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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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

If Appellant Dave Hammer had still been SeaWorld's Chief Human Resources Officer on May 8, 2017, he has adequately alleged that he would have received the 60% Amendment. SeaWorld's public disclosure of the 60% Amendment in its April 14, 2017 8-K confirms that Hammer's allegation is true: the recipients of the 60% Amendment included "existing management" and "all other current employees."[1]

The actual terms of the 60% Amendment provide for the partial vesting of the Tranche 3 shares subject to the employee's "continued employment" through the May 8, 2017, closing date. But SeaWorld did not provide Hammer with the 60% Amendment – even though Hammer was entitled to have his Tranche 3 shares vest after his separation from SeaWorld "as if" he had remained "continuously employed" with SeaWorld.

SeaWorld asserted below that only "certain" employees received the 60% Amendment, but now says that who received the 60% Amendment is not relevant to this dispute. And SeaWorld continues to maintain that the discretion afforded SeaWorld under the pertinent Plan documents permits it to pick and choose who received the 60% Amendment. The briefing therefore reveals a glaring factual dispute: did every current SeaWorld employee with Tranche 3 shares receive the

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1 SeaWorld's Form 8-K, dated April 14, 2017, at Item 5.02 (Appx. at A-1004)

60% Amendment that waived the Performance Condition in return for the vesting of 60% of their Tranche 3 shares (as the Executives allege), or did only "certain" of them received it because the Performance Condition was not satisfied (as SeaWorld originally asserted). This dispute of material fact cannot be resolved on a Rule 12 motion.

In the face of these factual disputes and the plain meaning of the terms used, SeaWorld focuses on what it *could* have done, and what terms *could* apply, rather than on what the Executives actually allege occurred here. SeaWorld's arguments are therefore red herrings. It's not what SeaWorld *could* have done, or what the Plan documents *could* have permitted SeaWorld to do that is relevant to this appeal. Instead, this appeal, like each Executive's claim, is focused on what SeaWorld *actually did* – and whether what SeaWorld did is consistent with the terms of the documents each Executive received.

Resolving this case starts with the terms of each Executive's separation documents, which are the documents that provide the basis for the claim each Executive asserts – not the Plan provisions never referenced in the 60% Amendment. Those relevant facts are properly set forth in the Counterclaims of each Appellant/Executive.

Viewing the facts in the light most favorable to Appellants, the non-moving party below, establishes that SeaWorld's interpretation of the language at issue in

this case is not the only reasonable one. The Chancery Court's decision should be reversed.

ARGUMENT

I. SEAWORLD'S INTERPRETATION OF THE EXECUTIVES' SEPARATION DOCUMENTS IS NOT THE ONLY REASONABLE ONE.

The plain meaning of the phrase at issue – that each Executive "shall continue to be eligible to vest (as if the Participant had remained continuously employed with the Company)" – does not simply remove the "Employment Condition," as SeaWorld asserts. Even the Chancery Court concluded that the plain meaning of the phrase was that the Executives were to be treated after separation "as if they had not been terminated." It is simply unreasonable for SeaWorld to conclude that the language supplied to each Executive upon his separation – that for Tranche 3 vesting purposes, he would be treated "as if" he was "continuously employed" – could not apply as a matter of law to the 60% Amendment that only required an employee's "continued employment."

SeaWorld never addresses the plain meaning of the entirety of the phrase at issue in its Answering Brief – because SeaWorld's view of the contract is myopic. The only words necessary to achieve the result sought by SeaWorld is that the shares "shall not be forfeited on the Termination Date." But that ignores all of the relevant language: Tranche 3 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." Every underlined word in the phrase is redundant and unnecessary if the provision was only meant to remove the Employment Condition..

Giving meaning to those remaining words is not simply redundant. Unlike the phrase "shall not be forfeited on the Termination Date" the remaining phrase begins with the words "shall continue to be eligible to vest" and provides circumstances when eligibility occurs – the Executive is eligible "as if" he had "remained continuously employed with the Company."

As discussed in the Opening Brief, this is not a "belt and suspenders" redundancy, and SeaWorld makes no attempt to defend the cases cited by the Chancery Court in support of the redundancy of the language used.[2] To the contrary, the language used does *more* than simply remove the Employment Condition, and it is consistent with the language used in the 60% Amendment.[3]

SeaWorld also simply ignores in its Answering Brief the language of the 60% Amendment. The most natural reading of the language at issue in this case as applied to the 60% Amendment is that that the Performance Condition for Tranche 3 was altered by the 60% Amendment for every employee who had "continued

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2 *Compare* Opening Brief, pp.19-20 *with* Answering Brief, p.14.

3 The language used, unlike the additional term included in former CEO Jim Atchison's agreement, does not constitute a "most favored nations clause," and that clause does not constate a basis for the Chancery Court's decision. Nor could it – because the additional language included with Atchison's agreement provides a second, independent reason why Atchison received the 60% Amendment, rather than a reason why the Executives should not have received the 60% Amendment.

employment." That condition is satisfied by the Executives in this case because their Tranche 3 shares vest "as if" they "remained continuously employed with the Company."

SeaWorld's citations regarding Delaware's rules of contract interpretation also lead it astray.[4] It is true that words must be read in context, but only after starting with the dictionary definitions of undefined words, and then construing the agreement as a whole, giving effect to all provisions therein. *In re P3 Health Group Holdings, LLC*, 282 A.3d 1054, 1066-67 & nn.3-4 (Del. Ch. 2022). And the other case SeaWorld cites provides a reminder relevant to this case: an interpretation "that gives effect to each term of an agreement is preferable to any interpretation that would result in a conclusion that some terms are uselessly repetitive." *O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 287 (Del. 2001).

The Executives' reading gives full meaning to each phrase and term used in all of the documents, provides no redundancies, and uses the provisions in the manner a reasonable person would understand "continuously employed" and "continued employment" to mean. SeaWorld's interpretation does not. Instead, it creates a redundancy, fails to explain why "continued employment" in the 60% Amendment does not apply to separated employees who for purposes of Tranche 3

4 Answering Brief, pp.12-13.

vesting are treated "as if" they were "continuously employed," and attempts to override the plain language of the pertinent words by reference to the so-called "purpose" of the Equity Agreements.

SeaWorld's interpretation is not the only reasonable interpretation as a matter of law. A "reasonable third person" would think that the Executives should have received the 60% Amendment under the terms of their separation documents. *See, Eagle Indus., Inc. v. DeVilbiss Health Care*, 702 A.2d 1228, 1232 (Del. 1997) (A "reasonable third person" would be "uncertain" about the proper application of an indemnification provision, rendering the provision ambiguous). As a result, the Chancery Court's decision should be reversed.

II. SEAWORLD'S ARGUMENT CONFIRMS THAT THERE ARE MATERIAL QUESTIONS OF FACT THAT CANNOT BE RESOLVED ON A RULE 12 MOTION.

Rather than interpret the pertinent language, SeaWorld assert that a different factual scenario applies to this case. Instead of addressing the facts alleged in this case, and the provisions that actually apply, SeaWorld identifies the provisions that *could* apply that would have allowed it to deny the 60% Amendment to the Executives. Because those arguments raise issues of fact that are not appropriate for a Rule 12 motion, the Chancery Court's decision should be reversed.

SeaWorld asserts that the Plan's provisions allow them to pick and choose whether to make awards under the agreements, particularly because the Performance Condition was not satisfied.[5] But that is not what is alleged to have occurred here. This case is not about whether SeaWorld *could* have only chosen a handful of plan participants to vest their Tranche 3 shares, or whether the documents before the Court *could* have been drafted differently and still been consistent with the terms of the overall plan. Just because SeaWorld had the ability to treat participants differently under the Plan's documents does not mean that *it did so*.

Instead, the facts that provide the basis for the claim are as set forth in the Counterclaims: that every active employee, as well as the Chairman of the Board,

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5 Answering Brief, pp.14-15.

and the former CEO, received the 60% Amendment, but the Executives did not. SeaWorld denied that assertion below, which created an issue of fact to be resolved.

SeaWorld's parade of hypotheticals are not before the Court, and amount to the assertion that SeaWorld could simply have done whatever it wanted, without recourse, and without regard to what actually occurred in April 2017 when the 60% Amendment was drafted and provided to participants in the Plan. Simply put, SeaWorld's actions must conform with not only the terms of the Plan but also the terms of the separation documents provided to the Executives. Whether they do conform is a question of fact, not a matter of law, under Rule 12.

CONCLUSION

Solely for purposes of vesting in their Tranche 3 shares, the Executives are to remain eligible to vest "as if" they were "continuously employed" at SeaWorld. Because SeaWorld's interpretation that this language only removed the Employment Condition is not the only reasonable interpretation, and there are numerous unresolved factual disputes, the decision of the Chancery Court should be reversed. 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.

Dated: November 2, 2023

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CERTIFICATE OF SERVICE

I, David G. Holmes, hereby certify that on November 2, 2023, a true and correct copy of the *Appellants' Reply Brief* was served upon the following individuals in the manner indicated:

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