



IN THE DELAWARE SUPREME COURT

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

REPLY BRIEF FOR APPELLANT EV3 INC.

Of Counsel:

Theodore B. Olson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
202.955.8500 (P) 202.467.0539 (F)

Christopher D. Dusseault
Joshua S. Lipshutz
Michael Holecek
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
213.229.7000 (P) 213.229.7520 (F)

Dated: December 31, 2013

Matt Neiderman (# 4018)
Gary W. Lipkin (# 4044)
Benjamin A. Smyth (# 5528)
DUANE MORRIS LLP
222 Delaware Avenue, Suite 1600
Wilmington, DE 19801
302.657.4900 (P) 302.657.4901 (F)

Jeffrey J. Bouslog
Bret A. Puls
Dennis E. Hansen
OPPENHEIMER WOLFF &
DONNELLY LLP
222 S. Ninth Street, Ste. 2000
Minneapolis, MN 55402
612.607.7000 (P) 612.607.7100 (F)

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
ARGUMENT	4
I. THE TRIAL COURT ERRED BY ALLOWING THE JURY TO INTERPRET THE MERGER AGREEMENT BASED ON THE LOI.....	4
A. The Trial Court Failed To Interpret The Contract.	5
B. The Trial Court’s Failure To Interpret Section 9.6 And Exclude Conflicting Portions Of The LOI Infested The Trial.	8
II. THE TRIAL COURT’S JURY INSTRUCTION ON GOOD FAITH WAS AN INCORRECT STATEMENT OF DELAWARE LAW.	14
III. THE TRIAL COURT ERRED BY ADMITTING ONE-SIDED EVIDENCE OF THE PARTIES’ PRE-CONTRACTUAL INTENT.....	19
CONCLUSION.....	20

TABLE OF CITATIONS

Page(s)

Cases

<i>Atwell v RHIS, Inc.</i> , 974 A.2d 148 (Del. 2009).....	13
<i>Ayoub v. Spencer</i> , 550 F.2d 164 (3d Cir. 1977).....	17
<i>Beck v. Haley</i> , 239 A.2d 699 (Del. 1968).....	16
<i>Culver v. Bennett</i> , 588 A.2d 1094 (Del. 1991).....	18
<i>Dietz v. Mead</i> , 160 A.2d 372 (Del. 1960).....	9
<i>DV Realty Advisors LLC v. Policemen’s Annuity and Benefit Fund of Chi.</i> , 75 A.3d 101 (Del. 2013).....	2, 14
<i>E.I. DuPont de Nemours & Co. v. Pressman</i> , 679 A.2d 436 (Del. 1996).....	7, 9, 17
<i>Emmons v. Hartford Underwriters Ins. Co.</i> , 697 A.2d 742 (Del. 1997).....	8
<i>Gerber v. Enter. Prods. Holdings, LLC</i> , 67 A.3d 400, 418 (Del. 2013).....	12, 14, 17
<i>GMC v. Grenier</i> , 981 A.2d 531 (Del. 2009).....	18
<i>J.A. Moore Constr. Co. v. Sussex Assocs. Ltd.</i> , 688 F. Supp. 982 (D. Del. 1988).....	19
<i>LaPoint v. AmeriSourceBergen Corp.</i> , 2007 WL 2565709 (Del. Ch. Sept. 4, 2007).....	15
<i>Lum v. State</i> , 571 A.2d 787 (Del. 1989).....	9

**TABLE OF CITATIONS
(Cont'd)**

	<u>Page(s)</u>
<i>Pellaton v. Bank of N.Y.</i> , 592 A.2d 473 (Del. 1991).....	6
<i>PharmAthene, Inc. v. SIGA Techs., Inc.</i> , 2011 Del. Ch. LEXIS 136 (Del. Ch. Sept. 22, 2011).....	11
<i>Pope v. State</i> , 632 A.2d 73 (Del. 1993).....	8
<i>Robelen Piano Co. v. Di Fonzo</i> , 169 A.2d 240 (Del. 1961).....	16
<i>Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods.</i> , 370 U.S. 19 (1962)	7

INTRODUCTION

ev3 bargained for a contractual provision granting it the right to fund pursuit of the post-acquisition milestones in its “*sole discretion, to be exercised in good faith*” (emphasis added), and it agreed to *no other obligations* as to whether or how it would pursue those milestones. Because the Trial Court abdicated its duty to interpret the Merger Agreement, Plaintiffs were able to point the jury to nonbinding language from a pre-merger LOI to alter the meaning of the “sole discretion” clause and create phantom “promises” that ev3 never made—stripping ev3 of the benefit of its bargain. The Trial Court also incorrectly instructed the jury on contractual “good faith” under Delaware law, and improperly admitted one-sided parol evidence of the parties’ pre-merger communications. This Court should order a new trial in which the parties’ *actual* agreement is enforced.

In their Answering Brief, Plaintiffs attempt to transform this appeal into a fact-intensive inquiry into whether ev3’s decisions constituted “good faith.” It is not. This appeal turns on *legal* questions of contractual interpretation that are *antecedent* to any such factual inquiry: what does “sole discretion, to be exercised in good faith” mean in Delaware, and can a nonbinding statement in a pre-merger LOI trump and fundamentally alter the “sole discretion” provision? Because the Trial Court did not properly address and answer these antecedent legal questions,

the jury could not fairly perform its duty to resolve the factual questions that should have been before it.

On appeal, Plaintiffs run from the theory of the case they presented to the jury—primarily, their repeated arguments and testimony that ev3 was contractually “obligated” to fund pursuit of the milestones and that ev3 had discretion only over *how* to do so—no doubt because their trial position is flatly contrary to the plain language of the parties’ final agreement. Plaintiffs further attempt to recast what happened at trial by arguing that ev3 waived its right to challenge legal errors that were among the most hotly and repeatedly contested issues in the trial. While Plaintiffs understandably want to divert this Court from the events that *actually* transpired at trial, the record is undeniable and indefensible.

Plaintiffs also fail to offer a meaningful defense of the Trial Court’s “good faith” instruction. This Court’s recent decision in *DV Realty Advisors LLC v. Policemen’s Annuity and Benefit Fund of Chi.*, 75 A.3d 101, 110-11 (Del. 2013), confirms that the Trial Court’s instruction did not accurately state Delaware law, and instead fundamentally confused contractual good faith with the implied covenant of good faith and fair dealing. Yet Plaintiffs bury their response to *DV Realty* in a single footnote. Significantly, Plaintiffs do not dispute that the Trial Court’s jury instruction included several erroneous statements of law.

Finally, Plaintiffs contend that the Trial Court’s errors were not prejudicial and that the jury would have reached the same verdict—finding that ev3 acted in bad faith—*notwithstanding* the Trial Court’s failure to interpret the contractual “sole discretion” provision, *notwithstanding* the erroneous admission of the nonbinding LOI, *notwithstanding* the erroneous good faith instruction, and *notwithstanding* prejudicial spillover evidence from Plaintiffs’ dubious fraud claim. That Plaintiffs fought so hard for these errors belies the notion that they were inconsequential. But there is simply no way to know what the jury would have done if these significant errors had not occurred. This Court should order a new trial in which both sides have a fair chance to present proper evidence, make proper arguments, and find out what a properly instructed jury would do.¹

¹ Plaintiffs devote 11 pages of their Answering Brief to their statement of facts. Because this appeal presents pure *legal* errors, Plaintiffs’ “facts” are irrelevant and need not be addressed in this Reply Brief, as they can and should be resolved by the jury in a new trial. ev3 is compelled, however, to correct a few of Plaintiffs’ more egregious misstatements: (1) There was no evidence (and Plaintiffs do not cite any) to support Plaintiffs’ theory that ev3 schemed to throw away \$50 million on PLAATO simply to bolster ev3’s IPO three years later. In fact, ev3’s IPO documents barely mentioned PLAATO—“an irrelevant piece of information in a document that’s three inches thick.” *See* AR16-AR23. Nor does Plaintiffs’ theory, that ev3 shelved a device with wildly profitable potential simply to avoid milestone payments, make any sense. If PLAATO had such potential—and everyone came to realize it did not, as confirmed by the mere \$6 million PLAATO fetched at market (A460 at 17:5-10)—then surely ev3 would have developed it and reaped the benefits of its investment. (2) ev3 did not shutter PLAATO in response to this lawsuit (a contention for which Plaintiffs provide no citation); that decision was put in motion long before litigation. *See* A862-A864. And again, if ev3 had believed at the time of the lawsuit that PLAATO was a “billion dollar opportunity,” surely it would have pursued those profits lawsuit or no lawsuit. (3) Plaintiffs themselves agreed that a randomized trial (the type of trial the FDA eventually required) was “not reasonable.” *See* A362-A364. (4) ev3 did not apply for a Humanitarian Use Device exception in order to delay PLAATO; Plaintiffs themselves applauded the HDE strategy as “very sensible.” AR13-AR14.

ARGUMENT

I. THE TRIAL COURT ERRED BY ALLOWING THE JURY TO INTERPRET THE MERGER AGREEMENT BASED ON THE LOI.

Plaintiffs claim that “[t]his case [i]s not about the *legal* meaning of Section 9.6.” Ans. 17. But the interpretation of § 9.6 and the relevance of the LOI to interpreting that provision were the most sharply disputed issues before, during, and after trial, arising repeatedly throughout the litigation. For example:

- ev3 filed a motion in limine “To Exclude Evidence Of The Non-Binding ‘Funding To Projections’ Portion Of The [LOI]” (A190), which the Trial Court denied (Opening Brief (“Br.”) Ex. B at 13:2-5).
- ev3 argued at the pre-trial conference that the LOI should not be used to “affect Section 9.6” (Br. Ex. B at 15:2-16:3), a point that Plaintiffs characterized as improper “reargument” because “the Court has already ruled . . . that [the LOI] . . . would be allowed” (*id.* at 16:4-9; 22:7-22).
- Before opening statements, ev3 objected to Plaintiffs’ demonstratives that “they intend to use . . . to show that [the LOI] alters the meaning of Section 9.6,” and that this is “a question for the Court.” A217-A218. The Trial Court overruled the objection. A218 at 19.
- ev3 filed a “Motion For A Jury Instruction On The Impact Of The Letter Of Intent On The Meaning Of Section 9.6 Of The Merger Agreement” (A332), on which the Trial Court never ruled. ev3 also submitted a proposed instruction on this subject that the Trial Court never gave. A338.
- At trial, when Plaintiffs tried to elicit testimony altering the meaning of § 9.6, the Trial Court overruled ev3’s objections. *See, e.g.*, AR6-AR12.
- When ev3 challenged these errors in its motion for a new trial, the Trial Court recounted ev3’s “various motions in *limine*” on these issues before addressing ev3’s arguments, and did not mention waiver. Br. Ex. H at 3.

The Trial Court’s failure to interpret the parties’ contract infested the entire trial, leaving the parties to argue to the jury legal questions about the contract’s meaning, not just the factual questions that are properly within the jury’s province.

A. The Trial Court Failed To Interpret The Contract.

Section 9.6 provides that “[n]otwithstanding any other provision in the Agreement to the contrary,” ev3’s “obligation to provide funding for [Appriva], including without limitation funding to pursue achievement of any of the Milestones, shall be at [ev3’s] sole direction, to be exercised in good faith.” A790 § 9.6. The Trial Court found that provision to be unambiguous, but nevertheless allowed the parties to argue competing interpretations to the jury.

Plaintiffs argued that ev3 was *committed* to funding each milestone and had discretion only as to *how* to fund them. *See, e.g.*, AR3-AR4 (Plaintiff van der Berg: “[ev3] didn’t have the discretion not to pursue any milestones. . . . They had leeway on how they pursued PLAATO.”); A678 at 10-13 (Plaintiffs’ closing argument: “ev3 can’t just moth ball PLAATO . . . when they have an expressed obligation to fund it, and to pursue the milestones. They have to at least try.”); A229 at 1-8. ev3, on the other hand, was left to try to explain to the jury that § 9.6 meant what it said—that it gave ev3 sole discretion over *whether* to fund pursuit of the milestones, provided it acted in good faith when exercising that discretion.

See, e.g., AR27 at 265 (ev3: the “decision to shut [PLAATO] . . . [is] precisely the kind[] of business considerations that are well within the sole discretion standard”).

The Trial Court erred by delegating to the jury its responsibility to interpret the contract. *See Pellaton v. Bank of N.Y.*, 592 A.2d 473 (Del. 1991). Plaintiffs do not dispute this bedrock principle of contract law; they instead pretend that the jury was *not* asked to interpret the contract. Ans. 20. But Plaintiffs themselves exhorted the jury to interpret the contract. *See, e.g.*, A250 (“You’re going to have to interpret the contract however you read it.”). That Plaintiffs choose on appeal to deny that the jury was left to interpret the Merger Agreement, rather than defend what transpired as appropriate or consistent with Delaware law, speaks volumes.

Worse, the Trial Court’s failure to interpret the agreement allowed Plaintiffs to argue that it included *two separate promises*: one promise to fund pursuit of the milestones in good faith (derived from Section 9.6), and a separate unconditional promise to ensure the funding of each milestone under any circumstances (derived from ev3’s nonbinding, pre-contractual LOI). *See* A481 at 173:14-22 (“In the [LOI, ev3] promised Appriva that they would insure—that’s a pretty strong word, insure—that there is sufficient capital to achieve the performance milestones . . . *That was one of the promises they made in the contract. That wasn’t the only promise.* [In Section] 9.6, they told us they would fund and pursue the milestones

in good faith.”) (emphasis added); A223 (“[ev3 breached] those promises I just walked you through about ensuring adequate funds, about good faith funding”).

Thus, even though the actual contract contained only one binding promise regarding ev3’s obligation to fund pursuit of the milestones, there is no way to know *which* alleged promise the jury found ev3 to have breached. Plaintiffs say the Trial Court’s failure to interpret the contract was harmless because, whatever that contract means, the jury must have found that “ev3 breached the good faith obligation in Section 9.6.” Ans. 21. Not so. It is entirely possible that because of the Trial Court’s errors, the jury *never even reached the question of good faith*, concluding instead that ev3 breached a separate, unconditional commitment that Plaintiffs claimed arose from the nonbinding LOI. *See* A565 (Plaintiffs’ demonstrative illustrating multiple promises, including a promise from the LOI not conditioned on “good faith”); A481 at 173 (Plaintiffs’ closing argument describing the LOI and § 9.6 as two separate promises). The jury verdict form states only that the jury found a “breach”; nowhere does it state that the jury found a breach of § 9.6, as opposed to the phantom LOI obligation pressed by Plaintiffs. Br. Ex. G. That uncertainty alone warrants a new trial. *See Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods.*, 370 U.S. 19, 30 (1962); *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 444 (Del. 1996).

B. The Trial Court’s Failure To Interpret Section 9.6 And Exclude Conflicting Portions Of The LOI Infested The Trial.

The Trial Court’s abdication of its responsibility to interpret § 9.6 manifested itself in various ways throughout trial, including improper jury instructions, erroneously admitted evidence, and improper arguments by Plaintiffs’ counsel. Plaintiffs argue that each of these separate errors should be reviewed under an abuse of discretion standard, but they ignore the underlying *legal error* that was the driving force behind all of these decisions—an error of contractual interpretation that this Court should review *de novo*. See *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 744 (Del. 1997).

1. Improper Jury Instructions. Despite having ruled that § 9.6 was unambiguous (Br. Ex. B at 12:4-7), the Trial Court refused to give ev3’s proposed jury instruction that “[u]nder Delaware law, you may not consider any of the language of the Letters of Intent when considering the meaning of Section 9.6 of the Merger Agreement” A339. Plaintiffs capitalized on this error by arguing repeatedly that the LOI should be used to alter the plain meaning of § 9.6. See, e.g., A229 at 1-8; A481 at 173:6-18; A484 at 185:8-14.

Plaintiffs respond that ev3’s proposed instruction was too “confusing” because it would have “instruct[ed] the jury on how *not* to interpret Section 9.6.” Ans. 19. This is nonsense. Courts regularly instruct juries *not* to construe evidence in a certain way. See, e.g., *Pope v. State*, 632 A.2d 73, 78 (Del. 1993).

Here, the Trial Court was required to give ev3’s proposed instruction to dispel the confusion *Plaintiffs* created regarding how many promises ev3 made, which promises were binding, and what § 9.6 actually meant. Telling the jury that ev3 made only one promise—that it would exercise its sole discretion in good faith—and that the LOI could not alter that promise, was part of the Trial Court’s job of interpreting the contract, not some superfluous or confusing additional step.

Plaintiffs also fault ev3 for failing to propose its corrective jury instruction a second time at the charge conference, but that was not necessary to preserve ev3’s arguments under Delaware law. No waiver will lie “if the party’s position previously has been made clear to the trial judge and it is plain that a further objection would be unavailing.” *E.I. DuPont*, 679 A.2d at 439-40 (holding that defendant’s failure to object to a jury instruction did not constitute waiver because he had already unsuccessfully argued his legal position). ev3 sufficiently preserved its arguments regarding exclusion of the LOI and its corrective jury instruction by unsuccessfully making multiple motions in limine and objections before and during trial. *See id.*; *Dietz v. Mead*, 160 A.2d 372, 374 (Del. 1960).²

2. Erroneously Admitted Evidence. The nonbinding funding provision in the LOI had no place at trial because it directly contradicted § 9.6—an

² Plaintiffs cite *Lum v. State*, 571 A.2d 787, 1989 WL 160439 (Del. 1989) (unpub.), to support their waiver argument. But, in *Lum*, the Court found waiver based on a Superior Court Criminal Rule not applicable in this case, and *Lum* did not involve a circumstance where (as here) the issue had been raised multiple times with futility before. *Id.* at *3-4.

unambiguous final expression of the parties’ agreement that controlled “[n]otwithstanding any other provision in the Agreement to the contrary” (A790)—and was not relevant to any other issue. ev3 repeatedly warned the Trial Court that admission of this evidence would confuse the jury and prejudice the trial (e.g., A194), and that is precisely what happened.

As ev3 explained in its Opening Brief, the Trial Court’s erroneous decision to admit the nonbinding LOI provision stemmed from three incorrect findings:

First, the Trial Court was wrong to hold that the LOI’s funding provision was incorporated into the Merger Agreement. It was not incorporated; it simply was not superseded. Plaintiffs completely ignore the cases that ev3 cited explaining this distinction and holding that the very language found in the Merger Agreement is insufficient to incorporate a pre-contractual letter of intent. *See* Br. 18. Rather than defend incorporation on the merits, Plaintiffs make the specious argument that ev3 “conceded” the point. Ans. 23. ev3 made no such concession. Indeed, ev3 consistently argued before and during trial that the LOI’s funding provision was not incorporated in the Merger Agreement, even if other parts of the LOI were incorporated. *See, e.g.*, A192-193; A426 at 242:14-19. ev3 did argue that the “incorporated LOI” barred Plaintiffs’ fraud claims—but it did so only *after* the Trial Court had already ruled that the LOI was in fact incorporated (*see* AR2 at 18:2-5), and *after* ev3 had preserved its objection to that erroneous conclusion (*see*

A192-A193), a fact that Plaintiffs ignore when they describe ev3’s position. *See also* B137 at 165; Br. Ex. B 15:16-16:3 (ev3’s counsel: “to the extent that plaintiffs are allowed to suggest to the jury that the [LOI] language . . . was to be incorporated by reference . . . , can ev3 still put [in] the contrary negotiating history[?]”).

Second, even if the LOI’s funding provision was incorporated, it was nevertheless nonbinding *on its face*. *See* A824 (“The foregoing terms are . . . non-binding.”); *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 Del. Ch. LEXIS 136, *49-56 (Del. Ch. Sept. 22, 2011) (nonbinding term sheet did not become binding when it was attached to the Merger Agreement). Plaintiffs offer no response to ev3’s authorities. In fact, they do not even dispute that the LOI’s funding provision is nonbinding (contrary to the position they took with the jury), making the Trial Court’s error all the more indefensible. *See* Ans. 24 (“Whether the provision was binding was of no import.”).³

Third, even if the LOI’s funding provision was incorporated and binding, it still was inadmissible because § 9.6 governed “[n]otwithstanding any other provision . . . to the contrary.” A790. The LOI’s funding provision is obviously

³ In its Order denying ev3’s post-trial motion for a new trial, the Trial Court stated that ev3’s characterization of the LOI as nonbinding was based on the fact that § 9.6 began with the words “[n]otwithstanding any other provision to the contrary.” Br. Ex. H at 9. That is wrong. What makes the LOI’s funding provision nonbinding is that *the LOI expressly says so on its face*. The Trial Court’s statement makes clear that it fundamentally misunderstood the LOI, a misunderstanding that permeated many of its rulings and instructions at trial.

“contrary” to § 9.6 and the Trial Court was flat wrong in concluding otherwise. Again, Plaintiffs offer no response to this argument.

Plaintiffs argue that the LOI was a “prior dealing” of the parties and was admissible as “evidence bearing on the question of whether ev3 exercised its discretion in good faith.” Ans. 24. This argument conflates *contractual* good faith with the *implied covenant* of good faith (which the Trial Court correctly found to be inapplicable in this case (Br. Ex. A at 10)). Pre-contractual statements and prior dealings are *not* admissible evidence bearing on *contractual* good faith, because contractual good faith “looks to the parties as situated at the time of the wrong.” *See Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 418-19 (Del. 2013).⁴ Indeed, Plaintiffs argued at summary judgment that the LOI was admissible only “as it relates to the overall implied covenant.” Br. Ex. B at 23:7-22. Now Plaintiffs reverse course and argue that the LOI is relevant to their *contractual* good faith claim (tellingly, they still cite implied covenant cases (*see* Ans. 21 n.4)). But contractual good faith and the implied covenant are “very different” (*Gerber*, 67 A.3d at 418), and the parties’ nonbinding, pre-contractual LOI has no bearing on whether ev3 acted in bad faith *under the contract* several years later.

⁴ Plaintiffs’ cite *Gerber* for the proposition that contractual good faith turns on “historical events, and past dealings” (Ans. 20-21), but misleadingly omit the rest of the sentence, which reads in full: “The nature of the parties’ relationship may turn on historical events, and past dealings necessarily will inform the court’s analysis, *but liability depends on the parties’ relationship when the alleged breach occurred, not on the relationship as it existed in the past.*” 67 A.3d at 418 (emphasis added).

3. Improper Arguments To The Jury. The Trial Court’s failure to interpret § 9.6 also allowed Plaintiffs to unleash a torrent of improper arguments on the jury. Plaintiffs seized on the LOI’s funding provision, arguing repeatedly that ev3 had *no discretion* whether to fund pursuit of the milestones. *See, e.g.,* A229 at 1-8 (“In this letter of intent, look at this language. They said they *will*, not *may*, *will* commit to finding funding based on the projections prepared by its management—and this is a key phrase—to ensure, to ensure that there is sufficient capital to achieve the performance milestones detailed above. That’s what they told us in the letter of intent.”); A689 at 7-9. Plaintiffs also elicited the same improper remarks about the LOI from their witnesses. *See, e.g.,* A268-A270.

Instead of defending their legally erroneous statements to the jury—which they plainly cannot do—Plaintiffs contend that any error was harmless because ev3 “was equally free to argue and make statements about the significance of the LOI.” Ans. 19 n.3. Not surprisingly, Plaintiffs offer no legal support for the preposterous suggestion that improper evidence is harmless as long as both parties can argue about it to the jury. Plaintiffs also respond that their improper arguments were cured because “the judge instructed the jury to decide the case based solely on the evidence and [not the] opinions or beliefs of counsel.” *Id.* But an “instruction that statements of counsel [a]re not evidence d[oes] not cure . . . counsel’s improper statement[s].” *See Atwell v RHIS, Inc.*, 974 A.2d 148, 154 (Del. 2009).

II. THE TRIAL COURT’S JURY INSTRUCTION ON GOOD FAITH WAS AN INCORRECT STATEMENT OF DELAWARE LAW.

The Trial Court’s jury instruction on the meaning of contractual “good faith” did not accurately state Delaware law, and thus constituted *plain error*. Notably, Plaintiffs do not dispute ev3’s authorities establishing that the jury instruction misstated the law and improperly borrowed concepts from the implied covenant of good faith that this Court has held are inapplicable to contractual good faith.

A. Bad Faith. Because this case involves contractual good faith, the Trial Court should have instructed the jury (as ev3 requested) that the absence of good faith requires a finding of bad faith. Plaintiffs say that such an instruction would have been “confusing,” “contrary to Delaware law,” and “cumulative, adding nothing to the jury’s deliberative process.” Ans. 29. But this Court recently held exactly the opposite—that an understanding of bad faith is necessary to a proper understanding of good faith. *DV Realty*, 75 A.3d at 110.

Plaintiffs respond to *DV Realty* only in a footnote, attempting to distinguish the case on the basis that it involved limited partners. Ans. 28 n.5. But nothing in this Court’s opinion suggests that its definition of good faith does not apply with equal force to the Merger Agreement here. Plaintiffs themselves rely on cases involving limited partnership agreements when it suits them. *See* Ans. 20 (citing *Gerber*). Moreover, at trial (before this Court issued the *DV Realty* decision), Plaintiffs’ counsel urged the Trial Court to defer to this Court’s precedents

contrasting good faith with bad faith: “I think we can all agree that the most recent statement by the Delaware Supreme Court on good faith, viz-a-viz, bad faith is actually the binding precedent.” AR24-AR25 at 168:22-169:5. The binding precedent now is *DV Realty*.

B. Abstract Definition of Good Faith. The Trial Court also erred by failing to instruct the jury about what specific conduct constitutes bad faith and what conduct may be consistent with good faith—an omission that enabled Plaintiffs to argue that ev3 *necessarily* acted in bad faith by taking into account the milestone payments when deciding whether to pursue PLAATO. *See* Br. 23. Plaintiffs’ argument was incorrect as a matter of law. *See LaPoint v. AmeriSourceBergen Corp.*, 2007 WL 2565709, at *10-11 (Del. Ch. Sept. 4, 2007). But the jury had no way of knowing that because the Trial Court rejected ev3’s instruction, which would have explained that “[a] party does not act in bad faith *just because* it acts in the interest of its own profitability or economic viability, including considering the financial impact of milestone payments.” A203 (emphasis added).

Plaintiffs say this instruction would have rendered the good-faith provision “illusory” because parties “always” act in the interest of their own profitability. Ans. 31. But the proposed instruction did not say that acting in the interest of profitability is *always* consistent with good faith; it merely would have explained that a party does not *necessarily* act in bad faith “just because” it takes profits into

consideration—an instruction the jury needed to hear in light of Plaintiffs’ arguments to the contrary.

Plaintiffs also argued to the jury that ev3 acted in bad faith by shutting down PLAATO after it *tried and failed* to raise additional funding. *See* A483, 180:14-18 (“[T]hey decide to postpone the clinical trial. Why? Because they can’t raise money from other people.”). But the Trial Court should have told the jury that “[a] party does not act in bad faith merely because it could conceivably try harder or take different or more actions to achieve a goal,” as ev3 proposed. A203. Indeed, it is difficult to imagine a more clearly “good faith” reason to decide not to pursue something than the unavailability of funds to do so. Failure to adopt ev3’s proposed instruction left the jury with an insufficiently abstract definition of good faith—susceptible to Plaintiffs’ misleading and legally improper arguments that ev3 was *obligated* to fund pursuit of each milestone, even though § 9.6 expressly gave it the right *not* to fund pursuit of a milestone as long as it had a good faith basis for deciding not to do so. *See Beck v. Haley*, 239 A.2d 699, 702 (Del. 1968); *Robelen Piano Co. v. Di Fonzo*, 169 A.2d 240, 247 (Del. 1961) (ordering new trial because defendant “was entitled to have the issue of contributory negligence submitted to the jury under proper instructions relating directly to the factual issues in the case”).

C. Implied Covenant and UCC. The Trial Court also erred by giving a “good faith” jury instruction derived from the implied covenant of good faith and the UCC. *See Gerber*, 67 A.3d at 418-19 (in contractual good faith cases, Delaware law prohibits a court from applying “the standard that is embedded in the implied covenant”). Importantly, Plaintiffs *do not dispute* that the instruction was derived from those improper sources, or that how one looks at good faith is fundamentally different in those two settings. Instead, they argue that the errors should stand because (1) the instruction was framed in the disjunctive, and (2) ev3 waived certain of its objections. Both arguments fail.

Plaintiffs’ “disjunctive” argument fails first and foremost because the language that the Trial Court improperly drew from the implied covenant of good faith (“faithfulness to an agreed common purpose and consistency with the justified expectations of the party”) ***was not in the disjunctive portion of the instruction***. Instead, it appeared in a standalone paragraph that came *after* the disjunctive part. Br. Ex. D at 11. A new trial is required because the jury could have based its verdict on this erroneous language. *See E.I. DuPont*, 679 A.2d at 444 (ordering new trial because the trial court’s overbroad jury instruction on the implied covenant of good faith included both legally proper and legally improper bases for liability; that the jury may have found the defendant liable under a legally proper basis is irrelevant); *see also Ayoub v. Spencer*, 550 F.2d 164, 168 n.7 (3d

Cir. 1977) (“What the jury ultimately found, of course, is beyond our knowledge. . . . [Whether erroneous] instructions did or did not bring about the verdict is not crucial. . . . If it appears that such instructions might have been responsible for the verdict, a new trial is mandatory.”).

Plaintiffs’ waiver argument fails because no such waiver occurred. After the Trial Court rejected ev3’s proposed instruction, counsel for ev3 said that he could accept the Court’s instruction *only* if the Trial Court included certain additional language. A449 at 1-5. Of course, when the Trial Court refused to include the additional language, ev3’s conditional “acceptance” was effectively rescinded. Further, the Trial Court directed the parties *not* to offer any additional objections to the Trial Court’s “good faith” instruction after each party expressed dissatisfaction with the instruction proposed by the Trial Court (*see* Br. 28)—a point that Plaintiffs do not dispute. Under such circumstances ev3 can hardly be faulted for not raising its objection yet again, rightfully believing it had been preserved for appeal. *See GMC v. Grenier*, 981 A.2d 531, 541 n.27 (Del. 2009) (purpose of waiver doctrine is to provide trial court with adequate opportunity to address legal disputes, and a party cannot be faulted with following court’s instruction to hold objections). Finally, even if ev3 failed to properly object, ev3 was denied its “unqualified right to have the jury instructed with a correct statement of the substance of the law.” *Culver v. Bennett*, 588 A.2d 1094, 1096 (Del. 1991).

III. THE TRIAL COURT ERRED BY ADMITTING ONE-SIDED EVIDENCE OF THE PARTIES' PRE-CONTRACTUAL INTENT.

The Trial Court permitted Plaintiffs to use extrinsic evidence to show that ev3 had promised to fund pursuit of the milestones. But it barred ev3's contrary evidence, which would have showed that Plaintiffs had asked for such a guarantee *and that ev3 had rejected those requests*. Those irreconcilable rulings left the jury with a one-sided view of the parties' pre-contractual intentions and expectations.

Plaintiffs try to distinguish their own pre-contractual evidence, which they say was relevant only to the fraud claim, from ev3's pre-contractual evidence, which they say was relevant only to the breach of contract claim. Ans. 34-35. But the fraud and breach of contract claims were intertwined—Plaintiffs claimed that they were fraudulently induced *to enter the contract*; thus, the merits of their fraud claim turned on the language adopted in the parties' agreement. *See J.A. Moore Constr. Co. v. Sussex Assocs. Ltd.*, 688 F. Supp. 982, 990 (D. Del. 1988). “[P]arol evidence intended to alter the meaning of the Agreement” (Ans. 34-35) should have been equally inadmissible, regardless whether it ostensibly was being offered to support the fraud claim or the breach of contract claim.⁵

Plaintiffs also argue that ev3's evidence was “not ‘rebuttal’ evidence” because Plaintiffs' fraud claim “was not premised on ev3's alleged promise to

⁵ Plaintiffs also misrepresent that the LOI “was not related to the fraud claim.” Ans. 34. Plaintiffs said the exact opposite to the Trial Court. *See* Br. Ex. B at 17:12-15.

fund.” Ans. 33-34. But the record clearly shows the contrary: Plaintiffs’ fraud theory was that ev3 had “promised” it would fund the milestones, and that Plaintiffs relied on those promises to their detriment. A487 at 195; A272-A273.

Finally, Plaintiffs argue that the Trial Court’s error should stand because ev3 failed to ask for a “spillover instruction.” Ans. 33. But any “spillover instruction” would have been inadequate. The Trial Court should have either admitted or refused *both* parties’ parol evidence.⁶

CONCLUSION

For the reasons set forth by ev3, this Court should grant a new trial.

Dated: December 31, 2013

DUANE MORRIS LLP

Of Counsel:

/s/ Gary W. Lipkin

Theodore B. Olson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
202.955.8500 (P) 202.467.0539 (F)

Matt Neiderman (# 4018)
Gary W. Lipkin (# 4044)
Benjamin A. Smyth (# 5528)
222 Delaware Avenue, Suite 1600
Wilmington, DE 19801
302.657.4900 (P) 302.657.4901 (F)

Christopher D. Dusseault
Joshua S. Lipshutz
Michael Holecek
GIBSON, DUNN & CRUTCHER LLP
333 S. Grand Avenue,
Los Angeles, CA 90071
213.229.7000 (P) 213.229.7520(F)

Jeffrey J. Bouslog
Bret A. Puls
Dennis E. Hansen
OPPENHEIMER WOLFF &
DONNELLY LLP
222 S. Ninth Street, Ste. 2000
Minneapolis, MN 55402
612.607.7000 (P) 612.607.7100 (F)

⁶ Plaintiffs have not appealed the dismissal of their fraud claim. Thus, if this Court orders a re-trial, it will exclude Plaintiffs’ fraud evidence and there will be no spillover concerns.