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Case No. 4128-VCP

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.	:	

OPENING BRIEF IN SUPPORT OF PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

PROCTOR HEYMAN LLP
Kurt M. Heyman (# 3054)
Patricia L. Enerio (# 3728)
Jill K. Agro (# 4629)
1116 West Street
Wilmington, DE 19801
(302) 472-7300
Attorneys for Plaintiff

OF COUNSEL:

BARNETT, BOLT, KIRKWOOD
LONG & MCBRIDE
Robert S. Bolt
David M. Hemeyer
601 Bayshore Blvd., Suite 700
Tampa, FL 33606
(813) 253-2020

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PRELIMINARY STATEMENT

Susan A. Martinez ("Martinez") was a senior executive with AmSouth Bancorporation ("AmSouth") prior to Regions Financial Corporation's ("Regions") merger with AmSouth. Martinez's Employment Agreement with AmSouth (the "Employment Agreement") guaranteed Martinez two years of employment, compensation, and other benefits in the event of a change of control of AmSouth. The unambiguous terms of the Employment Agreement expressly provide that in any contest regarding Regions' liability under any provision of the Employment Agreement, Regions will advance Martinez's legal fees regardless of the outcome of the contest. Regions' failure to advance Martinez the fees she has incurred related to this litigation is the subject of this motion for partial summary judgment.

After Regions merged with AmSouth, Regions demanded that Martinez sign a Revised Change in Control Agreement that would decrease the benefits to which she was entitled under her previously-executed Employment Agreement. When Martinez declined Regions' demand to sign the less favorable Revised Change in Control Agreement, she was terminated without cause.

Subsequent to Regions' termination of Martinez without cause, Regions has failed to perform its obligations and provide Martinez the full compensation and benefits to which she was entitled under the Employment Agreement. Consequently, Martinez has filed this action due to Regions' breaches of contract and of the implied covenant of good faith and fair dealing resulting from Regions' failure to pay compensation to which Martinez is entitled. Moreover, Regions has failed to vest and distribute Martinez's stock options and awards as required under Martinez's Long Term Incentive Plan (the "LTIP"). Additionally, Regions has refused to advance Martinez attorneys' fees related to this dispute as required under her Employment Agreement. Martinez is entitled to summary judgment and an order compelling Regions to

reimburse Martinez for her attorneys' fees accrued to date, in addition to her fees incurred in the future.

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 (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).

Martinez is filing a motion for partial summary judgment on Count IV. This is Martinez's opening brief in support of her motion for partial summary judgment.

STATEMENT OF RELEVANT FACTS

Ms. Martinez is a citizen of the State of Florida. Martinez Aff. ¶ 1.[1] Regions is a Delaware corporation with its principal place of business in Birmingham, Alabama.

On or about February 1, 2004, as a result of her promotion to Senior Executive Vice President and Member of AmSouth's Corporate Management Committee, Martinez and AmSouth entered into an Employment Agreement. *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. 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 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.

Prior to a change of control of AmSouth, as defined in the Employment Agreement, the Employment Agreement characterized Martinez's employment as "at will." *Id.* § 3(b). Upon a change of control, the Employment Agreement provides that Martinez was no longer an "at will" employee:

> 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

[1] Affidavit of Plaintiff Susan A. Martinez in Support of Her Motion for Partial Summary Judgment ("Martinez Aff.") (Exhibits to the Martinez Aff. are designated herein as "Martinez Ex. ___.").

> commencing on the [date of the change in control] and ending on the second anniversary of such date (the "Employment Period").

Id. § 3(a).

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)-(E).

On or about November 4, 2006, Regions merged with AmSouth. Martinez Aff. ¶ 3. The merger of Regions and AmSouth constituted a change in control as defined by the Employment Agreement. Martinez Ex. A § 2. Accordingly, as of November 4, 2006, Martinez's "at will" employment was replaced by the two year term of employment outlined in the Employment Agreement. *Id.* § 1-3.

Subsequent to the change in control and effective April 24, 2007, Martinez was granted an incentive stock option to buy 2,851 shares of Regions stock at $35.07 per share. Additionally, effective April 24, 2007, Martinez was granted a non-qualified stock option to purchase 54,292 shares of Regions stock at $35.07 per share, and a restricted stock award of 7,143 shares of Regions stock. *See* Complaint Exhibit D. By their express terms, these grants are governed by the LTIP (*See* Complaint Exhibit C) and the Option Agreements attached to the grant. *See* Complaint Exhibit D.

On September 15, 2007, despite the fact it was expressly obligated to honor the terms of the Employment Agreement (Martinez Ex. A § 11), Regions presented Martinez and other former members of the AmSouth Corporate Management Committee with a Revised Change in

Control Agreement. Martinez Aff. ¶ 4. 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.* ¶ 5. 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.* ¶ 6.

Prior to October 12, 2007, Martinez advised Regions that she was not inclined to sign the less favorable Revised Change in Control Agreement. *Id.* ¶ 7. 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.* ¶ 8. The termination date was later, by agreement of the parties, made effective December 31, 2007. *Id.* ¶ 9. Regions paid Martinez certain benefits under Section 6 of the Employment Agreement as if she had been terminated without Cause. *Id.* ¶ 10. However, since its termination of Martinez, Regions has failed to pay Martinez her salary, benefits, and other compensation for the remainder of the Employment Period as required by Section 4 of the Employment Agreement. *Id.* ¶ 11. Moreover, Regions has failed to pay Martinez her full bonus for 2007 and has failed to distribute and vest the 2007 stock award and options to Martinez as required under the LTIP. *Id.*

On or about October 30, 2008, Martinez filed her Complaint alleging claims for Regions' breaches of Martinez's Employment Agreement, breach of the LTIP, breach of the implied covenant of good faith and fair dealing, and specific performance or, alternatively, advancement.

Martinez's claim for specific performance or, alternatively, advancement arise from Section 8 of the Employment Agreement which provides that Regions is required to pay, as incurred, all Martinez's legal fees reasonably incurred in any contest related to Regions' liability under the Employment Agreement or the enforceability of the Employment Agreement,

including any contest by Martinez about the amount of any payment pursuant to the Agreement, regardless of the outcome of the contest, plus interest on any delayed payment. Martinez Ex. A § 8. Martinez has demanded payment of her legal fees from Regions, however, despite the clear wording of the Employment Agreement, Regions has refused to pay Martinez's fees. Martinez Aff. ¶ 13. As outlined below, summary judgment should be entered for Martinez on this claim.

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. Inds., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979) (*citing Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977)). Here, Martinez's advancement claim is ripe for adjudication on summary judgment as it involves an unambiguous contract provision. *See United Rentals, Inc., v. Ram Holdings, Inc.,* 937 A.2d 810, 830 (Del. Ch. 2007).

"Summary judgment practice is an efficient and appropriate method to decide advancement disputes, because 'the relevant question turns on the application of the terms of the corporate instruments setting forth the purported right to advancement and the pleadings in the proceedings for which advancement is sought.'" *Jackson Walker, LLP v. Spira Footwear, Inc.*, 2008 WL 2487256, *3 (Del. Ch.) (Ex. 1 hereto) (citations omitted). Prompt summary adjudication is particularly appropriate in advancement actions because "to be of any value to the executive or director, advancement must be made promptly, otherwise its benefit is forever lost because the failure to advance fees affects the counsel the director may choose and litigation strategy that the executive or director will be able to afford. . . . Delaware's policy [is to] resolv[e] advancement issues as quickly as possible." *Homestore, Inc. v. Tafeen*, 886 A.2d 502, 505 (Del. 2005) (*quoting with approval* Chancellor Chandler's decision below).

II. MARTINEZ IS ENTITLED TO ADVANCEMENT AND INDEMNIFICATION UNDER THE TERMS OF THE AGREEMENT AND 8 *DEL. C.* § 145(k)

1. The Statutory Scheme

Section 145 of the General Corporation law provides for indemnification, under particular circumstances, of legal fees and expenses reasonably incurred by persons made parties to litigation "by reason of the fact that the person is or was a director, officer, employee, or agent of the corporation." 8 *Del. C.* §§ 145(a), (b). Indemnification or advancement of fees, however, is not limited to persons made parties "by reason of" the person's service to the corporation; section 145(f) provides that subsections (a) and (b) are "not . . . exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any . . . agreement . . . or otherwise, both as to action in such person's official capacity, and as to action in another capacity . . ." *Id*. § 145(f) (emphasis added). Finally, section 145(k) provides:

> The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions for advancement of expenses or indemnification brought under . . . any . . . agreement . . . . The Court of Chancery may summarily determine a corporation's obligation to advance expenses (including attorneys' fees).

Id. § 145(k).

2. Construction of the Agreement to Indemnify and Advance Expenses

In construing a contract, bylaw, or other written instrument providing for indemnification or advancement of litigation expenses, Delaware courts observe the rule that:

> if the [provision] is unambiguous in its language, we do not proceed to interpret it or to search for the parties' intent behind the [provision]. . . . We only construe the [provision] as it is written, and we give language which is clear, simple, and unambiguous the force and effect required. . . . The [provision] is not made ambiguous merely because the parties disagree on its proper construction.

Hibbert v. Hollywood Park, Inc., 457 A.2d 339, 343 (Del. 1983) (citations omitted).

The Employment Agreement provides for an extremely broad and unambiguous right to legal fees and, as relevant here, advancement of such fees, in the event that Martinez and AmSouth or its successor, Regions, engage in any contest concerning the parties' rights, obligations and liabilities under the Employment Agreement. Section 8 of the Agreement provides:

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

Martinez Ex. A § 8 (emphasis added).

This contractual language is remarkably broad and mandatory. It provides that Martinez is entitled to advancement of her reasonable fees and expenses incurred, in any "contest" concerning the validity, enforceability, or any liability under any provision of her Employment Agreement regardless of whether Martinez ultimately prevails in the contest. In describing the "contests" for which Martinez's expenses must be advanced, the Employment Agreement explicitly includes any contest by Martinez concerning the amount of any payment under the Employment Agreement. The Employment Agreement unconditionally requires Regions to pay Martinez's expenses as they are incurred and does not require Martinez to provide an undertaking or to repay Regions, even in the event that her "contest" is unsuccessful.

As this Court has held, "there is no requirement that advancement provisions be written broadly or in a mandatory fashion. But when an advancement provision is, by its plain terms,

expansively written and mandatory, it will be enforced as written." *Lillis v. AT&T Corp.*, 904 A.2d 325, 331-32 (Del. Ch. 2006) (*quoting DeLucca v. KKAT Mgmt., L.L.C.,* 2006 WL 224058 (Del. Ch.) (Ex. 2 hereto). In *Lillis*, the Court considered corporate executives' "change of control" agreements which required advancement and indemnification of all expenses incurred by the executives "in connection with" the agreement, including "all such fees and expenses, if any, incurred in . . . seeking to obtain or enforce any right or benefit provided by this Agreement, regardless of the outcome, unless, in the case of a legal action brought by . . . the Executive, . . . such actions were not brought by Executive in good faith." *Id*. at 329. Noting that the *Lillis* agreement's "in connection with" language was a "paradigmatically broad term" (*id*. at 331), Vice Chancellor Lamb concluded:

> In the spectrum of advancement and indemnification provisions, language that provides for payment with no provision for reimbursement if the litigation fails necessarily stand as examples of the broadest possible provision permitted under our law.

Id. at 333. The Court accordingly entered judgment in favor of the plaintiffs on their advancement claim. As set forth above, Martinez's Employment Agreement, which provides for advancement for any contest "of the validity or enforceability of, or liability under, any provision of this Agreement," without regard to the result of such "contest," is at least as broad as that at issue in *Lillis*.

3. The Agreement Plainly Compels the Advancement Relief Martinez Seeks

By the Employment Agreement's plain terms, all that is required for Martinez to perfect her right to advancement and indemnification is:

- a "contest"
- concerning the validity or enforceability of or liability under the Employment Agreement

As discussed below, there is no question of material fact concerning either of these elements that would negate Martinez's right to advancement as a matter of law.

First, this action is plainly a "contest" within the meaning of the Agreement. As the term is not defined in the Agreement, the Court may look to its ordinary and plain meaning, including by reference to a dictionary.[2] Black's Law Dictionary defines "contest" as, *inter alia*, "[t]o litigate or call into question; challenge."[3] The instant action, a lawsuit, is plainly a "contest."

The sole remaining condition to Martinez's right to advancement of reasonable expenses under the Agreement is that the contest concerns "the validity or enforceability of, or liability under, any provision of this Agreement or any guarantee of performance thereof." Like the first element, this element is easily met on the present record.

Martinez's Complaint sets forth claims for breach of the Employment Agreement, pleading specifically that Regions is liable to her for certain compensation and benefits under Section 4 of the Employment Agreement and for her 2007 bonus. *See* Complaint, Counts I, II. Additionally, Martinez claims that Regions breached the implied covenant of good faith and fair dealing implicit in the Employment Agreement by attempting to force Martinez to give up rights under the Employment Agreement, and subsequently terminating her for refusing to give up those rights. *Id.*, Count III.

Given that the broadly worded mandatory advancement language of the Agreement places the burden of proof in this action on Regions, Martinez's Complaint, read together with

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[2] *See, e.g., Calpine Corp. v. Bank of N.Y.*, 895 A.2d 880, 892 (Del. Ch. 2005) (in interpreting a contract, "reference to a dictionary . . . is a permissible interpretive aid"); *id.* at 895 (*citing* BLACK'S LAW DICTIONARY); *ABRY Ptnrs. V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1053 (Del. Ch. 2006) (same).

[3] BLACK'S LAW DICTIONARY 337 (8th ed. 2004); *see also* WEBSTER'S THIRD NEW INT'L DICTIONARY 492 (1993) (defining "contest" as, *inter alia*, "to make a subject of litigation").

the Employment Agreement, entitles her to summary judgment with respect to her advancement claim. *See VonFeldt v. Stifel Financial Corporation,* 1999 WL 413393, *3 (Del. Ch.) (Ex. 3 hereto) (burden of proof shifted to defendant resisting advancement); *Weinstock v. Lazard Debt Recovery GP, LLC*, 2003 WL 21843254, *2 (Del. Ch.) (Ex. 4 hereto) (summary judgment in advancement actions "turns on the application of the terms of the corporate instruments setting forth the purported right to advancement and the pleadings in the proceedings for which advancement is sought").

III. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE REGIONS HAS NO VIABLE DEFENSE TO MARTINEZ'S CLAIM FOR ADVANCEMENT

Although Martinez is not required to negate, in advance, any defenses Regions might raise, she notes that none of the defenses commonly raised by advancement-claim defendants would, if raised by Regions, bar her entitlement to prompt payment of her incurred expenses and fees and advancement of her future expenses and fees related to this suit.

1. Martinez is Not Required to Provide an Undertaking

Certain advancement actions are predicated on corporate bylaws, board resolutions, or other instruments that require the putative indemnitee to provide an undertaking to the corporation, whereby she agrees to repay any advanced expenses in the event that she is ultimately found not to be entitled to indemnification. *See, e.g., Thompson v. Williams Companies, Inc.*, 2007 WL 2215953 (Del. Ch.) (Ex. 5 hereto) (rejecting advancement claim where plaintiff refused to sign secured undertaking). But the Agreement between Martinez and Regions does not require such an undertaking.[4]

[4] Nor could it, logically, as the Agreement does not require Martinez to repay advanced funds even if her suit is unsuccessful.

2. Martinez's Right to Advancement is Not Barred By Her Status as a Plaintiff in the Underlying Suit

Many advancement actions are predicated on corporate bylaws, board resolutions, or other instruments limiting advancement to those seeking indemnification for actions in which they are defendants, rather than plaintiffs. *See, e.g., Gentile v. Singlepoint Fin'l, Inc.*, 788 A.2d 111, 113 (Del. 2001) (affirming denial of advancement to plaintiff in underlying action where corporation's bylaws indemnified only "a named defendant or respondent in a Proceeding"). Yet it is clear that there is no categorical prohibition on a party receiving advancement or indemnification of expenses incurred in an action in which that person is a plaintiff. *See, e.g., Hibbert*, 457 A.2d at 343-44 (holding that indemnification bylaw "refers to either the plaintiff or the defendant in a lawsuit . . . . [I]ndemnity is not limited to only those who stand as a defendant in the main action.").[5] And the Agreement itself, by its plain language, contemplates advancement for Martinez in an action such as this. Martinez Ex. A § 8 ("The Company agrees to pay as incurred, to the full extent permitted by law, all legal fees and expenses which the Executive may reasonably incur as a result of any contest by the Company, Executive, or others…(including as a result of any contest by the Executive about the amount of any payment pursuant to this Agreement)…."). Martinez's status as a plaintiff is no defense to and in no way bars her claim for advancement and indemnification.

3. Regions is Not Entitled to and Would Not Be Aided by Discovery

"[I]n most advancement disputes, summary judgment practice is an efficient and appropriate method to decide [the] case, as the relevant question turns on the application of the

[5] *See also May v. Bigmar, Inc.*, 838 A.2d 285 (Del. Ch. 2003) (awarding indemnification and "fees on fees" to plaintiff in underlying litigation); *Lillis*, 904 A.2d at 326 (ordering advancement to plaintiffs in underlying litigation); *Salovaara v. SSP Advisors, L.P.*, 2003 WL 23190391, *3-4 (Del. Ch.) (Ex. 6 hereto) (same).

terms of the corporate instruments setting forth the purported right to advancement and the pleadings in the proceedings for which advancement is sought." *Weinstock,* 2003 WL 21843254, at *2; *see also Brady v. i2 Techs. Inc.,* 2005 WL 3691286, *2 (Del. Ch.) (Ex. 7 hereto) (same); *Senior Tour Players 207 Mgmt. Co. v. Golftown 207 Hldg. Co.*, 853 A.2d 124, 126-27 (Del. Ch. 2004) (same); *Morgan v. Grace*, 2003 WL 22461916, *1 (Del. Ch.) (Ex. 8 hereto) (same). As this Court has held:

> Advancement cases are particularly appropriate for resolution on a paper record, as they principally involve the question of whether claims pled in a complaint . . . trigger a right to advancement under the terms of a corporate instrument . . . . And although advancement provisions in corporate instruments often are of less than ideal clarity, rarely is resort to parol evidence appropriate or even helpful, as corporate instruments addressing advancement rights are often crafted without the involvement of the parties who later seek advancement and often with little negotiation between any contending parties at all. Those factors are not problematic, however, as they tend to reinforce the legal policy of this State, which strongly emphasizes contractual text as the overridingly important guide to contractual interpretation.

DeLucca, 2006 WL 224058, at *6 (granting plaintiff's Rule 12(c) motion for judgment on the pleadings) (citations omitted); *Lillis,* 904 A.2d at 330 (granting judgment on the pleadings where "the contract's meaning is unambiguous"). Where, as here, the Complaint and the Employment Agreement speak for themselves, it is difficult to imagine how any discovery could be relevant to this motion.[6]

As outlined above, Regions' can assert no viable defenses that overcome the unambiguous wording of the Employment Agreement which provides Martinez with the right of advancement of her legal fees related to this matter.

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[6] Regions' advancement obligations include Martinez's fees incurred in this action to date, including the fees incurred in presenting this motion. *Brady*, 2005 WL 3691286, at *4 (granting "fees on fees" where executive's employment agreement entitled him to advancement); *see also DeLucca,* 2006 WL 224058, at *15-16 (plaintiff entitled to "fees on fees" where agreement provided for advancement).

CONCLUSION

For the foregoing reasons, Martinez is entitled to partial summary judgment in her favor on Count IV of her Complaint.

PROCTOR HEYMAN LLP

<u>/s/ Patricia L. Enerio</u>
Kurt M. Heyman (# 3054)
Patricia L. Enerio (# 3728)
Jill K. Agro (# 4629)
1116 West Street
Wilmington, DE 19801
(302) 472-7300
Attorneys for Plaintiff

OF COUNSEL:

BARNETT, BOLT, KIRKWOOD
LONG & MCBRIDE
Robert S. Bolt
David M. Hemeyer
601 Bayshore Blvd., Suite 700
Tampa, FL 33606
(813) 253-2020

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