EFiled: Dec 20 2017 03:15PM EST
Filing ID 61489455
Case Number 443,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM E. PETTIT and SUSAN VAN HOUTEN, On Behalf of Themselves and All Others Similarly Situated Plaintiffs, v. HD SUPPLY HOLDINGS, INC., Defendant.	No. 443, 2017 On Appeal from the Court of Chancery C.A. No. 2017-0125-JTL

APPELLANTS' [CORRECTED] OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

NATURE OF THE PROCEEDINGS

Plaintiffs William E. Pettit and Susan Van Houten ("Plaintiffs") originally brought a class action against their former employer, Defendant HD Supply Holdings, Inc. ("Defendant") in the Circuit Court of Cook County, Illinois. The action stemmed from Defendant's refusal to accelerate vesting of unvested equities held by Plaintiffs and members of a class they seek to represent. The equities were granted by Defendant as part of a management benefits program; the terms of the contract governing that program stated that unvested equities would become fully vested upon certain transactions constituting a "change in control," including a "merger, consolidation or other similar transaction." However, when Plaintiffs' business unit was spun off, their unvested equities were cancelled by Defendant and treated as worthless. Plaintiffs contend that the spin-off of their business unit was a merger or similar transaction under the benefits contract, and that they were entitled to the full value of their unvested awards.

The Circuit Court of Cook County dismissed the suit based on a forum-selection clause in Defendant's corporate charter that purported to require all matters affecting the company's internal affairs to be filed in Delaware Court of Chancery. Plaintiffs timely appealed that ruling. Meanwhile, after Defendant refused to enter into a tolling agreement while the venue issue was fully litigated in Illinois, Plaintiffs filed a class action complaint in the Court of Chancery in order to avoid breaching a

contractual, one-year litigation limitations period. After Defendant refused to agree to a stay of the Delaware case pending resolution of the Illinois appeal, Plaintiffs sought leave of the Court of Chancery to amend their complaint to add a count for declaratory judgment on the venue issue. The court denied that request; a copy of the order is attached hereto as Exhibit A. Plaintiffs next sought a stay of the Delaware litigation pending outcome of the Illinois appeal. The court denied that request as well; a copy of that order is attached hereto as Exhibit B.

The parties then fully briefed Defendant's motion for judgment on the pleadings. Following oral arguments, the court on September 25, 2017 granted Defendant's motion in full. A copy of the order is attached hereto as Exhibit C. Regarding Plaintiffs' claim for breach of contract, the court held that while the spin-off of Plaintiffs' business unit was a merger or similar transaction under the benefits plan as a "purely technical matter," and that Plaintiffs' interpretation of the contract was correct from a linguistic perspective, it did not believe it was a reasonable interpretation. A139-41. The court also rejected Plaintiffs' claims for breach of the covenant of good faith and fair dealing, and unjust enrichment. Plaintiffs timely filed a notice of appeal with this Court.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred by entering judgment on the pleadings in favor of Defendant. For instance, the lower court:

(a) acknowledged that Plaintiffs' interpretation of the relevant change-in-control provision was correct "as a purely technical matter," (A141), and that the contract did not "literally" support the court's own interpretation, (A140), but nevertheless entered judgment on the pleadings for Defendant. The court cannot be permitted to supplant the plain language of the contract with its own interpretation. At worst, the contract is ambiguous, making judgment on the pleadings inappropriate.

(b) held that even if the court's interpretation of the contract was incorrect, it would nevertheless grant judgment on the pleadings to Defendant due to deference afforded to the administrator of the benefits plan. However, the administrator was constrained by a duty of good faith which it breached by failing to apply the plain language of the plan contract. Additionally, the administrator acted in bad faith by granting the full amount of unvested awards to employees of another of Defendant's subsidiaries that was spun off in an earlier transaction, and then denying full vesting to Plaintiffs.

(c) misconstrued Plaintiffs' claim for breach of the covenant of good faith and fair dealing as an effort to imply new change-in-control terms into the contract. On the contrary, Plaintiffs' covenant claim alleged that Defendant breached an implied duty to not use oppressive or underhanded tactics to deprive them of the benefits of the contractual relationship. More specifically, Plaintiffs alleged that Defendant promised them full vesting and granted full vesting to a the earlier spun-off employees, but then denied Plaintiffs the value of their awards when their business unit was transferred.

(d) incorrectly granted judgment on Plaintiffs' unjust enrichment claim by stating Defendant did nothing unjust by complying with the contract – even after finding that Plaintiffs' interpretation of the contract was correct as a "technical matter."

2. The Court of Chancery erred by refusing to grant Plaintiffs leave to amend the complaint to address the venue issue after Defendant refused to agree to stay the Delaware case while the venue issue was litigated in Illinois.

3. The Court of Chancery erred by refusing to stay the Delaware litigation while the venue issue was resolved in Illinois. The court required to the parties to address the merits before there was a final Illinois ruling on where venue was proper.

STATEMENT OF FACTS

HD Supply

Defendant HD Supply Holdings, Inc., a spinoff of Home Depot, is a publicly traded holding company that operates its Georgia-headquartered HD Supply business through several different affiliated companies and subsidiaries that collectively comprise one of the largest industrial suppliers in North America. A29 at ¶¶ 9-11.[1] Prior to October 2015, Defendant conducted one of its business divisions as HD Supply Power Solutions ("Power Solutions"), all by affiliated entities fully owned and operated by Defendant. A29 at ¶ 11.

The Plaintiff Employees

Plaintiffs (residents of Illinois and other states, but none from Delaware) were high-ranking employees and members of the Power Solutions management team who had been granted restricted stock awards and stock options pursuant to Defendant's Management Equity Program. A30 at ¶ 13. The Management Equity Program was offered only to high-level employees and was offered in addition to other incentive plans. A30 at ¶ 14.

The Plan

The Management Equity Program was governed by the 2013 Omnibus Incentive Plan ("Plan"). A27 at ¶ 3. Management Equity Program participants were

[1] References to the appendix shall read "(A___").

granted restricted equity awards every year which vested at 25 percent annually over the course of four years. A31 at ¶ 16. The Plan provided Power Solutions participants with accelerated vesting of their unvested equity awards in certain situations, including, relevant here, that upon a "change in control" of the company, "all such Awards shall vest and become non-forfeitable and be cancelled in exchange for an amount equal" to the price of the securities on the date there was a change in control of the company. A31 at ¶ 17. A "change in control" is defined by the Plan as:

> the merger, consolidation *or other similar transaction* involving the Company, as a result of which persons who were holders of voting securities of the Company immediately prior to such merger, consolidation or other similar transaction do not, or any of the Investors, does not, immediately thereafter, beneficially own, directly or indirectly, more than 50% of the combined voting power entitled to vote generally in the election of directors of the merged or consolidated company.

A31 at ¶ 18 (emphasis added).

The Plan provides and promises that "neither the amendment, suspension nor termination of the Plan shall, without the consent of the holder of the Award, adversely alter or impair any rights or obligations under any Award theretofore granted," and that if any Award Agreement was amended "the rights of a Participant under an Award Agreement shall not be adversely impaired without the Participant's written consent." A31-32 at ¶ 19.

The Venue Provision

On July 2, 2013, related to its initial public offering, Defendant filed with the Delaware secretary of state an amended certificate of incorporation which included a provision designating the Delaware Court of Chancery as the exclusive forum for any action asserting a claim "governed by the internal affairs doctrine." A43.

The Earlier Crown Bolt Sale

In 2014, Defendant spun off another one of its companies, HD Supply Hardware Solutions (commonly referred to by its pre-HD Supply name "Crown Bolt"). A32 at ¶ 20. Upon that sale, all participants in Defendant's Management Equity Program employed by Hardware Solutions had all their unvested equity awards vested on an accelerated basis and were compensated for the full amount of their unvested awards. *Id*. It was common knowledge among the Power Solutions management team that the Hardware Solutions management team had received the full value of their unvested awards upon the sale of that company. A32 at ¶ 21.

The Power Solutions Transaction

In March 2015, Defendant began notifying certain executives and upper-management members that it intended to sell off the Power Solutions division. A32 at ¶ 22. On multiple occasions in 2015, Defendant's senior executives assured Plaintiffs and other members of the Class that their unvested awards would vest upon a change in control of Power Solutions. A32 at ¶ 23. On July 15, 2015, Defendant

entered into an agreement to transfer Power Solutions to Anixter, Inc. for $825 million in cash. A33 at ¶ 24.

The transfer of Power Solutions to Anixter closed on October 5, 2015 in Chicago, Illinois. A33 at ¶ 26. Immediately afterward, Defendant's shareholders no longer had any voting power over Power Solutions, the merged or consolidated company which then belonged to Anixter. *Id*. However, Defendant did not accelerate full vesting of the Power Solutions management team's unvested equity awards upon this change in control of Power Solutions. A33 at ¶ 27. Instead, Defendant treated all employees of Power Solutions as having been "terminated" despite being immediately rehired by Anixter pursuant to the Sale Agreement, and thereafter cancelled and declared worthless all restricted awards that were unvested at the time of the sale. *Id*. Plaintiffs' unvested awards were then just cancelled by Defendant and they were not given replacement awards or a substantially similar equity program at Anixter. A34 at ¶ 29.

Employees' Timely Claim and Denial

On December 21, 2015, Plaintiffs and more than a dozen other members of the Class filed a timely, formal claim for themselves and for others similarly situated, under Defendant's Omnibus Incentive Plan objecting to Defendant's failure to accelerate vesting upon the change in control of Power Solutions. A34 at ¶ 30. On April 14, 2016, Defendant denied Plaintiffs' claim. A34 at ¶ 32.

The Illinois Litigation

Plaintiffs filed a Class Action Complaint on May 18, 2016, in the Circuit Court of Cook County, Illinois, alleging that Defendant refused to accelerate vesting of Plaintiffs' unvested stock options and restricted equity awards as promised in the Plan. Ex. A at ¶ 1. Defendant moved to dismiss the Illinois action based on a forum-selection clause in the company's certificate of incorporation purporting to force plaintiffs to bring their claims in the Delaware Court of Chancery. Ex. A at ¶ 3. On October 11, 2016, the Circuit Court of Cook County dismissed the complaint pursuant to the corporate-charter venue provision. *Id*. Plaintiffs on December 2, 2016 timely filed a notice of appeal in the Illinois Appellate Court regarding the venue issue. *Id*.

The Delaware Protective Action

Meanwhile, after Defendant refused to enter into a tolling agreement to stop the clock on the Plan's one-year litigation limitations period, Plaintiffs on February 16, 2017 filed a class action complaint in the Delaware Court of Chancery. Ex. A at ¶ 4. On March 22, 2017, with the Illinois appeal of the venue issue still unresolved, Plaintiffs sought leave from the Court of Chancery to amend their complaint to correct various scriveners' errors as well as to add a count for declaratory judgment addressing whether venue was proper in Delaware. Ex. A at ¶ 5. The Court of

Chancery denied the motion, holding that "the proper course is to pursue the appeal, which [Plaintiffs] are doing." Ex. A at ¶ 9.

On May 2, 2017, with the Illinois appeal still pending and the venue issue unresolved, Defendant moved for an order setting a briefing schedule on its motion for judgment on the pleadings for Plaintiffs' Delaware action. Ex. B at ¶ 5. On May 5, 2017, Plaintiffs move to stay the Delaware proceedings pending the outcome of the Illinois appeal. Ex. B at ¶ 6. On May 31, 2017, the Court of Chancery denied Plaintiffs' motion to stay, and ordered Plaintiffs to file their answering brief to Defendant's motion for judgment on the pleadings within 14 days. Ex. B at ¶ 10.

On September 25, 2017, the Court of Chancery held oral arguments on Defendant's motion for judgment on the pleadings, and entered judgment in Defendant's favor on that day. *See* A104-150. Regarding Plaintiffs' claim that Defendant breached the Plan contract by refusing to accelerate vesting upon the Power Solutions transaction, the court ruled that "as a purely technical matter," the transaction met one of the Plan's definitions of a change in control that should have triggered accelerated vesting. A141. However, the court ruled that – despite Plaintiffs' interpretation of the Plan's change-in-control provisions being correct from a "linguistic perspective" – the transaction was not, in the court's view, a change in control under the Plan. A139. The court held that what the Plan was "really talking about" was a merger or similar transaction affecting the parent

company, and not the Power Solutions company – although the court acknowledged the Plan "doesn't say that literally." A139-140. Again, while the court ruled that the Plan's change-in-control provision "as a purely technical matter…applies under these circumstances," the court nevertheless held that it did not apply because "it's just not an immediately reasonable reading" of the Plan. A141. The court also granted judgment on the pleadings to Defendant on Plaintiffs claims for breach of the covenant of good faith and fair dealing, and unjust enrichment. A144-146.

On October 25, 2017, Plaintiffs timely filed their notice of appeal with this Court. A151-155.

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS BECAUSE THE PLAN LANGUAGE REQUIRES ACCELERATED VESTING OF THE EQUITIES ON THIS TRANSACTION, WHICH WAS SIMILAR TO THE MERGER OF A SUBSIDIARY

A. QUESTION PRESENTED

Whether the Court of Chancery erred in granting Defendant's motion for judgment on the pleadings. This issue was preserved for appeal. A65-103.

B. SCOPE OF REVIEW

The grant of a motion for judgment on the pleading presents a question of law which is reviewed de novo. *W. Coast Opportunity Fund, LLC v. Credit Suisse Sec. (USA), LLC*, 12 A.3d 1128, 1131 (Del. 2010).

C. MERITS OF THE ARGUMENT

The Court of Chancery erred by granting Defendant judgment on the pleadings because (i) by the court's own acknowledgement, a change in control occurred pursuant the actual Plan language, which should have triggered accelerated vesting; (ii) the Plan administrator did not have discretion to ignore the contract terms or treat different groups of employees differently under the Plan; (iii) Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing adequately alleged that Defendant had an implied duty not to deprive Plaintiffs of

the benefits of the Plan contract; and (iv) Plaintiffs suitably alleged unjust enrichment in the alternative to their contract claims.

1. The Court of Chancery Acknowledged that Plaintiffs Established a Breach of Contract Pursuant to the Plan Language

The Court of Chancery acknowledged that the plain language of the relevant Plan provision supports Plaintiffs' breach of contract claim, holding that "from a linguistic perspective, it does work." A139. That is, the court held that the plain language of the Plan established that the change-in-control provision had been triggered by the Power Solutions transaction which should have resulted in accelerated vesting of Plaintiffs' equities. However, the court ruled that in his view the relevant Plan language was "really talking about" was something else – even though the contractual language "doesn't say that literally." A139. The Court of Chancery's decision to choose between two competing interpretations of contractual language at the pleading stage is improper. The court's decision is all the more erroneous as it ignored the plain contractual language – language drafted by Defendant – to impose an alternate interpretation directly conflicting with the written Plan terms.

Like a motion to dismiss for failure to state a claim, "a trial court cannot choose between two differing reasonable interpretations of ambiguous" contracts when considering a motion for judgment on the pleadings. *Vanderbilt Income &*

Growth Assocs., L.L.C. v. Arvida/JMB Managers, 691 A.2d 609, 613 (Del. 1996); *see also VLIW Tech., L.L.C.*, 840 A.2d at 615 ("Because the provisions at issue in the Agreement are susceptible to more than one reasonable interpretation, for purposes of deciding a motion to dismiss, their meaning must be construed in the light most favorable to the non-moving party."). Where, as here, there exists a material issue of fact as to the interpretation of "change in control" in the Plan. Like contracts, interpretation of benefit plans are subject to the same rules. *See, e.g., Markow v. Synageva Biopharma Corp*., 2016 Del. Super. LEXIS 167 at *17 (Del. Sup. Ct. Mar. 3, 2016) ("Ultimately, the Court cannot conclude Defendant's interpretation is the only reasonable construction of the Employment Agreements…"); *Athey v. Hercules Inc*., 985 F.Supp. 441, 450 (D. Del. 1997) ("it is apparent the Layoff Plan's phrase 'laid off because the workforce is reduced' is subject to more than one reasonable interpretation and, therefore, is ambiguous"). Accordingly, the Court of Chancery was not permitted to pick between two competing interpretations of the same contract provision. Rather, Plaintiffs should have been permitted to proceed to discovery into whether the Power Solutions transaction constituted a "Change in Control" requiring accelerated vesting of employees' equity awards under the Plan and whether Plaintiffs' reasonable expectations under the contract were denied.

There is no dispute that the Plan promised accelerated vesting of HD Supply's employees' equity awards upon a change in control. A "Change in Control" is defined by the Plan as:

> the merger, consolidation or other similar transaction involving the Company, as a result of which persons who were holders of voting securities of the Company immediately prior to such merger, consolidation or other similar transaction do not, or any of the Investors, does not, immediately thereafter, beneficially own, directly or indirectly, more than 50% of the combined voting power entitled to vote generally in the election of directors of the merged or consolidated company.

A31 (citing Plan at §2.10(b)). Meanwhile, Plaintiffs' complaint alleges that:

> The sale of Power [S]olutions was a "merger, consolidation or other similar transaction" as set forth in the Plan's definition of change in control. Plan at 3. As a result of the transaction, "persons who were holders of the voting securities of the Company [Defendant] immediately prior to such merger, consolidation or other similar transaction do not…immediately thereafter, beneficially own, directly or indirectly, more than 50% of the combined voting power entitled to vote generally in election of directors of the merged or consolidated company [Power Solutions]." That is, as a result of the transaction between Power Solutions and Anixter, holders of voting securities of Defendant no longer had control of Power Solutions.

A37 at ¶ 45. There is no dispute that following the transaction at issue, holders of its voting securities no longer held control over Power Solutions. After the transaction, Power Solutions ceased to exist as separate HD Supply subsidiaries and was absorbed into Anixter or its subsidiaries which retained its own name and

identity after acquiring the Power Solutions business, including its assets and liabilities.

The Court of Chancery recognized that this fact pattern fit within subsection (b)'s change-in-control definition:

> The Plaintiffs have a clever technical argument under 2.10(b). It's so clever and counterintuitive that it took me awhile to figure what they were actually talking about. But from a linguistic perspective, it does work. As I said, the idea here is that Section 2.10(b) deals with 'mergers, consolidations, or other transactions involving the Company." This allows the plaintiffs to say that this transaction, because the asset sale could have been effectuated as a merger of the subsidiaries constituting the Powers Solutions business, is, therefore similar to a merger, and that because the parent company was involved and, indeed, was a signatory to the asset purchase agreement, this is enough to make it a merger, consolidation, or similar transaction involving the company.

A139-40. Regardless of whether Plaintiffs' interpretation of the provision was "clever and counterintuitive," it was nevertheless reasonable because it was based on the actual language of the provision. Specifically, reading the defined term "Company" as HD Supply and (small c) "company" as the Power Solutions companies, there has clearly been an outgoing cash-out merger or spin off of the Power Solutions business.

The Court of Chancery was not permitted to supplant as a matter of law Plaintiff's text-based interpretation with its own version of what, it perceived, the contract was "really talking about." A139. That is particularly true when the court

acknowledges that its version "doesn't say that literally" in the Plan. *Id*. Faced with the precise Plan language, the court should have the chosen that interpretation regardless of whether it seemed "counterintuitive." Even if the contract language was merely ambiguous, it nevertheless should have been construed against Defendant as the drafter. *See Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 398 (Del. 1996) ("It is a well-accepted principle that ambiguities in a contract should be construed against the drafter.").

In justifying its interpretation of the Plan language, the Court of Chancery repeatedly cited subsection (e) of the change-in-control definitions, which describes an asset sale. Indeed, to avoid its equity-vesting obligations under the Plan, Defendant contended that it was a not a merger between Power Solutions and Anixter, but rather was a sale of assets by the holding company. But what cannot be denied is that it was a *similar transaction* to a merger. If Defendant, as the unilateral drafter of the Plan, did not want transactions "similar" to a merger to count as a change-of-control, it could have omitted that language. Moreover, there is no explanation from neither Defendant nor the court why the Power Solutions transaction cannot be considered a merger or similar transaction under the actual Plan language solely because it does not meet the asset-sale definition in subsection (e). Accelerated vesting is triggered when any one of the section 2.10 subsection definitions is met. The fact that the Power Solutions transaction would not trigger

vesting under subsection (e) does not mean it would not trigger vesting under subsection (b) – particularly when the court acknowledges that definition has been "literally" met.

Finally, even if the court could have properly picked its own interpretation of the Plan provision, Defendant had already demonstrated its contractual intent of the Plan. For example, in an identical sale of the Crown Bolt division, Defendant interpreted the plan as requiring the acceleration of those participants' equity awards under the same Plan. *See AT&T Corp. v. Lillis*, 953 A.2d 241, 254 (Del. 2008) (where an ambiguity exists in the parties' constructive intent the court may look to a defendants' "course of conduct" to discern such intent). There is no dispute that that all of the Crown Bolt participants received the full value of their unvested awards upon the change of control of that company. This fact, which was common knowledge among Plaintiffs, combined with the fact they were repeatedly promised their own awards would fully vest upon a change in control of Power Solutions, created a reasonable expectation that Defendant failed to uphold. As discussed further *infra*, the defeated expectations created by the Crown Bolt transaction alone are actionable.

2. Deference to the Administrator is Inappropriate Where Its Decision Directly Contradicts Plan Language

After holding that Plaintiffs' interpretation of the Plan – despite being "linguistically" correct – was incorrect as a matter of law, the Court of Chancery

stated that "[a]ssuming I'm wrong and the plaintiffs' reading is sufficiently cognizable to warrant consideration such that the agreement would be ambiguous," he would nevertheless grant Defendant judgment on the pleadings due to the Plan provisions granting the administrator power to interpret the Plan. The court held that Plaintiffs' claims that the administrator acted in bad faith were "contrary to the language of the [P]lan." However, the Court had previously found that the language of the Plan "literally" supported Plaintiffs' claims for accelerated vesting.

The fact that the Plan Administrator was granted discretion to interpret the Plan does not insulate Defendant from litigation or strip courts of jurisdiction over Plaintiffs' claims. "Although the Plan, like many equity plans, gives the Board broad discretion over determinations affecting Company stock, it also imposes certain limitations on that discretion." *Markow*, 2016 Del. Super. LEXIS 167 (refusing to dismiss Plaintiffs' claims that plan administrator unfairly waited until after a merger to price stock options). "In other words, just because the Plan gave [defendant] discretion to terminate the Plan without paying unearned bonuses does not mean that [defendant] is necessarily incapable of abusing that discretion." *Wilson v. Career Educ. Corp.*, 729 F.3d 665, 675 (7th Cir. 2013).

In this case, the Plan Administrator has discretion only to act pursuant to the Plan. Plaintiffs have alleged that the Plan provisions called for accelerated vesting upon a change in control, and that the Plan Administrator did not comply with those

provisions upon the change in control of Power Solutions. More generally, the Plan Administrator's discretion is constrained by a duty to act in good faith. *See, e.g., Fox v. CDX Holdings, Inc.*, 2015 Del. Ch. LEXIS 194 (Del. Ch. July 28, 2015) (awarding damages to class of stock option holders challenging valuation despite plan administrator's sole discretion to set value); *see also Goldstein v. Johnson & Johnson*, 251 F.3d 433, 436 (3d Cir. 2001) ("Ordinary contract principles require that, where one party is granted discretion under the terms of the contract, that discretion must be exercised in good faith – a requirement that includes the duty to exercise the discretion reasonably.") (citing Restatement (Second) of Contracts § 205 & cmt (a)).

Judgment for Defendant based on the Plan administrator's discretion is unwarranted. Plaintiffs allege that the administrator refused to follow the express provisions of the Plan; whatever discretion the Plan Administrator may have been granted, it was not permitted to ignore contractual provisions. The Court of Chancery held that there could have been no bad faith on the part of the administrator because it complied with the terms of the Plan. But as the court itself determined, the plain language of the Plan supports Plaintiffs' claim for accelerated vesting. Thus, an administrator's decision that conflicts with the plain language of the Plan cannot fall within its good-faith discretion.

Moreover, it is undisputed that the Plan Administrator accelerated full vesting of equity awards following the change in control of another one of its companies, HD Supply Hardware Solutions (commonly known as "Crown Bolt") but refused to do so for Plaintiffs in an identical transaction involving Power Solutions. This exercise in bad faith, defeating Plaintiffs' reasonable expectations, cannot be absolved by any discretion afforded the Plan Administrator and cannot be decided at this stage. *See Desert Equities, Inc*., 624 A.2d at 1206 (Del. 1993) (reversing and holding that the trial court erred "as a matter of law" in granting judgment on a complaint where complaint contained facts supporting a claim that defendant "acted in bad faith"). Defendant paid the Crown Bolt participants the full value of their unvested equities when that division was spun off. As the Power Solutions transaction loomed, Defendant promised Plaintiffs that they, too, would receive the full value of their unvested equities. But when the transaction was finalized, Defendant went back on its word and rendered those equities worthless. In an effort to escape the consequences of its prior conduct and promises to its employees including Plaintiffs, Defendant invoked the contractual provisions granting its own administrator full, binding authority to interpret the Plan in any manner it sees fit. But the administrator may not be granted such broad deference in the face of its bad-faith handling of the Power Solutions transaction.

The Court of Chancery addressed the differences between the Crown Bolt awards and the cancellation of the Power Solutions awards by noting that he tips differently when dining out. "I mean, look, I sometimes tip 15 percent. I sometimes tip 20 percent." A144. But the chancellor is under no contractual duty to tip *anything* at restaurants. Defendant, on the other hand, had a contractual duty to accelerate vesting upon conditions meeting one of the definitions of change in control in the Plan. And the court has held that the circumstances of the Power Solutions transaction "literally" satisfied a change-in-control definition requiring accelerated vesting. Nevertheless, the administrator refused to accelerate vesting for Plaintiffs. The Crown Bolt participants, on the other hand, received the exact amount of their unvested equities upon that transaction in which their business unit was spun off in a manner identical to Plaintiffs'. While the Court of Chancery found the different treatment "doesn't give rise to any question of good faith or arbitrariness or anything like that," (A145), it is hard to view the conflicting treatment as anything but arbitrary. The Crown Bolt employees received the benefit of the Plan's accelerated vesting while Plaintiffs did not. The administrator may have been granted discretion to interpret the Plan, but not to interpret the Plan one way for one group of employees and another way for another group of employees. Different treatment is allowed while tipping at a restaurant, but not when two groups are entitled to the same awards under a benefits contract.

3. Plaintiffs Properly Pleaded their Implied Covenant Claim

In assessing Plaintiffs' claim for breach of the covenant of good faith and fair dealing, the Court of Chancery again fell back on its own interpretation of the Plan's change-in-control provisions and held that "I think that the plain language controls." Putting aside the fact that the court already stated that the language of the relevant change-in-control provision "literally" supported accelerated vesting for Plaintiffs, the court misapprehended the substantive nature of Plaintiffs' implied covenant claim.

The court correctly stated that the claim is "a way of implying terms," (A145), but the terms Plaintiff seek to imply are not new change-in-control provisions (they already established change in control via the Plan's plain language). Rather, Plaintiffs alleged that Defendant breached an implied duty to not use oppressive or underhanded tactics to improperly deprive them of the benefits of the contractual relationship. "In order to plead successfully a breach of an implied covenant of good faith and fair dealing, the plaintiff must allege a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff." *Fitzgerald v. Cantor*, 1998 Del. Ch. LEXIS 212, at *4 (Del. Ch. Nov. 10, 1998). Here, Plaintiffs identified a separate implied duty that Defendant acted in bad faith to deprive them of the benefit of their bargain and their covenant claim is thus actionable. *See, e.g., Data Ctrs., LLC v. 1743 Holdings LLC*, 2015 Del. Super.

LEXIS 979, at *19 (Del. Super. Ct. Oct. 27, 2015) ("The facts here are different from those in *Kuroda* and *Fortis*. TDC does not invoke the implied covenant to override express provisions of the contract, nor does it fail to identify an implied contractual term different from the express terms of the contract.")

Moreover, in Delaware, "more recent case law reflects a willingness to allow implied covenant claims to survive, despite the presence of relevant contractual language, where a defendant failed to uphold the plaintiff's reasonable expectations under that provision or failed to exercise discretion under the contract reasonably." *Markow*, 2016 Del. Super. LEXIS 167 at *21. Here, Plaintiffs allege that they were repeatedly promised that their equity awards "would fully and immediately vest following a sale of the Company," A27 at ¶ 2; that they were assured by managers that "their unvested Awards immediately vest upon a change-in-control of Power Solutions," A27 at ¶ 3; and that it was common knowledge that the Crown Bolt participants "had received the full value of their unvested awards upon that sale of that company," A27-28 at ¶ 4.

Plaintiffs thus adequately alleged that Defendant failed to uphold their reasonable expectations under the contract as in *Markow*, thereby destroying their rights to receive the benefit of the contract. These allegations were sufficient to state a good-faith covenant claim at this procedural stage. *See, e.g., Renco Group, Inc.*, 2015 Del. Ch. LEXIS 25 at *22 ("Given the early stage of the proceedings, the

complexity of the business arrangement, and the breadth of the factual allegations, the Court cannot foreclose the reasonably conceivable claims that MacAndrews AMG's alleged misconduct went to matters so fundamental that Plaintiff's reasonable expectations were frustrated."); *see also Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400, 422 (Del. 2013) (reversing dismissal and finding that an implied covenant claim was stated because plaintiff "still retained a reasonable contractual expectation that the defendants would properly follow the [contract's] substitute standards"), overruled on other grounds by *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013)).

4. Plaintiffs Properly Pleaded Unjust Enrichment in the Alternative

The Court of Chancery dismissed Plaintiffs' unjust enrichment claim, holding that "there's nothing unjust about giving the plaintiffs nothing more than what they were entitled to under the agreement." A146. However, the court had already ruled that under the actual language of the Plan's change-in-control provision, Plaintiffs should have been entitled to accelerated vesting. In any event, Plaintiffs' unjust enrichment claim was pleaded in the alternative to their contract claims. Plaintiffs are permitted to plead unjust enrichment alternatively to contract claims. *See BAE Sys. Info. & Elec. Sys. Integration v. Lockheed Martin Corp.*, 2009 Del. Ch. LEXIS 17, at *29 (Del. Ch. Feb. 3, 2009) ("In some instances, both a breach of contract and an unjust enrichment claim may survive a motion to dismiss when pled as alternative

theories for recovery.") (Emphasis in original). Unjust enrichment may be pleaded in the alternative where a "plaintiff pleads a right to recovery not controlled by contract." *Great Hill Equity Partners IV, LP v. BlueSnap, Inc.*, 2014 Del. Ch. LEXIS 243, at *89 (Del. Ch. Nov. 26, 2014) (refusing to dismiss unjust enrichment claim at the pleading stage). Here, Plaintiffs allege that – regardless of the Plan language – "Plaintiffs were assured multiple times by HD Supply's senior executives and management that their unvested Awards would immediately vest upon a change-in-control of Power Solutions." A27 at ¶ 2. As such, Plaintiffs alleged a right of recovery outside the contract and their unjust enrichment claim should not have been dismissed at the pleading stage.

II. THE COURT OF CHANCERY ERRED BY DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE A VERIFIED FIRST AMENDED CLASS ACTION COMPLAINT

A. QUESTION PRESENTED

Whether the Court of Chancery erred in denying Plaintiffs' motion for leave to file a verified first amended class action complaint. This issue was preserved for appeal. A42-51.

B. SCOPE OF REVIEW

The trial court's ruling on a motion for leave to amend pleadings is reviewed for an abuse of discretion. *Laird v. Buckley*, 539 A.2d 1076, 1079 (Del. 1988).

C. MERITS OF THE ARGUMENT

The Court of Chancery erred in refusing to grant Plaintiffs' leave to amend their complaint to address the threshold issue of venue. Pursuant to Court of Chancery Rule 15(a), leave to amend "shall be freely given when justice so requires." Indeed, "Rule 15(a) is a highly permissive standard." *Agilent Techs., Inc. v. Kirkland*, 2009 Del. Ch. LEXIS 11, at *4 (Del. Ch. Jan. 20, 2009). "Courts have interpreted this provision to allow for liberal amendment in the interest of resolving cases on the merits." *Whittington v. Dragon Group L.L.C.*, 2011 Del. Ch. LEXIS 26 * (Del. Ch. Feb. 11, 2011). "In the absence of undue prejudice, undue delay, bad faith, dilatory motive or futility of amendment, leave to amend should be granted." *In re TGM Enters., L.L.C.*, 2008 Del. Ch. LEXIS 130, at *4 (Del. Ch. Sept. 12, 2008).

In the instant case, leave to amend should have been granted because there was no undue prejudice to Defendant; there had been no undue delay, bad faith or dilatory motive by Plaintiffs; and the proposed amendment would not have been futile.

To unduly prejudice a nonmoving party, an amendment under Rule 15(a) must unfairly disadvantage the nonmoving party or deprive the party of the opportunity to present its defense. *Fitzgerald v. Cantor*, 1999 WL 66529, at *1 (Del. Ch). In the absence of prejudice to the non-moving party, "the trial court is required to exercise its discretion in favor of granting leave to amend." *Mullen v. Alarmguard of Delmarva, Inc*., 625 A.2d 258, 263 (Del. 1993). A party opposing a motion for leave to amend has a heavy burden of establishing undue prejudice. *See, e.g., Buckson v. Town of Camden*, 2001 Del. Ch. LEXIS 156, at **24-25 (Del. Ch. Dec. 4, 2001) (finding that amendment after summary judgment briefing was completed did not rise to the level of undue prejudice to the party opposing amendment). Here, Defendant would not have been prejudiced by the proposed amendment in any manner whatsoever. The amended complaint would not have deprived Defendant of the opportunity to present its defense. In fact, Defendant had already presented its defense to the merits of Plaintiffs' claims twice – in Illinois and then in Delaware. Adding the declaratory judgment claim to the amended complaint would have merely put the venue question to a Delaware court. And the venue issue was raised

in this litigation solely by Defendant; it is Defendant which claimed that the provision inserted in its corporate charter to govern shareholder and derivative litigation somehow applies to this contractual dispute brought by former employees. Venue was a threshold issue, raised by Defendant, and unresolved by the Illinois courts. It was in no way prejudicial to Defendant for Plaintiffs to ask this Court to determine whether the charter provision Defendant has used to force the filing of this suit was indeed applicable to this case.

There was no undue delay, bad faith or dilatory motive by Plaintiffs. The original Delaware complaint in this litigation was filed on February 16, 2017. Defendant received notice of Plaintiffs' intention to amend the complaint on March 15, 2017. That was Plaintiffs' first motion to amend the complaint. The only reason Plaintiffs filed anything in a Delaware court was because (i) Defendant insisted that the forum provision in the charter required Plaintiffs to sue in Delaware; and (ii) Defendant refused to enter into a tolling agreement in the Illinois action while the venue issue was appealed there, and threatened to enforce the one-year contractual limitations period. Having filed the "protective action" which Defendant informed the Illinois court Plaintiffs needed to file to protect their rights, Defendant then refused Plaintiffs' request to agree to stay this action while the venue issue was resolved by the Illinois appellate court. That is, Defendant asserted that Plaintiffs were required to file a protective action in Delaware, but then refused to treat that

action as a protective action. Instead, Defendants immediately moved to have the Delaware action adjudicated on the merits – knowing full well that the issue of whether the suit even belongs in Delaware was pending in Illinois.

Critically, Plaintiffs' proposed amendment would not have been futile. To determine whether an amendment is futile, the Court will assume all facts in the pleading are true and make all reasonable inferences in favor of Plaintiffs. *In re Fuqua Indus., Inc*., 2004 Del. Ch. LEXIS 187, *5 (Del. Ch. Dec. 14, 2004). Under that standard, this Court should make the reasonable inference in favor of Plaintiffs' allegations in the amended complaint that the venue provision in the corporate charter was inapplicable because this contract dispute is not governed by the internal affairs doctrine. The venue issue is of great concern to both Delaware courts (which may have some concern about the impact of permitting Delaware-incorporated entities to impose Delaware venue for most employee claims) and the states whose employees are so affected. Defendant's attempt to apply its corporate-charter venue provision to this case is unprecedented and unsupportable. These charter provisions are a recent phenomenon, and – as set forth in *Boilermakers Local 154 Retirement Fund v. Chevron Corp*., 73 A.3d 934 (Del. Ch. 2013) and codified by the legislature in 8 *Del. C.* §115 – they were meant to prevent multiforum litigation and channel shareholder, derivative and governance cases to Delaware. There is no legal precedent for such a provision being wielded in a situation like this, where former

employees, suing not as shareholders but as contracting employees, allege breach of a contract that does not contain a venue provision.

The Court of Chancery gave three bases for denying Plaintiffs' request to amend: that it was made solely to achieve a tactical advantage; that "principles of claim preclusion would seem to apply; and that the court should defer to the earlier-filed proceeding as set forth in *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co*., 263 A.2d 281 (Del. 1970). The court erred on all three grounds. First, there was no tactical advantage for Plaintiffs. They were forced to file in Delaware. After Defendant refused to enter into a tolling agreement or stay merits-briefing, Plaintiffs were forced to seek amendment in order to address the still-open threshold issue of proper venue. Second, issue preclusion would apply only if the venue issue had already been "fully adjudicated on the merits." *In re Trust Under Agreement*, 2008 Del. Ch. LEXIS 239, n. 53 (Del. Ch. 2008). Third, the court's professed deference for the first-filed action and reliance on *McWane* are particularly misplaced when, as described immediately infra, after refusing to grant Plaintiffs leave to amend to address the venue issue in Delaware, the court the refused to stay the Delaware case to allow them to address the venue issue in Illinois prior to taking up the merits in Delaware.

III. THE COURT OF CHANCERY ERRED IN DENYING PLAINTIFFS' MOTION TO STAY PROCEEDINGS

A. QUESTION PRESENTED

Whether the Court of Chancery erred in denying Plaintiffs' motion to stay proceedings in Delaware to resolve the venue issue in Illinois prior to addressing the merits in Delaware after refusing Plaintiffs leave to amend to address the venue issue in Delaware. This issue was preserved for appeal. A52-64.

B. SCOPE OF REVIEW

A trial court's ruling on a motion to stay proceedings is reviewed for abuse of discretion. *Williams Gas Supply Co. v. Apache Corp*., 594 A.2d 34, 37 (Del. 1991).

C. MERITS OF THE ARGUMENT

After denying Plaintiffs leave to amend their Delaware action to address the venue issue and instructing them to pursue the appeal on that issue in Illinois, the Court of Chancery then denied Plaintiffs request to stay merits-briefing in Delaware while the venue issue was resolved in Illinois. The court's refusal to stay the Delaware action was an abuse of discretion that conflicted with its own prior ruling on the motion to amend, ignored the first-filed status of the Illinois action, and set the stage for inconsistent rulings.

The decision of whether to stay a Delaware action in favor of a foreign action is a matter of discretion for the trial court, however, that "discretion should be exercised freely in favor of the stay when there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues; that, as a general rule, litigation should be confined to the forum in which it is first commenced…that these concepts are impelled by considerations of comity and the necessities of an orderly and efficient administration of justice." *McWane*, 263 A.2d at 283.

Where, as here, "a party alleges that there is an earlier foreign action, *McWane* provides the appropriate analysis, holding that the discretion to grant a stay should be exercised freely where (1) there is a prior pending action, (2) that involves the same parties and issues, and (3) the other court is capable of doing prompt and complete justice." *Kurtin v. KRE, LLC*, Civil Action No. 730-N, 2005 Del. Ch. LEXIS 70, at *12 (Del. Ch. May 16, 2005). In this case, the Court of Chancery should have stayed this action pending the outcome of the Illinois appeal because (1) the Illinois action was an earlier-filed action pending in another jurisdiction; (2) the Illinois action involved the same parties and the same issues as the instant action; and (3) the Illinois court is capable of doing prompt and complete justice.

First, "[t]he *McWane* doctrine reflects the weight this state places on comity towards its sister states and the respect this state has for the choice of forum made

by a diligent plaintiff." *Caithness Res., Inc. v. Ozdemir*, C.A. No. 18073, 2000 Del. Ch. LEXIS 159, at *10 (Del. Ch. Nov. 22, 2000). As such, the existence of a first-filed action in another jurisdiction is a threshold issue for the application of the *McWane* doctrine. "When actual service of a complaint has been made on the defendants and is followed by a later-filed mirror-image suit in this court, this court may confidently presume that the policy concerns identified in *McWane* apply in favor of the prior-filed action." *Id*. There is no dispute that the Illinois action was earlier filed. That complaint was filed on May 18, 2016. The instant case – a mirror image of the Illinois complaint – was filed in this Court on February 16, 2017 solely to protect Plaintiffs' rights in the face of contractual and statutory limitations issues.

Second, the Illinois action and the mirror-image protective complaint filed in this Court involve identical parties and identical issues. Even if the parties and issues were not identical, *McWane* would favor a stay of this action upon "a showing of substantial or functional identity." *QVT Fund LP v. Eurohypo Capital Funding LLC I*, C.A. No. 5881-VCP, 2011 Del. Ch. LEXIS 97, at *51 (Del. Ch. July 8, 2011). And even when there is not identity among the various parties and issues in competing litigations, the Court must consider "whether allowing the cases to progress in tandem would either risk conflicting rulings or foster an unseemly race to judgment in each forum." *Willis v. PCA Pain Ctr. of Va., Inc*., C.A. No. 9006-VCN, 2014 Del. Ch. LEXIS 212, at *20 (Del. Ch. Oct. 20, 2014). "The primary

analysis is whether the issues arise out of a common nucleus of operative facts." *McQuade v. McQuade*, Civil Action No. 612-N, 2005 Del. Ch. LEXIS 75, at *13 (Del. Ch. May 24, 2005). Here, the Illinois and Delaware actions involve identical parties and identical claims. The common nucleus of operative facts stem from Defendant's refusal to accelerate Plaintiffs' restricted equity awards upon a change of control of their company.

Third, the Illinois court was capable of doing prompt and complete justice. The Illinois case had been pending for a year when the Court of Chancery denied Plaintiffs' motion to stay. The sole issue before the appellate court (and now the Illinois Supreme Court) is the applicability of Defendant's corporate-charter venue provision.

Rather than negate the specter of conflicting rulings by staying the Delaware action, the Court of Chancery forced Plaintiffs to litigate the merits in Delaware while simultaneously litigating the venue issue in Illinois. The result was a ruling on the merits in Delaware prior to a final determination of the venue issue in Illinois – an issue that is still unresolved and very well may end with a ruling from the Illinois Supreme Court that Plaintiffs never should have had to file in Delaware in the first place. The Court of Chancery justified its denial of a stay by concluding that Plaintiffs were seeking a tactical advantage. But it was Defendant that sought (and won) a tactical advantage by pushing for a ruling on the merits before the issue of

proper venue was adjudicated. Defendant strategically forced this case to be filed in order to preempt Plaintiffs' choice of venue and then demanded that both cases proceed simultaneously. Notably, Defendant never suggested that the Illinois appeal be stayed and insisted on proceeding immediately to the merits in the Court of Chancery. Finally, the denial of the stay utterly ignored Illinois' concrete interest in affording justice to Illinois-based employment disputes. Illinois courts certainly have an interest in ensuring that litigation filed in Illinois, then forced to be refiled in Delaware on an untested venue provision and a threat of a limitations defense, is not resolved on the merits in Delaware before an Illinois court can determine whether Illinois venue was proper in the forum chosen by Plaintiffs.

CONCLUSION

WHEREFORE, This Court should reverse the Court of Chancery's grant of judgment on the pleadings for Defendant and enter judgment on the pleadings for Plaintiffs and the putative Class, and grant all other relief deemed appropriate.

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