IN THE

Supreme Court of the State of Delaware

EXPRESS SCRIPTS, INC. and
UNITED BIOSOURCE LLC,

Defendants-Below,
Appellants/Cross-Appellees,

v.

BRACKET HOLDING CORP.,

Plaintiff-Below,
Appellee/Cross-Appellant.

No. 62,2020

COURT BELOW:

SUPERIOR COURT OF THE
STATE OF DELAWARE,
Consol. C.A. No.
N15C-02-233-WCC CCLD

PUBLIC VERSION FILED:
August 11, 2020

APPELLEE/CROSS-APPELLANT BRACKET HOLDING CORP.'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

Of Counsel:

Paul D. Clement
C. Harker Rhodes IV
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 389-5000

Kevin M. Neylan, Jr.
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800

ROSS ARONSTAM & MORITZ LLP

David E. Ross (Bar No. 5228)
Eric D. Selden (Bar No. 4911)
100 S. West Street, Suite 400
Wilmington, Delaware 19801
(302) 576-1600

*Attorneys for Plaintiff Below,
Appellee/Cross-Appellant
Bracket Holding Corp.*

July 27, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Rules and Statutes

Other Authorities

NATURE OF PROCEEDINGS

This is an appeal from the verdict of a jury that considered Defendants' arguments and all the evidence and concluded that Defendants engaged in a straightforward and egregious fraud. After a ten-day trial, a jury found that Defendants Express Scripts, Inc. and United BioSource LLC sold one of their subsidiaries ("the Company") to Plaintiff Bracket Holding Corp. ("Bracket") by fraudulently inflating the Company's revenue and working capital—a fraud that Defendants knew would cause Bracket to overpay for the Company by tens of millions of dollars. The jury recognized the overwhelming evidence of Defendants' guilt, and awarded Bracket over $82 million in damages. As the Superior Court explained, "the core of the jury's decision" was that Defendants "manipulated their records to create a revenue picture that they knew was false," and "there was no doubt by the jury or this Court regarding their liability." Op.6-7.[1]

Defendants largely ignore both the overwhelming evidence of their fraud and the conclusive verdict against them. Their imaginative retelling begins in the first sentence of their opening brief, where they describe this case as a mere "accounting dispute." Br.1.[2] After hearing all the evidence at trial, both the jury

---

[1] Citations to "Op.__" are to the post-trial opinion below, attached as Exhibit I to Defendants' opening brief.

[2] Citations to "Br.__" are to Defendants' opening brief.

and the Superior Court knew better: "The conduct here was not simply a dispute over the proper accounting procedures, but was an intentional act … to manipulate the financial records [Defendants] knew would be reasonably relied upon by the Plaintiff in the evaluation of the value of the Company." Op.6. "Regardless of how the Defendants try to spin the facts here, they manipulated their records to create a financial picture of [the Company] that was simply wrong and fraudulent." Op.6.

The evidence at trial was overwhelming. With Defendants' knowledge and acquiescence, the Company's Vice President of Finance Jim Stewart cooked the books to create a snapshot of the Company's historic revenue that was vastly inflated. Stewart maintained a "revenue file" separate from the Company's general ledger, which he would use to direct adjustments to the general ledger with no support and no explanation. He booked revenue on nearly two dozen projects that never existed. He booked revenue on well over a hundred projects long after the Company had finished performing work on them, or before the Company had done any work whatsoever. And on still more projects, Stewart booked revenue at inappropriate junctures in order to make the Company's financials look more robust during the key period that he knew Bracket was relying on to price the deal.

Stewart managed to avoid detection long enough for the deal to close. He deflected suspicion by spreading revenue among projects, came up with plausible explanations for the Company's high volume of unbilled accounts receivable, and repeatedly assured Bracket's diligence team that the accounts were legitimate. Soon after the deal closed, however, Stewart cashed out his stock and abruptly quit, leaving Bracket to untangle his fraud. Bracket soon learned that the Company's working capital was substantially less than Defendants had warranted—by nearly $30 million—and that the Company's financial statements were largely works of fiction. Indeed, when Defendants' own accounting firm KPMG investigated the Company's records shortly after the deal closed, it told Defendants that Stewart's accounts had an error rate of ***94.8%***—a fact Defendants concealed for over five years, and that only emerged mid-trial as one of their key witnesses was on the brink of perjuring himself about his confidence in Stewart's work as reflected in KPMG's earlier QoE report.

In short, the jury's verdict was fully supported by overwhelming evidence, and none of Defendants' attacks on the judgment below withstands scrutiny. To begin, the Superior Court was wholly correct to instruct the jury on the established Delaware scienter standard for fraud, which includes both reckless and intentional acts, and to reject Defendants' argument that a single misspelled word in the SPA was intended to deviate from that traditional definition and the parties' express intent to impose liability on Defendants for fraud as reflected in numerous other provisions in the contract. In any event, any error was harmless given the overwhelming evidence that Defendants engaged in "intentional" (not reckless) fraud in "manipulat[ing] their records to create a financial picture of [the Company] that was simply wrong and fraudulent." Op.6.

Defendants are equally wrong in claiming that the Superior Court abused its discretion by excluding three unfairly prejudicial exhibits. To the extent Defendants claim these exhibits would prove Bracket placed no reliance *at all* on the financial representations in the SPA, their argument is both forfeited and facially absurd. In any event, the Superior Court was well within its discretion to conclude that those exhibits would produce far more unfair prejudice than probative value, by allowing Defendants to falsely imply that Bracket deliberately hid its subsequent pricing calculations. And any error was clearly harmless, given the extensive evidence that (unsurprisingly) Bracket did rely on Defendants' warranted financial representations in deciding whether to buy the Company and what to pay for it.

Nor do Defendants fare better in attacking the testimony of Bracket's expert Louis Dudney. Their repeated assertion that Dudney applied different revenue-recognition policies than those disclosed by Defendants and represented in the SPA is simply false, and flatly contradicted by Dudney's trial testimony. As the overwhelming evidence at trial showed—and both the jury and the Superior Court properly concluded—the difference between Dudney's figures and those represented in the SPA was the result of Defendants' fraud, not a mere accounting dispute.

Dudney's testimony was also more than sufficient to support the jury's damages award, which properly compensated Bracket for the injury it suffered from Defendants' fraud. As the Superior Court recognized, Dudney's testimony provided the jury a reasonable valuation of the Company based on the amount that an arms-length buyer (Bracket) would be willing to pay for it. Defendants had their chance to cross-examine Dudney, or present their own damages expert (which they declined to do), but the notion that there is any basis to disturb the jury's acceptance of Dudney's calculation of Bracket's damages borders on the frivolous.

There is no basis for disturbing the jury's verdict, and this Court need only rectify two aspects of the judgment below: the Superior Court's postjudgment interest award, which used the wrong rate and applied it to only part of the judgment, and the denial of Bracket's motion for attorneys' fees. The Court should remand on those two issues and affirm in all other respects.

SUMMARY OF ARGUMENT

Defendants' arguments for a new trial or remittitur are entirely unpersuasive. The Court should uphold the jury's verdict and damages award in their entirety, and remand solely on postjudgment interest and attorneys' fees.

1. Denied. Defendants argue that the Superior Court erred by instructing the jury on the elements of fraud under Delaware law, because (they claim) the parties' Securities Purchase Agreement ("SPA") supposedly eliminated the common-law rule that the scienter necessary for fraud includes recklessness. That argument is untenable. The SPA contains numerous provisions that expressly establish Defendants' liability "in the case of fraud," and Defendants do not dispute that these provisions refer to common-law fraud. Instead, Defendants highlight one line in the SPA that restricts Bracket's remedies "except in the case of any deliberant [sic] fraudulent (i) act, (ii) statement, or (iii) omission." But established canons of construction require reading that provision in harmony with the rest of the SPA, and the SPA itself explicitly requires reading that phrase "in furtherance of the foregoing" provision preserving Bracket's ability to sue Defendants for common-law fraud. Nor does the Superior Court's reading strain the word "delibera[te]," which is not a term-of-art commonly used to describe a hemisphere of common-law frauds, but is often used to cover both intentional and reckless acts, and comes nowhere near showing the requisite clear intent to depart

from the traditional Delaware scienter standard. In any event, any error was unquestionably harmless, because the evidence at trial overwhelmingly established that Defendants' fraud was indeed intentional.

2. Denied. Defendants next argue that the Superior Court abused its discretion by excluding three exhibits relating to Bracket's later pricing calculations for the Company, which Defendants claim would have cast doubt on whether Bracket relied on the false March 2013 financial statements that Defendants specifically represented in the SPA. To the extent Defendants seriously contend that these exhibits—one of which explicitly states that Bracket *did* rely on those financial statements—would have shown that Bracket actually placed no reliance on the represented statements *at all*, their argument is not only specious, but also forfeited. In any event, the Superior Court acted well within its discretion in determining that the risk of unfair prejudice from admitting those exhibits outweighed any probative value they might have, and properly prevented Defendants from falsely implying to the jury that Bracket tried to deliberately hide its subsequent pricing calculations from their view. That was not, as Defendants would have it, a disguised summary judgment ruling, but a straightforward application of the normal rules of evidence. Even if the Superior Court had erred (it did not), any error would be harmless in light of Defendants' extensive

exploration of these issues at trial and the meager value of these additional exhibits.

3. Denied. Defendants next contend the Superior Court abused its discretion by allowing Bracket's expert Louis Dudney to testify regarding his analysis of the Company's accounts and in allowing the jury to credit his testimony. Not so. Dudney, a forensic accountant, was indisputably qualified to testify, and his testimony was more than sufficient to support the jury's verdict. Defendants' assertions that Dudney's testimony was not connected to any misrepresentation in the SPA, that Dudney did not apply the Company's disclosed policies, and that his testimony showed at most a mere accounting dispute, are flatly contradicted by the record and simply ignore Dudney's actual testimony. At best, those were arguments for the jury, which rejected them. Defendants' ongoing disagreement with the jury's decision on those factual issues hardly warrants a new trial.

4. Denied. Defendants are equally wrong to claim that the Superior Court abused its discretion by allowing Dudney to present his damages calculation. As the Superior Court recognized, Dudney *did* estimate the actual value of the Company, using the same method Bracket itself used to value the Company. Defendants' assertion that Dudney should have used some other valuation method is not supported by any Delaware precedent, and was properly rejected by both the

jury and the Superior Court. Again, Defendants had the opportunity to cross-examine Dudney, and the opportunity (not seized) to present their own damages expert. But the jury was not persuaded by Defendants' critique of Dudney's damages theory (which largely paralleled Defendants' equally unpersuasive defense on liability), and there is no basis for disturbing that verdict.

5. While the jury properly calculated damages, the Superior Court did err in calculating postjudgment interest. As its name implies, postjudgment interest should be calculated using the interest rate on the date of the judgment. A plain reading of 6 *Del. C.* §2301(a) requires that result, and this Court's precedents support it. In addition, postjudgment interest should apply to the portion of the judgment reflecting prejudgment interest. Prejudgment interest is part of the judgment that must be either paid immediately or paid with postjudgment interest. That approach makes ample sense, and has been followed by every other jurisdiction to consider this question. This Court should join that uniform consensus.

6. Finally, the Superior Court abused its discretion in denying Bracket's motion for attorneys' fees. Given the years of bad-faith conduct by Defendants, both before and during this litigation, this is the rare case where attorneys' fees are plainly warranted.

COUNTERSTATEMENT OF FACTS

On appeal from a jury verdict, this Court views the record "in the light most favorable to the prevailing part[y]," and draws all "reasonable inferences from the record" in its favor. *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1, 7 (Del. 2005). Defendants' statement of facts ignores this standard, and ignores the extensive evidence at trial supporting the jury's verdict.

A. The Transaction

Defendants are Express Scripts, Inc. ("ESI") and its subsidiary United BioSource LLC ("UBC"). In April 2012, ESI acquired UBC, including UBC's subsidiaries Bracket Global Holdings, LLC, Bracket Global K.K., and Bracket Global Limited (collectively, "the Company"). A1654-55. The Company's financial records were managed by Jim Stewart, its Vice President of Finance. Op.3.

Defendants began marketing the Company for sale later that year. Op.3. Defendants hired Credit Suisse Securities (USA) LLC ("Credit Suisse") as their financial advisor, and KPMG LLC ("KPMG") for seller-side due diligence. Op.3. Based on information from Stewart, KPMG published a Quality of Earnings ("QoE") report that was provided to the private equity firm Parthenon Capital Partners ("Parthenon"), a potential buyer. Op.4. In February 2013, Parthenon sent

Defendants a letter of intent to purchase the Company, subject to continued due diligence. Op.3-4.

Defendants knew by January 2013 that Parthenon's purchase price would be determined by one metric above all: the Company's EBITDA, essentially its earnings. Op.6; A1458; A1670; A1685; B92. In particular, Defendants knew Parthenon would be pricing the deal by applying an as-yet-undetermined multiple to the Company's EBITDA over a designated twelve-month period preceding the closing, a figure sometimes referred to as "TTM" EBITDA, for "trailing-twelve-month" EBITDA. Op.6; A1452-53. That procedure was "a very standard approach in private equity." A1452; A1814. To determine the Company's TTM EBITDA, Parthenon necessarily relied on Defendants to furnish accurate financial information. A1452; A1473; A1631; A1633.

Parthenon's diligence team soon raised concerns. As Parthenon executive Kurt Brumme testified, the Company had "a high balance" of "unbilled accounts receivable," which are "asset[s]" purporting to represent "work that the company ha[d] done on behalf of its clients ... but ha[d] not yet billed them for." A1731-32. KPMG's QoE report also noted this high balance. A2276-77. But—relying on Stewart—KPMG explained that the Company's unbilled receivables resulted principally from "unexecuted change orders." A1732; A2276. An "unexecuted change order," as the jury was later told, is what would happen if a client asked the

Company to render services beyond the scope of its original contract, and the Company performed that additional work before the contract could be revised, but with the understanding that a revised contract would be executed subsequently so that the Company could bill for those services. A1732; A2276. KPMG indicated no concern with the Company's ability to collect these accounts. A2276-77.

As Brumme testified, Parthenon not only reviewed KPMG's analysis, but "spent a lot of time on our own with Jim Stewart understanding [his] explanation" for the high balance of unbilled receivables, and also hired Ernst & Young "to evaluate it." A1732. Stewart repeatedly gave Parthenon and Ernst & Young the same assurances he had given KPMG: the unbilled receivables resulted primarily from unexecuted change orders; unexecuted change orders were common in the industry; and the unbilled receivables were collectable. A1733; B142. Stewart gave the same explanation on multiple occasions to Parthenon executive Jeff Stein, who was evaluating the Company's working capital. A1767-69.

B. The Securities Purchase Agreement

Eventually satisfied with Stewart's explanations, Parthenon formed Bracket to purchase the Company for $187 million. Op.4. Parthenon determined that price by taking the Company's TTM EBITDA through March 31, 2013 ("the TTM period"), which Defendants represented was over $29 million, and multiplying that figure by 6.3. A1473.

Defendants and Bracket entered into the SPA on July 12, 2013. A2507. In §3.4 of the SPA, Defendants represented that the financial statements underlying the Company's $29 million TTM EBITDA were true and correct:

> Attached as Disclosure Schedule 3.4(a)(i) are the Financial Statements. The Financial Statements (a) were derived from and are consistent with the books and records of the Companies and the Company Subsidiaries, (b) present fairly in all material respects the financial position and results of operations of the Companies and the Company Subsidiaries at the dates and for the periods indicated therein and (c) were prepared in accordance with GAAP [Generally Accepted Accounting Principles] except as described in Disclosure Schedule 3.4(a)(ii).

A2536. Disclosure Schedule 3.4(a)(i) broke down the Company's purported financial metrics, including its EBITDA and unbilled receivables, from January 2011 through March 2013. A2325, A2327-29. Parthenon's co-CEO David Ament unequivocally testified at trial that Bracket relied on those EBITDA figures in purchasing the Company. A1453; A1476.

The SPA also represented, in §2.4(a), that the Company had $11.85 million in working capital as of May 31, 2013. A2526-27. The SPA provided that after closing, Bracket would deliver a Closing Statement calculating the Company's precise working capital at closing, so the parties could make an adjustment if it was either more or less than $11.85 million. A1475; A2257-59.

The transaction closed on August 14, 2013. Op.5. Section 3.26 of the SPA declared that the Company was being sold "'as is, where is,'" with two exceptions:

(1) "[e]xcept for the representations and warranties contained in this Article III," *i.e.*, Defendants' representations about the Company's financial statements; and (2) more generally, "except in case of fraud." A2552. Other provisions of the SPA likewise recognized that Defendants could be held liable for misrepresentations "in the case of fraud," and conversely that Bracket could not recover from Defendants for misrepresentations "in the absence of fraud." *See* A2555-56, A2582-84.

C. Bracket Discovers Defendants' Fraud

Not long after closing, Stewart unexpectedly cashed out his stock and quit. A403; A1480-81. Shortly after that, while attempting to verify the Company's working capital, Bracket realized Defendants had inflated the Company's historical revenue by tens of millions of dollars.

As Bracket's new CFO Vic Rainsford testified, he quickly realized that a substantial amount of the Company's unbilled receivable balance was invalid. A1566. In some cases, there simply "wasn't a contract that existed to support those balances and the revenue that was recognized against them"; in other cases, Stewart had recognized revenue against contracts long after the Company had ceased performing work under them; and in still other cases, "the contracts had been closed, and all the work was completed and the contract was closed out," yet Stewart had continued booking revenue. A1566. None of that "revenue" could be collected. A1566.

On December 13, Bracket informed Defendants that the Company's working capital was *negative* \$2.7 million, or nearly \$14.5 million less than Defendants had represented. B158. Bracket also stated that there was an additional "\$12.7 million ... of 'Unbilled Receivables'" that Bracket had so far been unable to verify. B154.

Defendants sent a team from KPMG to Bracket's offices in January 2014 to investigate. A1571-72. On January 22, 2014, KPMG told Defendants that the Company's unbilled receivables—all recognized by Stewart—had an error rate of ***94.8%***, and that Defendants owed Bracket an adjustment of more than \$12 million. A1724; B178. Despite that undeniable evidence that Stewart committed egregious misconduct, Defendants made no attempt to share KPMG's findings with Bracket, let alone to acknowledge their responsibility and make Bracket whole. In fact, Defendants continued to conceal that evidence from Bracket through more than *five years* of litigation, until it eventually emerged in the midst of trial. *See* A1661-63.

On January 26, 2014, Bracket informed Defendants that Bracket's closing working capital appeared to be negative \$14.8 million, requiring an adjustment of over \$25 million. B194. Even that figure did not capture the full working capital shortfall, which in reality exceeded ***\$29 million***. A1772. As Stein testified, "the primary source of the problem" was "[o]verstated unbilled receivables." A1772.

Or put more simply: Stewart had flatly lied about the Company's outstanding unbilled balance. A1770.

Defendants' fraud not only inflated the Company's working capital, but the price Bracket paid for the Company as well. As Ament testified, "if those unbilled receivables are wrong, the revenue is wrong … We weren't just defrauded on working capital, we were hit on revenue[.]" A1489. Because Bracket "value[d] this business at the multiples ... off of that [revenue]," Defendants' fraud caused Bracket to pay tens of millions of dollars more than it would have paid if Defendants' representations had been true. A1489.

D. This Litigation

In February 2015, Bracket sued Defendants for fraudulently inducing Bracket to purchase the Company by misrepresenting its financial status. Op.5. After Defendants filed unsuccessful motions to dismiss and for summary judgment—and after Defendants delayed the proceedings for over a year by compelling a working capital arbitration that Defendants knew could not resolve Bracket's fraud claim, *see* B1-2—the Superior Court held a ten-day jury trial from June 10 to June 21, 2019.

At that trial, the jury heard extensive testimony laying bare Defendants' fraud, including all of the testimony described above (which Defendants largely ignore). That evidence showed that the Company's financial records were, as the

Superior Court put it, "Mr. Stewart doing whatever he wanted to do whenever he wanted to do it." A1395. In particular, Stewart maintained a "revenue file" separate from the Company's routine financial records, which he used to direct "top side entries" adjusting the amount of revenue the Company recognized every month. A1818. Stewart would input these "top side entries" (or instruct his staff to do so) "with no detail," and without any supporting documentation, which made the whole process highly "susceptible to manipulation." A1818. Stewart would also override revenue entries manually, again without supporting documentation. A1820-22. The record included specific examples of Stewart manually overriding revenue spreadsheets to "move revenue between customers and contracts," with the evident goal of making the Company's records seem less suspicious by moving revenue out of contracts showing greater than 100% completion and into contracts showing less than 100% completion. A1904-06. The jury also heard compelling evidence that Stewart's superiors knew that many of his accounts were invalid. A1637-38. Notably, those same superiors blocked Parthenon's efforts to obtain more detailed information during due diligence. A1632-33.

To help explain Defendants' fraud and the damages it caused, Bracket presented expert testimony from forensic accountant Louis Dudney. A1813. Over three days of testimony, Dudney explained that he and his team had comprehensively reconstructed the Company's financials by *applying the*

Company's own stated revenue recognition policies. *See, e.g.*, A1817; A1848-50. Contrary to Defendants' repeated and inexplicable misstatements, Dudney did *not* "invent[] his own approach to revenue recognition," let alone "admit[] at trial that his model did not track the Company's revenue-recognition policies," Br.14-15. On the contrary, Dudney repeatedly testified that he "wasn't applying a new standard," but instead was "seeking to apply [the Company's] interpretation" as reflected in the Company's "represented revenue recognition policies." A1849; *see* A1817; A1849 (explaining that Dudney applied "the way that the [C]ompany thought about its revenue recognition, at least as articulated in this policy"—that is, "the represented policies that were contained in the documents" the Company disclosed); A1850 (explaining that Dudney used "those policies and representations" to "make [his] assessment"). To be sure, defense counsel repeatedly sought to insinuate at trial that Dudney had departed from the Company's disclosed recognition policies—but Dudney repeatedly rejected those insinuations, and the jury obviously believed him. *See, e.g.*, A1866-67 ("Q. It's not in the revenue recognition policies; is it, sir? A. Well, I would disagree[.]"); *see also* A1895-96. In reality, the person who deviated from the Company's stated revenue recognition policies was not Dudney, but Stewart, by repeatedly manipulating revenue numbers at his whim.

Applying the Company's revenue recognition policies, Dudney's team "went through contract-by-contract approximately 600 contracts," in order to calculate a "restatement and correction of the earnings for the trailing 12-month period" to identify (a) the amount by which Bracket overpaid and (b) the Company's working capital at closing. A1848. Dudney concluded that Defendants inflated the Company's TTM EBITDA by $8.4 million—which, applying Parthenon's multiple of 6.3, ballooned the purchase price by $53 million—and that Defendants overstated the Company's working capital by $29.2 million. A1857.

Dudney explained that Stewart fraudulently inflated the Company's TTM-period earnings by manipulating 342 contracts. First, Stewart recognized revenue under eighteen contracts that simply did not exist. A1815; A1823. Second, he recognized revenue during the TTM period under 127 contracts that had been closed or canceled before the TTM period began. A1816; A1823-24. Third, he recognized revenue during the TTM period under six contracts that did not start until after the TTM period was over. A1816; A1824-26. Finally, there were 191 contracts that at least were active during the TTM period, but under which Stewart fraudulently recognized a large amount of revenue during the TTM period that should have been recognized outside of it under the Company's stated policies. A1816-17; A1826.

As Dudney testified—contrary to the representations in §3.4(a) of the SPA—the revenue Stewart recognized under those 342 contracts found no support in the Company's books and records, in no way fairly presented the Company's results of operations, and was wholly inconsistent with GAAP, and neither the Company's earnings nor its unbilled receivables were true and accurate. A1814; A1826-27. Nor were Stewart's accounts consistent with the revenue recognition policies Defendants disclosed to Parthenon during due diligence. A1848-50. Indeed, *no* legitimate revenue recognition policy would have allowed *any* of Stewart's manipulations. A1826-27; A1904. As Dudney testified, the resulting misrepresentations could not possibly "have been the result of just mistakes" or "simply negligence or errors." A1845.

Defendants did practically nothing at trial to counter the overwhelming evidence that they had committed not just accounting errors but intentional fraud. In fact, much of their trial presentation only made their case worse. After telling the jury at length in their opening statement that KPMG "did [a] full scrub" of the Company's business and "found no big issues there," A1422, Defendants were confronted with the KPMG report finding a ***94.8%*** error rate in Stewart's unbilled accounts receivable—a report that emerged only midway through trial, after the Superior Court admonished defense counsel that Defendants' witness was on the brink of perjuring himself by testifying that KPMG's work gave him full confidence in the Company's financials. A1661-63. That devastating admission—that only one in every twenty of Stewart's unbilled accounts receivable was accurate—powerfully reinforced Dudney's testimony that Stewart's efforts reflected intentional manipulation and not mere sloppiness.

Defendants presented their own accounting expert at trial, Professor Gordon Klein, but in many respects his testimony likewise did Defendants more harm than good. For instance, Klein acknowledged that "unexecuted change orders" were the only non-fraudulent explanation Stewart offered for the discrepancies in the Company's unbilled receivables—but severely undermined the plausibility of that explanation by conceding that any unexecuted change orders during the TTM period surely would have been executed before the trial *six years later*, but Defendants *could not identify a single one*. A1978-79.

Klein also admitted that—unlike Dudney—he had not performed "a full forensic examination of the books and records of the [C]ompany," and so could not "come in here and tell the jury that, in fact, they were true and accurate." A1979-80; A1991. The only opinion Klein could offer was that the Company's "books *appear* to be correct" and "are *presumably* correct" because "KPMG look[ed] at it in detail" in the QoE report. A1976 (emphasis added). But the fact that the books appeared to be correct simply underscores that Bracket's reliance on the facially plausible revenue numbers was reasonable. Meanwhile, Klein's presumption that they were in fact correct based on KPMG's QoE report was eviscerated when Klein admitted on the witness stand that Defendants never told him about KPMG's later report finding that Stewart's accounts showed a nearly 95% error rate, and that he was only able to review that extraordinary evidence "[v]ery briefly" after the trial began. A1972. Klein did not opine on damages, A1913, and Defendants elected not to put on their own damages expert. *See* A1765; A1808-09; A1938.

E. Verdict And Post-Trial Rulings

After ten days of trial, the jury found that ESI and UBC committed fraud and that ESI aided and abetted UBC in committing fraud, and awarded Bracket $82.1 million in damages. Op.5-6. That $82.1 million represented the $8.4 million difference between the Company's actual TTM EBITDA (as calculated by Dudney) and the fraudulent TTM EBITDA that Defendants represented in the SPA, times the 6.3 multiple that Parthenon used to value the Company, plus the $29.2 million by which Defendants overstated the Company's working capital. *See* A1857; Op.21-22; Br.19 n.5.

Following the verdict, Defendants moved for judgment as a matter of law, a new trial, and remittitur, all of which the Superior Court denied. Op.10, 17, 23. "Regardless of how the Defendants try to spin the facts here," the court explained, "the core of the jury's decision" is that Defendants "manipulated their records to create a financial picture of [the Company] that was simply wrong and fraudulent.

They knew that the Plaintiff was valuing the Company by the revenue the Company was generating in the trailing twelve month ... period before March [2013] and they manipulated their records to create a revenue picture that they knew was false. The conduct here was not simply a dispute over the proper accounting procedures, but was an intentional act by their Vice President of Finance to manipulate the financial records he knew would be reasonably relied upon by the Plaintiff in the evaluation of the value of the Company.... [T]here was no doubt by the jury or this Court regarding their liability." Op.6-7.

The court awarded Bracket prejudgment and postjudgment interest, but declined to calculate postjudgment interest based on the 3.00% federal discount rate that prevailed at the time of the judgment. Op.36-38. Instead, the court interpreted 6 *Del. C.* §2301(a) to require that Bracket's *post*judgment interest rate equal its *pre*judgment interest rate, which meant basing *post*judgment interest on the historically low 0.75% discount rate that applied when the deal closed six years before the judgment. Op.38. The court also (without explanation) declined to award postjudgment interest on the portion of the judgment representing prejudgment interest due on the date of the judgment. Op.36, 39-40. Finally, the court declined to award Bracket attorneys' fees under the "bad faith" exception to the American Rule. Op.42-45.[3]

[3] Bracket also sought punitive damages at trial, but the Superior Court refused to submit that issue to the jury. Op.46. Bracket continues to believe punitive damages were warranted, but has chosen not to appeal that issue.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY INSTRUCTED THE JURY ON THE SCIENTER REQUIRED FOR FRAUD.

A. Question Presented

Whether the Superior Court erred by instructing the jury that recklessness sufficed to establish scienter for fraud under Delaware law and the SPA, and if so whether any such error was harmless.[4]

B. Scope Of Review

This Court reviews questions of contract interpretation and jury instructions *de novo*. *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012); *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002). The Court will not reverse for instructional error unless the instruction "undermined the jury's ability to intelligently perform its duty in returning a verdict." *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 540 (Del. 2006).

C. Merits Of Argument

1. The Superior Court's Instruction Was Proper Under Both Delaware Law And The SPA.

Under Delaware law, recklessness suffices to establish the scienter required for fraud. *See, e.g.*, *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 115 (Del. 2006). As the Superior Court recognized, any attempt to contractually modify that scienter standard "can only be done by express agreement," and the

[4] *See* Br.Ex.B at 61-71; A2003-04; A2626-30.

SPA contains no such "clear articulation of the parties' intent to alter the mental state required by law." Op.13. The Superior Court thus correctly instructed the jury that Bracket could recover if Defendants were "recklessly indifferent" in making their false representations. A2088.

Delaware courts interpret contracts "according to their plain, ordinary meaning." *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012). A court "must read the instrument as a whole, and, if possible, reconcile all the provisions of the instrument." *Id.* at 386. Here, numerous provisions of the SPA recognize Defendants' liability "in the case of fraud," and conversely that Bracket's recovery "in the absence of fraud" was limited to a representations and warranties ("R&W") insurance policy. A2552 (§3.26); A2555 (§4.9(a)); A2555-56 (§4.9(b)); A2582-83 (§9.6(d)); A2583-84 (§9.8). Defendants do not dispute that those numerous references to "fraud" incorporate the normal Delaware scienter standard, including both intentional and reckless misrepresentations.

For example, §3.26 of the SPA states that the Company is being sold "'as is, where is,'" with two exceptions: "[e]xcept for the representations and warranties contained in this Article III," which include the Company's financial statements, "*and except in the case of fraud*." A2552 (emphasis added). Similarly, §4.9(a) limits Bracket's ability to recover for misrepresentations concerning "the value of the financial condition, assets, operations and prospects" of the Company, and related topics—"*except in the case of fraud*," a limitation §4.9(a) repeats three times. A2555 (emphasis added). In §4.9(b), Defendants disclaimed any liability to Bracket "from the distribution ... of any information regarding" the Company—but once again, "*except ... in the case of fraud*." A2556 (emphasis added).

Those provisions fit together seamlessly with the indemnification provision in Article 9. First, §9.6(d) states that "[n]otwithstanding any other provision herein to the contrary, … *except in the case of fraud*," Defendants will not be liable for "any breach of any representation or warranty" in the SPA. A2582-83 (emphasis added). Next, §9.8 states that "*[i]n the absence of fraud* and except for [Bracket's] and its Affiliates' rights under the R&W Policy," the SPA's indemnification provisions "shall provide the exclusive remedy for breach of any covenant, agreement or representation or warranty." A2583 (emphasis added). Finally, §9.8 declares that "*in absence of fraud*," Defendants will not be liable for any breach of a "Non-Fundamental Representation," including the representations at issue here. A2583 (emphasis added). Taken together, these provisions form a coherent liability regime that allows Bracket to hold Defendants liable in court if it can prove common-law fraud, and that limits Bracket to recovering under the R&W Policy if it cannot.

Defendants try to escape this coherent scheme by focusing on a single misspelled word in §9.6(d), which they believe conflicts with—and overrides—all of the coherently interlocking provisions above. They rely on the second sentence of §9.6(d), which provides that "[i]n furtherance of the foregoing, ... except in the case of any deliberant [sic] fraudulent (i) act, (ii) statement, or (iii) omission," Bracket's sole remedy is the R&W Policy. A2583. Defendants rest their entire argument on the misspelled word "delibera[te]," claiming that one word insulates them from any liability for common-law fraud committed recklessly despite all the other provisions of the SPA that contemplate such liability.

That reed is far too thin for all the weight Defendants place on it. As the Superior Court recognized, "the inclusion of one undefined term—'deliberate'—in the indemnification section of the SPA" cannot be reasonably understood as a clear agreement to "alter[] the mental state required for common law fraud." Op.13 (emphasis omitted). As an initial matter, "delibera[te]" in §9.6(d) is an *adjective* that modifies the nouns "act," "statement," and "omission," not an *adverb* that modifies "fraudulent." *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018) ("According to the ordinary understanding of how adjectives work, … [a]djectives modify nouns."); *Webster's Third New International Dictionary* 596 (1966) (defining "deliberate" as an adjective and "deliberately" as an adverb). Even if Defendants were right to claim that "deliberate" means "intentional," §9.6(d) would require only an intentional *act,* *statement, or omission*; it would not alter the scienter standard for whether such intentional act were *fraudulent*.

More fundamentally, the SPA makes clear that the parties never intended the term "delibera[te]" in §9.6(d) to rewrite the established Delaware scienter standard for fraud or the parties' broader agreement to limit liability "except in the case of fraud." One sentence in §9.6(d) cannot be read divorced from the rest of the SPA, and it certainly cannot be read divorced from the balance of §9.6(d), especially when the text of §9.6(d) explicitly links the sentences together by providing that the phrase "delibera[te] fraudulent (i) act, (ii) statement, or (iii) omission" must be read "[i]n *furtherance* of the foregoing" sentence, not in contradistinction to it. A2583 (emphasis added). That "foregoing" sentence—like numerous other provisions throughout the SPA—imposes limits on liability and indemnification "except in the case of fraud." Even Defendants concede that the reference to fraud in §9.6(d)'s first sentence refers to common-law fraud and not some subset that excludes recklessness. Given the express linkage between the two sentences, there is no reason to think that the second sentence refers to only a subset of common-law fraud. And if there were any tension between the two sentences (and properly read there is not), the first sentence's reference to common-law fraud would trump given that the first sentence is the one that includes the nonobstante/notwithstanding clause. A2582.[5] Given those clear textual instructions, the phrase "delibera[te] fraudulent (i) act, (ii) statement, or (iii) omission" cannot be read to contradict the consistent regime set forth throughout the SPA and Delaware law by suddenly imposing a separate and heightened scienter requirement.

Instead, the far more natural and harmonious reading of the word "delibera[te]" in this context is that it simply reinforces the SPA's other references to common-law fraud by excluding *equitable* fraud, which covers "negligent or innocent misrepresentations." *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983). Contrary to what Defendants suggest, deliberate is not some well-established term-of-art for excluding recklessness. Indeed, there is nothing exceptional about using the term "deliberate" to include recklessness. *See, e.g.*, *Estate of Jackson v. Genesis Health Ventures*, 23 A.3d 1287, 1290 n.2 (Del. 2011) ("deliberate and reckless indifference to danger"); *In re Guy*, 756 A.2d 875, 880 (Del. 2000) ("deliberate pattern of reckless disregard"); *see also Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 48 (2011) ("deliberate recklessness"); *cf. Webster's Third*, *supra*, at 596 ("deliberate" includes "presumed …

[5] Defendants egregiously misread the SPA by suggesting this "notwithstanding any other provision" clause modifies "delibera[te] fraudulent act." Br.28. "Notwithstanding any other provision" appears in the *first* sentence of §9.6(d), which ensures that Bracket *can* hold Defendants liable "in the case of fraud." A2582.

awareness”). Even the term “intentional”—which Defendants choose as their preferred definition of “deliberate,” *see* Br.22—is regularly used in the fraud context to include reckless conduct. *See, e.g.*, *Katz v. Maffett*, 2020 WL 113912, at *2 (Del. Super. Ct. Jan. 9, 2020) (“intentional misrepresentation” includes “reckless indifference to the truth”); *Friedman v. Zahid Aslam, Bibee, LLC*, 2015 WL 966111, at *4 (Del. Super. Ct. Jan. 2, 2015) (same); *Kronenberg v. Katz*, 872 A.2d 568, 585 n.25 (Del. Ch. 2004) (same). Read in context, the single misspelled word “deliberant” in §9.6(d) gives no indication that the parties intended to redefine the traditional Delaware scienter standard for common-law fraud, much less a “clear articulation” that the parties reached an “express agreement” to that effect. Op.13.[6]

2. Any Purported Error Was Harmless.

In any event, any error in instructing the jury on recklessness did not “undermine[] the jury’s ability to intelligently perform its duty.” *Sammons*, 913 A.2d at 540. The overwhelming evidence at trial—which Defendants again

[6] Defendants’ suggestion that the Superior Court changed its mind on this issue, *see* Br.17-19, 23-24, is plainly wrong. As the Superior Court explained before trial, its summary judgment decision—like the SPA—was not intended to redefine the scienter required for fraud under Delaware law. Br.Ex.B at 65-71. Defendants likewise err in relying on *ABRY Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032 (Del. Ch. 2006). *See* Br.24-25. That case involved a contract that absolved the seller from *all* liability for misrepresentations, *including* intentional fraud; the question there was only the extent to which that provision was enforceable. Here, by contrast, the SPA repeatedly makes clear that Bracket *can* hold Defendants liable for common-law fraud. *Supra* pp.26-30.

ignore—showed that Defendants committed intentional and not merely reckless fraud. To quote the Superior Court, Defendants' misstatements were "not simply a dispute over the proper accounting procedures," but "an *intentional act* … to manipulate the financial records [Defendants] knew would be reasonably relied upon by [Bracket]." Op.6 (emphasis added). Indeed, the "core of the jury's decision" was that Defendants consciously "manipulated their records to create a revenue picture that they knew was false," and there was "no doubt by the jury or [the Superior] Court regarding their liability" on that basis. Op.6-7.

On this record, Defendants' assertion that the jury might have based its verdict on recklessness alone is preposterous. Even if the Superior Court had erred by instructing the jury on recklessness, that purported error did not undermine the jury's ability to return a proper verdict and so cannot warrant reversal. *Sammons*, 913 A.2d at 540.[7]

[7] Defendants' assertion that the jury's verdict on conspiracy suggests otherwise, Br.30-31, is equally preposterous. That verdict shows only that the jury was not convinced ESI and UBC specifically "agreed with each other" to commit fraud, not that the fraud the jury found each Defendant committed was somehow unintentional. A2089.

II. THE SUPERIOR COURT PROPERLY EXCLUDED DEFENDANTS' UNFAIRLY PREJUDICIAL EVIDENCE REGARDING BRACKET'S PRICING METHODOLOGY.

A. Question Presented

Whether the Superior Court abused its discretion by excluding three unfairly prejudicial exhibits regarding Bracket's methodology for pricing the Company, and if so whether any such error was harmless.

Defendants sought to admit these exhibits at trial to challenge Bracket's damages calculation by arguing that Bracket did not actually determine its purchase price by multiplying the March 2013 TTM EBITDA by 6.3. A1778-80; A1898-99. To the extent Defendants now argue those exhibits show that Bracket placed no reliance *at all* on the represented March 2013 financial statements, Defendants' argument is not only facially absurd, but was never fairly presented at trial. Because Defendants have made no attempt to show that the interests of justice require considering that argument, this Court should disregard it. Del. Sup. Ct. R. 8.[8]

B. Scope Of Review

The Superior Court's decision to exclude evidence "will not be reversed absent a clear abuse of discretion." *Firestone Tire & Rubber Co. v. Adams*, 541

[8] Defendants' arguments in their post-trial motion are not sufficient to preserve an argument not made at trial. *See, e.g.*, *Riggins v. Mauriello*, 603 A.2d 827, 828-30 (Del. 1992); *Weedon v. State*, 647 A.2d 1078, 1082-83 (Del. 1994) (evidentiary argument on appeal must be "the one raised at trial").

A.2d 567, 570 (Del. 1988). Even if the Superior Court abused its discretion, this Court will not reverse unless the error caused "significant prejudice so as to have denied the appellant a fair trial." *Id.* Where an appellant makes an argument that differs fundamentally from the argument it made at trial, the trial court's decision is reviewed at most for plain error. Del. Sup. Ct. R. 8; *Baize v. Vincent*, 2016 WL 5874839, at *2 (Del. 2016).[9]

C. Merits Of Argument

Defendants assert that the Superior Court erred by excluding three exhibits: (1) an affidavit by Parthenon executive Jeff Stein that clearly states, contrary to Defendants' representations, that Bracket "relied on the accuracy" of the March 31, 2013 financials in deciding to purchase the Company and in "agreeing to the final purchase price," A2658-59; (2) a one-line email from Stein saying that Parthenon used a June 2013 date to calculate that price, A2665; and (3) unexplained spreadsheets showing various financial information about the Company, A2663, A2669-93. Defendants' arguments are forfeited, plainly meritless, or both.

1. Defendants Never Fairly Presented Their Reliance Argument At Trial.

Defendants assert on appeal that the three exhibits the Superior Court excluded would have shown that "Bracket Did Not Rely On The March 2013

[9] Defendants' argument for *de novo* review, asserting the challenged evidentiary ruling was a *de facto* grant of summary judgment, is meritless. *Infra* pp.37-38.

Financial Statements" represented in the SPA. Br.32. To the extent Defendants suggest these exhibits show that Bracket did not rely *at all* on the represented March 2013 financial statements, both in deciding to buy the Company and in deciding how much to pay for it, their argument is not only fanciful but forfeited. Defendants sought to introduce these exhibits at trial to challenge Bracket's calculation of *damages*, not to challenge the *reliance* element of Bracket's liability case. Because Defendants' reliance argument on appeal is wholly different from the damages argument they presented at trial, this Court should not consider it. Del. Sup. Ct. R. 8.

To establish its damages at trial, Bracket presented Parthenon executives who testified that they calculated the purchase price for the Company by multiplying its March 2013 TTM EBITDA by 6.3, such that every dollar by which Defendants inflated their March 2013 TTM EBITDA inflated the purchase price by $6.30. *See, e.g.*, A1453; A1473; A1786; *supra* pp.13, 19-20. Part of Defendants' strategy was to challenge that testimony by arguing that Bracket had not actually priced the deal by applying a multiple to the Company's historical financials, or that Bracket had actually used a smaller multiple—and so Bracket's damages should be lower than the amount Bracket claimed. *See, e.g.*, A1494-95; A1498-1500; A1504-06; A1743-44.

Defendants moved to admit the exhibits at issue here to bolster that damages argument. As defense counsel argued to the Superior Court, "we have to be able to explain to the jury that this position that the plaintiff is putting forth, they base the purchase price based on this formula," is "inconsistent with the record," because the exhibits that Defendants sought to introduce showed that "the multiples move around each time." A1779. As defense counsel explained, their goal was to show that Bracket's "damages calculation" was not "valid," because Bracket did not "actually use[] it in real time." A1779. Defense counsel then repeated Defendants' view that their evidence was relevant and probative because it showed "a lower multiple that [Bracket is] using." A1780. Underscoring the purpose of this evidence, defense counsel declared that "*we don't have to touch it if they only drop their damages*." A1779 (emphasis added). Further underscoring the point, Defendants sought to introduce these exhibits again two days later when cross-examining Dudney—who testified as an expert witness on damages, not a fact witness on reliance. *See* A1899 (seeking to introduce the exhibits at issue in cross-examining Dudney because they show "a difference on the damages calculation").

Defendants now appear to raise a wholly different argument, asserting that the exhibits here were relevant not to Bracket's damages calculation, but to whether Bracket relied *at all* on the financial representations in the SPA in deciding to buy the Company and how much to pay for it. Br.32-39. Setting aside the staggering implausibility of that argument—that Bracket placed *no reliance at all* on Defendants' binding contractual representations about the Company's finances in deciding whether to spend $187 million to buy the Company—and setting aside that the lead exhibit at issue flatly contradicts that argument, *see* A2658-59 (affirming that Bracket "relied on the accuracy" of the March 2013 financials in "agreeing to the final purchase price"), the crucial point for present purposes is that Defendants "did not feature" that reliance argument "in the same way" at trial. *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 363 (Del. 2017). This Court should therefore refuse to consider that forfeited argument. Del. Sup. Ct. R. 8.

2. The Superior Court Was Well Within Its Discretion To Exclude Defendants' Unfairly Prejudicial Evidence.

Defendants' evidentiary objection is not just forfeited but meritless. The Superior Court was well within its discretion to prohibit Defendants from introducing confusing and unfairly prejudicial evidence in a blatant attempt to distort the court's prior rulings limiting Bracket's damages case to its pricing calculations based on the March 2013 TTM period.

To begin, Defendants are obviously wrong to suggest that the Superior Court somehow "effectively grant[ed] summary judgment" on reliance for Bracket by barring Defendants from introducing three unfairly prejudicial exhibits. Br.36; *see* Br.6, 32-33, 37-38. As this Court has made clear—in a decision that Defendants themselves cite—there is a straightforward difference between summary judgment decisions and evidentiary rulings: the former are "dispositive of a substantive legal issue," while the latter simply concern "the admissibility of evidence." *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 499-500 (Del. 2001). Nothing in the Superior Court's decision here is "dispositive" on the question of reliance, which the Superior Court properly left to the jury, instructing that Defendants were liable only if the jury determined that Bracket "acted in justifiable reliance on [Defendants'] false representation[s]." A2088. That question *was* "resolved by the jury," just as Defendants claim it must be. Br.37. Defendants cannot evade the demanding standard of review that protects the trial court's discretion over evidentiary questions by mischaracterizing the exclusion of three unfairly prejudicial exhibits as an improper grant of summary judgment.

Nor did the Superior Court abuse its wide discretion in determining that those exhibits would create unfair prejudice far beyond any probative value they might have. In bringing this case, Bracket initially argued that its damages could be calculated based on either the Company's March 2013 or May 2013 TTM financials. *See, e.g.*, A760, A768. That was not, as Defendants inexplicably suggest, because Bracket "could not get its story straight," *contra* Br.33-34; it is simply because Bracket (like any other sophisticated buyer) took account of all the information it had available in deciding to purchase the Company, and so a jury could reasonably have based Bracket's damages on either representation of the Company's value. *See Stephenson*, 462 A.2d at 1076. At summary judgment, however—in an apparent attempt to simplify the issues in the case—the Superior Court ruled that Bracket "was limited to [the March 2013 TTM] period" for the damages it could seek, and could not introduce evidence of greater damages based on any later TTM period. Op.15. That ruling "had a significant impact on the damages [Bracket was] claiming," Op.15, reducing the potential damages Bracket could recover by over $7 million. *See* A2678.

Bracket dutifully complied with that ruling, limiting its evidence at trial to the March 2013 TTM period. On the first morning of trial, counsel for Bracket informed the court that "we followed your ruling" and "calculated all our damages on March [2013]. And we do not intend to put in May [2013]. That actually cost our client a fairly significant amount of money, but we're following the ruling." A1406. At the same time, Bracket asked the Superior Court to confirm that "there won't be conversations about May [2013]," because it would be "quite prejudicial—if [Defendants] were allowed to say [that Bracket's calculations] used to say May, or you had a calculation for June, or you were thinking at one point about 2012, [or] other [TTM] dates." A1406. Otherwise, Defendants could falsely suggest that Bracket had tried to hide its subsequent pricing calculations from the jury, rather than being compelled by the court to limit its evidence to the March 2013 TTM period. A1406.

Defense counsel neither disputed the clear potential for prejudice nor argued that Defendants were entitled to present evidence of other TTM dates in order to disprove reliance. Instead, defense counsel stated only that Defendants "do expect to have evidence about other [TTM] dates," without clarifying why that evidence would be admissible. A1406. The court instructed defense counsel that "if you're going to go down that road, I want to understand why you're going down that road at the time the witness is on so I can have some perspective of the context of that." A1406. The parties and the court thus understood from the first day of trial that the topic of "other [TTM] dates" had the potential to seriously and unfairly prejudice Bracket by creating the erroneous impression that Bracket had tried to conceal its later pricing calculations.

The Superior Court nevertheless gave Defendants every opportunity to attack Bracket's evidence showing that Bracket based its purchase price on the March 2013 financial statements. On the second day of trial, for instance, defense counsel cross-examined Parthenon's co-CEO David Ament at length in an effort to impeach his testimony that Parthenon determined its purchase price by multiplying the Company's March 2013 TTM EBITDA by a multiple of about 6.3. Defense counsel noted that Parthenon discussed "various different multiples" at investor meetings "in February, March, April, May, June and July" of 2013. A1494-95. When Ament reiterated that Parthenon priced the deal based on the March 2013 financials, defense counsel pressed him on whether Parthenon "changed the pricing" later on based on subsequent financial statements. A1495. Ament said no. A1495; *see also* A1500. Defense counsel then introduced an exhibit, A2595, showing a September 2013 Parthenon investor presentation in which Parthenon described the deal's "Valuation" and purchase price by referencing a multiple of "6.0X ... based on [TTM] July 2013." A1504; A2607. But Ament stuck to his testimony that Parthenon had determined its purchase price "months before," based on the March 2013 financials and a multiple of 6.3. A1504. Defense counsel pressed Ament once more on whether "the pricing was determined in the May, June timeframe ... based on using a six or so times multiple, times the overall EBITDA of the company as of March 31st of 2013," to which Ament repeatedly answered "Yes." A1505; A1505-06.

Shifting gears slightly, defense counsel confronted Ament about whether Parthenon's price was based on projections—rather than historic financials—but Ament denied it. A1498. Changing tactics again, defense counsel tried to elicit an admission that Parthenon did *not* first select a multiple and then apply it to the Company's financials; "in fact," defense counsel said, "the formula is price divided by EBITDA equals multiple; correct, sir?" A1499. "No," Ament testified. A1499. This line of questioning continued for some time. A1499-1500.

Defense counsel revisited these topics three days later, cross-examining Parthenon executive Kurt Brumme on whether "the ultimate purchase price that Parthenon settled on for [B]racket [was] based solely on a trailing 12 month EBITDA metric times a multiple?" A1743. At sidebar, the Court told defense counsel that "I am more than willing to let you go on, but I guarantee the jury doesn't want to hear it.... You were going over things that you have already established, things other witnesses have already established." A1743. Defense counsel repeated the question anyway, and Brumme confirmed that "a trailing 12 month EBITDA metric times a multiple" was "the primary metric we used" to calculate a purchase price. A1743-44. At no point while questioning Ament and Brumme did Defendants try to introduce the three exhibits that they now claim could have devastated Bracket's evidence that it relied on the March 2013 financial statements represented in the SPA.

It was only after all of the testimony of these fact witnesses—on the sixth and eighth days of trial—that Defendants sought to introduce the three exhibits at issue here. A1778-81; A1898-99. Defense counsel proffered these exhibits not to show that Bracket had placed *no reliance at all* on the March 2013 financial statements represented in the SPA, but as part of its damages critique to show that

Parthenon "didn't determine a particular multiple to apply to a TTM period to get a purchase price," but was instead "using projections," A1779, or perhaps "a lower multiple" of "6.05," A1780, which "has a difference on the damages calculation," A1899.

The Superior Court properly excluded those three exhibits. As the Court explained, Defendants' attempt to present evidence that Bracket had continued to update and confirm its pricing calculations with new information that Defendants provided during the parties' negotiations was simply "irrelevant to whether Bracket was defrauded," since Defendants did not (and could not) claim that Bracket placed no reliance at all on the false March 2013 financial statements in deciding to buy the Company. Op.15. After all, Defendants could hardly argue with a straight face that Bracket would have ignored the represented March 2013 statements and bought the Company at the same price even if those statements had (accurately) shown that the Company was actually earning millions of dollars less.

Conversely, to the extent that Defendants sought to attack Bracket's damages by showing that Bracket had considered other pricing calculations based on the Company's May 2013 and June 2013 financial statements, allowing Defendants' evidence risked serious unfair prejudice. Op.15. By its pretrial ruling, the Superior Court had foreclosed Bracket from introducing any evidence that its damages should be enlarged based on its later pricing calculations—a ruling that "had a significant impact on the damages [Bracket was] claiming," cutting them by some $7 million. Op.15; *see* A1780 (recognizing the "detriment to [Bracket]" from that ruling). Once the Superior Court "made th[at] ruling," Bracket "relied upon it," limiting its evidence of damages at trial to the pricing methodology it applied to the March 2013 TTM EBITDA. A1780.

Defendants' attempt to introduce evidence of Bracket's subsequent calculations to confirm its proposed price was "simply a back door effort to get around the Court's previous ruling" excluding that evidence, Op.15, and to unfairly prejudice Bracket by making it seem as if Bracket had been hiding those later pricing calculations, *see* A1406-07. The Superior Court properly determined this risk of unfair prejudice substantially outweighed the probative value of the exhibits that Defendants proffered—particularly when one of those exhibits explicitly affirms Bracket actually *did* "rel[y] on" the represented March 2013 financial statements in "agreeing to the final purchase price." A2659. That ruling was well within the Superior Court's "wide discretion" in light of its "unique position to evaluate and balance the probative and prejudicial aspects of the evidence." *Smith v. State*, 560 A.2d 1004, 1007 (Del. 1989).

3. Any Purported Error Was Harmless.

Even if the Superior Court had abused its broad discretion in excluding the exhibits at issue—and it did not—that ruling would in no way "constitut[e] significant prejudice." *Firestone*, 541 A.2d at 570. To the extent Defendants claim those exhibits would have convinced the jury that Bracket placed *no reliance at all* on the represented financial statements in the SPA in deciding to buy the Company, their argument is meritless. Extensive evidence at trial showed (unsurprisingly) that Bracket relied on Defendants' binding contractual representations about the Company's financial status in deciding whether to buy the Company and what to pay for it, *see* A1473; A1453; A1786, and Defendants raised no serious argument to the contrary. Even more remarkable, the lead exhibit on which Defendants rely specifically *reaffirmed* that point, stating explicitly that Bracket "relied on the accuracy of" the represented March 2013 financial statements in "agreeing to the final purchase price." A2659. Defendants' assertion that these exhibits might have changed the jury's mind on reliance is fanciful.

So too for Defendants' more limited argument that these exhibits might have affected the jury's damages award. As described above, the evidence at trial overwhelmingly demonstrated that Bracket relied on Defendants' represented financial statements to set its purchase price at 6.3 times the Company's March 2013 TTM EBITDA. *See* A1473; A1453; A1786. Defendants cross-examined Bracket's witnesses extensively on that issue, *see* A1494-95; A1498-1500; A1504-06; A1743-44, and introduced numerous other exhibits attempting to refute their testimony, *e.g.*, A2607, to no effect. Under these circumstances, there is simply no "real possibility that the jury would have reached a different outcome" even if Defendants had also introduced the three exhibits at issue. *Cooney-Koss v. Barlow*, 87 A.3d 1211, 1217 (Del. 2014).

III. THE SUPERIOR COURT PROPERLY ADMITTED BRACKET'S EXPERT TESTIMONY AND PROPERLY UPHELD THE JURY'S VERDICT REGARDING DEFENDANTS' MISREPRESENTATIONS.

A. Question Presented

Whether the Superior Court abused its discretion by allowing Bracket's expert to explain Defendants' financial misrepresentations, and by denying Defendants' post-trial motions for a new trial or remittitur because that testimony properly supported the jury's verdict.[10]

B. Scope Of Review

This Court reviews decisions admitting expert testimony and decisions denying a new trial or remittitur for abuse of discretion. *Gen. Motors Corp. v. Grenier*, 981 A.2d 531, 536 (Del. 2009); *Burkett-Wood v. Haines*, 906 A.2d 756, 764 (Del. 2006); *In re Asbestos Litig.*, 223 A.3d 432, 434 (Del. 2019). In reviewing a new trial motion, a court must give "enormous deference" to the jury, *Cuonzo v. Shore*, 958 A.2d 840, 844 (Del. 2008), and "view[] the record from the perspective most favorable to the jury's verdict," *Burkett-Wood*, 906 A.2d at 764. A new trial is not appropriate unless the evidence weighs "so heavily against the jury verdict that a reasonable jury could not have reached the result." *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).

---

[10] *See* A2631-35; A2648-49.

C. Merits Of Argument

Defendants argue that the Superior Court should have excluded Bracket's expert witness Louis Dudney and ordered a new trial or remittitur because Dudney failed to "connect the claimed damages to any actionable misrepresentations" in the SPA. Br.40. That argument is again meritless. Section 3.4(a) of the SPA explicitly represented that the Company's March 2013 financial statements "present fairly in all material respects the financial position and results of operations of the Compan[y]," and "were prepared in accordance with GAAP except as described in Disclosure Schedule 3.4(a)(ii)." A2536. As Dudney demonstrated at length at trial, those financial statements were instead blatant misrepresentations of the Company's financial position that were wholly inconsistent with the Company's disclosed revenue recognition policies—and indeed, with *any* legitimate revenue recognition policy. A1826-27; A1848-50; A1904; *supra* pp.20-21.

After seeing that extensive evidence, both the jury and the Superior Court had no difficulty concluding that what happened here was *not* (as Defendants would have it) a mere "dispute over the proper accounting procedures." Op.6-7. Instead, the evidence proved—and the jury and the Superior Court concluded—that Defendants intentionally "manipulated their records to create a financial picture of [the Company] that was simply wrong and fraudulent" and that

Defendants "knew was false." Op.6-7. That evidence was both admissible and sufficient to support the jury's verdict.

1. The Superior Court Properly Allowed Dudney To Testify.

Defendants present no serious argument that the Superior Court abused its discretion in allowing Dudney to testify. *See Norman v. All About Women, P.A.*, 193 A.3d 726, 730 (Del. 2018) (expert testimony is "appropriate" to "assist the trier of fact in understanding the relevant facts"). Defendants have never challenged Dudney's qualifications, which the Superior Court rightly found impeccable. A1386. Nor have they challenged the need for expert testimony to help the jury understand financial accounting. Instead, Defendants contend that Dudney's testimony should have been excluded because (Defendants say) his conclusions relied on two "assumptions" that supposedly made his analysis "unsound and unsubstantiated." Br.41-44.

As explained in detail below (and as the jury concluded), Defendants' arguments about those "assumptions" are flat wrong. *Infra* pp.53-55. But in any event, this Court has repeatedly held that when a party seeks to "attack the validity of the assumptions ... that [an expert] relied upon," the proper means for doing so is by "vigorous cross-examination," not by seeking to exclude that testimony completely. *Porter v. Turner*, 954 A.2d 308, 314 (Del. 2008); *see, e.g.*, *Rodriguez v. State*, 30 A.3d 764, 770 (Del. 2011); *Pavey v. Kalish*, 3 A.3d 1098 (Del. 2010).

The Superior Court followed that binding precedent, explaining that "[w]hile Defendants object to Dudney's methodology … this is simply an area to explore in cross-examination" and "does not mandate exclusion of the expert's testimony." Br.Ex.A. at 28-29. Defendants had "a full and fair opportunity to cross-examine Dudney and to explore their objections in front of the jury"—which they did at length—and to present their own expert to criticize Dudney's work. Op.14-15. Defendants' failure to persuade either the jury or the Superior Court that Dudney's analysis was unreliable is no reason to vacate the judgment.

2. The Superior Court Properly Found Dudney's Testimony Sufficient To Support The Jury's Verdict.

Defendants likewise have no plausible grounds to argue that Dudney's testimony (and all the other trial evidence) was insufficient to support the jury's finding that Defendants committed egregious fraud. Once again, Defendants dramatically mischaracterize the record, claiming that Dudney "failed to identify any SPA representation" supporting his analysis; that he based his conclusions on "how [he] preferred the Company account for its revenue" rather than "how the Company in fact accounted for it"; that the Company "expressly disclosed" that it was applying methods different than those Dudney used; and that the sum of Dudney's testimony amounted to a "[m]ere disagreement over proper accounting methods." Br.41-42 (emphasis omitted). That not only fails to read the record "from the perspective most favorable to the jury's verdict," *Burkett-Wood*, 906 A.2d at 764, but practically ignores the record entirely.

In reality, Dudney explicitly testified that his analysis was based on the representations in §3.4(a) of the SPA that the March 2013 financial statements "present fairly in all material respects the financial position and results of operations" of the Company and were "prepared in accordance with GAAP." A2536; *see* A1814; A1826-27; A1848-49. Dudney likewise explicitly testified that his analysis followed the Company's disclosed revenue recognition policies, and repeatedly rejected defense counsel's attempts to insinuate otherwise. *See, e.g.*, A1848-50; A1866-67; A1996; *supra* pp.18-19. On that basis, Dudney concluded that *no* legitimate revenue recognition policy could possibly have produced Defendants' manipulations, and that the resulting misrepresentations could not possibly have been "just mistakes" or "simply negligence or errors." A1845; *see supra* pp.20-21. That evidence was confirmed by the KPMG report (and Defendants' protracted efforts to conceal that report), which also applied the Company's own revenue recognition policies and found a *94.8% error rate* in the Company's unbilled receivables. A1724; B178.[11]

[11] Defendants also ignore the record by claiming that their fraud simply affected the timing of when the Company recognized revenue, without altering the total amount of revenue properly recognized or the Company's actual cash receipts. *Contra* Br.16, 42. If Stewart's revenue adjustments had any basis in

Defendants' suggestion that Dudney's testimony presented only "a big picture" analysis or a "big mush," Br.44, is likewise impossible to square with the record. As the Superior Court recognized after trial, Dudney's testimony—which covered numerous hours over three days of trial—demonstrated that he had performed a "painstaking analysis of each contract" under which the Company had recognized revenue, Op.14, and convinced both the jury and the Superior Court that Defendants had "manipulated their records to create a revenue picture that they knew was false." Op.6. In particular, Dudney explained that Stewart fraudulently booked TTM-period revenue under 342 different contracts, inflating the Company's TTM EBITDA by over $8 million and overstating its working capital by over $29 million. A1848-50; A1857; A1895. "Regardless of how the Defendants try to spin the facts here," Dudney's testimony conclusively showed their misconduct was "not simply a dispute over the proper accounting procedures," but deliberate and egregious fraud. Op.6.

Defendants' attempts to discredit that evidence are no more persuasive on appeal than they were at trial. To begin, Defendants do not meaningfully dispute Dudney's testimony that Stewart fraudulently assigned revenue to 151 contracts that either never existed or were not active during the TTM period, representing roughly a third of the total overstated revenue. A1815-16; A1823-26. Defendants

reality, they should have eventually been reflected in executed change orders—none of which in fact occurred. *See* A1978-79; *supra* pp.21-22 & n.1.

fleetingly challenge that damning testimony only in a footnote in their statement of facts, *see* Br.16 n.4; and "[a]rguments in footnotes," especially outside the argument section, do not preserve an issue for review. *Lum v. State*, 101 A.3d 970, 972 (Del. 2014). In any event, the jury was well within its province to credit Dudney's testimony, based on his "painstaking analysis of each contract," Op.14, that those 151 contracts were nonexistent or inactive contracts on which no work was being performed, *see* A1815-16; A1823-26—rather than Defendants' speculation that, according to Stewart, those contracts might have been pending formal contract execution or extension, *see* A371-72.

Defendants focus instead on Dudney's testimony regarding 191 modestly less damning contracts which actually existed and were active during the relevant periods, but for which Stewart fraudulently booked revenue during the TTM period that should have been recognized outside that period. Defendants offer two criticisms of that testimony, neither of which addresses the far more damning testimony concerning the other 151 non-existent or non-active contracts, or comes anywhere near showing that "a reasonable jury could not have reached the result" that the jury and the Superior Court did. *Burkett-Wood*, 906 A.2d at 764.

First, Defendants claim that Dudney departed from the Company's accounting policies by amortizing certain software-related revenue on a straight-line basis over the life of the associated contract. Br.42-43. But Dudney squarely refuted that claim at trial, explaining that he followed the disclosed Company policy of "'recogniz[ing] revenue on a straight line basis, beginning with the contract start date, for EBC software, through the expected service completion date.'" A1849-50; A1996. As Dudney noted, that treatment of software-related revenue was confirmed by KPMG—Defendants' own accounting firm—which interpreted the Company's policy in the same way. A1850; B196. Defendants tried to suggest that this policy was only in effect for some of the TTM period, but Dudney disagreed, as did KPMG. A1895; B196. The jury resolved this factual dispute by crediting Dudney (and KPMG) rather than Defendants. That is hardly grounds for a new trial.

Second, Defendants claim that for non-software-related revenue, Dudney ignored the Company's policy of recognizing revenue when work under the associated contract was actually performed, and instead recognized revenue based only on the "fixed fee due date" specified in the contract. Br.42-43. Defendants again ignore Dudney's actual testimony. As Dudney explained at trial, he and his team *did* apply the Company's disclosed policy of recognizing revenue "as services are performed," A1849, and painstakingly determined when the Company had performed work on each contract by speaking with project managers and examining emails, invoices, billing files, scope trackers, change orders, and the like. *See* A1817; A1825-26; A1848; A1851-52; A1996; A1998-99. Defendants “had a full and fair opportunity” to “object[] to Dudney’s methodology” at trial, Op.13-14, and took full advantage of that opportunity, *see, e.g.*, A1891-93; A1923-24; A1931-32—but without persuading the jury. Once again, the fact that the jury “accepted [Dudney’s] testimony” and resolved this factual dispute for Bracket is no proper ground for a new trial. Op.13-14; *Burkett-Wood*, 906 A.2d at 764.

IV. THE SUPERIOR COURT PROPERLY ADMITTED BRACKET'S EXPERT TESTIMONY ON DAMAGES AND PROPERLY UPHELD THE JURY'S DAMAGES AWARD.

A. Question Presented

Whether the Superior Court abused its discretion by allowing Dudney to testify regarding Bracket's valuation of the Company, and by denying Defendants' motion for a new trial or remittitur because that testimony properly supported the jury's damages award.[12]

B. Scope Of Review

This Court reviews decisions admitting expert testimony and decisions denying a new trial or remittitur for abuse of discretion. *Gen. Motors*, 981 A.2d at 536; *Burkett-Wood*, 906 A.2d at 764; *Asbestos Litig.*, 223 A.3d at 434. In reviewing a new trial motion, courts must "view[] the record from the perspective most favorable to the jury's verdict," *Burkett-Wood*, 906 A.2d at 764, and deny the motion unless "a reasonable jury could not have reached the result," *Storey*, 401 A.2d at 465.

C. Merits Of Argument

1. The Superior Court Properly Allowed Dudney To Testify.

Defendants again present no serious argument that the Superior Court abused its discretion in allowing Dudney to testify. *See supra* pp.49-50. Defendants contend that Dudney's testimony should have been excluded because,

[12] *See* A2646-48.

in their view, his analysis was "defective" in valuing the Company in the same way that Bracket itself did. Br.52. But again, the proper remedy for any purported defect in that analysis was "vigorous cross-examination," not wholesale exclusion. *Porter*, 954 A.2d at 314; *supra* pp.49-50.

2. The Superior Court Properly Found Dudney's Testimony Sufficient To Support The Jury's Damages Award.

The Superior Court likewise properly concluded that Dudney's testimony was sufficient to support the jury's damages award. As Defendants recognize, a plaintiff who proves fraud under Delaware law is entitled to recover "the difference between the actual and the represented values of the object of the transaction," so as to "put the plaintiff in the same financial position that he would have been in if the defendant's representations had been true." *Stephenson*, 462 A.2d at 1076. Once a plaintiff proves the fact of damage, precision over the amount of damages is not required. The plaintiff must make an inherently counterfactual demonstration of what would have happened absent the defendant's fraud, and the benefit of the doubt or imprecision goes to the defrauded party. Thus, the plaintiff need not prove its damages amount with "mathematical certainty," instead, a "responsible estimate" is sufficient. *Beard Research, Inc. v. Kates*, 8 A.3d 573, 613 (Del. Ch. 2010); *see Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1111 (Del. 2015) (damages "can be an estimate").

Dudney's testimony fully complied with those governing principles, and (as the Superior Court recognized) gave the jury a "fair and appropriate" basis for the damages it awarded. Op.22. Dudney estimated the actual value of the Company by applying "the same formula" used by Bracket, multiplying the Company's *actual* March 2013 TTM EBITDA "once the fraudulent revenue figures were removed" by 6.3. Op.22; *see* A1856-57; A1899-1900; A1903. As the Superior Court recognized, that calculation provides a fair and reasonable estimate of the Company's actual value, because it estimates the market price that a sophisticated buyer would have been willing to pay for the company in an arms-length transaction. In the Superior Court's words, that calculation reflects that "[t]he value of the Company here is based on what [Bracket] was willing to pay for it, not some hypothetical evaluation." Op.22. Consistent with Delaware law, Dudney's calculation (and the jury's award) provided Bracket "the difference between the actual and the represented values of the [Company]" and "put [Bracket] in the same financial position that [it] would have been in if the [D]efendant's representations had been true." *Stephenson*, 462 A.2d at 1076.

Defendants concede that the Superior Court "correctly stated the settled rule governing calculation of damages under Delaware law," Br.48, and recognize the Superior Court's holding that Dudney did "effectively calculate[] the [actual] value of the Company" as Delaware law requires. Br.51 n.17. They argue, however, that Dudney's calculation was not sufficiently "principled," Br.51 n.17, and ask this Court to impose some (unspecified) higher evidentiary standard for proving "actual value"—one that would apparently exclude showing what a sophisticated arms-length buyer would have paid, and require some kind of built-from-scratch hypothetical expert valuation of a company's "true value." Br.51.

No Delaware precedent whatsoever adopts that vague and concocted requirement. Contrary to what Defendants suggest, this Court in *Poole* actually *rejected* precisely the kind of "hypothetical evaluation" that Defendants apparently envision. *Contra* Br.49-50 (citing *Poole v. N.V. Deli Maatschappij*, 224 A.2d 260, 264-65 (Del. 1966)). Defendants' reliance on *Zayo* is equally misplaced; the Court of Chancery there declined to use an EBITDA multiple to measure damages where the buyer had not "actually based its purchase price" on that measure, but noted an EBITDA multiple could be appropriate where (as here) the target company was worth "less than the value for which the buyer bargained." *Zayo Grp., LLC v. Latisys Holdings, LLC*, 2018 WL 6177174, at *17-18 (Del. Ch. Nov. 26, 2018); *see also id.* at *17 n.215 (citing cases applying EBITDA multiples to calculate damages). Put simply, there is nothing in Delaware law to support Defendants' misguided attack on the adequacy of Dudney's testimony as a basis for the jury's damages award.

Defendants cite no law to support their assertion that Dudney's methodology "violated established requirements for calculating fraud damages." Br.51. Defendants had every right (and took every opportunity) to try to persuade the jury that Dudney's methodology was unreliable, whether because he chose to apply Bracket's pricing methodology or because (consistent with that methodology) he used the Company's March 2013 financial statements rather than its July 2013 statements or Parthenon's September 2013 valuation. Br.51. They also had the right to present their own damages expert, but preferred to rest on their efforts to discredit Dudney through cross-examination. *See* A1913; A1808-09; A1938-39. The jury rejected those efforts, and credited Dudney's testimony instead. Br.19 n.5. Because that testimony was more than sufficient to support the verdict, the Superior Court was both correct and well within its discretion to deny Defendants' post-trial motions.

V. THE SUPERIOR COURT ERRED BY AWARDING FAR LESS THAN THE PROPER AMOUNT OF POSTJUDGMENT INTEREST.

A. Question Presented

Whether the Superior Court erred as a matter of law under 6 *Del. C.* §2301(a) by (1) failing to calculate postjudgment interest based on the applicable rate at the judgment date, and (2) failing to award postjudgment interest on the portion of the judgment representing prejudgment interest.[13]

B. Scope Of Review

This Court reviews the interpretation of 6 *Del. C.* §2301(a) *de novo*. *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.3d 482, 484 (Del. 2011).

C. Merits Of Argument

1. Postjudgment Interest Should Be Calculated Based On The Interest Rate At The Time Of Judgment.

The Superior Court erred by basing the rate of postjudgment interest on the historically low federal discount rate on August 14, 2013, when Bracket was injured years before the judgment, rather than the rate on June 24, 2019, when the jury rendered its verdict. Under the governing statute and this Court's precedent, postjudgment interest—as its name implies—runs from the date of judgment (here, the date of the jury verdict), and should be calculated based on the federal discount rate on that date. *See* 6 *Del. C.* §2301(a); *Wilmington Country Club v. Cowee*, 747

---

[13] *See* B7-8; B86-87.

A.2d 1087, 1097-98 (Del. 2000); *Moffitt v. Carroll*, 640 A.2d 169, 177-78 (Del. 1994).

Delaware law provides that "the legal rate of interest shall be 5% over the Federal Reserve discount rate … as of the time from which interest is due." 6 *Del. C.* §2301(a). Postjudgment interest, of course, "is due" to a prevailing plaintiff "as of the time" the judgment is entered. *See, e.g.*, *Cowee*, 747 A.2d at 1097 ("Interest on a judgment begins to accrue when the judgment is entered as final and determinative of a party's rights."). That is why this Court has repeatedly held that postjudgment interest runs from the date of the verdict, not some earlier date that predates the judgment, like the date of injury. *Id.* at 1097-98; *Moffitt*, 640 A.2d at 177-78. Especially in light of that consistent precedent, the most natural reading of the statutory text is that postjudgment interest should be based on the federal discount rate on the date of judgment.

That plain-meaning construction is all the more appropriate given this Court's instruction that statutes (and §2301(a) in particular) should be "construe[d] ... 'to give a sensible and practical meaning to [the] statute as a whole.'" *Rapposelli v. State Farm Mut. Auto. Ins. Co.*, 988 A.2d 425, 427 (Del. 2010). "Post-judgment interest is intended to compensate a plaintiff for the loss of use of funds until the judgment is paid." *Shepherd v. Knapp*, 1999 WL 1611320, at *1 (Del. Super. Ct. Apr. 1, 1999), *aff'd*, 741 A.2d 1026 (Del. 1999). That goal is best accomplished by basing the plaintiff's recovery on the interest rate that prevails when such funds become due—which, for *post*judgment interest, is the date of judgment. Postjudgment interest also "prevents the unjust enrichment of judgment debtors who would otherwise be permitted to finance appeals with money belonging to the judgment creditor." *Hughes v. Jardel Co.*, 1987 WL 12433, at *2 (Del. Super. Ct. June 8, 1987). That goal, too, is served best by using the interest rate at the time of judgment, which more accurately captures the cost of delaying payment that is due upon the judgment while the appeal is pending. Basing postjudgment interest on the date of judgment also provides a simple and easily administrable rule (and, in cases where prejudgment interest is not available, eliminates any incentive for the parties to litigate over when a disputed injury occurred).

Given these considerations, it is unsurprising that a number of Delaware decisions have followed the statutory text and awarded postjudgment interest based on the federal discount rate at the date of judgment. *See, e.g.*, *Novkovic v. Paxon*, 2009 WL 659075, at *5-6 (Del. Super. Ct. Mar. 16, 2009); *Maconi v. Price Motorcars*, 1993 WL 542571, at *1 (Del. Super. Ct. Dec. 1, 1993); *see also Cowee*, 747 A.2d at 1097-98 (awarding postjudgment interest from the date of judgment without specifying the applicable rate); *Moffitt*, 640 A.2d at 177-78 (same).

The decision below disregarded that precedent and instead awarded postjudgment interest at the same rate as prejudgment interest—not by conducting an independent analysis of the statutory text or this Court's precedent, but by relying on the unpublished Superior Court decision in *TranSched Sys. Ltd. v. Versyss Transit Sols., LLC*, 2012 WL 1415466, at *6 (Del. Super. Ct. Mar. 29, 2012). *TranSched*, however, is wholly unpersuasive. That decision began from the premise that §2301(a) "does not distinguish between pre- and post-judgment interest," and so concluded that the same rate should apply to both. 2012 WL 1415466, at *6. But §2301(a) *does* distinguish between prejudgment and postjudgment interest, even if not in express terms: it provides that the legal rate shall be determined based on the prevailing federal discount rate "as of the time from which interest is due." 6 *Del. C.* §2301(a). As this Court's precedents make clear, prejudgment interest and postjudgment interest become "due" at different times: prejudgment interest runs from when the plaintiff is injured, while postjudgment interest runs from when the court enters judgment. *Compare Brandywine*, 34 A.3d at 484 (prejudgment interest), *with Cowee*, 747 A.2d at 1097 (postjudgment interest). Nothing in §2301(a) displaces that longstanding principle.[14]

[14] In any event, *TranSched*'s premise no longer holds, as §2301(a) now *does* explicitly "distinguish between pre- and post-judgment interest." *TranSched*, 2012 WL 1415466, at *6. In 2012 (after *TranSched* was decided), the General

Even if the statutory language were unclear—and it is not—the relevant practical considerations weigh heavily against the *TranSched* approach. For one thing, the *TranSched* approach would lead to the anomalous consequence that a party like Bracket would receive a *worse* postjudgment interest rate simply because it exercised its right to collect prejudgment interest. Had Bracket relinquished its right to prejudgment interest, the postjudgment rate would necessarily be set as of the date of judgment. Nothing in law or logic justifies penalizing Bracket for exercising its right to collect prejudgment interest by cutting down its postjudgment interest to the prejudgment rate.

More important, as both the decision below and *TranSched* itself recognize, postjudgment interest based on the date of injury is not "a fair reflection of the cost of money over the relevant time period." Op.38 (quotation marks and brackets omitted); *TranSched*, 2012 WL 1415466, at *6. This case is a perfect example: the historically low federal discount rate at the date of injury in August 2013 bears no relation to the rate when judgment was finally entered nearly six years later in June 2019. As between those two, the rate at the date of judgment is plainly the more relevant basis for postjudgment interest that is intended to compensate Bracket for Defendants' delay in paying the amount they owe under the judgment, and to deter

---

Assembly added what is now the last sentence of §2301(a), capping "post-judgment interest" in cases involving personal loans. 6 *Del. C.* §2301(a). That amendment illustrates that the General Assembly has no aversion to calculating prejudgment and postjudgment interest using different rates.

Defendants from continuing to strategically delay their payment. *See Shepherd*, 1999 WL 1611320, at *1; *Hughes*, 1987 WL 12433, at *2.

2. Postjudgment Interest Should Apply To The Entire Judgment, Including Prejudgment Interest.

The Superior Court also erred by failing to award postjudgment interest on the entire judgment—in particular, the portion attributable to prejudgment interest. As this Court has made clear, postjudgment interest "is not dependant upon the trial court's discretion." *Cowee*, 747 A.2d at 1097. The Superior Court nevertheless failed to award postjudgment interest on the portion of the judgment representing prejudgment interest, and provided no reason for that omission. That constitutes reversible error.

As the Superior Court has previously explained, "pre-judgment interest" represents part of "the judgment's full amount" that is due when judgment is entered and hence postjudgment interest on that amount "is routinely granted." *Starkey v. Liberty Mut. Fire Ins. Co.*, 2015 WL 13697681, at *5 (Del. Super. Ct. Nov. 18, 2015). Indeed, this Court itself has recognized that prejudgment interest is one element of the "full compensation" that Delaware courts award to an injured party as part of the judgment "as a matter of right." *Brandywine*, 34 A.3d at 486. In that respect, prejudgment interest is no different from any other component of actual damages. *See id.*; *see also, e.g.*, *SEB S.A. v. Sunbeam Corp.*, 476 F.3d 1317, 1320 (11th Cir. 2007) (explaining that prejudgment interest "forms part of the actual amount of a judgment on a claim"); *Air Separation, Inc. v. Underwriters at Lloyd's of London*, 45 F.3d 288, 290 (9th Cir. 1995) (postjudgment interest properly applies to prejudgment interest as a "component of a district court's monetary judgment").

To be sure, in a decision rendered more than three decades ago, this Court did once affirm a trial court decision that refrained from applying postjudgment interest to a prejudgment interest award. *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 410 (Del. 1988). That decision stands at most for the proposition that a trial court *may* deny postjudgment interest on the prejudgment interest portion of a judgment under appropriate circumstances—and the Superior Court here made no attempt to explain why the present circumstances made that course appropriate. At a bare minimum, this Court should remand for the Superior Court to explain its reasoning.

The better course, however, would be for this Court to reconsider the relevant portion of *Summa Corp.* The entire discussion of postjudgment interest in *Summa Corp.* amounts to no more than a short paragraph, and shows no sign of realizing that the Court was reaching an outlier result that has apparently been rejected by every other jurisdiction to consider it. *See Markham Contracting Co. v. First Am. Title Ins. Co.*, 2013 WL 3828690, at *14 (Ariz. Ct. App. July 18, 2013) (collecting cases showing that "other jurisdictions … clearly and nearly uniformly" apply postjudgment interest to the entire judgment, including the prejudgment-interest component, and citing *Summa Corp.* as the sole counterexample); *see also, e.g.*, *Air Separation*, 45 F.3d at 290 (concluding it is "well-established" in the federal courts that "postjudgment interest also applies to the prejudgment interest component" of a judgment).

The only rationale that *Summa Corp.* gave for its outlier result was that the law has "traditionally disfavored the practice of compounding interest." 540 A.2d at 410. But as numerous other courts have explained, awarding postjudgment interest on the entire judgment (including prejudgment interest) does *not* constitute compounding interest. *See, e.g.*, *Air Separation*, 45 F.3d at 291 n.2; *Markham Contracting*, 2013 WL 3828690, at *14 (collecting cases). Because prejudgment interest is *part of* the underlying judgment that becomes due when the judgment is entered, it forms the *principal* on which postjudgment interest is awarded. As such, the fact that "prejudgment interest is a component of that judgment does not lead to the conclusion that interest is compounded." *Air Separation*, 45 F.3d at 291 n.2. The Court should take this opportunity to adopt that persuasive reasoning and bring its jurisprudence on postjudgment interest into line with every other jurisdiction that has considered this question.

VI. THE SUPERIOR COURT ERRED BY REFUSING TO AWARD ATTORNEYS' FEES.

A. Question Presented

Whether the Superior Court erred in refusing to award attorneys' fees despite Defendants' bad-faith conduct before and during this litigation.[15]

B. Scope Of Review

The Superior Court's ruling on attorneys' fees is reviewed for abuse of discretion. *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005).

C. Merits Of Argument

Delaware follows the American Rule, under which each party normally bears its own attorneys' fees. *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 545 (Del. 1998). That rule, however, is qualified by a bad-faith exception, under which the "bad faith conduct of a party to the litigation" may warrant fee shifting. *Id.* at 546. The Superior Court abused its discretion by refusing to apply that exception here.

First, the record makes clear that Defendants acted in bad faith in denying their obvious wrongdoing and "forc[ing]" Bracket to bring this suit "to enforce a legal claim that [Defendants] knew was valid," and in conducting "the litigation process itself." *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d

---

[15] *See* B26-50; B60-76.

225, 231 (Del. Ch. 1997). Most strikingly, in January 2014—a year before Bracket filed suit—KPMG had already told Defendants that Stewart's unbilled accounts receivable were subject to a 94.8% error rate, requiring compensation to Bracket exceeding $12 million. B178. But rather than accept responsibility, Defendants buried KPMG's analysis and initiated a scorched-earth litigation strategy designed to delay justice, avoid an investigation into the truth, and drive up the costs of this litigation.

Second, once litigation began, Defendants orchestrated a working capital arbitration simply to "prolong[] and increase[] the costs of the litigation." *Dobler*, 880 A.2d at 228. Then, at trial, Defendants intentionally misled the jury, asserting that their financial statements were accurate, *see, e.g.*, A404, A1422-24, A1426, and that KPMG had done "a full scrub of Bracket" and "found no big issues," A1422—statements that Defendants knew were egregiously false or misleading in light of KPMG's later damning report. Defendants also hid that damning report from their expert, intentionally eliciting misleading testimony from him as well. A1972; A1976. This conduct is plainly "demonstrative of bad faith" and requires fee-shifting. *Dobler*, 880 A.2d at 228-29.

CONCLUSION

The Court should remand for the Superior Court to recalculate postjudgment interest and award Bracket attorneys' fees, and affirm in all other respects.

ROSS ARONSTAM & MORITZ LLP

/s/ David E. Ross
David E. Ross (Bar No. 5228)
Eric D. Selden (Bar No. 4911)
100 S. West Street, Suite 400
Wilmington, Delaware 19801
(302) 576-1600

Attorneys for Plaintiff Below, Appellee/Cross-Appellant Bracket Holding Corp.

Of Counsel:

Paul D. Clement
C. Harker Rhodes IV
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 389-5000

Kevin M. Neylan, Jr.
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800

July 27, 2020

PUBLIC VERSION FILED:
August 11, 2020