STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21 CVS 13907
JORDAN HARRIS, Plaintiff, v. TEN OAKS MANAGEMENT, LLC, Defendant.	**ORDER ON MOTIONS IN LIMINE**

1. Pending are seven motions in limine: one by Plaintiff Jordan Harris and six by Defendant Ten Oaks Management, LLC. (*See* ECF Nos. 83, 85, 90, 91, 93, 95, 98.) The motions are fully briefed, and the Court heard oral argument at a pretrial hearing on 14 November 2023.

2. **Background.** This is an employment dispute involving a single claim for breach of contract. Ten Oaks is a so-called "family office" that invests in corporate divestitures. It employed Harris from April to September 2020. Harris's duties included sourcing deals for the firm, and his employment agreement promised him incentive compensation for those deals. At issue is a deal involving the acquisition of the European division of a company called ScanSource, Inc. In short, Harris claims that he sourced the ScanSource deal but that Ten Oaks refused to pay him the incentive compensation outlined in his employment agreement. Ten Oaks denies that Harris sourced the deal and contends that he was paid all that he was owed. Earlier opinions describe the facts and the parties' contentions in greater detail. *See generally Harris v. Ten Oaks Mgmt., LLC*, 2023 NCBC LEXIS 90 (N.C. Super. Ct.

July 31, 2023); *Harris v. Ten Oaks Mgmt., LLC*, 2022 NCBC LEXIS 62 (N.C. Super. Ct. June 20, 2022).

3. **Daniel Hoover.** The Court begins with Harris's lone motion in limine. He seeks to exclude Daniel Hoover from testifying at trial on the ground that Ten Oaks did not identify him, in response to interrogatories served during discovery, as a person with knowledge of the events alleged in the complaint. Whether Ten Oaks should have identified Hoover during discovery is debatable because he was not involved in the events that gave rise to this action. Hoover is an information technology professional; his anticipated testimony would be limited to authenticating documents. Even if Ten Oaks should have identified Hoover during discovery, allowing him to testify about the authenticity of a few documents would not prejudice Harris in any way. As Ten Oaks notes, Hoover cannot and will not testify about material facts. The Court denies Harris's motion.[1]

4. **Evidence of Wealth and Damages.** Ten Oaks filed two related motions to exclude a capitalization table, distribution schedules, bank statements, and similar documents stemming from the acquisition of ScanSource's European division. Ten Oaks argues, first, that these documents contain irrelevant and prejudicial evidence of its wealth or of the wealth of its principals, Matt Magan and Michael Hahn. The Court disagrees. All the disputed evidence relates directly to the ScanSource deal, which lies at the heart of this case. The documents do not concern the general wealth

[1] To ensure that there is no prejudice, the Court may consider other protective measures—allowing Harris to depose Hoover before trial, for example—if Harris makes a reasonable request.

of any party or witness. To the extent the documents show that Magan and Hahn benefited financially from the ScanSource deal, their self-interest is highly relevant to their credibility as witnesses and in no sense unfairly prejudicial. *See State v. Lewis*, 365 N.C. 488, 494 (2012) ("We have long held that evidence of bias is logically relevant to a witness' credibility and that a party may cross-examine a witness regarding facts that have a logical tendency to show that the witness is biased against that party."); *see also Shook Builders Supply Co. v. E. Assocs., Inc.*, 24 N.C. App. 533, 537 (1975) (observing that credibility of "an interested witness" is for the jury to decide).

5. Second, Ten Oaks argues that Harris should not be allowed to offer these documents as evidence of damages. As Harris correctly points out, however, the disputed documents are relevant to issues other than damages, including the nature and substance of the transaction, how it was structured, and who was involved. There is very little risk that the jury will be inflamed by the size of ScanSource's assets, liabilities, revenues, and resulting distributions because, as Ten Oaks concedes, the parties do not dispute the amount of damages that would be due if the jury finds Ten Oaks liable for breach of contract.

6. Ten Oaks argues in passing that Harris lacks personal knowledge of these documents and cannot testify about them. This argument is undeveloped. Questions about authenticity and personal knowledge are best addressed in context during trial.

7. The Court denies Ten Oaks' motions to exclude evidence of wealth and regarding damages.

8. **Expert Testimony.** During discovery, Harris designated Richard G. Wheelahan, III as an expert witness. Wheelahan did not produce an expert report. In response to an interrogatory, Harris stated that Wheelahan may offer opinions regarding the meaning of the word "source" in this context, industry standards for compensating a person who sources deals, and whether Harris or someone else sourced the ScanSource deal. (ECF No. 95.3 at 4.) Wheelahan further explained his opinions and the basis for them in his deposition. (*See* ECF No. 95.4.) Ten Oaks seeks to exclude Wheelahan on the grounds that his anticipated testimony conflicts with the Court's summary-judgment opinion and is otherwise unreliable and irrelevant.

9. North Carolina follows the federal "*Daubert* standard for admitting expert testimony." *Insight Health Corp. v. Marquis Diagnostic Imaging of N.C., LLC*, 2017 NCBC LEXIS 14, at *39 (N.C. Super. Ct. Feb. 24, 2017) (citation and quotation marks omitted). This means that the "testimony must meet the minimum standard for logical relevance" under Rule 401. *State v. McGrady*, 368 N.C. 880, 889 (2016). And it must satisfy the three-part test set out in Rule 702(a): (1) "expert testimony must be based on specialized knowledge that will assist the trier of fact"; (2) "the expert must be qualified"; and (3) "the testimony must be reliable." *Insight Health*, 2017 NCBC LEXIS 14, at *39. Experts may not testify as to "whether legal conclusions should be drawn or whether legal standards are satisfied." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 587 (1991).

10. Wheelahan's expected testimony fails that test because it is irrelevant and unreliable. At summary judgment, the Court construed the term "source" as a matter of law and observed that "Harris may not use expert testimony to contradict" its ordinary meaning. *Harris*, 2023 NCBC LEXIS 90, at *11. What was true then is true now: the meaning of "source" is settled, and expert testimony offered to confirm or contradict the Court's construction is irrelevant. In addition, Wheelahan's opinion that Harris sourced the ScanSource deal is inadmissible because his understanding of "source" conflicts with the Court's construction.

11. Harris insists that Wheelahan may testify about industry norms and protocols but does not say what those norms and protocols are or how they relate to the issues the jury will decide. Without more, the Court cannot conclude that this testimony is relevant or see how it would aid the jury. *See, e.g.*, *Cook v. Sheriff of Monroe Cnty.*, 402 F.3d 1092, 1111 (11th Cir. 2005) (holding that "a trial court may exclude expert testimony that is imprecise and unspecific, or whose factual basis is not adequately explained" (citation and quotation marks omitted)).

12. The Court grants the motion. Wheelahan may not testify as an expert witness at trial.[2]

13. **Severance Offer and Separation Agreement.** When Ten Oaks fired Harris in September 2020, he voiced surprise and asked to be reinstated. Ten Oaks refused. The two sides then began discussing the terms of a separation agreement.

[2] In a footnote, Harris suggests that his expert's shortcomings are no worse than those of Ten Oaks' expert. Yes, the *Daubert* standard is sauce for goose and gander alike. But Harris did not move to exclude Ten Oaks' expert, and his undeveloped objection isn't ripe. He is, of course, free to object at trial.

Ten Oaks offered to give Harris a severance package, including incentive compensation for the ScanSource deal, and to help with his job search. Discussions stretched into November 2020. Ten Oaks eventually gave Harris a choice: take $50,000 guaranteed and forgo any interest in the ScanSource deal or take five percent equity in the deal and risk receiving nothing if it fell through. Either way, Harris would have to release any and all claims in return. Harris opted to take the equity but, according to Ten Oaks, did so after its offer expired.

14. Ten Oaks now moves to exclude all evidence of its severance offers and the related discussions, arguing that statements made in negotiations to compromise a disputed claim are inadmissible under Rule 408. Harris contends that the motion is overbroad. He concedes that a dispute arose in November 2020 and that evidence of offers and negotiations during that time are inadmissible. But he argues that statements made in September and October 2020 are admissible because no dispute about the validity or amount of his claim had yet arisen.

15. Under Rule 408, "evidence of conduct or statements made in compromise negotiations" regarding a disputed claim "is inadmissible" if offered to prove the claim's validity or amount. *Renner v. Hawk*, 125 N.C. App. 483, 492 (1997). This reflects "the strong public policy favoring settlement of controversies out of court." *Cates v. Wilson*, 83 N.C. App. 448, 458 (1986). In keeping with this policy, actual or threatened litigation is not necessary. Rather, "a dispute exists" for purposes of Rule 408 "so long as there is an actual dispute or difference of opinion regarding a party's

liability for or the amount of the claim at issue." *Macsherry v. Sparrows Point, LLC*, 973 F.3d 212, 222 (4th Cir. 2020) (cleaned up).

16. Analogous federal cases are instructive. They hold that trial courts have "substantial discretion to determine whether" an "employment separation agreement is an offer to settle a disputed claim under Rule 408" based on the "facts and circumstances" of each case. *Weems v. Tyson Foods, Inc.*, 665 F.3d 958, 966 (8th Cir. 2011). They also caution against rigid rules that might defeat Rule 408's animating purpose. Thus, a dispute between an employer and its former employee need not "be *explicitly* communicated from one party to the other before it implicates" Rule 408. *Macsherry*, 973 F.3d at 222 (emphasis in original). A difference of opinion implied by conduct or silence may suffice. This is true even when the former employee "was not contemplating legal action at the time." *Weems*, 665 F.3d at 965. In short, "when the issue is doubtful, the better practice is to exclude evidence of compromises or compromise offers." *Bradbury v. Phillips Petrol. Co.*, 815 F.2d 1356, 1364 (10th Cir. 1987); *see also Macsherry*, 973 F.3d at 225; *Weems*, 665 F.3d at 966; *Affiliated Mfrs., Inc. v. Aluminum Co. of Am.*, 56 F.3d 521, 528 (3d Cir. 1995).[3]

[3] The outlier is the Ninth Circuit, which "created an exception to the general rule against admitting offers to settle a case," *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1290 (9th Cir. 2000), that applies "when an employment relationship is terminated and the employer offers a contemporaneous severance pay package in exchange for a release of all potential claims," *Cassino v. Reichhold Chem., Inc.*, 817 F.2d 1338, 1342 (9th Cir. 1987). This exception, which appears to be limited to age discrimination claims, is inconsistent with North Carolina law and the broad majority of federal decisions around the country. Indeed, the Fifth Circuit has expressed "doubt about the continuing precedential value of *Cassino*." *Haun v. Ideal Indus., Inc.*, 81 F.3d 541, 547 n.3 (5th Cir. 1996).

17. Although Harris contends that he and Ten Oaks had no dispute before November 2020, the circumstances say otherwise. After Ten Oaks fired him, Harris asked Magan and Hahn to let him make a case for reinstatement. Magan agreed to hear him out but warned that the "bar" was "high" and that even a temporary reinstatement would foreclose future "runway for severance or otherwise." (ECF No. 98.2.) In making his case for reinstatement, Harris claimed that "I have uncovered 7+ deals, 2 of which are under LOI" and protested that performance "issues weren't communicated to me until that decision was already 'made.' " (Ex. 14 to Magan Dep., ECF No. 50.4.) Ten Oaks decided not to reinstate Harris, implying its disagreement with his defense of his performance.

18. It was at that point—24 September 2020—that Ten Oaks made what Harris called "a generous and dignified offer" to pay severance that included incentive compensation for the ScanSource deal. Harris argues that this offer shows Ten Oaks' agreement—not its disagreement—that it owed him incentive compensation for that deal. To be sure, in an e-mail to Magan and Hahn, *Harris* stated that "my understanding of the offer" is that "I will be paid out according to my contract." But neither Magan nor Hahn agreed with his understanding. Magan responded that he would call Harris to "go through this" and would need the firm's outside counsel to prepare a written agreement. (Ex. 15 to Magan Dep.) The timing of the offer, the wording of the e-mails, and the overt nod to lawyer approval all signal an actual dispute: that Ten Oaks made the offer "inferentially in response to [Harris's] expressed concerns over the circumstances of [his] removal." *Weems*, 665 F.3d at 965–

66; *see also Macsherry*, 973 F.3d at 223 (noting that invitation to make "offer" implied a dispute); *Jeffrey v. Mid-Atlanticare S. LLC*, 2012 U.S. Dist. LEXIS 59763, at *4 (E.D.N.C. Apr. 30, 2012) ("[B]ecause Plaintiff had already been terminated from his employment, the Court finds that there was an actual dispute between Plaintiff and Defendant.").

19. Over time, the discussions between Harris and Ten Oaks grew less amicable and more adversarial. By November 2020, intermittent negotiations had led to changes in the terms of the offer. Each side sought the advice of lawyers. And in the draft separation agreement, Ten Oaks demanded a release of claims as part of the consideration that Harris would have to give in return for the severance package. *See, e.g.*, *Vetromile v. JPI Partners, LLC*, 706 F. Supp. 2d 442, 456 n.2 (S.D.N.Y. 2019) ("[I]f an offer to pay monies Plaintiff believed were due to him in exchange for a release from all legal claims is not a statement made during 'compromise negotiations,' then the Court is not sure that anything would be.").

20. Certainly, the rupture was complete at that point. But the parties' dispute arose when Ten Oaks rejected Harris's case for reinstatement, terminated him once and for all, and offered severance pay as part of a lawyer-approved separation agreement. For these reasons, the Court concludes that a dispute between Harris and Ten Oaks existed as of 24 September 2020.

21. Rule 408 therefore excludes evidence of compromise negotiations after that date unless Harris can show that he intends to offer the evidence for a purpose, "such as proving bias or prejudice of a witness," other than to establish the validity or

amount of his claim. N.C. R. Evid. 408. Harris contends that the compromise negotiations show bias and prejudice because Ten Oaks "engaged in actions designed to purposefully benefit itself" at his expense. (ECF No. 105 at 5.) That goes to the merits of Harris's claim, not bias. And in any event, the limited probative value of bias is substantially outweighed by the danger of unfair prejudice that would result from admission of the compromise negotiations. *See* N.C. R. Evid. 403; *see also, e.g.*, *Wallis v. Carco Carriage Corp.*, 1997 U.S. App. LEXIS 25309, at *18 (10th Cir. Sept. 19, 1997) (unpublished) ("[E]ven if Carco sought to show bias or prejudice of a witness in introducing the settlement agreement, the district court may still exclude the evidence under [Rule 403] if the danger of unfair prejudice substantially outweighs the relevance of the evidence.").

22. The Court grants Ten Oaks' motion. Harris may not offer or refer to evidence of compromise negotiations occurring on or after 24 September 2020.

23. **Zoho E-mails.** Next, Ten Oaks seeks to exclude several e-mails generated by a customer relationship management system called Zoho for a host of reasons, including hearsay and unfair prejudice. Each e-mail includes a picture of a bag of gold coins, some generic text (such as "Big deal has been Created [sic]"), and several data fields that list "Jordan Harris" as the "Deal Owner" and either "ScanSource" or "Dentsply" as the relevant deal. Harris argues that the e-mails are not hearsay because they do not contain an assertion, are not being offered for the truth of any assertion, and fall within Rule 803(6)'s exception for business records.

24. The e-mails are inadmissible hearsay. *See* N.C. R. Evid. 801, 802. As Harris concedes, they were not self-generated; a person typed in the information, including the names of the deal and "Deal Owner." Computerized records that require "actual human input or discretion in their generation" are subject to hearsay rules. *State v. Smith*, 287 N.C. App. 191, 197 (2022) (citation and quotation marks omitted). And although Harris says otherwise, it is evident that the e-mails contain an assertion—that he is the "Deal Owner" of the ScanSource and Dentsply deals—and that he intends to offer the e-mails for the truth of that assertion. Harris's argument regarding Rule 803(6) is conclusory. He hasn't come close to showing that it was Ten Oaks' "regular practice" to use the Zoho platform, N.C. R. Evid. 803(6), admitting that he doesn't "remember how in-depth we used Zoho," (ECF No. 88 at 235:24–25). *See Gilreath v. N.C. HHS*, 117 N.C. App. 499, 505–06 (2006) (excluding a document as inadmissible hearsay when proponent failed to satisfy the requirements of Rule 803(6)).

25. Regardless, the e-mails have negligible probative value. They show, according to Harris, only that he was involved with the ScanSource deal in some way. But it is undisputed that Harris worked on the deal. What is in dispute is whether Harris sourced the deal. Even Harris does not argue or point to evidence to show that the Zoho e-mails use "Deal Owner" to refer to the person who sourced a given deal. Yet the e-mails pose a substantial risk of misleading the jury into believing just that. The e-mails' limited probative value is substantially outweighed by the danger of unfair prejudice and potential to mislead the jury. N.C. R. Evid. 403.

26. The Court grants Ten Oaks' motion. Harris may not introduce or refer to the Zoho e-mails at trial.

27. **Other Lawsuits Against Ten Oaks.** In its sixth and final motion, Ten Oaks seeks to exclude evidence of other lawsuits in which it is a defendant. Harris concedes that evidence of other lawsuits is usually not admissible but argues that evidence of the litigation against Ten Oaks is admissible under Rule 608(b) to impeach its principals, Magan and Hahn. That is unpersuasive. Rule 608(b) gives trial courts discretion to allow a party to cross-examine a witness regarding "[s]pecific instances" of conduct "concerning his character for truthfulness or untruthfulness." Despite several chances, Harris has yet to identify any instances of alleged conduct by Magan and Hahn that bear on their character for truthfulness. Astonishingly, when the Court asked Harris's counsel to specify the relevant conduct at the pretrial hearing, he stated that he *didn't know*. Rule 608(b) does not allow general cross-examination about other lawsuits. Moreover, the mere fact that another lawsuit exists is not probative of character for truthfulness. Allowing Harris to cross-examine Magan and Hahn on the subject would surely confuse the jury and be unfairly prejudicial. *See* N.C. R. Evid. 403. The Court therefore grants the motion to exclude evidence of other lawsuits.

28. **Conclusion.** For the foregoing reasons,

- Harris's motion to exclude the testimony of Daniel Hoover is **DENIED**;
- Ten Oaks' motion to exclude evidence of wealth is **DENIED**;
- Ten Oaks' motion in limine regarding damages is **DENIED**;

- Ten Oaks' motion to exclude Richard G. Wheelahan, III as an expert is **GRANTED**;
- Ten Oaks' motion to exclude evidence of compromise negotiations is **GRANTED**;
- Ten Oaks' motion to exclude evidence of other lawsuits is **GRANTED**;
- Ten Oaks' motion to exclude e-mails generated by the Zoho system is **GRANTED**.

SO ORDERED, this the 21st day of November, 2023.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases