

**THE STATE OF SOUTH CAROLINA  
In the Court of Appeals**

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**APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas**

**The Honorable Marvin H. Dukes III  
Beaufort County Master In Equity**

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**Case No.: 2006-CP-07-2689**

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**Microclean Technology, Inc. .... Appellant,**

**vs.**

**EnviroFix, Inc. .... Respondent.**

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**FINAL BRIEF OF APPELLANT**

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## **STATEMENT OF ISSUES ON APPEAL**

1. Did the trial court err in finding that EnviroFix properly terminated the parties' contract on 60 days' advance written notice?
2. Did the trial court err in finding that MicroClean Technology provided no credible evidence that EnviroFix otherwise failed to comply with the parties' contract?
3. Did the trial court properly calculate the damages payable to MicroClean Technology for EnviroFix's failure to make the required monthly license payments due under the contract?
4. Did the trial court err in denying MicroClean Technology's cause of action for claim and delivery based upon EnviroFix's failure to allow MicroClean to regain possession of the collateral?
5. Did the trial court err in granting EnviroFix's cause of action for breach of contract based upon MicroClean Technology's failure to comply with its maintenance and repair obligations under the parties' contract?

## **STATEMENT OF THE CASE**

This case concerns a licensing and contract dispute between two businesses. On October 24, 2006, MicroClean Technology, Inc. ("MicroClean"), brought this action for breach of contract, claim and delivery, and quantum meruit against EnviroFix, Inc. ("EnviroFix"), and requested damages of \$83,813, plus late fees and

interest. EnviroFix answered and asserted counterclaims against MicroClean for breach of contract, breach of the covenant of good faith and fair dealing, quantum meruit, negligent misrepresentation, and fraudulent misrepresentation.

A bench trial on the matter was held on February 24, 2011. The Court of Common Pleas entered an Order on April 12, 2011. The court denied MicroClean's causes of action for breach of contract, claim and delivery, and quantum meruit but granted damages to MicroClean in the amount of \$2,500 for EnviroFix's failure to make monthly license payments for December 2005 and January 2006, and in the amount of \$11,190 for EnviroFix's failure to make a total of 30 monthly payments due under an installment agreement. The court further ruled that MicroClean was entitled to retain in full EnviroFix's security deposit of \$15,000.

The Court of Common Pleas then granted EnviroFix's cause of action for breach of contract in the amount of \$13,377. In so doing, the court found that MicroClean had breached its maintenance and repair obligations under the parties' contract. The court denied EnviroFix's remaining claims for breach of the covenant of good faith and fair dealing, quantum meruit, negligent misrepresentation, fraud in the inducement, and fraudulent misrepresentation.

By way of a setoff for the above-referenced claims, the court concluded that MicroClean was entitled to receive total damages from EnviroFix in the amount of \$313. On September 19, 2011, MicroClean served its Notice of Appeal on Envirofix.

## STATEMENT OF FACTS

This case involves a dispute over a licensing contract for the use of a BioTower, a unique technological system used to eliminate odors and eradicate some molds from cars, houses, apartments, and other locales. (R. pp. 31, 32, 43, 44-45, 69) The BioTower is manufactured by MicroSweep Corporation ("MicroSweep"), a corporation with headquarters in Texas.

Shortly after the BioTower was developed in 2004, MicroSweep representatives Brad Hall ("Hall") and Leonard Barrera ("Barrera") began to distribute the BioTower system. (R. pp. 36-38) In June 2004, Hall and Barrera granted a license to Ansley Cohen III ("Cohen") and Jim Bragonier ("Bragonier") to distribute the BioTower across the eastern seaboard. (R. p. 40)

In August 2004, MicroSweep informed Cohen and Bragonier that Hall and Barrera were no longer the sales arm for the company. (R. p. 41) Cohen and Bragonier then entered into negotiations concerning their distributorship directly with MicroSweep. (R. p. 41) In the meantime, Cohen and Bragonier formed MicroClean, the entity which became a distributor of the MicroSweep BioTower in North Carolina. (R. p. 84-85); Def.'s Ex. 9, License Agrmt. (R. p. 151); Def.'s Ex. 58, MicroSweep Distributor Agrmt. § 1 (R. p. 178) A written distributorship agreement was executed by MicroSweep and MicroClean on August 2, 2004. (Def.'s Ex. 58, MicroSweep Distributor Agrmt.) (R. p. 178)

While Cohen and Bragonier were in the midst of negotiations with MicroSweep, they were also negotiating a license arrangement with David Stoner ("Stoner"), the principal who formed EnviroFix, Inc. (R. pp. 41, 94) MicroSweep was aware of and fully supported the proposed license agreement between Cohen/Bragonier and Stoner. (R. pp. 41-42)

On July 14, 2004, MicroClean prepared a License Agreement for use in its proposed licensing arrangement with EnviroFix. (Def.'s Ex. 9, License Agrmt.) (R. p. 151) Although this contract is dated July 14, 2004, it was not actually executed by EnviroFix until sometime after August 16, 2004. (R. pp. 121-122); Pl.'s Ex. 10 (R. p. 150)

Under the License Agreement, EnviroFix obtained four BioTowers manufactured by MicroSweep and a unique system of marketing, or a plan to persuade customers to use the BioTower system, developed by MicroClean. (R. pp. 31, 33, 35, 46, 69, 85-86, 87, 97-98; Def.'s Ex. 9, License Agrmt. (R. p. 151) The contract granted EnviroFix the nonexclusive right to use the trade name "MicroSweep" in the operation of a business utilizing the BioTower system in the Triangle Area of North Carolina. (Def.'s Ex. 9, License Agrmt. § 1) (R. p. 151) In addition, the License Agreement granted EnviroFix an exclusive right of distributorship within Wake County, North Carolina, for a period of one year. (R. pp. 50, 98, 123); Def.'s Ex. 9, License Agrmt. § 1 (R. p.151)

The License Agreement contained a fixed term of six years. (Def.'s Ex. 9, License Agrmt. § 3) (R. p. 151) However, EnviroFix had the right to terminate the agreement upon "60 days advance written notice[.]" (Def.'s Ex. 9, License Agrmt. § 2) (R.p.151) The License Agreement further provided that "[a]ll notices . . . required or permitted hereunder shall be in writing and shall be deemed to have been duly given if hand delivered, if sent by reputable overnight delivery service, or if mailed, by certified mail, return receipt requested, postage prepaid" to the party's address specified therein. (Def.'s Ex. 9, License Agrmt. § 12(b)) (R. p. 151) The agreement also contains a choice-of-law clause which provides that it shall be governed by and construed and enforced in accordance with South Carolina law. (Def.'s Ex. 9, License Agrmt. § 12(e)) (R. p. 151)

Section 3 of the License Agreement sets forth the territory and license fees EnviroFix owed to MicroClean:

The Territory fee shall be \$25,000, which shall be paid to [MicroClean] contemporaneously with the execution of this Agreement by [EnviroFix]. Thereafter, for a term of six years, [EnviroFix] shall pay to [MicroClean] a Monthly License Fee of \$1,000 per month, due on the first day of each month for the first 12 months and \$1250 on the first of each month for the balance of the six-year term hereof . . . It is further agreed that at such time as [EnviroFix] requires additional BioTowers from [MicroClean], beyond the initial four, [EnviroFix] will pay to [MicroClean] an additional License Fee of \$7,500 for each such BioTower, or \$7,000 each if [EnviroFix] requires more than one additional tower at any given time. In addition, it is agreed that for each additional BioTower that [EnviroFix] requires from [MicroClean], [EnviroFix] will pay an additional Monthly License Fee of \$250, starting as each such BioTower is delivered. It is agreed, however, that the License Fee for the BioTowers shall be due on each machine for no more than six years after delivery, and once the License fees have been

made for six years; ownership of such BioTower will be deemed transferred to [EnviroFix] herein, with no further payment being due for such machine.

(Def.'s Ex. 9, License Agrmt. § 3) (R. p. 151)

Under the License Agreement, EnviroFix was to pay monthly installment fees of \$1,000 per month to MicroClean throughout the first year of the contract. (R. p. 49); Def.'s Ex. 9, License Agrmt. § 3 (R. p. 151). Thereafter, the monthly installment fee increased to \$1,250 during the balance of the six-year term. (R. p. 49); Def.'s Ex. 9, License Agrmt. § 3) (R. p. 151)

In addition, the License Agreement required EnviroFix, as licensee, to deposit the sum of \$15,000 as a security deposit on the MicroSweep products. (Def.'s Ex. 9, License Agrmt. § 4) (R. p. 151) The security deposit was to be refunded to EnviroFix at the expiration of the contract provided that the company complied with the contract terms. (R. p. 48.)

Upon the expiration or termination of the contract, MicroClean was to "take possession of all Proprietary Products provided to [EnviroFix] by [MicroClean] pursuant to this Agreement and licensed to [EnviroFix] for less than six years." (Def.'s Ex. 9, License Agrmt. § 10) (R. p. 151) EnviroFix was obligated to "fully cooperate with [MicroClean] in the delivery of all such Proprietary Products used by [EnviroFix], which delivery shall be at the expense of [MicroClean]." (Def.'s Ex. 9, License Agrmt. § 10) (R. p. 151) MicroClean had the right to pick up the items

"without having to resort to legal process of any kind." (Def.'s Ex. 9, License Agrmt. § 10.) (R. p. 151)

MicroClean's maintenance and repair obligations to EnviroFix concerning the BioTowers were set forth as follows:

The parties agree that until title to any Proprietary Product is so transferred to [EnviroFix], [MicroClean] will have the responsibility for maintenance and repairs on the Proprietary Products . . . . There shall be no Monthly License Fee for Proprietary Products during the times the Proprietary Product is under repair by Licensor.

(Def.'s Ex. 9, License Agrmt. § 3) (R. p. 151)

Pursuant to the License Agreement, Stoner, on behalf of EnviroFix, paid a \$25,000 territory fee to MicroClean. (R. pp. 48, 99, 102); Def.'s Ex. 20. (R. p. 161) At trial, Stoner acknowledged that EnviroFix received the full benefit of this territorial fee. (R. p. 123) Stoner also paid the security deposit of \$15,000 called for in the contract. (R. 48, 100, 102); Def.'s Ex. 20 (R. p. 161)

In May 2005, the parties executed a second contract whereby EnviroFix obtained two additional BioTowers from MicroSweep at a cost of \$7,000. (R. pp. 47, 101, 103, 128); Def.'s Ex. 9, License Agrmt. Ex. A, Equipment Schedule) (R. pp. 151) This installment agreement provided that EnviroFix was to pay an additional monthly fee of \$373 over the next 36 months for the use of the two additional BioTowers. (R. p. 47); Def.'s Ex. 9, License Agrmt. Ex. A, Equipment Schedule (R. pp. 151)

For the most part, the six BioTower devices worked well for EnviroFix in eliminating odor and mold in customers' properties. (R. p. 128) The equipment fulfilled the purpose for which it was designed. (R. p. 128)

Around April 2005, Stoner, on behalf of EnviroFix, reported some problems with warping on the caps of the BioTowers to MicroClean. (R. pp. 51, 113-114); Def.'s Ex. 44, Ltr. dated 12/04/05) (R. p. 176) This was a cosmetic issue that did not affect the performance of the device. (R. pp. 51-52, 72) MicroClean, in turn, immediately reported the problem to MicroSweep. (R. p. 51)

MicroSweep promised to replace the caps. (R. pp. 51-52.) This took some time to accomplish, as MicroSweep had to determine what was causing the problem and then had to change the supplier and materials used in manufacturing the caps. (R. p. 52); Def.'s Ex. 45, Ltr. dated 12/10/05) (Supp. R. pp. 1, 2)

EnviroFix also reported experiencing some problems with timer operations. (R. pp. 53, 73, 104-109); Def.'s Ex. 25, E-mail dated 11/14/04 (R. p. 165); Def.'s Ex. 26, E-mail dated 1/09/05 (R. p. 166); Def.'s Ex. 27, E-mail dated 6/06/05 (R. p. 167); Def.'s Ex. 28, E-mail dated 10/13/05 (R. p. 168); Def.'s Ex. 44, Ltr. dated 12/04/05 (R. p. 176) The timer is an optional feature that increased the convenience of use of the BioTower device but generally did not affect the actual operation of the equipment. (R. pp. 53, 72)

MicroClean immediately reported the problem to MicroSweep, and MicroSweep sent new timers directly to EnviroFix. (R. p. 53) However, only

MicroSweep representatives were qualified to change out this electrical component. (R. pp. 53-54) At MicroClean's suggestion, MicroSweep eventually agreed to have one of its representatives travel to Raleigh to change out the timers and caps. (R. p. 54)

On two instances, Stoner, acting as representative of EnviroFix, reported a fan problem with the BioTower equipment to MicroClean. (R. pp. 54, 73-74, 110-112); Def.'s Ex. 30, E-mail dated 10/27/05 (R. p. 170); Def.'s Ex. 31, E-mail dated 10/14/05 (R. p. 171) On those occasions, the ties on the UV bulbs had fallen from their original location onto the fan. (R. pp. 54, 73-74) When the problem first surfaced in 2004, EnviroFix and MicroClean agreed to have the BioTower in question shipped to MicroSweep's Texas offices for repair. (R. p. 55); Def.'s Ex. 45, Ltr. dated 12/10/05 (Supp. R. pp. 1, 2) MicroSweep promptly repaired the equipment and shipped it back to EnviroFix. (R. pp. 55, 77, 129-130); Def.'s Ex. 45, Ltr. dated 12/10/05 (Supp. R. pp. 1, 2) MicroClean covered the cost of the repairs and the shipping. (R. pp. 129-130)

When EnviroFix experienced the problem on the second occasion in April 2005, Stoner informed MicroClean that he did not want MicroClean to get involved and that he would ship the BioTower to MicroSweep in Texas himself. (R. p. 55); Def.'s Ex. 44, Ltr. dated 12/04/05 (R. p. 176) Upon receiving the equipment, MicroSweep informed MicroClean that it had fixed the problem. MicroSweep sent the BioTower back to EnviroFix the next day. (R. pp. 55, 59) MicroClean offered to

reimburse EnviroFix for any out-of-pocket shipping costs associated with this repair.  
(R. pp. 55-56, 130)

Due to confusion regarding EnviroFix's UPS service location and the Thanksgiving holiday, EnviroFix lost the use of one BioTower for a period of two weeks while the equipment was in transit. (R. pp. 58-59, 130); Def.'s Ex. 45, Ltr. dated 12/10/05 (Supp. R. pp. 1, 2) During that time, MicroClean did not charge a license fee on that equipment. (R. p. 58); Def.'s Ex. 45, Ltr. dated 12/10/05 (Supp. R. pp. 1, 2)

By letter dated December 4, 2005, Stoner, on behalf of EnviroFix, notified MicroClean that it was dissatisfied with MicroClean's performance under the License Agreement. (R. p. 57); Def.'s Ex. 44, Ltr. dated 12/04/05 (R. p. 176) This letter reiterated the problems EnviroFix had sustained in regard to the caps warping, timer operations, and fan motor failures. (Def.'s Ex. 44, Ltr. dated 12/04/05) (R. p. 176)

The letter then asserts:

You have never inspected or tested the machines to assure their proper and safe working order. You have failed to perform any periodic maintenance on machines. Basically, you have not made one repair or performed any maintenance on any machine at any time, until the recent repairs made by the manufacturer [MicroSweep] on one machine.

This letter references only a few of the things you have not done as provided for by the terms our [sic] agreement. Some may argue that these breaches of contract may be viewed as having already terminated our agreement. I do not know. I do know that due to your actions, or the lack thereof, that the spirit of the agreement has been violated and is dead.

Please be advised that I am not going to pay my monthly fees this month nor will I pay any future monthly fees until my machines are repaired.

(Def.'s Ex. 44, Ltr. dated 12/04/05) (R. p. 176) The record evidence does not reflect the manner by which this letter was delivered.

Throughout the time period in which the foregoing complaints were made, EnviroFix was in possession of manuals it received from MicroClean about the operation of the BioTower. (R. p. 133) In addition, in accordance with the licensing arrangement, MicroClean passed along any technical questions that EnviroFix had to MicroSweep. (R. pp. 133-135) MicroSweep would then provide the answers to those questions. (R. pp. 135-136.)

EnviroFix paid all of the monies due under the License Agreement and the related installment agreement from the inception of the contract through November 2005. (R. p. 99) However, beginning in December 2005, EnviroFix failed to pay the required monthly installment fees under the contracts. (R. p. 58) By letter dated December 20, 2005, EnviroFix notified MicroClean that "[i]n EnviroFix's opinion the agreement with MicroClean is void." (Def.'s Ex. 46, Ltr. dated 12/20/05) (R. p. 177) The record evidence does not reflect the manner by which this letter was delivered to MicroClean. EnviroFix has not paid any monies to MicroClean since November 2005. (R. pp. 58, 99, 117-118, 131-132)

By letter dated January 24, 2006, MicroClean acknowledged that EnviroFix's correspondence of December 4 and December 20, 2005 took the position that the

parties' contract was terminated. (Def.'s Ex. 47, Ltr. dated 1/24/06) (Supp. R. p. 3)  
In that letter, MicroClean stated that it would like to pick up the BioTowers that EnviroFix had leased on February 1, 2006. (Def.'s Ex. 47, Ltr. dated 1/24/06) (Supp. R. p. 3)

EnviroFix, however, refused to allow MicroClean to obtain possession of the six leased BioTowers. (R. pp. 63, 80, 120, 136-137) In this regard, Stoner, on behalf of EnviroFix, informed MicroClean that he would return the BioTowers to MicroClean only if MicroClean refunded all the money EnviroFix had paid under the License Agreement. (R. p. 137) In his trial testimony, Stoner also indicated that if MicroClean had appeared on his premises in February 2006, he was prepared to resist MicroClean's efforts to regain possession of the collateral. (R. pp. 120, 137)

Because EnviroFix would not allow MicroClean to peaceably regain possession of the six leased BioTowers, MicroClean considered the License Agreement and the related installment agreement as remaining in force through the remainder of the six-year contract term. (R. p. 63) In other words, MicroClean treated the contracts as though they were never terminated.

On March 9, 2006, MicroSweep terminated its distributorship contract with MicroClean because MicroClean was unable to meet the sales quota required in that contract. (R. pp. 66, 81-83, 89); Def.'s Ex. 61, Ltr. dated 3/09/06) (R. p. 191) However, MicroClean still had the right to purchase BioTower machines from MicroSweep at a higher cost. (R. pp. 66, 89) In addition, MicroClean still had the

ability to ensure that any repair issues that EnviroFix faced could be handled by MicroSweep. (R. pp. 66-67, 91)

As of the date of trial on February 24, 2011, EnviroFix continues to do business utilizing the BioTower device. (R. pp. 68, 94-96) EnviroFix now has a total of 19 BioTowers and still utilizes on a daily basis the original six BioTowers it acquired from MicroClean in 2004 and 2005. (R. pp. 68, 124, 128, 138) The 13 additional BioTowers were acquired by EnviroFix directly from MicroSweep and/or were manufactured by EnviroFix. (R. p. 127)

At trial, MicroClean calculated that a balance of \$84,063 in license fees remained due and owing by EnviroFix under the License Agreement and the installment agreement. (R. p. 65); Pl.'s Ex. 8 (R. p. 141) The interest owed totaled \$45,491.37. (R. p. 65); Pl.'s Ex. 8 (R. P. 141) An additional \$4,700 was due based on the \$100 per month late penalty payment under the contract. (R. pp. 64-65); Pl.'s Ex. 8 (R. p. 141)

## **ARGUMENT**

### **I. THE TRIAL COURT ERRED IN DENYING MICROCLEAN'S CAUSE OF ACTION FOR BREACH OF CONTRACT.**

#### **A. Standard Of Review**

On appeal of an action for breach of contract involving a case tried without a jury, "the appellate court's standard of review extends only to the correction of errors

of law." Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004); accord Consignment Sales, LLC v. Tucker Oil Co., 391 S.C. 266, 271, 705 S.E.2d 73, 76 (Ct. App. 2010). The appellate court will not disturb the trial judge's findings of fact unless no evidence exists which reasonably supports said findings. Consignment Sales, 391 S.C. at 271, 705 S.E.2d at 76; Electro Lab of Aiken, 357 S.C. at 367, 593 S.E.2d at 172.

### **B. Breach Of License Agreement**

The License Agreement is a contract. To prevail on a cause of action for breach of contract, the plaintiff must prove the existence of a valid contract, the defendant's breach of that contract, and the plaintiff's damages caused by the breach. Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and proximate result of such breach." Id. In the present case, the trial court erred in concluding that MicroClean failed to establish all the requisite elements of a breach of contract claim.

Toward this end, the trial court incorrectly ruled that EnviroFix properly terminated the License Agreement in December 2005 and so cannot be held liable for breach of contract based upon its failure to make monthly licensing payments after January 2006. In addition, the trial court erred in finding that MicroClean failed to

produce credible evidence that EnviroFix otherwise failed to comply with the contract terms.

### **1. Notice of Termination**

As set forth in the state of Facts, supra, the License Agreement contained a term of six years. (Def.'s Ex. 9, License Agrmt. § 3) (R. p. 151) This six-year term, however, was subject to EnviroFix's right to terminate the agreement upon "60 days advance written notice." (Def.'s Ex. 9, License Agrmt. § 2) (R. p. 151) Such notice "shall be deemed to have been duly given if hand delivered, if sent by reputable overnight delivery service, or if mailed, by certified mail, return receipt requested, postage prepaid" to MicroClean's specified address. (Def.'s Ex. 9, License Agrmt. § 12(b)) (R. p. 151)

The evidence at trial demonstrated that EnviroFix did not provide MicroClean with the required 60 days advance notice of an intent to terminate the contract. EnviroFix's letter dated December 4, 2005, stated that it did "not know" whether it could or should view the License Agreement as terminated due to MicroClean's allegedly deficient performance of its repair and maintenance obligations. (Def.'s Ex. 44, Ltr. dated 12/04/05) (R. p. 176) Similarly, EnviroFix's follow-up letter dated December 20, 2005, simply stated, "In EnviroFix's opinion the agreement with MicroClean is void." (Def.'s Ex. 46, Ltr. dated 12/20/05) (R. p. 177)

These letters are legally insufficient to provide the 60 days' advance notice of termination required by the License Agreement. Instead, these letters represent an improper attempt by EnviroFix to immediately terminate the contract. See Litchfield Co. of S.C. v. Kiriakides, 290 S.C. 220, 225 n.2, 349 S.E.2d 344, 347 n.2 (Ct. App. 1986) ("[A] demand for immediate possession of premises is not sufficient notice of termination of the lease[.]").

Under the clear and unambiguous terms of the License Agreement, EnviroFix lacked any right to terminate the contract before the end of the six-year contract term without providing 60 days advance written notice. Thus, EnviroFix's attempt to immediately terminate the parties' agreement in December 2005 constitutes a breach of the License Agreement. See Furst & Thomas v. Davis, 150 S.C. 1, 147 S.E. 654, 655 (1929) (seller had no right to terminate contract without notice to buyer, and seller's attempt to do so amounts to breach of contract); see also Litchfield Co. of S.C., 290 S.C. at 225 n.2, 349 S.E.2d at 347 n.2.

Further, EnviroFix failed to establish to the trial court that its letters of December 5 and December 20, 2005 conformed to the notice requirements set forth in the parties' contract. The License Agreement expressly states that any notice required or permitted under the contract will be deemed to have been delivered if it is hand-delivered, sent by a reputable overnight delivery service, or mailed by certified mail, return receipt requested. (Def.'s Ex. 9, License Agrmt. § 12(b)) (R. p. 151)

Under South Carolina law, "notice of termination must be given in accordance with the terms of the contract." Edisto Island Historical Soc'y, Inc. v. Gregory, 354 S.C. 198, 202, 580 S.E.2d 141, 143 (2003); see also Furst & Thomas, 147 S.E. at 655. Because EnviroFix did not provide the trial court with any evidence as to the manner by which its letters of December 5 and December 20, 2005, were delivered, the trial judge erred in concluding that EnviroFix followed the steps necessary to properly terminate the License Agreement before the six-year term had expired.

Moreover, EnviroFix's notice of termination also fails for another reason: EnviroFix failed and refused to allow MicroClean to regain possession of the six BioTowers after EnviroFix purportedly terminated the contract. (R. pp. 63, 80, 120, 136-137) The License Agreement provides that upon the termination of the agreement prior to the expiration of the six-year contract term, MicroClean had the right to retake possession of all Proprietary Products provided to EnviroFix, including the BioTower systems. (Def.'s Ex. 9, License Agrmt. § 10) (R. p. 151) As a result, EnviroFix was required to allow MicroClean to peaceably take possession of the BioTowers. This requirement was a condition to EnviroFix's ability to terminate the contract prior to the expiration of the six-year term.

In this respect, EnviroFix's obligation to allow MicroClean to regain possession of the BioTowers resembles a condition subsequent. A condition subsequent is "something relied upon to modify or defeat" a party's right of action. Worley v. Yarborough Ford, Inc., 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App.

1994). By continually denying MicroClean the ability to regain possession of the six BioTower systems, EnviroFix failed to properly and effectively terminate the contract prior to the expiration of the six-year term.

As a result, the contract remained in effect, and EnviroFix's payment obligations continued until the contract term expired in December 2010. Accordingly, EnviroFix must be held liable for breach of its contractual obligation to make the installment payments due through the end of the six-year contract term.

In concluding otherwise, the trial court erroneously found that MicroClean did not take any steps to regain possession of the BioTowers and, therefore, the company waived any rights it may have had to the collateral. The law, however, does not require the doing of a useless act. Pinson v. Anderson, 119 S.C. 115, 111 S.E. 886, 887 (1922); Faulkner v. Jones, 51 F.3d 440, 454 (4th Cir.) (Hamilton, J., dissenting), cert. dismissed, 516 U.S. 910, cert. denied, 516 U.S. 938 (1995). Because EnviroFix had indicated that it would not give up the BioTowers to MicroClean until MicroClean refunded all of the monies EnviroFix had paid under the License Agreement and the related installment agreement, there was no point for MicroClean representatives to travel to Raleigh in a vain attempt to retake possession of the collateral, as the trial court erroneously suggested. (R. p. 80) Instead, EnviroFix's stated refusal to allow MicroClean to regain possession of the collateral as required by the License Agreement suffices to constitute a breach of contract.

## 2. Failure to Comply with Contract Terms

It is undisputed that EnviroFix failed to make any installment payments due under the License Agreement and the related installment agreement after November 2005. EnviroFix's failure to pay the required monthly installment fees to MicroClean constitutes a breach of contract.

In this regard, it should be recognized that EnviroFix's letters of December 5 and December 20, 2005, amount to an anticipatory repudiation. An anticipatory repudiation occurs when one party to a contract communicates his intent to commit a breach in the future that would of itself give rise to a claim for damages for total breach by the nonrepudiating party. Alabama v. North Carolina, 130 S. Ct. 2295, 2312 (2010); Franconia Assocs. v. United States, 536 U.S. 129, 139 (2002). The "archetypal anticipatory repudiation" occurs where one party declares the contract invalid or at an end, accuses the other party of materially breaching the contract, and states that he will no longer do business with the nonrepudiating party. Hess Energy, Inc. v. Lightning Oil Co., 338 F.3d 357, 362 (4th Cir. 2003). This is exactly what EnviroFix has done here.

EnviroFix's anticipatory repudiation constitutes a breach of the License Agreement. A repudiation of a contract is justified only if the other party's breach of the agreement is "so fundamental and substantial as to defeat the purpose of the contract." Ackerman v. McMillan, 314 S.C. 268, 271, 442 S.E.2d 618, 620 (Ct. App. 1994). As discussed in detail in Argument Point IV, infra, MicroClean's alleged

noncompliance with its maintenance and repair obligations cannot reasonably be classified as a material breach of the License Agreement that is so substantial that it serves to defeat the purpose of the contract.

Because MicroClean's actions did not warrant EnviroFix's repudiation of the Agreement. EnviroFix is subject to liability for its failure to continue to make the installment payments due and accruing under the parties' contracts. In other words, upon EnviroFix's anticipatory repudiation of the License Agreement and installment agreement, MicroClean was excused from further performance and had the right to file suit immediately to recover damages arising from the breach. See Hampton v. Supreme Lodge K.P., Courts of Calanthe, Pride of Columbia No. 55, 161 S.C. 540, 159 S.E. 923, 924 (1931) (upon party's repudiation of contract, nonbreaching party is excused from further performance, may treat contract as terminated, and may maintain an action at once for damages occasioned by the repudiation); see also Studio Frames Ltd. v. Standard Fire Ins. Co., 369 F.3d 376, 381 (4th Cir. 2004) (when one party repudiates or commits an anticipatory breach of contract, the nonrepudiating party is discharged from any remaining contractual obligations and has the immediate legal right to file suit). Thus, the trial court's Order determining that EnviroFix is not liable for breach of contract must be reversed.

**II. THE TRIAL COURT ERRED IN FAILING TO AWARD DAMAGES TO MICROCLEAN FOR THE FULL VALUE OF THE UNPAID MONTHLY LICENSE PAYMENTS DUE AND ACCRUING THROUGH THE END OF THE SIX-YEAR CONTRACT PERIOD.**

When one party to a contract commits an anticipatory repudiation of the Agreement, the other party is excused from further performance, may treat the contract as terminated, and may immediately maintain an action for damages arising from the repudiation, without awaiting the time fixed by the contract for the defendant's performance. Hampton, 159 S.E. at 924. "The common law authorizes an action for money damages . . . on a contract that is breached by repudiation." WRH Mortg., Inc. v. S.A.S. Assocs., 214 F.3d 528, 533 (4th Cir. 2000). When a contract is to be performed in installments and one party repudiates the agreement during the period of performance, the nonrepudiating party is entitled to recover damages for the breach "consisting in the nonperformance of subsequent installments[.]" Roller v. George H. Leonard & Co., 229 F. 607, 621 (4th Cir. 1915).

Applying these principles to the present case, MicroClean is entitled to damages in the form of the unpaid monthly license payments due and accruing under the License Agreement. In this regard, it is undisputed that EnviroFix failed and refused to make the required \$1,250 monthly license payments due from the time of its anticipatory repudiation in December 2005 through the end of the six-year contract term in July 2010. Thus, MicroClean is entitled to the sum of \$1,250 per month over the course of 56 months, for a total of \$70,000.

In failing to reach this conclusion, the trial court erroneously limited MicroClean's damages arising from EnviroFix's failure to make the required monthly license payments to the two-month advance written notice period contained in the

Agreement. Even if MicroClean's contractual damages generally could have been limited to the notice period,<sup>1</sup> this limitation could not legitimately apply where EnviroFix refused to return the BioTower systems to MicroClean.

This point is discussed in detail in Argument Point I, supra, and Point III, infra. By refusing to allow MicroClean to regain possession of the BioTowers throughout the term of the Agreement, EnviroFix failed to properly terminate the License Agreement. Instead, the contract continued to remain in effect through the end of the six-year term, and EnviroFix remained liable for the monthly installment obligations that accrued thereunder. As a result, the trial court's incorrect calculation of damages should be set aside and an order entered directing entry of judgment in favor of MicroClean in the amount of \$70,000 for unpaid monthly license payments.

Moreover, for the reasons detailed in Argument Point III, infra, even if the contract did not remain in effect, MicroClean is still entitled to damages for its loss of use of the six BioTowers from December 2005 through the end of the contract period. If MicroClean had had possession of those BioTowers, it could have licensed them to another licensee, presumably at the monthly rate of \$1,250 to which EnviroFix was obligated. Because EnviroFix wrongfully denied MicroClean the use of the

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<sup>1</sup>The South Carolina courts have not addressed the impact of a notice period upon the damages recoverable on a plaintiff's breach-of-contract claim. Some courts within the Fourth Circuit, however, have taken the position that a plaintiff's damages for a defendant's failure to provide the notice of termination required in a contract are limited to the notice period. See, e.g., Storetrax.com, Inc. v. Gurland, 168 Md. App. 50, 72, 895 A.2d 355, 368 (2006), aff'd, 397 Md. 37, 915 A.2d 991 (2007).

BioTowers during this period, EnviroFix is liable in damages for the sum of \$1,250 per month, which again equates to a total of \$70,000.

**III. MICROCLEAN IS ENTITLED TO PREVAIL ON ITS CAUSE OF ACTION FOR CLAIM AND DELIVERY.**

A South Carolina action for claim and delivery "is an action to determine the right to the possession of personal property." Burnett v. Boukedes, 240 S.C. 144, 155-56, 125 S.E.2d 10, 16 (1962). This cause of action "contemplates the recovery of the specific property claimed when possible or its value when delivery is not possible." Nat'l Bank of S.C. v. Daniels, 283 S.C. 438, 442, 322 S.E.2d 689, 692 (Ct. App. 1984).

In the present case, the evidence at trial clearly established MicroClean's right to prevail on its cause of action for claim and delivery. In this regard, the License Agreement specifies that in the event the contract was terminated prior to the expiration of the six-year term, MicroClean had the right to take possession of the BioTowers and other proprietary products that MicroClean provided to EnviroFix. (Def.'s Ex. 9, License Agrmt. § 10) (R. p. 151) EnviroFix was required to "fully cooperate with [MicroClean] in the delivery" of those products. (Def.'s Ex. 9, License Agrmt. § 10) (R. p. 151)

The undisputed evidence at trial demonstrated that after EnviroFix attempted to terminate the parties' contract in December 2005, EnviroFix failed and refused to allow MicroClean to peaceably obtain possession of the BioTower systems. (R. pp.

63, 80, 120, 136-137) In this regard, Stoner, on behalf of EnviroFix, informed MicroClean that he would return the BioTowers to MicroClean only if MicroClean refunded all the money EnviroFix had previously paid under the License Agreement and the related installment agreement. (R. p. 137) In the meantime, EnviroFix continued to do business utilizing the BioTower device. (R. pp. 68, 94-96.) Indeed, EnviroFix has continued to use the six BioTowers it obtained from MicroClean through the present day. (R. pp. 68, 124, 128, 138)

By refusing to allow MicroClean to regain possession of the six BioTowers in question, EnviroFix wrongfully denied MicroClean the use and value of its property. Because it was not possible for MicroClean to peaceably regain possession of these BioTowers, MicroClean is entitled to damages.

In wrongfully denying MicroClean any right of recovery, the trial court incorrectly concluded that the BioTowers were akin to "a perishable item with no marketable resale value[.]" (Order ¶ 15) Perhaps this conclusion was based on the fact that if parties had continued to perform in accordance with the License Agreement over the full six-year term, EnviroFix would then be considered the owner of the BioTowers. (Def.'s Ex. 9, License Agrmt. §§ 3, 10) (R. p. 151) At the time EnviroFix repudiated the contract in December 2005, however, the agreement had been in effect for only 18 months.

The trial court's ruling contravenes the principles of law governing claim and delivery causes of action. As Rule 49(c) of the South Carolina Rules of Civil Procedure explains:

In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, . . . the jury shall assess the value of the property if the verdict be in favor of the plaintiff . . . . The jury may at this time assess the damages, both actual and punitive, which the prevailing party has sustained by reason of the detention or taking and withholding of such property.

Rule 49(c), SCRPC.

Pursuant to Rule 49(c), "[a]ctual and punitive damages are available in a claim and delivery action." McClellan v. Godwin Props., Inc., 292 S.C. 518, 521, 357 S.E.2d 473, 475 (Ct. App. 1987). A prevailing plaintiff is entitled to recover "the property or its value, and in addition such actual damages as [he or] she might have suffered by reason of the taking and withholding of the same." Manley v. Bailey, 151 S.C. 366, 149 S.E. 119, 123 (1929).

The actual damages recoverable by the plaintiff in a claim and delivery action include compensation for the plaintiff's loss of use of the property as well as for any injury to or depreciation of said property. Assoc. Commercial Corp. v. Wood, 22 F. Supp. 2d 502, 507 n.7 (D. Md. 1998); see Faulkner v. Marineland, Inc., 18 Conn. App. 1, 2, 555 A.2d 1001, 1002 (1989) ("[D]epreciation in value during the period of detention is a proper element of damages in an action of replevin[.]"); Culligan Rock River Water Conditioning Co. v. Gearhart, 111 Ill. App. 3d 254, 258, 443 N.E.2d 1065, 1068 (1982) ("Where property is recovered, plaintiffs are entitled to the

reasonable value of the use of said property during the period of wrongful detention as well as depreciation in the value of the property while unlawfully detained."); Wellman v. Birkel, 220 Neb. 1, 8, 367 N.W.2d 716, 721 (1985) ("Where the property is returned in a replevin action, the party recovering possession of the property is entitled to recover as damages any deterioration or depreciation in the value which has taken place during the wrongful detention."); Hall v. Tillman, 110 N.C. 220, 14 S.E. 745, 747 (1892) (where property cannot be returned, plaintiff is entitled to recover its value at the time of the unlawful taking or detention, with interest from the time of the taking); Wensel v. Reed, 161 Pa. Super. 488, 490, 55 A.2d 548, 550 (1947) (in suit for unjust detention of vehicle, plaintiff is entitled to recover damages for the period of the defendant's unlawful detention, "plus any damage or depreciation of said vehicle" sustained during that period).

In measuring actual damages, depreciation is calculated as the difference between the fair market value of the property at the time of the taking less its present value. Gen. Motors Acceptance Corp. v. Henson, 243 S.C. 276, 279, 133 S.E.2d 798, 799-800 (1963); Michalowski v. Ey, 8 A.D.2d 854, 854, 190 N.Y.S.2d 535, 536 (App. Div.), aff'd, 7 N.Y. 2d 71, 195 N.Y.S.2d 633, 163 N.E.2d 863 (1959). In addition, the plaintiff is entitled to interest from the time of the taking to the date of trial. Michalowski, 8 A.D.2d at 854, 190 N.Y.S.2d at 536.

Notably, the damages recoverable on a claim and delivery cause of action are equivalent to those recoverable for a conversion claim. McClean, 292 S.C. at 521,

357 S.E.2d at 475. This is because by refusing to give up possession of the property owned by the plaintiff, the defendant to a claim and delivery action has effectively converted the property for its own use.

Under South Carolina law, a plaintiff who prevails on a conversion claim is entitled to recover damages in the amount of the value of the property converted, with interest thereon, from the date of the conversion to the date of trial. King v. Allstate Ins. Co., 272 S.C. 259, 261, 251 S.E.2d 194, 195 (1979); Green v. Waidner, 284 S.C. 35, 37-38, 324 S.E.2d 331, 333 (Ct. App. 1984). This equates to a recovery for the value of the property taken in a claim and delivery cause of action. See McClean, 292 S.C. at 521, 357 S.E.2d at 475.

Here, EnviroFix has wrongfully refused to allow MicroClean to regain possession of the six BioTowers that MicroClean provided to EnviroFix in July 2004. MicroClean is, therefore, entitled to recover damages equivalent to the fair market value of these BioTowers as of February 2006, the date that EnviroFix denied MicroClean possession.

In this regard, the evidence before the trial court showed that as of January 1, 2004, the manufacturer's suggested retail price of each BioTower was \$6,395. (Def.'s Ex. 58, MicroSweep Distributor Agrmt. Ex. A, Product Listing Chart) (R. p. 178) Multiplying this figure by six, the total fair market value of the six BioTowers EnviroFix obtained from MicroClean in July 2004 was \$38,370. If depreciation is taken at a flat monthly rate over the six-year contract term, the monthly rate of

depreciation is \$532.92. Applying this rate of depreciation to the BioTowers, the fair market value of the collateral as of February 2006, when EnviroFix refused to permit MicroClean to regain possession, was \$27,711.60. (i.e., original market value of \$38,370.00 - depreciation of \$10,658.40 = \$27,711.60). In addition, MicroClean is entitled to recover interest on this amount from February 2006 through the date of trial. Pursuant to the License Agreement, the \$15,000 security deposit EnviroFix paid to MicroClean is to be offset against this amount. (Def.'s Ex. 9, License Agrmt. § 4) (R. p. 151)

Clearly, the trial court failed to properly account for all the damages components of MicroClean's claim and delivery cause of action. Accordingly, the trial court's Order denying this cause of action should be reversed, and an order entered directing judgment in favor of MicroClean on this claim in the amount of \$12,711.60 plus interest.

**IV. THE TRIAL COURT ERRED IN GRANTING ENVIROFIX'S BREACH OF CONTRACT CAUSE OF ACTION AGAINST MICROCLEAN.**

**A. Maintenance And Repair Obligations**

The trial court erroneously granted judgment in favor of EnviroFix on its breach-of-contract claim against MicroClean based upon MicroClean's alleged failure to comply with its maintenance and repair obligations under the License Agreement. Because the evidence before the trial court overwhelmingly demonstrated that

MicroClean properly fulfilled its contractual obligations, the trial court's Order to this effect must be reversed.

The License Agreement sets forth MicroClean's obligations for maintenance and repair obligations as follows:

The parties agree that until title to any Proprietary Product is so transferred to [EnviroFix], [MicroClean] will have the responsibility for maintenance and repairs on the Proprietary Products . . . There shall be no Monthly License Fee for Proprietary Products during the times the Proprietary Product is under repair by Licensor.

(Def.'s Ex. 9, License Agrmt. § 3.) (R. p. 151)

As documented in the Statement of Facts, supra, EnviroFix made three basic complaints to MicroClean about the BioTowers. First, EnviroFix reported that the caps on the BioTower devices were warped. (R. pp. 51, 113-114); Def.'s Ex. 44, Ltr. dated 12/04/05 (R. p. 176) Although EnviroFix maintained that this warping lessened the professional appearance of the BioTower systems, the condition of the caps in no way affected the actual performance of the devices. (R. pp. 51-52, 72)

Second, EnviroFix reported that on certain occasions, the timer operations on the BioTower systems failed to operate correctly. (R. pp. 53, 73, 104-109); Def.'s Ex. 25, E-mail dated 11/14/04 (R. p. 165); Def.'s Ex. 26, E-mail dated 1/09/05 (R. p. 166); Def.'s Ex. 27, E-mail dated 6/06/05 (R. p. 167); Def.'s Ex. 28, E-mail dated 10/13/05 (R. p. 168); Def.'s Ex. 44, Ltr. dated 12/04/05 (R. p. 176) The timer is an option that MicroSweep installed on the BioTower devices to increase the convenience of use of

those systems. (R. pp. 53, 72) Like the caps, however, the timer did not generally affect the actual operation of the BioTower systems. (R. pp. 53, 72)

Third, EnviroFix experienced fan problems with some of the BioTowers in its possession. (R. pp. 54, 73-74, 110-112); Def.'s Ex. 30, E-mail dated 10/27/05 (R. p. 170); Def.'s Ex. 31, E-mail dated 10/14/05 (R. p. 171) This necessitated the return of the BioTowers in question to MicroSweep's Texas office for repair. (R. p. 55); Def.'s Ex. 45, Ltr. dated 12/10/05) (Supp. R. pp. 1, 2) EnviroFix complained that the delays associated with these repairs were undue and were somehow attributable to MicroClean. (R. p. 57); Def.'s Ex. 44, Ltr. dated 12/04/05 (R. p. 176)

As set forth in the License Agreement, MicroClean was simply a distributor of the BioTower for MicroSweep. (Def.'s Ex. 9, License Agrmt. p. 1.) (R. p. 151) At the time the License Agreement was executed, EnviroFix was aware that the answers to any technical questions it had would ultimately have to be answered by MicroSweep, the manufacturer of the BioTowers. (R. pp. 133-136)

In response to each of EnviroFix's complaints, MicroClean immediately referred the report to MicroSweep, which then undertook repairs. (R. pp. 51-52, 54, 56, 59, 77, 129-130); Def.'s Ex. 45, Ltr. dated 12/10/05 (Supp. R. pp. 1, 2) On each occasion, MicroClean covered the cost of the repairs and the shipping to MicroSweep. (R. p. 55, 56, 58, 129-130) In addition, in accordance with the License Agreement, MicroClean did not charge EnviroFix any license fees for the dates that the BioTowers were being repaired. (R. p. 58); Def.'s Ex. 45, Ltr. dated 12/10/05 (Supp.

R. pp. 1, 2) However, the timing and substance of MicroSweep's repairs were issues that were beyond MicroClean's control.

MicroClean's maintenance and repair obligations must be considered in light of the License Agreement as a whole and the purpose of that contract. See Cullen v. McNeal, 390 S.C. 470, 481, 702 S.E.2d 378, 384 (Ct. App. 2010) (contract is to be interpreted so as to give legal effect to the intentions of the parties, as expressed in the contract language); Ecclesiastes Prod'n Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 498, 649 S.E.2d 494, 502 (Ct. App. 2007) ("The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof", and in ascertaining parties' intent, court will take into account the "situation of the parties, along with their purposes at the time the contract was entered.").

The BioTower systems were unique, wholly new products for which no substitute existed in the marketplace. As such, EnviroFix should have been aware that it could take MicroSweep a significant amount of time to create a viable solution to system shortcomings, such as the fan problem. Under the circumstances, the delays and shortcomings associated with EnviroFix's needed repairs were reasonable, and, in any event, were attributable to MicroSweep and not MicroClean. Hence, the events should not be classified as a breach of contract by MicroClean. See In re Reg'l Bldg. Sys., Inc., 320 F.3d 482, 485-86 (4th Cir. 2003) (contractor was not liable to subcontractor for delay damages because delay was attributable to third party and was beyond contractor's control); S. Pine Fibre Co. v. N. Augusta Land Co., 53 F. 318,

321 (4th Cir. 1892) (plaintiff was not entitled to recover damages for defendant's delay in building track, where defendant was making every effort to acquire right-of-way on which to build; delay arose from defendant's inability to build on land it did not yet own, and defendant had no means of condemning the land or compelling its sale). This is particularly true given the fact that two out of the three types of product complaints made by EnviroFix related to items that were cosmetic in nature and did not affect the actual operation of the BioTowers.

#### **B. Damages**

After erroneously ruling in favor of EnviroFix on its breach-of-contract claim, the trial court concluded that MicroClean owed damages to EnviroFix for this breach in the amount of \$13,377. This figure was apparently taken from EnviroFix's letter of December 4, 2005, which demanded that MicroClean remit to EnviroFix the sum of \$13,377 in monthly license fees that EnviroFix had previously paid to MicroClean on BioTowers that were "in disrepair and requiring maintenance." (Def.'s Ex. 44, Ltr. dated 12/04/05) (R. p. 176)

For the reasons enunciated in subsection (A) above, MicroClean did not breach the License Agreement and so should not be held liable for any damages whatsoever. Even if the Court should conclude that MicroClean was in violation of the parties' contract, the damages sustained by EnviroFix are far less than the \$13,377 awarded by the trial court.

In this regard, the License Agreement expressly specifies that MicroClean will not charge any license fee for a BioTower during the period of time in which that BioTower was under repair. (Def.'s Ex. 9, License Agrmt. § 3) (R. p. 151) This contract provision should be characterized as a liquidated damages clause. See Robert E. Lee & Co. v. Comm'n of Pub. Works of Greenville, 248 S.C. 92, 98, 149 S.E.2d 59, 61 (1966) (where amount due contractor was calculated to a sum certain subject to deduction or offset of \$100 for each day's delay in completing contract, the sum so stipulated constitutes liquidated damages). Liquidated damages are a sum certain or amount which has been contractually stipulated to by the parties and cannot be changed by the proof. Beckmann Concrete Contractors, Inc. v. United Fire & Cas. Co., 360 S.C. 127, 131-32, 600 S.E.2d 76, 78-79 (Ct. App. 2004). A contract may include a provision stipulating that a particular sum shall be paid to one party in the event that the other party fails to perform. Benya v. Gamble, 282 S.C. 624, 630, 321 S.E.2d 57, 61 (Ct. App. 1984), cert. dismissed, 329 S.E.2d 768 (S.C. 1985).

In the present case, the liquidated damages clause of the License Agreement calls for an offset in the monthly license fee during any period of time in which a BioTower is under repair. This offset represents the appropriate measure of damages for any breach of MicroClean's maintenance and repair obligations. See Norrell Forest Prods. v. H&S Lumber Co., 310 S.C. 368, 371, 426 S.E.2d 800, 801-02 (1993). See generally Nat'l Loan & Exch. Bank of Greenwood v. Gustafson, 157 S.C. 221, 154 S.E. 167, 188 (1930).

In no event is EnviroFix entitled to a reimbursement of the total monthly license and installment fees of \$13,377. This measure of damages basically equates to a rescission of the License Agreement and the installment contract. As discussed in Argument Point I, supra, such drastic relief is available only upon a party's material breach of the entire contract. A material breach is a breach that is "so fundamental and substantial as to defeat the purpose of the contract." Ackerman, 314 S.C. at 271, 442 S.E.2d at 620. It goes to the very essence of the agreement and serves to defeat the purpose and object of the parties in entering into the contract. City of Fairfax, Va. v. Wash. Metro Area Transit Auth., 582 F.2d 1321, 1327 (4th Cir. 1978), cert. denied, 440 U.S. 914 (1979).

Here, the License Agreement contains only a cursory reference to MicroClean's maintenance and repair obligations. (Def.'s Ex. 9, License Agrmt. § 3) (R. p. 151) In addition, the evidence in the record demonstrates that the vast majority of the problems EnviroFix experienced with the BioTower systems were cosmetic in nature and did not affect the actual performance of the systems. As a result, MicroClean's alleged breach of its repair and maintenance obligations did not go to the heart of the contract nor did it serve to defeat the very purpose of the agreement. See id.; Ackerman, 314 S.C. at 271, 442 S.E.2d at 620. Accordingly, EnviroFix is not entitled to rescission-type damages in the amount of \$13,377.

Instead, EnviroFix received appropriate compensation for any damages it sustained as a result of any breach of MicroClean's contractual duties of maintenance

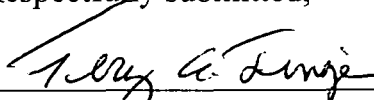
and repair through the liquidated damages provision which excused EnviroFix from paying any monthly license fees during the period while the BioTowers were under repair. It follows that the trial court erred in offsetting the damages payable by EnviroFix to MicroClean by \$13,377, the monthly license and installment fees EnviroFix had previously paid. Hence, this portion of the trial court's order should be reversed.

### CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Common Pleas as to MicroClean's causes of action for breach of contract and claim and delivery, and as to EnviroFix's cause of action for breach of contract. This Court should also revise the damages awarded to MicroClean accordingly.

Respectfully submitted,

April 20, 2012

  
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**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

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**APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas**

**The Honorable Marvin H. Dukes, III  
Beaufort County Master In Equity**

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**Case No.: 2006-CP-07-2689**

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MicroClean Technology, Inc.....Appellant.

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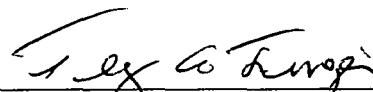
**PROOF OF SERVICE**

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I certify that I have served a copy of the Final Brief of Appellant on Respondent, EnviroFix, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on April 20, 2012, addressed to Respondent's attorneys of record, Robert E. Sumner, IV, Esquire, Moore & VanAllen, PLLC, P. O. Box 22828, Charleston, SC 29413-2828.

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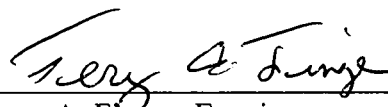
**CERTIFICATE OF COUNSEL**

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The undersigned certified that this Final Brief complies with Rule 211(b),  
SCACR.

April 20, 2012

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