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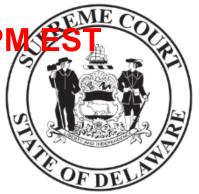

# IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| BRADLEY BAKOTIC and JOSEPH HACKEL, | ) | |
| Plaintiffs-below/ Appellees, | ) | No. 382, 2021 |
| v. | ) | On Appeal from the Superior Court of the State of Delaware |
| BAKO PATHOLOGY LP, BPA HOLDING CORP., and BAKO PATHOLOGY ASSOCIATES, LLC, | ) | C.A. No. N17C-12-337 WCC |
| Defendants-below/ Appellants. | ) | |

## APPELLANTS' OPENING BRIEF

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**TABLE OF CONTENTS**

**Page**

TABLE OF CITATIONS ..... iii

NATURE OF PROCEEDINGS ..... 1

SUMMARY OF ARGUMENT ..... 4

STATEMENT OF FACTS ..... 5

A. The Parties ..... 5

B. Plaintiffs' Agreements ..... 6

1. Plaintiffs' Employment Agreements ..... 6

2. The Merger Agreement ..... 7

3. The Partnership Agreement ..... 8

C. Plaintiffs Sought to Invalidate Their Restrictive Covenants While Simultaneously Breaching Them ..... 9

1. Plaintiffs Breached Their Covenants by Forming the Rhett Foundation to Perform the Same Duties They Performed at Bako for the Benefit of Bako Customers ..... 9

2. Plaintiffs Breached Their Covenants by Using Bako's Confidential Information Related to PAS, PCR, and GMS Testing ..... 11

3. Plaintiffs Filed Suit to Invalidate Their Restrictive Covenants and Formed Rhett Diagnostics to Compete with Bako ..... 14

4. Bako Took Action to Stop Plaintiffs' Breaches ..... 14

5. Plaintiffs' Misconduct Caused Bako to Lose Customers ..... 16

D. The Superior Court's Findings ..... 22

ARGUMENT ........................................................................................24

I. The Superior Court Abused its Discretion by Applying an Arbitrary Growth Rate Without Providing any Calculation or Record Support, Failing to Articulate its Damages Calculations and Incorrectly Calculating Bako's Damages, and Failing to Award Lost Business Value to Bako, all Resulting in a Damages Award of Only $1,740,254. ........................................24

A. Question Presented........................................................24

B. Scope of Review ........................................................24

C. Merits of Argument........................................................25

1. The Superior Court Abused its Discretion by Arbitrarily Applying a 1.5% Growth Rate Without Providing any Calculation ........................................25

2. The Superior Court Abused its Discretion Because a 1.5% Growth Rate Has No Record Support ................27

3. Even if the Superior Court's 1.5% Growth Rate is Appropriate, the Superior Court Incorrectly Calculated Damages ........................................31

4. The Superior Court Abused its Discretion When it Failed to Award Lost Business Value to Bako...............33

II. The Superior Court Abused its Discretion and Erroneously Applied Delaware Law by Not Awarding Attorneys' Fees to Bako........................................................................35

A. Question Presented........................................................35

B. Scope of Review ........................................................35

C. Merits of Argument........................................................36

CONCLUSION ........................................................................................45

## TABLE OF CITATIONS

**Cases**

*AFH Holding & Advisory, LLC v. Emmaus Life Scis., Inc.*,
2014 WL 1760935 (Del. Super. Apr. 16, 2014)........................................... 39, 43

*Dittrick v. Chalfant*,
2007 WL 1378346 (Del. Ch. May 8, 2007) ........................................................37

*Dover Hist. Soc'y, Inc. v. City of Dover Planning Comm'n*,
902 A.2d 1084 (Del. 2006)..........................................................................35

*Duncan v. SITCPL, LLC*,
2020 WL 829374 (Del. Super. Feb. 19, 2020)...................................... 39, 40, 41

*Golden Telecom, Inc. v. Global GT LP*,
11 A.3d 214 (Del. 2010)...................................................................... 25, 30, 31

*Knight v. Grinnage*,
1997 WL 633299 (Del. Ch. Oct. 7, 1997)..................................................... 37, 41

*Mahani v. Edix Media Grp., Inc.*,
935 A.2d 242 (Del. 2007)............................................................................36

*Mills Acquisition Co. v. MacMillan, Inc.*,
559 A.2d 1261 (Del. 1989)..........................................................................34

*Montgomery Cellular Holding Co. v. Dobler*,
880 A.2d 206 (Del. 2005)............................................................................35

*Mrs. Fields Brand, Inc. v. Interbake Foods, LLC*,
2018 WL 300454 (Del. Ch. Jan. 5, 2018) ..................................................... 39, 41

*North River Ins. Co. v. Mine Safety Appliances Co.*,
105 A.3d 369 (Del. 2014)............................................................................36

*Northwestern Nat'l Ins. Co. v. Esmark, Inc.*,
672 A.2d 41 (Del. 1996)..............................................................................36

*Pitts v. White*,
109 A.2d 786 (Del. 1954)...................................................................... 35, 36

*RBC Capital Mkts., LLC v. Jervis*,
129 A.3d 816 (Del. 2015).............................................................. 24, 25, 27, 34

*SIGA Techs., Inc. v. Pharmathene, Inc.*,
67 A.3d 330 (Del. 2013)...................................................................... 34, 35, 36

*Sternberg v. Nanticoke Mem. Hosp., Inc.*,
62 A.3d 1212 (Del. 2013)........................................................................... 38, 43

*Tyndall v. Tyndall*,
214 A.2d 124 (Del. 1965)..............................................................................36

*Verition Partners Master Fund, Ltd. v. Aruba Networks, Inc.*,
210 A.3d 128 (Del. 2019)........................................................................... 26, 31

*Vianix Delaware LLC v. Nuance Commc'ns, Inc.*,
2010 WL 3221898 (Del. Ch. Aug. 13, 2010)................................... 38, 39, 41, 42

*Zachman v. Real Time Cloud Servs. LLC*,
2021 WL 1561430 (Del. Apr. 20, 2021)..............................................................27

## NATURE OF PROCEEDINGS

Plaintiffs Bradley Bakotic and Joseph Hackel (collectively "Plaintiffs") are Georgia citizens and two of the founders of what is now Defendant Bako Pathology Associates, LLC, a national pathology reference laboratory headquartered in Georgia. In 2011 and 2016, Plaintiffs sold certain of their ownership interests in the laboratory and, in exchange for millions of dollars in cash and equity and continued employment, executed three relevant agreements. Specifically, Plaintiffs entered into identical Employment Agreements, a Merger Agreement, and a Partnership Agreement (collectively "Plaintiffs' Agreements"). In addition to Defendant Bako Pathology Associates, LLC, Defendants BPA Holding Corp. and Bako Pathology LP (collectively "Bako") are parties to Plaintiffs' Agreements. All of Plaintiffs' Agreements contain restrictive covenants.

After their employment with Bako terminated, Plaintiffs filed an action in Superior Court, seeking a declaratory judgment that the restrictive covenants in their Employment Agreements and Partnership Agreement were invalid pursuant to 6 *Del. C.* § 2707 ("Section 2707"). Bako filed an Answer and Counterclaims, alleging that Plaintiffs breached restrictive covenants in all of Plaintiffs' Agreements and asserting several tort claims. Bako also sought its attorneys' fees based on contractual fee-shifting provisions in Plaintiffs' Agreements. During discovery in the Superior Court action, Plaintiffs engaged in additional activities in breach of their

restrictive covenants. Thus, Bako filed an action against Plaintiffs in the Court of Chancery seeking injunctive relief (the "Chancery Action"), which resulted in entry of a Status Quo Order prohibiting Plaintiffs from engaging in certain activities in breach of Plaintiffs' Agreements. The Chancery Action was later stayed (with the Status Quo Order in place) while the parties litigated in the Superior Court.

Following completion of discovery, the Superior Court granted Bako's Motion for Partial Summary Judgment, upholding the enforceability of Plaintiffs' Agreements and rejecting Plaintiffs' argument that Section 2707 invalidated their restrictive covenants. Thus, the only claims remaining for trial were Bako's breach of contract claims against Plaintiffs and two tort claims against Plaintiff Bakotic unrelated to Plaintiffs' Agreements.

The Superior Court conducted a seven-day bench trial in January 2020. On November 2, 2021, the Superior Court issued a Decision After Bench Trial finding that Plaintiffs breached all of Plaintiffs' Agreements; specifically, Plaintiffs breached: (1) the non-compete covenants contained in their Employment Agreements; (2) the non-solicitation covenant contained in the Merger Agreement; (3) the non-compete covenant contained in the Partnership Agreement; and (4) the non-disclosure and non-use of proprietary information covenants contained in their Employment Agreements. ("Trial Op.," Ex. A.) The Superior Court determined that Plaintiffs did not breach the non-compete covenant of the Merger Agreement

and that Plaintiff Bakotic did not tortiously interfere with two contracts between Bako and third parties. (*Id.*)

The Superior Court awarded damages to Bako for these contractual breaches in the amount of $1,740,254. (*Id.*) The Employment Agreements and Partnership Agreement contain fee-shifting provisions, but the Merger Agreement does not. Despite the fee-shifting provisions in the Employment Agreements and Partnership Agreement and Bako's success on all claims concerning these agreements, the Superior Court declined to award attorneys' fees to Bako. (*Id.*)

Bako appeals the Superior Court's ruling awarding only $1,740,254 in damages to Bako and failing to award attorneys' fees to Bako.

## SUMMARY OF ARGUMENT

1. Whether the Superior Court abused its discretion by applying an arbitrary growth rate without providing any analysis in support thereof, failing to articulate its damages calculations and incorrectly calculating Bako's damages, and failing to award lost business value to Bako, all resulting in a damages award of only $1,740,254.

2. Whether the Superior Court abused its discretion and erroneously applied Delaware law by not awarding attorneys' fees to Bako.

## STATEMENT OF FACTS

Distilled to one sentence, this case is about Plaintiffs seeking to void the restrictive covenants in Plaintiffs' Agreements' while simultaneously breaching them, resulting in Bako obtaining damages and injunctive relief.

### A. The Parties

Plaintiffs are two founders of Bako and still hold equity interests in it. (Ex. A, Trial Op. at 1.) Bako provides anatomic and molecular pathology services, microbiology services, and neuropathy-related testing to podiatrists and dermatologists (collectively "Laboratory Services"). (A515 at 32:3-33:2.) Simply put, podiatrists and dermatologists send patient samples (nails, skin, etc.) to Bako for Laboratory Services. *Id.* Bako provides Laboratory Services to podiatrists and dermatologists in all 50 states. *Id.*

After founding Bako, Plaintiffs worked to brand it as a nationally recognized provider of Laboratory Services. (A314, Plfs. Ans. to Supp. Counterclaims at ¶9.) To do this, Plaintiffs implemented a multi-pronged marketing campaign focused on increasing brand awareness by: (1) providing financial sponsorships to podiatry and dermatology association events; (2) speaking at podiatry and dermatology association events; and (3) administering a fellowship program for podiatry students. (A526 at 77:2-19; A526-A527 at 78:19-80:23; A527 at 81:16-22; A527-A528 at 83:8-84:20; A592 at 56:17-57:3.) The events and fellowship program provided

Bako and Plaintiffs with continued exposure to actual and potential clients that, over time, built Bako into a national brand. (A314, Plfs. Ans. to Supp. Counterclaims at ¶9.) Based on the success of this marketing campaign, Plaintiffs sold interests in Bako, the last of which was in 2016 for $242,500,000.00, of which Plaintiff Bakotic received $30,400,768.51 in cash and stock and Plaintiff Hackel received $14,357,043.92 in cash and stock. (A108-A225, Agmt. and Plan of Merger; A315-A316, Ans. to Compl. for Decl. Judgment and Counterclaims at ¶12; A528 at 84:21-85:6, 87:8-13; A529 at 88:7-12; A591 at 53:4-10.) Defendant Bako Pathology LP owns Defendant BPA Holding Corp. (A515 at 34:23-35:6.) Defendant BPA Holding Corp. is the sole member of Bakotic Pathology Associates, LLC, which operates Bako's laboratory in Alpharetta, Georgia. (A313, Pltfs. Ans. to Supp. Counterclaims at ¶6; Ex. A, Trial Op. at 1.)

### B. Plaintiffs' Agreements

To ensure Bako's new owners received the benefit of their bargain, Plaintiffs entered into three relevant agreements, all of which contain restrictive covenants.

#### 1. Plaintiffs' Employment Agreements

First, in exchange for continued employment, Plaintiffs executed substantively identical Employment Agreements. (A93-A100, Bakotic Emp't Agmt.; A101-A107, Hackel Emp't Agmt.) Under Paragraph 1 of the Employment Agreement, Plaintiffs agreed that, for a period of twenty-four (24) months following

the end of their employment with Bako, they would "not perform the same or similar duties" that they performed for Bako on behalf of or for the benefit of "(i) any laboratory and/or health care provider which competes with [Bako], or (ii) any customer or client of [Bako] with whom [Bako] provided services within two years prior to [their] termination" from Bako, in any "territory where [Bako] was doing business at the time of termination." (*Id.*) Additionally, under Paragraph 2 of the Employment Agreement, Plaintiffs agreed "not to use, utilize, disclose, or reverse engineer [Bako's] Confidential Information or Trade Secrets for any purpose . . . ." (*Id.*)

The Employment Agreements also contain a fee-shifting provision:

> If [Bako] is the prevailing party in any legal proceeding to construe, apply, interpret, enforce or defend any of [Bako's] rights in this Agreement, [Plaintiffs] agree to reimburse [Bako] for all reasonable costs, expenses and attorneys' fees incurred by [Bako] in such proceedings.

(*Id.*)

**2. The Merger Agreement**

Next, to effectuate their sale of certain interests in Bako, Plaintiffs executed a Merger Agreement, which includes additional restrictive covenants. (Ex. A, Trial Op. at 7.) Specifically, and in relevant part, Plaintiffs agreed they would not: (a) engage in a "Competing Business" or (b) have any interest in any person or entity that directly or indirectly engages in a "Competing Business." (A108-A225, Agmt.

and Plan of Merger.) A "Competing Business" means "any business in which [Bako] or any of its Subsidiaries is engaged, or has specific plans (as evidenced by documentation of [Bako]) to become engaged, in each case, as of the Closing Date." (*Id.*) Additionally, in the Merger Agreement, Plaintiffs agreed not to hire or solicit any Bako employee for twelve months from the end of the employee's employment with Bako. (*Id.*) The Merger Agreement does not contain a fee-shifting provision. (Ex. A, Trial Op. at 52.)

### 3. The Partnership Agreement

Following the execution of the Merger Agreement, a new partnership was created to operate Bako. Pursuant to the Partnership Agreement, Plaintiffs became and currently remain Limited Partners. (*Id.* at 9.) While Plaintiffs remain Limited Partners, they agree not to "have any business interests or engage in business activities in addition to those relating to the Partnership, including, without limitation, business interests and activities in direct competition with the Partnership or any of its Subsidiaries . . . ." (*Id.*)

The Partnership Agreement contains the following fee-shifting provision:

> If any dispute between parties hereto should result in litigation or arbitration, the prevailing party in such dispute shall be entitled to recover from the other party all reasonable fees, costs and expenses of enforcing any rights of the prevailing party, including without limitation, reasonable attorney's fees and expenses, all of which shall be deemed to have accrued upon the commencement of such action and shall be paid whether or not such action is

> prosecuted to judgment. Any judgment or order entered in such action shall contain a specific provision for recovery of attorney's fees and costs incurred in enforcing such judgment and an award of prejudgment interest from the date of the breach at the maximum rate of interest allowed by law. For the purposes of this Section 12.12: (a) attorney's fees shall include, without limitation, fees incurred in the following: (i) post-judgment motions; (ii) contempt proceedings; (iii) garnishment, levy, and debtor and third-party examinations; (iv) discovery and (v) bankruptcy litigation and (b) "prevailing party" means the party who is determined in the proceeding to have prevailed or who prevails by dismissal, default or otherwise.

(*Id.* at 51-52.)

### C. Plaintiffs Sought to Invalidate Their Restrictive Covenants While Simultaneously Breaching Them

#### 1. Plaintiffs Breached Their Covenants by Forming the Rhett Foundation to Perform the Same Duties They Performed at Bako for the Benefit of Bako Customers

Plaintiff Bakotic was terminated from employment with Bako on September 7, 2017. Shortly thereafter, Plaintiff Hackel purportedly "retired" on September 30, 2017. Plaintiffs immediately founded the Rhett Foundation on October 3, 2017, for the purpose of providing Plaintiffs with a vehicle to lecture throughout the country and sponsor various educational events and institutions for the benefit of Bako's customers as they had done at Bako. (Ex. A, Trial Op. at 11; A526 at 76:1-3; A530 at 95:18-21; A590 at 50:19-51:1.) Indeed, just like when they worked for Bako, Plaintiffs performed the same duties on behalf of their Rhett Foundation: Plaintiff

Bakotic selected which podiatric conferences the Rhett Foundation would sponsor (A543 at 145:6-147:19); Plaintiff Bakotic lectured at podiatric conferences (A545 at 154:14-155:14); Plaintiff Bakotic lectured at component dinners (A548 at 164:3-22); and Plaintiff Hackel lectured at podiatric conferences (A593 at 60:15-22). While Plaintiffs defended this conduct by claiming they were simply engaged in altruistic, educational endeavors, Plaintiffs were actually branding and marketing their Rhett Foundation to Bako's customers while simultaneously preparing to open a competing laboratory under the same name. (A532 at 101:1-11; A544-A545 at 149:18-152:17; A556-A557 at 196:15- 200:22.)

Additionally, Plaintiff Bakotic hired Kristen Paoli, his former assistant at Bako, to work at the Rhett Foundation and trained her to sponsor the same events as Bako "at either the same or a higher level than Bako," at which Plaintiff Bakotic presented lectures which were at least 50% recycled from the contents of lectures he gave on behalf of Bako. (A543-A544 at 147:20-148:4; A545 at 154:23-155:10.) These sponsorships and lectures all occurred between October 2017 and October 2018. (*See* A237-A244, Conferences Sponsored by TRF.)

Importantly, the podiatrists who attended the events sponsored by the Rhett Foundation are the primary customer base of Bako. (A526 at 76:10-20.) When announcing their Rhett Foundation, Dr. Bakotic promised that he and Dr. Hackel would continue to serve the podiatric community "as [they] always have" by

sponsoring and lecturing at podiatric events because their hope was that these "podiatric clinicians" would "benefit from [their] various initiatives in some way." (A229-A230, B. Bakotic Facebook Post.) The Rhett Foundation sponsored twenty podiatric conferences and provided a speaker at thirty-five other podiatry events. (Ex. A, Trial Op. at 11.)

#### 2. Plaintiffs Breached Their Covenants by Using Bako's Confidential Information Related to PAS, PCR, and GMS Testing

Bako offers three different tests for nail samples: (1) PAS; (2) PCR; and (3) GMS. (A228, Bako Pathology Servs. Patient Form.) At Bako, Plaintiff Bakotic promoted a comprehensive testing panel for nail clippings which included PAS, PCR, and GMS testing. (A548-A550 at 167:12-175:16.) The requisition form that Plaintiff Bakotic helped design and approve for Bako encourages podiatrists to order PAS and GMS testing together because it provides a "higher sensitivity" than just "routine" PAS testing. (A228, Bako Pathology Servs. Patient Form.) In fact, it was Plaintiff Bakotic's idea to offer these tests together. (A549 at 171:11-13.)

When Bako developed its proprietary PCR test, Plaintiff Bakotic drafted and sent a letter to Bako's customers which promoted conducting PAS/PCR/GMS tests at the same time. (A226-A227, Bako Integrated Physician Solutions' Announcement of the Completion of PCR Assay/Molecular Genetic Testing; A550 at 173:5-18.) This campaign was so successful that, for nail clippings (representing

approximately 60% of the samples sent to Bako), instead of ordering just one test, podiatrists would order three tests for each nail clipping. (A515-A516 at 35:14-36:9.) This testing protocol and Plaintiff Bakotic's promotion of it "drove revenue and growth" at Bako. *Id.* Plaintiff Bakotic knew that all three of these tests were profitable for Bako. (A550 at 172:18-173:4.)

Armed with this knowledge, in the summer of 2018 after his departure from Bako, Plaintiff Bakotic made a complete about-face and, with Plaintiff Hackel, began advocating a different testing protocol in their "Rhett's Perspectives" advertisements. (A551 at 176:7-13; A245-A247, Rhett's Perspectives – Diagnosing Onychomycosis.) These advertisements were drafted together by Plaintiffs and were published on their Rhett Foundation Facebook page and in PM News, an electronic newsletter sent to podiatrists, including Bako's customers. (A532 at 102:16-103:6; A553 at 184:7-13; A825 at 159:20-23.) Whereas on behalf of Bako, Plaintiff Bakotic had advocated ordering PAS, GMS, and PCR testing at once for every nail sample, now Plaintiffs were advocating a less profitable protocol—*i.e.*, that podiatrists should start first with PAS testing and determine later whether to order GMS and/or PCR testing. (A245-A247, Rhett's Perspectives – Diagnosing Onychomycosis.) Bako was the only laboratory offering this PCR testing. (A520 at 53:14-16.)

Next, Plaintiffs disclosed Bako's confidential information regarding the potential efficacy of the GMS test. In 2017, shortly before Dr. Bakotic's termination, Dan Spragle, Bako's President, generated a confidential report suggesting that conducting the GMS test at the same time as the PAS test made a difference in 5% of cases. (A685 at 87:9-18; A732 at 5:10-6:3.) In other words, in 95% of cases, GMS testing did not add any value over just the PAS test. (A697 at 133:20-134:6.) Mr. Spragle shared this confidential report with Plaintiff Bakotic, and they discussed it because they wanted to ensure that the testing Bako was offering and advocating actually made a difference in patient care. (*Id.* at 133:20-134:20.) Bako did not publicize or share this confidential report with the public in any way. (A697 at 134:21-135:9; A732 at 5:10-6:3.)

At their Rhett Foundation, Plaintiffs attacked Bako's testing protocol by disclosing the details of this confidential report. Specifically, in a Rhett's Perspective entitled "Diagnostics Onychomycosis," Plaintiffs informed the podiatric community that they had learned ordering tests above and beyond a PAS test had "no diagnostics utility" in 95% of cases. (A245-A247, Rhett's Perspectives – Diagnosing Onychomycosis.) Plaintiffs advocated against PAS and GMS testing together. *Id.*

### 3. Plaintiffs Filed Suit to Invalidate Their Restrictive Covenants and Formed Rhett Diagnostics to Compete with Bako

On December 27, 2017, Plaintiffs filed suit in Superior Court seeking a declaratory judgment that the restrictive covenants contained within their Employment Agreements and Partnership Agreement were invalid pursuant to Section 2707. (A231-A236, Compl.) The next day, Plaintiffs formed Rhett Diagnostics, LLC, which was intended to serve as a human anatomic pathology lab in competition with Bako, and hired former Bako employees. (Ex. A, Trial Op. at 14; A556 at 196:15-19; A557 at 203:17-22.) Plaintiffs invested approximately $1.7 million into Rhett Diagnostics. (A556 at 196:15-19; A557 at 203:17-22.)

### 4. Bako Took Action to Stop Plaintiffs' Breaches

Even though Bako had asserted breach of contract counterclaims in the Superior Court, Bako filed for injunctive relief in the Court of Chancery in July 2018 due to Plaintiffs' competitive behavior at podiatric events with their diagnostic laboratory waiting in the wings. (Ex. A, Trial Op. at 14-15.) This, however, did not deter Plaintiffs in their efforts to compete with Bako, as Plaintiff Bakotic told Dr. David Tarr (a Bako client) that Bako was attempting to secure an injunction against him and Plaintiff Hackel to prevent them from lecturing at podiatric events. (A538 at 125:22-127:14.) Dr. Tarr drafted a letter to the podiatric community asking Bako's customers to demand all efforts to enjoin Dr. Bakotic cease and, if Bako

refused, that the customers stop doing business with Bako. (A538 at 127:15-22; A279-A280, Email from A. Discont to D. Tarr; A301-A303, Tarr Petition.) Dr. Tarr, however, had no means of distributing his letter. (A539 at 128:1-129:4.) Undaunted, Plaintiff Bakotic marshalled the resources of his Rhett Foundation, including an IT specialist and two Public Relations specialists, to disseminate Dr. Tarr's letter. (A539 at 129:5-130:23.) This Rhett Foundation team edited and disseminated Dr. Tarr's letter, via a phantom email account known as davidtarrdpm@gmail.com, to the Rhett Foundation's thousands of contacts (many of whom are Bako's customers) and posted Dr. Tarr's letter online as a petition that Bako's customers could read and sign ("Tarr Petition"), all of which was paid for by the Rhett Foundation. (A539 at 131:1-9; A540-A541 at 132:19-139:3; A279-A280, D26; A301-A303, Tarr Petition.) Some of Bako's clients either signed the Tarr Petition or responded to the email. (A742 at 46:5-10.)

On September 6, 2018, the Court of Chancery entered a Status Quo Order enjoining Plaintiffs from various activities, including (1) speaking at or sponsoring podiatry or dermatology conferences, (2) interfering with Bako's sponsorship and speaking, and (3) owning, operating, or having any interest in a lab engaged in the provision of anatomic and molecular pathology services. (Ex. A, Trial Op. at 14-15.) Essentially, the Status Quo Order, if followed, would stop all the competitive

behavior by Plaintiffs described above. However, the Status Quo Order could not address the significant damage Plaintiffs had already inflicted on Bako.

#### 5. Plaintiffs' Misconduct Caused Bako to Lose Customers

Plaintiffs' misconduct caused Bako to lose customers, who stopped doing business entirely with Bako or sent significantly fewer samples for testing to Bako:

- Drs. Toback, Gilmore, and Stanton stopped using Bako because Plaintiff Bakotic called them to explain his side of his termination and/or ask them to stop using Bako (A641 at 49:20-51:12; A650 at 85:10-86:23; A776-A777 at 183:2-184:17);

- Drs. Kauthon, Cairns, McEnberg, Green, Concho, and Lin stopped using Bako because of something they read or heard in one of Plaintiff Bakotic's Rhett Foundation publications or lectures regarding Bako's "treatment" of Plaintiff Bakotic (A650-A651 at 87:20-89:2; A653-A654 at 99:19-101:23; A678 at 56:23-58:7; A683 at 78:9-16, 79:2-13; A683-A684 at 79:20-80:8);

- Drs. Zaborowski, Donela, and Bhatia stopped using Bako at the same time they signed the Tarr Petition and/or specifically referenced the Tarr Petition as the reason they left Bako (A642 at 54:1-55:23; A643-A644 at 59:22-60:4; A658 at 118:7-119:12); and

- Drs. Willinski and LeBow stopped ordering GMS or PCR tests as a result of what they read in the Rhett's Perspectives article, which was written using

Bako's confidential information. (A678 at 58:8-23; A684 at 80:22-81:15.)

At trial, Bako presented evidence from its damages expert, Mark Hosfield. Mr. Hosfield testified that, in his expert opinion, Bako suffered lost profits from January 2018 through February 2019 in the amount of $8,273,121 and lost business value in the amount of $65,980,243. (A745 at 58:2-59:11; A752 at 85:12-18; A752-A753 at 87:14-88:15.) In its simplest terms, Mr. Hosfield calculated these damages by looking at Bako's sales and determining first whether its sales were impacted in any way during the relevant timeframe and, if so, what caused that change. To do this, Mr. Hosfield extensively reviewed the evidence in this case and interviewed various Bako employees. (A346-A490, Hosfield Rpt.; A737 at 24:3-25:4.)

The first step of Mr. Hosfield's analysis was to determine whether sales at Bako were, in fact, impacted during the relevant time frame. Mr. Hosfield looked at Bako's sales data over time—on an annual and monthly basis—to determine whether there were any patterns or trends showing an impact on sales. (A739 at 33:16-34:22.) More specifically, Mr. Hosfield analyzed thousands of Bako's sales records at the customer level as well as the testing procedure code level. (A739 at 34:10-22.) Mr. Hosfield was focused on the number of testing procedures performed at Bako (also known as "units") because "revenue can be impacted by price, which changes." (A739-A740 at 35:3-36:4.) This data plainly showed that, in 2018, unit

sales (*i.e.*, the number of tests performed for customers) at Bako dropped to a level lower than 2017 and 2016. (A740 at 36:5-17.)

After confirming that unit sales at Bako did drop in 2018, Mr. Hosfield focused his analysis on whether there was data evidencing that this drop in unit sales was caused by Plaintiffs. For this analysis, Mr. Hosfield reviewed the sales data for the Bako customers who were known to have been contacted or influenced by Plaintiffs and determined that their business did indeed decrease after Plaintiffs' misconduct. (A741 at 42:8-43:16; A742 at 45:6-47:6; A743 at 49:15-19.) Specifically, Bako's Account Managers testified that these customers stopped doing business entirely with Bako or sent significantly fewer samples for testing to Bako. (A741 at 42:8-43:16.)

In addition to these customers, Mr. Hosfield also looked at the unit sales data for customers who signed the Tarr Petition and/or responded to the email circulating the petition. (A742 at 45:6-47:6.) This data also showed dramatic declines in unit sales for these customers. (A743 at 49:15-19.)

Further, in November and December of 2018, Plaintiffs sent approximately 50 emails to various members of the podiatric community, including Bako customers, soliciting affidavits for use in the litigation. (A554 at 188:7-20; A595 at 70:5-22.) Attached to the emails were three versions of a draft affidavit. (A555 at 195:5-13.) Mr. Hosfield analyzed the sales activity of the Bako customers who

signed the affidavits and determined that their business with Bako declined after they signed. (A743 at 49:21-51:21.)

Confident that the Plaintiffs caused a decrease in sales at Bako, Mr. Hosfield then calculated Bako's actual lost profits. This calculation involves two steps: (1) determine the number of unit sales lost during the relevant time period as a result of Plaintiffs' misconduct; and (2) determine the lost profits stemming from these lost unit sales.

**a. Step One: Determining Lost Unit Sales**

To determine Bako's lost unit sales, Mr. Hosfield first calculated the unit sales Bako expected to generate in the relevant time period. This calculation is performed by applying an expected growth rate to Bako's past sales. (A745 at 57:7-58:19.) To determine Bako's expected unit sales for 2018 and January/February 2019, Mr. Hosfield applied an expected growth rate to Bako's 2017 and January/February 2018 unit sales, respectively. (A748 at 69:10-70:5.)[1] In performing this calculation, Mr. Hosfield applied growth rates (9.4% for 2018 and 8.9% for 2019) that had been projected when Bako was purchased in 2015. (A745 at 57:13-59:11.)[2] Notably,

[1] Bako notes that there is a typo on line 69:23 in the trial transcript—Mr. Hosfield applied an 8.9% growth rate, not 0.9% as the transcript states.

[2] In 2015, when he sold Bako, Plaintiff Bakotic projected a growth rate of 22% for 2018 and 18.5% for 2019. Taking a more conservative approach, Mr. Hosfield actually used the lower growth rate projected by Bako's purchaser during these negotiations. (A745 at 58:2-59:16.)

these growth rates were less than Bako's actual historic compound average growth rate from 2012-2016 (17.8%).[3] (A745 at 58:2-59:16; A747-A748 at 66:14-68:1; A748 at 69:10-71:13; A750 at 78:19-22.)

After calculating Bako's expected unit sales, also known as the "but for" units, (A745 at 56:1-10; A747 at 64:21-65:20; A749 at 72:9-15), Mr. Hosfield then subtracted Bako's actual unit sales for 2018 and January/February 2019 from the "but for" or expected unit sales. The resulting number represents Bako's lost unit sales. (A745 at 56:1-10; A747 at 64:21-65:20; A749 at 72:9-15.) In other words, "but for" Plaintiffs' misconduct, Bako would have sold this many more units during the relevant time. (*Id.*)

#### b. Step Two: Determining Lost Profits Stemming from "But For" Units

Mr. Hosfield then calculated Bako's lost profits stemming from these lost "but-for" unit sales. To perform this calculation, Mr. Hosfield multiplied the amount of lost but-for unit sales by the actual price of the units for that given month. (A749 at 72:9-23.) Mr. Hosfield then subtracted costs and bad debt expenses. (A749 at 73:1-15.) Using the actual price of these lost units, and subtracting Bako's

[3] Further, in 2016, Bako's actual growth rate was 20%. (A442-A446, Hosfield Rpt.)

associated costs, Mr. Hosfield concluded that Bako's lost profits from these lost units totaled $8,273,121.[4] (A752 at 85:12-18.)

Given the Rhett's Perspective advertisements, Mr. Hosfield also performed this analysis on the four procedure codes associated with Bako's GMS and PCR tests. In other words, Mr. Hosfield was able to calculate the damage caused solely by the Rhett's Perspectives, as evidenced by the customer reports to Account Managers and lack of any other credible explanation. (A745 at 58:8-23; A751 at 80:22-81:15; A752 at 85:23-86:20.) This damage is clearly reflected in the drop of units sold in the last four months of 2018, following the publication of the Rhett's Perspectives. (A445, Hosfield Rpt.) Significantly, of the $8,273,121 in lost profits Bako has suffered to date, $5,658,318 stems directly from losses in GMS and PCR testing. (A427-A428, Hosfield Rpt.; A749-A750 at 74:1-77:7.)

In addition to calculating Bako's lost profits, Mr. Hosfield also calculated Bako's loss in business value. This is the permanent and long-term damage caused to Bako by the aforementioned loss of customers and profits. By relying on the multiple used in 2015 by the purchaser of Bako, Mr. Hosfield was able to calculate the long-term value of the lost profits, which total $65,980,243. (A421, Hosfield Rpt.; A752-A753 at 87:14-88:15.)

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[4] Notably, this method of calculating lost profits is recommended over a customer-by-customer approach, the latter of which is impossible to calculate given the varied buying habits of customers. (A847 at 64:18-65:19.)

### D. The Superior Court's Findings

The Superior Court found that Plaintiffs breached all of their Agreements, including every restrictive covenant except one in the Merger Agreement. (Ex. A, Trial Op. at 54.) The Superior Court also found that Plaintiff Bakotic did not tortiously interfere with two Bako contracts unrelated to Plaintiffs' Agreements. (*Id*.)

The Superior Court selected its own growth rate and awarded $1,740,254 in damages to Bako for the breach of contract claims. Specifically, the Superior Court ruled that the growth rates of 9.4% and 8.9% were too high. (*Id*. at 49.) Rather than using an alternative growth rate supported by the evidence, the Superior Court instead chose its own growth rate of 1.5% without any explanation as to how it calculated, or why it elected to apply, this growth rate, which had not been offered as an option either by Mr. Hosfield or by Plaintiffs' rebuttal expert. (*Id*.) Moreover, even using its unexplained 1.5% growth rate, the Superior Court did not properly apply the growth rate to Bako's lost sales, resulting in an inaccurate damages calculation. Finally, the Superior Court failed to award Bako its loss in business value related to the loss of customers and loss of future earnings attributable to Plaintiffs. Accordingly, the Superior Court awarded damages to Bako only in the amount of $1,740,254, in error.

Additionally, although the Employment and Partnership Agreements contain

fee-shifting provisions awarding fees to the prevailing party, and Bako prevailed on all of the claims brought pursuant to these Agreements, the Superior Court held that neither party was the prevailing party because both parties "failed to exercise good business judgment and have used the justice system to obtain some form of revenge." (Ex. A, Trial Op. at 51-53.) As a result, the Superior Court did not award any attorneys' fees to Bako, in error.

# ARGUMENT

## I. The Superior Court Abused its Discretion by Applying an Arbitrary Growth Rate Without Providing any Calculation or Record Support, Failing to Articulate its Damages Calculations and Incorrectly Calculating Bako's Damages, and Failing to Award Lost Business Value to Bako, all Resulting in a Damages Award of Only $1,740,254.

### A. Question Presented

Did the Superior Court abuse its discretion by awarding only $1,740,254 in damages, when that damages award resulted from the application of an arbitrary growth rate without providing any calculation or record support thereof, the failure to articulate its damages calculation, the incorrect calculation of damages using its arbitrary growth rate, and the failure to award damages based on lost business value after finding that some factors causing Bako's lost business value were attributable to Plaintiffs' wrongful acts? This issue was preserved below through the testimony of Appellants' expert, Mark Hosfield. (A745 at 58:2-59:16; A747-A748 at 66:14-68:1; A748 at 69:10-71:13; A750 at 78:19-22; A752 at 85:12-18; and A752-A753 at 87:11-88:15.)

### B. Scope of Review

Findings as to damages are reviewed for an abuse of discretion. *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 866 (Del. 2015). When awarding damages, a court abuses its discretion if it: (1) makes factual findings lacking record support; and/or (2) fails to explain its reasoning, such that the parties have a record basis to

challenge the decision. *Id.* at 868; *Golden Telecom, Inc. v. Global GT LP*, 11 A.3d 214, 219 (Del. 2010).

### C. Merits of Argument

#### 1. The Superior Court Abused its Discretion by Arbitrarily Applying a 1.5% Growth Rate Without Providing any Calculation

The Superior Court agreed with Mr. Hosfield's damages methodology related to lost units but departed from the growth rate used by Mr. Hosfield, and instead selected a growth rate of 1.5% to calculate Bako's lost profits. Relying on Plaintiff Bakotic's testimony regarding outside market factors affecting growth at Bako, the Superior Court concluded that Mr. Hosfield's applied growth rates of 9.4% and 8.9% were too high. (Ex. A, Trial Op. at 48.) Absent from Plaintiff Bakotic's testimony is any suggestion of a specific growth rate, even if his testimony would be dispositive on this point, which it is not. Indeed, there is no evidence in the record supporting a 1.5% growth rate; rather, the Superior Court arbitrarily chose this growth rate,[5] stating only, "based on the testimony of what was occurring in the industry and the turbulent situation at Bako, the Court has decided to apply a growth rate of 1.5% to

[5] Had the Superior Court simply wanted to apply a lower growth rate, Mr. Hosfield also provided alternative growth rates for the Superior Court's consideration: 4.7% for 2018 and 4.45% for 2019. (A844 at 54:11-19.) Even Plaintiffs' own expert, while not necessarily opining on an appropriate growth rate, referred to a 3% growth rate. (A795 at 37:2-15.)

the 'but for' figure calculated by Mr. Hosfield." (*Id.* at 49.) In so doing, the Superior Court abused its discretion. *Verition Partners Master Fund, Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128, 130 (Del. 2019) (finding abuse of discretion when court ignored evidence of market price and applied its own unsupported market price instead).

In *Verition*, this Court found an abuse of discretion when the Court of Chancery ignored the experts' valuation methodologies and, instead, created its own analysis of value per share and failed to explain why its per share estimate was more reliable.[6] *Id.* at 132. Further, the court then chose not to use its $18.20 estimate because it believed it needed to make an additional deduction. *Id.* at 133. However, there was nothing in the record to suggest any part of the deal price paid involved the potential deductions not already captured by the buyer's estimate. *Id.* at 134. This Court found that the Court of Chancery abused its discretion when it ignored deal price minus synergies estimates that were supported by the record in favor of its own unsupported, speculative market price. *Id.* at 141-42.

Like the Court of Chancery in *Verition*, the Superior Court ignored the evidence in the record and chose its own speculative and unsupported growth rate without explaining how it calculated such a growth rate. In so doing, the Superior Court abused its discretion. *Id*; *see also Zachman v. Real Time Cloud Servs. LLC*,

[6] In *Verition*, the Court of Chancery did explain how it reached its estimate per share, which is more than the Superior Court has done in the instant case. *See id.* at 132 (describing how the Court of Chancery reached its estimate).

2021 WL 1561430, at *5 (Del. Apr. 20, 2021) (finding no abuse of discretion because the court chose a growth rate within the range testified to by the cross-appellant's expert and explained the rationale for choosing that rate); *RBC Capital Mkts.*, 129 A.3d at 868 (finding the Court of Chancery did not abuse its discretion where it explained its damages calculation in great detail and looked to the expert analysis in determining the remedy). Accordingly, this Court should reverse and remand with instructions for the Superior Court to apply a growth rate supported by the record and, if it elects a growth rate other than that used by Mr. Hosfield, to explain its calculations for selecting that alternate growth rate.

#### 2. The Superior Court Abused its Discretion Because a 1.5% Growth Rate Has No Record Support

While lacking any citation to a calculation, the closest articulation offered by the Superior Court regarding its chosen growth rate is:

> The Court has no question that if Plaintiffs had left under no cloud of suspicion and simply removed themselves from the podiatry community, Bako's revenue still would have suffered. The Court also finds credible [Plaintiff] Bakotic's testimony that, during this timeframe, Bako had reached a market saturation that would hamper any additional growth, that many of the podiatry services were being insourced by the doctors, and hospitals, with their own labs, and were beginning to purchase podiatric practices. Those would have affected any potential growth rate that the company would have experienced in 2018 and 2019. In addition, it appears that while sales had diminished during that period, the company's revenues remained relatively consistent.

(Ex. A, Trial Op. at 48.) These reasons, however, do not support a 1.5% growth rate for several reasons. First, as Mr. Hosfield testified, the risk of Plaintiffs' departure from Bako was considered and factored into the growth rate he applied, which was based on the negotiations when Plaintiffs sold interests in Bako. (A756 at 100:10-16.) Additionally, that Bako would have lost business simply because Plaintiffs left was specifically accounted for in Mr. Hosfield's analysis. In performing his calculations, Mr. Hosfield took into account business lost from doctors who may have quit using Bako simply because Plaintiffs were no longer employed there. Specifically, Mr. Hosfield relied on unit sales from 2017, which includes a period of time after Plaintiffs' respective employment ended, when calculating but-for unit sales.[7] Such an approach takes into consideration the doctor-customers who quit buying from Bako immediately after Plaintiffs left by using the reduced base of units from 2017. (A740 at 38:18-39:17.) Mr. Hosfield's alternative growth rate scenarios also account for this consideration.

Second, Plaintiff Bakotic testified that at the time of Bako's purchase in 2015, the parties had considered Bako's market saturation in their negotiations.[8] (A820 at

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[7] A428 and A438, Hosfield Rpt.

[8] Further, despite this alleged saturation, Plaintiff Bakotic himself still projected a growth rate of 22% for 2018 and 18.5% for 2019. (A745 at 58:2-59:16.) It is only in the context of litigation affecting his pocketbook that he attempted to argue otherwise.

138:15-139:10.) Thus, because Mr. Hosfield relied on the growth rate projected during these negotiations, market saturation was accounted for in his calculations. (*Id.*)

Third, when explaining his theory regarding insourcing, Plaintiff Bakotic admitted he could think of only one podiatric practice that had insourced its laboratory services and even that practice still sent certain specimens to Bako. (A821 at 142:15-143:17.)

Fourth, that Bako's *revenue* remained relatively consistent as the Superior Court points out has no bearing on whether Plaintiffs harmed Bako. Rather, Bako's revenue is based on reimbursement rates per test as set by insurance companies. (A746 at 62:8-21.) So, if reimbursement rates are higher in a given year, revenue can appear higher even though actual unit sales are lower than the prior year. (A746 at 61:21-63:19; A748 at 68:4-69:9.) As the reimbursement rate is controlled by a third party, it is not an accurate picture of damages. *Id.* Rather, as the Superior Court recognized, Bako's *actual unit sales* had diminished. (Ex. A, Trial Op. at 48.) That diminishment is where damages lie: Plaintiffs' actions caused Bako to sell fewer units than it would have otherwise. (A746 at 61:21-63:19; A748 at 68:4-69:9.) If Plaintiffs' misconduct had never occurred, Bako would have sold more units and recognized more revenue. *Id.*

The Superior Court also expressed confusion as to why it had not been provided the actual growth rates for 2018 and 2019 for Bako or similar labs.[9] (Ex. A, Trial Op. at 49.) However, by 2018 and 2019, the harm caused by the Plaintiffs had already occurred; thus, the *actual* growth rates for 2018 and 2019 would have already been impacted by Plaintiffs' misconduct and are meaningless as a tool to calculate lost profits. As such, Mr. Hosfield's analysis utilized what the growth rate *should have been* in the absence of Plaintiffs' misconduct to determine the amount of harm caused to Bako. (A747 at 64:21-65:20; A840 at 38:16-39:14.) Accordingly, Mr. Hosfield used the growth rates projected when Bako was purchased.[10]

As demonstrated above, the Superior Court's findings offered to apply a lower growth rate do not have record support. Therefore, the Superior Court abused its discretion when it chose an unsupported 1.5% growth rate. *Golden Telecom*, 11 A.3d at 219 (holding that the Superior Court abuses its discretion when "its factual findings do not have record support"). Here, as in *Verition*, the Superior Court ignored the record evidence for its own speculative and unsupported growth rate.

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[9] As argued herein, such information is irrelevant to Bako's damages calculation. However, this information is discernable from Bako's actual sales data from 2018 and 2019, which were included in Mr. Hosfield's report and tendered into evidence by Plaintiffs. (A768 at 150:20-151:4; A346-A490, Hosfield Rpt.) Using this actual sales data, Plaintiffs' misconduct impacted Bako's growth: Bako's year-over-year growth rate in 2018 was -3.56% and -0.31% for January-February 2019. *Id.*

[10] Growth rates of similar labs are private information and thus not available to Bako or its expert.

As discussed above, there is nothing to suggest that each of the Superior Court's concerns were not already considered in Mr. Hosfield's analysis. *Verition*, 210 A.3d at 134, 141-42 (finding an abuse of discretion where there was nothing in the record to suggest the concerns of the court were not already included in the expert's calculation and the court ignored record evidence for its own unsupported market price); *see also Golden Telecom*, 11 A.3d at 219 (finding no abuse of discretion where the court "addressed each of [its] findings of fact and [the] valuation methods" and the court "followed an orderly and logical deductive process in arriving at [its] conclusions"). Accordingly, this Court should reverse and remand with instructions for the Superior Court to apply a growth rate supported by the record.

### 3. Even if the Superior Court's 1.5% Growth Rate is Appropriate, the Superior Court Incorrectly Calculated Damages

Even if this Court finds that the Superior Court's 1.5% growth rate is appropriate, the Superior Court's calculation of lost profits using that growth rate is incorrect. Specifically, the Superior Court stated it would apply a 1.5% growth rate to the "but for" figure calculated by Mr. Hosfield. (Ex. A, Trial Op. at 49.) This is methodologically incorrect. As explained above, the applicable growth rate is applied to Bako's *historical sales data* to determine Bako's expected sales, of "but for" sales, absent Plaintiffs' misconduct. (A748 at 69:10-70:5.) Actual sales are then subtracted from expected, or "but for", sales, the result of which is the lost unit

sales. (A745 at 56:1-10; A747 at 64:21-65:20; A749 at 72:9-15.) In other words, a growth rate is never applied to the "but for" unit sales. Rather, it is applied to historical sales data as part of the calculation of "but for" unit sales. As the Superior Court did not explain its calculations, it is unclear how it arrived at its awarded damages amount; however, this explanation demonstrates the Superior Court did not properly apply the growth rate to calculate damages.[11]

In another apparent calculation error, the Superior Court concluded that Schedules 2.a., 2.b., and 2.c. to Mr. Hosfield's Report contain "52,419 units [that] were affected by Plaintiffs' conduct. In other words, Mr. Hosfield would have expected that many additional units of service to have been sold if the providers listed in Exhibit H had continued with their historic buying practices." (Ex. A, Trial Op. at 47.) Schedules 2.a., 2.b., and 2.c. to Mr. Hosfield's Report, however, actually contain the monthly units bought from 2015 through February 2019 for three small subsets of customers who, due to the actions of Plaintiffs, are known to have ceased doing business with Bako or reduced their purchases from Bako. (A371-A374, Hosfield Rpt.; A741 at 41:14-43:16; A742-A743 at 45:6-51:21.) The total of 52,419 is the total actual units sold to this subset of customers in 2018 and January/February 2019, not the amount of units Bako lost because of Plaintiffs' misconduct. (A456-

[11] This further supports Bako's argument in Section 1 above that the Superior Court abused its discretion by not explaining its calculations.

A457, A461-A462, A466-A467, Hosfield Rpt.) Thus, the Superior Court's use of this information is based on a significant misunderstanding of what the figure represents.

While the Superior Court's failure to provide a clear explanation of its calculations is a reversible abuse of discretion, the minimal reasoning provided by the Superior Court suggests it incorrectly applied the arbitrary growth rate it selected. Thus, even if this Court agrees with the Superior Court's growth rate of 1.5%, it should remand for a proper calculation of lost profits using this growth rate.

#### 4. The Superior Court Abused its Discretion When it Failed to Award Lost Business Value to Bako

The Superior Court's analysis regarding Bako's lost business value is sparse and limited to the following:

> There is also no contesting that Bako was financially impacted once Dr. Bakotic's termination became public. Nevertheless, considering the podiatric community's subsequent sentiments about Dr. Bakotic's termination and the details of this litigation, the Court finds it unreasonable to accept the calculations of Mr. Hosfield concerning the loss of business value and to **contribute all of it to the conduct of the Plaintiffs** . . . . There are simply too many factors that go into explaining a loss in value and **all** are not contributable to the Plaintiffs.

(Ex. A, Trial Op. at 49-50) (emphasis added). Despite the Superior Court's conclusion that Bako had lost customers and profits due to actions of the Plaintiffs and that that *some* of the lost business value was attributable to Plaintiffs' conduct,

it declined to award *any* lost business value to Bako. *Id.* After making the factual determination that some of Bako's lost business value was attributable to Plaintiffs, it was an abuse of discretion not to award Bako at least some measure of loss of business value damages. *SIGA Techs., Inc. v. Pharmathene, Inc.*, 67 A.3d 330, 351-52 (Del. 2013) (remanding for determination of expectation damages consistent with the trial court's factual findings); *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1264 (Del. 1989) (reversing where legal conclusions were inconsistent with factual findings). Further, the Superior Court should have explained what it meant by "too many factors" and calculated how each of those factors impacted Bako's lost business value and awarded Bako damages for those factors attributable to Plaintiffs. Failure to conduct or explain any calculation was an abuse of discretion. *RBC Capital Mkts.*, 129 A.3d at 868 (finding an abuse of discretion where the court failed to explain its reasoning in determining damages). Accordingly, this Court should reverse and remand with instructions for the Superior Court to calculate lost business value to Bako consistent with its own factual findings.

## II. The Superior Court Abused its Discretion and Erroneously Applied Delaware Law by Not Awarding Attorneys' Fees to Bako

### A. Question Presented

Did the Superior Court abuse its discretion and erroneously apply Delaware law by not awarding attorneys' fees to Bako consistent with the fee-shifting provisions in the Employment and Partnership Agreements? This issue is preserved below because Bako sought its attorneys' fees at trial and presented evidence that, through December 2019, they totaled approximately $2.3 million.[12] (A701 at 148:8-20.)

### B. Scope of Review

The Superior Court's interpretation of the contractual fee-shifting provision is reviewed *de novo*, and the Superior Court's decision not to award attorneys' fees under an exception to the American Rule is reviewed for an abuse of discretion. *SIGA*, 67 A.3d at 341; *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005). This Court will find an abuse of discretion when the holding was arbitrary and capricious. *Dover Hist. Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006). An abuse of discretion occurs when a court has "ignored recognized rules of law or practice, so as to produce injustice." *Pitts v. White*, 109 A.2d 786, 788 (Del. 1954) ("The essence of judicial discretion is the

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[12] Further, the Superior Court stated that it was accepting Bako's approximate amount and would request support for that amount later if needed. (A839 at 32:3-12.)

exercise of judgment directed by conscience and reason, as opposed to capricious or arbitrary action; and where a court has not exceeded the bounds of reason in view of the circumstances, and has not so ignored recognized rules of law or practice, so as to produce injustice, its legal discretion has not been abused."); *North River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 381-82, 382 n.55 (Del. 2014) (*citing Pitts*, 109 A.2d at 788); *Tyndall v. Tyndall*, 214 A.2d 124, 126 (Del. 1965) (holding that "misapplication of the law" was an abuse of discretion).

**C. Merits of Argument**

"Under the American Rule and Delaware law, litigants are normally responsible for paying their own litigation costs." *SIGA*, 67 A.3d at 352 (quoting *Mahani v. Edix Media Grp., Inc.*, 935 A.2d 242, 245 (Del. 2007)). In contract litigation, however, where the contract contains a fee-shifting provision, this Court will enforce that provision. *Id.* Contracts must be construed "to give effect to the intentions of the parties." *Northwestern Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996). "Where the contract language is clear and unambiguous, the parties' intent is ascertained by giving the language its ordinary and usual meaning." *Id.* at 43-44 (holding the Superior Court erred in its finding that Northwestern was not entitled to attorneys' fees under the Hold Harmless Agreement). "In recognition that inclusion of such a clause may well have helped induce a party to sign an agreement, Delaware courts will 'routinely enforce provisions of a contract allocating costs of

legal actions arising from the breach of a contract.'" *Dittrick v. Chalfant*, 2007 WL 1378346, at *2 (Del. Ch. May 8, 2007) (quoting *Knight v. Grinnage*, 1997 WL 633299, at *3 (Del. Ch. Oct. 7, 1997)).

This case involved three contracts that contain fee-shifting provisions: the identical Employment Agreements and the Partnership Agreement. The Employment Agreements specifically award fees to Bako if it is the prevailing party. (A93-A100, Bakotic Emp't Agmt.; A101-A107, Hackel Emp't Agmt.) The Partnership Agreement awards fees to the prevailing party. (Ex. A, Trial Op. at 51-52.) The Superior Court found that Plaintiffs breached these agreements and found for Bako on all claims brought pursuant to these agreements.[13]

Opining that the parties "failed to exercise good business judgment and have used the justice system to obtain some form of revenge," (Ex. A, Trial Op. at 51), the Superior Court erroneously concluded that neither party was the prevailing party because Bako prevailed on four of five contract claims and Plaintiffs prevailed on one contract claim and two tort claims. (Ex. A, Trial Op. at 53.) As an initial matter, the Superior Court provides no factual basis regarding Bako "failing to exercise good business judgment" or using the judicial system as "some form of revenge." Indeed, the Superior Court found that Bako was damaged by Plaintiffs' breaches of contract,

[13] Additionally, prior to trial, the Superior Court granted summary judgment in Bako's favor on Plaintiffs' sole claim that Section 2707 invalidated the restrictive covenants in their Agreements. (A491-A504, Dec. 11, 2019 Memorandum Op.)

so it is difficult to understand how Bako's pursuit of such claims could be a "form of revenge." (Ex. A, Trial Op. at 51.) Similarly, to the extent that the Superior Court's reference to exercising "good business judgment" refers to its belief that Bako should have settled instead of taking its claims to trial, there is no evidence in the record reflecting what, if any, settlement offers were made by Plaintiffs. Regardless, the Superior Court's ruling denying attorneys' fees does not apply Delaware law.

Rather, the Superior Court should have looked at the claims brought pursuant to the Agreements with the fee-shifting provisions to determine the prevailing party for each. Specifically, Bako prevailed on all claims regarding the Employment and Partnership Agreements, including Plaintiffs' declaratory judgment claim which was dismissed on summary judgment.[14] Such an outcome ends the analysis under Delaware law such that Bako should receive its attorneys' fees. *Vianix Delaware LLC v. Nuance Commc'ns, Inc.*, 2010 WL 3221898, at *28 (Del. Ch. Aug. 13, 2010) ("[A] party who is deemed a prevailing party under an attorneys' fees provision such as the one at issue here typically is entitled to recover all of its attorneys' fees, even if it does not win every disputed claim."); *see also Sternberg v. Nanticoke Mem. Hosp., Inc.*, 62 A.3d 1212, 1221 (Del. 2013) (affirming grant of all attorneys' fees

[14] That Bako did not prevail on one claim under the Merger Agreement or the tort claims is of no consequence as they do not relate to the contracts with fee-shifting provisions.

where defendant only prevailed on one of two claims where contract provided that if claimant initiates suit and does not prevail, it pays attorneys' fees); *AFH Holding & Advisory, LLC v. Emmaus Life Scis., Inc.*, 2014 WL 1760935, at *3 (Del. Super. Apr. 16, 2014) (finding that defendant "predominated in the litigation regarding [the] breach of contract issues" because the defendant won partial summary judgment in the case when the court granted its request for a declaratory judgment regarding the contract). Indeed, *AFH Holding* involved two distinct issues—breach of contract and fraud—but the court held that the defendant was the prevailing party regarding the breach of contract issues and "[wa]s entitled to reasonable fees under the fee-shifting agreement." *Id.* The court found that "neither party predominated regarding the fraud claims" but that "[did] not alter [the defendant's] status as the prevailing party **under the fee-shifting provision**." *Id.* (emphasis added).[15]

In fact, the Superior Court cited to cases which properly apply the standard to determine prevailing party status when there are contractual fee-shifting provisions. Specifically, the Superior Court cited three cases to support its decision that neither party was the prevailing party: *Duncan v. SITCPL, LLC*, *Mrs. Fields Brand, Inc. v. Interbake Foods, LLC*, and *Vianix Delaware LLC v. Nuance Commc'ns, Inc.* (Ex. A, Trial Op. at 53.) While the Superior Court correctly noted that courts often

[15] Further, the court stated, "The Court finds that a voluntary dismissal of the fraud claims by [the defendant], or a dismissal by the Court, would not alter [the defendant's] status as the prevailing party." *Id.*

consider an all-or-nothing approach when determining prevailing party status under a fee-shifting provision, it failed to recognize that the courts only look at the claims *related to the contracts with the fee-shifting provision* to determine prevailing party status under the fee-shifting provisions. (Ex. A, Trial Op. at 52.)

First, in *Duncan*, the parties brought (1) breach of contract claims related to a 2009 Settlement Agreement, (2) negligence claims, and (3) a claim related to a lease agreement. 2020 WL 829374, at *1 (Del. Super. Feb. 19, 2020). In ruling on cross-summary judgment motions, the plaintiff prevailed as to his claim under the lease agreement and as to one defendant's claim for indemnification under the 2009 Settlement Agreement, one defendant prevailed on the plaintiff's contract claim under the 2009 Settlement Agreement and a negligence claim, and another defendant prevailed on the plaintiff's negligence claim. *Id.* The 2009 Settlement Agreement contained a fee-shifting provision awarding fees to the prevailing party. *Id.* at *15. In determining who was the prevailing party and who predominated in the litigation for purposes of fees, the court *only considered this in the context of the 2009 Settlement Agreement*. *Id.* at *16. Specifically, the court stated "[w]ith regard to the litigation focused on the 2009 Agreement, the Court finds two chief issues: (1) [plaintiff's] environmental damages claim, and (2) [defendant's] counter-claim for indemnification." *Id.* Because each party had won one of the chief issues as it

related to the *contract with the fee-shifting provision*, the court found that neither was the prevailing party and that neither was entitled to fees. *Id.*

Second, in *Mrs. Fields*, the claims and counterclaims related to a License Agreement. 2018 WL 300454, at *1 (Del. Ch. Jan. 5, 2018). The License Agreement contained a fee-shifting provision awarding fees to the prevailing party. *Id.* at *2. The Court of Chancery noted, "[i]n such cases, the court will 'routinely enforce provisions of a contract allocating costs of legal actions arising from the breach of contract.'" *Id.* at *1 (quoting *Knight*, 1997 WL 633299, at *3). The court considered the chief issues as it related to the License Agreement (*e.g.*, the contract with the fee-shifting provision). *Id.* at *3. As both parties had prevailed on claims under the License Agreement, neither was found the prevailing party for purposes of the fee-shifting provision in the License Agreement. *Id.* at *4.

Third, in *Vianix*, the plaintiff brought claims for breach of contract related to a Technology Licensing Agreement ("TLA") and injunctive relief, and the defendant counterclaimed for breach of contract and a declaratory judgment that it complied with its payment obligations under the TLA. 2010 WL 3221898, at *4 (Del. Ch. Aug. 13, 2010). The defendant also brought claims for fraudulent inducement and rescission, but withdrew those claims prior to trial. *Id*. After trial, the court found that the defendant breached the TLA and owed royalties for certain products, but the defendant was successful in proving it did not owe royalties for other products. *Id.*

at *28. The TLA contained a fee-shifting provision awarding fees to the prevailing party. *Id*. The court noted that "a party who is deemed a prevailing party under an attorneys' fees provision such as the one at issue here typically is entitled to recover all of its attorneys' fees, even if it does not win every disputed claim." *Id*. As each party had won on some claims ***under the TLA***, the court found that neither party was the prevailing party. *Id.* at *28-29. The court looked to the claims under the contract with the fee-shifting provision to determine the prevailing party. *Id.*

Finally, as part of its analysis, the Superior Court stated there were two chief issues presented at trial: the five breach of contract claims and the two tortious interference claims. (Ex. A, Trial Op. at 53.) As the Superior Court noted in 2018, however, enforcement of Plaintiffs' post-termination non-compete agreements was the "crux of this case." (A282, Dec. 10, 2018 Memorandum Op at 1.) Indeed, this litigation began when Plaintiffs sought to invalidate their restrictive covenants in order to compete with Bako. (Ex. A, Trial Op. at 1, 11, 13-14.) In response, Bako pled counterclaims seeking declaratory judgment that the restrictive covenants were operative and enforceable, and pursued claims for breach of the restrictive covenants. (*Id.* at 1-2.) Additionally, in July 2018, due to Plaintiffs' behavior, Bako obtained a Status Quo Order from the Court of Chancery, enjoining Plaintiffs from the continued breach of their Agreements. (*Id.* at 14-15.)

In this regard, Bako has prevailed continuously on claims related to Plaintiffs' restrictive covenants. First, the Superior Court granted summary judgment to Bako, dismissing Plaintiffs' only claim. (A491-A504, Dec. 11, 2019 Memorandum Op.) Specifically, the Superior Court found that Section 2707, which prohibits non-competes in certain agreements among physicians, was inapplicable to the Employment and Partnership Agreements and, thus, Plaintiffs could not use Section 2707 to invalidate their restrictive covenants. (Ex. A, Trial Op. at 2; A491-A504, Dec. 11, 2019 Memorandum Op.) Then, at trial, the Superior Court found that Plaintiffs had breached all of their Agreements, including all of the restrictive covenants in their Agreements with the fee-shifting provisions. (Ex A, Trial Op. at 54.) That there were also two tort claims presented at trial does not make them a co-chief issue. Regardless, as demonstrated by *AFH Holding*, failing to prevail on claims that arose outside of the agreements that contain the fee-shifting provisions, even if considered a chief issue, does not nullify Bako's status as the prevailing party on the claims brought under the agreements that contain the fee-shifting provisions.

Because Bako prevailed on all claims under the Employment Agreements and Partnership Agreement—the contracts with the fee-shifting provisions—Bako is the prevailing party. *Sternberg*, 62 A.3d at 1221; *AFH Holding*, 2014 WL 1760935, at *3. Thus, the Superior Court abused its discretion by looking beyond the claims under the Employment and Partnership Agreements—including the parties'

litigation conduct, as to which there is no evidence in the record—to determine the prevailing party and deny attorneys' fees to Bako. Accordingly, this Court should remand this case to the Superior Court with direction to award attorneys' fees to Bako.

## CONCLUSION

For the reasons set forth above, Appellants Bako Pathology Associates, LLC, BPA Holding Corp. and Bako Pathology LP, respectfully requests that the Court remand this matter to the Superior Court to conduct an analysis of Appellants' damages in accordance with Delaware law, and to enter an award of attorneys' fees in their favor.


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