

IN THE DISTRICT COURT
WITHIN AND FOR CAMPBELL COUNTY
SIXTH JUDICIAL DISTRICT
STATE OF WYOMING

QUEST HOLDCO, LLC,

Plaintiff,

vs

JEDIDIAH HOUGHTON,
KASEY HOUGHTON, and
JOSHUA HOUGHTON

Defendants.

Civil Action No. 36833

FILED
CAMPBELL COUNTY, WYOMING

DEC 18 2020

DEPUTY CLERK OF THE DISTRICT COURT

ORDER AND JUDGMENT

THIS MATTER comes before the Court following a trial on the merits to the Court commencing on November 16, 2020, and concluding on November 18, 2020. The Plaintiff was represented by Ryan W. McGrath, *Esq.* (Horning & McGrath, LLC) and Mr. Jordan D. Factor, *Esq.* and Jeremy T. Jonsen, *Esq.* (Allen Vellone Wolf Helfrich & Factor, P.C.), with Defendants represented by Ms. Kara L. Ellsbury, *Esq.* and Mr. Khale J. Lenhart, *Esq.* (Hirst Applegate, LLP). Having considered the testimony and credibility of the witnesses, the exhibits admitted into evidence, the relevant law, and being fully advised in the premises, the Court finds and concludes as follows:

I. Findings of Fact

A. Line Finders, Inc.'s Background

1. Line Finders, Inc. (the "Company" or "Line Finders") was founded in November 2006 by Defendant Joshua Houghton ("Josh"¹) and Josh's wife, Defendant Kasey Houghton ("Kasey"), who collectively contributed \$100,000.00 and a trencher to the Company. Day 1 Trial Transcript ("Day 1") at 257:20—258:4; 291:19—292:10; Day 2 Trial Transcript ("Day 2") at 338:8-15.

¹ Given that all Defendants have the same surname, Defendants are referenced herein by their first name to alleviate confusion. No disrespect is intended.

2. The Company, which is and always has been based in Wyoming operated as, among other things, a utility locating and hydrovac excavating contractor, primarily for the oil and gas industry. Defendants' Exhibit ("Def. Ex.") A.

3. Initially, Josh and Kasey owned 100% of the equity in Line Finders. Day 1 at 257:25—258:2.

4. Throughout their time with Line Finders, Josh and Kasey were "absentee" owners who were never involved in the day-to-day operations and management of the business. Def. Ex. A at p. 9; Day 1 at 293:9-21; 294:19-20; Day 2 at 338:22—340:7.

5. While Josh was, at times, consulted for certain Line Finders' purchases, Line Finders was exclusively managed and operated by his brother, Defendant Jedidiah Houghton ("Jed"). Day 1 at 293:7-15; 294:16-18; Day 2 at 333:16—334:2.

6. Despite having minimal to no involvement with the business, both Josh and Kasey received a salary and regular owner draws. Day 1 at 294:23—296:7.

7. The current Line Finders president, Staci Pope, was the only other employee in the Company office with Jed when she joined the Company in 2008. Day 2 at 456:2-12; 457:2-8. When she started, Ms. Pope was responsible for, among other things, maintaining the Company's financial books and billing customers. Day 2 at 458:2—459:1.

8. Beginning in 2012 the Company expanded services from its home state of Wyoming to North Dakota. Day 1 at 258:8-18; Day 2 at 459:11-18.

9. In recognition of Jed's role in expanding the Company, in 2012 Josh and Kasey gave Jed 25% ownership in the Company. Day 1 at 258:8-10; 294:4-15.

10. At or about that same time, the Company began to experience explosive growth. Plaintiff's Exhibit ("P. Ex.") 15 at p. 1.

B. Hess Corporation

11. One of the key contributors to the Company's rapid growth was its relationship with Hess Corporation ("Hess"), a global exploration and energy production company. Def. Ex. GG at p. 4.

12. On May 25, 2012, Line Finders entered into a Master Services Agreement ("MSA") with Hess for utility line locating services in North Dakota. *Id.*

13. Charles Columbus became employed by Hess in March 2013 as the North Dakota ground disturbance supervisor. Day 2 at 388:8-20.

14. As part of his duties, Columbus managed Hess' contracts with utility locating companies, including Line Finders, by assigning locators as needed from those companies. Day 2 at 388:21—389:4.

15. The Company's work for Hess started in and around Keene, North Dakota on June 6, 2012. Day 1 at 183:13-15; Day 2 at 465:2-22. That area—because it is South of the Missouri river—was referred to by both Hess and the Company as "South of the River" ("SOR"). Day 1 at 184:19-24.

16. Soon, Hess requested that the Company also perform work in Tioga, North Dakota alongside Okie Pipe Finders. Day 1 at 183:16-18; 185:4-10. That area—because it is North of the Missouri river—was referred to by both Hess and the Company as "North of the River" ("NOR"). Day 1 at 184:25—185:6. The Company started work NOR on December 31, 2012. Stipulated Exhibit ("Stip. Ex.") 14 at p. 12; *see also* Day 2 at 466:3-8.

17. Keene (SOR) and Tioga (NOR) were separate Hess subsidiaries. Day 1 at 184:12-18. NOR and SOR had two different points of contact that reported to Charles Columbus. Day 1 at 183:22-24; Day 2 at 471:25—472:7. Line Finders billed each subsidiary separately. Day 1 at 183:19-21; Day 2 at 469:16—470:18.

18. The Company's internal accounting for Hess, which was maintained on a QuickBooks database, kept NOR and SOR separate and distinct. *See* Def. Ex. NN; Day 2 at 470:19-24. The Company's internal and external records never merged NOR and SOR. Day 2 at 472:24—473:6. In fact, if a report on Hess were run today, it would reflect NOR and SOR as separate entities. Day 2 at 471:7-20.

19. NOR and SOR each individually generated significant revenue for Line Finders. *See* Def. Ex. NN.

20. Overall, locating services for Hess accounted for 31.72% of Company sales in 2013. Def. Ex. M at p. 6; Def. Ex. NN.

C. Whiting Oil and Gas

21. In 2012, Whiting Oil and Gas ("Whiting"), an oil and gas exploration company, had an increased demand for locating services in North Dakota. Day 1 at 239:12-15; Day 2 at 430:20-24; 432:11—433:3.

22. Christopher Hofland was Whiting's first one-call coordinator, who thereafter became Whiting's damage prevention supervisor. Day 2 at 430:6-14. As part of his responsibilities, Hofland would monitor all one-call system locating. Day 2 at 431:4-10.

23. Hofland and his supervisor, Richard Brierley, met with Jed about Line Finders providing locating services for Whiting. Day 2 at 433:14—434:1.

24. Jed was “a very good salesman” and Hofland was impressed with what he told Whiting. Day 2 at 434:2-8. Jed emphasized Line Finders’ safety, efficiency, and training program. Day 2 at 434:8-13.

25. Given the potential for catastrophic consequences if a line strike occurs, Jed’s representations relating to safety and personnel training were critical to Whiting and made Whiting feel comfortable with Line Finders. Day 2 at 435:6—436:5.

26. In July 2013, Line Finders, which had also received a reference from Columbus, began working for Whiting. Day 1 at 238:13—239:4.

27. Hofland was Line Finders’ one-call coordinator for approximately the first six months of Line Finders’ time with Whiting. Day 2 at 439:24—440:3.

28. Eventually Mark Roningen was hired as another one-call coordinator to manage Line Finders. Day 2 at 445:17—446:3.

29. Hofland was called, at times, to investigate and examine Line Finders’ work both before and after Roningen took over the Line Finders relationship for Whiting. Day 2 at 440:4—441:20; 445:10-16; 446:15-23.

30. Like Hess, Whiting was a major driver of the Company’s revenue, accounting for nearly 10% of sales in 2013, despite the Company only providing services to Whiting for part of that year. Def. Ex. NN.

D. The Company Goes on the Market

31. Due to the increasing demand of large customers like Hess and Whiting in North Dakota, the Company had expanded beyond Jed’s management capabilities and capacity. See Def. Ex. A at p. 9; Day 1 at 301:3-25; P. Ex. 15 at p. 1.

32. At the same time, a real estate investment company owned by Josh and Kasey, JKH Investments, was running out of capital, which was inhibiting its growth. Day 1 at 297:19—298:6. JKH Investments, which was very important to both Josh and Kasey, needed more money and more of Josh’s time. Day 1 at 298:7-13; Day 2 at 341:15—342:1. Consequently, Josh and Kasey decided not to reinvest in Line Finders. See Def. Ex. A at p. 9.

33. Without more capital, Line Finders had “hit a wall”. Day 1 at 302:9-21. It could not add more locators and it was “tapped out at the bank.” Day 1 at 302:22—304:9.

34. It was important to Josh and Kasey to sell their interests in Line Finders to grow JKH Investments. Day 1 at 304:18-22. Likewise, it was important to Jed to sell equity to get an infusion of capital into Line Finders. Day 1 at 304:23—305:1.

35. As such, toward the end of 2012, Defendants decided to sell equity in the Company. Day 1 at 260:21-23.

36. Defendants engaged Scott Bushkie, the owner of Cornerstone Business Services, Inc. ("Cornerstone"), to act as their agent in selling the Company. Day 2 at 514:1-3. For its services, Defendants agreed to pay Cornerstone: (1) a \$9,500.00 engagement fee; (2) \$1,000 per month as a marketing fee; and (3) a "success fee" depending on the sales price of the business. Day 2 at 514:4-21; 515:17-20.

37. The initial term of the brokerage agreement was 9 months after which the agreement could be terminated by the sellers without cause on 30-days' notice. Day 2 at 516:3—517:3.

38. Cornerstone created a Confidential Information Memorandum ("CIM") in 2013 that represented key information about the Company to provide to interested and prospective buyers. *See* Def. Ex. A.

39. The CIM is a critical document in any merger or acquisition process. Day 1 at 54:1-14. It sets forth the vast majority of information that a buyer would deem material. *Id.* Buyers rely on the information contained in a CIM to formulate the material terms of their offer. Day 1 at 54:4-14; Day 2 at 554:14—555:24.

40. Jed worked with Cornerstone to create the CIM, providing nearly all of the information contained in the document. Day 2 at 572:12—573:9. The CIM emphasized that Line Finders' relationship with Hess was strong, prominently displaying in multiple places a positive recommendation from Columbus. Def. Ex. A at pp. 4, 27. The CIM emphasized the growth opportunities available to the Company, which would be realized by leveraging the strength of the Hess relationship. *See ex. Id.* at pp. 4, 6, 8, 12, 13, 14, and 17; Day 1 at 190:17-193:20.

41. The CIM contained, among other things:

- a. Representations touting the Company's proprietary processes, quality controls, and extensive training (Def. Ex. A at p. 4);
- b. Representations concerning the Company's "superior reputation in the marketplace" (*Id.*);
- c. A glowing recommendation from Charles Columbus, Hess's decisionmaker for utility locating work (*Id.*);
- d. Representations showing strong historical and projected sales growth, including a projected 10-fold increase over five years in North Dakota, largely because of the Company's relationship with Hess (*Id.* at 6; Day 1 at 73:22—75:18);

- e. Representations of a "Recurring Revenue Model" driven by the Company's MSA's, which purportedly "lock[ed] in profits for the next 24 months" (Def. Ex. A at p. 7).

42. It is standard practice for a seller to disclose to a buyer prior to closing any material changes to the representations contained in a CIM. Day 2 at 556:7—557:2.

E. Gardner Standard Background

43. Gardner Standard, owned by Michael Healy, is a private equity firm that invests in companies generating between \$7.5 and \$75 million in sales. Day 1 at 51:9-21.

44. When Gardner Standard finds a company for sale that it is interested in investing in, generally it alerts the sales broker, signs a confidentiality agreement, and then receives the CIM. Day 1 at 53:12-25.

45. After reviewing the CIM and speaking to the prospective target's management team, if Gardner Standard is still interested, it will craft a letter of intent outlining the terms of Gardner Standard's offer. Day 1 at 55:15—56:3.

46. If the letter of intent is signed, Gardner Standard begins due diligence. Day 1 at 56:14—57:4.

47. Due diligence cannot uncover every potential hazard with a prospective target. Day 1 at 58:9-11.

48. As such, Gardner Standard relies on negotiated representations from any seller in the eventual acquisition agreement. Day 1 at 58:12—59:4.

49. A seller's representations are typically among the most heavily negotiated terms of an acquisition agreement. Day 1 at 59:5—60:7.

50. Gardner Standard would not go forward with a deal without being satisfied with the scope and language of a seller's representations. Day 1 at 59:13-17.

51. The price that Gardner Standard is willing to pay for a business depends significantly on the scope and language of the seller's representations. Day 1 at 58:21—59:4.

52. Likewise, when it sells businesses, Gardner Standard is careful to ensure that the representations that it makes are accurate. Day 1 at 61:22—62:13.

F. Gardner Standard's Interest in the Company

53. Gardner Standard executed the confidentiality agreement and received the Line Finders CIM from Cornerstone. Day 1 at 66:12—67:2; Def. Ex. A.

54. Gardner Standard was interested in, among other things, the CIM's representations about the Company's growth and its strong customer relationships. Day 1 at 63:19-25; 72:18—75:23.

55. Gardner Standard's primary concern was the Company's high customer concentration—which is when a large percentage of the sales of a company are from one or a small group of customers. Day 1 at 64:4-18; Day 2 at 359:16—360:4.

56. Gardner Standard relied on the material representations in the CIM when ultimately deciding what terms to offer for the acquisition of the Company. Day 1 at 67:9-12.

- a. The CIM's representations relating to the strength of the Company's proprietary processes, quality controls, and extensive training were important to Gardner Standard given the catastrophic safety, reputational, and financial consequences associated with mismarking or not finding utility lines. Day 1 at 69:8—70:12.
- b. The CIM's representations concerning the Company's "superior reputation" were important to Gardner Standard given the tight-knit relationship among the Company's existing and prospective customers. Day 1 at 70:13—71:10.
- c. The recommendation in the CIM from Charles Columbus was critical to Gardner Standard since it illustrated that the Company had a good relationship with its largest customer and it validated the CIM's projections. Day 1 at 71:11—72:17.
- d. Likewise, the CIM's growth projections, arising mostly from its relationship with Hess, were important to Gardner Standard because it represented that the relationship with Hess was strong with significant room to grow. Day 1 at 72:18—75:18.
- e. The CIM's representations relating to the MSAs "locking in" profits were important because it communicated that its customer relationships were secure and the growth projections were attainable. Day 1 at 77:12-20.

57. Gardner Standard expected that if any material representation in the CIM changed prior to closing, the Defendants would disclose such change to Gardner Standard. Day 1 at 68:14-23.

58. Apart from the CIM, on August 19, 2013, Bushkie, acting on behalf of the Defendants, sent to Healy the text of an email from Columbus stating that Hess had increased Columbus's budget to enable him to retain the services of four additional Line Finders' locators by spring 2014. Def. Ex. C; Day 1 at 82:2-14.

59. In that same email chain, Bushkie touted great reviews from Line Finders customers and the impact this would have for future growth. Def. Ex. C.

60. On September 9, 2013, Bushkie reiterated to Healy that Hess was adding four more Line Finders locators in 2014. Def. Ex. D; Day 1 at 83:2-10.

61. In reliance on the information and representations it had received from Defendants and their agent, Gardner Standard submitted a letter of intent ("LOI") to Mr. Bushkie on October 5, 2013, detailing Gardner Standard's proposal to acquire the Company. Day 1 at 84:6-17; Stip. Ex. 2.

62. Of note, on October 28, 2013, Jed instructed Bushkie to put in the data room² a three-year outlook estimating 24 locators in North Dakota by third quarter 2014 and 40 by the end of 2016. P. Ex. 21; Day 1 at 194:8—195:15.

63. In late October 2013, Defendants rejected Plaintiff's offer as too low. Day 1 at 87:24—88:11.

64. Defendants instead decided to proceed with the proposal by PJM Advisors ("PJM"). Day 1 at 197:8-10.

65. The deal with PJM fell apart because it could not come up with funding. Day 1 at 199:10-13.

66. Defendants subsequently selected the next best offer from D Energy. Day 1 at 199:14-16.

67. D Energy decided on March 13, 2014, to not pursue the deal. Day 1 at 199:22—200:2; 262:7-15.

G. Deterioration

i. Hess

68. In the summer of 2013, the relationship between Hess and Line Finders was very good. Day 1 at 187:8-10.

² A data room is a collection of documents, typically maintained, shared, and accessed virtually, that a seller provides to a buyer to review during due diligence. Day 1 at 221:12-18.

69. In February 2014, Line Finders' relationship with Hess changed materially. Day 1 at 130:10-14; Day 2 at 389:10-18.

70. In early 2014, Line Finder's work—the quality of its personnel, training, and services—started deteriorating. Day 2 at 399:11—401:8.

71. By early 2014, Hess was spending money to retrain Line Finders' locators. Day 2 at 400:13-21.

72. In addition, Line Finders began experiencing significant and rapid turnover of the locators working for Hess. Day 2 at 402:2—403:17. These locators were dissatisfied with their compensation and their housing, and were being lured away by Line Finders' competitors. Day 2 at 402:19—403:17; 404:14—405:14. These locators began complaining to Columbus about their employment conditions. *Id.* The dissatisfaction and turnover of locators became a problem for Columbus and Hess. Day 2 at 402:5-18.

73. In early 2014, Columbus told Jed about problems Hess had with Line Finders. Day 2 at 401:9-17.

74. Columbus informed Jed, among other things, that 1) Line Finders' Wyoming-centric training did not translate to North Dakota, 2) there were problems with employee turnover because Line Finders locators were departing to other companies for higher pay and better housing, and 3) employees were complaining of broken promises from Jed. Day 1 at 401:18—403:17.

75. When Jed was told about these problems, he always promised he was working on it, but Columbus never saw any change. Day 2 at 403:18—404:7.

76. Consequently, Columbus began reducing Line Finders' work in February 2014 with the intention of phasing Line Finders out completely. Day 2 at 404:10-13; 406:23—407:5; 409:12-18.

77. Line Finders had seven locators working full-time for Hess and expected to increase that to nine locators by Spring 2014. Day 1 at 205:12-18; P. Ex. 25 at p. 3.

78. But on February 5, 2014, Columbus told Jed that Hess only intended to utilize four Line Finders locators going forward. Stip. Ex. 3; Day 1 at 206:24—207:2; Day 2 at 411:13-20.

79. For some period thereafter, only four Line Finders' locators performed work for Hess. Day 1 at 227:15-23. Eventually, Hess utilized the services of five Line Finders' locators. Day 3 Trial Transcript ("Day 3") at 716:10—718:20. At no point after February 5, 2014 did Hess utilize more than five Line Finders locators. Stip. Ex. 14, pp. 60-87; Day 3 at 716:10—718:20.

80. Moreover, in February 2014, Columbus advised Jed that he was eliminating Line Finders' work for the NOR subsidiary and giving it all to Line Finders' competitor Okie Pipe Finders. Stip. Ex. 4; Day 2 at 404:14—405:14; 479:16—480:9. Jed confirmed the change by looking at the Hess ticketing software and seeing that Line Finders locators were not being assigned NOR. Day 2 at 479:16-24.

81. Line Finders' last day performing work NOR was March 14, 2014. Stip. Ex. 14 at p. 64; Day 2 at 479:4-7.

82. On March 20, 2014, Columbus disputed Line Finders' historical billing of standby hours to Hess. Stip. Ex. 6 at p. 5. For a significant period of time, Line Finders had been billing Hess for a minimum of 8 hours per day for each locator assigned to work for Hess, regardless of whether such locator performed work on that day. *Id.* Jed represented that Hess had guaranteed Line Finders a minimum of eight hours per day per locator. *Id.* However, following internal discussions at Hess, Columbus concluded that there was no such agreement. *Id.* at pp. 2-3. Jed initially testified that he could not locate the written agreement, but then testified that there never was a written agreement. Day 1 at 237:15-238:12. So, Columbus ended the practice of billing for eight hours per day per locator. Stip. Ex. 6; Def. Ex. QQ at p. 16; Day 2 at 413:24—416:7; 480:25—481:17.

83. On March 25, 2014, Columbus informed Jed that one of the Line Finders locators who had been performing work for Hess "has been extremely rude" to Hess personnel "and we do not want him to ever work for Hess in any fashion again." Stip. Ex. 7.

84. Columbus had multiple conversations with Jed relating to the reductions, concerns, and weakening relationship and believed that Jed should have seen the "writing on the wall" when Columbus was not filling the positions of departed Line Finders' locators, but found that Jed was "in his own world." Day 2 at 406:23—407:19; 421:9-23.

85. It is apparent that Jed had been aware of Columbus' concerns in early 2014 given that Jed responded to Columbus by promising that Line Finders would make necessary changes and, in fact, took steps to address the problems—via "significant changes"—over the next several months. Stip. Ex. 10 at pp. 1-2; Day 1 at 217:9—218:11; 220:8-16; Day 2 at 403:18—404:7.

ii. Whiting

86. Within weeks of Line Finders starting work for Whiting, a third-party excavating company complained about missed lines and requested an audit of Line Finders' work. Day 2 at 440:4-23; 443:1-5. Hofland went to the site and found multiple lines that should have been located by Line Finders but were missed. Day 2 at 440:24—441:11.

87. When Whiting spoke to Jed about the incident, he dismissed the complaints and cast the blame on Whiting. Day 2 at 441:21—442:13. Whiting was concerned that the level of negligence it had observed would get someone hurt. Day 2 at 443:15-21.

88. Line Finders' work continued to deteriorate with more instances of negligently missed locates and Jed continuing to deflect blame and not take accountability. Day 2 at 443:6—445:9.

89. On December 20, 2013, Mark Roningen wrote to Jed complaining about the "caliber" of Line Finders' people and demanding that they not work for Whiting anymore. P. Ex. 34.

90. Whiting's troubles—and relationship—with Line Finders concluded in a damaging and dangerous line strike where Line Finders failed to identify lines within an excavation area. Day 2 at 449:14—450:18.

91. When confronted about the incident, Jed again blamed Whiting, disregarded Whiting's investigation, and was only concerned with who would pay for the incident. Day 2 at 450:11-21; 451:16—452:10.

92. Whiting subsequently launched a significant investigation into Line Finders' overall work and found that Line Finders lacked a basic understanding of underground utility locating. Day 2 at 451:3-15.

93. Hofland's conclusion was that he had been "conned" by Jed's representations about the quality of Line Finders' personnel and service. Day 2 at 447:13—449:9. Hofland testified: "I've been almost 27 years in experience, in excavation, underground excavation activities, in particular one-call. And it takes a hell of a salesman to con me, and that's what I felt like I had been conned." Day 2 at 449:1-9.

94. Columbus knew of the problems that Whiting had been experiencing with Line Finders. Day 2 at 409:5-11.

H. Defendants Come Back to Gardner Standard

95. By March 2014 (when the D Energy transaction fell through), the Company had been up for sale for over a year, well past the term of Bushkie's contract. Day 1 at 262:13—263:5.

96. Line Finders could, at this point, terminate Bushkie's contract. Day 1 at 263:6-8. If they did so, or if the Company did not sell, Cornerstone would not have received a success fee. Day 2 at 514:7—516:19. The Line Finders success fee would ultimately account for over 25% of Cornerstone's revenue during 2014. Day 2 at 575:15-23.

97. Jed was entering the busy season with Line Finders, overloaded with demands from both the Company and Bushkie, could not afford to lose more customer relationships, needed an infusion of capital, and was emotionally drained. Day 1 at 267:25—268:14; Day 2 at 550:18—553:9

98. If the Company did not sell, Josh and Kasey would have had to ask for “mercy from the bank” to fund JKH Investments. Day 1 at 305:17—306:8.

99. Bushkie reached out to Gardner Standard in early March 2014 to see if it was still interested in acquiring the Company. Day 1 at 88:12—89:19.

100. Bushkie represented to Healy that the Company had been doing great and meeting its projections. Day 1 at 89:10-19.

101. Gardner Standard, which had not had any contact with the Company or its agents since October 2013, advised that it was still interested. Day 1 at 88:12—89:19; Day 2 at 360:24—361:3.

102. Gardner Standard submitted a revised LOI on March 18, 2014. Stip. Ex. 5.

103. The 2014 LOI was an increased offer in all material respects from the 2013 LOI, including offering \$1.5 million more in consideration. Day 1 at 90:21—91:13; Stip. Ex. 5.

104. Gardner Standard increased its offer—which Defendants accepted—because Defendants represented the Company was performing in accordance with what had been projected in the 2013 CIM. Day 1 at 93:24—93:12.

105. After the LOI was accepted on Mach 18, 2014, Gardner Standard promptly began due diligence until the acquisition closed on May 22, 2014. Day 1 at 93:10—94:7.

I. Gardner Standard is Blocked from Speaking with Columbus

106. Because of, among other things, Line Finders’ high customer concentration, from the outset Gardner Standard made clear that a key part of its diligence efforts would be conducting calls or meetings with the “Company’s key customers.” Stip. Ex. 5 at § 8(e). Indeed, within two days of its LOI being accepted, Gardner Standard asked to meet with Hess specifically. Day 2 at 95:7—96:20.

107. The only way for Gardner Standard to determine whether a large customer was at risk of leaving was to either speak with the individual at the target company who was responsible for the customer relationship or speak with the customer directly. Day 1 at 64:19—65:2.

108. Bushkie acknowledged that, even if Gardner Standard got all the documents it wanted in due diligence, it would not have discovered that the Hess relationship changed materially in February 2014. Day 2 at 568:2-15; 569:2-5.

109. On March 20, 2014, Bushkie stated that Gardner Standard could not talk to Company clients—expressly referencing Hess—until “the end of the process” but specifically represented that there were “no issues with the [Hess] relationship.” Def. Ex. J.

110. Healy was reassured by Defendants’ representation that there were no issues with the Hess relationship as of March 20, 2014. Day 1 at 96:21—97:9.

111. Since Jed was copied on Bushkie’s email, Healy assumed that Jed would have corrected any misstatements by Bushkie. Day 1 at 97:10—98:11. Jed did not correct Bushkie’s representation that there were no issues with the Hess relationship as of March 20, 2014. Day 1 at 98:6-11.

112. Relying on that representation, Gardner Standard agreed to wait until “the end of the process” to speak with Hess. Day 2 at 96:21—97:9.

113. On April 22, 2014, Jed and Josh instructed Bushkie that they did not want Gardner Standard “talk[ing] with any of our clients.” Stip. Ex. 8. Jed and Josh insisted that Gardner Standard should be satisfied with the positive reference from Columbus in the CIM. *Id.*; Day 1 at 265:21—266:4; 309:8-24.

114. Two days later, Jed and Josh continued to assert that Gardner Standard would not be able to meet with customers in person, and could only meet by phone after “the previously set closing date.” P. Ex. 33.

115. Gardner Standard was not afforded the opportunity to speak with customers prior to executing the acquisition agreement. Day 1 at 116:16-19.

J. Gardner Standard is Misled Throughout Due Diligence

116. Rather than disclose to Healy that Line Finders’ relationship with Hess had changed and that Hess had reduced the amount of business it was doing with Line Finders, Jed represented to Healy that a 40% increase in Hess revenue over 2013 was what Gardner Standard could “expect sales to do throughout 2014.” Def. Ex. M at p. 5.

117. Healy relied on Jed’s representations and believed that sales were going well and that revenue from Hess would be higher in 2014 than 2013. Day 1 at 107:15—108:1.

118. Throughout due diligence, Gardner Standard was continuously told that Line Finders had an excellent, secure relationship with Hess. Day 1 at 111:25—112:4.

119. Jed instructed Bushkie to inform prospective buyers in February 2014 that Line Finders locating revenue was projected to increase substantially. P. Ex. 17; Day 1 at 220:19—221:25. This projection was based on the representation that Line Finders would have 10 full time locators in North Dakota. Day 2 at 222:12-19. By this point, however, Line Finders' largest customer in North Dakota (Hess) had reduced the number of Hess locators to four and the second-largest customer in North Dakota (Whiting) had terminated the relationship entirely. P. Ex. 17; Stip. Ex. 3; P. Ex. 36; Day 1 at 244:20-23.

120. Gardner Standard learned that Hess was potentially offering a new area in Ohio to Line Finders. P. Ex. 3; Day 1 at 255:3—256:7.

121. Gardner Standard learned of opportunities that Line Finders apparently had to turn down. P. Ex. 27.

122. Gardner Standard was not told that Columbus had terminated Line Finders' work for the NOR Hess subsidiary. Day 1 at 112:5-9.

123. Gardner Standard was not told that Hess had reversed its decision to add four more locators. Day 1 at 112:10-14.

124. Gardner Standard was not told that Hess had reduced the number of Line Finders' locators. Day 1 at 112:15-18.

125. Gardner Standard was not told that Hess was no longer going to pay a guaranteed eight hours per day per locator. Day 1 at 112:19-22.

126. Had Gardner Standard been told these facts, it would not have closed on the purchase of Line Finders. Day 1 at 113:16—115:7.

127. Bushkie, too, was not given emails between Jed and Columbus to provide to Gardner Standard that described Hess' reduction in locators, Hess' elimination of work NOR, and Hess' elimination of guaranteed daily hours. Day 2 at 559:20—561:11.

128. Jed testified that he told Gardner Standard various negative information about Hess and Whiting in a meeting at Toni Bell's office. Day 1 at 245:16—246:2; 279:21—280:19; 282:1—284:24.

129. Contrary to Jed's testimony, Josh testified that at this meeting he could not recall Gardner Standard being told anything negative about Hess or Whiting. Day 1 at 307:1—308:13.

130. Phillip Johnson, who assisted Gardner Standard with due diligence and attended the meeting at Toni Bell's office, also confirms that at that meeting, and throughout due diligence, Gardner Standard was never told that Line Finders' work for Hess was split into two locations; never told that Line Finders would no longer be working NOR; never told that Columbus wanted to change billing practices; never told that Hess was not going to add four additional locators; never told that Hess had reduced the number of full time locators; and never told about the contract dispute resulting in Hess refusing to continue to pay a guaranteed eight hours daily per locator. Day 2 at 366:19—368:22; 370:4—371:25.

131. Instead, Johnson confirms that Jed only told Gardner Standard positives about the Hess relationship. Day 2 at 366:19—367:2; 368:23—369:24.

132. In regard to the Whiting relationship, Gardner Standard was told that Whiting had taken safety, compliance, and legal shortcuts which were unacceptable to Line Finders and caused Line Finders to terminate the relationship. Day 1 at 106:6—107:8; P. Ex. 36; Day 2 at 365:14—366:6.

133. The apparent transparency about Whiting gave Gardner Standard the impression that Jed and the Defendants were being honest and open about the Hess relationship. Day 2 at 366:7-18.

134. Jed did not produce the letter from Whiting where Whiting terminated the relationship with Line Finders. Day 1 at 245:16-20.

135. Jed did not disclose that Whiting had been complaining about Line Finders' poor quality, training, and supervision for months. Day 1 at 250:3-13; Day 2 at 372:21-25; 373:5-12.

136. Jed did not disclose that Whiting had terminated Line Finders employees. Day 1 at 250:14-22.

137. Jed did not disclose that Whiting blamed Line Finders for a costly line strike. Day 2 at 373:1-4.

138. Jed did not disclose that it was Whiting that terminated the relationship with Line Finders. P. Ex. 36; Day 1 at 249:22—250:22.

139. Bushkie was not given emails between Whiting and Jed to provide to Gardner Standard that reflected Whiting's problems with Line Finders locators and Whiting's problems with Jed. Day 2 at 562:2—563:13.

140. Jed did, however, produce a "write-up" where Jed represented that Line Finders walked away from the Whiting contract due to Whiting's misconduct. P. Ex. 36; Day 1 at 247:8—250:2. Jed provided this write-up to Bushkie for Bushkie to put in the data room. Day 2 at 563:14-24.

K. The Acquisition Agreement

141. Defendants and Plaintiff entered into an Acquisition Agreement (the "Agreement") on May 7, 2014, pursuant to which Plaintiff was to purchase all of the outstanding stock of the Company for a total price of \$6,398,458, plus certain other potential payments. Stip. Ex. 16.

142. The Agreement expressly provided that the calculations attributable to the determination of the purchase price took into account "the Company's current assets," including its "accounts receivable ('AR')." *Id.* at §§ 3.1 and 3.2.

143. Within the Agreement were representations jointly and severally made by the Defendants. *Id.* at § 4.

144. Of relevance here, the Defendants represented that since December 31, 2013 "[t]here has not been any change in the financial condition, operations, or, to the knowledge of the Sellers, forecasts of the Company other than changes in the ordinary course of business, none of which had or has a Material Adverse Effect." *Id.* at § 4.10(a).

145. Defendants represented that since December 31, 2013 "there has not been any material change in the terms of payment by its clients for any services the Company performs, other than extensions of payment terms granted in the ordinary course of business, in any event, not exceeding sixty (60) days after the invoice date[.]" *Id.* at § 4.10(l).

146. Defendants represented that since December 31, 2013, "there has not been any Material Adverse Effect". *Id.* at § 4.10(s). Material Adverse Effect is defined as "a change, effect or circumstance that, when considered either individually or in the aggregate together with all other adverse changes, effects or circumstance. . . could reasonably be expected to have a material adverse effect on the financial condition or results of operations or forecasts of the Company in an amount in excess of One Hundred Fifty Thousand Dollars (\$150,000)." *Id.* at § 1.1.

147. With respect to the Company's top ten largest customers identified in section 4.14 of the Company Disclosure Schedules, Defendants further represented that from December 31, 2013 through May 22, 2014 "[e]xcept as set forth in Section 4.14 of the Company Disclosure Schedule, no such customer or supplier identified in Section 4.14 of the Company Disclosure Schedule has cancelled, terminated, rescinded, suspended, or reduced in any respect, or made any threat or other communication to the Company to cancel, terminate, rescind, suspend or reduce in any respect, or otherwise reflecting a change in, the business relationship with any such customer or supplier." *Id.* at § 4.14.

148. On Section 4.14 of the Company Disclosure Schedule, Defendants disclosed that the relationship with Whiting had been “terminated.” Stip. Ex. 18 at § 4.14.

149. Defendants did not disclose on Section 4.14 of the Company Disclosure Schedule any change, cancellation, reduction, termination, rescission, or suspension of any aspect of the Hess relationship. *Id.*

150. Jed acknowledges that looking at Section 4.14 of the Company Disclosure Schedule, no one could know that Line Finders had previously been doing work with two different Hess companies and was now only doing business with one. Day 1 at 234:19—235:4.³

151. Defendants further represented that “the Company’s accounts receivable are or will be current and collectible.” Stip. Ex. 16 at § 4.17.

152. Finally, Defendants represented that, in making the representations under Article 4, they did not “omit to state any material fact” necessary to make the representations made not misleading. *Id.* at § 4.40.

153. Jed acknowledged that he reviewed the Agreement, understood the Agreement, negotiated terms, had the opportunity to ask legal counsel any questions, and executed the Agreement. Day 1 at 268:24—269:9.

154. Josh and Kasey did not know their representations to be true nor did they make any effort to determine such truth. Day 1 at 313:7—319:7; Day 2 at 343:24—351:5.

155. Kasey did not read the Agreement. Day 2 at 343:20-23.

156. Gardner Standard relied on each of the representations in Article 4 and would not have purchased Line Finders without them. Day 1 at 117:17-23.

157. Defendants acknowledge that it was reasonable for Gardner Standard to rely on the Agreement’s representations and they knew that Gardner Standard would, in fact, so rely. Day 1 at 230:22—231:1; 319:8-23; Day 2 at 343:5-16.

158. Section 4.14’s representation concerning the Company’s relationships with key customers was particularly important to Gardner Standard given the Company’s high customer concentration and, therefore, outsized dependence on individual customer relationships. Day 1 at 122:21—123:8.

³ In a prior disclosure schedule from November 2013, Defendants had disclosed to a prospective buyer that Line Finders worked for two separate Hess companies: “North Tioga” and “South Keene & Hawkeye.” P. Ex. 19 at § 4.17; Day 1 at 231:2—232:3.

159. In reliance on the representations Defendants made both in the Agreement and outside of the Agreement, especially those representations concerning the Company's customers, the transaction closed on May 22, 2014, with Gardner Standard creating an entity, Plaintiff Quest Holdco, LLC ("Plaintiff"), to make the acquisition and paying \$6.8 million in total consideration. Day 1 at 62:18-22; 94:2-4; 130:6-9.

160. Josh and Kasey walked away with approximately \$2 million. Day 1 at 321:11—322:1; Day 2 at 351:6-14.

161. Jed received around \$1 million. Day 3 at 700:23—701:5.

L. JN Field Services and Backwoods Excavation

162. The express terms of Line Finders' invoices gave customers 30 days to pay. Day 2 at 486:6-12; Def. Ex. AAA; Def. Ex. ZZ.

163. JN Field Services was a customer that Line Finders worked for in 2013 and 2014. Def. Ex. AAA; Day 2 at 485:4-8.

164. Pope performed billing for JN Field Services and never received full payment from them. Day 2 at 485:15—486:5.

165. On May 22, 2014, the date the acquisition closed, JN Field Services was over 90 days past due on its outstanding balance to Line Finders. Day 2 at 487:12-18; Def. Ex. AAA.

166. Backwoods Excavating was also a customer that Line Finders performed work for. Day 2 at 488:1-5; Def. Ex. ZZ.

167. Pope performed billing for Backwoods Excavating. Day 2 at 489:5-11.

168. Backwoods Excavating never made any payments. Day 2 at 490:2-4.

169. On May 22, 2014, Backwoods Excavating was over 60 days past due on its outstanding balance to Line Finders. Def. Ex. ZZ; Day 2 at 489:12-22.

M. Plaintiff's Damages

170. In the months following closing, Plaintiff learned about the problems that had been plaguing the Hess relationship since February 2014. Day 1 at 130:10-14. As a result of that changed relationship, sales for Hess, which in the third quarter of 2013 were \$433,455, dropped to \$278,932 in the third quarter of 2014, and \$0.00 in the third quarter of 2015. P. Ex. 37 at p. 5.

171. Plaintiff asserts it learned the accounts receivable for JN Field Services and Backwoods Excavating were uncollectible. Day 1 at 179:6—180:5. The court

finds, for purposes of evaluating damages in this case, that only the JN Field Services account receivable was uncollectible.⁴

172. The imminent loss of Hess and the uncollectability of the JN Field Services account receivable diminished the value of Line Finders at the time of the Agreement. *See ex.* Day 1 at 133:2-18; 179:15—181:14.

173. John Mitchell, a CPA and CVA who was qualified as an expert in valuation, opined on the difference in value between what Plaintiff actually paid under the Agreement with what Line Finders' value had been given that the relationship with Hess was impaired and the account receivable from JN Field Services was uncollectible. Day 2 at 582:5—583:8.

174. In the transaction, the buyer and seller were taking an income approach to Line Finders' value where the purchase price is expressed as a multiple of earnings

⁴ The Acquisition Agreement language relative to accounts receivable contained the following:

Section 4.1(l): "there has not been any material change in the terms of payment by its clients for any services the Company performs, other than extensions of payment terms granted in the ordinary course of business and, in any event, not exceeding sixty (60) days after the invoice date;"

Section 4.17: "All of the Company's accounts receivable that are valid and collectible obligations arising from bona fide arms-length sales actually made by the Company in the ordinary course of business at the aggregate recorded amount thereof, net of any applicable reserve for doubtful accounts included as a Current Liability. Except to the extent paid prior to the Closing, the Company's accounts receivable are or will be **current and collectible**. To the knowledge of the Sellers, there is no contest, claim, defense or right of set off, other than returns in the ordinary course of business of the Company, under any agreement or contract with any account debtor of an account receivable relating to the amount or validity of such account receivable." (emphasis added).

The court is satisfied by clear and convincing evidence that neither the JN Field Services account receivable nor the Backwoods Excavating account receivable was current *and* collectible, the standard that had to have been met under the Acquisition Agreement. Therefore, the first element of the claim for intentional misrepresentation is met (the defendant made a false representation intended to induce action by the plaintiff). This being said, the calculation of damages by Plaintiff's expert depended upon both accounts being uncollectible. The court is not persuaded by clear and convincing evidence that the Backwoods Excavating account was uncollectible (even though, to be sure, it was not current). Therefore, the court is unwilling to include the sum of damages attributable to any alleged uncollectibility of the Backwoods Excavating account — which is how the Plaintiff's expert chose to value this piece of damage.

before interest, taxes, depreciation, and amortization ("EBITDA"). Day 2 at 587:22—589:7.

175. To determine EBITDA, Mitchell looked at Line Finders' financial statements and found that it was \$1,764,124 in 2013. Day 2 at 589:12-20.

176. Mitchell then divided the purchase price by the EBITDA and reached 3.627. Day 2 at 590:9-23. That number is the EBITDA multiple, *i.e.*, a buyer in an arms' length transaction would agree to multiply EBITDA by this number to arrive at a purchase price. Day 2 at 588:25—589:7.

177. From there, Mitchell determined the income attributable to Hess (\$1,282,157) and deducted expenses attributable to Hess (\$628,525) to arrive at a Hess EBITDA of \$653,632. Day 2 at 590:24—597:23. That is the amount that the Hess relationship contributed to the Company's EBITDA. Day 2 at 597:14-23.

178. Then, to determine the value of the purchase price attributable to Hess, Mitchell multiplied the Hess EBITDA by the EBITDA multiplier of 3.627 and arrived at \$2,370,723. Day 2 at 598:3-21.

179. Recognizing that the Hess relationship continued for a number of months post-closing, Mitchell deducted \$304,939 in value that Plaintiff received from Hess after the sale. Day 2 at 586:10-14; 599:6—600:1.

180. After that deduction Mitchell arrived at \$2,065,784 in damages attributable to the impairment of the Hess relationship. Day 2 at 600:5-17. Defendants dispute that the Company's cash on hand should be included in the calculation of EBITDA. Mitchell maintains that this inclusion was proper. Day 2 at 613:24—616:14. In Defendants' view, if cash on hand is removed from the calculation of EBITDA, the resulting EBITDA multiple would be 3.263 and the resulting damages from the Hess relationship would be \$1,828,013. Day 2 at 623:21—625:1. The court is persuaded by Defendants' position here.

181. As to JN Field Services, Mitchell assumed this account was uncollectible. Day 2 at 600:18-25.

182. Even if the seller was to receive the collection from this account receivable, the buyer still would have been damaged because the buyer had valued the Company based on, among other things, the represented accounts receivable. Day 2 at 601:9—602:5.

183. The value attributable to the uncollectible JN Field Services account receivable is, therefore, calculated the same way as the Hess value was calculated. Day 2 at 602:6-9.

184. After performing such calculation, Mitchell determined that, after reductions for expected earnings, the value for JN Field Services was \$61,910.00. Day 2 at 602:10—603:25.

II. Conclusions of Law

A. Plaintiffs' Intentional Misrepresentation Claim

1. To prevail on a claim for intentional misrepresentation under Wyoming law, the following elements must be proven: (1) the defendant made a false representation intended to induce action by the plaintiff; (2) the plaintiff reasonably believed the representation(s) to be true; and (3) the plaintiff relied on the false representation(s) and suffered damages as a result thereof. *See Birt v. Wells Fargo Home Mortg., Inc.*, 2003 WY 102, ¶ 42. The plaintiff must prove each element of the claim by clear and convincing evidence. *Rogers v. Wright*, 2016 WY 10, ¶ 13. "Clear and convincing evidence" is the "kind of proof which would persuade a trier of fact that the truth of the contention is highly probable." *Alexander v. Meduna*, 2002 WY 83, ¶ 29.

2. The plaintiff must also prove that the defendant made the misrepresentations at issue, either: (a) with knowledge of the falsity of such misrepresentations or (b) with awareness that they lacked the basis for making such statements. *Birt*, ¶ 43, fn. 12; *see also* Restatement 2d Torts § 526.

3. As explained below, the Court CONCLUDES that Plaintiff satisfied all elements required for its intentional misrepresentation claim as to Hess and the JN Field Services account receivable.

i. Defendants made false representations regarding the Hess relationship.

4. Defendants jointly and severally made the following material representations concerning the Hess relationship intending to induce Plaintiff to acquire Line Finders:

a. Since December 31, 2013, "[t]here has not been any change in the financial condition, operations, or, to the knowledge of the Sellers, forecasts of the Company other than changes in the ordinary course of business, none of which had or has a Material Adverse Effect." Stip. Ex. 16 at § 4.10(a);

b. Since December 31, 2013 "there has not been any material change in the terms of payment by its clients for any services the Company performs, other than extensions of payment terms granted in the ordinary course of business, in any event, not exceeding sixty (60) days after the invoice date[.]" *Id.* at § 4.10(l);

c. Since December 31, 2013, “there has not been any Material Adverse Effect”. *See Id.* at § 4.10(s). Material Adverse Effect is defined as “a change, effect or circumstance that, when considered either individually or in the aggregate together with all other adverse changes, effects or circumstance. . . could reasonably be expected to have a material adverse effect on the financial condition or results of operations or forecasts of the Company in an amount in excess of One Hundred Fifty Thousand Dollars (\$150,000).” *Id.* at § 1.1;

d. With respect to the Company’s top ten largest customers identified on section 4.14 of the Company Disclosure Schedules, Defendants represented that from December 31, 2013 through May 22, 2014 “[e]xcept as set forth in Section 4.14 of the Company Disclosure Schedule, no such customer or supplier identified in Section 4.14 of the Company Disclosure Schedule has cancelled, terminated, rescinded, suspended, or reduced in any respect, or made any threat or other communication to the Company to cancel, terminate, rescind, suspend or reduce in any respect, or otherwise reflecting a change in, the business relationship with any such customer or supplier.” *Id.* at § 4.14. On Section 4.14 of the Company Disclosure Schedule, Defendants did not disclose that there had been any change, cancellation, reduction, termination, rescission, or suspension of any aspect of the Hess relationship. *Stip. Ex. 18* at § 4.14. Defendants instead represented that no such change or reduction of any aspect of the Hess relationship had occurred. *Stip. Ex. 16* at § 4.14.

5. These representations were false. In February 2014, Hess began to phase out Line Finders by 1) terminating Line Finders’ work for the NOR subsidiary; 2) reversing its decision to add four more Line Finders’ locators; 3) reducing the number of Line Finders’ locators working full time for Hess; and 4) refusing to continue to pay for a minimum of eight hours per day per locator.

6. The decision to terminate Line Finders’ work NOR eliminated almost 10% (\$373,492.37) of Line Finders’ revenue from 2013. *Def. Ex. NN*.

7. The decision to no longer pay a guaranteed eight hours per day per locator—a payment change under § 4.10(l)—eliminated tens of thousands of dollars of pure profit. *See ex. Def. Ex. QQ* (compare \$11,003.13 in billed stand-by hours in April 2013 to \$0.00 in April 2014).

8. And the reduction—not addition—of locators contributed to a significant current and projected decline given that each locator accounted for over \$240,000.00 a year in revenue. *Day 1* at 102:3-9; *Def. Ex. M*.

9. The Court is not persuaded by Defendants’ insistence that there was no reduction or change in the Hess relationship.

10. Jed testified that he understood from conversations with Columbus that there would be increases in Line Finders' work SOR to make up for Line Finders losing NOR. Day 3 at 674:1-25. But the Court heard from Charles Columbus that he was dissatisfied with Line Finders and that the aforementioned reductions were intended to phase Line Finders out completely. The Court did not hear any testimony from Columbus relating to alternate arrangements with Jed or promises that positions SOR would replace those lost NOR.

11. Furthermore, the Company's financials do not support Jed's testimony since after February 2014 the Company's Hess revenue decreased year over year. *See* Def. Ex. QQ; P. Ex. 37 at p. 5. And the Court heard clear evidence that the number of Line Finders' locators working for Hess never reached nine. Instead, the number of locators was reduced from 7 in 2013 to 4 or 5 in 2014. *See ex.* Day 3 at 716:10—718:20.

12. The Court heard testimony from Jed about an unusually cold North Dakota winter in 2014 and a drop in oil prices in 2014 that purportedly caused declining locating sales. Besides Jed's anecdotal testimony, Defendants did not adduce evidence—reports, articles, etc.—which would bolster Jed's self-serving recollections. Defendants did not ask Columbus whether a cold winter or declining oil prices drove the reduction in sales, nor was Columbus's testimony at all consistent with such an explanation.

13. The documentary evidence does not suggest that a cold winter or oil prices contributed to any decline in Hess locating revenue in 2014. January and February 2014 (both winter months) featured significantly more Hess locating sales than those same months in 2013. Def. Ex. QQ. But March 2014 (which is the month after the change in the relationship and prior to the drop in oil prices) shows significantly less in locating sales than March 2013. *Id.* That trend continues throughout 2014, with April through December 2014 seeing significantly less in Hess sales than those same months in 2013. *Id.*

14. The Court finds that, contrary to Defendants' contractual and extra-contractual representations, the relationship between Line Finders and Hess had become materially worse by the time the Agreement was executed. Defendants did not advise Gardner Standard of the reductions and did not advise Gardner Standard of Hess' dissatisfaction with Line Finders. To the contrary, Defendants falsely represented that the relationship with Hess was stable, unchanged, and strong.

15. The Court, therefore, CONCLUDES that Defendants' representations regarding Line Finders' relationship with Hess were false and intended to induce action by Plaintiff.

ii. Defendants made false representations regarding Line Finders' accounts receivable.



16. Defendants, without qualification, represented that since December 31, 2013 “there has not been any material change in the terms of payment by its clients for any services the Company performs, other than extensions of payment terms granted in the ordinary course of business, in any event, **not exceeding sixty (60) days after the invoice date[.]**” *Id.* at § 4.10(I) (emphasis added).

17. On May 22, 2014, the date the Agreement closed, JN Field Services’ accounts receivable was over 90 days past due. Def. Ex. AAA.

18. The Backwoods Excavating account became 60 days past due on May 19, 2014, three days before closing. Def. Ex. ZZ.

19. Defendants also represented without qualification that “the Company’s accounts receivable are or will be current and collectible.” Stip. Ex. 16 at § 4.17.

20. Line Finders required customers to pay bills within 30 days. Day 2 at 486:6-12.

21. Neither JN Field Services nor Backwoods Excavating ever paid any portion of the accounts receivable that was past due on the date of closing.

22. The Court, therefore, CONCLUDES that Defendants’ representations concerning extensions of payment terms beyond sixty days relative to both JN Field Services and Backwoods Excavating were false, and the representations concerning the collectability of the JN Field Services account receivable was false.

iii. Plaintiff reasonably relied on Defendants’ representations.

23. Each of the Defendants admitted that it was reasonable for Gardner Standard to rely on their various representations concerning Hess and the accounts receivable.

24. The Court heard credible testimony from Plaintiff that it, in fact, relied on those representations in deciding to close on the Agreement.

25. Moreover, as Plaintiff, Defendants, and Defendants’ agent Scott Bushkie, acknowledged, it is difficult for a buyer to uncover information relating to the strength of a customer relationship given that such information is uniquely in the possession of the seller and the seller’s customers.

26. Thus, knowing that there was a risk that it could not learn everything about Line Finders’ customers in due diligence, Gardner Standard insisted on—and paid for—various representations relating to Line Finders’ customer relationships.

27. Mike Healy, Phil Johnson, and Scott Bushkie testified that representations about major customer relationships—like the ones Defendants made here—are commonly made and relied upon in merger and acquisition transactions.

28. The Court is not persuaded by Defendants' argument that Plaintiff's substantial due diligence and purportedly unfettered access to the Company's QuickBooks files could have uncovered the change in the Hess relationship. As discussed, the only way Plaintiff could have discovered the changed relationship is through disclosure by Jed or by speaking directly with Columbus. Defendants restricted Plaintiff's access to Line Finders' customers—especially Columbus. Defendants did not allow Plaintiff to speak with customers until after execution of the Agreement, when, as it turns out, Columbus was unavailable. Instead, Defendants diverted Plaintiff to two lower level Hess employees, and there was no evidence either one could or would have lent clarity to the Hess-Line Finders relationship.

29. Finally, as is customary in the industry, Plaintiff expected that Defendants' representations in the CIM (such as the Columbus testimonial) would be updated if anything changed. Bushkie agreed that such updates are standard and required for any material changes. It was, therefore, reasonable for Plaintiff to conclude that nothing had changed when Defendants did not update any of their representations.

30. The Court, therefore, CONCLUDES that Plaintiff reasonably relied on Defendants' representations concerning the Hess, JN Field Services, and Backwoods Excavating relationships.

iv. Defendants intentionally made the misrepresentations at issue

31. That Defendants intended to make the misrepresentations at issue is clear from the record.

32. The evidence reflects at least three documented instances in which Columbus directly advised Jed of reductions in Line Finders' work as a result of their declining business relationship. Stip. Exhs. 3, 4, and 6.

33. Moreover, there was substantial credible testimony from Columbus that in and around February 2014, he repeatedly advised Jed of issues Hess had with Line Finders. *See also* Stip. Ex. 10 at p. 5.

34. Shortly after February 2014, Jed began taking steps to address the concerns that Columbus articulated, demonstrating that he had heard and understood those problems.

35. The Court is not persuaded by Jed's testimony that NOR and SOR merged into one company in Line Finders' internal and external records immediately

prior to that disclosure. Staci Pope, who was responsible for billing and record keeping during the relevant time, credibly testified that NOR and SOR never merged.

36. Pope could not explain why financial information for NOR and SOR were combined into one Hess company in Def. Ex. PPP, but testified that 1) in those months, there was no internal or external change in Line Finders' bookkeeping, 2) QuickBooks reports could be edited after the fact, 3) only she, her assistant, and Jed had access and authority to make that change, and 4) she did not make that change. Day 2 at 471:21-24; 476:5—478:24; 484:5—485:3.

37. The weight of the evidence supports the conclusion that the QuickBooks records were edited to conceal from Gardner Standard that Line Finders had previously been doing work for two separate Hess subsidiaries and had lost the business of one of them.

38. Moreover, Jed knew by the date of closing that both the JN Field Services and Backwoods Excavating accounts were over sixty days past due. Therefore, he knew that it was false to represent that such receivables were current *and* collectible, that no receivable was more than 60 days past due, and that there had been no Material Adverse Effect.

39. However, even if Defendants did not know the representations they were making were false, the intent element is satisfied because Defendants, at a minimum, were aware that they had no basis for making the representations they did. *See Birt*, 75 P.3d at 656 (intent satisfied if defendants were aware they had no basis to make the representations they did). Both Josh and Kasey made *de minimis* efforts to uncover any information relating to the representations they made in the Agreement. Kasey did not even read the Agreement before executing it. As a result, they testified they did not know if the representations they were making were true or not.

v. Plaintiff suffered damages.

40. Healy testified credibly that Plaintiff relied on Defendants' misrepresentations and that, had Gardner Standard known the truth about Hess, it would not have gone forward with the Agreement.

41. Losing the value of the Hess relationship was a consequential damage of Defendants' misrepresentations to Plaintiff.

42. As Plaintiff's expert, John Mitchell, testified, in order to calculate the damage caused by the undisclosed impairment of the Hess relationship and the JN Field Services uncollectible account receivable, it is necessary to determine the value the Parties attributed to both the Hess relationship and the uncollectible JN Field Services account receivable.



43. The Court finds that damages attributable to the loss of the Hess relationship equal \$1,828,013.00.

44. The Court finds that damages attributable to the uncollectible JN Field Services account receivable equal \$61,910.00.

45. In total, the Court CONCLUDES that Plaintiff has been damaged in the amount of \$1,889,923.00.

B. Plaintiff's Breach of Contract Claim

46. Plaintiff's breach of contract claim arises from the same facts as Plaintiff's intentional misrepresentation claim. "The elements for a breach of contract claim consist of a lawfully enforceable contract, an unjustified failure to timely perform all or any part of what is promised therein, and entitlement of an injured party to damages." *Schlinger v McGhee*, 2012 WY 7, ¶ 12.

47. Prior to closing on the Agreement, Line Finders' relationship with Hess had materially changed.

48. These changes, which largely went into effect in February 2014, resulted in revenue reductions of hundreds of thousands of dollars.

49. Thus, Defendants' representation that "[t]here has not been any change in the financial condition [or] operations . . . of the Company other than changes in the ordinary course of business, none of which had or has a Material Adverse Effect" under § 4.10(a) was false.

50. Defendants' representation that since December 31, 2013, "there has not been any material change in the terms of payment by its clients for any services the Company performs, other than extensions of payment terms granted in the ordinary course of business, in any event, not exceeding sixty (60) days after the invoice date" under § 4.10(l) was false.

51. Defendants' representation that since December 31, 2013, "there has not been any Material Adverse Effect" under § 4.10(s) was false.

52. And Defendants' representation that Hess had not "cancelled, terminated, rescinded, suspended, or reduced in any respect, or made any threat or other communication to the Company to cancel, terminate, rescind, suspend or reduce in any respect, or otherwise reflecting a change in, the business relationship with any such customer or supplier" under § 4.14 of the Agreement and the Company Disclosure Schedule was false.

53. Defendants also represented "the Company's accounts receivable are or will be current *and* collectible" under § 4.17. (emphasis added). By the time the

Agreement closed, the JN Field Services and Backwoods Excavating accounts had exceeded 60 days past-due, and the JN Field Services account was decidedly uncollectible. Defendants' representations under §§ 4.10(l) and 4.17 were, therefore, false.

54. Defendants are, therefore, liable for breach of contract.

55. Plaintiff incurred the same damages from Defendants' breach of contract as it did from Defendants' intentional misrepresentations, even taking into account the lower burden of proof on the breach of contract action (preponderance of the evidence). See discussion of calculation of damages in Findings of Fact ¶ 171 and fn. 4, and Conclusions of Law ¶¶ 42-45.

56. Thus, for reasons already explained herein, the Court CONCLUDES that Defendants' breach of contract has caused Plaintiff damages in the amount of \$1,889,923.00.

C. Plaintiff's Breach of Implied Warranty of Good Faith and Fair Dealing Claim

57. Parties to a commercial contract in Wyoming may legitimately assert a claim for breach of the implied covenant of good faith and fair dealing based upon a contract theory. *Scherer Constr., LLC v. Hedquist Constr., Inc.*, 2001 WY 23, ¶ 24.

58. The implied covenant of good faith and fair dealing, implied in every contract including the Agreement at issue here, requires that the parties to a contract act consistently with the agreed common purpose and justified expectations of the other party. *Whitlock Constr., Inc. v. South Big Horn County Water Supply Joint Powers Bd.*, 2002 WY 36, ¶ 24 (citing *Scherer*, ¶ 19). In uncovering the common purpose, intentions, and justified expectations, courts in this State consider the language in the contract itself, the course of dealings between and the conduct of the parties. *Id.*

59. A claim for breach of the covenant of good faith and fair dealing must derive from rights or duties agreed upon by the parties as memorialized in the contract – here, the Agreement. *Id.* “The implied obligation must arise from the language used or it must be indispensable to effectuate the intention of the parties.” *Id.*

60. Here, Plaintiff's purpose and expectation in entering into the Agreement was to acquire Line Finders and its represented potential for growth.

61. It is clear to the Court that Plaintiff's expectations arose, at least in part, from Defendants' repeated misrepresentations—both in the Agreement and prior to the Agreement—concerning Line Finders' growth potential and relationships with its customers.

62. Defendants' representations were indispensable to the Agreement given that Plaintiff would not have proceeded without them.

63. Thus, Defendants breached the implied covenant of good faith and fair dealing with their various misrepresentations, set forth herein.

64. Plaintiff incurred the same damages from Defendants' breach of the implied covenant of good faith and fair dealing as it did for Defendants' breach of contract and intentional misrepresentations.

65. Thus, for reasons already explained herein, the Court CONCLUDES that Defendants' breach of the implied covenant of good faith and fair dealing has caused Plaintiff damages in the amount of \$1,889,923.00.

D. Plaintiff's Indemnification Claim

66. Under Section 13 of the Agreement, Plaintiff is entitled to seek indemnification against Defendants for damages arising from Defendants' intentional misrepresentations and breaches of, among other things, Sections 4.10, 4.14, and 4.17 in the Agreement.

67. The Court has found, among other things, that Defendants are liable for intentional misrepresentation and breaching Sections 4.10, 4.14, and 4.17 of the Agreement, causing Plaintiff \$1,889,923.00 in damages.

68. As such, Defendants are jointly and severally liable to indemnify Plaintiff for that amount and may not seek contribution from Line Finders.

III. Judgment

1. In summary, Defendants are liable, jointly and severally, to Plaintiff in the amount of \$1,889,923.00 . (the "Judgment").⁵

2. Furthermore, Plaintiff's claims are claims "arising out of or relating to [the] Agreement." Plaintiff is the prevailing party on these claims. Thus, under

⁵ As a term of the purchase of Line Finders, Plaintiff issued a promissory note to Jedediah Houghton that was immediately canceled in exchange for 14.7% ownership in Line Finders. Accordingly, Plaintiff currently only owns 85.3% of Line Finders. Defendants argue any damage assessment ought to be discounted on account of the fact Plaintiff would only be entitled to 85.3% of the damages associated with Line Finders' value. The court disagrees. Plaintiff paid for 100% of Line Finders when the Agreement was executed, and Defendants were paid accordingly. Whether or not Jedediah Houghton is entitled to any set-off in damages related to his 14.7% ownership interest in Line Finders after the Agreement was executed, and how that might affect any damage assessment against the remaining defendants is not an issue presently before the court for resolution.

Section 14.2 of the Agreement, as the prevailing party, Plaintiff is also entitled to reasonable attorney fees and costs that it incurred in connection with this litigation. Plaintiff shall file a Bill of Fees and Costs within thirty (30) days of this Order. Defendants may file a response thirty (30) days thereafter. The Court may or may not hold a hearing. In any event, whether responded to or not and whether there is a hearing or not, the Court will independently scrutinize Plaintiff's submittal and issue a separate order in connection therewith.

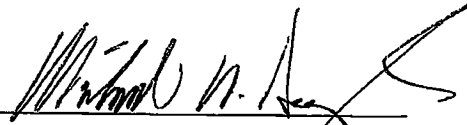
So ordered, this 17 day of Dec, 2020.

#19931

12-22-20

By R. McGRATH-BOX
R. STERNLIEB-MAIL
K. LENTHART-MAIL

BY THE COURT:


Hon. Judge Michael N. Deegan
District Court Judge

NO. 2021-765222 ORDER-NO LEGAL

EDA SCHUNK THOMPSON, SHERIDAN COUNTY CLERK
HORNING HORNING & MCGRATH LLC ATTN: CASSIE LEWIS
400 SOUTH DOUGLAS HIGHWAY GILLETTE WY 82716

STATE OF WYOMING } s.s.
Campbell County }

CHERYL CHITWOOD, Clerk of the Court, within and for said county and state aforesaid, does hereby certify the foregoing to be a full, true and complete copy as the same appears on file and of record in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the official seal of said Court at my office in Gillette, Wyoming, this date.


CHERYL CHITWOOD
Clerk of the Court, Sixth Judicial District
12-23-20

STATE OF WYOMING } s.s.
Campbell County }

CHERYL CHITWOOD, Clerk of the Court, within and for said county and state aforesaid, does hereby certify the foregoing to be a full, true and complete copy as the same appears on file and of record in this office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the official seal of said Court, at my office in Gillette, Wyoming, this date.

DEC 22 2020
CHERYL CHITWOOD
Clerk of the Court, Sixth Judicial District
DEPUTY