EFiled: Mar 03 2020 04:58PM EST
Filing ID 64784722
Case Number 20,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ACCURUS AEROSPACE CORPORATION and ACCURUS AEROSPACE WICHITA LLC,	)	
Defendants and Counterclaim Plaintiffs-Below, Appellants/Cross Appellees,	)	No. 20, 2020 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2017-0632-MTZ
v.	)	
BRADLEY E. JULIUS,	)	
Plaintiff and Counterclaim Defendant-Below, Appellee/Cross-Appellant,	)	
-and-	)	
ZTM, INC., THE KELLEY JULIUS REVOCABLE TRUST, and THE BRADLEY JULIUS REVOCABLE TRUST,	)	
Counterclaim Defendants-Below, Appellees/Cross-Appellants.	)	

APPELLANTS' OPENING BRIEF

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Dated: March 3, 2020

TABLE OF CONTENTS

Exhibits

Exhibit A: October 31, 2019 Memorandum Opinion ("Op.")

Exhibit B: December 18, 2019 Final Order and Judgment and Stay Pending Appeal

TABLE OF CITATIONS

Page(s)

Cases

Other Authorities

NATURE OF PROCEEDINGS

In June 2016, Accurus Aerospace Corporation ("Accurus" or "Buyers") entered into an Asset Purchase Agreement ("APA") with ZTM, Inc. ("ZTM"), an airplane parts manufacturer, and its stockholders (together with ZTM, the "Sellers") for the purchase of ZTM for $80 million.

Prior to signing the APA, Accurus and its advisors conducted thorough due diligence and spent time and resources negotiating the representations, warranties, and indemnities in the APA for protection against any number of foreseeable and unforeseeable issues. Within the APA, Buyers and Sellers agreed 38 times to qualify Sellers' representations by knowledge (*i.e.*, Sellers bore the risk of such representations only if they had actual or constructive knowledge of the underlying facts). Otherwise, the parties agreed that Sellers' representations would be unqualified by knowledge. Sellers concede that their "indemnification obligations under the APA, for losses arising out of breaches of the representations and warranties under Article III of the APA, are not affected by whether or not Seller had actual or constructive knowledge concerning the inaccuracy of any of those representations and warranties, except as otherwise qualified by knowledge. . . ." A569 ¶ 119.

These unqualified representations in the APA evidence Accurus' negotiation for broad representations with straightforward language that, among other things,

protected Accurus against concerns or problems (or worse) relating to customers or suppliers, whether known or unknown to Sellers. In one such core provision, Sellers agreed, *without knowledge qualification*, to disclose: "any material disputes, complaints, or issues with respect to any customers or suppliers . . ." (APA §3.25(d)). In other words, Sellers bore the risk of the existence of any "issues with respect to any customers," whether or not the underlying circumstances were yet known to Sellers.

Shortly after closing, Buyers discovered that Sellers had failed to disclose, at signing or closing (or ever), that the opportunity to re-bid on 53 high-margin airplane parts for The Boeing Corporation ("Boeing"), representing approximately 10% of ZTM's 2017-2019 projected revenue (the "Lost Parts"), no longer existed.

Despite the undisputed allocation of risk through knowledge qualifiers (or lack thereof), and through the plain language of the representations, this fight over whether Buyers or Sellers should bear the risk for this material loss of business and company value resulted in the litigation below. While the Court of Chancery correctly found that Sellers fully expected that Buyers would have the opportunity to re-bid on the Lost Parts, and that this opportunity to re-bid was valuable (and that Buyers had success winning those parts on which it was able to bid), the Court of Chancery nonetheless ruled that Sellers did not breach the APA because no "issue with Boeing" existed.

The Court of Chancery did not respect the risk allocation decisions and common-place wording used by the parties, and, accordingly made several reversible errors. When interpreting Section 3.25(d), the Court of Chancery ignored the absence of a knowledge qualifier, ignored a key phrase ("with respect to"), replacing it with either "with" or "between," and contorted the meaning of the word "issue" by implying a knowledge qualifier into the word and by failing to look to the entire APA (rather than just one sentence) in analyzing the word's meaning. The Court of Chancery's decision perversely rewards ZTM for its inaction regarding the status of its customer relationships, even though ZTM was the party better positioned to assess whether the opportunity to re-bid on parts still existed.

If the Court of Chancery's decision on Buyers' Counterclaim is not reversed, buyers contracting in Delaware cannot rely on the established practice of using broad unqualified representations to shift risk to sellers. Instead, buyers will need to predict all possible bad outcomes and then memorialize them in detailed representations and warranties. Further, future contracting parties will no longer be able to rely on the presence or absence of knowledge qualifiers to shift risk, and instead must find a new way—different from omitting a knowledge or similar qualifier—to ensure that a representation not qualified by knowledge is interpreted the same by the Delaware courts.

Respectfully, this Court should reverse the Court of Chancery's judgment with respect to Buyers' Counterclaim and uphold Delaware's strong pro-contractarian policy, basic canons of contract construction, and common sense.

SUMMARY OF ARGUMENT

1. In ruling for Sellers that the Lost Parts did not give rise to an "an issue with Boeing," the Court of Chancery made a number of distinct errors. Instead of analyzing the actual language of Section 3.25(d)—"with respect to"—the Court of Chancery analyzed the words "with" or "between." In so doing, the Court of Chancery failed to take into account that "with" and "with respect to" are separate terms with separate dictionary definitions, and are used differently both within Section 3.25 and more broadly throughout the APA. The Court of Chancery also mistakenly interpreted the key word "issue," which is commonly defined as a "concern" or "problem," as being synonymous with two nearby words ("disputes" and "complaints"). Indeed, the Court of Chancery focused its interpretation largely on how it read these three words in one sentence rather than taking into account how the parties used these words throughout the APA—including within other subsections of Section 3.25 itself. The Court of Chancery also read "issues" to contain an "implie[d]" knowledge qualifier, even though the parties specifically defined a knowledge qualifier—a well-known and commonly used method for allocating risk in acquisitions—that they chose *not* to include in Section 3.25(d) (in contrast to its inclusion in 38 places in the APA, notably in two subsections of Section 3.25).

Section 3.25(c) of the APA, not at issue here, highlights the Court of Chancery's errors with respect to Section 3.25(d). In Section 3.25(c), Sellers agreed to disclose "any *dispute with* any supplier or customer." (Emphasis added). The meaning of this phrase is clear. In the very next section, Section 3.25(d), the parties opted for a different formulation and additional words: Sellers agreed to disclose "any material *disputes*, complaints, or *issues with respect to* any customers or suppliers." (Emphasis added). Despite the explicit addition of separate terms—"issues" and "with respect to"—the Court of Chancery interpreted "issues" to be synonymous with "disputes" because "issues" "necessarily implies" a dispute with a customer. Further, the Court of Chancery simply ignored the addition of "with respect to" entirely. Moreover, defining "issues" as synonymous with "disputes" contradicts the parties' use of the term throughout the APA—"disputed issues" and "issues in dispute"—and renders the word "issues" as "mere surplusage."

The Court of Chancery's decision runs counter to several well-settled canons of contract construction, not to mention the pro-contractarian policy of Delaware jurisprudence. If left to stand, the decision will cause significant financial harm to Accurus and rob it of the benefits of the bargain it struck under the APA, rendering the representations and warranties and the negotiated presence or absence of knowledge qualifiers meaningless. More broadly, this decision, if left intact, will engender uncertainty for deal practitioners, will lead to more costly and time-

consuming due diligence, negotiations, and drafting, and will render questionable a core method for allocating risk—expressly allocating the risk of unknown facts through the use of, or purposeful non-use of, a knowledge qualifier.

Accordingly, Buyers respectfully request that this Court reverse the Court of Chancery's judgment with respect to Buyers' Counterclaim and remand for further proceedings with respect to the damages suffered by Buyers.

STATEMENT OF FACTS

The key facts at issue before the Court of Chancery were—and remain—undisputed.

A. Liberty Hall and Accurus.

Liberty Hall Capital Partners ("Liberty Hall"), founded by Rowan Taylor in 2011, is a private equity firm focused on investments in the aerospace industry. Op. 9. Liberty Hall formed Accurus in November 2013. Op. 9. Liberty Hall or Accurus acquired six aerospace companies prior to the ZTM acquisition. Op. 9.

B. ZTM.

ZTM manufactured precision aerospace parts and assemblies for commercial aviation and military customers. Op. 5. ZTM's largest customer was Boeing, comprising 66.3% of ZTM's sales in 2014. Op. 5–6. ZTM was founded by Bradley Julius in 1989. A28.

Manufacturers, like ZTM, typically enter into Long Term Agreements ("LTA") with customers. Op. 6. Manufacturers and customers also enter into sub-contracts that identify the parts to be manufactured. Op. 6. These sub-contracts may expire before the LTA expires. Op. 6. Sub-contracts for parts are awarded through a bidding process. Op. 6. For example, when Boeing seeks bids for parts, it typically sends a Request for Proposal ("RFP") or Request for Quotation ("RFQ"). Op. 6. Manufacturers then bid on these RFPs or RFQs, and the winner receives an award letter from Boeing that identifies the specific parts awarded.

Op. 6–7. The awarded parts "roll on" to the customer's LTA by amendment, while parts that are not awarded "roll off" the LTA upon expiration of the sub-contract. Op. 7.

C. Accurus Acquires ZTM.

On June 3, 2016, Accurus and ZTM entered into the APA for the purchase of ZTM for $80 million. Op. 15; A70–227. The deal closed on July 29, 2016. Op. 15. As Mr. Taylor testified: "[T]he fundamental assets we purchased was the right to be able to renew and compete to renew parts when they expired." A797 at 326:3–6.

As the Court of Chancery found: "ZTM informed Accurus that they believed [ZTM] would have the opportunity to bid on the expiring parts [at issue]." Op. 15 (citing A298 at 66:10–23, A332 at 200:3–23). Mr. Julius testified: "[E]verybody thought the opportunity to quote [the expiring parts] would come." Op. 15 (second alternation in original) (citing A297 at 65:13–17). The revenue from these parts was projected to account for 10.6% ($3.96 million) of the total 2017 sales, 10.8% ($4.62 million) of the total 2018 sales, and 10.4% ($4.62 million) of the total 2019 sales. Op. 19; A825–26.

a. The Representations and Warranties

Article III of the APA, titled "Representations and Warranties Regarding the Business and Seller," protected the Buyer. *See* A82–110. Article III begins:

"Seller represents and warrants to Buyer, as of the date of this Agreement and as of the Closing, as follows," and then proceeds to identify the twenty-eight negotiated categories of representations and warranties made by the Seller. A82. Article IV, titled "Representations and Warranties of Buyer," protected the Sellers. A110–12.

Relevant to this appeal are four representations and warranties of the Sellers: Sections 3.25(d), 3.7(a), 3.25(a), and 3.28. Section 3.25(d) states:

> Seller has disclosed to Buyer any material disputes, complaints, or issues with respect to any customers or suppliers and the manner in which Seller proposes to resolve such disputes, complaints or issues. A110.

Section 3.25(a) states:

> Since the Balance Sheet Date, no customer, distributor, or supplier of the Business has terminated or materially reduced or altered its business relationship with Seller or Seller Subsidiary or materially changed the terms on which it does business with either, or threatened that it intends to cancel, terminate, or otherwise materially reduce or alter its business relationship with either. A109.

"Balance Sheet Date" is defined as December 31, 2015. A138. Section 3.7(a) states:

> Since the Balance Sheet Date, the Seller Group has conducted its operations in the ordinary and usual course of business consistent with past practice, and there has not been any: (a) event, occurrence, or development that has had, or reasonably could be expected to have, individually or in the aggregate, a Material Adverse Effect.[1] A87.

[1] In relevant part, "Material Adverse Effect" is defined as "any event, occurrence, fact, condition, or change that is, or could reasonably be expected to become,

Section 3.28 states:

> No representation or warranty made by Seller in this Agreement and no statement contained in the Disclosure Schedule to this Agreement or any certificate or other document furnished or to be furnished to Buyer pursuant to this Agreement, including the other Transaction Documents, contains any untrue statement of a material fact, or omits to state a material fact necessary to make the statements contained therein, in light of the circumstances in which they are made, not misleading. A110.

Buyers and Sellers further agreed to a defined term—Knowledge of Seller—to qualify certain representations and warranties. A145. "Knowledge of Seller" is defined as:

> [T]he actual knowledge of Bradley E. Julius, Viet Tran, Jamie Woodson or any other officer, director, or manager of the Seller Group and the knowledge that each such person would have reasonably obtained after making due and appropriate inquiry with respect to the particular matter in question. *Id.*

In addition to the terms of the APA, after months of diligence, Buyers and Sellers negotiated fifty-one disclosure schedules to the APA, including information on contracts, customers, and suppliers. *See* A614–752.

b. Indemnification Provisions.

Pursuant to the indemnification provisions in Article VIII of the APA, Buyers and Sellers indemnified each other under specified circumstances. A129–

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individually or in the aggregate, materially adverse to [] the business, results of operations, prospects, condition (financial or otherwise), or assets of the Seller Group or Business." A146.

33. Sellers agreed to indemnify Buyers "from all Losses[2] arising out of, relating to, or resulting from (i) the breach of any representation or warranty of Seller in Article III . . . without giving effect to any materiality, Material Adverse Effect or similar qualifications." A130 §8.3(a)(i). The APA details the procedures for asserting an indemnification claim. The parties entered into an Escrow Agreement to set aside funds for possible indemnification.

D. ZTM Pursues Opportunities to Re-Bid.

As the Court of Chancery found, "ZTM vigorously pursued the opportunity to re-bid on expiring contracts." Op. 8. Jamie Woodson, ZTM's Senior Program Manager, testified that is was "standard practice to follow up [with Boeing] on existing work." A379 at 343:10–15. ZTM maintained master electronic files that contained all RFQs/RFPs, award letters, and related documents. Op. 7. Ms. Woodson testified that it was possible for these files to be cross-checked against the spreadsheets to identify the parts for which ZTM had been given the opportunity to re-bid, *see* A376–78 at 329:24–331:7, and thereby identify the parts for which no quotes had been requested.

In the summer and fall of 2015, ZTM received four RFQs that ZTM initially thought related only to parts expiring at the end of 2015. A878–905. However, upon learning that the RFQs included parts expiring in 2016 and 2017, ZTM

[2] *See* A146.

proactively reached out to Boeing to try to secure the opportunity to re-bid on other parts expiring in 2016 and 2017. A907–11.

In December 2015, ZTM received the award letter related to the four RFQs and identified parts for which it had not been provided the opportunity to re-bid. *See* A907–11, A915–17. ZTM reached out to Boeing for an explanation. *See* A915. The parts for which ZTM did not have an opportunity to bid were valued at approximately $2 million (in 2015 sales). Op. 31.

After signing the APA and before closing, ZTM continued to receive award letters from Boeing concerning parts expiring in 2016. A605–10. During this period, ZTM internally analyzed the 2016 expiring parts, specifically identifying those that ZTM had not bid on, but did *not* follow-up to determine if the opportunity to bid on these parts even existed. *See* A361 at 198:17–24, A584 ("ZTM has a large number of Boeing parts that are due to expire at the end of 2016. ZTM has already quoted on 212 of the 608 parts. . . . That leaves 396 parts that ZTM will quote on with a value of $6.8M."). At the same time, as Ms. Woodson testified, there was a "business strategy" in place not to push Boeing for quotes for parts expiring in 2016, *see* A379–82 at 343:16–346:19; critically, this "business strategy" would have kept ZTM from finding out information about the Lost Parts.

E. The Discovery of the Lost Parts.

As the Court of Chancery found, after the purchase of ZTM, "buyers walked into a situation that was worse than they expected." Op. 3. After the deal closed, ZTM (now owned by Accurus) received an award letter from Boeing identifying the parts awarded to Accurus through the bidding process started prior to the acquisition. Op. 19. Upon receipt, Accurus compared the awarded parts to the list of parts circulated by ZTM in spreadsheets. *Id.* The spreadsheets, circulated during due diligence, listed each part under contract, and identified with red triangles the parts that were no longer available for re-bid. Op. 11–13; A452–63; *see, e.g.*, A467, A480. Accurus discovered that 53 parts that had been identified as available for re-bid on the spreadsheets were not on Boeing's award letter. Op. 11–13.

Accurus reached out to Sellers and Boeing to investigate the issue. Accurus eventually learned from Boeing during discovery that Boeing had awarded the parts to other manufacturers in 2013 and 2014—and that the Lost Parts were never available to ZTM for re-bid.

F. Procedural History.

On April 5, 2017, prior to the May 31, 2017 deadline, Accurus asserted a Direct Claim, pursuant to APA Section 8.3(g), alleging that Sellers breached their representations and warranties. Op. 20, 45. Pursuant to the APA and Escrow Agreement, the funds remained with the Escrow Agent pending resolution of the Direct Claim. Op. 21.

On September 1, 2017, Sellers filed a Complaint, followed by an Amended Complaint on September 26, 2017. Op. 21. Sellers asserted five counts against Accurus seeking a declaratory judgment that Accurus breached the Escrow Agreement and the APA (Count I), specific performance of the Escrow Agreement (Count II), declaratory judgment for beach of the APA (Count III), mandatory injunction for breach of the APA (Count IV), and breach of the implied covenant of good faith and fair dealing (Count V). Op. 21.

On October 11, 2017, Buyers filed a counterclaim against Sellers for breach of contract (Counterclaim Count I). Op. 21.

On April 15, 2019, Buyers and Sellers filed cross-motions for partial summary judgment as to liability. Although the parties agreed to brief summary judgment as to liability only, Sellers requested attorney's fees. On October 31, 2019, the Court of Chancery issued its Opinion.

The Court of Chancery granted Buyers' motion for partial summary judgment dismissing Counts I through IV of the Sellers' Amended Complaint because: "Following negotiated and agreed-upon indemnification procedures is not evidence of a breach of contract." Op. 43. "Sellers do not dispute that Buyers followed the agreed-upon procedures." Op. 42.

The Court of Chancery granted Buyers' motion for partial summary judgment dismissing Count V of Sellers' Amended Complaint because "[t]he implied covenant does not reach Sellers' theory." Op. 44. The Court of Chancery held: "Here, no 'gap' exists in either the APA or Escrow Agreement that requires that cautious enterprise of inferring terms beyond those agreements' clear language. The parties designed the APA and Escrow Agreement for just this situation." Op. 45.

The Court of Chancery denied Buyers' motion as to Counterclaim Count I because it held that the failure by Sellers to disclose the loss of the opportunity to bid on parts constituting approximately 10% of projected revenues did not constitute an "issue with a customer." The Court of Chancery denied Sellers' partial motion for summary judgment as to Counts I through V of its Amended Complaint, and granted the Sellers' motion as to Buyers' Counterclaim Count I.

The Court of Chancery held that "Sellers are not entitled to attorney's fees," Op. 47, because "Buyers did not 'knowingly assert[] frivolous claims' or engage in

'obstinate, deceptive or inherently unreasonable' conduct." Op. 47–48 (alteration in original) (footnotes omitted). "Sellers have offered no evidence that Buyers relied on their preferred interpretations of the APA in bad faith." Op. 48.

On January 15, 2020, Buyers timely filed a Notice of Appeal with this Court "from the Memorandum Opinion, dated October 31, 2019."

On January 30, 2020, Sellers timely filed a Notice of Cross-Appeal with this Court "from the order that [Sellers] are not entitled to an award of attorney's fees."

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY MISINTERPRETING OR IGNORING THE PLAIN LANGUAGE OF THE APA.

A. Question Presented.

Whether the Court of Chancery erred in its interpretation of the APA: (1) with respect to the meaning of "issues" in Section 3.25(d) because the Court of Chancery (a) interpreted the phrase "issues with customers" and ignored the actual contract language, "issues with respect to any customers" (preserved at A966–68); (b) rewrote Section 3.25(d) to include an implied knowledge qualifier even though the parties opted not to include such a knowledge qualifier (in contrast to its inclusion in Sections 3.25(b) and 3.25(e), as well as 36 other places in the APA) (preserved at A53–56, A969–71); and (c) improperly found that "issues" is effectively synonymous with "disputes" and "complaints" even though such a reading renders "issues" mere surplusage and is inconsistent with how "issues" is used by the parties in the APA (*i.e.*, "issues in dispute," "disputed issues") (preserved at A819–21, A966–68); and (2) with respect to the role of the Balance Sheet Date in Sections 3.7(a) and 3.25(a) (preserved at A825–30, A992–94).

B. Scope of Review.

"A decision granting summary judgment is subject to *de novo* review." *Nw. Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996). "The interpretation of contract language is reviewed by [the Supreme] Court *de novo.*" *Sonitrol Holding*

Co. v. Marceau Investissements, 607 A.2d 1177, 1181 (Del. 1992). "Under Delaware law, when interpreting a contract, the role of a court is to effectuate the parties' intent. In so doing, [courts] are constrained by a combination of the parties' words and the plain meaning of those words where no special meaning is intended." *AT&T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008) (internal quotation marks and citation omitted). "Absent some ambiguity, Delaware courts will not destroy or twist [contract] language under the guise of construing it." *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

C. Merits of Argument.

1. The Court of Chancery Ignored The Plain Text Of Section 3.25(d)—"With Respect To."

Section 3.25(d) states: "Seller has disclosed to Buyer any material disputes, complaints, or issues *with respect to* any customers or suppliers and the manner in which Seller proposes to resolve such disputes, complaints or issues." A110 §3.25(d) (emphasis added). Although the Court of Chancery focused on the terms "disputes," "complaints," and "issues," it failed to address the plain language qualifying these terms—"with respect to." *See Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019) ("To determine what contractual parties intended, Delaware courts start with the text.").

The Court of Chancery repeatedly framed its inquiry and conclusions as whether or not an issue "with" or "between"—rather than "with respect to"—a customer called for a disclosure by Sellers under the representations and warranties. *See, e.g.*, Op. 27 ("The parties disagree as to whether the lost opportunity to bid is a material 'issue' *with* Boeing.") (emphasis added); Op. 32 ("The fact that Boeing awarded the Lost Parts to other suppliers is not, by itself, evidence of a dispute, complaint, or issue *between* ZTM and Boeing.") (emphasis added); Op. 33 ("Buyers have not demonstrated that awarding parts to other suppliers was the result of, or resulted in, any disagreement *between* Boeing and ZTM.") (emphasis added); Op. 33 ("When the parties signed the APA, Boeing and ZTM had a good working relationship and had no disputes, issues, or complaints *between* each other, under the plain meaning of these terms.") (emphasis added).

a. The Parties' Usage of "With" and "With Respect To" in the APA Highlights the Different Meanings.

That "with" and "with respect to" are not synonymous in the APA is notably evident by reading the representations and warranties surrounding Section 3.25(d).[3]

In Section 3.25(c), for example, Sellers represented that "neither Seller nor Seller Subsidiary has had any dispute *with* any supplier or customer." A109

[3] The parties' numerous uses of "with respect to" throughout the APA supports defining "with respect to" as "concerning" or "about," rather than "between" or "against." *See, e.g.*, A91 §3.9(j), A107 §3.19(c), A110 §3.25(e).

§3.25(c) (emphasis added). In Section 3.25(d), however, the parties explicitly added a different term when referring to customers and suppliers—"with respect to"—making it clear that the parties intended a different meaning. In Section 3.25(e), the parties utilized both "with" and "with respect to" as separate terms. A110 §3.25(e) ("[N]either Seller nor Seller Subsidiary is a party to any Contract *with* any customer containing any provisions for the reduction of prices to be paid by the customers thereunder. *With respect to* any such Contracts, (i) no reductions in the prices to be paid by the customers thereunder have ever been triggered….") (emphasis added). When the parties wanted to use the term "with," they did so. When the parties wanted to use the term "with respect to," they did so. There is simply no evidence in the APA, nor analysis by the Court of Chancery, to support an interpretation of the contract that ignores the term "with respect to."

b. Dictionary Definitions Further Support the Distinction Between "With" and "With Respect To."

"With respect to" and "with" are separate terms with separate meanings. The Court of Chancery used "with" to mean a specific interaction—'an issue with Boeing.' Merriam-Webster defines "with" as, among multiple definitions, "in opposition to: Against // had a fight *with* his brother."[4] *With*, MERRIAM-WEBSTER

[4] This definition is relevant here because its sample usage—"fight with his brother"—most closely resembles the definition created by the Court of Chancery, *i.e.*, "'issue' with Boeing." *See* Op. 29 n.136. Substituting "with respect to" into this sample—"fight *with respect to* his brother" (that is, a fight

ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/with (last visited March 2, 2020). The Court of Chancery's use of the term "with" connotes direct conflict.

In contrast, Merriam-Webster defines "with respect to," within the definition for "respect," as "with reference to: in relation to," and defines "in respect to" as "with respect to: concerning." *With Respect To*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/respect (last visited March 2, 2020).

Notably, Merriam-Webster's thesaurus does not identify "with respect to" as a synonym of "with," nor does it identify "with" as a synonym of "with respect to."[5] *With*, MERRIAM-WEBSTER'S ONLINE THESAURUS, https://www.merriam-webster.com/thesaurus/with (last visited March 2, 2020); *With Respect To*,

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concerning his brother)—underscores the different meanings of the different terms. Merriam-Webster also defines "with" as "in respect to: so far as concerns // on friendly terms *with* all nations," but the sample usage of this definition further shows that "with" is not a synonym of "with respect to." *See With*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/with (last visited March 2, 2020).

[5] Synonyms of "with respect to" in Merriam-Webster include, among others, "having to do with," "about," "concerning," "regarding," and "with regard to"—but not "with." *With Respect To*, MERRIAM-WEBSTER ONLINE THESAURUS, https://www.merriam-webster.com/thesaurus/withrespectto (last visited March 2, 2020).

MERRIAM-WEBSTER ONLINE THESAURUS, https://www.merriam-webster.com/thesaurus/withrespectto (last visited March 2, 2020).

Moreover, at least one court in Delaware defined the standalone term "with respect to" to mean "with reference to, relating to, or pertaining to." *See USA Cable v. World Wrestling Fed'n Entm't, Inc.*, 2000 WL 875682, at *11 (Del. Ch. June 27, 2000), *aff'd*, 766 A.2d 462 (Del. 2000). In *USA Cable*, the Court of Chancery interpreted a provision stating that WWE could not enter into an agreement "with respect to any or all of the three Series without first giving to USA a right of first refusal." *See id.* at *8 (citation omitted). WWE received an offer that included the three Series, as well as other terms. The question for the Court of Chancery was whether the contract required USA to match the entire offer, or only the portion of the offer "with respect to" the Series. *See id.* Ultimately, the Court of Chancery held that "with respect to" was limiting, not expansive, language that should not be read to change the meaning of the contract provision: "The only way that the [additional terms] would fall within the scope of the right of first refusal is if I interpreted 'with respect to the Series' to mean an offer '*including* the Series.' . . . Interpreting 'with respect to the Series' to actually mean '*including* the Series' and to expand the scope of the right of first refusal . . . in my mind, robs §5 of its intended meaning." *See id.* at *11.

Here, although the issue is not whether the term is expansive or restrictive, *USA Cable* is instructive because it cautions against changing the meaning of contract provisions, specifically "with respect to." *See id.* *USA Cable*'s definition of "with respect to" underscores the Court of Chancery's error in ignoring the clear distinction between an "issue *with* any customer or supplier" and an "issue *with respect to* (or, per *USA Cable*, "with reference to," or "relating to," or "pertaining to") any customer or supplier." *See id.* at *11; A110 §3.25(d). The former framework, as the Court of Chancery held, necessarily implies a dispute between two parties that is known to those parties. *See* Op. 29. But the latter framework, which is the framework established by the actual contract language, implies no such thing. *See USA Cable*, 2000 WL 875682, at *11.

Therefore, despite the Court of Chancery's apparent decision to assume, without analysis, that "with" and "with respect to" are synonymous, both dictionary definitions and case law indicate otherwise. Taken together, these sources support a plain reading of "with respect to" as "concerning" or "about."[6]

[6] This definition of "with respect to" also addresses the Court of Chancery's holding that there was no issue (or dispute or complaint) "with Boeing" because in June 2016 Accurus recognized "ZTM's 'good standing with The Boeing Company'" in a letter to Boeing. *See* Op. 33. But this statement was made by Accurus after the execution of the APA, and before the discovery of the Lost Parts.

c. This Court Reverses Decisions That Ignore Plain Contract Language.

The Court of Chancery's failure to analyze the plain terms of Section 3.25(d) contravenes longstanding canons of contract interpretation in Delaware requiring courts to interpret all provisions of a contract. *See CompoSecure, L.L.C. v. CardUX, LLC*, 206 A.3d 807, 811 n.6 (Del. 2018); *Sunline*, 206 A.3d at 839.

In *CompoSecure*, for example, this Court remanded a case because the post-trial decision failed to take into account explicit language agreed-to by the contracting parties in an LLC Agreement. *See* 206 A.3d at 810. At issue was whether an action taken by a board member without requisite approvals resulted in a conflicted transaction implicating a related party provision (rendering the action "voidable," but able to be ratified) and/or a restricted activities provision (rendering the action "void," and unable to be ratified). *Id.* at 811.

Although this Court found the related party analysis to be persuasive, the case was remanded because it failed to address the plain language of the restricted activities provision: "[Court of Chancery] did not consider whether the Sales Agreement is a 'Restricted Activity,' nor did it attempt to address whether the Sales Agreement would be 'void and of no force or effect whatsoever' if it were a Restricted Activity." *See id.* at 816; *see also Sunline*, 206 A.3d at 844 (reversing and remanding a trial court decision as to the termination date of a contract

because the court interpreted one termination clause but "did not discuss the [other termination] clause").

Here, as in *Sunline* and *CompoSecure*, the Court of Chancery erred by failing to address specific contract language. *See* 206 A.3d at 844; 206 A.3d at 817. Relying on its definition of "issues," which mistakenly required a known dispute between two parties, the Court of Chancery found no breach of Section 3.25(d) because there was no issue "with" (or "between") Boeing. *See, e.g.*, Op. 29. But to arrive at this conclusion, the Court of Chancery simply ignored the plain language requiring disclosure of an issue "*with respect to* any customers or suppliers." *See* A110 §3.25(d); *CompoSecure*, 206 A.3d at 810. The correct interpretation of "with respect to," similar to the ignored language in *CompoSecure*, "could be a game-changer." *CompoSecure*, 206 A.3d at 816.

2. The Court of Chancery Disregarded The Absence Of The Knowledge Qualifier In Section 3.25(d).

An important issue in this dispute, and on this appeal, is which party—Buyers or Sellers—bears the risk of unknown occurrences. The parties carefully addressed this through their use (or exclusion) of a defined term—Knowledge of Seller—throughout the APA. Knowledge qualifiers, as Delaware courts have held, allocate risks through contractual representations and warranties. *See, e.g.*, *Ivize of Milwaukee, LLC v. Compex Litig. Support, LLC*, 2009 WL 1111179, at *9 (Del. Ch. Apr. 27, 2009) ("'Knowledge qualifiers' *may* be used to limit representations

and, in fact, the Asset Purchase Agreements contain 'knowledge qualifiers' in multiple places."). Here, Buyers and Sellers negotiated for a defined knowledge qualifier—Knowledge of Seller—and chose to include that knowledge qualifier 38 times in the APA. Although the Court of Chancery acknowledged the risk allocation consequences of *including* the qualifier, it erred by disregarding the risk allocation consequences of *excluding* the qualifier.[7]

However, the parties' decision to allocate risk was not limited to their decision to include the knowledge qualifier; rather, the parties also allocated risk by choosing *not* to include the knowledge qualifier, thereby allocating the risk onto Sellers. *See* A87 §3.7(a), A109–10 §§3.25(a), 3.25(d), 3.28; *Ivize of Milwaukee*, 2009 WL 1111179, at *9 ("The representations . . . are not so limited [by a knowledge qualifier], and the court will not add to them language that could have been negotiated for but was not."); LOU R. KLING, EILEEN T. NUGENT & BRANDON A. VAN DYKE, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES, AND

[7] That the Court of Chancery understood the role of the knowledge qualifier as a risk allocator between the parties is undisputed. *See* Op. 29 n.136 & 36 n.160. In the two footnotes that briefly address, but summarily dismiss, the role of the knowledge qualifier with respect to the representations and warranties at issue, the Court of Chancery properly held that its *inclusion* in the relevant sections would have "clearly" allocated the risk of loss to Buyers. Op. 29 n.136 ("I agree that Section 3.25(d) does not have a knowledge qualifier that would have clearly allocated the risk of loss to Buyers"); Op. 36 n.160 ("As with Section 3.25(d), Sections 3.25(a) and 3.7(a) do not include knowledge qualifiers that would have clearly allocated the risk of an unknown loss to Buyers.").

DIVISIONS §11.02 (2018) ("The key fact to realize when discussing knowledge qualifications is that their use *or absence* allocates risk between the Buyer and the Seller.") (emphasis added); *Expressio Unius Est Exclusio Alterius*, Black's Law Dictionary (11th ed. 2019) ("A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.").

The contractual indemnification provisions elucidate the parties' risk allocation scheme with respect to knowledge. *See* A129–31 §§8.2, 8.3. Buyers negotiated for indemnification protections that did not allocate risk to Buyers if Buyers obtained actual or constructive knowledge relevant to their representations and warranties. *See* A131 §8.3(g). Sellers, on the other hand, admitted that—"except as otherwise qualified by knowledge"—their indemnification obligations are not affected by whether or not Sellers had knowledge of inaccuracies in their representations and warranties. *See* A569 ¶ 119 ("[Sellers] ADMIT that Sellers' indemnification obligations under the APA, for losses arising out of breaches of the representations and warranties under Article III of the APA, are not affected by whether or not Seller had actual or constructive knowledge concerning the inaccuracy of any of those representations and warranties, *except as otherwise qualified by knowledge*, including on the disclosure schedules, or otherwise (*e.g.*, lapse of time)." (emphasis added)).

It is undisputed that the text of Section 3.25(d) does not contain the knowledge qualifier. *See* A110 §3.25(d). Ignoring the contract language, and even the Sellers' admissions, the Court of Chancery instead improperly *implied* a knowledge qualifier into Section 3.25(d). Op. 29 ("This necessarily implies that ZTM or Boeing needed to be aware of a problem[.]"). Although the Court of Chancery correctly acknowledged that it should "look only to the plain language of the APA's representations and warranties to determine whether the parties accounted for the risk of unknown and undisclosed lost parts," Op. 27, by adding an implied knowledge requirement for Sellers into Section 3.25(d), the Court of Chancery disregarded this interpretive canon, resulting in the aforementioned changes to the parties' agreed-upon risk allocation concerning customers.

The Court of Chancery's decision to disregard the exclusion of the knowledge qualifier similarly runs afoul of another longstanding canon of contract interpretation cited by the Court itself: "Consistent with Delaware's pro-contractarian policy, a party may not come to court to enforce a contractual right that it did not obtain for itself at the negotiating table." Op. 26 (quotation marks omitted). By disregarding the absence of the explicit knowledge qualifier agreed to by the parties, and instead implying a knowledge qualifier agreed to by neither party, the Court of Chancery created new rights for Sellers, even though Sellers failed to successfully negotiate the protection of having the agreed-upon

knowledge qualifier added to Section 3.25(d). Instead, Buyers negotiated the risk allocation and the Court of Chancery's interpretation changed that. *See GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489, at *7 (Del. Ch. June 21, 2012) ("[A] party may not come to court to enforce a contractual right that it did not obtain for itself at the negotiating table."); *see also Ivize of Milwaukee*, 2009 WL 1111179, at *9.

To understand that when the parties intended to allocate risks of unknown losses to Buyers, they did so through the inclusion of the knowledge qualifier, the Court of Chancery needed to look no further that the same section of the APA. *See* A109–10 §§3.25(b), (e). Unlike subsection (d) of Section 3.25, subsections (b) and (e) explicitly contain the term "Knowledge of Seller." *See id.* The Court of Chancery's decision to imply a knowledge qualifier not present in the provision upends the parties' risk allocation decisions.

i/m^x Information Management Solutions is instructive. *See i/m^x Info. Mgmt. Sols., Inc. v. MultiPlan, Inc.*, 2013 WL 3322293, at *5–6 (Del. Ch. June 28, 2013). In that case, the indemnification provision of a stock purchase agreement contained multiple subsections, some of which required "the knowledge of Seller," and some that did not. *Id.* at *5. The seller argued that because the knowledge of seller was included in some of the subsections, it should be imputed into all of the subsections. *Id.* The Court of Chancery disagreed, explaining that "[seller's]

interpretation . . . would render superfluous the second use of the phrase 'to the knowledge of Seller' . . . . [and] there is a presumption that the parties intended every part of the agreement to mean something." *Id.*; *see also Nw. Nat'l*, 672 A.2d at 44 (reversing and remanding an interpretation of an insurance policy because it "add[ed] a limitation not found in the contract language").

Here, Buyers and Sellers clearly allocated risks of the unknown by *including* Knowledge of Seller in subsections (b) and (e) of Section 3.25 (as well as 36 other instances in the APA), and *excluding* Knowledge of Seller from subsections (a), (c), and (d). *See* A109–10. To imply a knowledge qualifier into Section 3.25(d), despite the exclusion of Knowledge of Seller, fails to respect the parties' risk allocation decisions, and denies Buyers' risk allocation protection they successfully negotiated for with Sellers. *See Nw. Nat'l*, 672 A.2d at 44; *i/m^{x} Info. Mgmt. Sols.*, 2013 WL 3322293, at *5.

3. The Court of Chancery Erred In Its Interpretation Of The Term "Issues."

As the Court of Chancery correctly held: "When interpreting a contract, a court must give effect to all of the terms of the instrument and read it in a way that, if possible, reconciles all of its provisions. [A] court will prefer an interpretation that harmonizes the provisions in a contract as opposed to one that creates an inconsistency or surplusage." Op. 25–26 (internal quotation marks and footnotes omitted).

Citing Black's Law Dictionary and Merriam-Webster, the Court of Chancery held that "issue" can be defined as "'a point in dispute between two or more parties,'" "'a vital or unsettled matter,' a 'concern' or 'problem,' 'a matter that is in dispute between two or more parties,' and 'the point at which an unsettled matter is ready for a decision.'" Op. 28 (citations and footnotes omitted). With this Buyers do not quarrel. However, the Court of Chancery erred by holding that the ordinary meaning of the term "issues" in the APA "requires there to have been an actual dispute or question raised by ZTM or Boeing that ZTM or Boeing intended to resolve." Op. 29. The Court of Chancery further acknowledged that its definition was "bolster[ed]" by its similarity to the definitions of "disputes" and "complaints": "Similar to the definition of 'issue,' the definitions of 'dispute' and 'complaint' require there be an active controversy of which both parties are or become aware." Op. 29–30.

This analysis, though, is inextricably linked, indeed likely even caused by, the Court of Chancery's failure to analyze the term "with respect to" and error of implying a phrase—Knowledge of Seller—into the provision despite the parties' decision to exclude it.

a. The Court of Chancery's Definition of "Issues" Contradicts the Use of the Term Throughout the APA.

The parties utilized the term "issues," as a noun, either standalone or in a phrase, ten separate times in the APA, including "issues," "material issues," "issues in dispute," and "disputed issues." *See* A77 §1.2(e)(xiv), A80 §2.4(c), A110 §3.25(d), A135–36 §9.6. But if, as the Court of Chancery concluded, the term "issues" "requires there to have been an actual dispute," Op. 29, there would have been no reason for the use of the phrases "issues in dispute" and "disputed issues" in Sections 2.4(c) and 9.6. *See* A80 §2.4(c), A135–36 §9.6; *see, e.g.*, *BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 415 n.9 (Del. 2012) ("[C]ourts should not interpret a contract so as to render any of its language 'meaningless or illusory.'"). The parties certainly drew a distinction between an issue and a disputed issue.

The Court of Chancery's error is perhaps best exemplified by a comparison to subsections (c) and (e) of Section 3.25. *See supra* p.21. In Section 3.25(c), the parties agreed, in relevant part, that "neither Seller nor Seller Subsidiary has had any *dispute with* any supplier or customer." A109 §3.25(c) (emphasis added). In the very next section, Section 3.25(d), the parties agreed that "Seller has disclosed any material *disputes*, complaints, or *issues with respect to* any customers or suppliers." A110 §3.25(d) (emphasis added). "Issues," and "with respect to," were specifically added to Section 3.25(d)—giving each term an independent

purpose that a reviewing court should respect. If the parties had intended "issues" to mean "disputes," they would have simply left it out of Section 3.25(d), as they did in Section 3.25(c). Similarly, if the parties had intended "issues" to mean a "dispute with Boeing," as the Court of Chancery held, they would have simply utilized the same language from the prior section—"dispute with any supplier or customer." Instead, they chose to include "with respect to."

BLGH Holdings is instructive with respect to interpreting terms to give effect to the whole contract. 41 A.3d at 414–16. In that case, buyer and seller entered into a Unit Purchase Agreement ("UPA") pursuant to which buyer would pay a bonus payment if seller entered into a new transaction as "outlined" in the UPA by a date certain. *Id.* at 412. The seller entered into the transaction, but the parties disputed whether the ultimate transaction was the one "outlined" in the UPA. *Id.* at 412–13.

The transaction "outlined" in the UPA referred to a letter of intent with terms stating that that the final agreement's terms "may be modified, deleted, or added in each parties' sole discretion." *Id.* at 413. Buyer argued that the term "outlined" included implicit conditions that must be interpreted to mean that "the final agreement cannot deviate in any material or substantial way" from the terms of the letter of intent. *Id.* at 414–15. This Court rejected buyer's position and held that it could not imply "material" and "substantial" conditions into the term

"outline" because, reading the contract as a whole, such an interpretation of "outline" would disregard the express intentions of the letter of intent to allow modifications to the terms. *See id.* at 415–16 ("That approach would violate the cardinal rule of construction requiring a court to give effect to all contract terms, where possible."). Here, the term "issues" should not be read in a manner that is inconsistent with the parties' intent that "issues" are distinct from "disputes." *See id.* at 414–16.

b. The Court of Chancery's Definition of "Issues" Renders the Term Mere Surplusage in Section 3.25(d).

The Court of Chancery's interpretation of "issues" not only renders other uses of the term in the APA meaningless, but renders the use of the term within Section 3.25(d) a redundancy of "disputes" and "complaints." The decision to define the term as without a meaning distinct from "disputes" and "complaints" essentially reads the entire term out of the contract and overrides the will of the contracting parties. *See* Op. 22–33.

If the Court of Chancery's definition of "issues" stands, the result is that Section 3.25(d) would be the same whether or not the parties agreed to include the separate term "issues."[8] But such a result ignores the fact that the parties *did*

[8] This representation and warranty is not merely standard language. For example, a review of the Practical Law Corporate & Securities Form Merger Agreement (Private Company, Pro-Buyer) includes no similar representation and warranty. *See* Merger Agreement (Private Company, Pro-Buyer) Practical

include the term "issues," (after excluding it from Section 3.25(c)) and did so in the *disjunctive* (that is, "disputes, complaints *or* issues") because it was meant to have separate meaning. *See* A110 §3.25(d); *i/m^{x} Info. Mgmt. Sols.*, 2013 WL 3322293, at *5. The Court of Chancery's conclusion runs afoul of longstanding canons of contract interpretation. *See, e.g., Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

4. "Issues" Can—And Should—Be Interpreted To Have A Meaning Independent Of "Disputes" and "Complaints."

Although the Court of Chancery attempted to explain its decision to create this redundancy as "conservative verbosity," it ignored an interpretation of "issues" that gives independent meaning to the term—and comports with the parties' decision to use that specific term, and to use it in the disjunctive with "complaints" and "disputes." *See i/m^{x} Info. Mgmt. Sols.*, 2013 WL 3322293, at *5. This interpretation properly accounts for the term "with respect to," and does not require the court to imply improperly a knowledge qualifier.

Utilizing the Court of Chancery's dictionary definitions, Sellers' own conduct in 2015 paints a clear picture of the distinction among "issue," "dispute," and "complaint." For example, in the summer and fall of 2015, Sellers received

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Law Corporate & Securities (Westlaw). The "Customers and Suppliers" section mirrors Section 3.25(a) of the APA—but includes no language similar to 3.25(d). *See id.*

four RFQs that they believed offered the opportunity to bid to renew parts expiring at the end of 2015. *See* A823–25, A878–905. However, Sellers learned that through these RFQs Boeing was also offering the opportunity to bid to renew certain parts expiring in 2016 and 2017. A907–11.

This created a "concern" or "vital or unsettled matter" (*i.e.*, an "issue") internally at ZTM. *See id.* ZTM knew that it was manufacturing a number of parts expiring in those years for which it wanted the opportunity to re-bid. *See* A907–08 (Julius: "I wasn't aware 2016 and 2017 w[a]s on the quote."; Woodson: "I am sorry Brad I wasn't aware either. . . . I should have validated the information."). To address this 'vital matter,' Ms. Woodson explained that she would call "Boeing on Monday to confirm that we can negotiate all of the 2016 and 2017 items if there are any they are thinking of moving." A908. She added, "if I can't get a hold of [the Boeing representative] I will call her boss and confirm."[9] *Id.* Mr. Julius added that he believed ZTM would have "more time to them [*sic*] about the 2016 2017 stuff," A907—thereby entertaining the possibility that the next step may be to

[9] ZTM's conduct in 2015 also supports a common sense reading of the language in Section 3.25(d) requiring ZTM to disclose material issues "and the manner in which Seller proposes to resolve such disputes, complaints or issues." A110 §3.25(d). Here, it is evident that ZTM put together a plan to resolve the issue concerning the availability of parts for re-bid.

"express dissatisfaction" (*i.e.*, a "complaint"[10]) if no opportunities are provided, or raise it to the level of "contend[ing] over" the opportunity to re-bid (*i.e.*, "dispute"[11]).

Similarly, in December 2015, ZTM received the award letter for the four RFQs that revealed an "issue"—ZTM had lost bids for parts totaling $2 million. *See* A919–29. Ms. Woodson lodged a "complaint" with Boeing about this "issue." *See* A915–17. Once the loss was confirmed, Sellers represented the loss to Buyers by identifying the parts with red triangles on the spreadsheets. *See* A823–25; *see, e.g.*, A480.

5. The Court of Chancery Erred In Its Interpretation of Sections 3.7(a) And 3.25(a).

The Court of Chancery misstated Buyers' argument with respect to Sections 3.25(a) and 3.7(a) when it held that "Buyers contend the Balance Sheet Date has no bearing on my analysis." Op. 35. The Balance Sheet Date clearly has a bearing on any analysis of Sections 3.25(a) and 3.7(a) because it—like Knowledge of Seller—is a defined term utilized as a qualifier by the parties in the plain text of the

[10] "Merriam-Webster defines 'complaint' as an 'expression of grief, pain, or dissatisfaction' or 'something that is the cause or subject of protest or outcry.'" Op. 30.

[11] "Merriam-Webster defines the noun 'dispute' as 'verbal controversy,' 'debate,' or 'quarrel,' and defines the verb as 'to call into question or cast doubt upon,' 'struggle against,' 'oppose,' or 'contend over.'" Op. 30.

contract. What Buyers did, and do, contend is that the perspective through which to understand these representations and warranties is that of Sellers—not Boeing, who is not a party to the contract. *See* A46–51; *see, e.g.*, *Ivize of Milwaukee*, 2009 WL 1111179, at *9 ("As a default, a representation must be true at the time it is made to avoid a breach, regardless of who knew whether the representation was true or not.").

Pursuant to Section 3.25(a), *Sellers* represented and warranted that "[s]ince the Balance Sheet Date, no customer . . . has terminated or materially reduced or altered it business relationship with Seller." A109 §3.25(a). The Court of Chancery held that "Boeing awarded the Lost Parts to other suppliers in 2013 and 2014" and therefore "[a]nything that occurred before the Balance Sheet Date cannot form the basis of Buyers' claims." Op. 35. But the risk here is on Sellers, not Boeing. No one disputes that the parts were awarded by Boeing prior to December 31, 2015. What is disputed is ZTM's ignorance defense despite its admission that it had the tools to determine whether Boeing had sent out bids for the parts, *see* A376–78 at 329:24–331:7—but chose not to use them, not to add a knowledge qualifier, and yet still make the representation. As both parties understood to be the case in the aviation industry, the opportunity to bid often became a live issue as early as one year prior to expiration. A49–50. Sellers themselves vigorously pursued lost opportunities once they discovered them in

2015, and even began speaking to Boeing about pursuing parts expiring in 2016 and 2017. *See supra* p.36–38.

What Section 3.25(a) protects—*without the knowledge qualifier*—is a situation in which Sellers sit on their hands and do nothing to understand any changes in the customer relationships in the period leading up to renewals (or pursue a business strategy of doing nothing), and then represent that there are no issues. But Sellers, not Buyers, were in a better position to understand the customer relationships. Sellers even conceded that they were pursuing a strategy of *not* pursuing Boeing aggressively in 2016 so as to squeeze them for awards at the end of the year—yet still made the contractual representations. *See* A379–82 at 343:16–346:19. The reality was, however, that after December 31, 2015—a time when ZTM would be and was identifying opportunities to re-bid—ZTM should have determined that Boeing materially reduced its business by not offering the opportunity to re-bid during this period.

The same is true for Section 3.7(a) in which Sellers represented and warranted that "[s]ince the Balance Sheet Date . . . there has not been any event, occurrence, or development that has had, or reasonably could be expected to have . . . a Materially Adverse Effect." A87 §3.7(a). Here, again *without the knowledge qualifier*, the risk is on the Seller—not Boeing or Buyers—that there are no material issues with re-bidding (an ongoing process post-Balance Sheet

Date). ZTM assumed the risk because the representation included no knowledge qualifier. An investigation by ZTM would have uncovered the loss of the opportunity to bid on parts valued at approximately 10% of ZTM's projected sales for the next three years.

Finally, because the Court of Chancery held that there was no breach of the representations and warranties in Sections 3.7(a), 3.25(a), and 3.25(d), it held that there was no breach of Section 3.28. *See* Op. 38–40. If this Court reverses the Court of Chancery's summary judgment order with respect to any or all of Sections 3.25(d), 3.25(a), and 3.7(a), as Buyers submit it should do, it should also reverse the Court of Chancery with respect to Section 3.28.

6. The Court of Chancery's Reallocation of Risks Creates Uncertainty For Contracting Parties in Delaware.

As the Court of Chancery properly held, "[c]ontracting parties allocate risk through representations and warranties." Op. 26; *see Cobalt Operating, LLC v. James Crystal Enters., LLC*, 2007 WL 2142926, at *28 (Del. Ch. July 20, 2007) ("[R]epresentations like the ones made in the [contract] serve an important risk allocation function."), *aff'd*, 945 A.2d 594 (Del. 2008) (TABLE); *ABRY P'rs V, L.P. v. F&W Acq. LLC*, 891 A.2d 1032, 1061 (Del. Ch. 2006) ("[Delaware courts] respect the ability of sophisticated businesses . . . to make their own judgments about the risk they should bear and the due diligence they undertake, recognizing that such parties are able to price factors such as limits on liability."); Steven M.

Haas, *Contracting Around Fraud Under Delaware Law*, 10 DEL. L. REV. 49, 59–60 (2008) ("[F]reedom of contract principles dictate that parties can freely allocate risk—including the accuracy of information—in any given transaction.").

Disregarding the parties' risk allocation decisions and failing to address specific terms results is an improper judicial reallocation of risks that stands contrary to the plain language of the contract. *See, e.g.*, *CompoSecure*, 206 A.3d at 811 n.6 ("[I]t is our role to enforce the parties' bargained for allocation of risks and opportunities."); 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §31.5 (4th ed. Supp. 2019) ("A contract is not a non-binding statement of the parties' preferences; rather, it is an attempt by market participants to allocate risks and opportunities. [The court's role] is not to redistribute these risks and opportunities as [it sees] fit, but to enforce the allocation the parties have agreed upon.") (alterations in original) (citation omitted)).

Here, the Court of Chancery's reasoning creates the perverse incentive for a seller under these circumstances simply to stick its head in the sand because all risks will be interpreted to be borne by the buyer whether or not the seller negotiated for a knowledge qualifier, and regardless of the fact that the representations at issue were made *by the seller* concerning *the seller's customers*. By this logic, if Sellers had decided to "vigorously pursue[] the opportunity to re-bid on expiring [parts]" in 2016, as they had in 2015, they put themselves at risk of

uncovering problems or concerns that would implicate Section 3.25(d). *See* Op. 8, 27–33. But as long as they made no effort, the risk would be borne by Buyers under the Court of Chancery's analysis.

The Court of Chancery's interpretation of Section 3.25(d) rewards and encourages inaction. Such a result undercuts the purpose of representations and warranties in contracts. Buyers contracting in Delaware must now foresee every potential problem with "any customer or supplier," A110 §3.25(d), and include specific language in the representations and warranties or attach or incorporate into the APA every possible document related to any and all potential problems.[12] That result is exactly the opposite of what it should be. *See Cobalt Operating*, 2007 WL 2142926, at *28 ("[A buyer's] need then, as a practical business matter, to independently verify those things was lessened because it had the assurance of legal recourse against [seller] in the event the representations turned out to be

[12] Buyers' claim exists because Sellers assumed the risk as to disclosing material issues with respect to one of its customers. The issue is not, as the Sellers briefed before the Court of Chancery, a fraud-like claim dependent on the integration or non-integration of the spreadsheets. This is a red herring. Although the spreadsheets provide useful background on damages and the bidding process, among other items, the risk allocation decisions are the relevant focus. Sellers agreed to bear the risk of any material "issues" which makes sense because Sellers were in the better position, as compared to Buyers, to assess and manage the risk. It is the risk allocation decisions made by the parties through representations and warranties and Sellers breaches thereof—not the integration or non-integration of the spreadsheets—that is at issue.

false."). This is not how business is conducted, and it would dramatically increase the costs and scope of due diligence and drafting for parties contracting in Delaware. *Id.* at *28 ("Due diligence is expensive and parties to contracts in the mergers and acquisitions arena often negotiate for contractual representations that minimize a buyer's need to verify every minute aspect of a seller's business.").

There is, of course, more than one way for a party to protect itself from the unknown. In this case, Buyers chose to shift the risk for any material issues with respect to any customers or suppliers onto Sellers and Sellers, having agreed to this provision, undertook this risk without a knowledge qualifier. *Id.* at *28 ("Having contractually promised [buyer] that it could rely on certain representations, [seller] is in no position to contend that [buyer] was unreasonable in relying on [seller's] own binding words."). There was a material issue with respect to Boeing and Buyers protected themselves against such issue through the unqualified representation.

In accordance with Delaware's pro-contractarian policies, this Court should reverse the Court of Chancery's judgment with respect to Buyers' Counterclaim and defer to the risk allocation decisions of the contracting parties as set forth in the plain language of the APA.

CONCLUSION

For the foregoing reasons, Buyers respectfully submit that this Court should reverse the order of the Court of Chancery granting Sellers' motion for partial summary judgment as to Counterclaim Count I, and grant Buyers' motion for partial summary judgment as to Counterclaim Count I.

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Dated: March 3, 2020

CERTIFICATE OF SERVICE

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