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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

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SUMMARY OF REPLY ARGUMENT

BE&K's Answering Brief fails to seriously address the core arguments on this appeal—why the Court of Chancery should be reversed for (a) granting an anti-suit injunction when the relief sought was moot, and (b) erring as a matter of law in holding that a particular contract (the DLA) governs BE&K's work on the Strategic Project, and refusing to consider affidavits showing material issues of fact which preclude summary judgment pursuant to Rule 56. BE&K's opposition fails:

1. To justify why the Court of Chancery "went out of its lane" to issue an anti-suit injunction and a broad (but erroneous) declaration on work covered by a specific contract after RockTenn agreed to litigate these issues in the same Delaware Superior Court action which BE&K itself had filed.

2. To offer meaningful support for the application of the judicial admissions doctrine when RockTenn's initial statements about which contract governs is a legal issue, and inapplicable after RockTenn clarified its position at the early stage of the litigation.

3. To meaningfully rebut RockTenn's common sense textual interpretation of the $5 million cap which precludes the application of the DLA, or to even acknowledge the meaningful distinction made in the DLA between total-installed construction costs and engineering fees.

4. To explain why summary judgment was proper without the benefit of discovery when there were disputed facts as to material issues and a Rule 56(e) & (f) affidavit explaining the disputes and the need for discovery.

REPLY ARGUMENT IN SUPPORT OF APPEAL[1]

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

As RockTenn noted in its Opening Brief, the Court of Chancery lost subject matter jurisdiction when RockTenn agreed to litigate the scope and applicability of the DLA in Delaware, thereby providing BE&K the relief it sought and thus mooting the anti-suit injunction. In opposition, BE&K (1) fails to address the appropriate standard for mootness under Delaware law; (2) does not argue that either of the two exceptions to the mootness doctrine is applicable; and (3) functionally capitulates on RockTenn's arguments that the clean-up doctrine is inapplicable and inappropriate in these circumstances.

Instead, BE&K doubles down on the Court of Chancery's erroneous logic that dismissing the anti-suit injunction in Chancery after RockTenn agreed to litigate in Delaware Superior Court would somehow violate the distinction between law and equity. BE&K does so by conflating the "scope" of the relief it sought in the Court of Chancery, which was solely a request that litigation be venued in Delaware, with the "scope" of the DLA.

To be sure, dismissal of the anti-suit injunction will require the Superior Court to determine the extent to which the DLA governs any of BE&K's work—a

[1] Citations herein to Appellants' Opening Brief are cited as "Op. Br." and to Appellees' Answering Brief as "Ans. Br." Citations to Exhibits other than to Exhibit E (attached hereto) refer to Exhibits A, B, C, and D attached to Appellants' Opening Brief. All other defined terms have the meanings ascribed to them in the Opening Brief. RockTenn addresses only the most salient points raised in BE&K's Answering Brief, and expressly does not waive any arguments made in its Opening Brief.

determination to be made in the same case BE&K filed in August 2013 and which is currently pending before Judge Carpenter. This is as it should be. The question of the extent to which the DLA governs BE&K's work is a question of contract interpretation, which is a matter of law, not equity. Had RockTenn never counterclaimed in Georgia, but filed suit initially in Delaware, as BE&K claimed it should have done, that question would have been squarely before the Superior Court. Absent the Court of Chancery's erroneous ruling, RockTenn would be defending against BE&K's lawsuit in the Superior Court on grounds including that the DLA does not apply, and the Superior Court would necessarily be addressing the scope and applicability of the DLA. Doing so would have implicated legal claims only and would have been entirely within the Superior Court's jurisdiction.

Perhaps recognizing that contract interpretation is solidly within the Superior Court's jurisdictional wheelhouse, BE&K claims that RockTenn "forced" the Court of Chancery to render an opinion on the scope and applicability of the DLA. (Ans. Br. at 15) RockTenn did so, according to BE&K, by arguing that the DLA may not govern BE&K's work on the Strategic Project, and by submitting a Proposed Order reflecting RockTenn's agreement to litigate in Delaware. (*Id.* at 15-16) This makes no sense. When RockTenn agreed to litigate in Delaware Superior Court, it short-circuited the sole basis for BE&K's anti-suit injunction, which was a venue provision in the DLA requiring litigation in Delaware. End of controversy, period. It is fully permissible for a party to agree to litigate in a particular venue in order to moot an alleged breach of a venue provision. By doing so, RockTenn mooted the basis for Court of Chancery's jurisdiction, it did not broaden it. The parties were

then free to fight over the applicability of the DLA in the Superior Court, as BE&K itself envisioned by filing suit there.

Further, the Proposed Order and RockTenn's proffered stipulation negated any need for an injunction. No injunction was necessary, whether the Court of Chancery entered the Proposed Order, or just dismissed the matter based on RockTenn's agreement to litigate in Delaware. There would have been no injunction for the Superior Court to "expand or contract." Instead, the Superior Court would have proceeded with sorting through numerous contract interpretation issues, which remain for the Superior Court to decide. (*See* Ex. E, RockTenn CP's Amended Counterclaims and Third-Party Claims (filed May 12, 2014 in the Delaware Superior Court Action).) The claim that the Delaware Constitution would have been violated is unsupported and meritless.

In short, BE&K's argument depends upon an inaccurate conflation of (a) the scope of an injunction, which was rendered unnecessary by RockTenn's agreement to litigate in Delaware, and (b) the scope of the DLA, which remains at issue in the Superior Court.

II. THE COURT OF CHANCERY ERRED IN RULING THAT ROCKTENN'S LEGAL STATEMENTS WERE JUDICIAL ADMISSIONS.

A. BE&K Overstates RockTenn's Initial Legal Position.

BE&K colorfully claims that (1) RockTenn has taken a "dizzying array of contradictory positions," when it "suddenly" opposed the Preliminary Injunction by arguing that there were factual issues as to which contract governs BE&K's work (Ans. Br. at 8-9); (2) these were "newly minted" theories (*Id.*); and (3) RockTenn did not argue its $5 million cap theory, claimed to be RockTenn's "final change in position," until its opposition to BE&K's Motion for Summary Judgment on December 11, 2013. (*Id*. at 10) BE&K then claims that the Court of Chancery "collects well over fifty judicial admissions" by RockTenn. (Ans. Br. at 7) These are inaccurate and hyperbolic statements. BE&K also seeks to capitalize on the mistaken legal position that RockTenn took for the first month of this vast and complex litigation by suggesting there is something morally culpable about a party correcting its course early in litigation. This is neither the law generally, nor the law of judicial admissions.

RockTenn readily admits that in August 2013, at the very inception of the Georgia Action in which RockTenn CP and RockTenn SS had to file answering pleadings and respond to discovery in a tight timeframe, RockTenn made a host of allegations about BE&K's poor work and made claims that the DLA governed that

work.[2] These allegations were by no means persistent and reflect only RockTenn's early, and mistaken, understanding as to which contract governs BE&K's work. This mistaken understanding bled into the Court of Chancery on September 4, 2013, when RockTenn SS sought to dismiss the anti-suit injunction as to itself on jurisdictional grounds. Thereafter, and in **every pleading** on the merits of an injunction, the RockTenn entities have steadfastly maintained the position in Delaware that there are a number of contracts between the parties that may govern BE&K's conduct, and the express terms of the DLA demonstrate that, without more, it cannot govern BE&K's work. (*See, e.g.*, Ex. E (seeking Declaratory Judgment as to which express contract(s), if any, among the Contractor's Agreement, the DLA, the GLA, and the ALA, govern work performed by BE&K, KBR, Inc. and/or Kellogg that are the subject of BE&K's claims and RKT CP's counterclaims and third-party claims).)

Moreover, RockTenn's position that the DLA's express terms do not apply to BE&K's work was not a "newly minted" theory. RockTenn raised the issue of the $5 million cap at the Preliminary Injunction hearing on September 27, 2013. (A1193-94 ("I think this is, again, significant but has been overlooked so far, total installed per project cost for construction, less than $5 million.")) RockTenn raised

[2] RockTenn does not know how BE&K counted "fifty" admission in the Court of Chancery Opinion, but all of the bullets in the Opinion on pages 15-18 come from a single pleading and attached affidavit filed in the Georgia Action on August 12, 2013.

it again in the October 29, 2013 letter that RockTenn submitted to the Court of Chancery, when it explained how the $5 million cap in the DLA showed that it could not govern the work on the Strategic Project. (A0258; Ans. Br. at 10) This is a legitimate and honest legal position—the face of the DLA, and the written negotiating history of the DLA, which was presented to the Court of Chancery—all demonstrate that the DLA was designed to apply only to smaller "projects."

RockTenn also did what it could within the bounds of law and propriety to resist and productively guide the Court of Chancery in its determination, contrary to BE&K's claim. (*See* Ans. Br. at 10 (claiming RockTenn never "questioned the process by which the Court of Chancery proposed to determine the scope of the DLA").) After the parties exchanged diametrically opposite position letters regarding the 16 purchase orders, in which RockTenn noted that it was not even possible to settle on the final purchase orders without discovery, RockTenn opposed BE&K's "extremely expedited schedule" noting it was "highly prejudicial" to RockTenn and unnecessary given the maintenance of the status quo. (A0283-91) The Court of Chancery rejected RockTenn's position, and ordered expedited summary judgment briefing. Then, after RockTenn mooted the sole relief sought in the anti-suit injunction by agreeing to litigate in Delaware, RockTenn sought dismissal of the action. RockTenn's efforts were again rejected.

Finally, with respect to the actions in Georgia, BE&K seeks to capitalize on

the whip-saw created by, on the one hand, RockTenn's effort to comply with the Preliminary Injunction and, on the other hand, RockTenn's effort to protect its interests (by avoiding a statute of limitations defense in Georgia if claims were ultimately allowed to go forth in Georgia). (Ans. Br. at 10, 13)[3] The fact remains that since September 2013, RockTenn intentionally did **nothing** to pursue the DLA claims anywhere but in Delaware so as to remain in compliance with the preliminary, and now permanent, injunction. As the Court of Chancery itself conceded, forbearance is all that is required of RockTenn: Vice Chancellor Laster granted BE&K a negative injunction, which meant that RockTenn's sole obligation was to refrain from affirmative acts to pursue the enjoined claims. (A1204, A1208)

B. RockTenn's Mistaken Statement Cannot Form the Basis of a Judicial Admission Because It Was a Legal Position.

As a preliminary matter, BE&K concedes that judicial admissions are reviewed *de novo* but claims that this Court should review BE&K's supporting arguments for plain error. (Ans. Br. at 18) BE&K does not explain how this Court can review the issue *de novo* while reviewing the supporting arguments for plain error, nor does BE&K cite any case law for this two-tiered review. (*See id.* at 18.) RockTenn undisputedly defended below that its statements in Georgia were not binding judicial admissions. On appeal, RockTenn may assert any argument in

[3] The Court of Chancery and BE&K complain that RockTenn SS sought to amend its initial pleading in Georgia on September 19, 2013, in order to delete the count for breach of the DLA but still maintained its original allegations. (Ex. B at 19; Ans. Br. at 9 fn 5) RockTenn SS did this in an effort to assuage BE&K's claim of breach of the venue provision but avoid a statute of limitations defense if claims were ultimately allowed to go forth in Georgia.

support of that defense. *See, e.g., Yee v. Escondido*, 503 U.S. 519, 534 (1992); *cf Clark v. Clark*, 47 A.3d 513, 518 (Del. 2012) (holding only that an issue never raised below cannot be raised anew); *Duphily v. Del. Elec. Co-op., Inc.*, 662 A.2d 831, 832 (Del. 1995) (same). In any event, the trial court's error was plain, and this Court should not repeat the error. This Court has held unequivocally that "admissions made in judicial proceedings are never conclusive and never raise an estoppel except in the suit in which they are made." *Rudnick v. Schoenberg*, 122 A. 902, 903 (Del. 1923).

As explained in RockTenn's Opening Brief, the doctrine of judicial admissions applies only to factual admissions. (Op. Br. at 15-17) BE&K concedes that contract interpretation is a legal issue, does not dispute that RockTenn's statements concerned whether the DLA applies to the parties' dispute, and does not address the case law holding that whether a contract applies to a dispute is a question of law. (*Compare* Op. Br. at 16 *with* Ans. Br. at 18-23.) Instead, BE&K asserts that such legal statements are factual statements because they "relate to whether the DLA applied, not how the terms of the DLA should be interpreted." (Ans. Br. at 21) This is incorrect: whether a contract applies is a classic legal issue for determination by a court. The cases BE&K cite merely hold that a contract or its terms can be a fact question where a party claims the contract or terms did not exist.[4] BE&K's citation to *Brown* is especially curious, as the *Brown* court

[4] *See Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co.*, 976 F.2d 58, 61 (1st Cir. 1992) (holding that the statement that "'a contract did, in fact, exist between the parties'" was a judicial admission); *H.E. Contracting v. Franklin Pierce College*, 360 F. Supp. 2d 289, 293-94 (D.N.H. 2005) (court declined party's attempt to vary the meaning of a contract via parol evidence when it had admitted that the contract language at issue was binding).

distinguished the factual issue of what the contractual terms are from the legal issue of "the meaning of those terms." *Capital Mgmt. Co. v. Brown*, 813 A.2d 1094, 1097 (Del. 2002). RockTenn does not dispute the DLA's existence or its terms. RockTenn's statements concerned which contract governs BE&K's work, which is a legal issue.

C. Even Were RockTenn's Statements a Judicial Admission, They Would Not Support the Court of Chancery's Ruling.

Furthermore, RockTenn also showed that the Court of Chancery plainly erred (regardless of the legal or factual nature of RockTenn's statement) by holding that the DLA governs all of BE&K's work on the Strategic Project because RockTenn's supposed judicial admissions were not that broad.[5] (Op. Br. at 19-20) RockTenn merely stated that "the [DLA] was used for BE&K to perform design and engineering work on the Strategic Project." (*Id.* at 19) BE&K does not dispute that RockTenn never stated that the DLA governs all of BE&K's work. (*See* Ans. Br. at 22-23.) BE&K does not dispute that it performed work on the Strategic Project before the DLA was executed and after other contracts were executed. (*See id.*) BE&K does not dispute that it performed services other than design and engineering work. (*See id.*) And BE&K does not dispute that it charged RockTenn for non-engineering work and for work performed by non-BE&K entities who have

[5] BE&K claims that this issue should be reviewed for plain error because RockTenn did not raise the court's error before the court committed the error. This argument is illogical. RockTenn could not know that the trial court would enter a holding going beyond RockTenn's statements. In any event, the court's error was plain. *See AT&T Corp. v. Lillis*, 953 A.2d 241, 256-57 (Del. 2008) (judicial admissions are "restricted to **unequivocal** statements") (emphasis added).

different contracts with RockTenn. (*See id.*) Rather than address the scope of the statements that RockTenn made, BE&K opts rather to assert, *ipse dixit*, that the statements "fully support the conclusions of the Court of Chancery."[6] (*Id.* at 23) This is not the case.

BE&K also attempts to create new admissions that do not exist and were not relied upon by the Court of Chancery. For example, BE&K states that RockTenn admitted that 16 "purchase order numbers [covering all of the Specific Work Orders] relat[e] to work performed on the Strategic Project by BE&K." (Ans. Br. at 10) Putting aside that BE&K altered the statement to add language, the statement does not concede that purchase orders were ever issued or that the DLA governs those unauthenticated purchase orders. As BE&K knows, RockTenn has consistently disputed the authenticity of the documents called Purchase Orders and Work Orders. *See infra* at Part IV, p. 17.

Finally, BE&K ignores the far-reaching effect of the Court of Chancery's application of the judicial admissions doctrine here, particularly where there is no prejudice whatsoever resulting from a party's early legal position. *See, e.g., Beazer E., Inc. v. Mead Corp.*, 412 F.3d 429, 437 n.11 (3d Cir. 2005).

[6] Although the Court of Chancery broadly held that the DLA applies to all BE&K's work, the court did so under the mistaken impression that BE&K performed only engineering work when, in fact, BE&K also provided non-engineering services. (Op. Br. at 19 (explaining how BE&K performed, e.g., project management services)) Facing this dilemma, BE&K edits the court's opinion to make it appear that the court deliberately held that the DLA applies to BE&K's non-engineering services. (*See* Ans. Br. at 23 (adding "services" to the court's statement).)

III. A PLAIN READING OF THE DLA DEMONSTRATES THAT IT CANNOT APPLY BECAUSE THE PROJECT, AND EVEN EACH WORK ORDER, IS ASSOCIATED WITH TOTAL CONSTRUCTION COSTS EXCEEDING $5 MILLION.

The parties have staked out differing interpretations of the meaning of "project" and of the applicability of the $5 million cap provided in § 1.2 of the DLA. While RockTenn maintains its interpretation is sensible and BE&K's requires linguistic gymnastics, the competing arguments demonstrate how, at a minimum, §1.2 is ambiguous and warrants consideration of extrinsic evidence. RockTenn has offered ample extrinsic evidence of BE&K's own characterizations which speak for themselves, and are properly before this Court (including publicly available pleadings filed in other actions, of which this Court may take judicial notice). (Op. Br. at 25-26); s*ee* Del. R. Evid. 201(c), (d); *see also, e.g., Lorenzetti v. Enterline*, 44 A.3d 922 (Del. 2012) (taking judicial notice of a prior suit in the Court of Chancery that gave rise to the Superior Court suit which was on appeal); *Johnson v. State*, 55 A.3d 839 (Del. 2012) (taking judicial notice of a separate criminal matter unrelated to the action on appeal).

BE&K ignores RockTenn's textual arguments, inexplicably stating that RockTenn provides "no textual basis" for its interpretation. (*Compare* Ans. Br. at 26 *with* Op. Br. at 22-25.) In doing so, BE&K ignores RockTenn's argument about the canon against surplusage, and then violates the canon again by claiming that "Project" is defined by the Scope of Services that is included in individual Work Orders. If Scope of Services defines Project, then § 1.2 would have been written as follows:

> 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~~ Scope of Services specified in each Work Order will be less than Five Million Dollars ($5,000,000).

(A1235 at Art. 1.2.)

But § 1.2 was not written this way, and BE&K's interpretation requires this Court to presume that the parties meant for "Work Order," "Project," and "Scope of Services" to all mean the same thing, even though they are each defined separately in the DLA.

BE&K is silent on the consequence of its interpretation, which is that if the DLA applies, and conversely does not apply, on a per-Work Order basis, then the work performed by BE&K on a single project could be governed by any number of contracts between the parties.

Finally, and of note, BE&K capitulates on RockTenn's argument that the Court of Chancery failed to address the fact that the $5 million cap in § 1.2 is keyed to total-installed construction costs, and that the monetary amounts identified in the Work Orders are keyed solely to engineering fees, a small subset of total-installed construction costs. BE&K's sole response is to characterize RockTenn's argument as a "derivation of its overall position that the $5 million cap cannot be considered on a work order-by-work order basis." (Ans. Br. at 27) This is demonstrably wrong. Even if, for arguments' sake, the Court of Chancery was correct that the $5 million cap should be applied on a per-work order basis, the DLA would still not

apply in whole or in part. This is because the work performed under the individual work orders almost certainly pertained to total-installed construction costs exceeding $5 million.

For example, Work Order # 3 (A0460-63), which is associated with Purchase Order No. 00551078 (A0453-59), was for replacement and upgrade of the "OCC" (old container cardboard) part of the Hodge Mill. BE&K originally estimated the total cost of this work to be $10 million. (A1808) The cost of the engineering work for Work Order # 3, however, was only estimated to be $362,004.40. (A0460-63) Similarly, Work Order No. 15 (A0427-31), which is associated with Purchase Order No. 00594302 (A0421-26), was for engineering for the upgrades of Paper Machines Numbers 4 and 5. BE&K originally estimated the total cost of this work to be $35 million. (A1808) Work Order No. 15, however, reflected engineering fees of only $285,000. (A0427-31) RockTenn has repeatedly raised this argument, and BE&K has done nothing but ignore it. The Court of Chancery similarly ignored it and issued an opinion without a shred of evidence, or finding of fact, that any of BE&K's Work Orders is associated with total-installed construction costs of less than $5 million. The net result is that the Court of Chancery deleted the $5 million cap entirely from § 1.2.

In sum, the Court of Chancery erred in ruling on Summary Judgment that the DLA applies to all work performed by BE&K, especially in the face of § 1.2. This Court should reverse, and direct that all issues regarding the DLA, and the work performed pursuant to it, should be decided in the pending Superior Court action, where BE&K sought to litigate in the first place.

IV. THE COURT OF CHANCERY ERRED IN DENYING DISCOVERY AND THEN RESOLVING DISPUTED FACTS AGAINST ROCKTENN.

Summary judgment can only be granted where there is no material factual dispute and only after the parties have had access to relevant material through discovery. However, despite identifying the factual issues in dispute and filing an affidavit demonstrating its need for discovery pursuant to Court of Chancery Rules 56(e) and (f), the Court of Chancery prematurely granted summary judgment adverse to RockTenn before discovery could be completed. In so ruling, the Court of Chancery made factual determinations and inferences adverse to RockTenn.

As BE&K's brief concedes, some of the key issues material to the Court of Chancery's legal determination that the DLA governs BE&K's work are: (1) who issued "Work Orders"; and (2) whether RockTenn "approved" or "issued" documents that are deemed to be Work Orders, and more specifically, whether it agreed with the reference to the DLA that BE&K had unilaterally placed in the Work Orders. (Ans. Br. at 31-34) The Court of Chancery ignored the disputed issues of fact raised by RockTenn pursuant to Rule 56 and procedurally improperly rendered its own dispositive factual findings as to each.

Who issued "Work Orders": During summary judgment briefing, the parties agreed that it was BE&K who first issued Work Orders. (*See* A0314-15 (listing "BE&K Initiating WO(s)); A0901 ("The most that can fairly be said from what BE&K provided to the Court is that it appears someone within BE&K who drafted these Work Order documents referenced the [DLA]").) During oral argument, it became clear that the Court is confused about which documents

constitute Work Orders, which the parties agree are "Contract Documents" under the DLA, and which documents are merely "Purchase Orders," which BE&K and the Court of Chancery agree were not Contract Documents. Vice Chancellor Laster inquired of RockTenn's counsel, "Why do you say that the work orders were issued by BE&K?" and then cited to the requirement in DLA § 1.2 that owner (i.e., RockTenn), not BE&K, was to issue Work Orders.[7] (Ex. C at 59-63) Counsel explained how the documents, based upon content and chronology, were self-evidently issued by BE&K. (*Id*.) The Court then inquired about the contents of the documents and what the Court should make of them. (*Id.*) ("If your view is that this is a nonbinding purchase order, what do I do with the word 'contract' at the top?" "What do I do with the words 'contract amendment' at the bottom?") Counsel replied that more information was needed because signatures were missing and there was no manifestation of agreement. (*Id*.)

In its Answering Brief, BE&K does not dispute that the Court of Chancery's Opinion erroneously cites to documents as "Work Orders" that both parties had agreed were Purchase Orders. (Ans. Br. at 31) Instead, BE&K claims that because the Work Orders unilaterally generated by BE&K follow the format specified for a Work Order in the DLA, the Court of Chancery was warranted in holding that the DLA governs. (*Id*. at 31-32.) If, as BE&K claims, this formatting similarity was the "the single, dispositive factor" for the trial court's decision (*Id.* at 34), then the trial court made a host of inferences and findings of fact adverse to RockTenn, and

[7] It is, in fact, curious that BE&K issued Work Orders since the DLA specifies that it is the owner (RockTenn) who was to issue Work Orders. The parties' undisputed departure from the requirements of the DLA was yet another flag that discovery was needed. (*See* Ex. C at 60-61.)

did so contrary to evidence provided by RockTenn.

For example, RockTenn disputed that the parties had even identified the final versions of each Purchase Order, with RockTenn claiming that there were multiple iterations of the documents. (A0254-55; A0256-68 (including a spreadsheet showing multiple "purchase orders" corresponding to a particular number); A0286 ("The documents uncovered so far show that for each purchase order number, there are several versions of a purchase order form, and each version may differ as to the names of the parties, dollar amounts, dates of submission, signing and/or execution, and may or may not be signed by different individuals on behalf of different entities. To make sense of how these documents fit together, and what they mean, requires discovery."); Ex. C. at 61:5-10 (explaining there were numerous versions of the same documents and "we don't know which one is the final one"); *see also* A0901; A0910-21; Ex. C at 60-61) The Court of Chancery thus disregarded RockTenn's disputed material facts, not only with the meaning of the documents, but with their very authenticity. This is improper fact-finding on summary judgment, and it is doubly improper without the benefit of discovery.

Whether RockTenn "approved" or "issued" contractually relevant documents and agreed that the DLA should apply: RockTenn not only disputed that the Purchase Orders attached by BE&K to its motion for summary judgment were the final versions, as there were numerous, conflicting versions of each Purchase Order (*see*, *e.g.*, A0254-55; A0256-68; A0286; Ex. C. at 61:5-10),[8] RockTenn also heartily disputed that there was any evidence to indicate that

[8] BE&K's claim that this is a new argument is false. (Ans. Br. at 32)

RockTenn agreed the DLA would govern BE&K's work. (*See* A0901; A0914-17; A1779-804.) RockTenn provided the Court of Chancery with ample evidence demonstrating how it was not RockTenn's intent for the DLA to govern BE&K's work. (*Id*.) Also, at the summary judgment hearing, RockTenn explained to the Court of Chancery why it would not agree that it had "approved" the BE&K Work Orders. (*See* Ex. C at 53.) As noted by RockTenn in the summary judgment briefing, fact issues abounded, including:

> (3) who within RockTenn received those Work Orders and when they received them, (4) whether anyone with any appropriate authority in RockTenn reviewed those Work Orders, (5) whether such RockTenn personnel knowingly and intentionally agreed that the work for the Strategic Project should be governed by the Delaware Law Agreement, notwithstanding the fact that it far exceeded the $5 million limitation and the fact that the Delaware Law Agreement contains a limitation of liability clause appropriate for small, not large, projects.

(B58-59)

Notably, BE&K has never proffered any evidence that RockTenn "approved" or "issued" Work Orders, nor has it offered a shred of evidence that RockTenn agreed that the DLA should govern the work by BE&K. [9]

In sum, BE&K argues the Court of Chancery was correct in concluding that the DLA applies solely because someone had "copied and pasted" into RockTenn's

[9] BE&K misleads in its brief at page 12, the context of which begins on transcript page 59, line 10, in which counsel sought to explain how the parties' practice departed from the DLA requirements. Counsel corrected herself when she used the word "issued," stating, "RockTenn then issued -- generates a purchase order which, as we've noted in prior pleadings[s], we have like ten different purchase orders for each -- under each name. And they all vary. **We don't know which one is the final one**." (emphasis added) (Ex. C at 59-61; *see also* A0256-68 (explaining RockTenn's dispute about the authenticity of the documents relied upon by BE&K).)

requisition system (where Purchase Orders are generated) certain documents that had been unilaterally generated by BE&K. On its face, this amounts to plain legal error and also demonstrates how the Court of Chancery ignored contrary evidence. In light of the Court of Chancery's grant of summary judgment without the benefit of discovery, and in light of RockTenn's Rule 56 (e) and (f) affidavit, it is entirely appropriate to note that as a result of recent discovery in the Georgia Action, it is clear that BE&K had direct access to RockTenn's requisition system. (Op. Br. at 34) This raises serious questions about the propriety of relying on any "copied and pasted" BE&K documents in RockTenn's system. It also demonstrates how it was improper to grant the summary judgment without discovery.

Reversal is "mandated" if a trial court denies discovery when discovery would not interfere with the administration of justice. (*See* Op. Br. at 27 (citing *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1061 (Del. 1986)); *see* Ans. Br. at 29 (BE&K does not dispute).); *Doe v. Abington Friends Sch.*, 480 F.3d 252 (3d Cir. 2007 (vacating trial court grant of summary judgment where trial court did not allow discovery requested in Rule 56(f) affidavit); *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292 (2d Cir. 2003) (same). BE&K's blanket statement that a trial court has discretion to deny discovery does not address this Court's holding that a trial court abuses its discretion and must be reversed when it denies parties "a reasonable opportunity to develop material facts in opposition" to summary judgment. *Mann*, 517 A.2d at 1060. As demonstrated above, RockTenn was denied a reasonable opportunity to develop facts highly pertinent to the issues decided by the Court of Chancery, and reversal is warranted.

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 and the DLA in the Delaware Action currently pending in the Superior Court.

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