

SHUMAN McCUSKEY SLICER PLLC

ATTORNEYS AT LAW

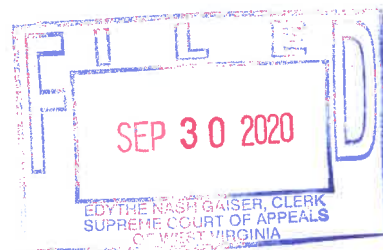
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Morgantown, WV 26505
Telephone: 304.291.2702
Facsimile: 304.291.2840

WWW.SHUMANLAW.COM

Roberta F. Green
rgreen@shumanlaw.com
September 30, 2020



Via Hand Delivery

Edythe Nash Gaiser, Clerk of Court
State Capitol, Room E-317
1900 Kanawha Blvd., East
Charleston, WV 25305

RE: Welford v. FormTech Concrete Forms, Inc., v. Construction Solutions & Leasing, LLC: Kanawha County Civil Action No. 20-C-660

Dear Ms. Gaiser:

Enclosed for filing please find the original and five (5) copies of the ***“Motion to Refer Case to the Business Court Division”*** in the above-captioned matter. A complete copy of the within-named document has this day been served on counsel of record and as set designated below.

Also enclosed is a sixth copy of the Motion to Refer, which we provide to facilitate return of a date/time stamped copy by email: rgreen@shumanlaw.com

Thank you for your assistance in this matter.

Sincerely,

Roberta F. Green

Enclosures: *as stated*

cc: (w/encl): Christopher D. Pence, Esq.
Honorable Jennifer Bailey, Judge
Executive Director Carol A. Miller, Business Court Division
Honorable Cathy S. Gatson, Circuit Clerk of Kanawha County
Construction Solutions & Leasing, LLC – courtesy copy

DO NOT REMOVE
FILE COPY

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JULIUS WOLFORD,

Plaintiff,

v.

**Civil Action No. 20-C-660
Hon. Jennifer Bailey, Judge**

**FORM TECH CONCRETE FORMS, INC.,
A Michigan corporation,**

Defendant,

and

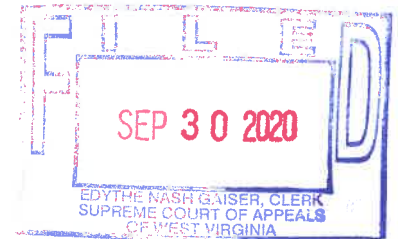
**FORM TECH CONCRETE FORMS, INC.,
A Michigan corporation,**

Third-Party Plaintiff,

v.

**CONSTRUCTION SOLUTIONS & LEASING, LLC,
A West Virginia Limited Liability Company,**

Third-Party Defendant.



**MOTION TO REFER CASE TO THE
BUSINESS COURT DIVISION**

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, FormTech Concrete Forms, Inc., by counsel, Roberta F. Green, Christopher D. Negley and Shuman McCuskey Slicer PLLC, respectfully requests the above-styled case be referred to the Business Court Division.

The instant matter arises from disputes relative to a series of contracts executed between and among the parties, said contracts related to the transfer of business assets, the nature of the relationships between the parties, the sale and lease of commercial property, and the condition of said commercial property located in Marion County, WV. The instant matter is also related to and complicated by an alleged chemical spill which occurred on or about June 25, 2019, on the

commercial property, the previous condition of the commercial property, the actions and inactions of the parties – all or some of which resulted in a series of violations, an expenditure of considerable sums in defense, and a West Virginia Department of Environmental Protection Consent Order. Arguably at issue in this claim are *inter alia* breach of contract relative to at least four contracts, including an asset purchase agreement (3.13.19), a consulting agreement (3.13.19), a purchase agreement (2.8.17), and an alleged commercial lease; commercial and other torts; and complex relationships, factual scenarios and legal issues. Ancillary issues may include regulatory duties, insurable interests and fraud. *See* Exhibit A (attached). While FormTech denies any and all of the allegations of wrongdoing raised against it, FormTech nonetheless avers that the issues between these parties are salient and perpetual across now multiple counties and two tribunals. Beyond the fact that the parties allege mispayment or nonpayment of sums between and among them, along with failures to accept legal duties and responsibilities, this claim involves voluminous documentation and complex legal issues sounding *inter alia* in contract, tort, agency, employment, and administrative and regulatory law.

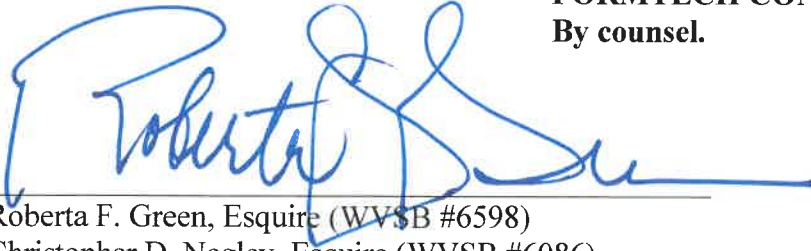
FormTech by counsel advised Plaintiff by counsel of this filing and the option to join the initiative. No response has been received as of this filing.

In support of this motion, attached please find the docket sheet, the Complaint and Amended Answer, Counterclaim and Third-Party Complaint of FormTech Concrete Forms, Inc. Summonses are outstanding for Construction Solutions & Leasing, LLC, who is receiving a service copy of this Motion as well.

WHEREFORE, pursuant to West Virginia Trial Court Rule 29, the undersigned hereby MOVES the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the

Business Court Division.

Respectfully submitted, this 30th day of September, 2020.



FORMTECH CONCRETE FORMS, INC.,
By counsel.

Roberta F. Green, Esquire (WVSB #6598)
Christopher D. Negley, Esquire (WVSB #6086)
SHUMAN MCCUSKEY SLICER PLLC
1411 Virginia Street, East, Suite 200
Post Office Box 3953
Charleston, WV 25301-3953
(304) 345-1400
(304) 343-1826 facsimile
rgreen@shumanlaw.com
cnegley@shumanlaw.com

CASE 20-C-660 KANAWHA PAGE 1
 JULIUS WOLFORD VS FORM TECH CONCRETE FORMS, INC.
 TIME DATE ACTION
 1 08/06/20 # CASE INFO SHEET; COMELALET W/EXHIB; ISSUED SUM \$ 2 CPYS; P
 2 FEB; RPT 5/15/19; \$200.00
 3 06/17/20 # SET FR SS DTD 9/10/20; SUM W/RET 19/10/20 SS) AS TO FORX
 4 TECH CONCRETE FORMS INC
 5 05/15/20 # E-CERT FR SS AS TO FORX TECH CONCRETE FORMS INC DTD 8/15/20
 6 05/24/20 # CASE INFO SHEET; ANS, CC & 3RD EIT C OF FORXTECH CONCRETE
 7 FORMS INC W/COS; FEB; RPT 5/25/20; \$213.00



(/DEFAULT.ASPX)

Civil

Case Information

Thirteenth Judicial Circuit of Kanawha County

20-C-660

Judge: JENNIFER BAILEY

JULIUS WOLFORD VS. FORM TECH CONCRETE FORMS, INC.,

Plaintiff(s)Plaintiff Attorney(s)

WOLFORD, JULIUS

CHRISTOPHER D. PENCE|JUSTIN K.

CHANDLER

Defendant(s)Defendant Attorney(s)

FORM TECH CONCRETE FORMS, INC

ROBERTA F. GREEN

Date Filed: 08/06/2020

Case Type: CONTRACT

Appealed: 0

Final Order Date: N/A

Statistical Close Date: N/A

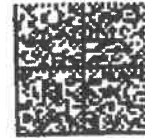
<u>Line</u>	<u>Date</u>	<u>Action / Result</u>
0001	08/06/2020	# CASE INFO SHEET; COMPLAINT W/EXH'S; ISSUED SUM & 2 CPYS; F
0002		FEE; RCPT 581574; \$200.00
0003	08/17/2020	# LET FR SS DTD 8/10/20; SUM W/RET (8/10/20 SS) AS TO FORM
0004		TECH CONCRETE FORMS INC
0005	08/18/2020	# E-CERT FR SS AS TO FORM TECH CONCRETE FORMS INC DTD 8/15/20
0006	09/24/2020	# CASE INFO SHEET; ANS, CC & 3RD PTY C OF FORMTECH CONCRETE
0007		FORMS INC W/COS; FEE; RCPT 582595; \$215.00

These materials have been prepared by the Office of the Clerk of the various Circuit Courts from original sources and data believed to be reliable. The information contained herein, however, has not been independently verified by the Office of the Clerk or Software Computer Group, Incorporated. The Office of the Clerk of the Circuit Courts and Software Computer Group, Inc. assume no liability for the accuracy, completeness, or timeliness of the information contained herein.

Software Computer Group | PO Box 27 | Fraziers Bottom WV 25082

EXHIBIT A

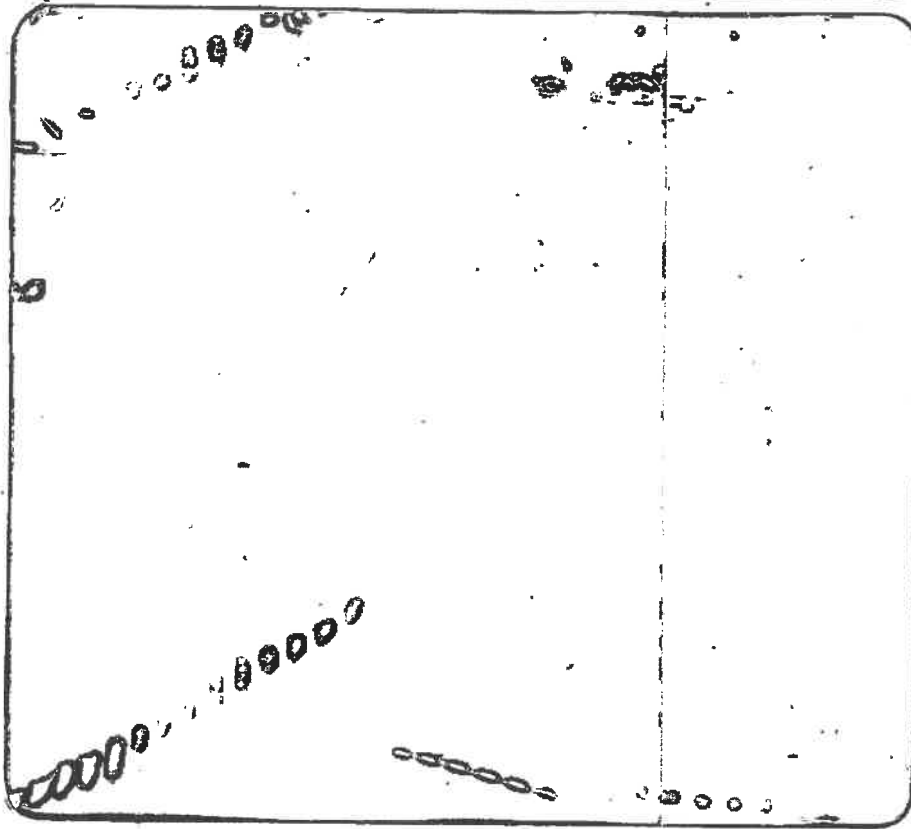
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Office of the Secretary of State
Building 1 Suite 157-K
1900 Kanawha Blvd E.
Charleston, WV 25305



Mac Warner
Secretary of State
State of West Virginia
Phone: 304-558-6000
888-767-8683
Visit us online:
www.wvsos.com

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9214 8901 1251 3410 0002 7528 01

FORM TECH CONCRETE FORMS, INC.
C. T. Corporation System
1627 QUARRIER ST.
CHARLESTON, WV 25311

Control Number: 261777

**Defendant: FORM TECH CONCRETE FORMS,
INC.
1627 QUARRIER ST.
CHARLESTON, WV 25311 US**

Agent: C. T. Corporation System

County: Kanawha

Civil Action: 20-C-660

Certified Number: 92148901125134100002752801

Service Date: 8/10/2020

I am enclosing:

1 summons and complaint

which was served on the Secretary at the State Capitol as your statutory attorney-in-fact. According to law, I have accepted service of process in the name and on behalf of your corporation.

Please note that this office has no connection whatsoever with the enclosed documents other than to accept service of process in the name and on behalf of your corporation as your attorney-in-fact. Please address any questions about this document directly to the court or the plaintiff's attorney, shown in the enclosed paper, not to the Secretary of State's office.

Sincerely,

A handwritten signature in cursive script that reads "Mac Warner".

Mac Warner
Secretary of State

SUMMONS

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JULIUS WOLFORD,

Plaintiff,

v.

Civil Action No. 20-C-660

FORM TECH CONCRETE FORMS, INC.,
a Michigan corporation,

Defendant.

To the above-named Defendant: Form Tech Concrete Forms, Inc.
c/o CT Corporation System
5400 D Big Tyler Road
Charleston, WV 25313

RECEIVED FOR
OFFICE OF PROCEEDS
JUN 10 A 10 40
CLERK OF COURT
STATE OF WEST VIRGINIA
Bailey

IN THE NAME OF THE STATE OF WEST VIRGINIA, you are hereby Summoned and required to serve upon Christopher D. Pence, Plaintiff's attorney, whose address is Hardy Pence PLLC, P.O. Box 2548, Charleston, West Virginia 25329, an answer, including any related counterclaim you may have, to the Complaint filed against you in the above-styled civil action, a true copy of which is herewith delivered to you. You are required to serve your answer within 30 days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint and you will be thereafter barred from asserting in another action any claim you may have which must be asserted by counterclaim in the above-styled civil action.

Dated: 8/6/20

Cathy S. Gatson, Clerk

Clerk of Court

By: Clugh

CIVIL CASE INFORMATION STATEMENT
(Civil Cases Other than Domestic Relations)

FILED

I. CASE STYLE:

Plaintiff(s)

JULIUS WOLFORD

Case No. 2020-11-20-C-660

Judge: Clay Bailey

Plaintiff's Phone: _____

vs.

Defendant(s)

FORM TECH CONCRETE FORMS, INC.

Name

Days to
Answer

30

Type of Service

WV Secretary of State

Defendant's Phone: _____

Street Address

City, State, Zip Code

II. TYPE OF CASE:

- ☒ General Civil
☐ Mass Litigation [As defined in T.C.R. 26.04(a)]
☐ Asbestos
☐ FELA Asbestos
☐ Other: _____
☐ Habeas Corpus/Other Extraordinary Writ
☐ Other: _____

- ☐ Adoption
☐ Administrative Agency Appeal
☐ Civil Appeal from Magistrate Court
☐ Miscellaneous Civil Petition
☐ Mental Hygiene
☐ Guardianship
☐ Medical Malpractice

III. JURY DEMAND: ☒ Yes ☐ No CASE WILL BE READY FOR TRIAL BY (Month/Year): 11 / 2021

**IV. DO YOU OR ANY
OF YOUR CLIENTS
OR WITNESSES
IN THIS CASE
REQUIRE SPECIAL
ACCOMMODATIONS?**

☐ Yes ☒ No

IF YES, PLEASE SPECIFY:

- ☐ Wheelchair accessible hearing room and other facilities
☐ Reader or other auxiliary aid for the visually impaired
☐ Interpreter or other auxiliary aid for the deaf and hard of hearing
☐ Spokesperson or other auxiliary aid for the speech impaired
☐ Foreign language interpreter-specify language: _____
☐ Other: _____

Attorney Name: Christopher D. Pence

Firm: Hardy Pence PLLC

Address: P.O. Box 2548 Charleston, WV 25329

Telephone: (304) 345-7250

Representing:

- ☒ Plaintiff ☐ Defendant
☐ Cross-Defendant ☐ Cross-Complainant
☐ 3rd-Party Plaintiff ☐ 3rd-Party Defendant

☐ Proceeding Without an Attorney

Original and 2 copies of complaint enclosed/attached.

Dated: 08 / 05 / 2020

Signature: [Signature]

Plaintiff: JULIUS WOLFORD , et al Case Number: _____
vs.
Defendant: FORM TECH CONCRETE FORMS, INC. , et al

**CIVIL CASE INFORMATION STATEMENT
DEFENDANT(S) CONTINUATION PAGE**

Form Tech Concrete Forms, Inc. Defendant's Phone: _____
Defendant's Name
c/o CT Corporation System, 5400 D Big Tyler Rd. Days to Answer: 30
Street Address
Charleston, WV 25313 Type of Service: WV Secretary of State
City, State, Zip Code

Defendant's Name Defendant's Phone: _____
Days to Answer: _____
Street Address Type of Service: _____
City, State, Zip Code

Defendant's Name Defendant's Phone: _____
Days to Answer: _____
Street Address Type of Service: _____
City, State, Zip Code

Defendant's Name Defendant's Phone: _____
Days to Answer: _____
Street Address Type of Service: _____
City, State, Zip Code

Defendant's Name Defendant's Phone: _____
Days to Answer: _____
Street Address Type of Service: _____
City, State, Zip Code

Defendant's Name Defendant's Phone: _____
Days to Answer: _____
Street Address Type of Service: _____
City, State, Zip Code

Defendant's Name Defendant's Phone: _____
Days to Answer: _____
Street Address Type of Service: _____
City, State, Zip Code

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JULIUS WOLFORD,

Plaintiff,

v.

FORM TECH CONCRETE FORMS, INC.,
a Michigan corporation,

Defendants.

FILED
Chop
2020 AUG -6 A 11:27
Civil Action No. 20-c-660
KANAWHA COUNTY CIRCUIT COURT
Judge Bailey

COMPLAINT

Julius Wolford ("Plaintiff"), states and alleges the following as his Complaint against Form Tech Concrete Forms, Inc. ("Defendant"):

A. Parties, Jurisdiction and Venue

1. Julius Wolford is a resident of Putnam County, West Virginia.
2. Form Tech Concrete Forms, Inc. is a Michigan corporation with its principal place of business located in Wixom, Michigan, which, at all relevant times, conducted business activities and maintained an office in Kanawha County, West Virginia.
3. Many of the events giving rise to the claims against Defendant occurred in Kanawha County, West Virginia. Therefore, jurisdiction and venue are appropriate in this Court.

B. Factual Background

4. Plaintiff adopts and incorporates the allegations of paragraphs 1-3 as if set forth herein *verbatim*.
5. On or around March 13, 2019, Plaintiff entered into a contract ("Asset Purchase Agreement") with Defendant whereby Plaintiff agreed to, among other things, transfer all rights, title and interest in his company, Wolford Concrete Forms & Scaffold Supply, LLC, to Defendant in exchange for payment in the sum of \$150,000.00.
6. A true and exact copy of the Asset Purchase Agreement is attached hereto as Exhibit A.

7. The Asset Purchase Agreement delineated the assets that were to be transferred to Defendant and the assets to be retained by Plaintiff. Pursuant to the terms of Section 1.2(e), all Plaintiff's "raw materials, supplies, work in process, finished goods and other inventories..." were to be retained by Plaintiff.
8. Included within the materials to be retained by Plaintiff was a forklift which the parties verbally agreed that Plaintiff would rent to Defendant for use in Defendant's business activities in exchange for a monthly rental fee of \$800.00.
9. On or around March 13, 2019, Plaintiff entered into a second contract ("Consulting Agreement") with Defendant whereby Plaintiff agreed to provide his services to Defendant to help transition and grow Defendant's business, among other things.
10. A true and exact copy of the Consulting Agreement is attached hereto as Exhibit B.
11. The scope of the services to be provided by Plaintiff were delineated in Article I of the Consulting Agreement. Plaintiff was assigned a defined regional sales territory determined by Defendant's Vice President of Sales, Frank Smiser, and/or Defendant's Regional Manager, Gary Jividen, and was provided business cards with Defendant's insignia with instructions to represent himself as an employee of Defendant when interacting with current and prospective customers. Additionally, Plaintiff was required to provide a minimum of fifteen (15) days per month exclusively to performing services on behalf Defendant.
12. Article II of the Consulting Agreement delineated the compensation and expense reimbursement that Plaintiff would receive from Defendant in consideration for providing his services, including the payment of monthly consulting fees and sales commissions.
13. Pursuant to the terms of Section 2.1 of the Consulting Agreement, Plaintiff would receive a monthly consulting fee from Defendant in the sum of \$3,000.00 with the total amount of consulting fees not to exceed \$30,000.00.

14. Additionally, pursuant to Section 2.2 of the Consulting Agreement, Plaintiff would receive commissions equal to fifteen percent (15%) of the "gross profit," as defined in the Consulting Agreement, attributable to sales generated by Plaintiff on behalf of Defendant. The commissions were payable within thirty (30) days after the close of Defendant's monthly financial results.
15. Pursuant to the terms of Section 3.1 of the Consulting Agreement, either party could terminate the agreement "at any time upon providing five-day advance notice to the other party" and Defendant had the right to immediately terminate the agreement for "cause," a defined term in the Consulting Agreement.
16. "Cause," as defined in the Consulting Agreement, included: "(a) failure of [Plaintiff] to follow or comply with any material rule or policy of Defendant, provided Defendant's Vice President of Sales, [Frank Smiser], notified [Plaintiff] of the failure and provided [Plaintiff] five (5) calendar days to cure such failure; (b) commission of felony, fraud, embezzlement or theft by [Plaintiff]; (c) inability to provide consulting services ... due to sickness, disability or death; (d) unwillingness to provide consulting services ... as evidenced by Plaintiff's providing less than fifteen (15) days per month of [Plaintiff's] time to [Defendant]."
17. In the event of termination of the Consulting Agreement by Defendant for any reasons other than for "cause," Section 3.1(c) required Defendant to continue "mak[ing] the [consulting fee] payments with such payments due on the last day of each month up to the consulting fee cap [\$30,000.00]."
18. Plaintiff immediately began performing his obligations under the terms of the Consulting Agreement after its execution. Plaintiff began assisting in the relocation of purchased assets under the Asset Purchase Agreement, transitioning customers of his former business to

Defendant's business, securing new customers on behalf of Defendant inside his assigned territory, among other things.

19. Plaintiff received monthly consulting fees due under the Consulting Agreement for his first three (3) months of service but Defendant failed to pay any of the agreed upon commission despite Plaintiff generating substantial sales during this time.
20. On or around June 25, 2019, agents from the West Virginia Department of Environmental Protection, Division of Water and Waste Management ("DEP"), conducted an inspection of a facility previously leased by Plaintiff's former business in Marion County, West Virginia ("Marion County Facility").
21. At the time of the inspection, the Marion County Facility was being leased by Defendant and in Defendant's exclusive possession and control. The Marion County Facility housed Defendant's inventory which had recently been shipped to that location after leasing, as well as assets that were purchased by Defendant and assets retained by Plaintiff under the Asset Purchase Agreement.
22. Included in Plaintiff's retained assets located at the Marion County Facility was a supply of concrete curing compound. At the direction of Defendant's Regional Manager, Gary Jividen, workers selected and paid by Defendant were sent to the Marion County Facility to clean up and reorganize materials at the facility in preparation for Defendant to begin conducting business activities from that location.
23. While performing work on behalf of Defendant and at the sole direction of Mr. Jividen, Defendant's workers unlawfully and hazardedly disposed of Plaintiff's curing compound by pouring it out onto the ground around the Marion County Facility.
24. After the unlawful and hazardous dumping of the curing compound, hazardous material eventually leaked into a nearby stream resulting in the DEP inspection of the Marion County

Facility and the subsequent issuance of a DEP Violation to Plaintiff's former business, the previous lessee of the facility.

25. Plaintiff was not contacted by Mr. Jividen or any other representative of Defendant prior to the dumping of the curing compound and was not present at the Marion County Facility at the time of the incident. Accordingly, Plaintiff had no knowledge of Defendant's intent to dump the curing compound before the unlawful and hazardous dumping occurred.
26. On the day of the DEP inspection, Plaintiff was contacted by a DEP representative and was informed of the unlawful dumping of the curing compound. This was the first time Plaintiff became aware that the curing compound was unlawfully dumped at the Marion County Facility. Plaintiff immediately traveled to the facility where he spoke with DEP representatives who demanded that the site be immediately cleaned-up by a professional hazardous waste disposal service.
27. Plaintiff then contacted Mr. Jividen immediately after his discussion with DEP representatives and advised him of the DEP demand for immediate cleanup. In response, Mr. Jividen contacted a professional hazardous waste disposal service, Miller Environmental, Inc., and arranged for the performance of the facility clean-up.
28. In late July 2019, around a month after the incident, Plaintiff received a phone call from Defendant's CEO, Guy Williams, who informed Plaintiff that he was indefinitely suspended from representing Defendant under the terms of the Consulting Agreement pending an internal investigation into the incident at the Marion County Facility.
29. During Plaintiff's "suspension," sales were being generated in Plaintiff's sales territory through customers either acquired or transferred by Plaintiff and through the use of Plaintiff's assigned internal sales representative identification number. Defendant did not assign another representative to Plaintiff's territory during this time.

30. On or around October 10, 2019, Plaintiff received a letter from the DEP stating that after further investigation, the DEP Violation previously issued to his former business was being officially rescinded.
31. The DEP Violation was subsequently reissued to Defendant due to its exclusive role in permitting the unlawful and hazardous disposal of the curing compound around its leased and exclusively controlled premises.
32. Plaintiff had no contact with any of Defendant's representatives regarding the internal investigation into the incident at the Marion County Facility since his phone call with Defendant's CEO, Guy Williams, in July 2019.
33. On or around November 25, 2019, through counsel, Plaintiff sent a letter to Defendant's CEO, Mr. Williams, requesting that he be paid monthly consulting fees which remained outstanding at that time and payable under the Consulting Agreement. Plaintiff also requested that he be paid commissions in accordance with the terms of Consulting Agreement of which he had yet to receive any payments despite generating substantial sales.
34. On or around December 18, 2019, Defendant, through counsel, responded to Plaintiff's November 25, 2019 letter by alleging that Plaintiff had breached the Consulting Agreement by "failing to relocate his assets in a proper and timely fashion."
35. On or around January 17, 2020, Plaintiff, through counsel, responded to the allegations made in Defendant's December 18, 2019 letter by stating that he had no role in the unlawful dumping of the curing compound at the Marion County Facility. The unlawful dumping was the result of actions taken by Defendant's employees and at the sole direction of Defendant's Regional Manager, Gary Jividen, and took place on a property which was leased and exclusively controlled by Defendant.

Count I – Breach of Contract (Consulting Agreement)

36. Plaintiff adopts and incorporates the allegations of paragraphs 1-35 as if set forth herein *verbatim*.
37. Upon execution of the Consulting Agreement, the parties entered into a valid, binding and enforceable contract. The parties were fully competent and legally able to contract, the Consulting Agreement contained lawful subject matter, the parties mutually assented to its terms and provided good and valuable consideration in exchange for the promises contained therein.
38. Defendant materially breached the Consulting Agreement in at least five separate and distinct ways, including: (a) failing to pay Plaintiff the agreed upon monthly consulting fees as required by Section 2.1; (b) failing to pay Plaintiff commissions on sales attributable to his services as required by Section 2.2; (c) immediately terminating the Consulting Agreement without “cause,” as defined in Section 3.1(b); (d) terminating the Consulting Agreement without providing Plaintiff advanced notice as required by Section 3.1(a); and (e) “suspending” Plaintiff and hindering his ability to perform services under the contract pending an internal investigation into the incident at the Marion County Facility.
39. Under the terms of the Section 2.1 of Consulting Agreement, Plaintiff was to be paid a monthly consulting fee of \$3,000.00. Plaintiff only received monthly consulting fees for his first three (3) months of service and has not received any further payments due under the terms of Section 2.1. By failing to pay Plaintiff the agreed upon monthly consulting fees, Defendant breached Section 2.1 of the Consulting Agreement.
40. Under the terms of Section 2.2 of the Consulting Agreement, Plaintiff was to be paid a commission equal to fifteen percent (15%) of the “gross profit,” as defined in the agreement, attributable to sales generated by Plaintiff. Plaintiff has not received any commissions for sales

attributable to his services due under the terms of Section 2.2. By failing to pay Plaintiff any of the agreed upon commissions attributable to sales generated by Plaintiff, Defendant breached Section 2.2 of the Consulting Agreement.

41. In its December 19, 2019 letter to Plaintiff, Defendant immediately terminated the Consulting Agreement without "cause" and without providing Plaintiff at least five (5) day notice advanced notice. Consequently, Defendant's actions constitute breaches of both Sections 3.1(a) and 3.1(b) of the Consulting Agreement.
42. By "suspending" Plaintiff and demanding that he cease all interaction with customers, Defendant breached the Consulting Agreement by taking adverse, disciplinary action(s) against Plaintiff which were not authorized or contemplated by the parties in the Consulting Agreement.
43. As a direct and proximate result of Defendant's breaches, Plaintiff suffered the damages set forth herein, which include, but are not limited to, the monthly consulting fees and sales commissions.

Count II –Violations of West Virginia Wage Payment and Collection Act,

W.Va. Code § 21-5-1, et seq.

44. Plaintiff adopts and incorporates the allegations of paragraphs 1-43 as if set forth herein *verbatim*.
45. Plaintiff was an "employee," as defined in the West Virginia Wage Payment and Collection Act, W.Va. Code § 21-5-1(b), and is covered under the provisions of the Act.
46. Despite the terms of the Consulting Agreement purporting to characterize Plaintiff as an independent contractor, the relationship between Plaintiff and Defendant was that of an employer-employee as evidenced by the subsequent conduct of the parties.

47. Defendant exerted substantial control over the manner in which Plaintiff provided his services under the Consulting Agreement, including, defining a certain geographical territory for Plaintiff to perform his services, requiring Plaintiff to devote a specified amount of time to providing his services, regular instruction and directives to Plaintiff regarding his services, among other things.
48. Additionally, Plaintiff was treated as an employee as evidenced by Defendant providing Plaintiff with business cards which included Defendant's insignia, its Kanawha County office address, its office phone fax numbers, an email address for Plaintiff on Defendant's server, instructions to Plaintiff to present himself as Defendant's employee to customers, perceived authority to take disciplinary action against Plaintiff as evidenced by his suspension in July 2019 at the behest of Defendant's CEO, among other things.
49. Defendant was an "employer," as defined in the West Virginia Wage Payment and Collection Act, W.Va. Code § 21-5-1(m), and subject to requirements of the Act.
50. The consulting fees and commissions owed to Plaintiff under Section(s) 2.1 and 2.2 of the Consulting Agreement are "wages," as defined in the West Virginia Wage Payment and Collection Act, W.Va. Code § 21-5-1(c).
51. Defendant violated the requirements of W.Va. Code § 21-5-3(a) by failing to pay Plaintiff his wages due under the terms of the Consulting Agreement for the services Plaintiff provided pursuant to its terms.
52. Additionally, Defendant violated the requirements of W.Va. Code § 21-5-4(e) by failing to timely pay Plaintiff his final wages due after Defendant terminated the Consulting Agreement.
53. As a direct and proximate result of Defendant's violations of the West Virginia Wage Payment and Collection Act, W.Va. Code § 21-5-1, et seq., Plaintiff is entitled to statutory damages.

Count III – Breach of Oral Contract (Forklift Rental)

54. Plaintiff adopts and incorporates the allegations of paragraphs 1-53 as if set forth herein *verbatim*.
55. Upon mutually assenting to the terms of an oral rental agreement whereby Plaintiff agreed to provide his forklift for Defendant's use in consideration for monthly rental fees in the sum of \$800.00, the parties entered into a valid, binding and enforceable contract.
56. Plaintiff performed his obligations under the contract by making the forklift available for Defendant's use at the Marion County Facility and Defendant obtained the benefit of Plaintiff's performance through use of the forklift in furtherance of its business activities.
57. Defendant breached the contract by failing to make the monthly rental payments of \$800.00 to Plaintiff while continuing to use the forklift at its Marion County Facility.
58. As a direct and proximate result of Defendant's breach of the oral rental agreement, Plaintiff suffered the damages set forth herein, which include, loss of monthly rental fees and use of his forklift while in Defendant's possession.

Count IV – Quantum Meruit (Forklift Rental)

59. Plaintiff adopts and incorporates the allegations of paragraphs 1-58 as if set forth herein *verbatim*.
60. Plaintiff provided services to Defendant for which he reasonably expected to be compensated for by agreeing to rent his forklift to Defendant for Defendant's exclusive use.
61. Defendant accepted and benefited from Plaintiff's services by utilizing Plaintiff's forklift in furtherance of its business activities and was aware that Plaintiff expected to be compensated for providing such services.
62. By utilizing Plaintiff's forklift in furtherance of its business activities and without compensating Plaintiff, Defendant was unjustly enriched at Plaintiff's expense.

63. Accordingly, Plaintiff is entitled to relief under the equitable theory of quantum meruit for the reasonable rental value of the forklift.

Damages

64. Plaintiff adopts and incorporates the allegations of paragraphs 1-63 as if set forth herein *verbatim*.

65. As a direct and proximate result of Defendant's actions as set forth herein, Plaintiff is entitled to the following damages:

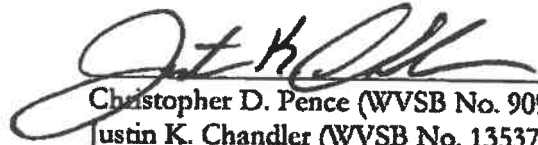
- a. Unpaid consulting fees and sales commissions, payable under the terms of the Consulting Agreement;
- b. Liquidated damages for violations of W.Va. Code § 21-5-4(e);
- c. Unpaid forklift monthly rental fees payable under the oral rental agreement or under the equitable theory of quantum meruit;
- d. Damages for annoyance, inconvenience and embarrassment;
- e. Pre and post-judgment interest;
- f. Attorneys' fees; and
- g. All other damages permitted by West Virginia law or which become evident during discovery.

WHEREFORE, Plaintiff demands judgment against Defendant for the damages as described herein and any such further relief the Court deems appropriate.

PLAINTIFF DEMANDS A TRIAL BY JURY.

JULIUS WOLFORD,

By Counsel:

A handwritten signature in black ink, appearing to read "Jt K Pence", is written over a horizontal line.

Christopher D. Pence (WVSB No. 9095)

Justin K. Chandler (WVSB No. 13537)

Hardy Pence PLLC

10 Hale Street, 4th Floor (25301)

P.O. Box 2548

Charleston, WV 25329

(304) 345-7250 (Phone)

(304) 553-7227 (Fax)

ASSET PURCHASE AGREEMENT

THIS ASSET PURCHASE AGREEMENT (this "*Agreement*"), dated as of this 13th day of March, 2019, is by and among Form Tech Concrete Forms, Inc., a Michigan corporation (the "*Purchaser*"), Wolford Concrete Forms & Scaffold Supply, LLC, a West Virginia limited liability company (the "*Seller*"), and Julius Wolford, sole member of the Seller (the "*Member*"). The Seller and the Member are collectively referred to herein as the "*Seller Group*".

RECITALS

A. From its location at 6120 MacCorkle Avenue SW, St. Albans, West Virginia, the Seller is engaged in the business of (i) renting scaffolding equipment (the "*Retained Business*") and (ii) renting steel-ply forming equipment (the "*Purchased Business*"); and

B. The Purchaser desires to purchase from the Seller, and the Seller desires to sell to the Purchaser, all of the Seller's right, title and interest in and to the Purchased Assets (as defined below) upon the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the mutual promises and representations and subject to the terms and conditions herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties intending to be legally bound hereto agree as follows:

ARTICLE I PURCHASE AND SALE OF ASSETS

1.1 Assets to be Transferred. Simultaneously with the execution and delivery of this Agreement, the Purchaser shall purchase from the Seller, and the Seller shall sell, transfer, assign, convey and deliver to the Purchaser, free and clear of all security interests, mortgages, liens, pledges, encumbrances, security interests, claims, charges, defects in title or other similar restrictions (collectively, "*Liens*"), all of the Seller's right, title and interest in and to the assets, rights and properties listed below (collectively, the "*Purchased Assets*");

(a) all equipment that is owned or leased by the Seller related to the operation of the Purchased Business, including the items listed on Schedule 1.1(a), and all warranties of any kind covering all or any part of such items ("*Purchased Inventory*");

(b) all customer lists and customer contact information related to the Purchased Business;

(c) all telephone numbers, email addresses, domain names and facsimile numbers associated with the operation of the Purchased Business;

(d) all rights and incidents of interest of, and benefits accruing to, the Seller in and to (i) the contracts, agreements, commitments, instruments, guarantees, bids, purchase orders, proposals, licenses and other agreements specifically listed on Schedule 1.1(a) or identified by the Purchaser following the date hereof as being necessary for the operation of the Purchased Business, as currently conducted, and (ii) the open sales orders or other contracts for the sale of products or services of the Purchased



Business with respect to which such products or services have not been delivered, whether or not set forth on Schedule 1.1(a) (collectively, the "*Purchased Contracts*"); and

(e) the name "Wolford Concrete Forms & Scaffold Supply".

1.2 Retained Assets. Notwithstanding anything in this Agreement to the contrary, the Seller shall retain only those assets, rights and properties specifically identified below, and the Purchaser will in no way be construed to have purchased or acquired (or to be obligated to purchase or to acquire) any interest whatsoever in any of the following assets, rights and properties (collectively, the "*Retained Assets*");

(a) all cash held by the Seller;

(b) all accounts and notes receivable and other claims for money due to the Seller;

(c) all prepaid expenses, surety accounts and other similar deposits of the Seller, including deposits with landlords and utilities;

(d) all rights and incidents of interest of, and benefits accruing to, the Seller in and to (i) the contracts, agreements, leases, commitments, instruments, guarantees, bids, purchase orders, proposals, licenses and other agreements related to the operation of the Retained Business, and (ii) the open sales orders or other contracts for the sale of products or services with respect to which such products or services have not been delivered related to the operation of the Retained Business and (iii) all contracts to which the Seller is a party of and to which the Purchased Assets are bound other than the Purchased Contracts ;

(e) all raw materials, supplies, work in process, finished goods and other inventories, including such items previously purchased that are in transit to the Seller;

(f) all machinery, equipment, furniture, furnishings, fixtures, office equipment, computer hardware and all other tangible property of any kind or nature that are owned or leased by the Seller related to the operation of the Retained Business;

(g) all business records of the Seller;

(h) the Retained Business as a going concern and all of the goodwill associated with the Retained Business, including all customer and vendor relationships;

(i) all intellectual property owned or used by the Seller for the operation of the Retained Business, but excluding the name "Wolford Concrete Forms & Scaffold Supply" and all software used in the Retained Business;

(j) all corporate minute books and related records of the Seller;

(k) all assets in connection with all "employee benefit plans" of the Seller as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974;

(l) all insurance policies owned or maintained by the Seller and all premium refunds and insurance proceeds due to the Seller thereunder;

(m) all tax refunds or tax credits due to the Seller;

(n) all real property related to the operation of the Purchased Business;

(o) all licenses, permits and other authorizations necessary for the continued operation of the Retained Business including any waiver of any of the foregoing issued to the Seller by any government or political subdivision or regulatory authority, whether federal, state, local, or foreign, or any agency or instrumentality of any such government or political subdivision or regulatory authority, or any federal, state, local or foreign court or arbitrator (each a "Governmental Authority") and

(p) those assets specifically identified on Schedule 1.2.

1.3 Retained Liabilities. The Purchaser shall not assume, pay, perform, discharge, or accept any liability or obligation of the Seller of any kind whatsoever, whether actual, contingent, accrued, known or unknown. The Seller shall be responsible for and the Member shall so cause the Seller to pay, perform and discharge as and when due, all liabilities or obligations of the Seller, whether related to the Purchased Business or the Retained Business.

1.4 Closing; Effective Time. The transfer of the Purchased Assets to the Purchaser is taking place concurrently with the execution and delivery of this Agreement via the remote exchange of documents and signatures (the "Closing"). All transfers and assumptions hereunder will be deemed to have been made simultaneously and will become effective at and as of 12:01 a.m., Eastern Time, on the date of this Agreement (the "Closing Date").

ARTICLE 2 PURCHASE PRICE

2.1 Purchase Price.

(a) The aggregate purchase price paid by the Purchaser to the Seller in consideration for the Purchased Assets is an amount equal to \$150,000 minus (i) any and all outstanding Indebtedness (as defined below) and (ii) any and all outstanding balances owed by the Seller to the Purchaser immediately prior to the Closing (the result of the foregoing computation is referred to herein as the "Net Purchase Price"). The Seller has delivered to the Purchaser, and the Purchaser has physically reviewed and approved, a good faith estimate of the book value of the Purchased Inventory as of the close of business on the day prior to the Closing.

(b) At the Closing, the Purchaser shall pay or cause to be paid the Net Purchase Price by bank wire transfer of immediately available funds to an account designated in writing by the Seller. At the Closing, the Purchaser shall also pay to the Persons (as defined below in Section 8.5) entitled thereto the amount of the Indebtedness of the Seller to the extent set forth in the payoff letters referenced in Section 3.1(f).

(c) The Net Purchase Price is referred to herein as the "*Purchase Price*".

(d) For purposes of this Agreement:

(i) "*Indebtedness*" means: either (A) any liability of the Seller (1) for borrowed money (including the current portion thereof), (2) under any

reimbursement obligation relating to a letter of credit, bankers' acceptance or note purchase facility, (3) evidenced by a bond, note, debenture or similar instrument (including a purchase money obligation), (4) for the payment of money relating to leases that are required to be classified as a capitalized lease obligation in accordance with generally accepted accounting principles, (5) for all or any part of the deferred purchase price of property or services (other than trade payables), including any "earnout" or similar payments or any non-compete payments, or (6) under interest rate swap, hedging or similar agreements or (B) any liability of others described in the preceding clause (A) that the Seller has guaranteed, that is recourse to the Seller or any of its assets or that is otherwise its legal liability or that is secured in whole or in part by the assets of the Seller. Indebtedness includes any and all accrued interest, success fees, prepayment premiums, make-whole premiums or penalties and fees or expenses (including attorneys' fees) associated with the prepayment of any indebtedness.

ARTICLE 3 DELIVERIES

3.1 Deliveries by the Seller Group. Simultaneously with the execution and delivery of this Agreement, the Seller Group shall deliver to the Purchaser the following items:

- (a) copies of resolutions of the Member, and the board of managers of the Seller (if any), approving the execution and delivery of this Agreement and the Ancillary Agreements (as defined below) to which the Seller is a party, and the consummation of the transactions contemplated hereby and thereby, certified by an officer of the Seller;
- (b) a copy of a bill of sale, in the form of Exhibit A attached hereto (the "*Bill of Sale*"), duly executed by the Seller;
- (c) a copy of the consulting agreement, in the form of Exhibit B attached hereto (the "*Consulting Agreement*"), duly executed by Jay Wolford;
- (d) a copy of the license and service agreement, in the form of Exhibit C attached hereto (the "*License & Service Agreement*") duly executed by the Seller;
- (e) all Consents (as defined below) listed on Schedule 4.5;
- (f) payoff letters and appropriate termination statements (or partial termination statements) under the Uniform Commercial Code and other instruments as may be requested by the Purchaser or its lenders to extinguish (i) the indebtedness of the Seller and (ii) all Liens on the Purchased Assets, in each case all to the extent reasonably directed by the Purchaser;
- (g) a non-foreign person affidavit that complies with the requirements of Section 1445 of the Code (as defined below), duly executed by the Seller and in form and substance reasonably satisfactory to the Purchaser;
- (h) an amendment to the Seller's articles of organization, filed with the Secretary of State of West Virginia, changing the name of the Seller to a name that, in the reasonable judgment of the Purchaser, is not similar to "Wolford Concrete Forms & Scaffold Supply, LLC" and

(i) such other documents and instruments as the Purchaser may reasonably request to consummate the transactions contemplated hereby.

3.2 Deliveries by the Purchaser. Simultaneously with the execution and delivery of this Agreement, the Purchaser shall deliver to the Seller Group the following items:

- (a) the Net Purchase Price payable at the Closing;
- (b) a copy of the Consulting Agreement, duly executed by the Purchaser;
- (c) a copy of the License & Service Agreement, duly executed by the Purchaser; and
- (d) such other documents and instruments as the Seller may reasonably request to consummate the transactions contemplated hereby.

ARTICLE 4 REPRESENTATIONS AND WARRANTIES OF THE SELLER GROUP

Each member of the Seller Group jointly and severally represents and warrants to the Purchaser as follows:

4.1 Existence; Good Standing; Ownership. The Seller is a limited liability company duly formed, validly existing and in good standing under the laws of the State of West Virginia and is duly authorized, qualified or licensed to do business as a foreign limited liability company and in good standing in each of the following jurisdictions, which are the only jurisdictions in which the Company is required to be so qualified: West Virginia. The Member owns all the outstanding equity interests of the Seller. No Person holds any instrument that is convertible into or exchangeable or exercisable for equity securities of the Seller.

4.2 Power and Authority. The Seller has the limited liability company power and authority to (a) own, operate, license and lease the Purchased Assets as and where currently owned, operated, licensed and leased and (b) carry on the Purchased Business as currently conducted. Each member of the Seller Group has the requisite capacity or power and authority, as the case may be, to execute, deliver and perform fully his or its obligations under this Agreement and the Ancillary Agreements. For purposes of this Agreement, "Ancillary Agreements" means the Bill of Sale, the License & Service Agreement, the Consulting Agreement and each agreement, document, instrument or certificate contemplated by this Agreement or to be executed by the Purchaser or the Seller or another member of the Seller Group in connection with the consummation of the transactions contemplated by this Agreement, in each case only as applicable to the relevant party or parties to such Ancillary Agreement, as indicated by the context in which such term is used.

4.3 Validity and Enforceability. This Agreement and each Ancillary Agreement has been duly executed and delivered by each member of the Seller Group and, assuming due authorization, execution and delivery by the Purchaser, represents the legal, valid and binding obligation of each member of the Seller Group, enforceable against each member of the Seller Group in accordance with its terms.

4.4 No Conflict. The execution and delivery of this Agreement and the performance by the members of the Seller Group of their respective obligations hereunder and the execution and delivery of the Ancillary Agreements by the members of the Seller Group and the performance by them of their

obligations thereunder will not (a) violate or conflict with the articles of organization or limited liability company agreement of the Seller or any law, statute, code, ordinance, regulation or other requirement of any Governmental Authority (each, a "Law") or any order, judgment, injunction, award, decree, ruling, charge or writ of any Governmental Authority (each, an "Order"). (b) violate, conflict with or result in a breach or termination of, or otherwise give any Person additional rights or compensation under, or the right to terminate or accelerate, or constitute (with notice or lapse of time, or both) a default under the terms of any note, deed, lease, instrument, security agreement, mortgage, commitment, contract, agreement, license or other instrument or oral understanding to which any member of the Seller Group is a party or by which any of the Purchased Assets are bound, or (c) result in the creation or imposition of any Lien with respect to, or otherwise have an adverse effect upon, any of the Purchased Assets.

4.5 Consents. Except as set forth on Schedule 4.5, no consents, novations, approvals, authorizations, requirements (including filing and registration requirements), transfers, notices, waivers and agreements from any Persons, including Governmental Authorities (collectively "Consents"), are required in connection with the execution and delivery by the members of the Seller Group of this Agreement or the Ancillary Agreements or the consummation of the transactions contemplated hereby or thereby.

4.6 Property. The Seller has good and marketable title to, or valid and enforceable license or leasehold interests in, all of the Purchased Assets, in each case free and clear of all Liens other than Liens for current Taxes (as defined below), assessments, fees and other charges by Governmental Authorities that are not due and payable as of the date hereof.

4.7 Litigation. Except as set forth on Schedule 4.8, there is no instance in which any member of the Seller Group, with respect to the Purchased Business or the Purchased Assets, is or has been (a) subject to any unsatisfied Order or (b) a party, or threatened to be made a party, to any complaint, action, suit, proceeding, hearing, investigation, charge, audit, claim or demand (each, a "Proceeding") of any Person or Governmental Authority. There are no judicial or administrative Proceedings pending or threatened that question the validity of this Agreement, the Ancillary Agreements or any of the transactions contemplated hereby or thereby.

4.8 Compliance with Laws. The Seller is now, and has been, in compliance with all Laws and Orders applicable to the Purchased Assets and the Purchased Business. To the knowledge of the Member, there is no proposed Law or Order that would be applicable to the Purchased Assets or the Purchased Business that would have a material adverse effect on the Purchased Assets or the Purchased Business.

4.9 Licenses and Permits. Except for the licenses, permits, and authorizations set forth and described on Schedule 4.10, there are no licenses, permits or other authorizations, whether written or oral, necessary or required for the conduct of the Purchased Business or for the ownership or use of any of Purchased Assets.

4.10 Indebtedness. Schedule 4.11(b) sets forth a true and complete list of the individual components (indicating the amount and the Person to whom such amount is owed) of all Indebtedness.

4.11 Purchased Inventory. The Purchased Inventory is of a quality and quantity useable and saleable in the normal and the ordinary course of business consistent with past custom and practice. None of the Purchased Inventory is held on consignment, or otherwise, by third parties.

4.12 Taxes. The Seller has timely filed all Tax returns, statements, reports and forms (including estimated Tax or information returns and reports) ("Returns") that it was required to file. All

such Returns were correct and complete in all material respects. All Taxes owed by the Seller (whether or not shown or required to be shown on any Return) have been paid. No member of the Seller Group expects any Governmental Authority to assess any additional Taxes for any period for which Returns have been filed. There are no Liens on any of the Purchased Assets that arose in connection with any failure (or alleged failure) to pay any Tax. No member of the Seller Group has received notice of any claim by a Governmental Authority in a jurisdiction where the Seller does not file Returns that it is or may be subject to taxation by any Governmental Authority. For purposes of this Agreement, "Tax" means (a) any net income, alternative or add-on minimum tax, gross income, gross receipts, sales, use, ad valorem, value added, transfer, franchise, profits, license, withholding on amounts paid to or by the Seller, payroll, employment, excise, severance, stamp, occupation, premium, property, environmental or windfall profit tax, custom, duty or other tax, governmental fee or other like assessment or charge of any kind whatsoever, together with any interest, penalty, addition to tax or additional amount imposed by any Governmental Authority, whether disputed or not, (b) any liability of the Seller for the payment of any amounts of any of the foregoing types as a result of being a member of an affiliated, consolidated, combined or unitary group, or being a party to any agreement or arrangement whereby liability of the Seller for payment of such amounts was determined or taken into account with reference to the liability of any other Person and (c) any liability of the Seller for the payment of any amounts as a result of being a party to any Tax sharing agreements or arrangements (whether or not written) binding on the Seller or with respect to the payment of any amounts of any of the foregoing types as a result of any express or implied obligation to indemnify any other Person.

4.13 Brokers. No Person has acted directly or indirectly as a broker, finder or financial advisor for any member of the Seller Group in connection with the negotiations relating to the transactions contemplated by this Agreement, and no Person is entitled to any fee or commission or like payment in respect thereof based in any way on any agreement, arrangement or understanding made by or on behalf of any member of the Seller Group.

4.14 Disclosure. No member of the Seller Group has withheld from the Purchaser any material facts relating to the Purchased Assets or the Purchased Business. Neither this Agreement (including the exhibits and schedules hereto) or the Ancillary Agreements, nor any other agreement, document, certificate or written statement furnished to the Purchaser by or on behalf of the Seller in connection with this Agreement, the Ancillary Agreements or the transactions contemplated by hereunder or thereunder, contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements contained herein or therein not misleading.

ARTICLE 5 REPRESENTATIONS AND WARRANTIES OF THE PURCHASER

The Purchaser hereby represents and warrants to the members of the Seller Group as follows:

5.1 Existence and Good Standing. The Purchaser is a corporation duly organized, validly existing and in good standing under the laws of the Michigan.

5.2 Power. The Purchaser has the corporate power and authority to execute, deliver and perform fully its obligations under this Agreement and the Ancillary Agreements.

5.3 Validity and Enforceability. This Agreement and each Ancillary Agreement has been duly executed and delivered by the Purchaser and, assuming due authorization, execution and delivery by the members of the Seller Group, represents the legal, valid and binding obligation of the Purchaser, enforceable against the Purchaser in accordance with its terms.

5.4 No Conflict. Neither the execution of this Agreement and the Ancillary Agreements, nor the performance by the Purchaser of its obligations hereunder or thereunder will violate or conflict with the Purchaser's Articles of Incorporation or Bylaws or any Law or Order.

5.5 Consents. No consent, approval or authorization of, or notice to, any third party or Governmental Authority that has not been obtained is required in connection with the execution and delivery by the Purchaser of this Agreement or the Ancillary Agreements or the consummation of the transactions contemplated hereby or thereby.

5.6 Brokers. No Person has acted directly or indirectly as a broker, finder or financial advisor for the Purchaser in connection with the negotiations relating to the transactions contemplated by this Agreement, and no Person is entitled to any fee or commission or like payment in respect thereof based in any way on any agreement, arrangement or understanding made by or on behalf of the Purchaser.

ARTICLE 6 CERTAIN COVENANTS

6.1 Further Assurances. From and after the Closing Date, at the request of the Purchaser, the members of the Seller Group shall execute and deliver or cause to be executed and delivered to the Purchaser such deeds, bills of sale, assignments or other instruments in addition to those required by this Agreement, as the Purchaser may reasonably request, in order to implement the transactions contemplated by this Agreement.

6.2 Competitive Activity; Confidentiality; Non-Solicitation.

(a) Acknowledgments and Agreements. Each member of the Seller Group hereby acknowledges and agrees that through active participation in the Purchased Business, he or it has been brought into frequent contact, either in person, by telephone or through the mails, with existing and potential customers of the Purchased Business. Each member of the Seller Group also agrees that trade secrets and confidential information related to the Purchased Business, more fully described in Section 6.2(g), were developed by the Seller through substantial expenditures of time, effort and money; will be acquired by the Purchaser pursuant to this Agreement; and will constitute valuable and unique property of the Purchaser. Each member of the Seller Group further understands and agrees that the foregoing makes it necessary for the protection of the Purchaser and the Purchased Business that the members of the Seller Group not compete with the Purchased Business for a reasonable period after the Purchaser's acquisition of the Purchased Business, as further provided in this Section 6.2. For the purposes of this Section 6.2, the Purchaser shall also include any Affiliate of the Purchaser.

(b) Conduct of the Purchaser's Business and Operations Post-Closing. The Purchaser and each member of the Seller Group further acknowledge that (i) after the Closing, the Purchaser intends to conduct its business (including the Purchased Business) throughout the United States, including the Core Restricted Territory (as hereinafter defined), (ii) a substantial portion of the value of the Purchased Assets is the goodwill that the Seller has built up in the Core Restricted Territory and the ability of the Purchaser (as the purchaser of the Purchased Assets) to expand the Purchaser's business within the Core Restricted Territory and (iii) that the Purchaser would not be purchasing the Purchased Assets but for such goodwill and ability to expand.

(c) Non-Competition.

(i) For a period of two (2) years following the Closing Date, no member of the Seller Group will:

- a) enter into or engage in any business which competes with the Purchased Business or part of the Purchased Business within a (i) one hundred (100) mile radius of any and all location(s) in which the Seller conducts or has conducted the Purchased Business or in which the Member performed services on behalf of the Purchased Business at any time in the two years preceding the date hereof and (ii) all of the specific customer accounts of the Purchased Business, whether within or outside of the United States, for the two (2)-year period prior to the Closing Date ("*Core Restricted Territory*");
- b) solicit customers, prospective customers, business, patronage or orders for, or sell, any products and services in competition with, or for any business, wherever located, that competes with, the Purchased Business or part of the Purchased Business within the Core Restricted Territory;
- c) divert, entice or otherwise take away any customers, business, patronage or orders of the Purchased Business within the Core Restricted Territory, or attempt to do so; or
- d) promote or assist, financially or otherwise, any Person engaged in any business which competes with the Purchased Business or part of the Purchased Business within the Core Restricted Territory.

(d) Non-Solicitation. No member of the Seller Group will, directly or indirectly, at any time, solicit or induce or attempt to solicit or induce any employee, representative, agent, consultant or vendor of the Purchaser to terminate his, her or its employment, representation or other association with the Purchaser without obtaining written consent from the Purchaser prior to engaging or attempting to engage in such solicitation or inducement.

(e) Indirect Competition. For the purposes of Section 6.2(c) and Section 6.2(d) of this Agreement, a member of the Seller Group will be in violation thereof if he or it engages in any or all of the activities set forth therein directly or indirectly for any other Person and whether as a partner, joint venturer, agent, employee, salesperson, consultant, officer or director of any Person or as an equity holder of any Person in which any member of the Seller Group or the Member's spouse, child or parent (including adoptive relationships) owns, directly or indirectly, any of the outstanding equity interests (including convertible debt).

(f) Extension. If it shall be judicially determined that any member of the Seller Group has violated any of his, her or its obligations under Section 6.2(c), then the period applicable to each obligation determined to have been violated by that member of the Seller Group shall, with respect to that member of the Seller Group, automatically be extended by a period of time equal in length to the period during which such violation(s) occurred.

(g) Further Covenants. Each member of the Seller Group will keep in strict confidence, and will not, directly or indirectly, at any time, disclose, furnish, disseminate, make available or, except in the course of performing services on behalf of the Purchaser, use any trade secrets or confidential business and technical information of the Purchased Business or its

customers or vendors, including as to when or how such member of the Seller Group may have acquired such information. Such confidential information shall include the unique selling and servicing methods and business techniques of the Purchased Business; training, service and business manuals, promotional materials, training courses and other training and instructional materials used or developed in connection with the Purchased Business; vendor and product information, customer and prospective customer lists, other customer and prospective customer information and other business information related to the Purchased Business. Each member of the Seller Group specifically acknowledges that all such confidential information, whether reduced to writing, maintained on any form of electronic media, or maintained in his, her or its mind or memory and whether compiled by the Purchaser, the Seller and/or any other member of the Seller Group, derives independent economic value from not being readily known to or ascertainable by proper means by others who can obtain economic value from its disclosure or use, that reasonable efforts have been made by the Purchaser to maintain the secrecy of such information, that such information is the sole property of the Purchaser and that any retention and use of such information by a member of the Seller Group, except in the course of performing services on behalf of the Purchaser, will constitute a misappropriation of the Purchaser's trade secrets, unless such information (i) is or becomes generally available to the public through no action of any member of the Seller Group, or (ii) is or becomes available to a member of the Seller Group on a nonconfidential basis from a source, which such member of the Seller Group believes was not prohibited from disclosing such information by a contractual, legal or fiduciary obligation, in which case no violation of this Section 6.2(g) exists.

6.3 Acknowledgment and Release. The members of the Seller Group hereby acknowledge that, in connection with the transactions contemplated by this Agreement and the Ancillary Agreements, the members of the Seller Group have received all that the members of the Seller Group are entitled to receive in connection with any prior ownership of the Purchased Assets and the Purchased Business. Each member of the Seller Group acknowledges that the Purchase Price is fair and reasonable consideration for his, her or its undertaking not to compete in accordance with the terms of Section 6.2. Each member of the Seller Group acknowledges that his, her or its obligations under Section 6.2 are reasonable in the context of the nature of the Purchased Business and competitive injuries likely to be sustained by the Purchaser if a member of the Seller Group was to violate such obligations. Other than rights provided under this Agreement and the Ancillary Agreements, the members of the Seller Group hereby fully, finally and forever release, discharge, quit claim, and covenant not to sue and otherwise agree to enforce any claim, cause of action, right, title or interest against, each of the Purchaser, its respective successors and assigns, and any Affiliate of the foregoing of, from and with respect to any and all claims, counterclaims, debts, covenants, agreements, obligations, liabilities, actions or demands of any kind or character in connection with the Purchased Assets or the Purchased Business.

6.4 Forwarding of Mail. Each member of the Seller Group hereby covenants and agrees that he or it will promptly forward to the Purchaser any mail received by such member of the Seller Group relating to the Purchaser, the Purchased Assets or the Purchased Business.

6.5 Accounts Receivable. If any member of the Seller Group receives any payment relating to any Purchased Asset for invoices generated after the Closing Date, such payment will be the property of, and shall be immediately forwarded and remitted to, the Purchaser. The members of the Seller Group, as applicable, shall promptly endorse and deliver to the Purchaser any cash, checks or other documents received by any member of the Seller Group, on account of any such Purchased Asset. The members of the Seller Group, as applicable, shall advise the Purchaser (promptly following any member of the Seller Group becoming aware thereof) of any counterclaims or set-offs that may arise subsequent to the Closing Date with respect to any such Purchased Asset.

6.6 Bulk Sales Laws. Each party hereto waives compliance by each other party hereto with any bulk sales law which may be applicable to the transactions contemplated by this Agreement. Notwithstanding the foregoing, the failure of the parties to comply with any bulk sales laws shall not affect the Seller's retention of the Retained Liabilities (including all liabilities and obligations related to Taxes).

6.7 Use of Name. Following the Closing, the Seller will not, directly or indirectly, use or do business, or allow any of its Affiliates to use or do business, under the name "Wolford Concrete Forms & Scaffold Supply, LLC" or any name that, in the reasonable judgment of the Purchaser, is similar to such name. On the Closing Date, the Seller shall amend or terminate (as appropriate) any articles of organization or similar organizational documents and any assumed name or d/b/a filings to eliminate the Seller's right to use the name "Wolford Concrete Forms & Scaffold Supply, LLC" or any name that, in the reasonable judgment of the Purchaser, is similar to such name.

6.8 Transition Services. During the ninety (90) day-period following the Closing, the members of the Seller Group shall assist the Purchaser with the transitioning of the Purchased Business to the Purchaser (the "Services"). The members of the Seller Group shall perform such duties as may be mutually agreed upon by the President of the Purchaser and the members of the Seller Group.

ARTICLE 7 REMEDIES

7.1 General Indemnification Obligation.

(a) The members of the Seller Group shall jointly and severally indemnify and hold harmless the Purchaser and its officers, directors, employees, agents and Affiliates from and against any and all losses, liabilities, claims, damages, penalties, fines, judgments, awards, settlements, Taxes, costs, fees, expenses (including reasonable attorneys' fees) and disbursements (collectively "Losses") sustained by any of such Persons based upon, arising out of or otherwise in respect of (i) any inaccuracies in or any breach of any representation or warranty of any member of the Seller Group contained in this Agreement (including any Schedule or Exhibit attached hereto) or any Ancillary Agreement, (ii) any breach of any covenant or agreement of any member of the Seller Group contained in this Agreement (including any Schedule or Exhibit attached hereto) or any Ancillary Agreement and (iii) any of the Retained Assets or the Retained Liabilities.

(b) The Purchaser shall indemnify and hold harmless the Seller and its officers, directors, employees, agents and Affiliates, from and against any and all Losses actually sustained by any of such Persons based upon, arising out of or otherwise in respect of (i) any inaccuracies in or any breach of any representation or warranty of the Purchaser contained in this Agreement (including any Schedule or Exhibit attached hereto) or any Ancillary Agreement, and (ii) any breach of any covenant or agreement of the Purchaser contained in this Agreement (including any Schedule or Exhibit attached hereto) or any Ancillary Agreement.

7.2 Specific Performance. Each party's obligation under this Agreement is unique. If any party should breach its covenants under this Agreement, the parties each acknowledge that it would be extremely impracticable to measure the resulting damages; accordingly, the non-breaching party or parties, in addition to any other available rights or remedies, may sue in equity for specific performance, and each party expressly waives the defense that a remedy in damages will be adequate.

7.3 Setoff. The Purchaser will be entitled to recover any indemnification payment or other amounts due from a member of the Seller Group pursuant to this Article 7 by setting off and retaining any amounts due or to become due from the Purchaser to any member of the Seller Group.

ARTICLE 8 MISCELLANEOUS

8.1 Press Release and Announcements. No member of the Seller Group will issue any press release or other public announcement relating to the subject matter of this Agreement or the transactions contemplated hereunder without the prior approval of the Purchaser.

8.2 Expenses and Transfer Taxes. The Purchaser, on the one hand, and the members of the Seller Group, on the other hand, shall each bear their respective expenses incurred or to be incurred in connection with the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby. All transfer, documentary, sales, use, stamp, registration, value added and other such Taxes and fees (including any penalties and interest) imposed on the Purchaser or the Seller in connection with the sale of the Purchased Assets pursuant to this Agreement will be split between the Buyer and the Seller when due. All necessary Returns and other documentation with respect to all such Taxes and fees will be filed by the party required to make such filings by applicable Law, at such party's expense.

8.3 No Assignment. The Purchaser may, without the consent of any other party, assign its rights under this Agreement to any of its lenders, to any Affiliate of the Purchaser or in connection with any sale by the Purchaser of all or substantially all of its assets. The rights and obligations of the Purchaser hereunder may not otherwise be assigned without the prior written consent of the Seller. No member of the Seller Group may assign his, her or its rights and obligations hereunder without the prior written consent of the Purchaser.

8.4 Integration, Modification and Waiver. This Agreement, together with the exhibits, schedules and certificates or other instruments delivered hereunder, constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior understandings of the parties. No supplement, modification or amendment of this Agreement shall be binding unless executed in writing by each of the parties hereto. No waiver of any of the provisions of this Agreement shall be deemed to be or shall constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver.

8.5 Construction. The parties have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement. Any reference to any federal, state, local or foreign statute or law shall be deemed also to refer to all rules and regulations promulgated thereunder, unless the context requires otherwise. The headings contained in this Agreement are included for purposes of convenience only, and shall not affect the meaning or interpretation of this Agreement. For the purposes of this Agreement, an "Affiliate" of any Person means any Person directly or indirectly controlling, controlled by, or under common control with, any such Person, and any officer, director or controlling person of such Person. The term "Affiliate" also includes any child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law or sister-in-law, including adoptive relationships, of such Person. The word "including" shall mean including without limitation. Any reference to the singular in this Agreement shall also include the plural and vice versa. The word "knowledge" shall mean knowledge obtained or obtainable after due inquiry and reasonable investigation. The word "Person"

means an individual, sole proprietorship, partnership, corporation, limited liability company, unincorporated society or association, trust or other entity.

8.6 Severability. If any provision of this Agreement or the application of any provision hereof to any party or circumstance shall, to any extent, be adjudged invalid or unenforceable, the application of the remainder of such provision to such party or circumstance, the application of such provision to other parties or circumstances, and the application of the remainder of this Agreement shall not be affected thereby.

8.7 Notices. All notices and other communications required or permitted hereunder shall be in writing and shall be deemed to have been duly given when delivered in person or when dispatched by electronic facsimile transmission or electronic mail (if confirmed in writing by mail simultaneously dispatched) or one business day after having been dispatched by a nationally recognized overnight courier service to the appropriate party at the address or facsimile number set forth on the signature pages hereto.

8.8 Governing Law. This Agreement and the Ancillary Agreements shall be governed by and construed and enforced in accordance with the laws of the State of West Virginia without regard to principles of conflicts of law.

8.9 Waiver of Jury Trial. EACH PARTY HERETO HEREBY IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY PROCEEDING (WHETHER BASED IN CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS AGREEMENT, ANY ANCILLARY AGREEMENT OR ANY OF THE CONTEMPLATED TRANSACTIONS OR THE ACTIONS OF ANY PARTY HERETO IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE OR ENFORCEMENT HEREOF OR THEREOF.

8.10 Counterparts. This Agreement may be executed in two or more counterparts (including facsimile or other electronically transmitted counterparts), each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

[Signature Pages to Follow]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

FORM TECH CONCRETE FORMS, INC.

By: Guy Williams
Name: GUY WILLIAMS
Title: President-CEO
Form

Notice Address:


48575 Downing Street
Wixom, Michigan 48393
Attention: Guy Williams, CEO
Facsimile No.: _____
Email: gwilliams@formtechinc.com

with a copy to:

Kirtland Capital Partners
3201 Enterprise Parkway
Suite 200
Beachwood, Ohio 44122
Attention: James Foley, Partner
Facsimile No.: (216) 593-0240
Email: jfoley@kirtlandcapital.com

Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Attention: William R. Stewart, Jr.
Facsimile No.: (216) 579-0212
Email: wrstewartjr@jonesday.com

**WOLFORD CONCRETE FORMS &
SCAFFOLD SUPPLY, LLC**

By: 

Name:

Title: GENERAL MANAGER


JULIUS WOLFORD

Notice Address:

3612 Brackshill Drive
Hickory, West Virginia
Facsimile No.: 606-761-7877
Email: jcw@wolfordsupply.com

with a copy to:

Facsimile No.: () _____

Email: _____

CONSULTING AGREEMENT

This Consulting Agreement (the "Agreement"), dated as of March 13, 2019 is entered into by and between Julius Wolford (the "Consultant"), and Form Tech Concrete Forms, Inc. (the "Company").

RECITALS

WHEREAS, the Consultant is currently employed by Wolford Concrete Forms & Scaffold Supply, L.L.C. ("Wolford") and has responsibility for sales and managerial oversight of Wolford's operation located at 6120 MacCorkle Avenue SW, St. Albans, West Virginia;

WHEREAS, the Company is purchasing the steel-ply forming equipment, rental business and other assets ("Purchased Business") from Wolford as of the date hereof (the "Transaction"); and

WHEREAS, the Company and Consultant deem it advisable to enter into this Agreement, under which Consultant will make his skills and knowledge available to the Company;

NOW, THEREFORE, in consideration of the premises and the mutual agreements contained in this Agreement, the parties to this Agreement hereby agree as follows:

AGREEMENT

ARTICLE I ENGAGEMENT

1.1 Term. The Company hereby retains Consultant, and Consultant agrees to perform the consulting services defined in Section 1.2 hereto for the Company, for the period commencing on the date hereof and ending in accordance with the terms of Article III (the "Engagement").

1.2 Consulting Services. Consultant shall provide consulting services to assist the Company in (i) the transition and continuation of the Purchased Business following the Transaction and (ii) the growth of the Company's business and the Purchased Business. Such services to be provided by the Consultant shall include, but are not limited to, the following:

(a) Working with the Company's senior management team and sales representatives to (i) relocate the assets of the Purchased Business to the Company's branch location at 161 Industrial Road, St. Albans, West Virginia and (ii) successfully transition existing and prospective customers of the Purchased Business to the Company;

(b) Continuing to identify, quote and secure new business opportunities from existing and prospective customers of the Company and the Purchased Business within the defined sales territory to be determined by the Company's Vice President of Sales (all pricing and granting of credits on rental, sales, and service opportunities managed by the Consultant to be approved in advance of the Company's Vice President of Sales);

(c) Tracking all new business opportunities, sales calls, and sales visits in the Company's customer relationship management system;



(d) Preparing and submitting information to the Company's Vice President of Sales on a bi-weekly basis as required by the Company to develop and maintain an accurate sales forecast for upcoming projects and new business opportunities in the assigned sales territory;

(e) Submitting new rental and sales documentation to the Company in accordance with and utilizing the Company's standard sales, pricing, and services submission forms; and

(f) Providing other consulting services as mutually agreed upon by the Company and the Consultant.

1.3 Independent Contractor.

(a) During the term of this Agreement, Consultant's relationship with the Company will at all times be and remain as an independent contractor and not as an employee of Company. Consultant shall be free to exercise Consultant's own judgment as to the manner and method of providing the consulting services to the Company, subject to applicable laws and requirements reasonably imposed by the Company.

(b) Each party shall report all payments hereunder to all governmental agencies as payments to an independent contractor, with the Company reporting amounts paid to Consultant on Form 1099-MISC (or successor form), and in no event shall the Company treat or report payments to Consultant as amounts paid to an employee for purposes of federal, state, local or foreign income tax withholding, nor unless otherwise specifically provided by law, for purposes of the Federal Insurance Contributions Act, the Social Security Act, the Federal Unemployment Tax Act or any Worker's Compensation law of any state or country. Consultant shall have no right to any benefits or unemployment compensation by virtue of the independent contractor relationship created hereunder.

(c) Consultant acknowledges and agrees that as an independent contractor, Consultant will be required, during the term of this Agreement, to pay any applicable taxes on the fees paid to Consultant. Consultant shall indemnify, hold harmless and defend the Company for all tax and other liabilities (including, without limitation, reasonable fees and expenses of attorneys and other professionals) arising out of or relating to Consultant's failure to report and pay all employment income taxes or other taxes due on taxable amounts paid to or on behalf of Consultant by the Company.

1.4 Holidays. The Consultant will be considered to have provided his consulting services to the Company on any day that the Company considers to be a paid holiday.

ARTICLE II FEES AND EXPENSES

2.1 Consulting Fee. The Company shall pay Consultant a monthly consulting fee of Three Thousand Dollars (\$3,000) ("Consulting Fee"), payable on a monthly basis within 10 days after the Company's receipt of an invoice from Consultant detailing the days worked by Consultant during the prior month. The maximum amount of the Consulting Fee to be paid by the Company will be Thirty Thousand Dollars (\$30,000) ("Consulting Fee Cap") and the Company will no longer pay Consultant a monthly Consulting Fee once the Consulting Fee Cap has been reached.

2.2 Commission. The Company shall pay Consultant a commission equal to 15.0% of the Gross Profit (as hereinafter defined) attributable to sales generated and collected by the Consultant associated with the Purchased Business or the Company's other products, and which sales were approved in accordance with Section 1.2. For purposes of this Agreement, "Gross Profit" is defined as gross dollars generated and collected from the approved sale or rental of equipment and products of the Company and Purchased Business less (i) any discounts, credits or other adjustments to sales and (ii) any direct costs associated with sale of products or rental of equipment as determined by the Company's Chief Financial Officer based on the Company's established sales commission accounting policies and procedures. The Sales Commission will be payable within 30 days after the close of the Company's financial results in a given month. For the avoidance of doubt, the Company shall not pay Consultant any commission on sales attributable to scaffolding products.

2.3 Expense Reimbursement.

(a) The Company shall reimburse Consultant for all mileage and reasonable business expenses incurred in connection with the performance of Consultant's duties hereunder. Mileage reimbursement will be consistent with the Company's established mileage reimbursement policy and procedures and will be reimbursed on a weekly basis within ten days of receipt of sufficient documentation as determined by the Company. Business expense reimbursement will not exceed Five Hundred Dollars (\$500.00) per month without the prior written authorization of the Company. The Consultant shall submit an invoice to the Company for the reimbursement of business expenses with such documentation as the Company may reasonably request.

(b) If any reimbursements or in-kind benefits provided by the Company pursuant to this Agreement would constitute deferred compensation for purposes of Section 409A of the Internal Revenue Code of 1986, as amended, such reimbursements or in-kind benefits shall be subject to the following rules: (a) the amounts to be reimbursed, or the in-kind benefits to be provided, shall be determined pursuant to the terms of the applicable benefit plan, policy or agreement and shall be limited to Consultant's lifetime and the lifetime of Consultant's eligible dependents; (b) the amounts eligible for reimbursement, or the in-kind benefits provided, during any calendar year may not affect the expenses eligible for reimbursement, or the in-kind benefits provided, in any other calendar year; (c) any reimbursement of an eligible expense shall be made on or before the earlier of (i) the last day of the calendar month following the calendar month in which the expense report and any required documentation were submitted or (ii) the last day of the calendar year following the calendar year in which the expense was incurred; and (d) Consultant's right to an in-kind benefit or reimbursement is not subject to liquidation or exchange for cash or another benefit.

ARTICLE III TERMINATION

3.1 Right to Terminate.

(a) Either the Company or the Consultant may terminate this Agreement at any time upon providing five-day advance notice in writing to the other party. The provisions of Section 1.3, 4.1 and 4.2 hereof shall survive any termination of this Agreement.

(b) Upon termination of this Agreement by the Consultant or termination of this Agreement by the Company for "Cause" (as hereinafter defined), the Company shall have no further obligations to the Consultant hereunder, except for the payment of any unpaid Consulting Fee with respect to the period prior to the effective date of termination and reimbursement of expenses to which the Consultant is entitled under Section 2.3 hereof. "Cause" shall be defined as: (i) failure of the Consultant to follow or comply with any material rule or policy of the Company; provided, that the Company's Vice President of Sales shall notify Consultant of such failure and Consultant shall have 5 calendar days to cure such failure, (ii) commission of a felony, act of fraud, embezzlement, or theft by the Consultant, (iii) inability of the Consultant to provide the consulting services under Section 1.2 hereof as a result of sickness, disability or death or (iv) unwillingness of the Consultant to provide the consulting services under Section 1.2 hereof as evidenced by Consultant providing less than 15 days per month of Consultant's time to the Company.

(c) Upon termination of this Agreement by the Company for any reason other than Cause, the Company shall be obligated to make (i) the payments under Section 2.1 with such payments to be made on the last day of each month up to the Consulting Fee Cap and (ii) reimburse any expenses to which the Consultant is entitled under Section 2.3 hereof that were incurred prior to the date of termination, but not reimbursed as of the date of termination.

ARTICLE IV CONFIDENTIALITY

4.1 Confidential Information. Consultant acknowledges that Consultant has and will acquire information of a confidential nature relating to the Company, including, without limitation, the operation, finances, business relationships and trade secrets of the Company and its affiliates. During the Engagement and following termination thereof, Consultant will not use (except for use in the course of Consultant's consulting services on behalf of the Company), publish, disclose, or authorize anyone else to use, publish or disclose, without the prior written consent of Company, any confidential information pertaining to the Company or its affiliates, including, without limitation, any information relating to existing or potential business, customers, trade or industrial practices, plans, costs, processes, technical or engineering data, or trade secrets. The foregoing notwithstanding, Consultant has no obligation to refrain from using, publishing or disclosing any such confidential information which is available to the public otherwise than by use, publication or disclosure by Consultant.

4.2 Breach. Consultant agrees that the remedy at law for any breach of this Agreement by Consultant will be inadequate and will cause irreparable injury to the Company and that the Company will be entitled to equitable relief, including, without limitation, injunctive relief and specific performance, in addition to any other remedy available to the Company as a result of such breach. Consultant has carefully considered the nature and extent of the restrictions placed upon him and the rights and remedies conferred upon the Company, and Consultant

acknowledges that the same are reasonable, are designed to protect the Company from unlawful disclosure and unfair competitive harm, and are fully required to protect the legitimate interests of the Company.

ARTICLE V GENERAL PROVISIONS

5.1 Entire Agreement; Amendments. This Agreement constitutes the entire Agreement between the parties related to the subject matter hereof. This Agreement may be amended only in a writing signed by both parties.

5.2 Counterparts. This Agreement may be executed in multiple counterparts, all of which together shall constitute a single agreement.

5.3 Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns; provided, however, that Consultant shall not assign his rights or obligations hereunder without the prior written consent of the Company, which consent may be withheld by the Company in its sole and absolute discretion.

5.4 Enforceability. In the event that any one or more of the provisions contained in this Agreement shall be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision did not exist.

5.5 Governing Law. This Agreement shall in all respects be interpreted, construed and governed by and in accordance with the laws of the State of West Virginia (without giving effect to its rules of conflicts of laws).

5.6 Counterparts. This Agreement may be executed in multiple counterparts, all of which together shall constitute a single agreement.

5.7 Waivers. No waiver of any of the provisions of this Agreement shall be valid and enforceable unless such waiver is in writing and signed by the parties to be charged, and, unless otherwise stated therein, no such waiver shall constitute a waiver of any other provision hereof (whether or not similar) or a continuing waiver.

[SIGNATURES ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF, this Agreement has been executed and delivered by the parties set forth below.

COMPANY:

Form Tech Concrete Forms, Inc.

By: 
Guy Williams
President & CEO

CONSULTANT

By: _____
Julius Wolford

IN WITNESS WHEREOF this Agreement has been executed and delivered by the parties set forth below.

COMPANY:

Form Tech Concrete Forms, Inc.

By: _____
[Name]
[Title]

CONSULTANT

By: 
Julius Wolford

Commission and Gross Profit

Subject: Commission and Gross Profit
From: Lucy Klohs <lklohs@FORMTECHINC.COM>
Date: 2/8/2019, 10:57 AM
To: Jay Wolford <jcw@wolfordsupply.com>

Hi Jay, thanks for taking my call earlier,

Here is the definition and sample calculation for the Commission agreement. Please let me know if you need any additional info to feel comfortable with the math.

Thanks,
Lucy

Lucy Klohs | Chief Financial Officer
FORMTECH Concrete Forms, Inc.
48575 Downing, Wixom, MI 48393
O: 248-344-8260 | C: 248-826-4271
www.formtechinc.com



— Attachments: —

Commission and Gross Profit Definition.xlsx

11.9 KB

Form Tech / Jay Wolford
Commission and Gross Profit

Gross Profit is defined as gross dollars generated and collected from the approved sale or rental of equipment and products and add-ons of the Company and the Purchased Business less:

- (i) Discounts, credit memos, or other adjustments to sales (included in Net Revenue in the sample calculation below)
- (ii) Re-Rent Expense
- (iii) Cost of Goods Sold
- (iv) Freight Expense

The following is a hypothetical calculation to illustrate how the math works:

Sample Commission Calculation

Net Revenue - Co. Owned Equipment Rentals	\$ 5,000.00
Net Revenue - Re-Rent Equipment Rentals	\$ 1,000.00
Net Revenue - Product Sales	\$ 1,000.00
Net Revenue - Freight	\$ 500.00
Total Revenues	\$ 7,500.00
Less: Re-Rent Expense	\$ 525.00
Less: Cost of Products Sold	\$ 750.00
Less: Freight Expense	\$ 425.00
Total Expenses	\$ 1,700.00
Total Gross Profit	\$ 5,800.00
Commission %	15%
Commission \$	\$ 870.00

SHUMAN McCUSKEY SLICER PLLC

ATTORNEYS AT LAW

116 South Stewart Street, 1st Floor
Winchester, VA 22601
Telephone: 540.486.4195
Facsimile: 540.486.4912

1411 Virginia Street East, Suite 200
Charleston, WV 25301
Telephone: 304.345.1400
Facsimile: 304.343.1826

1445 Stewartstown Road, Suite 200
Morgantown, WV 26505
Telephone: 304.291.2702
Facsimile: 304.291.2840

WWW.SHUMANLAW.COM

Roberta F. Green
rgreen@shumanlaw.com

Christopher D. Negley
cnegley@shumanlaw.com

September 24, 2020

Cathy Gatson, Clerk
Kanawha County Circuit Court
Judicial Annex, 111 Court St.
P. O. Box 2351
Charleston, WV 25328

**Re: Welford v. FormTech Concrete Forms, Inc.
Civil Action No. 20-C-660**

Dear Clerk Gatson:

Enclosed for filing in the above-referenced matter, please find the original and one copy of a **“Civil Case Information Sheet”** the **“Answer, Counterclaim and Third-Party Complaint of FormTech Concrete Forms, Inc.”** and a **“Third-Party Summons.”** Please issue the Third-Party Summons and return to me in the enclosed self-addressed envelope for service upon the Third-Party Defendant. Also enclosed is our firm check number 66591 in the amount of \$215.00 to cover the filing fee. A true copy has this day been served upon counsel of record.

Thank you for your attention to this matter. If you have any questions in this regard, please feel free to contact me.

Very truly yours,



Roberta F. Green
Christopher D. Negley

Enclosures: *as stated*

cc (w/enc): Christopher D. Pence, Esq.

PLAINTIFF: JULIUS WOLFORD	Case No. 20-C-660 The Hon. Jennifer Bailey, Judge
DEFENDANT: FORM TECH CONCRETE FORMS, INC.	
THIRD-PARTY DEFENDANT: CONSTRUCTION SOLUTIONS & LEASING, LLC PROPERTIES	

II. TYPE OF CASE:

TORTS	OTHER	CIVIL
<input type="checkbox"/> Asbestos	<input type="checkbox"/> Adoption	<input type="checkbox"/> Appeal from Magistrate Court
<input type="checkbox"/> Professional Malpractice	<input checked="" type="checkbox"/> Contract	<input type="checkbox"/> Petition for Modification of Magistrate Sentence
<input type="checkbox"/> Personal Injury	<input type="checkbox"/> Real Property	<input type="checkbox"/> Miscellaneous Civil
<input type="checkbox"/> Product Liability	<input type="checkbox"/> Mental Health	<input type="checkbox"/> Other
<input type="checkbox"/> Other Tort:	<input type="checkbox"/> Appeal of Administrative Agency	

III. JURY DEMAND: ☒ Yes ☐ No

CASE WILL BE READY FOR TRIAL BY _____

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS DUE TO A DISABILITY OR AGE? ☐ YES ☒ NO

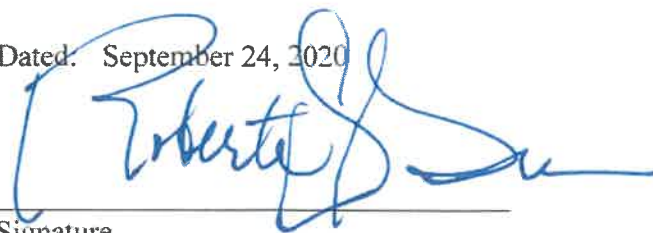
IF YES, PLEASE SPECIFY:

- ☐ Wheelchair accessible hearing room and other facilities
☐ Interpreter or other auxiliary aid for the hearing impaired
☐ Reader or other auxiliary aid for the visually impaired
☐ Spokesperson or other auxiliary aid for the speech impaired
☐ Other: _____

Attorney Name: Roberta F. Green, Esq. (WVSB #6598) Representing: FormTech Concrete Forms, Inc.
Christopher D. Negley, Esq. (WV Bar #6086)
Firm: Shuman, McCuskey & Slicer, PLLC ☐ Plaintiff ☒ Defendant
Address: 1411 Virginia St., E., Suite 200
P.O. Box 3953
Charleston, WV 25339
Telephone: 304-345-1400

Dated: September 24, 2020

Signature



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JULIUS WOLFORD,

Plaintiff,

v.

**Civil Action No. 20-C-660
Hon. Jennifer Bailey, Judge**

**FORM TECH CONCRETE FORMS, INC.,
A Michigan corporation,**

Defendant,

and

**FORM TECH CONCRETE FORMS, INC.,
A Michigan corporation,**

Third-Party Plaintiff,

v.

**CONSTRUCTION SOLUTIONS & LEASING, LLC PROPERTIES,
A West Virginia General Partnership,**

Third-Party Defendant.

**ANSWER, COUNTERCLAIM AND THIRD-PARTY COMPLAINT
OF FORMTECH CONCRETE FORMS, INC.**

Now comes FormTech Concrete Forms, Inc. (FormTech), by counsel, Roberta F. Green, Christopher D. Negley, Shuman McCuskey Slicer PLLC, and responds as follows to plaintiff's Complaint.

This responsive pleading has been prepared, served, and filed by counsel for FormTech within the time frames established by the West Virginia Rules of Civil Procedure and by agreement of counsel.

As permitted by Rule 8(e)(2), some defenses to the claims made in plaintiff's Complaint may be asserted alternatively and, in some cases, hypothetically. Defenses are being asserted regardless of their consistency and are based both on legal and equitable grounds.

As the facts of this civil action are fully developed through the discovery process, certain defenses may be abandoned, modified, or amended as permitted by and consistent with the West Virginia Rules of Civil Procedure.

ANSWER

A. Parties, Jurisdiction and Venue.

1. On information and belief, FormTech admits the representations in paragraph 1 of the Complaint.

2. FormTech admits the representations in paragraph 2 of plaintiff's Complaint but denies any and all allegations of wrongdoing in plaintiff's Complaint or elsewhere.

3. FormTech denies that

B. Factual Background.

4. FormTech incorporates by reference its responses to paragraphs 1-3 of the Complaint as if set forth in their entirety herein.

5. FormTech admits and denies the representations in paragraph 5 of plaintiff's Complaint in that some portions of the business were transferred in return for the \$150,000 payment, subject to various provisos and conditions.

6. In response to paragraph 6 of the Complaint, FormTech denies that a 'true and exact copy of the Asset Purchase Agreement' is attached to plaintiff's Complaint.

7. FormTech denies the representations in paragraph 7 of plaintiff's Complaint as it is at best a partial statement of a larger, complex contract.

8. In response to paragraph 8 of the Complaint, FormTech denies that this paragraph fully, fairly, accurately reflects the related facts and, therefore, denies same. Further, FormTech denies any and all allegations of wrongdoing relative to the forklift or otherwise in this Complaint or elsewhere.

9. Paragraph 9 of the Complaint references a document that speaks for itself, such that FormTech need not admit or deny same. To the extent that a response is required, FormTech denies the representations in paragraph 9 of plaintiff's Complaint as *inter alia* an incomplete statement of the terms of the Consulting Agreement.

10. On information and belief, FormTech admits the representations in paragraph 10 of the Complaint.

11. Paragraph 11 of the Complaint references a document that speaks for itself, such that FormTech need not admit or deny same. To the extent that a response is required, FormTech denies the representations in paragraph 11 of plaintiff's Complaint as *inter alia* an incomplete statement of the terms of the Consulting Agreement.

12. Paragraph 12 of the Complaint references a document that speaks for itself, such that FormTech need not admit or deny same. To the extent that a response is required, FormTech denies the representations in paragraph 12 of plaintiff's Complaint *inter alia* as an incomplete statement of the terms of Article II the Consulting Agreement.

13. . Paragraph 13 of the Complaint references a document that speaks for itself, such that FormTech need not admit or deny same. To the extent that a response is required, FormTech denies the representations in paragraph 13 of plaintiff's Complaint as *inter alia* an incomplete statement of the terms of Section 2.1 of the Consulting Agreement.

14. Paragraph 14 of the Complaint references a document that speaks for itself, such that FormTech need not admit or deny same. To the extent that a response is required, FormTech denies the representations in paragraph 14 of plaintiff's Complaint as *inter alia* an incomplete statement of the terms of Section 2.2 of the Consulting Agreement.

15. Paragraph 15 of the Complaint references a document that speaks for itself, such that FormTech need not admit or deny same. To the extent that a response is required, FormTech denies the representations in paragraph 15 of plaintiff's Complaint as *inter alia* an incomplete statement of the terms of Section 3.1 of the Consulting Agreement.

16. Paragraph 16 of the Complaint references a document that speaks for itself, such that FormTech need not admit or deny same. To the extent that a response is required, FormTech denies the representations in paragraph 16 of plaintiff's Complaint as *inter alia* an inexact restatement of the term 'Cause' from the Consulting Agreement.

17. Paragraph 17 of the Complaint references a document that speaks for itself, such that FormTech need not admit or deny same. To the extent that a response is required, FormTech denies the representations in paragraph 17 of plaintiff's Complaint as *inter alia* an incomplete statement of the terms of Section 3.1(c) of the Consulting Agreement.

18. FormTech denies the representations in paragraph 18 of plaintiff's Complaint and denies any and all allegations of wrongdoing in plaintiff's Complaint or elsewhere.

19. FormTech denies the allegations in paragraph 19 of plaintiff's Complaint and denies any and all allegations of wrongdoing in plaintiff's Complaint or elsewhere.

20. FormTech denies the representations in paragraph 20 of plaintiff's Complaint and denies any and all allegations of wrongdoing in plaintiff's Complaint or elsewhere.

21. FormTech denies the representations in paragraph 21 of plaintiff's Complaint and denies any and all allegations of wrongdoing in plaintiff's Complaint or elsewhere.

22. FormTech denies the representations in paragraph 22 of plaintiff's Complaint and denies any and all allegations of wrongdoing in plaintiff's Complaint or elsewhere.

23. FormTech denies the representations in paragraph 23 of plaintiff's Complaint and denies any and all allegations of wrongdoing in plaintiff's Complaint or elsewhere.

24. FormTech denies the representations in paragraph 24 of plaintiff's Complaint and denies any and all allegations of wrongdoing in plaintiff's Complaint or elsewhere.

25. FormTech denies the representations in paragraph 25 of plaintiff's Complaint and denies any and all allegations of wrongdoing in plaintiff's Complaint or elsewhere.

26. FormTech denies the representations in paragraph 26 of plaintiff's Complaint and denies any and all allegations of wrongdoing in plaintiff's Complaint or elsewhere.

27. FormTech denies the representations in paragraph 27 of plaintiff's Complaint and denies any and all allegations of wrongdoing in plaintiff's Complaint or elsewhere.

28. FormTech admits the representations in paragraph 28 of plaintiff's Complaint.

29. FormTech denies the representations in paragraph 29 of plaintiff's Complaint.

30. Paragraph 30 of the Complaint references a document that speaks for itself, such that FormTech need not admit or deny same.

31. FormTech denies the representations in paragraph 31 of plaintiff's Complaint and denies any and all allegations of wrongdoing in plaintiff's Complaint or elsewhere.

32. FormTech denies the representations in paragraph 32 of plaintiff's Complaint and denies any and all allegations of wrongdoing in plaintiff's Complaint or elsewhere.

33. Paragraph 33 of the Complaint references a document that speaks for itself, such that FormTech need not admit or deny same. To the extent that a response is required, FormTech denies the representations in paragraph 33 of plaintiff's Complaint as *inter alia* an incomplete recitation of the document at issue.

34. Paragraph 34 of the Complaint references a document that speaks for itself, such that FormTech need not admit or deny same. To the extent that a response is required, FormTech denies the representations in paragraph 34 of plaintiff's Complaint as *inter alia* an incomplete recitation of the document at issue.

35. Paragraph 35 of the Complaint references a document that speaks for itself, such that FormTech need not admit or deny same. To the extent that a response is required, FormTech denies the representations in paragraph 35 of plaintiff's Complaint as *inter alia* an incomplete recitation of the document at issue.

Count I – Breach of Contract (Consulting Agreement)

36. Defendant adopts and incorporates the allegations of paragraphs 1-35 as if set forth verbatim herein.

37. Paragraph 37 of the Complaint sets forth legal conclusions to which FormTech need not respond and therefore denies same.

38. FormTech denies any and all allegations of wrongdoing in paragraph 38 of plaintiff's Complaint or elsewhere.

39. FormTech denies any and all allegations of wrongdoing in paragraph 39 of plaintiff's Complaint or elsewhere.

40. FormTech denies any and all allegations of wrongdoing in paragraph 40 of plaintiff's Complaint or elsewhere.

41. FormTech denies any and all allegations of wrongdoing in paragraph 41 of plaintiff's Complaint or elsewhere.

42. FormTech denies any and all allegations of wrongdoing in paragraph 42 of plaintiff's Complaint or elsewhere.

43. FormTech denies any and all allegations of wrongdoing in paragraph 43 of plaintiff's Complaint or elsewhere, denies having injured plaintiff in any way, and denies that plaintiff is entitled to recover against it.

Count II – Violations of West Virginia Wage Payment and Collection Act,

W. Va. Code § 21-5-1, et sq.

44. FormTech adopts its responses to paragraphs 1 through 43 (above) as if set forth in their entirety herein.

45. To the extent that paragraph 45 of plaintiff's Complaint sets forth a legal conclusion to which no response is necessary, FormTech denies same. Further, FormTech denies any and all allegations of wrongdoing in plaintiff's Complaint or elsewhere.

46. To the extent that paragraph 46 of plaintiff's Complaint sets forth a legal conclusion to which no response is necessary, FormTech denies same. Further, FormTech denies any and all allegations of wrongdoing in plaintiff's Complaint or elsewhere.

47. To the extent that paragraph 47 of plaintiff's Complaint sets forth a legal conclusion to which no response is necessary, FormTech denies same. Further, FormTech denies the representations in paragraph 47 and denies any and all allegations of wrongdoing in plaintiff's Complaint generally or elsewhere.

48. To the extent that paragraph 48 of plaintiff's Complaint sets forth a legal conclusion to which no response is necessary, FormTech denies same. Further, FormTech denies the

representations in paragraph 48 and denies any and all allegations of wrongdoing in plaintiff's Complaint generally or elsewhere.

49. To the extent that paragraph 49 of plaintiff's Complaint sets forth a legal conclusion to which no response is necessary, FormTech denies same. Further, FormTech denies the representations in paragraph 49 and denies any and all allegations of wrongdoing in plaintiff's Complaint generally or elsewhere.

50. To the extent that paragraph 50 of plaintiff's Complaint sets forth a legal conclusion to which no response is necessary, FormTech denies same. Further, FormTech denies the representations in paragraph 50 and denies any and all allegations of wrongdoing in plaintiff's Complaint generally or elsewhere.

51. To the extent that paragraph 51 of plaintiff's Complaint sets forth a legal conclusion to which no response is necessary, FormTech denies same. Further, FormTech denies the representations in paragraph 51 and denies any and all allegations of wrongdoing in plaintiff's Complaint generally or elsewhere.

52. To the extent that paragraph 52 of plaintiff's Complaint sets forth a legal conclusion to which no response is necessary, FormTech denies same. Further, FormTech denies the representations in paragraph 52 and denies any and all allegations of wrongdoing in plaintiff's Complaint generally or elsewhere.

53. To the extent that paragraph 53 of plaintiff's Complaint sets forth a legal conclusion to which no response is necessary, FormTech denies same. Further, FormTech denies the representations in paragraph 53 and denies any and all allegations of wrongdoing in plaintiff's Complaint generally or elsewhere.

Count III – Breach of Oral Contract (Forklift Rental)

54. FormTech adopts its responses to paragraphs 1 through 53 (above) as if set forth in their entirety herein.

55. To the extent that paragraph 55 of plaintiff's Complaint sets forth a legal conclusion to which no response is necessary, FormTech denies same. Further, FormTech denies the representations in paragraph 55 and denies any and all allegations of wrongdoing in plaintiff's Complaint generally or elsewhere.

56. To the extent that paragraph 56 of plaintiff's Complaint sets forth a legal conclusion to which no response is necessary, FormTech denies same. Further, FormTech denies the representations in paragraph 56 and denies any and all allegations of wrongdoing in plaintiff's Complaint generally or elsewhere.

57. To the extent that paragraph 57 of plaintiff's Complaint sets forth a legal conclusion to which no response is necessary, FormTech denies same. Further, FormTech denies the representations in paragraph 57 and denies any and all allegations of wrongdoing in plaintiff's Complaint generally or elsewhere.

58. To the extent that paragraph 58 of plaintiff's Complaint sets forth a legal conclusion to which no response is necessary, FormTech denies same. Further, FormTech denies the representations in paragraph 58 and denies any and all allegations of wrongdoing in plaintiff's Complaint generally or elsewhere.

Count IV – Quantum Meruit (Forklift Rental)

59. FormTech adopts its responses to paragraphs 1 through 58 (above) as if set forth in their entirety herein.

60. To the extent that paragraph 60 of plaintiff's Complaint sets forth a legal conclusion to which no response is necessary, FormTech denies same. Further, FormTech denies the representations in paragraph 60 and denies any and all allegations of wrongdoing in plaintiff's Complaint generally or elsewhere.

61. To the extent that paragraph 61 of plaintiff's Complaint sets forth a legal conclusion to which no response is necessary, FormTech denies same. Further, FormTech denies the representations in paragraph 61 and denies any and all allegations of wrongdoing in plaintiff's Complaint generally or elsewhere.

62. To the extent that paragraph 62 of plaintiff's Complaint sets forth a legal conclusion to which no response is necessary, FormTech denies same. Further, FormTech denies the representations in paragraph 62 and denies any and all allegations of wrongdoing in plaintiff's Complaint generally or elsewhere.

63. To the extent that paragraph 63 of plaintiff's Complaint sets forth a legal conclusion to which no response is necessary, FormTech denies same. Further, FormTech denies the representations in paragraph 63 and denies any and all allegations of wrongdoing in plaintiff's Complaint generally or elsewhere. FormTech further denies that it injured plaintiff in any way and denies that plaintiff is entitled to recover against it in any way.

Damages

64. FormTech adopts its responses to paragraphs 1 through 63 (above) as if set forth in their entirety herein.

65. To the extent that paragraph 65 of plaintiff's Complaint sets forth a legal conclusion to which no response is necessary, FormTech denies same. Further, FormTech denies the representations in paragraph 65, denies any and all allegations of wrongdoing in plaintiff's

Complaint generally or elsewhere, denies having injured plaintiff in any way, and denies that plaintiff is entitled to any recovery against it whatsoever

66. FormTech denies any and all allegations not expressly admitted to herein.

AFFIRMATIVE DEFENSES

FormTech pleads the following affirmative defenses to the extent the same are supported by the facts and/or discovery herein.

1. Plaintiff has failed to state a claim upon which relief can be granted.

2. Plaintiff breached the Consulting Agreement and failed to adhere to the provisions of the Asset Purchase Agreement, such that his prior breach and unclean hands bar any recovery here.

3. FormTech has not breached the Consulting Agreement.

4. Plaintiff failed in his duty of good faith and fair dealing in that he has never had FormTech's best interests at heart in failing to transition the business in good faith and in raising unnecessary, untrue, and potentially injurious allegations against FormTech and its principals.

5. FormTech denies that plaintiff is owed any moneys whatsoever and denies that he is entitled to recover against it in any way.

6. FormTech reserves the right to assert additional claims, whether they be cross-claims, third-party claims or other claims as investigation and discovery may prove applicable, and hereby reserves all rights with respect to any such claims or potential claims.

7. FormTech denies that any of its actual employees, agents, or representatives breached any affirmative duty or standard of care with respect to the plaintiff.

8. FormTech hereby relies upon any other defenses that may become available or apparent during the discovery proceedings in this matter, pursuant to Rules 6, 8(c) or 12 of

the West Virginia Rules of Civil Procedure, or otherwise, and hereby reserves the right to amend its answer and to assert any such defense.

9. FormTech specifically reserves the right to plead any and all other affirmative defenses not specifically raised herein that may arise during discovery or otherwise. Further, FormTech specifically reserves the right to file an amended answer if additional discovery demonstrates the need to do so.

10. FormTech raises so as to preserve accord and satisfaction; estoppel; laches; payment; release; *res judicata*; statute of limitations; failure to mitigate damages; statute of frauds; statutory protection and immunities; improper party; and any other matter constituting an affirmative defense which may become apparent through the course of discovery.

11. Plaintiff, by his own conduct, caused his own injuries and damages, if any, such conduct is the sole or primary cause of its injuries and damages, if any, and as a result, plaintiff cannot recover from FormTech.

12. FormTech reserves the right to have the fault of all persons determined in the manner provided by law and hereby reserves its right of comparative contribution and/or indemnity, as the same may prove applicable.

13. Plaintiff's claims are barred by the doctrine of unclean hands.

14. To the extent plaintiff relies upon any oral representations outside the written agreements between the parties, his claims may be barred by the statute of frauds.

15. Plaintiff owes FormTech more in payments made on his behalf than FormTech could owe plaintiff.

16. Plaintiff was expressly, decidedly, admittedly an independent contractor at all times at issue.

17. Performance of the contract has become impossible or the purpose of the contract has become frustrated.
18. Enforcement of the contract would violate public policy
19. The contract contains a mutual mistake, stating something different from what either party intended.
20. The contract is null and void due to changed circumstances and impossibility.
21. The contract contains a unilateral mistake that was material to the agreement and the other party knew or should have known of the mistake.
22. The contract is unjust and unreasonable in its terms.
23. The contract is unenforceable as written in that it is violative of West Virginia law and public policy.
24. The contract is unenforceable based on impossibility, frustration, and commercial impracticability.
25. The contract is unenforceable as written because it is unconscionable, against public policy, and must be declared null and void in any event due to the supervening frustration of its purpose.
26. The contract is unenforceable based on the substantive unfairness of the agreement between the parties in that the contract is one-sided and will have an overly harsh effect on the disadvantaged party.
27. The contract places unrealistic limitations upon FormTech, such that the terms were unreasonably favorable to plaintiff and “its enforcement equivalent to the perpetration of a fraud[.]”

28. The contract is commercially unreasonable given the allocation of the risks between the parties and public policy concerns and cannot be enforced as written.

29. The contract is unenforceable due to the supervening frustration of its alleged purpose.

30. The contract was void *ab initio*.

31. The Agreement must fail because the object of contract is frustrated by “a fact of which [FormTech] has no reason to know and the non-existence of which is a basic assumption on which the contract is made.”

32. Plaintiff, by his own conduct, caused his own injuries and damages, if any, such conduct is the sole or primary cause of his injuries and damages, if any, and as a result, plaintiff cannot recover from the FormTech.

33. The contract is unenforceable as written, given defects in its formation, including by example only failure of meeting of the minds.

34. The contract is unenforceable as written, given the frustration of its purpose and the changed circumstances between the parties.

35. FormTech placed plaintiff on notice of his material breach.

36. FormTech has not breached the contract, and plaintiff’s claim is moot as plead and must be dismissed with prejudice.

37. This contract is unconscionable and unenforceable as written.

38. To the extent plaintiff relies upon facts that are contrary to representations made by plaintiff and/or the communications and agreements between the parties, his claims may be barred by fraud if misrepresentations were relied upon by FormTech to its detriment.

WHEREFORE, for all of the reasons set forth herein, FormTech moves this Honorable Court to dismiss this action as against it with prejudice and for any and all relief related thereto.

FormTech demands a trial by jury.

FORMTECH'S COUNTERCLAIM AGAINST JULIUS WOLFORD

Now Comes Defendant and Third-Party Plaintiff FormTech pursuant to West Virginia Rule of Civil Procedure 13 and states the following for its Counterclaim against Plaintiff Julius Wolford.

1. FormTech incorporates the allegations of the Plaintiff's Complaint as if they were fully set forth herein.
2. FormTech incorporates its previous responses to the Plaintiff's Complaint as if they were fully set for the herein.

COUNT – 1
BREACH OF CONTRACT

1. At all times relevant to this action Plaintiff Julius Wolford and Defendant FormTech were in a contractual relationship, to-wit, a Consulting Agreement ("Agreement") wherein Plaintiff was to accomplish certain duties and obligations.

2. Plaintiff breached that contract by, *inter alia*, incorrectly, improperly and negligently transitioning the Business, failing to work with FormTech to identify and secure new business opportunities, failing to track all new business opportunities in FormTech's customer relationship management system, failing to prepare and submit to FormTech's vice president information on a bi-weekly basis to develop and failing to maintain an accurate sales forecast and submitting new rental and sales documentation to FormTech.

3. As a result of Plaintiff's breach FormTech suffered damages.

COUNT – II
COMMON LAW FRAUD

1. At all times relevant to this action Plaintiff Julius Wolford and Defendant FormTech were in a contractual relationship, to wit, the aforesaid Agreement.

2. Section 1.3 of the Agreement that plaintiff was acting solely as an Independent Contractor of Defendant and, inter alia, that Plaintiff's relationship with the Defendant will "at all times be and remain as an independent contractor and not as an employee of" FormTech.

3. Defendant FormTech relied on Plaintiff's representation that plaintiff would be an independent contractor in executing the Contract.

4. Plaintiff Julius Wolford materially represented that he was to perform his obligations under the Agreement as an independent contractor.

5. Plaintiff Julius Wolford made other material representations that have been false, misleading and/or deceiving, upon which FormTech relied to its detriment.

6. Defendant FormTech relied on these material representations to its detriment.

7. As a result of its reliance on Plaintiff Julius Wolford material misrepresentations Defendant FormTech has suffered damages.

FORMTECH'S THIRD PARTY COMPLAINT
AGAINST CONSTRUCTION SOLUTIONS & LEASING, LLC

Now Comes Defendant and Third-Party Plaintiff FormTech pursuant to West Virginia Rule of Civil Procedure 14 and states the following for its Third-Party Complaint against Construction Solutions & Leasing, LLC.

1. FormTech incorporates the allegations of the Plaintiff's Complaint as if they were fully set forth herein.

2. FormTech incorporates its previous responses to the Plaintiff's Complaint as if they were fully set forth herein.

3. Construction Solutions & Leasing, LLC, is a Limited Liability Company that is chartered in West Virginia.

4. Upon information and belief Construction Solutions & Leasing, LLC, leases the property wherein the transactions that gave rise to the instant lawsuit occurred.

COUNT – 1
TORTIOUS INTERFERENCE
WITH A BUSINESS CONTRACT

1. At all times relevant to this action FormTech was legally on the property owned by Construction Solutions & Leasing, LLC, and supplying concrete form work and construction support to contractors.

2. At all times relevant to this action FormTech was on the property paying a monthly stipend in anticipation of signing a leasehold with third-party Defendant Construction Solutions & Leasing, LLC.

3. At all times relevant to this action FormTech and Plaintiff were acting in furtherance of their respective obligations under an Asset Purchase Agreement (APA) properly signed and executed by the parties, to-wit, the transfer of certain assets from Julius Wolford to FormTech so as to allow FormTech to operate as a concrete form work company.

4. The APA at section 1.1 "Assets to be Transferred" provide the following assets were to be transferred:

1.1 Assets to be Transferred. Simultaneously with the execution and delivery of this Agreement, the Purchaser shall purchase from the Seller, and the Seller shall sell, transfer, assign, convey and deliver to the Purchaser, free and clear of all security interests; mortgages, liens, pledges, encumbrances, security interests, claims, charges, defects in title or other similar restrictions (collectively,

"Leins"), all of the Seller's right, title and interest in and to the assets, rights and properties listed below (collectively, the "*Purchased Assets*"):

- (a) all equipment that is owned or leased by the Seller related to the operation of the Purchased Business, including the items listed on Schedule 1.1 (a), and all warranties of any kind covering all or any part of such items ("*Purchased Inventory*");
- (b) all customer lists and customer contact information related to the Purchased
- (c) all telephone numbers, email addresses, domain names and facsimile numbers associated with the operation of the Purchased Business;
- (d) all rights and incidents of interest of, and benefits accruing to, the Seller in and to (i) the contracts, agreements, commitments, instruments, guarantees, bids, purchase orders, proposals, licenses and other agreements specifically listed on Schedule 1.1(a) or identified by the Purchaser following the date hereof as being necessary for the operation of the Purchased Business, as currently conducted, and (ii) the open sales orders or other contracts for the sale of products or services of the Purchased Business with respect to which such products or services have not been delivered, whether or not set forth on Schedule 1.1(a) (collectively, the "*Purchased Contracts*"); and
- (e) the name "Wolford Concrete Forms & Scaffold Supply".

5. Upon information and belief, and unbeknownst to FormTech, third-party Defendant Construction Solutions & Leasing, LLC., had arranged and/or purchased and/or stored and/or allowed the previous tenant to store and/or purchased property 'as is' (acknowledging the existence of hazards on the property) without making provision for or protecting FormTech or the public generally from the multiple 55-gallon drums of hazardous waste and other hazardous refuse as defined by West Virginia law, which Construction Solutions & Leasing, LLC, left unattended, unremediated, uninsured, and otherwise maintained a hazard without taking any precautions.

6. Upon information and belief said multiple 55-gallon drums of hazardous waste were ultimately abandoned, leaking, by Julius Wolford, purchased by Construction Solutions & Leasing, LLC, as a feature of said real property purchased 'as is' in contravention of state law resulting in the release of harmful chemicals through an abandoned, crushed, unmitigated,

unremediated aqueduct into the waters of the state of West Virginia and necessitating a formal investigation by the West Virginia Department of Environmental Protection.

7. Upon information and belief Wolford's and Construction Solutions & Leasing, LLC's combined failure to remove the multiple 55-gallon drums of hazardous waste and other refuse resulted in the failure of the aforesaid Leasehold Agreement and further caused Defendant FormTech to pay for the remediation of Construction Solutions & Leasing, LLC's property.

8. Construction Solutions & Leasing, LLC, failed to insure for environmental risks the property it purchased 'as is,' failed to mandate that the prior owner (Wolford) place a bond or maintain insurance on the risks, allowed Wolford to continue to occupy the property without bond/insurance in place relative to the 'as is' acknowledged condition of the property, and failed to remediate its property itself in any way, operating an unsafe leasehold without taking a single precaution for renters, the public, the government, itself.

9. Third-Party Defendant Construction Solutions & Leasing, LLC, has a non-delegable duty to ensure that property under its control remains in compliance with state and federal laws.

10. The failure of third-party Defendant Construction Solutions & Leasing, LLC, to ensure that its property remained in compliance with state and federal law contributed, in part, to the failure of the Wolford and FormTech to complete their contractual obligations.

11. Construction Solutions & Leasing, LLC's knowing purchase of polluted or otherwise damaged property as an 'as is' purchase demonstrates knowledge or inquiry knowledge of known hazards that were allowed to continue without remediation, investigation, insurance to protect parties injured by Construction Solutions & Leasing, LLC's recalcitrance.

12. Construction Solutions & Leasing, LLC's failure to ensure its property remained in compliance with state and federal law has damaged defendant FormTech.

13. Wherefore, FormTech prays for damages in amount to be determined at trial.

A jury trial is demanded on all triable issues.

FORMTECH CONCRETE FORMS, INC.,
By counsel.



Roberta F. Green, Esquire (WVSB #6598)
Christopher D. Negley, Esquire (WVSB #6086)
SHUMAN MCCUSKEY SLICER PLLC
1411 Virginia Street, East, Suite 200
Post Office Box 3953
Charleston, WV 25301-3953
(304) 345-1400
(304) 343-1826 facsimile
rgreen@shumanlaw.com
cnegley@shumanlaw.com

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JULIUS WOLFORD,
Plaintiff,

v.

Civil Action No. 20-C-660
Hon. Jennifer Bailey, Judge

FORM TECH CONCRETE FORMS, INC.,
A Michigan corporation,

Defendant,

and

FORM TECH CONCRETE FORMS, INC.,
A Michigan corporation,

Third-Party Plaintiff,

v.

CONSTRUCTION SOLUTIONS & LEASING, LLC PROPERTIES,
A West Virginia General Partnership,

Third-Party Defendant.

CERTIFICATE OF SERVICE

The undersigned, counsel for Form Tech Concrete Forms, Inc., certifies that I served true and exact copy of the foregoing "*Civil Case Information Sheet*" and the "*Answer, Counterclaim and Third-Party Complaint of FormTech Concrete Forms, Inc.*" via hand-delivery in an envelope properly addressed as follows:

Christopher D. Pence
HARDY PENCE PLLC
10 Hale Street, 4th Floor
P.O. Box 2548
Charleston, WV 25329

Dated this 24th day of September 2020.



Roberta F. Green (WVSB #6598)
Christopher D. Negley (WVSB #6086)

S U M M O N S

JULIUS WOLFORD,

Plaintiff,

v.

Civil Action No. 20-C-660

Hon. Jennifer Bailey, Judge

FORM TECH CONCRETE FORMS, INC.,

A Michigan corporation,

Defendant,

and

FORM TECH CONCRETE FORMS, INC.,

A Michigan corporation,

Third-Party Plaintiff,

v.

CONSTRUCTION SOLUTIONS & LEASING, LLC PROPERTIES,

A West Virginia General Partnership,

Third-Party Defendant.

TO THE ABOVE-NAMED THIRD-PARTY DEFENDANT:

Construction Solutions & Leasing, LLC

c/o Michael L. Neville

3544 Teays Valley Road

Hurricane, WV 25526

IN THE NAME OF THE STATE OF WEST VIRGINIA, you are hereby summoned and required to serve upon Christopher D. Pence, Plaintiff's attorney, whose address is, respectively, HARDY PENCE PLLC, P. O. Box 2548, Charleston, WV 25329 and Roberta F. Green and Christopher D. Negley, Defendant's attorneys, whose address is SHUMAN MCCUSKEY SLICER PLLC, P. O. Box 3953, Charleston, West Virginia 25339, an answer,

including any related counterclaim you may have, to the Third-Party Complaint filed against you in the above-styled civil action, a true copy of which is herewith delivered to you.

You are required to serve your answer to the Third-Party Complaint within thirty (30) days after acceptance of service of this summons, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Third-Party Complaint and you will be thereafter barred from asserting in another action any claim you have which must be asserted by counterclaim in the above-styled action.

A copy of the Plaintiff's Complaint is also herewith delivered. You may, but are not required to, respond to it.

Date: _____

Clerk of Court

PROOF OF SERVICE		
SERVED	DATE	PLACE
SERVED ON (PRINT NAME)		MANNER OF SERVICE
SERVED BY (PRINT NAME)		TITLE
DECLARATION OF SERVER		

I declare under penalty of perjury under the laws of the State of West Virginia that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

DATE : September 23, 2020
CHE # : 66591
AMOUNT : \$215.00
ACCOUNT : 1
PAID TO : Clerk, Kanawha County
A/P Payment on Account

Inv#	Amt	Inv#	Amt
Filing Fee	215.00		

SHUMAN, MC CUSKEY & SLICER
P.O. BOX 3953
CHARLESTON, WV 25339



66591

66591

*** Two Hundred Fifteen *****

00/100

DATE

AMOUNT

Sep 23, 2020

\$215.00

PAY
TO THE
ORDER
OF

Clerk, Kanawha County
Circuit Court
P.O. Drawer 2351
Charleston, WV 25328

AUTHORIZED SIGNATURE

Security features. Details on back.

⑈066591⑈ ⑆052202225⑆ 100⑈66256⑈



Construction Solutions & Leasing

PURCHASE AGREEMENT

1. DATE: Date of this agreement: February 8, 2017
2. SELLER'S NAME: J. C Welford
3. PURCHASER'S NAME: Construction Solutions and Leasing, LLC
4. DESCRIPTION: The subject property is in, Fairmont, WV, Marion County, is more particularly described as:

*Tax Map 03-17
Part of Parcel 16
2.52 AC*

5. PRICE: Purchaser will pay Seller for said property the sum of:

Two hundred and fifty-five thousand dollars, of which sum

\$500.00 is in hand paid, receipt of which is hereby

acknowledged, and the balance to be paid as follows:

AT CLOSING WITHIN IN 45 - 60 DAYS

6. CLOSING: This sale shall be completed and all necessary papers executed and delivered within 60 days at 12:00 o'clock.
7. POSSESSION: Possession of said property shall be given be given to Purchaser
AT CLOSING
8. EXPIRATION: This offer expires N/A, at o'clock

9. FURTHER AGREEMENTS AND/OR EXCLUSIONS: (If no further agreements or Exclusions, say "NONE: PROPERTY AS IS

WITNESS the following signatures and seals of Purchasers, Seller, and Broker on the day, month and year above noted and those parties acknowledge that they have read this entire two page agreement, which consists of the preprinted agreement with all blanks complied and any addendums attached.

BY: 

Print Name: Robert T Marks

BY: 

Print Name: J. C. WOLFORD

BY: _____

Print Name: _____

BY: _____

Print Name: _____



**Construction
Solutions
& Leasing**

**PO.BOX 1046
HURRICANE, WV 25526**

LEASE AGREEMENT

THIS LEASE AGREEMENT is made and entered into as of by and between -
Construction Solutions and Form Tech, Inc, in consideration of the mutual covenants set forth
herein, Landlord and Tenant agree as follows:

1. **Premises.** (a) Landlord hereby leases Form Tech Inc., hereby leases from
Construction Solutions & Leasing, LLC, for the rental and on the terms and conditions set forth
in this Lease, approximately _____ square feet of rentable area known

2023 Pleasant Valley Road
Fairmont, WV 26554

2. **Term.** Subject to and upon the conditions set forth in this Lease, the term of this
Lease shall commence and shall continue for a 06/01/2019 to 11/30/2019

3. **Rental.** Payment of Monthly Base Rent shall commence upon the Rent
Commencement Date, and shall continue until Termination Date, unless Lease is sooner
terminated in accordance with the terms of this Lease. Tenant shall pay to Landlord as Monthly
Base Rent (herein called "Base Rent"), as follows:

<u>Date</u>	<u>Monthly Base Rent</u>
06/01/2019 - 11/30/2019	\$ 2,500.00

If the Rent Commencement Date is not on the first day of a calendar month, the Base Rent
for any partial month shall be prorated on a per diem basis. The Base Rent is due and payable on
the first (1st) day of each month during the term of this Lease. Any payment required to be made
by Tenant under this Lease, including Base Rent, which remains unpaid for five (5) days after
Landlord's written notice of such past due amount, shall bear interest from the due date at the
rate of five percent (5%) per annum. Base Rent and all other payments to Landlord shall be made
payable to Landlord and forwarded by Tenant direct to Landlord at the address set forth below
Landlord's signature.



**Construction
Solutions
& Leasing**

**PO.BOX 1046
HURRICANE, WV 25526**

4. **Possession.** If the Premises are not ready for total occupancy by Tenant by the Commencement Date specified in Paragraph 2, rent shall abate and the Commencement Date shall not occur until the Premises are ready for total occupancy. Total occupancy shall occur upon completion by Landlord of the improvements to the premises outlined in Exhibit ____.
5. **Tenant's Early Entry.** Tenant may, prior to the Commencement Date, without incurring any liability for payment of rent or other charges, measure the Premises, design and layout the Tenant improvements and install its personal property, equipment and trade fixtures in the Premises at Tenant's risk and expense, provided it causes no material interference with Landlord.
6. **Tenant's Renewal Option.** Tenant has option to renew for _____ year terms. (Rates to be negotiated at time of renewal and agreed upon by both parties)
7. **Condition of Premises and Building Systems.** Landlord warrants that as of the Commencement Date, the building systems servicing the premises shall be in good working order and condition (including without limitation electrical, HVAC, plumbing).
8. **Services and Maintenance.**
 - (a) Landlord shall provide all reasonably necessary maintenance to the structure of the Building (but not to fixtures installed for or used in connection with Tenant's operations) and the Land on which the Building is located ("Land"), including landscaping, to the extent necessary to maintain all of the same in good repair and in a good state of appearance.
 - (b) Tenant shall provide all utilities to Leased Premises at its sole cost.
9. **Common Areas and Parking.** During the term of this Lease, Landlord hereby grants to Tenant a non-exclusive license to use the public corridors, elevators, stairways, and similar common areas comprising the Land and the Building, subject to the rules and regulations for the use thereof as prescribed from time to time by Landlord.
10. **Tenant Improvements and Alterations.** Landlord shall deliver the Premises in "as is" condition. Except for minor non-structural alterations, Tenant shall make no alterations, installations, additions or improvements in or to the Premises without Landlord's prior written consent to such work. Landlord agrees that its consent will not be unreasonably withheld or delayed. Upon Landlord's request, provided at the time of Landlord's written consent to any



PO.BOX 1046
HURRICANE, WV 25526

such alteration, installation, addition or improvement. Tenant will, prior to or immediately after the surrender of the Premises, remove any and all such items.

11. **Quiet Enjoyment.** Tenant, on performing the covenants to be performed by it under this Lease, shall peaceably and quietly hold and enjoy the Premises for the Term of this Lease.

12. **Assignment and Subletting.** *Tenant shall not assign this Lease or sublease the Premises or any part thereof or grant any concession or license within the Premises without the prior written consent of Landlord, which consent shall not be unreasonably withheld or denied.*

13. **Taxes.** Tenant shall pay all ad valorem taxes or assessments levied on or applicable to all equipment, fixtures, furniture, and other property placed by Tenant in the Premises, and all license and other fees or charges imposed on the business conducted by Tenant on the Premises. Landlord shall pay all other ad valorem taxes or assessments levied on or applicable to the Land and the Building.

14. **Casualty and Insurance.** Tenant, at its sole cost and expense, shall at all times during the term of this Lease maintain policies of insurance providing comprehensive general public liability insurance with limits of not less than one million dollars (\$1,000,000) per occurrence and one million dollars (\$1,000,000) in the annual aggregate, and Landlord, at its sole cost and expense, shall at all times during the term of this Lease maintain policies of insurance providing comprehensive general public liability insurance with limits of not less than one million dollars (\$1,000,000) per occurrence and one million dollars (\$1,000,000) in the annual aggregate and the replacement value of the Building. Upon written request, Tenant and Landlord shall provide each other with certificates of insurance verifying such coverage prior to the Commencement Date and as otherwise requested.

The parties release each other and their respective authorized representatives from any claims or injury to any person or damage to the property that are caused by or result from risks insured against under any all risk or fire insurance policies carried by either of the parties. Each party to the extent possible shall obtain for each policy of insurance, provisions permitting waiver of any claim against the other party of loss or damage within the scope of the insurance and each party to the extent permitted, for itself and its insurer, waives all such insured claims against the other party. If such waiver or agreement shall not be, or shall cease to be obtainable without additional charge or at all, the insured party shall so notify the other party promptly after notice



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**PO.BOX 1046
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thereof. If the other party shall agree in writing to the insurer's additional charge therefore, such waiver or agreement shall (if obtainable) be included in the policy.

15. Indemnity.

(a) Tenant shall defend, indemnify and save harmless the Landlord, its affiliates and their officers, directors, shareholders and partners against all claims, liabilities, losses, fines, penalties, damages costs and expenses (including reasonable attorney's fees and other costs of litigation) because of injury, including death, to any person or damage or loss of any kind to any property caused by any action or omission of Tenant, or any failure on the part of Tenant to perform its obligations under this Lease, except to the extent caused by the negligence or willful misconduct of Landlord or its employees, contractors, agents or representatives.

16. Subordination and Non-Disturbance. Landlord may subordinate Tenant's interest in this Lease to any mortgage now or hereafter placed on the Property, provided Landlord delivers to Tenant from any present or future mortgagee, trustee, fee owner, prime lessor or any person having an interest in the Premises superior to this Lease a written and reasonably acceptable subordination and non-disturbance agreement in recordable form providing that so long as Tenant performs all of the terms of this Lease, Tenant's rights under this Lease shall not be disturbed and shall remain in full force and effect for the term, and Tenant shall not be joined by the holder of any mortgage or deed of trust in any action or proceeding to foreclosure thereunder. In the event an acceptable non-disturbance agreement is not delivered to Tenant pursuant to the terms hereof, this Lease shall not be subordinate to any mortgage now or hereafter placed on the property.

18. Landlord's Right of Entry. Landlord has the right to enter the Premises at any reasonable time upon three (3) days prior written notice to Tenant, or without notice in case of emergency, for the purpose of performing maintenance, repairs, and replacements to the Premises as are permitted under this Lease. During business hours and upon reasonable notice to Tenant, Landlord may during the Term, show the Premises to prospective purchasers and mortgages, and during the six (6) months prior to expiration of this Lease, to prospective Tenants. Landlord shall not interfere with or disrupt the normal operation of Tenant's business. Landlord and any third parties entering the Premises at Landlord's invitation or request shall at all times strictly observe Tenant's rules relating to security on the Premises. Tenant shall have the right to designate a representative to accompany Landlord or any third parties while they are on the Premises.



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**PO.BOX 1046
HURRICANE, WV 25526**

19. Tenant Defaults and Landlord Duty to Mitigate:

(a) For monetary default, Tenant shall have ten (10) Business Days to cure after written notice from Landlord.

(b) For non-monetary defaults, Tenant shall have at thirty (30) days to cure after written notice from Landlord, however, if a cure cannot be effected in such 30-day period, Tenant shall not be held in default if Tenant is diligently pursuing a cure to completion.

(c) **No Consequential Damages and Mitigation:** Anything in this Lease to the contrary notwithstanding, Landlord shall not be entitled to receive from Tenant any consequential, special or punitive costs or damages incurred by Landlord. In addition, following Tenant's default hereunder, Landlord shall mitigate its damages, including using commercially reasonable efforts to relet the Premises.

20. **Landlord Default:** Landlord shall be in default of this Lease if it fails to perform any term or provision under this Lease required to be performed by Landlord, and such failure shall have continued for a period of thirty (30) days after written notice thereof by Tenant; provided, if the nature of Landlord's default is such that more than thirty (30) days are reasonably required in order to cure, Landlord shall not be in default if Landlord commences to cure such failure within such thirty (30) day period, and thereafter diligently pursues the cure of such failure to completion. If Landlord shall fail to cure within the times permitted for cure herein, Landlord shall be subject to all remedies as may be available to Tenant at law or in equity (subject to the other provisions of this Lease), including, without limitation, the right of Tenant to terminate this Lease without Tenant waiving its right to damages for Landlord's default. Without limiting the generality of the foregoing, Landlord acknowledges that Tenant shall have the right, but not the obligation, to cure any such default by Landlord, in which event Landlord shall reimburse Tenant for the reasonable costs and expenses incurred by Tenant in performing such cure.

23. **Entire Agreement.** This instrument and any attached addenda or exhibits signed by the parties constitute the entire agreement between Landlord and Tenant. No prior written or prior or contemporaneous oral promises or representations shall be binding. This Lease shall not be amended, changed or extended except by written instrument signed by both parties. Section captions are for Landlord and Tenant's convenience only, and neither limits nor amplifies the provisions of this instrument.



**Construction
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**PO.BOX 1046
HURRICANE, WV 25526**

24. **Notices.** Notices or demands required or permitted to be given or served by either party to this Lease to or on the other shall be in writing and delivered personally or forwarded by Certified or Registered Mail, Return Receipt Requested, postage prepaid, addressed to the addresses indicated on the signature page. Either party may change its address for notice by giving the other party ten (10) days notice of such change in the manner set forth in this Section.

25. **Successors and Assigns.** The provisions of this Lease shall be binding upon and inure to the benefit of the successors and assigns of the parties.

26. **Signage.** Tenant is responsible for purchasing and installing their own sign(s). Tenant, at Tenant's sole cost, may also apply vinyl window lettering and/or install sign by suite entry door, if they desire.

Michael L. Neville

Robert T. Meeks

(Tenant)

(Tenant)

19631.001

CUSTOMER'S WORK ORDER

To: Miller Environmental Incorporated
105 Lawrence Street
Morgantown, West Virginia 26508

Please furnish the required work and materials, using such available personnel, equipment and materials as in your judgement are necessary, to correct the existing pollution or hazard of pollution located and described as follows:

2019 PLEASANT VALLEY RD. FAIRMONT, WV

PLEASE, provide Insurance Carrier _____ and Claim #: _____
and Adjustor _____

for all of which the undersigned CUSTOMER agrees to pay Miller Environmental Inc. at the current standard rates on the published rate schedule, a copy of which is attached. This work order also authorizes Miller Environmental to profile and dispose of wastes generated on this project, on behalf of CUSTOMER.

Payment will be due upon presentation of invoices and CUSTOMER agrees to make payment of such invoices in full when due, whether or not CUSTOMER has been paid by any insurance carrier or other party with whom it may have a claim. Interest will accrue on all amounts unpaid after the expiration of 30 days from the due date at the rate of 1 ½% per month until paid and CUSTOMER agrees to pay interest and all expenses of collection, including attorney's fees.

At all times before or during the performance of the herein described services, Miller Environmental, Inc. retains the right, following written notice provided to CUSTOMER at least 10 business days in advance, to terminate this Work Order and cease any further services. Upon such event, CUSTOMER is obligated only for services, or portions thereof, actually provided.

Miller Environmental, Inc. being unwilling, but for this agreement, to accept any exposure to possible claims or suits by persons who actually or allegedly suffer damage or injury as a result of said existing or threatened pollution, and CUSTOMER desiring the services of Miller Environmental, Inc. and/or the use of its equipment, CUSTOMER does hereby agree that it will indemnify Miller Environmental Inc. against and hold it harmless from any person, firm or corporation, including any public agency and including CUSTOMER, its agents, servants, and employees, arising out of any actual or alleged failure to prevent or to limit, contain, correct or remedy the effects of such pollution, whether or not such claim, demand, suit, prosecution or other proceeding be based upon actual or alleged negligence of Miller Environmental Inc.

Dated: 6-26-19

Phone Number (304) 542-6567

J. C. WOLFORD
CUSTOMER
By: [Signature]
Signature
J. C. WOLFORD
Printed Name

Address PO BOX 690

Address SCOTT DEPOT, WV 25560



west virginia department of environmental protection

Environmental Enforcement
Hazardous Waste
2031 Pleasant Valley Road, Suite #1
Fairmont, WV 26554-9295
(304) 238-1220, Extension 3514

Austin Caperton, Cabinet Secretary
dep.wv.gov

July 22, 2019

Jason Wolford
Owner
Wolford Contractors Supply
3612 Brookshire Drive
Hurricane, WV 25526

CERTIFIED RETURN RECEIPT REQUIRED

Dear Mr. Wolford:

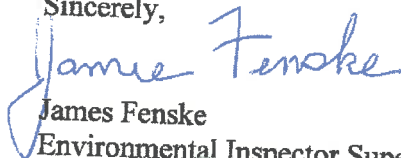
Enclosed is a copy of the Focused Compliance Inspection conducted by a representative from the Director of the Division of Water and Waste Management. This report is based on the inspection conducted on June 25, 2019.

Your immediate attention should be given to the violation listed in the report and the attached **Notice of Violation (NOV)**. The observation and documentation of this violation may result in enforcement action as outlined in Chapter 22, Article 18 of the West Virginia Code.

Be guided by the attached **Notice of Violation** as how to advise the West Virginia Department of Environmental Protection (WVDEP) as to your plan to bring your facility back into compliance. A written submittal is required from you.

If you have any questions, please contact Environmental Inspector Tim Keller at (304) 368-3960.

Sincerely,

A handwritten signature in blue ink that reads "James Fenske". The signature is written in a cursive, flowing style.

James Fenske
Environmental Inspector Supervisor
Environmental Enforcement – Hazardous Waste

Enclosure

c: Joseph M. Sizemore, Assistant Chief Inspector, EE – HW/UST/AST
Tim Keller, Environmental Inspector, EE - HW

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INSPECTION FACT SHEET

COMPANY NAME: Wolford Contractors Supply

EPA ID#: WVR000012732

MAILING ADDRESS: 3612 Brookshire Drive
Hurricane, WV 25526

COUNTY: Marion

LOCATION: 2019 Pleasant Valley Road
Fairmont, WV 26554

FACILITY TYPE: Undetermined

FACILITY CONTACT: Mr. Jason Wolford, Owner

PERMITTED FACILITY: No

EMAIL: jcw@wolfordsupply.com

HANDLING CODES: S01

PURPOSE: Focused Compliance Inspection (FCI)

GPS COORDINATES: 39.444292°
-80.153514°

APPLICABLE REGULATIONS: Title 40 Code of Federal Regulation (CFR) Parts 260-279
as adopted and incorporated by reference in
WV Hazardous Waste Management Act (Chapter 22-18), and the
WV Hazardous Waste Management Rule (33CSR20).

LIST OF WASTE TYPES: Undetermined

ENFORCEMENT:

☐

NOT APPLICABLE

☐

DETERMINATION PENDING

☐

NO VIOLATIONS

☒

VIOLATION

☐

AREA OF CONCERN

☐

REFERRED FOR ENFORCEMENT



west virginia department of environmental protection

DWWM-EE/Hazardous Waste
2031 Pleasant Valley Road
Fairmont, WV 26554
Phone: 304-368-3960

Austin Caperton, Cabinet Secretary
dep.wv.gov

FOCUSED COMPLIANCE INSPECTION

RE: Wolford Contractors Supply

EPA ID: WVR000012732

Date/Time Inspected:

June 25, 2019 at 12:00 pm

Facility Representative(s):

Mr. Jason Wolford

Inspected By:

Tim Keller, WVDEP-EE/HW
Courtne May, WVDEP-EE/WW
Cody Howdyshell, WVDEP-EE/WW
Tonya Mather, WVDEP-EE/WW
Travis Lawson, WVDEP-EE/HW

Prepared By:

Tim Keller, Environmental Inspector

On June 25, 2019 West Virginia Department of Environmental Protection (WVDEP) personnel received a complaint regarding a strong chemical odor in the Pleasant Valley Road area near Fairmont, West Virginia. WVDEP Inspectors were able to identify the source of the odor which was coming from Wolford Contractors Supply located at 2019 Pleasant Valley Road, Fairmont, WV 26554. Employees of the facility stated that they were told to dispose of multiple 55-gallon drums of various materials by spreading the material onto the ground.

At approximately 12:00pm, WVDEP hazardous waste personnel arrived to assist with the site assessment. Multiple puddles of black, brown, and white material were observed across a vacant lot at the rear of the Wolford Contractors Supply building. Shortly after arriving, workers began to move empty drums away from the dump area which can be seen in Photo 1. This made it difficult to know what material was dumped in which location. Photos 2 through 6 show puddles of material which were deliberately dumped on site for disposal. Upon further investigation, buckets of adhesive and other materials were observed scattered across the facility with many being buried in piles of debris. Examples of this can be seen in Photos 7 and 8. Many drums, which appeared to be freshly emptied, were also scattered across the site with an example shown in Photo 9.

An unnamed tributary to the Tygart Valley River flows underneath of the dump area through a culvert. This tributary daylights behind the WVDEP office located at 2031 Pleasant Valley Road, Fairmont, WV. A petroleum sheen and strong odor were encountered at this location. Absorbent pads and a boom were placed here as a precautionary measure. The pads began soaking up a black colored liquid with a strong solvent-based odor which can be seen in Photo 10.

At approximately 12:30pm, WVDDEP Inspector Cody Howdyshell informed the owner of the facility, Mr. Jason Wolford, of the severity of the situation. Mr. Wolford stated that he was on his way to the facility from the Charleston, WV area and would be there within a few hours. He also arranged for a cleanup company, Miller Environmental, to perform a site assessment and begin cleanup operations.

Mr. Wolford arrived around 3:00pm. At this time Safety Data Sheets (SDSs) and an inventory of chemicals was requested. No SDS were available, but Mr. Wolford stated that the majority of the material was a concrete coating and that it would eventually harden. He was informed that this was an unacceptable method of disposal and that he would be responsible for cleanup and proper disposal. Shortly after Mr. Wolford's arrival, Miller Environmental arrived. At this time an interceptor trench was excavated to prevent the further migration of the dumped materials. **This can be seen in Photos 11 and 12.** One roll-off box was filled, but Miller Environmental would not continue work until the next day when a contract was signed.

On June 26, 2019 Miller Environmental removed several more roll-off containers of contaminated soil. At this time, it is unknown the extent of the contamination both vertical and horizontal. Sampling will be needed to ensure that all contaminants are adequately removed and to prevent further migration off-site and to waters of the State. Several SDSs were eventually provided to WVDEP personnel. These SDSs show that some of the materials stored on site are considered hazardous materials and hazardous waste.

The facility has generated, accumulated and disposed of hazardous waste. It has been determined that the facility has engaged in a hazardous waste activity without notifying the Secretary of the Department of Environmental Protection. **This is a violation of 33CSR§20.4.1** which states that *"Any person who engages in a hazardous waste activity in the State of West Virginia shall notify the Secretary of these activities when that activity begins, unless those activities are exempted from the requirements of this rule"*. It has also been determined that the facility has disposed of hazardous waste in an unapproved manner and without a permit. **This is a violation of Chapter 22, Article 18, Section 8(a) of the WV Code** which states that *"No person may own, construct, modify, operate or close any facility or site for the treatment, storage, or disposal of hazardous waste...without first obtaining a permit from the director for such facility, site, or activity and all other permits as required by law."*

At approximately 6:00pm, the inspection concluded. I discussed my findings and concerns with Mr. Wolford, thanked him for his time and departed the facility.



west virginia department of environmental protection

DWWM-EE-Hazardous Waste
2031 Pleasant Valley Road
Fairmont, WV 26554
Phone: 304-368-3960

Austin Caperton, Cabinet Secretary
dep.wv.gov

NOTICE OF VIOLATION

DATE INSPECTED: June 25, 2019
ISSUED TO: Wolford Contractors Supply
US EPA ID NUMBER: WVR000012732
FACILITY MAILING ADDRESS: 3612 Brookshire Drive, Hurricane, WV 25526
FACILITY REPRESENTATIVE: Mr. Jason Wolford, Owner

TIME INSPECTED: 12:00 pm
NOV#: 1906-840

On the above-specified date, an authorized agent of the Director of the Division of Water and Waste Management conducted an inspection of the facility described above in accordance with West Virginia Code §22. During that inspection, the following violations were noted:

1. A. (Regulation) 33CSR§20.4.1
B. (Facts) The facility engaged in hazardous waste activities by generating, accumulating, and disposing of hazardous waste without notifying the Secretary of the Department of Environmental Protection.
2. A. (Regulation) Chapter 22, Article 18, Section 8(a) of the WV Code
B. (Facts) The facility has disposed of hazardous waste on site without a permit.

In order to correct the violations cited above, the following measures are necessary:

- 1) The facility must notify the Secretary that it has engaged in hazardous waste activities
- 2) The facility must dispose of hazardous wastes in a proper manner and provide receipts for such activities.

The issuance of this Notice may result in further enforcement action(s) in accordance with West Virginia Code §22. Within **15 calendar days** of receipt of this Notice, submit your written response to the address listed above. Please contact the Environmental Inspector listed below if you have any questions regarding this Notice.

ISSUED BY: Tim Keller, Environmental Inspector

DATE ISSUED: July 16, 2019

SIGNATURE:





Google Earth

2019 Pleasant Valley Rd

Wolterd Contractors Supply

300 ft



PHOTO LOG

Company Name: Wolford Contractors Supply

Location: 2019 Pleasant Valley Road, Fairmont, WV 26554

Photo #	File Name	Date	Time	Photographer	Description of Photo
1	IMG 1043	6/25/19	12:19pm	Tim Keller	Worker moving drums
2	IMG 1046	6/25/19	12:32pm	Tim Keller	Unknown material on the ground
3	IMG 1048	6/25/19	12:32pm	Tim Keller	Unknown material on the ground
4	IMG 1049	6/25/19	12:32pm	Tim Keller	Unknown material on the ground
5	IMG 1060	6/25/19	12:33pm	Tim Keller	Unknown material on the ground
6	IMG 1061	6/25/19	12:33pm	Tim Keller	Unknown material on the ground
7	IMG 1062	6/25/19	1:07pm	Tim Keller	Adhesive discarded at the rear of the facility
8	IMG 1063	6/25/19	1:09pm	Tim Keller	Buckets of unknown material buried in debris
9	IMG 1052	6/25/19	12:32pm	Tim Keller	Empty drums
10	IMG 1065	6/25/19	2:22pm	Tim Keller	Absorbent pads and boom
11	IMG 1068	6/25/19	3:48pm	Tim Keller	Cleanup crew on site
12	IMG 1070	6/25/19	4:01pm	Tim Keller	Interceptor trench

Photographer signature



Photo 1 – Worker moving drums



Photo 2 – Unknown material on the ground



Photo 3 – Unknown material on the ground



Photo 4 – Unknown material on the ground



Photo 5 – Unknown material on the ground



Photo 6 – Unknown material on the ground



Photo 7 – Adhesive discarded at the rear of the facility



Photo 8 – Buckets of unknown material buried in debris



Photo 9 - Empty drums



Photo 10 – Absorbent pads and boom



Photo 11 – Cleanup crew on site



Photo 12 – Interceptor trench



west virginia department of environmental protection

Division of Water and Waste Management
601 57th Street SE
Charleston, WV 25304
Phone: (304) 926-0470
Fax: (304) 926-0452

Austin Caperton, Cabinet Secretary
dep.wv.gov

**CONSENT ORDER
ISSUED UNDER THE
WATER POLLUTION CONTROL,
HAZARDOUS WASTE MANAGEMENT, SOLID WASTE MANAGEMENT, AND
GROUNDWATER PROTECTION ACTS
WEST VIRGINIA CODE, CHAPTER 22, ARTICLES 11, 12, 15, AND 18**

TO: Form Tech Concrete Forms, Inc.
Attn: Gary Jividen, Regional Manager
161 Industrial Road
St. Albans, WV 25177

DATE: July 10, 2020

ORDER NO.: MM-20-26

INTRODUCTION

This Consent Order is issued by the Director of the Division of Water and Waste Management (hereinafter "Director"), under the authority of West Virginia Code 22-11-1 et seq.; 22-12-1 et seq.; 22-15-1 et seq.; and 22-18-1 et seq. to Form Tech Concrete Forms, Inc. (hereinafter "Form Tech Concrete Forms").

FINDINGS OF FACT

In support of this Order, the Director hereby finds the following:

1. Form Tech Concrete Forms conducted activity at a facility located in Fairmont, Marion County, West Virginia and was assigned EPA ID Number WVR000012732.
2. In March 2019, Form Tech Concrete Forms purchased certain assets from Wolford Concrete Forms and Scaffold Supply, LLC, and Julius Wolford was hired as an independent contractor for Form Tech Concrete Forms.
3. On June 25, 2019, West Virginia Department of Environmental Protection (WVDEP) personnel conducted an investigation at the facility. The investigation was in response to WVDEP personnel being made aware of deliberate dumping of industrial chemicals onto the ground. During the investigation, there was a strong odor at the facility, and puddles

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of various unknown substances were observed near several empty 55-gallon drums. Persons who were determined to be temporary employees of the facility stated that they were directed to dump the material, thought to be a concrete sealant, onto the ground for disposal. Violations of the following sections of WV State Code and WV Legislative Rules were observed and documented:

- a. 33CSR1 Section 7.1.a.-An open dump was created by discarding the contents of drums on the ground. In addition, various other solid waste was observed throughout the site.
- b. 47CSR58 Section 7.1-A chemical mixture was deliberately allowed to flow onto or under the land surface in such a manner that could impact groundwater quality. Specifically, several drums had been opened, and an unknown chemical mixture had been dumped onto the ground.
- c. 47CSR2 Sections 3.2.a and c-Conditions not allowable were created in waters of the State. Specifically, a chemical mixture disposed of on-site infiltrated soils and migrated into an unnamed tributary of the Tygart River. Oily slicks were distinctly visible in the tributary, as well as a strong solvent-like odor.
- d. 47CSR11 Section 2.2.a.-Immediate notification to the Emergency Number was not given after becoming aware of a discharge of pollutants into waters of the State. The release was not reported until June 28, 2019, more than seventy-two (72) hours after becoming aware of the release.
- e. 47CSR58 Section 4.7.4.-Drums on the site were bulging, deteriorated, damaged, and knocked over. Best management practices were not initiated to ensure spills and leaks were contained.
- f. 47CSR58 Section 4.11.-There was no Groundwater Protection Plan.
- g. 22-18-8(a)-A hazardous waste treatment, storage, or disposal facility was being operated without obtaining the required permit. From a review of Safety Data Sheets (SDSs), WVDEP personnel determined that the following hazardous wastes were being treated, stored, and/or disposed of at the facility: Carlisle CCW-704, Euclid Chemical Co Euco Diamond Hard, and Euclid Company Rez Seal.
- h. 33CSR20 Section 4.1-Hazardous waste was being generated, was accumulating, and was being disposed without properly notifying WVDEP.

As a result of the aforementioned violations, Notice of Violation (NOV) Nos. 119-24-CJM-001 and 084-172 were issued to Form Tech Concrete Forms.

4. On October 31, 2019, Order No. MM-20-09 was issued to Form Tech Concrete Forms. The Order was issued in response to the aforementioned violations, and it required Form Tech Concrete Forms to submit an approvable Plan of Corrective Action (POCA), outlining action items and completion dates for how and when Form Tech Concrete Forms would achieve compliance with all pertinent laws and rules. Specifically, the POCA was required to include, but not be limited to, horizontal and vertical delineations of the aforementioned contamination at the facility and detailed provisions for properly remediating all identified areas of contamination.
5. On December 4, 2019, Form Tech Concrete Forms filed a Notice of Appeal of Order No. MM-20-09 to the West Virginia Environmental Quality Board.

6. On February 11, 2020, WVDEP personnel performed a chemical inventory of all remaining items located outside of the aforementioned facility's main building.
7. On February 18, 2020, 50 gallons of D001 hazardous waste and 775 gallons of non-regulated waste from inside the facility was removed by a contractor for Form Tech Concrete Forms.
8. On March 17, 2020, WVDEP approved Form Tech Concrete Forms' POCA that was submitted to fulfill the requirement of Order No. MM-20-09. The approved POCA included Form Tech Concrete Forms' December 9, 2019 submittal and subsequent amendments, dated January 15, 2020 and March 16, 2020.
9. On March 25, 2020, a contractor for Form Tech Concrete Forms sampled soils from roll-off boxes which contained soils excavated during the initial response. Liquids from drums across the site were consolidated and staged at the front of the facility for disposal.
10. On June 18, 2020, WVDEP terminated Order No. MM-20-09 after determining during a follow-up inspection conducted on June 11, 2020 that Form Tech Concrete Forms had achieved compliance with the terms and conditions of the Order and had properly remediated the site.
11. On July 1, 2020, WVDEP personnel met by telephone with representatives of Form Tech Concrete Forms to discuss the terms and conditions of this Order. Form Tech Concrete Forms provided documentation to WVDEP to dispute the aforementioned violations, including disputing ownership of the chemical compounds, but it worked with WVDEP to resolve the issues at the facility. Form Tech represented that remedial activities at the site were conducted in an effort to be a good corporate citizen and good steward of the environment. Form Tech Concrete Forms further attested that it never had an ownership interest in the subject property or chemicals, and that it has no continuing leasehold or option for leasehold or other relationship with the subject property.

ORDER FOR COMPLIANCE

Now, therefore, in accordance with West Virginia State Code 22-11-1 et seq.; 22-12-1 et seq.; 22-15-1 et seq.; and 22-18-1 et seq., it is hereby agreed between the parties, and ORDERED by the Director:

1. Form Tech Concrete Forms shall immediately take all measures to initiate compliance with all pertinent laws and rules.
2. Because of Form Tech Concrete Forms' West Virginia Code and Legislative Rule violations, Form Tech Concrete Forms shall be assessed a civil administrative penalty of twenty-seven thousand three hundred forty dollars (\$27,340) to be paid to the West Virginia Department of Environmental Protection within thirty (30) days of the effective date of this Order, as follows:

Twenty-two thousand thirty dollars (\$22,030) shall be deposited into the Hazardous Waste Management Fund.

Five thousand three hundred ten dollars (\$5,310) shall be deposited into the Water Quality Management Fund.

Payments made pursuant to this paragraph are not tax-deductible for purposes of State or federal law. **Payment shall include a reference to the Order No. and shall be mailed to:**


**Chief Inspector
Environmental Enforcement - Mail Code #031328
WV-DEP
601 57th Street SE
Charleston, WV 25304**

OTHER PROVISIONS

1. Form Tech Concrete Forms hereby waives its right to appeal this Order under the provisions of West Virginia State Code 22-11-21; 22-12-11; 22-15-16; and 22-18-20. Under this Order, Form Tech Concrete Forms agrees to take all actions required by the terms and conditions of this Order and consents to and will not contest the Director's jurisdiction regarding this Order. However, Form Tech Concrete Forms does not admit to any factual and legal determinations made by the Director and reserves all rights and defenses available regarding liability or responsibility in any proceedings regarding Form Tech Concrete Forms other than proceedings, administrative or civil, to enforce this Order.
2. The Director reserves the right to take further action if compliance with the terms and conditions of this Order does not adequately address the violations noted herein and reserves all rights and defenses which he may have pursuant to any legal authority, as well as the right to raise, as a basis for supporting such legal authority or defenses, facts other than those contained in the Findings of Fact.
3. If any event occurs which causes delay in the achievement of the requirements of this Order, Form Tech Concrete Forms shall have the burden of proving that the delay was caused by circumstances beyond its reasonable control which could not have been overcome by due diligence (i.e., force majeure). Force majeure shall not include delays caused or contributed to by the lack of sufficient funding. Within three (3) working days after Form Tech Concrete Forms becomes aware of such a delay, notification shall be provided to the Director/Chief Inspector and Form Tech Concrete Forms shall, within ten (10) working days of initial notification, submit a detailed written explanation of the anticipated length and cause of the delay, the measures taken and/or to be taken to prevent or minimize the delay, and a timetable by which Form Tech Concrete Forms intends to implement these measures. If the Director agrees that the delay has been or will be caused by circumstances beyond the reasonable control of Form Tech Concrete Forms (i.e., force majeure), the time for performance hereunder shall be extended for a

period of time equal to the delay resulting from such circumstances. A force majeure amendment granted by the Director shall be considered a binding extension of this Order and of the requirements herein. The determination of the Director shall be final and not subject to appeal.

4. Compliance with the terms and conditions of this Order shall not in any way be construed as relieving Form Tech Concrete Forms of the obligation to comply with any applicable law, permit, other order, or any other requirement otherwise applicable. Violations of the terms and conditions of this Order may subject Form Tech Concrete Forms to additional penalties and injunctive relief in accordance with the applicable law.
5. The provisions of this Order are severable and should a court or board of competent jurisdiction declare any provisions to be invalid or unenforceable, all other provisions shall remain in full force and effect.
6. This Order is binding on Form Tech Concrete Forms, its successors and assigns.
7. This Order shall terminate upon Form Tech Concrete Forms' notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.



Gary Jividen, Regional Manager
Form Tech Concrete Forms, Inc.

8/10/20

Date

Public Notice begin:

Date

Public Notice end:

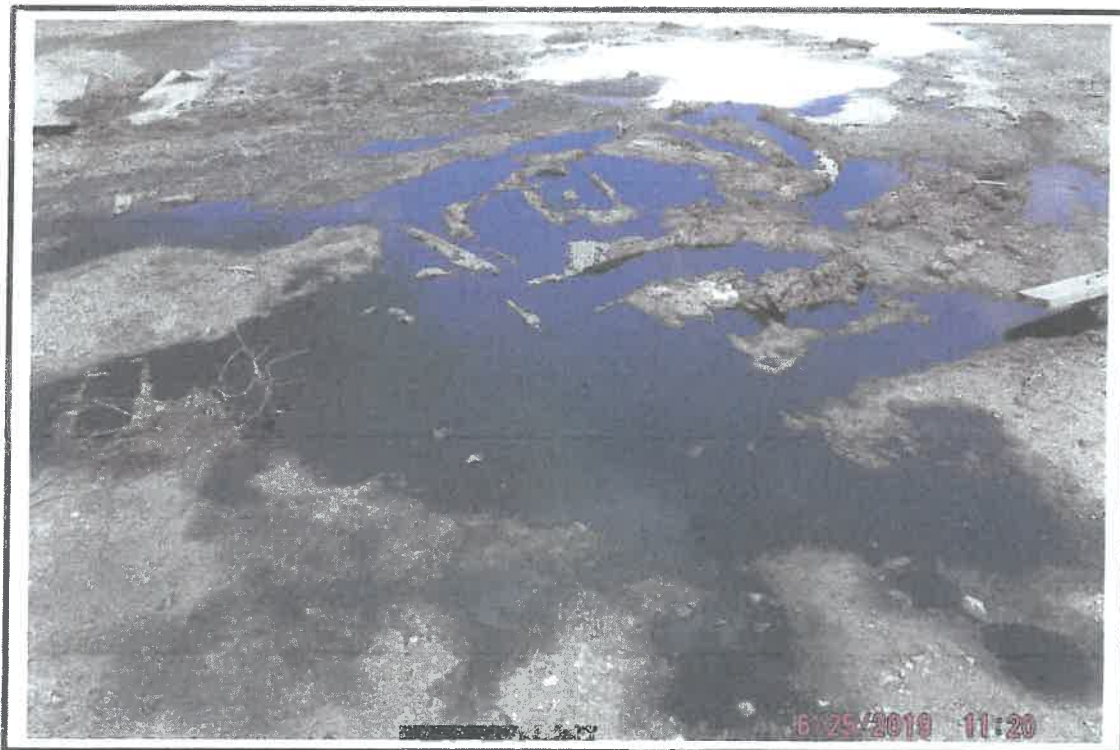
Date

Katheryn Emery, P.E., Acting Director
Division of Water and Waste Management

Date



Unknown material dumped on the ground. White material is not solid.



Unknown material dumped on the ground.



Empty drums near the dumped material.



Empty drums near the dumped material.



Unknown material dumped on the ground. Open dump in background.



Empty drums and solid waste near the dumped material.



Drums and other materials stored outside.



Material which entered an Unnamed Tributary of the Tygart Valley River.

Hazardous Waste Base Penalty Calculation

(pursuant to 33CSR27-6.1)

Responsible Party: Form-Tech Concrete Forms, Inc.

EPA ID Number: _____

Generator Classification:

Enter FOF# and rate each finding as to Potential and Extent.

1)	Potential for Harm Factor	Factor Range	FOF#											
			3g	3h										
a)	Harm to RCRA Program	1 to 3	3	3										
b)	Probability of Exposure	0 to 3	3	3										
c)	Potential Seriousness of Contamination	1 to 3	3	3										
	Average Potential for Harm Factor		3	3	No	No	No	No	No	No	No	No	No	No
2)	Extent of Deviation Factor	Factor Range												
	Degree of Non-Compliance	1 to 3	3	3										

Potential for Harm Factors

1a. - Harm to the RCRA Program

- All regulatory requirements are fundamental to the continued integrity of the RCRA Program
- Violations that undermine the statutory or regulatory purposes or procedures for implementing the RCRA program may have serious implications and merit substantial penalties. Examples include but are not limited to: failure to notify as a generator, failure to respond to an info request, failure to prepare or maintain a manifest, and operating / disposal without a permit

1b. - Probability of Exposure - factors to be considered include but are not limited to: evidence of a release, evidence of waste mismanagement, and adequacy of provisions for detecting and preventing a release

1c. - Potential Seriousness of Contamination - factors to consider include but are not limited to quantity and toxicity of wastes (potentially) released, likelihood or fact of transport by way of environmental media (e.g. air and groundwater), and existence, size and proximity of receptor populations (e.g. local residents, fish, wildlife) and sensitive environmental media (e.g. surface waters and aquifers.)

Note: Rate as 1 for Minor, 2 for Moderate and 3 for Major. Rate as 0 if it does not apply.

Continue rating Findings of Facts (FOF) here, if necessary. Otherwise, continue on Page 3.

[illegible]

		Extent of Deviation from Requirement		
		Major	Moderate	Minor
Potential for Harm to Human Health or the Environment	Major	\$8,000 to \$10,000	\$6,000 to \$8,000	\$5,000 to \$6,000
	Moderate	\$4,000 to \$5,000	\$3,000 to \$4,000	\$2,000 to \$3,000
	Minor	\$1,500 to \$2,000	\$1,000 to \$1,500	Up to \$1,000

FOF #	Potential for Harm	Extent of Deviation	Penalty	Multiple Factor	Base Penalty
3g	Major	Major	\$10,000	1	\$10,000
3h	Major	Major	\$10,000	1	\$10,000
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
0	FALSE	FALSE	FALSE	1	\$0
Total Base Penalty					\$20,000

Penalty Adjustment Factors
(pursuant to 33CSR27-6.2)

Penalty Adjustment Factors

- 6.2.b.1 - Good faith efforts to comply or lack of good faith - 10% decrease to 10% increase
- 6.2.b.2 - Degree of Willfulness and / or Negligence - 0% to 30% increase
- 6.2.b.3 - Cooperation with the Secretary - 0% to 10% decrease
- 6.2.b.4 - History of Non-Compliance - 0% to 100% increase -
based upon review of last three (3) years - Warning = maximum of 5% each,
N.O.V. = maximum of 10% each, previous Order = maximum of 25% each
- 6.2.b.5 - Ability to pay a civil administrative penalty - 0% to 100% decrease
- 6.2.b.6 - Economic Benefit of non-compliance
- 6.2.b.7 - Staff Investigative Costs
- 6.2.b.8 - Other relevant factors determined on a case-by-case basis

Base Penalty Adjustments

(pursuant to 33CSR27-6.2)

Penalty Adjustment Factor	% Increase	% Decrease	Base Penalty Adjustments
6.2.b.1 - Good Faith - Increase			\$0
6.2.b.1 - Good Faith - Decrease		10	(\$2,000)
6.2.b.2 - Willfulness and/or negligence	30		\$6,000
6.2.b.3 - Cooperation with the Secretary		10	(\$2,000)
6.2.b.4 - Compliance/noncompliance history			\$0
6.2.b.5 - Ability to Pay an Administrative Penalty			\$0
6.2.b.6 - Economic Benefit (flat monetary increase)	\$0		\$0
6.2.b.7 - Staff Investigative Costs (flat monetary increase)			\$0
6.2.b.8 - Additional Other Factors - Increase (flat monetary increase)			\$0
6.2.b.8 - Additional Other Factors - Decrease (flat monetary decrease)			\$0
Public Notice Cost (flat monetary increase)	\$30		\$30
Penalty Adjustments			\$2,030
Penalty =			\$22,030

Estimated Economic Benefit Item	Estimated Benefit (\$)
Monitoring & Reporting	
Installation & Maintenance of Pollution Control Equipment	
O&M expenses and cost of equipment/materials needed for compliance	
Permit Application or Modification	
Competitive Advantage	
Estimated Economic Benefit	\$0
Comments: Economic benefit not warranted.	

Base Penalty Calculation

(pursuant to 47CSR1-6.1)

Responsible Party: Form Tech Concrete Forms, Inc. **Receiving Stream:** _____

Treatment System Design Maximum Flow: _____ **MGD**

Treatment System Actual Average Flow: _____ **MGD** (if known)

Enter FOF# and rate each finding as to Potential and Extent.

1)	Potential for Harm Factor	Factor Range	FOF#											
			3c	3d										
a)	Amount of Pollutant Released	1 to 3	1	1										
b)	Toxicity of Pollutant	0 to 3	3	0										
c)	Sensitivity of the Environment	0 to 3	1	0										
d)	Length of Time	1 to 3	1	1										
e)	Actual Exposure and Effects thereon	0 to 3	1	0										
	Average Potential for Harm Factor		1.4	0.4	No	No	No	No	No	No	No	No	No	No
2)	Extent of Deviation Factor	Factor Range												
	Degree of Non-Compliance	1 to 3	3	1										

Potential for Harm Factors:

1)c - Sensitivity of the Environment Potentially Affected (0 for "dead" stream)

1)d - Length of Time of Violation

1)e - Actual Human/Environmental Exposure and Resulting Effects thereon

Examples/Guidance:

Note: Rate as 1 for Minor, 2 for Moderate and 3 for Major. Rate as 0 if it does not apply.

Minor = exceedance of permit limit by $\leq 40\%$ for Avg. Monthly or $\leq 100\%$ for Daily Max., exceed numeric WQ standard by $\leq 100\%$, or report doesn't contain some minor information.

Moderate = exceedance of permit limit by $\geq 41\%$ and $\leq 300\%$ for Avg. Monthly, $\geq 101\%$ and $\leq 600\%$ for Daily Max., exceed numeric WQ standard by $\geq 101\%$ and $\leq 600\%$ or report doesn't fully address intended subject matter.

Major = exceedance of permit limit by $\geq 301\%$ for Avg. Monthly, $\geq 601\%$ for Daily Max., exceed numeric WQ standard by $\geq 601\%$, failure to submit a report, failure to obtain a permit, failure to report a spill, etc. Note that a facility in SNC should be rated as major for length of time and degree of non-compliance.

Narrative WQ standard violations - case-by-case.

Continue rating Findings of Facts (FOF) here, if necessary. Otherwise, continue on Page 3.

[illegible]

[illegible]

Penalty Adjustment Factors

(pursuant to 47CSR1-6.2)

Penalty Adjustment Factor

6.2.b.1 - Degree of or absence of willfulness and/or negligence - 0% to 30% increase

6.2.b.4 - Previous compliance/noncompliance history - 0% to 100% increase - based upon review of last three (3) years - Warning = maximum of 5% each, N.O.V. = maximum of 10% each, previous Order = maximum of 25% each - Consistent DMR violations for <1 year = 10% maximum, for >1 year but <2 years = 20% maximum, for >2 years but <3 years = 30% maximum, for >3 years = 40 % maximum

6.2.b.6 - Economic benefits derived by the responsible party (increase to be determined)

6.2.b.7 - Public Interest (increase to be determined)

6.2.b.8 - Loss of enjoyment of the environment (increase to be determined)

6.2.b.9 - Staff investigative costs (increase to be determined)

6.2.b.10 - Other factors

Size of Violator: 0 - 50% decrease

NOTE: This factor is not available to discharges that are causing a water quality violation. This factor does not apply to a commercial or industrial facility that employees or is part of a corporation that employees more than 100 individuals.

Avg. Daily WW Discharge Flow (gpd)	% Reduction Factor
< 5,000	50
5,000 to 9,999	40
10,000 to 19,999	30
20,000 to 29,999	20
30,000 to 39,999	10
40,000 to 99,999	5
> 100,000	0

Additional Other factors to be determined for increases or decreases on a case-by-case basis.

Public Notice Costs (cost for newspaper advertisement)

6.2.b.2 - Good Faith - 10% decrease to 10% increase

6.2.b.3 - Cooperation with the Secretary - 0% to 10% decrease

6.2.b.5 - Ability to pay a civil penalty - 0% to 100% decrease

Base Penalty Adjustments

(pursuant to 47CSR1-6.2)

Penalty Adjustment Factor	% Increase	% Decrease	Base Penalty Adjustments
6.2.b.1 - Willfulness and/or negligence -	30		\$1,440
6.2.b.4 - Compliance/noncompliance history -			\$0
6.2.b.6 - Economic benefits - (flat monetary increase)			\$0
6.2.b.7 - Public Interest - (flat monetary increase)			\$0
6.2.b.8 - Loss of enjoyment - (flat monetary increase)			\$0
6.2.b.9 - Investigative costs - (flat monetary increase)			\$0
6.2.b.10 - Other factors (size of violator)			\$0
6.2.b.10 - Additional Other Factors - Increase (flat monetary increase)			\$0
6.2.b.10 - Additional Other Factors - Decrease (flat monetary decrease)			\$0
Public Notice Costs (flat monetary increase)	\$30		\$30
6.2.b.2 - Good Faith - Increase			\$0
6.2.b.2 - Good Faith - Decrease		10	(\$480)
6.2.b.3 - Cooperation with the Secretary		10	(\$480)
6.2.b.5 - Ability to Pay			\$0
Penalty Adjustments			\$510
Penalty =			\$5,310

Estimated Economic Benefit Item	Estimated Benefit (\$)
Monitoring & Reporting	
Installation & Maintenance of Pollution Control Equipment	
O&M expenses and cost of equipment/materials needed for compliance	
Permit Application or Modification	
Competitive Advantage	
Estimated Economic Benefit	\$0
Comments: Economic benefit not warranted.	