IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN RE BRACKET HOLDING CORP. LITIGATION,	) CONSOLIDATED) C.A. No. N15C-02-233 WCC CCLD

Submitted: March 28, 2019
Decided: April 11, 2019

Express Scripts, Inc. and United BioSource LLC's Motion *in Limine* to Exclude Certain Evidence at Trial – GRANTED in Part and DENIED in Part

Express Scripts, Inc. and United BioSource LLC's Motion for Summary Judgment – DENIED

Bracket Holding Corp.'s Motions *in Limine* to Exclude Certain Irrelevant, Confusing, and Prejudicial Evidence – GRANTED in Part and DENIED in Part

Express Scripts, Inc. and United BioSource LLC's Daubert Motion to Exclude the Expert Testimony of Louis Dudney - DENIED

Bracket Holding Corp.'s Daubert Motion to Exclude the Expert Testimony of Mark Zmijewski and Gordon Klein – DENIED

MEMORANDUM OPINION

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CARPENTER, J.

Before the Court is Defendants Express Scripts, Inc. ("ESI") and United BioSource LLC's ("UBS") (collectively, "Defendants") Motion *in Limine* to Exclude Certain Evidence at Trial and Motion for Summary Judgment. Plaintiff Bracket Holding Corp. ("Plaintiff" or "Bracket") has also filed its own Motions *in Limine* to Exclude Certain Irrelevant, Confusing, and Prejudicial Evidence. Both parties have also filed Daubert Motions to exclude the testimony of each other's expert witnesses. For the reasons set forth in this Opinion, Defendants' Motion *in Limine* is GRANTED in part and DENIED in part, and their Motion for Summary Judgment is DENIED. Plaintiff's Motions *in Limine* are GRANTED in part and DENIED in part. The Daubert Motions to exclude expert witnesses are DENIED.

I. FACTUAL & PROCEDURAL BACKGROUND

A. The Parties

ESI is a Delaware corporation engaged in pharmaceutical support services and benefits management.[1] In April 2012, ESI purchased UBC, which owned Bracket Global Holdings LLC, Bracket Global K.K., and Bracket Global Limited (collectively, "the Company").[2] In June 2013, Parthenon Capital Partners ("Parthenon"), a private equity fund, formed Bracket Holding Corp. in order to purchase the Company from UBC (the "Sale" or "Transaction").[3] At all relevant

[1] Bracket Holding Corp.'s Am. Compl. ("BAC") ¶¶ 7-8.
[2] *Id.* ¶ 1.
[3] *Id.* ¶ 6.

times prior to closing the Sale, Jim Stewart ("Stewart") was the Company's Vice President of Finance and Controller for its Scientific Services Division.[4] After the Transaction closed on August 15, 2013, Stewart was appointed Bracket's Vice President of Finance and Secretary.[5]

B. Marketing & Sale of the Company

ESI and UBC began marketing the Company for sale in the fall of 2012.[6] ESI, through its agents and employees, apparently "exercised significant control over the process of selling the Company."[7] ESI hired Credit Suisse Securities (USA) LLC ("Credit Suisse") as a financial advisor and KPMG LLC ("KPMG") to perform seller-side due diligence.[8] Credit Suisse prepared a Confidential Information Memorandum ("CIM"),[9] and KPMG conducted a Quality of Earnings ("QoE") investigation and issued its findings in a February 2013 QoE Report.[10]

Both the CIM and QoE Report were provided to potential purchasers in connection with the sale of the Company.[11] The materials reflected, among other things, the Company's historical earnings before interest, tax, depreciation, and

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[4] *Id.* ¶ 142.
[5] *Id.* ¶ 143.
[6] *Id.* ¶ 16.
[7] BAC ¶ 20. ESI's "employees and agents were personally involved in the marketing of the Company and the sale transaction, including Benjamin Bier, David Norton, Jennifer Seeser, Dean Milcos, Michael Kennedy, Chris McGinnis, Joseph Satorius, and Jamie G. Kates." *Id.*
[8] *Id.* ¶ 17.
[9] BAC Ex. A [hereinafter CIM].
[10] BAC Ex. B [hereinafter QoE].
[11] BAC ¶ 17.

amortization ("EBITDA"), along with current and projected estimates of working capital.[12] The CIM touted the Company as a leading pharmaceutical services provider with a 16.4% increase in revenue from 2009 to 2012.[13] These financial figures were apparently based on historical "unaudited internal management financial statements" and projections supplied by Company management.[14] The QoE Report cited the CIM, information provided by management, and "Q&A sessions" with Stewart and others as the "key sources" KPMG relied upon in arriving at its QoE findings.[15]

ESI and UBC collected and prepared the financial information KPMG and Credit Suisse used to complete the CIM and QoE Report.[16] In this regard, ESI and UBC worked closely with Stewart, as the Company's then-Vice President of Finance and Controller of the Scientific Services Division.[17] Throughout the sales process, Stewart was "substantially involved and worked closely with ESI and UBC in responding to due diligence requests with respect to the Company's revenue recognition policies and financial statements."[18]

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[12] *Id.* ¶ 18.
[13] *Id.* ¶ 21.
[14] CIM at 60.
[15] QoE at 7.
[16] BAC ¶ 17.
[17] *Id.* ¶ 19.
[18] *Id.* ¶ 50.

At ESI's direction, UBC sent a copy of the CIM to Parthenon in October of 2012. Based on the representations contained in the CIM and conversations with Credit Suisse personnel, Parthenon viewed the Company as a potential acquisition target. On January 3, 2013, Parthenon sent Credit Suisse an indication of interest.[19]

Several meetings among Parthenon, Company management, and representatives of both ESI and UBC took place in January and February of 2013.[20] On February 22, 2013, Parthenon sent a letter of intent to purchase the Company.[21] Thereafter, Parthenon continued to perform due diligence, which included review and consideration of the QoE Report, the Company's financials, and customer agreements. Parthenon also engaged auditors from Ernst & Young to further assist with the diligence process.

On April 13, 2013, Parthenon submitted a revised letter of intent based collectively on the CIM, QoE Report, and the represented historical financial information of the Company through March 31, 2013. These financials reflected that the Company continued to generate over $30 million in EBITDA over the prior twelve-month period. Parthenon's intent to purchase the Company would

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[19] *Id.* ¶¶ 23-25.

[20] *Id.* ("Included among these early meetings was a January 23, 2013 road show presentation which was attended in person by Catherine Spear (President), Jim Stewart (VP Finance) and others from the Company, and telephonically by Benjamin Bier of ESI and Annette Vaughan of UBC, among others.").

[21] *Id.* ¶ 26.

nevertheless remain contingent upon the Company's financial performance through May 2013.

UBC and Credit Suisse provided the May 31, 2013 financial statements to Parthenon in early June 2013. The updated financials were based on and incorporated the March 31, 2013 statements, and reflected similar trailing twelve months ("TTM") revenue and EBITDA.[22] UBC and ESI allegedly represented that the financial information was true and accurate.[23]

Satisfied with the information it received about the Company, Parthenon formed Bracket to complete the Transaction.[24] Bracket agreed to purchase the Company from UBC for over $180 million.[25]

C. The Securities Purchase Agreement

UBC and Bracket entered a Securities Purchase Agreement ("SPA") on July 12, 2013.[26] The SPA included express representations and warranties by UBC as to the accuracy of certain financial information. Specifically, in § 3.4, UBC represented and warranted that the "Financial Statements" were derived from and consistent with the Company's books and records, had been "prepared in accordance with" U.S. Generally Accepted Accounting Principles ("GAAP"), and "present[ed]

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[22] BAC ¶ 29.
[23] *Id.*
[24] *Id.* ¶¶ 31-32.
[25] *Id.* ¶ 34. Apparently, "Bracket initially offered a purchase price of $200 million in reliance on the financials presented in the CIM and the materials Credit Suisse provided to Bracket." *Id.*
[26] BAC Ex. C [hereinafter SPA].

fairly in all material respects the financial position and results of operation" of the Company.[27] As defined, "Financial Statements" included the Company's unaudited combined balance sheets as of (1) March 31, 2013 and "related statements of income for the three-month period then ended;" (2) December 31, 2012 and "related statements of income for the twelve-month period then ended;" and (3) December 31, 2011 and "related statements of income for the twelve-month period then ended."[28]

Closing took place on August 14, 2013. In accordance with SPA Disclosure Schedule 2.3, Bracket wired the funds to close the deal to ESI's account.[29] UBC, at ESI's direction, executed a closing certificate affirming to Bracket that UBC's representations and warranties remained true and correct as of the Closing date and that all covenants and agreements had been performed.[30] Individuals comprising the "Knowledge Group," including Stewart, likewise signed certificates at closing

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[27] BAC ¶ 39; SPA § 3.4(a). UBC also represented and warranted that "[n]one of the Companies or any of the Company Subsidiaries has any material obligations or material liabilities (whether accrued, absolute, contingent or unliquidated whether or not known, whether due or to become due and regardless of when asserted)," with the exception of:

> (i) obligations under Material Contracts set forth on the Disclosure Schedules or under other Contracts entered into in the Ordinary Course, including without limitation obligations under or with respect to Straddle Contracts, (ii) liabilities reflected on the face of the liabilities side of the Balance Sheet, (iii) liabilities which have arisen after the date of the Balance Sheet in the Ordinary Course, (iv) liabilities incurred in connection with, or as a result of entering into, or the consummation of, the transactions pursuant to, this Agreement, (v) liabilities disclosed on Disclosure Schedule 3.4(b).

SPA § 3.4(b).

[28] SPA § 1.71.

[29] *Id.*, Disclosure Schedule 2.3.

[30] BAC ¶ 38, Ex. E.

attesting to the truth and accuracy of representations and warranties contained in the SPA.[31]

D. Bracket's Discovery of the Alleged Fraud

The day after the Transaction Closed, August 15, 2013, Stewart was named Bracket's Vice President of Finance and Secretary. However, by December 2013, Stewart's financial reporting and accounting practices were called into question. Bracket's new Chief Financial Officer and consultants apparently "discovered that many of the unbilled receivables" Stewart recorded "were invalid and could never be billed." Further investigation allegedly revealed that Stewart had tracked revenue in a separate file maintained only by him and recognized revenue for contracts prior to work being performed, from non-existent and/or terminated contracts, and/or in amounts above contracted totals for active contracts.

As a result of these alleged improper accounting practices, it is asserted that UBC overstated revenue in connection with the sale of the Company by approximately $8 million in the financial statements provided for the twelve months ended December 31, 2011; $8 million in the financial statements for the twelve months ended December 31, 2012; and $2.8 million in the financial statements for the three months ended March 31, 2013. Overall, Bracket claims it overpaid to

[31] BAC ¶ 43, Ex. F. Per § 10.13 of the SPA, "knowledge," as used in the agreement with respect to UBC, means anything within the "actual knowledge" of certain key individuals, including Stewart. *See* SPA § 10.13.

acquire the Company by $50 million dollars as a result of the purportedly fraudulent financials Defendants supplied in connection with the Transaction.

E. The Instant Litigation

On April 13, 2016, Bracket filed an Amended Complaint in this Court. Bracket's Amended Complaint asserted a number of claims, including fraud, aiding and abetting, conspiracy, and breach of fiduciary duty against ESI, UBC, and Stewart. The Court dismissed Plaintiff's Amended Complaint against Stewart in a Memorandum Opinion dated July 31, 2017. Defendants' Motion to Dismiss was denied in the same Opinion.

On October 1, 2018, Defendants filed a Motion *in Limine* to Exclude Certain Evidence at Trial and a Motion for Summary Judgment. Plaintiff filed its own Motions *in Limine* on the same date. The Court reserved decision on these Motions after hearing oral argument on December 18, 2018. The Court conducted a hearing on March 28, 2019 to determine the admissibility of the Plaintiff's expert opinion. While briefly addressed at the end of this Opinion, the parties have been advised that the expert testimony would not be excluded. This Opinion resolves all pending motions before the Court, and the trial in this matter is scheduled to begin on June 10, 2019.

II. DISCUSSION

A. Defendants' Motion *in Limine* to Exclude Certain Evidence at Trial

Defendants have filed a Motion *in Limine* seeking to exclude: (1) baseless and unfairly prejudicial assertions of a "secret" Revenue File; (2) irrelevant, dated, and unfairly prejudicial emails; (3) the Allied World arbitration decision; (4) testimony devoid of personal knowledge and based on hearsay regarding purported analysis by, or communications with, third parties; (5) compensation information; and (6) inflammatory and conclusory descriptors.[32] This Opinion will address each issue in the order in which it was presented to the Court.

1. "Secret" Revenue File

Defendants argue that Plaintiff should not be permitted to offer any testimony, evidence, or argument that Stewart allegedly kept a "secret" revenue file on his Company-issued laptop because it is unfounded speculation and unfairly prejudicial.[33] In response, Bracket contends that "objections to evidence concerning Stewart's secret revenue file are premature … and should be reserved for trial."[34]

The Court generally agrees with Plaintiff that any rulings regarding the admissibility of the alleged secret revenue file should be made during trial. At the

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[32] *See* Defs.' Opening Br. Mot. *in Limine* at 2-5.
[33] *Id.* at 2.
[34] Pl.'s Opp'n Br. Mot. *in Limine* at 2.

hearing on March 28, 2019 regarding the admissibility of Plaintiff's expert, Louis Dudney ("Dudney"), there appeared to be no dispute that Stewart maintained a revenue file separate from the routine financial records of the Company. It further appears this file was utilized to make changes to the Company's financial records at the direction of Stewart. The Court has been told the revenue file was provided to Plaintiff upon the closing of the Sale. If true, the Court finds it unfairly prejudicial to reference this file as "secret." If Plaintiff did not know about the revenue file until after closing, Bracket certainly may testify that its existence was not disclosed or that it was unaware of the revenue file when making the purchase decision. Plaintiff's expert may also testify how, from his review, this file was maintained and used by Stewart. However, "secret" has a particularly sinister connotation and should not be used at trial. As to whether Plaintiff will establish the proper foundation for its admissibility will remain an issue for trial.

2. "Earnings Management" Emails

Defendants next seek to exclude certain emails purportedly indicative of Stewart's manipulation of the Company's financial statements, or his "earnings management," because they are irrelevant, prejudicial, and would create an unnecessary series of mini-trials.[35] Plaintiff claims that the emails are relevant

[35] *See* Defs.' Opening Br. Mot. *in Limine* at 3.

because they "demonstrate Stewart's long history of manipulating financial reports and overstating revenue" and also establish Defendants' knowledge of his fraud.[36]

These emails do not appear to reference the Transaction at issue here, nor is it possible to fairly put them in context without unnecessarily expanding the trial into areas not related to this Sale. Therefore, unless Plaintiff can demonstrate that an email specifically references the Bracket Transaction, it is not admissible. That said, the Court can envision the possibility of the emails becoming relevant for impeachment purposes on cross-examination. If a party wants to use the emails in this manner, it will be required to seek a ruling from the Court at trial and may not display them to the jury or ask questions about them until the Court rules on their limited admission. Therefore, Defendants' Motion *in Limine* to exclude the "earnings management" emails as substantive evidence is granted, with the very limited exception noted above.

3. Allied World Arbitration Decision

Defendants also argue that Plaintiff should not be permitted to introduce a prior arbitration decision related to Bracket's purchase of the Company because it is inadmissible hearsay.[37] More specifically, Bracket obtained a representation and warranty insurance policy when it bought the Company, and "prevailed … against

[36] Pl.'s Opp'n Br. Mot. *in Limine* at 2.
[37] *See* Defs.' Opening Br. Mot. *in Limine* at 3-4.

the insurer to recover … proceeds for purported breaches of the representation and warranties in the Securities Purchase Agreement."[38] Defendants "were not parties in that arbitration and had absolutely no opportunity to participate or present a defense."[39] In response, Bracket contends that although it "does not intend to use the decision for collateral estoppel purposes," any ruling on its admissibility should be reserved until trial, if necessary.[40]

The Court finds the Allied World arbitration decision is generally not admissible, unless Plaintiff can establish its relevance in trial. Bracket may not refer to the decision during trial, unless the Court rules otherwise.

4. Certain Testimony of Plaintiff's Witnesses

Next, Defendants move to exclude the accounting analyses and investigations performed by AlixPartners and Pine Hill Group to the extent they relied upon witnesses who allegedly have no personal knowledge of services rendered prior to the Sale of the Company.[41] Additionally, they argue that any testimony regarding Stewart's purported motivations for allegedly committing fraud, as well as any hearsay evidence concerning him, should be excluded at trial.[42]

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[38] *Id.* at 3.
[39] *Id.*
[40] *See* Pl.'s Opp'n Br. Mot. *in Limine* at 3.
[41] *See* Defs.' Opening Br. Mot. *in Limine* at 17-18.
[42] *See id.* at 19-22.

Bracket claims that its witnesses do have personal knowledge relating to the work done by Pine Hill Group and AlixPartners, and any objection to their testimony is premature.[43] Plaintiff also argues it "is allowed to put in evidence, and can argue from that evidence, that there was a motivation for Stewart to commit fraud, and [the] jury is free to believe or disbelieve that evidence."[44] Finally, Bracket contends that objections to hearsay evidence concerning Stewart are vague and also premature.[45]

This issue was also raised in the hearing relating to the admissibility of Dudney's testimony. The objection rose from the fact that, when Dudney had questions regarding a particular contract, he would go to the corresponding contract manager to resolve the issue. There is some disagreement as to whether these individuals were actually managing the contracts in the time frame relevant to this litigation, and whether Dudney's team talked to the actual contract manager or to a designated intermediate acting as point person for these questions. While these issues are certainly appropriate areas for cross-examination, the Court does not find they warrant excluding the sources of the information used by Dudney in his opinions from his testimony. The Court assumes many of the contract personnel during the relevant time frame of this dispute worked for Defendants and they

[43] Pl.'s Opp'n Br. Mot. *in Limine* at 18.
[44] *Id.* at 21.
[45] *Id.* at 22.

certainly should know who they are and could have questioned them. That said, Dudney should be prepared to respond to questions about who provided the information he is relying upon for his opinions, and what those discussions entailed. The inability to do so will undermine his credibility and the opinions he is rendering.

Further, objections to the admissibility of any evidence concerning Stewart's motivation are premature and must await trial. If the Plaintiffs have evidence that Stewart took certain actions so he would benefit from the Transaction, they are free to present it. However, at the moment, all the Court has heard is speculation and unfounded inferences, which will not be admitted. Therefore, the admissibility of this evidence will await trial.

5. Compensation Information

Defendants also move to exclude evidence and testimony "concerning the compensation of Stewart and Catherine Spear (formerly the General Manager of the Company) in 2013 and the surrounding years."[46] They argue that this information is irrelevant and unfairly prejudicial because Plaintiff has been unable to establish any factual link between their compensation and the alleged fraud.[47] In response, Bracket contends that evidence relating to Stewart and Spear's salaries goes directly to the issue of motivation to commit the fraud and helps establish Defendants' liability.[48]

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[46] *Id.*
[47] *Id.* at 5.
[48] *See* Pl.'s Opp'n Br. Mot. *in Limine* at 22-23.

The Court will not permit Plaintiff to introduce W-2s for Stewart and Spear because that information by itself is not relevant. If Bracket wishes to use Stewart's or Spear's compensation to establish motive, it must tie their financial situation to the benefit they would receive by the Sale of the Company and the alleged fraud. As such, the admissibility of this evidence will wait until it is presented at trial.

6. Inflammatory and Conclusory Descriptors

Finally, Defendants seek to exclude the "inflammatory and conclusory" descriptors used in Bracket's Amended Complaint.[49] They contend that the use of terms like "fake," "false," "phantom," "fictitious," "non-existent", and "forced" at trial will be unfairly prejudicial.[50] Plaintiff argues that Defendants' objection to these terms is overbroad and lacks support.[51]

The Court believes this is clearly an issue that must be decided at trial, if or when the terms objected to are improperly used by counsel or the parties' witnesses. Counsel is warned that if the Court finds these descriptors are unfairly characterizing the situation and are only introduced to prejudice the jury against Defendants, it will not hesitate to admonish counsel and/or the witness in front of the jury.

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[49] *See* Defs.' Opening Br. Mot. *in Limine* at 24-25.
[50] *See id.*
[51] *See* Pl.'s Opp'n Br. Mot. *in Limine* at 23-24.

B. Defendants' Motion for Summary Judgment

In reviewing a motion for summary judgment pursuant to Superior Court Civil Rule 56, the Court must determine whether any genuine issues of material fact exist.[52] The moving party bears the burden of showing that there are no genuine issues of material fact, such that he or she is entitled to judgment as a matter of law.[53] In reviewing a motion for summary judgment, the Court must view all factual inferences in a light most favorable to the non-moving party.[54] Where it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate, summary judgment will not be granted.[55]

1. Non-Disclosure Agreement

Defendants first argue that Plaintiff is prohibited from recovering because it executed a non-disclosure agreement (NDA), which included a liability disclaimer provision. However, to put this assertion in proper context, this document was executed as Plaintiff began its due diligence examination. These agreements have become standard in the industry and put all parties on notice that they should perform their own due diligence and not rely solely upon the information presented by the seller. However, it is also why the certification of the accuracy of certain financial

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[52] Super. Ct. Civ. R. 56(c); *see also Wilm. Tru. Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).
[53] *See Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).
[54] *See Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).
[55] *See Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. Ct. 1962), *rev'd in part* on procedural grounds and *aff'd in part*, 208 A.2d 495 (Del. 1965).

statements is critical in finalizing the purchase of an entity. Without such representation, the buyer potentially has no recourse for misleading and inaccurate financial information that it is relying upon to make critical decisions.

The Court, however, finds that regardless of how one interprets these disclaimers, it would be unconscionable and against public policy to allow an entity to knowingly create false documents or provide false information with the specific intention of misleading the other company. As such, the Court finds that one may not contractually remove liability for fraudulent conduct. So, even if the Court was to accept Defendants' argument that the NDA was still in effect, it is not willing to enforce the liability disclaimer provision for the fraudulent conduct alleged by Plaintiff.

However, in this case, the applicability of the NDA becomes moot, as the SPA executed in this matter excluded fraudulent conduct. The SPA indemnification provisions state that:

> each of the Buyer and Parent acknowledges and agrees, that from and after the Closing, *except in the case of fraud*, Parent shall not have any direct or indirect liability . . . with respect to any breach of any representation . . . made by Parent in this Agreement.[56]

As a result, the Court finds that Defendants may be held liable for false statements and documents intentionally made to mislead the Plaintiff. The NDA, even if it

[56] SPA § 9.6(d) (emphasis added).

continues to be applicable, which the Court has some skepticism about, cannot insulate Defendants from such fraudulent conduct.

2. Fraud

Defendants next assert that Plaintiff cannot establish "deliberate" fraud. First, this argument at this stage of the litigation is simply untimely. If Plaintiff is unable to present evidence at trial of Defendants' fraudulent conduct, then Defendants are free at that time to move for judgment based upon the evidence presented. In its response, Plaintiff indicated it has evidence to support the fraudulent allegations made in the Complaint, and whether they will meet this burden is a matter for the jury to decide.

The Defendants appear to be attempting to argue pretrial as to how the Court should instruct the jury regarding fraudulent conduct. The Court is confident there will be a significant dispute over how the jury will be instructed regarding fraud and what Plaintiff needs to establish to support this allegation. It is, however, hard to dispute that, for years, Stewart engaged in activity to manipulate the books and records of Bracket to accomplish financial goals he or the Company found to be to their advantage. Some of this conduct may have been a legitimate exercise of his discretion as CFO of the Company; some may have been done with the intent to place himself or others in a more favorable position at critical reporting junctions; or, as alleged by Plaintiff, to create a false impression of the financial well-being of

the Company to others outside of the organization. ESI purchased Bracket in April of 2012 and quickly decided it was not a strategic fit for its business and, within months, began the process to sell. By early 2013, Parthenon emerged as a leading contender to purchase Bracket, so it would be reasonable for those managing the Company to appreciate the importance of its financial statements to those considering its purchase.

As in most fraud investigations, one is not going to generally find the "smoking gun" reflecting communications between those within the company indicating they are manipulating the books and records of the company with the specific intent to mislead a potential buyer. Therefore, whether there was fraudulent intent here will most likely have to be established by circumstantial evidence. Clearly Stewart's conduct is questionable and the extent to which others may have had knowledge of or reasonably suspected it will be one for the jury to decide. However, Stewart was the CFO, not some low-level employee going rogue without management's knowledge, and his actions can implicate the liability of his employer.

Plaintiff will be required to establish that the intent of Defendants, through their employees, was to knowingly create false financial documents and, recognizing those documents would be relied upon by Plaintiff in determining whether to

purchase the business, they certified them as true and correct. The exact wording of the jury instructions will await the submissions by the parties.

3. Causation

The final argument made by Defendants in their Motion for Summary Judgment is that Plaintiff will be unable to establish that they suffered any damages as a result of the alleged fraudulent conduct. While generally an issue of this nature would await the presentation of evidence at trial, there is a body of cases in the context of market or securities fraud that hold the investors are required to show the disclosure of the fraud created an inability to recoup the amount they paid by post-transaction selling of the security.[57] However, this is not a transaction in the open market where a party is simply buying stock and makes the investment in reliance upon misinformation provided by the company. This is a negotiated sale of the business in which it is alleged that the contractual price paid was affected by the alleged misconduct of Defendants. As such, allowing the market to rectify the fraud is simply not applicable. Obviously, Plaintiff will be required to show that there was the intentional creation of fraudulent documents, which it relied upon and was the proximate cause of the damages it suffered. In the context of this dispute, the

[57] *See generally McCabe v. Ernst & Young, LLP*, 494 F.3d 418 (3d. Cir. 2007); *Bouriez v. Carnegie Mellon Univ.*, 585 F.3d 765 (3d Cir. 2009); *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725 (Del. Ch. 2014).

subsequent market effect is not relevant, as the damages are the inflated price of the contractual sale at the time the agreement closed.

Defendants also assert that Plaintiff has failed to identify an expert in order to establish damages. The Court heard from Dudney regarding Defendants' Daubert Motion and it is clear that he will be testifying regarding damages. He will testify that Plaintiff used the financial statements certified by Defendants in determining the value of the Company, and then applied a multiple factor of 6.05 to come to a purchase price decision. Since it will be his testimony that the financial statements overstated revenue by 9.53 million dollars, the Company overpaid for Bracket in the amount of 57.7 million dollars, if the same multiplier is utilized. Dudney will also testify to a similar shortfall in the working capital that was to be available to the purchaser.

Based upon the above, at this stage in the litigation, the Court can find no basis to grant summary judgment regarding damages. The Defendants have identified experts who will testify that, even if there were inflated revenue figures in the financial statements, the method used by Dudney to establish damages is inconsistent with accepted business and accounting principles used to make such calculations. The Court has found that Dudney's damages calculation will be admitted, as will those of Defendants' experts. The decision as to which opinions

are accepted by the jury will await trial. However, in its gatekeeper role, the Court will not exclude the experts' testimony.

C. Plaintiff's Motions *in Limine* to Exclude Certain Irrelevant, Confusing, and Prejudicial Evidence

Plaintiff has filed its own motions *in limine* to exclude evidence related to: (1) the sale of Bracket to Genstar in 2017, Bracket's post-2015 financial information, and Parthenon's post-2014 valuations of Bracket; (2) Parthenon's investments, portfolio companies, and funds other than Bracket and Parthenon Fund IV; (3) criticism of Brad Sloan, Steve Nardi, and Catherine Spear's use of her husband's Comcast email account; (4) the LEK market report; and (5) the working capital arbitration.[58] The Court will address each issue in the order in which it was presented in the parties' briefs.

1. Post-Transaction Evidence

Bracket first seeks to exclude evidence relating to its sale to Genstar in 2017, post-2015 financials, and post-2014 valuations by Parthenon.[59] It argues that this information, which goes "well beyond the Closing date of August 15, 2013, is neither material nor probative of any issue in this case."[60] Defendants, in response,

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[58] *See* Pl.'s Opening Br. Mot. *in Limine*.
[59] *See id.* at 11-15.
[60] *Id.* at 11.

contend the post-Transaction evidence is relevant to show that Plaintiff cannot establish loss causation and that its alleged damages are not properly calculated.[61]

The Court rejects Defendants' proposition that financials from 2016 and beyond are relevant to the issue of whether Bracket was unharmed by the Sale when it occurred in 2013. As the Court has previously noted, even though Plaintiff was able to later sell the Company in a favorable position or their financials improved after the Transaction, it does not diminish the fact that they allegedly overpaid based on the fraudulent financials. It simply means that, in 2013, they overpaid for the Company.

That said, it appears the expert witnesses may need to use some financials from after the 2013 Sale to fairly set forth their opinions. However, the Court finds the relevance of financial statements beyond 2015 is diminished and, consequently, they will be excluded. Thus, no financial statements from 2016 or 2017 are to be introduced or utilized by any witnesses, including experts. The Court also believes that Bracket's eventual sale to Genstar in 2017 is irrelevant to the alleged damages it suffered in 2013, and evidence relating to the Genstar sale may not be introduced.

2. Parthenon's Investments and Portfolio Companies

Bracket next moves to exclude any evidence related to Parthenon's portfolio companies and investment funds, other than Bracket and Parthenon Fund IV,

[61] *See* Defs.' Opp'n Br. Mot. *in Limine* at 8, 10.

because they are irrelevant to this litigation and would confuse the jury.[62] Defendants argue that Parthenon's non-Bracket investments "are relevant to demonstrating the bias of several Parthenon witnesses" and "the performance of Parthenon's other investments is necessary context for Bracket's performance."[63] They also contend that there are two other Parthenon funds, besides Fund IV, which have an interest in Bracket.[64]

The Court agrees with Plaintiff that Parthenon's non-Bracket investments and portfolios should not be used or introduced during trial, as long as all funds actually involved in the 2013 Transaction have been identified by the parties. If there are other Parthenon funds besides the two named by Plaintiff that were connected to the 2013 Sale, as Defendants assert, then the Court believes they are relevant and should not be excluded.

3. Criticism of Brad Sloan, Steve Nardi, and Catherine Spear

Plaintiff also seeks to exclude evidence relating to the work performance of Brad Sloan, a former principal at Parthenon.[65] It argues that "Parthenon's views of Sloan's work performance and career potential have nothing to do with whether Defendants fraudulently misrepresented the Companies' financial statements and

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[62] *See* Pl.'s Opening Br. Mot. *in Limine* at 16.
[63] Defs.' Opp'n Br. Mot. *in Limine* at 22-23.
[64] *Id.* at 22.
[65] *See* Pl.'s Opening Br. Mot. *in Limine* at 17-18.

whether Bracket overpaid for the Companies as a result."[66] In response, Defendants contend that Sloan's poor pre-Transaction performance is relevant to whether Parthenon can establish justifiable reliance.[67] While a risky move, the Court can envision Defendants attempting to present evidence that, because of Parthenon management's view of the poor work being done by Sloan in its due diligence, those making the decisions were not actually relying upon the financial statements in its evaluation of the Company. So, while the Court has concerns as to whether there is evidence to reasonably imply this was the case, it cannot be excluded before trial. Obviously, if Sloan takes the stand and his role in the evaluation of Bracket is established, it is fair to explore his expertise and work in the context of Parthenon's assessment of the Company's value.

Additionally, Bracket moves to exclude evidence relating to prior disciplinary action taken against Steve Nardi, the "relationship partner" at Pine Hill Group.[68] Plaintiff claims that evidence of Nardi's previous disbarment is unduly prejudicial and has no relevance to the work Pine Hill did for Bracket in 2013.[69] Defendants argue that evidence of Nardi's disbarment provides reason to doubt the quality of Pine Hill Group's work product, as well as the assessments of Plaintiff's expert.[70]

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[66] *Id.* at 18.
[67] *See* Defs.' Opp'n Br. Mot. *in Limine* at 18-20.
[68] *See* Pl.'s Opening Br. Mot. *in Limine* at 19-20.
[69] *Id.* at 20.
[70] *See* Defs.' Opp'n Br. Mot. *in Limine* at 20-22.

Again, the Court believes that evidence of Nardi's disciplinary action is only relevant if he was involved in the day-to-day accounting review that led to the fraud discovery and if Nardi himself actually testifies at trial. Under those limited circumstances, Defendants will be permitted to introduce evidence of prior disciplinary action taken against him on cross-examination.

Finally, Bracket also seeks to exclude any evidence relating to Parthenon's communications with Catherine Spear on her husband's personal email account.[71] Plaintiff argues that "[e]vidence … Parthenon communicated with Spear, Bracket's then-president, using her husband's personal email account is entirely irrelevant to the fraud at issue here."[72] According to Bracket, "[w]hether communications on Spear's personal email accounts were authorized by Credit Suisse or allowed under the terms [of the nondisclosure agreement executed by Parthenon in the Transaction] is inconsequential to the questions of liability for fraud and potential damages."[73]

Defendants argue that Parthenon's violations of the no-contact agreement are relevant because they refute the allegations that ESI and UBC knew of Stewart's alleged misreporting of revenue, and they undermine the credibility of Parthenon CEO, David Ament.[74]

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[71] *See* Pl.'s Opening Br. Mot. *in Limine* at 20-21.
[72] *Id.* at 21.
[73] *Id.*
[74] *See* Defs.' Opp'n Br. Mot. *in Limine* at 20-22.

The Court believes that Parthenon's alleged violations of the no-contact agreement through its communications with Spear on her husband's private email account are simply not relevant. That said, the substance of these emails, particularly if they provided information that would influence the bid price or provided evidence that Plaintiff was aware the financial information was incorrect, is relevant. Assuming Defendants can establish that the emails relate to this Transaction, the Court will allow witnesses to be asked about the communications and the impact it had on the price paid for Bracket.

4. The LEK Market Report

Parthenon hired L.E.K. Consulting ("LEK") to analyze the potential markets for Bracket as part of its due diligence in the Sale.[75] LEK delivered its findings in a report, and Parthenon discovered that the report contained significant errors in early 2014, after the Transaction had been finalized for several months.[76] Plaintiff now moves to exclude the LEK report so the jury may not draw the improper conclusion that the errors in it are responsible for Bracket's damages.[77]

In response, Defendants argue that the LEK report "is directly relevant to understanding Parthenon's diligence process and the extent to which any diminution

[75] Pl.'s Opening Br. Mot. *in Limine* at 21.
[76] *Id.* at 22.
[77] *Id.*

in value of the Companies below the purchase price was the result of [LEK's] flawed analysis versus the impact of the alleged fraud."[78]

The Court finds that, if a witness testifies Plaintiff relied on the LEK report in its due diligence, it is fair to allow Defendants to introduce evidence regarding the improper findings in the report and the impact it would have had on the decision to purchase the Company. The extent to which such evidence is admissible will be decided at trial if it is attempted to be introduced.

5. The Working Capital Arbitration

Lastly, Plaintiff seeks to exclude a 2016 working capital arbitration between Bracket and UBC before a KPMG arbitrator, on the grounds that it is irrelevant to this litigation.[79] Defendants, however, have stated that they do not intend to introduce any evidence related to the working capital arbitration.[80]

In the event that Defendants' intentions have changed since filing their briefs, the Court believes the working capital arbitration is inadmissible and should not be used in any way at trial.

D. Daubert Motions

As the Court advised counsel at the end of Dudney's testimony on March 28, 2019, it can find no basis to exclude any of the experts offered by either party. While

[78] Defs.' Opp'n Br. Mot. *in Limine* at 25.
[79] *See* Pl.'s Opening Br. Mot. *in Limine* at 23-24.
[80] Defs.' Opp'n Br. Mot. *in Limine* at 25.

Defendants object to Dudney's methodology and his alleged failure to comply with Bracket's accounting practices and procedures, a claim which he denies, the Court finds this is simply an area to explore in cross-examination, but does not mandate exclusion of the expert's testimony.

While the experts may testify, the financial statements that were certified in § 3.1 of the SPA are set forth in disclosure statement § 3.4(a). It is the representation as to these statements that Plaintiff alleges is false. It has also been represented to the Court that Plaintiff determined its pricing based upon these disclosure statements. Therefore, the Court believes it is the difference between the financial statements ending as of March 2013 and those recalculated by Dudney that are at issue. As a result, the calculations set forth in Exhibit 2 of Dudney's report would appear to reflect the relevant difference and are the calculations that the Court will allow testimony about.

In addition, the Court has previously ruled that the "earnings management" emails are not admissible unless they specifically reference the Bracket transaction. Therefore, since the "earnings management" testimony directly relates to these emails, none of the experts may render opinions about what the emails reflect or reference them in their testimony, unless they can establish a link to the Bracket Transaction.

III. CONCLUSION

For the foregoing reasons, Defendants' Motion *in Limine* is **GRANTED IN PART AND DENIED IN PART**. Defendants' Motion for Summary Judgment is **DENIED**. Plaintiff's Motions *in Limine* are **GRANTED IN PART AND DENIED IN PART**. Both parties' Daubert Motions are **DENIED**.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.