NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1417

ERIC BLATTMAN, individually and as an assignee of
certain former members of E2.0, LLC;
DAVID STAUDINGER; LAMB FAMILY LLC

v.

C3, INC.; THOMAS M. SIEBEL; DAVID SCHMAIER

(D. Del. No. 1-15-cv-00530)

C3, INC., d/b/a C3 IoT; THOMAS M. SIEBEL; DAVID SCHMAIER

v.

ERIC BLATTMAN, individually, and as an assignee of
certain former members of E2.0, LLC,
and as the Securityholder Representative for Unitholders of E2.0 LLC;
LAMB FAMILY LLC; DAVID STAUDINGER

(D. Del. No. 1-16-cv-00750)

ERIC BLATTMAN, DAVID STAUDINGER;
LAMB FAMILY LLC,
Appellants

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Nos. 1-15-cv-00530 and 1-16-cv-00750)
District Judge: Honorable Colm F. Connolly

Argued
on November 9, 2020

Before: HARDIMAN, GREENBERG*, and SCIRICA, *Circuit Judges.*

(Opinion Filed: February 17, 2021)

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OPINION[**]

SCIRICA, *Circuit Judge*

This dispute arises from a May 2012 transaction in which Defendant-Appellee C3, Inc. ("C3") acquired Efficiency, 2.0 LLC ("E2.0") in a stock-for-stock merger under a Merger Agreement between the companies. Each company was founded in 2009 and each company created software and services to help customers gain visibility into their energy expenditures and take action to achieve energy savings. Plaintiffs-Appellants are former members and shareholders of E2.0, specifically Eric Blattman, the Lamb Family

[*] The Honorable Morton I. Greenberg participated in the decision in this case, but died before the opinion could be filed. This opinion is filed by a quorum of the court. 28 U.S.C. § 46 and Third Circuit IOP 12.1(b).

[**] This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

LLC, and David Staudinger.[1] Defendants are C3, Thomas M. Siebel—Chief Executive Officer of C3—and David Schmaier—the former Chief Operating Officer of C3.[2]

Plaintiffs filed fraud claims against all Defendants and breach of contract claims against C3. After a seven-day bench trial, the District Court found against Plaintiffs on all claims in a comprehensive 53-page memorandum opinion setting forth findings of fact and conclusions of law. *Blattman v. Siebel*, No. 15-cv-530, 2020 WL 475413 (D. Del. Jan. 29, 2020). Plaintiffs contend the District Court erred in finding they did not offer evidence of damages, a necessary element of their contract claim regarding Holdback shares.[3] Plaintiffs appeal solely from the District Court's rejection of their Holdback claim.

I

Negotiation and Merger Agreement

Our recitation of the facts reflects the findings of fact made by the District Court. On March 30, 2012, C3 offered to purchase E2.0's stock in a stock-for-stock merger. To determine the purchase price, the parties had to agree on the value of C3 shares relative to

[1] E2.0 was founded by Blattman and non-party Thomas Scaramellino who was E2.0's CEO from its inception through the merger with C3. Blattman was a sophisticated businessperson who had worked at four Wall Street investment banks and founded a hedge fund.

[2] C3's CEO Siebel was a sophisticated businessperson who founded and grew a company that he took public and then sold to Oracle Corporation. During a period of Siebel's convalescence, Schmaier served as C3's acting Chief Operating Officer.

[3] The parties refer to the contract claim as the Holdback claim, because it centers on C3's contractual obligation to provide Plaintiffs with Holdback Shares. The parties also used interchangeably the terms "unit" and "share." We do the same.

E2.0 shares.[4] The parties discussed the relative valuations of the two companies based on the companies' existing and projected revenues. The parties agreed the total value of outstanding C3 shares was about ten times greater than the total value of E2.0 shares. Accordingly, the final Merger Agreement posited a 10:1 Exchange Ratio.

To utilize the 10:1 ratio for the purposes of exchanging shares, the companies assumed values, with C3's assumed value set at $500 million and E2.0's assumed value set at $50 million—$500 million being ten times greater than $50 million. *See Blattman*, 2020 WL 475413, at *10 ("[A]n assumed, relative $500 million valuation of C3 . . . was used as part of the [10:1 Share] Exchange Ratio to calculate the number of C3 shares the E2.0 shareholders were owed upon consummation of the merger."); *id.* at *5 ("Scaramellino [the former CEO of E2.0] explained . . . 'you could have valued C3 at $10 and valued E2.0 at . . . $1 post earnout and you would have received the same exact practical outcome in the transaction.'"); *id*. at *5 (Scaramellino testified, "We frankly could have cared less about the actual [valuation] number." (alteration in original)).

The number of C3 shares received by E2.0 shareholders depended upon the assumed values of the two companies. A "Unit Divisor" of $3.33 was calculated by dividing C3's assumed $500 million valuation by the number of outstanding C3 shares. The $3.33 Unit Divisor was used to determine the number of shares E2.0 shareholders would receive in the transaction.

[4] This stock-for-stock merger required the use of an Exchange Ratio, which was used to calculate how many shares C3 needed to issue for each share a shareholder owned in E2.0.

The Merger Agreement required C3 to make payment in the form of (1) a debt payment, (2) C3 shares upon the closing of the merger ("Up-front Shares"); (3) additional C3 shares at various points following the merger, if the E2.0 business unit hit certain financial milestones ("Earnout Shares"); and (4) certain C3 shares that C3 would hold back for up to 18 months after the merger's closing as partial security for E2.0's obligations to indemnify C3 for breaches of certain representations, warranties, and covenants ("Holdback Shares"). The Holdback Shares are the focus of this appeal.

The Merger Agreement provided that the Holdback Shares would not be transferred to E2.0 shareholders in the event that C3 gave "a Notice of Indemnification Claim containing an indemnification claim which has not been resolved . . . ." Under Section 6.5(a) of the Merger Agreement, any Notice of Indemnification Claim was required to contain a "good faith, non-binding, preliminary estimate of the aggregate dollar amount of damages that have arisen or reasonably may arise as a result of the inaccuracy, breach or other matter referred to in such notice."

In October 2013, C3 issued an "Indemnification Notice" to E2.0. It identified breaches of representations and warranties by E2.0 with respect to Merger Agreement Sections 2.5 ("Absence of Change"), 2.9(l) ("Intellectual Property-Software Defects"), and 2.9(n) ("Intellectual Property-Source Code"), estimating C3's damages at approximately $4.45 million. E2.0 shareholders disputed the claim, but C3 never responded to the dispute notices nor delivered the Holdback Shares. In their Holdback claim, Plaintiffs asserted this was a breach of the Merger Agreement, arguing the $4.45 million indemnification amount was not calculated in good faith.

Bench Trial and Memorandum Opinion

As to damages on their Holdback claim, Plaintiffs argued at trial that "the Holdback amount is defined in the [Merger Agreement] as $4 million," which is derived by multiplying the number of C3 shares Plaintiffs could potentially be issued following the expiration of the Holdback period by the $3.33 Unit Divisor. According to Plaintiffs, this meant that for purposes of calculating damages, the District Court should have found that the $3.33 was indicative of C3's share price as of closing in May 2012. Plaintiffs argued that, because C3's revenues increased after the merger, the Holdback Shares must have been worth at least $3.33 at the time of the breach 18 months later, in November 2013. Thus, Plaintiffs argued that the District Court should have determined damages by multiplying $3.33 by the number of Holdback shares they allege C3 improperly withheld.[5]

Plaintiffs also raised a fraud claim alleging C3 falsely represented "that C3 was worth $500 million" at the time of the merger. Plaintiffs contended the $3.33 Unit Divisor "represented [the] per-share value for C3" because $3.33 multiplied by the number of C3 shares outstanding at the time of the merger would equal approximately $500 million.

Regarding the fraud claim, the trial judge concluded Defendants did not misrepresent the value of C3 prior to the merger. *Blattman*, 2020 WL 475413, at *8, *17. The District Court rejected the argument that $3.33 represented the actual value of C3's

[5] Plaintiff did not ask for specific performance (e.g. delivery of the issued Holdback Shares) or any other form of equitable relief in their Second Amended Complaint and insisted at trial that the only remedy they were seeking was money damages.

shares as of May 2012 or at any other point in time. *Id*. at *8–13. In reaching this conclusion, the District Court relied on the terms of the Merger Agreement and also credited testimony from lead negotiators from both sides—Scaramellino (former E2.0 CEO), Siebel (C3's CEO), Schmaier (C3's COO), and Eric Jensen[6]—that $3.33 did not represent the actual value of C3's shares at any point in time. *See id.* at *8–9 (crediting testimony of Schmaier and Siebel; *id* at *9 (crediting testimony from Scaramellino that $3.33 was not indicative of value); *id* at *10 (crediting testimony from Jensen that the $3.33 Unit Divisor "says 'nothing' about the value of C3's shares" and crediting evidence that Goodwin Proctor, E2.0's law firm, made edits to the Merger Agreement to "remove any suggestion that $3.33 was 'the value of the shares'").

The District Court noted and credited that Schmaier and Scaramellino each testified that they understood $500 million, C3's assumed value for the merger, to be an arbitrary number—a proxy to serve as the common denominator with which to calculate the absolute number of C3 units each E2.0 unitholder would gain from the transaction. *Id.* at *4–5. Further, the District Court found Blattman's testimony "that Defendants represented as a matter of fact that C3 had a value of $500 million *lacked* credibility." *Id.* at *5 n.2 (emphasis added).

Regarding the Holdback claim, the District Court found C3 breached the Merger

[6] Jensen was C3's principal lawyer for the drafting and negotiation of the Merger Agreement. E2.0 was represented by Goodwin Proctor during the negotiation of the Merger Agreement. The District Court found "it informative (but not surprising) that Plaintiffs did not call a Goodwin Proctor witness at trial to contradict Jensen's testimony." *Blattman*, 2020 WL 475413, at *10.

Agreement. *Id*. at *19. The District Court found C3 acted in bad faith because of C3's insufficient indemnification notice. *Id*. at *15–16. The District Court, however, held that Plaintiffs' Holdback claim failed as a matter of law because Plaintiffs failed to prove damages—a requirement for contract claims under Delaware law.[7] *Id*. at *19.

Finally, the District Court awarded Defendants their attorneys' fees as the prevailing party pursuant to a fee-shifting provision in the Merger Agreement. *Id*. The District Court entered final judgment, and Plaintiffs appealed.

II[8]

On appeal, Plaintiffs contend the District Court erred in finding their Holdback claim failed as a matter of law. A plaintiff cannot prevail on a contract claim without proof that damages resulted from breach. *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003). Plaintiffs contend they provided three per share values of C3 as proof of damages resulting from C3's breach of the Merger Agreement's Holdback provisions: $3.33, $1.72, and $0.44. The District Court was not clearly erroneous in finding that $3.33 was not a representation of actual value, so the $3.33 per share value

[7] The parties agree that Delaware law governs Plaintiffs' Holdback claim. Under Delaware law, the elements of a breach of contract claim are (1) the existence of an enforceable obligation, (2) breach of the obligation, and (3) resulting damages. *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

[8] For a case appealed after a non-jury trial, we review findings of fact for clear error and conclusions of law de novo. *McCutcheon v. Am.'s Servicing Co.*, 560 F.3d 143, 147 (3d Cir. 2009). "A finding of fact is clearly erroneous when it is 'completely devoid of minimum evidentiary support displaying some hue of credibility or bears no rational relationship to the supportive evidentiary data.'" *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 283 (3d Cir. 2014) (quoting *Berg Chilling Sys., Inc. v. Hull Corp.*, 369 F.3d 745, 754 (3d Cir. 2004)).

offered by Plaintiffs was not proof of damages resulting from C3's breach of contract. Furthermore, we find Plaintiffs forfeited arguments regarding $1.72 and $0.44 per share values because Plaintiffs did not raise these arguments before the District Court. We also reject Plaintiffs' request for nominal damages and their challenge to the District Court's award of attorneys' fees to C3.

A

At trial, the only argument Plaintiffs made with respect to contract damages on the Holdback claim was based on the $3.33 Unit Divisor in the Merger Agreement. The District Court concluded that $3.33 "was not a representation of actual value." *Blattman*, 2020 WL 475413, at *10. We cannot disturb the District Court's factual finding absent clear error, and we find no such error here.

The District Court thoroughly reviewed the documentary record, the plain language of the Merger Agreement, and its credibility determinations as to the testimony of C3's lead negotiators, E2.0's lead negotiator, and C3's counsel, all of which confirmed that $3.33 was never intended to reflect an actual valuation of C3's shares. The record shows that the $3.33 Unit Divisor was derived from C3's proxy $500 million valuation, specifically by dividing that proxy value by the amount of outstanding C3 shares. The $500 million proxy value was not indicative of actual value, and, accordingly, neither is any number derived from the proxy value.[9]

[9] For the purposes of contract damages, Plaintiffs ask this Court to ignore the $3.33 Unit Divisor and consider instead the Merger Agreement's stated Holdback amount of $4 million. But that $4 million figure was also not indicative of actual value. Instead, it is simply the number of Holdback shares multiplied by the $3.33 Unit Divisor.

The District Court did not commit clear error in finding that the $3.33 Unit Divisor was not indicative of any real value. And because the $3.33 Unit Divisor was the basis for the only evidence Plaintiffs presented to the District Court for alleged contract damages, the District Court correctly found Plaintiffs failed to offer any evidence that could be used to prove damages. Accordingly, Plaintiffs' Holdback claim failed as a matter of law.

B

Plaintiffs contend for the first time on appeal that evidence they provided at trial regarding C3 per share values of $1.72 and $0.44 is relevant evidence of damages for their Holdback claim. We find Plaintiffs forfeited these arguments. Any arguments not argued before the trial judge are deemed forfeited on appeal. *DIRECTV Inc. v. Seijas*, 508 F.3d 123, 125 n.1 (3d Cir. 2007). "To preserve a matter for appellate review, a party 'must unequivocally put its position before the trial court at a point and in a manner that permits the court to consider its merits.'" *Garza v. Citigroup Inc.*, 881 F.3d 277, 284 (3d Cir. 2018) (quoting *Shell Petroleum, Inc. v. United States*, 182 F.3d 212, 218 (3d Cir. 1999)).

While Plaintiffs presented evidence of $1.72 and $0.44 per share values, this evidence was not presented as evidence of the measure of damages for Plaintiffs' Holdback claim. First, Plaintiffs point to testimony from their expert, Kenneth Metcalfe, asserting $1.72 was the fair market value of C3's shares as of the date of the merger. But Metcalfe was opining on fraud damages. At no point did Plaintiffs argue that $1.72 was

proof of contract damages for their Holdback claim.[10]

Second, Plaintiffs point to a $0.44 per share value reflected in a November 2013 transaction in which certain C3 shares were purchased from E2.0's prior CEO. This evidence was presented for the purposes of showing bad faith, not damages.[11] Plaintiffs do not identify any instance in the District Court record where they argued that the $0.44 per share value was proof of contract damages for their Holdback claim.

It is not the role of the court to search the record for an argument Plaintiffs did not make. Accordingly, Plaintiffs forfeited arguments that contract damages on their Holdback claim could be based on share values of $1.72 or $0.44.

C

On appeal, for the first time, Plaintiffs ask for nominal damages. Plaintiffs contend nominal damages must be awarded where a breach has been found and actual harm is certain. Under Delaware law, awarding nominal damages is discretionary if they are not requested. *See LaPoint v. AmerisourceBergen Corp.*, 2007 WL 2565709, at *4 (Del. Ch. Sept. 4, 2007), *aff'd*, 956 A.2d 642 (Del. 2008) ("[W]here the amount of damages may not be estimated with reasonable certainty despite a showing of breach on the part of

[10] At closing argument, Plaintiffs attempted to add a contract claim regarding the Up-front Shares, alleging that C3 breached the Merger Agreement by providing Up-front Shares worth $1.72 as opposed to the $3.33 indicated in the Merger Agreement. The District Court denied Plaintiffs' request based on its finding that $3.33 was not representative of any value. *Blattman*, 2020 WL 475413, at *17. On appeal, Plaintiffs do not challenge that denial.

[11] Plaintiffs claimed Scaramellino was intimidated into selling his shares for $0.44 per share. But in his testimony, Scaramellino confirmed he acted without duress and of his own free volition in making this transaction.

defendant, the Court may still award nominal damages." (citations omitted)). Plaintiffs conceded at oral argument that nominal damages were not requested in their claim for relief nor their post-trial briefing.[12] Accordingly, the District Court was not required to award them. We see no clear error or abuse of discretion.

The District Court held "[b]ecause defendants prevailed on all claims, Defendants are entitled to fees and costs." *Blattman*, 2020 WL 475413, at *19. Because Plaintiffs did not prevail on the chief issues, we hold the trial judge correctly found C3 to be the prevailing party entitled to attorneys' fees and costs under the Merger Agreement. *See Duncan v. STTCPL, LLC*, 2020 WL 829374, at *15 (Del. Super. Ct. Feb. 19, 2020) (explaining that in order to be the prevailing party, a party must at least prevail on the chief issue in the case).

III

For the foregoing reasons, we will affirm the judgment and orders of the District Court.

[12] Plaintiffs also did not mention nominal damages in their proposed findings of fact and conclusions of law.