

UNITED BIOSOURCE LLC,)
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 Plaintiff,)
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 v.) C.A. No. _____ - _____
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 BRACKET HOLDING CORP.,)
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 Defendant.)

Plaintiff United BioSource LLC (“UBC”), by its undersigned attorneys, hereby alleges upon personal knowledge as to its actions, and upon information and belief as to all other allegations herein, as follows:

1. On August 15, 2013, the private equity firm Parthenon Capital Partners (“Parthenon”), by way of its wholly owned subsidiary Bracket Holding Corp. (“Bracket”), purchased three related companies (the “Companies”) from UBC (in the “Transaction”). Once Parthenon took possession of the Companies, it directed Bracket to repudiate its obligations under the governing Securities Purchase Agreement (the “SPA,” attached as Exhibit 1) and embark on a coordinated effort to extract additional dollars from UBC through litigation. Bracket and Parthenon’s post-closing litigation has already cost UBC millions of dollars in value that it was promised in the Transaction.

2. As UBC has learned, Parthenon and its affiliates treat binding contracts as optional, and think nothing of taking self-serving and improper actions in violation of their contracts without any justification for doing so. Since the Transaction closed, Bracket – at Parthenon’s direction – refused to pay UBC millions of dollars owed for post-closing transition services, refused to participate in the SPA’s mandatory and binding Working Capital adjustment process, filed meritless representation and warranty claims masquerading as “fraud” allegations (after agreeing in the SPA that representations and warranties would not be enforceable against UBC after the Transaction’s closing),¹ and destroyed business records exculpatory of UBC despite the SPA’s clear prohibition on doing so.

3. Most recently, Parthenon directed Bracket to withhold approximately \$4.5 million in recently-issued tax refunds relating to pre-closing payments, despite contractual language assigning those refunds to UBC. Parthenon has no

¹ Indeed, Bracket and Parthenon enticed UBC to sell by promising an “as-is, where-is” transaction and taking out representation and warranty insurance. As UBC recently discovered, Bracket and Parthenon *already recovered \$13 million from their insurer for their representation and warranty claims*, and yet are still seeking a double recovery in the Superior Court based on a meritless, bootstrapped “fraud” claim. See <http://www.kirkland.com/sitecontent.cfm?contentID=220&itemid=8000> (noting October 2015 AAA arbitration captioned *Bracket Holding Corp. v. Allied World Assurance Co.*). Unsurprisingly, Bracket and Parthenon failed to forthrightly disclose the insurance recovery in the parties’ pending Superior Court action or to UBC. Rather, UBC recently found out about it because Bracket and Parthenon’s lawyers touted the recovery on their website.

justification for doing so; rather, it seeks only to take advantage of UBC and extract more cash from the Transaction than UBC agreed to pay. Bracket's impermissible refusal to give the tax refunds to UBC is the sole focus of this action.

4. This is not the first time that UBC has sought the Court's assistance in defending against Bracket and Parthenon's malfeasance. In the spring of 2015, UBC filed an action² against Bracket seeking (among other things) specific performance of its arbitration right under the SPA, because Bracket and Parthenon were refusing to complete the mandated post-closing Working Capital adjustment process. The Court found the SPA to be clear and enforceable and ordered Bracket to perform as required; thereafter, the Arbiter ruled for UBC on all issues in dispute.

5. In August of this year, Bracket breached the SPA again. As noted above, Bracket – at Parthenon's direction – refuses to forward to UBC a significant tax refund that one of its subsidiaries (which was sold in the Transaction) recently received from the Pennsylvania Department of Revenue. Thus, UBC once more seeks the Court's assistance in holding Bracket to its contractual promises.

² *United BioSource LLC v. Bracket Holding Corp.*, C.A. No. 10840-CB (Del. Ch.).

6. Specifically, on August 5, 2016, Bracket received a refund of \$4,566,646.88 from the Pennsylvania Department of Revenue relating to periods before the Transaction closed (the “Pennsylvania Tax Refund”).

7. The SPA requires Bracket to promptly forward to UBC all tax refunds that it and its subsidiaries receive, insofar as the refunds relate to periods prior to the Transaction’s closing. But rather than promptly giving the Pennsylvania Tax Refund to UBC, Bracket (at Parthenon’s direction) is withholding it pending the resolution of unrelated claims currently before the Delaware Superior Court. The SPA does not contain any provision suspending Bracket’s obligation to forward tax refunds during the pendency of unrelated claims. To the contrary, the SPA unambiguously provides that the Pennsylvania Tax Refund is UBC’s property, and Bracket must give it to UBC promptly after receipt thereof.

8. The Court confronted this exact situation earlier this year in *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, a case wherein (as here) the buyer withheld a pre-closing tax refund from the seller on the basis of pending, unrelated claims between the parties.³ The *FdG* court ordered the buyer to immediately forward the tax refund to the seller, holding that “[i]t would be inappropriate to rewrite the unambiguous terms of the Merger Agreement governing pre-closing tax

³ 131 A.3d 842, 865 (Del.Ch. 2016).

refunds to have it serve [the buyer's] current strategic interests in delaying payment of an obligation that is now owed.”⁴ Rather, the Court noted that the buyer, “a sophisticated contracting party, could have bargained for the right to delay payment of the tax refunds pending the resolution of its indemnification or other claims arising out of Merger Agreement. It did not do so.”⁵

9. So too here. This dispute is based on an entirely separate set of wrongful actions that implicate provisions of the SPA that are not at issue in the parties' pending Superior Court action. Bracket has failed to comply with the procedural mechanics set forth in the SPA for delivering tax refunds to UBC, and the SPA does not provide a right to delay the transfer of tax refunds pending the resolution of unrelated money damages claims. Indeed, the SPA expressly provides that Bracket *may not contest* UBC's entitlement to specific performance on the grounds that a legal remedy would suffice. Rather, *FdG* is controlling, and mandates relief in UBC's favor.

10. Accordingly, by this action UBC seeks an order of specific performance compelling Bracket to forward the Pennsylvania Tax Refund to UBC immediately as required by contract between the parties.

⁴ *Id.* at 866.

⁵ *Id.*

THE PARTIES

11. UBC is a Delaware limited liability company with its primary place of business in Blue Bell, Pennsylvania. UBC is a wholly owned subsidiary of United BioSource Holdings, Inc., a Delaware corporation which is itself a wholly owned indirect subsidiary of Express Scripts, a major healthcare company which is the largest pharmacy benefit management organization in the United States.

12. Bracket is a Delaware corporation with its headquarters in Wayne, Pennsylvania, and is a holding company wholly owned and controlled by Parthenon. Bracket, in turn, owns the Companies, which provide scientific, technical and operational support to pharmaceutical firms in connection with clinical trials and other research.

13. Parthenon is currently planning to sell Bracket and the Companies.

14. Specifically, in September 2016 the Wall Street Journal reported that Parthenon is interviewing investment banks “to decide which one it will mandate to run the sale process for Bracket,” and that the sale process will commence shortly. Inside sources report that Bracket generated just under \$50 million in EBITDA over the last year, and that Parthenon expects to sell Bracket for approximately \$700 million.

JURISDICTION

15. This Court has subject matter jurisdiction over the claims asserted in this Complaint pursuant to 10 *Del. C.* § 341, 10 *Del. C.* § 6501 and 8 *Del. C.* § 111.

16. In addition, the SPA is governed by Delaware law and provides that the parties have agreed to submit to the exclusive jurisdiction of the Court of Chancery (or, if it does not have jurisdiction, the Superior Court) for the purposes of any suit, action or proceeding arising out of or relating to the SPA. (*See* SPA § 10.10.)

17. The SPA provides that injunctive relief and/or specific performance are the designated remedies for any party's failure to perform according to its terms. (*See* SPA § 10.14.) The parties further agreed that irreparable damage would occur upon such a failure to perform. (*See id.*)

SUBSTANTIVE ALLEGATIONS

18. Section 2.6(e) of the SPA governs the handling of tax refunds concerning the Companies that are paid after the Transaction's closing, and provides as follows:

Except to the extent included as a current asset on the Final Statement pursuant to Section 2.5, any cash Tax refunds (or a credit in lieu of a cash refund) and interest paid thereon by a Governmental Authority received by the Buyer,⁶ any of the Companies or any of the Company

⁶ Bracket and UBC are referred to in the SPA as "Buyer" and "Parent," respectively. (*See* SPA at 1.)

Subsidiaries, or to which the Buyer, any of the Companies or any of the Company Subsidiaries become entitled, that relate to Pre-Closing Periods or the portion of the Straddle Period ending at the Effective Time shall be for the account of Parent, and the Buyer shall pay over to Parent any such Tax refund and interest or the amount of any such credit within fifteen (15) days after receipt or entitlement thereto, net of (1) any reasonable costs associated with obtaining such refund, (2) any applicable withholding Taxes required to be withheld on such payment, and (3) any Taxes incurred in respect of the receipt or payment of such refund. If any payment by the Buyer to the Parent pursuant to this Section 2.6(e) is subsequently reduced or disallowed, the Parent shall indemnify and hold harmless the Buyer from and against any Tax or cost that is attributable to such reduction or disallowance. In the event the Buyer or Parent, as applicable fails to pay to the other party any such amounts due under this Section 2.6(e) within the time period specified, the Buyer or Parent, as applicable, shall pay, in addition to the amounts due, interest on such amount, compounded annually, calculated using a 365 day year from the date of receipt or entitlement thereto through the date prior to the date of payment at the prime lending rate of Bank of America, N.A. as in effect as of the date of receipt or entitlement thereto.

19. On August 5, 2016, P-Star Acquisition Co., Inc. (“P-Star”) received the \$4,566,646.88 Pennsylvania Tax Refund from the Pennsylvania Department of Revenue.

20. P-Star (which is currently a subsidiary of Bracket) is one of the “Company Subsidiaries,” as that term is defined in the SPA. (*See* SPA § 1.36.)

21. The Pennsylvania Department of Revenue is a “Governmental Authority,” as that term is defined in the SPA. (*See* SPA § 1.81.)

22. The Pennsylvania Tax Refund is a cash refund of Tax, as that term is defined in the SPA. (*See* SPA § 1.152.)

23. The Pennsylvania Tax Refund relates to the periods from April 1, 2012 through December 1, 2012 and January 1, 2013 through August 14, 2013. Those periods are “Pre-Closing Periods,” as that term is defined in the SPA. (*See* SPA § 1.130.)

24. The Pennsylvania Tax Refund was not included as a current asset on the Final Statement pursuant to Section 2.5.

25. Accordingly, the SPA required Bracket to forward the Pennsylvania Tax Refund to UBC within fifteen days after P-Star’s receipt thereof. (*See* SPA § 2.6(e).)

26. Bracket failed to forward the Pennsylvania Tax Refund to UBC within fifteen days after P-Star’s receipt thereof.

27. Instead, Bracket concealed the existence of the Pennsylvania Tax Refund from UBC for nearly two months.

28. On September 22, 2016, Bracket sent a letter to UBC (the “Disclosure Letter,” attached hereto as Exhibit 2), in which it notified UBC that P-Star had received the Pennsylvania Tax Refund on August 5, 2016.

29. The Disclosure Letter informed UBC that P-Star “is holding these funds in a separate interest bearing account during the pendency of its lawsuit against UBC and ESI currently pending in the Delaware Superior Court.”

30. No provision of the SPA permits Bracket to withhold UBC's property (including the Pennsylvania Tax Refund) on this or any other basis.

31. Bracket's failure to forward the Pennsylvania Tax Refund to UBC within fifteen days of P-Star's receipt thereof is a breach of Section 2.6(e) of the SPA.

32. On October 18, 2016, UBC provided notice of Bracket's breach of the SPA and UBC's intention to seek a remedy in this Court should Bracket fail to perform. As required by the SPA, UBC sent the notice (the "Notice Letter," attached as Exhibit 3) by certified mail and fax to Parthenon and to Bracket and Parthenon's legal counsel.

33. Notwithstanding the Notice Letter, Bracket failed to forward the Pennsylvania Tax Refund to UBC as required by the SPA.

34. SPA § 10.14(a) provides the remedy for any party's failure to perform according to the terms of the agreement:

The Parties hereto agree that irreparable damage would occur if any provision of this Agreement were not performed in accordance with the terms hereof and that, ... the Parties shall be entitled, without posting a bond or similar indemnity, to an injunction or injunctions to prevent breaches of this Agreement or to enforce specifically the performance of the terms and provisions hereof in any court as specified in Section 10.10, in addition to any other remedy to which they are entitled at law or equity.

35. SPA § 10.14(c) further provides:

Each of the parties agrees that it will not oppose the granting of an injunction, specific performance and other equitable relief (if the applicable conditions with respect thereto have been satisfied hereunder) on the basis that (x) the other party has an adequate remedy at law or (y) an award of specific performance is not an appropriate remedy for any reason at law or equity.

36. Accordingly, UBC is entitled to an order of specific performance compelling Bracket to immediately forward the Pennsylvania Tax Refund to UBC pursuant to the terms of Section 2.6(e) of the SPA.

COUNT I
SPECIFIC PERFORMANCE

37. UBC repeats, realleges and incorporates by reference the allegations in the foregoing paragraphs of this Complaint as if fully set forth herein.

38. The SPA is a valid, binding and enforceable agreement.

39. UBC has performed all of its obligations under the SPA.

40. Bracket willfully breached Section 2.6(e) of the SPA by failing to forward the Pennsylvania Tax Refund to UBC within fifteen days of P-Star's receipt thereof.

41. UBC was damaged by Bracket's breach of the SPA because it has not received the Pennsylvania Tax Refund, to which it is entitled.

42. UBC has no adequate remedy at law.

43. Section 10.14 of the SPA provides that, if Bracket fails to perform in accordance with any provision of the SPA, irreparable damage would occur and UBC shall be entitled, without posting a bond or similar indemnity, to enforce specifically the performance of the terms and provisions of the SPA, in addition to any other remedy to which UBC may be entitled at law or equity.

44. Accordingly, UBC is entitled to an order of specific performance compelling Bracket to immediately forward the Pennsylvania Tax Refund to UBC pursuant to the terms of Section 2.6(e) of the SPA.

WHEREFORE, UBC respectfully requests that the Court:

- (a) enter a judgment in its favor on this Complaint;
- (b) order Bracket to comply with the terms of the SPA and, specifically, immediately forward the Pennsylvania Tax Refund to UBC pursuant to Section 2.6(e) thereof; and
- (c) grant UBC such other and further relief as the Court deems just and proper, including the costs and reimbursements of this action and reasonable attorneys' fees.

/s/ Edward B. Micheletti

Edward B. Micheletti (ID No. 3794)

Cliff C. Gardner (ID No. 5295)

Matthew P. Majarian (ID No. 5696)

SKADDEN, ARPS, SLATE,

MEAGHER & FLOM LLP

One Rodney Square

P.O. Box 636

Wilmington, Delaware 19899-0636

Tel.: (302) 651-3000

Fax: (302) 651-3001

Attorneys for Plaintiff

United BioSource LLC

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