

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

CLERK'S OFFICE U.S. DIST. COURT
AT HARRISONBURG, VA
FILED

O' SULLIVAN FILMS, INC.,
1944 Valley Avenue
Winchester, Virginia 22601

Plaintiff,

v.

PRECISION ROLL GRINDERS, INC.,
6356 Chapmans Road
Allentown, Pennsylvania 18106

Defendant,

v.

WALZEN IRLE GMBH
Huttenweg 5
57250 Netphen Deuz, Germany
Serve: Mr. Martin Grosskreutz

Third-Party Defendant.

Civil Action No. 5:09CV00062

OCT 14 2009

JOHN F. CORCORAN, CLERK
BY: [Signature]
DEPUTY CLERK

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DEFENDANT PRECISION ROLL GRINDERS, INC.'S
THIRD PARTY COMPLAINT

COMES NOW Defendant/Third-Party Plaintiff PRECISION ROLL GRINDERS, INC., by and through its attorneys, JEFFREY R. SCHMIELER and SAUNDERS & SCHMIELER, P.C., and pursuant to Federal Rule of Civil Procedure 14, files this Third-Party Complaint against WALZEN IRLE GMBH and in support thereof, states as follows:

STATEMENT OF FACTS

1. Plaintiff, O'SULLIVAN FILMS, INC. is a Delaware corporation with its principal

place of business located at 1944 Valley Avenue, Winchester, Virginia. **O'SULLIVAN FILMS, INC.** (hereinafter "O'Sullivan") is engaged in the business of producing calendered vinyl and alloy films for various uses, including in the automotive industry for vacuum-formed instrument panels.

2. Defendant/Third-Party Plaintiff **PRECISION ROLL GRINDERS, INC.** is a Pennsylvania Corporation with its principal place of business located at 6356 Chapmans Road, Allentown, Pennsylvania. **PRECISION ROLL GRINDERS, INC.** (hereinafter "Precision") is engaged in the business of distributing calender rolls, which are long metal cylinders used in various industrial processes.
3. Third-Party Defendant **WALZEN IRLE GMBH** is a German Corporation with a principal place of business located at Hüttenweg 5, 57250 Netphen, Germany. **WALZEN IRLE GMBH** (hereinafter "Walzen") is engaged in the business of manufacturing calender rolls and other products.
4. Defendant/Third-Party Plaintiff **PRECISION** contracted with Third-Party Defendant **WALZEN** as Third-Party Defendant's exclusive distributor of calender rolls manufactured by Third-Party Defendant. See Exhibit A.
5. On or about September 30, 2003, Third-Party Plaintiff **PRECISION** and Third-Party Defendant **WALZEN** entered into a Contract (hereinafter the "Distributor Agreement") in which **PRECISION** and **WALZEN** agreed that **PRECISION** "shall buy and sell exclusively the Products directly from [WALZEN] IRLE."¹ As consideration for Precision's promises and agreements, Third-Party Defendant

¹ See Exhibit A at 1.

Walzen agreed to appoint **PRECISION** "as its exclusive Distributor for the sale of the Products within the Territory."²

6. Plaintiff alleges that on or about May 17, 2005, Plaintiff **O'SULLIVAN** and Third-Party Plaintiff **PRECISION** entered into a contract in which they agreed that **PRECISION** would sell two calender rolls to **O'SULLIVAN** that met **O'SULLIVAN'S** specifications. Plaintiff **O'SULLIVAN'S** Complaint (attached hereto as Exhibit B) focuses on one of those two calender rolls (hereinafter referred to as "Calender Roll 4.") Plaintiff alleges that it paid \$110,000 to **PRECISION** for Calender Roll 4.
7. When, pursuant to **PRECISION** and **WALZEN'S** Distribution Agreement, Defendant/Third-Party Plaintiff **PRECISION** received the two calender rolls from Third-Party Defendant **WALZEN**, the rolls included the following representations and warranties made on behalf of **WALZEN**:

IRLE represents and warrants (a) that the rolls will be of good and workman like quality and free of any and all defects of relevance for the operation in materials and workmanship (b) that the material properties like tonsile strength, etc. are within the specification given in the material data sheet (c) that **there will be no cracks on the roll surface under regular operating conditions** (4000 PLI separating force in the nip and at 1600 PSI roll bending pressure) due to a material fault; damages caused by external circumstances, not attributable to the roll material, are explicitly excluded from IRLE's warranty and (d) that rolls supplied under this contract [the O'Sullivan contract] will meet the technical specifications of the purchasing agreement.

See Exhibit C.

² See Exhibit A at 1.

8. Plaintiff alleges that **PRECISION** delivered the calender rolls to **O'SULLIVAN** on January 25, 2006, and further alleges that **O'SULLIVAN** put the calender rolls into service in its Calender #3 machine on February 12, 2007. Plaintiff alleges that it discovered a crack in the surface of Calender Roll 4 on April 3, 2007.
9. Plaintiff further alleges that the rolls were removed from its Calender #3 machine, replaced with spares, and shipped to Germany for evaluation by manufacturer, Third-Party Defendant **WALZEN**. Plaintiff alleges that **WALZEN** examined Calender Roll 4 and determined that it had been cracked in an un-repairable fashion.
10. Plaintiff further alleges that **WALZEN'S** analysis of Calender Roll 4 revealed that the roll suffered from manufacturing defects related to **HARDNESS, CHILL DEPTH and CASTING DEFECTS**, such that the roll contained "cracks that started on the barrel surface with axial orientation."³
11. At all times relevant hereto, **WALZEN** was required to comply with the terms of the Distribution Agreement and the representations and warranties that **WALZEN** made on behalf of the calender rolls in question. See Exhibits A and C.
12. The Plaintiff alleges that Defendant/Third-Party Plaintiff **PRECISION** breached its contract and its warranties that Calender Roll 4 would meet the Plaintiff's specifications, would be merchantable, and would be fit for the particular purpose of allowing the Plaintiff to produce films through operation of its Calendar #3 machine.

³ Plaintiff's *Complaint* at 4.

13. The Third-Party Defendant **WALZEN** was the manufacturer of Calendar Roll #4 which is the subject of the allegations contained in the Plaintiff's Complaint.
14. The Third-Party Defendant **WALZEN** is responsible for any and all claims and damages averred by the Plaintiff, as the manufacturer of Calendar Roll #4.
15. The Third-Party Defendant **WALZEN** made and breached express warranties to the Plaintiff regarding its Calendar Roll 4.
16. The Third-Party Defendant **WALZEN** made and breached implied warranties to the Plaintiff regarding its Calendar Roll 4.
17. The Third-Party Defendant **WALZEN** breached the terms of its Distribution Agreement with Defendant/Third-Party Plaintiff **PRECISION** with regard to Calendar Roll 4.
18. The Plaintiffs have alleged injuries and damages against the Defendant/Third-Party Plaintiff, **PRECISION**, which are set forth in the Complaint.

COUNT I
(Indemnification (Common Law) -- WALZEN)

19. The Defendant/Third-Party Plaintiff **PRECISION** incorporates paragraphs 1 through 18 as if fully set forth herein.
20. The Defendant/Third-Party Plaintiff **PRECISION** denies all wrongdoing and denies any liability alleged by the Plaintiff in its Complaint. If, however, Plaintiff prevails and is found to have sustained any damages and injuries as a consequence of the conduct and allegations contained in the Complaint, which the Defendant/Third-Party Plaintiff **PRECISION** denies, then and in that event, it is averred that Defendant/Third-Party Plaintiff **PRECISION** would be entitled to indemnification

from the Third-Party Defendant **WALZEN**.

21. The Third-Party Defendant **WALZEN** breached the express and implied warranties that it made to the Defendant/Third-Party Plaintiff, including that Calendar Roll 4 was of good and workmanlike quality, free of any and all defects inclusive of cracks on the rolls surface, and manufactured to meet the technical specifications required by the Plaintiff.
22. Further, the Defendant/Third-Party Plaintiff alleges that if the Plaintiff was injured and damaged as alleged, then such injuries and damages were the proximate result of the actions of the Third-Party-Defendant **WALZEN** without any wrongdoing on the part of the Defendant/Third-Party Plaintiff **PRECISION** contributing thereto in which event the Third-Party Defendant **WALZEN** is liable to the Defendant/Third-Party Plaintiff **PRECISION** for indemnity and contribution of all amounts recovered by the Plaintiff **O'SULLIVAN** against the Defendant/Third-Party Plaintiff **PRECISION**.
23. Further, the Third-Party Plaintiff alleges that if the Plaintiff was injured and damaged as alleged, then such damages were the proximate result of the defective manufacture, design and distribution on the part of Third-Party Defendant **WALZEN**, because it manufactured Calendar Roll 4 in such a manner as to include defects in **HARDNESS, CHILL DEPTH and CASTING DEFECTS**, such that Calendar Roll 4 contained "cracks that started on the barrel surface with axial orientation."⁴

⁴ Plaintiff's *Complaint* at 4.

WHEREFORE, the Third-Party Plaintiff **PRECISION** demands judgment against the Third-Party Defendant **WALZEN**, and that Third-Party Defendant be liable to Third-Party Plaintiff for all compensatory damages, consequential damages, costs, interest, and for any monies for which a judgment is entered against the Third-Party Plaintiff for this suit.

COUNT II
(Contribution (Common Law) -- WALZEN)

24. The Third-Party Plaintiff re-alleges all of the preceding paragraphs as if fully stated herein.
25. In the alternative, if it is determined that there was any breach of contract or express and implied warranties on the part of the Third-Party Plaintiff, such breach was merely passive and/or potential and the breach and/or acts or omissions of the Third-Party Defendant **WALZEN** was the active and effective cause of the Plaintiffs' injuries and damages, in which case the Third-Party Defendant is liable to the Third-Party Plaintiff for indemnity and contribution for all amounts recovered by the Plaintiff against Third-Party Plaintiff.
26. Further, Third-Party Plaintiff alleges that **WALZEN'S** negligent manufacture, design, and distribution were the active and effective cause of the Plaintiff's injuries and damages because **WALZEN** manufactured Calender Roll 4 in such a manner as to include defects in **HARDNESS, CHILL DEPTH and CASTING DEFECTS**, such that Calender Roll 4 contained "cracks that started on the barrel

surface with axial orientation.”⁵

27. In the alternative, if the Third-Party Plaintiff is found to have contributed to the Plaintiff's injuries and damages, then the actions of the Third-Party Defendant **WALZEN** also caused and/or contributed to the Plaintiffs' injuries and damages in which event the Third-Party Defendant is liable to the Third-Plaintiff for contribution of any and all amounts awarded to the Plaintiff.

WHEREFORE, the Third-Plaintiff **PRECISION** demands judgment against Third-Party Defendant **WALZEN**, and that the Third-Party Defendant be liable to Third-Party Plaintiff for all compensatory damages, consequential damages, costs, interest, and for any monies for which a judgment is entered against the Third-Party Plaintiff for this suit. Moreover, if there is any liability to the Plaintiff then the Third-Party Defendant is liable to the Third-Party Plaintiff and in the event a verdict is recovered by the Plaintiff against the Third-Party Plaintiff, that Third-Party Defendant be held primarily and/or concurrently liable and the Third-Party Plaintiff have judgment over and against the Third-Party Defendant for the full amount of any judgment entered in favor of the Plaintiff against Third-Party Plaintiff together with the cost and disbursement and/or contribution by the Third-Party Defendant for any judgment awarded to the Plaintiff. In the alternative, if the Third-Party Defendant is required to pay any judgment to the Plaintiff for which Third-Party Defendant is jointly liable, that the Third-Party Defendant be required to indemnify the Third-Party Plaintiff for any amounts the Third-Party Plaintiff is required to pay to the Plaintiff or in the alternative that the Third-Party Defendant be required to contribute

⁵ Plaintiff's *Complaint* at 4.

equally to any such judgment entered against the Third-Party Plaintiff.

COUNT III
(Indemnification (Contract) -- WALZEN)

28. The Defendant/Third-Party Plaintiff re-alleges all of the preceding paragraphs as if fully stated herein.
29. The Defendant/Third-Party Plaintiff **PRECISION** denies all wrongdoing and denies any liability alleged by the Plaintiff on all counts.
30. If, however, Plaintiff is found to have sustained any damages and injuries as a consequence of the conduct and allegations contained in the Complaint, which the Defendant/Third-Party Plaintiff **PRECISION** denies, then and in that event Defendant/Third-Party Plaintiff **PRECISION** would be entitled to contractual indemnification from the Third-Party Defendant **WALZEN** pursuant to the terms and provisions of the Distribution Agreement inclusive of the warranty documents entered into between Defendant/Third-Party Plaintiff **PRECISION** and Third-Party Defendant **WALZEN**. See Exhibits A and C.
31. Third-Party Plaintiff, **PRECISION** asserts that the Distribution Agreement entered into by **WALZEN** as **Indemnitor**, provides indemnification to the Third-Party Plaintiff, **PRECISION** as **Indemnitee**, for all of the claims and allegations asserted against the Defendants by the Plaintiffs as set forth in the Complaint.
32. **WALZEN'S** representations and warranties with regard to the calender rolls in question, and particularly as to Calender Roll 4 provide in pertinent part that:

IRLE represents and warrants (a) that the **rolls will be of good and**

workman like quality and free of any and all defects of relevance for the operation in materials and workmanship (b) that the material properties like tonsile strength, etc. are within the specification given in the material data sheet (c) that **there will be no cracks on the roll surface under regular operating conditions** (4000 PLI separating force in the nip and at 1600 PSI roll bending pressure) due to a material fault; damages caused by external circumstances, not attributable to the roll material, are explicitly excluded from IRLE's warranty and (d) that rolls supplied under this contract [the O'Sullivan contract] will meet the technical specifications of the purchasing agreement.

33. Further, **PRECISION** and **WALZEN'S** Distribution Agreement provides in pertinent part that:

With the exception of any express written warranty provided in connection with any particular sale, there are no warranties, express or implied (including but not limited to the implied warranties of fitness for a particular purpose or warranty of merchantability) are made or shall be deemed to have been made by IRLE, regarding the Products. **IRLE neither assumes nor authorizes any other person to assume for it any obligation or liability in connection with the sale of the Products.**

PRGI shall not be liable for any claims whatsoever due to any act or omission on the part of IRLE and IRLE agrees to **defend, indemnify, and hold PRGI** harmless from and against any claim, cause of action, loss or liability of any kind arising solely out of IRLE's activities under this agreement.

See Exhibit A.

34. The above-referenced Indemnification Agreement is effective and controlling to provide indemnification to Defendant/Third-Party Plaintiff **PRECISION** from Third-Party Defendant **WALZEN**, for all claims and allegation asserted against Defendant/Third-Party Plaintiff **PRECISION** by the Plaintiff **O'SULLIVAN** as set forth in the Complaint.

WHEREFORE, the Defendant and Third-Party Plaintiff, **PRECISION**, demands judgment

against the Third-Party Defendant, **WALZEN**, by way of contractual indemnification for all sums which may be adjudged against it, attorney's fees, and further demands:

- A. That the Plaintiff take nothing by their action against the Third-Party Plaintiff;
- B. That the Defendant and Third-Party Plaintiff, **PRECISION**, be awarded judgment in the same amount as is adjudged against the Third-Party Plaintiff **PRECISION** in these proceedings;
- C. That in the event the Third-Party Plaintiff **PRECISION** is held liable to the Plaintiff, in any amount, the Third-Party Plaintiff **PRECISION** be awarded judgment against the Third-Party Defendant **WALZEN** in that amount;
- D. That the Third-Party Plaintiff **PRECISION** be awarded costs of this action and reasonable attorney's fees; and
- E. That the Court grant such other and further relief as it may deem proper.

COUNT IV
(Breach of Contract -- WALZEN)

- 35. The Defendant/Third-Party Plaintiff re-alleges all of the preceding paragraphs as if fully stated herein.
- 36. On September 30, 2003, Defendant/Third-Party Plaintiff entered into a Distribution Agreement inclusive of warranty documents. See Exhibits A and C.
- 37. As a party to the Distribution Agreement, the Third-Party Defendant **WALZEN** had a duty to comply fully with the provisions of the Agreement and inclusive warranty documents. The Third-Party Defendant **WALZEN** failed to perform its contractual obligations when it provided to Defendant/Third-Party Plaintiff Calender Roll 4

which **WALZEN** manufactured in such a manner as to include defects in HARDNESS, CHILL DEPTH and CASTING DEFECTS, such that Calender Roll 4 contained "cracks that started on the barrel surface with axial orientation."⁶

38. In particular, Third-Party Defendant **WALZEN** represented and warranted to Defendant/Third-Party Plaintiff:

IRLE represents and warrants (a) that the **rolls will be of good and workman like quality and free of any and all defects** of relevance for the operation in materials and workmanship (b) that the material properties like tensile strength, etc. are within the specification given in the material data sheet (c) that **there will be no cracks on the roll surface under regular operating conditions** (4000 PLI separating force in the nip and at 1600 PSI roll bending pressure) due to a material fault; damages caused by external circumstances, not attributable to the roll material, are explicitly excluded from IRLE's warranty and (d) that rolls supplied under this contract [the O'Sullivan contract] will meet the technical specifications of the purchasing agreement.

39. Pursuant to the terms and provisions of the Distribution Agreement inclusive of the warranty documents entered into between Defendant/Third-Party Plaintiff **PRECISION** and Third-Party Defendant **WALZEN**, Third-Party Defendant **WALZEN** breached its duties and obligations to Defendant/Third-Party Plaintiff **PRECISION** under the distribution agreement when Third-Party Defendant **WALZEN** provided to Defendant/Third-Party Plaintiff Calender Roll 4 which **WALZEN** manufactured in such a manner as to include defects in HARDNESS, CHILL DEPTH and CASTING DEFECTS, such that Calender Roll 4 contained

⁶ Plaintiff's *Complaint* at 4.

"cracks that started on the barrel surface with axial orientation."⁷

40. Third-Party Defendant **WALZEN'S** breach has caused and will cause Defendant/Third-Party Plaintiff **PRECISION** to incur damages, expenses, fees, costs to defend, costs to pursue coverage, attorney's fees, consultation fees, charges, expert fees, litigation costs and expenses, miscellaneous costs and expenses, and other fees, costs and expenses, including but limited to, and amounts of any adverse judgment entered in favor of the Plaintiff **O'SULLIVAN**.
41. Third-Party Plaintiff **PRECISION** alleges that in the event the Plaintiff was damaged and injured as a consequence of the conduct and allegations contained in the Complaint, which the Third-Party Plaintiff denies, then and in that event, **WALZEN** is liable for all damages and injuries complained of.

WHEREFORE, the Defendant and Third-Party Plaintiff **PRECISION** demands Judgment against the Third-Party Defendant **WALZEN** for any and all sums which may be adjudged against the Defendant and Third-Party Plaintiff **PRECISION** in these proceedings including attorney's fees, and further demands:

- A. That the Plaintiff take nothing by action against the Defendant/Third-Party Plaintiff **PRECISION**;
- B. That in the event the Defendant/Third-Party Plaintiff **PRECISION** is held liable to the Plaintiff in any amount in this action, the Defendant/Third-Party Plaintiff **PRECISION ROLL GRINDERS, INC.** be awarded judgment against the Third-Party Defendant, **WALZEN IRLE GMBH**, in that amount;

⁷ Plaintiff's *Complaint* at 4.

- C. That the Defendant/Third-Party Plaintiff **PRECISION ROLL GRINDERS, INC.** be awarded costs of this action and reasonable attorney's fees;
- D. That judgment be entered against the Third-Party Defendant, **PRECISION ROLL GRINDERS, INC.**, by way of indemnification and contribution on the grounds of breach of contract for damages caused solely by the Third-Party Defendant **WALZEN IRLE GMBH** and for indemnification and contribution of the total amount of any judgment that might be awarded in favor of the Plaintiff or any other party to this action against the Defendant/Third-Party Plaintiff **PRECISION ROLL GRINDERS, INC.**; and
- E. That the Court grant such other and further relief as it may deem proper.

Respectfully Submitted,

/s/

Jeffrey R. Schmieler
Virginia Bar #32175
Attorney for Defendant, Precision Roll Grinders, Inc.
Saunders & Schmieler, P.C.
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Silver Spring, MD 20910
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 2nd day of October, 2009, a copy of the foregoing Defendant **PRECISION ROLL GRINDERS, INC.**'s Third-Party Complaint which was electronically filed in this case with the United States District Court for the Western District of Virginia, was mailed via first-class mail, postage pre-paid, to:

Kevin M. Rose, Esquire
BotkinRose, PLC
3210 Peoples Drive
Harrisonburg, Virginia 22801
Attorney for Plaintiff

Steven L. Smith, Esquire
Law Office of Steven L. Smith, P.C.
404 Harvard Avenue
Swarthmore, Pennsylvania 19081
Attorney for Plaintiff
(Pro Hac Vice admission pending)

Sent via International Mail:

Mr. Martin Grosskreutz
WALZEN IRLE GMBH
Huttenweg 5
57250 Netphen Deuz, Germany
Third-Party Defendant

/s/
JEFFREY R. SCHMIELER #32175