THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No.: 2021-001168

BVW HOLDING AG…….Respondent,

v.

HOOWAKI, LLC,……..…….Appellant.

RECORD ON APPEAL

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP2301191

BVW Holding Ag
PLAINTIFF(S)

Hoowaki Llc
DEFENDANT(S)

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), 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:

At the call of the case Attorneys Amber Bagby Glidewell and James Cassidy appeared on behalf of the Plaintiff BVW Holding Ag. Attorney Vincent Austin Sheheen appeared on behalf of the Defendant Hoowaki LLc. The Defendant Hoowaki's Motion to Dismiss and Compel Arbitration is taken under advisement. Counsel for both sides to submit proposed orders within 30 days from the date of today's hearing.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/02/2021 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: 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 judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

Greenville Common Pleas

Case Caption: BVW Holding Ag vs. Hoowaki Llc

Case Number: 2021CP2301191

Type: Order/Electronic Form 4

So Ordered

s/Alex Kinlaw, Jr., #2763

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
BVW Holding AG,	)	
	)	
Plaintiff,	)	**ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION**
	)	
vs.	)	
	)	
Hoowaki, LLC,	)	C.A. No.: 2021-CP-23-01191
	)	
Defendant.	)	
	)	

This matter comes before the Court by way of a Motion to Dismiss and to Compel Arbitration filed by Hoowaki, LLC ("Hoowaki") on August 2, 2021 on the grounds that certain Agreements existed between Hoowaki and BVW Holding AG ("BVW") which contemplate that any dispute between the parties shall be resolved through Alternate Dispute Resolution.

A hearing was held on August 2, 2021, at the Greenville County Court of Common Pleas. Present at the hearing were James H. Cassidy and Amber Glidewell of Roe Cassidy Coates & Price, P.A., attorneys for BVW and Vincent A. Sheheen of Savage, Royall & Sheheen, LLP, attorneys for Hoowaki. Prior to the hearing, both parties filed with the Court legal memoranda with exhibits.

Having carefully considered the entirety of the record in this matter, including the Motion, the pleadings, the legal memoranda and supporting documents, and the arguments of counsel, the Court hereby finds that Defendants Motion to Dismiss and Compel Arbitration should be **DENIED**.

BACKGROUND

This action was brought by BVW by the filing of a complaint on March 10, 2021 against Hoowaki for failure to pay a promissory note. Hoowaki executed and delivered a promissory note

to BVW dated October 16, 2018, containing a promise to pay the principal sum of One Hundred Nineteen Thousand and 00/100 Dollars ($119,000.00) (the "Note"). A copy of the Note was attached to BVW's complaint and reviewed by the Court. BVW also filed a verified statement of account as certifying the amount due as of February 27, 2021 to be One Hundred Thirty-Three Thousand Six Hundred Eighty-Six and 50/100 Dollars ($133,686.50). Hoowaki filed a Motion to Dismiss and Compel Arbitration on April 29, 2021.

STANDARD OF REVIEW

A defendant may move to dismiss a complaint based on a plaintiff's failure to state facts sufficient to constitute a cause of action. Rule 12(b)(6), SCRCP; Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). A court's decision to grant a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. Spence, 368 S.C. at 116, 628 S.E.2d at 874; Clearwater Trust v. Bunting, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006).

In reviewing a motion to dismiss, the court must accept as true the well-pleaded facts in the complaint. See Gressette v. S.C. Elec. & Gas Co., 370 S.C. 377, 379, 635 S.E.2d 538, 538 (2006). Essentially, the plaintiff must describe each element of the cause of action in terms of the facts of the case. "The cause of action should not be struck merely because the court doubts the plaintiff will prevail in the action." McCormick v. England, 328 S.C. 627, 494 S.E.2d 431, 433 (Ct. App. 1997). The Court is required to "construe the complaint in a light most favorable to the nonmovant." Freemantle v. Preston, 398 S.C. 186, 192, 728 S.E.2d 40, 42 (2012).

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). It is well established that "where one party denies the

existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67,78,749 S.E.2d 139, 144 (Ct. App. 2013). Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007).

ANALYSIS

After reviewing the Note, I find that BVW's complaint has sufficiently stated the facts in order to constitute its cause of action for a suit on the Note. The Note is dated October 16, 2018 and specifically provides that the Note was made and executed under, and is to be construed by, the laws of South Carolina.

Hoowaki contends that a Cooperation and License Agreement (the "Agreement") entered into between the parties and made effective January 10, 2012 requires that any dispute between the parties be controlled by the "Dispute Resolution" provisions of the Agreement and therefore BVW should be required to participate in the dispute resolution terms of the Agreement.

I find that Hoowaki's obligations to repay the Note do not arise out of the Agreement and is a wholly unrelated obligation of Hoowaki to BVW. The Agreement grants licenses for certain patents and dictates the collaborative relationship between the parties for development of certain products. The Agreement is a stand-alone agreement which is separate and distinct from the Note. The Note is devoid of any reference to the Agreement, or of any other contract or transaction between BVW and Hoowaki. Likewise, the Agreement is devoid of any reference to a note or any

other obligation of repayment on a loan. Neither the Note nor the Agreement identify or link the Note as an obligation arising out of the Agreement.

I find that the language of the Note provides for its remedies. The Note is governed by the laws of the State of South Carolina and further contains no requirement to arbitrate or reference to the Federal Arbitration Act. A disclosure that the document is subject to arbitration is notably absent from the face of the Note. In addition, the Note provides that the maker agrees to pay reasonable attorney's fees in case of a suit or collection by an attorney or litigation involving the debt or any security therefore reasonably requiring employment of counsel to protect or enforce any right or remedy of the holder. The maker also waived presentment, demand, protest, and notice of dishonor. The Note clearly contemplates that any action for collection will be brought pursuant to the terms provided therein, not based on another document or agreement between the parties. There are no facts to suggest that the Note is governed under the Agreement.

By contract, the Agreement is governed by New York law and includes a specific dispute resolution procedure for resolving disputes between the parties which arise out of the Agreement. The dispute resolution procedures dictated in the Agreement are inconsistent with the terms of the Note. Section 11.2 references dispute resolution under "this Agreement" and does not include or contemplate the Note or any other agreement between the parties in the definition of "this Agreement." Section 11.2(a) of the Licensing Agreement requires that each party first provide a "Dispute Notice" to summarize the dispute, set forth the party's position, and provide relevant material. In contrast, the Note, governed by South Carolina Law, explicitly waives any requirement to follow the dispute resolution procedure contained in the Agreement, and states that the maker waives presentment, demand, protest and notice of dishonor. The dispute resolution procedures provided in the Agreement cannot be reconciled with the Note's explicit language for resolution

of the payment terms. The obligation of repayment by Hoowaki is not determined by the Agreement, but is instead contained within the Note itself.

Having carefully considered all of the facts and evidence presented, I find that BVW has properly plead sufficient facts to constitute a cause of action for suit and Note, that there is no valid and enforceable arbitration requirement for the Note and, therefore, the Motion to Dismiss and Compel Arbitration is DENIED.

IT IS, THEREFORE, ORDERED, ADJUGED, AND DECREED that there, the Defendants' Motion is hereby **DENIED**.

AND IT IS SO ORDERED.

(JUDGES SIGNATURE PAGE TO FOLLOW)

Greenville Common Pleas

Case Caption: BVW Holding Ag vs. Hoowaki Llc

Case Number: 2021CP2301191

Type: Order/Other

So Ordered

s/Alex Kinlaw, Jr., #2763

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMOM PLEAS
BVW Holding AG, Plaintiff	)	ORDER DENYING DEFENDANT'S RULE 59(e) MOTION
VS.	)	2021-CP-23-01191
Hoowaki, LLC Defendant	)	

Upon the Court's examination of the Motion filed by the Defendant, as well as supporting argument, this Court finds nothing that would alter or amend its prior order filed with the court on September 1, 2021. Therefore, the Defendant's Rule 59 (e) Motion asking the Court to reconsider its prior ruling in the matter is hereby Denied.

Greenville, South Carolina
September 20, 2021

_____
Alex Kinlaw, Jr.
Circuit Court Judge

Greenville Common Pleas

Case Caption: BVW Holding Ag vs. Hoowaki Llc

Case Number: 2021CP2301191

Type: Order/Other

So Ordered

s/Alex Kinlaw, Jr., #2763

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
BVW Holding AG,	)	
	)	
Plaintiff,	)	**SUMMONS**
	)	
vs.	)	
	)	
Hoowaki, LLC,	)	
	)	
Defendant.	)	
	)	

You are hereby summoned and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at Post Office Box 10529, Greenville, S.C. 29603, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint, appear, or defend within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

s/ Amber B. Glidewell
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aglidewell@roecassidy.com
Roe Cassidy Coates & Price, P.A.
Attorneys for Plaintiff
Post Office Box 10529
Greenville, SC 29603
(864) 349-2600

Greenville, South Carolina
Date: March 10, 2021

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
BVW Holding AG,	)	
	)	
Plaintiff,	)	**COMPLAINT**
	)	**(Suit on Note)**
vs.	)	**Non-Jury Proceedings**
	)	
Hoowaki, LLC,	)	
	)	
Defendant.	)	
	)	

The Plaintiff, BvW Holding AG (hereinafter "Lender" or "Plaintiff"), complaining of the above-named Defendant would respectfully show unto the Court that:

1. Lender is a company organized and existing under the laws of Switzerland and doing business in the County of Greenville, State of South Carolina.

2. Upon information and belief, Defendant, Hoowaki, LLC (hereinafter, "Debtor"), is a company organized and existing under the laws of the State of South Carolina.

4. This Court has jurisdiction over the parties and subject matter hereto pursuant to the terms of the Note (as hereinafter defined).

5. This action involves the collection of a debt.

6. For value received, Debtor executed and delivered a Note to Lender dated October 16, 2018, containing a promise to pay the principal sum of One Hundred Nineteen Thousand and 00/100 Dollars ($119,000.00), together with interest thereon upon such terms as are contained in said Note (hereinafter "Note"). A copy of which is attached to and made a part of this Complaint as "**Exhibit A**" and incorporated herein by reference, the same as if fully set forth in this Complaint.

7. The terms of said Note provided, among other things, that on failure to pay any installment of either principal or interest, or any portion thereof, when due or on failure to comply with any of the conditions and requirements in said documents, then the whole principal sum and accrued interest shall, at the option of the legal holder thereof, become immediately due and payable and collectable by foreclosure. The maker of said documents further agreed to pay reasonable attorney's fees in the event said Note should be collected or foreclosed by an attorney.

8. Debtor has failed to pay in accordance with the terms and provisions of the Note, and the subject account is presently in arrears. Plaintiff, under the terms of the subject Note, has declared the entire outstanding indebtedness to be immediately due and payable. The subject account remains in arrears. There is now due and owing to Plaintiff on the Note, the sum of One Hundred Thirty-Three Thousand Six Hundred Eighty-Six and 50/100 Dollars ($133,686.50), plus interest from February 27, 2021, at the rate as shown on the Verified Statement of Account, which is attached hereto, marked as "**Exhibit B**," and made a part and parcel of this Complaint, the same as if fully set forth herein.

9. Under the terms and provisions of the Note, Plaintiff is entitled to recover reasonable attorneys' fees, court costs, and any other legal expenses to be determined by the Court.

10. Plaintiff is informed and believes that Debtor are liable to Plaintiff in the sums set forth above and Plaintiff is entitled to judgment for the same.

11. Plaintiff specifically reserves its right to proceed against all other obligors and all collateral securing this debt, wherever situate and located, and/or to seek the appointment of a receiver, now or in the future.

12. This Summons and Complaint is an attempt to collect the debt and any information obtained will be used for that purpose.

WHEREFORE, Plaintiff demands judgment against Defendant as follows:

(1) Bank have judgment against for the sum of One Hundred Thirty-Three Thousand Six Hundred Eighty-Six and 50/100 Dollars ($133,686.50), plus interest from February 27, 2021, at the rate as shown on the affidavit of account and reasonable attorney's fees as allowed by the Court and for all costs of collection; and

(2) For such other and further relief as the Court may deem just and proper.

s/ Amber B. Glidewell
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Roe Cassidy Coates & Price, P.A.
Attorneys for Plaintiff
Post Office Box 10529
Greenville, SC 29603
(864) 349-2600

Greenville, South Carolina
Date: March 10, 2021

STATE OF SOUTH CAROLINA

PROMISSORY NOTE

COUNTY OF GREENVILLE

FOR VALUE RECEIVED, the undersigned promises to pay, without offset, to the order of BvW Holding AG (hereafter, together with any holder hereof, called "Holder"), at such place as holder may designate and notify undersigned, the full and just principal total sum of One Hundred and Nineteen Thousand Dollars ($119,000.00), with principal and interest thereon payable December 31, 2019. Principal and interest are calculated in three portions: $50,000 from July 14, 2017; $19,000 from July 27, 2017; and $50,000 from August 22, 2017 at the rate 7.50% compounded monthly.

All payments of principal and interest are payable in lawful money of the United States of America, past due principal and interest bear interest at the rate of 7.5%. Maker may pay part or all of the principal in advance, without penalty.

It is further agreed that on failure to pay any installment of either principal or interest, or any portion thereof when due, then the whole principal sum and accrued interest, shall at the option of the legal holder hereof become due and payable without further notice. Forbearance to exercise this right with respect to any failure or breach of the maker shall not constitute a waiver of the right as to any subsequent failure or breach.

The maker of this Note further contracts and agrees to pay a reasonable attorney's fee in case of suit or collection by attorney or litigation involving this debt or any security therefore reasonably requiring employment of counsel to protect or enforce any right or remedy of the holder.

The maker and endorsers of this Note hereby waive presentment, demand, protest and notice of dishonor. It is expressly agreed and understood that this Note is made and executed under and in all respects to be construed by the laws of the State of South Carolina.

Witness the hand and seal of the maker hereof as of this 16th day of October 2018.

WITNESS

Sarah Gibbons

MAKER

Ralph Hulseman, President
Hoowaki, LLC

PLAINTIFF'S EXHIBIT A

"EXHIBIT B"

VERIFIED STATEMENT OF ACCOUNT

1.	Date of note:	October 16, 2018
2.	Amount of note:	$ 142,194.56
3.	Principal balance:	$ 119,000.00
4.	Late Charges:	$ 11,491.94
5.	Interest Fees:	$ 23,194.56
6.	Payoff as of February 27, 2021:	$ 20,000
7.	Final Amount Due:	$ 133,686.50

The above is a true and correct statement of the obligation Hoowaki, LLC has to BVW Holding AG.

Stefan Studer and Armand Brand PERSONALLY appeared before me, Peter Meyer, who, being first duly sworn, deposes and says that they are members of the board of directors (with joint signature right) of BVW Holding AG, and, as such, are thoroughly familiar with the above-stated account; that the information stated above is, according to the records of BVW Holding AG, a true and correct statement of the account of Hoowaki, LLC; that no part of the sum due has been paid by cash, discount, set-off, or otherwise; and that the undersigned has authority to verify this account.

SWORN TO AND SUBSCRIBED
before me this the 04
day of march, 2021

PETER MEYER · AARGAUISCHE URKUNDSPERSON

Notary

None
Expiration Date

BVW Holding AG

BY: _____
Stefan Studer

ITS: Director

BY: _____
Armand Brand

ITS: Director

PLAINTIFF'S EXHIBIT B

APOSTILLE

(Convention de La Haye du 5 octobre 1961)

1. Country / Land: **Swiss Confederation, Canton of Argovia** / **Schweizerische Eidgenossenschaft, Kanton Aargau**

This public document / Diese öffentliche Urkunde

2. has been signed by / ist unterschrieben von: **Peter Meyer**

3. acting in the capacity of / in seiner Eigenschaft als: **Aargauische Urkundsperson**

4. bears the stamp/seal of / Sie ist versehen mit dem Stempel/Siegel des/der: **Peter Meyer Aargauische Urkundsperson**

Certified / Bestätigt

5. at / in: **Aarau**

6. the / am: **05.03.2021**

7. by the / durch das: **Canton of Aargau; Department of Economics and Interior Affairs** / **Kanton Aargau; Departement Volkswirtschaft und Inneres**

8. No. / Nr.: **52589**

9. stamp/seal / Stempel/Siegel

CANTON OF AARGAU • DEPARTMENT OF ECONOMICS AND INTERIOR AFFAIRS

10. Signature / Unterschrift: **Tabatha Hüssy**

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	THIRTEENTH JUDICIAL IRCUIT
BVW HOLDING AG, Plaintiff, vs. HOOWAKI, LLC, Defendant.	Civil Action No.: 2021-CP-23-01191 **MOTION TO DISMISS AND COMPEL ARBITRATION**

TO BVW HOLDING AG AND AMBER B. GLIDEWELL, ESQUIRE, COUNSEL FOR PLAINTIFF:

Defendant hereby moves the Court to dismiss Plaintiff's Summons and Complaint and compel arbitration of Plaintiff's claims. This argument is made pursuant to Rule 12 of the South Carolina Rules of Civil Procedure, as amended; the Federal Uniform Arbitration Act, 9 U.S.C. §§ 1, *et. seq.*; the dispute resolution provision of the Cooperation and Licensing Agreement between the parties; as well as applicable Federal and South Carolina jurisprudence. This motion will be further supported by Defendant's memorandum of law to be supplied before the time of the hearing, plus any other affidavits or documents supplied to the Court.

Respectfully submitted,

s/Michael D. Wright

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mwright@thesavagefirm.com
Attorneys for Defendant Hoowaki

April 29, 2021

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
BVW Holding AG,	)	
	)	
Plaintiff,	)	**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**
	)	
vs.	)	
	)	
Hoowaki, LLC,	)	
	)	C.A. No.: 2021-CP-23-01191
Defendant.	)	
	)	

Plaintiff submits this Memorandum of Law in Opposition to Defendant's Motion to Dismiss and Compel Arbitration (the "Motions") by showing the following:

BACKGROUND

This action was brought by Plaintiff by filing a complaint against Defendant for a suit on a note on March 10, 2021. Defendant executed and delivered a promissory note to Plaintiff dated October 16, 2018, containing a promise to pay the principal sum of One Hundred Nineteen Thousand and 00/100 Dollars ($119,000.00) (the "Note"). A copy of the Note is attached to Plaintiff's complaint as Exhibit A. Plaintiff filed a verified statement of account as Exhibit B, certifying the amount due as of February 27, 2021 to be One Hundred Thirty-Three Thousand Six Hundred Eighty-Six and 50/100 Dollars ($133,686.50). Defendant filed a Motion to Dismiss and Compel Arbitration on April 29, 2021.

STANDARD OF REVIEW

A defendant may move to dismiss a complaint based on a plaintiff's failure to state facts sufficient to constitute a cause of action. Rule 12(b)(6), SCRCP; Spence v. Spence, 368 S.C. 106,

116, 628 S.E.2d 869, 874 (2006). A court's decision to grant a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. Spence, 368 S.C. at 116, 628 S.E.2d at 874; Clearwater Trust v. Bunting, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006).

In reviewing a motion to dismiss, the court must accept as true the well-pleaded facts in the complaint. See Gressette v. S.C. Elec. & Gas Co., 370 S.C. 377, 379, 635 S.E.2d 538, 538 (2006). Essentially, the plaintiff must describe each element of the cause of action in terms of the facts of the case. "The cause of action should not be struck merely because the court doubts the plaintiff will prevail in the action." McCormick v. England, 328 S.C. 627, 494 S.E.2d 431, 433 (Ct. App. 1997). The Court is required to "construe the complaint in a light most favorable to the nonmovant." Freemantle v. Preston, 398 S.C. 186, 192, 728 S.E.2d 40, 42 (2012).

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007) (internal citation omitted). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67,78,749 S.E.2d 139, 144 (Ct. App. 2013). Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007).

ARGUMENT

1. Motion to Dismiss should be denied because Plaintiff's complaint state facts sufficient to constitute a case of action.

Plaintiff's complaint has sufficiently stated the facts in order to constitute its cause of action. As of the date of filing this Memorandum, Defendant has not filed any supporting document(s) setting forth its allegations with regards to the sufficiency of Plaintiff's complaint.

2. Motion to Compel Arbitration should be denied because the Note does not require Arbitration and is unrelated to the Cooperation Agreement.

Defendant's Motions reference a Cooperation and Licensing Agreement between the parties. Plaintiff and Defendant entered into a Cooperation and Licensing Agreement effective as of January 10, 2012[1] (the "Licensing Agreement"). The Licensing Agreement grants licenses for certain patents and dictates the collaborative relationship between the parties for development of certain products. The parties entered into an addendum to the Licensing Agreement in 2017[2] (the "Addendum"). The Licensing Agreement is a stand-alone agreement which is separate and distinct from the Note which is the subject of Plaintiff's Complaint.

The Note did not arise out of the Licensing Agreement and is a wholly unrelated obligation of Defendant to Plaintiff. The Note does not originate from any obligation, payment, or requirement of the Licensing Agreement and Addendum between the parties. The Note itself is devoid of any reference or implication to the Licensing Agreement and Addendum, or of any other contract or transaction between Plaintiff and Defendant. Further, the Licensing Agreement and Addendum do not anticipate or contemplate a loan from Plaintiff to Defendant. Thus, neither the

[1] Due to the confidential nature of the Licensing Agreement, a copy will be provided for the Court's review at the hearing.
[2] Due to the confidential nature of the Addendum, a copy will be provided for the Court's review at the hearing.

Note nor the Licensing Agreement and Addendum identify or link the Note as an obligation arising out of the Licensing Agreement or Addendum.

As further evidence the Note is separate and distinct from the Licensing Agreement and Addendum, the language of the Note provides for its remedies. The Note is governed by the laws of the State of South Carolina and further contains no requirement to arbitrate or reference to the Federal Arbitration Act. A disclosure that the document is subject to arbitration is notably absent from the face of the Note. In addition, the Note provides that the maker agrees to pay reasonable attorney's fees in case of a suit or collection by an attorney or litigation involving the debt or any security therefore reasonable requiring employment of counsel to protect or enforce any right or remedy of the holder. The maker also waived presentment, demand, protest and notice of dishonor. The Note clearly contemplates that any action for collection will be brought pursuant to the terms provided therein, not based on another document or agreement between the parties. There are no facts to suggest that the Note is governed under the Licensing Agreement.

By contract, the Licensing Agreement is governed by New York law and includes a specific dispute resolution procedure for resolving disputes. Section 11.2 references dispute resolution under "this Agreement" and does not include or contemplate the Note or any other agreement between the parties in the definition of "this Agreement." Section 11.2(a) of the Licensing Agreement requires that each party first provide a "Dispute Notice" to summarize the dispute, set forth the party's position, and provide relevant material. In contrast, the Note – governed by South Carolina Law – explicitly waives any requirement to follow the dispute resolution procedure contained in the Licensing Agreement, and states that the maker waives presentment, demand, protest and notice of dishonor.

The Licensing Agreement does not have a specific and mandatory arbitration procedure. Instead, it contains a dispute resolution procedure that pertains to disputes arising only under the Licensing Agreement. Section 11.2 sets forth the dispute procedure for disputes arising under the Licensing Agreement and requires the parties to exchange a "Dispute Notice," then have an initial meeting to attempt resolution, then participate in mediation if no settlement is achieved. The Licensing Agreement provides that if mediation fails "either Party may initiate arbitration." The permissive language contained in Section 11.2(d) indicates that arbitration is not mandatory, but "may" be initiated.

Although there have been disputes between the parties with respect to the Licensing Agreement, the parties have not engaged in arbitration to resolve these differences. The parties have had discussions and attempted to resolve certain issues between themselves with respect to intellectual property, proposed breaches of the Licensing Agreement, and certain ownership rights, but at no time have the parties entered into mediation or arbitration. As part of those discussions, the parties have agreed the Licensing Agreement will terminate at the end of the current term, which will occur January 10, 2022, and no extension will take place as of that date. The parties are currently working together to finish out the remaining term of the Licensing Agreement

To help reach a resolution, and to maintain the working relationship between the parties, a new agreement has been negotiated and signed which sets out certain services Defendant will provide to Plaintiff as an independent contractor. The new agreement was negotiated and put in place to resolve the disputes, at least temporarily, between the parties regarding the Licensing Agreement and Addendum. Neither the Licensing Agreement and Addendum, nor the new agreement provides for or addresses the Note as part of either document.

As evidenced by this action filed by Plaintiff, the parties are not working together to resolve the default on the Note. The distinction between the parties' course of dealing with regards to the Licensing Agreement and the default under the Note further evidences that the Licensing Agreement and Note are wholly unrelated.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Defendant's Motion to Dismiss and to Compel Arbitration should be denied.

s/ Amber B. Glidewell
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July 29, 2021

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	THIRTEENTH JUDICIAL IRCUIT
BVW HOLDING AG, Plaintiff, vs. HOOWAKI, LLC, Defendant.	Civil Action No.: 2021-CP-23-01191 **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION**

NOW COMES the Defendant Hoowaki, LLC ("Defendant"), by and through its undersigned counsel, in support of its Motion to Dismiss and Compel Arbitration and would state as follows:

INTRODUCTION

The Defendant is an industry leader in high and low friction micro-surfaces for grips, devices, gear, and packaging and holds multiple U.S. patents. On or about July 10, 2015, Plaintiff and Defendant entered into a Cooperation and License Agreement ("Agreement") between the entities. *See* **Exhibit A** attached hereto. The Agreement provided for, among other things, an agreement to cross-license certain intellectual properties from one entity to the other for the use in the parties' respective businesses, or "fields of use" as well as facilitated cooperation in the development of further intellectual property that the parties could utilize in their respective fields of use. On or about June 9, 2017, the parties entered into an Addendum to the Cooperation and License Agreement ("Addendum") which modified certain terms of the Agreement between the parties. *See* **Exhibit B** attached hereto. These agreements are still in full force and effect and the parties are currently operating under the terms of these agreements.

The Plaintiff has brought suit against the Defendant regarding a promissory note that was executed between the parties in order to facilitate the parties' business arrangement consistent with the terms of the Agreement. The only reason Defendant executed the promissory note at issue was to further the contractual agreements between the parties at issue since the inception of the Agreement in 2015. In short, the promissory note is only one part of a larger series of dealings and agreements between the parties.

ARGUMENT

A. The Agreements between the parties contemplate that any dispute between the parties shall be resolved through Alternative Dispute Resolution.

The parties entered into the Cooperation and License Agreement, under which the parties were to mutually collaborate to cross-license certain intellectual property from the other party. Having operated under the terms of the Agreement for several years and in order to better facilitate the parties' business arrangement consistent with the terms of the Agreement, the parties executed the promissory note at issue in the underlying matter. Defendant could have easily obtained a traditional loan from a third-party financial institution, but asserts that this related document and transaction contemplated therein is consistent with the parties' overall business dealings.

While the entire Agreement is attached hereto for the Court's consideration, the Agreement contains the following, pertinent language:

> Article 11, Miscellaneous
>
> Section 11.2 Dispute Resolution. The Parties accept the process set forth below as the exclusive means to resolve disputes arising under this Agreement.
>
> (a) Dispute Notice. Either Party ("Claimant") may promptly notify the other Party ("Respondent") in writing ("Dispute Notice") of a dispute arising under this agreement that has not been resolved through ordinary commercial means. The Dispute Notice will include (i) a summary of the dispute; (ii) the Claimant's position; and (iii) any material and relevant documentary information or

references relating to the dispute that are in Claimant's possession or control. Within five (5) business days after receiving the Dispute Notice, Respondent will respond in writing by either (I) agreeing to Claimant's position or (II) scheduling a dispute resolution meeting to occur within ten (10) business days following receipt of the Dispute Notice.

(b) Initial Meeting. If Respondent schedules a dispute resolution meeting, Respondent will submit to Claimant (i) Respondent's written position and (ii) any material and relevant documentary information or references relating to the dispute that are in Respondent's possession or control. The dispute resolution meeting may be by telephone or other agreed means of contemporaneous communication. Each Party will appoint one or more individuals authorized to act with regard to the disputed issue. All dispute resolution meetings must be concluded within twenty (20) business days of the Dispute Notice ("dispute resolution meeting period"). If the dispute has not been resolved by the Parties within five (5) business days of the conclusion of the dispute resolution meeting period, each Party will prepare, and deliver to the other Party, a written summary (not to exceed three (3) 8.S"xll" pages; single spaced; typed; one-inch margins; 12-point Times New Roman font) identifying (I) all resolved issues and how they were resolved and (II) any unresolved issues and including each Party's proposed resolution ("Written Summary").

(c) Mediation. If the Parties are unable to resolve all disputed issues themselves by meeting, either Party may initiate mediation by notice to the other generally following the Commercial Mediation Procedures of the American Arbitration Association ("AAA") (see www.adr.org) within thirty (30) days following delivery of the Dispute Notice. The mediator will be a qualified neutral, but need not be a member of the AAA panel of neutrals. Within seven (7) business days of initiating the mediation process, the Parties or their legal counsel shall attempt in good faith to select a single mediator; if they cannot, then a neutral shall be selected by each Party (and compensated by same) who shall together select a third neutral to mediate the matter. The Parties will present to the mediator the Written Summary and any material and relevant documentary information previously shared by the Parties, and a confidential memorandum if requested by the mediator. The confidential memorandum will be maintained in confidence by the mediator unless and only to the extent disclosure to the other Party or third parties is authorized in writing by the Party submitting such memorandum. The mediation will be completed within thirty (30) days of the mediator's appointment, and will be held in New York, USA. If the mediation resolves all disputed issues, the Parties will bear their own mediation costs and equally share the cost of the mediator.

(d) Arbitration. If the mediation fails to resolve all disputed issues, either Party may initiate arbitration within ten (10) days after the mediation concludes. Arbitration will be governed by the US Federal Uniform Arbitration Act (Title 9, US Code, Section 1-14, as amended), and will follow the AAA Arbitration Rules

then effective, as amended from time to time. The arbitrator will be a qualified neutral, but need not be a member of the AAA panel of neutrals. Within seven (7) business days of initiating arbitration, the Parties or their legal counsel shall attempt in good faith to select a single arbitrator; if they cannot, then a neutral shall be selected by each Party (and compensated by same) who shall together select a third neutral, to be the sole arbitrator of the matter. The Parties will present to the arbitrator their Written Summary and any material and relevant documentary information previously provided to the mediator, and a confidential memorandum if requested by the arbitrator. The confidential memorandum will be maintained in confidence by the arbitrator unless and only to the extent disclosure to the other Party or third parties is authorized in writing by the Party submitting such memorandum. Arbitration will be held in the State of New York, and will be completed with a final determination rendered within forty-five (45) days of the arbitrator's appointment. Unless otherwise determined by the arbitrator (or the judge in the case of applying clause (f), below, or Sections 11.3 -11.5, below), the non-prevailing Party will be obligated to reimburse the prevailing Party's reasonable attorneys' fees and other expenses related to the mediation, arbitration, or any judicial action; the Parties' good faith compliance with the intent of this Section 11.2 shall be a material factor in such determination by the arbitrator (judge).

(e) Application and Finality of Arbitration. The procedures outlined in this Section 11.2 will be the sole and exclusive process for dispute resolution between the Parties and relating to this Agreement. Judgment upon an arbitrator's determination may be entered by any court having competent jurisdiction over the affected Party. Notwithstanding the foregoing, either Party may seek a preliminary injunction or other equitable judicial relief if such action is commercially reasonable to prevent irreparable damage.

(f) Continuing Obligation to Perform. The Parties will continue in good faith to perform their respective obligations hereunder throughout any dispute resolution process. Throughout the entire dispute resolution process the Parties will have a continuing obligation to produce all relevant documentary information or references relating to the dispute that are in the Parties' respective possession or control.

See Agreement, Ex. A., at P. 13-15. Moreover, the Agreement maintains that "[t]his Agreement *and all related documents, and all matters arising out of or relating to this Agreement*, are governed by, and construed in accordance with, the laws of the State of New York, United States of America . . ." *See* Agreement, Ex. A., at, P. 15. (emphasis added).

Defendant submits this dispute is within the substantive scope of the arbitration provisions of the Agreement. As an initial matter, Defendant asserts that Plaintiff has failed to avail itself of any of the provisions of Section 11.2 of the Agreement which governs resolution of disputes between the parties. Regardless, it is evident that the parties contemplated that disputes between these two parties be resolved outside of the courts. The promissory note at issue is related to the original Agreement between the parties and the current dispute between the parties arises out of the basic subject matter which the Agreement governs. As noted herein, the arbitration between the parties shall be governed by the US Federal Uniform Arbitration Act (Title 9, US Code, Section 1-14, as amended), and the arbitration is to follow the AAA Arbitration Rules. *See* Agreement, Ex. A., at, P. 14. Pursuant to the US Federal Uniform Arbitration Act, there must be a stay of the underlying proceedings when the issues alleged are referrable to arbitration. *See* 9 U.S. Code § 3 ("If any suit or proceeding be brought in any courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.").

B. The Court should Require Arbitration Under the Federal Arbitration Act.

The Federal Arbitration Act ("FAA"), which applies to this arbitration provision, mandates that arbitration agreements in contracts "evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA "is a congressional declaration

of a *liberal federal policy favoring arbitration agreements*." *See Drews Distrib. v. Sillicon Gaming, Inc.*, 245 F.3d 347, 349 (4th Cir. 2001) (emphasis added). The "central" purpose of the FAA is to "ensure that 'private agreements to arbitrate are enforced according to their terms.'" *StoltNielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (citation omitted). Moreover, it is important to note that the Federal Arbitration Act "applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). Here, you have a company based in Switzerland entering into multiple agreements with a South Carolina based company regarding the development of intellectual property rights that the parties might use in their respective fields of use. The instant matter consists of numerous transactions involving interstate commerce and the FAA should be applied to resolve the parties' dispute.

Even assuming, *arguendo*, that the promissory note is not an extension of the parties' original agreements to facilitate the underlying Cooperation and License Agreement and subsequent Addendum, (which the Defendant expressly denies), the threshold issue of whether this dispute should be submitted to arbitration in the first instance should be determined by the arbitrator—not this Court. The Federal Arbitration Act "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). As such, courts "are to resolve any doubts concerning the scope of arbitrable issues in favor of arbitration with a healthy regard for the federal policy favoring arbitration." *Cherry v. Wertheim Schroder and Co.*, 868 F. Supp. 830, 834 (D.S.C. 1994).

The Supreme Court has further observed that, under the FAA, procedural matters relating to arbitration are for the arbitrators:

> [C]ourts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86 (2002) (courts assume parties "normally expect a forum-based decisionmaker to decide forum-specific procedural gateway matters" (emphasis added)). These procedural matters include claims of "waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983). And they include the satisfaction of " 'prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate.'" *Howsam*, supra, at 85, 123 S. Ct. 588 (quoting the Revised Uniform Arbitration Act of 2000 § 6, Comment 2, 7 U.L.A. 13 (Supp.2002); emphasis deleted). See also § 6(c) ("An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled"); § 6, Comment 2 (explaining that this rule reflects "the holdings of the vast majority of state courts" and collecting cases).

BG Grp., PLC v. Republic of Argentina, 572 U.S. 25, 34–35, 134 S. Ct. 1198, 1207, 188 L. Ed. 2d 220 (2014) (emphasis added). Respectfully, the determination as to whether the arbitration provision applies in the first instance is reserved to the arbitrator(s). Accordingly, the court should compel arbitration for determination of the threshold arbitrability issue.

CONCLUSION

For all of the foregoing reasons, this Court should grant Defendant's Motion to Dismiss and Compel Arbitration. The Could should either: (a) dismiss this action and direct the parties to engage in arbitration; or (b) stay this lawsuit and compel the parties to engage in arbitration under their agreement with each other.

[Signature Page to Follow.]

Respectfully submitted,

s/Michael D. Wright

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July 30, 2021

COOPERATION AND LICENSE AGREEMENT

This COOPERATION AND LICENSE AGREEMENT ("Agreement") is entered into by BvW Holdings AG ("BvW"), and Hoowaki, LLC, a South Carolina limited liability company ("Hoowaki"), each referred to herein to as a "Party" and collectively referred to as the "Parties," to be legally binding and effective as of January 10, 2012 ("Effective Date").

In consideration of the mutual promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto hereby covenant and agree as follows:

ARTICLE 1
DEFINITIONS

For purposes of this Agreement, the following capitalized terms shall have the following meanings:

General Usage Definitions

1.1 "Affiliate" of a Party means any Person that, directly or indirectly, controls, is controlled by or is under common control with that Party for so long as such control exists, as such term is further defined in the regulations under the Securities Act of 1933.

1.2 "Claim" means any charge, complaint, action, suit, proceeding, hearing, investigation, claim or demand.

1.3 "Laws" means all laws, statutes, rules, regulations of a governmental authority.

1.4 "Person" means any natural person, corporation, general partnership, limited partnership, limited liability company, joint venture, proprietorship or other de jure entity organized under the Laws of any jurisdiction.

1.5 "Third Party" means a Person who is not a Party or an Affiliate of a Party.

General IP Definitions

1.6 "Intellectual Property Rights" means any and all invention rights, patent rights, design rights, copyright rights, trade secret rights and all other intellectual and industrial property rights of any sort throughout the world, whether registered or unregistered, including, but not limited to, any application therefor, and all renewals and extensions of any of the foregoing.

1.7 "Joint Improvement" means an Improvement with respect to which employees and/or agents of both BvW and Hoowaki are joint inventors or creators in the course of the activities hereunder, regardless of whether any Third Parties are also joint inventors or creators, including, without limitation, all Intellectual Property Rights therein.

1.8 "Know-How" means information, including technical information, trade secrets, and data, in each case, in any tangible or intangible form, relating to or useful for the practice of a Party's Intellectual Property Rights, in all cases whether patentable or not, but expressly excluding the information claimed in any Patent.

1.9 "Patent" means any patent or patent application, filed or registered in any country, including, without limitation, any provisional application, any non-provisional application, and any continuation, continuation-in-part, divisional, registration, confirmation, revalidation, reissue, reexamination, PCT application, patent term extension, and utility model, as well as all related extensions or restorations of terms thereof.

Agreement-Specific Definitions

1.10 "BvW Fields of Use" means all applications and products where a Subject Surface or Subject Technology is used in market applications set forth in Exhibit 5 hereto, as the same may be amended by the Parties from time to time by mutual written agreement.

1.11 "Hoowaki Fields of Use" means all applications and products where a Subject Surface or Subject Technology is used in market applications as set forth in Exhibit 6 hereto, as the same may be amended by the Parties from time to time by mutual written agreement.

1.12 "BvW Know-How" means all Know-How which is owned or controlled by BvW at any time, whether now existing or created during the term of this Agreement, and that is necessary or useful for Hoowaki to develop, make, and/or commercialize products in the Hoowaki Fields of Use.

1.13 "Hoowaki Know-How" means all Know-How which is owned or controlled by Hoowaki at any time, whether now existing or created during the term of this Agreement, and that is necessary or useful for BvW to develop, make, and/or commercialize products in the BvW Fields of Use, excluding Hoowaki Tool and Die Intellectual Property.

1.14 "BvW Patents" means (i) all Patents set forth in Exhibit 1 attached hereto, and (ii) all Patents owned or controlled by BvW whether now existing or existing during the term of this Agreement, whether or not listed on Exhibit 1, and that are necessary or useful for Hoowaki to develop, make and/or commercialize products in the Hoowaki Fields of Use.

1.15 "Hoowaki Patents" means (i) all Patents set forth in Exhibit 2 attached hereto, and (ii) all Patents owned or controlled by Hoowaki whether now existing or existing during the term of this Agreement, whether or not listed on Exhibit 2, and, that are necessary or useful for BvW to develop, make and/or commercialize products in the BvW Fields of Use, excluding Hoowaki Tool and Die Intellectual Property.

1.16 "Hoowaki Tool and Die Intellectual Property" means all Patents and all Know-How that is owned or controlled by Hoowaki, that is designated as such in Exhibit 2, which Patents and Know-How are necessary or useful for Hoowaki to make, use, or sell tools and dies.

1.17 "Improvements" means, at such time as the Parties by mutual agreement add to Exhibit 4, any Subject Technology or Subject Surfaces conceived, reduced to practice, developed or made

pursuant to and during the term of this Agreement. The Parties will undertake the foregoing determination using good faith efforts.

1.18 "Net Sales" means the total gross amount of monies or cash equivalent or other consideration paid by unaffiliated third parties, including without limitation royalties, license fees and income of any kind or source whatever, to an Exploiting Party (and its Sublicensees) for sales of Subject Products less the sum of the following, provided and to the extent such items are actually incurred and do not exceed reasonable and customary amounts in each market in which such sales occurred: (a) discounts allowed in amounts customary in the trade; (b) sales, tariff duties and use taxes directly imposed and with reference to particular sales (but not income taxes); (c) outbound transportation prepaid or allowed; and (d) amounts allowed or credited on returns.

1.19 "Joint Patents" means any Patents are set forth in Exhibit 3 attached hereto that describe one or more Joint Improvements. Inventorship for Joint Improvements shall be determined in accordance with the patent laws of the United States.

1.20 "Other Field of Use" means any field of use other than the BvW Fields of Use and the Hoowaki Fields of Use that relates to a Subject Surface or Subject Technology.

1.21 "Subject Intellectual Property" means all Intellectual Property Rights that relate in any manner to Improvements and/or Joint Improvements but excludes Hoowaki Tool and Die Intellectual Property.

1.22 "Subject Products" means any product or service (or component thereof) that incorporates or uses an Improvement.

1.23 "Subject Surface" means a multidimensional micro-textured surface with sinusoidal features and with 2 or 3 stacked layers of features having adhesive properties to wet surfaces that are described in Exhibit 4. Exhibit 4 will be updated as necessary upon agreement by the Parties. Any multi-dimensional micro-textured pattern that is not set forth in Exhibit 4 shall be specifically excluded from being a Subject Surface.

1.24 "Subject Technology" means the technology or Know-How relating to the development, creation or use of a multidimensional micro-textured surface that can be or was used to create, develop, or modify a Subject Surface, but excludes any of the Hoowaki Tool and Die Intellectual Property.

ARTICLE 2
LICENSE GRANTS

2.1 License to BvW. Subject to the terms and conditions set forth in this Agreement, Hoowaki hereby grants to BvW, and BvW accepts, during the term of this Agreement, an irrevocable, sole, worldwide, royalty bearing, transferable and sublicensable license, to the Hoowaki Patents and the Hoowaki Know-How, including any improvements thereto, to develop, make, have made, import, use, sell, and offer to sell products that are usable in, and only in, the BvW Fields of Use; provided, however, that the foregoing license (i) to improvements to the Hoowaki Patents and Hoowaki Know-How and related Intellectual Property Rights shall be non-exclusive and shall be transferable only pursuant to Section 2.7, and (ii) does not include and expressly excludes, Hoowaki Tool and Die Intellectual Property. For greater certainty, Hoowaki expressly reserves from this license grant the continued right to use the

Hoowaki Patents and the Hoowaki Know-How, including any improvements thereto, other than in the BvW Fields of Use.

2.2 License to Hoowaki. Subject to the terms and conditions of this Agreement, BvW hereby grants to Hoowaki, and Hoowaki accepts, during the term of this Agreement, an irrevocable, sole, worldwide, royalty bearing, transferable and sublicensable license, to the BvW Patents and the BvW Know-How, including any improvements thereto, to develop, make, have made, import, use, sell, and offer to sell products that are usable in the Hoowaki Fields of Use; provided, however, that the foregoing license to improvements to the BvW Patents and BvW Know-How and related Intellectual Property shall be non-exclusive and shall be transferable only pursuant to Section 2.7. For greater certainty, BvW expressly reserves from this license grant the continued right to use the BvW Patents and the BvW Know-How, including any improvements thereto, other than in the Hoowaki Fields of Use.

2.3 Improvements and Joint Patents. Subject to the provisions of section 3.1, each Party shall have the right to exploit Improvements, Joint Improvements and Joint Patents without notice to or consent of the other Party, but only in their respective Fields of Use. If any of the Joint Improvements are patentable, the Parties will mutually designate in writing in each instance which Party, BvW or Hoowaki, is authorized to prepare, file and prosecute such joint patent, and the patent shall reflect joint ownership of the Parties. In such circumstances, the Parties will equally share patent expenses, unless one Party elects by notice to the other Party that it shall not thereafter share patent expenses. A Party who elects to not share in patent expenses shall assign its rights to the invention for which patent protection is being sought to the other Party subject to grant-back of a non-exclusive license to exploit the Joint Improvement in the licensee Party's Field of Use. **Notwithstanding anything to the contrary in this Agreement, the Parties acknowledge and agree that (a) McNair Law Firm, P.A., represents Hoowaki in regard to this Agreement and patent prosecution matters; (b) McNair Law Firm, P.A. does not and will not represent BvW or any of its Affiliates in regard to this Agreement or patent prosecution matters; (c) where Hoowaki is the filing party, BvW has and hereby does delegate prosecution of Joint Patents to Hoowaki to use counsel of Hoowaki's choice; (d) BvW will fully cooperate in and provide all documents requested by Hoowaki in furtherance of prosecution of Joint Patents; and (e) BvW will not seek to disqualify McNair Law Firm, P.A. from, or seek damages or equitable relief from McNair Law Firm, P.A. for, future or further representation of Hoowaki based upon a claim of conflict of interest or otherwise.**

2.4 Enforcement of Intellectual Property Rights protecting Joint Improvements. In the event that a Party becomes aware of an alleged infringement by a third party of any Intellectual Property Rights protecting a Joint Improvement or which becomes a party to a declaratory judgment action alleging the invalidity or non-infringement of the Intellectual Property Rights, shall promptly provide written notice to the other Party hereto. The notice receiving Party shall have the right, but is not obligated, to initiate and/or prosecute or defend any litigation related to infringement of the Intellectual Property Rights, provided that if the notice receiving Party elects to so protect the Intellectual Property Rights, the other Party will fully cooperate in such efforts at the notice receiving Party's expense; provided, however, if the notice receiving Party chooses to take no, or cease, action, then the other Party may, but is not obligated to, initiate and/or prosecute or defend such litigation related to third-party infringement at its expense, and the notice receiving Party will fully cooperate in such efforts at the other Party's expense; provided, however, that if one Party elects to protect the Intellectual Property Rights and the other elects not to do so, the Party electing not to protect such Rights shall promptly and irrevocably assign all its right and interest in such Intellectual Property Rights to the protecting Party; provided, further, that once the subject protective actions have been fully and finally

completed with all appeals exhausted, or have been conclusively and irrevocably settled, the Parties shall be restored to their former position as joint owners with respect to the relevant Intellectual Property Rights. A Party initiating or defending any suit or proceeding pursuant to this Section 2.4 shall have the exclusive right, in its sole discretion, to settle and compromise such suit or proceeding, whether by settlement or other voluntary final disposition, without prior written approval or consent of the other Party hereto, provided that the terms of such resolution do not:

(a) enjoin future action by the other Party or any of its Affiliates, licensees, sublicensees, or customers (collectively, including the other party, the "Affected Persons");

(b) derogate from or diminish any of the other Party's rights or licenses under this Agreement;

(c) require any of the Affected Persons to make any payment;

(d) fail to grant the other Party (and its Affiliates) a release of all claims in the suit or proceeding;

(e) require the admission or concession that any claim or aspect of any Joint Improvement or the other Party's Intellectual Property Rights is invalid or unenforceable, or require any waiver or disclaimer of any rights with respect to such claim or Patent; or

(f) otherwise have a material adverse effect upon any of the Affected Persons or any of their assets, or any objectives or subject matter of this Agreement.

2.5 Other Fields of Use.

(a) If a Party elects to exploit an Improvement in any Other Field of Use (the "First Party"), it shall so notify the other Party (the "Second Party") in writing (an "Opportunity Notice"). Upon its receipt of such Opportunity Notice, the Second Party shall have sixty (60) days to (i) provide consent in writing to the First Party to exploit the Improvement in the Other Field of Use ("Consent"), and (ii) notify the First Party in writing that the Second Party also desires to exploit such Other Field of Use, individually or jointly with the First Party. The First Party shall then have thirty (30) days in which to notify the Second Party in writing of the First Party's election to exploit such Other Field of Use exclusively by the First Party, jointly with the Second Party, or exclusively by the Second Party (a "Final Notification"). The failure of the First Party to provide a Final Notification to the Second Party will be deemed to indicate that the First Party will retain the subject Other Field of Use exclusively. The First Party shall not exploit the Improvement in the Other Field of Use without receiving Consent.

(b) In order to be effective, the Opportunity Notice shall specify in reasonable detail the characteristics and limits of the proposed Other Field of Use and the steps that the First Party plans to take to exploit the Other Field of Use. Unless and until each Party, in accordance with the foregoing provision, obtains the right to exploit an Other Field of Use, it shall not grant any licenses to any Third Party that would grant such Third Party the right to use the Improvement in such Other Field of Use.

(c) The First Party or the Second Party shall have one-hundred eighty (180) days following the date a Final Notification would be due under (a) above, to initiate substantive preparations to exploit such Other Field of Use and at the conclusion of such period will provide the other Party with a reasonable summary of efforts undertaken and anticipated in the succeeding year. If the developing Party fails to provide to the other Party such summary or if the other Party believes that the summary is

inadequate or that the developing Party has not reasonably undertaken preparations to exploit the relevant Other Field of Use, the other Party may notify the developing Party in writing of its objections, providing reasonable specificity, and requiring remedial action. The developing Party, upon receipt of the Notice of Objection shall within fifteen (15) days provide the required summary, or shall have ninety (90) days during which to make reasonable progress as to preparation to exploit and shall advise the other Party in reasonable detail of such efforts. If the other Party believes the developing Party's performance is inadequate, the other Party may apply to the developing Party to receive exclusive right to the subject Other Field of Use, using dispute resolution procedure set forth in Section 11.2 hereof. If the Party intending to exploit such Other Field of Use does not proceed in good faith with such plans, its exploitation rights shall expire.

2.6 Tools and Dies. Anything contained in this Agreement to the contrary notwithstanding, in no event may BvW exploit the Hoowaki Tool and Die Intellectual Property. Hoowaki shall, on an exclusive basis, provide or supply to BvW, and BvW shall, on an exclusive basis, obtain or purchase from Hoowaki or its Alternative Source (as defined below), all of BvW's and the BvW Transferees' (as defined in Section 4.4(b)) tools and dies for which the Hoowaki Tool and Die Intellectual Property is necessary or useful to make, use, or sell Subject Surface; provided, however, that if Hoowaki is unable to provide or supply such tools and dies as set out in this Section 2.6, for any reason whatsoever, BvW shall have the right to obtain or use such tools and dies from a source other than Hoowaki, which source is acceptable to Hoowaki in its reasonable discretion ("Alternative Source"), and Hoowaki shall sublicense the Hoowaki Tool and Die Intellectual Property to the Alternative Source on terms acceptable to Hoowaki in its reasonable discretion such that the Alternative Source can provide the tools and dies as required by BvW throughout such period of unavailability.

2.7 Sublicenses. Each Party may sublicense its license rights under this Agreement pursuant to an agreement in which the sublicensee agrees to perform all of the applicable obligations of the licensing Party under this Agreement, including any payment provisions; provided that the licensing Party acknowledges in writing to the other Party that it will (i) be responsible for any failure of its sublicensees to comply with this Agreement, including any payment and confidentiality provisions, (ii) include in the sublicense agreement such provisions protecting the Parties' interests as are consistent with this Agreement, and (iii) provide the other Party with a complete copy of any such sublicense agreement promptly following the execution thereof.

2.8 Trademarks. Neither Party shall have any right to use the trademarks of the other Party absent a separate written agreement of the parties executed by their respective authorized representatives.

ARTICLE 3
LICENSE FEES AND ROYALTIES

3.1 Royalties in General. In consideration for the license rights granted in Article 2 hereof, and as regards the BvW Fields of Use and Hoowaki Fields of Use, the Party exploiting an Improvement, Joint Improvement or Joint Patent, in a BvW Field of Use or a Hoowaki Field of Use (an "Exploiting Party") shall share equally with the other Party (a "Receiving Party") a royalty portion of all Net Sales received from such Field of Use by or for the benefit of the Exploiting Party ("Deemed Royalty"), such that the Exploiting Party will separate out and pay to the Receiving Party in accordance with Section 3.2 hereof one-half of such Deemed Royalty, which such Deemed Royalty shall be equal to 6% for healthcare markets and 4% for non-healthcare markets of the Net Sales obtained from such exploitation

in that Field of Use, except as otherwise provided in Exhibit 5 hereto. The Exploiting Party shall retain for itself the remaining one-half of such Deemed Royalty. Each Exploiting Party will use commercially reasonable efforts to maximize sales and other revenue generation in each of its Fields of Use.

3.2 Payment Terms and Royalty Statements. After first commercial sale of any Subject Product in a Field of Use pursuant to section 3.1 (b), Exploiting Party shall render to Receiving Party within 30 days after the end of each calendar quarter a royalty report for such quarter as to the royalty payments having accrued on the Subject Products sold during such calendar quarter for such Field of Use under this Article 3 and concurrent therewith Exploiting Party shall pay to Receiving Party the royalty payment due for such quarter. The royalty report shall state, in reasonable detail, Net Sales of each Subject Product with respect to which royalties are payable and the amount of royalties due with respect to such quarter. Such payments shall be made in US Dollars by wire transfer, at the Exploiting Party's cost, to such bank as shall be notified by Receiving Party. Payments of royalties accrued on net sales in other currencies than US Dollars shall be made in US Dollars at the rate of exchange quoted by a first class commercial bank in the Exploiting Party's country on the last day of the relevant calendar quarter.

3.3 Late Payments. If the Exploiting Party fails to make the payments as provided for herein, such amounts shall bear interest from and after the due date at the rate of Two Percent (2%) above the one month LIBOR for the currency of payment.

3.4 Tax Withholding. Withholding or other taxes assessed on Receiving Party in connection with the payment of royalties and other consideration due hereunder and which the Exploiting Party is required by law to deduct and withhold when making payments, may be deducted from royalty payments hereunder and shall be paid by the Exploiting Party to the competent authority on behalf of Receiving Party. The originals of the official government receipt for such taxes paid by the Exploiting Party on Receiving Party's behalf, shall so indicate such fact and shall be sent by the Exploiting Party to Receiving Party not later than fifteen (15) working days after the date of payment, indicating net payment of royalties to which such taxes relate, and in accordance with the instructions given by Receiving Party. The sums so paid by the Exploiting Party shall be credited by Receiving Party in partial discharge of the Exploiting Party's obligation for gross royalties as provided for herein.

3.5 Records. Exploiting Party shall keep, and shall cause its Affiliates, sublicensees and distributors to keep for a period of six (6) years after a royalty payment has been made, true, accurate, current and complete records of total quantities of Subject Products sold in the subject Field of Use and the Net Sales thereof in sufficient detail to permit determination of royalties payable hereunder.

3.6 Audit Rights. Exploiting Party and its Affiliates will permit Receiving Party or its representatives, at Receiving Party's expense, to periodically examine books, ledgers, and records during regular business hours, at Exploiting Party's or its Affiliate's place of business, on at least 30 days advance notice, to the extent necessary to verify any payment or report required under the Agreement. For each Sublicensing party, Exploiting Party shall obtain such audit rights for Receiving Party or itself. If Exploiting Party obtains such audit rights for itself, it will promptly conduct an audit of the Sublicensing party's records upon Receiving Party's request, and Exploiting Party will furnish to Receiving Party a copy of the findings from such audit. No more than one audit of Exploiting Party, each Affiliate, and each Sublicensing party shall be conducted under this Section 3.6 in any calendar year. If any amounts due Receiving Party have been underpaid, then Exploiting Party shall immediately pay Receiving Party the amount of such underpayment plus accrued interest due in accordance with Section 3.3. If the amount

of underpayment is equal to or greater than 5% of the total amount due for the records so examined, Exploiting Party will pay the cost, including expenses, of such audit. Such audits may, at Receiving Party's sole discretion, consist of a self-audit conducted by Exploiting Party at Exploiting Party's expense and certified in writing by an authorized officer of Exploiting Party. All information examined pursuant to this Section 3.6 shall be deemed to be the Confidential Information of the Exploiting Party.

ARTICLE 4
COLLABORATION

4.1 Collaboration. Hoowaki and BvW will cooperate and collaborate on development of the Subject Surfaces and Subject Technology. Hoowaki will focus primarily on micro pattern design, tooling, simulation and design rules and physics testing and on market applications in Hoowaki Field of Use. BvW will focus primarily on medical testing, medical outcomes, any FDA or similar approvals, and on market applications in BvW Field of Use. The Parties shall hold meetings at least once each calendar year which will be attended by appropriate representatives from each of the Parties (e.g., representatives from the research and development department of each Party, as appropriate) ("Development Meetings"). The purpose of such meetings is to facilitate collaboration between the Parties in the development of products in their respective Fields of Use. The Parties intend that their respective organizations will work together and will use commercially reasonable efforts to assure success of the collaboration.

4.2 Responsibilities. Except as specified otherwise in this Agreement, the Parties will work together, during quarterly meetings, which will be in addition to Development Meetings, and/or at such other times as the Parties deem appropriate, to:

(a) Assist each other in developing products using the Subject Technology and Subject Surfaces (without any obligation to incur any significant expenses in connection therewith);

(b) Facilitate the transfer of Know-How between the Parties for purposes of conducting the activities and enabling rights granted hereunder;

(c) Decide on a strategy for preparing, filing, prosecuting, and maintaining Intellectual Property Rights, including Patents, directed to Joint Improvements;

(d) Resolve disputes, disagreements and deadlocks unresolved by any other committee (if any); and

(e) Evaluate the licensing of Third Party intellectual property which might be utilized by a Party within its respective Fields of Use.

4.3 Expenses. Each Party shall be responsible for all travel and related costs and expenses for its members and other representatives to attend meetings.

4.4 Supply Arrangements. (a) Hoowaki shall be the exclusive supplier to BvW and all BvW's licensees, sub-licensees, contractors, sub-contractors, and customers (collectively "Transferees", and when modified by the name of a Party, the Transferees of such Party), and Transferees shall be the exclusive customer of Hoowaki, of all tools and dies for which the Hoowaki Tool and Die Intellectual

Property is necessary or useful to make, create, use, or sell a Subject Surface; provided, however, if Hoowaki is unable to provide or supply such tools and dies, the provisions of section 2.6 will apply.

(b) BvW will not, with respect to Subject Technology used in the BvW Fields of Use, and will not permit or assist any BvW Transferees to, enter into a supply agreement with, or purchase or lease any tools or dies required to impart micro-texture to a surface from, a Third Party unless BvW has first negotiated in good faith with Hoowaki for a period of at least 60 days to enter into or continue an exclusive supply arrangement with Hoowaki. In the event BvW and Hoowaki are unable to come to mutually agreed terms in such period, BvW shall have the right to obtain, purchase, or use such tools from a source other than Hoowaki; provided, however, neither BvW, the BvW Transferees, nor any Third Party may exploit any Hoowaki Tool and Die Intellectual Property.

(c) All tools and dies supplied by Hoowaki to BvW for any purposes will be sold at a price determined by negotiation of pricing in good faith at least annually.

(d) All tools and dies and related Know-How provided by Hoowaki (i) shall be held in strictest confidence by BvW or other recipient, (ii) are considered trade secrets of Hoowaki, (iii) may not be transferred except to BvW or to a BvW Transferee who has executed for the benefit of Hoowaki a suitable agreement to protect the confidentiality and authorized use of Hoowaki's Tool and Die Intellectual Property, including its proprietary technology, and (iv) shall be destroyed or returned to Hoowaki at Hoowaki's request and expense at the conclusion of any supply arrangement or use cycle.

4.5 Exclusions. In conducting activities under this Agreement, neither Party shall prejudice the value of any Subject Product by reason of such Party's activities outside of the collaboration; provided that, except as specifically provided in Section 2.5 and Section 2.7, the foregoing shall not require either Party to limit the development, manufacture or commercialization of products other than Subject Product. Subject to the terms of this Agreement, the activities and resources of each Party shall be managed by such Party, acting independently and in its individual capacity.

ARTICLE 5
CONFIDENTIAL INFORMATION

5.1 Definition. "Confidential Information" means confidential or proprietary information, data or know-how, whether provided in written, oral, visual or other form, provided by one Party (the "Disclosing Party") to the other Party (the "Receiving Party") in connection with this Agreement, including, but not limited to, the terms of this Agreement and information relating to the Disclosing Party's existing or proposed research, development efforts, Patent applications, business or products, including Know-How. Confidential Information shall not include any such information that: (i) is already rightfully known to the Receiving Party or its Affiliates (other than under an obligation of confidentiality at least as stringent as required in this Agreement) at the time of disclosure (as evidenced by written records of the Receiving Party); (ii) is or becomes generally available to the public other than through any act or omission of the Receiving Party or its Affiliates; (iii) is disclosed to the Receiving Party or its Affiliates without an obligation of confidentiality by a Third Party who had no separate nondisclosure obligation in respect of such information; or (iv) is independently discovered or developed by or on behalf of the Receiving Party or its Affiliates without the use of or reference to the Confidential Information of the Disclosing Party (as evidenced by written records of the Receiving Party). Without

limiting the foregoing, the design of and manufacturing process for all tools and dies provided by and proprietary to Hoowaki, shall be deemed Confidential Information for purposes of this Article 5.

5.2 Confidentiality. The Receiving Party shall keep in confidence all Confidential Information of the Disclosing Party with the same degree of care it employs to maintain the confidentiality of its own Confidential Information, but no less than a reasonable degree of care. The Receiving Party shall not use such Confidential Information for any purpose other than in performance of this Agreement.

5.3 Permitted Disclosure and Use. Without limiting Section 5.2, each Party may disclose Confidential Information of the other Party to Third Parties on a confidential basis only for permitted sublicensing, prosecuting patent, copyright and trademark applications, prosecuting or defending litigation, and complying with applicable governmental regulations, so long as such Third Party enters into a confidentiality agreement consistent with this Article 5.

5.4 Return. Upon termination of this Agreement, the Receiving Party shall return or destroy all documents or other media containing Confidential Information of the Disclosing Party with the exception of one (1) copy for the sole purpose of monitoring and documenting the confidentiality obligations hereunder.

5.5 Survival. This Article 5 shall survive the expiration or termination of this Agreement indefinitely with respect to any item of Confidential Information until such item no longer meets the definition of Confidential Information.

ARTICLE 6
COMPLIANCE WITH LAWS

6.1 Patent Marking. Each Party and any Sublicensee shall comply with the patent marking provisions of 35 USC § 287(a) by marking all Subject Products with the word "patent" or the abbreviation "pat." and either the numbers of the relevant Patents or a web address that is freely accessible to the public and that associates the Subject Products with the relevant Patents. Each Party shall include in all sublicense agreements a patent marking requirement substantially identical to Section 6.1. Each Party and any Sublicensee shall also comply with the patent marking laws of the relevant countries in which the Subject Product is sold.

6.2 Regulatory Clearance. Each Party, itself or through any of its Sublicensees, shall, at such Party's or Sublicensees' expense, comply with all regulations and safety standards concerning Subject Products developed and commercialized by or under the authority of such Party and obtain all necessary governmental approvals for the development, production, distribution, sale and use of Subject Products developed and commercialized by or under the authority of the Party, including any safety or clinical studies. Such Party shall have responsibility for and provide suitable warning labels, packaging and instructions as to the use for such Subject Products.

6.3 Export Compliance. Neither a Party nor any of its Sublicensees shall, directly or indirectly, export (including any "deemed export"), nor re-export (including any "deemed re-export") the Subject Products or Subject Technology (including any associated products, items, articles, computer software, media, services, technical data, and other information) in violation of any applicable U.S. Laws. The Party and each Sublicensee shall include a provision identical in substance to Section 6.3 in its agreements with its Sublicensees, third party wholesalers, distributors, customers and end-users

requiring that these Persons comply with all applicable U.S. Laws, including all applicable U.S. export Laws. For the purposes of Section 6.3, the terms "deemed export" and "deemed re-export" have the meanings set forth in Section 734.2(b)(2)(ii) and Section 734.2(b)(4), respectively, of the Export Administration Regulations (EAR) (*15 CFR §§ 734.2(b)(2)(ii) and 734.2(b)(4)*).

ARTICLE 7
REPRESENTATIONS AND WARRANTIES

7.1 Mutual Representations and Warranties.

BvW and Hoowaki each represents and warrants to the other that:

(a) Such Party: (i) is a company duly organized, validly existing and in good standing under the Laws of the jurisdiction of its organization; and (ii) has the requisite power and authority and the legal right to conduct its business as now conducted and hereafter contemplated to be conducted;

(b) The execution, delivery and performance of this Agreement by such Party: (i) are within the corporate power of such Party; (ii) have been duly authorized by all necessary or proper corporate action; (iii) do not conflict with any provision of the organizational documents of such Party; (iv) will not, to the Party's knowledge, violate any Laws or any order or decree of any court or Governmental Authority; and (v) will not violate or conflict with any terms of any indenture, mortgage, deed of trust, lease, agreement or other instrument to which such Party is a party, or by which such Party is bound; and

(c) This Agreement has been duly executed and delivered by such Party and constitutes a legal, valid and binding obligation of such Party, enforceable against such Party in accordance with its terms; and

(d) Each Party has no reason to believe that the use by the other Party of the first Party's Patents and Know-How will infringe the Intellectual Property rights of Third Parties.

ARTICLE 8
INDEMNIFICATION AND LIMITATION OF LIABILITIES

8.1 Indemnification. Each Party shall defend and indemnify the other Party (and its Affiliates, officers, directors, employees, successors and assigns) from and against all Claims of Third Parties, and all associated losses, damages and expenses, to the extent arising out of the indemnifying Party's breach of any of its representations, warranties, covenants or agreements under this Agreement.

8.2 Limitation of Liabilities. NOTWITHSTANDING ANYTHING IN THIS AGREEMENT TO THE CONTRARY, AND REGARDLESS OF WHETHER ANY REMEDY SET FORTH HEREIN FAILS OF ITS ESSENTIAL PURPOSE, IN NO EVENT SHALL HOOWAKI OR BVW BE LIABLE, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, FOR ANY INDIRECT, INCIDENTAL, PUNITIVE, SPECIAL OR CONSEQUENTIAL DAMAGES (INCLUDING LOST SAVINGS, LOST PROFITS OF ANY KIND, LOSS OF BUSINESS OPPORTUNITY, LOSS OF BUSINESS REPUTATION, OR BUSINESS INTERRUPTION), HOWSOEVER ARISING IN CONNECTION WITH THIS AGREEMENT OR THE PERFORMANCE THEREOF, EVEN IF A PARTY WAS ADVISED, SHOULD HAVE KNOWN OR WAS AWARE OF THE POSSIBILITY OF SUCH LOSS, DAMAGE, OR EXPENSE.

ARTICLE 9
PATENTS

9.1 Ownership of Improvements. Each Party shall promptly disclose to the other Party all Improvements made by such Party under this Agreement. Subject to the license provisions of this Agreement, each Party shall own all right, title and interest in and to any Improvements invented or created solely by such Party, including, without limitation, any Intellectual Property Rights therein. Each Party shall own a joint, undivided interest in all Joint Improvements, which Joint Improvements shall be subject to the license provisions of this Agreement. To the extent that the Parties do not agree, after good faith discussions, as to whether an Improvement is a Joint Improvement or an Improvement invented solely by one Party, the Parties will resolve the dispute pursuant to Section 11.2 of this Agreement. Subject to section 2.5, each Party may use Joint Improvements only in its respective Fields of Use.

9.2 Prosecution and Maintenance of Patents. Each Party shall have the sole right (but not the obligation), at its expense, to prepare, file, prosecute and maintain all Intellectual Property Rights solely owned by it. If a Party decides to abandon any of its Intellectual Property Rights, it will give the other Party the opportunity to acquire such rights at no cost, provided that the transferee shall be deemed to grant a non-exclusive license to the transferor on the same basis as the other non-exclusive license grants under this Agreement.

ARTICLE 10
TERM AND TERMINATION, ETC.

10.1 Term. This Agreement shall commence on the Effective Date and, unless terminated earlier in accordance with Section 10.2, remain in force on an individual Field of Use basis:

(a) for the lesser of (i) five years, with automatic five-year extensions for an indefinite number of additional five-year periods, provided that either Party may terminate this Agreement and the underlying licenses with respect to the relevant Field of Use by giving notice to the other Party that it does not wish an extension to take place, such notice to be given at least six months prior to the expiration of the then current term for the specified Field of Use; or (ii) until the expiration of the last to expire valid claim of a Patent in the relevant Field of Use. Upon expiration (but not termination) of this Agreement, all license provisions shall remain in effect indefinitely, but all obligations with respect to subsequent Improvements shall cease.

(b) for rights and obligations concerning the applicable Know-How, for five years from the date of first commercial use, sale, transfer or other disposition of a product within the relevant Field of Use, with automatic five-year extensions for an indefinite number of additional five-year periods, provided that either Party may terminate this Agreement and the underlying license with respect to the relevant Field of Use by giving notice to the other Party that is does not wish an extension to take place, such notice to be given at least six months prior to the expiration of the then current term for the specified Field of Use.

10.2 Termination for Cause. In the event of the failure by a Party to comply with any of the material obligations contained in this Agreement, such Party shall be in default under this Agreement, whereupon the non-defaulting Party shall be entitled to give notice to the defaulting Party to have the

default cured. If a noticed default is not cured within thirty (30) days (the "Cure Period") after the receipt of such notice (or, if such default cannot be cured within such thirty (30)-day period, if the Party in default does not commence actions to cure such default within the Cure Period and thereafter diligently continue such actions), the Party not in default shall be entitled, without prejudice to any of its other rights conferred on it by this Agreement, and in addition to any other remedies available to it by law or in equity, to terminate this Agreement in its entirety. Upon such termination, the non-defaulting Party shall retain all license rights granted to it hereunder and the defaulting Party shall lose all license rights hereunder; provided, however, that in the event of a good faith dispute with respect to the existence of a material breach or bankruptcy petition, or the timely cure thereof, the sixty (60) day cure period shall be tolled until such time as the dispute is resolved pursuant to arbitration provisions of this Agreement.

10.3 Maintenance Provisions. If either Party is preparing to file a bankruptcy provision or is preparing to permanently cease operations (other than in connection with a sale of all or substantially all of its business and assets), then both Parties shall negotiate in good faith for a sale of the applicable Subject Intellectual Property to the other Party.

10.4 Consequences of Expiration or Termination. Except as otherwise provided herein, upon the expiration or termination of this Agreement:

(a) all remaining records and materials in a Party's possession or control containing the other Party's Confidential Information and to which the former Party does not retain usage rights hereunder, shall promptly be returned or destroyed at the request of the disclosing Party. Notwithstanding the foregoing, one copy of such records may be retained by legal counsel for the former Party solely for archival purposes.

(b) For reason of a default described in Section 10.2 above, the non-defaulting Party shall retain all license rights provided in this Agreement for the non-defaulting Party's Fields of Use as allocated herein, but such license rights shall be non-exclusive.

ARTICLE 11
MISCELLANEOUS

11.1 Relationship of the Parties. For all purposes, the Parties' legal relationship under this Agreement to each other shall be that of independent contractor. Nothing contained in this Agreement shall be construed as creating any agency, partnership, joint venture or other form of joint enterprise, employment or fiduciary relationship between the Parties, and neither Party shall have authority to contract for or bind the other Party in any manner whatsoever. Each Party shall bear its own costs incurred in the performance of its obligations hereunder without charge or expense to the other except as expressly provided in this Agreement.

11.2 Dispute Resolution. The Parties accept the process set forth below as the exclusive means to resolve disputes arising under this Agreement.

(a) Dispute Notice. Either Party ("Claimant") may promptly notify the other Party ("Respondent") in writing ("Dispute Notice") of a dispute arising under this agreement that has not been resolved through ordinary commercial means. The Dispute Notice will include (i) a summary of the dispute; (ii) the Claimant's position; and (iii) any material and relevant documentary information or

references relating to the dispute that are in Claimant's possession or control. Within five (5) business days after receiving the Dispute Notice, Respondent will respond in writing by either (I) agreeing to Claimant's position or (II) scheduling a dispute resolution meeting to occur within ten (10) business days following receipt of the Dispute Notice.

(b) Initial Meeting. If Respondent schedules a dispute resolution meeting, Respondent will submit to Claimant (i) Respondent's written position and (ii) any material and relevant documentary information or references relating to the dispute that are in Respondent's possession or control. The dispute resolution meeting may be by telephone or other agreed means of contemporaneous communication. Each Party will appoint one or more individuals authorized to act with regard to the disputed issue. All dispute resolution meetings must be concluded within twenty (20) business days of the Dispute Notice ("dispute resolution meeting period"). If the dispute has not been resolved by the Parties within five (5) business days of the conclusion of the dispute resolution meeting period, each Party will prepare, and deliver to the other Party, a written summary (not to exceed three (3) 8.5"x11" pages; single spaced; typed; one-inch margins; 12-point Times New Roman font) identifying (I) all resolved issues and how they were resolved and (II) any unresolved issues and including each Party's proposed resolution ("Written Summary").

(c) Mediation. If the Parties are unable to resolve all disputed issues themselves by meeting, either Party may initiate mediation by notice to the other generally following the Commercial Mediation Procedures of the American Arbitration Association ("AAA") (see www.adr.org) within thirty (30) days following delivery of the Dispute Notice. The mediator will be a qualified neutral, but need not be a member of the AAA panel of neutrals. Within seven (7) business days of initiating the mediation process, the Parties or their legal counsel shall attempt in good faith to select a single mediator; if they cannot, then a neutral shall be selected by each Party (and compensated by same) who shall together select a third neutral to mediate the matter. The Parties will present to the mediator the Written Summary and any material and relevant documentary information previously shared by the Parties, and a confidential memorandum if requested by the mediator. The confidential memorandum will be maintained in confidence by the mediator unless and only to the extent disclosure to the other Party or third parties is authorized in writing by the Party submitting such memorandum. The mediation will be completed within thirty (30) days of the mediator's appointment, and will be held in New York, USA. If the mediation resolves all disputed issues, the Parties will bear their own mediation costs and equally share the cost of the mediator.

(d) Arbitration. If the mediation fails to resolve all disputed issues, either Party may initiate arbitration within ten (10) days after the mediation concludes. Arbitration will be governed by the US Federal Uniform Arbitration Act (Title 9, US Code, Section 1-14, as amended), and will follow the AAA Arbitration Rules then effective, as amended from time to time. The arbitrator will be a qualified neutral, but need not be a member of the AAA panel of neutrals. Within seven (7) business days of initiating arbitration, the Parties or their legal counsel shall attempt in good faith to select a single arbitrator; if they cannot, then a neutral shall be selected by each Party (and compensated by same) who shall together select a third neutral, to be the sole arbitrator of the matter. The Parties will present to the arbitrator their Written Summary and any material and relevant documentary information previously provided to the mediator, and a confidential memorandum if requested by the arbitrator. The confidential memorandum will be maintained in confidence by the arbitrator unless and only to the extent disclosure to the other Party or third parties is authorized in writing by the Party submitting such memorandum. Arbitration will be held in the State of New York, and will be completed with a final determination rendered within forty-five (45) days of the arbitrator's appointment. Unless otherwise

determined by the arbitrator (or the judge in the case of applying clause (f), below, or Sections 11.3 - 11.5, below), the non-prevailing Party will be obligated to reimburse the prevailing Party's reasonable attorneys' fees and other expenses related to the mediation, arbitration, or any judicial action; the Parties' good faith compliance with the intent of this Section 11.2 shall be a material factor in such determination by the arbitrator (judge).

(e) Application and Finality of Arbitration. The procedures outlined in this Section 11.2 will be the sole and exclusive process for dispute resolution between the Parties and relating to this Agreement. Judgment upon an arbitrator's determination may be entered by any court having competent jurisdiction over the affected Party. Notwithstanding the foregoing, either Party may seek a preliminary injunction or other equitable judicial relief if such action is commercially reasonable to prevent irreparable damage.

(f) Continuing Obligation to Perform. The Parties will continue in good faith to perform their respective obligations hereunder throughout any dispute resolution process. Throughout the entire dispute resolution process the Parties will have a continuing obligation to produce all relevant documentary information or references relating to the dispute that are in the Parties' respective possession or control.

11.3 Governing Law; Submission to Jurisdiction.

(a) Governing Law. This Agreement and all related documents, and all matters arising out of or relating to this Agreement, are governed by, and construed in accordance with, the laws of the State of New York, United States of America, without regard to the conflict of laws provisions of any jurisdiction to the extent such principles or rules would require or permit the application of the laws of any jurisdiction other than those of the State of New York.

(b) Submission to Jurisdiction; Service of Process. Any action, suit or other proceeding arising out of or related to this Agreement, the licenses granted hereunder, or the validity or enforceability or scope of any claim of a Patent licensed hereunder, or a Party's obligations concerning the other Party's Know-How, shall be instituted exclusively in the federal courts of the United States or the courts of the State of New York, and each Party irrevocably submits to the exclusive jurisdiction and venue of such courts in any such suit, action or proceeding. Service of process, summons, notice or other document by mail to such Party's address set forth herein shall be effective service of process for any action, suit or other proceeding brought in any such court.

11.4 Waiver of Jury Trial. Each Party irrevocably and unconditionally waives any right it may have to a trial by jury for any legal action arising out of or relating to this Agreement or the transactions contemplated hereby.

11.5 Equitable Relief. Notwithstanding anything to the contrary in this Article, the Parties shall be entitled to seek a restraining order, injunction, or similar extraordinary equitable in any court of competent jurisdiction to prevent any violation of the applicable agreement if such violation is reasonably anticipated to cause irreparable harm. The Parties agree that an amount greater than $10,000 shall not be necessary for purposes of providing adequate security to assure that a Party wrongfully restrained or enjoined shall be paid costs and damages; however, the amount of security provided according to this provision shall not limit the amount of actual costs or damages which a Party wrongfully restrained or enjoined may recover. These remedies shall not be deemed to be exclusive but

shall be in addition to all other remedies available under this Agreement at law or in equity, subject to any express exclusions or limitations in this Agreement to the contrary.

11.6 Attorneys' Fees. In the event that any action, suit or other legal or administrative proceeding, or arbitration, is instituted or commenced by either Party hereto against the other Party arising out of or related to this Agreement, the prevailing Party shall be entitled to recover its reasonable attorneys' fees and court costs from the non-prevailing Party.

11.7 Assignment. This Agreement, and resulting and related contracts, licenses and Background IP, may not be assigned or transferred by either Party, in whole or in part, whether voluntarily or by operation of law, without the prior written consent of the other Party, which consent will not be unreasonably withheld, delayed or conditioned; provided that, without prior written consent, either Party may assign this Agreement, in whole or in part, to any of its Affiliates if such Party guarantees the performance of this Agreement by such Affiliate; provided, however, that neither Party may assign this Agreement to a non-Affilate successor to all or substantially all of the assets or business of such Party to which this Agreement relates, whether by merger, sale of stock, sale of all or substantially all business and assets or other similar transaction without the prior written consent of the other Party, which consent will not be unreasonably withheld, delayed or conditioned. Any assignment in violation of this Section 11.7 provision is void and without effect. This Agreement shall be binding upon and inure to the benefit of the Parties hereto, their permitted successors, legal representatives and assigns. All licenses granted hereunder shall be assigned in compliance with the foregoing.

11.8 Notices. All demands, notices, consents, approvals, reports, requests and other communications hereunder must be in writing, and will be deemed to have been duly given only if delivered personally, by mail (certified, return receipt requested, postage prepaid), or by overnight delivery using a nationally-recognized carrier, or by email (upon confirmation of receipt by the recipient by email or otherwise in writing, and with a copy of such communication mailed by first class mail, postage prepaid) to the Parties at the following addresses:

BvW:

BvW, ~~LLC~~ Holding AG
Eichstrasse 6A Cham
Switzerland 6330

Attn: Corinne Welti, Director
Email: C.Welti@treuco.ch

with a copy to:
Edward T Fan
Torys, LLP
79 Wellington St. W.
30th Floor, Box 270, TD South Tower
Toronto, Ontario M5K 1N2
Canada
efan@torys.com
416.865.8244

Hoowaki:

Hoowaki, LLC
511 Westinghouse Road
Pendleton, SC, 29670

Attn: Ralph Hulseman, President
Email: RalphHulseman@Hoowaki.Com

with a copy to:
Jim Denning
McNair Law Firm, P.A.
104 South Main St
Suite 700
Greenville SC 29602
USA
jdenning@mcnair.net
(864) 271-4940

or to such other address as the addressee shall have last furnished in writing in accord with this provision. All notices shall be deemed effective upon receipt by the addressee.

11.9 Severability. If any provision of this Agreement is held to be invalid, illegal or unenforceable in any respect, that provision shall be limited or eliminated to the minimum extent necessary so that this Agreement shall otherwise remain in full force and effect and enforceable. Upon a determination that any term or other provision is invalid, illegal or unenforceable, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.

11.10 Amendment; Modification; Waiver. This Agreement may only be amended, modified or supplemented by an agreement in writing signed by each Party hereto. No waiver by any Party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the waiving Party. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any rights, remedy, power or privilege arising from this Agreement shall operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege.

11.11 Interpretation. For purposes of this Agreement: (a) the words "include," "includes" and "including" shall be deemed to be followed by the words "without limitation"; (b) the word "or" is not exclusive; and (c) the words "herein," "hereof," "hereby," "hereto" and "hereunder" refer to this Agreement as a whole.

Unless the context otherwise requires, references herein: (x) to Sections and Schedules refer to the Sections of and Schedules attached to, this Agreement; (y) to an agreement, instrument or other document means such agreement, instrument or other document as amended, supplemented and modified from time to time to the extent permitted by the provisions thereof; and (z) to a statute means such statute as amended from time to time and includes any successor legislation thereto and any regulations promulgated thereunder. This Agreement shall be construed without regard to any presumption or rule requiring construction or interpretation against the party drafting an instrument or causing any instrument to be drafted. Any Schedules referred to herein shall be construed with, and as an integral part of, this Agreement to the same extent as if they were set forth verbatim herein.

The headings used in this Agreement have been inserted for convenience of reference only and do not define or limit the provisions hereof.

11.12 Entire Agreement. This Agreement (including, but not limited to, the exhibits and schedules hereto) constitutes the entire agreement between the Parties hereto with respect to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings between the Parties, whether written or oral, with respect to the subject matter.

11.13 Further Assurances. Each Party shall, and shall cause their respective Affiliates to, upon the reasonable request of the other Party, promptly execute such documents and take such further actions as may be necessary to give full effect to the terms of this Agreement.

11.14 No License. Nothing in this Agreement shall be deemed to constitute the grant of any license or other right in either Party, to or in respect of any Subject Product, Patent, trademark, Confidential Information, trade secret, Know-How, or other data or any other intellectual property or Intellectual Property Rights of the other Party, except as expressly set forth herein.

11.15 No Third Party Beneficiaries. None of the provisions of this Agreement shall be for the benefit of or enforceable by any third party, including, but not limited to, any creditor of either Party hereto.

11.16 Counterparts. This Agreement may be executed in counterparts, each of which, when executed, shall be deemed to be an original and all of which together shall constitute one and the same document. Executed counterpart signature pages may be delivered by electronic transmission and shall be effective upon authorized affixation to a counterpart of this Agreement in the form signed by the Parties.

[SIGNATURE PAGE IMMEDIATELY FOLLOWS]

IN WITNESS WHEREOF, BvW and Hoowaki, by their duly authorized officers, have executed and delivered this Cooperation and License Agreement on or about July 10, 2015 to be legally binding and effective as of the Effective Date.

BvW Holdings AG

By: _____

Name: C. Welti / U. Felder

Title: Directors

HOOWAKI, LLC

By: _____

Name: Ralph Hulseman

Title: President, Hoowaki LLC

List of Exhibits:

Exhibit 1 – BvW Patents
Exhibit 2 – Hoowaki Patents and Tool and Die Intellectual Property
Exhibit 3 – Joint Patent(s)
Exhibit 4 – Subject Surface Characteristics (list of micro patterns)
Exhibit 5 – BvW Fields of Use and Royalties
Exhibit 6 – Hoowaki Fields of Use and Royalties

Exhibit 1 – BvW Patents

Title	Number	Priority/ Filing Date	Patent No.	Issue Date	Country
Implant Localization Device	US20140288582 A1	Jun 21, 2011			US
	PCT/US2012/043471	Jun 21, 2012			PCT
Implantable Superhydrophobic Surfaces	WO2013112378 A2	Jan 24, 2012			US
	PCT/US2013/022214	Jan 18, 2013			PCT
Bio-Selective Surface Textures	WO2013112380 A2	Jan 24, 2012			US
	PCT/US2013/022234	Jan 18, 2013			PCT

Exhibit 2 – Hoowaki Patents and Tool and Die Intellectual Property

Title	Number	Priority/ Filing Date	Patent No.	Issue Date	Country
METHOD FOR MAKING MICROSTRUCTURED OBJECTS		May 8, 2009	US 8720047 B2	May 13, 2014	US
					PCT
METHOD FOR MANUFACTURING MICROSTRUCTURED METAL OR CERAMIC PARTS FROM FEEDSTOCK	US 20110266724 A1	May 8, 2009			US
					PCT
System and method for extruding parts having microstructures	WO 2012116301 A3	Febr 24, 2011			PCT
	US 20120223451 A1	Febr 24, 2011			US
	EP 2678143 A2	Febr 24, 2011			Europe
	CA 2828499 A1	Febr 24, 2011			Canada
	CN 104010515 A	Febr 24, 2011			China

This application claims the benefit of and priority of PCT Patent Application: US09/43306,"Method of Manufacturing Microstructures", filed on May 8, 2009; PCT Patent Applications: US09/43307,"Flexible Microstructured Superhydrophobic Materials", filed on May 8, 2009 and PCT Patent Application: US09/49565, "Casting Microstructures into Stiff and Durable Materials from a Flexible and Reusable Mold", filed on Jul. 2, 2009 incorporated by reference and pursuant to 35 U.S.C. §111.

Exhibit 3 – Joint Patent(s)

To be added as the patents are filed. Two patents are in preparation as of May 24, 2015.

Exhibit 4 – Subject Surface Characteristics (list of micro patterns)

Pattern #	Feature size	Feature shape	Pitch	Lattice geometry	Feature depth	Comment
063A	Combo 067A, 068A	circles	N/a	triangular	35	MastBio Non-Fluted Flat
064A	Combo 067A, 069A	circles	N/a	triangular	35	MastBio Fluted Flat
065A	Combo 067A, 068A, 070A	circles	N/a	triangular	85, 135	MastBio Sinusoid Non-Fluted (Hoowaki Background)
066A	Combo 067A, 069A, 070A	circles	N/a	triangular	85, 135	MastBio Sinusoid Fluted (Hoowaki Background)
067A	3	circles	6	triangular	5	Level 1 (Small Hair MB Features)
068A	25	circles	35	triangular	30	Level 2 (Non-Fluted) Features
069A	35	circles	45	triangular	30	Level 2 (Fluted) Features
070A	100, 150	circles	300	triangular	50, 100	Level 3 (Hoowaki Features)
071A	70, 70	circles	150	triangular	50, 100	Level 3 (MB Features)
072A	Combo 067A, 069A, 078A	circles	300	triangular	100	MastBio Sinusoid Fluted (Hoowaki Background 078A)
073A	Combo 067A, 069A, 079A	circles	N/a	triangular	85, 135	MastBio Sinusoid Fluted (Hoowaki Background 079A)
074A	Combo 067A, 069A, 080A	circles	N/a	triangular	85, 150	MastBio Sinusoid Fluted (Hoowaki Background 080A)
078A	300	circles	300	triangular	100	Level 3 (Hoowaki Rd. 2 Features)
079A	300	circles	300	triangular	150	Level 3 (Hoowaki Rd. 2 Features)
080A	300	circles	300	triangular	200/300	Level 3 (Hoowaki Rd. 2 Features)

Pattern #	Feature size	Feature shape	Pitch	Lattice geometry	Feature depth	Comment
085A	3+35	circles	6+35	triangular	4+30	L2 +L1 flutes 10 microns deep
086A	3+35	circles	6+35	triangular	4+45	L2 +L1 flutes 10 microns deep
087A	450	circles	450	triangular	300	Level 3
088A	600	circles	600	triangular	400	Level 3
089A	750	circles	750	triangular	500	Level 3
090A	Combo 085A, 087A	circles	N/a	triangular	35, 300	Mast Bio
091A	Combo 085A, 088A	circles	N/a	triangular	35, 400	Mast Bio
092A	Combo 085A, 089A	circles	N/a	triangular	35, 500	Mast Bio
093A	Combo 086A, 087A	circles	N/a	triangular	45, 300	Mast Bio
094A	Combo 086A, 088A	circles	N/a	triangular	45, 400	Mast Bio
095A	Combo 086A, 089A	circles	N/a	triangular	45, 240	Mast Bio
095B	Combo 086A, 089A	circles	N/a	triangular	45, 370	Mast Bio

Exhibit 5 – BvW Fields of Use and Royalties

Application	Territory	Date Of Agreement
MAST Biosurgery surgical wrap products	World-wide	Jan. 2012

Exhibit 6 – Hoowaki Fields of Use and Royalties

Application	Territory	Date Of Agreement

Addendum To

Cooperation and License Agreement between BVW Holding AG and Hoowaki, LLC dated January 10, 2012 (the "Agreement")

The Parties have agreed that the Agreement shall be amended by way of an addendum (this "**Addendum**"), effective as of ~~June 19, 2017~~ (the "**Addendum Effective Date**"). For the avoidance of doubt, the Agreement (including its exhibits, schedules, and terms and conditions, as amended herein), and this Addendum shall together constitute one single and entire agreement between the Parties.

Capitalized terms used and not otherwise defined in this Addendum shall have the meanings given to them in the Agreement.

In the case of any inconsistency or conflict between any terms of this Addendum and the provisions of the Agreement, the provisions of this Addendum shall prevail.

In consideration of the mutual covenants and agreements contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound, the Parties agree as follows:

1. Article 1 of the Agreement is amended by appending the following to the end thereof:

Further Definitions

1.25 "Capital Costs" means all Costs incurred in connection with the enlargement, and/or modification of a Facility, and refurbishing, repair, or replacement, as applicable, of capital equipment used in a Facility, that is customarily understood in the industry as a capital cost, and is required for the production of, but solely to the extent allocable to, Subject Products.

1.26 "Direct Costs" means all costs, expenditures, disbursements, charges, fees, payments, liabilities and expenses, directly related to the Subject Products minus Cost of Goods Sold (as defined in 1.28 hereof). Direct Costs include costs directly attributable to the Subject Products including Sales Costs, legal contract costs, R&D research costs, and freight; and includes costs directly attributable to the Subject Products including ratably proportioned utilities such as energy, and ratably proportioned overhead including building rent, managerial and administrative staff, and insurance.

1.27 "Direct Cost Carry Ratio" means the pre-agreed ratio of the Direct Cost that each Party is committed to carry for a specific Field of Use.

1.28 "Facility" means any processing or manufacturing plant which is owned or operated by a Party for the purpose of producing Subject Products.

1.29 "Cost of Goods Sold" ("COGS") means the costs of raw materials, labor, capital equipment rental, third party vendor, and all other additives or consumables, required for and actually utilized in the production of, and solely allocable to, Subject Products by a Party at a Facility from time to time, but not including Direct Costs.

1.30 "Gross Profit" means Net Sales, less the COGS, provided and to the extent such costs are actually incurred and do not exceed reasonable and customary amounts in each market for such. For the purposes of this Addendum, "market" shall be understood in reference to a particular field of use in a particular geographic region.

1.31 "Net Profit" means Gross Profit, less the sum of, less the sum of Direct Costs, provided and to the extent such costs are actually incurred in the production or sale of, and are properly allocable to Subject Products and do not exceed reasonable and customary amounts in each market for such.

1.32 "Sales Commission" means employee(s) monetary compensation directly related to sale(s) made.

1.33 "Sales Costs" means cost of tracked time of sales labor, cost of travel of sales activities, and expenses for marketing, publicity, and trade show activities but not Sales Commission.

1.34 "Specific Fields of Use" means the BvW Fields of Use and the Hoowaki Fields of Use.

2. Article 3 of the Agreement is amended by appending the following to the end thereof:

3.7 Capital Equipment Rental. Each party individually will solely own and purchase capital items (including equipment). Use by a party of equipment purchased through Capital Costs to produce the Subject Products will be reimbursed through capital equipment rental charges included in COGS. Capital equipment rental charges shall not exceed reasonable and customary amounts in each market for such.

3.8 Direct Costs Reimbursement unrelated to a Specific Field of Use. Subject to Section 3.10 of the Agreement, each Party shall on a quarterly basis invoice the other Party one-half of the Direct Costs allocable to the Subject Products and not related to a Specific Field of Use the invoicing Party has incurred in the preceding quarter duly specifying each such Direct Cost in its invoice, and the other Party shall pay the invoicing Party the amount set out it the invoice within 30 days of receipt of the invoice. Such Direct Cost shall not exceed reasonable and customary amounts in each market for such.

3.9. Gross Profit Distribution unrelated to a Specific Field if Use. Without prejudice to the provisions of Sections 3.1 and 3.2 of the Agreement and subject to Section 3.11 of the Agreement, each Party shall on a quarterly basis share the Gross Profit of Subject Products unrelated to Specific Fields of Use of the preceding quarter such that each Party shall receive 50 % on the Gross Profit of Subject Products unrelated to Specific Fields of

Use of the preceding quarter. Applicable payments shall be made within 30 days after the end of each relevant quarter.

3.10 Direct Costs Reimbursement for a Specific Field of Use.
If the Parties agree to a predetermined Direct Cost Carry Ratio for a Specific Field of Use between the Parties, then Section 3.8 of the Agreement shall not apply, and instead each Party shall on a quarterly basis invoice the other Party the Direct Costs allocable multiplied by the Direct Cost Carry Ratio to the Subject Products to such Specific Field of Use the invoicing Party has incurred in the preceding quarter duly specifying each such Direct Cost in its invoice, and the other Party shall pay the invoicing Party the amount set out it the invoice within 30 days of receipt of the invoice. Such Direct Cost shall not exceed reasonable and customary amounts in each market for such.

3.11 Gross Profit Distribution for a Specific Fields of Use.
Notwithstanding the provisions of Sections 3.1 and 3.2 of the Agreement, if the Parties agree to a predetermined Direct Cost carry Ratio for a Specific Field of Use between the Parties, then Sections 3.1, 3.2 and 3.9 shall not apply, and instead each shall share the Gross Profit such that the Gross Profit will be distributed between the Parties using the same Direct Cost carry Ratio; provided, however, that regardless of the Direct Cost Carry Ratio, each Party shall receive a minimum of 20% of the Gross Profit. The sharing of Gross Profit shall be determined on a quarterly basis, and applicable payments shall be made within 30 days after the end of each relevant quarter.

3.12 Notice Of and Consent To Capital Expenditures. If a Party desires to make one or a series of closely related capital expenditures that will be included in the "capital equipment rental charges" paid by the other Party as provided in Section 3.8 and where such capital expenditure is at least USD$100,000, it shall so notify the other Party in writing, providing reasonable detail relating thereto including amount of applicable expenditure, purpose of expenditure and its relationship to the Subject Product, and the resulting amount of quarterly rental charges, and shall obtain the other Party's consent thereto prior to making such expenditure. The other Party shall have twenty (20) days to consider and consent or reject in writing to the particulars set forth in such notice, provided that consent by the other Party shall not be unreasonably withheld, conditioned or delayed. If the other Party does not consent or reject in writing within twenty (20) days of receiving such notice, it shall be deemed to have consented to the expenditure.

3.13 Notice of Direct Cost Increases. If a Party anticipates that Direct Costs associated with any one or more Subject Products will increase from the immediately preceding calendar quarter to the next succeeding calendar quarter by USD$50,000 or more, it shall so notify the other Party in writing at least sixty (60) days prior to such next succeeding calendar quarter providing reasonable detail relating thereto.

3.14 Information and Audit Rights. Each Party shall provide the other Party with a quarterly report containing in reasonable detail all factors relevant for determining the claims of the other Party under Sections 3.7 to 3.12 hereof. Section 3.6 (Audit rights) of the Agreement shall apply mutatis mutandis with respect to Sections 3.7 – 3.13 hereof.

3.15 Confidentiality. All such reports and the information presented therein by a Party under Sections 3.7 – 3.14 hereof shall be Confidential Information of the providing Party, and Article 5 (Confidential Information) of the Agreement shall apply mutatis mutandis with respect thereto.

3. General:

3.1 No Other Effect. Except as specifically set forth herein, all other terms, conditions, and provisions of the Agreement shall remain in full force and effect and no amendment, modification, waiver, release, or consent of or with respect to any of the matters set forth in or provisions of such Agreement shall be implied except as otherwise expressly set forth in this Amendment. As used in the Agreement, the terms "this Agreement," "herein," "hereof," "hereinafter," "hereto" and words of similar import, shall, unless the context otherwise requires, mean the Agreement as amended by this Amendment.

3.2 Counterparts. This Amendment may be executed by facsimile and in any number of counterparts, each of which shall be deemed to be an original and all of which shall be deemed to be one and the same instrument.

3.3 Governing Law. The Agreement and this Amendment, and all matters arising out of or relating to the Agreement or this Amendment, are governed by, and construed in accordance with, the laws of the State of New York, United States of America, without regard to the conflict of laws provisions of any jurisdiction to the extent such principles or rules would require or permit the application of the laws of any jurisdiction other than those of the State of New York.

(*signature page follows*)

RAH

IN WITNESS WHEREOF, BVW and Hoowaki, by their duly authorized officers, have executed and delivered this Addendum on or about June 19, 2017 to be legally binding and effective as of the Addendum Effective Date. January 1, 2016

BVW Holding AG	HOOWAKI, LLC
By:	By:
Name:	Name: Ralph Hulseman
Title:	Title: President, Hoowaki LLC

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
BVW HOLDING AG, Plaintiff, vs. HOOWAKI, LLC, Defendant.	Civil Action No.: 2021-CP-23-01191 **MOTION TO ALTER OR AMEND AND FOR RECONSIDERATION**

This Motion to Alter or Amend and for Reconsideration ("Motion") is made pursuant to Rules 52 and 59 of the South Carolina Rules of Civil Procedure. It is also made pursuant to the South Carolina Supreme Court's decision in Elam v. South Carolina Department of Transportation, which instructs that a Rule 59(e) motion is not only a vehicle to ask a circuit court to alter or amend a judgment, but it is also as a vehicle to seek reconsideration. See 361 S.C. 9, 21-22, 602S.E.2d 772, 778-79 (2004).

Rule 59(b) specifies that this motion may not be made later than ten days after the moving party receives written notice that the court's judgment has been entered. Defendant received written notice on September 1, 2021 that this Honorable Court's order was entered on September 1, 2021. This motion is accordingly timely.

ARGUMENT

The purpose of this Motion is to direct the court's attention that this Honorable Court erred in concluding that this matter is not subject to arbitration. While Defendant understands that this Honorable Court has deliberated on this matter and rendered its decision, the Defendant respectfully submits that the court has overlooked or misapplied the law in reaching that decision in several pertinent areas.

i. Standard of Review

As a threshold matter, this Honorable Court erred as a matter of law in its decision to solely consider the allegations as set forth in the complaint. See Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999) ("[T]his Court has the power and duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence."). Additionally, "affidavits and other evidence outside the pleadings may, in certain circumstances, be considered in support of a motion to dismiss based on lack of jurisdiction." Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999). Defendant asserted in its Motion to Dismiss and Compel Arbitration that the threshold issue of whether this dispute should be submitted to arbitration in the first instance should be determined by the arbitrator and not the circuit court. Defendant respectfully contends that this Honorable Court improperly failed to consider the 2015 Collaboration and License Agreement ("Agreement") between the Plaintiff and Defendant which contains the applicable arbitration provision and, therefore, erred as a matter of law.

Additionally, this Honorable Court also erred in applying the wrong standard of review with respect to the enforcement of arbitration. This Honorable Court stated in its order that "[t]he party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement." (Order., P. 2). Respectfully, Defendant contends this is an error of law. In fact, our courts have held that "[t]he party **resisting** arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (quoting Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000)) (emphasis added). Moreover, "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of

arbitration." Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118–19 (2001). This Honorable Court's standard of review in its order improperly shifted the burden of proof with respect to the threshold arbitrability decision and therefore is in error.

ii. Liberal Policy Favoring Arbitration

Defendant respectfully asserts that this Honorable Court failed to properly consider the relationship between the promissory note and the Agreement. The broadly-worded arbitration clause included in the Agreement applies to the dispute over the alleged debt of the promissory note executed between the parties due to the Defendant's representations that the promissory note was to further the overall business dealings between the parties. The parties have operated under the Agreement for several years and the promissory note at issue is related to the original Agreement between the parties and the same basic subject matter which the agreement governs. "[a] broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." Id. at 598, 553 S.E.2d at 119. Moreover, the Federal Arbitration Act ("FAA"), which applies to this arbitration provision, mandates that arbitration agreements in contracts "evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements." See Drews Distrib. v. Sillicon Gaming, Inc., 245 F.3d 347, 349 (4th Cir. 2001). Given the improper standard of review applied by this Honorable Court and our Court's jurisprudence that any doubts concerning the scope of arbitrable issues

should be resolved in favor of arbitration, Defendant respectfully requests that this Honorable Court reconsider this matter.

CONCLUSION

Defendant respectfully requests that the court grant reconsideration, withdraw its previous order, and substitute a new order that follows the reasoning articulated in Defendant's memorandum of law in support of motion to dismiss, presentation at oral argument, and in this written Motion by dismissing Plaintiff's Complaint and compelling arbitration.

Respectfully submitted,

s/Michael D. Wright
Vincent A. Sheheen, Esq. SC Bar #:11552
Michael D. Wright, Esq. SC Bar #: 78401
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Attorneys for Defendant Hoowaki

September 10, 2021

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

COURT OF COMMON PLEAS
2021-CP-23-01191

BVW HOLDING AG,
PLAINTIFF,

vs.

HOOWAKI, LLC,
DEFENDANT.

TRANSCRIPT OF RECORD

COPY

August 2, 2021
Greenville, South Carolina

B E F O R E:

THE HONORABLE ALEX KINLAW, JR., JUDGE.

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

JAMES H. CASSIDY, ESQ.
AMBER B. GLIDEWELL, ESQ.
Attorneys for the Plaintiff

VINCENT A. SHEHEEN, ESQ.
Attorney for the Defendant

HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits introduced.)

P R O C E E D I N G S

THE COURT: The next matter before the Court appears to be BMW [sic] Holding AG vs. Hoowaki, LLC, case number 2021-CP-23-1191. This is a debt collection matter.

I have Ms. Amber Glidewell.

Is she here? That's you, ma'am?

MS. GLIDEWELL: That's me, yes.

THE COURT: All right. She's here on behalf of the Plaintiff.

And then I've got Mr. --

MR. SHEHEEN: Vincent Sheheen, Your Honor.

THE COURT: Vincent Sheheen.

MR. SHEHEEN: It's good to see you.

THE COURT: All right. You look better with your mask on.

MR. SHEHEEN: That's what I hear. Everybody but my wife says that.

THE COURT: I've got Mr. Sheheen here on behalf of the Defendant.

And then I've got another gentleman.

MR. CASSIDY: Judge, I can't believe --

THE COURT: You look better -- you look better with your mask on. Okay.

MR. CASSIDY: You hurt my feelings, Judge.

THE COURT: Oh, I'm so sorry.

MR. CASSIDY: I'm just a mirage.

THE COURT: And this is your motion, Mr. Sheheen.

MR. SHEHEEN: Yes, sir, Your Honor.

Your Honor, if I may approach, I have a memorandum and exhibits that I filed on Friday. And I'll hand -- excuse me -- hand a copy to you and your law clerk.

Thank you.

Your Honor, as we speak, would like us to take our mask off --

THE COURT: I'm going to give you back -- I don't have a law clerk right now.

MR. SHEHEEN: Okay.

THE COURT: I'm going to give you back that copy.

MR. SHEHEEN: Very good.

Thank you.

THE COURT: Okay. Tell me -- give me a little bit of rendition of the facts. And then give -- you can go into the motion.

MR. SHEHEEN: Thank you, Your Honor.

Would you like us to keep our mask on when we speak or off?

THE COURT: Well, you -- you can take them off, if you want to.

MR. SHEHEEN: Thank you, Your Honor.

I'll put it back on when I'm done. It's hard to get

it out when the mask is on.

THE COURT: All right.

MR. SHEHEEN: Your Honor, this is a case bought -- brought by BVW against Hoowaki on a note, an outstanding note. But the case has a lot more to it.

Hoowaki is a -- kind of an upstart design company that designs different medical devices. It's located here in South Carolina. It's closely held.

The Defendant is an international company, I believe, headquartered in Switzerland that manufacturers multiple different types of devices.

Hoowaki designed a nose swab. And this was, actually, before the -- our -- our recent familiarity with nose swabs. But they designed a nose swab that they wanted to put in production. They partnered with the Plaintiff, with BVW Holdings, to manufacture it. There's a lot of interlocking relationships between the parties.

And a dispute arose between the parties because Hoowaki claimed that BVW Holding was not performing. They weren't producing the swab in a timely manner. That put Hoowaki unable to pay bills and losing money.

And they began in the agreements -- which you have attached as A and B to my memo. They began to hold discussions under those agreements up in New York.

There's a requirement if there's any disputes that

they have to have a negotiation session. They have to have a mediation session. And then if they can't resolve it, it results in arbitration. As you can imagine, the arbitration provision was included at the request of the big company, BVW Holding AG, when they executed these agreements.

Judge, meanwhile, while these disputes arose, the Plaintiff in this case, BVW Holdings, filed suit on an outstanding note in Greenville. And that's why we are before you today.

That note was a -- monies borrowed by Hoowaki from BVW Holdings. They borrowed those monies, Your Honor, as we talk about in our memo so that they could begin production under the agreements that the parties entered into. It was part of the financing arrangement that they needed to move forward.

And, Your Honor, we have now filed a motion to enforce the -- the arbitration agreement and to dismiss the complaint. Because all of this should be handled in New York where all -- where 90 percent of it is being handled right now in a negotiation and mediation.

And, Your Honor, with that, I will turn to the motion, if that's okay with you.

THE COURT: Okay.

MR. SHEHEEN: Thank you, Your Honor.

Your Honor, we filed this motion to enforce the arbitration provision that was included in the agreements, which are attached at A, B.

Your Honor, and the crux of this for your determination really is -- is the note and the loan following in the arbitration provision. Because there is a separate note that was executed. And the answer, Your Honor, we would argue is, yes, it is.

As you know, the Federal Arbitration Act is broad. It is to be interpreted by the Court with leeway giving toward things being included in arbitration.

Your Honor, this isn't even a -- you know, a consumer case where one side can say, oh, well, you know, I'm just a consumer and got locked into this arbitration. This is a very sophisticated party that included this arbitration provision in the agreements that it wanted with our client.

Your Honor, the note is directly related to exhibit A, which talks about all the different interactions that the parties will have. The only reason that my client needed this note was to try to perform under this agreement.

Your Honor, and if we went forward in state court, our defenses and counterclaims would all be about the agreements the parties have between themselves, which

contained this arbitration provision. This really is all part and parcel of the underlying agreements.

And, Your Honor, if you turn to Page 6 -- excuse me, Page 14 of Exhibit A.

THE COURT: Okay.

MR. SHEHEEN: You will see the process for dispute resolution, actually, starts on Page 13 of Exhibit A.

THE COURT: Okay.

MR. SHEHEEN: And I won't walk you through all that. But, you know, 11.2 says, first, you'll have dispute notice. Then you'll have an initial meeting. Then you'll have mediation. Then you'll have arbitration. Again, these things are going on in New York.

There was some illusion in opposing Counsel's brief that there -- a settlement had been reached in that. But my client has informed me that no settlement has been reached in any of the matters in New York. And there would be an agreement if there was.

So, Your Honor, very briefly on the law --

THE COURT: And that arbitration in New York, is that currently ongoing?

MR. SHEHEEN: They are in step two of that, which is the initial meeting and discussions. And if you look on Page 14 of this agreement in A, the next thing is mediation.

THE COURT: Yeah.

MR. SHEHEEN: They have exchanged mediator names, I believe, but haven't started the mediation. And then you would, eventually, get to the arbitration.

THE COURT: Got you.

MR. SHEHEEN: Your Honor -- Your Honor, the Federal Arbitration Act -- and you'll see in our brief on Page 6. I'm just quoting from a case, Leaves no place for the extra -- for the exercise of discretion by the district court, but, instead, mandates the district court shall direct the parties to proceed to arbitration on issues to which an arbitration agreement has been signed. As such, courts are to resolve any doubts concerning the scope -- which is really the crux here -- of arbitration issues in favor of arbitration and with healthy regard for the federal policy faving -- favoring arbitration.

Your Honor, the last thing I would mention to you about the law on Page 7 -- and we cited it in our brief. But it says that under the Federal Arbitration Act procedural matters, which really this is -- does this fall under the arbitration provision or not -- are, first, to be decided by the arbitrator.

So if they want to try to carve out this one piece of the dispute, they need to take that up with the arbitrator in New York once that person is appointed. And if the

arbitrator says it's not covered, which I doubt they would, then we'd be back at you.

Finally, Your Honor, it just doesn't serve judicial economy to piecemeal litigation. 90 percent of this fight is up in New York. It's in the pre-mediation stage. And then if they don't settle it, it will go to arbitration stage.

The Plaintiff in this case is trying to use this one piece of the case as leverage against my client. And we don't think the Court should allow that for judicial economy, especially since the arbitration provision governs the parties...

Thank you, Your Honor.

THE COURT: All right. Mr. Cassidy -- and I -- I failed to put Mr. Cassidy's name on the record earlier.

So Mr. Cassidy or Ms. Glidewell, either one. Go ahead.

And feel free to take your mask off so everybody can hear a little better.

MR. CASSIDY: Your Honor, I don't know whether you have the note that's the subject matter of this litigation. So I'm just going to offer it up to you.

THE COURT: Okay.

MR. CASSIDY: It's attached to the brief that we filed in this matter.

THE COURT: All right.

MR. CASSIDY: As you can see, this action is just a simple action suit on a note. The note speaks for itself. It's for $119,000. It's important to note what the date is, October 16th, 2018.

The agreements that Mr. Sheheen are [sic] referring to occurred prior to this note. There's no reference that this note would be attached or related to the licensing agreement at all.

We have pled in the complaint a default. We've given notice. We've attached a sworn statement of account to show the -- the indebtedness.

So as far as looking at the four corners of the pleadings, we have set out proper allegations for a collection on a suit on a note. But, more importantly, the note, also, provides that it be interpreted by South Carolina law, not New York law.

THE COURT: It does say that.

MR. CASSIDY: Which shows you that this has nothing to do with the licensing agreement at all. But, more importantly, they wanted to attach arbitration to it under the code, which I would offer up to you.

They would have to put notice of arbitration in bold and underline at the top of the document. And the code is pretty clear that if it's not on the first page and it's

displayed conspicuously, then arbitration shall not apply.

As Mr. Sheheen said, these are sophisticated parties, commercial parties. If they wanted arbitration to apply to this note, they would have put it in there.

So with all due respect to Mr. Sheheen, I believe the argument about this licensing agreement is a red herring. It has nothing to do with the note itself. And this Court has jurisdiction over it. [Inaudible] is here in South Carolina. They signed the note in South Carolina. They agreed to have it interpreted under South Carolina law, not New York law.

THE COURT: All right. It looks like the licensing agreement was signed back in January of 2012.

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

THE COURT: Okay.

MR. CASSIDY: And it was amended in July of 2015. This note was in 2018. So they couldn't have had a perspective thought that there was going to be a note some three or four years earlier. So this is a separate unrelated matter that has nothing to do with the licensing agreement.

THE COURT: Okay. Mr. Sheheen.

MR. SHEHEEN: Thank you, Your Honor.

It doesn't make a bit of sense that this would be a separate independent matter. Because this company, BVW

Holding, is not in the business of loaning money. You don't go to them to borrow money. It is because of the agreement that was entered into. And I think the date is very important because it shows the parties were working under an agreement when they did the note. And the agreement is what you have before us.

Your Honor, as to the South Carolina code, the -- the case law is really clear that the Federal Arbitration Act trumps this provision of the South Carolina code. I've, actually, litigated that, I belive, in the Court of Appeals.

Federal law is -- trumps everything relating to federal -- to arbitration. And federal law says that if anything is related to the -- you'll have to look at the language yourself, Your Honor. But anything that arises under an agreement for arbitration should be arbitrated. And, again, the appropriate party to make that determination is the arbitrator anyway, at least, the first instance.

So, Your Honor, these parties, all of their activities, their work together arose under the agreement from 2012. And that's the only reason my client borrowed money from them was to further that agreement. And this agreement's really clear that anything arising under it is supposed to be in arbitration.

And again --

THE COURT: Let me ask you --

MR. SHEHEEN: Yes, sir.

THE COURT: And I don't mean to cut you off. Let me ask you this -- and I -- to try to get me where I need to go. If that's the case, why didn't the note, specifically, put that language in there?

MR. SHEHEEN: Your Honor, I wasn't the lawyer at the time. So, honestly, I can't answer what was intended by them -- or what was contemplated by them. But the --

THE COURT: And the only reason I say that is because you both indicate that these are sophisticated parties. And it would just seem to me that the thing would be to, specifically, put that language in there. 2018 -- I'm --

MR. SHEHEEN: Yes, sir.

THE COURT: I'm just --

MR. SHEHEEN: Your Honor, maybe I can answer that another way.

THE COURT: Okay.

MR. SHEHEEN: And that is our defenses to the payment of this note are that they have not performed under the cooperation and licensing agreement, which is, clearly, arbitrable, which means you're going to get right back into arbitration. And that is why the Federal Arbitration Act is so broad, because you can't untangle these issues

from each other.

In other words, if they are not performing under their agreement and that has caused us damages that makes it impossible for us to pay on the note, which is, indeed, what has happened, then we're going to be litigating all of this in one case. And it has to be arbitrated, which is the whole point of having broad --

THE COURT: But -- but if we're operating under the terms of South Carolina law, then we're -- we're right back to 15-48-10 that talks about what you have to have on the face of the agreement. If you look at -- if -- if -- I mean, if -- if a determination is made they were operating under South Carolina law, then this would apply in terms of the notice factor.

MR. SHEHEEN: Well, actually, I think the note will be governed by South Carolina law. And under South Carolina law, the Federal Arbitration Act trumps this provision. So federal law applies even when South Carolina law is applying clearly for -- for arbitration acts. And that -- that's been litigated a lot.

And so -- so that is why there's a broad scope to the Federal Arbitration Act. Because you can't untangle these types of things.

So let's say that you deny our motion, we would then file an answer and counterclaim. We would file this --

this -- their breach of disagreement as our counterclaim and our defenses, and our answers. Clearly, this is all arbitratable. And then we're sitting around talking about what we're talking about right now.

THE COURT: Maybe so.

MR. SHEHEEN: Maybe so.

THE COURT: Mr. Cassidy.

MR. CASSIDY: Your Honor, just in summary, if that was so important to these folks, they would have put it in the note. There's no default provision that says you got to go to arbitration or you have to refer to the licensing agreement. It's a pretty simple note. You pay, you have no problem. You don't, then we accelerate. And that's exactly what's happened here.

MR. SHEHEEN: Your Honor, of course, their defense is to a note. It goes much beyond that.

Your Honor, if I may, I'm happy to send you some case law on the applicability of this provision as well, if you'd give me time for that.

THE COURT: Well, I'd -- I'd love to read that.

MR. SHEHEEN: Thank you.

THE COURT: Okay. Anything else?

MR. CASSIDY: No, sir.

MR. SHEHEEN: No, sir.

THE COURT: Okay. I've got -- I'll tell you what I'm

going to let you both do, if you could send me a proposed order within 30 days.

Also, Mr. Sheheen, send me those cases, if you like.

MR. SHEHEEN: Thank you, Your Honor.

THE COURT: Just e-mail it to me at: AKinlawj@sccourts.org.

30 days is enough time?

MR. SHEHEEN: Yes, Your Honor. I have a trial in the middle of August that will be done. So that should give me time.

THE COURT: Well, let's -- okay. Let's say by the end of August.

Will that give you enough time?

MR. SHEHEEN: Yes, Your Honor.

THE COURT: Get the kids in school, and all that.

Mr. Cassidy, that works for you?

MR. CASSIDY: Yes, sir.

THE COURT: All right. So get it to me at: AKinlawj@sccourts.org.

And I'm assuming that I can hold onto what you guys have given me.

MR. CASSIDY: Yes, sir.

MR. SHEHEEN: Yes, Your Honor.

THE COURT: All right. Good to see both of you.

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

CERTIFICATE OF REPORTER

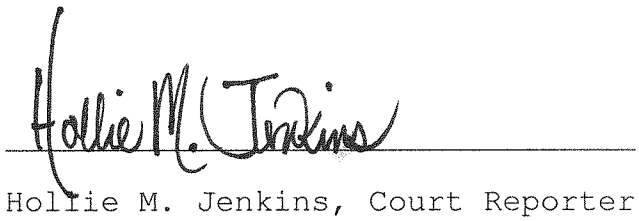
STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth 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 the evidence introduced in the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 2nd day of August, 2021.

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

September 2, 2021



Hollie M. Jenkins, Court Reporter

AFFIDAVIT OF SERVICE

State of South Carolina **County of Greenville** **Common Pleas Court**

Case Number: 2021-CP-23-01191

Plaintiff:
BVW Holding AG

vs.

Defendant:
Hoowaki, LLC

For:
Amber Glidewell
Roe Cassidy Coates & Price, P.A.
Po Box 10529
Greenville, SC 29603

Received by Roe Cassidy Coates & Price P.A to be served on **Hoowaki, LLC, 400 Birnie Street, Suite C, Greenville, SC 29611**.

I, Tammy Hyatt, being duly sworn, depose and say that on the **15th day of March, 2021** at **2:30 pm, I:**

served a **CORPORATION** by delivering a true copy of the **Summons and Complaint and Exhibits** to: **Ralph Hulseman** as **Registered Agent** for **Hoowaki, LLC**, at the address of: **400 Birnie Street, Suite C, Greenville, SC 29611**, and informed said person of the contents therein, in compliance with state statutes.

I certify that I am over the age of 18, have no interest in the above action, and am a Process Server in good standing in the judicial circuit in which the process was served.

Subscribed and Sworn to before me on the 15th day of March, 2021 by the affiant who is personally known to me.

NOTARY PUBLIC

LYNN SMITH
MY COMMISSION EXPIRES
JULY
30
2028
SOUTH CAROLINA
NOTARY PUBLIC

Tammy Hyatt
Process Server

Roe Cassidy Coates & Price P.A
Po Box 10529
Greenville, SC 29603
(864) 349-2600

Our Job Serial Number: UPL-2021000633
Ref: 3394.0001

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
BVW Holding AG,	)	
	)	
Plaintiff,	)	**AFFIDAVIT OF DEFAULT**
	)	
vs.	)	C.A. No.: 2021-CP-23-01191
	)	
Hoowaki, LLC,	)	
	)	
Defendant.	)	
	)	

PERSONALLY appeared before me, the undersigned, who, being first duly sworn, states that she is an attorney with the law firm of Roe Cassidy Coates & Price, P.A., attorneys for the Plaintiff in the above-entitled action; that a copy of the Summons and Complaint were duly and legally served on Defendant, shown by the Affidavit of Service on file; the said Defendant has served no answer as required in and by said Summons and the South Carolina Rules of Civil Procedure; and that said Defendant is now in default.

SWORN TO AND SUBSCRIBED
before me this the 13 day
of October, 2021.

Notary Public for South Carolina
My Commission Expires: 1-14-24

ROE CASSIDY COATES & PRICE, P.A.:

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Case No.: 2021-CP-23-01191

BVW HOLDING AG…….Respondent,

v.

HOOWAKI, LLC,……..…….Appellant.

NOTICE OF APPEAL

Hoowaki, LLC, by and through undersigned counsel, hereby appeal the Orders of the Honorable Alex Kinlaw, Jr.

On September 1, 2021, Judge Kinlaw denied Appellant's Motion to Dismiss and Compel Arbitration. Appellant timely filed a Motion to Alter or Amend and for Reconsideration of Judge Kinlaw's order. Judge Kinlaw's Order denying Appellant's Motion to Alter or Amend Judgment was entered on September 20, 2021 and Appellant received written notice of entry of this order the same day.

A copy of the Orders referenced in this Notice of Appeal are attached.

[Signature Page to Follow.]

Respectfully submitted,

s/Michael D. Wright

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October 14, 2021

Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Case No.: 2021-CP-23-01191

BVW HOLDING AG…….Respondent,

v.

HOOWAKI, LLC,……..…….Appellant.

PROOF OF SERVICE

I hereby certify that I have served the foregoing Notice of Appeal on the above-named Respondent via Electronic mail and ECF Notice to its counsel of record as follows:

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Respectfully submitted,

s/Michael D. Wright

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October 14, 2021

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October 14, 2021

VIA E-Filing to: ctapp@filings@sccourts.org
& U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: BVW Holding AG v. Hoowaki, LLC
Civil Action No. 2021-CP-23-01191

Dear Mrs. Kitchings:

I hope this correspondence finds you doing well.

Enclosed please find out check in the amount of $250.00 for filing the Notice of Appeal in the above-referenced matter. By copy of this letter, we are serving all counsel of record and have also electronically filed the Notice of Appeal with the Greenville County Court of Common Pleas.

All counsel of record are being served with the same via electronic mail.

Very truly,

Michael D. Wright

Enclosures as Stated

cc: Amber B. Glidewell, Esquire (via email)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No.: 2021-001168

BVW HOLDING AG…….Respondent,

v.

HOOWAKI, LLC,……..…….Appellant.

CERTIFICATE OF COUNSEL

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

Respectfully submitted,

s/Michael D. Wright
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March 7, 2022

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Case No.: 2021-CP-23-01191

BVW HOLDING AG…….Respondent,

v.

HOOWAKI, LLC,……..…….Appellant.

PROOF OF SERVICE

The undersigned certifies that, on March 7, 2022, he has served counsel for Respondent with a copy of the **RECORD ON APPEAL** in this matter via electronic mail using the email addresses listed in the Attorney Information System as set forth below:

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Ross B. Lyler, Esquire
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Attorneys for Respondent

[Signature Page to Follow.]

Respectfully submitted,

s/Michael D. Wright

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March 7, 2022