IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ERIK B. ADDINGTON, Plaintiff, v. IMERYS PERLITE USA, INC., Defendant/Counter-Plaintiff, v. SEVEN PEAKS MINING, INC., et al., Counter-Defendants.	)	C.A. No.: N23C-03-013 EMD CCLD

Submitted: April 28, 2026
Decided: July 30, 2026

Upon Plaintiff's and Counter-Defendants' Motion for Summary Judgment
GRANTED in part and DENIED in part

Upon Defendant/Counter-Plaintiff's Motion for Summary Judgment
DENIED

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DAVIS, P.J.

I. INTRODUCTION

This is a civil action assigned to the Complex Commercial Litigation Division of the Superior Court. On March 6, 2023, Erik B. Addington (the "Plaintiff")[1] commenced this action asserting a single breach of contract claim against Imerys Perlite USA, Inc. ("IPU" or the "Defendant"). Mr. Addington alleges that IPU breached the terms of the parties Asset Purchase Agreement (the "APA") by increasing the price of perlite produced at certain facilities (the "Earn-out Facilities") to an amount more than 25% greater than the price in effect immediately prior to the closing of the APA (the "Closing").

On April 17, 2023, IPU filed its Answer to the Complaint (the "Answer"), in which IPU denied the allegation that it breached the APA. Additionally, IPU asserted two indemnification counterclaims/third-party claims against Seven Peaks Mining, Inc. ("SPM"), Cornerstone Industrial Minerals Corporation U.S.A. ("CIM"), American Garden Perlite LLC ("AGP"), American Garden Perlite OR, LLC ("AGPOR"), Seven Peaks Land Company, LLC ("SPLC"), Mr. Addington, and Bruce Addington (collectively, the "Sellers" or the "Counter-Defendants").

On October 4, 2024, IPU filed an amended counterclaim/third-party claim (the "Amended Counterclaim") to include a cause of action for breach of contract. The Amended Counterclaim alleged that the Sellers failed to render a "Catch-Up Payment" pursuant to the terms of the APA. The Plaintiff and Sellers filed their Answer to the Amended Counterclaim on October 15, 2024.

Presently before the Court are the parties Cross-Motions for Summary Judgment (the "Motions"), which were filed on November 7, 2025. The parties filed their opposition briefs on

[1] The Plaintiff sued IPU acting as a representative of the Sellers and equity holders set forth on the signature pages of the APA.

November 21, 2025. The parties filed their reply briefs in support of their respective motions on February 12, 2026. The Court held a hearing on the Motions on April 28, 2026. At the conclusion of the hearing, the Court took the Motions under advisement.

For the reasons set forth below, the Court **GRANTS in part and DENIES in part** the Plaintiff's Motion for Summary Judgment (the "Plaintiff's Motion") as follows: (i) **DENIED** as to the Plaintiff's breach of contract claim; (ii) **GRANTED** as to IPU's counterclaim for indemnification relating to Danny Stewart's purported breach of the APA; (iii) **GRANTED** as to IPU's counterclaim for indemnification for the Sellers' purported breach of environmental representations and warranties under the APA; and (iv) **DENIED** as to IPU's counterclaim for breach of contract relating to the Sellers' alleged failure to render a catch-up payment pursuant to the terms of the APA.

In addition, the Court **DENIES** the Defendant's Motion for Summary Judgment (the "Defendant's Motion").

II. RELEVANT FACTS

A. The Parties

1. Plaintiff

The Plaintiff is a citizen of Kentucky.[2] The Plaintiff initiated this civil action in his capacity as the representative of the Sellers and the equity holders of the Sellers as set forth on the signature pages to the APA.[3]

[2] Complaint for Breach of Contract ("Compl.") (D.I. No. 1) ¶ 7.
[3] *Id*. ¶ 1.

2. Defendant

IPU is a Delaware corporation with its principal place of business in Roswell, Georgia.[4] IPU was the purchaser of the Sellers' assets under the APA.[5]

3. Counter-Defendants[6]

Counter-Defendant Name	Domicile
SPM	Florida
CIM	Oregon
AGP	Florida
AGPOR	Oregon
SPLC	Florida
Bruce Addington	Kentucky

The Counter-Defendants, defined as the Sellers, all entered into the APA with IPU.

B. NATURE OF THE DISPUTE

1. Background Information on the Parties' Business Relationship

Perlite is a form of volcanic glass that expands when rapidly heated to a high temperature.[7] Perlite has a wide variety of uses in the fields of construction, filtration, and horticulture.[8]

In 1999, the Addington family became involved in the perlite industry, when Bruce Addington acquired CIM.[9] Bruce Addington's son, the Plaintiff, later joined the business.[10]

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[4] *Id*. ¶ 8.
[5] *Id*. ¶ 4.
[6] The information contained in the below chart is drawn from paragraphs 3-9 of the Defendant's Counterclaims ("Answer") (D.I. No. 7).
[7] Plaintiff Erik Addington's Opening Brief in Support of Motion for Summary Judgment as to His Breach of Contract Claim and Counter-Defendants' Motion for Summary Judgment as to Defendant Imerys Perlite USA, Inc.'s Counterclaims ("Pl. Mot.") (D.I. No. 109) at 2.
[8] *Id*.
[9] *Id*.
[10] *Id*.

Upon joining the family business, the Plaintiff realized that there was a large horticultural perlite market in Florida and decided to pursue opportunities there.[11]

In 2016, Bruce Addington and the Plaintiff formed AGP.[12] In doing so, the Addingtons installed a perlite expander at a new ten-acre facility in Lake Wales, Florida and shipped ore from CIM for expansion and sale to the Florida horticultural perlite market.[13] The Addingtons also hired Danny Stewart to serve as the general manager and granted Mr. Stewart an ownership percentage in AGP.[14]

AGP initially capitalized on its position as a "low-cost producer" of horticultural perlite.[15] Each AGP product had a set price, which included the cost of shipping the product to the customer.[16] While contractual agreements with individual customers slightly varied in pricing depending on the product type and grade,[17] AGP never raised its prices during its existence.[18]

The Addingtons began exploring the perlite market on the west coast.[19] The Addingtons subsequently established another facility in Klamath Falls, Oregon, known as AGPOR.[20] AGPOR's ore shipments and management were structured almost identically to AGP.[21] AGPOR then expanded into a smaller market to sell "fines," which are perlite particles that pass through the expander, but do not expand enough to be sold as another grade of perlite product.[22]

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[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Id*. at 2-3.
[17] Opening Brief in Support of Defendant – Counter-Plaintiff's Motion for Summary Judgment ("Def. Mot.") (D.I. No. 112) at 6.
[18] Pl. Mot. at 3.
[19] *Id*.
[20] *Id*.
[21] *See id*.
[22] *Id*. at 3-4.

In 2019, IPU had established three perlite expanding plants in Florida, Texas, and North Carolina.[23] These plants focused on manufacturing perlite for the construction and filtration industries.[24] At some point in 2019, IPU became interested in expanding its business into the horticultural perlite market.[25] After investigating the horticultural perlite market, IPU identified CIM, AGP, and AGPOR as potential acquisition targets and began conducting due diligence.[26] IPU's due diligence included a review of market overviews, environmental impact studies, employee rosters, and financial information.[27] IPU and the Addingtons then began negotiations for IPU to acquire the Sellers' perlite assets.[28]

2. The APA

On March 16, 2020, IPU, the Plaintiff, Stewart, and the Sellers entered into the APA (the "Transaction").[29] The APA contemplated a purchase price payment of $35,000,000, subject to various adjustments, in exchange for the Sellers' perlite assets.[30] The Transaction closed on April 15, 2020.[31]

a. The Earnout Payment Provision

APA Section 3.7(a) provides for an earnout, capped at $15,000,000,[32] based upon certain post-closing performance targets.[33] Section 3.7 provides:

(a) As used herein, the following terms will have the meaning set forth below:

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[23] *Id*. at 4.
[24] *Id*.
[25] *See id*.
[26] *See id*.
[27] *See id*.
[28] Def. Mot. at 6.
[29] Pl. Mot. at 4.
[30] *Id*.; *see also* Pl. Mot., Ex. 6 (the "APA") §§ 2.1, 3.1(a)-(b).
[31] *Id*. at 5.
[32] APA § 3.7(f)(iii).
[33] *See* APA § 3.7.

> (i) "Earn-out Payment" means, with respect to any Earn-out Period, the positive result of the following formula:
>
> > $1,250,000 * [(Additional Volume - Catch-up Volume as of the beginning of such Earn-out Period) / Reference Volume]
>
> Where:
>
> (ii) "Additional Volume" means, with respect to any Earn-out Period, an amount (whether positive or negative) equal to (i) the Perlite Volume, minus (ii) the Reference Volume.
>
> (iii) "Perlite Volume" means, with respect to any Earn-out Period, the cumulative total of expanded perlite produced at the Earn-out Facilities sold during such Earn-out Period (measured in kmt);
>
> (iv) "Reference Volume" means 1.875 kmt of expanded perlite.
>
> (v) "Earn-out Facilities" means the facilities for production of expanded perlite of American Garden Perlite, LLC and American Garden Perlite OR, LLC.
>
> …
>
> (viii) "Earn-out Period" means each calendar quarter, beginning with the first full calendar quarter following the Closing, through and including the 16th full calendar quarter following the Closing.[34]

APA Section 3.7(f)(i) further states that:

> [i]f the amount of expanded perlite (excluding filter aid) produced by the Purchaser's assets in Texas, Florida and/or North Carolina (other than the Earn-out Facilities) and sold during any Earn-out Period is greater than 1,425 kmt, such excess volume will be included in the calculation of Perlite Volume for such Earn-out Period.[35]

The earnout payments were made as follows:

> [d]uring the calendar quarter following each Earn-out Period, the Purchaser will pay the Earn-out Payment with respect to the prior Earn-out Period (if any) to the Seller Representative (on behalf of the Sellers) by wire transfer of immediately available funds to an account designated in writing by the Seller Representative; provided, that the Purchaser will not be required to pay any Earn-out Payment prior to the time at which such Earn-out Payment becomes final pursuant to Section 3.7(b) or (c).[36]

[34] APA § 3.7(a).
[35] APA § 3.7(f)(i).
[36] APA § 3.7(d).

b. The Catch-up Payment Provision

The APA contains a "catch-up mechanism" provision that applies in a situation when perlite sales did not rise to the level initially contemplated by IPU in entering the Transaction:

> [i]f the Catch-up Volume as of immediately after the final Earn-out Period is positive and the aggregate amount of the Earn-out Payments with respect to all Earn-out Periods was positive, then within five Business Days following the time at which the Catch-up Payment becomes final pursuant to Section 3.7(b) or{£)_, the Seller Representative (on behalf of the Sellers) will pay the Catch-up Payment to the Purchaser, by wire transfer of immediately available funds to an account designated in writing by the Purchaser.[37]

"Catch-up Volume" is defined as:

> as of any particular time, the greater of (i) zero, and (ii) an amount equal to (A) the absolute value of the aggregate Additional Volume for all previously ended Earn-out Periods for which Additional Volume was negative, if any, minus (B) the aggregate Additional Volume for all previously ended Earn-out Periods for which Additional Volume was positive and Catch-up Volume as of the beginning of such Earn-out Period was positive; provided, that "Catch-up Volume" with respect to the first Earn-out Period will be zero.[38]

"Catch-up Payment" was defined as "the lesser of (i) the aggregate amount of the Earn-out Payments with respect to all Earn-out Periods, and (ii) the product of (A) $15,000,000 and (B) the quotient obtained by dividing the Catch-up Volume as of immediately after the final Earn-out Period, by 22.5 kmt."[39]

c. Additional Provisions Relating to IPU's Conduct Toward the Earnout

The APA also imposed certain restrictions on the conduct of IPU relating to the potential earnout payment.[40] Section 3.7(f)(vi) provides:

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[37] APA § 3.7(e).
[38] APA § 3.7(a)(vi).
[39] APA § 3.7(a)(vii).
[40] *See* APA § 3.7(f)(vi).

> [f]rom and after the Closing, and subject to the terms of this Agreement, the Purchaser will have sole discretion with respect to all matters relating to the operation of the Earn-out Facilities and its other assets; provided, that (A) the Purchaser will not, directly or indirectly, take any actions in bad faith that would have the purpose of avoiding or reducing any Earn-out Payment, and (B) prior to the end of the final Earn-out Period, the Purchaser will not increase the price of perlite produced at the Earn-out Facilities to an amount more than 25% greater than such price in effect as of immediately prior to the Closing. Notwithstanding the foregoing, the Purchaser has no obligation to operate the Earn-out Facilities or any of its other assets in order to achieve any Earn-out Payment or to maximize the amount of any Earn-out Payment.[41]

d. Restrictive Covenants and Related Definitions

APA Section 7.8(b) imposed certain non-competition covenants upon the parties.[42]

Section 7.8(b) states:

> (i) [e]ach Seller and each Equityholder hereby acknowledges that (A) the Sellers conduct the Business or have current plans to expand the Business throughout the Territory and (B) to protect adequately the interest of the Purchaser in the business and goodwill attached to the Business and the Purchased Assets, it is essential that any non-competition covenant with respect thereto cover all of the Business and the entire Territory.
>
> (ii) [n]either any of the Sellers nor any Equityholder will, during the Non-Compete Period, in any manner, either directly, indirectly, individually, in partnership, jointly or in conjunction with any Person, (A) engage in the Restricted Business within the Territory, or (B) have an equity or profit interest in, advise or render services (of an executive, marketing, manufacturing, research and development, administrative, financial, consulting or other nature) or lend money to any Person that engages in the Restricted Business within the Territory.[43]

"Business" is defined as "the business of mining, processing, supplying and marketing perlite."[44]

"Restricted Business" is defined as "the business of mining, processing, supplying and marketing

[41] *Id*.
[42] *See* APA § 7.8(b).
[43] *Id*.
[44] APA § 1.1.

perlite, vermiculite and pumice, in each case for use in agricultural, horticultural and building products applications."[45] The "Non-Compete Period" is defined as "the three-year period immediately following the Closing."[46] "Territory" is defined as "the United States; Quebec, Canada; and Ontario, Canada."[47]

e. Sellers' Indemnification Provision and Related Representation and Warranty

APA Section 10.1 sets forth certain indemnification obligations on the part of the Sellers and Equityholders.[48] Section 10.1 provides:

> (a) From and after the Closing, the Sellers and the Equityholders will, jointly and severally, indemnify and hold harmless the Purchaser Indemnified Parties from and against, and compensate, reimburse and pay the Purchaser Indemnified Parties for, any and all Losses arising out of or relating to:
>
> > (i) any inaccuracy in or breach of any representation or warranty set forth in Article V of this Agreement;
> > (ii) any breach of any covenant, agreement or undertaking made by the Sellers or the Equityholders in this Agreement; and
> > (iii) any Excluded Liability.[49]

Pursuant to Section 5.20(a), the Sellers represented and warranted that they were, and at all times had been, "in material compliance with all applicable environmental Laws."[50] The Sellers further represented that "[e]xcept as set forth in Section 5.20(a) of the Seller Disclosure Schedule, no Seller has received any notice or other communication, whether from a Governmental Body, citizens group, employee or otherwise, that alleges that any Seller is not in compliance with any Environmental Law."[51]

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[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *See* APA § 10.1(a).
[49] *Id*.
[50] APA § 5.20(a).
[51] *Id*.

3. Mr. Stewart's Non-Compete Agreement

On April 3, 2020, Mr. Stewart entered into a non-compete agreement with IPU.[52] Mr. Stewart's non-compete agreement states:

> [e]mployee agrees that during his/her employment and for a period of one (1) year immediately following his/her termination for any reason, he/she will not, in the Restricted Territory, perform duties or functions that are both: (a) the same as or substantially similar to Employee's primary job duties performed on behalf of IMERYS during the final year of his/her employment with IMERYS; and (b) on behalf of himself/herself or any other person or entity engaged in business in competition with IMERYS. For purposes of this provision, "Restricted Territory" means the Employee's assigned territory as of the date of termination. This restriction shall be limited to the performance of duties or functions in the line(s) of IMERYS's business in which Employee worked during the final year of his/her employment. Employee's territory, primary job duties, and line of business as of the date of this Agreement (which may differ from those at the time of termination) are set forth in Exhibit A.[53]

Mr. Stewart's non-compete agreement further provides:

> [t]his Agreement is intended to be the final and complete expression of the parties' agreement with respect to its subject matter. This Agreement supersedes any former agreements governing the same subject matter and may be modified only by a written instrument signed by each of the parties hereto.[54]

4. Post-Closing Developments and the Alleged Breaches

COVID-19 began around the same time as the Closing and coincided with the first half of the Earnout Period.[55] During this time, sales of horticultural products containing perlite exploded.[56] IPU strived to meet its customer demand and sold out of perlite for nearly the entire

[52] Pl. Mot. at 13.
[53] *Id*. at 32-33, *see also* Pl. Mot., Ex. 15.
[54] *Id*. at 33, *see also* Pl. Mot., Ex. 15.
[55] Def. Mot. at 9.
[56] *Id*.

first half of the Earnout Period.[57] The high volume of sales of horticultural products containing perlite resulted in earnout payments to the Sellers.[58] Specifically, in the first eight quarters of the Earnout Period, IPU made $8,216,667 in earnout payments to the Sellers.

To calculate the initial earnout payments, Oscar Torres, IPU's Director of Financial Planning and Analysis, prepared the earnout statements for each quarter.[59] Mr. Torres gathered sales data spreadsheets from AGP, AGPOR, and IPU's other facilities for each quarter.[60] Mr. Torres utilized a cubic feet measurement to track AGP and AGPOR's respective sales volume, even though the earnout calculation formula was expressed in metric tons.[61] IPU averaged past density readings for each product to create a set of density conversion factors in converting the data to metric tons.[62]

Mr. Torres isolated the appropriate data and fed such data into a spreadsheet to perform the earnout calculation.[63] This process generated an earnout statement, which summarized the data used in the calculation.[64] After an earnout statement was generated, Mr. Torres would provide the statement with Justin Cain,[65] Doug Smith,[66] Julian Zugmeyer,[67] and Jim Murberger.[68][69] These individuals would in turn review the earnout statement and suggest changes.[70]

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[57] *See id*.
[58] *Id*.
[59] Pl. Mot. at 10.
[60] *Id*.
[61] *Id*.
[62] *Id*.
[63] *Id*. at 11.
[64] *Id*.
[65] Mr. Cain is IPU's Director of Mergers and Acquisitions.
[66] Mr. Smith was IPU's Sales Vice President. Mr. Smith was subsequently replaced by Amanda Glaser.
[67] Mr. Zugmeyer was IPU's Finance Vice President. Mr. Zugmeyer was subsequently replaced by Francois Michel.
[68] Mr. Murberger is IPU's Vice President and General Manager.
[69] Pl. Mot. at 11.
[70] *Id*.

The business relationship seemed to smoothly proceed throughout the first eight quarters following Closing, with the Sellers receiving more than half of the potential earnout payments. However, during this time, IPU began changing its pricing structure for horticultural perlite products.[71] Specifically, IPU departed from AGP's "delivered" pricing model and adopted "ex works pricing," then charged customers separately for freight.[72] Moreover, IPU implemented multiple price increases, which resulted in several customer complaints.[73]

In January 2022, the Plaintiff began questioning Mr. Torres about the earnout statement for the fourth quarter of 2021.[74] The Plaintiff seemed especially concerned with the loss of the Sungro business and the exclusion of fines from the calculation.[75] Mr. Torres responded that the loss of the Sungro location was "due to price."[76] Moreover, Mr. Torres stated that the fines were excluded from the calculation as fines are a byproduct of horticultural perlite, "which would be wasted and disposed of to a landfill if they were not sold."[77] In response, the Plaintiff asked how many tons of fines were sold as byproduct, and how much IPU increased Sungro's prices.[78] Mr. Torres responded by stating that IPU had sold 154 metric tons in fines in the fourth quarter of 2021.[79] However, Mr. Torres failed to answer as to Sungro's purported price increase, citing confidentiality.[80]

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[71] *Id*.
[72] *Id*.
[73] *Id*. at 11-12.
[74] *Id*. at 12.
[75] *See id*.
[76] *Id*., *see also* Pl. Mot. Ex. 9.
[77] *Id*.
[78] *Id*.
[79] *Id*.
[80] *Id*.

The Sellers received an earnout payment for the first quarter of 2022.[81] However, the Sellers did not receive any additional earnout payments.[82] COVID-19 restrictions began to be lifted in the second quarter of 2022 and horticultural perlite sales decreased dramatically.[83] As such, sales of perlite from the Earn-out Facilities purportedly fell below the threshold to make future earnout payments obligatory and "Catch-up Volume" began to accrue during each of the last eight quarters of the earnout period.[84] As set forth in the final earnout statement, IPU claimed that the Sellers owed a Catch-up Payment of $4,079,492.[85] The Sellers have since refused to render the Catch-up Payment and have initiated the instant action to be compensated for IPU's alleged breach of the APA, which in turn purportedly lowered the ultimate amount of earnout payments.

5. Mr. Stewart's Departure and Subsequent Litigation

Mr. Stewart left his employment with IPU in September 2021.[86] In Spring 2022, Mr. Stewart began working at Norcal, a competitor in the horticultural perlite industry.[87] On August 18, 2022, IPU sued Mr. Stewart in the Delaware Court of Chancery (the "Chancery Action"), alleging a violation of the APA's restrictive covenant and a separate non-compete agreement signed by Mr. Stewart on April 3, 2020.[88]

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[81] *Id*.
[82] *Id*.
[83] Def. Mot. at 10.
[84] *Id*.
[85] *Id*.
[86] Pl. Mot. at 13.
[87] *Id*.
[88] *Id*.

In the Chancery Action, Mr. Stewart agreed to a Stipulation enjoining him from involvement in the perlite business through November 1, 2023.[89] After November 1, 2023, Mr. Stewart resumed his employment at Norcal.[90]

C. PROCEDURAL POSTURE

On March 6, 2023, Mr. Addington commenced this action asserting a single breach of contract claim against IPU. Mr. Addington alleges that IPU breached the terms of the APA by increasing the price of perlite produced at the Earn-out Facilities to an amount more than 25% greater than the price in effect immediately prior to the Closing.

On April 17, 2023, IPU filed the Answer, in which IPU denied the allegation that it breached the APA. Additionally, IPU asserted two indemnification counterclaims against the Sellers. IPU's indemnification counterclaims are based upon the alleged breaches of the non-compete by Mr. Stewart and environmental representations and warranties.

On October 4, 2024, IPU filed the Amended Counterclaim to include a cause of action for breach of contract. The Amended Counterclaim alleged that the Sellers failed to make a "Catch-Up Payment" pursuant to the terms of the APA. The Plaintiff and Sellers filed their Answer to the Amended Counterclaim on October 15, 2024.

Presently before the Court are the Motions, which were filed on November 7, 2025. The trial date has been continued.

III. STANDARD OF REVIEW

Superior Court Civil Rule 56 governs motions for summary judgment.[91] The Court's principal function when considering a motion for summary judgment is to examine the record to

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[89] *Id.*
[90] *Id.*
[91] *ET Aggregator, LLC* v. *PFJE AssetCo Holdings, LLC*, 2025 WL 2682583, at *5 (Del. Super. Sept. 9, 2025).

determine whether genuine issues of material fact exist, "but not to decide such issues."[92] Summary judgment will be granted if, after viewing the record in a light most favorable to a nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[93] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted.[94]

The moving party bears the initial burden of demonstrating that the undisputed facts support its claims or defenses.[95] If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for the resolution by the ultimate fact-finder.[96]

"These well-established standards and rules equally apply [to the extent] the parties have filed cross-motions for summary judgment."[97] Where cross-motions for summary judgment are filed and neither party argues the existence of a genuine issue of material fact, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[98] However, the "existence of cross motions for summary judgment does not act per se as a concession that there is an absence of factual issues."[99] Therefore, where cross-motions for summary judgment are filed and an issue of material fact exists, summary judgment is not appropriate.[100] To determine whether there is a

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[92] *Id*. (citing *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 99-100 (Del. 1992).
[93] *Id*.
[94] *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del. 1962).
[95] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970) (citing *Ebersole*, 180 A.2d at 470).
[96] *Brzoska v. Olsen*, 668 A.2d 1355, 1364 (Del. 1995).
[97] *IDT Corp. v. U.S. Specialty Ins. Co.*, 2019 WL 413692, at *5 (Del. Super. Jan. 31, 2019).
[98] Del. Super. Ct. Civ. R. 56(h).
[99] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).
[100] *Motors Liquidation Co. DIP Lenders Tr. V. Allianz Ins. Co.*, 2017 WL 2495417, at *5 (Del. Super. June 19, 2017).

genuine issue of material fact, the Court evaluates each motion independently.[101] And again, where it seems prudent to make a more thorough inquiry into the facts, summary judgment will be denied.[102]

IV. DISCUSSION

A. Plaintiff's Motion

1. The Plaintiff's Motion is denied with respect to the Plaintiff's breach of contract claim.

Under Delaware law, to state a claim for breach of contract, a party must allege "(i) the existence of a contract; (ii) the breach of a contractual obligation; and (iii) resulting damages."[103] Although damages may be plead generally, "conclusory allegations of damages are insufficient."[104]

Mr. Addington argues that he is entitled to summary judgment on his breach of contract claim.[105] Mr. Addington asserts that there is no dispute that the APA is a valid and enforceable contract.[106] Mr. Addington further claims that there is no genuine issue of material fact that IPU breached APA Section 3.7(f)(vi)(B).[107] Mr. Addington contends that IPU also undisputedly breached APA Section 3.7(f)(vi)(A) as IPU acted in bad faith to reduce the earnout.[108] Mr. Addington finally contends that he has established damages.[109]

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[101] *Id*.
[102] *Ebersole*, 180 A.2d at 470-72.
[103] *Wellgistics, LLC v. Welgo, Inc.*, 2024 WL 113967, at *4 (Del. Super. Jan. 9, 2024) (citing *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003)).
[104] *Id*.
[105] Pl. Mot. at 30-31.
[106] *Id*. at 16.
[107] *Id*. at 17.
[108] *Id*. at 24.
[109] *Id*. at 29.

IPU does not dispute that the APA is a valid and enforceable contract.[110] Moreover, IPU does not dispute that it breached APA Section 3.7(f)(vi)(B) in that, "at various times during the Earn-out Period, the price of certain expanded perlite products charged to certain customers was more than 25% greater than the price for that product charged to that customer prior to Closing."[111] Instead, IPU opposes the Plaintiff's Motion by alleging that summary judgment must be denied as there are disputes of material fact as to whether any breach caused any reduced sales.[112] IPU further maintains that summary judgment is inappropriate because there are disputes of material fact as to the amount of damages.[113] IPU additionally argues that there is no evidence that IPU took any actions in bad faith for the purpose of reducing the earnout payments, and that in any event, there is no evidence that such action caused damages.[114]

Based upon the foregoing, the Court finds that there is no genuine issue of material fact as to (i) whether the APA is a valid and enforceable contract and (ii) whether IPU breached APA Section 3.7(f)(vi)(B). The Court finds that the only remaining issues relating to the Plaintiff's breach of contract claim are (i) whether IPU breached APA Section 3.7(f)(vi)(A); (ii) whether either alleged breach caused damages; and (iii) the amount of damages.

a. There is a genuine issue of material fact as to whether IPU breached Section 3.7(f)(vi)(A).

APA Section 3.7(f)(vi)(A) provides that: "the Purchaser will not, directly or indirectly, take any actions in bad faith that would have the purpose of avoiding or reducing any Earn-out

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[110] Answering Brief in Opposition to Plaintiff Erik Addington's Motion for Summary Judgment ("Def. Opp'n.") (D.I. No. 118) at 10.
[111] *Id*.
[112] *Id*. at 10-11.
[113] *Id*. at 11.
[114] *Id*. at 19.

Payment."[115] While the APA does not explicitly define bad faith, the term is typically understood as "[d]ishonesty of belief, purpose, or motive."[116]

Mr. Addington argues that IPU acted in bad faith for the purpose of reducing earnout payments in that IPU "acted dishonestly in excluding fines from the earnout calculations."[117] Moreover, Mr. Addington asserts that IPU knowingly used inaccurate density conversion factors to calculate the earnout payments.[118] In support, Mr. Addington cites to the deposition testimony of several key figures involved in the calculation of the earnout payments.

IPU argues that there is no evidence that IPU took actions in bad faith for the purpose of reducing the earnout payments.[119] IPU asserts that there is a dispute of fact as to whether fines constitute "expanded perlite" as that term is used in the APA.[120] Moreover, IPU claims that there is a dispute of fact as to whether the density conversion factor was applied in bad faith.[121] In any event, IPU contends that Mr. Addington is not entitled to summary judgment with respect to the bad faith claim as he has no evidence of damages.[122]

With this record, the Court finds that there are genuine issues of material fact as to whether IPU breached Section 3.7(f)(vi)(A). The Court finds that there is a genuine issue of material fact as to whether IPU acted in bad faith for the purpose of reducing earnout payments when it excluded the sales of fines from the earnout calculation. Mr. Addington has advanced evidence sufficient to support the finding that IPU's actions constituted bad faith. Mr. Addington points to the deposition testimony of Mr. Torres, which indicates that fines were

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[115] APA § 3.7(f)(vi)(A).
[116] Black's Law Dictionary (12th ed. 2024).
[117] Pl. Mot. at 25.
[118] *Id*. at 27.
[119] Def. Opp'n. at 19.
[120] *Id*.
[121] *Id*. at 20.
[122] *Id*. at 21.

initially included in the earnout calculations.[123] Moreover, the deposition testimony of Mr. Murberger further indicates that fines began to be excluded from the earnout calculations only at the point where the perlite market began to slow.[124]

However, IPU also advances evidence sufficient to support a finding that its actions were not taken in bad faith. IPU initially notes that "expanded perlite" is an undefined term under the APA, and thus, there is at least a genuine issue of material fact as to whether fines would be included in the meaning of "expanded perlite," as that term is used in Section 3.7.[125] IPU points to the deposition testimony of several individuals involved in the earnout calculation process who testified that fines are a waste product or byproduct of the process for producing expanded perlite for sale.[126] Moreover, IPU provides deposition testimony indicating that the majority of the fines produced in the expansion process had to be sent to a landfill for disposal.[127] Such evidence is sufficient to create a factual dispute as to whether IPU's actions in excluding fines from the earnout calculation were done in bad faith.

The Court is a bit skeptical of IPU's position. While IPU is correct that "expanded perlite is an undefined term," IPU's argument ignores that fines are generated through the perlite production process, which includes being put through a perlite expander. Thus, fines are, in a literal sense, "expanded perlite." IPU's argument also sidesteps the fact that fines were often sold to customers post-Closing. While fines were apparently not as lucrative as other expanded perlite products, IPU recognized that they had value. This is evidenced by the fact that IPU initially included the sales of fines in its earnout calculation. As such, IPU's unilateral decision

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[123] Pl. Mot. at 26; *see also* Pl. Mot., Ex. 5, 46:5-51:6.
[124] *Id*.; *see also* Pl. Mot., Ex. 4, 46:20-24.
[125] Def. Opp'n. at 20.
[126] *Id*. at 19-20.
[127] *Id*. at 20.

to begin excluding fines from the earnout calculation once sales decreased could be considered an act done for the purpose of reducing the earnout payments. However, at this juncture, the Court nonethelesss finds that a material factual dispute exists as to whether IPU acted in bad faith for the purpose of reducing the earnout amounts when it began excluding fines from the earnout calculation.

The Court also finds there is a genuine issue of material fact as to whether IPU's utilization of purportedly inaccurate density conversion factors to calculate the earnout amounts constitutes bad faith. Mr. Addington has advanced evidence to support a finding that the utilization of the density conversion factors constitutes bad faith. Mr. Addington cites deposition testimony of several key individuals connected to the calculation of the earnout payments indicating that IPU was aware that they had initially utilized inaccurate conversion factors and acknowledging that such inaccuracies needed to be fixed.[128]

Mr. Addington further relies on an email from Mr. Zugmeyer stating that "[t]he reporting in our accounting system was inaccurate" and that the numbers "needed to be aligned with the actual densities of the products instead of using theoretical numbers."[129] Despite being aware of this issue, Mr. Addington points to the fact that none of IPU's witnesses could recall actually adjusting the factors used in the earnout calculation.[130]

However, IPU also advances evidence sufficient to support a finding that its actions were not taken in bad faith. For example, IPU points to the fact that Mr. Addington acknowledged in his deposition that IPU was transparent about its use of the density conversion factors.[131] IPU further notes that Mr. Addington "raised no issue with [IPU] as to the density conversion factors

[128] *See* Pl. Mot. at 28.
[129] *Id*.
[130] *Id*. at 29.
[131] Def. Opp'n. at 20.

being used over the first half of the Earn-out Period when [the] Sellers received over half of the maximum earnout they could receive. The transparent nature of IPU's disclosures regarding the density conversion factors appears to indicate a lack of "dishonesty of belief, purpose, or motive." As such the Court finds that a genuine dispute of material fact exists as to whether IPU acted in bad faith when it utilized inaccurate density conversion factors in connection with the calculation of the earnout payment.

b. Mr. Addington has provided sufficient evidence of causation to survive summary judgment.[132]

To establish a breach of contract claim, a plaintiff must prove that any purported breach is "causally related" to the alleged damages.[133] To establish causation, a plaintiff must "demonstrate with reasonable certainty that the defendant's breach caused the loss."[134] However, at the summary judgment stage, a plaintiff "may satisfy [its] burden merely by taking the causation of damages out of the area of speculation, and it is not necessary to show with absolute certainty that defendant's action caused plaintiff's harm."[135]

The parties dispute whether Mr. Addington has set forth sufficient evidence on causation with respect to the price increases. IPU argues that Mr. Addington has failed to present evidence that price increases above the Price Cap caused him damages.[136] IPU's argument focuses on the lack of an opinion as to causation by Mr. Addington's expert. IPU does not appear to dispute that Mr. Addington has set forth sufficient evidence to establish causation with respect to the bad faith claims.

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[132] IPU moves for summary judgment on this basis in the Defendant's Motion. However, this issue is also addressed in connection with the Plaintiff's Motion.
[133] *Trifecta Multimedia Holdings Inc. v. WCG Clinical Services LLC*, 318 A.3d 450, 470 (Del. Ch. June 10, 2024).
[134] *Active Day OH, Inc. v. Wehr*, 2024 WL 3201167, at *4 (Del. Super. June 27, 2024).
[135] *Id*.
[136] Def. Opp'n. at 11.

In response, Mr. Addington contends that he has established causation with reasonable certainty with respect to the price increases.[137] In support, Mr. Addington points to email chains and other documents that purportedly establish IPU lost business as a result of the price increases, which in turn, decreased the amount of the Earnout-Payment.[138] Mr. Addington also notes that IPU has not disputed that the element of causation has been established with respect to the bad faith claims.

The Court finds that Mr. Addington has provided sufficient evidence of causation to survive summary judgment. With respect to the price increase claim, Mr. Addington has advanced evidence showing that IPU employees acknowledged that the price increases caused a decrease in business overall. For example, Mr. Addington points to an email from Mr. Torres stating that "[r]egarding the shipments to Sungro out of Klamath Falls, we lost one location *due to price*, and the other two have delayed orders until February in the off peak season."[139] Moreover, Mr. Torres later testified that "by not selling to [a specific] location, there was no volume to be included for that particular location in – in the earnout calculation."[140] As such, Mr. Addington has met his burden to take "the causation of damages out of the area of speculation."[141]

c. The Court defers ruling on the damages issue until the competing *Daubert* motions are addressed.

The final element of a breach of contract claim is "resulting damages." At the summary judgment phase, a party "need only present some credible evidence that supports a claim for

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[137] Pl. Reply at 2.
[138] *Id*. at 2-3.
[139] *Id*. at 3; *see also* Pl. Reply, Ex. 9.
[140] Pl. Mot. at 24; *see also* Pl. Mot. Ex. 5, 152:18-153:19.
[141] Mr. Addington appears correct that IPU does not dispute causation with respect to the bad faith claims. As such, the Court is not addressing that argument in this decision.

damages."[142] The Court's role is not to resolve "factual issues on a motion for summary judgment."[143] Conflicts in evidence regarding damages are "resolved by the trier of fact."[144]

Mr. Addington argues that he has established damages under both the increased price and bad faith theories of breach. Mr. Addington points to the expert report of Christen Morand in which she opines that Mr. Addington should have received $3,894,846 more in earnout than IPU paid.[145] Mr. Addington further posits that IPU's expert, Jody Bland, fails to render an admissible opinion on damages.[146] Thus, Mr. Addington asserts that there is no genuine issue of material fact as to damages.

IPU counters, contending that Mr. Addington has not provided sufficient evidence of damages in connection with IPU's alleged breaches.[147] IPU incorporates its *Daubert* motion to exclude the expert opinion of Ms. Morand into its opposition. IPU contends that, because its *Daubert* motion regarding Ms. Morand should be granted, Mr. Addington has provided no evidence of damages.[148] Moreover, IPU asserts that, even if the Court were to deny IPU's *Daubert* motion regarding Ms. Morand, IPU has raised a genuine issue of material fact as to damages through its own expert, Mr. Bland.[149] In his expert report, Mr. Bland seemingly opines that Mr. Addington is not entitled to any damages for IPU's alleged breaches.[150]

The Court has not yet addressed the dueling *Daubert* motions as the trial date has been moved.[151] The Court, therefore, will re-address damages after ruling on those motions. The

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[142] *Active Day OH, Inc.*, 2024 WL 3201167, at *5.
[143] *Id*.
[144] *Id*.
[145] Pl. Mot. at 29-30.
[146] *Id*. at 30.
[147] Def. Opp'n. at 17.
[148] *Id*.
[149] *Id*.
[150] *See* Pl. Mot., Ex. 12.
[151] The Parties NEED to communicate with Chambers to get a new trial date. This is not the responsibility of Chambers and cooperation from the parties is vital.

Court, however, cautions the parties to manage their expectations that the Court will exclude the experts at trial.

2. The Plaintiff's Motion is granted in part and denied in part with respect to the Defendant's Counterclaims.

IPU asserts counterclaims for (i) indemnification relating to Danny Stewart's purported breach of the APA ("Count I"); (ii) indemnification for the Sellers' purported breach of environmental representations and warranties under the APA ("Count II"); (iii) and breach of contract for the Sellers' alleged failure to render a catch-up payment pursuant to the terms of the APA ("Count III").[152]

a. The Plaintiff's Motion is granted regarding Count I.

"Delaware recognizes that where a new, later contract between the parties covers the same subject matter as an earlier contract, the new contract supersedes and controls that issue if the two agreements conflict."[153] The same principal holds true "if the parties expressly agreed that the new contract would supersede the old one."[154]

Mr. Addington argues that IPU is not entitled to indemnification for Mr. Stewart's alleged breach of APA Section 7.8(b).[155] Mr. Addington asserts that Mr. Stewart's subsequently executed non-compete agreement constitutes a final agreement concerning competitive activity and, thus, controls over Section 7.8(b).[156] As such, Mr. Addington contends that he is entitled to summary judgment on Count I as IPU is precluded from establishing a breach under Section 7.8(b).[157]

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[152] *See* Defendant, Counter-Plaintiff Imerys Perlite USA, Inc.'s Amended Counterclaim ("Am. Countercl.") (D.I. No. 35).
[153] *Cabela's LLC v. Wellman*, 2018 WL 5309954, at *4 (Del. Ch. Oct. 26, 2018).
[154] *Country Life Homes, Inc. v. Shaffer*, 2007 WL 333075, at *5 (Del. Ch. Jan. 31, 2007).
[155] Pl. Mot. at 32.
[156] *Id*. at 34.
[157] *Id*.

IPU argues that Mr. Addington is not entitled to summary judgment on Count I as the subject matter of the APA and Mr. Stewart's non-compete agreement differ.[158] IPU claims that the subject matter of the APA is the purchase and sale of the assets of an operating business, whereas the subject matter of Mr. Stewart's non-compete agreement relates to Mr. Stewart's post-Closing employment with IPU.[159] IPU contends that "[b]ecause the non-compete provisions of the [non-compete agreement] cover different interests from those protected by the business sale non-compete in the APA, the agreements do not 'govern[] the same subject matter.'"[160] IPU maintains that the integration clause contained in the non-compete agreement does not cause Mr. Stewart's non-compete agreement to supersede APA Section 7.8(b).[161]

The pertinent contractual language is contained in APA Section 7.8(b) and Mr. Stewart's non-compete agreement. In relevant part, Section 7.8(b) states:

> [n]either any of the Sellers nor any Equityholder will, during the Non-Compete Period, in any manner, either directly, indirectly, individually, in partnership, jointly or in conjunction with any Person, (A) engage in the Restricted Business within the Territory, or (B) have an equity or profit interest in, advise or render services (of an executive, marketing, manufacturing, research and development, administrative, financial, consulting or other nature) or lend money to any Person that engages in the Restricted Business within the Territory.[162]

Moreover, Mr. Stewart's non-compete agreement states:

> [e]mployee agrees that during his/her employment and for a period of one (1) year immediately following his/her termination for any reason, he/she will not, in the Restricted Territory, perform duties or functions that are both: (a) the same as or substantially similar to Employee's primary job duties performed on behalf of IMERYS during the final year of his/her employment with IMERYS; and (b) on behalf of himself/herself or any other person or entity engaged in business in competition with IMERYS. For purposes of this provision, "Restricted Territory"

[158] Def. Opp'n. at 27.
[159] *Id*.
[160] *Id*. at 29.
[161] *Id*.
[162] APA § 7.8(b)(ii).

> means the Employee's assigned territory as of the date of termination. This restriction shall be limited to the performance of duties or functions in the line(s) of IMERYS's business in which Employee worked during the final year of his/her employment. Employee's territory, primary job duties, and line of business as of the date of this Agreement (which may differ from those at the time of termination) are set forth in Exhibit A.[163]

Mr. Stewart's non-compete agreement further provides:

> [t]his Agreement is intended to be the final and complete expression of the parties' agreement with respect to its subject matter. This Agreement supersedes any former agreements governing the same subject matter and may be modified only by a written instrument signed by each of the parties hereto.[164]

The Court finds that Mr. Stewart's non-compete agreement supersedes APA Section 7.8(b). As a preliminary matter, the APA constitutes a former agreement as it was executed prior to the execution of Mr. Stewart's non-compete agreement. IPU is correct that the overall subject matter of the APA differs from the subject matter of Mr. Stewart's non-compete agreement. The former relates to the purchase and sale of assets of the Sellers' perlite assets. The latter specifically relates to Mr. Stewart's post-Closing employment relationship with IPU. However, a more nuanced inquiry is required to determine whether the specific non-compete provision contained in the APA covers the same subject matter as Mr. Stewart's non-compete agreement.

The Court notes that the contractual language of Section 7.8(b) and Mr. Stewart's non-compete agreement address a nearly identical purpose. Namely, both provisions are primarily concerned with restricting Mr. Stewart's professional activities in a manner that protects IPU's business interests from the misuse of potential confidential information acquired by Mr. Stewart in connection with his previous employment. While the specific restrictions differ based upon duration, scope, and geography, the provisions do not serve independent purposes. The Court

[163] Pl. Mot. at 32-33; *see also* Pl. Mot., Ex. 15.
[164] *Id*. at 33; *see also* Pl. Mot., Ex. 15.

finds that Section 7.8(b) and Mr. Stewart's non-compete agreement cover the same subject matter. As such, the Court holds that Mr. Stewart's non-compete agreement supersedes Section 7.8(b). Therefore, IPU has no cognizable claim under Section 7.8(b).

b. The Plaintiff's Motion is granted with respect to Count II.

Mr. Addington argues that IPU is not entitled to indemnification for the Sellers' alleged breach of the environmental representations and warranties provision because IPU has not established a breach on the part of the Sellers.[165] Mr. Addington notes that Count II is based upon the theory that the Sellers failed to obtain permits to store waste material in the attic of the sold facility.[166] Citing the deposition testimony of Mr. Rasmussen,[167] Mr. Addington asserts that such a permit was not required to store waste materials in the attic of the sold facility.[168] Mr. Addington contends that IPU "has not, and cannot, prove that [the] Sellers violated environmental law by failing to obtain such a permit, [and IPU] cannot establish that [the] Sellers violated any representations and warranties regarding environmental compliance."[169] Mr. Addington claims that, "absent such a violation, [IPU] is not entitled to indemnification under the APA."[170]

IPU has agreed to withdraw Count II of its Counterclaim.[171] IPU notes that, while it "was misled as to the extent of the waste fines stored" at the relevant facility, "the cost to litigate [Count II] exceeds any likely recovery…."[172]

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[165] Pl. Mot. at 34.
[166] *Id.*
[167] Mr. Rasmussen was responsible for ensuring environmental compliance at the relevant facilities.
[168] Pl. Mot. at 35-36.
[169] *Id.* at 36.
[170] *Id.*
[171] Def. Opp'n. at 29.
[172] *Id.*

The Court does not have to determine whether IPU is entitled to indemnification for the Sellers' purported breaches of the environmental representations and warranties under the APA. IPU has withdrawn Count II.

c. The Plaintiff's Motion is denied regarding Count III.

"It is a basic tenet of contract law that a party is excused from performance under a contract if the other party is in material breach thereof."[173] However, the materiality of a purported breach is "a question of great specificity."[174] Thus, the materiality of an alleged breach "is a question of fact and one that is ordinarily not suited for summary judgment."[175]

Mr. Addington argues that he is entitled to summary judgment on Count III as it has been purportedly established that IPU "committed material breaches of the APA during the earnout periods."[176] Mr. Addington claims that "[b]ecause of its prior material breach, [Mr.] Addington was excused from performing his obligation to make any catch-up payment, and [IPU] cannot prove breach."[177] Additionally, Mr. Addington contends that Count III fails as IPU "has not established damages stemming from the alleged breach."[178] In support, Mr. Addington references his *Daubert* motion concerning Mr. Bland and states that IPU's "claimed damages rest solely on [Mr. Bland's] conclusory opinion, which does not pass muster under *Daubert*.[179]

IPU asserts that Mr. Addington's argument as to materiality fails as it simply rests on a bald assertion that "Mr. Addington has already established that [IPU] committed material breaches of the APA during the earnout periods."[180] IPU notes that Mr. Addington "cites to no

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[173] *Word v. Johnson*, 2005 WL 2899684, at *7 (Del. Ch. Oct. 28, 2005).
[174] *Estate of Buller v. Montague*, 2020 WL 996883, at *5 (Del. Cuper. Mar. 2, 2020).
[175] *Id*.
[176] Pl. Mot. at 31-32.
[177] *Id*. at 31.
[178] *Id*.
[179] *Id*. at 31-32.
[180] Def. Opp'n. at 22-23.

authority discussing what is and is not a material breach that might excuse performance, and fails to present any analysis of whether the breach alleged here might be 'material.'"'[181] IPU further argues that Mr. Addington has waived this defense as he failed to plead such an affirmative defense.[182] IPU finally contends that, even if the *Daubert* motion as to Mr. Bland was granted, IPU has additional evidence of damages.[183] Specifically, IPU notes that Mr. Torres can adequately calculate the disputed catch-up payment.[184]

The Court notes that IPU is incorrect that Mr. Addington has waived the defense of prior material breach. Delaware Superior Court Rule 8(c) does require a party to "set forth affirmatively" each affirmative defense. Moreover, the defense of prior material breach has previously been found to constitute an affirmative defense.[185] However, Delaware courts have recognized that "the failure to plead an affirmative defense does not render the defense waived unless the [party] can show that the failure to plead the affirmative defense prejudiced him."[186]

To that point, IPU has admittedly not conducted discovery on the issue of materiality.[187] The Court believes that IPU's failure to conduct discovery on the issue of materiality appears to be an issue of oversight. When IPU filed Count III as part of its Amended Counterclaim, Mr. Addington denied IPU's entitlement to the catch-up payment. Given that Count III is essentially a mirror image of IPU's alleged breach of the price cap provision of the earnout mechanism, IPU was on notice that Mr. Addington's defense to Count III would involve an assertion that IPU's alleged breaches excused Mr. Addington's obligation to pay the catch-up payment. As such, any prejudice suffered by IPU as to this issue appears to be caused by their own oversight.

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[181] *Id*. at 23.
[182] *Id*.
[183] *See id*. at 26.
[184] *Id*.
[185] *See Standard Gen. L.P. c. Charney*, 2017 WL 6498063, at *21 (Del. Ch. Dec. 19, 2017).
[186] *Wang v. Injective Labs Inc.*, 2025 WL 1825571, at *6 n. 4 (D. Del. June 26, 2025).
[187] Def. Opp'n. at 23.

Therefore, the Court does not find that Mr. Addington waived the defense of prior material breach simply based upon his initial failure to plead that defense.

The Court, however, finds that a genuine issue of material fact exists as to the materiality of any purported breaches on the part of IPU. IPU is correct that the essential purpose of the APA was the purchase and sale of a business.[188] However, through his reply brief, Mr. Addington has also advanced evidence indicating that the price cap provision was heavily negotiated and served as a main part of the basis of the bargain.[189] Specifically, Mr. Addington points to the deposition testimony of Stephen Addington, which states:

> I know the reason we negotiated the provision and the concern at drafting the document was that when you raise price to a certain level, you will run off customers. So that's why we picked the 25 percent threshold. We felt like that was a fair enough number. Any time the price would increase more than that, you jeopardize future volumes. So I don't know what the prices were during the term, but that was the reason if intent of the 25 percent trigger point.[190]

Based upon Stephen Addington's testimony, a reasonable jury could conclude that a breach of the price cap provision constitutes a prior material breach of the APA. As such, a material factual dispute exists as to whether IPU's breach of the price cap provision constitutes a prior material breach that precludes IPU from validly asserting Count III.

Accordingly, the Plaintiff's Motion is denied with respect to Count III.[191]

d. IPU'S MOTION

IPU argues that Mr. Addington's lack of evidence on causation entitles IPU to summary judgment on Mr. Addington's breach of contract claim.[192] Alternatively, IPU next asserts that

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[188] *Id*. at 24.
[189] *See* Pl. Reply at 19.
[190] *Id*.; *see also* Pl. Reply, Ex. 6.
[191] For the reasons set forth above regarding the competing *Daubert* motions, the Court defers the issue of damages.
[192] Def. Mot. at 17.

summary judgment should be entered in IPU's favor on Mr. Addington's breach of contract claim if IPU's *Daubert* motion is granted as Mr. Addington would then be unable to establish damages.[193]

Finally, IPU contends that it is entitled to summary judgment on Count III.[194] IPU posits that because "there is no dispute as to any material fact concerning [IPU's] Price Cap claim, and because the terms relevant to this claim are unambiguous and Sellers breached them, and because [Mr.] Addington's claim fails, [IPU] is entitled to judgment as a matter of law."[195]

Here, each of the aforementioned arguments were addressed in connection with the Plaintiff's Motion. For the same reasons set forth in the analysis of the Plaintiff's Motion, the Defendant's Motion is denied.

V. CONCLUSION

For the reasons set forth above, the Court **GRANTS in part** and **DENIES in part** the Plaintiff's Motion as follows:

- **DENIED** as to the Plaintiff's breach of contract claim;
- **GRANTED** as to IPU's counterclaim for indemnification relating to Danny Stewart's purported breach of the APA;
- **GRANTED** as to IPU's counterclaim for indemnification for the Sellers' purported breach of environmental representations and warranties under the APA; and
- **DENIED** as to IPU's counterclaim for breach of contract relating to the Sellers' alleged failure to render a catch-up payment pursuant to the terms of the APA.

193 *Id*. at 19.
194 *Id*. at 25.
195 *Id*.

In addition, the Court **DENIES** the Defendant's Motion.

July 30, 2026
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, President Judge

cc: File&ServeXpress