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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 Plaintiffs, v. HD SUPPLY HOLDINGS, INC., Defendant.	No. 443, 2017 On Appeal from the Court of Chancery C.A. No. 2017-0125-JTL

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Defendant cannot avoid the Court of Chancery's determination that the actual language of the relevant Plan provision supports Plaintiffs' claims. The court held that Plaintiffs' interpretation of the Plan – which Defendant drafted – was correct from a "linguistic perspective" and correct as a "technical matter." The court nevertheless adopted Defendant's interpretation – despite admitting that the Plan language did not "literally" support this reading. The trial court cannot be permitted to impose its own interpretation, as a matter of law, of the provision based on what it thought Defendant *meant* to say in the Plan. Either the plain language should control, or the provision should be declared ambiguous, allowing the prior Crown Bolt transaction and other extrinsic evidence to be considered.

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY GRANTING JUDGMENT ON THE PLEADINGS FOR DEFENDANT

A. Plaintiffs Adequately Alleged Breach of Contract

1. The Actual Plan Language Supports Plaintiffs' Interpretation

Simply put, this Court's challenge is to decide whether to favor the corporate drafter's professed intent or Plaintiffs' plain-language parsing of the relevant Plan provision. Posed that way, Plaintiffs should have been able to rely on the Plan's plain language and should receive the benefit of the doubt at the pleading stage. Defendant accuses Plaintiffs of "cherry picking the court's words," (Def. Br. 20) to support the conclusion that the court found that that actual Plan language supports Plaintiffs' claims for accelerated vesting. But there is no dispute that the Court of Chancery stated that Plaintiff's interpretation of the Plan provision is correct "from a linguistic perspective" (A139); that the Plan language "allows" Plaintiffs to make their claim for accelerated vesting, *id*.; that Plaintiffs' interpretation is correct as a "technical matter" (A141); and that the Plan "doesn't say…literally" what the court believes it means (A140).

It is true, as Defendant points out, that the court also stated that Plaintiffs' interpretation was "contrary to the plain language" of the Plan." A137. But Defendant omits the fact that the court prefaced that statement by saying Plaintiffs' "argument, *in my view*, is contrary to the plan language of the plan." *Id*. (emphasis

added). Indeed, it may be that neither party can adequately explain how the court could find that the "plain language" of the Plan supports Defendant's interpretation, but also supports Plaintiffs' interpretation from a "linguistic perspective" and at the same time also does not "literally" support the court's own interpretation. Certainly, Plaintiffs advocate choosing the interpretation of the Plan language that is "linguistically" correct – particularly where Defendant drafted that language.

At worst, the Court of Chancery's own analysis demonstrates that the Plan provision is ambiguous, tilting the interpretation in Plaintiffs' favor and admitting evidence of the prior Crown Bolt transaction as evidence of how all parties had interpreted the disputed provision. In any event, the court should not be permitted to select an interpretation that conflicts with the actual language and which it acknowledged is not "literally" supported by the Plan itself.

2. Defendant Was "Involved" In The Power Solutions Transaction

Defendant's repeated argument that it was not "involved" in the Power Solutions transaction (Def. Br. 22-24) intentionally misstates the facts. While the holding company was not a signatory to the Power Solutions-Anixter purchase agreement, it is simply not honest to say Defendant was not "involved." Although Defendant structured and documented the Power Solutions transaction as a sale of or by its wholly owned subsidiaries as signatories, Defendant absolutely and undeniably was "involved" in the transaction. Indeed, Defendant's "involvement"

is demonstrated by the press release Defendant issued on July 15, 2015:

> HD Supply Holding [sic], Inc. (NASDAQ: HDS) ("HD Supply") today announced that it has entered into a definitive agreement to sell its HD Power Solutions business unit, a leading provider of a diverse product and service offering serving investor owned utility, public power, construction and industrial markets, to Anixter Inc…
>
> 'After a detailed evaluation, we determined that a sale of our Power Solutions business to Anixter is in the best interests of our Power Solutions associates and HD Supply shareholders,' said Joe DeAngelo, HD Supply Chairman and CEO…
>
> HD Supply Holdings, Inc. will host a conference call on the transaction on July 16 at 8 a.m.

See "HD Supply Enters Into Definitive Agreement to Sell its Power Solutions Business Unit to Anixter Inc.," AR1-6. That is, Defendant issued its own press release announcing the sale of "its" own Power Solutions business, quoting its own CEO about "our" Power Solutions business, and for good measure hosted a conference call on the transaction.

Defendant's assertion that it was not "involved" in the transaction because it was a not a party to the transaction is belied by its own press release. The assertion seems to be based solely on a web of corporate formalities and the designation of Defendant, HD Supply Holdings, Inc., as a holding company. Defendant operated its business through several affiliated entities all fully owned and operated by Defendant. In light of the overlapping assets and personnel – all controlled by Defendant – it cannot be stated as a matter of law that Defendant simply had no

"involvement" in the transaction.

3. The Plan Cannot Be Rewritten To Fit Defendant's Interpretation

Since the actual language of subsection (b) supports Plaintiffs' claim for accelerated vesting, the Court of Chancery and Defendant interpreting the Plan by rewriting it or by turning to other provisions is not appropriate.

The Court determined that in subsection (b), the Plan "is talking about a change of control at the level of the Company, capital C company, which is defined as HD Supply." A138. But the court acknowledged that "this subsection refers to a lower case c 'company' in the end and, hence, it gives the plaintiffs their argument." *Id*. That is Plaintiffs' argument (at least as to their breach of contract claim), and it is supported by the plain language of the Plan. Subsection (b) uses the word "company" three times: "Company," a defined term in the Plan, when referring to HD Supply Holdings, Inc's involvement in change-in-control transaction; "Company" when referring to HD Supply Holdings, Inc.'s voting securities; and "company" when referring to the "merged or consolidated company" existing after the transaction. There is no explanation why Defendant would refer to a "Company" and a "company" in two different ways in the same sentence if it was referring to the same entity. But the court went on to reject Plaintiffs' argument, essentially holding that Defendant – the Plan drafter – meant to write "Company" with a capital C in the latter part of subsection (b). The court's attempt to rewrite the most critical part of

the Plan provision as a matter of law, and in favor of the moving party, cannot be permitted.

Defendant, meanwhile, opines on what language *could* have been added to the Plan that would presumably make Plaintiffs' claim more palatable. *See* Def. Br. at 23 ("While the Plan could have defined 'Change in Control' as the 'the merger, consolidation or other similar transaction involving the Company or its Subsidiaries,' it did not."). But this theoretical exercise only raises the question: If Defendant wanted to limit accelerated vesting to change-in-control transactions resulting only from a merger or consolidation, why did it expand that definition to "other similar transaction?" If Defendant wanted to exclude a "merger, consolidation or similar transaction" involving subsidiaries, why did the Plan not state that? If Defendant used "Company" to refer to HD Supply Holdings, Inc. the first two times in subsection (b), why did it use "company" the third time? Defendant cannot now ponder how its own drafting could have been clearer in an attempt to evade the plain language of its own Plan.

4. The Crown Bolt Transaction Must Be Considered

Defendant urges this Court to disregard the import of the Crown Bolt sale because (i) it is extrinsic evidence not needed to interpret an unambiguous contract; (ii) Plaintiffs have not established the transactions were identical; and (iii) the Plan Administrator had discretion to treat different participants differently.

First, as discussed *supra*, the relevant Plan language cannot be declared unambiguous where the Court of Chancery found Plaintiffs' interpretation was "linguistically correct" but favored a competing interpretation it admitted was not "literally" written in the Plan. Second, Defendant is being too clever by half by stating the two transactions were not identical because they "involved different terms and different parties." Def. Br. 31. Defendant has never disputed that the Crown Bolt division was spun off from HD Supply in a manner identical to the Power Solutions transaction and that the Crown Bolt Plan participants received the full value of their unvested equities upon the close of that transaction. Plaintiffs' allegations regarding the precedent set by the Crown Bolt transaction are more than sufficient at the pleading stage. Third, as discussed immediately *infra*, while the Plan Administrator may have had the discretion to treat different transactions differently, that does insulate Defendant from allegations of bad faith where that discretion is abused – and it certainly does not allow the Administrator to interpret the same Plan provision differently for different groups of employees.

5. The Administrator Did Not Have Discretion To Ignore Plan Language

Plaintiffs have alleged that the Administrator abused its discretion by ignoring the plain-language Plan provisions regarding change-in-control transactions. Defendant contends that this "simple disagreement" cannot amount to bad faith.

Def. Br. at 33. However, the Plan Administrator had discretion only to act pursuant to the Plan provisions, and that discretion was constrained by a duty to act in good faith. It is not a "simple disagreement" for the Administrator to contradict the express language of the Plan – or, as the Court of Chancery prefers to describe it, an interpretation of that language that is correct from a "linguistic perspective." And if the Plan language was ambiguous, the Administrator should have used its discretion to interpret the provision at issue in the same manner it had interpreted it in the past – in favor of the employees, just as it had done for the Crown Bolt employees. The discretion granted the Administrator to interpret ambiguous Plan provisions certainly did not include the discretion to interpret the same provision differently for different groups of employees. That level of discretion would render the Plan itself utterly meaningless.

B. Plaintiffs Adequately Alleged Breach Of The Covenant Of Good Faith And Fair Dealing

Defendant contends that Plaintiffs have failed to plead with specificity the bad faith underlying their claim for breach of the covenant of bad faith and fair dealing. But Plaintiffs have pleaded their covenant claim very specifically, and the issue is relatively straightforward: Defendant defeated Plaintiffs' reasonable expectations for accelerated vesting under the Plan contract by giving the Crown Bolt participants the full value of their unvested equities when their business unit was spun off, and then cancelling Plaintiffs' unvested equities when their business unit was

subsequently spun off in an identical transaction. The Power Solutions participants rightfully assumed they would receive accelerated vesting – regardless of the Plan language – because the Crown Bolt participants received it.

C. Plaintiffs Adequately Alleged Unjust Enrichment

Plaintiffs properly pleaded unjust enrichment in the alternative. While Defendant insists that Plaintiffs – at the pleading stage – did not provide enough factual support for their claims that they were promised full vesting upon a change in control of Power Solutions, that core promise is self-evident and undisputed: When Plaintiffs' fellow Plan participants at Crown Bolt saw their business unit spun off, they received the full value of their unvested equities – and Plaintiffs rightfully believed they would receive the same treatment after their business unit was subsequently spun off in an identical transaction.

II. THE COURT OF CHANCERY ERRED BY DENYING PLAINTIFFS' MOTION TO AMEND

Defendant's opposition to Plaintiffs' appeal of the Court of Chancery's refusal to permit amendment to add the venue issue to this litigation is based entirely on a claim of mootness, with Defendant asserting there had been a final judgment on the issue in Illinois. Due to technical issues accompanying the recent implementation of mandatory electronic filing in the Illinois Supreme Court, Plaintiffs' petition for leave to appeal Illinois Appellate Court's ruling was not entered onto the Illinois Supreme Court's docket. Plaintiffs successfully moved the court to refile instanter, and the petition for leave to appeal is now pending before the Illinois Supreme Court. See AR7-43. Thus, despite the Court of Chancery's ruling on the merits of the case, there has not yet been a final ruling – in either Illinois or Delaware – on whether the insertion of an "internal affairs" venue provision in Defendant's corporate charter (but intentionally omitted from the Plan document that employees do typically see) can force Illinois employees to bring their employment-related claims in Delaware courts. The issue presents, respectfully, not just due process concerns, but major policy issues of what cases the Delaware courts want to require to be heard here.

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

As with the amendment issue, Defendant countered Plaintiffs' appeal of the Court of Chancery's denial of their motion to stay by contending the issue was moot because of a final judgment in Illinois. As discussed *supra*, the issue is important and still pending in Illinois.

CONCLUSION

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

Dated: January 31, 2018

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