IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

ANSWERING BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Administrative Materials

PRELIMINARY STATEMENT

Men who wish to know about the world must learn about it in its particular details.

-- Heraclitus

Defendant Regions Financial Corporation's ("Regions") motion for summary judgment ignores many of the details of Regions' Employment Agreement with Plaintiff Susan Martinez ("Martinez") and paints with a broad brush (i) to portray Martinez as a greedy former employee who is seeking more payments notwithstanding the payments she has already received, and (ii) to argue that this case is controlled by a decision in another case that purportedly "construed virtually identical contract language" and found that the employee in that case was not entitled to receive both severance and salary payments after termination.

Of course, it is easy to make generalities of this sort if one ignores the details. The details of this case reveal that it is not one that can be resolved based on platitudes and generalities. Rather, it will require an examination of the actual terms of the Employment Agreement in this case, not the terms of a different agreement in a different case.

That examination will reveal that the Employment Agreement here does not cut off Martinez's entitlement to continue to receive her salary during the remainder of her two year Employment Period if she is terminated without Cause during that period. The Employment Agreement also entitled Martinez to a bonus for the full fiscal 2007 year -- since she worked the entirety of that year, and not only for the portion of the year on which Regions bases the bonus it paid her. If the foregoing is true, then Martinez can hardly be faulted for seeking to vindicate her rights to additional payments under the Employment Agreement.

The examination of the actual terms of the Employment Agreement will also reveal that it is materially different from the agreement at issue in the other case upon which Regions relies so heavily, and that these material differences show why that case is not controlling here.

Finally, examination of the terms of the Employment Agreement, as well as the facts and circumstances surrounding Martinez's termination, will reveal that, at the very least, there are genuine issues of material fact relating to the construction of the Employment Agreement and its application to the facts of this case that preclude summary judgment. Martinez should accordingly be afforded the opportunity to take discovery before the Court entertains the possibility of entering summary judgment.

NATURE AND STAGE OF THE PROCEEDINGS

On October 30, 2008, Martinez filed her Verified Complaint (the "Complaint") against Regions for breach of the Employment Agreement between Martinez and Regions (the "Employment Agreement") (Counts I and II), breach of the implied covenant of good faith and fair dealing (Count III), specific performance, or in the alternative, advancement (Count IV) and breach of the LTIP (Count V).[1]

On November 25, 2008, Regions answered the Complaint.

On November 26, 2008, Martinez filed a motion for partial summary judgment on her advancement claim (Count IV). The parties entered into a briefing schedule on that motion, which was approved by the Court on December 4, 2008.

On December 12, 2008, Martinez served document requests and interrogatories relating to Counts I-III and V of the Complaint. These discovery requests relate directly to Regions' motion for summary judgment, and as set forth below, the discovery requests seek information that would assist Martinez in responding to the motion.

On January 14, 2009, Regions filed its motion for summary judgment on all counts of the Complaint and a motion for protective order staying discovery.[2] Regions also filed its Opening Brief in Support of its Motion for Summary Judgment ("Opening Brief" or "OB").

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[1] Martinez will not pursue her claim under Count V of her Complaint. Count V did not arise under the Employment Agreement, and therefore, does not implicate Martinez's advancement claim.

[2] As set forth in the March 9, 2009 Stipulation and Order regarding Stay of Discovery and Briefing on Defendant's Motion for Summary Judgment, Martinez does not oppose the motion to stay discovery, however, she is not conceding that Regions' summary judgment motion can be resolved without discovery, and Martinez reserved all her rights, including the right to respond to Regions' summary judgment motion pursuant to Chancery Court Rule 56(f).

On January 28, 2009, Martinez filed her reply brief in support of her motion for partial summary judgment on the advancement claim. Accordingly, Regions' motion for summary judgment as to Count IV is addressed in the reply brief filed in support of Martinez's motion for partial summary judgment.[3]

This is Martinez' Answering Brief in Opposition to Regions' motion for summary judgment. Martinez is also filing a Rule 56(f) affidavit that sets forth the discovery that Martinez needs in order to adequately respond to Regions' motion for summary judgment. (*See* Affidavit of Patricia L. Enerio Pursuant to Chancery Court Rule 56(f) ("56(f) Aff.")).

[3] After Martinez filed her reply brief in support of her motion for partial summary judgment, Regions wrote to the Court on February 2, 2009, and for the first time cited *Curby v. Solutia, Inc.*, 351 F.3d 868 (8th Cir. 2003), to support its contention that Martinez is not entitled to advancement of her attorneys' fees because her litigation position is unreasonable. *Curby* is easily distinguishable from the instant case as it involved a plaintiff seeking severance benefits under a change in control provision in her employment agreement, despite the fact that no change in control had occurred. *Id*. at 872. Accordingly, *Curby* has no impact on Martinez's right to advancement, nor does it impact the arguments raised in her motion for partial summary judgment.

STATEMENT OF RELEVANT FACTS

A. The Parties

Martinez is a citizen of the State of Florida. (Martinez Aff. ¶ 1.)[4]

Regions is a Delaware corporation with its principal place of business in Birmingham, Alabama.

B. The Employment Agreement

This case arises from Regions' failure to pay Martinez the compensation and benefits she is due under her Employment Agreement. Martinez was a senior executive with AmSouth Bancorporation ("AmSouth") prior to Regions' merger with AmSouth. On or about February 1, 2004, as a result of her promotion to Senior Executive Vice President and a Member of AmSouth's Corporate Management Committee, Martinez and AmSouth entered into an Employment Agreement that replaced her then-existing employment agreement with AmSouth. (*Id.* ¶ 2). The terms and conditions of Martinez's employment were memorialized in the Employment Agreement, which is governed by Delaware law. (Martinez Ex. A). Martinez's Employment Agreement with AmSouth guaranteed Martinez two years of employment, compensation, and other benefits in the event of a change of control of AmSouth.

Pursuant to Section 11 of the Employment Agreement, the Employment Agreement is binding upon any successors and assigns of AmSouth:

> (b) This Agreement shall inure to the benefit of and be binding upon the Company and its successors and assigns.
>
> (c) The Company will require any successor (whether direct or indirect, by purchase, merger, consolidation or otherwise) to all or substantially all of the business and/or assets of the Company to assume expressly and agree to perform this Agreement in the same manner and to the same extent that the Company

[4] Affidavit of Plaintiff Susan A. Martinez in Opposition to Regions' Motion for Summary Judgment ("Martinez Aff.") (Exhibits to the Martinez Aff. are designated herein as "Martinez Ex. ___").

> would be required to perform it if no such succession had taken place. As used in this Agreement, "Company" shall mean the Company as hereinbefore defined and any successor to its business and/or assets as aforesaid which assumes and agrees to perform this Agreement by operation of law, or otherwise.

(Martinez Ex. A § 11).

The Employment Agreement guaranteed Martinez certain benefits and compensation during the two year Employment Period following a change in control. (*Id.* § 4(b)). Additionally, in the event Martinez was terminated after a change in control other than for "Cause" or "Disability," or Martinez terminated the Employment Agreement for "Good Reason" during the two year Employment Period, Martinez was entitled to additional compensation and benefits outlined in the Employment Agreement. (*Id.* § 6(a)).

C. Regions Wants Out of the Employment Agreement

On or about November 4, 2006, Regions merged with AmSouth. (Martinez Aff. ¶ 4). The merger of Regions and AmSouth constituted a change in control as defined by the Employment Agreement. (*Id*. § 2). Accordingly, as of November 4, 2006, Martinez's employment became subject to the two year Employment Period outlined in the Employment Agreement. (*Id.* §§ 1-3).

On September 15, 2007, despite being expressly obligated to honor the terms of the Employment Agreement (*id.* § 11), Regions presented Martinez and all executives, including other former members of the AmSouth Corporate Management Committee, with a proposed Revised Change in Control Agreement. (Martinez Aff. ¶ 6). By its terms, the Revised Change in Control Agreement would have replaced Martinez's Employment Agreement and would have provided less favorable benefits to Martinez than those provided by the Employment Agreement. (*Id*. ¶ 7). Regions advised Martinez and the other executives that if they did not sign the Revised

Change in Control Agreement by October 15, 2007, their employment would be terminated. (*Id*. ¶ 8).

Prior to October 12, 2007, Martinez advised Regions that she was not inclined to sign the less favorable Revised Change in Control Agreement. (*Id*. ¶ 9). On October 12, 2007, after reconfirming her decision not to sign the Revised Change in Control Agreement, Martinez's employment with Regions was terminated without Cause effective November 30, 2007. (*Id.* ¶ 10). Martinez's last day of employment was later, by agreement of the parties, changed to December 31, 2007, and Martinez actively worked for Regions through December 31, 2007. (*Id.* ¶ 11). In order to smooth the transition, Martinez, while reserving all her rights related to the characterization of her termination as "retirement," cooperated with Regions in issuing a release advising that she had decided to retire effective December 31, 2007. (*Id.* ¶ 12). At no time between the parties agreeing to change Martinez's last day of employment to December 31, 2007, and the start of the current litigation, did Regions ever advise Martinez that it believed her actual termination date was October 12, 2007, nor did Regions ever provide Martinez written notice under Section 13(b) of the Employment Agreement that her termination date was October 12, 2007. (*Id.* ¶¶ 13, 17).

After her termination date was changed to December 31, 2007, Martinez was in regular telephonic and e-mail contact with Regions' Human Resources Department regarding the compensation and benefits she was entitled to under her Employment Agreement. (*Id.* ¶ 14). Jill Shelton, a Senior Vice President in the Human Resources Department, advised Martinez she would receive her full 2007 bonus, but as the bonus had not yet been calculated, Regions would use the amount of her 2006 bonus as a "placeholder" in calculating the compensation to which Martinez was entitled. (*Id.* ¶¶ 16, 19).

Subsequent to July 1, 2008, Regions paid Martinez certain benefits under Section 6(a) of the Employment Agreement as if she had been terminated without Cause. (*Id*. ¶ 20). However, since its termination of Martinez, Regions has failed to pay Martinez her salary, benefits, and other compensation for the remainder of her two year Employment Period as required by Section 4 of the Employment Agreement. (*Id*. ¶ 26). Moreover, despite the fact that Martinez worked all of 2007 for Regions and was entitled to a 2007 bonus no less favorable than that received by her peer executives, Regions paid Martinez a smaller bonus amount that was equal to her 2006 bonus. (*Id.* ¶¶ 20, 26).

Prior to filing her suit, Martinez contacted Regions regarding the amounts she believed she was still owed, however, Regions refused to make the required payments. (*Id*. ¶¶ 21-26). Ignoring the written agreement made at the time of the press release, Regions justified its refusal by characterizing Martinez's termination as a Martinez initiated voluntary resignation for Good Reason and retirement. (*Id.* ¶ 24; Martinez Exs. D, J).

Regions has moved for summary judgment on all Martinez's claims, asserting that it is entitled to summary judgment based on the unambiguous wording of the Employment Agreement attached to Martinez's Complaint. (OB at 1). As shown below, Regions is not entitled to summary judgment as to Counts I, II, and III as its interpretation of the Employment Agreement is neither reasonable nor correct and there are questions of material fact that must be resolved.[5]

[5] Counts I, II and III all arise under the Employment Agreement. As set forth in Martinez's motion for partial summary judgment on Count IV (advancement under the Employment Agreement), she is entitled to advancement of her fees in this action regardless of the outcome on this motion. Regions, however, essentially takes the position that Martinez's claims must survive this motion in order for her to be entitled to advancement. Accordingly, if summary judgment is not granted as to any one of the claims under Count I, II, or III, Martinez will be entitled to advancement of her fees in this action, even under Regions' overly restrictive position.

ARGUMENT

I. THE LEGAL STANDARD

Summary judgment is appropriate when there are no questions of material fact and the moving party is entitled to judgment as a matter of law. *See Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996). In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party, and the moving party generally has the burden of demonstrating that there is no material question of fact. *Tanzer v. Int'l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979) (citing *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977)).

"If the movant puts in the record facts which, if undenied, entitle him to summary judgment, the burden shifts to the defending party to dispute the facts by affidavit or proof of similar weight." *Id.* However, "[i]n ruling on a motion for summary judgment, the court should not weigh evidence and accept the argument perceived to be of greater weight" but should only determine whether there is any evidence supporting a favorable conclusion to the nonmoving party, if such evidence exists, summary judgment is inappropriate. *Izquierdo v. Sills*, 2004 WL 2290811, *2, *9 (Del. Ch.) (Ex. 1 hereto) (citing *Cont'l Oil Co. v. Pauley Petro., Inc.*, 251 A.2d 824, 826 (Del. 1969)).

When presented with a contract dispute, summary judgment should only be granted if the contract at issue is unambiguous and is not susceptible to different interpretations. *Rossi v. Ricks*, 2008 WL 3021033, *2 (Del. Ch.) (Ex. 2 hereto). Thus, in order to succeed on its motion for summary judgment as it relates to Counts I and II of the Complaint, Regions must establish that its interpretation of the contracts at issue is the only reasonable interpretation. *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007). As illustrated below, Regions is unable to carry this burden.

II. MARTINEZ IS ENTITLED TO A BONUS FOR 2007 DETERMINED BY A METHODOLOGY NO LESS FAVORABLE THAN THAT APPLIED TO HER PEER EXECUTIVES.

A. Martinez's Termination Date of December 31, 2007, Entitles her to her Full 2007 Bonus Under Section 4 of her Employment Agreement.

Count I of Martinez's Complaint arises from Regions' failure to pay Martinez the full 2007 bonus she is due. Specifically, under Sections 4(b)(ii) and (iii) of the Employment Agreement, Martinez is entitled to an annual bonus that is calculated using a methodology no less favorable than that used to calculate the annual bonuses of her peer executives. The applicable sections provide:

> (ii) Annual Bonus. In Addition to Annual Base Salary, the Executive shall be awarded, **for each fiscal year ended during the Employment Period**, an annual bonus (the "Annual Bonus") in cash at least equal to the Executive's highest bonus under the Company's Executive Incentive Plan, or any comparable bonus under any predecessor or successor plan, or otherwise, for the last three full fiscal years prior to the Effective Date (annualized in the event that the Executive was not employed by the Company for the whole of such fiscal year) (the "Recent Annual Bonus"). Each such Annual Bonus shall be paid no later than the end of the third month of the fiscal year next following the fiscal year for which the Annual Bonus is awarded, unless the Executive shall elect to defer the receipt of such Annual Bonus.
>
> (iii) Incentive, Savings and Retirement Plans. During the Employment Period, the Executive shall be entitled to participate in all incentive, savings and retirement plans, practices, policies and programs applicable generally to other peer executives of the Company and its affiliated companies, **but in no event shall such plans, practices, policies and programs provide the Executive with incentive opportunities** (measured with respect to both regular and special incentive opportunities, to the extent, if any, that such distinction is applicable), savings opportunities and retirement benefit opportunities, in each case, **less favorable, in the aggregate, than the most favorable of those** provided by the Company and its affiliated companies for the Executive under such plans, practices, policies and programs as in effect at any time during the 120-day period immediately preceding the Effective Date or if more favorable to the Executive, those **provided**

> **generally at any time after the Effective Date to other peer executives of the Company and its affiliated companies**.

(Martinez Ex. A § 4) (emphasis added).

Thus, the above Section 4(b)(ii) expressly provides that Martinez is entitled to an Annual Bonus for each fiscal year ended during the Employment Period, and under Section 4(b)(iii), the bonus opportunity or program applicable to Martinez for 2007 must not be any less favorable than the most favorable opportunity or program provided to her peer executives.[6] However, instead of providing Martinez with a bonus pursuant to the terms of the Employment Agreement, Martinez was given the same bonus amount for 2007 that she was given for 2006.

Regions attempts to justify the smaller bonus amount given to Martinez on the purported grounds that Martinez's termination date, as defined by Section 5(e) of the Employment Agreement, was October 12, 2007, despite her last day of employment being December 31, 2007. (OB at 5, 8 n.5).[7] Relying on this erroneous termination date, Regions argues it is entitled to summary judgment as it was not obligated to pay Martinez her full 2007 bonus. (*Id.* at 18-19). Specifically, Regions has contended that due to her initial October termination date, Martinez

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[6] Section 4(b)(ii) also provides that that the bonus amount due to Martinez must be "at least equal" to or no lower than the highest bonus she received for the three years prior to the change of control. However, since this amount would result in a bonus lower than a bonus calculated under the required methodology of Section 4(b)(iii), the minimum bonus amount outline in Section 4(b)(ii) is inapplicable here.

[7] Regions focuses on a single phrase in paragraph 25 of Martinez's Complaint to support its argument that Martinez was terminated on October 12, 2007. (*See* OB at 8 n.5). However, it is clear from the Complaint that Martinez was notified of her termination on October 12, 2007, but she remained employed by Regions and continued to work for Regions until December 31, 2007, when her termination became effective. (*See* Compl. ¶¶ 22, 27; *see also* Martinez Aff. ¶ 11).

was not due a bonus under Section 4 of the Employment Agreement.[8] (*Id.*). Instead, Regions argues that Section 6 of the Employment Agreement is the applicable section that must be used to calculate Martinez's bonus amount, and that Regions actually paid Martinez more than the bonus she was due under this Section. (*Id*. at 8 n.5, 18-19). Regions' argument and its carefully worded affidavit cannot hide the fundamental flaw with Regions' position, which is that Martinez worked for the entire 2007 fiscal year because both parties agreed to postpone her termination date to December 31, 2007.

Regions' remarkable proposition that Martinez was terminated October 12, 2007, but the termination only became effective December 31, 2007, is a transparent rewriting of the facts to avoid paying Martinez her full bonus for 2007. There is compelling evidence that the parties agreed to change Martinez's termination date to December 31, 2007, and, in fact, even cooperated in a press release advising that Martinez would be leaving on December 31, 2007. (Martinez Aff. ¶¶ 11, 12, 18; Martinez Ex. D).

Regions' actions also contradict its newly-minted position that Martinez's termination date was October 12, 2007. Regions asserts that October 12, 2007 was Martinez's termination date (OB at 19) and, therefore, since under the Employment Agreement the severance payment must be made to Martinez within 30 days of the Date of Termination, the bonus component "cannot be adjusted based on a hypothetical, future end-of-year bonus." (*Id*.). This argument ignores the fact that Regions did not actually pay Martinez the severance payment within 30 days

[8] The Affidavit of Jill Shelton filed by Regions states that "[u]nder Regions' Incentive Plans in place in 2007 (the 'Plan'), an Executive was required to be actively employed with Regions, at the time bonuses were paid, in order to receive a bonus under the Plan. 2007 bonuses were paid during February of 2008." (Shelton Aff. ¶ 6). Martinez disputes that the Plan, even if it states what is alleged, negates the terms of Martinez's Employment Agreement or the specific statements made to Martinez by Jill Shelton. However, as Regions did not attach the Plan to its Motion, and no such plan was attached to the Complaint, nor did Regions make any specific arguments mentioning the Plan in its Motion, Martinez will limit her arguments in this brief to those arguments actually raised in Regions' Motion.

of October 12, 2007. (Martinez Aff. ¶ 20). Thus, Regions own behavior is inconsistent with its current assertion that Martinez's termination was October 12, 2007.

Regions' willingness to manipulate the facts to whatever posture best suits its position, as shown by its attempt to portray Martinez's termination date as October 12, 2007, is not unprecedented in Regions' dealings with Martinez. As can be seen by the letter from Regions' Executive Vice President, Lisa Narrell-Mead, as late as August 29, 2008, Regions was contending that Martinez had not been terminated but had retired and resigned her employment for Good Reason. (Martinez Ex. J). This assertion and multiple other documents and statements identified below are clearly inconsistent with the current position Regions has taken that Martinez's termination date was on October 12, 2007. Moreover, the fact that Regions took a stance in August 2008 that Martinez "retired," which directly contradicts Regions' current position that it terminated Martinez, is indicative of Regions' bad faith in its dealings with Martinez and that there are issues of fact related to Martinez's termination that must be resolved before summary judgment is entertained.

As indicated, Regions now contends Section 4 of Martinez's Employment Agreement is inapplicable to her 2007 bonus entitlement and that under Section 6(a)(i)(A) Martinez was entitled to "an accrued bonus calculation based on the fraction of the current fiscal year through the Date of Termination." (OB at 18). Regions' contention defies logic because Martinez did not work for a fraction of a current fiscal year. The evidence shows Martinez's termination date, by agreement of the parties, was moved to the end of the last day of 2007, and that she in fact worked the entirety of 2007. Indeed, Regions concedes Martinez's last day of employment was December 31, 2007 (*id.* at 5), and a lump sum worksheet document and change in control explanation of benefits memorandum provided by Regions to Martinez in December 2007 lists

Martinez's termination date as December 31, 2007. (Martinez Ex. F). Accordingly, the calculation set out in Section 6(a)(i), which is required to determine the amount of bonus earned if an executive was terminated prior to the completion of the fiscal year, is not applicable or relevant to Martinez's 2007 bonus. Other documents provided by Regions further illustrate that, due to working the full 2007 fiscal year, Martinez was entitled to a full 2007 bonus amount under Section 4 of the Employment Agreement. In the Martinez Employment Agreement Summary provided by Regions to Martinez in October 2007, Regions identified Section 4(b)(ii) as providing for a bonus payable for each fiscal year ending during the Employment Period. (Martinez Ex. E at 2). Furthermore, nowhere in the Employment Agreement does it state that Martinez must be employed at the time the bonuses are actually distributed in order to receive a bonus for each fiscal year completed. In fact, the Agreement contemplates bonuses may be paid out after the end of the fiscal year. (Martinez Ex. A § 4(b)(ii)). Consequently, Regions' argument that Section 4 of the Employment Agreement is not relevant to Martinez's 2007 bonus calculation is contradicted by both the facts and Regions' own documents.

In short, Martinez's peer executives received bonus amounts for 2007 that were greater than the bonuses they received for 2006. Martinez worked the entire 2007 fiscal year and based on the clear language of Section 4 of her Employment Agreement she is entitled to a bonus for that year under a program no less favorable than that provided to her peer executives. Therefore, Regions' motion for summary judgment as to Count I must be denied.

B. Assuming *Arguendo* that Regions is Correct and Section 6(a) of the Employment Agreement Governs Martinez's Bonus Calculation, Martinez is Still Entitled to her Full 2007 Bonus.

As illustrated above, Martinez is entitled to a 2007 bonus no less favorable than that received by her peer executives in accordance with the wording of Section 4 of her Employment

Agreement. However, assuming *arguendo* that Regions is correct and Section 6(a)(i)(A) is the governing provision for determining Martinez's 2007 bonus amount, the result does not change. The language of Section 6(a)(i)(A) relied upon by Regions actually supports Martinez's interpretation that she is due a greater bonus amount for 2007. The provision states that the Executive is due, within 30 days after the date of termination, the aggregate of the following amounts:

> A. the sum of (1) the Executive's Annual Base Salary through the Date of Termination to the extent not theretofore paid, (2) the product of (x) the higher of (I) the Recent Annual Bonus [defined as the executive's highest annual bonus received in the three years preceding the change in control (*see* Section 4(b)(ii))] and (II) the Annual Bonus paid or payable, including any bonus or portion thereof which has been earned but deferred (and annualized for any fiscal year consisting of less than twelve full months. . .), for the most recently completed fiscal year during the Employment Period, if any (such higher amount being referred to as the "Highest Annual Bonus") and (y) **a fraction, the numerator of which is the number of days in the current fiscal year through the Date of Termination, and the denominator of which is 365**…

(Martinez Ex. A § 6(a)(i)(A)) (emphasis added).

Under the above provision, Martinez was owed within thirty (30) days of the date of termination the annual bonus paid or payable for the most recently completed fiscal year during the Employment Period at a pro rata amount based on the number of days actually worked in that year. The annual bonus payable for the most recently completed fiscal year at the time of Martinez's termination was the 2007 bonus as 2007 was the most recently completed fiscal year at the time Martinez was terminated. Therefore, even if the amount of bonus due to Martinez after her termination is governed by Section 6 rather than Section 4 of the Employment Agreement, the end result is the same. The annual bonus payable for the most recently completed fiscal year under Section 6 would not be calculated using the bonus amount from

2006 because 2006 was not the most recently completed fiscal year. Rather, the bonus amount payable would be calculated using the bonus amount for 2007 because that was the most recently completed fiscal year at the time of Martinez's termination. Accordingly, even under Section 6(i)(a) of the Employment Agreement, Regions' contention that it only owes Martinez the amount of her 2006 bonus for work performed for the full 2007 fiscal year fails.

Significantly, in addition to being contradicted by the clear wording of Section 4 and Section 6 of the Employment Agreement, Regions' contentions that Martinez is not entitled to more than her 2006 bonus amount for 2007 are also contradicted by Regions' own actions. Martinez was specifically told by Jill Shelton, Regions' Senior Vice President of Compensation and Benefits, that the 2006 bonus amount of $656,000 was specifically being used as a "placeholder" but that her 2007 bonus, not yet calculated, would be the actual amount she received. (Martinez Aff. ¶ 16). Further, when Martinez questioned wording in a document that identified her 2007 bonus as being pro-rated, Shelton told her not to worry and that Martinez would receive her entire bonus for 2007. (*Id*. ¶ 19). That Shelton made these comments is reinforced by the lump sum benefit calculation provided by Regions in December 2007 that lists Martinez termination date as December 31, 2007. (Martinez Ex. F at 1). This document lists $656,000 (the amount of Martinez's 2006 bonus) as an "Assumed Bonus in Year of Termination." (*Id*.). Notably, this bonus amount is the only value in the lump sum calculation document that is listed as an "assumed" amount. (*Id*.). This is significant because, if Regions had believed Martinez was only entitled to an amount less than or equal to her 2006 bonus for the 2007 fiscal year she worked, it would not have specified that the bonus amount from 2006 listed was an "assumed amount," rather it would have just listed the 2006 bonus amount as Martinez's bonus for her year of termination. The fact that Regions specified in its own

summary that the 2006 bonus figure listed as Martinez's bonus for the year of termination was an "assumed" amount indicates that Regions was indeed using the 2006 amount as a placeholder and intended to calculate Martinez's true 2007 bonus amount at a subsequent date.

Finally, Regions' Proxy Statement filed with the SEC on March 12, 2008 (Ex. 3 hereto) indicates that Regions believed at least some executives, if they had been terminated for a reason other than for Cause in 2007, would have been entitled to their full 2007 bonuses. (*Id*. at 61 n.1) (stating each named executive would have been entitled to receive his 2007 annual incentive upon a non-voluntary termination or termination other than for cause). Indeed, Martinez believes that other of her peer executives, such as Alton Yothers, who left the firm or retired shortly after Martinez was terminated received their full 2007 bonus amounts. (Martinez Aff. ¶ 25). Pursuant to Chancery Court Rule 56(f), Martinez is entitled to and requires additional discovery on this issue. Thus, Regions' employee's statements, its documents, and likely its treatment of other executives, contradict the position it has assumed in this litigation regarding the 2007 bonus amount due to Martinez. These contradictions, at the very least, raise an issue of material fact that precludes summary judgment on this issue. (*See* 56(f) Aff. ¶¶ 8(a)-(b)).

In summary, Martinez worked the entire 2007 fiscal year and her Employment Agreement provides that she is entitled to a bonus for that year no less favorable than that received by her peer executives. Despite the clear wording in the Employment Agreement and the clear statements of its employee, Regions, after Martinez worked the entire 2007 fiscal year, decided to pay Martinez a 2007 bonus less favorable than that received by her peer executives. To the extent that Regions disputes Martinez's right to a 2007 bonus amount comparable to her peer executives because it asserts Martinez's termination date occurred on October 12, 2007, and not December 31, 2007, that dispute involves an issue of material fact not properly decided at

this stage of the proceeding. (*See* 56(f) Aff. ¶¶ 8(a)-(b)). As Regions' reading of the Employment Agreement is unreasonable and because there are issues of material fact regarding Martinez's termination date, among other things, Regions' motion for summary judgment as to Count I must be denied.

III. THERE IS NO BASIS UNDER THE WORDING OF THE EMPLOYMENT AGREEMENT OR CASE LAW TO GRANT REGIONS' MOTION FOR SUMMARY JUDGMENT AS TO COUNT II.

In Count II of her Complaint, Martinez seeks the compensation and benefits she is entitled to for the remainder of her two year term Employment Period under Section 4 of her Employment Agreement. Regions contends that it is entitled to summary judgment as to Count II of Martinez's Complaint based on the language of the Employment Agreement. (OB at 13-18). Regions asserts that the severance payments made to Martinez after she was terminated pursuant to Section 6(a) of her Employment Agreement are in lieu of any compensation she was entitled to under Section 4 of the Employment Agreement. (*Id.*). As outlined below, (a) Regions' assertion ignores the plain wording of the Employment Agreement that explicitly creates a two year employment period for which Martinez is entitled to compensation after a change in control occurs, and it does not limit this liability to the severance compensation she is entitled to if she is terminated by Regions without Cause; (b) Regions' argument regarding the interpretation of Section 6(a) of the Employment Agreement must also be rejected as it requires that the Court infer a limitation of Regions' obligations under Section 6(a) that is not only absent from Section 6(a) itself, but is also expressly prohibited by the wording of Section 7; and (c) the *Gerow* authority relied upon by Regions does not compel granting summary judgment in its favor on Count II.

A. Under the Wording of the Employment Agreement and Normal Rules of Contract Construction, Martinez is Entitled to Section 4 and Section 6 Benefits.

In disputing Martinez's entitlement to Section 4 compensation after her termination date, Regions contends that Section 4 and Section 6 of the Employment Agreement are alternative provisions and that the Section 6 severance benefits it paid Martinez after her termination were in lieu of Section 4 salary benefits. (OB at 13). In analyzing Regions' erroneous interpretation of the Employment Agreement it is necessary to look at the actual wording of the applicable provisions contained within the Agreement. Section 3 of the Employment Agreement expressly provides that:

> 3. Employment Period; Prior Agreements. (a) The Company hereby agrees to continue the Executive in its employ, and the Executive hereby agrees to remain in the employ of the Company subject to the terms and conditions of this Agreement, for the period commencing on the Effective Date[9] and ending on the second anniversary of such date (the "Employment Period"). This Agreement completely replaces and supersedes that certain Employment Agreement between the Executive and the Company dated November 16, 2000.

(Martinez Ex. A § 3).

The above section makes clear that after the change in control of AmSouth occurred, a two year Employment Period was created during which Regions could not terminate Martinez, and Martinez could not resign or terminate the Agreement except as expressly provided in the

[9] The Effective Date is defined in Section 1 of the Employment Agreement as the first date during the Change of Control Period on which a Change of Control occurs.

Employment Agreement.[10]

Section 4 of the Agreement then provides what benefits and compensation Martinez is entitled to during that Employment Period (*i.e.*, salary). (Martinez Ex. A § 4). Nowhere in Section 4 does it provide that the salary compensation outlined therein terminates upon Martinez being terminated for a reason other than for Cause. (*Id.*).

Section 6(a) of the Employment Agreement specifically provides additional severance payments Martinez is entitled to in the event Martinez is terminated other than for Cause, or if Regions gives Martinez Good Reason to terminate her employment. This section states:

> 6. Obligations of the Company upon Termination. (a) Good Reason: Other Than for Cause, Death or Disability. If, during the Employment Period, the Company shall terminate the Executive's employment other than for Cause or Disability or the Executive shall terminate employment for Good Reason:
>
> (i) except as specifically provided below, the Company shall pay to the Executive in a lump sum in cash within 30 days after the Date of Termination the aggregate of the following amounts: [11]

(Martinez Ex. A § 6).

Importantly, no portion of Section 6(a) expressly states that the severance payments due Martinez under that section constitute Regions' sole obligations to Martinez in the event of a

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[10] Regions insists that Section 3(a) does not create a two year Employment Period, based on the clause in that section stating that it is "subject to the terms and conditions of this Agreement." (OB at 5, 13, 17). According to Regions, this clause "mak[es] . . . clear that termination of employment is not a breach of any obligation to keep Martinez employed for a defined period of time," and purportedly supports its position that it was not required to pay her both severance and salary upon her termination without Cause. (*Id.* at 17). But Regions reads too much into this clause. This clause neither adds to nor detracts from the other terms of the Employment Agreement; it simply makes Regions' obligation to continue Martinez in its employ during the Employment Period, and Martinez's obligation to remain in Regions' employ during the Employment Period, "subject to" those other terms. Thus, the issue remains what the "other terms" provide. If, as Martinez contends below, the other terms of the Employment Agreement require Regions to pay her both severance and salary upon her termination without Cause, nothing in Section 3(a) changes this result.

[11] The remaining portions of Section 6(a) go on to specify the amounts Martinez will receive within 30 days after being terminated by Regions other than for Cause, or if she terminates for Good Reason.

termination without Cause or for Good Reason, nor does it state that the severance payments outlined in that section are in lieu of or replace the salary payments due to Martinez under Section 4 of the Employment Agreement. (*Id.*). This omission of wording that would limit Regions' obligations to only the severance payments outlined in Section 6(a) of the Employment Agreement in the event of a termination other than for Cause is notable in light of the fact that the drafters of the Agreement clearly knew how to draft provisions limiting Regions' obligations to Martinez. Indeed, the drafters included specific language limiting Regions' obligations for the other types of terminations addressed in the remaining provisions of Section 6. Unlike Section 6(a), the wording of Sections 6(b), 6(c), and 6(d), use wording that expressly limits Regions' obligations should a termination occur under those specific sections:

> (b) Death. If the Executive's employment is terminated by reason of the Executive's death during the Employment period, **this Agreement shall terminate without further obligations to the Executive's legal representatives under this Agreement, other than for payment of Accrued Obligations and the timely payment or provision of Other Benefits**.
>
> (c) Disability. If the Executive's employment is terminated by reason of the Executive's Disability during the Employment period, **this Agreement shall terminate without further obligations to the Executive, other than for payment of Accrued Obligations and the timely payment or provision of Other Benefits**.
>
> (d) Cause: Other than for Good Reason. If the Executive's employment shall be terminated for Cause during the Employment Period, **this Agreement shall terminate without further obligations to the Executive other than the obligation to pay to the Executive (x) his Annual Base Salary through the Date of Termination, (y) the amount of any compensation previously deferred by the Executive, and (z) Other Benefits, in each case to the extent theretofore unpaid**. If the Executive voluntarily terminates employment during the Employment Period, excluding a termination for Good Reason, **this Agreement shall terminate without further obligations to the Executive, other than for Accrued Obligations and the timely payment or provision of**

> **Other Benefits**. In such case, all Accrued Obligations shall be paid to the Executive in a lump sum in cash within 30 days of the Date of Termination.

(*Id.*) (emphasis added).

The wording of the above provisions makes clear that the drafters knew how to effectively limit Regions' obligations in the event of a termination. *See Gary v. Beazer Homes USA, Inc.*, 2008 WL 2510635, *4 (Del. Ch.) (Ex. 4 hereto) (plain language that specified agreement shall terminate without further obligations to the executive if terminated for cause, limited the compensation and benefits specified upon termination); *Del Pharmaceuticals, Inc., v. Access Pharmaceuticals, Inc.*, 2004 WL 1631355, *9 (Del. Ch.) (Ex. 5 hereto) ("This language shows that the parties knew how to draft [such] a provision. . . ."). The fact the drafters did not include such wording in the event of termination by Regions other than for Cause, or by Martinez for Good Reason indicates that the drafters did not intend to limit Regions' obligations solely to the compensation outlined in Section 6(a) in the event of either of these types of terminations. Consequently, the Court should not infer such a limitation, and Regions' motion should be denied. *See Allied Capital Corporation v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1035 (Del. Ch. 2006) ("courts should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it"); *Cargill v. JWH Special Circumstance LLC*, 959 A.2d 1096, 1110 (Del. Ch. 2008) (same).

B. Regions' Interpretation of the Employment Agreement Requires the Court to Disregard the Express Terms in Section 7 of the Agreement.

Further undermining Regions' position is that, in addition to requiring the Court to imply a limitation of obligations under Section 6(a) that does not exist, Regions' interpretation of the Employment Agreement also requires the Court to disregard an express term of the Employment Agreement. "A court must interpret contractual provisions in a way that gives effect to every

term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole." *Council of the Dorset Condo. Apartments v. Gordon*, 801 A.2d 1, 7 (Del. 2002). Section 7 of the Employment Agreement provides:

> 7. Non-exclusivity of Rights. **Nothing in this Agreement shall** prevent or limit the Executive's continuing or future participation in any plan, program, policy or practice provided by the Company or any of its affiliated companies and for which the Executive may qualify, nor, subject to Section 3(b), shall anything herein limit or **otherwise affect such rights as the Executive may have under any contract or agreement with the Company** or any of its affiliated companies. **Amounts which are vested benefits or which the Executive is otherwise entitled to receive under** any plan, policy, practice or program of or [sic] **any contract or agreement with the Company** or any of its affiliated companies at or subsequent to the Date of Termination **shall be payable in accordance with such** plan, policy, practice or program or **contract or agreement except as explicitly modified by this Agreement**.

(Martinez Ex. A § 7) (emphasis added).

Section 7 expressly states that nothing in the Agreement limits or otherwise affects the rights Martinez has under any contract or agreement with Regions and that amounts to which Martinez is entitled to receive under any contract or agreement shall be payable in accordance with such contract or agreement except as explicitly modified by the Agreement. The Employment Agreement is a "contract or agreement with the Company." Under the terms of Section 3 and Section 4 of the Employment Agreement, Martinez was entitled to payment and compensation for the Employment Period that covered the two years following the date of a change of control of AmSouth. Thus, under the non-exclusivity provision of Section 7, Martinez is entitled to those payments unless something in the Employment Agreement explicitly modifies that entitlement. As shown, there is nothing in Section 6(a) that explicitly modifies Martinez's entitlements under Section 4, nor, -- unlike Sections 6(b), 6(c), and 6(d) -- does Section 6(a) state

the payments outlined therein represent Regions' sole obligations to Martinez in the event of her termination other than for Cause. Consequently, Section 7 expressly precludes Regions' proposed interpretation of the Agreement as it requires the Court infer an implicit and non-expressed limitation in Section 6(a) that would act to modify and cut off Martinez's rights under Section 4. "[C]ourts will not rewrite contractual language covering particular topics just because one party failed to extract as complete a range of protections" as it desired. *Allied Capital,* 910 A.2d at 1033.

Regions also asserts that, despite the clear wording of Sections 3 and 4 of the Employment Agreement that unambiguously create a two year Employment Period after a change in control occurs, Martinez's Employment Period and Regions' obligations under Section 4 ended upon Regions' termination of Martinez without Cause. (OB at 14). Region's assertion ignores that Section 3 and 4 create an express protected Employment Period and nothing in the Employment Agreement specifies that this Employment Period ends upon Regions' unilateral decision to terminate Martinez without Cause.

Additionally, it is clear from Regions' own Revised Change in Control Agreement that the drafters could have specified that Martinez's protected Employment Period did end upon her termination without Cause if they desired to create such protection for Regions. The Revised Change in Control Agreements Regions distributed to its employees and filed with the Securities Exchange Commission in the fall of 2007 (Ex. 6 hereto) provides:

4. Terms of Employment Following Change in Control

> If a Change in Control occurs during the term of this Agreement, a "*Protected Employment Period"* will begin and the following employment terms will be effective. Your Protected Employment Period will end on the second anniversary of the Change in Control **or your separation of service from the Company if earlier**.

(Ex. 6 § 4) (emphasis added).

The above wording proves that drafters are able to compose effective provisions that allow for employment periods to be terminated prior to the expiration of their term, and do so. That Martinez's Employment Agreement includes no such wording is indicative that its drafters did not intend for Martinez's two year Employment Period, and Regions' obligations under Section 4, to terminate upon Regions' termination of Martinez without Cause. The above wording also demonstrates that Regions realized in September 2007 that it would need to change the wording of its change of control agreement from that used by AmSouth if it wished to be able to terminate the agreements before the end of the employment period and avoid liability and further belies Regions' current interpretation of the Employment Agreement. Martinez should at least be permitted to take discovery into why Regions added the above wording to its Revised Change of Control Agreement before the Court grants summary judgment by inferring such language in an agreement where it does not exist. (*See* 56(f) Aff. ¶ 8(e)).

As illustrated above, when the clear wording of the Employment Agreement is examined, Regions' interpretation that its obligations in Section 6(a) are in lieu of its obligations in Section 4 in the event of a termination without Cause must be rejected. At the very least, there are ambiguities in the Employment Agreement that preclude summary judgment in Regions' favor. Furthermore, despite devoting a great deal of analysis to a Seventh Circuit Court of Appeals case, Regions has cited no compelling authority that supports granting Regions' motion for summary judgment.

C. The Cases Cited in Regions' Opening Brief do not Support Regions' Position that Section 4 and Section 6 are Alternative Provisions.

Rather than addressing the actual wording of the Employment Agreement at issue, Regions relies more heavily on the Seventh Circuit's decision in *Gerow v. Rohm & Haas Co.*, 308 F.3d 721 (7th Cir. 2002) for the general assertion that, post-termination, Martinez was not

entitled to continued salary payments for the duration of her Employment Period pursuant to Section 4 of her Employment Agreement. Regions contends that the *Gerow* court construed "virtually identical" claims and contract provisions to those in the instant matter and found that the executive was not entitled to the compensation he sought. (OB at 14-18). Assuming *arguendo* that *Gerow* was decided correctly, there are compelling differences between the *Gerow* Employment Agreement (Ex. 7 hereto) and the Martinez Employment Agreement that require a different conclusion here than the one reached in *Gerow*. Moreover, Martinez's position is supported by the Eight Circuit's decision in *Deal v. Consumer Programs, Inc.*, 470 F.3d 1225 (8th Cir. 2006), which involved an agreement that is much more similar to Martinez's than the agreement in *Gerow*. Additionally, *Gerow* should not be followed because its reasoning is flawed.

1. The Martinez Employment Agreement materially differs from the *Gerow* Employment Agreement.

One significant way in which the Martinez Employment Agreement differs from the *Gerow* Agreement is that it does not allow Martinez to receive severance upon her resignation unless it is with Good Reason. Specifically, the Martinez Agreement provides that Section 6 severance compensation is paid:

> If, during the Employment Period, the Company shall terminate the Executive's employment other than for Cause or Disability **or the Executive shall terminate the employment for Good Reason**.

(Martinez Ex. A § 6(a)) (emphasis added).

On the other hand, the *Gerow* Agreement provided that the severance package would be paid:

> If, during the Employment Period, the Company shall terminate the Executive's employment other than for Cause or Disability, **or**

> **if the Executive shall terminate employment under this Agreement**. . . .

(Ex. 7 § 5(d)) (emphasis added).

This difference is significant because in finding that the *Gerow* Agreement did not provide for both severance and salary for the employment period in the event of termination, the court placed emphasis on the fact that, under the *Gerow* Agreement, the employee could unilaterally terminate the agreement at any time and still receive the severance benefits. The court specifically stated:

> Surely Gerow does not think that [the sections of the agreement] read together give the employee an option to quit without cause and *still* be paid both salary and severance. Yet there is no way to read this contract as saying that the total payments are greater if the employee is fired than if he quits during the "employment period" and triggers [the severance benefits]. The only way to make sense of the executive's right to walk—an option to put his job back to the employer in exchange for the severance package—is to say that all the "employment period" does is measure the *time* during which the employee receives either an undiminished salary (and perks) or a specified severance package. One or the other, but not both.

Gerow, 308 F.3d at 725 (emphasis in original).

Thus, the Martinez Employment Agreement is distinguishable from the *Gerow* Agreement because the Martinez Agreement does not provide Martinez with the right to receive severance if she resigns without Good Reason. (*See* Martinez Ex. A § 6(d)). The severance package is only available to Martinez as a result of actions by Regions (termination other than for Cause, or giving Martinez Good Reason to resign). In *Gerow*, the employee held his own key to obtaining the severance package, whereas here Regions held the key under the Agreement as to whether it would cause the Section 6(a)(i) benefits to become payable. Consequently, the Seventh Circuit's analysis that the *Gerow* Agreement could not have been intended to require the payment of severance and salary upon termination is not applicable to the Martinez Agreement.

Another significant difference between the *Gerow* and Martinez Agreements is the Non-exclusivity of Rights Provisions contained in the two contracts. The *Gerow* Agreement provided:

> Non-exclusivity of Rights: Nothing in this Agreement shall prevent or limit the Executive's continuing or future participation in any benefit, bonus, incentive or other plans, programs, policies or practices, provided by the Company or any of its affiliated companies and for which the Executive may qualify, nor shall anything herein limit or otherwise affect **such rights as the Executive may have under any other agreements with the Company** or any of its affiliated companies. Amounts which are vested benefits or which the Executive is otherwise entitled to receive under any plan, policy, practice or program of the Company or any of its affiliated companies at or subsequent to the Date of Termination shall be payable in accordance with such plan, policy, practice or program except as explicitly modified by this Agreement.

(Ex. 7 § 6) (emphasis added).

The Martinez Agreement provides:

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

(Martinez Ex. A. § 7) (emphasis added).

These differences in the language of the two agreements are significant. Unlike the *Gerow* Agreement, which only states that the agreement does not limit the executive's rights

under any **other** agreement he has with the company and that he is still entitled to receive amounts to which he is entitled under such plan, policy practice or program, the Martinez Agreement language is broader. It specifically states that the Agreement does not limit any rights the executive may have under **any** contract or agreement, and it specifically states amounts which the executive is otherwise entitled to receive under **any contract or agreement** with the company is payable in accordance with such **contract or agreement** except as explicitly modified by the Employment Agreement. "Any contract" includes the Employment Agreement itself, whereas "any other agreements" (the language in the *Gerow* Agreement) does not. Thus, Martinez's entitlement under Section 4 of the Employment Agreement is enforceable unless that entitlement to salary is explicitly modified elsewhere in the Agreement. As already discussed, nowhere in Section 6, nor in any other section of the Employment Agreement, does it explicitly state that the severance compensation due to Martinez in the event she is terminated other than for Cause after a change in control is in lieu of the salary compensation to which she is entitled pursuant to her two year Employment Period outlined in Section 4 of the Agreement. Consequently, the differences in the wording of the non-exclusivity of rights clauses of the *Gerow* and Martinez Agreements require a different result here than that reached by the *Gerow* court.

Finally, the Martinez Employment Agreement contains an additional provision that is not found in the *Gerow* Agreement that further supports Martinez's provision. Section 3(b) of the Martinez Employment Agreement provides:

> The Executive and the Company acknowledge that, except as may otherwise be provided under any other written agreement between the Executive and the Company, the employment of the Executive by the Company is "at will" and, subject to Section 1(a) hereof, prior to the Effective Date, the Executive's employment and/or this Agreement may be terminated by either the Executive or the

> Company at any time prior to the Effective Date, in which case the Executive shall have no further rights under this Agreement. From and after the Effective Date this Agreement shall supersede any other agreement between the parties with respect to the subject matter hereof.

(Martinez Ex. A § 3(b)). The *Gerow* Agreement contains no similar provision.

Section 3(b) of the Martinez Agreement establishes two different regimes: one prior to the Effective Date (*i.e.*, Regions' merger with AmSouth), during which the employment was "at will"; and one after the Effective Date, during which the Employment Agreement governs the relationship. To the extent that there is any ambiguity about this, this reading is supported by a March 20, 2000 memorandum from AmSouth to Martinez (whose maiden name was Allen) regarding her 2000 employment agreement (Martinez Ex. B) (which is substantially similar to the 2004 Employment Agreement at issue in this case), in which AmSouth stated:

> It is important to note that while your new agreement is called an "employment agreement", such contractual employment relationship would not begin unless and until there were a change in control. Prior to that time you remain an employee at will.

(Martinez Ex. C).

The conclusion that Martinez was no longer an "at will" employee after the Effective Date further supports her position that Section 3(a) of the Employment Agreement established a protected two year Employment Period during which she could only be terminated in accordance with the terms of the Employment Agreement. *See Sapp v. Casey Employment Servs., Inc.*, 1989 WL 133628 *1, *5 (Del. Ch.) (Ex. 8 hereto) (employee who had an employment contract for a fixed three-year term was not terminable at will). Moreover, because Martinez had a protected two year Employment Period, it should come as no surprise that Regions would be required to pay her her salary for the remainder of Employment Period if she was terminated without Cause

(as defined in the Agreement) before the conclusion of that period -- in addition to the severance benefits provided in the Employment Agreement in the event of such a termination.[12]

The *Gerow* Agreement contained no provision like Section 3(b) of the Martinez Employment Agreement. Thus, to the extent that *Gerow* was correctly decided, it cannot be read to apply to an agreement that contained a significant additional protection that was not present in the agreement before the *Gerow* court, namely, an express recognition that the employment during the Employment Period was **not** "at will."

2. Martinez's position is supported by *Deal*, which construed a more similar agreement than *Gerow*.

In addition to being supported by the express wording of the Employment Agreement, there is also persuasive authority that supports Martinez's interpretation that Section 6(a) does not cut off Martinez's salary and compensation under Section 4. *Deal v. Consumer Programs, Inc.*, 470 F.3d 1225 (8th Cir. 2006), involved claims by an executive terminated without cause after a change in control that are similar to the ones in the instant matter. In *Deal*, after receiving severance benefits called for by her employment agreement, the executive sought the remainder of the annual base salary and bonus she would have earned for the five months outstanding on her term of employment. *Id*. at 1229. Like Regions argues here, the *Deal* employer, CPI, argued that the severance payment was in lieu of the executive's unpaid base salary and bonus payment under the employment agreement. *Id.* The relevant provision of the employment agreement analyzed in *Deal* (Ex. 9 hereto) provides:

[12] In this way, the Martinez Employment Agreement is no different than any other agreement containing a specified term, which, if breached during the term of the agreement, would entitle the non-breaching party to damages for what that party would have earned if there had been no breach. *See Curran v. Smith-Zollinger Co*., 157 A. 432, 432 (Del. Ch. 1931) ("The general rule in such case is that the damages are to be measured by the difference between the rent stipulated in the lease and the fair rental value for the balance of the term.").

> 6. Termination of Employment.
>
> (d) Payments for Involuntary Termination Without Cause.
>
> (2) If following a Change of Control (i) the Corporation terminates Executive's employment (other than for Cause pursuant to Subsection 6(b) hereof), or (ii) the Executive's employment terminates by reason of the Corporation's termination of this Agreement pursuant to subsection 6(c) hereof, the Corporation shall, at the time of such involuntary termination, make a lump sum cash payment to Executive equal to 200% of her Base Salary for the Fiscal Year of termination. In addition to the payment pursuant to this Subsection 6(d)(2) and any payments to which the Executive may be entitled pursuant to Subsections 5(g), 5(h) and 5(i), Executive shall be entitled to all remedies available under this Agreement or at law in respect of any damages suffered by Executive as a result of an involuntary termination of employment without Cause.

(Ex. 9 § 6).

In analyzing the above provision, the district court entered summary judgment in favor of the executive and the appellate court affirmed the ruling. *Deal,* 470 F.3d at 1227. The logic of the appellate court is instructive for the circumstances surrounding this case. The court stated:

> [W]e note that it is undisputed Deal's Employment Agreement was in effect at the time of her termination . . . . By terminating Deal without cause before her Employment Agreement expired on October 21, 2004, CPI breached its contract with Deal, thus entitling Deal to the remaining amount CPI would have paid her had it fully performed under the contract. . . .
>
> CPI's interpretation is contradicted by the unambiguous language of the Employment Agreement. Under subsection 6(d)(2), '*in addition to*' the $490,000 severance payment, Deal *also* is 'entitled to *all remedies available under this Agreement or at law* in respect of any damages suffered by Deal as a result of an involuntary termination of employment without Cause. (emphasis added). We agree with the district court that under 'the plain language of the employment agreement, Deal's lump-sum cash payment was awarded *in addition to-not in lieu of*-all other remedies she may have for breach of her employment agreement.' Nothing in subsection 6(d)(2) limits Deal's right to recover both the severance payment and any damages resulting from a breach of contract. . . .

> As the district court correctly noted 'had the parties intended the severance payment to provide Deal's exclusive remedy for unpaid salary and bonus payments upon CPI's breach of the employment agreement, they could have so provided.' Indeed, subsection 6(d)(1)-which applies to terminations occurring *before* a change in control and entitles Deal to her accrued base salary, an additional 100 percent of her annual base salary, and a prorated bonus payment-imposes such a limitation. . . . The inclusion of this limitation in subsection 6(d)(1), and its noticeable absence from the provision at issue in this case, further indicate the parties did not intend Deal's $490,000 severance payment to limit her ability to recover any unpaid salary and bonus payment.

Id. at 1230-31.

The above analysis is equally compelling when applied to the similar facts of this case. Section 7 of Martinez's Employment Agreement provides that nothing in the Agreement prevents or limits Martinez's rights under any contract or agreement with the company, and that any amounts payable to Martinez under any contract or agreement at or subsequent to the Date of Termination are payable in accordance with that agreement except as explicitly modified by the Employment Agreement. Thus, like the provision in the *Deal* Agreement that specified that the executive was still entitled to all damages suffered as a result of an involuntary termination, the plain language of Section 7 of the Martinez Agreement specifies Martinez is still entitled to all payments due to her under any agreement, which includes the Employment Agreement, unless explicitly modified. Thus, like *Deal*, Martinez is entitled to her Section 4 salary payments as those payments are not explicitly modified or limited anywhere in Section 6(a) or any other sections of the Employment Agreement.

As in *Deal*, this interpretation is further bolstered by the fact that Regions limited its obligations in other provisions of the Agreement (*see* Sections 6(b), 6(c), and 6(d)), but failed to do so in Section 6(a). Therefore, the same factors that influenced the conclusion reached by the

Deal court are present here and this Court should reach a similar conclusion. At the very least, for purposes of ruling on Regions' motion for summary judgment, the *Deal* decision indicates that the terms of Martinez's Employment Agreement are ambiguous as to whether the Section 6(a) compensation is in lieu of Section 4 salary and that summary judgment at this time would be inappropriate.

3. *Gerow* should not be followed because its reasoning is flawed.

As set forth above, there are significant differences between the actual language of the *Gerow* Agreement and the Martinez Agreement that mandate a different result here -- in line with the *Deal* decision, which involved an agreement containing much more similar terms to the Martinez Agreement. Ignoring the important distinctions between the *Gerow* and Martinez Agreements, Regions relies on *Gerow* to argue that reading the Martinez Agreement to require her to be paid both severance and salary "'attributes irrationality to [her] employer and 'makes no business sense,' for as Judge Easterbrook explains [in *Gerow*]: 'Why would the acquirer ever *fire* any executive during the [term of the agreement], if the executive has a guaranteed position for that time? . . . .'" (OB at 16 (quoting *Gerow*, 308 F.3d at 724-25)) (emphasis in original).

Of course, categorical statements (or rhetorical questions) like "why would someone **ever** do X given the consequences" are frequently overly broad and overly simplistic.[13] In fact, far from attributing "irrationality" to Regions, there could be many **rational** reasons that make perfect "business sense" for Regions to fire an executive **notwithstanding** the consequences of having to pay the executive both severance and salary. We know here that Regions wished to free itself of the burden of the employment agreements entered into by AmSouth with its senior executives in favor of new, less generous agreements, and that it told the executives they would

[13] To say that "categorical statements are **always** overly broad" would itself be an overly broad categorical statement.

be terminated if they did not sign the new agreements. We also know that Martinez told Regions' management that she was not inclined to sign the new agreement. Regions could have, quite rationally, determined that it wished to "make an example" of Martinez to the other executives by carrying out on its threat to terminate her for her refusal to sign the new agreement. This would have made perfect business sense for Regions notwithstanding the need to pay Martinez both severance and salary given the substantial savings that could be achieved if the other executives were successfully pressured into signing the new agreements. Or, perhaps less sinisterly, Regions could have determined it was in its best interests to give Martinez a graceful and generous exit from the company so that she would go quietly and not encourage other executives to refuse to sign the new agreements.

We do not know at this point whether either of these scenarios actually occurred, since no discovery has taken place. But the point here is that -- contrary to the suggestions in *Gerow* and by Regions -- there could well have been one or more rational business purposes for Regions to terminate Martinez notwithstanding the need to pay both severance and salary. Accordingly, the *ipse dixit* assertion to the contrary in *Gerow* should not have greater weight in the contractual analysis than the actual contractual language itself, particularly when the applicable language of the *Gerow* Agreement materially differs from that in the Martinez Agreement for the reasons discussed above.[14] At the very least, Martinez should be afforded the opportunity to take discovery regarding Regions' motivation for terminating her and whether it engaged in the type of cost/benefit analysis described above before summary judgment is granted based on the *ex*

[14] Parroting *Gerow*, one could just as easily ask -- in equally categorical fashion -- why would an executive **ever** quit during the employment term without Good Reason given that she would be giving up all severance and salary by doing so? Just as Regions could rationally decide that it was worth paying both severance and salary if it thought it could achieve overall greater savings with other executives by doing so, an executive could rationally decide to quit without Good Reason if, for example, the executive received another employment offer for compensation that exceeded the value of the benefits the executive would be foregoing by quitting.

cathedra assertion that it would have made no business sense to do so if Regions had to pay both severance and salary. (*See* 56(f) Aff. ¶ 8(d)).

* * *

In summary, Regions' interpretation that Section 6(a) of the Employment Agreement precludes or cuts off Martinez's salary and compensation under Section 4 is not supported by the actual wording of the Agreement and, is in fact, expressly precluded by Section 7 of the Agreement. Therefore, Regions' interpretation of the Employment Agreement as it pertains to Count II cannot be the only reasonable interpretation of the Employment Agreement and Regions' motion for summary judgment as to Count II must be denied. Moreover, the language of the Employment Agreement and the non-binding authorities cited above illustrate, at the very least, that the terms of the applicable provisions of the Employment Agreement are ambiguous and further discovery is warranted. Such a finding also precludes summary judgment as to Count II. Therefore, Regions' motion for summary judgment as to Count II must be denied.

IV. MARTINEZ HAS STATED A CLAIM THAT REGIONS BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

Count III of Martinez's Complaint alleges that to the extent that the Court finds that the express terms of the Employment Agreement do not entitle Martinez to her full 2007 bonus in accordance with what her peer executives received, Regions is liable for damages for breaching the implied covenant of good faith and fair dealing by timing Martinez's termination in such a manner as to deny Martinez her rightful 2007 bonus amount. Regions argues it is entitled to Summary Judgment as to Count III because the allegations raised in Count III of Martinez's Complaint do not state a claim for relief. (OB at 20-21). Regions misinterprets the law and its motion must be denied.

In Delaware, inherent in every contract is an implied covenant of good faith and fair dealing. *Caldera Properties-Lewes/Rehoboth VII, LLC v. Ridings Development, LLC*, 2008 WL 3323926, *16 (Del. Super.) (Ex. 10 hereto). This covenant requires the parties to a contract to "interpret and act reasonably upon contractual language" and is utilized when "without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain." *Id*. Analysis of a claim for breach of the implied covenant of good faith and fair dealing "requires the court to extrapolate the spirit of the agreement from its express terms and based on that 'spirit,' determine the terms that the parties would have bargained for to govern the dispute had they foreseen the circumstances under which their dispute arose." *Id*. To successfully plead a breach of the "implied covenant of good faith and fair dealing, the plaintiff must allege a specific implied contractual obligation, a breach of that obligation by the defendants, and resulting damage to the plaintiff." *Fitzgerald v. Cantor*, 1998 WL 842316, *1 (Del. Ch.) (Ex. 11 hereto). As explained below, Martinez has made allegations sufficient to state a claim for Regions' breach of the implied covenant of good faith and fair dealing.

Martinez alleges in her Complaint that Regions breached the implied covenant by timing its threat to terminate Martinez to deny Martinez the full 2007 bonus she earned. "Every employment contract contains an implied covenant of good faith and fair dealing." *Rizzitiello v. McDonald's Corp.*, 868 A.2d 825, 830 (Del. 2005) (citations omitted). "The covenant of good faith and fair dealing may be breached . . . when an employer uses its superior bargaining power to deprive the employee of clearly identifiable compensation related to the employee's past service. . . ." *Nye v. University of Delaware*, 2003 WL 22176412, *4 (Del. Super.) (Ex. 12 hereto).

Despite this breach having been alleged in Count III of Martinez's Complaint, Regions' motion fails to discuss or raise any grounds why this basis for Martinez's Count III claim is insufficient. For that reason alone, summary judgment is inappropriate on Count III. However, as shown below, even if Regions had addressed this subject in its motion, there is no basis for dismissal or summary judgment in favor of Regions.

As already discussed in Section I above, Regions has asserted that under the terms of Martinez's Employment Agreement, Martinez's date of termination is October 12, 2007. Based on this termination date, Regions posits that, despite working through the end of the 2007 fiscal year, Martinez is not entitled to a full 2007 bonus, but is instead only entitled to a pro-rata bonus for 2007 based on her 2006 bonus amount. Martinez has already discussed the flaws with Regions' argument and why Regions' failure to pay the full 2007 bonus constitutes a breach of the Employment Agreement. However, in the event the Court finds that Regions' actions did not breach the express terms of the Employment Agreement, Martinez has stated an alternative claim in Count III for a breach of the implied covenant of good faith and fair dealing.

Implicit in any finding by the Court that Regions did not breach the express terms of the Employment Agreement by failing to pay Martinez her full 2007 bonus, is the finding there is no express provision in the Employment Agreement addressing how to calculate the bonus of an employee that is allegedly provided notice prior to the end of the fiscal year of a termination that only becomes effective after the employee works the last fiscal day of the year. Thus, the Court should look at the "spirit" of the Agreement to determine how the parties would have addressed such a situation at the time of contracting. *See Caldera,* 2008 WL 3323926, at *16.

Based on the purpose of the Employment Agreement, the Court should find that had the parties addressed this issue at the time of contracting, Martinez would have been entitled to a full

bonus for each full fiscal year worked. This finding is supported by the wording of Section 4 of the Employment Agreement which provides that Martinez will be "awarded, for each fiscal year ending during the Employment Period, an annual bonus," and by the fact that a "pro-rata" calculation based on a portion of the fiscal year worked is the only calculation outlined in Section 6(a)(i) of the Employment Agreement. (Martinez Ex. A §§ 4, 6). These provisions indicate that the parties assumed at the time of contracting that if a termination occurred at the end of the fiscal year, the employee would be entitled to her earned bonus for that year, and if the termination occurred during the fiscal year, the employee would be entitled to a pro-rata bonus based on her previous year's bonus.

Based on the above, the Court should find there is an implied obligation to pay Martinez an annual bonus based on her work for the full 2007 fiscal year. Thus, regardless of what date Regions alleges Martinez was advised of her termination, the controlling factor for purposes of Martinez's bonus entitlement should be what date Martinez actually stopped working for Regions. As indicated above, there is compelling evidence that Martinez's last day, by agreement of the parties, was December 31, 2007, and there is substantial evidence that Regions' employee believed and advised Martinez that Regions' obligation was to pay Martinez a bonus for the full 2007 fiscal year in line with what her peer executives received and not a pro-rata bonus based on an October 12, 2007 termination date. Consequently, Regions' attempts to either create a termination date earlier than the last day Martinez actually worked or to "backdate" Martinez's termination prior to the actual termination date the parties agreed upon to lessen the amount of bonus Martinez would receive is a breach of the implied covenant of good faith and fair dealing. Martinez should at least be permitted to take discovery regarding whether Regions

improperly manipulated the timing of her termination in order to avoid paying her full 2007 bonus. (*See* 56(f) Aff. ¶ 8(c)).

In summary, Martinez pleads in Count III that, regardless of what Regions contends her termination date was, in the alternative to an express contractual duty, Regions had an implied obligation to pay Martinez a bonus amount no less favorable than the bonus received by her peer executives for the full 2007 fiscal year Martinez worked. Martinez further alleges that Regions breached this obligation and damaged Martinez by failing to pay her such a 2007 bonus based upon a fabricated termination date of October 12, 2007, despite Martinez working the full 2007 fiscal year. Accordingly, Martinez has adequately pled a claim for breach of the implied covenant of good faith and fair dealing and has raised factual issues that preclude dismissal or summary judgment in favor of Regions on Count III of the Complaint. (*Id.*).

CONCLUSION

For the above reasons, Regions' motion for summary judgment should be denied as to Counts I, II, III and IV.

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