EFiled: May 21 2014 09:24PM EDT
Filing ID 55483920
Case Number 120,2014

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 Defendant Below-Appellee.	No. 120, 2014 On Appeal From The Court of Chancery of the State of Delaware, C.A. No. 8837-VCL

APPELLEE'S ANSWERING BRIEF

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Dated: May 21, 2014

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NATURE OF PROCEEDINGS

Appellants RockTenn CP, LLC ("RKT CP") (f/k/a Smurfit-Stone Container Corporation) and Rock-Tenn Shared Services, LLC ("RKT SS") (collectively, "RockTenn") entered into a contract with Appellee BE&K Engineering Company, LLC, n/k/a KBR Engineering Company, LLC ("BE&K") that contained a clear and unambiguous Delaware forum selection clause and then inexplicably brought claims under that contract in Georgia. When asked to explain its actions to the Court of Chancery, RockTenn could not stick to a consistent story and, instead, offered several explanations to the court before settling on its final position. The Court of Chancery rejected that position in a thorough, well-reasoned opinion in which it ordered specific performance of the Delaware forum selection clause. Like the penny that keeps coming back, RockTenn has turned to this Court to perpetuate its "do anything to be anywhere but Delaware" strategy, this time by grounding its appeal in new materials not filed with or presented to the Court of Chancery,[1] new arguments never made below,[2] and "factual murk"[3] it alone created

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[1] RockTenn has improperly included 400+ pages of documents in its Appendix of Exhibits. (B143-44.) These documents were not filed with or presented to the Court of Chancery – and they should be struck. *See* Supr. Ct. R. 9(a) ("An appeal shall be heard on the original papers and exhibits which shall constitute the record on appeal.").

[2] For the numerous arguments RockTenn has waived in this appeal, *see* discussion, *supra*, at Parts II.C.1. at 19-20, II.C.3. at 22-23, IV.C. at 32, *and* IV.C. at 35.

[3] As explained in this brief, the reference to "factual murk" comes directly from RockTenn's own characterization of the second iteration of its ever-evolving position as to why it should be excused from adhering to a clear and unambiguous Delaware forum selection clause in the

by taking flatly inconsistent positions in two different trial courts in two different states.[4] However, RockTenn's attempts to distance itself from its repeated judicial admissions and to create issues of fact on appeal where none existed in the trial court miss the mark. As the Court of Chancery correctly held, RockTenn has a clear contractual obligation to litigate in Delaware.

On August 23, 2013, BE&K was forced to file this action to enjoin RockTenn from litigating in Georgia certain third-party claims (the "Third-Party Claims") against BE&K, and other third-party defendants, under a Master Engineering Services Contract, dated December 21, 2010 (the "Delaware Law Agreement" or "DLA"), in the matter styled *SW&B Construction Co., LLC v. RockTenn CP, LLC*, No. 13-C-03677-3, State Court of Gwinnett County, State of Georgia (the "Georgia Action"). In its Verified Complaint for Injunctive and Equitable Relief (the "Complaint"), BE&K sought (1) an injunction stopping RockTenn from prosecuting all claims arising out of or relating to the DLA in courts outside of Delaware; and (2) an order compelling specific performance of the DLA's mandatory Delaware forum selection clause. (A0038-44.)

On September 27, 2013, the Court of Chancery granted BE&K's Motion for Preliminary Injunction at oral argument. (A1205-07 at 122-33; B1-3.) Thereafter,

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contract that, according to its own pleadings, governs the claims that are the subject of the Court of Chancery's permanent anti-suit injunction. (*See* A1188 at 56, A1201 at 106.)

[4] Even the Court of Chancery observed that RockTenn has failed to hew a consistent position in this litigation. (Op. Br. Ex. B at 22; *see also* discussion, *supra*, Part II, "Facts" at 6-10.)

the Court of Chancery entered a scheduling order that permitted BE&K to seek summary judgment based on the pleadings and other matters filed in Chancery and the Georgia Action and the clear and unambiguous terms of the DLA. (A0292-95.) On November 18, 2013, BE&K filed its Motion for Summary Judgment. (B8-9; A0296-334.) In response, on December 5, 2013, RockTenn filed a competing Motion to Dismiss the Complaint as Moot and Stay All Proceedings Pending Resolution (the "Mootness Motion"), together with a proposed order (the "Proposed Order"). (A0863-83.) On December 6, 2013, the Court of Chancery denied RockTenn's request to stay briefing on the Motion for Summary Judgment pending resolution of the Mootness Motion. (B10-42 at 27-31.)

The Court of Chancery heard oral argument on both motions on January 10, 2014, and denied the Mootness Motion from the bench. (Op. Br. Ex. C at 81; *see also* B61-65.) Five days later, it issued a Memorandum Opinion ("Opinion") granting summary judgment and entering a permanent injunction, among other relief. (Op. Br. Ex. B at 31-44, 46-48.) The Court of Chancery entered its Final Order and Judgment on February 6, 2014. (Op. Br. Ex. A.)

SUMMARY OF ARGUMENT

1. Denied. RockTenn's Proposed Order – which it submitted as part of its Mootness Motion – did not moot this proceeding because it did not afford BE&K all of the equitable relief it sought in the Court of Chancery, which was fully empowered to issue its anti-suit injunction.

2. Denied. RockTenn's admissions that the DLA applied to BE&K's work and services at Hodge Mill are binding factual admissions. These statements do not constitute legal positions or legal interpretations.

3. Denied. No term in the DLA – and particularly the "$5 Million Cap" upon which RockTenn focuses – precludes the DLA's application to BE&K's work and services at Hodge Mill.

4. Denied. The Court of Chancery properly granted summary judgment based on the clear and unambiguous terms of the DLA and RockTenn's own admissions of fact. No additional discovery was necessary.

STATEMENT OF FACTS

I. THE GEORGIA ACTION

On June 7, 2013, SW&B Construction Company, LLC ("SW&B"), an affiliate of BE&K, filed suit against RKT CP in the Georgia Action to recover roughly $30 million for construction work that SW&B had performed at Hodge Mill under a Master Purchase Agreement for Equipment, Parts, Services (the "Georgia Law Agreement" or "GLA"). (B66-136; A1266-1316.) BE&K was not an original party to the Georgia Action. However, on August 12, 2013, RKT CP filed a Third-Party Complaint, and RKT SS sought to intervene, to pursue Third-Party Claims arising out of or relating to BE&K's work and services provided under a separate contract, the DLA. (A0584-661.) RockTenn filed its Third-Party Claims against BE&K, Kellogg Brown & Root LLC ("KBRLLC"), and KBR, Inc., the latter two of which are not parties in this action.

In the Third-Party Claims, RockTenn alleged that BE&K "breached" a single contract – the DLA – and violated duties defined under or relating to that agreement alone. (A0607-09 ¶¶ 112-22; A0648-50 ¶¶ 112-22.) The claims were grounded on these pled facts: "[BE&K was] engaged to provide project management, engineering, and design services on the Strategic Project. *BE&K was working under* . . . [the DLA] that it had *entered into* with RKT CP." (A0703 (emphasis added).) The pleadings even included, as part of their "Material Facts,"

allegations that (1) RKT CP and BE&K "entered into [the DLA] for BE&K to design and manage the Strategic Project" (A0589 ¶ 16); and (2) the DLA "was *in fact* employed for certain written work orders, also known as purchase orders, issued by RKT CP to BE&K for work on the Strategic Project." (A0589 ¶ 18; A0670 ¶ 18 (emphasis added).) And for its claim of express breach of the DLA, RKT CP alleged that it "has performed all of its obligations to BE&K . . . under the . . . [DLA] and applicable purchase orders in substantial compliance with the terms and conditions thereof." (A0607 ¶ 113.)

RockTenn then repeated these facts in sworn discovery responses: "RKT CP . . . and BE&K entered into [the DLA], *which provided the terms and conditions of BE&K's purchase and change orders for the Strategic Project.* BE&K failed to perform its contractual obligations, duties, and responsibilities in conformance with and pursuant to the [DLA] . . . . Therefore, it breached its agreement with RKT CP." (A0797 (emphasis added)); *see also* A0805 ("RKT CP expected BE&K to comply with all terms and conditions provided in the [DLA].").) RockTenn even maintained this position in sworn affidavit testimony from a fact witness – Tom Stigers, a Senior Vice President of Containerboard Mills for RockTenn – who stated that he had "oversight and management" of Hodge Mill. (A0842 ¶¶ 1-2.) Specifically, in his affidavit, Mr. Stigers swore: "RKT SS and RKT CP . . . have disputes with BE&K . . . for work allegedly performed on

the Strategic Project. The *essential terms and conditions governing those purchase orders are supplied by* [*the DLA*][.]" (A0843 ¶ 5 (emphasis added).) Although he further stated in this affidavit that he was "familiar with the contracts that pertain . . . to work allegedly performed . . . at the Hodge Mill (the 'Strategic Project')," (A0842 ¶ 2), Mr. Stigers did not mention any contract other than the DLA as relating to BE&K's work at Hodge Mill.

RockTenn cemented these allegations in at least four pleadings, two motions, two sworn affidavits, and verified discovery responses in the Georgia Action. (A0304-10; A0318-22; A0585-860.) The Court of Chancery's Opinion collects well over fifty judicial admissions. (Op. Br. Ex. B at 14-21.)

II. ROCKTENN'S SHIFTING POSITIONS IN DELAWARE

RockTenn's pursuit of the Third-Party Claims in Georgia was a clear breach of the mandatory forum selection clause in Article 17.1 of the DLA (the "Forum Selection Clause"), which provides, in part, as follows:

> If a dispute *arises out of or relates to this Contract*, any Work Order(s), or the breach thereof, and if said dispute cannot be settled [by direct discussions, mandatory mediation, or arbitration (if the parties agree to arbitrate),] . . . the dispute shall be resolved by litigation in the *state or federal courts in Wilmington, Delaware*, and the parties agree to the *exclusive jurisdiction and venue* of said courts.

(A1245 at art. 17.1 (emphasis added).) To stop RockTenn's breach, BE&K filed this action on August 23, 2013, seeking an anti-suit injunction and other equitable relief from the Court of Chancery to enforce the Forum Selection Clause.

BE&K requested expedited proceedings in the Court of Chancery, which was granted. (A1171 at 21.) In opposing expedition, RockTenn argued that its dispute with BE&K was properly venued in Georgia because the Third-Party Claims were "inextricably intertwined" with the Georgia Action (A1170 at 14, A1171 at 19) and, in doing so, RockTenn confirmed that RKT CP and BE&K "entered into" the DLA, which "related to the reconstruction of [Hodge Mill]. BE&K was going to provide the engineering services." (A1169 at 13.) RockTenn reaffirmed these facts when RKT SS filed a Motion to Dismiss for Lack of Personal Jurisdiction in the Court of Chancery on September 4, 2013. (A0045-54.) In that motion, RockTenn stated, again, that RKT CP and BE&K "entered into *a contract* [the DLA] for the design and engineering of the [Hodge Mill]," and submitted another sworn affidavit from Mr. Stigers in support, in which he swore that "[t]he [DLA] *was used* for BE&K to perform design and engineering work on the Strategic Project." (A0049, A0057 ¶ 5 (emphasis added).)

On September 23, 2013, RockTenn filed an Opposition to BE&K's Motion for Preliminary Injunction (A0189-224), in which it made its first shift in what would become a dizzying array of contradictory positions on the DLA's applicability to try to avoid the Forum Selection Clause. In this Opposition, RockTenn suddenly claimed that any injunction was premature because of the "factual murk" and "complexity" of the dispute, and that there are, or "may" be,

multiple contracts "potentially governing" the work of BE&K on the Strategic Project.[5] (A1188 at 56, A1201 at 106; *see also* A1188 at 55 ("I'm very hesitant to make any representations about what contracts are in place. . . ."); A1200 at 103 ("[O]ther contracts may apply."); A0203 ("[M]ultiple contracts . . . potentially govern[.]"); A0215 ("It is possible that [multiple] agreements control. . .").)

The Court of Chancery rejected RockTenn's arguments and entered a preliminary anti-suit injunction on September 27, 2013, barring RockTenn from litigating claims that arise out of or relate to the DLA outside of Delaware, but clarifying that the injunction did not apply to non-DLA contracts or claims. (A1201 at 108, A1203 at 117, A1206-08 at 127-134.) However, in light of RockTenn's newly-minted "multiple contracts" theory – and related claim that it would be difficult to determine what portion of BE&K's work fell under any given agreement – the court concluded that, for the permanent injunction phase of the proceedings, the parties were "going to have to litigate which purchase orders fall under which agreement." (A1196 at 88-89, A1208 at 134.) The court then directed the parties to report back with a list of disputed purchase orders, (A1208 at 134-37), and the parties submitted a joint letter of 16 disputed purchase orders on

[5] Within days of receiving BE&K's Motion for Preliminary Injunction, RKT SS amended its proposed intervenor claims in the Georgia Action to remove only one count – express breach of the DLA – but it retained its other Third-Party Claims that relied on the DLA. (*Compare* A0625-61 *with* A0662-700.) However, RKT CP did not amend (and still has not amended) any of its Third-Party Claims in the Georgia Action in which the DLA is expressly referenced. (A0584-624.)

October 28, 2013. (A0254-55.) The next day, RockTenn submitted its own letter identifying the same 16 purchase orders, and stating that they "relat[e] to *work performed on the Strategic Project by BE&K.*" (A0257 (emphasis added).)[6] Importantly, RockTenn never sought reargument or otherwise questioned the process by which the Court of Chancery proposed to determine the scope of the DLA.

Despite the parties' conferral process in Delaware, RockTenn was simultaneously stating to the court in the Georgia Action that the preliminary injunction "is not binding upon [that] Court," "is not entitled to full faith and credit under the U.S. Constitution," and "need not be followed by" the Georgia court. (B137-42 at 5-6.) Thereafter, in opposing BE&K's Motion for Summary Judgment, RockTenn made its final change in position, coming to a complete about-face on the applicability of the DLA: RockTenn decided that the DLA "unambiguously" does not apply to BE&K's work on the Strategic Project as evidenced by the $5 Million Cap provision in that agreement. (A0889, A0896-903.)

[6] Both letters identified a seventeenth purchase order (no. 565111) that the parties agreed "is not under the [DLA]" because it was "not issued to BE&K." (A0254, A0257.) Neither purchase order number 565111, nor any related work order, is the subject of the permanent injunction issued by the Court of Chancery on summary judgment.

III. SUMMARY JUDGMENT PROCEEDINGS

On November 18, 2013, BE&K filed a Motion for Summary Judgment, demonstrating that BE&K's work on the Strategic Project was governed by the DLA based on RockTenn's judicial admissions and the clear and unambiguous language of the DLA and Work Orders included in Exhibits A1-A14 to the supporting Affidavit of John L. Cutts, Jr. ("Cutts Affidavit"). (B8-9; A0296-528; A0314-15 (chart of Cutts Affidavit documents).) Under the DLA, BE&K was to provide its work and services "in accordance with written [W]ork [O]rders . . . issued by [RKT CP] and approved and accepted by [BE&K]," and "[t]he terms and conditions of th[e] [DLA] shall govern each Work Order and the liability of the parties arising from each Work Order." (A1235 at art. 1.2.) The DLA also contains an integration clause, providing, in part, that "[t]he Contract Documents constitute the entire agreement between the parties . . . ." (A1247 at art. 20.4.) The Contract Documents are defined to include, among others, the DLA and an "Exhibit A – Scope of Project/Work Order Form." (A1236 at art. 2.1.) Under Article 2 of the DLA, the "Scope of Work/Work Order Form," which is attached as Exhibit A to the DLA, requires that Work Orders contain the following information: "Scope of Services," "Deliverables," "Schedule," "Estimated Cost," "Estimated Workhours," and "Project Contact." (A1249.)

Consistent with the terms of the DLA, for each of the 14 Work Orders in the

Cutts Affidavit, BE&K first transmitted a work order to RockTenn, who, in response, issued a purchase order to BE&K that attached either (1) BE&K's initiating work order or (2) a Work Order issued by RockTenn that included a "cut and paste" of the terms of BE&K's work order. (A0335-A0528.) The Work Orders of BE&K and RockTenn thus included the *same* terms, including those required by Article Two of the DLA. (*Id.*) Each Work Order also stated (a) that BE&K's work was being performed at Hodge Mill; and (b) that any purchase order issued in relation to such work would be governed "*solely by the terms and conditions of the [DLA] dated December 21, 2010.*" (*Id.* (emphasis in original).)[7]

At the summary judgment hearing, RockTenn's counsel confirmed this process flow. Referencing the documents in the Cutts Affidavit, RockTenn's counsel stated, "[T]he way the parties did this – *and the documents evidence it themselves* – is that BE&K generated a work order . . . [and] sent that work order over to RockTenn. RockTenn then issued – generates a purchase order[.]" (Op.

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[7] This language is part of what was dubbed by the Court of Chancery as the "Engineering Agreement Incorporation Provision," which contained the following language (or nearly identical language):

> *"The parties hereto agree and affirm that this Purchase Order is for administrative and billing purpose only and the services to be performed by BE&K Engineering, LLC, and authorized hereunder shall be solely by the terms and conditions of the [DLA] dated December 21, 2010 in lieu of any preprinted terms and conditions contained or referenced on the face or reverse hereof."*

(A0344.)

Br. Ex. B at 61.) Finally, in its Sur-Reply in Opposition to BE&K's motion, RockTenn stated that the Work Orders it attached to its purchase orders are, in fact, Work Orders – specifically referring to the Work Orders by Bates number. (*See* B47-60 at 2-3 (stating A0343 and A0345 are "Work Orders"), (stating A0379 is a "Work Order[]").)

When the Court of Chancery granted BE&K's Motion for Summary Judgment, it ordered that the resulting permanent injunction covered the 14 Work Orders attached to the Cutts Affidavit. (Op. Br. Ex. B.) The Court's Final Order and Judgment encompasses these documents plus two additional Work Orders, referenced as Contracts 532730 and 525202, which were included based on the parties' agreement and the Court of Chancery's ruling regarding judicial admissions. (Op. Br. Ex. A at 2 n.1.) Despite the preliminary and permanent injunctions, and its latest position that the DLA absolutely does not govern BE&K's work at Hodge Mill, RockTenn has never dismissed, withdrawn, or otherwise corrected the Third-Party Claims that "specifically invoke[]," are "permeate[d]" by, and "necessarily turn" and "rel[y]" on, the DLA. (A1202 at 110-11, A1204 at 119, A1205 at 124.)[8]

[8] In its brief to this Court, RockTenn concedes that "there is no dispute about the *validity or existence* of the DLA," (Op. Br. at 17 n.9 (emphasis added).) It also acknowledged during discovery that it "is not aware of *any persons* employed by RockTenn who, during the period of the Strategic Project, expressly told BE&K that the [DLA] did not and/or would not apply to and/or govern some or all of BE&K's work and/or services." (B43-46 at 20 (emphasis added).)

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY CONCLUDED THAT ROCKTENN DID NOT MOOT THIS PROCEEDING BY OFFERING INCOMPLETE RELIEF TO BE&K

A. Question Presented

Did the Court of Chancery correctly conclude that RockTenn did not render this proceeding moot when it unilaterally offered to dismiss one Third-Party Claim and stay others in the Georgia Action, and permit the Delaware Superior Court to determine the scope of any permanent injunction? (A1094-113.)

B. Standard and Scope of Review

This Court engages in *de novo* review of decisions about the mootness of any particular matter. *Crescent/Mach I Partners, L.P. v. Dr Pepper Bottling Co. of Tex.*, 962 A.2d 205, 208 (Del. 2008).

C. Merits of Argument

RockTenn claims "[t]he trial court lost subject matter jurisdiction when RockTenn agreed [in the Proposed Order] 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." (Op. Br. at 9.) This contention is groundless because the Proposed Order did not afford BE&K the full equitable relief it requested, as it did not define the scope of such relief.[9] Indeed, had the Court of Chancery adopted

[9] In the Proposed Order, RockTenn offered to (a) stay the Third-Party Claims in the Georgia Action that were preliminarily enjoined, save one count alleging an express breach of the DLA,

the Proposed Order, it would have erred by ceding to the Superior Court its exclusive equitable jurisdiction to determine the scope of the injunction.

"Mootness arises when a controversy between the parties no longer exists such that a *court can no longer grant relief* in the matter." *Mentor Graphics Corp. v. Shapiro*, 818 A.2d 959, 963 (Del. 2003) (emphasis added). Here, BE&K sought a preliminary and permanent injunction to prevent RockTenn from litigating its DLA-related Third-Party Claims in the Georgia Action. (A0042 ¶ 25.) Although RockTenn did (and does) not contest that such relief was warranted in light of the Forum Selection Clause in the DLA, it argued that the DLA did not apply to BE&K's work and services at Hodge Mill. (Op. Br. at 17 n.9; A1188 at 56; A1201 at 106.) As a result of this position, the Court of Chancery was forced to determine the scope of any permanent injunction; otherwise, it could not issue a meaningful or properly-tailored injunction. *Ivanhoe Partners v. Newmont Mining Corp.*, 533 A.2d 585, 609 (Del. Ch. 1987), *aff'd*, 535 A.2d 1334 (Del. 1987) ("[A]n injunctive remedy should not be disproportionate or excessive in relation to the specific harm that it is intended to prevent[.]").

After it introduced the issue of the scope of the injunction into the proceedings – and apparently deducing that it would not fare well on this issue

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which it agreed to dismiss (Op. Br. Ex. D ¶ 1), and (b) have the scope and applicability of the DLA determined in a companion damages action (the "Delaware Damages Action") filed by BE&K against RKT CP in the Delaware Superior Court to recover amounts due and owing under the DLA (*Id.* ¶¶ 2-4.)

after having received several other adverse rulings (*e.g.*, A0292-95; B4-7; B10-42 at 27-31) – RockTenn then sought a retreat from the Court of Chancery in yet another strategic maneuver. It did so by offering the Proposed Order, which even RockTenn admits would not have satisfied BE&K's request for injunctive relief because it left open the issue of scope for determination by the Superior Court in the Delaware Damages Action. (Op. Br. at 9.) This is precisely what the Court of Chancery concluded. (Op. Br. Ex. C at 84.) ("[G]iven the fact that the actual extent of the injunction would continue to be litigated [under the Proposed Order], BE&K really would not be getting what it sought from this Court in the first place, which is a definitive ruling enforcing the Delaware forum clause.") Thus, the Proposed Order did not moot the proceedings in the Court of Chancery. Rather, it did nothing but try to create a detour around that court on the open issue of scope, as to which the court necessarily was required to grant further relief. *Mentor Graphics Corp.*, 818 A.2d at 963.[10]

[10] Moreover, and as the Court of Chancery observed, the Proposed Order would have improperly "collapse[d] the division between law and equity that is the hallmark of Delaware's system." (Op. Br. Ex. C at 84; *see also id.* at 88.) ("Determining not only whether equitable relief is necessary, but also the scope of that equitable relief, is a subject matter that the Delaware Constitution of 1897 assigns to this Court."); *Nat'l Indus. Grp. (Holding) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 382 (Del. 2013) ("[T]he Court of Chancery has exclusive jurisdiction where injunctive relief is sought.") (internal quotations omitted). It follows that the Court of Chancery would have violated the Delaware Constitution had it adopted the Proposed Order, and thus, as a matter of law, that order could not have mooted those proceedings.

Even if the determination of the scope of an injunction might somehow be shoehorned into a legal claim that would fall within the jurisdiction of the Superior Court, the Court of Chancery, nevertheless, properly determined that it had the authority to decide this issue under its ancillary jurisdiction. The Court of Chancery squarely held that its determination of the scope of its injunction was an equitable matter, but it went on to state, alternatively, that although it was "not asserting jurisdiction . . . over this case [including the Delaware Damages Action] as a whole[,] . . . to the extent there was a problem created by this situation [that is, if scope were not an equitable issue] the cleanup doctrine is the doctrine of first resort that applies." (Op. Br. Ex. C at 89.) This observation is correct because the Court of Chancery is permitted to decide issues of law, which might otherwise have been adjudicated by the Superior Court, regarding matters incidental to its equitable jurisdiction. *Ellis D. Taylor, Inc. v. Craft Builders, Inc.*, 260 A.2d 180, 181 (Del. Ch. 1969).

II. ROCKTENN'S STATEMENTS THAT THE DLA APPLIED TO BE&K'S WORK AND SERVICES AT HODGE MILL ARE BINDING, FACTUAL JUDICIAL ADMISSIONS

A. Question Presented

Whether RockTenn's multiple, express acknowledgments that the DLA applies to BE&K's work and services at Hodge Mill constitute binding, factual admissions, and not legal conclusions. (A0318-22; A1124-26.)

B. Standard and Scope of Review

RockTenn has advanced arguments regarding the binding effect of RockTenn's judicial admissions that it did not raise below. These arguments should be evaluated under a plain error standard of review. *Clark v. Clark*, 47 A.3d 513, 518 (Del. 2012) This Court should review *de novo* the Court of Chancery's determination that RockTenn's admissions related to matters of fact, not matters of law, as RockTenn did raise this issue below. *Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 768 (Del. 2013).

C. Merits of Argument

In granting summary judgment in favor of BE&K, the Court of Chancery ruled that all of BE&K's work and services at Hodge Mill were governed by the DLA, as reflected in the Work Orders. In part, it based this determination on RockTenn's own admissions:

> The Rock-Tenn Defendants have represented clearly, directly, and repeatedly to the Georgia Court that the [DLA] governs the work and

> services that BE&K provided to RKT CP on the Strategic Project. Before BE&K moved for summary judgment, the Rock-Tenn Defendants similarly represented to this court that the [DLA] governs the work and services that BE&K provided to RKT CP on the Strategic Project. The Rock-Tenn Defendants' admissions are numerous, pervasive, and binding, and they warrant summary judgment on this issue.

(Op. Br. Ex. B at 13.) Admissions of fact made in a judicial proceeding are *binding* on the party who makes them. *Merritt v. United Parcel Serv.*, 956 A.2d 1196, 1201-02 (Del. 2008). As a result of its application of the judicial admissions doctrine, the Court of Chancery made the following declaration in relation to its grant of summary judgment:

> The [DLA] was used for BE&K to perform design and engineering work on the Strategic Project. RKT CP issued work orders to BE&K for work on the Strategic Project. The terms and conditions for those work orders are supplied by the [DLA], which governs those work orders and the services provided by BE&K in connection with the work orders.

(Op. Br. Ex. B at 24.) RockTenn now contests this holding, arguing that the Court of Chancery misapplied the judicial admissions doctrine. (Op. Br. at 15.) But the court did not err, and even if it did, any such error is entirely inconsequential.

1. RockTenn's Admissions in the Georgia Action Are Binding

RockTenn maintains that the Court of Chancery mistakenly considered RockTenn's statements in the Georgia Action to be binding admissions because statements made in a collateral proceeding may not constitute "judicial admissions." (*Id.*) RockTenn did not make this argument below and raises it here

for the first time, one of several such instances in this appeal, again demonstrating RockTenn's never-ending shifts in position. RockTenn has waived this issue on appeal. *Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821, 832 (Del. 1995).

Regardless, this new argument is of no moment for at least two reasons. First, although it is true that, in *Rudnick v. Schoenberg*, 122 A. 902, 903 (Del. 1923), this Court held that admissions in one legal proceeding are not binding in another, it also strongly suggested that this holding would *not* apply if the successor proceeding was sufficiently "related to or dependent upon" its predecessor. *See id.* at 903-04 ("We fail to see how it can be held that these two actions are related to or dependent upon the other to such an extent that the pleadings, admissions or statements made in the former would be binding in the latter.") While BE&K recognizes the holding in *Rudnick*, this case could not be a clearer example of a "related or dependent" proceeding in which RockTenn should be bound by its admissions. Indeed, this case arises solely because RockTenn improperly asserted the Third-Party Claims in the Georgia Action that, to date, have not been withdrawn and are grounded in RockTenn's admissions that the DLA governs BE&K's work at Hodge Mill. Therefore, because this proceeding is directly "dependent upon" RockTenn's admissions in the Georgia Action, the Court of Chancery did not err in concluding that RockTenn is bound by these admissions.

Moreover, even if the Court of Chancery did err in this conclusion, it did not commit "plain error" because RockTenn's indisputable, binding judicial admissions *in this matter* cover the same ground as its admissions in the Georgia Action, and thus, they are dispositive. (A0057 (Stigers Aff.: "The [DLA] was used for BE&K to perform design and engineering work on the Strategic Project."); A0257 (October 29 Letter to the Court: referencing 16 "purchase order numbers relating to work performed on the Strategic Project by BE&K ...."); A1169 at 13 ("[T]he contract that is at issue, what's referred to as the master contract [*i.e.*, the DLA] . . . related to the reconstruction of a paper mill in Louisiana. BE&K was going to provide the engineering services.").)

2. RockTenn's Admissions Were Factual in Nature

Next, RockTenn contends that its admissions about BE&K's work and services at Hodge Mill were legal positions and not admissions of fact, only the latter of which are binding. In support of this position, RockTenn cites cases that stand only for the well-settled principle – one that BE&K does not dispute – that the *interpretation of the meaning* of contract terms is a matter of law, not fact. (Op. Br. at 16.) But what RockTenn admitted in this proceeding (and in the Georgia Action) was that, *under the facts*, the DLA *applied* to BE&K's work at Hodge Mill. It is because RockTenn's statements relate to whether the DLA applied, not how the terms of the DLA should be interpreted, that RockTenn's

statements constitute admissions of fact, not law. *See Capital Mgmt. Co. v. Brown*, 813 A.2d 1094, 1097 (Del. 2002) ("The very terms of the contract, what they were, not what they meant, were at issue and were, therefore, properly submitted to the jury as a question of fact."); *see also Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co., Inc.*, 976 F.2d 58, 61 (1st Cir. 1992) (holding that plaintiff made a binding judicial admission when it alleged that the contract at issue "did, in fact, exist between the parties" and ruling that "plaintiff should not be allowed to contradict its express factual assertion in an attempt to avoid summary judgment"); *H.E. Contracting v. Franklin Pierce Coll.*, 360 F. Supp. 2d 289, 293 (D.N.H. 2005) (plaintiff made a "binding judicial admission" as to "the applicable contract between the parties" by alleging, in part, that "the parties entered into [the contract at issue] covering [plaintiff's] work on the project").

3. The Court of Chancery Did Not Misinterpret the Breadth of RockTenn's Admissions

Finally, in another argument not raised in the Court of Chancery – and thus waived for purposes of appeal – RockTenn now maintains that the court misinterpreted the breadth of its admissions. Specifically, RockTenn contends that the Court of Chancery erred in concluding that its admissions mean "that all of BE&K's work [at Hodge Mill] is governed by the DLA." (Op. Br. at 19.)

Yet, under any analysis – and its waiver notwithstanding – RockTenn is bound by its *judicial admissions in this proceeding* that (a) "[t]he ... [DLA] was

used for BE&K to perform design and engineering work on the Strategic Project." (A0057); (b) sixteen "purchase order numbers [covering all of the Specific Work Orders] relat[e] to work performed on the Strategic Project by BE&K . . . ." (A0257); and (c) the DLA "related to the reconstruction of a paper mill in Louisiana." (A1169 at 13). These judicial admissions fully support the conclusions of the Court of Chancery that the "[DLA] was used for BE&K to perform design and engineering work [and services] on the Strategic Project," (Op. Br. Ex. B at 24), and indeed, that the DLA governed all of the work that BE&K performed at Hodge Mill (*see id.* at 46-48). And these conclusions are only fortified when they are coupled with RockTenn's admissions that are still extant in the Georgia Action, such as that (a) "BE&K was working under" the DLA at Hodge Mill, (A0703); (b) the DLA "was in fact employed for certain work orders . . . issued by RKT CP to BE&K for work on the Strategic Project[,]" (A0589 ¶ 18; A0670 ¶ 18); and (c) "[t]he essential terms and conditions governing . . . purchase orders [and hence, the Specific Work Orders attached] are supplied by" the DLA (A0843 ¶ 5).

The evidence, as admitted by RockTenn, is abundantly clear, and thus, the Court of Chancery correctly concluded that the parties agreed that BE&K was to perform its work at Hodge Mill under the DLA, which governed *all* of the work orders at issue in this case.

III. THE "$5 MILLION CAP" IN THE DLA DOES NOT PRECLUDE THE DLA'S APPLICATION TO BE&K'S WORK AND SERVICES AT HODGE MILL

A. Question Presented

Whether the Court of Chancery correctly determined that the "$5 Million Cap" in the DLA does not render that agreement inapplicable to BE&K's work at Hodge Mill. (A1126-40.)

B. Standard and Scope of Review

This Court "review[s] questions of contract interpretation *de novo*." *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012) (footnote omitted).

C. Merits of Argument

RockTenn also takes issue with the Court of Chancery's interpretation of the so-called "$5 Million Cap" of the DLA. In its Opening Brief, RockTenn never explains why any misinterpretation of the $5 Million Cap should lead to reversal. However, from what it argued in the Court of Chancery, it is evident that RockTenn's contention here is that because the total construction costs for the Strategic Project at Hodge Mill – as a whole, and as opposed to on a work order-by-work order basis – were much greater than $5 million, the DLA could not apply to BE&K's work at Hodge Mill. (*See* A0898-99.) This argument – the final evolution of RockTenn's position in this case – fails for the reason stated by the

Court of Chancery: it does not square with a plain reading of the text of the DLA. (Op. Br. Ex. B at 25.)

The parties agree that the precepts of contract interpretation require (a) that terms are to be construed in accordance with their ordinary meaning in the context of the entire contract; and (b) that intent is to be determined from the perspective of a reasonable person in the position of the parties to the contract. *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334-35 (Del. 2012) ("We 'must construe the *agreement as a whole*, giving effect to all provisions therein' . . . We 'interpret clear and unambiguous terms according to their *ordinary meaning.*'") (emphasis added; footnotes and internal quotations omitted). In this case, under § 1.2 of the DLA, the $5 Million Cap applies on a work order-by-work order basis rather than on a Strategic Project-wide basis, as RockTenn argues. The relevant language from the DLA reads:

> 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 ("Projects(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). **The terms and conditions of this Agreement shall govern each Work Order** and the liability of the parties arising from each Work Order. **Each Work Order** shall contain the information specified in Exhibit A, including the ENGINEER's **Scope of Services for the Project[.]**

(A1235 at art. 1.2 (emphasis added).) Therefore, under § 1.2, the terms of the

DLA – and thus, its $5 Million Cap – apply to individual "Projects," each of which is defined in a distinct "Work Order" by its "Scope of Services," and not, as RockTenn argues, by the indiscernible scope for any sort of larger, undefined "undertaking." (Op. Br. at 22.) As the Court of Chancery aptly analyzed:

> BE&K agreed in Section 1.2 to provide services "in accordance with written work orders ('Work Order(s)') issued by [RKT CP] . . . for individual projects." The reference to plural "Work Orders" corresponds to the reference to plural "Projects." Later in the section, the contract states that "[e]ach Work Order shall contain the information specified in Exhibit A, including [BE&K's] Scope of Services for the Project." Here, the reference to a singular "Work Order" corresponds to the reference to a singular "Project," and the sentence states the former defines the "Scope of Services" for the latter. Section 1.2 also provides that the "[t]erms and conditions of this Agreement shall govern each Work Order and the liability of the parties arising from each Work Order," thus making clear that *each Work Order is a separate commitment.*

(Op. Br. Ex. B at 26 (emphasis added; citations omitted; brackets in original).)

The flaws in RockTenn's opposing argument are multifold. First, it provides *no textual basis* whatsoever – and none is available – for its reading of § 1.2, in which it posits that a "Project" must be defined as an overall "undertaking." RockTenn just baldly writes: "[T]he 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." (Op. Br. at 22.) This is purely a conjured definition that fails to comport with any analysis of § 1.2, from which the term "undertaking" is altogether absent.

Second, RockTenn argues that the Court of Chancery's reading of § 1.2 makes the terms "Work Order" and "Project" duplicative. (*Id.*) But this is not so, because it is only the "Scope of Services" section of any particular "Work Order" – and not the entirety of the Work Order – that actually defines a "Project."

Next, RockTenn tries to create some significance from the fact that the Court of Chancery did not address in its analysis of the $5 Million Cap issue the distinction between construction costs for any given Project and engineering fees for work and services set forth in the Work Order relating to that Project. RockTenn seems to argue that since (a) the $5 Million Cap is measured by "[the] total. . . per-project cost for any construction[;]" and (b) "the Work Orders submitted by BE&K itemize only the value of their engineering [work] and do not state the total-installed costs associated with that engineering work[;]" then (c) because the Court of Chancery did not ascribe significance to these facts in its analysis, it "effectively deleted" the "total. . . per-project cost for any construction" requirement of the DLA. (Op. Br. at 24-25.) Thus, it seems that RockTenn's argument is merely a derivation of its overall position that the $5 Million Cap cannot be considered on a work order-by-work order basis, which the Court of Chancery squarely addressed and properly rejected, as discussed above.

Finally, RockTenn argues that extrinsic evidence should apply to the interpretation of § 1.2 because its "interpretation is at least as reasonable as

BE&K's[,]" evidently because BE&K has referred to the overall Strategic Project as "the Project" in pleadings and at a hearing.[11] This argument is meritless because, as just discussed above, there is no ambiguity in the term "Project" appearing in § 1.2 of the DLA, and thus, no extrinsic evidence can cast additional light on its meaning. *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). Regardless, even when an ambiguity does exist, referring in a pleading to the Strategic Project as "the Project" says nothing about the meaning of the contract term "Project" under § 1.2. Extrinsic statements that do not even purport to relate to the meaning of the ambiguous contract term are completely irrelevant.

[11] One pleading to which RockTenn refers – BE&K's Answer to RKT CP's Third-Party Claims in the Georgia Action (A1751) – RockTenn included in its Appendix but is not actually in the record because it was not presented to the Court of Chancery. *Delaware Elec. Co-op, Inc. v. Duphily*, 703 A.2d 1202, 1206 (Del. 1997). ("Supreme Court Rule 9(a) implicitly imposes a limitation upon the record on appeal by requiring that such record shall consist of 'the original papers or exhibits.' 'Original papers' are documents filed with and presented to the trial court."). BE&K has summarized the 400+ pages RockTenn included in its Appendix but did not present to the Court of Chancery at B143-44.

IV. THE COURT OF CHANCERY PROPERLY GRANTED SUMMARY JUDGMENT BASED ON ROCKTENN'S ADMISSIONS AND THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE DLA AND THE WORK ORDERS

A. Question Presented

Whether, without allowing for additional discovery, the Court of Chancery properly granted summary judgment based on RockTenn's admissions of fact and the clear and unambiguous language of the DLA and the Contract Documents. (A0296-334; A1114-40.)

B. Standard and Scope of Review

This Court will review for abuse of discretion a trial court's decision to disallow additional discovery in relation to a motion for summary judgment. *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1061 (Del. 1986) ("The application of the discovery rules [in the summary judgment context] is subject to the exercise of the trial court's *sound discretion*.") (emphasis added).

C. Merits of Argument

In its final argument, RockTenn presents a loose compendium of issues related to the Court of Chancery's work order-by-work order analysis of documents attached to the Cutts Affidavit. (Op. Br. Ex. B at 30-44.) As a threshold matter, this Court need not consider any aspect of this argument if it determines – as it should – that the decision of the Court of Chancery to grant summary judgment with respect to *all work orders tied to Hodge Mill* was

independently justified by RockTenn's admissions that BE&K's work and services at Hodge Mill was covered by the DLA. Indeed, the Court of Chancery relied solely on RockTenn's admissions when it granted summary judgment as to certain documents that did not qualify as Contract Documents on their own. (Op. Br. Ex. A at 2 n.1) (additional Work Orders); (Op. Br. Ex. B at 46-48 (other documents)).

On the merits, RockTenn first maintains that the Court of Chancery prematurely granted summary judgment because it "issued a ruling without the benefit of discovery[,]" which RockTenn contends it needed "to litigate *which contract governs* BE&K's wide-ranging work on the Strategic Project." (Op. Br. at 28 (emphasis added).)[12] Of course, this argument presupposes that the Court of Chancery erred in determining that the DLA applies to BE&K's work and services at Hodge Mill based on the plain terms of the Contract Documents and RockTenn's admissions. However, as discussed above, the Court of Chancery's summary judgment ruling is unassailable, obviating the need for further discovery: RockTenn's admissions were binding statements of fact (*see* Part II, above), and the DLA and Work Orders unambiguously speak for themselves.

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[12] It was only as to this issue that RockTenn sought additional discovery in its Rule 56(f) affidavit. (A0913 ¶ 9.) ("[A] number of fact intensive issues remain in dispute and are relevant to the issue of which contract governs the work by BE&K[.]"); (*id.* ¶ 12) (testimony of additional witnesses "is important to the understanding of the facts surrounding the applicability of the Delaware Agreement."). It is ironic and confounding that, for purposes of its argument regarding discovery, RockTenn identifies the issue of "which contract governs" as one of *fact*, because it argued that the same issue was one of *law* for purposes of its judicial admissions argument, addressed above in Part II.

Next, RockTenn contends that, "The trial court's analysis is predicated first upon an erroneous factual assumption that certain documents are 'Work Orders' for purposes of the DLA[,]" and further, that that Court "engaged in supposition and utilized deductive reasoning to conclude that they are governed by the DLA." (Op. Br. at 28.) RockTenn breaks this argument out into four subsections.

First, RockTenn claims that the Opinion "is **solely** premised upon documents that RockTenn and BE&K agree are Purchase Orders[,]" which are not Contract Documents, and thus, create no contractual obligations. (*Id.* at 29 (emphasis in original).) However, the truth is that although the Court of Chancery's work order-by-work order analysis in the Opinion refers to the purchase orders, the Court did so only in the context of focusing on what it properly determined to be the dispositive Contract Documents – the DLA and the Work Orders – the latter of which were *attached to or incorporated into* the purchase orders. (Op. Br. Ex. B at 31 ("Under . . . [§ 1.2 of the DLA], the written *Work Order* issued by RKT CP, read together with the *Engineering Agreement* itself, compose the *operative legal documents*.").) Demonstrating this focus on work orders, and not on purchase orders, the Court of Chancery's analysis of the documents attached to the Cutts Affidavit (purchase orders with associated work orders) honed in on whether the work orders satisfied the DLA's Article Two definition of a "Work Order." (*Id.* at 30-44.) Crucially, in three instances when a

document was referred to in a purchase order but otherwise was not attached to the purchase order – and thus, where the Court could not determine whether it was a Work Order qualifying as a Contract Document – the Court *declined* to grant summary judgment based on its assessment of the Cutts Affidavit, and instead, did so based on RockTenn's admissions. (*Id.* at 46-48.) Thus, contrary to RockTenn's argument, it is readily apparent that the Court of Chancery did *not* grant summary judgment in any respect based on the substance of purchase orders.

Second, RockTenn claims that the documents contained in the Cutts Affidavit do not show that contractual Work Orders were issued by RockTenn, as was necessary for them to be operative under § 1.2 of the DLA. (Op. Br. at 30.) This is yet another new argument that RockTenn did not present to the Court of Chancery, and thus, has waived on appeal. Regardless, the undisputed facts irrefutably demonstrate that RKT CP did issue purchase orders with work orders attached or incorporated because: (a) RockTenn's counsel admitted that "the documents . . . themselves" show that "RockTenn . . . *issued* – generate[d] purchase orders" to BE&K, (Op. Br. Ex. C at 61 (emphasis added)); (b) on appeal, RockTenn itself denotes as "purchase orders" certain documents attached to the Cutts Affidavit (which bear the heading "Contract"), (Op. Br. at 29), which RockTenn then admits have "as an attached document a complete 'cut and paste' of the BE&K Work Order[,]" (*Id.* at 30 n.12); (c) RockTenn made an admission in

the Georgia Action that the DLA was "in fact employed for certain work orders, also known as purchase orders, *issued* by RKT CP to BE&K for work on the Strategic Project[,]" (A0589 ¶ 18; A0670 ¶ 18 (emphasis added)); and (d) in its Sur-Reply on summary judgment, RockTenn referred to documents attached to purchase orders, identifiable by Bates number as being attached to the Cutts Affidavit, as "Work Orders." (B47-60 at 2-3, 7.) In short, RockTenn has admitted that it issued purchase orders to BE&K that attached operative Work Orders, which are Contract Documents within the meaning of the DLA.

Third, RockTenn claims the Court of Chancery "made several (wrong) factual assumptions" as to "internal accounting [documents]," which is what § 1.2 of the DLA calls "purchase orders." (A1235 at art. 1.2.) This argument is essentially a re-hash of what immediately precedes it. RockTenn first tries to draw significance from the fact that the Court of Chancery stated that the purchase orders bear the word "Contract" and are marked "Executed," (Op. Br. at 30-31), but, as already discussed, the key to the Court's analysis was not what the purchase orders said, but instead, whether they incorporated or had attached documents that qualify as Work Orders under the DLA.

RockTenn also takes issue with the fact that the Court of Chancery referred to the Engineering Agreement Incorporation Provision in its analysis of the Work Orders. (*Id.* at 32-33.) In addition to arguing that it needs discovery regarding this

provision – discovery that it did not identify in its Rule 56(f) affidavit – RockTenn also claims that, "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." (*Id.* at 33.) Again, the single, dispositive factor in the Court of Chancery's determination as to whether a document attached to the Cutts Affidavit was a Work Order, which qualified as a Contract Document under the DLA, was whether it satisfied the definition of Article Two of the DLA. In any event, the Engineering Agreement Incorporation Provision does not even purport to "unilaterally invoke the DLA," as RockTenn claims. It merely confirms what the DLA independently mandates, which is that any Work Order that is a Contract Document is incorporated into the DLA and is controlled by its terms and conditions.

Finally, RockTenn attacks the fact that, in the course of its work order-by-work order analysis, the Court of Chancery compared the documents it was reviewing with the requirements of the GLA and determined that they were not purchase orders under the GLA. (*Id.* at 33.) It contends that when the Court of Chancery found that the GLA did not apply to any given work order, it concluded that "the DLA must govern by default." (*Id.*) To the contrary, it is self-apparent that the Court of Chancery did not employ this comparison as part of some sort of binary "which-contract-governs" decision, but instead, as a "check" on its initial

conclusion that any given work order was controlled by the DLA.

Fourth, in a last-ditch effort to argue that further discovery was warranted, RockTenn discusses what "[o]ngoing [d]iscovery in Georgia [r]eaffirms." (*Id.* at 34-35.) In doing so, RockTenn shamelessly relies on materials that it placed in its Appendix, but that it never presented to the Court of Chancery. *See Duphily*, 703 A.2d at 1206; Supr. Ct. R. 9(a). What matters in this case is not what is going on in Georgia, but instead, whether the Court of Chancery correctly decided summary judgment – and it did – based on RockTenn's factual admissions and the plain text of the DLA and its Contract Documents (*i.e.* the Work Orders).

CONCLUSION

For all of the foregoing reasons, BE&K respectfully requests that this Court AFFIRM the Final Order and Judgment of the Court of Chancery.

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Dated: May 21, 2014