



IN THE
Supreme Court of the State of Delaware

PARAGON METALS HOLDINGS LLC, a Delaware limited liability company; PARAGON METALS LLC, a Delaware limited liability company, STELLEX PARAGON METALS SPLITTER LP, a Delaware limited partnership; STELLEX CAPITAL INVESTORS, a Delaware limited partnership,

Plaintiffs Below, Appellants/
Cross-Appellees,

v.

MICHAEL J. SMITH, an individual; and THE PARAGON INDUSTRIAL HOLDINGS GROUP, INC., a North Carolina corporation,

Defendants Below, Appellees/
Cross-Appellants.

No. 385, 2025

Court Below:

Superior Court of the
State of Delaware

C.A. No. N21C-12-090 SKR [CCLD]

APPELLEES/CROSS APPELLANTS' REPLY BRIEF ON CROSS-APPEAL

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ARGUMENT

I. The trial court erred by applying a preponderance standard to Stellex's fraud claim and its scienter finding should be vacated.

As Defendants explained in their cross-appeal brief, the trial court applied a preponderance standard rather than the clear-and-convincing standard required by this Court's precedents. Stellex says that Delaware law allows a plaintiff to prove fraud by a preponderance of the evidence, leaning on trial court decisions applying the lower standard. This argument ignores a century of this Court's precedents applying the clear-and-convincing standards to fraud allegations and overstates the trial court decisions' significance. Indeed, only one of those decisions actually examines which standard applies, and that decision reached the wrong conclusion by misidentifying this Court's decision as a Superior Court decision. Stellex says that the preponderance standard that the trial court applied is the "majority rule." (3d Br. 31.)¹ But the principle that "[w]rong does not cease to be wrong because [a] majority share in it," is as accurate when applied to jurisprudential issues as it is in other contexts. Leo Tolstoy, *A Letter to a Hindu* (1908), *quoted in* Martin Luther King, Jr., *Stride Toward Freedom: The Montgomery Story* 88 (1958). This Court's

¹ This brief refers to Appellees' Answering Brief on Appeal and Opening Brief on Cross-Appeal as "2d Br." and Appellants' Reply Brief on Appeal and Answering Brief on Cross-Appeal as "3d Br." This brief otherwise uses the same definitions and abbreviations as in the 2d Br.

decisions require the clear-and-convincing standard. The trial court erred by applying the lesser preponderance standard.

Stellex does not contest that if the trial court had applied the clear-and-convincing standard, its finding that Stellex proved scienter must be vacated. (*See* Opinion 39-40; 2d Br. 55-59.)

A. This issue was preserved.

Stellex asserts that the Defendants did not preserve this issue. This Court has held that “a party may preserve claims by referring to them in post-trial briefing and arguments.” *In re Tesla, Inc. Deriv. Litig.*, 2025 WL 3689114, at *10 (Del. 2025). Where a trial court “understood and addressed the argument being made on appeal,” the argument is preserved. *Id.*; *see also Origis USA LLC v. Great Am. Ins. Co.*, 345 A.3d 936, 953 n. 76 (Del. 2025) (“[T]he trial court addressing an issue on the merits may be sufficient to fairly present it to the trial court and enable this Court’s review on appeal.”).

Defendants satisfy this standard. In their post-trial brief, Defendants identified the uncertainty among Delaware trial courts regarding the proper evidentiary standard for common-law fraud and argued that “clear and convincing evidence is the correct standard.” (Defs.’ Post-Trial Br. 12 & n.1, A016182.) Defendants also argued that they should prevail under the preponderance standard, which would mean that the trial court “need not decide” which standard applies. (*Id.*) The trial

court addressed the issue, acknowledged Defendants’ arguments, and noted that “Delaware Supreme Court caselaw unequivocally provides ‘fraud must be established by clear and convincing evidence.’” (Opinion at 17 n. 110 (citation omitted)).

Because Defendants raised the burden-of-proof issue and the trial court addressed it, the issue is preserved.

B. This Court established the clear-and-convincing standard for fraud more than a century ago.

This Court’s holdings in *Griffin v. Star Printing Co.*, 74 A. 1072 (Del. 1910) and *Killen v. Purdy*, 99 A. 537 (Del. 1916), established that the clear-and-convincing standard applies for fraud claims under Delaware law. Stellex tries to summarily distinguish *Killen* and ignores *Griffin* altogether. (3d Br. 37-39.) Stellex focuses instead on the volume at which the lower courts have endorsed a preponderance standard. (*Id.* at 32 (“loudly”).) This focus on lower-court decisions reflects Stellex’s inability to muster any decision by this Court adopting the preponderance standard.

In *Griffin*, this Court held as a “proposition[] of law” that common-law fraud claims “must be *clearly established* by the evidence.” 74 A. at 1072-73 (emphasis added). Stellex does not even mention *Griffin*. (*See generally* 3d Br. v, 30-40; *but see* 2d Br. 51 (quoting *Griffin*).)

In *Killen*, the Court applied the same standard, holding that “[f]raud when alleged must be *clearly proved* to avail the party charging it[.]” 99 A. at 538 (emphasis added). Stellex tries to limit this precedent to the context of avoiding a deed. (3d Br. 38). That distorts *Killen*. There, this Court applied the general rule to a particular case, stating that fraud must be “clearly proved ... and *especially is this so* when it is sought to avoid a deed on that ground.” *Killen*, 99 A. at 538 (emphasis added).

Stellex claims that Defendants “twist[.]” and “torture[.]” 19th century decisions by interpreting requirements that fraud must be “clearly established” or “clearly proved” (as was also true in *Griffin* and *Killen*) as the modern clear-and-convincing standard. (3d Br. 33-35.) But courts in the 1800s did not always recite the words “clear and convincing” to designate the intermediate evidentiary standard; they used words to similar effect. *See Addington v. Texas*, 441 U.S. 418, 424 (1979). For example, the predecessor to this Court explained that in certain civil law contexts “greater caution should be exercised in admitting and weighing the evidence,” which merited the application of a “high standard of proof” requiring more than mere “preponderate” evidence. *Rice v. Pennypacker*, 10 Del. 279, 372 (Del. Ct. Err. & App. 1877). Expressions of this standard varied, but the one constant across all formulations was the presence of the word “clear” or “clearly.” *See, e.g., Rice*, 10 Del. at 360 (requiring “clear, full, and satisfactory” evidence); *Walker’s Adm’x*

v. Farmers' Bank, 14 A. 819, 822 (Del. Ct. Err. & App. 1888) (requiring “clear, unequivocal, and convincing” evidence); *Fooks v. Lawson*, 40 A. 661, 663 (Del. Super. 1893) (requiring that a jury be “clearly convinced”).

Thus, when this Court required that something be “clearly proved” in *Griffin* and *Killen*, it chose words denoting the intermediate evidentiary standard, now called the clear-and-convincing-evidence standard. *See Addington*, 441 U.S. at 424 (“The intermediate standard ... usually employs some combination of the words ‘clear,’ ‘cogent,’ ‘unequivocal,’ and ‘convincing’[.]”). And when the Court (or its predecessor) wanted the lower evidentiary standard, it used a form of the word preponderate.² *See Rice*, 10 Del. at 372. Accordingly, the Court has already adopted the clear-and-convincing standard to prove common-law fraud.

In the century following *Griffin* and *Killen*, this Court has consistently applied the clear-and-convincing standard to fraud claims across multiple contexts. (*See* 2d Br. 51-52 (collecting cases).) *Stellex* tries to cabin each case to its facts without

² *Stellex's* cited cases demonstrate that the Superior Court followed the same approach. (3d Br. 34 (citing *Freeman v. Topkis*, 40 A. 948 (Del. Super. 1893) (clear and convincing); *Fait & Slagle Co. v. Truxton*, 39 A. 457, 461 (Del. Super. 1897) (preponderance); *Thomas v. Grise*, 41 A. 883, 885 (Del. Super. 1898) (preponderance)).) *Stellex's* effort to distinguish *Mears v. Waples*, 8 Del. 581 (Del. Super. 1868), *Kent Cnty. R. Co. v. Wilson*, 10 Del. 49 (Del. Super. 1875), and *Freeman* because they contain “charges to the jury” is unpersuasive. (3d Br. 34.) Correctly stating the law is nowhere more important—every jury instruction must be “a correct statement of the substance of the law.” *Culver v. Bennett*, 588 A.2d 1094, 1096 (Del. 1991).

identifying any common thread. (3d Br. 37-39.) But the common thread is readily evident: each involves the requirement to prove fraudulent intent, and that is why the Court applied a clear-and-convincing-evidence requirement in each context.

* * *

The clear-and-convincing standard is warranted because fraud claims typically rely on circumstantial evidence—creating a greater risk of error—and because a fraud finding carries moral stigma. (2d Br. 53-54.) Stellex responds that the higher evidentiary standard would protect defendants, even where direct evidence of fraud exists. (3d Br. 36.) But that is a feature, not a bug; smoking-gun emails, confessions, and other direct evidence clears the clear-and-convincing hurdle without the risk of error inherent in circumstantial cases like this one.

Stellex’s own brief demonstrates the moral stigma a fraud finding carries—Stellex accuses Defendants of committing fraud despite failing to prove it. (*See* 3d Br. 31.) These policy concerns explain why most states’ highest courts apply the clear-and-convincing standard to common-law fraud claims, an observation Stellex does not dispute. (*Compare* 2d Br. 54 & n.11; Ex. 1 (listing cases)³; *with* 3d Br. 32.)

³ Exhibit 1 is included in the word count for this brief.

C. The trial court decisions Stellex cites do not cast doubt on this Court's precedent.

Consistent with the trial court's observation (Opinion 17 n. 110), the parties agree that the trial courts have not consistently applied the clear-and-convincing or preponderance standard to common-law fraud claims. (3d Br. 37-40; 2d Br. 50-55.) Stellex touts the number of trial court decisions that have applied the preponderance standard. But in only one of those cases did the parties contest the evidentiary standard for common-law fraud, and that court erred after misidentifying this Court's binding precedent as merely persuasive Superior Court authority. In all the other cases, the evidentiary standard was not at issue.

Stellex cites several trial decisions applying the preponderance standard to common-law fraud claims. (*See* 3d Br. 33, n. 5.) But this Court "is ... the final arbiter on matters of Delaware law." *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 663 (Del. Ch. 2012). Trial court decisions repeating a standard without analysis provide no persuasive basis for this Court to adopt the preponderance standard.

Here, the trial court relied upon *Sofregen Medical, Inc. v. Allergan Sales, LLC*, 2024 WL 4297665, at *16 (Del. Super. Sept. 26, 2024) for the standard of proof. (Opinion 17 n.110.) That decision illustrates the problem. The *Sofregen* court offers no analysis of the burden. *See* 2024 WL 4297665, at *16. Instead, *Sofregen* adopts the standard from *In re IBP, Inc. Shareholders Litigation*, 789 A.2d 14, 54 (Del. Ch. 2001). *Id.* *IBP* too offers no analysis, instead citing to *NRG Barriers, Inc. v. Jelin*,

1996 WL 451319, at *7 (Del. Ch. Aug. 6, 1996). *IBP*, 789 A.2d at 54. But *NRG Barriers* cites no authority; it simply adopts the preponderance standard *ipse dixit*. This line of cases is an analytical dead end.

The same deficiency appears in *Nye Odorless Incinerator Corp. v. Felton*, 162 A. 504, 510 (Del. Super. 1931), which cites no authority for adopting a preponderance standard. (See 2d Br. 53.) Stellex argues that if “*Nye* represented a sea change in Delaware law, this Court certainly had the opportunity to point that out.” (3d Br. 36.) But this Court does not correct errors *sua sponte*; parties must contest the issue at the trial court and then argue on appeal that the lower court’s misapplication resulted in reversible error. See *Protech Minerals, Inc. v. Dugout Team, LLC*, 284 A.3d 369, 377-78 (Del. 2022) (generally “this Court does not consider issues that are not raised” at the trial court). And where the parties have appealed the question of whether the clear-and-convincing or preponderance standard applies to a fraud-related claim, this Court has consistently chosen the former. (See 2d Br. 51-52 (collecting cases).)

The only case that Stellex cites where the parties contested the evidentiary standard, *George v. A.C. & S. Co., Inc.*, 1988 WL 22365 (Del. Super. Feb. 16, 1988), illustrates how an error can propagate through the common law. There, the defendant argued that plaintiff must prove civil conspiracy to commit common-law fraud with clear-and-convincing evidence. *Id.* at *1. The court discussed the clear-

and-convincing standard in *Griffin*, but misattributed that decision to the Superior Court rather than this Court. *Id.* (citing *Griffin* as “*Griffin v. Star Printing Co.*, Del. Super., 74 A. 1072 (1910)”). For that reason, the court treated it as on par with later divergent decisions by the Superior Court. *Id.* (discussing *Ranch v. Lynch*, 89 A. 134 (Del. Super. 1913) and *Nye*). Because the court thought *Griffin* was on equal footing with *Nye*, it saw no issue in propagating *Nye*’s error. Thus, the only decision cited by Stellex addressing this question reached an incorrect conclusion based on the misattribution of authority.

D. Stellex concedes that a clear-and-convincing burden requires vacatur.

Lastly, Stellex does not contest that, if clear and convincing is the correct standard, this Court should vacate the scienter finding. (*See* 2d Br. 55-59.) Stellex’s references to the trial court’s scienter analysis do not defend that finding under the heightened burden and are often inaccurate. For instance, Stellex claims the trial court “found” “seven badges of fraud.” (3d Br. 2-3.) The trial court made no such finding. (*See generally* Opinion.) Rather, the trial court “cobbled together” some of Defendants’ actions—acknowledging each may have had an “innocuous” explanation—to “paint a picture of scienter.” (Opinion 39-40.) Stellex’s own pejorative use of “cobbling” (3d Br. 30), underscores that the cobbled-together evidence falls short of the “abiding conviction” that it is “highly probable” that Defendants acted with the requisite intent, as would be required by the clear-and-

convincing standard. *In re Martin*, 105 A.3d 967, 975 (Del. 2014). This Court should therefore vacate the scienter holding.⁴

⁴ Stellex’s use of terms like “cryptic,” “hidden,” or “buried” is unsupported by the trial court’s findings. The trial court found “repeated, though perhaps inartful, disclosure,” and observed that Stellex “ignored” the information provided. (Opinion 3, 39–40, 47.) The trial court further found that Stellex knew the disclosed information and incorporated it into its deal modeling and internal diligence materials—undermining any claim of concealment. (*Id.* at 3, 35.)

II. The trial court erred when it concluded that Defendants made false statements.

The trial court correctly interpreted the sections of Article 3 in the Agreement together to mean that Paragon had not warranted business with its customers beyond that contained in its scheduled customer agreements. But the trial court erred in construing Paragon's ZF and FCA customer contracts. The trial court interpreted them as providing for orders stretching years into the future because it erroneously elevated parol evidence and the inferred expectations of the contracting parties over the plain meaning of Paragon's release-by-release customer agreements.

Stellex first argues that the Court should reject the trial court's efforts to read Paragon's representations and warranties together. Instead, Stellex says that the representations in Section 3.23 are unbounded by Paragon's disclaimers in Sections 3.12 and 3.30. But contract provisions must be interpreted together, and the trial court correctly rejected Stellex's proposed interpretation otherwise. (*See* SJ Opinion 25; Opinion 19-23.)

Stellex's other argument regarding falsity repeats the trial court's errors in interpreting Paragon's contracts with ZF and FCA. Stellex does not dispute that the ZF GPA and FCA purchase orders are governed by Michigan law but pays no respect to binding Michigan law under which these agreements are properly characterized as release-by-release contracts. Instead, Stellex urges the Court to interpret

Paragon's customer contracts in a way that favors parol evidence over the actual contract language.

Finally, although the trial court found falsity as to both Section 3.23 and 3.8, Stellex does not defend the trial court's decision as it relates to Section 3.8. (*See* 3d Br. 41-47 (not addressing Section 3.8 or "material adverse effect"); *but see* 2d Br. 60-67 (arguing for reversal of the falsity ruling as to both sections).) Stellex has implicitly conceded that the trial court's ruling regarding Section 3.8 should be reversed.

A. The trial court correctly determined that the Agreement did not contain representations about future sales volumes beyond the scheduled customer contracts.

The trial court correctly read the sections of Article 3 together to mean that Paragon had not made representations in Sections 3.23 or 3.8 that Paragon disclaimed elsewhere in Sections 3.12 and 3.30. Stellex disagrees, asserting that these provisions should not be read together because the limitations on Paragon's customer representations in Sections 3.12 and 3.30 are not "found in Section 3.23 itself." (3d Br. 42.) Stellex says the trial court reached the same conclusion. (*Id.*) Not so. (*See* SJ Opinion 25; Opinion 19-23.)

The trial court first addressed the interplay between the sections of Article 3 at summary judgment where it harmonized the various sections. In its complaint, Stellex alleged intra-contractual fraud related to another Paragon customer, Musashi.

Stellex averred that Paragon forecasted future orders from Musashi and learned before closing that it would not receive those orders, but did not disclose that to Stellex. (Am. Compl. ¶¶43-48, A000451-453.) At summary judgment, Stellex defended these allegations by arguing that the purported omission rendered Section 3.23 false and amounted to a material adverse effect under Section 3.8 because it represented knowledge that Musashi would “decrease the rate” of purchasing Paragon products. (Pltfs’ SJ Resp., A005263.)

The trial court granted Defendants’ summary-judgment motion on this issue because Paragon’s knowledge regarding future customer orders could not render Section 3.23 false if Sections 3.12 and 3.30 disclaimed any warranty over potential future orders for which Paragon did not have a contract. (SJ Opinion 25.) Specifically, the court observed that “Schedule 3.12, which identified all ‘contract[s] or purchase order[s]’ between Paragon and Musashi, did not include any agreement related to” the allegedly declining Musashi orders. (*Id.*) The court also cited Section 3.30 for the proposition that “Stellex expressly disclaimed any reliance on extra-contractual representations.” (*Id.*, n. 154.) The trial court thus did not limit its inquiry to just Paragon’s Section 3.23 customer representations. (*Contra* 3d Br. 42.)

Stellex notes that the trial court conducted this analysis under a section of its summary judgment opinion purportedly addressing reliance. (3d Br. 42.) But Defendants raised this argument on summary judgment in defense of the falsity

element, and the trial court’s analysis mirrored Defendants’ argument. (*See* Defs’ SJ Br., A000699-701.) Regardless, the trial court understood the issue as a defense to falsity when it weighed Defendants’ argument after trial. (Opinion 19-23.) The trial court reapplied the same framework, evaluating whether the customer agreements scheduled on Schedule 3.12 foreclosed Stellex’s falsity arguments. (*Id.*)

Stellex rejects this interplay between the Article 3 sections, asking the Court to interpret Section 3.23 as warranting future customer business regardless of whether Paragon expressly disclaimed any warranty regarding that same business in Sections 3.12 or 3.30. (3d Br. 42.) Stellex says that Defendants “conflate[]” Sections 3.12 and 3.23, and that the disclaimers in Sections 3.12 and 3.30 do not affect the scope of the Section 3.23 representations because that section “makes no reference to” the contracts scheduled on Schedule 3.12 or “the business reflected” in those contracts.” (*Id.*)

The Court should reject this request to read Section 3.23 in a vacuum as contrary to the rules of contract interpretation. What Stellex calls “conflating” two sections is just reading them together, as required: “When interpreting a contract, Delaware courts read the agreement as a whole[.]” *Thompson St. Cap. P’rs IV, L.P. v. Sonova U.S. Hearing Instruments, LLC*, 340 A.3d 1151, 1166 (Del. 2025). This means interpreting a contract to “giv[e] effect to all its provisions.” *Salamone v. Gorman*, 106 A.3d 354, 368 (Del. 2014). The trial court applied these rules here to

mean that something disclaimed in one section of Article 3 could not be read into another section.

Stellex's contrary reading would create internal inconsistencies and render Section 3.12 meaningless. Under Stellex's theory, Paragon warranted that customers would not decrease future orders regardless of whether Paragon expressly disclaimed having a contract for those orders. But this would also nullify the representation in Section 3.12 that, other than the agreements identified on Schedule 3.12, Paragon "is not a party to or bound by ... [a]ny long term or master supply agreement" with any of its top-ten customers. Properly read, Section 3.23 is limited to customer notice or knowledge regarding purchase volumes Paragon was contractually entitled to receive; it does not warrant forecasts of business Paragon never had a contract to obtain. The trial court correctly read the Sections of Article 3 together to mean that Section 3.23 is limited by the disclaimed warranties in Sections 3.12 and 3.30. Stellex's argument to the contrary should fail.

B. Under binding law, Paragon's agreements with ZF and FCA were release-by-release contracts, which did not provide for long-term sales.

The trial court erred in interpreting the scope of Paragon's contracts with ZF and FCA warranted under Section 3.12. Under Michigan law (which governs the contracts), Paragon's GPA with ZF and its purchase orders with FCA were release-

by-release contracts, meaning Paragon disclaimed any warranties related to future releases that it had not yet received.

Stellex first defends the trial court's ruling with an argument that the trial court did not endorse. Stellex contends that because Section 3.12(a)(i) lists "long term or master supply agreement[s]," Stellex was entitled to believe that the ZF GPA and FCA purchase orders obligated ZF and FCA to order parts from Paragon over the long-term. This argument fails for two reasons.

First, Stellex misses that Section 3.12(a)(i) covers "long term" agreements *or* "master supply agreements." (Agreement §3.12, A000486-487.) Paragon thus did not, by listing a contract in Schedule 3.12, characterize that contract as a long-term agreement to purchase parts; it could instead be a master supply agreement. (*See id.*)

Second, Stellex incorrectly focuses on the duration of the ZF GPA and FCA purchase orders instead of the term necessary to make those agreements binding commitments to purchase parts: quantity. The ZF GPA's term extends through the "end of life of the current OEM customer programs using the Parts." (3d Br. 43.) And Stellex can identify several provisions in the ZF GPA that appear to contemplate long-term supply. (*Id.* at 43-45 (pointing to provisions that provide for pricing set through 2027; establish manufacturing capacity obligations and peak

volume estimates⁵; Paragon’s ability to pursue obsolescence claims; and a competitiveness clause).) Stellex makes a similar argument with respect to FCA, noting that the terms of FCA’s purchase order terms require Paragon to have a tooling and production plan in place that will enable it to supply FCA’s annual orders and that FCA’s terms include a competitiveness clause. (*Id.* at 45.) But Stellex identifies no provision of either the ZF GPA or FCA purchase orders requiring either customer to order any quantity of parts outside of the two-week window on the most recently issued ZF release. No such provision exists, and this point should have been dispositive.

Stellex barely taps the brakes when breezing past the Michigan Supreme Court’s holding in *MSSC, Inc. v. Airboss Flexible Prods. Co.*, 999 N.W.2d 335 (Mich. 2023), *as amended* (Sept. 22, 2023). Stellex calls the case “non-binding” and tries to distinguish it on the basis that it did not arise from a corporate transaction. (3d Br. 44-45.) But *Airboss* is binding; Stellex does not dispute that both the ZF GPA and FCA purchase orders are governed by Michigan law. (*See* 2d Br. 8, 62.)

⁵ Stellex emphasizes that the ZF GPA uses the phrase “Estimated Annual Volume,” suggesting this must mean there is an annual purchase obligation. (3d Br. 44.) But the GPA defines “Estimated Annual Volume” as the potential “peak volume” for the programs at issue. (GPA §1, B000015.) The GPA makes clear that it does not guarantee any future purchase volume. (GPA §3.5, B000018-19.)

Nor does Stellex challenge that *Airboss* is the definitive statement of Michigan law concerning whether a supply agreement provides for long-term purchases.

Stellex minimizes the *Airboss* decision because it rejects the trial court's reasoning that Stellex echoes here. There, an automotive-parts manufacturer argued that its supplier was bound to continue supplying parts pursuant to a binding purchase order that was valid for the "life of the program" and contained annual pricing that stretched out years. *Id.* at 342. The court rejected this argument because, although the parties' master supply agreement was a long-term agreement, it lacked a quantity provision necessary to compel future purchases or sales. *Id.* at 345-47.

The *Airboss* court explained that such long-term agreements are common in the automotive industry as an alternative to requirements contracts. *Id.* at 339-41. Release-by-release agreements are often governed by a master agreement that "sets the overall contract terms, and the buyer issues subsequent releases that set forth the specific quantity the buyer needs." *Id.* at 340. When the buyer issues a release for parts, "the seller is bound by the terms agreed to in the [governing document] when future releases are issued and accepted." *Id.* For this reason, a release-by-release agreement is "more appropriately thought of as an umbrella agreement that governs the terms of future contract offers" in form of releases. *Id.* This means that under a release-by-release agreement, "[t]he seller cannot be guaranteed future business from the buyer." *Id.* at 341.

Stellex says the ZF GPA and FCA purchase orders are not release-by-release agreements but offers no explanation. Stellex does not address to the ZF GPA provision stating that ZF's purchase orders are "NOT A REQUIREMENTS CONTRACT." (*See* B000040.) Nor does Stellex acknowledge the FCA terms disclaiming any purchase obligation. (*See* B000073-75.) And Stellex, like the trial court, fails to identify any quantity of parts that FCA or ZF must purchase beyond the then-current released quantity. Neither agreement provides for any volume of future purchases.

Stellex instead offers that, even accepting the proper interpretation of the ZF GPA and FCA purchase orders, the trial court's falsity determination could be upheld because "a decrease in the rate of sales would be measured on an order-by-order basis" and "both ZF and FCA told Sellers that purchases would decrease." (3d Br. 46.) But Stellex cites only the two five-year forecasts received from ZF and FCA. (*Id.* (*citing* PX131 and JX6).) This confuses forecasts with actual orders for parts in the form of releases.

Under both the ZF GPA and FCA purchase orders, "releases" constituted orders for parts and identified specific quantities and delivery dates. (GPA, B000032-33, B000057; FCA Terms, B000073-74.) Forecasts are different: under both contracts, customer-provided forecasts are "for planning purposes" and "for informational purposes" only. (GPA §3.5, B000018; FCA Terms, B000074.) The

contracts expressly provided that forecasts did not create commitments to purchase parts. (GPA §3.5, B000018-19; FCA Terms §5, B000078-79.) And the forecasts Stellex cites do not contain any delivery dates. (*See* 3d Br. 46 (*citing* PX131 (B000102) and JX6 (B000098)).)

Stellex’s claims were always based on forecasts; it presented no evidence at trial of releases showing declining customer orders. (*See* Cochran Testimony, A012749-754.) There is thus no evidence to support Stellex’s assertion that ZF and FCA told Paragon that orders would decrease. (*See* 3d Br. 46.)

C. Stellex doubles-down on the use of parol evidence to try to avoid the release-by-release nature of the ZF GPA and FCA purchase orders.

Instead of adhering to binding Michigan authority to interpret Paragon’s Michigan-law-governed supply contracts, Stellex leans on parol evidence, just as the trial court did. This violates Michigan (and Delaware) contract-interpretation law.

Stellex does not contest that Michigan employs the parol-evidence rule to “prohibit[] the use of extrinsic evidence to interpret unambiguous contract language.” *Kendzierski v. Macomb Cnty.*, 931 N.W.2d 604, 615 (Mich. 2019). Stellex instead makes two points that contradict one another. Stellex first says that “the trial court’s analysis focused on Section 3.23, and not the agreements under Section 3.12,” presumably referring to the customer contracts identified in Schedule 3.12. (3d Br. 46.) In the next breath, however, Stellex says the opposite,

asserting that “the trial court relied upon the terms of the GPA, the GPA Amendment, and the FCA agreements *themselves*, and how those agreements operated, not testimony relating to their intent.” (*Id.* at 46-47.)

Both statements are wrong. The trial court did focus on Paragon’s customer contracts (*see* Opinion 19-23), it just interpreted them incorrectly because it favored parol evidence over unambiguous contract language. Stellex repeats this mistake. Stellex argues that Defendants cannot “contend they invested \$20 million in 2017 and 2018 into a two-week contract or ones from which ZF or FCA could walk away at any moment.”⁶ (3d Br. 45.)

But Paragon’s investment decisions are of no moment to the interpretation of its unambiguous customer contracts. Under the law governing interpretation of Paragon’s customer contracts, Paragon could have bet the house on future purchases from ZF and FCA and it would not change the plain meaning of its agreements with those customers. *See Universal Underwriters Ins. Co. v. Kneeland*, 628 N.W.2d 491, 494 (Mich. 2001) (“Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement.”). Michigan law rejects an approach “where judges divine the parties’

⁶ Defendants do not make this contention. The testimony Stellex cites explained that the \$20 million invested by Paragon was across its entire product line of more than 80 automotive parts—not just the ZF and FCA parts at issue here. (3d Br. 45. (citing A012528-A012529).)

reasonable expectations” from extrinsic evidence “and then rewrite the contract accordingly.” *Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776, 782 (Mich. 2003). This is “contrary to the bedrock principle of American contract law that ... courts are to enforce the agreement as written.” *Id.* This is the error the trial court committed when it interpreted Paragon’s customer contracts by evaluating Paragon’s investments as opposed to the plain contract terms.

For these reasons, should the Court grant any portion of Stellex’s appeal, it should also reverse the trial court’s falsity finding.

CONCLUSION

For the reasons explained above and those contained in Defendants' earlier brief, the trial court's scienter ruling should be vacated because it was premised on the wrong burden of proof. If the Court agrees with any of Stellex's appeal arguments, the Court should nevertheless affirm the judgment in Defendants' favor because Stellex did not prove falsity. And if Stellex obtains remand, the mandate should require that the entire case be reassessed applying the clear-and-convincing-evidence standard.

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