



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SUSAN A. MARTINEZ,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 4128-VCP
)	
REGIONS FINANCIAL CORPORATION, a)	
Delaware corporation, as successor in interest to)	
AMSOUTH BANCORPORATION, a Delaware)	
corporation,)	
)	
Defendant.)	

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

Defendant Regions Financial Corporation (“Regions”) submits this memorandum of law in support of its motion for summary judgment, filed contemporaneously herewith, and in opposition to the motion for partial summary judgment filed by plaintiff Susan Martinez (“Plaintiff” or “Martinez”) on November 26, 2008, respecting the advancement of attorneys’ fees. For all the reasons stated below, this case can be decided based on the application of the law to the unambiguous terms of the contracts attached to plaintiff’s Verified Complaint (the “Complaint”).

This case follows the November 2006 merger of two banks – AmSouth Bancorporation (“AmSouth”) and Regions Bank. Martinez was an executive of AmSouth who signed an Employment Agreement with AmSouth, dated February 1, 2004 (the “Employment Agreement”). The Employment Agreement was expressly designed to provide her with defined “compensation and benefits arrangements upon a Change of Control” that were “competitive with those of other corporations.” (Compl. Ex. A at 1) After the merger, Martinez was employed by Regions until almost a year later, when she chose not to sign a new employment agreement proposed by Regions. Because she decided not to sign a new employment agreement, the employment relationship ended on or about October 12, 2007, though Martinez was permitted to remain on the payroll until December 31, 2007. Thereafter, as required by Section 6 of the Employment Agreement, Regions paid Martinez \$7,136,120 in severance benefits, which amount represented the sum derived from a contractual formula, which included three times her salary and prior bonus as well as three times a \$1,000,000 long term incentive grant. (Shelton Aff. ¶ 2)

Not satisfied with that payout, Martinez seeks even more. Martinez alleges that she was entitled to receive both the \$7,136,120 in severance benefits set forth in Section 6 of the Employment Agreement **AND** the salary and bonus she would have earned under Section 4 of the Employment Agreement had she remained employed with Regions for the remaining one year term of the Employment Agreement. But if Martinez had remained employed through November 2008, Regions' only contractual obligation to her would have been payment of her annual salary of \$475,000 and a bonus for 2007 (a total of less than \$1,200,000). Martinez argues that she is entitled to that \$1,200,000 (as if she had stayed) in addition to the \$7.1 million in severance benefits that she received pursuant to a contractually defined formula for her early termination.

The same argument was rejected by the United States Court of Appeals for the Seventh Circuit just over a year before AmSouth and Martinez signed the Employment Agreement. In *Gerow v. Rohm & Haas Company*, 308 F.3d 721 (7th Cir. 2002),¹ Judge Easterbrook construed virtually identical contract language and determined as a matter of law that the former employee's argument for double compensation was "unreasonable" and fallacious, "attributes irrationality to his employer" and "makes no business sense." *Id.* at 724, 725, 726. Similarly, Martinez's argument would render meaningless the section of the Employment Agreement plainly applicable in the situation of a termination following a Change of Control. Nevertheless, in the face of the *Gerow* decision, and despite the \$7.1 million she already has been paid, Martinez presses forward, no doubt motivated by the inclusion in the Employment Agreement of an attorneys' fees provision that Martinez interprets as entitling her to payment of her attorneys'

¹ All opinions cited herein are contained in a compendium filed contemporaneously herewith.

fees on a current basis, regardless of the outcome of her lawsuit or the reasonableness of her claims.

Martinez also claims that she is entitled to payment of “a full 2007 Annual Bonus,” when in fact she has already been paid the bonus component required by Section 6 of the Employment Agreement as part of the severance payment. Martinez also asserts a claim for violation of the implied covenant of good faith and fair dealing, even though the Employment Agreement provides a clear legal right for Regions to terminate her employment. Because she has been paid the bonus provided for in the Employment Agreement, and because no additional term can be implied in an Employment Agreement that details the payment formula upon termination without cause following a Change of Control, these claims are due to be dismissed as a matter of law. Since Martinez’s decision to pursue claims for breach of the Employment Agreement is not reasonable on the merits, this Court should dismiss Martinez’s claim for attorney’s fees, just as the *Gerow* Court rejected the appellant’s claim for the legal fees incurred in his appeal.

Lastly, Martinez asserts a claim under the AmSouth Long Term Incentive Compensation Plan (the “LTIP”) that she is entitled to exercise unvested stock options and restricted stock granted to her by Regions after the Change of Control. The LTIP plainly creates no such right. Moreover, the pertinent agreements plainly state that all unvested stock options and unvested restricted stock are *forfeited* upon the termination of Martinez’s employment. As such, this claim is due to be dismissed as a matter of law.

This is a case that cries out for summary judgment. The terms of the contracts are unambiguous, the material facts are not in dispute, and the legal claims asserted are wholly

without merit. This is Regions' opening brief in support of its motion for summary judgment and in opposition to plaintiff's motion for partial summary judgment.

STATEMENT OF FACTS

A. Martinez's Employment History; The AmSouth-Regions Merger

Martinez was a senior executive with AmSouth. (Compl. ¶ 1; Ans. ¶ 1) On or about February 1, 2004, Martinez and AmSouth entered into an Employment Agreement.² (Compl. ¶ 5; Ans. ¶ 5; Agmt. § 3) The Employment Agreement is not the product of unique, individualized negotiation. Martinez alleges that the terms of the Employment Agreement are materially identical to those that AmSouth entered into with other senior executives. (Compl. ¶ 5; Ans. ¶ 5) As made clear in the only recital to the Employment Agreement, AmSouth entered into the contract with the express objective that its terms addressed the potential for a "Change of Control" of AmSouth and would provide "the Executive with compensation and benefits arrangements upon a Change of Control which ensure that the compensation and benefits expectations of the Executive will be satisfied and which are competitive with those of other corporations." (Agmt. at 1)

Nearly three years later, in November 2006, Regions closed on a merger with AmSouth, which merger constituted a Change of Control as defined by the Employment Agreement. (Compl. ¶¶ 7,8; Ans. ¶¶ 7,8) Regions succeeded AmSouth and assumed its obligations under the Employment Agreement.

In April 2007, Regions granted stock options and restricted stock to Martinez. (Compl. Ex. D) In September 2007, Regions proposed an alternative employment agreement to a number

² The Employment Agreement is attached as Exhibit A to the Affidavit of Jill Shelton and is also attached as Exhibit A to the Complaint. It is cited herein as "Agmt. ___".

of its executives, including Martinez. (Compl. ¶ 18) Martinez chose not to accept the newly proposed agreement. As a result of her decision, on October 12, 2007, Martinez's employment with Regions was terminated without cause, with her last day of employment being December 31, 2007. (*Id.* ¶¶ 22, 25)

B. The Employment Agreement

The Employment Agreement was designed by AmSouth with the express objective of providing a competitive set of compensation arrangements for its senior executives in the event of a Change of Control. This is made clear in the only recital to the Employment Agreement:

The Board of Directors of the Company (the "Board"), has determined that it is in the best interests of the Company and its shareholders to assure that the Company will have the continued dedication of the Executive, notwithstanding the possibility, threat or occurrence of a Change of Control (as defined below) of the Company. ***The Board believes it is imperative*** to diminish the inevitable distraction of the Executive by virtue of the personal uncertainties and risks created by a pending or threatened Change of Control and to encourage the Executive's full attention and dedication to the Company currently and in the event of any threatened or pending Change of Control, and ***to provide the Executive with compensation and benefits arrangements upon a Change of Control which ensure that the compensation and benefits expectations of the Executive will be satisfied and which are competitive with those of other corporations.*** Therefore, in order to accomplish these objectives, the Board has caused the Company to enter into this Agreement.

(Agmt. at 1) (emphasis added).

Section 3 of the Employment Agreement provides that the presumptive term of the employment period is "subject to the terms and conditions of this Agreement":

3. Employment Period; Prior Agreements. (a) The Company hereby agrees to continue the Executive in its employ, and the Executive hereby agrees to remain in the employ of the Company ***subject to the terms and conditions of this Agreement***, for the period commencing on the Effective Date and ending on the second anniversary of such date (the "Employment Period").

(*Id.* at 3) (emphasis added).³ Section 5(e) of the Employment Agreement expressly contemplates that Martinez’s employment could be terminated without cause at any time:

“Date of Termination” means ... (ii) if the Executive’s employment is terminated by the company other than for Cause or Disability, the Date of Termination shall be the date on which the company notifies the Executive of such termination ...

(*Id.* at 8)

Section 4 of the Employment Agreement sets forth the compensation Martinez would be paid during the “Employment Period” (*i.e.*, while she was employed at AmSouth or its successor):

4. Terms of Employment. ... (b)Compensation. (i) Base Salary. During the Employment Period, the Executive shall receive an annual base salary (“Annual Base Salary”)...

(ii) Annual Bonus. In addition to the Annual Base Salary, the Executive shall be awarded, for each fiscal year ending during the Employment Period, an annual bonus (the “Annual Bonus”) in cash at least equal to the Executive’s highest bonus under the Company’s Executive Incentive Plan, or any comparable bonus under any predecessor or successor plan, or otherwise, for the last three full fiscal years prior to the Effective Date ... (the “Recent Annual Bonus”).

(iii) Incentive, Savings and Retirement Plans. During the Employment Period, the Executive shall be entitled to participate in all incentive, savings and retirement plans, practices, policies and programs applicable generally to other peer executives of the Company ...

(iv) Welfare Benefit Plans. During the Employment Period, the Executive and/or the Executive’s family, as the case may be, shall be eligible for participation in and shall receive all benefits under the welfare benefit plans, practices, policies and programs provided by the Company and its affiliated companies (including, without limitation, medical, prescription, dental, disability, employee life, group life, accidental death and travel accident insurance plans and programs)...

...
(vi) Fringe Benefits. During the Employment Period, the Executive shall be entitled to fringe benefits, including, without limitation, tax

³ The Effective Date is defined in Section 1 of the Employment Agreement as the date a Change of Control occurs.

and financial planning services, payment of club dues, and, if applicable, use of an automobile and payment of related expenses...

(*Id.* at 3-5)

Section 6 of the Employment Agreement expressly contemplates that Martinez's employment could be terminated without cause and provides for the payment of "golden parachute" severance benefits in the event that Martinez is terminated without "Cause":

6. Obligations of the company upon Termination. (a) Good Reason; Other Than for Cause, Death or Disability. If, during the Employment Period, the company shall terminate the Executive's employment other than for Cause or Disability or the Executive shall terminate employment for Good Reason:

(i) except as specifically provided below, the Company shall pay to the Executive in a lump sum in cash within 30 days after the Date of Termination the aggregate of the following amounts:

A. the sum of (1) the Executive's Annual Base Salary through the Date of Termination to the extent not theretofore paid, (2) the product of (x) the higher of (I) the Recent Annual Bonus and (II) the Annual Bonus paid or payable ..., for the most recently completed fiscal year during the Employment Period, if any (... the "Highest Annual Bonus") and (y) a fraction, the numerator of which is the number of days in the current fiscal year through the Date of Termination, and the denominator of which is 365 and (3) any compensation previously deferred ... and any accrued vacation pay...

B. the amount equal to the product of (1) three and (2) the sum of (x) the Executive's Annual Bonus and (z) the value determined ... to be a competitive annual long term incentive grant...

...

E. An amount equal to three times the sum of: (i) the Executive's annual club dues bonus (if applicable); plus (ii) the Executive's annual automobile allowance (if applicable) for the year in which the Executive's Date of Termination occurs.

(*Id.* at 8-10)

Section 8 of the Employment Agreement is the source of Martinez’s purported entitlement to current payment of her attorney fees, although the obligation to pay is expressly conditioned on the reasonableness of her legal expenses:

The Company agrees to pay as incurred, to the full extent permitted by law, all legal fees and expense which the Executive may reasonably incur as a result of any contest (regardless of the outcome thereof) by the Company, the Executive or others of the validity or enforceability of, or liability under, any provision of this Agreement or any guarantee of performance thereof (including as a result of any contest by the Executive about the amount of any payment pursuant to this Agreement)

(*Id.* at 12) (emphasis added).

C. Regions Makes the Required Severance Payment

On June 15, 2008, Regions paid Martinez more than \$7,136,120 in severance benefits pursuant to Section 6 of the Employment Agreement. (Shelton Aff. ¶ 2) This payment was the aggregate of the following three components:

- pursuant to Section 6(a)(i)A:
\$656,000 (0⁴ + (the Highest Annual Bonus x (365/365⁵) + 0);
- pursuant to Section 6(a)(i)B:
\$6,393,000 (3 x (\$475,000⁶ + \$656,000⁷ + \$1,000,000⁸); plus

⁴ There was no annual base salary “to the extent not theretofore paid,” as all salary had already been paid through December 31, 2007.

⁵ Regions overpaid this component, as Regions was only obliged to pay a fraction of the Highest Annual Bonus based on the “number of days in the current fiscal year through the Date of Termination,” which was that number of days through October 12, 2007, the date on which Regions notified Martinez of her termination. (Compl. ¶ 25; Agmt. § 5(e))

⁶ Martinez’s Annual Base Salary.

⁷ Martinez’s Highest Annual Bonus. \$656,000 is the amount of the bonus paid to Martinez in 2006, the most recently completed fiscal year during the Employment Period, which is higher than the bonus paid to Martinez by AmSouth in any of the last three fiscal years prior to the Change of Control (*i.e.*, the “Recent Annual Bonus”). (Shelton Aff. ¶¶ 2, 7)

⁸ The value determined to be a “competitive annual long term incentive grant.”

- pursuant to Section 6(a)(i)E:
\$87,120 (3 x \$29,040⁹)

(Shelton Aff. ¶ 2)

D. The Unvested Regions Stock Options and Restricted Stock

The AmSouth Bancorporation 2006 Long Term Incentive Compensation Plan (“LTIP”) provides for the immediate exercisability of option awards that were outstanding upon a Change of Control:

6.9 TERMINATION OF EMPLOYMENT. Each Option Award Agreement shall set forth the extent to which the Participant shall have the right to exercise the Option following termination of the Participant’s employment with the Company. ... In the event of a termination of employment after a Change of Control, Options shall be treated in the manner set forth in Article 16.

* * *

ARTICLE 16. CHANGE IN CONTROL

16.1 TREATMENT OF OUTSTANDING AWARDS. Any provision of the Plan ... to the contrary notwithstanding, *upon the occurrence of a Change in Control* ... during the employment of a Participant ... unless the applicable Award Agreement provides otherwise:

(a) Any and all *then outstanding Options* ... shall become immediately exercisable[.]

(Shelton Aff. Ex. B at C-11, C-20) (emphasis added).¹⁰ There is no dispute relating to any securities issued to Martinez by AmSouth prior to the November 2006 Change of Control.

Martinez’s claim centers around Regions’ grant to her of incentive stock options, non-qualified stock options and restricted stock in the spring of 2007, after the Change of Control. On May 14, 2007, Martinez signed three separate notices, each of which states that the respective grants were effective on April 27, 2007, and that the securities are “governed by the terms and

⁹ The amount for dues and allowances.

¹⁰ The LTIP is also attached as Exhibit C to Plaintiff’s Complaint.

conditions of the [LTIP] ... and the Option Agreement, which is enclosed and made a part of the Agreement.” (Shelton Aff. Ex. C)¹¹ A Stock Option Agreement was enclosed with the notices for the stock options, and a Restricted Stock Award Agreement was enclosed with the notice of the restricted stock award. (*Id.*)

Each of the three notices includes the vesting schedule for the respective securities. The vesting schedules plainly indicate that none of the securities vest prior to 2008. (*Id.*) Both agreements plainly state that unvested securities are forfeited upon termination of employment (assuming that termination occurs prior to a Change of Control of Regions). The Stock Option Agreement states:

. . . . Your options will become immediately exercisable in full if your employment ceases by reason of death or Disability or if a Change in Control occurs *while you are employed by Regions*. . . .

. . . .

If you cease to be employed by Regions for Cause or for any other reason except retirement at or after age 55 with 10 years of service on or after November 30, 2007, death, or Disability, *any unvested options will be forfeited as of the date your employment terminates*. . . .

(*Id.* Stock Option Agmt. at 1-2) (emphasis added). The Restricted Stock Award Agreement similarly states:

The granted date of your Restricted Stock is April 24, 2007. The Period of Restriction begins on the grant date and ends on the third anniversary of the grant date, at which time all restrictions will lapse, the Award will be fully vested, and the shares will be released to your control. . . .

. . . .

If, during the Period of Restriction, your employment with Regions is terminated for reasons other than death, Disability, retirement at or after age 55 with 10 years of service, or a Change in Control while you are employed, *your Restricted Stock is forfeited*. . . .

(*Id.* Restricted Stock Agmt. at 1-2) (emphasis added).

¹¹ The three notices and the respective option agreements are also attached as Exhibit D to Plaintiff’s Complaint.

No Change of Control of Regions occurred during Martinez's employment with Regions.
(Shelton Aff. ¶ 8)

ARGUMENT

To obtain summary judgment, a movant must establish that no genuine issue of fact exists and the movant is entitled to judgment as a matter of law. Ch. Ct. R. 56(c); *Arco Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002). Where the “moving party supports its motion with admissible evidence and points to the absence of proof bolstering the non-moving party’s claims, the non-moving party must come forward with admissible evidence creating a triable issue of material fact or suffer an adverse judgment.” *Henderson v. Chantry*, 2002 Del. Ch. LEXIS 14, *9 (Feb. 5, 2002).

A court asked to grant summary judgment based on a contract's interpretation must first determine whether, as a matter of law, the contract is unambiguous on its face. *Klair v. Reese*, 531 A.2d 219, 222 (Del. 1987). “Where the dispute centers on the proper interpretation of an unambiguous contract, summary judgment is appropriate because such interpretation is a question of law.” *Seidensticker v. Gasparilla Inn, Inc.*, 2007 Del. Ch. LEXIS 155, *6 (Nov. 8, 2007); *see also MHM/LLC, Inc. v. Horizon Mental Health Mgmt.*, 1996 Del. Ch. LEXIS 129 (Oct. 3, 1996) (granting summary judgment where the contract was clear on its face, and no genuine disputes of fact existed).

A contract “is not ambiguous simply because the parties disagree concerning its intended construction.” *Eagle Indus., Inc. v. Devilbliss Health Care, Inc.*, 702 A.2d 1228, 1232 n.8 (Del. 1997). “Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.” *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del. 1992). If “a court can determine the meaning of a contract without any other guide than

knowledge of the simple facts on which, from the nature of language in general, its meaning depends,” no ambiguity exists, and the parties are bound by its plain meaning. *Id.*

“A contract must be construed as a whole, giving effect to all of its provisions,” *Seabreak Homeowners Ass’n v. Gresser*, 517 A.2d 263, 269 (Del. Ch. 1986), and each clause of any contract must be read in relation to each other to bring harmony, if possible, between all parts of the writing. *Troumouhis v. State*, 2006 Del. Super. LEXIS 234, *14 (May 31, 2006); *Commercial Credit Co., v. Empire of America Relocation Services, Inc.*, 1987 Del. Super. LEXIS 1363, *11 (Nov. 17, 1987). “Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one.” *DCV Hldgs., Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005).

I. REGIONS DID NOT BREACH THE EMPLOYMENT AGREEMENT

Martinez asserts four claims under the Employment Agreement: (i) failure to pay future compensation in addition to severance pay (Count II); (ii) failure to pay “a full annual bonus for 2007” (Count I); (iii) violation of the implied covenant of good faith and fair dealing in not paying future compensation and a “full 2007 Annual Bonus” in addition to severance pay (Count III); (iv) failure to pay attorneys’ fees (regardless of the reasonableness of her other claims under the Employment Agreement) (Count IV). None of these claims has merit.

A. The Employment Agreement Does Not Require Regions to Pay Martinez Both Her Future Compensation and Severance Pay

Martinez’s primary claim in this litigation (pled in Count II of her Complaint) is that, though her employment at Regions was terminated on or about October 12, 2007 (effective December 31, 2007), and though she undisputedly received the generous severance package called for in Section 6 of the Employment Agreement, she was nonetheless entitled (under

Section 4) to *also* continue receiving her regular pay and benefits as an employee, *as if her employment had not ended*. Martinez’s argument requires a nonsensical reading of the language of the Employment Agreement that has been flatly rejected by the only courts that have addressed the same contention, based on nearly identical contract language.

Section 4 and Section 6 of the Employment Agreement are alternative provisions. Section 4 applies to the period that Martinez remains employed, and Section 6 applies in the event she is terminated without “Cause” or resigns for a “Good Reason” before the contract term had run. Martinez’s argument that she was entitled to *both* sets of compensation is belied by the language of the Employment Agreement.

Section 4 sets forth Martinez’s duties and her regular compensation, bonus, and benefits “[d]uring the Employment Period.” (Agmt. §§ 4(a), (b)) The definition of “Employment Period” is presumptively two years after a Change of Control, but expressly modified to make it “subject to the terms and conditions of this Agreement.” (*Id.* § 3(a)) Section 5 sets forth various ways in which Martinez’s employment may terminate prior to what would otherwise be the two-year term of employment, including termination for death, disability, “Cause” or “Good Reason.” Section 6 provides for golden parachute severance payments to Martinez if she terminates her own employment “for Good Reason” or if the company terminates her employment “other than for Cause or Disability.”

Martinez’s claim that Section 6 was meant to provide *additional* benefits—on top of what was provided for in Section 4—makes no sense when reading the Employment Agreement as a whole. Section 6(a)(i) specifies how to calculate the “aggregate” amount “the Company shall pay to the Executive in a lump sum in cash” following a termination without cause. (Agmt. at 8) Included in that subsection are subparts A through E. Subpart A is a formula that sums three

components called the “Accrued Obligations,” which represent Martinez’s accrued compensation (salary, bonus and accrued vacation) during the year in which she was terminated. Subpart B is a formula that pays her three times the sum of (x) her annual salary, (y) her Highest Annual Bonus and (z) “a competitive annual long term incentive grant.” Given these detailed formulas in Section 6 guaranteeing Martinez payment of her accrued compensation and an extra three years of compensation, among other benefits, it is wholly illogical to interpret Section 6 as if it contains an absent term saying that Martinez is also entitled to receive whatever compensation she would otherwise earn under Section 4 if she were not terminated.

Section 4 creates no entitlement to additional compensation upon her termination because her term of employment had come to an end. Regions had no obligation to pay Martinez for post-termination salary, bonus and benefits under Section 4, just as Martinez had no post-termination obligation to perform the services described in Section 4.

Martinez’s claim also makes no sense in light of the express purpose of the Employment Agreement, as set forth in the recital – to provide a defined, “competitive” set of compensation arrangements in the event of a termination after a Change of Control. (Agmt. at 1) The express purposes of the Employment Agreement are inconsistent with any reasonable expectation to a windfall payment premised on her never being fired in addition to the formula compensation set forth in Section 6 for a termination after a Change of Control. *See Citadel Holding Corp. v. Roven*, 603 A.2d 818, 823 (Del. 1992) (looking to recitals for contractual intent).

The reasonable expectations of the parties at the time of contracting should reflect an authoritative interpretation of a virtually identical contract barely a year earlier in *Gerow v. Rohm & Haas Co.*, 308 F.3d 721 (7th Cir. 2002). In *Gerow*, the Seventh Circuit Court of Appeals rejected a virtually identical contract claim for additional compensation in addition to

specified severance benefits. Judge Easterbrook began his opinion by noting the novelty of the former employee's claim:

Gerow's position, in other words, is that he is entitled to both the pay he would have received had he stayed, and the severance payments he actually received on his discharge. He insists that this is the consequence of the provisions creating a three-year "employment period" with protection of salary and status. . . .

Although the agreement is of a common variety, derived from language that Wachtell, Lipton, Rosen & Katz drafted for Morton and many other potential targets of acquisition bids, Gerow's understanding of his entitlements is novel. . . . The parties could not find any published decision discussing this agreement's language, and neither could we. Nor are the parties aware of any executive covered by an agreement of this kind who has received both salary and severance for the same period. . . .

Id. at 722-23.

The district court had rejected Gerow's claim for additional compensation under Section 3 of his contract, in light of the severance benefits specified in Section 5(d)¹²:

Gerow urges us to read Section 3 in isolation and find that he is entitled to the Section 3 benefits for the entire Employment Period because the Section itself does not provide a cessation of those benefits in the event of termination. Gerow's position would be plausible only if we were to completely ignore the existence of Section 5. As previously noted, Section 5(d) provides that "[i]f, *during the Employment Period*" the Company terminates an Executive other than for cause, the Executive is to receive a clearly-defined laundry list of payments and benefits. The event contemplated by Section 5(d) is precisely what happened here. Gerow was undisputedly terminated without cause, and he subsequently received the benefits outlined in Section 5(d). Read as whole, the contract plainly provides for certain defined benefits *in the event an employee is terminated*. The fact that Section 3 itself does not explicitly curtail the "Employment Period" in the event of termination is immaterial when only a few pages later, the Agreement so clearly provides what happens in the event of a termination.

In short, we believe that Gerow's interpretation of the Rohm Agreement that, post-termination, he is entitled to termination benefits *and* employment benefits is not reasonable, and therefore find as a matter of law that he is not entitled to additional compensation and benefits under Section 3.

¹²Sections 2, 3 and 5(d) in the Gerow contract match up to Sections 3, 4 and 6(a), respectively, of the Employment Agreement.

Gerow v. Rohm and Haas Co., 2001 U.S. Dist. LEXIS 15698, at *11-12 (N.D. Ill. Sept. 28, 2001) (emphasis in original) (citation omitted).

Judge Easterbrook’s opinion for a unanimous panel of the Seventh Circuit affirmed, and further articulated the fallacies inherent in the position now espoused by Martinez. Judge Easterbrook noted that the dual purposes of a golden parachute agreement – protecting executives from insecurity and aligning their incentives with investors – do not “call[] for compensating an executive twice on a change of control, however—once through guaranteed salary, and a second time through guaranteed severance over the same period.” 308 F.3d at 723. Proceeding with a textual analysis of Gerow’s agreement, Judge Easterbrook rejected the argument that the three-year length of the “Employment Period” implied a right to three years of compensation. Instead, Section 3 “provides a three-year period of protection” and Section 5(d) is “a liquidated-damages provision in the form of severance pay.” *Id.* at 724. Gerow’s argument “attributes irrationality to his employer” and “makes no business sense,” for as Judge Easterbrook explains:

Why would the acquirer ever *fire* any executive during the first three years, if the executive has a guaranteed position for that time? Why would P5(d) provide for severance benefits that *assume* lack of employment? . . . The big contextual clue is not that this agreement contains P3, which Gerow finds significant, but that it contains P5(d), which on Gerow’s view is either useless (because he can’t be fired, period) or just an option on Rohm’s part to make a magnanimous gesture (because the executive gets full pay whether he stays or not). . . . Gerow’s reading of this contract, in other words, makes no business sense, while Rohm’s reading is practical. And it is a fundamental principle of contract interpretation that courts read language to make business sense whenever possible.

. . . [O]n Gerow’s reading of P2 an executive who quits within three years breaks his promise and should be required to pay damages for breach, rather than receiving millions in severance. . . . The only way to make sense of the executive’s right to walk—an option to put his job back to the employer in exchange for the severance package is to say that all the “employment period” does is measure the *time* during which the employee receives either an undiminished salary (and perks) or a specified severance package. One or the other, but not both.

Id. at 724-725 (emphasis in original) (citation omitted).

The reasoning of the *Gerow* opinions is even more powerful as applied to the Employment Agreement, because the Employment Agreement does not provide for a fixed “Employment Period.” The definition of “Employment Period” in the Employment Agreement incorporates the modifying phrase “subject to the terms and conditions of this Agreement,” which phrase was absent in *Gerow*, making even more clear that termination of employment is not a breach of any obligation to keep Martinez employed for a defined period of time. (Agmt. at 3) Termination simply triggers a right to the golden parachute severance benefits of Section 6(a), which Regions paid, and which are far more generous than payment of the regular compensation associated with the remaining approximate one year of the default two-year employment period.

Gerow is compelling, and there is no contrary authority. In *Deal v. Consumer Programs, Inc.*, 470 F. 3d 1225 (8th Cir. 2006), which distinguished *Gerow*, the employment agreement provided that in the event of termination without cause after a change of control, the employee would receive a cash payment of two times base salary, and “[i]n addition” to that, “all remedies available under this Agreement or at law in respect of any damages suffered by [Deal] as a result of an involuntary termination of employment without Cause.” *Id.* at 1228. The *Deal* Court allowed recovery of compensation for the remainder of the fixed employment period and distinguished *Gerow*, reasoning that since *Gerow*’s contract, unlike *Deal*’s, “explicitly identified an exclusive ‘laundry list’ of amounts recoverable in the event of termination” and “did not include an ‘all remedies’ provision,” *Gerow* could recover only the items specified, which did not include damages for breach of contract. *Id.* at 1231.

Like *Gerow* and unlike *Deal*, Section 6(a) of the Martinez Employment Agreement identifies a laundry list of benefits payable upon a termination without cause and says nothing about any additional remedy for damages suffered. Accordingly, Martinez's claim for damages under Section 4 of the Employment Agreement must fail.

B. Martinez Was Paid All Bonus Amounts Owed

Martinez claims in Count I of her Complaint that she is entitled to "her full 2007 Annual Bonus under Section 4 of the Employment Agreement and any correlative adjustments related thereto under Section 6 of the Employment Agreement[.]" (Compl. at 9) Both aspects of her claim are based on a misreading of the Employment Agreement.

Martinez was not entitled to a 2007 bonus under Section 4 of the Employment Agreement. As discussed above, Section 6(a)(i) supersedes Section 4 in the context of a termination without cause by specifying how to calculate the payment owed upon a termination of Martinez's employment. Included in that total severance payment are three components described in Subsection 6(a)(i)A and referred to collectively as the "Accrued Obligations." They each represent aspects of Martinez's accrued compensation for the year in which she was terminated: (1) salary through the Date of Termination "to the extent not theretofore paid"; (2) an accrued bonus calculation based on the fraction of the current fiscal year through the Date of Termination; plus (3) any unpaid deferred compensation and accrued vacation pay. (Agmt. at 8) The bonus component of the "Accrued Obligations" is what Martinez was owed for a 2007 bonus. There is no separate entitlement to a 2007 bonus under Section 4.

The particular manner in which the Section 6(a)(i)A bonus component is calculated also shows that there is no separate obligation under Section 4 to pay a 2007 bonus and no need to make a "correlative adjustment" for purposes of Section 6. The bonus component of Section 6(i)(A) is the product of two elements: (x) the "Highest Annual Bonus"; and (y) a fraction based

on the “number of days in the current fiscal year through the Date of Termination.” (Agmt. at 8) Both elements are inconsistent with any notion that Martinez is entitled to a full year bonus for 2007, the year in which she was terminated.

For purposes of determining the “Highest Annual Bonus,” one must look backward to a bonus previously paid for a completed prior fiscal year. “Highest Annual Bonus” is defined as “the higher of (I) the “Recent Annual Bonus” [*i.e.*, the highest annual bonus in the three fiscal years prior to the Change of Control (Agmt. § 4(b)(ii))] and (II) the “Annual Bonus paid ... for the *most recently completed* fiscal year during the Employment Period.” (Agmt. at 8) (emphasis added). In no circumstance would the “Highest Annual Bonus” be a function of some “adjustment” based on a hypothetical bonus to be paid for the fiscal year that has not yet been completed. Yet that is what Count I of the Complaint appears to assume.

The other bonus component of the Section 6(a)(i) severance payment – the fraction based on the “number of days in the current fiscal year through the Date of Termination” – is also backward looking. For purposes of a termination without cause, the “Date of Termination” is the “date on which the Company notifies the Executive of such termination.” (Agmt. § 5(e)) Martinez alleges that October 12, 2007 is that date. (Compl. ¶¶ 22, 25) Since the severance payment shall be made “within 30 days after the Date of Termination,” and since the bonus component is the product of a past annual bonus and the fraction of the current year actually worked, the bonus component cannot be adjusted based on a hypothetical, future end-of-year bonus. Martinez’s claim that she is entitled to such an adjusted severance payment is not supported by the Employment Agreement and must be dismissed.

C. Regions Did Not Breach the Implied Covenant of Good Faith and Fair Dealing

Because the language of the Employment Agreement cannot get Martinez where she wishes to go, she next looks to the implied covenant of good faith and fair dealing to rescue her claims, and *undo* the terms of her contract. Martinez writes:

To the extent that the Employment Agreement does not provide Martinez with her full 2007 Annual Bonus or with continued salary or other benefits upon her termination without cause, Regions is nevertheless liable to her . . . for breach of the implied covenant of good faith and fair dealing.

(Compl. ¶ 44) Martinez conceives of the implied covenant of good faith and fair dealing as a doctrine by which Regions can be liable for exercising its clear right under the Employment Agreement to terminate Martinez without cause. Martinez claims that “she was terminated without Cause for failing to give up her rights under her Employment Agreement and for refusing to sign the Revised Change in Control Agreement despite Regions’ obligation to perform under the Employment Agreement.” (*Id.* ¶ 49)

These allegations do not state a claim for relief. An implied covenant claim must be based on clear textual evidence that the parties would have negotiated to proscribe the conduct complained of:

Only when it is clear from the writing that the contracting parties would have agreed to proscribe the act later complained of had they thought to negotiate with respect to that matter may a party invoke the covenant's protections. In other words, the implied covenant of good faith and fair dealing should not be applied to give the plaintiffs contractual protections that they failed to secure for themselves at the bargaining table.

Corporate Prop. Assocs. 14 Inc. v. CHR Holding Corp., 2008 Del. Ch. LEXIS 45, *17 (Apr. 10, 2008) (internal quotations omitted).¹³

¹³ Delaware courts are “cautious” and “exacting” when asked to imply a contractual obligation from the written text of a contract, and it is only in the “rare” case that “compelling fairness” necessitates the implication of a contractual term “so as to honor the parties’ reasonable

The Employment Agreement anticipates that Martinez may be terminated without cause for any reason. The introductory paragraph notes “the personal uncertainties and risks created by a pending or threatened Change of Control.” (Agmt. at 1) Section 6 of the Employment Agreement expressly recognizes that a successor to AmSouth may “terminate the Executive’s employment other than for Cause or Disability” and creates a package of remedies for Martinez in that event. (*Id.* at 8) The Employment Agreement creates an identical package of remedies if Martinez resigns for “Good Reason,” which is defined in Section 5(c)(iv) to include “any purported termination by the Company of the Executive’s employment otherwise than as expressly permitted by this Agreement.” (*Id.* at 7) It would be an impermissible re-writing of the Employment Agreement to afford Martinez greater remedies than those specified in Section 6(a) simply because a successor to AmSouth was unwilling to retain an employee who would not sign a new employment agreement. Accordingly, the Court should dismiss Martinez’s claim for breach of the covenant of good faith and fair dealing.

D. Martinez’s Claim for Attorney Fees Fails Because Her Position in this Litigation Is Patently Unreasonable

In Count IV of her Complaint, Martinez seeks advance payment of the attorney fees she has incurred in bringing the instant litigation, and claims entitlement to retain such funds regardless of the outcome of this case. In her opening brief in support of her motion for partial summary judgment, Martinez appears not to conceive of any defense to her claim for advancement that is predicated on the merits of her other claims. This blanket entitlement to fees, she contends, is based on the language of Section 8 of the Employment Agreement, and this

expectations.” *Cincinnati SMSA Ltd. P’ship v. Cincinnati Bell Cellular Systems Co.*, 708 A.2d 989, 992, 993 (Del. 1998); see *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 442 (Del. 2005).

Court's opinion in *Lillis v. AT & T Corp.*, 904 A.2d 325 (Del. Ch. 2006). (See Pl's. Op. Br. at 9-11)

Those sources do not support the blanket relief Martinez seeks. Section 8 of the Agreement includes two critical qualifiers, as noted below

The Company agrees to pay as incurred, *to the full extent permitted by law*, all legal fees and expense which the Executive may *reasonably* incur as a result of any contest (regardless of the outcome thereof) by the Company, the Executive or others of the validity or enforceability of, or liability under, any provision of this Agreement or any guarantee of performance thereof (including as a result of any contest by the Executive about the amount of any payment pursuant to this Agreement)

(Agmt. at 12)

Gerow interpreted the word “reasonably” in a parallel contractual provision. Judge Easterbrook reasoned that in the context of a promise to pay fees regardless of the outcome of the litigation, the word “reasonably” necessarily requires that a party’s litigation position be reasonable:

An opportunity to litigate on the adversary’s dime, without any need to prevail in order to collect, creates a moral hazard, which is mitigated by the requirement that the fees be incurred “reasonably.” Like the district judge, we read the word “reasonably” in context to curtail this hazard by requiring not only that the time devoted to advocacy must be reasonable in light of the litigation’s nature (a requirement in every fee-shifting situation) but also that the litigating position must be “reasonable” (a filter necessitated by the promise to reimburse even if the claim is unsuccessful). Otherwise the employer has written a blank check that every employee would seek to cash on the off chance that a court would order the employer to pay more. . . .

. . . . A “reasonable” position for purposes of this kind of bargain is the sort of cost-justified argument that would be advanced by a solvent litigant who knew in advance that he would have to pay the tab but thought the return (discounted by the risk of loss) greater than the outlay. . . .

308 F.3d at 725-26 (citation omitted). Applying that standard, Judge Easterbrook rejected *Gerow*’s claim for the attorneys’ fees he incurred in his appeal, because his legal position (identical to that of *Martinez*) had been exposed as fallacious:

A position may be rendered less reasonable, indeed may be shown to be unreasonable, by a judicial decision exposing its fallacies. That is a sound description of Gerow’s litigation. He had a legal position never before rejected by any court. He lost in the district court, which wrote a thorough opinion exposing many of the position’s weaknesses. At that point Gerow should have packed up his attache case and retired from the fray. Instead he persevered. That was his right—his contentions are not frivolous—but under the circumstances pressing on was unreasonable and thus at Gerow’s expense. . . .

Id. at 726.

Martinez is situated in a far worse position than the appellant in *Gerow*. Martinez filed this case knowing that the Seventh Circuit had authoritatively rejected her position as incorrect, irrational and unreasonable. She knew that the language of the Employment Agreement is indistinguishable from that in *Gerow*, she knew that the drafting of the Employment Agreement was presumably informed by *Gerow*, and she knew that the Eighth Circuit in *Deal* had supported *Gerow* for purposes of the contract language now at issue. Martinez’s decision to proceed on her claims was not reasonable, and Regions is not financially responsible for the cost of Martinez’s unreasonable choice.

This Court’s decisions do not aid Martinez. In *Lillis*, Vice Chancellor Lamb observed that a change of control agreement that includes a promise to pay attorneys’ fees regardless of the outcome of litigation “is not an invitation for the plaintiffs to abuse their contractual rights. In the end, the plaintiffs’ actions are limited by the implied covenant of good faith and fair dealing, which inures to all Delaware contracts.” *Lillis*, 904 A.2d at 333-34 n.34 (citing *Dunlap*, 878 A.2d 434). See also *Levy v. HLI Operating Co.*, 924 A.2d 210, 226-27 (Del. Ch. 2007) (invalidating contractual provision that mandated payment of attorney’s fees regardless of outcome of indemnification claim because it “contravenes notions of sound public policy,” as “[t]he law should not encourage directors and officers to bring non-meritorious indemnification

claims against the corporation, and the provision at issue here clearly creates a perverse incentive to do so.”).

For the same reasons why Martinez’s litigation positions are not objectively reasonable, her pursuit of them, and her premature effort to secure attorneys’ fees that she believes she can never be called upon to reimburse, is inconsistent with good faith and fair dealing. As such, this claim is due to be dismissed.

II. MARTINEZ’S CLAIM FOR STOCK AWARDS IS MERITLESS.

In Count V of her Complaint, Martinez alleges that Regions breached the LTIP by “failing to fully vest the stock awards and stock options Martinez received from Regions upon her termination without cause.” (Compl. ¶ 54) This, she claims, was a breach of the LTIP because, “[p]ursuant to Article 6.9 and Article 16 of the LTIP, in the event Martinez was terminated after a Change in Control, then certain stock options would vest and become immediately exercisable and certain stock awards would be distributed to her.” (Compl. ¶ 32)

Martinez’s application of the LTIP to the facts of her case is fatally flawed. All of the stock awards and stock options at issue were granted in April 2007 (Shelton Aff. Ex. C) — more than six months *after* the November 2006 Change of Control. As indicated above, Sections 6.9 and Section 16 of the LTIP provide for the vesting of “then outstanding Options” upon the occurrence of a Change in Control. (Shelton Aff. Ex. B at C-11, C-20) Option grants that had not yet been made as of the Change in Control were not “then outstanding.”

The operative contract provisions are found in the Stock Option Agreement and the Restricted Stock Award Agreement enclosed with the notices signed by Martinez. They provide for the forfeiture of stock options and restricted stock that is not vested as of the date that employment terminates. The Change in Control provisions in these agreements only relate to changes in control of Regions. (Shelton Aff. Ex. C) It is undisputed that Regions did not itself

experience a change in control. (*Id.* ¶ 8) Count V is negated by the unambiguous language of the relevant agreements and should be dismissed.

CONCLUSION

For all of the foregoing reasons, Regions respectfully requests that summary judgment be entered in its favor as to all claims asserted in this litigation by Martinez.

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