



IN THE SUPREME COURT OF THE STATE OF DELAWARE

EV3 INC.,)
)
Defendant Below, Appellant,)
)
v.)
)
MICHAEL LESH, M.D. and ERIK) Case No. 515, 2013
VAN DER BURG, acting jointly as the)
Shareholder Representatives for former) On Appeal from the Superior Court
shareholders of Appriva Medical, Inc.,) of the State of Delaware in and for
) New Castle County
Plaintiffs Below, Appellees.) (C.A. No. 05C-05-218-CLS)

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NATURE OF THE PROCEEDINGS

After a nine-day trial, the jury found that Defendant ev3 consciously and deliberately breached its express contractual obligation of “good faith” for the purpose of avoiding \$175 million in milestone payments to Plaintiffs. On appeal, ev3 does not deny its wrongful conduct or challenge the sufficiency of the evidence supporting the jury’s verdict. It instead challenges the court’s discretionary admission of evidence, as well as parts of jury instructions to which ev3 itself consented. To the extent they are not waived, these challenges do not come close to showing that the verdict should be overturned.

Plaintiffs founded Appriva to develop a medical device called PLAATO, which was designed to reduce the risk of stroke in patients with atrial fibrillation, a common heart condition. In late 2002, ev3—an investment vehicle controlled by two private-equity funds—purchased Appriva for \$225 million, with \$175 million of that amount due upon ev3’s completion of four regulatory “milestones” by certain dates. The parties agreed that ev3 would have “sole discretion” in pursuing those milestones, “*to be exercised in good faith.*” ev3’s conduct, however, was the antithesis of good faith. ev3 intentionally delayed the development of PLAATO specifically to *avoid* the milestone payments. At trial, overwhelming evidence revealed a carefully designed plan to deprive Plaintiffs of their payments while making PLAATO the centerpiece of ev3’s IPO.

The jury, for example, learned that the first milestone was tied to the FDA's approval of a protocol for a trial to test PLAATO's efficacy in human patients. ev3 knew precisely what sort of protocol the FDA would require by 2003, but it postponed its application by another two years, until just *after* the milestone's deadline. This was no coincidence—it was part of an operating plan specifically designed to avoid the “contingent milestone payments” by “postponing the start of Appriva's U.S. clinical trial.” B231. The jury also heard that ev3 disingenuously tried to deceive Appriva by claiming that PLAATO's clinical results did not satisfy the milestone requirements, even though ev3's own head of Regulatory Affairs admitted that they did (and ev3 stipulated so at trial). And the jury heard that, by April 2004, the funds controlling ev3 had already determined that ev3 would delay an international testing program that would trigger another of the milestones, all to prop up ev3's balance sheet for its imminent IPO.

On appeal, ev3 seeks to re-characterize as a *legal* dispute what was a straightforward *factual* dispute at trial: namely, whether ev3's conduct breached its express obligation to act in “good faith.” ev3 manufactures several new legal questions that it failed to raise at trial and that are, in any event, meritless.

To begin, ev3 argues that a letter of intent (“LOI”) executed before the merger “was not incorporated” and should therefore have been excluded. ev3 Br. 19. This argument flatly contradicts ev3's position at trial, where it told the court

that “the [] letter of intent *was* incorporated by reference into the agreement.” B137 at 165:8-12.¹ Also, the LOI was plainly relevant to, and provided context for, the factual question of whether ev3 breached its obligation to act in good faith. Instructing the jury to “not consider” it would have been legal error.

Relatedly, ev3 argues that the trial judge should have instructed the jury on the meaning of Section 9.6 of the Merger Agreement. But the judge did exactly that. The parties proposed, and the judge ultimately gave, an instruction on the meaning of “good faith.” At the close of the prayer conference, ev3 accepted in relevant part that instruction, which tilted heavily in its favor by requiring Plaintiffs to prove that ev3’s conduct violated *both* subjective *and* objective good faith. The additional language ev3 now seeks to graft onto the instruction—that it could not be held to act in bad faith “because it acts in the interest of its own profitability,” B146 at 152:3-6—was unwarranted and is legally incorrect, as it would have rendered illusory ev3’s promise to pursue the milestones in “good faith.”

Lastly, ev3 argues that the trial court abused its discretion in evidentiary rulings on Plaintiffs’ fraud claim—even though ev3 prevailed on that claim at trial. The jury clearly understood the distinction between the fraud and contract claims, as reflected in its well-supported verdict. That verdict should be affirmed.

¹ All emphasis added unless otherwise noted.

SUMMARY OF ARGUMENT

1. Denied. ev3 waived its argument that the trial court should have provided additional instructions on the meaning of Section 9.6 or an instruction that the jury “not consider” the LOI “when considering the meaning of Section 9.6,” and the trial court did not commit plain error in refusing to give these instructions. ev3’s LOI instruction only would have confused the jury, which was never tasked with interpreting the meaning of Section 9.6. Instead, the court instructed the jury on the meaning of Section 9.6 and only asked the jury to decide the factual question of whether ev3 breached its good faith obligation.

2. Denied. ev3 waived any objection to the language of the court’s instruction on the meaning of “good faith,” which was not plainly erroneous. Indeed, because that instruction was phrased in the disjunctive, it required Plaintiffs to prove that ev3 acted with *neither* subjective *nor* objective good faith. The court did not abuse its discretion in refusing to supplement its instruction with ev3’s proposed language that was confusing and contrary to law.

3. Denied. The trial court did not abuse its discretion in admitting evidence relevant to Plaintiffs’ fraud claim, on which ev3 prevailed. Any potential “spillover” could have been addressed by a limiting instruction, but ev3 did not ask for one. The court did not abuse its discretion in excluding “rebuttal” evidence that was, in fact, parol evidence offered to alter an unambiguous contract term.

STATEMENT OF FACTS

In 1998, Dr. Michael Lesh and Erik van der Burg founded Appriva to develop the Percutaneous Left Atrial Appendage Transcatheter Occlusion (“PLAATO”) implant device and delivery system. PLAATO was designed to reduce the risk of stroke in patients with atrial fibrillation, a condition in which the heart beats irregularly, causing blood to stagnate and clot in a small vestigial appendage in the heart. B96 at 10:17-11:2, 11:20-12:5. Given PLAATO’s promising test results, the millions of individuals at risk of stroke due to atrial fibrillation, and the dearth of alternative treatments, PLAATO had the potential to become a multi-billion dollar device. *See* B143 at 81:22-82:1; B318.

The defendant in this litigation, ev3, is a medical-device company that was created as an investment vehicle for the private equity funds Warburg Pincus and The Vertical Group. B92 at 130:15-19. In March 2002, ev3 made an unsolicited offer to purchase Appriva for \$190 million, \$115 million to be paid upfront and \$75 million to be paid upon the completion of several regulatory milestones. B90 at 113:22-115:16. After finishing its diligence, ev3 rebid the deal, reducing the upfront payment to \$50 million and increasing the “milestone” payments to \$175 million. B91 at 116:7-117:6. ev3 defended these changes on the basis that the FDA would likely require a randomized clinical trial—a more expensive type of trial—before approving PLAATO. *See, e.g., id.* at 117:7-17 (explaining that

ev3 “wanted to reduce the down payment” because “the ... trial design that [Appriva] had been working on at the time was less likely to be approved ... than a randomized control trial design”); B97 at 28:1-4; B102 at 167:17-168:7; B103 at 170:21-171:10. Contrary to its claim (rejected by the jury) that a randomized clinical trial would have been “a non starter,” ev3 Br. 5, ev3’s own regulatory consultant advised ev3 pre-merger of the need for a randomized trial, B163 at 33:7-34:2, and the reduced upfront compensation was intended to free up resources for just such a trial, B91 at 117:18-118:2.

Appriva agreed to ev3’s revised terms on July 15, 2002. Under the terms of the parties’ merger agreement (the “Agreement”), the \$175 million in contingent merger compensation would become due upon the completion of four milestones: (1) FDA approval of the IDE application and achievement of certain “Acceptable Clinical Outcomes” (\$50 million); (2) enrollment of 300 patients in an “International Registry” (\$25 million); (3) submission of an application for Pre-Market Approval with the FDA (\$50 million); and (4) approval of that application (\$50 million). A755-A756, § 4.3(a)(i)-(iv). The first milestone had to be completed by January 1, 2005; the second and third had to be completed by January 1, 2008; and the fourth by January 1, 2009. *Id.*

Section 9.6 of the Agreement included requirements for ev3’s funding of post-merger Appriva: “Notwithstanding any other provision in the Agreement to

the contrary, [ev3's] obligation to provide funding for [post-merger Appriva], including without limitation funding to pursue achievement of any of the Milestones, shall be at [ev3's] sole discretion, *to be exercised in good faith.*"

A790, § 9.6. Although the Agreement did not further define the term "good faith," the Agreement referenced and incorporated the LOI:

"This Agreement contains the entire understanding among the parties hereto with respect to the transactions contemplated hereby and supersede[s] and replace[s] all prior and contemporaneous agreements and understandings, oral or written, with regard to such transactions, *other than the Letter of Intent*"

A801, § 16.9. In the LOI, ev3 stated that it would "commit to funding based on the projections prepared by its management to ensure that there is sufficient capital to achieve the performance milestones." A824.

A. ev3 Intentionally Delays PLAATO's Development to Avoid Making Any Milestone Payments.

ev3 claims that it made PLAATO "a high priority" following the merger. ev3 Br. 8. The jury decided otherwise, and rightly so. The evidence shows that by March 2003, ev3's board of directors—specifically, the private equity funds that controlled it—had decided to position the company for an IPO. B231. That meant reducing expenses and contingent liabilities, most notably the milestone payments to the Appriva shareholders. *See* B119-B120 at 24:19-29:14; B131 at 243:5-16; B239. Because ev3's board viewed these payments as "optional and/or

negotiable,” they decided that ev3 would “no longer [be] planning to set aside money” for them. B233. By April 2003—just months after acquiring Appriva and nearly two years before the first milestone deadline—ev3 developed a “revised operating plan” that called for “postponing the start of Appriva’s U.S. clinical trial” to generate “a savings of \$50 million in contingent milestone payments.” B231.

On appeal, ev3 makes much of Section 9.6, which, as noted, governed the funding for PLAATO’s development. But as ev3’s own emails showed, “funding [wasn’t] the issue.” B235. To the contrary, “[t]he issue [was] the ... milestone payment of \$50M which obviously gates the US trial.” *Id.*; *see also* B311 (March 2003 email stating that “we ARE NOT GOING to finance both the milestone payment and clinical trial”); B289-B290 (July 2003 email stating “we ARE NOT DOING A PLAATO TRIAL!!!!”).

In line with its “revised operating plan,” ev3 made certain not to do anything that would trigger the milestones during 2003 and 2004 (a two-year period that is all but ignored in ev3’s brief). For example, in May 2003, the FDA informed ev3 that it would require a randomized clinical trial in the IDE application for PLAATO, B93-B94 at 147:13-149:11, just as ev3’s regulatory consultant had predicted prior to the merger, B163 at 33:7-34:2. At that point, ev3 still had nearly two years, until January 1, 2005, to submit an IDE application and achieve the first

milestone. But ev3 waited until March 2005, two months *after* the first milestone’s deadline, before submitting its IDE application. B93 at 147:3-5. That application called for a randomized trial, the very same trial design that ev3 now claims was a “non starter.” ev3 Br. 5. The FDA approved ev3’s IDE application in October 2005, B336, just late enough to avoid the first milestone payment.

During 2003, the Appriva shareholders grew increasingly concerned about ev3’s inattention to the IDE application and pressed ev3 for an explanation. B177-B179. Not wanting to disclose its “revised operating plan,” ev3 tried to cover its tracks by telling Appriva that it first wanted to apply to the FDA for a Humanitarian Use Device (“HUD”) exception for PLAATO. HUD status, however, is reserved for medical devices designed to treat patient populations of 4,000 or less, whereas PLAATO was designed to treat millions. B88-B89 at 107:20-108:2; B133 at 35:15-19. ev3’s board knew all along that the FDA would reject the HUD application for PLAATO, which it did. *See* B308; B122-B123 at 39:19-42:12. But ev3’s board also knew that a HUD application, unlike an IDE application, could not trigger the first milestone, B109 at 96:4-9, which explains why ev3 pursued this futile strategy in the first place.

While ev3 had no intention of paying the milestones, it still had an interest in developing PLAATO and tapping into its revenue potential. So in the fall of 2003, ev3 hatched a scheme to “have its cake and eat it too”—develop PLAATO without

paying the milestones. This scheme sought to exploit the first milestone's requirement that PLAATO achieve Acceptable Clinical Outcomes ("ACOs"), which measured the number of negative safety events, such as "surgical intervention," in PLAATO's early clinical testing. A741; A750; A806. Despite internal emails stating that PLAATO's clinical data was all "highly compelling," B375, in October 2003 ev3 tried to convince Appriva that PLAATO had not achieved ACOs because according to ev3, pericardiocentesis—a procedure in which excess fluid around the heart is removed with a needle—constituted "surgical intervention" under the Agreement and thus precluded PLAATO from satisfying the first milestone. *See* B99 at 73:23-74:9; B105 at 177:23-178:14. ev3, however, knew this was not true: several months earlier, ev3's own regulatory head specifically told ev3's board that pericardiocentesis was *not* considered "surgical intervention" under the Agreement, and thus PLAATO was on track to achieve ACOs. *See, e.g.,* B287-288. Appriva did not believe ev3's ACO argument and, apparently, neither did ev3: at trial, ev3 *stipulated* that PLAATO had achieved ACOs for purposes of the first milestone. B6.

By impeding achievement of the first milestone, ev3 knew that it was also impeding achievement of the third and fourth milestones. As conceded by Warburg's representative on the ev3 board, these three milestones "are all linked," such that if ev3 did not timely achieve the first milestone, it was "virtually

impossible” to achieve the third and fourth milestones. B110 at 137:5-16.

ev3 also made sure to avoid triggering milestone two, which required completion of the “International Registry,” a reference to the PLAATO device being used in, and data collected on, 300 patients outside of the United States and Canada by January 1, 2008. A746. As of December 2002, ev3’s plan was to enroll those 300 patients in two 150-patient phases, both of which ev3 projected would be complete by the end of 2004. A815-A816. But once ev3’s board imposed the revised operating plan, ev3 altered its plans for the International Registry: ev3 only set up the first 150-patient phase and jettisoned the second, B134 at 39:17-19, thereby precluding the achievement of the second milestone.

All of ev3’s conduct—delaying the IDE application, pursuing a futile HUD strategy, lying about the ACOs, and abandoning the International Registry—was designed specifically to avoid the milestones. This was not mere speculation; ev3’s own documents showed that no later than April 2004, “ev3 determined not to pursue” any of the milestones. B342. ev3, however, continued to pursue its IPO, which it successfully completed in June 2005. And in the course of marketing its IPO in roadshows and SEC filings, ev3 touted PLAATO as a “significant new market opportunity” that had “the potential to change the standard of care for patients at risk for atrial fibrillation-related stroke,” and boasted that “[r]esults presented to the American College of Cardiology in March 2005 supported safety

of PLAATO [] and estimated a 43% reduction in expected annual stroke risk.” B328-B330; B335; B111-B113 at 147:17-156:13; B314-B315.

B. ev3 Discontinues the Development of PLAATO After Plaintiffs File This Lawsuit.

On May 20, 2005, Plaintiffs brought suit against ev3 in Delaware Superior Court. Plaintiffs alleged, *inter alia*, that ev3 breached the Agreement’s requirement that it fund and pursue the PLAATO milestones in good faith, and fraudulently induced Appriva into entering the Agreement by misrepresenting its willingness to develop the device in the event the FDA required a randomized clinical trial.

Several months later, in September 2005, ev3 discontinued PLAATO’s development. ev3 now claims that it did this because of “troubling” performance, ev3 Br. 10, but the jury rejected that claim. Far from performance concerns, ev3 told the FDA as late as March 2008 that “the safety and effectiveness” demonstrated in PLAATO’s feasibility study “justif[ied] the transition to a pivotal study.” B337. The real reason ev3 shut down PLAATO is because the device had already served its purpose—it was the focus of an IPO that Warburg viewed as a “terrific” outcome. B344. ev3 recognized that any further development of PLAATO would only serve to bolster Plaintiffs’ claims in this litigation.

C. The Trial, Jury Instructions, and Post-Trial Briefing.

The case was tried over nine days beginning April 19, 2013. Although the deadline for submitting proposed jury instructions was April 15, 2013, in the middle of trial, on April 21, 2013, ev3 submitted a motion asking for an instruction that the jury “not consider” the LOI. A332-A339. The trial court instructed the parties to address ev3’s proposed instruction at the prayer conference. B95 at 3:15-16 (court). When that prayer conference was held on April 29, 2013, the court told the parties to voice any and all objections to its proposed instructions. *See* B144 at 144:8-11.

With respect to the term “good faith” in Section 9.6, the court proposed the very instruction it ultimately gave:

Good faith is a state of mind consisting in: (1) Honesty in belief or purpose[;] (2) Faithfulness to one’s duty or obligation[;] (3) Observance of reasonable commercial standards of fair dealing in a given trade or business; *or* (4) Absence of intent to defraud or to seek unconscionable advantage. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and with consistency with the justified expectations of the party.

B151 at 149:12-21. Plaintiffs objected on the basis that the court’s instruction, couched in the disjunctive, would require them to prove that ev3 acted with *none* of the aforementioned four elements. B145 at 145:17-21. ev3 requested additional language but otherwise stated that it would “take the definition as it stands.” B146

at 151:3-4. The court denied Plaintiffs' objection and rejected ev3's additional language, which would have told the jury that ev3 does not act in bad faith "just because it acts in the interest of its own profitability." As the court explained, "[t]here's too many other things in that clause for me to get into that type of instruction." B147 at 155:11-14; (court); *see also* B146 at 152:7-8 ("[court]: That's an awful lot of facts that I typically do not give in an instruction").

At the prayer conference, ev3 did not request any other instruction on the meaning of Section 9.6, which it had argued was unambiguous. ev3 also did not renew its request for an instruction that the jury "not consider" the LOI. Nor did it request any instruction that the jury disregard evidence admitted in support of Plaintiffs' fraud claim when evaluating Plaintiffs' breach-of-contract claim. *See* B148 at 170:4-5 ("[counsel for ev3]: [J]ust to be clear, we didn't have any other comments on the instructions.").

The jury returned a verdict finding that ev3 had breached the contract but had not committed fraud. B159 at 47-48. It awarded \$175 million in contract damages, the combined amount of the four milestones. *Id.*

ev3 subsequently filed motions for judgment notwithstanding the verdict and a new trial. In its new trial motion, ev3 argued, among other things, that the court erred in allowing the jury to consider non-binding provisions of the LOI; that, despite its decision to "take the definition [of good faith] as it stands," the court's

instruction was erroneous; and, *in a footnote*, that the court’s failure to dismiss Plaintiffs’ fraud claim “created a ‘prejudicial spillover’ of evidence.” B364 at n.3.

The trial court rejected each of these arguments. First, it held that “the parties expressly contracted to include the Letter of Intent into the Merger Agreement. Therefore, the Letter of Intent and its funding provision did not constitute ... parol evidence.” Ex. H at 8.² Second, it held that ev3 had waived its objection to the language of the good-faith instruction by agreeing to “‘take the definition as it stands.’” *Id.* at 11 (citing B146 at 151:1-5). The court found that ev3 had preserved its request to include additional language that “a party is entitled to take into account [its] own financial considerations,” but held that this additional language was unnecessary. *Id.* at 12. Finally, the court held that “ev3’s argument that it was unable to introduce evidence to rebut the pre-contractual statements [was] without merit since those statements related to fraud and the jury found in ev3’s favor on that claim.” *Id.* at 10.

² “Ex.” refers to the Orders ev3 is appealing, which were appended to ev3’s Opening Brief.

ARGUMENT

I. THE COURT DID NOT COMMIT PLAIN ERROR OR ABUSE ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY NOT TO CONSIDER THE LOI “WHEN CONSIDERING THE MEANING” OF SECTION 9.6.

A. Question Presented

Whether the trial court committed plain error, or abused its discretion, in declining to issue an instruction that ev3 never requested during the parties’ prayer conference, and that would have confused the jury by telling them what they should “not consider ... when considering the meaning” of Section 9.6, where the court already had instructed the jury on the meaning of Section 9.6.

B. Standard of Review

Objections not raised below are reviewed only for plain error, and affirmatively waived objections are not reviewed at all. *Wright v. State*, 980 A.2d 1020, 1023 (Del. 2009). For an error to be “plain,” it “must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.” *Turner v. State*, 5 A.3d 612, 615 (Del. 2010). A refusal to give a particular instruction to the jury is reviewed for abuse of discretion. *Hankins v. State*, 976 A.2d 839, 840 (Del. 2009).

C. Merits of Argument

ev3 argues that the trial court committed reversible error by failing to instruct as to the meaning of Section 9.6, and failing to instruct the jury “that it

could not look to non-binding language from an earlier Letter of Intent” when interpreting Section 9.6. ev3 Br. 13-14. Neither argument has merit. As to Section 9.6, ev3 consented to the court’s language defining “good faith,” and never requested an instruction on the only other operative term, “sole discretion.” Thus, there is no issue preserved for appeal. As for the LOI, ev3 never requested its LOI instruction at the prayer conference, and thus waived this issue. That aside, the court did not abuse its discretion, much less commit plain error, in refusing to give ev3’s confusing and unnecessary instruction. This case was not about the *legal* meaning of Section 9.6, which both parties agreed was unambiguous, but rather the *factual* question of whether ev3 acted in good faith. *See* 23 Williston on Contracts § 63:15 (4th ed.) (“Good faith is usually a factual question, especially well-suited for a jury's determination”). The court already instructed the jury on the meaning of “good faith,” and thus it would have been confusing to also instruct the jury on documents that did *not* bear on that meaning.

1. ev3’s argument that the trial court “provided the jury with no instruction at all as to the meaning and effect of Section 9.6,” ev3 Br. 17, is just wrong. The trial court specifically instructed the jury on the meaning of “good faith” in Section 9.6, and ev3 consented to the language it provided. Although ev3 now complains that the court never instructed the jury on the meaning of “sole discretion,” ev3 Br. 17, ev3 never requested such an instruction, and the trial court’s failure to provide

on its own initiative an instruction that ev3 never requested was not plain error. *See Turner*, 5 A.3d at 615. “Issues that are not fairly presented to the trial court will not be heard on appeal except when the interests of justice so require.” *New Castle Cnty. Dept. of Fin. v. Teachers Ins. & Annuity Ass’n*, 669 A.2d 100, 104 (Del. 1995). In any event, an instruction on the meaning of “sole discretion” would have been unnecessary because, as ev3 conceded, the nub of the case was not whether ev3 had the discretion to determine how it would develop and fund PLAATO, but whether it exercised that discretion in good faith. *See Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 541-42 (Del. 2006).

ev3 also waived its argument that the trial court erred by failing to instruct the jury that it could not consider the LOI “when considering the meaning of Section 9.6 of the Merger Agreement.” A333. After ev3 filed a procedurally improper motion requesting this instruction, the court stated on multiple occasions that any requests for, or objections to, jury instructions should be raised at the prayer conference. *See* B95 at 3:15-16; B140 at 244:19-23. During the prayer conference, ev3 asked for certain parts of its proposed instructions, *see, e.g.*, B146 at 151:5-152:6, but it *never* mentioned its LOI instruction. Near the end of the conference, ev3 stated: “[J]ust to be clear, we didn’t have any other comments on the instructions.” B148 at 170:4-5. Thus, ev3’s LOI instruction was never properly renewed at the prayer conference, and is waived. *See Lum v. State*, 571 A.2d 787,

at *3 (Del. 1989) (unpub.) (finding waiver where defendant requested instruction prior to prayer conference but failed to “renew[] his request ... [and] did not make an objection, on the record, when the missing instruction charge he had proposed earlier was not included”); *see also* Del. Sup. Ct. R. 8.

2. Even if ev3 had properly requested its LOI instruction, the court did not abuse its discretion in refusing to give it. Jury instructions must only “be ‘reasonably informative and not misleading.’” *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002) (quoting *Cabrera v. State*, 747 A.2d 543, 545 (Del. 2000)). A “party does not have a right to a particular instruction in a particular form.” *Id.* Here, the court did exactly what it was supposed to: Prior to trial, it instructed the jury that the court, not the lawyers, would give “instructions on the law,” B84 at 46:9-19, and after the close of evidence, the court gave a correct statement of law concerning the meaning of good faith, B151 at 149:12-21.³

Having already instructed the jury on how to interpret Section 9.6, it would have been misleading and confusing for the court to then instruct the jury on how *not* to interpret Section 9.6. *See Wells v. State*, 832 A.2d 1253, 1253 (Del. 2003)

³ ev3 criticizes certain statements made by Plaintiffs in opening and closing, but the judge instructed the jury to decide the case based solely on the evidence and that opinions or beliefs of counsel were not evidence. B150 at 144:3-10; B158 at 33:23-34:11. ev3, moreover, was equally free to argue and make statements about the significance of the LOI, and it did so. *See, e.g.*, B86 at 78:11-79:9; B154 at 222:5-20.

(“Preventing confusion about the applicable law and the applicable standard of proof is an important role of the trial judge.”); *Adams v. Aidoo*, 2012 WL 1408878, at *12 (Del. Super. Ct. Mar. 29, 2012) (“In providing instructions, judges must avoid confusing the jury.”). ev3’s proposed LOI instruction—telling the jury not to consider the LOI “when considering the *meaning* of Section 9.6”—would have been particularly confusing because the court never posed to the jury the legal question of what Section 9.6 means. Instead, the court told the jury what Section 9.6 means by defining good faith. The question the court posed to the jury was the factual one of whether ev3 complied with Section 9.6: “You must determine from a preponderance of the evidence whether ev3 breached the terms of the merger agreement.” B151 at 148:7-9.

In its brief, ev3 argues that by failing to give the LOI instruction, the court permitted the jury to use the non-binding LOI to interpret the meaning of Section 9.6. ev3 Br. 13. This is wrong. As noted, the court did not ask or instruct the jury to *interpret* Section 9.6, only to decide if ev3 *breached* that provision. In resolving this factual inquiry, the jury could properly consider any evidence of the parties’ prior dealings and understandings, including the LOI. *See Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 418 (Del. 2013) (while liability for breach of a contractual fiduciary duty of good faith may “depend[] on the parties’ relationship when the alleged breach occurred,” “[t]he nature of the parties’ relationship may

turn on historical events, and past dealings necessarily will inform the court’s analysis”); *Stewart v. BF Bolthouse Holdco, LLC*, 2013 WL 5210220, at *7 (Del. Ch. Aug. 30, 2013) (plaintiff stated a claim that defendant breached its obligation to value membership units in good faith where the valuation was inconsistent with defendant’s prior representations and the parties’ course of dealing).⁴

Even if the court somehow erred in rejecting ev3’s proposed LOI instruction—which it did not—any such error was harmless “because it was not prejudicial to defendant.” *Baynard v. State*, 518 A.2d 682, 694 (Del. 1986). As discussed, there was ample evidence to support the jury’s conclusion that ev3 breached the good faith obligation in Section 9.6 even without consideration of the funding language in the LOI. Indeed, as ev3’s emails showed, “funding [wasn’t] the issue,” B235; rather, the issue was ev3’s scheme to avoid triggering the milestone payments. If ev3 was concerned that the jury would base its breach of contract verdict on the LOI rather than Section 9.6, it could have addressed this concern by requesting special interrogatories in the verdict sheet. *Mills v. The*

⁴ See also *Horizon Personal Commc’ns, Inc. v. Sprint Corp.*, 2006 WL 2337592, at *14 n.129 (Del. Ch. Aug. 4, 2006) (“Court may consider extrinsic evidence to determine whether [defendant’s] proposed conduct will violate the implied duty of good faith.”); *Horizon Holdings, LLC v. Genmar Holdings, Inc.*, 244 F. Supp. 2d 1250, 1268 (D. Kan. 2003) (“[E]vidence concerning the parties’ pre-acquisition negotiations is entirely appropriate to provide context for plaintiffs’ claim that defendants breached their duty of good faith.”); *True North Composites, LLC v. Trinity Indus., Inc.*, 191 F. Supp. 2d 484, 514 (D. Del. 2002), *rev’d on other grounds*, 65 Fed. Appx. 266 (Fed. Cir. 2003) (same).

Southland Corp., 1986 WL 1259, at *2 (Del. Super. Ct. Jan. 28, 1986) (concluding that “any speculation on this matter could have been eliminated had the parties requested special interrogatories to the jury”). ev3 never did so, and should not be allowed to exploit any resulting uncertainty on appeal to overturn the verdict.

3. In addition to challenging the trial court’s refusal to give the LOI instruction, ev3 levels three other attacks on the court’s treatment of the LOI. None is compelling. *First*, ev3 argues that “the LOI was not incorporated into the Merger Agreement” and thus “should have been excluded.” ev3 Br. 19. The trial court’s decision to admit the LOI was hardly an abuse of discretion. *See McNair v. State*, 990 A.2d 398, 401 (Del. 2010). While ev3 claims the LOI was *not* incorporated, Section 16.9 says otherwise: “This Agreement ... supersede[s] and replace[s] all prior and contemporaneous agreements and understandings ... with regard to such transactions, *other than the Letter of Intent...*” A801, § 16.9. This language does more than just “reference” the LOI, ev3 Br. 18, it states that the LOI is part of “the entire *understanding* among the parties.” A801, § 16.9. As such, it is part of the material the jury had to consider. *See Star States Dev. Co. v. CLK, Inc.*, 1994 WL 233954, at *4-5 (Del. Super. Ct. May 10, 1994) (incorporation is a question of intent); *Crown Books Corp. v. Bookstop, Inc.*, 1990 WL 26166, at *6 (Del. Ch. Feb. 28, 1990) (finding related agreements were relevant and not inadmissible “parol evidence”). Any other result would render

meaningless the reference to the LOI in Section 16.9 of the Agreement.

ev3's argument on appeal is a marked departure from its position in the trial court, where ev3 conceded time and again that the LOI "was incorporated by reference into the [merger] agreement." B137 at 165:7-12; *see also* B138 at 173:3-6 ("[counsel for ev3]: the parties agreed [that Section 16.9] would be negotiated to include the letter of intent that was incorporated into that agreement."); A189 (referring to "the incorporated letter of intent" in pretrial motion *in limine*). ev3 had strategic reasons for this concession: it argued that statements in the LOI could not form the basis for Plaintiffs' fraud claim precisely because they were part of the Agreement. B137 at 165:7-12 ("[ev3]: *I believe that the [] letter of intent was incorporated by reference into the agreement. So, therefore, it itself cannot constitute a statement that is fraudulent.*"). Having made this concession, ev3 cannot escape it on appeal. *Wright*, 980 A.2d at 1023.

Second, ev3 argues that even if the LOI was incorporated, the court needed to instruct the jury that its funding provisions "were *non-binding* on their face." ev3 Br. 19 (emphasis in original). This argument is waived because ev3 never asked the court for such an instruction; its proposed instruction (which it never requested during the prayer conference) would have told the jury to "not consider" the LOI at all. *Beebe Med. Ctr., Inc. v. Bailey*, 913 A.2d 543, 556 (Del. 2006). It was not plain error to exclude this language, which only would have served to

confuse the jury. Whether the provision was binding was of no import. The jury was entitled to consider the entire LOI, even the “non-binding provisions,” when answering the factual question of whether ev3 breached its good faith obligation.

Third, ev3 argues that, even if the LOI was incorporated, the trial court erred by holding that “it could coexist with ... Section 9.6.” ev3 Br. 20. It is not clear what ev3 is challenging here. If this is an argument that the court should have excluded the LOI, there was no abuse of discretion for the reasons discussed above. If this is an argument that the court should have instructed the jury that the LOI and Section 9.6 were contradictory, this argument fails in the first instance because ev3 never proposed this instruction. Moreover, such an instruction would have been both confusing and wrong, as the LOI can readily be harmonized with Section 9.6. While Section 9.6 gave ev3 “sole discretion” over funding decisions for PLAATO, it cabined that discretion by requiring that it be exercised in “good faith.” The LOI is evidence bearing on the question of whether ev3 exercised its discretion in good faith and is thus not “to the contrary” of Section 9.6. Indeed, if ev3 stated in the LOI that it would provide “sufficient capital to achieve the performance milestones,” incorporated that LOI into the Agreement, but then refused to fund pursuit of the milestones, that is evidence that the jury could consider in evaluating ev3’s good faith. Ultimately, it was up to the jury to decide what weight, if any, to afford this evidence.

II. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR OR ABUSE ITS DISCRETION IN INSTRUCTING THE JURY AS TO THE MEANING OF “GOOD FAITH.”

A. Question Presented

Whether the trial court committed plain error or abused its discretion by using ev3’s own proposed language to instruct the jury as to the meaning of “good faith” in Section 9.6 and by refusing to add unnecessary and confusing facts.

B. Standard of Review

Objections not raised below are reviewed for plain error, and objections that are affirmatively waived are not reviewed at all. *Wright*, 980 A.2d at 1023. The refusal to give a particular instruction is reviewed for abuse of discretion. *Hankins*, 976 A.2d at 840. Instructions “will not be the basis for reversible error if they ‘are reasonably informative and not misleading.’” *Haas v. United Techs. Corp.*, 450 A.2d 1173, 1179 (Del. 1982) (quotation marks and citation omitted).

C. Merits of Argument

ev3 claims that the trial court abused its discretion by including charge language drawn from the implied covenant of good faith and the UCC in its definition of “good faith” and excluding additional language (i) equating “the absence of good faith” with “bad faith” and (ii) stating that “[a] party does not act in bad faith just because it acts in the interest of its own profitability or economic viability, including reconsidering the financial impact of milestone payments.”

ev3 Br. 21. Each of these arguments, however, mischaracterizes the court’s instruction and is meritless. Indeed, the trial court would have committed reversible error had it adopted the flawed and slanted language ev3 requested.

1. As the trial court found, ev3’s claim that the court erroneously included UCC and implied covenant language in its instruction is waived. *See* Ex. H at 11. ev3 affirmatively accepted the proposed language, saying that it “*would take the [court’s] definition as it stands*,” and then in the proposed instruction that we offered add the language.” B146 at 151:3-6. ev3 never objected to the instruction on the basis that it incorporated implied covenant or UCC related concepts—and for good reason. ev3 proposed nearly the same language it now criticizes. *Compare* A203 (ev3 proposed instruction defining “good faith” in part as “faithfulness to the purpose of the contract”), *with* ev3 Br. 25 (claiming error with “faithfulness to an agreed common purpose” language). And it supported that language with implied covenant cases. *See* B145-B146 at 148:21-149:1. As such, ev3 has waived its objection to language in the good faith instruction.

Hoping to undo its waiver, ev3 argues that its offer to “take the definition as it stands” was conditioned on the court adding the additional language it requested. ev3 Br. 29. As the trial court held, however, ev3 never predicated its acceptance of the court’s instruction on the inclusion of additional language. *See* Ex. H at 11; *see also* Del. Super. Ct. Civ. R. 51; *Weedon v. State*, 647 A.2d 1078, 1082-83 (Del.

1994) (objection on one ground does not preserve objection on different ground). Indeed, ev3 never objected to the elements of the instruction it now claims are erroneous. Because it failed to do so, the trial court had no occasion to consider altering its instruction—which, contrary to ev3’s argument, *see* ev3 Br. 29-30, is precisely the point of the waiver doctrine, *see Smith v. Boro of Wilkinsburg*, 147 F.3d 272, 276 (3d Cir. 1998); Ex. H at 8.

2. On the merits, ev3’s objection is premised upon a mischaracterization of the trial court’s instruction on “good faith,” which it never cites in full. The trial court did *not* instruct the jury, as ev3 claims, “that ‘good faith’ required ev3 to ‘observ[e] reasonable commercial standards’ *and* act ‘consistent[] with [Appriva’s] justified expectations.’” ev3 Br. 12. Just the opposite is true. Whereas ev3 portrays the court’s instruction as being in the *conjunctive*, in truth the instruction was in the *disjunctive*. The court instructed the jury that “good faith” would be satisfied by *any* of the following elements: “[1] honesty [in] belief or purpose, [2] faithfulness to one’s duty or obligation, [3] observance of reasonable commercial standards of fair dealing in a given trade or business, *or* [4] absence of intent to defraud or to seek unconscionable advantage.” B151 at 149:12-17. Thus, Plaintiffs were required to prove, and the jury to find, that ev3 acted inconsistently with *all* of those elements. This instruction was very favorable to ev3.

It was for this very reason that *Plaintiffs* objected to the court’s disjunctive

phrasing. B145 at 145:17-21. ev3, in contrast, defended the instruction:

I disagree that the disjunctive should be changed.... [T]here are a variety of different things that can ... constitute good faith, and [] the plaintiff has to show the absence or the opposite of those things.... [T]he “or” makes that clear to the jury that *any of these things*, if defendant acted in an honest belief, faithfulness *or* acted with an absence of intent to defraud or seek unconscionable advantage, that’s correct Defendant doesn’t have to act with all of those together....

Id. at 148:13-20; B146 at 149:7-15. The court sided with ev3 and retained the disjunctive, thereby requiring Plaintiffs to disprove all four elements in the instruction. Had the jury found that ev3’s conduct satisfied one element but failed all of the others, it would still have been required to find for ev3.

In view of the court’s use of the disjunctive, there is no merit to ev3’s criticism of including “faithfulness to an agreed common purpose” or “observance of reasonable commercial standards” language. Even if those two elements misstated Delaware law—and they did not—the instruction required Plaintiffs to prove not only that ev3 failed to act with “honesty [in] belief or purpose,” but *also* that it acted with an “absence of intent to defraud or to seek unconscionable advantage.”⁵ These two elements are interchangeable with what ev3 requested,

⁵ ev3’s criticism of the instruction finds no support in *DV Realty Advisors LLC v. Policemen’s Annuity and Benefit Fund of Chicago, Illinois*, 75 A.3d 101 (Del. 2013). That case recognized that courts must evaluate a contract’s “overall scheme” and the “value [] it sought to protect” when determining the nature of a contractual duty of good faith. *Id.* at 110. Whereas

and ev3 never argues that they are inadequate or improper. *See* A203 (requesting instruction that good faith means “honesty in fact” and absence of “moral obliquity”). The “error” of which ev3 complains only placed an added burden on Plaintiffs to prove that ev3 acted with *neither* subjective *nor* objective good faith.

3. ev3 also argues that the trial court should have instructed the jury that “the absence of good faith requires a finding of bad faith” and “a party may consider its own financial interests when exercising good faith.” ev3 Br. 21; *see also* B146 at 151:11-152:6. The court, however, was well within its discretion in denying ev3’s requested language, which was plainly confusing, cumulative and contrary to Delaware law. *See id.* at 152:7-8 (court); B147 at 155:11-14 (court).

As an initial matter, language equating “the absence of good faith” with “bad faith” would have been “cumulative, adding nothing to the jury’s deliberative process.” *Wright v. State*, 374 A.2d 824, 832 (Del. 1977). That is because the instruction, as worded, already required a finding of bad faith. The court instructed the jury that any one of “honesty [in] belief or purpose,” “absence of intent to defraud,” or “observance of reasonable commercial standards of fair dealing”

DV Realty involved a fiduciary duty of good faith owed to a partnership in a limited partnership agreement, this case involves a straightforward obligation of good faith owed to a counterparty in an arm’s-length merger agreement. At most, *DV Realty* stands for the proposition that contractual good faith requires only “subjective good faith—‘honesty in fact.’” *Id.* at 111. Here, ev3 would have prevailed if the jury found *either* subjective good faith (“honesty [in] belief or purpose”) *or* objective good faith (“observance of reasonable commercial standards”).

could constitute good faith. B151 at 149:12-17. As such, to find that ev3 did not act in good faith, the jury had to conclude that ev3 acted dishonestly, with the intent to defraud, and without observing reasonable commercial standards. That is substantively identical to what ev3 said would establish “bad faith” in its proposed instruction: “dishonest purpose,” “moral obliquity,” or having taken “unreasonable actions with no reasonable purpose” other than avoiding contractual entitlements. B146 at 151:11-18. ev3 itself acknowledged that, under the court’s instruction, the “plaintiff has to show the absence or the opposite of those things, *meaning the plaintiff has to show that the defendant acted in bad faith.*” B145 at 148:16-20.

It was also not an abuse of discretion to deny ev3’s request for language that it would not act in bad faith “just because it acts in the interest of its own profitability ... including reconsidering the financial impact of milestone payments.” A450. The court’s instruction already required the jury to find that ev3 acted dishonestly and with the intent to defraud or seek unconscionable advantage over Plaintiffs—which ev3’s principal case agrees violates a contractual good faith obligation. *See LaPoint v. AmerisourceBergen Corp.*, 2007 WL 2565709, at *10 (Del. Ch. Sept. 4, 2007) (showing “defendant stifled otherwise profitable merger negotiations ... in order to avoid earnout payments” would amount to breach). Moreover, ev3’s proposed language misstates the law—specifically, the “familiar principle that contracts must be interpreted in a manner

that does not render any provision ‘illusory or meaningless.’” *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 832 n.102 (Del. Ch. 2007). ev3’s proposed instruction is tantamount to an instruction that ev3 could, consistent with “good faith,” delay PLAATO’s development solely to sidestep the milestone payments—after all, it would always be in the interest of ev3’s “own profitability” to commercialize PLAATO in a way that avoided triggering the milestone payments. ev3’s “profitability” language would equate “good faith” with “anything good for ev3,” rendering ev3’s “good faith” obligation meaningless. The court did not abuse its discretion in refusing this language.

In any event, even if ev3’s proposed language was permissible, its absence would not be an abuse of discretion. The court’s instruction accurately reflects Delaware law and is sufficient for the jury to have “intelligently perform[ed] its duty in returning a verdict.” *Storey v. Castner*, 314 A.2d 187, 194 (Del. 1973). Even if additional language could add clarity, that does not make an instruction erroneous, let alone constitute an abuse of discretion. *See Corbitt*, 804 A.2d at 1062 (no “right to a particular instruction in a particular form”). Instead, “all that is required is that such statements be reasonably informative and not misleading.” *Id.*; *see Massey v. State*, 953 A.2d 210, 216 (Del. 2008) (“the ‘deficiency’ in the jury instruction was harmless error, because it did not undermine the jury’s ability to perform its duty intelligently”). The instruction here does that.

III. THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE RELEVANT TO THE FRAUD CLAIM AND EXCLUDING PAROL EVIDENCE CONCERNING SECTION 9.6.

A. Question Presented

Whether the trial court abused its discretion by allowing the jury to hear evidence related to Plaintiffs' fraudulent inducement claim, or by excluding parol evidence meant to rebut Plaintiffs' breach of contract claim.

B. Standard of Review

This Court "review[s] a Superior Court judge's rulings on the admission of evidence for abuse of discretion." *McNair v. State*, 990 A.2d 398, 401 (Del. 2010). "An abuse of discretion occurs when a court has exceeded the bounds of reason in light of the circumstances, or so ignored recognized rules of law or practice so as to produce injustice." *Id.*

C. Merits of Argument

In the final few pages of its brief, ev3 argues that Plaintiffs' fraud claim was so "*obviously invalid*" that neither it nor any of the evidence supporting it should have been presented to the jury. ev3 Br. 33 (emphasis in original). As a fallback, ev3 claims that the trial court abused its discretion by denying what ev3 characterizes as fraud "rebuttal evidence," but is really just parol evidence targeted at Plaintiffs' contract claim. *Id.* Neither of these arguments is availing.

1. To begin, ev3 mischaracterizes Plaintiffs' fraud claim when arguing that

it was “obviously invalid.” ev3 Br. 33. That claim was not “premised on ev3’s alleged ‘promise to fund,’” *id.* at 32-33, but rather on ev3’s “half-truth” concerning its plans for developing PLAATO: at a presentation on May 15, 2002, prior to the Agreement, ev3 told Appriva that a randomized trial for PLAATO would be “[m]ost supportable to FDA, panel and medical community,” B189, but failed to disclose that it had no intention of pursuing a randomized trial if it that meant having to pay the milestones, *see Corporate Prop. Assocs. 14 Inc. v. CHR Holding Corp.*, 2008 WL 963048, at *6 (Del. Ch. Apr. 10, 2008) (there is a “duty to make full and fair disclosure as to the matters about which [one] assumes to speak”). Even though the jury found for ev3 on that claim, Plaintiffs submitted sufficient evidence from which the jury *could* have found in their favor, thereby precluding summary judgment. *See* Ex. A at 13-14; *see also Cerberus Int’l Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002).

The trial court did not abuse its discretion in admitting the May 15, 2002 presentation, as that presentation preceded the Agreement and was central to Plaintiffs’ fraud claim. To the extent ev3 was concerned about “spillover,” ev3 Br. 34, the proper course would have been to request a limiting instruction that the jury not consider fraud evidence when evaluating the breach of contract claim. *See State v. Siple*, 1996 WL 528396, at *4 (Del. Super. Ct. July 19, 1996) (“If the jury is instructed ... that evidence admitted for one offense is not to be used in

determining the guilt for another, this is sufficient to eliminate the potential ‘spillover’ effect.”). But ev3 never requested such an instruction. Moreover, there was no “spillover” because ev3 prevailed on the fraud claim.

ev3 also challenges the court’s admission of the LOI, but that document was not related to the fraud claim. Rather, the LOI was related to the contract claim and, in particular, the factual question of whether ev3 acted in good faith, as measured in part by the parties’ “past dealings.” *Gerber*, 67 A.3d at 419.

ev3 next claims that the Agreement’s integration clause barred Plaintiffs’ reliance on representations extraneous to the Agreement in support of the fraud claim. ev3 Br. 33. Integration clauses, however, must *expressly* and *specifically* bar reliance on extra-contractual statements in order to be given that effect. *See Kronenberg v. Katz*, 872 A.2d 568, 591-94 (Del. Ch. 2004). Section 16.9 does not include any such language, and, indeed, is nearly identical to the clause found not to bar reliance in *Kronenberg*.

2. ev3 argues that the trial court erred by excluding its so-called “rebuttal evidence,” namely, evidence that ev3 rejected specific funding plans in the Agreement. ev3 Br. 33-34. But this evidence was not “rebuttal” evidence on Plaintiffs’ fraud claim, which was premised on ev3’s half-truths regarding its willingness to conduct a randomized trial. Rather, ev3’s evidence concerning the negotiation of Section 9.6 was parol evidence intended to alter the meaning of the

Agreement. The trial court was well within its discretion in excluding this evidence because both parties agreed that Section 9.6 was unambiguous. Ex. B at 23:8-9. Regardless, as ev3 stated during closing, “numerous witnesses [] testified ... that [] non-binding letters of intent change as a result of due diligence.” B155 at 226:3-15. It is simply not true that the jury was left with “a one-sided view” of the parties’ expectations. ev3 Br. 34.

CONCLUSION

For the above-stated reasons, Plaintiffs/Appellees respectfully request that this Court affirm the judgment below.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 16, 2013, a true and correct copy of the foregoing document was served by hand delivery and by File & Serve Xpress upon the following counsel of record:

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