

*(Note: The orders and opinions reproduced in this appendix have been reprinted verbatim as they appear in the original documents, without identifying typographical or other errors with the notation “[sic].”)*

**APPENDIX A**

**VIRGINIA:**

***In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 22nd day of March, 2018.***

MCC (Xiangtan) Heavy  
Industrial Equipment Co., LTD., Appellant,  
against Record No. 171003  
Circuit Court No. CL1100114F-15

Liebherr Mining & Construction  
Equipment, Inc., etc., Appellee.

From the Circuit Court of the City of Newport News

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

Justice Goodwyn took no part in the resolution of the petition.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: [Illegible]  
Deputy Clerk

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**APPENDIX B**

VIRGINIA: IN THE CIRCUIT COURT FOR THE  
CITY OF NEWPORT NEWS

LIEBHERR MINING & CONSTRUCTION  
EQUIPMENT, INC. d/b/a LIEBHERR MINING  
EQUIPMENT NEWPORT NEWS CO.

Plaintiff,

v. CASE NO. CL1100114F-15

RICHARD HUDSON, et al.,

Defendants.

**ORDER**

THIS MATTER comes before the Court on Defendant MCC's Motion To Set Aside Default and Default Judgment Pursuant to Special Appearance (the "Motion"). For the reasons stated in the Court's letter opinion of March 27, 2017 (the "Letter Opinion"), the Court **DENIES** MCC's Motion. The Court's Letter Opinion is hereby incorporated by reference and adopted as if fully set forth herein. This Order further adopts all facts and evidence presented up to and including the damages hearing.

Entered this 2nd day of May, 2017.

/s/ Timothy S. Fisher  
Hon. Timothy S. Fisher  
Circuit Court Judge

5-3-17  
B. Spain, Esq.  
B. Howard, II, Esq.

A COPY TESTE,  
Gary S. Anderson, Clerk  
Newport News Circuit Court

By: /s/ [Illegible] D.C.

WE ASK FOR THIS AND OBJECTED TO ONLY  
TO THE EXTENT THE COURT DID NOT DENY  
THE MOTION ON ALL THE GROUNDS  
ASSERTED IN LIEBHERR'S PLEADINGS  
AND AT ORAL ARGUMENT:

/s/ Brett A. Spain

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Inc. d/b/a Liebherr Mining Equipment Newport News Co.*

SEEN AND OBJECTED TO FOR THE REASONS  
STATED IN MCC'S PLEADINGS AND AT ORAL  
ARGUMENT:

/s/ Brian L. Howard, II

Brian L. Howard, II (VSB No. 85924)

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Equipment Co., Ltd.*

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**APPENDIX C**

[SEAL]

**Seventh Judicial Circuit  
COMMONWEALTH OF VIRGINIA**

TIMOTHY S. FISHER 2500 WASHINGTON AVENUE  
JUDGE CIRCUIT COURTROOM TWO  
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March 27, 2017

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Re: Liebherr Mining and Construction Equipment.  
d/b/a Liebherr Mining Equipment Newport News,  
a Virginia Corporation Plaintiff v. Richard  
Hudson, et al, Defendants  
Case No. CL1100114F-15

Dear Counsel:

The following constitutes the court's decision on defendant MCC's motion to set aside default and default judgment pursuant to special appearance.

As both sides are familiar with the history and facts of this case and not surprisingly maintain their own interpretations thereof, the court will recite facts only to extent necessary to explain the decision.

This court entered an order on damages on April 12, 2016 along with a judgment order entered April 12, 2016 which said judgment order was amended by order entered on May 2, 2016 more specifically delineating the basis for jurisdiction over the defendants. To the extent necessary for this decision and to remind the parties, those orders remain the orders of the court in this case and the factual findings therein remain the factual findings of this court for purposes of this decision.

Briefly stated, defendants MCC (Xiangtan) Heavy Industrial Equipment Company, Limited which is also known and named as a separate defendant in this case as Ceri (Xiangtan) Heavy Industrial Equipment Co., Ltd. is known collectively as "MCC" and further known as Elite, and for the purposes of this opinion will hereafter be referred to Elite; has filed a motion to set aside the default judgment pursuant to "special appearance."

At the outset, it is important to note that the plaintiff has alleged that the actions of Elite by filing this motion and by making the claims which they have made has made a general appearance and therefore has waived all objections to personal jurisdiction.

*Gilpin v. Joyce*, 257 Va. 579, 581 (1991). For the purposes of this opinion this court will assume without deciding that the defendants are making a special appearance to challenge the default judgment entered against them.

The court takes this position to further ensure that the defendants in this case which up to this point have received all the benefits of due process to which they may be entitled will continue to receive the benefit of due process to which they may be entitled by this court continuing on to describe the basis for this decision without relying on the ruling on the motion that the defendants have waived their objections to personal jurisdiction by making a general appearance.

Obviously, that may not preclude any appellate court from making that determination; however, this court will proceed.

The motion was filed on October 27, 2016 alleging, *inter alia*, that the service of process upon Elite (MCC) was defective.

As part of the basis for the decision herein the court has gone back through the file contained in this office which is about six boxes of documents and starting from the beginning reviewed the service of process procedure utilized by the plaintiff and the documents supporting that service of process.

The court finds that the plaintiff complied with Virginia Law, International Law and to the extent implicated, the provisions of the Foreign Sovereign Immunities Act (FSIA).

It is interesting to note, (illustrative, although not dispositive) that in the process of this litigation which began in 2011, other Chinese entities were added as defendants in this case. They were the China Aerospace Science and Industry Corporation (“CASIC”), China Space Sanjing Group Company (Sanjing) or “CSSG” and Wuhan Sanjing Export Company, Ltd. “Wuhan” which were sometimes referred to collectively in our litigation as the “CASIC defendants”. Those defendants appeared pursuant to “special appearance” to challenge the personal jurisdiction of the court.

At no time did any of those defendants challenge the method of service of process which is the same service of process utilized to serve Elite (MCC). There was also no issue raised of any application of the Foreign Sovereign Immunities Act to those entities even though the court was made aware of their status as a “government owned company.”

I attach a plaintiff’s Exhibit 5 on April 14, 2015 hearing which states in paragraph 3 “due to Sanjing group as ‘government owned company . . .’ So they had to prepare the feasibility report and send it to the government.” **(Exhibit A)**

I have not gone back through the record to confirm, but, my memory also is there was a reference to one or more of those entities also being co-owned by the Hunan Province along with the Peoples’ Republic of China.

Defendant Elite also complains that the plaintiff failed to follow the provisions of the Foreign Sovereign

Immunities Act (FSIA) in that the notice provided in the service of process required that the defendant(s) answer within twenty-one (21) days (pursuant to Virginia civil procedure) and that they should have been allowed sixty (60) days to file the answer under the provisions of FSIA.

The court notes with interest that the defendant complains about a process which allegedly doesn't comply with the provisions of the Foreign Sovereign Immunities Act which they also allegedly did not receive. It doesn't seem to make any difference what the time limit was for a response since they complained they did not receive the process in the first place.

Regardless, the actual judgment was not entered for several years after the service of process was complete on the defendant(s) much less within twenty-one (21) or sixty (60) days.

There will be further discussion of the Foreign Sovereign Immunities Act; however, for the purposes of the service of process the defendant(s) seem to assume that the Foreign Sovereign Immunities Act provides them some special right with the claim that "a defendant is always free to ignore the judicial proceedings, ***risk a default judgment***, and then challenge that judgment on jurisdictional grounds in a collateral proceeding. (emphasis added) *Insurance Corp. v. Compagnie, Des Bauxites* 456 U.S. 694, 706-707 (1982). Frankly, that quotation states the obvious. A defendant properly served may certainly ignore the process and not appear or answer.



That is accurately described in the decision of that court as a “**risk**”. That apparently was a risk that Elite (MCC) was and is willing to take and did so.

The other Chinese entities (CASIC entities) were not willing to take that risk and they appeared and challenged the personal jurisdiction of the court requesting that the court set an evidentiary hearing on the issue of jurisdiction.

The court does agree and did agree that, “the party claiming that a court in exercising jurisdiction, bears the burden of showing a *prima facie* case for that claim. *ESAB GROUP, Inc. v. Zurich INS. PLC*, 685 F. 3d 376, 391 (4th Cir. 2012) cited in *Yelp, Inc. v. Hadeed Carpet Cleaning*, 289 Va. 426, 446, 447 (2015). This court made an initial determination that the complaint filed by Liebherr stated a cause of action and if proven, would establish jurisdiction under the Virginia Long Arm Statute over the “CASIC” entities. Elite does not contest that conclusion as it is the same with regard to them.

The CASIC defendants requested an evidentiary hearing first which would then bind them. “By submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court’s determination on the issue of jurisdiction; that decision will be *res judicata* on that issue in any further proceeding. *Insurance Corp. supra at 706-707* (1982)

The option proposed was to hold an evidentiary hearing which if the decision on jurisdiction was established to the detriment of the “CASIC” entities, a trial

would take place either immediately thereafter or at a subsequent date.

There was no question the CASIC entities were going to be producing Chinese witnesses, would have to travel from the Peoples Republic of China and presumably also would require interpreters.

The court determined that the “evidentiary hearing” would take place at the trial. Normally, “such an issue would be ripe for it’s own evidentiary hearing or a deferred ruling ‘pending receipt at trial of evidence relevant to the jurisdictional question’”. *Combs v. Baker*, 886 F. 2d 673, 676 (4th Cir. 1989).

It appears the plaintiff would have borne the burden of proving “the existence of a ground for jurisdiction by a preponderance of the evidence” at an evidentiary hearing if contested from the outset or at trial. *Verizon On Line Services Company v. Ralsky, et al*, 203 F. Supp. 2d 601 (E.D. Va. 2002) (This case is also illustrative on the issue of Long Arm Jurisdiction and Due Process and will be discussed later herein.)

Although the foregoing was based on the application of the Federal Rule of Civil Procedure 12(b)(2) this court will assume, again with deciding, that this court was correct in determining that the plaintiff had demonstrated a *prima facie* basis for sufficient jurisdiction to survive the jurisdictional challenge and that setting the matter for trial was the appropriate use of judicial resources and more convenient for the defendants to only have to travel from China one time. This methodology was clearly supported in *Combs v. Baker*,

*supra* at 676 and as quoted in *Azzure Denim v. E and J Lawrence Corporation*, 69 Va. Cir. 485 (2006).

Nevertheless, the evidentiary hearing did not occur as matters were resolved between the parties by non-suit and the court did not inquire nor is it aware of events which may or may not have transpired prior to the non-suit.

The issue of the application of the Foreign Sovereign Immunities Act is an interesting one. As stated earlier the “CASIC” entities did not raise any implication of that Act and the defendant(s) in this case do not seem to claim immunity from suit as they do not address the “Commercial Activity exception to the Act. See *World Wide Demil L.C. . . . v. NAMMO, A.S.* 51 *Fed. Appx* 403 (4th Cir. 2002)

28 USC §1602 in the “Findings and Declaration of Purpose states as follows:

The Congress finds that the determination by United States Courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interest of justice and would protect the rights of both foreign states and litigants in the United States courts. Under International Law, states are not immune from the jurisdiction of foreign courts in so far as their commercial activities are concerned and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and other states in

conformity with the principals set forth in this chapter.

28 USC §1603(D) states as follows:

A “commercial activity” means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

The defendant(s) claim that a court must presume a foreign corporation is entitled to a review of the foreign Sovereign Immunities Act provisions.

The defendant(s) state in their reply brief on page 31 that “what Liebherr misses, however, is that even in MCC’s ‘absence’ Liebherr must prove that MCC is not entitled to immunity under the FSIA before *the entry of a default judgment.*”

They quote a case where the defendant is the “Peoples Republic of Bangladesh,” and further from a case involving the defendant “Islamic Republic of Iran” and again in *Murphy v. Islamic Republic of Iran*, 778 F Supp. 2d 70, 71, 72 (D.D.C. 2011) that before entry of a default judgment, “having been served with an initial complaint and declining to participate in litigation, a foreign state or entity remains protected by the requirement that a plaintiff substantiate her claim.” They did go on to extend that to include that “once on notice that MCC is a state owned enterprise, there is a presumption that MCC is an instrumentality of a foreign state.”

I am not sure where the evidence is that Liebherr was aware that MCC (Elite) was wholly owned or a state owned company by the Peoples Republic of China other than to engage in, to use the defendant(s) word “Xenophobia.”

Regardless, assuming without deciding, that the provisions of the Foreign Sovereign Immunities Act apply in this case although the cases cited by the defendant(s) actually indicate the sovereign nation involved is the “defendant” as opposed to a political subdivision or some other entity as described in 28 USC §1603(B)(2), . . .

Being a company “whose majority of whose shares or their ownership interest is owned by a foreign state or political subdivision thereof,” the commercial activity exception still applies.

28 USC §1608(e) FSIA further requires,

No judgment by default shall be entered by a court of the United States or of a state against a foreign state, a political sub-division thereof, or an agency or instrumentality of a foreign state unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political sub-division in the manner proscribed for service in this section.

Virginia Supreme Court Rule 3:19(c)(2) states as follows:

If the relief demanded is unliquidated damages, the Court shall hear evidence and fix the amount thereof . . .

Every court in the Commonwealth of Virginia is required to ensure that a plaintiff seeking a default judgment must “establish his claim or right to relief by evidence satisfactory to the court” as described in FSIA which, frankly, contains the same requirement as Rule 3:19(c)(2).

As an aside, in 2006 I was presented with a Motion for Default Judgment in a case in which the defendant, former fiancé of the plaintiff, was properly served and did not appear or answer.

I did not grant the default judgment and entered a written opinion on December 22, 2006, at *Georgalias v. Kilgore*, 73 Va. Cir. 34 (2006) stating that the default judgment would not be entered as it did not state a cause of action.

I was not alone at that time in determining that the failure to return an engagement ring was not a breach of a conditional gift.

The engagement ring in question was about \$32,000.00 and I considered the action barred by the law and public policy of the Commonwealth of Virginia stating it was not a cause of action citing *Landcraft Co. v. Kincaid*, 220 Va. 865, 870 (1980).

The issue had not been decided and I was hoping that the plaintiff in the case, a plaintiff of some means, with a competent attorney, would find the situation sufficiently serious to appeal to the Virginia Supreme

Court and the manner could be resolved once and for all.

They didn't do so and in the interest of full disclosure, the Virginia Supreme Court has now decided that issue in *McGrath v. Dockendorf*, 292 Va. 834 (2016). The court was considering a case other than mine so I don't consider my decision to have been reversed.

Regardless, both the Law of the Commonwealth of Virginia and the provisions of FSIA require a court to make the plaintiff substantiate the claim prior to entering a default judgment.

This court has had this matter on its docket for almost five years. The court had the benefit of numerous hearings, primarily over discovery issues; arguments, and briefs regarding jurisdiction of the other defendants. The court then conducted a two day hearing concerning damages against these defendants in this case who were determined to be in default. The court finds that the provisions of the foreign Sovereign Immunities Act were followed.

In fact, the single entity "Elite" was served twice as the plaintiff thought it was dealing with two different entities although it now determines that they are in effect one entity; however, they were served twice properly with appropriate service of process and the entities did not respond.

There is no question that the commercial activity exception to the Foreign Sovereign Immunities Act applies in this case and that the requirement for the court to be satisfied that the claimant has substantiated the claim has and did occur.

The remaining issue in FSIA regarding the service of the default judgment order will be addressed at the end of this opinion as the next session will cover personal jurisdiction under the Long Arm Statute.

As stated in the foregoing, the court determined that the complaint stated a *prima facie* case as to the exercise of jurisdiction, and that the evidence presented at the hearing in December of 2015 over a two day period clearly established the jurisdiction by a preponderance of the evidence.

Courts acknowledging the conspiracy theory of jurisdiction seem to recognize a defendant who joins a conspiracy knowing that acts in furtherance of the conspiracy have taken or will take place in the forum state is subject to personal jurisdiction in that forum because the defendant has purposely availed himself of the privileges of that state and should reasonably expect to be haled into there. *Noble Security Inc., et al v. Miz Eng'g Ltd.* 611 F. Supp. 2nd 513, 539, (E.D. Va. 2007) A co-conspirator is subject to personal jurisdiction in a forum where co-conspirators have sufficient contacts with the forum so that due process would not be violated. *Verizon v. Ralsky*, 203 F. Supp. 2d, 601 (E.D. Va. 2002) Due process is not offended so long as the co-conspirator knew or should have known that acts in furtherance of the conspiracy will be committed in the forum. A co-conspirator could reasonably expect to be haled into court where their conspiratorial acts inflicted the greatest harm. Moreover the state maintains a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out of state actors



(citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) cited in *Nathan v. Takeda Pharmaceuticals America Inc., et al*, 83 Va. Cir. 216 (2011))

Specific jurisdiction assesses whether a foreign corporation has sufficient contacts with a state for its courts to constitutionally exercise jurisdiction over the corporation based on its activity there. *Burger King, supra* at 472. Further the foreign corporation's activities must be 'purposely directed' at that state. *Id.* Activity is purposely directed at a state, if it is 'such that the corporation should reasonably anticipate being haled into court there. *Id.* at 474, Random, fortuitous or attenuated 'activity or the unilateral activity of another party or third person' is insufficient. *Id.* at 475 *Yelp Inc. Hadeed Carpet Cleaning*, 289 Va. 426, 446-447 (2015)

Further, the Foreign Sovereign Immunities Act at 28 U.S.C. §1605 A 2 states as follows:

A foreign state shall not be immune from the jurisdiction of the courts of the United States or the states in any case – (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity in the foreign state elsewhere and that act causes a **direct effect** in the United States;. (emphasis added)

It is absolutely clear that the allegations of the plaintiff in this case, if proven, support not only the

jurisdiction under the Virginia Long Arm Statute but also the judgment entered against the defendant. (Elite does not contest that conclusion. They only deny any knowledge thereof).

Rule of the Supreme Court of Virginia 3:19 D (2) provides that, “a final judgment no longer within the jurisdiction of the trial court under Rule 1:1 may not be vacated by that court except as provided in Virginia Code §8.01-428 and 8.01-623. 8.01-623 is inapplicable here. 8.01-428A states *inter alia*, “ . . . the court may set aside a judgment by default or a decree *pro confesso* upon the following grounds: (i) fraud on the court, (ii) a void judgment . . .

Having determined that a valid default judgment has been entered by this court that code section provides the defendant the only relief available. In this court’s continuing effort to provide the defendant Elite with all of the constitutional due process to which it is entitled, this court has fully considered all of the arguments submitted by Elite.

The only additional argument was sought by Elite after Liebherr had filed a supplemental brief and Elite alleged that it was beyond the page limit which Elite needed to respond to. The court replied by e-mail to all parties there was no need to have any additional briefing as the matter needed to come to an end under the original briefing schedule regardless of whether or not Liebherr had exceeded a page limit.

MCC also alleged a further need to respond to Liebherr’s Supplemental Brief “due to mischaracterizations and misstatements in Liebherr’s supplemental

brief.” As will be further explained, the court disagreed with that assessment then and continues to disagree now.

Elite admits that the defendant Detroit Heavy Truck Engineering came into being with its *raison detre* to design and manufacture a truck such as the truck Liebherr claims has been the subject of theft of its company property and proprietary information.

Elite does not contest the allegations that former Liebherr employees took with them all of the information required to build the entire truck and provided all of that information to Detroit Heavy Truck Engineering. Elite admits that it built the truck in conjunction with Detroit Heavy Truck Engineering. Elite claims the information that was provided was in the public domain and not trade secrets; but, they only require that defense if one does not believe their primary defense which is “they didn’t know.” The evidence presented throughout this case and including the evidence presented at the damages hearing, frankly, is and was irrefutable.

Elite does not address the evidence presented at the damages hearing for many reasons not the least of which was they were not there.

They have not had the benefit of hearing the witnesses from Liebherr which this court did.

I have always learned something new every day and in that hearing I learned it was possible to have a Ph.d. in welding.

I didn’t know that one could get a Ph.d. in welding.

However, special welding techniques and tools were required to be able to build this truck as testified to by the Liebherr witness with the Ph.d. in welding. The techniques and tools were considered proprietary and secret by Liebherr.

Virginia Code §59.1-3336 defines “Trade Secret” means information, including but not limited to a formula, pattern, compilation, program device, method, technique, or process that:

1. Drives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who could obtain economic value from its disclosure or use, and
2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

All of the Liebherr employees in this case were alleged to have executed confidentiality agreements at some point at the beginning or during their employment and/or upon their departure.

They are all alleged to have taken the information without permission.

The information they took was testified to be everything one needed to design and build Liebherr’s truck.

Defendant Hudson, who was still employed, at the time (he is now deceased) with Liebherr when he was recruited into the conspiracy by the other former employees then working for Detroit Heavy Truck

Engineering took pictures of the entire processing line at Liebherr's manufacturing facility in Newport News, Virginia on July 4th when no one would be there. He took those pictures along with a brand new lap top and thousands of documents to China with him to meet with Detroit Heavy Truck Engineering and Elite.

The testimony at the hearing was that Liebherr had spent anywhere from five to ten years perfecting the design of this truck at various stages and it was simply impossible for anyone else to design and manufacture this truck in less than three to five years if they had to start at the beginning without other information.

That other information has clearly been uncontradicted to be the trade secrets and proprietary information of Liebherr. To reiterate all of the evidence, much of which has been recited in the briefs, would extend this opinion beyond double its length as the court in this case heard two days of testimony at the damages hearing alone.

In lieu of reciting everything in this case, the court encloses portions of internet sites referenced in the briefs and referenced in the trial of Elite and Detroit Heavy Truck Engineering.

One shows a picture with MCC at the top and a picture of the Elite 6000 truck also as referenced in the trial by Liebherr as their truck. Elite (MCC) has never denied its relationship with Detroit Heavy Truck Engineering or the purpose for that relationship. **(Exhibit B)**

It was referenced in trial and in the briefs there was an incentive from the Chinese government for the first company to produce this truck in China, so there was an interest in getting into this market.

Elite describes itself as “one of the largest technical equipment manufacturing enterprises in the world.” Detroit Heavy Truck Engineering acknowledges that it “recruited and employed experienced engineers who are distinguished by their specific technical expertise.” These engineers have spent many years successfully designing and producing heavy equipment. DHTE has combined the skills with those of Elite to create the Elite 6000.

What would have been presented at trial is sufficient direct and circumstantial evidence that there is simply no way that Elite could have built the truck it built in a year to 18 months in compliance with their schedule without obtaining the designs from someone else. **(Exhibit C)**

They alleged those designs were created by DHTE and the evidence would have been submitted direct and circumstantial that DHTE did not design the truck on its own but utilized Liebherr designs and information to provide to Elite to build the truck.

The evidence would show direct and circumstantially that there is no way the truck could have been built on their time table and there is simply no way that Elite did not know or certainly should have known that such information was not being obtained by proper means.

The fact is that this court does not believe that Elite turned a blind eye to the actions of DHTE; however, even if that were true, liability would still be imposed. Frankly, if Elite were charged as a defendant with possession of stolen property, faced with the standard of beyond a reasonable doubt, the conviction would be a foregone conclusion.

This court concludes based on the facts presented in this case no reasonable jury would have found that Elite did not know or should not have known about the utilization of Liebherr's property and would have imposed liability in the same manner and amount as this court did as a result of the damages hearing.

This court specifically finds that there has been absolutely no fraud perpetrated on this court by the plaintiff or plaintiff's counsel. This case has been diligently pursued and meticulously presented by competent counsel on behalf of an obviously victimized plaintiff.

One of the most interesting exhibits presented in the trial is Exhibit 24 at the damages hearing and is attached hereto which is a "Welder and Welding Operator Qualification Test Record." (**Exhibit D**)

The defendant(s) disregarded this as simply evidence of nothing, and frankly, if this case wasn't so serious this exhibit would almost be comical. One would almost have to assume it was done as a joke and it clearly was not.

The top of the form has the symbol of Elite with a picture of the truck to the right, some welding information with a test conducted at the bottom by "Richard

Hudson” the now deceased defendant who went to China while still employed by Liebherr. Below that is **LIEBHERR MINING EQUIPMENT COMPANY** in all capital letters and bold.

By itself it may not be evidence of much; but, it is the one symbol that summarizes this entire case. I won't use the term that a picture is worth a thousand words; but, this one is pretty close.

Virginia Code §8.01-428A states, “. . . the court may set aside a judgment by default . . .” as stated by the Supreme Court of Virginia in *Sauder v. Ferguson*, 289 Va. 449, 457-458 (2015)

The General Assembly used the word “may” six times in Code §8.01-428 while it uses the word “shall” four times.

When the General Assembly uses two different terms in the same act, it is presumed to mean two different things (citation omitted) The General Assembly is well aware of the difference between the words “may” and “shall” and we concluded does not use these words synonymously within the language of Code §8.01-428 (citation omitted) We have held that whether to relieve a defendant of a default judgment of Rule 3:19D1 rests within the sound discretion of the trial court.” *Id.* “We have explained that the phrase ‘abuse of discretion’ means that the circuit court ‘has a range of choice’, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.” *Landrum v. Chipenham and Johnson Willis Hospitals, Inc.* 282 Va. 346, 342 (2011).



Having concluded that this judgment is not void and there has been absolutely no fraud perpetrated on this court by the plaintiff or plaintiff's counsel and that the requirements of the laws of the Commonwealth of Virginia, International Law, and the Foreign Sovereign Immunities Act (to the extent implicated) have been fully complied with and that the defendant MCC (Elite) has received constitutional due process in light of what is, overwhelming evidence of their liability in this case, and, what this court concludes that a jury would find to be disingenuousness at a minimum and further finding that the evidence of their liability in this case and the participation and conspiracy to utilize the trade secrets and proprietary information of Liebherr in order to gain an economic advantage to build their own truck is irrefutable. Any denials, again as I have stated before, simply strain credulity and require a suspension of disbelief.

Accordingly, there appears to be no reason to grant the motion to set aside the default judgment on any legal basis or equitable grounds or constitutional due process grounds or basics of fundamental fairness.

In fact, constitutional due process argues that the plaintiff in this case was seriously victimized and taken advantage of by a foreign corporation. That injury has occurred and has continued to occur to a resident corporation in the Commonwealth of Virginia and that plaintiff should have and does have access to redress in the courts of this Commonwealth.

Accordingly, the Motion to Set Aside the Default Judgment be and hereby is denied and I would ask that plaintiff's counsel prepare the appropriate order

by incorporating this letter opinion herein and adopting it as if fully restated and adopting all facts and evidence presented up to and including the damages hearing at which the order was entered by this court.

Even considering the affidavits and other representations of the defendant(s) in this case to the contrary, MCC's position is simply unpersuasive.

In summary, it is absolutely clear that MCC desired to build a large mining truck and had as an incentive from the Chinese Government the need to build it quickly.

Apparently, recognizing they couldn't build it alone, they did not wish to spend the money to buy a truck and reverse engineer it, the defendant, Detroit Heavy Truck Engineering came into being with its sole purpose of obtaining the means to design and build the truck in record time.

It is absolutely clear from the evidence and testimony presented at trial that at the time only Liebherr, Caterpillar and a Russian company had ever produced one of those trucks. **(Exhibit E)**

The time table by which Elite managed to design and manufacture the truck simply could not have been met by proper means and it was not conducted by proper means.

The fact MCC after being properly served with process chose to ignore this litigation and "take the risk" of judgment by default, which has now occurred, does not justify setting aside the default judgment.

The time to challenge the facts is at a trial which they did not attend and as this court has concluded, had they attended, they would not have prevailed.

The issue of the Foreign Sovereign Immunities Act and the question of serving the default judgment order on them appears to be related to execution of judgment and that issue and does not implicate the validity of the default judgment by statute or any suggested case law.

Since we are not at an execution of judgment question, that issue is not one for the court to further address.

Very truly yours,

/s/ Timothy S. Fisher  
Timothy S. Fisher  
Judge

TSF:lg

The court gratefully acknowledges the much needed help and valuable assistance from our Law Clerk, Scott A. Krystiniak noting that his strange affection for civil procedure was very useful in this process.

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[Exhibits Omitted]

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**APPENDIX D**

VIRGINIA: IN THE CIRCUIT COURT FOR THE  
CITY OF NEWPORT NEWS

LIEBHERR MINING &  
CONSTRUCTION EQUIPMENT,  
INC. d/b/a LIEBHERR MINING  
EQUIPMENT NEWPORT NEWS  
CO., a Virginia corporation,

Plaintiff,

Case No.  
CL1100114F-15

v.

RICHARD HUDSON, et al.,

Defendants.

**JUDGMENT ORDER**

(Filed May 2, 2016)

THIS DAY came Liebherr Mining & Construction Equipment, Inc., d/b/a Liebherr Mining Equipment Newport News Co. (“Liebherr”), by counsel, and moved the Court for entry of judgment against Defendants CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd., and MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd., jointly and severally. Whereupon, after hearing oral argument, conducting an evidentiary hearing on damages, reviewing the briefs and authorities presented by counsel, reviewing the items deemed admitted in the Third Amended Complaint, reviewing the evidence submitted by Liebherr, and for good cause shown, the Court ORDERS, ADJUDGES and DECREES as follows:

### **Service and Jurisdiction**

1. Liebherr effected service, under the Hague Convention, of its Second Amended Complaint on both CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd., and MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd. on September 12, 2012 and October 10, 2012, respectively. Copies of the certificates of service are attached hereto, collectively, as **Exhibit 1**. Liebherr filed the originals of these certificates with the Court on January 8, 2013.

2. On June 4, 2013, Liebherr served its Third Amended Complaint on MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd. A copy of the certificate of service is attached hereto as **Exhibit 2**. Liebherr filed the original of this certificate with the Court on March 11, 2014. Liebherr received notice dated August 13, 2013 that its attempt to serve the Third Amended Complaint on CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd. failed because the entity did not exist (at least not at the address where Liebherr had previously served it the Second Amended Complaint). A copy of this notice is attached hereto as **Exhibit 3**.

3. Upon receipt of service, CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd. and MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd. had twenty one (21) days to file a responsive pleading. Va. Sup. Ct. R. 3:8, 3:19(a). Neither party filed a pleading in response to Liebherr's Second Amended Complaint or Liebherr's Third Amended Complaint, and both are in default.

4. Based on the above, the Court FINDS that Liebherr properly served both CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd. and MCC (Xiangtan)

Heavy Industrial Equipment Co., Ltd. and that both companies had actual notice of these proceedings but chose not to participate. Service was perfected on MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd. and the prior service on CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd. was sufficient under Virginia law because a party in default is not entitled to notice of any further proceedings and the Third Amended Complaint did not materially alter the allegations against CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd. *See* Va. Sup. Ct. R. 3:19(a) (“A defendant in default is not entitled to notice of any further proceedings in the case.”).

5. The Court further FINDS based on the admitted allegations and the evidence presented at the damages hearing on December 15-16, 2015, that it has personal jurisdiction over both CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd. and MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd. Among other factors supporting the exercise of personal jurisdiction, the Court FINDS:

(a) Both companies received the benefit of services from multiple Virginia residents, including Defendants Allen Cunningham, Billy Lewis, Larry Golladay, Marc Viau, and Off-Highway Engineering, Inc., including from multiple personal visits by these individuals to the Chinese facilities of CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd. and MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd. to help design and build mining trucks. Before, during, and after these visits, these individuals and the other individual defendants provided confidential and proprietary Liebherr information taken from Liebherr’s

manufacturing facility in Virginia to CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd. and MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd.

(b) While he was still employed by Liebherr in Virginia, CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd. and MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd. encouraged Defendant Richard Hudson to visit the Chinese facility to provide services and to provide Liebherr trade secrets which were stolen from Virginia. During at least one of these visits, Hudson provided a complete set of pictures of Liebherr's proprietary manufacturing process at its Virginia facility that Hudson had taken in breach of his fiduciary duties and in violation of a "no picture" policy at Liebherr.

(c) CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd. and MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd. designed the Chinese facility and their competing mining trucks (with the assistance of Virginia residents) through the use of Liebherr information which they both knew was stolen from Liebherr's Newport News facility. Indeed, the evidence admitted at the damages hearing clearly and unequivocally proved that CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd. and MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd. directly encouraged its agents and representatives (including Virginia residents) to steal and provide Liebherr information and used that material to help design a facility, procure tools, procure and design fixtures, and to help design and build their trucks.

(d) CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd. and MCC (Xiangtan) Heavy Industrial

Equipment Co., Ltd. encouraged Virginia residents to steal and use Liebherr information on their behalf, and knew or should have known that all Defendants were using trade secrets and other property misappropriated from Virginia. CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd. and MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd. conspired with the other Defendants (including Virginia residents and other Defendants subject to jurisdiction in Virginia), encouraged these Defendants to take unlawful acts in furtherance of the conspiracy in Virginia (including misappropriating trade secrets and other property from Liebherr's Newport News facility and breaching their fiduciary duties while working in Virginia), and knew or should have known that these Defendants took numerous actions in furtherance of the conspiracy in Virginia.

(e) CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd. and MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd. also aided and abetted the breach of fiduciary duties of individuals in Virginia, tortiously interfered with various non-disclosure and confidentiality contracts entered into in Virginia, and directly contracted and communicated with Virginia residents to perform design related services while in possession of Liebherr property and trade secrets.

(f) The actions described above, admitted by CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd. and MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd. and proven at the damages hearing, are more than sufficient to establish jurisdiction under Sections 8.01–328.1(1), (3) and (4) of Virginia's long-arm statute and to satisfy any constitutional due



process requirements. Because Liebherr also proved beyond any doubt a conspiracy among the defendants to accomplish the unlawful activities described in the complaint, personal jurisdiction is independently established based on the jurisdictional contacts of the other defendants, who are either residents of Virginia or clearly subject to its jurisdiction. *See Nathan v. Takeda Pharmaceuticals America, Inc.*, 83 Va. Cir. 216, 225, 231 (Fairfax County August 2, 2011); *St. Paul Fire & Marine Ins. Co. v. Hoskins*, 2011 WL 1897683, at \*3 (W.D. Va. May 18, 2011); *America Online, Inc. v. Ambro Enterprises*, No. Civ. A.04-1498, 2005 WL 2218433, at \*3 (E.D. Va. Sept. 8, 2005); *Siu Ming Hong v. Chum Moon Tong*, No. HS-2093, 61 Va. Cir. 439, 441 (Richmond April 9, 2003).

### **Damages**

6. For the reasons set forth in its Order on Damages entered on April 12, 2016, a copy of which is attached hereto as **Exhibit 4**, the Court hereby enters judgment for money, in favor of Liebherr Mining & Construction Equipment, Inc., d/b/a Liebherr Mining Equipment Newport News Co. and against: (i) CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd., and (ii) MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd., jointly and severally, as follows:

(a) Count II – Trade Secret Misappropriation: \$47,675,176.00.

(b) Count IV – Aiding and Abetting Breach of Fiduciary Duty: nominal damages of \$1.00

(c) Count V – Tortious Interference with Contractual Relations: nominal damages of \$1.00

(d) Count VII – Common Law Conspiracy: nominal damages of \$1.00

(e) Count VIII – Conversion: nominal damages of \$1.00

(f) Count IX – Unjust Enrichment: nominal damages of \$1.00

(g) Count VI – Statutory Business Conspiracy: compensatory damages of \$47,675,176.00 (not to be double counted on top of the trade secret damages), forensic investigation damages of \$223,397.66, and nominal damages of \$1.00 attributable to non-forensic components of the conspiracy.

(h) Total Compensatory Damages Award – \$47,898,579.66 in compensatory damages. This Amount is then reduced to \$40,000,000, the pre-trebling amount of compensatory damages prayed for in Liebherr’s Third Amended Complaint.

(i) Pursuant to the Virginia business conspiracy statute, an additional \$80,000,000 to accomplish the trebling provided for in Virginia Code Section 18.2-500.

(j) Pursuant to the Virginia Uniform Trade Secret Act as well as the common law torts alleged by Liebherr, an additional \$350,000 in punitive damages.

(k) Pursuant to Liebherr’s Petition for Attorneys’ Fees, \$851,292.00 in attorneys’ fees.

(l) This equals a total judgment of \$121,201,292 against (jointly and severally) CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd., and MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd.

7. Liebherr, the Plaintiff and now judgment creditor in this action, has its address at 4100 Chestnut Avenue, Newport News, Virginia 23607.

8. CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd. and MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd., the Defendants and now judgment debtors in this action, have their address at No. 8, Jiangnan Avenue, Jiuhua, Xiangtan, Hunan Province, China 411200.

9. This total judgment of \$121,201,292 shall bear interest from the date it is entered at the statutory annual rate of six percent.

10. For the reasons stated in the Court's Order on Damages, the Court also ORDERS, ADJUDGES and DECREES that CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd. and MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd. are hereby permanently enjoined from any further possession or use of Liebherr trade secrets, including without limitation, information relating to the design of Liebherr's trucks, its manufacturing process, and its smart truck technology. This injunction shall only be binding on CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd. and MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd., their officers, agents, servants, employees, and attorneys, and upon those persons or entities in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

36a

ENTERED this 2d day of May, 2016.

/s/ Timothy S. Fisher  
Timothy S. Fisher,  
Circuit Court Judge

WE ASK FOR THIS:

/s/ Brett A. Spain  
Brett A. Spain (VSB No. 44567)  
David A. Kushner  
(VSB No. 71173)  
Jason E. Lohana  
(VSB No. 82485)  
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dkushner@wilsav.com  
johana@wilsav.com

[Exhibits Omitted]

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**APPENDIX E**

VIRGINIA: IN THE CIRCUIT COURT FOR THE  
CITY OF NEWPORT NEWS

LIEBHERR MINING &  
CONSTRUCTION EQUIPMENT,  
INC. d/b/a LIEBHERR MINING  
EQUIPMENT NEWPORT NEWS  
CO., a Virginia corporation,

Plaintiff,

Case No.

v.

CL1100114F-15

RICHARD HUDSON, et al.,

Defendants.

**ORDER ON DAMAGES**

(Filed Apr. 12, 2016)

THIS DAY came Liebherr Mining & Construction Equipment, Inc. (“Liebherr”), by counsel, and moved this Court to award damages against MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd., Inc. and CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd., Inc. (referred to individually and collectively in this Order as, “Elite”). The Court previously entered default judgment against these parties, and conducted an *ore tenus* hearing on the amount of damages on December 15 and December 16, 2015 (the “Damages Hearing”). Based on the facts deemed admitted in the Third Amended Complaint (“Complaint”), the testimony and argument received by the Court at the Damages Hearing, the exhibits reviewed by the Court *in camera* at the Damages Hearing, the exhibits and deposition designations received in evidence (both public and under

seal), Liebherr's various filings with the Court, and for good cause shown, the Court Orders as follows:

**Elite's Default**

On July 30, 2015, this Court entered Default Judgment against Elite, finding (among other things) that Elite was properly served<sup>1</sup> and had not participated in this action. This Court further ordered that a hearing on the appropriate amount of damages be conducted. Elite was not present at and did not participate in the Damages Hearing.

**Effect of Elite's Default**

By reason of its Default, Elite is deemed to have admitted all of the allegations contained in Liebherr's Complaint. In addition, Liebherr submitted a memorandum identifying certain key admissions.

The Court finds that the facts deemed admitted in the Complaint are sufficient to establish all of the elements of each cause of action asserted against Elite in the Complaint. The Court also finds that these facts were further supported by the testimony and evidence tendered at the Damages Hearing.

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<sup>1</sup> This Court has personal jurisdiction over Elite because (among other reasons) Elite conspired with Virginia residents to misappropriate trade secrets and non-trade secret property from Liebherr's Virginia facility, aided and abetted the breach of fiduciary duties of individuals in Virginia, tortiously interfered with contracts entered into in Virginia, and directly contracted and communicated with Virginia residents to perform design related services while in possession of Liebherr property and trade secrets. *See, e.g.*, Complaint at Paragraph 38.

### **The Damages Hearing**

At the Damages Hearing the Court received testimony and evidence from six witnesses, whose testimony is summarized below.

#### **The Testimony**

*J. Christopher Racich:* The Court received Mr. Racich as an expert in the forensic investigation of computers and other electronic media. Mr. Racich testified (among other things) that he discovered thousands of Liebherr documents on computers and devices owned or used by Elite's co-conspirators, including Detroit Heavy Truck Engineering, LLC, ("DHTE") Liangyu Huang, Shenger Ying, Bill Lewis, Francis Bartley, Allen Cunningham, and Richard Hudson, among others.<sup>2</sup> Mr. Racich also testified concerning the evidence he discovered of these co-conspirators' possession, access, and use of Liebherr documents. During Mr. Racich's testimony, the Court received for *in camera* review numerous examples of Liebherr documents (many of which were clearly marked as confidential) that were possessed, accessed, used and/or copied by Elite and its co-conspirators. The Court has considered Mr. Racich's testimony, finds it credible, and finds that it offers further support for the facts deemed admitted, including that Elite misappropriated Liebherr trade secrets concerning Liebherr's design, manufacturing techniques, and smart truck technology, and that Elite conspired with the other

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<sup>2</sup> Liebherr has previously resolved its disputes with the other prior Defendants, who are no longer parties to this case. The allegations of conspiracy and other factual allegations related to these individuals are deemed admitted only for purposes of the default judgment against Elite, and shall not be used against any of these prior Defendants in any other manner.

co-conspirators to cause the unlawful activity alleged in the Complaint. The Court finds that the expert testimony of Mr. Racich was (1) based upon sufficient facts and/or data, (2) was the product of reliable principles and methods, and (3) that Mr. Racich applied the principles and methods reliably to the facts of the case.

*Bryant Ward:* The Court received Mr. Ward as an expert in the areas of (1) designing a mining truck (including the steps necessary to design a truck, the time it takes to complete those steps, and the materials created in the design process), (2) the process for producing a prototype mining truck and the associated testing and updating that precedes the large-scale manufacturing of a production model, and (3) the manufacturing process for a mining truck (including specifying materials, dealing with suppliers and vendors, and quality control). Mr. Ward testified that he had reviewed many of the Liebherr design trade secrets misappropriated by Elite and its co-conspirators, including engineering drawings, specifications, bills of materials, schematics, and concept sketches. The Court reviewed examples of such files (found on Elite's co-conspirators' devices) *in camera*, and the Court has subsequently accepted these and other examples into evidence. Mr. Ward testified that Liebherr's design (including but not limited to the categories of documents described above) was a trade secret. Based on (among other things): (1) the facts deemed admitted in the Complaint that Elite misappropriated and used virtually all of the design documents for Liebherr's 400-ton and 240-ton mining trucks, (2) the other evidence reviewed by Ward in his capacity as an expert, (3) the fact that the 400-ton design Elite misappropriated had taken Liebherr over 10 years to refine, and (4) Ward's



experience and expertise in the field of mining truck design, Ward concluded (among other things), to a reasonable degree of technical certainty, that using Liebherr design trade secrets (as was deemed admitted) allowed Elite to save at least 3-4 years in designing and manufacturing its own mining trucks, and further allowed Elite to produce mining trucks of a higher quality than would otherwise be possible. The Court has considered Mr. Ward's testimony, and finds it credible. The Court finds that the testimony of Mr. Ward was (1) based upon sufficient facts and/or data, (2) was the product of reliable principles and methods, and (3) that Mr. Ward applied the principles and methods reliably to the facts of the case.

*Ed Opalka:* The Court received Mr. Opalka as an expert in the field of mining truck computerization technology and the steps necessary to computerize a large scale mining truck. Mr. Opalka testified about the process of creating truck computerization technology. Mr. Opalka testified that the specifications, schematics, and source code Liebherr developed through this process were closely guarded trade secrets. Mr. Opalka testified that he led the team that computerized mining trucks at both Euclid-Hitachi (another mining truck producer) and Liebherr. He testified that in both cases, the project started with an existing, fully-designed physical truck, which drastically simplified the computerization process. Even with the physical truck designed, built, and ready for field testing, each computerization project took approximately seven years at both of these established companies. Mr. Opalka then testified that he had reviewed the smart truck related trade secrets misappropriated by Elite's co-conspirators (many of which were found in a folder

labeled “China/Smart Truck”), and that they comprised effectively all Liebherr’s truck computerization technology as it existed at the time. The Court reviewed *in camera* some examples of the source code, specifications and other smart truck technology misappropriated by Elite, and has subsequently accepted these documents into evidence. Based on: (1) the facts deemed admitted in the Complaint, including that Elite designed and built its computerized mining truck in one year, (2) the fact that it took established mining truck companies Euclid-Hitachi and Liebherr (which unlike Elite both had fully-designed physical trucks on which to test the technology) seven years to develop production quality truck computerization technology, (3) Opalka’s review (in his capacity as an expert) of the evidence related to Elite’s misappropriation of the smart truck-related trade secrets, and (4) Opalka’s experience and expertise in the field of mining truck computerization technology, Opalka concluded, to a reasonable degree of technical certainty, that using the Smart Truck trade secrets allowed Elite to save at least 3-4 years in developing its truck computerization technology. The Court has considered Mr. Opalka’s testimony and finds it credible. The Court finds that the expert testimony of Mr. Opalka (1) was based upon sufficient facts and/or data, (2) was the product of reliable principles and methods, and (3) that Mr. Opalka applied the principles and methods reliably to the facts of the case.

*Cort Reiser:* The Court received Mr. Reiser, Liebherr’s Executive Vice President of Manufacturing, as an expert in the field of mining truck manufacturing techniques, facility layout and design, and the steps necessary to create a manufacturing facility and

techniques capable of producing and mass-producing large-scale mining trucks. Mr. Reiser testified that Liebherr's manufacturing process<sup>3</sup> is a critical trade secret and that refinements made in the process during his tenure enabled Liebherr (among other things) to go from building one truck every three weeks in 2002 to being able to build more than one truck per week by 2010. Mr. Reiser testified that he reviewed manufacturing process trade secrets misappropriated by Elite and its co-conspirators, including detailed photographs of each step in Liebherr's manufacturing process, welding procedure documents, quality inspection plans, and supplier quality manuals. The Court reviewed examples of these documents *in camera*, and has subsequently accepted these documents into evidence. Based on (among other things): (1) the facts deemed admitted in the Complaint, (2) the fact that it took Liebherr over 8 years to improve its production capacity from 20 to 70 trucks per year, (3) Reiser's review (in his capacity as an expert) of evidence related to Elite's misappropriation of Liebherr trade secrets related to its manufacturing techniques and facility design, and (3) Reiser's experience and expertise in the field of mining truck manufacturing process and facility design (which has included setting up manufacturing facilities and processes for John Deere, and re-designing the process for Liebherr), Reiser concluded, to a reasonable degree of technical certainty, that using Liebherr's trade secrets allowed Elite to save at least four years in achieving a facility and

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<sup>3</sup> Mr. Reiser testified that the manufacturing process includes facility design and layout, tooling and fixture designs, welding techniques, quality procedures, fabrication and assembly procedures, and other related information.

manufacturing techniques capable of manufacturing even a small number of mining trucks, and at least six years in achieving a facility and techniques capable of mass-producing manufacturing trucks. The Court has considered Mr. Reiser's testimony and finds it credible. The Court finds that the expert testimony of Mr. Reiser (1) was based upon sufficient facts or data, (2) was the product of reliable principles and methods, and (3) that Mr. Reiser applied the principles and methods reliably to the facts of the case.

*Joachim Janka:* The Court received Mr. Janka as an expert on the mining truck industry, including the companies engaged in the mining truck business, the factors that drive demand for mining trucks, the expected profits from the sale of mining trucks and after sales parts and service, and mining truck market expectations in 2010. Mr. Janka testified extensively regarding the market for mining trucks during the time periods relevant to this lawsuit, Liebherr's own forecasts, and the factors Liebherr would consider if it were forced to license its technology to a competitor like Elite. Mr. Janka identified and discussed certain third party industry publications describing the positive outlook of the mining industry in 2010 and 2011. The Court reviewed a number of forecast documents *in camera*, as well as a license Liebherr previously entered into regarding an unproven technology which Liebherr hoped to perfect and market (the "BHP License"). Mr. Janka testified about the costs incurred by Liebherr in attempting to refine the product that was the subject of the BHP License and the fact that Liebherr ultimately abandoned the project after spending tens of millions of dollars. Mr. Janka testified about the hypothetical negotiation with Elite that

underlies a reasonable royalty analysis. Mr. Janka testified about the damage that would be caused to Liebherr by a perpetual worldwide license of its trade secrets to Elite, the fact that it would never agree to license its technology to Elite, but if forced to do so would require a large lump sum payment due to the inability to monitor or enforce a license agreement in China. As compared to the BHP License, Mr. Janka testified (among other things) that Liebherr would require a premium for the fact that it would be licensing proven technology and a premium for the inclusion of manufacturing techniques and smart truck technology. The Court has considered Mr. Janka's testimony and finds it credible. The Court finds that the expert testimony of Mr. Janka was (1) based upon sufficient facts and/or data, (2) was the product of reliable principles and methods, and (3) that Mr. Janka applied the principles and methods reliably to the facts of the case.

*George Miller:* The Court received Mr. Miller as an expert in the appropriate calculation and quantification of damages including trade secret damages, and more specifically reasonable royalty damages. Mr. Miller testified that he chose the reasonable royalty measure of damages because Elite's default and consequential lack of discovery made it impossible to calculate the full extent of Liebherr's lost profits or the extent to which Elite was unjustly enriched. Mr. Miller testified that in preparing his expert opinion on the amount of reasonable royalty damages, he reviewed and considered (among other things): (a) the Complaint, (b) DHTE, Elite, Liebherr and CSSG's projections, (c) market research regarding the expected demand for mining trucks, (d) market research regarding the mining market in China, (e) publically available

information about Elite, (f) information relating to Liebherr's expected 2010 and 2011 sales, (g) information regarding Liebherr's revenues, costs, and profits, (h) other information produced in discovery, (i) the BHP License agreement under which Liebherr licensed unproven mining truck technology, (j) testimony and input from Joachim Janka and other Liebherr executives, and (k) currency conversion tables and indices of inflation rates, as well as his notes from meetings with Liebherr representatives. Mr. Miller identified and discussed a number of schedules and documents he used in conducting his analysis. The court has reviewed these schedules *in camera* and has subsequently accepted them into evidence. Based on the foregoing, and taking into account other factors typically considered when assessing a reasonable royalty, including (but not limited to): (1) the price Liebherr paid to license mining truck technology in a previous transaction, and the manner in which Liebherr structured this license, (2) the fact that the technology Elite acquired was mature and incorporated decades worth of field testing and improvements, (3) the fact that Liebherr would have no effective way to limit the geographical scope or duration of the license, (4) the likely loss in market share Liebherr would face in licensing its technology to Elite, (5) Elite's ownership by a mining and metals conglomerate that would ensure that Elite not only had the funding to see the project through but also that Elite would have a sure customer for its trucks, (6) the time savings that Elite obtained through the use of Liebherr's trade secrets and the value of that time savings based on projections produced in discovery, (7) other relevant factors suggested by *Georgia-Pacific Corp. v. United*

*States Plywood Corp.*, 318 F.Supp. 1116, 1120 (S.D.N.Y. 1970) and related cases, and (8) other factors discussed in Liebherr's Bench Brief on Damages ("Bench Brief"), Mr. Miller testified, to a reasonable degree of economic certainty, that a reasonable royalty for the trade secrets Elite misappropriated from Liebherr would be at least \$47,675,156. The Court found Mr. Miller's testimony to be credible, logical and a conservative estimate of damages. The Court found that the testimony of Mr. Miller (1) was based upon sufficient facts or data, (2) was the product of reliable principles and methods, and (3) that Mr. Miller applied the principles and methods reliably to the facts of the case. For the reasons described herein and further explained in Liebherr's Bench Brief, the Court accepts Mr. Miller's testimony as setting the appropriate measure of compensatory damages.

### **The Deposition Designations and Exhibits**

In addition to the *ore tenus* testimony described above, Liebherr also submitted deposition testimony designations, along with exhibits, from the following depositions: Liangyu Huang, Shenger Ying, Bill Lewis, Francis Bartley, Richard Hudson, Allen Cunningham, and Zhuang Yin.

In addition to *ore tenus* and deposition testimony described above, Liebherr, through its witnesses, also introduced a number of exhibits, which were initially reviewed *in camera* by the Court, in order to protect the trade secret status of some of these exhibits. As requested by the Court, Liebherr submitted for entry into evidence the following documents and deposition testimony, all of which is accepted into evidence:

- a. The documents and deposition exhibits that Liebherr has submitted, and the Court has received, under seal are listed on the document attached to this Order as **Exhibit 1**. These documents shall be sealed because of the confidential/trade secret nature of these documents, and for other good cause shown, and for the reasons stated in Liebherr's Motion to Close the Courtroom for the Presentation of Confidential Information and Motion to Seal.
- b. The documents and deposition designations that Liebherr has now submitted and which are not under seal are listed on the document attached to this Order as **Exhibit 2**.
- c. The Court hereby admits the documents listed in Exhibit 1 and Exhibit 2 into evidence.

### **Liability**

In its Complaint, Liebherr set out the following causes of action against Elite: Count II, Trade Secret Misappropriation; Count IV, Aiding and Abetting Breach of Fiduciary Duty; Count V, Tortious Interference with Contractual Relations; Count VI, Statutory Business Conspiracy; Count VII, Common Law Business Conspiracy; Count VIII, Conversion; and Count IX, Unjust Enrichment. As described above and below, the Court finds that, based on the facts deemed admitted in the Complaint as well as the testimony and evidence submitted by Liebherr during and subsequent to the Damages Hearing, and the previous default judgment entered against Elite, Liebherr has established that Elite is liable under each of these counts.



**Count II, Trade Secret Misappropriation**

Based on the allegations from the Complaint which are deemed admitted and the testimony and evidence received at (and in conjunction with) the Damages Hearing, the Court finds that Elite misappropriated Liebherr trade secrets, including, but not limited to: the design of Liebherr's 400-ton and 240-ton trucks (including but not limited to design drawings, bills of materials, schematics, and 3-D models), Liebherr's Smart Truck technology (including but not limited to source code, specifications, and schematics), and Liebherr's manufacturing techniques and facility design (including but not limited to welding procedures, facility layout photographs and drawings, quality procedures and documents, and fixture and tooling photographs and drawings) (hereinafter, the "Trade Secrets"). More specifically, the Court finds that: (a) Liebherr derives independent economic value from the Trade Secrets not being generally known to other persons or readily ascertainable by proper means, (b) Liebherr took reasonable efforts under the circumstances to maintain the secrecy of the Trade Secrets, (c) Elite acquired the Trade Secrets with knowledge or constructive knowledge that they were acquired by improper means (such as through unauthorized use of computer networks, induced breaches of fiduciary duties, violations of confidentiality agreements and electronic espionage), and (d) Elite used the Trade Secrets, which it acquired by improper means and which it knew others acquired and used on its behalf using improper means. The Court also finds that Elite's misappropriation was willful and malicious supporting Liebherr's right to attorneys' fees and punitive damages.

### **Count VI, Statutory Business Conspiracy**

Based on the allegations deemed admitted in the Complaint and the evidence and testimony received at (and in conjunction with) the Damages Hearing, the Court finds that Elite agreed to combine together with DHTE, Liangyu Huang, Shenger Ying, Bill Lewis, Francis Bartley, Richard Hudson, Allen Cunningham, Larry Golladay, and Marc Viau, and others, to (among other things) (a) misappropriate Liebherr trade secrets, (b) convert other Liebherr property, (c) procure breaches of certain co-conspirators' fiduciary duties owed to Liebherr and the confidentiality agreements with Liebherr, (d) breach the Virginia Computer Crimes Act, and (e) build a company and a series of mining trucks to compete with Liebherr using Liebherr's own technology. The Court also finds that: (1) Elite entered the conspiracy and combination for the purpose of willfully and maliciously<sup>4</sup> injuring Liebherr in its trade and business; (2) Elite attempted to procure and in fact did procure participation in the conspiracy by DHTE and the individuals named in this paragraph; and (3) by reason of this conspiracy, Liebherr has suffered damages.

### **Count VII, Common Law Conspiracy**

The Court finds that the same facts and admissions referred to in the preceding paragraph also support a

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<sup>4</sup> To prevail on a claim for conspiracy, Liebherr was required to prove only legal malice, not actual malice; legal malice means that the defendant acted "intentionally, purposefully, and without lawful justification." *Advanced Marine Enters. V. PRC. Inc.*, 256 Va. 106, 117 (1998). The Court finds, based on the admissions and the evidence received at the Damages Hearing, that Liebherr has proven legal malice.

claim for common law conspiracy. Based on the facts deemed admitted in the Complaint, along with the testimony and evidence received at the Damages Hearing, the Court finds that Elite did combine with the individuals described above, to accomplish together the unlawful purposes described above, and to accomplish Elite's business objectives by unlawful means, resulting in damage to Liebherr.

**Remaining Counts: Count IV (Aiding and Abetting Breach of Fiduciary Duty), Count V (Tortious Interference with Contractual Relations), Count VIII (Conversion), and Count IX (Unjust Enrichment)**

Based on the allegations deemed admitted in the Complaint and the evidence and testimony received at (and subsequent to) the Damages Hearing, the Court finds that Liebherr has established all elements necessary to demonstrate Elite's liability for the above referenced claims.

**Damages**

Based on facts deemed admitted in the Complaint, the evidence presented at and in conjunction with the Damages Hearing, and Liebherr's Bench Brief, the Court awards Liebherr the following damages.

**Trade Secrets Damages:** Based on the allegations deemed admitted in the Complaint, the testimony and evidence received at the Damages Hearing (including the testimony of damages expert George Miller), for the reasons more fully laid out in Liebherr's Bench Brief, and for other good cause shown, the Court awards Liebherr the reasonable royalty of \$47,675,156 to which Mr. Miller testified.

**Other Non-Conspiracy Damages:** The Court awards Liebherr nominal damages of \$1 on each of the following counts: Count IV (Aiding and Abetting Breach of Fiduciary Duty), Count V (Tortious Interference with Contractual Relations), Count VII (Common Law Conspiracy), Count VIII (Conversion), and Count IX (Unjust Enrichment).

**Conspiracy Damages, Ad Damnum Issues and Trebling:**

Based on the allegations deemed admitted in the Complaint, the testimony and evidence received at and in conjunction with the Damages Hearing, and for the reasons more fully laid out in Liebherr's Bench Brief, Liebherr is also entitled under its conspiracy claims to the forensic expenses it incurred in uncovering and repairing the damages of the conspiracy. Thus, in addition to the \$47,675,176 for the conspiracy to misappropriate trade secrets, the Court awards Liebherr the \$223,397.66 requested in the Liebherr's Bench Brief and supported in the affidavit of J. Christopher Racich which is attached to Liebherr's brief. The Court also awards Liebherr nominal damages of \$1.00 for the trade secret or computer damage components of the conspiracy.

This results in a total pre-trebling judgment against Elite in the amount of \$47,898,579.66.<sup>5</sup> Because Liebherr only requested \$40,000,000 (along with trebling of this amount) in its *ad damnum* in the Complaint, the Court will reduce this amount to \$40,000,000. In addition, pursuant to its statutory

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<sup>5</sup> The compensatory damages under the trade secrets and business conspiracy counts are being awarded only once.

business conspiracy claim, Liebherr is entitled to “three-fold the damages” arising from the conspiracy. The Court finds that (for the reasons set forth in Liebherr’s Bench Brief along with the facts deemed admitted in the Complaint and evidence and testimony presented at the Damages Hearing) Liebherr is entitled to the trebling of its compensatory damages, including the reasonable royalty awarded on the trade secrets claim. Thus, the Court awards Liebherr an additional \$80,000,000 under Virginia Code Section 18.2-500, resulting in a trebling of Liebherr’s compensatory damages to a total of \$120,000,000.

In addition, based on the allegations deemed admitted in the Complaint, the testimony and evidence received at the Damages Hearing, and the reasons laid out in Liebherr’s Bench Brief, the Court awards Liebherr \$350,000 in punitive damages on Liebherr’s trade secret claim and common law tort claims.

The Court further finds that Liebherr is entitled to its costs and attorneys’ fees under statutory conspiracy count and trade secrets count. Having reviewed Liebherr’s Petition for Attorney’s Fees, and concluded that Liebherr’s request is reasonable, the Court awards Liebherr \$851,292 in attorneys’ fee.

WHEREFORE, the Court Orders:

(1) That Judgment be entered against MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd., Inc. and CERI (Xiangtan) Heavy Industrial Equipment Co., Ltd., jointly and severally, in the total amount of \$121,201,292, broken down as follows: (1) \$40,000,000 in compensatory damages (including reasonable royalty damages) (2) \$80,000,000 (to achieve the trebling required by Virginia Code Section 18.2-500), (3)

\$350,000 in punitive damages, and (4) \$851,292 in attorneys' fees; and

(2) That Elite be permanently enjoined from any further possession or use of Liebherr trade secrets.

ENTERED this 12th of April, 2016.

/s/ Timothy S. Fisher  
Timothy S. Fisher  
Circuit Court Judge

WE ASK FOR THIS:

/s/ Brett A. Spain  
Brett A. Spain (VSB No. 44567)  
David A. Kushner (VSB No. 71173)  
Jason E. Ohana (VSB No. 82485)  
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VIRGINIA: IN THE CIRCUIT COURT FOR THE  
CITY OF NEWPORT NEWS

LIEBHERR MINING &  
CONSTRUCTION EQUIPMENT,  
INC. d/b/a LIEBHERR MINING  
EQUIPMENT NEWPORT NEWS  
CO., a Virginia corporation,

Plaintiff,

Case No.

v.

CL1100114F-15

RICHARD HUDSON, et al.,

Defendants.

**EXHIBIT 1 TO THE COURT'S**  
**ORDER ON DAMAGES**

Based upon Liebherr's Motion to Seal filed on June 29, 2015, the Court's August 18, 2015 order on this Motion, Liebherr's unopposed presentation of evidence and argument at the Damages Hearing, the Court's opportunity to review all exhibits submitted by Liebherr *in camera*, and consistent with the Court's oral rulings at the Damages Hearing, the Court hereby accepts the follow exhibits presented at the Damages Hearing, along with deposition designations and exhibits presented at the Damages Hearing, into evidence **under seal**, based on the trade secret or potential trade secret nature of such documents. The Court notes that Liebherr has submitted separate binders to the Court containing only the sealed documents, and orders that these binders will be maintained under seal and will not be available to the public.

**Trial Exhibits Accepted into Evidence Under Seal:**

6B	11B	14C
7B	11C	14D
8B	11D	15A
8C	12C	16A
9A	12D	17
10A	12E	18
10B	14A	19
10C	14B	19A
20	36C	55C
20A	37	55D
21	37A	56A
21A	38	56B
22	38A	57
22A	39	57A
23	43A	57B
25	44A	58
26	45	59
26A	46A	60A
27A	47A	60B
27B	47B	61 (including CD)
32A	48A	63
32B	49A	64J
32C	50A	65B
34A	51A	65C
34B	51B	65D
34C	52	65E
34D	53A	65F
35A	54	66
36A	55 A	70
36B	55B	70A
		71



**Deposition Exhibits:**

Shenger Ying

Deposition Exhibit Nos. 6, 7, 9, 10, 11, 12, 21, 22, 30, 31, 32, 33, 34, 35, 39, 51, 52 and 55

Francis Bartley

Deposition Exhibit Nos. 6, 12, 16, 20, 21, 23, 28, 30, 32, 33, 37, 42, 44, 45, 46, 47, 51, 55, 56, 59, 61, 66, 67 and 68

Bill Lewis

Deposition Exhibit Nos. 15, 29, 30, 32, 35, 40, 62, 64, 67, 68, 71, 72, 76, 77 and 78

Allen Cunningham

Deposition Exhibit Nos. 6, 7, 10, 11, 18 and 25

VIRGINIA: IN THE CIRCUIT COURT FOR THE  
CITY OF NEWPORT NEWS

LIEBHERR MINING &  
CONSTRUCTION EQUIPMENT,  
INC. d/b/a LIEBHERR MINING  
EQUIPMENT NEWPORT NEWS  
CO., a Virginia corporation,

Plaintiff,

v.

RICHARD HUDSON, et al.,

Defendants.

Case No.

CL1100114F-15

**EXHIBIT 2 TO THE COURT'S  
ORDER ON DAMAGES**

Based on the testimony and evidence submitted during the Damages Hearing, Liebherr's unopposed argument, evidence and testimony at the Damages Hearing, the Court's opportunity to review all exhibits submitted by Liebherr in camera, and consistent with the Court's oral ruling at the Damages Hearing, the Court hereby accepts the follow exhibits submitted at the damages hearing into evidence. These exhibits and designations will be accepted into evidence and maintained in the public file. The Court notes that Liebherr has submitted binders to the Court containing only the public documents and transcripts.

**Trial Exhibits**

1	11	28
2	11A	28A
3 (including CD)	12	29
4	12A	29A
6	12B	30
6A	13	31
7	14	32
7A	15	33
8	16	34
8A	23A	35
9	24	36
10	27	40
41	53	64E
42	55	64F
43	56	64G
44	60	64H
46	62	64I
47	64	65A

59a

48	64A	67
49	64B	68
50	64C	69
51	64D	

**Deposition Exhibits:**

Richard Hudson

Deposition Designations

Entire transcript of designated portions

JhuangYin

Deposition Designations

Entire transcript of designated portions

Deposition Exhibit Nos. 7, 8, 9 and 20

Shenger Ying

Deposition Designations

Entire transcript of designated portions

Deposition Exhibit Nos. 2, 3 and 8

Mike Huang

Deposition Designations

Entire transcript of designated portions

Deposition Exhibit Nos. 1, 9, 15, 23, 29, 31 and 32

Francis Bartley

Deposition Designations

Entire transcript of designated portions

Deposition Exhibit Nos. 5, 17, 19, 31, 50, 53, 57 and 62

60a

Bill Lewis

Deposition Designations

Entire transcript of designated portions

Deposition Exhibit Nos. 10, 11 and 38

Allen Cunningham

Deposition Designations

Entire transcript of designated portions

Deposition Exhibit Nos. 1, 5, 32, 33 and 34

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**APPENDIX F**

**VIRGINIA:**

***In the Supreme Court of Virginia held at the  
Supreme Court Building in the City of Richmond  
on Friday the 11th day of May, 2018.***

MCC (Xiangtan) Heavy  
Industrial Equipment Co., LTD., Appellant,

against Record No. 171003  
Circuit Court No. CL1100114F-15

Liebherr Mining & Construction  
Equipment, Inc., etc.,

Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to  
set aside the judgment rendered herein on the 22nd  
day of March, 2018 and grant a rehearing thereof, the  
prayer of the said petition is denied.

Justice Goodwyn took no part in the resolution of  
the petition.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By /s/ [Illegible]

\_\_\_\_\_  
Deputy Clerk

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