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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE'S CORRECTED ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

This appeal from the Court of Chancery involves a contract dispute between William E. Pettit and Susan van Houten (together, "Plaintiffs") and HD Supply Holdings, Inc. ("HD Supply" or the "Company"), a Delaware corporation, arising out of the Company's 2013 Omnibus Incentive Plan (the "Plan"). The Compensation Committee of the Company's Board of Directors (the "Administrator") administers the Plan for the benefit of, among others, eligible employees of the Company's wholly-owned subsidiaries, including Plaintiffs.

With this action, Plaintiffs, for themselves and on behalf of a putative class, challenge the Administrator's interpretation of the Plan. Specifically, Plaintiffs assert that the Company breached the Plan when it failed to accelerate vesting of Plaintiffs' unvested equity awards upon the sale of the Company's power solutions business unit ("Power Solutions") (the "Power Solutions Sale" or the "Sale"). Plaintiffs' Complaint contains three theories of liability: breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. As held by the Court of Chancery, and for the reasons herein, their Complaint fails to state a viable claim.

Not long after Plaintiffs voluntarily filed this action in the Delaware Court of Chancery, thereby subjecting themselves to the jurisdiction and venue of the Delaware courts, Plaintiffs had a change of heart. They twice sought to shut down

this action by filing motions to amend and stay on bases related to a prior pending action that Plaintiffs filed in Illinois.

Prior to initiating this action, Plaintiffs had filed an ***identical*** putative class action against HD Supply, alleging the same operative facts and claims, in the Illinois Circuit Court (the "Illinois Action"). The Circuit Court dismissed Plaintiffs' Illinois Action based on a forum selection clause in the Company's certificate of incorporation, which makes the Delaware Court of Chancery the exclusive forum for this dispute. Plaintiffs appealed that dismissal to the Illinois Appellate Court (the "Illinois Appeal"). They then sought to use this Delaware action to collaterally attack the Illinois decisions, as detailed herein.

For the sake of clarity, the sole merits issue before the Court is a simple one: whether the Power Solutions Sale constituted a "Change in Control" as defined in the Plan. Plaintiffs, however, appeal three decisions by the Court of Chancery:

(i) the court's denial of Plaintiffs' motion to amend their Complaint to add a declaratory judgment claim seeking a declaration that the Company's forum selection clause does not apply to this dispute (the "Declaratory Judgment Count"), (Pls. Ex. A); [1]

(ii) the court's denial of Plaintiffs' motion to stay this action pending resolution of their Illinois Appeal, (Pls. Ex. B); and

(iii) the court's grant of judgment on the pleadings in favor of HD Supply, (Pls. Ex. C).

[1] The following abbreviations are used herein: "Pls.__" refers to the Opening Brief of Appellants; "A__" refers to the Appendix to Appellants' Opening Brief; and "B__" refers to the Appendix to Appellee's Answering Brief.

For the reasons herein, HD Supply respectfully requests that the Court affirm each decision.

First, in a detailed written order, the Court of Chancery properly exercised its discretion to deny Plaintiffs' motion to for leave to amend their Complaint to add the Declaratory Judgment Count. *See* (Pls. Ex. A). The court found that the Illinois trial court had already addressed the issue in that count and that Plaintiffs' collateral attack on the Illinois court's dismissal was improper. In any event, the issue is now moot. As described more fully below, the Illinois Appellate Court affirmed the dismissal of the Illinois Action. Plaintiffs chose not to seek review of this decision in the Illinois Supreme Court, and the time for doing so has passed. As such, the Illinois Appellate Court entered final judgment on this issue, collaterally estopping Plaintiffs from relitigating the applicability of the forum selection clause—*i.e.*, their Declaratory Judgment Count—here.

Second, in another detailed written order, the court properly exercised its discretion to deny Plaintiffs' motion to stay the action pending the outcome of their Illinois Appeal. *See* (Pls. Ex. B). The court found that a stay was not warranted where Plaintiffs voluntarily initiated this action after filing the Illinois Action and the Illinois Appeal and then sought to stay this action only for tactical purposes. Regardless, the Illinois Appellate Court's final judgment moots Plaintiffs' motion to stay.

Third, the court correctly entered judgment on the pleadings in favor of HD Supply because the Plan's unambiguous language forecloses Plaintiffs' claims as a matter of law. *See* (Pls. Ex. C). Plaintiffs premise their entire Complaint on the erroneous theory that the Power Solutions Sale constituted a "Change in Control" under Plan Section 2.10(b), and thus, triggered accelerated vesting of Plaintiffs' unvested equity awards. Finding that theory "contrary to the plain language of the [P]lan," the court held that (i) under no reasonable interpretation of the Plan is the Power Solutions Sale a "Change in Control," and, therefore, Plaintiffs failed to plead a breach of the Plan; and, alternatively, (ii) even if the Plan's provisions were ambiguous, Plaintiffs' claims still fail because the Plan vests the Administrator with the power to interpret the Plan, and Plaintiffs did not plead any basis to question the Administrator's good faith interpretation. Finally, the court found that Plaintiffs failed to state claims for breach of the implied covenant of good faith and fair dealing and unjust enrichment because the Plan governs the dispute—*i.e.*, the claim lies in contract. For these reasons, HD Supply respectfully submits that the Court should affirm the judgment in HD Supply's favor.

SUMMARY OF ARGUMENT

1. *Denied*. Judgment on the pleadings is the proper framework for enforcing unambiguous contracts like the Plan. To avoid that conclusion here, Plaintiffs twist the Court of Chancery's clear holdings to suit their argument. For the reasons that follow, the Court of Chancery correctly entered judgment on the pleadings in favor of HD Supply.

(a) *Denied*. The Court of Chancery correctly granted judgment on Plaintiffs' breach of contract claim for failure to plead a breach of the Plan. Plaintiffs' claim hinges on whether the Power Solutions Sale constituted a "Change in Control" under Section 2.10(b), triggering accelerated vesting provisions. The court properly held that (i) the Plan is unambiguous; and (ii) the Power Solutions Sale—a sale of the equity interests in indirect, wholly-owned subsidiaries and related assets—was not a "Change in Control," as defined by the Plan because it neither involved the Company nor was a transaction similar to a merger of the Company, as Section 2.10(b) requires.

(b) *Denied*. The Court of Chancery correctly held that, because the Plan expressly authorizes the Administrator to conclusively interpret the Plan's provisions, it must defer to the Administrator's interpretation that the Power Solutions Sale was not a "Change in Control," even assuming the Plan was ambiguous. The court also correctly concluded that Plaintiffs failed to plead any

allegations of bad faith by the Administrator that would justify setting aside the Administrator's interpretation.

(c) *Denied.* The Court of Chancery properly granted judgment on Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing because the Plan's terms govern this dispute as to whether a "Change in Control" occurred, and Plaintiffs failed to plead a separate actionable implied duty.

(d) *Denied*. The Court of Chancery properly granted judgment on Plaintiffs' claim for unjust enrichment because Plaintiffs pled no facts challenging HD Supply's conduct on a basis not entirely governed by the Plan.

2. *Denied*. Because the Illinois Appellate Court entered a final judgment on the very issue Plaintiffs raise in their Declaratory Judgment Count—*i.e.*, whether the Company's forum selection clause applies to this dispute such that Plaintiffs must litigate their claims in the Delaware Court of Chancery—that count is collaterally estopped and rendered moot. Accordingly, Plaintiffs' motion for leave to amend their Complaint is moot. Regardless, the Court did not abuse its discretion when it denied Plaintiffs' motion for leave to amend their Complaint, finding Plaintiffs sought to use the declaratory judgment procedure to improperly collaterally attack the Illinois trial court's ruling.

3. *Denied*. The Illinois Appellate Court's final judgment mooted Plaintiffs' motion to stay this action pending an outcome of that appeal.

Nonetheless, the Court of Chancery did not abuse its discretion in denying the stay when it applied sound Delaware law counseling against a stay where Plaintiffs sought to stay the representative action they voluntarily filed.

STATEMENT OF FACTS

A. HD Supply Holdings, Inc.—The "Company"

HD Supply is a publicly traded Delaware corporation headquartered in Georgia. (A29 ¶9). Through numerous wholly-owned subsidiaries, the Company engages in industrial distribution, primarily in North America. (B163; A29 ¶11). Prior to October 2015, certain of its subsidiaries operated a business unit known as "Power Solutions." (A29 ¶¶11–12). This action arises out of the fall 2015 sale of Power Solutions to Anixter, Inc. ("Anixter"), discussed below. (A28 ¶¶5-7).

The Company's certificate of incorporation contains a forum selection clause that designates the Delaware Court of Chancery as the exclusive forum for certain disputes. (B162, Art. XII). Delaware law governs the Plan and this dispute. (B28 §15.8).

B. Equity Grants Under the 2013 Omnibus Incentive Plan

Eligible employees, including certain Power Solutions employees, received Company stock options and awards granted under the 2013 Omnibus Incentive Plan (the "Plan"). (A30 ¶¶14-16; *see also* B2 §2.5 ("Award")). Plaintiffs contend that they were participants in the Plan "who had been granted restricted stock awards and stock options" thereunder. (A30 ¶13).

An "Administrator," the Compensation Committee of the Company's Board of Directors, administers the Plan. (B8 §3.1; B113). The Plan provides that "[a]ll

actions taken and all interpretations, decisions and determinations made by the Administrator, in good faith shall be final and binding[.]" (B9 §3.4). The Administrator has the specific powers in its discretion to

> (i) determine whether, to what extent, and pursuant to what circumstances...an Award may be canceled, forfeited or surrendered;
>
> (j) suspend or accelerate vesting of any Award granted under the Plan;
>
> (k) construe and interpret the terms of the Plan and Awards granted pursuant to the Plan; and
>
> (l) make all other decisions and determinations that may be required pursuant to the Plan or as the Administrator deems necessary or advisable to administer the Plan.

(B8-9 §3.2). The Administrator also has the power to decide all claims related to Plan benefits and rights, and its "decision is final and conclusive and binding." (B29 §15.13). "The Administrator's determinations under the Plan need not be uniform and may be made by the Administrator selectively among persons who receive, or are eligible to receive, Awards under the Plan, whether or not such persons are similarly situated." (B9 §3.4).

The Plan contains a provision governing the treatment of certain stock awards in the event of a "Change in Control." (B24 §14.1). "Change in Control" is defined in pertinent part as:

> ***the merger, consolidation or other similar transaction involving the Company***, as a result of which persons who were holders of voting securities of the Company immediately prior to such merger,

> consolidation, or other similar transaction do not, or any of the Investors, does not, immediately thereafter, beneficially own, directly or indirectly, more than 50% of the combined voting power entitled to vote generally in the election of directors of the merged or consolidated company[.]

(B3 §2.10(b) (emphasis added)).

The Plan defines "Company" as "HD Supply Holdings, Inc." (B4 §2.13). The Plan distinctly defines "Subsidiary" as "any entity that is directly or indirectly controlled by the Company or any entity in which the Company has at least a 50% equity interest"—*e.g.*, Power Solutions. (B7 §2.55).

C. The Power Solutions Sale

On July 15, 2015, certain of the Company's wholly-owned subsidiaries ("Sellers") entered into a Purchase Agreement with Anixter pursuant to which Anixter agreed to acquire the Power Solutions business—the Power Solutions Sale. *E.g.*, (A33 ¶¶24-26; B31-112). The Company was ***not*** a party or a signatory to that agreement.[2] *See* (B31, B110-12).

On October 5, 2015, the Sellers and Anixter completed the Power Solutions Sale, and Anixter purchased all equity interests of three Company ***subsidiaries*** and certain assets of the Sellers and their affiliates for $825 million (excluding post-closing working capital adjustment). *See* (A33 ¶26; B125 ¶5; B31-112). Power Solutions accounted for approximately 13.4% of the Company's total assets and

[2] The Vice Chancellor misspoke when he stated that the Company (HD Supply Holdings, Inc.) was a "signatory" to the Purchase Agreement. (A140).

9.3% of its adjusted EBITDA on a consolidated basis. (B125 ¶5). The purchase price represented less than 8% of the Company's enterprise value. (*Id.*). Anixter did ***not*** purchase any of the Company's equity. (B31-112).

Following the Sale, the Power Solutions employees, including Plaintiffs, were terminated, and, in most cases, Anixter immediately rehired them. (A34 ¶27; A34 ¶28). The Sale was not a "Change in Control" of the Company under the Plan, and therefore Plaintiffs' and other option holders' ***unvested*** stock awards were forfeited and canceled upon their termination. (B113-114; *see also* B23 §13.2).

D. Plaintiffs' Demand And The Administrator's Decision

On December 21, 2015, counsel for twenty "Represented Employees," including Plaintiffs, sent a letter to the Company's General Counsel and Corporate Secretary, claiming that under the Plan certain former Power Solutions employees were entitled to full vesting of "restricted shares and stock options" in the Company due to the Power Solutions Sale, and demanding the value of each restricted share as if vested upon the Sale. In relevant part, the Demand Letter claims that the Sale constituted a "Change in Control" under Plan Section §2.10(b). (B163).

On April 14, 2016, the Administrator, aided by independent Delaware counsel Morris, Nichols, Arsht & Tunnell (which was specially engaged to address

the demand), formally denied Plaintiffs' claim. The Administrator found, in pertinent part:

> 1. Any unvested awards previously granted to employees of the Power Solutions business were forfeited and canceled upon the termination of their employment in connection with the completion of the [Power Solutions Sale]….
>
> 4. The [Sale] does not constitute a "Change in Control" of the Company as defined in the Plan.
>
> 5. There are no extra-contractual bases to depart from the Plan.

(B113-14).

E. Plaintiffs' Illinois Action

On May 18, 2016, Plaintiffs filed a lawsuit, captioned *Pettit v. HD Supply Holdings, Inc.*, 2016-CH-06885, in the Circuit Court of Cook County, Illinois (the "Illinois Action"). The complaint in that action was substantially identical to the Complaint here and challenged the same conduct and raised the same legal question presented here: whether the Power Solutions Sale constituted a "Change in Control" of the parent Company under the Plan.

On October 11, 2016, the Illinois trial court dismissed the action on procedural grounds, ruling that the forum selection clause in the Company's certificate of incorporation made the Delaware Court of Chancery the exclusive forum for Plaintiffs' claims. (B200). Plaintiffs filed a motion for reconsideration, which the court denied on November 22, 2016. (B201). On December 2, 2016, Plaintiffs appealed the dismissal to the Illinois Appellate Court.

On September 27, 2017, the Illinois Appellate Court entered a final judgment affirming the trial court's dismissal of the Illinois Action in its entirety. *See* Ex. A attached hereto, *Pettit v. HD Supply Holdings, Inc.*, No. 1-16-3213 (Ill. App. 1 Dist. Sept. 27, 2017) (ORDER).[3] Notably, Plaintiffs fail to mention the Illinois Appellate Court ruling in their opening brief.

Plaintiffs' opening brief contains two false statements about the current status of the Illinois Action:

1. "The sole issue before the appellate court ***(and now the Illinois Supreme Court)*** is the applicability of Defendant's corporate-charter venue provision."

2. ". . . the venue issue in Illinois – ***an issue that is still unresolved and very well may end with a ruling from the Illinois Supreme Court*** that Plaintiffs never should have had to file in Delaware in the first place."

(Pls. 36-37 (emphasis added)). To the contrary, the applicability of the forum selection clause (*i.e.*, "the venue issue") is not—and has never been—pending before the Illinois Supreme Court. In fact, Plaintiffs did ***not*** file a petition for leave to appeal the Illinois Appellate Court judgment to the Illinois Supreme Court.[4] The

[3] Pursuant to Delaware Uniform Rule of Evidence 201, the Court may take judicial notice of publicly available documents, including court orders. *See, e.g.*, *In re Ebix, Inc. S'holder Litig*., 2016 WL 208402, at *10 (Del. Ch. Jan. 15, 2016).

[4] HD Supply's counsel has repeatedly checked the dockets in the Illinois Supreme Court and the Illinois Appellate Court, First Judicial District, since the Illinois Appellate Court's final judgment on September 27, 2017. As of the date of this brief, Plaintiffs have not filed anything in either court since the Appellate

time for filing a petition for leave to appeal to the Illinois Supreme Court expired on November 1, 2017—six weeks before Plaintiffs filed their opening brief here. *See* Ill. Sup. Ct. R. 315(b)(1) ("[A] party seeking leave to appeal must file the petition for leave in the Supreme Court within 35 days after the entry of such judgment."); (b)(2) ("The time for filing a petition for leave to appeal a Rule 23 order shall be the same as for published opinions[.]"). Simply put, the Illinois Appellate Court judgment is final.

F. Proceedings Below

On February 16, 2017, with their Illinois Appeal pending, Plaintiffs filed this lawsuit in the Delaware Court of Chancery, challenging the same conduct and raising the same legal question at issue in the Illinois Action: whether the Power Solutions Sale constituted a "Change in Control" of the parent Company under the Plan. HD Supply filed its answer and its motion for judgment on the pleadings on March 7 and its brief in support of that motion on March 15.

On March 22, 2017, Plaintiffs moved for leave to file an amended complaint in the Delaware Action, seeking to collaterally attack the Illinois trial court's prior judgment with the Declaratory Judgment Count. Specifically, Plaintiffs sought a declaration that, contrary to the Illinois trial court's decision, the forum selection clause in the Company's certificate of incorporation does not apply to this dispute

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Court's judgment. Nor has HD Supply or its counsel been served with any such filing.

and, thus, did not require Plaintiffs to file in Delaware. (A45). Finding that the Illinois trial court "already addressed this issue," the Court of Chancery denied Plaintiffs' motion on April 28. *See* (Pls. Ex. A, 2). The Court explained that it would "not entertain a collateral attack on another court's ruling disguised as a declaratory judgment" and that "[e]mployment of the declaratory judgment procedure solely to achieve a tactical advantage should not be endorsed." (*Id*. at 2-3).

On May 1, Plaintiffs filed a motion to stay this action pending the outcome of the Illinois Appeal. The Court of Chancery similarly denied that motion on May 31, explaining that a stay is not warranted where, as here, "the plaintiffs originally sought to litigate in this court in an effort to attack the trial court's ruling in the Illinois Action[, and w]hen that request was denied, they reversed course and now seek to avoid litigating here." (Pls. Ex. B, 3 ¶9).

Plaintiffs thereafter filed their opposition to HD Supply's long-pending motion for judgment on the pleadings, which the court orally granted following argument on September 25. (A136; Pls. Ex. C). Specifically, the court held that Plaintiffs had not pled a "Change in Control" under the Plan's terms and, therefore, Plaintiffs failed to plead a breach of the Plan. (A137). The court reached that holding based on the following conclusions: (i) Plan Section 2.10(b), defining a "Change in Control," applies only to "a change in control of HD Supply," not

Company subsidiaries or assets, like Power Solutions, (A137); (ii) the other "Change in Control" definitions in Section 2.10 confirm that reading of Section 2.10(b), (A138, 141-42); and (iii) Plaintiffs' argument "is largely inconsistent with" a "Change in Control Price," defined in Plan Section 2.14, (A142-43).

In dismissing Plaintiffs' argument, the court made it clear that Plaintiffs' argument was not a reasonable reading of the Plan. (A141). The court described their argument as "contrary to the plain language of the plan," (A137); and "so clever and counterintuitive that it took [him] awhile to figure out what they were actually talking about," (A139).

The court held, in the alternative that, even assuming the Plan's "Change in Control" provision was ambiguous, because Plaintiffs had not pled any basis to question the Administrator's good-faith interpretation, it must defer to the Administrator's interpretation as required under the Plan. (A143-44).

Finally, the court held that Plaintiffs failed to state claims for the implied covenant of good faith and fair dealing and unjust enrichment because the Plan's plain language governs the dispute and, thus, the claim—and any relief—lies in contract. (A145-46).

Undeterred by the final rulings by the Illinois Appellate Court and the Court of Chancery, Plaintiffs have appealed all three orders of the Court of Chancery.

ARGUMENT

This Court can resolve this dispute, just as the Court of Chancery did, by reference to the four corners of the operative contract, the Plan. Because the Plan's plain and unambiguous terms foreclose any theory of relief, Plaintiffs' Complaint fails to state a claim, and the Court of Chancery correctly entered judgment on the pleadings in HD Supply's favor.

Because the definition of "Change in Control" ***of the Company*** does not include—nor does any reasonable interpretation include—a Subsidiary and related asset sale of the type at issue here, and because Plaintiffs offer no basis to second-guess the Administrator's final and binding determination, Plaintiffs' breach of contract claim fails as a matter of law.

Plaintiffs' remaining claims, for breach of the implied covenant of good faith and fair dealing and unjust enrichment, likewise fail because they are premised upon Plaintiffs' flawed breach of contract claim. Delaware law is clear that neither claim may lie where an express contract (the Plan) controls the issue in dispute.

Plaintiffs' motion to amend and motion to stay, also on appeal, were tactical moves untethered to the merits of this dispute. The Court of Chancery properly recognized Plaintiffs' efforts at tactical gamesmanship to avoid litigating the merits of their claims filed in Delaware, and properly rejected Plaintiffs' efforts to

collaterally attack the Illinois trial court's ruling that Illinois is not a proper forum. Accordingly, the Court of Chancery did not abuse its discretion in denying both motions, and the rulings below should be affirmed. Moreover, the final ruling of the Illinois Appellate Court renders these claims moot, as explained below.

I. THE COURT OF CHANCERY PROPERLY GRANTED JUDGMENT ON THE PLEADINGS IN THE COMPANY'S FAVOR BECAUSE THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE PLAN FORECLOSES PLAINTIFFS' CLAIMS.

A. Question Presented

Whether the Court of Chancery correctly granted judgment on the pleadings in favor of HD Supply when (i) the Power Solutions Sale was not a "Change in Control" under the Plan's unambiguous definition; and (ii) the Plan grants final, binding authority to the Administrator to interpret the Plan. (B171-213; B245-76).

B. Scope of Review

This Court reviews de novo the Court of Chancery's grant of a motion for judgment on the pleadings. *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 925 (Del. 2017).

C. Merits of Argument

Plaintiffs' Complaint asserts three claims: breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. The Plan's plain and unambiguous terms foreclose Plaintiffs' breach of contract claim for two independent reasons: (i) the Power Solutions Sale was not a "Change in Control" as defined by the Plan; and (ii) the Plan grants final, binding authority to the Administrator to interpret the Plan.[5] Because the Plan controls this dispute,

[5] As detailed in HD Supply's briefing below, but not reached by the Court of Chancery, Plaintiffs' claims are also time-barred as a matter of law because

Plaintiffs' other claims, namely breach of the implied covenant of good faith and fair dealing and unjust enrichment, provide no bases for relief. For those reasons, as detailed below, the Court should affirm the Court of Chancery's entry of judgment on the pleadings in favor of HD Supply.

1. Plaintiffs Misconstrue the Court of Chancery's Holding to No Avail.

As a preliminary matter, Plaintiffs' arguments to this Court center on their erroneous notion that the Court of Chancery "***held*** that the plain language of the Plan established that the change-in-control provision had been triggered by the Power Solutions transaction which should have resulted in accelerated vesting of Plaintiffs' equities." (Pls. 13 (emphasis added); *see also* Pls. 19 (arguing same regarding deference to Administrator); 23 (implied covenant claim); 25 (unjust enrichment claim)). Plaintiffs concoct this conclusion—which could not be farther from the truth—by ignoring the Court of Chancery's actual holdings and disingenuously cherry-picking the court's words from the oral transcript ruling.

Quite the opposite, the court plainly rejected Plaintiffs' argument as "***contrary to*** the plain language of the plan." (A137 (emphasis added)). Parsing through Plaintiffs' argument, the court characterized it as "not an immediately reasonable reading." (A141). The Court made it clear that the Sale did not qualify

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Plaintiffs failed to file a timely claim with the Administrator within the Plan's internal claim deadline. *See* (B29 §15.13; B196-98).

as a Change in Control because it was not a change of control of the parent Company. *See* (A137 ("[I]t is clear that what the plan is contemplating is a change of control of HD Supply."); A138 ("It is talking about a change of control at the level of the Company, capital C company, which is defined as HD Supply."); A138-39 ("[O]n a cold read, I have to tell you this is a provision that is talking about...a Company-level type transaction.")).

The Court should not indulge Plaintiffs' desperate attempt to save their deficient Complaint by twisting the Court of Chancery's words and misconstruing its holding. This Court should affirm the Court of Chancery's entry of judgment on the pleadings in HD Supply's favor for the reasons that follow.

2. The Court of Chancery Properly Held that Plaintiffs Did Not Plead A Breach Of The Plan Contract Because The Power Solutions Sale Was Not A "Change in Control."

This Court need not look beyond the Plan's unambiguous language to affirm the Court of Chancery's entry of judgment on the pleadings. Contract interpretation "starts with the terms of the contract. If the terms are plain on their face, then the analysis stops there." *Sanders v. Wang*, 1999 WL 1044880, at *6 (Del. Ch. Nov. 8, 1999). Judgment on the pleadings "is the proper framework for enforcing unambiguous contracts because there is no need to resolve material disputes of fact" and because "a determination of whether a contract is ambiguous is a question for the court to resolve as a matter of law." *Id.* at *5 (citation

omitted); *accord OSI Sys., Inc. v. Instrumentarium Corp.*, 892 A.2d 1086, 1090 (Del. Ch. 2006).

The Plan demonstrates that, as the Court of Chancery held, Plaintiffs' breach of contract claim rests on an erroneous interpretation of the term "Change in Control"—*i.e.*, that the Power Solutions Sale constituted a "Change in Control" under Section 2.10(b). (A31 ¶18); *see also* (Pls. 14-16 (contending that their proffered "text-based interpretation" is enough to entitle them to discovery)). As discussed below, the Power Solutions Sale was not a "Change in Control" because (i) the "Company" (HD Supply Holdings, Inc.) was ***not*** involved in the Sale; and (ii) the Sale was ***not*** a "merger, consolidation or other similar transaction."

a. The Power Solutions Sale Did Not Involve HD Supply.

Determinative here, to qualify as a "Change in Control," the Power Solutions Sale had to "involv[e] the Company." (B3 §2.10(b)). The Plan defines "Company" as "HD Supply Holdings, Inc."—*i.e.*, the parent company. (B4 §2.13); *accord* (Pls. 16). The Company, however, was not a party to the Power Solutions Sale. *See* (B31 (listing parties)).[6] Rather, non-parties and Company

[6] Plaintiffs actually misstated below that HD Supply entered into the Purchase Agreement; it did not. *Compare* (A33 ¶24), *with* (B31); *see supra* Facts §C. "[I]n the case of a conflict between the exhibit and the pleading, the exhibit controls." *Abt v. Harmony Mill Ltd. P'ship*, 1992 WL 380615, at *2 (Del. Ch. Dec. 21, 1992) (citation omitted).

subsidiaries were the only entities involved in the Sale. *See id*.; *accord* (Pls. 9 ("Sale of or by [the Company's] wholly owned subsidiaries.")).

The Plan, specifically Section 2.10, is the best evidence of the parties' intent regarding the definition of "Change in Control." *See Salamone v. Gorman*, 106 A.3d 354, 368 (Del. 2014) ("[T]his Court will give priority to the parties' intentions as reflected in the four corners of the agreement, construing the agreement as a whole and giving effect to all its provisions." (internal quotations and citation omitted)). As the Court of Chancery held, a plain reading reveals that the Plan defines a "Change in Control" at the Company level, not at the "Subsidiary" or business unit level. *See* (B3 §2.10); *accord* (A138-39). The Plan clearly distinguishes between the "Company" and its "Subsidiaries"—*e.g*., Power Solutions. *See* (B4 § 2.13; B7 §2.55). The Plan treats these defined terms distinctly, not synonymously, at least ***forty-five times***. *See, e.g.*, (B2 §2.9; B3 §2.10(a), 2.10(d)). Section 2.10(b)—the section Plaintiffs rely upon—does not reference a "Subsidiary." *See* (B3).

While the Plan could have defined "Change in Control" as "the merger, consolidation or other similar transaction involving the Company ***or its Subsidiaries***," it did not. Plaintiffs' reading, however, asks this Court to do just that by conflating the distinct terms "Company" and "Subsidiary." To do so would violate Delaware contract law by distorting the intended and distinct meanings of

these terms throughout the Plan, generally, and Section 2.10, specifically. *See Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (refusing to "rewrite the contract to appease a party who later wishes to rewrite a contract"). Further, it would impermissibly render ***the forty-five times*** the parties used the terms "Company" and "Subsidiary" separately as mere surplusage. *See Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396–97 (Del. 2010) ("We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage."). Thus, Plaintiffs' assertion that the Company was "involved" in the Sale of its Subsidiary business unit—Power Solutions—to which the Company was not even a party, does not square with the Plan's plain language or Delaware law.

Plaintiffs' own allegations lend further support here. Indeed, the Complaint affirmatively states that the Sale was a "change in control of ***Power Solutions***," not the Company. (A34 ¶30 (emphasis added)); *see also* (A37 ¶44 ("The entire Power Solutions business changed ownership[.]")). The Complaint also alleges the Sale involved a third party obtaining equity interests of Subsidiary entities, ***not the Company***. *See* (A33 ¶25 ("Anixter obtained all of the issued and outstanding equity interests of [three subsidiaries]")). Simply put, by Plaintiffs' own allegations, the Sale was ***not*** a "Change in Control" "involving the Company."

b. The Power Solutions Sale Was Not a Merger or Similar Transaction.

To qualify as a "Change in Control," the Power Solutions Sale also had to be a "merger, consolidation or other similar transaction involving the Company[.]" (B3 §2.10(b)). Plaintiffs allege that the Sale was similar to a merger.[7] (A37 ¶45; Pls. 17). The Court of Chancery held that it was not for the same reasons the Court should here: (i) under the common meanings of "merger" and "other similar transaction," the Sale was not a qualifying transaction; and (ii) Plaintiffs' argument, if accepted, would render entire provisions of the Plan meaningless.

First, the Court need only look to the common meanings of "merger" or "similar transaction" to appreciate that the Sale—a Subsidiary and related asset sale—does not, and was not intended to, constitute a "similar transaction" under the Plan. *See Norton v. K-Sea Transp. P'rs, L.P.*, 67 A.3d 354, 360 (Del. 2013) ("We give words their plain meaning unless it appears that the parties intended a special meaning."). "Strictly speaking, a merger means the absorption of one

[7] Plaintiffs contend that the fact that the last sentence of 2.10(b) contains the term "company" (lowercase "c"), rather than "Company" (uppercase "C") demonstrates that the Sale qualifies as a "Change in Control" when "Power Solutions companies" is substituted for "company." (Pls. 16). As the Court of Chancery properly held, this tortured reading is not supported by the Plan's plain language. *See* (A138-140 (describing this argument as "so clever and counterintuitive that it took me awhile to figure out what they were actually talking about," and holding that "it's just not an immediately reasonable reading")). It violates clear principles of contract interpretation as discussed herein, and it disregards the fact that the transaction must involve the Company—HD Supply Holdings, Inc.

corporation by another[.]" *Fidanque v. Am. Maracaibo Co.*, 92 A.2d 311, 315 (Del. Ch. 1952). HD Supply did not absorb, nor was it absorbed by, another corporation.

To determine if the Sale was "similar" to a merger, the Court should look to the "fundamental nature" of the Sale. *See Activision Blizzard, Inc. v. Hayes*, 106 A.3d 1029, 1034 (Del. 2013) (looking to the "fundamental nature" of a stock transaction to determine whether it constituted a merger or similar transaction). Here, certain subsidiaries sold equity interests in and assets of the subsidiaries comprising Power Solutions—nothing more, nothing less. (B31-112). Plaintiffs' allegations confirm this fact. *See* (A29 ¶11 (listing Subsidiary entities comprising Power Solutions); A33 ¶25 ("Anixter obtained all of the issued and outstanding equity interests of [three subsidiaries]."); Pls. 15-16 ("Power Solutions ceased to exist as separate HD Supply subsidiaries[.]")).

The "fundamental nature" of a Subsidiary and related asset sale varies markedly from a merger involving HD Supply—the parent. *See ONTI, Inc. v. Integra Bank*, 751 A.2d 904, 933 (Del. Ch. 1999) (Delaware law "treat[s] a merger differently from the sale of a company"); *Rothschild Int'l Corp. v. Liggett Grp., Inc.*, 463 A.2d 642, 646 (Del. Ch. 1983) ("[A merger] is separate and distinct from…a sale of assets."), *aff'd*, 474 A.2d 133 (Del. 1984). This distinction is abundantly clear here, where it is undisputed that the sale of Subsidiary assets was

limited to only 7.6% of the parent Company's enterprise value and only 13.4% of its total assets. (B125 ¶5); *accord* (A137). Such a Subsidiary and related asset sale is not similar to the merger of the parent Company under any theory.

Second, Plaintiffs' interpretation requires the Court to ignore the Plan's other "Change in Control" provisions. This it cannot do. *See Zohar CDO 2003-1, LLC v. Patriarch P'rs, LLC*, 2016 WL 6248461, at *10 (Del. Ch. Oct. 26, 2016) (rejecting party's interpretation of contractual term "construed in a vacuum" in favor of interpretation consistent with surrounding terms), *aff'd*, 165 A.3d 288 (Del. 2017) (TABLE).

Construing the Plan as a whole, the Sale of a Subsidiary business unit—Power Solutions—was not the type of form or ownership change contemplated by Section 2.10(b) or elsewhere. The Plan's "Change in Control" provisions all contemplate an event that has an existential impact on the parent ***Company***—*i.e.*, an event that fundamentally changes the form or ownership of the HD Supply Holdings, Inc. corporate entity. *See, e.g.*, (B3 §2.10(a) ("the acquisition, directly or indirectly...of more than 50% of the combined voting power of ***the Company's*** then outstanding voting securities" (emphasis added)); §2.10(e) ("the sale, transfer or other disposition of all or substantially all of the assets of ***the Company***" (emphasis added))). Reading Section 2.10 as a whole, as Delaware law requires,

reveals that a qualifying "Change in Control" must be at the Company level, not the Subsidiary level. *See* (A137-38 (holding same)).

As the Court of Chancery found, Section 2.10(e) is instructive because it defines the only type of asset sale that qualifies as a "Change in Control." (B3 §2.10(e)). Plaintiffs' reading of Section 2.10(b) to cover any Subsidiary or asset sales by the Company, even limited ones like the Power Solutions Sale—involving only 13.4% of the parent Company's total assets (B125 §5)—reads Section 2.10(e), which limits qualifying asset sales to sales of "all or substantially all assets of the Company," out of the Plan. *See, e.g.*, (Pls. 17-18). This reading violates the principle that when "interpreting contracts, th[e] Court...avoids interpretations that would result in superfluous verbiage." *Seidensticker v. Gasparilla Inn, Inc*., 2007 WL 4054473, at *3 (Del. Ch. Nov. 8, 2007) (internal quotations omitted).

Furthermore, Section 14.1(b)—addressing accelerated vesting of shares—further demonstrates that a "Change in Control" is an event that fundamentally changes the Company's form or ownership, not its Subsidiaries'. Section 14.1(b) provides that upon a "Change in Control," "[a]wards shall vest and become non-forfeitable and be canceled in exchange for an amount equal to the ***Change in Control Price***." (B25 §14.1(b) (emphasis added)). "Change in Control Price" is defined as "the highest price per share of ***Company Common Stock offered*** in conjunction with any transaction resulting in a Change in Control." (B3-4 §2.11

(emphasis added)). In the Power Solutions Sale, HD Supply did not offer, nor did Anixter buy or receive, any "Company Common Stock"—*i.e.*, stock of HD Supply, the parent (B4 §2.14). *See* (B31-112). Rather, Anixter received only stock and certain assets of Company subsidiaries comprising Power Solutions. (*Id*.). Because no Company Common Stock was offered in conjunction with the Power Solutions Sale, Section 14.1(b) undermines Plaintiffs' argument that the Sale was a qualifying transaction. To conclude otherwise would read this entire provision out of the Plan.

Thus, under no reasonable reading of the Plan's unambiguous terms was the Power Solutions Sale a "Change in Control." Plaintiffs cannot manufacture ambiguity where none exists. *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) ("Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty."). Accordingly, judgment on the pleadings was proper.

c. Extrinsic Evidence, Including the Distribution Services Sale, Is Irrelevant Because the Plan Is Unambiguous.

Plaintiffs urge the Court to look at a different transaction, which they describe as "sale of the Crown Bolt division" (referred to herein as "Distribution Services Sale"), to determine the "contractual intent of the Plan." (Pls. 18). The Court need not consider that sale, or any extra-contractual events, because the

Plan's language is unambiguous. *See O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 288-89 (Del. 2001) ("[W]here the language of a [contract] is clear and unequivocal, the parties are to be bound by its plain meaning.").

Moreover, setting aside Plaintiffs' mischaracterization of the transaction, Plaintiffs' reliance on the Distribution Services Sale is unavailing because the Plan gives the Administrator the power to treat different transactions differently. *See* (B9 §3.4 ("The Administrator's determinations under the Plan need not be uniform and may be made by the Administrator selectively among persons who receive, or are eligible to receive, Awards under the Plan, whether or not such persons are similarly situated.")).

Their reliance on the Distribution Services Sale is further misplaced because this Court "must assess the parties' reasonable expectations at the time of contracting." *Nemec*, 991 A.2d at 1126. The Distribution Services Sale occurred on January 12, 2015—***after*** adoption of the Plan and after the named Plaintiffs became Plan participants. (B133-34 ¶20.) Plainly, a transaction that occurred after Plaintiffs became Plan participants could not have informed their intent or "reasonable expectations" at the time of contracting. Plaintiffs' contention that "the defeated expectations created by the Crown Bolt transaction alone are actionable," (Pls. 18), thus fails as a matter of law.

Furthermore, Plaintiffs premise their claims on fundamental factual inaccuracies because the Distribution Services Sale was not identical to the Power Solutions Sale. *See* (B120-21 (the sales involved different terms and different parties)). Plaintiffs provide no facts in their Complaint—nor could they—to support their allegation that the two transactions were "identical." *See, e.g.*, (A32 ¶¶20–21). As Plaintiffs' own cited case confirms, this distinguishable prior transaction does "***not*** necessarily evidence what the parties intended to occur" in the Power Solutions Sale. *AT&T Corp. v. Lillis*, 953 A.2d 241, 254 (Del. 2008) (emphasis added); (Pls. 18). Thus, as the trial court found, Plaintiffs' improper attempt to circumvent the Plan's clear language by reference to the distinct Distribution Services Sale does not save their claim. (A144-45).

3. The Court of Chancery Properly Deferred to the Administrator's Decision That the Sale Was Not a Change in Control.

As the Court of Chancery correctly held, even if the Plan could be considered ambiguous—which it is not, and for which Plaintiffs have pled no basis—judgment on the pleadings is still proper because the Plan unambiguously grants final, binding authority to the Administrator to interpret the Plan. (B9 §§3.2(k)-(l), 3.4; B29 §15.13; A143-44).

Where an equity plan authorizes an administrator to make final and binding decisions with respect to such plan, Delaware courts routinely defer to the

administrator's decisions. *See, e.g.*, *Friedman v. Khosrowshahi*, 2014 WL 3519188, at *9 (Del. Ch. July 16, 2014) (deferring to the administrator's interpretation of stock incentive plan pursuant to a plan provision stating "the Compensation Committee has the authority 'to interpret the terms and provisions of the Plan and *any award issued under the Plan*'"), *aff'd*, 2015 WL 1001009, at *1 (Del. Mar. 6, 2015) (ORDER) ("[T]he Plan expressly gave the board the authority to resolve any ambiguity itself."); *W.R. Berkley Corp. v. Hall*, 2005 WL 406348, at *4 n.13 (Del. Super. Ct. Feb. 16, 2005) (refusing to "second guess[]" final determination of committee "absent…fraud or bad faith"). Applied here, this Court should defer to the Administrator's good faith determination that the Power Solutions Sale was not a "Change in Control."

Plaintiffs' Complaint offers no valid basis to collaterally attack the Administrator's determination. The Plan and Delaware law require a plaintiff attacking an administrator's decision to plead specific facts showing the decision resulted from bad faith or fraud. *See* (B9 §3.4 (providing that Administrator's "good faith" interpretations and decisions are conclusive)); *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009) ("General allegations of bad faith conduct are not sufficient."); *W.R. Berkley Corp.*, 2005 WL 406348, at *4 & n.13 (requiring "a showing of fraud or bad faith"). Plaintiffs have not pled a single fact in support of their claim that the Administrator exercised its discretion in bad

faith.[8] In fact, the Complaint contains only one conclusory reference to "bad faith," generically asserting that "[t]he Company caused or allowed the bad faith violations of the Management Equity Program." (A38 ¶51). The pleading standards demand more. *Accord* (A145).

To rebuff that conclusion, Plaintiffs contend that it is enough that they "alleged that the [A]dministrator refused to follow the express provisions of the Plan." (Pls. 20). In other words, Plaintiffs equate their simple disagreement with bad faith. Next, without any factual support, Plaintiffs contend that the Administrator acted in bad faith by treating the Power Solutions Sale differently than the Distribution Services Sale. (Pls. 21). As discussed above, reliance on that sale is meritless. *See supra* Argument I.C.2.c. Because Plaintiffs cannot manufacture an issue of fact solely from their disagreement with the Administrator's decision, the Court of Chancery properly deferred to the Administrator's determination that the Power Solutions Sale was not a "Change in Control."

[8] To the contrary, Plaintiffs acknowledge that the Administrator engaged independent, sophisticated Delaware counsel "to conduct a factual and legal investigation of the claim on its behalf," (B115), "exchanged several letters [with Plaintiffs] regarding the nature of the claim," (A34 ¶31), and denied Plaintiffs' claims in a letter detailing its investigation and findings, (B113-21).

4. The Court of Chancery Properly Entered Judgment on Plaintiffs' Breach of the Implied Covenant of Good Faith and Fair Dealing Claim Because The Plan's Terms Control.

Plaintiffs' implied covenant claim fails as a matter of law because the Plan's express terms control the issue in dispute—*i.e.*, whether the Power Solutions Sale constituted a "Change in Control." *See Fortis Advisors LLC v. Dialog Semiconductor PLC*, 2015 WL 401371, at *3 (Del. Ch. Jan. 30, 2015) ("Where the contract speaks directly regarding the issue in dispute, existing contract terms control[.]" (internal quotations omitted)); *Kuroda*, 971 A.2d at 888 ("To the extent [the] implied covenant claim is premised on the failure of defendants to pay money due under the contract, the claim must fail because the express terms of the contract will control such a claim."). Indeed, this claim is indistinguishable from their breach of contract claim. *Compare* (A39 ¶54 ("By refusing to accelerate vesting of all unvested awards upon the sale of Power Solutions, H[D] Supply breached the implied covenant of good faith and fair dealing.")), *with* (A38 ¶47 ("H[D] Supply breached its obligations under the Plan by failing to fully accelerate vesting of unvested equity awards upon the 'change-in-control' of Power Solutions.")).

Plaintiffs attempt to avoid this conclusion by manufacturing "a separate implied duty that Defendant acted in bad faith" based on their "common knowledge" as to the Distribution Services Sale and alleged promises made by HD

Supply "managers." (Pls. 24). As a matter of law, such a free-floating "bad faith" theory of liability is not permissible. *See Fortis Advisors*, 2015 WL 401371, at *3 ("[I]mplied good faith cannot be used to circumvent the parties' bargain, or to create a free-floating duty unattached to the underlying legal documents." (internal quotations omitted)). Further, this argument is meritless because Plaintiffs (i) fail to support any alleged promises with specific facts, and (ii) fail to plead bad faith with specificity.

This Court should not accept Plaintiffs' conclusory allegations of purported promises made by unidentified "managers" at unspecified times. *See, e.g.*, (A32 ¶23). Delaware law requires allegations supported by specific facts. *See Cypress Assocs., LLC v. Sunnyside Cogeneration Assocs. Project*, 2007 WL 148754, at *2 (Del. Ch. Jan. 17, 2007) ("In ruling on a Rule 12(c) motion,…[the court is not] required to accept as true conclusory assertions unsupported by specific factual allegations."). Because Plaintiffs fail to substantiate their allegations with specific facts, their implied covenant claim further fails as a matter of law.[9]

[9] Moreover, only the Administrator has the power to amend the Plan, and certain material modifications require shareholder approval. (B26 ¶15.2(a)). Thus, it would be unreasonable as a matter of law for Plaintiffs to rely upon such alleged oral representations by "managers" even if they occurred.

Further, like their breach of contract claim, this claim fails because Plaintiffs do not adequately allege bad faith. *See Kuroda*, 971 A.2d at 888 ("General allegations of bad faith conduct are not sufficient."); *see supra* Argument I.C.3.

Plaintiffs' cited cases are inapposite. (Pls. 24-25.) In stark contrast to the Complaint here, in *Data Centers, LLC v. 1743 Holdings LLC*, the plaintiff alleged several specific "acts of bad faith." 2015 WL 9464503, at *7 (Del. Super. Ct. Nov. 20, 2015). Also unlike *Data Centers*, Plaintiffs invoke the implied covenant to override the Plan's unambiguous definition of "Change in Control"—namely, to add Subsidiaries' sales of a business unit as a qualifying transaction—and express delegation of discretion to the Administrator. *Id*. The implied covenant, however, operates to fill contractual gaps, and cannot be employed to override the operative contract. *Fortis Advisors*, 2015 WL 401371, at *5; *see also Veloric v. J.G. Wentworth, Inc.*, 2014 WL 4639217, at *17 (Del. Ch. Sept. 18, 2014) ("It is improper...for Plaintiffs to rely upon the implied covenant to attempt to rewrite and expand the Change of Control definition….").

Next, Plaintiffs' own allegations defeat their attempt to square this case with cases "where a defendant failed to uphold the plaintiff's reasonable expectations." (Pls. 24 (relying on *Markow v. Synageva Biopharma Corp.*, 2016 WL 1613419 (Del. Super. Ct. Mar. 3, 2016))); *see also Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400, 421 (Del. 2013) ("Applying the implied covenant is a 'cautious

enterprise'...we must assess the parties' reasonable expectations at the time of contracting." (citation omitted)), *overruled on other grounds by Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013). The alleged extra-contractual events they cite occurred well ***after*** contracting. *See* (A32 ¶20 (2014 Distribution Services Sale); ¶23 ("In 2015, Plaintiffs were assured multiple times by HD Supply's senior executives and management….")). The Plan unambiguously outlined Plaintiffs' only reasonable expectations here. *See* (B3 §2.10 ("Change in Control"); B24-25 §14.1 ("Accelerated Vesting and Payment")).

In sum, because Plaintiffs' implied covenant claim is indistinguishable from their breach of contract claim, which the Plan unambiguously forecloses, and because Plaintiffs provide no gap to fill or basis to infer an implied Plan term, this claim fails as a matter of law.

5. The Court of Chancery Properly Held that Plaintiffs' Claim for Unjust Enrichment Fails Because It is Premised On the Enforceable Plan Contract.

Finally, Plaintiffs fail to state an alternative claim for unjust enrichment because their "Complaint contains no facts challenging [Defendant's] conduct on a basis not comprehensively governed by the [Plan]." *BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp.*, 2009 WL 264088, at *8 (Del. Ch. Feb. 3, 2009); *id.* at *7 ("[W]hether a contract already governs" is "the threshold inquiry[.]").

Plaintiffs correctly contend that unjust enrichment may be pled in the alternative where a "plaintiff pleads a right to recovery not controlled by contract." (Pls. 26 (quoting *Great Hill Equity P'rs IV, LP v. SIG Growth Equity Fund I, LLLP*, 2014 WL 6703980 (Del. Ch. Nov. 26, 2014))). However, the claim, as pled, arises entirely from the Plan. *See* (A39 ¶58 ("***[T]he failure to adhere to the terms of the [Plan]*** bestowed upon H[D] Supply improper benefits by improper and/or unlawful means." (emphasis added))).

Plaintiffs nonetheless contend that they have a right to recover "regardless of the Plan language" based on alleged promises made by Company representatives. (Pls. 26). As noted, Plaintiffs have provided no factual support for any purported promises made by unidentified "executives and management" at unspecified times. Such pleading does not suffice under Delaware law. *See Great Hill*, 2014 WL 6703980 at *27 ("[T]he right to plead alternative theories does not obviate the obligation to provide factual support for each theory." (internal quotations omitted)). Thus, because Plaintiffs fail to plead a right to recover not controlled by the Plan, the Court of Chancery correctly entered judgment on their unjust enrichment claim.

II. PLAINTIFFS' MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT IS MOOT; REGARDLESS, THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION IN DENYING IT.

A. Question Presented

Whether the Court of Chancery properly exercised its discretion to deny Plaintiffs' motion for leave to file an amended complaint to add the Declaratory Judgment Count seeking a declaration that was purely advisory and sought for the sole purpose of collaterally attacking an Illinois trial court judgment. (B202-13).

B. Scope of Review

"A motion for leave to amend a complaint is always addressed to the discretion of the trial court. While leave to amend should be granted freely when justice requires it, it is always, however, a discretionary matter with the trial judge, and is reviewable on appeal solely for abuse of discretion." *Bokat v. Getty Oil Co*., 262 A.2d 246, 251 (Del. 1970).

C. Merits of Argument

Simply put, as the Court of Chancery recognized, Plaintiffs' proposed amendment was nothing more than an improper "collateral attack on [the Illinois] court's ruling disguised as a declaratory judgment." (Pls. Ex. A, 3 ¶9). As a threshold matter, the Court need not entertain the merits of Plaintiffs' appeal of the order denying their motion to amend because the Illinois Appellate Court's final decision, affirming dismissal based on the forum selection clause, mooted

Plaintiffs' motion. Regardless, Plaintiffs have provided no basis to find the Court of Chancery abused its discretion in denying their motion.

1. The Illinois Appellate Court's Decision Moots Plaintiffs' Motion to Amend Because It Decided the Same Issue Plaintiffs Seek to Add to Their Deficient Complaint.

Following a final judgment, collateral estoppel prevents a party who "litigated an issue in one forum from later relitigating that issue in another forum." *Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, 2015 WL 5278913, at *7 (Del. Ch. Sept. 10, 2015) (citation omitted).

That is precisely the scenario here where the issue Plaintiffs seek to litigate in their Declaratory Judgment Count is the ***identical*** issue the Illinois Appellate Court already decided—*i.e.*, the applicability of the Company's forum selection clause to this dispute. *Compare* (A45 (proposing the Declaratory Judgment Count)) *with* (Ex. A, 1 (affirming dismissal of the Illinois Action)). Collateral estoppel bars Plaintiffs from doing so. Because the Declaratory Judgment Count addresses that issue, it is moot as is Plaintiffs' motion. *See In re Boyd*, 99 A.3d 226 (Del. 2014) (TABLE) (holding final ruling on the merits moots a collateral challenge); *Carlyle*, 2015 WL 5278913, at *18 (holding Third Circuit's decision that a party is bound by a forum selection clause "mooted the requested declaratory relief," and thus mooted the declaratory judgment).

2. The Court of Chancery Did Not Abuse Its Discretion in Denying Plaintiffs' Motion for Leave to Amend.

First, the Court of Chancery had discretion to deny Plaintiffs' motion to amend to add the Declaratory Judgment Count because the count was (i) futile and/or (ii) improperly sought solely for a tactical advantage. *See* Ct. Ch. R. 15

The Court of Chancery has discretion to deny leave to amend pleadings, and should deny leave where the "proposed amendment would be futile"—*i.e.*, fails to state a claim. *Clark v. State Farm Mut. Auto. Ins. Co*., 131 A.3d 806, 811-12 (Del. 2016). Accordingly, leave to amend should not be granted to add a claim seeking a "non-justiciable advisory or hypothetical opinion." *Id*. at 811, 814.

Plaintiffs essentially contend that their amendment would not have been futile because they would have prevailed on the venue issue raised in the Declaratory Judgment Count—*i.e.*, the Court of Chancery would have concluded the Illinois courts got it wrong. (Pls. 30-31). This circular argument is unavailing. After losing in Illinois, Plaintiffs chose to file in Delaware, thereby voluntarily subjecting themselves to the jurisdiction and venue of the Court of Chancery. Consequently, venue—including the forum selection clause's applicability—is not, and has never been, at issue in Delaware. The Declaratory Judgment Count, asking the court to opine on venue, (Pls. 29), is, thus, a hypothetical question that the court should not entertain. *Amer v. NVF Co*., 1994 WL 279981, at *8 (Del. Ch. June 15, 1994) (refusing to determine hypothetical declaratory counterclaim);

Those Certain Underwriters At Lloyd's, London v. Nat'l Installment Ins. Servs., Inc., 2007 WL 4554453, at *7 (Del. Ch. Dec. 21, 2007) (citation omitted) (denying Plaintiffs' request for declaratory judgment that "cannot have any practical effect on the existing controversy"), *aff'd*, 962 A.2d 916 (Del. 2008) (TABLE).

Second, Delaware law prohibits using a declaratory judgment "solely to achieve a tactical advantage." *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1242 (Del. Ch. 1987). As the Court of Chancery held, "[t]his principle applies all the more strongly where the declaratory judgment functions as a collateral attack on a ruling previously rendered in another proceeding." (Pls. Ex. A, 2 ¶7).

Plaintiffs' tactical maneuvering in this action is obvious. After filing this action, Plaintiffs sought an extension of time to file their opening Illinois appellate brief citing this action as grounds. Only after receiving an extension of time in Illinois, did Plaintiffs move to add the Declaratory Judgment Count in hopes of getting a sound bite to use in the Illinois Appeal.

In sum, Plaintiffs put forth no basis for finding that the Court of Chancery abused its discretion in denying Plaintiffs' motion.

III. PLAINTIFFS' MOTION TO STAY THE ACTION IS MOOT; REGARDLESS, THE COURT OF CHANCERY PROPERLY EXERCISED ITS DISCRETION TO DENY IT.

A. Question Presented

Whether the Court of Chancery properly exercised its discretion when it denied Plaintiffs' motion to stay the action pending resolution of the Illinois Appeal after Plaintiffs voluntarily and deliberately filed this action alleging the same claims they alleged in the Illinois Action. (B219-38).

B. Scope of Review

This Court reviews a trial court's denial of a motion to stay proceedings for an abuse of discretion. *Fujisawa Pharm. Co. v. Kapoor*, 655 A.2d 307 (Del. 1995) (TABLE).

C. Merits of Argument

1. Plaintiffs' Motion to Stay this Action Is Moot Because the Illinois Appellate Court Entered a Final Judgment.

Plaintiffs next sought to stay this action "pending the outcome of Plaintiffs' [Illinois] [A]ppeal." (A55). As explained, the Illinois Appeal is no longer pending because the Illinois Appellate Court entered a final judgment affirming the trial court's dismissal. *See* Ex. A. Thus, Plaintiffs' motion to stay is moot. *See, e.g., In re Boyd*, 99 A.3d 226 (Del. 2014) (TABLE).

2. The Court of Chancery Properly Exercised Its Discretion to Deny Plaintiffs' Motion to Stay.

Plaintiffs assert that in denying the stay the Court of Chancery abused its discretion in three ways: (i) it "ignored the first-filed status of the Illinois action" under the *McWane* first-filed doctrine, (Pls. 33-36)[10]; (ii) it "utterly ignored Illinois' concrete interest" in the dispute, (Pls. 37); and (iii) its ruling "set the stage for inconsistent rulings," (Pls. 33, 36-37). These contentions are meritless.

First, Delaware law is clear that the *McWane* doctrine does not apply to this dispute. Rather, a *forum non conveniens* analysis applies where, as here, multiple representative actions are at issue. *Rosen v. Wind River Sys., Inc.*, 2009 WL 1856460, at *4, *6 (Del. Ch. June 26, 2009). By making the "calculated decision" to file this lawsuit ***after*** filing their identical Illinois Action, Plaintiffs reduced any weight that a court would ordinarily give to their choice of forum and which action was first-filed. *In re Walt Disney Co. Deriv. Litig.*, 1997 WL 118402, at *3 (Del. Ch. Mar. 13, 1997); *accord* (Pls. Ex. B, 2 ¶8). Moreover, the applicable Delaware forum selection clause, *see* (Ex. A), also displaces the *McWane* doctrine. *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010).

Second, the Delaware courts, not Illinois, have an overwhelming interest in the merits of this dispute—*i.e.*, whether a "Change in Control" occurred under the

[10] *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970).

terms of the ***Delaware Company's*** incentive Plan governed by ***Delaware law***. Indeed, "novel and substantial issues of Delaware corporate law are best resolved in Delaware courts." *Ryan v. Gifford*, 918 A.2d 341, 350 (Del. Ch. 2007) (citation omitted). Plaintiffs put forth no countervailing Illinois interest. Regardless of which action Plaintiffs first-filed, a *forum non conveniens* analysis demonstrates that the Delaware Court of Chancery should adjudicate Plaintiffs' claims. *See* (B228-34); *see also Disney*, 1997 WL 118402, at *3.

In light of Plaintiffs' clear tactical motivations—"to avoid an adverse result" on HD Supply's pending motion for judgment on the pleadings—and Delaware's interest in the dispute, the Court of Chancery was well within its discretion to deny the stay. *See Disney*, 1997 WL 118402, at *3-4 ("One must wonder what theory of judicial efficiency or comity would promote a rule that encourages plaintiffs' counsel to file in multiple jurisdictions, force defendants to commit resources from coast to coast, and then allow plaintiffs' counsel, at their own whim, to move the lines of battle after they have already begun to form?").

Third, the court's decision did not create the risk of inconsistent rulings. The Illinois Appeal related solely to venue, whereas the merits of Plaintiffs' claims were at issue in Delaware on HD Supply's motion for judgment on the pleadings. If any risk existed, it was Plaintiffs who, in their own words, "set the stage for inconsistent rulings" by filing identical lawsuits here and in Illinois. (Pls. 33).

The Court of Chancery properly found that Plaintiffs' tactical maneuvering did not entitle them to a stay.

CONCLUSION

For the foregoing reasons, Plaintiffs' appeal is meritless. HD Supply respectfully submits that the Court should find that Plaintiffs' motions to amend and stay are moot. Setting aside mootness, the Court should affirm the Court of Chancery's denials of those motions and grant of judgment on the pleadings in favor of HD Supply.

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