EFiled: Dec 23 2020 04:07PM EST
Transaction ID 66209185
Case No. 2020-0909-AGB

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PETER SERVAAS, ILYA REKHTER, JUSTIN REES, and KELLY REES, Plaintiffs, v. FORD SMART MOBILITY LLC and JOURNEY HOLDING CORP., d/b/a TRANSLOC INC., Defendants.	)	C.A. No. 2020-0909-AGB **REDACTED VERSION--** **Filed: December 23, 2020**

DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR PARTIAL MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiffs Justin and Kelly Rees used corporate funds to pay their nanny for personal tasks, including to potty train their children and drive them to violin lessons. Based in part on this flagrant misuse of company resources, the Reeses' employment was terminated for cause. Plaintiff Peter SerVaas also was terminated for cause, based in part on SerVaas having used company funds to pay his "Administrative Assistant," who was, in fact, his personal assistant—engaged in tasks such as researching nannies and supervising construction projects at his home. Plaintiff Ilya Rekhter's employment likewise was terminated for cause, after it was discovered that he had made false statements about the company's capabilities in Requests for Proposals ("RFPs") and misrepresented his title in various RFPs and contracts.

Now, the Reeses, SerVaas, and Rekhter (collectively, "Plaintiffs") have filed suit against Defendants Ford Smart Mobility LLC and Journey Holding Corp. (collectively, "Ford"), alleging that they are entitled to approximately [redacted] in deferred consideration for their sale of stock to Ford and potential bonuses, all of which they forfeited when their employment was terminated. In this motion, Ford seeks to dismiss four of Plaintiffs' six claims—specifically, Plaintiffs' claim under the Delaware Wage Payment and Collection Act (Count VII); Plaintiffs' breach-of-contract claim seeking unpaid "transaction bonuses" (Count III); and Plaintiffs' duplicative claims for breach of the implied covenant of good faith and fair dealing

and unjust enrichment (Counts IV and VI).[1]

Plaintiffs' claim under the Delaware Wage Payment and Collection Act fails for the simple reason that Plaintiffs lived and worked in Utah and Indiana. Delaware wage law does not apply to employees who work in other states. *Klig v. Deloitte LLP*, 36 A.3d 785, 797 (Del. Ch. 2011). Nor could it, since well-established principles of federal constitutional law prohibit states from regulating beyond their borders. *See, e.g.*, *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 332 (1989). And, in any event, Plaintiffs cannot state a claim under the Delaware Wage Payment and Collection Act for the additional reason that the money they seek is not "wages." Instead, Plaintiffs seek "deferred consideration" and "transaction bonuses" that Ford agreed to pay (subject to contingencies that were not met here) in exchange for Plaintiffs' sale of their stock in Journey. Compensation for the sale of stock does not constitute wages under Delaware law. *See* 19 *Del. C.* § 1101(a)(5) (defining wages as "compensation for labor or services rendered by an employee").

Plaintiffs' breach-of-contract claim for their unpaid transaction bonuses fails because Ford had no contractual obligation to pay Plaintiffs bonuses once their employment ended, regardless of the reason for their termination. In other words,

[1] Plaintiffs' two remaining claims for breach-of-contract (Counts I and II) are based on their allegation that they were not actually removed for "cause" and that their terminations were, instead, the result of an elaborate conspiracy by a senior Ford executive to cut costs. Those claims lack merit, but are not at issue in this motion.

even if Plaintiffs were correct that they were not terminated for sufficient "cause," Plaintiffs still were at-will employees with no contractual guarantee to bonuses if their employment ended ***for any reason***. And Plaintiffs' implied-covenant and unjust-enrichment claims fail because, among other reasons, they are impermissibly duplicative of Plaintiffs' breach-of-contract claims.

The Court should dismiss Counts III, IV, VI, and VII of the Complaint.

STATEMENT OF FACTS[2]

I. Ride Systems, A Utah LLC, And DoubleMap, An Indiana Corporation, Combine To Form Journey.

Plaintiffs Justin and Kelly Rees are the founders and original owners of Ride Systems LLC, while Plaintiffs SerVaas and Rekhter are the founders and original owners of DoubleMap, Inc. Compl. ¶¶ 19–20. Ride Systems is a Utah LLC, and the Reeses reside in Morgan, Utah. *Id*. ¶¶ 7–8, 11. DoubleMap is an Indiana corporation, and SerVaas and Rekhter reside in Indianapolis, Indiana. *Id*. ¶¶ 5–6, 12. The Reeses worked in Ride Systems's offices in Utah, and SerVaas and Rekhter worked in DoubleMap's offices in Indiana. *See* Compl. Ex. E, J. Rees Employment Agreement at 2 ¶ 3; *id.*, K. Rees Employment Agreement at 2 ¶ 3; *id.*, SerVaas Employment Agreement at 2 ¶ 3; *id.*, Rekhter Employment Agreement at 2 ¶ 3.

[2] Solely for purposes of this motion to dismiss, Ford accepts as true the facts properly pled in the Complaint and in the exhibits attached to the Complaint.

Ride Systems and DoubleMap provide "intelligent transportation systems" for public transit, universities, and airports, among other customers. Compl. ¶¶ 19–21. In January 2019, the two companies merged their operations under the umbrella of a new Delaware corporation, Journey Holding Corp. *Id.* ¶¶ 10–12, 21. Plaintiffs were Journey's sole stockholders. *Id.* ¶ 10.

II. Ford Purchases Journey From Plaintiffs.

In July 2019, Ford purchased Journey from Plaintiffs. Compl. ¶¶ 2, 10. In connection with the acquisition, Ford agreed to pay Plaintiffs approximately [redacted] in immediate and deferred consideration. *Id.* ¶ 2. Plaintiffs and certain other employees at Ride Systems and DoubleMap also were eligible to receive additional, "Potential Bonus Amounts"—so-called "transaction bonuses"—up to a combined total of [redacted] based on various performance metrics. *See id.*, Ex. C ("Disclosure Schedules") at 4. This case is about Plaintiffs' alleged entitlement to their deferred consideration and their share of these transaction bonuses, which together total a maximum of about [redacted] *See* Compl. ¶¶ 1, 30.

A. The Stock Purchase Agreement

Each of Plaintiffs' claims has its origin in the Stock Purchase Agreement—the contract that governed Plaintiffs' sale of Journey to Ford. *See generally* Compl. Ex. B ("Stock Purchase Agreement"). Plaintiffs agreed to sell all of Journey's stock to Ford for a "Purchase Price" of about [redacted] *See* Compl. ¶ 27; *see also* Stock

Purchase Agreement at 9. Ford agreed to pay about 70% of that amount upfront. Compl. ¶¶ 2, 28. The remaining amount (approximately [redacted] was deferred, and contingent on the terms of separate Deferred Consideration Agreements (or "DCAs") that Ford executed with each of the four Plaintiffs. *Id*. ¶ 28. In addition, Ford agreed to create an "Employee Incentive Bonus Plan" worth up to [redacted] in total, which would be paid out to specified employees in two installments—the first in March 2020, and the second in March 2021—subject to certain contingencies. *Id*. ¶ 29; Stock Purchase Agreement at 59; Schedule 7.14. Plaintiffs and Ford refer to these potential bonuses as the "transaction bonuses."

B. The Deferred Consideration Agreements

Plaintiffs' DCAs spell out the terms for the potential award to Plaintiffs of roughly [redacted] in total, conditional, deferred consideration for Plaintiffs' sale of their stock in Journey. Compl. ¶ 30; *id.* Ex. A ("DCAs").[3] As relevant here, these Agreements provide that if Plaintiffs' employment ends because of a termination for cause or a resignation without "Good Reason," then Plaintiffs forfeit their right to any remaining, unvested deferred consideration. *Id.* at 5 ¶ 4(a).

The DCAs each start by reciting that, under the Stock Purchase Agreement,

[3] Each of the Plaintiffs signed his or her own DCA, but the DCAs are identical in relevant part. *See* DCAs. Specifically, the substantive terms, pagination, and paragraph numbering cited in this brief are identical for all four agreements.

"a portion of the cash consideration for [Plaintiffs'] pro rata share of the Purchase Price … otherwise payable to [Plaintiffs] with respect to their shares of [Journey]'s common stock" will "be withheld by [Ford] and [Journey] and instead be payable … solely in accordance with this Agreement." DCAs at 1 ¶ B. Plaintiffs' agreement to the terms of the DCAs was "a condition to the execution of the Purchase Agreement and the consummation of the proposed Transaction." *Id.* at 1 ¶ C.

The DCAs provide that [redacted] of the deferred consideration under the Agreements is "subject to Time-Based vesting." DCAs at 4 ¶ 2. Half of this amount was due to vest "on the first anniversary of the Closing Date" of Ford's purchase of Journey—*i.e.*, on July 25, 2020. *Id.* at 5 ¶ 3(a); Compl. ¶ 27. The rest was scheduled to vest on the second anniversary of the Closing Date—*i.e.*, on July 25, 2021. *Id.*

The remaining [redacted] of the total deferred consideration under the DCAs was "subject to Performance-Based vesting." DCAs at 4 ¶ 2. This portion was scheduled to vest in two installments "in accordance with attainment of" specified performance targets for Journey in 2019 and 2020. *Id.* at 5 ¶ 3(a), Ex. C.

Each portion of the time-based and performance-based deferred consideration under the DCAs was contingent on Plaintiffs being "continuously employed with the Company Group" as of the scheduled vesting date. DCAs at 5 ¶ 3(a). The Agreements contemplate that Plaintiffs' employment might end before these dates, and provide different outcomes for the deferred consideration depending on the

reason for the termination of Plaintiffs' employment. *Id.* at 5 ¶ 4. Specifically, if Plaintiffs left Journey "due to a termination without Cause or a resignation for Good Reason," then any remaining portion of their time-based deferred consideration would vest immediately. *Id.* at 5 ¶ 4(a). In that scenario, any remaining portion of Plaintiffs' performance-based deferred consideration would vest later, "if and when earned as set forth" in the performance targets for Journey. *Id.* at 6 ¶ 4(b).

On the other hand, if Plaintiffs' employment ended "due to a termination for Cause or because [Plaintiff] terminates his or her employment with the Company Group without Good Reason," the DCAs make clear that Plaintiffs would "forfeit any portion of the Aggregate Founder Deferred Consideration Amount that has not vested as of the date of his or her employment termination." DCAs at 6 ¶ 4(e). The Agreements define "[c]ause" to mean, among other things, the "commission of an act of fraud, theft, embezzlement, misappropriation, self-dealing, or breach of fiduciary duty against the Company or any of its Affiliates." *Id.* at 2.

C. The Transaction Bonuses

In addition to providing for upfront cash payments and deferred consideration, the Stock Purchase Agreement also provides for up to [redacted] in conditional, potential "transaction bonuses" to be paid to certain Journey employees, including Plaintiffs, in the event that Journey achieved revenue targets in 2019 and 2020 (*i.e.*, during the first year and a half after Ford's purchase of the company) and in the event

that the employees remained employed on the payment date. *See* Stock Purchase Agreement at 59 § 7.14; Compl. Ex. D ("Transaction Bonus Plan Reallocation Agreement"). The transaction bonuses were expressly contingent on an employee being "still employed with the Company on each payment date, in accordance with the terms of the transaction bonus agreements to be executed in connection with the Transaction Bonus." Transaction Bonus Plan Reallocation Agreement at ¶ B; *see also* O'Toole Decl. Ex. 1 at 1 ("Transaction Bonus Agreements") (transaction bonuses contingent on Plaintiffs being "still employed with the Company Group on each payment date"); Transaction Bonus Plan Reallocation Agreement at Schedule 7.14 (paragraph labeled "Forfeited Bonus" and providing for the reallocation of bonuses allocated to any employee whose "relationship with the Company is terminated" prior to the applicable payment date). Plaintiffs each signed individual "Transaction Bonus Agreements" that also make clear that the contemplated, potential bonuses were contingent on their continued employment. Transaction Bonus Agreements at 1.[4]

[4] The substantive terms, pagination, and paragraph numbering are identical in relevant part for each of the Transaction Bonus Agreements. Although Plaintiffs attached the other relevant contracts to their Complaint, Plaintiffs omitted the Transaction Bonus Agreements. Nevertheless, the Court still can consider these Agreements at the motion-to-dismiss stage, because they are "integral to" Plaintiffs' claims seeking to recover the transaction bonuses and are therefore deemed "incorporated into the complaint." *Winshall v. Viacom Int'l, Inc.*, 55 A.3d 629, 631 n.1 (Del. Ch. 2011). For example, the Transaction Bonus Plan Reallocation

Subject to their contingencies, the transaction bonuses were to be paid by mid-March 2020 and mid-March 2021 in two equal installments. Transaction Bonus Agreements at 2–3. Unlike the DCAs, neither the Transaction Bonus Plan Reallocation Agreement nor Plaintiffs' individual Transaction Bonus Agreements include any provision stating that Plaintiffs will receive the transaction bonuses if they are terminated "without cause" or resign "for Good Reason" before the bonuses vest. To the contrary, the Transaction Bonus Agreements specifically state that they "shall create no right in the Employee to continue in the Company Group's employment for any specific period of time" and "shall not restrict the right of the Company Group to terminate the Employee." Transaction Bonus Agreements at 4 ¶ 9(a).

D. Plaintiffs' Employment Agreements

After the acquisition of Journey by Ford, Plaintiffs continued to remain employed at Ride Systems (the Reeses) and DoubleMap (SerVaas and Rekhter), and also served as Journey's CEO (Justin Rees) and Vice Presidents (Kelly Rees, SerVaas, and Rekhter). Compl. ¶¶ 31–34. Rekhter later left his position as a Vice President and became "Special Projects Lead." *Id*. ¶ 32.

Agreement—which Plaintiffs did attach to the Complaint and rely on extensively—specifically references "the terms of the transaction bonus agreements to be executed in connection with the Transaction Bonus (the '**Transaction Bonus Agreements**')." Transaction Bonus Plan Reallocation Agreement at ¶ B (emphasis in original).

The terms of Plaintiffs' employment were set forth in separate contracts. Compl. ¶ 31 n.10; *id.*, Ex. E ("Employment Agreements"). Among other things, Plaintiffs' Employment Agreements state their "Work Location" and "Compensation and Benefits," specify that Plaintiffs' employment is "at-will," and include choice-of-law provisions, which explain that the Agreements are governed by Utah law (for the Reeses, who continued to work in Utah) or Indiana law (for SerVaas and Rekhter, who continued to work in Indiana). *See* Employment Agreements ¶¶ 3, 5, 9.[5] The Employment Agreements also provide that they do not supersede Plaintiffs' separate "Purchase-Related Agreements" with Ford, and that disputes arising out of the "Purchase-Related Agreements" will be resolved pursuant to their own terms. *Id.* ¶ 8; *see also id.* ¶ 13.

III. Ford Terminates Plaintiffs' Employment Because, Among Other Reasons, Plaintiffs Justin And Kelly Rees Kept Their Nanny On The Company Payroll.

In June 2020, Ford fired Plaintiffs for cause after uncovering misconduct by each of them. About a month later, Ford provided a detailed, written explanation to Plaintiffs' attorney. Compl. ¶¶ 39, 51, 53; *id*., Ex. F ("Ford Termination Letter").

[5] As with the DCAs and Transaction Bonus Agreements, Plaintiffs' individual Employment Agreements are identical in relevant part, except that the Reeses' Employment Agreements reference Ride Systems and Utah, while SerVaas's and Rekhter's Agreements reference DoubleMap and Indiana.

Ford explained that Plaintiffs Justin and Kelly Rees had "committed fraud, misappropriation, and breached their fiduciary duties by, among other things, placing their family's nanny … on the Ride Systems payroll, and by falsely representing that she was working as Ride Systems' Executive Coordinator." Compl. ¶ 53; Ford Termination Letter at 1, 3–7. "[I]n actuality, she was providing [the Reeses] with personal childcare and housekeeping services." Ford Termination Letter at 2. For example, the "Executive Coordinator" kept detailed timesheets, in which she described her performance of tasks like the following: "Vacuumed Kelly Rees's car, organized laundry, took the kids for a walk, fed the kiddos!"; "Potty trained" one of the Reeses' children; and "Watched the Rees kids all day!" *Id.* at 3–4 (alterations omitted). She also requested and received gas-mileage reimbursements from Ride Systems for "driving the Rees children to various after-school activities, such as violin lessons and tumbling classes." *Id.* at 4. "Noticeably absent from [the nanny]'s comprehensive time entries [wa]s any indication that she ever performed any business-related tasks for her employer, Ride Systems." *Id.*

Ford explained that the misconduct it had uncovered extended to Plaintiffs SerVaas and Rekhter as well. For example, SerVaas had used "the Journey Companies' funds to pay his so-called 'Administrative Assistant'—a contractor in the Philippines who was, in fact, his personal assistant" and who handled tasks unrelated to company business. Ford Termination Letter at 7–8. SerVaas also had

made false and misleading representations, and engaged in other unethical business practices. Compl. ¶ 82; Ford Termination Letter at 8–9. Similarly, Rekhter had made false representations and had misrepresented himself as being Journey's Vice President even after he no longer held that position. Compl. ¶ 98; Ford Termination Letter at 9.

Plaintiffs allege that these reasons "were a sham, lacked any legitimate bases, and resulted *at minimum* from a fundamentally flawed or grossly negligent process." Compl. ¶ 38 (emphasis in original). The actual reason for their termination, Plaintiffs say, was a conspiracy spearheaded by a Ford executive to deprive them of their deferred consideration and the second tranche of their transaction bonuses. *See Id*. ¶¶ 41–45. (Plaintiffs do not allege that they were deprived of the first tranche of their transaction bonuses, which were due to be paid on March 15, 2020.) The purported goal of this executive's alleged conspiracy to terminate Plaintiffs' employment was to create the illusion of cost-cutting in the aftermath of the COVID-19 pandemic, Plaintiffs allege, and thereby earn the executive a promotion. *Id.* Accordingly, Plaintiffs claim that they were not actually fired for cause or that, if they were, the decision to fire them for cause was made in bad faith in furtherance of the alleged conspiracy. *See, e.g.*, *id*. ¶¶ 42, 50.

NATURE AND STAGE OF PROCEEDINGS

Plaintiffs filed this lawsuit in October 2020, asserting six claims.[6] The first two claims (Counts I and II) allege that Ford breached the Deferred Consideration Agreements by improperly terminating Plaintiffs' employment for cause when there was not cause to do so, and by refusing to pay Plaintiffs the unvested portions of their deferred consideration as a result of their terminations. *See* Compl. ¶¶ 115–37. The third claim (Count III) alleges that Ford breached the Stock Purchase Agreement and Transaction Bonus Plan Reallocation Agreement by terminating Plaintiffs' employment before they could satisfy the performance targets necessary for them to receive the second tranche of their potential transaction bonuses. *See id.* ¶¶ 138–44. The fourth and fifth claims (Counts IV and VI) are for breach of the implied covenant of good faith and fair dealing and unjust enrichment, based on similar allegations. *See id.* ¶¶ 145–66. Plaintiffs' final claim (Count VII) alleges that Ford violated the Delaware Wage Payment and Collection Act. *Id.* ¶¶ 167–87.

In this partial motion to dismiss, Ford asks the Court to dismiss Counts III, IV, VI, and VII. Because Ford is not seeking to dismiss the entire Complaint, Ford is filing an Answer contemporaneously with this motion.

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[6] Although the Complaint includes only six counts, Plaintiffs' numbering omits a "Count V" and includes a "Count VII." For clarity, this brief uses Plaintiffs' numbering to describe individual claims.

JURISDICTION

Plaintiffs allege that this Court has subject-matter jurisdiction over their claims pursuant to 8 *Del. C.* § 111. Compl. ¶ 16. Section 111 provides that this Court has authority to hear "[a]ny civil action to interpret, apply, enforce or determine the validity of the provisions of … [a]ny instrument, document or agreement … to which a corporation and 1 or more holders of its stock are parties, and pursuant to which any such holder or holders sell or offer to sell any of such stock." 8 *Del. C.* § 111(a)(2)(ii).

Here, Journey is a Delaware corporation, *see* Compl. ¶ 10, and was a party to the Stock Purchase Agreement, which was an agreement pursuant to which Plaintiffs—"holders of [Journey's] stock"—sold their shares in Journey to Ford. *See* Stock Purchase Agreement; 8 *Del. C.* § 111(a)(2)(ii). Journey was also a party to the Deferred Consideration Agreements and Transaction Bonus Plan Reallocation Agreement, and each of those Agreements involves compensation purportedly owed to Plaintiffs as a result of their sale of Journey's stock. Thus, all of Plaintiffs' claims involve "interpret[ing], apply[ing], enforc[ing] or determin[ing] the validity of the provisions of" the Stock Purchase Agreement and related agreements. *Id.* This Court therefore has jurisdiction under Section 111(a)(2). To the extent that any of Plaintiffs' individual claims do not fall within that statutory grant of jurisdiction,

then this Court still has supplemental jurisdiction over those claims. *See, e.g.*, *Kraft v. WisdomTree Invs., Inc.*, 145 A.3d 969, 974 (Del. Ch. 2016).[7]

STANDARD OF REVIEW

"This Court may grant a motion to dismiss under Rule 12(b)(6) for failure to state a claim if a complaint does not allege facts that, if proven, would entitle the plaintiff to relief." *In re Volcano Corp. Stockholder Litig.*, 143 A.3d 727, 737 (Del. Ch. 2016). Although the Court must accept all well-pled factual allegations as true, the Court need not "accept conclusory allegations unsupported by specific facts" or "draw unreasonable inferences in the plaintiff's favor." *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009). "[T]he plaintiff is entitled to all reasonable inferences that logically flow from the face of the complaint," but the Court need not "accept every strained interpretation of the allegations proposed by the plaintiff." *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001). And "a claim may be dismissed if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law." *Id.*

[7] If the Court has any concerns as to its assertion of subject-matter jurisdiction over Plaintiffs' claims, Ford would welcome the opportunity to submit additional briefing on that issue at an early stage of this case, before the parties and the Court expend substantial resources litigating the merits of Plaintiffs' claims.

ARGUMENT

I. The Court Should Dismiss Plaintiffs' Claims Under The Delaware Wage Payment And Collection Act (Count VII).

The Court should dismiss Plaintiffs' claims under the Delaware Wage Payment and Collection Act (Count VII) because the Act does not apply to employees in Utah and Indiana. And, even if the Act could be applied to employees in Utah and Indiana, Plaintiffs still could not recover any of the damages they seek.

A. Delaware Wage Law Does Not Apply Because Plaintiffs Worked In Utah And Indiana.

1. The Delaware Wage Payment And Collection Act Does Not Apply To Employees In Other States.

The Wage Payment and Collection Act applies only to "persons 'suffered or permitted to work by an employer under a contract of employment either *made in Delaware* or to be *performed wholly or partly therein*.'" *Klig v. Deloitte LLP*, 36 A.3d 785, 797 (Del. Ch. 2011) (emphasis in original) (quoting 19 *Del. C.* § 1101(a)(3)). A contract of employment is "performed wholly or partly" in Delaware if the employee actually "work[ed] wholly or partly within Delaware." *Id.*

Employees who do not work in Delaware cannot bring claims under the Act, even if their employer is a Delaware corporation. *See Klig*, 36 A.3d at 797. In *Klig*, for example, the Delaware Court of Chancery rejected a Deloitte partner's attempt to invoke the Wage Payment and Collection Act, where the partner "did not work wholly or partly within Delaware" and "instead worked out of Deloitte's New York

office." *Id.* This Court reached that conclusion even though the partner had worked for two "Delaware limited liability partnerships." *Id.* at 788–89.

Here, Plaintiffs do not allege that their employment contracts were made in Delaware or that they worked in Delaware. To the contrary, Plaintiffs Justin and Kelly Rees admit that they lived and worked in Utah for a Utah LLC. Compl. ¶¶ 7–8; *id.* Ex. E, J. Rees Employment Agreement at 2 ¶ 3; *id.*, K. Rees Employment Agreement at 2 ¶ 3. And Plaintiffs SerVaas and Rekhter admit that they lived and worked in Indiana for an Indiana corporation. *See* Compl. ¶¶ 5–6; *id.* Ex. E, SerVaas Employment Agreement at 2 ¶ 3; *id.*, Rekhter Employment Agreement at 2 ¶ 3.

Plaintiffs' "contract[s] of employment," 19 *Del. C.* § 1101(a)(3), confirm that their "principal work location" was "at the Company's office[s] in" Utah and Indiana, Employment Agreements at 2 ¶ 3. Each Employment Agreement also includes a choice-of-law clause, providing that the contract is governed by either Utah or Indiana law. *Id.* at 4 ¶ 9. Because the Complaint and exhibits thereto make clear that Plaintiffs were not Delaware employees, they cannot bring claims under the Delaware Wage Payment and Collection Act. *Klig*, 36 A.3d at 797; *Blood v. Columbus, US, Inc.*, 2017 WL 3432773, at *2 (Del. Super. Aug. 10, 2017) (Maryland employee could not bring claim under the Act).[8]

[8] *See also, e.g.*, *Hirtle Callaghan Holdings v. Thompson*, 2020 WL 5820735, at *7 (E.D. Pa. Sept. 30, 2020) (Arizona employee could not bring claim under the Act);

Plaintiffs attempt to cure the obvious deficiency in their claim by alleging that their Deferred Consideration Agreements, the Stock Purchase Agreement, and the Transaction Bonus Plan Reallocation Agreement are governed by Delaware law, and that "the University of Delaware was the Founders' client during the entirety of their employment with Journey, and Journey provided transportation services on the university's campus in Delaware." Compl. ¶ 174. According to Plaintiffs, this means that "the SPA as well as the Founders' DCAs, and the Transaction Bonus Plan Reallocation Agreement[,] were at least partially performed in Delaware." *Id.*

This theory fails for several reasons. *First*, Plaintiffs ignore their actual "contract[s] of employment." 19 *Del. C.* § 1101(a)(3). Each of those contracts provides that Plaintiffs would work in Utah or Indiana and that those states' laws, not Delaware's, would govern their employment. *See supra* at 10, 17. Plaintiffs do not allege, nor could they allege based on their Employment Agreements' plain terms, that their "contract[s] of employment" were made or performed in Delaware. Instead, Plaintiffs allege only that the various agreements related to their sale of stock in Journey were partially performed in Delaware. That allegation—even if it were true—is not sufficient to bring Plaintiffs within the ambit of the Delaware Wage Payment and Collection Act, which requires that work be performed in

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Nikolouzakis v. Exinda Corp., 2012 WL 3239853, at *12 (D. Del. Aug. 7, 2012) (same for Australia employees).

Delaware or pursuant to an *employment* contract made in Delaware. 19 *Del. C.* § 1101(a)(3) ("'Employee' means any person suffered or permitted to work by an employer under a *contract of employment* either made in Delaware or to be performed wholly or partly therein.") (emphasis added); *see also* 19 *Del. C.* § 1101(a)(5) (defining wages as "compensation for labor or services").

Second, none of the agreements governing Plaintiffs' sale of their stock in Journey was made or performed in Delaware, either. The fact that Journey is incorporated in Delaware or that Journey supposedly had a contract with a client in Delaware does not mean that Ford's *purchase of Journey's stock* from Plaintiffs took place in Delaware, let alone that Plaintiffs were Delaware employees as defined in Section 1101(a)(3). *See, e.g.*, *Nikolouzakis*, 2012 WL 3239853, at *12 ("[I]ncorporation in a particular state does not mean that all of the corporation's contracts are made or performed in the incorporating state.").

Third, Plaintiffs' theory would lead to the absurd result that any company that does business in Delaware subjects itself to Delaware's wage laws for all of its employees, even those who live and work in other states. That interpretation of the Act would be unworkable for interstate employers and Delaware courts, and would be unconstitutional to boot. *See infra* at 21–25.

Fourth, the choice-of-law provisions concerning Plaintiffs' sale of their stock in Journey are irrelevant to the question of whether the Delaware Wage Payment and

Collection Act applies to Plaintiffs' employment. A choice-of-law provision cannot extend the application of a Delaware statute into other states. *See FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, 131 A.3d 842, 853 (Del. Ch. 2016). In *FdG Logistics*, for example, this Court rejected the argument that a choice-of-law provision could trigger application of the Delaware Securities Act. *Id.* at 855–56. Other courts routinely reject similar arguments in the context of state wage laws, including the Delaware Wage Payment and Collection Act. *See, e.g.*, *Hirtle Callaghan Holdings*, 2020 WL 5820735, at *7 (explaining that "the fact that a contract contains a Delaware choice-of-law provision has no bearing on" whether the Wage Payment and Collection Act applies); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059, 1064 (N.D. Cal. 2014) (same under California law); *Panos v. Timco Engine Ctr., Inc.*, 677 S.E.2d 868, 874–75 (N.C. Ct. App. 2009) (same under North Carolina law). And, even if a choice-of-law provision could determine whether Delaware wage law applied to Plaintiffs' employment, Plaintiffs' "contract[s] of employment" specified that they would be governed by Utah and Indiana law, not Delaware law. *See supra* at 10, 17.

If there were any remaining doubt, Plaintiffs' espoused interpretation of the Delaware Wage Payment and Collection Act would be foreclosed by the presumption against extraterritoriality. "[T]he Delaware Supreme Court [has] noted that there is 'a presumption that a law is not intended to apply outside the territorial

jurisdiction of the State in which it is enacted.'" *FdG Logistics*, 131 A.3d at 853 (quoting *Singer v. Magnavox Co.*, 380 A.2d 969, 981 (Del. 1977), *overruled on other grounds by Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983)). "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010); *see also, e.g.*, *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918) ("Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction.").

Here, nothing in the Wage Payment and Collection Act indicates that the General Assembly intended the Act to apply to employees who live and work in other states, let alone *clearly* indicates that the Act has extraterritorial application. To the contrary, the General Assembly limited the definition of "[e]mployee[s]" to those who work under a "contract of employment" that is either made in Delaware or performed in Delaware. 19 *Del. C.* § 1101(a)(3). In adopting the Act, therefore, "the Delaware General Assembly exercised [its] traditional authority" to "regulate the employment relationship to protect workers *within the State*." *Klig*, 36 A.3d at 797–98 (emphasis added, quotation marks omitted).

For similar reasons, courts regularly reject plaintiffs' efforts to bring claims under state wage laws where, as here, the plaintiffs lived and worked in other states. *Redick v. E Mortg. Mgmt., LLC*, 2013 WL 1089710, at *11 n.9 (D. Del. Mar. 15, 2013) ("[O]ther states, including Delaware, have interpreted their respective wage

laws to extend only to regulation of employment within state borders.").[9] For example, the Seventh Circuit has held that a plaintiff could not bring a claim under Illinois wage law where the plaintiff was not "a resident of Illinois" and did not "perform any work in Illinois." *Glass v. Kemper Corp.*, 133 F.3d 999, 1000 (7th Cir. 1998). The North Carolina Court of Appeals likewise has held that North Carolina's Wage and Hour Act has no application to an employee "who worked primarily outside of the State" of North Carolina. *Panos*, 677 S.E.2d at 874–75. The same result is warranted here.

2. If The Act Applied To Employees In Other States, Then It Would Be Unconstitutional.

To the extent that the Delaware Wage Payment and Collection Act were found to apply to employees in Utah and Indiana, it would violate the federal Constitution. For this reason as well, the Court should avoid such an interpretation of the Act. *See, e.g.*, *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 286 (Del. 2016).

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[9] *See also, e.g.*, *Abdulina v. Eberl's Temp. Servs., Inc.*, 79 F. Supp. 3d 1201, 1205–07 (D. Colo. 2015); *Cotter*, 60 F. Supp. 3d at 1061–64; *Ortiz v. Goya Foods, Inc.*, 2020 WL 1650577, at *2–4 (D.N.J. Apr. 3, 2020); *Moss v. Loandepot.com, LLC*, 2020 WL 1508504, at *4–5 (E.D. Mich. Mar. 30, 2020); *Handmaker v. CertusBank, N.A.*, 2015 WL 13635662, at *6–7 (W.D. Ky. July 7, 2015); *Cruz v. Lawson Software, Inc.*, 2009 WL 10711629, at *5–6 (D. Minn. May 21, 2009); *Priyanto v. M/S Amsterdam*, 2009 WL 175739, at *6–7 (C.D. Cal. Jan. 23, 2009); *Mitchell v. Abercrombie & Fitch*, 2005 WL 1159412, at *2–4 (S.D. Ohio May 17, 2005).

"No State can legislate except with reference to its own jurisdiction[.]" *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) (quoting *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881)). Accordingly, under basic principles of federalism, "[i]t would be impossible to permit the statutes of [Delaware] to operate beyond the jurisdiction of that State[.]" *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) (quoting *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914)) (alterations omitted). This Court applied that common-sense rule in *Klig*, holding that "[u]nder our federal system of co-equal state sovereigns, Delaware can readily regulate within its borders, but cannot regulate the wages of an individual working in another state, outside of Delaware's jurisdiction." 36 A.3d at 797–98.

In addition, "the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State[.]" *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (quotation marks and alterations omitted). And the question of whether a statute impermissibly regulates commerce in other states depends not only on the "consequences of the statute itself, but also [on] how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id.*

Here, Plaintiffs' interpretation of the Wage Payment and Collection Act would apply Delaware law to employees who worked outside of Delaware—

specifically, in Utah and Indiana. This "would essentially be [a] finding that [Delaware]'s laws applied across the country," which is "plainly impermissible." *Moss*, 2020 WL 1508504, at *4; *see also Mitchell*, 2005 WL 1159412, at *4 ("Such an extension of another state['s] law creates the type of burden on interstate commerce that the Commerce Clause prohibits.").

In addition to extending Delaware wage law beyond Delaware state lines, Plaintiffs' interpretation of the Wage Payment and Collection Act would interfere "with the legitimate regulatory regimes of other States." *Healy*, 491 U.S. at 336. Both Utah and Indiana have their own statutes governing the wages that employers must pay in those states. *See, e.g.*, Utah Code Ann. § 34-28-1 *et seq.*; Ind. Code Ann. § 22-2-4-1 *et seq.* Plaintiffs' interpretation of the Wage Payment and Collection Act would displace and frustrate those laws. Worse, Plaintiffs' theory—that Delaware wage law applies here because Journey provided transportation services to the University of Delaware—would allow any other state in which Journey does business to apply its own wage laws to all of Journey's employees. That would subject employers operating in interstate commerce to an overlapping and inconsistent patchwork of different states' wage-and-hour laws. That is precisely the harm that the dormant Commerce Clause prohibits—"[t]his kind of potential regional and even national regulation of [wages] is reserved by the Commerce Clause to the Federal Government and may not be accomplished

piecemeal through the extraterritorial reach of individual state statutes." *Healy*, 491 U.S. at 340.

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For all of these reasons, the Delaware Wage Payment and Collection Act does not apply to these Plaintiffs, each of whom lived and worked in Utah or Indiana. The Court should dismiss Plaintiffs' wage claim (Count VII) on that basis.

B. Even If Plaintiffs Had Worked In Delaware, Their Claims Under The Act Still Would Fail.

Plaintiffs' wage claim fails for the additional reason that none of the monies Plaintiffs seek in this lawsuit constitute "wages." 19 *Del. C.* §§ 1103(a), (b), 1113.

Plaintiffs seek to recover two categories of purported damages. *First*, Plaintiffs seek about [redacted] in "[d]eferred [c]onsideration" for the sale of their stock in Journey. Compl. ¶¶ 30, 183. That amount is the portion of Journey's sale price that would have been paid to Plaintiffs in July 2020, March 2021, and July 2021 if they had not been terminated for cause, some of which was contingent on Journey's performance. *See* DCAs at 5 § 3; *id.* at Ex. C. *Second*, Plaintiffs seek [redacted] in forfeited, potential "[t]ransaction [b]onuses." Compl. ¶¶ 30, 184. That amount represents Plaintiffs' share of the second tranche of conditional bonuses for which Plaintiffs negotiated in exchange for the sale of their Journey stock, but

that were not due to be paid (if at all) until mid-March 2021. *See* Stock Purchase Agreement at 56 § 7.14; Ex. C, Disclosure Schedules (Timing).[10]

1. Compensation For Plaintiffs' Sale Of Their Stock In Journey Is Not "Wages."

Neither the deferred consideration nor the transaction bonuses that Plaintiffs seek constitute "wages" as defined in the Wage Payment and Collection Act.

Section 1103(a) provides that "[w]henever an employee quits, resigns, is discharged, suspended or laid off, the *wages earned* by the employee shall become due and payable by the employer on the next regularly scheduled payday[.]" 19 *Del. C.* § 1103(a) (emphasis added). The Act also provides employees with a private right of action "to recover unpaid *wages* and liquidated damages." *Id.* § 1113(a) (emphasis added). And Section 1103(b) similarly provides that "[i]f an employer, without any reasonable grounds for dispute, fails to pay an employee *wages*, as required under this chapter," the employer is also liable for liquidated damages. *Id.* § 1103(b) (emphasis added). The Delaware Supreme Court has held that this last provision, by its plain terms, limits liquidated damages to claims for unpaid "wages" and does not include claims for alleged unpaid benefits or wage supplements. *See*

[10] Because portions of the damages that Plaintiffs seek are expressly contingent on Journey meeting performance targets for fiscal year 2020—and were not due to be paid, if at all, until mid-March 2021 or later—as of the date of this motion, it remains unclear whether Plaintiffs would have received those amounts even if they had remained employed by Ride Systems and DoubleMap.

Gen. Motors Corp. v. Local 435 of Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., 546 A.2d 974, 980 (Del. 1988).

The General Assembly defined "wages" to mean "compensation for labor or services rendered by an employee, whether the amount is fixed or determined on a time, task, piece, commission or other basis of calculation." 19 *Del. C.* § 1101(a)(5). "[T]he use of the word 'wages' in the statute corresponds with the word 'pay,'" and includes "'regular direct recurrent compensation.'" *State ex rel. Lawrence v. Am. Ins. Co.*, 559 A.2d 1247, 1250 (Del. 1989); *see also Dep't of Labor v. Green Giant Co.*, 394 A.2d 753, 755–56 (Del. Super. 1978) (same). "[N]onrecurrent benefits" are not "wages." *Green Giant*, 394 A.2d at 755–56.

Deferred consideration. The deferred consideration at issue in this suit was not "wages" because it was not "compensation for labor or services." 19 *Del. C.* § 1101(a)(5). Instead, it was consideration for Plaintiffs' sale of their stock in Journey. Plaintiffs admit as much in the Complaint, as they explain that they each "agree[d] to defer receipt of his or her portion of approximately [redacted] of *Acquisition consideration* (roughly 30% *of the purchase price*)." Compl. ¶ 28 (emphases added). The Deferred Consideration Agreements also explain that they apply to "a portion of the cash consideration for [Plaintiffs'] pro rata share of the Purchase Price … otherwise payable to [Plaintiffs] with respect to their shares of the Company's stock[.]" DCAs at 1 ¶ B. Plaintiffs each agreed and consented to Ford

"withholding a portion of the Purchase Price otherwise payable to [Plaintiffs] under the Purchase Agreement," and agreed that "such withheld cash amount will be paid (if at all) to [Plaintiffs] solely in accordance with the vesting and other terms of this Agreement and the Purchase Agreement." *Id.* at 4 ¶ 2.

In other words, both the Complaint and the DCAs themselves make clear that the deferred consideration contemplated by the DCAs was compensation for Plaintiffs' sale of their stock in Journey, not "compensation for labor or services rendered by an employee," 19 *Del. C.* § 1101(a)(5). That Ford and Plaintiffs structured the transaction so that part of the purchase price was "deferred" rather than paid in cash at the outset does not transform that portion of the price into wages.

The deferred consideration is not wages for the additional reason that it was not "regular direct recurrent compensation." *Lawrence*, 559 A.2d at 1250. Instead, the Deferred Consideration Agreements were one-time arrangements to compensate Plaintiffs for their shares in Journey over a series of structured (and contingent) payments. Unlike a regular annual bonus or commission, the deferred consideration was not a recurrent part of Plaintiffs' salaries that would have continued so long as Plaintiffs kept their jobs. Accordingly, the payments are not within the purview of the Wage Payment and Collection Act. *See, e.g.*, *Gallagher v. E.I. DuPont de Nemours & Co.*, 2010 WL 1854131, at *6–7 (Del. Super. Apr. 30, 2010) ("19 *Del. C.* § 1101 does not provide relief for such additional payments that are not part of

the regular recurrent compensation for services rendered by the employee."); *Compass v. Am. Mirrex Corp.*, 72 F. Supp. 2d 462, 469 (D. Del. 1999) (one-time, "nonrecurrent enterprise appreciation bonus" did "not constitute 'wages' as that term is defined in the Wage Act").

All of this is confirmed by Plaintiffs' Employment Agreements—which, once again, Plaintiffs simply ignore. Those contracts describe the "Compensation and Benefits" that Plaintiffs were entitled to in exchange for their work, including their "Base Salary," "Standard Benefits," and "Paid Time Off." *See* Employment Agreements at 2–3 ¶ 5. They do not mention the deferred consideration from Plaintiffs' sale of their stock in Journey because those proceeds were not wages.

Transaction bonuses. For similar reasons, Plaintiffs' potential second tranche of transaction bonuses are not "wages," either. Like the deferred consideration at issue, Plaintiffs' alleged entitlement to the bonuses stems from the Stock Purchase Agreement—*i.e.*, their agreement to sell Journey to Ford in exchange for cash upfront and a series of contingent payments that they might receive later. *See* Compl. ¶¶ 29, 184. Plaintiffs admit that "Ford, Journey, and the Founders" agreed to the transaction bonuses "[p]ursuant to Section 7.14 of the SPA" (the Stock Purchase Agreement). *Id*. ¶ 29.

Nor were the transaction bonuses "'regular direct recurrent compensation'" *Lawrence*, 559 A.2d at 1250. As with the deferred consideration, the bonuses were

a one-time arrangement to be paid (potentially) in two discrete installments. The bonuses were not part of the Founders' regular pay. And they were not included in the "Compensation and Benefits" that Plaintiffs agreed to receive in exchange for their work. *See supra* at 29.

Even setting all that aside, unearned bonuses like these would not be recoverable under the Wage Payment and Collection Act even if they were part of an employee's compensation for hours worked. A plaintiff only may recover "the portion of a year-end bonus ***earned*** at the time of his discharge." *SCOA Indus., Inc. v. Bracken*, 374 A.2d 263, 263 (Del. 1977) (per curiam) (emphasis added). In other words, to constitute earned wages, a bonus must have been "earned or accrued" such that an employee's right to the bonus had already "vested" when his employment ends. *Thayer v. Tandy Corp.*, 533 A.2d 1254, 1987 WL 3745, at *1 (Del. 1987) (unpublished table decision). Here, the second tranche of the transaction bonuses was to be based on "fiscal year 2020 combined GAAP revenue of the Company." Transaction Bonus Plan Reallocation Agreement, Schedule 7.14 (Timing: Payment 2). But Plaintiffs were terminated in June 2020, long before the revenue targets for the second tranche of their transaction bonuses could have been satisfied, and thus, long before they could have "earned or accrued" any vested right to that portion of the potential transaction bonuses. Again, Plaintiffs effectively admit as much in the Complaint, since they allege only that Journey was "on track to meet revenue targets

for 2020 *before COVID-19 hit*, and despite the pandemic's efforts, still had *opportunities* to meet those targets." Compl. ¶ 35 (emphases added). Because Plaintiffs concede they had not earned the second tranche of potential transaction bonus payments at the time of their discharge, *Thayer*, 1987 WL 3745, at *1, they could not recover those payments as "wages earned," 19 *Del. C.* § 1103(a), even if the Wage Payment and Collection Act applied to them (which it does not).

2. Compensation For Plaintiffs' Sale Of Their Stock In Journey Is Also Not A "Wage Supplement," And, In Any Event, There Is No Private Right Of Action To Recover "Wage Supplements" Under Delaware Law.

To the extent that Plaintiffs argue the damages they seek are "wage supplements," Compl. ¶¶ 183–84, that argument also fails for two separate reasons.

First, the deferred consideration and transaction bonuses at issue are not "wage supplements" within the meaning of Section 1109(a). Section 1109(a) provides that employers must pay "benefits or wage supplements" "within 30 days after such payments are required to be made." 19 *Del. C.* § 1109(a). "'[B]enefits or wage supplements' means compensation for employment other than wages, including, but not limited to, reimbursement for expenses, health, welfare or retirement benefits, and vacation, separation or holiday pay[.]" *Id.* § 1109(b). Here, as explained above, the deferred consideration and transaction bonuses were compensation for Plaintiffs' sale of stock in Journey, not "compensation for

employment." And the deferred consideration and transaction bonuses do not bear any resemblance to the enumerated benefits in Section 1109(b)—*e.g.*, health benefits and holiday pay. *See, e.g.*, *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1265 (Del. 2004) ("[W]here general language follows an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class[.]") (quotation marks omitted).

Second, even if the deferred consideration and transaction bonuses did constitute a "wage supplement" within the meaning of Section 1109, Plaintiffs lack a private right of action to enforce that Section. The General Assembly provided a private cause of action for certain claims under the Wage Payment and Collection Act, but limited that cause of action to claims seeking "to recover unpaid *wages*." 19 *Del. C.* § 1113(a) (emphasis added). The General Assembly did ***not*** provide a cause of action for claims seeking to recover wage *supplements*.[11]

In *General Motors*, the Delaware Supreme Court confirmed that "wages" and "benefits or wage supplements" are mutually exclusive categories because "'benefits or wage supplements' are defined as 'compensation for employment *other than*

[11] *See Compass*, 72 F. Supp. 2d at 469 (finding that a "one-time bonus" was "more analogous to severance pay than … 'regular direct compensation[,]'" and that the complaint thus "fail[ed] to state a claim under the Wage Act").

wages.'" 546 A.2d at 980 (emphasis in original) (quoting 19 *Del. C.* § 1109(b)). Courts "must assume that the General Assembly intended to use the term wages consistently throughout chapter 11 of Title 19." *Id.* That means an employee's right to bring an action to "recover unpaid wages," 19 *Del. C.* § 1113(a), does not include the right to bring an action to recover alleged unpaid wage supplements.[12]

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For these reasons, too, the Court should dismiss Plaintiffs' claim under the Delaware Wage Payment and Collection Act.[13]

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[12] In *Green Giant*, the Superior Court held that the General Assembly implicitly expanded the reach of Section 1113 when it added Section 1109 to the Wage Payment and Collection Act, and therefore, that a plaintiff may bring an action under Section 1113 seeking unpaid wage supplements. 394 A.2d at 757–58; *see also Girardot v. Chemours Co.*, 2018 WL 1472337, at *2 (Del. Super. March 26, 2018) (relying on *Green Giant* for the same proposition). But that holding is inconsistent with the text of the Act and the Delaware Supreme Court's subsequent holding in *General Motors*.

[13] At minimum, the Court should dismiss Plaintiffs' request for liquidated damages. As the Delaware Supreme Court explained in *General Motors*, "[t]he liquidated damages provision of the Wage Payment Act applies when an employer withholds '*wages*' without any reasonable grounds for dispute." 546 A.2d at 980 (emphasis added) (quoting 19 *Del. C.* § 1103(d) (1979)). The "statutory language is clear and unequivocal" on this point. *Id.*; *see also Grove v. Breeding & Day, Inc.*, 2003 WL 22496037, at *3 (Del. Super. Nov. 3, 2003) (liquidated damages under 19 *Del. C.* § 1103 are available only for unpaid "wages"). Because the deferred consideration and transaction bonuses that Plaintiffs seek are not wages, *see supra* at 27–32, their request for liquidated damages should be rejected.

II. The Court Should Dismiss Plaintiffs' Breach-Of-Contract Claim Based On The Transaction Bonuses (Count III).

The Court also should dismiss Plaintiffs' claim alleging breach of Section 7.14 of the Stock Purchase Agreement and the Transaction Bonus Plan Reallocation Agreement (Count III).

To state a claim for breach of contract, a plaintiff must demonstrate, among other things, the breach of an obligation imposed by the contract. *See, e.g.*, *Israel Discount Bank of N.Y. v. First State Depository Co.*, 2013 WL 2326875, at *11 (Del. Ch. May 29, 2013). Here, Plaintiffs allege that Ford breached its obligations concerning the transaction bonuses "by improperly purporting to terminate each Founder for Cause when there was no Cause as defined in the DCAs to terminate any Founder." Compl. ¶ 142. According to Plaintiffs, this "prevent[ed] the Founders from satisfying the 2020 performance metrics" and earning the second set of their potential transaction-bonus payments. *Id.* ¶ 143.

This claim lacks merit under the plain terms of the relevant contracts. Plaintiffs' allegations in this Count—entitled "Breach of the Stock Purchase Agreement and Transaction Bonus Plan Reallocation Agreement"—are, in fact, premised on a breach of the for-cause removal provisions of the Deferred Consideration Agreements. Compl. ¶ 142. But the transaction bonuses were not governed by the Deferred Consideration Agreements. *See supra* at 4–9. Thus, the

for-cause removal provisions of those Agreements have no application to the transaction bonuses.

The plain terms of the Transaction Bonus Plan Reallocation Agreement and Plaintiffs' individual Transaction Bonus Agreements—the operative contracts for purposes of this claim—make clear that Plaintiffs lack any contractual entitlement to the second tranche of bonus payments regardless of why they were fired. Specifically, the Reallocation Agreement provides that certain Journey employees (including Plaintiffs) have "the *potential* to receive two cash Transaction Bonus payments if the performance targets are attained, *and the employee is still employed with the Company on each payment date*[.]" Transaction Bonus Plan Reallocation Agreement at 1 ¶ B (emphases added). The Reallocation Agreement provides that an employee's potential bonus is "forfeited" if "an employee's relationship with the Company is terminated" at any point, irrespective of the reason. *Id.* at Schedule 7.14 (Forfeited Bonuses); *see also* Transaction Bonus Agreements at 3 ¶ 4 (same).

The individual Transaction Bonus Agreements that Plaintiffs executed also specifically state that Plaintiffs had only "the potential to receive two cash Transaction Bonus payments if the performance targets are attained, *and the Employee is still employed with the Company Group on each payment date*, in accordance with the terms described herein." Transaction Bonus Agreements at 1 (emphasis added). The Agreements go on to explain that they "create no right in the

Employee to continue in the Company Group's employment for any specific period of time" and "shall not restrict the right of the Company Group to terminate the Employee." *Id.* at 4 ¶ 9(a). Plaintiffs' Employment Agreements, too, provided that their employment was "at-will," meaning that they could be terminated "at any time for any reason." Employment Agreements at 3 ¶ 6(a).

The second tranche of transaction bonuses was not even scheduled to be paid until March 15, 2021—*i.e.*, four months from now, and approximately nine months after Plaintiffs were terminated for cause. Because the relevant contracts—the Transaction Bonus Plan Reallocation Agreement, the individual Transaction Bonus Agreements, and Plaintiffs' Employment Agreements—make clear that Plaintiffs were at-will employees, and that their transaction bonuses would be "forfeited" in the event that they were terminated prior to the payment date for any reason, Plaintiffs cannot state a claim for breach of contract based on their failure to receive the second tranche of their transaction bonuses. The Court should dismiss this claim.

III. The Court Should Dismiss Plaintiffs' Duplicative Claim For Breach Of The Implied Covenant Of Good Faith And Fair Dealing (Count IV).

The Court also should dismiss Plaintiffs' claim alleging breach of the implied covenant of good faith and fair dealing (Count IV).

"[T]he covenant is a limited and extraordinary legal remedy." *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010). "Existing contract terms control," and

"the implied covenant only applies where the contract lacks specific language governing an issue and the obligation the court is asked to imply advances, and does not contradict, the purposes reflected in the express language of the contract." *Cedarview Opportunities Master Fund, LP v. Spanish Broad. Sys., Inc.*, 2018 WL 4057012, at *14 (Del. Ch. Aug. 27, 2018) (quotation marks omitted). "Consistent with its narrow purpose, the implied covenant is only rarely invoked successfully." *Kuroda v. SPJS Holdings, LLC*, 971 A.2d 872, 888 (Del. Ch. 2009). Where, as here, a plaintiff's claim "is premised on the failure of defendants to pay money due under [a] contract," a parallel claim based on an alleged breach of the implied covenant "must fail because the express terms of the contract will control." *Id.*

In other words, "merely repeating the defendant's allegedly improper acts or omissions already the subject of a breach of contract claim is insufficient to support a claim for breach of the implied covenant of good faith and fair dealing." *Haney v. Blackhawk Network Holdings, Inc.*, 2016 WL 769595, at *9 (Del. Ch. Feb. 26, 2016); *see also Edinburgh Holdings, Inc. v. Educ. Affiliates, Inc.*, 2018 WL 2727542, at *9 (Del. Ch. June 6, 2018). Similarly, "general accusations of bad faith" are insufficient to save an otherwise duplicative implied covenant of good faith and fair dealing claim. *Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at *11 (Del. Ch. Dec. 22, 2010).

Here, Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing fails for at least four separate reasons. *First*, the Deferred Consideration Agreements, the Stock Purchase Agreement, and the Transaction Bonus Plan Reallocation Agreement include "specific language governing" whether Plaintiffs are entitled to recover the damages they seek in this case. *Cedarview*, 2018 WL 4057012, at *14; *see also Kuroda*, 971 A.2d at 888. Specifically, the Deferred Consideration Agreements explain the precise conditions necessary for Plaintiffs to receive deferred consideration; they define "cause"; and they specify the consequences of Plaintiffs' termination for cause on Plaintiffs' receipt of the deferred consideration. DCAs at 2, 5–7, §§ 3–4, Ex. C. The Stock Purchase Agreement, Transaction Bonus Plan Reallocation Agreement, and individual Transaction Bonus Agreements likewise include detailed provisions setting forth the terms of the transaction bonuses, including provisions that state the bonuses do *not* imply any obligations that would "restrict the right of the Company Group to terminate" Plaintiffs' employment. Transaction Bonus Agreements at 4 ¶ 9(a); *see also* Stock Purchase Agreement at 59 § 7.14; Transaction Bonus Plan Reallocation Agreement ¶ B. These "[e]xisting contract terms control," and Plaintiffs cannot bring an implied covenant of good faith and fair dealing claim in the face of "specific language governing" the deferred consideration and transaction bonuses at issue in this lawsuit. *Cedarview*, 2018 WL 4057012, at *14.

Second, and relatedly, Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing is "improperly duplicative" of their breach-of-contract claims. *Edinburgh Holdings*, 2018 WL 2727542, at *9. As with Plaintiffs' breach-of-contract claims in Counts I, II, and III, Plaintiffs allege in Count VI that Ford improperly terminated them for cause, thereby depriving them of the remaining portions of their deferred consideration and transaction bonuses. *Compare* Compl. ¶¶ 122–25, 133, 135 (breach-of-contract claims alleging that Ford "improperly" and "wrongfully" classified Plaintiffs' terminations as for cause), *with* Compl. ¶¶ 154–60 (implied-covenant claim alleging that Ford terminated Plaintiffs for cause "in bad faith"). Reciting the allegations that form the basis of Plaintiffs' breach-of-contract claims and adding the words "bad faith" is insufficient to state an independent claim for breach of the implied covenant of good faith and fair dealing. *Haney*, 2016 WL 769595, at *9; *Narrowstep*, 2010 WL 5422405, at *11.

Third, Plaintiffs' implied covenant claim seeks to undo Ford's "clear exercise of an express contractual right" to withhold the remaining portions of their deferred consideration and transaction bonuses. *Nemec*, 991 A.2d at 1127. Remarkably, Plaintiffs allege that if "the Court were to conclude that any of the purported bases for the Cause termination of the Founders were *permitted under the terms of* the DCAs, SPA, and Transaction Bonus Plan Reallocation Agreement," then the Court should nonetheless override the parties' agreed-upon contractual terms and hold

Ford liable for breach of the implied covenant of good faith and fair dealing. Compl. ¶ 154 (emphasis added). But Plaintiffs cannot avoid the plain terms of their DCAs, the Stock Purchase Agreement, the Transaction Bonus Plan Reallocation Agreement, and their individual Transaction Bonus Agreements by adding new, contradictory terms under an implied covenant theory. *See, e.g.*, *Nemec*, 991 A.2d at 1127 (courts cannot imply terms that contradict the express terms agreed upon by the parties).

The Transaction Bonus Plan Reallocation Agreement and Plaintiffs' individual Transaction Bonus Agreements each state that Plaintiffs will forfeit their potential bonuses in the event that their employment ends before the scheduled payment date. *See supra* at 8–9. The individual Transaction Bonus Agreements also state that they "shall create no right in the Employee to continue in the Company Group's employment for any specific period of time," and do not "restrict the right of the Company Group to terminate the Employee." Transaction Bonus Agreements at 4 ¶ 9. Plaintiffs' Employment Agreements likewise provide that Plaintiffs' employment is at-will, "is not guaranteed for any specified time," and that Plaintiffs' employment can be terminated "for any reason, with or without cause, and with or without advance notice." Employment Agreements at 3 ¶ 6(a). Plaintiffs seek to override these express terms by implying a good-faith restriction on "the right of the Company Group to terminate" them, Transaction Bonus Agreements at 4 ¶ 9, before the payment date of the potential transaction bonuses, *see* Compl. ¶ 156. But

Plaintiffs cannot add implied terms that would nullify the express terms that the parties agreed to five times, in five separate contracts—the Deferred Consideration Agreements, the Stock Purchase Agreement, the Transaction Bonus Plan Reallocation Agreement, the individual Transaction Bonus Agreements, and Plaintiffs' Employment Agreements. *See, e.g.*, *Nemec*, 991 A.2d at 1127; *Cedarview*, 2018 WL 4057012, at *14 (same).

Fourth, Plaintiffs' claim does not fall within one of the four narrow exceptions to the at-will employment doctrine, which "authorizes the discharge of an employee at any time without cause." *Lord v. Souder*, 748 A.2d 393, 400–01 (Del. 2000). Where, as here, an at-will employee claims that her termination violated the implied covenant of good faith and fair dealing, the employee must show either that: (1) "the termination violated public policy"; (2) "the employer misrepresented an important fact and the employee relied thereon either to accept a new position or remain in a present one"; (3) "the employer used its superior bargaining power to deprive an employee of clearly identifiable compensation related to the employee's past service"; or (4) "the employer falsified or manipulated employment records to create fictitious grounds for termination." *Id.* at 400 (quotation marks omitted). These categories are "exclusive." *Id.* at 401.

Here, however, Plaintiffs do not allege that any of these exceptions to at-will employment applies. Instead, Plaintiffs allege only in a conclusory fashion that the

decision to terminate them for cause "was made in bad faith" as part of a "larger scheme" to cut costs. Compl. ¶ 156–59. But an employer's alleged "personal motivations" and "ill will" towards an employee are insufficient to state a claim for breach of the implied covenant of good faith and fair dealing under Delaware law. *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 444 (Del. 1996). Nor can an employee state a claim for breach of the implied covenant of good faith by alleging that an employer gave "a false reason for dismissal," where the employee does not allege that the employer actually "falsified or manipulated employment records to create fictitious grounds for termination." *Reed v. Agilent Techs., Inc.*, 174 F. Supp. 2d 176, 191 (D. Del. 2001) (citing *Pressman*, 679 A.2d at 442–44).

Accordingly, the Court should dismiss Plaintiffs' claim alleging breach of the implied covenant of good faith and fair dealing (Count IV).

IV. The Court Should Dismiss Plaintiffs' Duplicative Claim For Unjust Enrichment (Count VI).

The Court also should dismiss Plaintiffs' duplicative claim for unjust enrichment (Count VI).

The doctrine of unjust enrichment was developed as a theory of recovery to "remedy the absence of a formal contract." *ID Biomedical Corp. v. TM Techs., Inc.*, 1995 WL 130743, at *15 (Del. Ch. Mar. 16, 1995). To establish a claim for unjust enrichment, Plaintiffs must show, among other things, "the absence of a remedy

provided by law." *Nemec*, 991 A.2d at 1130. For this reason, courts routinely dismiss unjust-enrichment claims when the plaintiffs cannot show that they lack any other "remedy to recover the benefit of which they were wrongfully deprived." *Id.* Where, as here, a contract comprehensively governs the parties' relationship, the contract alone "must provide the measure of the plaintiff's rights." *BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp*., 2009 WL 264088, at *7 (Del. Ch. Feb. 3, 2009); *see also Kuroda*, 971 A.2d at 891; *Bakerman v. Sidney Frank Importing Co*., 2006 WL 3927242, at *18 (Del. Ch. Oct. 10, 2006). Stated differently, "a party cannot recover under a theory of unjust enrichment if a contract governs the relationship between the contesting parties that gives rise to the unjust enrichment claim." *Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 58 (Del. Ch. 2012).

Here, the relationship between Ford and Plaintiffs that gives rise to Plaintiffs' unjust-enrichment claim is governed not by one or two, but by *four* separate contracts—namely, the Stock Purchase Agreement that sets forth the terms of Plaintiffs' sale of Journey to Ford; the Deferred Consideration Agreements that govern a portion of Plaintiffs' deferred consideration for that sale; the Transaction Bonus Plan Reallocation Agreement that partially reallocated the conditional bonuses that Ford agreed to pay Plaintiffs as part of the Stock Purchase Agreement;

and the individual Transaction Bonus Agreements that specify the terms of the potential transaction bonuses.

Plaintiffs expressly rely on three of these four contracts (all but their individual Transaction Bonus Agreements) as the basis for their claims in this case—including their unjust-enrichment claim. *See* Compl. ¶¶ 117–120, 129–132, 139, 141, 147–151, 153, 169–173. Specifically, Plaintiffs allege that Ford was supposedly unjustly enriched by "terminating the Founders in bad faith and improperly classifying the Founders' terminations as for Cause when, in fact, no Cause existed, and then relying on that pretext to refuse to pay the Founders the Deferred Consideration it owes them *under the DCAs* and the Transaction Bonuses it owes them *under Schedule 7.14 of the SPA and the Transaction Bonus Plan Reallocation Agreement*." Compl. ¶ 162 (emphases added).

The Complaint also makes clear that any factual issues underlying Plaintiffs' unjust-enrichment claim are, in fact, covered by these contracts. Specifically, Plaintiffs allege that the question of whether there was "Cause" to terminate their employment turns on the definition of that term in the Deferred Consideration Agreements. *See* Compl. ¶ 121 ("Defendants breached the DCAs by improperly purporting to terminate each Founder for Cause when there was no Cause *as defined in the DCAs* to terminate any Founder.") (emphasis added); *see also id*. ¶¶ 50, 121, 142, 172. Because Plaintiffs' unjust-enrichment claim is "premised on an 'express,

enforceable contract that controls the parties' relationship,'" damages are "an available remedy at law," so Plaintiffs' duplicative unjust-enrichment claim should be dismissed. *Veloric v. J.G. Wentworth, Inc*., 2014 WL 4639217, at *19 (Del. Ch. Sept. 18, 2014) (quoting *Kuroda*, 971 A.2d at 891).

To avoid dismissal of this claim, Plaintiffs would need to have alleged some *factual basis* for their unjust-enrichment claim "independent of the allegations relating to [their] breach of contract claim[s]." *Doberstein v. G-P Indus., Inc*., 2015 WL 6606484, at *6 (Del. Ch. Oct. 30, 2015). They have not done so. Instead, Plaintiffs seek damages under a breach-of-contract theory premised on the exact same factual allegations as those asserted in support of their unjust-enrichment claim. In fact, the unjust-enrichment claim repeats the allegations that form the basis of Plaintiffs' breach-of-contract claims practically verbatim. For example, in Counts I and II (breach-of-contract claims), Plaintiffs assert that Ford is liable because the "time-based portion of the Deferred Consideration would have vested but for Defendants improperly classifying the Founders' terminations as for Cause when, in fact, no Cause existed." Compl. ¶¶ 122, 133. In Count VI (the unjust-enrichment claim), Plaintiffs similarly allege that "Ford has enriched itself … by terminating the Founders in bad faith and improperly classifying the Founders' terminations as for Cause when, in fact, no Cause existed." *Id*. ¶ 162.

Plaintiffs' cut-and-paste allegations do not satisfy the pleading requirements for an unjust-enrichment claim. The Court should dismiss this claim as well.

CONCLUSION

For all the foregoing reasons, the Court should dismiss Counts III, IV, VI, and VII of Plaintiffs' Complaint for failure to state a claim.

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DATED: December 16, 2020