IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DXE CORPORATION LIQUIDATING TRUST fka ADVANCED CREATIONS, INC., :

Plaintiff, :

v. Case No. 3:12-cv-98

L3 COMMUNICATIONS CORP., et al., : JUDGE WALTER H. RICE

Defendants.

DECISION AND ENTRY OVERRULING, WITHOUT PREJUDICE TO RENEWAL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S COMPLAINT (DOC. #32) AND OVERRULING, WITHOUT PREJUDICE TO RENEWAL, PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (DOC. #38); CONFERENCE CALL SET WITH DIRECTIONS TO COUNSEL

Plaintiff DXE Corporation Liquidating Trust, fka Advanced Creations, Inc. ("Plaintiff" or "DXE"), filed this breach of contract action against L-3 Communications Avionics Systems, Inc. ("Defendant" or "L-3 Avionics"), based on allegations that Defendant breached three provisions of an asset purchase agreement for the sale of Plaintiff's avionics technology in anticipation of corporate dissolution. The Court's jurisdiction is based on the parties' diverse citizenship and the amount in controversy. 28 U.S.C. § 1332. Pending before the Court are Defendant's Motion for Summary Judgment (Doc. #32) and Plaintiff's Motion for

Partial Summary Judgment (Doc. #38), which the parties filed simultaneously on July 26, 2013. For the reasons set forth below, the Court OVERRULES both motions, without prejudice to renewal.[1]

I. FACTUAL AND PROCEDURAL HISTORY

Unless otherwise noted, the following facts are undisputed by the parties. Advanced Creations, Inc. ("Advanced Creations"), was incorporated in 1988 under Ohio law by a group of engineers for the purpose of developing an electronic flight instrument system ("EFIS") and related technology. Doc. #1 at 1 & 4, ¶¶ 1 & 11; Doc. #19 at 3 ¶ 12. The company's efforts eventually resulted in the development of the Onboard Avionics Synergistic Information System ("OASIS"), an interactive cockpit display system with a touch screen interface. Doc. #1 at 5 ¶ 13; Doc. #19 at 3 ¶ 5; Doc. #33 (Watson Dep.) at 127 & 130.

During the 1990s, BFGoodrich Avionics Systems, Inc. ("BFGoodrich") was also engaged in the development of an EFIS. Doc. #32-2 ¶ 6 (Watson Decl.). Its system, which featured "programmable display screens, rather than individual instrument displays," was eventually named "SmartDeck." *Id.* In 1999, Advanced

[1] DXE originally named L-3 Communications Corporation ("L-3 Communications") as a defendant also, but voluntarily dismissed all claims against L-3 Communications on September 20, 2013, without prejudice. Doc. #43. L-3 Communications was subsequently terminated as a defendant from this lawsuit, leaving L-3 Avionics as the only defendant.

Creations presented its OASIS system to BFGoodrich. Doc. #1 at 7 ¶ 19; Doc. #19 at 4 ¶ 19. After BFGoodrich "became interested" in OASIS, the companies entered into an Asset Purchase Agreement ("APA") for the sale of OASIS to BFGoodrich on July 28, 2000. Doc. #1 at 9 ¶ 23; Doc. #19 at 5 ¶ 23; Doc. #38-1. At the time they entered into the APA, OASIS was not certified by the Federal Aviation Administration ("FAA").[2] Doc. #1 at 8 ¶ 21; Doc. #19 at 4 ¶ 21.

A. The Asset Purchase Agreement ("APA")

Under the APA, Advanced Creations agreed to "sell substantially all of its assets, properties, rights and interests" to BFGoodrich, including the OASIS EFIS, for a base purchase price of three million dollars. Doc. #38-1 at 7; Doc. #32-2 at 2 ¶ 8; Doc. #38-1 at 9 (APA § 1.4(a)). The APA divided the payment into four "landmark" payments of $750,000, each to be paid upon the occurrence of a particular event or condition set forth in Sections 1.4(b)(i)–(iv) of the agreement. Doc. #38-1 at 9. The first payment was due upon the closing of the APA, and the second payment was due upon the "completion of two [] operational prototypes"

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[2] The parties dispute the degree to which OASIS was operational at the time of the acquisition. DXE alleges in its Complaint that "[t]he OASIS prototype was fully operable, functional, and flyable." Doc. #1 at 8 ¶ 21. L-3 Avionics generally denies that allegation. Doc. #19 at 4 ¶ 21. Moreover, Gary Watson, L-3 Avionics' Director of Advanced Technology, stated that at the time of its acquisition by BFGoodrich, OASIS was "merely a demonstration system," similar to a "flight simulator, and could not be used on real aircraft." Doc. #32-2 at 2 ¶ 7.

of the OASIS system and hardware. *Id.* The third payment was due upon BFGoodrich obtaining a contract or purchase order from a major original equipment manufacturer ("OEM") of aircraft for an EFIS that used the OASIS technology. *Id.* The fourth payment was due upon BFGoodrich obtaining certification from the FAA for the use of the OASIS EFIS in aircraft that was the subject of an OEM contract. *Id.* The parties agree that BFGoodrich paid the first three payments in accordance with the terms of the APA. Doc. #1 at 10 ¶ 25; Doc. #19 at 5 ¶ 25.

The APA also provided for additional consideration of up to four million dollars (the "Contingent Consideration"), that was to be paid "upon the achievement of certain product or training sales levels." Doc. #38-1 at 9. The conditions were set forth in Exhibit A of the APA. *Id.* at 35. The Contingent Consideration consisted of 4% of the gross annual revenue from "product sales," "training sales," and "engine control product sales" that used the OASIS EFIS, up to a maximum of four million dollars, "for the period commencing on the Closing Date and ending on December 31, 2010." *Id.*

The APA also contained a right of first refusal that prevented BFGoodrich from selling the OASIS EFIS without first offering Advanced Creations/DXE Corp. the opportunity to reacquire the technology before any sale. *Id.* at 27. In addition, Section 9.6 of the APA expressly acknowledged Advance Creations' intent to dissolve as a corporation, giving it the right to "assign its rights and obligations [under the APA] to its successors upon such dissolution." *Id.* at 33.

B. Corporate Dissolution and Creation of the Liquidating Trust

On July 21, 2000, the directors of Advanced Creations agreed to sell all of its assets to BFGoodrich pursuant to the APA and dissolve the corporation. Doc. #45-1 (Pl. Ex. 1). The directors adopted a Plan of Dissolution that set a one-year deadline for filing the company's Certificate of Dissolution with Ohio's Secretary of State. *Id.* at 2. On July 27, 2000, the shareholders of Advanced Creations agreed to the directors' Plan of Dissolution. *Id.* at 7. The shareholders also approved an amendment to the company's Articles of Incorporation that changed the name of the corporation to DXE Corporation ("DXE Corp."). *Id.* at 8.

A year later, on July 25, 2001, pursuant to DXE Corp.'s Plan of Dissolution, a liquidating trust was established for the distribution of its assets to shareholders. Doc. #45-2. The property and assets that were transferred to the trust included what the trust agreement referred to as "a promissory note . . . issued by BFGoodrich Avionics Systems, Inc. . . . pursuant to the sale of substantially all of the assets of [DXE Corp.] to [BFGoodrich]. Payments on such Note are due and payable upon the occurrence of certain performance objectives and sales milestones of [BFGoodrich]." *Id.* The same day, DXE Corp. assigned all of the "right, title, and interest in and to [its] assets" to the trust, pursuant to an assignment signed by its directors. Doc. #45-3.

C. Events Subsequent to DXE Corp.'s Sale

As previously noted, the parties do not dispute that BFGoodrich paid the first three of the four $750,000 landmark payments in accordance with the APA. Doc. #1 at 10 ¶ 25; Doc. #19 at 5 ¶ 25. The third payment, which was due upon BFGoodrich obtaining a contract or purchase order from an OEM for an EFIS that used the OASIS technology, was triggered when BFGoodrich entered into an agreement with Piper Aircraft, Inc. ("Piper), in December of 2000, for the sale of the SmartDeck system. Doc. #1 at 14 ¶ 35; Doc. #19 at 7 ¶ 35. As part of the APA transaction, certain principals of DXE Corp. signed employment contracts with BFGoodrich and began to work there on the development of the SmartDeck EFIS. Doc. #1 at 12 ¶ 30; Doc. #19 at 6 ¶ 30; Doc. #32-2 at 2 ¶ 10. In July of 2001, two of those former DXE Corp. principals, Cliff Brust and Gary Evans, submitted provisional patent applications to the United States patent office. Doc. #1 at 14 ¶ 37; Doc. #19 at 7 ¶ 37.

On January 28, 2003, the L-3 Communications Corporation purchased the stock of BFGoodrich, acquiring it as a subsidiary. Doc. #32-3 at 2 ¶¶ 6-7. The subsidiary underwent several name changes before ultimately being given the name of L-3 Communications Avionics Systems, Inc., the remaining Defendant in this case (referred to herein as "L-3 Avionics"). *Id.* ¶ 8.

On December 20, 2007, L-3 Avionics entered into a purchase agreement with Cirrus Design Corporation ("Cirrus") for 250 of the SmartDeck systems. Doc.

#1 at 15 ¶ 41; Doc. #19 at 8 ¶ 41; Doc. #36-4. Cirrus was an OEM manufacturer with whom L-3 Avionics worked on the development of SmartDeck. *Id.*; Doc. #32-2 at 3 ¶ 14. The purchase order referenced the "future certification" of SmartDeck. Doc. #36-4 at 1.

On May 21, 2008, L-3 Avionics received a "Technical Standard Order Authorization and Supplemental Type Certification" from the FAA for SmartDeck. Doc. #1 at 16 ¶ 42; Doc. #19 at 8 ¶ 42. The certification authorized the "[i]nstallation of a[n] L-3 Communications Avionics Systems SmartDeck Flight Guidance and Display System" as an FAA-approved design change to Cirrus's Model SR22 aircraft. Doc. #33-1 at 1.

On October 15, 2010, L-3 Avionics entered into a "Technology License Agreement" with CMC Electronics, Inc. ("CMC"), for the SmartDeck technology, in exchange for consideration of nine million dollars. Doc. #32-3 at 4, 9. L-3 Avionics and CMC also entered into an "Asset Transfer Agreement" on the same date, which transferred the right, title, and interest in certain SmartDeck technology and assets, including ten "shipsets" of SmartDeck components. Doc. #32-3 at 62-63.

The parties dispute a number of facts relevant to the foregoing events. L-3 Avionics denies DXE's allegation that the patent applications submitted by Brust and Evans were based on OASIS technology that was incorporated into SmartDeck. *Id.* Crucially, the parties dispute whether the SmartDeck EFIS was based on the OASIS technology that was the subject of the APA. Gary Watson, L-

3 Avionics' Director of Advanced Technology, declared that the work with Cirrus required their engineers to "essentially start[] over in the development process," forcing them to restart development on SmartDeck based on "architecture that predated the purchase of [DXE Corp.'s] assets." Doc. #32-2 at 3 ¶ 14. However, as explained more fully below, the parties have filed cross-motions for summary judgment asking for the Court to rule on the construction of the contractual language of the APA, which the Court may do while factual issues remain unresolved.

D. Procedural Background

On March 30, 2012, DXE filed suit against L-3 Avionics. Doc. #1. DXE's Complaint stated three claims for breach of contract arising under the APA. Count I alleged that L-3 Avionics breached Section 1.4(b)(iv) of the APA when it refused to make the final landmark payment of $750,000 after receiving FAA Supplemental Type Certification for the use of SmartDeck on Cirrus SR22 aircraft. *Id.* at 18-20. Count II alleged that L-3 Avionics breached the right of first refusal under Section 6.2 of the APA when L-3 Avionics entered into its agreement with CMC without giving DXE notice or the option required by that provision. *Id.* at 20-22. DXE alleged that the agreement between L-3 Avionics and CMC had "had the substantive effect of a sale," which triggered its right of first refusal. *Id.* at 21. In addition to damages as a remedy for the alleged breach, DXE also prayed for an order of specific performance that would require L-3 Avionics to transfer all property and rights obtained under the APA back to DXE. *Id.* at 22. In Count III, DXE alleged that L-3 Avionics breached the "Contingent Consideration Provision" of the APA when it sold SmartDeck and certain computer based training to various entities between 2001 and 2010 without paying it 4% of those gross annual sales. *Id.* at 22-24. As a remedy, DXE demanded damages in the amount of $750,000, 4% of the gross annual sales derived from SmartDeck, and compensation for the harm it suffered from not having been offered the right of first refusal. *Id.* at 24.

On May 30, 2012, L-3 Avionics filed an Answer, denying that it had breached any provision of the APA. Doc. #19.

On June 6, 2013, the parties filed a Joint Motion to Stay Discovery Pending [a Ruling on] Cross-Motions for Summary Judgment on Contractual Issues, which the Court sustained on June 28, 2013. Doc. #28. The parties informed the Court that they wished to stay discovery pending a ruling "on the legal issues of contract interpretation that are ultimately necessary to the resolution of this case." *Id.* The parties identified those issues as "L-3 [Avionics'] potential liability to DXE under the Asset Purchase Agreement entered into among the Plaintiff and Defendant's respective predecessors in interest on July 25, 2000," stating that a ruling thereon "will ultimately shape and dictate what, if any, further discovery is necessary in order for this case to be made ready for trial." *Id.*

On July 26, 2013, DXE filed a Motion for Partial Summary Judgment. Doc. #38. Therein, DXE acknowledged that several facts remain in dispute, namely, whether the OASIS technology was part of the Cirrus OEM purchase order, the

FAA certification of SmartDeck for use in Cirrus's SE-22 aircraft, and the licensing agreement between L-3 Avionics and CRC. *Id.* at 7. However, DXE stated that, solely for purposes of obtaining a ruling construing the contract language of the APA, the parties had stipulated that OASIS technology was a part of SmartDeck. *Id.* DXE then set forth its arguments for the construction of the provisions of the APA allegedly breached by L-3 Avionics. *Id.* at 7-18.

L-3 Avionics also filed a Motion for Summary Judgment on July 26, 2013. Doc. #32. Unlike DXE, L-3 Avionics did not move for partial summary judgment or mention the parties' stipulation. Instead, L-3 Avionics argued that the undisputed facts show that it is entitled to judgment as a matter of law on all of DXE's claims. First, L-3 Avionics argued that, as a dissolved corporation, DXE did not have "standing" to file this lawsuit. *Id.* at 10. Second, L-3 Avionics argued that DXE was not entitled to the final $750,000 payment under the APA, pursuant to its reading of the contract language. *Id.* at 13-17. Third, the company argued that the APA's provision for a right of first refusal was not breached because it only licensed, not sold, the SmartDeck technology to CRC. *Id.* at 18-19. Finally, L-3 Avionics claimed that the undisputed evidence shows that there were no sales of SmartDeck, so DXE was not entitled to any percentage-based payment under the Contingent Consideration provision. *Id.* at 23-26.

DXE filed a Brief in Opposition to Defendant's Motion for Summary Judgment on September 20, 2013. Doc. #45. Therein, DXE argued that L-3

Avionics disregarded the party's stipulation to only seek partial summary judgment on issues of contract interpretation:

> [T]he parties quite explicitly agreed that the purpose of these Motions was to resolve the *legal* issues relating to the language of the Agreement and certain other disputed contracts. The parties stipulated amongst themselves that the factual issue of whether the Plaintiff's technology was utilized in the versions of SmartDeck that L-3 eventually produced and sold was not being briefed and that - for the purpose of these Motions - the parties would argue the legal issues only. Defendant apparently could not control itself.

Id. at 2-3. DXE also defended its "standing" to bring this claim, arguing that Ohio law allows dissolved corporations to sue and be sued, and reiterated its interpretation of the provisions of the APA at issue. *Id.* at 3-8. Furthermore, DXE pointed to several disputed facts, such as the exact scope of the FAA certification (which determines whether its rights under the APA were triggered), and Defendant's internal corporate documents that identified the agreement with CRC not as a lease, but as a sale, all of which make summary judgment inappropriate. *Id.* at 9-11.

L-3 Avionics filed a Response to DXE's Motion for Partial Summary Judgment on September 20, 2013. Doc. #46. Therein, it asserted that the parties did not stipulate to any facts, and that it only "agreed to participate in early summary judgment motions so that the Court could resolve certain contract issues prior to either party incurring additional discovery expense concerning whether or not L-3 [Avionics'] SmartDeck technology contains any [Advanced Creations]-developed technology." *Id.* at 2 n.3. L-3 Avionics also repeated its argument that

DXE lacks "standing" to sue it, as well as its interpretation of the language of the APA. *Id.* The company also argued that only principles of contract interpretation, not its internal corporate documents, should determine whether its agreement with CRC amounted to a license or a sale. *Id.* at 18. Thus, the accounting memorandum cited by DXE that refers to the agreement as a sale "has no bearing on the Court's analysis of the meaning of either the APA or the License Agreement." *Id.*

The parties filed Reply Briefs on October 31, 2013. Doc. #49-1 (Defendant's Reply) & Doc. #51-1 (Plaintiff's Reply). L-3 Avionics' Reply Brief substantially elaborates on its "standing" arguments. Doc. #49-1 at 2-9; *see also infra* Part II.B. Otherwise, its Reply Brief simply summarizes its previously stated arguments. Doc. #49-2 at 9-16. DXE's Reply Brief clarifies its interpretation of the language of the APA and its previous arguments. Doc. #51-1. However, it also accuses L-3 Avionics of "sandbagging" by not disclosing documents related to the termination of the contract between L-3 Avionics and Cirrus until several days before the deadline to file the Reply Briefs. *Id.* at 11. L-3 Avionics was also granted leave to file a Sur-Reply, which it filed on December 3, 2013. Doc. #56. Therein, it addressed DXE's "accusations of discovery misconduct" as "unfounded and gratuitous," and argued that it had been forthcoming about its continual production of documents during the briefing period. *Id.* at 4-5.

II. ANALYSIS

After setting forth the legal standard applicable on summary judgment, the Court will first address L-3 Avionics' argument that it is entitled to summary judgment because DXE lacks the requisite capacity to sue. Finally, the Court will address both parties' arguments for summary judgment on DXE's claims for breach of contract.

A. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure sets forth the standard and procedure applicable to summary judgment. Upon motion by either party, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The movant's burden is to demonstrate "the absence of a genuine issue of material fact as to at least one essential element on each of the Plaintiff's claims." *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 572 (6th Cir. 2000) (citing *Celotex*, 477 U.S. at 322). Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477

U.S. at 322. Conversely, material facts in genuine dispute that "may reasonably be resolved in favor of either party" require denial of summary judgment in order to be properly resolved by a jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). When ruling on a motion for summary judgment, a court must assume as true the evidence of the nonmoving party and draw all reasonable inferences in that party's favor. *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). A court must avoid "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts," which are "jury functions" that are inappropriate to employ at the summary judgment stage. *Id.*

When the parties do not dispute the facts relevant to the plaintiff's claim, but disagree as to the legal import of those facts, the parties may file cross-motions for summary judgment. *E.g.*, *Northrup Prop., Inc. v. Chesapeake Appalachia, LLC*, 567 F.3d 767 (6th Cir. 2009) (upholding summary judgment entered in favor of defendant after both parties filed cross-motions for summary judgment). Although the parties may agree that no genuine issues of material fact exist that would preclude the resolution of their claims and defenses as a matter of law, such a stipulation does not require a court "to rule that no fact issue exists." *Greer v. United States*, 207 F.3d 322, 326 (6th Cir. 2000) (quoting *Cherokee Ins. Co. v. E.W. Blanch Co.*, 66 F.3d 117, 123 n.4 (6th Cir. 1995)). However, "cross motions for summary judgment do authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties." *Greer*, 207 F.3d 322 (quoting *Harrison W. Corp. v. Gulf Oil Co.*, 662 F.2d 690, 692 (10th Cir.1981)).

Thus, there is no obligation to "grant judgment as a matter of law for one side or the other," simply because the parties have filed simultaneous cross-motions for summary judgment based on their apparent agreement as to the facts. *Profit Pet v. Arthur Dogswell, LLC*, 603 F.3d 308, 312 (6th Cir. 2010) (citing *Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991)). Instead, "a 'court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.'" *Id.* (quoting *Taft*, 929 F.2d at 248). Each motion must be evaluated under the familiar summary judgment standard, which requires the court to "view all facts and inferences in the light most favorable to the non-moving party." *Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co., Inc.*, 598 F.3d 257, 264 (6th Cir. 2010) (quoting *Beck v. City of Cleveland, Ohio*, 390 F.3d 912, 917 (6th Cir. 2004)).

B. DXE's Capacity to Sue

L-3 Avionics argues that DXE lacks standing to file this lawsuit because, as a self-identified "liquidating trust" formed after the dissolution of DXE Corp. on July 25, 2001, Ohio law only allows DXE to perform acts that are required to wind up corporate affairs, or to pursue claims that accrued prior to dissolution. Doc. #32 at 17-18. Because the earliest event alleged by DXE to breach the APA occurred in 2007, six years after DXE Corp.'s dissolution, L-3 Avionics asserts that this lawsuit cannot be related to winding up of corporate affairs, and concludes that DXE lacks both standing and the capacity to sue. *Id.* at 19-20.

In response, DXE argues that it was specifically assigned the interest in the consideration due to DXE Corp. under the APA upon its dissolution, pursuant to the trust agreement approved by the corporation's shareholders and directors. Doc. #45 at 4. DXE also argues that, even without the assignment, Ohio law would allow DXE Corp. to sue to enforce a contract that was breached after dissolution as part of the winding up of its affairs. *Id.* at 4-5. Finally, DXE asserts that L-3 Avionics waived any defense based on a lack of standing by not asserting it in its Answer. *Id.* at 5.

L-3 Avionics makes several arguments in reply. First, it argues that it could not waive a defense based on DXE's lack of standing because standing is a matter of subject matter jurisdiction, which cannot be waived by the parties. Doc. #49-1 at 2-3. Second, the trust agreement only allowed DXE to collect and hold cash and a note owed by BFGoodrich, and DXE does not identify where the trust was assigned any interest owed to DXE Corp. under the APA. *Id.* at 3-5. Thus, L-3 asserts that DXE lacks standing because it has no right to assert a claim arising under the APA. *Id.* Third, the company again argues that even if there had been an assignment of DXE Corp.'s interest under the APA to DXE, the trust would have been restricted by Ohio law to actions incident to winding up the affairs of DXE Corp., which cannot include litigating claims that arise after dissolution. *Id.* at

5-6. Fourth, L-3 Avionics argues that DXE cannot point to language of the APA to demonstrate standing, which is a question of subject matter jurisdiction that cannot be created by the parties. *Id.* at 7-8. Finally, L-3 Avionics argues that the sections of the Ohio Revised Code upon which DXE relies only allow for claims against dissolved corporations, and do not give a dissolved corporation standing to bring a claim. *Id.* at 8-9.

The parties' arguments employ the term "standing" with imprecision, indiscriminately equating it with DXE's capacity to sue and the Court's jurisdiction over DXE's claims. Citing the restrictions that Ohio law places on the activities of dissolved corporations, L-3 Avionics attacks the ability of DXE to bring any claim at all. This is not, in fact, a challenge to DXE's constitutional standing in federal court, but to its capacity to sue, as a liquidating trust formed in the wake of DXE Corp.'s dissolution. "Capacity is the ability of a particular individual or entity to use, or to be brought into, the courts of a forum." *Johnson v. Helicopter & Airplane Servs. Corp.*, 404 F. Supp 726 (D. Md. 1975) (citations omitted). Thus, although L-3 Avionics correctly states that it could not have waived a challenge to DXE's *standing*, because standing is a prerequisite to subject matter jurisdiction that may be challenged at any time, that argument conflates the issue of standing with DXE's capacity to sue. *Compare* Fed. R. Civ. P. 12(h)(3) (allowing a court to examine the issue of its subject matter jurisdiction "at any time") with Fed. R. Civ. P. 9(a)(2) (requiring a party to raise the issue of capacity "by a specific denial"); *see also Tri-Med Fin. Co. v Nat'l Century Fin. Enters., Inc.*, No. 98-3617, 2000 WL

282445 (6th Cir. Mar. 6, 2000) (rejecting an "attempt to frame the question of capacity as one of standing"). "Capacity and standing are two distinct legal questions." *Miller v. City of Cincinnati*, 870 F.Supp.2d 534, 538 (S.D. Ohio 2012) (*citing Certain Interested Underwriters at Lloyd's, London, England v. Layne*, 26 F.3d 39, 43 n.1 (6th Cir.1994)). The Court, therefore, overrules L-3 Avionics' motion for summary judgment insofar as it seeks dismissal of this lawsuit on DXE's alleged lack of standing.

Issues of capacity are addressed by Rule 9 of the Federal Rules of Civil Procedure. Rule 9 states that "[e]xcept when required to show that the court has jurisdiction, a pleading need not allege: (A) a party's capacity to sue or be sued; (B) a party's authority to sue or be sued in a representative capacity; or (C) the legal existence of an organized association of persons that is made a party." Fed. R. Civ. P. 9(a)(1). However, Rule 9 does require that "[t]o raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge." *Id.* 9(a)(2). As a matter of procedure, the Sixth Circuit has not yet answered the question of whether a party waives the defense of an opponent's lack of capacity by not timely raising the defense. In two unpublished cases, it held that a party attempting to raise lack of capacity after trial had waived the defense. *Tri-Med Fin. Co. v Nat'l Century Fin. Enters., Inc.*, No. 98-3617, 2000 WL 282445 (6th Cir. Mar. 6, 2000); *Hendricks v. Office of Clermont Cnty. Sheriff*, No. 06-4431, 326, Fed. App'x 347 (6th Cir. Apr. 27, 2009). Both cases cited *Wagner Furniture Interiors, Inc. v. Kemner's*

Georgetown Manor, Inc., 929 F.3d 343 (7th Cir. 1991), in which the Seventh Circuit held that a party had waived the defense by raising it two weeks before trial, based on the principle that "a party must raise lack of capacity to sue in an appropriate pleading or amendment to avoid waiver." *Wagner*, 929 F.3d at 345 (citations omitted). Many courts, including *Wagner* and both of the Sixth Circuit cases, agree with the position set forth in the Wright & Miller treatise on the issue. *Id.* at 435-46; *Tri-Med*, 2000 WL 282445 at *5; *Hendricks*, 326 Fed. App'x at 349-50. According to Wright & Miller:

> [A]lthough an objection to a party's capacity, authority, or legal existence is not technically speaking an affirmative defense, it can be analogized to an affirmative defense and treated as waived if not asserted by motion or responsive pleading, subject, of course, to the liberal pleading amendment policy of Rule 15. Early waiver is necessary to give meaning to the requirement in Rule 9(a) that these matters must be put in issue by a "specific [denial]."

Wright & Miller*, Federal Practice and Procedure* § 1295 (3d Ed. 2013).

Here, L-3 Avionics did not raise the issue of DXE's capacity to sue in its Answer with the specificity required by Rule 9. L-3 Avionics stated only that "Plaintiff's Complaint fails to state a claim upon which relief can be granted," while making specific references only to defenses based on "acquiescence, laches, waiver, release, unclean hands, and or/estoppel." Doc. #19 at 12. After filing its Answer, L-3 Avionics did not move the Court under Rule 15 at any time during discovery for leave to amend the Answer and include this defense. Thirteen months later, after extensive discovery and depositions, L-3 Avionics first raised the lack of capacity defense when filing for summary judgment. Under these circumstances, DXE's argument that the L-3 Avionics waived the defense is more than colorable.

One final factor tips the scale in DXE's favor on the issue of waiver. L-3 Avionics was on notice from the time that DXE filed its complaint that it was being sued by a party that was no longer incorporated under Ohio law. Paragraph 2 of the Complaint states that "DXE Corp. was dissolved with all rights and obligations under the APA assigned to DXE," and DXE never held itself out as anything other than a trust that was formed after the dissolution of DXE Corp. Furthermore, DXE Corp.'s dissolution was a matter of public record, as evidenced by the copy of the Certificate of Dissolution filed with the Ohio Secretary of State on July 25, 2001, that L-3 Avionics attached as Exhibit 8 to its Motion for Summary Judgment. Doc. #32-8. In short, L-3 Avionics had ample notice of the status of the party suing it under Ohio law, and adequate opportunity to raise the defense of capacity before now. Under these circumstances, the Court concludes that L-3 Avionics has waived any defense based on DXE's lack of capacity to bring this lawsuit. *See Srock v. United States*, No. 04-cv-72788, 2006 WL 2460769 (E.D. Mich. Aug. 23, 2009) (rejecting defendant's argument that the plaintiff did not qualify as a personal representative of her deceased husband's estate under controlling state law and therefore lacked capacity to sue, where argument was untimely raised and probate records had been publicly available since before suit was filed).

Furthermore, even if L-3 Avionics had specifically alleged that DXE lacked the capacity to sue in its Answer or in a Motion to Dismiss, it would not have succeeded in having this action dismissed on that basis. Under Rule 17(b)(2) of the Federal Rules of Civil Procedure, the capacity of a corporation to sue or be sued is determined "by the law under which it was organized," which also determines the capacity of the corporation that survives its dissolution. *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U.S. 257, 259-60 (1927) (stating that after dissolution, "if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation," which "concerns the fundamental law of the corporation enacted by the state which brought the corporation into being"); *Gross v. Hougland*, 712 F.2d 1034 (6th Cir. 1983) (citing *Oklahoma Natural Gas* and stating "the question whether an action has abated because of the dissolution of a corporation is controlled by the law of the state of incorporation").

Here, it is undisputed that DXE Corp. was organized under Ohio law. In accordance with Rule 17(b)(2), Ohio law must, therefore, also determine its capacity to sue or be sued after dissolution. Under the version of the section of the Ohio Revised Code governing the post-dissolution "winding up" of corporations that was in effect when DXE filed this lawsuit, the directors of a corporation have "all the authority of the corporation" to effect its winding up. Ohio Rev. Code

Ann. § 1701.88 (LexisNexis 2009).[3] This includes the authority to "employ one or more persons as liquidators to wind up the affairs of the corporation with such authority as the directors see fit to grant," as well as the authority to "cause the title to any of the assets of the corporation to be conveyed to such liquidators for that purpose." *Id.* § 1701.88(D). Here, the actions by the company's shareholders and officers in its post-dissolution phase all fall within the authority granted by the statute. At a special meeting of the shareholders of Advanced Creations, Inc., held on July 27, 2000, its shareholders voted to approve each of the following: 1) an amendment to its Articles of Incorporation that changed the company's name to DXE Corp.; 2) the APA between it and BFGoodrich, in order to sell substantially all of its assets; and 3) a Plan of Dissolution and Complete Liquidation ("Dissolution Plan"). Doc. #45-1. The Dissolution Plan specifically stated that the company would not "engage in any business activities except for the purpose of preserving the value of its assets, adjusting and winding up its

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[3] The Ohio legislature enacted an amendment that rewrote several provisions of Ohio's corporations statute that came into effect on May 4, 2012, approximately one month after DXE filed this lawsuit. H.B. 48, 129th Gen. Assemb. (Ohio 2011). Consequently, citations and quotations to the statute are to the version in effect at the time DXE filed suit. Furthermore, Section 3 of the amendment stated that "the provisions of division (B)(2) of section 1701.88 of the Revised Code, as amended by this act, shall only apply to causes of action arising on or after the effective date of this act." Division (B)(2) provided for a five year limitations period on actions by dissolved corporations. Because DXE filed suit prior to the effective date of the amendment, the limitations period does not apply.

business and affairs, and distributing its assets in accordance with the [Dissolution] Plan." *Id.* at 2. It also authorized the company's officers to sell its assets, and to "distribute all of the assets of the Company to such persons or entities serving as an agent or trustee" for the shareholders, as the statute allowed. *Id.* The officers did just that, according to both an Assignment that they signed on July 25, 2001, and the Liquidating Trust Agreement signed the same day. Doc. #45-2 and Doc. #45-3. The Assignment, referencing the Dissolution Plan, stated that it "hereby assigns, transfers, and conveys to the Trust established under the Liquidating Trust Agreement entered into by the Corporation [and the trustees], all of the Corporation's right, title and interest in and to the assets of the Corporation, wherever located, whether tangible or intangible, real or personal." Doc. #45-3. Thus, the trust was established to hold the rights that DXE Corp. had acquired under the APA, as those rights involved potential benefit to the shareholders. Enforcing those rights so that it can fulfill its obligation to distribute assets to the shareholders is, therefore, an activity that is reasonable to identify with the winding up of DXE Corp.

Several provisions of the Liquidating Trust Agreement support DXE's position that bringing this lawsuit is legally authorized under the winding-up process. The Liquidating Trust Agreement recognized that it existed "to hold and distribute [the] property and assets [of DXE Corp.] for the benefit of all [its] shareholders." Doc. #45-2 at 2. Beyond that, however, many of its key terms suggest that it was designed specifically to hold payments made by BFGoodrich during the time it took for that company to perform under the APA, and then deliver those payments to DXE Corp.'s former shareholders. For example, it specifically included "a promissory note (the 'Note') issued by BFGoodrich . . . pursuant to the sale of substantially all of the assets of [DXE Corp.] to [BFGoodrich]" within the corporate assets held by the trust. *Id.* at 1 (stating also that "Payments on such Note are due and payable upon the occurrence of certain performance objectives and sales milestones of [BFGoodrich]"). The agreement also structured the term of the trust on BFGoodrich's performance, stating that the trust would "terminate upon that date on which the Note is paid in full and payments on such Note are distributed to the shareholders" of DXE Corp. *Id.* The Liquidating Trust Agreement also expressly stated that its "primary purpose" was "to collect and hold the Note and the Cash as the corpus of this trust, and to disburse the same [to shareholders], in order to facilitate the liquidation of [DXE Corp.] and not for the purpose of continuing or engaging in the conduct of a trade or business." Based on the express terms of the Liquidating Trust Agreement, the Dissolution Plan, and the Assignment, it is evident that the shareholders and directors of DXE Corp. considered the ongoing collection of payments due from BFGoodrich under the APA as part of the winding up process after corporate dissolution.

Apart from DXE Corp.'s documentation, the language of the APA itself demonstrates that the parties to it understood that BFGoodrich's performance would continue after the dissolution of DXE. Corp. In Section 9.6, the APA expressly stated that "the parties acknowledge [that] it is Seller's intention to dissolve within the one year period beginning on the Closing Date, and Seller may assign its rights and obligations hereunder to its successors upon such dissolution." Doc. #38-1 at 33. The post-dissolution enforcement of those "rights and obligations" was, therefore, expressly contemplated by the parties. Furthermore, the Contingent Consideration provision of the APA required BFGoodrich to continue to pay 4% of its annual sales from DXE Corp.'s technology through December 31, 2010. Thus, BFGoodrich agreed to be bound to its obligations for a period of over ten years, and thus, to be bound for over nine years after the contemplated dissolution of DXE Corp. When L-3 Avionics purchased BFGoodrich, the express terms of the APA provided notice to L-3 Avionics of its ongoing obligations to DXE. It is disingenuous, therefore, to now argue that DXE cannot enforce those obligations because they are beyond the scope of the allowable winding up activities of DXE Corp. By agreeing to its express terms, the parties certainly contemplated the possibility that the process would extend for many years.

To be sure, this protracted period of activity associated with corporate winding up is unusual, and ill-serves the statute's command to "proceed as speedily as is practicable to a complete winding up of the affairs of the corporation" that has been dissolved.[4] Ohio Rev. Code Ann. § 1701.88(D) (LexisNexis 2009). A speedy winding up was clearly favored by the courts in the cases that L-3 Avionics cites in support of its argument that "DXE may only pursue claims that existed prior to the date DXE Corp. was dissolved." Doc. #32 at 18. However, in those cases, each court examined the particular factual circumstances that motivated the claim before concluding that the dissolved corporation had not initiated the lawsuit incident to its winding up, rather than simply imposing a bright line rule based on the date of dissolution. For example, in *Bain Builders v. Huntington National Bank*, No. 78442, 2001 WL 777011 (Ohio Ct. App. 8th Dist. July 5, 2001), the defendant successfully argued that the plaintiff lacked the capacity to sue on a contract for the construction of a commercial building that the plaintiff had only partially performed upon when its articles of incorporation were involuntarily canceled for failing to maintain a statutory agent. The *Bain Builders* plaintiffs sued on a contract that wholly involved the plaintiff's activities in the normal course of its business, construction and remodeling, that were intended to

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[4] It is not apparent that, if filed today, DXE would state a claim upon which relief may be granted. The provision of the Ohio Revised Code that was effective shortly after DXE filed suit appears to place a five-year limitations period on a dissolved corporation's ability to sue. Ohio Rev. Code. § 1701.88(B). However, as noted above, *see supra* note 3, this action is not governed by that limitations period. See Ohio Rev. Code. § 1701.88 & H.B. 48, 129th Gen. Assemb. (Ohio 2011) (stating that "provisions of division (B)(2) of section 1701.88 of the Revised Code, as amended by this act, shall only apply to causes of action arising on or after the effective date of this act").

be performed while it was a viable enterprise. Similarly, in *Alpha Telecommunications, Inc. v. International Business Machines Corp.*, No. 1:06-cv-1110, 2006 WL 2472994 (N.D. Ohio Aug. 24, 2006), the dissolved corporation invoiced IBM for computer services work it performed while it was an active enterprise, but only sent the invoice years after finishing the work, and a year after its court-ordered dissolution. *Kiraly v. Francis Bonanno, Inc.*, No. 18250, 1997 WL 775685 (Ohio Ct. App. 9th Dist. Oct. 29, 1997), which L-3 Avionics also cites, involved a suit in which a wine distributor sued a producer for terminating its franchise agreement, which occurred six months prior to dissolution. Here, in contrast, DXE Corp. entered into the allegedly-breached APA for the express purpose of dissolution. Selling all of its existing technology to BFGoodrich through the APA allowed DXE Corp. to discontinue its enterprise and implement the Dissolution Plan. In contrast, the contracts that gave rise to claims in *Bain Builders*, *Alpha Telecommunications*, and *Kiraly* all concerned activities that were representative of their activities as ongoing enterprises: building construction, computer services, or wine distribution. Under these particular circumstances, the Court believes that this lawsuit, which DXE brings to enforce the rights created by the APA, is incident to the winding up of DXE Corp., and therefore DXE has the capacity to sue based on an alleged breach of the APA.

Finally, L-3 Avionics argues the Liquidating Trust Agreement only references a Note issued by BFGoodrich, and not the APA itself, so "DXE cannot rely on the language of the [Liquidating] Trust Agreement to show that it has any rights under the APA." Doc. #49-1 at 5. L-3 Avionics also points out that DXE has not produced any Note. DXE has not addressed those arguments. The Court shares the concern over DXE's failure to produce or explain the referenced Note. However, the Court also believes that the argument that the Liquidating Trust Agreement only refers to a Note, and not the APA, prioritizes form over substance. The Liquidating Trust Agreement clearly refers to the substance of the APA and the obligations due to DXE Corp. under it by stating that payments were triggered by "the occurrence of certain performance objectives and sales milestones of [BFGoodrich]." Doc. #45-2 at 1. It is also difficult to square these conditions with an actual promissory note, as payment due upon "performance objectives and sale milestones" would destroy the negotiability of such an instrument. *See* Ohio Rev. Code § 1303(A)(setting forth conditions of negotiability, including that the instrument be "an unconditional promise or order"); *Stancik v. Hersch*, 2012-Ohio-1955, 2012 WL 1567213 (Ohio Ct. App. 8th Dist. May 3, 2012) (noting that an agreement that "requires actions other than the payment of money" is not negotiable under Ohio Rev. Code § 1303.03(A)). Thus, the references to a "Note" in the Liquidating Trust Agreement may be to the APA itself, in spite of the nomenclature employed. However, the references are clearly to the obligations due to DXE Corp. under the APA, which are the rights at issue.

For the foregoing reasons, the Court concludes DXE had the capacity to sue L-3 Avionics when it filed this lawsuit under Ohio law, because the rights it seeks to enforce are related to the winding up process of DXE Corp. Accordingly, to the extent that L-3 Avionics seeks summary judgment on the issue of DXE's capacity to sue, its motion is overruled.

C. DXE's Breach of Contract Claims

L-3 Avionics and DXE each seek summary judgment in its favor on DXE's state law breach of contract claims, which arise under the APA. Section 9.3 of the APA contains a choice-of-law provision stating that the agreement must "in all respects be governed by and construed in accordance with the laws of the State of Ohio, without regard to its conflicts of law doctrine." Doc. #38-1 at 31. The Court will, therefore, apply Ohio law to DXE's breach of contract claims.

In Ohio, as elsewhere, courts construe written contracts as a matter of law. *Saunders v. Mortensen*, 801 N.E.2d 452, 454 (Ohio 2004). "The cardinal purpose for judicial examination of any written instrument is to ascertain and give effect to the intent of the parties." *Foster Wheeler Enviresponse, Inc. v. Franklin Cnty. Convention Facilities Auth.*, 678 N.E.2d 519, 526 (Ohio 1997) (citing *Aultman Hosp. Ass'n v. Cmty. Mut. Ins. Co.*, 544 N.E.2d 920, 923 (Ohio 1989)). "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.*, 509 N.E.2d 411 (Ohio 1987) (paragraph 1 of the syllabus) (citing *Blosser v. Enderlin*, 148 N.E. 393 (Ohio 1925)). If the language is clear and unambiguous, the court "must simply give effect to the contractual language" in order "to determine the parties' rights and obligations;" however, if confronted with ambiguity, "an issue of fact exists," allowing the introduction and consideration of extrinsic or parol evidence to determine the parties' intent. *Blair v. McDonagh*, 894 N.E.2d 377, 388 (Ohio Ct. App. 2008); *see also Shifrin v. Forest City Enter.*, 597 N.E.2d 499, 501 (Ohio 1992).

A court must "presume that words are used for a specific purpose" and strive to "avoid interpretations that render portions meaningless or unnecessary." *Wohl v. Swinney*, 888 N.E.2d 1062, 1066 (Ohio 2008). "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Foster*, 678 N.E. at 526 (quoting *Alexander v. Buckeye Pipe Line Co.*, 374 N.E.2d 146 (Ohio 1978); *see also McConnell v. Hunt Sports Ent.*, 725 N.E.2d 1193, 1206 (Ohio Ct. App. 1999) (describing the foregoing principle as a "test for determining whether a term is ambiguous"). A court must read a contract "as a whole," and, in the process, "give effect to each provision of the contract." *Saunders*, 801 N.E.2d at 455 (citations omitted). "Only when the language of a contract is unclear or ambiguous . . . will extrinsic evidence be considered in an effort to give effect to the parties' intentions." *Shifrin*, 597 N.E.2d at 501.

1. *DXE's Claim for the Fourth $750,000 Landmark Payment*

DXE's first breach of contract claim alleges that is owed the fourth and final landmark payment of $750,000 under the APA. Section 1.4(b) of that agreement set forth the conditions for the four payments, and subsection (iv) specifically pertained to the final payment. Doc. #38-1 at 9-10. According to that subsection, the final $750,000 was payable under either Condition (A) or Condition (B), as described below:

> (A) the first certification of an EFIS that utilizes the Seller's cockpit technology via [a] "Type Certificate," "Amended Type Certificate" or "Supplemental Type Certificate" received with respect to an airframe which is the subject an OEM Award, *provided, however,* that such payment is contingent upon the Buyer receiving an EFIS position on the OEM Award as described in Section 1.4(b)(iii) above; or (B) a "Supplemental Type Certificate" for an EFIS that utilizes the Seller's cockpit technology in the aftermarket and the achievement of aggregate sales which would be comparable to those which would be the subject of an OEM Award as mutually agreed to by Buyer and Seller.

Id. at 10 (with underlining for emphasis; italics in original). The clause above is underlined to emphasize Condition (A)'s reference to Section 1.4(b)(iii), which sets forth the APA's conditions for the third landmark payment. Under Section 1.4(b)(iii), the third landmark payment was payable:

> upon award of a contract or purchase order from Raytheon, Cessna, Piper, Eclipse or any other original equipment manufacturer agreed upon in writing by Buyer in its reasonable discretion for an electronic flight instrumentation system ("EFIS") that utilizes the Seller's cockpit technology (collectively, the "OEM Award"); *provided, however*, that if the OEM award has not occurred by June 30, 2003, Buyer shall not be obligated to make any payments under this Section 1.4(b)(iii) and Buyer may, in its sole discretion, suspend all efforts to obtain the OEM award[.]

According to L-3 Avionics, the language of Condition (A) that references Section 1.4(iii) places several "express limitations" on the conditions that triggered payment under Section 1.4(b)(iv). Doc. #32 at 23. First, L-3 Avionics believes that by stating "such payment is contingent upon the Buyer receiving an EFIS position on the OEM Award as described in Section 1.4(b)(iii) above," Condition (A) requires both 1) an OEM award before June 30, 2003, and 2) "an FAA certification *for the airframe that is the subject of that OEM award.*" *Id.* (emphasis added). In other words, L-3 Avionics reads the provision to require that the FAA certification triggering the final landmark payment to be for same OEM award of a contract or purchase order that triggered the third landmark payment. Thus, because the OEM award before June 30, 2003, that triggered Section 1.4(b)(iii) was the purchase order from Piper,[5] and the eventual FAA certification was for the placement of SmartDeck on a Cirrus aircraft, a different manufacturer by a different OEM award, L-3 Avionics reasons that Condition (A) was not met.

However, L-3 Avionics' reading imposes an identity requirement between the subjects of the OEM award and the FAA certification that contradicts the other language of both provisions. The first clause of Condition (A) states that the FAA certification must be for "*an* airframe which is the subject *an* OEM Award," not *the* airframe which is the subject of *the* OEM award in Section 1.4(b)(iv). The use of the indefinite article "an" implies that the parties contemplated (and surely hoped)

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[5] It is undisputed that the third landmark payment under Section 1.4(b)(iii) occurred after BFGoodrich entered into an agreement with Piper, in December of 2000, for the sale of the SmartDeck system. Doc. #1 at 14 ¶ 35; Doc. #19 at 7 ¶ 35.

that the Buyer would procure more than one possible OEM award, any one of which might lead to FAA certification. This reading is bolstered by the use of the phrase "first certification" in the first clause. If the parties believed that their agreement would lead to the FAA certifying the use of more than one EFIS on the original manufacturers' aircraft, they must have contemplated multiple sales.

The second phrase of Condition (A), which states that "payment is contingent upon the Buyer receiving an EFIS position on the OEM Award as described in Section 1.4(b)(iii) above," does not create the limitation that L-3 Avionics argues. The phrase does not require that the subject of the OEM Award also be the subject of the FAA certification in the first clause. Rather, its language references the general condition precedent to payment of the third landmark payment, which is triggered in Section 1.4(b)(iii) by "award of a contract or purchase order from Raytheon, Cessna, Piper, Eclipse or any other original equipment manufacturer . . . for an electronic flight instrumentation system ('EFIS') that utilizes the Seller's cockpit technology (collectively, the 'OEM Award')." Thus, the contingency in Condition (A) requires a sale of the EFIS to an original equipment manufacturer *in addition to* FAA certification. This condition is logical, because Buyer must have wanted to make certain that the EFIS was marketable, and not simply FAA-certifiable. The Court reads this provision as a means for Buyer to protect itself from having to make a landmark payment in the event that certification was obtained for a product it could not sell.

L-3 Avionics also argues that the June 30, 2003, cutoff date for an OEM award in Section 1.4(b)(iii) applies to the OEM award that is the subject of the FAA certification in Section 1.4(b)(iv). Doc. #32 at 24. For the reasons set forth above, the Court rejects this interpretation. As stated previously, Section 1.4(b)(iv) does not require that the FAA certification that triggers the fourth landmark payment be for the same OEM award that satisfies Section 1.4(b)(iii). Furthermore, there is an express limitation of the June 30, 2003, cutoff date to that section: "if the OEM award has not occurred by June 30, 2003, Buyer shall not be obligated to make any payments *under this Section 1.4(b)(iii)*" (emphasis added). This precise limitation provides no reason for applying the deadline to another section of the APA.

The parties do not dispute that the third landmark payment under Section 1.4(b)(iii) was made after BFGoodrich entered into an agreement with Piper, in December of 2000. Doc. #1 at 14 ¶ 35; Doc. #19 at 7 ¶ 35. Under the construction of Section 1.4(b)(iv) set forth by the Court, the Piper deal satisfied the second clause of Condition (A), which made "payment [] contingent upon the Buyer receiving an EFIS position on the OEM Award as described in Section 1.4(b)(iii)[.]" Doc. #38-1 at 10.

This leaves the first clause of Condition (A), which made the final landmark payment payable upon "the first certification of an EFIS that utilizes the Seller's cockpit technology via [a] "Type Certificate," "Amended Type Certificate" or "Supplemental Type Certificate" received with respect to an airframe which is the subject an OEM Award[.]" This phrase is not subject to competing interpretations such that it requires the Court's construction. Rather, the parties cannot agree on how, or whether, those conditions were satisfied. It is undisputed that L-3 Avionics received a Supplemental Type Certificate from the FAA on May 21, 2008. Doc. #33-1. Thus, two factual issues remain. First, was the May 21, 2008, Supplemental Type Certification of an EFIS that utilized OASIS, the "Seller's cockpit technology"? Second, was the certification "received with respect to an airframe which was the subject of an OEM Award"?

L-3 Avionics asserts that the version of SmartDeck that the FAA certified in the May 21, 2008, certification did not utilize any of DXE's EFIS technology, citing to a deposition of a retired employee who worked on SmartDeck. Doc. #32 at 23 (citing Doc. #32-5, Getson Decl. ¶¶ 5-7). However, according to DXE, the parties "stipulated amongst themselves that the factual issue of whether the Plaintiff's technology was utilized in the versions of SmartDeck that L-3 [Avionics] eventually produced and sold was not being briefed and that – for purposes of these Motions [for Summary Judgment] – the parties would argue the legal issues only." Doc. #45 at 3. DXE's contention is supported by the parties' Joint Motion for a Stay of Discovery, in which they asked the Court to stay discovery so that they could "file cross motions for summary judgment on the legal issues of contract interpretation that [were] ultimately necessary to the resolution of this case." Doc. #28. Because the parties agreed to a stay of discovery before filing their motions, DXE may not have had the opportunity to uncover evidence that it could use to controvert the evidence cited by L-3 Avionics. It would, therefore, be prejudicial to DXE for the Court to accept the declaration of L-3 Avionics' former employee as evidence of an absence of a genuine dispute of material fact on this issue. This is particularly true because whether any OASIS technology existed in the version of SmartDeck that the FAA certified and that L-3 Avionics sold appears to be the crucial factual issue of this case.

The second question that Condition (A) asks– whether certification applied "to an airframe which was the subject of an OEM award"– is also unresolvable on summary judgment. The APA defines an OEM Award as "a contract or purchase order from Raytheon, Cessna, Piper, Eclipse or any other original equipment manufacturer . . . for an [EFIS] that utilizes the Seller's cockpit technology." The FAA Certification itself states that it was issued for Cirrus' Model SR-22. Doc. #33-1. DXE pointed to several purchase orders for the SR-22 model and argued that each of them qualified as an OEM Award. Doc. #38 at 9-10. In response, L-3 Avionics argued that the only OEM Award that involved an original (as opposed to a replacement) airframe was the Cirrus SR-22 G3, an item which the FAA certification did not cover. Doc. #32 at 24. Nevertheless, DXE pointed to statements by Gary Watson, L-3 Avionics' Director of Advanced Technology, that the FAA certification would have allowed the installation on the Cirrus SR-22 G3. Doc. #45 at 9; Doc. #33 at 151-52. Thus, even if the Court were to set aside the parties' stipulation to confine their arguments to purely legal issues of contract interpretation, Watson's admission demonstrates a genuine issue of material fact as to whether the May 21, 2008, FAA certification applied "to an airframe which was the subject of an OEM award."

The same factual issues also prevent the Court from concluding, as a matter of law, that Condition (B) of Section 1.4(b) the APA was or was not met. Condition (B) would have required payment upon the certification of "a 'Supplemental Type Certificate' for an EFIS that utilizes the Seller's cockpit technology in the aftermarket and the achievement of aggregate sales which would be comparable to those which would be the subject of an OEM Award as mutually agreed to by Buyer and Seller." As discussed, the issue of whether the EFIS in question utilized the OASIS cockpit technology cannot be resolved on summary judgment. L-3 Avionics argues that the cancellation of the purchase orders to Piper and Cirrus precludes a finding that there were any "sales" that would satisfy Condition (B), and that the parties never mutually agreed upon terms. DXE does not respond to these arguments. Nevertheless, the Court cannot conclude that L-3 Avionics is entitled to a ruling that, as a matter of law, Condition (B) was not met. First, in light of the parties' stipulation, the Court is reluctant to enter summary judgment based on any purportedly undisputed facts. Second, L-3 Avionics entered into a "Technology License Agreement" with CMC Electronics, Inc. ("CMC"), for the SmartDeck technology, in exchange for consideration of nine million dollars. Doc. #32-3 at 4, 9. There has been no evidence put before the Court to demonstrate what might or might not constitute "aggregate sales which would be comparable to those which would be the subject of an OEM Award."

Thus, the fact that L-3 Avionics entered into this and other transactions with third parties concerning the OASIS EFIS creates a question of fact as to whether any of them might have satisfied Condition (B). For the foregoing reasons, the Court is unable to grant summary judgment to either party on Count I of DXE's Complaint.

2. *DXE's Claim for Breach of the Right of First Refusal under the APA*

Count II of DXE's Complaint alleges that the license agreement that L-3 Avionics entered into with CMC was, in effect, a sale that breached its right of first refusal under the APA. Section 6.2 of the APA describes the right of first refusal as follows:

> Buyer shall not sell, transfer, assign or convey all or any part of the electronic flight instrumentation system technology acquired from Seller to any Person . . . without the prior written consent of Seller (or its successors in interest), or, in the absence of such consent, without first giving to Seller at least 30 days' written notice of Buyer's intention to dispose of such technology and the terms and conditions of such proposed disposition. Within such 30 day period, such technology shall be offered for sale to and shall be subject to an option to purchase on the part of Seller, which option shall be exercised, if at all, within such 30 days.

Doc. #38-1 at 27.

L-3 Avionics has moved for summary judgment on Count II, arguing that its transaction with CMC could not have triggered the right of first refusal. According to L-3 Avionics, the "plain terms" of the provision above apply only to a complete sale or "disposal" of the technology, and it argues that it only licensed "certain rights in the technology to CMC." Doc. #32 at 26-27. In response, DXE points out that this argument is contradicted by the plain language of the APA. Doc. #45 at 11-12.

The Court reads the phrase "sell, transfer, assign or convey all or *any part of* the electronic flight instrumentation technology" as encompassing either a license or a sale. Doc. #38-1 at 27 (emphasis added). By its plain terms, it is broad enough to trigger the right of first refusal upon a transfer of "any part of" the technology. The transactions that this phrase encompasses cannot be limited to an outright sale, but must include the transfer of "any part" of the EFIS technology. L-3 Avionics emphasizes the use of the phrases "intention to dispose of such technology" and the "proposed disposition," and the Court recognizes a suggestion of finality in those phrases. However, within the provision as a whole, neither phrase limits of the type of action that triggers the right of first refusal. Once Buyer has the intent to "sell, transfer, assign or convey all or any part" of the EFIS technology, the provision gives the Seller the right of first refusal.

L-3 Avionics also argues that even if DXE demonstrates a breach of the right of first refusal, it cannot show that it suffered any economic damages from its alleged failure to provide notice of the transaction with CMC, or that DXE would have even been able to exercise the right of first refusal because it was not an active entity that could obtain financing or otherwise enter into a purchase transaction. These arguments present serious evidentiary concerns for DXE. It is axiomatic that if DXE proves that L-3 Avionics breached the right of first refusal, it must also prove, "with reasonable certainty," the existence and extent of any resulting damages. "Damages are not awarded for a mere breach alone." *Rasnick v. Tubbs*, 710 N.E.2d 750, 752 (Ohio Ct. App. 3d Dist. 1998). In addition to damages, DXE has also prayed for relief in the form of specific performance. Doc. #1 at 22. A plaintiff who demonstrates the defendant's breach of the right of first refusal may be entitled to specific performance, but bears the additional burden of proving that it would have exercised the right, had it been presented with the notice and opportunity to do so. *See Christiansen v. Schuhart*, 951 N.E.2d 107, 115 (Ohio Ct. App. 5th Dist. 2011) (affirming judgment that plaintiffs were not entitled to specific performance of a right of first refusal because evidence showed that plaintiffs would not have chosen to purchase property if asked). DXE has not answered these arguments. Normally, on summary judgment, the Court would consider such silence a tacit admission that the party has no undisputed evidence to counter the movant's arguments. However, the parties' stipulation to stay discovery and present only legal issues on summary judgment prevents the Court from reaching that conclusion. *See* Doc. #28 (Joint Motion for a Stay of Discovery Pending Cross-Motions for Summary Judgment on Contractual Issues). The Court, must, therefore, overrule both parties' motions with respect to Count II, having provided the foregoing construction of the provision for the right of first refusal in Section 6.2 of the APA. DXE is also on notice of its burden to show that but for the alleged breach, it would have exercised its right of first refusal, and reasonably certain damages from its inability to do so.

The Court must make a final observation regarding DXE's prayer for specific performance in Count II. Specific performance, like other forms of relief for breach of contract, is only available "to put the parties in the position which they would have been in had the contract been carried out," but for the breach. *Murphy v. Porter*, 114 N.E.2d 89, 96 (Ohio Ct. Comm Pl. 1952). Yet DXE has prayed for "[a]n order of specific performance against Defendants requiring Defendants to transfer to Plaintiff those certain property rights, designs, architecture, and assets obtained from Plaintiff through the APA" as a remedy for the alleged breach of its right of first refusal. A transfer of all the property to DXE goes far beyond the position the parties would have been in but for the alleged breach, which would only have entitled DXE the first right to purchase the property in question.

3. *DXE's Claim for Breach of the Contingent Consideration Provision*

In Count III, DXE alleged that purchase orders by L-3 Avionics in 2001, 2007, and 2008 breached Section 1.4(a)(ii) of the APA, which allowed for:

> Additional consideration of up to Four Million Dollars ($4,000,000) (the "Contingent Consideration) upon the achievement of certain product or training sales levels. The Contingent Consideration shall be earned and distributed according to the terms and conditions set forth in Exhibit A attached hereto.

Doc. #38-1 at 9.

Exhibit A, in relevant part, provided that:

> Buyer shall pay Seller as additional contingent consideration, four percent (4%) of the gross annual (i) electronic flight instrumentation system product sales utilizing the Seller's integrated cockpit technology, (ii) training sales utilizing the Seller's integrated cockpit technology and (iii) engine control

> product sales utilizing the Seller's engine data acquisition and control system technology up to an aggregate maximum of $4,000,000, for the period commencing on the Closing date and ending on December 31, 2010.

Id. at 35.

In moving for summary judgment, L-3 Avionics argues that there were never any sales that would have triggered the payment of the Contingent Consideration, citing to the declaration of Frank Riddle, Jr., its Vice President of Sales and Marketing. Doc. #32 at 31 (citing to Doc. #32-6). It also argues that proceeds from its settlement with Cirrus do not qualify as Contingent Consideration because the litigation it entered into with that company only involved unrelated technology. *Id.* In response, DXE argued that it was due payment under the Contingent Consideration provision for the CMC transaction, which qualified as a sale under the APA. Doc. #45 at 12. DXE also argues that it is "entitled to recover [Contingent Consideration] on the settlement with Cirrus resulting from sales that were booked but cancelled by Cirrus at the last minute." *Id.*

The parties do not dispute the meaning of the language contained in the Contingent Consideration provision. As discussed previously when construing Section 1.4(b)(iii) of the APA, the extent to which the "Seller's integrated cockpit technology" was a constituent part of the "electronic flight instrumentation system product" in any sales is a question of fact. The other issues that arise under the Contingent Consideration provision also involve questions of fact, such as the presence or absence of sales that would create any right or obligation under that provision, and the extent to which transactions with Cirrus or CMC involved technology in which DXE claims rights. As with many of the arguments presented in their cross-motions, these factual issues fall outside the scope of the stipulation of the parties in their Joint Motion for a Stay of Discovery Pending Cross-Motions for Summary Judgment on Contractual Issues. *See* Doc. #28. Thus, to the extent that the parties' Cross-Motions move the Court for summary judgment on Count III of DXE's Complaint, they are accordingly overruled.

III. CONCLUSION

For the reasons set forth above, the Court OVERRULES, without prejudice to renewal, both Defendant's Motion for Summary Judgment on Plaintiff's Complaint (Doc. #32) and Plaintiff's Motion for Partial Summary Judgment (Doc. #38). Under Ohio law, Plaintiff has the capacity to bring this suit, and Defendant is not entitled to summary judgment in its favor on that basis. As requested by the parties, the Court has construed the APA, and its construction is set forth above in Part II.C. Due to the parties' stipulation to seek a ruling only on the legal issues and their agreed stay of discovery pending said ruling, the Court does not consider any factual issues ripe for a ruling at this time. Accordingly, to the extent their Cross-Motions for Summary Judgment move the Court for summary judgment on any allegedly undisputed factual issues, they are OVERRULED without prejudice to refiling at the conclusion of discovery.

Counsel will note that a telephone conference call will be convened between the Court and counsel, at 4:30 p.m. on Thursday, August 28, 2014. Not later than 48 hours prior thereto, the parties must file a jointly prepared supplemental case management order setting forth recommended dates leading to the resolution of this litigation.

Date: August 12, 2014

WALTER H. RICE
UNITED STATES DISTRICT JUDGE