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Case Number 62,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EXPRESS SCRIPTS, INC. and UNITED BIOSOURCE LLC,	)	
Defendants-Below, Appellants / Cross-Appellees,	)	No. 62, 2020
v.	)	Court Below: Superior Court of the State of Delaware,
BRACKET HOLDINGS CORP.,	)	Consol. C.A. No. N15C-02-233-WCC CCLD
Plaintiff-Below, Appellee / Cross-Appellant.	)	PUBLIC VERSION FILED SEPTEMBER 15, 2020

REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL OF DEFENDANTS-BELOW, APPELLANTS / CROSS-APPELLEES EXPRESS SCRIPTS, INC. AND UNITED BIOSOURCE LLC

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NATURE OF PROCEEDINGS

Bracket's verdict rests on erroneous jury instructions that contravened the express terms of the parties' agreement by allowing recovery for *reckless* fraud absent any showing of deliberateness, on a *de facto* grant of summary judgment on contested facts regarding reliance, and on improper expert testimony divorced from any alleged misrepresentation. Each error alone is dispositive; together they make a new trial imperative.

Far from defending the Superior Court's rationale for its erroneous jury instructions and evidentiary rulings, Bracket runs from them. Bracket thereby signals that the judgment's underpinnings are not only flawed, but indefensible.

While recasting the verdict as reflecting that the jury found *deliberate* fraud, Bracket whistles past the jury instruction that permitted a finding based on recklessness (for which Bracket fervently argued below) and invited the jury to reach its verdict *without* finding *deliberate* fraud. Although Bracket emphasizes that this Court must accord the jury verdict all reasonable inferences, Ans.10,[1] those inferences stop short of any *deliberate, intentional* fraud because the jury was instructed that reckless fraud sufficed. *Conner v. Marilyn Miglin, Inc.*, 900 F.2d 262 (Table) (9th Cir. 1990) ("[W]e cannot infer specific findings of fact from a jury

[1] Citations to "Ans.__" are to Bracket's answering brief.

verdict that did not address those specific facts."); *Innes v. Marzano-Lesnevich*, 136 A.3d 108, 117 (N.J. 2016) (applying same rule where "jury did not make a specific finding that defendants [acted] intentionally"). Bracket's assertion that the jury *would* have found *deliberateness or intentionality* is similarly defective; the jury made no such finding, and neither KPMG's draft analysis, which Bracket distorts, nor any other record evidence supports Bracket's speculation. Bracket fought hard for its pivotal instruction precisely because the record points at most to clerical error, not intentional deceit, with respect to the accounting practices at issue. The erroneous instruction renders the resulting verdict infirm.

Bracket does not even defend the Superior Court's rationale for excluding Defendants' key evidence challenging reliance. The Superior Court excluded that evidence only because the court purportedly resolved on summary judgment (although Bracket neither sought nor could obtain summary judgment on this point) that Bracket in fact relied on specified financial statements. Unable to defend that stated basis for exclusion, Bracket pretends the evidence was instead excluded as unfairly prejudicial. But Bracket cannot transform the Superior Court's erroneous exclusion into a *different* exclusion, nor does Bracket's revisionism withstand scrutiny: The record reveals no cognizable prejudice whatsoever—much less *unfair*

prejudice—posed by admitting on-point, probative evidence supporting Defendants' reliance challenge.

Finally, Bracket fails to justify its expert's proffer of what the Superior Court aptly termed a "big mush," A1385, equating the numbers generated by his preferred accounting methodology to fraud damages, notwithstanding express deal disclosures stating that the Company did *not* use the expert's preferred methodology. Lest there be any doubt, Bracket's expert admitted that his preferred methodology did *not* track the Company's represented methodology to which it needed to be pegged. A2610. And Bracket is likewise bereft of evidence establishing the Company's *actual* value *at closing*, as is prerequisite to calculating fraud damages under Delaware law. These evidentiary defects further call for vacatur.

SUMMARY OF ARGUMENT

As to the cross-appeal, Bracket's requested relief is moot if this Court vacates, as urged by Defendants, but should otherwise be:

5. Denied. The Superior Court did not err by calculating postjudgment interest at the rate prevailing when the injury occurred, pursuant to Delaware's longstanding preference for utilizing one interest rate for both prejudgment and postjudgment interest and statutory language codifying that preference. Nor did the Superior Court err in following precedent by excluding prejudgment interest from the total subject to postjudgment interest, consistent with Delaware courts' eschewal of compound-interest awards.

6. Denied. The Superior Court by no means abused its discretion by concluding that no bad faith justified awarding attorneys' fees. Because Bracket's claims were brought at law, not equity, attorneys' fees are jurisdictionally unavailable. Regardless, Defendants' substantial arguments foreclose any plausible claim of bad faith.

RESTATEMENT OF FACTS

Defendants address aspects of the record implicated by the cross-appeal.

A. The KPMG Analysis Was Appropriately Withheld As Privileged And Does Not Support Bracket's Claims Of Fraud Or Bad Faith

In attempting to suggest fraud and bad faith, Bracket seizes upon KPMG's partial and privileged post-transaction draft analysis of the Company's accounting, and how that analysis came to be produced. *See, e.g.,* Ans.15. But neither the circumstances surrounding KPMG's analysis nor its content—which identified potential accounting errors that both *increased and decreased* the Company's reported accounts receivable—suggests fraud or bad faith.

Defendants' handling of KPMG's draft analysis was entirely proper. After inadvertently producing KPMG's draft analysis during discovery, Defendants clawed it back and obtained a ruling that the draft was privileged, per "the discovery procedures approved by the Court." AR1. But Bracket nonetheless improperly used the knowledge it retained concerning the draft analysis to pose questions at trial, thereby necessitating waiver by Defendants. *See* A1647-A1649.

The record thus refutes Bracket's assertions that Defendants improperly "conceal[ed]" evidence or "buried KPMG's analysis." Ans.15, 70. To the contrary, following clawback (long before trial), Defendants produced KPMG's draft analysis *in camera* and obtained a ruling that it was privileged. AR1-AR2. The Superior

Court "ha[d] no question that, absent some waiver, these documents are work product and would not be required to be disclosed" because "KPMG had been retained by ESI to assist in resolving the dispute regarding working capital and in anticipation that litigation may result." *Id*; *see also* Ex. B. at 26 (THE COURT: "I don't think there was any dispute here that it's a prepared in litigation, privilege[d] document."); *id.* at 38-39.[2]

Notwithstanding the Superior Court's instruction that its "decision places Plaintiff in the same position it would have been in if the documents had not been inadvertently disclosed," AR2, Bracket exploited its retained knowledge of the inadvertently-produced documents at trial by posing questions expressly framed around KMPG's privileged analysis. *See* A1647 ("[Y]ou recall, don't you, that KPMG …."); A1651-A1652. That forced Defendants to waive privilege over certain documents during trial. A1662-A1663. But Defendants' ultimate decision to waive privilege to counteract Bracket's trial tactics in no way undercuts the Superior Court's prior ruling that KPMG's work had been properly withheld as privileged. And safeguarding privilege obviously does not evince fraud or bad faith.

[2] All citations to "Ex. __" refer to exhibits to Defendants' opening brief.

Nor does KPMG's analysis support Bracket's narrative. In resolving Bracket's motion to compel, the Superior Court reiterated that "this litigation is about the allegations that fraudulent information was provided to Bracket prior to or at the time the purchase was completed," and noted "[t]he KPMG documents in dispute that were prepared post-transaction *simply have no value to that issue*." AR2 (emphasis added). Later, when Defendants reproduced KPMG's work product mid-trial, the Superior Court observed: "I'm not quite sure why we are fighting so much, because, although [the documents] help, they don't totally support [Bracket's] position and to some degree support [Defendants'] position." A1663.

The Superior Court correctly characterized KPMG's work. KPMG was addressing the amount of a "[w]orking capital potential adjustment," B178, and in no way supported Bracket's notion that Defendants "cooked the books." Ans.2. Indeed, KPMG confirmed that Bracket's working-capital claim depended on *re-doing* the Company's revenue recognition *contrary* to the Company's established accounting practices. As KPMG observed in a related memorandum, "Buyer has restated revenue" without regard for "[p]ast practice"; KPMG contrasted "[p]ast practice … to recognize revenue when the service was complete" versus "buyer's method … which likely does not reflect when the service was provided." B196. Moreover, KPMG tentatively suggested a *total* adjustment of $10.06 million—less

than half of what Bracket then claimed and a small fraction of its claim at trial. At most, that could support *some* of the [redacted] *See* A556-A594; Ex. A at 11-12.

Yet KPMG's draft analysis cannot carry Bracket even that far. Without reaching firm conclusions, KPMG simply formulated a draft analysis based on the limited set of documents Bracket provided during an on-site review. A1724-A1725. As the Superior Court explained when sustaining Defendants' objection to Bracket's efforts to place the analysis before its expert as if it were final, "[t]he document is labeled 'draft' and [KPMG] wrote a memo after the document that *rejected* the [working capital] claim." A1855.

Even if KPMG had reached final conclusions on Bracket's claimed working-capital adjustment, however, that would bear no fair relation to Bracket's claims at trial:

First, KPMG was retained to review Bracket's request for a post-closing price adjustment under the SPA's working-capital provisions, which contemplated a price adjustment absent any fraud. A2527-A2529; 2.5. To recommend a working-capital adjustment, KPMG need not have identified anything other than clerical errors—far different from *fraud*.

Second, Bracket's fraud claim involves allegedly overstated *revenues*, not understated billings or collections. Unbilled accounts receivable can result from overstating revenues *or* from failing to account for all billings and collections. A1860-A1861. Bracket repeatedly trumpets a 94.8% error rate for unbilled accounts receivable on "Closed/Inactive contracts," *e.g.*, Ans.3, but even if that error rate withstood final review, it would not follow that the Company overstated its revenue. As Plaintiff's expert acknowledged, the Company could also have "end[ed] up with too much unbilled" accounts receivable because the Company's "billings could be too low." A1860. And neither the KPMG nor Bracket purported to calculate "how much of [the unbilled accounts receivable figure] comes from inflated revenue, rather than too few billings being populated into the file." A1862.

Third, as the Superior Court noted, A1663, KPMG's analysis goes *both* ways and *undercuts* allegations of deliberate fraud, particularly because KPMG found that Bracket's claims concerning "Active contracts"—constituting the vast majority of Bracket's claims at trial—were baseless. B178. Indeed, KPMG's analysis indicated that the Company had *understated* unbilled accounts receivable by $1.98 million on "Active contracts," B178—and that the revenue-recognition policies applied by Bracket (and its expert) to Active contracts broke from the Company's policies pre-

acquisition. B196. Bracket has no explanation for why the Company would have, in Bracket's words, "cooked the books" to *understate* its revenues on Active contracts. At most, KPMG's preliminary analysis may suggest that the Company's financials contained errors—but that does not equate to bad faith or deliberate deceit.

B. The Superior Court Rejected As Meritless Bracket's Requests For Higher Interest And Attorneys' Fees

The Superior Court followed Delaware statute and precedent by awarding prejudgment and postjudgment interest using the same fixed rate (5.75%) and by applying postjudgment interest to Bracket's jury award, excluding prejudgment interest. Ex. I at 38.

Bracket also sought more than $25 million in attorneys' fees based, first, on a (now-abandoned) contractual theory and, second, supposed bad faith. *See id.* at 40-44. The Superior Court disagreed, finding no intent to shift fees, and that "the facts of this case are not so extraordinary as to warrant an award of attorneys' fees" under the bad-faith exception. *Id.* at 44. Because Defendants' challenge to "Bracket's expert's testimony regarding his revenue model … would have effectively refuted Bracket's claims," Defendants necessarily had at least "a colorable basis for their defense." *Id.* If any aspect of this case was extraordinary it was (in the court's words when denying punitive damages) the "affront to and … embarrassment for our civil

justice system" posed by Bracket's efforts "to obtain a greater monetary award" notwithstanding Bracket's lack of "a principled belief that the Defendants' conduct warrants additional punishment." *Id.* at 49.

ARGUMENT

I. Bracket's Defense Of The Superior Court's Flawed "Reckless" Jury Instructions Defies The Terms And Structure Of The SPA

The Superior Court erred by instructing the jury that a "reckless" mental state sufficed to find fraud, despite the parties' unambiguous agreement that nothing short of deliberate fraud would suffice. *See* Br.21-31.[3] Bracket here sheds the Superior Court's view that "one undefined term—'deliberate'—in the *indemnification* section of the SPA" cannot "alter[] the mental state required for common law fraud." Ex. I at 13 (emphasis in original). Instead, Bracket accepts that the provision *does* alter the fraud standard, but only insofar as it "exclud[es] *equitable* fraud." Ans.30.

That leaves no dispute that these are sophisticated parties; that they were capable of adjusting the fraud standard through an indemnification provision like the SPA's; or that Section 9.6(d) *did in fact alter* the standard Bracket must satisfy before recovering for fraud. The only dispute now is whether "delibera[te]" reflects the parties' intent to rule out reckless fraud or merely equitable fraud. Because Bracket's attempt to treat "deliberate" fraudulent acts as interchangeable with "reckless" ones defies plain English, settled law, and the SPA's design, a new trial before a properly-instructed jury is required.

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

A. The SPA Does Not Permit Claims For Reckless Fraud

To discount the importance of the word "deliberate" in Section 9.6(d), Bracket argues the parties did not modify the scienter requirement for common-law fraud through a "single misspelled word." Ans.3, 27. But this particular word arises in a sub-provision demarcated in ALL-CAPITALS to *narrow* sellers' liability and susceptibility to recourse, A2582-2583, and it carries plain, agreed meaning: Parthenon's 30(b)(6) witness confirmed the parties understood "deliberate" to be distinct from reckless, testifying that deliberate means "methodical, calculated, intentional," A544; *see* Br.22. And Bracket continues to acknowledge that the word has meaning, albeit while warping that meaning into "excluding *equitable* fraud." Ans.30.

Bracket's effort to construe "deliberate" as meaning "non-equitable" is unavailing. Bracket cites no authority so construing the term. Nor could equitable fraud be a basis for recovering monetary relief (the relief implicating indemnification and the R&W Insurance Policy) absent a fiduciary relationship between the parties—and no such relationship ever exists between sophisticated parties, like these, negotiating at arms-length. *In re Wayport, Inc. Litig.*, 76 A.3d 296, 327 (Del. Ch. 2013) ("The principal factor distinguishing" equitable "fraud from actual fraud is the existence of a special relationship … such as where the

defendant is a fiduciary for the plaintiff."); *Osram Sylvania Inc. v. Townsend Ventures, LLC*, 2013 WL 6199554, at *15 (Del. Ch. Nov. 19, 2013) (dismissing equitable-fraud claim absent "fiduciary relationship").

In no event can a *deliberate* fraudulent act equate to a *reckless* one.[4] Bracket itself understands that recklessness differs from deliberate, intentional fraud. Otherwise, Bracket would not have injected the former into the jury instruction. That Bracket fought so hard to have "recklessness" enumerated as a *separate* basis for finding fraud, *infra* 23-24, gives the lie to its attempt now to equate recklessness and intentionality as one and the same.

Courts, hornbooks, and practitioners likewise recognize the difference between a reckless state of mind and a deliberate or intentional one. *See* Br.22-23; *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011) (distinguishing "[i]ntentional torts … from negligent or reckless torts"); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 493 (2008) ("Reckless conduct is not intentional."); *Kawaauhau v. Geiger*, 523 U.S.

[4] Bracket quibbles that "delibera[te]" modifies the nouns "act," "statement," and "omission," rather than the adjective "fraudulent." Ans.28. But "deliberate" immediately precedes "fraudulent," unseparated by comma, forming a legal term of art whose meaning is no less clear than, say, reference to any "gross negligent act." *See infra* at 20-21. Indeed, even Bracket accepts that "deliberate" *does* modify "fraudulent" to the extent of precluding *equitable* fraud. Ans.30. Nor could Bracket's grammatical parsing make any practical difference, for Bracket would still need to convince the jury that a fraudulent act, statement, or omission was *deliberate*, which Bracket never did. A2088.

57, 61–62 (1998) ("[D]eliberate or intentional" is not "reckless."); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994) ("But recklessness, not intentional wrongdoing, is the theory …."); *Daniels v. Williams*, 474 U.S. 327, 334 n. 3 (1986); *United States v. Begay*, 934 F.3d 1033, 1040 (9th Cir. 2019) ("Reckless conduct … is not intentional."); *Mingachos v. CBS, Inc.*, 491 A.2d 368, 376 (Conn. 1985) ("[M]isconduct deemed to be 'reckless,' … differs from intentional misconduct."); *DeLane ex rel. DeLane v. City of Newark*, 778 A.2d 511, 520 (N.J. App. Div. 2001) ("[R]eckless [conduct], does not satisfy the intentional wrong standard."); *Forbush v. City of Lynn*, 625 N.E.2d 1370, 1371-72 (Mass. 1994) ("'[R]eckless' conduct should not be equated with the intentional….").[5]

[5] To be sure, rare pockets of law may equate recklessness and deliberateness, such that courts refer to both states of mind interchangeably, as in the cases Bracket cites, Ans.30. *See, e.g., Estate of Jackson v. Genesis Health Ventures*, 23 A.3d 1287, 1290 n.2 (Del. 2011) (citing provision whereby "deliberate and reckless indifference" forfeits workers' compensation rights). By contrast, the distinction between deliberate and reckless fraud carries marked significance in the relevant contexts of acquisitions and insurance coverage, as reflected in *ABRY*, insurance law, and advice that sophisticated parties rely upon to modify fraud liability in Delaware. *See* Glenn D. West, *Contracting to Avoid Extra-Contractual Liability—Can Your Contractual Deal Ever Really Be The "Entire" Deal?*, 64 BUS. LAW. 999, 1033 (2009) ("If your counterparty insists on a 'fraud exclusion,' limit the exclusion to 'intentional fraud….'"); *Golf Ranch Resort Motel, Inc. v. Tar Heel Mortg. Co.*, 341 F. Supp. 846, 850 (E.D. Va. 1972) (distinguishing "reckless statements without regard for their veracity" from "deliberate fraudulent misrepresentations").

Most importantly, "deliberate" carries particular significance in limiting post-closing remedies, as the Court of Chancery made clear in *ABRY Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1064 (Del. Ch. 2006), which sets bounds for how buyers and sellers may validly contract to limit remedies. While proscribing total preclusion of fraud claims (for that contract absolved the seller from "all liability … including intentional fraud," Ans.31 n.6), the Court of Chancery provided a clear, reliable blueprint for limiting fraud claims.

Once *ABRY* provided a "road map" for parties to exclude recovery for reckless fraud, many parties began including deliberate or intentional qualifiers specifically for acquisitions. *See, e.g., EMSI Acquisition, Inc. v. Contrarian Funds, LLC*, 2017 WL 1732369, at *7 (Del. Ch. May 3, 2017); *see also* Glenn D. West, *That Pesky Little Thing Called Fraud: An Examination of Buyers' Insistence Upon (and Sellers' Too Ready Acceptance of) Undefined "Fraud Carve-Outs" in Acquisition Agreements*, 69 BUS. LAW. 1049, 1052 (2014) ("[A]n appropriate area for negotiations was a specific carve-out for *deliberate* misrepresentations….") (emphasis added); *id.* at 1074 ("[T]here is a clear 'trend to increasingly define fraud with some specificity when including it as an exception to an [exclusive remedy] provision.' And defining fraud by adding a descriptive adjective is certainly a step in the right direction…."). Affirming the Superior Court would not only upend the

agreement struck by these sophisticated parties in this case, but also pull the rug out from under countless sophisticated entities that have contracted under Delaware law to obtain the contractual freedom and reliable constructions long championed here.

Nor can Bracket deflect attention from "deliberate" by citing other contractual provisions that refer to fraud generally. Section 9.6 specifies—in ALL-CAPITALS—the claims buyer might bring against seller for breaching non-Fundamental Representations, and it is the "specific provision [that] should govern." *Gloucester Holding Corp. v. U.S. Tape & Sticky Prods., LLC*, 832 A.2d 116, 129 (Del. Ch. 2003). The provisions quoted by Bracket do not even address Bracket's remedies or the availability of damages in the event of post-closing dispute. *See* A2552, 3.26 (concerning representations and warranties outside the SPA); A2555-A2556, 4.9 (concerning Bracket's independent investigation of the Company).

Even if those other provisions spoke to the availability of a fraud claim in a post-closing dispute (which they do not), the "general terms of the contract," referencing fraud generally, "must yield to more specific terms," requiring deliberate fraud specifically to recover beyond the R&W Insurance Policy. *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019); *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005). Furthermore, the SPA makes clear that the "deliberate" fraud limitation is the more

specific by enumerating it "in furtherance of the foregoing," A2583, and thereby clarifying the preceding sentence's reference to fraud generally.

Bracket's argument boils down to the fallacy that the parties' use of "delibera[te]" was some inadvertent slip of the pen—that it was, in Bracket's words, a "single misspelled word," Ans.3, bearing no relation to anything else in the SPA. The SPA refutes this argument conclusively. Not only does Section 9.6 announce in ALL-CAPITALS that it departs from the default principles that would otherwise govern post-closing liability, but it continues a refrain that echoes throughout the SPA. Bracket altogether ignores (Br.13, 23 n.8) the corresponding provision in Section 4.6, where the word "deliberate" (spelled correctly) twice modifies "fraudulent (a) act, (b) statement or (c) omission" to establish the bounds of the insurance policy Bracket obtained under the SPA, A2553, 4.6; *see also* A586, 9.2. Especially considering that the word "deliberate" systematically repeats, it must be given "effect, so as not to render any part of the contract mere surplusage." *United States v. Sanofi-Aventis U.S. LLC*, 226 A.3d 1117, 1129 (Del. 2020) (citation and quotations omitted).

Indeed, Bracket's argument falls apart upon examining how the parties synchronized the insurance provision in Section 4.6 with the remedy limitations in Section 9.6(d) to provide a coherent, integrated framework—a framework that

consistently repeats the *deliberate* limitation. Read as a whole, the SPA makes clear that the R&W Insurance Policy would afford the sole remedy for any breach of a non-Fundamental Representation or warranty and that the sellers would not face any post-acquisition liability to *either* the insurer *or* the buyer for anything less than "deliberate" fraud. Again, Section 9.6(d) states the buyer's "sole and exclusive remedy" is the R&W Insurance Policy, "except in the case of any delibera[te] fraudulent (i) act, (ii) statement, or (iii) omission." A2582-A2583. Correspondingly, Section 4.6 represents that the R&W Insurance Policy "shall not provide for, or increase, any liability of Parent or its Affiliates … except as may result in the case of any *deliberate* fraudulent (a) act, (b) statement or (c) omission," then repeats the same "deliberate" limitation in order to carve out such conduct from the R&W insurer's general "waiver" of its "rights of subrogation." A2553 (emphasis added). Under Section 6.6, those terms define the scope of the "R&W Policy" itself, "which shall conform to the representation in Section 4.6." A2566. Section 9.2 of the R&W Insurance Policy repeats these same terms twice, including by providing that "[t]he Insurer shall only be entitled to exercise rights of subrogation against the Seller(s) … if the Loss arose in whole or part out of any deliberate fraudulent act, statement or omission." A586.

This framework is clear-cut and uniform: Only a claim of deliberate fraud can subject sellers to liability to the insurer and/or the buyer, beyond the terms of the R&W Insurance Policy. A2583, 9.6(d); *see* Br.13. For anything *non*-deliberate, any dispute is solely between buyer and insurer, and recovery is confined to the R&W Insurance Policy. The contracting parties thus used the word "deliberate" three times in the SPA, then twice more in the contractually-required R&W Insurance Policy, each time to ensure the R&W Insurance Policy would be the sole remedy and that the sellers would face *no* liability (whether to the insurer or the buyer) absent a deliberate transgression.

Such insurance limitations are customary; insurance policies often carve out *deliberate* fraud or other misconduct using this very word. *See, e.g., In re Massey Energy Co.*, 2011 WL 2176479, at *27 n.180 (Del. Ch. May 31, 2011) ("Typical exclusions [from D & O insurance coverage] include … any deliberate criminal or deliberate fraudulent act.") (quotations and citations omitted); *Evanston Ins. Co. v. Certified Steel Stud Ass'n, Inc.*, 787 F. App'x 879, 884 (6th Cir. 2019) (reversing application of "deliberately fraudulent" exclusion because jury did not "necessarily" find the insured "committed each act intentionally"); *Imperato v. Navigators Ins. Co.*, 777 F. App'x 341, 344 (11th Cir. 2019) (addressing insurance policy that "expressly excluded coverage for indemnification … where a director or officer is

adjudicated of 'deliberately fraudulent or criminal acts'"); *Rochester Drug Co-Operative, Inc. v. Hiscox Ins. Co., Inc.*, 2020 WL 3100848, at *11 (W.D.N.Y. June 11, 2020) (declining to apply exclusion where party "ha[d] not met its burden of demonstrating … a 'deliberate criminal or deliberate fraudulent act'").

In sum, the SPA prohibited both the buyer and the insurer from recovering against the seller absent some "deliberate fraudulent (a) act, (b) statement or (c) omission"—by using terminology that is well understood to exclude recklessness, mistake, or other inadvertence. By instructing the jury to find for Bracket absent deliberate fraud, the Superior Court disregarded this express limitation and committed legal error.

B. The Error Requires A New Trial

Bracket half-heartedly contests prejudice, asserting that "overwhelming evidence at trial … showed that Defendants committed intentional and not merely reckless fraud." Ans.31-32. But Bracket cannot credibly make any such argument now, after conspicuously recognizing at trial that potential consideration of *reckless* fraud would sway this jury, on this record. In any event, only the jury may "draw[] inferences from proven facts," *Young v. Frase,* 702 A.2d 1234, 1237 (Del. 1997), and flawed instructions denied this jury that opportunity. A new trial follows when jury instructions fail to provide "a correct statement of the substance of the law."

R.T. Vanderbilt Co. v. Galliher, 98 A.3d 122, 125 (Del. 2014) (citation and quotations omitted); *see Volkswagen of Am., Inc. v. Costello*, 880 A.2d 230, 235–36 (Del. 2005).

Nor can Bracket explain away the jury's finding for Defendants on the sole count on which recklessness was insufficient to establish liability—conspiracy. *See* A2088-A2089. Without disputing that conspiracy requires the intentionality that the reckless fraud instruction did not, Br.31, Bracket speculates the jury found for ESI and UBC solely because there was no agreement between them, Ans.32 n.7. But the record reveals no meaningful distinction between ESI and UBC's shared understanding of the accounting specifics underlying the fraud allegation. To the extent the jury found no agreement between ESI and UBC to commit a conscious, concerted accounting fraud, that is just another way of saying there was no *intentionality* in the Defendants' conduct. *Raymond L. v. VRE Chicago Eleven, LLC*, 2019 WL 330476, at *2 (N.D. Ill. Jan. 25, 2019) (dismissing conspiracy claim given failure to allege "agreement *or intentionality* by [defendant] to further the conspiracy") (emphasis added).

Although Bracket tries to leverage the Superior Court's gloss on the jury verdict, Ans.32, Bracket cannot properly treat the jury's verdict as establishing deliberate fraud, above and beyond reckless fraud, after successfully fighting for a

jury instruction designed to obviate any distinction between the two. Before changing its tune *post*-verdict, Bracket recognized *pre*-verdict that the distinction between recklessness and intentionality would be pivotal.

Specifically, during argument at the pre-trial conference regarding the "reckless versus deliberate, intentional fraud standard," Ex. B. at 61, Bracket argued for a recklessness instruction to allow it to "prove [its] claim based on reckless indifference to the truth by the defendants." *Id.* at 63. And Bracket persuaded the Superior Court to abandon the plain language of the SPA and its own prior ruling, Br.18-19, by issuing the disputed instruction.

At the charging conference, Bracket remained unsatisfied. Bracket argued not only that the Court should instruct the jury to find for Plaintiff based on recklessness, but that the Court should remove the italicized intent clause of the following instruction: "Plaintiff is required to establish *it was the intent of the defendant*, through their employees, to knowingly create false financial statements or to be recklessly indifferent as to whether they were false." A2001. Fearing it could not meet even the lowered *mens rea* threshold it obtained at the pretrial conference, Bracket complained that this language "adds an additional element to the knowledge that we have to prove." *Id.* Again, Bracket prevailed. *See* A2088. Having persuaded the Superior Court first to instruct that recklessness sufficed, and second

to remove *any* reference to *any* intentionality requirement, Bracket cannot now posit, counter-factually, that the jury found (or would have found) deliberate, intentional fraud. *See, e.g.*, Ans.2.

Had Bracket been so sure that the jury would find deliberate, intentional fraud on this record, it would not have strained for such lenient instructions. Nor would Bracket have included in its closing argument a theory that ESI "s*hould have known* as of June 11th" that "there was something wrong with these financial statements," as distinct from ESI *deliberately* misrepresenting those statements. A2063 (emphasis added).[6]

Even setting aside Bracket's own underlining of the disputed instruction, it suffices to note that "the jury did not make the findings of fact necessary to fix liability upon [defendant]," and that an appellate court "cannot infer specific findings of fact from a jury verdict that did not address those specific facts." *Conner*, 900

[6] The record belies Bracket's speculation that the jury *would* have found deliberateness. Bracket does not dispute that the Company employed its relevant accounting policies for *years* pre-acquisition, including across prior transactions predating ownership by ESI or UBC, which is incompatible with any notion that these accounting practices were *deliberately* adopted to deceive Bracket. Br.9. Although Bracket insinuates the Company's accounting practices were "cooked" in sinister fashion just "long enough for the deal to close," Ans.2, such insinuation is no answer to uniform record evidence demonstrating that these accounting policies merely continued the Company's established, historic practices. A346-A348; A359; A365; A1226.

F.2d 262; *Myers v. Cent. Fla. Investments, Inc.*, 592 F.3d 1201, 1217 (11th Cir. 2010) ("There is no natural reading of the verdict alongside the instructions that yields the conclusion that the jury made the requisite findings" of heightened *mens rea*.). "[W]here the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury." *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 88 (1943). A new trial should follow inexorably, therefore, unless the disputed instruction was correct.

II. Bracket Does Not Meaningfully Defend The Superior Court's Erroneous Exclusion Of Defendants' Reliance Evidence

The Superior Court erred by converting its summary-judgment ruling in favor of Defendants (limiting Bracket's claimed reliance to the March 2013 financial statements) into a grant of summary judgment for Plaintiff (that Bracket in fact relied on the March 2013 financial statements). That is the Superior Court's only stated reason for excluding Defendants' evidence disproving reliance. *See* Ex. I at 15 ("The decision as to [the reliance evidence's] exclusion was set forth in the Court's Memorandum Opinion [on Defendants' Motion for Summary Judgment] of April 11, 2019, which resolved the dispute over the appropriate TTM period."); A1779-A1780. Bracket offers no defense of that decision—none. This error alone requires a new trial. Alternatively, the Superior Court abused its discretion by unjustifiably excluding compelling evidence disproving reliance, and the resulting prejudice necessitates a new trial.

A. Defendants Preserved Their Reliance Argument

Hoping now to dodge this issue, Bracket concocts a waiver theory that defies both the trial record and common sense. Ans.34-37. Without denying that Defendants sought to introduce the relevant exhibits into evidence, then made a proffer on their exclusion, then raised the erroneous exclusion as a basis for a new trial, Bracket nonetheless argues waiver by trying to split hairs between Defendants'

instant argument and the substantively identical argument Defendants made to the Superior Court.

It suffices to note Defendants made precisely the same argument in post-trial briefing[7] (as Bracket tacitly acknowledges, Ans.33 n.8), and that Bracket did not argue waiver then.[8] Likewise, the Superior Court adjudicated precisely this argument without suggesting any waiver. *See* Ex. I at 15. There can be no colorable claim of waiver after the appellee itself *waived* any such argument in opposition and the trial court perceived no waiver in *adjudicating the merits*. *Simpkins v. State*, 905 A.2d 747 (Table) (Del. 2006) (disregarding arguments that "either were raised for the first time on appeal or were not explicitly ruled upon by the Superior Court"); *Noel v. N.Y. State Office of Mental Health Cent. N.Y. Psychiatric Ctr.*, 361 F. App'x. 196, 197 (2d Cir. 2010) (party "waived the waiver argument by not raising it in response to [a] post-verdict motion"); *Fillebrown v. Steelcase, Inc.*, 63 F. App'x. 54, 56 (3d Cir. 2003) (rejecting waiver argument where party had "not raise[d] the waiver issue … and the Court decided the *Daubert* issue on its merits").

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[7] *See* A2636-A2639 ("Defendants attempted to proffer evidence showing that Plaintiff did not, in fact, determine its pricing based upon the March 2013 financial statements—*and, therefore, that Plaintiff could not prove reliance* on any actionable false statement.") (emphasis added); A2756-2758.

[8] AR29-AR30.

Nor is there any substance to Bracket's newly-minted waiver theory: Bracket's entire case rests on the premise that the represented financial statements defrauded it into increasing the purchase price—which it claimed at trial to have calculated by applying a multiple to the Company's trailing-twelve-month EBITDA as derived from its March 2013 financial statements. A212-A213. Proving that Bracket did *not* rely upon on the March 2013 financial statements (the *only* financial statements attested to in the SPA to calculate the purchase price, *see* A2552, 3.26), would establish *both* that reliance was lacking *and* that the alleged increase of the purchase price was not attributable to any actionable financial representation. To say that Bracket did not base its purchase price on the represented financial statements is to say that it did not rely upon them as Bracket alleged. Just as this equivalence was clear below, Defendants spelled it out for this Court in their opening brief—noting that "[t]he gravamen of Plaintiff's complaint" is that "an alleged overstatement of EBITDA led Plaintiff to set its price higher than it otherwise would have," and then explaining how the excluded evidence would disprove Bracket's claimed reliance. Br.33.

Even setting aside the illusoriness of Bracket's attempted distinction, Defendants told the Superior Court *in terms* that Defendants' evidence would specifically show that Defendants "didn't" "*rel[y]* on the represented financials."

A1779 ("But as a factual matter, they have to establish that [Bracket] relied on the represented financials. And what the documents show is they didn't."); *see also* A1780. The same reliance argument presented on appeal (and in post-trial briefing) was thus preserved at trial not only in substance, but using the *same words*—challenging Bracket's reliance—that Bracket now claims were somehow missing.

Finally, even if Bracket's baseless waiver theory had any merit, the most that follows is that Defendants are now limited to arguing their evidence undercuts Bracket's damages. But trial errors that skew a jury's consideration of damages are especially prejudicial because a jury has such wide latitude in selecting a damages number. Br.46. The remedy therefore remains the same: new trial.

B. The Superior Court's *De Facto* Grant Of Summary Judgment Reflects Dispositive Legal Error

Bracket does not contest that this Court reviews *de novo* summary judgment decisions "disposi[ng] of a substantive legal issue." Ans.38. As the Superior Court explained at trial, it somehow believed that reliance had been resolved at summary judgment: "the Court ruled that the financials that were important to the decision as to how they were going to proceed … [were] March and beyond that, it doesn't matter." A1779. It reiterated that "this is all the argument that was made months ago … it's what I said it was before … the Court made the ruling." A1780. Post-trial, the Superior Court reiterated its rationale for the exclusion, explaining it was

"established before trial" that "Bracket relied upon the March 2013 financial statements in setting the purchase price for the transaction," citing in a footnote to its summary-judgment decision. Ex. I at 15 n.45. In reality, however, the summary-judgment decision stated only that "[i]t has also been *represented* to the Court that Plaintiff determined its pricing based upon these disclosure statements." Ex. A at 29 (emphasis added). Nevertheless, the Superior Court's subsequent treatment of that representation as conclusive proof of reliance formed its sole basis for excluding Defendants' evidence disproving reliance.

That *de facto* grant of summary judgment on reliance was obvious error. *See* Br.37; *Vague v. Bank One Corp.*, 850 A.2d 303 (Table) (Del. 2004); *George v. Frank A. Robino, Inc.*, 334 A.2d 223, 224 (Del. 1975). Because Bracket does not even dispute this was error, this Court should reverse and order a new trial.

Bracket cannot forestall reversal by positing a *different* basis for exclusion: supposed unfair prejudice. To the extent Bracket would invoke Delaware Rule of Evidence 403—which Bracket never references, even now, and the Superior Court never alluded to, *see* Ex. I at 15—any such assessment of "unfair prejudice under D.R.E. 403 is within the sound discretion of the trial court." *Green v. St. Francis Hosp., Inc.*, 791 A.2d 731, 738 (Del. 2002) (quotations omitted). Because no such assessment was made and no such discretion was exercised, no such rationale can

be a basis for affirmance. *United States v. Sampson*, 980 F.2d 883, 889 (3d Cir. 1992) (granting new trial where "the court failed to perform [Rule 403 balancing] analysis," because "there is no way to review its discretion"); *United States v. Kaplan*, 510 F.2d 606, 612 (2d Cir. 1974) ("It is not enough to suppose that the judge 'would have' or 'might have' made [discretionary determination] …. [I]t was for him, not for an appellate court, to confront and assess the evidence at the point of decision."); *Dubern v. Girard Tr. Bank*, 454 F.2d 565, 571 (3d Cir. 1972).

Indeed, far from altering the analysis, the Superior Court's lone reference to "prejudic[e]" confirms its legal error. When the Superior Court passingly referenced "prejudic[e]" in its post-trial opinion, Ex. I at 15, it was not suggesting *unfair* prejudice—that is, prejudice that the Superior Court perceived as substantially outweighing the evidence's probative value. Rather, consistent with its misconception that Bracket had conclusively established reliance by opposing summary judgment, the Superior Court's deemed the excluded evidence "prejudicial *and* irrelevant." *Id.* (emphasis added). In other words, the excluded evidence had *no* probative value in the Superior Court's view, precisely because the court mistook Bracket's reliance as a given. *Id.* (characterizing Defendants' efforts to introduce "evidence regarding other potential periods" as "a back door effort to get around the Court's previous ruling"). Because such reasoning betrays legal error, it necessarily

constitutes an abuse of discretion. *Miller v. State Farm Mut. Auto. Ins. Co.*, 993 A.2d 1049, 1053 (Del. 2010); *Digiacomo v. Bd. of Pub. Educ. in Wilmington*, 507 A.2d 542, 546 (Del. 1986). The same holds for the Superior Court's misconstruction of its earlier ruling on summary judgment. *Cooney-Koss v. Barlow*, 87 A.3d 1211, 1217 (Del. 2014).

C. Alternatively, The Superior Court Abused Its Discretion In Excluding Highly Probative Evidence That Posed No Unfair Prejudice

Even if Bracket could reframe the Superior Court's exclusion as resting on a determination of unfair prejudice under Rule 403, that too would constitute an abuse of discretion. Reliance is an essential element of a fraud claim. *DCV Holdings*, 889 A.2d at 958. So are damages. *See Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 815 (Del. Ch. 2014). And the excluded evidence was highly probative in both respects. It established that, when pricing the Company, Plaintiff relied on the **May** 2013 financial statements, A2656-A2662, or **June** 2013 financial statements, A2665, neither of which were covered by any SPA representation or shown to be false at trial. *See* Br.33-34.

On the flip side, the evidence posed no cognizable prejudice to Bracket. Bracket was free to prove that it did rely on the **March** 2013 financial statements, which was the only reliance that could support its fraud claim, given (i) the terms of

the SPA's representations, confined to the March 2013 financial statements, A2517, 1.71.; and (ii) the SPA's merger clause, *see* A2552, 3.26. The Superior Court's summary judgment simply limited Bracket to relying upon the March 2013 financials (*the* financial statements represented and warranted under the SPA), explaining "the financial statements that were certified in § 3.1 of the SPA are set forth in disclosure statement § 3.4(a). It is the representation as to these statements that Plaintiff alleges is false." Ex. A at 29.

To claim prejudice, Bracket now pretends that the Superior Court prohibited, *in limine*, either party from ever referencing the post-March financials. Ans.39 (recasting reliance ruling as "an apparent attempt to simplify the issues in the case"). But the Superior Court issued no such *in limine* ruling, and its summary-judgment ruling cannot bear Bracket's characterization. The Superior Court ruled only that Bracket could not substantively rely on anything other than the March financials to support its fraud claim because the SPA disclaimed reliance on any other financials. Ex. A at 29. That Bracket in fact relied on *other* financials is "prejudicial" only insofar as it negates Bracket's case—that is no more prejudicial, and no more subject to exclusion, than is any on-point evidence that serves to refute a core element of plaintiff's case and thus to preclude or limit recovery.

D. A New Trial Is Required Under Either Standard Of Review

In any event, a new trial would be required to remedy the improper exclusion of key evidence. The excluded evidence proved that Bracket did not rely on the represented March financial statements but on later statements that were not represented and warranted under the SPA, *supra* 29-30,[9] and also undermined the credibility of Bracket's witnesses and overall case.[10]

At a bare minimum, the jury deserved a full and fair record on which to decide reliance, without which Bracket could not prove fraud. *DCV Holdings*, 889 A.2d at 958. But the Superior Court relieved Bracket of this burden by banishing all contrary evidence from the jury's sight.

Even if Bracket were correct that the excluded evidence went only to damages, exclusion of evidence undercutting Bracket's damage claims is still error

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[9] Bracket cannot gainsay the March 2014 email where Plaintiff's expert asked, "[W]hat is the date Parthenon utilized to calculate the final purchase price (we've seen some indications for March and others for June 2013)?," and Parthenon's executive responded, "**June**." A2665 (emphasis added). Instead, Bracket offers (Ans.45) a self-serving reading of an affidavit that claims reliance on the March 31, 2013 financials *alongside later* financials, while tellingly stating that the purchase price was "based on a multiple … generated by the Company as of May 31, 2013." A2659.

[10] Bracket highlights the prejudice when it invokes its witnesses' testimony that Parthenon did rely on the March 2013 financials. Ans.44-46. Beyond affording basis for the jury to find reliance wanting, the excluded evidence would also impeach the sworn testimony of Bracket's witnesses.

warranting a new trial. Like reliance, damages are a core element of fraud, *see Vichi*, 85 A.3d at 815, and the excluded evidence bore directly on Bracket's damages. *Miller*, 993 A.2d at 1057 (exclusion "materially prejudiced the [plaintiff] and was not harmless" where evidence went to "the amount of [plaintiff's] damages").

III. Notwithstanding Bracket's Attempts To Rehabilitate Its Sole Expert, The Superior Court Erred By Letting Plaintiff's Expert Offer Testimony And Plaintiff Recover Damages Divorced From Any Actionable Misrepresentations

The Superior Court abused its discretion by admitting Dudney's testimony and denying a new trial, despite Dudney's failure to connect Bracket's fraud theory and damages to any actionable misrepresentations. Br.41-46. In recalculating the Company's financial statements based on his own preferred accounting methodology, Dudney failed to tie his recalculations to any misrepresentations by Defendants under the SPA. Testimony unmoored from "the fundamental facts of the case … is not merely subject to refutation by cross-examination," but should have been excluded. *Perry v. Berkley*, 996 A.2d 1262, 1271 (Del. 2010) (quotations omitted). Failing that, the Superior Court should have recognized that Dudney's testimony—Plaintiff's lynchpin for its fraud theory and damages, *see* Ex. I at 44—could not support the verdict. *Amalfitano v. Baker*, 794 A.2d 575, 577-78 (Del. 2001) (granting new trial because "the jury must still base its opinion on the evidence before it").

A. Dudney's Testimony Should Have Been Excluded

Bracket attempts to rehabilitate Dudney by arguing that he "testified that his analysis followed the Company's disclosed revenue recognition policies." Ans.51. To be sure, Dudney blankly asserted that he followed those policies. *E.g.*, Ans.18.

But Dudney could not identify any support in the Company's disclosures for his reconstruction of the Company's financials on two critical dimensions underpinning the "vast majority" of Bracket's case. A1202. Bracket does not deny that Dudney candidly acknowledged the disconnect in his work product, which expressly stated his accounting methodologies were "not part of the disclosures made to Parthenon during due diligence." A2610; *see* Br.44.[11]

First, Dudney characterized revenue as software-related *contrary to* the Company's disclosures, then used his divergent characterization to amortize the lion's share of revenue over the life of the contract, rather than when work was performed. Br.15, 42-43. Dudney's "software-related" designations are flatly irreconcilable with the Company's pre-acquisition approach, as disclosed, which treated the bulk of the contracts in question as *non*-software-related, such that they

[11] Bracket makes much of the contracts that Dudney claimed were non-existent, Ans.52, suggesting those alone legitimize Dudney's assumptions. But Bracket does not dispute that the "vast majority," A1202, of Dudney's differential concerned only timing, rather than actual revenue on non-existent contracts. Indeed, only **$256,000 (or 3%)** of Dudney's claimed earnings adjustments was attributable to the allegedly non-existent contracts. A1886-A1887. If Bracket were defending a $**1.5 million** verdict (the amount of Dudney's earnings adjustments based on claimed non-existent contracts, times Bracket's multiplier), Bracket might argue those suffice to sustain a verdict or ground Dudney's testimony. To justify affirmance, however, Dudney's methodology must carry the full weight of the $82 million he calculated and the jury awarded—which the minute fraction of contracts found non-existent cannot possibly do.

would *not* be subject to amortization, even by Dudney's account. A2253-A2254; A1302-A1303; A1867-A1868. At trial, Dudney purported to have derived his "key" for distinguishing software-related from non-software-related revenue from an undocumented "conversation," A1867, he claimed to have had with an individual outside Defendants' knowledge group as defined in the SPA, A2589, 10.13, rather than from any SPA representation, the sole source of any actionable representation, A2552, 3.26. After obfuscating and being asked by the Superior Court to clarify himself on this score, Dudney admitted, "That's correct. They did not represent this." A1868. And when asked whether he was "aware … *of any representation having been made to the buyer* in the sale process that this key was used to identify software-related activity that would be amortized," Dudney responded, "*I don't have such a document; no*." *Id.* (emphases added).

Unable to defend Dudney on this point, Bracket deflects by reiterating that software revenue is amortized over the life the contract, Ans.54, which is undisputed. The point remains that Dudney designedly broke from the Company's disclosed policies in order to *reclassify* large revenue streams as *software-related* that were never previously so classified. A2253-A2254; A1302-A1303; A1867-A1868; *see also* B196 (KPMG analysis observing Bracket "restated revenue" contrary to "[p]ast practice"). Only thus could Dudney subject those revenues to amortization, delay

revenue recognition, and arrive at supposed "fraud" damages that far surpass anything traceable to any actual misrepresentation in the pre-acquisition disclosures, which supply the only proper touchstone for fraud.

Second, in recognizing contract revenue on the "fixed fee due date," A1998, Dudney brazenly departed from the Company's disclosed practice of recognizing revenue when work was actually performed, not on payment dates fixed by the underlying contracts. B196. Again, Dudney did not deny that the Company's pre-acquisition disclosure of its revenue-recognition policies accurately reflected the Company's practice of recognizing revenue when work was performed, not on a fixed-fee date. A2292-A2293 ("Revenue is recognized based upon the proportion of work completed on a given project."). Dudney agreed that "there's not a single witness from Parthenon who testified that it was represented to them that the company's policy was to recognize revenue on the fixed fee date." A1998; *see also* A1293-A1294 (acknowledging at *Daubert* hearing that he could not identify "any document in which the seller represented that revenue was recognized based on the fixed fee due date" or "anyone who stated that the seller represented that"). Those admissions alone should have precluded Dudney's methodology and testimony.

Bracket responds that Dudney recited the Company's policy to recognize revenue "as services are performed," and claims he timed revenue recognition by

"speaking with project managers and examining emails, invoices, billing files, scope trackers, change orders, and the like." Ans.54 (citing A1849). But paying lip service to the Company's disclosure is different from substantively heeding it. And Bracket's scattered record citations do not even speak to Dudney's specific methodology at issue.

As Dudney attested, his focus on the "*fixed fee due date*" pegged revenues to contractual milestones, *not* when work was actually performed. What ultimately drove Dudney's actual dates for recognizing revenue, he testified, were "a combination between the milestone or fixed fee due date and the invoice date." A1998. When pressed to specify how he determined when to recognize revenue on the exemplar contract spotlighted at trial, Dudney acknowledged the fixed fee due date controlled. A1998-A1999. The upshot systematically inflated Bracket's claimed damages far beyond anything attributable to any *fraud:* Whereas most of the Company's work had been performed and correspondingly recognized, as disclosed, earlier in a contract's life cycle, Dudney pushed revenue out later. A1923-A1924.

Bracket also attempts to salvage Dudney's testimony, Ans.51, by mischaracterizing his analysis as tied to the representation in Section 3.4(a) of the SPA that the March 2013 financial statements were "prepared in accordance with

GAAP." A2536. But when asked on cross-examination if his model is "a GAAP model" that sought "to identify departures from GAAP," Dudney answered "No." A1895-A1896; *see also* A1923, A1928. Foreclosed from going down this path, Bracket never once mentioned GAAP in its closing. A2055-A2067.

In sum, Dudney's "big mush," A1385, was a recipe for misleading the jury into a fraud verdict unmoored from the defining representations. Especially given clear warning that Dudney was deviating from the proper considerations for "a jury in determining a damages award," the Superior Court should have been a more vigilant gatekeeper and excluded his testimony. *Dana Cos., LLC v. Crawford*, 35 A.3d 1110, 1113 (Del. 2011).

Failure to exclude Dudney's testimony was unquestionably prejudicial on the question of damages, where "erroneous admission" of evidence is almost always "materially prejudic[ial]." *Miller*, 993 A.2d at 1057 (holding "erroneous admission … not harmless" where it implicated "the amount of [plaintiff's] damages"). And it was especially prejudicial because Bracket relied wholly and solely on Dudney for its damages calculation. Ex. I at 44.

In response, Ans.49-50, Bracket argues that any attack on the assumptions underpinning expert testimony should be resolved through "vigorous cross-

examination," rather than exclusion. Ans.49.[12] But cross-examination is meant to play its part only after expert testimony has been established to be admissible as an aid to the jury. Delaware Rule of Evidence 702, which "establishes a standard of evidentiary reliability" for expert testimony, "requires a valid connection to the pertinent inquiry as a *precondition to admissibility*." *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 523 (Del. 1999) (emphasis added; alterations and quotations omitted). In this case, the "pertinent inquiry" is whether the Company's financial statements deviated from the accounting practices disclosed in connection with the transaction. Because Dudney's report and testimony were admittedly not tied to

[12] The cases Bracket cites, Ans.49, do not justify admitting expert testimony divorced from the underlying facts. First, in *Porter v. Turner*, 954 A.2d 308, 314 (Del. 2008), this Court upheld the admission of challenged expert testimony because the appellant "challenges only [the expert's] underlying assumptions, not the methodology that is based on the assumptions." Here, Defendants challenge both Dudney's assumptions (classifying certain revenue streams) and his accounting methodology (recognizing revenue on a fixed fee date or amortizing revenue). Second, in *Rodriguez v. State*, 30 A.3d 764, 770 (Del. 2011), the Court considered "cross-examination" to be the "appropriate means of attacking shaky but admissible evidence." Dudney's testimony simply did not clear that threshold for "admissible evidence," including for reasons noted by the Superior Court, A1385-A1386. Last, *Pavey v. Kalish*, 3 A.3d 1098 (Table) (Del. 2010), recognizes "the duty of the trial court is … to act as a 'gatekeeper' who determines whether the testimony is *based on sufficient facts* or data and on *reliable principles and methods that have been reliably applied to this case*." (emphases added). Those are the very principles that were violated by admitting Dudney's testimony.

those accounting practices as disclosed, his testimony did not bear a "valid connection" to the "pertinent inquiry" and should have been excluded.

After recognizing that Bracket would be using Dudney's testimony to take "a big mush and … throw you the mush, jury, and hope you figure it out," A1385, which would be "unfair," A1386, the Superior Court erred by nevertheless admitting it. This error invited the jury to draw inferences "not based upon the facts of the case at hand, but rather on impermissible speculation based on inapplicable statistics." *Timblin v. Kent Gen. Hosp. (Inc.)*, 640 A.2d 1021, 1026 & n.2 (Del. 1994) (granting new trial to remedy "improper expert testimony [that] did not provide any factual basis for the jury to decide the issue" and "did not add to the jury's understanding of the facts or issues").

B. Even If Dudney's Testimony Were Admissible, It Cannot Support The Jury's Verdict

To defend admission of Dudney's testimony, Bracket emphasizes the role cross-examination plays in exposing methodological defects. Br.49-50. The corollary, of course, is that the record will contain the result of cross-examination, which courts will then account for when assessing whether competent evidence supports a verdict. *Hudak v. Procek*, 806 A.2d 140, 144 (Del. 2002) (reviewing "the entire record" and "test[ing] the … factual findings in accordance"). Simply stated,

a record dependent on Dudney's testimony is a record incapable of withstanding review for sufficiency of the evidence.

Bracket does not dispute that Dudney's testimony was the sole support for its damages claim, such that successfully challenging Bracket's "expert's testimony regarding his revenue model … would have effectively refuted Bracket's claims." Ex. I at 44; Br.45-46. In the wake of cross-examination, Defendants had indeed "effectively refuted Bracket's claim" by laying bare why Dudney's methodology was incapable of supporting the testimony on which the jury relied. *Id.* Assuming arguendo that it was within the Superior Court's discretion to admit Dudney's testimony, therefore, the Superior Court should not have denied a new trial with eyes wide open to incontestable ways that Dudney's testimony fell short of sustaining the jury's verdict. *Supra* 36-41.

Despite fatal concessions from Dudney, the jury was (much as the Superior Court predicted it might be) confused by Dudney's "mush." A1385. Just as his expert testimony did not properly connect to the facts of the dispute, the resulting verdict lacks adequate evidence to support it. A new trial is the appropriate remedy. *Amalfitano*, 794 A.2d at 577-78; *Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997).

IV. Bracket Fails To Justify The Superior Court's Decision To Let Plaintiff's Expert Testify And Plaintiff Recover Damages Without Establishing Actual Valuation At The Time Of The Acquisition

The Superior Court abused its discretion by admitting Dudney's testimony and denying a new trial despite Plaintiff's failure to prove damages by properly valuing the Company upon closing. Delaware law requires (1) a valuation of the Company (2) at the time of the transaction. Br.47-52. Dudney heeded neither requirement, and Bracket makes no argument whatsoever as to the second. *See* Ans.56-60.

First, Dudney failed to value the Company independently, or at all, instead adopting Bracket's hypothetical pricing exercise as his own. Where "the measure of damages is the difference between the price paid … and its true value," "[i]t is necessary … that a determination of true value be made and compared with the price paid." *Poole v. N. V. Deli Maatschappij*, 224 A.2d 260, 265 (Del. 1966); *see also Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1076 (Del. 1983). Yet Dudney made no determination of the Company's true value.

Without denying that Delaware law so requires, Ans.57, Bracket contends damages need only be a "responsible estimate." *Beard Research, Inc. v. Kates*, 8 A.3d 573, 613 (Del. Ch. 2010). But the cases Bracket cites confirm the methodology required under Delaware law—the price paid less the company's actual value. The

problem here is not that Dudney was insufficiently precise; it is that Dudney did not even purport to "estimate" the Company's value. All he did was adopt Bracket's pricing model as though it were self-justifying and conclusive. In an analogous context, this Court rejected such attempts to derive valuation just by seizing upon what a particular buyer, in a vacuum, was willing to pay. *M.P.M. Enters., Inc. v. Gilbert*, 731 A.2d 790, 797 (Del. 1999) (to determine fair value, "merger price must be accompanied by evidence tending to show that it represents the going concern value of the company rather than just the value of the company to one specific buyer").

Nor does Bracket deny that Dudney opted *against* fixing pricing/valuation *at the time of the transaction*, as reflected in near-contemporaneous documentation, and circled back to *months earlier*. Br.51. Specifically, Dudney seized the Company's **March** 2013 financials in order to determine its "true value," A699-A700, even though the closing did not occur until nearly six months later, in **August** 2013, and Dudney had readily available to him a near-contemporaneous valuation from **September** 2013, A2607, based on the Company's July financials. Tellingly, Bracket offers no argument why the same failure identified by the Court of Chancery in *Zayo Grp., LLC v. Latisys Holdings, LLC*, 2018 WL 6177174, at * 16 n.206 (Del.

Ch. Nov. 26, 2018)—the expert's failure to analyze value specifically at closing—is not evident here. Br.50.

This Court should not abide such concerted efforts to evade an established requirement of Delaware law. It should reverse on the ground that Dudney's testimony was prejudicial and due to be excluded, *see Dana Cos.* 35 A.3d at 1113, or else that the jury award "is contrary to the jury instructions," *id*., because it does not calculate damages based on "the difference, if any, between what Bracket paid for the company and the value [of] the company they received on August 15th, 2013," A2089; *see also Duphily v. Del. Elec. Co-op., Inc.*, 662 A.2d 821, 834 (Del. 1995) (granting new trial where verdict "was patently contrary to the jury instructions").

V. The Superior Court Properly Calculated Postjudgment Interest In Accordance With Precedent

A. Question Presented

Whether the Superior Court erred by (1) using one rate for both prejudgment and postjudgment interest as pegged to the injury date, and (2) following this Court's precedent in declining to compound interest by awarding postjudgment interest on prejudgment interest.[13]

B. Scope Of Review

This Court reviews statutory constructions *de novo*. *Brandywine Smyrna, Inc. v. Millenium Builders, LLC*, 34 A.3d 482, 484 (Del. 2011). "As to the interest allowed," however, "[t]he trial Judge is vested with some discretion." *Maryland Cas. Co. v. Hanby*, 301 A.2d 286, 288 (Del. 1973).

C. Merits Of Argument

1. Postjudgment Interest May Rely On The Rate Of Interest At The Time Of Injury

Under 6 *Del C.* § 2301(a), "the legal rate of interest shall be 5% over the Federal Reserve discount rate including any surcharge as of the time from which interest is due." Because the statute does not distinguish between postjudgment and prejudgment interest, the Superior Court adopted the same rate for both: 5% over

[13] *See* B7-8.

the federal discount rate on the August 14, 2013 closing. Bracket now reaches for the higher interest rate on the judgment date, but the Superior Court did not err in employing a single interest rate.

Because interest is "a continuing liability which merely accumulates with the passage of time, it is not recalculated on the day final judgment is entered to determine a different post-judgment rate" and instead "remains fixed," as the Superior Court consistently holds. *Houghton v. Shapira*, 2013 WL 3349956, at *5 (Del. Super. Ct. June 27, 2013), *aff'd and remanded sub nom. Shapira v. Christiana Care Health Servs., Inc.*, 99 A.3d 217 (Del. 2014) (citations and quotations omitted); *see also TranSched Sys. Ltd. v. Versyss Transit Sols., LLC*, 2012 WL 1415466, *6 (Del. Super. Ct. Mar. 29, 2012); *Rollins Envtl. Servs., Inc. v. WSMW Indus., Inc.*, 426 A.2d 1363, 1367–68 (Del. Super. Ct. 1980).

Indeed, under Delaware law, "disfavored is the segmenting of interest, i.e., awarding different rates of interest for prejudgment and post-judgment interest." *O'Riley v. Rogers*, 2013 WL 4773076, at *1 (Del. Super. Ct. Sept. 4, 2013) (alterations, quotations, and citations omitted); *Kirkpatrick v. Caines Landing Wildlife Pres. Ass'n*, 1992 WL 383382, at *1 (Del. Ch. Dec. 15, 1992); *Commonwealth Constr. Co. v. Cornerstone Fellowship Baptist Church, Inc.*, 2006

WL 2901819, at *1 (Del. Super. Ct. Oct. 3, 2006). This precedent is consistent, well-considered, and longstanding—and the Superior Court simply followed it.

By Bracket's account, Ans.61-62, the statute requires a separate rate for postjudgment interest because interest is to be calculated "as of the time from which interest is due." 6 *Del. C.* § 2301(a). But the quoted language prescribes a single formula, without distinguishing postjudgment from prejudgment interest. *Id.*[14] Moreover, the statute refers to "the," singular, "legal rate of interest," *id.*, thereby ratifying the common-law preference for one rate. *Cf. Reid v. Angelone*, 369 F.3d 363, 367 (4th Cir. 2004) ("[B]ecause Congress used the definite article 'the,' ... there is only one order subject to the requirements.").

Prejudgment interest undisputedly became due upon injury. *See Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 409 (Del. 1988). And the Superior Court correctly followed precedent and the statutory prescription contemplating a single rate spanning prejudgment and postjudgment interest.

[14] That an ensuing sentence in the provision—having no bearing on calculation of interest here—references postjudgment interest does not alter the formula set forth in the operative sentence.

2. This Court Should Not Reverse Its Precedent Declining To Compound Interest

Nor did the Superior Court err by following this Court's precedent and declining to pile postjudgment interest atop prejudgment interest. *Summa*, 540 A.2d at 410. In *Summa,* this Court rejected a cross-appellant's indistinguishable attempts to include prejudgment interest in the calculation, explaining the plaintiff "cites no Delaware authority for its position," and noting that "Delaware courts have traditionally disfavored the practice of compounding interest, and we see no reason to depart from that rule here." *Id*. This Court's express reliance on "that rule" not to compound interest refutes Bracket's suggestion that denial of postjudgment interest is discretionary and commends remand. Ans.67.

Stare decisis counsels against overturning settled law. *White v. Liberty Ins. Corp.*, 975 A.2d 786, 790 (Del. 2009). Adherence to precedent respects "[t]he need for stability and continuity in the law," *Account v. Hilton Hotels Corp.*, 780 A.2d 245, 248 (Del. 2001), even when Delaware may become an outlier jurisdiction. *Aizupitis v. State*, 699 A.2d 1092, 1094 (Del. 1997) (rejecting argument that Delaware abandon its prior rulings to "join twenty-two other jurisdictions"); *Samson v. Smith*, 560 A.2d 1024, 1026 (Del. 1989). That other jurisdictions opt for a different approach, Ans.67-68, is insufficient justification for this Court to renounce its longstanding precedent.

VI. The Superior Court Did Not Abuse Its Discretion By Rejecting Bracket's Overreach In Seeking Attorneys' Fees

A. Question Presented

Whether the Superior Court abused its discretion in declining to award attorneys' fees.[15]

B. Scope Of Review

This Court reviews denials of attorneys' fees for abuse of discretion, and affirms absent departure from "conscience and reason." *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 607-08 (Del. 2010).

C. Merits Of Argument

At this stage, Bracket's claim for attorneys' fees is jurisdictionally foreclosed, because attorneys' fees are unavailable in "an action at law, absent a … contractual provision." *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1090 (Del. 2006). Exception arises only where a court of law is applying equitable principles, *id.*, yet Bracket has not only waived but altogether disclaimed equitable relief. A208 ("[J]urisdiction is proper" because "***this suit only seeks damages***.") (emphasis added). Upon abandoning the contractual argument it advanced below for fee shifting, therefore, Bracket lost its lone jurisdictional basis.

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[15] *See* B26-50.

Regardless, the claim is meritless. "The bad faith exception applies only in extraordinary cases," *Lawson v. State*, 91 A.3d 544, 552 (Del. 2014), and the movant "bears the stringent evidentiary burden of producing clear evidence of bad faith conduct," *Beck v. Atl. Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005) (citations and quotations omitted). The one aspect of this case that Bracket has demonstrated to be extraordinary is its incessant overreach in seeking "a greater monetary award." *See* Ex. I at 49 (denying punitive damages). As for other items Bracket invokes (Ans.69-70), its distortions of the KPMG analysis are unfair and unsustainable, *supra* 5-10; and Defendants' unwillingness to pay Bracket's working-capital pre-suit demand simply tracked the SPA's bargained-for terms, A2527-A2528, 2.5, combined with KPMG's assessment that the demand was excessive and divorced from the accounting methodology disclosed by the Company, *see* B196.

In any event, Dudney's centrality to Bracket's entire case placed beyond question Defendants' good faith in defending, as the Superior Court noted. Ex. I at 44. While Bracket argues why Dudney's testimony was not so defective as to invalidate the verdict, Bracket does not come close to establishing that Defendants acted in bad faith by questioning Dudney's calculations. Similarly, the lengths Bracket went to in order to obtain a key jury instruction and evidentiary ruling—both of which came as surprises relative to the Superior Court's earlier rulings,

Br.17-19—should establish, at a minimum, that reasonable minds could differ about the natural outcome here. *P.J. Bale, Inc. v. Rapuano*, 888 A.2d 232 (Del. 2005) (denying fees where "there was a colorable basis for Appellees' position").

CONCLUSION

This Court should reverse denial of a new trial, vacate the judgment, and remand.

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2020, my firm served true and correct copies of the *Public Version of Reply Brief on Appeal and Answering Brief on Cross-Appeal of Defendants-Below, Appellants / Cross-Appellees Express Scripts, Inc. and United BioSource LLC* upon the following counsel of record via File & Serve*Xpress*:

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