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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

OPENING BRIEF FOR APPELLANT EV3 INC.

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NATURE OF THE PROCEEDINGS

In 2002, Defendant ev3 acquired Appriva, the developer of a single medical device called PLAATO (Percutaneous Left Atrial Appendage Transcatheter Occlusion) to be used for the prevention of strokes. Pursuant to the Merger Agreement, the parties agreed that ev3 would pay Appriva's shareholders $50 million at closing and four additional, contingent payments to be made if and only if certain defined "Milestones" were achieved. With respect to ev3's post-merger obligation to fund the pursuit of the Milestones, the parties expressly agreed as follows:

> 9.6 Funding of the Surviving Corporation. Notwithstanding any other provision in the Agreement to the contrary, from and after the Closing, [ev3's] obligation to provide funding for [Appriva], including without limitation funding to pursue achievement of any of the Milestones, shall be at [ev3's] sole discretion, to be exercised in good faith.

A790, § 9.6.

When none of the Milestones was achieved, Plaintiffs sued ev3 for breach of contract. Despite the clear and unambiguous language of Section 9.6 above, Plaintiffs argued that ev3 was required and had promised to fund PLAATO's pursuit of all four Milestones. At trial—and with the blessing of the Trial Court over ev3's repeated objections—Plaintiffs argued to the jury that a non-binding Letter of Intent signed by ev3 before the Merger Agreement was negotiated and the "good faith" language in Section 9.6 converted ev3's "sole discretion" over

funding of the Milestones into a binding contractual commitment to do so. The jury agreed, ordering ev3 to pay Plaintiffs $175 million—the sum of all the Milestone payments—on top of the $50 million up-front payment ev3 had already made and the tens of millions of dollars it had invested in Appriva post-merger.

ev3 moved for a new trial, arguing that the Trial Court improperly left the jury to interpret an unambiguous provision in the Merger Agreement on its own without sufficient guidance from the Court, and without an instruction informing the jury that it could not use the non-binding, pre-contractual Letter of Intent to alter that contractual provision. ev3 also argued that the Trial Court provided the jury with an improper definition of "good faith" and improperly admitted one-sided parol evidence. The Trial Court denied ev3's motion for a new trial. ev3 respectfully requests that the Trial Court's order be reversed and the case remanded for a new trial.

SUMMARY OF ARGUMENT

1. The Trial Court held that Section 9.6 of the Merger Agreement was unambiguous, yet it allowed the jury to interpret that provision for itself, at Plaintiffs' counsel's urging, to alter the meaning of the Agreement and strip ev3 of the "sole discretion" for which it had bargained. Once it handed this issue over to the jury, the Trial Court further erred by refusing to instruct the jury that Section 9.6 could not be altered by the non-binding Letter of Intent.

2. The Trial Court erred by giving an erroneous and incomplete jury instruction on the meaning of "good faith." First, the Trial Court refused to instruct the jury that the absence of good faith requires a finding of bad faith. Second, the Trial Court refused to explain that taking financial considerations into account does not constitute bad faith. Third, the Trial Court imported irrelevant standards from the implied covenant of good faith and the UCC.

3. The Trial Court improperly admitted Plaintiffs' parol evidence about the parties' pre-contractual intent to support a fraud claim that was obviously non-justiciable and should have been dismissed (and was ultimately rejected by the jury). This end-run around the parol evidence rule had a prejudicial "spillover" effect on the breach of contract claim. The Trial Court compounded this error by incorrectly excluding ev3's evidence on the very same issue, leaving the jury with a one-sided and inaccurate record of the parties' pre-contractual exchanges.

STATEMENT OF FACTS

A. Appriva's Development Of PLAATO.

Appriva, founded in 1998 by Plaintiffs Dr. Michael Lesh and Erik van der Burg, developed a single medical device—PLAATO—which required FDA approval before it could be sold commercially in the United States. A262-A263. To receive FDA approval, Appriva was required to demonstrate, through an FDA-approved clinical study, that PLAATO was both safe and effective. Only after completing a successful clinical study could Appriva submit an application to the FDA for Pre-Market Approval. The FDA process is unpredictable and presents substantial risk, especially with respect to novel, implantable medical devices such as PLAATO. *See* A359-A360.

Although the FDA prefers that clinical studies utilize a *randomized* control trial ("RCT") design (*see* A414-A415; A419 at 19:15-20), Appriva determined that a randomized study was not feasible for PLAATO because of concerns over patient safety and cost. A348-A349; A361-A363; A364 at 8-20; A404-A406. Thus, Appriva designed a *non-randomized* clinical study for PLAATO. Appriva met with the FDA in 2002 to advocate for its non-randomized study and concluded from those meetings that the FDA was supportive. *See* A365 at 2-13; A840.

B. Appriva's Merger Discussions With ev3.

ev3 was a privately held medical device company until 2005. In early 2002, Lesh, the CEO of Appriva, and Paul Buckman, the CEO of ev3, engaged in discussions that ultimately led to a merger of Appriva into ev3. From the beginning, ev3 expressed that its biggest concern about PLAATO was the design of the clinical study. A397-A399; A402-A403. In particular, ev3 was concerned that the cost and risks of regulatory approval could be excessive if the FDA required a randomized design. *See id.* Like Appriva, ev3 believed a randomized clinical study "was a non starter." A409.

ev3 also expressed skepticism about the FDA's endorsement of Appriva's non-randomized design. A401-A406. But Appriva showed ev3 minutes from FDA meetings indicating the FDA's support, and Lesh declared a high level of confidence that the "FDA supports a risk-adjusted [non-randomized] OPC based trial design." A400-A401; A407; A724; A828.

C. The Letter Of Intent And The Merger Agreement.

Because of ev3's concern about the potentially risky and uncertain FDA path for PLAATO, ev3 decided to reduce the previously discussed "up-front" merger payment of $115 million to $50 million, and to replace the difference with contingent payments based on "Milestones" payable only upon the occurrence of certain events. A264-A266; A823.

Appriva agreed, and ev3 issued a non-binding "letter of intent" ("LOI") to Appriva. The LOI proposed, as part of the contemplated transaction, that "ev3 will commit to funding based on the projections prepared by its management to ensure that there is sufficient capital to achieve the performance milestones." A824. But the LOI was expressly non-binding and stated that "this letter agreement merely sets forth a preliminary statement of intentions [and] . . . does not constitute an obligation binding on ev3." A827. The LOI further provided that "[a] binding agreement with respect to the Contemplated Transaction will result only from the execution of a definitive agreement with respect thereto and will be entirely subject to the terms and conditions contained therein." *Id.* Finally, the LOI expressly stated that certain specified sections, but *not* the section that included the funding provision, were "fully binding on the parties." *Id.*

Over the next two months, the parties negotiated a definitive Merger Agreement, which was executed on July 15, 2002. *See* A736. Under the Agreement, Plaintiffs (Appriva shareholders) received $50 million at closing—double their investment. *See* A274-A275; A753, § 4.1(a). The Merger Agreement also provided for four contingent payments if PLAATO achieved certain "Milestones" by certain dates. The Milestones were as follows:

- Milestone 1 ($50,000,000) — Clinical Study Approval— 1/1/2005.
- Milestone 2 ($25,000,000) — International Registry — 1/1/2008.

- Milestone 3 ($50,000,000) — Pre Market Approval Application — 1/1/2008.
- Milestone 4 ($50,000,000) — Pre-Market Approval — 1/1/2009.

A755 at § 4.3(a)(i)–(iv).

The parties also negotiated the contractual term that would govern funding of the Milestones after the Merger closed. *See* A164 at 69:10-16; A170-A171; A176 at 30:1-33:18.[1] Appriva repeatedly proposed language that would commit ev3 either to follow specific plans or provide specific levels of funding and effort toward achieving the Milestones, but ev3 rejected each proposal and made clear that it would not make any promises about future PLAATO funding, in light of the risks associated with the FDA process. *Id.* As Appriva's transaction counsel explained, "Appriva wanted specific funding obligations," but any such funding guarantee was a "deal breaker" for ev3. *Id*. In the end, ev3 insisted on, and Appriva agreed to, the following provision:

> 9.6 Funding of the Surviving Corporation. ***Notwithstanding any other provision in the Agreement to the contrary***, from and after the Closing, [ev3's] obligation to provide funding for [Appriva], ***including without limitation funding to pursue achievement of any of the Milestones***, shall be at ***[ev3's] sole discretion, to be exercised in good faith***.

A790 § 9.6 (emphases added).

[1] ev3 attempted to offer this evidence of the parties' negotiations at trial, but the Trial Court improperly precluded it. *See* Ex. C at 30:1-31:15; A383-A384; A426 at 240:1-243:7 (Trial Court denying ev3's request for an "offer of proof"); *see also infra* Part III.

D. ev3's Post-Merger Efforts To Achieve The Milestones.

Following the Merger, ev3 made PLAATO a high priority, dedicated substantial internal staff and external experts, and over time spent approximately $27 million—above and beyond the $50 million it had paid to the Appriva shareholders—developing and trying to commercialize PLAATO. *See* A388 at 229:4-13; A410-A411; A420 at 116:22-119:19; A421 at 124:7-125:18; A809-A816. Unfortunately, at a September 10, 2002 meeting (only one month after the merger closed), the FDA called into question the viability of a non-randomized clinical study for PLAATO when it denied Pre-Market Approval for a similar cardiac device that had completed a non-randomized clinical study. A421-A422 at 126:11-128:5. The FDA said the company that owned the cardiac device (NMT Medical) needed additional evidence of efficacy and required a much larger and more risky randomized study, which ultimately failed and caused NMT to go out of business. *Id.* Despite this bad news, ev3 continued to commit significant resources to exploring a variety of clinical study design options for PLAATO. A422-A423 at 128:6-132:1.

Appriva's former Vice President, Michael Kolber, who was now an ev3 employee, drafted a submission to the FDA describing why a randomized study was not a viable option for PLAATO, which was reviewed and approved by Dr. Lesh. A423-A424 at 133:19-136:7; A842-A849; A850. On February 14, 2003,

ev3 submitted a non-randomized study design to the FDA for review. A817. ev3 believed that the proposed clinical study would pass FDA review, and even Lesh was "betting on a conditional approval." A358 at 16-20; A860.

On May 28, 2003, however, the FDA rejected ev3's proposed clinical study design and suggested that it would require a randomized study design for PLAATO. *See* A367 at 4-9; A819. Then, at a November 30, 2004 meeting, the Director of the FDA Division of Cardiovascular Devices eliminated any reasonable hope for a clinical study acceptable to ev3 when he announced that the FDA is "never going to [accept a non-randomized clinical study] for this technology." A431-A433. To ev3, the decision felt "like [the FDA] cut our legs off." A395-A396.

With no other options, ev3 submitted to the FDA, on March 11, 2005, a request to conduct a randomized clinical study, and the FDA granted that submission. *See* A434-A435. Even though implementation of the randomized study was infeasible, ev3 believed that establishing with clarity which study the FDA would accept could be helpful in the event it chose to sell PLAATO to another medical device company. *Id.*

E. ev3 Sells PLAATO At A Substantial Loss.

In addition to the clinical study design problems, PLAATO was not commercially successful in Europe, and ev3 estimated that it would not achieve

appreciable sales revenue in Europe for another six years. A437-A439; A862. Equally troubling, ev3's analysis of PLAATO's safety and efficacy data showed that safety concerns (complication rates) were increasing, while efficacy (stroke reduction rate) was decreasing. A436-A437; A862; A866-A870.

In April 2005, ev3's CEO, James Corbett, suggested discontinuing PLAATO. In a detailed memo to the Board, Corbett described the significant cost of pursuing PLAATO, the uncertainty over obtaining Pre-Market Approval in the United States, and the long time horizon before PLAATO could reach its market potential, if it ever did. A862-A863. In September 2005, ev3's Board and Corbett decided to shut down PLAATO and sell the technology. A865.

After more than a year and a half of attempting to sell PLAATO, there was only one company that had any interest in PLAATO—a competitor that was interested only in obtaining the rights to PLAATO's intellectual property and not in taking the many steps that remained to bring PLAATO to market. A440 at 13-21. That competitor, Atritech, ultimately purchased PLAATO's IP rights for $6 million—less than one-eighth of what ev3 paid for PLAATO. A460 at 17:2-10. None of the four Milestones had been achieved.

F. Appriva's Former Shareholders Sue ev3.

Former Appriva shareholders sued ev3 for breach of contract, breach of implied covenant of good faith, fraudulent inducement, and violations of the California Corporations Code. Ex. H at 2-3.[2]

Contrary to the plain language of Section 9.6 and after ev3 had rebuffed its repeated proposals to include specific funding commitments in the Merger Agreement, Plaintiffs argued that ev3 had promised to pursue the Milestones when it signed the LOI, which stated that "ev3 will commit to funding . . . to ensure that there is sufficient capital to achieve the performance milestones." *See, e.g.*, A481 at 173:13-22; A824. ev3 argued in response that the LOI was expressly non-binding and that the parties' actual funding commitments were embodied in the final Merger Agreement. Under that Agreement, ev3 had *not* promised to pursue the Milestones; rather, ev3 had "sole discretion" in deciding whether to pursue the Milestones, "to be exercised in good faith." A790, § 9.6. As ev3 explained, because of developments with PLAATO at the FDA and elsewhere, ev3 had made a good-faith business decision that pursuing the Milestones no longer made sense.

The Trial Court permitted, over ev3's objection, "evidence and argument related to the funding provision of the March 15, 2002 Letter of Intent." Ex. H at 3. After Plaintiffs introduced the LOI (and other pre-contractual statements) as

[2] "Ex." refers to the Orders being appealed, which have been appended to this Brief pursuant to Rule 14(b)(vii) of the Supreme Court of Delaware.

evidence that ev3 had "promised" to fund the Milestones, ev3 attempted to introduce rebuttal evidence showing that ev3 had explicitly *refused* to include a funding guaranty in the Merger Agreement, but the Trial Court excluded ev3's rebuttal evidence, leaving the jury with only one side of the story.

ev3 also proposed a jury instruction on the meaning of "good faith," which would have explained that the absence of good faith requires a finding of "bad faith" and that ev3 was permitted to consider its own financial situation when exercising good faith. *See* A203. But the Trial Court rejected that instruction in favor of a definition drawing largely from the implied covenant of good faith and the UCC, which improperly instructed the jury that "good faith" required ev3 to "observ[e] reasonable commercial standards" and act "consistent[] with [Appriva's] justified expectations." Ex. D at 11.

After a nine-day trial, the jury found that ev3 breached the Merger Agreement and that Plaintiffs were entitled to $175 million in damages, which represented the sum of all four Milestone payments. Ex. H at 3. The jury found that ev3 did not commit fraud. *Id.* The Trial Court denied ev3's motion for judgment as a matter of law and/or motion for new trial or, in the alternative, remittitur. *Id.* at 2.

ARGUMENT

I. THE TRIAL COURT IMPROPERLY PERMITTED THE JURY TO INTERPRET AN UNAMBIGUOUS CONTRACTUAL PROVISION BASED ON AN EARLIER, NON-BINDING LETTER OF INTENT.

A. Question Presented.

Whether the Trial Court erred by failing to instruct the jury as to the interpretation of an unambiguous contract provision, instead permitting the jury to use a non-binding letter of intent to interpret the provision. *See* A190; A217-A218; A332; A338.

B. Scope Of Review.

The interpretation of contracts "involves legal questions and thus the standard of review is *de novo*." *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 744 (Del. 1997). "The standard of review of denial to give a jury instruction is . . . *de novo*." *Lunnon v. State*, 710 A.2d 197, 199 (Del. 1998).

C. Merits Of Argument.

It is unquestionably "the province of *the court* to construe written contracts and *not* the province of the jury." *John Hancock Mut. Life Ins. Co. v. De Costa*, 81 F.2d 390, 391 (3d Cir. 1936) (emphases added); *see also Pellaton v. Bank of N.Y.*, 592 A.2d 473 (Del. 1991) ("The proper interpretation of language in a contract . . . is treated as a question of law both in the trial court and on appeal."). Indeed, "no principle is more clearly settled, than that the construction of a written evidence is exclusively with the court." *Levy v. Gadsby*, 7 U.S. 180, 186 (1805) (Marshall,

C.J.). A trial judge is obligated to give "the jury clear and positive instructions as to [the meaning of the contract]" and "[t]he refusal to give such instructions constitute[s] substantial error." *John Hancock*, 81 F.2d at 391 (ordering a new trial because the judge permitted the jury to interpret an insurance policy).

Here, the Trial Court twice held that Section 9.6 of the Merger Agreement—the provision that defines ev3's post-merger funding obligations—is unambiguous. Thus, it was the Trial Court's responsibility to interpret the contract and to instruct the jury as to the provision's unambiguous meaning. The Trial Court was also required to instruct the jury that it could not look to non-binding language from an earlier Letter of Intent to alter that meaning. ev3 proposed a jury instruction that would have accomplished just that. *See* A332; A338. But the Trial Court refused to give that instruction, leaving the jury free to interpret Section 9.6 on its own (as Plaintiffs urged) by taking into account the non-binding funding provision in the LOI. That error, which disrupted the well-established division of responsibility between judge and jury on contractual interpretation issues, requires a new trial.

1. Section 9.6 of the definitive Merger Agreement states: "Notwithstanding any other provision in the Agreement to the contrary, . . . [ev3's] obligation to provide funding . . . to pursue achievement of any of the Milestones, shall be at [ev3's] sole discretion, to be exercised in good faith." A790, § 9.6. Both parties agree that the provision is unambiguous. *See* Ex. B at 23:8-9. And the Trial Court

twice ruled that Section "9.6 is clear and unambiguous." Ex. B at 12:4-7; *see also* Ex. H at 3.

Despite that consensus, Plaintiffs argued at trial that language from the parties' non-binding LOI should be used to interpret the plain meaning of Section 9.6. Specifically, ev3 proposed in the LOI that it "will commit to funding . . . to ensure that there is sufficient capital to achieve the performance milestones." A824. Thus, Plaintiffs argued that ev3 was required to fund Appriva's pursuit of the Milestones. *See*, *e.g.*, A229 at 1-8 (Plaintiffs' opening statement: "In this letter of intent, look at this language. They said they *will*, not *may*, *will* commit to finding funding based on the projections prepared by its management—and this is a key phrase—to ensure, to ensure that there is sufficient capital to achieve the performance milestones detailed above. That's what they told us in the letter of intent."); A678 at 10-13 ("ev3 . . . ha[d] an expressed obligation to us to fund it, and to pursue the milestones."); A565 (Plaintiffs' graphic identifying the LOI as the contract that was breached); A689 at 7-9.

But the LOI was simply a non-binding expression of ev3's beliefs at the *start* of the merger discussions, before it had completed its due diligence. *See* A824 ("The foregoing terms are . . . non-binding."). As the negotiations proceeded and the risks of the deal became clearer, the situation changed. Indeed, during the merger negotiations, Plaintiffs asked ev3 to commit to funding pursuit of the

Milestones, but ev3 refused to undertake that risk. *See* A164 at 69:10-16; A170-A171; A176 at 30:1-33:18. By the time the parties completed their merger negotiations, a very different funding provision appeared in the binding Merger Agreement, leaving all funding decisions to ev3's "*sole discretion*, to be exercised in good faith." A790, § 9.6 (emphasis added). The Merger Agreement, of course, was the final embodiment of the parties' agreement. *See* A801, § 16.9. Thus, its unambiguous funding provision, and *not* the non-binding provision in the LOI, governs.

Because all parties and the Court recognized that Section 9.6 was unambiguous, and because Section 9.6 specifically provided that the "sole discretion" provision controlled "notwithstanding any other provision in the Agreement to the contrary," ev3 filed a motion in limine to exclude the LOI and, once the LOI was introduced over its objection, proposed a jury instruction that would have told the jury to set aside the LOI in applying Section 9.6. *See* A190; A332; A338. But the Trial Court erroneously rejected ev3's instruction.[3] Plaintiffs took full advantage of that decision, consistently and repeatedly arguing to the jury that despite the "sole discretion" provision in the Merger Agreement, ev3 had "promised" to fund Appriva's pursuit of all four Milestones. *See*, *e.g.*, A481 at

[3] ev3 continued to object throughout trial whenever Plaintiffs introduced evidence or argument designed to alter the unambiguous meaning of Section 9.6. *See*, *e.g.*, A217-A218 (ev3: "[The LOI] is nonbinding and we believe they intend to use that to show that it alters the meaning of Section 9.6 . . . ." The Court: "That's fine. I will allow it.").

173:13-18; A482 at 174:6-11; A483 at 180:4-23; A484 at 184:21-185:2; A486 at 193:19-22.

In the end, the Trial Court provided the jury with *no instruction at all* as to the meaning and effect of Section 9.6, other than an abstract and legally erroneous definition of "good faith." *See infra* Part II. In fact, the Trial Court's jury instructions did not include a single reference to "Section 9.6," nor mention the words central to the ev3's unambiguous funding obligation: "sole discretion." *See* A474-A477.

In the absence of any such instruction, Plaintiffs were more than happy to fill the void, telling the jurors—incorrectly—that it was *their duty* to interpret the unambiguous Section 9.6. For example, Plaintiffs' counsel told the jury:

> *You're going to have to interpret the contract however you read it. . . .* Can ev3 really make all of these promises about good faith and ensuring adequate funds and using good faith to fund and pursue the milestones on one hand, and then take all of that away with the phrase 'sole discretion' on the other hand. *You have to decide that*."

A250 at 7-21 (emphases added).

The Trial Court's abdication of its responsibility to interpret Section 9.6 and instruct the jury accordingly, and its decision to allow Plaintiffs' counsel to urge the jury to interpret the provision for itself, was plain error requiring a new trial. *See Sirmans v. Penn*, 588 A.2d 1103, 1104 (Del. 1991) ("We will reverse if the

trial court's failure to give appropriate instructions to the jury undermined the jury's ability to intelligently perform its duty.").

2. Had the Trial Court fulfilled its responsibility to interpret the contract and instruct the jury accordingly, it could have reached only one conclusion: that ev3 had *not* promised to fund pursuit of the Milestones, but rather was imbued with the "sole discretion" to decide whether to fund them, so long as it exercised that discretion in good faith. That is what Section 9.6 said in plain, unambiguous terms. The Trial Court's improper approach stemmed from three legal errors:

First, the Trial Court erred by ruling that the LOI "was expressly incorporated into the Merger Agreement via Section 16.9." Ex. H at 8. Incorporation requires evidence of an "explicit manifestation of intent" to incorporate, and there was no such evidence here. *See Wolfson v. Supermarkets Gen. Holdings Corp.*, 2001 WL 85679, at *5 (Del. Ch. Jan. 23, 2001). The Merger Agreement merely stated that the LOI was not "supersede[d]" or "replace[d]," A801, § 16.9, which is plainly insufficient to evidence an intent to incorporate. *See Pauley Petroleum, Inc. v. Cont'l Oil Co.*, 43 Del. Ch. 366, 377–78 (1967) (simply not superseding an earlier agreement is insufficient to incorporate its terms); *see also Layne Christensen Co. v. Bro-Tech Corp.*, 836 F. Supp. 2d 1203, 1236 (D. Kan. 2011). In fact, Section 16.9 of the Merger Agreement expressly incorporates certain exhibits and schedules—but *not* the LOI. Thus, it is plain that

the parties knew how to incorporate documents by reference and that they deliberately chose *not* to incorporate the LOI. *See TEG-Paradigm Envtl., Inc. v. United States*, 465 F.3d 1329, 1341 (Fed. Cir. 2006). And, because the LOI was not incorporated into the Merger Agreement, it was nothing more than parol evidence of the parties' pre-contractual intent that the Court should have excluded.

Second, even if the funding provision of the LOI had been incorporated into the Merger Agreement, the Trial Court failed to recognize and instruct the jury that the provisions on which Plaintiffs relied were *non-binding* on their face. *See* A824 ("The foregoing terms are . . . non-binding."). Incorporation does not convert a nonbinding provision into a binding provision. *See PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 Del. Ch. LEXIS 136, *49–56 (Del. Ch. Sept. 22, 2011) (nonbinding term sheet did not become binding when it was attached to the Merger Agreement), *rev'd on other grounds*, 67 A.3d 330 (Del. 2013). Thus, even if the LOI were part of the contract, the funding provision in the LOI did not commit ev3 to anything.

Third, even if the LOI had been incorporated into the Merger Agreement *and* even if it had been binding, the Merger Agreement states that Section 9.6 controls "notwithstanding any provision in this Agreement to the contrary." Thus, Section 9.6 would have trumped the funding provision in the LOI. Inexplicably, the Trial Court held that the LOI's mandatory funding provision was not a

"provision to the contrary," and thus that it could coexist with, rather than being superseded by, Section 9.6. *See* Ex. H at 9. That was an unreasonable interpretation of the contract, as a side-by-side reading of the two provisions makes clear. *Compare* A824 (LOI: "ev3 will commit to funding") *with* A790, § 9.6 (Merger Agreement: "[ev3's] obligation to provide funding . . . shall be at [ev3's] sole discretion, to be exercised in good faith"). Indeed, the fact that the LOI's funding provision and Section 9.6 of the Merger Agreement represent conflicting obligations is further evidence that the LOI was not incorporated into the Agreement. *See Falcon Steel Co. v. Weber Eng'g Co.*, 517 A.2d 281, 285–86 (Del. Ch. 1986).

At bottom, the Trial Court should have instructed the jury not to consider the LOI's funding provision when interpreting Section 9.6—even if the LOI had been incorporated into the Merger Agreement (which it was not) and even if it had been binding (which it was not). The Trial Court's failure to do so sets dangerous precedent that could introduce unwarranted costs and uncertainty into merger negotiations across the country. *See Rennick v. O.P.T.I.O.N. Care*, 77 F.3d 309, 315 (9th Cir. 1996) ("Letting a nonbinding letter of intent go to a jury as a possible basis for . . . damages makes it too risky to sign one. . . ."). And it requires a new trial. *See Sirmans*, 588 A.2d at 1104.

II. THE TRIAL COURT FAILED TO INSTRUCT THE JURY PROPERLY ON THE MEANING OF GOOD FAITH.

A. Question Presented.

When the parties to a contract agreed that one party could act (or refuse to act) at its "sole discretion, to be exercised in good faith," whether the Trial Court improperly instructed the jury on the meaning of good faith when it (1) failed to explain that the absence of good faith requires a finding of bad faith, as this Court recently held in *DV Realty Advisors LLC v. Policemen's Annuity and Benefit Fund of Chi., Ill.*, 2013 Del. LEXIS 430, at *24 (Del. Aug. 26, 2013); (2) refused to instruct the jury that a party may consider its own financial interests when exercising good faith; and (3) used a jury instruction that was derived from the implied covenant of good faith and fair dealing and from a UCC provision that the parties did not adopt. *See* A203; A340; A446-A453.

B. Scope Of Review.

The "refusal to give a 'particular' [jury] instruction" is reviewed for an abuse of discretion. *Wright v. State*, 953 A.2d 144, 148 (Del. 2008).

C. Merits Of Argument.

Section 9.6 of the Merger Agreement states that "[ev3's] obligation to provide funding for [Appriva] . . . shall be at [ev3's] sole discretion, to be exercised in good faith." A790, § 9.6). The Trial Court's jury instruction on the meaning of "good faith" was both incorrect and incomplete, and requires reversal.

1. Because this case involves contractual good faith, the Trial Court was required to instruct the jury that the absence of good faith requires a finding of bad faith. This Court recently explained the importance of "defin[ing] the characteristic of good faith by its opposite characteristic—bad faith." *DV Realty*, 2013 Del LEXIS 430, at *23–24. "[W]e often gain knowledge of . . . a characteristic by the opposite characteristic," and "[g]ood faith and bad faith are illustrative examples . . . in that each is used in more than one sense and thereby informs our understanding of each other." *Id.* Thus, in a similar case involving contractual good faith, this Court held that the proper definition of the absence of good faith is "action 'so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.'" *Id.* at *24 (quoting *Brinckerhoff v. Enbridge Energy Co., Inc.*, 67 A.3d 369, 373 (Del. 2013)).

Here, ev3 proposed the following instruction: "To prove that ev3 breached Section 9.6, the Appriva Shareholders must prove by a preponderance of the evidence that ev3 ***acted in bad faith***." *See* A203 (emphasis added). Further, ev3's proposed instruction explained that bad faith requires a finding "that ev3 consciously acted wrongly because of a dishonest purpose or moral obliquity, or that ev3 took unreasonable action with no reasonable purpose other than to deprive the Appriva Shareholders from receiving something that they would otherwise be entitled to receive." *Id.* Plaintiffs fought vigorously to prevent the incorporation

of any "bad faith component into a jury instruction." *See, e.g.*, A450-A452 at 152:17-154:4. But ev3's proposed instruction is substantially similar to the definition this Court provided in *DV Realty*; thus, the Trial Court erred by refusing to instruct the jury accordingly. *See Sirmans*, 588 A.2d at 1104.

2. The Trial Court failed to instruct the jury that ev3 could consider its own financial situation when exercising good faith. Under Delaware law, a jury instruction that merely restates an abstract legal standard is insufficient and improper. *Beck v. Haley*, 239 A.2d 699, 702 (Del. 1968). "Good faith" is a paradigmatic example of an abstract concept that must be "submitted to the jury with particular care and particularity" and "with such application of the law to the evidence as will enable the jury intelligently to perform its duty." *See id.*

Here, the Trial Court refused to instruct the jury that ev3 had a right to take into account the impact of the Milestone payments on its own financial situation when exercising good faith. *See* A203; A340. The Trial Court's guidance on this issue was crucial because this was a central theme of Plaintiffs' case: Plaintiffs repeatedly argued to the jury that ev3 improperly considered its own financial interests when exercising its discretion. *See* A483 at 180:17-21 (closing argument: "[T]hey're saying we are going to postpone the clinical trial to save $50 million. . . . [I]s that a good faith effort to pursue the milestone[?]"); A238 at 4-6; A239 at 21-22. Yet the Trial Court's instruction left the jury with no way of

knowing whether ev3 had a right to take its own financial considerations into account—an inexcusable error where, as here, there was recent case law directly on point involving strikingly similar facts. *See LaPoint v. AmeriSourceBergen Corp.*, 2007 WL 2565709, at *10–11 (Del. Ch. Sept. 4, 2007) ("ABC's concern with this cost was wholly in keeping with its duty to act in good faith towards Bridge shareholders.").[4]

ev3's proposed jury instruction accurately adapted *LaPoint*'s holding to the facts of the case, but the Trial Court refused that instruction. A450 at 7-8. Because the Trial Court failed to "apply the law specifically to the facts of the case" when instructing the jury on the abstract legal concept of good faith, reversal is warranted. *See Beck*, 239 A.2d at 702; *see also Culver v. Bennett*, 588 A.2d 1094, 1098 (Del. 1991).

3. The Trial Court improperly gave a jury instruction derived from the implied covenant of good faith and the UCC.

a. Implied Covenant: When parties negotiate for a specific contractual standard that includes a "good faith" component, Delaware law prohibits a court from applying the "good faith" standard described in the implied covenant of good faith because the two may be "very different." *See Gerber v. Enter. Prods.*

[4] ev3's financial decision to stop pouring money into PLAATO ultimately proved to be a sound one; when ev3 attempted to sell PLAATO to an outside investor, no buyer was willing to pay more than $6 million—less than one-eighth what ev3 had invested—and no buyer was willing to take on the risk of bringing PLAATO to market. A460 at 17:2-10.

Holdings, LLC, 67 A.3d 400, 418–19 (Del. 2013), *overruled on other grounds as stated in Winshall v. Viacom Intern., Inc.*, 2013 WL 5526290, at *13 n.13 (Del. Oct. 7, 2013); *DV Realty*, 2013 Del. LEXIS 430, at *21. Indeed, the Trial Court in this case correctly determined that "the implied covenant of good faith does not apply because the covenant is superseded by [Section 9.6 of the Merger Agreement]." Ex. A at 10.

Nevertheless, the Trial Court erroneously incorporated the implied covenant's definition of good faith into its jury instructions, telling the jury that "[g]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party"—language taken *verbatim* from the same implied covenant that the Trial Court found not to be part of the parties' Merger Agreement. *See* Restatement (Second) of Contracts § 205; *see also Cont'l Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1234 (Del. Ch. 2000) ("The implied covenant of good faith . . . emphasizes 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'").

The Trial Court's improper use of the implied covenant of good faith and fair dealing fundamentally altered ev3's obligations under the Merger Agreement and imposed a limitation to which ev3 never agreed. Imposing on ev3 an

obligation to consider Plaintiffs' "justified expectations" essentially eliminated the "sole discretion" standard for which it bargained.

Under the standards embodied in the implied covenant and erroneously incorporated into the jury instructions, for example, the inquiry focuses on what the parties "would have agreed to themselves had they considered the issue in their original bargaining positions." *Gerber*, 67 A.3d at 418 (quoting *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434 (Del. Ch. 2012)). Contractual good faith, on the other hand, "looks to the parties as situated *at the time of the wrong*." *Id.* at 419 (emphasis added). Thus, ev3 had no obligation to consider Plaintiffs' original "expectations"—its only obligation was to act in good faith based on the information it possessed *at the time it exercised its sole discretion*. As this Court has noted, "[t]hat temporal criterion is important," *DV Realty*, 2013 Del. LEXIS 430, at *21, and a trial court errs when it "ignores the temporal distinction between [contractual good faith and the implied covenant]," *Gerber*, 67 A.3d at 419.

b. UCC: The Trial Court's jury instruction also included language from the UCC's definition of good faith—specifically, an obligation to observe "reasonable commercial standards of fair dealing." *See* 6 Del.C. § 1-201. The Trial Court explained that it was adopting the instruction "consistent with the Chancery Court's rationale in *Policemen's Annuity & Benefit Fund of Chicago v. DV Realty*

Advisors LLC, 2012 WL 3548206 (Del. Ch. Aug. 16 2012)." Ex. H at 12. But this Court has since ruled that the Chancery Court's understanding of good faith in *Policemen's Annuity* was flawed and that the Chancery Court erred by incorporating a definition of good faith derived from the UCC when it should have applied the standard actually adopted by the parties' contract. *DV Realty*, 2013 Del. LEXIS 430, at *20–27.

As in *Policeman's Annuity*, the parties here negotiated for a standard of good faith different from the UCC definition. If they "wanted to use the UCC definition of good faith, they could have so provided in the [contract] or incorporated it as a defined term by reference. Because neither alternative was chosen by the parties . . . the [Trial Court] inappropriately applied the UCC definition of good faith to the [Merger Agreement]." *DV Realty*, 2013 Del. LEXIS 430, at *21–22.

Indeed, the Trial Court's reference to "reasonable commercial standards" fundamentally altered the good-faith standard that the parties had negotiated; it imposed both a subjective *and objective* analysis of ev3's good faith, whereas the parties had bargained *only* for a subjective standard ("sole discretion"). *See id.* at *14, 26 (where an agreement requires one party to "[determine] in good faith . . . that [an action] is necessary," the "proper good faith standard . . . is purely subjective"). The parties did not use the term "reasonable" to qualify ev3's good-

faith obligation, as they would have done if they had intended to adopt an objective standard. *See Norton v. K-Sea Transp. P'rs*, 67 A.3d 354 (Del. 2013).

Again, Plaintiffs' counsel took full advantage of the Trial Court's erroneous instruction by arguing that ev3's conduct was objectively unreasonable. *See*, *e.g.*, A239 at 4-7 ("You're going to have to decide at the end of this case whether . . . that's how honest partners should treat one another."). Because the Trial Court's erroneous instruction compelled the jury to assess ev3's conduct under a heightened, objective standard of good faith to which ev3 had never agreed, this Court should remand for a new trial under the proper standard.

c. Waiver: In denying ev3's post-trial motion, the Trial Court held that ev3 had waived its objection to the Trial Court's inclusion of language from the implied covenant and the UCC.[5] That is clearly wrong and contrary to the record. In fact, ev3 proposed its own jury instruction on "good faith," accompanied by a motion and brief in support of that proposed instruction, but the Trial Court refused ev3's instruction. *See* A203; A340.

Indeed, the Trial Court directed the parties *not* to offer any additional objections to the Trial Court's "good faith" instruction after each party expressed its dissatisfaction with the instruction proposed by the Trial Court. *See* A453 at

[5] The Trial Court correctly held that ev3 did *not* waive its objection to the Court's refusal to *add* language to the good faith instruction, specifically language requiring a finding of bad faith (*see supra* Part II.C.1) and language explaining that ev3 could consider its own financial situation when exercising good faith (*see supra* Part II.C.2). Ex. H at 11.

19-21 (responding to attempt by Plaintiffs' counsel to state formal objection following exchange between both parties and the Court on the instruction, stating: "Your conversation has been the objection, and you've already given it. So once I make a ruling, you don't get to add on."). It was manifestly unjust for the Trial Court to later find that ev3 waived its objection, even though it was simply "follow[ing] the court's instruction." *See GMC v. Grenier*, 981 A.2d 531, 541 n.27 (Del. 2009).

Nor did ev3 "accept" the Trial Court's "good faith" instruction, as the Court held. After the Trial Court rejected ev3's proposed jury instruction, counsel for ev3 said that ev3 could accept the Court's instruction *only* if the Trial Court included certain additional language. *See* A449 at 1-5 ("Your Honor, we would take the definition as it stands, and then in the proposed instruction that we offered add the language."). But the Trial Court refused to add ev3's proposed language; thus, ev3 *never* agreed to the Trial Court's jury instruction as given.

Finding waiver here also would not serve the purpose of the waiver doctrine, which is to provide the Trial Court with adequate opportunity to address legal disputes. *See Grenier*, 981 A.2d at 541 n.27. Here, the Trial Court was presented with competing "good faith" instructions, the parties debated those proposals at the charging conference, and the Trial Court ultimately rejected ev3's proposed instruction, adopting instead an instruction that imported language from the

implied covenant and the UCC. Thus, the arguments that ev3 is presenting on appeal were squarely presented to—and squarely rejected by—the Trial Court.

In any event, even if ev3 failed to object to the Trial Court's "good faith" instruction, this Court should still order a new trial because the instruction constituted plain error. *See Culver*, 588 A.2d at 1096. Under the plain error standard, "a party [has] the unqualified right to have the jury instructed with a correct statement of the substance of the law." *Id.* at 1096, 1099. This Court has already determined that borrowing extraneous definitions of good faith is legally erroneous when the parties have expressly bargained for a particular standard of good faith. *See DV Realty*, 2013 Del LEXIS 430, at *21–27. Thus, the Trial Court committed plain legal error when it provided an instruction that incorporated inapplicable standards from the implied covenant and the UCC.

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

A. Question Presented.

Whether the Trial Court erred by admitting Plaintiffs' evidence of pre-contractual intent and expectations, while at the same time excluding ev3's direct rebuttal evidence. *See* A183; A190; A351-A353; Ex. B at 14:11-18:4.

B. Scope Of Review.

"[T]he decision whether to admit or exclude evidence . . . can be reversed only for abuse of that discretion." *Capano v. State*, 781 A.2d 556, 586 (Del. 2001). But if the judge admitted or excluded evidence based on a misunderstanding of the law, that constitutes an abuse of discretion. *See Miller v. State Farm Mut. Auto. Ins. Co.*, 993 A.2d 1049, 1053 (Del. 2010).

C. Merits Of Argument.

Over ev3's objections, Plaintiffs introduced pre-contractual statements to argue that ev3 promised to fund the Milestones. That evidence was inadmissible parol evidence, but the Trial Court permitted Plaintiffs to introduce it to support their baseless fraud claim—a claim that was obviously invalid as a matter of law because, among other reasons, the Merger Agreement included an integration clause that precluded Plaintiffs from relying on any pre-contractual statements. The Trial Court then inexplicably compounded its error by precluding ev3 from presenting its own rebuttal evidence of the parties' pre-contractual exchange.

1. The Trial Court improperly allowed Plaintiffs to introduce pre-contractual statements to argue that ev3 had promised to fund and pursue the Milestones. For example, Plaintiffs' witnesses testified about ev3's May 15, 2002 presentation, which they viewed as a commitment to fund the Milestones irrespective of the language in the Merger Agreement. *See* A350 at 3-23; A371-A372. Plaintiffs emphasized that point again at closing: "So, the purpose of the May 15, 2002 presentation was to convince us to take the deal with less money down. Did we rely on it? You bet we did." A488 at 198:8-11.

Plaintiffs made similar use of statements from the pre-contractual LOI. For example, Plaintiff Erik van der Burg testified: "'[E]nsure' is a pretty strong word in my book. So when they said they were going to ensure they would provide sufficient [capital], I felt they were actually going to follow through with the plan to achieve these milestones." A268-A269; *see also* A270 at 12-15; A271-A273; A481 at 173:3-20. That testimony was classic parol evidence that never should have been admitted. *See Pellaton*, 592 A.2d at 478. ev3 objected to all of Plaintiffs' evidence of pre-contractual intent and expectations. *See* A183; A190; A351-A356.

Although the Trial Court *agreed* that the pre-contractual statements were parol evidence, it admitted the evidence in support of Plaintiffs' fraud claim. *See* Ex. H at 10. But Plaintiffs' fraud claim—which was premised on ev3's alleged

"promise to fund," even though the Merger Agreement itself stated unambiguously that the decision whether to fund was in ev3's "sole discretion"—was *obviously invalid* as a matter of law because it was based on statements directly contrary to the Merger Agreement's plain language. Fraud claims are not justiciable when they allege reliance on an understanding of the contract that contradicts the plain language of the contract itself. *J.A. Moore Constr. Co. v. Sussex Assocs. Ltd.*, 688 F. Supp. 982, 990 (D. Del. 1988). Moreover, the parties agreed to an integration clause stating that the written Agreement was the sole reflection of the parties' agreement and barring reliance on extraneous representations. A801, § 16.9; *see Great Lakes Chem. v. Pharmacia Corp.*, 788 A.2d 544, 555–56 (Del. Ch. 2001).

Thus, the Trial Court should have granted Plaintiffs' summary judgment motion and excluded Plaintiffs' fraud claim—and the parol evidence that supported it—from the trial. The admission of this evidence had an improper and prejudicial effect on the trial of the breach of contract claim.

2. If the Trial Court did not err by admitting Plaintiffs' parol evidence, then it erred by excluding ev3's comparable rebuttal evidence. The Trial Court's summary judgment and parol evidence rulings permitted Plaintiffs to argue that ev3 had promised—before signing the Merger Agreement—to fund and pursue the Milestones. But the complete negotiating history of the Merger Agreement showed the contrary: that Plaintiffs had repeatedly asked for a funding guarantee

and that ev3 refused each time. For example, ev3 offered documents and testimony that Plaintiffs sought but failed to secure guarantees from ev3 to fund the Milestones. Ex. C at 34:17-36:9; A373-A383. In fact, such guarantees were "cut, rejected and left on the editing room floor" during drafting of the Merger Agreement. Ex. B at 14:11-16:3.

But every time ev3 attempted to introduce this evidence, the Trial Court precluded it as inadmissible parol evidence. *See, e.g.*, A373-A383. In the Trial Court's view, ev3's rebuttal evidence was inadmissible because it related to the parties' contract negotiations, and thus was not "clearly outside the contract." *See* Ex. C at 30:1-36:9; A375; A381-A384. There was no legal basis for drawing a distinction between Plaintiffs' evidence (which the Trial Court admitted) and ev3's evidence (which it rejected).[6]

The Trial Court's rulings left the jury with a one-sided view of the parties' pre-contractual intentions and expectations. And, even though all of this parol evidence was supposed to inform *only* Plaintiffs' fraud claim, the Trial Court did nothing to prevent prejudicial spillover of this one-sided evidence into the jury's interpretation of the contract. The jury could not reasonably be expected to ignore

[6] By requiring ev3's evidence to be "outside the contract," the Trial Court conflated two distinct legal doctrines. Fraud claims based on representations made "inside a contact" are not justiciable. *See Mitsubishi Power Sys. Ams., Inc. v. Babcock & Brown Infrastructure Grp. US, LLC*, 2010 Del. Ch. LEXIS 11, at *28–32 (Del. Ch. Jan. 22, 2010). But if the court permits a fraud claim to go forward (as the Trial Court did here), then evidence of "negotiations . . . will be admissible" to prove or disprove the elements of fraud. *See Falco v. Alpha Affiliates, Inc.*, 2000 U.S. Dist. LEXIS 7480, at *2 (D. Del. Feb. 9, 2000).

the one-sided parol evidence it was given when deliberating over the breach of contract claim, especially where Plaintiffs argued that the evidence informed the parties' contractual expectations. *See, e.g.*, *United States v. Pelullo*, 14 F.3d 881, 898 (3d Cir. 1994) ("prejudicial spillover" warranted new trial).

CONCLUSION

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

Dated: November 12, 2013

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Copies of Orders Being Appealed Pursuant to Rule 14(b)(vii)

1. The April 15, 2013 Order denying ev3's Motion for Summary Judgment, a copy of which is attached hereto as **Exhibit A**;

2. The Court's rulings, or failure to rule, on ev3's pre-trial motions, as reflected in the transcripts from pre-trial conferences dated March 22, 2013 and April 17, 2013, including: ev3's Motion to Exclude in Part the Expert Opinion of Dr. Zvi Ladin; ev3's First Motion in Limine to Exclude Evidence Related to the Achievement of the Acceptable Clinical Outcomes Component of Milestone 1; ev3's Second Motion in Limine to Preclude Admission of Preliminary Form S-1 Statement; ev3's Third Motion in Limine to Exclude Internal Warburg Documents; ev3's Fourth Motion in Limine to Exclude Evidence of Pre-Merger Communications That Contradict the Plain Language of the Merger Agreement; ev3's Fifth Motion in Limine to Exclude Evidence of the Non-Binding "Funding to Projections" Portion of the May 22, 2002 Letter of Intent; ev3's Seventh Motion in Limine to Exclude any Reference to or Evidence of the Financial Conditions of Warburg Pincus and the Vertical Group; and ev3's Eighth Motion in Limine to Exclude any Reference to or Evidence of the Covidien Merger or the Financial Condition of Covidien. Copies of the Court's rulings as reflected in the transcripts from pre-trial conferences dated March 22, 2013 and April 17, 2013 are attached hereto as **Exhibits B and C**, respectively;

3. The Court's ruling on jury instructions and special verdict form, copies of which jury instructions and special verdict form are attached hereto as **Exhibits D and E**, respectively;

4. The Court's April 30, 2013 ruling on ev3's Motion for Judgment as a Matter of Law, a copy of which is attached hereto as **Exhibit F**;

5. The May 2, 2013 jury verdict and final judgment, inclusive of, but not limited to, evidentiary and trial process rulings preceding the jury verdict and final judgment, a copy of which is attached hereto as **Exhibit G**; and

6. The August 29, 2013 Order denying Defendant's Renewed Motion for Judgment as a Matter of Law and Defendant's Motion for New Trial or Remittitur, a copy of which is attached hereto as **Exhibit H**.

EXHIBIT “A”

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MICHAEL LESH, M.D. and ERIK VAN DER BURG, acting jointly as the Shareholder Representatives for former shareholders of Appriva Medical, Inc.,	)	C.A. No. 05C-05-218 CLS
Plaintiffs,	)	
v.	)	
EV3 INC.,	)	
Defendant.	)	

Date Submitted: February 1, 2013
Date Decided: April 15, 2013

On Defendant ev3's Motion for Summary Judgment. **DENIED.**

ORDER

Jon E. Abramczyk, Esq. , Matthew R. Clark, Esq., Morris of Nichols, Arsht & Tunnell, LLP, Wilmington, Delaware and Jay Lefkowitz, Esq., Eric F. Leon, Esq., John Del Monaco, Esq., of Kirkland & Ellis, LLP, New York, New York and Robert A. Goodin, Esq., Francine T. Radford, of Goodin, MacBride, Squeri, Day & Lamprey, LLP, San Francisco, California. Attorneys for Plaintiffs.

Matt Neiderman, Esq., Benjamin A. Smyth, Esq. of Duane Morris, LLP, Wilmington, Delaware and Jeffrey J. Bouslog, Esq., Bret A. Puls, Esq., Dennis E. Hansen, Esq., Cynthia S. Wingert, Esq. of Oppenheimer, Wolff & Donnelly, LLP, Minneapolis, Minnesota and Matthew A. Taylor, Esq., James L. Beausoleil, Jr., Esq., Seth A. Goldberg, Esq. of Duane Morris, LLP, Philadelphia, Pennsylvania. Attorneys for Defendant ev3, Inc.

Scott, J.

Introduction

Before the Court is Defendant ev3's Motion for Summary Judgment. The Court has reviewed the parties' submissions and determined that ev3's motion is **DENIED** for the following reasons.

Background

The plaintiffs in this case are two former shareholders of Appriva Medical, Inc. ("Appriva"), Dr. Michael Lesh ("Lesh") and Erik van der Burg ("van der Burg") who represent the former shareholders of Appriva. Founded by Lesh and van der Burg in 1998, Appriva developed an implantable cardiac device known as the Percutaneous Left Atrial Appendage Transcatheter Occlusion ("PLAATO).[1] Defendant ev3 is a privately-held medical device company, which was founded in 2000 and owned and primarily financed by two private equity companies, Warburg Pincus and The Vertical Group. Paul Buckman ("Buckman") was the CEO of ev3 and Bruce Krattenmaker ("Krattenmaker") was ev3's Vice President of Regulatory Affairs.

Prior to being commercially marketed and sold in the United States and in Europe, PLAATO had to satisfy certain regulatory requirements. In the United States, PLAATO was required to receive approval from the Food and Drug

[1] PLAATO was designed to reduce the risk of strokes in patients suffering from atrial fibrillation by closing off the heart's left atrial appendage, which prevents blood clots from forming in the appendage and causing strokes. Pl. Opp., at p. 4.

Administration ("FDA") to conduct a "feasibility" clinical trial in the United States. Then, PLAATO was required to demonstrate by an FDA-approved clinical trial ("Pivotal Study") that PLAATO was safe and effective. There were different types of Pivotal Study designs that could be submitted to the FDA: a "non-randomized" Objective Performance Criterion control ("OPC") and a more costly and lengthy "randomized" Pivotal Study. If data obtained from the Pivotal Study showed that PLAATO met safety and efficacy requirements ("endpoints"), then an application could be submitted to the FDA for Pre-Market Approval. Once Pre-Market Approval was granted, PLAATO could be commercially marketed and sold in the United States.

In January 2002, ev3 approached Appriva to express an interest in purchasing Appriva and its PLAATO technology. On March 13, 2002, ev3 made an unsolicited offer to acquire Appriva for up to $190 million in a Letter of Intent.[2] Thereafter, on May 15, 2002, ev3 submitted to Appriva a revised Letter of Intent ("May 15, 2002 Letter of Intent") which reduced the upfront payment. The Letter of Intent also stated that "ev3 will commit funding based on the projections prepared by its management to ensure that there is sufficient capital to achieve the performance milestones detailed above."[3] In the Letter of Intent, these terms were considered part of "solely a non-binding indication of the proposal [ev3] currently

[2] Pl. Opp., Ex. 8.
[3] Pl. Opp., Ex. 18, Merger Agreement.

intend[ed] to make" and "[a]ny transaction between APPRIVA and ev3 will be subject to execution of the necessary definitive agreements between APPRIVA and ev3, containing customary representations, covenants, conditions, indemnification provisions and other terms to be agreed upon."[4]

Also on May 15, 2002, a meeting was held in which Krattenmaker discussed randomized trial options for PLAATO. After negotiations and due diligence, the parties entered into a merger agreement on July 15, 2002 ("Merger Agreement") and the merger closed on August 10, 2002. Pursuant to the Merger Agreement, the Appriva shareholders would receive an "Initial Merger Consideration" of $50 million. In addition, shareholders were entitled to contingent merger consideration based on four "Milestones."

If Milestone #1 was achieved by January 1, 2005, Appriva shareholders would be entitled to a payment of $50 million.[5] Milestone #1 was described as "the receipt of the surviving corporation of IDE Clinical Approval and Achievement of Acceptable Clinical Outcomes at either the 75 or 100 total Patient Year Analysis Point. The cumulative cohort of trial patients must be comprised of a minimum of 80 total patients enrolled with at least 40 patients from the United

[4] *Id*.
[5] Merger Agreement, Section 4.3(a)(i).

States".[6] "IDE Clinical Approval" was defined as "authorization under FDA regulations from the FDA to commence enrollment in a Phase III clinical study designed to support Pre-market Approval".[7]

Milestone #2 was defined as "International Registry Completion." "International Registry Completion" meant "the inclusion of at least 300 patients into the International Registry,[8] provided that at least 250 of such patients shall have come from Switzerland or countries belonging to the European Union or European Economic Area".[9] Appriva shareholders would be entitled to receive $25 million so long as Milestone #2 was achieved by January 1, 2008.[10]

Appriva shareholders would be entitled to receive $50 million so long as Milestone #3 was achieved by January 1, 2008.[11] Milestone #3 consisted of the "submission to the FDA of an application seeking Pre-Market Approval which such application the surviving Corporation believes includes adequate data that

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[6] *Id.*, Art. I.
[7] *Id*.
[8] The "International Registry" is a "collection of entry, acute and follow-up data on patients who have undergone the PLAATO procedure in countries other than the United States and Canada. A patient shall be deemed entered into the International Registry on the day he or she undergoes the PLAATO procedure, irrespective of whether PLAATO device is successfully implanted in such patient. Patient data collection in this registry will be conducted in accordance with a protocol approved by all required county specific regulatory agencies and hospital ethics boards". *Id.*
[9] *Id.*
[10] *Id*. at Section 4.3(a)(ii).
[11] *Id*. at Section 4.3(a)(iii).

supports the achievement of the Phase III trial primary endpoint(s);"[12] If Milestone #4, which was the Pre-Market Approval by the FDA, was achieved by January 1, 2009, Appriva shareholders would receive $25 million.[13]

Section 9.6 of the Merger Agreement provided that ev3's "obligation to provide funding for the Surviving Corporation, including without limitation funding to pursue achievement of any of the Milestones, shall be at [ev3's] sole discretion, to be exercised in good faith." The Merger Agreement also contained an integration clause ("Integration Clause") which stated that all prior and contemporaneous agreements were superseded "other than the Letter of Intent, dated March 15, 2002, as amended."[14]

After the closing of the merger, ev3 developed a new trial design instead of the OPC trial or a randomized trial. In February 2003, ev3 submitted a pre-IDE submission which would have provided ev3 informal feedback from the FDA instead of submitting a formal IDE Application. In the Fall of 2002, Warburg and Vertical Group began seeking ways to gain additional investors; however, by March 2003, they could not secure the total amount from new outside investors as they had hoped. Thereafter, Warburg developed a new operating plan in which it considered "postponing the start of Appriva's U.S. clinical trial (***a savings of $50***

[12] *Id*. at Art. I.
[13] *Id*. at Section 4.3(a)(iv).
[14] *Id*. at Section 16.9.

million in contingent milestone payments) while realizing revenues related to PLAATO's European commercialization and HDE approval in the U.S."[15] In an April 2003 e-mail, Buckman wrote to the Board and stated that funding wasn't the issue for the PLAATO trials "because [ev3 had] 2003 for both trials budgeted. The issue is the IDE milestone payment of $50 [million] which obviously gates the U.S. trial."[16]

In May 2003, the FDA responded to the pre-IDE submission and indicated that it would require a randomized trial. Thereafter, ev3 unsuccessfully attempted to renegotiate the milestone payments with the Appriva shareholders. ev3 then decided to pursue a different type of regulatory approval known as a Humanitarian Device Exception ("HDE").

While pursuing the pivotal trial design and as of December 2002, ev3 was planning to conduct a 300-patient clinical trial in Europe, but its plan was to split the 300 patients into two 150-patient phases. ev3 then decided to pursue a "controlled commercialization vs. a more complex and large registry" which would have resulted in " a complete European trial, as planned, but with fewer patients and maybe taking longer".[17] In an e-mail, Buckman stated "Looks like we may be

[15] Pl. Opp., Ex. 24.
[16] *Id*., Ex. 29.
[17] *Id*., Ex. 52.

in a position to not have any milestone exposure based upon current data, IDE schedule, and EU registry plan."[18]

In late 2004 and early 2005, ev3 began preparations for an initial public offering and made representations about its pursuit of PLAATO in connection with the IPO. In early March 2005, ev3 submitted a pivotal trial application to the FDA for a randomized trial. In September 2005, ev3 ceased development and commercialization of PLAATO based on several considerations.

Standard of Review

Summary judgment is to be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[19] When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party.[20] Where there is a material fact in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law, summary judgment is inappropriate.[21] If a motion for

[18] Pl. Opp., Ex. 53.
[19] Superior Court Rule 56; *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[20] *Bailey v. City of Wilmington*, 766 A.2d 477, 479 (Del. 2001).
[21] *Tew v. Sun Oil Co.*, 407 A.2d 240,242 (Del. Super. 1979).

summary judgment is properly supported, the burden shifts to the non-moving party to show that there are material issues of fact.[22]

Discussion

I. Milestones #1, #3, and #4

Defendant ev3 moves for summary judgment on Counts I through VI of Plaintiffs' eight-count complaint. In Count I, Plaintiffs alleged that ev3 breached its obligations under the Merger Agreement by failing to make good faith efforts to pursue the achievement of Milestone #1 and by repudiating their obligation to pursue the achievement of Milestones #3 and #4 and to make the corresponding payments.

ev3 asserts that Plaintiffs fail to show specific evidence of bad faith and that ev3's actions were based not only on the Merger Agreement's standard giving ev3 "sole discretion, to be exercised in good faith", but on reasonable business decisions. ev3 also argues that the implied covenant of good faith and fair dealing cannot apply where the parties have expressly provided for the standard governing the conduct of the parties.

The purpose of the implied covenant of good faith and fair dealing is to "enforce the parties' contractual bargain by implying only those terms that the parties would have agreed to during their original negotiations if they had thought

[22] *State v. Regency Group, Inc.*, 598 A.2d 1123, 1129 (Del. Super. 1991).

to address them."[23] The express agreement must clearly show that the parties "would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter."[24] The implied covenant also applies to a party's discretionary rights. However, if the agreement expressly provides a standard for evaluating a decision, then that "[e]xpress contractual provision[] always supersede[s] the implied covenant…"[25]

Section 9.6 expressly provided that ev3's "obligation to provide funding for the Surviving Corporation, including without limitation funding to pursue achievement of any of the Milestones, shall be [ev3's] sole discretion, to be exercised in good faith." Based on this language, the Court finds that the standard governing ev3's conduct in funding and pursuing the milestones is this "sole discretion, to be exercised in good faith" standard expressly set forth; therefore, the implied covenant of good faith does not apply because the covenant is superseded by this express standard.

Issues of fact exist as to whether ev3 exercised its discretion in good faith with regard to the achievement and funding of Milestone #1. ev3 has offered evidence

[23] *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 440 (Del. Ch. 2012).
[24] *Ibid*.
[25] *ASB Allegiance,* 50 A.3d at 441.

that it put a considerable amount of effort into designing the pivotal study in order to submit the IDE Application, to include retaining clinical and regulatory experts, in order to achieve Milestone #1. In addition, ev3 has submitted facts showing that, when it the proposed study was rejected on May 28, 2003 and the FDA indicated that it would require a randomized study, ev3 made significant efforts to pursue alternative designs and pursued HDE approval based on its discussion with the FDA. Plaintiffs have presented the statements and the revised Warburg operating plan which suggest that the decision was made not to finance or pursue Milestone #1 prior to the FDA's rejection of the pivotal study. Based on these facts, an issue of fact exists as to whether ev3 acted in good faith in the pursuit and funding of Milestone #1.

Milestones #3 and #4 were directly dependent upon the achievement of the FDA's IDE clinical approval. If the FDA did not grant IDE clinical approval, then ev3 could not submit an application for and the FDA could not grant Pre-Market Approval. Although the facts do not show with certainty that the FDA would have approved a randomized trial design if it had been immediately submitted by ev3 or that it would have granted Pre-Market Approval, Plaintiffs have presented facts showing that there was a likelihood of approval had a randomized trial design been submitted earlier. Nevertheless, ev3 also presented evidence that the FDA had denied Pre-Market Approval on a similar device despite the device's randomized

trial design. Since the Court finds that an issue of fact exits as to whether ev3 acted in bad faith with regard to Milestone #1, the Court also finds that an issue of fact exists as to whether ev3's actions, relating to the IDE application, materially contributed to the nonoccurrence of Milestones #3 and #4.[26] Therefore, summary judgment is also denied as to Plaintiffs' claims relating to Milestones #3 and #4.

II. Milestone #2

An issue of fact exists as to whether ev3 exercised its discretion in good faith with regard to Milestone #2. ev3 has proffered evidence showing that its decision to conduct the International Registry in two phases was based on several legitimate factors. However, Plaintiffs suggests that Buckman's March 2003 e-mail in which he stated, "Looks like we may be in a position to not have any milestone exposure based upon current data, IDE schedule and EU registry plan",[27] suggests that ev3 could have decided to divert patients from the European Registry and implant the patients with PLAATO in a commercial setting to ensure that it would not meet the 300-patient milestone. Construing the facts in favor of the Plaintiffs, the Court finds that an issue of fact exists as to whether ev3 acted in good faith with respect to Milestone #2. Further, Plaintiffs argue that Milestone #2 was actually achieved

[26] *See WaveDivision Holdings, LLC v. Millennium Digital Media Sys., L.L.C.*, 2010 WL 3706624, at*14 (Del. Ch. Sept. 17, 2010)(quoting Restatement (Second) of Contracts § 245)("It is an established principle of contract law that '[w]here a party's breach by nonperformance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused'").

[27] *E.g,* Pl. Ex. 53.

and that ev3 has breached the Merger Agreement by failing to make the corresponding payment. Plaintiffs support this argument with an e-mail from a European PLAATO investigator that 340 European patients had been implanted with PLAATO. Based on this, an issue exists as to whether ev3 actually reached the Milestone #2 payment and, consequently breached the Merger Agreement by failing to make the corresponding payment.

III. Fraud Claims

Whether there has been fraud is a question of fact for the jury to consider.[28] However, in order for Plaintiffs fraud claims to survive summary judgment, genuine questions of fact must exist that a "false representation of a material fact [was] knowingly made with intent to be believed to one who, ignorant of its falsity, relies thereon and is thereby deceived."[29] In addition, the reliance alleged must be justifiable.[30] Plaintiffs have submitted evidence that Krattenmaker informed the Appriva shareholders that a randomized trial design would be "[m]ost supportable to FDA".[31] Plaintiffs also present bullet points from the "Operating Plan and International Strategy" portion of the May 15, 2002 presentation in which certain

[28] *Johnson v. Messick*, 11 Del. Ch. 454, 106 A. 58, 59 (1919); *Clayton v. Cavender*, 15 Del. 191, 40 A. 956 (Super. Ct. 1893).
[29] *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487, 499 (Del. 1982)(citing *Twin Coach Company v. Chance Vought Aircraft, Inc.*, 163 A.2d 278 (Del. Super. 1960); *See also In re Brandywine Volkswagen, Ltd.*, 306 A.2d 24, 28 (Del. Super. 1973).
[30] *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 142 (Del. Ch. 2003).
[31] Pls. Ex. 13.

representations were made, such as a representation that the Appriva operating plan would remain generally intact. Plaintiffs characterize the statements made as a series of promises on which ev3 failed to deliver. To show that ev3 failed to disclose that it had no plans to actually pursue the randomized trial option, Plaintiffs offer the statements obtained in discovery by Krattenmaker that he never told Appriva that there was no way ev3 would pursue a randomized trial option[32] and that he would have wanted to know, had he been in Appriva's position, about the problems associated with the randomized trial option and about ev3's views about the feasibility of pursing a randomized trial option.[33] However, in this same deposition, Krattenmaker also stated that, in his view, "[ev3] had not abandoned or necessarily discounted [the randomized trial] as an option."[34] Furthermore, ev3 presented evidence that Buckman did not believe that the statements made during the presentation were false at the time they were made.[35] Therefore, the Court finds that the issue of fraud is a question of fact properly reserved for the jury and summary judgment is denied for the fraud claims against ev3.

[32] Pl. Ex. 15, Krattenmaker Dep. Tr. 65:7-14).
[33] *Id*. at 70:3-18.
[34] *Id.* at 65:20-23
[35] Def. Mot. Exs. 14, 28.

Conclusion

Based on the foregoing reasons, Defendant ev3's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.

EXHIBIT “B”

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MICHAEL LESH, M.D. and ERIK VAN DER BURG, acting jointly as the Shareholder Representatives for former shareholders of Appriva Medical, Inc.,) C.A. No. 05C-05-218 CLS

Plaintiffs,

v.

EV3, INC.,

Defendant.

BEFORE: HONORABLE CALVIN L. SCOTT, JR., J.

TRANSCRIPT OF PRETRIAL CONFERENCE
MARCH 22, 2013

LUCILLE A. MANCINI, CCR
SUPERIOR COURT OFFICIAL REPORTERS
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APPEARANCES:

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OPPENHEIMER, WOLFF & DONNELLY, LLP
BY: JEFFREY J. BOUSLOG, ESQ.
BY: BRET A. PULS, ESQ.
For the Defendant

March 22, 2013
Chambers
9:10 a.m.

PRESENT:
As noted.

THE COURT: I just wanted to kind of go through a few things that I was thinking about, and then maybe we can delve into some of the other matters.

I'm trying to figure out how the trial's going to work. I looked at the exhibits, and Plaintiff's Exhibit 1 seems exactly like Defense Exhibit 6. I only allow one exhibit. So I would love for you guys to get together. If they're going to be a joint exhibit, then we can mark them as joint exhibits, but only one exhibit.

Are you all going to do jury notebooks, or what was the thought there?

MR. LEON: That was our plan, Your Honor, by witness, to do that; and then because it will probably be multi-volume, to have a whole set of notebooks.

THE COURT: It looks like the exhibits here,

plaintiff has maybe a little less than 300. Defense has like 500 or more. Are all of those going to be addressed to the jury?

MR. LEON: Part of the issue right now is that we have not collaborated with the other side in joint exhibits. That's going to radically reduce the number of exhibits. Also, we have a significant amount of duplication, at least on plaintiff's side, because we have the same documents that may have been marked as separate exhibit numbers during deps. So we're going to go back and reduce that, as well. So we imagine that, at least on plaintiff's side, our number will be drastically reduced before trial.

MR. BOUSLOG: I think that's right, Your Honor. We've really engaged in the first step of the process. We appreciate your comments, and we'll take them to heart. We have met with them. We do recognize there's a fair amount of overlap, and that can be consolidated down to a single exhibit that everyone agrees this is what we agree is the exhibit that will come in. And we're kind of starting that process with opposing counsel, and

so far we've been working cooperatively, and we'll continue to do that.

THE COURT: Will every exhibit be addressed with the jury?

MR. BOUSLOG: To the extent that we're going to offer the exhibit, we're going to address it with the jury through a witness, yes, Your Honor. That would be our intent and purpose.

MR. LEON: Frankly, Your Honor, the answer is probably, but can't say for sure because several of our exhibits pertain to witnesses that they may or may not produce at trial.

We've asked for several of their witnesses that we're going to call in our case in chief. If they don't produce the witness, then we're going to have to argue from the docs and won't be able to use it with that witness. Assuming they produce all the witnesses that we have asked them to make available at trial, then I think we would address the exhibits.

THE COURT: Argue from the docs?

MR. LEON: Correct. I don't think there will be any dispute as to their admissibility.

THE COURT: But we won't have an attorney testifying about them?

THE DEFENDANT: No. Just referenced in opening and closing. As I say, they won't be in dispute.

THE COURT: Designations. What is the Court supposed to do with designations? This isn't Chancery, and I'm not the fact finder.

MR. BOUSLOG: I'm not sure. Are you talking about deposition designations?

THE COURT: That was my question. Is it your intention to designate certain depositions?

MR. BOUSLOG: Yes. And I think with respect to our witnesses, Your Honor, I think most of those witnesses will be brought live. We are having some conversations with a few that are former employees whom we don't have control over anymore, and we may be doing some. We would do deposition clips.

And we have actually been working fairly cooperatively with the other side, and we have come up with a schedule for actually exchanging deposition designations, so that we'll give ours to them, and they'll give theirs to us, and then we'll

do counter-designations.

And I assume Your Honor would want us to put those all together in a package of clips and present all the depositions related to a particular witness at one time. That's kind of what our plan was, as opposed to having them do the clips from Witness A, and then us do those clips down the road for Witness A.

THE COURT: Yes, you can work it out. My concern was there wouldn't be depositions that you expected the Court or the jury to review independently of the trial.

MR. BOUSLOG: No. You're exactly right on that. Everything has been videotaped, so we will present it through a videotape presentation in the form of clips.

THE COURT: Major problem. May 2nd and 3rd is a judicial retreat. What issues are caused by the trial having to be finished by May 1st? Verdict rendered and everything else?

MR. BOUSLOG: I think that's a little bit difficult to assess, in part, because we have a number of issues to talk to you about about the

scope of the trial. Obviously, the bigger the scope of the trial, the longer it's going to take to try it.

I have one witness issue that I can think of off the top of my head, Your Honor, with respect to that, that we were going to bring in on the 2nd. So we would need to reach out to that witness and see if that witness couldn't be scheduled earlier. I know that they're in Amsterdam at a conference for the week, for several days before the 2nd, and they were planning to be there on the 2nd. But we'll follow up with that witness.

MR. LEON: Your Honor, while we're on that, this is an important issue. The two witnesses that counsel is referring to are the board of directors from Warburg Pincus and The Vertical Group. They are the key witnesses that we want to put on in our case in chief. And we expect we can complete our case in chief in that first week, assuming that they make these witnesses available.

What I can't have is a situation where they tell us these witnesses are unavailable during that first week while I'm putting my case in chief on,

and then all of the sudden they're available that second week, the last day of trial, to come in and try to clean everything up. If they're not going to make them available in my case in chief, then, frankly, they ought not to be available. That's their choice.

But I'm sorry. A private equity conference that goes two weeks in Amsterdam, that, frankly, doesn't strike me as a good reason to not make them available when I want them in my case in chief.

MR. BOUSLOG: Just so we're clear on this, I have discussed, and we've had a pretty good and open dialogue about witness availability, and I have given them specific dates when our witnesses can and will be available.

Some witnesses we have no control over. These are former investors in the company. Their interest has been sold. They're not within the subpoena power of the Court. They are people that are just out there. They're interested parties. We're not disputing the fact that they have information relevant to the trial.

We don't have control over them. So we are

asking them to make themselves available. They have raised the issue that they have a conference that they intend to attend. It's not a two-week conference.

And I think I've shared that with you, Eric. And I have a call in to them to find out when the conference starts and what their availability might be that first week. But this is an issue, because I know they were available on the 2nd and were planning to be there on the 2nd. So I will have to raise with them your concern. And I'll get back to Mr. Leon and to the Court.

So your thought would be to start on the 22nd of April, and then try to have closings and a trial, a jury result, by the 1st of May. Is that the thought, Your Honor?

THE COURT: Correct. Have you all looked at your jury instructions at all yet?

MR. BOUSLOG: There's been no sharing of instructions at this point in time. We have started to look at it internally, Your Honor.

THE COURT: How about verdict sheets?

MR. BOUSLOG: We have not exchanged verdict

sheets yet.

THE COURT: It seems simple to me, the verdict sheet. You guys may have a different -- as well as voir dire. Typically I ask three questions. So I'll let you be guided by that.

MR. LEON: Your Honor, on the issue of voir dire, is it Your Honor's practice that the attorneys will have an opportunity to question prospective jurors?

THE COURT: Never.

MR. LEON: Just making sure. That was my assumption.

THE COURT: Throughout the pretrial you have reserved the right to call the other party's witnesses. I don't allow you to call the other party's expert without the express written permission of the expert.

Any specific issues within the pretrial that you want to discuss?

MR. ABRAMCZYK: We have none, Your Honor, for the plaintiffs.

MR. BOUSLOG: Not that come to mind, Your Honor.

THE COURT: I'll quickly go through some of the motions in limine. The motion for a 12-person jury is denied. That has been waived.

There is a motion to exclude extrinsic evidence regarding the meaning of Section 9.6. 9.6 is clear and unambiguous, so parol evidence as to that section is not relevant.

The motion in limine to exclude evidence related to previous shareholders' investment returns, I'm going to have to hear more about that at trial. So that will be a trial decision. And I guess that depends on how the damage claims go.

The motion to preclude admission of preliminary Form S-1 Registration Statements, those statements are relevant, and I will allow them.

The motion to exclude evidence related to the achievement of Acceptable Clinical Outcomes components of Milestone 1, I think that's relevant to the issue of good faith, and we're going to allow those.

The motion to exclude internal Warburg documents, those documents are relevant and will be allowed. There's no merit to the argument that

they shouldn't be shared.

The motion to exclude evidence of the nonbinding Funding to Projections portion of the May 22nd, 2002, letter of intent, that is not parol evidence, and it's relevant, so it will be allowed.

There is a motion to exclude expert testimony offered by lay witnesses. I think we're going to have to see how that goes at trial. But they can testify to any factual information to which they have direct knowledge. And that's for Michael Lesh and Erik van der Burg.

Motion to exclude any reference to or evidence of financial conditions of Warburg Pincus and The Vertical Group, we're going to have to reserve that as a trial decision, and it's not hearsay.

The motion to exclude the affirmative opinions of witness Dr. Lehmann, he can properly testify to: This is the standard, and this is what happened. He cannot offer any legal conclusions.

MR. BOUSLOG: This is the Lehmann motion?

THE COURT: This is the Lehmann motion. Dr. Ladin.

MR. BOUSLOG: Ladin, yes.

THE COURT: Most of the issues raised in his testimony go to weight, not admissibility, so he will be allowed to testify.

I still have not done the motion for summary judgment, the motion for adverse jury instruction, and the reference to the Covidien merger. I just can't find my notes on that, frankly, so I'll let you know on that one.

Anything else?

MR. PULS: Bret Puls on behalf of ev3. One of them that I didn't hear referenced was ev3's fourth motion in limine which is to exclude evidence of pre-merger communications. It's the analog to Plaintiff's Motion in Limine Number 1 to exclude parol evidence which you agreed with.

THE COURT: In that case it will basically be a trial decision, but evidence should be excluded that alters, kind of a different meaning than 9.6.

MR. PULS: Alters or interprets?

THE COURT: Alters or interprets it, because, as I said before, it was clear and

unambiguous.

MR. PULS: One question of clarity on the denial of the motion to exclude the letter of intent language. The letter of intent language says in sum and substance that, the proposal in that language at least was that ev3 would propose a business plan, and that business plan would have projections for funding, and then ev3 would follow those.

Much of the merger agreement exchange back and forth after that letter of intent was Appriva putting forth the proposal that ev3 follow a business plan and ev3 fund the projections. That was cut, rejected, and left on the editing room floor.

The question I have for Your Honor is, to the extent that plaintiffs are allowed to suggest to the jury that the letter of intent language on business funding was to be incorporated by reference into the merger agreement, and, therefore, affect Section 9.6, can ev3 still put the contrary negotiating history, meaning the actual drafts that went back and forth, that

rejected that same language as the parties negotiated what was the controlling language in Section 9.6 of the merger agreement?

MR. ABRAMCZYK: Your Honor, this sounds like reargument to me, but if Your Honor wants to hear this, I'm prepared to address it. This is Number 5 that the Court has already ruled on that it's not parol evidence and the evidence would be allowed. I think that's what Mr. Puls is suggesting.

THE COURT: He's saying the letter of intent has been allowed.

MR. ABRAMCZYK: Right.

THE COURT: Can they put in additional.

MR. ABRAMCZYK: And the short answer, Your Honor, as the Court has already recognized, the answer to that has to be: Of course they can't do that. The Court has already ruled on that, too, which is that that is evidence that would be directly relevant to try to reshape Section 9.6.

And they are the party that came before the Court on summary judgment and said very unequivocally that the language of 9.6 is unambiguous. And now Mr. Puls is arguing that what

the Court should allow in is evidence that reads directly on what the Court has expressly and correctly disallowed under the Delaware law objective theory of contract.

So he's pointing to exactly the distinction that's made in the motions, but the Court has ruled correctly under the law that, number one, anything that tries to vary the term 9.6 is not admissible, but evidence about expectations, intent, is not parol evidence to try to reshape that. So that's the distinction we're going at, Your Honor.

THE COURT: If the purpose of the letter of intent was to show some type of fraud or something like that, was that part of the purpose?

MR. ABRAMCZYK: It is, Your Honor. The evidence around expectations is certainly part of the record that will develop the support for the fraud claim. But that's not the same thing as ev3 coming in and saying: Let me put on the lawyer to present the drafting and negotiation history here. That's not the same thing.

THE COURT: We will look at that at trial, but to the extent you have a document that may

refute the issue of fraud, then we will make that decision at trial. Right now that's not in. Those documents are not in, to the extent that they alter 9.6.

MR. PULS: To the extent that -- and I assume that the same is true, that the plaintiffs are not planning to or would not be allowed to offer what they call their reasonable expectations to interpret, or alter, or apply the merger -- or Section 9.6, which is the controlling contract language. Am I understanding that correctly?

MR. ABRAMCZYK: Respectfully, Your Honor, I think Mr. Puls is misinterpreting what the rulings are. I think the Court has already ruled on their Motion 5 that evidence as to parties' expectations about what was going on and what they thought was going to happen is distinguishable from putting the drafter up there and saying this is the history of how we got to the provision. The history of how they got to the provision, and the actual negotiation history, and the lawyer sitting there testifying, the Court has properly ruled excluded.

It sounds to me now that Mr. Puls is trying

to reargue again the substantive ruling of Number 5, which is the Court's ruling that what we are saying should be admitted is not to alter 9.6. We wholeheartedly agree that there's no parol evidence on that. We also agree with the Court's ruling that what we are talking about is fairly allowed in is not parol evidence.

And I'm not quite sure where he's going with what he's trying to get a ruling on now, but it is not about trying to now sort of revisit that and exclude this expectation evidence or other -- however he's describing it. I mean, that was the subject of a motion, and the Court has ruled that's not parol evidence that would be excluded under the principles that there's no ambiguity in 9.6.

MR. PULS: Your Honor, I think we're arguing two different motions here. Mr. Abramczyk is talking about reasonable expectations and the party witnesses' own subjective interpretation of the language. That's our Motion in Limine Number 4 that I raised that I hadn't heard a ruling on.

Motion in Limine Number 5 has to do with the incorporation by reference of the letter of intent

language through the integration clause Section 16.9. So I'm not trying to reargue Motion in Limine Number 5 at all. I understand Your Honor's ruling.

My question is then to: One, what rebuttal evidence are we allowed, if any, as to how plaintiffs argue how that language works and how that language is used to interpret Section 9.6?

THE COURT: And that, I threw in I don't think I can make that until we get to trial to see exactly how that document's used.

MR. PULS: Understood.

THE COURT: So I will preclude it at this point, but we will wait and see how that's attacked.

MR. PULS: And then as to Motion in Limine Number 4, in their opposition to 1 or in their Motion in Limine Number 1 and in their opposition to our Motion in Limine Number 4, the plaintiffs argue expressly that what they want to put in front of the jury is what their reasonable expectations were going into the deal. And then they want to measure ev3's conduct against those reasonable

expectations.

Our argument in Motion in Limine Number 4 is this is a contract case, and under Section 9.6, which is the sole and only language in the contract governing what ev3 had to do after the merger, that's not the standard. The standard isn't what they reasonably expected.

They cite a handful of implied covenant of good faith and fair dealing cases, but even the cases they cite, and the ones that we've put in front of you, Your Honor -- and I can pull out a couple, if we need them -- the implied covenant never applies and can't be used to introduce extrinsic evidence where the parties specifically negotiated a provision that controls the issue, and that includes when the parties specifically considered a provision and then chose not to include it. And that's where I'm talking about the drafting history, Your Honor.

In Exhibits B and C to our Motion in Limine Number 4 we showed the Court where the plaintiffs had put forth what their expectations, what their hopes were, what they wanted the contract to say.

And ev3 rejected it. And that included funding. That included pursuit to commercially reasonable efforts. That included funding to a business plan. All of that was rejected in getting to the clear and unambiguous language that we now have in Section 9.6.

And the cases that we cited to Your Honor, the Allied case, the Supreme Court Nemec case, all say that the implied covenant must be used rarely and sparingly and can't be used to introduce extrinsic evidence to interpret a contract when the contract language has touched on the issue and is clear and unambiguous. That's our Number 4.

MR. ABRAMCZYK: Your Honor, I'm afraid defendants are being just too blunt with all this. Number one, I think the Court, again, has already ruled on Number 4. And to the extent the issues that Mr. Puls is now trying to put on the table are going to be implicated at all, it does seem to be the kind of decision that is more appropriately made at trial on sort of a question-by-question basis.

However, if the Court's going to consider it

right now, this is not -- it's too broad and too blunt to say this is just a contract case. Yes, there is a provision dealing with good faith in 9.6.

THE COURT: And some of that I will get into in the summary judgment motion.

MR. ABRAMCZYK: Perfectly understandable. In 9.6, which is unambiguous, as they're first to say, and we agree. But that's not the end of the inquiry. The contract also has an overlay of an implied covenant of good faith and fair dealing as to all terms. And, so, it's not so simple as to simply say you get no extrinsic evidence on anything having to do with good faith, for a couple of reasons.

One, as it relates to the overall implied covenant that fills the interstices of other terms of the contract, certainly that evidence is relevant. But perhaps more to the point, it's equally relevant on the expectations of the parties around what the -- evidence around what the parties thought the obligations were.

Pre-merger, all pre-merger communications

about what the parties expected would happen in this contract is directly relevant to good faith. As the Court of Chancery so carefully pointed out, Vice Chancellor Laster, in the ASB case, it's a contextual inquiry for good faith. And the context is shaped around the contours of the expectations of the parties back in hindsight. It's not whether -- what was going on the day the breach occurred. It's a contextual inquiry that may well include evidence of pre-merger conduct.

And, so, it's just too blunt to come in and throw a motion in limine in front of the Court and say: Therefore, all pre-merger conduct cannot be admissible as it relates to parties' expectations as to what their -- how they would satisfy their obligations in this contract.

THE COURT: I am going to reserve decision on that, particularly because there's the issue of whether good faith and 9.6 kind of transcends everything else. So right now this will be impacted by the summary judgment motion, as well as what happens at trial.

MR. BOUSLOG: Can I just have one point of

clarification. At the very beginning you ruled on parol evidence. Were you ruling just on their motion?

THE COURT: Just on that particular issue.

MR. BOUSLOG: On their motion. Because we have a parol evidence motion, as well, and that's what Bret is getting at, Motion Number 4. So are you reserving on 4 and their motion, or are you reserving on just 4?

THE COURT: Well, I had already said in response that evidence that kind of seeks to alter or give expectation on 9.6 is excluded.

MR. BOUSLOG: Okay.

THE COURT: Everything else we will figure out at trial.

MR. BOUSLOG: Very good.

MR. PULS: Thank you, Your Honor.

THE COURT: So, generally, there's witnesses that have been listed as live witnesses and some that will be by deposition, and the parties are going to kind of get together and try to figure out which is which?

MR. BOUSLOG: That's correct, Your Honor.

THE COURT: In the other matter, Section A, the parties agree that deposition by transcript or video will not be used other than for impeachment. Isn't that a little different than what we've already said?

MR. NEIDERMAN: I think that was caveated for witnesses that are available.

THE COURT: Generally, we only take 8-1/2 by 11 exhibits. And I have kind of eliminated other matters. The parties agree that identical versions of the same document, even if they bear different Bates numbers or exhibits, shall be treated and recognized as the same document.

MR. BOUSLOG: Very good, Your Honor.

THE COURT: Anything else?

MR. ABRAMCZYK: Your Honor, just one point, a small point, I think. Is it the Court's practice to allow the jurors to take notes?

THE COURT: Yes, yes.

MR. BOUSLOG: Could you give us an idea of the trial day that you intend to conduct, when you intend to start, and approximate stop? And I guess that there may be some variations, depending upon

other motions you have and the like.

THE COURT: Generally we start at 10 o'clock, take a morning 10- to 15-minute break, lunch at 1, back at 2, and then go to 4:30 or so. We can start a little earlier on a given day, depending on my schedule.

MR. NEIDERMAN: I know it's tough with a jury, Your Honor. Is there any flexibility, if we're trying to make that May 1 cutoff, to start a little earlier and go a little later from time to time?

THE COURT: Certainly.

MR. BOUSLOG: We will have just one other kind of logistics question. This may be more for your staff than you, but we'll probably have some screens that we want to bring in to project documents so that the witnesses can follow -- or the jurors can follow along. Are you --

THE COURT: I mean, we have some high-tech courtrooms that have screens in the jury box.

MR. BOUSLOG: Can we work with you and your staff to try to get that courtroom so that it makes it easier?

THE COURT: Yes.

MR. BOUSLOG: Sometimes it's hard. In the courtroom that we've heard argument, it's hard to figure out where you'd put a screen that everyone would be able to see. So if you have a courtroom that's like that.

THE CLERK: 8B has been reserved. And I have e-mailed both local counsel as to doing a tech check.

MR. BOUSLOG: Is that one of the ones that has the technological capabilities?

THE CLERK: Yes.

MR. BOUSLOG: Great. Thank you.

THE COURT: Questions?

MR. TAYLOR: Could we impose upon -- maybe is it open now, after we leave chambers, that we could just --

THE CLERK: I can go down and check. I'm not sure.

MR. TAYLOR: If not, no big deal.

MR. BOUSLOG: So your practice, as I understand it, would be to -- how many alternates do you intend to use?

THE COURT: Because of the length of the trial, I was thinking about four.

MR. BOUSLOG: And the alternates would not deliberate? Is that your practice?

THE COURT: That is correct. Once deliberation starts, we can't restart. We can't have them involved. So we'll see if the courtroom is available.

Jury selection day. Maybe if you have your documents ready to go, we can premark them. If there's no objection to the exhibits, we'll mark them, and that will just save that much time at trial. Anything else?

MR. ABRAMCZYK: Nothing from plaintiffs, Your Honor.

MR. BOUSLOG: Nothing from defense, Your Honor.

THE COURT: Thank you very much.

(The proceedings concluded at 9:54 a.m.)

STATE OF DELAWARE:
NEW CASTLE COUNTY:

I, Lucille A. Mancini, Official Court Reporter of the Superior Court, State of Delaware, do hereby certify that the foregoing is an accurate transcript of the proceedings had, as reported by me in the Superior Court of the State of Delaware, in and for New Castle County, in the case therein stated, as the same remains of record in the Office of the Prothonotary at Wilmington, Delaware, and that I am neither counsel nor kin to any party or participant in said action nor interested in the outcome thereof.

This certification shall be considered null and void if this transcript is disassembled in any manner by any party without authorization of the signatory below.

WITNESS my hand this day of , .

Lucille A. Mancini, CCR
CCR No. 30XI00105200
Expiration Date: June 30, 2014

EXHIBIT “C”

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MICHAEL LESH, M.D. and ERIK VAN DER BURG, acting jointly as the Shareholder Representatives for former shareholders of Appriva Medical, Inc., Plaintiffs,	:	
v.	:	
EV3, INC., Defendant.	:	05C-05-218

BEFORE: THE HONORABLE CALVIN L. SCOTT, JR.

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HEARING TRANSCRIPT
APRIL 17, 2013

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JAMES C. PAVONE, RPR
SUPERIOR COURT OFFICIAL REPORTERS
500 North King Street - Suite 2609
Wilmington, Delaware 19801-3725
302.255.0651

Wednesday, April 17, 2013
Courtroom No. 8B
2:00 p.m.

APPEARANCES:

MORRIS, NICHOLS, ARSHT & TUNNELL, LLP
BY: JON E. ABRAMCZYK, ESQUIRE
MATTHEW R. CLARK, ESQUIRE
- and -
KIRKLAND & ELLIS
BY: ERIC F. LEON, ESQUIRE
JOHN P. DEL MONACO, ESQUIRE
KATHERINE L. MC DANIEL, ESQUIRE
Representing the Plaintiffs

DUANE MORRIS, LLP
BY: SETH GOLDBERG, ESQUIRE
- and -
OPPENHEIMER, WOLFF & DONNELLY, LLP
BY: BRET A. PULS, ESQUIRE
DENNIS E. HANSEN, ESQUIRE
Representing the Defendant

- - - -

THE COURT: I am ready when you were.
MR. LEON: Your Honor, thank you. Eric Leon for plaintiffs. The first thing I'd like to address before we get into the dep designations is, I guess they're still raising three objections to documents we plan to use in our opening. They're all Warburg documents. There's no question as to authenticity. I guess now the objection that I just heard was that they're hearsay. Not sure how they're raising that. If you recall, they originally said keep them all out all in their motion in limine. That was denied.
Warburg Pincus, it's undisputed, controlled the company. They had a board seat, they have -- they have their own board member, Bess Weatherman, saying, and I quote: I think effectively we controlled the company. They filed an S-1 with the SEC saying they owned 87-and-a-half percent of the company. When we fought over their privilege log, all of these communications among Warburg they asserted were still privileged because Warburg was -- everybody associated with Warburg was acting as an agent. And they used the agency. So it's not hearsay under 801(d)(2). It's not even close. It's a statement of a party admission -- a statement of a party opponent. Warburg was in every sense of the word ev3, there's no question about that. Even if

you move past 801(d)(2)(a) -- and we don't believe you do, we get to 801(d)(2)(b), a statement by the party's agent or servant concerning a matter within the scope of the agency.
And again, Your Honor, I have a letter from ev3's own counsel -- and this is the privilege point I just raised saying we are maintaining our privilege objection over all communications that pertain to Warburg, precisely because all the Warburg employees were agents of ev3.
THE COURT: Will this document come into evidence?
MR. LEON: Yes, it will, Your Honor.
THE COURT: How would it come into evidence?
MR. LEON: We are calling Bess Weatherman, the ev3 board director. We are going to show her all these documents. There's no question they're Warburg documents. They were produced by Warburg. Again, they made a motion in limine to keep all of this stuff out. It was denied. Frankly, I don't think a hearsay objection has any place on Warburg documents.
MR. GOLDBERG: Thank you, Your Honor, Seth Goldberg on behalf of ev3.
There are actually three documents they're trying to get in in their opening from Warburg and I'll take them --

THE COURT: So you object to these coming into evidence?
MR. GOLDBERG: We object to these coming into evidence in the opening. We object to these coming in and being discussed in the opening.
THE COURT: Do you object to them coming into evidence?
MR. GOLDBERG: Well, we think that for one of them foundation would have to be established in order for it to come into evidence. We think the other two are going to be objectionable on hearsay grounds. And we can talk to them, they can try to get them in during trial, but until they do, we don't think it's proper for them to have them in the opening.
THE COURT: Okay. Can I see the documents?
MR. LEON: Yes, Your Honor. May I approach?
THE COURT: Sure.
MR. GOLDBERG: And, Your Honor, if I could --
MR. LEON: Here are the three documents.
MR. GOLDBERG: I'll wait until you have them.
THE COURT: Okay.
MR. GOLDBERG: May I approach? It will be a little easier.

THE COURT: You may.
MR. GOLDBERG: So the first document that we would make an objection to in terms of the opening is this document that's March 25th, 2003. We don't think there's -- a proper foundation has not been established for this document. They did show this document to Ms. Weatherman in her deposition and all they did was say to her is this a Warburg document and she said yes, basically. And then they read a little bit from it and she said that's what it says. But there was no other foundation laid for this document, so we don't think it's proper for it to be shown in the opening. If they want to establish a foundation with her at trial, that's -- that's something that we can address then.
THE COURT: What more do you need in terms of foundation?
MR. GOLDBERG: Well, I think that she -- I think we need to know whether she saw a document, when it was created, whether she was involved in the document concurrent with its creation, whether she reviewed it and used it. That's not in the deposition. That's our position with respect to this document.
On the next document, which is also a Warburg-looking presentation. This document is a draft.

This is not a complete document and we object to it being shown in the opening on hearsay grounds and we will object to it at trial on hearsay grounds because it is a draft. It is not a business record. It is not a document that is routinely created. There is no -- and you can see throughout this document, there are --

THE COURT: Okay. Can't drafts be routinely created?

MR. GOLDBERG: I think our research has shown that drafts are hearsay. And this is not a -- a business record that would withstand a hearsay objection. And we can provide you with that research, Your Honor, but --

THE COURT: Just give me the case and what the holding is.

MR. GOLDBERG: If Your Honor flips through this document, you'll see -- and I just flipped to one page, for instance, which is 800 at the bottom, 101-800. You'll see throughout this document, you've got pages that aren't filled in. You've got rows and columns of empty information. So to say that this is a business record that has -- that is a Warburg business record --

THE COURT: Are there specific pages that are going to be -- that you plan on showing?

MR. LEON: Yes, Your Honor.

THE COURT: Can you identify them?

MR. LEON: Of course. I apologize, I do not have it marked.

MR. GOLDBERG: I believe this was the page.

(Counsel reviewing document.)

MR. LEON: Correct.

MR. GOLDBERG: Your Honor, I believe the page is -- that they would be showing is 101-758.

THE COURT: 101-758?

MR. GOLDBERG: Correct. And I believe they would want to talk about the portion that refers to PLAATO, which is the top half.

THE COURT: And those are the dates that the milestones were supposed to occur on?

MR. GOLDBERG: That's correct. And what I think the point that they would like to show is the status, which is the ev3 determined not to pursue. And I think they intend to emphasize that in their opening. Your Honor --

THE COURT: Couldn't they -- I mean, that seems to be an important part of your case. Couldn't they mark that on a board? I mean, isn't this the same information we already know?

MR. GOLDBERG: Well, I think if they wanted to argue it and if they wanted to talk about it, that's different than having it in the document and they can argue --

THE COURT: Well, what's the difference between this page and marking it on a board?

MR. GOLDBERG: Marking it -- an attorney writing it?

THE COURT: Yeah, the exact same information.

MR. GOLDBERG: I think if an attorney writes it, it is significantly different. Because I think when you have the document with the Warburg Pincus heading, which I know they're going to point out --

THE COURT: We're talking one page here. It says milestone payments.

MR. GOLDBERG: Well -- and, Your Honor, I think the point here is that the language "ev3 determined not to pursue," as its written here is not necessarily the conclusion that Warburg drew because this is a draft document. And so it had never gone through the proper channels at Warburg to say that's right, that's our position with respect to the milestones.

And if you look at PLAATO --

THE COURT: Stop.

MR. GOLDBERG: Sure.

THE COURT: Suppose they take milestone payments and show this -- redact "highly confidential, Warburg"?

MR. GOLDBERG: I think you get to the same place, Your Honor, which is it suggests that a party has concluded that ev3 has determined not to pursue. Warburg is not a party here, the document is a draft and if you look at other pages of the PLAATO information here --

THE COURT: I'm not looking at any other page but this one and the information that's on this particular page. Isn't this information that's well known in this case?

MR. GOLDBERG: Your Honor, that is --

THE COURT: Isn't this their case?

MR. GOLDBERG: Your Honor, that is the central point of dispute. And what they are trying to say is that somebody had actually reached the conclusion in 2003 that ev3 would not pursue the milestones in things that are here.

THE COURT: So you're telling me it's okay for them to draw up a slide to say the exact same thing, milestone payments, Appriva description, status, ev3 decided not to pursue and a date. That's okay --

MR. GOLDBERG: Your Honor --

THE COURT: -- if they -- that's okay if they do a separate slide?

MR. GOLDBERG: It goes back to what Your Honor said --

THE COURT: Is that correct?

MR. GOLDBERG: -- to the jury today.

I think it's argument. I don't think it's -- I mean, I think it's argument so it's not evidence, as Your Honor instructed the jury today. I think the difference is a qualitative difference. Okay? This becomes to the jurors, a piece of evidence when it's shown in the opening.

And this piece of evidence may even be inadmissible at trial because it's a draft, because it's hearsay. And if you look at the PLAATO pages in this document, you will see that the PLAATO pages have plenty of missing information. And I just lost my page, I'll find that.

THE COURT: Okay. I asked the question, what page do you intend to show. Are there more than one page?

MR. LEON: No, Your Honor, that's the page.

THE COURT: So nothing else in this document is relevant to what they're going to show the jury.

MR. GOLDBERG: But it's relevant to the hearsay

argument.

THE COURT: But that -- we'll address that in trial.

MR. GOLDBERG: But if you're going to address that in trial and you decide at trial that the document is actually inadmissible because it's hearsay, then having it up in the opening will then -- will then be a bell that can't be unrung because the jury will have concluded that this is evidence.

THE COURT: I'm asking if the same -- you said they could write the same information on the board or they can do a slide that conveys this exact same information.

MR. GOLDBERG: I think that they are going to argue --

THE COURT: Let's --

MR. GOLDBERG: I can't picture what the slide looks like.

THE COURT: Let's focus on my point. A slide would have the exact same information: Milestone payments, same headings, everything else, it would not have highly confidential and it would not have the Warburg page. Is that okay?

MR. GOLDBERG: You know, I don't -- I don't know

that we would have an objection to that slide. I mean, that's argument. If they can put that in -- if Your Honor thinks that that is a permissible slide to have for an opening, I think we'd have to look at the slide and see what it looks like. But I think that from a qualitative perspective, that slide is less like evidence than the actual document that they're going to show.

And I think that's our concern here, is the primary concern, that they're going to show a document. The document may ultimately not be admissible because of hearsay -- and I have the cases here for Your Honor on the draft if you'd like them. I can read them into the record if you'd like.

THE COURT: Not yet.

MR. GOLDBERG: So --

THE COURT: Anything else?

MR. GOLDBERG: Well, there was a third document. Should I talk to you about that?

THE COURT: Let's go back to the other document. Is there a particular page in this other document you plan on using?

MR. LEON: There's actually a couple here, Your Honor. And, Your Honor, just so I might, I think we're sort

of getting far afield because these are all Warburg documents and they've never denied the authenticity of these documents. Warburg documents are admissions by a party opponent, by definition, so I think we've gotten far afield. The fact that these are bad documents for them doesn't mean they're not evidence, doesn't mean that they're not allowed to come into evidence and it doesn't make them hearsay. And I haven't heard them yet explain how they're hearsay other than to say, well, they might not come in. But that's not a hearsay objection.

A hearsay objection is it's an out-of-court statement by someone other than the declarant offered for the truth of the matter asserted. It is not hearsay when you're talking about a party admission. When you have Bess Weatherman, who has already been deposed, asked the following question and answer:

"QUESTION: Was it true that Warburg controlled the board of ev3?

"ANSWER: Taking into account the fact that we need to control the board or that the company could control -- well, I was the only representative on the board, but we were the majority shareholder so I think, effectively, we controlled the company."

They filed an S-1 with the SEC that said Warburg Pincus has an 87-and-a-half percent ownership of ev3. And, Your Honor, again, if you don't want to call Warburg Pincus ev3 -- and they clearly were, they were one in the same. Again, I mentioned the agency. We asked them -- this was in August of 2012, we had raised -- and this is their letter to us and they point out that plaintiff's listed a number of entries from ev3's privilege log that indicated privileged communications were copied to employees of ev3's controlling shareholder, Warburg Pincus, and contended that such communications are not privileged because the individuals copied were neither ev3 employees nor members of ev3's board of directors.

That was our challenge. They said no, those documents among the Warburg folks are privileged, and here's why: Delaware law provides that the attorney/client privilege extends to include a client and its agents.

That's the position that they took. They can't now walk away and say, well, they were agents for purposes of privilege, but when we're talking about party admissions, no, we're going to say they're not agents anymore. It's good for the goose, it's good for the gander.

Now as to Your Honor's question, there's a couple

of documents from this March 2005 -- March 2003 presentation that we're going to use -- at least these are the ones that are in play. The first would be Warburg 019324. That was the original ev3 financing plan. And then if you move ahead to Warburg 019328, that was the revised financing plan put in place by the controlling shareholder, Warburg Pincus. And then, Your Honor, towards the back -- if I can just find the correct one -- there is Warburg Pincus -- yes, if you look at Warburg 019350, that's the revised cash flow statement in light of the Warburg revised funding plan. And if you see about a quarter of the way down, there's a milestone payment in the left-hand column. Do you see that yet, Your Honor?

THE COURT: Yes.

MR. LEON: And below that it's got Appriva and right across the board there are zeros. And this is March of 2003, almost two years before the sunset for the first milestone.

MR. GOLDBERG: Your Honor, may I respond?

THE COURT: Yes.

MR. GOLDBERG: On the point about Warburg being in control and being an agent, I think that that is -- it's -- one, it's a little bit misdirected here. Yes, they were an

87 percent owner. I don't think there's a dispute about the fact they invested in the company and had a big stake in the company. But that does not make them a party in this case.

These documents were not created in the capacity of their agency -- in the capacity as an agent. These are internal Warburg documents that are being made to analyze Warburg's business. If every investor became an agent of the company they're investing in, the agency theory would be all-inclusive.

Here, Warburg is operating its business over here, it's not acting as an agent. It's not going out and doing something for ev3, it's analyzing its investment, sharing with its investment partners, just like any bank would do. Yeah. And then when it acts as an agent when Ms. Weatherman is sitting on the board, she's working for ev3. She's advising ev3 on how to do their business. She's doing what a board member does for ev3.

But this -- these documents are not created for ev3 to do ev3 business. These documents are created for Warburg to do Warburg business. At some point the agency line breaks. You can make an investment and not be an agent.

Now, they don't have a case saying otherwise.

They don't have a case saying, look, an 87 percent owner makes you a party for purposes of the hearsay rule. And that's an important thing to point out, because they're going to try to make this case about what Warburg did over here when Warburg was doing its business. And they're going to show you a lot of Warburg documents and that's what they're going to try to do with the juror.

We did provide you an argument about hearsay. We told you it was a draft. The cases are at 734 F.2d 1428.

THE COURT: Slow down.

MR. GOLDBERG: Yes.

THE COURT: Give me the name of the case and what cite and then how it helps you.

MR. GOLDBERG: The names of the case are -- I can't read.

MR. HANSEN: Your Honor, the names of the cases are Lloyd versus Professional Realty Services, Incorporated, 734 F.2d 1428. That's the Eleventh Circuit, 1984. The second case is Wells Fargo Bank versus LaSalle Bank National, 2011 Westlaw 6300946 at 6. And that's District of Nevada, December 15th, 2011. The third case is William versus Humble Oil, 53 F.R.D. 69470, Eastern District of Louisiana, 1971.

THE COURT: And what does each of these cases say?
MR. GOLDBERG: These cases essentially say that a business record -- I think draft cannot be a business record for purposes of the hearsay rule.
THE COURT: For purposes of opening, would you agree that they can use this information? If your -- your objection --
MR. GOLDBERG: I think they can use the information to the extent they want to argue it, but my -- I think our objection is that they not be able to use these kinds of documents that have admissibility problems in the opening.
THE COURT: Okay. I take it there were no Delaware cases on point or anything close?
MR. HANSEN: No, Your Honor, there weren't any Delaware State Court cases on point that we found.
Just to add, since I actually reviewed the cases that Mr. Goldberg just talked about, the underlying issue here is whether the document is trustworthy and to -- to get past the hearsay rule through an exception like a business record, it has to be a trustworthy document. The fact that it is a draft renders it untrustworthy and not a business record.

THE COURT: Okay.
MR. GOLDBERG: There was a third document, Your Honor --
THE COURT: Yes.
MR. GOLDBERG: -- which was an email.
THE COURT: Yes.
MR. GOLDBERG: Our view of this --
THE COURT: What part of the email is in question in?
MR. GOLDBERG: So they, I believe -- and I'm sure they'll correct me, but I believe that they want to use the first sentence of the email from Ms. Weatherman to Mr. Kaye on March 30th --
THE COURT: Do we need to talk? All right.
MR. GOLDBERG: -- where it says "the short version."
THE COURT: Okay.
MR. LEON: The middle of the page, Ms. Weatherman the ev3 board of director writes "The short version of the ev3 financing update."
THE COURT: What's your objection to this email?
MR. GOLDBERG: Is that this is also hearsay. This is not a business record. This is --

THE COURT: Isn't she going to testify?
MR. GOLDBERG: She is going to testify.
THE COURT: Did she write this email?
MR. GOLDBERG: She did write the email.
THE COURT: So if she says the same thing that this email says, then --
MR. GOLDBERG: Then they can ask her about it, they don't need to use this document. But we think the document is hearsay.
THE COURT: But it's her statement. She's the declarant and she's --
MR. GOLDBERG: She will be here and they can ask her about it.
THE COURT: Interesting.
Response.
MR. LEON: I'm sorry?
THE COURT: Response to the email.
MR. LEON: Sure, Your Honor. Again, just calling something hearsay doesn't make it so. And they've cited you cases about drafts don't qualify --
THE COURT: This is not a draft.
MR. LEON: Correct.
MR. GOLDBERG: Your Honor, this is hearsay because

it's not a business record. It's being offered for the truth of the matter asserted and it's simply somebody's editorial comments in an email.
THE COURT: Out-of-court statement by someone other than the declarant. Who's the declarant?
MR. LEON: Bess Weatherman.
MR. GOLDBERG: I didn't say it was an out-of-court statement by someone other than the declarant.
THE COURT: Isn't that hearsay? Isn't that the definition of hearsay?
MR. GOLDBERG: I'm sorry.
THE COURT: What's the definition of hearsay?
MR. GOLDBERG: An out-of-court statement offered for the truth of the matter asserted.
THE COURT: By who?
MR. GOLDBERG: By the declarant.
THE COURT: By someone other than the declarant.
MR. LEON: Other than one made by the declarant.
THE COURT: Is this really hearsay?
MR. LEON: Your Honor, if I can briefly address this because, again, I think we're still getting -- I mean, this is the director of ev3 writing an email and they're going to sit here and say it's hearsay? It is, by

definition, a member of a board of directors is authorized to speak on behalf of a company and bind the company.

And this wasn't just any director. This was a director of Warburg Pincus who they have admitted was the controlling shareholder and who Ms. Weatherman has admitted controlled the company.

I don't even know how we're talking about hearsay at this point. They tried to keep all this out with a motion in limine. The motion in limine was denied and now they're trying to do an end run around the Court's ruling with, frankly, an insipid hearsay objection.

Warburg documents are at the very center of this case. They were the controlling shareholder, they were the one that directed everything at ev3. If they want to stand up there and argue, well, that was a frolic and detour by Warburg and Warburg was not defining policy for ev3, they can argue that. That all goes to the weight of the document, they're free to argue it, but it's certainly not hearsay.

MR. GOLDBERG: Your Honor, the definition of hearsay is a statement other than one made by the declarant while testifying at trial or hearing offered in evidence to prove the truth.

And we -- that -- Your Honor, testifying at trial. Here they will be showing this in an opening argument, nobody will have testified yet.

THE COURT: Use the information that's contained in these documents, create a separate slide, show it to the other side and I will make a ruling on the hearsay during trial after I read these cases.

MR. LEON: Well, Your Honor, just so I'm clear, our opening is going --

THE COURT: Your --

MR. LEON: Well, Your Honor, because --

THE COURT: Your opening can contain a similar slide.

MR. LEON: Well, we were going to have a PowerPoint that shows this information. There is zero chance that this information can qualify as hearsay. And as we all know, the importance of openings, we get to preview the evidence.

THE COURT: I'm letting you do that.

MR. LEON: Okay.

THE COURT: I'm letting you show the information on these slides.

MR. LEON: Okay.

THE COURT: Redact the highly confidential.

MR. LEON: Got it.

THE COURT: You can use the information in the email, create a slide based upon that.

MR. LEON: What do I have to change about the email, Your Honor?

THE COURT: Basically taking her name out of it.

MR. LEON: Well, Your Honor, the jury has to know who authored this.

THE COURT: They will find that out when we get into trial.

MR. LEON: Your Honor, respectfully, that's just going to create --

THE COURT: Unless --

MR. LEON: -- confusion.

THE COURT: Well, the other way --

MR. LEON: That's not fair to us because --

THE COURT: The other way --

MR. LEON: -- that's going to create confusion.

THE COURT: The other way to do this is to hold my decision until trial until I get a chance to read these cases since this has been brought up today.

MR. LEON: Well, Your Honor, we would respectfully

request a ruling on this hearsay objection prior to opening because this would put us at a disadvantage.

THE COURT: Well, I may or may not be able to get to that.

MR. LEON: Again, Your Honor, I'd like to hand up a letter from ev3's counsel, if I can, to the Court because -- going to the definition of what is not hearsay. Statements which are not hearsay: A statement is not hearsay if: Admission by party opponent, the statement is offered against a party and is --

THE COURT: I've -- I've heard your argument on that.

MR. LEON: Okay. But I have a letter from them telling us that everyone at Warburg Pincus was an agent of ev3.

THE COURT: Okay. I -- I've already heard you say that.

MR. LEON: Okay.

THE COURT: So I've been taking that into account. I don't need to see that again.

MR. GOLDBERG: Your Honor, just a question of clarification. When you're talking about how to use the information, you're saying they can create a slide?

THE COURT: Um-hmm.
MR. GOLDBERG: They can't show the documents? Is that some sort of --
THE COURT: Page 101-758, they can show everything except "highly confidential" and "Warburg."
I think you're hearing where my ruling is going to go, I just need to read about it. 3019324, you can show everything except "Warburg Pincus, highly confidential." And the same thing with the other two slides.
MR. LEON: And, Your Honor, that's fine, I think that resolves that, so the only remaining issue would be the email.
THE COURT: Email, correct.
MR. LEON: Your Honor, if you would like, we can submit a legion of cases stating that a board member is an authorized agent of a corporation authorized to speak on behalf of the corporation and bind the corporation. I think that's a well-settled proposition.
THE COURT: That's fine.
MR. LEON: Would you like those cases?
THE COURT: Yes.
MR. LEON: Fair enough. We'll have that to you this afternoon, Your Honor.

THE COURT: Okay. Anything else?
MR. GOLDBERG: I believe that's it, Your Honor.
THE COURT: Okay.
MR. PULS: We have been working diligently with the other side to both narrow the numerosity of deposition designations and also to narrow and come to terms with some of the objections to those that remain.
THE COURT: Okay. Can you explain in what form you're talking about the depositions?
MR. PULS: We are designating the deposition transcripts page and line back and forth with one another.
THE COURT: Okay.
MR. PULS: Once those are agreed upon --
THE COURT: Tell me what that means, because my theory of designation is that's -- you're giving me something to read --
MR. PULS: No, Your Honor.
THE COURT: -- for the purpose of the trial. And I think your definition is a little different.
MR. PULS: As we mentioned at the pretrial, we're designating them and then they'll be cut. Every single one of these people were videotaped.
THE COURT: These are on video?

MR. PULS: Yes.
THE COURT: That's what I wanted to know.
MR. PULS: They will all be played video and to land on the -- what's left the video clip so that we can actually get them cut. An important thing being that, you know, we've got -- the trial days we have, we got a shortened trial schedule and we're going to have those ready so that they can be played in the dead space whenever the dead space comes up or a party chooses.
So we're down to a number of deposition designations that have objections by one or the other party and we need to get those resolved so that we can get the tapes cut without having to interrupt those while playing or before trial each day at trial.
I'll start with a couple of -- and, John, we've agreed to hold off on Mr. Berman right now; correct?
MR. DEL MONACO: Correct.
MR. PULS: Your Honor, on one of the witnesses that we anticipate, Mr. Berman, that will be played closer toward the end of trial and we expect -- and we've agreed to work with one another to that end between now and then and I won't trouble the Court if we can with regard to Mr. Berman.
THE COURT: Okay.

MR. PULS: One of the witnesses that we intend to play, Your Honor, is the attorney for Appriva. The attorney's name is Peter Townshend. And he provided testimony about a number of the documents that constituted the negotiation and drafting history of what became the merger agreement.
Your Honor, we are not intending to, nor do we desire to offer any of that evidence as parol evidence. The Court has ruled the contract is unambiguous and there's no parol evidence to be offered in this case.
What we are offering that evidence for, Your Honor, is to rebut the reasonable reliance that has been alleged with respect to the fraud claim. As a for instance, at paragraph 5 of plaintiff's complaint, they state: To induce Appriva to accept a drastically reduced up-front pavement, ev3 made a series of representations, described in more detail below, to the effect that it would provide broad support for PLAATO, thus enabling Appriva to achieve the milestones and its shareholders to receive the corresponding milestone payments. And that continues through the complaint and it's also in the plaintiff's pretrial stipulation.
We've done research and I have a bench memo to

hand up to Your Honor, if you'll accept it, that negotiating history is relevant to directly rebut whether a party's reliance is reasonable on what they alleged to have been misrepresentations.

Here those representations all encompass what they claim was ev3's promise that induced the plaintiffs to enter into the merger agreement that all relate to what ev3 would do in terms of funding to a business plan, making commercially reasonable efforts and otherwise.

The drafting history that postdates those statements that they allege were made make very clear that the parties discussed those issues and ev3 said no to each one of them, which rebuts whether it's reasonable to rely on an earlier statement that you believed promised a future act.

THE COURT: So you will only use that if that information comes up on direct examination or during plaintiff's case in chief?

MR. PULS: Correct, Your Honor, opening or in their case in chief. If they offer, for instance the one that we anticipate -- of course, we don't know what they're going to do but --

THE COURT: Right.

MR. PULS: -- what we anticipate is that plaintiffs will offer a May 15, 2002 PowerPoint presentation during which Paul Buckman made a series of representations, according to plaintiffs, one of which related to how Appriva would be operated and seek the milestone payments after ev3 closed on the deal. In fact, it's one that we believe that they're -- that document in particular will be used in their opening. And once they make the argument that their clients had reasonably relied on statements made on May 15th, the drafting history from May 15 through the merger agreement signing on July 15, 2002, we believe are fair game.

MR. LEON: May I be heard, Your Honor?

THE COURT: Yes.

MR. LEON: Apparently it looks like we're going to revisit every one of the motions in limine. We had a motion in limine that said let's exclude all of the parol evidence concerning the interpretation or the meaning of an unambiguous contract. That motion in limine was granted.

We are talking about Mr. Townshend. Mr. Townshend was a deal lawyer. His only involvement in this case was representing ev3 in negotiating the merger agreement. The only possible evidence he has is as to the meaning and a party's intent concerning the meaning of various terms in

the merger agreement. That's all out under the Court's ruling excluding parol evidence on the meaning of the contract. That's the only thing he can testify.

Now they try to backdoor it in by saying, well, we're going to use it to rebut a claim of reasonable reliance.

That doesn't work for one simple reason. If it's a fraud claim, then, by definition, the fraudulent misrepresentation or the fraudulent half-truth has to be something outside of the four corners of the contract. If the fraudulent misrepresentation or fraudulent half-truth is contained in the contract, then it would be subsumed by a breach of contract claim.

They moved to dismiss our fraud claim years ago, saying it was subsumed by the contract. The Court denied it, reasoning, as we argued, no, these are all alleged misreps outside of the four corners of the contract. By definition, they have to be or they cannot support a fraud claim. Otherwise they would be subsumed by the contract.

So if we're talking about fraudulent misreps, we are, by definition, talking about something outside of the contract and you can't use a deal lawyer who negotiated the terms of the contract to rebut reasonable reliance as to

fraudulent representations not contained in the contract.

THE COURT: Are there specific lines in issue or is it the entire testimony?

MR. LEON: They have designated, from what we can tell, a large amount of his deposition testimony walking through the entire negotiating history between the parties: They wanted this term, we pushed back with this term; this was an important point in the negotiations; this was a sticking point; this was a deal breaker. All of that is encompassed in their dep designations.

So, again, we believe this is all covered by the motion in limine and trying to backdoor that in through reasonable reliance doesn't work, because if we're talking about fraud, we're talking about something outside of the contract.

THE COURT: Mr. Puls.

MR. PULS: Your Honor, I think to some extent in one narrow area, counsel's argument hits the nail right on the head. We're not offering up anything that is in the contract and we're not offering to interpret anything that is in the contract.

What we're offering this testimony and the documents -- most importantly, this authenticates and

provides foundation and admissibility for the documents that we seek to enter. Those documents show what isn't in the contract. Those documents show promises that weren't made. Those documents show that when the Appriva shareholders, represented here by Dr. Lesh and Mr. van der Burg, negotiated and agreed to this deal, the representations they say were made to them to induce them into the deal were raised and ev3 said no, I'm not doing that.

So we're showing the jury what was left on the editing room floor, Your Honor, in terms of if they can't come in and say we were promised that you would follow a business plan -- and that's really what you meant by good faith -- you said you would do this and that's why we entered into the deal, when the evidence actually shows that they raised it with our representatives and our representatives said no, so it was stricken and cut.

THE COURT: What's the difference between your motion now and your their motion in limine.

MR. PULS: Our motion now, Your Honor -- and we also had a motion in limine advocating the exclusion of parol evidence. We're not seeking to interpret what sole discretion means or what good faith means. We are seeking solely to rebut what they will officer as extra-contractual

statements that allegedly misled them into entering into the contract in the first place. And the fact that ev3 rejected the notion of each one of those statements cuts directly against whether it would be reasonable for the plaintiffs to rely on those in entering into what is now a clear and unambiguous contract.

THE COURT: I'm going to allow that testimony for the purpose of rebuttal only and it has to be clearly outside the contract.

MR. PULS: Thank you, Your Honor.

Your Honor, I'm going to jump -- a number of the witnesses that we intend to offer by video we've come to agreement on. There's one designation from one witness named Sigrid Van Bladel that we were not able to run aground over the past few days and even today in the hallway. And I'm going to read to you that short designation that ev3 offered but that the plaintiffs have objected to.

Your Honor, the offered designation comes at page 265 of Ms. Van Bladel's transcript and if Your Honor would like, we can provide that to you.

THE COURT: Yes.

MR. PULS: Page 265. Line number 21, which is near the bottom:

"QUESTION: You've been handed a short email that has been marked Exhibit Number 39 purportedly from **Ryan Durant to you regarding Appriva. And it states, 'Take the 2x with another 1x IDE and 5x potential. Life's too short.' Ryan Durant, if I recall your testimony, was a colleague of yours in the healthcare investing side of NEA.

"ANSWER: Absolutely.

"QUESTION: Did I say that correctly?

"ANSWER: Yeah, you did."

Your Honor, Sigrid Van Bladel is one of the -- is a -- was a representative of Appriva's largest Investor NEA, a venture capital firm and this testimony goes to Ms. Van Bladel's and NEA's motivation to do the deal, which also relates to reliance and undercuts the plaintiffs' fraud claim of inducement into the contract.

It also May, Your Honor, go to damages, in terms of the value that Ms. Van Bladel believed was appropriate to accept for this deal. That's entirely relevant in our view, given that the motivations and the ev3's impact on the largest shareholder's motivation standard of this deal has been brought into question by of plaintiffs in this case.

MR. LEON: Your Honor, briefly. I thought we had almost worked this out in the hallway. As Your Honor may

recall, there were two motions in limine that were held in abeyance. One was our motion to exclude evidence of the Appriva shareholders' return on their investment, that's the two times that you see in here. And they had a motion to exclude evidence concerning the sale of the ev3 to Covidien for several hundred million dollars.

The Court reserved judgment on both of those and I believe the Court thought they went in tandem. Frankly, we're happy to have it go either way. If Your Honor wants to let in the two times -- we don't think it's relevant, but if that comes in, then the sale to Covidien evidence comes in for the exact same reason. On the other hand, if evidence of both is kept out, then we understand that. But we always understood Your Honor to say those two went hand in hand.

As far as arguing relevance of the Appriva shareholders' return on investment, frankly, I don't see it as particularly relevant but we just want to make sure that everybody is playing by the same rules. If Your Honor is going to allow that evidence in, then the evidence concerning of Covidien -- the Covidien sale also comes in.

MR. PULS: Your Honor, we, of course disagree that those two motions or those two subjects go hand in hand.

The issue here was the sale of Appriva Medical and at issue was whether the Appriva Medical shareholders entered into that agreement fairly and whether they got a fair price for the deal. That's -- those are plaintiffs' claims. What Covidien bought ev3 for some ten years later is entirely irrelevant to the motion. It's well outside the relevant scope of activity that's related to this case whatsoever so, Your Honor, we don't see those as two sides of the same coin.

The differentiating point on that particular testimony that I just read to you is not what did they actually get and how did they actually get it and what money did Appriva shareholders take home, which, as we -- as we articulated in our opposition to the motion, we do believe that's absolutely relevant. But this particular page in mind, this particular testimony is NEA's internal thought process in deciding to accept the deal. This is pre-acceptance of the deal. It's NEA talking amongst itself and saying take the two times the investment plus some backload, life's too short. It's offered for that simple point that NEA was making its own decisions and evaluating its investment on its own.

THE COURT: Mr. Leon.

MR. LEON: Your Honor, very briefly. With all due respect to counsel, our claim is not whether or not we fairly ly entered into a contract. Our claim is that they breached the contract by failing to fund and pursue milestones in good faith. This is not about the $50 million payment. There was a 175,000,000 in milestones after that 50 million up-front payment. That's what this case is about.

They're pointing to evidence about NEA's return on investment saying, well, that's why you wanted this, you were satisfied with your return on investment. By the same token, the sale to Covidien gave Warburg and Vertical Group their massive return on investment. And they sold out for exactly that reason. So it's the exact same reason.

And if you want to say that the NEA shareholders' return on investment is relevant to this case, then, of course, then the Warburg -- the ev3 investors' return on investment is relevant for the exact same reason. Because our whole case here that everything they did was to promote their own return on investment, even if it meant sacrificing Appriva and even if it meant in bad faith taking the milestones right off the table because that was going to hurt their ultimate return on investments. And the sale to

Covidien is all part of that story.

THE COURT: The pages that you've shown me, I'm going to allow. I think they're relevant.

MR. PULS: Thank you, Your Honor.

And, Your Honor before I raise the next witness, there's one question to counsel, please.

(Counsel conferring.)

MR. PULS: Your Honor, another witness that we intend to put on, Linda Johnson, had a number of objections that plaintiffs would assert, but it sounds like we're still in a productive process so -- and there are quite a few of them, so rather than bother you with this now, Your Honor, we will work quickly with them only that, and if we can't resolve it, we'll find time to come before you again.

THE COURT: Okay. Does plaintiff have any issues?

MR. DEL MONACO: Good afternoon, Your Honor, John DelMonaco on behalf of the plaintiffs. We had two witnesses whose deposition testimony we designated that we would like to take up with Your Honor this afternoon.

The first one is a gentleman names Charles Tollinche. You've heard a lot about Warburg Pincus today already. Mr. Tollinche was an associate at that firm during 2002 through 2005. He was a professional. He worked on the

team with Bess Weatherman and some other folks in the medical device group. We took his deposition last summer. Mr. Tollinche is no longer an employee of Warburg Pincus.

He testified about a number of documents, some of which you heard about today, Your Honor, others of the same vein. And he testified that these were Warburg documents, these were documents that he helped create himself, he played a role in reviewing, he was on Ms. Weatherman's team. He testified about the contents of the documents.

And ev3 has made a number of objections to his testimony concerning the details, the contents of the documents on the basis of foundation and we don't think that those objections have any basis, frankly, Your Honor, because, again, it's an individual who worked for the company, whose documents bore the company's -- who created the documents, reviewed the documents. There's no question about whether he had qualification to talk about the documents. So, again, I think it's just part of the same game of trying to keep testimony about what Warburg was doing behind the scenes out of this case.

THE COURT: Okay.

MR. GOLDBERG: Your Honor, may I approach?

THE COURT: Yes.

MR. GOLDBERG: Our view of their designations and the Tollinche testimony and why we feel there are foundational problems with what they're trying to do with the testimony is, throughout his deposition -- and Mr. Tollinche was shown documents. He had just joined Warburg maybe a year earlier straight out of college or straight out of business school. He joined the healthcare group during the negotiations of this transaction in early 2002. At his deposition he was shown a number of documents. He was asked are these Warburg documents. And he says yes. Do you recall them, he says no. Do you recognize them. No, but I agree they are Warburg documents. Do you have any reason to believe they're not Warburg documents, no. Let me read this portion to you, does this -- and then a portion would be read into the record. Did you read -- did I read that correctly, yes, and then move on.

So what they have designated are questions about whether the documents are Warburg documents, it is. Do you recognize it. I don't. And let me read it into the record. And that's how they're going to get in a lot of this testimony.

And I can give you some examples, Your Honor, and -- and, you know, they don't establish -- they can't

establish through him -- they can't properly establish foundation through him because he doesn't know the documents. He doesn't recall the documents. He doesn't say that this is what I worked on. He says things like "we would have done this, we would have done that." An example --

THE COURT: Was he cross-examined about these documents?

MR. GOLDBERG: No, he was not.

THE COURT: Why not?

MR. GOLDBERG: I'm sorry, Your Honor?

THE COURT: Why not? If one side asked him about the documents and he said he didn't recognize them, there was no cross-examination to explore that further?

MR. GOLDBERG: They were taking a deposition, they asked him whether he knew about the documents, he said no and, no, it wasn't explored further. We hadn't taken it up at that point, Your Honor.

MR. HANSEN: Your Honor, could I respond?

THE COURT: Yeah, I'm confused.

MR. HANSEN: I'm confused too.

THE COURT: Well --

MR. HANSEN: Part of the reason is --

THE COURT: Go ahead.

MR. HANSEN: If I may, Your Honor, I'm -- with all due respect to counsel, I'm not sure that that's an accurate representation of what the witness testified about. I'm happy to show Your Honor a copy of some of the documents we're talking about and the testimony because I don't think that Mr. Tollinche disclaimed knowledge of these documents. Again, these are documents that he helped create. And if I may, Your Honor, with your permission, pass you a copy of the deposition transcript.

THE COURT: That's fine. Can I pass this back down?

MR. GOLDBERG: Your Honor, do you want to hear more on this point?

THE COURT: Well, let --

MR. GOLDBERG: I can turn you to a few pages that are exactly what I'm talking about. If you want to turn to page -- if you want to turn to page 116.

THE COURT: Okay.

MR. GOLDBERG: Your Honor, the question -- I'm at 116, line 6:

"QUESTION: Take a moment to review Exhibit 11. Let me know whether you recognize it as a Warburg Pincus

revised funding strategy.

"ANSWER: I recognize it as a document that was prepared by Warburg as a funding strategy.

"QUESTION: Did you have a role in the creation of this document?

"ANSWER: I don't recall putting it together, but I would have had a role in it.

"QUESTION: Who else would have played a role?

"ANSWER: Anybody on the team, on the medical devices team."

If you look at --

THE COURT: Okay. So there, we have some testimony. And you're telling me no one cross examined him to explore this further?

MR. GOLDBERG: We didn't, Your Honor, because we didn't -- we objected, we felt there was a lack of foundation. They didn't do anything further to establish the foundation and we're raising the objection now, Your Honor, that this is not -- a proper foundation has not been laid here and they shouldn't be able to get this testimony in or the document in through this testimony.

THE COURT: Okay.

MR. GOLDBERG: If you look on page 121 --

THE COURT: I -- he's testifying about who else on the team was involved with this project.
MR. GOLDBERG: Um-hmm.
THE COURT: But he says he recognized it was a document prepared by Warburg Pincus.
MR. GOLDBERG: Yeah. I mean, he's shown a document he sees the Warburg Pincus label on it and he says it's a Warburg document.
THE COURT: It seems like a typical trial question. I'm not getting this objection and -- and I don't understand why it wasn't followed up. That's your loss, isn't it?
MR. GOLDBERG: There are numerous places in this deposition, Your Honor, where they do the same thing and they ask Mr. Tollinche to even draw conclusions about these documents that he doesn't recall. He -- he doesn't adopt the document. He doesn't -- he doesn't have a specific recollection of the document and he's asked to draw conclusions about them.
THE COURT: Give me another example.
MR. GOLDBERG: I'll give you another example which is page 121, right at the bottom since you have it open. 121, line 15, he's asked question:

"QUESTION: Turn to page 19248. The question is -- title of this slide is January Financing Plan overview.
"ANSWER: Yes.
"QUESTION: January '03?"
He says:
"ANSWER: It doesn't say it but I will take your word for it.
"QUESTION: Do you have any reason to doubt that it's the 2000 financing plan?
ANSWER: I don't. This relates back to the same document."
He didn't work on -- he had no specific recollection of the document.
Another example is -- the way this works, it's rather long to take you through examples, but if you go to 93 -- page 93, line 6 through line 20 and I'll explain to you what happens here. On page 83, they ask him about this document at --
THE COURT: Page 93 or 83?
MR. GOLDBERG: Yeah, if you go to 93, line 6 --
THE COURT: Okay.
MR. GOLDBERG: -- this is where they're asking

Mr. Tollinche, a person who's been on the project for a few months, they're asking him at 93, line 6 through 14:
"QUESTION: Below this --"
I'm on page 93:
"QUESTION: Below this -- below that there's a reference to a target for a first half of 2004 IPO.
"ANSWER: Right.
"QUESTION: Yes? And was it Warburg Pincus' intention at the time to raise additional financing through an IPO?
"ANSWER: So I don't recall what the exact intention was from a financing perspective at that point, but reading this, it states that."
All he's doing is reading a document they've shown him. And if I take you back to Page 83, he says:
"ANSWER: I don't recall the document. I don't know that I worked on the document."
So if you had him on the stand, he wouldn't be able -- he would say, I don't know, I don't recall, that's what it says. It's not my document, that's what it says.
THE COURT: But that's what he said; right, "I don't recall"? I mean, isn't that what he said, "I don't recall"? He testified truthfully?

MR. GOLDBERG: He said "I don't recall what the exact intention was."
THE COURT: "I don't recall;" correct?
MR. GOLDBERG: "I don't recall what the exact intention was from the financing perspective."
Based on, you know, that they're going to try to get the document in through this testimony, he doesn't know what the document is. He's just guessing.
THE COURT: That's the problem with depositions. That's why we typically don't have people testify by deposition.
MR. GOLDBERG: But the -- another point is, Your Honor, as you know, we are going to have two Warburg witnesses who are going to testify live who can be asked about these documents.
THE COURT: So they'll be coming in through them?
MR. GOLDBERG: I don't know if they are going to ask them about them and if they can establish a proper foundation to get them in, but just showing somebody a document that has a Warburg Pincus emblem on it and having a guy say, yeah, it's a Warburg document and then they read it into the record and then he says, yeah, you read it correctly, that's not -- that's getting the document to

testify, not the witness and that's how they're trying to get the information in here.

Another example --

THE COURT: And why wasn't there any cross-examination of this?

MR. GOLDBERG: I --

THE COURT: You just let it go?

MR. GOLDBERG: Well, I think that at the time, they were taking their deposition, we thought the foundation had not been laid, we felt that was sufficient that Your Honor would conclude that proper foundation has not been laid.

They could have asked him better questions. They could have asked him the foundational questions. They didn't, they just tried to get the document in. They just wanted to show somebody a document, have him say yeah, that's a Warburg document and then read it into the record so that when they play the video, that's all they're going -- that's all we're going to see is the quotes from the documents.

THE COURT: Response.

MR. HANSEN: Would you like me to respond, Your Honor?

THE COURT: Yes.

MR. HANSEN: Again, I'm not sure I understand the argument completely. I think that the simple story here is that this is an individual who worked on these documents, he helped create them. The evidence that counsel pointed you to showed that this witness had direct involvement in the documents. We're not designating testimony for documents that are not going to be in evidence. We're not going to have him testify about documents that he doesn't know anything about. If he doesn't happen to recall one particular statement in a document, I don't think that means that he has no basis to talk about the document at all. And, frankly, all this goes to at the end of the day is to the weight of the testimony, not to its admissibility.

THE COURT: I agree, I think it goes to weight.

MR. DEL MONACO: Your Honor, I mentioned we had two witnesses whose testimony we wanted to designate. The other individual's name is David Worrell.

And just for background, Mr. Worrell was an ev3 employee. He worked in the regulatory group for ev3. He's the individual at ev3 that signed the March 2005 pivotal trial, IDE application, one of the critical documents in this case. He was designated by ev3 as a 30(b)(6) witness

on multiple topics, some of which concerned regulatory matters. And there are two particular pieces of his testimony where ev3 has objected to its admissibility based on a relevance objection and if Your Honor would like, I can pass up a copy of Mr. Worrell's deposition testimony.

THE COURT: That's fine.

MR. DEL MONACO: Your Honor, if I might just spend 30 seconds with some more background, which I think will be helpful. If Your Honor will recall, the first milestone in this case relates to the FDA's approval of what's known as an IDE application and that milestone had a deadline of January 1 of 2005. Ev3 acquired Appriva in the summer of 2002. The deal closed and the transaction was complete as of August of 2002. And at that time, Appriva was well on its way to completing what's known as an IDE application. At that point. Ev3 took the reins. And one of the critical parts of the case is the fact that ev3 didn't submit an IDE application of any kind until after the January 1, 2005 deadline. So more than two-and-a-half years it waited and did nothing. And then in March of 2005, ev3 finally got around to submitting that IDE application. And the person who signed this is this gentleman, Mr. Worrell. And for that reason we wanted to take Mr. Worrell's deposition.

And at page 194 of his testimony, he was asked about that March 2005 IDE submission. And in particular he was asked about the particular trial design that was contained in that March 2005 IDE application and he was asked about whether ev3 learned anything between 2002 and 2005 that it didn't know back then and which it couldn't have submitted within this IDE for 2005. And ev3 has objected to that testimony on the basis of relevance.

Again, this is the individual who signed the pivotal trial IDE application and he's being asked whether ev3 could have done anything back in 2003, 2004 in order to submit that IDE application then. This, Your Honor, goes, frankly, to the center of our claim that they didn't act in good faith to file this IDE application. They had all the means to do it. They had the data, they had a good product and they could have done it, but they were trying to avoid paying this milestone. So we think that this evidence from one of their witnesses is absolutely fundamental to proving their bad faith.

MR. PULS: Your Honor, the Court -- Mr. Worrell did not join ev3 until December of 2004. The questions that we had objected to were comparing things that he was aware of at that time against things that ev3 did or didn't do in

May of 2003 when he wasn't at the company so he would have no knowledge of those things. Mr. Worrell was offered as a 30(b)(6) deponent for regulatory matters, but he was offered for August of 2003 forward. Another individual, Bruce Krattenmaker, was offered for the time period up until August of 2003. So our objection is really very simple, Your Honor. It's just that comparing something that he was aware of with something that he wasn't aware of is an unfair question because he does not know one way or the other, so his answer is irrelevant.

THE COURT: And still no cross examination? No one challenged -- no one challenged this witness through questioning?

MR. PULS: I suppose I'm confused by the question, Your Honor. This was an ev3 employee and he was asked to be deposed by the plaintiffs. So, of course, they cross-examined him. They had -- adverse direct, whatever you want to call it, as a cross. They took the cross examination questions. Objections to the admissibility of those questions are, of course, reserved for trial and that's what we're doing here today. Counsel asking a witness questions on what we believe to be an irrelevant point that we wouldn't follow-up on --

THE COURT: But you didn't object to this during the examination, did you? I see an objection that it's vague.

MR. PULS: The one in particular that I'm looking at, Your Honor, is page 196.

THE COURT: Well, we were discussing 194, 195 and then where on 196?

MR. PULS: 196:

"QUESTION: We've been talking about the sort of things ev3 did to ready itself for submission of an IDE application following this initial letter to the FDA in September of 2004."

Pause there. He was offered as a 30(b)(6) deponent to testify about things that went on in September of 2004.

"QUESTION: Of all those things that ev3 did --"

In September of 2004:

"QUESTION: -- are any of those things that would have been impossible for them to do -- "

Meaning ev3.

"QUESTION -- back in May of 2003?"

He answered:

"ANSWER: No."

I objected to form on that question but the reporter got it down after the answer came out.

But the point -- the important point there to both of those sets of testimony is, they're asking him what was or wasn't impossible at ev3 at a time when he wasn't there and that he was not offered or prepared to testify as a 30(b)(6) deponent.

As to pages 194 and 195, we don't object to any of the questions where they say:

"QUESTION: And could they have talked to investigators -- "

I apologize.

"QUESTION: Could ev3 have done a statistical analysis like they did following September 16th 2004?"

Asking about 2004, Your Honor, is fine, but this set of questions is designed to compare what he did know about to a time period that he didn't and this was a witness who was not there, wasn't involved, wouldn't have foundation making the questions and -- and the inference drawn from them unfair.

MR. DEL MONACO: Your Honor, if I may.

THE COURT: Yes.

MR. DEL MONACO: To begin with, this is the first

time we've heard about a foundational objection. My understanding was that ev3 lodged a relevance objection. But if Your Honor would like me to address the foundation point, I will briefly, which is that ev3 designated --

THE COURT: Before you get there, he objected to form. What did that mean?

MR. DEL MONACO: Well --

THE COURT: Isn't that the way the question was laid out? That doesn't tell me he objected based on foundation and based on a lack of knowledge.

MR. DEL MONACO: You're -- that's correct, Your Honor, I think it has to do with the form of the question.

THE COURT: Okay, go ahead.

MR. DEL MONACO: So as far as foundation, which is what we're hearing for the first time today, again, ev3 designated this witness to cover this exact topic, FDA regulatory matters. And during the deposition, Your Honor, Mr. Puls, at page 79, indicated that the witness was going to cover anything that their other 30(b)(6) on the same topic, Mr. Krattenmaker, couldn't cover and he was prepared to testify about matters that predate Mr. Krattenmaker's departure.

THE COURT: What page?

MR. DEL MONACO: Page 76, Your Honor, line 16. The import of that is that during the deposition we were advised that this witness would be able to cover matters that predate Mr. Krattenmaker's departure, i.e., the same testimony we've been talking about, which is ev3's conduct in 2003.

THE COURT: I was just reading Page 80.

Any response to that?

MR. PULS: Your Honor, I think page 78, which precedes that discussion, clarifies it somewhat. Ms. McDaniel asked if Mr. Worrell wasn't being offered as 30(b)(6) for the time period prior to December 2004 and my answer was no, he -- he's able to answer questions that predate December 2004, which is when he started. In other words, he had to learn from others what happened before he got there. But he was offered specifically to testify on matters after those which ended at Mr. Krattenmaker's departure from the company, which was August of 2003. And Mr. Krattenmaker, of course, will be here live as a witness.

THE COURT: On Page 80, he's questioned about documents from 2003 to 2004.

MR. PULS: Yes, he said he had seen some. But the clarification point, Your Honor, was that he wasn't being

offered as a corporate spokesperson through 30(b)(6) for the period after August -- before August of 2003.

THE COURT: But there was no specific objection to the testimony that he gave for any prior periods.

MR. PULS: Other than that we reserved that we hadn't offered him for that, I did not stop the questioning, Your Honor, so that's correct.

THE COURT: You can't stop the questioning but you could object.

MR. PULS: Correct.

THE COURT: I'm going to allow this. I think it's relevant.

MR. PULS: Thank you.

MR. LEON: I think that's all we had, Your Honor.

THE COURT: Anything else from the defendants?

MR. PULS: Other than as we mentioned, we'll work with our opponents on the remaining couple of witnesses and advise Your Honor.

THE COURT: Okay. I will take these documents and you will give me some hearsay cases.

MR. LEON: We will. We'll provide those to Your Honor this afternoon.

THE COURT: Thank you, Court stands in recess.

(Court in recess.)

CERTIFICATE OF COURT REPORTER

I, James C. Pavone, RPR, Official Court Stenographer of the Superior Court, State of Delaware, do hereby certify that the foregoing is an accurate transcript of the proceedings had, as reported by me, in the Superior Court of the State of Delaware, in and for New Castle County, in the case herein stated, as the same remains of record in the Office of the Prothonotary at Wilmington, Delaware, and that I am neither counsel nor kin to any party or participant in said action nor interested in the outcome thereof.

This certification shall be considered null and void if this transcript is disassembled in any manner by any party without authorization of the signatory below.

WITNESS my hand this 18th day of April, 2013.

/s/ James C. Pavone
James C. Pavone, RPR, CSR
Official Court Reporter

EXHIBIT “D”

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL LESH, M.D. and ERIC VAN DER BURG, acting jointly as the Shareholder Representatives for former shareholders of Appriva Medical, Inc., Plaintiffs, v. EV3, INC. Defendant.	))))))))	C.A. No. 05C-05-218 CLS

JURY INSTRUCTIONS

By The Honorable Calvin L. Scott

April 30, 2013

APPEARANCES:

Jon E. Abramczyk, Esq. , Matthew R. Clark, Esq., Morris of Nichols, Arsht & Tunnell, LLP, Wilmington, Delaware and Jay Lefkowitz, Esq., Eric F. Leon, Esq., John Del Monaco, Esq., and Katherine L. McDaniel, Esq., of Kirkland & Ellis, LLP, New York, New York and Robert A. Goodin, Esq., Francine T. Radford, of Goodin, MacBride, Squeri, Day & Lamprey, LLP, San Francisco, California. Attorneys for Plaintiffs.

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INTRODUCTION

You now have heard the final arguments of the lawyers. I am now going to read you the final set of instructions on the law you must apply during your deliberations.

It is important that I instruct you on certain duties and functions which you, as jurors, have. Your function is to determine the facts in this case from the evidence produced in Court. As I have mentioned, it is also your duty to accept the law as stated in all of these instructions, regardless of what you personally might believe the law is or ought to be. You should then apply the law to the facts as you find them and, in this way, decide the case.

The order in which the instructions have been given has no significance as to their relative importance and I ask you to listen to these concluding instructions and consider all of the instructions as a whole and not to place undue emphasis on any particular instruction.

Please understand that you are the sole judges of the facts of the case and the law does not permit me to comment on the evidence and nothing I say or have said in these instructions or have said or done during the trial is meant to suggest that the Court has any opinion on the weight of the evidence or intended to favor either side. The Court simply explains the law that applies in

a case of this kind and you decide the case based on your evaluation of the evidence.

FURTHER FUNCTION OF THE JURY

I have already informed you of certain duties. You also have a duty to consult with one another and to deliberate with an open mind and with a view to reaching a verdict. And as you know, all twelve jurors must unanimously agree to the jury's verdict. Each of you should decide the case for yourself but only after impartially considering the evidence with your fellow jurors. And in the course of deliberations, do not hesitate to reexamine your first impression or to change your opinion if you are convinced by the discussions. However, you should not surrender your own opinion as to the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the mere purpose of returning a verdict. You are officers of the court and must act impartially, that is, without favoring either side but based on the evidence and with a desire to declare the proper verdict.

Your verdict must be based solely and exclusively on the evidence in the case. You cannot be governed by passion, prejudice, bias, sympathy, or any motive whatsoever except a fair and impartial consideration of the evidence; and that you must not, under any circumstances, allow any sympathy which you might have or entertain for anyone to influence you in any degree whatsoever in arriving at your verdict.

BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE

In a civil case such as this one, the burden of proof is by a preponderance of the evidence. Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not. Preponderance of the evidence does not depend on the number of witnesses. If the evidence on any particular point is evenly balanced, the party having the burden of proof has not proved that point by a preponderance of the evidence, and you must find against the party on that point.

In deciding whether any fact has been proved by a preponderance of the evidence, you may, unless I tell you otherwise, consider the testimony of all witnesses regardless of who called them, and all exhibits received into evidence regardless of who produced them.

CONTRACT FORMATION

A contract is a legally binding agreement between two or more parties. Each party to the contract must perform according to the agreement's terms. A party's failure to perform a contractual duty constitutes breach of contract. If a party breaches the contract and that breach causes injury or loss to another party, then the injured party may claim damages.

For a legally binding contract to exist, there must be:

1) an offer of a contract by one party;

2) an acceptance of that offer by the other party;

3) consideration for the offer and acceptance; and

4) sufficiently specific terms that determine the obligations of each party.

(Here, the parties do not dispute the existence of a contract and agree that the Merger Agreement is the contract that governs the parties' performance.)

In this case, plaintiffs allege that defendant breached a contract by breaching the terms of the Merger Agreement. You must determine from a preponderance of the evidence whether ev3 breached the terms of the Merger Agreement.

DAMAGES - BREACH OF CONTRACT

A party that is harmed by a breach of contract is entitled to damages in an amount calculated to compensate it for the harm caused by the breach. The compensation should place the injured party in the same position it would have been in if the contract had been performed.

If you find that plaintiffs are entitled to a verdict in accordance with these instructions, but do not find that plaintiffs have sustained actual damages, then you may return a verdict for the plaintiffs in some nominal sum such as one dollar. Nominal damages are not given as an equivalent for the wrong but rather merely in recognition of a technical injury and by way of declaring the rights of the plaintiffs.

PROXIMATE CAUSE

A party's breech, by itself, is not enough to impose legal responsibility on that party. Something more is needed: the party's breech must be shown by a preponderance of the evidence to be a proximate cause of the damage.

Proximate cause is a cause that directly produces the damage, and but for which the damage would not have occurred. A proximate cause brings about, or helps to bring about, the loss, and it must have been necessary to the result.

DEFINITION OF GOOD FAITH

Good Faith is a state of mind consisting in:

(1) Honesty in belief or purpose.

(2) Faithfulness to one's duty or obligation.

(3) Observance of reasonable commercial standards of fair dealing in a given trade or business; or

(4) Absence of intent to defraud or to seek unconscionable advantage.

Good Faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the party.

CORPORATIONS AND THEIR AGENTS

Defendant is a corporation. A corporation is considered a person within the meaning of the law. As an artificial person, a corporation can only act through its servants, agents, or employees. If you find that any of a corporation's personnel performed a breech in their duties at the time of the incident, then the corporation performed a breech in its duties.

The fact that a party is a corporation should not affect your decision in any way. All persons, whether corporate or human, appear equally in a court of law and are entitled to the same equal consideration.

FRAUD

Fraud consists of the following five elements:

1) the false representation of a fact that is important to another;

2) the knowledge or belief that this representation was false, or was made with reckless indifference to the truth, or had a special duty to know whether the representation was false;

3) the intent to induce plaintiffs to act on the false representation, or to decline to act;

4) the fact that plaintiffs acted, or declined to act, in justifiable reliance on the false representation; and

5) damage to plaintiffs as a result of this reliance.

A false representation may be asserted by words or by conduct. A fact is important if it would cause a reasonable person to decide to act in a particular way, or if the maker of the misrepresentation knew another person would regard it as important.

If you conclude that defendants made statements that constitute fraud, plaintiffs must show that the majority of them relied on those statements in entering into the Merger Agreement to prevail on their fraud claim.

If you find that plaintiffs have proved all of the above elements by a

preponderance of the evidence, then defendant is liable for fraud.

INTENTIONAL CONCEALMENT OF FACTS

Fraud does not merely consist of overt misrepresentations. Fraud may also occur when someone deliberately conceals facts important to a transaction, causing plaintiffs to rely on the deception to its detriment. This concealment can occur by a person's silence in the face of a duty to disclose the facts or by some action taken to prevent plaintiffs from discovering the facts important to the transaction.

EXPRESSION OF OPINION

An expression of an opinion or a speculation about future events, when clearly made as such, is not considered fraud or misrepresentation even if the opinion or speculation turns out to be untrue. But if an opinion or speculation is false and made with the intent to deceive, then it is fraudulent just as a misstatement of fact is fraudulent.

NONDISCLOSURE OF FACTS ALREADY KNOWN TO PLAINTIFF

If the plaintiffs were aware of the true facts of the transaction, even if they were concealed by the other party, or if the plaintiffs did not rely on the concealment of these facts, then there is no fraud.

DAMAGES - FRAUD

If you find that defendant has committed fraud, then plaintiffs are entitled to damages that will put them in the same financial position that would have existed had defendant's representation been true. Your award should reflect what damages the plaintiffs sustained and would be entitled to recover from the defendant for any breach of contract.

However, if you have already awarded Plaintiffs compensatory damages under Plaintiffs' claim for breach of contract for a particular Milestone payment, you cannot award any compensatory damages for the same Milestone payment based on fraud because those damages would be the same.

EFFECT OF INSTRUCTIONS AS TO DAMAGES

The fact that I have instructed you about the proper measure of damages should not be considered as my suggesting which party is entitled to your verdict in this case. Instructions about the measure of damages are given for your guidance only if you find that a damages award is in order.

PUNITIVE DAMAGES

If you decide to award compensatory damages to Plaintiffs, for the Fraud Count only, you must determine whether defendant is also liable to plaintiff for punitive damages.

Punitive damages are different from compensatory damages. Compensatory damages are awarded to compensate the plaintiff for the injury suffered. Punitive damages, on the other hand, are awarded in addition to compensatory damages.

You may award punitive damages to punish a party for outrageous conduct and to deter a party, and others like it, from engaging in similar conduct in the future. To award punitive damages, you must find by a preponderance of the evidence that defendant acted intentionally and/or recklessly. Punitive damages cannot be awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence.

Intentional conduct means it is the person's conscious object to engage in conduct of that nature. Reckless conduct is a conscious indifference that amounts to an "I don't care" attitude. Reckless conduct occurs when a person, with no intent to cause harm, performs an act so unreasonable and dangerous that it knows or should know that there is an eminent likelihood of harm that

can result. Each requires that the defendant foresee that its conduct threatens a particular harm to another.

The law provides no fixed standards for the amount of punitive damages.

In determining any award of punitive damages, you may consider the nature of defendant's conduct and the degree to which the conduct was reprehensible. Finally, you may assess an amount of damages that will deter defendant and others like it from similar conduct in the future. You may consider defendant's financial condition when evaluating deterrence. Any award of punitive damages must bear a reasonable relationship to plaintiffs' compensatory damages. If you find that plaintiff is entitled to an award of punitive damages, state the amount of punitive damages separately on the verdict form.

While you may consider defendant's financial condition in assessing punitive damages, you may not consider defendant's financial condition in assessing compensatory damages.

EFFECT OF INSTRUCTIONS AS TO PUNITIVE DAMAGES

The fact that I have instructed you about the proper measure of punitive damages should not be considered as an indication that plaintiff is entitled to recover punitive damages from defendant. The instructions on punitive damages are given only for your guidance, in the event you find in favor of plaintiff on its claims for punitive damages.

EVIDENCE: DIRECT, INDIRECT OR CIRCUMSTANTIAL

Generally speaking, there are two types of evidence from which a jury may properly find the facts. One is direct evidence -- such as the testimony of an eyewitness. The other is indirect or circumstantial evidence -- circumstances pointing to certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts from all the evidence in the case: both direct and circumstantial.

PRIOR SWORN STATEMENTS

If you find that a witness made an earlier sworn statement that conflicts with witness's trial testimony, you may consider that contradiction in deciding how much of the trial testimony, if any, to believe. You may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact or a small detail; whether the witness had an explanation for the inconsistency; and whether that explanation made sense to you.

Your duty is to decide, based on all the evidence and your own good judgment, whether the earlier statement was inconsistent; and if so, how much weight to give to the inconsistent statement in deciding whether to believe the earlier statement or the witness's trial testimony.

PRIOR INCONSISTENT STATEMENT BY WITNESS

A witness may be discredited by evidence contradicting what that witness said, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, that is inconsistent with the witness's present testimony.

It's up to you to determine whether a witness has been discredited, and if so, to give the testimony of that witness whatever weight that you think it deserves.

OBJECTIONS - RULINGS ON EVIDENCE

Lawyers have a duty to object to evidence that they believe has not been properly offered. You should not be prejudiced in any way against lawyers who make these objections or against the parties they represent. If I have sustained an objection, you must not consider that evidence and you must not speculate about whether other evidence might exist or what it might be. If I have overruled an objection, you are free to consider the evidence that has been offered.

DEPOSITION - USE AS EVIDENCE

Some testimony is in the form of sworn recorded answers to questions asked of a witness before the trial. This is known as deposition testimony. This kind of testimony is used when a witness, for some reason, cannot be present to testify in person. You should consider and weigh deposition testimony in the same way as you would the testimony of a witness who has testified in court.

CREDIBILITY OF WITNESSES - WEIGHING CONFLICTING TESTIMONY

You are the sole judges of each witness's credibility. That includes the parties. You should consider each witness's means of knowledge; strength of memory; opportunity to observe; how reasonable or unreasonable the testimony is; whether it is consistent or inconsistent; whether it has been contradicted; the witnesses' biases, prejudices, or interests; the witnesses' manner or demeanor on the witness stand; and all circumstances that, according to the evidence, could affect the credibility of the testimony.

If you find the testimony to be contradictory, you must try to reconcile it, if reasonably possible, so as to make one harmonious story of it all. But if you can't do this, then it is your duty and privilege to believe the testimony that, in your judgment, is most believable and disregard any testimony that, in your judgment, is not believable.

EXPERT TESTIMONY

Expert testimony is testimony from a person who has a special skill or knowledge in some science, profession, or business. This skill or knowledge is not common to the average person but has been acquired by the expert through special study or experience.

In weighing expert testimony, you may consider the expert's qualifications, the reasons for the expert's opinions, and the reliability of the information supporting the expert's opinions, as well as the factors I have previously mentioned for weighing the testimony of any other witness. Expert testimony should receive whatever weight and credit you think appropriate, given all the other evidence in the case.

EXPERT SCIENTIFIC OPINION MUST BE TO A REASONABLE PROBABILITY

You have heard scientific experts being asked to give opinions based on a reasonable scientific probability. In Delaware, a scientific expert may not speculate about mere possibilities. Instead, the expert may offer an opinion only if it is based on a reasonable scientific probability. Therefore, in order for you to find a fact based on an expert's testimony, that testimony must be based on reasonable scientific probabilities, not just possibilities.

ATTORNEY'S BELIEF OR OPINION

The role of attorneys is to zealously and effectively advance the claims of the parties they represent within the bounds of the law. It is improper for an attorney to state an opinion as to the credibility of a witness or the liability or lack of liability of any party. What an attorney thinks or believes about the evidence or the credibility of any witness in a case is absolutely irrelevant, and you are instructed to disregard any personal opinion or belief which an attorney offers during opening or closing statements, or at any other time during the course of the trial.

JUROR'S NOTES

The Court has allowed the jury to take notes during trial. The purpose of doing so was to assist you during your deliberations in recollecting the testimony and contentions presented at trial. During your deliberations, you should not allow the notes taken by one or several jurors to control your consideration of the evidence. Rather, due regard should be given to the individual recollection of each juror whether or not supported by a written note. Your ultimate judgment should be the product of the collective memory of all 6 jurors. Please remember that during your deliberations, we do not reread testimony given at trial.

CONCLUSION

Now, upon retiring to the jury room, I suggest that you carry on your discussions in an orderly way and give everybody an opportunity to express their views before taking a vote or attempting to decide the case. All the issues should be fully and fairly discussed and everyone should have a fair chance to be heard and participate. As I mentioned, all 6 jurors have to unanimously agree to your verdict.

After you have reached unanimous agreement, you will return to the courtroom and, upon inquiry by the Clerk, your foreperson, who by custom of this Court is the No. 1 juror, will announce your verdict by answering the questions on the Verdict Worksheet.

EXHIBIT “E”

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL LESH, M.D. and ERIC VAN DER BURG, acting jointly as the Shareholder Representatives for former shareholders of Appriva Medical, Inc., Plaintiffs, v. EV3, INC. Defendant.	))))))))))	C.A. No. 05C-05-218 CLS

SPECIAL VERDICT FORM

1(A.) Did ev3 breach the Merger Agreement?

Yes _____ No _____

If the answer to Question No. 1(A) is "Yes," please go to Question No. 1(B). If the answer to Question No. 1(A) is "No," go to Question No. 2(A.)

1(B.) Was the Defendant's breach the proximate cause of some or all of the damages to plaintiffs?

Yes _____ No _____

If the answer to Question No. 1(B) is "Yes," please go to Question No. 1(C) and state the amount of the damages. If the answer to Question No. 1(B) is "No," go to Question No. 2(A.)

1(C.) Please state the amount of the damages you award.

$ _____

2(A.) Did ev3 commit fraud as to the Appriva Shareholders?

Yes _____ No _____

If the answer to Question No. 2(A) is "Yes," please go to Question No. 2(B) and state the amount of the damages. If the answer to Question No. 2(A) is "No," you have now completed your assignment in this case. Please let the bailiff know that you are ready to return to the courtroom.

2(B.) Please state the amount of the damages you award.

$ _____

If you awarded plaintiffs compensatory damages for their breach of contract claim for a particular milestone payment, you cannot award any compensatory damages for the same Milestone payment because those damages would be the same.

2(C.) For the purposes of Punitive Damages, as related to the fraud claim, do you find that the defendants acted recklessly or intentionally?

YES _____ NO _____

If the answer to Question No. 2(C) is "Yes," please go to Question No. 2(D) and state the amount of the damages. If the answer to Question No. 2(C) is "No," you have now completed your assignment in this case. Please let the bailiff know that you are ready to return to the courtroom.

2(D.) What amount of damages do you award for Punitive Damages?

$ _____

You have now completed your assignment in this case. Please let the bailiff know that you are ready to return to the courtroom.

Dated: _____, 2013

_____
(Foreperson)

EXHIBIT “F”

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL LESH, M.D. and ERIK VAN DER BURG, acting jointly as the Shareholder Representatives for former shareholders of Appriva Medical, Inc.,	)	C.A. No. 05C-05-218 CLS
Plaintiffs,	)	
v.	)	
EV3 INC.,	)	
Defendant.	)	

- - - -

BEFORE: HONORABLE CALVIN L. SCOTT, JR., J.
and jury

- - - -

TRIAL TRANSCRIPT
APRIL 26, 2013

SUPERIOR COURT OFFICIAL REPORTERS
500 N. King Street - Wilmington, Delaware 19801
(302) 255-0570

their case-in-chief, Your Honor.

THE COURT: Ladies and gentlemen, I'm going to allow you to go ahead and take your lunch break. It's going to be a slightly extended lunch break, so you may break until 2:30.

Mr. Goldberg?

MR. GOLDBERG: Good afternoon, Your Honor.

Your Honor, at this time, defendants move for judgment as a matter of law on all of the claims in the amended complaint, and would ask to be heard with respect to a few of those claims now.

I have for Your Honor the motion that I'll hand up to Your Honor and provide to opposing counsel. We have several copies, Your Honor.

Your Honor, the motion that we specifically handed up specifically addresses three of plaintiff's claims, the common law fraud claim, the claim for breach of Milestone 4, and the claim for violation of the California securities laws.

We ask that each of those claims be dismissed as a matter of law.

With respect to the fraud claim. Plaintiffs have now, at trial, isolated the fraud claim to

statements made in a May 15, 2002 presentation and to an e-mail that Mr. Buckman sent to Mr. Lesh in May of 2002. The presentation is Plaintiff's 19. The e-mail is Plaintiff's 23. And they've also --

THE COURT: Excuse me. Are you eliminating then the terms in the letter of intent?

MR. GOLDBERG: Your Honor, there are two letters of intent. I believe that the May 15th letter of intent was incorporated by reference into the agreement. So, therefore, it itself cannot constitute a statement that is fraudulent inducement.

The plaintiffs also appear to be -- although it's not clear -- relying on the March 14, 2002 letter of intent as a basis for their fraud claim. So there are three documents on which they base their fraud claim.

The statements in P19, the May 15th presentation, D40, the letter of intent, March 14, 2002, and the e-mail from Mr. Buckman to Mr. Lesh, P23, all of the statements that plaintiffs claim to rely on in those documents are statements about things that are proposed to happen after the

merger. Promises of things that will happen down the line, things that -- business plans, clinical approval submissions, applications, all things that might happen after the merger.

Delaware law is clear that those kinds of promises, statements about what will happen in the future, cannot constitute fraud. And the statements themselves do not show that when the promises were made, that the promises were false and were intentionally deceptive.

Plaintiffs have pointed to no other evidence, contemporaneous with the times those statements were made. They haven't pointed to an e-mail, to a phone call, to a communication, to a meeting that says when those statements were made in those three documents, ev3 knew those statements were false and made them with the intent to deceive. The mere fact that the promises that were contained in those statements, or at least the alleged promises that were contained in those statements, the mere fact that those statements, those promises were unfulfilled after the merger does not make the statements themselves false and

made with the intent to deceive.

The testimony in the record suggests entirely otherwise. Mr. Krattenmaker sat on the stand today and talked about that presentation and told you, told the jury that everything that was said in that was true, that there was no intent to make those statements to deceive, that they did not believe those statements to be false when made.

There is a case called Berdell versus Berman Real Estate, 1997 Westlaw 79300088. It's a Delaware Chancery Court decision. And in that case, which is much like this case, the defendant had promised before a transaction to obtain financing to fund a real estate development project.

THE COURT: In that case, when did the Chancery Court make the decision; was it a --

MR. GOLDBERG: That was a summary judgment decision, Your Honor. It was a decision as a matter of law.

THE COURT: Did they have a little more leeway in evaluating the facts of the case?

MR. GOLDBERG: I'm not sure I understand

your question, Your Honor.

THE COURT: Well, you just quoted me what a witness testified to. If I have to reconcile the facts among the witnesses, then certainly that goes to the jury.

MR. GOLDBERG: Your Honor, you don't have to reconcile the facts. I was just merely bringing that up.

The law is clear. The statements on which they relied are statements of future performance and they cannot constitute actionable fraud. We've raised that in our motion to dismiss, our summary judgment motion and now we are in trial and they have shown no contemporaneous fact, nothing to suggest that when the statements were made they were false and misleading. And just -- Your Honor, to explain what Vice Chancellor Jacobs said in that decision -- and I'll just read you a quote.

"The plaintiffs have not showed that the defendant lied or otherwise misled the plaintiffs about its negotiations or about its intention to build or finance the development project, or that defendant knew that its alleged promise was

impossible to fulfill when made. What the record does indicate is that at various times the defendant considered the economic feasibility of building and the financial soundness of a loan offered by another party, but on each occasion decided against taking these steps. A party's failure to keep a promise does not prove that the promise was false when made. The plaintiffs have not shown any such intention to renege. The defendant considered fulfilling its promises, but ultimate decided not to, but does not prove bad faith."

Now, not only is there no evidence in the record that the statements were made to intentionally deceive plaintiffs, that the statements were false. It is, under Delaware law, unreasonable to rely on statements of future promises as a guarantee of events that will happen.

In a decision in the Chancery Court, Vice Chancellor Strine was evaluating a case where plaintiffs acquired, entered into a licensing agreement for software -- I'm sorry -- entered into an agreement to acquire a copying company based on

projections presented by the defendant during the negotiations.

Vice Chancellor Strine determined that it was unreasonable for plaintiffs to rely on those projections as a guarantee that the company they were acquiring would perform to those projections after the acquisition.

And what he says on Page 15 of this decision, which is in Homan v. Turoczy, 2005 Westlaw 200756. What he says on Page 15 is: As to the projections, I do not find that the defendants made any statements telling the plaintiffs that they could rely on defendants, on the company producing $50,000 per month as a virtual certainty. As a general matter, our law, Delaware law, is reluctant to permit a plaintiff to premise a fraud claim on the failure of future predictions to come true, because such predictions are, by definition, not statements of past fact, but necessarily imprecise attempts to foresee the future. It is the law in Delaware that statements of opinion concerning probable future events cannot be deemed fraud or misrepresentations when, as here, they

were made as such.

Your Honor, an interesting point to raise about the evidence on fraud and reliance here. Plaintiffs have -- Dr. Lesh testified that the Appriva merger was passed by a vote of the Appriva board. We have only heard from two -- from three -- well, we've only heard in plaintiff's case, which is now closed, from two of the seven Appriva board members that they relied on statements made by ev3. Those two board members were Dr. Lesh and Ms. Robertson. Dr. Lesh could not recall any statement, any specific statement that he relied on. He did not identify any specific statement.

What he did say was that he relied on P23, in which Mr. Buckman says, "I think you know how excited I am about the prospects of this combination and also my personal commitment to ensuring the success of this wonderful technology. At the risk of sounding a bit corny, we believe that the PLAATO technology will truly provide a solution for patients where none exists today. And this is one of the founding principles of ev3."

Your Honor, other than some optimism about what PLAATO might be some day, there is nothing in this e-mail that is even a promise. But be that as it may, Dr. Lesh, even if he relied on this statement, even if this statement could constitute fraud, Dr. Lesh's reliance cannot be imputed to the six other board members who had to resolve to vote on the Appriva merger with ev3.

We don't know if any of those board members relied on statements made by ev3 in resolving to enter into the merger agreement. There is no evidence in the record on that, Your Honor. And so there is no evidence that in resolving to do the Appriva transaction Appriva was the fraud. Mr. Lesh may feel like he relied on statements that were fraud, but we don't know if Appriva did.

Mr. Van der Burg van, well he may have relied on statements in that May a 15 presentation is not a board member. Dr. Lesh testified he did not vote. He was a shareholder.

Yet another reason this fraud claim needs to be dismissed is there is an integration clause in the agreement, Your Honor, and it specifically

precludes relying on extra contractual statements subsection 16.9 of J4. And that clause was not a boilerplate clause because that clause, the parties agreed, would be negotiated to include the letter of intent that was incorporated into that agreement.

For these reasons, Your Honor, and these Delaware law principles, we believe that it would be improper to submit the fraud claim to the jury and the fraud claim should be dismissed as a matter of law.

I'd like to turn quickly -- and it will be quick -- to the breach of contract claim for Milestone 4.

As Your Honor now knows, Milestone 4 requires that there will be actual PMA approval in order for Milestone 4 to be paid. Plaintiffs have provided no evidence in their case-in-chief that Milestone 4 would have been achieved if a PMA application had been filed.

There is no evidence in the record suggesting that the Milestone 4 was a fait accompli, all that needed to happen was a PMA

application needed to be file. They are speculating about what might happen in this regulatory process should the various steps that need to be taken for PMA approval be taken. That kind of speculation is far too great to submit the claim to the jury.

Now, plaintiffs will argue that Milestone 4 wasn't achieved because Milestone 1 wasn't achieved, because Milestone 3 wasn't achieved. And they are going to argue that ev3, quote, prevented Milestone 4 from happening because ev3 didn't submit those milestones.

Your Honor, there is a clear exception to what is known as the "prevention doctrine," which is what plaintiffs argue gets them to submit a claim for Milestone 4 to the jury. And that exception is that when a party assumes the risk that the counterparty has the discretion in how to perform. The prevention doctrine does not apply. And we know in this case that Appriva agreed to allow ev3 to have the sole discretion to be exercised in good faith, but the sole discretion, nonetheless, to fund the milestones, to fund the

pursuit of the milestones, and that kind of discretion undermines, if not eviscerates any reliance the plaintiffs may put on the prevention doctrine with respect to Milestone 4. And for that reason and for the lack of any evidence that the PMA, the FDA would grant a PMA approval for PLAATO, ev3 requests that Your Honor dismiss the breach of contract claim with respect to Milestone 4.

Lastly, Your Honor, I would like to just turn to the California Securities Law claim. That claim must be dismissed. And the reason is, we've heard no evidence, there's none in the trial record that would establish the damages that are needed to be established in that case.

Your Honor, Section 25501 of the California Corporation Code says that the damages under that section are based on the value of the securities on the date the claim is filed. The claim under that section was filed in the amended complaint on August 30th, 2009.

THE COURT: August or April?

MR. GOLDBERG: August 30th, 2009 is when the amended complaint was filed.

There is no evidence in the trial record of what the value of Appriva securities were on April 30th, 2009. There is no way for the jury to assess damages for this claim.

And for that, we ask that Your Honor dismiss the claim for California securities fraud.

Thank you, Your Honor.

THE COURT: Thank you. Why don't you start with the last point first.

MR. LEON: I will do, Your Honor.

As for the first two points, I'm prepared to address them, although we would respectfully request time to brief them if Your Honor wants to entertain them.

THE COURT: All right.

MR. LEON: I just heard counsel say that we did not add the California Corporations Code until the 2009 complaint. Your Honor, I'm looking at the complaint filed May 20th, 2005, filing ID 5862024. I would direct the Court's attention --

THE COURT: Which complaint was that?

MR. LEON: This was the complaint filed by Michael Lesh individually and then there was a

separate complaint, and ultimately they were consolidated.

THE COURT: Which was filed improperly; correct?

MR. LEON: No, that's not correct. There were two complaints.

THE COURT: They weren't filed jointly.

MR. LEON: Correct. And ultimately the two complaints were consolidated.

THE COURT: Then we had an amended complaint?

MR. LEON: Correct.

THE COURT: So as of May 20, 2005, is there a value of the securities in the record.

MR. LEON: Is there a value of the securities in the record?

THE COURT: The price at which the security was sold plus interest at a legal rate.

MR. LEON: No, Your Honor. We believe that's a question for the jury.

THE COURT: There's no evidence of what the price of the security was, is there?

MR. LEON: We believe it's for the jury to

determine the difference in value.

THE COURT: How do they know what the values were?

MR. LEON: We believe the value is a question -- is reserved for the jury.

THE COURT: The value at the filing is a specific number.

MR. LEON: This was a privately held corporation.

THE COURT: You had no one evaluate what you thought the security would be. That requires an expert witness.

MR. LEON: I'm not sure we agree that's what's required under the California Corporations Code so we would request the opportunity to brief the issue.

THE COURT: Brief the issue over valuation.

MR. LEON: We will do that, Your Honor.

THE COURT: So, in your opinion, is there enough in the record for the jury to evaluate what the security was worth?

MR. LEON: Your Honor, I respectfully request permission to go back and respond after

we've had the opportunity to do a deep dive into that.

THE COURT: Okay.

MR. LEON: We'd also like the opportunity to brief "fraud in Milestone 4," although if Your Honor would like, I'm prepared to address that.

THE COURT: No. I'll allow you to brief that, also.

MR. LEON: Thank you, Your Honor.

THE COURT: You'll file that by Monday morning?

MR. LEON: Sure.

THE COURT: Okay.

MR. GOLDBERG: Your Honor, if I may, just follow-up on one thing?

THE COURT: Sure.

MR. GOLDBERG: I may have misspoken about the claim. And I believe that the 25501 claim under the California Securities Code was first filed, that claim under that code was first filed in the August 30th, 2009 amended complaint.

Yeah, there were securities law claims filed before, but the 25501 claim, which is what the

argument was about and how you pay damages, was filed in the August 30th, 2009 amended complaint.

THE COURT: Court stands in recess.

(Luncheon recess taken at 1:10 p.m. to 2:35 p.m.)

THE COURT: Good afternoon.

Are we ready for the jury?

MR. BOUSLOG: We are, Your Honor. Just so you know what the schedule is, we are going to do that short video. It's 18 minutes long.

And then we have a live witness that may be for the balance of the day. And if they are not, we do have another video that we could play. But that witness may go for the balance of the day.

(Whereupon, jury entered the courtroom.)

MR. PULS: Your Honor, by video testimony the defense called Sigrid Van Bladel, a Appriva investor from NEA.

(Videotape played at this time.)

MR. PULS: Your Honor, we move to admit Defense Exhibits 31 and 71 that were played during Ms. Van Bladel's testimony.

MR. LEON: No objection.

THE CLERK: Marked as Exhibits 31 and Defendant's Exhibit 71, Your Honor.

THE COURT: Call your next witness.

MR. GOLDBERG: Defense calls Sean Carney, Your Honor.

THE CLERK: Please state your name.

THE WITNESS: Sean Dylan Carney.

(Whereupon, SEAN DYLAN CARNEY, having been sworn, testified as follows:)

BY MR. GOLDBERG:

Q. Good afternoon, Mr. Carney. Can you introduce yourself to the jury, please?

A. Yes. My name is Sean Dylan Carney.

Q. Where do you live?

A. I live in New Canaan, Connecticut.

Q. You have a wife and kids?

A. I have a wife of almost 16 years and four children.

Q. And what do you do for a living?

A. I'm a Managing Director and a partner at Warburg Pincus, which is a global private equity firm based in New York City.

Q. Mr. Carney, can you give the jury a sense of your educational background and your professional background?

A. Yes, of course. I graduated from Harvard College in 1991, and I graduated from Harvard Business School with an MBA in 1995.

From 1993 to 1993 and then again from 1995 to 1996 I worked at a firm called McKinsey & Company, which is a consulting firm. And in 1994 I worked at Golden Sachs. I joined Warburg Pincus in November of 1996 and have been there ever since.

Q. What is your current title at Warburg Pincus?

A. I'm a Managing Director and a partner.

Q. How long have you been a Managing Director?

A. Since January 1st of 2001.

Q. Do you work in a particular department at Warburg Pincus?

A. Yes. I work in the healthcare group of Warburg Pincus.

Q. Can you describe what your responsibilities are as a managing director?

A. I help to find investment opportunities for the firm. I help to evaluate potential investment

opportunities, and then I help to oversee and to monitor those investments once we have made them.

Q. Are you familiar with Warburg's investment in a company called ev3?

A. Yes, I am.

Q. Can you describe how you became familiar with that investment?

A. When I -- I spent a couple years in Warburg Pincus's London office. When I came back from London in the Fall of 2003, I was asked to lead an independent review of Warburg Pincus's investment in ev3.

Q. What was the purpose of that independent review?

A. At the time ev3 was among Warburg Pincus's largest investments. It was a troubled investment, it was struggling and not doing well. It had required a lot more money than we had expected and would continue to require a lot of money going forward. And so we thought -- the firm thought that it would be worthwhile to do an independent review to sort of take stock of how the company was doing and what we should do about it.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL LESH, M.D., and ERIK VAN DER BURG, acting jointly as the Shareholder Representatives for former shareholders of Appriva Medical, Inc.,
Plaintiffs,
v. CA 05C-05-218

EV3, INC.,
Defendants.

BEFORE: THE HONORABLE CALVIN L. SCOTT, JR., J, and jury

TRIAL TRANSCRIPT
APRIL 30, 2013

SUPERIOR COURT REPORTERS
KIM L. HALEY, RPR
PAMELA A. MADRACK, RPR
SUPERIOR COURT REPORTERS
500 N. KING STREET
WILMINGTON DELAWARE 19801

A. I do.
Q. You were asked if you had looked at a couple of board members' depositions and, of course, indicated you hadn't; is that right?
A. That's correct.
Q. Was Jim Corbett a board member?
A. Jim Corbett, I believe to have been a board member.
Q. Did you review his deposition?
A. Yes, sir.
Q. Was Paul Buckman a board member?
A. I think so.
Q. Did you review his deposition?
A. Yes, sir.
Q. You were asked some questions about Appriva people and whether you'd reviewed any of their deposition transcripts?
A. Yes, sir.
Q. Did you review the deposition transcript of Michael Kolber?
A. I did.
Q. And did you review Dr. Lesh's deposition?
A. Yes, sir.

Q. No further questions.
THE COURT: Does that prompt any others?
MR. DEL MONICO: That's it, Your Honor.
THE COURT: You may step down.
(Witness excused.)
THE COURT: Anything else from the defense?
MR. PULS: Brief housekeeping matter, Your Honor.
Following the Mike Berman deposition we moved for a number of exhibits and one of them was noted in our reference as Defense 328. That actually should have been Defense 294, so we would like to withdraw 328, because it wouldn't make sense in the deposition, of course, and move 294's submission.
MR. LEON: No objection.
THE COURT: That's fine.
MR. PULS: And then there is a document both sides used. It was joint Exhibit 19. It wasn't clear if it was moved for admission, so we would move for the admission of that.
THE COURT: That's fine.
MR. LEON: No objection.

MR. PULS: Your Honor, at this point in time the defense is prepared to rest.
THE COURT: Any rebuttal witnesses?
MR. LEON: No, Your Honor.
THE COURT: Why don't we break, then, until 2 o'clock. We will send you out for lunch. Please do not deliberate or discuss the case yet.
(Jury exits the courtroom.)
THE COURT: I am aware on the verdict sheet that there is a typo in 1(b). Did anyone catch that? I see heads nodding.
MR. LEFKOWITZ: Typo with the three additional words.
THE COURT: It should be a breach.
Any other notes from that?
MR. PULS: Your Honor, I had one question on the verdict sheet. Before I get there, I just wanted to -- the defense re-raises its motion for judgment as a matter of law and will rest on the arguments that we've made and the briefs that we've submitted.
And, Your Honor, I think that there may be a typographical error in 1(a), as well. With the

insertion of 1(b), I think that 1(a) now reads please go to question 1(b) and state the amount of damages.
THE COURT: Okay.
MR. PULS: That's all we've got on the verdict form.
THE COURT: I am going to give the punitive damages together with everything else. I have inserted the paragraph in our notes that we're required to put in that includes, "While you may consider defendant's financial condition in assessing punitive damages, you may not consider defendant's financial condition in assessing compensatory damages."
Anything else?
MR. LEFKOWITZ: Your Honor, we submitted a response to their motion. I am assuming since we've got the jury instructions, the Court doesn't want to hear argument on that motion. I am happy to make argument if the Court would like.
THE COURT: We are going to send it to the jury.
MR. LEFKOWITZ: Thank you, Your Honor.

EXHIBIT “G”

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL LESH, M.D. and ERIC VAN DER BURG, acting jointly as the Shareholder Representatives for former shareholders of Appriva Medical, Inc., Plaintiffs, v. EV3, INC. Defendant.	))))))))))	C.A. No. 05C-05-218 CLS

SPECIAL VERDICT FORM

1(A.) Did ev3 breach the Merger Agreement?

Yes ✓ No _____

If the answer to Question No. 1(A) is "Yes," please go to Question No. 1(B). If the answer to Question No. 1(A) is "No," go to Question No. 2(A.)

1(B.) Was the Defendant's breach the proximate cause of some or all of the damages to plaintiffs?

Yes ✓ No _____

If the answer to Question No. 1(B) is "Yes," please go to Question No. 1(C) and state the amount of the damages. If the answer to Question No. 1(B) is "No," go to Question No. 2(A.)

1(C.) Please state the amount of the damages you award.

$ 175 Million

2(A.) Did ev3 commit fraud as to the Appriva Shareholders?

Yes _____ No ✓

If the answer to Question No. 2(A) is "Yes," please go to Question No. 2(B) and state the amount of the damages. If the answer to Question No. 2(A) is "No," you have now completed your assignment in this case. Please let the bailiff know that you are ready to return to the courtroom.

2(B.) Please state the amount of the damages you award.

$ _____

If you awarded plaintiffs compensatory damages for their breach of contract claim for a particular milestone payment, you cannot award any compensatory damages for the same Milestone payment because those damages would be the same.

2(C.) For the purposes of Punitive Damages, as related to the fraud claim, do you find that the defendants acted recklessly or intentionally?

YES _____ NO _____

If the answer to Question No. 2(C) is "Yes," please go to Question No. 2(D) and state the amount of the damages. If the answer to Question No. 2(C) is "No," you have now completed your assignment in this case. Please let the bailiff know that you are ready to return to the courtroom.

2(D.) What amount of damages do you award for Punitive Damages?

$ _____

You have now completed your assignment in this case. Please let the bailiff know that you are ready to return to the courtroom.

Dated: May 1, 2013

Kyle William Kuchaski
(Foreperson)

EXHIBIT “H”

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MICHAEL LESH, M.D. and ERIK VAN DER BURG, acting jointly as the Shareholder Representatives for former shareholders of Appriva Medical, Inc.,	)	C.A. No. 05C-05-218 CLS
Plaintiffs,	)	
v.	)	
EV3, INC.,	)	
Defendant.		

Date Submitted: June 20, 2013
Date Decided: August 29, 2013

On Defendant's Renewed Motion for Judgment as a Matter of Law. **DENIED.**
On Defendant's Motion for New Trial or Remittitur. **DENIED.**

Jon E. Abramczyk, Esq. , Matthew R. Clark, Esq., Morris of Nichols, Arsht & Tunnell, LLP, Wilmington, Delaware and Jay Lefkowitz, Esq., Eric F. Leon, Esq., John Del Monaco, Esq., of Kirkland & Ellis, LLP, New York, New York and Robert A. Goodin, Esq., Francine T. Radford, of Goodin, MacBride, Squeri, Day & Lamprey, LLP, San Francisco, California. Attorneys for Plaintiffs.

Matt Neiderman, Esq., Benjamin A. Smyth, Esq. of Duane Morris, LLP, Wilmington, Delaware and Jeffrey J. Bouslog, Esq., Bret A. Puls, Esq., Dennis E. Hansen, Esq., Cynthia S. Wingert, Esq. of Oppenheimer, Wolff & Donnelly, LLP, Minneapolis, Minnesota and Matthew A. Taylor, Esq., James L. Beausoleil, Jr., Esq., Seth A. Goldberg, Esq. of Duane Morris, LLP, Philadelphia, Pennsylvania. Attorneys for Defendant ev3, Inc.

Scott, J.

Introduction

Before the Court is Defendant ev3, Inc.'s ("ev3") renewed motion for judgment as a matter of law and motion for new trial, or remittitur. The Court has reviewed the parties' submissions and, for the following reasons, ev3's motions are **DENIED**.

Background

Plaintiffs, former Appriva, Inc. ("Appriva") shareholders ("Plaintiffs"), and ev3 entered into a merger agreement ("Merger Agreement") in which ev3 acquired a medical device from Appriva and agreed to make certain payments to the Appriva shareholders ("Milestone payments") which were dependent on certain regulatory events ("Milestones").[1] The Merger Agreement required ev3 to fund and pursue the Milestones "notwithstanding any provision to the contrary […] at its sole discretion, to be exercised in good faith."[2] The Merger Agreement also incorporated a March 15, 2002 Letter of Intent ("Letter of Intent"), which stated that ev3 would "commit to funding based on the projections prepared by its management to ensure that there is sufficient capital to achieve the performance milestones […]" When the Milestones were not achieved by ev3, Plaintiffs filed suit for breach of contract, breach of the implied

[1] The details for each Milestone and the corresponding payments have been fully described in this Court's prior opinions in this case.
[2] Merger Agreement, Section 9.6.

covenant of good faith and fair dealing, fraudulent inducement, and violations of the California Corporations Code.

Prior to the trial, ev3 submitted various motions in *limine*, including motions to exclude evidence relating to the funding provision of the Letter of Intent and pre-merger communications contradicting the plain language of the Merger Agreement. The Court ruled that Section 9.6 of the Merger Agreement, the provision concerning ev3's obligations to fund and pursue the Milestones, was unambiguous and that parol evidence would be inadmissible to vary its terms. The Court also permitted evidence and argument relating to the funding provision of the March 15, 2002 Letter of Intent ("Letter of Intent").

After a nine-day trial, the jury rendered a verdict finding that ev3 breached the Merger Agreement and that Plaintiffs were entitled to $175 million in damages, which represented the sum of the four Milestone payments. The jury found that ev3 did not commit fraud. After the close of the evidence, ev3 submitted a motion for judgment as a matter of law. The Court took the matter under advisement pursuant to Rule 50 and submitted the case to the jury without ruling on the motion. ev3 then submitted a renewed motion for judgment as a matter of law and a motion for new trial or, in the alternative, remittitur.

Discussion

I. DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Superior Court Rule 50 sets forth the proper procedure for filing a motion for judgment as a matter of law. Under Rule 50(a)(1)

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the Court may determine the issue against the party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

The Court must view the evidence in the light most favorable to the nonmoving party and determine whether the evidence and all reasonable inferences justify a jury verdict in favor of the plaintiff.[3]

A party may file a motion for judgment as a matter of law any time before the case is submitted to the jury, but that motion "shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment."[4] Where a motion is not granted, a party may file a renewed motion for judgment as a matter of law within 10 days after the judgment.[5] A "renewed motion" should

[3] *Mumford v. Paris*, 2003 WL 231611, at *2 (Del. Super. Jan. 31, 2003).
[4] Rule 50(b)
[5] *Id.*

actually *renew* a prior motion for JML.[6] In other words, the moving party cannot present new legal theories or arguments not advanced in the original motion.[7]

ev3 moved for judgment as a matter of law on all counts contained in Plaintiffs' Amendment Complaint, but only specifically addressed three of plaintiff's claims: the common law fraud claim, the claim for breach of Milestone 4, and the claim for violation of the California securities laws.

Thereafter, ev3 filed a renewed motion for judgment as a matter of law on all claims. However, ev3 specifically argued that there was no basis for the jury to have found that ev3 failed to act with good faith in regard to Milestone 1, that Plaintiffs failed to show that the failure to achieve Milestone 2 was based on anything other than a reasonable business decision, and that there was no evidence to show that ev3's actions proximately caused its failure to achieve Milestones 3 and 4.

As stated above, ev3 cannot present new arguments in its renewed motion for judgment as a matter of law that were not specifically argued in the original motion. ev3 did not address Milestone 2, Milestone 3, or the good faith claim relating to Milestone 1 in the original motion Therefore, those arguments have been waived. Furthermore, it is not necessary to address the fraud claim since the

[6] *Atwell v. RHIS, Inc.*, 2007 WL 1153054, at *1 (Del. Super. Feb. 27, 2007).
[7] *Id.*

jury found for ev3 on that claim or the claims based on the California Corporations Code since Plaintiffs dismissed that claim. The only remaining argument to address is ev3's argument based on Milestone 4.

ev3 argues that Plaintiffs failed to meet their burden to prove that ev3's failure to act in good faith in pursuing and funding Milestone 1, which involved developing and conducting a trial for the medical device, was the proximate cause of the failure to achieve Milestone 4, which was Premarket Approval ("PMA") of the device by the Food & Drug Administration ("FDA"). Under Restatement (Second) of Contracts § 245, "[w]here a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused."[8] Comment *b* to §245 states "[a]lthough it is implicit in the rule that the condition has not occurred, it is not necessary to show that it would have occurred but for the lack of cooperation. It is only required that the breach have contributed materially to the non-occurrence."[9] Plaintiffs introduced evidence that Milestone 4 was contingent upon the submission of the IDE Application, which was the basis for Milestone 1. Although ev3 is correct that is not possible to predict with certainty that Milestone 4 would have been achieved, once Plaintiff showed that ev3 did not pursue Milestone 1 in good faith, Plaintiffs

[8] Restatement (Second) of Contracts § 245; *WaveDivision Holdings, LLC v. Millennium Digital Media Sys., L.L.C.*, 2010 WL 3706624, *14-15 (Del. Ch. Sept. 17, 2010).
[9] Restatement (Second) of Contracts § 245, Comment *b.*

only had to show that that breach materially contributed to the non-occurrence of Milestone 4.

II. DEFENDANT'S MOTION FOR NEW TRIAL OR REMITTITUR[10]

A. Standard of Review

A motion for new trial may be joined with a motion for judgment as a matter of law.[11] "A new trial may be granted as to all or any of the parties and 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 trial have heretofore been granted in the Superior Court."[12] A jury's verdict should be set aside only when its "manifestly and palpably against the weight of the evidence, or for some reason, justice would miscarry if the verdict were allowed to stand."[13] The Court's duty "when considering a motion for a new trial, the Court weighs the evidence in order to determine if the verdict is one which a reasonably prudent jury would have reached."[14]

B. Language from Letter of Intent

Defendant argues that the Court should grant a new trial because the Court allowed Plaintiffs to introduce evidence and argument regarding the funding

[10] Defendant requested that the Court set aside the verdict and order a new trial without mentioning the grounds under which remittitur is required. Therefore, the Court will not address remittitur.
[11] Rule 50(b).
[12] Del. Super. Ct. Civ. R. 59(a).
[13] *Burgos v. Hickok*, 695 A.2d 1141, 1145 (Del. 1997)(citing *Storey,* 401 A.2d at 465).
[14] *Id.* at 1144-45.

provision in the Letter of Intent. The Court allowed Plaintiffs to introduce the funding provision of the letter of intent because the Letter of Intent was expressly incorporated into the Merger Agreement via Section 16.9; therefore, it was not barred by the parol evidence rule. The funding provision of the letter intent states that "ev3 will commit to funding based on the projections prepared by its management to ensure that there is sufficient capital to achieve the performance milestones […]"[15] Section 16.9 states

> This Agreement contains the entire understanding among the parties hereto with respect to the transactions contemplated hereby and **supersede and replace all prior and contemporaneous agreements and understandings**, oral or written, with regard to such transactions, **other than the Letter of Intent, dated March 15, 2001, as amended. […]**[16]

"The parol evidence rule bars 'evidence of additional terms to a written contract, when that contract is a complete integration of the agreement of the parties.'"[17] Such evidence "'may not be used to interpret a contract or search for the parties' intentions where the contract is clear and unambiguous on its face.'"[18] However, where a written contract "expressly recognizes the existence of other agreements between parties, these may be shown."[19] Here, the parties expressly

[15] March 15, 2002, Letter of Intent.
[16] Merger Agreement, Section 16.9 (emphasis added).
[17] *Peden v. Gray*, 886 A.2d 1278 (Del. 2005(TABLE), at *2 (quoting *Teeven v. Kearns,* 1993 WL 1626514, at *3 (Del.Super.Ct. Dec.3, 1993)).
[18] *Id*.
[19] *Arthur Jordan Piano Co. v. Lewis*, 154 A. 467, 469 (Super. Ct. 1930)(quoting 22 C. J. 1253).

contracted to include the Letter of Intent into the Merger Agreement. Therefore, the Letter of Intent and its funding provision did not constitute additional terms and testimony related to them was not parol evidence.

Defendant argues that the funding provision was "expressly nonbinding" based on the fact that the funding provision in the Merger Agreement, Section 9.6, which stated that ev3's obligation to provide funding "shall be at [ev3's] sole discretion, to be exercised in good faith" was to apply "[n]otwithstanding any other provision to the contrary".[20] The funding provision in the Letter of Intent requires ev3 to carry out its obligation to fund the Milestones based on projections by management. The funding provision in the Merger Agreement requires ev3 to carry out its obligation to fund the Milestones based on its "sole discretion, to be exercised in good faith." The funding provision in the Letter of Intent does not contradict the good faith standard in Section 9.6 of the Merger Agreement.

C. Pre-Contractual Statements and Rebuttal Evidence

ev3 argues that the Court wrongfully permitted Plaintiffs to introduce evidence and argument regarding pre-contractual statements in support of their fraud claim without allowing ev3 to rebut that evidence.[21] ev3 further

[20] Merger Agreement, Section 9.6.
[21] Def. Mot. New Trial, Ex. E, 4/22/2013 (Lesh) Trial Tr. at 31:3-23, 32:1-6, 36:11-37:20;(Robertson) at 169:6-170:4 (Dkt. 347).

argues that allowing evidence of the fraud claim created "prejudicial spillover" and warrants a new trial on that basis.[22]

The pre-contractual statements introduced by Plaintiffs were admissible because they related to the representations and reliance required to support Plaintiffs' fraud claim and not to contractual construction. Thus, the statements were not barred by the parol evidence rule.[23] ev3's argument that it was unable to introduce evidence to rebut the pre-contractual statements is without merit since those statements related to fraud and the jury found in ev3's favor on that claim.

D. Instruction regarding the Meaning of Good Faith

ev3 also moves for new trial based on the Court's purported failure to adequately instruct the jury on the meaning of "good faith." The Court instructed the jury that

> Good Faith is a state of mind consisting in:
>
> (1) Honesty in belief or purpose.
> (2) Faithfulness to one's duty or obligation.

[22] ev3 argues that the fraud claim was "meritless," that it should have been dismissed at the summary judgment stage, and that the failure to dismiss the claim along with the Court's refusal to allow ev3 to submit rebuttal evidence relating to the pre-contractual statements constituted "prejudicial spillover." The Court found that an issue of fact existed as to Plaintiffs' fraud claims; therefore, it was not "clear" that the evidence did not support the claim or that it should not have been submitted to the jury. *Contra Estate of Alberta Rae v. Murphy*, 2006 WL 1067277, at *3 (Del. Super. Mar. 13, 2006) *aff'd sub nom. Estate of Rae v. Murphy*, 956 A.2d 1266 (Del. 2008)(granting summary judgment were it was "clear" that the evidence did not support a claim for punitive damages.)

[23] *See Scott-Douglas Corp. v. Greyhound Corp.*, 304 A.2d 309, 315 (Del. Super. 1973).

(3)Observance of reasonable commercial standards of fair dealing in a given trade or business; or
(4)Absence of intent to defraud or to seek unconscionable advantage.

Good faith performance of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the party.[24]

Although ev3 requested that the Court include additional language, ev3 ultimately accepted the language in the Court's jury instruction on "good faith."[25] Therefore, ev3 has waived its opportunity to challenge the language in the instruction. Nevertheless, ev3 did challenge the Court's refusal to include the additional language involving bad faith and a rule stating that party has a right to include its own financial considerations when exercising good faith.

Jury instructions "need not be perfect [] and a party does not have a right to a particular instruction in a particular form."[26] Instead, the trial court is only required to provide jury instructions that "give a correct statement of the substance of the law [which are] 'reasonably informative and not misleading.'"[27] The Court should first rely on the pattern jury instructions; although, such reliance is not dispositive because the instructions may require modification based on the law and

[24] Jury Instructions, at p. 11.
[25] Trial Tr., 4/29/13, 151:1-5 ("Your Honor, we would take the definition as it stands, and then in the proposed instruction that we offered add the language.")
[26] *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002).
[27] *Id.*(quoting *Cabrera v. State,* 747 A.2d 544, 545 (Del.2000)); *Hankins v. State*, 976 A.2d 839, 842 (Del. 2009).

facts of the case.[28] However, if the jury instructions, viewed as a whole, are reasonably informative and not misleading, those instructions will be sufficient.[29]

The Court is not persuaded by ev3's argument that the instruction should have included a rule that "a party is entitled to take into account their own financial considerations in exercising rights in good faith."[30] The Court's instruction follows the pattern jury instructions and is "reasonable informative and not misleading." Furthermore, it is consistent with the Chancery Court's rationale in *Policemen's Annuity & Benefit Fund of Chicago v. DV Realty Advisors LLC*, 2012 WL 3548206 (Del. Ch. Aug. 16, 2012), a case in which the court was required to determine "some rubric" to define "good faith" in the absence of the parties' express definition by which to define a contractual, discretionary "good faith" standard.[31]

The Court also notes that no error was committed when it allowed Plaintiffs to quote Mr. Spencer's, ev3's founder, deposition testimony regarding his definition of good faith in the opening statement, despite *later* ruling that it was inadmissible.[32] The Court informed the jury in the beginning of trial and before

[28] *Id.*
[29] *See Id.*
[30] Def. Reply Br., Mot. for New Trial, at p.3.
[31] *Policeman's Annuity,* 2012 WL 3548206, at *12-14.
[32] *See Wilson v. State*, 950 A.2d 634, 640 (Del. 2008).

deliberation that statements that an attorney makes in opening or closing arguments are not evidence.

E. Special Verdict Form

The Special Verdict Form was adapted from the Model Jury Instructions and required the jury to answer whether "ev3 breach[ed] the Merger Agreement" and whether "the Defendant's breach was the proximate cause of some or all of the damages to plaintiffs." Ev3 argues that the form failed to instruct the jury to find breach and causation independently for each Milestone. The Court's use of the model jury instructions as the basis for the special verdict form did not constitute prejudicial error.[33]

Conclusion

For the foregoing reasons, Defendant's renewed motion for judgment of a matter of law and motion for new trial or remittitur are **DENIED** and

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.

[33] *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002); *See Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 542 (Del. 2006)("The trial judge did not abuse her discretion because her response was intuitively accurate and complied with the pattern jury instructions"); *See also Spencer v. Goodill*, 17 A.3d 552, 557 (Del. 2011) ("The pattern jury instructions 'reflect the collective effort of several distinguished jurists and practicing attorneys' and are a 'valuable resource for the bench and bar').