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Case Number 62,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EXPRESS SCRIPTS, INC. and UNITED BIOSOURCE LLC,	)	
Defendants-Below, Appellants / Cross-Appellees,	)	No. 62, 2020
v.	)	Court Below: Superior Court of the State of Delaware,
BRACKET HOLDINGS CORP.,	)	Consol. C.A. No. N15C-02-233-WCC CCLD
Plaintiff-Below, Appellee / Cross-Appellant.	)	PUBLIC VERSION FILED JUNE 26, 2020

OPENING BRIEF OF DEFENDANTS-BELOW, APPELLANTS / CROSS-APPELLEES EXPRESS SCRIPTS, INC. AND UNITED BIOSOURCE LLC

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NATURE OF PROCEEDINGS

This appeal involves an accounting dispute that arose out of an acquisition agreement negotiated and executed by sophisticated parties that expressly precluded any extra-contractual recovery absent "delibera[te]" fraud. A2582-A2583, 9.6(d). Yet Plaintiff Bracket Holding Corp. ("Bracket" or "Plaintiff") recovered for reckless fraud without showing deliberate conduct, without allowing the jury to see key evidence disproving Bracket's claimed reliance, and without connecting its misplaced damages analysis to any fraud. Only by ignoring the terms of the parties' contract and established bounds of Delaware law, therefore, did Plaintiff transform an accounting dispute into a fraud case and recover damages bearing no fair relation to any alleged fraud.

Defendants Express Scripts, Inc. ("ESI") and its former subsidiary United BioSource LLC ("UBC") sold three pharmaceutical research and development ("R&D") companies (together, the "Company") to Bracket, a holding company formed for the acquisition by private equity firm Parthenon Capital Partners, LP ("Parthenon"). After many months of detailed due diligence, these sophisticated parties entered into a Securities Purchase Agreement (the "SPA"), and Bracket bought the Company in August 2013 for $187 million. The SPA supplied and defined the only actionable representations and warranties. A2552, 3.26.

Soon after closing, the pharmaceutical R&D industry experienced a slump, dragging down the Company's financial results and valuation. At the same time, Plaintiff purported to identify approximately $10 million in potential accounting errors related to unbilled receivables. A264. Plaintiff then proceeded to complain about the dates on which the Company recognized revenue derived from its customer contracts and the revenue-recognition policies the Company had employed throughout its history, when compared and contrasted with Plaintiff's new, preferred revenue-recognition policies. A269-A270. Instead of following the dispute-resolution process agreed to in the SPA, Plaintiff sued ESI and UBC, contending that the Company's longstanding (and fully disclosed) accounting practices were fraudulent.

Plaintiff's claim ultimately totaled more than $110 million, even after Bracket sold the Company for [redacted] *see* A2834, and even after Bracket [redacted] that the sellers provided under the SPA to cover any breach of the financial representations and warranties. *See* A556-A594; Ex. A at 11-12. When Plaintiff grasped even further for punitive damages post-trial, the Superior Court decried its efforts as an "affront to and … embarrassment for our civil justice system," observing that Plaintiff's "continued

effort to impose a punitive damage award is not born[] from a principled belief that the Defendants' conduct warrants additional punishment … but it is simply their aim to obtain a greater monetary award." Ex. I at 49.

In truth, the same overreach underlies Plaintiff's entire case. Because the Superior Court failed to hold Plaintiff within the established limitations of the SPA and governing Delaware law, this Court should order a new trial.

As it went to the jury, Plaintiff's fraud case rested on faulty foundations. In negotiating the SPA with the benefit of industry-leading attorneys and consultants (Kirkland & Ellis, Bryan Cave, Credit Suisse, Ernst & Young, and KPMG), these "sophisticated parties," Ex. I at 44, expressly limited liability such that Plaintiff could not recover beyond the applicable R&W Insurance Policy for anything short of "delibera[te]" fraud. A2582-A2583, 9.6(d). By instructing the jury that it could find for Plaintiff based on mere ***recklessness***, the Superior Court broke from that express agreement, its own pre-trial ruling, and decisions of the Court of Chancery enforcing such agreements.

Beyond that, the Superior Court erroneously precluded testing at trial of the reliance element of Plaintiff's fraud claim: When Defendants tried to introduce compelling evidence that Plaintiff had not in fact relied on the only financial statements at issue in arriving at its purchase price, the Superior Court excluded

Defendants' evidence by reasoning that Plaintiff's reliance had been summarily established through its counsel's pre-trial representations—representations that contradicted, *e.g.*, a sworn affidavit from Plaintiff's own witness. As a result, the jury was instructed to find for Plaintiff under a recklessness theory expressly prohibited by the SPA, on a skewed record that assumed reliance.

Similarly defective is Plaintiff's theory of the alleged accounting fraud, as credited by the jury. Bracket's accounting expert testified about alleged fraud and damages ***without regard for the SPA's underlying representations***. Upon comparing the Company's reported revenues (derived from its disclosed, historical accounting practices) to his recalculation of its revenues (derived from the expert's preferred revenue-recognition methodology), he attributed the differential to fraud, even though the Company expressly disclosed pre-acquisition that it was not following the expert's preferred revenue-recognition methodology. Fraud damages cannot stem from a seller's failure to follow accounting practices that it ***expressly told*** the buyer it was ***not*** following.

Finally, although black-letter law required that Bracket prove damages measured by the difference between the Company's value as represented and its ***actual*** value at the deal's closing, Bracket and its expert failed to supply any such assessment of the Company's actual valuation at closing. Instead, they improperly

relied on the expert's hypothetical recasting of Bracket's purchase-price calculations from months earlier.

In multiple respects, the verdict and judgment are invalid. Settled law calls for a new trial so that the disputed issues can be properly decided on a full and fair record, consistent with Delaware law and the parties' agreement.

SUMMARY OF ARGUMENT

1. The Superior Court erred by instructing the jury, at Plaintiff's urging, that a "reckless" mental state sufficed to find fraud ***notwithstanding*** Section 9.6(d) of the SPA, under which a R&W insurance policy supplied the sole and exclusive remedy for the seller's alleged breach of the relevant financial representations and warranties absent "deliberate" fraud. Of course, reckless conduct is not deliberate conduct, and reckless fraud entails a lower threshold than deliberate fraud. By instructing the jury that recklessness sufficed, the Superior Court defied the SPA's express limitations and allowed the jury to find fraud without finding any deliberate conduct by Defendants. By all indications, the jury credited Plaintiff's theory of reckless (rather than deliberate) fraud in finding for Plaintiff, contrary to the SPA.

2. The Superior Court also erred by effectively granting summary judgment for Plaintiff on the reliance element of its fraud claim, even though Plaintiff never moved for summary judgment. On that erroneous basis, the Superior Court precluded Defendants from introducing telltale evidence that Plaintiff did ***not*** rely on the ***only*** financial statements represented in the SPA (those covering the period ending March 31, 2013) and from alerting the jury that Plaintiff admitted it relied on ***later*** financial statements that (as the Superior Court had correctly ruled on summary judgment) were ***not actionable*** under the SPA. Although reliance poses a

classic factual question reserved for the jury, the Superior Court withheld key evidence from the jury that Plaintiff never relied on the only financial statements grounding its claims.

3. The Superior Court abused its discretion by admitting inapposite calculations by Plaintiff's expert and declining to grant a new trial and/or remittitur after the jury improperly credited the resulting expert testimony. In his testimony, Plaintiff's relevant expert admitted that ***he never connected his calculation of allegedly overstated revenue to any misrepresentation in the SPA***. To the contrary, he arrived at his conclusions only by faulting the revenue-recognition policy that had been ***disclosed*** through due diligence. Plaintiff cannot recover damages for fraud that are untethered to any alleged fraud.

4. Finally, the Superior Court abused its discretion by letting Plaintiff calculate and recover damages without proving the Company's actual value at closing and by denying a new trial and/or remittitur on this basis. As the jury instructions reflected, Delaware law requires that damages be calculated based on the difference between what Plaintiff paid and what Plaintiff obtained in terms of the Company's actual market value, as measured at closing. The jury's award cannot stand consistent with this black-letter requirement.

STATEMENT OF FACTS

A. The Company And Its Disclosed, Historical Accounting Practices

The Company[1] provides technology and expertise to pharmaceutical manufacturers to aid in developing drug products through clinical trials, A246, via two major divisions: (1) Scientific Services and (2) eClinical. A1412. This dispute concerns the longstanding accounting practices of Scientific Services, *id.*, which helps pharmaceutical manufactures set up and run clinical drug trials, as explained by the former Controller and Vice President of Finance, Jim Stewart, Ex. I at 3.

Throughout its history (until the acquisition by Bracket), Scientific Services had generally recognized revenue from contracts with pharmaceutical manufacturers when it performed work, instead of amortizing revenue over a contract's life or recognizing revenue on the date payment was contractually due (which Plaintiff would later advocate as the "billing date" or "fixed fee due date"). *See generally* A1240-A1243; A1740; A1998. Because Scientific Services performed much of its set-up work early in the clinical trial process (*e.g.*, establishing protocols and translating them into multiple languages), it generally recognized a substantial amount of revenue early in a project's life, sometimes even before a formal contract

[1] The Company is composed of Bracket Global Holdings LLC, Bracket Global K.K., and Bracket Global Limited. A294.

was signed, *see, e.g.*, A359-A360. Although there is no dispute that Scientific Services employed these accounting practices historically, A359; A365; A1226, including through a series of earlier transactions, *see* A348, and these accounting practices were expressly disclosed during diligence, Plaintiff made a fraud case out of them following the acquisition. *See* A262-A273.

B. ESI Acquires And Markets The Company

The Company in its present incarnation was formed in 2011, after UBC merged two of its subsidiary divisions together. A2174. Medco Health Solutions ("Medco") had owned UBC until ESI, another pharmacy benefit manager ("PBM"), acquired Medco in April 2012. Ex. C at 3. "[Q]uickly" thereafter, ESI decided to sell several Medco subsidiaries, including the Company, for lack of "a strategic fit" with its core PBM business. Ex. A at 19. Accordingly, ESI and UBC "began the process to sell" the Company "within months" of acquiring it, around fall 2012. *Id.*

C. Parthenon Agrees To Acquire The Company After An Extensive Due Diligence Process

Before marketing the Company, "ESI hired [Credit Suisse] as a financial advisor and [KPMG] to perform seller-side due diligence." Ex. I at 3. As part of that diligence, Credit Suisse prepared a Confidential Information Memorandum ("CIM"), and KPMG prepared a Quality of Earnings ("QoE") report. *Id.* at 3-4; A2143-A2216; A2217-A2291. These documents reflected the Company's historical

earnings before interest, tax, depreciation, and amortization ("EBITDA"), and current and projected estimates of working capital. Ex A. at 2-3. The financial figures were derived from historical, unaudited financial statements and projections supplied by the Company's management. *Id*.

In preparing to sell, ESI memorialized the Company's accounting practices, including its preexisting revenue-recognition policies. Defendants provided a memo in due diligence explaining that the Company recognized revenue "based upon the proportion of work completed on a given project." A2293. KPMG's QoE report further explained that, for any services offered by Scientific Services, the Company recognized revenue "as deliverables (units) [were] delivered to the customer." A2253. In other words, the Company represented that it recognized revenue ***when*** it did the work for the customer—not *pro rata* over the life of a contract or when the contract authorized billing (as Plaintiff would later prefer).

ESI provided those documents to Parthenon. Ex. A at 4. In early 2013, Parthenon met repeatedly with Defendants' representatives and the Company's management, and retained Ernst & Young to aid its diligence, "which included review and consideration of the QoE Report, the Company's financials, and customer [pharmaceutical manufacturer] agreements." *Id.* On April 13, 2013, Parthenon submitted a letter of intent to purchase the Company. *Id.*

In early June 2013, UBC and Credit Suisse provided Parthenon with the Company's May 2013 financial statements. *Id.* at 5. Ultimately, Parthenon agreed to purchase the Company for $187 million. Ex. I at 4. Although Parthenon did not disclose its pricing methodology to Defendants, A536; A554, it purports to have set its purchase price by applying a multiple to the Company's EBITDA, as provided in the financial statements covering a trailing twelve-month period (the "TTM period") preceding the deal. *See* A693-A694; A1815; A1779-A1780; A2663.

After completing diligence, Parthenon formed Bracket to complete the transaction. Ex. A at 5. UBC and Bracket entered the SPA on July 12, 2013, and the transaction closed August 14, 2013. *Id.* at 5-6.

D. The Sophisticated Parties Allocate Risk In The SPA

The SPA consummated "a transaction between two sophisticated parties," Ex. I at 44, that allocated between them the risk of any inaccuracy. In Section 3.26 of the SPA, ESI and UBC "expressly disclaim[ed]" any representations or warranties other than those "contained in this Article III." A2552. Central to this appeal are the specific representations concerning certain of the Company's Financial Statements, which Section 3.4 generally represented to be accurate. A2536.

In light of Parthenon's extensive diligence, the SPA narrowly defined the "Financial Statements" that the seller represented to be accurate. The only such Financial Statements were:

> "(a) the unaudited combined balance sheets … ***as of March 31, 2013*** (the "Balance Sheet"), and the related statements of income for the three-month period then ended; (b) the unaudited combined balance sheets … as of December 31, 2012 and the related statements of income for the twelve-month period then ended; and (c) the unaudited combined balance sheets … as of December 31, 2011, and the related statements of income for the twelve-month period then ended."

A2517, 1.71 (emphasis added). No representations were made as to any later financial statements.

The SPA entitled the buyer to indemnification for any losses "arising from … any breach of any of the Fundamental Representations made in Article III by Parent," A2578, 9.1(b), none of which is at issue. A2517, 1.74. As to any alleged breach of any other representation, including the financial-statement representations at issue, the buyer's "sole and exclusive remedy" under the SPA was confined to the R&W Insurance Policy, A2523, 1.138, subject to one express carve-out. A2582-A2583, 9.6(d); *see also* A2566, 6.6.[2]

[2] Bracket [redacted] Allied World Assurance Co., the R&W Insurance Policy carrier. *See* A492, A556-A594; Ex. A. at 11-12.

Specifically, the parties agreed that Bracket could seek relief ***beyond*** the R&W Insurance Policy ***only*** for "any delibera[te] fraudulent (i) act, (ii) statement, or (iii) omission." A2583, 9.6(d).[3] The SPA correspondingly distinguished deliberate fraud, which could trigger additional liability, from mere mistake or inaccuracy. *See* A2553, 4.6 ("The R&W Policy shall not provide for, or increase, any liability … except as may result in the case of any deliberate fraudulent (a) act, (b) statement or (c) omission.").

In sum, the SPA afforded a sole remedy confined to the R&W Insurance Policy. Bracket could not recover anything more without showing ***deliberate*** fraud.

E. The Transaction Closes, And Parthenon Disputes The Company's Disclosed Accounting Practices

After the transaction closed, the Company experienced a market-wide downturn. A1545-A1547; A1020. Amidst that market decline, Parthenon claimed to discover that Defendants overstated the Company's EBITDA for the TTM periods ending on March 31, 2013 and May 31, 2013 (a period for which Parthenon obtained no representations); overstated the Company's balance of unbilled receivables as of

[3] Although Section 9.6(d) contains a typographical error, referring to a "deliberant [*sic*] fraudulent (i) act," A2583, 9.6(d), Plaintiff's 30(b)(6) witness confirmed that "deliberant" meant "deliberate," A543, as also found (without the typographical error) in Section 4.6, A2553.

August 14, 2013 (another period for which Parthenon obtained no representations); and understated the Company's balance of deferred-revenue liability as of that same date. A245; A254. Plaintiff claimed these purported overstatements and understatements somehow reduced the Company's actual value by over $80 million, or nearly half the $187 million purchase price, even though Parthenon ***never*** valued the Company ***below $156.7 million*** in its own investment portfolio. A603.

Bracket leaned heavily on its expert, Louis Dudney, retained in 2014, to define the alleged revenue overstatement. As the Superior Court noted, successful challenges to "Bracket's expert testimony regarding his revenue model ... would have effectively refuted Bracket's claims." Ex. I at 44.

Dudney built a model that purported to calculate what the Company's revenue should have been consistent with the revenue-recognition policies it represented in due diligence. A1848-A1849; A697-A703. But that is not what Dudney did. Instead, he made assumptions about the Company's revenue-recognition policies that contradicted the actual representations in due diligence and disregarded the SPA's disclosures. Ignoring on-point disclosures, Dudney started from scratch in inventing his own approach to revenue recognition (never represented by the Company) that divided the Company's deliverables into two categories: the first for a large list of items he treated as software-related and the second for other services.

For the first category, encompassing many services that the Company never treated as software-related, Dudney amortized revenue on a straight-line basis throughout the life of the contracts, A1849-A1850; A1866; for the second category, he recognized revenue on the contractually-specified billing date ("fixed fee due date"), A1998. Dudney admitted at trial that his model did not track the Company's revenue-recognition policies as disclosed. A1866-A1868.

Neither of Dudney's revenue-recognition methods comported with the Company's ***actual*** disclosures, *id.*, of its longstanding accounting policies, *see* A1226. As Dudney's own drafts recognized, his methodology was "not part of the disclosures made to Parthenon during due diligence." A2610. First, the Company disclosed through the QoE report that most of its revenues were not software-related and that it recognized revenue when it delivered the work. Only by recharacterizing much of this revenue as software-related did Dudney delay revenues by amortizing them at a consistent rate over a contract's lifespan—thereby moving those revenues out of the TTM period and leading Dudney to maintain that TTM revenues were overstated. *Compare* A2253 *with* A1302-A1303 *and* A1866-A1868. Second, for other revenues, the Company disclosed in a revenue memorandum that it recognized revenue as it performed the work. A2292-A2293. Dudney revised the Company's recognition of revenue on these contracts based on when payment from the customer

was contractually owed, which Dudney dubbed the "fixed fee due date." A1998. That approach not only broke from the Company's disclosed, historic practices, but ignored changes in scope of work that frequently arose after contracts were executed and were sometimes documented only belatedly in change orders. A368-A369; A1740-1741.

Dudney admitted at trial that his adjustments to the timing of revenue recognition on these active contracts generally did not bear upon the cash the Company ultimately received for real work it performed.[4] What his adjustments did do is dramatically reduce revenue recognized in the TTM period. Because the Company frequently recognized revenue early in a contract period (when it did much of its work setting up clinical trials), recognizing revenue over the life of a contract or on billing dates enabled Dudney to delay revenue recognition in his made-for-

[4] Although the "vast majority," A1202; *see also* A1886-A1887, of Plaintiff's asserted damages arose from Dudney's recalculation of revenue on active contracts, Dudney also claimed "less than 3%" of the overstated revenue arose from "non-existent" contracts, A1886, and roughly 30% in overstated revenue from closed or inactive contracts, *id.* As with his treatment of active contracts, however, Dudney disregarded the Company's express policy to recognize revenue when work was done: the "non-existent" category concerned contracts that the Company was already performing (pending formal contract execution), while the "closed" category concerned contracts that the Company continued performing pending formal contract extension via change order. A371-A372.

litigation model. The upshot was to decrease revenue during the TTM period while increasing revenue post-acquisition—thereby spiking Bracket's claimed damages.

F. Proceedings Below

Bracket filed suit alleging it was fraudulently induced because ESI and UBC misrepresented the Company's financial statements. A244. In the operative amended complaint, Bracket alleged fraud and other claims against ESI, UBC, and Stewart. Ex. A at 8. The Superior Court dismissed allegations against Stewart for lack of personal jurisdiction, but permitted Bracket's claims against ESI and UBC. A294.

Following discovery, ESI sought summary judgment because Bracket lacked evidence of deliberate fraud and causation. A477-A519. ESI also sought to exclude Dudney's testimony because he failed to calculate the Company's actual value at the time of the closing, as required under Delaware law, and failed to connect any alleged discrepancies in when revenue was recognized (the basis for his damages calculation) to any alleged misrepresentation. A612-A643.

In denying summary judgment, the Superior Court expressly recognized that reckless conduct would not satisfy Plaintiff's burden and "Plaintiff will be required to establish that the intent of Defendants ... was ***to knowingly create*** false financial documents." Ex. A at 19-20 (emphasis added). The Court also appeared to

recognize that Plaintiff would have to show "***those documents would be relied upon by Plaintiff*** in determining whether to purchase the business." *Id.* (emphasis added).

In addressing *Daubert* motions, the Superior Court limited the Financial Statements underlying Bracket's claimed reliance to those ending March 2013, because those were the only Financial Statements "certified in § 3.1 of the SPA" and "set forth in disclosure statement § 3.4(a)." Ex. A at 29. It refused to exclude Dudney, however, despite articulating strong concern that his trial testimony would be "like I got a big mush and so I'm going to throw you the mush, jury, and hope you figure it out. Because it is a big mess .... [T]hose spillover kind of effects of doing it in a big picture world is unfair." A1385-A1386. According to the Superior Court's ruling, its stated concerns translated "simply [to] areas of cross examination" rather than "excluding [Dudney] as a witness." A1386.

Then, at trial, the Superior Court changed the legal framework in ways that defy explanation.

First, contrary to its earlier ruling and over Defendants' objections, the Court instructed the jury that it could find fraud if "[D]efendant[s] ... were ***recklessly indifferent*** as to whether [a representation] was false," and that "Plaintiff is required to establish the defendant, at the time the [SPA] was executed, knew the financial documents attached to the SPA were false ***or to be recklessly indifferent*** as to

whether they were false." A2088 (emphases added). The jury instructions for aiding and abetting fraud similarly encompassed mere recklessness. *Id.*

Second, the Superior Court excluded key evidence that Plaintiff had ***not*** relied on the March 2013 financial statements to establish its purchase price, including a sworn affidavit from one of Parthenon's testifying executives indicating the purchase price was based on the **May** 2013 financial statements and that same executive's email pointing to **June** financial statements, *see infra* II.C. The Court reasoned that its prior ruling limiting Plaintiff's fraud case to the **March** 2013 financial statements (because those were the latest statements for which representations were made) somehow ***established*** that Plaintiff ***did rely*** on those statements so as to foreclose evidentiary contest at trial. A1778-A1780; A1898-A1899.

Following trial, the jury found that ESI and UBC committed fraud and that ESI aided and abetted UBC in committing fraud. Ex. H. On the one count for which a reckless state of mind was insufficient, however, A2089, the jury found that ESI had not conspired with UBC. Ex. H. The jury awarded Plaintiff $82.1 million in fraud damages, all based on Dudney's presentation. *Id.*[5]

[5] The jury apparently multiplied the alleged inflated earnings number that Dudney calculated for the March 2013 TTM period ($8.4 million) by the 6.3x

Defendants filed a renewed motion for judgment as a matter of law, motion for a new trial, and motion for remittitur. A2613-A2651.

The Superior Court denied those motions. Ex. I. It also denied Plaintiff's motion for a new trial on punitive damages, deeming "the Plaintiff's continued insistence" on obtaining punitive damages "an affront to and an embarrassment for our civil justice system." *Id.* at 49. The Superior Court granted Defendants' motion to stay execution of judgment pending resolution of appeal, recognizing their post-trial motions "involve serious legal questions." *Id.* at 26.

Defendants timely noticed this appeal.

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aggregate EBITDA multiple that Parthenon allegedly applied in calculating the purchase price, which equals $52.9 million, then added Dudney's claimed Working Capital shortfall ($29.2 million) to arrive at total damages of $82.1 million. *See* A1857; A1473.

ARGUMENT

I. The Superior Court Erred By Instructing The Jury That A "Reckless" Mental State Sufficed To Find Fraud, Contrary To The SPA

A. Question Presented

Whether the Superior Court erred by instructing the jury that a "reckless" mental state sufficed to find fraud, despite the parties' unambiguous agreement that nothing short of deliberate fraud would suffice.[6]

B. Scope Of Review

This Court "interpret[s] contracts *de novo*." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010). "A jury instruction challenged on appeal is subject to *de novo* review … to determine whether the instruction correctly stated the law and enabled the jury to perform its duty." *Spencer v. Wal-Mart Stores E., LP*, 930 A.2d 881, 885 (Del. 2007) (citation and quotations omitted).

C. Merits Of Argument

1. The Superior Court Departed From The SPA

Section 9.6(d) of the SPA states that, for anything other than breach of a Fundamental Representation, the buyer's "sole and exclusive remedy" is the R&W Insurance Policy, "except in the case of any delibera[te] fraudulent (i) act, (ii) statement, or (iii) omission." A2582-A2583. By using the term "deliberate," the

[6] Issue preserved below. Ex. B. at 61-71; A2002; A2626-A2630; A2746-2752.

parties clearly specified the scienter requirement for a fraud claim that would enable Bracket to avoid the SPA's "sole remedy" provision. Because the alleged misrepresentations undisputedly do not implicate the SPA's Fundamental Representations but only the financial statements represented in Sections 3.4(a) and 2.4(a), A256-A257, Plaintiff's sole recourse under the SPA was confined to the R&W Insurance Policy, [redacted] *See* A492; A556-A594; Ex. A at 11-12. Simply stated, Plaintiff cannot recover beyond the SPA without demonstrating deliberate fraud.

The SPA's clear and unambiguous terms should be accorded their "ordinary meaning." *Riverbend Community, LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 335 (Del. 2012). Unlike recklessness, which "involves ... a lesser degree of fault than intentional wrongdoing," *Recklessness*, BLACK'S LAW DICTIONARY (11th ed. 2019), "deliberate" conduct must be "intentional; premeditated; fully considered." *Deliberate*, BLACK'S LAW DICTIONARY (11th ed. 2019).[7] The Superior Court erred by reading the word "deliberate" out of the SPA.

Courts distinguish between deliberate and reckless conduct. *See Greenstar, LLC v. Heller*, 814 F. Supp. 2d 444, 453 (D. Del. 2011) ("intentional fraud" requires

[7] Parthenon's 30(b)(6) witness confirmed the parties' shared this understanding, testifying that deliberate means "methodical, calculated, intentional." A544.

"acting in more than a reckless, grossly negligent, or negligent manner") (quotations omitted); *Weinberger v. UOP, Inc.*, 1985 WL 11546, at *2 (Del. Ch. 1985) (acknowledging defendant's conduct "may not have constituted a deliberate fraud" although "nondisclosure of relevant information necessarily constitutes a misrepresentation … even if it was done unintentionally … rather than deliberately"); *Davis v. Twp. of Hillside*, 190 F.3d 167, 174 n.3 (3d Cir. 1999) ("Because the officer's actions were reckless, *but not ... intentional or deliberate*, we affirmed") (emphasis added) (alterations, citations, and quotations omitted); *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998) (distinguishing "deliberate or intentional injury," from "'reckless' or 'negligent'" injury).[8] Accordingly, Plaintiff needed to go beyond recklessness to establish deliberate fraud and thereby transcend the SPA's sole-remedy provision.

The Superior Court recognized as much in its summary-judgment decision: "Plaintiff will be required to establish that the intent of Defendants … was to *knowingly* create false financial documents and, recognizing those documents would

[8] The same distinction between deliberate and reckless fraud that marks the outer limit on the R&W Insurance Policy's coverage, *see* A2553, 4.6, is common to insurance policies. *See, e.g., Barrett v. Am. Country Holdings, Inc.*, 951 A.2d 735, 738 (Del. Ch. 2008) ("[I]f the Former Directors are later found liable for intentional fraud, their conduct would likely be deemed … explicitly excluded from coverage.").

be relied upon by Plaintiff in determining whether to purchase the business, they certified them as true and correct." Ex. A at 19-20 (emphasis added). At trial, however, the Superior Court did an about-face and instructed the jury, at Plaintiff's urging and over Defendants' objections, that it should find fraud and award damages if "[D]efendant[s] … were recklessly indifferent as to whether [a representation] was false." A2088.

This was error. Delaware courts have uniformly enforced agreements between sophisticated parties that allocate the risk of non-deliberate fraud and will not let "the Buyer … escape the contractual limitations on liability." *ABRY Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1064 (Del. Ch. 2006) (Strine, V.C.). *ABRY* confirms that ***reckless*** conduct will ***not*** suffice when the parties so agree, even if recklessness suffices for common-law fraud. *Id.* Such a provision evinces that "[t]he Buyer knowingly accepted the risk that the Seller would act with inadequate deliberation"; as "an experienced private equity firm that could have walked away without buying," Plaintiff "has no moral justification for escaping its own voluntarily-accepted limits on its remedies against the Seller absent proof that the Seller itself acted in a consciously improper manner." *Id*. The parties in this case are precisely such "sophisticated" companies, as the Superior Court repeatedly observed. *See, e.g.*, A1910; A2055.

Operating under the framework of the Court of Chancery's decision in *ABRY*, these parties agreed—just as other sophisticated parties have—that Bracket would bear the risk that the Company might have accidentally, inadvertently, or even recklessly misstated its financials. By choosing Delaware law and agreeing to Section 9.6 of the SPA, the parties clearly foreclosed the buyer from recovering outside the SPA absent ***deliberate*** fraud. *See ABRY*, 891 A.2d at 1062-63; *see also EMSI Acquisition, Inc. v. Contrarian Funds, LLC*, 2017 WL 1732369, at *7 (Del. Ch. May 3, 2017) (noting "Defendants claim [*ABRY*] served as a road map for the provisions they bargained for in the SPA"). *ABRY* and its progeny permit "sophisticated commercial parties to craft contracts that insulate a seller" from liability "for a contractual false statement of fact that was not intentionally made." *ABRY*, 891 A.2d at 1035. And the Court of Chancery has consistently enforced such contractual constraints on an aggrieved buyer. *See EMSI*, 2017 WL 1732369, at *8; *PR Acquisitions, LLC v. Midland Funding LLC*, 2018 WL 2041521, at *9 (Del. Ch. Apr. 30, 2018). The Superior Court erred by breaking from the SPA and Delaware precedent enforcing such express, agreed limitations on remedies. If the Superior Court's ruling in this case stands, it will create a worrisome variance in the enforceability of provisions limiting post-closing remedies—with enforcement now dependent upon which Delaware court handles the proceeding.

In its post-trial opinion, the Superior Court justified the departure from its pre-trial rulings and on-point Delaware precedent by arguing the parties' use of "one undefined term—'deliberate'—in the *indemnification* section of the SPA" cannot "alter[] the mental state required for common law fraud." Ex. I at 13 (emphasis in original).[9] But that reasoning is unsustainable.

First, the Superior Court's instructions deny meaning to the "deliberate" modifier, contrary to basic maxims of contract construction. *See, e.g.*, *United States v. Sanofi-Aventis U.S. LLC*, 226 A.3d 1117, 1129 (Del. 2020) ("We give each provision and term effect, so as not to render any part of the contract mere surplusage.") (citation and quotations omitted); *Zimmerman v. Crothall*, 62 A.3d 676, 691 (Del. Ch. 2013).

Second, Section 9.6(d) by its terms covers ***all*** potential claims between buyer and seller. It states that the R&W Insurance Policy provides the "***sole and exclusive*** remedy" for breaches of non-fundamental representations. A2583, 9.6(d) (emphasis added). Delaware courts strictly enforce such exclusive-remedy provisions,

[9] The Superior Court also cited two definitions of common-law fraud requiring only reckless indifference. Ex. I at 13. But the SPA properly defines the bounds of the fraud claim no less than it supplies the representations underlying the fraud claim, and Delaware allows sophisticated parties to structure their acquisition deals and attendant representations in precisely this fashion. *See, e.g.*, *ABRY*, 891 A.2d at 1065.

recognizing that failure to do so would "defeat the reasonable commercial expectations of the two parties." *Transched Sys. Ltd. v. Versyss Transit Sols., LLC*, 2008 WL 948307, at *2 (Del. Super. Ct. Apr. 2, 2008); *see also ABRY*, 891 A.2d at 1035. Here, after Plaintiff [redacted] without regard for the SPA's "deliberate" limitation.

Third, the parties made matters even clearer by specifying that this language should prevail over any conflicting provisions elsewhere, beginning Section 9.6(d) with "[n]otwithstanding any other provision herein to the contrary …." A2582. That preface signifies that the ensuing provision "trumps" any other SPA provision in the event of "any conflict." *See Sodano v. Am. Stock Exch. LLC*, 2008 WL 2738583, at *13 (Del. Ch. July 15, 2008), *aff'd sub nom.*, *Am. Stock Exch. LLC v. Fin. Indus. Reg. Auth., Inc.*, 970 A.2d 256 (Table) (Del. 2009); *ev3, Inc. v. Lesh*, 114 A.3d 527, 537 (Del. 2014), *as revised* (Apr. 20, 2015) (explaining the words "[n]otwithstanding any other provision in the Agreement to the contrary" "render ineffective any contrary provision in the [] agreement").

Fourth, the location of the "sole and exclusive" remedy provision within the SPA's "Indemnification" article is perfectly consistent with limiting claims between the parties themselves. *See, e.g.*, Glenn D. West, *That Pesky Little Thing Called*

Fraud: An Examination of Buyers' Insistence Upon (and Sellers' Too Ready Acceptance of) Undefined "Fraud Carve-Outs" in Acquisition Agreements, 69 BUS. LAW. 1049, 1074-1078 (2014) (surveying recent indemnification provisions that limit a buyer to an exclusive contractual remedy unless the seller has scienter associated with "actual and intentional," "willful[] and knowing[]," or "intentional or willful" fraud). Such "[d]eal-related indemnification provisions" exist precisely to "address post-closing risk allocation" by "disclaim[ing] certain claims and remedies." *EMSI*, 2017 WL 1732369, at *8 (quotations omitted). It is a "well-established rule in Delaware that where a written contract exists which includes a specific indemnification provision setting forth the rights and duties of the parties, the specific provision should govern." *Gloucester Holding Corp. v. U.S. Tape & Sticky Prods., LLC*, 832 A.2d 116, 129 (Del. Ch. 2003) (citation and quotations omitted). If anything, the fact that the "exclusive remedy" provision is found in the article addressing post-closing disputes further confirms its applicability here.

Fifth, the SPA expressly foreclosed the Superior Court's wayward use of the "Indemnification" title, *see* Ex. I at 13, to alter the specific provision at issue. Section 10.8 states that "[t]he article and section headings contained in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement." A2587. Delaware courts heed such

language and reject attempts to evade the plain meaning of a particular provision by invoking its header. *See, e.g.*, *Ostroff v. Quality Servs. Labs., Inc.*, 2007 WL 121404, at *9 n.59 (Del. Ch. Jan. 5, 2007) (heading "does not help [plaintiff]" where stock purchase agreement states that descriptive headings have no interpretive effect); *Dawson v. Pittco Capital Partners, L.P.*, 2013 WL 396181, at *2 n.9 (Del. Ch. Jan. 31, 2013).

2. The Error Requires A New Trial

By instructing the jury that Plaintiff could prevail merely by showing "recklessness," the Superior Court failed to "give a correct statement of the substance of the law." *Chrysler Corp. (Delaware) v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1034 (Del. 2003) (citations and quotations omitted). "It is fundamental that the jury have a basic understanding of the law which it is asked to apply in order to intelligently perform its duty." *Duphily v. Del. Elec. Coop., Inc.*, 662 A.2d 821, 834 (Del. 1995). Defendants had an "unqualified right to have the jury instructed on a correct statement of the substance of the law," and inaccuracy in instructing the jury requires a new trial. *R.T. Vanderbilt Co. v. Galliher*, 98 A.3d 122, 125 (Del. 2014) (citation and quotations omitted).

What is more, the Superior Court's erroneous instruction was gravely prejudicial. Plaintiff's fraud theory faulted longstanding accounting practices at the

Company that predated and transcended the acquisition at issue and relied upon an expert's after-the-fact account of what proper accounting allegedly required all along; it nitpicked the policies Defendants had disclosed to the buyer in due diligence. *See supra* at 13-16. Such a theory by no means equates with ***intentional deceit***. *See In re Ikon Office Solutions, Inc.*, 277 F.3d 658, 673 (3d Cir. 2002) ("[T]he discovery of discrete errors after subjecting [accounting work] to piercing scrutiny post-hoc does not, standing alone, support a finding of intentional deceit."); *Greenstar, LLC v. Heller*, 934 F. Supp. 2d 672, 696-97 (D. Del. 2013) (plaintiff failed to show "intentional fraud" because "[i]t is at least just as likely that [defendant] was under the mistaken impression that his omissions were irrelevant").[10]

In fighting to lower the bar to recklessness, *see, e.g.*, Ex. B at 62-65, Plaintiff signaled its concern that it would not clear the agreed bar of intentionality. And the jury effectively confirmed the absence of intentionality when it found that ESI aided

[10] Although the Superior Court's post-trial opinion took the view that Defendants "manipulated their records," Ex I. at 6, such post-trial gloss cannot substitute for a nonexistent jury finding. *Young v. Frase,* 702 A.2d 1234, 1237 (Del. 1997) ("[T]he jury is the sole trier of fact responsible for … drawing inferences from proven facts."); *North v. Owens-Corning Fiberglas Corp.*, 704 A.2d 835, 838 (Del. 1997) ("The trial court must submit all the issues affirmatively to the jury.") (citation and quotations omitted). This jury neither found intentionality, Ex. H, nor received instruction that such a finding was prerequisite to its verdict.

and abetted UBC in committing fraud, but that ESI ***did not conspire*** with UBC to defraud Plaintiff, which required intentionality. Ex. H. Tellingly, conspiracy was the lone claim for which the jury was not instructed it could rely upon recklessness ***and*** the lone claim for which the jury found ***against*** Plaintiff. A2088-A2089; *see also Levine v. Metal Recovery Techs., Inc.*, 182 F.R.D. 112, 115 (D. Del. 1998) (whereas aiding and abetting may "involve[] only recklessness," "intentional wrongdoing … typically underlies claims of conspiracy"); *Anderson v. Airco, Inc.*, 2004 WL 2827887, at *5 (Del. Super. Ct. Nov. 30, 2004) ("Unlike civil conspiracy's emphasis on explicit agreement to commit a wrong, aiding-abetting liability is elastic enough to admit a common, negligent course of action."); PROSSER, LAW OF TORTS § 41; 16 AM. JUR. 2D *Conspiracy* § 51.

Because the jury should have decided the factual question whether Defendants engaged in ***deliberate*** fraud but that question was obviated by flawed instructions, a new trial is required. *See North*, 704 A.2d at 839 (requiring new trial where "the jury was not able to engage in its initial determination of liability on all theories of recovery because of the trial court's restrictive instructions"); *see also Culver v. Bennett*, 588 A.2d 1094, 1098-99 (Del. 1991) (requiring new trial where the term "substantial factor" was erroneously included in jury instructions and "undoubtedly undermined the jury's ability to intelligently perform its duty ….").

II. The Superior Court Erred By Excluding ESI's Evidence That Bracket Did Not Rely On The March 2013 Financial Statements, Based On A *De Facto* Grant Of Summary Judgment For Plaintiff On Reliance

A. Question Presented

Whether the Superior Court erred by converting its summary judgment ruling in favor of Defendants (limiting Bracket's claim of reliance to the March 2013 financial statements) into a grant of summary judgment for Plaintiff (that Plaintiff did in fact rely on the March 2013 financial statements) for purposes of excluding Defendants' evidence disproving reliance, or, alternatively, whether the Superior Court abused its discretion by excluding Defendants' evidence.[11]

B. Scope Of Review

Where, as here, the trial court's evidentiary decision is "in reality" a "summary judgment or partial summary adjudication," this Court reviews it *de novo*, as with any grant of summary judgment. *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 499-500 (Del. 2001) (applying summary judgment standard of review to denial of motion *in limine* that "sought a ruling that 'nothing in the Court's [Summary Judgment Opinion] precludes the presentation of evidence … [to] the jury," because

[11] Issue preserved below. A1778-A1780; A1898-A1899; A1970-A1971; A2636-A2639; A2756-2758.

the motion went to summary judgment) (alterations in original); *see Ramirez v. Murdick*, 948 A.2d 395, 399 (Del. 2008).

In other circumstances, this Court would "review[] a trial judge's decision to admit or exclude evidence for abuse of discretion." *Miller v. State Farm Mut. Auto. Ins. Co.*, 993 A.2d 1049, 1052 (Del. 2010). Where a legal error underlies an evidentiary exclusion, discretion has been abused. *See id.* "If the court finds error or abuse of discretion in the rulings, it must then determine whether the mistakes constituted significant prejudice so as to have denied the appellant a fair trial." *Green v. Alfred A.I. duPont Inst. of Nemours Found.*, 759 A.2d 1060, 1063 (Del. 2000) (citation and quotations omitted).

C. Merits Of Argument

The gravamen of Plaintiff's complaint is that, because it allegedly set its purchase price based on a multiple of EBITDA during the TTM period, an alleged overstatement of EBITDA led Plaintiff to set its price higher than it otherwise would have (specifically by the amount of the overstatement in the relevant TTM period times the EBITDA multiple Plaintiff claims to have used). A244-A245. That equation turned on the specific EBITDA represented in the allegedly false financial statements that Plaintiff allegedly relied on to price the transaction. Yet Plaintiff could not get its story straight about ***which*** financial statements those were. In its

complaint (A254), internal documents (A2663), and a sworn declaration (A2659), Plaintiff claimed to have relied on the Company's **May** 2013 financial statements to set its purchase price. In other words, Plaintiff ostensibly relied on financial statements that were never represented in the SPA. Only by changing its story and representing that it set the purchase price based on the **March** 2013 financial statements did Plaintiff purport to make its fraud case at trial. Ex. A at 29.

At summary judgment, the Superior Court decided which financial statements might properly ground Plaintiff's fraud claim. Specifically, the Court ruled that any fraud claim was necessarily limited to the **March** financial statements, because those were the latest ones "that were certified in § 3.1 of the SPA" and "set forth in disclosure statement § 3.4(a)." *Id*. Plaintiff's claim of reliance on false financial statements was necessarily confined to those statements, the Court observed, because "[i]t is the representation as to these statements that Plaintiff alleges is false" and because "[i]t has also been *represented to the Court* that Plaintiff determined its pricing based upon these disclosure statements." *Id.* (emphasis added). But the Court was ***not*** asked to determine on summary judgment—nor could it have done so—that Plaintiff ***in fact relied*** on the March financial statements (rather than later ones or on other information) in setting its purchase price. This critical factual question remained to be contested and decided at jury trial.

At trial, Defendants sought to introduce compelling evidence to show that—contrary to Plaintiff's representations to the Court and testimony to the jury—Plaintiff did ***not*** in fact set its purchase price based upon the **March** financial statements. A1778-A1880; A1898-A1899; A1970-A1971. This posed a classic, pivotal, factual dispute for the jury to consider and resolve, just as it would in any fraud case.

Defendants' evidence that Plaintiff did not rely included: (1) a sworn affidavit of a Parthenon executive and witness, Jeff Stein, stating that the purchase price was based on the **May** 2013 financial statements (as to which ***no representation was made in the SPA and no proof of falsity was introduced at trial***), A2656-A2662; (2) emails between the same Parthenon executive and Plaintiff's expert's firm stating Plaintiff set its purchase price based on **June** 2013 financial statements (which, like the May statements, were ***not*** covered by any SPA representation or shown to be false), A2665; and (3) spreadsheets demonstrating the multiples Plaintiff used had nothing to do with the Company's financial statements, A2663; A2669-A2693. *See also* A1778-A1880; A1898-A1899; A1970-A1971. Especially telling is the March 2014 email between a Parthenon executive and Plaintiff's expert. There, the Parthenon executive was asked: "[W]hat is the date Parthenon utilized to calculate

the final purchase price (we've seen some indications for March and others for June 2013)?," and the executive responded, "***June***." A2665 (emphasis added).

But the Superior Court excluded all of this critical evidence so as to prevent Defendants from disputing Plaintiff's claim that it relied on the March 2013 financial statements in setting the purchase price. The court explained at trial that it premised these rulings on what it characterized as a prior "rul[ing] that the financials that were important to the decision as to how they were going to proceed [were] end of … March and beyond that, it doesn't matter." A1779; *see also* Ex. I at 15 ("The decision as to [the reliance evidence's] exclusion was set forth in the Court's Memorandum Opinion of April 11, 2019, which resolved the dispute over the appropriate TTM period.").[12] The Superior Court erred as a matter of law by effectively granting summary judgment on a disputed factual question—reliance—based on counsel's prior ***representation*** that Plaintiff relied on the March 2013 financial statements, without Plaintiff ***even seeking*** summary judgment.

[12] The post-trial order leaves no doubt that the Superior Court took it as "established before trial" that "Bracket relied upon the March 2013 financial statements in setting the purchase price for the transaction," citing a footnote to its summary judgment decision. Ex. I at 15. In actuality, that decision stated only that "[i]t has also been ***represented*** to the Court that Plaintiff determined its pricing based upon these disclosure statements." Ex. A at 29 (emphasis added). Plaintiff could not possibly have obtained summary judgment on reliance because, *inter alia*, Plaintiff never sought it.

First, Delaware law recognizes that the questions whether a plaintiff relied, and did so reasonably, are factual and must be resolved by the jury. *Vague v. Bank One Corp.*, 850 A.2d 303 (Table) (Del. 2004); *Darnell v. Myers*, 1997 WL 382984, at *1 (Del. Ch. June 24, 1997).

Second, summary judgment is particularly "inappropriate where, as here, the inference or ultimate fact to be established concerns intent or other subjective reactions." *George v. Frank A. Robino, Inc.*, 334 A.2d 223, 224 (Del. 1975). The question whether Plaintiff in fact used the March financial statements in setting its purchase price hinged on Plaintiff's "state of mind" at the time of the transaction, which cannot possibly be proved—let alone proved ***conclusively***—by mere representations from counsel. *Moore Bus. Forms, Inc. v. Cordant Holdings Corp.*, 1995 WL 662685, at *9 (Del. Ch. Nov. 2, 1995) (citing *Burge v. Fidelity Bond & Mortg. Co.*, 648 A.2d 414, 420 (1994)).

Third, the specific evidence Defendants sought to introduce underlined just how intense the parties' factual dispute over reliance was in this case, thereby rendering summary judgment all the more inappropriate. *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 845 (Del. 2019); *Pipher v. Parsell*, 930 A.2d 890, 893-94 (Del. 2007); *see supra* at 35.

It was, in sum, legal error for the Superior Court to treat reliance as having been resolved on summary judgment.

A new trial is no less necessary if the evidentiary exclusion is reviewed for abuse of discretion. As explained above, the exclusion betrays a legal misconception that, by definition, entails an abuse of discretion. Also problematic is the way that the Superior Court misconstrued its earlier order, which merely observed "[i]t has also been represented to the Court" that Bracket relied on the relevant financial statements. Ex. A at 29; *see Cooney-Koss v. Barlow*, 87 A.3d 1211, 1217 (Del. 2014) (trial court abused its discretion in excluding evidence where "pretrial stipulation expressly allowed the impeachment evidence" and "trial court made its mistake because it focused on another section of the pretrial stipulation").

In its post-trial opinion, the Superior Court also framed its exclusion of Defendants' reliance evidence in terms of the evidence being "prejudicial [to Bracket] and irrelevant to whether Bracket was defrauded." Ex. I at 15. But that, too, is obvious error. A factual dispute over whether Bracket relied upon the specific representations made in the SPA in setting its purchase price went to the heart of whether Bracket was defrauded. Indeed, the SPA precisely defined the represented financial statements, *see* A2517, 1.71, and contained a merger clause foreclosing reliance on ***any other*** representations ***outside*** the SPA, *see* A2552, 3.26.

Accordingly, Defendants' evidence that Bracket had not used the March 2013 financials to set its purchase price amounted to evidence that Bracket had not been defrauded.

Severe prejudice resulted. The Superior Court excluded sworn, telltale evidence that Plaintiff did ***not*** rely on the financial statements that were the subject of the SPA representation, which was ***essential*** to the fraud claim. *See, e.g.*, *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 958 (Del. 2005). Because "the excluded evidence goes to the very heart of [the] case and might well have affected the outcome of the trial, the exclusion of the evidence warrants a new trial." *Green*, 759 A.2d at 1063 (citation and quotations omitted). Indeed, this Court consistently holds that prejudice well short of that evinced in this record warrants a new trial, so long as there is "a real possibility that the jury would have reached a different outcome had all of this evidence been introduced." *Cooney-Koss*, 87 A.3d at 1217; *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1255 (Del. 2011).

III. The Superior Court Erred By Letting Plaintiff's Expert Offer Testimony And Plaintiff Recover Damages Divorced From Any Actionable Misrepresentations

A. Question Presented

Whether the Superior Court abused its discretion by admitting Dudney's testimony and denying Defendants' motion for a new trial and/or remittitur, notwithstanding Dudney's fundamental failure to connect the claimed damages to any actionable misrepresentations.[13]

B. Scope Of Review

This Court reviews "a motion judge's decision to deny exclusion of expert testimony for abuse of discretion." *Gen. Motors Corp. v. Grenier*, 981 A.2d 524, 527 (Del. 2009). "[I]n an appeal from either the grant or denial of a new trial, the sole question is whether the decision constituted an abuse of discretion." *Wilmington Tr. Co. v. Aetna Cas. & Sur. Co.*, 690 A.2d 914, 917 (Del. 1996). This Court likewise reviews "for abuse of discretion the Superior Court's denial of a motion for remittitur." *In re Asbestos Litig.*, 223 A.3d 432, 434 (Del. 2019). "An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances, or so ignored recognized rules of law or practice so as to

[13] Issue preserved below. A504-A505; A617-A631; A1032-A1044; A1068; A1369-A1381; A1385-A1395; Ex. A at 28-29; A2631-2635; A2752-2755; Ex. I at 13-14.

produce injustice." *Greene v. Beebe Med. Ctr., Inc.*, 663 A.2d 487 (Table) (Del. 1995) (alterations, citations, and quotations omitted).

C. Merits Of Argument

The Superior Court abused its discretion in admitting Dudney's testimony and denying a new trial and/or remittitur because Dudney's liability testimony and damages calculation—as claimed by Plaintiff and awarded by the jury—were unsound and unsubstantiated. By Dudney's own admission, he concluded that the Company's financial statements overstated its revenue and calculated damages based simply on the difference between how Dudney ***preferred*** the Company account for its revenue, versus how the Company in fact accounted for it.[14] A1866-A1867; A1886; A1998. But Dudney failed to identify any ***SPA representation*** that supports his prescription for how the Company should have calculated revenue. A1866-A1867; A1998. In fact, the Company ***expressly disclosed*** that it was accounting for revenue ***contrary to*** Dudney's made-for-litigation prescription. *See*

[14] Dudney's calculation of damages also relied upon overstated "working capital." Because working capital itself derives (in part) from revenue recognition, however, Dudney's claims regarding inflated working capital suffer from the same defects as his revenue recalculation. "Working capital" is calculated by subtracting a company's current liabilities from its current assets, and current assets include unbilled receivables, which are derived from revenue calculations. A1857. Accordingly, any overstatement in working capital that Dudney purported to identify depends upon his claim that revenues were overstated. A724; A1859.

A2292-A2293. Mere disagreement over proper accounting methods for recognizing revenue was no basis for Dudney to opine about fraud or fraud damages, or for the jury to award such damages.

The "vast majority," A1202; *see also* A1886-A1887, of Dudney's alleged EBITDA overstatement consisted of "adjustments" his revenue model made to TTM revenue for what he acknowledged were valid and active contracts. *See* A1886. His adjustments assumed that: (1) certain revenue that he (but not the Company) characterized as software-related should have been amortized over the life of the contract; and (2) the anticipated completion date of the relevant contract ("fixed fee due date") was the appropriate date to recognize non-amortized revenue. *See* A1866-A1867; A1998. The effect of his assumptions was generally to delay recognition of the Company's revenue—pushing the revenue out of the TTM period and into a later time period—without altering either the total amount of revenue properly recognized on the contract or the Company's actual cash receipts.

Neither of Dudney's assumptions was grounded in ***any*** alleged misrepresentation in the SPA, which the Superior Court correctly determined was the sole source of actionable representations, Ex. A at 29. Nor is either assumption reconcilable with the disclosures surrounding the SPA. First, for the contract revenue that Dudney amortized by recharacterizing it as software-related revenue,

the Company disclosed in the QoE report that it recognized revenue when the contractually-specified deliverables were delivered (***not*** by amortizing revenue over the contract's lifespan), and that only a small portion of the Company's revenue was treated as software-related. A2253-A2254; A1302-A1303; A1867-A1868. Second, for the category of contract revenue that Dudney recognized on the "billing date" or contractually "fixed fee due date," the Company had historically recognized revenue when work was actually performed, not on payment dates fixed by the contracts. A1998; A1740. And the Company so disclosed to Parthenon. *See* A2292-A2293.

What Dudney called "overstated" revenue was simply revenue that the Company accounted for at a time different than Dudney preferred. Given that the Company ***disclosed*** that it was ***not*** accounting for revenue the way Dudney preferred, Dudney's calculation could not possibly serve as the correct touchstone for ***fraud*** liability or damages, much less for ***deliberate*** fraud. Indeed, Dudney testified that his model was not even designed to capture damages from any alleged deviation from GAAP, A1895-A1896, which is the SPA's express touchstone for the Company's financial statements, A2536, 3.4, (excluding the few non-GAAP items specified in the Disclosure Schedule, A2325-A2326).

Dudney's approach thus undisputedly deviated from what Parthenon ***knew*** the Company was doing and posited made-for-litigation "damages" that bear no relation

to what had been expressly represented. A1293-A1294; A1296-A1297; A1998; A1740. Even drafts of Dudney's work product recognized that his methodology for recognizing revenue "were not part of the disclosures made to Parthenon during due diligence." A2610. Through Dudney's model, Bracket substituted its preferred accounting methods for the Company's represented historical practices and transformed that into a supposed fraud case.

Notably, the Superior Court warned that Dudney would mislead and confuse the jury by throwing it a "big mush" and a "big mess," and would be "unfair" to Defendants by offering his analysis "in a big picture world." A1385-A1386. Yet the Superior Court refused to follow its observations to their natural conclusion when it declined to exclude Dudney's testimony and to grant a new trial and/or remittitur in the wake of the resulting verdict. Because Plaintiff's sole evidence supporting its claim that the Company fraudulently overstated revenues and its damages calculation had nothing to do with any SPA representations, Dudney should not have been allowed to testify as he did, nor should the jury have awarded fraud damages as it did. A new trial is the appropriate remedy. *See Burgos v. Hickok*, 695 A.2d 1141, 1145 (Del. 1997); *Amalfitano v. Baker*, 794 A.2d 575, 578 (Del. 2001); *Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997).

Contrary to the Superior Court's deference to "the jury's province to determine the credibility of the experts," Ex. I at 14, Rule of Evidence 702 "imposes a special obligation upon a trial judge to ensure that any and all scientific testimony … is not only relevant, but reliable." *Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787, 794 (Del. 2006) (citation and quotations omitted). Because Dudney's testimony was unmoored from "the fundamental facts of the case," it offered "no assistance to the jury" and was due to "be excluded." *Perry v. Berkley*, 996 A.2d 1262, 1271 (Del. 2010).[15]

The resulting prejudice requires a new trial. As the Superior Court recognized, had Defendants succeeded in their challenge to "Bracket's expert's testimony regarding his revenue model" they "would have effectively refuted Bracket's claims." Ex. I at 44; *see also Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 815 (Del. Ch. 2014) ("To be actionable, a fraudulent misrepresentation or omission must cause the plaintiff to suffer damages."). This Court has ordered a new trial where improper evidence bore less directly on fundamental issues. *See,*

[15] In denying a new trial, the Superior Court reasoned "[i]t is within the jury's province to determine the credibility of the experts and to decide which testimony they find most credible." Ex. I at 14. But "[w]hat considerations may permissibly be taken into account by a jury in determining a damages award, is a question of law." *Dana Cos., LLC v. Crawford*, 35 A.3d 1110, 1113 (Del. 2011).

e.g., *R.T. Vanderbilt*, 98 A.3d at 129-30 (requiring new trial based on improper admission of testimony that undermined defendant's credibility on key issue). As in *R.T. Vanderbilt*, the improperly admitted testimony here went to an important, disputed factual question; unlike in *R.T. Vanderbilt*, however, the expert testimony here was Plaintiff's ***only*** evidence supporting its damages claim. Moreover, erroneous admission of evidence that either reduces or enhances awarded damages carries particular prejudice. *See Miller*, 993 A.2d at 1057 (holding "the Superior Court's erroneous admission of the collateral source evidence materially prejudiced the [plaintiff] and was not harmless" where it implicated the jury's assessment of "the amount of [plaintiff's] damages").

Predictably, this jury was misled and confused by Dudney's "mush," A1385, or else "misunderstood the applicable law." *Duphily*, 662 A.2d at 834. Either way, a new trial should follow.

IV. The Superior Court Erred By Letting Plaintiff's Expert Testify And Plaintiff Recover Damages Without Establishing Actual Valuation At The Time Of The Acquisition, As Required By Delaware Law

A. Question Presented

Whether the Superior Court abused its discretion by admitting Plaintiff's expert, denying a new trial, and denying remittitur despite the failure of Plaintiff and its expert to calculate damages by properly valuing the Company at the time of the closing.[16]

B. Scope Of Review

This Court reviews "a motion judge's decision to deny exclusion of expert testimony for abuse of discretion." *Gen. Motors*, 981 A.2d at 527. It likewise reviews the denial of a new trial based on insufficiency of evidence for abuse of discretion, *Wilmington Tr. Co. v. Aetna Cas. & Sur. Co.*, 690 A.2d 914, 917 (Del. 1996), and denial of a motion for remittitur under the same standard, *In re Asbestos Litig.*, 223 A.3d at 434. "An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances, or so ignored recognized rules of law or practice so as to produce injustice." *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (alterations, citations, and quotations omitted).

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[16] Issue preserved below. A637-A640; A1069-A1074; Ex. A at 28-29; A2631; A2646-2648; A2760-A2762.

C. Merits Of Argument

Although the Superior Court correctly stated the settled rule governing calculation of damages under Delaware law, including when instructing the jury, it erred by letting Plaintiff and its expert violate that rule. Ultimately, the court allowed Plaintiff to obtain $82 million in damages for fraud relating to a Company that Plaintiff acquired for $187 million, never valued below $156.7 million, *see* A603, and sold for [redacted] *see* A2734. Only with smoke and mirrors did Bracket contend that the Company had been worth little more than $100 million upon purchase; its claimed proof never substantiated that proposition.

As the Superior Court instructed the jury: "Your award should reflect the difference, if any, between what Bracket paid for the Company and the value of the Company they received on August 15, 2013, the closing date of the transaction." A2089. That instruction followed Delaware law. "[B]enefit of the bargain" damages reflect the "difference between the actual and the represented values of the object of the transaction," whereas "out of pocket" damages reflect "the difference between what [a party] paid and the actual value of the item." *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1076 (Del. 1983). Both require assessing "actual value." *See also Harnish v. Widener Univ. Sch. of Law*, 833 F.3d 298, 307 (3d Cir. 2016) ("[T]he measure of [fraud] damages is the difference in value between the real, or

market, value of the property at the time of the transaction and the higher, or fictitious, value which the buyer was induced to pay for it.") (alterations, citations, and quotations omitted); *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods., N.V.*, 2003 WL 21555325, at *5 n.29 (Del. Ch. July 8, 2003) ("[Fraud] damages … are calculated by determining the amount a party should have received at the time of a transaction less the value of what that party actually received."), *aff'd in part, rev'd in part sub nom. Hauspie v. Stonington Partners, Inc.*, 945 A.2d 584 (Del. 2008).

Evidence showing the Company's actual market value at the time of closing was therefore indispensable: Where "the measure of damages is the difference between the price paid … and its true value," "[i]t is necessary [] that a determination of true value be made and compared with the price paid." *Poole v. N. V. Deli Maatschappij*, 224 A.2d 260, 265 (Del. 1966). "This is the comparison that must be made, if liability is assumed or proved, before it can be said that the plaintiffs have suffered." *Id.* In *Poole*, this Court reversed a trial court's calculation of damages that did not "make a determination of the true value of the stock" and instead "arrived at a hypothetical evaluation" based on what a stockholder "could have calculated from" the representations "attached to the Offering Letter." *Id.* at 264-65. Dudney's

methodology reflects the kind of "hypothetical evaluation" that this Court rejected in *Poole*.

Beyond that, the Superior Court deviated from on-point Court of Chancery authority that rejected as "unpersuasive" a damages methodology paralleling Dudney's. *See Zayo Grp., LLC v. Latisys Holdings, LLC*, 2018 WL 6177174, at *15-18 (Del. Ch. Nov. 26, 2018). In *Zayo*, the plaintiff relied heavily on an expert who "base[d] her opinion" on the value of the company "solely on a multiple of EBITDA." *Id.* at *15. But the court held that to be an inappropriate measure of the "value the purchaser actually received" for two reasons equally applicable here: (1) "using a multiple to calculate damages is appropriate only where there is a permanent impairment to the value of the business and the value the buyer receives is less than the value for which the buyer bargained," *id.* at *16,*18; and (2) the plaintiff's expert did not calculate the value of the acquired company "as of the time of the closing," *id.* at *16 n.206. Unlike the expert in *Zayo*, Dudney could not even testify that the Company was worth less than the purchase price at the time of the transaction because he did not even purport to value the Company.

Rather, Dudney calculated damages simply by multiplying the claimed amount of EBITDA overstatement in the TTM period ending March 31, 2013 ($8.4m, A1857) by the multiple that Bracket purportedly used in setting its purchase

price (6.3x, A719, A2066). He thereby violated established requirements for calculating fraud damages. First, without determining "true value," even as of the March 2013 time period to which his analysis was supposed to relate, Dudney simply adopted on faith Plaintiff's approach to its pricing, as part of an abstract exercise that Dudney never grounded in the Company's actual value.[17] Second, even if Dudney's abstract exercise could fairly be taken as establishing a "true value" as of March 2013 (and it cannot), he sidestepped the numbers from the closing, which occurred months later, in **August** 2013. *See* A699-A700. Tellingly, Dudney ignored the nearly-contemporaneous valuation that Parthenon had provided to its investors in **September** 2013, A2607, based on the Company's **July** financials, instead seizing upon the *outdated* EBITDA numbers that had driven Plaintiff's pricing calculations back in **March** 2013. A699-A700. Far from seeking out the Company's "true value" at closing, therefore, Dudney took pains to dodge that value.

Ultimately, the Superior Court erred by failing to enforce its jury instructions and their call for "the difference, if any, between what Bracket paid for the Company and the value [of] the Company they received on August 15th, 2013." A2089.

[17] The Superior Court maintained post-trial that Plaintiff's expert had effectively calculated the value of the Company by deducting amounts from Plaintiff's own calculation from months before closing. Ex. I at 21-22. But that differs from any principled valuation of the Company at closing.

"What considerations may permissibly be taken into account by a jury in determining a damages award, is a question of law." *Dana Cos.*, 35 A.3d at 1113. And "[i]t is error for a trial court to uphold a jury verdict that is contrary to the jury instructions." *Id*.

In this respect, too, the Superior Court committed prejudicial error both by admitting Dudney's pivotal yet defective expert testimony and by denying a new trial. This Court should vacate the judgment and remand for a new trial, or, in the alternative, order remittitur of the damages (the entirety of the award) attributable to the defective expert testimony.

CONCLUSION

For the reasons set forth herein, this Court should reverse the denial of a new trial, vacate the judgment, and remand.

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