IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ITW GLOBAL INVESTMENTS INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N14C-10-236 JRJ CCLD
	)	
AMERICAN INDUSTRIAL PARTNERS CAPITAL FUND IV, L.P.; AMERICAN INDUSTRIAL PARTNERS CAPITAL FUND IV (PARALLEL), L.P.; and AIPCF IV, LLC,	)	
	)	
Defendants.	)	

OPINION

Date Submitted: January 24, 2017
Date Decided: March 6, 2017

Upon Defendants' Motion for Summary Judgment: **DENIED.**

P. Clarkson Collins, Esquire, Meghan A. Adams, Esquire, Morris James LLP, 500 Delaware Avenue, Suite 1500, Wilmington, DE 19899, Richard C. Pepperman, Esquire (*pro hac vice*) (argued), William B. Monahan, Esquire (*pro hac vice*), C. Megan Bradley, Esquire (*pro hac vice*), Stephanie S. Heglund, Esquire (*pro hac vice*), Evan M. Mateer, Esquire (*pro hac vice*), Sullivan & Cromwell LLP, 125 Broad Street, New York, NY 10004, James H. Congdon, Esquire (*pro hac vice*), Sullivan & Cromwell LLP, 1700 New York Avenue NW, Washington, DC 20006, Attorneys for Plaintiff.

William D. Johnston, Esquire, Mary F. Dugan, Esquire, Young Conaway Stargatt & Taylor LLP, 1000 North King Street, Wilmington, DE 19801, Lawrence Portnoy, Esquire (*pro hac vice*) (argued), Jillian Rennie Stillman, Esquire (*pro hac vice*), Shahira D. Ali, Esquire (*pro hac vice*), John M. Briggs, Esquire (*pro hac vice*), Davis Polk & Wardwell LLP, 450 Lexington Avenue, New York, NY 10017, Peter D. Doyle, Esquire (*pro hac vice*), Jordan B. Leader, Esquire (*pro hac vice*), Seth D. Fier, Esquire (*pro hac vice*), Proskauer Rose LLP, 11 Times Square,

New York, NY 10036, John E. Roberts, Esquire (*pro hac vice*), Jinnie Reed, Esquire (*pro hac vice*), William D. Dalsen, Esquire (*pro hac vice*), Proskauer Rose LLP, 1 International Place, Boston, MA 02110, Attorneys for Defendants.

Jurden, P.J.

I. INTRODUCTION

Before the Court is Defendants American Industrial Capital Fund IV, L.P., American Industrial Partners Capital Fund IC (Parallel), L.P., and AIPCF IV, LLC's (collectively, "AIP")[1] Motion for Summary Judgment.[2] AIP contends that it is entitled to summary judgment on ITW's fraudulent inducement claim.[3]

This case arises from Plaintiff ITW Global Investments Inc.'s ("ITW") purchase of Brooks Instrument, LLC ("Brooks") from AIP (the "Transaction").[4] The Transaction was memorialized in the Securities Purchase and Sale Agreement ("SPSA"). According to ITW, AIP breached the SPSA by certifying that two allegedly false statements made in the SPSA were accurate: (1) all Material Contracts to which Brooks was a party had been disclosed in the SPSA; and (2) all financial statements had been prepared in accordance with GAAP.[5] ITW alleges that AIP's certification of these false statements, and AIP's involvement in a series of "sham sales" related to the false statements, fraudulently induced ITW to enter into the SPSA.

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[1] Defendants American Industrial Capital Fund IV, L.P., American Industrial Partners Capital Fund IC (Parallel), L.P., and AIPCF IV, LLC are related entities. For ease of reference, they will be collectively referred to in this opinion as "Defendant" or "AIP."

[2] Defendants' Opening Brief in Support of Their Motion for Summary Judgment ("Defs.' Opening Br.") (Trans. ID. 59726456).

[3] *Id.*

[4] Plaintiff ITW Global Investments Inc.'s Amended Complaint ("Am. Compl.") (Trans. ID. 59505952).

[5] Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at 30 ("Pl.'s Opp'n Br.") (Trans. ID. 59869620); *see also* Am. Compl.

In opposition, AIP asserts that any alleged misrepresentations in the SPSA were made by Brooks, not AIP, and therefore, ITW cannot prove that AIP had knowledge of the alleged misrepresentations. AIP further contends that ITW's release (the "NWC Release") in connection with a Net Working Capital adjustment bars ITW's fraudulent inducement claim.

For the reasons discussed below, AIP's Motion for Summary Judgment is **DENIED.**

II. BACKGROUND

A. The Transaction

In 2007, Defendant AIP, a private equity firm which buys underperforming companies, makes operational changes to improve their profitability and value, and then sells them for a profit,[6] acquired Brooks, which manufactures advanced flow, pressure, and vacuum measurement and control solutions, such as mass flow controllers ("MFCs").[7] AIP owned Brooks by way of AIP/BI Holdings, a holding company whose primary asset was Brooks.[8]

In 2011, AIP sought to sell Brooks.[9] During the summer of 2011, AIP pitched Brooks to dozens of potential purchasers, including Plaintiff ITW,[10] a

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[6] Affidavit of Mary Dugan in Support of Defendants' Motion for Summary Judgment ("Dugan Aff.") Ex. 10 at 18:7–12 (Trans. ID. 59726456).
[7] *Id.* Ex. 45 at ITW000087580.
[8] *Id.* Ex. 9 at 235:24–236:5.
[9] *Id.* Ex. 17 at 9:2–11:20. In doing so, AIP was actually selling AIP/BI Holdings. *See id.* Ex. 1 at AIP0076020.

company specializing in the manufacture, sales, and service of industrial components and equipment.[11] On October 28, 2011, ITW submitted a $500 million bid to purchase Brooks.[12] ITW's bid was subject to certain conditions, including receipt of Brooks' financial statements from Fiscal Year 2011.[13] ITW also requested information regarding Brooks' "bookings" (orders received) and "backlog" (unshipped orders).[14]

Brooks was expected to earn $13.5 million in revenue for October sales,[15] and $49 million in combined total revenue for October, November, and December 2011 sales.[16] In communicating with Brooks' CEO Clark Hale[17] and CFO Waqar Nasim[18] in late October, however, AIP's general partners Kim Marvin, John Becker, and Dino Cusumano,[19] Eric Baroyan (the AIP partner in charge of the efforts to sell Brooks),[20] and Paul Bamatter (the CFO of AIP and the Director of

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[10] Affidavit of Meghan A. Adams, Esquire, in Support of Plaintiff ITW Global Investments Inc.'s Brief in Opposition to Defendants' Motion for Summary Judgment ("Adams Aff.") Ex. 3 (Trans. ID. 59869620); *id.* Ex. 4 at 46:17–47:9.
[11] Dugan Aff. Ex. 81; Am. Compl. ¶ 8.
[12] Adams Aff. Ex. 16 at ITW000129698 at ¶ 1.
[13] *Id.* Ex. 16 at ITW 000129700 ¶ 6(E) ("Sellers shall have delivered audited financial statements to the Buyer as of and for the twelve months ended September 30, 2011.").
[14] *Id.* Ex. 18 at ITW000037570.
[15] *Id.* Ex. 33; *see also id.* Ex. 65 at 4, 7.
[16] *Id.* Ex. 65 at 4, 7.
[17] *Id.* Ex. 14 at 19:25–20:10.
[18] *Id.* Ex. 14 at 102:5–8.
[19] Dugan Aff. Ex. 10 at 13:3–14:10.
[20] Adams Aff. Ex. 13.

Brooks)[21] learned that Brooks was struggling to meet the $13.5 million October revenue projection.[22]

As a result, AIP and Brooks reached out to another AIP subsidiary, Ichor, a semiconductor integrator that purchases supplies from Brooks to build larger systems for its customers.[23] David Shimmon, the CEO of Ichor, also served as a non-managing partner of AIP and the Chairman of Brooks' Board of Directors.[24] On October 31, 2011, after communication among the key players in AIP, Brooks, and Ichor, Ichor placed a $5 million order with Brooks[25]—which only drove up Brooks' October revenue to $10.8 million, leaving it $2.7 million shy of the October projection of $13.5 million.[26]

AIP advised ITW of Brooks' October revenue on November 18, 2011, but represented that AIP still expected Brooks' total revenue for October, November, and December 2011 to be $49.3 million, given revised projections of $17 million in November revenue and $21.5 million in December revenue.[27] That same day,

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[21] *Id.* Ex. 13.
[22] *See, e.g.*, *id.* Ex. 29.
[23] *Id.* Ex. 78.
[24] *Id.* Ex. 79 at 10:11–13, 12:2–16; *id.* Ex. 80 at RSM_Brooks_001416.
[25] *Id.* Exs. 25–27; *see also* Appendix A to this Opinion ("**Appendix A**").
[26] Adams Aff. Ex. 29.
[27] *Id.* Exs. 36–37.

ITW responded by reducing its offer from $500 million to $425 million,[28] conditioned on Brooks' November revenue results.[29]

Motivated to ensure that Brooks met its projected November revenue, AIP and Brooks communicated about a "Last Time Buy" sale involving Ichor.[30] Prior to 2011, Brooks had informed its customers that it planned to stop manufacturing various lines of gas-specific MFCs ("Legacy MFCs") and transition to its new line of MFCs ("GF MFCs").[31] Because of this transition, Brooks offered its customers the opportunity to make a Last Time Buy.[32]

In the summer of 2011, Applied Materials, Inc. ("AMAT"), a Brooks customer, expressed interest in placing a Last Time Buy order for the Legacy MFCs.[33] However, AMAT and Brooks encountered difficulties negotiating the terms of the Last Time Buy, and had not reached an agreement by November 2011.[34] As a result, in November 2011, Brooks once again turned to Ichor for help. Ichor agreed to take shipment of the Legacy MFCs, and resell the inventory

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[28] *Id.* Ex. 41; *id.* Ex. 43 at 195:16–201:20.
[29] Dugan Aff. Ex. 76 ¶ 1; Adams Aff. Exs. 4, 40; *id.* Ex. 42 at 197:20–23.
[30] *See* Appendix A. A Last Time Buy occurs when a manufacturer offers to its customers a final chance to purchase a product the manufacturer plans to stop producing. *See* Dugan Aff. Exs. 18, 29, 58; *id.* Ex. 21 at 198:20–199; *see also* Defs.' Opening Br. at 10.
[31] Dugan Aff. Ex. 21 at 198:20–199; *id.* Exs. 29, 58.
[32] *See id.* Exs. 18, 29, 58; *id.* Ex. 21 at 198:20–199; *see also* Defs.' Opening Br. at 10.
[33] Dugan Aff. Ex. 11 at 46:17–47:12.
[34] Adams Aff. Exs. 87–88; *id.* Ex. 89 at 95:5–18.

to AMAT.[35] As AIP notes, "this arrangement was beneficial to Brooks because it could recognize revenue immediately upon shipment to Ichor."[36]

In negotiating with Brooks, Ichor initially sought a right to return to Brooks any Legacy MFCs that AMAT did not ultimately purchase.[37] However, after Waqar Nasim advised Clark Hale that Brooks would not be permitted to recognize revenue if the written agreement included a right of return,[38] Brooks and Ichor excised the right of return from the written agreement.[39] The Last Time Buy Agreement was signed on December 2, 2011, but backdated to November 14, 2011.[40] ITW argues that although the right of return was removed from the Last Time Buy Agreement, Brooks and Ichor shared the understanding that the right of return still existed based on their "working relationship."[41]

In an effort to help Brooks meet its November revenue target,[42] Ichor ordered GF MFCs from Brooks.[43] According to ITW, David Shimmon agreed that Brooks could accelerate shipment of those products into November[44] if they were

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[35] Dugan Aff. Ex. 53.
[36] Defs.' Opening Br. at 12 (citing Dugan Aff. Ex. 18 at 409:9–410:5); Dugan Aff. Ex. 8 at 147:14–148:25.
[37] Adams Aff. Ex. 95 at ICHR00007031; *id.* Ex. 96 at ICHR00007055; *id.* Ex. 97 at ICHR00007120; *id.* Ex. 98 at ICHR0010239.
[38] *Id.* Ex. 100 The right of return would not have been in accordance with GAAP. *See* Dugan Aff. Ex. 18 at 510:15–511:8; Adams Aff. Ex. 65 at ¶¶ 78–80, 92–93.
[39] Dugan Aff. Ex. 53.
[40] *Id.* Ex. 53.
[41] Pl.'s Opp'n Br. at 26; *see also* Adams Aff. Ex. 100; Dugan Aff. Ex. 53.
[42] *See* Adams Aff. Ex. 59.
[43] *See id.* Exs. 59, 64, 108.
[44] *Id.* Ex. 62.

subject to a right of return or a rework provision.[45] In addition, in Fall 2011, Brooks sold $800,000 worth of MFCs to Precision Flow Technologies ("PFT"), an Ichor subsidiary.[46] The agreement between Brooks and PFT included an express right of return.[47]

Throughout late November 2011, AIP communicated with Brooks almost daily to monitor its sales and ensure Brooks was on track to meet the projected November revenue.[48] Much of AIP's communication specifically focused on the materialization of the Last Time Buy.[49] As a result of the Last Time Buy, Brooks recognized almost $1.5 million in revenue.[50] According to ITW, the Last Time Buy and the additional transactions with Ichor and PFT ultimately enabled Brooks to report $17.8 million in November revenue,[51] thereby exceeding its $17 million November revenue goal.[52]

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[45] *Id.* Exs 64, 108. "Reworking" means that Brooks would modify the MFCs if needed to meet the demands of Ichor's customers. *E.g.*, Defs.' Opening Br. at 13. (citing Dugan Aff. Ex. 56; *id.* Ex. 18 at 510:15–511:8, 512:24–513:23; 533:10–535:9; *id.* Ex. 19 at 467:16–470:9; *id.* Ex. 20 at 185:18–187:23).
[46] Dugan Aff. Ex. 12 at 150:2–7; *id.* Ex. 40 at ITW000177724.
[47] Adams Aff. Ex. 111 at ITW000081280; *id.* Ex. 112 at 307:8–308:13; *id.* Ex. 113.
[48] *See* Appendix A.
[49] *See, e.g.*, Appendix A; Dugan Aff. Exs. 57, 69; Adams Aff. Exs. 29, 24, 47, 35, 48, 49, 50, 51, 52, 53, 54, 55.
[50] Adams Aff. Ex. 65 ¶ 45.
[51] Pl.'s Opp'n Br. at 18; Dugan Aff. Ex. 72.
[52] Adams Aff. Ex. 65 § 3.

B. The SPSA

On December 13, 2011, after receiving Brooks' November financial statements, ITW and AIP entered into the SPSA.[53] In the SPSA, ITW agreed to pay $425 million for Brooks, with a contingent $75 million "earn out" based on Brooks' performance in 2012.[54] Brooks represented in the SPSA that Brooks' financial statements for October and November 2011 "ha[d] been prepared in accordance with GAAP,"[55] and that Brooks "operated only in the ordinary course of business consistent with past practices" in October and November 2011.[56]

In Schedule 2.17 of the SPSA, AIP listed each Material Contract to which Brooks was a party.[57] A Material Contract is defined in the SPSA as "a Contract involving the obligation of [Brooks] to deliver products or services for payment in excess of $250,000 . . . other than purchase orders entered into in the ordinary course of business."[58] Paul Bamatter, the CFO of AIP and the Director of Brooks, signed the SPSA on behalf of both AIP and AIP/BI Holdings (Brooks).[59] The Last Time Buy was not disclosed in Schedule 2.17 of the SPSA.[60]

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[53] Dugan Aff. Ex. 1. AIP asserts that representations in the SPSA were made by AIP/BI, and that AIP/BI was the entity actually acquired by ITW pursuant to the SPSA. Defs.' Opening Br. at 22; *see also* Dugan Aff. Ex. 9 at 235:24–236:5.
[54] Dugan Aff. Ex. 1.
[55] *Id.* Ex. 1 § 2.8
[56] *Id.* Ex. 1 § 2.9
[57] *Id.* Ex. 1 Schedule 2.17.
[58] *Id.* Ex. 1 Schedule 2.17(a)(viii).
[59] *Id.* Ex. 1 at AIP0076089.
[60] *Id.* Ex. 1 Schedule 2.17.

ITW made the following representations in the SPSA: ITW did not rely on any statement made by AIP or Brooks "other than those representations expressly made" within the SPSA;[61] it had been permitted access to Brooks' management, facilities, books, and records during due diligence;[62] and it "is an informed and sophisticated purchaser and has engaged expert advisors, experienced in the evaluation and purchase of companies."[63]

The SPSA includes an Exclusive Remedies provision which states:

> From and after the Closing, the rights of the parties to indemnification relating to this Agreement or the transactions contemplated hereby shall be strictly limited to those contained in this Article VIII, and such indemnification rights be the sole and exclusive remedies of the parties subsequent to the Closing with respect to any matter in any way relating to this Agreement or arising in connection herewith. To the maximum extent permitted by law, the parties hereby waive all other rights and remedies with respect to any matter in any way relating to this Agreement or arising in connection herewith . . . *except to the extent of fraud or willful misconduct by any Person*.[64]

Notably here, the SPSA contains a carve-out that exempts fraud claims from the remedies prescribed in the Exclusive Remedies Provision.[65]

Pursuant to the SPSA, closing was conditioned on, *inter alia*, the signing of Officer's Certificates by AIP certifying the accuracy of the representations and

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[61] *Id.* Ex. 1 § 4.8(ii)
[62] *Id.* Ex. 1 § 4.8
[63] *Id.* Ex. 1 § 4.7.
[64] *Id.* Ex. 1 § 8.6(b) (emphasis added).
[65] *Id.* Ex. 1 § 8.6(b).

warranties in Articles II and III of the SPSA.[66] On January 3, 2012, Paul Bamatter and partner John Becker signed Officer's Certificates on behalf of AIP, which provide: "[T]he representations and warranties of [AIP/BI Holdings, Inc.] set forth in Section [] II of the [SPSA] are true and correct as of the Closing Date (other than representations and warranties that are made as of a particular date, which shall be true and correct as of such date.)."[67] The sale closed on January 3, 2012.[68]

C. The Net Working Capital Adjustment

The SPSA provides that the $425 million Purchase Price for Brooks would be adjusted based on the Net Working Capital ("NWC") at the time of Closing.[69] The target NWC was $42.4 million.[70] Section 1.4 of the SPSA provides for an initial adjustment of the Purchase Price on an estimation of Brooks' NWC made just prior to the Closing Date,[71] and Section 1.5 provides for a second NWC adjustment based on the NWC made after the Closing.[72] Section 1.5 allows ITW to dispute the NWC calculations, which ITW did as to both the Last Time Buy and PFT transactions.[73]

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[66] *Id.* Ex. 1 § 7.2(c).
[67] Adams Aff. Ex. 114.
[68] Dugan Aff. Ex. 15 at 15:7–9.
[69] *Id.* Ex. 3 § 1.4.
[70] *Id.* Ex. 3 § 1.4.
[71] *Id.* Ex. 3 § 1.4.
[72] *Id.* Ex. 3 § 1.5.
[73] *See id.* Ex. 13 at 226:14–227:14; *id.* Ex. 15 at 241:18–242:5; *id.* Ex. 39 at AIP0060298–99; *id.* Ex. 40 at ITW000177724; *id.* Ex. 42 at ITW000089098.

The parties eventually settled on a final closing adjustment of $2,495,000 to be paid by AIP to ITW.[74] The NWC payment was memorialized in the NWC Release, dated June 8, 2012, which, *inter alia*, provides:

> Buyers and Sellers' Representative each hereby agree that payment of the Final Closing Adjustment is made in complete and full satisfaction of all obligations of all parties pursuant to Sections 1.2 and 1.5 of the Agreement, and each party hereby completely and fully releases each of the other parties . . . from any and all claims, demands, actions, lawsuits, or causes of action of every kind, nature, or description, whether known or unknown, that now or hereafter exist as a result of or arising out of Sections 1.2 or 1.5 of the Agreement (the "Released Claims"). Each party hereto agrees not to sue or otherwise bring any action against any other party relating to the Released Claims, including, without limitation, pursuant to Article VIII of the Agreement.[75]

In the months following ITW's acquisition of Brooks, Brooks did not perform as well as AIP had projected, or as ITW had expected.[76] After learning of allegedly false representations made in the SPSA, ITW filed suit against AIP for, *inter alia*, fraudulent inducement.[77]

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[74] *Id.* Ex. 3.

[75] *Id.* Ex. 3. Sections 1.2 and 1.5 address the NWC adjustment, and Article VIII deals with indemnification. *Id.* Ex. 1 §§ 1.2, 1.5, 8.1–8.6.

[76] *E.g.*, Am. Compl. ¶ 62 (According to ITW, "[w]hile AIP had projected Brooks' 2012 EBITDA would be $70 million, it was actually only $25.5 million—a shortfall of over 63 percent. AIP projected Brooks' 2012 revenue would be $250 million, but Brooks' 2012 total sales were only $160 million.").

[77] *See* Plaintiff ITW Global Investments Inc.'s Complaint (Trans. ID. 56245529). In 2015, the Court dismissed ITW's additional claims for fraud, fraudulent inducement based on extra-contractual statements, breach of contract, indemnification, and seeking declaratory judgment. *ITW Glob. Invs. Inc. v. Am. Indus. Partners Capital Fund IV, L.P.*, 2015 WL 3970908, at *1 (Del. Super. June 24, 2015).

III. PARTIES' CONTENTIONS

AIP argues it is entitled to summary judgment because Brooks, not AIP, made all of the alleged misrepresentations, and therefore, ITW cannot prove that AIP had knowledge of the alleged fraud.[78] AIP further argues that ITW must show that AIP *knew* about the alleged misrepresentations in the SPSA, and that a showing of reckless indifference to the truth is insufficient to prove the scienter element of a fraudulent inducement claim.[79] Finally, AIP asserts that ITW's release in connection with the NWC adjustment bars ITW's fraudulent inducement claim.[80]

ITW counters that AIP is liable if it knew the representations in the SPSA were false or were made with reckless indifference to the truth, and that there are genuine issues of material fact with regard to AIP's state of mind that make this case inappropriate for disposition on summary judgment.[81] With regard to AIP's release argument, ITW responds that it has not released its fraudulent inducement claim because the NWC Release is limited to only the NWC adjustment.[82]

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[78] *E.g.*, Defs.' Opening Br. at 22.
[79] *E.g.*, *id.* at 22–23.
[80] *E.g.*, *id.* at 31–35.
[81] *E.g.*, Pl.'s Opp'n Br. at 32–33.
[82] *E.g.*, *id.* at 47–50.

IV. STANDARD OF REVIEW

Summary judgment is warranted when "there is no genuine issue as to any material fact [] and the moving party is entitled to a judgment as a matter of law."[83] The Court must "view the facts of the record, including any reasonable hypotheses or inferences, in the light most favorable to the non-moving party."[84] "Rule 56(c) mandates the entry of summary judgment against a party who fails to establish the existence of an element essential to that party's case."[85]

With regard to AIP's release argument, summary judgment is inappropriate if the language in a release is "fairly susceptible [to] different interpretation[s]," or where "there are conflicting factual inferences with regard to the scope of the release."[86] However, "[i]n construing a release, the intent of the parties as to its scope and effect are controlling, and the court will attempt to ascertain their intent from the overall language of the document."[87]

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[83] Super. Ct. Civ. R. 56(c).
[84] *M3 Healthcare Solutions v. Family Practice Assocs., P.A.*, 996 A.2d 1279, 1282 (Del. 2010).
[85] *Collins v. Ashland Inc.*, 2011 WL 5042330, at *2 (Del. Super. Oct. 21, 2011).
[86] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012).
[87] *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 336 (Del. 2012) (quoting *Corp. Prop. Assocs. 6 v. Hallwood Grp. Inc.*, 817 A.2d 777, 779 (Del. 2003)).

V. DISCUSSION

A. Fraudulent Inducement

1. ITW must demonstrate that AIP had knowledge of the alleged misrepresentations.

The elements of fraudulent inducement are: "1) a false statement or misrepresentation; 2) that the defendant knew was false or made with reckless indifference to the truth; 3) the statement induced the plaintiff to enter the agreement; 4) the plaintiff's reliance was reasonable; and 5) the plaintiff was injured as a result."[88] The knowledge that the statement was false, or made with reckless indifference to the truth, is commonly referred to as "scienter."[89]

Under Delaware law, a private equity firm which sells one of its portfolio companies can be held liable for the portfolio company's misrepresentations in the sales agreement.[90] In *ABRY Partners* and *Prairie Capital*,[91] which both involved the sale of a portfolio company by a parent, the Court of Chancery held that the

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[88] *In re Student Fin. Corp.*, 2004 WL 609329, at *7 (D. Del. Mar. 23, 2004) (*citing Lord v. Souder*, 748 A.2d 393, 402 (Del. 2000)).

[89] *In re Wayport, Inc. Litig.*, 76 A.3d 296, 326 (Del. Ch. 2013) ("Under Delaware law, *scienter* can be proven by establishing that the defendant acted with knowledge of the falsity of a statement or with reckless indifference to its truth.") (citing *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 143 (Del. Ch. 2004)).

[90] *See Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35, 59–61 (Del. Ch. 2015).

[91] *ABRY Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032 (Del. Ch. 2006); *Prairie Capital*, 132 A.3d at 35.

plaintiff must make a showing of the seller's knowledge of, rather than reckless indifference to, the misrepresentations.[92]

In *ABRY Partners*, a private equity firm (the "Buyer"), bought a portfolio company (the "Company") from another private equity firm (the "Seller").[93] The parties signed a Stock Purchase Agreement, wherein both the Seller and the Company made misrepresentations.[94] The Stock Purchase Agreement "carefully delineat[ed]" which party—the Seller or the Company—actually made each representation and warranty therein.[95]

The Stock Purchase Agreement in *ABRY Partners* contained a clause stating that the Company's financial statements "fairly present in all material respects the financial condition of the Company and the Company Subsidiaries at the dates therein indicated and the results of operations for the periods therein specified . . . [and] have been prepared in accordance with GAAP."[96] The Stock Purchase Agreement in *ABRY Partners* also contained an Exclusive Remedy Provision barring fraudulent representation claims against the Seller in favor of capped Indemnity Claims.[97] In addition, the Stock Purchase Agreement provided that the Closing of the transaction was conditioned on, *inter alia*, the submission of an

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[92] *ABRY Partners* 891 A.2d at 1063–64; *Prairie Capital*, 132 A.3d at 59–61.
[93] *ABRY Partners*, 891 A.2d at 1034.
[94] *Id.* at 1038–40.
[95] *Id.* at 1041.
[96] *Id.* at 1041–42.
[97] *Id.* at 1044, 1055.

Officer's Certificate.[98] The transaction closed after the Seller's representative signed the Officer's Certificate.[99]

After the Closing, the Buyer in *ABRY Partners* uncovered numerous problems, prompting it to sue the Seller for fraudulent inducement.[100] The Buyer alleged that the Company's financial statements, upon which it had relied when negotiating the sale, "contained material misrepresentations and did not accurately portray the Company's financial condition."[101] More specifically, the Buyer alleged that the Company used a variety of improper methods to manipulate its reported earnings and overstate its revenues in a series of financial reports, thereby violating § 3.6 of the Stock Purchase Agreement.[102] In response, the Seller moved to dismiss the case for failure to state a claim.[103]

The Court of Chancery held in *ABRY Partners* that while the Exclusive Remedies Provision would have ordinarily barred the Buyer's claim, Delaware's public policy—its "distaste for immunizing fraud"—permitted the Buyer to bring a

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[98] *Id.* at 1043. The Officer's Certificate provided:

> Pursuant to Section 8.2(h)(i) of the Agreement, the undersigned duly elected and authorized officer of the Selling Stockholder, hereby certifies that . . . (1) Each representation and warranty of the Company set forth in Article III and the Selling Stockholder set forth in Article IV of the Agreement or in each case deemed made pursuant to Section 7.10(a) is true and correct as of the Closing Date . . . .

Id.

[99] *Id.*

[100] *Id.* at 1038–40.

[101] *Id.* at 1038.

[102] *Id.* at 1038–39, 1041–42.

[103] *Id.* at 1035.

fraudulent inducement claim against the Seller.[104] However, in an effort to balance the contract's plain language with Delaware's public policy, the Court of Chancery "resolved" that the Buyer was required to make a showing of the Seller's knowledge of the false statements, rather than merely showing that the statements were made with reckless disregard for the truth.[105]

In *ABRY Partners*, the Court of Chancery refused to dismiss the case given the Buyer's well-pled allegations of facts and circumstances which, if proven, could support the conclusion "that the Seller was in a position to know of the falsity of the financial statements."[106] In particular, the Court of Chancery pointed to the signing of the Officer's Certificate, the Seller's "close contact with the Company's management on several occasions regarding the financials of the Company," and their discussion of "such subjects as the preparation of projections to provide potential buyers, the Company's EBITDA, the Company's poor financial performance, and the attainment of certain financial targets" as factors which could support the conclusion that the Seller knew of the misrepresentations in the Stock Purchase Agreement.[107]

In *Prairie Capital*, a private equity parent firm (the "Parent") sold a subsidiary company (the "Company") to a buyer (the "Buyer") who later sued the

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[104] *Id.* at 1061.
[105] *Id.* at 1064–65.
[106] *Id.* at 1051.
[107] *Id.*

Parent for, *inter alia*, fraud.[108] In that case, the Stock Purchase Agreement included a carve-out which removed fraud claims from the purview of the Stock Purchase Agreement's otherwise all-encompassing indemnification provision.[109] The *Prairie Capital* transaction did not include Officer's Certificates.

In *Prairie Capital*, the Court of Chancery, relying on *ABRY Partners*, held that the Buyer was required to show that the Parent *knew* of the Company's misrepresentations, even where there was a fraud carve-out[110]—as there is in the SPSA. In refusing to dismiss the fraud claim in *Prairie Capital*, the Court of Chancery pointed to several facts that, if proven, could "conceivably" support the conclusion that the Parent knew of the misrepresentations.[111] For example, the Court of Chancery considered that the Parent's directors:

> participated in numerous conference calls regarding the preparation of the written . . . Presentation, made numerous revisions to, and ultimately approved, that document before its dissemination to [the Purchaser]. Indeed, [the Parent was] so intricately involved in the sales process that one or both of the [Parent's Directors] flew out to the Company's headquarters to *rehearse* the management presentation with [the Company's CEO and CFO] shortly before that presentation was given to [the Purchaser] . . . The [Parent's] directors oversaw the entire process and "affirmatively encouraged, assisted or approved the fraudulent scheme, including by approving or directing [the

[108] *Prairie Capital*, 132 A.3d at 42.
[109] *Id.* at 55. The Stock Purchase Agreement in *Prairie Capital* provided: "Except . . . in the case of fraud, the remedies set forth in this Article X [relating to indemnification] constitute the sole and exclusive remedies for recovery of Losses incurred after the Closing arising out of or relating to this Agreement and the Transaction." *Id.* Thus, the exception in *Prairie Capital* is nearly identical to the exception in the SPSA.
[110] *Id.* at 60–61.
[111] *Id.* at 61.

> Company's CEO and CFO] to provide the false sales numbers for March 2012 to [the Purchaser], and then stood by silently while [the Purchaser] closed the transaction under false pretenses."[112]

ITW argues that because Officer's Certificates were executed in the instant case, *Prairie Capital* is not on all fours with this case, and thus, *Prairie Capital*'s knowledge requirement is inapplicable here.[113] This argument is unavailing. The execution of Officer's Certificates constitutes *one factor*, to be considered among many, that could support a showing of knowledge.[114] In *ABRY Partners* and *Prairie Capital*, the Court of Chancery looked at numerous facts and circumstances which could, if proven, support the conclusion that the parent firms *knew* of their subsidiaries' misrepresentations.

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[112] *Id.* The careful consideration given by the Court of Chancery in *Prairie Capital* of the facts and circumstances relating to the transaction at issue mirrors the Court of Chancery's approach in *ABRY Partners*.

[113] December 16, 2016 Summary Judgment Oral Argument Transcript at 67:21–68:6 ("Summ. J. Oral Arg. Tr.") (Trans. ID. 59995212).

[114] *See ABRY Partners*, 891 A.2d at 1051. In addition, ITW makes much of the fact that *Prairie Capital* refers to recklessness twice in the opinion. *Id.* at 40; Summ. J. Oral Arg. Tr. at 66:5–22. While it is true that the Court of Chancery referred to recklessness twice, it only did so in the course of recounting the traditional elements of fraud. *Prairie Capital*, 132 A.3d at 60–62, 65. The Court of Chancery makes clear in *Prairie Capital* that knowledge, rather than knowledge or recklessness, is the applicable standard in cases where a plaintiff seeks to hold a parent liable for its subsidiary's representations.

2. Knowledge in fraud cases is often proven by circumstantial evidence.

Because there often is no "smoking gun" in fraud cases that directly evidences knowledge, Delaware law provides that "intent can be inferred from circumstantial evidence."[115]

In *ABRY Partners*, the Court of Chancery considered circumstantial evidence, including the execution of Officer's Certificates, as well as the motive and opportunity of the defendant to misrepresent facts, to reach its conclusion that summary judgment was not appropriate.[116] As noted by the Superior Court, the evidence in *ABRY Partners* "helped demonstrate a clear pattern of deception."[117]

Here, there is a wealth of circumstantial evidence relating to knowledge, including, for example, numerous communications between directors of AIP and Brooks,[118] the execution of Officer's Certificates by Paul Bamatter and John Becker, transactions between Brooks and its customers, Ichor and PFT, that

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[115] *Goldsborough v. 397 Props., LLC*, 2000 WL 33110878, at *2 (Del. Super. Sept. 29, 2000); *see also Prairie Capital*, 132 A.3d at 62 (providing that a defendant's state of mind, including its knowledge and intent, "may be averred generally.") (citing *Anglo Am. Sec. Fund, L.P. v. S.R. Glob. Int'l Fund, L.P.*, 829 A.2d 143, 158 (Del. Ch. 2003)); *Cobalt Operating, LLC v. James Crystal Enters., LLC*, 2007 WL 2142926, at *25 (Del. Ch. July 20, 2007), *aff'd*, 945 A.2d 594 (Del. 2008) (noting in a case involving the sale of a radio station from a defendant to a plaintiff that a "smoking gun admission" is "rarely available in cases like this and fraud is often proven by the very type of circumstantial evidence . . . presented here," and consequently assessing the breadth of circumstantial evidence in that case—the various recorded communications and actions, the relevant facts and circumstances, the defendant's motive, and the opportunity to carry out that motive—to determine that fraud had occurred.)

[116] *ABRY Partners*, 891 A.2d at 1051, 1064.

[117] *Abbott Labs. v. Owens*, 2014 WL 8407613, at *9 (Del. Super. Sept. 15, 2014) (citing *ABRY Partners*, 891 A.2d at 1039).

[118] *See* Appendix A.

included rights of return, and AIP's motive and opportunity to misrepresent facts. This evidence could prompt a factfinder to conclude that AIP was involved in a "pattern of deception," and/or that AIP had knowledge of the misrepresentations in the SPSA. It is clear from the record that there are genuine issues of material fact in dispute which must be determined by the finder of fact and are therefore inappropriate for disposition on summary judgment.

3. The Officer's Certificates foreclose AIP's argument that because AIP disclaimed responsibility for the representations made by Brooks in Article II, AIP is not liable for those representations.

AIP argues that because Brooks made the alleged misrepresentations in the SPSA, AIP cannot be held liable.[119] In support of this argument, AIP cites *Abbott Laboratories v. Owens*,[120] which involved the acquisition of a company (the "Company") by another company (the "Buyer"). In *Abbott*, the Company had an application pending before the FDA.[121] After the merger agreement was signed but before the closing, the Company received adverse news from the FDA, which was not, in turn, disclosed to the Buyer.[122] Officer's Certificates from the Company's

[119] Defs.' Opening Br. at 22.
[120] Defendants' Response to ITW Global Investments, Inc.'s Supplemental Submission at Summary Judgment Hearing at 11 (citing *Abbott*, 2014 WL 8407613 at *8–9, 8 n.129) (Trans. ID. 59998242).
[121] *Abbott*, 2014 WL 8407613 at *1.
[122] *Id.* at *3.

directors certifying the veracity of statements in the merger agreement were thereafter delivered at the closing.[123]

The Superior Court held in *Abbott* that because the adverse news was received *after* the merger agreement was signed, all of the representations in the merger agreement were true at the time the agreement was signed.[124] Thus, there were no misrepresentations at the time of signing that induced the transaction, and the Officer's Certificates did not certify any misrepresentations made by the acquired company.[125] The Court in *Abbott* specifically distinguished *Abbott*'s timeline from that in *ABRY Partners*, noting: "Unlike in *[ABRY] Partners*, where the financial statements represented and warranted in the SPA were manipulated before the SPA was signed, in this case, all the alleged misrepresentations occurred after the Merger Agreement was signed."[126]

Here, ITW alleges that the statements in the SPSA were false *at the time the SPSA was signed*,[127] and thus, *Abbott* is inapplicable. AIP has not provided, and the Court has not identified, any authority for the proposition that a parent is not responsible for its subsidiary's representations where the parent has executed

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[123] *Id.* at *4.
[124] *Id.* at *9.
[125] *Id.*
[126] *Id.*
[127] Plaintiff ITW Global Investments Inc.'s Response to Slides 10–12 of Defendants' Supplemental Summary Judgment Submission (Trans. ID. 60109652).

Officer's Certificates certifying their veracity at the time the agreement was signed.

4. Further genuine issues of material fact remain in dispute.

Finally, although the parties' briefing did not focus on whether the statements at issue in the SPSA were, in fact, misrepresentations, at oral argument, AIP challenged ITW's allegations that the Last Time Buy Agreement was required to be disclosed in Schedule 2.17 of the SPSA, and that the Ichor sales involved a right of return.[128] These are additional genuine issues of material fact that remain in dispute.

B. Release of Fraudulent Inducement Claim

AIP contends that the NWC Release executed on June 8, 2012 constitutes a release of ITW's fraudulent inducement claims.[129] AIP points to the last sentence of the NWC Release, which provides, "Each party hereto agrees not to sue or otherwise bring any action against any other party relating to the Released Claims, including, without limitation, pursuant to Article VIII of the Agreement."[130] Under the language of the NWC Release, the "Released Claims" were those arising out of the SPSA's NWC adjustment provisions.[131] Article VIII, *inter alia*, provides for

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[128] Summ. J. Oral Arg. Tr. at 30:22–33:21.
[129] Defs.' Opening Br. at 31–35.
[130] Dugan Aff. Ex. 3.
[131] *See id.* Ex. 3 (Each party hereby completely and fully releases each of the other parties . . . from any and all claims . . . that now or hereafter exist as a result of or arising out of Sections 1.2

AIP to indemnify ITW for breaches of the representations and warranties made in Article II of the SPSA.[132]

Relying on the phrase "relating to," AIP argues that because the facts underlying the NWC adjustment overlap with the facts underlying the instant fraudulent inducement claims, the NWC adjustment is "related to" the fraudulent inducement claims.[133] The Court disagrees.

Under Delaware law, "words of general application used in [a] release which generally follow a specific recital of the subject matter concerned are not to be given their broadest significance but will be restricted to the particular matters referred to in the recital."[134] Given that the foregoing language in the NWC Release concerns only the NWC adjustment, the phrase "relating to" must be read narrowly. Therefore, the overlapping facts supporting the NWC adjustment and the fraudulent inducement claims do not render them "related" claims for the purposes of interpreting the NWC Release.

Along these lines, AIP also points to the phrase "including, without limitation, pursuant to Article VIII" to argue that ITW released the right to bring *any* claims under Article VIII, or elsewhere in the SPSA.[135] Again, the Court

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or 1.5 of the Agreement (the 'Released Claims')"). Sections 1.2 and 1.5 address the NWC adjustment. *Id.* Ex. 1 §§ 1.2, 1.5.

[132] *See id.* Ex. 1 §§ 8.1–8.6.

[133] *E.g.*, Defs.' Opening Br. at 32–34.

[134] *E.I. du Pont de Nemours & Co. v. Fla. Evergreen Foliage*, 744 A.2d 457, 460 (Del. 1999).

[135] *E.g.*, Defs.' Opening Br. at 34–35.

disagrees. This language indicates that the parties agreed to give up their right to seek any type of relief—including the relief mechanisms provided for in Article VIII—*for issues relating to the NWC adjustment*.

Therefore, the NWC Release does not encompass ITW's instant fraudulent inducement claims.

VI. CONCLUSION

For the foregoing reasons, AIP's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

Jan R. Jurden, President Judge

APPENDIX A

EXHIBIT	DATE	FROM	TO	COMMUNICATION
Adams Aff. Ex. 20 at AIP0030639	Sept. 8, 2011	Dino Cusumano	Daniel Davis (AIP employee)	"Biggest issue we have is bookings right now . . ."
Adams Aff. Ex. 20 at AIP0030637	Sept. 10, 2011	Daniel Davis	Dino Cusumano	"The bookings are dropping like a rock – hope buyers don't think this is a falling knife."
Adams Aff. Ex. 13 at AIP0035094	Oct. 20, 2011	Kim Marvin	Eric Baroyan, John Becker, Dino Cusumano, Paul Bamatter	"All the strategic dogs in the process are gobbling down the dog food and racing toward final bid date on October 28th. None of the many geniuses and outside consultants seems focused on the quarterly earnings (or lack thereof) although RWB just woke up to the fact Brooks had a $6 mm quarter in Sept and has another one coming in December. I am a little flinchy because Joel at RWB is VERY close to Steve Martindale at ITW (does a lot more business with Steve than us) and may tip Steve off rather than bagging him with an air bubble . . . it will cause them to ask for quarterly breakout of the 2012 budget (amazingly, despite their thousands of man-hours of collective work, no buyer has asked that question). Once asked, the biopsy result will come back positive and we will have snatched defeat from the jaws of victory . . . JUST WANT TO BE SURE SOME MANAGEMENT BONUS WRANGLING DOESN'T UNWITTINGLY TIP US INTO AN "EMPEROR HAS NO CLOTHES" (autofill suggested close) REVELATION (autofill suggested revaluation—perhaps prescient)."
Adams Aff. Ex. 21 at AIP0033955	Oct. 21, 2011	Dino Cusumano	Eric Baroyan, Kim Marvin	"Dave needs to book order before we send data"
		Eric Baryoan	David Shimmon	"YOU'RE on deck."
		David Shimmon	Eric Baroyan	"Got it"
Adams Aff. Ex. 22 at AIP0034543	Oct. 25, 2011	Waqar Nasim	Eric Baroyan, Clark Hale	"Will stall as long as we can – hopefully the AMAT LTB orders will actually show up from ichor/AMAT before too long . ."
		Eric Baroyan	Waqar Nasim, Clark Hale	"Keep on punting on [Q1 2012] backlog. I'll talk to Kim today"
Adams Aff. Ex. 23 at ITW000180926	Oct. 25, 2011	Waqar Nasim	Kim Marvin, Eric Baroyan, Clark Hale	"Current October booking estimates, excluding AMAT LTB, are: 1. Industrial: $8.2M 2. Semi/LED: $3.8M

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				3. Total of 12M vs $11.99M for September So effectively flat with Sept."
Adams Aff. Ex. 17 at AIP0048043	Oct. 29, 2011	Kim Marvin	Eric Baroyan, Paul Bamatter, Dino Cusumano, John Becker	"Tactic is we need a way to push these guys fast so they don't spend too much time on the deteriorating results and the lack of competition."
Adams Aff. Ex. 28 at ITW000037625–26	Nov. 10, 2011	Clark Hale	Eric Baroyan, Kim Marvin, Dino Cusumano, Paul Bamatter, John Becker	"Unfortunately, ITW is pressing us for October results."
		Paul Bamatter	Clark Hale, Eric Baroyan, Kim Marvin, Dino Cusumano, John Becker	"Budget Oct 2011 revenues was $13.4M vs. actual $10.9M Where was the shortfall/why? . . . is there a story that is not scary????"
Adams Aff. Ex. 30 at AIP0040625–26	Nov. 11, 2011	Spencer Crawford (Baird)	Clark Hale, Eric Baroyan; forwarded to Dino Cusumano	"I just received an email from Jim [ITW?] stating that the October financials are a higher priority than the audit . . . they put the October financials as a higher priority than KPMG's requests."
		Dino Cusumano	Eric Baroyan	"Shit"
Adams Aff. Ex. 47 at ITW000023146	Nov. 13, 2011	Eric Baroyan	Waqar Nasim, Clark Hale	"This goes without saying, but we need to book the hell out of everything we possibly can over the next 10-15 days to ease any concern ITW is going to have once they see October data. this will be very important."
Adams Aff. Ex. 94 at ITW000211599	Nov. 14, 2011	David Shimmon	Clark Hale	"Without AMAT signing up, they could easily convert and stick Ichor with the legacy product inventory."
		Clark Hale	David Shimmon	". . . agree that Ichor should be covered in case AMAT does not consume legacy."
Adams Aff. Ex. 91 at ITW000023192	Nov. 14, 2011	Clark Hale	Bhushan Somani; Zak Subedar	"Dave indicated that Ichor will handle the last time buy . . . ."

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			(Brooks)	
Adams Aff. Ex. 39 at AIP0028978	Nov. 15, 2011	Eric Baroyan	David Shimmon	"to talk through some strategy stuff"
Adams Aff. Ex. 44 at AIP0030987	Nov. 17, 2011	Eric Baroyan	Kim Marvin, Graham Sullivan, Dino Cusumano, John Becker	"Outcome with ITW on the line based on Brooks' November shipments."
Adams Aff. Ex. 48 at ITW000162789–90	Nov. 18, 2011	Clark Hale	Eric Baroyan	"We are finding more things to fill up the bucket for November. Still need . . . Ichor to insert themselves between us on LTB for AMAT service unit (AGS). Trying to connect with Dave on this."
		Eric Baroyan	Clark Hale, Kim Marvin, Paul Bamatter, John Becker, Dino Cusumano	"Keep us posted on your November sales goal of $17mm. can you provide an updated revenue number for November . . . ."
Adams Aff. Ex. 92 at 000198514	Nov. 19, 2011	Clark Hale	Bhushan Somani	"We . . . are trying to get Ichor in the middle"
Adams Aff. Ex. 45 at AIP0029148	Nov. 19, 2011	Dino Cusumano	John Becker	"Whole [B]rooks things is such a pisser. Kim really has dick in dirt . . . . Kills me to think how much Clark and team will make and yet they just couldn't run their f**king company for the three months that really mattered."
Adams Aff. Ex. 57 at AIP0034476	Nov. 19, 2011	Eric Baroyan	Paul Bamatter, Kim Marvin, Dino Cusumano, John Becker	"Issue is november of 17mm is going to be a stretch . . . ."
Adams Aff. Ex. 46 at AIP0034395–96	Nov. 21, 2011	Kim Marvin	John Becker, Dino Cusumano, Paul Bamatter	"This [October 2011 results and Quarter 1 2012 outlook], of course, was the smoking gun."
Adams Aff. Ex. 49 at AIP0032469–70	Nov. 21, 2011	Eric Baroyan	Clark Hale, Waqim Nasir	"To summarize – I'm looking for the below: • Update on November revenue estimate . . . • Scenario analysis on your EBITDA on what November sales

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				could be if the major risk revenue targets didn't hit • Update on what ending November backlog would be . . . • Want to develop a clinical understanding of November to anticipate what earnings would be"
		Eric Baroyan	Clark Hale, Waqim Nasir	"Still feel like $17mm is doable?"
		Clark Hale	Eric Baroyan, Waqim Nasir	"It's in our sights, need some help on AMAT LTB . . . ."
Adams Aff. Ex. 58 at AIP0034031	Nov. 22, 2011	Clark Hale	Eric Baroyan, Wasim Naqir	" . . . we need the Ichor drop-in . . . ."
Adams Aff. Ex. 56 at AIP0029406	Nov. 22, 2011	Eric Baroyan	Clark Hale, Kim Marvin	"Do you have a November update on the company's target of $17mm of revenue – it is of paramount importance."
Adams Aff. Ex. 50 at AIP0025990	Nov. 22, 2011	Eric Baroyan	Clark Hale, Waqim Nasir	"Let's pull everything in as possible . . . so we do whatever we possibly can to not miss the November revenue target."
Adams Aff. Ex. 52 at AIP0025590	Nov. 22, 2011	Derek Leck (AIP)	Kevin Gallagher (Brooks)	"Checking in on how November is going. Are we on track for $17 million of revs?"
Adams Aff. Ex. 51 at ITW000162799	Nov. 23, 2011	Eric Baroyan	Clark Hale, Kim Marvin, John Becker, Dino Cusumano	"We can't miss the 17mm."
Adams Aff. Ex. 53 at AIP0034101	Nov. 29, 2011	Eric Baroyan	Clark Hale	"Please shoot me an email 1st thing today on where revenue stands. Deal hinges on the 17 mm . . . ."
		Eric Baroyan	Clark Hale	"Company is sold if we can get the 17mm of sales. Or else it's a big problem."
Adams Aff. Ex. 54 at AIP0034803	Nov. 29, 2011	Clark Hale	Eric Baroyan	"We are at 12.4mm . . . Once we get the GF orders from Ichor we will get to the $16.9.
		Eric Baroyan	Clark Hale	Are you supposed to get the GF orders today? what is the production schedule today and tomorrow to get to the $16.9mm?"
Adams Aff. Ex. 55 at ITW000162816	Nov. 29, 2011	Eric Baroyan	Clark Hale	"By the way how did bookings for the month shape up? How does December look?"
Adams Aff. Ex. 59 at	Dec. 1, 2011	Geoff Chriswisser	Mark Hutson (Ichor)	"These were the MFC's Shimmon wanted to purchase outside of the AMAT LTB to support Brooks revenue . . . These were outside of the

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ICHR00010442				terms/agreement letter for LTB, but had separate agreement between Shimmon and Hale that Brooks would rework at no cost to Ichor over next 60 days, returns by Feb 1 . . . ."
ITW ex. 76 at AIP0029892	Dec. 4, 2011	Paul Bamatter	Kim Marvin, Eric Baroyan, Dino Cusumano, John Becker	"We might want to SERIOUSLY consider having an arrangement with Ed Manley/Tim H to protect our interests next year . . I can manage that conversation/arrangement but will need to offer something . . all we want is 100% accurate/fair # . . no more . . . no less . . Without someone unofficially/quietly 'protecting our interests' we are likely to get screwed"
ITW ex. 73 at AIP0029760–61	Dec. 6, 2011	Eric Baroyan	Clark Hale	"How is December shaping up in terms of revenue"
		Clark Hale	Eric Baroyan	"Not very attractive right now. First response from team was $12M. We need to be closer to $19M. I've got a roadmap to almost $15M and am looking for additional opportunities."
		Eric Baroyan	Clark Hale	"Same exact exercise as November, $19mm is the correct number."
		Clark Hale	Eric Baroyan	"If the deal rests on $19M, then I'm very concerned."
ITW ex. 68 at AIP0065153	Dec. 7, 2011	Eric Baroyan	Kim Marvin, John Becker, Dino Cusumano, Paul Bamatter	"Don't want to mention anything about December because we're going to miss our December by a wide margin."
		Kim Marvin	Eric Baroyan, John Becker, Dino Cusumano, Paul Bamatter	"Same shitty result in December that we had in October."