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Case Number 222,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRAD ANDREWS, EUGENIO BALLESTEROS, RICHARD BEDDOW, LOREN BENDER, DANIEL BROWN, NORBERT DEAN, DANIEL DECKER, HOWARD DEMSKY, ROI EWELL, THIRUNELLAI GANESHAN, STEVEN GLASHOWER, DAVID HAMMER, MICHAEL HARTMAN, SCOTT HELMSTEDTER, RONALD LOIDA, DONALD MILLS, TERRY PRATHER, ROY RIEVE, and CHARLES WETESNIK, Appellants, Defendants Below, v. SEAWORLD ENTERTAINMENT, INC., Appellee, Plaintiff Below.	Case No. 222, 2023 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2020-0955-NAC

CORRECTED OPENING BRIEF OF APPELLANTS

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NATURE OF PROCEEDINGS

On October 9, 2018, all of the Appellants, collectively and through counsel, asserted claims under Appellee SeaWorld Entertainment Inc.'s Dispute Resolution Program that 60% of their remaining restricted shares (known as "Tranche 3" shares) should have been vested. Appellants (hereinafter the "Executives") asserted that the terms of their separation documents when they left SeaWorld provided that they "shall be eligible to vest" in the Tranche 3 shares "as if" they "had remained continuously employed with" SeaWorld. But contrary to those terms, in April 2017, SeaWorld announced that only then-current SeaWorld employees, as well as SeaWorld's Chairman, and the former CEO, would be vested in 60% of their Tranche 3 shares, not the Executives.

The Dispute Resolution Program requires pre-suit mediation of claims if requested by Appellee, and SeaWorld asserted through its then-counsel in April 2019 that it wanted to mediate. After Appellee re-scheduled the mediation twice and the onset of the Covid-19 pandemic resulted in additional rescheduling, the mediation was not conducted until October 27, 2020. The mediation was unsuccessful.

Less than two weeks later, on November 9, 2020, Appellee filed the underlying lawsuit for declaratory judgment in the Court of Chancery. On the same day, the Executives provided their Notice of their Statement of Claim for arbitration

under the Dispute Resolution Program. After the Executives moved to dismiss the Verified Complaint in favor of arbitration on December 9, 2020, SeaWorld and the Appellants agreed to submit to arbitration the initial question of whether the parties' claims were arbitrable. On October 21, 2021, the arbitrator determined that the claims were not subject to arbitration and venue was appropriate in the Court of Chancery.

On August 10, 2022, the Executives answered SeaWorld's Complaint and filed Counterclaims against SeaWorld. On October 10, 2022, SeaWorld filed a Motion to Dismiss the Executives' Counterclaims, as well as filing a Motion for Judgment on the Pleadings on its claims against the Executives (the "Motions"). SeaWorld asserted that the pertinent phrase in this case – that the Executives "shall be eligible to vest" in the Tranche 3 shares "as if" they "had remained continuously employed with" SeaWorld – only removed the "Employment Condition" for vesting the Tranche 3 shares. SeaWorld also asserted that not all actively-employed SeaWorld employees had 60% of their Tranche 3 shares vested, but rather that only "certain" of them had been vested.

On November 17, 2022, Appellants filed their Answering Brief. On December 22, 2022, SeaWorld filed its Reply Brief. The Chancery Court held a hearing on the Motions on March 29, 2023. At the end of the hearing, SeaWorld's

counsel admitted that there was a dispute of fact regarding the number of SeaWorld employees who received the 60% Amendment.

Despite this admission regarding a factual dispute at the heart of this case, the lower Court's Letter Decision, which granted the Motions as to Count II of the Verified Complaint and dismissed all Counterclaims, was issued on May 19, 2023. The Court held that the language provided to Appellants at the time of their departure was unambiguous and could only reasonably be interpreted to have removed the "Employment Condition" as a condition for vesting. An Order effectuating that decision was entered on May 26, 2023. The Notice of Appeal was filed on June 21, 2023. This is Appellants' Corrected Opening Brief.

SUMMARY OF ARGUMENT

1. The Court of Chancery erroneously concluded that the plain language of the provision provided to each Executive – that he "shall continue to be eligible to vest (as if the Participant had remained continuously employed with the Company)" – only had one reasonable interpretation: it only removed the "Employment Condition" from their Tranche 3 shares (the requirement that they still be employed by SeaWorld to vest), and did not provide that the Executives shall be vested no differently than had they remained continuously employed.

2. Had they remained continuously employed, the Executives alleged that they would have had 60% of their Tranche 3 shares vested because all of the actively employed SeaWorld employees had their shares vested at 60%. SeaWorld denies that all actively-employed SeaWorld employees in April 2017 with Tranche 3 shares were vested, but admits that this factual dispute is unresolved in the record.

3. Despite this unresolved factual issue, and others, the Court of Chancery did not view these facts in a light most favorable to the non-moving party in response to SeaWorld's Motions under Rule 12. The Court also concluded that the plain meaning of the pertinent phrase permitted the Executives to vest in their Tranche 3 shares "as if they had not been terminated." But instead of denying SeaWorld's Motions, the Court reviewed the "purpose" of certain plan documents and other provisions of the incentive plan adopted by SeaWorld to conclude that the only

reasonable interpretation was that only the "Employment Condition" was removed.

4. Because a reasonable person can interpret the pertinent phrase to provide that the Executives should have been vested no differently than the actively employed SeaWorld employees with Tranche 3 shares in April 2017, the Court should have denied the Motions and permitted the parties to resolve these issues on a full factual record, rather than granting the Motions under Rule 12.

STATEMENT OF FACTS

For 44 years, Appellant Brad Andrews was an employee of the company now known as SeaWorld, and he is the Emeritus Chief Zoological Officer for SeaWorld.[1] Appellant Donald Mills spent more than 42 years with SeaWorld, and was the SeaWorld Orlando Parks President at the time of his retirement from the company.[2] David Hammer was employed by SeaWorld for more than 37 years, and was the Chief Human Resources Officer at the time of his separation; and he held that role when most of the Appellants in this case separated from SeaWorld.[3] They, and 15 other former SeaWorld executives constitute the 18 Executives with more than 370 years of service to SeaWorld in this case.[4]

In 2013, SeaWorld adopted an Omnibus Incentive Plan (the "Plan") that permitted an award of restricted shares to eligible employees.[5] The purpose of the Plan is to is to give SeaWorld a means by which its employees "can acquire and maintain an equity interest in the Company," as well as receive incentive

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[1] Andrews' Answer and Counterclaim, at Counterclaim ¶5 (Appx. at A-247-48).

[2] Mills' Answer and Counterclaim, at Counterclaim ¶5 (Appx. A-735).

[3] Hammer's Answer and Counterclaim, at Counterclaim ¶5 (Appx. at A-596).

[4] There were originally 19 Executives in this case, but Daniel Decker has withdrawn from this case upon his passing in August 2023.

[5] Verified Complaint, at Ex. A (SeaWorld's 2013 Incentive Compensation Plan), Section 1 (Appx. at A-33).

compensation ("including incentive compensation measured by reference to the value" of SeaWorld's shares), to align "their interests with" those of SeaWorld's stockholders.[6]

As set forth in each Executive's Counterclaim, each Executive was provided with an award of restricted shares, and those shares fell into one of three categories.[7] One-third of the shares would vest (and no longer be restricted) based upon the amount of time an employee was employed after SeaWorld's incentive plan was adopted and other factors; these shares were thereafter referred to as "Tranche 1." The second third of the shares would vest if SeaWorld's then-owner, Blackstone, was able to sell its shares and achieve a significant internal rate of return and return on invested capital in SeaWorld; these shares were thereafter referred to as "Tranche 2." In order for Tranche 2 to vest, Blackstone had to realize a 2.25 multiple return on invested capital; 2.25 times the net amount Blackstone earned on its SeaWorld investment. SeaWorld therefore also referred to Tranche 2 as the "2.25x Exit-Vesting Restricted Shares" because they vested if Blackstone's exit achieved a 2.25x multiple. The final third of the shares would also vest based upon Blackstone's internal rate of return and return on invested capital in SeaWorld – if Blackstone's

[6] *Id.*

[7] *See e.g.*, Andrews' Counterclaim, at ¶¶8-9 (Appx. at A-248-49).

return on invested capital was 2.75x; these shares were thereafter referred to as "Tranche 3".

The requirement that SeaWorld achieve a 2.75x return to vest the Tranche 3 shares is called in this case the "Performance Condition." In addition, the Tranche 3 shares required the employee to remain employed to be eligible to vest. SeaWorld refers to this requirement as the "Employment Condition."

The Executives separated from SeaWorld between 2015 and 2017. Each of them received documentation upon their separation; that documentation differed. Attached to the Verified Complaint, at Exhibit D is the Amendment to the Restricted Stock Award for Appellant Roi Ewell.[8] The Court of Chancery stated that this document was representative of the "Separation Agreements" signed by the Executives, but this document is not a Separation Agreement – it's an Amendment.[9]

Ewell's Separation Agreement is the document referred to in his Counterclaim as his Separation Agreement and is entitled "Confidential Separation Agreement and Release and Waiver of Claims."[10] It provides Ewell with severance and other

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[8] Verified Complaint, at Ex. D (Ewell's November 15, 2015 Amendment) (Appx. at A-95).

[9] *Compare* Verified Complaint, at Ex. D (Appx. at A-95) *with* Letter Opinion, p. 2 n.7 (referring to Exhibit D to the Complaint as the "Separation Agreements.").

[10] Appellants' December 9, 2020 Motion to Dismiss, at Ex. E (Ewell's Separation Agreement) (Appx. at A-182).

benefits in exchange for a release of claims by Ewell. One of those benefits is the continued vesting of his Tranche 3 shares.

The Court stated in its Letter Decision that for the purpose of considering the Motions the parties agree that the "Separation Agreements are to be treated as one,"[11] but that is also inconsistent with the record. The Executives asserted in opposition to SeaWorld's Motions that "the record does not contain a full and complete copy of each Executive's separation documents from SeaWorld, which vary in form."[12] Moreover, the oral representations the Executives received were provided by different SeaWorld employees – many of the Executives received representations from Appellant Hammer,[13] Hammer received the same language in his agreement he had been representing to others,[14] and after Hammer's separation other Executives received similar representations from other SeaWorld employees.[15]

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[11] Letter Op., p.2 n.7

[12] Appellants' Answering Brief, at p.24 (Appx. at A-910).

[13] *See e.g.*, Andrews' Answer and Counterclaim, at Counterclaim ¶¶15-18 (Appx. at A-250-51).

[14] Hammer's Answer and Counterclaim, at Counterclaim ¶¶15-17 (Appx. at A-600).

[15] Mills' Answer and Counterclaim, at Counterclaim ¶¶15-21 (Appx. at A-738-39).

What is common to all Executives, however, is that regardless of whether contained in an Amendment, a Separation Agreement, or both, they were promised orally and in writing that their Tranche 3 shares would vest no differently than if they remained employed, even after their separation. The provision in Ewell's Amendment, for example, provides as follows:

> 15. Modified Forfeiture Provision for 2.75x Performance Restricted Shares.…upon the Company's termination of the Participant's employment as provided in the Confidential Separation Agreement *** the 2.25x Performance Restricted Shares and the 2.75x Performance Restricted Shares ***shall not be forfeited*** on the Termination Date ***and shall continue to be eligible to vest (as if the Participant had remained continuously employed with the Company)*** in accordance with the provisions of this Grant (including Schedule A and Appendix A) ***[16]

Ewell's Separation Agreement, at paragraph 6, also provides that subject to the terms of the Amendment, he "shall continue to be eligible to vest as if Employee had remained continuously employed with SeaWorld."[17] To the Executives, this provision provided that their separation did not affect their rights to vest in the Tranche 3 shares.

[16] Verified Complaint, at Ex. D (Ewell's November 15, 2015 Amendment) (Appx. at A-95) (emphasis added).

[17] Appellants' December 9, 2020 Motion to Dismiss, at Ex. E, ¶6 (Ewell's Separation Agreement) (Appx. at A-183).

In April 2017, Blackstone sold its remaining equity interest in SeaWorld, and in doing so slightly missed achieving the 2.75x Performance Condition. But in recognition of the outstanding return achieved by Blackstone, SeaWorld provided an amendment to vest 60% of the Tranche 3 shares (the "60% Amendment"). The 60% Amendment removed the Performance Condition from employees who had "continued employment" through the closing of the Blackstone sale. This language is virtually identical to the language provided to the Executives that states that they "shall continue to be eligible to vest" as if they remained "continuously employed."

As alleged in each Executive's Counterclaim, the Executives assert that every actively-employed SeaWorld employee with restricted Tranche 3 shares received the 60% Amendment.[18] This factual assertion should have been accepted as true under Rule 12. In contrast, SeaWorld asserts that only "certain" employees received the 60% Amendment.[19] That question – who was actually provided the 60% Amendment – is one of the key factual disputes in this case.

SeaWorld cites its April 14, 2017, Form 8-K to say that only "certain" employees received the 60% Amendment. But the text of the 8-K says that the 60% Amendment was provided to only "*certain* of the Company's *equity plan*

[18] *See e.g.*, Andrews' Answer and Counterclaim, at Counterclaim ¶¶20, 24, 45 (Appx. at A-252-53, A-256).

[19] March 29, 2023 Hearing Transcript, at p.63 (Appx. at A-998).

participants."[20] The 8-K describes which "certain" equity plan participants received the 60% Amendment – "existing management," as well as SeaWorld's Chairman of the Board David D'Alessandro and its former CEO Jim Atchison.[21]

The reference to "existing management" apparently includes every actively employed SeaWorld employee with Tranche 3 shares at the time of the 60% Amendment. That reading is confirmed later in the 8-K, when SeaWorld notes that "eight of the Company's senior executives," as well as the Chairman and the former CEO agreed to forfeit their remaining 40% Tranche 3 shares. But "all other current employees" remained eligible to vest in their unvested 40% of Tranche 3 shares – because those "all other current employees" had received the 60% Amendment. The Executives have alleged in their Counterclaims that every actively employed SeaWorld employee in May 2017 with restricted Tranche 3 shares received the 60% Amendment. A proper reading of the 8-K is that the only "certain" participants in SeaWorld's equity plan that did not receive the 60% Amendment were the Executives in this case.

[20] SeaWorld's Form 8-K, dated April 14, 2017, at Item 5.02 (emphasis added) (Appx. at A-1004)

[21] *Id.*

SeaWorld's counsel agreed that there was an issue of fact whether all employees or only certain SeaWorld employees received the 60% Amendment.[22] But the Court of Chancery concluded that the dispute was not relevant, because the language provided to the Executives was unambiguous and only had one meaning: only the Employment Condition was removed by the pertinent language provided to the Executives upon their separation. This Appeal followed.

[22] March 29, 2023 Hearing Transcript, at p.63 (Appx. at A-998).

ARGUMENT

I. THE BREACH OF CONTRACT CLAIM AND COUNTERCLAIMS WERE IMPROPERLY DISMISSED BECAUSE SEAWORLD'S INTERPRETATION OF THE CONTRACTUAL PROVISION IS NOT THE ONLY REASONABLE INTERPRETATION

A. Question Presented

The Executives have alleged that in May 2017, every actively employed SeaWorld employee who had been issued restricted Tranche 3 shares, as well as SeaWorld's Chairman of the Board and the former CEO, received the 60% Amendment and had 60% of their Tranche 3 shares vested. The primary question in this appeal is whether the contractual provision that was included at the time of each Executives' separation – that their Tranche 3 shares "shall continue to be eligible to vest (as if the Participant had remained continuously employed with the Company)" – unambiguously provides that the Executives were not entitled to receive the 60% Amendment, even when every continuously employed SeaWorld employee received the Amendment.

This argument was preserved before the Court of Chancery. *See* A907-909, A998.

B. Standard of Review

The standard of review of this appeal is *de novo*. The Court of Chancery granted Appellee's motions for judgment on the pleadings and to dismiss, determining that the agreements at issue were unambiguous. Because this case

involves "the interpretation of contract language, [it is a] question of law that this Court reviews *de novo* for legal error.'" *AT&T Corp. v. Lillis*, 953 A.2d 241, 251-52 (Del. 2008) (*citing Honeywell Intl. Inc. v. Air Prods. & Chem., Inc.*, 872 A.2d 844, 950 (Del. 2005)).

C. Merits of the Argument

The Court improperly concluded that the only reasonable interpretation of the pertinent language was that only the "Employment Condition" was removed for the Executives. But that's not what the provision says. In fact, the Court recognized that what the provision says is that the Executives were to be treated "as if they had not been terminated." Had the Court properly construed the provision that was provided to the Executives upon their separation, the Court would have concluded that SeaWorld's interpretation was not the only reasonable interpretation, and would not have dismissed the Executives' Counterclaims for breach of contract or granted judgment on the pleadings for SeaWorld's declaratory judgment claim at Count II.

Dismissal of a breach of contract claim at the pleading stage is appropriate only when the moving party "has offered the singular reasonable construction of the operative language as a matter of law, and that construction reveals that there is no breach." *Anschutz Corp. v. Brown Robin Capital, LLC*, 2020 WL 3096774, *9 (Del. Ch. June 11, 2020); *see Caspian Alpha Long Credit Fund L.P. v. GS Mezzanine Partners 2006 L.P.,* 93 A.3d 1203, 1205 (Del. 2014) ("Dismissal of a claim based

on contract interpretation is proper "if the defendants' interpretation is the *only* reasonable construction as a matter of law."). To resolve the case, then, the Court must decide "whether the contract at issue is *any way ambiguous*[.]" *Lillis v. AT&T Corp.*, 904 A.2d 325, 330 (Del. Ch. 2006) (emphasis added).

Because the provision does not unambiguously provide that only the Employment Condition is removed, SeaWorld's Motions to dismiss the breach of contract counterclaims and for judgment on its declaratory judgment claim should have been denied.

1. The Court of Chancery's Plain Meaning Interpretation of the Pertinent Phrase Provides Eligibility for Tranche 3 Vesting "As If" the Executives were "Continuously Employed" – "As If They Had Not Been Terminated"

The Court improperly interpreted the pertinent phrase: that the Executives "shall continue to be eligible to vest (as if the Participant had remained "continuously employed" with SeaWorld. Instead of starting with the contract language at issue and reviewing the relevant document in which that language appears — the Separation Agreements and related documents — the Court began with the Plan. That mis-sequencing led the Court astray and it failed to apply the plain and ordinary meaning of the disputed terms in the Separation Agreement. As a result, the Court concluded that the phrase was limited to only removing the "Employment Condition." That conclusion was incorrect.

The Court's interpretation *should* have begun with the phrase at issue. Once it finally got around to the language at issue, the Court recognized it needed to grapple with what "eligible to vest" means. The term "eligible to vest" provides that the Executives were entitled to receive a benefit – the vesting of their shares. "Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006). Courts often turn to Black's Law Dictionary. *Metro Storage Int'l, LLC v. Harron*, 275 A.3d 819, 874 (Del. Ch. 2022). Black's defines "eligible" as "[f]it and proper to be selected or to receive a benefit; legally qualified for an office, privilege, or status." *Eligible*, Black's Law Dictionary (11th ed. 2019) (hereinafter "Black's"). Other sources confirm this. *E.g.*, *Eligible*, OXFORD ENGLISH DICTIONARY ONLINE, www.oed.com/dictionary/eligible_adj (last visited Aug. 24, 2023) ("fit or deserving to be chosen") (hereinafter Oxford).

The Court then correctly noted that the parenthetical following "eligible to vest" – "as if the Participant had remained continuously employed with the Company" – modifies this phrase. The parenthetical plainly provides that the Executives' eligibility for vesting shall be "as if" they "had remained continuously employed" by SeaWorld. "Continuously employed" refers to employment that is "uninterrupted," "unbroken," or "extended." *Continuing*, BLACK'S (11th ed. 2019). Other definitions comport. *E.g.*, *Continuous*, OXFORD,

https://www.oed.com/dictionary/continuous_adj (last visited Aug. 24, 2023) ("characterized by continuity; having no interstices or breaks").

The Executives do not argue that the "continuously employed" parenthetical should be excised from "eligible to vest," or that they were "deputized" as current employees for "all vesting purposes."[23] Instead, as the Executives asserted below, and assert here, the pertinent phrase permits the Executives to be "eligible to vest" for just their restricted Tranche 3 shares no differently than if their employment had not ended – "as if" they were "continuously employed."

On this the Court agreed – concluding that that the plain meaning of the phrase was that the Executives shall vest after their separation "as if they had not been terminated."[24] But contrary to that conclusion, which is based on the plain and unambiguous language, the Court went on to review the "purpose" of the Plan and the surrounding contractual provisions to arrive at the conclusion that the provision only removed the "Employment Condition" and did not provide for anything else.

As discussed below, nothing about the "purpose" of the Plan or the related documents provides for this contrary conclusion. And none of the contractual

[23] Letter Op., p.11

[24] Letter Op., p.9.

provisions contradict the plain meaning of the phrase as initially determined by the Court.

For example, the Court cited SeaWorld's freedom under the Plan to liberally amend the terms of an award, and noted that the remaining provisions of the original award still applied.[25] But the freedom to amend also permits the parties to enter into the language at issue in this case in the manner argued by the Executives: that SeaWorld was free under the Plan to allow the Executives to vest no differently than if they were still employees.

Likewise, the Court's conclusion that the parenthetical clause is "redundant" but, nonetheless, consistent with its conclusion that the language only removes the Employment Condition, is an interpretative error. If only the Employment Condition was at issue, neither the Court nor SeaWorld adequately explain why the Separation Agreement does not merely delete the Employment Condition language from the Executives' awards or render the Employment Condition a nullity. If all the parties were agreeing to do was eliminate the Employment Condition, they don't need the "as if" the Executive was "continuously employed" language.

The Court's response that this is a "belt and suspenders" approach is contrary to the cases cited. For example, *Sycamore Partners Mngmt., L.P. v. Endurance Am.*

[25] *Id.*

Ins. Co. concerns the interpretation of an insurance contract that uses "four, virtually synonymous phrasal verbs" regarding an exclusion. *Sycamore Partners Mngmt., L.P. v. Endurance Am. Ins. Co.,* 2021 WL 4130631, at *12 n.98 (Del. Super. Sept. 10, 2021). That exception to the general rule that redundancy is sought to be avoided hardly explains why, in this case, language that did not need to be included at all to simply eliminate the "Employment Condition" constitutes a belt and suspenders approach to interpretation, rather than an interpretation that improperly contravenes the ordinary meaning of the terms used. *Id.*

In short, none of the provisions identified by the Court contradict the meaning of the pertinent phrase that the Court determined – that the Executives shall vest "as if they had not been terminated." Because that interpretation provides more to the Executives than simply eliminating the Employment Condition, the Court's own interpretation would provide for vesting if every actively employed SeaWorld employee was vested. SeaWorld's interpretation is not the only reasonable one, and dismissal of the breach of contract claims and counterclaims should be reversed.

2. The Chancery Court Misapprehended the 60% Amendment. The Amendment Removes the Performance Condition – and Should Have Been Provided to the Executives

In addition, the Court also misapprehended the effect of the 60% Amendment. To be sure, the Court correctly recognized that the 60% Amendment removed the Performance Condition for employees who had "continued employment" through

the closing of the sale transaction.[26] But from that correct premise the Court reached an incorrect conclusion: that the Executives "were not employed 'through the closing' of the Sale."[27]

What the Court failed to recognize is that the Executives are treated as if they were current employees for purposes of the Tranche 3 sale. The Court improperly ascribed different meanings to the phrases "continuously employed" and "continued employment" without any valid basis for doing so. At a minimum, ambiguity about these phrases exists.

The Separation Agreements create the legal fiction that the Executives remain "continuously employed" as if they were current employees for the limited purpose of Tranche 3. Because the Performance Condition was altered for those who had "continued employment" – and the Separation Agreements provide the Executives "continue to be eligible to vest" "as if" they "remained continuously employed with the Company" – the 60% Amendment applies to the Executives. This natural reading of the Separation Agreements together with the 60% Amendment comports both with what a reasonable person would understand "continuously employed" and "continued employment" to mean, *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*,

[26] Letter Op., p. 10.

[27] *Id.*

702 A.2d 1228, 1231–32 (Del. 1997), and provides coherent meaning to the overall scheme, *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).

A reasonable interpretation of the language at issue is that the 60% Amendment to the Performance Condition applies equally to the Executives because they are treated as if they "remained continuously employed with the Company" for vesting their Tranche 3 shares. SeaWorld's interpretation is not a reasonable one, let alone the only reasonable one. The Court's dismissal under Rule 12 was improper.

3. The Court Improperly Focused on the Purpose of the Plan, to the Exclusion of the Separation Agreements

The Chancery Court also unnecessarily focused on the purpose of the Plan, but spent too little time acknowledging the obvious purpose of the pertinent phrase's inclusion in the Executives' separation documents: to incentivize the Executives to separate from SeaWorld in return for a release of claims, and to also permit them to share in the rewards of having built the company after numerous years of service.

The purpose of the separation documents is to provide the terms upon which the Executive will depart from SeaWorld. Upon his departure, the Executive will not be eligible to receive any further awards. For example, the Separation Agreement of Appellant Roi Ewell acknowledged that other restricted shares awarded him in

2015 would be forfeited.[28] Current management can be awarded a Tranche 4 and Tranche 5, but only Tranche 3 is available to reward the separated Executives who devoted in many instances their entire professional lives to SeaWorld's parks, animals, and customers.

In addition, the purpose of the Plan is not simply to provide "incentive compensation" to employees.[29] Instead, the Plan's purpose allows employees to "maintain an equity interest in" and align "their interests with" those of SeaWorld's stockholders.[30]

It's therefore illogical that *missing* the Tranche 3 target would result in partial vesting for the *current* employees that missed the target, but *no* vesting for the former employees that spent years building the company until shortly before the April 2017 sale. It's not just the 11 players on the field who are rewarded when a football team scores a touchdown, or (in this instance) gets to the 3-yard line; nor is it just the "management team" on the date the company achieves a milestone that took years to achieve, and is based upon a multiple of invested capital, that is rewarded when recognition for years of stellar performance is deserved.

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[28] Appellants' December 9, 2020 Motion to Dismiss, at Ex. E, ¶6 (Ewell's Separation Agreement) (Appx. at A-183).

[29] Letter Op., p.8.

[30] Verified Complaint, at Ex. A (SeaWorld's 2013 Incentive Compensation Plan), Section 1 (Appx. at A-33).

The purpose of the language, as contained within the separation documentation, supports the interpretation that separated employees should have also vested like the currently-employed employees. Contrary to the Court's conclusion, the purpose of the documents undermines SeaWorld's contention that there is only one reasonable interpretation of the pertinent phrase.

II. THERE ARE MATERIAL QUESTIONS OF FACT THAT CANNOT BE RESOLVED ON A RULE 12 MOTION

A. Question Presented

Because the pertinent language is not unambiguously limited to removing the Employment Condition, the Court of Chancery should have determined in the light most favorable to the non-moving party whether there were unresolved factual disputes. But the Court did not do so. There are unresolved questions of fact that must first be resolved before the Court can consider motions for judgment as a matter of law.

This argument was preserved before the Court of Chancery. *See* A889, A906-910, A998.

B. Standard of Review

De novo. Because this case involves "the interpretation of contract language" and whether that language is unambiguous, this is another "question of law that this Court reviews *de novo* for legal error." *Lillis*, 953 A.2d at 251-52.

C. Merits of the Argument

SeaWorld's Motions were asserted under Rule 12(b)(6) and Rule 12(c). Under both Rule 12(b)(6) and 12(c), "a trial court is required to view the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party." *Penton Bus. Media Holdings, LLC v. Informa PLC*, 252 A.3d 445, 453 (Del. Ch. 2018) (citations omitted). The Court of Chancery rejected the

opportunity to review the evidence on a full factual record, concluding that the language was unambiguous.

SeaWorld's actual defense in this case is that not all actively employed SeaWorld employees in April 2017 received the 60% Amendment – that only "certain" of them did so, allowing SeaWorld to selectively choose who received the 60% Amendment and who did not. The Executives have alleged the opposite – that every actively employed SeaWorld employee received the 60% Amendment. SeaWorld's Form 8-K appears to confirm that the Executives are correct.

The Court acknowledged this factual dispute at the hearing.[31] In response, counsel for SeaWorld admitted that there is not "a factual record on the exact ones that got it and/or didn't get" the 60% Amendment, asserting that the Executives' allegation "is inconsistent with" the Form 8-K.[32]

But the Court ultimately disregarded this factual dispute, concluding that SeaWorld was permitted to exercise "discretion" as to whether the Executives would receive the Amendment.[33] Whether SeaWorld actually exercised that discretion, and can demonstrate that there were actively employed SeaWorld employees with

[31] March 29, 2023 Hearing Transcript, at p.63 (Appx. at A-998).

[32] *Id.*

[33] Letter Op., p.9.

restricted Tranche 3 shares who were not offered the 60% Amendment is a question of fact for trial.

In addition, as the Executives explain in their Answers and Counterclaims, their awards were amended (and the pertinent language added upon their separation) upon circumstances that differed – some of them received verbal communications from David Hammer,[34] while Executives that separated after him received communications from other SeaWorld executives.[35] The documentation amongst the Executives is different as well. The "Separation Agreement" of Brad Andrews, for example, also includes a Consulting Agreement.[36]

That extrinsic evidence is not alleged to try to render the pertinent provision ambiguous, as the Court of Chancery erroneously concluded. Instead, these allegations confirm that the language provided to the Executives was intended to give the Executives the opportunity to vest in their Tranche 3 shares no differently than if they were continuously employed by SeaWorld, and not intended to only remove the Employment Condition.

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[34] *See e.g.*, Andrews' Answer and Counterclaim, at Counterclaim ¶¶15-18 (Appx. at A-250-51).

[35] *See, e.g.,* Mills' Answer and Counterclaim, at Counterclaim ¶¶15-21 (Appx. at A-738-39).

[36] Andrews' Answer and Counterclaim, at Counterclaim ¶18 (Appx. A-251).

It is axiomatic that unresolved material factual disputes are inappropriate for judgment as a matter of law, let alone on a Rule 12 motion. In *Eagle Indus., Inc. v. DeVilbiss Health Care*, this Court reversed the Chancery Court's decision that contractual language was unambiguous and remanded the case for consideration of extrinsic evidence. *Eagle Indus., Inc. v. DeVilbiss Health Care*, 702 A.2d 1228 (Del. 1997). The same result should occur here.

CONCLUSION

Solely for purposes of vesting in their Tranche 3 shares, the Executives are to be eligible to vest no differently than if they were still continuously employed at SeaWorld. The decision of the Chancery Court should be reversed, and this case should be remanded so the parties can develop a full factual record regarding the application of the pertinent term and the 60% Amendment.

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CERTIFICATE OF SERVICE

I, David G. Holmes, hereby certify that on September 13, 2023, a true and correct copy of the *Corrected Opening Brief of the Appellants* was served upon the following individuals in the manner indicated:

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