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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

APPELLEE/CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

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I. INTRODUCTION

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 Reply Brief on Cross-Appeal in response to the Reply Brief on Appeal and Cross-Appellee's Answering Brief on Cross-Appeal ("Appellant/Cross-Appellee's Reply Brief") 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").

The only issue Sellers raised on cross-appeal was the Chancery Court's failure to award Sellers their attorneys' fees. Sellers have argued that Buyers pursued and continue to pursue meritless claims, and therefore have acted in bad faith. In response, Buyers attempt to cast their wrongful refusal to release the escrowed funds owed to Sellers (which necessitated this litigation) and their Counterclaim as a mere disagreement over the interpretation of the contract.

However, Buyers' legal theories and arguments have been moving targets throughout this case. When one argument has proven unavailing, rather than simply pay Sellers the escrowed money they are owed, Buyers have instead concocted new and often contradictory arguments to unnecessarily extend this litigation and impose additional legal costs on all parties involved. For example, after pleading and

arguing for months that Sellers breached the Asset Purchase Agreement ("APA") because there was an undisclosed issue "with" Boeing, Buyers now insist that is not what they meant, and that they should have been arguing that there was an undisclosed issue "with respect to" Boeing.

Moreover, despite Buyers' revolving door of legal arguments, they have refused to change their position in the face of undisputed evidence obtained during discovery that refutes Buyers' allegations. Two of the representations in the APA (in sections 3.7(a) and 3.25(a)) only apply to events, occurrences, developments, or material reductions or alterations in certain business relationships that occurred *after December 31, 2015*. There is no dispute regarding the fact that the Lost Parts were lost in 2013 and 2014; therefore, this event (the alleged basis for Buyers' claims) fell outside of the temporal limits of sections 3.7(a) and 3.25(a).

Buyers' actions have made the procession of this case unduly complicated and expensive. The Chancery Court's failure to award Sellers' fees based on Buyers' bad faith conduct creates injustice and, therefore, is an abuse of discretion.

II. ARGUMENT

A. Buyers Should Bear Sellers' Attorneys' Fees.

As noted in Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross Appeal ("Appellee/Cross-Appellant's Brief"), fees are only shifted in "exceptional cases in order 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. July 20, 2007); Appellee/Cross-Appellant's Brief, 48. A party's "dogged pursuit of the borderline *frivolous or near frivolous*" claims justifies an award of attorneys' fees when those claims "utterly lack[] any legal or factual bases." *Martin v. Med-Dev Corp.*, 2015 WL 6472597, at *2 (Del. Ch. Oct. 27, 2015) (emphasis added).

Buyers first insist that their claims cannot be frivolous because Buyers prevailed on all of Sellers' affirmative claims against Buyers. Appellant/Cross-Appellee's Reply Brief, 38. That fact holds little, if any, relevance, as the Court of Chancery also *granted* summary judgment in favor of Sellers as to Buyers' Counterclaim. Op. 49. The effect of the Court of Chancery's ruling was that "Buyers must release the escrowed funds" that Sellers have been seeking all along. Op. 42.

Buyers next point to the Chancery Court's ruling that "Sellers have offered no evidence that Buyers relied on their preferred interpretations of the APA in bad

faith." Op. 48. Sellers have offered such evidence. Buyers simply do not wish to confront it.

For instance, Buyers claim that Sellers offered no citation for Sellers' statement that "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 work a far-reaching and overly elastic definition." Appellant/Cross-Appellee's Reply Brief, 38. But the very next sentence in Sellers' brief is a citation to the Chancery Court's ruling, based on the totality of the parties' summary judgment evidence and oral arguments, that Buyers "eschew the plain meaning of 'issues' and argue for a broader reading." *Id.* It is a sign of bad faith to "eschew" the plain meaning of the words used in a contract because, when interpreting contracts, courts are constrained by the parties' words and the plain meaning of those words. *AT&T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008).

Buyers attempt to frame this dispute as a run-of-the-mill disagreement over the interpretation of a contract. But the Court of Chancery found that Buyers adopted an interpretation of the contract that abandoned the plain meaning of the word "issues." It was and is patently unreasonable for Buyers to adopt a position and necessitate litigation based on an interpretation of the APA that is *contrary* to the plain meaning of the words chosen by the parties.

Sellers have also pointed to Buyers' constantly shifting legal theories as evidence of bad faith. Buyers shrug this off as, at most, a "refine[ment]" of their legal theories. Appellant/Cross-Appellee's Reply Brief, 40. Buyers' original position in this case was that they were entitled to recover because they relied on certain alleged financial projections provided by Sellers.[1] *See* B73-B75. To the extent Buyers have used this "projections" argument to deny Sellers the escrowed funds that are rightfully due to Sellers, it is evidence of bad faith. Buyers' reliance on the so-called projections was frivolous from the start because this is a breach of contract action, and the financial projections are not part of the fully-integrated APA, nor are they even mentioned in the APA. A70-A227.

Moreover, as already discussed in detail, Buyers' conduct on appeal further demonstrates a bad faith motive. First, in Appellant/Cross-Appellee's Reply Brief, Buyers again rely heavily on the alleged distinction between "with" and "with respect to" as used in the contract. Appellant/Cross-Appellee's Reply Brief, 7-12. There is no need to repeat Sellers' response to this argument, which is set forth in Appellee/Cross-Appellant's Brief at pages 26-29. Buyers admit in a footnote that this alleged distinction between "with" and "with respect to" was only raised at the

[1] As explained previously, these "projections" provided 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. Appellee/Cross-Appellant's Brief, 11.

summary judgment stage at oral argument.[2] Appellant/Cross-Appellee's Reply Brief, 8 n.3. Conflictingly, numerous times in its summary judgment briefing, Buyers asserted that it was an undisclosed issue *with* Boeing that it was asserting in this lawsuit. Appellee/Cross-Appellant's Brief, 27-28.

Buyers try to explain this contradiction away by asserting they were merely "summarize[ing] the language without quoting it *verbatim*." Appellant/Cross-Appellee's Reply Brief, 8 n.3. But Buyers cannot have it both ways. Buyers would have the Court believe that there is a vital distinction between the words "with" and "with respect to" that necessitates reversal of the Court of Chancery's well-reasoned opinion, and *also* that there is nothing wrong with Buyers' use of the words "with" and "with respect to" interchangeably when describing its position to the Court. This glaring contradiction defies logic.

Finally, even if, as Vice Chancellor Zurn found, Buyers "earnestly believ[ed] the representations in the APA were false" at the time Buyers asserted their counterclaim, discovery compelled them to reassess their legal theories. *See* Op. 48. Buyers continue to assert that Sellers violated Sections 3.25(a) and 3.7(a). Appellant/Cross-Appellee's Reply Brief, 26-29. Sellers have addressed these

[2] In the same brief, Buyers argue the Sellers waived their argument that Sections 3.25(a) and 3.25(d) must be construed together by not presenting it to the Chancery Court. Appellant/Cross-Appellee's Reply Brief, 18-19. That assertion is factually inaccurate, as this issue was raised below. *See* A946-A948.

provisions previously at pages 42-45 of Appellee/Cross-Appellant's Brief. In short, both provisions contain representations *only* about things that occurred after the "Balance Sheet Date" of December 31, 2015.

Having filed their final appellate brief in this matter, Buyers have demonstrated conclusively that they have no evidence whatsoever to establish a violation of Sections 3.25(a) and 3.7(a) of the APA, as it does not appear in any of their briefing. Instead, Buyers attempt to take a statement from an unrelated section of Sellers' brief out of context and argue that Sellers simply "conceded" Buyers' position. Appellant/Cross-Appellee's Reply Brief, 27. Sellers did not and do not.

In Sellers' brief, when pointing out *why* all the parties thought that Boeing would eventually give Buyers the ability to bid on the Lost Parts, Sellers noted that in the previous year (2015), Boeing had sent multiple RFQs in the late summer and fall covering parts expiring that same year. Appellee/Cross-Appellant's Brief, 40-41. Then, Sellers stated that "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)." *Id.* at 41. This was merely a statement about when Boeing might choose to issue RFQs in a typical year, and had nothing to do with whether Sellers breached Sections 3.7(a) or 3.25(a) by not disclosing a years-old decision by Boeing to award the Lost Parts to other suppliers (which Sellers did not know about).

The facts are simple and undisputed. The parties learned in discovery that Boeing awarded the Lost Parts to other suppliers in 2013 and 2014, long before the "Balance Sheet Date" of December 31, 2015. A39; Appellants' Opening Brief, 14. Therefore, as of 2014 at the latest, Sellers no longer had any opportunity to re-bid on the Lost Parts—Sellers just did not know it. Yet, Buyers still argue that "the opportunity to rebid remained outstanding." Appellant/Cross-Appellee's Reply Brief, 28. How? As the parties confirmed in discovery, Sellers truthfully represented that *since the Balance sheet date*, no customer had "terminated or materially reduced or altered its business relationship with Seller" and that there had not been any "event, occurrence, or development that has had, or could reasonably be expected to have . . . a Material Adverse Effect." *See* A87, A109.

Even if this Court concludes that Buyers did not *initiate* its Counterclaim in bad faith, Buyers refusal to acknowledge or accept the legal significance of the facts learned by both parties in discovery is the type of frivolous, abusive, and harassing litigation tactic that warrants sanction. *See Martin*, 2015 WL 6472597, at *2 (Pursuing a legal claim that is contrary to the plain language of a company's bylaws constitutes bad faith litigation and warrants an award of fees because of "a disconcerting lack of diligence"). That the Court of Chancery did not award attorneys' fees to Sellers creates injustice and therefore constitutes an abuse of

discretion. This Court should reverse the Court of Chancery's decision regarding attorneys' fees, and Buyers should bear Sellers' attorneys' fees in this action.

III. CONCLUSION

The Court of Chancery abused its discretion in failing to award Sellers their attorneys' fees. Buyers have raised and have continued to pursue claims 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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