

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

FRANK U. WETMORE,

Plaintiff

v.

**MACDONALD, PAGE, SCHATZ,
FLETCHER & COMPANY, LLC,**

Defendant

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Docket No. 06-26-P-S

**MEMORANDUM DECISION ON DEFENDANT’S MOTION TO EXCLUDE AND
RECOMMENDED DECISION ON DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT**

The defendant, Macdonald, Page, Schatz, Fletcher & Company, LLC, an accounting firm, moves for summary judgment in this action alleging accounting malpractice¹ and to exclude the testimony of an expert witness identified by the plaintiff. Because both parties rely on the deposition testimony of that expert to support their positions, I will address the latter motion first.

I. Motion to Exclude

The defendant moves to exclude any testimony by John Gurley, an expert witness identified by the plaintiff, alleging that the expert’s “work and report contain[] numerous mistakes that are fatal under” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Defendant’s Motion to

¹ The plaintiff’s opposition to the defendant’s motion for summary judgment purports to include a motion for partial summary judgment on liability. Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment, etc. (“Summary Judgment Opposition”) (Docket No. 34) at 10-15. As the defendant points out, Defendant’s Reply to Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment (“Summary Judgment Reply”) (Docket No. 38) at 1 n.1, the plaintiff’s motion was filed some 21 days after the dispositive motion deadline set by the applicable scheduling order. The plaintiff did not request leave to file the motion after the deadline, and nothing in the plaintiff’s filings suggests any reason why the motion could not have been filed in a timely fashion. The cross-motion is accordingly stricken.

Exclude Plaintiff's Expert John Gurley ("Motion to Exclude") (Docket No. 31) at 3.² The motion also relies on Fed. R. Evid. 702. *Id.* at 1. Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. Under Rule 702, "it is the responsibility of the trial judge to ensure that an expert is sufficiently qualified to provide expert testimony that is relevant to the task at hand and to ensure that the testimony rests on a reliable basis." *Beaudette v. Louisville Ladder, Inc.*, 462 F.3d 22, 25 (1st Cir. 2006).

With respect to reliability:

In *Daubert*, the Supreme Court set forth four general guidelines for a trial judge to evaluate in considering whether expert testimony rests on an adequate foundation: (1) whether the theory or technique can be and has been tested; (2) whether the technique has been subject to peer review and publication; (3) the technique's known or potential rate of error; and (4) the level of the theory or technique's acceptance within the relevant discipline. However, these factors do not constitute a definitive checklist or test, and the question of admissibility must be tied to the facts of a particular case.

Id. (citations and internal quotation marks omitted); *see also, e.g., Zachar v. Lee*, 363 F.3d 70, 76 (1st Cir. 2004) ("The court's assessment of reliability is flexible, but an expert must vouchsafe the reliability of the data on which he relies and explain how the cumulation of that data was consistent with standards of the expert's profession.") (citation and internal quotation marks omitted).

With respect to relevance, or "fit":

² Per the court's scheduling order, motions filed pursuant to *Daubert* and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), "shall include any challenges to lack of qualifications, scope of testimony and any other issues addressed by these decisions." Scheduling Order with incorporated Rule 26(f) Order (Docket No. 21) at 2 n.1.

[T]he *Daubert* Court imposed a special relevancy requirement. To be admissible, expert testimony must be relevant not only in the sense that all evidence must be relevant, but also in the incremental sense that the expert's proposed opinion, if admitted, likely would assist the trier of fact to understand or determine a fact in issue. In other words, Rule 702, as visualized through the *Daubert* prism, requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co., 161 F.3d 77, 81 (1st Cir. 1998) (citations and internal quotation marks omitted).

As the First Circuit has observed, “*Daubert* does not require that the party who proffers expert testimony carry the burden of proving to the judge that the expert's assessment of the situation is correct.” *United States v. Mooney*, 315 F.3d 54, 63 (1st Cir. 2002) (citation and internal quotation marks omitted). “It demands only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion.” *Id.* (citation and internal quotation marks omitted). That said, “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” *Ruiz-Troche*, 161 F.3d at 81 (citation and internal quotation marks omitted).

In this case, the defendant contends that Gurley should not be allowed to testify about his appraisal of the value of Portland Shellfish, a company owned by the plaintiff and Donna Holden at the relevant time, for the following reasons: (i) Gurley relied on the plaintiff as his primary source of information, making no attempt to verify that information from objective sources; (ii) Gurley excluded 1998 from his historical average, which had the effect of increasing his valuation; (iii) Gurley failed to consider valuable information available from Jeff Holden, husband of Donna Holden, president of Portland Shellfish and day-to-day manager of Portland Shellfish; (iv) Gurley did not apply a key person discount to the value of the company; (v) Gurley did not make a site visit

to the operations of Portland Shellfish; (vi) Gurley failed to factor in the fact that there were no noncompete agreements with key employees of Portland Shellfish; and (vii) Gurley failed to take into account litigation in which Portland Shellfish was involved. Motion to Exclude at 4-10.

In general, these alleged shortcomings appear to me to go to the weight of Gurley's opinion about the value of Portland Shellfish rather than its admissibility. Thus, while relying solely on information provided by the party retaining him may weaken an expert witness's opinion and report, that fact alone will not generally render the opinion or report inadmissible. The court in *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 2003 WL 22124991 (S.D.N.Y. Sept. 15, 2003), a case cited by the defendant, Motion at 4 n.2, found the opinion of a proposed expert witness "undependable" because he had not independently verified information given him by the party that sought to present his testimony, when such verification would have been relatively easy to accomplish, 2003 WL 22124991 at *4. Here, it is clear from the face of Gurley's report that he relied on data in addition to that supplied by the plaintiff in reaching his conclusions. Portland Shellfish Company, Inc.: Summary Valuation Report on the Fair Market Value of the Common Stock as of June 30, 2002 (Exh. 9 to Deposition of John T. Gurley ("Gurley Dep.") (Exh. B to Defendant's Statement of Undisputed Material Facts ("Defendant's SMF") (Docket No. 30)) at 33-34. Similarly, the court in the other case cited by the defendant, *Supply & Building Co. v. Estee Lauder Int'l, Inc.*, 2001 WL 1602976 (S.D.N.Y. Dec. 14, 2001), excluded expert testimony because the party proffering the expert could not "cite a place in the record demonstrating that [the expert] reviewed [the subject company's] records rather than relying on his client's conclusory statements[,]" *id.* at *4. Here, Gurley's report reflects that he did review the records of Portland Shellfish. First Gurley Report at 33. This factor may be explored by the defendant in cross-

examination. See *Great Northern Storehouse, Inc. v. Peerless Ins. Co.*, 2000 WL 1900299 (D. Me. Dec. 29, 2000), at *2.³

The same is true of Gurley's failure to include the company's 1998 performance in his data. Significantly, the defendant fails to cite any authority for its assertion that "[i]f Mr. Gurley had taken 1998 into account in the averages, his valuation would have been far lower." Motion to Exclude at 5. If that is in fact the case, this effect on Gurley's overall valuation is grist for the cross-examination mill.

The defendant next contends that, had Gurley spoken with Jeff Holden, he would have discovered that Portland Shellfish did not have employment or non-compete agreements with any of its "critical" employees, that Jeff Holden would not agree to a non-compete agreement and would immediately begin to compete with Portland Shellfish if he did not own it, that Portland Shellfish was engaged in "expensive and serious" litigation in California and that Jeff Holden was a "key person to the success of" Portland Shellfish, requiring Gurley to apply a key-person discount to the value of the company. *Id.* at 5. As evidence that Jeff Holden was a key employee, the defendant cites the plaintiff's willingness to buy the shares held by Jeff and Donna Holden based on a company value of \$3.125 million if Jeff Holden would sign an employment or non-compete agreement and his refusal to make any offer based on the defendant's valuation of \$1.09 million "without Mr. Holden." *Id.* at 5 n.4.

Gurley explained at his deposition why the presence or absence of such employment or non-compete agreements made no difference to his analysis. Gurley Dep. at 137-49. Gurley also testified that the plaintiff had told him that Jeff Holden was a key person in the company and about

³ The defendant also cites Gurley's choice of a valuation date of December 31, 2002 rather than the date of the defendant's valuation, June 30, 2002. Motion at 5 n.3. The difference in dates goes to the weight of the evidence as it bears on the opinion presented by Gurley rather than its admissibility.

the effect that might have on a prospective purchaser. *Id.* at 153. Other appraisers might differ, but the defendant has offered no evidence that Gurley's position on these questions is so out of line with prevailing standards for his profession that his conclusion may not be considered by a factfinder. The defendant cites *Children's Broad. Corp. v. Walt Disney Co.*, 245 F.3d 1008 (8th Cir. 2001), in support of its assertion that "the failure to consider the lack of a non-compete clause between companies can make an expert's opinion unreliable and speculative," Motion to Exclude at 3, but the case at hand involves only one company and, in *Children's Broadcasting*, the question did not involve non-compete agreements with employees but rather the existence of an actual competitor, 245 F.3d at 1018.

Next on the defendant's list of reasons why Gurley should not be allowed to testify is that fact that he did not visit Portland Shellfish's business location. This, the defendant asserts, is a failure to "follow the accepted practice of an appraiser" that somehow proves the he "failed to show the necessary objectivity of a dispassionate appraiser." Motion to Exclude at 6. I do not see how the latter necessarily follows from the former. The defendant lists the following things that Gurley "likely would have learned" during a site visit that "would have depressed his valuation of the company:" (i) how critical Jeff Holden was to the value of the company, (ii) the "extremely tenuous relationship the company had with its landlord, including the fact that the company had no lease," (iii) the company's need for capital expenditures and (iv) the price of crab was "likely to remain stable in the future in the face of increasing foreign competition." *Id.* The defendant does not suggest how a site visit would make learning each of these things likely; from all that appears in the record, these things could have been learned just as well without a site visit. In the absence of any

specific statement of the effect that each of the last three of these factors would have had on the bottom line of Gurley's appraisal,⁴ the defendant takes nothing by this argument.

Finally, the defendant contends that litigation in which Portland Shellfish was involved in California was "[aken] very seriously" by the lawyers for Portland Shellfish and by Jeff Holden, even though he "did not think that the litigation had merit[.]" *Id.* at 9. It mentions legal fees "between \$400,000 and \$450,000" and a settlement of \$10,000 in "one of the lawsuits" and asserts that two of three banks approached to finance Portland Shellfish refused to do so "because of" the California litigation. *Id.* The plaintiff responds that the California litigation was not disclosed in Portland Shellfish's financial statements and was not discussed in the defendant's expert's valuation. Plaintiff's Opposition to Defendant's Motion to Exclude, etc. (Docket No. 36) at 7. More important, it asserts that "[a]ll the parties agreed . . . that the California litigation was meritless." *Id.* at 8. This appears to be correct. *See, e.g.,* Deposition of Jeffrey D. Holden, Sr. ("Holden Dep.") (Exh. A to Defendant's SMF) at 91 (page 88 in original); Deposition of: Stanley Jay Feldman (Exhibit 1 to Motion to Exclude) at 98 (litigation expense not treated as expense for valuation purposes). Even if a failure to account for this "meritless" litigation in Gurley's appraisal was an error, the defendant has not offered any evidence of how that error affected the bottom line of Gurley's appraisal. At most, on the showing made, this argument goes to the weight of Gurley's opinion rather than its admissibility.

The defendant has not shown that Gurley's opinion is contradicted by undisputed facts in the record or that it has insufficient factual support. *See Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000). The motion to exclude Gurley's testimony is **DENIED**.

⁴ The first item on the list, Jeff Holden's value to the company, has already been discussed above.

II. Motion for Summary Judgment

A. Summary Judgment Standards

1. *Federal Rule of Civil Procedure 56*. Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Santoni*, 369 F.3d at 598. Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

2. *Local Rule 56*. The evidence the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the Local Rules of this District. *See* Loc. R. 56. The moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and supported by a specific record citation. *See id.* The nonmoving party must then submit a responsive “separate, short, and concise” statement of material facts in which it must “admit, deny or qualify the facts by reference to each numbered paragraph of the moving party’s statement of material facts[.]” Loc. R. 56(c). The nonmovant likewise must support each denial or qualification with an appropriate record citation. *See id.* The nonmoving party may also submit its own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id.* The movant then must respond to the nonmoving party’s statement of additional facts, if any, by way of a reply statement of material facts in which it must “admit, deny or qualify such additional facts by reference to the numbered paragraphs” of the nonmovant’s statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id.*

Failure to comply with Local Rule 56 can result in serious consequences. “Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted.” Loc. R. 56(e). In addition, “[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment” and has “no independent duty to search or consider any part of the record not specifically referenced in the parties’ separate statement of fact.” *Id.*; *see also, e.g., Cosme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) (“We have consistently upheld the enforcement of [Puerto Rico’s similar local] rule, noting repeatedly that

parties ignore it at their peril and that failure to present a statement of disputed facts, embroidered with specific citations to the record, justifies the court's deeming the facts presented in the movant's statement of undisputed facts admitted.") (citations and internal punctuation omitted).

B. Factual Background

Jeffrey Holden, husband of Donna Holden, is president of Portland Shellfish and has served as its day-to-day manager since its inception. Defendant's SMF ¶ 1; Plaintiff's Response to Defendant's Statement of Undisputed Material Facts ("Plaintiff's Responsive SMF") (Docket No. 35) ¶ 1. On February 1, 1994, a Shareholders' and Officers' Agreement for Portland Shellfish was executed. *Id.* ¶ 2. Section 11.5.5 of that document provides:

In the event the operations of the Company are impaired because of deadlock on the board of directors, the shareholders agree that they shall each have the right to acquire the other shareholder's stock, as follows. In the event of deadlock, the directors shall hire an accountant at Macdonald Page & Co., South Portland, Maine, to determine the value of the outstanding shares. Once the value is reported to the directors by the accountant, the directors shall call a meeting of the shareholders. At such meeting, each shareholder shall have the right to buy out the other shareholder(s)' interest, at a price equal to or greater than the price determined by the accountant. The highest offer made by any shareholder at the meeting shall be binding upon the other shareholder(s). The shareholder who is acquiring the stock shall be required to close on the acquisition within 90 days of the meeting of the shareholders.

Shareholders' and Officers' Agreement ("Agreement"), Exh. 8 to Gurley Dep., § 11.5.5. Defendant's SMF ¶ 4.⁵ Prior to August 2003 the plaintiff was the treasurer of Portland Shellfish, which processed live shellfish. Statement of Additional Facts ("Plaintiff's SMF") (included in Plaintiff's Responsive SMF beginning at 21) ¶ 1; Defendant's Reply to Plaintiff's Additional [sic] Statement of Additional Facts ("Defendant's Responsive SMF") (Docket No. 39) ¶ 1.

⁵ The plaintiff purports to deny this paragraph of the defendant's statement of material facts, stating: "Denied that paragraph 11.5.5 is reproduced completely accurately." Plaintiff's Responsive SMF ¶ 4. I have reproduced the paragraph above by consulting the original. The only inaccuracy in the defendant's restatement of the paragraph is the (*continued on next page*)

On or about October 19, 1995 the Second Shareholders' and Officers' Agreement was executed and as a result the plaintiff and Donna Holden became the sole shareholders of Portland Shellfish with each owning 300 shares of common stock. Defendant's SMF ¶ 6; Plaintiff's Responsive SMF ¶ 6. The Second Shareholders' Agreement included a profit-sharing provision allotting 60% of the next income of the company to the plaintiff and 40% to Donna Holden. *Id.* ¶ 7. The plaintiff also owned 150 non-voting shares of Portland Shellfish stock; a total of 750 shares were issued. Plaintiff's SMF ¶ 2; Defendant's Responsive SMF ¶ 2. A Third Shareholders and Officers' Agreement was executed on or about October 21, 1996. Defendant's SMF ¶ 8; Plaintiff's Responsive SMF ¶ 8.⁶ The board of directors of Portland Shellfish was restricted to the plaintiff and Jeff Holden. Plaintiff's SMF ¶ 7; Defendant's Responsive SMF ¶ 7.

During the summer of 2001, the Holdens initiated an attempt to terminate their business relationship with the plaintiff. Defendant's SMF ¶ 9; Plaintiff's Responsive SMF ¶ 9. In a letter dated December 4, 2001 the Holdens offered to sell Donna Holden's interest in Portland Shellfish to the plaintiff or to buy his interest therein. *Id.* ¶ 10. The plaintiff's agreement to buy Donna Holden's interest in Portland Shellfish was never consummated because he made a non-competition agreement or an employment contract with Jeff Holden a precondition of the transaction. *Id.* ¶ 12. By letter dated January 15, 2002 the plaintiff reiterated his refusal to purchase Donna Holden's interest in Portland Shellfish without a non-competition or employment agreement. *Id.* ¶ 14. In January 2002 the plaintiff also stated that he disagreed with the Holdens' valuation of the company, *Id.* ¶ 15. The plaintiff offered to pay an unspecified increased purchase price for Donna Holden's shares in exchange for a non-competition or employment agreement; alternatively he offered to sell

use of the word "on" instead of the work "of" in the first sentence.

⁶ The plaintiff purports to deny this paragraph of the defendant's statement of material facts, but the denial does not address the portion of that paragraph recited in the text. Because that portion of the paragraph is supported by the (*continued on next page*)

his shares to the Holdens for a price in excess of the \$400,000 they had previously discussed. *Id.* ¶ 16. In January 2002 the plaintiff also noted three other options: sell Portland Shellfish to a third party, continued joint ownership or liquidation of the Company's assets. *Id.* ¶ 17. The plaintiff wanted to avoid liquidation because it would result in a lower return on his ownership than a negotiated sale. *Id.* ¶ 18.

In January 2002 the plaintiff's lawyer responded to Jeff Holden's condition that he would not enter into a non-competition agreement by stating that "demanding such a condition would be tantamount to asking the buyer to underwrite the seller's immediate formation of a directly competing business." *Id.* ¶ 19. On or about January 28, 2002 the Holdens notified the plaintiff that the board of directors was deadlocked and, as a result, they were invoking the purchase and sale provisions of Section 11.5.5 of the Shareholders' Agreement. *Id.* ¶ 20. The Holdens indicated that Macdonald Page would be engaged to value the outstanding shares of Portland Shellfish, in accordance with Section 11.5.5. *Id.* ¶ 21. The plaintiff was informed that once the value was reported to the directors a special meeting of the shareholders would be called, at which time the shareholders would have the right to purchase the other shareholders' interest at a price equal to or greater than the price reported by Macdonald Page. *Id.* ¶ 22. In its engagement letter, Macdonald Page stated that "[t]he objective of our valuation will be to estimate the fair market value of a 100% common equity interest in Portland Shellfish." Plaintiff's SMF ¶ 11; Defendant's Responsive SMF ¶ 11. The engagement letter defined "fair market value" as follows:

The price at which the property would change hands between a willing buyer and a willing seller, neither being under a compulsion to buy or sell and both having reasonable knowledge of relevant facts.

Id. ¶ 12.

citations given by the defendant, it is deemed admitted.

On or about January 10, 2003 Macdonald Page issued its valuation report for Portland Shellfish, which concluded that a reasonable estimate of the fair market value of 100% of the common stock of the company as of June 30, 2002 was \$1,090,000. Defendant's SMF ¶ 61; Plaintiff's Responsive SMF ¶ 61. One of the limiting conditions listed in Macdonald Page's report stated: "The estimate of value included in this report assumes that the existing company will maintain the character and integrity of the company through any sale, reorganization or reduction of any owner's/manager's participation in the existing activities of the company." Plaintiff's SMF ¶ 16; Defendant's Responsive SMF ¶ 16. The report reiterated the definition of fair market value included in the engagement letter and acknowledged the purpose of the valuation as "[t]o provide an independent valuation opinion, which will be used by Mr. Frank Wetmore and Mr. Jeff Holden in connection with their stockholder agreement." *Id.* ¶ 19.

On May 12, 2003 the plaintiff's attorney indicated that the plaintiff believed that the process required under Section 11.5.5 of the Shareholders' Agreement had not been followed and that he "continue[d] to disagree with, or be troubled by, [the] invocation of a mandatory sale of shares pursuant to Section 11.5.5 of the Agreement." Defendant's SMF ¶ 28; Plaintiff's Responsive SMF ¶ 28. On or about the same date the plaintiff indicated that he disagreed with the quality of the Macdonald Page appraisal and its applicability. *Id.* ¶ 29. He thought that the value conclusion reached by Macdonald Page "was much too low" and remained of the opinion that the company was worth \$3,000,000. *Id.* ¶ 59. According to the plaintiff, Donna Holden's bid for his shares was inadequate because it represented 50% of the value of Portland Shellfish as opposed to the 60% that he said he owned. *Id.* ¶ 30. In May 2003 the plaintiff offered to sell his shares to Donna Holden for \$700,705.20. *Id.* ¶ 36. This occurred during an ongoing negotiation process between the plaintiff and the Holdens to determine who would buy out the other and to avoid litigation. *Id.* ¶ 37. The

Macdonald Page valuation was an important consideration to Jeff Holden in bargaining the purchase price for the plaintiff's shares. Plaintiff's SMF ¶ 22; Defendant's Responsive SMF ¶ 22.

The plaintiff also offered to combine to sell to a third party but noted that any third party would likely require non-compete or employment contracts and reiterated his interest in selling to Donna Holden for \$700,705.20. Defendant's SMF ¶ 41; Plaintiff's Responsive SMF ¶ 41. The deal that the plaintiff reached with the Holdens was the result of extended negotiations that took place over more than a year. *Id.* ¶ 45. Jeff Holden took the position that the only options for the parties were that the plaintiff purchase Donna Holden's shares without a non-competition agreement or that the Holdens purchase the plaintiff's shares. *Id.* ¶ 63. To purchase the plaintiff's shares, the Holdens had to apply for financing from Maine Bank and Trust as two other lenders rejected their request for financing. *Id.* ¶ 49. When Jeff Holden went back to Maine Bank and Trust just prior to the closing to seek the additional amounts the plaintiff requested, the bank was very close to not financing the transaction. *Id.* ¶ 51. Part of the financing that the Holdens received from Maine Bank and Trust was to finance at least a portion of the sub-S distribution of profits the plaintiff took as part of the settlement amount negotiated by the plaintiff and his attorneys. *Id.* ¶ 56.

The plaintiff did not rely on the Macdonald Page valuation when he offered to buy Donna Holden's shares for \$1,250,000. *Id.* ¶ 60.

The report of Stephen Bravo, an expert witness designated by the defendant, criticizes Gurley for using the "willing buyer, willing seller" definition of fair market value. Plaintiff's SMF ¶¶ 30, 36; Defendant's Responsive SMF ¶¶ 30, 36.

C. Discussion

1. Law of the case. The defendant's first argument is that the plaintiff cannot prevail on any of his claims because he cannot establish causation. Defendant's Motion for Summary Judgment

(“Motion”) (Docket No. 29) at 9-15. The plaintiff argues in response that the defendant may not raise this argument due to the legal principle of “law of the case.” Summary Judgment Opposition at 7-10. The plaintiff’s argument evinces a serious misunderstanding of this legal doctrine.

The defendant in this case did file a motion to dismiss, in which it argued, *inter alia*, that the plaintiff had failed sufficiently to allege causation as an element of the claims asserted in the complaint. *See* Motion to Dismiss (Docket No. 4). I recommended that the motion be granted, Docket No. 9, and Chief Judge Singal did so, Docket No. 12. The plaintiff appealed from the dismissal, Docket No. 14, and the First Circuit reversed, Docket No. 18. In its opinion remanding the case, the First Circuit observed as follows: “We emphasize that there are many factual questions and matters of proof that remain unresolved, but those will require a more developed record — they simply are not before us at the Rule 12(b)(6) stage.” *Wetmore v. Macdonald, Page, Schatz, Fletcher & Co.*, 476 F.3d 1, 6 (1st Cir. 2007). Yet, the plaintiff nonetheless contends that the First Circuit’s conclusion that he has adequately pleaded the causation element of his claims also establishes that he can produce sufficient evidence of causation to overcome a motion for summary judgment.

The plaintiff asserts that “[i]t does not matter that the standard of review is different for motions to dismiss and motions for summary judgment because there are no material differences between the allegations in the Complaint that were relevant to the motion to dismiss and the facts in the summary judgment record.” Opposition at 9. This argument is simply wrong. As the Supreme Court said in a case involving the doctrine of qualified immunity:

[R]esolution of the immunity question may require more than one judiciously timed appeal, because the legally relevant factors bearing upon the . . . question will be different on summary judgment than on an earlier motion to dismiss. At that earlier stage, it is the defendant’s conduct *as alleged in the complaint* that is scrutinized for objective legal reasonableness. On summary judgment, however, the plaintiff can no longer rest on the pleadings, . . . and the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the . . .

inquiry. It is no more true that the defendant who has unsuccessfully appealed denial of a motion to dismiss has no need to appeal denial of a motion for summary judgment, than it is that the defendant who has unsuccessfully *made* a motion to dismiss has no need to *make* a motion for summary judgment.

Behrens v. Pelletier, 516 U.S. 299, 309 (1996) (emphasis in original; internal quotation marks omitted).

As most commonly defined, the doctrine [of law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.

Harlow v. Children's Hosp., 432 F.3d 50, 55 (1st Cir. 2005) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)); *see also United States v. Hall*, 434 F.Supp.2d 19, 22 (D. Me. 2006) (“law of the case” principle precludes relitigation of legal issues presented in successive stages of a single case once those issues have been decided). “Whether the law of the case doctrine applies at all is a question of law[.]” *Harlow*, 432 F.3d at 55.

Here, it is incorrect to suggest that the facts presented to the court in connection with the motion for summary judgment (20 pages’ worth, from both sides) are identical to those alleged in the complaint (an 8-page document, Docket No. 1). The plaintiff’s own statement of material facts, while it often tracks the language of the complaint, adds facts which the plaintiff must deem material to those included in the complaint. *Compare Plaintiff’s SMF with Complaint* (Docket No. 1). More important, in evaluating a motion to dismiss the court accepts the allegations in a complaint as true. In evaluating a motion for summary judgment, the court accepts as true only those factual allegations that are admitted by the opposing party or those that are deemed to be admitted after the court has reviewed the cited source of the factual allegation to be sure that the allegation is in fact supported by evidence. The test for summary judgment is thus much more rigorous. *See, e.g., Muzikowski v. Paramount Pictures Corp.*, 477 F.3d 899, 905 (7th Cir. 2007) (rejecting plaintiff’s

argument that circuit court's decision reversing granting of motion to dismiss had "definitively resolved in his favor the question whether he had presented sufficient evidence on [a particular] issue to reach a jury"). The substantive issue of causation has not yet been litigated in this case; causation was only considered in connection with the procedural question whether the complaint sufficiently alleged it.

The plaintiff takes nothing by his law-of-the-case argument.

2. *Causation.* The defendant contends that the evidence of causation in this case "leaves open the question of how plaintiff's circumstances would have improved had the defendant acted differently," thus entitling it to summary judgment. Motion at 11. This is so, it asserts, because the Holdens could not and would not have paid any more than they did for the plaintiff's stock and the plaintiff would not have been better situated had the Holdens been unable to purchase his stock. *Id.* at 11-15. In the alternative, the defendant argues that the evidence does not establish a causal link between its valuation and the price the plaintiff obtained for his shares. *Id.* at 15-18.

The plaintiff responds that he merely needs to prove that absent the defendant's valuation he would have avoided receiving less than the full market value of his shares, and that this can be proven without determining whether the Holdens would have been able to buy his shares at whatever higher valuation would have been correct. Summary Judgment Opposition at 11-12. But the fact remains that in order to recover against this defendant, the plaintiff must show that he actually was injured by the alleged malpractice, which he claims was the setting of a valuation that was lower than the true market value of the shares. If the Holdens, who were given the right by paragraph 11.5.5 of the Agreement⁷ to buy out the plaintiff's interest "at a price equal to or greater than the

⁷ The paragraph provides, in relevant part: "In the event the operations of the Company are impaired because of deadlock on the board of directors, the shareholders agree that they shall each have the right to acquire the other shareholder's stock, as follows. In the event of deadlock, the directors shall hire an accountant at MacDonald [sic] Page & Co., South (continued on next page)

price determined by the accountant[.]” were in fact unable or unwilling to pay anything more than what they offered, based at least arguably on the defendant’s valuation, then the plaintiff would have been unable to force a sale of his shares to them at all. In the words of the First Circuit, if Donna Holden, the only other shareholder, was unable to buy the plaintiff’s shares at a higher value than that set by the allegedly incompetent valuation report at issue, that valuation report could not have “foreclos[ed the plaintiff’s] opportunity to *sell* at a fair price.” *Wetmore*, 476 F.3d at 5 (emphasis in original).⁸

At that point the plaintiff could have paid Donna Holden the amount set by an arguably correct higher valuation for her shares, which would not represent a loss to him, as he would be acquiring 100% of the correctly-valued shares of Portland Shellfish; the plaintiff could have sold his shares to a third party; or the parties could have resorted to dissolution of the company. The plaintiff has made no attempt to show that the latter two alternatives would have garnered him more than he in fact received from the Holdens. Indeed, he suggests the opposite as to liquidation, as he contends that this would be the “most draconian (and least profitable)” option for the parties to the Agreement. Defendant’s SMF ¶ 18; Plaintiff’s Responsive SMF ¶ 18. The plaintiff offers no evidence about the likely amount per share he could have obtained at the relevant time by a sale to a third party; it would not be appropriate for the court to speculate about this.

The plaintiff does offer evidence — his own testimony, albeit largely denied by the defendant — that he relied on the defendant’s report in accepting the Holdens’ offer for his shares.

Portland, Maine, to determine the value of the outstanding shares. Once the value is reported to the directors by the accountant, the directors shall call a meeting of the shareholders. At such meeting, each shareholder shall have the right to buy out the other shareholder(s)’ interest, at a price equal to or greater than the price determined by the accountant. The highest offer made by any shareholder at the meeting shall be binding upon the other shareholder(s).” Agreement, ¶ 11.5.5.

⁸ Under Maine law, “[f]or causation to be established . . . the plaintiff must allege that, but for the defendant’s acts, the resulting outcome for the plaintiff would have been both different[] and more favorable.” *Tri-Town Marine, Inc. v. J.C.* (continued on next page)

Plaintiff's SMF ¶¶ 23-26; Defendant's Responsive SMF ¶¶ 23-26; Declaration of Frank U. Wetmore ("Plaintiff's Decl.") (Exhibit 11 to Plaintiff's Responsive SMF) ¶¶ 5-6.⁹ The critical question then becomes whether the defendant's assertion that the Holdens would not and could not have paid more for the plaintiff's shares than they did is undisputed. For this factual point, the defendant relies on paragraphs 48-52 of its statement of material facts. Motion at 12-13. The only one of these paragraphs wholly admitted by the plaintiff is Paragraph 49, which reads: "To purchase Mr. Wetmore's shares, the Holdens had to apply for financing from Maine Bank and Trust as two other lenders rejected his request for financing." Defendant's SMF ¶ 49; Plaintiff's Responsive SMF ¶ 49. The plaintiff's responses to the other cited paragraphs are primarily qualifications based on testimony by the plaintiff that he did not "know if [the Holdens] would have been willing to pay more or not[.]" Plaintiff's Responsive SMF ¶ 48, and Jeff Holden's testimony that he did not know if he could have obtained more financing if the appraisal by the defendant had been higher because he did not ask for more than an amount based on the appraisal, *id.* ¶¶ 50-52. Paragraph 48 is denied in part and qualified in part by the plaintiff, and the denial and qualification are supported by the

Milliken Agency, Inc., 2007 ME 67, ¶ 10, 924 A.2d 1066, 1070.

⁹ The defendant asserts that paragraph 5 of the plaintiff's declaration "directly contradicts his deposition testimony in which he admits that the agreement to purchase his stock was the result of extended negotiations." Defendant's Responsive SMF ¶ 24. An affidavit of a party that contradicts that party's earlier deposition testimony cannot be used to create a factual conflict unless the change is satisfactorily explained. *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994). However, in this case, there is no contradiction. Paragraph 5 of the declaration says, in pertinent part: "The price of \$700,705.20 that the Holdens paid for my shares was calculated by taking 60% of the pre-marketability discount valuation figure from the Macdonald Page valuation report of \$1,167,842 That was all the Holdens paid for the shares." Plaintiff's Decl. ¶ 5. At the pages of the plaintiff's deposition cited by the defendant, he said "yes" in response to the question: "And the amount that the Holdens paid you or Donna Holden paid for your shares was the highest value that you were able to achieve from them after negotiations, correct?" Deposition of: Frank U. Wetmore (Exh. C to Defendant's SMF) at 32, and "yes" in response to the question: "[T]he deal that you reached was not the result of a single shareholder meeting where an auction process took place; it was the result of extended negotiations over more than a year?," *id.* at 32-33. Neither answer contradicts the statement in the plaintiff's declaration. The defendant also contends that the plaintiff's declaration must be disregarded because it is made on information and belief, rather than on personal knowledge as required by Fed. R. Civ. P. 56(e). Summary Judgment Reply at 5 n.5 & 7. However, the first paragraph of the declaration states, in pertinent part: "I make this declaration of my own personal knowledge except were [sic] noted that my statements are based upon information and belief. Where so noted, I believe them to be true." Plaintiff's Decl. ¶ 1. No such notation is made in the remainder of the declaration, which must
(continued on next page)

citations given to the summary judgment record. *Id.* ¶ 48. The plaintiff’s qualifications of paragraphs 50-52 of the defendant’s statement of material facts are all supported by a citation to Jeff Holden’s deposition testimony in which, when asked “[I]f the Macdonald Page valuation were higher and you had to pay more to buy Frank out . . . do you know if you could have gotten financing to fund the additional money?” he said, “Well, that’s a good question because it wasn’t higher, so I didn’t ask for more. So I can’t answer that.” Holden Dep. at 81-82. At the portion of that deposition cited by the defendant, Jeff Holden acknowledged that he “was right at the limit” with Maine Bank & Trust as to what it would finance with respect to buying out the plaintiff. *Id.* at 104. None of this evidence establishes without dispute that the Holdens could not or would not have paid more for the plaintiff’s shares if the defendant’s evaluation had been higher. Accordingly, summary judgment cannot be granted on this basis.

I thus turn to the defendant’s alternative causation argument: that there is no causal link between its valuation and the sale price the plaintiff obtained for his shares. In this regard, the defendant asserts that the price paid by the Holdens for the plaintiff’s stock was “based upon a negotiation, rather than the terms of the Shareholders’ Agreement,” and that if Section 11.5.5 of the Agreement, “which is the only section that makes Macdonald Page’s valuation relevant,” was not the basis of the transaction, then the parties must have “set their own price at an amount unrelated to the value assigned by Macdonald Page,” Motion at 15. This argument erroneously assumes that the parties could not have relied on the Macdonald Page valuation in reaching the price for the sale of the plaintiff’s stock if they negotiated the price or if they did not rely on Section 11.5.5 of the Agreement in setting the price. However, the defendant offers no argument as to why these assumptions are necessarily true. As a matter of simple logic, they are not.

therefore have been made, as far as the plaintiff is concerned, entirely on personal knowledge.

A few of the defendant's specific arguments nevertheless must be addressed. The defendant asserts that "the sale did not occur at the prorated portion of the Macdonald Page valuation" because 60% — the percentage of ownership claimed by the plaintiff — of the Macdonald Page valuation after its discount for marketing¹⁰ was \$46,705 less than what the plaintiff received for his shares from the Holdens. *Id.* at 16. This argument simply ignores the fact that the price paid by the Holdens for those shares was exactly 60% of the Macdonald Page valuation without the marketing discount. Nothing in the language of Section 11.5.5 of the Agreement requires the use of one or the other of these valuation figures. A case can certainly be made for the proposition that no marketing discount was appropriate when the transfer of shares took place between the only two shareholders in the corporation. In any event, this "fact" as posited by the defendants does not establish that the price paid for the plaintiff's shares was determined without regard to the Macdonald Page valuation.

The defendant also argues that the plaintiff offered to sell his shares at the price at which the sale ultimately occurred and therefore "should not now be heard to complain that he suffered any damages as a result of an appraisal on which he did not rely," since "the facts do not demonstrate that Mr. Wetmore was ever compelled to sell his shares" at that price. *Id.* at 17. Of course, the plaintiff contends that he did rely on the defendant's evaluation, and that factual assertion is at best disputed. The plaintiff contends that he "was bound" to sell his shares at that price "because of the language of section 11.5.5 and to avoid a lawsuit with the Holdens." Plaintiff's SMF ¶ 26. The defendant denies this paragraph of the plaintiff's statement of material facts, Defendant's Responsive SMF ¶ 26, apparently basing its denial on the fact that the plaintiff's affidavit states that he "believed" he was bound to accept the Macdonald Page figure and its previous assertion that the

¹⁰ The valuation stated that "[t]he sum of the tangible and intangible assets of the company is . . . \$1,167,842[.]" from which it subtracted 7% for "fees involved with marketing the company plus the associated transaction costs . . . [which] results in a value of \$1,090,000." Portland Shellfish Company, Inc. Valuation Report (Exh. D to Complaint) at 11.

transaction price resulted from negotiation. Neither basis serves to make it undisputed that the plaintiff was *not* bound to sell his shares at that price. His belief that he was bound to sell was sufficient to make the plaintiff sell and it is entirely possible that any and all negotiations over the sale price were governed by the Macdonald Page valuation. It is highly unlikely that the transaction occurred at a price that represented exactly 60% of the Macdonald Page pre-discount valuation merely by chance. Judgment for the defendant on this basis could only result from the kind of evaluation of the evidence that is the exclusive province of the factfinder.

The defendant is not entitled to summary judgment on this basis.

3. *Negligence.* The defendant contends that the plaintiff cannot establish that the defendant breached a duty of care owed to the plaintiff. Motion at 18-20. This argument goes only to Counts I and III of the complaint, which allege different types of negligence. Complaint ¶¶ 20-24, 30-33.¹¹ The defendant does not specify what that duty might be. Rather, it argues that the plaintiff's "evidence and expert testimony" fail to consider all of the factors and elements which might reasonably enter into determining the value of the plaintiff's stock. Motion at 19. Apparently, the defendant considers its duty to the plaintiff to have been to arrive at a value after considering all of these factors and elements. This terminology comes from *In re Valuation of Common Stock of McLoon Oil Co.*, 565 A.2d 997 (Me. 1989), which the defendant cites in support of its position. The issue in that case was the appropriate judicial appraisal of the value of stock in a company surviving after the merger of three closely-held companies, *id.* at 1000, a procedure that is governed by a

¹¹ The defendant also repeats in this context, in slightly different language, its assertion that the plaintiff did not rely on its appraisal, this time citing paragraph 60 of its statement of material facts. Motion at 20. That paragraph merely states that the plaintiff did not rely on the appraisal "when he offered to buy Donna Holden's shares for \$1,250,000.00[.]" Defendant's SMF ¶ 60. That offer was accompanied by a demand that Jeff Holden and a second employee sign employment agreements, *id.* ¶ 40; Plaintiff's Responsive SMF ¶ 40, which must account for some portion of the offer. In any event, that is not the price at which the sale took place; the offer was not even made by the party who ultimately paid for the shares when they changed hands. This argument fails as a basis for summary judgment.

statute that defined “fair value,” 13-A M.R.S.A. § 909(9)(E). I am not at all convinced that this statute provides the duty of care applicable to an accountant valuing the stock of an existing company, the directors of which have reached deadlock, for the purpose of a sale of shares between existing shareholders. Assuming *arguendo* that case law interpreting that statute does have some value for illuminating the applicable standard of care in the case at hand, however, the defendant’s arguments nonetheless fall short of demonstrating his entitlement to judgment on either Count I or Count III.

Specifically, the defendant argues that the plaintiff’s expert “incorrectly assumed that key employees of Portland Shellfish are bound by non-competition or employment agreements[,] “ that the expert “failed to take into account that the company was involved in large, expensive, and potentially crippling litigation in California federal court[,]” and that the expert used a different valuation date from that used by the defendant, all of which, according to the defendant, demonstrate that the expert failed to take into consideration all of the factors and elements of valuation set out in *McLoon*. Motion at 19. I have already determined that these alleged failures go to the weight of the opinion of the plaintiff’s expert, Mr. Gurley, rather than to its admissibility. As noted above, Gurley explained why the lack of non-compete and employment agreements made no difference to his valuation and all of the parties apparently agree that the California litigation was meritless. The difference in valuation dates also does not render the opinion inadmissible, although the defendant may wish to argue at trial that it reduces the accuracy or value of that opinion. In addition, the defendant’s argument does not mention the plaintiff’s second expert, who will proffer testimony critical of its valuation. *See* letter dated May 23, 2007 from E. I. Feldman to James Kilbreth (Attachment 2 to Plaintiff’s Responsive SMF) & encl.

The plaintiff's response to this argument is unhelpful. He points out that he has two experts, not just Gurley, on whom the defendant focuses, "who have concluded that the value of Portland Shellfish was two times higher than the Macdonald Page figure[,]" and "[i]n sharp contrast, Defendant could not find a single expert to say that its valuation was competent and accurate." Opposition at 16. Of course, the test on summary judgment is not what the moving party could prove, but rather whether the plaintiff's claims are sufficiently supported by the evidence to go to a jury. Thus, whether the defendant has any "evidence that its report is accurate[,]" *id.*, is irrelevant for the court's current purpose.

The defendant's argument on this point is essentially a rehash of its arguments in support of its motion to exclude Gurley's testimony. It serves its current purpose no better than it served that one. The motion for summary judgment on this basis should be denied.

III. Conclusion

For the foregoing reasons, the defendant's motion to exclude the testimony of one of the plaintiff's designated expert witnesses, John Gurley, is **DENIED** and I recommend that the defendant's motion for summary judgment be **DENIED**. The plaintiff's motion for partial summary judgment is **STRICKEN** as untimely filed.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 7th day of November, 2007.

/s/ David M. Cohen

David M. Cohen
United States Magistrate Judge

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