NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

May 20, 2019

Joseph D. Wilson, Esquire
Ira T. Kasdan, Esquire
KELLEY DRYE & WARREN LLP
3050 K Street N.W., Suite 400
Washington, DC 20007
jwilson@kelleydrye.com
ikasdan@kelleydrye.com

Charles M. Sims, Esquire
Rachael L. Loughlin, Esquire
Mary Grace Miller, Esquire
O'HAGAN MEYER, PLLC
411 East Franklin Street, Suite 500
Richmond, Virginia 23219
csims@ohaganmeyer.com
rloughlin@ohaganmeyer.com
mgmiller@ohaganmeyer.com

Re: *Sevatec, Inc. v. Balan Ayyar,* et al.
Case No. CL–2018–9156

Dear Counsel:

In this case alleging usurpation of a business opportunity, the issue before the Court is whether to exclude Sevatec, Inc's ("Sevatec's") expert witness from offering expert testimony at trial because the expert relies on a disputed legal standard to define the term "corporate business opportunity." The Court concludes the proffered testimony will not mislead the jury as to the law in Virginia. It acknowledges the law is unclear as to the applicable legal test for determining

OPINION LETTER

what precisely constitutes a "corporate business opportunity" subject to possible "usurpation" (or, more accurately, a "corporate fiduciary duty" subject to a possible "breach").[1] However, this Court holds that Virginia embraces the "line of business" test as one such test and that Sevatec's expert may present expert testimony applicable to this test.

Separately, the Court concludes that Sevatec's expert will help the jury understand complex evidence and, therefore, his testimony will not invade the province of the jury. The Court also holds that no rule obligates Sevatec to disclose to Defendants every source underlying its expert's opinions and the Court will not compel Sevatec to do so. Accordingly, the Court denies Defendant's Motion and Plaintiff's expert shall be permitted to offer expert testimony at trial absent a valid and timely objection for another reason.

I. BACKGROUND

Sevatec provides advanced technology solutions to federal government agencies, principally in the national security sector. One such solution is a "data analytics" solution—*i.e.*, business intelligence, machine learning, artificial intelligence, and open source technologies—comprising 20% of Sevatec's overall business. Until January 5, 2017, Defendant Balan Ayyar ("Ayyar") served as president and chief executive officer for Sevatec; and until December 9, 2016, Defendant Anantha Bangalore ("Bangalore") served as its chief technology officer. In the complaint, Sevatec alleges Ayyar and Bangalore conspired to develop a new technology solution involving artificial intelligence and data analytics prior to their departures and formed Defendant Percipient.AI, Inc. ("Percipient") whose flagship offering is the technology solution developed while in the employ of Sevatec.

On March 12, 2019, Sevatec designated Michael Hermus ("Hermus") as an expert witness. His resume indicates he has over 20 years' experience in the field of information technology. He will testify that a technology solution akin to—and including—Percipient's "flagship offering" is an opportunity in Sevatec's line of business and that Percipient's flagship offering pertained to Sevatec's business interests in the second half of 2016. His expert testimony is germane to the first three counts of the complaint, which allege breach of fiduciary duty premised on Ayyar's and Bangalore's alleged usurpation of business opportunities from Sevatec.

In response, Defendants filed a motion in limine, moving the Court to exclude Hermus from offering any expert testimony at trial for three reasons. First, Defendants contend Hermus's opinions improperly and unfairly emphasis the "line of business" test—articulated in *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939), but not expressly adopted by Virginia courts—and that such undue emphasis will mislead the jury. Second, they assert Hermus's opinions will invade the province of the jury because they are rudimental and will not assist the jury in resolving any facts

[1] In Virginia, there is technically no "usurpation of corporate business opportunity" cause of action. The applicable cause of action is really "breach of a corporate fiduciary duty." *Feddeman & Co. v. Langan Assocs., P.C.*, 260 Va. 35, 46 n.1 (2000) (citations omitted).

at issue. Third, they complain Sevatec failed to identify all the documents and information relied upon by Hermus in his expert disclosure.

The parties presented oral argument on the motion in limine on May 10, 2019. Considering the impending trial date of June 3, 2019, the Court ruled on the motion from the bench, denying Defendants's motion. Nonetheless, the Court advised counsel for the parties that an opinion letter would ensue, chiefly to amplify the Court's ruling on the motion as it relates to the status of the line of business test in the jurisprudence of this Commonwealth.

II. ANALYSIS

A. *Hermus's Proffered Expert Testimony Will Not Mislead the Jury as to Virginia Law*

Sevatec's expert designation for Hermus reads: "In arriving at this opinion [that Percipient's flagship offering was an opportunity in Sevatec's line of business], Mr. Hermus has been guided by the standards set forth in *Guth v. Loft, Inc.*, 5 A.2d 503, 514 [] ([Del.] 1939)." Sevatec maintains that *Guth* is "a leading decision, if not the leading decision, in the U.S. on breach of fiduciary duty by usurping corporate opportunity." Defendants object to Hermus's reliance on *Guth*, contending that such "analysis is unsupported by Virginia law." Therefore, his testimony will mislead the jury and should be excluded under Rule 2:403 of the Rules of the Supreme Court of Virginia.[2]

To support their argument, Defendants observe that American courts "have adopted a number of tests as 'standards for identifying a corporate opportunity.'" To wit, the tests previously adopted by other courts include: (1) "the line of business" test; (2) the "interest or expectancy" test; (3) the "multiple factors" test; (4) the "fairness" test (and its "two-step" variant); and (5) the American Law Institute test.

Defendants propound that in *Williams v. Technology Partners, LLC*, 265 Va. 280, 292 (2003), the Supreme Court of Virginia intimated "the standard is whether the corporation had an 'objective or tangible business opportunity', which is more akin to the [alternative] 'interest or expectancy test'" than the line of business test relied upon by Hermus. As a counterpoint, Sevatec cites to a circuit court case, *Central Fidelity Bank v. Goode*, 30 Va. Cir. 521, 1990 WL 10030105, 2 (Lynchburg 1990), as "the only Virginia decision known to address the test for identifying the existence of a corporate opportunity," and which "cites *Guth* favorably and relies on its line of business test, or one substantially like it."

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[2] Under this rule, "[r]elevant evidence may be excluded if . . . the probative value of the evidence is substantially outweighed by . . . its likelihood of confusing or misleading the trier of fact." Va. Sup. Ct. R. 2:403(a)(ii).

Without a clear test governing what constitutes a corporate opportunity,[3] the Court will now generally define each test as adopted by courts of other jurisdictions and examine which of those tests align with present Virginia jurisprudence on usurpation of corporate opportunity claims.

1. Usurpation of Corporate Opportunity in Virginia

In Virginia, "usurpation of corporate business opportunity is generally considered a breach of fiduciary duty rather than conduct constituting a distinct cause of action." *Feddeman & Co. v. Langan Assocs., P.C.*, 260 Va. 35, 46 n.1 (2000) (citations omitted). "A corporate opportunity is a business opportunity in which a corporation has an expectancy, property interest, or right, or which in fairness should otherwise belong to the corporation." *Cent. Fidelity*, 1990 WL 10030105 at 1 (citation omitted).

The fundamental principle underlying a claim for usurpation of corporate opportunity is "that a corporate officer or director is under a fiduciary obligation not to divert a corporate business opportunity for personal gain because the opportunity is considered the property of the corporation." *Today Homes, Inc. v. Williams*, 272 Va. 462, 471 (2006) (citation omitted). Where a fiduciary acquires an interest adverse to his principal, "equity will regard him as a constructive trustee and compel him to convey . . . a proper interest in the property or to account to him for the profits derived therefrom." *Trayer v. Bristol Parking, Inc.*, 198 Va. 595, 604 (1956) (citations omitted).

This is because, "[a]t common law, and by the modern current of authority . . . the directors of a private corporation . . . are considered in equity as bearing a fiduciary relation to the corporation and its stockholders." *Id.* (citation omitted). "This is a rule of common sense and honesty as well as of law," *Horne v. Holley*, 167 Va. 234, 241 (1936) (citations omitted), that "is wide of application, and extends to every variety of circumstances." *Rowland v. Kable*, 174 Va. 343, 367 (1940) (citation omitted).

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[3] Virginia is not alone in being without a clear test. Many other states have not overtly established a standard for identifying what constitutes a corporate opportunity. *See* James D. Cox & Thomas Lee Hazen, 2 TREATISE ON THE LAW OF CORPORATIONS § 11:8, Ch. 11, Pt. B (3d Nov. 2018) ("Courts rarely articulate a specific test and apply it strictly." (footnote omitted)). The various tests adopted by the courts are "widely differing." 2 TREATISE ON THE LAW OF CORPORATIONS § 11:8. This is because "a good deal of uncertainty exists as to what constitutes a usurpation of a corporate opportunity." 2 TREATISE ON THE LAW OF CORPORATIONS § 11:8. Consequently, "the factors of each test are [quite] general," 2 TREATISE ON THE LAW OF CORPORATIONS § 11:8, and whether a business opportunity is a corporate opportunity "is largely a question of fact to be determined from the objective facts and surrounding circumstances existing at the time the opportunity arises." 3 FLETCHER CYC. CORP. § 861.10 (Sept. 2018 Update). "Under any test, a corporate opportunity exists when a proposed activity is reasonably incident to the corporation's present or prospective business and is one in which the corporation has the capacity to engage." 3 FLETCHER CYC. CORP. § 861.10.

2. The Line of Business Test

Guth v. Loft, Inc., 5 A.2d 503 (Del. 1939), the case relied upon by Hermus, established the line of business test and remains the leading case for this test today. *See* 2 TREATISE ON THE LAW OF CORPORATIONS § 11:8; 3 FLETCHER CYC. CORP. § 861.20. In *Guth*, the Supreme Court of Delaware opined:

> It is true that when a business opportunity comes to a corporate officer or director in his individual capacity rather than in his official capacity, and the opportunity is one which, because of the nature of the enterprise, is not essential to his corporation, and is one in which it has no interest or expectancy, the officer or director is entitled to treat the opportunity as his own, and the corporation has no interest in it, if, of course, the officer or director has not wrongfully embarked the corporation's resources therein. . . .
>
> On the other hand, it is equally true that, if there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself. . . .
>
> Conceding that the essential of an opportunity is reasonably within the scope of a corporation's activities, latitude should be allowed for development and expansion. To deny this would be to deny the history of industrial development.

5 A.2d at 510–11, 514 (citations omitted).

3. The Interest or Expectancy Test

The Supreme Court of Alabama introduced the interest or expectancy test in *Lagarde v. Anniston Lime & Stone Co.*, 28 So. 199 (Ala. 1900). There, the court recognized that it is a breach of a director's or officer's fiduciary duty, "in antagonism to the corporate interest, to oust the corporation from beneficial property rights which ought to be preserved to it by acquiring the property for themselves." *Id.* at 501 (citations omitted). However, the court limited the breadth of this fiduciary duty by concluding that:

> the legal restrictions which rest upon such officers in their acquisitions are generally limited to property wherein the corporation has an interest already existing, or in which it has an expectancy growing out of an existing right, or to cases where the officers' interference will in some degree balk the corporation in effecting the purposes of its creation.

Id. at 502.

4. The Multiple Factors Test

There are no set parameters for the multiple factors test. As its name insinuates, "the cases determine whether the director or officer has usurped a corporate opportunity by weighing a range of factors." 2 TREATISE ON THE LAW OF CORPORATIONS § 11:8, Ch. 11, Pt. B (3d Nov. 2018). As understood by one treatise, "[a]mong the factors or circumstances" having particular significance are:

> (1) Is the opportunity to acquire real estate, patents, etc., of special and unique value, or needed for the corporate business and its expansion?
>
> (2) Did the discovery or information come to the officer by reason of his official position?
>
> (3) Was the company in the market, negotiating for, or seeking such opportunity or advantage, and, if so, has it abandoned its efforts in this regard?
>
> (4) Was the officer especially charged with the duty of acquiring such opportunities for his enterprise?
>
> (5) Did the officer use corporate funds or facilities in acquiring or developing it?
>
> (6) Does taking the opportunity place the director in an adverse and hostile position to his corporation?
>
> (7) Did the officer intend to resell the opportunity to the corporation?
>
> (8) Was the corporation in a favorable position to take advantage of the opportunity, or was it financially or otherwise unable to do so?

2 TREATISE ON THE LAW OF CORPORATIONS § 11:8.

5. The Fairness Test

The fairness test is quite simple, holding: "corporate personnel are precluded from diverting unto themselves opportunities which in fairness ought to belong to the corporation." *Md. Metals, Inc. v. Metzner*, 382 A.2d 564, 572 n.5 (Md. 1978) (collecting cases). Nonetheless, some courts have created a two-step analysis; a sort of hybrid between the line of business and the fairness tests.

> Under the combined approach, the challenging party bears the initial burden to show that the business opportunity that the defendant pursued was also a corporate

> opportunity in light of all the facts and circumstances surrounding the transaction. The burden then shifts to the defendant to establish the fairness of the transaction.

Cannon Oil & Gas Well Serv., Inc. v. Evertson, 836 F.2d 1252, 1256 (10th Cir. 1987) (citation omitted).[4]

6. The American Law Institute Test

The American Law Institute defines a corporate opportunity as:

> (1) Any opportunity to engage in a business activity of which a director or senior executive becomes aware, either
>
> > (A) in connection with the performance of functions as a director or senior executive, or under circumstances that should reasonably lead the director or senior executive to believe that the person offering the opportunity expects it to be offered to the corporation; or
> >
> > (B) through the use of corporate information or property, if the resulting opportunity is one that the director or senior executive should reasonably be expected to believe would be of interest to the corporation; or
>
> (2) Any opportunity to engage in a business activity of which a senior executive becomes aware and knows is closely related to a business in which the corporation is engaged or expects to engage.

American Law Institute, *ALI Principles of Corporate Governance: Restatement & Recommendations* § 5.05(b) (1992).

7. The Line of Business Test, the Interest or Expectancy Test, and the Contours of Virginia Law

A more recent opinion from the Supreme Court of Delaware interpreting the *Guth* line of business test explained that:

> [it] holds that a corporate officer or director may not take a business opportunity for his own if: (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for

[4] The Supreme Court of Georgia further modified this test as it applies to former officers. *See Se. Consultants, Inc. v. McCrary Eng'g Corp.*, 273 S.E.2d 112, 117 (Ga. 1980) ("[A]s to former officers we adopt the 'interest or expectancy' test as the threshold inquiry or first step in former officer cases." (footnote omitted)).

> his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation.

Broz v. Cellular Info. Sys., Inc., 673 A.2d 148, 154–55 (Del. 1996).

In *Broz*, the court pointed out that:

> *Guth* also derived a corollary which states that a director or officer *may* take a corporate opportunity if: (1) the opportunity is presented to the director or officer in his individual and not his corporate capacity; (2) the opportunity is not essential to the corporation; (3) *the corporation holds no interest or expectancy in the opportunity*; and (4) the director or officer has not wrongfully employed the resources of the corporation in pursuing or exploiting the opportunity.

Id. at 155 (emphasis added) (citation omitted); *see also Guth*, 5 A.2d at 510 (explaining that a corporate opportunity that came to him in his individual capacity "in which [the corporation] has no *interest or expectancy*" (emphasis added)).

In contrast, the competing *Lagarde* interest or expectancy test subjects itself to common criticism because it restricts a usurpation of corporate opportunity claim only to those opportunities in which the corporation has an existing legal interest or has an expectancy based on a pre-existing right. Apparently in response to such criticism, the Supreme Court of Alabama revisited and expounded on its holding in *Lagarde* establishing the interest or expectancy test. *See Morad v. Coupounas*, 361 So. 2d 6, 8 (Ala. 1978). "[A]lthough the case has often been described as restrictive[, w]e think that *Lagarde* when properly read establishes responsibilities for the corporate officer or director comparable to those outlined in *Guth*. . ." *Id.* (citation omitted). The court concluded that a passage from *Guth* "provides a workable definition of 'balking the corporate purpose,'" as that phrase was used in *Lagarde*:

> [I]f there is presented to a corporate officer or director a business opportunity which the corporation is . . . *in the line of the corporation's business* and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and . . . the law will not permit him to seize the opportunity for himself.

Morad, 361 So. 2d at 9 (emphasis added) (quoting *Guth*, 5 A.2d at 511).

Indeed, in the decade prior, the Supreme Court of Delaware rearticulated "the rule of the *Guth* case" as follows:

> when there is presented to a corporate officer a business opportunity which the corporation is financially able to undertake, and which, by its nature, falls into the line of the corporation's business and is of practical advantage to it, *or is an opportunity in which the corporation has an actual or expectant interest*, the officer

> is prohibited from permitting his self-interest to be brought into conflict with the corporation's interest and may not take the opportunity for himself.

Equity Corp. v. Milton, 221 A.2d 494, 497 (Del. 1966) (emphasis added).

In other words, in the eyes of their creators, each test—the line of business test and the interest or expectancy test—embodies the other, albeit articulated in different terms. The tests are not mutually exclusive. Therefore, even taking Defendants's contention that *Williams v. Dominion Technology Partners, L.L.C.*, 265 Va. 280 (2003) suggests that Virginia jurisprudence adheres to the interest or expectancy test as true, such a conclusion does not mandate a further conclusion that the line of business test cannot apply. Indeed, as Sevatec points out, the Circuit Court for the City of Lynchburg previously applied the *Guth* line of business test without reservation.[5] *See Cent. Fid.*, 1990 WL 10030105 at 2. Yet, neither does this automatically mean the line of business test does not run afoul of Virginia law.

Nonetheless, upon comparison of the line of business test with the existing law in Virginia, it is readily apparent that the test as elucidated in *Guth*—and relied upon by Hermus—does not run afoul of Virginia jurisprudence. In Virginia, an officer or director "entrusted with the business" of his corporation "cannot . . . make that business an object of interest to himself." *Today Homes*, 272 Va. at 471 (citation omitted). Likewise, under the line of business test, an officer or director cannot usurp for self-interest "a business opportunity . . . in the line of the corporation's business." *Guth*, 5 A.2d at 511. Virginia law demands an officer or director not "act adversely to the interest of his employer." *Horne*, 167 Va. at 241 (citations omitted). Analogously, the line of business test proscribes appropriation of opportunities "in which the corporation has an interest or reasonable expectancy." *Guth*, 5 A.2d at 511. Virginia law provides that "[d]irectors of corporations . . . are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of" his corporation. *Rowland*, 174 Va. at 367 (citation omitted). Correspondingly, the line of business test forbids "the self-interest of the officer or director [being] brought into conflict with that of his corporation." *Guth*, 5 A.2d at 511.

In sum, Virginia has not expressly adopted a test to standardize how courts identify a corporate opportunity. Therefore, an expert may rely on a test articulated by a court of another jurisdiction so long as the basic tenets of that test do not run afoul of Virginia law. The *Guth* line of business test created by the Supreme Court of Delaware is one such test. It conforms to the legal principles underlying a usurpation of corporate opportunity claim in Virginia.

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[5] In its opposition memorandum, Sevatec does not pinpoint the precise test relied upon by the Circuit Court for the City of Lynchburg in *Central Fidelity*. In that opinion, the court apparently adopts the two-step variant of the fairness test opining that "if it has been determined that the appropriated opportunity is within the corporation's 'business expectations,' then the 'fairness' test is utilized . . ." 1990 WL 10030105 at 2. Indeed, one leading treatise seemingly interprets *Today Homes* as embodying some manifestation of the fairness test. *See* 3 FLETCHER CYC. CORP. § 861.10, n.'s 3, 5–7. Of course, another treatise seemingly concludes that this same case, *Today Homes*, instead applied some variant of the multiple factors test. 2 TREATISE ON THE LAW OF CORPORATIONS § 11:8, n. 27.

Consequently, Hermus's proffered expert testimony, conceived partly in reliance on *Guth*, will not mislead jurors as it is not premised on an erroneous understanding of Virginia jurisprudence.[6]

B. *Hermus's Opinions Do Not Invade the Province of the Jury*

Defendants next argue Hermus's proffered expert testimony is not necessary to help the jury understand the evidence because sources cited in Hermus's expert disclosure are noncomplex[7] and therefore his testimony will invade the province of the jury under Rule 2:702(a)(i) of the Rules of the Supreme Court of Virginia. This Court disagrees. Rule 2:702(a)(i) authorizes an expert to testify where his "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." In other words, "[e]xpert testimony is admissible . . . when experience and observation in a special calling give the expert knowledge of a subject beyond that of persons of common knowledge and ordinary experience." *Online Res. Corp. v. Lawlor*, 285 Va. 40, 59 (2013) (citation omitted).

Although the sources cited in Hermus's expert disclosure are perhaps unremarkable to the lay person, Hermus's proffered expert testimony relates to complex subject matters—data analytics, artificial intelligence, and machine learning. A proper understanding of these fields cannot be based on deductions and inferences drawn from ordinary knowledge, common sense, and practical experience gained in the ordinary affairs of life. *Cf. Holmes v. Doe*, 257 Va. 573, 578 (1999) (citations omitted). Hermus's 20-year experience in information technology gives him knowledge beyond that of persons of common knowledge and ordinary experience and therefore his testimony is appropriate to aid the jury in determining whether Defendants usurped a technology solution from Sevatec. *Cf. Online Res.*, 285 Va. at 59; *Holmes*, 257 Va. at 578 (citations omitted). Thus, the Court holds that Hermus's proffered expert testimony does not invade the province of the jury.

C. *Sevatec Was Not Required to Identify All Sources Underlying Hermus's Proffered Expert Testimony*

Defendants allege Sevatec's failure to disclose the "basis" of Hermus's expert opinions was to their severe prejudice and insist Hermus should be precluded from offering expert testimony as a consequence.[8] Sevatec retorts that Defendants's "claim of granularity" finds no support in the text of Rule 4:1(b)(4)(A)(i) or Virginia case law.

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[6] Of course, "[q]ualification of an expert witness does not insure admission of his every statement and opinion." *Welton v. Branch Banking & Tr. Co.*, 785 S.E.2d 217, 219 (Va. 2016). (citation omitted), and "in no event shall [Hermus] . . . express any opinion which constitutes a conclusion of law." VA. CODE § 8.01-401.3(B).

[7] Namely, "the Webster's dictionary, three documents related to Sevatec's business and financials, a public website related to Percipient, an article on data analytics and data science, an email, and a college course description concerning data sciences."

[8] Specifically, Defendants allege Sevatec failed to disclose the following: (1) "any documents related to [Percipient's flagship offering]"; (2) "capability decks"; (3) that he spoke with a Sevatec program manager; (4) multiple communications between Ayyar, Bangalore, and a specifically-named third party; or (5) documents produced in the course of discovery.

Rule 4:1(b)(4)(A)(i) requires a party "to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." "[T]he purpose of Rule 4:1(b)(4)(A)(i)[ ] is to 'allow the litigants to discover the expert witnesses' *opinions* in preparation for trial.'" *Condo. Servs., Inc. v. First Owners' Ass'n of Forty Six Hundred Condo., Inc.*, 281 Va. 561, 576 (2011) (emphasis added) (citation omitted). A recent string of cases from the Supreme Court of Virginia adequately demarcates the bounds of this Court's discretion. *Cf. Condo. Servs.*, 281 Va. at 575 (citations omitted).

In *John Crane*, as a matter of first impression, the court held that an expert disclosure must, at a minimum, reveal the both topic and the substance of a disclosed expert's testimony. 274 Va. at 591–93. In *Condominium Services*, the court ruled that an expert disclosure need not be specifically itemized so long as it sufficiently conveys the subject matter, substance, and a summary of the grounds of the expert's proffered opinions. 281 Va. at 576. Finally, in *Emerald Point, LLC v. Hawkins*, 294 Va. 544, 554 (2017), the court held a lower court erred in admitting an expert's testimony regarding dementia where the expert disclosure contained only one reference to the topic of dementia.

Discernable from these cases is the principle that a party need not disclose each and every source of its expert's opinions, but rather need only disclose the "*substance* of the facts and opinions" and a "*summary* of the grounds" of its expert's testimony.[9] Here, although Sevatec did not specifically document the evidentiary "basis" of each of Hermus's opinions, its disclosure sufficiently identified the substance of the facts and opinions to which he is expected to testify and a summary of the grounds for each opinion in compliance with Rule 4:1(b)(4)(A)(i).[10]

III. CONCLUSION

Since the line of business test set forth in *Guth* comports with Virginia jurisprudence, the Court holds that Hermus's proffered expert testimony will not mislead jurors as to Virginia law. In addition, his proffered opinions relate to complex subject matters such as data analytics, artificial intelligence, and machine learning for which expert testimony would be proper and

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[9] The Court concludes, as a matter of law, that this conclusion comports with the purpose underlying Rule 4:1(b)(4)(A)(i) and the plain meaning of the language used. *See Graham v. Cmty. Mgmt. Corp.*, 294 Va. 222, 226 (citation omitted); *In re Watford*, 295 Va. 114, 122 (2018) (citation omitted); *In re Vauter*, 292 Va. 761, 769 (2016) (citation omitted); *see also Substance*, THE MERRIAM-WEBSTER DICTIONARY (New Ed. 2016) (definition (1)(a)); *Ground*, THE MERRIAM-WEBSTER DICTIONARY (New Ed. 2016) (definition (2)(a)); *Summary*, THE MERRIAM-WEBSTER DICTIONARY (New Ed. 2016) (definition (1)).

[10] Indeed, Sevatec's expert disclosure specifically notes Hermus's reliance or reference on all of the nondisclosures alleged by Defendants. Page 1 and Footnote 4 of Sevatec's disclosure indicate Hermus reviewed Percipient's website and a Percipient internet release. Footnotes 6, 7, and 8 all reference slide decks concerning "capabilities." Although the disclosure does not name the program manager by name, page 1 clarifies Hermus's opinions were also based on "conversations . . . with Sevatec personnel." Footnote 8 reveals an email exchange involving Ayyar, Bangalore, and the specifically named third party. Page 1 states Hermus reviewed "discovery responses . . . in this case to date."

helpful and, therefore, they do not invade the province of the jury. Finally, neither Rule 4:1(b)(4)(A)(i) nor any other rule requires Sevatec disclose all sources forming the basis of Hermus's proffered testimony but merely requires it disclose sufficient information to allow Defendants to discover the substance of the facts and opinions and a summary of the grounds of Hermus's opinions. As such, Defendants's Motion in Limine sets forth no basis upon which to preclude Hermus from testifying at trial.

An appropriate order superceding the order entered on May 10, 2019 is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

SEVATEC, INC.,	)	
	)	
Plaintiff,	)	
v.	)	CL–2018–9156
	)	
BALAN AYYAR, *et al.*,	)	
	)	
Defendant.	)	

ORDER

THIS MATTER came before the Court on Defendant's Motion in Limine to Exclude Sevatec's Expert Michael Hermus;

UPON CONSIDERATION of Defendant's Motion, Defendant's Memorandum in Support, and Plaintiff's Opposition Memorandum; and

UPON HEARING oral argument of counsel on May 10, 2019 on the matter; it is hereby

ORDERED and DECREED that Defendant's Motion is DENIED;

OREDERED and DECREED that the Opinion Letter dated May 20, 2019 is hereby adopted by reference into this Order as though it were fully restated herein; and

ADJUDGED that to the extent this Order conflicts with or varies from the previous Order concerning Defendant's Motion dated May 10, 2019, the edicts of this Order shall supersede those of the former.

MAY 2 0 2019 [redacted]

Dated Judge David A. Oblon

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.