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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAZARD TECHNOLOGY PARTNERS LLC, as representative of the former equity holders 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)

REPLY BRIEF OF APPELLANT LAZARD TECHNOLOGY PARTNERS LLC

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

I. LAZARD WAS NOT REQUIRED TO PROVE QNA'S SOLE INTENT 3

A. Lazard Proved That QNA Took Deliberate Action To Deprive CYV Of Company Revenue 3

B. An Errant Characterization Of Mr. Burns' Testimony Is Irrelevant 6

C. QNA Stalled Business Opportunities And The Court Of Chancery Rejected Its Excuses 7

D. Lazard Proved That QNA's Stalling Of The GCHQ Opportunity And The IRA Deprived Lazard Of Company Revenue 11

II. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW WHEN IT RULED THAT THE INTENT REQUIREMENT OF SECTION 5.4 DISPLACED THE IMPLIED COVENANT 13

A. The Court Of Chancery Erred In Holding That The Implied Covenant Would Be Displaced By A Contractual "Intent" Standard Where There Were Unfilled "Gaps" 14

B. The Court Of Chancery Properly Ruled That There Were "Gaps" Not Covered By The Negotiating History; The Implied Covenant Should Therefore Have Governed The Parties' Conduct 16

C. The Court Of Chancery Further Erred In Denying Relief On The Ground That It Would Have To Infer "Specificities" 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Allstate Ins. Co. v. Foster,
693 F.Supp. 886 (D. Nev. 1988).....5

Horizon Holdings, LLC v. Genmar Holdings, Inc.,
244 F. Supp. 2d 1250 (D. Kan. 2003).....11

State Cases

Allied Capital Corp. v. GC Holdings, L.P.
910 A.2d 1020 (Del. Ch. 2006) 17

Auriga Capital Corp. v. Gatz Props., LLC,
40 A.3d 839 (Del Ch. 2012) 17

Cincinnati SMSA LP v. Cincinnati Bell Cellular Sys. Co.,
1997 WL 525873 (Del. Ch. Aug. 13, 1997), aff'd, 708 A.2d 989
(Del. 1998) 17

Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp.,
1991 WL 277613 (Del. Ch. Dec. 30, 1991) 17

Demetree v. Commonwealth Trust Co.,
1996 WL 494910 (Del. Ch. Aug. 27, 1996) 7

Dunlap v. State Farm Fire & Cas. Co.,
878 A.2d 434 (Del. 2005) 18

E. I. duPont de Nemours and Co., Inc. v. Shell Oil Co.,
498 A.2d 1108 (Del. 1985) 5

Eagle Indus. v. DeVilbiss Health Care,
702 A.2d 1228 (Del. 1997) 6

Gerber v. Enter. Prods. Holdings, LLC,
67 A.3d 400 (Del. 2013) .....*passim*

Hexion Specialty Chems., Inc. v. Huntsman Corp.,
965 A.2d 715 (Del. Ch. 2008) 5, 6, 7

ION Geophysical Corp v. Fletcher Int'l, LTD,
2010 WL 4378400 (Del. Ch. Nov. 5, 2010) 5

Katz v. Oak Indus., Inc.,
508 A.2d 873 (Del. Ch. 1986) 17

LaPoint v. AmerisourceBergen Corp.,
2007 WL 1309398 (Del. Ch. May 1, 2007).....12

Lorillard Tobacco Co. v. Am. Legacy Found.,
903 A.2d 728 (Del. Super. 2006).....11, 12

Nemec v. Shrader,
991 A.2d 1120 (Del. 2010) 16

Stephan v. Pennsylvania General Insurance Company,
621 A.2d 258 (Conn. 1993) 5

Winshall v. Viacom,
76 A.3d 808 (Del. 2013) 13

INTRODUCTION

As Lazard's Opening Brief made clear, at trial Lazard proved that prior to QNA[1] acquiring CYV in 2009, QNA had already put in place a business plan, unbeknownst to CYV, to ensure that no Earn-out Payment would be made. QNA actively monitored developments throughout the Earn-out Period, which enabled it to twice confirm to its parent, accurately, that there would be no Earn-out Payment.

QNA was only able to accomplish this because it deliberately engaged in conduct that breached the Merger Agreement. How? First, whenever CYV identified revenue opportunities that would have resulted in sufficient revenue to secure CYV an Earn-out Payment, QNA deliberately blocked and stalled those opportunities, most notably with the GCHQ and the IRA with QinetiQ (despite the fact that QinetiQ had advanced $40 million to enable QNA to acquire CYV). Second, QNA failed and refused to take ordinary and customary steps to integrate CYV's offerings into QNA's established and successful government sales processes, including the simple step of adding CYV's offerings to QNA's existing GSA schedules to enable ready US government purchases. QNA's "efforts" to use CYV to secure *non-Earn-out* revenue, in furtherance of the direct/indirect revenue distinction that was central to its no-Earn-out plan, does not constitute a defense.

[1] Abbreviations not otherwise defined in this Reply Brief have the meanings assigned to them in Appellant's Opening Brief. "An. Br." refers to QNA's Corrected Answering Brief filed on December 17, 2014.

Lazard proved that QNA deliberately stalled CYV revenue opportunities, knowing that they would negatively impact CYV's ability to secure an Earn-out. The Court of Chancery found that QNA did so. That was sufficient to entitle CYV to relief. But the Court of Chancery ruled, in error, that Lazard was further required to prove that QNA acted in "bad faith" and with the *sole, specific or express* intent to reduce or limit the Earn-out payment. That is the first purely *legal* question on which Lazard has sought review and reversal. As to the implied covenant, the Court of Chancery improperly conflated the *contractual* "intent" term with the objective standards applicable under the implied covenant – also a purely *legal* question – on which Lazard also seeks review and reversal.

QNA's Answering Brief ignores its pre-Merger scheme to preclude any Earn-out Payment, and instead floods the Court with ten pages of factual *minutae* about its efforts to execute on its *no-Earn-out* business plan, none of which is relied upon by the Court of Chancery as a basis for its conclusions. QNA seeks affirmance by, *inter alia*, misrepresenting the record; presenting irrelevant facts; arguing points not at issue; and, most telling, choosing not to defend the grounds that the Court of Chancery set out as the bases for its conclusions, or even present them accurately, but instead fleeing from them. In so doing, QNA has underscored the fatal defects in the decision rendered below.

ARGUMENT

I. LAZARD WAS NOT REQUIRED TO PROVE QNA'S SOLE INTENT

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. Instead of simply applying the common law meaning of the word "intent," the Court of Chancery instead required Lazard to prove that QNA acted in bad faith and with the sole, specific and express intent to reduce or limit the Earn-out Payment. QNA does not dispute that this is what the Court of Chancery did. Instead, QNA offers up an assortment of apologia for the Court's errant interpretation – none of which finds support in the Court's actual decision, the record, or the law. Consequently, the judgment below should be reversed, and judgment should enter for Lazard.

A. Lazard Proved That QNA Took Deliberate Action To Deprive CYV Of Company Revenue

Under the plain language of Section 5.4, all Lazard had to prove with respect to QNA's intent was that QNA knew that its chosen and intentional actions in stalling CYV revenue opportunities would reduce or limit any Earn-out Payment. Op. Br. at 15-18. In other words, Lazard needed only to establish sufficient facts to meet the common law meaning of "intent." As demonstrated in its Opening Brief, Lazard did just that. Lazard proved that QNA, unbeknownst to CYV, promised QinetiQ – in writing – that CYV would not achieve any Earn-out, and

QNA then embarked on a deliberate scheme to ensure that result was obtained. Op. Br. at 10-12. That alone was sufficient for judgment to enter for Lazard.

Further, while parties can contract around the common law, nothing in the plain language of Section 5.4 suggests, let alone establishes, that the parties did so here. The terms of the Merger Agreement do not limit QNA's covenant to situations in which it acts in bad faith, or where its sole, specific or primary intent in stalling revenue opportunities was to thwart an Earn-out Payment.

Faced with the plain language of Section 5.4, QNA resorts to torturing certain canons of interpretation in an attempt to salvage the holding below. An. Br. at 20-22. Nothing in any of the decisions rendered in this case suggests that the Court relied at any time upon use of the article "the" as relevant to its analysis.[2] Despite this, QNA argues that use of the article "the" somehow transforms the term "intent" in Section 5.4 from common law intent to specific intent – and thus, that the parties used the article "the" to achieve this result *sub rosa*, rather than just saying directly that QNA had to act with the sole, express or specific intent to thwart the Earn-out. An. Br. at 21. Simply put, this argument does not hold water.

In proffering this argument, QNA ignores the most basic of canons: a contract is to be considered as a whole and its meaning gathered from the entire

[2] In fact, nothing in the record suggests that QNA *ever sought* a specific intent provision. Moreover, QNA's argument about use of the article "the" does nothing to support the Court's requirement that Lazard *also* prove that QNA acted with bad faith. Op. Br. at 17-18.

context, and not from particular words, phrases or clauses, or from detached or isolated portions. *E. I. duPont de Nemours and Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985) ("[t]he meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan."). Indeed, one of the cases upon which QNA relies underscores this point. *ION Geophysical Corp v. Fletcher Int'l, LTD*, 2010 WL 4378400, at *8 (Del. Ch. Nov. 5, 2010) (under New York law, "the determination as to the function of an indefinite article, particularly whether it denotes a singular or plural term, must be made in regard to the context in which it is used.").[3] There is nothing in the Merger Agreement that supports QNA's post-trial contention that "the" transformed the meaning of "intent."

Moreover, QNA deliberately avoids the point of *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008). An. Br. at 22-24. QNA presents a factual recitation derived from *Hexion*, but ignores that prior to examining any facts, the court first had to determine, as a matter of law, what

[3] The context in which "a" was used in *Ion* – the focus of that court's discussion – was whether a party could send more than one notice under an agreement. *Ion*, 2010 WL 4378400, at *9. The use of the article "a" in that context is scarcely analogous to this case. Nor do QNA's other cases support its attempt to convert use of the word "the" into a requirement to prove specific or sole intent. *Allstate Ins. Co. v. Foster*, 693 F.Supp. 886, 889 (D. Nev. 1988) (interpreting Nevada law in the specific context of exclusion clauses in insurance contracts); *Stephan v. Pennsylvania General Insurance Company*, 621 A.2d 258, 261 (Conn. 1993).

constituted a "knowing and intentional breach" of a covenant. *Id*. at 746. Hexion argued that a "knowing" breach "require[d] that Hexion not merely know of its actions, but have *actual knowledge* that such actions *breach[ed]* the covenant." *Id*. In addition, it argued that for such a breach to also be "intentional," Hexion must have "acted 'purposely' with the 'conscious object' of breaching" the covenant at issue. *Id*. The court rejected these contentions and instead concluded:

> 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 which results indirectly, or as a result of the breaching party's negligence or unforeseeable misadventure. In other words, a "knowing and intentional" breach, as used in the merger agreement, is the taking of a deliberate act, which act constitutes in and of itself a breach of the merger agreement, even if breaching was not the conscious object of the act. It is with this definition in mind that Hexion's actions will be judged.

Id. at 747-48. If a "knowing and intentional breach" of a specific covenant only requires proof of a *deliberate act* with a *direct consequence*, then use of the article "the" in the phrase "the intent" to do *X* cannot require more.

B. An Errant Characterization Of Mr. Burns' Testimony Is Irrelevant

Faced with the reality that the Court of Chancery misinterpreted Section 5.4, QNA seeks to excuse the error by claiming that the testimony of a party can relieve the Court of its duty to interpret a contract. An. Br. 18-20 & 22. But it is quintessentially the duty of the Court, not the parties, to interpret the contract. *Eagle Indus. v. DeVilbiss Health Care*, 702 A.2d 1228, 1231 (Del. 1997) ("We are

not bound, and the trial court was not bound, by the parties' present claim that the provision is unambiguous. We determine that question de novo."); *Demetree v. Commonwealth Trust Co.*, 1996 WL 494910, at *4 (Del. Ch. Aug. 27, 1996) (the construction of an unambiguous integrated written contract "should be that which would be understood by an objective reasonable third party.").

Moreover, the testimony QNA relies upon does not support its or the Court's erroneous interpretation in any event. Mr. Burns acknowledged questions that rephrased Section 5.4 and his agreement to its terms; he did not agree, and was not asked, whether he thought QNA was only liable if it acted with the *sole, express or specific* intent to thwart the Earn-out and, tellingly, no witness was asked that question. B0383 at 85:1-15. His testimony is altogether consistent with *Hexion's* holding that a deliberate act with a direct consequence, beyond mere negligence or "unforeseeable misadventure," was required, but not more. 965 A.2d at 747-48.

C. QNA Stalled Business Opportunities And The Court Of Chancery Rejected Its Excuses

After hearing all of QNA's excuses for failing to pursue the multi-million dollar GCHQ opportunity that its own parent, QinetiQ, presented, the lower court concluded: "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.

And yet the Court denied all relief, and did so without identifying any particular reason for QNA's obstructive behavior. Instead, without following an

orderly and logical deductive process, the Court concluded that *whatever* was going on, QNA was "stalling for other reasons." Ex. A, 75:11-13 (noting that "[i]t is hard to determine precisely what" those other reasons were). QNA argues that the Court's conclusion was actually based on Dr. Cambone's unsupported belief that a relationship with the GCHQ could hurt prospects with the U.S. government. An. Br. at 24-25. While the Court of Chancery noted this issue, it did not rest its decision upon it,[4] nor upon any of the other excuses that QNA advanced, noting merely that there were "potentially other reasons in the record," without embracing any of them. Instead, the Court, seemingly *sua sponte*, concluded that it thought QNA stalled the GCHQ opportunity because QNA was engaged in some sort of "turf battle" with its parent. Ex. A, 75:13-16, 76:7-10 ("I really think ultimately it was a turf battle about who got to sell and about QNA protecting what it saw as its relationships and something that it thought was one of its products.").

QNA does not even attempt to defend this aspect of the Court's decision. An. Br. 24-26.[5] The fact that various QNA actors may have had collateral, mixed

[4] The purported concern was hollow in any event. QNA *press-released* the fact QinetiQ would make sales to the UK government and elsewhere when the Merger was announced. Op. Br. at 7 & n.5. *See also* AR0071 at 122:6-11 (no recollection of any concerns that QNA's relationship with US government customers would be impacted by a sale to GCHQ); B1148-1150 at 850:8-852:19 (Cambone only began reaching out to his government contacts in April 2010 to inquire about the potential impact of the GCHQ opportunity, which had arisen in mid-2009); AR0059, AR0060 at Response 6 & 10 (admitting CYV technology was not subject to ITAR export restrictions).

[5] QNA offers that there were additional reasons for opposing the GCHQ opportunity, including purported concerns about whether the technology could be replicated in the UK. An. Br. at 24

or even indeterminate motives in *deliberately* stalling CYV revenue opportunities, *knowing* that doing so would negatively impact the earn-out, does not mean that QNA as a business organization did not have the requisite common law *intent* to thwart the Earn-out, and thereby breach the contract. Op. Br. at 23 n.38. The Court of Chancery's approach to this issue, which effectively assumed that the personal motivations of some corporate actors could displace all corporate intent, was simplistic to a fault and errant as a matter of law. It failed to take into account that while a corporation's individual agents may act for mixed reasons, the corporation, like any person, is deemed to intend the direct and known consequences of its chosen actions, which here meant the avoidance of an Earn-out Payment. Op. Br. at 16-17 & n.21, 22-23 & n.38. This was not a complicated issue.

Faced with the adverse, binding testimony of its own witnesses – including Mr. Papas, who freely admitted QNA deliberately stalled the GCHQ opportunity (A1693-95 at 940:23-942:14) – QNA resorts to misrepresenting CYV's witnesses' testimony.[6] Neither Rose nor Panos "conceded at trial" that QNA's decision not to

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n.7. All of these excuses were soundly refuted at trial, and the Court of Chancery adopted none of them. *See, e.g*. B0966-970 at 668:21-673:2 (CYV's CTO, Srivastava: not only could CYV's technology be replicated, but it had already been done in the US).

[6] QNA has resorted to this improper tactic repeatedly, both at trial and on appeal. *See also infra*, n. 7. For example, QNA contends CYV's own witness conceded that QNA "hustled" to get the Reseller Agreement in place. An. Br. at 26. But the cited testimony is that in November 2009, QNA assisted in getting the *precursor* to the IRA in place (the heads of terms or "HOT"), only

replicate CYV in the UK "had nothing to do with the [E]arn-out." An. Br. at 25-26. At trial Rose was asked whether "the idea of setting up a UK node was abandoned *outside the earn-out period* for reasons unrelated to the earn-out." B0503 at 205:2-6 (emphasis added). Rose replied that the final decision was made long after the Earn-out expired, so the Earn-out had no bearing at that point. *Id*. Panos similarly testified that decisions made well *after* the Earn-out Period "had nothing to do with the earn-out." B0689 at 391:8-12 ("But don't forget, also, that because he [Dr. Cambone] didn't want to sell during the earnout, we actually lost that opportunity [with the GCHQ]").[7]

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after CYV had worked on it for months, and it took an additional five months to get an actual agreement in place, notwithstanding that QinetiQ already had such agreements in place with a number of its subsidiaries, including QNA. B0539-40 at 241:13-242:15; Op. Br. at 19, n.31. Similarly, QNA asserts that pre-merger, CYV had been given a "going concern" exception from its auditors (An. Br. at 5-6), when that was not the case (AR0028; AR0001 at QNA0103866-G ("Audited financial statements for the last five years were provided with clean opinions.")), and that CYV did not achieve its own pre-merger projections. *Compare* An. Br. at 13 *with* A1631-1632 at 51:13-52:5; B0415-416 at 117:13-118:14 (Burns: projections provided with respect to the Earn-out specifically were $27-29 million).

[7] Similarly, QNA seeks to obscure its obstructive conduct by presenting pages of *minutae* about what it supposedly *did*. An. Br. at 4-13. But in so doing, QNA repeatedly misrepresents the record below. For example, QNA claims credit for one of the few successes CYV had in selling to the U.S. government – securing a Secret Service contract. An. Br. at 12. It was CYV, however, not QNA, that identified, pursued and won that contract based on a pre-merger relationship CYV had. B0624-625 at 326:11-327:4. Similarly, QNA also touts matters that were anything but *bona fide* opportunities. For example, the approach to the DoD after the Fort Hood tragedy (An. Br. at 10) was referred to at QNA as a "snowflake" – a whim of Cambone. AR0076-0077 at 306:1-307:20 (meaning "if something happened over the weekend or something like this, [Cambone] would always want us to go see if we could make a business of it," but nothing ever came of these "snowflakes.").

D. Lazard Proved That QNA's Stalling Of The GCHQ Opportunity And The IRA Deprived Lazard Of Company Revenue

QNA asserts that the Chancery Court's decision can be affirmed for the independent reason that Lazard failed to prove damages. An. Br. at 26-28. That, however, would reward QNA for its success in improperly blocking the GCHQ and IRA opportunities at the outset. That is simply not the law.

The Court of Chancery unequivocally found that QNA delayed the GCHQ opportunity. Ex. A, 75:5-7 ("The evidence is clear that QNA delayed this opportunity. There's no question about that. The evidence is clear that they were stalling."). QNA cannot turn its bad behavior to its advantage by claiming that because the GCHQ opportunity was stalled before a formal offer or proposal was made to pay for the project, Lazard cannot prevail. An. Br. at 27; *Horizon Holdings, LLC v. Genmar Holdings, Inc.*, 244 F. Supp. 2d 1250, 1260-1261 (D. Kan. 2003) (internal quotations omitted) (applying Delaware law) (any doubt concerning the amount of damages is resolved against the defendant, as the breaching party "should not be permitted to reap advantage from [its] own wrong by insisting on proof which by reason of [its] breach is unobtainable.").

To prove damages on its claims, Lazard needed only to show the existence of damages provable to a reasonable certainty, flowing from QNA's violation of the contract. *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. Super. 2006). Delaware law does not require Lazard to demonstrate damages

with mathematical certainty. *Id*. *See also LaPoint v. AmerisourceBergen Corp*., 2007 WL 1309398, at *9 (Del. Ch. May 1, 2007). At trial, Lazard laid "a reasonable foundation" which took the estimation of damages out of the realm of speculation or uncertainty by proving that QNA blocked *bona fide* business opportunities. *Lorillard Tobacco Co.*, 903 A.2d at 739; *LaPoint*, 2007 WL 1309398, at *2, *9 (the plaintiff's burden is satisfied "merely by taking the causation of damages out of the area of speculation, and it is not necessary to show with absolute certainty that [D]efendant's actions caused [P]laintiff[']s] harm."). Lazard proved that had the GCHQ opportunity not been blocked, CYV would have achieved substantial Company Revenue. Op. Br. at 18-19, n.26. Similarly, Lazard proved that had the IRA not been inexcusably delayed, CYV would have achieved at least $3 million in Company Revenue.[8] Neither the common law nor the terms of the Merger Agreement required Lazard to prove anything more.

[8] The $3 million figure was sufficiently firm and removed from the realm of speculation that it was included in the IRA itself. A1152; A0906, §5.5; AR0052 at 33:4-12.

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

The Court of Chancery also erred in ruling that the "intent" requirement in Section 5.4 of the Merger Agreement applied to Lazard's implied covenant claim, rather than an objective standard based on established implied covenant principles. Op. Br. at 27-28. QNA does not dispute the bedrock principle, reinforced unanimously by this Court in *Gerber* just last year, that trial courts should not conflate limited-purpose contractual "intent" or "good faith" standards with the objective standards applicable to the implied covenant.[9] Instead, QNA pretends this is not what the Court of Chancery did, and that the Court's remarks on the subject were merely a holding "in the alternative" that effectively doesn't matter. An. Br. at 2, 33. That QNA chooses on appeal to re-characterize the Court of Chancery's implied covenant analysis, rather than defend it, speaks volumes.

QNA asserts that the Court of Chancery held the implied covenant "inapplicable to the case given the extensive negotiation history over QNA's post-closing obligations. The Court held *in the alternative* that if it were to imply a provision at all it would parallel the [Section 5.4] intent language." An. Br. at 2 (emphasis added); *see also id*. at 33. Thus, QNA seeks to cast the Court of Chancery's analysis as a conventional one, in which the negotiating history

[9] *Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400 (Del. 2013), overruled in part by *Winshall v. Viacom*, 76 A.3d 808 (Del. 2013).

precluded implied terms. An. Br. at 30-32. QNA then asserts that the Court's holding that any *other* gaps would be filled with an intent-based standard was merely "in the alternative" and didn't matter because, arguing in a circle, QNA says the negotiating history really *did* occupy the field with respect to any QNA post-closing obligations and left no *other* "gaps" to be filled. *Id*. at 33-34.

But that is not what the Court of Chancery said or did, and this is true on at least two different, but equally fundamental, levels.

A. The Court Of Chancery Erred In Holding That The Implied Covenant Would Be Displaced By A Contractual "Intent" Standard Where There Were Unfilled "Gaps"

First, the Court of Chancery *did in fact hold* that insofar as there were "gaps" in the contract, the standards of the implied covenant *would be displaced* by the contractual "intent" standard of Section 5.4, and that was reversible error. In commencing its implied covenant discussion, the Court initially noted that there were "necessarily" gaps because the contract governed "ongoing performance issues" and "a complex relationship" over an 18-month period. Ex. A, 78:6-15. The Court ultimately concluded that "there is no gap that should be filled in this case, and if it were filled, it would be filled with an implied term that turned on intent, not [an objective standard]." *Id*. at 79:23-80:3.

In the 32 lines of text in between (*id*. at 78:15-79:22), the Court touches upon *both* the negotiating history (78:22-79:8) *and* its view that any *other* gaps

would be filled by an intent-based standard (79:9-22). The two points are presented in parallel, as dual bases for the Court's decision, and the latter is not expressed as an *alternative* to the former. *See id*. at 78:15-79:22; An. Br. at 33. The Court did not say "in the alternative" anywhere. Rather, it stated, "*To the extent that one could find a gap*, for example, as to whether QNA, as opposed to [CYV], might take certain . . . actions,…in my view the evidence from the specific [intent-based] provision upon which the parties agreed…*leads me to conclude that the only substitute provision…would have again been an intent-based standard*." *Id*. at 79:9-17 (emphasis added). The net result was that the Court applied no implied covenant standards at all, but only the contractual intent standard of Section 5.4 (*id*. at 79:17-22), and "[s]o in light of that," the Court concluded, "there is no gap that should be filled." *Id*. at 79:23-24.

One of Lazard's points at trial, included in its closing argument and the referent for the Court of Chancery's comment about a "gap" regarding QNA taking actions separate from CYV, was this: the negotiating history involved covenants as to QNA's post-closing operation of *CYV itself* (*e.g.*, disabling or blocking CYV's own efforts, as with the GCHQ); there was *no* negotiating history pertinent to QNA's discretionary decision-making with respect to *its own efforts* to sell CYV

offerings to *its* government clients. A1720-1721 at 27:2-28:15.[10] The expectation that QNA would sell CYV's services to QNA government customers had been a core premise of the Merger. Op. Br. at 6-7. The Court of Chancery addressed that critical issue as *not* covered by the negotiating history, but held that any associated "gap" would only be filled with "an intent-based standard." Ex A, at 79:9-22. The latter holding constituted reversible error.

B. The Court Of Chancery Properly Ruled That There Were "Gaps" Not Covered By The Negotiating History; The Implied Covenant Should Therefore Have Governed The Parties' Conduct

Second, the Court of Chancery ruled that there were "gaps" in the contract that were not covered by the negotiating history (Ex. A, 79:9-80:3), and therefore the objective standards of the implied covenant should have filled those gaps. Here again, QNA does not seek to defend the lower court's ruling, but flees from it. QNA seeks an unduly narrow construction of the implied covenant, confined to filling "unanticipated gaps," relying on an unduly narrow reading of *Nemec v. Shrader*, 991 A.2d 1120 (Del. 2010). An. Br. at 30-32. That position is not only inconsistent with the decision below; it is also inconsistent with established Delaware law. *E.g.*, *Gerber*, 67 A.3d at 419. At the same time, in an effort to render no gap unanticipated, it conflates the negotiation of *one type* of post-closing

[10] The parties at one point considered but rejected a blanket provision to cover any conduct that negatively impacted the Earn-out, leaving the background law in place. Op. Br. at 32-33.

obligation (*i.e.*, QNA's post-closing operation of CYV) with the negotiation of *any and all* post-closing obligations. An. Br. at 31-34.[11]

This Court scarcely needs Lazard to point out that the implied covenant does not merely fill "unanticipated gaps" – it also operates at the opposite end of the spectrum, where some terms in the contemplated contractual relationship are so obvious as not to call for negotiation;[12] it operates to ensure that contractual discretion is exercised reasonably and in good faith;[13] and it applies where it would be cost-prohibitive to negotiate every theoretical contingency, if it were even possible to conceive of all of them, in an ongoing, complex contractual relationship. *Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp.*, 1991 WL 277613 at *23 (Del. Ch. Dec. 30, 1991). In such instances, a party may rationally anticipate *some* possible issues and yet not undertake to negotiate them

[11] The testimony of Panos that QNA cites underscores the point: he testified that Section 5.4 was the only restriction in the Merger Agreement *on QNA's operation of CYV post-merger*; it has nothing to do with QNA's own efforts to sell CYV offerings to QNA customers, or anything else. An. Br. at 31 n.9; B0806 at 508:9-18. Yet QNA conflates the two and proceeds to make the patently false assertion that Section 5.4 was "the only post-closing obligation placed on QNA." An. Br. at 31. Even a cursory review of the agreement shows that proposition to be false. *See, e.g.*, A0759, Sections 1.11 (earn-out); 5.5 (D&O indemnity, insurance); 5.6 (employee matters); 8.5-8.7 (tax matters); 10.1 & 10.3 (reps and warranties, indemnification).

[12] *Allied Capital Corp. v. GC Holdings, L.P.*, 910 A.2d 1020, 1032-33 (Del. Ch. 2006) (the implied covenant applies to protect "the expectations of the parties [that] were so fundamental that it is clear that they did not feel a need to negotiate about them"); *Auriga Capital Corp. v. Gatz Props., LLC*, 40 A.3d 839, 853 nn. 54-56 (Del. Ch. 2012) (same); *Cincinnati SMSA LP v. Cincinnati Bell Cellular Sys. Co.*, 1997 WL 525873, at *5 (Del. Ch. Aug. 13, 1997) (same), aff'd, 708 A.2d 989 (Del. 1998); *Katz v. Oak Indus., Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986) (same).

[13] *E.g., Gerber*, 67 A.3d at 419.

because it would not be feasible to anticipate and negotiate *all* of them; instead, the parties may elect to rely on the background law and adopt the implied covenant's baseline "good faith" standard to govern their conduct where the contract is silent.

The Court of Chancery observed that in this case, the contract "contemplated a complex relationship. There was no way for human minds to foresee all the different potentialities," and "Certainly there were gaps as to how the parties would interact with each other during the earn-out period." Ex. A, 78:11-15. Here, the issue was not merely the customary concern that the buyer might thwart the acquired company's efforts; in addition, the buyer (QNA) was expected to *itself* market and sell the acquired company's (CYV's) services to the buyer's customer base.[14] Precisely how that would be done was not specified, but left to the buyer's discretion, subject to the good faith and reasonableness standards of the implied covenant. *E.g.*, *Gerber*, 67 A.3d at 419. The buyer in this case, after all, was expert in making government sales. Op. Br. at 5-6. In this context, as relevant to QNA's excuses for its obstruction, a party cannot justify actions that frustrate the purpose of a contract under cover of purported business considerations. *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (the implied covenant confers on each party "an obligation to refrain from conduct that would frustrate

[14] As was evident from, *inter alia*, QNA's statements immediately following the Merger (A0838, A0877, A0835-36), a prime purpose of the transaction was for QNA and QinetiQ to sell CYV's offerings to *their* respective government customers, while CYV continued to sell on a commercial basis. Strategically, the Merger was to result in a proverbial "three-legged stool."

the other party's reasonable expectations"). The implied covenant is available to address just such situations, when disputes about the buyer's discretionary conduct arise. *Gerber*, 67 A.3d at 419; Op. Br. at 29, n.45.

C. The Court Of Chancery Further Erred In Denying Relief On The Ground That It Would Have To Infer "Specificities"

There remains the Court of Chancery's comment that, "I do not believe that this is a gap that should be filled *with specificities* that would cover the *types of actions* that QNA supposedly failed to take in this case." Ex. A, 78:18-21 (emphasis added). But no one was asking the Court to craft specific rules to govern, as a matter of Delaware law, when and how acquirers should add particular acquired services to its GSA schedules, or integrate acquired services into its established marketing and sales channels, to take two examples of the types of actions that Lazard charged QNA with failing to take. A1496-99, A1543-47. Rather, the point of the analysis is the other way around: the Court is presented with an entire course of conduct and called upon to rule whether, taken as a whole, it is within or without the objective standards that the covenant imposes when the contract does not speak to the issue. The Court of Chancery could not logically or validly deny relief because it did not consider it advisable to craft relief in a manner that the law did not contemplate and that the Plaintiff did not seek.

CONCLUSION

For all of the foregoing reasons and the reasons set forth in its Opening Brief, 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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