**IN THE SUPREME COURT OF MISSISSIPPI**

**No. 2007-CA-00341**

**PEAVEY ELECTRONICS CORPORATION** **APPELLANT**

**V.**

**BAAN U.S.A., INC.** **APPELLEE**

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**ON APPEAL FROM THE CIRCUIT COURT OF LAUDERDALE COUNTY, MISSISSIPPI**

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# BRIEF OF APPELLANT PEAVEY ELECTRONICS CORPORATION

**ORAL ARGUMENT REQUESTED**

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## STATEMENT CONCERNING ORAL ARGUMENT

Appellant Peavey Electronics Corporation has requested oral argument and believes it would assist the decisional process in this appeal for two reasons. First, this appeal challenges orders dismissing without benefit of a trial all claims in a complex, multi-million dollar computer software dispute, and related orders refusing to allow relevant discovery that could have affected the decision on whether summary judgment should be granted. The subject matter of this dispute is technical, the record is voluminous, and the facts are hotly contested. Oral argument would aid the Court by allowing it to resolve any confusion about the record facts and their relationship to the legal arguments presented by both parties. Second, although this appeal involves numerous legal issues, the Court only needs to decide several of these issues to resolve the case. Oral argument would allow the Court to focus on the dispositive issues and resolve any questions about how recent authorities should be applied to the unique facts in the case at bar. Accordingly, Appellant Peavey Electronics Corporation respectfully requests that the Court allow each side 30 minutes for oral argument.

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Peavey Electronics Corporation, Appellant;

2. Jerry K. Clements, Vincent J. Hess, April R. Terry, Barbara Ellis, Susan A. Kidwell, LOCKE LORD BISSELL & LIDDELL LLP; James P. Streetman III, David Lee Gladden, Jr., SCOTT, SULLIVAN, STREETMAN & FOX, P.C.; Ronnie L. Walton, GLOVER, YOUNG, WALTON & SIMMONS, PLLC; attorneys for Appellant Peavey Electronics Corporation;

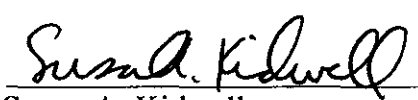
3. Baan U.S.A., Inc., Appellee;

4. William C. Hammack, Lee Thaggard, BORDEAUX AND JONES LLP; Daniel D. Zegura, Christopher M. Golden, Robert B. Remar, ROGERS AND HARDIN LLP; attorneys for Appellee Baan U.S.A., Inc.;

5. Honorable Lester F. Williamson, Jr., Circuit Court Judge;

6. Honorable Larry E. Roberts, Court of Appeals Judge and former Circuit Court Judge.

Respectfully submitted,



Susan A. Kidwell
One of the Attorneys of record for Appellant Peavey Electronics Corporation

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## STATEMENT OF ISSUES

1. Did the trial court err in granting partial summary judgment on Peavey's tort claims?

2. Did the trial court err in granting summary judgment on Peavey's contract and warranty claims?

3. Did the trial court abuse its discretion in denying Peavey's motions to compel discovery?

## STATEMENT OF THE CASE

### A. Nature of the Case

This case arose after Defendant/Appellee Baan U.S.A. Inc. ("Baan") sold Plaintiff/Appellant Peavey Electronics Corp. ("Peavey") a multi-million dollar bundle of computer software and related services. The software was to be installed in phases to minimize the risks associated with such a large project. However, significant problems with the initial phase led to extended delays in installing the full package. Baan attempted to remedy the problems until 2003. By that time, it had became apparent that critical components of the software package were either incompatible or did not exist and, therefore, Baan could not install the full software package to perform as promised. Peavey spent many millions of dollars on the Baan project, but instead of realizing significant cost savings due to increased efficiency, Peavey actually lost sales and incurred additional expenses to maintain and support old computer systems that Baan was supposed to replace.

### B. Course of Proceedings

Peavey filed its Original Complaint on February 27, 2004, alleging claims for breach of contract, breach of express and implied warranties, fraud and fraudulent

misrepresentation, negligent misrepresentation, and breach of the duty of good faith and fair dealing. (1 CR 2.[1]) In April 2004, Baan moved to dismiss the Complaint based on the statute of limitations. (1 CR 82.) The Honorable Larry E. Roberts heard arguments in October 2004 and declined to dismiss any of Peavey's claims. (1 RR 51.) However, he ordered Peavey to replead its fraud and fraudulent misrepresentation claim with more particularity. (1 RR 54.) Peavey filed its First Amended Complaint in December 2004 (2 CR 169) and a Second Amended Complaint in April 2005 (18 CR 2614). The amended pleadings have more expansive and detailed factual allegations relating to the fraud and fraudulent misrepresentation claim and added a new cause of action for money had and received. (*See* 18 CR 2623-35.)

In support of its claims, Peavey sought to discover Baan's research and development records and documents showing other customer complaints about the software at issue. (*See* 3 CR 335; 5 CR 670.) Instead of producing the requested information, Baan filed a motion for partial summary judgment on all of Peavey's tort claims in March 2005. (*See* 7 CR 961.) Judge Roberts denied Peavey's motion to compel the needed discovery, concluding that the information sought was not relevant to Peavey's claims. (*See* App. F.) After refusing to reconsider the ruling (*see* App. G), Judge Roberts entered an order granting Baan's motion for partial summary judgment and dismissing all of Peavey's tort claims as barred by the three-year statute of limitations. (App. B.) The order granting partial summary judgment was premised on erroneous conclusions that: (i) Peavey's claims accrued as soon as Peavey experienced

[1] The Clerk's Record is cited as "[vol.] CR [page]," the Reporter's Record is cited as "[vol.] RR [page]," and the Appendix of Record Excerpts filed concurrently with this Brief is cited as "App. [tab] at [page]."

the initial problems with Phase I implementation; (ii) the discovery rule did not apply because Peavey knew about its injury when it experienced the initial problems in July 1999; and (iii) Peavey failed to present any evidence raising genuine fact issues about whether the statute of limitations was tolled based on equitable estoppel, the continuing tort doctrine, or fraudulent concealment. (*See* Apps. B & C.)

Shortly thereafter, Baan filed a second summary judgment motion on Peavey's contract and warranty claims. (32 CR 4820.) Peavey attempted to discover documents relating to the SCS software that it purchased but could not install because SCS was incompatible with other programs in Peavey's bundle. (*See* 36 CR 5352; 50 CR 7514.) However, noting that Peavey had never installed SCS, the Honorable Lester Williamson, Jr.[2] concluded that documents about whether SCS was compatible with the rest of Peavey's software package were "not relevant" to the remaining issues in the case. (App. H at 8545.) Accordingly, he denied Peavey's request for discovery pertaining to the SCS software applications. (*Id.* at 8546.)

In January 2007, Judge Williamson granted Baan's second summary judgment motion based, in part, on a "waiver" ground that was neither presented by Baan in its motion nor raised at the December 2006 hearing.[3] (*See* App. E; 2 RR 295.) The final judgment incorporates both summary judgment rulings and dismisses all of Peavey's claims with prejudice. (App. D.)

Peavey timely filed this appeal on February 28, 2007. (96 CR 14474.)

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[2] Judge Williamson began presiding over the case when Judge Roberts was appointed to the Mississippi Court of Appeals in January 2006.

[3] The court concluded that Peavey waived its contract and warranty claims by entering into a 2001 addendum to one of the contracts at issue. (App. E at 14471.)

## C. Statement of Facts

This case arose after Baan sold Peavey a multi-million dollar bundle of software products and related maintenance and consulting services. Critical components in the software package either did not exist or were incompatible with other components in the package, so Peavey's bundle of software could not be fully implemented to perform as promised. The trial court's judgment dismissing all of Peavey's claims is premised on a fundamental misunderstanding about the nature of Peavey's claims and on "facts" improperly determined by construing the evidence in a light most favorable to Baan. As Appellee's brief will undoubtedly confirm, many of the underlying facts relating to the merits of Peavey's claims are hotly disputed. However, that only demonstrates the need for a trial on the merits. The following statement of facts explains the context in which Peavey's claims arose based on the evidence favorable to Peavey:

### *1. Peavey's decision to purchase a bundle of Baan software*

Peavey is one of the world's leading designers and manufacturers of musical and audio equipment, including guitars, amplifiers, and speakers. (App. X at 8853.) In the mid to late 1990s, Peavey determined that it needed a more modern computer system that would be "Y2K compliant." (*Id.*) It began investigating major suppliers of Enterprise Resource Planning ("ERP") software, which is computer software designed to automate all aspects of a company's business. (*Id.*)

Baan is a leading manufacturer of ERP software. (*Id.*) It develops, distributes, supports, and licenses computer software to businesses and also provides consulting and implementation services to the businesses that license its software. (*Id.*) Baan describes

its consultants as "certified experts" with extensive experience implementing software systems and the most thorough functional and technical knowledge of Baan ERP software. (*See* 99 CR 14942.) Consequently, Baan consultants hold themselves out to be particularly well suited to assist with complex implementations of Baan software and resolve any problems that might arise during the process. (*Id.*; *see also* App. X at 8871.)

Peavey began discussions and negotiations with Baan about purchasing Baan ERP software in 1997. (*See* App. M.) Peavey ultimately chose Baan over other vendors based on the purported strength of Baan's SCS product, which was supposed to make Peavey's manufacturing system much more efficient. (*See* App. W at 9119 ¶ 12.) Based on Baan's initial sales representations, Peavey reasonably expected that it could achieve substantial cost savings through improved efficiency, recover the total project costs of more than $19 million in three and one half years, and enjoy a total net gain of almost $13.5 million in cash flow over five years. (*See* App. M at 15051.)

*a.* *The Software Agreement*

Peavey and Baan executed a "Software License and Support Agreement" ("Software Agreement") on October 31, 1997, by which Peavey agreed to pay Baan over $3.6 million in license and maintenance fees for an extensive package of Baan software. (App. I.) The software licensed to Peavey included Baan IV.0b Orgware (ERP software), Supply Chain (SCS) applications, Baan Source Code, and numerous other products described in Schedule A of the Software Agreement. (*See id.* at 8952-53.) Peavey had no reason to believe that the SCS module was "not an integral part" of the software package it purchased. (App. X at 8883.)

*b.* *The Services Agreement*

Concurrently with the Software Agreement, Peavey and Baan entered into a "Professional Services Agreement" ("Services Agreement") relating to the Software Baan licensed to Peavey in the Software Agreement. (App. K at 8960.) Peavey agreed to pay Baan hourly consulting fees in exchange for Baan's assistance in implementing the Baan Software being licensed to Peavey. (*Id.* § 4.1.) Baan was responsible for controlling, directing, and assisting Peavey with the Baan software implementation. (*Id.* § 1.) Baan's consultants were expected to provide "expert guidance" in implementing the Baan Software package and resolving any problems that might arise during the process. (*See* App. X at 8871-72.)

*c.* *The Source Code Agreement*

ERP software packages are typically customized to fit a company's business needs. (*See* 101 CR 15394-96.) That is because "there will always be gaps between the business processes represented in an ERP system and the ones a company uses," and "[n]o company should change the business processes that give it competitive advantage in expectation of improved workflow from an ERP [system]." (101 CR 15395.) Accordingly, Peavey and Baan also entered into a Source Code Agreement,[4] by which Baan gave Peavey the source code to the Baan ERP software so that Peavey could customize the software. (*See* App. L §§ 1.2, 1.4, 1.7, 2.1, & Recitals.) "[S]ource code is only provided to a client if they intend to undertake customization." (App. X at 8897.)

[4] "Source code" is the underlying computer language by which software applications operate.

### 2. *Baan's Blueprint for phased implementation*

Peavey decided to implement the Baan software in several phases "in order to minimize the risks associated with such a complex undertaking." (App. X at 8854.) In consultation with Peavey, Baan developed a lengthy "Blueprint" for implementation. (*See* 60 CR 9008.) The Blueprint explains how various components of the Baan software package were supposed to relate to different business functions at Peavey. (60 CR 9015.) The Blueprint also identifies and prioritizes numerous system customizations "as required for the successful implementation of the Enterprise Systems Project." (60 CR 9094-98.) Baan did not warn Peavey that customizing the software might prevent Peavey from implementing the entire package of software it purchased. (*See* 61 CR 9231 ¶ 8; 62 CR 9280 ¶ 6; 62 CR 9311 ¶ 8.) To the contrary, Baan portrayed customization "as a bridge from what the Baan products could do and what Peavey required from business systems supporting their operations." (App. X at 8879.)

### 3. *Baan's inability to implement the full system Peavey purchased*

Peavey understood that SCS "Planner, Scheduler and Execution modules would integrate and operate successfully with the Baan IVb version of the software" it licensed. (App. X at 8904.) However, by January 1998, Baan notified Peavey that SCS was not compatible with version IVb. (*Id.* at 8885.) Baan said it would notify Peavey when version IVc2 – "with which SCS would be compatible" – would be available. (*Id.*)

In August 1998, Baan acknowledged that SCS Scheduler would work with Baan IVc2, but that SCS Execution and Planner required version IVc3 or higher. (64 CR 9699.) Internal communications from December 1998 confirm that Baan knew Peavey

needed at least version IVc3 to run SCS. (64 CR 9701.) Despite this knowledge, Baan installed version IVc2, advised Peavey that full SCS functionality would become available on version IVc2, and continued trying to implement Peavey's software package using version IVc2. (*See* App. V at 9111 ¶ 10; App. W at 9123 ¶ 28; App. X at 8905.)

By February 1999, Baan knew that it was on "VERY thin ice" with Peavey because it had a "billing SCS consultant on-site helping to build a model for *software that may not exist.*" (App. O (emphasis added).) Baan knew that Peavey might have to upgrade to version IVc3 but that other Baan customers had experienced problems when they did so. (*Id.*) Baan also knew that Peavey would be "EXTREMELY upset" if it upgraded its software and experienced problems. (*Id.*) Even though no one at Baan knew whether the software model it was building for Peavey would work, Baan proceeded with "time wasting wild goose chases" while trying to figure out how to implement and customize the software package it sold Peavey using version IVc2. (*Id.*)

Peavey's "go live" on the Sales and Distribution Module in Phase I of the project occurred in July 1999. (98 CR 14783.) Because the Sales and Distribution module was designed to automate Peavey's customer invoicing and shipping processes, it was critical to Peavey's ability to ship products and invoice its customers. (*See* App. P.) Serious problems arose during the "go live" on Sales and Distribution. (*See* App. Q at 14934; App. V at 9112 ¶ 12; 68 CR 10286.) Most notably, a defective component of the Sales and Distribution module caused Peavey to lose its automated shipping functions. (*See* 61 CR 9234 ¶ 13.) As a result, Peavey lost its ability to ship and bill orders to customers. (App. X at 8881.) The damage to Peavey's market share and customer perceptions was

significant. (*See, e.g.*, 68 CR 10286.) Three months after the failed "go live," the Phase I software had "still not achieved a stable and workable status." (App. Q at 14934.)

In Phase II, Peavey intended to implement and "go live" on the manufacturing and SCS modules. (*See* App. V at 9111 ¶ 8.) Because Peavey's original cost justification for purchasing the software package was based on Baan's promised integration of the sales and distribution modules (Phase I) with the manufacturing and SCS modules (Phase II), Baan knew that full implementation of Phase II was crucial for Peavey to obtain the benefit of its bargain with Baan. (*See* App. M at 15051; App. T at 14792; App. W at 9119 ¶ 12.)

Peavey began work on the Phase II implementation even before the July 1999 "go live" on Phase I, and Phase II work continued while the parties tried to resolve the problems that arose after the July 1999 "go live." (*See* 62 CR 9312 ¶ 12.) Baan initially planned to complete its implementation of Phase II in November 1999. (*See* App. Q.) However, serious problems implementing Phase I rendered the November 1999 goal "unachievable." (*Id.*) Consequently, Baan developed a new plan to "go live" on Phase II by July 2000. (*Id.*)

In the meantime, with January 2000 rapidly approaching, Peavey had to temporarily postpone its Baan implementation project and, instead, upgrade its legacy systems to achieve Y2K compliance. (*See* App. Q; App. V at 9112 ¶ 12.) Although Baan consultants left the Peavey premises during that process (App. Q), Peavey fully intended to implement the entire bundle of software it purchased, including the manufacturing and SCS applications. (*See* 62 CR 9324-26.) Consistent with that intent,

Peavey continued to pay Baan "maintenance" and "support" fees related to the SCS software through at least January 2003. (*See* 62 CR 9316-18.)

In October 2002, Peavey was still working with Baan to determine whether to proceed with implementation and, if so, whether to use the current version of Baan IV or upgrade to a newer version of Baan Vc. (App. S.) Although Baan was still telling Peavey it could proceed with full implementation using Baan IVc2 (App. W at 9123 ¶ 28), internal communications reveal that version IVc2 was incompatible with SCS. (*See* Apps. O, Q, R; App. V at 9112 ¶ 11.)

Baan attempted to conceal the integration problems by recommending that Peavey upgrade to a newer version of software. (*See, e.g.*, 99 CR 14941 ("Baan Solution Proposal" recommending "ERP re-implementation as an opportunity to improve the flexibility and effectiveness of operations"); 99 CR 14993 (recommending "vanilla implementation of Baan Vc").) Although Baan eventually attempted to blame the integration problems on Peavey's customizations and interfaces (*see* App. T at 14792), the evidence favorable to Peavey shows that:

- Baan described its software as "highly customizable" (App. X at 8877);
- Baan was supposed to provide the knowledge and experience to implement the software Peavey purchased (App. K; App. X at 8872);
- Baan's "Blueprint" for implementing the package listed numerous customizations that had been "identified and prioritized as required for the successful implementation of the [package]" (60 CR 9094-98);
- Baan entered into a Source Code Agreement with Peavey to enable Peavey to customize the software (App. L); and
- Baan did not provide adequate warnings to Peavey that "customizations to the Baan ERP software would preclude Peavey from being able to reasonably upgrade

to future releases and versions of the software" (App. X at 8900; *see also* 61 CR 9231 ¶ 8; 62 CR 9280 ¶ 6; 62 CR 9311 ¶¶ 6-8).

In January 2003, Baan was still attempting to resolve Peavey's problems. (*See* App. T.) Baan acknowledged that Peavey's original justification for the software package was to achieve Y2K compliance and to realize $13.2 million in savings from the integration of sales and distribution with manufacturing and engineering. (*See id.* at 14792.) However, "[t]he SCS module never worked so [Peavey was] not able to realize this savings." (*Id.*) One of Baan's proposed solutions was to complete implementation with "concessions" in the area of maintenance and support fees. (*See id.* at 14793.) Peavey was unhappy that it had paid $3.9 million in license and maintenance fees for software that could not be installed. (*See* 69 CR 10380-85.)

Discussions about options for resolving the implementation problems continued until at least May 2003. (*See* 62 CR 9297 ¶ 8.) The following month, Peavey and Baan amended the Software Agreement to reduce the number of software users and associated support fees and to cancel support of unused software licenses. (App. J.) However, Baan never achieved full integration and implementation of the software package it sold Peavey and promised to successfully install. (*See* App. W at 9120.) Because Baan was unable to complete implementation, Peavey incurred "staggering" costs to maintain its computer system. (App. U at 9553-54.)

In February 2004, Peavey sued Baan alleging breach of contract, breach of express and implied warranties, fraud and fraudulent misrepresentation, negligent misrepresentation, and breach of the duty of good faith and fair dealing. (*See* 1 CR 2.) After repeatedly refusing to allow Peavey to obtain critical discovery in support of its

claims, the trial court granted partial summary judgments for Baan and entered a final judgment dismissing all of Peavey's claims. (*See* Apps. B - H.) This appeal ensued.

## SUMMARY OF THE ARGUMENT

Peavey paid Baan many millions of dollars to install an extensive package of computer programs that are critical to the successful operation and profitability of the company. The software package was so large, it had to be installed in phases. Although it was apparent that certain components of the package installed during the initial phase did not work, Baan repeatedly reassured Peavey that Baan would fix the problems and install the full package as promised. Based on Baan's assurances, Peavey did not sue Baan as soon as there were problems. Rather, Peavey patiently gave Baan opportunities to achieve full implementation in the hope that Peavey could realize its anticipated gains in efficiency. What Peavey did not know is that critical components of the Baan software package were either incompatible or did not exist and, therefore, the software package could *never* be fully implemented. Nor did Baan warn Peavey that software customizations – done at Baan's recommendation, under Baan's supervision, and at considerable expense to Peavey – would effectively preclude Peavey from making necessary software upgrades.

Peavey's patience eventually ran out. By early 2004, it had become clear that the software package Baan sold Peavey could not be installed to perform as promised. When Peavey filed this lawsuit, Baan resisted discovery and took the incredible position that many of Peavey's claims were barred by limitations because Peavey had not sued Baan within three years of experiencing the initial problems.

The trial court erred in dismissing all of Peavey's tort claims based on the statute of limitations. (*See* App. B; App. C at 4781.) Although Peavey knew about the problems encountered in July 1999 during the Phase I implementation, Peavey's tort claims arose from a continuous course of misleading and deceptive conduct that began before and continued well after July 1999. Baan's misrepresentations concerning its ability to resolve Peavey's problems and achieve full implementation of Peavey's software package continued into 2003, only a year before Peavey filed suit and, therefore, well within the limitations period. The evidence, thus, raises genuine issues of material fact about when Peavey's claims accrued under the continuing tort doctrine.

The evidence also raises genuine issues of material fact about whether Baan's continual reassurances that it could fix an unfixable problem induced Peavey not to file suit within three years of the July 1999 "go live," and about whether Baan fraudulently concealed information about Peavey's cause of action that prevented Peavey from discovering its true injury and the causal connection between that injury and Baan's misconduct until shortly before it filed suit. Accordingly, even if this Court concludes that Peavey's tort claims accrued more than three years before Peavey sued Baan, the evidence raises fact questions about whether Baan is estopped from asserting limitations as a defense to Peavey's tort claims and whether the statute of limitations was tolled by the fraudulent concealment doctrine or the discovery rule. For any or all of these reasons, the order granting Baan's motion for summary judgment on Peavey's tort claims must be reversed.

addition, the orders are contrary to general principles favoring discovery and to the guidelines for exercising discretion on discovery matters. After erroneously denying Peavey's discovery requests, the court compounded its error by summarily dismissing Peavey's claims, even though the requested documents would have further demonstrated the need for a trial on the merits.

For these reasons, the summary judgment and discovery orders at issue should be reversed and the case remanded to the trial court with instructions to allow the requested discovery.

## ARGUMENT

### I. The Trial Court Misapplied the Summary Judgment Standard.

Summary judgment should only be granted if the moving party meets its burden to show that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *See* MISS. R. CIV. P. 56(c); *Byrd v. Bowie*, 933 So. 2d 899, 902 (Miss. 2006). "[T]he court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried." MISS. R. CIV. P. 56 cmt.

As this Court has recognized:

> All motions for summary judgment should be viewed with great skepticism and if the trial court is to err, it is better to err on the side of denying the motion. When doubt exists whether there is a fact issue, the non-moving party gets its benefit. Indeed, the party against whom the summary judgment is sought should be given the benefit of every reasonable doubt.

*Robinson v. Cobb*, 763 So. 2d 883, 886 (Miss. 2000) (citations omitted). A motion for summary judgment should, therefore, be denied "unless the trial court finds beyond any

reasonable doubt that the plaintiff would be unable to prove any facts to support his/her claim." *Id.*

This Court reviews a trial court's order granting summary judgment *de novo*. *See Wilner v. White*, 929 So. 2d 315, 318 (Miss. 2006). The evidence must be viewed in the light most favorable to the non-moving party. *Id.* If any fact issues exist, summary judgment must be reversed. *Id.* The trial court's order must also be reversed if it was granted "*sua sponte* on grounds not requested by the moving party." *John Deere Co. v. Am. Nat'l Bank, Stafford*, 809 F.2d 1190, 1192 (5th Cir. 1987).

As explained more fully below, the trial court misapplied Rule 56 by: (i) mischaracterizing Peavey's claims; (ii) failing to view the evidence in a light most favorable to Peavey; (iii) resolving disputed issues of material fact in Baan's favor instead of recognizing that there were issues to be tried; (iv) erroneously concluding that Baan was entitled to judgment as a matter of law; and (v) granting summary judgment on Peavey's contract and warranty claims on a ground not raised by Baan. The summary judgment evidence establishes numerous fact issues entitling Peavey to a trial on the merits of all of its claims. Accordingly, the trial court's orders granting summary judgment must be reversed.

## II. The Trial Court Erred in Granting Summary Judgment on Peavey's Tort Claims.

The trial court's judgment that all of Peavey's tort claims are barred by the three-year statute of limitations in Mississippi Code § 15-1-49 is premised on the erroneous conclusion that Peavey's tort claims accrued by mid-2000, when it was "clear . . . [that] Peavey knew of the alleged defects in the software." (App. C at 4777.) This reflects

fundamental misconceptions about the tort claims at issue. In brief, the trial court assumed that Peavey's tort claims only sound in product liability and only complain about defects exposed during the initial stages of installation.

Instead, Peavey's tort claims arise from Baan's misleading and deceptive conduct to conceal the true nature of Peavey's injury. That conduct continued until 2003. The pleadings and evidence, properly construed in Peavey's favor, thus raise fact questions about when Peavey's claims accrued under the continuing tort doctrine, about whether Baan should be estopped from asserting a limitations defense, and about whether the statute of limitations was tolled by the fraudulent concealment doctrine and/or the discovery rule.

### A. Genuine issues of material fact exist as to when Peavey's tort claims accrued under the continuing tort doctrine.

This Court has defined the continuing tort doctrine as follows:

> [W]here a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury, or when the tortious acts cease. Where the tortious act has been completed, or the tortious acts have ceased, the period of limitations will not be extended on the ground of a continuing wrong.
>
> A 'continuing tort' is one inflicted over a period of time; it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action. A continuing tort sufficient to toll a statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation.

*Smith v. Franklin Custodian Funds, Inc.*, 726 So. 2d 144, 148 (Miss. 1998) (quoting *Stevens v. Lake*, 615 So. 2d 1177, 1183 (Miss. 1993)). "The defendant must commit *repeated acts of wrongful conduct*" for the doctrine to toll limitations. *Smith*, 726 So. 2d at 149 (emphasis added).

For example, the continuing tort doctrine has been applied to a claim for the intentional infliction of emotional distress arising out of a vengeful son's repeated attempts to have his father committed to a mental institution. *See McCorkle v. McCorkle*, 811 So. 2d 258, 264 (Miss. App. 2001). Even though the son's initial attempts took place outside the limitations period, those attempts were closely related to misconduct occurring within limitations, so all of the conduct was treated as part of "one continuing act." *Id.* In contrast, the doctrine did not toll limitations for an emotional distress claim arising out of a single act of misconduct – the filing of a frivolous lawsuit. *See Randolph v. Lambert*, 926 So. 2d 941, 945 (Miss. App. 2006). The critical distinction is whether the alleged harm resulted from a single act or from "continuing unlawful acts." *See id.*

Here, Peavey's tort claims arise out of Baan's continuing misrepresentations that the software package Baan sold Peavey could be fully implemented to perform as promised. Those misrepresentations began in 1997, when Baan induced Peavey to purchase the software package, and continued at least through 2003, with Baan's repeated affirmations that Baan could achieve full implementation.

Peavey's original justification for buying the software package was based on an extensive evaluation process that involved meeting with Baan representatives, reviewing Baan product documentation, visiting the Baan plant, and attending Baan user presentations. (*See* App. M at 15034.) Based on Baan's representations, Peavey concluded it could achieve "pay back" in less than four years and increase its cash flow by more than $13.5 million after five years. (*Id.* at 15051.) These estimated savings

were primarily based on Baan's promised integration of sales and distribution with manufacturing and engineering. (*See* App. T at 14792.)

Even after significant problems were encountered during Phase I of implementation, Baan continued to reassure Peavey that it could implement the full software package Peavey had purchased using Baan IVc2 – even though Baan knew that Baan IVc2 could not be integrated with SCS. (*See* Apps. O, Q, R, T.) Baan's misrepresentations that it could fully implement an incompatible package of software continued into 2003, less than a year before Peavey filed suit. (*See* App. T; 62 CR 9297 ¶ 8.)

The trial court mistakenly assumed that Baan's only wrongful act was the 1997 sale of defective software. In so doing, the court overlooked evidence raising a fact issue about whether Peavey's injury resulted from "continuing unlawful acts," *i.e.*, the ongoing, actionable misrepresentations that provide the basis for Peavey's tort claims. Although Peavey knew about the problems implementing Phase I of the software package in July of 1999 – and that Baan was "furiously trying to fix bugs in the integration of SCS and Baan" – Peavey did not know that Baan IV and Baan SCS were fundamentally incompatible. (*See* App. X at 8886.) Consequently, Peavey did not know that Baan's continuing representations that the software package could be fully implemented – representations made from 1997 through 2003 – were false.

Erroneously construing the evidence in a light most favorable to Baan, the trial court further assumed that Baan's attempts to sell Peavey additional software had nothing to do with Peavey's claims because they were not representations about the current

software. (*See* App. C at 4776.) However, Baan's sales efforts – misleadingly characterized as "ERP *re*-implementation as an opportunity to improve the flexibility and effectiveness of operations" (99 CR 14941) – were inextricably intertwined with Baan's efforts to conceal its failure to deliver and implement the original software package it sold to Peavey. (*See* App. X at 8855.) The evidence thus raises fact issues about whether Baan attempted to sell Peavey additional software to avoid (or at least delay) legal action.

In sum, the evidence most favorable to Peavey raises fact issues about whether Baan engaged in repeated acts of wrongful conduct sufficient to toll the statute of limitations under the continuing tort doctrine. Accordingly, the trial court's order granting partial summary judgment on Peavey's tort claims must be reversed. *See* MISS. R. CIV. P. 56; *Smith*, 726 So. 2d at 148.

### B. Genuine issues of material fact exist as to whether Baan is equitably estopped from asserting that the statute of limitations is a defense to Peavey's tort claims.

The trial court correctly recognized that a party can be equitably estopped from asserting a defense based on the statute of limitations. (*See* App. C at 4775-77.) However, misapplying the summary judgment standard, the trial court stated that Peavey did not present "any *significant* evidence" to support tolling the statute of limitations based on the equitable estoppel doctrine. (*Id.* at 4776 (emphasis added).)

The equitable estoppel doctrine can prevent a party from successfully asserting a statute of limitations defense when "inequitable or fraudulent conduct" is established. *See Trosclair v. Miss. Dep't of Transp.*, 757 So. 2d 178, 181 (Miss. 2000). To toll limitations based on estoppel, a plaintiff must prove that: (i) it was induced by the

defendant's conduct not to file its complaint sooner; (ii) its claim was barred by limitations as a result; and (iii) the defendant knew or had reason to know that such consequences would follow. *Harrison Enters., Inc. v. Trilogy Commc'ns, Inc.*, 818 So. 2d 1088, 1095 (Miss. 2002).

*Harrison* involved a suit on an open account where a seller, Trilogy, made repeated attempts to recover its debt from a buyer, Harrison Enterprises. *Id.* at 1091. Harrison responded to Trilogy's requests by asking for more time and promising to pay later. *Id.* When Trilogy finally resorted to legal action, this Court held that the equitable estoppel doctrine barred Harrison from asserting a limitations defense. *Id.* at 1096. The Court's rationale is particularly noteworthy:

> The stated purpose behind the statute [of limitations] is to discourage lawsuits. Further, it is to reward the vigilant, not the negligent. It is to prevent false and stale claims. None of these concerns are exemplified here. Trilogy was trying to solve this problem without resorting to a lawsuit. Trilogy was vigilant in pursuing this debt, relying on the continual reassurances by Harrison Enterprises.

*Id.*

Applying *Harrison* to analogous facts, the Mississippi Court of Appeals recently concluded that fact issues about whether equitable estoppel acted to toll limitations precluded summary judgment. *See Douglas Parker Elec., Inc. v. Miss. Design & Dev. Corp.*, 949 So. 2d 874, 879 (Miss. App. 2007). The Court reversed a summary judgment order because the plaintiff's version of events – *taken as true, as required on summary judgment* – showed that the defendant, who had made "regular reassurances" that it would pay the plaintiff, knew or should have known that its actions would cause plaintiff to delay filing suit. *Id.* Clearly, the same reasoning applies to the case at bar.

*1. Peavey was induced by Baan's conduct not to file its complaint sooner.*

"[I]nducement may consist either 'of an express representation that the claim will be settled without litigation or *conduct that suggests a lawsuit is not necessary.*'" *Miss. Dep't of Pub. Safety v. Stringer*, 748 So. 2d 662, 666 (Miss. 1999) (emphasis added); *see also Douglas Parker*, 949 So. 2d at 879. For instance, a party attempting to resolve a problem without resorting to a lawsuit may be "induced" not to file its complaint within the limitations period by "continual reassurances" that the other party will perform its obligations. *See Harrison*, 818 So. 2d at 1096; *see also Izard v. Mikell*, 163 So. 498, 499, 173 Miss. 770 (Miss. 1935) (holding that estoppel tolls limitations when a plaintiff is induced "to believe that an amicable adjustment of the claim will be made without suit"); *Douglas Parker*, 949 So. 2d at 879.

It is undisputed that the Baan software was to be implemented in phases, that Peavey experienced significant problems with the July 1999 attempt to "go live" on the sales and distribution modules during Phase I, and that Peavey filed suit more than three years after those problems arose. However, the evidence clearly raises a fact issue about whether Baan's continuing reassurances that it could resolve the software problems and achieve full implementation induced Peavey not to file suit within three years of experiencing the initial problems.

The record contains numerous documents evidencing communications between Peavey and Baan after the failed July 1999 attempt to "go live" with Phase I. (*See* Apps. Q-T; 62 CR 9297 ¶ 8.) From 1999 until at least 2003, Baan repeatedly told Peavey it could achieve full implementation of the software package that Peavey purchased. (*See*

*id.*) The evidence of Baan's reassurances that Baan would meet its contractual obligations and provide Peavey with a fully integrated software package as promised is sufficient to raise a fact question on the inducement element of equitable estoppel. *See Harrison*, 818 So. 2d at 1096; *Stringer*, 748 So. 2d at 666; *Douglas Parker*, 949 So. 2d at 879.

***2. Peavey's claims were barred by limitations as a result of Baan's conduct.***

Assuming, without conceding, that Peavey's tort claims accrued in July 1999 – even before Baan committed some of the continuing wrongful acts that gave rise to those claims – Peavey's tort claims would have been barred by limitations as a result of Baan's successful efforts to induce Peavey from filing suit earlier. Accordingly, the second element of equitable estoppel is satisfied.

***3. Baan's conduct was inequitable or fraudulent.***

The evidence favorable to Peavey also raises a fact issue about whether Baan's conduct in inducing Peavey not to file suit earlier was inequitable or fraudulent. There is ample evidence that Baan knew by early 1999 that the SCS applications it sold Peavey were incompatible with Baan IVc2. (*See* App. O.) Indeed, a Baan consultant recognized that Baan was on "VERY thin ice" because it was billing Peavey to build a software model that "may not exist." (*Id.*) Baan also knew that other customers had problems upgrading to version IVc3 and that Peavey would be "EXTREMELY upset" if it experienced similar problems. (*Id.*)

In the fall of 1999, a Baan consultant acknowledged that "the full suite of BaanSCS products *will not operate* under the Baan IVc2 product." (App. Q at 14934

(emphasis added).) Instead of informing Peavey of these issues, Baan continued billing Peavey to pay for consultants who were leading Peavey on "wild goose chases" and to support software that could not be implemented. (*See* App. O; 62 CR 9316-18.) Baan was also smelling "big bucks" from additional sales it hoped to make if it could convince Peavey to buy even more software to achieve the results Baan promised when it sold the original package. (98 CR 14771.) This evidence raises a fact issue about the third element of the equitable estoppel doctrine and demonstrates that this is the very sort of case in which a party should be estopped from asserting a limitations defense. *See Harrison*, 818 So. 2d at 1095.

Misapplying the summary judgment standard, the trial court stated that Peavey did not present "any *significant* evidence" to support tolling the statute of limitations based on the equitable estoppel doctrine. (App. C at 4776 (emphasis added).) This Court need not decide whether Peavey presented "significant evidence" to support tolling. The correct standard is whether the trial court could have found "beyond any reasonable doubt that [Peavey] would be unable to prove any facts to support [its affirmative defenses]." *See Robinson*, 763 So. 2d at 886. Because the record contains enough evidence to raise a fact issue about whether limitations was tolled by the equitable estoppel doctrine, the trial court's order granting partial summary judgment on Peavey's tort claims must be reversed. *See* MISS. R. CIV. P. 56; *Trosclair*, 757 So. 2d at 181.

### C. Genuine issues of material fact exist about whether the fraudulent concealment doctrine tolled limitations on Peavey's tort claims.

The trial court also misapplied the summary judgment standard and the law governing the fraudulent concealment doctrine. Fraudulent concealment of a cause of

action tolls the statute of limitations until "the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered." MISS. CODE § 15-1-37; *see also Robinson*, 763 So. 2d at 887. "The fraudulent concealment doctrine 'applies to any cause of action.'" *Robinson*, 763 So. 2d at 887. To establish fraudulent concealment, a plaintiff must show: (i) "some act or conduct of an affirmative nature designed to prevent and which does prevent discovery of the claim"; and (ii) that he or she "acted with due diligence in attempting to discover [the] claim." *Id.* at 887-88.

*Robinson* illustrates how this Court has previously applied the fraudulent concealment doctrine to a case dismissed on summary judgment. Robinson and Johnson were killed when their truck was hit by a tractor-trailer driven by Dennis Doom. *Id.* at 885. Officers from the Mississippi Highway Patrol investigated the accident and learned from witnesses that a third driver, Robert Cobb, was chasing Robinson's vehicle "at a high rate of speed while firing shots at it" just before the accident occurred. *Id.* Cobb denied any involvement, and the investigators decided not to file criminal charges. *Id.*

Robinson's and Johnson's surviving family members filed wrongful death actions against Doom within the applicable limitations period, but did not discover claims that Cobb was involved in the accident until after limitations had expired. *Id.* at 887. The trial court granted Cobb's motion for summary judgment based on limitations. *Id.* at 886. This Court reversed, concluding that "[w]hether Cobb concealed his participation in the fatal wreck is a fact question that should have been left for jury determination." *Id.* at 888. The evidence before the Court also showed that an attorney for the plaintiffs had hired someone to investigate the accident, but the MHP did not reveal information that

might have enabled plaintiffs to connect Cobb to the accident. *See id.* at 885-86. Consequently, the Court also concluded that "[t]here was enough conflicting evidence before the circuit court regarding the due diligence issue to deny the motion for summary judgment." *Id.* at 888.

Here, as set out below, the summary judgment evidence raises fact issues on both elements of the fraudulent concealment doctrine.

***1. Baan took affirmative actions to prevent discovery of Peavey's claims.***

Baan knew by early 1999 that the SCS applications it had sold Peavey were incompatible with the Baan IVc2 software it had installed on Peavey's computers. (*See* App. O.) But instead of telling Peavey, Baan continued billing Peavey for consultants who were leading Peavey on "wild goose chases" and for maintenance and support fees to support software that Baan knew could not be implemented. (*See id.*; 62 CR 9316-18.) In addition, Baan tried to conceal the integration problems by blaming Peavey for customizing the software (*see* App. T at 14792), and by trying to convince Peavey to upgrade to a newer version of software (*see* 99 CR 14941).

Failing to view the evidence in a light favorable to Peavey, the trial court made an impermissible fact finding that Baan did nothing to prevent Peavey from discovering its claims. (*See* App. C at 4781.) In so doing, the court mistakenly assumed that Peavey knew about its claims in July 1999 "when it went live on *the software*." (*Id.* (emphasis added).) Again, the trial court overlooked the fact that "the software" was a large bundle of different components and that, in July 1999, Peavey went live only on a small portion of that bundle. Although Baan did not prevent Peavey from discovering the intial

problems that were manifest in July 1999, the evidence, properly construed, raises a fact issue about whether Baan took affirmative steps to prevent Peavey from discovering that key components in the bundle were incompatible.

*2. Peavey exercised due diligence in trying to discover its claims.*

The trial court also recognized evidence raising a fact issue about whether Peavey exercised due diligence in trying to discover its claims. For instance, the court acknowledged that Peavey "hired Ken Kantor, a professional in the area of information systems," who had "experience with ERP software and implementation" as its director of information services in October 1999. (App. C at 4766.) Kantor "made a thorough investigation of the cause of the problems Peavey experienced during the [July 1999] 'go live' . . .[,] assessed the status of Peavey's information systems . . . [and] prepared a report to the senior management of Peavey outlining his assessment and recommendations concerning the ERP project." (*Id.*) In 2001, Peavey commissioned Ellen Moreland to perform another assessment to determine the cause of its problems. (*See* 99 CR 14992 – 100 CR 15018.)

Although Kantor concluded that Peavey's problems were "our own making" (*i.e.*, caused by the customizations) and "not inherent in Baan" (App. C at 4766), Kantor's conclusions about the "cause" of Peavey's problems are irrelevant.[5] The fact that Peavey was attempting to determine the cause of its problems raises a fact issue on the second element of the fraudulent concealment doctrine. Fact issues on both elements of the

[5] As previously explained, Baan recommended and supervised the customizations. (*See supra* at 10-11.) Moreover, nothing in the Kantor or Moreland reports reveals what is evident from Baan's internal communications: Baan's highly paid consultants knew that key parts of the expensive bundle of software Baan sold Peavey were fundamentally incompatible and, therefore, that the bundle could not be fully implemented. (*See* Apps. O, Q, R, T.)

fraudulent concealment doctrine should have precluded the trial court from dismissing Peavey's tort claims based on limitations. *See* MISS. R. CIV. P. 56; MISS. CODE § 15-1-37; *Robinson*, 763 So. 2d at 887.

### D. Genuine issues of material fact exist as to whether the discovery rule tolled the statute of limitations on Peavey's tort claims.

The discovery rule applies to toll limitations until "a plaintiff 'should have reasonably known of some negligent conduct, even if the plaintiff does not know with absolute certainty that the conduct was legally negligent.'" *Boyles v. Schlumberger Tech. Corp.*, 832 So. 2d 503, 506 (Miss. 2002) (quoting *Sarris v. Smith*, 782 So. 2d 721, 725 (Miss. 2001)). The statute of limitations begins to run "when the [plaintiff] can reasonably be held to have knowledge of the injury itself, the *cause* of the injury, and the *causative relationship* between the injury and the conduct of the [defendant]." *Boyles*, 782 So. 2d at 725 (quoting *Smith v. Sanders*, 485 So. 2d 1051, 1052 (Miss. 1986)) (emphasis added).

For example, limitations does not begin to run on a medical malpractice claim as soon as a patient dies from a heart attack. *Sarris*, 782 So. 2d at 723-24. That is because a surviving family member cannot reasonably know the causal relationship between the patient's death and the doctor's malpractice until she reviews medical records showing the doctor's misinterpretation of test results and failure to inform the patient of the need for follow-up treatment. *Id.* If the defendant fails to present evidence conclusively establishing when the plaintiff discovered it had an injury caused by defendant's conduct, judgment as a matter of law is improper. *Smith*, 485 So. 2d at 1055.

In this case, the trial court recognized these principles, but it incorrectly assumed that Peavey's injury was the harm that resulted when the Phase I "go live" failed in July 1999. (*See* App. C at 4778-79.) The court further erred by ignoring fact issues relating to causation. (*Id.*)

***1. Peavey's injury was latent and undiscoverable.***

The trial court's impermissible finding that Peavey's injury was not latent is again based on the court's fundamental misunderstanding of Peavey's claim. Peavey's injury is not simply that Phase I did not work when installed; rather, it is that the software package Baan sold and agreed to implement could not be installed to function in an integrated manner because, as Peavey eventually discovered, the SCS component of the package either did not exist or was incompatible with the remaining components. (*See* Apps. O, Q, R.) Incorrectly assuming that Peavey was only complaining about manifest defects in the software components installed in July 1999, the trial court mistakenly believed that Peavey's injury occurred at that time and, therefore, that the discovery rule did not toll limitations. (*See* App. C at 4779.) In 1999, not even Baan knew whether SCS was compatible with Baan IVc2 and, therefore, whether it could be fully implemented on the Peavey system. (*See* App. O.) If Baan did not know about Peavey's injury, then Peavey could not reasonably have known. Because the trial court's summary judgment is based on an impermissible and erroneous finding about the nature of Peavey's injury, it must be reversed.

### 2. *The trial court ignored fact issues about causation.*

Confusion about Peavey's injury caused the trial court to ignore fact issues on causation. Peavey obviously knew that some of the software components installed in Phase I did not work. However, at that time, Peavey could not have reasonably known that some of the components to be installed in Phase II either did not exist or could not be integrated with the other software it purchased. Although the trial court acknowledged that Peavey might not have known the exact cause of the problems it experienced in 1999, it still concluded that the discovery rule did not apply. (App. C at 4779.) Because Peavey could not reasonably have known about its injury – much less, about the causative relationship between its injury and Baan's misconduct – Peavey's tort claims did not accrue in 1999 or 2000, as the trial court incorrectly determined. (*See id.*) Fact issues about the discovery rule's application should have precluded summary judgment.

## E. **The order dismissing Peavey's tort claims must be reversed.**

The summary judgment evidence raises numerous fact issues about when Peavey's tort claims accrued, about whether Baan should be estopped from asserting the statute of limitations, and about whether the statute was tolled by the fraudulent concealment doctrine or the discovery rule. Accordingly, the trial court erred in granting Baan's summary judgment motion. *See* MISS. R. CIV. P. 56; *Robinson*, 763 So. 2d at 886. Alternatively, the court erred in dismissing Peavey's tort claims without allowing Peavey to conduct discovery in support of its claims. Either way, the trial court's order dismissing Peavey's tort claims must be reversed.

## III. The Trial Court Erred in Granting Summary Judgment on Peavey's Contract and Warranty Claims.

After dismissing Peavey's tort claims, the trial court considered a second summary judgment motion filed by Baan – this time, seeking judgment on Peavey's contract and warranty claims. (*See* 32 CR 4820.) The court erred in dismissing the claims arising from the Software Agreement based on waiver, a ground not even asserted by Baan in its motion. (*See* App. E at 14471.) The court further erred in dismissing the claims arising from the Services Agreement based on limitations. (*Id.*) Baan was not entitled to summary judgment on the contract and warranty claims based on waiver, limitations, or any other asserted ground.[6] Accordingly, the order dismissing Peavey's contract and warranty claims must be reversed.

### A. The trial court erred in granting summary judgment on Peavey's claims arising from the Software Agreement.

Ignoring Baan's alleged grounds, the trial court granted summary judgment on the Software Agreement claims based on a waiver ground that Baan never raised. (App. E at 14471.) The errors in the court's waiver analysis demonstrate why a trial court should not rule on grounds neither raised nor argued – and why the trial court's order cannot be upheld on appeal.

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[6] Baan also moved for summary judgment based on lack of notice and failure to revoke acceptance, which, Baan alleged, deprived Baan of a reasonable opportunity to cure any deficiencies. (*See* 32 CR 4820.) Baan further argued that Peavey's implied warranty claims were properly disclaimed. (*Id.*) Anticipating that the trial court might reject all these arguments, Baan also moved for "no evidence" summary judgment on the ground that "Peavey has failed to put forth evidence from which a reasonable trier of fact could find in Peavey's favor on any of its claims." (*Id.*) None of these grounds was addressed in the court's order granting summary judgment. (*See* App. E.)

### *1. The court should not have granted summary judgment* sua sponte *on a ground not raised in Baan's motion.*

Under the Federal Rules of Civil Procedure, "'a district court may not grant summary judgment *sua sponte* on grounds not requested by the moving party.'" *Baker v. Metro. Life Ins. Co.*, 364 F.3d 624, 632 (5th Cir. 2004) (quoting *John Deere*, 809 F.2d at 1192). That is because the procedural safeguards in the summary judgment rule entitle the non-moving party to an opportunity to respond. *See John Deere*, 809 F.2d at 1192. The Mississippi Rules of Civil Procedure are construed the same way. *See Nichols v. Tubb, M.D.*, 609 So. 2d 377, 383 (Miss. 1992).

Here, without the benefit of any briefing by the parties – and without giving Peavey notice or an opportunity to respond to an argument based on a clearly inapplicable theory – the trial court granted summary judgment based on waiver. (*See* App. E at 14471.) The court's order must be vacated, and the case must be remanded to the trial court for further proceedings based on this error alone. *See Baker*, 364 F.3d at 632.

### *2. Baan is not entitled to summary judgment based on waiver.*

If the trial court's waiver theory had been raised and Peavey had been given an opportunity to respond, it could have explained why waiver does not apply to Peavey's claims based on the Software Agreement. Instead, the trial court misapplied the law on waiver and improperly deprived Peavey of its right to a trial on the merits concerning its Software Agreement claims.

The court's waiver analysis is based on cases in which the parties to an original contract entered into a subsequent contract that nullified and superseded the original one.

(*See* App. E at 14467-69 (discussing *Kelso v. McGowan*, 604 So. 2d 726 (Miss. 1992), and *Eubanks v. W. H. Hodges & Co.*, 180 So. 2d 922, 254 Miss. 376 (Miss. 1965)).) In such instances, "the original contract is superseded and the new contract becomes the subsisting obligation between the parties." (App. E at 14468 (quoting *Eubanks*, 254 Miss. at 383).)

*Kelso* involved two written agreements to guarantee loans. 604 So. 2d at 728. In holding that the parole evidence rule did not bar evidence showing that Kelso made contemporaneous and subsequent promises to pay additional consideration for the guarantees, the court acknowledged that contracts can be modified by subsequent agreement of the parties. *Id.* at 731 (quoting 3 CORBIN, CONTRACTS § 574 at 373-75 (1960)). When a contract is modified, "we are no longer interested in the terms of the antecedent contract for purposes of enforcement of them, *in so far as those terms have been nullified by the new agreement.*" *Id.* (emphasis added).

*Eubanks* arose after a borrower defaulted on a promissory note secured by a chattel deed of trust describing 193 cattle. 180 So. 2d at 923. After being sued, the borrower alleged that the maker of the note had fraudulently supplied him with sick cattle, which infected and ultimately destroyed his entire herd. *Id.* at 924. However, because the borrower had voluntarily renewed the note after acquiring full knowledge of the alleged fraud, the court held that he waived any defense or counterclaim based on fraud. *Id.* at 925.

Misplacing its reliance on these authorities, the trial court erroneously assumed that the 2003 Addendum superseded the 1997 Software Agreement in its entirety and,

therefore, that Peavey waived any claims based on the 1997 Software Agreement by entering into the 2003 Addendum. (*See* App. E at 14470-71.) The court's analysis is mistaken in fact and in law.

The 2003 Addendum only amended a few terms in the 1997 Software Agreement. (*See* App. J.) It reduced the number of Baan software users from 500 to 175, reduced the associated support fee, and canceled support of certain software licenses. (*Id.*) However, it did not amend or nullify any of the terms in the 1997 Software Agreement that form the basis of Peavey's complaint. Indeed, the 2003 Addendum expressly states that: "The Agreement as amended by this Addendum *shall remain in full force and effect.*" (*Id.* at 8965 (emphasis added).) Consequently, the 2003 Addendum did not become the "subsisting obligation between the parties." (*Contra* App. E at 14468.)

Nor did Peavey enter into the 2003 Addendum with full knowledge of facts giving rise to its claims based on the 1997 Software Agreement. To the contrary, the evidence favorable to Peavey shows that Peavey executed the 2003 Addendum while it was still trying to work with Baan to achieve full implementation of the software package purchased. (*See, e.g.*, Apps. S & T.) Peavey had not yet filed suit, and there is no evidence that Peavey knew Baan could not achieve the full implementation it had promised. Instead, Baan was attempting to cover up these serious problems by blaming Peavey for attempting to customize the software to fit its business needs and by trying to sell Peavey additional software to achieve the benefits that Peavey was supposed to realize with the original package. (*See* Apps. R - T.) These facts are, therefore, wholly distinguishable from those supporting waiver in *Kelso* and *Eubanks*.

The errors in the trial court's waiver analysis demonstrate why a trial court should not grant summary judgment *sua sponte* on grounds not raised by the moving party. *See Baker*, 364 F.3d at 632. Regardless, the summary judgment dismissing Peavey's claims arising from the Software Agreement cannot be affirmed based on waiver.

### B. The trial court erred in granting summary judgment on Peavey's claims arising from the Services Agreement.

The trial court also concluded that Peavey's claims based on the Services Agreement were barred by limitations. (App. E at 14471.) Again, the court misapplied the summary judgment standard and reached erroneous conclusions about the viability of Peavey's claims.

#### *1. Related transaction documents should be construed as one contract.*

"[W]hen separate documents are executed at the same time, by the same parties, as part of the same transaction, they may be construed as one instrument." *Sullivan v. Mounger*, 882 So. 2d 129, 135 (Miss. 2004). For instance, when parties use multiple agreements to delineate their relationship and the individual agreements are "integral and interrelated parts of the one deal," those individual agreements should be treated as part of a single transaction. *See id.* at 134.

The summary judgment evidence establishes that the parties executed several agreements related to Baan's sale of computer software and services to Peavey. (*See* Apps. I, K, L.) Both the Software Agreement and the Services Agreement were executed by the same parties at the same time as part of the same transaction. (*See* Apps. I & K.) The Services Agreement expressly references, and is integral to and interrelated with, the Software Agreement. (*See* App. K.) Indeed, the main purpose of the Services

Agreement was to "describe[] the terms and conditions pursuant to which Baan will provide professional services with respect to the Software licensed by Baan to [Peavey] . . . pursuant to a certain Software License and Support Agreement." (*Id.* at 8960.) Under these circumstances, the Software and Services Agreements should be construed as a single contract. *See Sullivan*, 882 So. 2d at 135.

Construing the Agreements together is consistent with Mississippi law and the parties' clear intent as manifest in both Agreements. Indeed, Baan espoused – and an Indiana appellate court adopted – this position in *Dexter Axle Co. v. Baan USA, Inc.*, 833 N.E.2d 43, 50 (Ind. App. 2005), a case with facts that are strikingly similar to those presented here:

*Dexter* arose after "Baan and Dexter entered into a Software License and Support Agreement (Software Agreement) under which Baan licensed to Dexter use of several of Baan's software products including its Enterprise Resource Planning (ERP) software." *Id.* at 46. "Because ERP software is not fully functional 'off the shelf,' the user typically engages consultants to 'implement' the software, which involves configuring the software and business processes and training users to use the software." *Id.* at 46-47. "Accordingly, . . . the parties entered into a second agreement – the Consulting Services Agreement (Consulting Agreement) whereby Baan agreed to provide certain consulting services related to implementing the ERP software for Dexter." *Id.* at 47. Dexter "went 'live' on the ERP software" and experienced significant problems. *Id.* After terminating both agreements, Dexter sued Baan for damages. *Id.*

The issue in *Dexter* was whether a forum selection clause in the Consulting Agreement applied to claims arising out of the Software Agreement.[7] *Id.* at 50. In response to Dexter's contention that the two contracts are "separate, discrete, and independent," Baan took the position that "the two agreements are intertwined and interrelated and all of Dexter's claims arise from the same transaction." *Id.* The Indiana court of appeals agreed with Baan. *Id.* at 51 (recognizing that "Dexter and Baan entered into a single business transaction whereby Dexter sought to obtain from Baan licensing and implementation of an ERP computer system"). Although the parties' business relationship was governed by two contracts, the court concluded that "both contract[s] were part of a single business transaction and are pieces of the same 'jigsaw puzzle.'" *Id.* Accordingly, the court held that the forum selection clause applied to all claims arising out of either agreement. *Id.*

In this case, the trial court mistakenly viewed the Services Agreement in isolation instead of construing it as part of a single transaction. (*See* App. E at 14471.) Consequently, it erroneously concluded the Services Agreement was governed by the three-year statute of limitations. If the court had properly construed the parties' agreements as a single transaction, it would have recognized that the agreements at issue form a single contract for the sale of goods (computer software) and related services (installation, consulting, maintenance, and support). *See Sullivan*, 882 So. 2d at 135; *Dexter*, 833 N.E.2d at 50-51.

[7] Baan sought to have the forum selection cause in the Consulting Agreement apply to Dexter's claims under the Software Agreement.

### 2. *The court erred in applying the three-year statute of limitations.*

In cases involving mixed transactions, "whether or not the contract should be interpreted under the UCC [Uniform Commercial Code] or general contract law should depend on the nature of the contract and also upon whether the *dispute* in question primarily concerns the goods furnished or the services rendered under the contract." *J.O. Hooker & Sons, Inc. v. Roberts Cabinet Co.*, 683 So. 2d 396, 400 (Miss. 1996). If the dispute concerns the quality of the goods furnished, "[t]his Court *would not hesitate* to apply Article 2." *Id.* (emphasis added). However, if the fact that goods were furnished has no bearing on the legal analysis, the dispute clearly concerns the service aspect of a mixed transaction, and the UCC does not apply. *Id.*

Here, the contractual dispute in question involves Baan's obligation to deliver and implement the software package Peavey purchased. Baan's obligation to furnish the services portion of the parties' transaction is ancillary to its obligations under the Software Agreement. (*See* App. K.) Because this dispute is, at its core, about the quality of the software package Baan sold to Peavey, the trial court should not have hesitated to apply the UCC. *See J.O. Hooker*, 683 So. 2d at 400. Instead, the court erred in concluding that Peavey's claims were governed by the three-year limitations period in Mississippi Code § 15-1-49. (*See* App. E at 14471.)

### 3. ***Alternatively, fact questions about whether Baan is equitably estopped from asserting a limitations defense require reversing the order dismissing Peavey's claims arising from the Services Agreement.***

Alternatively, as explained more fully above, genuine questions of material fact about whether Baan is equitably estopped from asserting a limitations defense should

have also precluded summary judgment on Peavey's claims relating to the Services Agreement. (*See supra* at 20-24.) Because the record contains sufficient evidence to raise a fact issue on each element of Peavey's estoppel defense, the trial court erred in granting summary judgment on Peavey's claim for breach of the Services Agreement based on limitations.

In sum, the trial court erred in applying the three-year statute of limitations to claims arising out of the Services Agreement. Alternatively, the record contains sufficient evidence to raise a fact issue on each element of Peavey's estoppel defense to limitations. For either or both reasons, the trial court's order granting summary judgment on Peavey's claims arising from the Services Agreement cannot be sustained based on the three-year statute of limitations in Mississippi Code § 15-1-49.

### C. The trial court's order cannot be sustained on any other asserted ground.

Baan alleged three other grounds for summary judgment on Peavey's contract and warranty claims: (i) lack of notice; (ii) disclaimer of implied warranty claims; and (iii) "fail[ure] to put forth evidence from which a reasonable trier of fact could find in Peavey's favor on any of its claims." (32 CR 4820.) The trial court did not rule on any of these grounds. (*See* App. E.)

As a general rule, this Court does not consider issues not decided by the trial court. *Tricon Metals & Servs., Inc. v. Topp*, 516 So. 2d 236, 239 (Miss. 1987). There is no reason to depart from the general rule here. But even if the Court were to disregard established precedent and consider issues not ruled upon, those issues would provide no basis for affirming the trial court's judgment.

### *1. Baan is not entitled to summary judgment based on lack of notice.*

Baan argued that it was entitled to summary judgment on Peavey's contract and warranty claims because "Peavey failed to notify Baan USA of any alleged breach prior to bringing this lawsuit and accordingly failed to revoke its acceptance [of the goods]." (32 CR 4820.) Baan is mistaken.

Mississippi law does not require a buyer to revoke acceptance as a prerequisite to sue for breach of contract or warranty. *See* MISS. CODE § 75-2-714.[8] To the contrary, a buyer can recover damages for "any nonconformity" in accepted goods if the buyer gives notice that satisfies § 75-2-607. *See* § 75-2-714. A nonconformity "includes not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract." § 75-2-714 cmt. 2. Accordingly, the order dismissing Peavey's contract and warranty claims cannot be sustained based on Peavey's alleged failure to revoke acceptance.

Nor does Baan's notice ground provide any basis for affirming the order. To satisfy the notice requirement and recover damages for a nonconformity in accepted goods, "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of the breach or be barred from any remedy." § 75-2-607(3). The notice requirement is liberal:

> The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer . . . . Nor is there reason for requiring the

[8] However, if a buyer revokes acceptance within a reasonable time after discovering the ground for it, the buyer "has the same rights and duties with regard to the goods involved as if he had rejected them." § 75-2-608.

> notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification . . . need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

§ 75-2-607, cmt. 4. Thus, notice "need not be a specific claim for damages or an assertion of legal rights." *Miss. Chem. Corp. v. Dresser-Rand Co.*, 287 F.3d 359, 368 (5th Cir. 2002) (construing MISS. CODE § 75-2-607(3)(a) and quoting *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 976 (5th Cir. 1976)). "Whether a notice provision has been complied with 'is a question which is *particularly within the province of the jury.*'" *Miss. Chem. Corp.*, 287 F.3d at 368 (quoting *Eastern Air Lines*, 532 F.2d at 973) (emphasis added).

The record contains ample evidence that Peavey gave Baan notice that the software at issue did not conform to Baan's contractual obligations and warranties. For instance, Peavey sent Baan a detailed list of issues after the July 1999 "go live" on Phase I of the implementation. (*See* App. P.) Because Baan consultants were on-site supervising the implementation, Baan was clearly aware of the problems experienced in July 1999 and that the software it sold and attempted to implement at Peavey was not performing as promised. (*Id.*; *see also* App. Q.) Indeed, Baan continued to work with Peavey to resolve those problems and to complete implementation of the entire software package as planned. (*See* Apps. Q - T.)

In 2002, Peavey also put Baan on notice of Peavey's dissatisfaction with the lack of integration for the SCS products. (*See* 69 CR 10380-85; App. S.) Peavey's notice concerning SCS issues and its accompanying request for concessions also meets the liberal notice standard in § 75-2-607. It informed Baan that the transaction remained

troublesome and that concessions were required because Baan still had not provided the promised software and related services.

For these reasons, Baan clearly failed to meet its summary judgment burden to conclusively establish its "lack of notice" defense. *See* MISS. R. CIV. P. 56. Nor could it, when the adequacy of Peavey's notice is a fact question for the jury to resolve. *See Miss. Chem. Corp.*, 287 F.3d at 368. Accordingly, the trial court's order granting summary judgment cannot be sustained based on insufficient notice.

### 2. *Baan is not entitled to summary judgment based on invalid warranty disclaimers.*

Baan also moved for summary judgment on Peavey's implied warranty claims on the ground that such claims were "properly disclaimed." (*See* 32 CR 4820.) Again, Baan's argument is inconsistent with Mississippi law and must be rejected.

Mississippi law provides, as a general rule, that "there shall be no limitation of remedies or disclaimer of liability as to any implied warranty of merchantability or fitness for a particular purpose." MISS. CODE § 11-7-18. Nevertheless, Baan attempted to disclaim these implied warranties in both the Software and the Services Agreements. (*See* App. I § 7.2; App. K § 5.1.) Those purported disclaimers were invalid under the law in effect in 1997 when the agreements were executed. *See* MISS. CODE § 11-7-18.

In 1998, the Legislature amended the Mississippi Code to allow disclaimers of implied warranties relating to computer software and services that are "sold between merchants." *See* 1998 Miss. Laws Ch. 513 (H.B. 1392) (the "1998 Amendments"). However, the trial court's order cannot be sustained on these amendments for two reasons:

First, the 1998 Amendments did not take effect until July 1, 1998 – more than eight months after the Agreements were executed. This Court does not give a statute retroactive effect unless the statute contains a clear and positive declaration that it is to be given retroactive effect. *See Boston v. Hartford Accident & Indem. Co.*, 822 So. 2d 239, 245 (Miss. 2002), overruled on other grounds by *Capital City Ins. Co. v. G.B. "Boots" Smith Corp.*, 889 So. 2d 505 (Miss. 2004). The 1998 Amendments contain no such declaration, and the Court should not apply them retroactively to impose obligations that were illegal and unenforceable when the parties entered into the Agreements. *See id.*

Second, even if the Court concludes that the 1998 Amendments apply retroactively to impose new obligations on Peavey, Baan did not meet its summary judgment burden to conclusively establish that the computer software and services at issue were sold "between merchants." "'Between merchants' means in any transaction with respect to which both parties are chargeable with the knowledge and skill of merchants." MISS. CODE ANN. § 75-2-104(3). A "merchant" means any "person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." § 75-2-104(1). Peavey deals in musical and audio equipment, not sophisticated computer software. (*See* App. X at 8853.) That is why Peavey engaged Baan consultants to implement the computer software at issue. (*See* App. K.) These circumstances raise, at minimum, a fact issue as to whether the transaction at issue was

"between merchants." That fact issue precludes summary judgment on Baan's "implied warranty" ground.

For either or both of these reasons, the summary judgment order cannot be sustained as to the implied warranty claims.

### *3. Peavey presented sufficient evidence to reach a jury on all its claims*

Recognizing that the trial court might reject all of Baan's arguments that Peavey's claims are legally barred, Baan asserted that it was still entitled to summary judgment because "Peavey has failed to put forth evidence from which a reasonable trier of fact could find in Peavey's favor on any of its claims." (32 CR 4820.) Baan's blanket assertion appears to be based on "undisputed facts" suggesting that the problems Peavey experienced were caused by Peavey and not inherent in Baan. (*See* 32 CR 4829 (citing testimony and June 2000 report by Ken Kantor).)

Kantor's opinions are not "undisputed facts." To the contrary, his statements are contradicted by other summary judgment evidence. Although Kantor opined that Peavey's problems were not caused by Baan, the evidence favorable to Peavey shows that Baan:

- knew as early as 1999 that it was billing Peavey to implement a software model that "may not exist" (App. O);
- knew as early as 1999 that "the full suite of BaanSCS products will not operate under the Baan IVc2 product" (App. Q);
- knew by 2002 that Peavey had paid $314,009 to support products for which "integration was not available" (App. R);
- was contractually obligated to supervise implementation of the software package Peavey purchased (App. K);

- developed a Blueprint for implementation that identified and prioritized software customizations to accommodate Peavey's business needs (60 CR 9008); and
- failed to warn Peavey that customization might hinder Peavey's ability to implement the full software package it purchased (*see* 61 CR 9231 ¶ 8; 62 CR 9280 ¶ 6; 62 CR 9311 ¶¶ 6-8).

This and other evidence before the court clearly raises fact issues on all elements of Peavey's contract and warranty claims. (*See also* 58 CR 8704 – 64 CR 9709 (Peavey's Br. in Opposition to Baan's 2d Mot. for Summ. J. & Exs.).) The trial court's order cannot be sustained on Baan's "no evidence" ground. *See* MISS. R. CIV. P. 56.

### D. The order dismissing Peavey's contract and warranty claims must be reversed.

The trial court erred in granting summary judgment on Peavey's contract and warranty claims. Baan neither requested nor was entitled to summary judgment on the Software Agreement claims based on waiver, the Services Agreement claims were erroneously dismissed based on limitations, and the summary judgment order cannot be sustained on any other ground. Alternatively, the trial court erred in granting summary judgment without allowing Peavey to conduct discovery in support of its claims. Either way, the order dismissing Peavey's contract and warranty claims must be reversed and the case remanded to the trial court for further discovery and a trial on the merits.

## IV. The Trial Court Erred in Denying Peavey's Motions To Compel Discovery.

The trial court further erred in granting summary judgment after refusing to allow Peavey opportunities to conduct discovery that was relevant to its claims and could have affected the result at trial. (*See* App. F – H.) Accordingly, the discovery orders under

review should also be reversed and the case remanded to the trial court with instructions to allow the requested discovery.

### A. A trial court abuses its discretion by refusing to allow a litigant to discover important information that could affect the trial of a case.

Although a trial court's discovery rulings are reviewed for abuse of discretion, if "limitations on discovery are improvidently ordered or allowed and important information is denied a litigant[,] reversal will obtain." *Dawkins v. Redd Pest Control Co.*, 607 So. 2d 1232, 1235 (Miss. 1992). In determining whether a trial court abused its discretion in denying discovery, this Court considers whether the trial court was guided by principles that:

> (a) the court follow the general policy that discovery be encouraged, (b) limitations on discovery should be respected but not extended, (c) while the exercise of discretion depends on the parties' factual showings[,] disputed facts should be construed in favor or discovery, and (d) while the importance of the information must be weighed against the hardships and cost of production and its availability through other means, it is preferable for the court to impose partial limitations on discovery rather than an outright denial.

*Id.* at 1236. "Any record which indicates a failure to give adequate consideration to these concepts is subject to the attack of abuse of discretion, regardless of the fact that the order shows no such abuse on its face." *Id.*

"Erroneous denial of discovery is ordinarily prejudicial in the absence of circumstances showing it was harmless." *Id.* If this Court "cannot determine from the record whether the requested documents might have changed the result [at] trial, [it] cannot say the error was harmless." *Id.*

### B. The 2005 Discovery Order must be reversed.

Shortly after filing suit, Peavey sought to discover Baan's research and development records and information about other customer complaints relating to the software at issue. (5 CR 670.) The trial court refused to allow this discovery because it concluded such records were "not relevant" and, therefore, not discoverable. (*See* App. F ("2005 Discovery Order") at 1758.) The court also denied Peavey's motion for reconsideration. (App. G.)

It is unclear why the trial court concluded the requested discovery was not relevant to Peavey's claims. The research and development records clearly relate to the software's functionality and receptiveness to customization, and the customer complaints are directly related to Peavey's fraud and bad faith claims. (*See* 5 CR 676; 14 CR 2155.) As Peavey explained to the trial court, information about Baan's conduct involving other customers could show that Baan's dispute with Peavey is not an isolated incident but, rather, another example of Baan's practice to induce customers to purchase its software by misrepresenting the software's capabilities. (*See* 14 CR 2158.) Indeed, substantially similar conduct gave rise to related litigation in New Mexico. (*See id.*) Consequently, the requested discovery could have revealed Baan's awareness of problems with the software at issue and its inequitable or fraudulent conduct to conceal such problems from Peavey – issues that are central to whether Baan should be equitably estopped from asserting a limitations defense, and to whether limitations was tolled by the fraudulent concealment doctrine.

Because Peavey was denied important discovery that could have affected the result at trial, the trial court abused its discretion in refusing to allow the requested discovery. *See Dawkins*, 607 So. 2d at 1235. This is especially true when the orders at issue defy the very principles that should have guided the trial court's discretion in the first place. *See id.* Nothing in the record can overcome the presumption that the trial court's erroneous denial of discovery was prejudicial. *See id.* Accordingly, the 2005 Discovery Order must be reversed and Peavey should be allowed to discover Baan's research and development records as well as other customer complaints relating to the software at issue.

### C. The 2006 Discovery Order must be reversed.

After the trial court dismissed Peavey's tort claims, Peavey sought to discover documents specifically relating to SCS software. (*See* 36 CR 5352.) Peavey argued that the requested discovery was relevant to its breach of contract and warranty claims because Baan contracted to provide SCS software, Baan breached its contract by failing to do so, and Baan's breach deprived Peavey of its contractual bargain because it impeded full implementation of the software package purchased. (*Id.* at 5354-59.)

The evidence in support of Peavey's SCS discovery requests shows that Baan consultants knew that the package Baan sold Peavey was incapable of being successfully integrated because SCS was incompatible with IVc2, Peavey might have to upgrade to a later version of the ERP software if it wanted the benefits of SCS, other customers were having problems with upgrades, and Peavey would be "EXTREMELY upset" if it experienced similar problems. (*See* 36 CR 5371 – 37 CR 5509.) Nevertheless, the trial

court concluded such evidence was "not relevant" to Peavey's claims because SCS was never installed. (*See* App. H ("2006 Discovery Order") at 8545.) Accordingly, it denied Peavey's motion to compel without any apparent consideration of the *Dawkins* guidelines. (*Id.* at 8546.) In so doing, the trial court further abused its discretion. *See Dawkins*, 607 So. 2d at 1235.

The fact that SCS was never installed does not make the information sought irrelevant to Peavey's claims. To the contrary, the evidence, properly construed in favor of discovery, indicates that SCS was not installed because it was incompatible with the rest of the software Peavey purchased. (*See* App. U at 9554 ¶ 22.) Because Baan's inability to install SCS is a core issue, the 2006 Discovery Order must also be reversed.

In sum, the trial court's erroneous discovery rulings are clearly premised on the same mistaken assumption that led to reversible error in the summary judgment orders – that Peavey's claims relate only to software defects that were manifest at the time of the July 1999 "go live" during the initial phase of the planned installation. For reasons explained above, this Court should reverse the summary judgment orders and remand the case to the trial court for further proceedings consistent with this Court's opinion. The opinion should instruct the trial court that, on remand, Peavey should be allowed to conduct all relevant discovery in accordance with the *Dawkins* guidelines.

## CONCLUSION AND PRAYER

The record establishes that there are genuine issues of material fact that must be resolved by a jury. In reaching the opposite conclusion, the trial court misapplied the summary judgment standard, improperly viewed the evidence in a light favorable to

Baan, impermissibly resolved fact questions against Peavey, and misapplied the substantive law. Accordingly, the summary judgment orders at issue must be reversed and the case must be remanded for a trial on the merits.

It is impossible to say whether the trial court would have reached the same erroneous conclusions on the summary judgment orders if it had allowed Peavey to discover the information it sought that was relevant and material to its claims. Regardless, the court abused its discretion in denying the requested discovery and compounded its error by dismissing Peavey's claims based, in part, on the mistaken assumption that Peavey had not presented sufficient evidence to support those claims. On remand, the court should be instructed to allow the requested discovery.

FOR THESE REASONS, Appellant Peavey Electronics Corporation requests that the Court reverse the summary judgment and discovery orders at issue and remand this case to the trial court for further proceedings consistent with the Court's opinion. Peavey also prays for any and all such further relief to which it may be justly entitled.

Respectfully submitted, this the 7th day of March, 2008.

**PEAVEY ELECTRONICS CORPORATION**

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## CERTIFICATE OF SERVICE

I, Susan A. Kidwell, one of the counsel of record for Appellant **Peavey Electronics Corporation**, do hereby certify that I have this the 7th day of March, 2008, caused to be delivered via United States Mail postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant Peavey Electronics Corporation and accompanying Appendix of Record Excerpts to the following:

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**IN THE SUPREME COURT OF MISSISSIPPI**

**No. 2007-CA-00341**

**PEAVEY ELECTRONICS CORPORATION** **APPELLANT**

**V.**

**BAAN U.S.A., INC.** **APPELLEE**

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C. Memorandum Opinion on Baan's Motion for Partial Summary Judgment signed August 15, 2005 (32 CR 4764)

D. Judgment granting Baan's Motion for Summary Judgment on Peavey's remaining claims signed January 29, 2007 (96 CR 14473)

E. Memorandum Opinion on Baan's Motion for Summary Judgment on Peavey's remaining claims signed January 24, 2007 (96 CR 14459)

F. Order on Motions signed April 18, 2005 (12 CR 1758)

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S. 10/3/02 Email from Robin Long (99 CR 14978)

T. 1/24/03 Email from Eduardo Lugo (98 CR 14791)

U. 11/18/05 Affidavit of Diane Johnson (63 CR 9549)

V. 2/24/06 Affidavit of David Sharman (61 CR 9110)

W. 11/16/06 Affidavit of Robert Muirhead (61 CR 9117)

X. 10/16/06 Expert Report of Richard L. Diamond (59 CR 8848)