THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIFIED QUESTION
From the United States Court of Appeals
For the Fourth Circuit

King, Keenan, and Harris, Circuit Judges

Appellate Case No. 2021-000027
Fourth Circuit Appeal No. 19-1957

Poly-Med, Inc.;

Plaintiff,

v.

Novus Scientific Pte. Ltd.;
Novus Scientific, Inc.;
Novus Scientific AB,

Defendants.

REPLY BRIEF OF PLAINTIFF

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Poly-Med[1] replies to Novus's brief as follows.

ARGUMENT IN REPLY

I. This Supreme Court should answer the primary certified question in the affirmative so as to allow Poly-Med to bring suit on fresh or non-stale causes of action.

Novus's brief does not undermine any of Poly-Med's arguments for why this Court should answer the primary certified question "yes" and allow Poly-Med to pursue its timely claims for Novus's "fresh" breaches of contract. Novus argues the sky will fall, the foundations of justice will crumble, and it—the wrongdoer—will suffer undue prejudice. Such hyperbole should not sway the Court.

The Court should instead adhere to the policies and principles underlying its recent decisions in *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 414 S.C. 33, 777 S.E.2d 176 (2015), and *Marshall v. Dodds*, 426 S.C. 453, 827 S.E.2d 570 (2019); basic propositions already established in the state's extant contract law, including the long recognized proposition that "a breach at one stage of a *continuing* contract . . . does not necessarily put an end to the whole of the contract;"[2] and the well-reasoned jurisprudence from other jurisdictions recognizing

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[1] Shorthand references already defined in Poly-Med's principal brief (e.g., "Poly-Med" for Plaintiff, Poly-Med, Inc., and "Novus" or "Novus Defendants" for Defendants, Novus Scientific Pte. Ltd., Novus Scientific, Inc., and Novus Scientific AB, collectively) are continued in this reply brief.

[2] *Collins-Plass Thayer Co. v. Hewlett*, 109 S.C. 245, 95 S.E. 510, 512 (1918) (emphasis added).

that allowing suit for *fresh* breaches (while barring suit for *stale* ones) is just and equitable and does *not* frustrate the policies underlying statutes of limitations or the discovery rule.

A. Novus ignores the key fact that the Agreement is an executory, i.e., continuing, contract under which both parties continued to operate even after the stale breaches occurred.

The term "executory contract" is best understood in its ordinary common law sense—a contract in which at least some of the obligations are not yet performed. 1 Williston on Contracts 1:19 (4th ed.). Although the contract at issue, i.e., the Agreement, is undoubtedly an executory contract, "with," in the words of the Fourth Circuit Court of Appeals, "continuing rights and obligations,"[3] by Poly-Med's count, in all of Novus's forty-page brief the term "executory contract" is only mentioned three times, and only once in a manner even remotely substantive: a single two-sentence paragraph wherein Novus declares that, because the General Assembly included "[n]o . . . exception . . . for executory contracts or contracts with continuing rights and obligations" in the statute of limitations for breach of contract actions, i.e., in S.C. Code Ann. § 15-3-530, "[t]he only way to make such an exception would be to change the law." (Defs.' Br. p. 12).

Novus's analysis works well enough in a situation involving a simple contract with a single promise or obligation. For example, where A promises to pay B $1,000

[3] (Fourth Circuit Certification Order p. 2.)

in exchange for B's promise to paint A's house within one week. If B does not paint A's house within one week, that is *the* breach, and starting then, A has three years to sue.[4] In a situation like the present, however, involving, in the words of the very question put to this Court, "a contract with continuing rights and obligations,"[5] Novus's simplistic analysis is misplaced.

Trying to escape the undeniable logic that each individual breach of a continuing contract like the Agreement is a discrete, individually actionable wrong with its own limitations period, Novus tries to rebrand all of its many individual breaches as just two all-encompassing "contract interpretation" disputes, one about the "hernia only" claims and one about the "patent application" claims. It asserts all of its alleged wrongful conduct arose out of one or the other of those disputes and, therefore, regardless of when that conduct occurred or what the actual breach was, the statute of limitations for all the conduct began to run at the outset of the "contract interpretation" dispute to which it corresponds. This analytical foundation allows Novus to contend that even for wrongful conduct that unquestionably occurred less than three years before suit was filed (and to be clear, this goes not only for merely

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[4] Please know the use of such a simple example above is not meant to be flippant but merely to show that (be it a promise to do some act for one dollar or for millions of dollars) the breach is generally easy to identify in contracts where there is one promise or act to be performed. Here, however, the Agreement is not a simple contract with one promise to act or one grant of permission to take some singular action.

[5] (Fourth Circuit Certification Order p. 2.)

"alleged" wrongful conduct but even, under the logic of Novus's theory, for conduct that is unquestionably wrongful) Poly-Med's claims are nonetheless barred by the three-year limitations period. Novus even urges the Court to disregard the obvious difference between the wrongful *sale* of the Mesh in breach of the Agreement sometime before 2010 (Novus even now has not specified when it first started illegally selling the Mesh) and the wrongful *manufacture* of the Mesh in 2014; all of it is swept into the virtual "contract interpretation" dispute.

Novus's contract-interpretation-dispute argument is contrary to South Carolina law. A contract may give a right to demand performance, but no cause of action actually arises until a party refuses or neglects to perform some duty required by the terms of the contract. *See Tillinghast v. Boston & Port Royal Lumber Co.*, 39 S.C. 484, 18 S.E. 120 (1893), *overruled on other grounds by Hendrix v. Hendrix*, 296 S.C. 200, 371 S.E.2d 528 (1988). Thus, a contract cannot give rise to a cause of action until there has been some breach of such contract. *Id.* A breach of contract is defined as a failure without legal excuse to *perform* any promise that forms the whole *or part* of a contract. Black's Law Dictionary 188 (6th ed.1990). In other words, a mere dispute about contract interpretation, in the absence of *conduct* contrary to the terms of the contract (i.e., an act or omission amounting to a failure of performance), does not give rise to a cause of action for breach of contract: the cause of action and the accrual thereof is tied to the occurrence of the alleged

wrongful *conduct*, a point which is wholly consistent with, and thus underscored by, the discovery rule itself. *See True v. Monteith*, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997) ("Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that *a cause of action exists for the wrongful conduct*.") (emphasis added).

Novus asks this Court to ignore the fact that it committed separate and distinct acts (and, in the case of manufacturing, entirely new acts), within the limitations period, that constitute separate and distinct actionable breaches of the *ongoing* Agreement. Instead, it asks this Court to accept that the issue is two "contract interpretation" disputes. Allowing what are in fact non-actionable "disputes" to govern the statute of limitations would be the truly revolutionary action. All contract actions would be governed by the date on which one of the parties disputed what contract language meant, not when the wrongful act or inaction occurred.

Without question, the Agreement was in force and binding on Novus at all times relevant to the fresh breaches underlying the claims Poly-Med seeks to pursue. Novus does not deny that the Agreement was in force. For that matter, by its very nature, Novus's statute of limitations argument does not deny the existence of Poly-Med's rights under the Agreement. *See Merchant's Mutual Ins. Co. v. S.C. Second Injury Fund*, 277 S.C. 604, 608, 291 S.E.2d 667, 669 (1982) ("A statute of limitations period affects the *remedy, not the right* . . .") (emphasis added).

Fundamentally, Novus's analysis fails for the same reason that doomed the district court decision the Seventh Circuit Court of Appeals reversed in *Hi-Lite Products Co. v. American Home Products Corporation*: "it fail[s] to consider the nature of the contract [at issue] and the nature of the breaches." 11 F.3d 1402, 1408 (7th Cir. 1993). Despite Novus's assertions to the contrary, the idea that the nature of the contract at issue and the nature of the alleged breaches should be considered in analyzing the accrual of causes of action for breach of contract is not alien to South Carolina law. Indeed, as the United States District Court for the Central District of California recognized in finding *Hi-Lite* instructive: "[A]lthough *Hi-Lite* 'is not a California case, it involves *a basic proposition of contract law*—the accrual of causes of action for breach of contract. There is no reason to believe . . . that California law on this issue is different from the Illinois law applied in' *Hi-Lite*." *Bakst v. Community Mem. Health Sys., Inc.*, 2011 WL 13214315 at *11 n.54 (C.D. Cal. 2011) (emphasis added).[6] There is likewise no reason to believe that South Carolina law is materially different on this score either. In fact, as this Court long ago recognized, "When a party to a contract refuses to do that which he thereby

[6] An additional longstanding, out-of-state authority supporting this basic proposition of contract law is *Green v. Petersen*, 218 N.Y. 280, 281–83, 112 N.E. 746, 746–47 (1916) ("We think that the bond was intended as a continuing security; that each breach as it was committed gave rise to a separate cause of action; and that the loss through lapse of time of the remedy for one wrong has therefore no effect upon the remedy for the others.")

promised to do, *that act* constitutes a breach of the contract, and gives the other party *a cause of action for that breach*. But a breach at one stage of a *continuing* contract . . . does not necessarily put an end to the whole of the contract; that is, entitle the other party [(i.e., the non-breaching party)] to rescind the entire contract." *Collins-Plass Thayer*, 109 S.C. 245, 95 S.E. at 512 (emphasis added).

B. This Court is not being asked to adopt new law.

Every argument raised by Novus proclaims this Court is being asked to adopt new law. Beyond that, Novus claims that such a change will be "seismic." It is not new law, much less some seismic change, that Poly-Med proposes; nor is it a patchwork of bits and pieces of law. It is an interpretation accepted in numerous jurisdictions throughout the country. Moreover, while other jurisdictions may have put a finer point on it, it is the interpretation called for by South Carolina's existing law. Poly-Med merely seeks to have this Court apply our existing law in an equitable and logical manner to the facts of this particular case.

Poly-Med wonders whether this Court has ever seen a record or brief where a party has proclaimed with such enthusiasm how early and often it breached its contractual obligations, thereby supposedly inoculating itself from litigation after three years. Novus does not stop there. It has the audacity to invoke equitable principles by arguing the "undisputed and *egregious facts of this case*" (emphasis added) by Poly-Med (one assumes for not suing on the first "disagreement" Novus

claims the parties may have had as to the interpretation of the Agreement) should color this Court's view of the questions presented in its favor.

Novus's gall continues as it argues that, if Poly-Med is allowed to pursue claims for its *fresh* breaches, "it would be severely prejudiced by their investment of millions of dollars . . . but for [Poly-Med's] decision to ignore the statute of limitations." (Defs.' Br. p. 25).[7] This argument is a poor attempt to rebut the argument in Poly-Med's initial brief that:

> Novus does not claim it was somehow lulled into believing it had the right(s) under the Agreement to take the various actions (i.e., breaches) it is being sued for by Poly-Med. Rather, it proclaims it likely breached the Agreement on the date it was entered. (*See* J.A. 1690–91.) It seeks to turn admitted wrongdoing into a viable defense—to profit and obtain legal rights to which it is not entitled via breaching an executory Agreement (under which it continued to partially perform even after the stale breaches).

(Pl.'s Br. p. 22). Now, for the first time and with no reference to the record, Novus asserts a manufactured reliance on its part as a result of not being sued for some earlier breach it committed. This is but an attempt to divert attention from its own

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[7] Found throughout its brief is the sentence or phrase "[t]he Novus Defendants do not make this point to *tout allegedly breaching behavior*." (*See, e.g.,* Defs.' Br. pp. 6, 9 (emphasis added).) To the contrary, Novus touts its early breaches because it believes that, by operation of the statute of limitations, those breaches immunize it from the consequences of its later breaches, such as its *manufacturing* the Mesh in violation of the Agreement, which the record establishes only first occurred within three years of the filing of this lawsuit, and for which Poly-Med unquestionably timely sued.

actions and the question at hand. In the thousands of pages filed, Novus never asserts it did not commit the numerous and deliberate breaches of the Agreement raised. Sometimes it is what is not said that is the more telling.

Poly-Med is asking this Court to apply our current statutory and case law to answer the certified questions posed by the Fourth Circuit Court of Appeals. Contrary to Novus's brief, Poly-Med is NOT asking this Court to make new law. Rather, Poly-Med merely asks that this Court clarify how our statute of limitations applies to contracts with multiple obligations that are and remain ongoing over time. As the federal district court itself recognized, if our statute of limitations applies (as our extant case law and logic dictate it should) separately to separate breaches of continuing contractual obligations, Novus is not entitled to summary judgment on Poly-Med's claims for fresh breaches of the Agreement.

Novus's counsel hedges by claiming that a ruling by this Court allowing suit on fresh breaches would be "new law" in this state. It would not be new law, but rather an answer to how our existing law can and should be applied to a rather unique factual scenario. Although never stated, Poly-Med anticipates Novus will attempt to classify any ruling in Poly-Med's favor as new substantive law of prospective application only. But such an effort by Novus would be misguided, as again, statutes of limitations are procedural under South Carolina law. Further, Poly-Med is not seeking a change in the law. *See, e.g., Marcum v. Bowden*, 372 S.C. 452, 643 S.E.2d

85 (2007) (changing common law to adapt to the realities of the modern world regarding social host liability). It seeks clarification from this Court on the application of our current law to this case.

C. This case involves no tort claims.

The parties, the district court, and the Fourth Circuit all recognized this factual scenario has not been specifically reviewed or ruled upon by this Court in a breach of contract case. While Novus attempts in its brief to make this issue out to be a quixotic effort by Poly-Med, the district court recognized the issue as the "crux" of the underlying case, holding "*if the court finds that continuing breach is recognized* under South Carolina law, *Poly-Med's claims* alleging *the breach of the Agreement would not be barred* by the statute of limitations merely because *one or more of the alleged breaches occurred outside of the three year limitations period*." (emphasis added.)

This is an action for breach of contract. Tort claims were not raised and were never in issue. Novus spends many pages addressing numerous tort cases. This is not a tort case. To read Novus' brief, one would assume it is. There is no need to review cases from this or any other court addressing the "continuing tort doctrine" or the "continuous treatment doctrine." (*See, e.g.,* Defs.' Br. pp. 17–18.) They are irrelevant to the issue before this Court and primarily relate to a form of tolling which

allows recovery for stale claims. Poly-Med has made clear tolling is not what it is seeking here.

In an effort to conflate totally unrelated issues, Novus notes, "no South Carolina case has determined that a breach of contract claim *should be converted into a continuing-tort type claim* in order to avoid or alter application of the three-year statute of limitations." (Defs.' Br. p. 18 (emphasis added).) Poly-Med has never claimed as much and certainly has never asked this Court to convert breach of contract claims into tort claims. Novus briefs this issue extensively to avoid discussion of the actual issue here: whether, where a continuing contract is breached more than once, the injured party should be allowed redress for the discrete, independently actionable wrongs when suit on those wrongs is timely commenced within the applicable statute of limitations.

D. Public policy is supported by answering the primary certified question affirmatively.

Novus argues, "changing the law" (its mischaracterization of what it would mean for this Court to answer "yes" to the primary certified question) "would be contrary to public policy." (Defs.' Br. pp. 19-20.) First, Poly-Med seeks no "change" in the law. This red herring is nothing more than an effort to avoid addressing the actual questions posed by the Fourth Circuit.

The Fourth Circuit recognized the Agreement established "continuing rights and obligations . . . ." It further recognized that Poly-Med brought "breach-of-

contract claims . . . for separate breaches that occurred (or were only first discovered) within the statutory period . . . notwithstanding the prior occurrence and/or discovery of breaches as to which the statute of limitations has expired."

Novus's argument avoids addressing the many examples found in Poly-Med's brief as to why fresh claims should be actionable under South Carolina law. Likewise, it summarily ignores the very apt example and discussion of law and equity by the Fourth Circuit in *Betsy Johnson*[8] by simply stating it is an installment contract case. Novus's only defense is to state from the beginning of its brief that *all* causes of action relate in one way or another to the "same contract interpretation dispute . . . ." (Defs.' Br. p. 1.)

If this approach is followed, where one party to a long-term, continuing contract does not sue for an act/omission that can be traced back to a disagreement regarding contract terms, after three years, the other party is effectively free to breach other provisions of the contract without consequence. This is especially true here, where the right to *use and sell* the Mesh is distinct from the right to actually *manufacture* the Mesh. These rights are set forth in separate provisions of the Agreement. (*Compare* J.A. 81–82 § 5 *with* 83–84 § 6(c).) Novus's surface-level analysis fails to discern, much less address, the simple fact that an executory contract

[8] *MedCap Corp. v. Betsy Johnson Health Care Sys., Inc.*, 16 Fed. Appx. 180, 2001 WL 880097 (4th Cir. 2001).

may be subject to multiple breaches. *Collins-Plass Thayer*, 109 S.C. 245, 95 S.E. 510; *cf. Marshall v. Dodds*, 426 S.C. 453, 827 S.E.2d 570 (2019) (recognizing multiples breaches of the standard of care for medical malpractice claims) (citing *Kaminer v. Canas*, 282 Ga. 830, 653 S.E.2d 691, 698 (2007)).

Novus asserts all breaches of a contract ultimately relate back to the interpretation of a contract. It contends the first disagreement triggers three years to sue, even for breaches that have not occurred. Based on this fiction, Novus asserts there are no fresh breaches as "all [of the alleged] wrongful conduct all arises out of the contract interpretation dispute . . . ." (Defs.' Br. p. 5.)

Such a broad and superficial approach is inconsistent with both public policy and the purpose of statutes of limitations. The statute of limitations should not be used as a sword to usurp rights or property a party admittedly does not own. It should likewise not be used as a vaccine to inoculate actionable breach of contract claims, i.e., discrete, independently actionable wrongs. That is the exact position Novus champions.

"Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that *a* cause of action exists for *the* wrongful conduct." *True*, 327 S.C. at 119, 489 S.E.2d at 616 (emphasis added). This is not a case of one instance of wrongful conduct causing continuous harm over a protracted period. This case

involves separate and distinct acts of wrongful conduct (each giving rise to a separate and distinct claim for breach of contract) for which the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for each such instance of wrongful conduct.

Novus would force parties to litigate any contract-related issues, even those a party may not (for any number of reasons) wish to litigate, or face losing the right to enforce contractual rights that have not yet been breached. For fresh breaches, which first occurred or were only first discoverable within three years of bringing suit, faded memories or lost evidence are simply not a concern. This is one of the key policy reasons behind statutes of limitations, and Novus never addresses it. Perhaps that is because Judge Posner had it right when he noted that if the last act of the unlawful course of conduct occurred within the limitations period, some of the evidence of the alleged misconduct will be "fresh" and that any uncertainty a defendant has about whether they will be sued will evaporate upon the expiration of the statute of limitations period *following the final bad act*. *Taylor v. Meirick*, 712 F.2d 1112, 1119 (7th Cir. 1983) (applying continuous violations doctrine to trademark claims). Surely, public policy does not favor forcing parties into litigation at their first potential disagreement. Statutes of limitations serve a laudable goal, but incentivizing and then immunizing wrongful conduct in violation of a

contract is simply not it; nor is it mandating the pursuit of otherwise avoidable litigation. If Novus wanted to rely on the statute of limitations, it should have stopped breaching the Agreement. Instead, it deliberately continued to engage in actionable wrongs. Public policy and the most elementary notions of justice should not shield such behavior.

E. Novus's attempts to use factual arguments to undercut the law are unavailing.

Novus argues the underlying facts extensively. It does so at the expense of addressing the questions presented. This is perplexing, as even the district court recognized, under the facts claimed by Novus, that if South Carolina allows a party to sue for multiple separate breaches of a continuing contract, Novus will be required to go to trial. Poly-Med will be allowed to sue for independent breaches of the Agreement that occurred or were only first discoverable within three years of this suit. The district court recognized this giving full consideration to the "facts" Novus raises repeatedly.

A prime example of how Novus is wrong to assert that all breaches arise out of a "contract interpretation" dispute and can be wrapped in the same package comes from the Agreement's terms regarding manufacturing. The Agreement prohibits Novus's *manufacture* of the Mesh for any purpose other than hernia repair. The evidence in the record is that Novus did not begin to *manufacture* the Mesh *at all* until 2014—well within the three-year statute of limitations. (*See* J.A. 2723 ¶ 21,

2756 ¶ 64.) Nonetheless, the district court ruled Poly-Med was powerless to enforce the Agreement's prohibition on *manufacturing* for non-hernia purposes because Novus had (among other, undeniably fresh occasions) previously breached the Agreement's prohibition on *using and selling* the Mesh (manufactured by Poly-Med) for applications other than hernia repair dating back to 2010. Novus's response to this glaring example of a separate and distinct violation is to throw the words "making and/or having the mesh manufactured" in its descriptions of what it deems its prior breach of the contract. As noted, per its own testimony, Novus did not *manufacture* the Mesh *at all* until 2014. (*See* J.A. 2723 ¶ 21, 2756 ¶ 64.)

Likewise, in an ongoing contract, just because you get away with a breach or a party to the contract decides not to sue for some reason does not give one free reign to convert the contract into an invitation to commit additional discrete, independently actionable wrongs, i.e., breaches, which in turn allow improper possession and use of patents, sales, or other property rights once three years passes from the first improper conduct. This is especially true where the Agreement contains two non-waiver provisions. With regard to the performance of all obligations, the Agreement specifically provides in relevant part, "Any waiver by either party hereto of any rights arising from any breach of any provision of this Agreement shall not be construed as a continuing waiver of other breaches of the same or other provisions of this Agreement." (J.A. 98–99.) With regard to

termination for default, the Agreement provides in relevant part, "Waiver by either party of a single default or a succession of defaults shall not deprive such party of any right to terminate this Agreement arising by reason of any subsequent default." (J.A. 94–95 § 20; *see also* J.A. 923 ¶ 16 (non-waiver clauses are enforceable under Swedish Law).) A declaration that the Agreement is terminated is precisely what Poly-Med seeks in this action.

Poly-Med is not attempting to go back in time to recover damages for stale breaches. There is simply no reason, be it public policy or avoiding stale litigation claims, to allow Novus to escape accountability for breaches which occurred within three years of Poly-Med filing suit. To sanction such actions would be contrary to the fundamental duties of good faith and fair dealing that are implied by law into every contract in this state. *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) ("There exists in every contract an implied covenant of good faith and fair dealing.").

F. *Wilson* and *Marshall*, while not controlling, support the acceptance of allowing suit for breach of contract when such breaches were sued upon within three years of the discovery of the discrete independently actionable wrong.

Novus spends significant time explaining the obvious points found in *Wilson* and *Marshall*. Poly-Med understands *Wilson* is a UTPA case. It is aware each unfair act is a separate and distinct violation per the terms of the statute. Conceptually, however, this is no different from what the Agreement provides: each breach is a

separate and distinct violation per the terms of the Agreement, which terms, of course, include the aforementioned non-waiver clauses. Indeed, the statute of limitations for UTPA claims and breach of contract claims is in fact the very same statute, § 15-3-530, with subsection (1) applying to "an action upon a contract . . ." and subsection (2) applying to "an action upon a liability created by statute other than a penalty or forfeiture," and the discovery rule applies to both UTPA and breach of contract claims. *See Wilson*, 414 S.C. at 76, 777 S.E.2d 198–99 (recognizing that the discovery rule applies to UTPA claims); *Price v. Liberty Life Ins. Co.*, 390 S.C. 166, 169, 700 S.E.2d 280, 282 (Ct. App. 2010) ("The discovery rule applies to breach of contract actions.").

Wilson was cited by Poly-Med to support the right to sue for timely challenged wrongs as well as the remedy reached by this Court in addressing such wrongs. Stale claims not timely brought may not form the basis for a violation of the UTPA as to its penalty and remedy provisions, but timely violations that occurred and are sued upon within the applicable limitations period may be pursued.

In *Wilson*, this Court rejected the defendant's position that its successful statute of limitations defense for old violations also "insulated" it from liability for its new ones,

> [T]he inequities that would arise if the expiration of the statute of limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or misconduct;

> parties engaged in long-standing malfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing malfeasance. In addition, where misfeasance is ongoing, a defendant's claim to repose, the principal justification underlying the limitations defense, is vitiated. . . . [Accordingly,] separate, recurring invasions of the same right can each trigger their own statute of limitations. . . . *Generally speaking, continuous accrual applies whenever there is a continuing or recurring obligation: [w]hen an obligation or liability arises on a recurring basis, a course of action accrues each time a wrongful act occurs, triggering a new limitations period.*

Id. at 78, 777 S.E.2d 199–200 (emphasis added)

The district court dismissed *Wilson* out of hand on the basis that it was a UTPA claim, but it did not have the benefit of *Marshall*. Poly-Med fully understands *Marshall* involved the statute of repose for medical malpractice actions. Still, the *Marshall* Court ultimately faced what in many ways is a similar issue: "In a medical malpractice case where evidence exists that doctors breached the standard of care on multiple occasions, does the statute of repose begin to run with each breach, resulting in recent breaches being actionable even though older ones are barred?" 426 S.C. at 460–61, 827 S.E.2d at 574.[9] Answering the question in the affirmative, this Court reasoned:

[9] While *Marshall* involved a statute of repose, we are dealing with a statute of limitations in this case. A statute of repose "creates a substantive right in those protected to be free from liability after a legislatively-determined period of time, and it creates a substantive definition of rights rather than a procedural limitation provided by a statute of limitation." *Rogers v. Lee*, 414 S.C. 225, 230,

> *We fail to see the logic in preventing an aggrieved party from seeking redress for acts that occurred within the repose period.* It can hardly be said that the acts of negligence alleged here that occurred within the repose period constitute "long-forgotten" acts or omissions.
> *Our decision also does not implicate any tolling principles, as only claims based on acts within the repose period are actionable.* We find it wholly inconsistent to immunize serial malpractice under the guise that the legislature intended an "absolute time limit" when the acts for which the Marshalls seek to recover fall within such time constraints. *See State ex rel. Wilson v. Orth- McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 78, 777 S.E.2d 176, 199-200 (2015) (noting that fixing the deadlines on the date of the first instance of misconduct *when there is repeated wrongdoing would allow "parties engaged in long-standing malfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing malfeasance. In addition, where misfeasance is ongoing, a defendant's claim to repose, the principal justification underlying the limitations defense, is vitiated"*) (quoting *Aryeh v. Canon Bus. Solutions, Inc.*, 55 Cal.4th 1185, 151 Cal. Rptr. 3d 827, 292 P.2d 871, 880 (2013)).

Id. at 465–66, 827 S.E.2d at 576 (emphasis added); *see also Johnson v. Roberts*, 427 S.C. 258, 259, 830 S.E.2d 910, 911 (2019) (relying on *Marshall* for the proposition that "the statute of repose begins to run after each occurrence [of negligence]").

Poly-Med maintains that the reasoning and logic of *Marshall* and *Wilson* applies with equal force to the present case. This Court has plainly recognized the

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777 S.E.2d 402, 405 (Ct. App. 2015). This was a key point of the *Marshall* dissent, but it is not implicated in this case. Poly-Med seeks NO tolling, equitable or otherwise.

common-sense principle that aggrieved parties should be able to seek timely redress for recent wrongs. Novus analyzes *Wilson* and *Marshall* as separate cases. It never attempts to synthesize the two cases with regard to ongoing wrongful acts such as are present in this case. There is no logical reason why it would matter whether those wrongs take the form of statutory violations or breaches of contract. Indeed, this conclusion makes all the more sense here, where the contract at issue is operative at all relevant times—and thus continues to contain the very terms Novus maintains it is free to violate without consequence in perpetuity. *Wilson* and *Marshall* provide the framework and reasoning why this should not be the case when applied to breach of contract actions.

G. An affirmative answer to the primary certified question would provide no extra benefit, be it tolling or otherwise, to Poly-Med.

In an attempt to again shift attention from the question at hand, Novus argues answering "yes" to the primary certified question would authorize plaintiffs "to hold the threat of litigation over the defendants after the expiration of the statutory three-year limitations period . . . ." (Defs.' Br. p. 2.) It would not. If the statute has run on a breach, Poly-Med could not bring suit and seek recovery for that *stale* breach. Poly-Med seeks no tolling nor any ability to reach back to claims outside the applicable statute of limitations. It is solely for *fresh* breaches of the Agreement that Novus is exposed to potential litigation. Novus asserts the incredible position that once it runs out the earliest potential statute of limitations, for the remainder of the

contract, it should not face any threat of litigation, not even for subsequent breaches of its continuing contractual obligations. If avoiding the threat of litigation is what Novus seeks, then it should not breach the various obligations of the Agreement.

II. This Supreme Court should conclude it does not matter if the breaches are of the same character or type as the previous breaches now barred.

The fact that certain stale breaches are similar to fresh breaches should play no role in answering the first certified question. What matters is the continued existence of a contractual obligation and fresh conduct in breach of that obligation, not whether that conduct is similar to any earlier wrongful conduct. To deny redress for fresh breaches, i.e., fresh acts in breach of ongoing contractual obligations, on the basis of their similarity to prior breaches is to allow two wrongs to make a right and to encourage parties who have deliberately breached a contract to attempt to benefit by somehow linking such fresh breaches to their own prior bad acts.

Regarding the manufacturing claim, Novus's argument goes like is:

1. We did not manufacture the Mesh until 2014 (with this lawsuit being filed in 2015); *but*

2. The Agreement only prohibits manufacturing mesh for non-hernia use; *and*

3. We have sold or used the Mesh for non-hernia applications; *and if*

4. Poly-Med failed to try and stop us for what we knew was not allowed under the Agreement; *so*

5. Poly-Med should be omnipotent and realize that if we manufacture in the future it would be for non-hernia use; *but*

6. Manufacturing claims that did not arise until 2014 really relate back to our "contract interpretation dispute."

It takes a number of "ifs and buts" for Novus to try and tie manufacturing, which started in 2014, with an alleged contractual disagreement in 2010. Hopefully, this Court recognizes Novus never once claims the alleged 2010 disagreement had anything to do with actual manufacturing. It, like any skilled litigant, can play the six-degrees-of-separation game between a discrete, independently actionable wrong and an unrelated action from the past. This Court should not sanction such a farce.

In its opening brief, Poly-Med discussed a number of cases addressing the issue presented in the secondary certified question. These cases conclude that whether the acts in issue are "of the same character or type" is not material to determining the second certified question asked by the Fourth Circuit. The record here shows some breaches by Novus were more similar and others, such as those for wrongful manufacturing and for not respecting—in effect, stealing—Poly-Med's intellectual property, were less so. What is common to all is the harm for which Poly-Med seeks equitable and declaratory relief is unique to each fresh breach. To deny Poly-Med recourse for the same would be inconsistent with the notions of fair play and substantial justice mandated by this Court.

Novus maintains that all breaches that can be traced back by legal argument to a contract interpretation and are thus automatically of the same character or type as previous breaches are barred, regardless whether some of the breaches occurred during the limitations period or even after the action was filed. Such a rule would require courts to determine whether a given breach is of the "same character or type" as any prior, time barred breaches because it can be traced back by legal argument to a contract interpretation, instead of merely looking to the date of each separate and distinct breach. Courts should simply look at the date a given breach was discovered, or reasonably could have been discovered. Specific breaches discovered before the limitations period are barred and the plaintiff may have no remedy with respect thereto. Specific breaches that occurred during the limitations period, or after action was filed, are not barred and the plaintiff has a remedy, and in this case termination the contract, as a result therefrom.

Finally, the Agreement was an ongoing contract with two non-waiver provisions. Each sale in violation of its terms and conditions is a separate and distinct breach. Novus admittedly filed some patent applications in breach of the Agreement more than three years before this action was filed. But at least four separate and distinct patent applications involving the Mesh were filed within three years of this lawsuit's filing, and Poly-Med could not have known about at least two

others until a date less than three years before this action was filed in that they are kept officially confidential for a period of time.

The key factor is when did the independent breach occur, not whether Novus did something similar in the past which it got away with for some reason. As such, the second certified question should be answered no.

CONCLUSION

For the foregoing reasons, along with those already set forth in Poly-Med's principal brief, this Supreme Court should answer the Fourth Circuit Court of Appeals so as to allow Poly-Med to prosecute and maintain claims for all fresh causes of action, regardless of whether the fresh breaches are of the same character or type as stale breaches.

Respectfully submitted,
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