IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WILLIAM J. LaPOINT and JOHN M. NEHRA, in their capacity as Stockholder Representatives, NEW ENTERPRISE ASSOCIATES VI, LIMITED PARTNERSHIP, HALPERN, DENNY FUND II, L.P., and all other similarly situated former shareholders of Bridge Medical, Inc.,	)	
Plaintiffs,	)	Civil Action No. 327-CC
v.	)	
AMERISOURCEBERGEN CORPORATION,	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: July 2, 2007
Date Decided: September 4, 2007

Jon E. Abramczyk, of MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; OF COUNSEL: Eric F. Leon, Andrew G. Horne and Matthew F. Dexter, of KIRKLAND & ELLIS LLP, New York, New York, Attorneys for Plaintiffs.

Daniel V. Folt, Gary W. Lipkin and Matt Neiderman, of DUANE MORRIS LLP, Wilmington, Delaware; OF COUNSEL: John J. Soroko and John Dellaportas, of DUANE MORRIS LLP, Philadelphia, Pennsylvania, Attorneys for Defendant.

CHANDLER, Chancellor

This case falls into an archetypal pattern of doomed corporate romances. Two companies—Bridge Medical, Inc. and AmerisourceBergen Corporation—agree to merge, each convinced of a happy future filled with profits and growth. Although both partners harbor some initial misgivings, the merger agreement reflects these concerns, if at all, in an inaccurate and imprecise manner. After some time, the initial romance fades, the relationship consequently sours, and both parties find themselves before the Court loudly disputing what the merger agreement "really meant" back in its halcyon days.

If this case is different, it is only in the speed with which the ardor faded. Both parties now assert that mere months after the ink on the merger agreement had dried, if not before, their erstwhile paramour had determined that the relationship was not worth the candle. Plaintiffs (former shareholders of Bridge) insist that defendant provided lukewarm support for their operations and did everything possible to avoid having to pay merger consideration contingent on the success of plaintiffs' former firm. Defendant blames plaintiffs' woes upon plaintiffs' lack of long-term planning, inconsistency between plaintiffs' strategies and actions, and an inability to cope with market changes. Plaintiffs now seek damages in response to defendant's alleged breaches of contract.

I. STATEMENT OF FACTS

In considering the facts presented at trial, I must bear in mind that plaintiffs bear the burden of proving any disputed fact by a preponderance of the evidence.[1] Nevertheless, the relative weight given to any particular piece of evidence, and particularly witness testimony, is a matter for the Court to determine as the trier of fact.[2] The parties have submitted thousands of pages of documents in support of their position, and presented days of testimony at trial.

I have reviewed the evidence presented and reached several conclusions about its relevant veracity. Although there are exceptions, I place the greatest weight on documents created at or near the time of a transaction prepared by a party (or agent of a party) before any anticipation of litigation. In particular, several emails circulated by ABC to Bridge employees or to potential customers provide, in my opinion, far stronger evidence of ABC's intentions than witness testimony provided at trial.

A. Bridge and ABC negotiate and enter into a merger agreement

Plaintiffs are former shareholders of Bridge Medical, Inc., a company incorporated in Delaware in 1996. A technology startup, Bridge developed and marketed MedPoint, a bar-code enabled bedside point-of-care ("BPOC") solution.

[1] *Seaford Assocs. Ltd. P'ship v. Subway Real Estate Corp.*, 2003 WL 21254847, at *5 (Del. Ch. May 21, 2003).
[2] *Johnson v. Wagner*, 2003 WL 1870365, at *4 (Del. Ch. Apr. 10, 2003).

Having failed to turn a profit in any year between 1996 and 2002, Bridge's directors began seeking an acquirer in early 2002. Although there is disagreement as to which party made the initial overtures, Bridge's search eventually lead to the negotiating table with defendant AmeriSourceBergen Corporation ("ABC"). The two companies signed a letter of intent on August 27, 2002.

Under the terms of the letter of intent, and later the merger agreement, ABC agreed to pay Bridge shareholders an initial $27 million dollars, and further consented to "earnout" payments to former Bridge shareholders contingent upon certain EBITA targets being met in 2003 and 2004. These payments could vary between $55 million and zero, depending on the EBITA Bridge achieved in 2003 and 2004.[3] Defendant asserts that even at the outset, it was concerned about the excess of optimism in Bridge's sales forecasts, and so insisted on the earnout provision. Plaintiffs dispute this contention, but testimony presented at trial affirms that the earnout provision provided both protection to ABC shareholders and an incentive for Bridge to perform.

[3] The merger agreement specifies a sliding scale of earnout payments depending upon the Adjusted EBITA achieved by Bridge in 2003 and 2004. EBITA was to be calculated according to GAAP and adjusted according to the provisions of the merger agreement. In 2003, former Bridge shareholders would receive no earnout payments if Adjusted EBITA fell below $2.31 million, and would receive a maximum earnout of $21 million if Adjusted EBITA exceeded $4.29 million. In 2004, former Bridge shareholders were to receive no earnout if Adjusted EBITA did not reach $5.46 million, and would receive a maximum of $34 million if Adjusted EBITA exceeded $11.83 million.

Both parties expected to benefit from the acquisition. ABC sought to diversify in order to develop and promote a "closed loop" product, allowing it to combine lower-margin drug distribution activities with higher value added services throughout the hospital supply chain. Bridge shareholders, on the other hand, hoped to receive at least three benefits from the merger: an immediate cash payment, the possibility of additional earnout payments, and an increased market presence due to an alliance with a much larger firm. This last benefit is explicitly contemplated in the merger agreement, which states:

> [ABC] agrees to (and shall cause each of its subsidiaries to) *exclusively and actively* promote [Bridge's] current line of products and services for point of care medication safety. [ABC] shall not (and shall cause each of its subsidiaries to not) promote, market or acquire any products, services or companies that compete either directly or indirectly with [Bridge's] current line of products and services.[4]

In agreeing to a contingent earnout payment, Bridge shareholders explicitly contemplated and bargained for the receipt of exclusive and active promotional assistance from ABC. Further, the agreement clearly recognizes the risk that the surviving entity might exert its influence post-merger in order to avoid earnout payments:

> [ABC] will act in good faith during the Earnout Period and will not undertake any actions during the Earnout Period *any* purpose of which

[4] Trial Ex. 189, Annex I, ¶ 25 (emphasis added) [hereinafter Merger Agreement].

> is to impede the ability of the [Bridge] Stockholders to earn the Earnout Payments.[5]

The merger agreement explicitly provides protection to former Bridge shareholders in the event that they are unable to achieve their EBITA targets and, thus, receive their contemplated merger consideration due to action or inaction on the part of ABC.

B. ABC grows disenchanted with Bridge, begins to withdraw its active support, and explores other options in violation of the merger agreement

Unfortunately, much of the merger agreement consists of the sort of aspirational statements mentioned above, and these gossamer definitions have proven too fragile to prevent the parties from devolving into the present dispute. Although the terms of the agreement undoubtedly required ABC to "actively" promote Bridge products, defendant insists that efforts made over the course of the ABC/Bridge relationship were sufficient to satisfy this nebulous requirement. Plaintiffs object that the assistance provided could not reasonably be said to be enough. The parties further dispute whether ABC's obligation not to undertake action "any purpose of which is to impede the ability of the [Bridge] Stockholders to earn the Earnout Payments" required ABC to proceed with additional transactions disadvantageous to ABC, or whether ABC was entitled to enforce an

[5] Merger Agreement, Annex I, ¶ 2 (emphasis added).

unwritten press release policy that restricted Bridge's ability to access the business wire.

1. <u>ABC promotes competing products at other hospitals</u>

Far from exclusively promoting Bridge products, plaintiffs cite four occasions on which ABC actively promoted competing products of other companies. At the University of Utah Health Center, ABC partnered with Omnicell, a competitor of Bridge, to promote its SafetyMed product, and proposed a similar joint-venture at Lenox Hill Hospital. Other joint ventures were proposed with Cerner (using its competing PowerPOC product) at Medical University of South Carolina and Catholic Healthcare West.

Defendant argues that these joint-ventures do not constitute a breach of the duty to actively and exclusively promote the Bridge product for two reasons. First, defendant insists that at each and every hospital, defendant promoted Bridge to the greatest degree feasible, working to get its subsidiary before key purchasers. Second, defendant maintains that it is consistent with a policy of exclusive promotion to enter into a joint-bidding process with competitors, so long as defendant has made its best efforts to sell Bridge products during the process. Indeed, defendant introduced significant deposition testimony from key purchasing personnel at each hospital affirming that no confusion ever arose as to which product ABC was promoting.

Defendant's protestations of innocence are undercut, however, by a series of emails between Patricia Earl (then-Vice President of Strategic Development at ABC) and other ABC employees, asking for advice on how to deal with the University of Utah Health Center bid. In one email, Earl wrote:

> Just talked to our legal department and we need to make a call to someone at Utah and ask them for some assistance.
>
> *We want to use Omnicell's full solution* including the SafetyMeds, but we have a post-acquisition of Bridge ongoing obligation to exclusively promote and market their medication safety products. *Under our legal agreement with Bridge*, if we have the opportunity to present any medication safety product, *we have to include Bridge*. Alternatively, if Utah should tell us that they have already seen the Omnicell product and do not want to see the Bridge product (in an e-mail for documentation), we can then proceed to show the Omnicell SafetyMed product. *Legal is OK if we tell CSC or Utah that we have a 2 year earn out that shows good faith to their shareholders that we will make every reasonable effort to promote their product in any automation technology offering*.
>
> *Let me know if you think this is too risky to call and ask from Utah*.[6]

This conversation casts doubt upon more than defendant's intent with regard to the four hospital bids challenged by plaintiffs. It also calls into question every assurance given by defendant that it ever intended to comply with the terms of Annex I, Section 25 of the merger agreement. Instead, it is evidence of a policy of

---

[6] Trial Ex. 82 (emphasis added). Later in the same conversation, Earl writes "Tom C and David Senior both agree that we need to use any leverage that Omnicell might have with this account. So I am trying to find a solution that keeps us from being sued by Bridge too." *Id.* Needless to say, she was unsuccessful.

promoting Bridge if, and only if, it was convenient for ABC's sales staff to do so. When ABC's own interests in selling medications conflicted with its obligations under the merger agreement, it actively sought ways to fulfill only the most tepid interpretation of the letter of the agreement. The conversation is far more credible than the trial testimony of Kurt Hilzinger, who insisted that ABC pursued a consistent policy of promoting Bridge. Perhaps Hilzinger believed this to be true—though I have significant doubt in this regard—but at the very least upper management was unaware of activity constituting a contractual breach occurring at lower levels of management. Nothing in the conversation above is consistent with a contracting party attempting in good faith to "actively and exclusively" promote the product of their subsidiary.

If defendant's protestations of innocence ring hollow, the deposition testimony of designees from all four hospitals is considerably more credible. None of the four potential customers specifically named in the complaint actually purchased a bar-code point-of-care system similar to that offered by Bridge at any time during the earnout period, and only MUSC had purchased a similar system by the time of the trial. From the evidence presented in connection with these four specific hospitals, I conclude that even had ABC acted in utmost good faith, which it certainly did not, Bridge would have been highly unlikely to earn a sale and thus contribute to the EBITA calculations for purposes of the earnout.

2. The press release "policy"

Nor is defendant substantially more credible when it comes to the existence of a policy for the issuance of press releases over the business wire. Plaintiffs provided evidence that Bridge consistently sent press releases to the business wire announcing contract wins. After the merger, however, defendant prevented Bridge from issuing such press releases, supposedly as a matter of company-wide policy. Plaintiffs argue that the refusal to allow Bridge to issue press releases ruined the company's momentum in the marketplace, thus costing Bridge opportunities to improve its brand image and make sales.

As an initial matter, the testimony given by Kurt Hilzinger at trial on the nature of this supposed "policy" is at the very least difficult to credit. Hilzinger first testified that ABC possessed "very, very carefully constructed guidelines as to what goes out over [the business] wire."[7] Defendant concedes, however, that these "carefully constructed" guidelines are nowhere evidenced in writing. When asked about how such meticulously crafted rules could exist as a matter of oral tradition, Hilzinger continued:

> [I]t's just such an important part of being a public entity that what's understood by all the business units is that no business unit is allowed to do their own press releases on their own. In fact, we don't want business units to do press releases to any wire on their own. It needs to be a very carefully thought out and controlled process.

---

[7] Trial Tr. at 874-75.

> We have an executive in charge of that activity in Valley Forge, Mike Kilpatric, who is superb at this . . . . So the policy at AmerisourceBergen: if you want to think about doing a press release, call Mike Kilpatric.[8]

Defendant thus asks me to conclude, despite providing the Court with no first-hand testimony from Kilpatric, or any more than Hilzinger's hazy descriptions of the boundaries of this ethereal policy, that ABC's actions with respect to Bridge press releases were merely the result of an even-handed application of corporate policy. There is significant reason to believe this is untrue. Plaintiffs provided evidence that between the signing of the merger agreement and July 2004, Kilpatric prevented Bridge from issuing press releases over not only the business wire, but also the trade wires.[9] Yet after commencement of this lawsuit, Kilpatric began to

[8] *Id.* at 875-77. Mr. Kilpatric was not called to testify at trial.

[9] Neither party specifically addresses a case in which Bridge asked to release information to the trade press before July 2004 and was denied the ability to do so. According to the corporate policy as understood by defendant, Bridge was always free to do so, subject to approval by Kilpatric, and defendant insisted at trial that Bridge employees acknowledged this freedom during their depositions. *See* Def.'s Post-Trial Br. at 14. The deposition testimony itself, however, leads to a different conclusion. When asked whether ABC prevented Bridge from issuing trade press releases, former Vice President of Sales and Marketing Donald Bauman testified that, "The talk was always around wire press releases or press releases that would hit the wire and it was not that I recall ever brought up that, gee, we can't do those but let's go do these trade press things." Bauman Tr. at 165:5-8. Former Bridge Marketing Director Jamie Kelly similarly testified that, "[O]nce it was determined we could use trade media, we used trade media." Kelly Tr. at 150:2-4.

Considering the preponderance of the evidence, the best one can say of ABC's unwritten press release "policy" is that at some undetermined point in time it was made clear to Bridge that the blanket ban on announcing contract signings applied only to the business wire. The testimony strongly suggests, and I conclude, that this exception to the "policy" was not meaningfully communicated to Bridge from the beginning. Bridge appears to have been forced to discover the boundaries of these "carefully constructed guidelines," and the judgments that would take place within them, by engaging in repeated games of twenty-questions with Kilpatric.

allow announcements of contract signings and "go-lives" on the trade wire, testifying that what changed were not the guidelines, but "the judgments that take place within the guidelines."[10]

Far from actively promoting Bridge in press releases, ABC corporate policy under these guidelines apparently consisted of *not* promoting the brand. In 2003, Kilpatric approved an Omnicell press release announcing an eleven hospital deal with Sisters of Mercy Health System. The original press release (written by Omnicell) mentioned not only ABC, but also Bridge. Kilpatric struck the reference to ABC subsidiaries in the press release.[11] According to Kilpatric, "At that time we did not want to call out individual parts of the company because we had positioned the [ABC] brand as a whole going to market."[12]

Defendant mentions several plausible reasons that ABC might prefer to emphasize the parent company's brand over the subsidiaries, and the Court is keenly aware of the disclosure risks inherent in publication over the business wire. While these explanations are plausible, and might be reasonable if given by another defendant in another trial, I simply do not find the testimony provided by defendant to be credible in this case. Kilpatric's deposition testimony appears to be of a kind with Hilzinger's; that is to say, it consists mostly of *post hoc*

---

[10] Kilpatric Tr. at 280:10-13.
[11] Trial Ex. 219; Kilpatric Tr. at 154-160.
[12] Kilpatric Tr. at 146:13-16.

justifications for actions taken for the benefit of ABC without regard to defendant's duty to actively promote Bridge. Had ABC decided to aggressively promote Bridge as part of its "closed loop" system, and merely de-emphasized the Bridge brand in ABC press releases, this on its own might be a good faith strategic decision. Were ABC to allow Bridge to aggressively promote its own brand, but to occasionally participate in joint ventures with competitors after the target client had rejected its BPOC product, that too might be a good faith strategic decision. But where Kilpatric determines, on the one hand, that Bridge's name should not appear in press releases because the company is emphasizing the "closed loop" nature of its product portfolio, but Earl is simultaneously seeking excuses to pursue strategic alliances with vendors outside this supposed loop, I can only conclude that ABC was not taking its contractual duties seriously at all. That Hilzinger can, with a straight face, declare this to be consistent with the active promotion of Bridge seriously undermines his credibility on all other matters.

3. General failure to actively promote Bridge

These are merely specific instances of the overall dispute between the parties as to whether ABC actively promoted Bridge at all during the period of their coexistence. Taken as a whole, the evidence suggests that many individuals within ABC *did* attempt to actively promote Bridge, providing the occasional lead or business opportunity. Overall, however, this assistance was provided without

strategic coordination from the top, and certainly never in an exclusive manner. After the merger, defendant's support of Bridge sales efforts appears to have been limited to those instances when it was in the interests of ABC's shareholders to do so. When ABC's interests conflicted, the duty to Bridge was quietly set aside, with ABC employees going so far as to contact potential customers in order to provide cover for their faithlessness.

Plaintiffs are validly aggrieved by the behavior displayed by defendant over the course of the merger. Although the degree to which plaintiffs suffered damages may be in dispute, the evidence at trial strongly supports the conclusion that ABC frequently and intentionally breached its duty to provide active and exclusive support for Bridge sales efforts, a key element of the merger consideration.

C. ABC, Bridge, and Cerner pursue, negotiate, and abandon a merger

Plaintiffs maintain that defendant breached Annex I, ¶ 2 of the merger agreement, which prohibited defendant from taking "any actions during the Earnout Period any purpose of which is to impede the ability of the [Bridge] Stockholders to earn the Earnout Payments,"[13] by refusing to enter into a proposed three-way agreement between Cerner, Bridge, and ABC. Under one version of this agreement, Cerner was to agree to purchase exclusive rights to sell Bridge

[13] Merger Agreement, Annex I, ¶ 2.

software, and the companies would work together to sell integrated services to potential customers.

The evidence presented at trial paints contradictory pictures of who instigated this relationship and the nature of the partnership proposed at any point in time. Plaintiffs place great emphasis, however, on several key facts. Hilzinger approached the Bridge stockholders in early September 2003 and offered them $5 million to buy out their earnout agreement. This offer came in the midst of negotiations between Cerner and ABC that would have potentially resulted, absent such a concession on the part of Bridge stockholders, in the full earnout payments being made despite the lack of any significant sales by Bridge. The shareholders refused to make any such concession, which led to an email from David Senior, then ABC's Vice President for Strategy and Corporate Development, stating that he would "shut down" any Cerner deal:

> "With all this accounting detail, this [rationale for paying a Bridge earnout] has Terry Kinninger's fingerprints all over it . . . . Anyway, as I indicated today, I also could make and justify a similar case that a larger earnout payment works for us – but it still doesn't alleviate the fact that Bridge shareholders are taking our money because of value that ABC and Cerner will (be responsible to) create, which I assume is where the rub will be.

> I'm planning to shut the deal down tomorrow unless I'm told otherwise. Another day, another time.[14]

Shortly thereafter, ABC entered into a smaller proof-of-principle relationship with Cerner; by the middle of 2004, it became obvious that no large-scale three-way merger that would affect the earnout was forthcoming.

On the other hand, plaintiffs present little in the way of evidence that suggests exactly what "deal" the Senior email may have shut down. Plaintiffs place great emphasis on the fact that Cerner made strong hints, and more than hints, that a deal was forthcoming when dealing with a customer in September 2003.[15] This letter was shared with ABC personnel.[16] Nevertheless, plaintiffs cannot show beyond a preponderance of the evidence that on September 10, 2003 (the date of Senior's email), the relationship between Cerner and ABC consisted of anything greater than relatively advanced negotiations towards some unspecified future deal.

D. ABC intentionally miscalculates the earnout appropriate for 2003 by restating the terms of the merger agreement

Plaintiffs not only claim that defendant breached the contract by preventing Bridge from achieving revenue targets in order to reach an earnout, but also argue

---

[14] Trial Ex. 27. *See also* Trial Ex. 185 (record of ABC Healthcare Information Technology Strategy Meeting, October 30, 2003, stating, "The way the deal was structured would have artificially enhanced the earn-out and thrown off the deal—could not reach agreement on the earnout settlement. Decided that earn-out risk may or may not be a hurdle we could overcome.")
[15] Trial Ex. 71 (letter to UPMC stating that agreement expected by September 26, 2003).
[16] Trial Ex. 195.

that ABC miscalculated the agreed-upon adjustments to EBITA in order to ensure that plaintiffs received no payment. Defendant vigorously denies this, and instead maintain that plaintiffs have used a series of "accounting trick[s]"[17] in order to artificially inflate the payout to which plaintiffs are entitled.

Both plaintiffs and defendant presented lengthy expert testimony at trial to support their own versions of reality. Both parties agree that the actual EBITA values for 2003 and 2004 were -$1,256,152 and -$5,835,583 respectively.[18] Plaintiffs, however, insist that they are entitled to a revenue credit in 2003 of $2,185,220 from a sale to Sisters of Mercy Hospital and a credit of $3,976,048 in the same year from a sale made to the University of Pittsburg Medical Center hospitals. Defendant rejects both credits, and instead suggests that 2003 EBITA should be adjusted downwards by $1,254,932 to account for Bridge's failure to make R&D expenditures in 2003.[19] I address each of these disputed adjustments in turn.

---

[17] Def.'s Post-Trial Br. in at 39.

[18] *See* Trial Ex. 310 at Table 1, Table 2 (hereinafter "Gunther Report"); Trial Ex. 188 at 11-12 (hereinafter "Strang Report"). Likewise, both parties agree that, under the terms of the agreement, EBITA should have been adjusted upwards by $10,200 to account for the cost of directors' and officers' insurance, and that various minor credits should have been granted in 2004. *Id*.

[19] The parties also dispute various credits to the 2004 EBITA calculation. *See* Strang Report at 12. Under either scenario, however, EBITA in 2004 is negative, and plaintiffs are entitled to no earnout. Because my decision would in no way result in a positive EBITA calculation for 2004, I need not address this in detail.

1. UPMC

In 2003, Bridge and Cerner entered into a deal with University of Pittsburg Medical Center in which Bridge would license their software to thirteen hospitals in the UPMC system and provide installation services for three of them. Because Cerner held a pre-existing relationship with UPMC, and because UPMC had been informed that ABC and Cerner were close to a long-term strategic merger, Bridge's software was sold to Cerner and then licensed to UPMC.[20] As part of the deal, design services from AutoMed (another ABC subsidiary) were to be provided to UPMC free of charge.[21]

Annex I, ¶ 34 of the merger agreement provides, in relevant part:

> When [Bridge]'s products or services are bundled with other products or services of [ABC] or any of [ABC]'s other subsidiaries in a sale to a customer, [Bridge] will receive revenue credit for such bundled sale at [Bridge]'s list price for such products and services (less normal discounting of 20%; provided, however, that where products and services are discounted by more than 20%, the discount to be applied for purposes hereof shall be the average amount of the discount in the last five (5) unbundled contracts executed prior to the execution of the subject contract) for determining Adjusted EBITA attainment each year for comparison to the Earnout Payment objectives of each year. The credit for bundled sales will be added to revenues for determining Adjusted EBITA attainment in the year that the software is delivered to the customer and for services in the year in which the services are provided to the customer.[22]

---

[20] See Trial Ex. 524, 526.
[21] Trial Ex. 525.
[22] Merger Agreement, Annex I, ¶ 25.

Plaintiffs assert that the UPMC deal qualified as a "bundled" sale under ¶ 34 because software with a list price in excess of $7.6 million (discounted to a sale price of $1.75 million) was sold with an admittedly trivial amount of software from another ABC subsidiary. Because the effective discount of 77.1% is greater than the normal 20% discount, plaintiffs maintain that the actual EBITA credit due to Bridge was $3,976,048, due to an average discount applied to the last five unbundled contracts of $27.9%.

Before trial, I granted summary judgment to plaintiffs on the issue of whether or not the UPMC transaction constituted a bundled deal for purposes of ¶ 34.[23] Since that ruling, defendant has raised a number of challenges to plaintiffs' calculations, each more technical and desperate than the last. At trial, defendant proposed (and defendant's expert opined) that the appropriate average for the last five bundled contracts should be a "weighted" average, and that the contract actually calls for separate averages of license and service discounts.[24] Defendant also objected that UPMC only ever intended to install MedPoint software at three hospitals. In post-trial briefing, defendant further argues that because Bridge sold its software to Cerner, which then resold the software to UPMC, the "customer"

[23] Let. Op. at 4 (May 1, 2007).
[24] Strang Report at 23-25.

involved was, in fact, Cerner, and the discount should be taken from Cerner's list price.[25]

2. Sisters of Mercy Hospital

The parties also dispute the appropriate application of Annex I, ¶ 34 to a 2003 contract with Sisters of Mercy Hospital. Plaintiffs assert entitlement to a $2,185,220 credit. Defendant again argues that Annex I, ¶ 34 demands that separate weighted averages be employed for services and licensing. In addition, defendant suggests that plaintiffs seek to recognize as revenue in 2003 sales of licenses that were not accounted for in that year under GAAP.

3. R&D Charge for 2003

Finally, defendant asserts that Bridge's EBITA in 2003 should be adjusted downward by $1,254,732 to reflect the fact that Bridge spent only $2,447,486 in research and development expenses in 2003. Annex I, ¶ 9 of the merger agreement provides that:

> [Bridge] R&D expenditures for calendar year 2003 cannot be reduced to less than 80% of planned expenditure (80% of $4.6 million) without the consent of [ABC], which consent will not unreasonably be withheld or delayed.[26]

---

[25] No evidence has been provided to suggest, however, that the list price appropriate to Cerner was lower than that for UPMC, or that Bridge had a separate schedule of list prices available for software resellers.

[26] Merger Agreement, Annex 1, ¶ 9.

Irrespective of whether defendant approved the decreased R&D expenditure, neither party suggests that the merger agreement specifically states that defendant's remedy for a breach of ¶ 9 is an adjustment in the EBITA credit.

E. Bridge fails to achieve its post-merger targets

Whatever their disagreements, neither party presents the ABC/Bridge relationship as an astounding success. Bridge had never had a profitable year before the merger, and its cash flow never moved into the black thereafter. Although plaintiffs lay the blame for this squarely upon ABC's shoulders, defendant showed at trial that failure, in this case, had many fathers. Bridge faced all the considerable challenges of a young company promoting a new technology. Market trends toward integrated, enterprise information systems (and away from Bridge's "best of breed" system) retarded sales growth. Nor was Bridge without fault: ABC presented considerable evidence at trial to indicate that Bridge's management was pre-occupied with maximizing short-term EBITA (due to the earnout), cut marketing and R&D spending at the expense of long-term growth, and produced persistently over-optimistic sales forecasts. In early 2005, ABC entered into discussions that culminated in a sale of Bridge to Cerner for $10 million on June 15, 2005.

II. CONTENTIONS AND STANDARD OF REVIEW

Plaintiffs allege that ABC's actions constituted multiple breaches of the merger agreement, and that but for these breaches, plaintiffs would have been entitled to a full earnout payment in 2003 and 2004.[27] Defendant denies that a breach has occurred, and further maintains that any claim for damages is, at best, speculative. Even had ABC used every effort to support Bridge, and defendant insists that it did just this, Bridge's history of missed sales targets and non-existent profitability suggests that Bridge would never have met its EBITA targets. On the whole, I find plaintiffs' arguments more convincing with respect to the breaches of the merger agreement, but agree with defendant that plaintiffs have carried very little of their burden to demonstrate damages.

III. ANALYSIS

A. Elements of an action for breach of contract

In order to prevail on their claim for breach of contract, plaintiffs must show by a preponderance of the evidence: first, that an express or implied contract existed; second, that defendant breached that contract; and third, that the breach of contract led to damages suffered by plaintiffs.[28] In order to satisfy the final element, plaintiffs must show both the existence of damages provable to a

---

[27] In the process of briefing an earlier motion for summary judgment, plaintiffs withdrew two counts of their Amended Complaint. Answering Br. in Opp'n to Def.'s Mot. for Summ. J. at 45.
[28] *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606 (Del. 2003).

reasonable certainty,[29] and that these damages flowed from defendant's violation of the contract.[30]

Particularly vexatious in this case is the question of damages. To be entitled to compensatory damages, plaintiffs must show that the injuries suffered are not speculative or uncertain, and that the Court may make a reasonable estimate as to an amount of damages.[31] Yet such damages need not be demonstrated with mathematical accuracy: plaintiffs need only to lay a reasonable foundation by which the Court may estimate their loss.[32] On the other hand, where the amount of damages may not be estimated with reasonable certainty despite a showing of breach on the part of defendant, the Court may still award nominal damages.[33]

Neither party disputes that the merger agreement formed a valid contract between the parties. The only remaining issues are whether ABC's actions constituted breaches of the merger agreement, and whether those breaches led to

---

[29] *Cura Fin. Servs. N.V. v. Elec. Payment Exch., Inc.*, 2001 WL 1334188, at *19 (Del. Ch. Oct. 22, 2001), *citing Moody v. Nationwide Mut. Ins. Co.*, 549 A.2d 291, 293 (Del. 1988) (holding that plaintiff must demonstrate "a reasonable basis for the [fact finder] to estimate with a fair degree of certainty his probable loss").
[30] *Carlson v. Hallinan*, 925 A.2d 506 (Del. Ch. 2006).
[31] *Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv. of Cincinnati, Inc.*, 1996 WL 506906, at *20 (Del. Ch. Sept. 3, 1996).
[32] *Cura Fin. Servs.*, 2001 WL 1334188, at *20; *Tanner v. Exxon Corp.*, 1981 WL 191389, at *2 (Del. Super. July 23, 1981).
[33] *Edix Media Group, Inc. v. Mahani*, 2006 WL 3742595, at *10 (Del. Ch. Dec. 12, 2006); *Standard Distributing Co. v. NKS Distributors, Inc.*, 1996 WL 944898, at *11 (Del. Super. Jan. 3, 1996) (noting traditional nominal damages award as six cents).

loss of sales sufficient to trigger the earnout payments to which plaintiffs would have been entitled.

B. ABC violated its duties to exclusively and actively promote Bridge products, but plaintiffs have failed to show that this breach actually caused Bridge to miss its earnout targets

Plaintiffs present ample evidence to show that ABC frequently breached its obligations under the merger agreement. Throughout the relationship, ABC promoted Bridge only where it was in defendant's interests to do so. Where it appeared that another partnership—for instance, with Omnicell—would be more profitable, skullduggery and obfuscation became the order of the day. Patricia Earl's email appears indicative of ABC's actual behavior at an operational level: "promote" Bridge where absolutely required, but do not do so in good faith, while attempting through back-channel communication to get customers to provide avenues around contractual obligations. At some point very soon after the merger, ABC appears to have decided that it was futile to invest further time and effort into a strategic alliance with Bridge, and instead determined to work with them on roughly similar terms to Omnicell, Cerner, or other providers. Bridge became an occasional partner for scattered pieces of business, not the beneficiary of active and exclusive promotional efforts. In the meantime, ABC worked to promote the products of other companies while binding Bridge in its "carefully constructed" but utterly invisible press release policy.

On the other hand, defendant has produced convincing evidence to suggest that even had they acted in complete good faith, Bridge was unlikely to achieve considerably greater success. The sales cycle for Bridge's products extended over a year, and the earnout applied only in 2003 and 2004. The window of opportunity in which ABC's efforts could alter Bridge EBITA seems quite narrow. Bridge provided little direct evidence to suggest that any given hospital might have signed an additional contract, had only ABC's sales efforts been fully behind their subsidiary. The hospitals specifically mentioned in the complaint, to which ABC promoted alternative products, purchased *no* BPOC software in the relevant period. In short, plaintiffs fail to demonstrate that ABC's general failure to promote Bridge during the earnout period led to damages that can be fixed to a reasonable degree of certainty.

Where a defendant has breached a contract, but plaintiffs cannot fix damages to a reasonable degree of certainty, plaintiffs are nevertheless entitled to nominal damages. Plaintiffs are, therefore, awarded nominal damages in the sum of six cents.

C. ABC was not obligated to enter into a merger with Cerner solely to provide Bridge stockholders with the maximum possible earnout

Although ABC's internal communications suggest that the earnout was always a major consideration with regard to any alliance with Cerner, I cannot

conclude that ABC's conduct with respect to Cerner violated Annex I, ¶ 2 of the merger agreement, which requires that:

> [ABC] will act in good faith during the Earnout Period and will not undertake any actions during the Earnout Period any purpose of which is to impede the ability of the [Bridge] Stockholders to earn the Earnout Payments.[34]

Taken as a whole, the facts suggest that by September 2003, both ABC and Cerner foresaw the possibility of some form of profitable joint venture. One potential cost of that venture, for both parties, was the Bridge earnout. In order to determine how much that earnout would cost ABC, Bridge shareholders were asked to consider a buyout of their rights, an offer that they subsequently refused. Any merger (or other joint venture) between Cerner and ABC, therefore, carried the risk of a $55 million price tag. ABC's concern with this cost was wholly in keeping with its duty to act in good faith towards Bridge shareholders.

Although ABC could not unreasonably withhold consent from a transaction that would allow Bridge shareholders to *earn* their earnout payments, nothing in the merger agreement obligated ABC to enter into an unprofitable transaction. Had plaintiffs been able to demonstrate that defendant stifled otherwise profitable merger negotiations with Cerner simply in order to avoid earnout payments, they would be entitled to a finding that defendant breached the contract. But plaintiffs

[34] Merger Agreement, Annex I, ¶ 2.

do not suggest that any deal would have been profitable for ABC had it been forced to pay the full earnout to Bridge shareholders. On the contrary, the offer to purchase the interests of Bridge shareholders, and the subsequent email from Senior, suggest only that ABC might have found some theoretical deal profitable without the earnout. Nor is there sufficient evidence before me to conclude that a deal would have gone forward even if Bridge shareholders had agreed to sell their earnout rights.

Plaintiffs cannot meet their burden to show that ABC's purpose in rejecting a long-term strategic relationship with Cerner was to prevent Bridge shareholders from receiving their due. True, the fact that no Cerner/ABC merger took place in September 2003 may have prevented Bridge shareholders from receiving an unexpected windfall, but where defendant's purpose was merely to avoid a risky and speculative transaction, irrespective of plaintiffs' rights, the fact that plaintiffs did not derive wholly unearned benefits is incidental.

D. ABC cannot rewrite the merger agreement in order to deny plaintiffs the 2003 earnout

The conflict between the parties over the proper adjustments to be applied to Bridge's 2003 EBITA figures poses a difficult conflict. On the one hand, plaintiffs stand to benefit handsomely from some craftily-designed transactions that take advantage of clauses in the merger agreement that are unfortunately, but not ambiguously, drafted. On the other hand, defendant has presented a host of

arguments that fly in the face of common principles of contractual interpretation.[35] Having arrived at the courthouse realizing that the merger agreement exposes defendant to considerable risk, defendant now asks the Court to subtly rewrite it by inserting provisions that simply do not exist.

1. ABC had no good faith justification for applying an adjustment to EBITA to account for an underinvestment in R&D in 2003

For instance, defendant would have done well to have included in the original draft of the merger agreement a provision stating that if plaintiffs unilaterally reduced planned expenditure in any area by more than a given amount, that amount would in turn be applied to the end of year EBITA adjustment in 2003 or 2004. Instead, the merger agreement simply provides that Bridge shall expend a certain sum of money in R&D in 2003.[36] Had a breach of Article I, ¶ 9 actually occurred, and in the absence of specific contractual terms to the contrary, ABC's remedy would be repayment of the $1,254,932 shortfall from any appropriate defendants, along with any consequential damages that could be proven to a reasonable certainty. No rational reading of the contract would support the conclusion that an adjustment in EBITA would be an accurate reflection of expectation damages.

[35] Some of the most egregious of these arguments, including the contention that "less than" might ambiguously mean "more than," were disposed of at summary judgment. *See* Let. Op. at 6-12 (May 1, 2007).

[36] Merger Agreement, Annex I, ¶ 9.

This conclusion is immediately obvious when one remembers that the merger agreement set forth a sliding scale of earnout payments in 2003, in which plaintiffs were to receive $4 million if adjusted EBITA hit at least $2.31 million and would receive $21 million if EBITA were to reach $4.29 million or more. Had plaintiffs otherwise achieved an adjusted EBITA of $4 million in 2003, and yet failed to expend $1.3 million in R&D, I find it highly unlikely that defendant would stand before the Court in a suit against the plaintiffs asserting that its consequential damages amounted to $17 million.

Such a result would be highly favorable to defendant, and there would be nothing wrong with an R&D adjustment to EBITA if it had been specifically provided for in the contract. I see no reason, however, for the Court to draft any such clause into the agreement *ex post*.

2. Bridge is entitled to a credit to EBITA from the UPMC Hospitals deal of $3,976,048 in 2003

Defendant's arguments with regard to UPMC similarly invoke the merger agreement that it wishes it had signed, rather than the merger agreement that it drafted. Particularly fanciful is defendant's insistence that Annex I, ¶ 34 of the merger agreement somehow demands a particular type of weighted average favorable to defendant.

At first blush, the relevant instruction of ¶ 34 does not seem particularly unclear:

> where products and services are discounted by more than 20%, the discount to be applied for purposes hereof shall be *the average amount of the discount* in the last five (5) unbundled contracts executed prior to the execution of the subject contract . . . .[37]

The five contracts to be used in the calculation of the average are not in dispute. To arrive at a discounted amount, plaintiffs took a simple average of the percentage discount on these five contracts (51.2%, 24.2%, 26.7%, 37.3%, and 0% respectively) and arrived at an average discount of 27.9%.[38] Defendant, on the other hand, insists that the term "average" is ambiguous because it might mean a simple or weighted average, and that the discount percentages should be given more or less importance depending on the size of the deal. The contract subject to a 51.2% discount is by far the largest, and an average weighted by deal size leads to a weighted discount rate of 46.8%.

Once again, I can see how defendant might wish that the contract had specified a weighted average, but I cannot understand how the Court may impose one by fiat. First, the most straightforward usage of the term "average" is an arithmetic mean, or an average in which each term is given equal weight. Second, even if I were to conclude that some weighting factor was necessary, the language

---

[37] *Id*. at Annex I, ¶ 34.

[38] The only possible ambiguity in ¶ 34 was not raised by either party at trial. In considering the "average amount of the discount," one *might* choose to average not the percentage discounts, but their absolute dollar amounts. Neither party seriously argued this position at trial, however, and by an odd coincidence not required by the laws of mathematics, the result of averaging the discount amounts would be little different from the end result of plaintiffs' calculations. I do not, therefore, consider it here.

in the contract provides no reason to choose between any of the potential variables available. As in most cases where ABC is constructing helpful ambiguity, it provides a term that is helpful to its cause: deal size. This is certainly a plausible option, on the theory that a larger deal somehow weighs more heavily. But one might also choose to weight each unbundled contract according to the inverse of the time, measured in days, between its signing and that of the bundled contract, on the theory that more recent contracts are more important. Or the parties might have determined to weight the discounts according to the total revenue provided to ABC by each client, on the theory that Bridge should not have been punished because larger discounts were provided to more important clients. Any of these would be rational arrangements for the parties to have made when they signed the agreement, but none of them are included in the merger agreement itself.

Nor am I particularly impressed by defendant's half-hearted argument that a weighted average is more consistent with custom and usage. The most credible testimony offered in this regard came from defendant's expert, Dr. Strang, whose report states only that "based upon my business experience, a weighted average is commonly used to calculate an 'average' in many situations."[39] Testimony offered at trial was no more compelling, consisting of somewhat wandering assertions that weighted averages are commonly used, for example, in calculating grade point

[39] Strang Report at 16.

averages on college transcripts. Yet defendant did not show that colleges weight grade point averages as a matter of unwritten custom, and the Court has considerable reason to suggest that this is not the case.[40]

Despite having been specifically instructed by the Court that post-trial briefing on this subject was unnecessary, defendant nevertheless submitted three pages of detailed discussion that only reaffirms my conviction that, absent explicit instruction to the contrary, the term "average" implies a simple arithmetic mean. Attempting to show otherwise, defendant argues:

> There are several real-world examples of weighted averages not labeled as such, perhaps the most well-known being the Major League Baseball statistic for lifetime batting average. The career record holder, Ty Cobb, has a lifetime batting average of .366, calculated as the sum of lifetime hits divided by lifetime at-bats . . . . The point here is that the term "weighted" is found nowhere in the baseball record book, yet it is still widely understood to be the applicable methodology, because it is the most rational way to measure an average of fractions with disparate denominators.[41]

If only the ABC-Bridge merger agreement had been drafted with the same attention to—if not obsession with—detail shown by aficionados of the national

---

[40] *Compare* Trial Tr. at 1021-22 (Strang) (testifying that he has never heard the term "weighted grade point average," implying that this is merely understood by all involved) *with* University of Delaware, *Grades*, http://www.ust.udel.edu/action/Current%20Students/Academics/grades.aspx (last visited August 16, 2007) ("The cumulative grade point index (also known as GPA) is computed by dividing the total number of quality points by the total number of quality hours. The quality points for each course are obtained by multiplying the quality point value for each grade by the credits for that course . . . ."). Universities rarely leave matters as important as grades to unwritten custom.

[41] Def.'s Post-Trial Br. at 50-51 (citations omitted).

pastime! The concept of a lifetime batting average does not emerge from some "widely understood" natural law of statistics, but instead derives from specific rules that detail how a batting average is to be calculated.[42] The methodology holds true over any period, be it a game, a season, or a lifetime. Although the result might be considered a weighted average, the weighting results from the specific rules *agreed upon in advance*. The merger agreement gives no such instruction to the corporate scorekeeper. To borrow from a sport further afield, and yet similarly obsessed with statistics, to go outside the four corners of the contract to impose upon the parties methodologies agreed upon by professional sports teams simply wouldn't be cricket.

In another attempt to shift the goalposts, defendant maintains that the average discount required by Annex I, ¶ 34 should be calculated first by determining the average (either simple or weighted) of the license fees, and then similarly calculating the average discount for services.[43] Two factors make such a calculation favorable to ABC. First, the discounts for license fees in the last five unbundled deals are discounted considerably more heavily than the service contracts. Second, because UPMC purchased licenses for thirteen hospitals, but

---

[42] *See* Major League Baseball, Official Rules § 10.21(b) ("[To compute] [b]atting average, divide the total number of safe hits (not the total bases on hits) by the total times at bat . . . .").
[43] *See* Strang Report at 17.

only service contracts for three, a much higher percentage of the contract price may be allocated to licenses (and would be subject to the higher discount).

Defendant's argument here fails as a matter of plain language. Annex I, ¶ 34 refers to the "the last five (5) unbundled contracts executed prior to the execution of the subject contract," making no distinction between service and license contracts. Were the Court to consider license and service contracts to be separate, defendant's expert studied not five contracts, but ten. If the five contracts are considered as a whole, nothing in the merger agreement suggests that each contract is to be divided into pieces with separate discount rates.

In a last ditch effort, defendant protests that UPMC was never Bridge's customer. Instead, ABC maintains that Bridge sold its products to Cerner, which in turn sold the licenses on to UPMC under its own discount program. Accordingly, defendant argues, the Court should apply to the transaction the list price appropriate for Cerner, not UPMC. Further, defendant objects to characterizing the UPMC transaction as a thirteen hospital deal, as UPMC supposedly only ever intended to install the software at three hospitals.[44] Neither of these arguments has much force. First, the evidence presented at trial, including emails between Bridge and Cerner, frequently reflect the fact that while both parties were working together, the deal was done "on Cerner paper" in order to

[44] Def.'s Post-Trial Br. at 39.

give UPMC a Cerner discount,[45] and the party intended to be the customer for purposes of ¶ 34 was always UPMC. Little, if any, evidence exists of a separate list price that was, at the time, applicable to Cerner. Second, although UPMC may only have intended to install Bridge's software at three hospitals, as they hoped to use undeveloped "vaporware" software produced by Cerner for later installations, the contract indisputably entitles UPMC to thirteen licenses, whether they were used or not.

Having rejected all of defendant's arguments with regard to the UPMC transaction, I find Bridge to be entitled to a credit to 2003 EBITA of $3,976,048.

3. Sisters of Mercy Hospitals

A similar dispute arises between the parties as to a bundled transaction between Bridge and the Sisters of Mercy Hospitals. Defendant raises the same unavailing arguments about weighted averages and separation of service and licensing contracts that it applies to UPMC, and asserts that the Sisters of Mercy transaction was entitled to no EBITA credit.[46] I have already rejected these arguments.

In addition, defendant suggests that plaintiffs' calculations of adjusted EBITA unfairly accelerate revenue recognition, in violation of GAAP, by crediting

---

[45] Trial Ex. 518.
[46] Strang Report at 15-18.

to Bridge's 2003 EBITA revenues that would not ordinarily be applied until later years.[47] Plaintiffs, on the other hand, insist that the merger agreement explicitly demands this acceleration. At issue is the tension between two related clauses of Annex I. First, Annex I, ¶ 4 of the merger agreement states:

> The term "Adjusted EBITA" means the earnings of the Surviving Corporation before interest, taxes and amortization, as determined in accordance with GAAP applied on a consistent basis, *as adjusted pursuant to and in accordance with this Annex I . . . .*"[48]

On the other hand, Annex I, ¶ 34 provides that:

> The *credit for bundled sales* will be added to revenues for determining Adjusted EBITA attainment *in the year that the software is delivered* to the customer and for services in the year in which the services are provided to the customer.[49]

Defendant notes that of the $2,185,220 revenue credit plaintiffs attribute to Bridge's 2003 revenues, approximately $1,000,000 is attributable to income that, according to GAAP, could not be recognized until later years.[50]

The merger agreement, however, is perfectly explicit as to the fact that the adjustments in Annex I take precedence over GAAP accounting. In this regard, the application of the appropriate credit is really quite straightforward. In the event of a bundled sale, Bridge is to receive a credit equal to "[Bridge]'s list price for such

---

[47] *Id*. at 18-21.
[48] Merger Agreement, Annex I, at ¶ 4 (emphasis added).
[49] *Id*. at ¶ 34.
[50] Strang Report at 19.

products and services" less the appropriate discount.[51] This credit is in lieu of actual contracted revenues. The credit for such a sale is applied in the year that the software is delivered, with no other relevant caveat employed.

By contrast, defendant's expert maintains that recognition of revenue under GAAP is subject to a number of conditions, including (a) existence of delivery, (b) probability of collection of revenues, and (c) the determinability of a vendor's fee.[52] The terms of Annex I, ¶ 34 are, therefore, an explicit departure from the terms of GAAP. Had defendant wished to ensure that the revenue credit due to plaintiffs was recognized only when the relevant sales were recognized under GAAP, it would have been easy to draft such a contract. Defendant did not do so, however, and cannot be heard to complain now that the standards of ¶ 34 are too lenient.

Plaintiffs are entitled to recognition of a 2003 EBITA credit of $2,185,220 arising from the Sisters of Mercy transaction.[53]

---

[51] Merger Agreement, Annex I, at ¶ 34.
[52] Strang Report at 20.
[53] Defendant's report suggests that, due to a mathematical error, the credit due may even be higher. *See* Strang Report at Ex. 9 (showing a $2,225,231 adjustment due to plaintiffs). Given that there is only $40,011 difference between the figures, and plaintiffs are entitled to the maximum earnout for 2003 under either scenario, however, I need not consider this detail.

4. Damages due to miscalculation of 2003 EBITA

Plaintiffs are entitled to a total 2003 EBITA adjustment of $6,161,268 from the Sisters of Mercy Hospital and UPMC contracts. Further, the negative $1,254,932 adjustment applied by ABC should be removed. I therefore conclude that Bridge's Adjusted EBITA for 2003 should have totaled $4,915,316, entitling plaintiffs to the entire 2003 earnout payment of $21 million.

IV. CONCLUSION

Plaintiffs are entitled to nominal damages of six cents in compensation for defendant's various breaches of their contractual duties, and $21 million arising from miscalculations to 2003 Adjusted EBITA. Parties shall confer and submit to the Court a form of Order implementing this decision within five days.

IT IS SO ORDERED.