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Supreme Court of Texas.
MONSANTO COMPANY, Petitioner,
v.
Kamel BOUSTANY, et al., Respondents.
No. 00-0037.

January 17, 2001.

Appearances:
David E. Keltner, Jose Henry Brantley & Keltner, Fort Worth, TX,
for petitioner.
Russell W. Heald Hilliard & Heald, Beaumont, TX, for respondents.

Before:
Chief Justice Thomas R. Phillips, Nathan L. Hecht, Harriet
O'Neill, Priscilla Richman Owen, James A. Baker, Craig Enoch, Deborah
Hankinson, Justices.

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JUDGE: Thank you. Please be seated.
JUDGE: The Court is ready to hear argument from petitioner in
Monsanto v. Boustany.
SPEAKER: May it please the Court. Mr. David Keltner will present
argument for the petitioner. The petitioner has reserved five minutes
for rebuttal.

ORAL ARGUMENT OF DAVID KELTNER ON BEHALF OF THE PETITIONER

MR. KELTNER: Thank you. May it please the Court. There are two reasons in this case but I wanted to begin with contract instruction. We had passed out to you an exhibit we're gonna use for oral argument purposes or run through the -- the option plan and the certificate. All of you know that a contract instruction, the most important thing to do is determine the intent of the party. And in this case, that is an easy situation because the party specified the intent in the option plan. And on page 2 of the handout, we see what it is. It is the plan that's designed to [inaudible] the claims of the company and the company by the way, is defined in -- later in the plan as Monsanto, it's subsidiary or associated companies, first known with exceptional ability into motivate set personnel to added incentive to make a maximum contribution to whom, to the company, Monsanto.

JUDGE: But the purpose clause works both ways, doesn't it? I mean,

opposing counsels argued that it is also a reward which incentive doesn't preclude. And so, I mean, where does that end up?

MR. KELTNER: Well, your Honor, I think that's -- that's a very important argument. And I think you have to look and put the plan [inaudible] does in definition.

JUDGE: Well, yeah, okay. So, more specifically than incentive.

MR. KELTNER: Yes. But I -- I --

JUDGE: [inaudible] too. [inaudible] attracted to a place. It's gonna leave me in ten -- ten years to hope the market goes up [inaudible] until they decide to sell [inaudible].

MR. KELTNER: Absolutely, your Honor. And if that was all that was in the purpose clause, we might have a different situation.

JUDGE: Let's call on another clause.

MR. KELTNER: Yeah. [laughs]. But, I think what is important is, to meet the objectives of the company. The important thing here is that -- that when you look at this, all parties agreed that once the options were issued, that they -- that they lasted for ten years and could be exercised any time during that ten-year period with the exception of termination of employment. And that's the [inaudible] in this case candidly from the contract instruction. What employment? In -- in what termination?

Now, the plaintiff says, it is termination with Fisher, we say there's a Monsanto related company. And let's look at what the plan says, and I'll ask you to turn, if you will, to page 3 of the handout, because I think the definitions give you an example. The plaintiff set up on lease of the -- by the way, the option certificate that is -- that is, page 5 of our handout. But in the very first paragraph of the option certificate itself, the option says, look through the plan for the definition of termination of employment. And here is what the plan says, it means discontinuance of an employment of a participant for any reason. Participant is also a defined term. Participant means, an eligible participant to whom a stock option has been granted. Eligible participant finally is the last defined term and it means, any employee of the company of subsidiary or the associated company. And remember, company is defined in the plan as Monsanto. So, I think it is clear that what Monsanto was attempting to do here was to re -- to continue to let options stay with an employee during the time they became a participant and will remain an employee of a Monsanto-related company.

JUDGE: Mr. Keltner, let me sidetrack you for just a second, and then have you come back in to this. I wanna understand the context of your -- the argument that you're currently making. If we were to decide in your favor, on the issues you're discussing right now, do we -- do we even need to get into all the Delaware Law stuff and conflict of laws and all that, or if -- if we decide this, does that -- those others should go away?

MR. KELTNER: Your Honor, I hope you will get into them but the answer to your question is, they don't go away, because they would come on board. They -- they -- Let me out it to you this way --

JUDGE: Not that they [inaudible].

MR. KELTNER: They -- I think the Court should decide that the fact, this case really gives the Court a perfect opportunity to adopt a new statute of limitations conflict rule --

JUDGE: But you're -- but the contract instruction issue is dispositive.

MR. KELTNER: The contract instruction --

JUDGE: Okay, you're not saying it's not.

MR. KELTNER: No.

JUDGE: Oh, okay.

MR. KELTNER: It is dispositive, your Honor. It certainly is. There's no doubt about that. But again I think, it -- it does give the Court a perfect way to enact the changing the law and decide on the issue of contract instruction, and we think we win that issue and [inaudible] --

JUDGE: So, we -- we say as a matter of law, the context should be interpreted the way you're requesting the Court to interpret it, case closed.

MR. KELTNER: You would not have to reach the statute of limitations provision, that is correct.

JUDGE: Alright. Let's -- let's look back where you were looking at termination of employment. It -- it strikes me that a -- a significant term that -- that hasn't been focused on as much as the definition of transfer. And I'm gonna ask this of your opposing counsel as well, but transfer means a change of employment of a participant within the group consisting of the company and its subs. And doesn't that imply that in transfer is within the company and therefore termination of employment is without the company. What is your answer to that? I'm not trying to trick you, I mean --

MR. KELTNER: [laughs] Well, you're doing a good job though.

JUDGE: Well, I mean, It -- it strikes me that right -- that defining transfer as something within the group and saying that termination means discontinuance of employment of a participant for any reason other than transfer implies that termination of employment means outside the group. And once Fisher was sold, it was outside the group.

MR. KELTNER: Yes, your Honor. That's very consistent with what the purpose of the plan was, to benefit the company, to benefit Monsanto, with all due respect, it is very consistent --

JUDGE: But, I mean, you don't even need to get into purpose. Under the plain meaning of transfer and its incorporation and determination of employment., doesn't that lead to the conclusion that you're arguing?

MR. KELTNER: It certainly does. [inaudible] --

JUDGE: And I'm -- I'm really giving your opposing counsel some time to think about that.

MR. KELTNER: Okay.

JUDGE: I just wanna know, you're -- you're -- I know that you don't make this argument, but if this had been a change of control in Monsanto, does that mean that that stock should be exercised for full ten years even if there's a termination and a subsequent termination of employment? What's your position on that?

MR. KELTNER: If I understand your question, if this was a change of control of Monsanto or would occur and that [inaudible] completely different provision on change of control of Monsanto, paragraph 7, of -- of this agreement which deals solely with the change of the control of Monsanto and not of the subsidiary.

JUDGE: I -- I understand. I'm just asking what's your position on that? Does -- does they -- the termination of employment still true to that ten-year provision on that?

MR. KELTNER: Absolutely, your Honor. The -- and -- and the reason is, under the terms of 7, it wouldn't apply. Seven only comes into applying for Monsanto goes away or [inaudible].

JUDGE: I'm just asking hypothetically.

MR. KELTNER: Yes.

JUDGE: Let's suppose Monsanto was -- merged into another company. There was a change of control of Monsanto, the company.

MR. KELTNER: Then -- then --

JUDGE: Within the meaning of the plan? And employees were subsequently who had been Monsanto employees were then terminated by the acquiring company. Would their stock options continue or not? For ten years or not?

MR. KELTNER: No. they would have a ten-year period under paragraph 7. They would.

And we -- the point that I think we need to make to you is the only way to construe this plan and give meaning to every provision, is to look at the purpose. To make sure that we understand that is, the purpose of the plan is directly incorporated into that certificate. In paragraph 10, which is the page 5 of our handout to you. You'll see the highlighted parts of -- of paragraph 10 and it says, that each and every provision of the option should be administered, construed, and interpreted so that the option shall in all respects, conform to the provisions of the plan. That's important in this case because the plaintiff's stated a position that you can only read the option certificate alone. And the option certificate says that's wrong. You must interpret it in -- in the connection with the entire plan. Equally important in this case, in Employment Compensation Committee, we call the ECC, was authorized and in fact directed under the plan to interpret it in all situations. And it was asked to that in this case.

JUDGE: Mr. -- Mr. Keltner --

MR. KELTNER: Yes?

JUDGE: Is option A, a defined term in the where -- I couldn't find it and it seems to be used in particular in the option term provision of the option agreement. It might be of some significance.

MR. KELTNER: Your Honor, it is not a defined term. We raised this absolutely correctly. I believe it means the only thing that he can mean is participant, because a participant by definition is an employee of Monsanto or related company who receives an option. So, I think those two change -- those two terms were interchangeable.

JUDGE: Then what about their argument that there's a difference between an eligible participant and a participant because once you become a participant, you actually have the plan and you're an optionee. And since you have ten years, rather than to be caught up in determination.

MR. KELTNER: Your Honor, I think it fails for two reasons. First off, there is no provision in the contract that elevates anyone to some super additional status. You would have to still --

JUDGE: Well, but [inaudible] they are eligible because they don't have an option and then you become a participant because you [inaudible] -- so, you're in different class.

MR. KELTNER: There's no doubt about it but the way of the participant --

JUDGE: Then let's go within the participant class that would aid their argument. Or does it -- does it?

MR. KELTNER: I don't think it does. Because still, to be a participant which is defined as someone who has an option, you have to be one more thing. You have to be an employee of the Monsanto-related company. And that makes sense in -- in -- in the governance of the plan. You would want to define that that way, to make sure that the plan applied to everybody. Your Honor, I think it's important to note as well, all the cases, they have been cited to you on interpretation of these plans under Delaware Law, that their case that the plaintiff cite, the Stemerman case that both of them cite, virtually have the same provisions. And they -- they limit participation in plan to people

who were still employees with the company. And that makes sense because that's the only way these people can participate in the -- in helping Monsanto do the things that he needs to do. In --

JUDGE: The respondent in this brief says, I'm at page 19 at the option certificate, it's best advised that termination must be by both of the company and its subsidiaries.

MR. KELTNER: That the option certificate -- I disagree with that your Honor. And in fact, in reading the -- both the option certificate and the plans, which I really think they're requiring to, I don't believe it says that. I think the issue is whether you are an employee or -- or terminated from a Monsanto related company. Now, I think that is the only thing again that makes sense. And under the Delaware Law, and that's the -- the DuPont case v. Shell Oil, harmonizes all the provisions. This next issue as you know that we had is a choice of law issue on statute of limitations.

JUDGE: Well, if we could decide this on the contract. Haven't you noticed in the past, our Court had a reluctance to talk about nondispositive issues.

MR. KELTNER: Yes, your Honor, I have.

JUDGE: And maybe you should've started limitations first.

MR. KELTNER: [laugh] Well, your Honor. I -- I want --

JUDGE: While -- while we maintain what's been seen in the 1800s, a consistent statement that limitation did procedurally work on and apply our law and get into an extracurricular activity of revealing all of those factors that the restatement didn't do when it's pretty simple. You just say it's procedural, and three years, four years or whatever, was to other than mere desire --

MR. KELTNER: [laugh]

JUDGE: -- for Monsanto to instill the desire to change this policy.

MR. KELTNER: It is good public policy for the state. For a whole host of reasons. There has not been a commentator in the last ten years who has advocated the retention of the lex for eye rule that we have. Three quarters of the state in this union have abrogated lex for eye in their common law, another ten states on top of that if -- if they had it by statute and the like. Texas --

JUDGE: [inaudible] --

JUDGE: Well, let's --

JUDGE: -- on limitations or total?

MR. KELTNER: On statute and limitations.

JUDGE: Let me stop you -- go ahead.

JUDGE: Go ahead. But they have an adopted rule 142.

MR. KELTNER: Not all of them have. No, your Honor. Three states specifically have done that. You'll notice that the plaintiff's point out that this is not exactly a big band wagon. I disagree. What happened is, when [inaudible] looked at this in '88, and this was after a period of about five years of looking with [inaudible], they followed the trend that they saw from other states. By 1997, we know from the [inaudible] article that there were 17 states, until they had abandoned lex for eye. There were three who did it specifically adoptive to restatement. And let me tell you, a lot of them have just don't have great interest analysis of who has the most significant interest with -- with the -- with the proceeding and with the parties as well. We thought that the restatement was a good place for this Court to go because it remains consistent with what you've done in the DeSantis case in 1990 and back in Gutierrez in -- in 1979.

JUDGE: But with all your due respect, the law professor doesn't

want to rule, Judge Baker [inaudible]

MR. KELTNER: And some lawyers don't need to, your Honor. And if -- if -- and that's true. And I would say, I would have to admit that the rule is easy to apply. But this Court in Gutierrez looked at the same -- exact same rule in -- in Section 6 of the restatement which is the interest analysis, your Honor. And what they said is, it may be simple but it doesn't lead good results and is not rational.

JUDGE: If we were writing on a clean slate it might be one thing, but what deference should we give to the legislative decision in '97 to enact the borrowing statute that only applies to personal injury and wrongful death occurred.

MR. KELTNER: Your Honor, I don't think the legislature entered this arena in anything other than the -- the [inaudible] performed litigation. Remember, that legislature passed with the adoption formed on convenience, the change of the venue laws in a [inaudible] performed statute. They looked at what you did and they made -- or what the court did in applying lex for eye. The nice thing about this is, Section 6 of the -- of the restatement, which is really the action part of 142 would allow you in an interest analysis to first apply the first provision A and 6 is, you apply the statutory law of the state. So, we -- in -- it does fails perfectly with that. Additionally remember, choice of law issues have traditionally been reserved for the courts.

JUDGE: I -- I thought you were advocating the -- in your brief, you were advocating that state once the court by common law to adopt Section 142 in the restatement. The first thing to do the legislature is then to abolish the [inaudible] statute because we wouldn't meet.

MR. KELTNER: No. Your Honor, let me explain what we meant by that. There is no doubt that the -- one of the comments of 142 says that that's one of the things you should do. The reason that it is not being inconsistent, if you read the comment as the plaintiff suggest the reason that you should reject the [inaudible] statute is it's no longer needed.

JUDGE: Well, I thought you said, first things you look at even under restatement is the form of states law.

MR. KELTNER: Yes. And maybe I was answering the question you weren't asking about. I apologize. What I meant to say is, 6 is consistent and it did not step on the legislature's pose in all of these circumstance because in personal injury cases and wrongful death cases, it would allow the application of -- of that law and the rest would be taken care of in the interest analysis.

JUDGE: Any other questions? Thank you, Counsel.

SPEAKER: May it please the Court. Mr. Russell Heald will present argument for the respondent.

ORAL ARGUMENT OF RUSSELL HEALD ON BEHALF OF THE RESPONDENT

MR. HEALD: May it please the Court. If -- if I could, I'd like to go ahead and start with the contract issues first. And I wanna -- your Honor, I wanna answer the issue about the transfer, but I think the first thing that we have to deal is, if -- if you all will look on in our brief under tab A, is a plan, and under tab B is the option certificate. And -- and the important highlight I wanted to point out about the plan under tab A is on page 9 Section 4(b), is we're talking about the exercising stock options and that's a big distinction that I

think we have to make here. Who -- who is an eligible participant determines who's gonna get a grant of stock options. But, it is not until you become an optionee that we start looking at who could exercise the option. And under 4(b), your Honors, it says, that the -- the committee, they -- well, first of all, it says that my clients have a ten-year option term. And it says the committee can make it a shorter period. But that period has to be asked in the grant and also the triggering mechanism for that shorter period also has to be as specified in the option. And if I could, your Honors, if I could approach my [inaudible] over here.

JUDGE: You may.

MR. HEALD: So -- so there --

JUDGE: Read it.

JUDGE: If you're gonna --

JUDGE: Read it loudly and clearly, because I can't even see it from here.

JUDGE: I -- I can't either.

MR. HEALD: And -- and I apologize. If -- if you will look at tab B that has the options certificate. And what I'd like to show is just that the points that this Court needs to look and determine. We're talking about the exercise of options. The first thing that you got to remember is this option agreement is pertaining to both the Monsanto employees and the Fisher employees. It's the all option use. And once those employees become an optionee, then, this agreement --

JUDGE: Where does it -- where does it say that?

MR. HEALD: Where does it say what? That --

JUDGE: Your former statement, they become optionees. Where does it say that in the --

MR. HEALD: Oh -- on the front, if you'll look on the front. If they will have, for example, in this case, they had Boustany's [inaudible] and then it says, the optionee is just [inaudible] as the optionee. Do you see that from -- from the --

JUDGE: Uh huh. So --

MR. HEALD: And that's the only place that it does [inaudible] the optionees.

JUDGE: So, then the reference in the stock option is not to a defined term but in fact to the actual person who owns the option?

MR. HEALD: That's correct, your Honor.

JUDGE: So, we see optionee in here we're talking about in this instance, Mr. Boustany.

MR. HEALD: That's correct. He's the optionee and his ability to exercise his option term is governed right here on the backside of the option certificate under the terms conditions. And when we look at this, the -- the first thing is that there's no distinction between optionees. It doesn't matter how highly required your option, you're an optionee. The second thing is, that on his terms and conditions, there is no change of control of the subsidiary provision. I -- I think the parties agree there's nothing here and so the only thing --

JUDGE: What do we do with these words consent to -- subject to the provisions of the plan. And surely we have to look at the plan. That's on the plan of the certificate.

MR. HEALD: Certainly, we could. And as to the exercising of the options, we had to look to page 9 of the plan, because that specifically tells us about the exercising the option. We have to keep in mind, your Honor, that this plan governs two different employment plans. It -- it -- it's a bonus plan and a stock option claims, but the specifics of this particular claim that we're here about is what's on

page 9. And that tells you about the exercise of options.

JUDGE: Okay, but I -- I'm -- I'm still not making the connection with the relevance of the argument you're making to the issue about the termination of these stock options.

MR. HEALD: And -- and I'll get to that.

JUDGE: Okay.

MR. HEALD: Because, right here is the issue, your Honor, because there's no change of control of the subsidiary, Monsanto has to say that this provision 3(a) -- they have to try to rewrite it into becoming a change of control over the subsidiary.

JUDGE: But -- but both -- but while it doesn't talk about change of control of the subsidiary, those -- the plan on page 9 and the stock option in -- in paragraph three, talk about termination of the employment in the plan -- in the stock option with respect to the option A, which is requiring. So, there is a triggering event that is mentioned and it's determination of employment and the stock option incorporates by reference the definition in the plan for termination of employment. So, why isn't that the key provision for us to be looking at to interpret both paragraph or part 3 of the plan and paragraph 3 of the option.

MR. HEALD: I -- I agree that it is. And let's -- let's see what the termination of employment is required to. It says that if -- you know, this is under 3(a) now, if employment shall have been terminated by the company and its subsidiaries. So, if it requires my client's case, that there be a termination, a termination by Fisher which never occurred.

JUDGE: Is -- is Fisher Monsanto's subsidiary today?

MR. HEALD: No. it is not.

JUDGE: Well, on subsidiaries --

JUDGE: So, when did Fisher stopped from being a subsidiary at Monsanto?

MR. HEALD: When -- when it was sold to Emerson.

JUDGE: And that means as of that day, obviously is not it's subsidiary and to this agreement.

MR. HEALD: And I agree with that. That's not what the plaintiff says. It says, if employment shall have been terminated, it requires a termination by Fisher, of my [inaudible]. And -- and to understand this, we gotta go back to the purposes of the plan. This is --

JUDGE: Where -- where can it also mean the discontinuation of employment with a subsidiary of Monsanto. And he is no longer employed by subsidiary of Monsanto.

MR. HEALD: No.

JUDGE: Because Fisher is not a Monsanto employee. I mean, if he -- if he walked through the depth of the three definitions that are on Mr. Keltner's oral exhibit or oral argument exhibit.

JUDGE: Well, actually, you -- you can discern what their meaning here if you read A, B, C. And A, B, C, they contemplate different ways in which somebody is terminated: B, because of disability; C, because of death, and A, because they no longer work at the company.

MR. HEALD: And that's exactly why it makes like Judge Wellford lower court's opinion. We have to be mindful to give words their plain meaning. And termination, when you think of termination, it -- for example, if you see someone on the street and you say, and they come up to you and say, "Hey, I just got terminated from XYZ Company." You don't think the stock of XYZ Company just got solved. You think you got fired.

JUDGE: But -- but Mr. Heald, I don't understand why we'd be

looking at the common definition of termination when in fact the defined term in the plan and the option. And it means discontinuance of employment of a participant and then you have to move elsewhere for definition of participant and in term eligible participant. Why are we looking anywhere but the definitions in the plan and the option.

MR. HEALD: But -- but your Honor, the -- the definitions of participant and eligible participant were brought forward under the -- under the definition section. Termination of employment is, but not participants.

JUDGE: Well, but you can't. You can't read the definition of termination of employment in the plan without also reading the definitions that are incorporated into that definition, because participant is a capital P in the defining term. I mean, so -- so you would have it -- what then does it -- what then does participant mean in termination of employment, the definition if we don't carry over the definition of participant for purposes of interpreting the option?

MR. HEALD: Well, for discontinuance of employment, what -- what participant is gonna still subsumed under the termination of employment --

JUDGE: Why?

MR. HEALD: But eligible participant is not, your Honor.

JUDGE: But eligible -- but in order to understand what participant means, it uses the defined term eligible participant with capitals, so in turn that you have to then read that definition to know what participant means, so that you can know what termination of employment meant.

MR. HEALD: No, your Honor. It -- if I could just -- If I could look at it this way, your Honor.

JUDGE: Okay.

MR. HEALD: If -- if we're just like Justice Abbott you said, you've got to look at this Section 3 as a whole, and it -- it talks about actual termination of employment. It would work in the termination of employment of the optionees. So, we have to look at the optionees' employment status with its employer. And that's exactly what it does in 3(c). It talks about death. In 3(b), it talks about retirement or disability and in 3(a), there it is discussing whether a person is fired or quit because -- because it requires termination by the subsidiary.

JUDGE: Then why -- why doesn't Monsanto care about that? Why did they care that the subsidiary that it no longer owns, if it terminates the employee, the options should be shorter. Why -- why did they care about it?

MR. HEALD: And that's a great question. Because the purpose of this plan is one plan to motivate both Monsanto and subsidiary employees, and subsidiary employees can't be motivated to work hard because it's a catch 22. The harder you work, the more [inaudible] you can make Fisher for sale, the more likely you're to lose your stock options. There's no exhibit. And that's exactly why true to the purposes of the plan, Monsanto made it here so that the termination of the employment would have to be by Fisher. That's why this is simply limited to -- on termination of employment of the optionee. Not the participant but of the optionee.

JUDGE: Well, let's look at this. We gotta look at the whole thing. You don't [inaudible] you look at the [inaudible].

MR. HEALD: Yes ma'am.

JUDGE: We're talking about disability. Under your reading, disability, it's hard for you to read at this time, shall have been

terminated by total and permanent disability as determined by the commission. Excuse me --

MR. HEALD: -- of the committee.

JUDGE: The committee. In the [inaudible] under reasonable exercise of its judgment. Now, the committee, is not gonna be the committee of its new employer, is it? The committee means the Monsanto committee.

MR. HEALD: The -- the committee as to what permanent disability is?

JUDGE: Because you're arguing that let's suppose that your client now employed by Fisher, five years down the line and if he says, I'm totally and permanently disabled and that plays into this B provision, how long does stock options act last. And that total and permanent disability is to be determined by corporate -- the committee. And does that mean the committee of who? Plainly it means to me that the committee of Monsanto not at Fisher [inaudible] --

MR. HEALD: And I -- I -- agree with that. I agree with that.

JUDGE: So, you're saying that the committee of Monsanto now in the next ten years will be making determinations of total and partial disability of the subsidiary that it sold in ten years.

MR. HEALD: And -- and that's correct. And that's -- that's why they -- they -- that's the way Monsanto [inaudible] we gotta keep in mind that is the only way that -- that Fisher employees could be motivated. That's the only way the stock options could motivate their request for [inaudible]. And your Honor, --

JUDGE: You may please go by.

MR. HEALD: -- [inaudible]

JUDGE: I -- I don't think anybody here is arguing that the stock option applies to employees of subsidiaries in Monsanto. I don't believe anybody is disputing there. It seems to me that's your argument. But as I understand, nobody disputes that. The question is when the subsidiary no longer is a subsidiary, is that tantamount to termination. And so, the argument you make about the incentive, it seems to me works against you. If -- if the -- if the subsidiaries cut out, so Monsanto no longer has employees and a Fisher subsidiary. It seems to me that it works against your argument, because there is no incentive on the part of Monsanto. The want Monsanto to have some competitive operation out there [inaudible] to -- to I don't know, [inaudible] to improve Monsanto's stock.

MR. HEALD: No, but your Honor, I -- I think with that it ignores two things. It's first of all, is Monsanto's decision to sell Fisher, they know that they're trying to motivate his employees with the guarantee of -- of a ten-year option term. So, it's -- it's Monsanto's decision that they are making this case.

JUDGE: Well, it's your argument that has said that -- that if Monsanto sells off a subsidiary that is not the same thing as terminating employment of the employees of that specific area. That's your argument.

MR. HEALD: It -- it is not because the plaintiff under 3(a) requires that if -- there'd be a termination by the subsidiary. And that's consistent with the purposes of the plan to [inaudible] --

JUDGE: Well, it's not a subsidiary. No, nobody argues that the employee of the subsidiary. The whole issue here is, this is no longer a subsidiary. So, there weren't terminated by the -- that the subsidiary no longer exists was the fact that the subsidiary no longer exist, tantamount to the people being terminated with respect to Monsanto.

MR. HEALD: No, because the plan requires that the only way to a

ten-year option terms can be reduced is if they were terminated by a company and its subsidiary. And they were never terminated by Fisher in this case.

JUDGE: Let me ask you three [inaudible] questions. Let's assume that the definition of termination that we're going to apply in this case is the definition that's contained in the plan.

MR. HEALD: Correct.

JUDGE: Let's assume secondly that we construed that definition to meaning of it when it says, discontinuance of employment means that when Monsanto sold Fisher and Fisher was no longer a subsidiary, the -- the plaintiff's employment with Monsanto was discontinued. Assume that one. And assume one other thing with me and that is that the Court construes the plaintiff in this case to be a participant. Assuming those three things, do you lose? And if not, why not?

MR. HEALD: If -- if -- on your second, hypothetical. I believe I'm not sure I got it correct.

JUDGE: Discontinuance of employment.

MR. HEALD: -- is that discontinuance of employment equates to Monsanto selling Fisher.

JUDGE: And when -- when Monsanto sold Fisher, the plaintiff in this case assumed that we construed that to mean with the plaintiff in this case was no longer employed and the Monsanto [inaudible]. Okay. It was no -- no longer employed.

MR. HEALD: Yes, your Honor.

JUDGE: Okay. That -- that -- that satisfies and was written as discontinuance of employment, okay? Assuming that satisfies that phrase, do you lose and if not, why not?

MR. HEALD: Well, your Honor, you're correct. If -- if you give it that interpretation but it cannot be given that interpretation because the plan requires that the discontinuance of employment be from the subsidiary, which never occurred in this case.

JUDGE: Where -- where -- what specific claim must do you point to -- to reestablish this [inaudible]

MR. HEALD: Number one is, there is nowhere in the plan from the options certificate a change of control of the subsidiary provision. Monsanto knew how to address that. It did kind of address the change in control over year. And to me, that's instructed to you when -- when Monsanto was trying to bootstrap 3(a) in the meaning change of control. It's instructed to [inaudible] that we're gonna use the ordinary meanings of the words here. And that requires the -- the discontinuance of employment of my client from the subsidiary which never occurred.

JUDGE: Let me ask you this, pushing from a different direction, perhaps more policy on either purpose [inaudible] about the contract and that is when the plaintiff was working for Fisher and Fisher was a sub of Monsanto, the plaintiff had an incentive with regard to the options to do the job because the better job he did, the more money Fisher made, the more money Monsanto made. And the stock price went up, meaning his options will work more.

MR. HEALD: Correct.

JUDGE: Once Fisher had been cut loose by Monsanto, there was no incentive at all for the plaintiff to do anything for Monsanto. No one said to -- in fact he had no ability in fact to improve the value of the stock at Monsanto.

MR. HEALD: And if I -- I could just show you where I think you're missing the point, is that these stock options were awarded to my clients based on their performance in the year before. It was based upon past performance. Whether they will get employment options or a

thousand options or no option, depending on their performance in the past year. So, once Monsanto gain that rent from their hard work, they became optionees. Now, as to what -- what in the future is Monsanto gonna get to get from this, it is Monsanto's decision whether or not to sell Fisher or to keep Fisher and Monsanto can keep the subsidiary and get all the benefits from my -- my client's hard work or they can make a decision in this case to make a tremendous profit because my client has made Fisher so [inaudible]. But we've got to keep in mind that these grants of stock options were awarded based upon past performance --

JUDGE: Can we go back to --

MR. HEALD: And not for summary judgment [inaudible].

JUDGE: Can we go back to the termination of employment and explore that a little bit.

MR. HEALD: Yes, ma'am.

JUDGE: And at the phrase, it does mean the discontinuance of employment of a participant for any reason other than a transfer. And I assume that they included the works other than the transfer to have some -- some meaning. Let's assume you took those words out, so, termination probably means a discontinuance of employment of a participant. It seems to me that if you've finally had taken another job within the Monsanto Company without that qualify for any reason other than a transfer, this plan will consider that a termination of employment even though he was just now employed by different Monsanto subsidiary.

MR. HEALD: Well, I -- I would disagree with you in that. I don't think there would ever be a discontinuance of employment by the company and its subsidiary issue, that there's still would be a Monsanto [inaudible].

JUDGE: Then why did they put in the plan for any reason other than a transfer and then go to great pains to define what a transfer was?

MR. HEALD: Well, I -- I think the reason in -- in your question about the transfer is that that's there so that -- and it goes to the purposes of the plan. We want the optionees to give their full ten-year option terms [inaudible] so they want to be able to allow these people to transfer back an forth.

JUDGE: Why? But then if -- if you're under you're theory that wouldn't even need this because simply by even if you sell the company, the termination of employment has not been terminated, because they are still employed by the same company that they were employed by when they got the stock options. So, you don't -- under your interpretation of the -- the plan, you wouldn't need this qualifier because it wouldn't constitute the termination of employment.

MR. HEALD: I -- I don't think that the place for any other reason in the transfer takes away the requirement that there has to be a termination of employment. I -- I don't see how that would [inaudible].

JUDGE: But doesn't that contemplate that transferring someone from one sub to another is a termination even though they're within the company, or otherwise they wouldn't have had to qualify for any reason other than a transfer?

MR. HEALD: No, your Honor. I -- I don't think so. I -- I think that is simply there just to -- to demonstrate the purpose of the plan that we don't want people lose a ten-year option term.

JUDGE: I -- let me just -- I see your time is up. Let me follow up with one question. Obviously, we've got some disagreement about whether this term means. I mean, the -- the Court of Appeals had one interpretation we're looking at another. The parties have bitterly

disputed and filed extensive briefs on it. Isn't that the reason to put in the plan that the committee will make this determination? Do we have to find that -- that Monsanto's position or the committee's position is unreasonable in order to rule for you?

MR. HEALD: The -- the -- Monsanto has to [inaudible] their summary judgment [inaudible] that the interpretation is reasonable. Under Delaware Law, that interpretation has to be reasonable, and --

JUDGE: So, we would have to find that it's not reasonable as a matter of law in order to overturn summary judgment then.

MR. HEALD: And -- and also your Honor, under Delaware Law, the committee cannot stop the reasonable expectations of my client. And -- and if you look in this case, first of all, the committee's interpretation does not follow anything in the plan --

JUDGE: Wait, wait, let me just make sure I have the terms right. Monsanto doesn't have to show that the committee's interpretation is reasonable to prevail. They -- they would -- you would have to prove that it's unreasonable, correct?

MR. HEALD: In -- in summary judgment --

JUDGE: To defeat summary judgment, because it's within their discretion for terminate unless it's unreasonable.

JUDGE: No. No. No. Your Honor, First of all, under the statute -- they -- they quote in their exhibit there, is big the interpretation. It has to be consistent with the provision of the claim. It -- it says that. And -- and --

JUDGE: So, we would have to find that their interpretation is inconsistent.

MR. HEALD: And -- and there also would [inaudible] to the exercise of stock options, that's gonna be controlled on page 9 not 14, about what the committee can do to shorten the length of time for -- in order to make the options aren't less than ten years.

JUDGE: But you would agree that -- that the committee may make this interpretation?

MR. HEALD: If it's consistent with the provision of the plan.

JUDGE: And we would have to find that inconsistent --

MR. HEALD: Of course.

JUDGE: in order to Rule 3(a).

MR. HEALD: and -- and in this case, under the facts, it would have to be inconsistent because --

JUDGE: Okay, well, I just -- I understand. We would have to find it inconsistent. I understand you say it is but that would [inaudible] --

MR. HEALD: Well, my point is, your Honor, the committee didn't follow any language from the plan of the certificate. They said, my clients were involuntarily terminated for reasons we ordinary control from Monsanto. It had nothing. They knew there wasn't a change of control --

JUDGE: But we would have to accept your definition of what subsidiary means here in order to fall into [inaudible].

MR. HEALD: That's correct.

JUDGE: Okay.

MR. HEALD: That -- that there has been -- have been a termination of employment of optionee by the subsidiary.

JUDGE: And we would have to find that that is really the only reasonable interpretation of that provision.

MR. HEALD: Well --

JUDGE: We can't find -- I get were ambiguous. We would have to rule from Monsanto.

MR. HEALD: If it were ambiguous under the --

JUDGE: Ambiguous.

MR. HEALD: If it is ambiguous, it's gonna be fact question.

JUDGE: Well, if it is ambiguous, doesn't the agreement give the authority to the committee to make that determination.

MR. HEALD: No, it -- it has -- it has to be whatever you said [inaudible]. It has to be consistent with -- with the plan. And what -- what we would gotta keep in mind, your Honor, here is that there is no provision that -- that -- talks to the change of control of the subsidiary. They're simply trying to bootstrap this 3(a) because they forgot to address that provision.

JUDGE: So, assuming they don't -- don't address that and we don't agree to your interpretation so that the -- that agreement just doesn't really touch the situation topside or bottom. What about the provision on page 4 that says, a plan that says the committee shall have the exclusive right to interpret this incentive plan. Are you saying that we should not give affect to that? Are you saying, [inaudible] as it gets public policy?

MR. HEALD: No. No, your Honor. I'm saying in the middle of that big long paragraph there, is just that the interpretation has to be consistent with the provisions of the claim. That this committee was not given the Court [inaudible] to do what they want. In fact, this committee had some very type of [inaudible]. One, it had to be consistent with the provisions of the plan, and on page 9, it says that, if you gonna let the option term less than ten years, you gotta specify that time in the grant and you gotta specify that triggering event. And that exactly [inaudible]

JUDGE: But no provision [inaudible] doesn't it also say in that same paragraph that termination of employment and shall have been determined by the committee so that they have the power to decide what constitute termination of employment.

MR. HEALD: Right. And they have to specify any option, and that's what they did. [inaudible] 3(a), (b), (c) that -- see -- their discretion it isn't there. The plans tell them [inaudible] you don't have this [inaudible] discretion. If you wanna make the time period to exercise the option less than ten years, then you have to set it out here. And that's what 3A, B, C, are. That's exactly what we're looking [inaudible] --

JUDGE: Look, let me get back to my question on page 4. Do you think it is against public police to give a plans committee the inclusive right to interpret the [inaudible].

MR. HEALD: I -- I think it is, because in this case, it goes against the reasonable expectations on my client and Delaware Law requires the committee not to go against the reasonable expectations. And that's -- to interpret it any other way would be against the purposes of the plan of motivating my clients, and it would be against this provision here that it -- it is limited to termination of employment of the optionee unless the optionees employment stands with his employer. That's all that he would get. Because if we are talking about Monsanto's status with regards to other companies, that is addressed only if there is change of control.

JUDGE: But we decide this as ambiguous. That it's just not clearly stated out. Why shouldn't we say that the agreement control that all acts and decisions of the committee with respect to the question are binding.

MR. HEALD: Number one, because it had to be consistent with the provisions of it.

JUDGE: But if they're ambiguous? Why -- why shouldn't we then say what the parties agree that when there's ambiguity at a minimum. Whether there is ambiguity in the plans, the committee controls.

MR. HEALD: Well, it -- it doesn't say that anywhere in the plan, that -- that if there -- there is a provision that becomes ambiguous to the committee --

JUDGE: He says that committee's interpretation is -- is finally binding.

MR. HEALD: If it is consistent with the provisions of the plan.

JUDGE: Any other questions. Thank you, Counsel. The Court is ready to hear rebuttal.

REBUTTAL ARGUMENT OF DAVID KELTNER ON BEHALF OF THE PETITIONER

JUDGE: Mr. Keltner. Do you paraphrase what Mr. Heald has said in, I'm not sure that I'm doing it justice. Assuming that Monsanto says we're having trouble with treating employees for our subsidiaries because in this economic environment, holding companies are buying and selling subsidiaries right and left. We want to [inaudible] these employees to work for our subsidiaries, so we're gonna give them a ten-year option to buy our stock. And because, they are facing this risk that we made just to sell the subsidiary, and therefore, not really wanna work for them but rather work for us will -- will indeed let them have ten years to exercise the option on our stock unless they're terminated by the subsidiary. And so what Mr. Heald designed, well, they went to work for a subsidiary, they get a ten-year option to exercise it, and there's a reason why that option arrangement does not talk about a transfer of ownership of the subsidiary, it's because that was a risk the employees -- we wanted the employees to run and to get them to work for that subsidiary. We agreed to give them ten years to exercise the option of stock. Why can't that be -- what this is all about.

MR. KELTNER: Your Honor, let me -- I think the greatest two questions you're making through with that provision, and let me address the issue on change of ownership is false issue. And in fact, Justice Owen, in answering your question a minute ago, I think what you're really were asking me, was whether Section 7 of this option certificate prompt the termination of employment. The answer is no. Seven is only a vesting provision. Seven is really in there for two reasons. It's a poison pill. It gives all the -- the employees immediately investing of their stock option making much more difficult for a take over to occur.

JUDGE: But that was my question. It is a poison pill. Does that mean that even if you're terminated, they're after that ten years?

MR. KELTNER: No, they have -- if -- if they're terminated, they have a period of time for termination under the option to exercise. You go ahead and [inaudible] Section 7 is merely a vesting. It doesn't give them an absolute ten-year right. And I think I misunderstood your question. Your Honor, though in further answering what you -- you were saying, I think that's part of it regarding that. They did deal with the issue of termination even under 3(a) which he talks about. It doesn't say the company and subsidiary. It says the company which is defined in Monsanto and its subsidiaries, totally different, when you're no longer or an employee of the subsidiary of Monsanto, termination occurs.

Next question, I think you raise in your question, your Honor, and I'm making this reading and I hope not, is -- is this. It is -- is that another reason for interpretation. I don't think so. But even if it were -- given the powers given to the committee in -- in -- on page 4 -- Section 4 -- page 4, the committee was given the opportunity that he needs to interpret it and in binding on everybody. The question was asked, is that against public policy? No, this Court in New [inaudible] attacking and addressed that issue and found that it is not violative of the public policy. Following a -- a Dallas Court of Appeals' decision in [inaudible] Stemerman from the Delaware Supreme Court says exactly the same thing. Interestingly, Stemerman deals with Delaware Law applied to Texas [inaudible] based in Dallas in interpreting stock options. And the question there was, well, there's a -- there's a committee and the board of directors both. They both had duties of -- to interpret the plan and have the right to do that and Delaware says, yes. Delaware has never struck down a committee determination. It refers to one case, the plaintiffs refer to one case, it is a Connecticut case, Ellis. If you read Ellis while it mentions Delaware Law in one provision of the -- of the statement, it does not report to apply Delaware Law to that -- to that particular provision. In fact, it quotes law from Pennsylvania, Iowa, and California.

JUDGE: Why didn't -- I didn't hear your opposing counsel to say that it was against public policy. I -- I heard your opposing counsel say that it's just inconsistent with the plan terms with that [inaudible] --

MR. KELTNER: Yes, [inaudible]. I think it has to be reasonable under Delaware Law. That is what Stemerman says, and that's also what the [inaudible] case which we cite to you said. But reasonable means, I think both consistent and if there were ambiguity, I think the committee certainly gets to make that decision. In this case, I don't think there's an ambiguity. The nice thing about this case is, since Delaware and Texas Law are identical on contract instruction, it being one a question of law; two, from the phase of the document and three, I think most importantly, reading the whole document together in trying to harmonize the provision is the -- the Delaware Supreme Court did in DuPont in this case, I mean, this Court continued what it tells what to do, it is clear. The one thing that was absolutely true in termination and everybody agrees determination terminates the right to exercise the option. No one disagrees with that. And as -- as result to that, the -- the -- it had to be the determination is termination from a Monsanto-related company.

JUDGE: Any other questions? Thank you, Counsel.

MR. KELTNER: Thank you.

SPEAKER: That concludes the argument in today's [inaudible]. Marshall will adjourn the Court.

SPEAKER: All rise. O yes, o yes, o yes. The Honorable, Supreme Court of Texas now stands adjourned.

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