

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

FILED

I. CASE STYLE:

Plaintiff(s)

JULIUS WOLFORD

Case No. 20-CV-6460

Judge: Bailey

KANAWHA COUNTY CIRCUIT COURT

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:

- | | |
|--|---|
| <input checked="" type="checkbox"/> General Civil | <input type="checkbox"/> Adoption |
| <input type="checkbox"/> Mass Litigation [As defined in T.C.R. 26.04(a)] | <input type="checkbox"/> Administrative Agency Appeal |
| <input type="checkbox"/> Asbestos | <input type="checkbox"/> Civil Appeal from Magistrate Court |
| <input type="checkbox"/> FELA Asbestos | <input type="checkbox"/> Miscellaneous Civil Petition |
| <input type="checkbox"/> Other: _____ | <input type="checkbox"/> Mental Hygiene |
| <input type="checkbox"/> Habeas Corpus/Other Extraordinary Writ | <input type="checkbox"/> Guardianship |
| <input type="checkbox"/> Other: _____ | <input type="checkbox"/> 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:

- | | |
|---|--|
| <input checked="" type="checkbox"/> Plaintiff | <input type="checkbox"/> Defendant |
| <input type="checkbox"/> Cross-Defendant | <input type="checkbox"/> Cross-Complainant |
| <input type="checkbox"/> 3rd-Party Plaintiff | <input type="checkbox"/> 3rd-Party Defendant |

☐ Proceeding Without an Attorney

Original and 2 copies of complaint enclosed/attached.

Dated: 08 / 05 / 2020

Signature: [Signature]

SCA-C-100: Civil Case Information Statement (Other than Domestic Relations)

PYMT Type K
Rept # 521574 \$200 ☒ \$135
Iss. Sum. + cc No Sum. Iss
Ret. to Atty. \$20cm X
Mailed CM/RM \$5 clk X
Mailed to sos w/ck# _____
Sent to _____ w/ck# _____ \$15 mdf X _____

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: _____
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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.

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.

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2020 AUG -6 A 11:27
KANAWHA COUNTY CLERK
Civil Action No. 20-C-660
Judge Bailey

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:

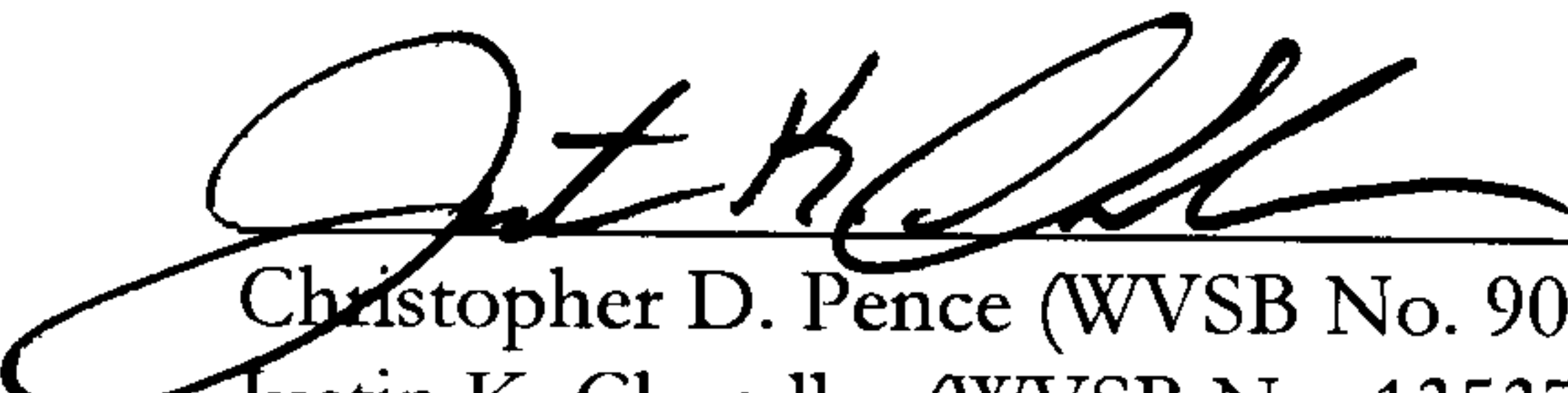
- a. Unpaid consulting fees and sales commissions, payable under the terms of the Consulting Agreement;
- b. Liquidated damages for violations of W.Va. Code § 21-5-4(e);
- c. Unpaid forklift monthly rental fees payable under the oral rental agreement or under the equitable theory of quantum meruit;
- 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:



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 1 PURCHASE AND SALE OF ASSETS

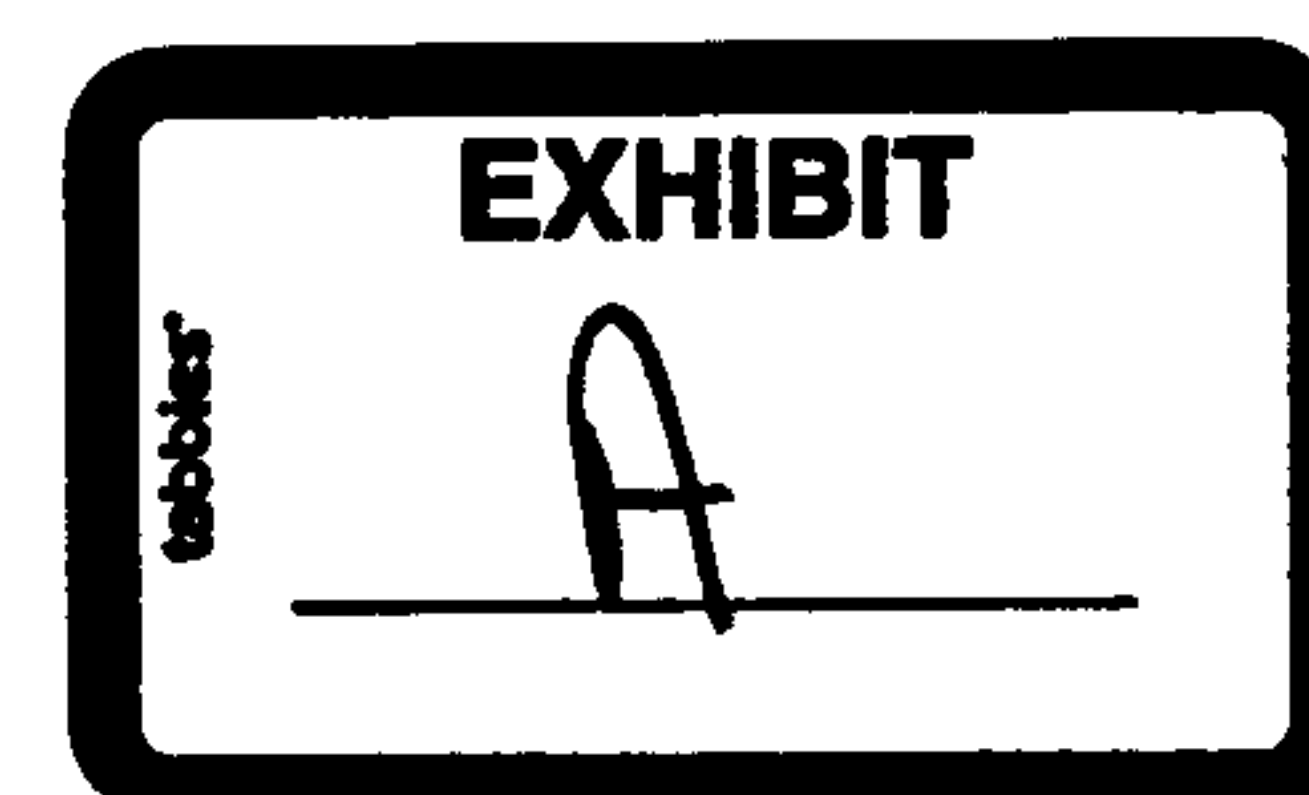
1.1 Assets to be Transferred. Simultaneously with the execution and delivery of this Agreement, the Purchaser shall purchase from the Seller, and the Seller shall sell, transfer, assign, convey and deliver to the Purchaser, free and clear of all security interests, mortgages, liens, pledges, encumbrances, 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 hercof 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

(c) 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:

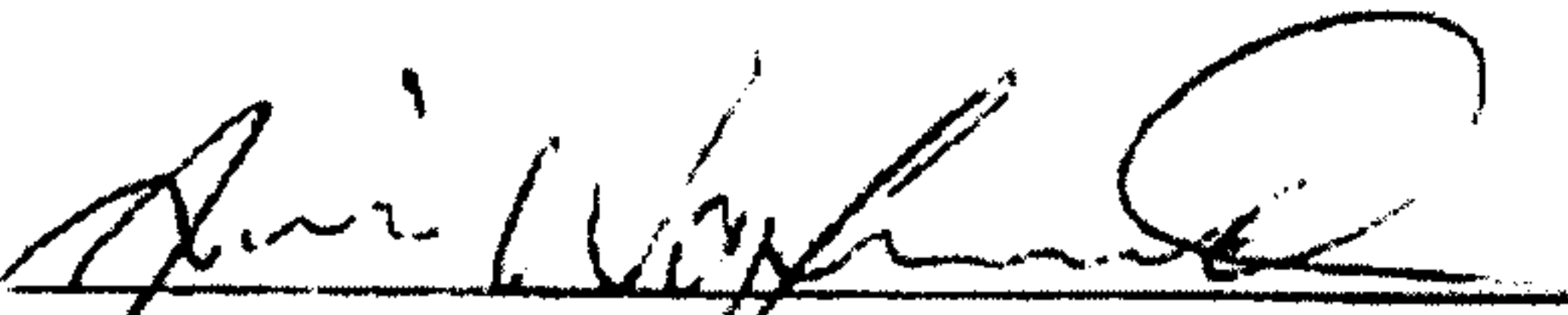
48575 Downing Street
Wixom, Michigan 48393
Attention: Guy Williams, CEO
Facsimile No.: _____
Email: gwilliams@formtechinc.com

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

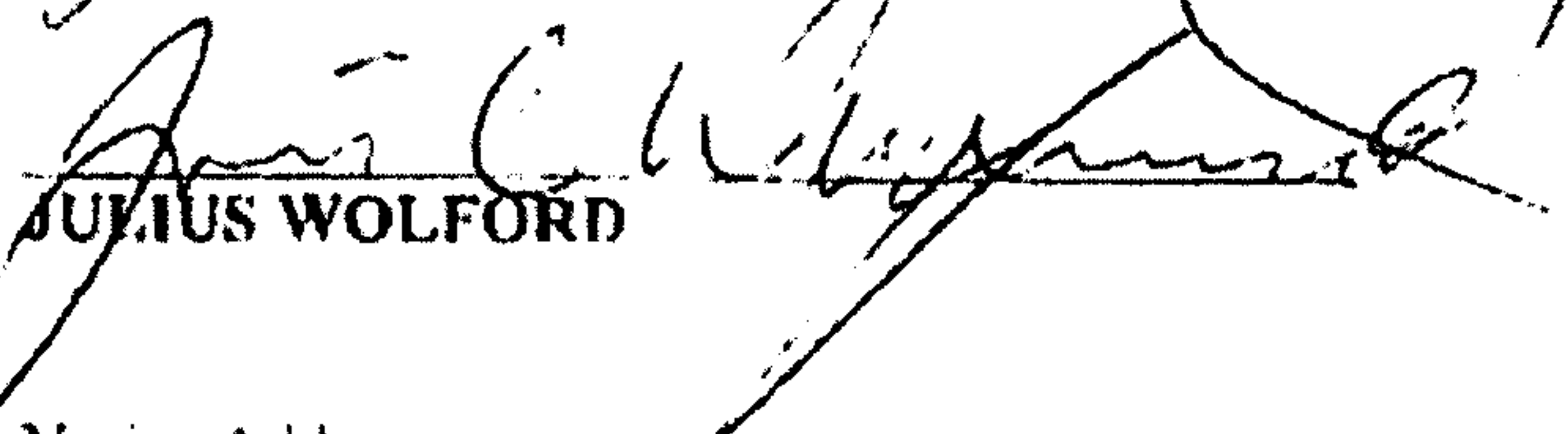
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Attention: William R. Stewart, Jr.
Facsimile No.: (216) 579-0212
Email: wrstewartjr@jonesday.com

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

By: 

Name:

Title: GENERAL MANAGER



JULIUS WOLFORD

Notice Address:

3612 Brookshire Drive
Hillside, West Virginia

Facsimile No.: 864-765-7257

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, LLC ("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

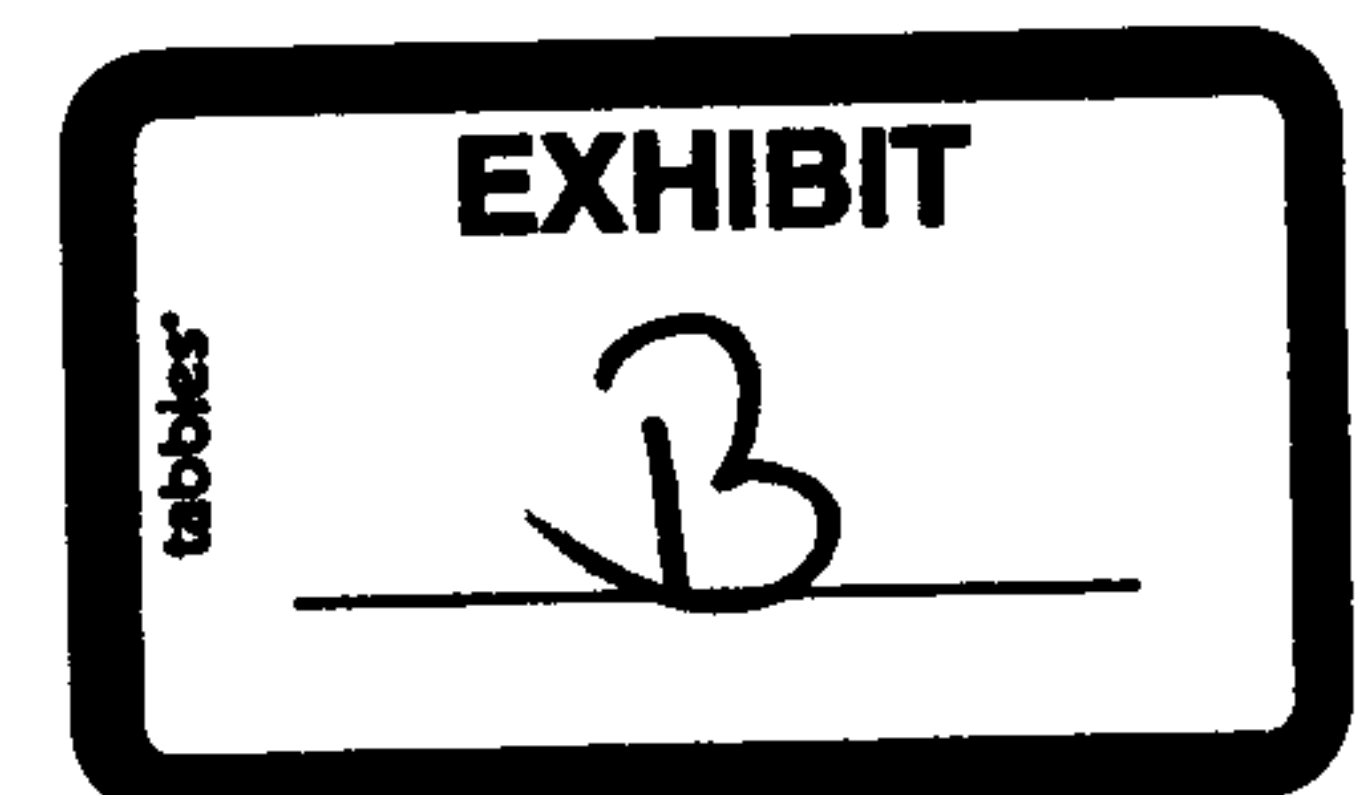
1.1 Term. The Company hereby retains Consultant, and Consultant agrees to perform the consulting services defined in Section 1.2 hereto for the Company, for the period commencing on the date hereof and ending in accordance with the terms of Article III (the "Engagement").

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.

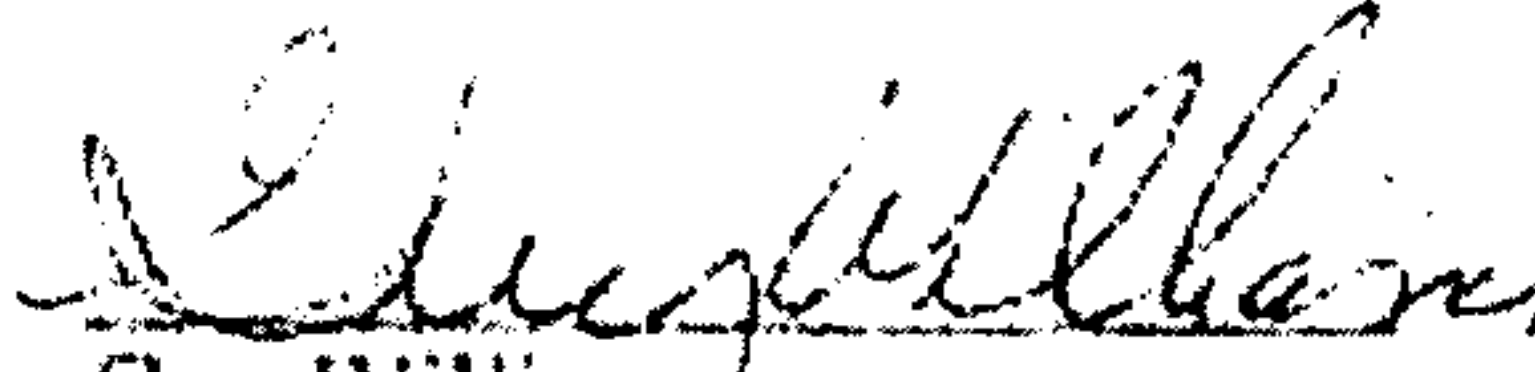
5.7 Waivers. No waiver of any of the provisions of this Agreement shall be valid and enforceable unless such waiver is in writing and signed by the parties to be charged, and, unless otherwise stated therein, no such waiver shall constitute a waiver of any other provision hereof (whether or not similar)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

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