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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAZARD TECHNOLOGY PARTNERS LLC, as representative of the former equityholders of Cyveillance, Inc., Plaintiff Below, Appellant v. QINETIQ NORTH AMERICA OPERATIONS LLC, Defendant Below, Appellee.	No.: 464, 2014 On Appeal from the Court of Chancery of the State of Delaware in and For New Castle County (C.A. No. 6815-VCL)

CORRECTED OPENING BRIEF OF APPELLANT LAZARD TECHNOLOGY PARTNERS LLC

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NATURE OF PROCEEDINGS

In 2009, QinetiQ North America Operations LLC ("QNA") acquired Cyveillance, Inc. ("CYV"). CYV was focused on detecting emerging threats via technology-based analysis of public Internet content, *before* those threats caused harm. QNA, a government contractor, focused on defense and security technology. Its parent, QinetiQ Ltd. ("QUK"), a UK defense contractor, focused on software and services. QNA and QUK each had $1 billion in annual revenue.

QNA acquired CYV for $40 million cash up front, with an Earn-out of up to $40 million more, if CYV-related revenue equaled or exceeded $30 million during a two-year Earn-out Period. QNA covenanted, in operating CYV post-closing, not to divert or defer contracts or business opportunities with the intent to reduce or limit the Earn-out Payment. QNA's covenant was based on common law intent (*viz.*, deliberate action undertaken with a known consequence); the contract did not require exclusive or specific intent. Otherwise, QNA's discretion – including in selling CYV's offerings to QNA's *own* government clients (the core rationale for the merger) – was governed by the implied covenant of good faith and fair dealing.

QNA was under scrutiny from its parent to show that the Merger would meet QUK's near-term bank covenant, EPS and other financial criteria. Unknown to CYV, QNA projected to QUK, both pre-Merger and twice during the Earn-out Period, that there would be no Earn-out Payment, and QNA developed a business

strategy to ensure that result. When CYV identified opportunities that did not fit QNA's plan, QNA deliberately stalled them. CYV achieved its pre-Merger projections with $27.2 million in qualifying revenue, but QNA generated only $71,406, or less than $4,000 per month. QNA did not sell a single CYV license; QUK generated nothing; and no Earn-out Payment was made. Lazard Technology Partners LLC ("Lazard"), as representative of CYV's former equity holders, brought suit, asserting breach of contract and of the implied covenant.

The Court found that QNA had deliberately stalled CYV opportunities, but nonetheless denied all relief. After post-trial argument and a brief recess, the Court delivered an informal oral ruling. It rejected the breach of contract claim on the errant theory that the "divert or defer" covenant required proof of a *specific, bad faith* intent to thwart the Earn-out, and it rejected the implied covenant claim on the errant theory that it required proof of the *same* intent, conflating the limited-purpose "intent" covenant with the standards applicable to the implied covenant.

Lazard appeals from both rulings. The Court found sufficient facts to establish the breach of contract claim, and QNA presented no damages case. Lazard respectfully requests that this Court grant Lazard judgment on its breach of contract claim and award the full Earn-out Payment. In the alternative, Lazard seeks a remand with instructions for a post-trial decision that is based on the correct "intent" and implied covenant standards.

SUMMARY OF ARGUMENT

1. The Court of Chancery interpreted and applied Section 5.4 of the Merger Agreement as if it required Lazard to prove that QNA acted in bad faith, and with the *singular, express or specific* intent to thwart an Earn-out Payment. This was reversible error. Section 5.4 contains no language qualifying the common law term "intent" to require proof of bad faith, or of exclusive, express or even primary intent. Lazard proved at trial that QNA took deliberate action to divert or defer revenue opportunities, *knowing* that its conduct would impair CYV's ability to capture enough revenue to secure an Earn-out Payment. That is all that Lazard had to prove under the common law and the terms of Section 5.4.

2. The Court of Chancery also erred in ruling that the intent standard of Section 5.4 applied across-the-board to *all* QNA discretionary conduct, conflating a limited-purpose "intent" provision with the standards applicable to the implied covenant. In the past two years, this Court has repeatedly instructed the Court of Chancery not to make this error. The Court of Chancery compounded its error by using the academic device of an "original bargaining position," ignoring the *actual record evidence* that the parties *considered and rejected* the broadly-applicable intent standard that the Court hypothecated to deny Lazard relief. This, too, was reversible error: trial courts cannot use the implied covenant to imply a provision that the parties rejected.

STATEMENT OF FACTS

A. The Parties.

1. Cyveillance

Pre-Merger, CYV was a leader in the emerging cyber-intelligence market, proactively managing risks for clients by using its proprietary technology to mine the internet for specific "threat" information, which experts would review to prevent incidents before they occurred. A0700; A1677-78 at 627:18-628:13; A0838. Lazard was among CYV's preferred stockholders, and Kevin Burns of Lazard served on CYV's Board prior to the Merger. A1621 at 10:1-3, 14-23. Lazard, as the Holder Representative under the Merger Agreement, executed the Merger Agreement with QNA. A0753.

CYV was successful in selling to commercial customers, including three-quarters of the top Fortune 500 companies in the financial services, pharmaceutical, energy, and technology industries. A1653 at 317:3-14; A1383. CYV had government customers,[1] but it had not yet built a broad-based government marketing and sales capability. CYV was actively exploring relationships with companies that could support the expansion of its government sales by serving as resellers or partnering with CYV in teaming arrangements.[2]

[1] *See* A1654 at 318:3-17; A0842 (State Department passport process); A1650 at 302:18-21 (program with FBI).

[2] *See, e.g.*, A1622 at 24:6-17; A1654-55 at 318:18-319:16; A0702; A0847-54; A0842.

When discussions with QNA began, CYV had an annual revenue run rate of $10 million per year, and an expected annual growth trajectory of 20-25%. A1639-40 at 162:16-163:16; A0860. In the two quarters before CYV was acquired (Q1 and Q2 of calendar 2009), CYV's revenues grew by 36% and 24% on a year-over-year basis. A1383. In 2009, CYV's revenues reached $12.8 million, the highest level to date, and consistent with a 20-25% growth trajectory.[3]

2. QNA and QUK

QNA is a defense and security technology company that provides technology-based offerings to government and commercial customers. *See* A1564 at ¶8. In 2009, over two-thirds of QNA's U.S. business was focused on providing services to U.S. Government customers. *See id.* at ¶9, 10; A1343 at No. 2. Before acquiring CYV, QNA did not possess a comparable proprietary technology platform, or the associated expert analysts, in providing cyber-intelligence solutions to its customers. A1564 at ¶11. QNA's annual revenues ranged from approximately $800 million to $1.3 billion during the years 2008-2012. A1483.

QNA is a subsidiary of QUK, a London-based software and services provider in aerospace, defense, and security. *See* A1352 at No. 22. Privatized in 2001, QUK had been part of the UK's Defense Evaluation and Research Agency, then the UK's largest science and technology organization. *Id*. at No. 23.

[3] A1640 at 163:17-24; A1278, A1312 (total 2009 revenue of $12,806,467.10).

B. The Genesis Of The Merger And The Merger Negotiations.

QNA first initiated contact with CYV in the spring of 2008 through a consultant. *See* A1655 at 319:17-23; A1675-76 at 607:23-608:3. The initial discussions involved partnering, but QNA wanted to control CYV's technology and sought an acquisition. A1655-56 at 319:17-320:20. QNA repeatedly represented in the negotiations that a combination with QNA would provide CYV access to QNA's U.S. government clients and contacts, and expand its presence in the UK and other international markets through QNA's parent, QUK, and other international subsidiaries. A1659-61 at 323:21-325:21; A1422-23 at 60:16-61:6. QNA sought to acquire CYV as part of its "string of pearls" strategy, complementary to another recent acquisition, DTRI, to afford CYV broader entré into the growing government cyber market.[4]

CYV originally sought a $100 million price based on a number of factors, including the investments made to build CYV. A1657-58 at 321:6-322:2. QNA countered at $80 million, without an earn-out. A1658 at 322:3-9. QNA, however, was unable to persuade QUK to approve that price, and the parties discussed the use of an earn-out. A1658 at 322:5-15. Those negotiations resulted in a signed letter of intent in September 2008, including an outline of the Earn-out that would later be memorialized in the Merger Agreement. *See* A0021-25.

[4] *See* A0701; A1647 at 290:9-23; A0838; A0877; A0835-36.

QNA represented – to CYV *and* to the public at large – that the integration and roll-out of CYV products would involve: (1) CYV continuing to sell to commercial customers in the U.S. and abroad; (2) QNA selling CYV's products to QNA's government clients in the U.S. and abroad; and (3) QUK doing the same with its government clients in the UK, the Middle East and Europe.[5] QNA executives confirmed that they believed that QNA *could* (*i.e.*, had the ability to) effectuate significant sales of CYV to its government clients and contacts.[6]

Based on these and other representations, after almost a year of negotiation, in May 2009 CYV agreed to be acquired by QNA in a transaction that valued CYV at up to $80 million – $40 million in cash at closing, and up to an additional $40 million Earn-out Payment. *See* A0760-62, A0772.[7]

C. Key Provisions of the Merger Agreement.

1. Company Revenue

The linchpin of the Earn-out is the definition of "Company Revenue." Witnesses consistently testified that the definition was drafted broadly to ensure that CYV would be credited for all revenue related to its core technology during

[5] *See* A1624 at 44:3-15; A1643-45 at 264:18-266:1; A0838; A0877; A0835-36.
[6] *See* A1624-26 at 44:16-46:19; A1660-61 at 324:15-325:21; A1682 at 739:5-15.
[7] The Earn-out Period ran from January 1, 2009 through December 31, 2010. A0817.

the Earn-out, regardless of which entity made the sale or what form the transaction took. A1630-31 at 50:5-51:12; *see also* A1641 at 166:6-11; A1466 at 29:2-9.[8]

The resultant definition of Company Revenue was as follows:

> ***the worldwide revenue of the Company, Purchaser or its Affiliates***, determined in accordance with GAAP, during the Earn-out Period ***arising out of the licenses or services, including but not limited to any permanent, subscription, or term license, sublicense or transaction fees or any maintenance, training, professional or consulting services, related directly to and data derived from the use of the Company's core technology*** as of the date hereof or as derived from or modified or expanded by Purchaser and any derivative or optional add-on application modules thereof.

A0816 (emphasis added).

2. Formula for Calculating the Earn-out

Sections 1.11(c) and (d) of the Merger Agreement set out the formula for calculating the Earn-out Payment. If Company Revenue reached at least $30 million in the two-year Earn-out Period, an Earn-out Payment would result, with the maximum payment achieved if Company Revenue reached or exceeded $45 million. A0772. The formula is not linear; after the $30 million threshold, each additional dollar of revenue resulted in more than a dollar of Earn-out Payment. A0772. CYV would realize the full $40 million Earn-out Payment if QNA and QUK each sold less than one-half of 1% of their annual revenue in CYV-related offerings during the Earn-out Period – a modest threshold to meet. *See id*.; A1483.

[8] The testimony of many former QNA employees was presented at trial via deposition testimony, as the witnesses were beyond the Court's jurisdiction. A1575-76; A1671-72 at 497:16-498:24.

By the same token, the minimum revenue needed to achieve any level of the Earn-out – $30 million – was a number that CYV was *not* expected to achieve on its own.[9] CYV projected revenue of $27-29 million during the Earn-out Period – just shy of the threshold.[10] QNA and QUK, for their part, needed only to sell a combined $2-3 million for CYV to secure the minimum Earn-out Payment.[11]

3. Limitations on QNA's Actions with Respect to CYV

CYV sought and obtained provisions to preserve and protect its rights to the Earn-out Payment. After considering having "tactical operational type covenants," including a list of specific "thou shalt do this" provisions (A1627-28 at 47:24-48:11), the parties opted instead for a "strategic framework, framing in kind of the objective of the merger," that included the definition of Company Revenue discussed above and broad protective provisions. A1628-30 at 48:12-50:4.

In particular, Section 5.4 of the Merger Agreement (Conduct of Surviving Corporation) prohibited QNA from "tak[ing] any action to divert or defer contracts or business opportunities that would result in Company Revenue with the intent of reducing or limiting the Earn-out Payment." A0801. This straightforward

[9] Given CYV's own projections, it is nonsensical that CYV would have agreed to the Earn-out if it had not believed, given the repeated assurances of QNA, that QNA intended to market and sell CYV's offerings to QNA's government customer base. *See* A1632 at 52:15-24; A1152 (noting that CYV budget *assumed* QNA and QUK sales).

[10] A1624-25 at 44:16-45:16; A1631-32 at 51:13-52:5; A1642 at 167:2-17; A1658-59 at 322:19-323:16.

[11] *See* A0772 (earn-out threshold); A1168-69 (at November 2010, CYV on target for just under $28M); A1143 ("I just recall CYV statements that to get to the original $17M revenue plan they submitted, they required about $2M of USG sales.").

provision barred QNA from diverting or deferring relevant contracts or business opportunities, knowing that its action would reduce or limit any Earn-out Payment.

D. QNA's Plan and Representations to its Parent: No Earn-out Payment.

QNA prepared a series of Board memoranda in the course of the negotiations. The penultimate May 2009 Board memorandum (A0695-752; the "May Memo") was presented to the Boards of both QNA and QUK – the latter to approve the acquisition and fund it.[12] The May Memo projected that by the end of the Earn-out Period (December 31, 2010), the Merger would have generated a total of $43.2 million, cost-justifying the initial $40 million purchase price and meeting QUK's criteria for return on invested capital (ROIC) and neutral to accretive impact on QUK's EPS.[13] However, the May Memo projected that only $29.9 million of that sum would qualify as "Company Revenue" for earn-out purposes – just $100,000 short of the minimum threshold – of which $26.6 million would be CYV's own commercial sales, and only $3.3 million would be government sales. A0708. Over four times that much government revenue – an additional $13.3 million – would also result from the Merger, but it would not be treated as "Company Revenue." *Id.* Unknown to CYV, QNA did *not* plan to drive significant CYV government sales; if anything, it would be the reverse.

[12] A0700 ("[t]he purpose of this paper is to request authority for [QNA] to . . . purchase" CYV); A1658 at 322:5-15; A1467 at 69:17-21.
[13] A707; A708; A1646 at 278:3-22 (QUK required 13% ROIC); A0126-29.

These figures were of critical importance to QUK due to its bank debt covenants and eroding share price, and QNA knew this from January 2009, four months before the Merger Agreement was executed.[14] As a result, to meet all of QUK's criteria, QNA developed a distinction between "product" and "non-product" sales (later "directly" vs. "indirectly" related sales), with 80% of the projected government revenue resulting from the Merger categorized as "non-product" or "indirect" sales, which QNA did not intend to credit towards the Earn-out.[15] QNA CEO Andrews confirmed at trial that this distinction was critical for QNA to obtain QUK's approval for the merger (A1687 at 753:8-18),[16] and he conceded that the uncredited revenue would have been "attributable" to CYV "in a business sense." A1688 at 756:14-24; A1683-86 at 743:24-746:16. All of this

[14] In mid-January 2009, QUK's CFO (Mellors) told QNA's CFO (Weston) that QUK had only £38 million in acquisition funding available under its debt covenant limits for the fiscal year, and any additional acquisition consideration would require bank waivers if funded through debt. A0019. Thus, the "consideration" QNA was requesting of its parent to proceed with the Merger (meaning, "the most likely total consideration for the investment") had to include "earn-out consideration . . . to the extent likely." *Id.* QUK needed to know if *any* level of the Earn-out Payment was "likely," and QNA proceeded to project that CYV was unlikely to achieve *any* level of the Earn-out Payment. A0007 (need "all amounts likely to be payable"); A0019 (debt covenant limits); A0708 ($29.9MM U.S. projected; no Earn-out); A1636-37 at 56:18-57:15; *see also* A0104-05 (due to declining share price, EPS impact recalculated in February 2009).

[15] A1470 at 143:2-20; A1683-86 at 743:24-746:16; A1433-34 at 79:2-80:18; A1435-36 at 88:18-89:2; A0708.

[16] In fact, when prompted by QUK in February 2009 to work with the projections to achieve a year-two neutral to accretive EPS result, the CFO increased CYV's commercial sales projections, but was immediately told by Andrews: "We can't do it in commercial sales or we trigger the earnout and higher price." A0113. Andrews suggested the "answer" included "higher government (non-product) sales," and in response, the CFO increased projections for "QNA non-product sales – Government," which would not count toward the Earn-out. A0115-16.

was, of course, unknown to CYV.[17] With this strategy, QNA was confident enough, both pre- and post-Merger, to repeatedly represent to QUK that CYV would fall just short of the Earn-out threshold. A0708 (5/09); A0902 (3/10, no deferred consideration in cash flow projections); A1163 (9/10, "this deferred consideration payment will not be triggered").

E. Company Revenue Earned During the Earn-out Period.

As discussed in Argument I below, QNA made good on its projections to QUK, including by deliberately stalling opportunities identified by CYV that did not fit QNA's plan. At the end of the Earn-out Period, CYV had achieved approximately $27.2 million in Company Revenue – within the range it had projected for itself pre-Merger; $600,000 more than QNA had projected to QUK in the May Memo; and only $2.8 million short of the Earn-out threshold. A1250 (2009 and 2010 Company Revenue was $27,179,515); A0708. QNA, with its extensive government contacts, contract vehicles, experience, and billion-dollar annual revenue run rate, generated a paltry $71,416 in Company Revenue, or less than $4,000 per month in the 18 months that passed post-closing.[18]

[17] The Board memoranda were internal to QNA and QUK. A1468 at 86:20-87:7. Had they been shared, there would have been no Merger on these terms. A1633-37 at 53:18-57:15 (Kevin Burns: "that would have been a huge disconnect, because it strikes at the fundamental premise of the whole merger").

[18] A1226, A1229, items 2, 4 & 6; CYV won item 5, US Secret Service (A1152, 1154).

F. The Trial and Post-Trial Oral Ruling.

This action was commenced on August 29, 2011, and a five-day trial was scheduled to commence on March 3, 2014, after more than two and a half years of pre-trial discovery and motion practice. A projected five-day trial was compressed into four days, from March 4 through March 7, 2014, due to inclement weather. At the trial, ten witnesses testified in person (A1575), and an additional fourteen witnesses testified via their deposition testimony and expert reports (A1575-76). The testimony of many former QNA employees was presented via videotaped deposition testimony. A total of 912 trial exhibits were submitted.

The parties submitted post-trial briefing, and post-trial argument was held on July 11, 2014. At the conclusion of post-trial argument and after a brief recess, the Court of Chancery delivered an informal oral ruling, consisting of roughly 18 double-spaced transcript pages, noting that it "could easily write a 100-page exegesis," but declined to do so, instead providing some "brief factual background" for "the benefit of any more senior tribunal that reviews this decision." Ex. A, 63:19-64:3. No specific law was referenced in the oral ruling, few specific facts were found, and the Court entered judgment for the defendant. This appeal followed.

ARGUMENT

I. THE COURT OF CHANCERY IMPROPERLY REQUIRED LAZARD TO PROVE THAT QNA ACTED WITH THE SOLE INTENT TO REDUCE OR LIMIT ANY EARN-OUT PAYMENT

A. Question Presented.

Whether the Court of Chancery erred in requiring Lazard to prove when QNA delayed or deferred Company Revenue opportunities – which the Court found QNA did – that Lazard was required *also* to prove that QNA did so in *bad faith*, with the *sole*, specific or express intent to reduce any Earn-out Payment.[19]

B. Scope of Review.

The interpretation of contracts "involves legal questions and thus the standard of review is *de novo*." *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 744 (Del. 1997). This Court will accept the factual findings below "[i]f they are sufficiently supported by the record and are the product of an orderly and logical deductive process." *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972). This Court may substitute its own findings where "the findings below are clearly wrong and the doing of justice requires their overturn." *Id*. In such cases, this Court has the authority to review the entire record and make its own findings of fact. *Id*.; *Smith v. Van Gorkom*, 488 A.2d 858, 871 (Del. 1995)[20] (Supreme Court made its

[19] A0801, §5.4; Ex. A, 71:1-77:15; A1375-76 at ¶¶78-82; A1698-1713 at 5:9-20:21.
[20] *Overruled in part on other grounds by Gantler v. Stephens*, 965 A.2d 695 (Del. 2009).

own finding where Vice-Chancellor's finding was "contrary to the record and not the product of a logical and deductive reasoning process.").

C. Merits of Argument.

Section 5.4 prohibited QNA from "tak[ing] any action to divert or defer contracts or business opportunities that would result in Company Revenue with the intent of reducing or limiting the Earn-out Payment." A0801. Lazard proved that QNA deliberately diverted or deferred CYV contracts or business opportunities, *knowing* that it would negatively impact the Earn-out. The Court of Chancery erred as a matter of law when it imposed upon Lazard the obligation to prove, *in addition*, that QNA acted in *bad faith*, and with the *sole*, specific and express intent to reduce or limit the Earn-out Payment. Section 5.4 required no such thing.

"Intent" to bring about a result is proven under the common law when it is shown that a party elected to take a particular course of action, knowing that it would bring about that result. Section 5.4 did not include terms limiting QNA's covenant to situations in which its "sole," "specific" or "primary" intent in stalling revenue opportunities was to thwart an Earn-out Payment, nor did it require "bad faith." QNA took deliberate actions with direct consequences to the CYV Earn-out; no additional or different intent needed to be shown.

The Court's decision to require proof of a singular, bad faith intent to thwart the Earn-out improperly introduced a new term into the contract that the parties

themselves did not employ. That was wrong as a matter of law and must be reversed. QNA's various internal agents may well have had a number of personal motives or designs in mind at the various points in time that QNA elected to take action that it knew would stall CYV revenue opportunities and (by definition) reduce or limit any Earn-out Payment. Under the common law, that is irrelevant. All that Lazard had to prove as to QNA's intent was that QNA *knew* (whatever its agents' proffered motivations or excuses may have been) that its chosen, intentional actions in stalling CYV revenue opportunities would reduce or limit any Earn-out Payment. Lazard proved that repeatedly. Judgment should have entered for Lazard at trial, and this Court should enter such judgment now.

1. The Common Law Meaning of "Intent"

"Intent" to bring about a result is proven under the common law when it is shown that a party elected to take a particular course of action, *knowing* that it would bring about that result; it is not necessary to prove *in addition* that the party had no other motives or intentions at the same time, or even that the result at issue was its primary or overriding objective. For example, in *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 748 (Del. Ch. 2008), the Court of Chancery examined a contract with a higher intent standard than that presented here – "knowing and intentional breach" – and concluded:

> Thus, a 'knowing and intentional' breach is a deliberate one – a breach that is a direct consequence of a deliberate act undertaken by

> the breaching party, rather than one that results indirectly, or as a result of the breaching party's negligence or unforeseeable misadventure.

If a "knowing and intentional" breach requires only a deliberate act with a direct consequence, simple common law "intent" cannot require *more*.[21]

The Court of Chancery committed reversible error by requiring proof that QNA acted with the *singular* or *specific* intent to reduce or limit any Earn-out Payment.[22] The Court compounded its error by also conflating the simple, unmodified contractual term "intent" with "*bad faith*," and wrongly requiring Lazard to prove that QNA acted in *bad faith* to prove a breach of Section 5.4. Ex. A, 77:7-11 ("I cannot say that it [QNA's delay with the IRA] was something that resulted from people's bad faith or an intent to undermine the earnout."). *See also id*. at 71:4-6 ("Absent this bad intent, actions that diverted or deferred opportunities would not violate Section 5.4"). Nothing in Section 5.4 – which

[21] *See also Wesco Autobody Supply Inc. v. Ernest*, 243 P.3d 1069, 1082 (Idaho 2010) ("Intent can be shown even if the inference is incidental to the actor's intended purpose and desire but known to him to be a necessary consequence of his action"); Restatement (Third) of Torts: Liability for Phys. & Emot. Harm, §1 (2010) ("A person acts with the intent to produce a consequence if (a) the person acts with the purpose of producing the consequence; or (b) acts knowing that the consequence is substantially certain to result."); *Ferki v. Wells Fargo Bank Nat. Ass'n*, 2010 WL 5174406, at *6 (E.D. Pa. Dec. 20, 2010); *The Eggert Agency, Inc. v. NA Mgmt. Corp.*, 2009 WL 2423991, at *8 (S.D. Ohio Aug. 5, 2009) (intent often inferred from totality of circumstances); *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 506 (2d Cir. 2004).

[22] Indeed, the lower court's ruling is fundamentally at odds with the core notion of an efficient breach of contract, in which the breaching party *typically* has other reasons for breaching (*e.g.*, a better opportunity, cost savings, and the like), and *intentionally* breaches to pursue the more attractive option. That does not render the breach unintentional, nor yet in "bad faith."

called only for a showing of "intent" (*see* A0801) – required proof of the significantly different concept of "bad faith."[23]

2. QNA Stalled Significant CYV Revenue Opportunities

Lazard proved at trial, and the Court found, that QNA took deliberate action to stall CYV contracts and business opportunities – defeating the primary goal of the Merger, which was to sell CYV solutions to government agencies in the US and worldwide. A0835-36; A0838; A1624-1627 at 44:3-47:13; A1632 at 52:15-20; A1682 at 739:5-15. Of these, two particularly stood out to the court below.[24]

The most significant was with one of QUK's best customers, the GCHQ,[25] which by itself would have resulted in a substantial Earn-out Payment.[26] Almost immediately after the Merger closed, in August 2009, CYV and QUK started to discuss the possibility of providing CYV's capabilities to the UK government, and specifically the GCHQ. A1666-68 at 364:2-14, 365:3-366:12; A0879-80. The

[23] *See* Black's Law Dictionary (6th ed. 1990) (defining "bad faith" as "generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive."); *Desert Equities Inc. v. Morgan Stanley Leveraged Equity Fund*, 624 A. 2d 1199, 1208 n.16 (Del. 1993) (quoting Fifth Edition of same).

[24] Both happen to involve UK opportunities. There was no shortage of stalled domestic opportunities, as well, although none could meet the lower court's "exclusive intent" standard. These included a stalled Navy bid that undermined a broad co-branding relationship with Accenture (*see* note 39, *infra*), and QNA's inexplicable delay in the simple task of placing CYV offerings on QNA's pre-existing government "GSA" schedules, to make them available for immediate government purchase. *See* A1496-99, A1541-43.

[25] The GCHQ is an intelligence and security agency and was a significant customer of QUK. A1667 at 365:12-15.

[26] A1424-25 at 140:18-141:3; A1155 ($13 million anticipated); A1180 (noting estimated $10 million cost to replicate CYV in the UK); A1669 at 372:9-18 (price of $12 million discussed); A1679-81 at 672:13-674:6.

GCHQ required that CYV's capabilities be provided from a UK installation – either a QUK or GCHQ location. A1668 at 366:5-12. Despite the fact that its own parent brought the opportunity forward, supported it, and it had the potential to be significant (both in dollar value and cache),[27] the Court found that QNA, far from embracing the idea, deliberately stalled it.[28] The Court observed: "The evidence is clear that QNA delayed this opportunity. There's no question about that. The evidence is clear that they were stalling." Ex. A, 75:5-7.[29]

Another opportunity was an ordinary commercial (*i.e.*, non-government) reseller agreement between QNA and its parent, QUK, for international commercial sales.[30] CYV began negotiating such an agreement with QUK in August 2009, but QNA did not enter into a Heads of Term agreement with QUK until December 2009, and the International Reseller Agreement ("IRA") itself took another four months. *See* A0881-83; A0887-90.[31] By the time the IRA was

[27] QUK estimated that the market for CYV technology in respect of UK government customers might reach £25 million over the next five years. A1176.

[28] In so finding, the Court was also necessarily rejecting the validity of the excuses that QNA had presented during the Earn-out Period, and again at trial.

[29] *See also* A1693-95 at 940:23-942:14 (Papas confirming the express sentiment at QNA was to stall the GCHQ opportunity in hopes that it would go away); A1167 (discussed below; Panos reporting QNA's plan to make GCHQ planning meeting with QUK "a wild goose chase"); A1236, 1238 (Andrews inquiring, after the GCHQ opportunity had been stalled, "[w]hat can we do to block" QUK from taking control of CYV itself?).

[30] CYV had reasonably expected $1.5 million in revenue from QUK's commercial sales under this agreement. A1152; A0906, §5.5.

[31] Other reseller agreements were already in place between QUK and its other divisions. *See* A1460-61 at 16:18-17:4. In fact, this was not even the first reseller agreement between QUK *and QNA*. A1456 at 37:17-21.

executed, eleven months had lapsed since the Merger Agreement was executed, and nine months had been wasted post-closing.[32]

Plaintiff's experts observed that a parent/subsidiary reseller agreement is a routine matter, typically addressed in a matter of days or weeks; this highly atypical scenario smacked of purposeful delay. A1525-27.[33] In fact, Leo Quinn, *QUK's CEO*, visited QNA in both December 2009 and January 2010 and expressed concern and impatience at the delay QNA was causing with the agreement. A1665 at 352:1-8. The Court observed,

> The last issue, which also to my mind presented a close case, was the execution of a reseller agreement with [QUK]. This took a colossally long time. A bizarrely long time. It's one of these things where someone who, certainly, deals with the private sector and who is used to the abilities that a nimble start-up venture-backed company would have when operating on its own, would view as incomprehensible on any basis other than people intentionally dragging their feet and delaying.

Ex. A, 76:11-20.

3. QNA Knew the Consequences of its Chosen Actions.

QNA was also well aware of the obvious consequence of its actions: in blocking or stalling these and other CYV revenue opportunities, QNA knew (could not fail to know) that its chosen course of conduct would negatively impact CYV's ability to secure an Earn-out Payment. Indeed, top QNA management knew in

[32] A1462-63 at 35:8-36:3 (in order for a sale to be consummated, a contract needed to be in place between QUK and QNA for CYV's offerings).

[33] A1454-55 at 25:22-26:24 (QUK managing director of security, noting that QUK identified multiple ideas for CYV's expansion or prospects in the UK, on which QNA did not engage).

modeling the Merger for QUK's approval and funding that any notable increase in CYV-related sales would trigger the Earn-out, and they consciously avoided doing so. *See* note 16, *supra* (*citing* A0113, CEO Andrews to CFO Weston: "We can't do it in commercial sales or we trigger the earnout and higher price.").

Moreover, CYV told QNA as much. For example, on September 13, 2010, CYV's CEO, Panos, emailed two QNA executives regarding an upcoming meeting with QUK about the GCHQ, reminding them, "we have a great **Customer** who WANTS the Cyveillance solution," and with the GCHQ transaction, an Earn-out would be achieved. A1157 (emphasis in original); *see also* A0976 (stopping a potential sale to the GCHQ "cuts . . . earnout potential"). By the next day, however, QNA management had reported to QUK that it was "confident" *no* Earn-out would be triggered. A1163. Two days later, at a QNA/CYV planning meeting (for the upcoming meeting with QUK about the GCHQ), QNA made clear that its objective was to show an "external attitude of full cooperation" to QUK, but in reality make the meeting a "wild goose chase." A1167.[34]

In fact, Mary Craft – leader of the "wild goose chase" meeting, head of the division that included CYV, and an addressee of A1157, in which Panos noted that the GCHQ alone would secure CYV an Earn-out Payment – *did not deny* that events unfolded as Panos had reported (*i.e.*, a deliberate plan by QNA executives

[34] A1670 at 382:7-9 ("Q. And that paragraph [the second paragraph of A1167] accurately reflects what happened at this meeting, sir? A. Absolutely.").

to thwart their own parent); did not deny promoting a strategy of false "external cooperation" to QUK;[35] and did not assert that no one at QNA would so act.[36]

In short, QNA knew *exactly* what it was doing to CYV's Earn-out potential by stalling the GCHQ. QNA also knew that a consequence of delaying the IRA would be to reduce or limit CYV's international revenue, and hence, CYV's Earn-out potential. As Richard Cambridge of QUK testified, for *QUK* to consummate any sale of QNA's offerings, a contract needed to be in place. A1462-63 at 35:8-36:3; A0980 (QUK seeking signed IRA in time for RFP).[37]

4. The Court Applied an Erroneous Standard of "Intent"

Instead of simply applying the well-established common law concept of "intent" to this record (*viz.*, proof of deliberate action, knowing that it would bring about a particular result) and entering judgment for Lazard, the Court instead, without discussion or notice, required proof that QNA acted in "bad faith," and

[35] Nor could she. Craft had, in fact, done precisely that, in writing, on other occasions. In a subsequent, May 10, 2011 email, she uses much the same phraseology: "We also need to appear to be completely cooperative and forward-leaning to the Brits." A1242.

[36] Instead, in a noticeably lowered voice and affect, she said she "could not recall" the meeting or views expressed. A1475-77 at 193:6-195:21.

[37] Had the reseller agreement (A0903-75) been timely entered into, it would have required QUK to use "commercially reasonable efforts" to sell CYV's offerings on a commercial basis abroad (Section 4.9). It otherwise generally limited CYV to servicing and renewing existing customers absent consent (Section 3.3), effectively placing any meaningful expansion of CYV's international sales efforts in the hands of its parent companies.

with the singular or express intent to reduce or limit any Earn-out Payment. That was reversible error. *See, e.g.*, *Hexion*, 965 A.2d at 748.[38]

Lazard simply had to prove that QNA stalled or interfered *knowing* its actions would impair CYV's ability to achieve the Earn-out (*i.e.*, common law "intent"). Lazard did that, and therefore proved that QNA chose to undertake a series of actions "with the intent" to negatively impact CYV's Earn-out.

Excerpts from the Court's informal oral ruling at the conclusion of post-trial argument illustrate its use of an erroneous standard for common law "intent." For example, the Court found that QNA *deliberately stalled* CYV's biggest revenue opportunity (the GCHQ), and stated that it could not "determine precisely" *why* QNA did so (*i.e.*, the Court did *not* adopt QNA's proffered explanations). The Court proceeded to comment that it "looked like" a "turf battle" between parent (QUK) and subsidiary (QNA) about who would sell CYV capabilities to whom, and denied relief on that basis. Ex. A, 75:5-76:10. But the Court made no *actual* finding of fact on this point, and the *proven* fact that CYV's Earn-out eligible revenue opportunity was a *deliberate casualty* in the supposed battle was itself sufficient to entitle Lazard to relief. *See, e.g.*, *Hexion*, 965 A.2d at 748.

[38] Indeed, the law does not require a showing of such singular intent on the part of a business organization and its agents to *convict* the organization of a *crime*. *See, e.g.*, United States Attorneys' Manual (USAM), Title 9, § 28.200 ("Agents may act for mixed reasons – both for self-aggrandizement…and for the benefit of the corporation, and a corporation may be held liable so long as one motivation of its agent is to benefit the corporation.") (citations omitted).

Similarly, the Court seemingly ignored that QUK's own CEO, Leo Quinn, twice called QNA out for stalling the IRA (A1665 at 352:1-8), and also dismissed expert opinion that QNA had intentionally stalled the IRA. *See* A1525-27; A0881-83; A0887-90. Instead, the Court stated:

> This thing could have been pursued more diligently….The best I can say is that this was the least-competently handled of the efforts, *but I cannot say that it was something that resulted from people's bad faith or an intent to undermine the earnout*.

Ex. A, 77:4-11 (emphasis added). But "bad faith" or a *specific* intent to "undermine the earnout" were not the issues before the Court; Mr. Quinn called QNA out on the rug because it was, in fact, stalling.

In the same vein, the Court acknowledged that QNA had actively interfered with and delayed CYV in submitting a bid with Accenture on another opportunity – the Navy SPAWAR project – but nonetheless concluded, "I can't say that *any of the interference* or any sort of delay of the Accenture/Cyveillance bid was done to reduce or limit the earnout payment." Ex. A, 73:10-13 (emphasis added). Again, that was not the applicable standard, and there is no instance in the lower court's ruling in which it employs the proper standard.[39]

[39] The real casualty from the delay of the Accenture-CYV SPAWAR bid, which the Court did not mention, was not the bid itself, but a CYV co-branding relationship with Accenture. A0847-48; A0840; A0842; A1441-43 at 103:16-105:12; A1444-1450 at 108:4-109:6, 110:12-15, 110:20-111:2, 112:15-114:15; A1638 at 88:8-23; A1662-64 at 337:21-339:3.

5. "An Orderly and Logical Deductive Process"

QNA's blocking and stalling of CYV revenue opportunities during the Earn-out Period did not occur in a vacuum. There was a *context* for QNA's actions, and in ignoring or dismissing that entire context, the lower court did not follow an orderly and logical deductive process (*Levitt*, 287 A.2d at 673), but its opposite.

For example, the Court dismissed as not "nefarious" the fact that QNA assured CYV that with QNA's government sales, they would easily clear the Earn-out,[40] while QNA internally projected to its Board and QUK's Board that no Earn-out threshold would be met. Ex. A, 66:15-22, 72:3-7. The issue, however, does not turn on QNA's duplicity (although it could), nor that earn-outs can often result from valuation "gaps."[41]

Rather, the issue arose from QNA's distinction in the May Memo between "product" and "non-product" revenue; its position that the "non-product" revenue, although resulting from the Merger and attributable to CYV "in a business sense," nonetheless would not count toward the Earn-out; and its repeated assurances to QUK, both before and during the Earn-out Period, that in fact there would be *no* Earn-out Payment. *See supra* pp. 10-12.

[40] A1624 at 44:3-15; A1624-26 at 44:16-46:19; A1660-61 at 324:15-325:21; A1682 at 739:5-15.
[41] The Court's stated rationale was unrelated to the evidence; it was instead the generic notion that if the buyer thought the business was worth more, then there probably would not have been a valuation "gap" to bridge with an earn-out. Ex. A, 66:15-67:9.

It was in *this* context, when CYV identified revenue opportunities that could have achieved the full Earn-out Payment, but were not accompanied by offsetting "non-product" or "indirectly related" revenue for QNA, that QNA blocked and stalled those opportunities, consistent with its assurances to its parent that there would be no Earn-out Payment.[42] The Court's dismissive treatment of these issues does not bear the earmarks of an orderly and logical deductive process. *Levitt*, 287 A.2d at 673. At one point, the Court read part of the definition of "Company Revenue" and then, after reciting the word "directly" (which echoes the direct/indirect distinction in the May Memo), said "and I pause to note that word will come back, so remember the word 'directly.'" Ex. A, 68:19-20. However, the Court did not return to that topic or explain its comment or its view on these issues. The lower court's informal oral ruling, citing no law and finding few facts, is not entitled to this Court's customary deference. *Nixon v. Blackwell*, 626 A.2d 1366, 1378 n.16 (Del. 1993) (no deference where crucial findings were "somewhat vague and the opinion does not crisply and clearly set forth findings of fact").

The Court of Chancery's informal ruling on Lazard's breach of contract claim was errant as a matter of law, and it is incapable of affirmance in any event.

[42] QNA was not interested in growing CYV's revenues unless QNA profited from it. A1691 at 794:12-13 ("So revenue without profit was not a helpful thing."); A1692 at 843:14-22; A1478 at 333:4-11 ("I wanted them to become profitable or at least break even.").

II. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW WHEN IT RULED THAT THE INTENT REQUIREMENT OF SECTION 5.4 ELIMINATED THE IMPLIED COVENANT

A. Question Presented.

Whether the Court of Chancery erred as a matter of law in ruling that the "intent" requirement found in Section 5.4 of the Merger Agreement applied to Lazard's implied covenant claim, rather than an objective standard derived from established implied covenant principles, effectively eviscerating the implied covenant in this case. A0753-832 (Merger Agreement); A0801 (§5.4); Ex. A, 77:16-80:3; A1713-1723 at 20:22-30:19; A1376-77 at ¶¶ 83-87.

B. Scope of Review.

The standard by which QNA's conduct is to be judged is a legal question and therefore subject to *de novo* review by this Court. *Nixon,* 626 A.2d at 1375. The ultimate determination of the Court of Chancery that QNA did not breach the implied covenant involves mixed questions of fact and law. *Id.* This Court reviews the entire record and the sufficiency of the evidence to test the propriety of those findings and will review the lower court's factual findings to determine if they are sufficiently supported by the record and if they are the product of an orderly and logical deductive process. *Id.*

C. Merits of Argument.

The Court of Chancery erred in applying the "intent" standard of Section 5.4 to QNA's discretionary decision-making under the Merger Agreement, rather than

the standards required by the implied covenant of good faith and fair dealing. This Court has repeatedly cautioned that a limited-purpose contractual "intent" standard does not *displace* the implied covenant in the contract as a whole. *EV3, Inc. v. Lesh*, 2014 WL 4914905, at *8 (Del. Supr. Sept. 30, 2014) ("a trial court must avoid conflating the standard for breach of an express contractual duty to exercise good faith with the implied covenant").[43]

Here, the Court erred in ruling that an "intent" provision in Section 5.4 (which, by its plain terms, is applicable only to a specific factual scenario; namely, deferred or diverted business opportunities and contracts) was applicable to *any and all* discretionary decisions that QNA might make with respect to CYV and the marketing and sale of its capabilities. In so ruling, the Court effectively held that the "intent" term in Section 5.4 *eliminated* application of the implied covenant to the contract as a whole.[44] That was incorrect as a matter of law.

1. The Implied Covenant Requires Reasonableness when Engaging in Discretionary Conduct

It is black-letter law that the implied covenant of good faith and fair dealing inheres in all Delaware contracts. *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159

[43] *See also Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 419-420 (Del. 2013) *overruled in part on other grounds by Winshall v. Viacom Int'l Inc.*, 76 A.3d 808 (Del. 2013) (Vice Chancellor "improperly conflate[d] two distinct concepts – the implied covenant and the [contract's requirement that all determinations and decisions to take or decline to take any action be done in "good faith"] – and ignore[d] the temporal distinction between them."); *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund of Chicago*, 75 A.3d 101, 109 (Del. 2013).
[44] *Compare* A1416-17 at 63:1-64:6 (using established "implied covenant" analysis in *this case*).

(Del. Ch. 1985). The implied covenant "requires that a party refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of its bargain." *Gerber*, 67 A.3d at 419.[45] "The implied covenant. . . emphasizes 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.'" *Cont'l Ins. Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1234 (Del. Ch. 2000).[46]

"When exercising a discretionary right, a party to the contract must exercise its discretion reasonably." *Gerber*, 67 A.3d at 419.[47] The implied covenant, in that sense, protects the "spirit" of an earn-out provision when an acquiror attempts to avoid its contractual obligation to make earn-out payments by acting in bad faith. *See, e.g., Keating v. Applus+ Tech., Inc.*, 2009 WL 261091, at *4 (E.D. Pa. Feb. 4, 2009) ("Applus cannot avoid its contractual [earn-out payment] obligations by

[45] *Accord Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (same); *Winshall.*, 76 A.3d at 816; *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 145-46 (2009) (same).

[46] *See also Credit Lyonnias Bank Nederland, N.V. v. Pathe Communications Corp.*, 1991 WL 277613, at *23 (Del. Ch. Dec. 30, 1991) ("[W]hile contracting parties are not fiduciaries for each other, there are outer limits to the self-seeking actions they may take under a contract. Where one party's actions are such as to deprive the other of a material aspect of the bargain for which he contracted, the first party will be found to have violated that elemental obligation of all contracting parties to deal with each other in good faith and to deal fairly with each other with respect to the subject matter of the contract.").

[47] *See also Airborne*, 984 A.2d at 146 (implied covenant requires acquirer "to make an honest go of it"); Paul M. Altman & Srinivas M. Raju, *Delaware Alternative Entities and the Implied Contractual Covenant of Good Faith and Fair Dealing Under Delaware Law*, 60 Bus. Law. 1469, 1481 (2005) ("Delaware cases generally support the proposition that the Implied Covenant requires that such discretion must be exercised in good faith and consistent with the reasonable expectations of the parties.").

creating, in bad faith, an outcome that technically satisfies the express terms of the SPA, but deprives plaintiffs of their legitimate expectations.").[48]

2. Section 5.4 Does Not Eliminate the Implied Covenant

The Court first found that the Merger Agreement contained "gaps:"

> This is a contract that addressed ongoing performance issues under an earnout that originally was supposed to cover two years and ended up covering 18 months. It contemplated a complex relationship. There was no way for human minds to foresee all the different potentialities. Certainly there were gaps as to how the parties would interact with each other during the earnout period.

Ex. A, 78:8-15; *Allen v. El Paso Pipeline GP Company, L.L.C.*, 2014 WL 2819005, at *11 (Del. Ch. June 20, 2014); *Amirsaleh v. Bd. Of Trade of the City of N..Y., Inc.*, 2008 WL 4182998, at *1 (Del. Ch. Sept. 11, 2008) (no contract, however precisely drafted, "can wholly account for every possible contingency.").

One such "gap" was the fact that the Merger Agreement did not address *how* QNA would exercise its discretion in introducing CYV offerings to QNA's *own* government client base. The Court erred in ruling that this gap could not be filled, and that the implied covenant would do no more than import the intent language from Section 5.4 in any event. Ex. A, 79:23-80:3. In essence, the ruling was that because the Merger Agreement contained a contractual intent standard – which, by

[48] *See also O'Tool v. Genmar Holdings, Inc.* 387 F.3d 1188, 1197 (10th Cir. 2004) ("The obvious spirit of the [earn-out provision] was that [plaintiffs] would be given a fair opportunity to operate the company in such a fashion as to maximize the earn-out consideration available under the agreement.").

its terms, applied only in defined circumstances – it nonetheless *had* to govern all of QNA's discretionary decisions. That was simply incorrect as a matter of law.

Section 5.4 applied to QNA when specific contracts or business opportunities involving CYV's capabilities arose: QNA could not take any action to divert or defer such contracts or opportunities with the intent of reducing or limiting the Earn-out. A0801 §5.4. The parties' post-merger relationship, however, involved much more than QNA's actions with respect to specific contracts or business opportunities that arose for CYV. As established at trial, the parties' expectations included that QNA would market and sell CYV's offerings to QNA's own customers, particularly its U.S. Government customers. A1624 at 44:3-15; A1643-45 at 264:18-266:1. The Merger Agreement is silent as to *how* QNA was to exercise its discretion in so doing. *Compare Gerber*, 67 A.3d at 419 (a contract "may identify factors that the decision-maker can consider, and it may provide a contractual standard for evaluating the decision").

Because the Merger Agreement granted QNA discretion as to *how* it would go about selling CYV's capabilities to its own government customers and prospects, the implied covenant required that QNA exercise that discretion reasonably and in good faith. *Gerber*, 67 A.3d at 419.[49] The implied covenant was

[49] The implied covenant does not turn on whether a party acted in subjective good faith. *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 442, 444 (Del. Ch. 2012), *aff'd in part, rev'd in part on other grounds*, 68 A.3d 665 (Del. 2013).

necessary to ensure that QNA did not exercise its discretion so as to deprive CYV of its legitimate expectations with respect to QNA's post-merger conduct.

There is nothing in the negotiating history to negate application of the implied covenant. As the Court noted, at one point CYV had proposed that QNA agree to certain affirmative obligations, including reasonable commercial efforts to recruit and employ sufficient employees, and market and bid for new contracts consistent with past practice. A0074 § 5.6. Notably, all of these pertained to QNA's *operation of CYV* as the surviving corporation, and not the conduct of QNA's own business. *See id*. QNA rejected that and sought a provision allowing it to "operate [CYV's] business in its sole discretion." A0178-79 §5.5. CYV rejected that proposal. A0339 §5.4. The parties settled on the final Section 5.4 language (A0801), and there is no evidence they ever agreed that an intent-based standard would govern *all* of QNA's discretionary decisions relative to CYV. In fact, the negotiating history shows that they considered and *rejected* the idea.

Intermediate drafts of the operative language of Section 5.4 had contemplated application of an intent standard to a much broader range of QNA conduct, with language that was *not* limited to QNA's actions with respect to specific business opportunities and contracts. A0583 § 5.4.[50] That language was

[50] The relevant proposed language at A0583 stated: QNA shall not "take *any action* intended to result in a reduction of the Earn-out Payment below that which would have been achieved if such action had not been taken, *including without limitation* diverting or deferring contracts or

rejected, leaving the background law (*i.e.*, the implied covenant) intact in that broader space; the final Section 5.4 speaks *only* to QNA's intent with respect to diverting or deferring contracts or business opportunities. A0801 §5.4. It does not address any *other* actions that QNA may take with respect to CYV, nor how QNA would *itself* go about selling CYV's capabilities to QNA's customer base.

Given that the parties expressly *rejected* an intent-based standard to govern all of QNA's actions, the Court's conclusion that the parties would have *agreed* to have such a standard govern all of QNA's conduct is not merely unsupported by the record but *contradicted* by it, and incorrect as a matter of law.[51] Ex. A, 79:9-22; *see Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1033 (Del. Ch. 2006) (implied covenant is not to be used to "rewrite contractual language covering particular topics just because one party failed to extract as complete a range of protections as it, after the fact, claims to have desired during the negotiation process"). Again, the lower court's informal ruling does not bear the earmarks of "an orderly and logical deductive process." *Levitt*, 287 A.2d at 673.

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business opportunities that would result in Company Revenue to products, businesses or periods that would not result in Company Revenue." (emphasis added).

[51] The Court stated that it based its decision on a review of the negotiations between the parties, but the Court did not refer to any specific communications or drafts of the Merger Agreement. Thus, it is unclear what, if any, documentary evidence the Court relied upon. Consequently, as the decision does not "crisply and clearly set forth findings of fact," it is not entitled to deference from this Court. *Nixon*, 626 A.2d at 1378 n.16.

The Court of Chancery should have ruled that QNA was required to exercise its discretion, including as to its own CYV-related sales efforts, reasonably, in good faith and so as not to thwart the parties' reasonable expectations.

3. The Decision Below Cannot be Affirmed

When evaluated under the correct legal framework, the evidence at trial readily established that QNA, contrary to its prior representations that it could and *would* sell CYV's offerings in volume to its government customers (A1624-27 at 44:3-47:13; A1660-61 at 324:1-325:24; A1682 at 739:5-15), proceeded to subvert the transaction's core premise by undertaking a course of conduct that not only diverted or deferred opportunities (discussed above), but precluded opportunities from arising in the first place.[52] QNA's conduct was entirely contrary to the parties' *ex ante* expectations and, when analyzed under the proper standards for an implied covenant claim, more than sufficient to prove Lazard's claim.

However, because the Court of Chancery did not examine or discuss the evidence under the standards applicable to an implied covenant claim, this Court

[52] On this point, the lower court's informal ruling again does not appear to be the product of "an orderly and logical deductive process." *Levitt*, 287 A.2d at 673. After extensively reviewing the record, Plaintiff's experts observed that QNA's "efforts" to sell CYV's offerings to QNA's *own* government customers (the point of the Merger) were marginal and haphazard, *until* the end of the Earn-out Period approached and QNA was comfortable there would be no Earn-out Payment, *at which point* a significant effort was launched to apply QNA's proven, disciplined sales techniques to CYV's offerings. *See* A1543-47. The lower court apparently ignored or overlooked this evidence and the expert's opinions (Ex. A, 72:8-73:2), including the critical *temporal* aspect, stating generically that "QNA in fact took steps to expand Cyveillance's sales…." Ex. A, 71:11-22.

cannot affirm the decision below, but must reverse it, with instructions to render a decision under the legal standards properly applicable to such claims.

CONCLUSION

For all of the foregoing reasons, Lazard respectfully requests that this Court reverse the rulings of the Court of Chancery; grant Lazard judgment on its breach of contract claim; and award the full Earn-out Payment. In the alternative, Lazard seeks a reversal of the rulings below and a remand with instructions for a post-trial decision and written opinion applying the correct legal standards for common law "intent" and the implied covenant of good faith and fair dealing. The informal ruling issued below is errant as a matter of law and incapable of affirmance.

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