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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:
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APPELLEE/CROSS-APPELLANT BRACKET HOLDING CORP.'S REPLY BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

After correctly recognizing that Defendants committed egregious fraud, and upholding the jury's $82 million verdict compensating Bracket for that fraud, the Superior Court committed two errors that reduced the postjudgment interest owed to Bracket by several million dollars. First, the Superior Court departed from Delaware law (and the essential nature of *post*judgment interest) by basing its postjudgment interest award on the prevailing rate on the date of injury rather than the date of judgment. That approach cannot be squared with the plain statutory text or its basic purposes. The governing Delaware statute makes clear that interest should be awarded based on the prevailing rate on the date "from which interest is due"—which, for postjudgment interest, is the date of judgment. 6 *Del. C.* §2301(a). If Defendants had promptly paid the judgment in full on its date of issuance, they would owe Bracket zero postjudgment interest, precisely because the date of the judgment is the date "from which interest is due." Defendants cannot evade that basic reality or the clear text, and they make no effort whatsoever to address the anomalous and perverse results that their preferred approach would produce.

Second, the Superior Court erred by failing to award postjudgment interest on the entire judgment: in particular, the millions of dollars in prejudgment interest that the court properly awarded Bracket as part of its actual damages. Defendants do not dispute that *every other jurisdiction* that has considered this question has held that

postjudgment interest should run on the entire judgment, including the prejudgment interest. Nor do they deny that the amount Defendants owed Bracket on the date of the judgment included prejudgment interest, such that if they delayed paying the amount of the judgment (including prejudgment interest), they logically should pay interest accounting for the delay in satisfying the full amount of the judgment. Instead, in a cursory two-paragraph argument, Defendants rely entirely on the assertion that this Court has already definitively resolved this issue and held that postjudgment interest should not apply to the portion of the judgment attributable to prejudgment interest. Defendants' argument dramatically overreads this Court's decision in *Summa Corporation v. Trans World Airlines, Inc.*, 540 A.2d 403 (Del. 1988), which spent only one sentence addressing this issue. And even if Defendants' reading of *Summa Corp.* were correct, there would still be no persuasive reason for this Court to insist on an approach to postjudgment interest that is wrong on the merits, contravenes this Court's other precedents, flatly conflicts with every other jurisdiction to consider the issue, and that has engendered zero reliance interests.

Finally, the Superior Court erred by refusing to grant Bracket's motion for attorneys' fees in light of Defendants' years of bad-faith litigation. In January 2014, more than a year before Bracket filed suit, Defendants' own accountants at KPMG told them that the financial records prepared by Jim Stewart and relied on by Bracket were riddled with errors—indeed, were wrong a stunning ***94.8%*** of the time with

respect to unbilled accounts receivable—and that Bracket had been deprived of at least $12 million in working capital as a result. That damning report powerfully demonstrated that Stewart had committed gross misconduct: that he had, as the jury and the Superior Court readily concluded, committed "an intentional act … to manipulate the financial records he knew would be reasonably relied upon by [Bracket]." Op.6.

Instead of acknowledging that fraud, coming clean about Stewart's indefensible practices, and working to make Bracket whole, Defendants chose to engage in years of scorched-earth litigation, doing everything in their power to cover up obvious wrongdoing and to avoid liability for their misdeeds. Most egregiously, Defendants engaged in a calculated effort to mislead the jury at trial by repeatedly volunteering that KPMG had *validated* the Company's financials, all the while knowing that KPMG had in fact severely *discredited* those financials. It was only midway through trial, after the Superior Court admonished Defendants for "pushing that envelope" by eliciting testimony bordering on perjury, A1662, that Defendants produced the KPMG report to Bracket and the jury. Astonishingly, Defendants continue their same strategy of denial and obfuscation even on this appeal, blindly asserting in the face of clear evidence (and the jury's verdict, and the Superior Court's findings) that "the record points at most to clerical error, not intentional

deceit, with respect to the accounting practices at issue." Reply/Ans.2.[1] Defendants' ongoing attempts to maintain that untenable position exemplify the bad faith they have shown throughout this litigation. Given Defendants' extreme and protracted bad faith, the Superior Court erred in refusing to grant Bracket an award of attorneys' fees.

[1] Citations to "Reply/Ans.___" are to Defendants' reply brief on appeal and answering brief on cross-appeal.

ARGUMENT

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

The Superior Court made two errors in its postjudgment interest calculation: basing its postjudgment interest rate on the date of injury rather than the date of judgment, and refusing to award postjudgment interest on the entire judgment (including prejudgment interest).

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

First, the Superior Court erred by basing its postjudgment interest rate on the date of injury rather than the date of judgment. Under the governing Delaware statute, postjudgment interest is awarded at "5% over the Federal Reserve discount rate … as of the time from which interest is due." 6 *Del. C.* §2301(a). As its name implies, and as this Court has repeatedly held, postjudgment interest is due from the date of judgment. *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1097-98 (Del. 2000); *Moffitt v. Carroll*, 640 A.2d 169, 177-78 (Del. 1994). If the losing party immediately satisfies the judgment in full, it owes no postjudgment interest, but if it delays payment, the "interest is due" from the date of judgment. The plain statutory text thus requires awarding postjudgment interest based on the prevailing rate on the date of judgment.

That approach not only follows from the statutory text, but also accords with the basic purposes of postjudgment interest: to compensate the plaintiff for the delay

between the date when judgment is entered and when it is eventually paid, and to prevent prevailing parties from being forced to finance the losing party's appeal at below-market rates. *See Shepherd v. Knapp*, 1999 WL 1611320, at *1 (Del. Super. Ct. Apr. 1, 1999); *Hughes v. Jardel Co.*, 1987 WL 12433, at *2 (Del. Super. Ct. June 8, 1987). Those purposes are best served by using the interest rate on the date of judgment, which most accurately captures the cost to the plaintiff and benefit to the defendant from delaying payment on the judgment, and provides a simple and easily administrable rule for determining the applicable rate.

Defendants have no persuasive response. Their sole textual argument is to assert that "the statute does not distinguish between postjudgment and prejudgment interest," and instead establishes only a "single formula" for "the" legal rate of interest—from which they deduce that a court must award both prejudgment interest and postjudgment interest at the same rate. Reply/Ans.48, 50. But the statute *does* provide a textual basis for distinguishing between prejudgment and postjudgment interest: it bases the applicable rate on "the time from which interest is due," and prejudgment and postjudgment interest become due at different times. *Compare Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.3d 482, 484 (Del. 2011) (prejudgment interest runs from when plaintiff is injured), *with Cowee*, 747 A.2d at 1097 (postjudgment interest runs from judgment). On top of that, as Defendants concede, the statute goes on to expressly set additional conditions on

postjudgment interest, plainly refuting any suggestion that the General Assembly intended a single rate to govern both. 6 *Del. C.* §2301(a) (setting additional rules for "post-judgment interest" under specific circumstances); *see* Reply/Ans.50 n.14.

Defendants' approach cannot be squared with the basic purposes of postjudgment interest. Defendants do not dispute that their interpretation of §2301(a) would create the anomalous and perverse consequence that a party like Bracket would receive a worse postjudgment interest rate just because it exercised its right to collect prejudgment interest, a result the General Assembly cannot have intended. Bracket.Br.65.[2] Nor do Defendants dispute that, as even the Superior Court recognized, their approach is not "a fair reflection of the cost of money over the relevant time period" after the judgment is entered, Op.38 (quotation marks and brackets omitted), and so fails to appropriately compensate plaintiffs for any delay in paying the judgment or dissuade defendants from using the judgment as free financing for their appeals. *See Shepherd*, 1999 WL 1611320, at *1; *Hughes*, 1987 WL 12433, at *2. Again, this case is a perfect example: as Defendants tacitly concede, the historically low federal discount rate at the date of injury in this case bore no relation to the rate on the date of judgment nearly six years later. Bracket.Br.65. As a result, Defendants have been allowed to force the prevailing

[2] Citations to "Bracket.Br.___" are to Bracket's answering brief on appeal and opening brief on cross-appeal.

party to finance this appeal at sub-market rates. Indeed, given the substantial delta between the unusually low rate that prevailed at the time of injury and the prevailing rate at the time of judgment, Defendants had no incentive whatsoever to satisfy the judgment in a timely fashion. Why pay now when the alternative is a loan at below-market rates? Put simply, Defendants' interpretation wholly fails to "give a sensible and practical meaning" to §2301(a), especially when compared with the far more natural reading that postjudgment interest depends on the rate at the date of judgment. *Rapposelli v. State Farm Mut. Auto. Ins. Co.*, 988 A.2d 425, 427 (Del. 2010).

Finally, Defendants rely on a handful of Superior Court and Chancery Court decisions to claim that prejudgment and postjudgment interest represent a single "continuing liability," Reply/Ans.49 (quoting *Houghton v. Shapira*, 2013 WL 3349956, at *5 (Del. Super. Ct. June 27, 2013)), and that "segmenting" that interest into "different rates of interest for prejudgment and post-judgment interest" is "disfavored," *id.* (quoting *O'Riley v. Rogers*, 2013 WL 4773076, at *1 (Del. Super. Ct. Sept. 4, 2013)). Needless to say, Defendants cite no decision from this Court for either proposition; and their claim that the cases they do cite represent "consistent, well-considered, and longstanding" precedent is a considerable exaggeration. *Contra* Reply/Ans.50. On the contrary, other Superior Court decisions have regularly followed the plain statutory text and held that prejudgment and

postjudgment interest become due at different times and so must be based on different rates. *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). At best, Defendants' cases show only a division of authority in the lower Delaware courts that this Court must resolve. In light of the clear statutory text and equally clear practical considerations, this Court should resolve that conflict by holding that postjudgment interest under §2301(a) must be based on the prevailing rate on the date when the judgment is entered. 6 *Del. C.* §2301(a).

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

The Superior Court made a second error in its postjudgment interest calculation by failing to award postjudgment interest on the entire judgment—in particular, on the portion of that judgment representing prejudgment interest, which Bracket was entitled to recover as of right as part of its actual damages. Op.39-40. The Superior Court gave no explanation for that decision, and Defendants devote only two paragraphs to their cursory attempt to defend it. Reply/Ans.51. Their perfunctory response is entirely unpersuasive.

As this Court itself has recognized, prejudgment interest is part of the "full compensation" that Delaware law awards to an injured plaintiff "as a matter of right." *Brandywine*, 34 A.3d at 486; *see also, e.g.*, *SEB S.A. v. Sunbeam Corp.*, 476 F.3d 1317, 1320 (11th Cir. 2007) (prejudgment interest "forms part of the actual

amount of a judgment on a claim"). It is undeniably part of the judgment that becomes due on the date of judgment, such that a party that wants to avoid paying postjudgment interest must satisfy the full amount of the judgment including prejudgment interest. It should thus come as no surprise that both in Delaware and in other jurisdictions, 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); *see, e.g.*, *Air Separation, Inc. v. Underwriters at Lloyd's of London*, 45 F.3d 288, 290 (9th Cir. 1995) (finding it "well-established" in the federal courts that "postjudgment interest also applies to the prejudgment interest component" of a judgment); *Markham Contracting Co. v. First Am. Title Ins. Co.*, 2013 WL 3828690, at *14 (Ariz. Ct. App. July 18, 2013) (courts "clearly and nearly uniformly" apply postjudgment interest to the entire judgment, including the prejudgment-interest component). Defendants do not dispute that in *every other jurisdiction* to consider the question, the uniform rule is that postjudgment interest applies to the entire judgment amount, including the prejudgment interest component. *See* Bracket Br.67-68; *Air Separation*, 45 F.3d at 290-91 (citing cases); *Markham*, 2013 WL 3828690, at *14 (citing cases).

Defendants' only response is to assert that this Court has already decided the matter and held that postjudgment interest cannot apply to the portion of a judgment attributable to prejudgment interest, and that *stare decisis* warrants maintaining that

outlier position even though it has been rejected by every other court to consider it. Reply/Ans.51 (citing *Summa Corp.*, 540 A.2d at 410). Their argument fails on both counts. To begin, *Summa Corp.* does not hold that a court *must* not apply postjudgment interest to the prejudgment-interest component of a judgment; at most, its lone sentence of analysis on this issue holds that a trial court *may* take that course under appropriate circumstances. *See* 540 A.2d at 410 (noting general rule against compounding interest, and finding "no reason to depart from that rule here"). Defendants do not dispute that the Superior Court said nothing to explain why that course—denying postjudgment interest that would otherwise be "routinely granted," *Starkey*, 2015 WL 13697681, at *5—should be considered appropriate in this case. *See* Reply/Ans.51. At a bare minimum, then, this Court should remand for the Superior Court to explain its reasoning. Bracket.Br.67.

The better course by far, however, would be for this Court to revisit the relevant part of *Summa Corp.* and bring Delaware jurisprudence on this issue into line with every other jurisdiction in the country. Remarkably, Defendants make no attempt to defend their preferred approach to postjudgment interest on the merits; instead, they content themselves with a brief nod to the doctrine of *stare decisis*, as if that doctrine were an inflexible rule against overturning prior precedent. Reply/Ans.51. In fact, *none* of the traditional *stare decisis* factors counsels against revisiting the relevant portion of *Summa Corp.* and joining the uniform nationwide

consensus that postjudgment interest applies to the entire judgment. On the contrary, revisiting *Summa Corp.* would be fully consistent with this Court's normal practice of reconsidering determinations that are of dubious merit, were decided in cursory fashion, conflict with this Court's other decisions, represent extreme outliers, and have not engendered reliance interests. *See, e.g.*, *Beattie v. Beattie*, 630 A.2d 1096, 1098-1100 (Del. 1993) (abrogating doctrine of interspousal immunity in tort law); *Duvall v. Charles Connell Roofing*, 564 A.2d 1132, 1134-35 (Del. 1989) (abandoning "unusual exertion" rule in workers' compensation law); *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 46 (Del. 1991) (abandoning choice-of-law rule of *lex loci delicti* for tort cases); *see also, e.g.*, *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (traditional *stare decisis* factors include "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision").

First, the legal rationale that *Summa Corp.* provided on this issue was cursory and not fully considered. The only reason *Summa Corp.* set forth for ignoring a portion of the judgment amount in calculating postjudgment interest is that the law has "traditionally disfavored the practice of compounding interest." 540 A.2d at 410. Like the Defendants here, *Summa Corp.* gave no explanation for why the rule against compounding interest would be implicated by awarding postjudgment interest on the entire judgment (including its prejudgment interest component); and

as every other court to address the issue has recognized, that rule simply is not implicated. *See, e.g.*, *Markham*, 2013 WL 3828690, at *14 (courts "clearly and nearly uniformly reject [the] concern that such a post-judgment interest award would represent impermissible compound interest"); *Air Separation*, 45 F.3d at 291 n.2 (rejecting argument that applying postjudgment interest to the entire judgment, including prejudgment interest, would be "an impermissible compounding of interest"); *Nakoff v. Fairview Gen. Hosp.*, 694 N.E.2d 107, 108 (Ohio Ct. App. 1997) ("[P]ostjudgment interest on prejudgment interest is not compounded interest."). On the contrary, the prejudgment interest award "is a component of th[e] judgment," and so forms part of the *principal* on which postjudgment interest is awarded. *Air Separation*, 45 F.3d at 291 n.2. "That prejudgment interest is a component of that judgment does not lead to the conclusion that interest is compounded." *Id.*

Second, *Summa Corp.* also stands in tension with this Court's other decisions. As already noted (and as Defendants do not dispute), this Court—like all others to address the issue—has recognized that prejudgment interest represents one aspect of the "full compensation" that an injured party is entitled to recover "as a matter of right" along with the rest of the injured party's judgment. *Brandywine*, 34 A.3d at 486; *see also, e.g.*, *SEB*, 476 F.3d at 1320 (prejudgment interest "forms part of the actual amount of a judgment on a claim"); *Air Separation*, 45 F.3d at 290 (prejudgment interest is a "component of a district court's monetary judgment"). It

is even more clear that if a defendant wants to avoid the obligation to pay postjudgment interest, it must satisfy the entire amount of the judgment including prejudgment interest. Simply proffering the amount of judgment less prejudgment interest neither satisfies the judgment nor cuts off the obligation to pay postjudgment interest. It follows that prejudgment interest should be treated the same as every other component of actual damages, and included in the base amount used to calculate postjudgment interest. The contrary rule suggested by *Summa Corp.* is incompatible with that principle, making it all the more appropriate for this Court to revisit *Summa Corp.* *Beattie*, 630 A.2d at 1098 (overruling interspousal immunity as inconsistent with previous abrogation of parental immunity); *Travelers*, 594 A.2d at 46 (overruling *lex loci delicti* choice-of-law rule in tort cases as inconsistent with previous overruling of *lex loci delicti* rule in contract cases).

Third, as already explained, every other jurisdiction to consider this issue has adopted the opposite rule. *Air Separation*, 45 F.3d at 290-91; *Markham*, 2013 WL 3828690, at *14. That overwhelming weight of contrary authority in other jurisdictions makes *Summa Corp.* a prime candidate for reconsideration. *Beattie*, 630 A.2d at 1099 (overturning interspousal immunity where "Delaware is the only state in the nation which recognizes the doctrine solely on common law grounds"); *Duvall*, 564 A.2d at 1134 (joining "a substantial majority of states" in abandoning the unusual-exertion rule); *Travelers*, 594 A.2d 38, 44-45 (abandoning choice-of-

law rule that "over thirty-one states now have rejected"). Notably, nothing in *Summa Corp.* suggests this Court consciously intended to render Delaware law an extreme outlier by adopting an approach different from every other jurisdiction.

Fourth, no practical considerations weigh against abandoning *Summa Corp.* Reconsidering that decision would not implicate any reliance interests, since parties do not frame their primary conduct around postjudgment interest rules. Nor would reconsidering that decision create any transition costs, or impose any collateral consequences on third parties. Nor would revisiting that decision have any significant effect on "stability and continuity in the law." *Contra* Reply/Ans.51. Indeed, in the more than 30 years since *Summa Corp.* was decided, Defendants cannot point to any other case from this Court relying on or even citing the relevant portion of that decision—presumably because the decision was minimally reasoned and in tension with this Court's other precedent. In short, *stare decisis* is no reason to affirm a ruling that is dubious on the merits, that was reached with only scanty reasoning, that diverges from this Court's other cases, that makes Delaware law a solitary outlier on this issue, and that is not supported by reliance interests or any other practical considerations.[3]

[3] None of the *stare decisis* cases that Defendants cite is remotely comparable. Defendants make no attempt to defend *Summa Corp.* on the merits, *cf. White v. Liberty Ins. Corp.*, 975 A.2d 786, 789-91 (Del. 2009) (reaffirming previous decision after finding the governing statute "clear on its face"); *Samson v. Smith*, 560 A.2d 1024, 1027 (Del. 1993) (refusing to alter common-law rule whose

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

The Superior Court also erred by refusing to award Bracket attorneys' fees under the "bad faith" exception to the American Rule. Defendants' renewed attempt to justify their conduct before and during trial continues the pattern of misleading representations and general obfuscation that necessitated fee-shifting below.

As an initial matter, Defendants are plainly wrong to argue that the Superior Court lacked jurisdiction to order fee-shifting. Reply/Ans.52. The very case Defendants cite proves them wrong. *See* Reply/Ans.52 (citing *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084 (Del. 2006)). In *Dover*, this Court explained that "[t]he Superior Court does hear cases in which it is occasionally required to apply equitable principles. In such cases the Superior Court has jurisdiction to award attorneys' fees even if no contract or statute requires it." 902 A.2d at 1090. To illustrate that point, *Dover* specifically noted that the Superior Court had "inherent equitable authority to 'control its own process'" by considering a "request for attorneys' fees under the 'bad faith' exception to the American Rule." *Id.* at 1090 n.14. That power applies in all cases without regard to whether the underlying cause of action sounds in law or equity. *See, e.g.*, *Gatz Props., LLC v.*

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reasoning "continue[d] to have validity"); and it has not been repeatedly reaffirmed by subsequent decisions of this Court or adopted by other jurisdictions, *cf. Account v. Hilton Hotels Corp.*, 780 A.2d 245, 247-49 (Del. 2001); *Aizupitis v. State*, 699 A.2d 1092, 1094 (Del. 1997).

Auriga Capital Corp., 59 A.3d 1206, 1222 (Del. 2012) ("[E]ven at law a court has inherent authority to shift fees where necessary to control the court's own process.").

Defendants are equally wrong to argue that no fee-shifting was warranted. KPMG's post-closing investigation informed Defendants in January 2014—over a year before Bracket filed suit—that Stewart's financial statements were full of unjustifiable misstatements, including an eye-popping ***94.8%*** error rate for unbilled accounts receivable. B178. It further informed Defendants that Bracket was owed *at least* $12 million in compensation for those errors. B178. From that point forward, Defendants knew they could not in good faith deny that they had misrepresented their financials to Bracket and that Bracket was entitled to be made whole for those misrepresentations. Yet that is what they did, forcing Bracket to expend substantial time and resources litigating over whether the Defendants had made any misrepresentations—even though Defendants knew from the outset that neither the Company's financials nor the representations in the SPA were accurate. Indeed, Defendants never deny that they forced Bracket to undergo a working capital arbitration that they knew could not resolve Bracket's claims, for no reason other than to "prolong[] and increase[] the costs of the litigation." *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 228 (Del. 2005); *see* Bracket.Br.70.

Defendants' bad faith was demonstrated most egregiously by their strategy at trial. On the first day of trial, Defendants' opening statement to the jury relied at

length on KPMG's *pre-closing* quality of earnings ("QoE") investigation, asserting that KPMG "did a full scrub of Bracket," that "KPMG studied whether Bracket was doing things right," and "when KPMG came in and did its full scrub, it … found no big issues." A1422. In light of what Defendants knew KPMG had actually found in their *post-closing* investigation—which Defendants at the time intended to withhold from the jury under a claim of privilege—those statements can only be described as a bad-faith attempt at misdirection.

Defendants' deliberate efforts to mislead continued during the testimony of Ben Bier, ESI's Vice President of Investor Relations, who testified that he had "no reason to believe that the financial statements as of the closing date were inaccurate"—a deliberate misstatement in light of the post-closing KPMG report, which Defendants were still continuing to conceal from the jury. A1646-47. In response, the Superior Court remarked to defense counsel: "Your client has just said that he has total reason to believe that the financial statements provided were totally accurate. These [KPMG] documents don't say that. In fact, they say your client owes money." A1648. The Superior Court continued, "I find what's happening here very unnerving…. It's simply your client hiding behind something … and not telling the jury the truth. We'll see how it ends at the end of the day, but you're not being candid." A1649.

Defendants doubled down on their deceptive presentation in cross-examining Bier, prompting the Superior Court to remark: "[Y]ou spent the last half hour having this witness articulate how wonderful KPMG is, including articulating information about accounts receivable, unbilled accounts.... [Y]ou are going to get up and argue that nothing was wrong here because KPMG did this incredible quality report." A1661-62. That argument was intentionally misleading, because "based on what [KPMG] told you afterwards" in its *post-closing* report, Defendants knew that the positive *pre-closing* report was "not reliable" and "not true." A1662. The Superior Court did not conceal its disdain for Defendants' tactics, rebuking them for "pushing th[e] envelope," "not even trying to seek the truth here," and "just trying to play the game." A1662. It was only after that rebuke—and after the Superior Court admonished Defendants that they had "totally opened the door" to examination on the post-closing KPMG report by eliciting testimony they knew was highly misleading—that Defendants finally caved and produced the damning post-closing KPMG report. A1661-63.

As the trial record illustrates, Defendants' claim that their decision to waive privilege was somehow the result of improper tactics *by Bracket* is absurd. *Contra* Reply/Ans.6. On the contrary, as the Superior Court recognized, it was *Defendants* whose trial tactics were improper in "argu[ing] that nothing was wrong here because KPMG did this incredible quality report" when "[w]e know that what they did is not

reliable based upon what they told you afterwards." A1662; *see also, e.g.*, A1647-50 (squarely rejecting Defendants' argument that Bracket's examination of Bier was improper).[4]

Defendants' bad-faith tactics extended to their expert testimony. Rather than providing their own expert witness with all the relevant information available regarding the financial statements at issue, Defendants intentionally concealed KPMG's post-closing report from their expert, *see* A1972, so that he could misleadingly testify that the financial statements at issue "*appear* to be correct" and "are *presumably* correct" because "KPMG look[ed] at it in detail" in the pre-closing QoE report. A1976 (emphasis added). Despite knowing full well that the QoE report was "not reliable," A1662, Defendants deliberately prepared their expert to mislead the jury by suggesting that report validated their claims. Defendants had done the same with Jim Stewart in his pre-trial deposition, eliciting knowingly misleading testimony about how KPMG had confirmed the accuracy of his accounts. A420-21.

Defendants' strained effort to minimize the significance of KPMG's devastating post-closing report, *see* Reply/Ans.7-10, is utterly unpersuasive. For

[4] Defendants continue to mislead by suggesting that Bracket is charging them with bad faith for merely "safeguarding privilege." Reply/Ans.6. Defendants' bad-faith misconduct was not in asserting privilege—it was in presenting misleading testimony and misleading arguments before and during trial that Defendants *knew* were flatly contradicted by the privileged material they had chosen to withhold.

starters, it is preposterous to suggest that KPMG's post-closing analysis—showing that the financial statements at issue were riddled with serious errors, including a ***94.8% error rate*** on unbilled accounts receivable, and corroborating the extensive expert analysis that Bracket presented at trial—did not "support Bracket's narrative." Reply/Ans.7; *see* Bracket.Br.17-21. Defendants themselves recognized the persuasive force of an independent third-party analysis of their financial statements; that is why their trial strategy from day one revolved around arguing to the jury that KPMG's *pre-closing* QoE report showed that there was nothing wrong with Defendants' financial statements, even though KPMG's *post-closing* report (which Defendants assumed the jury would never see) showed the exact opposite. *See* A1422. That later report eviscerated the central pillar of Defendants' misleading defense, which is why Defendants fought so hard for so long to keep it away from the jury and to build their trial presentation as if it never existed.

Defendants make no more headway by suggesting that KPMG's devastating report was not probative because it was only a "draft," and because KPMG was conducting a "[w]orking capital potential adjustment" rather than specifically conducting a fraud investigation. Reply/Ans.7-8. The pervasive financial misstatements that report revealed—and the fact that those misstatements

collectively cost Bracket *at least* $12 million,[5] even according to Defendants' own accounting firm—were obviously probative on the issue of whether Defendants' misstatements were mere "clerical errors" (as Defendants continue to insist, Reply/Ans.8) or conscious fraud (as the jury and the Superior Court easily concluded, *see* Op.6). Defendants' assertion that they were free to consciously mislead the jury without sanction because the document that revealed their misrepresentations was labeled "draft," Reply/Ans.8, simply boggles the mind.[6]

Next, Defendants suggest that the working capital shortfall KPMG found could theoretically have resulted from "failing to account for all billings and collections" rather than overstated revenues. Reply/Ans.9. That assertion is no more believable now than it was when Defendants floated the same notion at trial, A1860, when the jury rejected it as counter to all of the evidence. Notably, Defendants carefully avoid claiming that they genuinely believed in good faith that the pervasive errors exposed by the KPMG report were the result of understated billings rather

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[5] Defendants' claim that KPMG "suggested a *total* adjustment of $10.06 million," Reply/Ans.7, is false. In fact, KPMG calculated an adjustment of over $12 million for unbilled accounts receivable on closed and inactive contracts alone, and a total adjustment of over $14 million. B178.

[6] As for Defendants' repeated claim that the KPMG report supports their argument that Bracket's claim depends on deviating from the Company's accounting practices, *see* Reply/Ans.7, 9, the jury had that evidence and that argument before them and squarely rejected it. *See* Bracket.Br.17-18, 48-55.

than overstated revenues—presumably because Defendants never did believe that facially implausible and factually unsupported theory.

Defendants' assertion that the KPMG report "goes *both* ways and *undercuts* allegations of deliberate fraud," Reply/Ans.9, is equally baseless. Defendants claim the KPMG report showed the Company "had *understated* unbilled accounts receivable by $1.98 million on Active contracts," Reply/Ans.9 (citing B178); but they neglect to mention that KPMG found the Company had *overstated* deferred revenue on the same active contracts category by some $3.5 million, creating an overall *overstatement* of about $1.5 million. B178. That hardly suggests that the Company was not deliberately falsifying its revenue numbers—or that Defendants were litigating that issue in good faith.

Defendants respond to all this by trying to change the subject, asserting that Bracket has not "establish[ed] that Defendants acted in bad faith by questioning Dudney's calculations," and that the parties' disputes over jury instructions and evidentiary rulings indicate "that reasonable minds could differ about the natural outcome here." Reply/Ans.53-54. Those arguments are unpersuasive on their own terms; as the Superior Court put it, the trial evidence established beyond question that Defendants committed "an intentional act … to manipulate the financial records [they] knew would be reasonably relied upon by [Bracket]," which is why "there was no doubt by the jury or [the Superior] Court regarding [Defendants'] liability."

Op.6-7. Regardless, even if *some* of Defendants' arguments could conceivably have been made in good faith, that does not excuse their *other* repeated, calculated efforts to baselessly prolong this litigation and to mislead the jury at trial.

In sum, the record here unequivocally demonstrates that Defendants' conduct before and during trial "unnecessarily prolonged and increased the costs of the litigation" and "must … be regarded as demonstrative of bad faith." *Dobler*, 880 A.2d at 228. Given the "overwhelming evidence that [Defendants] repeatedly acted in bad faith," the Superior Court "abused its discretion by declining to award attorneys' … fees." *Id.* at 229.

CONCLUSION

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

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CERTIFICATE OF SERVICE

I, David E. Ross, hereby certify that on September 29, 2020, I caused a true and correct copy of the *PUBLIC VERSION* of *Appellee/Cross-Appellant Bracket Holding Corp.'s Reply Brief on Cross-Appeal* to be served through File & Serve*Xpress* on the following counsel of record:

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