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Attachment 1

Order Granting Plaintiffs' Motion for
Sanctions

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK)

SIXTEENTH JUDICIAL CIRCUIT

TIMOTHY W. HOWE,
Individually and as Personal
Representative of the Estate of
WAYNE ERVIN HOWE, deceased,
and **JEANETTE HOWE,**

C/A NO. 15-CP-46-03456

Plaintiffs,

**ORDER GRANTING PLAINTIFFS'
MOTION FOR SANCTIONS
AGAINST CLEAVER-BROOKS,
INC.**

v.

**AIR & LIQUID SYSTEMS
CORPORATION, et al.,**

Defendants.

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SC Court of Appeals

Plaintiffs Timothy W. Howe, Individually and as Personal Representative of the Estate of Wayne Ervin Howe, deceased, and Jeanette Howe moved for sanctions against Defendant Cleaver-Brooks, Inc. ("Cleaver-Brooks") for its abuse of the discovery and trial processes. For the reasons set forth herein, Plaintiff's motion for sanctions is GRANTED.

FINDINGS OF FACT

Cleaver-Brooks conceded in its brief before this Court that the "gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party." Response to Motion for Sanctions at 9 (citation omitted). Yet Cleaver-Brooks engaged in a course of withholding crucial documents until the night before its corporate representative was scheduled to testify and then ambushing Plaintiffs with testimony regarding those documents mid-way through trial. This issue of Cleaver-Brooks' failure to produce consequential documents permeated pretrial and trial procedure and was the subject of multiple motions and hearings. Cleaver-Brooks' argument that Plaintiffs have waived this issue (for which

Cleaver-Brooks cites no authority) is baseless. Likewise unfounded is Cleaver-Brooks' contention that this Court lacks jurisdiction to sanction Cleaver-Brooks' machinations. This is a simple issue: Cleaver-Brooks violated the discovery rules, at severe cost to Plaintiffs and waste of the resources of this Court and the jurors. This precisely the type of misconduct for which discovery sanctions are designed.

In its briefing before this Court, Cleaver-Brooks did not dispute this Court's observation that the "lynchpin" of this case at trial and during discovery was the location and number of Cleaver-Brooks boilers. Specifically, the issue was the presence, or absence, of Cleaver-Brooks boilers in the powerhouse at the Bowater plant where Howe worked. Throughout the entire course of discovery and throughout trial until the night before Cleaver-Brooks' corporate representative was designated to take the stand, Cleaver-Brooks hid critical evidence. Instead of producing all relevant evidence, as Plaintiffs repeatedly requested, Cleaver-Brooks produced misleading "commercial records" (the 25-page Bowater file) which indicated that more than one Cleaver-Brooks boiler was at Bowater. (Bates labeled BPM 000001-25.) The fact that Cleaver-Brooks' commercial records identified two Cleaver-Brooks boilers at Bowater is evidenced by Cleaver-Brooks' response to this Court as well as repeated assertions by its corporate representative, John Tornetta.

As Cleaver-Brooks admitted in its briefing, each boiler has a unique identifier called a unit number. Response to Motion for Sanctions at 2 ("Response"). Cleaver-Brooks has also repeatedly admitted as much in its testimony, including in this case. *See, e.g.*, Exhibit 8 to Motion for Sanctions ("Motion"), Dep. of John Tornetta, *Howe v. Air & Liquid Systems Corporation*, C/A No. 2015-CP-46-03456 (York County, S.C. Feb. 2, 2018), at 24:25–31:11 (explaining that he uses a boiler's unit number, which is on the index card, to get their commercial records); Ex. B to Reply

in Support of Fees and Costs (“Reply”), Dep. of John Tornetta, *Baccaglini and Zaino v. Cleaver-Brooks, Inc.* (N.Y. Supreme Court April 17, 2003), at 46:10-50:24 (explaining that each individual boiler has its own unit number); Ex. C to Reply, Trial Test. of John Tornetta, *Esposito v. A.O. Smith* (June 17, 2016), at 1530:21-26 (“we have index cards that indicate where we – not where we ship the boiler but where the boiler ended up, where we were told where a boiler ended up”); Ex. D to Reply, Trial Test. of John Tornetta, *Robaey v. Cleaver-Brooks Company* (N.Y. Supreme Court Dec. 12, 2016) at 1481:07-19; 1524:06-1525:04 (Cleaver-Brooks’ index card would show a unit number, or model number, for a particular boiler).

By Cleaver-Brooks’ own admission, the commercial file that Cleaver-Brooks produced to Plaintiffs as pertaining specifically to Bowater had two unit numbers—one ending in 43 and one ending in 44. This indicated that two Cleaver-Brooks boilers were at Bowater. Cleaver-Brooks tried to write off the fact that two units were identified in its Bowater commercial file as a “discrepancy.” Response at 4. On the contrary, the 25 pages which were produced by Cleaver-Brooks as the file for the Bowater site contained documents regarding a unit number 18343 (*e.g.*, Exhibit 4 to Motion at BPM000013, showing “unit number 18343” “ship to Bowater Carolina Corp, Catawba, South Carolina”), as well as documents regarding a unit number 18344 (*e.g.*, Exhibit 4 to Motion at BPM000016, showing “unit #0-18343” “ship to Bowater-Carolina Corp.”). Plaintiffs had no way to know that Cleaver-Brooks would claim mid-way through trial that the identification of one of the boilers was a typo. As Cleaver-Brooks’ own corporate representative admitted, the numbers 18344 and 18343 “are really different things.” Ex. E to Reply, Trial Trans. at 692:25-693:2. There was no discrepancy in the commercial records: all of the documents produced by Cleaver-Brooks up until it finally produced the midnight documents indicated unequivocally that there were two Cleaver-Brooks boilers at Bowater.

In conjunction with these documents produced at trial, Cleaver-Brooks' corporate representative offered new opinions that he had not held in either of his two depositions, including just days before trial. For example, he testified at trial that a consequential typo ran throughout the 25 pages that Cleaver-Brooks had produced in discovery. He offered multiple justifications for this erratum. Ultimately, however, such errors could have been discovered through earlier, timely production of the documents, and not ambush production in the middle of trial.

Based on the Bowater file, as well as the witness testimony, Plaintiffs made the perfectly reasonable decision to proceed to trial. Cleaver-Brooks maintains that it "cannot guess how opposing counsel will interpret—or in this case misinterpret—Cleaver-Brooks documents." Response at 11. Actually, Cleaver-Brooks could know how opposing counsel would interpret its documents because it had been telling Plaintiffs all along that unit numbers are discrete, unique identifying numbers for each boiler, like a social security card. *See* Tornetta trial and deposition testimony, *supra*. In Cleaver-Brooks' own words, "[e]ach Cleaver-Brooks boiler has a unique identification number called a unit number." Response at 2. Accordingly, Plaintiffs read Cleaver-Brooks' records exactly as they were designed to be read.

Mid-way through trial, Cleaver-Brooks for the first time produced evidence—the "midnight documents"—proving that one boiler that had been identified in the commercial records it had produced responsive to requests regarding Bowater in fact pertained to a boiler that was sent to Illinois, not Bowater. Accordingly, the midnight documents showed that only one Cleaver-Brooks boiler had been at Bowater, and that boiler had been in the administration building, not in the powerhouse. On cross-examination the next day, Cleaver-Brooks' corporate representative admitted that the records that Cleaver-Brooks had previously produced in response to discovery requests regarding Bowater did in fact contain unit numbers for two separate boilers. For the first

time at trial, Tornetta dismissed the boiler unit number 018344 as not being at Bowater, and having been listed in the Bowater commercial file due to a typo. Ex. A to Reply, Trial Trans. at 686:2-8.

Thus came Plaintiffs' second surprise at trial—despite two depositions, Tornetta for the first time testified at trial about the typo in the Bowater file, which was highly consequential to Plaintiffs' decision to go to trial. Thus, Cleaver-Brooks violated the rules of discovery once when it produced key documents at midnight mid-way through trial, and then again when Cleaver-Brooks offered new testimony that had not been provided in advance of trial despite two depositions of its corporate representative. Cleaver-Brooks hammered home on this testimony on its examination of Tornetta and again in its closing statement. *E.g.*, Trial Trans. at 1055:12-15 (“Mr. Tornetta told you last week and he told you again this week that Cleaver-Brooks never denied shipping *a* boiler to Bowater in 1957”).

Up until Tornetta's trial testimony, since these two boilers were identified in documents produced in response to requests pertaining to Bowater, it was reasonable for Plaintiffs to understand that two boilers had been at Bowater. The foundation for Cleaver-Brooks' response—that Plaintiffs were unreasonable in this understanding—is not borne out by the facts. Cleaver-Brooks attempts to skirt the issue by claiming that the midnight documents were never the subject of discovery requests in the first place. On the contrary, the index card pertaining to Bowater, which showed the unique identifier for the unit number of the boiler at Bowater, was always responsive to the requests. Were this not the case, Cleaver-Brooks would have had no reason to produce it mid-way through trial. That index card is as follows:

Name BOWATERS-CAROLINA CORPORATION
 Street Address _____
 City CATAWABA
 State SOUTH CAROLINA

 Model Number P-723-308
 Unit Number 0-18343
 S. O. Number P-1170

C 10-888 A

Had Cleaver-Brooks pulled the index card in a timely fashion, it would have discovered that the commercial records it produced to Plaintiffs erroneously identified two boilers at Bowater, and not one. Indeed, this is precisely what Cleaver-Brooks' corporate representative discovered when he finally pulled the index card the night before he was scheduled to testify at trial. Cleaver-Brooks knew that its index cards were always the subject of discovery requests, yet simply failed to conduct its requisite due diligence in searching its files for responsive evidence until its corporate representative was about to testify at trial.

These documents are responsive to Plaintiffs' Standard Interrogatories and Request for Production of Documents, which specifically requested "documents which show sales" pertaining to products containing asbestos to job sites at which plaintiff was employed, which included Bowater. Ex. E to Reply, Plaintiff's Standard Interrogatories and Request for Production of Documents, *County of Greenville, In re: Asbestos Litigation Coordinated Docket*. Those discovery requests further order that "[t]hese Interrogatories shall be deemed continuing in the sense of Rule 26(e) of the South Carolina Rules of Civil Procedure so as to require supplemental answers a reasonable time prior to trial. . ." The documents are also subject to the document request attached

to the Rule 30(b)(6) notice to take the deposition of Cleaver-Brooks' corporate representative. Ex. F to Reply, Tornetta Deposition Notice at ¶ 5 (produce "purchase order records for all asbestos-containing products sold to any Premises at Issue between 1962 and 2008"). The documents were also subject to Plaintiffs' motion to compel, and Plaintiffs had asked for the documents, as this Court recognized at trial: "Oh, no question about that." Ex. A to Reply, Trial Trans. at 711:7-16.

Even if Cleaver-Brooks did not know about the index cards at the time of its first production, it admits that its corporate representative was well aware of the index cards, as evidenced by his depositions. Response at 4. It then concedes that the index card regarding the Bowater boiler was responsive to discovery requests (and thus should have been produced), arguing only that the index card for the Illinois boiler was not responsive. Response at 6. Cleaver-Brooks' corporate representative Tornetta admitted at trial that Plaintiffs had explicitly asked for those index cards during his deposition. Exhibit A to Reply, Trial Trans., at 121:12-122:11. Moreover, on January 22, 2018, Plaintiffs moved to compel documents that Cleaver-Brooks had not produced. Ex. 5 to Motion. On March 9, 2018, Plaintiffs filed a motion for sanctions because further production at that late date would cause prejudice. Ex. 11 to Motion, Hearing on Motion for Sanctions Against Cleaver-Brooks. In lieu of yet again requesting the documents, Plaintiffs asked the Court for a presumption that Cleaver-Brooks' boiler had been in the powerhouse, which request this Court took under advisement. *Id.* Cleaver-Brooks knew it had an obligation to produce the index cards in supplementation of its original discovery production. It simply chose not to.

By Cleaver-Brooks' admission, it was again reminded of its obligation to supplement its document production when, following Art Welker's February 20, 2018 deposition, Plaintiffs again asked Cleaver-Brooks to produce responsive documents. Response at 5. Cleaver-Brooks again chose not to fulfill its obligation, but instead waited until midnight on March 15, 2018, mid-way

through trial, to even check its records for responsive documents. Trial Trans. 685:12-695:8. Tornetta had claimed that the index cards have “all the same information” on them that is within the commercial records that Cleaver-Brooks had already produced, and he refused to “get involved in” trying to find evidence of where the boiler was actually located. Ex. 8 to Motion, at 50:16-20; 59:4-11. This was inaccurate information, stated by Cleaver Brook’s representative that was easily corrected if they had reviewed the requested records.

Attempting to detract from the wrong underlying Plaintiffs’ motion—Cleaver-Brooks’ failure to comply with discovery requests, despite repeated requests and this Court’s own admonition to do so—Cleaver-Brooks faults Plaintiffs for handling the midnight documents as they did. Cleaver-Brooks claims that “[a]t no point during their opening did Plaintiffs reference the core part of their theory of the case:” the existence of two Cleaver-Brooks boilers at Bowater. Response at 5. On the contrary, Plaintiffs maintained that there were “specific boilers in this case sold by Cleaver-Brooks.” Trial Trans. at 50:12. Cleaver-Brooks’ counsel made the same claim, referring during opening statements to “Cleaver-Brooks boilers sold to the Bowater Paper Mill. . . .” *Id.* at 81:5.

In addition, Plaintiffs timely called to this Court’s attention the egregiously late production of these documents, requested their exclusion, and expressed an intent to seek sanctions. In response to Plaintiffs’ motion to exclude the midnight documents, the Court noted that Plaintiffs were under no obligation to reveal their trial strategy regarding the two boilers at Bowater earlier than they had:

What they say is they noticed that disparity and they are the kind of lawyers that do notice those kinds of things. I don't think they're obligated to tell y'all that. They had one little old something that they were going to hang their hat on to say, "Hey, there were two boilers here," and did a good job of elucidating that theory yesterday, and I think they were entitled to do that without violating the rules of having to disclose their theory, because you all had these records just like they did.

Trial Trans. at 717:25-718:9.

Cleaver-Brooks cites no legal authority for its claim that Plaintiffs erred in their handling of Cleaver-Brooks' wrongdoing. Moreover, it is Cleaver-Brooks' offense, and not Plaintiffs' response or Plaintiffs' trial strategy, that is the subject of the motion and for which Cleaver-Brooks must be sanctioned.

Cleaver-Brooks' production of erroneous evidence and failure to timely produce other evidence was extremely prejudicial to Plaintiffs' trial strategy and fundamentally changed the analysis of Plaintiffs' case, resulting in tremendous trial expenses and costs, the waste of judicial resources, and the squandering of citizens' time in serving on a jury. Cleaver-Brooks shrugs its shoulders and claims that it simply did not notice that two boilers were listed in the Bowater commercial file until prompted by Plaintiffs to double-check its records mid-way through trial. Response at 4. As a matter of policy, a party should not be rewarded for failing to examine its own files that it produces in discovery, making inaccurate claims about limited documents (namely that the index cards were the same as the commercial records) and then profit from that failure by misleading opposing counsel.

Once Cleaver-Brooks finally noticed the error in its file and produced the documents, Tornetta admitted that they had been sitting in his office all along and that Plaintiffs had asked him for them months ago during his depositions. Trial Trans. at 121:12-122:11. Cleaver-Brooks' lackadaisical attitude does not excuse the time and resources wasted at trial as a result of its mishandling of its own documents. This Court found that Cleaver-Brooks' behavior was "sloppy" and noted its corporate representative's "dereliction." Ex. 14 to Motion, Trial Transcript (Mar. 16, 2018), at 149:12-153:7. While errors happen, it is imperative that an error be both rectified in the moment and deter such errors from happening again in the future. Sanctions are warranted.

FINDINGS OF LAW

A. This Court May Exercise Its Discretion to Sanction Cleaver-Brooks.

“[T]he court in which the action is pending may make such orders in regard to the failure [to provide discovery] as are just. . . .” SCRCP 37(b)(2). This Court is therefore empowered to sanction Cleaver-Brooks.

Cleaver-Brooks complained that the judgment has not been entered timely. This is manifestly inaccurate, as shown by the governing rule:

- (a) Entry Upon Verdict or Decision. Subject to the provisions of Rule 54(b):
- (1) upon a general verdict of a jury, **or upon a decision by the court that a party shall recover only a sum certain or costs** or that all relief shall be denied, the clerk, **unless the court otherwise orders**, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court;
 - (2) **upon a decision by the court granting other relief**, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly prepare the form of the judgment, or direct counsel to promptly prepare the form of judgment, to which may be attached the decision, order or opinion of the court, and after review and approval by the court, the clerk shall promptly enter it.
- Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and entered in the record. Entry of the judgment should not be delayed for the taxing of costs.

SCRCP 58 (emphasis added). The judgment is not necessarily automatically entered upon rendition of a verdict, but may be rendered upon a decision of the court granting other relief, such as costs, if “the court otherwise orders,” or “upon a decision by the court granting other relief.” *Id.* As announced at the hearing, the Court instructed the Clerk of Court in York County to not enter the judgment until this motion for sanctions could be heard and decided. Here, judgment will be rendered upon a decision of this Court granting sanctions against Cleaver-Brooks.

B. Cleaver-Brooks’ Argument that Documents Regarding Unit 18344 Were Not Responsive to the Discovery Requests Is Irrelevant.

Cleaver-Brooks argues that it did not have to produce its documents regarding its Illinois

boiler because they were not responsive to the discovery requests. Cleaver-Brooks misses the point. Plaintiffs' discovery requests pertained to documents relevant to Wayne Howe's worksites. Plaintiffs had no interest in accessing Cleaver-Brooks' files pertaining to irrelevant sites, nor could Plaintiffs have anticipated that Cleaver-Brooks would produce such documents. Cleaver-Brooks, by producing documents apparently relevant to a completely unrelated location, put that location at issue. Worse, Cleaver-Brooks confused the issue by producing those documents as "commercial records" of Bowater, where Howe had worked, and later playing "gotcha" to reveal midway through trial that the documents were unrelated to Bowater but were mere typos. All of this confusion on the part of Cleaver-Brooks was the result of its failure to review a mere 25 pages of its commercial records and its failure to carefully maintain those commercial records in the first place. Cleaver-Brooks' sloppiness does not excuse its failure to comply with the discovery rules.

Cleaver-Brooks admits that it was not until mid-way through trial, and only when triggered by testimony at trial, that its corporate representative finally examined the commercial records (only 25 pages) that Cleaver-Brooks had produced to Plaintiffs two months earlier and for the first time discovered Cleaver-Brooks' error. Under Rules 26 and 34, a party must produce relevant documents, not random documents like a file identifying a boiler irrelevant to the action at hand. This is particularly true where the other party has no way to know that there is any error in the file. Under Rule 30(b)(6), a corporate representative must have knowledge of all information on the noticed topics reasonably available to the corporation. Ex. 16 to Motion, *Ethox Chem., LLC v. Coca-Cola Co.*, No. 6:12-cv-1682-TMC, 2014 WL 2719214, at *2 (D.S.C. June 16, 2014). This Rule is not met when a corporate representative fails to examine the corporate documents until mid-way through trial. Cleaver-Brooks' production of documents was misleading, did not comply with the Rules, did not comply with the 30(b)(6) notice, and did not comply with the Asbestos

Trial Docket Amended General Scheduling Order.

C. Cleaver-Brooks Should Be Sanctioned for Its Abuse of the Discovery and Trial Processes.

1. Cleaver-Brooks cannot escape sanctions by questioning Plaintiffs' trial strategy.

Cleaver-Brooks argues that "Plaintiffs had every opportunity to take discovery to resolve any ambiguities regarding the unit numbers in the commercial records." Response at 10. This summarizes the problem: Plaintiffs had no inkling that there was any such ambiguity, particularly since Cleaver-Brooks had produced the Bowater-specific "commercial records" in response to discovery requests specific to Bowater. While faulting Plaintiffs for failing to recognize an ambiguity in its own file, Cleaver-Brooks simultaneously admits that it too failed to recognized such ambiguity, and did not do so until trial and then only in response to questioning by Plaintiffs. In fact, during opening statements, Cleaver-Brooks' own counsel referred to multiple "Cleaver-Brooks boilers sold to the Bowater Paper Mill. . . ." Ex. A to Reply, Trial Trans., at 81:5.

Cleaver-Brooks accuses Plaintiffs of misinterpreting Cleaver-Brooks' files, but its own representative admitted at trial that its files that it produced to Plaintiffs were erroneous. There was no misinterpretation, just reasonable interpretation of the files as produced.

In any event, Cleaver-Brooks cannot escape sanctions for its failure to abide by the discovery rules because it disagreed with Plaintiffs' trial strategy. Plaintiffs gave Cleaver-Brooks' representative every opportunity to explain its files during both of his depositions. Exhibit 8 to Motion, Dep. of John Tornetta (Feb. 2, 2018), at 9:17-21; 26:8-28:11; 45:2-5, 50:11-20; 53:7-12; 59:4-11; Exhibit 9 to Motion, Dep. of John Tornetta, Vol. II (Mar. 6, 2018), at 228:4-18. Plaintiffs raised their theory that there was more than one boiler at Bowater during opening statements. Trial Trans. at 50:12. Yet Cleaver-Brooks waited days later, until the eve of Tornetta's testimony, to

double-check its files. This is sanctionable conduct.

2. Plaintiffs did not waive the right to seek sanctions.

Cleaver-Brooks willfully misinterprets this Court's comments at trial regarding waiver. When Plaintiffs first apprised this Court of the problem regarding Cleaver-Brooks' belated production of the midnight documents, the Court suggested that Plaintiffs may have waived their objection to Cleaver-Brooks' use of the documents regarding the Cleaver-Brooks boiler in Illinois. Ex. A to Reply, Trial Trans. at 710:14-711:16. After confirming with Plaintiffs' counsel that the only document Plaintiffs had used in questioning Cleaver-Brooks' corporate representative was the index card for boiler 43, the boiler that Cleaver-Brooks agrees was at Bowater, it became apparent to this Court that there was no waiver. This Court later granted Plaintiffs' objection to use of the index card regarding the Illinois boiler and excluded this evidence, finding there was no waiver of the objection. Trial Trans. at 715:25-719:3. This Court further clarified that waiver pertained only to the index card regarding the Bowater boiler, which Plaintiffs had put into evidence: "I think the plaintiffs have waived the Bowater card because they displayed it to the jury so I think I'm allowed to put that into evidence and use it." *Id.* at 714:13-15.

This Court then agreed that Plaintiffs had not waived an ability to seek sanctions:

MS. DEAN: . . . Your Honor, Ms. McVey had made a request on Friday that these actions were somewhat a lynch pin of our case, fundamentally fact of how we approached this trial. We want to seek -- I just want to make sure that if we seek sanctions for costs or time after trial we haven't waived anything.

THE COURT: You have already completely talked about how fundamental it was to your case so forth and so on, that is very well protected in the record as I view it.

Ex. A to Reply, Trial Trans., at 864:8-16. Accordingly, this Court rejects Cleaver-Brooks' argument that Plaintiffs waived a motion for sanctions by questioning its corporate representative about the documents at trial.

This Court also rejects Cleaver-Brooks' argument that Plaintiffs waived a motion for sanctions by not requesting the midnight documents during discovery because Plaintiffs, in fact, requested the documents repeatedly. Cleaver-Brooks complains that "Plaintiffs never made any request – not on the record at the deposition, not by email or letter to counsel following the deposition – for that index card." Response at 13. Cleaver-Brooks chooses its words carefully, and misleadingly, because its corporate representative admitted that Plaintiffs had requested the index cards at his deposition, Trial Trans. at 121:12-122:11 – whether that request was on the record is of no moment.

Cleaver-Brooks offers no legal authority for its claim that Plaintiffs should have asked for any piece of evidence by name. As set forth above, the documents are responsive to Plaintiffs' master discovery. The documents are responsive to Plaintiffs' motion to compel. The documents were the subject of Plaintiffs' motion for sanctions. The documents were discussed during both of Tornetta's depositions, at which, Tornetta admitted, he was asked to produce the index cards. It is difficult to imagine how many other ways or times Plaintiffs could have requested the same evidence. Cleaver-Brooks simply chose not to produce the evidence, regardless of how many times and in how many ways Plaintiffs asked.

Cleaver-Brooks contends that Plaintiffs should have raised the issue of the midnight documents before the examination of Mr. Tornetta, moved to strike the testimony, or moved for a mistrial. Cleaver-Brooks cites no legal authority for its contention that Plaintiffs' method of handling Cleaver-Brooks' improprieties constituted a waiver; Cleaver-Brooks' position is contrary to this Court's findings. In fact, an objection may be lodged *before* a motion to strike or a motion for mistrial. *See, e.g., State v. Wilson*, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010). Even then, a motion to strike or a motion for mistrial is not required, except if the party whose

objection is sustained wishes to preserve the issue for appeal. *Id.*

Cleaver-Brooks complains that Plaintiffs elicited testimony from Tornetta on the issue of the midnight documents. Plaintiffs were certainly entitled to ask Cleaver-Brooks about the documents it had produced mid-way through trial, and there is no rule that required any sort of motion in advance. That testimony brought additional surprise, including (1) the fact that Tornetta believed the second unit number listed in the commercial files for Bowater was a typo, and (2) the second unit went to another location. Cleaver-Brooks admits that this testimony was not provided in advance of trial. This was trial by ambush.

The right for sanctions was preserved by Plaintiffs' objection to the documents and request during trial to move for sanctions at a later time. There was no waiver.

3. The jury verdict was based on the evidence that the only boiler at Bowater was in the administration room.

Without question, the jury understood that the key issue in the case was the number and location of boilers at Bowater. Cleaver-Brooks itself commenced its questioning of its corporate representative with questions about the number and location of its boilers:

Q So John, you've known me for a long time, I'm going to go right to the questions. **I want to start by asking for the answers to some of the very basic questions that are at issue in this case** and then I am going to go back and talk about the basis for your answers, okay?

A Okay.

Q Did Cleaver-Brooks ship a boiler to the Bowater Paper Mill in Catawba, South Carolina?

A Yes.

Q And when I use the word Bowater in my questions, I mean the Bowater Mill at Catawba.

A Okay.

Q Did that boiler that Cleaver-Brooks shipped to Bowater contain asbestos?

A At the time of manufacturing it, yes.

Q **How many boilers did Cleaver-Brooks ship to Bowater?**

A One.

Q What was the unit number of the boiler that Cleaver-Brooks shipped to Bowater? And you could just get the last two digits.

A I think the whole unit number, if I get it, correctly is 0-18343.

Q **Did Cleaver-Brooks ship a boiler to Bowater with the unit number 0-18344?**

A No.

Trial Trans. at 736:4- 737:5 (emphasis added). Although Cleaver-Brooks maintains that it did not ask Tornetta about the location of unit 18344, Resp. at 12, that is misleading, as it made clear to the jury that the location of the unit was *not* Bowater. *See, e.g.*, Trial Trans. at 737:3-5; 743:2-4.

It was evident to everyone at trial, not least the jurors, that the key issue was whether there was a Cleaver-Brooks boiler in the powerhouse. Indeed, Cleaver-Brooks made this the starting point of its closing argument. *See* Trial Trans. at 1054-55. Cleaver-Brooks' counsel reminded the jury that the evidence showed only one boiler at Bowater, pointing out, for example, that "Mr. Tornetta told you last week and he told you again this week that Cleaver-Brooks never denied shipping *a* boiler to Bowater in 1957," and "all of the asbestos containing components in the Cleaver-Brooks boiler shipped to Bowater were inside *that* boiler." *Id.* at 1055:12-15; 1055:19-21 (emphasis added). Contrary to Cleaver-Brooks' claim that it did not argue in closing that there was only one boiler, Cleaver-Brooks walked the jury through its supporting evidence, admonishing that "Mr. Tornetta said this 18344 boiler was never at Bowater," explaining away the unit number issue as "mistakes happen," and dismissing Plaintiffs' key witness on the exposure issue. Trial Trans. at 1059:5-1061:24.

4. Exclusion of evidence is not a sanction.

There is no issue of double punishment here. Although this Court excluded from evidence the midnight documents regarding the Illinois boiler, that did not cure Tornetta's surprise

testimony regarding the typo in the commercial files. The revelation of the typo—which came belatedly as a result of the last-minute production of the midnight documents—undermined Plaintiffs’ claim that there were two Cleaver-Brooks boilers at Bowater. It is for this conduct that Cleaver-Brooks has not been sanctioned. Cleaver-Brooks points out that “[d]iscovery sanctions are imposed ‘to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent.’” *Creighton v. Coligny Plaza Ltd. P’ship*, 334 S.C. 96, 123, 512 S.E.2d 510, 524 (Ct. App. 1998). Here, a discovery sanction is warranted both to penalize Cleaver-Brooks and because Cleaver-Brooks continues to hide such documents in other cases, such that deterrence is required.

Cleaver-Brooks overreaches by trying to equate this case with a Fifth Amendment case. Even if a double-punishment issue were at hand here, the United States Supreme Court has held that “Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.” *Dep’t of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 793 (1994) (quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)). Double jeopardy is not at issue.

5. Plaintiffs’ attorneys’ fees are reasonable.

The selection of a sanction for discovery violations is within the trial court’s discretion. *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990). Sanctions can range up to default or dismissal, and “[i]n determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice.” *Griffin Grading & Clearing, Inc. v. Tire Service Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999)

(citing *Laney v. Hefley*, 262 S.C. 54, 202 S.E.2d 12 (1974)). The sanction should be aimed at the specific conduct of the party sanctioned. *Id.* (citing *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990)).

Here, the Court cannot award such sanctions as striking pleadings or entering default judgment as verdict has been rendered. The most appropriate sanction in this case is an award of costs, expenses, and attorneys' fees, as well as a denial of Cleaver Brooks' application for costs.

A court may award reasonable expenses, including attorneys' fees, for a party's failure to make or cooperate in discovery, as occurred here. SCRCP 37(b); *see, e.g., Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014) (affirming award of attorneys' fees and costs as sanctions for refusal to comply with discovery rulings); *Arnal v. Arnal*, 363 S.C. 268, 297, 609 S.E.2d 821, 836 (Ct. App. 2005), *aff'd as modified*, 371 S.C. 10, 636 S.E.2d 864 (2006) (court imposed sanctions awarding attorneys' fees for discovery abuse); *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 644, 579 S.E.2d 151, 154 (Ct. App. 2003) (trial court granted attorneys' fees for failure to participate in discovery); *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 305, 529 S.E.2d 45, 56 (Ct. App. 2000) (trial court assessed attorneys' fees for discovery abuses); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999) (trial court awarded attorneys' fees for failure to comply with discovery order).

In addition, a court may award attorney's fees and costs, including time at trial, against an opponent whose conduct results in mistrial and multiplication of proceedings, as here. *Cf. In re Gould*, 77 F. App'x 155 (4th Cir. 2003); *Abner v. Kansas City S. Ry. Co.*, 541 F.3d 372, 380 (5th Cir. 2008); *Gierlinger v. Gleason*, 160 F.3d 858, 862 (2d. Cir.1998). In South Carolina award of attorneys' fees is treated as an issue in equity. *Kilcawley v. Kilcawley*, 312 S.C. 425, 427, 440 S.E.2d 892, 893 (Ct. App. 1994) (citing *Brown v. State Farm Mut. Ins. Co.*, 275 S.C. 276, 269

S.E.2d 769 (1980)). Here, equitable factors, including the policy concerns of punishment and deterrence, weigh in favor of imposing fees and costs.

The amount of attorneys' fees to be awarded is within the discretion of the trial judge. *Burton v. York Cty. Sheriff's Dep't*, 358 S.C. 339, 357, 594 S.E.2d 888, 898 (Ct. App. 2004). The six factors a court considers when determining attorneys' fees are (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Id.*

Cleaver-Brooks does not challenge that the requested attorneys' fees are appropriate based on the nature, extent, and difficulty of the case, and the professional standing of counsel. It claims, instead, that Plaintiffs offered "bare assertions" to support the hourly rates for their attorneys' fees. On the contrary, Plaintiffs explained that the prevailing market rate may be established through evidence of fees that counsel with similar qualifications have received in comparable cases. *See Spell v. McDaniel*, 824 F.2d 1380, 1402 (4th Cir. 1987). Plaintiffs attached an order in another case awarding attorneys' fees that are in line with those requested here. Exhibit 20 to Motion, Order, *Brian Parker, et al. v. ABC Debt Relief, Ltd. Co., et al.*, No. 3:10-cv-1332-P (N.D. Tx. Apr. 9, 2014). This Court has the discretion to ascertain reasonable expenses, including attorneys' fees, and the evidence would fully support this Court's award of the fees requested. *E.g., Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014).

Cleaver-Brooks also accuses Plaintiffs of not providing the affidavit of Ms. McVey or Mr. Howe. These affidavits were, in fact, provided the day after Plaintiffs' motion was filed. Exhibits 18 & 22 to Motion. Ms. McVey's affidavit shows that Plaintiffs have not requested special rates for out of state counsel – both Ms. McVey and Ms. Dean, senior and seasoned trial lawyers, are

requesting \$550/hour. Mr. Holder is requesting \$400/hour. Although Cleaver-Brooks claims that the rates for Ms. Dean and Mr. Holder are not rates that a South Carolina attorney would typically receive, it provides no evidence in support. This Court finds that a reasonable attorneys' fee for Ms. McVey and Ms. Dean is \$500/hour rather than the \$550/hour requested by Plaintiffs. This Court finds that a reasonable attorneys' fee for Mr. Holder is \$400/hour.

Cleaver-Brooks also complains that Ms. Dean and Mr. Holder worked the same number of hours in the preparation of trial. Plaintiffs have represented, however, that both attorneys were working together, nearly around the clock in preparation for trial, as did Ms. McVey. It thus comes as no surprise that their hours would mirror each other. Further, itemization of counsel's time is not necessary, as it was evidenced by the degree of preparation required by a trial of this length and scope as well as by counsel's performance at trial, none of which Cleaver-Brooks questions. Finally, Plaintiffs have only requested fees for time spent beginning on the Sunday before trial started when Cleaver Brooks was the only remaining Defendant, as well as the depositions of Mr. Tornetta the Cleaver Brooks representative. Thus, all time requested by Plaintiffs was due only to trying the case against Cleaver Brooks.

Plaintiffs provided evidence that all counsel, including Ms. McVey, were forced to lodge in York in light of its location. As for the number of staff required to try this case, even Cleaver-Brooks does not deny that this was a case of sizable scope, complicated legal and scientific issues, and significant economic interests. So, too, Cleaver-Brooks does not deny that its trial support staff and attorney presence was significant.

The Court finds that the attorneys' fees sought by Plaintiffs, as reduced for Ms. McVey and Ms. Dean, are reasonable and just under the *Jackson* factors and are supported by substantial record evidence.

Finally, the Court rejects Cleaver-Brooks' contention that Mr. Howe and Ms. Myers should not receive the few hundred dollars they are requesting for time lost at work to attend trial. When there has been an abuse of the discovery rules, "the court in which the action is pending may make such orders in regard to the failure as are just." SCRCP 37(b)(2). Lost wages are just and reasonable in this instance.

CONCLUSION

This Court hereby exercises its discretion and grants sanctions against Cleaver-Brooks in the amount of:

- (1) costs incurred by Timothy W. Howe in taking time off from work for trial in the amount of \$2,310 (7 days trial x 10 hrs/day x \$33/hr);
- (2) costs incurred by Wende Myers in taking time off from work for trial in the amount of \$571.84;
- (3) attorneys' fees incurred in trying this case by Jessica Dean of \$78,000;
- (4) attorneys' fees incurred in trying this case by Theile McVey of \$70,500;
- (5) attorneys' fees incurred in trying this case by Jonathan Holder of \$62,400; and
- (6) Plaintiffs' trial expenses in the amount of \$90,835.16.

As a final sanction, I also exercise my discretion to deny Cleaver-Brooks' cost application.

IT IS SO ORDERED.

Jean Hoefler Toal, Chief Justice of the South
Carolina Supreme Court, Retired, Acting as
Circuit Court Judge

October ____, 2018

Spartanburg, South Carolina.



York Common Pleas

Case Caption: Wayne Ervin Howe , plaintiff, et al VS Air & Liquid Systems Corp ,
defendant, et al
Case Number: 2015CP4603456
Type: Order/Sanctions

IT IS SO ORDERED.

s/ Jean H. Toal #2758