IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

MEMORANDUM OPINION

Submitted: April 28, 2009
Decided: August 6, 2009

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PARSONS, Vice Chancellor.

This is an action by a former bank executive to enforce a change of control agreement she entered into with a first bank against a second bank into which the first later merged. The agreement provided the employee with certain rights during a two-year employment period after the effective date of any change of control and included "golden parachute" provisions, which came into effect if the new employer terminated her employment other than for cause or disability before the end of the employment period. In particular, the former executive, who was terminated without cause about midway through the employment period, seeks to obtain both the laundry list of severance benefits specified in the agreement and payment of her salary and other employment benefits for the year or so remaining in the contractual employment period, as if she had continued to be employed by the bank. The employee's claims also involve a dispute as to the amount of her most recent bonus. In addition, the former employee seeks advancement of her legal fees and expenses in connection with this litigation under a broad advancement provision that, by its terms, applies "as a result of any contest (regardless of the outcome thereof)." The successor bank has denied all liability.

Plaintiff, the former employee, has moved for partial summary judgment on her advancement claim. The defendant bank responded by seeking to preempt the advancement claim by shifting the focus of the litigation to the merits of the employee's claims for additional compensation under the change of control agreement. In that regard, the bank seeks summary judgment on all the counts of the complaint. The bank argues first that all the employee's claims for additional pay, bonus, and other benefits are not only without merit, but also objectively unreasonable. On that basis, the bank

urges this Court to reject the employee's advancement claim, because it applies only to legal fees and expenses the executive "reasonably" incurred and, therefore, does not encompass the employee's claims here.

For the reasons stated in this opinion, I grant the employee's motion for summary judgment as to her right to advancement of her fees and costs in this action. I also grant, in large part, the successor bank's motion for summary judgment based on my determination that, as a matter of law, the employee is not entitled to her salary and other employment benefits for the remainder of the employment period. I deny the bank's motion in part, however, in that it has not established the absence of any genuine issue of material fact as to that portion of Counts I and III of the complaint relating to the employee's claim that the bank failed to pay her the proper amount for her bonus in 2007, and thereby breached the change of control agreement and the covenant of good faith and fair dealing implicit in that agreement.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff, Susan A. Martinez, was a Senior Executive Vice President with AmSouth Bancorporation ("AmSouth") before its merger with Defendant.

Defendant, Regions Financial Corporation ("Regions" or the "Company"), is a Delaware corporation with its principal place of business in Birmingham, Alabama. When Regions merged with AmSouth in 2006 and became its successor-in-interest, Regions assumed certain obligations to Martinez under an employment agreement upon which this dispute is based.

B. Martinez's Employment History

In connection with being promoted to AmSouth Senior Executive Vice President and Member of the Corporate Management Committee, Martinez entered into an employment agreement with AmSouth on February 1, 2004 (the "Employment Agreement" or "Agreement").[1] The Agreement was not a product of individualized negotiations between Martinez and AmSouth. Rather, AmSouth entered into the same Agreement with all its executives based on the Board's decision to provide the executives with "golden parachute" change of control contracts.

According to the recitations in the Employment Agreement, AmSouth's Board decided it would benefit the Company to align the interests of the executives with those of investors in AmSouth and secure the executives' dedication to AmSouth by providing them with compensation and benefit arrangements upon a change of control that were competitive to those of other corporations.[2] Thus, AmSouth made clear to the executives that the Employment Agreement would become effective only upon a change of control. In November 2006, almost three years after Martinez signed the Agreement, a change of control event occurred—AmSouth merged with Regions.[3] This triggered the terms of the

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1 Verified Compl. ("Compl.") Ex. A, Employment Agreement, § 2.

2 *Id.* at 1.

3 The merger constituted a "Change of Control" as defined in § 2(c) of the Employment Agreement.

Employment Agreement and, as a successor-in-interest to AmSouth, Regions assumed AmSouth's obligations under the Agreement.[4]

Following the merger, Martinez remained employed with Regions as a Senior Executive for almost one year. On September 15, 2007, however, Regions proposed an alternative employment agreement to Martinez and other executives, offering less favorable terms than those provided by their existing contracts. With its offer, Regions informed the executives that if they declined to enter into the new employment agreement by October 15, 2007, their employment with Regions would be terminated.

Desiring to keep the more favorable terms of her current Employment Agreement, Martinez opted not to sign the new agreement with Regions and so advised Regions. On October 12, 2007, after Martinez had confirmed that she would not sign the new agreement, Regions notified Martinez they were terminating her employment effective November 30, 2008.[5] The parties later agreed that Martinez would work through December 31, 2007, which she did.[6]

On July 15, 2008, well after her termination, the Company paid Martinez severance benefits under the Employment Agreement totaling $7,136,120. That amount resulted from a formula articulated in section 6(a) of the Agreement, and represents the

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4 *See* Employment Agreement §§ 1(a)-(b).

5 Compl. ¶¶ 22, 27; Aff. of Susan A. Martinez, filed Nov. 26, 2008 ("First Martinez Aff."), ¶ 11.

6 Aff. of Susan A. Martinez, filed Mar. 23, 2009 ("Second Martinez Aff."), ¶ 11.

sum of three times her salary and largest prior annual bonus, plus three times a $1,000,000 long-term incentive grant. Unsatisfied, Martinez seeks additional employment benefits under the contract, including payment of the salary she would have received had she continued to be employed by Regions for a second year in 2008, and a larger amount reflective of her bonus history and based on the annual bonus she contends she should have received for 2007.

The obligations relevant to this dispute mainly involve sections 3, 4, and 6 of the Employment Agreement. Section 4 guarantees the executive, in this case, Martinez, her position and compensation, including an annual salary and bonus, during the "Employment Period."[7] Under section 3 of the Employment Agreement, the Company agreed "to continue the Executive in its employ . . . subject to the terms and conditions of this Agreement, for the period commencing on the Effective Date [the date of the merger, i.e, November 4, 2006] and ending on the second anniversary of such date," which constitutes the "Employment Period."[8]

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[7] As an employment benefit under section 4(b)(ii), Martinez is entitled to receive an annual bonus "for each fiscal year ending during the Employment Period" that shall be "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 (annualized in the event that the Executive was not employed by the Company for the whole of such fiscal year) (the 'Recent Annual Bonus')." Employment Agreement § 4(b)(ii).

[8] *Id.* § 3(a).

Another term of the Employment Agreement, section 6, applies if the Company terminates the executive without cause, as occurred in Martinez's situation. Under section 6, "If, during the Employment Period, the Company shall terminate the Executive's employment other than for Cause," then "the Company shall pay to the Executive in a lump sum in cash within 30 days after the Date of Termination the aggregate of" certain specified monetary benefits and provide additional nonmonetary benefits.[9] The list of severance benefits spans nearly three pages.[10] Further, the

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[9] *Id.* § 6(a).

[10] *See id.* The most relevant "golden parachute" severance benefits provided in section 6(a) are described in the following excerpt from that section.

> 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:
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> (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:
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> 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 (such higher amount being referred to as 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 . . . ; and

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

C. An amount equal to the actuarial present value equivalent of the aggregate benefits accrued by the Executive as of the date of termination under the terms of the Supplemental Retirement Plan . . . . For this purpose, the Executive's interest under the Supplemental Retirement Plan shall be fully vested and such benefits shall be calculated under the assumption that the Executive's employment continued following the date of termination for the number of years remaining in the term of this Agreement (i.e., additional years of service credits shall be added). . . ; and

* * * *

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.

(ii) for three years after the Executive's Date of Termination . . . the Company shall continue benefits to the Executive . . . at least equal to those which would have been provided [as] . . . described in Section 4(b)(iv) of this Agreement if the Executive's employment had not been terminated . . . ;

Agreement defines the "Date of Termination" for an executive terminated without cause as "the date on which the Company notifies the Executive of such termination."[11]

The required lump sum payment consists of several components. The first involves certain Accrued Obligations for unpaid salary through the Date of Termination, the bonus that would be due for the current fiscal year, which was to be pro-rated if the Executive worked only part of the year based on the number of days she worked as of the Date of Termination, and any previously deferred compensation and accrued vacation

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> (iii) the Company shall, at its sole expense as incurred, provide the Executive with outplacement services the scope and provider of which shall be selected by the Executive in his sole discretion;
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> (v) the Company shall pay or provide, as the case may be, relocation benefits under the relocation policy of the Company . . . which are requested by the Executive . . . within two years following the Date of Termination . . . ; and
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> (vii) [sic] the Company shall continue officer and director liability insurance coverage . . . in the same amounts, as in effect immediately prior to the Date of Termination for the benefit of the Executive until the expiration of all applicable statutes of limitations . . . .

Employment Agreement at 8-10 (subsection numbering as in original).

[11] *Id*. § 5(e)(ii), which states: "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." I also note that, although section 13(b) provides that any notification under the Agreement is sufficient if it is in writing, there is no requirement that the Company notify the Executive in writing of a termination other than for cause.

pay. The second component consists of a payment equal to three times the sum of the Executive's annual base salary, highest annual bonus, and a competitive long-term incentive grant. The remaining components are based on other benefits of the Executive, such as the present value of her interest in the Company's Supplemental Retirement Plan, any accrued interest in the Supplemental Thrift Plan, and an amount equal to three times the Executive's annual club dues bonus and automobile allowance.

In arguing that she is entitled to both her employment benefits through the remainder of the Employment Period and the specified severance package, Martinez also relies on section 7 of the Agreement. Section 7 provides:

> Nothing in this Agreement shall prevent or limit the Executive's continuing or future participation in any plan, program, policy or practice provided by the Company or any of its affiliated companies and for which the Executive may qualify, nor, subject to Section 3(b), shall anything herein limit or otherwise affect such rights as the Executive may have under any contract or agreement with the Company or any of its affiliated companies. Amounts which are vested benefits or which the Executive is otherwise entitled to receive under any plan, policy, practice or program of or any contract or agreement with the Company or any of its affiliated companies at or subsequent to the Date of Termination shall be payable in accordance with such plan, policy, practice or program or contract or agreement except as explicitly modified by this Agreement.

Additionally, under section 8 of the Employment Agreement, the Company agreed to pay Martinez's attorneys' fees and advance those fees and expenses for any claims she brought to enforce her rights under the Agreement. Section 8 states in pertinent part:

> The Company agrees to pay as incurred, to the full extent permitted by law, all legal fees and expenses 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), plus in each case interest on any delayed payment at the applicable Federal rate provided for in Section 7872(f)(2)(A) of the Internal Revenue Code of 1986, as amended (the "Code").

C. Procedural History

On October 30, 2008, Martinez filed her Complaint in this action against Regions, asserting multiple claims. Counts I and II allege Regions breached the Employment Agreement by not providing Martinez an annual bonus and salary, respectively, under sections 4 and 6 of the Agreement for the remainder of the Employment Period or even for the time through December 31, 2007, during which Martinez continued to work for Regions. Count III alleges, in the alternative to Count I, that Regions breached the covenant of good faith and fair dealing, implied in the Agreement, by not providing Martinez a bonus for 2007. Count IV seeks specific performance of the fee shifting and advancement clause in the Employment Agreement.[12]

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[12] The Complaint also includes a Count V accusing Regions of breaching a Long Term Incentive Plan, but Martinez has since withdrawn that Count. Pl.'s Answering Br. at 3 n.1; Def.'s Answering Br. at 3. Even if Martinez had not expressly withdrawn Count V, by not addressing the merits of Defendant's motion for summary judgment on Count V, she waived any arguments regarding that count. *See, e.g.*, *Whittington v. Dragon Group L.L.C.*, 2009 WL 1743640, at *7 n.41 (Del. Ch. June 11, 2009); *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief.")

Regions answered on November 25, 2008. The following day Martinez filed a motion for partial summary judgment on Count IV, her claim for advancement of her attorneys' fees. On January 14, 2009, Regions simultaneously filed an answering brief in opposition to Martinez's motion and a motion and supporting brief for summary judgment on all counts in the Complaint. Since then, the parties have fully briefed those motions and presented oral argument on them. Thus, before me now are Plaintiff's motion for summary judgment on her advancement claim, Count IV, and Defendant's motion for summary judgment on all of Plaintiff's claims, Counts I through IV.

D. Parties' Contentions

Martinez contends that Regions breached the Employment Agreement by not providing her employment benefits during the Employment Period, as required by sections 3 and 4 of the Agreement. In response, Regions argues that the terms of section 4 do not apply in the circumstances of this case. Rather, according to Regions, sections 4 and 6 are alternative provisions of the Agreement: section 4 defines the Company's obligations if the executive remains employed during the Employment Period, while section 6 specifies a golden parachute severance package to be provided to the executive if she is terminated without cause before the end of the Employment Period. Regions argues that, under the plain terms of sections 3, 4, and 6, the only reasonable interpretation of sections 4 and 6 is that they are alternative, and generally mutually exclusive, provisions. Thus, Regions contends that Martinez's claims to both employment and severance benefits under the Agreement are unreasonable.

Martinez also seeks the benefit of a bonus for the full year 2007 under sections 4(b)(ii) and 6(a)(i)(A) of the Employment Agreement. Martinez argues that section 4(b)(ii), together with section 4(b)(iii), requires that the Company pay her a bonus not less than the bonuses received by her peer executives for 2007. Martinez further contends she has a right under section 6(a)(i)(A) to receive the bonus portion of her severance package based on a 2007 bonus, because she worked until the end of 2007. In response, Regions denies that Martinez has any right to a bonus other than as part of her severance benefits under section 6(a)(i)(A), and contends the bonus determination under that section is linked explicitly to her Date of Termination, not her last day of work. According to Regions, Martinez's "Date of Termination" is a defined term under the Agreement, and is indisputably October 12, 2007. Because, under section 6(a)(i)(A), Martinez is entitled to a bonus for her "most recently completed fiscal year," and Martinez had not completed the 2007 fiscal year as of her Date of Termination, Regions contends Martinez is not entitled to a 2007 bonus.[13]

Additionally, Martinez contends that, even if the express terms of the Agreement deny her a bonus for the full year 2007, Regions still breached the covenant of good faith and fair dealing implied in every contract by denying her the equivalent of such a bonus. Because Martinez worked through the end of 2007, she contends that Regions acted in bad faith in denying her the 2007 bonus she allegedly earned. Regions argues, however,

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[13] Regions's fiscal year coincides with the calendar year, and, therefore, ends on December 31.

that because the express, unambiguous language of section 6(a)(i)(A) specifies the method of determining Martinez's bonus, she cannot use the doctrine of good faith and fair dealing to imply the existence of a clause that would contradict the explicit terms of the Agreement.

Lastly, Martinez contends that, regardless of the outcome of her other claims, she is entitled to attorneys' fees and expenses and advancement of those fees and expenses based on the clear terms of section 8. Regions disagrees and reads section 8 as entitling Martinez to attorneys' fees only if her litigation position is reasonable. Regions further contends that Martinez's position is unreasonable, because she has argued throughout this litigation that she is entitled to both a generous severance package and a salary for the remainder of the Employment Period, when at least one well-respected court from another jurisdiction previously rejected virtually the same argument.[14] Thus, according to Regions's interpretation of section 8, Martinez is precluded from recovering or obtaining advancement of the attorneys' fees she incurred in pursuing her claims in this action.

II. ANALYSIS

A. Summary Judgment Standard

"Court of Chancery Rule 56(c) permits summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

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[14] *Gerow v. Rohm & Haas Co.*, 308 F.3d 721 (7th Cir. 2002).

moving party is entitled to a judgment as a matter of law."[15] In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party and the moving party has the burden of demonstrating that no material question of fact exists.[16] The party opposing summary judgment, however, may not rest upon the mere allegations or denials contained in its pleadings, but must offer, by affidavit or other admissible evidence, specific facts showing that there is a genuine issue for trial.[17] "[S]ummary judgment may not be granted when the record indicates a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[18]

Further, when presented with disputes involving contracts, summary judgment should be granted only if the contract at issue is unambiguous and not susceptible to different interpretations.[19] A contract is not ambiguous, however, merely because the parties disagree on its intended construction.[20] Rather, a contract is ambiguous only

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15 *Walker L.L.P. v. Spira Footwear, Inc.*, 2008 WL 2487256, at *3 (Del. Ch. June 23, 2008) (quoting Ct. Ch. R. 56(c)).

16 *Id.* (citing *Senior Tour Players 207 Mgmt. Co. v. Golftown 207 Holding Co.*, 853 A.2d 124, 126 (Del. Ch. 2004)).

17 *Id.* (citing *Levy v. HLI Operating Co.*, 924 A.2d 210, 219 (Del. Ch. 2007)); Ct. Ch. R. 56(e).

18 *Id.* (citing *Pathmark Stores v. 3821 Assocs., L.P.*, 663 A.2d 1189, 1191 (Del. Ch. 1995) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962))).

19 *Rossi v. Ricks*, 2008 WL 3021033, at *2 (Del. Ch. Aug. 1, 2008).

20 *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 n.8 (Del. 1997).

when the provisions in controversy are reasonably or fairly susceptible to different meanings.[21] If a court can determine the meaning of the contract without any other guide than knowledge of the simple facts on which, from the nature of language in general, its meaning depends, the parties are bound by the plain meaning of the contract and no ambiguities exist.[22] With those principles of contract construction in mind, I turn to the parties' motions and proposed constructions of the Employment Agreement.

The two pending motions for summary judgment address different portions of the Employment Agreement and do not entirely overlap. Therefore, I must address them separately. I begin with Defendant's motion, which focuses on the monetary benefits to which Martinez was entitled in terms of salary, bonus, and severance benefits after her termination. I then turn to Plaintiff's motion for partial summary judgment on her claim for advancement and Defendant's cross motion on the same claim.

B. Defendant's Motion for Summary Judgment

1. Whether Martinez is entitled to a salary and benefits under section 4, in addition to her section 6 severance package

Because it presents the broadest issues, I begin with Count II of the Complaint. Three provisions of Martinez's Employment Agreement are relevant in determining whether she is entitled to both salary for the remainder of the two-year Employment Period and severance—namely, sections 3, 4, and 6. Martinez reads sections 3 and 4 as

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[21] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del. 1992).

[22] *Id.*

guaranteeing her an unconditional salary and benefits during the Employment Period, regardless of whether she remains employed with the Company. According to Martinez, she is entitled to employment benefits even though she was terminated and received a severance package under section 6. In contrast, Regions reads sections 4 and 6 of the Agreement as alternative provisions—*i.e.*, section 4 governs Martinez's benefits if she remains employed with Regions, while section 6 specifies her benefits if she is discharged. Regions argues further that its construction reflects the only reasonable reading of the plain terms of the Employment Agreement. Although I do not consider the issues to be as clear-cut as Regions contends, I find that Martinez's rights to the lucrative severance package provided for in section 6 preclude her from also receiving payment for the remainder of the Employment Period during which she indisputably did not work for Regions.

Section 3(a) provides in relevant part:

> 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").[23]

Section 4 delineates Martinez's employment benefits during the Employment Period. Section 6(a) of the Agreement then explicitly limits the Company's obligations under sections 3 and 4. Section 6(a) provides: "If, *during the Employment Period*, the

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[23] Employment Agreement § 3(a) (emphasis added).

Company shall terminate the Executive's employment other than for cause," as Regions did here, the executive shall receive a specified severance package, which Martinez largely received.[24] Those severance benefits, spelled out in detail in nearly three pages of the Agreement, became the obligations of Regions when it terminated Martinez's employment.

After Martinez was terminated without cause by Regions she qualified for and received over seven million dollars in severance benefits, including three times the amount of a representative bonus and a competitive annual long-term incentive grant, three times the sum of her annual country club dues and automobile allowance, three years of medical, prescription, dental, life, and long-term disability insurance, outplacement services, and relocation services. Assuming Martinez's employment with Regions did not end until December 31, 2007, as she alleges, she still would have had almost a full year remaining in the Employment Period. Yet, Martinez contends that, in addition to the severance package, she also was entitled under the Agreement to receive her salary and all her benefits during the remainder of the Employment Agreement. I consider this aspect of Martinez's Complaint unpersuasive, because it makes no business sense and is contrary to a fair reading of the Agreement as a whole.

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[24] *Id.* § 6(a) (emphasis added). Martinez disputes the adequacy of certain aspects of the severance package she received, regarding primarily the portion based on her bonuses. This dispute forms the basis for Count I of her Complaint and is discussed *infra* Part II.B.2.

Faced with interpreting similar provisions in an executive contract, the United States Court of Appeals for the Seventh Circuit in *Gerow v. Rohm & Haas Co.*,[25] held the severance package of an executive, Gerow, replaced his right to receive employment benefits under the contract.[26] While the provisions at issue in *Gerow* were similar, they differ from Martinez's Employment Agreement in that the provision pertaining to the employment period did not contain the express limiting language, "subject to the terms and conditions of this agreement."[27] In *Gerow*, the Seventh Circuit held that the provision entitled "obligations of the Company upon termination" explicitly limited any right the executive had to employment benefits during the remainder of the employment period.[28] Similar to the situation here, that provision opened with the language: "If, *during the Employment Period*, the executive is terminated without Cause," then the executive receives a laundry list of severance benefits.[29]

Indeed, the Seventh Circuit found the only reasonable interpretation of Gerow's contract was that his employment period created, on the one hand, a protective period with employment benefits, which included a position, an office, a salary and benefits, and, on the other hand, a liquidated damages provision, in the form of a "golden

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25 308 F.3d 721 (N.D. Ill. 2001) (Easterbrook, J.).

26 *Id.* at 723.

27 *See id*.

28 *Id*. at 725.

29 *Id.*

parachute" severance package.[30] Similarly, Martinez's Agreement contains a protective two-year Employment Period with employment benefits that are expressly "subject to the terms and conditions" of section 6, for example. Section 6 expressly recognizes Regions's ability to terminate Martinez other than for cause during the Employment Period and specifies a laundry list of valuable monetary payments and other benefits it would have to give Martinez in that event. The value of the generous "golden parachute" severance package called for in section 6 clearly exceeds the value of the employment benefits under section 4 that they replaced. In addition, if Martinez also were to receive the benefits provided for in section 4 for 2008, she would receive certain benefits or parts thereof twice, for no apparent reason. Thus, Martinez's reading of the Employment Agreement does not conform to its terms and must be rejected.

In resisting this conclusion, Martinez argues that section 6 cannot limit section 4 because section 6(a), which applies in the case of a termination without cause, does not state that the Agreement shall terminate "without further obligations," as do other provisions in section 6. Specifically, Martinez notes that section 6(b), which specifies the Company's severance obligations if the executive dies before the Employment Period ends, states, "this Agreement shall terminate without further obligations . . . other than for payment of Accrued Obligations and the timely payment or provision of Other Benefits,"

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[30] *Id*. at 723-24.

which are then explicitly defined.[31] Martinez urges this Court to infer from the omission of the "without further obligations" language in section 6(a), that further obligations exist, including a requirement to provide the employment benefits she seeks under section 4.

But, as the Seventh Circuit cautioned when Gerow advanced a similar argument:

> Drawing inferences from omissions is risky in the best circumstances and untenable here, for the language "without further obligations" would have been out of place. There were further obligations . . . .[32]

Indeed, here, based on the material differences between the benefits provided for in section 6(a) compared to the other subsections of section 6 and the continuing nature of several of the section 6(a) benefits, I do not believe the omission of the "without further obligations" language supports the inference Martinez urges. As the court observed in *Gerow*, "Why impute significance to the non-parallel phraseology when the underlying substance was not parallel?"[33] Therefore, I find the omission of the language "without further obligations" in section 6(a) immaterial for purposes of construing the contract terms in issue.

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[31] Sections 6(c) and 6(d) of the Employment Agreement, which deal with termination for Disability and for Cause, respectively, contain the same language. In each of sections 6(b), (c), and (d), however, the additional benefits to be provided differ materially from those specified in the severance package of section 6(a).

[32] *Gerow*, 308 F.3d at 724.

[33] *See id.*

I also find untenable Martinez's argument that section 7, the "non-exclusivity provision," somehow provides Martinez the salary she would have earned in 2008, as well as severance. Martinez analogizes section 7 to an "all remedies provision," under which the United States Court of Appeals for the Eighth Circuit held that an executive, Deal, in another case could recover damages based on loss of her salary, in addition to a severance payment.[34] The "all remedies provision" in *Deal*, however, expressly stated that "in addition to severance payments," Deal is entitled to *all remedies* for breach of the terms under this contract.[35] Consistent with the express terms of Deal's agreement, the court granted Deal her salary in addition to her severance payments.[36] Unlike the provision in *Deal*, which entitled her to the *right* to receive salary in addition to severance, Martinez's provision merely states she is entitled to those rights and amounts established under any contract with the Company except as explicitly modified by her Employment Agreement.

Section 7 states, in pertinent part:

> [N]or, subject to Section 3(b), shall anything herein limit or otherwise affect such rights as the Executive may have under

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34 *Deal v. Consumer, Inc.*, 470 F.3d 1225 (6th Cir. 2006).

35 *See id.* at 1225, 1230.

36 *Id.* at 1230-31 ("We agree with the district court that under 'the plain language of the employment agreement, Deal's lump-sum cash payment was awarded *in addition to—not in lieu of*—all other remedies she may have for breach of her employment agreement.' Nothing in subsection 6(d)(2) limits Deal's right to recover both the severance payment and any damages resulting from a breach of contract.") (emphasis in original).

> any contract or agreement with the Company . . . . Amounts which are vested benefits or which the Executive is otherwise entitled to receive under any . . . contract or agreement with the Company or any of its affiliated companies at or subsequent to the Date of Termination shall be payable in accordance with such . . . contract or agreement except as explicitly modified by this Agreement.[37]

To the extent this provision might be construed as treating Martinez's claim to future salary based on the second year of the Employment Period as a "vested benefit," I hold that the provisions of section 6(a), read in the context of the Agreement as a whole, modify the Agreement to preclude such a double recovery. Martinez's construction of the Agreement would render many express terms meaningless or mere surplusage, contrary to well-established rules of contract construction.[38]

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[37] Employment Agreement § 7.

[38] *Seabreak Homeowner's Ass'n v. Gresser*, 517 A.2d 263, 269 (Del. Ch. 1986) ("A contract must be construed as a whole, giving effect to all of its provisions and avoiding a construction which would render any of those provisions illusory or meaningless."). For example, Section 6(a)(i)(C) of the Agreement provides for the payment of:

> An amount equal to the actuarial present value equivalent of the aggregate benefits accrued by the Executive as of the date of termination under the terms of the Supplemental Retirement Plan . . . . For this purpose, the Executive's interest under the . . . Plan shall be fully vested and such benefits shall be calculated under the assumption that the Executive's employment continued following the date of termination for the number of years remaining in the term of this Agreement (i.e., additional years of service credits shall be added); provided, however, that, for the purposes of determining "final average pay" under the

Indeed, the express terms of section 6(a) make clear that the benefits it provides for are premised on Martinez's employment having terminated. For example, Martinez receives "welfare benefits coverage" under section 6(a)(v) and "relocation expenses incurred within two years of the Date of Termination" under section 6(a)(i)(E). Moreover, as indicated *supra* note 38, Martinez is entitled to a "Supplemental Retirement Plan," that "shall be calculated under the *assumption* that the Executive's employment continued following the Date of Termination for the number of years remaining in the term of this Agreement."[39]

In addition, while Martinez asserts she is entitled to a salary under section 4, that same section provides for her to receive numerous other benefits, such as an office.[40] Does that require the Company to maintain an office for Martinez during the remainder of the Employment Period? Furthermore, according to Martinez's interpretation of the Agreement, the Company granted her identical benefits twice in the event of a termination without cause: once as an employment benefit and a second time as

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> benefit calculation, the Executive's actual pay history as of the date of termination shall be used.

Notwithstanding Martinez's argument regarding the nonexclusivity provision in section 7, the express language quoted above from section 6(a) indicates that the parties knew how to make their intentions as to the handling of obligations stemming from the remainder of the Employment Period plain, when appropriate. Therefore, the absence of such language in the provisions in section 6 dealing with Martinez's salary is telling.

[39] Employment Agreement § 6(a)(i)(C).

[40] *Id.* § 4(a).

severance. For example, the Company would be required to provide a lump sum payment to Martinez for three times her annual club dues as part of her severance under section 6(a)(ii), while continuing to pay those same dues in 2008 as an employment benefit under section 4(b)(iv), even though she was no longer employed.

AmSouth's express purpose for entering into the Employment Agreement was to grant benefits to its executives, like Martinez, "competitive to those of other corporations." Nothing in the record suggests that, in the event of a permissible termination without cause, it would have been necessary or advisable to remain competitive for a bank like AmSouth to sweeten the lucrative severance package the Agreement contemplates by supplementing it with the executive's lost salary and other employment benefits for the remainder of the Employment Period.[41]

Therefore, I reject as contrary to the explicit terms of the Agreement Martinez's interpretation that, after being discharged, she had a right to receive termination benefits, in the form of an attractive "golden parachute" severance package, *and* employment benefits. Because I find Regions's construction in this regard consistent with the unambiguous language of the agreement,[42] I grant its motion for summary judgment and dismiss Count II of Martinez's Complaint.

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41 *See Gerow*, 308 F.3d at 723 (noting the purposes behind golden parachutes do not call for compensating an executive twice on a change of control, once through guaranteed salary, and a second time through guaranteed severance over the same period).

42 *See Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del. 1992) (noting a contract is not ambiguous, and thus proper for

2. Whether Martinez is entitled to a 2007 bonus

Regions also moved for summary judgment on Count I, in which Martinez alleges she is entitled to the benefits of a bonus for the 2007 fiscal year, ending December 31, 2007, under the terms of sections 4(b)(ii) and 6(a)(i)(A). While the resolution of Count II of Plaintiff's Complaint, for which I grant summary judgment in Defendant's favor, rests on the proper interpretation of the language of the Employment Agreement, the issues presented by Count I are more fact-intensive. Martinez's right to receive the requested relief in Count I depends on the implementation or execution of the Employment Agreement in connection with the payment of Martinez's bonus. Accordingly, I examine whether, drawing all reasonable inferences in Martinez's favor, there is any possibility that she is entitled to a bonus for the full year 2007, based on her evidence that she worked for Regions for the entire year.

The first issue raised by Count I is what Martinez was entitled to in terms of a bonus for 2007. The parties answer that question using different factual and legal predicates. Martinez proceeds from her assertion that she worked for the entire year 2007, and that her date of termination under the Employment Agreement was December 31, 2007. The premise of Regions's argument is that under the terms of the Agreement, Martinez's Date of Termination is October 12, 2007. To sort out this dispute, I must focus on several separate determinations as to amounts owed to Martinez. The first

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summary judgment, if the contract is susceptible only to one reasonable interpretation).

depends on whether Martinez was employed by Regions within the meaning of the Employment Agreement as of December 31, 2007. Martinez contends she was and, therefore, was employed for the entire 2007 fiscal year, which ended during the Employment Period, giving her a right to receive a 2007 Annual Bonus under section 4(b)(ii).

Regions argues that Martinez's Date of Termination was October 12, 2007, and suggests that her work for the Company from then to December 31, 2007, fell outside the scope of the Employment Agreement. Under Regions's theory, Martinez was not employed within the meaning of the Agreement as of the end of 2007; thus, she has no right to a bonus under section 4. Instead, whatever rights Martinez might have regarding a bonus would arise from section 6. In that regard, section 6(a)(i)(A) gives Martinez the right to receive as part of her Accrued Obligations a payment equal to the pro rata portion of her Highest Annual Bonus, which Regions contends was her 2006 bonus, corresponding to the fraction of the year represented by the period up to the Date of Termination, October 12, 2007. In addition, under section 6(a)(i)(B), Martinez's severance payment also would include a portion equal to three times her Highest Annual Bonus, or the 2006 bonus according to Regions. Martinez asserts that her putative 2007 bonus should have been used in the severance calculations.

Section 4(b)(ii) of the Employment Agreement requires payment of an annual bonus "for each fiscal year ended during the Employment Period." Section 4(b)(iii) provides that the bonus should be calculated using a methodology no less favorable than

the methodology used to calculate the bonuses awarded to Martinez's peer executives.[43] For 2007, Regions paid Martinez a bonus in the same amount as the bonus it paid her in 2006. Martinez's peer executives received 2007 bonuses that exceeded her 2006 bonus.[44]

Section 6(a)(i)(A) requires that Regions pay Martinez the "Highest Annual Bonus," which is the larger of the "Recent Annual Bonus"[45] and the annual bonus paid "for the most recently completed fiscal year during the Employment Period." There is no dispute that the bonus for Martinez's "most recently completed fiscal year during the Employment Period" is higher than her "Recent Annual Bonus." A key question, therefore, is whether 2006 or 2007 is Martinez's "most recently completed fiscal year."

Section 6(a) of the Agreement explicitly requires Regions to pay Martinez the bonus "in a lump sum in cash within 30 days after the Date of Termination." Martinez's "Date of Termination," is defined in section 5(e)(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 . . . .*"[46] The Company notified Martinez of her termination on October 12, 2007.[47] Hence, I find

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43 *See* Employment Agreement § 4(b)(iii).

44 *See* Second Martinez Aff. ¶ 20.

45 "Recent Annual Bonus" is defined in another section of the contract as the largest bonus received in the three years before the change of control. Employment Agreement § 4(b)(ii).

46 *Id.* § 5(e)(ii) (emphasis added).

47 Although Martinez argues that Regions's notification was required to be in writing, she is mistaken. While the general notice provision, section 13(b), on

that Regions provided Martinez sufficient notice of her termination when it orally advised her she was being terminated on October 12, 2007.

Regions, therefore, has a reasonable argument that Martinez's "Date of Termination" is October 12, 2007, according to the unambiguous terms of section 5(e)(ii). As of that date, the 2007 fiscal year had not yet ended. Consequently, Regions contends Martinez's "most recently completed fiscal year" was 2006, entitling her to a bonus payment based on her 2006 bonus. Because section 6(a)(i)(A) entitles Martinez to at least a portion of her 2006 bonus, and Regions paid Martinez a full 2006 bonus, Regions denies any breach of the Agreement in regard to the bonus. Due to Regions's own actions, however, the situation is much more muddled than it acknowledges.

When Regions notified Martinez of her termination, Regions indicated it would be effective November 30, 2007, more than 45 days after the Date of Termination. Further, there is no dispute that Martinez and Regions later agreed to extend the effective date of her termination until December 31, 2007. One effect of this extension presumably was that, through the end of 2007, Martinez received a salary consistent with what she was receiving under the Employment Agreement.[48]

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which Martinez relies, states notices under Martinez's Employment Agreement are *sufficient* if in writing, that does not mean they must be in writing. Moreover, Plaintiff has not offered any evidence that Regions's oral notification on October 12, 2007 was insufficient under the Agreement.

[48] Martinez has not asserted a claim for any outstanding salary for the time after October 12, 2007, that she worked for Regions.

The more difficult questions are: (1) what relationship, if any, does the fact that Martinez's Date of Termination appears to have been October 12, 2007 under the terms of the Agreement have to the fact that Martinez continued to work for Regions until December 31, 2007; (2) what effect, if any, did the fact that Martinez worked until December 31, 2007 have on her right to receive a bonus for 2007, and the amount of that bonus; and (3) what effect, if any, did the fact that Martinez worked for Regions until December 31, 2007 have on the amount of the bonus portion of her severance payment, as provided for in section 6(a)(i)? For example, the fact that Martinez worked until December 31, 2007 may require Regions to award her a 2007 bonus based on the entire fiscal year, which apparently would exceed the bonus for 2006. If Martinez is entitled to a full 2007 bonus, Martinez also has raised a reasonable inference that such bonus should have been used to calculate her lump sum payment under sections 6(a)(i)(A) and (B), because 2007 was the most recently completed fiscal year.

At this point, I note that only Regions moved for summary judgment as to Count I regarding the bonus issue. Martinez resists summary judgment, arguing that there are genuine issues of disputed facts related to Count I. I agree. Even accepting Regions's position that the Date of Termination is October 12, 2007, Regions's own conduct, documents, and the statements of at least one of its human resources personnel who interacted with Martinez during the relevant time period[49] are sufficient to support a

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[49] Regions's Senior Vice President of Compensation and Benefits, Jill Shelton, told Martinez that the amount of her 2006 bonus was being used as a placeholder until her 2007 bonus could be calculated. Second Martinez Aff. ¶ 16. Shelton also

reasonable, although not conclusive, inference that Martinez should have received credit for having worked the full year 2007 in terms of both her bonus for that year and the calculation of her severance payment.[50] Because these issues cannot be resolved on summary judgment, I deny Regions's motion as it relates to Count I.

In addition, I also deny Defendant's motion for summary judgment on Count III of the Complaint. In that Count, Martinez claims she is entitled to use a 2007 bonus amount under an alternative theory of a breach of the covenant of good faith and fair dealing.[51] Martinez contends Regions did not act fairly in asserting her termination date was October 12, 2007 and denying her a bonus for that year.[52] Because she worked until the

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allegedly told Martinez she would receive a full 2007 bonus rather than a pro-rated amount based on an earlier termination date, such as October 12, 2007. *Id.* ¶ 19.

50 The record does not disclose much about how the bonus Martinez received for 2006 compares to the bonus her executive peers received for 2007. Martinez's 2006 bonus apparently was in the range of $656,000. Second Martinez Aff. Ex. E. The 2007 bonus would have been larger.

51 I grant, however, Defendant's motion for summary judgment on Count III to the extent it relates to Martinez's claim that she is entitled to receive a salary for the remainder of the Employment Period as well as her severance because, as noted *supra* Part II.B.1, that position is contrary to a reasonable interpretation of the express terms of the Employment Agreement. *See Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. Apr. 15, 2009) ("The implied covenant cannot be invoked to override the express terms of the contract."); *Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992) ("[W]here the subject at issue is expressly covered by the contract, or where the contract is intentionally silent as to that subject, the implied duty to perform in good faith does not come into play.").

52 Indeed, during argument, Martinez's counsel characterized the "October 12th termination date [argument] [a]s a post hoc litigation fabrication by Regions that

end of 2007, Martinez contends Regions acted in bad faith in denying her that bonus. In support of its motion, Regions argues that a claim for breach of the implied covenant of good faith and fair dealing cannot lie where a party relies on express language of a contract, such as the definition of "Date of Termination" here. This argument is not entirely persuasive, however, in this context. The issue here involves how the defined Date of Termination relates to a different last day of employment agreed to by all parties. The Employment Agreement does not expressly address that circumstance. In any event, Martinez's entitlement to a 2007 bonus on this alternative theory raises genuine issues of material fact. Therefore, I deny summary judgment as to Count III to the extent it relates to Martinez's claim for a 2007 bonus.

3. Whether Martinez is entitled to attorneys' fees and legal expenses

Lastly, the parties have cross moved for summary judgment on Count IV—Martinez's claim for attorneys' fees and advancement. Because this count is before me on a cross motion and neither party contends there is any disputed issue of material fact, Court of Chancery Rule 56(h) applies. "Thus, the usual standard of drawing inferences in favor of the nonmoving party does not apply," and the Court will treat the issues as to Count IV as ripe "for decision on the merits based on the record submitted with the motions."[53]

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it's now clumsily attempting to make conform to the facts of what actually happened." Tr. at 44.

[53] Ct. Ch. R. 56(h); *see Walker L.L.P. v. Spira Footwear, Inc.*, 2008 WL 2487256, at *3 (Del. Ch. June 23, 2008).

Further, while Delaware follows the "American rule" under which each party is responsible for their own attorneys' fees, there are limited exceptions to that rule. Under Section 145(e) of the Delaware General Corporation Law ("DGCL"), a corporation may grant its officers expenses, such as attorneys' fees, and advancement of those fees "upon such terms and conditions, if any, as the corporation deems appropriate."[54] Advancement disputes are particularly appropriate for decision on summary judgment, as in most cases "the relevant question turns on the application of the terms of the corporate instruments setting forth the purported right to advancement and the pleadings in the proceedings for which advancement is sought."[55] As this Court has noted, resort to parol evidence in cases like this one is rarely appropriate, or even helpful, as corporate instruments addressing advancement rights are frequently crafted without the involvement of the parties who later seek advancement and often with little negotiation among any of the contending parties at all.[56] Those factors are not problematic, however, as they tend to reinforce the legal policy of this State, which strongly emphasizes contract text as the

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54 8 *Del. C.* § 145(e). Pursuant to Section 145(k) of the DGCL, the Court of Chancery may determine summarily a corporation's obligation to advance expenses.

55 *Reddy v. Elec. Data Sys. Corp.*, 2002 WL 1358761, at *3 (Del. Ch. June 18, 2002), *aff'd*, 820 A.2d 371 (Del. 2003).

56 *DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *20-21 (Del. Ch. Jan. 23, 2006) ("Advancement cases are particularly appropriate for resolution on a paper record, as they principally involve the question of whether claims pled in a complaint against a party . . . trigger a right to advancement under the terms of the corporate instrument . . . .").

overridingly important guide to contractual interpretation.[57] Thus, if the contractual instrument unambiguously grants advancement, summary judgment is appropriate.[58]

On the subject of advancement, Section 8 of Martinez's Employment Agreement provides:

> The Company agrees to pay as incurred, to the full extent permitted by law, all legal fees and expenses which the Executive may reasonably incur as a result of any contest (regardless of the outcome thereof) by the Company, the Executives 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 payment pursuant to this Agreement), plus in each case interest on any delayed payment at the applicable Federal rate provided for in Section 7872(f)(2)(A) of the Internal Revenue Code of 1986, as amended (the "Code").

Regions reads the reference to "all legal fees and expenses which the Executive may reasonably incur" in section 8 as a limitation, requiring Martinez to have a reasonable litigation position to qualify to receive attorneys' fees. According to Regions, because Martinez argued she was entitled to both a salary and severance benefits under sections 4 and 6 of the Agreement, and the Seventh Circuit previously dismissed similar arguments by another executive, her litigation position is unreasonable and she should be denied reimbursement of her attorneys' fees. Martinez counters that Regions's interpretation

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57 *Id.*

58 *See Lillis v. AT&T Corp.*, 904 A.2d 325, 333 (Del. Ch. 2006).

renders meaningless explicit terms of section 8, such as the "regardless of the outcome thereof" language, and is contrary to the plain language of that section.

I agree with Martinez. Under section 8, she enjoys the right to reimbursement for "*all* legal fees and expenses" incurred as a result of a covered contest and to advancement of those fees "*to the full extent permitted by law*" "*regardless of the outcome*" of the contest. The imposition of a requirement that Martinez's claims be substantively reasonable either as a precondition to advancement or as a basis for recouping advanced fees and expenses relating to an unsuccessful claim would undermine the plain meaning of that provision. As this Court recently observed:

> In the spectrum of advancement and indemnification provisions, language that provides for payment with no provision for reimbursement if the litigation fails necessarily stand as examples of the broadest possible provision permitted under our law. That language only further evidences the change of control agreement's intent to broadly protect the plaintiff [executives] in these circumstances.[59]

Despite that broad grant of advancement and indemnification rights as to attorneys' fees and expenses here, Regions urges the Court to condition any award of fees on a determination of the reasonableness of Martinez's litigation position. Yet, the Company expressly agreed to pay Martinez's fees "as incurred." According to Regions, if Martinez had attempted to enforce the advancement provision at the outset of this litigation, I would have had to make a threshold determination of the reasonableness of her underlying claims and compare them to claims unsuccessfully pursued by other

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[59] *Id.* at 332-33.

executives in foreign jurisdictions. Such a procedure for resolving an advancement claim, however, would defeat the purpose of advancing fees altogether, and render the "regardless of the outcome thereof" language in section 8 meaningless or illusory.[60]

The Employment Agreement granted Martinez a right to payment of "all legal fees and expenses" she reasonably incurred as a result of "any contest (regardless of the outcome thereof) . . . under any provision of this Agreement or any guarantee of performance thereof (including as a result of any contest by the Executive about an amount of payment pursuant to this Agreement)."[61] Nothing in that provision limits its reach to reasonable contests or disputes, and it explicitly covers the claims raised in Martinez's Complaint. As this Court stated in *Lillis v. AT&T Corp.*: "[T]here is no requirement that advancement provisions be written broadly or in a mandatory fashion. But when an advancement provision is, by its plain terms, expansively written and mandatory, it will be enforced as written."[62] Because Martinez enjoyed broad advancement rights under the Employment Agreement, the only limitation to those rights is the implied covenant of good faith and fair dealing.[63] Thus, absent a showing that

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60 *Delta & Pine Land Co. v. Monsanto Co.*, 2006 WL 1510417, at *4 (Del. Ch. May 24, 2006) ("[C]ontracts must be interpreted in a manner that does not render any provision meaningless or illusory.").

61 Employment Agreement § 8.

62 *Lillis*, 904 A.2d at 332-33.

63 *See id*. at 334 n.34.

Martinez pursued this action in bad faith, she would be entitled to advancement of her legal fees and expenses.

In the circumstances of this case, Regions has not shown that Martinez acted in bad faith in bringing any of her claims for benefits under sections 4 and 6 of the Employment Agreement. Although she did not prevail on her claim for the recovery of her salary for most of 2008, for example, I cannot say it was frivolous. Likewise, the fact that one court in another jurisdiction, namely, the Seventh Circuit in *Gerow v. Rohm & Haas Co.*,[64] rejected similar arguments under a similar executive contract does not prove that Martinez brought her claim in bad faith. Nor does it bar Martinez from receiving attorneys' fees under the Employment Agreement.[65]

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64 308 F.3d 721 (N.D. Ill. 2001).

65 Regions relies heavily on the Seventh Circuit's denial of Gerow's attorneys' fees on appeal as support for the denial of attorneys' fees to Martinez. Nevertheless, the district court in *Gerow* actually granted him attorneys' fees and costs under the agreement at issue there. Indeed, the Seventh Circuit noted:

> A position may be rendered less reasonable, indeed may be shown to be *un*-reasonable, 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 attaché 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.

Therefore, I grant Martinez's motion, and in so doing, deny Regions's cross motion for summary judgment on Count IV, and order Regions to pay Martinez the reasonable attorneys' fees and expenses she incurred in this action to date, with interest. This would include any "fees on fees."[66] In addition, Regions shall pay Martinez for any future legal fees and expenses as they are incurred, consistent with the Employment Agreement.

III. CONCLUSION

For the reasons stated, I grant Regions's motion for summary judgment on Count I of the Complaint, and dismiss that claim with prejudice. I also grant summary judgment in Defendant's favor as to Count III to the extent it relates to Martinez's claim that she is entitled to both her salary through the end of the Employment Period and her severance. I deny, however, Defendant's motion as to Count I and that part of Count III that relates to the claim that Martinez should be awarded a full year 2007 bonus and such bonus should be used to calculate her payments pursuant to section 6(a)(i)(A) and (B) of the Employment Agreement. Further, I deny Regions's motion for summary judgment on Count IV, and grant Martinez's motion for partial summary judgment on the claim for

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Gerow, 308 F.3d at 726. The position Martinez advances in this case has not been rejected previously by any Delaware court. This fact, together with the existence of certain differences between the agreements at issue here and in *Gerow*, and the deference our courts generally give to contractually provided advancement rights, torpedo Defendant's charges of bad faith.

66 *See Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 561 (Del. 2002) ("[W]ithout an award of attorneys' fees for the indemnification suit itself, indemnification would be incomplete").

specific performance of the advancement obligation under the Agreement and for an award of damages in the amount of her attorneys' fees and expenses as to all claims in the Complaint.

Counsel for the parties shall submit an appropriate form of judgment reflecting these rulings within ten calendar days from the date of this memorandum opinion.