

Litigators of the Week: Kirkland Team Adds Up a Win in Delaware Fraud Trial

By Jenna Greene
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Our Litigators of the Week are Kirkland & Ellis partners Reed Oslan and Mark Premo-Hopkins, who came out on top at trial against a team from Quinn Emanuel, winning an \$82 million jury verdict in Delaware Superior Court.

Oslan and Premo-Hopkins represented Bracket Holding Corp., which said it was duped by false financial statements when it bought a software business in 2013.

While Kirkland isn't typically a plaintiffs-side firm, Oslan and Premo-Hopkins specialize in such commercial cases. They were at their client's side from the first days of the investigation, following the paper trail to build a winning case.

They discussed the matter with Lit Daily.

Lit Daily: Who is your client and what was at stake?

Mark Premo-Hopkins: Our client was Bracket Holding Corporation. When Bracket paid \$187 million to purchase a clinical trial software business from Express Scripts Inc. (ESI) and its subsidiary United Biosource (UBC), Bracket believed that it was purchasing a robust business generating approximately \$120 million a year in revenue and \$30 million in earnings.

In fact, the financial picture was a mirage—the product of repeated manipulations of revenue and earnings. Nevertheless, the financials were represented as true and accurate by ESI, UBC and Jim Stewart, UBC's VP of Finance, during the sale process. As a result of the misrepresentations, Bracket overpaid for the business by more than \$50 million and found it was missing \$30 million in working capital.

Defendants refused to take accountability for the fraud for nearly six years after the deal closed. That eventually led us to a jury trial in Delaware Superior



Kirkland & Ellis partners Reed Oslan, left, and Mark Premo-Hopkins, right.

Court in Wilmington before Judge William C. Carpenter.

The jury held defendants accountable with a verdict totaling \$82.1 million against ESI and UBC for fraud and aiding and abetting fraud during the sale.

When and how did you come to be involved in the case?

Reed Oslan: We have a long history in representing clients in plaintiff-side commercial cases. When we learned of the case, we contacted the client and offered up our team. We were involved from the early parts of the investigation, just a few months after the deal closed. We lived through this difficult time with our client, which helped us convey to the jury the real life impact of fraud on a company.

Tell us about the fraud scheme.

Premo-Hopkins: United Biosource's VP of Finance, Jim Stewart, booked revenue and unbilled receivables

on the books every month using a spreadsheet that he managed himself, without any backup or support. The spreadsheet tracked revenue and receivables on a project-by-project basis. Stewart would shift revenue from month to month between customers and contracts to make sure his bottom line numbers met his goals each month.

But the result of the scheme was that, during the critical 12-month period our client used to price the deal, Stewart booked revenue to 18 contracts that did not exist, over 100 contracts that had long been closed or terminated, and booked revenue well in excess of the actual contract values—inflating the price by more than \$50 million and creating fake working capital to the tune of another \$30 million.

In due diligence, Bracket was not made aware of Stewart's spreadsheets or that he used an account called "unbilled receivables" to store the balances. Unbilled receivables is supposed to reflect money earned for work done, but where the company simply hasn't yet sent a bill out. Our client never had any thought that the balances didn't reflect actual work. And without bills going to customers, it was a difficult thing to test.

KPMG and E&Y both signed-off on defendants' explanations during the due diligence process. It was only after the sale, when we got access to the underlying documents at the company that we learned the revenue and unbilled receivables were no good.

What were your overarching themes in the litigation?

Oslan: Our overarching themes in the litigation were that the questions we had about the financial statements, and the answers to those questions, should be knowable by everyone—including the jury. It was just a fact-finding mission, not a complex accounting dispute.

Was there actual work done? Are there contracts to support the work? Are there documents at the company to support the numbers in the financials? These are relatively simple concepts that the jury learned with us over the course of a relatively short two week trial.

How much of this litigation involved a deep dive into financial statements? How did you make this compelling to the jury?

Premo-Hopkins: We taught the jury the basics of financial statements. They learned and understood what an "unbilled receivable" was, and how fake revenue impacts both the income statement and the balance sheet. But we saw the key as helping the jury understand that this was not a case of accounting nuance. The answers were simple and knowable.

We focused on the fact that financial statements are really just a summary of the work done at a company. And if you don't do the work, you can't get paid or record money on your books. If the financial statements are accurate, there should be evidence. Common sense tells you that there should be documents that reflect work done to support the financials—things like contracts and invoices and meeting notes.

When we showed the jury that these documents did not exist, it made it easy for the jury to understand how the account balances were being fabricated. We also showed them how, without this support, Stewart was forced to fabricate balances in his spreadsheet and move them between accounts to make his numbers appear to "add up."

How did you prepare for trial?

Oslan: We dug into the details and worked with our expert team at AlixPartners to make sure we knew the case inside and out. Then we spent a lot of time working out how to best explain financial statements and accounting details to a jury over the course of the trial. We landed on straightforward story about the work and documents at the company because there was no accounting policy that could explain away the false balances.

Who were the members of your team and what were their roles?

Premo-Hopkins: Our team was fantastic from top to bottom. One of the things we pride ourselves on at Kirkland is the depth and strength of our trial teams from the most senior partners to the more junior team members.

Reed and I took the lead with witnesses and in front of the jury. One of our partners, Howard Kaplan, did a great job examining one of our witnesses at trial as he told the jury about the misrepresentations he was told during the deal process. Brett Nerad, Greg Tsonis, and Stacy Maione skillfully handled arguments on key evidentiary issues and jury instructions that helped ensure victory for our client.

Did you make any unconventional strategic choices in how you litigated the case?

Oslan: While the case was ultimately about the accuracy of the financial statements provided to our client as part of the sale process, the case did not require a deep dive into accounting. It really was about “was work done?” and “are there documents to support the claims and numbers put forward by defendants?”

We chose to try the case with that common sense, straightforward approach—asking the jury to look for the evidence of work, and to see if the documents ever showed up at trial. The jury clearly heard us and understood that an accounting degree wasn’t necessary to understand the fraud here. And, importantly, we refused to give credence to the detailed accounting policy battle waged by the defendants.

What were some of the most memorable courtroom moments?

Premo-Hopkins: Reed’s cross-examination of defendants’ accounting expert was a highlight in terms of really bringing home to the jury our straightforward themes. The expert tried to explain away the fraud with complicated accountant speak.

Reed has a great skill of connecting with a jury in a way that cuts through expert advocacy. He brought the expert out of the world of accounting theory and forced the expert to confront his own lack of work in the case and the defendants’ lack of basic documentation. Time and again the expert was forced to admit that he had not done the work to look at the company’s documents, and was simply “presuming”

defendants’ financial statements were accurate.

Reed also used their expert to reinforce our themes that at this point, six years after the fact, the documents to support the work should exist. No delay in documentation could explain their absence at trial. And without the documents, the financials could not be “presumed” to be accurate.

Oslan: One of the most dramatic points of the trial was Mark’s cross examination of Ben Bier, the person that had run the sale back in 2013. Bier had received a report from defendants’ accountants at KPMG just a few months after the deal closed. We had a sense that the report existed but defendants refused to produce it, and until Mark’s cross they had succeeded in keeping it under wraps.

As a result of Mark’s cross-examination, where Bier admitted he and a team at ESI had seen and reviewed the report, defendants were forced to turn it over mid-trial. Rather than the rosy picture painted during due diligence, and defendants’ opening statement, this report showed that after doing a deeper dive, KPMG identified a 95% error rate in Stewart’s financial entries. Once this came out, any attempt to assert the financials were accurate resulted in a huge credibility hit in front of the jury.

The jury did find in United’s favor on a counterclaim, awarding \$2.26 million. What was the counterclaim?

Premo-Hopkins: The counterclaim involved services provided during the transition period after the deal. We never disputed that services were provided or that we owed something, but there was a dispute as to how much. We let the jury set the amount.

What message do you think the jury verdict sends?

Oslan: The verdict shows that a straightforward common sense case will overcome a technical complicated defense, even where the issues are foreign to most of the jurors. Do not run from complexity, just find a way to break it down and portray it in a sensible, convincing fashion.