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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROCKTENN CP, LLC, a Delaware corporation, and ROCKTENN SHARED SERVICES, LLC, a Georgia limited liability company, Defendants below/Appellants, v. BE&K ENGINEERING COMPANY, LLC, n/k/a KBR ENGINEERING COMPANY, LLC, a Delaware corporation, Plaintiff below/Appellee.	No. 120, 2014 Court below: Court of Chancery of the State of Delaware, C.A. No. 8837-VCL

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

This dispute arises from work performed by KBR Inc. and its subsidiaries[1] on a strategic capital upgrade project at RockTenn's[2] Containerboard Mill in Hodge, Louisiana (the "Strategic Project"). In June 2013, SW&B sued RKT CP in Georgia state court claiming monies owed for work on the Strategic Project (the "Georgia Action"). In August 2013, RockTenn answered and counterclaimed against SW&B and filed a Third-Party Complaint against related entities BE&K, KBR, Inc., and Kellogg, also alleging damages and monies owed. Some of the claims against BE&K were based on breach of a contract (dubbed the "Delaware Law Agreement" by the parties or the "DLA" herein[3]).

In August 2013, BE&K filed suit against RKT CP in Delaware Superior Court on claims, including breach of the DLA, arising out of the same Strategic Project (the "Delaware Action"). *See BE&K Engineering Company, LLC n/k/a KBR Engineering Company, LLC v. RockTenn CP, LLC*, Civil Action No. N13-008-105 WCC. Eleven days later, BE&K filed an action in the Court of Chancery seeking an anti-suit injunction against RockTenn to preclude it from pursuing claims against BE&K in the Georgia Action. BE&K claimed the DLA, with a Delaware venue provision, governed BE&K's work on the Strategic Project.

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[1] KBR Inc. and its subsidiaries BE&K Engineering Company, LLC ("BE&K"), SW&B Construction Company, LLC ("SW&B"), and Kellogg, Brown & Root, LLC ("Kellogg") are collectively referred to herein as "KBR."

[2] RockTenn CP, LLC ("RKT CP") and Rock-Tenn Shared Services, LLC ("RKT SS") are collectively referred to herein as "RockTenn."

[3] The trial court called this the "Engineering Agreement" to distinguish it from other contracts between the parties.

At the September 27, 2013 preliminary injunction hearing, RockTenn stated (and has continued to state ever since) that which contract(s) govern BE&K's work on the Strategic Project is complex and unclear, particularly given the lack of discovery and a $5 million project limitation clause in the DLA. (A0195-96, A0199). Nevertheless, the Court of Chancery entered a preliminary injunction enjoining RockTenn from pursuing its claims against BE&K in the Georgia Action. On November 13, 2013, the Court of Chancery ordered summary judgment briefing to be completed by December 13, 2013, **with no opportunity for discovery**, on the issue of which contracts apply to the Strategic Project.

Rather than have the Court of Chancery get out of its "lane" and issue rulings on the Strategic Project dispute under the guise of an anti-suit injunction proceeding, RockTenn mooted the proceeding by agreeing to litigate solely in the Delaware Action the claims that BE&K sought to enjoin in the Georgia Action, and on December 5, 2013 moved to dismiss the anti-suit injunction proceeding as moot. However, on January 10, 2014, the Court of Chancery denied the mootness motion. Only five days later the trial court issued a fifty-five page opinion, which not only granted a permanent anti-suit injunction against the Georgia Action, but also made numerous additional declaratory judgments regarding which contract governs BE&K's work on the Strategic Project. This appeal followed.

SUMMARY OF ARGUMENT

It is extraordinary for a Delaware court to enjoin parties from litigating claims in the courts of a sister state. The Court of Chancery erred in granting this extraordinary, unnecessary and inappropriate relief by:

1. "Going out of its lane" to issue an anti-suit injunction staying claims pending in the Georgia Action even though the relief sought by BE&K was moot—RockTenn had already agreed to litigate those claims in the Delaware Action—and ruling on a discrete, unessential, non-equitable legal issue pending before the Delaware Superior Court. The Court of Chancery deprived RockTenn of its due process rights and created significant potential for inconsistent and conflicting contract interpretation between the Court of Chancery and Superior Court.

2. Holding that a party's early, pre-discovery legal position regarding which contract governs a party's conduct constitutes a judicial admission. Judicial admissions apply to factual statements, not legal positions, and interpretations of a contract are legal positions.

3. Holding the DLA govern's BE&K's work on the Strategic Project even though the express terms of the DLA demonstrate that it cannot apply and its basic requirements were not satisfied.

4. Granting summary judgment, contrary to Court of Chancery Rule 56, without the benefit of discovery, resolving disputed factual issues in BE&K's favor, and ignoring RockTenn's affidavits submitted pursuant to Court of Chancery Rules 56(e) & (f).

STATEMENT OF RELEVANT FACTS

The Parties' Lengthy and Complex Relationship

KBR was engaged by RockTenn to provide design, procurement, project management, engineering, and construction for the Strategic Project. (A0890-91) It performed this work from 2010 to mid-2012. (A0335-39) During this time, four contracts were amended and/or executed among the parties and there was a lengthy and complicated course of conduct: the first contract was executed in 2002 and was later amended in 2011. (A1210-34, A1264-65) The DLA was executed on December 21, 2010 and is expressly limited to total-installed per-project costs of less than $5 million.[4] (A1235-52) On February 1, 2011, RockTenn entered into another contract with BE&K applicable to "capital projects generally under $20,000,000." (A1253 at ¶ 1.b). In December 2011, RockTenn and Kellogg entered into yet another contract, which specifically referenced BE&K. (A1266-316; A1179 at 19:7-10) Each of these contracts contain merger agreements. (A1246 at ¶ 20.4; A1285 at ¶ 41; A1259 at ¶ 14.f) The contracts are not neatly mutually exclusive, likely explained in part by the intervening bankruptcy of Smurfit Stone and subsequent acquisition by RockTenn in spring 2011. (*See id.*)

Disputes and Litigation in Multiple Jurisdictions

By summer 2012, the Strategic Project had suffered significant setbacks that are the subjects of the underlying litigation. In June 2013, SW&B sued RKT CP in Georgia claiming monies owed for work on the Strategic Project. (A0976-85) In

[4] It is undisputed that the Strategic Project's construction costs were originally estimated to be about $63 million. (A1849; A0296-334; A0884-909; A1114-40; A1203 at 20-23.)

August 2013, RockTenn filed a Third-Party Complaint in the Georgia Action against BE&K, KBR, Inc., and Kellogg. (A0585-616)

Rather than litigate the same cluster of complaints and facts in the Georgia Action, BE&K initiated its own litigation in connection with the Strategic Project on August 12, 2013, by filing the Delaware Action and making claims for open account, breach of the DLA, and quantum meruit. (A0030-37) Two weeks later, BE&K filed an anti-suit injunction in the Court of Chancery, asking that RockTenn be enjoined from pursuing the Third Party Complaint in the Georgia Action and requiring that RockTenn litigate such claims in Delaware only. (A0038-44)[5] BE&K maintained that the DLA governed the work performed by BE&K on the Strategic Project. (A0040) The DLA contains a venue selection clause requiring litigation in Delaware. (A0039-40) Consistent with an anti-suit injunction, the only relief that BE&K sought was "enjoining [RockTenn] from prosecuting certain claims in Georgia" such that the dispute between the parties would be litigated "exclusively in the state or federal courts of Wilmington, Delaware." (A0038; A0043)

Expedited proceedings were granted (A1171), and, after a hearing on September 27, 2013, the Court of Chancery entered a preliminary injunction enjoining RockTenn from "litigating issues arising out of or relating to the [DLA] in any court other than courts located in the state of Delaware," (A1201) and

[5] The Superior Court action is captioned *BE&K Engineering Company, LLC n/k/a KBR Engineering Company, LLC v. RockTenn CP, LLC*, C.A. No. N13-008-105-WCC CCLD. The Chancery Court action is captioned *BE&K Engineering Company* v *RockTenn CP, LLC*., C.A. No. 8837-VCL.

specifically enumerating claims that RockTenn had filed in Georgia, (A1206-07). The trial court allowed for expedited and limited discovery to proceed in mid-November and conclude by January 31, 2013. (A0293) However, the trial court also entered a schedule that provided for summary judgment briefing to commence on November 18, 2013 and close on December 13, 2013. (A0292) This meant that a merits determination loomed without the benefit of discovery.

When BE&K filed its motion for summary judgment, it did not seek just an anti-suit injunction, but a much broader declaration that the DLA governs all of the work performed by BE&K on the Strategic Project. (*See, e.g.*, Ex. B, Op. at 1) Such a ruling sought to "scoop" RockTenn's defenses in the Superior Court action. BE&K also argued that RockTenn's early statements about which contract applied constituted judicial admissions that should preclude RockTenn from litigating the merits of which contract governs BE&K's work.

It is regrettable but true that, in light of the tight timeframe involved and its admitted mistaken understanding, RockTenn initially took the position in the Georgia Action that the DLA governed BE&K's work on the Strategic Project. (A0756-73; A0585-616; A0626-61; A0663-700). RockTenn referenced this position once in the Court of Chancery when, on September 4, 2013, RKT SS filed a motion to dismiss on jurisdictional grounds. This motion and attached affidavit contained the statements that "BE&K entered into [the DLA] for the design and engineering of the upgraded paper mill," and "the [DLA] was used for BE&K to perform design and engineering work on the Strategic Project." (A0057 at ¶ 5; A0049).

However, since September 2013, and certainly prior to the Preliminary Injunction hearing, RockTenn has consistently taken the position that which contract governs BE&K's work on the Strategic Project is unclear. After all, there are numerous contracts between the parties, there has been no meaningful discovery, and the DLA cannot apply on its face because it contains a $5 million total-installed per-project cap that the Strategic Project far exceeds. (A0156, A0159; A1174-1209; A0896-904; A0198-201; A1845-917).

RockTenn Agrees to Litigate in Delaware

Rather than have the Court of Chancery get out of its "lane" and issue rulings on the Strategic Project dispute under the guise of an anti-suit injunction proceeding, RockTenn agreed to litigate the merits of the disputes between the parties in Delaware. (A0863-64; A0965-79) This way, BE&K would get all the relief it sought in the anti-suit injunction proceedings and RockTenn would have a fair opportunity to litigate the DLA's applicability to BE&K's work on the Strategic Project in the Delaware Action.

After BE&K refused RockTenn's offer, RockTenn filed a motion to dismiss the action, noting its agreement to

> (a) dismiss and/or amend all claims filed by RockTenn in the Georgia Action that are expressly based upon the DLA;
>
> (b) stay all claims that, according to the Court of Chancery, "implicated" the DLA; and
>
> (c) litigate the scope and applicability of the DLA in the Delaware Action.

(A0863-64; A0965-79) RockTenn's attached Proposed Order was careful to replicate the relief provided by the trial court in the Preliminary Injunction by dismissals and/or stays of the claims made in Georgia. (A0880-83)

While BE&K opposed the motion to dismiss claiming that RockTenn could somehow "repackage claims" that implicated the DLA, BE&K nevertheless filed a Proposed Order itself that was substantially similar to RockTenn's and, if entered, would have precluded RockTenn from pursuing the claims it filed in Georgia but allowed the parties to litigate the scope and applicability of the DLA in Superior Court. (A1109-13)

On January 10, 2014, the Court of Chancery heard arguments on the motion to dismiss and on the summary judgment motion filed by BE&K seeking a merits determination regarding the scope and applicability of the DLA. (Ex. C) The trial court denied RockTenn's motion to dismiss, permanently enjoined RockTenn from pursuing claims related to the DLA in any jurisdiction other than Delaware, and granted a declaratory judgment on the broad issue of which contract governs BE&K's work on the Strategic Project. Ignoring RockTenn's arguments and attached Rule 56(e) and (f) affidavit, the trial court made adverse inferences and assumptions and ruled that the DLA is the operative contract for BE&K's work on the Strategic Project. (Exs. A, B, C)

ARGUMENT

I. THE RELIEF BE&K SOUGHT WAS MOOTED WHEN ROCKTENN AGREED TO LITIGATE IN DELAWARE.

A. Question Presented

Did the trial court err by denying RockTenn's Motion to Dismiss for Mootness when RockTenn's agreement to litigate in Delaware rendered the anti-suit injunction moot and thus deprived the court of jurisdiction? (A0863-64; Exs. C, D)

B. Standard of Review

This court reviews questions of justiciability *de novo*. *Crescent/Mach I Partners, L.P. v. Dr. Pepper Bottling Co. of Texas*, 962 A.2d 205, 208 (Del. 2008). "Delaware law requires that a justiciable controversy exist before a court can adjudicate properly a dispute brought before it." *Id*.; *see also Candlewood Timber Group, LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 997 (Del. 2004).

C. Merits of the Argument

The trial court lost subject matter jurisdiction when RockTenn agreed to litigate the scope and applicability of the DLA in Delaware, providing BE&K the relief it sought and thus mooting the anti-suit injunction. Under the mootness doctrine, "although there may have been a justiciable controversy at the time the litigation was commenced, the action will be dismissed if that controversy ceases to exist." *State Farm Mut. Auto. Ins. Co. v. Davis*, 80 A.3d 628, 632-33 (Del. 2013). Dismissal is mandated because a court does not have subject matter jurisdiction over moot claims. *See NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 435 n.43 (Del. Ch. 2007).

1. The Mootness Doctrine Required Dismissal.

A proceeding becomes moot if the legal issue in dispute is no longer amenable to a judicial resolution or if a party has been divested of standing. The test of standing is whether: "1) there is a claim of injury-in-fact; and 2) the interest sought to be protected is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." *Gen. Motors Corp. v. New Castle Cnty.*, 701 A.2d 819, 823-24 (Del. 1997) ("*GMC*").

BE&K claimed as its injury that it would be "deprived of the benefit of its bargain and face duplicative litigation" if forced to litigate in both Delaware and Georgia. But RockTenn's agreement to litigate in Delaware vitiated any such injury. *See Glazer v. Pasternak*, 693 A.2d 319, 321 (Del. 1997) (finding the injunction sought was mooted by the termination of the threatened merger); *see also AIU Ins. Co. v. Am. Guar. & Liab. Ins. Co.*, 2013 WL 154263, at *1-2 (Del. Jan. 15, 2013) (holding "hypothetical, frivolous claims" that could be brought against a party "do not create an ongoing 'controversy'").

In addition, the two limited exceptions to the mootness doctrine are inapplicable because this case does not involve a question of public importance that is capable of repetition, yet evading review. *See, e.g., Radulski v. Del. State Hosp.*, 541 A.2d 562, 566 (Del. 1988). This is a private contract dispute between two private parties. It does not involve a matter of public importance affecting other litigants. *See, e.g., Kahn v. Kolberg Kravis Roberts & Co.*, 23 A.3d 831, 836 (Del. 2011) (holding issue was of public importance because "other litigants have raised the … issue"); *Dep't of Corr. v. Del. Corr. Officers' Ass'n*, 2002 WL 31926610, at

*2 (Del. Ch. Jan. 15, 2002) (holding dispute about public contract was not a matter of public importance).

Nor is this matter capable of repetition yet evading review. RockTenn would not violate the proposed stipulated order, and, if RockTenn did, BE&K could seek relief from Chancery or Superior Court. *See, e.g.*, *White v. Del. Bd. of Parole*, 2013 WL 455159, at *1 (Del. Feb. 5, 2013) (holding issue does not evade review where "there is no impediment to future review" by a court); *Multi-Fineline Electronix, Inc. v. WBL Corp., Ltd.*, 2007 WL 431050 (Del. Ch. Feb. 2, 2007) (holding that repetition is not likely without facts showing that party plans to engage in same conduct); *Nicotra v. Rowe*, 2000 Del. Ch. LEXIS 53 (Del. Ch. Mar. 21, 2000) (same).[6]

RockTenn carefully replicated the relief granted by the Court of Chancery in the preliminary injunction by specifying the claims it would not pursue in Georgia and by agreeing not to pursue claims that "implicated" the DLA. (A0880-83) RockTenn went further by agreeing to litigate the scope and applicability of the DLA in Superior Court, and by providing a mechanism for resolution if BE&K believed that RockTenn was somehow pursuing DLA-related claims elsewhere (while retaining Court of Chancery jurisdiction to enforce the order). (*Id.*) Particularly in light of the claims pending in Superior Court, there was nothing left of the dispute that BE&K initially brought to the Court of Chancery.

[6] The cases cited by the trial court depart from this Court's precedent by failing to analyze whether the conduct alleged to be repeated would evade review. Nevertheless, even those cases note that mere speculation — which is all that BE&K offered — about a party's future conduct does not show that an issue is "capable of repetition."

2. The Trial Court's Rationale Was Wrong.

The Court of Chancery's rationale for ruling on the merits was flawed. The trial court first conceded that it intended to grant "more specific relief than what was requested" but explained that this was necessitated by RockTenn's claims that the issue of the applicability of the DLA to the Strategic Project was factually complex. (Ex. C, Tr. at 84-85) Yet, the trial court entered summary judgment on briefing submitted without the benefit of discovery. *See also* Part IV, *infra*.

The trial court then claimed that if the Superior Court were permitted to determine whether the DLA applies, it would de facto "determine the scope" of the injunction and thereby "collapse the division between law and equity." (Tr. at 84:7-8) But if the Superior Court determines that the DLA does not govern BE&K's work, then the forum-selection clause in the DLA is irrelevant and there would be no need for an injunction in the first place. (Tr. at 83-84)

The Court of Chancery then noted that it did not trust that RockTenn would abide by the Superior Court's determination of the scope and applicability of the DLA. (Tr. at 85:18-86:6) As discussed *infra* at p. 18, the trial court mistook RockTenn's legitimate (and early) change of legal position for an "integrity" issue and broadly concluded that all future actions by RockTenn and its lawyers were circumspect. The trial court's mistrust was not only misplaced, it solved no problem: similar punitive consequences would exist for any potential violation of a court order whether it be issued by the Court of Chancery or the Superior Court. More importantly, the court's mistrust is not a legal basis to confer standing on

BE&K. As noted above, an exception to mootness requires *both* that the alleged wrongful conduct be capable of repetition *and* be incapable of review.

3. The Clean-Up Doctrine Does Not Create Jurisdiction Here.

Finally, the Court of Chancery invoked the clean-up doctrine for the novel proposition that the doctrine enables the court to issue a ruling on a discrete legal issue pending in Superior Court. (Tr. at 88:5-89:12) But this is not a case in which a party filed both equitable and legal claims in the Court of Chancery and thus endowed the court with broad jurisdictional powers to resolve the entire matter, even if the equitable claims were mooted. *See, e.g.*, *Wal-Mart Stores, Inc. v. AIG Ins. Co.*, 2006 WL 3742596, *3 (Del. Ch. Dec. 12, 2006). This is also not a case where the Court of Chancery used the clean-up doctrine to resolve legal issues in a consolidated matter pending before the court. *See, e.g.*, *Darby Emerging Markets Fund, L.P. v. Ryan*, 2013 WL 6401131, *8 (Del. Ch. Nov. 27, 2013). Nor is this even a case where the Court of Chancery's decision to entertain a discrete legal issue not pending before it would resolve any claims currently pending in Superior Court—for which there is no precedent in any event.

This is a case in which the Court of Chancery unnecessarily reached to partially (and wrongly) interpret a portion of a contract that must still be litigated in Superior Court. *See also* Part III *infra* (discussing the Court of Chancery's erroneous interpretation of the $5 million cap). The Superior Court, for its part, is going to have to interpret other parts of the DLA. This kind of piece-meal contract interpretation is ripe for each court to render conflicting interpretations of the same contract. In sum, the Court of Chancery's overreaching to interpret and rule upon

the DLA will not have the effect of resolving any of the claims pending in Superior Court,[7] will not streamline discovery,[8] potentially guts a defense by RockTenn to the breach of contract claim pending in Superior Court, and creates substantial risk of a piece-meal and contradictory interpretation of the DLA which would be harmful and unjust to both parties.

Even if it were legally permissible for the Court of Chancery to exercise the clean-up doctrine to decide a subsidiary legal issue pending before the Superior Court, doing so was an abuse of discretion here. None of the reasons for the exercise of expansive jurisdiction is served, particularly in light of the significant complications a piece-meal contract interpretation causes, the lack of any savings in party or judicial efficiency, and the decimation of one of RockTenn's defenses in Superior Court without the benefit of a full and fair hearing. *See Getty Ref. & Mktg. Co. v. Park Oil, Inc*., 385 A.2d 147, 150 (Del. Ch. 1978) (citing policy concerns that underlie the "clean-up" doctrine); *see also W. Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) ("[T]o deny [the defendant] the right to present a full defense on the issues would violate due process."); *Brown v. Fed. Nat. Mortg. Ass'n*, 359 A.2d 661, 663 (Del. 1976) (holding that due process requires a "full opportunity for exploration of the issues" raised). In conclusion, the trial court's denial of the Motion to Dismiss as Moot was erroneous and should be reversed.

[7] BE&K's claims of breach of the DLA, open account, and quantum meruit remain.

[8] Indeed, even after the trial court's ruling, BE&K's counsel demanded it was still entitled to contract negotiation documents. (A1158-65)

II. ROCKTENN'S EARLY STATEMENTS ABOUT THE DLA WERE LEGAL, NOT FACTUAL, SO THEY CANNOT BE DEEMED JUDICIAL ADMISSIONS.

A. Question Presented

Did the trial court err when it ruled that it was a judicial admission for RockTenn to initially take a legal position that the DLA governed BE&K's design and engineering work on the Strategic Project? (A0903-07)

B. Standard of Review

The Court reviews *de novo* a ruling on judicial admission. *See AT&T Corp. v. Lillis*, 953 A.2d 241, 255 (Del. 2008) (determining *de novo* whether judicial admission existed); *see also Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008); *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005) (*de novo* review for grant of summary judgment).

C. Merits of the Argument

1. Only Factual Statements, Not Legal Positions, Can Be Deemed Judicial Admissions, and Statements About Which Contract Governs Are Legal.

The trial court held that RockTenn's early statements that the DLA governed BE&K's design and engineering work on the Strategic Project constituted judicial admissions. (Op. at 12-24) This was erroneous. First, the trial court relied in substantial part on statements that RockTenn made in the Georgia Action. As this Court has held, statements may be deemed judicial admissions only if they are made in the same legal proceeding. *See, e.g., Rudnick v. Schoenberg*, 122 A. 902, 903 (Del. 1923); *Pesta v. Warren*, 2004 WL 1282214, at *1 (Del. Super. May 27,

2004). Thus, RockTenn's statements in the Georgia Action are irrelevant for judicial admissions purposes.

Second, the statements made by RockTenn were legal positions, not factual admissions. Judicial admissions "apply only to admissions of fact, not to theories of law, such as contract interpretation." *Lillis*, 953 A.2d at 257 (quotation omitted); *Bank of N.Y. Mellon v. Commerzbank Capital Funding Trust II*, 2011 WL 3360024, at *8 (Del. Ch. Aug. 4, 2011) (same). Conclusions of law are "not binding." *Lillis*, 953 A.2d at 257 (holding that judicial admissions do not apply "to counsel's statement of his conception of the legal theory of a case, *i.e.*, legal opinion or conclusion").

Whether a contract applies to a dispute between parties is a question of law. *See, e.g.*, *Reardon v. Exch. Furniture Store*, 188 A. 704, 707 (Del. 1936) (holding that the "construction and effect" of a contract is a "matter of law"); *Savannah Jaycees Found., Inc. v. Gottlieb*, 615 S.E.2d 226, 228 (Ga. App. 2005) (same). The "'legal operation of the contract—its effect upon the rights and duties of the parties'" is a "matter of law." *Segovia v. Equities First Holdings, LLC*, 2008 WL 2251218, at *8 (Del. Super. May 30, 2008) (quoting 24 *Corbin on Contracts* § 24.3 (1998)). Thus, the "construction, interpretation, and effect of contracts" is to be determined by the Court, not the fact finder. *Holco Commodities, Inc. v. Mayor & Council of City of Wilmington*, 1987 WL 8281, at *1 (Del. Super. Mar. 6, 1987).

The trial court held that RockTenn's assertions about which contract governs are factual based on the location of the statements made by RockTenn (in a "Material Facts" section of a Georgia pleading), the use of the phrase "in fact," and

a nonlawyer witness's opinion about a contract's application. (Op. at 21-22) A party's own characterization of an issue as one of fact or law does not make it so, and does not relieve a court of its obligation to engage in its own substantive analysis. The trial court also pointed to RockTenn's summary judgment argument that factual issues exist. There is nothing inconsistent, however, with RockTenn claiming that which contract governs is a legal issue, and also that there are disputed issues of fact that must be determined before the governing contract can be determined as a matter of law. Most legal disputes involve subsidiary fact issues that must be resolved first.[9]

The trial court's Memorandum Opinion vividly demonstrates that the issue of whether the DLA governs BE&K's work on the Strategic Project is legal, not factual. While the court first ruled in favor of BE&K on the issue of judicial admissions, it then analyzed whether BE&K's work, reflected in "Work Orders," was governed by the DLA. (Op. at 30-44) The court first invoked Delaware's "objective theory" of contracts and noted its power to interpret contracts. (Op. at 12) The court then analyzed the meaning of the $5 million cap and interpreted the meaning of various terms in the DLA. (Op. at 25-30) The court then concluded that the issue was appropriate for summary judgment "because the [DLA] defines the documents that make up the operative contract" between the parties. (Op. at 30)

[9] None of the three non-Delaware cases cited by the trial court hold that a party's claim that a particular contract governs is an issue of fact and not law. (Op. at 12-14) These cases stand for the unremarkable proposition that a party's concession about the existence or validity of a contract can be deemed a factual admission. Here there is no dispute about the validity or existence of the DLA; the dispute is which contract governs BE&K's work.

The trial court then went through each alleged work/purchase order and ruled that they are governed by the DLA based upon "the plain language." (Op. at 30-44)

Stripping out the finding of judicial admissions, the trial court undertook a quintessential contract interpretation analysis to get to its conclusion that alleged "Work Orders" are governed by the DLA. Indeed, the trial court **had** to approach this as a legal, and not factual, issue because RockTenn had filed a Rule 56(e) and (f) affidavit demonstrating that factual issues, and the paucity of discovery, rendered summary judgment inappropriate. (A0910-21)

It appears the trial court improperly applied the doctrine of judicial admissions because it mistakenly took offense at RockTenn's properly changed legal position on the applicability of the DLA—confusing a properly changed position with an "integrity" issue. This confusion was evident when the trial court erroneously indicated from the bench during oral argument on January 10, 2014 that RockTenn's initial misunderstanding regarding the DLA's application was "an integrity issue," "two-faced," implicated the outrageous conduct in *In Re Shearin*, and raised the specter of Rule ll. (Tr. at 67-79). These statements were wholly unjustified, and not repeated in the Opinion. Nevertheless, these statements from the bench may have contributed to the erroneous conclusions in the Opinion regarding the application of the doctrine of judicial admissions, especially where RockTenn's changed legal understanding occurred at the beginning of the litigation, and is justified in light of the DLA's plain language.

2. The Judicial Admissions Doctrine Cannot Be Applied Broadly.

Even if RockTenn's statements could be deemed to constitute judicial admissions, those statements are narrower than the trial court's broad holding. The trial court held that all of BE&K's work is governed by the DLA. (Op. at 24 (declaring that all BE&K work orders and the services provided thereunder are governed by the DLA).) But RockTenn did not state that the DLA governed **all** of BE&K's work or even **all** of BE&K's design and engineering work. *See* Statement of Facts, *supra* at p. 6 (noting that the affiant stated that "the [DLA] was used for BE&K to perform design and engineering work on the Strategic Project").

BE&K performed work on the Strategic Project before the DLA was executed and after other contracts were executed. (A1192-93 at 70:8-74:12 (Strategic Project purchase orders for work predating the DLA); A1193-96 at 77:13-87:13 (contracts executed after the DLA); A0335-39 (alleged purchase orders and work orders post-dating the DLA's execution).) BE&K also performed services other than design and engineering work. (*See, e.g.*, A0365-71; A0372-75; A0410-16; A0453-59; A0460-63; A0473-78; A0479-82; A0505-10; A0511-14 (providing alleged purchase orders and work orders for BE&K to provide "site project management services" and to "manage construction activities for contractors"); A1775-78 (certain unpaid invoices in dispute were for BE&K work that "had nothing to do with Engineering").) This matters because it appears that BE&K is seeking to charge RockTenn for non-engineering work and for work performed by non-BE&K entities who have different contracts with RockTenn. (*See, e.g.*, A1317-746 (including invoices for work performed by Kellogg, who is

not a party to the DLA).) The DLA, however, governs only engineering services, and the only parties subject to the DLA are RockTenn and BE&K. (A1235-52) To the extent discovery confirms that BE&K performed work other than engineering, and that BE&K is seeking to charge for work performed by entities not parties to the contract, those matters must be litigated and cannot be cut off by narrower "admissions."

3. The Trial Court's Ruling Has Serious Consequences for Future Litigants.

The Court of Chancery's application of the judicial admissions doctrine to these circumstances will have broad implications for future litigation in Delaware. While the purpose of the doctrine is not to create a "trap for the unwary," *MacDonald v. GMC*, 110 F.3d 337, 341 (6th Cir. 1997), *cited in Merritt v. UPS*, 956 A.2d 1196, 1202 n.19 (Del. 2008), or to "deprive a party of a decision on the merits," *Bryant v. Bayhealth Med. Ctr., Inc.*, 937 A.2d 118, 126 (Del. 2007), that is exactly what happened here. Rather than "simplify[ing] trials by eliminating facts about which there is no real controversy," *Bryant*, 937 A.2d at 126, the doctrine's application to these circumstances will turn early pleadings in Delaware into games of "gotcha!" and riddle pleadings and courts with burdensome prophylactic countermeasures.

Denying a party the right to litigate its case because of a mistaken position early in the litigation, a position that caused no prejudice whatsoever to the opposing party, is not justice. *See Lillis*, 896 A.2d at 878. For these reasons, the Court should reverse the trial court's ruling on judicial admission.

III. THE DLA, AS A MASTER AGREEMENT, CONTAINS THRESHOLD REQUIREMENTS THAT WERE VITIATED BY THE COURT OF CHANCERY.

A. Question Presented

Did the trial court err when it misinterpreted the DLA to eliminate a key threshold requirement and failed to address the DLA's distinction between construction and engineering costs? (A0896-903)

B. Standard of Review

This Court reviews contract interpretation *de novo*. *E.g.*, *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009).

C. Merits of Argument

RockTenn (and its predecessor) and KBR (and its subsidiaries) have more than a decade-long relationship spanning work all over the country. (*See, e.g.*, A1210-34) To avoid having to negotiate new contracts for each project, the companies entered into multiple "master agreements" which would automatically govern projects falling within each agreement's terms. (*See, e.g.*, A1210-34, A1235-52, A1253-63, A1266-316) There are multiple contracts between the parties. (*Id.*) The DLA is one of them.

Each master agreement set forth threshold parameters for its application. (*See, e.g.* A1235 at ¶1.2; A1253 at ¶1) They also provide that any changes to a master agreement must be set forth in a written amendment signed by both parties. (*See, e.g.*, A1247 at ¶ 20.4; A1285 at ¶ 40) Thus, a party cannot unilaterally make a project fall within a master agreement when the threshold parameters are not met simply by stating in a work order that the master agreement controls.

A key threshold parameter in the DLA is its specification that it does not apply to "Project(s)" with construction costs that equal or exceed $5 million. The relevant provision states:

> During the Term of this Agreement, ENGINEER will provide engineering services ("Services") to OWNER in accordance with written work orders ("Work Order(s)") issued by OWNER and approved and accepted by ENGINEER for individual projects relating to OWNER's facilities ("Project(s)") where the total installed per-project cost for any construction arising from the Services will be less than Five Million Dollars ($5,000,000).

(A1235 at Art. 1.2.)

When interpreting a contract, a court must seek to effectuate the parties' intent based on "the parties' words and the plain meaning of those words." *Lorillard Tobacco Co. v. Am. Legacy Found*., 903 A.2d 728, 739 (Del. 2006). Of paramount importance is "what a reasonable person in the position of the parties would have thought the language of the contract meant." *Rhone–Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co*., 616 A.2d 1192, 1195–96 (Del. 1992). Applying these principles to the DLA, the reasonable, common-sense interpretation of the word "Project" and the corresponding phrase "per-project" is, as 1.2 defines "Project," an undertaking at any of RockTenn's facilities. Such an undertaking, or Project, involves the provision of a variety of services by BE&K, which could include studies, conceptual designs, preliminary designs, detail designs, plans, construction drawings, etc. (A1235 at Art. 1.4.) The services to be provided, along with the estimated fees associated for those services, would be specified through the issuance, approval and acceptance of pieces of paper called "Work Orders."

(A1235-36 at Arts. 1.4, 1.7; A1237 at 4.1.) Thus, for example, what the parties called the "Strategic Project" at Hodge Mill to modernize its operations would be a "Project" that would be accomplished through a variety of engineering services provided by BE&K as specifically described in Work Orders.

The trial court, however, adopted BE&K's argument that "Project" is the same as "Work Order" such that the $5 million cap "operates on a per-Work Order basis." (Op. at 28) Thus, per the trial court, the DLA does not govern on a project-wide basis. Instead, it applies on a per-Work Order basis so long as each Work Order is below $5 million. Because the estimated engineering fees reflected in the "Work Orders" supplied by BE&K all were below $5 million, the trial court held they all fell within the DLA. (*Id*.) RockTenn appeals the trial court's interpretation for a number of reasons:

(1) *It violates the canon against surplusage*. The law requires a court give every contract term effect "so as not to render any part of the contract mere surplusage." *Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 397 (Del. 2010). The DLA defines and uses both "Work Order" and "Project" as distinct terms and thus, each must have a distinct meaning. Section 1.2 demonstrates this aptly, as it becomes nonsensical if "Work Order" can be substituted for "Project":

> During the Term of this Agreement, ENGINEER will provide engineering services ("Services") to OWNER in accordance with written work orders ("Work Order(s)") issued by OWNER and approved and accepted by ENGINEER for individual ~~projects~~ Work Orders relating to OWNER's facilities ("~~Project(s)~~" "Work Order(s)") where the total installed ~~per-~~

~~project~~ per-Work Order[10] cost for any construction arising from the Services will be less than Five Million Dollars ($5,000,000).

The trial court's interpretation renders the word "Project" meaningless. It also conflicts with the DLA's text, which contemplates that a "Project," which conceptually is a broader undertaking than a single Work Order, can have more than one "Work Order." (A1238 at Art. 6.2 (providing as a precondition for being paid, BE&K must submit "all invoices, receipts, **work orders**, and other documents.") (emphasis added)).

(2) *It ignores total-installed costs*. The DLA's $5 million cap is triggered by "total installed per-project cost for any construction." It is **not** limited to engineering fees. (A1235 at Art. 1.2 (emphasis added)). Total installed costs associated with any project include construction, engineering, equipment and other myriad items; engineering fees are but a single piece of a project's total costs. (A1896-901) There is no dispute that the Work Orders submitted by BE&K itemize only the value of their engineering fees and do not state the total-installed costs associated with that engineering work. (A0335-528) The total-installed costs for the Strategic Project were so substantial (they wound up exceeding $112 million), it is likely that the total-installed construction costs associated with several (if not all) of BE&K's Work Orders exceed $5 million. BE&K remained silent on this issue in briefing, and the trial court completely ignored the issue. As a result,

[10] RockTenn has never maintained that the capitalized and non-capitalized "Project" in 1.2 have different meanings; the trial court did. (Tr. at 56-58) RockTenn agrees with the trial court's comment that it would have been clearer if "per-project" had been capitalized (Op. at 29), making it clear that applying the $5 million cap on a per-Work Order basis contradicts the plain words of the DLA.

the Court of Chancery has effectively deleted the DLA's language providing "where the total installed per-project cost for any construction arising from the Services" and replaced it with "where individual Work Orders." This is impermissible.

The Court of Chancery's interpretation is further troubling because applying a master agreement like the DLA on a per-work order basis, and not on a project-wide basis, means that different and conflicting master agreements could govern intertwined engineering work by the same entity on the same project.

(3) *It is inconsistent with the parties' own use of the term "Project."* RockTenn's interpretation is at least as reasonable as BE&K's. Conflicting reasonable interpretations require a court to consider extrinsic evidence, such as prior communications and course of dealing. *See GMG Cap. Inv., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 784 (Del. 2012).

Throughout the Hodge Mill endeavor, both parties treated, conceived of, and talked about this endeavor as a project, not a "Work Order." RockTenn invited BE&K to bid on the Strategic Project as a single project, and BE&K provided a single bid for the Strategic Project. (A0966 at ¶ 28.) In its complaints filed in the Court of Chancery, the Superior Court, and in Louisiana, BE&K defined its work on the Strategic Project as a single "Project." (*See, e.g.*, A0040 at ¶¶ 12-13; A0031 at ¶ 9; A0966 at ¶ 28.) Similarly, in answering RockTenn's complaint in Georgia, BE&K admitted that the strategic plan to convert and upgrade the Hodge Mill was "the 'Project.'" (A1751)

In describing the process for fulfilling the Strategic Project bid, BE&K admitted that multiple "work orders and/or purchase orders were issued to BE&K for certain work and services during **the Project**." (A0040 at ¶ 13 (emphasis added).) Likewise, in its opposition to RKT SS's motion to dismiss, BE&K described its work as a single "Project." (A0156-57) BE&K's discovery responses also confirm its understanding that BE&K's work on the Strategic Project was a single, coordinated effort. (*See, e.g.*, A1141-45 (providing the bases for BE&K's contention that the DLA applies without asserting that BE&K's work consisted of multiple projects).) Finally, in oral argument before the trial court, BE&K's counsel stated that BE&K's work on the Hodge Mill was "**performed in one project or during the course of one project**." (A1169 (emphasis added).) In sum, BE&K and RockTenn viewed and treated BE&K's work on the Mill as a single project.

IV. IT WAS ERROR TO GRANT SUMMARY JUDGMENT WITHOUT DISCOVERY AND TO ISSUE A RULING THAT MAKES FACTUAL DETERMINATIONS.

A. Question Presented

Did the trial court err by granting summary judgment that the DLA governed BE&K's work on the Strategic Project when discovery had not yet been conducted, and when the court made incorrect assumptions, inferences adverse to RockTenn, and factual determinations citing disputed documents? (Op. at 25-51; A0901; A0910-21.)

B. Standard of Review

The Court reviews a grant of summary judgment *de novo*. *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005). A trial court commits legal error by granting summary judgment when there are disputed issues of material fact. *Id.* A trial court must "withhold decision" until the record is complete or the parties agree on the facts. *Id.* An unrebutted affidavit submitted by the party opposing summary judgment is "sufficient to establish the existence of a material issue of fact." *Barker v. Huang*, 610 A.2d 1341, 1347 (Del. 1992). A trial court commits legal error by granting summary judgment without discovery when there is "no indication that discovery … would interfere with the administration of justice." *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1061 (Del. 1986) (in such cases, reversal is "mandated"). "The test is not whether the judge considering summary judgment is skeptical that [the non-movant] will ultimately prevail." *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002) (reversing summary judgment by Court of Chancery); *see also Telxon Corp. v.*

Meyerson, 802 A.2d 257, 262 (Del. 2002) ("There is no 'right' to a summary judgment.").

C. Merits of the Argument

RockTenn argued that discovery must be conducted in order for there to be a full and fair opportunity for the parties to litigate which contract governs BE&K's wide-ranging work on the Strategic Project. (A0254-55; A0256-68; A0901; A910-21) RockTenn submitted an affidavit pursuant to Court of Chancery Rules 56(e) and 56(f) setting forth specific facts, documents, and emails showing the DLA did not apply to BE&K's work on the Strategic Project, and detailing numerous reasons why RockTenn could not yet present other facts essential to RockTenn's opposition, including witnesses whose testimony had not yet been taken, and documents BE&K had not yet produced. (A0911-17 at ¶¶ 6-35)

The Court of Chancery, however, issued a ruling without the benefit of discovery. The trial court relied in the first instance on the doctrine of judicial admissions, but then also issued a "declaration" that the DLA governs the disputed Work Orders attached by BE&K.

The trial court's contractual analysis is predicated first upon an erroneous factual assumption that certain documents are "Work Orders" for purposes of the DLA. (Op. at 30-44) Then, citing the contents of those non-Work Order documents, the court engaged in supposition and utilized deductive reasoning to conclude they are governed by the DLA. (*Id.*) By doing so, the trial court "shoe-horned" complicated and contradictory facts into the requirements of the DLA.

1. The Trial Court Relied Upon Extrinsic Evidence Despite Ruling as a Matter of Law.

The DLA requires that "Work Orders" be "issued" by Owner and then "approved and accepted" by Engineer. (A1235 at Art. 1.2.) The DLA further states that, while the Owner could "issue" a "Purchase Order" in connection with each Work Order "for its own internal accounting purposes," any terms and conditions in the Purchase Order "will not apply." (*Id*.) Citing to this language, BE&K argued and the trial court agreed that Purchase Orders are not "Contract Documents" and are thus irrelevant for the DLA. (*See* A0312-13; A0325; Op. at 31.) The trial court further refused to consider any of RockTenn's extrinsic evidence. (Op. at 44-45; *contra* A0901-21.)

Even so, the trial court's Memorandum Opinion is **solely** premised upon documents that both RockTenn and BE&K agree are Purchase Orders. Each document the court deemed to be a "Work Order" that was "issued" by RockTenn is, without dispute, an internal RockTenn document that even BE&K references in its briefing as "Purchase Orders." (*Compare* A0376-85 *with* Op. at 31; A0421-26 *with* Op. at 33; A0340-48 *with* Op. at 33; A0391-97 *with* Op. at 34; A0365-71 *with* Op. at 36; A0410-16 *with* Op. at 36; A0464-69 *with* Op. at 37; A0473-78 *with* Op. at 38; A0473-78 *with* Op. at 38; A0432-40 *with* Op. at 39; A0453-59 *with* Op. at 40; A0483-91 *with* Op. at 41; A0497-501 *with* Op. at 42; A0505-10 *with* Op. at 43; A0515-10 *with* Op. at 43.)[11])

[11] Other Cutts documents, not relied upon by the trial court, are described by BE&K as "Work Orders." (A0313-15; A0323-27; A0335-39)

2. The Trial Court Ignored the Undisputed Fact that the Parties' Conduct Contradicted the DLA's Requirements.

BE&K states that it would first issue a "Work Order," and then RockTenn would generate a "Purchase Order." (A0313) This is reflected in the documents supplied by BE&K.[12] These documents show no indicia of being "issued" by RockTenn, nor do they show approval by BE&K.

The process described by the parties and reflected in the documents does not comport with the DLA's requirements that "Work Orders" be "issued" by Owner and then "approved and accepted" by Engineer. (Tr. at 59-60) The parties' departure from the DLA's requirements raises, on its face, questions about the applicability of the DLA. Rather than acknowledge this factual complexity and allow for discovery to discern what the parties actually did, the trial court simply declared by fiat that RockTenn "issued" each cited document and that each cited document constitutes a "Work Order." (Op. at 31-44)

3. The Trial Court Made a Host of Adverse Inferences Against the Non-Moving Party.

Once the Court of Chancery declared RockTenn's internal accounting documents to be Work Orders, it then made several (wrong) factual assumptions about their contents to deduce that they are governed by the DLA. *First*, the Chancery Court noted that each of the RockTenn documents bears the designation

[12] The documents supplied by BE&K show chronologically that BE&K submitted a document that BE&K dubbed a "Work Order" to RockTenn for its approval. At a later date, RockTenn generated a document titled "Contract" that includes as an attached document a complete "cut and paste" of the BE&K Work Order. (*Compare* A0372-75 (letter from KBR with attached Exhibit A titled "Work Order Form" *with* A0365-71 (a RockTenn document with June 2011 dates which contains on pages 3-5 a complete cut and paste of the May 23, 2011 KBR letter.) There is no evidence this RockTenn document was sent to anyone, and BE&K notes it was "produced" by RockTenn in this litigation. (A0336 at ¶ 8)

"Contract" in the header, and to the right, a reference to "Executed" and a date. (Op. at 30-44) Yet, there was no evidence in the record before the court regarding the meaning of these words, why they were included, why the documents were generated, what the documents mean, or to whom (if anyone) the documents were sent.[13] There was also no discussion among the parties about the meaning of the words "Contract" and "Executed" in these documents—because they were created by RockTenn for their own purposes and are irrelevant under the DLA. It is unclear why the trial court cites to these words because, if the documents were in fact Work Orders as the trial court supposes, the DLA does not require they be titled "Contracts" or that they reference "Execution." It appears instead that the trial court cites to these words as a proxy for the DLA's requirement that Work Orders be "issued" by RockTenn and "approved and accepted" by BE&K.

In summary judgment, and before discovery, it is impermissible for a court to impute meaning to words upon which there is no evidence in order to shoehorn them into the contract's requirements. *Cf. Farm Family Cas. Co. v. Cumberland Ins. Co., Inc.*, 2013 WL 5488656, *3 (Del. Super. Oct. 2, 2013) ("Summary judgment is inappropriate 'when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.'") (quotation omitted). Setting aside that the documents relied upon by the Court of Chancery are not what the court says they are, they still do not on their face reflect a request by RockTenn

[13] The trial court briefly inquired about the word "Contract" in this document at oral argument, and RockTenn responded that more information was needed before the court could make any determinations. (Tr. at 63-34)

and approval by BE&K. None are signed by representatives from both parties. Several are not signed by anyone. (*See, e.g.*, A0410-16; A0432-40; A0464-69; A0473-78; A0497-501; A0505-10.) Whatever the boilerplate language "Contract" and "Executed" mean on a document RockTenn generated for its own purposes cannot be divined on the face of the documents or in a vacuum, which is what the trial court did.[14] RockTenn has also denied that the documents relied upon by the trial court are final, or even represent approval by RockTenn for the work reflected therein.[15] (A0254-55; A0256-68; A0283-91)

Second, the trial court referred to the so-called "Engineering Agreement Incorporation Provision" in each of the RockTenn Purchase Orders as support that they are governed by the DLA. (Op. at 33-43) On the face of the limited record before the trial court, however, it is clear that BE&K unilaterally included this language in the documents that it generated and sent to RockTenn. (Op. at 5-6) The specific language is peculiar in light of the DLA's requirements, as it instructs RockTenn to include in its own Purchase Orders a statement that the "parties hereto agree and affirm that this Purchase Order is for administrative and billing purposes only and the services to be performed by [BE&K] as authorized hereunder shall be governed solely by [the DLA]." (*E.g.*, A0340-48) Further, BE&K's request that

[14] For example, discovery would show that the word "contract" appears at the top of RockTenn requisition requests when RockTenn personnel were seeking internal approval for services, but "purchase orders" appears at the top of requisition requests seeking internal approval for the purchase of inventory and materials. This is important because the designation "Contract" versus "Purchase Order" (the two options available in RockTenn's accounting system) are relevant only for RockTenn's own internal accounting control purposes.

[15] Early on, RockTenn informed the trial court that there are several versions of the Purchase Orders attached by BE&K, with differing names of parties, dollar amounts, dates of submission, signing and/or execution, etc. (*See* A0286 at ¶ 8.)

this language be included in Purchase Orders, which are not contract documents, is odd, and the mere "cut and paste" of this language into RockTenn Purchase Orders by nonlawyer administrative personnel is meaningless without more.

A quick comparison of the terms of the DLA and this language raises serious factual questions that deserve interrogation before a court can utilize it as evidence that the DLA governs that work. A party cannot unilaterally invoke the DLA merely by referencing the DLA in a Work Order and thus render the Work Order governed by the DLA. The DLA specifies that no documents, including Work Orders, are to trump the terms of the DLA. (A1247 at Art. 20.7; *see also id.* Art. 20.4.) Instead, the threshold requirements of the DLA, which were once negotiated and agreed upon by both parties, must be satisfied. In sum, the language and the context in which it appears requires a significant, and adverse, inferential leap by the trial court for it to conclude that the DLA governs these documents. This is impermissible on summary judgment, especially without discovery.

Third, the Court of Chancery compared the "Work Orders" with the terms of the GLA, another master agreement, and concluded that the RockTenn documents did not comply with the terms of the GLA. (Op. at 32-44) The trial court then deduced that since the RockTenn documents do not appear to comport with the requirements of the GLA, the DLA must govern by default. (*Id.*) But the apparent inapplicability of the GLA on the record before the court says nothing about whether the DLA should govern. Indeed, applying the court's rationale, the parties' departure from the requirements of the DLA render it inapplicable, too.

4. Ongoing Discovery in Georgia Reaffirms that RockTenn's Rule 56(e) and 56(f) Affidavit Should Have Rendered Summary Judgment Premature.

RockTenn's Rule 56(e) and 56(f) affidavit identifies the need for documentary and witness discovery. (A0901-21) The Court of Chancery's grant of summary judgment before discovery deprived RockTenn a full and fair opportunity to defend against BE&K's claims. For example, evidence suggests that at least some of the work performed by BE&K under the aegis of the Work Orders relates to nonengineering services, work which is expressly not governed by the DLA. (*See* discussion, *supra*, at p. 19; A1235-36 at Art. 1.2 and 1.9.) Evidence also suggests that BE&K is seeking to charge for work performed by entities not a party to the DLA. (*See* discussion, *supra*, at p. 19.) Recent discovery also suggests that KBR itself had direct access to Passport (requisition system used by Smurfit-Stone), raising questions about the integrity of the Work Order approval process. (A1773; A1774) A party "must have access" to relevant materials through discovery before summary judgment can be granted. *Mann*, 517 A.2d at 1061; *see also In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995). When a trial court grants summary judgment "notwithstanding the non-movant's inability to develop material facts in opposition," the court must be reversed. *Levy v. Stern*, 687 A.2d 573 (Del. 1996); *see also Mann*, 517 A.2d at 1061.

In sum, the few undisputed facts between the parties demonstrate that summary judgment was premature. The trial court's further erroneous fact finding, assumptions, and inferences adverse to RockTenn were an abuse of discretion. This is particularly so when there was no indication that permitting discovery would

have interfered with the administration of justice. A preliminary injunction was in place, and RockTenn had agreed without reservation to litigate the DLA's applicability in Delaware. As a result, there was no need to rush a summary judgment ruling without discovery on an issue not raised in BE&K's complaint.

CONCLUSION

Appellant respectfully requests that this Court reverse the Court of Chancery's denial of the Motion to Dismiss as Moot, reverse and/or vacate the Court of Chancery's Final Order and Judgment, and remand with instructions that the parties litigate their claims, defenses, and counterclaims regarding the Strategic Project in the Delaware Action currently pending in the Superior Court.

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