

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

COBALT OPERATING, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 714-VCS
	)	
JAMES CRYSTAL ENTERPRISES, LLC	)	
and JAMES CRYSTAL LICENSES, LLC	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: April 25, 2007

Date Decided: July 20, 2007

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STRINE, Vice Chancellor.

I. Introduction

In March 2002, the plaintiff, Cobalt Operating, LLC agreed to buy a radio station, “WRMF,” from the defendants, James Crystal Enterprises, LLC and James Crystal Licenses, LLC (collectively, “Crystal”). The purchase price was \$70 million. Cobalt based its willingness to pay that price on Crystal’s representation that WRMF’s annual broadcast cash flow¹ was \$5 million — Cobalt was willing to pay fourteen times cash flow. In June 2002, after Cobalt’s due diligence confirmed that WRMF’s actual cash flow for the previous twelve months was in fact about \$5 million, the transaction closed.

About three months later, after WRMF’s traffic manager had resigned, Cobalt noticed that it could not fit all of the commercials that it had sold into WRMF’s daily on-air schedules. That struck Cobalt as odd because WRMF was not selling any more commercials than it had sold when Crystal owned the station. Nor had Cobalt reduced WRMF’s daily commercial load. When the problem persisted and Cobalt still could not figure out what it was doing differently, it cried fraud.

This post-trial opinion resolves the fraud and breach of contract claims brought by Cobalt against Crystal. Cobalt claims that in the period leading up to the sale, Crystal sold more pre-recorded commercial advertising to WRMF’s customers than WRMF was able to play on the air and then billed the advertisers — and collected — for ads that WRMF did not run. Cobalt claims that Crystal’s fraud artificially inflated WRMF’s cash flow by about

¹ Broadcast cash flow is a financial measure used in the radio industry and is roughly akin to earnings before interest, taxes, depreciation, and amortization.

a million dollars a year and that the fraud caused Cobalt to overpay for the station by \$12 million.

Crystal hotly disputes Cobalt's allegations and claims that it ran every ad that it billed. Crystal says that Cobalt's story was fabricated in order to re-cut a deal in which Cobalt thinks it paid too much. According to Crystal, because Cobalt has not come forward with any admission by one of Crystal's former employees confessing that the fraud actually occurred, Cobalt has not sustained its burden of proof.

The factual dispute in this case is stark and simple — did the disputed advertisements air or not? A week of trial testimony and thousands of pages of briefs and exhibits were devoted to that question. Cobalt bases its case on a series of computer files that were stored in WRMF's broadcast computer system, the Scott Studios System. The "Scott System" was the primary means through which music and commercials went out over the WRMF airwaves. The Scott System made a digital log, an "Aired File," of everything it played. Cobalt's analysis of those Aired Files (its "Bad Billings Analysis") shows that the station billed for about 16,000 pre-recorded commercials over the 18 months leading up to the sale that were not played through the Scott System. Not only that, as a result of those "Bad Billings," WRMF was billing for an extraordinarily large number of commercials — more than 20 minutes per hour, which is far more than is customary for similar radio stations in WRMF's market niche, both locally and nationally.

Nonetheless, I came into trial skeptical of Cobalt's claim, given the brazen type of fraud it was premised upon and Crystal's promise that the discrepancies between the Aired Files and the billing records it acknowledged existed could and would be convincingly

explained at trial. Coming into trial, Crystal admitted that it had invoiced a large, but according to it, not impossible number of commercials during the period leading up to the sale. Crystal insisted, however, that all of those invoiced commercials did play and that Cobalt's reliance on the Aired Files was misguided. Indeed, its pre-trial briefs raised a bunch of explanations for the omissions of these ads from the Aired Files and outlined how it intended to go about showing that Cobalt was just plain wrong. As an experienced radio operator, Crystal was well-positioned to explain the gap in a practical business-like way grounded in how it actually operated WRMF. Plus, its explanations were corroborated by a seemingly weighty authority, Dave Scott Blyth, the creator of the Scott System, who testified on behalf of Crystal and whose expert report contended that the Aired Files were not intended to be a complete list of everything that played on the air because, among other things, the Aired Files did not log commercials that were read live on the air by disc jockeys ("Live Reads") or that were played from outside of the Scott System.

But Crystal's pre-trial explanations all fell apart or were abandoned at trial. Indeed, Blyth's testimony, which Crystal contended in its pre-trial briefs was "so damning," largely misunderstood the Bad Billings Analysis presented by Cobalt and failed to address the actual facts on which the Bad Billings Analysis is premised. Blyth's explanations made no sense in light of the fact that Cobalt's Bad Billings Analysis gave Crystal credit for every Live Read that it billed and was limited to pre-recorded commercials, which, as Crystal's own witnesses testified, were almost exclusively played through, and would have been logged in the Aired Files by, the Scott System. Blyth himself even reluctantly admitted that the Aired Files accurately reflect everything that played through the System. In other

words, the fact that the disputed commercials are not in the Aired Files essentially means they weren't played.

When Crystal's initial defensive angle did not pan out, it began advancing new theories that constantly evolved and shifted throughout trial. Those theories grew increasingly fanciful, and none were supported by any evidence in the record. Rather, Crystal's explanations evoke notions of a "Rose Mary Stretch," famously depicted in this photograph of former President Nixon's loyal secretary:



Sure, it was possible for WRMF's disc jockeys to have played the commercials in a manner which would avoid having them appear in the Aired Files. But Crystal's explanations required the disc jockeys not just to stretch their arms and legs but to race from

the broadcast studio to a different part of the building to play commercials rather than use the System at their fingertips designed to let them do so conveniently. There is no evidence that WRMF's disc jockeys engaged in any of the inconvenient contortions suggested by Crystal *in briefs* but not by witness testimony. All of the evidence points to the conclusion that they did not play commercials that way, and there is no imaginable reason why they would have done it the way Crystal now says they did. Crystal's Rose Mary Woods-like explanations thus only highlight the fact that, although Cobalt never unearthed a written confession of fraud, the circumstantial evidence it presented easily proves by a preponderance of the evidence that the fraud Cobalt has alleged did occur.

That fraud was large in scope, accounting for about 20% of WRMF's pre-sale cash flow. Cobalt never discovered who at Crystal was responsible for the fraud, though it did establish that a number of individuals at Crystal had strong motives to commit it. Crystal's owner, Jim Hilliard, a veteran in the radio industry, was under pressure from his lenders to sell WRMF and would owe a substantial debt to the IRS after the sale. He needed to sell, and he needed to clear a large sale price just to break even on the deal. At the same time, Hilliard had promised large bonuses to WRMF's top managers. Those managers knew about Hilliard's financial situation, and knew that unless the purchase price for the station was high enough, there would be no surplus cash from which those bonuses would come. Notably, the fraud reached its height in the months of the final negotiations over the sale price. The people in charge at WRMF knew the revenue figures they needed to hit and did what it took to reach them.

Cobalt also identified one individual, WRMF's traffic manager, Lisa Colson, who must have been complicit in the fraud given that she was the individual who reconciled the station's on-air schedules with its invoices and determined which advertisers got billed and for what. Crystal held Colson out as its star witness in explaining how WRMF's operations worked during the pre-sale period, claiming that it was Colson's departure that caused Cobalt's scheduling difficulties. According to Crystal, Colson's replacements just could not handle the job.

But Colson's testimony revealed that she played no special role in getting an extraordinary number of commercials onto WRMF's airwaves. Rather, that role was delegated to WRMF's disc jockeys, none of whom corroborated Crystal's stories about the number of commercials WRMF supposedly played or the manner in which it supposedly played them. Indeed, Colson's testimony about how many commercials WRMF was typically playing during the months leading up to the sale of WRMF was inconsistent, argumentative, and generally not believable.

In this vein, the fact that Colson may have had a smaller financial motive to assist in Crystal's fraud does not aid Crystal. The sad fact of many fraudulent conspiracies is that those at the top often recruit more-poorly-compensated underlings to carry out their dirty work. Colson's participation in Crystal's fraud can likely be explained by the simple fact that she did what her bosses told her to do because she wanted to keep her job. In this regard, the fact that Colson left town immediately after resigning from WRMF and then returned a few months later, taking a job as traffic manager at another of Crystal's radio

stations, supports my view that Colson is continuing to tell the story that Crystal is instructing her to tell. That story, however, is not the truth as I perceive it.

The conclusion that the fraud Cobalt has alleged did in fact occur and that the legitimate cash flow of WRMF was about \$1 million less than Crystal represented it to be requires a remedy in favor of Cobalt. Both parties recognized that this was primarily a factual dispute and neither makes any substantial legal arguments. For one thing, Cobalt clearly has satisfied all of the elements of a cause of action for fraud. Moreover, the Asset Purchase Agreement between Crystal and Cobalt contained express representations that the financial information Crystal gave to Cobalt was not materially misleading and that WRMF would be operated in the normal course, and lawfully, until closing. Crystal has breached those representations.

In this regard, I reject Crystal's secondary arguments that even if the fraud occurred, Cobalt was not harmed and that the due diligence Cobalt conducted precludes Cobalt from obtaining a remedy for Crystal's fraud. Cobalt reasonably relied on the accuracy of WRMF's financial statements in entering into the transaction and presented credible, and unrebutted, expert evidence that, based on WRMF's legitimate cash flow, WRMF was worth substantially less at the time of the transaction than Cobalt paid.

On that basis, I grant judgment in favor of Cobalt and award it damages equal to the difference between the actual value of WRMF at the time of the sale and the \$70 million purchase price. I also award Cobalt a remedy under the Asset Purchase Agreement's indemnification provision for the costs Cobalt incurred in granting free airtime credits to the advertisers affected by Crystal's fraud. Finally, I award Cobalt pre-judgment interest on the

monetary aspects of the judgment, and I grant Cobalt attorneys' fees under the Asset Purchase Agreement.

II. Factual Background

A. WRMF's Business

WRMF is a prominent radio station located in West Palm Beach, Florida. It has an adult contemporary format and plays a mix of popular music from the last thirty or so years. Its format also includes a substantial amount of talk from its various on-air "personalities."

WRMF, like all commercial radio stations, makes money by selling advertising to local and national businesses and playing those commercials over the air during commercial breaks at pre-scheduled times during the day. A radio station's ability to sell ads to its customers depends on a number of factors, including the station's demographics (i.e., what type of listener the station is reaching) and its ratings (i.e., how many of those people are listening). Another related factor is also important, which is that advertisers seek to have their commercials played when listeners tune in. This means that they want ads to run at drive times, or at least during the waking hours of the day. Stations can charge more for peak ratings hours but get little for running ads for products appealing to scarce radio-listening night owls.

There are no legal or regulatory restrictions on the number of commercials that a radio station can play per hour. But the general wisdom in the industry is that if a station plays too many commercials, ratings will suffer and there will be negative long-term effects on the station's business. Radio stations similar to WRMF, in similar markets, typically play a maximum of about 16 minutes of commercials per hour.

As a highly rated station in a prime demographic, WRMF consistently sold out of all the advertising time that it could, as a practical matter, play on the air. As a result, WRMF often sold a number of commercials that it could not “clear,” i.e., play on the air at the contractually-agreed times. The invoices that WRMF submitted to its advertisers indicated when the advertisers’ ordered ads did not clear, and WRMF did not bill for those ads. Cobalt claims that, in addition to the unbilled ads that were indicated as not having aired, WRMF, during the time period leading up to the sale, also did not air large numbers of commercials for which it did bill and collect payment.

The actual number of commercials that WRMF played is the primary factual dispute in this case. That dispute is compounded by the fact that the official minute-by-minute records of what aired on WRMF in the period leading up to the sale, the written and disc-jockey-signed “program logs,” were destroyed, apparently in the ordinary course of business.² Nor are there any audio recordings of WRMF broadcasts from the period to confirm whether particular commercials were aired or not.

² I will not dwell at length on the parties’ arguments about what happened to these written program logs. Cobalt makes the generalized allegation that Crystal purposely destroyed them in order to cover up the fraud. But Cobalt did not present any evidence to show that it was not an ordinary practice in the industry to throw the program logs away. Lisa Colson testified that once she was done using the logs for reconciliation, she would stack the old logs into boxes in the traffic room. When the boxes would pile up and become cumbersome, someone would take them away and throw them out. That practice did not strike Cobalt as odd during due diligence, and it appears that Cobalt itself continued that practice after it took over the station, as the program logs for the first three months of Cobalt’s ownership of the station, during which it claims the fraud continued, have also been destroyed. Because Cobalt has not proven that it is unusual for a radio station to throw away its paper program logs, and indeed continued the practice, the fact that that was done does not color my factual conclusions in this case, except that I do believe Crystal purposely failed to disclose to Cobalt that it likely had a month or so of logs on hand when Cobalt asked for access to logs in due diligence. That likely was deliberate. That said, although both parties at times contended that the program logs would represent persuasive evidence of what actually played or did

B. Crystal's Acquisition Of WRMF And Its Decision To Sell

Crystal owns and operates a number of radio stations in the South Florida area. It is owned and controlled by a single individual, Jim Hilliard, who has had a long and successful career in the radio industry. Crystal bought WRMF in 1998 in a transaction involving Clear Channel Communications, one of the nation's largest radio station operators. The structure of the 1998 transaction created an arrangement between Crystal and Clear Channel that ultimately gave rise to Crystal's need to sell the station a few years later.

Back in 1998, Clear Channel wanted to buy WRMF itself, but, because it already owned a number of radio stations in the area, FCC regulations prevented it from doing so. Clear Channel's hope, however, was that the FCC would later relax its regulations regarding the number of radio stations in a given market that a single company could own, at which time Clear Channel would buy WRMF. In order to maximize its chances of being able to do that, Clear Channel was happy to help put WRMF into the hands of Crystal, which it viewed as a friendly ally. Clear Channel therefore agreed to guarantee the debt Crystal used to buy the station and, in exchange, retained certain formal contractual rights related to WRMF. Apparently there was also an informal agreement between Crystal and Clear Channel pursuant to which, when the appropriate time came, Crystal would sell WRMF to Clear

not play on the air, I am inclined toward the view that the program logs themselves would carry little evidentiary weight in that those documents easily could have been doctored during the course of the fraud, and may even have been the very documents that the conspirators at Crystal used to carry out the fraud and to communicate to each other about which non-aired commercials should be invoiced. In other words, the Scott Aired Files are actually the more reliable, if somewhat less complete, record of what was actually aired by WRMF.

Channel. Clear Channel engaged in this type of relationship, known in the industry as “warehousing,” with respect to many radio stations in a number of markets in the late 1990s.

The debt that Crystal used to buy WRMF was owed to Bank of America, though Crystal submitted its debt service payments to Clear Channel, who managed the relationship with the bank. The debt, which had a principal amount of \$53 million, had a short maturity period and by 2001 had already come due. Clear Channel negotiated for a limited extension of the maturity. But by the summer of 2001, it became clear that the FCC was not, in the foreseeable future, going to allow Clear Channel to buy WRMF. Not only that, it was cracking down on the type of warehousing arrangements involved here and was pressuring Clear Channel to sever ties with Crystal and WRMF. Clear Channel therefore told Crystal that it would not continue to seek extensions from Bank of America and that Crystal would either have to refinance the debt, which Clear Channel would not continue to guarantee, or else sell the station.

The problem for Crystal was that it was unable to refinance the debt on its own,³ and therefore had little choice but to sell by the time the debt came due in the summer of 2002. Jim Hilliard’s personal financial situation around this time appears to have been less than ideal in that the approximately \$7.5 million tax bill that he incurred as a result of Crystal’s

³ Deposition of Richard Hindes (“Hindes Dep.”) at 234 (“[P]art of what prompted [Hilliard] to sell the station was that he went to the bank to get money to take over the loan that Clear Channel had, and the banks would not give Jim, based on his own [credit], the total amount of funds necessary to pay off Clear Channel and continue operating the station.”).

sale of WRMF was not timely paid, resulted in the filing of a tax lien against his assets, and was not satisfied until June 2005, nearly three years after the sale of WRMF to Cobalt.⁴

Because of the \$53 million debt owed to Bank of America, and the large tax bill Crystal would incur in a sale, Crystal needed to clear a sale price of more than \$60 million in order for Hilliard to break even on the deal. In fact, the sale price needed to be even higher than that because Hilliard had promised substantial bonuses to his top managers at WRMF, contingent on a profitable sale of the station. Those bonuses included a promise of \$500,000 to \$600,000 to Tim Reeve, WRMF's general sales manager, \$300,000 to George Johns, a Music Director at WRMF, and \$100,000 to Ric Hinds, WRMF's controller.

C. The Crystal-Cobalt Negotiations And The Asset Purchase Agreement

Having decided to sell, Crystal began preliminary talks with several buyers and entered into serious negotiations with another large radio station operator, Jefferson Pilot. Jefferson Pilot, however, withdrew its indication of interest in WRMF after a preliminary due diligence review.

Eventually, Cobalt emerged as a potential purchaser. One of Cobalt's principals, Chet Tart, had worked for Jim Hilliard in the past, and had also been the general manager of WRMF for a number of years before Crystal owned it. Tart hoped to get his old job back running WRMF under Cobalt's ownership. Tart and another of Cobalt's principals, Michael Cutchall, saw WRMF as an excellent opportunity to acquire a premiere radio property in the growing West Palm Beach market. Tart and Cutchall considered WRMF a "crown jewel"

⁴ See Joint Exhibit ("JX") 156 (tax lien paperwork).

property, thinking it particularly attractive because, although considered a West Palm Beach station, WRMF had a strong signal that reached into the affluent northern Miami suburbs.

Cutchall took the lead in the negotiations, which went slowly at first because Cutchall thought Hilliard's initial \$100 million asking price was far too high. After Hilliard gave some summary financial statements to Cutchall, which indicated that WRMF's annual cash flow was about \$5 million, Cutchall told Hilliard he thought he could do a deal at \$75 million, which was based on a multiple of fifteen times cash flow. After September 11, 2001, though, some of the equity investors Cutchall had lined up backed out, and the cash flow multiple fell to fourteen. Cutchall told Hilliard, though, that if Hilliard agreed to a \$70 million sale price, when Cobalt eventually decided to sell WRMF, Cutchall and Tart would share some of their profit on the sale with Hilliard.⁵ Hilliard agreed, and Cutchall lined up equity financing for the deal from a private equity firm, Great Hill Partners, which specialized in the broadcasting industry.

In early February 2002, Cobalt and Crystal entered into a letter of intent for Crystal to sell all of the assets of WRMF to Cobalt for \$70 million in cash. The letter of intent was conditioned on Cobalt's verification, through due diligence, that WRMF's cash flow was in fact \$5 million, as represented by Hilliard.⁶ Stephen Gormley, a principal in Great Hill Partners testified that WRMF's cash flow was particularly important to his decision to cause Great Hill to invest in WRMF because in order to achieve the kind of returns expected by

⁵ Cutchall and Tart, in their personal capacities, eventually executed a \$5 million promissory note in favor of Crystal. See JX 8. The validity and enforceability of this note is the subject of separate litigation in Florida and is not in issue in this case.

⁶ See JX 3.

private equity investors like Great Hill, Cobalt would need to get a substantial amount of debt financing from a traditional senior lender, which in a deal like this will base the amount it is willing to lend strictly on a radio station's cash flow. Lenders of that type were offering to lend Cobalt about six times cash flow, a little bit less than half of the cash purchase price. At all relevant times, Hilliard and his Crystal subordinates knew that Cobalt was premising its offers on a multiple of broadcast cash flow, a common approach in acquisitions of radio stations.⁷

The issue that Cutchall and Gormley were particularly concerned about was that because Crystal owned and operated several radio stations out of a single facility that housed both WRMF and the other stations, and because WRMF and the other stations shared employees and equipment, Crystal's unaudited financial statements might improperly be allocating certain expenses incurred by WRMF to the other stations. Cobalt hired an accountant who specialized in radio transactions of this type, Les Sufrin, to look at Crystal's books. At that point, Cobalt sought to verify that WRMF was in fact bringing in the revenues it claimed and that Crystal was properly allocating its total expenses to each of the individual stations that incurred them.

After a preliminary due diligence review, Les Sufrin was able to verify that WRMF was in fact collecting the amount of cash it claimed to be collecting. But, after re-allocating various expenses in accordance with generally accepted accounting principles ("GAAP"), Sufrin concluded that WRMF's cash flow was only about \$4 million, not \$5 million, as claimed.

⁷ Hindes Dep. at 240-41.

Based on Sufrin’s conclusion, Cobalt sought to renegotiate the deal. At the same time, though, Crystal showed Cobalt a series of “pacing reports” — essentially projections based on actual advance advertising sales — showing substantial positive growth in advertising revenue. Indeed, by all accounts, WRMF appeared to be performing phenomenally well during the first several months of 2002. Rather than suffering a customary drop off in revenue following the advertising rush leading up to the December holidays, WRMF kept its revenue levels steady at just over \$1 million a month from February through May of 2002, a year-over-year revenue increase of about 40%. The pacing reports suggested that by early summer 2002, when the transaction was set to close, WRMF’s cash flow would be \$5 million, even on a proper allocation of expenses. On that basis, Cobalt agreed to keep the purchase price at \$70 million. But because of the added uncertainty, the payment terms were changed. The deal was now \$63 million in cash and a \$5 million subordinated promissory note.⁸ In addition, Crystal would receive a \$2 million equity interest in Cobalt.

On March 8, 2002, a formal Asset Purchase Agreement was entered into between Crystal and Cobalt on those terms. The transaction was subject to a financing contingency and was conditioned on satisfactory completion of additional due diligence. The Asset Purchase Agreement also contained important representations and warranties designed to protect Cobalt. These representations and warranties included the following:

- The financial statements Crystal has provided to Cobalt “fairly and accurately reflect the financial condition, operating results, and the income and expenses [of

⁸ This \$5 million promissory note is separate, and in addition to, the \$5 million note that Cutchall and Tart executed in their personal capacities.

WRMF] and do not fail to reflect any material information bearing on [WRMF's] financial condition or operating results.”⁹

- Crystal has “in its conduct of [WRMF's] business complied in all material respects with all applicable statutes, regulations, and orders”¹⁰
- “The operation of [WRMF] is in compliance with . . . all [] applicable federal, state, and local rules, regulations, requirements and policies”¹¹
- “There is no [] litigation, action, suit, investigation, or proceeding pending or, to the best of [Crystal's] Knowledge, threatened that may give rise to any claim against [WRMF] . . . or adversely affect [Cobalt's] operation of [WRMF] after the Closing. [Crystal] is not aware of any facts that could reasonably result in any such proceedings.”¹²
- “No statement made by [Crystal] to [Cobalt] and no information provided or to be provided by [Crystal] to [Cobalt] pursuant to this Agreement or in connection with the negotiations covering the purchase and sale contemplated herein contains or will contain any untrue statement of a material fact or omits or will omit a material fact.”¹³

The Asset Purchase Agreement also contained an indemnification provision in which Crystal promised to “indemnify and hold [Cobalt] harmless against [] any breach, misrepresentation, or violation of any of Crystal's representations or warranties.”¹⁴ The indemnification provision covered all costs and expenses related to Crystal's breach(es), “whether suit is instituted [against Cobalt] or not.”¹⁵ Under the Asset Purchase Agreement,

⁹ JX 7 at § 7.14.

¹⁰ JX 7 at § 7.12(a).

¹¹ JX 7 at § 7.12(d).

¹² JX 7 at § 7.10.

¹³ JX 7 at § 7.18.

¹⁴ JX 7 at § 12.1.

¹⁵ *Id.*

indemnification was not Cobalt's sole remedy,¹⁶ and the Agreement did not purport to limit Cobalt's contractual or extra-contractual remedies in any way.¹⁷

After the Asset Purchase Agreement was executed, Cobalt's accountant, Les Sufrin, made several trips to WRMF's facilities to conduct due diligence. The primary focus of Sufrin's due diligence was again to verify WRMF's cash receipts and expenses and to keep tabs on the monthly financial statements and projections Crystal was preparing in order to satisfy Cobalt that WRMF's cash flow for the trailing twelve months leading up to the closing would reach the \$5 million level. As stated, Cobalt was doing the deal based on Hilliard's representation that WRMF's cash flow for the twelve months leading up to the closing would be \$5 million and both the equity and the debt financing Cobalt had lined up was dependent upon that figure. Based on the due diligence and financing contingencies in the Asset Purchase Agreement, Cobalt believed that it had retained the right to back out of the deal if WRMF did not hit that cash flow number. As a result, Sufrin continued to review the pacing reports and monthly financial statements that Crystal provided to him throughout the first half of 2002, concluding in June that his best estimate of WRMF's cash flow for the trailing twelve months leading up to June 2002 was \$5.26 million. On that basis, the transaction closed on June 28, 2002.

D. WRMF's Traffic Practices And The Marketron System

Much of the factual dispute in this case centers on WRMF's traffic process and the activities of the traffic department in scheduling commercials and reconciling the schedules

¹⁶ JX 7 at § 12.5.

¹⁷ JX 7 at § 13.3.

against what actually played for purposes of billing. The heart of the traffic process at WRMF was a computer program called “Marketron,” which scheduled all of the station’s music, talk time, and commercials.

WRMF pre-set the Marketron system to allow the station to schedule between 16 and 18 commercials per hour.¹⁸ WRMF generally sold two different types of commercials, pre-recorded commercials and Live Read commercials. About four out of the 16 to 18 pre-scheduled commercials per hour were Live Reads. The rest were pre-recorded.

It was possible to set Marketron to schedule as many minutes of commercials as desired, but WRMF never caused Marketron to exceed 18 minutes of scheduled commercials per hour.

WRMF’s general manager had ultimate authority over how Marketron was set. The general manager was aided in this decision by input from both the station’s sales manager, Tim Reeve, and the program director, Russ Morley, who was also WRMF’s morning drive time disc jockey. There was tension between Reeve and Morley regarding the number of commercials the station should play. Reeve typically wanted to schedule more commercials in order to increase advertising revenue because his compensation was directly tied to the amount of advertising revenue the station earned. Morley wanted fewer commercials because less ad time usually means better ratings and both his compensation

¹⁸ Each commercial was generally a minute long. The exact number of pre-scheduled commercials varied depending on the time of day. During the morning drive hours, for example, WRMF set its Marketron system for 18 minutes of commercials. During the mid-day, WRMF typically set Marketron for 16 minutes, and sometimes slightly less, per hour.

and his reputation as a program director, and on-air personality, depended on WRMF's ratings.

The daily operation of the Marketron system was the responsibility of WRMF's traffic manager, Lisa Colson. Colson continued as traffic manager for about three months after the sale. It was immediately upon her departure that Cobalt noticed that it was unable to get all of the commercials it was selling onto the air.

Colson's daily commercial scheduling and reconciliation process went as follows: Each day, Colson would review sales orders provided by the sales department and would arrange the commercials into Marketron's pre-scheduled commercial time slots. Colson would then merge the commercial schedule with the station's music and talk schedule to create a complete broadcast day schedule. She would then designate the broadcast schedule as final in the Marketron system, thereby creating a "Marketron Board File" for the day. The Marketron Board File was the complete minute-by-minute list of what was scheduled to play on the air each day. Colson would electronically transfer the Marketron Board File to the Scott System located in the broadcast studio, allowing the schedule to show up on the touch-controlled computer screen of the Scott System that the disc jockeys used to actually play all of the programming.

Colson would also print out the Marketron Board File, and each day, before leaving the station, Colson, or another traffic employee helping her, would leave the paper print out in the broadcast booth so that the disc jockeys would have it when they began the broadcast day early the next morning. This hard copy served as the station's written program log, which the disc jockeys wrote on to indicate when they deviated from the pre-set schedule. It

was possible for the disc jockeys to delete pre-scheduled content from the Scott System and to add additional stuff that was not scheduled. When they did that, the disc jockeys would write by hand on the paper program log what they deleted, what they played, and when, and would certify that by signing the bottom of the log.

To the extent that WRMF had sold more advertising time than it could fit into the 16-18 pre-set commercial minutes — which was all the time — it was physically impossible to schedule those additional commercials into the Marketron schedule without adjusting, in the software program, the number of allowed commercial minutes per hour, which, as stated, WRMF never did. Instead, Marketron would create a “bump file” listing all of the unscheduled commercials. Colson would print out that bump file and attach it to the written program log before putting it in the broadcast booth for the disc jockeys. Colson testified that WRMF’s disc jockeys were under instructions to try to fit in additional commercials from the bump file during the course of the broadcast day when possible. When they did so, Colson said they would write by hand on the paper program log which additional commercials they played and when.

After the broadcast day ended, Colson would retrieve the written program log from the broadcast booth and would reconcile the program log against the Marketron Board File in order to determine what actually played on the air so that invoices could be prepared to bill the advertisers. Colson would also print a copy of the Aired File generated by the Scott System for the day. Going into trial, Colson claimed that she used the Scott Aired Files to confirm that the program logs signed by the disc jockeys were accurate and that only

commercials actually aired were billed.¹⁹ At trial, after it became clear that large numbers of invoiced commercials did not appear in the Aired Files, Colson contradicted herself, giving confusing and unconvincing testimony to the effect that although she printed out the Scott Aired Files she really only used the program logs to do her billing work.

In the billing process, invoices were generated from the Marketron Board Files. Therefore, according to Colson, to the extent the disc jockeys had indicated on the paper program logs that they had played commercials that were not pre-scheduled in the Marketron Board Files, Colson would go back and add those commercials into the Board Files after the fact in a process called “post logging.” Because of the limitations of the software, it was impossible, even during the reconciliation process, to fit additional commercials into the Board Files past the 16-18 minutes of pre-set commercial slots. Colson solved this problem by adding the additional commercials into open spots in the schedule during the less-desirable, and therefore uncrowded, overnight periods. For example, if the disc jockey decided during the 8:00 a.m. hour (a prime morning drive hour) to forgo an extra minute of talk time in his program in order to play an extra commercial from the bump file, Colson was not able to physically put that commercial into the 8:00 a.m. hour on the Board File during her reconciliation process. Instead, she would put it into a slot at, say, 3:46 a.m., and would note in the Board File that the commercial actually aired at 8:00 a.m. so that the advertiser would be billed a rate commensurate with an 8:00 a.m. air time.

¹⁹ Crystal’s Opening Pre-Trial Brief at 28; Trial Transcript (“Tr.”) at 849 (discussing Colson’s deposition testimony in which she claimed she used the Aired Files for reconciliation purposes).

All of the disputed commercials that Cobalt says Crystal billed for but did not air were post-logged spots. In the months when the alleged fraud was at its height, Colson would typically post log about 60 minutes worth of commercials per day. Because radio stations like WRMF are typically able to sell high-dollar ads of the type that were post logged for only about 18 hours out of the day, that works out to about 3.4 minutes of commercials per hour that Crystal claims it played in addition to the 16 to 18 minutes that were pre-scheduled in Marketron. Cobalt claims that WRMF did not actually play this extra 3.4 minutes of commercials per hour, but rather that Colson would regularly post log large numbers of spots that were not actually played so that Crystal could bill its customers for spots that did not air.

E. The Scott System

Cobalt's primary evidence that all billed commercials were not aired derives from the records of WRMF's broadcast system, the Scott System. The Scott System is a digital audio system that WRMF used as the primary playback device for playing music and commercials over the air.

After WRMF produced its advertisers' commercials in its production studios, or received recordings of the commercials from the advertisers or their advertising agencies, it would load and store the pre-recorded commercials in the Scott System. Each pre-recorded commercial was designated with a unique identifying number that began with the letters CM. For example, commercial number CM1000 might be a particular fast food restaurant commercial that would run multiple times over the course of several weeks. Marketron also referenced each commercial by its unique CM number. Therefore, when the Marketron

schedule was loaded into the Scott System, the Scott System would automatically call up the digital audio file for the scheduled commercial at the time the commercial was set to play.

The Scott System had two modes of operation, automatic and manual. If left in automatic mode, the Scott System would automatically play everything from the pre-set Marketron schedule, in order, one item after the next, at the scheduled time. In manual mode, the Scott System would still call up all of the pre-recorded commercials, music, and other material that was scheduled to be played, but would only play things when the disc jockey pressed a button on the touch-controlled computer screen instructing the system to do so, which the Scott System would prompt the disc jockey to do at the scheduled time for each item. In addition, the Scott System also has a “hot buttons” feature, which allows disc jockeys to program sound effects or other often played audio materials such as frequently repeated songs, commercials, or comedy bits. The disc jockey can then play that pre-stored item simply by pressing the “hot button” on the touch screen.

The only thing the Scott System cannot do by itself is play the things that actually come out of the disc jockeys’ mouths like Live Read commercials and disc jockey “banter” (though the Scott System can record that stuff and play it back later). The System would, however, indicate to the disc jockey whenever he was supposed to do a talk set or a Live Read.

Testimony regarding the Scott System reflects that it is a useful and user-intuitive system that does its job remarkably well. Digital audio systems like the Scott System revolutionized radio broadcasting by creating essentially a one-stop shop from which disc jockeys can play everything they would ever need or want to play on the air, without having

to search around the broadcast studio for compact discs, tapes, records, or “carts.” In fact, the physical compact discs, tapes, etc. were not even located in WRMF’s broadcast studio, but were instead stored in a separate storage closet in another part of the building.

The Scott System was the main component of the WRMF broadcast studio and consisted of two computers. One of those computers was called the production bank. It stored, as digital audio files, all of the music and pre-recorded commercials the station played. It was connected, through digital audio cards, to the audio chain that played out over the air. The other computer was the control unit and was connected to a touch screen monitor, a keyboard, and a mouse, which were the things the disc jockeys used to tell the Scott System what to do. It is the control unit that loaded the Marketron Board Files and received instructions from the disc jockeys. The control unit would then communicate instructions to the production bank, essentially telling the production bank what to play. The Aired File is a log of all of the communications between those two computers. It is a text file that describes everything that the control unit told the production bank to play.

For every item broadcast by the Scott System, the Aired Files record the item’s unique identifying number, its title, the precise second at which it began playing, and the duration for which it played. The Aired Files also reflect, with an entry reading “L1,” when the disc jockey would have been prompted to do, and presumably did, a Live Read commercial, and would indicate the duration of the Live Read. The Aired Files logged all of these items regardless of whether the System was in manual or automatic mode. *The Aired Files also logged every item that was played regardless of whether the item had been pre-scheduled in the Marketron Board File or not.*

It was easy for disc jockeys to call up items to play in the Scott System that were not pre-scheduled by Marketron: there was no rational reason for them to use any other method, much less one that required them to leave the broadcast studio and go to another part of the building where physical tapes, compact discs, or other media were stored. To play a song that was not pre-scheduled, for example, the disc jockey could simply search the Scott System's hard drive by artist or song title, bring the digital audio file onto the touch screen of the control unit and press play. To play a commercial from the bump file, the disc jockey would simply call up the commercial in the Scott System by its unique CM number — which would be indicated right on the bump file itself — and would play it through the System. The Aired Files would log all of these actions and would reflect that the unscheduled song or commercial played through the System.

F. Cobalt's Bad Billings Analysis

Cobalt's case is premised on the fact that the Aired Files it extracted from the Scott System in WRMF's broadcast studio do not match up with the station's billing records — specifically, that WRMF was invoicing more minutes of commercials per day than show up in the Aired Files.

Cobalt first began an analysis of the Aired Files in February 2003 after it had experienced several consecutive months where, although it had not sold any more commercials than it had typically been selling and was not airing materially fewer commercials, it had been unable to “clear” an unusually large number of the commercials it had sold. The individual that Cobalt asked to perform this analysis was Dale Graham, a

former Scott Studios employee and the independent contractor who maintained the Scott System at WRMF.²⁰

Graham testified at length about the process by which he attempted to reconcile the Aired Files with WRMF's billing records. At first, Graham selected a small number of WRMF's invoices from early 2002 and attempted to spot check all of the billed ads in those selected invoices against the Aired Files. Each of the invoices listed all of the ads that were billed and the date and time at which the ads purportedly aired. Graham used that information and attempted to locate the invoiced ads in the Aired Files at the times the ads supposedly ran by paging through the cumbersome Aired Files, going to the time at which each commercial supposedly aired, and seeing if there was entry in the Files for the commercial or not.²¹

Graham found that many of the ads matched up with the Aired Files. That is, the Aired Files reflect that those ads played at the times indicated on the invoices. But Graham was not able to locate *all* of the invoiced ads. The pattern he found was that on every invoice, most of the invoiced ads were in fact reflected in the Aired Files as having been played. But alongside those "Verified Billings," a number of invoiced ads could not be reconciled against the Aired Files. Graham was unable to come up with any explanation as to why the invoiced ads did not appear in the Aired Files because the Scott System was

²⁰ Cobalt later hired Graham on a full time basis and he currently serves as Cobalt's Director of Information Technology.

²¹ When spot checking each billed advertisement, Graham also looked through the Aired Files for 45 minutes before and after the time listed on the invoice. He chose that time window in light of the prevailing industry standard, and policy at WRMF, that an advertisement can be considered as having run at a particular time so long as it ran within 15 minutes before or after the time stated.

designed to log every item that was played, and by all accounts had been properly configured and was doing just that. As a result, Graham concluded that those unreconcilable ads represented “Bad Billings” and that those ads had not in fact been aired.

In performing his analysis, Graham focused only on the *pre-recorded commercials* that were invoiced and did not attempt to determine whether all of the invoiced Live Read commercials were or were not actually read. The reason for this was that the Scott System is not capable of accurately logging everything that comes out of the disc jockeys’ mouths during the broadcast day. It is true that when a Live Read is scheduled and not deleted from the Scott System, the Aired File registers an entry reading “L1” to indicate that the Live Read was done. But it would have been possible for the disc jockeys to do Live Reads at other times when other content was scheduled, such as during a talk set or the time scheduled for a news report. There would be no indication in the Aired Files of that Live Read having been done. Therefore, because there was no way to prove otherwise, Graham’s analysis assumed that *all* Live Read commercials were in fact read on the air, and thus *no Live Reads are included as Bad Billings*.

In order to determine the full extent of the Bad Billings during the time leading up to the sale of WRMF, Graham obtained the Marketron Board Files for each day during the 18 months prior to the June 2002 closing. The Marketron Board Files were the Files used to prepare WRMF’s invoices and thus reflected all of the ads that were billed, including the post-logged spots that are alleged to be the source of the discrepancies. Graham wrote a software program to compare the Board Files and the Aired Files and thus to determine precisely how many ads were included in what Graham determined to be Bad Billings. The

software program's comparison of the Board Files and the Aired Files identified approximately 16,000 minutes of invoiced pre-recorded commercials over the 18 months leading up to the sale of WRMF that do not appear in the Aired Files.

The results of Graham's analysis were corroborated by another expert, Richard Rowland, using a software program that he developed called "Powerlink." Rowland markets Powerlink to radio stations like WRMF for use in reconciling their pre-set schedules with the Aired Files that reflect what actually played. The purpose of using a program like Powerlink is to create an audit trail to prove to advertisers that the commercials they paid for played on the air. WRMF currently uses Powerlink to perform this function, although during the time period relevant to this case, it did not use any computer program for that purpose. Rather, this is what Lisa Colson supposedly did manually during her reconciliation process. In analyzing the time period relevant to this case, Rowland, using Powerlink, performed an independent comparison of the Marketron Board Files and the Scott Aired Files. That comparison produced results identical to Graham's analysis. Despite strenuous efforts to discredit Rowland's analysis, Crystal failed entirely in that project, and Rowland's analysis is credible, persuasive evidence of fraud.

Cobalt's Bad Billings Analysis revealed a pattern in which the amount of Bad Billings each month increased from less than \$50,000 a month in early 2001 to more than \$250,000 per month in February and March 2002, when the final negotiations over the sale price and terms of the Crystal-Cobalt transaction were taking place. In other words, the scope of the alleged fraud was at its greatest during the time when Crystal had the strongest

motive to inflate its cash flow in order to make sure a deal got done and to squeeze a higher price out of Cobalt.

Importantly, alongside its Bad Billings Analysis, Cobalt also performed an analysis of the billings that it *was* able to verify by reference to the Scott Aired Files. This “Verified Billings Analysis” buttresses the reliability of the Bad Billings Analysis for an important reason. By most accounts, during the period leading up to the sale of WRMF, the station was playing about 16-18 minutes of commercials per hour, consistent with the typical practices of similar radio stations.²² The Verified Billings account for all of those 16-18 minutes of commercials.²³ Therefore, to the extent that the Bad Billings actually represent commercials that were played, WRMF would have to have been playing substantially more commercials than (1) any of its competitors played; and (2) any of WRMF’s salespeople or disc jockeys testified to having been played by WRMF during the relevant time.

In this vein, it is telling that not a single witness for Crystal, other than Lisa Colson, whose testimony I did not believe, testified to WRMF playing the amount of commercials for which the station was billing.²⁴ Moreover, the testimony of Crystal’s witnesses was

²² See Tr. at 51, 970, 1013.

²³ For example, in January 2002, the Verified Billings accounted for, on average, 17.5 minutes of commercials per hour. Tr. at 536-37.

²⁴ Although Russ Morley did testify that there was an increase in the number of commercials WRMF played during the last few months leading up to the sale, see Tr. at 954-55, he did not testify that the number of commercials reached above 20 minutes per hour, which would have been the case had WRMF really been airing all of the commercials it invoiced. Also, testimony about an increase in commercial load during those few months does nothing to explain all of the Bad Billings that stretch as far back as 18 months before the sale. Moreover, even if WRMF had in fact played all of the commercials that it now claims it played, that important change in its programming itself would have been a breach of the Asset Purchase Agreement, which required Crystal to “operate [WRMF] in the normal and usual manner[,] conduct the Station’s business in the ordinary course . . . [and] maintain the present character and entertainment format of the Station and the quality of

often inconsistent on this point. For example, Colson initially testified that WRMF typically played two to three minutes of commercials in addition to the 18 minutes that were pre-scheduled in Marketron, but then changed her story and said that the station was airing as many as 25 minutes of commercials during certain hours of the day.²⁵ Neither of those stories jelled with sales manager Tim Reeve's trial testimony about WRMF's pre-sale commercial load, which wavered for a few minutes and ultimately settled on 16 to 18 minutes per hour, depending on day part.²⁶ And even that figure was inconsistent with Reeve's deposition testimony in which he said that WRMF was only airing about 15 minutes of commercials per hour during that time.²⁷

Another aspect of the Bad Billings Analysis also buttresses its reliability, which is that there are a number of days in which the Analysis revealed no Bad Billings. Crystal initially and intuitively seized on this fact as helpful to it, contending that the absence of Bad Billings on certain days undermined the evidentiary force of the Analysis for some unarticulated reason. But a review of the specific days in which there are no Bad Billings shows that almost all of those days are weekends, mostly Sundays,²⁸ when (1) it is likely that Lisa Colson and the others responsible for the fraud were not present at WRMF to carry

its programs" JX 7 at 9.6(a). A material increase of the number of aired commercials would involve an operation of the station outside of the ordinary course of business and would alter the character and quality of the station's programming.

²⁵ Tr. at 910.

²⁶ Tr. at 1009-1014.

²⁷ Tr. at 1009-1010.

²⁸ For example, from January to May 2002, when the fraud was at its height, the days on which there are no Bad Billings, other than April 9, the day on which Les Sufrin asked that the program log be set aside for him to review, are January 6 (Sunday), January 20 (Sunday), February 3 (Sunday), February 17 (Sunday), March 3 (Sunday), April 14 (Sunday), and May 4 (Saturday). See JX 124 (listing all Bad Billings for 2002 and showing no Bad Billings on those dates).

it out; (2) the station was less likely to be in an oversold situation because there are fewer listeners on those days than on ordinary workdays; and (3) the value of the fraud to WRMF would be reduced because the cost of each commercial spot on those days was less than during the regular work week.²⁹

Finally, Cobalt's Bad Billings Analysis also reflects that the majority of the Bad Billings were attributable to national, as opposed to local, advertisers. Advertisers like Dunkin Donuts, AT&T Wireless, and Washington Mutual show up frequently in Cobalt's Bad Billings Analysis. WRMF sold advertising time to these businesses through advertising agencies that handle many accounts, are not local to the West Palm Beach market, and thus were not likely to have been listening to the station to check that all of the commercials being invoiced were actually played. With respect to local advertisers, who would be more likely to perform checks of that type, the Bad Billings were far less common. This pattern reflects that Crystal focused its fraud on national advertisers in order to minimize the chances of the fraud being detected. Crystal also minimized its chances of the fraud being detected by spreading out the fraud among a large number of its advertisers and by playing most of the commercials for which advertisers were charged. By slipping in say two unaired commercials on an invoice for ten, and doing that on every invoice to every national customer, Crystal assured itself that even if the customers or ad agencies were listening, they would still hear most of their ads.

²⁹ See, e.g., JX 131 (Listing WRMF's Verified Billings for March 2002 and showing that WRMF played far more free and discounted ads on Sundays than it did on regular workdays).

G. April 9, 2002: A Very Special Day At WRMF

The fraud that occurred at WRMF is further supported by Crystal's own conduct during Cobalt's due diligence process. During that process, Cobalt's accountant Les Sufrin was concerned, to some extent, with verifying the overall integrity of WRMF's operations and assessing the internal controls of WRMF's billing and collections practices. During his first visit to WRMF after the signing of the Asset Purchase Agreement, Sufrin noticed the discrepancies between the Scott Aired Files and WRMF's billing records. In his report to Cobalt, Sufrin wrote:

In 1998, WRMF ceased keeping the daily program logs that are used by the DJ's or announcers to run or announce the daily advertisements. This daily program log is the only document that serves as proof that the Advertisement was aired. Again, the program logs are not being kept. During fieldwork (as an alternative verification procedure), [I] requested a print out of the [Scott Aired Files], which [are] production report[s] printed from the Scott production system and [are] currently the only trail of the transactions for the entire period Various invoices selected during our testing could not be found [in the Aired Files].³⁰

Sufrin concluded that WRMF's internal controls were weak. But, although he was aware of the discrepancies between the Aired Files and the invoices, Sufrin did not uncover the fraud that Cobalt's Bad Billings Analysis later revealed. Rather, Sufrin inquired about the discrepancies he had found and was told that the written program log was the only document that could be used to accurately reconcile what was played on the air with what was billed. Sufrin was told that those program logs were unavailable because Crystal did not retain them. That was not really true and Crystal knew it. Crystal stored the program logs in

³⁰ JX 55.

boxes in Lisa Colson's office, where they sat and piled up until they became too cumbersome and were thrown out in large bunches.³¹ Crystal therefore likely had several weeks, if not months, of such logs on hand at the time Sufrin asked for them. But it led Sufrin to believe that none were available for review. Crystal had something to hide.

In advance of Sufrin's next visit to WRMF, in early April, Sufrin requested that one of the program logs for a day around the time he would be visiting be set aside and given to him. Sufrin received the program log for April 9, 2002. That document was preserved in Sufrin's files and is the only written program log that was presented in this case.³² Not coincidentally, April 9, 2002 was an extraordinary day at WRMF, at least insofar as the *billing* of commercials was concerned. Tellingly, it was a typical day as to the *actual broadcasting* of commercials by WRMF. Cobalt's Bad Billings analysis did not uncover any Bad Billings on April 9. Consistently, there are also *zero* post-logged spots for that day on the Marketron Board Files, which is contrary to what Crystal says was normal. Indeed, there are no handwritten indications on the April 9 program log showing that WRMF's disc jockeys added additional commercials from the bump file that were not pre-scheduled in Marketron. This was also contrary to what Crystal says was normal.

The fact that no Bad Billings occurred on April 9 is highly suspicious. The most reasonable inference to be drawn from that is that, knowing Sufrin would be looking over

³¹ See Tr. at 810-813.

³² See JX 97. Russ Morley, WRMF's morning drive time disc jockey, testified that JX 97 looked somewhat different from typical WRMF program logs. According to Morley, the signature line that appears on the bottom of typical logs was missing from the exhibit. Morley claimed that the exhibit was also on a different size paper from the typical logs. Morley also explained that there was no bump file attached to the April 9 log or included in the trial exhibits. Morley stated that whenever he was given a program log in the broadcast studio, it was always accompanied by a bump file. Tr. at 971.

their shoulders for that day, the individuals at Crystal who perpetrated the fraud put the fraud on hold for the day in order to avoid detection. Crystal's deceptive efforts worked. After cross checking the April 9 program log against WRMF's invoices, Sufrin found no material discrepancies and was satisfied that the earlier discrepancies he had found between the Aired Files and WRMF's invoices did not raise a substantial enough red flag to warrant further investigation.

III. Crystal's Attempts To Explain The Discrepancies Between The Aired Files And WRMF's Billing Records

In its opening pre-trial brief, Crystal called this case a "shakedown." It claimed that Cobalt was suffering buyer's remorse and had cooked up its allegations of fraud in an attempt to renegotiate a deal in which Cobalt thinks it overpaid. Crystal acknowledged the discrepancies between the Marketron Board Files and the Scott Aired Files, but insisted that Cobalt's reliance on those discrepancies was misguided and resulted from a misunderstanding of WRMF's operations, and particularly its traffic process. It insisted that its explanations at trial would render the discrepancies between the Board Files and the Aired Files meaningless.

As stated, none of Crystal's explanations were persuasive, and some were so lacking in merit that Crystal abandoned them even before trial. For example, in its pre-trial briefs, which relied on the report of its expert Dave Scott Blyth, Crystal contended that the missing commercials might have played from other Scott Systems located elsewhere in the building and that the missing commercials could be accounted for as Live Reads that would not have been logged in the Aired Files. But because those contentions obviously ignored the

undisputed evidence that only a single Scott System existed in WRMF's broadcast booth from which things were played on the air and that Cobalt's Bad Billings Analysis gave credit for every single Live Read that was invoiced, Crystal did not press those arguments at trial.³³

In this section of the opinion, I address each of the additional attempted explanations that Crystal continued to press at trial and explain why none weaken the compelling evidence of fraud presented by Cobalt and why the multitude of unpersuasive explanations actually strengthen the inference that the alleged fraud occurred.

A. Crystal's Reliance On Lisa Colson's Special Traffic Management Skills

Crystal first seized on the fact that Cobalt did not begin to experience irregular difficulties clearing the ads it sold until immediately after Lisa Colson resigned as traffic manager of WRMF, which happened three months after the sale. Crystal's first explanation was that Colson was an especially skillful and creative traffic manager who was able to juggle all of the sold ads and get them on the air in ways that lesser traffic managers could

³³ In his expert report, Blyth contended that Cobalt's Bad Billings Analysis was incomplete and accused Cobalt's two experts, Graham and Rowland, of using the Scott Aired Files to misdirect the court's attention. But he provided no logical basis for his conclusion that Graham's and Rowland's analyses were incomplete, other than to assume, counterfactually, that WRMF's disc jockeys were playing commercials other than through the Scott System in the WRMF broadcast booth, which the trial testimony established they did not do. Blyth's report was rife with speculative blather. Instead of informing himself of the relevant facts and rendering an opinion applying his specialized knowledge to those facts, Blyth himself submitted an incomplete and rabidly aggressive report that did not even try to address the actual arguments made by Cobalt. Trite metaphors comparing Cobalt's Bad Billings Analysis to "a shell game played at carnivals with a pea under one of three walnut shells" do not substitute for an expert opinion based on actual facts. Blyth's inability to substantively rebut Cobalt's Bad Billings Analysis is also highlighted by the fact that once his explanations were discredited at trial, he resorted to an impromptu personal attack on Cobalt's expert Dale Graham based on facts that were not included in his expert report and that were not previously disclosed to Cobalt. See Tr. at 1111. Crystal did not offer Blyth as a fact witness and Blyth's personal attacks on Graham were unfair and improper.

not. Crystal's pre-trial briefs attributed much of WRMF's success in this regard to Colson's wizardry in the traffic room and claimed that her replacements, some of whom lasted only a few months on the job, simply could not rival her skills.³⁴

But there was nothing special in the way Colson ran traffic at WRMF that would explain the difficulties Cobalt had immediately upon her resignation. Much of Colson's discretionary judgment as a traffic manager consisted of deciding which commercials to put in the schedule (i.e., ensuring that the highest value spots from the station's best customers got first priority) and when (i.e., making sure that two furniture store commercials did not run back-to-back). As stated, because Marketron was pre-set to allow only 16-18 minutes of commercials per hour, it was physically impossible for Colson to schedule more commercials until Marketron was reset. The extent of Colson's efforts to air more commercials than were pre-scheduled in Marketron was to print out the bump file of unscheduled commercials compiled by Marketron and give it, along with the program log, to the disc jockeys with instructions for them to play any additional commercials they possibly could. That is, the job of juggling all of the items in the broadcast schedule with the goal of getting more commercials on the air — a job that Crystal claimed Colson did with virtuosic skill — was not handled by Colson. It was handled by WRMF's on air disc jockeys themselves. Colson merely collected the written program logs from the disc jockeys at the end of the broadcast day and did the post logging.

In this regard, Colson testified that the disc jockeys regularly wrote onto the program logs that they played large numbers of commercials in addition to those pre-scheduled in

³⁴ See Crystal's Opening Pre-Trial Brief at 19-29.

Marketron.³⁵ But, as stated, that testimony was repeatedly inconsistent and evasive, and was not corroborated by *any* of WRMF's disc jockeys. Colson initially testified that the disc jockeys would add, on average two to three commercials per hour, but typically only in the morning and afternoon drive times.³⁶ She then later contradicted herself, claiming that at times, the disc jockeys would add as many as six to eight minutes of commercials per hour.³⁷

WRMF's disc jockeys largely remained the same following the sale of the station to Cobalt and following Colson's departure in October 2002, and importantly, no WRMF disc jockey testified to adding such large numbers of commercials that were not pre-scheduled in Marketron, either before or after the sale. Rather, Russ Morley, WRMF's morning drive disc jockey and its program director testified that he typically played commercials from the bump file only about four to five times per week.³⁸ And he would generally do that only because there were sometimes problems with the audio files for the commercials that had been pre-scheduled in Marketron. That is, Morley went to the bump file not to add additional minutes of commercials, but to replace pre-scheduled commercials that he could not, for one reason or another, find in the Scott System.³⁹ In other words, Morley, who was

³⁵ *E.g.*, Tr. at 877-879. I note again that this was not the case on April 9, 2002.

³⁶ Tr. at 858-61.

³⁷ Tr. at 903.

³⁸ Tr. at 969.

³⁹ Morley testified that commercials were sometimes scheduled in Marketron that for one reason or another did not "make it into production the night before." Morley explained, "[i]t wasn't brought into production in a timely manner to be put into the system the night before. So when I would look up at the screen and it would show it was not loaded into the system, I would then go to the bump [file] and write in a commercial in its place." Tr. at 968.

proffered as a witness by Crystal, directly contradicted Crystal's theory that WRMF's disc jockeys regularly added large numbers of commercials from the bump file.

It is telling that Morley, who was the only believable witness presented by Crystal, described his daily broadcasting practices as being completely in line with the picture painted by Cobalt, which was that WRMF's disc jockeys largely followed the pre-set Marketron schedule and only rarely added additional commercials. In fact it would be completely illogical to infer that Morley was playing so many extra unscheduled commercials given that his compensation was tied to WRMF's ratings and he was consistently battling with Tim Reeve and other managers at the station to reduce WRMF's commercial load. Moreover, Morley's testimony was corroborated by David Brewster, another disc jockey at the station and WRMF's production director. Brewster testified that he never added substantial numbers of commercials from the bump file and that he had never witnessed any other WRMF disc jockeys doing so.⁴⁰

Other aspects of Colson's testimony were also inconsistent and highly suspect. For example, Colson testified at trial that so long as the disc jockeys wrote on the program logs that they played the commercials, she would not cross check that against the Aired Files. Colson's testimony at trial — that she relied, in her reconciliation process, solely on the written program logs — directly contradicted her prior deposition testimony on this point, in which she claimed that she reconciled the Scott Aired Files against the Marketron Board Files every day during the period leading up to the sale.⁴¹ Indeed, Colson printed out a copy

⁴⁰ Tr. at 387.

⁴¹ See Tr. at 849, 919-923.

of the Aired File for every broadcast day, an act that would have been useless had she really never used them, as she now claims.

Colson's explanation at trial for why she did not use the Aired Files in her reconciliation process involved the unbelievable claims that she considered the Aired Files unreliable, that there were often large chunks of time missing from the Aired Files, and that sometimes the Aired Files were unavailable due to things like power outages, hurricanes, and lightning strikes. But Cobalt has produced an Aired File for every day during the year and half leading up to the sale of WRMF and there are no substantial periods of missing time in those Files. Apparently lightning strikes were not as common at WRMF as Colson now claims. Moreover, there is nothing unreliable about the Scott Aired Files, as all of the testimony — including testimony from Crystal's expert Blyth — established that they accurately reflect everything that played through the Scott System.

Colson's inconsistent and evasive testimony highlights the fact that she played no special role in WRMF's ability to juggle the schedule to get large numbers of commercials on the air. It is also clear from the testimony of Morley and Brewster that WRMF's disc jockeys were not performing those scheduling acrobatics either. Indeed, this entire line of defense makes little sense in the first place because of its clear inefficiency. As stated, it was possible for WRMF's managers to change the settings in the Marketron system to allow for more commercials to be pre-scheduled. It is unreasonable to believe that WRMF was really regularly playing large numbers of commercials that were unable to be scheduled because they exceeded the number of minutes that WRMF set the system for. If they were, rational management would have reset the system to allow the additional commercials to be

pre-scheduled, thereby saving the disc jockeys from having to juggle the commercial load on the fly in the broadcast booth and saving Colson from having to go through the post logging process.

As the fraud was in fact implemented, Colson's post logging efforts were not very burdensome. She just jammed spots from the bump files into vacant, early-morning time slots.

B. Crystal Claims The Disputed Ads Played From Devices Outside The Scott System

Even if Crystal had produced some testimony to the effect that WRMF's disc jockeys were adding large numbers of additional commercials each hour, that would not explain why the disputed commercials do not show up in the Scott Aired Files because the Aired Files reflect everything that played through the Scott System, including unscheduled items added at the last minute.

Crystal's primary pre-trial explanation for the missing commercials was to point out that the Aired Files do not reflect 24 hours worth of aired material for each day because the Scott System does not log the time when the disc jockey is talking or doing weather, traffic, or news reports, etc. On average, the Scott Aired Files logged only about 22 hours worth of aired material per day. In this regard, Crystal argues that the Scott Aired Files obviously are not a complete record of everything that played on the air because, on average, there are two hours missing from each day's Aired File. Indeed, Crystal's expert, Blyth, testified that the Aired Files were never intended to be a complete record of everything that played on the air because the Scott System was intended to be supplemented in a station's broadcast studio by other playback devices. Crystal points out that several playback devices in addition to the

Scott System were present in the WRMF broadcast studio and available for use by the disc jockeys to play additional commercials. Those additional devices included a digital tape recorder called a “360 Machine,” a Minidisc Player, and three CD Players.⁴² To the extent that the disc jockeys used these other devices to play commercials, the commercials would not have been logged in the Scott Aired Files. Crystal contends that WRMF’s disc jockeys would regularly play large numbers of commercials from these other devices.

But Crystal did not answer the question of why the disc jockeys would use these other devices, instead of the much more convenient and accessible Scott System, to play additional commercials. To play commercials from one of the other playback devices, the disc jockey would actually have to have left the broadcast studio, walked to the separate storage room where the physical copies of the commercial recordings were stored on compact disc, located the correct compact disc, walked back to the broadcast studio, put in the CD Player, cued it up, and then played it. It is illogical to infer that WRMF’s disc jockeys did that repeatedly, to the tune of 60, and sometimes more, times per day, especially since it was so easy to play the commercial from the Scott System itself. Nearly all of the commercials that Cobalt claims were not played had CM numbers and were stored on the hard drives of the Scott System. To play any of those commercials using the Scott System, all the disc jockey would have to do is type in the commercial’s unique CM number listed on the bump file, call it up in the System, and press play. As Crystal wrote in its pre-trial brief,

Scott is a very flexible system, allowing the DJ or board operator immediate access by a computer touch screen to every recording that an operator would play, every script that would be read live

⁴² Tr. at 945.

on the air, access to change the order of events, or to delete and add events. *Scott also allows an operator to quickly call up and play unscheduled songs, jingles, sound effects, [and] commercials . . . usually within a few seconds.*⁴³

Crystal responds to this weakness in its argument by claiming elsewhere in its briefs that many commercials were often produced at the last minute and that there was often no time to load the commercial into the Scott System before it was played on the air. Crystal attempted to describe WRMF's broadcast studio as a chaotic environment in which people were constantly running into the studio with a CD or Minidisc in hand that contained a brand new commercial that was produced just minutes before it was scheduled to be aired. Crystal contended that it was a regular practice to play these last minute commercials from media outside of the Scott System and that the Aired Files would not log those plays.

But none of Crystal's witnesses testified to any such bizarre scenario. Rather, Russ Morley stated that, rather than playing commercials outside of the Scott System several times per hour, he would typically play commercials from CD or other media only about two or three times per week.⁴⁴ Except for those two or three rare exceptions, he played every single commercial from the Scott System.⁴⁵ David Brewster, the only other WRMF disc jockey to testify stated that he never played commercials using any device other than the Scott System.⁴⁶

Crystal's hypothesis regarding this supposed last minute production of commercials is also contradicted by the fact that the vast majority of the commercials that represent Bad

⁴³ Crystal's Opening Pre-Trial Brief at 27-28 (emphasis added).

⁴⁴ Tr. at 974-75.

⁴⁵ *Id.*

⁴⁶ Tr. at 377-78.

Billings in Cobalt's analysis consist of commercials with CM numbers that actually existed in the Scott System at the time that the commercial was supposedly played through some other device outside the System. In fact, in most instances, the very same commercial had been run through the Scott System on several previous occasions, and sometimes even earlier in the same day. Therefore, there would have been no rational reason to play it from another device. Not surprisingly, although Crystal contended in its briefs that many commercials were produced at the last minute with no time to load them into the Scott System, Crystal never came forward with a single example of a bad-billed commercial that did not have a CM number at the time Crystal contends it was played from some other device.

Finally, Cobalt established that in many instances, it would have been impossible for the commercials contained in the Bad Billings Analysis to have aired because the Scott Aired Files reflect that other things were playing during the time that the disputed commercials supposedly ran. For example, for the 4:00 p.m. hour on December 26, 2001, Cobalt's Bad Billings Analysis identified eight minutes of commercials that were invoiced but did not appear in the Aired Files. Yet the Aired Files logged 55 minutes and 39 seconds worth of programming for that hour.⁴⁷ Crystal does not explain how nearly 64 minutes worth of material could have aired in a 60 minute hour.

⁴⁷ See Tr. at 495-96. That hour of programming also contained 18 minutes worth of Verified Billings. *Id.* Similarly, in the 2:00 p.m. hour on December 5, 2001, Cobalt's Bad Billings Analysis identified four invoiced commercials that do not appear in the Aired Files. The Aired Files for that hour contain 59 minutes and 58 seconds worth of logged programming. *Id.* at 493-94.

Therefore, contrary to Crystal arguments, but consistent with testimony of its witnesses, I find that, with rare exceptions, all of the advertisements WRMF aired during the period leading up to the sale were played through the Scott System.

C. Crystal's Attacks On The Integrity Of The Aired Files

Once Crystal's attempts to explain why Cobalt's Bad Billings Analysis was wrong failed, it launched a series of attacks on the Aired Files themselves to try to show that the Aired Files should not be trusted as an accurate record of what WRMF played. The fact that Crystal did not advance arguments along these lines in its pre-trial briefs and did not focus on them at trial as its primary arguments until after its other explanations failed is a telling indicator of how lacking in merit these arguments are.

Crystal's first argument along these lines is based on the way in which the Aired Files were created. As stated, the Aired Files logged the communications between the two computers that make up the Scott System, the control unit and the production bank. It was possible to play audio material directly from the production bank, but this could only have been done by going to a separate keyboard located in another part of the broadcast studio and using it to control the production bank computer, unaided by the touch screen monitor that was connected to the control unit directly in front of the disc jockey. The inconvenience of doing that, of course, makes it illogical to infer that WRMF's disc jockeys did anything of that sort. Crystal failed to explain why disc jockeys would go to that trouble when they could have accomplished the same task by using the easy and intuitive touch screen monitor that was right in front of them. Most important, none of WRMF's disc jockeys testified that they ever played anything directly from the production bank. Rather,

they testified that they always used the touch screen monitor on the Scott System.⁴⁸ Indeed, the difficulty of playing commercials directly from the production bank effectively precludes me from affording any credit to this argument. Just because it was possible does not mean it happened and Crystal presented no evidence that it did.

Crystal's next argument relates to the Scott System's "hot buttons" feature. Crystal contends that it was possible for a disc jockey at WRMF to call up a commercial in the Scott System and store it on a "hot button." When the hot button would then be played, and the commercial would air, the Aired File would not reflect that the commercial itself was played, but rather, it would log a play of the hot button itself. Again, however, no WRMF disc jockey testified to ever having played commercials that way. Moreover, that hot button play would appear out of the ordinary. Most hot button plays logged in the Aired Files were of very short duration. The typical things played on hot buttons were brief sound effects. If a commercial were played using the hot buttons feature, it would be easily identifiable because it would last for about a minute, and Crystal has not identified any hot button entries in the Aired Files that it claims correspond to disputed commercials. Again, almost all of the allegedly bad-billed commercials had CM numbers and were reflected in the Aired Files as having been run at other, earlier times (often the same day) through the Scott System.

The last argument Crystal makes along these lines was not advanced until after trial and essentially involves an attack on the authenticity of the Aired Files produced by Cobalt. Crystal contends that the Aired Files should not be trusted because the Scott System was in

⁴⁸ Tr. at 975.

the custody of Cobalt at the time the Aired Files were extracted from the System and Crystal was somehow denied the opportunity to verify that the system was properly configured and functioning and that the Aired Files were not manipulated. WRMF's Scott System was dismantled and moved after the sale of WRMF to Cobalt because Cobalt moved WRMF's broadcast operations to a new location. Crystal's expert Blyth testified that, although in normal operation the Scott System would log in the Aired Files everything that the System played, it was possible to configure the Scott System so that it would not accurately log each played item.⁴⁹ On this basis, Crystal contends that Cobalt has failed to establish that the Aired Files are a reliable record of what played through the Scott System because — get this — *Crystal* might have configured the Scott System not to make accurate Aired Files.

I reject this argument initially because Crystal failed to make an authenticity objection to the Aired Files during trial and on that basis has waived its right to do so.⁵⁰ This case did not move to trial with lightning speed and Crystal had all the opportunity in the world to challenge the integrity of the Aired Files at an appropriate time in a way that comported with notions of fairness and professional courtesy. Had it done so, Cobalt could have developed a factual record to meet that challenge and could have presented evidence to demonstrate the accuracy of the data contained in the Aired Files it produced. But Crystal did not give fair notice of its desire to attack the accuracy of the Aired Files. Rather, its defenses were always based on the notion that the Bad Billings Analysis was incomplete and misguided, and only when those defenses failed did it shift gears and unfairly raise

⁴⁹ Tr. at 1130-31.

⁵⁰ *Clawson v. State*, 867 A.2d 187, 191 (Del. 2005) (explaining that evidentiary foundation issues must be raised either by a pre-trial motion or by an objection at trial).

tardy, new arguments that Cobalt had no reason to believe it would have to meet. Indeed, Crystal could have asked to inspect the hard drive on which the Aired Files were stored, but did not.

As important, Crystal has failed to put forth any evidence to suggest that the Scott System was not functioning normally, as it appeared to have been, or that the Aired Files were manipulated in any manner. Crystal, who was in control of the Scott System during the relevant time, has also failed to advance any rational reason why it would have configured the System to not log in the Aired Files everything that was played. Not surprisingly, Crystal also failed to produce a witness saying that he had changed the configuration of the Scott System at WRMF during Crystal's ownership to cause it to produce an incomplete Aired File.

As a result, having failed to make a timely challenge to the contrary and because all of its arguments along these lines lack merit anyway, I conclude, consistent with the testimony of expert witnesses from both sides, that the Scott Aired Files accurately reflect everything that played through the Scott System.

D. Crystal's Arguments About WRMF's Post-Transfer Revenues

Crystal's final argument with respect to the airing of the disputed commercials is based on an analysis of the revenue WRMF earned from playing commercials on the air in the period following the sale. This argument, like Crystal's arguments about the integrity of the Aired Files, were not advanced in a timely manner and Crystal did not give Cobalt proper notice of its intent to make them in a way that would have allowed Cobalt a fair chance to meet them at trial. Rather, when Crystal sought discovery related to Cobalt's

post-transfer financial performance, Cobalt objected on relevance grounds and Crystal did not timely move to compel its production. Although it did ultimately do so and was awarded the discovery it requested, Crystal did not highlight the arguments it now makes in its pre-trial submissions and did not focus on them at trial. No expert evidence was introduced by Crystal making a credible, apples to apples comparison of the performance of WRMF before and after the sale.

Based solely on a cursory review of WRMF's financial statements, Crystal now contends that there was a dramatic increase in net broadcast revenue at WRMF following the sale and that that increase proves that WRMF's pre-transfer revenue was all legitimately earned. Crystal points out that WRMF's net broadcast revenue for the calendar year 2003 (the first full year following the sale) of \$9.65 million represented an increase of more than \$800,000 over the net broadcast revenue from the trailing twelve months leading up to the closing. And, as Crystal further highlights, when the revenue attributable to the alleged Bad Billings is subtracted from the trailing twelve month figure, there would be a purported increase in revenue of almost \$2.6 million, or about 36%.

But this argument does not convince me. For starters, although broadcast revenue went up post-sale, WRMF's total cash flow went down substantially, and, in fact, as of the date of the trial, more than four years after the sale, WRMF had yet to achieve the cash flow levels at which the station was operating pre-transfer.⁵¹ Because this subject was never properly teed up in the pre-trial process, Cobalt did not come to trial expecting to address its

⁵¹ WRMF's cash flow for the years, 2003, 2004, and 2005 was \$4.5 million, \$4.7 million, and \$4.6 million, respectively. See JX 218.

post-transfer operations and cash flow in detail. But Cobalt did put forward evidence from which to infer that the increase in broadcast revenue was likely attributable to an increase in spending on sales-related efforts and Cobalt's ability to increase the rates it charged for air time on WRMF.⁵² Moreover, when certain adjustments are made to Cobalt's post-transfer revenue in order to make them more comparable to Crystal's pre-transfer accounting methods,⁵³ a comparison of the legitimate broadcast revenue (i.e., broadcast revenue less revenue attributable to Bad Billings) earned by WRMF in 2001 (\$8.73 million), 2002 (\$9.7 million), and 2003 (\$10.79 million) reflects consistent annual growth of about 10%. That growth rate, although impressive compared with many radio stations during those years, is not unrealistic for a station in an expanding market like West Palm Beach, and Crystal has not presented any credible evidence to suggest that it did not or could not have occurred. As a result, Crystal's arguments regarding Cobalt's post-transfer revenues do not persuade me that it did not commit fraud.

⁵² After the sale, Cobalt opened a second sales office for WRMF in a new location and began to focus on new segments of the West Palm Beach and northern Miami markets. It also increased the rates it charged for its most expensive commercials by about 15%. Although that 15% increase would not account for a 36% growth rate, the trial record reflects that WRMF did not charge its highest rates for the vast majority of the commercials it sold. Rather, pre-transfer, WRMF regularly sold discounted (and even gave away free) commercials during prime morning and afternoon drive times to many advertisers. Therefore, a logical inference to draw from the increase in WRMF's broadcast revenue is that, as a result of its increased sales efforts and expenditures, Cobalt was able to increase the proportion of WRMF's commercials that were sold at its top rates.

⁵³ For example, Crystal did not account for pre-transfer barter revenue in the same manner that Cobalt accounted for it post-transfer. Crystal's pre-transfer financial statements did not comply with GAAP, and, as a result, any comparison of those financial statements with Cobalt's GAAP-compliant financial statements involves a large degree of speculation. Crystal has provided no expert analysis making a reliable comparison.

E. The Disputed Commercials Did Not Air

Crystal's unpersuasive and fanciful attempts to explain why the disputed commercials do not appear in the Aired Files are confidence undermining. Indeed, its defenses in this regard were largely contradicted by the testimony of its own witnesses, who stated that WRMF did not exceed the 16-18 minutes of pre-scheduled commercials per hour during the time leading up to the sale of WRMF and that, with few exceptions, all of its commercials were played through, and logged in the Aired Files by, the Scott System. None of Cobalt's attempts to explain away Cobalt's Bad Billings Analysis withstood Cobalt's rebuttals and many do not even pass the straight face test. None of Crystal's last ditch attempts to challenge the Analysis itself had any merit.

Cobalt never discovered precisely which individuals at Crystal were responsible for the fraud, and, as stated, it never got a smoking gun admission from any of Crystal employees. But that type of evidence is rarely available in cases like this and fraud is often proven by the very type of circumstantial evidence Cobalt presented here.⁵⁴ A number of individuals within the Crystal organization had both a motive to artificially boost WRMF's bottom line in the months leading up to the sale, and the opportunity to carry out the fraud. Lisa Colson apparently was willing to do what her bosses told her and is still loyally fighting for her employer.

⁵⁴ See, e.g., *Brown v. Birman Managed Care, Inc.*, 42 S.W.3d 62, 67 (Tenn. 2001) (“[F]raud by its very nature is often difficult to prove and thus may be properly proved by wholly circumstantial evidence.”); accord *Journal Printing Co. v. Maxwell*, 43 A. 615, 616 (Del. Super. 1899) (explaining that fraud may “be proved by either direct or circumstantial evidence; that is, either by . . . admission . . . or by other facts and circumstances from which fraud may be reasonably inferred”).

Jim Hilliard himself had a strong motive to keep WRMF's cash flow up. By 2001, the \$53 million Bank of America loan was due and Clear Channel was not willing to help Crystal refinance. Crystal needed to sell and it needed to clear a large sale price for Hilliard to break even. Hilliard knew Cobalt was basing the price it would pay on a cash flow multiple and had already seen the sale price fall from \$75 million to \$70 million when the multiple fell from 15 to 14 after September 11. Any more price reductions would further eat into Hilliard's already narrow profit margin. In this vein, it is notable that until Les Sufrin looked into Crystal books, Crystal was improperly allocating WRMF's expenses to its other radio stations that were not involved in the deal. It appears that when that attempt to artificially inflate WRMF's cash flow was discovered, Crystal intensified its Bad Billings activity to make up for the loss, as the fraud began to quickly ramp up right around this time.

Several of WRMF's managers, including its sales manager Tim Reeve, had a motive to perpetrate the scheme in order to make a sale more likely. They had been promised substantial bonuses if a sale occurred. But there were no formal written agreements in this regard, and WRMF's managers knew that those bonuses were unlikely to be forthcoming if Hilliard himself lost money on the deal.

The reason Cobalt did not find a confessing individual is also relatively easy to explain. Unlike a criminal fraud prosecution in which the alleged co-conspirators each face personal risk and have an incentive to turn on their co-defendants, this case names only Crystal as a defendant. Thus, the individuals at Crystal with motive had a natural incentive

to hang together because their employer Crystal, as an entity, was the sole target of Cobalt's demand for recovery.

IV. The Remedial Implications Of Crystal's Fraud

A. Cobalt's Valuation Evidence

Cobalt's requested remedy is based on the contention that because a large portion of WRMF's broadcast revenue, and consequently its cash flow, was attributable to fraud, and was therefore not sustainable going forward, WRMF was worth materially less at the time of the transaction than the \$70 million purchase price that it paid. In proving the actual value of WRMF at that time, Cobalt relies on two primary sources: (1) independent valuation evidence from its expert, Peter Handy;⁵⁵ and (2) Stephen Gormley's testimony regarding what he would have been willing to pay for WRMF based on its "legitimate" cash flow.

In arriving at a valuation range for WRMF, Handy relied primarily on a cash flow valuation model, applying a multiple of 14 to the legitimate cash flow earned by WRMF.⁵⁶ Handy testified radio stations like WRMF are typically valued in the market based on cash flow multiples and that 14 was an appropriate multiple to apply in determining the value of

⁵⁵ Cobalt's valuation expert, Peter Handy is the founder and manager of an independent private equity firm specializing in media broadcasting and is also the founder and former managing partner of an investment bank that specializes in radio station transactions. He has been involved in the purchase or sale of approximately 2000 radio stations worth \$18 to \$19 billion in transaction value over the last 16 years.

⁵⁶ Handy also performed a valuation calculation using a "stick value" method, which ignores the actual cash flow of the station being valued, and bases valuation on the average cash flow of all radio stations in the relevant market. Handy concluded that this method, which resulted in a valuation figure of less than \$25 million, was not appropriate given the prominence and success of WRMF both before and after the transaction. Similarly, in performing a "comparable sales analysis," Handy reviewed all radio station transactions in comparable markets in the United States, but was unable to find any comparable transactions. West Palm Beach is the 48th largest radio market in the country. Handy reviewed all single radio station transactions in markets 35-56 from the years 1996 to 2002. None of those radio stations sold for more than \$20.5 million.

WRMF as of June 2002 because “[t]hat, at the time, was about the over/under for a market like West Palm.”⁵⁷

The disputed revenue attributable to Bad Billings for the twelve months leading up to the June 28, 2002 closing was \$1.76 million. Handy used a 60% profit margin to determine what percentage of the disputed revenue fairly represented disputed cash flow. Handy explained that 60% was a conservative percentage to use in calculating profit margin because many of the costs involved in running a radio station are fixed and that once those fixed costs are recouped, any incremental revenue largely represents profit.⁵⁸ Based on that figure, Handy’s best estimate of WRMF’s cash flow attributable to Bad Billings was \$1.058 million. When that figure is subtracted from Les Sufrin’s estimate of WRMF’s total cash flow for the trailing twelve months leading up the closing of \$5.26 million, WRMF’s legitimate cash flow for that period comes to \$4.2 million. That cash flow figure yields a value at 14 times cash flow of \$58.8 million. Handy performed a similar analysis based on WRMF’s performance in, and the Bad Billings attributable to, the calendar year 2001. That analysis yielded a legitimate cash flow figure of \$4.166 million and a consequent valuation of \$58.3 million. Based upon this analysis, Handy concluded that, based on legitimate cash flow figures, the actual value of WRMF as of June 2002 fell within a range of \$56 to \$62 million.

⁵⁷ Tr. at 705. *See also id.* at 705-06 (“I think that is kind of a best estimate. I don’t think anybody would have paid 16 times. I don’t think a seller would have wanted to sell at 12 times. So if you look at where trading multiples were, where they have been historically, where they are now, where they were then, 14 was about the right — in my opinion, the right number.”)

⁵⁸ Handy stated that because a radio station’s variable costs are primarily limited to commissions paid to sales personnel and advertising agencies as well as music licensing fees and other miscellaneous expenses, a more aggressive profit margin estimate applicable to incremental revenue of the type represented by Bad Billings could exceed 70%. Tr. at 713-14.

Gormley's testimony regarding the manner in which he valued WRMF was similar. Gormley based his willingness to provide equity financing for the WRMF transaction based upon a purchase price that represented a multiple of 14 times WRMF's approximately \$5 million cash flow. In determining the cash flow attributable to Bad Billings, he applied a profit margin of 70% to 75%. Applying those profit margins to the Bad Billings and subtracting the variable costs from the Bad Billings revenue, Gormley testified that he would have reduced the amount he was willing to pay for WRMF by \$17.5 million.⁵⁹

B. The Legal Basis For Cobalt's Requested Remedy

Based upon the valuation evidence it presented, Cobalt claims that a reasonable valuation of WRMF at the time of the sale was \$58 million and that it is therefore entitled to a remedy valued at \$12 million. It requests the following relief: (1) cancellation of the \$2 million equity interest received by Crystal as part of the purchase price; (2) cancellation of the \$5 million subordinated promissory note given by Cobalt to Crystal; and (3) \$5 million in damages. Cobalt also seeks indemnification from Crystal for the costs it has incurred in granting free airtime credits to the affected advertisers, as well as prejudgment interest and attorneys fees.

In pursuit of those remedies, Cobalt asserts causes of action for fraud, equitable fraud, negligent misrepresentation, breach of contract, breach of warranty, and breach of the implied covenant of good faith and fair dealing. The parties' briefs do not ponder the elements of those causes of action or their application to the facts of this case. Rather, both

⁵⁹ Tr. at 231-32.

parties recognized that this was largely a factual dispute with the legal result turning on the resolution of those factual issues.

Cobalt has clearly satisfied the elements of its common law fraud claim, as it proved that Crystal intentionally provided it with false financial information on which it reasonably relied in entering into the transaction and which caused it to overpay for WRMF.⁶⁰ Cobalt has also clearly established its right to recovery under the Asset Purchase Agreement. In that Agreement, Crystal represented that the financial statements of WRMF, reflecting annual cash flow of about \$5 million, it provided to Cobalt were not materially misleading. But nearly 20% of that cash flow was attributable to the fraud perpetrated by Crystal on its customers. As a result, the financial statements were materially misleading, and Crystal breached its representation to the contrary. Crystal also breached its representation regarding the fact that it operated WRMF in compliance with the law. Engaging in a repeated pattern of fraud is clear non-compliance with applicable law, and gives rise to claims in favor of the defrauded advertisers against WRMF.

⁶⁰ See, e.g., *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074 (Del. 1983) (reciting the elements of a cause of action for common law fraud). Because Cobalt has established a common law fraud claim, it has also established the rote elements of a claim for equitable fraud, which requires similar proof except that Cobalt would not have been required to prove scienter on the part of Crystal. E.g., *Shamrock Holdings of California, Inc. v. Iger*, 2005 WL 1377490, at *7 (Del. Ch. 2005) (“To make out a *prima facie* case of equitable fraud, plaintiff must adequately allege: 1) a false representation, usually of fact, by defendant; 2) an intent to induce plaintiff to act or to refrain from acting; 3) that plaintiff's action or inaction was taken in justifiable reliance upon the representation; and 4) damage to plaintiff as a result of such reliance.”). Crystal did not contest the applicability of the doctrine of equitable fraud here and is therefore stuck with a loss on that claim too. But see *Metro Communication Corp. BVI v. Advanced Mobilcomm Technologies, Inc.*, 854 A.2d 121, 160 n.93 (Del. Ch. 2004) (questioning the viability of an equitable fraud claim when a plaintiff seeks only a monetary remedy and not rescission).

Crystal has likely breached numerous other contractual representations, though these are the primary ones implicated. A complete listing of all of Crystal's contractual breaches is not required. The import of the package of representations and warranties for which Cobalt negotiated was to protect it against the possibility that the assumptions on which it relied in purchasing WRMF for \$70 million — i.e., that WRMF was making about \$5 million dollars a year and those earnings were sustainable on a going-forward basis — were incorrect. Not only did Cobalt prove that they were, it proved that Crystal perpetrated a fraudulent scheme that was large in scope and intentionally lied about its artificially and fraudulently inflated cash flow.

In this regard, I reject Crystal's contention that Cobalt's due diligence precludes its right to a remedy in this case. The argument is based on the notion that Les Sufrin's due diligence uncovered the very facts on which Cobalt premises its claim in this litigation, namely that there are discrepancies between the Scott Aired Files and WRMF's billing records. As a result, Crystal contends that Cobalt cannot establish that it reasonably relied on any of the representations Crystal made and was therefore not harmed. In support of its argument, Crystal cites *Homan v. Turoczy*,⁶¹ which held that a buyer of a business could not establish the justifiable reliance necessary to recover for fraud or equitable fraud where the buyer proceeded to closing in a commercially unreasonable manner, failed to conduct any meaningful due diligence, and signed an express anti-reliance clause stating that he was not relying on the statements he later claimed were false. But *Homan* has no implication here because the Asset Purchase Agreement contains an express and unqualified representation

⁶¹ 2005 WL 2000756 (Del. Ch. 2005).

regarding the material accuracy of WRMF's financial statements and its compliance with law.

For another thing, Cobalt's breach of contract claim is not dependent on a showing of justifiable reliance.⁶² That is for a good reason. Due diligence is expensive and parties to contracts in the mergers and acquisitions arena often negotiate for contractual representations that minimize a buyer's need to verify every minute aspect of a seller's business. In other words, representations like the ones made in the Asset Purchase Agreement serve an important risk allocation function. By obtaining the representations it did, Cobalt placed the risk that WRMF's financial statements were false and that WRMF was operating in an illegal manner on Crystal. Its need then, as a practical business matter, to independently verify those things was lessened because it had the assurance of legal recourse against Crystal in the event the representations turned out to be false.

Representations about the accuracy of unaudited financial statements of the type involved here are by no means a ubiquitous feature of M & A contracts. But, having given the representations it gave, Crystal cannot now be heard to claim that it need not be held to them because Cobalt's due diligence did not uncover their falsity. This point is, in fact, made clear in the Asset Purchase Agreement itself, which provides that "no inspection or investigation made by or on behalf of [Cobalt] or [Cobalt's] failure to make any inspection or investigation shall affect [Crystal's] representations, warranties, and covenants hereunder or be deemed to constitute a waiver of any of those representations, warranties, or

⁶² *E.g., Gloucester Holding Corp. v. U.S. Tape and Sticky Products, LLC*, 832 A.2d 116, 127 (Del. Ch. 2003).

covenants.”⁶³ Having contractually promised Cobalt that it could rely on certain representations, Crystal is in no position to contend that Cobalt was unreasonable in relying on Crystal’s own binding words.

Moreover, Cobalt’s failure to uncover the fraud during its due diligence review was not unreasonable, as the fraud was intentionally hidden from Cobalt when its due diligence team went looking. When Les Sufrin discovered the discrepancies between the Aired Files and WRMF’s invoices, he inquired into them and was told that the Aired Files were not an accurate record of everything that played on the air. He was told that only the paper program logs could be used to determine what was aired. He was also told that the paper program logs were destroyed, even though a large number of them were likely sitting in boxes in Lisa Colson’s office. And when Sufrin asked that a particular program log be given to him so that he could verify it against the invoices, he was given an incomplete log of a day in which there were, remarkably, no Bad Billings or post-logged commercials. In other words, it appears that Crystal’s own efforts at deception prevented the fraud from being detected during due diligence. Given these factors, and the other diligence Cobalt conducted, Cobalt satisfies its burden as a fraud plaintiff to show justifiable reliance.

C. Cobalt’s Expectation Damages

In Delaware, the traditional method of computing damages for a breach of contract claim is to determine the reasonable expectations of the parties.⁶⁴ Expectation damages are calculated as the amount of money that would put the non-breaching party in the same

⁶³ JX 7 at § 9.2.

⁶⁴ *Duncan v. Theratx*, 775 A.2d 1019, 1022 (Del. 2001).

position that the party would have been in had the breach never occurred.⁶⁵ Moreover, when a contract or agreement is silent as to the remedy for a breach, the Court of Chancery has the discretion to award any form of legal or equitable relief and is not limited to awarding contract damages for breach of the agreement.⁶⁶

In this vein, I reject Crystal's contention that the only remedy to which Cobalt is entitled, if any, is rescission of the Asset Purchase Agreement, which is not a remedy Cobalt seeks. Crystal contends that although Cobalt may have based its decision to buy WRMF on the station's cash flow, Crystal did not rely on cash flow in reaching its decision to sell WRMF for \$70 million. Crystal contends that it would not have sold for anything less than that price and argues that awarding Cobalt's requested remedy would effectively re-price the deal to \$58 million. According to Crystal, regardless of what WRMF's actual or legitimate cash flow was at the time, Crystal would never have done a deal at that price.

This argument misses the point of awarding a remedy in a breach of contract case like this, which is to compensate the non-breaching party for the injury caused by the breach.⁶⁷ Jim Hilliard knew Cobalt was relying on a cash flow multiple in reaching the price it was willing to pay for WRMF. Moreover, regardless of whether a deal would have been reached at a reduced price, Cobalt has demonstrated an injury equal to the true value of the station in light of its legitimate earnings. Rescission of a transaction like this, nearly five years after it

⁶⁵ *E.g., Delaware Limousine Serv., Inc. v. Royal Limousine Serv., Inc.*, 1991 WL 53449, at *3 (Del. Super. 1991).

⁶⁶ *Eureka VIII LLC v. Niagara Falls Holdings LLC*, 899 A.2d 95, 107 (Del. Ch. 2006) (quoting *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 176 (Del. 2002)).

⁶⁷ *E.g., Great Lakes Chemical Corp. v. Pharmacia Corp.*, 788 A.2d 544, 549 (Del. Ch. 2001).

was consummated would be an extraordinary remedy,⁶⁸ and Crystal has not demonstrated that it is even capable of buying back WRMF.⁶⁹ In fact, one of the reasons Cobalt has not sought rescission of the transaction is that it does not believe Crystal to have that ability. Moreover, the Asset Purchase Agreement itself, and particularly its indemnification provisions, contemplated monetary remedies in favor of Cobalt, and Cobalt's remedies under the Agreement were not limited in any way. As a result, there is no legal or equitable basis to limit Cobalt to a rescission remedy.⁷⁰

Cobalt bases its requested \$12 million remedy on a valuation of \$58 million, which it contends is a "reasonable valuation of WRMF in June 2002."⁷¹ The valuation evidence presented by its expert Peter Handy, placed WRMF's value in a range of \$56 to \$62 million. Crystal did not present its own valuation evidence, nor did it substantively rebut the analyses performed by Handy or Gormley. Rather, Crystal attempted to impeach those two witnesses with evidence regarding the fact that WRMF's post-transfer broadcast revenue increased following the sale of WRMF to Cobalt. For the reasons already discussed, I find those arguments unpersuasive.⁷²

⁶⁸ *E.g., Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983) (recognizing that long-completed transactions for the sale of large businesses are generally impossible to undo).

⁶⁹ Although Crystal claims that rescission is the only appropriate remedy here, it has not sought to deposit with the court the funds necessary to undo the transaction.

⁷⁰ *See Clark v. Teeven Holding Co.*, 625 A.2d 869, 877 (Del. Ch. 1992) (explaining that where a party is fraudulently induced to enter into a contract, he may elect to either affirm the contract and sue for damages or disaffirm the contract and seek rescission).

⁷¹ Cobalt's Opening Post-Trial Brief at 31.

⁷² I also reject Crystal's argument that Cobalt got the benefit of its bargain even based on an assumption that WRMF's legitimate cash flow for the trailing twelve months leading up to the closing was \$4.2 million (the figure determined by Peter Handy). Crystal Points out that when Les Sufrin did his initial due diligence in February 2002, he determined that WRMF's cash flow for the year 2001, based on a proper allocation of expenses among all of Crystal's radio stations, was only

Having not been presented with any countervailing valuation evidence from Crystal, I have no reason to question the accuracy of Handy's analysis. I note, however, that the midpoint of Handy's valuation range is \$59 million, not \$58 million. In fact, Handy's calculations based on the legitimate cash flow for the trailing twelve months before the closing and the year 2001 were \$58.8 million and \$58.3 million respectively — both higher than Cobalt's asserted \$58 million. I also note that Cobalt's Bad Billings Analysis, on which Handy based his valuation, did not take into account the small number of commercials that Russ Morley testified to having played outside of the Scott System. Morley stated that he played commercials from other media about two to three times per week and Cobalt did not refute that testimony. Those few commercials would have had a marginal effect on Handy's cash flow analysis.⁷³ Therefore, with the midpoint of Handy's valuation range in mind, and taking the marginal effect of those commercials into account, I find that WRMF's value as of June 2002 was \$59 million. The remedy that I award is based on that valuation figure and will be consistent with the form requested by Cobalt. Crystal's \$2 million equity interest in

about \$4 million. Crystal contends that because that figure (which included Bad Billings) was less than the actual, legitimate cash flow at the time of closing, Cobalt was not harmed. But Cobalt did not base its decision to enter into the Asset Purchase Agreement on the \$4 million in cash flow that WRMF earned in 2001. Rather, it relied on Crystal's representation that WRMF's cash flow was \$5 million and on pacing reports provided to it by Crystal which indicated that the \$5 million figure would be achieved by the time of the closing. In fact, Crystal appears to have ramped up the fraud right around this time in order to ensure that it would hit that number, likely because it knew that the \$5 million cash flow figure was a primary assumption underlying Cobalt's decision to do the deal.

⁷³ Assuming that both Morley and his afternoon drive counterpart both played 3 commercials per week outside of the Scott System, that represents an additional 312 commercials per year. Assuming that WRMF charged top rates for each of those commercials, that would amount to about \$70,000 of additional revenue over a 12 month period. At a 60% profit margin, that is an additional \$42,000 in cash flow. At a multiple of 14 times cash flow, that results in an increase in value of about \$590,000. I am conservatively giving Crystal more weight for this part of the record than it deserves, as Crystal never made it a feature of its briefs or trial presentation.

Cobalt will therefore be cancelled, as will the \$5 million promissory note. I award Cobalt \$4 million in damages.

D. Indemnification For Advertiser Credits

When Cobalt discovered that the fraud had occurred, and that it had continued for about three months after Cobalt had bought the station, Cobalt decided to grant free airtime credits to the advertisers that were affected during that three month period. In addition to its expectation remedy, Cobalt seeks a remedy reimbursing it for the cost of granting free airtime credits to those advertisers. Cobalt offered the advertisers \$400,000 worth of airtime credits, of which the advertisers actually used \$180,745. Cobalt seeks reimbursement for these costs under the Asset Purchase Agreement's indemnification provision, which requires Crystal to reimburse Cobalt for any out of pocket losses attributable to Crystal's breach of the Agreement.

Crystal makes three arguments resisting this claim. First, Crystal contends that it is not responsible for any fraud that occurred post-transfer, as that fraud would have been carried out by employees that were then under the control and supervision of Cobalt.⁷⁴ That is not convincing because Colson — who works for Crystal — stayed on at WRMF after the sale and maintained the status quo until her departure. Once Colson left, the fraud soon surfaced. In Delaware, damages recoverable under indemnification provisions such as the one involved here include all injurious consequences that were within the contemplation of

⁷⁴ See, e.g., *Draper v. Olivere Paving & Const. Co.*, 181 A.2d 565, 569 (Del. 1962) (explaining that, under Delaware law, an employer is liable for the acts of its employee acting within the scope of employment).

the parties at the time the contract was made.⁷⁵ What is important therefore is that the fraudulent practices instituted by Crystal, and put into place before the sale, breached Crystal's contractual representations to Cobalt and caused Cobalt to unknowingly operate its newly-bought business in an illegal manner, thereby exposing it to potential civil, and even criminal, liability. The costs of making the victims of that fraud whole therefore can be recovered under the contractual indemnification provision.

Crystal next argues that because no advertiser complained about the fraud or made a demand on Cobalt relating to the fraud, its voluntary decision to grant free airtime credits is not an out of pocket cost that can be recovered under the Asset Purchase Agreement. The indemnification provision, however, was broadly drafted, and covers all costs and expenses related to Crystal's breaches of contract "whether suit is instituted [against Cobalt] or not."⁷⁶ Cobalt made a reasonable decision to award a proactive remedy to the affected advertisers in an effort to mitigate the damage that could have flowed from the widespread scheme to defraud WRMF's customers. The actual costs of that scheme could have been far worse, and Cobalt should not be punished, by being denied a remedy, for trying proactively to make up for Crystal's fraud.

Lastly, Crystal contends that because Cobalt made no actual payments to any advertisers, but rather merely awarded them airtime credits, Cobalt was not harmed because it was free to, and could have, added additional commercials to its daily schedules to account for the free credits, with no impact on broadcast revenues. As stated, though, this case was

⁷⁵ *E.g., Harmony Mill Ltd. Partnership v. Magness*, 1990 WL 58149, at *6 (Del. Super. 1990).

⁷⁶ JX 7 at § 12.1.

premised on the fact, and Cobalt proved, that there is a limit on the number of commercials that a radio station like WRMF can play without adversely affecting ratings and therefore revenues. WRMF was sold out of all its available commercial slots at all times. Therefore, each free airtime credit that it gave out used up commercial time that could have been used for a full-price commercial. As a result, the value of each airtime credit had a direct effect on Cobalt's bottom line. Crystal has not disputed that WRMF's advertisers used \$180,754 worth of the airtime credits, and I therefore award Cobalt a remedy in that amount under the contractual indemnification provision.

E. Pre-judgment Interest

Cobalt seeks prejudgment interest on the monetary aspect of its expectation remedy and on the indemnification award for airtime credits. In Delaware, a successful plaintiff is entitled to interest on money damages as a matter of right from the date liability accrues.”⁷⁷ Crystal does not contest Cobalt's right to prejudgment interest.

In determining the interest rate to be applied, courts have broad discretion, subject to the principles of fairness, in fixing an appropriate rate.⁷⁸ Cobalt requests interest at the legal rate of 6.25%⁷⁹ on the \$4 million damage award from June 28, 2002, compounded quarterly. It requests interest at the legal rate of 7%⁸⁰ on the indemnification remedy from December

⁷⁷ *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 409 (Del. 1988).

⁷⁸ *E.g., Valeant Pharmaceuticals, Intern. v. Jerney*, 921 A.2d 732, 756 (Del. Ch. 2007).

⁷⁹ *See* 6 Del. C. § 2301. 6.25 % represents 5% plus the 1.25 % Federal Reserve discount rate that existed on June 28, 2002.

⁸⁰ *See id.* The last of the airtime credits was used on December 31, 2003. The Federal Reserve discount rate on that date was 2%.

31, 2003, compounded quarterly. Those requests are reasonable and I award pre-judgment interest in that amount.⁸¹

F. Attorneys Fees And Costs

Cobalt finally seeks an award of attorneys' fees and costs under the indemnification provision of the Asset Purchase Agreement. That provision provides that

[Crystal] undertake[s] and agree[s] to indemnify and hold [Cobalt] harmless against [] any breach, misrepresentation, or violation of any of [Crystal's] representations or warranties contained in this Agreement. . . . This indemnity is intended to cover all acts, suits, proceedings, claims, demands, assessments, adjustments, interest, penalties, costs, and expenses (including, without limitation, reasonable attorneys fees and disbursements of counsel)⁸²

Although presented with the opportunity to respond to Cobalt's claim for fees under this provision in its post-trial brief, Crystal did not do so and has failed to present its view of whether attorneys' fees for this litigation are covered by the indemnification and hold harmless language of this provision. I see no reason, though, why they are not. This court recently had occasion to consider similar language in *Majkowski v. American Imaging Management Services, LLC*,⁸³ in which it explained that an indemnification and hold harmless provision like this requires an indemnitor to make its indemnitee whole with regard to matters covered by the indemnity and that in many circumstances, that will require the reimbursement of the reasonable attorneys' fees expended in the matter. Crystal promised that if it breached the Asset Purchase Agreement, it would reimburse Cobalt for all out of

⁸¹ See *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *1 (Del. Ch. 2006) (awarding prejudgment interest at the legal rate compounded quarterly).

⁸² JX 7 at § 12.1

⁸³ 913 A.2d 572 (Del. Ch. 2006).

pocket expenses Cobalt incurred, including “reasonable attorneys’ fees,” and Cobalt will not be made whole unless it can recover the substantial fees it expended in enforcing its fraud and breach of contract claims.

The correctness of this interpretation is bolstered by another provision in the Asset Purchase Agreement, which provides that “if any lawsuit is filed to resolve an issue as to the interpretation or enforcement of this agreement . . . the prevailing party in such action shall be entitled to receive reimbursement from the other party for all reasonable attorneys’ fees and other costs and expenses.”⁸⁴ Although Cobalt does not reference this provision in its arguments, its meaning is clear in providing for the reciprocal obligation of the loser in any lawsuit between the parties to reimburse the winner for its attorneys’ fees. As a result, Cobalt is entitled under the Asset Purchase Agreement for an award of all reasonable attorneys’ fees and costs.⁸⁵

V. Conclusion

Consistent with the foregoing, I will grant judgment in favor of Cobalt on its fraud and breach of contract claims. Cobalt shall submit an implementing order of final judgment within ten days, with notice as to form to Crystal.

⁸⁴ JX 7 at § 17.15.

⁸⁵ Because I find that Cobalt is entitled to attorneys fees under the Asset Purchase Agreement, I need not consider whether it would be entitled to recovery under the bad faith exception to the American Rule. But given the numerous baseless arguments advanced by Crystal and the untimely manner in which it presented a number of them, at least a partial, but substantial, award of attorneys’ fees would likely be in order under that doctrine. *See, e.g., ATR-Kim Eng Financial Corp. v. Araneta*, 2006 WL 3783520, at * 22-23 (Del. Ch. 2006) (awarding attorneys fees based on bad faith litigation conduct), *aff’d*, 2007 WL 1704647 (Del. 2007).