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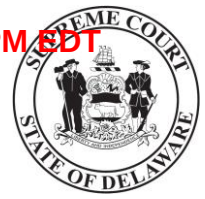

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEES' ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

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I. NATURE OF PROCEEDINGS

Appellees ZTM, Inc. (n/k/a BKJ Holdings, Inc., "ZTM"), The Kelly Julius Revocable Trust and the Bradley Julius Revocable Trust ("Stockholders") and Bradley Julius ("Plaintiff" or "Seller Representative") (collectively "Sellers") hereby file this Answering Brief on Appeal and Opening Brief on Cross-Appeal in response to the appeal filed by Appellants Accurus Aerospace Corporation ("Accurus") and Accurus Aerospace Wichita LLC (f/k/a ZTM Acquisitions, LLC, f/k/a ZTM Aerospace, LLC) (collectively "Buyers").

This case arises from Sellers' sale of a business that manufactures parts as a supplier for the aerospace industry to Buyers pursuant to an Asset Purchase Agreement executed on June 3, 2016 ("APA"). Plaintiff filed suit after Buyers refused to release funds held in escrow as set forth in the APA, as well as an attendant Escrow Agreement. Buyers counterclaimed, alleging that Sellers breached the APA. Buyers' Counterclaim centers upon 53 parts that ZTM was manufacturing at the time of the APA's closing on July 28, 2016 (the "Closing"), but that ZTM had no guaranteed right to manufacture after 2016. These parts were manufactured for The Boeing Company ("Boeing") and Buyers hoped to be able to bid to continue manufacturing these parts (termed the "Lost Parts" in this litigation) for Boeing after calendar year 2016.

Generally, in the course of ZTM's dealings with Boeing, ZTM was given the right to manufacture individual parts for Boeing for a specific period of time. After the manufacturing right for a specific part "expired," it could either be renewed or awarded to another supplier (if it was going to continue to be manufactured at all). At the time of the Closing, ZTM was manufacturing the Lost Parts, but the manufacturing rights were all due to expire in 2016. Unbeknownst to both Sellers and Buyers at the time of the Closing, the rights to manufacture the Lost Parts after their expiration with ZTM had been awarded to other suppliers in 2013 and 2014.

Sellers made no representations or warranties about Buyers' ability to bid on the Lost Parts, and Sellers made no promises about Buyers' ability to win the right to manufacture the Lost Parts after 2016. Buyers knew and understood that they were not guaranteed to have the right to manufacture the Lost Parts after calendar year 2016. The loss (and gain) of the rights to manufacture certain parts is typical for suppliers in the industry generally and was typical in Boeing and ZTM's relationship specifically.

This lawsuit became necessary after Buyers inappropriately refused to release escrowed funds meant to indemnify the parties for contractual breaches of the APA. In an attempt to justify their wrongful withholding of escrow funds, Buyers alleged that Sellers breached four specific provisions of the APA by not disclosing that the Lost Parts had been awarded to other suppliers and were not available for bid. Putting

aside the fact that Sellers did not know prior to the Closing that Boeing had awarded the parts to other suppliers, Sellers made no contractual promises that Boeing would give Buyers the right to bid on the Lost Parts, that the Lost Parts were not currently awarded to other suppliers beginning in 2017, or that the Lost Parts would not be awarded to other suppliers in the future.

Vice Chancellor Zurn, relying on the plain meaning of the words in the APA, determined that Sellers did not breach any representations or warranties. In the well-reasoned opinion below, Vice Chancellor Zurn confirmed Sellers had no "issues" with Boeing at the time the APA closed and that Sellers' failure to disclose Boeing's award of the Lost Parts to other suppliers in 2013 and 2014 (which Sellers did not know about) did not violate any of the representations and warranties identified in Buyers' Counterclaim. Boeing and ZTM had a good business relationship at the time the APA closed—a relationship that Buyers themselves praised shortly before the Closing.

As Vice Chancellor Zurn noted, this case "teaches an important lesson about the benefits of allocating risk among contracting parties and the detriments of imprecise drafting." Op. 3. Buyers are seeking recovery on a breach of contract theory, but Buyers simply did not negotiate the protections in the APA that they now purport to enforce. To the extent Buyers intend to convince this Court otherwise, they must overcome and contradict the plain meaning of the APA.

The Court of Chancery's finding that Sellers did not breach the APA should be affirmed. Moreover, because Buyers have pursued and continue to pursue plainly meritless claims, Buyers have acted in bad faith. Therefore, the Court should reverse the Court's finding that Sellers are not entitled to attorneys' fees.

II. SUMMARY OF ARGUMENT

Buyers' "Summary of Argument" is not stated in separate numbered paragraphs as required by Delaware Supreme Court Rule 14(b)(v), and instead contains only one numbered paragraph that extends for several pages. Sellers generally deny Buyers' argument that the Court of Chancery erred in interpreting the APA, and will do their best to address Buyers' numerous arguments within the separately numbered paragraphs below.

1. Sellers deny that the Court of Chancery erred by failing to take into account that "with" and "with respect to" are separate terms. First, Vice Chancellor Zurn specifically quoted the relevant language of Section 3.25(d) on pages 16 and 27 of the Opinion, so it is inappropriate to assume the Court did not take the relevant language into account. Second, Buyers failed to make a distinction between "with" and "with respect to" in their pleading and briefs below. In any case, the alleged distinction would not have affected the Court's analysis.

2. Sellers deny that the Court of Chancery misinterpreted the word "issues." The Court of Chancery correctly applied the common-sense definition of the word "issues," which requires an awareness of an "issue" before an "issue" can exist. Moreover, Buyers' "knowledge qualifier" argument is a distraction because Buyers are attempting to conflate a defined contract term ("Knowledge of Seller") with the

plain meaning of the word "issues." The two terms should not be confused with one another.

3. Sellers deny that the Court of Chancery's ruling renders the word "issues" mere surplusage. The word "issues" has its own distinct definition, on which the Court of Chancery relied, and with which Buyers profess to have no quarrels.

4. Sellers deny that the Court of Chancery's decision runs counter to any canons of construction or the pro-contractarian policy of Delaware jurisprudence. On the contrary, the Court of Chancery noted that Delaware law presumes that sophisticated entities engaged in arm-length transactions "are bound by the language of the agreement they negotiated." Op. 26. Therefore, Vice Chancellor Zurn properly "look[ed] only to the plain language of the APA's representations and warranties" when construing the contract. Op. 27. Buyers are sophisticated entities and knew they were entering into an APA that did not provide any guarantees or protections related to the Lost Parts.

5. Sellers deny that, if left to stand, the Court of Chancery's ruling will rob Buyers of the benefits of the bargain they struck. Buyers have admitted that they did not even request that the APA contain protection against the possibility that the Lost Parts would not be renewed after calendar year 2016.

6. Sellers deny that, if left to stand, the Court of Chancery's ruling will engender uncertainty for deal practitioners. As the Court of Chancery recognized, "[i]f

preserving opportunities to bid on potentially lost parts was so valuable to Buyers, they could have bargained for explicit protections against lost opportunities. They failed to do so." Op. 40.

7. Sellers did not Breach Section 3.25(d) because there were no issues between Sellers and Boeing at the time the APA closed.

8. Sellers did not breach Sections 3.25(a) and 3.7(a) because Boeing awarded the Lost Parts to other suppliers outside of the temporal scope of these sections.

9. Sellers did not breach Section 3.28 because it did not breach any of the other representations or warranties in the APA.

10. Sellers are entitled to their attorneys' fees because Buyers pursued their claims in this litigation in bad faith. (Preserved at B30-B34).

III. STATEMENT OF FACTS

On June 3, 2016, Accurus entered into the APA with ZTM, Stockholders, and Kelly and Bradley E. Julius, as Stockholder Individuals. B40-B41.

A. Parties to the Transaction

Plaintiff Bradley E. Julius founded ZTM. Op. 5. ZTM manufactured large, complex precision aerospace parts and assemblies for major commercial aviation and military customers. *Id.* Substantially all of ZTM's assets were sold pursuant to the APA. A78-A82, A149.

Prior to the transaction memorialized in the APA, ZTM was jointly owned by Kelly Julius as Trustee of the Kelly Julius Revocable Trust and Bradley E. Julius as Trustee of the Bradley E. Julius Revocable Trust. B104-B105.

Accurus is a sophisticated buyer of aerospace manufacturing companies, and it employed seasoned legal and accounting firms in the acquisition of ZTM's assets. B44. Accurus Aerospace Wichita LLC is a Delaware limited liability company, and is a wholly-owned subsidiary of Accurus. B45. Liberty Hall Capital Partners, L.P. ("LHCP") founded and, through an affiliate, controls Accurus and Accurus Aerospace Wichita LLC. B152.

B. ZTM's Business

Boeing was ZTM's primary customer at the time the APA was signed, and Boeing-related entities accounted for more than half of ZTM's sales. Op. 5-6. "The

relationship between ZTM and its customers, such as Boeing, followed an industry-standard pattern." Op. 6. ZTM and Boeing entered into multiple "master agreements" or "Long Term Agreements" ("LTAs"). Op. 6; B430 at 243:15-24. The LTAs contained separate sub-contracts for specifically identified parts, and those sub-contracts can expire before an LTA does. Op. 6; B433 at 51:13-15.

Generally, when Boeing wants to request bids from suppliers, it issues a "request for quotation" ("RFQ") in order to get pricing and lead time from the suppliers. B425 at 59:19 - B426 at 60:1. After Boeing determines what supplier it is going to award specific parts to, it sends the manufacturer an award letter, which identifies the specific parts Boeing has awarded to the manufacturer. Op. 6. RFQs from Boeing can be sent close in time to the expiration of parts contracts, even at the "11th hour." B443 at 368:12 - B444 at 369:1.

If ZTM bid on and won new parts in response to an RFQ from Boeing, Boeing and ZTM would not execute a new LTA. Op. 7; Appellants' Brief, 8-9. Instead, the new part would "roll on" and be assigned to one of the existing LTAs. *Id.* Therefore, each individual part has an expiration date under the existing LTAs. B460. In fact, it was typical for parts to be coming on and rolling off of the existing LTAs between Boeing and ZTM. B430 at 243:15-24.

C. Sellers Approach Buyers about a Potential Sale.

In August 2015, Ed Dunn, a broker for ZTM and Plaintiff, approached Buyers about a potential sale of Sellers' assets, property, and rights (the "ZTM Business") by sending an executive summary of the opportunity to LHCP. B121-B122. In connection with receiving the executive summary and other information, Rowan Taylor, on behalf of LHCP, signed a Confidentiality Agreement with ZTM dated August 13, 2015 (the "Confidentiality Agreement"). B208; B212. One purpose of the Confidentiality Agreement was to allow LHCP to receive "Evaluation Materials" for use in evaluating a possible transaction with ZTM. B208.

The Confidentiality Agreement defines "Evaluation Materials," in part, as:

> "all information, in whatever form or format and however it may be embodied, concerning the Disclosing Party that are furnished, made available, or otherwise disclosed to a Receiving Party by or on behalf of the Disclosing Party, orally or in writing, and whether or not such Evaluation Materials in whole or in part are protectable trade secrets independent from this Agreement; and includes the business plans, historic financials, **projected financials**, PowerPoint presentations, software, contracts, agreements, understandings, notes, analyses, compilations, studies or other documents or materials whether prepared by any Party or others, which contain or reflect all or any portion of such materials."

B208 (emphasis added.)

In the Confidentiality Agreement, LHCP and ZTM agreed that "the other Party does not make any representation or warranty as to the accuracy or completeness of such other Party's Evaluation Materials." B210.

Initially, ZTM was to be sold to another potential buyer, but that transaction fell through and Dunn contacted LHCP and Accurus again in early 2016. B122. On or about February 17, 2016, LHCP signed a new confidentiality agreement with ZTM, Inc. which included the same provision quoted above. B188 at 226:21 - B189:5; B214-B219.

Sometime before March 2, 2016, ZTM began populating a data room with documents for LHCP to review to evaluate the prospect of acquiring ZTM. B224 at 134:5-11; B230 at 90:7-22. In an email dated March 2, 2016, LHCP requested ZTM's revised forecasts for 2016 through 2019. A441. On March 4, 2016, Ed Dunn, on behalf of Sellers, sent an email to Buyers, including Rowan Taylor and Jim Gibson, President of Accurus, as recipients, attaching several documents, including revised sales forecasts for 2016 through 2019. A440. The projections estimated sales in two extreme scenarios: (1) if none of the Lost Parts (and other expiring parts) were awarded after their expiration dates, and (2) if all of the Lost Parts (and other expiring parts) were awarded and manufactured by ZTM through 2019.[1] A941-

[1] *See also* B493. These are the sales forecasts set forth in Excel spreadsheets that were produced in native format as part of this case, and were submitted to the Court electronically as part of the summary judgment record (referenced at B12). These documents are referenced at A443-A448 and A495-A563 but the spreadsheets themselves were not submitted by Appellants. The Excel spreadsheets are the "projections" referred to in this brief and that Buyers rely on to support their Counterclaim. Note that documents ACC_000015112 and ACC_000015137 only show past EBITDA information and are not projections.

A942. In a letter dated March 11, 2016, LHCP, on behalf of Accurus, offered to purchase ZTM for $80 million. B231 at 99:21 - B233 at 101:3; B238-B241.

On March 16, 2016, Ed Dunn, on behalf of Sellers, sent an email to Buyers, including Rowan Taylor and Jim Gibson as recipients, notifying Buyers that ZTM had discovered a formula error that affected the sales projections. The email attached revised projections that Dunn stated resolved the formula error. B226 at 175:15-23; A452. After receiving the March 16, 2016 email, LHCP did not revise the amount for which it was offering to purchase ZTM. B190 at 298:7-18.

D. The Parties Sign and Close on the APA.

The APA was dated June 3, 2016. A70. The APA contains an integration clause which states: "The Transaction Documents constitute the entire agreement and understanding of the Parties and **supersede all prior agreements, undertakings, negotiations, and communications, both written and oral**, among the Parties, or any of them, with respect to the subject matter hereof." A155 at § 12.5 (emphasis added). The APA defines "Transaction Documents" as "this Agreement, the Escrow Agreement, the Bill of Sale, the Assignment and Assumption Agreement, the Consulting Agreement, the Employment Agreements and the certificates, affidavits, and releases required to be delivered under this Agreement." A152.

The APA also contains several representations and warranties. 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 in relevant part:

> 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.

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 could reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect . . . .

A87.

The Balance Sheet Date is defined as December 31, 2015. A138.

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.

Sellers' sales projections that were provided to LHCP and Accurus prior to the execution of the APA are not attached to the APA. A70-A227. These sales projections are not referenced in the APA, nor are they incorporated into the APA by reference. *Id.* Also, no provision of the APA contains a guarantee or warranty that (i) Accurus would be given the ability to bid on the Lost Parts; (ii) Accurus would manufacture any of the Lost Parts beyond December 31, 2016; (iii) if Accurus or a successor were allowed to manufacture the Lost Parts after December 31, 2016, that Boeing would pay a specific price for any of the Lost Parts; or (iv) Boeing would order a certain quantity of any Lost Part. *Id.* Likewise, no provision of the APA included a representation or warranty as to the accuracy of the projections Sellers shared with Buyers prior to entering into the APA. *Id.*

Under the terms of the APA, $3,000,000 was initially deposited with an escrow agent for the exclusive purpose of making certain potential payments to Accurus in the event Accurus suffered losses indemnifiable pursuant to the APA (the "Indemnity Escrow Amount"). A76, A82, A129. The APA states that ZTM must indemnify Accurus against any losses arising out of, relating to, or resulting from the breach of any representation or warranty of ZTM in the APA. A130.

The APA required the parties to enter into a separate Escrow Agreement. A76. On July 28, 2016, Plaintiff (on behalf of Seller and Stockholders) and Accurus entered into an Escrow Agreement. B251. As part of the Escrow Agreement, the Escrow Agent agreed to hold the $3,000,000 Indemnity Escrow Amount in an Indemnity Escrow Fund. B251. The Escrow Agreement provided that the Escrow Agent will only disburse escrowed funds upon receipt of a joint written notice. B252 at § 3.1.

Like the APA, the Escrow Agreement provides that any portion of the funds remaining in the Indemnity Escrow Fund shall be disbursed to the Seller Representative

> on the first Business Day immediately following May 31, 2017 (less any amounts which are the subject of a pending or unresolved claim for indemnification that was delivered to the Seller Representative and the Escrow Agent on or prior to May 31, 2017, until such pending or unresolved claim for indemnification is resolved in accordance with the terms of the [APA] and [the Escrow Agreement] . . . promptly upon receipt by the Escrow Agent of a joint written instruction from an Authorized Representative . . . of each of [Accurus] and the Seller Representative.

A82; B252-B253.

E. Buyers Discover the Lost Parts.

In their Counterclaim, Buyers identify generally (without providing part numbers) more than 55 parts, the contracts for which were set to expire in 2016, that ZTM manufactured for Boeing's 747 and 787 aircraft. Buyers define these parts as

the "Lost Parts." B73. Later, in discovery, Buyers identified 53 specific part numbers as the Lost Parts. B292-293.

Prior to closing, Buyers were already negotiating with Boeing about the parts that would expire after Buyers completed the purchase of ZTM's assets. In a letter dated June 14, 2016, Buyers offered Boeing "1% per year price reductions, on the contracts that expire 2020 or earlier, for the next 4 years" in exchange for Boeing's agreement to extend "all contracts to 2024." B491. Boeing apparently did not agree to this, because after the closing of the APA, Defendants received an award of parts from Boeing that did not include at least 104 parts expiring in 2016 to Buyers. A38, B379.

Later, Jim Gibson, President of Accurus, compared the parts awarded to Accurus by Boeing in one post-closing award with projections Ed Dunn provided prior to execution of the APA. After completing that comparison, Gibson noticed that Accurus had no award allowing it to manufacture the 53 Lost Parts after calendar year 2016. B306 at 311:21 - B307 at 312:21. Other parts expiring in 2016 were still "available for re-bid" sometime after October 19, 2016. A38, n.7; B379.

The parties learned during discovery in this case that Boeing awarded the Lost Parts to other suppliers in 2013 and 2014. A39. Sellers were not aware that the Lost Parts had been awarded to other suppliers. B194 at 330:8-16; B305 at 278:2-8. Defendants do not have and have not provided any evidence that Sellers were aware

that Boeing had awarded the Lost Parts to other suppliers. B194 at 330:8-16. In fact, Buyers admit that Sellers believed that Boeing would eventually offer ZTM or its successor the opportunity to quote the Lost Parts. Appellants' Brief, 9.

Rowan Taylor was the primary person leading the contract negotiations for LHCP and he was the person responsible for reviewing the APA. B185 at 217:4 - B187 at 224:6. Rowan Taylor knew prior to entering into the APA that the Lost Parts were set to expire at the end of 2016, and that there was no guarantee that Accurus would be able to continue to manufacture the Lost Parts. B191 at 325:11 - B193 at 328:10. Taylor claims that with respect to the APA, "the fundamental assets [Accurus] purchased was the right to be able to renew and compete to renew parts when they expired." B192 at 326:3-6. But Taylor did not request that the APA contain protection against the possibility that the Lost Parts would not be renewed after calendar year 2016, B479 at 388:16-25, nor did Taylor ask for a provision that required ZTM to represent or warrant that the Lost Parts would be available for bid. B195 at 357:19 - B197 at 359:2.

On April 5, 2017, Accurus asserted a Direct Claim (as defined in the APA) against Sellers. B42. In the Direct Claim, Accurus claimed losses from Sellers' alleged breaches of the APA that exceeded the amount of funds remaining in the Indemnity Escrow Fund and demanded that the Indemnity Escrow Fund remain with the Escrow Agent pending resolution of the Direct Claim. B342-B346.

F. Buyers Assert Reliance on Projections That Were Not Part of the APA.

Buyers' Counterclaim alleges a single count for alleged breach of the APA and specifically limited their claim to "the breach of express representations in the APA." B86 at n.4. Buyers allege they overpaid for ZTM's assets. B71.

Paragraph 7 of the Counterclaim states, in part:

> In the first quarter of 2016, Defendants provided Buyers with a detailed set of financial projections reflecting, among other things, ZTM's projected sales and EBITDA for the years 2016-2019. The projections expressly assumed and incorporated sales of the Lost Parts in the years 2017, 2018 and 2019. In other words, the projections assumed that Boeing would renew ZTM's existing work statements for the Lost Parts prior to their 2016 expiration.

B73-B74.

In Paragraph 10 of their Counterclaim, Buyers allege:

> Had [Defendants] understood that Boeing, prior to closing, had moved the right to manufacture the Lost Parts to another supplier, and that ZTM had in fact lost any opportunity to manufacture such parts in the period after 2016, representing nearly 10% of Sellers' projected sales, Buyers would have significantly reduced the amount they agreed to pay for the ZTM Business.

B75.

In Paragraph 36 of their Counterclaim, Defendants alleges:

> Soon after, as [Defendants] and LHCP engaged in due diligence into the ZTM Business, Sellers provided them with detailed financial projections reflecting, among other things, ZTM's projected sales and EBITDA for the years 2016-2019 (the "Seller Projections"). Critically, the Seller Projections assumed and incorporated expected sales of the Lost Parts in each of the years 2017, 2018 and 2019.

B85.

In paragraph 37 of their Counterclaim, Buyers allege:

> On March 16, 2016, Sellers, through Ed Dunn, provided Accurus and LHCP with updated Seller Projections, revised to incorporate first quarter 2016 financial results and correct certain errors in the projections for 2016-2019. The revised Seller Projections continued to assume and incorporate expected sales of the Lost Parts after 2016.

B85-B86.

In Paragraph 42 of their Counterclaim, Buyers allege, in part: "Sellers were fully aware that Buyers were relying on ZTM's projected financial performance, as embodied in the Seller Projections, including the projection that ZTM still had the ability to negotiate the renewal of the Lost Parts, to value the ZTM Business and arrive at a purchase price." B87.

In Counts I through IV of the Complaint, Plaintiff seeks declaratory judgment that Accurus breached the Escrow Agreement and the APA, as well as specific performance of the Escrow Agreement or, in the alternative, a mandatory injunction for breach of the APA. B364-B367. In Count V, Plaintiff alleges Defendants breached the implied covenant of good faith and fair dealing by failing to release the Indemnity Escrow Fund and asserting improper and invalid indemnification claims. B368-B369.

Taylor testified with respect to the projections that "the spreadsheets we were provided were inaccurate with respect to . . . Accurus' ability to be able to renew"

the Lost Parts. B191 at 325:11 - B192 at 326:6. He stated that the projection spreadsheet provided by ZTM on March 16, 2016 was the "foundation of [LHCP's] valuation model" that it used to make its proposal to ZTM. B200 at 410:4 - B201 at 411:22. Jim Gibson, President of Accurus, testified that the projections were "[h]eavily relied on" by Accurus in Accurus' due diligence. B310 at 351:24 - B311 at 352:14; B312 at 359:21-24.

IV. ARGUMENT AND ANALYSIS

A. Sellers Never Represented to Buyers that Buyers Would Have the Opportunity to Bid on the Lost Parts.

1. Question Presented

Did the APA contain any promise that Buyers would have the opportunity to bid on the Lost Parts?

2. 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).

3. Merits of Argument

Buyers' opening brief and their arguments throughout this case rest entirely upon their complaint that, after closing on the APA, Buyers did not have the

opportunity to bid on the 53 Lost Parts. Appellants' Brief, 2. After Boeing did not give Buyers an opportunity to do so, Buyers have focused their ire not on Boeing, but on Sellers, and have accused Sellers of breaching four representations and warranties in the APA. Buyers have not asserted that Sellers engaged in any fraud. Furthermore, on appeal, Buyers appear to have abandoned their principal argument made below, which was that they had relied on certain financial projections that Sellers provided prior to the signing of the APA (and without any warranty of accuracy). Buyers allege breaches of the APA, but these financial projections are not mentioned anywhere in the APA—which is a fully integrated contract. A70-A227.

Below, Buyers alleged the projections were critical to this case. B85. In fact, they mentioned the "forecasts" or "projections" 30 times in their opening brief in support of their motion for partial summary judgment. A13-A68. In an abrupt about-face, Buyers now argue that "the issue is not . . . a fraud-like claim dependent on the integration or non-integration of the [projections]." Appellants' Brief, 43, n.12. While Sellers agree the focus of this Court's attention should be on the text of the APA, part of the necessary analysis of the APA is considering what it does *not* contain.

The fact that these allegedly critical financial projections are not mentioned in the APA is important because Buyers' argument below was squarely premised on the assertion that, through the projections, Sellers had "incorrectly conveyed that the

Lost Parts were available for re-bid." A58. First, the projections Sellers reference were not inaccurate. In addition to showing projected financials in the event the Lost Parts (and other parts) were renewed, the projections also showed Buyers who the company's financials would look like if *none* of the Lost Parts were awarded to ZTM after 2016. A941-A942.

Moreover, this is a breach of contract case, and Buyers have never identified any contractual representations from Sellers affirmatively representing that the Lost Parts would be available for bid. Buyers have not identified any contractual basis for believing they would have the future ability to bid on the Lost Parts (or any other parts). Instead, Buyers' breach of contract claim is based upon their bare assumptions about what would happen after Closing.

Additionally, Sellers could not have possibly promised that Buyers would have a right to bid on any parts, and Buyers knew that. As a supplier, ZTM had no control over whether Boeing asked ZTM to bid to manufacture any parts. Buyers have acknowledged that "Boeing chooses a manufacturer to award" parts to and that it was "Boeing's decision" whether to allow ZTM to bid to renew or extend the contracts for the Lost Parts. A29, A38. Therefore, the authority to send or not send an RFQ for parts rested with Boeing alone. It is absurd, then, for Buyers to suggest that Sellers could have or would have guaranteed the opportunity to bid on the Lost Parts.

Buyers "conducted thorough due diligence and spent time and resources negotiating the representations, warranties, and indemnities in the APA." Appellants' Brief, 1. Moreover, Rowan Taylor, who led to APA negotiations for Buyers, asserted that "the fundamental asset[] [Buyers] purchased was the right to be able to renew and compete to renew parts when they expired." B191 at 325:11-326:6. Yet, the APA is completely silent on the topic of bidding for parts.

"[A] party may not come to court to enforce a contractual right that it did not obtain for itself at the negotiating table." *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489, at *7 (Del. Ch. June 21, 2012). Rowan Taylor admitted that Buyers never asked that the APA include a provision requiring ZTM to represent or warrant that the Lost Parts would be available to bid after Buyers acquired the company. B195 at 357:8 - B197 at 359:2. In fact, Taylor did not request any sort of protection against the possibility that the Lost Parts would not be renewed after calendar year 2016. B479 at 388:17-25.

The APA confirms Taylor's testimony. No provision in the APA contains a guarantee or warranty that (i) Accurus would be given the ability to bid on the Lost Parts; (ii) Accurus would manufacture any of the Lost Parts beyond December 31, 2016; (iii) if Accurus or a successor were allowed to manufacture the Lost Parts after December 31, 2016, that Boeing would pay a specific price for any of the Lost Parts; or (iv) Boeing would order a certain quantity of any Lost Part. A70-A227. If Buyers

had wanted to negotiate protections from the possibility that they would not win these parts back (such as a clawback provision or an earn-out provision), they could have done so. But they did not.

Having failed to secure any protection for the Lost Parts at the negotiating table, Buyers have attempted in this case to expand the scope and application of unrelated representations and warranties that appear in the APA by arguing for unreasonably expansive and nonsensical interpretations. As discussed more fully below, Buyers would have this Court disregard the plain meaning of the words the parties chose to include in the APA and the temporal limits the parties placed on certain representations in order to reverse the Court of Chancery's well-reasoned opinion. Vice Chancellor Zurn's Opinion should be affirmed.

B. Sellers Did Not Breach Section 3.25(d) of the APA.

1. Question Presented

Did the Court of Chancery err in finding that Sellers did not breach Section 3.25(d) of the APA?

2. Scope of Review

"A decision granting summary judgment is subject to de novo review." *Nw. Nat'l Ins. Co.*, 672 A.2d at 43. "The interpretation of contract language is reviewed by [the Supreme Court] de novo." *Sonitrol Holding Co.*, 607 A.2d at 1181. "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 at 252 (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*, 616 A.2d at 1195.

3. Merits of Argument

a. Buyers Failed to Distinguish Between the Phrases "With Respect To" and "With" in Arguing and Construing Section 3.25(d) in its Own Briefs and Pleading Below.

Buyers allege that Vice Chancellor Zurn incorrectly found that Sellers did not breach Section 3.25(d) of the APA. Appellants' Brief, 3. That section 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.

The core of Buyers' argument on appeal is the alleged distinction between the uses of "with" versus "with respect to" in the APA. Buyers contend that the Court of Chancery "ignored a key phrase ('with respect to')" when construing Section 3.25(d) of the APA. Appellants' Brief, 3. They argue that "'with respect to' and 'with' are separate terms with separate meanings." Appellants' Brief, 21. This is not the position Buyers took in their pleading and briefs below.

From the very beginning of this case, Buyers alleged in their Counterclaim that

> by not disclosing that ZTM had a material issue ***with its largest customer***, in that Boeing had materially reduced its business relationship with ZTM by moving business amounting to nearly 10% of ZTM's total annual sales to one of ZTM's competitors, ZTM and the Stockholders caused ZTM to breach [Sections 3.7, 3.25(a), 3.25(d), and 3.28 of the APA].

B78 at ¶ 14 (emphasis added).

In the same pleading, Buyers alleged that they "had negotiated specific representations and warranties from ZTM that all *issues* ***with*** *clients*, including any material reduction in business from any customer, would be disclosed prior to the closing." B 75 at ¶ 10 (emphasis added). Numerous additional examples appear in Buyers' Summary Judgment Briefing. *E.g.* A27 Opening brief, 6 ("By not disclosing that (i) ZTM had a material issue with its largest customer . . . Seller breached these

representations and warranties . . . ."); A807 ("Sellers represented and warranted that they would disclose to Buyers any 'material issues' with any customer before the sale closed."); A817 ("The core issue is Sellers' failure to disclose a 'material issue' with its largest customer in breach of its agreed-upon representations and warranties.").

While Sellers acknowledge this Court has *de novo* review, Buyers should not be permitted to completely change their argument on appeal as to the meaning of Section 3.25(d). "When interpreting a contract, the Delaware courts strive to determine the parties' shared intent, 'looking first at the relevant document, read as a whole, in order to divine that intent.'" *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 2011 WL 1348438, at *8 (Del. Ch. Apr. 08, 2011). If Buyers truly believed the phrase "with respect to" was integral to the analysis of Section 3.25(d) or that it meant something meaningfully different than "with," then they should have made that clear in their filings below. The numerous occasions in which Buyers used "with" in place of "with respect to" in their own pleading and briefs reveal the shared intent of the parties that there was no meaningful difference in Section 3.25(d) between "with" and "with respect to."

b. Even Assuming "With Respect To" Has a Meaning Distinct from "With" in the APA, the Distinction is Irrelevant to the Court's Analysis.

Buyers devote a substantial portion of their brief to arguing that there is a distinction between "with respect to" and "with" in Section 3.25(d). But Buyers'

entire argument in this regard is a distraction. As noted above, Buyers have made it clear throughout this case that what they are alleging is that Sellers had a material issue ***with Boeing*** that they did not disclose. That is Buyers' claim, so whether the phrase "with respect to" broadens, restricts, or has no effect on the things that must be disclosed under Section 3.25(d), the issue is simply irrelevant.

Moreover, Buyers misleadingly argue that this alleged distinction between "with respect to" and "with" was important to the Court of Chancery's ruling. Appellants' Brief, 20. Vice Chancellor Zurn correctly recognized that the disagreement between the parties in their summary judgment briefs was "whether the lost opportunity to bid is a material 'issue' with Boeing." Op. 27. Vice Chancellor Zurn construed the plain and ordinary meaning of the word "issue" and granted partial summary judgment in favor of Sellers. As discussed more fully below, it was the definition of the word "issues," and the context in which it is used that compelled the Court's conclusion, not the use of the phrase "with respect to."

c. The Chancery Court Correctly Construed Section 3.25(d) because an "Issue" Cannot Arise Until there is an Actual Question or Dispute Raised.

Buyers assert that "[a]n important issue in this dispute, and on this appeal, is which party . . . bears the risk of unknown occurrences" and that whenever a "knowledge qualifier" was used, "the parties intended to allocate risk of unknown losses to Buyers." Appellants' Brief, 26, 30. These statements wrongly suggest that

the APA expressly allocated the risk of every conceivable type of unknown occurrence or loss. In this case, Buyers are attempting to transform Section 3.25(d) into a catchall representation that is so loosely defined that it could cover any imaginable "loss" that Buyers sustain after completing the asset purchase. But that is not what Section 3.25(d) says, nor is it what Section 3.25(d) means. Buyers only have the contractual rights (including allocations of risk) that they negotiated for and obtained as part of the APA. *See GRT, Inc.*, 2012 WL 2356489, at *7.

In her analysis of Section 3.25(d), Vice Chancellor Zurn first focused on the plain meaning of the word "issue," stating:

> Black's Law Dictionary defines "issue" as "a point in dispute between two or more parties." Merriam-Webster defines "issue" as: "a vital or unsettled matter," a "concern" or "problem;" "a matter that is in dispute between two or more parties."

Op. 28 (footnotes omitted).

Buyers "do not quarrel" with these definitions. Appellants' Brief, 32. In other words, Buyers admit that an "issue" is a point in dispute *between two or more parties*. Nevertheless, Buyers go on to argue for several pages that the word "issues" should have a different, more malleable meaning. In order to be enforceable, the parties to the contract must have had a shared intent about the meaning of the word "issue." *See Hartley v. Consol. Glass Holdings, Inc*., 2015 WL 5774751, *8 (Del. Ch. Sept. 30, 2015) (quoting *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008)) ("When faced with a question of contract interpretation, Delaware courts'

central task is determining the parties' shared intent."). Vice Chancellor Zurn's definition and analysis is based on the common understanding of the word, bolstered by dictionary definitions, which is precisely how courts are supposed to construe unambiguous contracts. *Phillips Home Builders, Inc. v. The Travelers Ins. Co.*, 700 A.2d 127, 129 (Del. 1997) ("[I]f the relevant contract language is clear and unambiguous, courts must give the language its plain meaning."). Buyers' argument is based on something different entirely.

Buyers falsely accuse Sellers of violating Section 3.25(d) by cherry-picking words from the definitions above while at the same time ignoring words in the APA and the Court of Chancery's ruling that they find inconvenient. First and foremost, Buyers largely ignore the fact that Section 3.25(d) explicitly required two things from Sellers: (1) They were required to disclose any material dispute, material complaint, or material issue, and (2) they must provide a proposed resolution. A110. In other words, to fall within Section 3.25(d)'s definition of an "issue," the issue must be *ongoing* and it must be c*apable of resolution*. Vice Chancellor Zurn understood that Section 3.25(d) must be read as a whole and correctly concluded that the ordinary meaning of "issues" as used in that subsection "requires there to have been an *actual dispute or question raised* by ZTM or Boeing *that ZTM or Boeing intended to resolve*." Op. 29 (emphasis added).

Buyers next argue that the parties "certainly drew a distinction between an issue and a disputed issue" because the APA contains the phrases "issues in dispute" or "disputed issues" in Sections 2.4(c) and 9.6. Appellants' Brief, 33. Buyers assert this change in phrasing compels a conclusion that the parties meant something different when they used the sole word "issues" in Section 3.25(d). Buyers are wrong.

The text of Sections 2.4(c) and 9.6 of the APA support Vice Chancellor Zurn's conclusions about the meaning of "issues" in Section 3.25(d). In Section 2.4(c), the APA states in part: "If Seller Representative gives Buyer a Notice of Objection, then Buyer and Seller Representative will use commercially reasonable efforts ***to resolve*** the issues in dispute." A80 (emphasis added). Similarly, Section 9.6 states in part that "issues in dispute ***shall be resolved*** by the Neutral Accountants consistent with the principles and procedures set forth in Section 2.4." A135-36 (emphasis added).

These sections unquestionably show that, under the APA, an "issue in dispute" is something that needs to be resolved. Buyers argue that the word "issues" in Section 3.25(d) has a different meaning. But while the parties did not use the phrase "issues in dispute" in Section 3.25(d), they explicitly included language requiring Sellers to propose a resolution to any material "issues." Although Section 3.25(d) is worded differently, it is clear that the meaning of "issues" in Section 3.25(d) is consistent with the meaning of the phrases "issues in dispute" or "disputed issues" as used in

other sections of the APA because, in all cases, the contemplated "issue" needs to be resolved.

d. The Word "Issues" is Not Redundant in Section 3.25(d).

Buyers also argue that Vice Chancellor Zurn's interpretation of the APA renders the term "issues" a redundancy of "disputes" and "complaints." Appellants' Brief, 35. Buyers argue that if Vice Chancellor Zurn's decision stands, then "Section 3.25(d) would be the same whether or not the parties agreed to include the separate term 'issues.'" *Id.* But Vice Chancellor Zurn specifically mentioned the definitions of both "disputes" and "complaints" in her memorandum opinion. The Chancery Court found that the noun "dispute" is a "'verbal controversy,' 'debate,' or 'quarrel,'" and a "'complaint' [is] an 'expression of grief, pain, or dissatisfaction' or 'something that that is the cause or subject of protest or outcry.'" Op. 30. While the definitions might have some similarities, they are by no means identical.

Disputes, complaints, and issues have comparable definitions, but Buyers have cited no authority that indicates a term is entirely devoid of meaning if it has a definition that is similar to other words that surround it in a contract. Further highlighting the similarity these words are meant to have in the APA, Section 3.25(d) specifically requires that whether there existed a dispute, complaint, or issue, in all cases, Sellers must be able to propose a resolution. A110. A feature common to all

three definitions is that the dispute, complaint, or issue is that they are capable of resolution.

e. Section 3.25(d) is not the Representation or Warranty that Addresses Reductions in Business.

In their briefing below, Buyers identify the "material issue" that should have been disclosed as the fact that "ZTM would not have the opportunity to re-bid on the high margin Lost Parts." A45. The parties *did* negotiate a representation that allocated the risk of a reduction in a customer's business, but it was not Section 3.25(d). It was Section 3.25(a). Section 3.25(a) provides some protection for material reductions in a business relationship with important customers like Boeing. A109-A110. The reasons Sellers did not breach Section 3.25(a) are discussed more fully below. But important here is the fact that Sellers and Buyers negotiated a specific representation related to potential changes in the business relationship.

Buyers cite and repeatedly invoke the rule that courts prefer contract interpretations that harmonize the provisions rather than create an inconsistency or surplusage. Appellants' Brief, 31. But now Buyers argue for an interpretation of Section 3.25(d) that is so broad, it would completely swallow the more specific Section 3.25(a). Not only would Buyers' interpretation create surplusage, but it would also run afoul of the well-settled rule that specific provisions in a contract control over more general provisions. *DCV Holdings, Inc. v. Conagra, Inc.*, 889 A.2d 954, 961 (Del. 2005) ("Specific language in a contract controls over general

language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one."). To avoid surplusage and other interpretation issues, Section 3.25(d) must necessarily contain representations *different* than Section 3.25(a). Given that the parties specifically negotiated a temporal limit to the representation in Section 3.25(a), it would also be inappropriate to interpret Section 3.25(d) so broadly that it effectively extinguishes the temporal limit of Section 3.25(a). A109-A110.

f. The Lack of a "Knowledge Qualifier" is Determinative to the Interpretation of Section 3.25(d) Because of the Words the Parties *Did* Choose to Include.

Buyers wrongly allege that Vice Chancellor Zurn "disregard[ed] the exclusion of the knowledge qualifier" in Section 3.25(d). Appellants' Brief, 29. In fact, Vice Chancellor Zurn specifically addressed Buyers' "knowledge qualifier" argument in footnote 136 of the Memorandum Opinion. There, Vice Chancellor Zurn explained succinctly:

> The parties sparred extensively over Section 3.25(d)'s lack of a knowledge qualifier. Buyers contend that because there is no language conditioning the duty to disclose on Sellers' knowledge of the fact that Boeing awarded the parts to other suppliers, Sellers are liable under 3.25(d) notwithstanding the fact ZTM was unaware that Buyers would not have the opportunity to bid on the Lost Parts at the time of contracting. I agree that Section 3.25(d) does not have a knowledge qualifier that would have clearly allocated the risk of loss to Buyers. However, the need for Sellers to have been aware of Boeing's decision to award the parts to other suppliers, thus eliminating the opportunity to bid on the parts, is implicit in the definition of "issue." Logically, ZTM could not have an "issue" with Boeing over the "unsettled

> question" of whether it would be able to bid on the Lost Parts if ZTM was unaware of Boeing's decision. ***Having an "issue" necessarily implies that one is aware of the underlying problem***.

Op. 29, n.136 (emphasis added).

Section 3.25(d) does not contain the term "Knowledge of Seller" as that term is defined in the APA. A110. But Buyers' total reliance on this omission—while completely ignoring the plain meaning of the words that *do* appear in Section 3.25(d)—strains credulity. Buyers' argument is that if Section 3.25(d) contained a knowledge qualifier, then the "risks of unknown losses" are on Buyers. Appellants' Brief, 30. If not, the risks are on Sellers. *Id.* In other words, Buyers suggest that the lack of a knowledge qualifier is *all that matters* in construing a representation or warranty. That is an inappropriate oversimplification.

The presence or absence of the words "Knowledge of Seller" alone are irrelevant to the question of *what* potential losses are addressed in a certain representation or warranty. Buyers have alleged throughout this case that the loss they believe they are entitled to recover is the fact that they "would not have the opportunity to re-bid on the high margin Lost Parts." A45. That particular risk was not allocated by the mere presence or absence of the words "Knowledge of Seller" in a particular provision. It is all the language in the APA that controls whether or to whom that risk was expressly allocated.

Moreover, Buyers attempt to confuse the defined term "Knowledge of Seller" and its alleged risk allocation function with the word "issues" in Section 3.25(d) by arguing the Court of Chancery's ruling "chang[ed] . . . the parties' agreed-upon risk allocation concerning customers." Appellants' Brief, 29. The term "Knowledge of Seller" has a specific, negotiated meaning, and is limited to the knowledge of certain individuals. A145. As such, it is distinct from the commonly understood definition of "issues" in Section 3.25(d). Vice Chancellor Zurn correctly noted that in order for an issue to exist between two parties, it must be brought "to the attention of the other party for inquiry and resolution." Op. 29. Therefore, the determination of whether a material issue existed at all is a question that is entirely separate from which party a particular risk was allocated to in the APA. Buyers' attempt to intermingle these questions should be rejected.

g. Based on the Plain Language of the APA, The Court of Chancery Correctly Found that There Were No Material Issues With Boeing that Sellers Were Obligated to Disclose Under Section 3.25(d).

At the time the APA closed, there were no material disputes, complaints, or issues between Boeing and Sellers relating to the Lost Parts (or any other parts). A key fact in this case is that Boeing awarded the Lost Parts to other suppliers in 2013 and 2014—years before the APA was signed. A39; B392. Vice Chancellor Zurn correctly pointed out, "[n]o 'issue' arose when Boeing awarded the Lost Parts to other suppliers and ZTM lost the opportunity to bid on those parts." Op. 32. ZTM's right

to manufacture the Lost Parts through 2016 was unaffected, and no problem or concern was raised by either Boeing or ZTM at the time. Specifically, Buyers have presented no evidence that Boeing confronted ZTM about any problem Boeing had in connection with the Lost Parts or that Boeing ever notified ZTM that it was awarding the Lost Parts to other suppliers.

Moreover, there is no evidence that Boeing's decision to award the Lost Parts to other suppliers created (or even was a symptom of) an issue between ZTM and Boeing. Boeing had an LTA with ZTM and it was typical and ordinary for parts to be added to or removed from an LTA between Boeing and ZTM and from LTAs between Boeing and its other suppliers. B430 at 243:15-24. There is no evidence that this "typical" act by Boeing (moving parts to another supplier) was the result of any disagreement or even any dissatisfaction with ZTM.

In the weeks leading up to the APA's closing, Jim Gibson a letter to Boeing stating that Accurus was "very pleased at ZTM's performance and its good standing with The Boeing Company." B487 at 299:17 – B488 at 300:1; B491. ZTM's good standing with Boeing is further supported by the fact that Boeing sent ZTM three letters awarding ZTM additional parts to manufacture in the month before the APA was signed. A602-A610; B375-B376. After the Closing, Boeing also renewed its contracts for "most of the parts set to expire in 2016 for which [Accurus] had the opportunity to bid." A35.

In order to disclose a material issue under Section 3.25(d), the issue must first exist. Here, there were simply no material issues, disputes, or complaints to disclose under Section 3.25(d). Sellers did not breach Section 3.25(d) by failing to disclose a years-old decision by Boeing (that it did not know about) to move the Lost Parts to another supplier. There is no evidence to suggest that decision was an issue between ZTM and Boeing at any time.

Buyers allege that ZTM's actions in the face of a pending RFQ in 2015 support its position, but the opposite is true. First, it is necessary to clarify what occurred in 2015. ZTM received three RFQs on July 29, 2015 and one more RFQ on September 25, 2015. A878, A892, A897, A902. Sellers at first thought all the parts in these RFQs were parts expiring in 2015, but later discovered that some parts expiring in 2016 and 2017 were also in the RFQs. A907-A908. By the time of this discovery in November 2015, ZTM had already submitted quotes to Boeing because the deadlines to submit those quotes all expired in August and October 2015. A878, A892, A897, A902, A907-A908. In December 2015, Sellers learned from Boeing that 44 of the parts set to expire in 2015 were not actually awarded to ZTM. A915-A917.

Buyers argue that the foregoing facts revealed "issues" in 2015. Appellants' Brief, 37-38. As discussed in this brief, Buyers' construction of the term "issues" in this case is erroneous. But even Buyers acknowledge that an alleged "issue" is only "created" after Sellers become aware of it. *Id.* at 37. Buyers note the RFQs were

received in July and September of 2015. *Id*. at 36-37. Then, they argue that Sellers later "learned that through these RFQs Boeing was also offering the opportunity to bid to renew certain parts expiring in 2016 and 2017." *Id.* at 37. According to Buyers, it was only the fact that Sellers *learned* the RFQs contained parts expiring in 2016 and 2017 that "***created*** a 'concern' or 'vital or unsettled matter." *Id.* (emphasis added).

Regardless, there are clear distinctions between foregoing 2015 events and the awarding of the Lost Parts at the center of this case. Both alleged "issues" from 2015—one of which was allegedly created in November when Sellers realized it had bid on parts expiring in 2016 and 2017, and the other when "ZTM received the award letter" in December 2015—required Sellers' awareness of the alleged "issue." Appellants' Brief, 37-38. But here, Sellers were *not* aware that Boeing decided to award the Lost Parts to other suppliers in 2013 and 2014. Boeing's decision to award the Lost Parts to another supplier was unilateral and internal. Moreover, once Boeing made that decision, there was nothing ZTM could have done to get those parts back. Even if Sellers had learned about those awards prior to Closing, there was nothing to resolve. The awards were final years before the APA was signed. Therefore, to the extent any "issue" connected to the Lost Parts ever could have existed, it was completely closed and settled by 2014 when the last of the Lost Parts were awarded to other suppliers.

To the extent Buyers suggest in their brief that Sellers should have known or could have guessed the Lost Parts were not going to be available for bid, the Court need only look to the dates of the RFQs received in 2015, which covered numerous parts expiring *later that same year*. They were dated July 29, 2015 and September 25, 2015. A878, A892, A897, A902. The APA closed on July 28, 2016, meaning Boeing still had plenty of time to issue RFQs covering parts expiring in 2016 (including the Lost Parts).

C. Sellers Did Not Breach Sections 3.7(a) and 3.25(a) Because Those Sections Are Limited to Representations or Warranties About Events or Occurrences After December 31, 2015, and Boeing Awarded the Lost Parts to Other Suppliers in 2013 and 2014.

1. Question Presented

Did the Court of Chancery err in finding that Sellers did not breach Sections 3.7(a) and 3.25(a) of the APA?

2. Scope of Review

"A decision granting summary judgment is subject to de novo review." *Nw.*, 672 A.2d at 43. "The interpretation of contract language is reviewed by [the Supreme Court] de novo." *Sonitrol Holding Co.*, 607 A.2d at 1181. "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 at 252 (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*, 616 A.2d at 1195.

3. Merits of Argument

Section 3.25(a) contains a representation that "Since the Balance Sheet Date, no customer . . . of [ZTM] has terminated or materially reduced or altered its business relationship with Seller. . ." A109. Somewhat similarly, Section 3.7(a) states in part that "Since the Balance Sheet Date . . . there has not been any: (a) event, occurrence,

or development that has had, or could reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect." A87. The APA defines the Balance Sheet Date as December 31, 2015. A138.

Buyers state on appeal that "[n]o one disputes that the [Lost Parts] were awarded by Boeing prior to December 31, 2015." Appellants' Brief, 39. Buyers go on to make arguments that lack any reasonable connection to the language of the representations they claim Sellers breached. Again, these arguments are a distraction. The focus should be on the text of the APA.

In Section 3.25(a), Sellers represented that no customer had materially reduced or altered its business with ZTM *since December 31, 2015*. That was, and remains, true. The parties learned in discovery that Boeing awarded the Lost Parts to other suppliers in 2013 and 2014 – long before the Balance Sheet Date. A39; Appellants' Brief, 14. Buyers have not presented any evidence that Boeing materially reduced or altered its business *after* December 31, 2015 and before either the execution of the APA on June 3, 2016, or the closing of the APA on July 28, 2016. B40-41. Therefore, even if Sellers had known about Boeing's decision in 2013-2014, the representation in Section 3.25(a) would still have been true.

Buyers' position on Section 3.25(a) exemplifies Buyers' inclination to ignore the language of the APA. On appeal, Buyers argue that Sellers breached Section 3.25(a) because it protects "a situation in which Sellers sit on their hands and do

nothing to understand any changes in the customer relationships . . ." Appellants' Brief, 40. First, Buyers still refuse to acknowledge that the status of the Lost Parts *did not change* between December 31, 2015 and the Closing. Second, Buyers do not explain how they reached this conclusion based on the contract language. All that is required of Sellers under Section 3.25(a) is a representation that no customers had taken any action to materially reduce or alter their business relationship with ZTM within a short, and well-defined timeframe. Because Boeing took action outside of the timeframe represented by Sellers, Sellers did not breach Section 3.25(a).

Similarly, in Section 3.7(a), Sellers merely represented that there has not been any "event[s], occurrence(s), or development(s)" that occurred after the Balance Sheet Date (December 31, 2015). A138. Buyers allege that if Sellers had engaged in an investigation, then they would have uncovered the loss of the opportunity to bid on the Lost Parts. Appellants' Brief, 40-41. First, this claim is dubious, since Buyers admit that RFQs can come at the "11th" hour and all parties expected the opportunity to bid on the Lost Parts would eventually come. B443 at 368:12 - B444 at 369:1. As discussed above, the RFQs for several parts expiring in 2015 were not even sent by Boeing until the summer and fall of 2015. A878, A892, A897, A902.

Even taking Buyers' claim at face value, the most Sellers could have learned during an investigation was that the Boeing had decided to move the Lost Parts to other suppliers before the Balance Sheet Date, and outside the temporal scope of

Section 3.7(a). The event, occurrence, or development that Buyers complain of is the loss of the ability to bid on the Lost Parts. That event, occurrence, or development occurred in 2014 at the latest. As Vice Chancellor Zurn stated, "Buyers cannot identify any actionable events or occurrences after [December 31, 2015]." Op. 38, n.166. Consequently, Sellers did not breach Section 3.7(a).

D. Sellers Did Not Breach Section 3.28 Because Sellers' Representations and Warranties in the APA Are Not False or Misleading.

1. Question Presented

Did the Court of Chancery err in finding that Sellers did not breach Section 3.28 of the APA?

2. Scope of Review

"A decision granting summary judgment is subject to de novo review." *Nw. Nat'l Ins. Co.*, 672 A.2d at 43. "The interpretation of contract language is reviewed by [the Supreme Court] de novo." *Sonitrol Holding Co.*, 607 A.2d at 1181. "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 at 252 (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*, 616 A.2d at 1195.

3. Merits of Argument

Section 3.28 of the APA 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.

The only argument Buyers make regarding Section 3.28 is that if this Court reverses Vice Chancellor Zurn's order with respect to Sections 3.25(a), 3.25(d), or 3.7(a), then this Court should also reverse the finding the Sellers did not breach Section 3.28. Appellants' Brief, 41. But Sellers did not breach Sections 3.25(a), 3.25(d), and 3.7 and therefore nothing in those Sections of the APA is false or misleading, and Sellers did not breach Section 3.28.

E. Buyers Unnecessarily Required the Institution of this Litigation and Should Bear Sellers' Attorneys' Fees.

1. Question Presented

Did the Court of Chancery err in finding that Sellers are not entitled to an award of attorneys' fees? B30-B34

2. Scope of Review

This Court "reviews a denial of an application for attorneys' fees and costs for abuse of discretion, but we review de novo the legal principles applied in reaching that decision." *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 417 (Del. 2010) (citing *Goodrich v. E.F.Hutton Group, Inc.*, 681 A.2d 1039, 1044 (Del. 1996)). The Chancery Court abuses its discretion "when it exceeds the bounds of reason in light of the circumstances or when it ignores the rules of law or practices in a manner that creates injustice." *Schultz v. Ginsburg*, 965 A.2d 661, 667 (Del. 2009) (citing *In re MCA, Inc., S'holder Litig.*, 785 A.2d 625, 633-634 (Del. 2001)).

3. Merits of Argument

"Although Delaware follows the American Rule, which requires parties in litigation to bear their own fees and costs regardless of the outcome of their case in most circumstances, fee-shifting awards may be merited in exceptional cases in order to deter abusive litigation, avoid harassment, and protect the integrity of the judicial process." *Fairthorne Maintenance Corp. v. Ramunno*, 2007 WL 2214318, at *9 (Del. Ch. 2007). Fee-shifting is warranted when a defending party

"unnecessarily required the institution of litigation" or "knowingly asserted frivolous claims." *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 546 (Del. 1998). A party who litigates in bad faith and who makes "'the procession of the case unduly complicated and expensive'" can be required to pay the opposing party's reasonable attorneys' fees. *Fairthorne Maintenance Corp.*, 2007 WL 2214318, at *9 (quoting *ATR-Kim Eng Financial Corp. v. Araneta*, 2006 WL 3783520, at *23 (Del. Ch. 2006), *aff'd*, 930 A.2D 928 (Del. 2007)). "The party invoking the bad faith exception 'bears the stringent evidentiary burden of producing "clear evidence" of bad-faith conduct' by the opposing party." *Marra v. Brandywine Sch. Dist.*, 2012 WL 4847083, at *4 (Del. Ch. 2012) (quoting *Beck v. Atl. Coast PLC*, 868 A.2d 840, 850-51 (Del. Ch.2005)).

Vice Chancellor Zurn found that Sellers "failed to meet their stringent burden of producing clear evidence of Buyers' bad faith conduct" in requiring this litigation. Vice Chancellor Zurn found that the Buyers "earnestly believ[ed] the representations in the APA were false." Op. 48. But Buyers' conduct throughout this litigation belies that finding.

Buyers unnecessarily required the institution of this litigation by improperly and without justification refusing to release the escrowed funds. Vice Chancellor Zurn found that "Sellers have offered no evidence that Buyers relied on their preferred interpretations of the APA in bad faith." Op. 48. But all parties agree that

the APA is unambiguous. Vice Chancellor Zurn, following clear Delaware court precedent, interpreted the APA by looking at the plain meaning of the words the parties used and agreed with Sellers position all along that Sellers did not breach any representations and warranties were breached.

Buyers "preferred interpretations," on the other hand, were asserted in bad faith. Buyers cobbled together an argument based on (1) an interpretation of Section 3.25(d) that is so absurdly broad it would seem to give Buyers an unlimited ability to deny Sellers the escrowed funds that rightfully belong to Sellers, (2) an interpretation of Sections 3.25(a) and Section 3.7(a) that unabashedly ignores the clear temporal limits contains in those representations, and (3) a catchall representation (Section 3.28) that Buyers allege Sellers breached merely because one of the other three identified representations was breached.

Buyers' bad faith is further exemplified by the constantly shifting theories Buyers have attempted to rely on throughout this litigation. Initially, in the Counterclaim, Buyers professed they were entitled to recover because they relied on certain financial projections. B73-B75. This argument was frivolous from the start because this is a breach of contract action, and the financial projections Buyers based their counterclaim on are not part of the fully-integrated APA and are not even mentioned in the APA. A70-A227.

Buyers continued to profess reliance on the projections in their summary judgment briefing. In their Opening Brief, Buyers indicated that Taylor thought ZTM "failed to adhere to their contractual representations." A66. As support for that assertion, Buyers cited Taylor's testimony that "[T]he source document[s] [for Liberty Hall's financial model were] the spreadsheets and forecasts that were provided by ZTM, which we found out later were inaccurate." A66-67. After Sellers pointed out that this reliance argument was fatally flawed, Buyers quickly retreated, claiming in their Answering Brief in response to Sellers' Motion for Summary Judgment that the projections "are not the source of the breaches." A778. Instead, Buyers shifted their focus to the word "issues" in Section 3.25(d).

Buyers knew that the plain meaning of the word "issues" as used in the APA would favor Sellers, and so they attempted to give the word a far-reaching and overly elastic definition. In Vice Chancellor Zurn's words, Buyers "eschew the plain meaning of 'issues' and argue for a broader reading." Op. 30. To do so, Buyers ignore the context in which the word is used in Section 3.25(d), as well as other provisions in the APA that make the meaning of Section 3.25(d) clear.

Now, on appeal, Buyers have once again abruptly changed their position. They argue that the distinction between "with" and "with respect to" was a "key phrase" in Section 3.25(d). Appellants' Brief, 3. As noted previously, Buyers argument is hopelessly in conflict with their Counterclaim and briefs filed below.

Buyers cannot argue there is a vital difference between these two phrases when they used them interchangeably throughout this case. This is clear evidence of bad faith.

Finally, and perhaps most egregiously, Buyers continue to assert on appeal that Sellers violated Sections 3.25(a) and 3.7(a). There is no question that these provisions do not contain any representations or warranties about events or occurrences *before* December 31, 2015. Once the parties learned in discovery that the Lost Parts were awarded to other suppliers in 2013 and 2014, any reasonable litigant would have abandoned these claims.

Instead, Buyers have pressed on, asserting that the awarding of the Lost Parts, which was completed years before the APA was signed, was somehow a "live issue" in 2016. Appellants' Brief, 39. This argument is nonsensical. Buyers' refusal to accept or acknowledge that the facts learned in discovery simply do not support their position is both obstinate and inherently unreasonable.

In *Martin v. Med-Dev Corp.*, 2015 WL 6472597, at *2 (Del. Ch. Oct. 27, 2015), the plaintiff initially brought a cause of action asserting that a particular member of a Board of Directors had been appointed in violation of the company's bylaws. The claim was "so meritless that it bordered on frivolous." *Id.* at *20. And although the plaintiff eventually abandoned it, he did not do so until shortly before trial. *Id.* Despite this abandonment, the court found that the plaintiff's "persistent

pursuit" of the meritless claim constituted bad faith and warranted a partial award of attorneys' fees to the defendants. *Id.* at *20-21.

The court acknowledged that "the standard for shifting fees pursuant to the bad faith exception to the American Rule is a stringent one," but nevertheless found that the plaintiff's "dogged pursuit of the borderline frivolous or near frivolous" claim met the standard "because it utterly lacked any legal or factual bases." *Id.* at *21. Buyers' comparable dogged pursuit of claims that plainly lack legal and factual merit in this case is clear evidence of bad faith. As a result, this Court should reverse the Court of Chancery's decision regarding attorneys' fees. Buyers should bear Sellers' attorneys' fees in this action.

V. CONCLUSION

The Court of Chancery rightly concluded that Sellers did not breach any provisions of the APA. The order, in that respect, should be affirmed. However, as discussed above, Buyers have pursued claim that plainly lack any legal or factual merit. For that reason, the Court should require Buyers to bear Sellers' attorneys' fees in this action.

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