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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,	)	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' REPLY BRIEF ON APPEAL AND CROSS-APPELLEES' ANSWERING BRIEF ON CROSS-APPEAL

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INTRODUCTION

This appeal raises a critical question—whether the specific allocation of contractual risk that sophisticated parties represented by sophisticated counsel agreed to in a written contract will be enforced by, or re-allocated by, a Delaware court. The Court of Chancery erred by determining that a broad representation and warranty made by the Sellers in the APA, stating that there were no "issues with respect to [Boeing]" without any qualification as to whether the Sellers were specifically aware of any such issues, did not give rise to an indemnification claim for the Buyers despite the post-closing discovery of such an issue with respect to Boeing—the loss of a multi-million dollar opportunity to bid on and renew the manufacture of various airplane parts.[1]

Yet, despite the clear allocation in the contract of such a risk to the Sellers, the Court of Chancery found that Sellers were not responsible, making three reversible errors. First, the Court of Chancery failed to give any effect to critical language in Section 3.25(d). Specifically, the Court of Chancery found that the plain contract language "issues with respect to" Boeing actually meant "issues with Boeing," ignoring the parties' use of "with" and "with respect to" distinctly and with different meanings throughout the APA. Second, the Court of Chancery

[1] All defined terms herein shall have the same definition as in Appellants' Opening Brief ("App. Br.").

effectively added a knowledge qualifier to Section 3.25(d) even though the parties, represented by experienced corporate counsel, did not add the contractually-defined knowledge qualifier to the section (but did add the knowledge qualifier in 38 other places throughout the APA, including in other subsections in Article III). Finally, the Court of Chancery erred by defining the term "issues" in Section 3.25(d) in a manner that rendered it both superfluous within the section, and inconsistent with its use throughout the APA. Absent reversal, the words that parties choose in contracts under Delaware law to allocate risks will no longer provide the certainty and clear guidance that the pro-contractarian jurisprudence of this Court has established.

In the APA, Buyers and Sellers negotiated four representations and warranties made by Sellers: namely, in relevant part, (1) that Sellers "disclosed 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," §3.25(d) (emphasis added); (2) that "[s]ince the Balance Sheet Date, no customer, distributor, or supplier has terminated or materially reduced or altered its business relationship with Seller," §3.25(a); (3) that "[s]ince the Balance Sheet Date . . . there has not been any . . . Material Adverse Effect," §3.7(a); and (4) that "[n]o representation or warranty made by the Seller . . . contains any untrue

statement of material fact, or omits to state a material fact necessary to make the statement . . . not misleading," §3.28.

After closing, Buyers discovered that an opportunity to re-bid on the Lost Parts constituting 10% of projected sales no longer—and never even—existed. Notably, this discovery was the result of an investigation that Sellers could have, but admittedly did not, undertake prior to closing. As the Court of Chancery noted: "[T]he buyers walked into a situation that was worse than they expected." Op. 3. Accordingly, Buyers turned to their negotiated contractual protections. Unfortunately, when interpreting these protections, the Court of Chancery disregarded long-standing canons of contract interpretation and re-allocated the risk of Sellers' misrepresentations onto Buyers.

In response, Sellers' argument is simple: ignore the plain language when it shows the Court of Chancery's errors. Ignore the fact that the plain language in Section 3.25(d) addresses "issues *with respect to*" Boeing (not, as the Court of Chancery improperly framed it, "issues with Boeing"). Ignore the absence of the defined knowledge qualifier. Ignore the instances in which the Court of Chancery's definition of "issues" contradicts other uses of "issues" in the APA. And ignore the fact that the Court of Chancery's decision renders superfluous the term "issues" in the phrase "disputes, complaint or issues" by defining it as a dispute.

Courts should not pick and choose which unambiguous contract language should be considered when interpreting a contract. All of the plain language has meaning, and, absent ambiguity, to hold otherwise invites a court into the position of a negotiating table backstop where parties can unilaterally ignore contractual terms they no longer like after the contract has been signed. Long-standing canons of contract interpretation, including respect for risk allocation decisions made by sophisticated parties, should not be ignored in favor of judicial re-writing of contractual protections. Accordingly, this Court should reverse the Court of Chancery's decision to grant summary judgment in favor of Sellers on Counterclaim Count I and grant Buyers' motion for summary judgment on Counterclaim Count I.

Further, despite acknowledging the "extraordinary circumstances" necessary to shift attorneys' fees when allegations of bad faith are made, Sellers offer this Court nothing to support the conclusion that the Court of Chancery abused its discretion and acted arbitrarily and capriciously in denying Sellers' request for attorneys' fees. This Court need look no further than Sellers' own cited cases to distinguish between the egregious conduct identified by Delaware courts that warrant fee shifting and the conduct in this case—a good faith legal dispute between two sophisticated parties concerning the interpretation of representations

and warranties in a contract. Accordingly, this Court should affirm the decision of the Court of Chancery denying Sellers' request for attorneys' fees.

SUMMARY OF ARGUMENT ON CROSS-APPEAL[2]

2. Denied. The Court of Chancery did not err by holding that Sellers are not entitled to attorneys' fees. In order to reverse the Court of Chancery's decision concerning attorneys' fees, this Court must find that the lower court abused its discretion by acting arbitrarily and capriciously in its decision. Sellers offer no evidence to support such a claim. Moreover, Sellers fail to address why, if Buyers' litigation was so devoid of merit, Sellers did not move to dismiss the complaint and why the Court of Chancery denied Sellers' summary judgment motion as to *all* of its claims against Buyers. Sellers have failed to meet the stringent evidentiary burden of clear and convincing evidence to depart from the American Rule.

[2] This Summary addresses only Appellees/Cross-Appellants' arguments in support of their Cross-Appeal.

ARGUMENT

I. THE COURT OF CHANCERY REALLOCATED THE RISKS NEGOTIATED BY THE PARTIES.

A. By Ignoring the Plain Language of Section 3.25(d)—"With Respect To"—the Court of Chancery Disregarded Well-Settled Canons of Contract Interpretation.

Sellers' argument in support of the Court of Chancery's clear error in disregarding the contractual term "with respect to" boils down to a simple, yet disturbing, suggestion for this Court—ignore it. *See* Appellees' Answering Brief on Appeal and Cross-Appellants' Opening Brief on Cross-Appeal ("Ans. Br.") 29. But the interpretation of the contractual term, "with respect to," is not, as Sellers want this Court to believe, "simply irrelevant." *See id.* It should go without saying that the plain language chosen by these sophisticated parties in a contract is not irrelevant. *See HC Cos., Inc. v. Myers Indus., Inc.*, 2017 WL 6016573, at *5 (Del. Ch. Dec. 5, 2017) ("The presumption that the parties are bound by the language of the agreement they negotiated applies with even greater force when the parties are sophisticated entities that have engaged in arms-length negotiations.") (citation omitted); *see, e.g.*, *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997); *Nw. Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996). "[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) (citation omitted). Indeed, it is well-settled

Delaware law that "[t]o determine what contractual parties intended, Delaware courts start with the text." *Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019).[3]

The text is clear.[4] Section 3.25(d) states:

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[3] Sellers' half-hearted attempt to argue that Buyers waived this argument—without citing any case law and while recognizing that this Court reviews matters *de novo*—should be dismissed. Buyers' counterclaim pleads the "with respect to" language. *See, e.g.*, B38, B76, B91. Moreover, the distinction was presented below during oral argument. Oral Argument Tr. A967; *see, e.g.*, *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 383 (Del. 2014). Sellers also fail to recognize that Buyers' focus on the Court of Chancery's failure to interpret the words of the provision—"with respect to"—could not occur until after the Court of Chancery's decision.

Further, although Sellers point out that Buyers used the term "with" in a few summary sentences that did not quote the relevant section, Sellers failed to identify any instance in which Buyers presented a direct quote of the plain language that altered the quote so as to change "with respect to" to "with." Sellers appear to ask this Court to adopt a new rule that the plain language of a contract should be overridden if, on occasion, a party summarizes the language without quoting it *verbatim* (despite always quoting *verbatim* when actually citing the relevant language). This argument has no support in case law (and Sellers cite none).

[4] Sellers' apparent distinction between the shared intent of contracting parties and the plain language agreed to by the parties is not supported by the case they cite. *See Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, 2011 WL 1348438, at *8 (Del. Ch. Apr. 8, 2011). Although Sellers accurately quote *Meso Scale* for the proposition that courts strive to determine the shared intent of contracting parties, the very next sentence in the case confirms that "[a]s part of that review, the court interprets the words 'using their common or ordinary meaning, unless the contract clearly shows that the parties' intent was otherwise.'" *Id.* Buyers agree that both "with" and "with respect to" should be interpreted using their—distinct—common or ordinary meanings.

> 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 (emphasis added).

As discussed in Buyers' Opening Brief, "with" and "with respect to" have different meanings. App. Br. 19–26. "With respect to" is defined in dictionaries as "with reference to" or "in relation to." App. Br. 21–24. Synonyms of "with respect to" include "having to do with," "about," or "concerning." *See id.* Synonyms of "with respect to," however, do not include "with" (and, vice versa). *See id.*

However, "with" is defined, among multiple definitions, as "in opposition to: Against // had a fight *with* his brother." App. Br. 21–22. As discussed in the Opening Brief, this is the relevant definition in Merriam-Webster because it most closely resembles the definition created by the Court of Chancery: "issues with Boeing." *See id.* 21 n.4. Substituting the contractual term "with respect to" into this sample usage of "with" underscores the distinct meanings of the distinct terms—"fight *with respect to* his brother." *See id.* A fight *with* one's brother is different than a fight *with respect to* (that is, "concerning" or "about") one's brother.

Moreover, the Court of Chancery has recognized the need to analyze—not disregard—the meaning of "with respect to" in the provision in which the parties

included it. *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) ("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."). So too, here. Ignoring "with respect to" robs Section 3.25(d) of its intended meaning—an issue about or concerning Boeing. Tellingly, Sellers ignore *USA Cable*.

Sellers' only attempt to address the distinction between "with" and "with respect to," was to ask this Court to ignore it and instead focus on the Court of Chancery's erroneous definition of the term "issues." Ans. Br. 29–30. But the term "issues" does not exist alone in Section 3.25(d), and should not be defined in a vacuum, as discussed in more detail below.[5] *See GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489, at *4 (Del. Ch. June 21, 2012) ("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.").

[5] Notably, the Court of Chancery made clear the importance of defining the term "issues" as part of the full section in which it was placed—not within a vacuum. Although rejecting an argument to interpret the term "material issues" as a standalone term, the Court of Chancery explained: "I focus on the meaning of 'issue' alone, recognizing that it is modified by the term 'material,' which has its own importance." Op. 28 n.133. Just as "material" is important to an understanding of the term "issues," so too is "with respect to" important to an understanding of the entire provision.

If the parties had agreed to use the term "with," rather than "with respect to," they would have done so. This is true because they did so in the section immediately preceding Section 3.25(d) in which Sellers represented:

> [S]ince the Balance Sheet Date, neither Seller nor Seller Subsidiary has had any *dispute with any supplier or customer* (whether written or oral) regarding a matter having value in excess of $50,000.

A109 §3.25(c) (emphasis added). Faced with the unenviable task of reconciling these clear language choices made by the parties, Sellers simply repeat their theme: ignore any contractual language that highlights the errors in the Court of Chancery's analysis.[6] *See* Ans. Br. 26–29.

It is undisputed that "with respect to" is the plain language agreed to by the parties in Section 3.25(d). By ignoring this language and opting instead to define the term "issues" outside of the context in which it was written, the Court of Chancery re-wrote the contract in a manner that does not—and cannot—reconcile

[6] This curious argument leaves unanswered what is to be done with the numerous uses of "with respect to" throughout the APA. *See* App. Br. 20 n.3. Pursuant to Sellers' theory, the interchangeability of "with" and "with respect to" should present no interpretive problems. Yet it does. For example, Section 3.9(j) states: "Seller has made available to Buyer accurate and complete copies of all income Tax Returns and other material Tax Returns filed by or with respect to Seller…." A91. Clearly, "with respect to" in this section means Tax Returns "in relation to" the Seller. But under Sellers' theory, this means that Sellers only had to make available Tax Returns or other material filed "with" Sellers. This is facially incoherent—Tax Returns are filed with state and federal agencies. Scratching the surface of this untenable interchangeability theory only further reveals the error of it.

the parties' language choices.[7] In so doing, the Court of Chancery changed the risk allocation decisions made by the parties.

This Court should reaffirm the primacy of the plain language used by the parties in a contract under Delaware law. *See, e.g.*, *Sunline Commercial Carriers*, 206 A.3d at 846; *Eagle Indus.*, 702 A.2d at 1232; *Nw. Nat'l Ins.*, 672 A.2d at 43.

B. The Parties Explicitly Contracted for a Knowledge-Based Allocation of Risk by Utilizing a Defined Term—Knowledge of Seller—To Allocate Known and Unknown Risks.

In their brief, Sellers made an important concession that highlights the Court of Chancery's error in imputing a knowledge qualifier into Section 3.25(d). While kicking up dust about a fraud claim never pled, Sellers implore this Court to focus on language that was ***not*** included in the APA: "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." Ans. Br. 22 (first emphasis added). Buyers wholeheartedly agree. *See, e.g.*, App. Br. 27 ("Although the Court of Chancery acknowledged the risk allocation consequences of *including*

[7] The Court of Chancery incorrectly defined "issues" as part of a non-contractual phrase created by the Court of Chancery—"issues *with* Boeing" (rather than the contractual phrase agreed to by the parties "issues with respect to" Boeing)—and therefore subsumed "with" into the definition of "issues" before it set out to define "issues." It is circular to argue that "with respect to"—the plain language of the contract—is not relevant because the definition of the term "issues" already subsumed the non-contractual term "with."

the qualifier, it erred by disregarding the risk allocation consequences of *excluding* the qualifier.").

Buyers and Sellers, as is often the case in acquisition agreements, agreed to use a knowledge qualifier—"Knowledge of Seller"—to allocate the risks of unknown occurrences. *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."); LOU R. KLING, EILEEN T. NUGENT & BRANDON A. VAN DYKE, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES, AND 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.").

When the parties agreed to use the "Knowledge of Seller" qualifier in any of the Sellers' representations and warranties, the risk of unknown occurrences related to that representation and warranty shifted to Buyers, unless Sellers had actual or constructive knowledge at the relevant time. When the parties agreed to not use the "Knowledge of Seller" qualifier, the risk of unknown occurrences with respect to the Sellers' representations and warranties remained with the Sellers. This made perfect sense because Sellers were in the better position to make such representations and warranties because they owned the business and, therefore, had

better access to relevant information at the time. The Court of Chancery agreed with this understanding of the role of the knowledge qualifier. *See* 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*." (emphasis added)); *id.* 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*." (emphasis added)).

However, despite agreeing with this approach, the Court of Chancery imputed a knowledge qualifier into the term "issues" (based on its interpretation of the term within a judicially-created phrase—"issues with Boeing") thereby disregarding the contractual intent of the parties as evidenced by the plain language of the representation and warranty. *See i/m^x Info. Mgmt. Sols., Inc. v. MultiPlan, Inc.*, 2013 WL 3322293, at *5–6 (Del. Ch. June 28, 2013).

The Court of Chancery's implicit addition of a knowledge qualifier also directly contradicts Sellers' concession in a Request for Admission that their "indemnification obligations under 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*," A568–69 ¶119 (emphasis added)—an admission noticeably unaddressed in Sellers' Answering Brief, and one that highlights the Court of Chancery's error.

Interestingly, while trying to minimize the fact that the parties agreed not to include Knowledge of Seller, Sellers made another concession in their brief that underscores the Court of Chancery's error: "It is all the language in the APA that controls whether or to whom that risk was expressly allocated." Ans. Br. 36. Once again, we agree. The parties' intent with respect to allocating knowledge-based risks is supported by a reading of the entire APA. The parties agreed to utilize the knowledge qualifier 38 times throughout the APA—and not to use it in Sections 3.25(d), 3.25(a), 3.7(a), and 3.28. Further, the allocation of knowledge based risks comports with the role of knowledge in the APA's indemnification provisions. *See* A129–31 §§8.2, 8.3.[8]

If the Court of Chancery's decision is affirmed, it not only re-writes the risks allocated in Section 3.25(d), but also the indemnification agreed to by the Sellers. The parties' agreed approach about how to allocate the risk of the unknown in various representations and warranties will be turned upside down if a court is free to change the agreed-upon risk allocation by adding a knowledge qualifier not included by the parties (38 times)—especially where the contract clearly provided a

[8] As discussed in Buyers' Opening Brief, the parties agreed that Buyers' indemnification rights were not impaired if Buyers obtained actual or constructive knowledge prior to signing of a breach of their representations and warranties. *See* App. Br. 28; A131 §8.3(g). This customary approach precludes a seller from seeking to upend the agreed-upon risk allocation.

mechanism for the parties to shift the risk of the unknown onto the Buyers. *See Nw. Nat'l*, 672 A.2d at 44 ("We find [the] interpretation to be untenable, because it adds a limitation not found in the contract language.").

Once again, rather than address the substance of Buyers' argument, Sellers ask this Court simply to deem "irrelevant" the presence or absence of an important Defined Term. *See* Ans. Br. 36 ("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."). But such an approach is contrary to fundamental principles of Delaware contract law.

In sum, by reading a knowledge qualifier into Section 3.25(d), despite the parties' decision *not* to include the defined knowledge qualifier, the Court of Chancery disregarded the parties' agreed-upon allocation of risk, and ignored the Sellers' express concession that it bore the risk of unknown matters under Section 3.25(d). This Court should not reallocate those risks back onto the Buyers and thereby deny Buyers the recourse available to them under the APA. *See Nw. Nat'l*, 672 A.2d at 44; *i/m*^{x} *Info. Mgmt. Sols.*, 2013 WL 3322293, at *5–6; *GRT, Inc.*, 2012 WL 2356489, at *7.

C. The Court of Chancery's Definition of "Issues" Contradicts its Other Uses in the APA and Renders it Meaningless within Section 3.25(d).

To bolster the Court of Chancery's error in defining "issues" both with an implied knowledge qualifier and as a redundancy of (or equivalent to) "complaints" and "disputes," Sellers broadly challenge the very purpose of representations and warranties in contracts under Delaware law. *See* Ans. Br. 29–30 ("These statements wrongly suggest that the APA expressly allocated the risk of every conceivable type of unknown occurrence or loss."). Delaware law is clear that parties are free to allocate risks as they see fit—and that courts will not rewrite those decisions. *See Cobalt Operating, LLC v. James Crystal Enters., LLC*, 2007 WL 2142926, at *28 (Del. Ch. July 20, 2007), *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); 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §31.5 (4th ed. Supp. 2019).

Despite Sellers' parade-of-horribles response, Buyers do not argue that a common understanding of the term "issues" in Section 3.25(d) covers "every conceivable type of unknown occurrence or loss." *See* Ans. Br. 30. Such hyperbole only underscores Sellers' detachment from the relevant text. It is worth, once again, returning to the text. Section 3.25(d) covers exactly what it says it covers: "*material*…issues with respect to any customers or suppliers." A110

(emphasis added). The plain language of Section 3.25(d) limits Sellers' representations to "material" items; the inclusion of "material" renders moot Sellers' argument that the relevant representations, under Buyers' read, would leave them responsible for every conceivable kind of loss.

In any event, what Sellers again fail to address in their hyperbole is that it was within *their* power at the negotiating table to structure *their* representations and warranties in a manner that provided them with a risk level that they were willing to tolerate. Sellers' purported fear of the unknown could have easily been addressed by one of any number of actions they took in other subsections of Article III: for example, to name only a few, adding "Knowledge of Seller" (as in Section 3.25(e)), limiting the section to "Material Customers" and "Material Suppliers" (as in Section. 3.25(b)), limiting the section to only "disputes" (as in Section 3.25(c)), and/or utilizing "with" instead of "with respect to" (as in Section 3.25(c)). Sellers consciously made the decision to bear the risks of the unknown in connection with Section 3.25(d), and now seek this Court's affirmation of the judicial reallocation of these risks to the detriment of Buyers.

Sellers do raise one argument that they never raised before in either briefing or oral argument—that Section 3.25(a) and Section 3.25(d) are in conflict and require this Court to interpret specific provisions to trump general provisions. *See* Ans. Br. 34–35. Pursuant to Supreme Court Rule 8, this Court should decline to

review this argument because it was not fairly presented to the Court of Chancery.[9] Del. Sup. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.").

However, even if this Court were to consider this argument, Sellers still miss the mark. Focusing on the plain language of the APA, as courts must do, it is clear that Section 3.25(a) and Section 3.25(d) are not in conflict. Section 3.25(a) is backward looking, but Section 3.25(d) is forward looking.[10]

The first sentence of Section 3.25(a) references a Disclosure Schedule identifying ZTM's top 10 customers and suppliers for the twelve-month period ending December 31, 2015—the Balance Sheet Date. The second sentence of 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

[9] Sellers' position that these sections are in conflict contradicts their representation to the Court of Chancery during oral argument that Section 3.25(d) "is something entirely different" from Section 3.25(a)—not something in conflict with Section 3.25(a). *See* A950.

[10] In creating this purported conflict, Sellers' new argument renders all of Section 3.25(d) meaningless. The "issue[]" is the loss of the opportunity to re-bid on the Lost Parts (that resulted in a loss of business going forward), not the loss of revenue from the Lost Parts through 2016 under the existing contract (which Buyers are not arguing). Sellers apparently now argue that any "issue" that could result in the loss of business, past, present, or future, must fall within 3.25(a)—which strains 3.25(a) beyond its plain language.

business relationship *with* . . . [Sellers], or *threatened that it intends* to cancel, terminate, or otherwise materially reduce or alter its business relationship *with* [Sellers]."[11] A109 (emphasis added).

The use of the past tense verbs ("terminated," "altered," "reduced," and "threatened") explains the relevance of this section—that is, the unqualified awareness of the company (through investigation or otherwise) that such actions were undertaken by the customer, distributor, or supplier. However, without a knowledge qualifier in the APA, Sellers bore the risk of failing to investigate whether any such actions had been taken.

In contrast, Section 3.25(d), written in the present tense, puts the onus on Sellers to disclose "disputes, complaints, and issues *with respect to* any customers or suppliers and the manner in which Seller *proposes* to resolve such disputes, complaints or issues." A110 (emphasis added). Requiring a proposed resolution underscores the forward-looking nature of Section 3.25(d), versus the backward-looking nature of Section 3.25(a).[12] These sections complement each other—they

[11] As discussed in the Buyers' Opening Brief, Section 3.25(d) is not a standard representation in a merger agreement. *See* App. Br. 35 n.8. It is of note, however, that the form merger agreement referenced in the Buyers' Opening Brief, does include a standard representation mirroring Section 3.25(a) of the APA. *See id.*

[12] The necessity of proposing a resolution underscores the fact that an "issue with respect to" a customer may not yet have been raised with that customer. No "propose[d] resolution" was required in Section 3.25(a) because the past tense

do not swallow each other—and are well-tailored to an industry in which the ongoing process of re-bidding on parts is the industry standard.[13]

1. The Definition of "Issues" Utilized by the Court of Chancery Contradicts the Use of the Term in Other Sections of the APA.

"[C]ourts should not interpret a contract so as to render any of its language meaningless or illusory." *BLGH Hldgs. LLC v. enXco LFG Hldg., LLC,* 41 A.3d 410, 415 n.9 (Del. 2012) (citation omitted). As discussed in Buyers' Opening Brief, the error of defining "issues" to include an implied knowledge qualifier is apparent when the term is considered as part of its other uses throughout the APA—"issues in dispute" and "disputed issues."[14]

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of the verbs clarified that the relationship had already been terminated, altered, or reduced. For example, pursuant to Section 3.25(a), Sellers would have been required to inform Buyers of a terminated contract, a significant raw materials shortage impacting a supplier, or the decision of a customer not to offer the opportunity to rebid for parts consisting of 10% of projected sales.

[13] Sellers' citation to *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005), is inapposite. Section 3.25(a) and Section 3.25(d) are not in conflict, and therefore do not require an analysis into specific versus general language. Furthermore, as noted, Sellers' attempts to raise this argument for the first time on appeal should be rejected. *See* Del. Sup. Ct. R. 8; *Cassidy v. Cassidy*, 689 A.2d 1182, 1184 (Del. 1997).

[14] Sellers' statement that Buyers "admit" that "issues" means "a point in dispute between two or more parties" because Buyers stated that they "do not quarrel" with the Court of Chancery's citation to Merriam-Webster and Black's Law Dictionary is off the mark. Buyers "do not quarrel" with Merriam-Webster or Black's Law Dictionary. Buyers do, however, quarrel with the implications of the Court of Chancery's definition of "issues" that renders it meaningless within Section 3.25(d) and contrary to its other uses throughout the APA.

In response, Sellers once again ask this Court to ignore the differences: "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." *See* Ans. Br. 32–33 (emphasis added). But Section 3.25(d) is "worded differently" because it means something different—and different language agreed to by parties contracting in Delaware should not be ignored by courts. *See, e.g., i/m^x Info. Mmgt. Sols.*, 2013 WL 3322293, at *5–6 ("[T]here is a presumption that the parties intended every part of the agreement to mean something.").

2. The Definition of "Issues" Utilized by the Court of Chancery Violates Canons of Contract Interpretation by Rendering the Term Superfluous in Section 3.25(d).

Pursuant to the Court of Chancery's decision, the outcome of this litigation would be the same whether or not the parties chose to include "issues" in Section 3.25(d). Sellers offer no coherent response to the fact that the term "issues" has been rendered meaningless by the Court of Chancery. Instead, Sellers once again turn to hyperbole to try to re-define Buyers' argument. Buyers do not argue that "a term is entirely devoid of meaning if it has a definition that is similar to other words that surround it in a contract." Ans. Br. 33. The problem is not *similarity*; the problem is *redundancy*.

Sellers argue that the Court of Chancery held that the three terms were different because the Court of Chancery cited the different dictionary definitions of the terms. *See* Ans. Br. 33. Buyers agree that the terms should be—and are—defined differently. Buyers do not agree, however, that the Court of Chancery's analysis maintained this distinction—and in failing to do so it ran afoul of well-settled Delaware law. *See, e.g.*, *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195–96 (Del. 1992) ("When the language of an insurance contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented." (citation and alterations omitted)).[15]

[15] Sellers' once again appear to argue that "shared intent" is somehow distinct from the plain language that the parties agreed to—and, once again, cite cases that do not contradict Buyers' arguments. *See* Ans. Br. 30–31; *Phillips Home Builders, Inc. v. Travelers Ins. Co.*, 700 A.2d 127, 129 (Del. 1997); *Hartley v. Consol. Glass Hldgs., Inc.*, 2015 WL 5774751, at *8 (Del. Ch. Sept. 30, 2015), *aff'd*, 137 A.3d 122 (Del. 2016) (TABLE); *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008). Sellers' citation to *Hartley* illustrates this point. In *Hartley*, the sentence directly following the sentence quoted by Sellers states: "To [determine shared intent], the court first looks to the contract's plain text." 2015 WL 5774751, at *8. Buyers agree. Similarly, *Sassano* states: "Because Delaware adheres to the objective theory of contract interpretation, the court looks to the most objective indicia of that [shared] intent: the words found in the written instrument." 948 A.2d at 462 (footnote omitted). Furthermore, both *Hartley* and *Phillips Home Builders*, are distinguishable because the courts held that the contract language was

Further, as discussed in Buyers' Opening Brief, Sellers' reliance on the phrase "the manner in which Seller proposes to resolve such disputes, complaints or issues" to define "issues" is misplaced. A110; *see* App. Br. 37; Ans. Br. 31–34. Sellers argue that an "issue" can only exist when it is capable of resolution—and because the Lost Parts were already awarded to other customers, it was incapable of resolution. First, this argument simply ignores Sellers' own 2015 conduct in which they identified an issue and a resolution. *See* App. Br. 36–38. Second, this argument merely rewards Sellers for their ignorance, despite the fact that they represented, without a knowledge qualifier, that no material issues existed. *See id.* They cannot now say that the issue was incapable of resolution (and therefore not an "issue") when they never even tried to resolve it because they never investigated it, despite bearing the risk of its undisclosed existence.[16]

Ultimately, Sellers offer no definition of the term "issues" that recognizances the parties' decision to include it as a separate term.[17] It is Buyers

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ambiguous and required extrinsic evidence—which neither Buyers or Sellers are arguing here. *See* 700 A.2d at 130; 2015 WL 5774751, at *10.

[16] For example, if, at the time, Sellers identified the issue in accordance with their contractual obligations, it should have been disclosed to Buyers pursuant to 3.25(d), along with the proposed resolution (perhaps, meet with Boeing, utilize the loss to leverage other bids and the like). Sellers would then have been fully informed of the risks and proceeded (with a price adjustment for instance), or not proceeded, with the deal as they saw fit.

[17] Sellers' position that "issues" is defined as a "dispute" renders the parties' usage of the term illogical. "Disputes, complaints or issues" now must be

who have offered the only definition of "issues"—based on Sellers own conduct—that provides a meaning for the term that is distinct from "complaints" and "disputes," comports with the common usage of the term as defined in dictionaries, incorporates the plain language "with respect to," and does not contradict the use of the term throughout the APA. *See* App. Br. 36–38.

In response to the relevance of their own conduct, Sellers once again seek to redefine Buyers' argument in a manner that only that magnifies the Court of Chancery's errors. *See* Ans. Br. 40. "According to Buyers," Sellers argue, "it was only the fact that Sellers *learned* the RFQs contained parts expiring in 2016 and 2017 that '*created* a 'concern' or 'unsettled matter'"—that is, an "issue." *See id.* But Sellers' investigation into, and resulting knowledge of, the issue is precisely what Section 3.25(d)—written *without a knowledge qualifier*—was intended to address.

Sellers argue that their conduct in 2015 was different because, after investigating the topic with Boeing, they learned about the loss of the opportunities to rebid on parts. But this argument only holds water if this Court accepts the Court of Chancery's decision to imply a knowledge qualifier into the term "issues"—despite the absence of Knowledge of Seller. Sellers' argument

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understood as "disputes, complaints or disputes." Clearly, the inclusion of "issues" means something different.

underscores the very purpose of the knowledge qualifier. Sellers were in the better position to investigate any "issues" with respect to their customer—as they did in 2015. Sellers could have reduced their risk by reaching out to customers to identify any issues. By representing that there were no issues, yet failing to investigate one way or the other, Sellers gambled that an issue existed but that ignorance would be their defense. The Court of Chancery rewarded their gamble. This Court should reverse that decision.

The ultimate question for this Court is not who had knowledge of the "issue"; the question is who bore the risk under the contract of not having knowledge of the issue. By the plain terms of Section 3.25(d), Sellers bore that risk.

D. The Court of Chancery Erred in its Analysis of Sections 3.7(a) and 3.25(a) by Focusing on Boeing's—not Sellers'—Conduct.

"As a default, a representation must be true at the time it [was] made to avoid a breach, regardless of who knew whether the representation was true or not." *Ivize of Milwaukee, LLC*, 2009 WL1111179, at *9. Boeing is not a party to the APA, and made no representations and warranties contained in Article III. Although Sellers attempt to shift the blame onto Boeing for awarding the parts to other suppliers prior to the Balance Sheet Date, the correct perspective through which to understand the representations and warranties in Sections 3.25(a) and 3.7(a) is that of the party making the representations and warranties—the Sellers.

Section 3.25(a) deals with terminations, material reductions, or material alterations in the business relationship with customers after the Balance Sheet Date. Section 3.7(a) deals with the existence of a contractually-defined Material Adverse Effect after the Balance Sheet Date. In response, Sellers argue that the Balance Sheet Date is dispositive. However, while attempting to distinguish their 2015 conduct to address Section 3.25(d), Sellers once again concede an important point that contradicts their argument—and the Court of Chancery's analysis—with respect to Sections 3.7(a) and Section 3.25(a).

While discussing ZTM's conduct investigating lost opportunities to rebid on parts in 2015, Sellers concede that Boeing "still had plenty of time" to provide the opportunity to bid on the Lost Parts in 2016: "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)." Ans. Br. 41. This is precisely the argument Buyers made—and Sellers rejected—before the Court of Chancery.

Apparently, Sellers have now changed their tune. The opportunity to rebid on the Lost Parts became a live issue *after* the Balance Sheet Date because Boeing, as Sellers now concede, "still had plenty of time to issue RFQs covering parts expiring in 2016 (including the Lost Parts)." *Contra* Sellers' Answering Brief in Opposition to Buyers' Motion for Summary Judgment, B410 ("Defendants nonsensically argue that 'the opportunity to re-bid for parts expiring in 2016

became a live issue as early as January 1, 2016.' The right to continue manufacturing the Lost Parts after 2016 was not a live issue in 2016 because Boeing already decided to award the Lost Parts to other suppliers in 2013 and 2014.").

Knowing that Boeing "still had plenty of time to issue the RFQs" puts to rest Sellers' ignorance defense because Sellers admittedly had the tools necessary to identify the parts available for rebid, understood that the opportunity to rebid remained outstanding, and still chose to do nothing about it. *See* A376–78 at 329:24–331:7. Sellers breached the APA because, despite (now) acknowledging the live issue, Sellers did nothing to investigate the opportunities—and yet made the affirmative decision to represent and warrant to Buyers—*without a knowledge qualifier*—that: (1) "Since the Balance Sheet Date . . . no customer has . . . materially reduced or altered its business relationship with Seller," A109, and (2) "[s]ince the Balance Sheet Date . . . there has not been any [] event, occurrence, or development that has had, or could reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect." A87. These representations were false when made.

Because the Court of Chancery incorrectly held that Sellers did not breach Sections 3.25(a) and 3.7(a) (and Section 3.25(d)), the Court of Chancery

incorrectly held that Sellers did not breach Section 3.28.[18] If this Court reverses the decision of the Court of Chancery with respect to any one of Sections 3.7(a), 3.25(a), or 3.25(d), this Court should reverse the Court of Chancery's decision with respect to Section 3.28.

E. The Reallocation of Risks by Courts in Delaware Creates Uncertainty for Contracting Parties.

This case is about the use of representations and warranties to allocate risks of the unknown between Buyers and Sellers in a purchase agreement under Delaware law. *See* App. Br. 2. It is well-settled under Delaware law that "representations and warranties . . . serve an important risk allocation function" that Delaware courts respect. *See Cobalt Operating, LLC*, 2007 WL 2142926, at *28; *see also ABRY P'rs V, L.P.*, 891 A.2d at 1061 ("[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."); 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'

[18] Section 3.28 states: "No representation or warranty made by Seller in this Agreement . . . 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.

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)). As the Court of Chancery acknowledged: "Delaware law presumes parties are bound by the language of the agreement they negotiated, especially when the parties are sophisticated entities that have engaged in arms-length negotiations." Op. 26; *see CompoSecure, L.L.C. v. CardUX, LLC*, 206 A.3d 807, 811 n.6 (Del. 2018) ("[I]t is our role to enforce the parties' bargained for allocation of risks and opportunities.").

Rather than address this core principle, however, Sellers' first argument in their brief was to obfuscate by focusing this Court's attention on *Sellers' interpretation* of what Buyers are arguing. *See* Ans. Br. 21–25. Sadly, we have been down this road before. Sellers' continued focus on the undisputed fact that Buyers are not bringing—and have never claimed to bring—a fraud claim based on reliance on the projections provided during due diligence is, and remains, perplexing. Sellers proclaim, incredulously, that Buyers' decision not to argue fraud is an "abrupt about-face," Ans. Br. 22—completely ignoring the fact that Buyers have never argued that this case was anything but a breach of contract.[19]

[19] *See* Counterclaim, B76 ("The non-disclosure by Sellers . . . meant that ZTM breached . . . [it]'s representation and warranty, in Section 3.25(d), that any

Wishing that Buyers' argument was different, however, does not make it so—nor, for that matter, does it make the argument relevant to this appeal. Sellers' puzzling choice to complain that Buyers failed to discuss the forecasts in relation to a (not alleged) fraud claim is particularly striking when considered against the Court of Chancery's decision to decline to consider the projections outside their role in the factual background—a position the Court of Chancery acknowledged was *advocated by Buyers*. *See* Op. 24 ("In keeping with Buyers' framing of the issue, I do not consider the projections beyond their significant role in the factual background."). No more ink needs to be wasted on this distraction.

Cutting through Sellers' attempts at misdirection, Buyers are asking this Court to reverse the decision of the Court of Chancery with respect to

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material issues with respect to any customers . . . had been disclosed."); Opening Summary Judgment Brief, A44–45 ("Pursuant to Article III of the APA, the Sellers made a series of representations and warranties in the APA regarding ZTM and its customers—including Boeing….These four representations and warranties were false."); Answering Summary Judgment Brief, A760 ("Sellers' defense to Buyers' breach claim is to argue that Buyers are bringing a fraud-type claim and then challenge whether Buyers could properly bring such a fraud claim. . . . Leaving aside that Sellers' arguments are mistaken as a matter of law, they are, more significantly, besides the point. Buyers are not asserting a fraud or fraudulent inducement claim."); Reply Summary Judgment Brief, A808–09 ("First, Sellers seek to re-define Buyers' claim as a species of fraud dependent upon reliance on the spreadsheets circulated by the Sellers during due diligence and then challenge reliance. But this is a breach case and reliance is not an element of Buyers' claim.").

Counterclaim Count I because it improperly re-allocated the risks agreed to by sophisticated parties in the representations and warranties of the APA.

In response, Sellers ask this Court to narrow the risk allocation function of representations and warranties under Delaware law and require buyers to use specific wording rather than broad wording. The impact of this will not only increase the size and complexity of contracts, but the cost and length of time it takes to agree to a contract. *See, e.g.*, *Cobalt Operating*, 2007 WL 2142926, 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. . . . [The 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 false."). This expanded need to cover all possible risks may now be necessary because the Court of Chancery's decision calls into question the validity of allocating knowledge-based risks through the use of a knowledge qualifier.

Sellers frame their argument such that there could be only one way for Buyers to protect themselves in these circumstances—namely, a specific

representation that guaranteed the right to re-bid on expiring parts.[20] This narrow frame, however, ignores the plain language of the APA, as discussed above, that makes clear the broad protections that Buyers negotiated for themselves with respect to Sellers' business and its customers—namely, allocating the risk of the unknown by identifying the risk ("material . . . issues"), identifying the source of the risk ("with respect to" its largest customer, Boeing), and allocating responsibility for knowledge of the risk (the risk lies with Sellers because it is their representation and the knowledge qualifier was excluded).

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[20] Sellers selectively quote testimony from Rowan Taylor concerning what he hypothetically could have asked for in a negotiation. *See* Ans. Br. 24. When asked whether a specific representation, as Sellers' counsel put it "repping and warrantying that the 2016 follow-on parts would be available to bid," B195, Mr. Taylor responded only that he "d[id]n't believe" such a representation as framed by counsel was requested. B196–97. What Sellers ignore, of course, is that no such specific representation was required based on what Buyers *did* negotiate for—broad representations and warranties, unqualified by knowledge, that there were no "material . . . issues with respect to" Boeing. Sellers' next quote from Mr. Taylor fares no better—and fails to account for the entire portion of this testimony. Sellers' counsel questioned Mr. Taylor about a true-up provision negotiated by the original buyer who backed out. B479. Counsel described the true-up as "a request that there be protection against the follow-on parts not going forward" and then asked Mr. Taylor if he "asked for that"—that is, the true-up, to which Mr. Taylor said no. Once again, the relevant question is not what specific language Mr. Taylor could have asked for in *Sellers' representations*, but what Buyers did ask for and receive from Sellers—in Sections 3.25(d), 3.25(a), 3.7(a), and 3.28. These are the provisions that Sellers breached, not hypothetical provisions posed in a deposition. Sellers' narrow argument underscores the consequences of what they are asking this Court to do—that is, render meaningless certain broad representations and warranties, unqualified by knowledge, that the parties willingly included in the APA.

What is more, the relevant representations and warranties in this case were the *Sellers'* representations about *their* business. Although Sellers now seek to limit their risk by narrowly framing the protection Buyers had to negotiate for, it was *Sellers* who had the ability to limit or expand their representations as they did throughout the twenty-eight enumerated representations and warranties they made in Article III of the APA.

Having failed to do so, Sellers' fallback position is to question the very purpose of representations and warranties under Delaware law. In so doing, Sellers ask this Court to uphold the Court of Chancery's decision to change the parties' agreement on risk allocation so as to protect Sellers in a way that they failed to protect themselves at the negotiating table. *See GRT, Inc.*, 2012 WL 2356489, at *7 ("[A] party may not come to court to enforce a contractual right that it did not obtain for itself at the negotiating table."). This Court should decline to do so.

II. THE COURT OF CHANCERY CORRECTLY HELD THAT SELLERS FAILED TO MEET THE STRINGENT BURDEN TO WARRANT SHIFTING ATTORNEYS' FEES.

A. Question Presented

Whether the Court of Chancery erred in holding that Sellers are not entitled to an award of attorneys' fees (preserved at A785–89, A983–85)?

B. Scope of Review

The standard of review concerning the award of attorneys' fees is abuse of discretion. *RBC Capital Mkts. LLC v. Jervis*, 129 A.3d 816, 876 (Del. 2015). The Court "do[es] not substitute [its] own notions of what is right for those of the trial judge if that judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness." *Id.* (citations omitted).

C. Merits of Argument

The Court of Chancery correctly held that "Sellers have failed to meet their stringent burden of producing clear evidence of Buyers' bad faith conduct" to warrant shifting of attorneys' fees.[21] Op. 48; *see Marra v. Brandywine Sch. Dist.*, 2012 WL 4847083, at *4 (Del. Ch. Sept. 28, 2012). "[W]hether a party's conduct

[21] Although not a basis for the Court of Chancery's decision denying Sellers' request for attorneys' fees, it is worth noting that in accordance with the APA, Sellers are not entitled to attorneys' fees under the contract for any of the claims they allege. A130, A146 §§8.3, 11.1. Pursuant to the APA's indemnification provisions, it is *Buyers* who have a contractually-based claim for attorneys' fees. *See id; see also* A785–86.

warrants fee shifting under the bad faith exception is a fact-intensive inquiry." Op. 47 (citation omitted). After undertaking this inquiry, the Court of Chancery found that, upon learning of the possible breach, "Buyers investigated internally and contacted both Sellers and Boeing in an effort to understand the problem with the Lost Parts. Thereafter, earnestly believing the representations in the APA were false, Buyers sent a claim notice in accordance with the APA's indemnification procedures and within the Escrow Agreement's deadline." Op. 48 (footnotes omitted). Accordingly, the Court of Chancery held that "Buyers did not 'knowingly assert[] frivolous claims' or engage in 'obstinate, deceptive or inherently unreasonable' conduct." *Id.*

In response, Sellers argue that fees should be shifted (1) because the Court of Chancery "agreed with Sellers position all along that Sellers did not breach any representations and warranties were breached [*sic*]," and (2) because Buyers' arguments were "so absurdly broad" and "unabashedly ignore[d] clear temporal limits" that they were "asserted in bad faith." *See* Ans. Br. 50. But the party seeking to invoke the exception to the American Rule that each party pays its own litigation expenses "must demonstrate by clear evidence that the party from whom fees are sought acted in subjective bad faith." *Lawson v. State*, 91 A.3d 544, 552 (Del. 2014) (internal quotation marks omitted) (citing *Auriga Cap. Corp. v. Gatz*

Props., *LLC*, 40 A.3d 839, 880 (Del. Ch. 2012), *aff'd*, 59 A.3d 1206 (Del. 2012)). Mere conclusory allegation will not suffice. *See* Op. 48.

Sellers' first complaint boils down to the fact that Buyers interpreted the APA in a manner different than Sellers—the basic premise of most, if not all, breach of contract cases. It is well-settled that Delaware courts reject shifting fees on this basis alone: "The[] facts [that] constitute the substance of [Buyer]s' claim . . . cannot provide a basis to award attorneys' fees under the general bad faith exception to the American Rule." *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 608 (Del. 2010); *see P.J. Bale, Inc. v. Pantano Real Estate, Inc.*, 2005 WL 3091885, at *2 (Del. Nov. 17, 2005) ("While [the Chancellor] noted that the claim may not have been a 'winning' one, it was nonetheless present … [and] Appellant had failed to present sufficient evidence of bad faith.") (footnote omitted). The Court of Chancery's decision fell squarely within this well-settled rule: "While I have concluded that Sellers did not breach the APA, that fact is insufficient, without more, to warrant a finding that Buyers brought their claims with bad faith." Op. 48–49.

Sellers' second complaint fares no better. As an initial matter, despite now complaining that Buyers' arguments were "absurdly" broad, "unabashedly" ignored certain information, and "frivolous from the start," Sellers never chose to bring a motion to dismiss these claims, which presumably would have ferreted out

such "frivolous" matters. *See* Ans. Br. 50. In addition, Sellers noticeably fail to mention the fact that Buyers prevailed on *all* of Sellers' affirmative claims against Buyers, including Sellers' allegation that Buyers breached the implied covenant of good faith and fair dealing. Op. 4, 41–46. Further, Sellers cite no testimony—*because they elicited none*—to support their claim that the actions taken by Buyers were done in bad faith.[22]

Once again, the Court of Chancery's well-reasoned analysis addressed this glaring deficiency: "Sellers have offered no evidence that Buyers relied on their preferred interpretations of the APA in bad faith. Indeed, Buyers' claims required the Court to interpret the APA." Op. 48. In response, Sellers only regurgitate their broad, conclusory allegations before this Court without any testimony or documentary support. *See, e.g.*, Ans. Br. 49 ("Buyers unnecessarily required the institution of this litigation by improperly and without justification refusing to release the escrowed funds." [No citation]); *id.* 51 ("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." [No citation]).

[22] Oddly, the testimony cited by Sellers in this section is a quotation from Buyers' representative Mr. Taylor about his belief that the Sellers "failed to adhere to their *contractual representations*"—the very basis of Buyers' claims. Ans. Br. 51 (emphasis added).

Furthermore, Sellers concede—as they must—that under Delaware law fee-shifting is awarded only in "exceptional cases" after satisfying a "stringent evidentiary burden of producing clear evidence of bad-faith conduct." Ans. Br. 48–49. But the Delaware case law cited by Sellers offers no support for the shifting of fees under the circumstances of this case—a commercial dispute over who bears the risks allocated in contractual representations and warranties. *See, e.g.*, *Johnson v. Arbitrium (Cayman Is.) Handels AG*, 720 A.2d 542, 545–46 (Del. 1998); *Marra*, 2012 WL 4847083, at *4; *Fairthorne Maint. Corp. v. Ramunno*, 2007 WL 2214318, at *9 (Del. Ch. July 20, 2007).

In *Fairthorne Maintenance*, for example, fees were shifted in a case in which defendants' counsel displayed an "extensive pattern of bad faith conduct" by acting "hostile and unprofessional" through an "adolescent letter writing campaign" and "threatening to inundate [plaintiff] with a deluge of nonsense claims and defenses." 2007 WL 2214318, at *1–2, *9. Similarly, in *Johnston*, the Court affirmed an award of attorneys' fees where the offending party "demonstrated a pattern of attempting to mislead the court and their adversaries," including changing sworn testimony and even "manufactur[ing]" evidence." 720 A.2d at 544. Furthermore, in *Martin v. Med-Dev Corporation*, fees were shifted by the Court of Chancery when it found that plaintiff's claims "lacked any legal or

factual bases" and relied on "provisions in the bylaws" that had "no relevance" to the allegations of the case. 2015 WL 6472597, at *21 (Del. Ch. Oct. 27, 2015).

Sellers assert no such allegations—or even remotely comparable allegations—of bad faith in this case. Instead, as a last ditch attempt to salvage their claim, Sellers return to their argument before the Court of Chancery that fees should be shifted because a purported lack of legal or factual basis can be inferred from Buyers' alleged "shift[ing]" legal strategy and "chang[ing] [] position." Ans. Br. 51. Even crediting Sellers' allegations that Buyers refined their arguments over the course of discovery, Sellers fail to offer any support for their conclusory allegations that the arguments advanced in three separate summary judgment briefs filed by Buyers, along with a two-hour oral argument, resulting in a forty-nine page judicial opinion were based on "frivolous," "absurd[]," and "nonsensical" arguments. *See id.* 50–52.

Finally, the burden is on Sellers to prove that the Court of Chancery abused its discretion by arbitrarily and capriciously failing to award attorneys' fees. Sellers offered the Court of Chancery no support for this claim, and offer this Court nothing new upon which to find that the lower court acted arbitrarily and capriciously in denying the fee request. The Court of Chancery's decision to deny Sellers' motion for attorneys' fees was in accordance with Delaware case law

(including the very cases cited by Sellers) and "was neither arbitrary or capricious." *See RBC Capital Mkts.*, 129 A.3d at 876.

Guided by the applicable standard of appellate review, this Court should affirm the Court of Chancery's decision to deny attorneys' fees to Sellers. *See, e.g.*, *Versata Enters.*, 5 A.3d at 608.

CONCLUSION

For the foregoing reasons, Buyers respectfully submit that this Court should (1) reverse the order of the Court of Chancery granting Sellers' motion for partial summary judgment as to Counterclaim Count I, (2) direct the Court of Chancery to grant Buyers' motion for partial summary judgment as to Counterclaim Count I, and (3) affirm the order of the Court of Chancery denying Sellers' request for attorneys' fees.

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