

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Circuit Court

Roger L. Couch, Circuit Court Judge

Case No. 2015-CP-23-04535
Appellate Case No. 2017-002487

RECEIVED
AUG 06 2018
SC Court of Appeals

Communication Concepts, Inc. Appellant,

v.

Controls for Automation, Inc. and
Digital Management Solutions, Inc. Respondents.

RECORD ON APPEAL

Burl F. Williams (S.C. Bar No. 77901)
Konstantine P. Diamaduros (S.C. Bar No. 102231)
Nexsen Pruet, LLC
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(864) 370-2211

Attorneys for Appellant Communications Concepts, Inc.

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C/O JASON G. LEFORT, REGISTERED AGENT
404 AIRDALE LANE
SIMPSONVILLE SC 29680

CONTROLS FOR AUTOMATION, INC.
C/O DAVID MOCHI, PRESIDENT
CONTROLS FOR AUTOMATION, INC.
25 CONSTITUTION DRIVE
TAUNTON MA 02780-1071

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Attorneys for Appellant Communications Concepts, Inc.

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STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

C/A No.: 2015-CP-23-04535

Controls for Automation, Inc.,)
Plaintiff,)

v.)

Digital Management Solutions,)
Inc., Communication Concepts,)
Inc.,)

Defendants.)

ORDER COMPELLING SETTLEMENT

FILED
CLERK OF COURT
OFFICE OF THE CLERK
PAUL W. WOODENSHIMER
2016 NOV 18 AM 9:50

THIS MATTER CAME BEFORE THE UNDERSIGNED on Motion of the Plaintiff, Controls for Automation, Inc. Plaintiff's motion seeks to compel a settlement agreement between the parties filed with the Court on April 14, 2016. Present at the hearing were Ian McVey, counsel for the Plaintiff, Burl Williams, counsel for CCI, and Mitchell Byrd, counsel for DMS. DMS joined in Plaintiff's Motion.

Under the terms of the Settlement Agreement, Digital Management Solutions, Inc. ("DMS") agreed to ship immediately one trailer for which Communication Concepts, Inc. ("CCI") had already paid. The parties stipulated that DMS had complied with this provision of the Settlement Agreement and CCI took delivery of the first trailer on May 2, 2016.

Thereafter, CCI was, within forty-five (45) days of shipment of the first trailer, to purchase, pay for and take delivery of at least one more trailer if not more. CCI has failed to comply with this provision of the Settlement Agreement. The Settlement Agreement likewise provides that CCI will purchase all of the remaining trailers within one hundred twenty (120)

Plc
PI

RECEIVED

NOV 21 2016

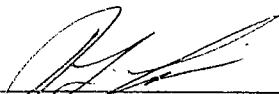
days of delivery of the first trailer to CCI in Florida. This time has likewise run, and CCI has not taken delivery of nor paid for the remaining trailers.

The Settlement Agreement complies with Rule 43(k), SCRCF, in that it is signed by the parties as well as by counsel. It was filed with the Court. Therefore, I find it is compellable.

THEREFORE, IT IS ORDERED that the parties shall comply with the terms of the Settlement Agreement within thirty (30) days of the date of the entry of this order with all trailers and funds having been delivered pursuant to the Settlement Agreement by that time.

IT IS SO ORDERED.

10/24 RLC
September __, 2016
Spartanburg, South Carolina



Roger L. Couch
Presiding Judge

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2015CP2304535

FILED
CLERK OF COURT
GREENVILLE, S.C.
PAUL B. WICKENSIMER
2015 NOV 19 PM 3:05

Controls For Automation Inc vs. Digital Management Solutions Inc

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter: _____

PRESIDING JUDGE - Roger L Couch

This judgment was entered on the , and a copy mailed first class this , to attorneys of record or to parties (when appearing pro se) as follows:

Ian Douglas McVey PO Box 1473 Columbia, SC
29202-1473
~~Langdon Cheves III PO Box 1509 Greenville, SC~~
~~29602~~

Mitchell K. Byrd Sr. 216 Pimlico Road Greenville,
SC 29607
Burl F. Williams PO Drawer 10648 Greenville, SC
29603

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

RECEIVED FORM 4

NOV 27 2017

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP2304535

Controls For Automation Inc 2017 NOV 22 AM 12:53	Digital Management Solutions Inc	Communication Concepts Inc
---	-------------------------------------	-------------------------------

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

11/22/2017

Date

For Clerk of Court Office Use Only

This judgment was entered on **November 22, 2017**, and a copy mailed first class or placed in the appropriate attorney's box on **November 22, 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Ian Douglas McVey PO Box 1473 Columbia, SC
29202-1473
Langdon Cheves III PO Box 1509 Greenville, SC 29602

Mitchell K. Byrd Sr. 114 Amber Drive Greenville, SC 29607
Burl F. Williams PO Drawer 10648 Greenville, SC 29603
Digital Management Solutions Inc 1200 Woodruff Road B15
Greenville, SC 29607

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Paul B. Wickensimer Greenville County Clerk Of
Court - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCPP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2015-CP-23-04535

Controls for Automation, Inc.,

Plaintiff,

vs.

Digital Management Solutions, Inc. and
Communication Concepts, Inc.,

Defendants.

**ORDER DENYING DEFENDANT
COMMUNICATION CONCEPTS,
INC.'S MOTION TO ALTER OR
AMEND**

2017 10/11 22 PM 09:51

THIS MATTER COMES BEFORE THE COURT on Defendant Communication Concepts, Inc.'s ("CCI") Rule 59(e) Motion for Reconsideration filed December 1, 2016. A hearing was held for the undersigned on February 2, 2017. Present at the hearing were Ian D. McVey, counsel for the Plaintiff, Burl Williams, Counsel for CCI, and Mitchell Byrd, counsel for Digital Management Solutions, Inc. ("DMS").

BACKGROUND

This action was commenced by Plaintiff on July 21, 2015 by the Plaintiff seeking to collect a debt against DMS. CCI was named as a party by virtue of the funds claimed due and owing by DMS from which Plaintiff sought repayment of its debt. DMS filed its Answer and Cross-claim against CCI on August 14, 2015 seeking payment and performance of the agreement between them. Both CCI's answer to the Complaint and Answer to the Cross-claim generally deny the allegations and assert various affirmative defenses.

On March 8, 2016, a mediation was held resulting, eventually, in a Settlement Agreement, the same being dated April 6, 2016. The Settlement Agreement was filed with the



Clerk's office for Greenville County on April 15, 2016. After non-performance by CCI, Plaintiff filed a Motion to Compel Settlement on August 5, 2016. A hearing was held and the undersigned entered an Order Compelling Settlement on November 18, 2016. CCI filed the Motion to Alter or Amend currently before the Court on December 1, 2016. This order denying same follows.

LEGAL STANDARD

Rule 59(e) of the South Carolina Rules of Civil Procedure is "substantially the Federal Rule" and provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." See Publisher's Notes to Rule 59, S.C.R.C.P. Courts construing the federal counterpart to Rule 59(e) have determined that a motion to alter or amend should be granted in limited circumstances "(1) to accommodate an intervening change in the law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." United States ex rel. Baker v. Westinghouse Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002), *quoting* Pacific Ins. Co. v. Am. Nat'l. Fire Ins., 148 F.3d 396, 403 (4th Cir. 1998); *see also* Unisun Ins. v. Hawkins, 342 S.C. 537, 542, 537 S.E.2d 559, 562 (Ct. App. 2000) ("In the absence of prior state law on the issue in question, federal cases interpreting the rule are persuasive.") (*citing* Roberts v. Peterson, 292 S.C. 149, 355 S.E.2d 280 (Ct. App. 1987)). Additionally, it is well-settled that "a party cannot use a motion to reconsider to present an issue the party could have raised prior to judgment, but did not." Anderson Memorial Hospital, Inc. v. Hagen, 443 S.E.2d 399, 400 (Ct. App. 1994); *see also* C.A.H. v. L.H., 434 S.E.2d 268 (1993).

ANALYSIS

CCI presents two arguments for reconsideration: i) the Settlement Agreement requires the

Court to order a damages hearing and not order specific performance, and ii) specific performance is improper. CCI presented both of these arguments at the hearing for Plaintiff's Motion to Compel Settlement. This Court has previously ruled that these arguments failed and that CCI should be compelled to perform under the terms of the Settlement Agreement. As set forth more fully below, nothing presented in CCI's Motion warrants the alteration or amendment of that Order.

I. This Court is not solely limited to ordering a damages hearing.

CCI first argues that Plaintiff is limited to requesting a damages hearing in the event of a default. The Court disagrees. A settlement agreement that meets the requirements of Rule 43(k), SCRPC shall be binding on the parties to the agreement. "A trial court has inherent jurisdiction to enforce settlement agreements entered before it." Kumar v. Third Generation, Inc., 324 S.C. 284, 289-90, 485 S.E.2d 626, 629 (Ct. App. 1995). General contract principles are used in the construction of a settlement agreement. Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 672 S.E.2d 799 (Ct. App. 2009). Thus, to determine whether the Settlement Agreement required this Court to order a damages hearing, we look to the plain language of the Settlement Agreement.

Paragraph 8 of the Settlement Agreement states "if any party does not fulfill its obligations under this agreement and the dispute between DMS and CFA returns to litigation, DMS and CFA agree to waive their right to a jury trial and will proceed with a hearing solely as to the amount of damages."

Nothing in the plain language of the Settlement Agreement puts a requirement on this Court that the sole remedy this Court must use to enforce settlement is to order a damages hearing. The plain language of the Settlement Agreement merely requires DMS and CFA to waive their right to a jury trial and argue any disputes between them solely on the issue of

damages. Plaintiff's request for a damages hearing, which can be made at any time after default, is separate and distinct from its request to compel specific performance of the Settlement Agreement.

Nowhere in the agreement did the parties contemplate this would be the sole and exclusive remedy. In fact, it seems clear to the court that the parties to the Settlement Agreement contemplated the possible enforcement of the agreement as paragraph 9 thereof provides as follows: "This constitutes an enforceable agreement pursuant to Rule 43(k) and 41, SCRPC and operates to end all litigation among the parties." Had CCI fulfilled its obligations under the Settlement Agreement, a damages hearing would be unnecessary. Therefore, the Court finds no reason to alter its judgment requiring CCI to perform under the Settlement Agreement.

II. Specific Performance was an appropriate remedy.

CCi further argues that Specific Performance is not warranted in this situation. Again, the Court disagrees. "A trial court has inherent jurisdiction to enforce settlement agreements entered before it." Kumar v. Third Generation, Inc., 324 S.C. 284, 289–90, 485 S.E.2d 626, 629 (Ct. App. 1995). Plaintiff's Motion to Compel the terms of the Settlement Agreement is properly before the Court. "In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or had been and remains able and willing to perform his or her part of the contract." Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 290–91 (2000). Specific performance is appropriate if no adequate remedy exists at law. Time Warner Cable v. Condo Servs., Inc., 381 S.C. 275, 284, 672 S.E.2d 816, 820 (Ct. App. 2009).

In the present case, Plaintiff brought a motion in equity to compel performance, not an action at law to construe a contract against CCI. The litigation is over pursuant to the agreement of parties. Further, the plain language of paragraph 9 of the Settlement Agreement indicates that such a remedy was contemplated by the parties. This Court found in its judicial discretion that the equitable remedy for specific performance was warranted. Additionally, this Court found that there was a valid settlement agreement under Rule 43(k), SCRCP. Further, this Court found that the Settlement Agreement had been partly carried into effect because DMS shipped the first trailer as required under the Settlement Agreement and CCI accepted it. Thus, the Court found that DMS and Plaintiff have performed their initial obligations under the Settlement Agreement and were ready, willing and able to perform the remainder of the terms of the Settlement Agreement. Therefore, requiring CCI to comply with its obligations under the Settlement Agreement is appropriate, and the Court sees no reason to alter its initial order compelling settlement.

CCI argues that specific performance is not warranted because Plaintiff has an adequate remedy at law in the form of obtaining a judgment against DMS. The Court is unmoved by this argument. As set forth more fully below, Plaintiff's remedy related to obtaining its judgment against DMS is separate and distinct from the right to require CCI to perform as it promised to do in the Settlement Agreement. Therefore, the Court finds CCI's argument lacks merit and compelling performance under the Settlement Agreement was warranted.

III. Mark Mills' Declaration.

Prior to the hearing on CCI's Motion, CCI submitted a declaration of Mark Mills, President of CCI. This declaration which is in the form of an affidavit of Mr. Mills which offers reasons as to why CCI should not be required to perform under the Settlement Agreement. This

Handwritten signature of Mark Mills, with the initials "MM" and the year "2015" written below it.

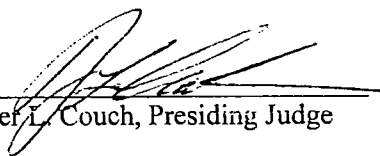
declaration was not submitted with CCI's motion and is therefore an attempt by CCI to supplement its Motion to Alter or Amend. This is impermissible under the South Carolina Rules of Civil Procedure. See Rule 6(d), SCRCP ("When a motion is to be supported by affidavit, the affidavit shall be served with the affidavit.") Therefore, this Court does not take into consideration the matters set forth in the declaration.

To the extent that CCI argues that it should be admitted because it is new evidence not available at trial, nothing in its motion or, for that matter, the declaration sets forth that this evidence was not available at trial and therefore, I find any such argument to the contrary fails.

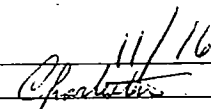
CONCLUSION

Based upon the foregoing, the Court denies CCI's motion to alter or amend.

IT IS SO ORDERED.



Roger L. Couch, Presiding Judge

 11/16, 2017
_____, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
	)	C/A No.: 2015-CP-23-04535
Controls for Automation, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	ORDER OF JUDGMENT
Digital Management Solutions,	)	
Inc., and Communication	)	
Concepts, Inc.,	)	
	)	
	)	
Defendants.	)	
	)	

THIS MATTER CAME BEFORE THE UNDERSIGNED on April 24, 2017 for a damages hearing. Present at the hearing were counsel for the Plaintiff, Ian D. McVey, and David Mochi, President of the Plaintiff. Further present was Mitchell L. Byrd, Esquire as counsel for Defendant Digital Management Solutions, Inc. Mr. Byrd was relieved as counsel for Digital Management Solutions, Inc. ("DMS") prior to proceeding with the damages hearing. A separate Order has been entered to that effect. Otherwise, no other parties were present and the matter proceeded.

PROCEDURAL HISTORY

This matter was commenced by the filing of a Summons and Complaint by Plaintiff Controls for Automation, Inc. ("CFA") on July 21, 2015. Thereafter, DMS filed an Answer, Affirmative Defense and Crossclaim on August 14, 2015. Defendant Communication Concepts, Inc. ("CCI") filed its Answer to the Complaint on August 20, 2015. Thereafter, CCI filed its Answer to the Crossclaim on December 15, 2015.

Plaintiff moved for Summary Judgment on August 2, 2015 and the matter was heard before the Honorable Paul W. Burch on January 13, 2016. The ruling on CFA's Motion for Summary Judgment was held in abeyance while the parties attempted to resolve this matter via mediation. A Settlement Agreement was entered on April 14, 2016. After failure to comply with the Settlement Agreement by

Defendant CCI, Plaintiff moved to compel the settlement on August 4, 2016. An Order compelling settlement was entered on November 18, 2016, and CCI filed a Motion pursuant to Rule 59(e), S.C.R.C.P. on December 2, 2016. At the time of the hearing, CCI's 59(e) Motion was under advisement by The Honorable Roger L. Couch.

On March 21, 2017, CFA filed a Notice of Motion and Motion for Damages Hearing and my review of the file indicates that Notice was properly served on all counsel of record. Mr. Mochi was called as witness for the Plaintiff. Based upon my review of the file, the evidence presented at trial and the testimony of Mr. Mochi, I find, order and conclude as follows:

FINDINGS OF FACT

1. David Mochi is President of CFA.
2. On or about January 1, 2014, DMS submitted a commercial credit application to CFA related to its request that CFA provide fuel cells for certain mobile security trailers it was producing for CCI.
3. On August 14, 2014, DMS submitted a purchase order to U.S. Marine Products, a division of CFA, for fourteen (14) fuel cells, fourteen (14) fuel level sensors, fourteen (14) gateways, and twenty-eight (28) adapters for a total purchase price of One Hundred Thirty-Six Thousand Eight Hundred Forty-One and 60/100s (\$136,841.60) dollars.
4. Pursuant to that purchase order, one (1) fuel cell and the accompanying equipment were provided to DMS and promptly paid for by DMS.
5. Based upon the success of the first unit, the parties proceeded to fill the entirety of DMS' purchase order.
6. On November 21, 2014, CFA shipped to DMS thirteen (13) fuel cells, thirteen (13) fuel sensors, thirteen (13) gateways, and twenty-six (26) adapters.
7. Concurrent with the shipping of these products, CFA provided to DMS an invoice in the total sum of One Hundred Twenty-Seven Thousand Eight Hundred Nine and 56/100s (\$127,809.56) dollars. Said invoice provided for net thirty (30) day payment terms.

8. DMS never contested the payment terms.

9. On January 20, 2015, DMS submitted another purchase order on net thirty (30) day payment terms for one (1) fuel level sensor in the amount of Three Hundred Nineteen and 80/100s (\$319.80) dollars.

10. On February 9, 2015, CFA shipped to DMS the requested fuel cartridge center along with an invoice in the amount of Three Hundred Forty-Nine and 67/100s (\$349.67) dollars. As with previous invoices, the terms of payment were net thirty (30) days.

11. Mr. Mochi testified that two (2) payments of Five Thousand (\$5,000.00) dollars each have been made throughout the course of this relationship; however, no payment has been made since May 4, 2015.

12. Pursuant to the evidence submitted at trial, there is an outstanding balance as of May 4, 2015 of One Hundred Eighteen Thousand One Hundred Fifty-Nine and 23/100s (\$118,159.23) dollars.

CONCLUSIONS OF LAW

1. I find that a contract existed between CFA and DMS for the delivery of fourteen (14) fuel cells, fourteen (14) fuel level sensors, fourteen (14) gateways, and twenty-eight (28) adapters for a total purchase price of One Hundred Thirty-Six Thousand Eight Hundred Forty-One and 60/100s (\$136,841.60) dollars.

2. I find that CFA complied with the terms of said contract and provided the forgoing products as ordered by DMS.

3. I find that the terms of the contract provided for payment within thirty (30) days of invoicing, and that DMS did not object to these terms. To the contrary, DMS acknowledged the terms by its purchase order for the additional fuel level sensor dated January 20, 2015.

4. I find that DMS has breached the terms of its contract with CFA by its failure to pay, when due and owing, sums due under the contract.

5. I further find that DMS is justly indebted to CFA in the amount of One Hundred Eighteen Thousand One Hundred Fifty-Nine and 23/100s (\$118,159.23) dollars.

6. I further find that CFA is entitled to pre-judgment interest on that amount at the statutory rate of 8.75% per annum from May 4, 2015 to April 24, 2017 in the amount of Twenty Thousand Four Hundred Twenty-Five and 93/100s (\$20,425.93) dollars.

THEREFORE, IT IS ORDERED that judgment should be entered against Defendant Digital Management Solutions, Inc. in the amount of One Hundred Thirty-Eight Thousand Five Hundred Eighty-Five and 16/100s (\$138,585.16) dollars. This amount shall accrue interest at the post-judgment rate from April 25, 2017 until paid in full.

THE CLERK OF COURT is hereby directed to enter this order on the public index for Greenville County, South Carolina.

IT IS SO ORDERED.

The Honorable J. Cordell Maddox, Jr.

_____, South Carolina.

July ____, 2017

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Greenville
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015- CP-23-04535

Controls for Automation, Inc.

Digital Management Solutions, Inc., and
Communication Concepts, Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Ian D. McVey, Esquire

Attorney for : ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Controls for Automation, Inc.	Digital Management Solutions, Inc.	\$138,585.16
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or
placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or
to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

Ian D. McVey, Bar No. 71196
Turner Padget Graham & Laney, P.A.
P.O. Box 1473, Columbia, SC 29202
Phone: (803) 227-4267
Fax: (803) 400-1564
Email: imcvey@turnerpadget.com

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:



Greenville Common Pleas

Case Caption: Controls For Automation Inc vs. Digital Management Solutions Inc ,
defendant, et al
Case Number: 2015CP2304535
Type: Order/Judgment and Form 4

So Ordered

s/ J. Cordell Maddox Jr.

Electronically signed on 2017-07-21 12:45:33 page 7 of 7

FILED-CLERK OF COURT
GREENVILLE CO. S.
PAUL B. WICKENS

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

2015 JUL 21

PM IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C/A NO.: 2015-CP-23- 04535

Controls for Automation, Inc.,

Plaintiff,

v.

Digital Management Solutions, Inc. and
Communication Concepts, Inc.,

Defendants.

ENTERED COMPUTER

SUMMONS
(Non-Jury)

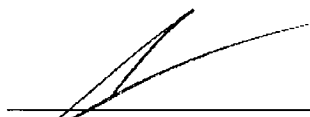
TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to appear and defend by answering the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer on the subscribers at their offices, 1901 Main Street, Suite 1700, Columbia, South Carolina 29201, or P.O. Box 1473, Columbia, South Carolina 29202, within thirty (30) days after the service hereof, exclusive of the day of such service, except that the United States of America, if named, shall have sixty (60) days to answer after the service hereof, exclusive of the day of such service; and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

SIGNATURE PAGE TO FOLLOW

Respectfully Submitted,

TURNER PADGET GRAHAM & LANEY, P.A.



Ian D. McVey (SC Bar No. 71196)
Post Office Box 1473
Columbia, South Carolina 29202
Telephone: 803-227-4267
Facsimile: 803-400-1564
imcvey@turnerpadget.com

Counsel for the Plaintiff

July 20, 2015
Columbia, South Carolina

FILED-CLERK OF COURT
STATE OF SOUTH CAROLINA GREENVILLE CO. IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE PAUL B. WICKENS THIRTEENTH JUDICIAL CIRCUIT

2015 JUL 21 PM 3 35

C/A NO.: 2015-CP-23-04535

Controls for Automation, Inc.,

Plaintiff,

v.

Digital Management Solutions, Inc. and
Communication Concepts, Inc.,

Defendants.

**COMPLAINT
(Non-Jury)**

NOW COMES THE PLAINTIFF, Controls for Automation, Inc., who hereby alleges and states as follows:

PARTIES AND JURISDICTION

1. Plaintiff is a corporation organized and existing under the laws of the Commonwealth of Massachusetts and having its principal place of business in Taunton, Massachusetts.

2. Defendant Digital Management Solutions, Inc. ("DMS") is, upon information and belief, a corporation organized and existing under the laws of the State of Delaware and having its principal place of business and residency in the Greenville County, South Carolina.

3. Defendants Communication Concepts, Inc. ("CCI") is, upon information and belief, a corporation organized and existing under the laws of the State of Florida and having its principal place in Cape Canaveral, Florida.

4. At all times relative hereto, Plaintiff and DMS were in a contractual relationship for the delivery of and payment for certain fuel cells and other related products (collectively

"Products") produced by the Plaintiff and delivered to DMS in its facility in Greenville County, South Carolina.

5. Plaintiff is informed and believes that DMS and CCI are in a contractual relationship to be performed by DMS in Greenville County, South Carolina.

6. Jurisdiction and venue are proper in the Court of Common Pleas for Greenville County, South Carolina.

FOR A FIRST CAUSE OF ACTION

7. On or about January 1, 2014, DMS submitted to Plaintiff a Commercial Credit Application. **See Exhibit A.**

8. The purpose of said application was to enter into a binding agreement for the purchase of the Products by DMS from Plaintiff.

9. Pursuant to the parties binding agreement, Plaintiff agreed to deliver the Products to DMS at its Greenville County location, and DMS agreed to pay for the Products within thirty (30) days of the date of the invoice.

10. As it was required to do under the agreement, Plaintiff delivered the Products to DMS and provided an invoice dated November 21, 2014 requiring payment of One Hundred Twenty-Seven Thousand Eight Hundred Nine and 56/100s (\$127,809.56) dollars within thirty (30) days of said invoice. A further invoice was issued on February 9, 2015 in the amount of Three Hundred Forty-Nine and 67/100s (\$349.67) dollars. **See Exhibits B and C.**

11. While partial payment has been made, the vast majority of the balance is due and owing.

12. There is currently due and owing the total sum of One Hundred Eighteen Thousand One Hundred Fifty-Nine and 23/100s (\$118,159.23) dollars. **See Exhibit D.**

13. Due its failure to pay Plaintiff as called for in its agreement, DMS is in breach of said agreement with Plaintiff and, as a direct and proximate result, Plaintiff has suffered and continues to suffer injury.

14. Therefore, Plaintiff would respectfully submit that it is entitled to a judgment against DMS in the amount of One Hundred Eighteen Thousand One Hundred Fifty-Nine and 23/100s (\$118,159.23) dollars together with pre-judgment interest thereon.

FOR A SECOND CAUSE OF ACTION

15. To the extent they are not inconsistent, the allegations contained in the preceding paragraphs are repeated and re-alleged herein as if in verbatim.

16. As has been set forth more fully above, Plaintiff, at the request of DMS, provided the Products to DMS at its facility in Greenville.

17. At the time the Products were provided, DMS was aware that Plaintiff expected to be paid for their value.

18. It would be inequitable and serve to unjustly enrich DMS to allow it to retain the benefit of the Products without paying Plaintiff for their value.

19. Therefore, Plaintiff would respectfully submit, in the alternative, that it is entitled to an award of judgment against DMS for the value of the Products, which is One Hundred Eighteen Thousand One Hundred Fifty-Nine and 23/100s (\$118,159.23) dollars together with pre-judgment interest.

FOR A THIRD CAUSE OF ACTION

20. To the extent they are not inconsistent, the allegations contained in the preceding paragraphs are repeated and re-alleged herein as if in verbatim.

21. Upon information and belief, Defendant CCI contracted with DMS for certain equipment manufactured with the Products.

22. Plaintiff is further informed and believes that CCI is withholding a sizeable sum of money from DMS pending correction to certain deficiencies in the equipment provided.

23. Plaintiff is further informed and believes that CCI has previously paid DMS sizeable sums of money that DMS failed and refused to pay to Plaintiff.

24. Plaintiff is informed and believes that, if CCI is permitted to pay DMS further funds without requiring them to be paid first to Plaintiff in satisfaction of its debt, Plaintiff will suffer irreparable harm because DMS will divert, use and otherwise alienate these funds without paying Plaintiff what it is owed for the Products.

25. Plaintiff is informed and believes it will be left without an adequate remedy at law because there will be no source of repayment.

26. Plaintiff is further informed and believes that it has a high likelihood of success on the merits given the length of time since payment has been made.

27. Therefore, Plaintiff would respectfully submit that it is entitled to an order enjoining CCI from distributing any further funds to DMS without first paying to Plaintiff sufficient funds to satisfy its debt with any remainder being paid to DMS.

WHEREFORE, having fully complained of the Defendants herein, Plaintiff would pray this Court for the following relief:

a. Award Plaintiff a judgment against DMS in the sum of One Hundred Eighteen Thousand One Hundred Fifty-Nine and 23/100s (\$118,159.23) dollars;

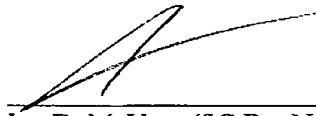
b. Award Plaintiff pre-judgment interest;

c. Enter an order requiring CCI to pay any funds due to DMS first to Plaintiff in satisfaction of its debt with any remainder to DMS; and

d. Award such other relief as is just and proper.

Respectfully Submitted,

TURNER PADGET GRAHAM & LANEY, P.A.



Ian D. McVey (SC Bar No. 71196)
Post Office Box 1473
Columbia, South Carolina 29202
Telephone: 803-227-4267
Facsimile: 803-400-1564
imcvey@turnerpadget.com

Counsel for the Plaintiff

July 20, 2015
Columbia, South Carolina

EXHIBIT

A

Commercial Credit Application

T Name <u>Controls for Automation</u>	F Name <u>Digital Management Solutions</u>
O Address _____	R Address <u>1200 Woodruff Road, Ste B15</u>
City/State/Zip _____	O City/State/Zip <u>Greenville SC 29607</u>
Credit Mgr _____	M E-Mail <u>accounting@dmsusa.net</u>
Phone _____	Phone <u>864-213-6300</u>

Business Type: ☐ Sole Proprietor ☐ Partnership ☒ Corporation: Delaware

How long in business: 8+ years D&B Number: 622384621

Names/Addresses of Individuals or Partners	-or-	Name/Title/Phone Number of Corporate Officers
President - Jason Lefort		
Vice President - Greg Ross		

Name of Person to Contact Regarding Purchase Orders and Invoices, Title, Address, and Phone

Purchasing - Josee Lefort - josee@dmsusa.net

Accounting - Lori Hile - accounting@dmsusa.net

Bank Reference

TD Bank

Account Number, Contact, Title, and Phone Number

1216 Woodruff Road, Greenville SC 29607

Phone 864-281-1626 / Fax 864-281-1452

Acct #: 7100596328

Trade References: Company Name, Address, Contact and Title, and Phone Number

TriEd Northern - 516.941.2864; F 516.921.2384

Skyway Security - 613-634-9336; F 613-634-8931

Winn Security - 877-476-6607; F 577-369-4956

The above information is submitted for the
sole purpose of opening an account and I
hereby certify the information to be true.

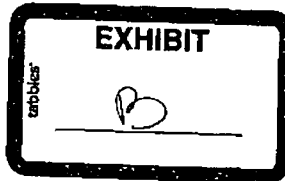
SIGNED Lori Hile
TITLE Office Manager
DATE 01.01.2014

Controls for Automation
25 Constitution Drive

Taunton MA 02780-1071
USA

Phone: 800-323-3164

Fax: 508-802-6006



INVOICE NO. 161140	APPLY TO 12896	INV. DATE 11/21/14	CUST. NO. 258505
PAGE NO.	INVOICE		WORK ORDER NO. BO

Copy

SOLD TO

DIGITAL MANAGEMENT SOLUTIONS

1200 WOODRUFF RD.
STE B15
GREENVILLE SC 29607
USA

SHIP TO

1200 WOODRUFF RD.
STE B15
GREENVILLE SC 29607
USA

DUE DATE 12/21/14	PURCHASE ORDER NO. 12896	SHIP VIA TRUCK		TRACKING NO		TERMS NET 30 Days		
BUYER		DATE REQUESTED	LOCATION	SALESPERSON 13 - US Marine Products		TERRITORY		
ITEM NO.		Description		QTY ORDER	Backorder	Qty Shipped	UNIT PRICE	EXTENSION

151 000 223	EFOY PRO 2400 DUO SET	13.000	0.000	13.000	\$ 8,159.0000	\$ 106,067.00
151 905 006	FUEL CARTRIDGE SENSOR FS1	13.000	0.000	13.000	\$ 319.8000	\$ 4,157.40
151 906 063	IP GATEWAY	13.000	0.000	13.000	\$ 820.0000	\$ 10,660.00
151 003 011	M28 ADAPTOR	26.000	0.000	26.000	\$ 237.8000	\$ 6,182.80

REMARKS

E-MAILED ORDER BY JOSEE Based On Sales Orders 105294.

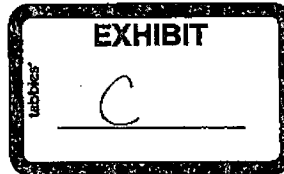
SUBTOTAL \$ 127,087.20	Tax	DEPOSIT	INVOICE NO. 161140	\$ 127,809.56
FREIGHT \$ 742.36			PLEASE REMIT THIS AMOUNT	

ROA-0027

Controls for Automation
25 Constitution Drive

Taunton MA 02780-1071
USA

Phone: 800-323-3164
Fax: 508-802-6006



INVOICE NO. 163528	APPLY TO 13282	INV. DATE 02/09/15	CUST. NO. 258505
1 PAGE NO.	INVOICE		WORK ORDER NO. BO

Copy

SOLD TO

DIGITAL MANAGEMENT SOLUTIONS
1200 WOODRUFF RD.
STE B15
GREENVILLE SC 29607
USA

SHIP TO

1200 WOODRUFF RD.
STE B15
GREENVILLE SC 29607
US

DUE DATE 03/11/15		PURCHASE ORDER NO. 13282		SHIP VIA UPS		TRACKING NO 1Z0345910357592312		TERMS NET 30 Days	
BUYER			DATE REQUESTED	LOCATION	SALESPERSON 13 - US Marine Products			TERRITORY	
ITEM NO.		Description			QTY ORDER	Backorder	Qty Shipped	UNIT PRICE	EXTENSION
151 905 006		FUEL CARTRIDGE SENSOR FS1			1.000	0.000	1.000	\$ 338.0000	\$ 338.00

REMARKS

E-MAILED ORDER Based On Sales Orders 109727. Based On Deliveries 90830.

SUBTOTAL	Tax	DEPOSIT	\$ 349.67
\$ 338.00			
FREIGHT		INVOICE NO. 163528	PLEASE REMIT THIS AMOUNT
\$ 11.67			

ROA-0028



STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
Controls for Automation, Inc.,)
Plaintiff,)
v.)
Digital Management Solutions, Inc.,)
Communication Concepts, Inc.,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

C/A No.: 2015-CP_____

AFFIDAVIT IN SUPPORT OF
COMPLAINT AND INJUNCTION

PERSONALLY APPEARED BEFORE ME, David S. Mochi, who after being duly sworn, deposes and says as follows:

1. I am over the age of eighteen (18) and competent to make this affidavit.
2. I am President of Controls for Automation, Inc. and in that capacity have personal knowledge of the facts set forth herein and in the Complaint to which this is attached.
3. On or about January 1, 2014, Digital Management Solutions, Inc. ("DMS") submitted to Plaintiff a Commercial Credit Application. **See Exhibit A** to Complaint.
4. The purpose of said application was to enter into an agreement for the purchase of fuel cells and related products (collectively, "Products") from Plaintiff.
5. Pursuant to our agreement, Plaintiff provided and delivered the Products to DMS and further provided invoices for same.
6. The invoices and agreement provided for payment within thirty (30) days of the invoices. **See Exhibits B and C** to Complaint.
7. While some payment has been made, there is still due and owing the sum of One Hundred Eighteen Thousand One Hundred Fifty-Nine and 23/100s (\$118,159.23) dollars.

8. I am informed and believe that DMS has a contract with Communication Concepts, Inc. ("CCI") to provide it with certain equipment which utilizes Plaintiff's Products.

9. I am further informed and believe that a sizeable sum of money has been paid to DMS from CCI which DMS has failed to utilize to satisfy Plaintiff's debt.

10. It is my understanding the CCI is withholding significant sums of money from DMS until certain deficiencies are corrected by DMS.

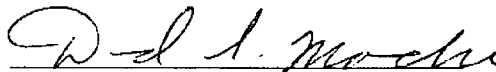
11. I believe that DMS will not pay Plaintiff's debt from the funds being held by CCI as they have failed to do so in the past.

12. If CCI is permitted to directly pay DMS without first paying Plaintiff's debt, I believe Plaintiff would suffer irreparable harm and be left without an adequate remedy at law as the funds will likely be diverted or otherwise alienated by DMS as it has done in the past.

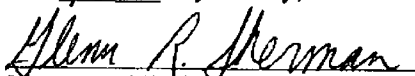
13. Therefore, I would respectfully request that this Court enter a judgment in favor of the Plaintiff in the sum of One Hundred Eighteen Thousand One Hundred Fifty-Nine and 23/100s (\$118,159.23) dollars with pre-judgment interest.

14. I would further request that the Court issue an injunction requiring CCI to pay any sums due and owing to DMS first to Plaintiff in satisfaction of its debt with any remainder payable to DMS.

FURTHER THE AFFIANT SAYETH NOT.


David S. Mochi, President

SWORN BEFORE ME
this 16 day of July, 2015


Notary Public for Massachusetts
My commission expires 5/25/18



STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Controls for Automation, Inc.,

FILED-CLERK OF COURT
GREENVILLE CO. S.C.

PAUL B. WICKENSIMMER

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2015 JUL 21 PM 3 36
Plaintiff(s)

2015-CP-23-

04535

vs.

Digital Management Solutions, Inc., et al.

Defendant(s)

Verified

Submitted By: Ian D. McVey, Esquire

Address: Turner Padget Graham & Laney, P.A.

P.O. Box 1473

Columbia, SC 29202

SC Bar #: 71196

Telephone #: 803-227-4267

Fax #: 803-400-1564

Other:

E-mail: imcvey@turnerpadget.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|---|--|
| Contracts
☐ Constructions (100)
☒ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 -NI-
☐ Notice/ File Med Mal (230)
☐ Other (299) | Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Administrative Law/Relief
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers Compensation Settlement Approval (780)
☐ Other (799) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Comm. (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Sexual Predator (510) | | |

Submitting Party Signature: _____

Date: July 20, 2015

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

FILED-CLERK OF COURT
STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

COUNTY OF GREENVILLE 2015 AUG 14 AM 9 24 THIRTEENTH JUDICIAL CIRCUIT

Controls for Automation, Inc.

CA# 2015-CP-23-04535

Plaintiff

vs

**ANSWER, AFFIRMATIVE DEFENSE
AND CROSS CLAIM BY DEFENDANT**

Digital Management Solutions, Inc
and Communication Concepts, Inc.

DIGITAL MANAGEMENT SOLUTIONS, INC.

Defendants

JURY TRIAL DEMANDED

TO THE PLAINTIFF AND DEFENDANT COMMUNICATION CONCEPTS, INC

Defendant Digital Management Solutions, Inc., (hereinafter denominated as "DMS"), answering the complaint herein and by way of set off against Plaintiff and cross claim against Defendant Communication Concepts, Inc.(hereinafter denominated as "CCI"), would respectfully show and states:

FOR A FIRST DEFENSE

1. All matters and things alleged in the complaint that are not hereinafter specifically admitted are denied and strict proof thereof is demanded.
2. DMS is without information sufficient to respond to the allegations in paragraphs one (1) and three (3) of the complaint but admits same.
3. DMS admits the allegations contained in paragraphs two (2), six (6), seven (7), eight (8), eleven (11), sixteen (16), seventeen (17) and twenty-one (21) of the complaint.

4. To the extent any response to paragraphs fifteen (15) and twenty (20) is called for or necessary DMS repeats all defenses stated herein.

5. DMS denies the allegations contained in paragraphs twelve (12), thirteen (13), fourteen (14), eighteen (18), nineteen (19), twenty-four (24), twenty-five (25), twenty-six (26), and twenty-seven (27) of the complaint.

6. DMS admits so much of paragraphs four (4) and nine (9) of the complaint as alleges that Plaintiff and DMS are in a contractual relationship for the delivery of and payment for certain fuel cells and other related products which were delivered to DMS however it was fully understood and agreed between these parties that payment for the fuel cells supplied by Plaintiff was dependent and conditioned upon CCI making full payment for the mobile video surveillance trailers manufactured for CCI by DMS.

7. DMS admits so much of paragraph five (5) of the complaint as alleges that DMS and CCI are in a contractual relationship however DMS has fully performed all of its obligations and CCI has failed and refused to pay DMS the balance due DMS.

8. DMS admits so much of Paragraph ten (10) of the complaint as alleges that Plaintiff delivered products to DMS however the invoice denominated by Plaintiff as Exhibit B is incorrect and inaccurate in that it contains a "net 30 day" term that was not agreed upon and the amount of the invoice is or may be incorrect and

MRB

unliquidated due inherent or latent defects in two (2) of the fuel cells supplied by Plaintiff or in the alternative for misuse or mishandling by CCI upon delivery to CCI of finished products by DMS all as more fully explained infra.

9. DMS admits so much of paragraph twenty-two (22) of the complaint as alleges that CCI is withholding funds from DMS however DMS denies that such sum is being withheld pending correction of certain deficiencies in the trailers either provided by or to be delivered to CCI. The trailers already provided by DMS to CCI met or exceeded all contractual requirements and specifications including any warranty obligations. The six (6) trailers unpaid for and remaining to be delivered were completed in February of 2015 and also meet or exceed all contractual requirements and specifications however CCI has failed and refused to pay the balance due to DMS or take delivery all in breach of its contractual obligations to DMS.

10. DMS admits so much of paragraph twenty-three (23) of the complaint as alleges that CCI has made partial payment to DMS however DMS denies that any preference in payment was or is due Plaintiff. The inability of DMS to pay Plaintiff in full was and is proximately caused by the failure and refusal of CCI to pay the balance due and owing to DMS.

MKB

FOR A SECOND DEFENSE AND BY WAY OF SET OFF

11. All statements in the preceding paragraphs not inconsistent herewith are re-alleged as if set forth verbatim.

12. On information and belief, two of the fuel cells supplied by Plaintiff did not function for the particular purpose warranted and were inherently defective or in the alternative were misused or mishandled by CCI following delivery to CCI of finished trailers. A copy of the affidavit of Jason Lefort regarding this issue is attached hereto as Exhibit 1 and incorporated herein by reference.

13. DMS is entitled to a set off against any sum ultimately determined to be owed by DMS to Plaintiff in the event two (2) of the fuel cells supplied by Plaintiff are determined to be defective. In the alternative if it is found that these fuel cells were mishandled or misused by CCI following delivery of the finished trailers to CCI then and in that event DMS is entitled to additional sums from CCI as damages for expenses incurred by and resulting to DMS on account of such misuse.

FOR A THIRD DEFENSE AND BY WAY OF CROSS CLAIM AGAINST DEFENDANT CCI

14. All allegations contained in the preceding paragraphs not inconsistent herewith are re-alleged as if repeated verbatim.

15. CCI has breached its contract with DMS by failing to pay for and take delivery of six (6) mobile video surveillance trailers manufactured by DMS for CCI in accordance with requirements and specifications requested by CCI. A true copy of the purchase order is attached hereto as exhibit 2 and incorporated herein by reference.

16. CCI owes and is indebted to DMS in the amount of \$ 260,115.23 as more fully appears in the verified statement of account attached hereto as Exhibit 3 and incorporated herein as if fully set forth.

17. DMS is entitled to judgment against CCI in the amount of \$ 260,115.23 plus any damages determined to be owing to DMS by CCI for any misuse of the two (2) fuel cells referred to in paragraphs eleven (11) through thirteen (13) ante and to an award to pre-judgment interest in addition to the amount owed DMS as set forth above.

WHEREFORE HAVING FULLY ANSWERED DMS PRAYS FOR JUDGMENT AS FOLLOWS:

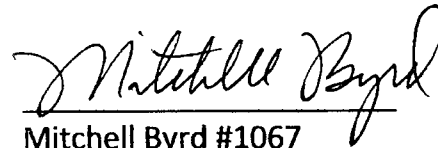
1. That the complaint be dismissed with all litigation costs and expenses taxed to Plaintiff.
2. In the alternative, that judgment be entered in favor of DMS against CCI on its cross claim against CCI for the amount owed by CCI to DMS plus all damages

JNB

incurred as a result of any misuse of fuel cells, prejudgment interest and all litigation costs and expenses incurred.

3. For judgment in favor of DMS against Plaintiff for any set off or in the alternative for damages against CCI for misuse.
4. For such other and further relief as the Court may deem just and proper.

August 12, 2015

A handwritten signature in black ink, appearing to read "Mitchell Byrd", is written over a horizontal line.

Mitchell Byrd #1067
216 Pimlico Road
Greenville SC 29607
864-331-9630
mitchell@mitchellbyrdlaw.com

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

THIRTEENTH JUDICIAL CIRCUIT

Controls for Automation, Inc.

CA# 2015-CP-23-04535

Plaintiff

vs.

AFFIDAVIT IN OPPOSITION TO
COMPLAINT AND INJUNCTION

Digital Management Solutions, Inc.
and Communication Concepts, Inc.

Defendants

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2015 AUG 4 AM 8 42

Personally appeared before me Jason Lefort, who after being duly sworn,
deposed and stated:

1. I am President of Digital Management Solutions, Inc. ("DMS"). I am over the age of eighteen, am competent to testify and make the statements contained in this affidavit based upon my own personal knowledge.

2. I have read the complaint filed by Controls for Automation, Inc. ("CFA") and the accompanying affidavit of David S. Mochi. Both contain misleading and inaccurate statements along with false and disparaging allegations.

3. During 2013, DMS entered into negotiations with Communication Concepts, Inc. ("CCI") for the possible production by DMS of mobile video surveillance trailers for the end use by CSX Transportation, Inc. ("CSX") during construction of its Virginia Avenue Tunnel project in Washington D.C.

4. Early in negotiations between DMS and CCI it was determined that the trailers would need to have a battery fuel source in addition to any solar power. At this point I had discussions with Frank Heid of SFC Energy AG ("SFC") to consider use of its EFOY fuel cells.

Exhibit 1

5. Following discussions with Mr. Heid, he persistently pressed me and DMS for a purchase order for the fuel cells as his company was closing its office in the United States. I consistently refused to place an order with SFC as DMS had not concluded negotiations with CCI.

6. Mr. Heid and SFC apparently consigned or transferred its fuel cell inventory to CFA whereupon Richard Gentile who was associated with or employed by CFA began to press me and DMS to place an order for fuel cells with CFA. Again I consistently declined to place any order with CFA as DMS was still negotiating terms and specifications with CCI.

7. In mid 2014, CCI finally issued a purchase order to DMS but had not yet provided DMS with final specifications for the trailers so DMS could not begin production and did not want to assume responsibility for CFA fuel cells until DMS was fully authorized by CCI to commence and complete production.

8. In late 2014 DMS received final specifications for the trailers from CCI whereupon I authorized CFA to ship the fuel cells to DMS. At no time did I or DMS agree to pay the total CFA invoice price for the fuel cells before CCI took delivery of the trailers. Mr. Mochi's allegation in his affidavit and in the complaint by CFA that DMS and CFA had a binding net 30 day contract is false. Note there is no such document attached to the CFA complaint. It should also be noted that DMS disputes the amount of the claim by CFA as two of the fuel cells provided by CFA were either inherently defective or subjected to misuse by CCI forcing DMS to replace these fuel cells at its expense, CFA having refused to honor any warranty or to offer repair assistance.

9. CCI took delivery of eight of the fourteen trailers it ordered and made partial payment to DMS but has since failed and refused to take delivery of the remaining six trailers which were completed and ready for delivery early in 2015. CCI now owes DMS substantially more money than any amount owed by DMS to CFA and DMS would gladly pay CFA the true and just amount owed by DMS to CFA if CCI would pay its debt to DMS.

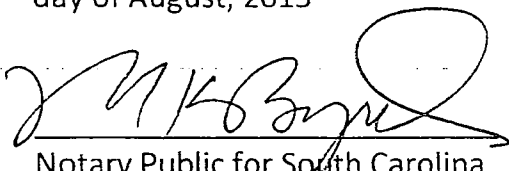
10. Mr. Mochi's allegations : that CFA would be irreparably harmed if CCI pays its debt to DMS and that DMS would divert such funds due DMS from CCI without paying CFA, are specious and disparaging. There are no deficiencies in the trailers produced by DMS for CCI and CCI has breached its agreement with DMS by failing to take delivery of and pay for the remaining trailers. It is this breach of contract by CCI that has caused CFA to remain unpaid to date, the risk of which CFA was well aware of from the commencement of negotiations for the sale of the fuel cells.

11. DMS would welcome payment of the money due it by CCI into escrow with the Clerk of Court for ultimate distribution to CFA and DMS as their interests are made to appear.

Dated: 8/3/15


Jason Lefort

Sworn to before me this 3rd
day of August, 2015


Notary Public for South Carolina
My commission expires 4/28/18

ORDERED BY:

Communication Concepts Inc.

2339 Destiny Way
Odessa, FL 33556

Voice: 813-888-6611

Fax: 813-888-7755

PURCHASE ORDER

Purchase Order No.: 9152

Date Issued: 6/11/14

Digital Management Solutions
1200 Woodruff Road, B15
Greenville, SC 29607

Communication Concepts Inc.
2339 Destiny Way
Odessa, FL 33556

7/11/14

Best Way

Net 30 Days

14.00

HCSMET2130 Mobile Equipment Trailers

50,731.00

710,234.00

CSX-VAT PROJECT

Authorized Signature

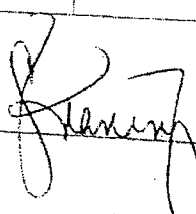


Exhibit 2

ROA-0042

Statement

Date

5/8/2015

To:

Communication Concepts
2339 Destiny Way
Odessa, FL 33556
Attn: Accts Payables

Amount Due

\$260,115.23

Date	Transaction	Amount	Balance
03/31/2014	Balance forward		0.00
07/01/2014	INV #30631. Due 08/01/2014.	713,984.00	713,984.00
07/01/2014	PMT #check 13018.	-213,070.20	500,913.80
09/08/2014	PMT #13111.	-142,046.80	358,867.00
02/11/2015	PMT #13394.	-100,000.00	258,867.00
05/01/2015	INV #FC 7. Due 05/01/2015. Finance Charge	1,248.23	260,115.23

THIS STATEMENT OF ACCOUNT IS TRUE AND CORRECT AND
NO PART OF THE BALANCE DUE HAS BEEN PAID BY DISCOUNT OR OTHERWISE

[Signature]
Jason Lefort

Sworn to before me this 11th day of August, 2015

[Signature]
Notary Public for South Carolina
My commission expires April 28, 2018

Current	1-30 Past Due	31-60 Past Due	61-90 Past Due	Over 90 Past Due	Amount Due
0.00	1,248.23	0.00	0.00	258,867.00	\$260,115.23

Phone Number: 864-213-6300

Fax Number: 864-751-2802

Email: info@dmsusa.net

Web Site: www.netvisionmobile.com

Exhibit 3

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

THIRTEENTH JUDICIAL CIRCUIT

Controls for Automation, Inc.

SUMMONS

Plaintiff

Vs

CA# 2015-CP-23-04535

Digital Management Solutions, Inc.
and Communication Concepts, Inc.

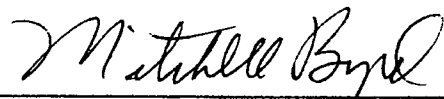
JURY TRIAL DEMANDED

Defendants

TO THE DEFENDANT COMMUNICATION CONCEPTS, INC.

YOU ARE HEREBY SUMMONED and required to answer the cross claim herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this cross claim upon the subscriber, at the address below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the cross claim, judgment by default will be rendered against you for the relief demanded in the cross claim.

Greenville, SC
August 14, 2015



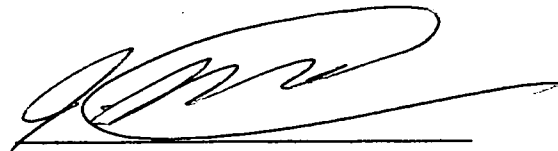
Mitchell Byrd #1067
216 Pimlico Road
Greenville SC 29607
864-331-9630
mitchell@mitchellbyrdlaw.com

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

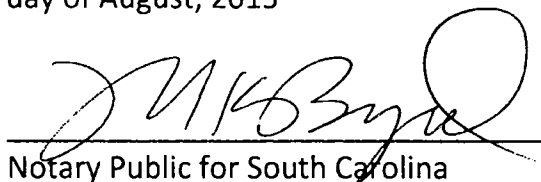
VERIFICATION

Personally appeared before me Jason Lefort who after being duly sworn stated that he has read the foregoing answer and knows the contents thereof, that the same are true to the best of his knowledge except those matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.



JASON LEFORT

Sworn to before me this 12th
day of August, 2015



Notary Public for South Carolina
My commission expires April 28, 2018

STATE OF SOUTH CAROLINA

GREENVILLE COUNTY

FILED-CLERK OF COURT

GREENVILLE CO. S.C.

PAUL B. WICKENSIMER

2015 AUG 14 AM 9 24

IN THE COURT OF COMMON PLEAS

THIRTEENTH CIRCUIT

CONTROLS FOR AUTOMATION, INC.

PLAINTIFF

CA# 2015-CP-23-4535

VS

DIGITAL MANAGEMENT SOLUTIONS, INC, AND

COMMUNICATION CONCEPTS, INC

CERTIFICATE OF SERVICE

DEFENDANTS

The undersigned certifies that he has caused copies of Defendant Digital Management Solutions, Inc.'s Verified Answer including defense of set-off, cross-claim, attachments, Summons, Interrogatories and Requests for Production to be served upon the Plaintiff Controls for Automation, Inc. by delivering such copies to its counsel of record listed below by depositing same in the US Mail with proper postage attached this 14th day of August, 2015 addressed as follows:

Ian D. McVey, Esquire
Box 1473
Columbia SC 29202



Mitchell Byrd #1067

216 Pimlico Rd.

Greenville SC 29607

mitchell@mitchellbyrdlaw.com

Attorney for Digital Management Solutions, Inc.

STATE OF SOUTH CAROLINA FILED-CLERK OF COURT IN THE COURT OF COMMON PLEAS
GREENVILLE CO. S.C.
GREENVILLE COUNTY PAUL B. WICKENSIMER THIRTEENTH CIRCUIT

2015 AUG 14 AM 9 24

CONTROLS FOR AUTOMATION, INC.

PLAINTIFF

CA# 2015-CP-23-4535

VS

DIGITAL MANAGEMENT SOLUTIONS, INC, AND

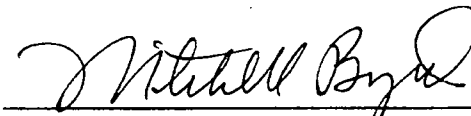
COMMUNICATION CONCEPTS, INC

CERTIFICATE OF SERVICE

DEFENDANTS

The undersigned certifies that he has caused copies of Defendant Digital Management Solutions, Inc.'s Verified Answer including defense of set-off, cross-claim, attachments, Summons, Interrogatories and Requests for Production to be served upon the Defendant Communication Concepts, Inc. by delivering such copies to its counsel of record listed below by depositing same in the US Mail with proper postage attached this 14th day of August, 2015 addressed as follows:

Trenton Leigh, Esquire
201 N. Franklin St. Ste. 1350
Tampa Fla. 33602



Mitchell Byrd #1067

216 Pimlico Rd.

Greenville SC 29607

mitchell@mitchellbyrdlaw.com

Attorney for Digital Management Solutions, Inc.

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

Controls for Automation, Inc.,

Civil Action No. 2015-CP-23-04535

Plaintiff,

ANSWER TO COMPLAINT

vs.

Digital Management Solutions, Inc. and
Communications Concepts, Inc.,

Defendants.

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSHER
2015 OCT 20 AM 9 06
18

TO: IAN D. McVEY, TURNER PADGET GRAHAM & LANEY, P.A., PO Box 1473 COLUMBIA, SOUTH CAROLINA 29202

NOW COMES Defendant Communications Concepts, Inc., ("Defendant"), answering Plaintiff's Complaint, and expressly reserving its right to challenge personal jurisdiction, states as follows:

(FIRST DEFENSE)
NO PERSONAL JURISDICTION

1. Defendant submits that a South Carolina court lacks personal jurisdiction over it in this case.

(SECOND DEFENSE)
GENERAL DENIAL

2. Each and every allegation not expressly admitted herein is denied.
3. Responding to Paragraph 1, Defendant lacks sufficient information to form a belief as to the truth of the allegations and therefore denies the same.
4. Responding to Paragraph 2, Defendant lacks sufficient information to form a belief as to the truth of the allegations and therefore denies the same.

5. Responding to Paragraph 3, Defendant admits that it is a Florida corporation, but denies its principal place of business is located in Cape Canaveral, Florida.

6. Responding to Paragraph 4, Defendant lacks sufficient information to form a belief as to the truth of the allegations and therefore denies the same.

7. Responding to Paragraph 5, Defendant submits that the allegations state legal conclusions to which no response is required; to the extent a response is required, Defendant denies the same.

8. Responding to Paragraph 6, Defendant submits that the allegations state legal conclusions to which no response is required; to the extent a response is required, Defendant denies the same.

9. Responding to Paragraphs 7-12, Defendant lacks sufficient information to form a belief as to the truth of the allegations and therefore denies the same.

10. Responding to Paragraph 13, Defendant submits that the allegations state legal conclusions to which no response is required; to the extent a response is required, Defendant denies the same.

11. Responding to Paragraph 14, Defendant submits that the allegations state legal conclusions to which no response is required; to the extent a response is required, Defendant denies the same.

12. Responding to Paragraph 15, Defendant restates and incorporates its previous paragraphs 1-11 as if stated herein verbatim.

13. Responding to Paragraph 16-17, Defendant lacks sufficient information to form a belief as to the truth of the allegations and therefore denies the same.

14. Responding to Paragraph 18, Defendant submits that the allegations state legal conclusions to which no response is required; to the extent a response is required, Defendant denies the same.

15. Responding to Paragraph 19, Defendant submits that the allegations state legal conclusions to which no response is required; to the extent a response is required, Defendant denies the same.

16. Responding to Paragraph 20, Defendant restates and incorporates its previous paragraphs 1-15 as if stated herein verbatim.

17. Responding to Paragraph 21, Defendant submits that the allegations state legal conclusions to which no response is required; to the extent a response is required, Defendant denies the same.

18. Responding to Paragraph 22, Defendant denies the allegations.

19. Responding to Paragraph 23, Defendant, upon information and belief, admits the allegations.

20. Responding to Paragraphs 24-27, Defendant submits that the allegations state legal conclusions to which no response is required; to the extent a response is required, Defendant denies the same.

21. Responding to Plaintiff's Wherefore Clause, Defendant submits that the allegations state legal conclusions to which no response is required; to the extent a response is required, Defendant denies the same; in the alternative, Defendant lacks sufficient information to form a belief as to the truth of the allegations and therefore denies the same.

(THIRD DEFENSE)
FAILURE TO STATE A CLAIM

22. Defendant submits that Plaintiff's allegations against it fail to state a claim for relief.

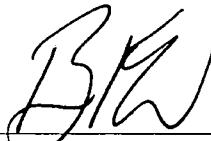
(FOURTH DEFENSE)
RESERVATION OF RIGHT

23. Defendant hereby provides notice that it is reserving its right to amend the answer to include any further defenses that they deem applicable to this case, whether learned through the discovery process, or not.

WHEREFORE, having fully answered Plaintiffs' Complaint, Defendant prays that:

(1) that the complaint be dismissed for lack of personal jurisdiction, (2) that the complaint be dismissed for failure to state a claim, (3) that the costs of this action, including Defendant's attorney fees, be taxed against Plaintiff, and (4) such further relief as the Court deems just and equitable.

Respectfully submitted,



Burl F. Williams (S.C. Bar No. 77901)
NEXSEN PRUET, LLC
55 East Camperdown Way (29601)
Post Office Drawer 10648
Greenville, South Carolina 29603-0648
864.370.2211

Attorney for Communication Concepts, Inc.

October 16, 2015

Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Controls for Automation, Inc.,
Plaintiff,

vs.

Digital Management Solutions, Inc. and
Communications Concepts, Inc.,
Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-23-04535

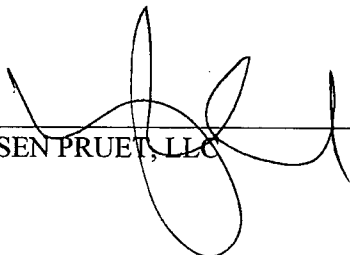
CERTIFICATE OF SERVICE

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENQUIER
OCT 20 AM 9 07

This is to certify that a copy of the foregoing **ANSWER TO COMPLAINT** has been served upon the following counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 16 day of October, 2015.

Ian D. McVey
Turner Padgett Graham & Laney
PO Box 1473
Columbia, South Carolina 29202

Mitchell K. Byrd, Sr.
216 Pimlico Road
Greenville, South Carolina 29607


NEXSEN PRUET, LLC

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS
STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS
2015 DEC 15 PM 10 10

Controls for Automation, Inc.,

Plaintiff,

vs.

Digital Management Solutions, Inc. and
Communications Concepts, Inc.,

Defendants.

Civil Action No. 2015-CP-23-04535

ANSWER TO CROSS-CLAIM

TO: MITCHELL BYRD, ESQ. 216 PIMLICO ROAD, GREENVILLE, SOUTH CAROLINA 29607

NOW COMES Defendant Communications Concepts, Inc., ("Defendant"), answering Digital Management Solutions, Inc.'s ("DMS") cross-claim, and expressly reserving its right to challenge personal jurisdiction, states as follows

FIRST DEFENSE
(NO PERSONAL JURISDICTION)

1. Defendant submits that a South Carolina court lacks personal jurisdiction over it in this case.

SECOND DEFENSE
(GENERAL DENIAL)

2. Each and every allegation not expressly admitted herein is denied.

3. Responding to Paragraph 14 and its incorporated paragraphs, Defendant lacks sufficient information to form a belief as to the truth of the allegations and therefore denies the same.

4. Responding to Paragraph 15, Defendant submits that that the allegations state legal conclusion to which no responsive pleading is required and therefore denies the same; to the extent a response is required, Defendant denies the allegations.

5. Responding to Paragraph 16, Defendant denies the allegations.

6. Responding to Paragraph 17, Defendant denies the allegations.

7. Responding to the Wherefore clause, Defendant denies any allegations contained therein and objects to any relief requested on the basis that there are no legal grounds for the relief.

THIRD DEFENSE
(RULE 12(b)(6))

8. The cross claim fails to plead sufficient facts to state a claim for relief and should be dismissed.

FOURTH DEFENSE
(NO CONTRACT)

9. The cross claim is invalid because there is no contract between the parties.

FIFTH DEFENSE
(PAYMENT)

10. The cross claim is invalid because DMS has already been paid for the trailers that it Defendant has received.

SIXTH DEFENSE
(ACCORD AND SATISFACTION)

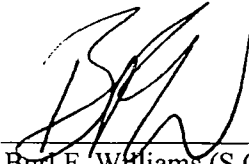
11. The cross claim fails because of the defenses of accord and satisfaction.

SEVENTH DEFENSE
(RESERVATION OF DEFENSES)

12. Defendant expressly reserves the right to supplement its defenses, including all applicable defenses under the Uniform Commercial Code.

WHEREFORE, having answered DMS's cross-claim, Defendant prays that: (1) the cross-claim be dismissed with all litigation costs and expenses taxed to DMS, and (2) for such other and further relief as the Court may deem just and proper.

Respectfully submitted,



Burl F. Williams (S.C. Bar No. 77901)
NEXSEN PRUET, LLC
55 East Camperdown Way (29601)
Post Office Drawer 10648
Greenville, South Carolina 29603-0648
864.370.2211

Attorney for Communication Concepts, Inc.

December 11, 2015

Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS
IN THE COURT OF COMMON PLEAS

Controls for Automation, Inc.,

Plaintiff,

vs.

Digital Management Solutions, Inc. and
Communications Concepts, Inc.,

Defendants.

2015 DEC 15 PM 10 10

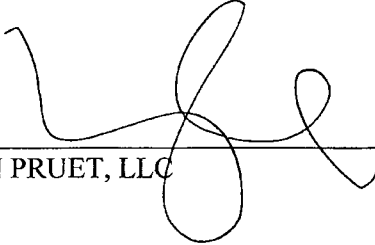
Civil Action No. 2015-CP-23-04535

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **ANSWER TO CROSS-CLAIM** has been served upon the following counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 11th day of December, 2015.

Ian D. McVey
Turner Padgett Graham & Laney
PO Box 1473
Columbia, SC 29202

Mitchell K. Byrd, Sr.
216 Pimlico Road
Greenville, SC 29607



NEXSEN PRUET, LLC

1 STATE OF SOUTH CAROLINA) IN THE COURT OF
 2) GENERAL SESSIONS
 3 COUNTY OF GREENVILLE) OF THE THIRTEENTH
 4) JUDICIAL CIRCUIT
 5)
 6 CONTROLS AUTOMATION, INC.,)
 7)
 8 Plaintiff,) TRANSCRIPT OF RECORD
 9 vs.) 2015-CP-23-04535
 10)
 11)
 12)
 13)
 14)
 15)
 16)
 17)
 18)
 19)
 20)
 21)
 22)
 23)
 24)
 25)

September 20, 2016
 Greenville, South Carolina

B E F O R E:

HONORABLE ROGER L. COUCH, Judge.

A P P E A R A N C E S:

IAN DOUGLAS MCVEY, ESQUIRE
 For Plaintiff

MITCHELL K. BYRD, SR., ESQUIRE
 For Digital Management Systems

BURL F. WILLIAMS, ESQUIRE
 For Communications Concepts, Inc.

Julie A. Ashbrook,
 Circuit Court Reporter
 Seventh Judicial Circuit

I N D E X

<u>WITNESS</u>	<u>PAGE</u>
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REPLY TO MOTION TO COMPEL By Mr. Byrd	9
REPLY TO MOTION TO COMPEL By Mr. Williams	13
FINAL ARGUMENT By Mr. McVey	15
FINAL ARGUMENT By Mr. Williams	17
ORDER OF THE COURT	19
CERTIFICATE OF REPORTER	21

EXHIBITS

MARKEDENTERED

NO EXHIBITS PROFFERED

1 CONTROLS AUTOMATION VS. MANAGEMENT SOLUTIONS, ET AL.

2 THE COURT: This is Controls For Automation; is
3 that right?

4 MR. MCVEY: That's correct, Your Honor.

5 THE COURT: All right. Yes, sir.

6 MR. MCVEY: Your Honor, may it please the Court?
7 My name is Ian McVey, I represent the Plaintiff,
8 Controls For Automation, Inc., in an action I filed
9 against Digital Management Solutions, Inc. and
10 Communication Concepts, Inc.

11 We actually mediated this case, Your Honor. And
12 while we did not settle at mediation, thanks to a lot of
13 good hard work candidly by Mr. Williams, we were able to
14 resolve it by way of settlement agreement which is
15 attached to the motion to compel settlement.

16 THE COURT: All right.

17 MR. MCVEY: Under the terms of that settlement
18 agreement, Communication Concepts -- well, excuse me.
19 Let me run through it just so we -- everybody can agree
20 on what terms have been complied with and haven't been.
21 DMS, who is Digital Management Solutions, shipped a
22 conforming trailer to CCI. That's happened. That was
23 one conforming trailer that they have already paid for.

24 And by way of background, these are mobile
25 surveillance trailers that are used by CSX, who is CCI's

1 ultimate end client for these things. They're mobile
2 surveillance trailers that they use on various job
3 sites. We provided -- my client, Controls Automation,
4 provided fuel cells for them. DMS, who's Mr. Byrd's
5 client, put them together. And then CCI in theory
6 bought them, Okay? And then when they got them, they
7 have to do a little bit of up fit, and then they turn
8 around and sell them to CSX.

9 Under the terms of the settlement agreement that
10 has been signed by all parties and their counsel and
11 also filed a record in this court, CCI was to purchase
12 one or more trailers within 45 days of the shipment of
13 the first trailer. Everybody will stipulate that that
14 time has come and gone. After that amount, each
15 trailer, for each trailer purchased, there would be a
16 payment of \$51,023.40 until a total payment of 255,117.
17 All that was gonna be paid into my trust account and
18 would be dispersed pursuant to the terms of the
19 settlement agreement.

20 CCI continued -- will continue to purchase the
21 remaining trailers cash on delivery as funds became
22 available and agrees that it will purchase all the
23 remaining trailers within at least 120 days of delivery
24 of the first trailer to CCI, which I don't remember what
25 day that was. Date of delivery?

1 MR. WILLIAMS: May 2.

2 MR. MCVEY: May 2nd, okay. Your Honor, there are
3 other various terms of the settlement agreement that
4 apply as this matter goes forward that really aren't
5 relevant to this motion to compel. What we have here,
6 Judge, is an absolute agreement by CCI to have taken
7 down one or more trailers within 45 days and that hasn't
8 happened. We had a further agreement to take them all
9 down within 120 days. And, of course, we haven't hit
10 120 days yet.

11 MR. WILLIAMS: Yeah, we have.

12 MR. MCVEY: Have we?

13 MR. WILLIAMS: We have.

14 MR. MCVEY: Okay. Whatever ---

15 MR. WILLIAMS: We were on 121 as of August 31st.

16 MR. MCVEY: All right. We have hit 120 days,
17 Your Honor. Apparently my math was incorrect. Your
18 Honor, at the end of the day I find myself agreeing with
19 the company that owes me the money in that CCI here
20 needs to do what it was told to do and what it agreed to
21 do in the settlement agreement, which is take down these
22 trailers.

23 Your Honor, what we're asking for today is one of
24 two things, either compel the settlement agreement,
25 require CCI to do what it said it would do, which is

1 take down these trailers, purchase them. There is no
2 condition in the -- there is no condition in this
3 settlement agreement that says they will have to take it
4 -- they will take it down as CSX calls for it, which is
5 what I think you're gonna hear from Mr. Williams in a
6 minute.

7 The condition says we will take them down within
8 45 days or take one down within 45 days and all of them
9 down within 120 days, neither of which has happened.
10 What we really want from -- Your Honor, at the end of
11 the day the other remedy I have available to me here is
12 a damages hearing against DMS, and that gets me a
13 judgment.

14 That's not what we -- anybody wants. What
15 everybody wants here is for the trailers to be delivered
16 and paid for. The money gets divvied up and everybody
17 goes about their way, this case is over. We don't have
18 to have a damages hearing. However, so -- excuse me.
19 So what we've asked this Court to do is to compel the
20 settlement agreement today, require CCI within a very
21 reasonable period of time, hopefully shorter rather than
22 longer, to compel them to purchase the trailers as they
23 have agreed. Thank you, Your Honor.

24 THE COURT: Yes, sir. Who's here for that
25 entity?

1 MR. WILLIAMS: Yes, Your Honor, Burl Williams.
2 Good morning, Judge Couch.

3 THE COURT: Good morning.

4 MR. WILLIAMS: May it please the Court?

5 THE COURT: Yes, sir.

6 MR. WILLIAMS: The context of the case I think my
7 colleague, Mr. McVey, has pretty clearly set forth, but
8 I want to add another aspect to it. So his client sold
9 batteries to DMS, which is Mr. Byrd's client, and they
10 are in the contractual relationship. Mr. Byrd's client,
11 DMS owes them money. We owe them nothing. We owe Mr.
12 Byrd's client some monies for the kind of trailers that
13 we buy and that we put a surveillance equipment on. And
14 just what's going on here is CFA, Mr. McVey's client, is
15 trying to kind of skip him to get to me to make me do
16 something which I have no otherwise obligation to do.

17 Now, the settlement agreement. The settlement
18 agreement is, of course, a contract that can be reviewed
19 under all the rules of contract interpretation. And
20 before I get to what I believe Mr. ---

21 THE COURT: If it's entered into and filed with
22 the court, then it becomes a matter the court can
23 enforce.

24 MR. WILLIAMS: Yes, Your Honor.

25 THE COURT: Okay.

1 MR. WILLIAMS: And what I -- before I get to what
2 I believe is his argument, which is that Your Honor
3 should enforce -- should employ the doctrine of specific
4 performance, I want to talk about the language of the
5 actual contract. Do you have a copy of it because I've
6 got extras?

7 THE COURT: I probably do. I think I'm looking
8 at it right now.

9 MR. MCVEY: Okay. Your Honor, it is attached to
10 the Motion to Compel as Exhibit 1.

11 THE COURT: I've got a settlement agreement. It
12 looks like the one that I see here was signed by at
13 least one party, and there may be other copies of it.

14 MR. WILLIAMS: Yeah, we pulled ---

15 THE COURT: 4/16 of 16?

16 MR. WILLIAMS: Yes, Your Honor.

17 THE COURT: 4/6 of 16.

18 MR. WILLIAMS: I think there about.

19 THE COURT: Okay, I'm looking at them.

20 MR. WILLIAMS: Okay. I'd like to direct Your
21 Honor to Paragraph 8.

22 THE COURT: All right.

23 MR. WILLIAMS: And what Paragraph 8 says is if,
24 for whatever reason, we can't do what we hoped we could
25 do, which is do the sequential takedown of the trailers,

1 then this -- and this dispute between the parties return
2 to litigation, so it was specifically believed that the
3 future could be litigation resumes.

4 THE COURT: Well, it allows for some type of
5 damages hearing of some kind. At least that's what Mr.
6 McVey says, towards the amount of damages.

7 MR. WILLIAMS: Right. So if we go back to
8 litigation, which is something the parties thought could
9 occur if we couldn't do this takedown.

10 THE COURT: Right.

11 MR. WILLIAMS: Then DMS and CFA agree to a
12 damages hearing, but not, not my client. Just the two
13 of them. The two that started this -- or CFA started
14 the lawsuit, filed against DMS. DMS cross-claimed us
15 in. So the plain language of the contract presumes that
16 perhaps it will not occur, and if it does we can go back
17 to litigation. So that's point one.

18 And point two is that what I hear is a request
19 for specific performance. And the Court may order
20 specific performance, and I'm quoting from a case handed
21 by our Court of Appeals, it's called Tom Warner against
22 Condo Services. It's 381 S.C. 275. The pen site is
23 between 281 and 282. And it says: (Reading.) The
24 Court may order specific performance if a valid contract
25 exists. (Ends reading.) We don't dispute about a

1 contract exists. (Reading.) No adequate remedy at law
2 exists for the breach and specific performance to
3 equitable between the parties and no fraud acts of the
4 State it affects the contract. (Ends reading.)

5 Element number two, I believe cannot be met. No
6 adequate remedy of law exists from the breach. Our
7 clients have not done what they hoped they could do, and
8 I'll talk about that last. And no adequate remedy of
9 law. The adequate remedy of law is just a damages
10 hearing or it's a judgment.

11 We're not talking about specific type of real
12 property. We're not talking about some third red horse,
13 we're just talking about some equipment that's used to
14 do surveillance. And so if we don't buy it, then the
15 adequate remedy of law which they have is to get a
16 judgment for money damages, which they have incurred
17 from the selling of a battery to a company that hadn't
18 paid for it. And so I believe under well established
19 South Carolina law specific performance would not be
20 proper.

21 And then finally, Your Honor, perhaps a
22 continuance would be in order before Your Honor rules.
23 So the premise behind this whole agreement was our
24 clients buy these kind of almost up fitted mobile
25 surveillance units. They get them, and then they put

1. the cameras on. They put the solar stuff on. They put
2 the thermal imagining and then they sell them to CSX.
3 CSX puts them all around the country on its tracks. And
4 what it deems vital areas that it needs to be able to
5 monitor. Monitor for crime, monitor for if an accident
6 occurs we can see exactly how it occurs.

7 We have ordered, it's either 14 or 16, from DMS.
8 We got half of them. Somewhere along the -- we're
9 supposed to get them all at one point in time.
10 Somewhere along the lines, CSX became unhappy with the
11 arrangement and they just halted payment to us. And so
12 that kind of backed up the line of, of the chain of how
13 we get these things paid for and it causes disruption
14 and ultimately this lawsuit is started.

15 My client, and I've provided these documents to
16 the other side, has not been paid in full. My client
17 tells me I need the remainder of these, I just need my
18 end user to finally get back on board. So what we have
19 is we have a dispute that has an end in sight. That end
20 is just at a further horizon than we had hoped, which
21 was 120 days.

22 So in summation, one, I think the agreement makes
23 clear that the parties knew they might go back to
24 litigation and, therefore, this specific forum is not
25 appropriate. Under the law the element of no adequate

1 damages at law doesn't exist here. And then finally,
2 perhaps a continuance would be in order to see if we can
3 finally get this, get this thing resolved and finally
4 get these things purchased and move on.

5 THE COURT: Okay.

6 MR. WILLIAMS: Thank you, Your Honor.

7 THE COURT: Yes, sir.

8 MR. BYRD: Thank you, Your Honor. Mitchell Byrd
9 representing Digital Management Services. I dispute the
10 interpretation of Paragraph 8. And by way of background
11 of that, we had a lengthy summary judgment hearing when
12 all the issues that have been related were aired. And
13 the consensus for the Court was that the case definitely
14 needed to be mediated. We mediated an entire day and we
15 thrashed all of these issues out. And we finally,
16 finally hammered out this agreement. And it was truly
17 hammered in the sense that it was late in the day before
18 we finally got to the point where we had the parameters
19 of the agreement.

20 So at no time during that entire process was it
21 ever brought up that the whole agreement, settlement
22 agreement, was contingent upon some other party coming
23 into the picture and contributing funds. All of the
24 agreements with regard to the money were if my client,
25 Digital Management, will in good faith produce for the

1 Florida company, CCI, one more trailer so that that
2 trailer could be shipped to the ultimate buyer for cash,
3 then we would proceed every 45 days with the purchase of
4 one or more until all of them were purchased.

5 A continuance is just almost like saying, well,
6 we're just gonna throw up our hands and start over here.
7 Paragraph 8 doesn't require litigation. It says if the
8 parties have failed to fulfill its obligations under
9 this agreement and the dispute between DMS and CFA
10 returns to litigation. We don't want to return to
11 litigation. So we're asking the Court to go ahead and
12 rule on this settlement agreement and rule that it's
13 enforceable pursuant to the rules. That's the whole
14 purpose of the procedure for enforcement of the
15 settlement agreements.

16 THE COURT: He seemed to indicate somehow that
17 his clients are not a party to this.

18 MR. BYRD: No, sir, he's a party to it. His fear
19 is we're not a party to the agreement to return to
20 litigation.

21 THE COURT: Oh.

22 MR. BYRD: He's a party to the settlement
23 agreement clearly and signed it. And at the point that
24 it was signed, it was never indicated that we're
25 agreeing to this except if we don't get paid by someone

1 else. It was we will do this if you give us one trailer
2 now, consideration, which we did, then we'll take down
3 another one within 45 days and we'll take all of them
4 within 120 days. And that cash will flow through us and
5 that cash will flow through to the plaintiff and the
6 case will be over. And we want the case to be over,
7 Judge.

8 THE COURT: All right. Yes, sir, Mr. McVey.

9 MR. MCVEY: Your Honor, I agree with Mr. Byrd
10 here. There is no -- nowhere in this settlement
11 agreement is there a contingency that they have to get
12 paid first. Excuse me, they do not say they. I mean
13 CCI has to get paid first. And, in fact, in Paragraph
14 3, CCI will continue. That's mandatory language. First
15 year of law school, will is mandatory language. Will
16 continue to purchase the remaining trailers cash on
17 delivery as funds become available and agrees that it
18 will purchase all of the remaining trailers within 120
19 days of delivery to the first trailer to CCI in Florida.
20 That is the condition and that condition has taken
21 place, 120 days.

22 Now, I hear what Mr. Williams is saying about
23 specific performance. And that would have been a
24 fantastic argument in the litigation that we settled in
25 this settlement agreement. That specific performance of

1 whether we're entitled or whether DMS is entitled to
2 specific performance against CCI, that's what we settled
3 right here, Your Honor. We have a settlement agreement
4 in which a party agreed to do something and put it on
5 the record. 43(k) allows us to enforce this settlement
6 agreement and require them to do it.

7 And obviously I object to any sort of continuance
8 here. Let me also point out that there is no affidavit
9 that has been -- or brief that has been submitted in
10 opposition to the settlement agreement that says CCI
11 doesn't even have the ability to perform, which is
12 another requirement. You have to show that you have --
13 don't have the ability to perform in order to get
14 specific performance denied against you.

15 Your Honor, first of all, I don't think we're
16 asking for specific performance. We're asking to compel
17 the settlement agreement, specific performances in the
18 action. This is in the settlement agreement. We want
19 it compelled. Second, even if it does apply, there's no
20 -- there is no -- there is not a witness here, there's
21 not an affidavit that has been submitted that says we
22 don't have the cash flow and the ability to purchase
23 these.

24 Your Honor, the only fair and equitable thing to
25 do here is to compel the settlement. Compel the

1 settlement that mind you CCI worked very hard for. We
2 all worked very hard for it. Thank you, Your Honor.

3 THE COURT: Final word.

4 MR. WILLIAMS: Yes, Your Honor. If I made it
5 sound like we weren't a party of the settlement
6 agreement, I apologize. We certainly are. My point of
7 it all was that Paragraph 8 made it clear that it was
8 possible that the case would return to litigation if
9 this didn't occur.

10 THE COURT: Well, if I were to order you to
11 comply and you didn't, it may still return to
12 litigation.

13 MR. WILLIAMS: Yes, Your Honor. I guess what I
14 would say is, first, everybody knew this was the deal
15 that we were trying to create cash flow to get the whole
16 chain of supply going again. That's why it says as
17 funds become available in Paragraph 3.

18 Second, adequate remedy of law. Mr. McVey's
19 client hasn't been paid by Mr. Byrd's client. They've
20 agreed that if this settlement doesn't work they'll have
21 a damages hearing. That's the adequate remedy of law
22 for them. Mr. Byrd hasn't moved to do anything. He
23 seeks no relief from this Court. The only party seeking
24 relief is CFA.

25 THE COURT: I think he wants the settlement

1 agreement adhered to. Is that what I understood you to
2 say?

3 MR. BYRD: Yes, sir.

4 THE COURT: Okay.

5 MR. WILLIAMS: That's -- yes, Your Honor. My
6 only point is he's not a moving party.

7 THE COURT: I understand. I didn't hear him
8 proposing the relief.

9 MR. BYRD: No. We join in the request.

10 THE COURT: Thank you, sir.

11 MR. WILLIAMS: And I guess the last point ---

12 THE COURT: Now, is there anything in the rules
13 that says the Court has the right to compel people to
14 live up to the settlement agreements that could only
15 happen if there's no other adequate remedy of law? Is
16 there something in the rule that says that?

17 MR. WILLIAMS: Well, if Your Honor will indulge
18 me I'll take a look.

19 THE COURT: Take a look. I don't recall it.

20 MR. WILLIAMS: I do not see it. But I guess ---

21 THE COURT: I didn't recall it being there.

22 MR. WILLIAMS: So I guess my point would just be
23 this, a settlement agreement still is a contract, but
24 there's case law that says that's how we look at it.
25 And so that then wraps into all contract law.

1 THE COURT: I'm gonna grant your motion
2 Mr. McVey. Prepare an order.

3 MR. MCVEY: Thank you, Your Honor.

4 THE COURT: Thank you, sir.

5 MR. MCVEY: Your Honor, if I may for point of
6 clarity?

7 THE COURT: Uh-huh.

8 MR. MCVEY: Obviously there are timelines that
9 were set forth in this settlement agreement. We're
10 before you today to compel timelines that have not
11 already been complied with. I'd like a little bit of
12 the Court's direction as to what's required ---

13 THE COURT: Well, why don't I give him a chance
14 to pick his poison. How soon can you comply?

15 MR. WILLIAMS: Your Honor, if I might have the
16 opportunity to speak with my client and then perhaps we
17 could ---

18 THE COURT: I'll ask you to advise all of us of
19 what they say. And, Mr. McVey, I'll give you a chance
20 to chime in, and both parties chime in, if you think
21 those are unreasonable requests.

22 MR. MCVEY: Your Honor, based upon the language
23 of the settlement agreement, I think all trailers have
24 got to be purchased at this point and I think we'll be
25 looking to Mr. Williams for a number.

1 THE COURT: Okay. I'll hear from you. Let me
2 know.

3 MR. MCVEY: Thank you, Your Honor.

4 MR. BYRD: Thank you, Your Honor.

5 THE COURT: But I will require that they comply
6 with the terms of the agreement.

7 MR. MCVEY: Thank you, Your Honor.

8 THE COURT: Yes, sir.

9 (Whereupon, hearing concluded at 11:43 a.m.)
10

11 --- THIS ENDS REQUESTED TRANSCRIPT ---
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1 COURT REPORTER CERTIFICATE

2
3 I, the undersigned Julie A. Ashbrook, Court
4 Reporter for the Seventh Judicial Circuit Court of the
5 State of South Carolina, do hereby certify that to the
6 best of my ability the foregoing is a true, accurate,
7 and complete transcript of record to the best of my
8 ability of all the proceedings and evidence introduced
9 in the hearing and/or trial of the captioned case,
10 relative to appeal, in the Court of Common Pleas for
11 Greenville County, South Carolina, on the 20th day of
12 September, 2016.

13 I do further certify that I am neither of kin,
14 counsel, nor interest to any party hereto.
15
16
17
18

19 s/Julie A. Ashbrook
20 Julie A. Ashbrook
21 Circuit Court Reporter
22 Seventh Judicial Circuit
23
24
25

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF GREENVILLE) COURT OF COMMON PLEAS NONJURY,
3
4 CONTROLS FOR AUTOMATION, INC.,) TRANSCRIPT
5 PLAINTIFF,) OF
6 VS.) RECORD
7 DIGITAL MANAGEMENT SOLUTIONS, INC.,)
8 ET AL,)
9 DEFENDANT.) 2015-CP-23-4535

10 February 2nd, 2017
11 Spartanburg, South Carolina
12
13

14 B E F O R E:

15 THE HONORABLE ROGER L. COUCH, Judge.
16

17 A P P E A R A N C E S:

18 IAN D. MCVEY
19 ESQ.
Attorney for the Plaintiff

20 BURL F. WILLIAMS
21 ESQ.
Attorney for the Defendant
22
23

24 PAMELA E. GREEN
25 Circuit Court Reporter
Seventh Judicial Circuit

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I N D E X O F W I T N E S S E S

(There were no exhibits marked or testimony taken
during this hearing.)

1 P R O C E E D I N G S

2
3 THE COURT: All right. The first case I'm gonna
4 discuss will be Controls Automation versus Digital
5 Management Solutions and Communication Concepts. It's a
6 Rule 59(e) motion for reconsider.

7 State your appearances on the record please.

8 MR. WILLIAMS: Good morning, Your Honor.

9 Burl Williams for Communication Concepts, Inc.

10 THE COURT: And?

11 MR. McVEY: Your Honor, Ian McVey for Controls for
12 Automation.

13 THE COURT: Okay. Thank you very much.

14 I believe it's your motion.

15 MR. WILLIAMS: Yes, sir.

16 THE COURT: Be happy to hear from you.

17 MR. WILLIAMS: May it please the Court?

18 THE COURT: Yes, sir.

19 MR. WILLIAMS: Your Honor, I appreciate you giving us
20 the opportunity to appear before you on this motion for
21 reconsideration. We briefed it. So, if you have any
22 questions, I'm open to answering, but, save that, I've got
23 few remarks.

24 THE COURT: Okay.

25 MR. WILLIAMS: Okay.

1 THE COURT: That will be fine.

2 MR. WILLIAMS: This case---

3 THE COURT: I looked over your brief this morning. And
4 so I'm familiar with your position.

5 MR. WILLIAMS: Okay. This case, I'll just give some
6 background, involved something that's called a mobile
7 surveillance unit. My client makes the end, end mobile
8 surveillance unit, sells it to CSX. And what it does is it
9 allows CSX to put this little trailer anywhere on its tracks
10 and be a link, satellite link, mobile ally surveil what's
11 going on.

12 THE COURT: Right.

13 MR. WILLIAMS: My client ordered 14 of the trailers,
14 which is a, a piece of the, the total pie, from a company
15 called DMS located in Greenville. In turn, DMS ordered 14
16 fuel cells from CFA, which is a company in, I'm not sure
17 what state, but it's north of us.

18 Over the course of the commercial relationship, my
19 client paid for and received -- well, paid for nine but
20 received eight of these trailers, which it later turned to
21 MSUs. I just want to give Your Honor some, some idea about
22 what we've already spent.

23 CCI advanced \$213,000 to DMS to get the whole project
24 going. Subsequently, it advanced another 114 -- \$142,000 to
25 continue the project and then another \$100,000.

1 During the course of this commercial relationship, we
2 were brought into a lawsuit and this lawsuit was brought by
3 CFA because DMS failed to pay about \$118,000 of what it owed
4 to CFA for the fuel cells. As soon as we got in this
5 lawsuit, my client said I'm not in the business of
6 litigating. Let's figure out a way to resolve this and get
7 us back into this commercial relationship. And so we
8 mediated, didn't work, but we continued to negotiate and
9 ultimately we reached a compromise settlement agreement, and
10 the compromise settlement agreement was suppose to work this
11 way.

12 I had -- I, my client, had paid for nine of these
13 trailers. It had only received eight. And so we were gonna
14 take the ninth one, sell it to CSX, create cash flow, and as
15 the terms of the agreement state, as we received that money,
16 we would take the tenth and so on and so on and so on.

17 The deal didn't work. CSX rejected them ultimately.
18 We've actually learned that they canceled the contract.
19 There are technical issues. They had received questions
20 from someone who's above the parties in the supply chain
21 about lack of payment. And so the, the deal's over, and, as
22 a result, the settlement agreement didn't work out.

23 The plain language of the settlement agreement says, if
24 it doesn't work out, CFA and DMS are gonna have a damages
25 hearing, and, once that occurs, then we figure out what

1 happens with my client.

2 So, it's our position that the plain language of the
3 settlement agreement compels the Court to use its discretion
4 to not compel my client to purchase anything, but to allow
5 the parties to follow the language of the agreement,
6 reconsider, and order a damages hearing and that's our
7 primary basis. Just the plain language of the, of the
8 agreement.

9 THE COURT: All right.

10 MR. WILLIAMS: And then I -- if I could tell you my
11 fallback?

12 THE COURT: Certainly.

13 MR. WILLIAMS: The fallback is that -- we believe that
14 instructing our client, my client, to purchase the remaining
15 units, notwithstanding the new information that CSX
16 canceled the contract, we believe is a contrary to specific
17 performance law because there's an adequate remedy, and, in
18 fact, the adequate remedy we've already agreed on, a damages
19 hearing.

20 So, thank you, Your Honor.

21 THE COURT: All right. Mr. McVey, he says you can only
22 seek a damages hearing.

23 MR. McVEY: Your Honor, this is not -- this is the
24 first time you have heard this argument from Mr. Williams or
25 from his client. And, Your Honor, if I can, I would -- I

1 have two technical objections to the 59(e) that I would like
2 to raise for the purposes---

3 THE COURT: Okay.

4 MR. McVEY: ---of the record.

5 First of all, declarations that are attached, along
6 with the fairly lengthy factual background related to the
7 litigation between the parties, et cetera, were not raised
8 at the hearing on the motion to compel, and it is clear law
9 in South Carolina that you can not raise it for the first
10 time on 59(e), something that should have been raised the
11 first time around, and, therefore, I object to the
12 consideration of this Court of the declarations or anything
13 really outside of the scope of this settlement agreement,
14 which is what we're here to talk about today.

15 Second, Your Honor, and I hate having to bring this one
16 up, I don't believe Rule 52(g) was complied with in that I
17 do not believe a copy of the 59(e) was served on Your Honor,
18 and, as such, this motion may not properly be before the
19 Court at this time. That being said, I understand, if the
20 Court wants to proceed and consider, consider it, I'm
21 prepared to argue it.

22 THE COURT: I'll go ahead and hear the arguments this
23 morning.

24 MR. McVEY: That's, that's fine, Your Honor. I
25 understand completely.

1 Now, Your Honor, what all of this, the, the declaration
2 of Mr. Mills, the factual background, CSX canceling
3 contracts, et cetera, that's all part of the underlying
4 litigation that was settled by this settlement agreement.
5 The only thing that we are here discuss -- to discuss today,
6 and that was the subject of the motion to compel, is this
7 settlement agreement that the parties entered into.

8 THE COURT: I recall the case as a case to enforce the
9 settlement agreement required.

10 MR. McVEY: That is correct, Your Honor.

11 THE COURT: Adhere to the settlement agreement.

12 MR. McVEY: And, Your Honor, the settlement agreement
13 is really pretty straightforward. It says CCI, and we use
14 CCI as an abbreviation, will purchase one or more trailers
15 within 45 days of the shipment of the first trailer. The
16 first trailer was shipped under this settlement agreement.
17 DMS did, in fact, deliver it. So, the parties have begun
18 performance in this. The only one who hasn't performed
19 really is CCI at this point.

20 It then says that CCI will purchase the remaining
21 trailer, trailer, cash on delivery and the funds become
22 available, and it agrees to purchase all remaining trailers
23 within 120 days of delivery of the first trailer to CCI in
24 Florida.

25 Interestingly enough, and this was a heavily negotiated

1 document, there is nothing in this document that creates a
2 contingency that CSX has to buy these things. It's not in
3 there. That wasn't a negotiated portion.

4 Now, CCI argues that our only remedy under this
5 document, or at least our remedy that we have to do first,
6 and I'm not really sure why that would matter, is to go get
7 a damages hearing and that damages hearing language is
8 Paragraph 8 of the settlement agreement. It says if any
9 party does not fulfill its obligation under this agreement,
10 and the dispute between DMS and CFA, not CCI, returns to
11 litigation, DMS and CFA agree to waive their right to a jury
12 trial, and will proceed with a hearing solely as to the
13 amount of damages.

14 The agreement, in Paragraph 9, further goes on to say,
15 this constitutes an enforceable settlement agreement
16 pursuant to Rules 43(k) and 41 S-E-R-C-P and operates to end
17 all litigation among the parties. We're entitled to enforce
18 this agreement, and, in fact, the parties specifically
19 contemplated being able to enforce it as is shown in
20 Paragraph 9 of the settlement agreement.

21 Now, Mr. Williams argues or CCI argues that we have an
22 adequate remedy of law. That's getting our damages. That's
23 a damages hearing.

24 Well, judge, my adequate remedy of law and that defense
25 and all of the defenses related to CSX, those were all

1 settled in the settlement agreement. What I have before me
2 today is a right and an obligation, under the terms of the
3 settlement agreement and under Rule 43(k), to enforce it
4 because if all I get to do is go get a damages hearing, what
5 was the point of entering into the settlement agreement in
6 the first place. That means CCI had absolutely zero
7 responsibilities and could just walk away from the
8 settlement at anytime, and if that's the case, then CFA and
9 DMS did not get the benefit of their bargain when we
10 negotiated this settlement agreement.

11 I would also note that the first time -- well, you know
12 what, never mind.

13 Your Honor, in terms of balancing equities here and,
14 again, what I think the argument behind the equitable -- his
15 equity argument or CCI's equity argument is all based upon
16 the fact that CSX doesn't now want to buy these trailers.
17 When we did this, it was -- they were gonna buy the
18 trailers.

19 Your Honor, that was in the lawsuit. That was settled
20 here. If that was gonna be a contingency, it should have
21 been added to this agreement and it wasn't.

22 Your Honor, they're no new arguments that have been
23 presented in the 59(e). I don't see any reason to disturb
24 your ruling now, and unless you have any further questions
25 from me, I'm gonna sit down.

1 THE COURT: Thank you, Mr. McVey.
2 MR. MCVEY: Thank you.
3 THE COURT: Do you want to respond to anything he said?
4 MR. WILLIAMS: Yes, Your Honor.
5 THE COURT: Briefly.
6 MR. WILLIAMS: Very.
7 I think this -- there's really just two things to say.
8 CFA, the acronym of his client, says well, this is a hollow
9 agreement if all I get to do is go do my damages hearing.
10 well, it's not. Paragraph 8 says that DMS and CFA are
11 going to waive their right to a jury trial. Waive their
12 right to a jury trial. So, DMS negotiated that I'm not
13 gonna put up my defenses. We're just gonna go have a
14 damages hearing. So, there's, there's something there.
15 The agreement contemplates a damages hearing if the
16 sequencing doesn't occur and so we think that's a
17 requirement.
18 Balancing equities, Your Honor, I've talked about how
19 much money is changed hands. My client has spent all the
20 money. Well over \$400,000. It's paid for everything it's
21 received, and, under that situation, it shouldn't be forced
22 further to do something that it doesn't have an outlet to
23 sell what it's being forced to purchase. And so we think it
24 would be inequitable to do that.
25 We appreciate the Court's time.

1 THE COURT: Okay. Thank you very much. I'll consider
2 it and inform you of an order.

3 Now, my official retirement date is February the
4 10th. My mailbox is gonna be opened after that. So, you
5 can send me things. I'm gonna be holding Court about half
6 the time in Charleston for the next six months. So, I will
7 be on the bench occasionally down there, but I'll inform you
8 as to how to get orders and things to me and we'll handle it
9 in that fashion.

10 Okay.

11 MR. WILLIAMS: Thank you, Your Honor.

12 THE COURT: Thank you very much.

13

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15 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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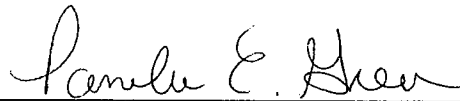
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Spartanburg County, South Carolina, on the 2nd day of February, 2017.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

December 12th, 2017



PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

COURT OF COMMON PLEAS
2015-CP-23-04535

CONTROLS FOR AUTOMATION, INC.)
PLAINTIFF,)

vs.)

DIGITAL MANAGEMENT SOLUTIONS,)
DEFENDANT.)

TRANSCRIPT OF RECORD

ORIGINAL

April 24, 2017
Greenville, South Carolina

B E F O R E:

THE HONORABLE J. CORDELL MADDOX, JR., JUDGE.

A P P E A R A N C E S:

IAN D. MCVEY, ESQ.
Attorney for the Plaintiff

MITCHELL K. BYRD, SR., ESQ.
Attorney for the Defendant

HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

(PW) - Denotes Plaintiff's Witness

(DW) - Denotes Defense Witness

Page No.

(PW) DAVID MOCHI:

Direct Examination by Mr. McVey.....11

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
(Plaintiff's Exhibits)			
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P-2	DMS Purchase Order.....	15.....	15
P-3	Invoice No. 161140.....	16.....	16
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All Exhibits were retained by the Clerk of Court for Greenville County.

P R O C E E D I N G S

THE COURT: Is this Controls for Automation?

MR. MCVEY: That's correct, Your Honor.

MR. BYRD: Yes, sir, Your Honor.

THE COURT: And it's a motion for damages?

MR. MCVEY: That's correct. It's a damages hearing, Your Honor, pursuant to a settlement agreement the parties entered into.

I -- Mr. Byrd represents what I'm going to call DMS, Digital Management Solutions.

THE COURT: Okay.

MR. MCVEY: He's, also, filed a motion to be relieved as counsel. I have no objection to having that heard prior to this hearing -- to my damages hearing provided it does not -- the Court is not going to rule that they've got 30 more days, or whatever it is, to find a new lawyer.

At this point, this thing has been going on for two years now. A settlement was entered into. It was put on the record. The parties have not complied with the terms of the settlement agreement. And my client's entitled to put his damages on the record.

THE COURT: Okay. Yes, sir.

MR. BYRD: And if I may briefly, Judge. Late last year -- I want to say it was around Thanksgiving, I received notice of the proposed hearing. I contacted DMS

1 through regular channels, got no response. Ultimately, I
2 received an e-mail saying that they were closing the
3 doors, going out of business.

4 I tried to serve them with a copy of the Plaintiff's
5 motion, as well as a motion to be relieved. It was
6 returned -- returned to sender, vacant, unable to forward.
7 I would just hand that up to the Court. We attached some
8 documents to it that indicate that the former executive
9 officer, Mr. Jason LaFord [phonetic], was served by mail
10 at his address listed in the Secretary of State's website
11 for the agent for the company.

12 I did, also, subsequently receive a notice of
13 bankruptcy from Mr. LaFord, which I would, also, hand up,
14 which does name Digital Management. But it's my
15 understanding, as I've informed counsel for the Plaintiff,
16 he was just an officer of the company. He was not an
17 owner of the company. So I don't think that notice
18 precludes the Plaintiff from moving forward.

19 But I would ask that we be relieved, if Your Honor
20 would consider that.

21 THE COURT: Well, let me ask you because I'm
22 obviously -- it looks like this notice to file proof of
23 claim of assets was filed on April 7th. Is there an
24 active -- there's an active bankruptcy right now?

25 MR. MCVEY: Judge, individually for Mr. LaFord, Your

1 Honor.

2 THE COURT: Okay. It says, also, known as Jason G.
3 LaFord, doing business as MBL Services.

4 MR. MCVEY: What I believe that is, Your Honor, is an
5 attempt to discharge by Mr. LaFord any liabilities he
6 might have had as the chief executive officer of Digital
7 Management Solutions.

8 THE COURT: Well, let me ask you this. I -- and
9 before I get to the substance, what was your settlement?
10 I mean, did y'all have a settlement that you put on the
11 record?

12 MR. MCVEY: Your Honor, if I can approach, I have a
13 copy of it.

14 THE COURT: Okay.

15 MR. MCVEY: You've seen this?

16 MR. BYRD: Sure.

17 THE COURT: But just, in general, what is it?
18 What --

19 MR. MCVEY: Your Honor, it's a little convoluted.

20 THE COURT: Okay.

21 MR. MCVEY: There was a dispute between my client --
22 just by way of background, my client, Controls for
23 Automation, provided 14 fuel cells for secure -- wireless
24 security trailers that DMS put together and was selling to
25 Communication Concepts, Inc., which is the other Defendant

1 in this action.

2 There was -- a dispute arose between Communication
3 Concepts and DMS. We -- in -- got ourselves involved in
4 that by trying to get the money that CCI owned -- owed
5 DMS. There was a lengthy all-day mediation down here with
6 Stuart Money -- or excuse me, Stuart Mauney.

7 We, ultimately, after the mediation, came up with an
8 agreement. The agreement provided for CCI to take down
9 these trailers on a certain schedule, but have taken them
10 all down within six months. That never happened. CCI did
11 not comply with its obligations under it.

12 We filed a motion to compel the settlement. Judge
13 Couch compelled the settlement. CCI has filed a 59(e)
14 motion. That was heard seven days prior to Judge Couch's
15 retirement. He has not yet ruled. Though, as I
16 understand it, he's sitting in an active-retired capacity.
17 But he has not yet ruled on the motion to compel.

18 Another remedy that is available to my client under
19 the terms of the settlement agreement is to go forward
20 with having a damages hearing today against DMS for the
21 amounts owed under our agreement.

22 THE COURT: Well, and I agree with you, because I see
23 that in the settlement. But Judge Couch has an
24 outstanding motion that would resolve this?

25 MR. MCVEY: It would not resolve it because it

1 still --

2 THE COURT: I mean, it compels them --

3 MR. MCVEY: -- it would resolve what are CCI's
4 obligations. But here's the problem, he could resolve it
5 by way of compelling it right now. DMS, as Mr. Byrd has
6 just indicated, has shuttered its doors. So it's
7 impossible, at this point, for DMS to comply by providing
8 the remaining trailers.

9 So, at this point -- my client's best remedy, at this
10 point, Your Honor -- and there may be future motions
11 related to CCI's conduct under the terms of the settlement
12 agreement. I'm not ruling those out. But my client's
13 remedy, which is an additional remedy -- there are
14 cumulative under the agreement -- is to go forward with
15 the damages hearing.

16 Under the agreement, all we did was -- we were going
17 to sit back and take a portion of the money as it came in.
18 And if you'll see, my firm was going to act as the escrow
19 agent as the money came in. None of that has taken place.

20 So my client, at this time, wants to move forward
21 with getting his damage -- getting his judgment, which is
22 what was agreed to by the parties under the terms of the
23 settlement agreement.

24 THE COURT: Well, I'm a little concerned about Judge
25 Couch's under advisement, which is a problem.

1 MR. MCVEY: Your Honor, I think the settlement
2 agreement allows us to do both.

3 THE COURT: Well, I don't -- I mean --

4 MR. MCVEY: Any --

5 THE COURT: But if you start one -- you've got to end
6 one before you start the second.

7 MR. MCVEY: Well, Your Honor, he's already ruled.
8 It's whether -- it's whether he's going to change his mind
9 or not.

10 THE COURT: Well, let's say he did. What if he did?

11 MR. MCVEY: Well, then any money that we got under
12 that settlement agreement would be used to offset the
13 judgment that was entered. And just -- I would note to
14 Your Honor, my client has come a really, really long way
15 for this hearing today.

16 MR. DAVID MOCHI: Twice.

17 THE COURT: Well, here's what I'll do just so you
18 don't have to do it again. And, again, I'm concerned
19 about the fact that -- and I understand it's under
20 advisement. But I'll allow you to put --

21 First, I'll grant your motion to be relieved.

22 MR. BYRD: Thank you.

23 THE COURT: And I'll allow you to put this on the
24 record. But I'm going to take it under advisement until I
25 find out -- just so you're on the record with him and he

1 doesn't have to come back, and you're protected there.

2 MR. MCVEY: Thank you, Your Honor.

3 MR. BYRD: Thank you.

4 THE COURT: Thank you.

5 All right. Yes, sir. You can call your first
6 witness.

7 Now, again, I'll have to deal with this in an order.
8 But, under these circumstances, I'll let you put this on
9 the record so that his attendance at any future hearing
10 isn't necessary.

11 MR. MCVEY: Your Honor, may I suggest then if I would
12 provide you with a proposed order, you can sit on it until
13 we figure out what Judge Couch is going to do?

14 THE COURT: Yeah.

15 MR. MCVEY: Okay.

16 THE COURT: Do that. But call him. Let him put on
17 the -- just the basics.

18 MR. MCVEY: Do you need an order from him relieving
19 him?

20 THE COURT: Yeah. I'm assuming I'll get one up here.
21 You need to send me one just --

22 MR. BYRD: I'll be happy to.

23 THE COURT: Okay.

24 MR. BYRD: Thank you.

25 MR. MCVEY: I didn't know if you were going to do a

1 Form 4 or a formal order.

2 THE COURT: Okay. Yeah. Just let him put some
3 testimony on the record, and we'll protect him from having
4 to come back.

5 MR. MCVEY: All right. Your Honor, at this point,
6 I'd -- at this time, I'd call David Mochi.

7 THE COURT: Okay. Yes, sir.

8 MR. MCVEY: You need to take the stand right up there
9 and be sworn in.

10 THE CLERK: Please place your left hand on the Bible
11 and raise your right hand.

12 WHEREUPON,

13 DAVID MOCHI,
14 after first having been duly sworn, testified as follows:

15 THE CLERK: Go ahead and have a seat.

16 Please state your full name for the record. Please
17 spell your last name.

18 THE WITNESS: My -- my full name is David Mochi,
19 M-O-C-H-I.

20 THE COURT: All right. Yes, sir.

21 MR. MCVEY: Thank you, Your Honor.

22 DIRECT EXAMINATION

23 BY MR. MCVEY:

24 Q Mr. Mochi, where do you live?

25 A I live in Mansfield, Massachusetts.

1 Q That's near Boston?

2 A Yes, just south of Boston.

3 Q All right. Where are you employed?

4 A I'm the president and owner of Controls for
5 Automation, Incorporated, in Taunton, Massachusetts.

6 Q Okay. And does Controls for Automation have any
7 divisions like --

8 A We have -- yes. We have a -- a division called U.S.
9 Marine Products, which is our marine products division.

10 Q Okay. And could you, if you would, give the Court
11 just a little bit of background as to how it is that
12 Controls for Automation got into a relationship with
13 Digital Management Solutions?

14 A Well, we're an industrial products distributor of
15 mechanical components. And we represent about 60
16 manufacturers of these components, one of which is a
17 company out of Germany called SFC, which makes methanol
18 fuel cells.

19 And at the request of SFC, we negotiated for a
20 railroad company, a process by which their fuel cells
21 would be used in trailers that provide emergency power for
22 something in the railroad system. And we were connected
23 with DMS, who was to build 14 of these trailers which,
24 ultimately, were sold to another company called CCI, who
25 was going to add additional components and technology to

1 the trailers which then, in turn, would be sold to CCI --
2 or to CSX.

3 Q Okay. And you understand that CSX was the end -- end
4 user for --

5 A Yes.

6 MR. MCVEY: All right. And if I may approach the
7 witness, Your Honor?

8 THE COURT: Yes, sir.

9 BY MR. MCVEY:

10 Q I'll show you a document. Do you recognize that
11 document?

12 A Yeah. It's our standard credit application that we
13 issued to DMS prior to -- you know, entering into purchase
14 agreements and supplying them with the fuel cells.

15 Q Okay. So Digital Management Solutions is the party
16 applying for credit; correct?

17 A Correct.

18 Q Okay. And it indicates that the purchasing agent --
19 excuse me, the president is Jason LaFord; vice president,
20 Greg Ross; purchasing, J.C. [phonetic] LaFord; and
21 accounting Roy Heim [phonetic]; correct?

22 A Correct.

23 Q And it gives an address here on Woodruff Road in
24 Greenville?

25 A Correct.

1 Q After this --

2 MR. MCVEY: Your Honor, I'd move that in as

3 Plaintiff's Exhibit No. 1.

4 THE COURT: All right. So admitted.

5 Mr. MCVEY: Thank you, Your Honor.

6 (WHEREUPON, Plaintiff's Exhibit No. 1 was marked and
7 admitted into evidence.)

8 BY MR. MCVEY:

9 Q Subsequent to the entering into that credit
10 agreement, did you receive a purchase orders from DMS?

11 A We did.

12 Q Okay. I'll show you a document and ask you if you
13 recognize that?

14 A Yes.

15 Q All right. So is this a purchase order -- this is a
16 purchase order that appears to be dated July 14, 2014;
17 correct?

18 A Yes.

19 Q And, again, U.S. Marine Products, that is --

20 A That is our marine products division. This fuel cell
21 product is -- is -- was sold under our -- both our
22 Controls for Automation and our U.S. Marine Products division.

23 Q Okay. And this appears to be a purchase order for
24 about \$136,841.60; is that correct?

25 A That's correct.

1 Q And this -- is it 14 fuel cells, 14 fuel level
2 sensors, 14 gateways, and 28 adaptors? Correct?

3 A Correct.

4 Q And, ultimately, one -- did one of these get shipped
5 out? Correct?

6 A Well, initially, one unit -- one out of the 14 was
7 provided to DMS in order for them to build a trailer,
8 verify with their customer that it -- it'd solve the
9 problem. They tested, evaluated, and then they agreed to
10 buy the balance of the 13 remaining fuel cells --

11 Q Okay.

12 A -- which they did.

13 Q Okay. So what's the date on that purchase order?

14 A Let's see. July 14th, 2014.

15 Q Okay. And then subsequently -- excuse me.

16 MR. MCVEY: I'd move that in as Plaintiff's Exhibit
17 No. 2, Your Honor.

18 THE COURT: All right. So admitted.

19 (WHEREUPON, Plaintiff's Exhibit No. 2 was marked and
20 admitted into evidence.)

21 BY MR. MCVEY:

22 Q Let me show you what's been -- do you recognize that
23 document, Your Honor -- excuse me, Mr. Mochi?

24 A Yes. After -- after the initial testing and the --
25 the first unit was bought and paid for by Digital

1 Management Solutions, and tested by CCI, and verified by
2 CSX that, you know, it was what, in fact, a -- they needed
3 and it was approved sometime later on 12/21/14. We
4 received the balance of the order for 13 complete systems,
5 which was 13 more of the items you just described. And
6 that was for a total of \$127,809.56.

7 Q Okay. And this is an invoice that was sent
8 concurrent with the shipping of this equipment?

9 A Yes.

10 Q Okay. And what are the payment terms under the terms
11 of this invoice?

12 A Net 30 days.

13 Q Okay. Was payment made?

14 A I'm sorry.

15 Q Has payment in full been made on this invoice?

16 A No.

17 MR. MCVEY: Your Honor, I'd move that in as, I think,
18 Plaintiff's Exhibit No. 3.

19 THE COURT: All right. So admitted.

20 (WHEREUPON, Plaintiff's Exhibit No. 3 was marked and
21 admitted into evidence.)

22 BY MR. MCVEY:

23 Q Did you, ultimately, receive a further invoice from
24 DMS for another fuel level sensor?

25 A Well, we issued one more -- one more invoice a

1 year -- a year later. Would that be right? It was just
2 a -- it was a level sensor in order for them to be able to
3 measure the level -- the level in one of the fuel
4 containers -- methanol fuel containers that powers the --
5 the fuel cell.

6 Q And did this purchase order request net 30 terms?

7 A Yes. All of our -- all of our invoices are net
8 30-day payment.

9 MR. MCVEY: Your Honor -- excuse me.

10 BY MR. MCVEY:

11 Q The sum on that, Mr. Mochi, is \$319.80; correct?

12 A \$319.80.

13 MR. MCVEY: Your Honor, I'd move that in as
14 Plaintiff's Exhibit No. 4.

15 THE COURT: All right. So admitted.

16 MR. MCVEY: Thank you.

17 (WHEREUPON, Plaintiff's Exhibit No. 4 was marked and
18 admitted into evidence.)

19 BY MR. MCVEY:

20 Q And ultimately -- I'm not going to belabor the point.
21 But you issued -- issued DMS an invoice for that fuel
22 cartridge --

23 A Yes.

24 Q And is that the invoice?

25 A Yes, we did. And that was on 3/11/15.

1 Q Okay.

2 A And, again, net -- net 30 days. The order
3 acknowledges 30-day payments on both and we -- and we --
4 our terms are, in fact, net 30 days.

5 Q And the total sum due under that invoice was \$349.67;
6 correct?

7 A Yes.

8 MR. MCVEY: I'd move that in as Plaintiff's Exhibit
9 No. 5, Your Honor.

10 THE COURT: All right. So admitted.

11 (WHEREUPON, Plaintiff's Exhibit No. 5 was marked and
12 admitted into evidence.)

13 BY MR. MCVEY:

14 Q Has -- have any of these sums been paid in full?

15 A Well, very early on, we did receive two small
16 payments towards the total balance. One was a -- a first
17 payment of \$5,000 by check from DMS. And the second was
18 another \$5,000 payment, I believe, in the form of a credit
19 card.

20 Q Was that payment made roughly around May the 4th of
21 2015?

22 A I believe so, yes.

23 Q Okay. I'll show you this document and ask you if you
24 recognize it?

25 A Well, that's our standard receivables aging. It

1 shows the -- shows the outstanding balance now at
2 \$117,809.56, which at the time was in the 61 to 90 day --
3 well, no, actually, it was in the 91 to 120-day payment.
4 That's as high as we go. After that, it stays in that
5 column. And that's where it's been now for two and a half
6 years.

7 Q So the total sum due and owing exclusive of interest
8 is \$118,159.23; is that correct?

9 A That's correct.

10 Q And the last time a payment was made was March -- May
11 the 4th, 2015; correct?

12 A Correct.

13 (WHEREUPON, Plaintiff's Exhibit No. 6 was marked for
14 identification only.)

15 MR. MCVEY: All right. Your Honor, at this time, I
16 would ask for a judgment to be entered against DMS -- or
17 Digital Management Solutions in the amount of \$118,159.23
18 together with prejudgment interest from April -- excuse
19 me, from May 4th, 2015, to today, \$20,425.93.

20 THE COURT: Okay.

21 MR. MCVEY: And that's at the 8.75 percent rate.

22 THE COURT: All right. Why don't you send me up an
23 order. I'll find out what's going on. I mean, I
24 understand the under advisement stuff because I'm probably
25 the worst at it. I'm a little worried about that floating

1 around. I mean, I'd like to end this thing for you so ,
2 that it's over.

3 So send me an order up and I'll sign it, but I will
4 check on that first.

5 MR. MCVEY: Thank you, Your Honor.

6 THE COURT: Okay. Thank you.

7 I'm just trying to make sure you don't have to come
8 back down from --

9 MR. MCVEY: And as --

10 THE COURT: -- Boston.

11 MR. MCVEY: -- a practical matter, you know, even
12 assuming that he affirms his ruling --

13 THE COURT: It won't really matter. I'd just kind of
14 like to tie it up. That's sort of -- the note -- I've got
15 a weird note on my roster here that this is floating
16 around, so I'm going to -- I'll take care of it. I'd like
17 to end it for you.

18 MR. MCVEY: It's just -- you know, it's unfortunate,
19 Your Honor, that the parties worked real hard to get it
20 settled, and it didn't work out, so.

21 THE COURT: Well, yeah. I mean, I -- yeah. It's
22 irritating, to be honest with you.

23 MR. MCVEY: Yeah.

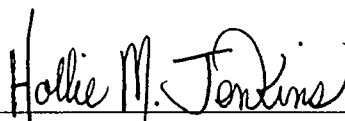
24 THE COURT: Okay. I Appreciate it.

25 *****END OF TRANSCRIPT OF RECORD*****

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3
4 CERTIFICATE OF REPORTER

5 STATE OF SOUTH CAROLINA)

6 COUNTY OF GREENVILLE)

7 I, HOLLIE JENKINS, Official Court Reporter for the
8 Thirteenth Judicial Circuit of the State of South Carolina,
9 do hereby certify that the foregoing is a true, accurate,
10 and complete Transcript of Record of the proceedings had and
11 the evidence introduced in the captioned case, relative to
12 appeal, in the Court of Common Pleas for Greenville County,
13 South Carolina, on the 24th day of April, 2017.14 I do further certify that I am neither of kin, counsel,
15 nor interest to any party hereto.
1617 June 13, 2017
1819 
20

21 Hollie M. Jenkins, Court Reporter

22 My Commission Expires: 09/24/20
23
24
25

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
	)	C/A No.: 2015-CP-23-04535
Controls for Automation, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
	)	MOTION TO COMPEL SETTLEMENT
Digital Management Solutions,	)	
Inc., Communication Concepts,	)	
Inc.,	)	
	)	
	)	
Defendants.	)	
_____	)	

YOU WILL PLEASE TAKE NOTICE that Plaintiff Controls for Automation ("CFA"), by and through its undersigned counsel, hereby moves the Court to enforce the terms of a settlement agreement reached in this case and executed by the parties. Plaintiff would show as follows:

1. Plaintiff filed its Complaint on July 21, 2015. The Complaint alleged that Defendant Digital Management Solutions, Inc. ("DMS") owes Plaintiff CFA One Hundred Eight Thousand, One Hundred Fifty-Nine and 23/100 Dollars (\$118,159.23) based on a contract for the sale of fuel cells and related products. The Complaint further alleged that Defendants DMS and Communication Concepts, Inc. ("CCI") entered into a separate sales contract for mobile trailers and that CCI was withholding a sizable sum of money owed under that contract pending correction of certain deficiencies.

2. The parties participated in mediation and thereafter executed a valid and binding settlement agreement, which was filed with the Court on April 14, 2016. (Exhibit

A). The agreement provides that DMS agreed to immediately ship one trailer, for which CCI had already paid, and that within 45 days of shipment of the first trailer, CCI agreed to purchase (pay for) and take delivery of a second trailer. The settlement agreement further provides that CCI shall pay \$51,023.45 upon taking delivery of the second trailer (Exhibit A, ¶¶ 1-2).

3. Upon information and belief, CCI took delivery of the first trailer on May 2, 2016. It has been more than 45 days since this trailer was shipped.

4. Upon information and belief, DMS is prepared to tender the second trailer to CCI.

5. Under the Settlement Agreement, CFA is entitled to receive \$33,165.21 from the \$51,023.45 purchase price. This amount was due no later than June 16, 2016.

6. CCI indicated through its counsel on or around June 23, 2016 that it was not prepared to pay for the second trailer.

7. The parties have delayed these proceedings at CCI's request in order to give CCI time to obtain the monies owed under the settlement agreement.

8. The settlement agreement provides that if any party does not fulfill its obligations under this agreement, the case proceeds to a hearing on damages. (Exhibit A, ¶ 8).

9. Pursuant to Rule 11, SCRCP, counsel for Plaintiff has consulted with counsel for Defendants regarding this motion.

WHEREFORE, for each of the foregoing reasons, CFA respectfully moves this Court to (1) enforce the Settlement Agreement the parties entered into and compel CCI to pay the amounts agreed upon therein, including amounts for trailers to be delivered in

the future, and (2) schedule a damages hearing as early as the Court may hear it.

Respectfully submitted,

TURNER PADGET GRAHAM & LANEY, P.A.

s/ Ian D. McVey

Ian D. McVey, S.C. Bar # 71196

Jessica L. Gooding, S.C. Bar # 101210

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Columbia, South Carolina
August 3, 2016

Counsel for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Controls for Automation, Inc.

Plaintiff,

v.

Digital Management Solutions, Inc.
and Communication Concepts, Inc.

Defendants

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Civil Action No.: 2015-CP-23-04535

SETTLEMENT AGREEMENT

1. DMS will ship one conforming trailer now to CCI risk of loss and shipping expense to be borne by CCI, and the risk of loss and shipping expense will be borne by CCI on every trailer that is subsequently shipped.
2. CCI will purchase one or more trailers within 45 days from shipment of the first trailer, cash on delivery. Cash on delivery means that CCI will wire payment for each trailer to Turner Padgett Graham & Laney, P.A.'s trust account at the time the trailer is placed on a truck for shipment to CCI and before the truck leaves DMS's parking lot. For each trailer purchased by CCI following the first one, CCI will pay \$51,023.40 until CCI pays \$255,117.00. Of this amount, \$16,318.00 will be paid directly to CFA for two new EFOY fuel cells, and the \$16,318.00 will be deducted from the balance CCI owes to DMS. The funds wired to the Turner Padgett trust account will be disbursed on a 65% (CFA) 35% (DMS) basis until CFA is paid \$118,159.23, less the amount credited for any fuel cells returned, as set forth herein.
3. CCI will continue to purchase the remaining trailers, cash on delivery (as defined above), as funds become available, and agrees that it will purchase all of the remaining trailers within 120 days of delivery of the first trailer to CCI in Florida.

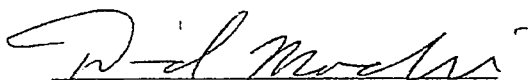
EXHIBIT A

4. Prior to taking delivery of the fifth and sixth trailers, CCI will directly pay CFA \$16,318 for two new fuel cells that will be shipped to CCI.
5. When CCI purchases the fifth trailer from DMS, it will wire \$12,663.60 (or whatever amount is needed so that CFA is paid a total of \$118,159.23, less any credit for returned fuel cells) to TPGL's trust account and directly pay to DMS the remaining balance of \$42,864.40 minus the amount wired to TPGL's trust account. (\$42,864.40 is \$51,023.40 for each trailer minus \$8,159.00 for each new fuel cell). When CCI purchases the sixth trailer from DMS, it will directly pay \$42,864.40 to DMS.
6. Once the fifth and sixth trailers are shipped to CCI, DMS will send a technician to CCI in order to install the two new fuel cells. When the DMS technician travels to CCI, he will bring any fuel cell related items (e.g., sensor, adapter, and gateway) that DMS currently possesses.
7. If CCI does not purchase the second or subsequent trailer from DMS, as provided in Paragraphs 2 and 3, then DMS will return the remaining unused fuel cells to CFA for a credit against the amount owed to CFA, less a 15% stocking fee. In addition, DMS will return the two non-functioning fuel cells to CFA for a credit of \$3,000 per unit.
8. If any party does not fulfill its obligations under this agreement and the dispute between DMS and CFA returns to litigation, DMS and CFA agree to waive their right to a jury trial and will proceed with a hearing solely as to the amount of damages.
9. This constitutes an enforceable settlement agreement pursuant to Rules 43(k), and 41, SCRCP, and operates to end all litigation among the parties.
10. The parties may draft a more complete settlement agreement.

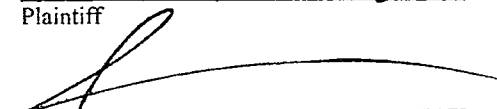
11. The parties agree that this document may be signed in counterparts and electronic or facsimile copies will be treated as original copies.
12. The parties agree that each party shall bear its own attorneys' fees/ legal expenses.

Plaintiffs

Controls for Automation, Inc.



Plaintiff



Attorney for Plaintiff

Defendants

Digital Management Solutions, Inc. and
Communication Concepts, Inc.

Defendant Digital Management Solutions, Inc.

Defendant Communication Concepts, Inc.

Attorney for Defendant
Digital Management Solutions, Inc.

Attorney for Defendant Communication Concepts,
Inc.



4-6-16

11. The parties agree that this document may be signed in counterparts and electronic or facsimile copies will be treated as original copies.
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Plaintiffs

Controls for Automation, Inc.

Plaintiff

Attorney for Plaintiff

Defendants

Digital Management Solutions, Inc. and
Communication Concepts, Inc.

Defendant Digital Management Solutions, Inc.

Defendant Communication Concepts, Inc.

Attorney for Defendant

Digital Management Solutions, Inc.

Attorney for Defendant Communication Concepts, Inc.

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Plaintiffs

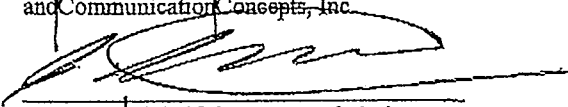
Controls for Automation, Inc.

Plaintiff

Attorney for Plaintiff

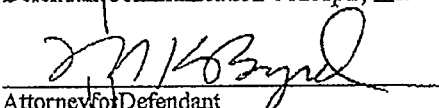
Defendants

Digital Management Solutions, Inc.
and Communication Concepts, Inc.



Defendant Digital Management Solutions, Inc.

Defendant Communication Concepts, Inc.



Attorney for Defendant
Digital Management Solutions, Inc.

Attorney for Defendant Communication Concepts,
Inc.

#3
4/11/16

MBB

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Controls for Automation, Inc.,

Plaintiff,

v.

Digital Management Solutions, Inc.
and Communication Concepts, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Civil Action No.: 2015-CP-23-04535

**DEFENDANT COMMUNICATION CONCEPTS,
INC.'S RULE 59(e) MOTION
FOR RECONSIDERATION**

Defendant Communication Concepts, Inc. ("CCI") hereby moves this Court pursuant to Rule 59(e), SCRPC, for the Court to reconsider and rule upon the issues raised to the Court but omitted from the Court's Order Compelling Settlement in favor of Plaintiff Controls for Automation, Inc. ("CFA") and Defendant Digital Management Solutions, Inc. ("DMS"). The Order was entered on Friday, November 18, 2016, and CCI received written notice of the entry of the Order on Monday, November 21, 2016.¹ (See Order attached as *Exhibit A*). Accordingly, CCI is timely in filing the subject Rule 59(e) motion dated Thursday, December 1, 2016. Rule 59(e), SCRPC (noting motion must be filed within 10 days of written notice of entry of the order).

CFA's Motion to Compel Settlement sought an order from this Court compelling enforcement of the Settlement Agreement entered into by the parties in this dispute by requiring CCI to purchase certain trailer units held by DMS. In granting CFA's Motion to Compel

¹ CCI timely filed the Rule 59(e) motion on or around 2:43 pm on December 1, 2016. (*Exhibit 1*, Notice of Filing e-mail dated December 1, 2016). On or around 9:43 am on December 2, 2016, the filing was rejected by the Greenville County Clerk of Court due to the type of signature used. (*Exhibit 2*, Rejection e-mail dated December 2, 2016). Accordingly, CCI re-filed the subject motion on December 2, 2016, with the different signature form.

CCI to purchase certain trailer units held by DMS. In granting CFA's Motion to Compel Settlement, the Court addressed the terms of the Settlement Agreement and found it compellable, but did not rule upon the legal arguments advanced by CCI at the hearing, as discussed below. CCI, therefore, is filing this motion in order to have the court reconsider its decision to compel CCI to make a purchase, and to preserve all issues for appellate review. *Elam v. S.C. Dep. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (noting that a "party *must* file [a Rule 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review") (emphasis in original).

BACKGROUND

Before turning to the legal arguments raised by CCI, but not ruled upon by the Court, it is important to provide the facts and procedural background of this case. This is a commercial dispute that involves component part suppliers involved in the construction of mobile surveillance units. (Decl. of Mark Mills, at ¶ 3, incorporated herein and attached as *Exhibit B*). Mobile surveillance units ("MSU") are essentially 3' x 3' trailers that are up-fitted with electronic equipment, including, for example, video cameras. (Mills Decl., at ¶ 4). They are used for safety and monitoring purposes. (Mills Decl., at ¶ 5). An MSU can be placed in any location and can monitor, via video signal transmission, the happenings at that location. (Mills Decl., at ¶ 6). Law enforcement and railroad companies regularly use these devices. (Mills Decl., at ¶ 7). In fact, the MSUs at issue in this case were being constructed for the CSX railroad. (Mills Decl., at ¶ 8).

CCI received a contract to provide 14 MSUs to CSX. (Mills Decl., at ¶ 9). CCI contracted with DMS to construct the base trailers, which also included wiring and fuel cells. (Mills Decl., at ¶ 10). In turn, DMS contracted with CFA for the purchase of the fuel cells. (Mills

Decl., at ¶ 11). Upon receipt of the trailers from DMS, CCI planned to up-fit them with substantial surveillance and other electronic equipment. (Mills Decl., at ¶ 12). Following this up-fit, the trailers would become MSUs. (Mills Decl., at ¶ 13). CCI then planned to sell those MSUs to CSX pursuant to its contract. (Mills Decl., at ¶ 14).

In order to facilitate construction of the trailers by DMS, on June 20, 2014, CCI advanced DMS \$213,070.20. (Mills Decl., at ¶ 15). Later, on August 27, 2014, CCI provided a second installment payment to DMS in the amount of \$142,046.80. (Mills Decl., at ¶ 16). Finally, on February 5, 2015, CCI provided a third installment payment to DMS in the amount of \$100,000. (Mills Decl., at ¶ 17). Prior to the commencement of this litigation, CCI paid DMS for roughly 9 MSUs but had only taken possession of 8; those 8 MSUs were delivered to CSX. (Mills Decl., at ¶ 18).

This litigation began when CFA filed a lawsuit against DMS and CCI on July 21, 2015. CFA's Complaint alleged that DMS failed to pay it for a large portion of the costs of the fuel cells. (CFA Complaint, ¶¶ 10-12, attached as *Exhibit C*). DMS then answered the Complaint and filed a Cross-Claim against CCI on August 14, 2015. (DMS Answer and Cross-Claim, attached as *Exhibit D*). DMS's Cross-Claim against CCI was based upon the fact that CCI had yet to pay for and take delivery of the final six MSUs. *See id.* at ¶¶ 14-16. After a delayed service of process, CCI answered the Complaint and Cross-Claim on October 20, 2015 and December 15, 2015, respectively. (CCI Answer to Complaint; CCI Answer to Cross-Claim, attached as *Exhibits E-F*).

The parties mediated this case on March 8, 2016, and continued to negotiate a settlement thereafter. Ultimately, on or around April 6, 2016, the parties reached a settlement agreement that envisioned a process whereby CCI would take the remaining MSUs in piecemeal fashion in

order to generate the cash flow necessary to purchase the remaining six MSUs.² (*See generally* Settlement Agreement). As the Settlement Agreement makes clear, CCI was provided with the previously paid for 9th MSU, (*See* Settlement Agreement, ¶ 1 attached as *Exhibit G*), and it was hoped that it could sell that MSU to generate the cash flow to purchase the next MSU, and so on. *See e.g.*, Settlement Agreement, ¶ 3 (“CCI will continue to purchase the remaining trailers, cash on delivery (as defined above), *as funds become available . . .*”). (emphasis added). Unfortunately, the hoped-for process did not work, as CCI has been unable to receive payment for the remaining MSUs from CSX. (Mills Decl., at ¶ 21).

STANDARD OF REVIEW

It is well established “that the trial court retains inherent jurisdiction and power to enforce agreements entered into in settlement of litigation before that court.” *Rock Smith Chevrolet, Inc. v. Smith*, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct. App. 1992) (citing *Ozyagcilar v. Davis*, 701 F.2d 306 (1983)); *see also Kumar v. Third Generation, Inc.*, 324 S.C. 284, 289–90, 485 S.E.2d 626, 629 (Ct. App. 1995) (“A trial court has inherent jurisdiction to enforce settlement agreements entered before it.”).

ARGUMENT FOR RECONSIDERATION

I. The Plain Language of the Settlement Agreement Requires the Court to Order a Damages Hearing and Not Order Specific Performance.

- The Settlement Agreement provides: “If any party does not fulfill its obligations under this agreement and the dispute between DMS and CFA returns to litigation, *DMS and CFA agree to waive their right to a jury trial and will proceed with a*

² During the course of the commercial relationship between DMS and CCI (CFA was not in the picture at this time, as it only supplied parts to DMS), CCI experienced payment lags from CSX. (Mills Decl., at ¶ 19). Notwithstanding the lag in payment, CCI was repeatedly assured that the remaining MSUs were needed by CSX. (Mills Decl., at ¶ 20). Moreover, notwithstanding the lag in payment, and as noted above, at the time this litigation was instituted, CCI had paid for more trailers than it had received from DMS.

hearing solely as to the amount of damages.” (See Settlement Agreement, ¶ 8) (emphasis added). A settlement agreement is a contract under South Carolina law. See *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). “‘If [a settlement agreement’s] language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the [settlement agreement’s] language determines the instrument’s force and effect.’” *Coastal States Bank v. Hanover Homes of S.C., LLC*, 408 S.C. 510, 518, 759 S.E.2d 152, 157 (Ct. App. 2014) (quoting *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004)).

- The parties expressly agreed that if any party did not fulfill its obligations under the agreement and the case returns to litigation, as it now has, then DMS and CFA agreed to conduct a damages hearing. The agreement to conduct a damages hearing, if the trailer sales were not completed, makes clear that the parties did not agree to require CCI to purchase the trailers if the hoped for sales could not be accomplished.
- Furthermore, the parties’ agreement for DMS and CFA to conduct a damages hearing if the parties returned to litigation demonstrates that the parties anticipated a return to litigation if CCI did not purchase the trailers, and not that CCI would be compelled to purchase the trailers.
- Accordingly, the Court should apply the plain language of the Settlement Agreement and require DMS and CFA to conduct a damages hearing; furthermore, the Court should deny the motion to compel performance of the Settlement Agreement based upon the parties’ language, which anticipated a return to litigation, if the future trailer purchases did not occur.

II. Specific Performance is Improper Because an Adequate Remedy Exists at Law in this Case.

- Whether to grant specific performance is an equitable determination. See *Campbell v. Carr*, 361 S.C. 258, 262, 603 S.E.2d 625, 627 (Ct. App. 2004) (“An action for specific performance is one in equity.”) (citations omitted).
- A party is not entitled to specific performance if an adequate remedy exists at law. See *Time Warner Cable v. Condo Servs., Inc.*, 381 S.C. 275, 284, 672 S.E.2d 816, 820 (Ct. App. 2009) (“A party is not entitled to specific performance of a contractual provision if an adequate remedy exists at law.”). An adequate remedy exists at law in this case for, if proved, general breach of contract damages. Accordingly, CCI should not be compelled to purchase the subject trailers—that is, specifically perform the terms of the Settlement Agreement.

CCI respectfully requests that the Court rule upon the legal arguments raised above, reconsider its Order Compelling Settlement, and enter an Order denying the Motion to Compel Settlement for the legal reasons identified above.

Respectfully submitted,

NEXSEN PRUET, LLC

s/Burl F. Williams

Burl F. Williams, Esq. (SC Bar No. 77901)

NEXSEN PRUET, LLC

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Attorneys for Communication Concepts, Inc.

December 1, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	Civil Action No.: 2015-CP-23-04535

Controls for Automation, Inc.,	)	
	)	
Plaintiff,	)	PLAINTIFF'S RESPONSE TO
	)	DEFENDANT'S RULE 59(e) MOTION
vs.	)	FOR RECONSIDERATION
	)	
Digital Management Solutions, Inc. and	)	
Communication Concepts, Inc.,	)	
	)	
Defendants.	)	
	)	
	)	

Plaintiff Controls for Automation, Inc. ("Plaintiff" or "CFA") hereby submits its Response in Opposition to Defendant Communication Concepts, Inc.'s ("CCI") Rule 59(e) Motion for Reconsideration filed December 1, 2016.

PROCEDURAL HISTORY

On July 21, 2015, Plaintiff brought an action for debt collection against CCI and Digital Management Solutions, Inc. ("DMS"). On August 14, 2015, DMS filed a cross-claim against CCI for breach of contract. On March 8, 2016, the parties mediated the initial action for debt collection and cross claim for breach of contract. On April 6, 2016, the parties stipulated to a settlement agreement in writing (the "Settlement Agreement"). On April 14, 2016, the parties filed the Settlement Agreement with this Court. On August 4, 2016, Plaintiff filed a Motion to Compel Settlement. The Court heard this motion and ultimately entered an Order compelling specific performance of the Settlement Agreement on November 18, 2016. CCI filed its Motion for Reconsideration on December 1, 2016.

LEGAL STANDARD

Rule 59(e) of the South Carolina Rules of Civil Procedure is “substantially the Federal Rule” and provides that “[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.” See Publisher’s Notes to Rule 59, S.C.R.C.P. Courts construing the federal counterpart to Rule 59(e) have determined that a motion to alter or amend should be granted in limited circumstances “(1) to accommodate an intervening change in the law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” United States ex rel. Baker v. Westinghouse Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002), *quoting* Pacific Ins. Co. v. Am. Nat’l. Fire Ins., 148 F.3d 396, 403 (4th Cir. 1998); *see also* Unisun Ins. v. Hawkins, 342 S.C. 537, 542, 537 S.E.2d 559, 562 (Ct. App. 2000) (“In the absence of prior state law on the issue in question, federal cases interpreting the rule are persuasive.”) (*citing* Roberts v. Peterson, 292 S.C. 149, 355 S.E.2d 280 (Ct. App. 1987)). Additionally, it is well-settled that “a party cannot use a motion to reconsider to present an issue the party could have raised prior to judgment, but did not.” Anderson Memorial Hospital, Inc. v. Hagen, 443 S.E.2d 399,400 (Ct. App. 1994); *see also* C.A.H. v. L.H., 434 S.E.2d 268 (1993).

ARGUMENT

Plaintiff respectfully submits that CCI’s Motion for Reconsideration is not warranted because there has been no intervening change in law, no new evidence not available at trial, and no need to correct a clear error of law or prevent manifest injustice.

CCI presents two arguments for reconsideration: i) the Settlement Agreement requires the Court to order a damages hearing and not order specific performance, and ii) specific performance is improper. CCI presented both of these arguments at the hearing for Plaintiff’s

motion to compel settlement and this Court correctly ruled that these arguments failed by requiring CCI to specifically perform under the Settlement Agreement.

I. This Court was not solely limited to ordering a damages hearing.

A settlement agreement that meets the requirements of Rule 43(k), SCRCP shall be binding on the parties to the agreement. “A trial court has inherent jurisdiction to enforce settlement agreements entered before it.” Kumar v. Third Generation, Inc., 324 S.C. 284, 289–90, 485 S.E.2d 626, 629 (Ct. App. 1995). General contract principles are used in the construction of a settlement agreement. Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 672 S.E.2d 799 (Ct. App. 2009). Thus, to determine whether the Settlement Agreement required this Court to order a damages hearing, we look to the plain language of the Settlement Agreement.

Paragraph 8 of the Settlement Agreement states “if any party does not fulfill its obligations under this agreement and the dispute between DMS and CFA returns to litigation, DMS and CFA agree to waive their right to a jury trial and will proceed with a hearing solely as to the amount of damages.”

Nothing in the plain language of the Settlement Agreement puts a requirement on this Court that the sole remedy this Court must use to enforce settlement is to order a damages hearing. The plain language of the Settlement Agreement merely requires DMS and CFA to waive their right to a jury trial and argue any disputes between them solely on the issue of damages. Plaintiff’s request for a damages hearing, which can be made at any time after default, is separate and distinct from its request to compel specific performance of the Settlement Agreement.

II. Specific Performance was an appropriate remedy.

As stated above, this Court has jurisdiction to enforce a settlement agreement entered before it. Therefore, Plaintiff properly brought a motion to compel specific performance of the Settlement Agreement, which is an action in equity. Specific performance is appropriate if no adequate remedy exists at law. Time Warner Cable v. Condo Servs., Inc., 381 S.C. 275, 284, 672 S.E.2d 816, 820 (Ct. App. 2009). "In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or had been and remains able and willing to perform his or her part of the contract." Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 290–91 (2000).

In the present case, Plaintiff brought a motion in equity to compel performance, not an action at law to construe a contract against CCI. This Court found in its judicial discretion that the equitable remedy for specific performance was warranted. Additionally, this Court found that there was a valid settlement agreement under Rule 43(k), SCRCP, this Court found that the agreement had been partly carried into due to the fact that DMS shipped the trailer, which CCI accepted, and this Court found that DMS and Plaintiff have performed their parts and are able and willing to perform future parts of the agreement.

III. CCI did not present any new evidence that was not available at the hearing.

While not specifically argued in CCI's motion for reconsideration, CCI attached a Declaration of Mark Mills as an exhibit to its motion. CCI has not provided any evidence or assertion that this declaration was not available at the hearing on the motion to compel settlement. Therefore, to the extent this declaration is being used as assertion to grant CCI's motion for reconsideration, this argument must fail.

CONCLUSION

Based upon the foregoing, Plaintiff would respectfully request that Defendant's Motion for Reconsideration be dismissed. Defendant has failed to meet any of the requisites for relief under Rule 59(e), SCRCP. First, Defendant's Motion is unrelated to any "intervening change in controlling law," as the law has remained unchanged since the Court made its ruling. Second, Defendant failed to identify any "new evidence" that previously was not available to the Court. Finally, Defendant's Motion failed to identify any "clear error of law" or manifest injustice. This Court was not required to order a damages hearing and this Court used appropriate judicial discretion to grant Plaintiff's motion to compel specific performance of the Settlement Agreement. Therefore, the Plaintiff submits that the Court should deny Defendant's Rule 59(e) Motion for Reconsideration.

TURNER PADGET GRAHAM & LANEY P.A.

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ATTORNEYS FOR PLAINTIFF

December 13, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Controls for Automation, Inc.,

Plaintiff,

v.

Digital Management Solutions, Inc.
and Communication Concepts, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Civil Action No.: 2015-CP-23-04535

**DEFENDANT COMMUNICATION CONCEPTS,
INC.'S REPLY TO PLAINTIFF'S RESPONSE
TO DEFENDANT'S RULE 59(e) MOTION
FOR RECONSIDERATION**

Defendant Communication Concepts, Inc. ("CCI") hereby submits its Reply to Plaintiff Controls for Automation, Inc.'s ("Plaintiff") Response to CCI's Rule 59(e) Motion for Reconsideration.

REPLY ARGUMENT

**I. PLAINTIFF'S RESPONSE SUGGESTS AN IMPROPER STANDARD OF REVIEW FOR A
RULE 59(e) MOTION**

Plaintiff's response suggests that this Court should follow federal law, and limit the grounds for a Rule 59(e) motion to the three grounds identified by the federal courts. Plaintiff's suggestion is incorrect. In *Elam v. South Carolina Department of Transportation*, our Supreme Court made clear that "[a] motion under Rule 59(e) long has been viewed as a 'motion for reconsideration' despite the absence of those words from the rule. Consequently, a party is usually allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004) (citations omitted). The Court further noted that "[t]here is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier

argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity.” *Id.* at 22, 602 S.E.2d at 779.

II. THE PLAIN LANGUAGE OF THE SETTLEMENT AGREEMENT LIMITS THIS COURT TO ORDERING A DAMAGES HEARING

“A trial court has inherent jurisdiction to enforce settlement agreements entered before it.” *Kumar v. Third Generation, Inc.*, 324 S.C.284, 289-90, 485 S.E.2d 626, 629 (Ct. App. 1995). Plaintiff correctly argues that “[g]eneral contract principles are used in the construction of a settlement agreement[,]” and therefore “we [must] look to the plain language of the Settlement Agreement” in order “to determine whether the Settlement Agreement required this Court to order a damages hearing.” Pl.’s Resp. 3 (citations omitted). Paragraph 8 of the Settlement Agreement states, “if any party does not fulfill its obligations under this agreement and the dispute between DMS and CFA returns to litigation, DMS and CFA agree to waive their right to a jury trial and will proceed with a hearing solely as to the amount of damages.” *Id.* (emphasis added).

Despite Plaintiff’s argument to the contrary, the plain language of the Settlement Agreement unambiguously¹ requires this Court to order a damages hearing – not specific performance – in the event that any party fails to fulfill its obligations under the Settlement Agreement. Plaintiff argues that its request for a damages hearing is “separate and distinct” from a request to compel specific performance of the Settlement Agreement. *See* Pl.’s Resp. 3. But the plain language of the Settlement Agreement belies that argument, as it provides that “if any party

¹ “If [a settlement agreement’s] language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the [settlement agreement’s] language determines the instrument’s force and effect.” *Coastal States Bank v. Hanover Homes of S.C., LLC*, 408 S.C. 510, 518, 759 S.E.2d 152, 157 (Ct. App. 2014) (quoting *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004)).

does not fulfill its obligations under this agreement . . . , DMS and CFA agree to waive their right to a jury trial and *will proceed* with a hearing solely as to the amount of damages.” Plaintiff did not have an alternative, “separate and distinct” option of pursuing relief through specific performance.

III. SPECIFIC PERFORMANCE IS INAPPROPRIATE BECAUSE AN ADEQUATE REMEDY EXISTS AT LAW AND SPECIFIC PERFORMANCE IS NOT EQUITABLE AS BETWEEN THE PARTIES

In its Response, Plaintiff argues that “[s]pecific performance is appropriate if no adequate remedy exists at law.” Pl. Resp. 4. Plaintiff then cites to *Ingram v. Kasey’s Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000) for the three elements a court should consider in deciding whether to grant specific performance. Plaintiff omitted, however, the language in *Ingram* immediately preceding the three elements. That language provides that: “[s]pecific performance should be granted *only* if there is no adequate remedy at law.” *Ingram*, 340 S.C. at 105, 531 S.E.2d at 291 (emphasis added and citations omitted). Contrary to Plaintiff’s argument, specific performance is not just an appropriate remedy if no adequate remedy exists at law, it is *only* an appropriate remedy if no adequate remedy exists at law. Under the facts and circumstances of this case, an adequate remedy exists at law for – if proved – general breach of contract damages.

Ingram further provides that specific performance is also only appropriate if “enforcement of the contract is equitable between the parties.” *Ingram*, 340 S.C. at 105, 531 S.E.2d at 291 (“Specific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties.”). As noted in CCI’s Rule 59(e) motion, and the accompanied Sworn Declaration of its President, prior to the initiation of this litigation, CCI paid co-Defendant DMS for more trailer units than it had received. Further, CCI did not have a commercial relationship with Plaintiff. Under the facts of

this case, it would be inequitable, as between the parties, to compel specific performance in this case.²

Finally, Plaintiff argues that it has styled its motion in equity as opposed to law. While it is unclear, Plaintiff appears to argue that the rules for ordering specific performance should be different in that situation. Plaintiff has cited to no law, however, to support this apparent position. Pl.'s Resp. 4. The fact that Plaintiff filed a motion that it has styled as equitable in nature rather than an action at law to construe a contract is of no consequence to this Court's analysis. The law remains the same: specific performance should only be granted where there is no adequate remedy at law and doing so would be equitable between the parties. *Ingram*, 340 S.C. at 105, 531 S.E.2d at 291; *see also Time Warner Cable v Condo Servs., Inc.*, 381 S.C. 275, 282, 672 S.E.2d 816, 819 (2009) ("[S]pecific performance is ***not an absolute right***, and a court granting it must follow established principles and carefully consider all the circumstances of the particular case." (emphasis added and citations omitted)). Accordingly, CCI should not be compelled to specifically perform the terms of the Settlement Agreement.

IV. CONCLUSION

CCI respectfully requests that the Court grant its Motion for Reconsideration and deny Plaintiff's motion to compel specific performance of the settlement agreement.

[Signature Page Follows]

² Furthermore, ***after*** CCI filed its motion for reconsideration, it learned that CSX is no longer interested in purchasing the remaining six units. Due to the holiday schedule, counsel for CCI has been unable to obtain a sworn declaration setting forth the circumstances surrounding this issue, but will promptly file a supplemental declaration when he is able to obtain the same.

Respectfully submitted,

NEXSEN PRUET, LLC

s/Burl F. Williams

Burl F. Williams, Esq. (SC Bar No. 77901)

NEXSEN PRUET, LLC

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Post Office Drawer 10648

Greenville, SC 29603-0648

Telephone: (864) 282-1165

Facsimile: (864) 477-2633

BWilliams@nexsenpruet.com

Attorneys for Communication Concepts, Inc.

December 29, 2016

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Controls for Automation, Inc.

Plaintiff,

v.

Digital Management Solutions, Inc.
and Communication Concepts, Inc.

Defendants

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Civil Action No.: 2015-CP-23-04535

SETTLEMENT AGREEMENT

1. DMS will ship one conforming trailer now to CCI risk of loss and shipping expense to be borne by CCI, and the risk of loss and shipping expense will be borne by CCI on every trailer that is subsequently shipped.
2. CCI will purchase one or more trailers within 45 days from shipment of the first trailer, cash on delivery. Cash on delivery means that CCI will wire payment for each trailer to Turner Padgett Graham & Laney, P.A.'s trust account at the time the trailer is placed on a truck for shipment to CCI and before the truck leaves DMS's parking lot. For each trailer purchased by CCI following the first one, CCI will pay \$51,023.40 until CCI pays \$255,117.00. Of this amount, \$16,318.00 will be paid directly to CFA for two new EFOY fuel cells, and the \$16,318.00 will be deducted from the balance CCI owes to DMS. The funds wired to the Turner Padgett trust account will be disbursed on a 65% (CFA) 35% (DMS) basis until CFA is paid \$118,159.23, less the amount credited for any fuel cells returned, as set forth herein.
3. CCI will continue to purchase the remaining trailers, cash on delivery (as defined above), as funds become available, and agrees that it will purchase all of the remaining trailers within 120 days of delivery of the first trailer to CCI in Florida.

4. Prior to taking delivery of the fifth and sixth trailers, CCI will directly pay CFA \$16,318 for two new fuel cells that will be shipped to CCI.
5. When CCI purchases the fifth trailer from DMS, it will wire \$12,663.60 (or whatever amount is needed so that CFA is paid a total of \$118,159.23, less any credit for returned fuel cells) to TPGL's trust account and directly pay to DMS the remaining balance of \$42,864.40 minus the amount wired to TPGL's trust account. (\$42,864.40 is \$51,023.40 for each trailer minus \$8,159.00 for each new fuel cell). When CCI purchases the sixth trailer from DMS, it will directly pay \$42,864.40 to DMS.
6. Once the fifth and sixth trailers are shipped to CCI, DMS will send a technician to CCI in order to install the two new fuel cells. When the DMS technician travels to CCI, he will bring any fuel cell related items (e.g., sensor, adapter, and gateway) that DMS currently possesses.
7. If CCI does not purchase the second or subsequent trailer from DMS, as provided in Paragraphs 2 and 3, then DMS will return the remaining unused fuel cells to CFA, for a credit against the amount owed to CFA, less a 15% stocking fee. In addition, DMS will return the two non-functioning fuel cells to CFA for a credit of \$3,000 per unit.
8. If any party does not fulfill its obligations under this agreement and the dispute between DMS and CFA returns to litigation, DMS and CFA agree to waive their right to a jury trial and will proceed with a hearing solely as to the amount of damages.
9. This constitutes an enforceable settlement agreement pursuant to Rules 43(k), and 41, SCRCF, and operates to end all litigation among the parties.
10. The parties may draft a more complete settlement agreement.

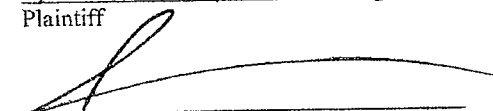
11. The parties agree that this document may be signed in counterparts and electronic or facsimile copies will be treated as original copies.

12. The parties agree that each party shall bear its own attorneys' fees/ legal expenses.

Plaintiffs

Controls for Automation, Inc.


Plaintiff


Attorney for Plaintiff

Defendants

Digital Management Solutions, Inc. and
Communication Concepts, Inc.

Defendant Digital Management Solutions, Inc.

Defendant Communication Concepts, Inc.

Attorney for Defendant
Digital Management Solutions, Inc.

Attorney for Defendant Communication Concepts,
Inc.



4-6-16

11. The parties agree that this document may be signed in counterparts and electronic or facsimile copies will be treated as original copies.
12. The parties agree that each party shall bear its own attorneys' fees/ legal expenses.

Plaintiffs

Controls for Automation, Inc.

Plaintiff

Attorney for Plaintiff

Defendants

Digital Management Solutions, Inc. and
Communication Concepts, Inc.

Defendant Digital Management Solutions, Inc.

Defendant Communication Concepts, Inc.

Attorney for Defendant
Digital Management Solutions, Inc.

Attorney for Defendant Communication Concepts, Inc.

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Plaintiffs

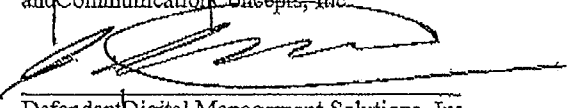
Controls for Automation, Inc.

Plaintiff

Attorney for Plaintiff

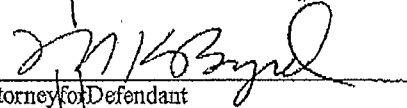
Defendants

Digital Management Solutions, Inc.
and Communication Concepts, Inc.



Defendant Digital Management Solutions, Inc.

Defendant Communication Concepts, Inc.



Attorney for Defendant
Digital Management Solutions, Inc.

Attorney for Defendant Communication Concepts,
Inc.

#3
4/11/16

MFB

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Controls for Automation, Inc.,

Plaintiff,

v.

Digital Management Solutions, Inc.
and Communication Concepts, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Civil Action No.: 2015-CP-23-04535

DECLARATION OF MARK MILLS

I, Mark Mills, declare as follows:

1. I, Mark Mills, am President of Communication Concepts Incorporated ("CCI"), a Florida Corporation, and offer this sworn declaration in support of a Rule 59(e), SCRCP Motion filed in the above captioned matter, *Controls for Automation, Inc. v. Digital Management Solutions, Inc. et al*, No. 2015-CP-23-04535.

2. The information contained herein is based on my own personal knowledge, my review of reasonably available documents prepared and/or maintained by CCI in the ordinary course of business, and upon information provided to me by employees responsible for and with knowledge of the business and accounting records of CCI. I have personal knowledge of the facts recited below, and if called upon to testify concerning them under oath, I could and would do so competently.

3. This is a commercial dispute that involves component part suppliers involved in the construction of mobile surveillance units.

4. Mobile surveillance units ("MSU") are essentially 3' x 3' trailers that are up-fitted with electronic equipment, including, for example, video cameras.

5. MSU are used for safety and monitoring purposes.

6. An MSU can be placed in any location and can monitor, via video signal transmission, the happenings at that location.

7. Law enforcement and railroad companies regularly use these devices.

8. The MSU's at issue in this case were being constructed for the CSX railroad.

9. CCI received a contract to provide 14 MSUs to CSX.

10. CCI contracted with Digital Management Solutions ("DMS") to construct the base trailers, which also included wiring and fuel cells.

11. In turn, DMS contracted with Controls for Automation, Inc. ("CFA") for the purchase of the fuel cells.

12. Upon receipt of the trailers from DMS, CCI planned to up-fit them with substantial surveillance and other electronic equipment.

13. Following this up-fit, the trailers would become MSUs.

14. CCI then planned to sell those MSUs to CSX pursuant to its contract.

15. In order to facilitate construction of the trailers by DMS, on June 20, 2014, CCI advanced DMS \$213,070.20.

16. / Later, on August 27, 2014, CCI provided a second installment payment to DMS in the amount of \$142,046.80.

17. Finally, on February 5, 2015, CCI provided a third installment payment to DMS in the amount of \$100,000.

18. Prior to the commencement of this litigation, CCI had paid DMS for roughly 9 MSUs but had only taken possession of 8. The 8 MSUs were delivered to CSX.

19. During the course of the commercial relationship between DMS and CCI, CCI experienced extended payment lags from CSX.

20. Notwithstanding the lags in payment, CCI was repeatedly assured that the remaining MSUs were needed by CSX.

21. Unfortunately, the hoped-for settlement process did not work, as CCI has, to date, been unable to receive payment for the remaining MSUs from CSX.

I declare under penalty of perjury that the foregoing is true and correct to the best of my personal knowledge and belief.

Dated this 30th day of November, 2016.

A handwritten signature in black ink, appearing to read 'Mark Mills', written over a horizontal line.

Mark Mills

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Controls for Automation, Inc.,

Plaintiff,

v.

Digital Management Solutions, Inc.
and Communication Concepts, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Civil Action No.: 2015-CP-23-04535

**SECOND DECLARATION OF MARK
MILLS**

I, Mark Mills, declare as follows:

1. I, Mark Mills, am President of Communication Concepts Incorporated ("CCI"), a Florida Corporation, and offer this sworn declaration in support of a Reply to Plaintiff's Response to a Rule 59(e), SCRC Motion filed in the above captioned matter, *Controls for Automation, Inc. v. Digital Management Solutions, Inc. et al*, No. 2015-CP-23-04535.

2. The information contained herein is based on my own personal knowledge, my review of reasonably available documents prepared and/or maintained by CCI in the ordinary course of business, and upon information provided to me by employees responsible for and with knowledge of the business and accounting records of CCI. I have personal knowledge of the facts recited below, and if called upon to testify concerning them under oath, I could and would do so competently.

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4. Mobile surveillance units ("MSUs") are essentially 3' x 3' trailers that are up-fitted with electronic equipment, including, for example, video cameras.
5. MSUs are used for safety and monitoring purposes.
6. An MSU can be placed in any location and can monitor, via video signal transmission, the happenings at that location.
7. Law enforcement and railroad companies regularly use these devices.
8. The MSUs at issue in this case were being constructed for the CSX railroad.
9. CCI received a contract to provide 14 MSUs to CSX.
10. CCI contracted with Digital Management Solutions ("DMS") to construct the base trailers, which also included wiring and fuel cells.
11. In turn, DMS contracted with Controls for Automation, Inc. ("CFA") for the purchase of the fuel cells.
12. Upon receipt of the trailers from DMS, CCI planned to up-fit them with substantial surveillance and other electronic equipment.
13. Following this up-fit, the trailers would become MSUs.
14. CCI then planned to sell those MSUs to CSX pursuant to its contract.
15. In order to facilitate construction of the trailers by DMS, on June 20, 2014, CCI advanced DMS \$213,070.20.
16. Later, on August 27, 2014, CCI provided a second installment payment to DMS in the amount of \$142,046.80.
17. Finally, on February 5, 2015, CCI provided a third installment payment to DMS in the amount of \$100,000.

18. Prior to the commencement of this litigation, CCI had paid DMS for roughly 9 MSUs but had only taken possession of 8. The 8 MSUs were delivered to CSX.

19. During the course of the commercial relationship between DMS and CCI, CCI experienced extended payment lags from CSX.

20. Notwithstanding the lags in payment, CCI was repeatedly assured that the remaining MSUs were needed by CSX.

21. Unfortunately, the hoped-for settlement process did not work, as CCI has, to date, been unable to receive payment for the remaining MSUs from CSX.

22. Despite CCI's extensive efforts to get CSX to accept the remaining MSUs, which spanned months, CSX has now informed CCI that it will not accept the remaining MSUs and is therefore cancelling the contract.

23. CSX has reported to CCI that it is experiencing a number of technical difficulties with the MSUs that it has deployed into the field.

24. CCI learned of CSX's cancellation decision after it filed the Rule 59(e), motion for reconsideration.

25. CSX has also asked CCI to confirm that CCI has paid for the MSUs that CSX has received because a company named SFC Energy ("SFC") has directly contacted CSX multiple times inquiring about payment for the fuel cells located in the MSUs.

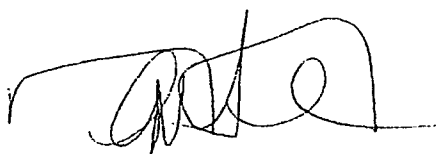
26. SFC is a company that sold batteries for the MSUs to CFA. The fuel cells were then sold by CFA to DMS, and by DMS to CCI to be included in the MSUs.

27. Based upon the repeated payment inquiries from SFC, it is my understanding that CFA has not paid SFC for these fuel cells.

28. SFC's interference with CCI's clients has helped to erode any and all opportunities to get the units accepted by CSX.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my personal knowledge and belief.

Dated this 27th day of December, 2016.

A handwritten signature in black ink, appearing to read 'Mark Mills', written over a horizontal line.

Mark Mills

2016-12-27
10:10 AM
10:10 AM

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Circuit Court

Roger L. Couch, Circuit Court Judge

Case No. 2015-CP-23-04535
Appellate Case No. 2017-002487

Communication Concepts, Inc. Appellant,

v.

Controls for Automation, Inc. and
Digital Management Solutions, Inc. Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

July 31, 2018

RECEIVED
AUG 06 2018
SC Court of Appeals

Respectfully submitted,



Burl F. Williams (S.C. Bar No. 77901)
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(864) 370-2211

*Attorneys for Appellant Communications
Concepts, Inc.*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Circuit Court

Roger L. Couch, Circuit Court Judge

Case No. 2015-CP-23-04535

Appellate Case No. 2017-002487

RECEIVED
AUG 06 2018
SC Court of Appeals

Communication Concepts, Inc. Appellant,

v.

Controls for Automation, Inc. and
Digital Management Solutions, Inc. Respondent.

PROOF OF SERVICE

As of June 4, 2018, counsel of record for Respondent(s) have withdrawn from the case and
therefore will not be served.



NEXSEN PRUET, LLC