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: September 23, 2019
Decided: February 7, 2020

Defendants Express Scripts, Inc. and United BioSource LLC's Motion for Judgment as a Matter of Law, Motion for New Trial, and Motion for Remittitur – DENIED

Defendants Express Scripts, Inc. and United BioSource LLC's Motion to Stay Execution of Judgment Pending Resolution of Post-Trial Motions and Appeal - GRANTED

Defendant United BioSource LLC's Motion for Award of Pre- and Post-Judgment Interest - GRANTED

Plaintiff Bracket Holding Corp.'s Motion for New Trial on Punitive Damages - DENIED

Plaintiff Bracket Holding Corp.'s Motion for Costs and Prejudgment and Postjudgment Interest – GRANTED in Part and DENIED in Part

Plaintiff Bracket Holding Corp.'s Motion for Attorneys' Fees and Expenses – DENIED

MEMORANDUM OPINION

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CARPENTER, J.

Before the Court are Defendants Express Scripts, Inc. ("ESI") and United BioSource LLC's ("UBC") (collectively, "Defendants") Motion for Judgment as a Matter of Law, Motion for New Trial, and Motion for Remittitur. Defendants have also filed a Motion to Stay Execution of Judgment Pending Resolution of Post-Trial Motions and Appeal, as well as UBC's unopposed Motion for Award of Pre- and Post-Judgment Interest. Plaintiff Bracket Holding Corp. ("Plaintiff" or "Bracket") has filed a Motion for Costs and Prejudgment and Postjudgment Interest, a Motion for New Trial on Punitive Damages, and a Motion for Attorneys' Fees and Expenses.

For the reasons set forth in this Opinion, Defendants' Motion for Judgment as a Matter of Law, Motion for New Trial, and Motion for Remittitur are **DENIED**. Defendants' Motion to Stay Execution of Judgment Pending Resolution of Post-Trial Motions and Appeal is **GRANTED**. Defendant UBC's Motion for Award of Pre- and Post-Judgment Interest is **GRANTED** and Plaintiff's Motion for Costs and Prejudgment and Postjudgment Interest is **GRANTED in part and DENIED in part**. Plaintiff's Motion for Attorneys' Fees and Expenses is **DENIED**. Plaintiff's Motion for New Trial on Punitive Damages is **DENIED**.

I. Factual & Procedural Background

A. The Parties

ESI, a Delaware corporation engaged in pharmaceutical support services and benefits management, purchased UBC in 2012.[1] UBC 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 to purchase the Company from UBC.[3] At all relevant 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]

B. Marketing & Sale of the Company

In the fall of 2012, ESI and UBC began marketing the Company for sale.[5] ESI hired Credit Suisse Securities (USA) LLC ("Credit Suisse") as a financial advisor and KPMG LLC ("KPMG") to perform seller-side due diligence.[6] Credit Suisse prepared a Confidential Information Memorandum ("CIM"),[7] and KPMG conducted a Quality of Earnings ("QoE") investigation and issued its findings in a February

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[1] *In re Bracket Holding Corp. Litig.*, 2019 WL 1762975, at *1 (Del. Super. Ct. Apr. 11, 2019).
[2] Bracket Holding Corp.'s Am. Compl. [hereinafter "Bracket's Compl."] ¶ 1.
[3] *Id.* ¶ 6.
[4] *Id.* ¶ 142.
[5] *Id.* ¶ 16.
[6] *Id.* ¶ 17.
[7] *Id.* at Ex. A.

2013 QoE Report.[8] Working closely with Stewart, Defendants prepared the financial information used by KPMG and Credit Suisse to produce their reports.[9] These reports were provided to Parthenon, as a potential buyer, who relied on their accuracy.

On February 22, 2013, Parthenon sent a letter of intent to purchase the Company and continued to perform due diligence. 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.[10] Parthenon's intent to purchase remained contingent upon the Company's financial performance through May 2013. In early June 2013, UBC and Credit Suisse provided the May 2013 financial statements to Parthenon, and UBC and ESI allegedly represented that the information was true and accurate.[11]

Satisfied with the information it received about the Company, Parthenon formed Bracket to purchase the Company from Defendants for $187 million.[12] On July 12, 2013, UBC and Bracket signed the Securities Purchase Agreement ("SPA").[13] UBC, at ESI's direction, executed a closing certificate affirming to

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[8] *Id.* at Ex. B.
[9] *Id.* ¶ 17. *See also In re Bracket Holding Corp. Litig.*, 2019 WL 1762975, at *1 ("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.").
[10] *Id.* ¶ 28.
[11] *Id.* ¶ 29.
[12] Pl.'s Opening Br. in Support of its Mot. for New Trial on Punitive Damages at 4.
[13] Bracket's Compl. ¶ 33.

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.[14] The transaction closed on August 14, 2013.[15]

C. Instant Matter

On February 27, 2015, Bracket filed its original complaint alleging Defendants fraudulently induced Bracket to purchase the Company by misrepresenting its financial status.[16] Bracket asserted that many of the unbilled receivables were invalid because Stewart recognized revenue for contracts prior to work being performed, from nonexistent and/or terminated contracts, and in amounts above contracted totals for active contracts, which he tracked in a separate file maintained only by him.[17] Defendants denied Plaintiff's allegations and UBC asserted a counterclaim for breach of contract and tortious interference, claiming Bracket failed to pay UBC for its performance under a separate Transition Services Agreement ("TSA").[18]

On June 24, 2019, following a ten-day trial, the jury determined that ESI and UBC committed fraud and that ESI aided and abetted UBC in the commission of the

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[14] *See id.* ¶ 38, Ex. E.
[15] *Id.* ¶ 36.
[16] Compl. ¶ 1. Bracket filed an Amended Complaint on April 13, 2016.
[17] Bracket's Compl. ¶¶ 54-55.
[18] *See* United BioSource LLC's Am. Compl. for Breach of Contract and Tortious Interference.

fraud. They awarded $82.1 million in damages to Bracket and $2,264,458.79 to UBC on their counterclaim for breach of contract. This is the Court's decision on all pending Post-Trial Motions.

II. Overview

While the Court will address the primary issues raised by the parties in this Opinion, it is important for this Court to note that all arguments for a new trial or judgment as a matter of law were addressed either in earlier opinions or in rulings made during the trial. As such, the Court finds no need to repeat them here. At times, it is easy to get sidetracked by the accounting disputes and lose sight of what is at the core of the jury's decision. Regardless of how the Defendants try to spin the facts here, they manipulated their records to create a financial picture of Bracket that was simply wrong and fraudulent. They knew that the Plaintiff was valuing the Company by the revenue the Company was generating in the trailing twelve month ("TTM") period before March and they manipulated their records to create a revenue picture that they knew was false. The conduct here was not simply a dispute over the proper accounting procedures, but was an intentional act by their Vice President of Finance to manipulate the financial records he knew would be reasonably relied upon by the Plaintiff in the evaluation of the value of the Company. While the Defendants may

legitimately stab at portions of the damages award, there was no doubt by the jury or this Court regarding their liability.

III. Defendants' Motion for Judgment as a Matter of Law

A. Standard of Review

Pursuant to Superior Court Civil Rule 50(b):

> Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the Court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion . . . . If a verdict was returned, the Court may . . . allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law.[19]

Under Rule 50, this Court is required to view the evidence in a light most favorable to the nonmoving party.[20] In order to grant Defendants' Motion, this Court must find that "there is no legally sufficient evidentiary basis for a reasonable jury to find for" Plaintiff.[21] Thus, "the factual findings of a jury will not be disturbed if there is *any* competent evidence upon which the verdict could reasonably be based."[22]

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[19] Del. Super. Ct. Civ. R. 50(b).
[20] *Mumford v. Paris*, 2003 WL 231611, at *2 (Del. Super. Ct. Jan. 31, 2003).
[21] Del. Super. Ct. Civ. R. 50(a).
[22] *Mumford*, 2003 WL 231611, at *2 (citing *Delaware Elec. Coop. Inc. v. Pitts*, 1993 WL 445474, at *1 (Del. 1993) (quoting *Mercedes-Benz v. Norman Gershman's*, 596 A.2d 1358 (Del. 1991)) (emphasis added).

B. Discussion

Defendants argue that Bracket failed to establish any misrepresentation related to the working capital aspect of its fraud claim.[23] They claim that the SPA did not make "any representation concerning the dollar amount of [w]orking [c]apital to be provided at [c]losing;" it solely provided for how working capital should be calculated.[24] Accordingly, Defendants assert that, per the SPA, Bracket could only establish fraud by proving the working capital statements were not calculated in accordance with the accounting principles required by the SPA, which Bracket did not prove.[25] Additionally, Defendants claim that the damages awarded are an "impermissible double recovery" based on the alleged inflated purchase price *and* shortfall in working capital, reflecting that the jury "double count[ed] working capital."[26]

In response, Bracket contends that Defendants' argument is frivolous because they presented abundant evidence that the working capital overstatement was inseparable from Defendants' financial misrepresentations. Bracket asserts that, in Section 3.4 of the SPA, Defendants "represented and warranted to Bracket that the financial statements of the [C]ompany were accurate" and Bracket's expert

[23] *See* Defs.' Opening Br. in Support of Their Renewed Mot. for J. as a Matter of Law, Mot. for New Trial, and Mot. for Remittitur at 2.
[24] *Id.* at 3.
[25] *Id.*
[26] *Id.* at 5-6.

confirmed this misrepresentation is directly related to working capital.[27] In response to Defendants' double recovery theory, Bracket argues that this has no support in the trial record because Defendants chose not to present their expert witness who would have testified to the double recovery theory.[28] Moreover, they maintain that the proper measure of damages "is the overpayment for the Company *plus* the shortfall in the working capital that Defendants were required to provide," so the double recovery theory is without merit.[29]

The Court finds that Bracket has presented sufficient evidence to support the jury's finding that Defendants misrepresented the Company's working capital and it will not disturb the jury's verdict. At trial, Bracket's expert opined that working capital is related to the fraud because the working capital was affected by the fraudulent misrepresentation of the financial records by Stewart.[30] Simply, if the underlying records that would be utilized to calculate working capital are incorrect due to the Defendants' fraudulent conduct, then the working capital required under the agreement would also be incorrect.

The dispute here is not whether the treatment of net working capital is an appropriate measure of damages, but how it was calculated by the Plaintiff's expert.

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[27] Pl.'s Answering Br. in Opp'n to Defs.' Renewed Mot. for J. as a Matter of Law, Mot. for New Trial, and Mot. for Remittitur at 7-8.
[28] *See id.* at 11.
[29] *Id.* at 12.
[30] *See* Trial Tr. at 83-84 (June 19, 2019).

This again turns on his analysis of the revenue accounts maintained by the Vice President of Finance and whether the jury believed the testimony as to their manipulation. Even the Defendants' expert would agree that if those accounts were affected in the way Bracket was recording revenue it would have an effect on the working capital calculation. As such, this issue comes down to which expert the jury believed and this is an area within the jury's province that will not be second guessed. The testimony provides sufficient evidence, contested during cross-examination, upon which the jury could have based its decision.

Furthermore, Defendants presented no evidence for their double recovery argument. Defendants' expert addressed the double recovery argument in his report, but Defendants chose not to call him to testify and, without his testimony, there was no evidence in the record to support this theory. However, even assuming Defendants' had offered this evidence into the record, the jury still would have been free to consider and accept the testimony of Plaintiff's expert's argument and calculate the damages to include the amount Bracket overpaid for the Company plus the shortfall in the working capital. As such, Defendants' Motion for Judgment as a Matter of Law is denied.

IV. Defendants' Motion for New Trial

A. Standard of Review

"A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative."[31] In considering a motion for a new trial, the Court should give the jury's verdict "enormous deference,"[32] and "should not set aside a verdict . . . unless, on review of all the evidence, [it] preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result."[33] "A new trial should be granted only when the great weight of the evidence is against the jury verdict."[34]

B. Discussion

First, Defendants request a new trial "based on the Court's erroneous jury instruction that a 'reckless' mental state was sufficient to find fraud" when, they argue, the SPA required "deliberate fraud."[35] They also assert that the verdict was against the great weight of the evidence because the revenue model used by Bracket's expert, Louis Dudney, was flawed.[36] In addition, Defendants claim that

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[31] Del. Super. Ct. Civ. R. 50(b).
[32] *Cuonzo v. Shore*, 958 A.2d 840, 844 (Del. 2008).
[33] *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979); *see also Town of Cheswold v. Vann*, 9 A.3d 467, 472 (Del. 2010).
[34] *Patterson v. Coffin*, 2004 WL 1656514, at *2 (Del. 2004).
[35] Defs.' Opening Br. in Support of Their Renewed Mot. for J. as a Matter of Law, Mot. for New Trial, and Mot. for Remittitur at 8-9.
[36] *Id.* at 13.

the Court improperly excluded the following evidence: (1) "Parthenon's actual reliance on financial statements other than those represented in the SPA," (2) "Parthenon's post-transaction valuations of Bracket close in time to the transaction (which 'priced in' any alleged fraud)," and (3) "Parthenon's failure to take an impairment to Bracket's goodwill in the post-transaction period (which directly contradicts Parthenon's claim of a more than $100 million loss)."[37]

In response, Bracket claims that the Court's instruction on the mental state required for fraud was proper and, alternatively, even if it was not, it did not deprive the Defendants of a fair trial.[38] Bracket contends that "the inclusion of the word 'deliberate' in the SPA does not and cannot change the standard for proving fraudulent intent under Delaware law."[39] They further assert that if the parties had intended for the word "deliberate" to alter the scienter requirement for fraud, they would have used a more express provision.[40] In addition, Bracket maintains that the verdict was supported by substantial evidence, specifically Dudney's expert testimony.[41] Lastly, they assert that any evidence that the Court excluded was proper because it was prejudicial and irrelevant.[42]

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[37] *Id.* at 18.
[38] Pl.'s Answering Br. in Opp'n to Defs.' Renewed Mot. for J. as a Matter of Law, Mot. for New Trial, and Mot. for Remittitur at 15.
[39] *Id.* at 13-14.
[40] *Id.* at 15.
[41] *See id.* at 17.
[42] *Id.* at 21.

First, the Court properly instructed the jury regarding the mental state required for fraud. In Delaware, the plaintiff must prove that the defendant had "knowledge or [a] belief that the representation was false, or [that the defendant acted with] reckless indifference to the truth."[43] As such, the decision to include a recklessness instruction was consistent with Delaware law.[44] The Court does not believe that the inclusion of one undefined term - "deliberate" - in the *indemnification* section of the SPA alters the mental state required for common law fraud. This can only be done by express agreement and the Court will not imply such an agreement into the SPA. As there is no clear articulation of the parties' intent to alter the mental state required by law, the Court properly instructed the jury to consider recklessness.

Second, the verdict was supported by sufficient evidence and the Court will not disturb the jury's verdict. Although it is clear that Defendants objected to Dudney's methodology, the jury accepted his testimony. Dudney testified to various accounting practices and procedures that, Bracket argued, established that the Defendants committed fraud. This included: (a) the booking of revenue for work allegedly performed during the TTM period for which no contracts or billings could

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[43] *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 773 (Del. Ch. 2014); *see In re Wayport, Inc. Litig.*, 76 A.3d 296, 323 (Del. Ch. 2013) ("As to common law fraud, the elements of that claim in Delaware are: (1) a false representation made by the defendant; (2) the defendant's knowledge or belief that the representation was false, or reckless indifference to the truth; (3) an intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) causally related damages to the plaintiff.").

[44] *See Vichi*, 85 A.3d at 773; *see also In re Wayport, Inc. Litig.*, 76 A.3d at 323; *see also Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983).

be located; (b) the recognition of revenue on contracts that were closed or cancelled during the TTM period; (c) the booking of revenue on contracts that had not yet begun; and (d) the inappropriate recognition of revenue from active contracts to increase revenue during the TTM period that was being used by the Plaintiff to value the Company.

Defendants had a full and fair opportunity to cross-examine Dudney and to explore their objections in front of the jury. The Defendants also presented their own expert to counter the procedures used by the Plaintiff's expert. However, it is perhaps notable that this expert took no effort to do the painstaking analysis of each contract, as done by the Plaintiff's expert. He simply criticized the assumptions made by Mr. Dudney and asserted the Company's policies did not support Dudney's analysis. There is no doubt that a significant portion of Dudney's calculations of damages related to how much revenue was booked on active contracts. Those bookings clearly had a significant impact on the revenue included in the TTM period and would reasonably influence Plaintiff's analysis of the value of the Company. Whether such conduct was fraudulent or an honest disagreement over appropriate accounting methods was one properly left to the jury to decide. It is within the jury's province to determine the credibility of the experts and to decide which testimony they find most credible. They did so and the Court finds that Plaintiff presented sufficient evidence to support the verdict.

Third, the Court believes that it properly excluded evidence that was prejudicial and irrelevant. As established before trial, Bracket relied upon the March 2013 financial statements in setting the purchase price for the transaction.[45] The evidence that Defendants sought to introduce regarding Bracket's evaluation of other statements would have been prejudicial and irrelevant to whether Bracket was defrauded. The decision as to their exclusion was set forth in the Court's Memorandum Opinion of April 11, 2019, which resolved the dispute over the appropriate TTM period. As a result of the Court's ruling, the Plaintiff was limited to this period, which had a significant impact on the damages they were claiming. In spite of the Court's ruling, at trial, the Defendants tried to introduce, through non-expert witness testimony, evidence regarding other potential periods. This was simply a back door effort to get around the Court's previous ruling. Accordingly, it was properly excluded.

Similarly, Bracket's post-closing valuations were excluded because they were forecasted financials "based on improvements Bracket hoped to make to the Company in the coming years;"[46] they were not reflective of the historical financials that Bracket alleged were fraudulent. Furthermore, as the Court has previously noted, the post-closing valuations and the later profitable sale of the Company have

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[45] *In re Bracket Holding Corp. Litig.*, 2019 WL 1762975, at *11 (Del. Super. Ct. Apr. 11, 2019).
[46] Pl.'s Answering Br. in Opp'n to Defs.' Renewed Mot. for J. as a Matter of Law, Mot. for New Trial, and Mot. for Remittitur at 24.

no bearing on whether Bracket overpaid for the Company in 2013. Nevertheless, the Court was prepared to allow the expert witnesses to introduce some post-closing financials, as needed to support their opinions.[47] However, Defendants chose not to present their expert, Professor Mark Zmijewski, who would have testified to such, and, consequently, the evidence was not admitted. Defendants cannot now argue that their litigation decision necessitates a new trial due to a limitation imposed by the Court. It was the Defendants, not the Court, who decided against presenting Zmijewski and, by extension, evidence of the post-closing financials; the results of that decision are of their own making.

Finally, the Court believes that the testimony regarding Bracket's "failure to take a write-down to goodwill for the alleged loss in value"[48] was properly excluded. Defendants were precluded from presenting testimony that because Bracket did not declare this loss in an audited financial statement from 2015, two years after the sale, Bracket did not genuinely believe they suffered this loss. When asked if, by not including the notation of their revenue claim on their financial statement, it would reflect that the loss did not occur, the Defendants' expert responded:

> I think it's more subtle than that. It's more subtle in this respect: If they did believe they suffered it, they may have suffered it. They would have had to tell people. That leads to one possible inference: We didn't tell people, so maybe we sincerely didn't believe we suffered it.

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[47] *In re Bracket Holding Corp. Litig.*, 2019 WL 1762975, at *9 ("That said, it appears the expert witnesses may need to use some financials from after the 2013 Sale to fairly set forth their opinions.").

[48] Defs.' Opening Br. in Support of Their Renewed Mot. for J. as a Matter of Law, Mot. for New Trial, and Mot. for Remittitur at 23.

The Court notes this was not a witness for Ernst & Young who prepared the financial statements to put in proper context what was disclosed to them or why it was not included, but was an accounting professor simply testifying as to what he asserted were appropriate accounting procedures. At best, this was a speculative conclusion without support and would have been extremely misleading to the jury. In addition, exhibits had been introduced showing, around the same time that this financial statement was prepared by Ernst & Young, Bracket Intermediate Holding Corp.'s consolidated financial statement for the year ending on December 31, 2014 stated:

> On February 27, 2015, the company filed a suit against ESI, United BioSource LLC and former employees to recover approximately $830 million related primarily to overstatements of revenue, EBITDA and working capital.

The Court made this ruling because this accounting assertion, raised only during trial, simply did not support the only reason for which it was being introduced, that is, to argue that the revenue claims were simply ones made up by the Plaintiff. This speculation was so inconsistent with the evidence presented during trial that the Court found it unreliable. Accordingly, Defendants' Motion for a New Trial is denied.

V. Defendants' Motion for Remittitur

A. Standard of Review

Upon a motion for remittitur, "the trial court must evaluate the evidence and decide whether the jury award falls within a supportable range."[49] In doing so, only the evidence that was placed into evidence should be considered.[50] Remittitur is only required if the damages are "so excessive" that the jury must have based their award on "passion, prejudice or misconduct, rather than on objective consideration of evidence presented at trial."[51] A verdict will only be set aside if it is "clear that the award is so grossly out of proportion to the injuries suffered, as to shock the court's conscience and sense of justice."[52] Absent these "exceptional circumstances," the jury's verdict will be given "enormous deference."[53]

B. Discussion

First, Defendants contend that remittitur is warranted because Bracket waived the right to an award of damages that was calculated by using a multiple and the Court should reduce the award to be consistent with the parties' contractual

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[49] *Reid v. Hindt*, 976 A.2d 125, 131 (Del. 2009).
[50] *Young v. Frase*, 702 A.2d 1234, 1237-38 (Del. 1997) ("[A] court's assessment of whether a jury's award of damages is within a range supported by the evidence must necessarily be based on the evidence presented to the jury and not on facts outside of the jury's purview.").
[51] *Barba v. Boston Sci. Corp.*, 2015 WL 6336151, at *9 (Del. Super. Ct. Oct. 9, 2015).
[52] *Mills v. Telenczak,* 345 A.2d 424, 426 (Del. 1975).
[53] *Barba,* 2015 WL 6336151, at *9.

agreement.[54] This argument is based on Section 9.9 of the SPA, which provides the following:

> ARTICLE IX
> INDEMNIFICATION
>
> 9.9 Certain Damages. In no event shall any Injured Party be entitled to recover or make a claim for any amounts in respect of, and in no event shall "Losses" for purposes of this Agreement with respect to amounts indemnifiable under Sections 9.1 for the breach of any Special Covenants be deemed to include consequential, incidental or indirect damages, lost profits or punitive, special or exemplary damages and, in particular, damages calculated by "multiple of profits" or "multiple of cash flow" or similar valuation methodology . . . .

Defendants separate this provision into two clauses to argue that Section 9.9 provides both a general limitation on damages, and a separate limitation on an indemnification-related definition of Losses.[55] Defendants argue that the broad language used in this provision indicates that it should apply to all claims, rather than solely indemnification claims.[56]

Defendants also assert that remittitur is warranted because Bracket's expert, Louis Dudney, did not perform an independent valuation of the Company, and instead "calculated the difference between what Plaintiff paid and what Plaintiff would have paid absent the fraud, *not* the actual value of the Company at the time of

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[54] Defs.' Opening Br. in Support of Their Renewed Mot. for J. as a Matter of Law, Mot. for New Trial, and Mot. for Remittitur at 26.
[55] *Id.*
[56] *Id.*

Closing."[57] Lastly, Defendants argue that they are entitled to remittitur of damages relating to active projects and projects started post-TTM in the amount of $52.14 million because "Plaintiff never tied [them] to any actionable misrepresentation."[58]

In response, Bracket asserts that the plain meaning of Section 9.9, "in keeping with its text and its placement in the portion of the SPA dealing with indemnification," indicates that it applies only to indemnification claims.[59] Furthermore, they argue that the language in this provision cannot be separated into two distinct clauses, and so the "limitation on damages calculated by 'multiple of profits' applies only to claims for indemnification," which has no effect on the damages available for Plaintiff's fraud claim.[60]

Bracket also contends that Dudney did, in fact, calculate the Company's actual value at the time of the closing.[61] However, they maintain that "there is no Delaware authority that requires an expert to provide an independent valuation to prove fraud damages."[62] Finally, Bracket asserts that the award based on active projects is sufficiently connected to Defendants' misrepresentations.[63] Plaintiff further explains that some of Defendants' misrepresentations related to 191 active contracts on which

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[57] *Id.* at 29.
[58] *Id.* at 31.
[59] Pl.'s Answering Br. in Opp'n to Defs.' Renewed Mot. for J. as a Matter of Law, Mot. for New Trial, and Mot. for Remittitur at 29.
[60] *Id.* at 28.
[61] *See id.* at 30.
[62] *Id.*
[63] *See id.* at 33.

Stewart manipulated revenue "by 'pulling' revenue into the TTM EBITDA period that should have been recorded outside of it, causing Bracket to overpay."[64]

The Court believes that the jury's verdict falls within a supportable range given the evidence that was presented at trial. Section 9.9 of the SPA does not limit the damages available in this matter. The text of the provision states that it limits damages "with respect to amounts indemnifiable" and this suit does not involve any indemnification claims; it is solely a first-party fraud case. Even the Defendants' argument requires the damage event relate to an "Injured Party," which is defined in Section 9.3 as a "party entitled to indemnification." If the parties wanted to limit damages for the buyer and seller, they could have clearly included such a limitation within the 79-page SPA executed here. The Court will not create a damage limitation where one has not clearly been established by the parties. In addition, Section 9 of the agreement specifically excludes fraudulent conduct from any limitation imposed under that Section.

Additionally, although the Defendants again urge the Court to discredit Dudney's testimony, the jury clearly credited his testimony, as evidenced by the verdict. Contrary to Defendants' assertion, Plaintiff presented evidence that part of the reason Bracket overpaid was because Stewart inflated revenue on the active contracts to purport that revenue was received during a specific period, which

[64] *Id.* at 32.

directly influenced the purchase price. The Court finds that the method utilized by Mr. Dudney to establish damages was fair and appropriate. The analysis froze in time the process used by the Plaintiff to determine the purchase price in 2013. At that time, the Plaintiff considered the revenue booked during the TTM period and applied a multiple they believed would accurately reflect the increasing value of the Company over time. As such, the jury held the multiple constant at 6.3 and multiplied it by the change in revenue from the Defendants' conduct. Here, the fraudulent conduct related to the overpayment by the Plaintiff due to the Vice President of Finance's manipulation of the records of the Company regarding revenue. The parties were aware of how the value of the Company would be determined and the Plaintiff has done nothing more than use the same formula once the fraudulent revenue figures were removed. The value of the Company here is based on what the Plaintiff was willing to pay for it, not some hypothetical evaluation post-closing. The Court finds the determination made by the jury was consistent with the Court's instruction and will not overturn their verdict. Dudney's testimony, in addition to the other evidence Bracket offered throughout the ten-day trial, is sufficient to uphold the award without modification.

Furthermore, the verdict was supported by the evidence and is not a clear result of passion, prejudice, or misconduct of the jury. The Defendants' own theory supports this conclusion:

> The jury clearly multiplied the alleged inflated earnings number that Dudney calculated for the March 2013 TTM period ($8.4 million) by the 6.3x aggregate EBITDA multiple that Parthenon allegedly applied in calculating the purchase price, which equals $52.9 million, then added Dudney's claimed Working Capital Shortfall ($29.2 million) to arrive at total damages of $82.1 million.[65]

This indicates that the jury weighed the evidence and came to a reasoned conclusion. Given the evidence in the record, the Court must give the jury's verdict the enormous deference it deserves. As such, Defendants' Motion for Remittitur is denied.

VI. Defendants' Motion to Stay Execution of Judgment Pending Resolution of Post-Trial Motions and Appeal

A. Standard of Review

Pursuant to Supreme Court Rule 32(a), "[a] stay or injunction pending appeal may be granted or denied in the discretion of the trial court, whose decision shall be reviewable by this Court."[66] In its analysis, the trial court should consider the following factors established by the Delaware Supreme Court in *Kirpat*: (1) the likelihood of success on the merits of the appeal; (2) whether the petitioner will suffer irreparable injury if the stay is not granted; (3) whether any other interested party will suffer substantial harm if the stay is granted; and (4) whether the public interest will be harmed if the stay is granted.[67]

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[65] Defs.' Opening Br. in Support of Their Renewed Mot. for J. as a Matter of Law, Mot. for New Trial, and Mot. for Remittitur at 5, n. 5.
[66] Del. Supr. Ct. R. 32(a).
[67] *Kirpat, Inc. v. Del. Alcoholic Bev. Control Comm'n,* 741 A.2d 356, 357 (Del. 1998).

Because "a literal reading" of the likelihood of success on appeal factor may require the trial court "first to confess error in its ruling," this "would lead most probably to consistent denials of stay motions."[68] Accordingly, if the last three factors all "strongly favor interim relief," then it will suffice for the first factor "if the petitioner has presented a serious legal question that raises a 'fair ground for litigation and thus more deliberative investigation.'"[69] The four factors should be considered together "to balance all of the equities involved."[70]

B. Discussion

Defendants argue that a stay pending appeal should be granted because they are willing to post a bond, providing sufficient security to Plaintiff in the event that Defendants' appeal is unsuccessful.[71] They assert that because they are willing to post a bond, "a stay is required under Rule 32(c)," which states that a stay "pending appeal shall be granted upon filing and approval of sufficient security."[72] In support, they cite to a 1986 Chancery Opinion, stating "[w]here the civil judgment is one requiring the payment of money, the giving of a bond in due form and in an

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[68] *Id.* at 358.
[69] *Id.*
[70] *Id.*
[71] Defs.' Mot. to Stay Execution of J. Pending Resolution of Post-Trial Motions and Appeal ¶ 6.
[72] Defs.' Reply in Support of Their Mot. to Stay Execution of J. Pending Resolution of Post-Trial Motions and Appeal ¶ 1. *See also* Del. Supr. Ct. R. 32(c).

appropriate amount is all that should ordinarily be required to justify a stay of the effectiveness of the order appealed from."[73]

Although Defendants argue that the *Kirpat* factors should not be used to evaluate Defendants' stay request because of their willingness to post a bond, alternatively, they contend that they have satisfied all four of the *Kirpat* requirements. Beyond establishing likelihood of success on appeal, they maintain that a stay is necessary to prevent irreparable harm. They explain that if Defendants are compelled to satisfy the judgment now and later succeed on appeal, "they may be forced to pursue multiple different entities in order to recover their payment" because Bracket will "distribute the proceeds of its recovery to its numerous investors."[74] Finally, Defendants assert that Bracket will not suffer substantial harm because the bond secures Bracket's interests, guaranteeing the judgment will be satisfied at the conclusion of the appeal, if necessary.[75]

In response, Plaintiff claims that a stay would be manifestly unjust and is simply being requested by Defendants as a tactic "to extend this litigation and avoid responsibility."[76] Further, they argue that Defendants have failed to establish that an analysis of the *Kirpat* factors favors granting a stay. Bracket claims that Defendants have not demonstrated a likelihood of success on appeal because they have simply

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[73] *Matter of State Insur. Dep't v. Remco Ins. Co.*, 1986 WL 3419, at *2 (Del. Ch. Mar. 18, 1986).
[74] Defs.' Mot. to Stay Execution of J. Pending Resolution of Post-Trial Motions and Appeal ¶ 11.
[75] *See id.* ¶ 13.
[76] Pl's Resp. to Defs.' Mot. to Stay Execution of J. Pending Resolution of Post-Trial Motions and Appeal at 1.

restated arguments that were previously presented to the Court.[77] Next, Plaintiff asserts that Defendants failed to establish irreparable harm because the possibility of pursuing multiple different entities to recover the judgment, should Defendants succeed on appeal, is insufficient harm.[78] Additionally, Bracket contends that Plaintiff will suffer substantial harm if the stay is granted, as this would lengthen the time that they have been unjustly deprived of their funds due to Defendants' fraud.[79]

The Delaware Supreme Court has made it clear that the full analysis for stay requests includes an analysis of the four factors identified in *Kirpat*. Therefore, despite Defendants' contention that a *Kirpat* analysis is inappropriate given their willingness to post a bond, this Court disagrees and will analyze the request using the *Kirpat* framework.

While the Court has denied Defendants' Motion for Judgment as a Matter of Law and their request for a new trial, these requests involve serious legal questions[80] that have resulted in a significant damage award. Clearly the issues raised are not frivolous or done for delay or other improper motives. The Court need not find that Defendants have demonstrated a likelihood of success on these issues. If the other factors weigh in favor of interim relief, the Defendants have sufficiently met their required showing for the first factor.

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[77] *See id.* ¶ 7.
[78] *Id.* ¶ 10.
[79] *See id.* ¶¶ 11-12.
[80] *Kirpat, Inc.*, 741 A.2d at 358.

Defendants have met their burden of establishing that the second factor weighs in favor of granting a stay to prevent irreparable harm. Although the award in this case involves only a money judgment, rather than injunctive relief, the specific facts of this case warrant a stay. Similarly, in *FdG Logistics LLC*, the Court of Chancery granted a stay in the context of a money judgment, in light of the concern that the plaintiff would disburse the award to its investors and the significant risk that the defendant would be unable to subsequently recover the payment if successful on appeal.[81] The Court of Chancery indicated that the plaintiff's questionable solvency significantly contributed to its decision to grant the stay.[82]

When Bracket receives the award, it will be required to distribute the proceeds of it to its numerous investors. In the event of Defendants' success on appeal, Defendants risk non-repayment of the award due to the disbursement. They may be forced to pursue multiple entities and individuals in an attempt to recover their original payment. As discussed below, since the Court finds that Plaintiff would not suffer substantial harm from a stay, there is no need for Defendants to risk non-repayment.

Third, if the stay is granted and the Defendants are unsuccessful on appeal, the only harm that Bracket will suffer is delay. The jury determined that Defendants

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[81] *FdG Logistics LLC v. A&A Logistics Holdings, Inc.*, 2016 WL 1060086, at *2 (Del. Ch. Mar. 16, 2016).
[82] *See id.* at *2.

committed fraud, which caused Bracket to overpay millions of dollars for the Company, and awarded $82.1 million to compensate Plaintiff for the harm suffered. As Defendants are willing to furnish a bond in the full amount necessary to secure a stay of judgment, there is no risk that Bracket will be denied the award if the judgment is affirmed on appeal. Accordingly, Bracket will not suffer substantial harm from the stay.

Fourth, the public interest factor is not implicated in this case. In conclusion, upon balancing the equities, the Court finds that the hardship factors weigh in favor of a stay and Defendants' Motion is granted based on the representation by the Defendants that they will post a bond equivalent to the verdict issued in the case.

VII. Defendant United BioSource LLC's Motion for Award of Pre- and Post-Judgment Interest

At the close of evidence, the Court granted judgment as a matter of law in favor of UBC on their counterclaim for breach of contract and permitted the jury to determine the amount of damages owed. The jury awarded UBC a total of $2,264,458.79 in damages.[83] UBC has moved for pre- and post-judgment interest on their award, requesting pre-judgment interest in the amount of $311,266.23 and

[83] United BioSource LLC's Mot. for Award of Pre- and Post-Judgment Interest ¶ 4.

post-judgment interest pursuant to the TSA.[84] As Plaintiff does not oppose the Defendant's Motion and does not dispute the calculations, UBC's Motion is granted.

VIII. Plaintiff's Motion for Costs and Prejudgment and Postjudgment Interest

A. Costs

The decision of whether or not to grant costs is within the discretion of the Court. Pursuant to Superior Court Rule 54(d), "costs shall be allowed as of course to the prevailing party upon application to the Court."[85] The definition of costs has been interpreted to mean "allowances in the nature of incidental damages awarded by law to reimburse the prevailing party for expenses necessarily incurred in the assertion of his rights in court."[86] This is not an "attempt by the court to fully compensate a litigant for all the expenses the litigant incurred,"[87] but it allows recovery of those expenses that "a party cannot litigate its case without incurring."[88]

Bracket seeks to be reimbursed for the following costs:

Court fees, filing fees, & electronic service fees:	$5,040.32
Service of process costs:	$1,902.35
Expert witness fees:	$16,713.27
Deposition court reporting:	$22,457.95
Trial technology fees:	$117,075.00

[84] The TSA provides that UBC is entitled to receive interest at a rate of 1.5% over the Federal Funds Rate, compounded monthly, from the date of judgment through the date of actual payment. *Id.* ¶ 7.
[85] Del. Super. Ct. Civ. R. 54(d).
[86] *Peyton v. William C. Peyton Corp.*, 8 A.2d 89, 91 (Del. 1939).
[87] *Wyatt v. Moore*, 1993 WL 138716, at *1 (Del. Super. Ct. Jan. 20, 1993).
[88] *See TranSched Sys. Ltd. v. Versyss Transit Sols., LLC*, 2012 WL 1415466, at *3 (Del. Super. Ct. Mar. 29, 2012).

In total, Bracket requests an award of $163,188.89 in costs.[89] Defendants argue that some of these costs are unrecoverable, excessive, or incorrectly calculated. The Court will examine each of Bracket's claimed costs individually to determine whether they are taxable against Defendants.

1. Court Fees, Filing Fees, & Electronic Service Fees

Court fees, filing fees, and electronic service fees are generally recoverable.[90] As Defendants do not dispute Bracket's calculations of these costs, the Court will allow them in the amount of $5,040.32.

2. Service of Process Costs

Likewise, service of process costs are generally recoverable[91] and they are undisputed by Defendants. As such, the Court will allow them in the amount of $1,902.35.

3. Expert Witness Fees

The prevailing party may recover costs for "the time an expert spends testifying or waiting to testify."[92] These costs should be limited to the time that the

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[89] *See* Pl.'s Mot. for Costs and Prejudgment and Postjudgment Interest at 8.
[90] *Dewey Beach Lions Club v. Longacre*, 2006 WL 2987052, at *2 (Del. Ch. Oct. 11, 2006).
[91] *Moyer v. Saunders*, 2013 WL 4138116, at *1 (Del. Super. Ct. July 24, 2013).
[92] *McKinney v. Brandywine Court Condo. Council, Inc.*, 2004 WL 2191033, at *2 (Del. Super. Ct. Aug. 12, 2004).

expert "spent attending court for the purpose of testifying."[93] As such, a party may not recover for an expert's time spent in preparation for trial, or for the time an "expert may spend listening to other witnesses for orientation or consulting with a party, counsel, or other witnesses during trial."[94] Reasonable travel expenses to and from the courthouse may also be recovered.[95]

Bracket requests $16,713.27 in total costs related to their expert, Louis Dudney. His standard billing rate is $995.00 per hour and Bracket claims that Dudney spent 13.5 hours either testifying or waiting to testify at trial, for a cost of $13,432.50.[96] Bracket does not seek to recover the cost for the other time that Dudney spent watching trial. Bracket also requests $933.37 for Dudney's airfare and $2,347.40 for his lodging from June 9, 2019 through June 20, 2019.

In response, Defendants object to Bracket's calculation of the costs included in their expert fee. Defendants note that Dudney testified for three days, yet Plaintiff seeks to recover eleven days of lodging expenses.[97] They also object to the inclusion of Dudney's time spent testifying in rebuttal.

The Court agrees that Bracket may recover reasonable expert witness fees. The Court believes that it is reasonable to compensate a party's expert for the time

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[93] *See TranSched Sys. Ltd.*, 2012 WL 1415466, at *4.
[94] *See id.*
[95] *Spencer v. Wal-Mart Stores E., LP*, 2007 WL 4577579, at *2 (Del. Super. Ct. Dec. 5, 2007).
[96] Plaintiff notes that Dudney's standard billing rate increased to $995.00, from $915.00, from the date on which he prepared his expert report to the date of trial. The Court will calculate Dudney's expenses using his rate at the time of trial. *See* Pl.'s Mot. for Costs and Prejudgment and Postjudgment Interest at 10.
[97] Defs.' Opp'n to Pl.'s Mot. for Costs and Prejudgment and Postjudgment Interest at 6.

they testify in the courtroom and for the time they are in the courtroom to listen to the testimony of opposing experts. The Court's records reflect that Dudney testified for 4 hours on June 18th, for 2.5 hours on June 19th, and for .5 hours on June 20th. Additionally, Dudney was present in the courtroom for 3 further hours on June 20th to listen to Defendants' expert witness, Professor Gordon Klein's testimony. As such, the Court will allow recovery of 10 hours of Dudney's time, as opposed to the requested 13.5 hours.[98] Accordingly, the Court awards $9,950.00 for time spent testifying and $933.37 for Dudney's airfare. As Dudney only testified on three of the ten days of trial, only costs associated with those three days will be allowed. Accordingly, the Court will award costs for three days of lodging, rather than the requested eleven, which comes to an award of $640.20 for lodging expenses. In total, the Court will allow Bracket to recover $11,523.57 for expert witness fees.

4. Deposition Court Reporting

Bracket requests $22,457.95 for court reporter costs for depositions that were entered into evidence.[99] This amount includes the cost of associated attendance fees, expedited fees, room rental fees, and shipping fees, as well as other charges.

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[98] Trial Tr. at 37-102 (Morning Session, June 18, 2019), Trial Tr. at 4-102 (Afternoon Session, June 18, 2019), Trial Tr. at 9-90 (June 19, 2019), Trial Tr. at 103-120 (June 20, 2019).
[99] Pl.'s Mot. for Costs and Prejudgment and Postjudgment Interest at 8.

In response, Defendants argue that the Court should recalculate the total cost by multiplying the number of pages by the official per page rate ($3.00) of the court reporters for the Superior Court.[100] The total recoverable costs under Defendants' theory would amount to $4,095 for the 1,365 pages of deposition testimony that were entered into evidence.

Pursuant to Superior Court Civil Rule 54(f), the "fees paid court reporters for the Court's copy of transcripts of depositions shall not be taxable costs unless introduced into evidence."[101] Accordingly, the Court will permit Bracket to recover costs of depositions paid to court reporters that were read into the record and submitted as Court exhibits. However, the Court will not permit Bracket to recover fees for additional copies of such transcripts, sales tax, delivery costs, attendance fees, or other associated fees.[102]

As such, Bracket is entitled to be reimbursed for the following deposition court reporting costs:

Jamie G. Kates	$1,234.20
Bradley Sloan	$1,366.70
Catherine Spear	$902.70
Jim Stewart	$1,489.15
Robert Van Brunt	$1,264.00
Annette Vaughan	$734.40

[100] Defs.' Opp'n to Pl.'s Mot. for Costs and Prejudgment and Postjudgment Interest at 9.
[101] Del. Super. Ct. Civ. R. 54(f).
[102] *See TranSched Sys. Ltd.*, 2012 WL 1415466, at *4 ("The Court will not allow [prevailing party] to recover costs for additional copies or for sales tax, delivery costs, or administrative fees associated with these transcripts."); *see also Foley v. Elkton Plaza Assocs., LLC*, 2007 WL 959521, at *3 (Del. Super. Ct. Mar. 30, 2007).

In total, the Court will allow Bracket to be reimbursed $6991.15 for the cost of deposition transcripts that have been entered into evidence. This number reflects the cost Bracket paid for one certified transcript per deposition and does not include any other fees.

5. Trial Technology Fees

Bracket requests an award of $117,075.00 for its "in-Court trial technology support staff," which they assert were critical to the trial presentation.[103] Bracket's records indicate that $55,575.00 of the total cost was charged for the onsite graphics support services.[104]

In response, Defendants assert that recoverable trial technology fees are limited to those fees incurred by the support person during trial, not those incurred in preparation for trial.[105] They further argue that the graphics services provided during trial, supplemental to the technology support services, should not be considered a necessary expense of the trial.[106]

The Court will allow recovery only to the extent of the cost of technology support services that were provided during trial. Bracket's trial technology support staff bills reflect significantly more than the maximum time the support staff could

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[103] Pl.'s Mot. for Costs and Prejudgment and Postjudgment Interest at 7.
[104] Aff. of Reed S. Oslan in Support of Pl.'s Mot. for Costs and Prejudgment and Postjudgment Interest, Ex. 2.
[105] Defs.' Opp'n to Pl.'s Mot. for Costs and Prejudgment and Postjudgment Interest at 9.
[106] Defs.' Opp'n to Pl.'s Mot. for Costs and Prejudgment and Postjudgment Interest at 9.

have spent in trial. For example, on June 10, 2019, Bracket requests costs for 19.75 hours of technology support services. Additionally, Bracket requests payment for services provided on Saturday, June 15th and Sunday, June 16th.

As this Court has previously held, "at least in complex litigation, technology support expenses are reasonable and expected costs of litigation."[107] The Court encourages the use of technology and support personnel in the presentation and viewing of exhibits at trial.[108] However, Plaintiff cannot recover for the services that the technology support staff provided outside the trial. As such, the Court will allow recovery of $52,850.00 reflecting the rate of $380 per hour for graphics support services and $375 per hour for other technological services for seven hours per day throughout ten days of trial.

B. Interest

Bracket seeks prejudgment interest that is "compounded quarterly with a variable rate set according to the legal rate of the federal discount rate plus 5%," yielding a sum of $37,069,719.99.[109] They assert that a variable rate is most appropriate because it accounts for the economic realities of the time period. When

[107] *TranSched Sys. Ltd.*, 2012 WL 1415466, at *5.
[108] *See id.* ("For years the Court has encouraged counsel to expand their use of technology and to utilize support personnel to assist in that effort.").
[109] Pl.'s Mot. for Costs and Prejudgment and Postjudgment Interest at 2-3.

the transaction closed, the federal discount rate was "near to its absolute low from the Great Recession" and Bracket argues that "Defendants should not be rewarded, nor should Bracket be punished, with an unusually low interest rate."[110]

In addition, Bracket requests a post-judgment interest amount for each day following the June 24, 2019 jury verdict and the eventual date on which Defendants pay the judgment. They propose that the following formula be used to calculate the post-judgment interest: Daily Post-Judgment Interest = ($82.1 Million Damages + Total Prejudgment Interest + Total Taxable Costs) × (3.00% Federal Discount Rate as of June 24, 2019 + 5%) × (1 /365).[111]

It is Defendants' position that Bracket is not entitled to any prejudgment interest under 6 Del. C. § 2301(d) or under the common law.[112] Section 2301(d) provides that prejudgment "interest shall be added . . . provided that the plaintiff had extended to defendant a written settlement demand . . . in an amount less than the amount of damages upon which the judgment was entered."[113] Section 2301(d) applies to tort actions for compensatory damages seeking monetary relief for property damage. Defendants claim that this statute applies to the instant matter because the Company "plainly comes within the meaning of property."[114] As

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[110] *Id.* at 2.
[111] *Id.* at 4.
[112] *See* Defs.' Opp'n to Pl.'s Mot. for Costs and Prejudgment and Postjudgment Interest at 1, 8.
[113] 6 Del. C. § 2301(d).
[114] Defs.' Opp'n to Pl.'s Mot. for Costs and Prejudgment and Postjudgment Interest at 2.

Bracket's settlement demand sought $300 million, much more than the $82.1 million awarded by the jury, Defendants argue that Bracket is statutorily barred from collecting prejudgment interest. Furthermore, they assert that even in the absence of the statute, the common law does not permit an award of prejudgment interest because the amount could not reasonably have been determined prior to judgment.[115] Alternatively, they argue that if the Court finds Bracket is entitled to prejudgment interest, it should be simple interest at a rate fixed on the date of the alleged wrong.

Defendants offer the following alternative formula to calculate postjudgment interest: ($79,835,541.20 + Total Taxable Costs) x (0.75% Federal Discount Rate as of August 14, 2013 + 5%) x (1/365).[116] Defendants argue that the same interest rate must apply to the prejudgment and postjudgment interest calculation, specifically the rate as of the date the transaction closed.[117] They also assert that the principal amount should be reduced by the amount of damages the jury awarded to Defendants on their counterclaim before calculating postjudgment interest, pursuant to the Interest on Balance Rule.[118]

The Court finds that Bracket is entitled to prejudgment interest and postjudgment interest. Contrary to Defendants' assertion, the Court does not believe

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[115] *Id.* at 5.
[116] *Id.* at 8.
[117] *Id.*
[118] *Id.*

that the claims for fraudulent misrepresentation qualify as property damage under Section 2301(d) and, therefore, the statute is inapplicable. Additionally, the common law does not preclude recovery of prejudgment interest because the damages were calculable, although contested, before trial. "Simply because the precise amount of the damage was not ultimately fixed until the award was rendered, does not diminish its pecuniary nature."[119]

Second, interest should be calculated using a simple fixed rate of 5.75%. This equals 5% over the Federal Reserve discount rate "as of the date of commencement of interest liability,"[120] which was .75% on August 14, 2013. The Court has held that the applicable interest rate should remain fixed, despite changing economic conditions.[121] Even if this may "not [be] a fair reflection of the cost of money" over the relevant time period, "to change this practice, the Court believes a legislative fix, and not a judicial one, is required."[122] As such, this same rate will be applied to the prejudgment interest, as well as to the postjudgment interest.

Finally, the Court must determine whether postjudgment interest should be applied to Bracket's full award or whether it should be applied after reducing the damages to account for Defendants' $2,264,458.79 award on their counterclaim.

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[119] *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.3d 482, 487 (Del. 2011) (quoting *Janas v. Biedrzycki*, 2000 WL 33114354 (Del. Super. Ct. Oct. 26, 2000)).
[120] *TranSched Sys. Ltd.*, 2012 WL 1415466, at *6.
[121] *See id.*
[122] *Id.*

Defendants urge the Court to apply the Interest on Balance Rule. Application of the Interest on Balance Rule depends on "the degree of correlation between the party's claims."[123] If the counterclaim is directly related to Plaintiff's claim then the Interest on Balance Rule applies to reduce the award by the setoff before interest, but if the counterclaim is collateral, then the rule does not apply and interest is awarded on the full amount.[124]

Here, Defendants' counterclaim is not directly involved in the fraudulent misrepresentation matter and the Interest on Balance Rule should not apply. The key inquiry on Plaintiff's claim was "whether Defendants misrepresented the financial condition of the companies they sold Bracket and how much Bracket overpaid as a result."[125] Defendants' counterclaim alleged that UBC and Bracket executed the TSA in which UBC agreed to provide certain transition services to Bracket and Bracket failed to pay for those services.[126] As such, the counterclaim is unrelated to the fraudulent misrepresentation allegations and interest should be applied to the full $82.1 million award.

In conclusion, Bracket is entitled to prejudgment interest in the amount of $27,677,821.92 and postjudgment interest using the following formula: ($82.1M +

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[123] *Fleet Fin. Grp., Inc. v. Advanta Corp.*, 2003 WL 22707336, at *3 (Del. Ch. Nov. 7, 2003).
[124] *See id.*
[125] Pl.'s Mot. for Costs and Prejudgment and Postjudgment Interest at 7.
[126] *See* United BioSource LLC's Am. Compl. for Breach of Contract and Tortious Interference ¶ 108.

Total Taxable Costs) x (0.75% Federal Discount Rate as of August 14, 2013 + 5%) x (1/365).

IX. Plaintiff's Motion for Attorneys' Fees and Expenses

Bracket requests an award of $21,138,809.55 in attorneys' fees and $4,611,305.83 in costs.[127] Typically, under the American Rule, parties bear their own costs of litigation. However, Bracket argues that they are entitled to fees and costs for two reasons: (1) the SPA and the R&W insurance policy indicate that the parties intended to shift fees for fraud claims; or, alternatively, (2) the bad faith exception applies.

A. Contractual Fee Shifting

The SPA provides:

> ARTICLE IX
> INDEMNIFICATION
>
> 9.1 Indemnification by Parent. . . . Parent shall indemnify and hold harmless the Buyer and Buyer's Affiliates . . . against and in respect of any and all Losses actually incurred by any Buyer Indemnified Party arising from: (a) any breach or violation of the covenants made in this Agreement by Parent or any of its Affiliates; (b) any breach of any of the Fundamental Representations made in Article III by Parent . . . .

[127] Pl.'s Mot. for Attorneys' Fees and Expenses at 1.

> 9.6 Limitation on Indemnification. . . . (d) Notwithstanding any other provision herein to the contrary, 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 . . . .

Bracket asserts that the term "Losses," as defined by the SPA, includes "costs and expenses of suits and proceedings, and reasonable fees and disbursements of counsel."[128] They conclude that, when these provisions are read together, "there is no question that the parties agreed to fee-shifting in cases where the Plaintiff is awarded damages for ***intentional fraud***."[129] Similarly, Bracket claims they should be awarded attorneys' fees under the R&W insurance policy because it includes prosecution costs as a loss that may be pursued through the policy.

In response, Defendants contend that there is no contractual basis for fee-shifting in the SPA. The section that Bracket identified as evidence of fee-shifting is the indemnification provision, which Defendants claim does not have any bearing on first-party suits.[130] They argue that an agreement to shift fees must be clear and unequivocal and nothing in the SPA clearly articulates a fee-shifting provision.[131]

First, the Court finds that there is not sufficient evidence of a fee-shifting agreement to support deviating from the American Rule to award attorneys' fees. This Court has previously held that "indemnity agreements are presumed not to

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[128] *Id.* at 8.
[129] *Id.* (emphasis in original).
[130] *See* Defs.' Answering Br. in Opp'n to Pl.'s Mot. for Attorneys' Fees and Expenses at 4.
[131] *See id.* at 5.

require reimbursement for attorneys' fees incurred as a result of substantive litigation between the parties to the agreement absent a clear and unequivocal articulation of that intent."[132] Without precise language setting forth an intent to shift fees, "[c]ounsel should not expect the Court to deviate from the American [R]ule if care has not been taken in drafting a contract's language."[133]

In the instant matter, neither the SPA nor the insurance policy clearly show that the parties contracted to shift attorneys' fees in first-party suits. Although "there is no specific language that must be used in order for an indemnity provision to provide recovery for first-party actions," the contract's language must clearly provide for fee-shifting.[134] Again, neither the SPA nor the insurance policy clearly provide any such language. Section 9.1 provides a standard indemnity clause and the Court will not presume that it applies to first-party claims in the absence of precise language directing its application.

B. Bad Faith Exception

Alternatively, Bracket asserts that they should recover attorneys' fees due to Defendants' bad faith before and during the litigation.[135] This exception permits the

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[132] *TranSched Sys. Ltd.*, 2012 WL 1415466, at *2.
[133] *Id.*
[134] *See Deere & Co. v. Exelon Generation Acquisitions, LLC*, 2016 WL 6879525, at *1-2 (Del. Super. Ct. Nov. 22, 2016) ("Otherwise, a typical indemnification provision would swallow the American Rule.") (internal quotations omitted).
[135] *See* Pl.'s Mot. for Attorneys' Fees and Expenses at 9.

Court to award attorneys' fees if it finds the Defendants acted in bad faith, even if the parties have not contracted for such an award. Bracket claims that "the number of baseless and disingenuous arguments advanced" by the Defendants sufficiently satisfies the high burden necessary to establish bad faith.[136]

In contrast, Defendants assert that the bad faith rule is inapplicable as a matter of law and factually unwarranted.[137] They maintain that bad faith is a narrow exception to the American Rule and it is inapplicable to the instant matter.[138] Defendants argue that attorneys' fees, based on a party's bad faith, are rarely awarded and the conduct in this case "does not come close to satisfying the applicable standard."[139]

"The bad faith exception applies only in 'extraordinary cases.'"[140] The Court assesses bad faith based on the unique facts and circumstances presented in each case to determine whether attorneys' fees are warranted.[141] The party seeking the award "bears the stringent evidentiary burden of producing 'clear evidence' of bad-faith conduct."[142] In order to award attorneys' fees, the Court must find that the party acted in "subjective bad faith."[143] Courts have awarded attorneys' fees for bad faith

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[136] *Id.*
[137] Defs.' Answering Br. in Opp'n to Pl.'s Mot. for Attorneys' Fees and Expenses at 7.
[138] *Id.* at 8.
[139] *Id.*
[140] *Lawson v. State*, 91 A.3d 544, 552 (Del. 2014) (quoting *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1093 (Del. 2006)).
[141] *See Beck v. Atl. Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005).
[142] *Id.* (quoting *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 232 (Del. Ch. 1997)).
[143] *Arbitrium (Cayman Islands) Handels AG*, 705 A.2d at 232.

"where parties have unnecessarily prolonged or delayed litigation, falsified records, or knowingly asserted frivolous claims."[144] Importantly, if there is "a colorable basis for a claim, the award of attorneys' fees and costs is unwarranted."[145]

Here, the Court finds that the bad faith exception is inapplicable because the facts of this case are not so extraordinary as to warrant an award of attorneys' fees. This litigation arises out of a transaction between two sophisticated parties for the purchase of a Company and the jury determined that the seller fraudulently misrepresented the finances of the Company to the buyer, causing the buyer to overpay. Although Bracket asserts that Defendants' conduct in defending the litigation over the last five years demonstrates their "steadfast[] refus[al] to take any responsibility for their actions,"[146] the length of the litigation and Defendants' corresponding defense are not indicative of bad faith.

Furthermore, the Court believes that Defendants had a colorable basis for their defense. At trial, Defendants challenged Bracket's expert's testimony regarding his revenue model, which, if successful, would have effectively refuted Bracket's claims. Because Defendants had a colorable basis for the arguments they made before and during trial, Plaintiff cannot satisfy the stringent standard necessary to

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[144] *Kuratle Contracting, Inc. v. Linden Green Condo., Ass'n,* 2014 WL 5391291, at *8, *12 (Del. Super. Ct. Oct. 22, 2014) (". . . Delaware courts have declined to engage in fee shifting when the evidence of bad faith was less than clear.") (internal citations omitted).

[145] *Id.* at *11.

[146] Pl.'s Mot. for Attorneys' Fees and Expenses at 2.

produce clear evidence of bad faith. The Defendants' conduct simply does not rise to the extraordinary level that would be necessary to impose attorneys' fees based on bad faith.

X. Plaintiff's Motion for New Trial on Punitive Damages

A. Standard of Review

Pursuant to Superior Court Civil Rule 59(a), a new trial may be granted "on all or part of the issues in an action in which there has been a trial for any of the reasons for which new trials have heretofore been granted in the Superior Court."[147] Although partial retrials are permitted by Rule 59, "the application of that procedure 'is by no means automatic.'"[148] New trials limited to fewer than all of the issues may only be permitted if two conditions are satisfied: "(1) the issue to be retried is clearly severable from the other issues, and (2) no injustice will result from limiting the issue on retrial."[149] Essentially, the purpose of Rule 59 is to "limit any new trial only to those issues which were incorrectly decided."[150]

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[147] Del. Super. Ct. Civ. R. 59.
[148] *Chilson v. Allstate Ins. Co.*, 979 A.2d 1078, 1084 (Del. 2009) (quoting *Chrysler Corp. v. Quimby*, 144 A.2d 123, 137 (Del. 1958)).
[149] *Scott v. Amisial*, 2019 WL 4724815, at *2 (Del. Sept. 26, 2019) (citing *Chilson v. Allstate Ins. Co.*, 979 A.2d 1078, 1084 (Del. 2009)).
[150] *Chilson*, 979 A.2d at 1084 (quoting *Larrimore v. Homeopathic Hosp. Ass'n of Del.*, 176 A.2d 362, 371 (Del. Super. Ct. 1961)).

B. Discussion

On June 21, 2019, the Court granted Defendants' Motion for Judgment as a Matter of Law on punitive damages, removing the question from the jury. Plaintiff now submits that this Court erred by precluding the jury from deciding whether punitive damages were warranted.

Bracket argues that they adduced substantial evidence during trial to support "a reasonable inference of conduct meeting the standard justifying punitive damages."[151] More specifically, Plaintiff contends that they established "Defendants knew the Company's financial statements were false before closing, yet pushed the sale through," "attempted to conceal the fraud after the sale," and engaged in "repeated actions of intentional malice, trickery, or deceit from the time of sale through trial," but Defendants dispute this characterization of the facts.[152] Further, Bracket emphasizes that the sophistication of the parties involved is not determinative of whether punitive damages should be considered by the jury.[153]

In response, Defendants assert that the Court properly denied Plaintiff's request to submit punitive damages to the jury based on well-established Delaware law and that Bracket has failed to offer any new law or facts that would warrant

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[151] Pl.'s Opening Br. in Support of its Mot. for New Trial on Punitive Damages at 1 (internal quotations omitted).
[152] *Id.* at 1-2 (internal quotations omitted). *See* Defs.' Br. in Opp'n to Pl.'s Mot. for New Trial on Punitive Damages at 6-16 ("Plaintiff also makes a number of baseless factual assertions, wildly mischaracterizing the trial record . . . .").
[153] *See* Pl.'s Opening Br. in Support of its Mot. for New Trial on Punitive Damages at 10-11.

reconsideration of the Court's prior decision.[154] Alternatively, Defendants claim that the SPA prevents Plaintiff from seeking punitive damages.[155] They maintain that Bracket's Motion should be denied; however, if their Motion is granted, Defendants argue that the whole case, not just punitive damages, must be retried.[156]

The question of punitive damages is ordinarily for the trier of fact, but where "the evidence permit[s] no reasonable inference" that a defendant's conduct was "sufficiently outrageous to warrant the imposition of punitive damages," the Court must issue a directed verdict or judgment.[157] Historically, punitive damages were only submitted to the jury in cases with "evidence of egregious conduct of an intentional or reckless nature."[158] More recently, punitive damages have also been permitted when the defendant's conduct, although unintentional, was "particularly reprehensible, i.e. reckless or motivated by malice or fraud."[159]

However, not every fraud case merits punitive damages. Punitive damages may be awarded in fraud cases if the conduct is "gross, oppressive or aggravated, or it involves breach of trust or confidence."[160] The Court must act as a gatekeeper to

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[154] Defs.' Br. in Opp'n to Pl.'s Mot. for New Trial on Punitive Damages at 1, 4.
[155] *Id.* at 1.
[156] *Id.* at 2.
[157] *Jardel Co. v. Hughes*, 523 A.2d 518, 527 (Del. 1987) (finding punitive damages should not have been submitted to the jury).
[158] *Id.* at 529.
[159] *Id.*
[160] *DiSimplico v. Equitable Variable Life Ins. Co.*, 1988 WL 15394, at *5 (Del. Super. Ct. Jan. 29, 1988) (quoting *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1076-77 (Del. 1983)).

determine if it is appropriate to submit the issue of punitive damages to the jury based on the individual facts and circumstances presented in each case.[161]

In the instant matter, this Court gave a great deal of consideration to the issue of punitive damages and reserved its decision until hearing all of the evidence presented at trial in order to accurately determine whether Bracket established a punitive threshold. Prior to making its decision, the Court also considered the arguments advanced by counsel in numerous oral arguments throughout the ten-day trial, as well as Bracket's midnight letter to the Court and Defendants' response.

The Court remains convinced that the facts involved in this case do not rise to the level necessary to support punitive damages. Defendants' conduct cannot easily be differentiated from other fraud cases in a way that would lead a factfinder to conclude it is "gross, oppressive or aggravated."[162] Moreover, as the parties' only relationship was as buyer and seller in an arm's length transaction, it is difficult to accept that Defendants' conduct breached the trust or confidence of Bracket. In the absence of further evidence making the conduct particularly reprehensible, the Court is not persuaded that this case warrants punitive damages.

As such, the Court finds that there was no error in its decision to grant Defendants' Motion for Judgment as a Matter of Law to remove the question of

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[161] *Id.* at *4 ("Where a plaintiff seeks to recover punitive damages from the defendant, it is essential that the Court test the legal sufficiency of the punitive damages claim . . . .").
[162] *See id.* at *5 (quoting *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1076-77 (Del. 1983)).

punitive damages from the jury. Further, the Court finds that the Plaintiff's continued effort to impose a punitive damage award is not borne from a principled belief that the Defendants' conduct warrants additional punishment to prevent such conduct from occurring again, but it is simply their aim to obtain a greater monetary award. To accept the Plaintiff's argument would open the floodgate to such claims in nearly every fraud case. The Court finds the Plaintiff's continued insistence on this issue is an affront to and an embarrassment for our civil justice system. Plaintiff's Motion for a New Trial on Punitive Damages is denied.

XI. Conclusion

For the foregoing reasons, Defendants' Motion for Judgment as a Matter of Law, Motion for New Trial, and Motion for Remittitur are **DENIED**. Defendants' Motion to Stay Execution of Judgment is **GRANTED**. Defendant UBC's Motion for Award of Pre- and Post-Judgment Interest is **GRANTED**. Plaintiff's Motion for New Trial is **DENIED**. Plaintiff's Motion for Costs and Prejudgment and Postjudgment Interest is **GRANTED in part and DENIED in part**. Plaintiff's Motion for Attorneys' Fees and Expenses is **DENIED**.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.