IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

WILLIAM R. WILLIAMS, ROBERT S. WILLIAMS, and ESTATE OF BRYAN P. WILLIAMS, Plaintiffs	:	No. 18-01063
vs.	:	CIVIL ACTION – LAW
GORDON C. BITLER, LEO M. WILLIAMS, JR., LYCOMING SUPPLY, INC., KAMATOMA EAST, LTD., and LYCOMING CONSTRUCTION SERVICES, LLC, Defendants	:	

OPINION AND ORDER

AND NOW, following argument on the parties' Motions for Summary Judgment and Motions to Exclude Expert Testimony, the Court hereby issues the following OPINION and ORDER.

BACKGROUND AND INSTANT MOTIONS

A. Brief Summary of Procedural History

Plaintiff commenced this case by filing a Praecipe for Writ of Summons on July 17, 2018, followed by a Complaint on September 5, 2018. Each Defendant filed Preliminary Objections to the Complaint in September or October of 2018. The Court ruled on the Preliminary Objections by Order dated April 17, 2019, after which Defendants filed Answers to Plaintiff's Complaint. The history of this case and allegations are recounted in detail in the April 17, 2019 Order as well as in this Court's April 19, 2021 Order or Plaintiffs' Motion to Compel Discovery Responses and Motion to Reschedule Case Deadlines.

B. Summary of Factual Allegations

Relevant to the instant motions discussed *infra*, the Complaint essentially alleges as follows:

Leo M. Williams, Sr. ("Leo Sr.") owned 996 of the 1,000 shares of Defendant Lycoming Supply, Inc. ("LSI"). Leo Sr. died on December 20, 1990, and his wife Josephine A. Williams ("Josephine") was appointed executrix of his Estate. Pursuant to the terms of his will, "Trust Share No. 2" was formed; in July 1991, Josephine was appointed trustee of Trust Share No. 2, and in June 1992 Defendant Gordon C. Bitler ("Bitler"), doing business as Bitler & Associates, was appointed by court order to serve as co-trustee of Trust Share No. 2. Since its formation, Trust Share No. 2 has held 508 of the 1,000 shares of LSI in trust. Pursuant to Leo Sr.'s will, the interest in these 508 shares was initially held in five equal parts by Plaintiff William Williams ("William"), Plaintiff Robert Williams ("Robert"), Plaintiff Bryan Williams ("Bryan"),[1] Defendant Leo M. Williams, Jr. ("Leo Jr."), and Bonnie Noviello ("Noviello"). Noviello sold her interest in the trust share to Leo Jr. in 2006, and since then each Plaintiff has owned a 20% interest in the trust share and Leo Jr. has owned a 40% interest in the trust share.

Under Leo Sr.'s Will, the trustees of Trust Share No. 2 were empowered:

> "To make distribution in case or in kind at current values or partly in each allocating specific assets to particular distributees and for such purposes to make reasonable determinations of current values as the

[1] Plaintiff Bryan Williams died during the pendency of this action, and the Court approved the substitution of his Estate as a party and the corresponding alteration of the caption. On June 23, 2022, the Estate of Bryan P. Williams filed a praecipe to settle and discontinue with respect to the Estate of Bryan P. Williams only.

> corporate trustee shall deem best, subject, nevertheless, to the power in the local court having jurisdiction over the administration of my estate to impose reasonable limitations on the exercise of this discretionary power in order to protect the interests transferred to the several beneficiaries."

A series of transactions concerning the LSI stock held in Trust Share No. 2 forms the basis of Plaintiffs' claims.

On February 2, 1993, LSI (through its President Josephine and its Secretary Robert) and Trust Share No. 2 (through its trustees Josephine and Bitler) executed an agreement (the "1993 Agreement") reflecting the stipulation of the parties that the current value of Trust Share No. 2 was $500,000. The 1993 Agreement required the parties to the Agreement to re-stipulate to a new value of Trust Share No. 2 annually, and provided that if the parties failed to re-stipulate then the value would be the higher of either the last previously stipulated value or the **book value** of the trust's assets as of the date of Josephine's death. This agreement was rescinded by LSI's board of directors on June 8, 1995.

On November 28, 1995, Leo Jr. and Trust Share No. 2 (through its trustees Josephine and Bitler) executed an agreement (the "1995 Agreement") that reflected the stipulation of the parties that the current value of the shares was $750,000 and bound Trust Share No. 2 to sell its shares to Leo Jr. upon Josephine's death. Like the 1993 Agreement, the 1995 Agreement required the parties to re-stipulate to a new value of Trust Share No. 2 annually, though it provided that if the parties failed to re-stipulate then the value would be the higher of either the last previously stipulated value or the **value** (not the book value) of the trust's assets as of the date of

Josephine's death. This agreement also required Leo Jr. to maintain a life insurance policy on Josephine worth $750,000 to ensure that upon her death he would possess sufficient assets to purchase the shares.

On January 22, 1999, LSI's Board of Directors (Josephine, Bitler, and Leo Jr.) executed a corporate resolution (the "1999 Resolution") amending LSI's bylaws as follows:

> "The price of an outstanding share of Lycoming Supply Inc. stock shall be valued using the **book value** method of the most recent audited financial statement for the purpose of buying, selling or satisfaction of any legal document. However, the Board of Directors shall have the right to reject any and all purchases and/or sales and shall have the final determination by unanimous vote of share pricing."[2]

On January 21, 2009, LSI and Leo Jr. executed an option and sale agreement (the "2009 Agreement") that noted:

- LSI had reacquired 299 treasury shares from Robert S. Williams and Bryan P. Williams in 1998 for a price of $835.45 per share.

- The 2009 Agreement was "intended to memorialize the terms and conditions made at or about the time of the Acquisition" – that is, 1998 – "by and between [LSI] and [Leo Jr.] by which [LSI] granted an option to [Leo Jr.]... to purchase the [299 treasury shares] in whole or in part [with] the purchase price agreed upon... equal to the price [of $835.45 per share] paid to Robert S. Williams and Bryan P. Williams.

- Leo Jr. was exercising his option to purchase the 299 shares at $835.45 per share, for a total sum of $249,799.55 plus interest.

On January 22, 2009, Leo Jr. and Trust Share No. 2 (through its trustees Josephine and Bitler) executed an agreement (the "2009 Future Option") which

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[2] Emphasis added.

granted Leo Jr. the option to purchase up to 304.8 shares of LSI with the purchase price determined by the **book value** as of the end of the most recent fiscal year, though in no event could the price be less than $835.45 per share.

Josephine died on September 5, 2015.

On July 7, 2016, Leo Jr. and Trust Share No. 2 (through its sole surviving trustee, Bitler) executed an agreement (the "2016 Agreement") which set the purchase price for LSI shares at $1,562.18 per share, or $476,152.46 for 304.8 shares.

Plaintiffs asserted in the Complaint that the parties to each Agreement entered into them without any consideration[3] or evidence that they consulted with Plaintiffs, each beneficiaries of Trust Share No. 2 and thus interested parties.

Plaintiffs claim that since December 2016, they have requested that Bitler, as trustee, distribute the LSI shares directly to the beneficiaries so they can negotiate their valuation or, in the alternative, provide justification as to the use of book value rather than a different method. They allege that Bitler has failed to do so.

Plaintiff's Complaint is based on the foregoing allegations. Count I asserts a breach of fiduciary duty and the duty of loyalty against Defendant Bitler, arguing that he violated the Pennsylvania Uniform Trust Act by failing to administer Trust Share No. 2 in good faith in the interests of the beneficiaries. Rather, they allege, Bitler administered the trust solely to the benefit of Leo Jr.

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[3] As discussed *infra*, Plaintiffs have withdrawn this contention except as to the 2016 Agreement.

Count II asserts a breach of fiduciary duty and the duty of loyalty against Bitler and Leo Jr. as members of LSI's board of directors, averring that their actions diminished the value of LSI to the detriment of its shareholders.

The Court dismissed Count III of the Complaint in its April 17, 2019 Order, which granted the Defendants' preliminary objections to this claim.

Count IV asserts a claim of abuse of minority shareholders' rights against Leo Jr., alleging that he used his standing as officer and largest shareholder of LSI to build up other businesses he owns, divert assets from LSI to those businesses, and direct business to LSI's competitors to the detriment of LSI's minority shareholders.

Count V asserts a claim of civil conspiracy against all Defendants, averring that they acted in concert to violate Pennsylvania's Uniform Trust Act, breach various parties' fiduciary duties, and oppress the rights of LSI's minority shareholders.

C. **Instant Motions**

On April 21, 2021, the Court entered a scheduling order establishing a deadline of August 6, 2021 for the filing of dispositive motions, including motions to exclude expert testimony under Pa. R.C.P. 207.1. The parties filed a total of seven motions with multiple parts; each party filed at least one motion for full or partial summary judgment, and LSI filed a Motion to Exclude Plaintiffs' Expert Testimony. Many of the Defendants joined the motions filed by the others. The Court heard argument on the Motions on December 22, 2021, and each is now ripe for disposition.

D. Standard for Motion for Summary Judgment

Pennsylvania Rules of Civil Procedure 1035.1 through 1035.5 govern the filing of motions for summary judgment.[4] When deciding a motion for summary judgment, the Court must view the record in the light most favorable to the non-moving party, with all doubts as to whether a genuine issue of material fact exists being decided in favor of the non-moving party.[5] The party moving for summary judgment bears the burden of proving both the absence of an issue of material fact and its right to judgment as a matter of law.[6] Once the moving party has met its burden, if the non-moving party fails to produce sufficient evidence on an issue on which that party bears the burden of proof, the moving party is entitled to summary judgment as a matter of law.[7] The Court will only grant summary judgment, however, "where the right to such judgment is clear and free from all doubt."[8]

In a case in which the parties rely in significant part on affidavits, depositions, and expert reports, the Court is especially cognizant of its role in resolving a motion for summary judgment:

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[4] Under Rule 1035.2, "[a]fter the relevant pleadings are closed, but within such time as to not unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." Pa. R.C.P. 1035.2.

[5] *Keystone Freight Corp. v. Stricker*, 31 A.3d 967, 971 (Pa. Super. 2011).

[6] *Holmes v. Lado*, 602 A.2d 1389, 1391 (Pa. Super. 1992).

[7] *Id.* (citing *Young v. Pa. Dept. of Transp.*, 744 A.2d 1276, 1277 (Pa. 2000)).

[8] *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1159 (Pa. 2010) (quoting *Toy v. Metro. Life Ins. Co.*, 928 A.2d 186, 195 (Pa. 2007)).

> The function of the summary judgment proceedings is to avoid a useless trial but is not, and cannot, be used to provide for trial by affidavits or trial by depositions. That trial by testimonial affidavit is prohibited cannot be emphasized too strongly. In considering a motion for summary judgment, the lower court must examine the whole record, including the pleadings, any depositions, any answers to interrogatories, admissions of record, if any, and any affidavits filed by the parties. From this thorough examination the lower court will determine the question of whether there is a genuine issue as to any material fact. On this critical question, the party who brought the motion has the burden of proving that no genuine issue of fact exists. All doubts as to the existence of a genuine issue of a material fact are to be resolved against the granting of summary judgment.
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> In determining the existence or non-existence of a genuine issue of a material fact, courts are bound to adhere to the rule of [*Nanty–Glo*] which holds that a court may not summarily enter a judgment where the evidence depends upon oral testimony.

With regard to expert opinions in the context of summary judgment, our Supreme Court has said:

> It has long been Pennsylvania law that, while conclusions recorded by experts may be disputed, the credibility and weight attributed to those conclusions are not proper considerations at summary judgment; rather, such determinations reside in the sole province of the trier of fact....
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> At the summary judgment stage, a trial court is required to take all facts of record, and all reasonable inferences therefrom, in a light most favorable to the non-moving party. This clearly includes all expert testimony and reports submitted by the non-moving party or provided during discovery; and, so long as the conclusions contained within those reports are sufficiently supported, the trial judge cannot *sua sponte* assail them in an order and opinion granting summary judgment. Contrarily, the trial judge must defer to those conclusions... and should those conclusions be disputed, resolution of that dispute must be left to the trier of fact.[9]

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[9] *DeArmitt v. New York Life Ins. Co.*, 73 A.3d 578, 594-96 (Pa. Super. 2013) (internal citations omitted).

LYCOMING SUPPLY, INC.'S COMBINED MOTION TO EXCLUDE PLAINTIFFS' EXPERT TESTIMONY AND OTHER DEFENDANTS' MOTIONS TO EXCLUDE EXPERT TESTIMONY

A. Motion to Exclude Plaintiffs' Expert Testimony and Report

1. Argument

LSI characterizes "[t]he gist of Plaintiffs' case" as contending that "Defendants have undervalued the LSI stock in Trust Share No. 2 by using book value rather than fair market value, which Plaintiffs claim would be more fair." LSI avers that, in order to meet their burden of proof on the remaining claims, Plaintiffs must "not only... prove their contention that book value was not the appropriate valuation method, but also... prove what the correct valuation method was **and** the value of the shares under that valuation method."[10] LSI contends that Plaintiffs cannot do so, largely because their expert report, authored by Crumling & Hoffmaster ("Crumling" and the "Crumling Report") does not establish required elements of Plaintiffs' claims with certainty.

LSI notes the Crumling Report's conclusion "that the 'correct' valuation method to calculate the value of the LSI stock... is what [Crumling] call[s] the 'adjusted book value method,'" and argues that, even assuming *arguendo* "that the adjusted book value method is the correct method" of valuing the LSI stock in Trust Share No. 2, "summary judgment in LSI's favor is required because Plaintiffs are unable to 'close the loop' on their claim by proving the value of the LSI stock under the adjusted book value method 'to a reasonable degree of professional certainty.'" Arguing that

[10] Emphasis in original.

Crumling's opinions "do not meet the 'reasonable certainty' standard" required by Pennsylvania Rule of Evidence 702 for the admission of expert testimony, LSI asks this Court to preclude Crumling's report and testimony as "based on speculation and assumptions that are void of any factual support in the record."

LSI highlights eleven areas of the 20-page Crumling Report it characterizes as fatally uncertain, stating that Crumling "have left more questions unanswered than they have answered and have taken no action to try to answer the remaining, and necessary, questions." LSI suggests that Crumling's alleged failure to state its opinions with the required certainty is largely Plaintiffs' doing, as Plaintiffs "have not appropriately pursued the production of documents... have not taken a single deposition... and have not hired the required equipment appraisers...." LSI contends that Plaintiff have admitted "their understanding that a 'proper business valuation' involves much more" than their experts have done. Regarding the specifics of valuation, LSI notes that Plaintiffs answered multiple interrogatories by stating, *inter alia*, "[i]n order to perform a valuation under any of the generally accepted methods, the business evaluator would need to interview management to determine the extent of 'add backs' necessary," but did not actually conduct any such interviews. Thus, LSI argues, by Plaintiffs' own admission they have not obtained the information required to carry their burden of proof and establish damages.

In response, Plaintiffs disagree that they need to establish "what the optimal calculation would have been" to determine the value of the stock in Trust Share No. 2, essentially averring that if they can prove that book value undervalued their stock

by some indeterminate amount that is at least $X, then they have established $X in damages and can recover. This "floor," Plaintiffs contend, is what they must prove to a reasonable degree of professional certainty to succeed.

Plaintiffs contend that Crumling has established this minimum amount of damages to a reasonable degree of professional certainty in a manner sufficient to satisfy the Rules of Evidence governing the admission of expert reports.[11] Plaintiffs generally dispute LSI's characterizations of portions of the Crumling Report, contending that read as a whole the report satisfies the requirements of the Rules of Evidence. Plaintiffs disagree that depositions are required to prove their case (pointing out that Defendants also did not take depositions), and argue that LSI's suggestion that Plaintiffs "have not appropriately pursued the production of documents their experts have said were necessary to their analyses" is disingenuous given that Plaintiffs filed a Motion to Compel discovery from LSI that this Court ultimately denied.

2. Analysis

a. Summary of Crumling Report

The Crumling Report begins by describing the nature and scope of Crumling's services and the Report, stating that Crumling was retained "to perform financial forensic and business valuation consulting services." Crumling noted that Plaintiffs hired them to:

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[11] Plaintiffs admit that Crumling cannot state a maximum amount of damages to a reasonable degree of professional certainty, but contend that this does not affect the viability of their case.

- “Based on documents available, determine if the value offered by [Leo Jr.] for the Plaintiffs’ beneficial ownership interest in [LSI] is fair and reasonable”;

- “Identify, if possible, evidence of revenues allegedly diverted from [LSI] to [Kamatoma] and/or [LCS]”;

- “Identify, if possible, evidence of expenses paid by [LSI] that are allegedly not ordinary and necessary business expenses of [LSI] based on our review of other available accounting records and documents provided”; and

- “Identify, if possible, any dissipation of the value of [LSI] by way of other alleged asset misappropriations….”

Crumling next summarized its opinions and conclusions, which are essentially as follows:

- “Book value… is not an appropriate valuation methodology that results in a fair and reasonable value” because it includes spurious estimates, fails to reflect the market value of equipment, and fails to account for “goodwill [and] other intangible assets”;

- “While the information available to us raised questions around the proper reporting of revenues by [LSI], [Kamatoma], or [LCS], given the lack of complete information, we do not have adequate financial information… to determine, with any degree of certainty, if revenues were diverted from [LSI] to the other companies”;

- “At a minimum, [LSI’s] value is understated by Kamatoma’s book value of equity which is estimated at $359,048…”; and

- “[Leo Jr.’s] purchase of 299 shares of [LSI] treasury stock… for a discounted price of $835.45 negatively impacts the value of [LSI] by $753,511 [and] dilutes each Plaintiff’s beneficial interest by $76,787.25.”

b. Rules of Evidence and Legal Principles Regarding Opinions and Expert Testimony

Pennsylvania Rule of Evidence 702 provides that:

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
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> (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
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> (c) the expert's methodology is generally accepted in the relevant field."

The Comment to Rule 702 notes that the rule "does not change the requirement that an expert's opinion must be expressed with reasonable certainty." The Superior Court explained in *Vicari* how a court is to answer this question with regard to a causation opinion:

> "In determining whether the expert's opinion is rendered to the requisite degree of certainty, we examine the expert's testimony in its entirety. That an expert may have used less definite language does not render his entire opinion speculative if at some time during his testimony he expressed his opinion with reasonable certainty. Accordingly, an expert's opinion will not be deemed deficient merely because he or she failed to expressly use the specific words, 'reasonable degree of [professional] certainty.' Nevertheless, an expert fails this standard of certainty if he testifies that the alleged cause 'possibly', or 'could have' let to the result, that it 'could very properly account' for the result, or even that it was 'very highly probable' that it caused the result."[12]

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[12] *Vicari v. Spiegel*, 936 A.2d 503, 510-11 (Pa. Super. 2007).

c. The Crumling Report

The Crumling report is divided into four sections: 1) "fairness and reasonableness of book value"; 2) "diverted revenues"; 3) "unordinary and/or unnecessary business expenses"; and 4) "other dissipation."

i. Fairness and Reasonableness of Book Value

Crumling first discusses the "fairness and reasonableness of book value."[13] Crumling opines that LSI should be evaluated as a going concern, but that "book value" is not an appropriate method to evaluate such a company. This is because "book value" is an accounting term, rather than a valuation method, and very rarely captures a company's actual fair market value. This is because it "is not related to any concept of economic value," inasmuch as it does not actually attempt to capture the actual value of the assets or liabilities held by a company, and may in fact completely omit such important components of a company's value.

The remainder of this section discusses specific ways in which the book value of LSI "is not indicative of fair market value, or any economic value...." Paragraph 1 states:

> "[LSI]'s book value includes several estimates... [LSI's] revenues... are largely based on management's estimates of the overall profitability of each job... Revenue is earned based on costs incurred to-date and management's estimate of total costs to be incurred. Total costs are difficult to estimate. If management's estimates are inaccurate (i.e. overly conservative or overly optimistic), they could report modest profitability in one year and significant profits the year the job is completed. One of the generally accepted accounting principles is conservativism [which] means a company's financial statements should reflect all probable losses when they are discovered, while gains can

[13] Pages 5 through 10 of the Crumling Report.

> only be recognized when they are fully realized.... This concept can cause volatility in the financial reporting of companies – especially in the construction industry.
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> [LSI's] book value varies based on profitability... [A substantial decrease in book value] in 2013 was the result of a $1.4 million dollar contract payment that was deemed not collectable by management... It is possible that the revenues, or at least some of the revenues, were collected in years subsequent to December 31, 2013.
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> Valuing Lycoming Supply based on book value as of a single point in time tends to over or under state the value as of that point in time. Be it based on the conservative generally accepted accounting principles or inaccurate estimates of total project costs and therefore the profits earned to date, the fluctuations in book value can be significant. In the case of [LSI], valuing the Company as of December 31, 2013 or December 31, 2015, the value would have been noticeably different (higher) than the conclusion as of December 31, 2014."

Paragraph 2 discusses "adjusted book value," which is a valuation method that values assets "at current market values," which Crumling explains provides a more accurate picture of a company's market value. Under the adjusted book value approach, "each asset or piece of equipment should be appraised individually to determine its market value." As an example of how the failure to do so has caused LSI's book value to potentially diverge from its actual value, Crumling notes that as of December 31, 2014 LSI owned a 2007 Ford F-150 truck "with a cost of $33,069 and a book value of $0." Inasmuch as the Kelly Blue Book value of similar trucks was approximately $7,400, Crumling argues, LSI's financial valuation of the truck meant that the LSI's book value failed to include a positive asset of several thousand dollars for a saleable truck.

Crumling notes that LSI's financial records revealed that the cost of their assets as of December 31, 2014 was $6,959,968; in LSI's books, this cost basis was

decreased by $5,209,620 to account for accumulated depreciation, resulting in a book value for these assets of $1,750,348.

Crumling undertook an analysis of these figures, though it provided the following caveat:

> "We are not equipment appraisers and do not have enough information regarding the condition or number of hours/miles of the assets to adequately determine the market value of the assets. We researched online equipment listing to obtain a general idea regarding each asset group but did not research each individual asset. Based on our research, we made assumptions and applied an estimated percentage to the cost of each individual asset based on the age of the equipment and current market prices."

Crumling estimated that the actual market value of LSI's assets as of December 31, 2014 was approximately $2,630,480, meaning that the book value understated the value of these assets by approximately $880,134. However, Crumling noted that "[t]he analysis summarized herein is an estimate. The actual market value could be higher or lower."

In paragraph 3, Crumling asserts that "[f]or an operating company such as [LSI], with a history of profitability, book value is typically used as a benchmark for the 'floor', or lowest possible, value" because it does not include intangible assets such as "an experienced workforce; processes and policies in place; relationships with general contractors, customers and suppliers; a good location; and a good reputation."[14]

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[14] Paragraph 4 notes that "[LSI] has had several transactions with related parties that have had a material impact on the Company's operating results and, therefore, book value. The related parties and nature of the transactions are discussed later in this report." These "transactions with related parties" are discussed *infra*.

LSI's ultimate conclusion is that "book value is... not an appropriate methodology to value a company such as Lycoming Supply [and] is not an appropriate valuation methodology that results in a fair and reasonable value for the Plaintiffs' beneficial interest."

Crumling goes no further than this, and does not state with any certainty whether Defendants' use of book value results in an overvaluation, undervaluation, or accurate valuation of LSI, and based on their expert report they clearly cannot testify as to any valuation, whole or partial, of LSI or its assets. To the extent the Crumling Report "estimates" the value of Crumling's assets, the methods utilized do not establish the difference between book value and actual value with any certainty.

ii. <u>Diverted Revenues</u>

The second section of the report discusses "diverted revenues."[15] Crumling notes that "LCS is a separate company wholly-owned by [Leo Jr.]," with the companies engaging in similar business but different in that "[LSI's] operations are for the completion of non-union contracts while [LCS's] operations are for the completion of union contracts."

Crumling states that "questions remain regarding the relationship between [LSI] and [LCS]," but "[a]dequate financial records for [LCS] were not available to [Crumling]" and thus they could not "determine with any degree of certainty if revenues were diverted from [LSI] to [LCS]."

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[15] Page 11 of the Crumling Report.

iii. Unordinary and/or Unnecessary Business Expenses

The third section of the report addresses "unordinary and/or unnecessary business expenses" for Kamatoma,[16] LCS,[17] and "related party rent"[18] separately.

Crumling notes that "Kamatoma is an equipment holding company owned by [Leo Jr.] and disclosed in [LSI's] financial statements as a 'variable interest entity,'" or "VIE," which is defined as "an entity in which the investor has a controlling interest despite not having a majority of the voting rights." Crumling explains that "VIEs are often established as special purpose vehicles to passively hold financial assets. In this case, [LSI], as the primary beneficiary of the VIE must disclose the holdings of Kamatoma as part of its consolidated balance sheet."

Crumling states that generally accepted accounting principles require VIEs to be consolidated with their beneficiaries, but LSI has not done so. Crumling reviewed Kamatoma's financial statements and noted irregularities. First, Kamatoma's total assets did not change from 2009 to 2010 or from 2013 to 2014, which belies logic given that cash was flowing into the business and the book value of assets was likely changing. Second, in certain years Kamatoma's total listed sales were less than the value of contracts they had with LSI. Third, "[t]he total sales disclosed in 2009 and 2010 did not change" even though LSI purchased assets from Kamatoma in 2009

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[16] Pages 11 through 16 of the Crumling Report.
[17] Pages 16 and 17 of the Crumling Report.
[18] Pages 17 and 18 of the Crumling Report.

and 2010. Crumling then reviewed a number of cash payments, rentals, and purchases by LSI, which resulted in funds flowing to Kamatoma.

Crumling's first conclusion regarding Kamatoma is that "the consolidation of the two entities, as called for under Generally Accepted Accounting Principles, would result in a higher book value and, therefore, a higher purchase price for the shares of [LSI] held in the trust." Crumling explained that, essentially, LSI pays for the equipment it receives from Kamatoma twice: first, after Kamatoma takes out a loan to purchase equipment, LSI rents that equipment and Kamatoma uses the rental payments to pay off the loan. Then, after Kamatoma repays the loan, LSI purchases the equipment from Kamatoma. Crumling notes that it is unable to say whether Kamatoma originally purchased any of the equipment it provides to LSI at a discount, save for a single piece of equipment that Crumling determined was "purchased from a dealership at market rates."

Regarding Kamatoma, Crumling concluded:

> "We do not have enough information to determine the full impact of Kamatoma's separate existence, both in legal formation and in maintaining of the accounting records, has on [LSI's] book value or, therefore, fair market value; and we are not confident the total assets of Kamatoma as disclosed in [LSI's] financial statements are accurate. However, [page 1 of the Exhibits to the Crumling Report] details a proforma [sic] balance sheet for Kamatoma as of December 31, 2014 based on available information along with educated assumptions for missing details. At a minimum, it is our opinion that Lycoming Supply's value is understated by Kamatoma's book value of equity. This amount is estimated to be $359,048 as of December 31, 2014...."

The estimate provided in page 1 of the exhibits to the Crumling Report starts with the value of Kamatoma's assets as reported by LSI, which is $550,000.

Crumling then calculates the value remaining on the three outstanding loans it was able to determine Kamatoma had taken. For one of these loans, Crumling was able to calculate the value utilizing the exact terms (60 months at an interest rate of 2.83%); for the other two, Crumling "assumed the same interest rate and 60 month term," and assumed their start dates to be when LSI began paying Kamatoma additional cash in an amount equal to the monthly payment. Based on these calculations and assumptions, Crumling estimated Kamatoma's outstanding liabilities as $190,952. The $359,048 that Crumling estimated as the "understatement" to LSI's book value due to the separation of the two companies is the difference between this rough estimate of liability and the listed asset valuation of $550,000.

With regard to LCS, Crumling explained that LCS is another company owned wholly by Leo Jr. Crumling noted that LSI uses LCS as a subcontractor on certain contracts, and that LCS charges a "65% overhead fee." Crumling suggested that "based on [its] experience and research, an overhead rate of 65% is high," though they admitted that they "[did] not have enough information to determine if the cost of the subcontractors is arm's length and at market rates." They also noted that in 2014 Leo Jr. and his wife took salaries of $188,778 and $45,154 respectively from LSI; Crumling "[did] not have enough information to determine if these salaries are fair and reasonable expenses of [LSI] based on the services [Leo Jr. and his wife] provide to the company' or if Leo Jr. and his wife receive a salary, benefits, or other compensation from LCS. Next, they stated "[i]t is possible [LCS] and [LSI] share operating resources." Finally, they noted that although a news release "stat[ed] that

[LCS] violated the Clean Air and Clean Water Acts" related to a contract in Jamestown, New York, the violation was discussed at LSI's board of directors meetings, and thus "it is unclear if [LCS] and [LSI] are, in fact, one and the same."

Regarding LCS, Crumling concluded:

> "While unanswered questions remain, we do not have adequate financial records or other information to determine with any degree of certainty if the expenses paid by [LSI] to [LCS] are ordinary and necessary expenses of [LSI]. We also do not have adequate financial records or other information to determine with any degree of certainty that the expenses paid by [LSI] are in fact all of its operating expenses or if the operations and expenses of [LCS] are subsidized by the operations of an payment of expenses by [LSI] or Kamatoma."

Finally, Crumling addressed "related party rent," and evaluated "related party rent payment for the land and office building used in [LSI's] operations." Crumling concluded that although "[LSI's] profitability was decreased by rental payments paid to [Leo Jr.] and his wife from 2007 to 2012" and "unanswered questions remain," they "did not have enough information to determine with any degree of certainty if this is an ordinary and necessary expense of [LSI]."

iv. Other Dissipation

Lastly, Crumling discussed "other dissipation." Crumling addressed Leo Jr.'s 2009 purchase of 299 treasury shares from LSI at the value of $835.45 per share, which was agreed to in the 1998 Agreement. Crumling noted that the book value of LSI's shares at the time of purchase was $3,355.55 per share. Thus, had Leo Jr. purchased the shares for book value, they would have cost $1,003,309.45 rather than the $249,799.55 he paid for them. The difference of $753,309.90 would have directly increased LSI's book value. Therefore, taking Plaintiffs' individual beneficial

interests in LSI into account, Leo Jr.'s purchase of the 299 shares at 1998 Agreement value rather than 2009 book value resulted in a "dilution of each Plaintiff's beneficial interest [in LSI] in the amount of $76,787.25."

v. <u>Ultimate Conclusion</u>

Although Crumling stated that its estimates throughout the report would yield an approximate value of $3,550,185 for LSI (rather than the $1,557,494 reported by LSI), they noted they "were not engaged to, nor did [they], perform a valuation of [LSI]." Rather, they "were engaged, however, to determine if book value approximated a fair and reasonable value of the Plaintiffs' beneficial interest" in LSI, and they ultimately concluded that "the value of [LSI] is materially different than its reported book value."

d. <u>Discussion</u>

The Court concludes that many portions of the Crumling Report fail to satisfy the Pennsylvania Rules of Evidence regarding expert testimony, and the remainder of the report is not relevant to any surviving issues before the Court. Therefore, the Court precludes the Crumling Report.

The first portion of the Crumling Report, the discussion of "the fairness and reasonableness of book value" generally on pages 5 through 7, is definitive, supported, and within Crumling's expertise. This portion of the Crumling Report addresses general principles of accounting and bookkeeping and frames the issues presented here in these terms, but does not reach any conclusions about the issues

in this case. Therefore, this section of the report would be admissible but only to the extent it supports relevant, admissible opinions regarding the issues in this case.[19]

Crumling's discussion of the ways in which LSI's book value is suspect, contained in numbered paragraphs 1 through 3 on pages 7 through 10 of the report, notes general principles but does not suggest how they apply to LSI specifically. Even a generous reading of this portion of the Report fails to yield any statement offered with the requisite level of professional certainty concerning a valuation of LSI's assets or any portion thereof (which is, of course, understandable, as Crumling was not retained to provide such an opinion). Crumling asserts that book value may "tend[] to over or under state the value" of LSI and that "[i]t is possible" LSI collected additional revenues it had previously deemed uncollectable, but does not conclude that either of these things actually happened (nor does it cite to any evidence of such). The discussion in Paragraph 1 is speculative as it relates to whether and to what extent LSI's book value differs from its actual value. The methodology of the estimate of the deviation between the market price of LSI's assets and the reported book value of those assets is not rigorous. Crucially, Crumling admitted that the difference may be "higher or lower." For these reasons, this section of the Crumling Report, as well as the preceding section, do not offer any support for the argument that "book value" undervalues – rather than overvalues or accurately values – LSI, because the Report does not state as much with any professional certainty.

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[19] A portion of an expert report that recounts background principles but does not support any relevant admissible opinion "will [not] help the trier of fact to understand the evidence or to determine a fact in issue" and thus will be inadmissible under Rule of Evidence 702(b).

Next, Crumling admitted that it could not determine with any degree of certainty if revenues were diverted from LSI to LCS.

Regarding Kamatoma, the only conclusion Crumling stated with the requisite level of professional certainty is that under generally accepted accounting practices the value of Kamatoma would have been included in LSI's book value. Crumling does not explain, however, how this accounting principle would impose a legal duty on LSI, Kamatoma, or their officers, as opposed to merely constituting best practices. Crumling opined that LSI's book value "is *understated* by Kamatoma's book value of equity," but they were also unable to state with any certainty what that value is, as their estimate of Kamatoma's value was not rigorous and explicitly not intended to be a valuation opinion. Because the Court does not have a reliable valuation of Kamatoma, it cannot conclude whether Kamatoma's book value is positive, negative, or zero, and therefore whether the failure to include it in LSI's value results in an increase or diminution in LSI's value.

The only opinion in the Crumling Report stated with the requisite level of professional certainty and directly applicable to an issue in this case is the analysis of the "dilution of each Plaintiff's beneficial interest [in LSI]" that resulted from Leo Jr.'s 2009 purchase of 299 treasury shares at the 1998 Agreement price rather than present book value. However, for reasons discussed later in this Opinion, the Court will grant summary judgment to Defendants on this claim, as it is barred by the relevant statute of limitations.

For the foregoing reasons, the Court grants Lycoming Supply, Inc.'s Motion to Exclude Plaintiffs' Expert Testimony, as well as the Motion of Gordon C. Bitler to Exclude Expert Testimony, the Motion to Exclude Plaintiffs' Expert Testimony of Defendants Kamatoma East, Ltd. and Lycoming Construction Services, LLC and the Motion to Exclude Plaintiffs' Expert Testimony of Defendant Leo M. Williams, Jr., each of which join LSI's Motion.

MOTIONS FOR SUMMARY JUDGMENT CONCERNING GORDON C. BITLER

Two of the issues addressed in Plaintiffs' Motion for Partial Summary Judgment as to Gordon C. Bitler and Bitler's Motion for Summary Judgment in Behalf of Defendant Gordon C. Bitler are identical: both Plaintiffs and Bitler believe they are entitled to judgment as a matter of law on Count I as well as the issue concerning the 2009 Agreement.[20] For that reason, the Court will summarize each motion and argument before analyzing them together.

A. Plaintiffs' Motion for Partial Summary Judgment as to Gordon C. Bitler

Plaintiffs' Motion for Partial Summary Judgment asks this Court to conclude as a matter of law that Bitler breached his fiduciary duty and duty of loyalty. Plaintiffs note that the Pennsylvania Uniform Trust Act[21] imposes certain fiduciary requirements on trustees, requiring them to administer a trust "in good faith, in accordance with its provisions and purposes and the interest of the beneficiaries and

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[20] These are the only two grounds in Plaintiffs' Motion; Bitler's Motion raises additional grounds for Summary Judgment.
[21] 20 Pa. C.S. § 7701 *et sub.*

in accordance with applicable law,"[22] "solely in the interest of the beneficiaries,"[23] "impartially,"[24] "as a prudent person would… by exercising reasonable care, skill, and caution,"[25] by "tak[ing] reasonable steps to take control of and protect the trust property,"[26] and by "keep[ing] adequate records of the administration of [the] trust."[27] In doing so, they note, "the trustee must display throughout the administration of the trust complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons."[28]

Plaintiffs argue that the Court can conclude as a matter of law that Bitler violated these duties in two ways: first, that Bitler breached his fiduciary duty by undervaluing shares of LSI, and second, that Bitler's endorsement of the 2009 Agreement violated his fiduciary duty to obtain an appropriate price for shares of LSI. The Court will address these arguments separately.

1. Undervaluing Shares

Plaintiffs begin their argument by stating that "[i]t was never the intent of [Leo Sr.] that the shares [in Trust Share No. 2] be valued at anything other than their highest and best value." To this end, LSI's original bylaws specified that the value of the shares would be the amount by which LSI's total tangible assets exceed their total tangible liabilities; this amount, Plaintiffs contend, is higher than book value.

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[22] 20 Pa. C.S. § 7771.
[23] 20 Pa. C.S. § 7772(a).
[24] 20 Pa. C.S. § 7773.
[25] 20 Pa. C.S. § 7774.
[26] 20 Pa. C.S. § 7779.
[27] 20 Pa. C.S. § 7780.
[28] *Vitow v. Robinson*, 823 A.2d 973, 977-78 (Pa. Super. 2003) (internal citations omitted).

Plaintiffs aver that none of the various defense experts "have disputed that the valuation set forth in the Original By-Laws" as described above "is different than book value," and similarly, that none of the experts "contested that fair market value yields a more accurate valuation than book value." Plaintiffs contend that there is no material fact in dispute concerning whether the choice to amend the valuation harmed Plaintiffs, because the uncontested portion of the Crumling Report establishes that book value was not "the best method to advance the Trust beneficiaries' interests equally."

In essence, Plaintiffs argue that the repeated revaluing and renegotiating of the values of LSI's shares by Bitler was obviously done solely for the benefit of Leo Jr. They argue that Bitler's failure to communicate with them about this issue was itself a breach of fiduciary duty but is also evidence that Bitler was not acting in good faith. By working in tandem with Leo Jr., Plaintiffs argue, Bitler did not behave impartially as the Uniform Trust Act requires him to do.

In response, as a threshold matter, Bitler contends that "expert testimony is required to establish a breach of fiduciary duty…." He notes that Paragraph 6(n)(1) of Leo Sr.'s Will empowers the trustees of Trust Share No. 2 to convey property in a number of ways, including by "selling at public or private sale without an order of court for such prices and upon such terms as to cash and credit as said fiduciaries deem best…." Bitler argues that expert testimony is required to establish that Bitler's sale (as trustee) of the shares at a "price [he] deem[ed] best," as facially authorized by Leo Sr.'s Will, is actually a breach of fiduciary duty.

Bitler contends that Plaintiffs have not provided such expert testimony. Although they have "produced an expert report relating to damages," Bitler argues that "[t]his report, at best, establishes only that there are different valuation methods that could be used to value the shares," but not that the choice of any of these methods over another constitutes a breach of fiduciary duty.

Bitler notes that, conversely, he has produced an expert report that concludes his sale of shares at book value was *not* a breach of fiduciary duty, and argues that this alone is sufficient to defeat summary judgment. Bitler argues that even if Plaintiffs had produced a contrary expert report, the resolution of a disagreement between two experts requires the weighing of credibility and evidence, which is a function that only the factfinder may perform at trial.

At argument, Plaintiffs staunchly averred that they do not need an expert to establish a breach of fiduciary duty, which is a legal standard. Rather, they contend the evidence as established by the record, in addition to the injury established by their own experts,[29] are sufficient together to allow the Court to conclude as a matter of law that Bitler breached his fiduciary duty.

Consistent with his pleadings and motions, at argument Bitler disputed a number of the underlying facts that Plaintiffs are asking the Court to consider when determining if Bitler breached his fiduciary duty. Bitler contended that the essential issue is *why* the parties to the agreements chose to use book value rather than some

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[29] For reasons discussed throughout this Opinion and Order, the Court concludes that Plaintiffs have not established an injury.

other valuation, and argues that whereas Plaintiffs and their experts are silent on this issue, Bitler and his experts have explained the reasons for the choice of this valuation in detail. At the very least, Bitler contends, this necessitates a denial of Plaintiffs' Motion for Summary Judgment on this count.[30]

2. The 2009 Option Purchase Agreement

Plaintiffs next contend that "Bitler breached his fiduciary duty by voting to allow the 2009 Option Agreement to proceed." They argue that the 2009 Agreement facially purports to utilize the 1998 purchase price "because there was a contemporaneous agreement in 1998 to allow Leo Williams to purchase the shares at the same price Lycoming Supply had purchased them from Plaintiffs Bryan P. Williams and Robert S. Williams," but even assuming the truth of this representation "there is no legal basis for why someone acting as a fiduciary will agree wholesale 11 years after the fact to honor a purchase price."

Plaintiffs base this contention on the well-established principle that "where no time is specified for performance of a contractual obligation, the courts will require that the obligation be performed within a 'reasonable' time."[31] Plaintiffs argue that Bitler should have realized that an 11-year gap, greatly in excess of the four-year statute of limitations applicable to breach of contract, rendered the 1998 Agreement unenforceable, and thus Bitler breached his fiduciary duty by failing to "make an

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[30] As discussed *infra*, Bitler takes this position further, contending that the Court should conclude as a matter of law that he *did not* breach his fiduciary duty by valuing the shares at book value.

[31] *Hodges v. Pennsylvania Millers Mut. Ins. Co.*, 673 A.2d 973, 974 (Pa. Super. 1996).

inquiry, prior to voting for the 2009 Option Agreement, as to whether the share value might have increased in those intervening years."

Plaintiffs contend that Bitler's expert stated that the 2009 Agreement "generated capital for the corporation and kept the operating shareholder interested in continuing the operation of the corporation and its continued existence as a going concern," but did not support his statement with "any evidence that capital was needed… [or that a need existed] to keep the 'operating shareholder interested.'" Plaintiffs additionally contend that much of Bitler's expert report is premised on the incorrect factual understanding that the Trust Share No. 2 was a minority shareholder of LSI, and therefore that report is of limited utility. No expert, Plaintiffs allege, has disputed that "had the 2009 Option Agreement been at book value, the additional capital raised would have been $753,511" or that the 2009 Agreement allowed Leo Jr. to purchase the shares "at an approximate discount from book value of 75%." Ultimately, Plaintiffs contend that even if there is "some dispute as to whether [Leo Jr.] was entitled to some type of incentive payment in the form of being able to purchase treasury shares at a reduced price," Bitler owed a fiduciary duty to all trust beneficiaries, and allowing a single beneficiary to reap a windfall breached that duty.

In his brief, Bitler first responds that Plaintiffs failed to plead the contention concerning the 2009 Agreement, and did not include these allegations in the Complaint as a basis for finding that Bitler breached his fiduciary duty. As such, Bitler argues, Plaintiffs may not recover on this ground. Bitler specifically notes that he filed a preliminary objection to Count II of the Complaint "to prevent vague and

general allegations from being 'amplified'... after the expiration of the statute of limitations," and that this Court overruled that objection for the specific reason that Plaintiffs had already stated the bases of Count II elsewhere in the Complaint. Bitler contends that here, however, the allegations concerning the 2009 Agreement are not pled *anywhere* in the Complaint, and thus this constitutes exactly the sort of amplification of general allegations that Bitler sought to forestall at the pleading stage.

Bitler further contends that Plaintiffs, in their responses to Bitler's discovery requests in mid-2020, "did not identify any claim against Mr. Bitler relating to the 2009 sale of treasury shares," and that Plaintiffs did not identify any such claim "until Plaintiffs' expert report [was] served on or about June 17, 2021...." Thus, Bitler argues, these claims are barred by the two-year statute of limitations pertaining to breach of fiduciary duty, which expired at the absolute latest two years after the filing of the Complaint, or September 27, 2020.

At argument, Plaintiffs argued that it was impossible for them to know at the time of pleading that the 2009 Agreement was based on the 1998 Agreement, and thus until they realized the former relied on the latter, they were unaware of the 11-year lapse that formed the basis for their claim that Bitler breached his fiduciary duty. Plaintiffs averred that they learned this information through discovery, and to the extent necessary they would move to conform their pleadings to these additional facts.

Bitler responded that Plaintiffs were aware of, and in fact pleaded in their September 5, 2018 Complaint, each of the facts that went into their claim concerning the 2009 Agreement.[32] Specifically, Bitler notes that Paragraph 15 of Plaintiffs' Answer to his Motion for Summary Judgment, discussed *infra*, admits that "Plaintiffs' Expert Report contains the first analysis of the 2009 sale of treasury shares," and Paragraph 16 admits "the 2009 sale is not specifically analyzed in the Complaint."

B. Motion for Summary Judgment in Behalf of Defendant Gordon C. Bitler

Bitler asserts that he is entitled to summary judgment on five issues. Bitler's arguments for summary judgment in his favor are similar to those he makes in response to Plaintiffs' motion for summary judgment on these issues, with his primary contentions being that Plaintiffs have failed to present expert testimony on the issue of Bitler's alleged breach of fiduciary duty and that the absence of expert testimony means they cannot meet their burden.

1. Count I – Breach of Fiduciary Duty as Trustee

As he did in response to Plaintiffs' Motion for Summary Judgment, Bitler argues that his actions as trustee of Trust Share No. 2 were facially authorized by Leo Sr.'s Will, and thus expert testimony was required to show why his actions violated his fiduciary duty despite this apparent authorization. Bitler asserts that "Plaintiffs' expert report on damages establishes at best only that there are different valuation methods that could be used to value the shares," but does not establish

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[32] As discussed *infra*, Plaintiffs attached the 2009 Agreement, which made reference to the 1998 Purchase Price, as Exhibit B to the Complaint.

that Bitler's choice to use one method instead of another constitutes a breach of fiduciary duty.

Bitler also contends that as a matter of law Plaintiffs are not entitled to his removal as trustee under 20 Pa. C.S. § 7766(b).

As above, Plaintiffs respond that "no such expert is required, as the ultimate determination of whether a fiduciary duty was breached is a legal determination reserved for the Court." Plaintiffs aver that, even if there are multiple potential valuations, in the circumstances presented here "[t]he use of book value, as set forth in Plaintiffs' Expert Report, was simply wrong and not a close call." Plaintiffs "admit[] that expert testimony is required for Plaintiffs to support each claim. However, it is denied that the expert must be a legal expert. . . ." They additionally contend that the record contains material issues of disputed fact that allow their claim for removal of Bitler as trustee to proceed to trial.

2. Count II – Breach of Fiduciary Duty as Officer/Director (2009 Agreement)

Bitler reiterates his argument concerning the 2009 Agreement, averring that Plaintiffs failed to plead this as a basis for liability or otherwise put Bitler on notice of this claim until its inclusion in Plaintiffs' expert report. Thus, Bitler argues, this claim is barred by the statute of limitations.

As above, Plaintiffs respond that they "put Bitler on notice as to what he was being pursued for," and deny that they "had to specify that the 2009 sale comprised part of [their] claim at an earlier point in the case, especially as Defendants controlled the documentation, and Plaintiffs have pleaded and can show that Bitler kept them

uninformed of the trust and of [LSI]." Plaintiffs contend that they "were unaware of the treasury stock issue until fully analyzed by its experts, in conformance with the Court's scheduling order." Plaintiffs ultimately suggest that Bitler was on notice of the nature of their claims and that allowing them to pursue this specific theory merely conforms their sufficiently specific pleadings to the facts learned through discovery and does not prejudice Bitler.

3. Count II – Breach of Fiduciary Duty as Officer/Director (Other Claims)

Bitler additionally argues that as with Count I, Plaintiffs' claims that he violated a fiduciary duty as officer and director of LSI fail in the absence of an expert report establishing that his actions constituted a breach.

As described above, Plaintiffs argue that the expert testimony they have produced is sufficient to demonstrate that Bitler breached a fiduciary duty.

4. Counts I and II – Lack of Consideration – Uniform Written Obligations Act

Bitler next addresses Plaintiffs' contention that the 1993, 1995, 2009 and 2016 Agreements "are invalid as they lacked consideration." Bitler notes that Pennsylvania's Uniform Written Obligations Act provides that "[a] written release or promise… made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound."[33] Bitler notes that each of the Agreements "contain such language

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[33] 33 P.S. § 6.

acknowledging an intent to be bound," and thus "Plaintiffs' claims that the agreements are invalid or unenforceable cannot stand as a matter of law."

In response, Plaintiffs "stipulate[d] that the 1993, 1995 and 2009 agreements contain the requisite intent to be bound set forth in the Uniform Written Obligations Act," but contend that the 2016 Agreement does not contain the necessary language. They also highlight that this allegation was only a small portion of Counts I and II, and argue that this stipulation does not materially undermine their broader claims.

5. Count V – Civil Conspiracy

Finally, Bitler contends he is entitled to summary judgment on the civil conspiracy charge levied by Plaintiffs for multiple reasons. First, Bitler asserts that inasmuch as the civil conspiracy counts are premised on his alleged breaches of duty, the failure of those underlying claims also foreclose a conspiracy to commit them. Additionally, Bitler notes that this Court, in overruling his preliminary objection to Count V, relied on the allegation that "Defendant Bitler was acting in his capacity as an insurance agent." It was this allegation, he argues, that allowed the claim to survive in spite of the general principle that "an entity (and its agents) cannot commit civil conspiracy against itself"; if Bitler and Williams were acting solely as agents of LSI, there could be no conspiracy because they would each be acting as the same entity. Bitler argues that Plaintiffs "have uncovered no evidence that [he] was acting as an insurance agent for the transactions at issue," and for this reason the allegation of civil conspiracy cannot be sustained. Bitler also avers that Defendants have failed to establish damages on this count.

With respect to the first of Bitler's contentions, Plaintiffs reiterate their contention that their expert report is sufficient to establish a breach of fiduciary duty. With regard to the second contention, Plaintiffs state they "have asserted that Bitler wore three hats: (1) trustee of the trust; (2) member of the board of directors; [and] (3) personally and as insurance agent." Plaintiffs aver that, "in his answers to Interrogatories… Bitler admits selling and renewing insurance policies for defendant and their immediate family member." Finally, Plaintiffs contend that their expert report clearly establishes that they suffered damages as a result of the civil conspiracy.

C. Analysis of Motions for Summary Judgment Concerning Bitler

1. Need for Expert Testimony and Breach of Fiduciary Duty (Count I)

At the outset, the Court agrees with Bitler's contention that at this stage, his presentation of an expert opinion that Bitler's actions did *not* constitute a breach of fiduciary duty, at the very least, establishes a genuine issue of material fact sufficient to preclude summary judgment in favor of Plaintiffs. The remaining issue, then, is whether Plaintiffs' failure to call an expert who opines that Bitler breached his fiduciary duty entitles Bitler to summary judgment.

As a general principle, "[e]xpert testimony [is] necessary when the subject matter of the inquiry is one involving special skills and training not common to the ordinary lay person… [such as] 'to establish negligent practice in any profession.'"[34]

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[34] *Storm v. Golden*, 538 A.2d 61, 64 (Pa. Super. 1988).

As such, claims of, *inter alia*, legal malpractice require expert testimony to establish the relevant professional standard in most cases.[35]

In Count I of the Complaint, Plaintiffs assert that Bitler violated his fiduciary duty in the following ways:

- Failing to maintain adequate records relating to the various Agreements and valuations;
- Failing to meet his ongoing obligation to keep the beneficiaries informed as to the transactions involving the trust;
- Failing to provide information to the beneficiaries upon request;
- Failing to provide documentation to Plaintiffs that could be used to verify the purported value of their shares of LSI;
- Selling insurance policies to LSI, Leo Jr., or Leo Jr.'s business entities while purporting to act as trustee of Trust Share No. 2;
- Intentionally withholding information and documentation from Plaintiffs so that he could fix the share prices of LSI to benefit one beneficiary, Leo Jr.;
- Turning a blind eye to Leo Jr.'s companies to the detriment of LSI;
- Proposing a share price that does not account for all company and related company assets;
- Acting to benefit himself and/or Leo Jr. to the Plaintiffs' detriment;
- Intentionally failing to act in good faith solely for the benefit of Plaintiffs; or, in the alternative,

[35] *Id.* at 65 ("Generally, the determination of whether expert evidence is required or not will turn on whether the issue of negligence in the particular case is one which is sufficiently clear so as to be determinable by laypersons or concluded as a matter of law, or whether the alleged breach of duty involves too complex a legal issue so as to warrant explication by expert evidence.")

- Negligently failing to act in good faith solely for the benefit of Plaintiffs by assuming a fiduciary role without adequate ability to protect the corpus of Trust Share No. 2 from being manipulated by Leo Jr.

Plaintiffs contend that as a result of all of this, "Bitler has caused financial injury to Plaintiffs by reducing the value of shares of [LSI], and Bitler's actions/inactions have been a real factor in bringing about such injury." Similarly, in Count II of the Complaint, Plaintiffs incorporate the previous counts, and further contend that for the reasons listed above Bitler "violated [his] fiduciary duty to [LSI], causing the value of [LSI] to decrease [and thus] financially harm[ing] Plaintiffs."

The Court concludes that Plaintiffs cannot establish a breach of fiduciary duty without presenting admissible expert testimony regarding 1) the valuation of LSI and 2) whether the above actions breached Bitler's fiduciary duty. Plaintiffs' failure to do so necessitates a grant of summary judgment on these claims. With regard to the first of these, the valuation of a company is a matter of sufficient complexity that expert testimony is required. As discussed above, the Crumling Report does not contain any admissible opinion that the decision to use book value resulted in an undervaluation, rather than overvaluation or accurate valuation, of LSI. Plaintiffs argue that it is facially obvious that book value omits certain of LSI's assets, but they provide the Court with no evidence upon which to conclude that book value does not also omit *liabilities* of LSI, or the relative effects of those competing components on company value. Plaintiffs' Complaint seeks, *inter alia*, money damages; one of the remedies for a breach of trust in 20 Pa. C.S. § 7781 is "[c]ompelling the trustee to redress a breach of trust by paying money...." The official note to this section states

that this "reference to payment of money... includes liability that might be characterized as damages, restitution, or surcharge." In order to recover a surcharge, a plaintiff must demonstrate not only "that the trustee breached a fiduciary duty" but also "that the trustee's breach caused a loss to the trust."[36] Plaintiffs have not presented expert testimony, and thus as a matter of law cannot establish that the use of book value, as opposed to some other valuation, caused a loss to the trust. Therefore, the lack of valuation testimony is sufficient to preclude Plaintiffs from recovery of monetary damages premised on this theory. In the absence of valuation testimony, Plaintiffs cannot establish that Bitler's actions caused them *any* financial harm. The record simply does not contain sufficient evidence to allow the factfinder to do anything other than speculate in this regard.

As such, the only possible claims remaining would be that the use of book value is *per se* a breach of fiduciary duty, or that Bitler's other actions constituted a breach of fiduciary duty despite a lack of injury sustained by Plaintiffs. The Court concludes that expert testimony is necessary on both of these issues. In particular, the Court does not see how it may conclude, in the absence of expert testimony, that the use of book value – which may have overvalued, undervalued, or accurately valued LSI – constitutes a breach of fiduciary duty in light of the provision of Leo Sr.'s will facially authorizing him to sell shares as trustee of Trust Share No. 2 at a "price [he] deems best...."

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[36] *Id.* at 573.

For the foregoing reasons, the Court grants summary judgment to Bitler on Count I of the Complaint.

2. The 2009 Agreement & Breach of Fiduciary Duty (Count II)

Next, Bitler alleges that Plaintiffs' theory concerning the 2009 Agreement, stated for the first time in their expert report which was provided to Bitler on or about June 17, 2021, constitutes a new theory raised after the expiration of the relevant statute of limitations; Plaintiffs respond that their Complaint put Bitler on notice of the nature of the allegations, and that this theory is consistent with the allegations as pled. The relevant question is whether the theory concerning the 2009 Agreement as set forth in Plaintiffs' "expert report sets forth a new cause of action" or whether the proposed claim "merely amplifies that which has already been averred...."[37]

> "A new cause of action does not exist if plaintiff's amendment merely adds to or amplifies the original complaint or if the original complaint states a cause of action showing that the plaintiff has a legal right to recover what is claimed in the subsequent complaint. A new cause of action does arise, however, if the amendment proposes a different theory or a different kind of negligence than the one previously raised *or if the operative facts supporting the claim are changed.*"[38]

In *Reynolds*, the plaintiff pled that "[an] intubation performed by Defendant, Daniel Anthony Beneski, M.D. and/or other agents, servants and/or employees of Defendant, Thomas Jefferson University Hospital was performed in a negligent manner...."[39] The plaintiff's expert opined, however, that the intubation was

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[37] *Reynolds v. Thomas Jefferson University Hosp.*, 676 A.2d 1205 (Pa. Super. 1996).
[38] *Id.* at 1210 (quoting *Junk v. East End Fire Dept.*, 396 A.2d 1269, 1277 (Pa. Super. 1978)) (internal citations omitted; emphasis in original).
[39] *Id.* at 1211.

performed correctly but a different doctor, also an agent of the hospital, negligently failed to refer the plaintiff to a specialist following the intubation.[40] The Superior Court concluded that despite the reference to "other agents, servants and/or employees of" the hospital, the expert's opinion constituted a new cause of action offered after the expiration of the statute of limitations, because the plaintiff's original claims were each premised on a negligent intubation.[41]

In doing so, the Superior Court contrasted the facts in *Reynolds* with those in *Connor v. Allegheny General Hospital*.[42] In *Connor*, the plaintiff alleged both that a barium enema caused a colonic perforation and, separately, that the doctors "otherwise fail[ed] to use due care and caution under the circumstances" presented by the plaintiff's perforation.[43] At trial, the plaintiff's expert "was not able to say with a reasonable degree of medical certainty that the barium enema caused the perforation… [but] did opine that the perforation should have been diagnosed more quickly, and that there was 'undue delay in performing surgery….'"[44] The Supreme Court of Pennsylvania held that this opinion did "amplify one of the allegations of the original complaint" – the averment concerning failure to exercise due care and caution – and thus did not constitute a new cause of action that may run afoul of the statute of limitations. The Court believes a similar standard should apply to a breach of fiduciary duty claim.

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[40] *Id.*
[41] *Id.* at 1212-13.
[42] *Connor v. Allegheny General Hospital*, 461 A.2d 600 (Pa. 1983).
[43] *Reynolds*, 676 A.2d at 1212 (citing *Connor*).
[44] *Id.*

The Court concludes that Plaintiffs' theory concerning the 2009 Agreement, raised on or about June 17, 2021, more than two years after the filing of the Complaint, does not merely "amplify one of the allegations of the original complaint" but instead constitutes a new theory raised for the first time after the expiration of the relevant statute of limitations. As Bitler noted, the Court denied his preliminary objection contending that Count II was insufficiently specific, because Count II alleged ways by which Bitler breached his fiduciary duty by incorporating the factual averments in Paragraphs 1 through 137 of the Complaint, without additional allegations. Thus, the Court ruled that Count I and Count II alleged the same claims, with the same sufficient specificity, with the difference between them being that Count I concerned Bitler's position as trustee and Count II concerned Bitler's position on LSI's board of directors. Implicit in this overruling of the preliminary objection was a finding that Plaintiffs were confined to their allegations as stated in Paragraphs 1 through 137 of their Complaint as incorporated into Count II.

A fair reading of these paragraphs does not reveal any allegation that Bitler breached his fiduciary duty by honoring the 1998 Agreement when setting the price of shares under the 2009 Agreement. Rather, Plaintiffs' new allegation is conceptually distinct from those contained in the Complaint, which were premised on the use of book value undervaluing LSI's shares, the alleged siphoning of assets from LSI to other companies, and the alleged failure to satisfy certain fiduciary requirements. The Court concludes that the theory of liability concerning the 1998

and 2009 Agreements is not an enlargement of a previously-pled theory but is a new theory.

Perhaps recognizing the potential that the Court may conclude as much, Plaintiffs invoke the discovery rule, arguing that it was impossible for them to know at the time of pleading that the 2009 Agreement was based on the 1998 Agreement, and thus they did not discover the basis for this theory until shortly before the completion of the Crumling Report. This argument is unavailing. As Bitler notes, Plaintiffs described the 2009 Agreement in Paragraph 40 of the Complaint and attached the 2009 Agreement as Exhibit B. The plain language of the 2009 Agreement clearly indicates that the price of each share LSI was selling to Leo Jr. was set at $835.45 in accordance with "an agreement made at or about the time" LSI repurchased the 299 shares from Robert S. Williams and Bryan P. Williams in 1998. Thus, as Bitler argues, Plaintiffs were, or should have been aware of all of the material facts necessary to plead this claim with specificity, as they were contained within the Complaint and its attachments. That Plaintiffs did not immediately appreciate the possibility that the 1998 Agreement may have been unenforceable in 2009, is not a valid ground upon which to invoke the discovery rule.

The Court concludes that Plaintiffs' allegations concerning the 2009 Agreement constitute new claims raised for the first time after the expiration of the applicable statute of limitations. Therefore, the Court grants Bitler's motion to preclude evidence of the 2009 Agreement in support of Plaintiffs' breach of fiduciary duty claims under Count II.

The remainder of Count II incorporates the allegations of Count I. For the reasons previously discussed, the Court grants Bitler's motion for summary judgement as to the remaining portions of Count II.

3. <u>Lack of Consideration and Uniform Written Obligations Act</u>

Plaintiffs have stipulated that the 1993, 1995, and 2009 agreements contain the requisite intent to be bound to satisfy the Uniform Written Obligations Act, and thus Plaintiffs have withdrawn their claims for lack of consideration as to these agreements.

Plaintiffs' claims concerning the 2016 Agreement rely on the contention that the use of book value resulted in an undervaluing of LSI and a concomitant diminution of Plaintiffs' interest therein. The Court has granted summary judgment to Defendants on all counts relying on the premise that the use of book value undervalued LSI. Therefore, the Court grants Bitler's motion for summary judgment as to the 2016 Agreement.

4. <u>Conspiracy Claim</u>

Plaintiffs' rest their claim for damages for civil conspiracy on damages arising from the diminution in value of LSI as established in the Crumling Report, which the Court has excluded. Therefore, the Court grants Bitler's motion for summary judgment as to Count V of the Complaint.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LYCOMING SUPPLY, INC. AND KAMATOMA EAST, LTD.

Plaintiffs assert that they are entitled to summary judgment on the issue of LSI's failure to include Kamatoma in its valuation.[45] Plaintiff notes that the Crumling Report opines that because Kamatoma is a VIE, generally applicable accounting principles require that its value be included in LSI's valuation. Plaintiff argues that this opinion is unrebutted, in that the expert report prepared for Leo Jr., Kamatoma and LCS neither "show[s] a flaw in the Crumling Report's analysis" nor "explain[s] why [Kamatoma's annual financial reports] prepared year after year by [LSI's] accountants... were wrong to reflect Kamatoma as a variable interest entity."

Defendants Leo Jr., Kamatoma and LCS point out that although "LSI's accountant wrote repeatedly in a footnote that LSI informed him that [Kamatoma] was a VIE," LSI denies that ever happened. They further contend that Plaintiffs' position that the Defendants' expert report is insufficient to rebut their own report is an impermissible attempt to shift to Defendants the burden of disproving Plaintiffs' theory.

The propriety of excluding Kamatoma in LSI's valuation therefore remains a genuine issue of material fact. More importantly, the Court has excluded the Crumling Report. Even had the Court not excluded the Report, at best, Crumling

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[45] Plaintiffs' Motion asks the Court to "enter partial summary judgment in their favor by finding that the value of Defendant Kamatoma East, LTD., should be included in the value of Defendant Lycoming Supply, Inc., as a matter of law, and provide such other relief as it deems equitable and just." Plaintiffs do not identify which claims or defendants are the subject of this Motion. Because the Court denies this Motion, the Court need not determine which claims or defendants are affected by this issue.

only established that under generally accepted accounting practices the value of Kamatoma should have been included in LSI's book value. Crumling did not establish that the failure to comply with this accounting practice resulted in LSI being undervalued. Therefore, the Court denies Plaintiffs' Motion for Summary Judgment.

MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS KAMATOMA EAST, LTD. AND LYCOMING CONSTRUCTION SERVICES, LLC

Kamatoma's and LCS's Motion for Summary Judgment notes that the only remaining count against these Defendants is Count V, civil conspiracy, the first element of which is "a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose."[46] These Defendants argue that Plaintiffs aver "only… that [LSI] assets and clients were diverted to [Kamatoma] and LCS; that LSI business connections and capital were used to build up [Kamatoma] and LCS; and that projects completed by [Kamatoma] or LCS were projects that would have typically been undertaken by LSI." Kamatoma and LCS suggest that Plaintiffs' experts could not identify any assets, clients, business connections or capital, or work diverted from LSI to Kamatoma or LCS.

Plaintiffs respond that there is a genuine issue of material fact concerning whether Kamatoma and LCS engaged in a civil conspiracy against them. Regarding Kamatoma, Plaintiffs note that the Crumling Report "determines that the value of [Kamatoma] should be included with LSI's valuation… [and] specifically describes

[46] Defendants cite *Pierce v. Allegheny Co. Bd. of Elections*, 324 F. Supp. 2d 684, 701 (W.D. Pa. 2003).

how LSI pays for equipment twice, to the benefit of [Kamatoma] and the detriment of LSI." Plaintiffs note that LCS "was established to provide [LSI] with access to union projects as needed," and that evidence exists showing that LCS and LSI are entangled.

Essential to Plaintiffs' claim for civil conspiracy is their allegation that the parties agreed to divert funds from LSI to other entities such as Kamatoma and LCS. Plaintiffs have not been able to identify any assets, clients, business connections, capital, or work diverted from LSI to Kamatoma or LCS. Further, for the reasons stated throughout this Opinion, the Court has concluded that as a matter of law Plaintiffs have not established any valuation of LSI, let alone a diminution in value, from any alleged diversion of assets, and therefore they cannot establish they have sustained damages as a result of this claim. Therefore, the Court grants the motion for summary judgment of Kamatoma and LCS.

LYCOMING SUPPLY, INC.'S MOTION FOR SUMMARY JUDGMENT

LSI argues that "Plaintiffs' inability to offer admissible expert testimony... results in Plaintiffs' inability to prove necessary elements of their case," and thus "requires the entry of summary judgment in LSI's favor." The sole count surviving against LSI is Count V, civil conspiracy, which LSI claims "depends upon the viability of" Counts I, II and IV. LSI avers that these claims may only survive if Plaintiffs "prove their contention that book value was not the appropriate valuation method... prove what the correct valuation method was and [prove] the value of the shares under that valuation method."

LSI does not elaborate on this argument, and the remainder of its Motion addresses the admissibility of Plaintiffs' expert as discussed above. LSI further adopts and incorporates the arguments for summary judgment advanced by the other Defendants.

The Court has granted summary judgment as to the underlying claims in Counts I, II and IV, and agrees that with the failure of these counts, a claim of conspiracy cannot survive. Further, for the reasons described above, Plaintiffs have not established a diminution in the value of LSI, and therefore have not established damages under Count V. Therefore, the Court grants LSI's motion for summary judgment.

MOTION FOR SUMMARY JUDGMENT OF DEFENDANT LEO M. WILLIAMS, JR.

Three of the four counts name Leo Jr. as a Defendant. Count II alleges a breach of fiduciary duty and duty of loyalty by both Bitler and Leo Jr. as members of LSI's board of directors. Leo Jr.'s motion for summary judgment on this count is substantively similar to Bitler's motion for summary judgment on this count, and is granted to the same extent. Leo Jr.'s motion for summary judgment concerning Count V, civil conspiracy, is similar to the motions of the other Defendants concerning this count, and for the reasons detailed above is also granted.

Count IV of the Complaint is for "abuse of minority shareholders' rights as to [Leo Jr.]" This Count alleges that Leo Jr. "has used the business connections and capital… of LSI to build up his other business entities," "used his shareholder status to operate [LSI] with limited oversight into his diversion of its potential business to his

other business entities," and breached the fiduciary duty he owed to Plaintiffs as "the operator of [LSI] and the largest shareholder [of LSI] outside of Trust Share #2...."

With regard to Count IV, Leo Jr. highlights, as did Kamatoma and LCS, that Plaintiffs' experts were unable to identify any diversions of assets, clients, business connections, capital, or work opportunities from LSI to Kamatoma or LCS. Leo Jr. notes that Plaintiffs have specifically described a theory of diminution in the value of LSI due to Leo Jr.'s purchase of 299 treasury shares at the 1998 Agreement price rather than 2009 book value, but Leo Jr. argues similarly to Bitler that this claim violates the statute of limitations. More broadly, Leo Jr. argues that any claims that the use of book value diminished the value of LSI are barred by the statute of limitations, because "Plaintiffs were aware of the use of book value to value LSI shares since at least 1998... yet they did not raise any issue directly to LSI as shareholders prior to selling their shares back to LSI in 1998... [and] failed to initiate any formal proceeding to stop the use [of] book value until 2018...." Finally, Leo Jr. avers that "Plaintiffs' claim of abuse of minority shareholders' rights is complex and requires expert testimony," and that Plaintiffs' failure to provide such expert testimony renders them incapable of proving their cause of action for abuse of minority shareholders' rights.

Despite the fact that they were unable to identify any diversion of assets, and the Court has precluded Plaintiffs' claim regarding the 2009 Agreement, Plaintiffs argue that there remains a genuine issue of material fact concerning whether Leo Jr. breached the fiduciary duty he owed them as controlling shareholder of LSI. Citing

case law discussing how a "more powerful" shareholder commits abuse of minority shareholder rights when he breaches a fiduciary duty resulting in a "less powerful shareholder being "frozen out" of the corporation, Plaintiffs contend that Leo Jr.'s actions as operating shareholder of LSI could support a finding that he prevented them from learning of LSI's diversion of business and funds to other entities, and other actions taken to Plaintiffs' detriment.

Defendant's argument, however, begs the question. Whether Plaintiff claims that Leo Jr. abused minority shareholder rights by diverting business assets or by preventing Plaintiffs from <u>learning</u> of LSI's diversion, Plaintiffs must prove that there has in fact been a diversion of assets. They have failed to do so.

For the reasons discussed above, the Plaintiffs have not met their burden on any of the claims brought against Leo Jr. Additionally, the Court agrees with Leo Jr. that Plaintiffs' claim of abuse of minority shareholders' rights, like Plaintiffs' claims of breach of fiduciary duty against the other Defendants, is complex and requires expert testimony. For all of these reasons, the Court grants Leo Jr.'s Motion for Summary Judgment.

<u>ORDER</u>

For the foregoing reasons, the Court hereby ORDERS as follows:

- Lycoming Supply, Inc.'s Motion to Exclude Plaintiffs' Expert Testimony; the Motion of Gordon C. Bitler to Exclude Expert Testimony; the Motion to Exclude Plaintiffs' Expert Testimony of Defendants Kamatoma East, Ltd. and Lycoming Construction Services, LLC; and the Motion to Exclude Plaintiffs' Expert Testimony of Defendant Leo M. Williams, Jr. are GRANTED.

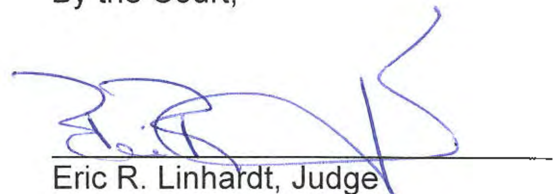
- Plaintiffs' Motion for Partial Summary Judgment as to Gordon C. Bitler is DENIED.
- The Motion for Summary Judgment in Behalf of Defendant Gordon C. Bitler is GRANTED.
- Plaintiffs' Motion for Partial Summary Judgment as to Lycoming Supply, Inc. and Kamatoma East, Ltd. is DENIED.
- The Motion for Summary Judgment of Defendants Kamatoma East, Ltd. and Lycoming Construction Services, LLC is GRANTED.
- Lycoming Supply, Inc.'s Motion for Summary Judgment is GRANTED.
- The Motion for Summary Judgment of Defendant Leo M. Williams, Jr. is GRANTED.

The Court's adjudication of the dispositive motions results in the grant of summary judgment as to all claims contained in Plaintiffs' Complaint. Therefore, the Court grants summary judgment in favor of Defendants on all counts. Plaintiffs' Complaint is hereby DISMISSED WITH PREJUDICE.

Because this Opinion and Order disposes of all claims and all parties, it is a final order from which an appeal may be taken as of right pursuant to Pa. R.A.P. 341(a).

IT IS SO ORDERED this 29th day of June 2022.

By the Court,



Eric R. Linhardt, Judge

ERL/jcr

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