IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BE&K ENGINEERING COMPANY, LLC, n/k/a KBR ENGINEERING COMPANY, LLC,	)	
Plaintiff,	)	
v.	)	C.A. No. 8837-VCL
ROCKTENN CP, LLC and ROCK-TENN SHARED SERVICES, LLC,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: January 10, 2014
Date Decided: January 15, 2014

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LASTER, Vice Chancellor.

Plaintiff BE&K Engineering Company, LLC ("BE&K") and defendant RockTenn CP, LLC ("RKT CP") are parties to an agreement that governs the engineering work that BE&K provides on projects at facilities owned by RKT CP. The agreement selects courts in Wilmington, Delaware as the exclusive forum for any disputes. An affiliate of BE&K and defendant Rock-Tenn Shared Services, LLC ("RKT SS") are parties to a second agreement that governs the construction work that the affiliate and any members of its corporate family provide to RKT SS and any members of its corporate family. The second agreement contains a one-way forum selection provision that allows RKT SS to sue anywhere but would require BE&K to sue in a Georgia court. Through this action, BE&K seeks to determine which contract governs its work on a large construction project so that the parties can litigate their disputes in the appropriate court.

BE&K has moved for partial summary judgment declaring that the Delaware agreement governs the engineering work it provided on the project. BE&K also has moved for narrower declarations establishing that the Delaware agreement governs specific work orders. If successful, BE&K asks the court to convert a previously issued preliminary anti-suit injunction into a permanent anti-suit injunction. The motion is granted and the permanent injunction entered.

I. FACTUAL BACKGROUND

The facts are drawn from the parties' submissions in connection with the motion for summary judgment. All factual disputes are resolved in favor of the non-movant defendants, who receive the benefit of all reasonable inferences. This procedural

principle does not affect the result, which is dictated by judicial admissions and the plain language of the operative agreements.

A. The Strategic Project

RKT CP is a Delaware limited liability company with its principal place of business in Norcross, Georgia. The company manufactures paperboard and paper-based packaging at pulp and paper mills located across the United States. RKT CP formerly was known as Smurfit-Stone Container Corporation, and that entity's predecessor in turn was Stone Container Corporation. Certain agreements in the record were executed by RKT CP's predecessors. For simplicity, this decision refers only to RKT CP.

In August 2010, RKT CP decided to upgrade a 70-year old pulp and paper mill in Hodge, Louisiana (the "Hodge Mill") and convert it to a linerboard-only operation. RKT CP termed the upgrade the "Strategic Project." RKT CP contemplated that the Strategic Project would proceed in phases, starting with design and engineering work and proceeding later to construction.

B. The Engineering Agreement

RKT CP hired BE&K to provide the engineering work and site services for the Strategic Project. BE&K later became known as KBR Engineering Company, LLC. Because BE&K appears in this action under its earlier moniker, this decision refers only to BE&K.

Both RKT CP and BE&K are members of larger corporate groups. RKT CP is a wholly owned subsidiary of non-party Rock-Tenn Company, the ultimate parent of its corporate group. BE&K is a wholly owned subsidiary of non-party KBR, Inc., the

ultimate parent of its corporate group. The Rock-Tenn and KBR corporate groups have worked together on a range of projects, and various entities in the two corporate families are parties to a range of agreements.

To govern the engineering work and site services for the Strategic Project, RKT CP and BE&K entered into a new agreement dated December 21, 2010, called the Master Engineering Services Contract. Dkt. 62 Ex. A. Because the agreement governs engineering services, this decision refers to it as the "Engineering Agreement" or "EA." The Engineering Agreement defines RKT CP as the "OWNER" and BE&K as the "ENGINEER." For the reader's convenience, this decision substitutes "BE&K" for "ENGINEER" and "RKT CP" for "OWNER" in quotations from the agreement.

The Engineering Agreement is a master agreement in the sense that its use is not limited to the Strategic Project at the Hodge Mill. Rather, the parties can use it to govern engineering work and site services that BE&K might provide on projects at any of RKT CP's facilities. Section 1.2 of the Engineering Agreement describes the scope of the Engineering Agreement as follows:

> During the Term of this Agreement, [BE&K] will provide engineering services ("Services") to [RKT CP] in accordance with written work orders ("Work Order(s)") issued by [RKT CP] and approved and accepted by [BE&K] for individual projects relating to [RKT CP's] facilities ("Project(s)") where the total installed per-project cost for any construction arising from the Services will be less than Five Million Dollars ($5,000,000). The terms and conditions of this Agreement shall govern each Work Order and the liability of the parties arising from each Work Order. Each Work Order shall contain the information specified in **Exhibit A,** including [BE&K's] Scope of Services . . . . For its own internal accounting purposes, [RKT CP] may issue a purchase order related to each Work Order; provided, however, that the terms and conditions of this Agreement will apply and the terms and conditions of the purchase orders

> (including but not limited to the standard terms and conditions on the back of a purchase order) will not apply.

EA § 1.2.

Section 1.4 of the Engineering Agreement elaborates on the types of services that BE&K might provide that will be governed by the contract. It states:

> [BE&K] shall perform the Services specified in each Work Order, which may include but [are] not limited to: studies, conceptual designs, preliminary designs, and detail designs; including, but not limited to, calculations, designs, equipment and material sizing, specifications, procurements, plans, construction drawings, estimates, schedules, and other ancillary engineering and procurement activities as required by the Contract Documents to complete the Project.

Id. § 1.4.

Section 2.1 of the Engineering Agreement defines the "Contract Documents" for each Project, stating that "[t]he following Enumerated [sic] documents are incorporated herein by reference . . . [and] such documents, together with this Agreement, constitute the Contract Documents and set forth the Contract." *Id.* § 2.1. Section 2.1 lists three documents: (i) "Exhibit A – Scope of Project/Work Order Form," (ii) "Exhibit B – Sworn Statement & Waiver of Lien Form," and (iii) "Exhibit C – Basis of Compensation." *Id.*

The parties selected Delaware law to govern the Engineering Agreement. *Id.* § 20.3. In the event of disputes, the parties conferred exclusive jurisdiction on the state and federal courts located in Wilmington, Delaware for any dispute that "arises out of or relates to this Contract, any Work Order(s), or the breach thereof." *Id.* § 17.1 (the "Delaware Forum Clause"). The parties agreed on a range of other provisions to limit

their contractual and extra-contractual liability and to regulate the dispute resolution process. *See, e.g.*, *id.* § 17.1 (waiving the right to jury trial).

C. The Construction Agreement

In November 2011, RKT CP interviewed companies to undertake the next phase of the Strategic Project, which was the construction work at the Hodge Mill. RKT CP decided to hire non-party SW&B Construction Company, LLC ("SW&B"). SW&B is an affiliate of BE&K and a wholly owned subsidiary of non-party Kellogg Brown & Root, LLC ("Kellogg"), which in turn is a wholly owned subsidiary of KBR.

For the construction phase, RKT CP and SW&B did not contract directly with each other. Instead, the Rock-Tenn corporate family used as its counterparty RKT SS, a Georgia limited liability company with its principal place of business in Norcross, Georgia. RKT SS is a sister subsidiary of RKT CP that provides administrative and management services to Rock-Tenn Company and its affiliates. The KBR corporate family used Kellogg as its counterparty.

As with the Engineering Agreement, the parties did not enter into a contract relating exclusively to the Strategic Project at Hodge Mill. Instead, they prepared a Master Purchase Agreement for Equipment, Parts, Services, which became effective as of December 5, 2011. Dkt. 27 Ex. 7. Because the agreement governs construction services, this decision refers to it as the "Construction Agreement" or "CA." Like the Engineering Agreement, the Construction Agreement is a master agreement that can be used for goods and services that entities in the KBR corporate family might provide for projects

identified by entities in the Rock-Tenn corporate family, whether at the Hodge Mill or at other facilities.

To this end, the Construction Agreement defines RKT SS as the "Buyer," but it specifically contemplates that Rock-Tenn Company and its affiliates, defined collectively in the agreement as the "Rock-Tenn Affiliates," can make purchases under the agreement. CA at 1 ("each of [the Rock-Tenn Affiliates] may be a purchaser hereunder"). The Construction Agreement defines Kellogg as the "Seller," but it specifically contemplates that the agreement can be "employed for Purchase Orders with other [Kellogg] entities or affiliates, as agreed to between the Parties, including but not limited to KBR USA LLC, SW&B Construction Company, LLC, and BE&K Construction Company, LLC." *Id.*

To regulate when the Construction Agreement applies, the Construction Agreement establishes different default rules for purchase orders issued to Kellogg itself, as opposed to purchase orders issued to Kellogg affiliates. Section 6(a) makes the Construction Agreement apply by default to any Purchase Order issued by a Rock-Tenn Affiliate to Kellogg:

> The terms and conditions of this Agreement shall govern all of the transactions between the Rock-Tenn Affiliates and Seller during the Term of this Agreement with respect to the purchase of Goods and Services, regardless of whether the Transaction Documents refer to this Agreement, unless the Transaction Documents for a particular Transaction (i) specifically provide otherwise and (ii) are signed by authorized representatives of the Rock-Tenn Affiliate placing the Purchase Order and Seller, in which event the other terms and conditions agreed to . . . with respect to such transaction shall apply to that particular transaction only.

Id. § 6(a). By contrast, the Construction Agreement does not apply by default to any Purchase Order issued by a Rock-Tenn Affiliate to a Kellogg affiliate. "In such situations, all such Purchase Orders must specifically reference the terms of [the Construction] Agreement." *Id.* at 1.

The Construction Agreement contemplates that a package of "Transaction Documents" will govern each particular "Transaction" under the agreement. Section 1 of the Construction Agreement explains generally that

> Seller shall deliver products, and/or equipment and/or perform applicable services ("Goods and Services") to be determined by Buyer's mill location on a "Transaction" basis during the term of this Agreement, all in accordance with the terms and conditions hereof and in accordance with the specifications set out in the applicable Statement of Work and/or Order Form and/or Purchase Order (collectively the "Transaction Documents"). SOWs will be numbered consecutively starting with E-1, E-2, E-3, and so on.

Id. § 1.

Other sections define elements of the Transaction Documents in greater detail. Section 6(c) of the Construction Agreement does so for the term "Purchase Order":

> The term "Purchase Order" means a purchase order for Products, Equipment and/or services submitted to Seller by the Rock-Tenn Affiliates. Each of the Rock-Tenn Affiliates desiring to order Products, Equipment or Services under this Agreement shall issue a Purchase Order to Seller containing the basic business terms of the desired Transaction, including, but not necessarily limited to, a description of the Products, Equipment and/or Service(s) ordered . . . and the address of Buyer's Location receiving the Products, along with a Statement of Work . . . . In the event this Agreement contemplates performance by Seller of any services . . . , such Services shall be set forth on one or more statements of work executed and agreed to by Buyer and Seller, in a form of which is attached hereto as Attachment E, and incorporated herein (the "Statement of Work").

Id. § 6(c). Section 2 of the Construction Agreement lists six additional documents that can be incorporated "if required under a specific Transaction Document." *Id.* § 2. They are:

> (a) One (1) copy of the document entitled "Product Prices" hereinafter Attachment A.
>
> (b) One (1) copy of the document entitled "Contractor Rate Sheet" hereinafter Attachment B.
>
> (c) One (1) copy of the document entitled "Certificate of Insurance" hereinafter Attachment C.
>
> (d) One (1) copy of the document entitled "Locations" hereinafter Attachment D.
>
> (e) One (1) copy of the document entitled "Statement of Work" hereinafter Attachment E.
>
> (f) One (1) copy of the document entitled "Equipment Order Form" hereinafter Attachment F.

Id. The designated attachments provide templates and identify the additional information they should contain.

The parties selected Georgia law to govern the Construction Agreement. *Id.* § 36. For dispute resolution, the Rock-Tenn Affiliates did not bind themselves to any particular forum. Rather, the Construction Agreement contains a one-sided forum selection provision under which "Seller consents, exclusively, to the adjudication of any dispute arising out of this Agreement by any federal or state court of competent jurisdiction sitting in the State of Georgia." *Id.*

D. The Georgia Action

On June 7, 2013, SW&B filed an action against RKT CP in the State Court for Gwinnett County, Georgia (respectively, the "Georgia Action" and the "Georgia Court"). SW&B alleged it had not been paid for certain work performed on purchase orders issued under the Construction Agreement and sought to recover approximately $30 million. Although RKT SS was the contractual counterparty under the Construction Agreement, SW&B sued RKT CP because it was the entity that issued the purchase orders. *See* CA § 36.

On August 12, 2013, RKT CP filed a third party complaint against BE&K claiming *breach of the Engineering Agreement* and asserting other theories that necessarily implicated the Engineering Agreement. *See* Transmittal Affidavit of Elizabeth A. Powers dated November 18, 2013 (the "Powers Aff.") Ex. E (the "RKT CP Georgia Complaint"). The RKT CP Georgia Complaint asserted seven substantive counts plus an eighth count to recover attorneys' fees and costs. Only one count, Count VII, rested on the Construction Agreement. Every other count expressly invoked the Engineering Agreement or inherently depended on provisions within the Engineering Agreement, thereby implicating the Delaware Forum Clause.

Also on August 12, 2013, RKT SS moved to intervene in the Georgia Action and filed a proposed third party complaint in intervention. *See* Powers Aff. Ex. F (the "RKT SS Georgia Complaint"). Like RKT CP, RKT SS named BE&K as a defendant, claimed that BE&K breached the Engineering Agreement, and asserted other theories that implicated the Engineering Agreement and thus the Delaware Forum Clause.

E. The Delaware Actions

On August 12, 2013, the same day that RKT CP filed third party claims and RKT SS moved for leave to file its complaint in the Georgia Action, BE&K brought suit against RKT CP in Delaware Superior Court for breach of the Engineering Agreement. BE&K seeks to recover $3,765,108.45 that RKT CP allegedly still owes BE&K for services performed under the Engineering Agreement.

On August 23, 2013, BE&K filed suit in this court against RKT CP and RKT SS (jointly, the "Rock-Tenn Defendants") seeking an injunction preventing them from asserting claims arising under the Engineering Agreement outside of Delaware in violation of the Delaware Forum Clause. BE&K moved for a preliminary anti-suit injunction, the parties briefed the issue, and the court heard oral argument on September 27.

As plaintiffs in the Georgia Action, the Rock-Tenn Defendants alleged that the Engineering Agreement governed BE&K's services on the Strategic Project and that BE&K breached the Engineering Agreement. During the hearing on the preliminary injunction, in sharp contrast to their positions in the Georgia Action, the Rock-Tenn Defendants alleged that there could be multiple contracts potentially governing BE&K's work on the Strategic Project. The Rock-Tenn Defendants argued that the issuance of any form of injunction would be premature because of the factual "murk" and "complexity" of the dispute. *BE&K Eng'g Co. v. RockTenn CP, LLC*, C.A. No. 8837-VCL, at 56, 106 (Del. Ch. Sept. 27, 2013) (TRANSCRIPT).

After hearing argument, the court issued a preliminary anti-suit injunction barring RKT CP from litigating Counts I-VI and VIII of its complaint in Georgia Action to the extent those counts arose out of or related to the Engineering Agreement. The preliminary anti-suit injunction barred RKT SS from litigating Counts I-V and VII-X of its proposed third party complaint in the Georgia Action to the extent those counts arose out of or related to the Engineering Agreement. Given the Rock-Tenn Defendants' arguments about factual ambiguity and multiple contracts, the obvious question to be litigated was the degree to which the counts arose out of or related to the Engineering Agreement.

BE&K has now moved for partial summary judgment. BE&K seeks a declaration that the Engineering Agreement governs BE&K's work and services on the Strategic Project. BE&K also seeks a series of narrower declarations that the Engineering Agreement governs the services called for by fourteen specific work orders.

II. LEGAL ANALYSIS

Under Court of Chancery Rule 56, summary judgment "shall be rendered forthwith" if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ct. Ch. R. 56(c). The initial burden is on the moving party to demonstrate the absence of a material issue of fact, with the evidence construed in the light most favorable to the non-moving party. *Brown v. Ocean Drilling & Exploration Co.*, 403 A.2d 1114, 1115 (Del. 1979). The burden then shifts to the non-moving party "to adduce some evidence of a dispute of material fact." *Metcap Sec. LLC v. Pearl Senior Care, Inc.*, 2009 WL 513756, at *3 (Del. Ch. Feb. 27, 2009), *aff'd*, 977

A.2d 899 (Del. 2009) (TABLE); *accord Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

"Summary judgment is the proper framework for enforcing unambiguous contracts because there is no need to resolve material disputes of fact." *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *9 (Del. Ch. May 2, 2007). The Delaware Supreme Court "has long upheld awards of summary judgment in contract disputes where the language at issue is clear and unambiguous." *GMG Capital Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 783 (Del. 2012) (footnote omitted).

"Delaware adheres to the 'objective' theory of contracts, *i.e.* a contract's construction should be that which would be understood by an objective, reasonable third party." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (footnote omitted). When interpreting a contract, the court "will give priority to the parties' intentions as reflected in the four corners of the agreement," construing the agreement as a whole and giving effect to all its provisions. *GMG Capital*, 36 A.3d at 779. "Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language." *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) (footnote omitted).

A. The Engineering Agreement Governs BE&K's Work On The Strategic Project.

BE&K seeks a declaration that the Engineering Agreement governs the work and services that BE&K provided to RKT CP on the Strategic Project. Given their averments

in the Georgia Action, one might think the Rock-Tenn Defendants would concede this point. But they have not. Instead, they contend before this court (but not in Georgia), that the Engineering Agreement does not apply because (i) "it was designed to apply to projects for which the total installed construction cost was below $5 million" and (ii) the Strategic Project "was massive and far exceeded a total installed construction cost of $5 million." Defs.' Ans. Br. at 1. The Rock-Tenn Defendants' re-interpretation conflicts with their representations to the Georgia Court and this court, and it has no support in the language of the Engineering Agreement.

1. The Rock-Tenn Defendants Are Bound By Their Admissions.

The Rock-Tenn Defendants have represented clearly, directly, and repeatedly to the Georgia Court that the Engineering Agreement governs the work and services that BE&K provided to RKT CP on the Strategic Project. Before BE&K moved for summary judgment, the Rock-Tenn Defendants similarly represented to this court that the Engineering Agreement governs the work and services that BE&K provided to RKT CP on the Strategic Project. The Rock-Tenn Defendants' admissions are numerous, pervasive, and binding, and they warrant entry of summary judgment on this issue.

a. The Doctrine of Judicial Admissions

Judicial admissions are "[v]oluntary and knowing concessions of fact made by a party during judicial proceedings (*e.g.*, statements contained in pleadings, stipulations, depositions, or testimony; responses to requests for admissions; counsel's statements to the court)." *Merritt v. United Parcel Serv.*, 956 A.2d 1196, 1201 (Del. 2008). They "are limited to factual matters in issue and not to statements of legal theories or conceptions."

Levinson v. Del. Comp. Rating Bureau, Inc., 616 A.2d 1182, 1186 (Del. 1992) (citation omitted). That is, "[t]he scope of a judicial admission by counsel is restricted to unequivocal statements as to matters of fact which otherwise would . . . require evidentiary proof; it does not extend to counsel's statement of his conception of the legal theory of a case, *i.e.*, legal opinion or conclusion." *AT&T Corp. v. Lillis*, 953 A.2d 241, 257 (Del. 2008) (footnote omitted).

Judicial admissions "are traditionally considered conclusive and binding both upon the party against whom they operate, and upon the court." *Merritt*, 956 A.2d at 1201-02 (footnote omitted). Such a statement is "'not merely another layer of evidence, upon which the . . . court can superimpose its own assessment of weight and validity. It is, to the contrary, an unassailable statement of fact that narrows the triable issues in the case.'" *Id.* at 1202 n.18 (quoting *Airco Indus. Gases, Inc. Div. of the BOC Gp., Inc. v. Teamsters Health & Welfare Pension Fund of Phila. & Vicinity*, 850 F.2d 1028, 1037 (3d Cir. 1988)); *see also Ervin v. Vesnaver*, 2000 WL 1211201, at *2 (Del. Super. June 20, 2000) ("Judicial admissions are not a means of evidence but a waiver of all controversy and therefore are a limitation on the issues.").

b. The Rock-Tenn Defendants' Admissions

In the Georgia Action, the Rock-Tenn Defendants have consistently maintained that the Engineering Agreement governs BE&K's work during the Strategic Project. Most prominently, RKT CP's Georgia Complaint contains the following allegations about BE&K's contractual obligations as "ENGINEER" under the Engineering Agreement and its alleged breach of those obligations:

- "On or about December 21, 2010, RKT CP (then, Smurfit-Stone) as 'Owner' and BE&K as 'Engineer' entered into a Master Engineering Services Contract (the 'Master Contract' [*i.e.*, the Engineering Agreement[1]]) for BE&K to design and manage the Strategic Project." RKT CP Georgia Complaint ¶ 16.

- "The [Engineering Agreement] could be employed for written work orders with BE&K." *Id.* ¶ 17 (citing EA § 1.2).

- "The [Engineering Agreement] was in fact employed for certain written work orders, also known as purchase orders, issued by RKT CP to BE&K for work on the Strategic Project." *Id.* ¶ 18.

- "Pursuant to the [Engineering Agreement], BE&K agreed that 'Services will be performed by such personnel as may be necessary or required to perform the Services required hereunder in accordance with standards of the industry for the type of services provided and shall be capable of meeting the requirements of the [Engineering Agreement] and Work Order.'" *Id.* ¶ 19 (quoting EA § 1.2).

- "Pursuant to the [Engineering Agreement], BE&K agreed that '[t]he Services shall be performed in accordance with industry standards and shall be capable of meeting the requirements of the scope of work as provided in the Contract Documents.'" *Id.* ¶ 20 (quoting EA § 1.5).

- "Pursuant to the [Engineering Agreement], BE&K agreed that '[d]etail drawings, specifications and special conditions shall completely describe the construction, machinery, material, equipment, workmanship and procedures to be followed for the complete construction of the Project.'" *Id.* ¶ 21 (quoting EA § 1.7).

- "Pursuant to the [Engineering Agreement], BE&K agreed that 'ENGINEER shall perform the Services in such a manner as to meet the Project Schedule for each Project and to avoid delays in the review, approval, certification and transmittal of drawings and other design matter.'" *Id.* ¶ 22 (quoting EA § 3.2).

- "Pursuant to the [Engineering Agreement], BE&K agreed that 'ENGINEER warrants that, in performing the Services required hereunder, ENGINEER shall exercise the standard of care normally exercised by internationally recognized

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[1] The Rock-Tenn Defendants' filings in the Georgia Action refer to the Engineering Agreement as the "Master Contract" and the Construction Agreement as the "Master Agreement." These terms are too similar for this court to keep straight, so this decision has substituted the Engineering Agreement and the Construction Agreement as more descriptive labels.

professional engineers having experience in the pulp and paper field.'" *Id.* ¶ 23 (quoting EA § 8.1).

- "After substantial work on the front end planning documents by BE&K and RKT CP, in the late fall of 2011, SW&B was invited to bid for the construction work portion of the Strategic Project, primarily related to the pulp mill and paper machine upgrades." *Id.* ¶ 25.

- "Poor and incomplete engineering and design by BE&K contributed to drastic increases in both design and construction costs." *Id.* ¶ 46.

- "BE&K's design and engineering work was of poor quality, incomplete, and delivered late." *Id.* ¶ 47.

- "BE&K repeatedly misrepresented the status of its design work to RKT SS and RKT CP." *Id.* ¶ 49.

- "BE&K led RKT SS and RKT CP to believe that SW&B had a complete set of drawings from which SW&B prepared its late-April 2012 cost estimate." *Id.* ¶ 51.

- "Leading up to the pre-scheduled Mill outage to begin May 6, 2012, BE&K repeatedly told RKT SS and RKT CP that the Strategic Project could be performed on time and was on budget." *Id.* ¶ 54.

- "RKT CP has performed all of its obligations to BE&K . . . under the [Engineering Agreement] and applicable purchase orders in substantial compliance with the terms and conditions thereof." *Id.* ¶ 113.

- "BE&K . . . breached the [Engineering Agreement] and applicable purchase orders in that BE&K's . . . design drawings and specifications failed to include the level of detail that is required under the [Engineering Agreement]." *Id.* ¶ 114.

- "BE&K's . . . failure to prepare the design drawings and specifications with the level of detail that is required under the [Engineering Agreement] constitutes a substantial and material breach of the [Engineering Agreement] and the applicable purchase orders." *Id.* ¶ 115.

- "BE&K . . . breached the [Engineering Agreement] and applicable purchase orders in that BE&K . . . did not perform [its] work on the Strategic Project in accordance with the standards of care provided by the [Engineering Agreement]." *Id.* ¶ 116.

- "BE&K's . . . failure to perform [its] work on the Strategic Project in accordance with the standards of care provided by the [Engineering Agreement] constitutes a substantial and material breach of the [Engineering Agreement] and the applicable purchase orders." *Id.* ¶ 117.

- "BE&K . . . breached the [Engineering Agreement] and the applicable purchase orders in that BE&K . . . did not manage and coordinate the work on the Strategic Project in a non-negligent manner and in accordance with the standards provided by the [Engineering Agreement]." *Id.* ¶ 118.

- "BE&K's . . . failure to mange and coordinate the work on the Strategic Project in a non-negligent manner and in accordance with the standards provided by the [Engineering Agreement] constitutes a substantial and material breach of the [Engineering Agreement] and the applicable purchase orders." *Id.* ¶ 119.

- "BE&K . . . breached the [Engineering Agreement] and the applicable purchase orders in that BE&K . . . did not perform [its] work on the Strategic Project in such a manner as to meet the project schedule and to avoid delays in review, approval, certification, and transmittal of drawings and other design matter as required by the [Engineering Agreement]." *Id.* ¶ 120.

- "BE&K's . . . failure to perform [its] work on the Strategic Project in such a manner as to meet the project schedule and to avoid delays in review, approval, certification, and transmittal of drawings and other design matter as required by the [Engineering Agreement] constitutes a substantial and material breach of the [Engineering Agreement] and the applicable purchase orders." *Id.* ¶ 121.

- "As a direct and proximate result of BE&K's . . . breaches of the [Engineering Agreement] and the applicable purchase orders, RKT CP has been damaged in that it has not received the benefit of its bargain, and RKT CP continues to incur significant damages and injury." *Id.* ¶ 122.

RKT CP made comparable allegations in its counterclaim against SW&B. *See* Powers Aff. Ex. I. In substance, RKT CP represented to the Georgia Court that the Engineering Agreement governed BE&K's work on the Strategic Project, that RKT CP issued purchase orders to BE&K pursuant to the Engineering Agreement for work on the Strategic Project, and that BE&K breached the Engineering Agreement and the applicable purchase orders.

The RKT CP Georgia Complaint likewise avers that "BE&K . . . had a duty to RKT CP to perform [its] work in accordance with standards of the industry for the type of services provided and to meet the requirements of the [Engineering Agreement], all

applicable purchase orders, and the scope of work as provided in the contract documents." RKT CP Georgia Complaint ¶ 132. In support of this count, RKT CP submitted to the Georgia Court an affidavit from Timothy R. Chitester, a professional engineer and Senior Vice President of Hill International. *See* RKT CP Georgia Complaint Ex. A.

- After describing the Strategic Project and defining it as "the Project," Chitester stated his "understanding that the design, engineering, and project management work on the Project was implemented through KBR, Inc. ('KBR') and its subsidiaries Kellogg, Brown & Root, LLC ('Kellogg') and BE&K Engineering Company, LLC." *Id.* ¶ 5. He later expressed his view that changes to "engineering" were the responsibility of BE&K. *Id.* ¶ 11.
- After quoting Section 3.2 of the Engineering Agreement, Chitester stated, "Based on my preliminary analysis of the Project documentation available to me, it is my opinion that KBR, Kellogg, and BE&K have failed to meet that standard." *Id.* ¶ 8.
- After quoting Section 1.5 of the Engineering Agreement, which established that services under the Engineering Agreement "shall be performed in accordance with industry standards," and quoting Section 8.1 of the Engineering Agreement, which established that BE&K would "exercise the standard of care normally exercised by internationally recognized professional engineers having experience in the pulp and paper field," Chitester stated, "Based on my preliminary analysis of the Project documentation available to me, it is my opinion that there were a number of errors and omissions in KBR's, Kellogg's, and BE&K's work, examples provided below, such that KBR, Kellogg, and BE&K have failed to perform in accordance with industry standards and breached the standard of care incumbent upon them." *Id.* ¶ 9.

In substance, Chitester's affidavit represented to the Georgia Court that the Engineering Agreement governed BE&K's work on the Strategic Project and that BE&K breached the standards of care required by the Engineering Agreement.

RKT SS made parallel representations to the Georgia Court. The allegations of the RKT SS Georgia Complaint track those found in the RKT CP Georgia Complaint to

the point of frequently using identical language. *See, e.g.*, RKT SS Georgia Complaint ¶¶ 11-13, 16-25, 46-56, 112-22, 131-37. In support of its motion to intervene in the Georgia Action and assert its claims, RKT SS submitted an affidavit of Tom Stigers, the Senior Vice President of Containerboard Mills for Rock-Tenn Company. *See* Powers Aff. Ex. H. Stigers stated under oath in his affidavit:

> RKT SS and RKT CP also have disputes with BE&K . . . for work allegedly performed on the Strategic Project. *The essential terms and conditions governing those purchase orders are supplied by a Master Engineering Services Contract* that was entered into by Smurfit Stone Container Corporation ("Smurfit Stone") and BE&K on or about December 21, 2010. Subsequent to the execution of this contract, closing in May 2011, Rock-Tenn acquired Smurfit Stone, with Smurfit Stone merging into RKT CP such that the contract was assigned to RKT CP.

Id. ¶ 5 (emphasis added).

On September 19, 2013, RKT SS proposed to file an amended pleading. *See* Powers Aff. Ex. G (the "RKT SS Amended Georgia Complaint"). That proposed complaint avers in substance that the Engineering Agreement governed BE&K's work on the Strategic Project, that RKT CP issued purchase orders to BE&K pursuant to the Engineering Agreement for work on the Strategic Project, and that BE&K breached the Engineering Agreement and the applicable purchase orders. *See, e.g.*, *id.* ¶¶ 11-13, 16-25, 46-56, 112-140.

During discovery in the Georgia Action, RKT CP provided interrogatory responses which admitted that the Engineering Agreement governed BE&K's work on the Strategic Project. One of responses states as follows:

> RKT CP (then Smurfit Stone Container Corporation) and BE&K entered into a Master Engineering Services Contract (the "Master Contract" [*i.e.*,

> the Engineering Agreement]), *which provided the terms and conditions of BE&K's purchase and change orders for the Strategic Project.* BE&K failed to perform its contractual obligations, duties, and responsibilities in conformance with and pursuant to the [Engineering Agreement] and appropriate industry standards. Therefore, it breached its agreement with RKT CP.

Powers Aff. Ex. J at 21 (emphasis added). The interrogatory response identifies five provisions of the Engineering Agreement that BE&K allegedly breached and cites a purchase order issued pursuant to the Engineering Agreement that BE&K allegedly failed to fulfill. *Id.* at 21-22. In a later response, RKT CP states, "RKT CP expected BE&K to comply with all terms and conditions provided in the [Engineering Agreement.]" *Id.* at 29.

After the hearing on the preliminary injunction on September 27, 2013, the Rock-Tenn Defendants never sought in Georgia to withdraw or correct any of their statements. They have continued to maintain these positions in the Georgia Action even after professing to this court during the preliminary injunction hearing that they could not determine whether the Engineering Agreement applied to BE&K's work.

RKT CP has even represented to the Georgia Court that the *same dispute resolution provision* that contains the Delaware Forum Clause governs its claims against BE&K. When it filed its third party complaint against BE&K, RKT CP asked the Georgia Court to stay proceedings on its claim pending mediation. RKT CP told the Georgia Court that its "claims against BE&K are subject to mandatory mediation under the [Engineering Agreement]." Powers Aff. Ex. M at 2. RKT CP quoted Section 17.1 of the Engineering Agreement, which contains both the mandatory mediation requirement

and the Delaware Forum Clause, argued that the provision governed its claims, and asked the Georgia Court to "immediately stay the litigation with BE&K" in favor of a mediation then scheduled for August 27, 2013. *Id.* at 2-3.

The Rock-Tenn Defendants made similar representations to this court. In support of a motion by RKT SS to dismiss for lack of personal jurisdiction, which this court denied, the Rock-Tenn Defendants submitted another Stigers affidavit. In this affidavit, Stigers stated flatly, "The [Engineering Agreement] was used for BE&K to perform design and engineering work on the Strategic Project." Powers Aff. Ex. N ¶ 5.

c. The "Fact" Versus "Law" Issue

As noted above, judicial admissions "are limited to factual matters in issue and not to statements of legal theories or conceptions." *Levinson*, 616 A.2d at 1186 (citation omitted). They do not extend "to counsel's statement of his conception of the legal theory of a case, *i.e.*, legal opinion or conclusion." *Lillis*, 953 A.2d at 257 (footnote omitted). Now that they are confronted with their judicial admissions, the Rock-Tenn Defendants have claimed that their earlier statements were really legal positions, not factual averments. This itself is a reversal of position, and not one that the Rock-Tenn Defendants have been able to maintain consistently.

When they were making their previous representations to the Georgia Court and this court, the Rock-Tenn Defendants presented those representations as addressing issues of fact. In RKT CP's Georgia Complaint, RKT CP made the critical allegations in paragraphs 16-23, 46-47, 49, 51, and 54 under the heading "**Material Facts**." RKT CP Georgia Complaint at 4. In paragraph 18 of its complaint, RKT CP stated that "[t]he

[Engineering Agreement] was **in fact** employed for certain written work orders, also known as purchase orders, issued by RKT CP to BE&K for work on the Strategic Project." *Id.* ¶ 18 (emphasis added). RKT SS advanced its parallel allegations under the heading "**Material Facts**." *See* RKT SS Georgia Complaint ¶¶ 11-13, 16-25, 46-56; RKT SS Amended Georgia Complaint ¶¶ 11-13, 16-25, 46-56. Stigers submitted both his affidavits as a fact witness and described his sworn averments as facts based on "personal knowledge." Powers Aff. Ex. H ¶ 3. Yet now the Rock-Tenn Defendants re-characterize these statements as legal positions, not facts.

In briefing the motion for summary judgment, the Rock-Tenn Defendants were unable to hew consistently to their new position and tried to play both sides of the fact/law divide. To avoid summary judgment on matters of contract interpretation, they argued that whether the Engineering Agreement governed BE&K's services is a question of fact. Then, to avoid the judicial admission doctrine, they reversed position and argued that whether the Engineering Agreement governed BE&K's services is an issue of law. For example, on page 2 of their brief, the Rock-Tenn Defendants argued that if the court rejects the $5 million limitation argument, then

> there is a material dispute as to what contract actually governs BE&K's work on the Strategic Project. To the extent this Court determines that the four corners of the agreement do not preclude its application to the Strategic Project, then there is a factual dispute as to which contract governs that work.

Defs.' Ans. Br. at 2. Yet later on the same page, to avoid the judicial admission doctrine, the Rock-Tenn Defendants contended that their invocation of the Engineering Agreement in the Georgia Action "was a legal position, not a factual admission." *Id. Compare id.* at

7 (arguing that "determining what contract governs the Work Orders . . . is fraught with factual disputes for which summary judgment is inappropriate"), *with id.* at 10 (arguing that their "statements that the [Engineering] Agreement governs the parties' disputes are legal interpretations of the [Engineering] Agreement and, consequently, not judicial admissions").

Whether the Engineering Agreement governs the relationship between BE&K and RKT CP is an issue where the Rock-Tenn Defendants can and should be held to their judicial admissions. The decision in *In re Summit United Serv., LLC*, 2005 WL 6488106 (Bankr. N.D. Ga. Sept. 19, 2005), is instructive. There, the plaintiff alleged that it sold goods to the defendants and installed certain fixtures in the defendants' stores, and that the defendants failed to pay for these goods and should turn over the fixtures as property of plaintiff's bankruptcy estate. *Id.* at *3. In its complaint, the plaintiff alleged that "[the plaintiff] and [the defendants] are parties to a scan-based trading agreement [the "SBTA"] pursuant to which [the plaintiff] delivers goods . . . for sale to eight specific locations of [the defendants]." *Id.* The plaintiff also alleged that the SBTA was an executory contract, which the plaintiff had not yet determined whether to assume or reject, and the plaintiff "sought payment of amounts due by [the defendants] pursuant to the terms of the SBTA." *Id.* The court held that these allegations constituted judicial admissions as to the SBTA's binding nature:

> Although the validity of a contract is not a fact, but rather a legal conclusion, by relying upon the validity of the SBTA to support its recovery against [the defendants], [the plaintiff] has necessarily assumed and admitted the facts necessary to reach the conclusion that [the plaintiff] and [the defendants] were legally bound by the SBTA. Additionally, by

> stating that the SBTA constituted an executory contract, which [the plaintiff] could choose to assume or reject, [the plaintiff] must have assumed that [the plaintiff] and [the defendants] were parties to a valid and enforceable contract with continuing obligations due by both parties. . . . Accordingly, [the plaintiff] cannot now argue that it was not bound by the terms of the SBTA.

Id. at *4; *accord Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co.*, 976 F.2d 58, 61 (1st Cir. 1992) (holding that the plaintiff made a binding judicial admission when it alleged in its original and amended complaints that the contract at issue "did, in fact, exist between the parties" and ruling that the "plaintiff should not be allowed to contradict its express factual assertion in an attempt to avoid summary judgment"); *H.E. Contr. v. Franklin Pierce Coll.*, 360 F. Supp. 2d 289, 293 (D.N.H. 2005) (holding that the plaintiff made a "binding judicial admission" as to "the applicable contract between the parties" by alleging, in part, that "the parties entered into [the contract at issue] covering [the plaintiff's] work on the project.").

d. The Summary Judgment Determination

The Rock-Tenn Defendants represented clearly, directly, and repeatedly to this court and the Georgia Court that the Engineering Agreement governed BE&K's services on the Strategic Project. Those representations constitute binding judicial admissions. Partial summary judgment is therefore granted in favor of BE&K declaring the following:

> The Engineering Agreement was used for BE&K to perform design and engineering work on the Strategic Project. RKT CP issued work orders to BE&K for work on the Strategic Project. The terms and conditions for those work orders are supplied by the Engineering Agreement, which governs those work orders and the services provided by BE&K in connection with the work orders.

2. The $5 Million Cap

In response to BE&K's motion for summary judgment, the Rock-Tenn Defendants have argued that as a matter of law the Engineering Agreement cannot apply because of a limitation in the agreement to projects costing less than $5 million. Leaving aside that this new position conflicts with their judicial admissions, the Rock-Tenn Defendants' argument is contrary to the plain meaning of the Engineering Agreement.

Section 1.2 of the Engineering Agreement indeed limits its application to "Projects" not exceeding $5 million:

> During the Term of this Agreement, [BE&K] will provide engineering services ("Services") to [RKT CP] in accordance with written work orders ("Work Order(s)") issued by [RKT CP] and approved and accepted by [BE&K] for individual projects relating to [RKT CP's] facilities ("Project(s)") *where the total installed per-project cost for any construction arising from the Services will be less than Five Million Dollars ($5,000,000).* The terms and conditions of this Agreement shall govern each Work Order and the liability of the parties arising from each Work Order. Each Work Order shall contain the information specified in Exhibit A, including [BE&K's] Scope of Services for the Project . . . .

EA § 1.2 (emphasis added). This opinion refers to the italicized portion of Section 1.2 as the "$5 Million Cap."

The Rock-Tenn Defendants argue that the total construction cost of the Strategic Project "far exceeded a total installed construction cost of $5 million," which would violate the $5 Million Cap, and therefore the Engineering Agreement could not apply. This latest argument confuses the Strategic Project as a whole with the definition of "Project" under the Engineering Agreement. Under the plain language of Section 1.2, a

"Project" is defined by a "Work Order," and the $5 Million Cap applies on a per-Work Order basis. BE&K agreed in Section 1.2 to provide services "in accordance with written work orders ('Work Order(s)') issued by [RKT CP] . . . for individual projects." *Id.* The reference to plural "Work Orders" corresponds to the reference to plural "Projects." Later in the section, the contract states that "[e]ach Work Order shall contain the information specified in Exhibit A, including [BE&K's] Scope of Services for the Project." *Id.* Here, the reference to a singular "Work Order" corresponds to the reference to a singular "Project," and the sentence states that the former defines the "Scope of Services" for the latter. Section 1.2 also provides that "[t]he terms and conditions of this Agreement shall govern each Work Order and the liability of the parties arising from each Work Order," *id.*, thus making clear that each Work Order is a separate commitment.

Section 1.3 similarly defines a "Project" in terms of a "Work Order." It states:

> Each Project is described in the drawings, specifications and other documents and written instructions forming a part of the Contract Documents listed in ARTICLE 2 hereof and such subsequent drawings, plans, specifications and written instructions as are hereafter issued in extension and development of the details of the Project agreed upon in writing by the parties.

Id. § 1.3. Section 2.1 defines the "Contact Documents" as the Work Order, the Waiver of Lien, the Basis of Compensation, and the Engineering Agreement. *Id.* § 2.1. Once again, a "Project" is linked to a "Work Order."

Other sections of the Engineering Agreement confirm this interpretation. Section 3.2 states that "[BE&K] shall perform the Services in such a manner as to meet the

Project Schedule for each Project." *Id.* § 3.2. Section 1.4 states that BE&K "shall perform the Services specified in each Work Order." *Id.* § 1.4. Exhibit A requires that each Work Order include a "Schedule." *Id.* Ex. A. Section 14.2 permits RKT CP to terminate BE&K if BE&K "fails or refuses to perform the Services required hereunder according to the applicable schedule for any Project." *Id.* § 14.2. The Project and the Project Schedule depend on the underlying Work Order.

Section 4.1 states that "[a]s full compensation for the Services for each Work Order, [RKT CP] shall pay [BE&K] as provided in ARTICLE 5. [BE&K's] estimated total compensation for a Project shall be included in a Work Order." *Id.* § 4.1. Article 5 requires all "fees, reimbursable expenses and agreed-to retainages [to] be set forth in the Contract Documents." *Id.* § 5.1. To reiterate, the Contract Documents are the Work Order, the Waiver of Lien, the Basis of Compensation, and the Engineering Agreement. BE&K's compensation for each Project is thus governed by the Work Order that is part of the Contract Documents for that Project.

Section 19.1 provides that unless otherwise designated, RKT CP's representative generally would be Wes Carlson "and, with respect to each particular Project, . . . the individual designated as such, if any, in the Contract Documents relating to such Project." *Id.* § 19.1. The notice provision connects a Project to the Contract Documents, which again are defined as the Work Order, the Waiver of Lien, the Basis of Compensation, and the Engineering Agreement.

Section 20.11 limits BE&K's liability to "three (3) times [BE&K]'s compensation pursuant to the applicable Work Order, and Two Million Dollars ($2,000,000) annual

aggregate." *Id.* § 20.11. The plain meaning of the reference to compensation "pursuant to the applicable Work Order" indicates that the liability limitation, like the $5 Million Dollar Cap, operates on a per-Work Order basis. As RKT CP recognizes, "[s]uch a limitation is sensible if the project on which BE&K worked was $5 million or less." Defs.' Ans. Br. at 5 n.4. This is true so long as both limitations operate on a per-Work Order basis.

The only instance in which a Project is not directly connected to a Work Order is in Article 7, which discusses changes to Work Orders. Under Section 7.1, RKT CP could request that BE&K change the scope of services governed by a Work Order. If this occurred, then BE&K would "determine the feasibility, the Estimated Cost, and the time requirement related to any such requested change," with those costs being "collected and kept separate from the costs associated with the Services" for the underlying Work Order. EA § 7.1. BE&K then would advise RKT CP "of the Estimated Costs, the time requirements and the effect on the schedule and completion date of any changes requested." *Id.* § 7.2. If RKT CP approved the changes, then "[t]he provisions of the Contract shall apply to any such approved changes and the Estimated Cost and the time for completion shall be changed in accordance with estimates approved in writing by [RKT CP's] Representative." *Id.* In addition, the cost of making the estimate would become separately compensable. *Id.* § 7.3. Taken together, Article 7 establishes a plain and common sense mechanism for changing a Work Order, such that if the initial Work Order is modified by a later change order, then the requirements of the Engineering Agreement apply to the Work Order as modified.

Against this interpretation of the Engineering Agreement as a whole, the Rock-Tenn Defendants rely on one instance of capitalization. They point out that in the $5 Million Cap, the word "project" in "per-project cost" is not capitalized, and they say it therefore must mean something different than the defined term Project. They argue that "per-project" with a lower case "p" must mean something bigger, like the Strategic Project. To repeat the pertinent language,

> [BE&K] will provide engineering services ("Services") to [RKT CP] in accordance with written work orders ("Work Order(s)") issued by [RKT CP] and approved and accepted by [BE&K] for individual projects relating to [RKT CP's] facilities ("Project(s)") where the total installed per-project cost for any construction arising from the Services will be less than Five Million Dollars ($5,000,000).

Id. § 1.2. The lower case "p" in "per-project cost," however, is the *second time* that the lower case term "project" appears in this sentence. The first time, ten words earlier, appears in the phrase that defines the term Project, *viz.*, "for individual projects relating to [RKT CP's] facilities ('Project(s)')." Read naturally, the phrase "per-project cost" relates back to the earlier phrase "individual projects." Given their close proximity and interrelationship, both uncapitalized uses of "project" have the same plain meaning, which is to define the capitalized term "Project" in reference to a written "Work Order." It might have been clearer if the second "p" in "per-project cost" had been capitalized, but that lone epigraphical detail does not render the Engineering Agreement ambiguous.

Read as a whole, the plain language of the Engineering Agreement defines and conceives of each Project in terms of the Work Order that formed part of the Contract Documents for the Services to be provided on that Project, together with any approved

changes to the Work Order. The $5 Million Cap therefore applies to each Work Order, not to the Strategic Project as a whole. The Rock-Tenn Defendants' argument that the Engineering Agreement could not apply to BE&K's services on the Strategic Project because the cost of the Strategic Project as a whole exceeded the $5 Million Cap is unavailing.

B. The Engineering Agreement Governs The Specific Work Orders.

BE&K has moved for narrower declarations that the Engineering Agreement governs specific work orders that BE&K has identified. This issue is appropriate for summary judgment because the Engineering Agreement defines the documents that make up the operative contract between BE&K and RKT CP. When those documents are plain and unambiguous, they can be interpreted as a matter of law.

Once again, Section 1.2 of the Engineering Agreement provides the operative language:

> During the Term of this Agreement, [BE&K] will provide engineering services ("Services") to [RKT CP] in accordance with written work orders ("Work Order(s)") issued by [RKT CP] and approved and accepted by [BE&K] for individual projects relating to [RKT CP's] facilities ("Project(s)") where the total installed per-project cost for any construction arising from the Services will be less than Five Million Dollars ($5,000,000). The terms and conditions of this Agreement shall govern each Work Order and the liability of the parties arising from each Work Order. Each Work Order shall contain the information specified in Exhibit A, including [BE&K's] Scope of Services for the Project, a Project Schedule, and any other requirements for the Services.

EA § 1.2. Exhibit A to the Engineering Agreement identifies the following items: Scope of Services, Deliverables, Schedule, Estimated Cost, Estimated Workhours, and Project Contact. *See* EA Ex. A.

Under this provision, the written Work Order issued by RKT CP, read together with the Engineering Agreement itself, compose the operative legal documents. Section 1.2 made clear that any purchase orders issued by RKT CP do not make up part of the operative legal documents:

> For its own internal accounting purposes, [RKT CP] may issue a purchase order related to each Work Order; provided, however, that the terms and conditions of this Agreement will apply and the terms and conditions of the purchase orders . . . will not apply.

Id. Elsewhere, the Engineering Agreement defines the "Contract Documents" as "Exhibit A – Scope of Project/Work Order Form," "Exhibit B – Sworn Statement & Waiver of Lien Form," and "Exhibit C – Basis of Compensation." *Id.* § 2.1. This definition does not include purchase orders. The integration clause in the Engineering Agreement similarly states that "[t]he Contract Documents constitute the entire agreement between the parties." *Id.* § 20.4. Once again, the term "Contract Documents" does not include purchase orders.

Through these definitions and contract provisions, the parties limited the sources that a court can look to when determining whether a particular document constitutes a work order governed by the Engineering Agreement. Using these definitions and contract provisions, this court can rule as a matter of law on many of the work orders that BE&K has been submitted.

1. Pulp Mill Upgrade WO #2

The work order titled "Pulp Mill Upgrade WO #2 BE&K Field Engineering—Pulp" was issued by RKT CP and marked "Executed: 04/18/2012." Transmittal

Affidavit of John L. Cutts, Jr. dated November 15, 2013 (the "Cutts Aff.") Ex. A-3. It bears the word "Contract" at the top and was designated "Contract: 00594303." *Id.* Exhibit A defines the Scope of Services, describes the Deliverables, the Schedule, the Estimated Cost, and the Estimated Workhours, and provides the Project Contact. Exhibit A also sets out the following language:

> Please ensure the following wording is included on the purchase order and this work order is referenced on the PO:
>
> "The parties hereto agree and affirm that this Purchase Order is for administrative and billing purpose only and the services to be performed by BE&K Engineering, LLC, as authorized hereunder shall be governed solely by the terms and conditions of the [Engineering Agreement] dated December 21, 2010, in lieu of any preprinted terms and conditions contained or referenced on the face or reverse hereof."

Id. at RKT-CH 000343 (the "Engineering Agreement Incorporation Provision").

The work order titled "Pulp Mill Upgrade WO #2 BE&K Field Engineering—Pulp" does not carry any of the hallmarks of a purchase order governed by the Construction Agreement. Because this work order was issued to BE&K, the Construction Agreement only would govern if it "specifically reference[d] the terms of [the Construction] Agreement." CA at 1. There is no such reference in the work order. It also does not resemble the package of Transaction Documents called for under the Construction Agreement.

The plain language of the work order titled "Pulp Mill Upgrade WO #2 BE&K Field Engineering—Pulp" establishes that it is governed by the Engineering Agreement. Summary judgment in favor of BE&K is granted as to this work order.

2. Pulp Mill Upgrade WO #3

The work order titled "#4 & #5 Paper Machine Upgrade WO #3 BE&K Field Engineering" was issued by RKT CP and marked "Executed: 04/18/2012." Cutts Aff. Ex. A-6. It bears the word "Contract" at the top and was designated "Contract: 00594302." *Id.* Exhibit A defines the Scope of Services, describes the Deliverables, the Schedule, the Estimated Cost, and the Estimated Workhours, and provides the Project Contact. Exhibit A also sets out the Engineering Agreement Incorporation Provision.

The work order titled "#4 & #5 Paper Machine Upgrade WO #3 BE&K Field Engineering" does not carry any of the hallmarks of a purchase order governed by the Construction Agreement. It does not specifically reference the Construction Agreement, and it does not resemble the package of Transaction Documents called for under the Construction Agreement.

The plain language of the work order titled "#4 & #5 Paper Machine Upgrade WO #3 BE&K Field Engineering" establishes that it is governed by the Engineering Agreement. Summary judgment in favor of BE&K is granted as to this work order.

3. BE&K Work Order No. 4 And Related Amendments

BE&K Work Order No. 4 was issued by RKT CP and marked "Executed: 04/21/2011." Cutts Aff. Ex. A-1. It bears the word "Contract" at the top and was designated "Contract: 00551537." *Id.* Exhibit A defines the Scope of Services, describes the Deliverables, the Schedule, the Estimated Cost, and the Estimated Workhours, and provides the Project Contact. Exhibit A also sets out the Engineering Agreement Incorporation Provision.

BE&K Work Order No. 4 was amended by Work Order No. 14, Work Order No. 20, and Work Order No. 21. Each amendment provides a separate Scope of Services, Deliverables, Schedule, Estimated Cost, Estimated Workhours, and Project Contact. Each includes the Engineering Agreement Incorporation Provision.

BE&K Work Order No. 4 does not carry any of the hallmarks of a purchase order governed by the Construction Agreement. It does not specifically reference the Construction Agreement, and it does not resemble the package of Transaction Documents called for under the Construction Agreement.

The plain language of BE&K Work Order No. 4 and its related amendments—Work Order No. 14, Work Order No. 20, and Work Order No. 21—establishes that they are governed by the Engineering Agreement. Summary judgment in favor of BE&K is granted as to these work orders.

4. BE&K W/O No. 5 And Related Amendments

The work order titled "BE&K W/O No. 5" was issued by RKT CP and marked "Executed: 4/21/2011." Cutts Aff. Ex. A-4. It bears the word "Contract" at the top and was designated "Contract: 00551538." *Id.* Exhibit A defines the Scope of Services, describes the Deliverables, the Schedule, the Estimated Cost, and the Estimated Workhours, and provides the Project Contact. Exhibit A also sets out the Engineering Agreement Incorporation Provision.

The work order titled "BE&K W/O No. 5" was amended by Work Order No. 13. The amendment provides a separate Scope of Services, Deliverables, Schedule,

Estimated Cost, Estimated Workhours, and Project Contact. It also includes the Engineering Agreement Incorporation Provision.

The work order titled "BE&K W/O No. 5" purports to have been amended by a work order titled "ADD $350 to BE&K W/O 19 PM4 DRYER PR254." The estimated project cost is $350,000. There is no supporting information for this amendment that is attached to the work order, and the work order documentation does not provide a Scope of Services, Deliverables, Schedule, Estimated Workhours, or Project Contact. BE&K has submitted a document entitled "Exhibit A: Scope of Work/Work Order Form, Work Order 19" that purports to describe this work order. *See* Cutts Aff. Ex. A-4(c). This document, however, does not appear on its face to be a work order issued by RKT CP as contemplated by the Engineering Agreement. It rather appears to be a document prepared by BE&K Engineering. It seems highly likely that the exhibit is connected to the work order, but a summary judgment determination cannot be made from the documents alone.

Under Article 7 of the Engineering Agreement, the operative work order includes amendments. Because it is not possible to grant summary judgment based on the documents alone as to the work order titled "ADD $350 to BE&K W/O 19 PM4 DRYER PR254," it is not possible to grant summary judgment as to the underlying work orders titled "BE&K W/O No. 5" and Work Order No. 13. But for the ambiguity created by the work order titled "ADD $350 to BE&K W/O 19 PM4 DRYER PR254," the plain language of the work orders titled "BE&K W/O No. 5" and Work Order No. 13 would establish that these work orders are governed by the Engineering Agreement.

5. Part 1 Of BE&K Work Order No. 6

Part 1 of BE&K Work Order No. 6 was issued by RKT CP and marked "Executed: 06/10/2011." Cutts Aff. Ex. A-2. It bears the word "Contract" at the top and was designated "Contract: 00556788." *Id.* Exhibit A defines the Scope of Services, describes the Deliverables, the Schedule, the Estimated Cost, and the Estimated Workhours, and provides the Project Contact. Exhibit A also sets out the Engineering Agreement Incorporation Provision.

Part 1 of BE&K Work Order No. 6 does not carry any of the hallmarks of a purchase order governed by the Construction Agreement. It does not specifically reference the Construction Agreement, and it does not resemble the package of Transaction Documents called for under the Construction Agreement.

The plain language of Part 1 of BE&K Work Order No. 6 establishes that it is governed by the Engineering Agreement. Summary judgment in favor of BE&K is granted as to this work order.

6. Part 2 Of BE&K Work Order No. 6

Part 2 of BE&K Work Order No. 6 was issued by RKT CP and marked "Executed: 06/13/2011." Cutts Aff. Ex. A-5. It bears the word "Contract" at the top and was designated "Contract: 00557233." *Id.* Exhibit A defines the Scope of Services, describes the Deliverables, the Schedule, the Estimated Cost, and the Estimated Workhours, and provides the Project Contact. Exhibit A also sets out the Engineering Agreement Incorporation Provision.

Part 2 of BE&K Work Order No. 6 does not carry any of the hallmarks of a purchase order governed by the Construction Agreement. It does not specifically reference the Construction Agreement, and it does not resemble the package of Transaction Documents called for under the Construction Agreement.

The plain language of Part 2 of BE&K Work Order No. 6 establishes that it is governed by the Engineering Agreement. In addition, this work order is one that the Rock-Tenn Defendants have relied on specifically by number in the Georgia Action. In the RKT CP Georgia Complaint, RKT CP alleged that this purchase order was an example of BE&K's breaches of its contractual obligations under the Engineering Agreement. *See* RKT CP Georgia Complaint ¶ 24. RKT SS has made the same allegation. *See* RKT SS Georgia Complaint ¶ 24; RKT SS Amended Georgia Complaint ¶ 24. RKT CP later served an interrogatory response in which it made the same representation. *See* Powers Aff. Ex. J at 22. Summary judgment in favor of BE&K is granted as to this work order.

7. BE&K Work Order No. 7

BE&K Work Order No. 7 was issued by RKT CP and marked "Executed: 08/19/2011." Cutts Aff. Ex. A-9. It bears the word "Contract" at the top and was designated "Contract: 00564711." *Id.* Exhibit A defines the Scope of Services, describes the Deliverables, the Schedule, the Estimated Cost, and the Estimated Workhours, and provides the Project Contact. Exhibit A also sets out the Engineering Agreement Incorporation Provision.

BE&K Work Order No. 7 does not carry any of the hallmarks of a purchase order governed by the Construction Agreement. It does not specifically reference the Construction Agreement, and it does not resemble the package of Transaction Documents called for under the Construction Agreement.

The plain language of BE&K Work Order No. 7 establishes that it is governed by the Engineering Agreement. Summary judgment in favor of BE&K is granted as to this work order.

8. BE&K Work Order No. 9

BE&K Work Order No. 9 was issued by RKT CP and marked "Executed: 08/19/2011." Cutts Aff. Ex. A-10. It bears the word "Contract" at the top and was designated "Contract: 00564716." *Id.* Exhibit A defines the Scope of Services, describes the Deliverables, the Schedule, the Estimated Cost, and the Estimated Workhours, and provides the Project Contact. Exhibit A also sets out the Engineering Agreement Incorporation Provision.

BE&K Work Order No. 9 does not carry any of the hallmarks of a purchase order governed by the Construction Agreement. It does not specifically reference the Construction Agreement, and it does not resemble the package of Transaction Documents called for under the Construction Agreement.

The plain language of BE&K Work Order No. 9 establishes that it is governed by the Engineering Agreement. Summary judgment in favor of BE&K is granted as to this work order.

9. Pulper Engineering Work Order No. 1 And Related Amendments

The work order titled "BE AND K ENGINEERING – PULPER ENGINEERING – $371K – 3000 HOURS" was issued by RKT CP and marked "Executed: 02/21/2011." Cutts Aff. Ex. A-7. It bears the word "Contract" at the top and was designated "Contract: 00544114." *Id.* Exhibit A identifies it as "Work Order No. 1" and identifies the relevant site as "Hodge, LA. Mill." Exhibit A defines the Scope of Services, describes the Deliverables, the Schedule, the Estimated Cost, and the Estimated Workhours, and provides the Project Contact. Exhibit A sets out the Engineering Agreement Incorporation Provision.

BE&K Work Order No. 1 was amended by Work Order No. 11 and Work Order No. 12. Each amendment provides a separate Scope of Services, Deliverables, Schedule, Estimated Cost, Estimated Workhours, and Project Contact. Each includes the Engineering Agreement Incorporation Provision.

BE&K Work Order No. 1 also states that it was amended by a work order titled "WORK ORDER NO. 2 – OCC UPGRADE PER HDG-0410-11-00002." The estimated project cost is $642,083. There is no supporting information for this amendment that is attached to the work order, and the work order documentation does not provide a Scope of Services, Deliverables, Schedule, Estimated Workhours, or Project Contact. BE&K has submitted a document purporting to be Exhibit A for Work Order No. 2. *See* Cutts Aff. Ex. A-7(b). This document, however, does not appear on its face to be a work order issued by RKT CP as contemplated by the Engineering Agreement. It rather appears to

be a document prepared by BE&K Engineering. It seems highly likely that the exhibit is connected to the work order, but a summary judgment determination cannot be made from the documents alone.

Under Article 7 of the Engineering Agreement, the operative work order includes amendments. Because it is not possible to grant summary judgment based on the documents alone as to the work order titled "WORK ORDER NO. 2 – OCC UPGRADE PER HDG-0410-11-00002," it is not possible to grant summary judgment as to the underlying work orders titled "BE AND K ENGINEERING – PULPER ENGINEERING – $371k – 3000 HOURS," Work Order No. 11, and Work Order No. 12. But for the ambiguity created by the work order titled "WORK ORDER NO. 2 – OCC UPGRADE PER HDG-0410-11-00002," the plain language of the work orders titled "BE AND K ENGINEERING – PULPER ENGINEERING – $371k – 3000 HOURS," Work Order No. 11, and Work Order No. 12 would establish that these work orders are governed by the Engineering Agreement.

10. OCC Upgrade Work Order No. 3

The work order titled "KBR WORK ORDER NO. 3 UPGRADE OCC PLANT, OCC PULPER REPLACE" was issued by RKT CP and marked "Executed: 04/18/2011." Cutts Aff. Ex. A-8. It bears the word "Contract" at the top and was designated "Contract: 00551078." *Id.* Exhibit A defines the Scope of Services, describes the Deliverables, the Schedule, the Estimated Cost, and the Estimated Workhours, and provides the Project Contact. Exhibit A sets out the Engineering Agreement Incorporation Provision.

The work order titled "KBR WORK ORDER NO. 3 UPGRADE OCC PLANT, OCC PULPER REPLACE" also states that it was amended by a work order titled "ADD RENTAL FOR A STORAGE TENT." There is no supporting information for this amendment that is attached to the work order, and the work order documentation does not provide a Scope of Services, Deliverables, Schedule, Estimated Workhours, or Project Contact. It does identify the estimated cost as $26,654.40. BE&K has not provided any other documents to support this item.

Under Article 7 of the Engineering Agreement, the operative work order includes amendments. Because it is not possible to grant summary judgment as to the work order titled "ADD RENTAL FOR A STORAGE TENT," it is not possible to grant summary judgment as to the underlying work order titled "KBR WORK ORDER NO. 3 UPGRADE OCC PLANT, OCC PULPER REPLACE." But for the ambiguity created by the work order titled "ADD RENTAL FOR A STORAGE TENT," the plain language of the work order titled "KBR WORK ORDER NO. 3 UPGRADE OCC PLANT, OCC PULPER REPLACE" would establish that this work order is governed by the Engineering Agreement.

11. Work Order No. 4 PM Hood

The work order titled "#4 PM HOOD BE&K FIELD SUPPORT SERVICES" was issued by RKT CP and marked "Executed: 05/03/2012." Cutts Aff. Ex. A-11. It bears the word "Contract" at the top and was designated "Contract: 00596172." *Id.* Exhibit A defines the Scope of Services, describes the Deliverables, the Schedule, the Estimated

Cost, and the Estimated Workhours, and provides the Project Contact. Exhibit A sets out the Engineering Agreement Incorporation Provision.

The work order does not carry any of the hallmarks of a purchase order governed by the Construction Agreement. It neither specifically references the Construction Agreement nor resembles the package of Transaction Documents that is called for under the Construction Agreement.

The plain language of the work order titled "#4 PM HOOD BE&K FIELD SUPPORT SERVICES" establishes that it is governed by the Engineering Agreement. Summary judgment in favor of BE&K is granted as to this work order.

12. Work Order No. 8 PM4 Dryer Addition

The work order titled "BE&K W/O 8 – PM4 DRYER ADDITION" was issued by RKT CP and marked "Executed: 08/19/2011." Cutts Aff. Ex. A-12. It bears the word "Contract" at the top and was designated "Contract: 00564712." *Id.* Exhibit A defines the Scope of Services, describes the Deliverables, the Schedule, the Estimated Cost, and the Estimated Workhours, and provides the Project Contact. Exhibit A sets out the Engineering Agreement Incorporation Provision.

The work order does not carry any of the hallmarks of a purchase order governed by the Construction Agreement. It neither specifically references the Construction Agreement nor resembles the package of Transaction Documents that is called for under the Construction Agreement.

The plain language of the work order titled "BE&K W/O 8 – PM4 DRYER ADDITION" establishes that it is governed by the Engineering Agreement. Summary judgment in favor of BE&K is granted as to this work order.

13. Work Order No. 10 Site Project Services

The work order titled "BE&K W/O 10 – SITE PROJECT SERV – PM4 DRYER" was issued by RKT CP and marked "Executed: 08/19/2011." Cutts Aff. Ex. A-13. It bears the word "Contract" at the top and was designated "Contract: 00564717." *Id.* Exhibit A defines the Scope of Services, describes the Deliverables, the Schedule, the Estimated Cost, and the Estimated Workhours, and provides the Project Contact. Exhibit A sets out the Engineering Agreement Incorporation Provision.

The work order does not carry any of the hallmarks of a purchase order governed by the Construction Agreement. It neither specifically references the Construction Agreement nor resembles the package of Transaction Documents that is called for under the Construction Agreement.

The plain language of the work order titled "BE&K W/O 10 – SITE PROJECT SERV – PM4 DRYER" establishes that it is governed by the Engineering Agreement. Summary judgment in favor of BE&K is granted as to this work order.

14. Work Orders No. 18 And No. 24 Field Support

The work order titled "#4 & #5 PAPER MACHINE BE&K FIELD SUPPORT" was issued by RKT CP and marked "Executed: 04/24/2012." Cutts Aff. Ex. A-14. It bears the word "Contract" at the top and was designated "Contract: 00594960." *Id.* Exhibit A further identifies it as Work Order No. 18 and defines the Scope of Services,

describes the Deliverables, the Schedule, the Estimated Cost, and the Estimated Workhours, and provides the Project Contact. Exhibit A sets out the Engineering Agreement Incorporation Provision.

The work order titled "#4 & #5 PAPER MACHINE BE&K FIELD SUPPORT" was amended by a work order titled "BE&K ENGINEERING FIELD SUPPORT FOR STARTUP." Exhibit A further identifies this amendment as Work Order No. 24 and defines the Scope of Services, describes the Deliverables, the Schedule, the Estimated Cost, and the Estimated Workhours, and provides the Project Contact. Exhibit A also sets out the Engineering Agreement Incorporation Provision.

These work orders do not carry any of the hallmarks of purchase orders governed by the Construction Agreement. None specifically reference the Construction Agreement, and none resemble the package of Transaction Documents that is called for under the Construction Agreement.

The plain language of the work order titled "#4 & #5 PAPER MACHINE BE&K FIELD SUPPORT," and its related amendment Work Order No. 24, establishes that they are governed by the Engineering Agreement. Summary judgment in favor of BE&K is granted as to these work orders.

C. Extrinsic Evidence Is Irrelevant.

In light of the plain meaning of the Contract Documents, the extrinsic evidence that the Rock-Tenn Defendants say they need to obtain through discovery is irrelevant. The Rock-Tenn Defendants claim that they have assembled some evidence showing that the negotiators for RKT CP and BE&K subjectively did not intend for the Engineering

Agreement to apply to the engineering work that BE&K performed on the Strategic Project, and they posit that discovery may reveal still more evidence. But when the plain and unambiguous language of a contract dictates a particular result, "extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity." *Eagle Indus.*, 702 A.2d at 1232 (footnote omitted). "[I]f the instrument is clear and unambiguous on its face, [courts may not] consider parol evidence to interpret it or search for the parties' intentions . . . ." *Pellaton v. Bank of N.Y.*, 592 A.2d 473, 478 (Del. 1991) (internal quotation marks and citation omitted). "[A] party will be bound by [a contract's] plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented." *Lillis*, 953 A.2d at 252 (footnote omitted).

The Rock-Tenn Defendants also claim ambiguity because they have identified other projects where the Engineering Agreement governed services that BE&K provided at other mill locations. That reality comports with the plain language of the Engineering Agreement. It is a "Master Agreement," and although it appears to have been prepared in connection with the Strategic Project, its use was not limited to the Hodge Mill. Section 1.2 states generally that BE&K will provide services to RKT CP "for individual projects relating to [RKT CP's] facilitates." EA § 1.2. It is hardly surprising, and does not give rise to an ambiguity, for the parties to have deployed the Engineering Agreement consistent with its plain meaning.

D. The Combined Effect Of The Judicial Admissions And The Work Orders

As discussed in Part B, *supra*, three work orders do not permit solely by their terms a conclusive determination that the Engineering Agreement applies. Nevertheless, when viewed together with the judicial admissions that the Rock-Tenn Defendants have made, summary judgment becomes appropriate on these work orders as well.

"Under standard rules of contract interpretation, a court must determine the intent of the parties from the language of the contract." *Twin City Fire Ins. Co. v. Del. Racing Ass'n*, 840 A.2d 624, 628 (Del. 2003). The plain language of the work order titled "BE&K W/O No. 5" and Work Order No. 13 would establish that these work orders are governed by the Engineering Agreement, but for the fact that the work order is missing information for one of its amendments, the work order titled "ADD $350 to BE&K W/O 19 PM4 DRYER PR254." Ordinarily, at this point, a court would turn to extrinsic evidence to identify the content of the missing information and thereby understand the intent of the parties. In this case, however, RKT CP has repeatedly represented to this court and the Georgia Court that the Engineering Agreement governed BE&K's services on the Strategic Project. As discussed in Part A, *supra*, these representations constitute judicial admissions of RKT CP's understanding and belief that the Engineering Agreement governed BE&K's work on the Strategic Project. Judicial admissions are "not merely another layer of evidence" that the court can weigh and are "considered conclusive and binding both upon the party against whom they operate, and upon the court." *Merritt*, 956 A.2d at 1201-02 & n.18 (citation omitted).

When read as a whole in the context of the Rock-Tenn Entities' judicial admissions, the work order titled "BE&K W/O No. 5," together with all of its amendments, was clearly part of the Strategic Project and is governed by the Engineering Agreement. Both the work order titled "BE&K W/O No. 5" and Work Order No. 13 are associated with the Hodge Mill, and Exhibit A to Work Order No. 13 references the contract number with the prefix "Hodge PO." The addendum is plainly part of BE&K W/O No. 5. Summary judgment in favor of BE&K is granted as to these work orders.

The same is true for the work order titled "BE AND K ENGINEERING – PULPER ENGINEERING – $371K – 3000 HOURS," together with its amendments. The plain language of the work order for "PULPER ENGINEERING" and two of its amendments (Work Order No. 11 and Work Order No. 12) would establish that these work orders are governed by the Engineering Agreement, but for the fact that one of the amendments, a work order titled "WORK ORDER NO. 2 – OCC UPGRADE PER HDG-0410-11-00002," is missing information. It is plain that this amendment is another amendment to the underlying work order and that all of the work orders relate to the Hodge Mill. Exhibit A to the work order titled "BE AND K ENGINEERING – PULPER ENGINEERING – $371K – 3000 HOURS" identifies the relevant site as "Hodge, LA. Mill," multiple project contacts are associated with the Hodge Mill, and Exhibit A to each of the amendments references the contract number with the prefix "Hodge PO." These references to the Hodge Mill make clear that the work order is part of the Strategic Project. Summary judgment in favor of BE&K is granted as to these work orders.

This analysis also applies to the work order titled "KBR WORK ORDER NO. 3 UPGRADE OCC PLANT, OCC PULPER REPLACE." Its plain language would establish that it is governed by the Engineering Agreement, but for the fact that the work order is missing information for one of its amendments, a work order titled "ADD RENTAL FOR A STORAGE TENT." Here too it is plain that this amendment is another amendment to the underlying work order and that all of the work orders relate to the Hodge Mill. Exhibit A to the work order titled "KBR WORK ORDER NO. 3 UPGRADE OCC PLANT, OCC PULPER REPLACE" identifies the relevant site as "Hodge, LA. Mill," and the scope of services states that BE&K will provide a site project manager for "SS-Hodge." These references to the Hodge Mill make clear that the work order is part of the Strategic Project. Summary judgment in favor of BE&K is granted as to these work orders.

E. Partial Conversion Of The Preliminary Injunction To A Permanent Injunction

The standards for a permanent injunction are identical to those for a preliminary injunction, "except that actual, rather than probable, success on the merits is the relevant criterion." *Draper Commc'ns, Inc. v. Del. Valley Broadcasters Ltd. P'ship*, 505 A.2d 1283, 1288 (Del. Ch. 1985). *Compare Copi of Del., Inc. v. Kelly*, 1996 WL 633302, at *4-5 (Del. Ch. Oct. 25, 1996) (requiring actual success on the merits), *aff'd sub nom. Smart Bus. Sys., Inc. v. Copi of Del., Inc.*, 707 A.2d 767 (Del. 1998) (TABLE), *with Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1375 (Del. 1995) (requiring likelihood of success on the merits). "To merit a permanent injunction, a plaintiff must show:

(1) actual success on the merits, (2) irreparable harm, and (3) the harm resulting from a failure to issue an injunction outweighs the harm to the opposing party if the court issues the injunction." *Copi*, 1996 WL 633302, at *4; *accord Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 56 A.3d 1072, 1144 (Del. Ch.), *aff'd*, 68 A.3d 1208 (Del. 2012).

The foregoing analysis of the Engineering Agreement and the resulting grant of summary judgment establish that BE&K has prevailed on the merits. The Engineering Agreement governs, and it contains the Delaware Forum Clause. Under binding Delaware Supreme Court precedent, a party suffers irreparable harm when forced to litigate in a jurisdiction other than the one selected by a valid forum selection clause. *See, e.g., Nat'l Indus. Gp. (Hldg.) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 385-86 (Del. 2013); *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1147 (Del. 2010).

The third element, the balancing of hardships, assumes a different tenor when a plaintiff has both succeeded on the merits and shown a threat of irreparable harm.

> [W]hen a plaintiff's legal rights have been established and a clear breach of those rights has been established, the course of a Court of Equity is clear. It has no option but to protect the plaintiff's established legal rights by the award of injunctive process, except in the rare case when the proof establishes equities in favor of the defendant arising from the inequitable conduct of the plaintiff.

Tull v. Turek, 147 A.2d 658, 663 (Del. 1958). *See generally* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 12.02[f], 12-36 (2012) (collecting cases).

These factors call for converting the preliminary anti-suit injunction to a permanent anti-suit injunction that bars the Rock-Tenn Defendants from seeking to

litigate claims arising out of or relating to the work orders for which summary judgment has been granted in this opinion (together, the "Specific Work Orders") anywhere other than in a federal or state court located in Wilmington, Delaware. Refusing to enforce the Engineering Agreement's forum selection clause will disrupt the parties' contractual expectations as to the forum in which disputes would be resolved. *See Carlyle*, 67 A.3d at 385. BE&K would be forced to litigate in the Georgia Action in derogation of the bargained-for dispute resolution clause in the Engineering Agreement and without the contractual protections set forth in that agreement.

For their part, the Rock-Tenn Defendants will suffer no harm if they are required to honor the Delaware Forum Provision to which they voluntarily agreed. Any harm they might suffer is "entirely self-inflicted" and stems from their choice to select a forum and then disregard it. *Carlyle Inv. Mgmt. L.L.C. v. Nat'l Indus. Gp. (Hldg.)*, 2012 WL 4847089, at *11 (Del. Ch. Oct. 11, 2012), *aff'd*, 67 A.3d 373 (Del. 2013) (noting that "[t]here is nothing unreasonable about enforcing the forum selection clause against [the resisting party], because any harm it has suffered is entirely self-inflicted"). To the extent the Rock-Tenn Defendants claim an entitlement to sue in Georgia under the Construction Agreement, the forum selection provision in that agreement does not establish Georgia as the exclusive jurisdiction. It only binds Kellogg and its affiliates to a Georgia forum, permitting the Rock-Tenn Defendants to sue anywhere. Requiring the Rock-Tenn Defendants to sue in a jurisdiction where they preserved the right to file offensive claims under the Construction Agreement and bound themselves to litigate under the Engineering Agreement does not amount to prejudice sufficient to warrant denial of

injunctive relief. In these circumstances, BE&K is entitled to "equitable relief by having the forum selection clause specifically enforced in the Court of Chancery by the issuance of an anti-suit injunction." *Carlyle*, 67 A.3d at 386.

F. The Terms Of The Permanent Injunction

The terms of the permanent injunction will be tailored to address only those claims and aspects of claims that depend on (i) the Engineering Agreement or (ii) work on the Specific Work Orders. The counts of RKT CP's Georgia Complaint and RKT SS's proposed Georgia complaint most clearly set out the theories that the Rock-Tenn Defendants seek to litigate elsewhere. This decision therefore describes the theories in terms of those pleadings.

Before doing so, the court wishes to emphasize what is hopefully self-evident, namely that the Court of Chancery means no disrespect to the Georgia Court by converting its preliminary anti-suit injunction into a permanent injunction to the extent set forth in this decision. What is disrespectful to the courts of both states is for the Rock-Tenn Defendants to have disregarded a clear forum selection provision that they previously accepted. It would be disrespectful for this court not to enforce an exclusive forum selection provision and thereby allow the Rock-Tenn Defendants to burden a sister court with litigation in contravention of their agreement.

Except in compliance with the Delaware Forum Clause, RKT CP is enjoined permanently from pursuing Count IV of its Georgia Complaint, which asserts that BE&K breached the Engineering Agreement. *See* RKT CP Georgia Complaint ¶¶ 112-22. This count obviously falls within the Delaware Forum Clause.

Except in compliance with the Delaware Forum Clause, RKT CP is enjoined permanently from pursuing Count VI of its Georgia Complaint, which asserts that BE&K committed professional negligence. In support of this claim, RKT CP alleges that that BE&K "had a duty to RKT CP to perform [its] work in accordance with standards of the industry for the type of services provided *and to meet the requirements of the [Engineering Agreement]*, all applicable purchase orders, and the scope of work as provided in the contract documents." *Id.* ¶ 132 (emphasis added). RKT CP further alleges that BE&K had a duty to "exercise the standard of care normally exercised by internationally recognized professional engineers having experience in the pulp and paper field." *Id.* ¶ 133. Both allegations paraphrased provisions of the Engineering Agreement. *See, e.g.*, EA §§ 1.5, 8.1. Count VI necessarily falls within the Delaware Forum Clause.

Except in compliance with the Delaware Forum Clause, RKT CP is enjoined permanently from pursuing Count V of its Georgia Complaint, which asserts a claim for breach of implied warranties. In this count, RKT CP alleges that BE&K warranted that it "would perform [its] work on the Strategic Project in a workmanlike manner," RKT CP Georgia Complaint ¶ 124, and would exercise the "reasonable degree of care, skill, and ability . . . as is ordinarily employed by others in the same profession" when working "under similar conditions and like surrounding circumstances," *id.* ¶ 125. Article 8 of the Engineering Agreement contract is titled "Warranty" and contains five sections addressing the scope of warranties contemplated by the agreement and the scope of liability that would exist for breach of warranty claims. Most pertinently, Section 8.4

states, in all capitals, "ALL IMPLIED WARRANTIES OF ANY KIND ARE HEREBY DISCLAIMED." EA § 8.4. Count V therefore falls within the Delaware Forum Clause.

Except in compliance with the Delaware Forum Clause, RKT CP is enjoined from pursuing its contract claims under the guise of tort theories. Count II of the third party complaint asserts a claim for fraud against BE&K on the grounds that BE&K's statements about the status of its design and engineering work were false when made. *See* RKT CP Georgia Complaint ¶¶ 92-101. Count III frames similar allegations as a claim against BE&K for intentional or negligent misrepresentation about the status of its design and engineering work. *See id.* ¶¶ 102-11. These claims allege that BE&K misrepresented the degree to which it had complied with the Engineering Agreement and thereby depend on what the Engineering Agreement actually required. Like the other counts, they also are affected by various risk-allocating provisions in the Engineering Agreement, such as an integration clause (EA § 20.4), a provision eliminating any liability for indirect, incidental, and consequential damages (*id.* § 20.9), and a provision placing a monetary cap on total damages (*id.* §20.11).

Except in compliance with the Delaware Forum Clause, RKT CP is enjoined from seeking to hold Kellogg and KBR liable for BE&K's obligations by piercing its corporate veil. *See* RKT CP Georgia Complaint ¶¶ 82-91. On this theory, RKT CP has proceeded against Kellogg and KBR on each of the foregoing counts, but in each case as parties responsible for what BE&K allegedly did or failed to do.

These rulings apply equally to the theories asserted by RKT CP as counterclaims or by RKT SS. Any claims that necessarily implicate the Engineering Agreement must

be brought in the federal or state courts located in Wilmington, Delaware, in accordance with the Delaware Forum Clause. As discussed above, this is true even when the claim does not expressly invoke the Engineering Agreement. The critical issue is whether the claim arises out of or relates to the Engineering Agreement. Claims that necessarily implicate the Engineering Agreement meet this test.

III. CONCLUSION

Partial summary judgment is granted in favor of BE&K declaring that (i) the Engineering Agreement was used for BE&K to perform design and engineering work on the Strategic Project, (ii) RKT CP issued work orders to BE&K for work on the Strategic Project, and (iii) the terms and conditions for those work orders are supplied by the Engineering Agreement, which governs those work orders and the services provided by BE&K in connection with the work orders. In addition, summary judgment is granted in favor of BE&K as to the Specific Work Orders. The preliminary injunction entered in this case is converted to a permanent injunction to the extent set forth herein. BE&K shall submit a form of order on notice.