Case No. 18-3447

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THE WEITZ COMPANY, LLC,
Plaintiff - Appellant,

vs.

WHITE WOODS RETIREMENT CAMPUS, INC., doing business as EPWORTH LIVING AT THE RANCH, and UMB BANK, N.A.,
Defendants - Appellees.

Appeal from the U.S. District Court, Southern District of Iowa
Honorable Robert W. Pratt, U.S. District Judge
Case No. 4:18-cv-00105-RP-HCA

BRIEF OF THE APPELLANT

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ORAL ARGUMENT REQUESTED

Summary and Request for Oral Argument

Weitz, a contractor, agreed to construct a retirement community in Oklahoma for Epworth, an owner. In connection with the close of financing, Weitz, Epworth, and a trustee for construction bonds connected to the project entered into a "liquidity support agreement" ("LSA") governed by Oklahoma law, under which Weitz would put money into a trust fund to pay construction and startup expense overruns if the construction loan was insufficient, to be reimbursed when the project was complete and entrance fees were received.

When UMB, a bank, became the bond trustee, it unilaterally decided to stop distributing to Epworth the construction loan proceeds, leaving Epworth unable to pay for the construction. UMB declared an "event of default" under the bonds and said it would use Weitz's LSA funds to pay interest on the bonds and Weitz would not be repaid them.

Weitz sued UMB for a declaratory judgment that under Oklahoma law UMB had abandoned the LSA, entitling Weitz to its money back. Weitz also sought to amend its petition to add a claim for statutory rescission of the LSA under 15 O.S. §§ 231-235. On UMB's motion the district court dismissed Weitz's declaratory claim under Rule 12(b)(6). It then denied Weitz's motion to amend. Weitz now appeals.

The issues on appeal are subtle and fact-intensive, and the interchange of oral argument would assist the Court in deciding them. 15 minutes per side is appropriate.

Corporate Disclosure Statement

Appellant The Weitz Company, LLC is owned 100% by The Weitz Group, LLC, an Iowa limited liability company. The Weitz Group, LLC is owned 100% by Orascom Construction USA Inc., a Delaware corporation. Orascom Construction USA Inc. is owned 100% by OCI Construction Limited, a Cyprus entity. OCI Construction Limited is owned 100% by Orascom Construction PLC, an Egyptian entity. Orascom Construction PLC is a publicly-traded entity dual listed on the NASDAQ Dubai and the Egyptian Stock Exchange.

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Jurisdictional Statement

Appellant The Weitz Company, LLC ("Weitz") filed an action against the appellees in Iowa state court (Appellant's Appendix ["Aplt.Appx."] 153), which Appellee UMB Bank, N.A. ("UMB") removed to the United States District Court for the Southern District of Iowa under 28 U.S.C. §§ 1441 and 1446 (Aplt.Appx. 148). The district court had jurisdiction under 28 U.S.C. § 1332(a), as the parties are citizens of different states and the amount in controversy exceeds $75,000 (Aplt.Appx. 149-50).

The district court entered its order disposing of all of Weitz's claims against UMB on August 20, 2018 (Aplt.Appx. 280; Add. A1), which it then certified as final and appealable under Fed. R. App. P. 54(b) (Aplt.Appx. 300; Add. A12), and on which it then entered judgment on September 27, 2018 (Aplt.Appx. 303). On September 27, 2018, Weitz filed a post-judgment motion under Fed. R. Civ. P. 59(e) (Aplt.Appx. 291). Under Rule 59(e), the motion was timely, as it was filed within 28 days of the district court's judgment. The district court denied the motion on October 29, 2018 (Aplt.Appx. 368; Add. A15).

Weitz filed its notice of appeal on November 14, 2018 (Aplt.Appx. 374). Under Fed. R. App. P. 4(a)(1)(A) and 4(a)(4)(A), the notice of appeal was timely, as it was filed within 30 days of the district court's order denying Weitz's post-judgment motion. Therefore, this Court has appellate jurisdiction under 28 U.S.C. § 1291.

Statement of the Issues

I. The district court erred in dismissing Weitz's declaratory judgment claim seeking construal of the LSA. Taking the allegations in Weitz's complaint as true and affording Weitz all reasonable inferences from them, Weitz must be relieved of its obligations under the LSA, there was no "event of default", and the appellees must return to Weitz the LSA's $1,500,000 deposit and release Weitz from its further obligations under the LSA, just as Weitz's declaratory judgment claim sought.

Berland's Inc. of Tulsa v. Northside Vill. Shopping Ctr., Inc., 447 P.2d 768 (Okla. 1968)

Tucker v. Edwards, 376 P.2d 253 (Okla. 1962)

Okla. Gas & Elec. Co. v. Pinkerton's, Inc., 742 P.2d 546 (Okla. 1986)

Pasotex Petroleum Co. v. British-Am. Oil Prod. Co., 431 P.2d 373 (Okla. 1966)

II. The district court erred in denying Weitz leave to file a first amended complaint adding a claim for statutory rescission of the LSA. Taking the allegations in Weitz's proposed first amended complaint as true and affording Weitz all reasonable inferences from them, the purpose and performance of the LSA failed. Under 15 O.S. § 231-235, Weitz therefore was entitled to seek rescission of the LSA.

M & W Masonry Const., Inc. v. Head, 562 P.2d 957 (Okla. Civ. App. 1977)

Davis v. Gwaltney, 291 P.2d 820 (Okla. 1955)

Davis v. Hastings, 261 P.2d 193 (Okla. Civ. App. 1953)

G.A. Nichols, Inc. v. Hainey, 122 P.2d 809 (Okla. 1942)

Statement of the Case

A. The parties' dispute

1. The Project and the bonds

The Weitz Company, LLC ("Weitz") is an Iowa limited liability company (Aplt.Appx. 153). In April 2014, Weitz entered into an agreement ("the Construction Contract") with White Woods Retirement Campus, Inc., d/b/a "Epworth Living at the Ranch" ("Epworth"), an Oklahoma corporation, to construct a retirement community for Epworth in Stillwater, Oklahoma to be named "Epworth Living at the Ranch" ("the Project") (Aplt.Appx. 153-54). Weitz then began performing its end of the Construction Contract, which involved "performing, providing, furnishing and supplying work, labor, materials and equipment for the construction or erection of buildings, improvements or structures at the Project" (Aplt.Appx. 154).

In June 2016, to provide construction financing for the Project, the Payne County [Oklahoma] Economic Development Authority ("the Authority") issued $110,960,000 in bonds under a Bond Trust Indenture ("the Bond Indenture") (Aplt.Appx. 153, 163; Add. A21). The Authority used the net bond sale proceeds to provide a construction loan to Epworth (Aplt.Appx. 163; Add. A21). Epworth's obligation to repay the Authority's loan was secured by a Mortgage and Security Agreement (Aplt.Appx. 39). The Authority then assigned all its rights under the Authority loan and the Mortgage to BancFirst, an Oklahoma banking

corporation, as trustee under a Master Trust Indenture ("the Master Indenture") and as trustee under the Bond Indenture entered into that same day, to secure the Authority's obligations under the bonds (Aplt.Appx. 24, 29, 153, 163; Add. A21).

2. The Liquidity Support Agreement

a. Purpose and general provisions

The same day as the Bond Indenture and Master Indenture were implemented, Weitz entered into a "Liquidity Support Agreement" ("the LSA") with Epworth and BancFirst, under which Weitz would make certain funds available "in trust" to provide support for the Project (Aplt.Appx. 154, 156, 160, 169; Add. A27). The LSA stated Weitz "is willing to make funds available to the Liquidity Support fund to provide support for the Project upon the terms and conditions set forth in this Support Agreement" (Aplt.Appx. 163; Add. A21). It stated it "constitutes the entire agreement, and supersedes all prior agreements and understandings, both written and oral, among the parties with respect to the subject matter hereof" (Aplt.Appx. 174-75; Add. A32-33). It also stated it is "governed exclusively by the applicable laws of the State of Oklahoma" (Aplt.Appx. 175; Add. A33).

Under the LSA, Weitz agreed to provide $2 million, the "Provider Support Obligation", to Epworth for deposit in the "Weitz Account in the Liquidity Support Fund" in two stages (Aplt.Appx. 168; Add. A26). First, it agreed to pay $1.5 million at the LSA's closing date (Aplt.Appx.

168; Add. A26). Second, it agreed to pay up to an additional $500,000 in "Deferred Provider Support" if and when needed (Aplt.Appx. 168; Add. A26). The Liquidity Support Fund was created under the Master Indenture, and the Liquidity Support Fund contained other accounts besides the Weitz Account with funds in them from other liquidity support providers under other LSAs (Aplt.Appx. 99).

b. Provisions about reduction, repayment, and disbursements from the Weitz Account, and receipt of entrance fees for the Project post-construction

Section 3.1 of the LSA provided that Weitz's

> Provider Support Obligation shall be reduced on a dollar for dollar basis as moneys are deposited in the Ranch Account in the Liquidity Support Fund. When $2,000,000 has been deposited in the Ranch Account in the Liquidity Support Fund, the Provider Support Obligation (including the Deferred Provider Support) shall be reduced to zero and this Support Agreement (other than provisions of Section 3.2(g) and the Corporation's obligations under Section 3.4) shall terminate and cease to be of any further force and effect.

(Aplt.Appx. 166-67; Add. A24-25).

Under the Master Indenture, initial entrance fees would be transferred to the master trustee for disbursement to several funds and accounts in a particular order, the fourth of which was $2,000,000 to the Ranch Account: "FOURTH: to the Ranch Account in the Liquidity Support Fund until the amount transferred from the Entrance Fees Fund to the Ranch Account in the Liquidity Support Fund equals

$2,000,000" (Aplt.Appx. 93-94). The "SIXTH" in the order was "to the Weitz Account … in the Liquidity Support Fund … any amount necessary to reimburse any amounts drawn on the Weitz Account … before the issuance of a certificates of occupancy [*sic*] for all units in the Project" (Aplt.Appx. 94). The Master Indenture also provided that "[u]p to $2,000,000 will be deposited in the Ranch Account from Initial Entrance Fees at the times required by subparagraph FOURTH under 'Entrance Fees Fund,' which deposits will reduce the obligations of the Weitz Liquidity Provider by a corresponding amount" (Aplt.Appx. 99-100).

In § 3.2(g), the LSA provided that "[t]he Weitz Account in the Liquidity Support Fund shall be closed upon the earliest to occur of" either "the Provider Support Obligation is reduced to zero in accordance with Section 3.1(b), and … the amounts, if any, have been paid to [Weitz] from the Weitz Account in accordance with Section 430(e) of the Master Indenture" or "all of the Bonds are paid in full or are deemed to be paid in full in accordance with Article XI of the Bond Indenture" (Aplt.Appx. 169; Add. A27). Section 430(e) of the Master Indenture in turn provided that as funds were deposited into the Weitz Account from the entrance fees, the trustee "shall notify [Weitz] … of the amount so deposited and within three Business Days after the date of deposit transfer a corresponding amount from the Weitz Account … to" Weitz (Aplt.Appx. 100).

Besides the repayment of Weitz's LSA funds, § 3.2 of the LSA also governed "[d]isbursements from the Weitz Account in the Liquidity Support Fund" (Aplt.Appx. 167; Add. A25).

First, in § 3.2(a), it provided that those funds may be disbursed to pay the "Costs" of the Project, as defined in the Bond Indenture, if all monies in the Project Fund, also as defined in the Bond Indenture, and "all other available funds (including Project contingency funds and immediately available insurance proceeds, if any) are insufficient to pay the Costs of the Project" (Aplt.Appx. 167; Add. A25).

Second, §§ 3.2(b) and (c) provided that if Epworth ever

> needs money for payment of any expenses [and any other expenses] that … otherwise could have been paid from the Working Capital Fund or the Operating Reserve Fund under the Master Indenture … and no moneys are on deposit in the Working Capital Fund and the Operating Reserve Fund held under the Master Indenture … then [Epworth] will deliver a Written Request to the Master Trustee to transfer moneys from the Weitz Account to [Epworth] for the payment of any such expenses ….

(Aplt.Appx. 167-68; Add. A25-26). Under the Master Indenture, the Working Capital Fund and Operating Reserve Fund also were to be funded from entrance fees that would be received only after completion of construction of the Project, coming "SECOND" and "THIRD" in order of priority, respectively, and before the Ranch Account (Aplt.Appx. 93).

Third, § 3.2(d) provided that

> [i]f funds held in an account in the Funded Interest Fund and the Debt Service Fund under the Bond Indenture are insufficient to pay the principal of or interest on a series of Bonds as the same come due, then moneys in the Working Capital Fund, the Operating Reserve Fund, the Weitz Account, the Ranch Account and the Meinders Account in the Liquidity Support Fund (in that order) shall be used for that purpose before any moneys in the Debt Service Reserve Fund held under the Bond Indenture are used.

(Aplt.Appx. 168; Add. A26).

Finally, § 3.2(f) provided that Epworth "shall consider and if feasible issue construction completion bonds as a source of funds prior to disbursement of any payments from the Liquidity Support Fund …" (Aplt.Appx. 168; Add. A26).

The Master Indenture stated that the trustee "may withdraw moneys from the Weitz Account … to the extent necessary (i) to pay the Costs of the Project, as defined in the Related Bond Documents in accordance with the Liquidity Support Agreements, or (ii) to pay Debt Service on the Series 2016 Bonds in accordance with the Liquidity Support Agreements" (Aplt.Appx. 100). The LSA stated that "[a]ll moneys and securities held in the Liquidity Support fund are held in trust by the Master Trustee for the purposes and to satisfy the obligations set forth in this Support Agreement and shall be applied solely as set forth in the Master Indenture and this Support Agreement" (Aplt.Appx. 169; Add. A27).

c. Provisions about termination

The LSA stated that Weitz's and Epworth's obligations under it "shall be absolute and unconditional and shall remain in full force and effect until" the LSA's terminated (Aplt.Appx. 172; Add. A30). It stated that it "shall terminate … upon the earlier to occur of the following: (i) the Provider Support Obligation has been terminated pursuant to Section 3.1(b) or (ii) all of the Bonds are paid in full or are deemed to be paid in full" (Aplt.Appx. 173; Add. A31). It also stated that the Provider Support Obligation shall terminate when $2 million has been deposited in the Ranch Account (Aplt.Appx. 166-67; Add. A24-25).

The LSA also stated that Weitz's obligations under the LSA "shall not be affected, modified or impaired upon … the default or failure … of [Epworth] to fully perform any of its obligations set forth in this Agreement, the Master Indenture, or the Loan Agreement" (Aplt.Appx. 172; Add. A30). It stated it obligated Epworth to repay Weitz any amounts drawn or transferred from the Weitz Account, secured by a subordinated note, which was subordinated to the Authority's obligations to repay the bonds (Aplt.Appx. 169-70; Add. A27-28).

3. Events leading to the proceedings below

Weitz paid the initial $1.5 million the LSA required on the LSA's closing (Aplt.Appx. 155-56). Then, per the "Deferred Provider Support Obligation" and with "the consent of" Epworth and BancFirst, Weitz deposited $625,000, which was 125% of the LSA's potentially-required

additional $500,000, in a bank account at Wells Fargo Bank, N.A. in Des Moines, Iowa, where it remains today (Aplt.Appx. 154, 156, 182). This performed all of Weitz's duties and fulfilled all its obligations under the LSA (Aplt.Appx. 156).

Beginning in October 2017, in violation of the terms of the Construction Contract, Epworth stopped paying Weitz for work, labor, materials, and equipment that Weitz performed, provided, furnished, and supplied to the Project (Aplt.Appx. 155). Weitz provided notice to Epworth and the trustee multiple times that payments due and owing under the Construction Contract were past due (Aplt.Appx. 155). At present, Weitz is owed more than $15 million (Aplt.Appx. 155, 183).

On December 20, 2017, UMB Bank, N.A. ("UMB"), a Missouri banking corporation, gave notice that on December 13 it had replaced BancFirst as both the trustee under the Bond Indenture and the trustee under the Master Indenture (Aplt.Appx. 153, 193).

In January 2018, Weitz notified Epworth and UMB in writing that it had not been paid a "use fee" for that month, which the LSA required (Aplt.Appx. 155, 195). Under the LSA, Epworth was to pay Weitz this fee "for the availability of amounts that have not been drawn on the Weitz Account in the Liquidity Support Fund equal to 0.996% per annum times the undrawn amount, adjusted upon each draw thereon, of the Liquidity Support Obligation on deposit in Weitz

Account", to be "computed and paid monthly by [Epworth] on the first business day of each month" (Aplt.Appx. 171; Add. A29).

The following month, February 2018, Weitz sent Epworth and UMB a written demand to repay Weitz the $1,500,000 it had deposited under the LSA at closing and release back to Weitz the $625,000 it had deposited into escrow for use of an additional $500,000 if needed be, plus interest (Aplt.Appx. 155, 196). Weitz stated it demanded this because "[t]he purposes of the LSA no longer exist and the conditions precedent to draws of the Provider Support Obligation have not been and will not be satisfied" (Aplt.Appx. 196).

UMB refused Weitz's demand (Aplt.Appx. 145, 155). UMB advised Weitz that it did not intend to allow further distribution of money from the Project Fund to allow completion of construction of the Project, and instead that it intended to use the remaining Project Fund money, more than $26.9 million, to partially repay the $110,960,000 of bonds used to finance the construction of the Project, and would use Weitz's funds in the Liquidity Support Fund to pay interest on the bonds (Aplt.Appx. 145-47, 155-56).

UMB stated that "[a]n event of default has occurred and is continuing under the Bond Indenture and Master Indenture as a result of [Epworth]'s … admission in writing of its inability to pay its debts as they become due" (Aplt.Appx. 145). It stated UMB "notified [Epworth] of the Event of Default on December 12, 2017", and that "[g]iven the

Event of Default, the Trustee does not intend to fund any further requisitions and the Project [Fund] is otherwise available for payments on the obligations due on the Bonds" (Aplt.Appx. 145).

Weitz then sent Epworth and UMB a written "stop notice" to protect the funds held in the Project Fund and those held in trust under the LSA (Aplt.Appx. 156, 198).

Neither Epworth nor UMB have claimed that Weitz either failed to perform under the LSA or otherwise breached or violated the LSA in any way (Aplt.Appx. 156).

B. Proceedings below

1. Weitz's Iowa declaratory petition

In March 2018, Weitz filed a petition for declaratory judgment against UMB and Epworth in the District Court of Polk County, Iowa (Aplt.Appx. 153), attaching among other things the LSA and its written notices to UMB and Epworth (Aplt.Appx. 160, 195-98).

Weitz argued that the funds it provided under the LSA were intended to be used to provide support for the Project and only became available to pay costs of the Project if all money in all other funds were insufficient to do so, that UMB and Epworth had abandoned completion of the Project but nonetheless refused to return Weitz's funds, and that UMB and Epworth should have to reimburse Weitz for those funds (Aplt.Appx. 156-57). It also argued that UMB and Epworth violated the LSA by refusing to pay Weitz its use fees (Aplt.Appx. 158).

Weitz sought a declaration of the parties' rights under the LSA, including whether if UMB and Epworth had abandoned completion of construction of the Project this meant Weitz was relieved of its responsibilities under the LSA, and whether if so this meant UMB and Epworth were required to reimburse Weitz for its $1.5 million payment and return its $625,000 deposit made under the LSA (Aplt.Appx. 158).

2. Removal and UMB's motion to dismiss

In April 2018, UMB timely removed Weitz's action to the U.S. District Court for the Southern District of Iowa (Aplt.Appx. 2, 148, 200). Epworth never filed any response to Weitz's action (Aplt.Appx. 2-7).

UMB then immediately moved under Fed. R. Civ. P. 12(b)(6) to dismiss Weitz's complaint (Aplt.Appx. 2, 8, 11). It argued that Weitz's requested declaratory judgment was inconsistent with the LSA's plain language, specifically that § 3.2(d) of the LSA allowed it to use Weitz's deposited funds to repay the bonds, that even in the event of an abandonment of the Project nothing in the LSA entitled Weitz to its money back, and that any obligation of Epworth to repay Weitz for its payments under the LSA was junior to UMB's rights to use those funds to repay the bonds (Aplt.Appx. 18-21). UMB attached an incomplete copy of the Master Indenture, a motion to consolidate that Weitz had filed in Oklahoma state court, and its letter to Weitz rejecting Weitz's repayment demand (Aplt.Appx. 24, 140, 145). It pointed to the Oklahoma motion because it said Weitz "acknowledged" in that motion

that "Epworth has stated it will have insufficient funds to pay its bond obligations and will not open the facility" (Aplt.Appx. 15, 141).

Weitz opposed UMB's motion to dismiss (Aplt.Appx. 202, 204). First, it argued that UMB's actions refusing to allow completion of construction of the Project rendered the LSA's primary purpose impossible, meaning it should be terminated or rescinded and Weitz's funds returned to it (Aplt.Appx. 207-10). Second, it argued that the plain language of the LSA and the Master Indenture showed its funds were merely a contingency fund to pay unanticipated excess costs during the Project's construction and startup, not to pay for the bondholders' losses, and certainly not to pay the bondholders if UMB wrongfully elected not to proceed forward with construction of the Project (Aplt.Appx. 210-17). Finally, it argued that even under UMB's argument that there had been an event of default, UMB could not show that the condition precedent of a written statement of default from Epworth had been satisfied, especially as UMB alleged it declared an "event of default" a day before UMB even became the successor trustee (Aplt.Appx. 217-19).

3. Weitz's motion for leave to file an amended complaint

Weitz also moved for leave to amend its complaint (Aplt.Appx. 230). Its proposed amended complaint added allegations that:

- the parties "agreed and intended that the Project would be constructed and initially occupied by residents paying entrance fees to Epworth";
- "completion of construction and initial occupancy of the Project and receipt of entrance fees by Epworth was an essential part of the bargain and Weitz would not have entered into the [LSA] with that consideration omitted";
- the LSA "contains no terms authorizing Defendants to decide not to complete construction of the Project to prevent initial occupancy and receipt of entrance fees from residents but nonetheless retain the loans advanced by Weitz to Epworth solely for the benefit of the bondholders";
- in October 2017 UMB "stopped approving distributions from the Project Fund … which prevented Epworth from continuing to pay for the completion of construction of the Project and which extinguished and make entirely void Epworth's receipt of entrance fees from initial occupancy of the Project";
- UMB "abandoned the completion of construction and initial occupancy of the Project, to extinguish and make void Epworth's receipt of entrance fees, and caused Epworth to do the same"; and
- in April 2018 Weitz wrote UMB and Epworth offering to return all fees it previously had received under the LSA in full rescission of it, but Epworth did not respond and UMB denied the offer.

(Aplt.Appx. 235-36, 272).

Weitz then sought to add to its request for a declaration of the parties' rights under the LSA two other counts: first, a claim for statutory rescission of the LSA under 15 O.S. §§ 231-235 and, second, an alternative claim that UMB breached the LSA (Aplt.Appx. 238-40).

UMB opposed Weitz's request to amend its complaint (Aplt.Appx. 275). It argued that Weitz's proposed new counts failed for the same reasons of the LSA's plain language that it had argued in its motion to dismiss (Aplt.Appx. 276-77).

4. Judgment, post-judgment motion, and appeal

In August 2018, the district court entered an order granting UMB's motion to dismiss (Aplt.Appx. 280; Addendum ["Add."] A1). It concluded Weitz "is not relieved of its obligations under the LSA, the LSA should not be rescinded, and [Weitz] is not entitled to the return of the funds it deposited or to be released from the Deferred Provider Support Obligation" (Aplt.Appx. 289-90; Add. A10-11).

The court held the LSA was clear and unambiguous, § 3.2(d) allowed UMB to use the money Weitz deposited under it to pay interest on the bonds, and to do so the LSA

> does not require that construction of the Project be complete, that any initial occupancy fees be received, or that either the Working Capital Fund or the Operating Reserve Fund have any money in them at all before the Master Trustee is authorized to use the funds in the Weitz Account to pay interest on the Bonds.

(Aplt.Appx. 287-88; Add. A8-9). It held Weitz had represented to an Oklahoma court that Epworth had admitted an "event of default", so that condition precedent was satisfied (Aplt.Appx. 288, n.3; Add. A9). It held it was not feasible for Epworth to issue construction completion bonds, because of the "event of default" (Aplt.Appx. 288; Add. A9). It held the LSA did not obligate UMB to pay Weitz the use fee if Epworth did not (Aplt.Appx. 288-89; Add. A9-10). Finally, it held that none of the LSA's events of termination had occurred, so "the LSA has not been terminated and [Weitz]'s obligations 'remain in full force and effect'" (Aplt.Appx. 289; Add. A10) (quoting LSA at § 4.1).

The court also denied Weitz's motion for leave to amend its complaint (Aplt.Appx. 290; Add. A11). It stated,

> an amendment as to [UMB] would be futile. For the reasons stated above, pursuant to the plain language of the LSA a claim for rescission must fail. Further, [Weitz] has failed to identify any promise made by [UMB] in the LSA that it has failed to perform; thus, a claim for breach of contract must also fail.

(Aplt.Appx. 290; Add. A11).

On UMB's motion (Aplt.Appx. at 291), which Weitz did not oppose (Aplt.Appx. 298), the court certified the order granting UMB's motion to dismiss as a final judgment under Fed. R. Civ. P. 54(b) and found "there is no just reason for delay" (Aplt.Appx. 300-02; Add. A12-14). It then entered judgment accordingly (Aplt.Appx. 303). (Weitz later dismissed

its claim against Epworth without prejudice under Fed. R. Civ. P. 41(a)(1)(A)(i) (Aplt.Appx. 319).)

Weitz timely moved to alter or amend the judgment under Fed. R. Civ. P. 59(e) (Aplt.Appx. 304). It argued the court erred in holding Weitz had admitted in an Oklahoma court that Epworth had admitted an "event of default", Weitz never admitted and did not admit there was an "event of default" as UMB claimed, and the Oklahoma court document to which the district court had pointed was merely Weitz rehashing an argument UMB had made (Aplt.Appx. 305-06, n.1). It pointed out that in another pleading in that Oklahoma case, even Epworth had denied that it ever had admitted in writing that it was in default (Aplt.Appx. 330). Weitz then argued that the court erred in denying it leave to amend, because taking the allegations in its proposed first amended complaint as true and affording it all reasonable inferences from those allegations, Weitz stated a cause of action for statutory rescission under Oklahoma law that was not "futile" (Aplt.Appx. 310-16).

UMB opposed Weitz's motion (Aplt.Appx. 321, 323). It also argued Weitz further had admitted that Epworth had admitted to an "event of default" by failing to object to UMB's request for appointment of a receiver over Epworth's property (other than the funds UMB held as trustee) for that reason in Oklahoma (Aplt.Appx. 333-34).

In October 2018, the court entered an order denying Weitz's motion to alter or amend the judgment (Aplt.Appx. 368; Add. A15). It held that Weitz's Oklahoma motion to consolidate did not merely rehash arguments made by other parties with which it did not agree, but instead "clearly states Epworth's default as an underlying fact" (Aplt.Appx. 370; Add. A17). It also held that Weitz's claim for rescission failed because Weitz "cannot show it would not have entered into the LSA without a guarantee that construction of the Project would be completed, the finished Project would be occupied, and initial occupancy fees would be received", and instead "[t]he plain language of the LSA itself shows that [Weitz] did, in fact, enter into the LSA without such a guarantee" (Aplt.Appx. 372; Add. A19). It held that "[b]ecause [Weitz] has not shown any consideration failed in whole or in part, or in a material respect, or became entirely void that would allow Plaintiff to rescind the LSA, any claim for rescission must fail" (Aplt.Appx. 372).

Weitz then timely appealed to this Court (Aplt.Appx. 374).

Summary of the Argument

The district court erred in dismissing Weitz's initial petition for a declaratory judgment. It also erred in denying Weitz leave to file a first amended complaint adding an Oklahoma statutory claim for rescission of the LSA and a claim that UMB breached the LSA.

First, the court erred in dismissing Weitz's request for a declaratory judgment. The law of Oklahoma equitably implied a condition in the LSA that the parties would not prevent the Project from being completed. Weitz loaned money to Epworth under the LSA to support the Project on the understanding that once construction was complete and entrance fees were received, Weitz would be repaid. But UMB prevented that from ever being possible by refusing to distribute Epworth any more construction loan proceeds, causing Epworth no longer to be able to pay for construction. Taking Weitz's allegations as true and according them all reasonable inferences, there was no event of default and Weitz was entitled to a judgment that UMB's actions abandoned the LSA and dissolved it, requiring Weitz to be repaid.

Second, the court erred in denying as "futile" Weitz's request for leave to amend its petition to state a claim for statutory rescission of the LSA. Taking Weitz's allegations in its proposed first amended complaint as true and according them all reasonable inferences, Weitz satisfied Oklahoma's requirements for a claim for statutory rescission of the LSA. Its statutory rescission claim therefore was not "futile".

Argument

I. The district court erred in dismissing Weitz's declaratory judgment claim seeking construal of the LSA. Taking the allegations in Weitz's complaint as true and affording Weitz all reasonable inferences from them, Weitz must be relieved of its obligations under the LSA, there was no "event of default", and the appellees must return to Weitz the LSA's $1,500,000 deposit and release Weitz from its further obligations under the LSA, just as Weitz's declaratory judgment claim sought.

Standard of Review

"This [C]ourt reviews the grant of a motion to dismiss [under Fed. R. Civ. P. 12(b)(6)] de novo." *BNSF R.R. Co. v. Seats, Inc.*, 900 F.3d 545, 546 (8th Cir. 2018). "The complain[t] 'must show the plaintiff is entitled to relief, by alleging sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Id.* (citations omitted). The Court "tak[es] all facts alleged in the complaint as true, and mak[es] reasonable inferences in favor of the nonmoving party." *Smithrud v. City of St. Paul*, 746 F.3d 391, 397 (8th Cir. 2014). The complaint need only plead "enough facts to state a claim that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id.* at 556 (citation and internal quotation marks omitted).

* * *

When parties enter into a contract on the understanding that something essential to its performance will continue to exist, the law of Oklahoma equitably implies a condition that, if that thing stops existing, the contract is abandoned and dissolves *ab initio*, and the parties must be restored to their status before the contract was executed. Here, Weitz loaned money to Epworth under the LSA to support the Project during construction and early startup on the understanding that once construction was complete and entrance fees were received, Weitz would be repaid. But UMB, holding the LSA funds as trustee for Weitz, prevented that from ever being possible by refusing to distribute to Epworth any further construction loan funds that UMB held as trustee for the bondholders, causing Epworth no longer to be able to pay for construction. When Weitz sought a declaratory judgment that UMB's actions abandoned the LSA and dissolved it, requiring Weitz be repaid its loan funds, the district court dismissed. Taking all of Weitz's alleged facts as true and making reasonable inferences in Weitz's favor, this was error.

A. Even though the dismissal pleadings presented materials that Weitz did not attach to its initial petition, the district court still properly viewed UMB's motion as a motion to dismiss, not one for summary judgment, and so this Court reviews the district court's order under the dismissal standard, not the summary judgment standard.

Fed. R. Civ. P. 12(d) provides that "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not

excluded by the court, the motion must be treated as one for summary judgment under Rule 56." While UMB attached to its motion to dismiss materials that Weitz had not attached to its initial petition, those materials were integral to Weitz's petition, which referred to all of them. Because of this, the district court correctly decided that despite Rule 12(d), UMB's motion to dismiss remained a motion to dismiss. Therefore, lest there by any confusion, this Court must apply the standard of review for Rule 12(b)(6) dismissals to the district court's order, not the standard for Rule 56 summary judgments.

"[A]n exception to" Rule 12(d)'s general procedure for converting a motion to dismiss into a motion for summary judgment "provides that a 'document *integral to or explicitly relied upon* in the complaint' may be considered 'without converting the motion …'" *Mele v. Fed. Reserve Bank of N.Y.*, 359 F.3d 251, 256 n.5 (3d Cir. 2004) (emphasis in the original) (citations omitted). This is so "[a] plaintiff cannot maintain a claim 'by extracting an isolated statement from a document and placing it in the complaint, even though if the statement were examined in the full context of the document, it would be clear that the statement [did not support the claim].'" *Id.* (citation omitted). So,

> [w]hile courts primarily consider the allegations in the complaint in determining whether to grant a Rule 12(b)(6) motion, courts additionally consider 'matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint

> whose authenticity is unquestioned;' without converting the motion into one for summary judgment.

Dittmer Props., L.P. v. F.D.I.C., 708 F.3d 1011, 1021 (8th Cir. 2013) (citations omitted).

Here, the district court correctly saw that the materials UMB attached to its motion to dismiss, and which Weitz had not attached to its original petition, plainly fit this exception. It decided UMB's motion under Rule 12(b)(6), not Rule 56 (Aplt.Appx. 283). The materials consist only of an incomplete copy of the Master Indenture, a motion to consolidate that Weitz had filed in court in Oklahoma, and UMB's letter rejecting Weitz's repayment demand (Aplt.Appx. 24, 140, 145). Weitz's petition referred to the Master Indenture and UMB's letter (Aplt.Appx. 153, 155-56). The LSA, which Weitz attached to its petition, also referred to the Master Indenture (Aplt.Appx. 163-64, 167-74, 179-80; Add. A21-22, A25-32), as did its demand letter attached to its petition (Aplt.Appx. 198). And the Oklahoma motion was open to judicial notice. *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 802-03 (8th Cir. 2002).

So, as UMB argued in its motion to dismiss, even citing *Dittmer*, 708 F.3d at 1021 (Aplt.Appx. 16), these materials properly were part of the record without its motion to dismiss becoming one for summary judgment. The district court correctly treated the motion as a motion to dismiss (Aplt.Appx. 283). Therefore, the standard of review for Rule 12(b)(6) dismissals applies, not the summary judgment standard.

B. Taking all of Weitz's alleged facts as true and making reasonable inferences in Weitz's favor, there was no "event of default", UMB's conduct rendered the LSA's primary purpose incapable of performance, and Weitz stated a proper claim under Oklahoma law that the LSA was abandoned and void *ab initio*, requiring the parties to be restored to their status before the LSA was executed.

In granting UMB's motion to dismiss Weitz's petition for declaratory relief, the district court relied principally on § 3.2(d) of the LSA, which it held allowed UMB to use the money Weitz deposited under the LSA to pay interest on the bonds without any further preconditions (Aplt.Appx. 287-88; Add. A8-9). It also held Weitz had admitted that Epworth admitted an "event of default", an "event of default" by Epworth was something § 4.1 of the LSA contemplated, and so under § 4.1 of the LSA this did not allow the LSA to be terminated (Aplt.Appx. 289; Add. A10).

Taking all of Weitz's alleged facts as true and making reasonable inferences in Weitz's favor, this was error. The purpose of the LSA was for Weitz to provide contingent funds to Epworth, to be held in trust to pay for certain unanticipated excess expenses during the Project's construction or startup. But this contemplated that other funds – beginning with the Authority loan proceeds that UMB held as trustee for the bondholders – would be used first, all of which in turn required completion of construction and the receipt of entrance fees by Epworth, resulting in Weitz ultimately being repaid its funds.

UMB's unilaterally decision no longer to disburse the Authority loan proceeds to Epworth, which prevented Epworth from continuing construction, was not an "event of default" that the LSA contemplated. Instead, UMB rendered the primary purpose of the LSA incapable of performance. Due to *UMB's* actions, not Epworth's those, the Authority loan proceeds that UMB held as trustee for the bondholders, which were supposed to be higher in priority for use than Weitz's LSA monies, never would be available for the Project, and Weitz never would be repaid. The LSA neither contemplated nor addressed these circumstances.

The law of Oklahoma is that, in these circumstances, the LSA was abandoned and dissolved *ab initio*, and the parties must be restored to their status before it was executed. (Per the LSA's choice-of-law clause (Aplt.Appx. 175; Add. A33), the parties and the district court all agreed that Oklahoma law governs Weitz's claims regarding the LSA (Aplt.Appx. 18, 209 n.3, 284; Add. A5).) Weitz properly stated a claim under Oklahoma law that UMB's conduct rendered the LSA abandoned and dissolved, requiring that Weitz be reimbursed its initial $1.5 million payment and that its later $625,000 escrow deposit be released to it.

1. **When parties enter into a contract on the understanding that something essential to the contract's performance will continue to exist, the law of Oklahoma equitably implies a condition that, if that thing stops existing, the contract is abandoned and dissolves *ab initio*, and the parties must be restored to their status before the contract was executed.**

The law of Oklahoma is that a contract is abandoned when a party to it intentionally acts to abandon the performance of its "paramount idea and purpose." *Pasotex Petroleum Co. v. British-Am. Oil Prod. Co.*, 431 P.2d 373, 381 (Okla. 1966) (citing 17 C.J.S. Contracts § 412, p. 899); *see also Tucker v. Edwards*, 376 P.2d 253, 255 (Okla. 1962); *Lewter v. Holder*, 348 P.2d 845, 848-49 (Okla. 1960). "[T]he elements of abandonment are: (1) an intention to abandon; and (2) an external act whereby such intention is carried into effect." *Tucker*, 376 P.2d at 255.

Similarly, in Oklahoma, a contract is equitably abandoned and dissolved when its primary purpose cannot be effected:

> Where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an implied condition that, if before the time for performance and without the default of either party the particular thing ceases to exist and be available for the purpose, the contract shall be dissolved and the parties excused from performing it.

Okla. Gas & Elec. Co. v. Pinkerton's, Inc., 742 P.2d 546, 547 (Okla. 1986) (quoting *Kan., Okla. and Gulf Ry. v. Grand Lake Grain Co.*, 434 P.2d 153 (Okla. 1967)).

While Oklahoma also has a statutory form of contract rescission, *see* 15 O.S. §§ 231-235, addressed in Point II, *infra*, this form of rescission by frustration of purpose is an equitable doctrine "governed by principles of equity." *Berland's Inc. of Tulsa v. Northside Vill. Shopping Ctr., Inc.*, 447 P.2d 768, 771 (Okla. 1968) (lease in shopping center rescinded where owner failed to provide vehicle parking). This makes the contract void *ab initio*, requiring the parties to be restored to the status quo before the contract was executed. *Id.* (reversing denial of right to restoration to pre-contract status quo and directing lower court to hear evidence and restore plaintiff to status quo).

2. UMB's actions in unilaterally refusing to allow further distributions of the construction loan proceeds to Epworth rendered the LSA's primary purpose impossible to perform, abandoning the LSA and dissolving it *ab initio*, and entitling Weitz to be restored to its status before the LSA was executed.

Taking all of Weitz's alleged facts as true and making reasonable inferences in Weitz's favor, Weitz properly stated a claim under Oklahoma law that UMB's conduct rendered the LSA abandoned and dissolved, requiring that Weitz be restored to its status before the LSA was executed by ordering UMB to reimburse Weitz's payments.

The LSA's primary purpose was for Weitz to provide funds to Epworth, to be held in trust to pay for certain unanticipated excess expenses during construction or early startup of the Project after first using the construction loan proceeds, and then be repaid when the Project opened. The LSA stated Weitz "is willing to make funds available to the Liquidity Support fund to provide support for the Project upon the terms and conditions set forth in this Support Agreement" (Aplt.Appx. 163; Add. A21). But both the LSA and the Master Indenture contemplated that once construction was complete, Weitz would be repaid that support in full (Aplt.Appx. 93-94, 99-100, 166-67, 169; Add. A24-25, A27). As the district court put it, "Upon completion of the Project and initial occupancy, entrance fees paid by residents were to be deposited into the Weitz Account to replace Plaintiff's moneys and the funds deposited by [Weitz] returned" (Aplt.Appx. 281; Add. A2).

Every LSA provision allowing the use of Weitz's funds to pay for unanticipated excess expenses rested on construction being completed and the Project opened, accruing entrance fees to repay Weitz:

- In § 3.2(a), the LSA provided that Weitz's funds could be disbursed to pay the Project's "Costs", **but only if all money in the Project Fund and "all other available funds (including Project contingency funds and immediately available insurance proceeds, if any) are insufficient** to pay the Costs

of the Project" (Aplt.Appx. 167; Add. A25) (emphasis added). So, the LSA contemplated that Weitz's funds only would be used for construction cost overruns after all bond loan proceeds in the Project Fund first were used to complete construction.

- In §§ 3.2(b) and (c), it provided that Weitz's funds could be used to pay Epworth's expenses, **but only if "no moneys are on deposit in the Working Capital Fund and the Operating Reserve Fund held under the Master Indenture"** (Aplt.Appx. 167-68; Add. A25-26) (emphasis added). But the Master Indenture, in turn, provided that the Working Capital Fund and Operating Reserve Fund both were to be funded from entrance fees, too (Aplt.Appx. 93). Once again, the LSA contemplated that Weitz's funds only would be used for these startup cost overruns after entrance fees were received after completion of construction.
- Finally, § 3.2(d), which UMB invoked and on which the district court relied, provided that

> [i]f funds held in an account in the Funded Interest Fund and the Debt Service Fund under the Bond Indenture are insufficient to pay the principal of or interest on a series of Bonds as the same come due, then moneys in **the Working Capital Fund, the Operating Reserve Fund, the Weitz Account,** the Ranch Account and the Meinders Account in the Liquidity Support Fund **(in that order)** shall be used for that purpose before any moneys in the Debt Service Reserve Fund held under the Bond Indenture are used

(Aplt.Appx. 168; Add. A26) (emphasis added). So, the ability to draw on the Weitz Account to pay interest on bonds under § 3.2(d) only could occur **after** money in the Working Capital Fund and Operating Reserve Fund first were fully used. But again, the Master Indenture provided that the Working Capital Fund and Operating Reserve Fund would not be funded until after completion of construction (Aplt.Appx. 93).

And of course, once construction was complete and equivalent entrance fees received, Weitz would be repaid in full what it had loaned in the first place (Aplt.Appx. 93-94, 99-100, 166-67, 169; Add. A24-25, A27).

What is more, this was all as the Master Indenture intended. In § 420(c), "FOURTH", the Master Indenture specifically provided that entrance fees must be used to fund the Ranch Account to allow repayment to Weitz upon initial occupancy of the completed Project (Aplt.Appx. 94). In § 420(c), "SIXTH", it further provided that even if the Weitz loan proceeds had been drawn before the Project received full certificates of occupancy for all units in the Project – that is, before completion of construction, any such draws nonetheless would be immediately repaid from entrance fees that Epworth received (Aplt.Appx. 94). Finally, in § 420(c), "SEVENTH", the Master Indenture specifically provided that repaying Weitz draws was a priority **over** funding of the Debt Service Fund (Aplt.Appx. 94).

Plainly, read together, the LSA and the Master Indenture intended that the agreed subordination of Weitz's funds only would apply after the Authority loan proceeds were fully distributed and after completion of construction. The parties agreed the Weitz Account would be fully replaced by the Ranch Account after only $11,500,000 of the entrance fees – only just over 10% of the amount of the bonds – were received during startup and initial occupancy of the Project (Aplt.Appx. 94).

So, every provision of the LSA that contemplated Weitz's funds being used to pay for something, *including interest to the bondholders*, **first** contemplated construction being completed. The purpose of Weitz's funds was "to provide support **for the Project**" (Aplt.Appx. 163; Add. A21) (emphasis added). And if construction were completed and some of Weitz's funds were necessary to pay for excess completion and startup costs, that is exactly what they would have been used for.

The problem here is that, taking all of Weitz's alleged facts as true and making reasonable inferences in Weitz's favor, UMB's unilateral actions prevented that from ever occurring, destroying the LSA's primary purpose. Weitz's funds now cannot be used "to provide support for the Project", because there is no Project. Instead, UMB effectively cancelled the Project and is using Weitz's funds to provide support *for the bondholders*. As Weitz put it below, [t]he Weitz loan proceeds were to 'support the Project' for these limited purposes and for this limited

period of time, not 'support the Bondholders' by paying interest on the bonds after construction of the Project had been abandoned by Epworth as a result of UMB's refusal to utilize the remaining bond loan proceeds for the agreed purposes" (Aplt.Appx. 214-15).

That is, because UMB refused to provide Epworth any further disbursements of the Authority loan proceeds that it held in trust as trustee for the bondholders, preventing Epworth from paying for construction, there never will be any completed Project. Along with that, once UMB first applies all the construction loan proceeds to partially repay the bonds, there never will be any money in the Project Fund to pay costs under § 3.2(a), or in the Working Capital Fund or Operating Reserve Fund to pay expenses under §§ 3.2(b) or (c) or principal or interest on the bonds under § 3.2(d). Indeed, UMB has stated it intends to apply all of the Authority loan proceeds it holds in trust for the bondholders to partially satisfy the Authority's obligation to repay the bonds, too (Aplt.Appx. 145-46).

Accordingly, Weitz properly stated a claim under Oklahoma law that UMB's conduct rendered the LSA abandoned and dissolved, requiring that Weitz be restored to its status before the LSA was executed by ordering UMB to reimburse its payments. The paramount idea and purpose behind the LSA were to provide support for the Project by providing contingent funds to Epworth, to be held in trust to pay for certain unanticipated excess expenses during construction or

early startup of the Project, only while entrance fees were not yet available to pay those expenses, and then reimbursed in full after receipt of a certain amount of entrance fees.

By preventing the Project from ever being completed, UMB abandoned performance of that purpose, because there never would be any entrance fees and Weitz never could be repaid. UMB intentionally prevented the Project from ever being completed (Aplt.Appx. 145-47, 155-56). It did not intend to allow further distribution of money from the Project Fund to allow completion of construction of the Project, and instead intended to use the remaining Project Fund money, more than $26.9 million, to partially repay the $110,960,000 of bonds used to finance the construction of the Project, and would use Weitz's funds in the Liquidity Support Fund to pay interest on the bonds (Aplt.Appx. 145-47, 155-56).

Accordingly, both elements of abandonment were met: "(1) an intention to abandon; and (2) an external act whereby such intention is carried into effect." *Tucker*, 376 P.2d at 255. Moreover, the existence and completion of the Project were essential to the LSA's existence, and the parties in entering into the LSA assumed it would continue to exist and progress toward completion, implying a condition that the Project would exist and would continue. *Okla. Gas & Elec. Co.*, 742 P.2d at 547 (citation omitted). As "before the time for performance and without the default of either party" UMB elected to refuse to allow further

distributions of Authority loan proceeds to Epworth, which prevented construction, the possibility of a completed Project "cease[d] to exist and be available for the purpose," and so the LSA must "be dissolved and the parties excused from performing it." *Id.* (citation omitted). What is more, the parties must be restored to the status quo before the LSA was entered into, meaning Weitz must be repaid its initial $1.5 million and its $625,000 must be released to it. *Berland's Inc.*, 447 P.2d at 771.

The district court erred in holding otherwise. This Court should reverse the district court's judgment and remand this case for further proceedings on Weitz's claim for a declaratory judgment.

3. There was no "event of default" within the meaning of the LSA and the Master Indenture.

The district court also held that Weitz had admitted that an "event of default" existed, which was something that § 4.1 of the LSA contemplated, and so under § 4.1 of the LSA this circumstance did not allow the LSA to be rescinded (Aplt.Appx. 289; Add. A10).

This failed to take Weitz's alleged facts as true and make reasonable inferences in Weitz's favor. Weitz pleaded it was not an "event of default" by Epworth that caused construction to cease, but instead was UMB's unilateral decision not to distribute to Epworth any more loan proceeds, which prevented Epworth from paying for any further construction. That was not an "event of default" by Epworth, but rather UMB preventing performance of the LSA's primary purpose.

Section 4.1 of the LSA stated Weitz's obligations under it "shall not be affected, modified or impaired upon … the default or failure … of [Epworth] to fully perform any of its obligations set forth in this Agreement, the Master Indenture, or the Loan Agreement" (Aplt.Appx. 172; Add. A30). The district court relied on this to hold that because UMB alleged an "event of default", the LSA contemplated this happening, and so Weitz could not get out of the LSA (Aplt.Appx. 289; Add. A10).

This was error. For an "event of default" to occur, under § 501(h) of the Master Indenture Epworth had to make an "admission … in writing of its inability or its failure to pay its debts generally as they become due" (Aplt.Appx. 103). Section 603, "Notice of Defaults", similarly required that "the Master Trustee shall be specifically notified in writing of such default by" Epworth (Aplt.Appx. 112). Here, it was *UMB* who stated *it* notified *Epworth* of an event of default (Aplt.Appx. 145). Moreover, UMB stated it had done so on December 12, 2017 (Aplt.Appx. 145), a day *before* it stated it actually became the successor trustee (Aplt.Appx. 153, 193). Even if Epworth may have been unable to pay its debts for the Project sometime in the future, this became a reality *now* only because UMB unilaterally decided to stop disbursing to Epworth any further Authority loan proceeds, preventing the Project's construction being completed (Aplt.Appx. 145). Weitz pleaded this, too (Aplt.Appx. 156).

Taking the alleged facts as true and making reasonable inferences in Weitz's favor, this was not an "event of default" by Epworth, but rather UMB unilaterally abandoning the Project and, with it, the LSA.

The motion Weitz filed in the Oklahoma case (Aplt.Appx. 141), which the district court held meant Weitz "admitted" an "event of default" existed (Aplt.Appx. 288, n.3; Add. A9), does not change this.

First, the motion was not an "admission" that an "event of default" existed (Aplt.Appx. 141). In a routine procedural motion, Weitz was arguing for two Project-related cases to be consolidated (Aplt.Appx. 141). Weitz merely noted that among the similarities in the cases, both involved *claims* that Epworth defaulted: "Both cases arise from a default by the property owner, Defendant White Woods Retirement Campus, Inc. dba Epworth Living at the Ranch ('Epworth') on the bonds that were issued to fund the Project" (Aplt.Appx. 141). As the motion plainly indicated, the base "fact" supporting this statement referred to an allegation that *UMB* had made in its petition. There certainly was no statement that under the terms of the Master Indenture and the LSA, there had been an "event of default" by Epworth, activating § 4.1 of the LSA. In fact, integral to that Oklahoma case is Weitz's position, just as it has maintained in this case, that there was *not* an "event of default" by Epworth.

Second, to the extent Weitz's statement in the Oklahoma motion could be viewed against Weitz, that only would create a question of fact.

But taking the allegations in the light most favorable to Weitz and making all reasonable inferences for Weitz, at this stage that question would have to be resolved in Weitz's favor.

The district court erred in granting UMB's motion to dismiss Weitz's petition for declaratory judgment. This Court should reverse the district court's judgment and remand this case for further proceedings.

II. The district court erred in denying Weitz leave to file a first amended complaint adding a claim for statutory rescission of the LSA. Taking the allegations in Weitz's proposed first amended complaint as true and affording Weitz all reasonable inferences from them, the purpose and performance of the LSA failed. Under 15 O.S. § 231-235, Weitz therefore was entitled to seek rescission of the LSA.

Standard of Review

This Court "usually review[s] the district court's 'denial of leave to amend a complaint under an abuse of discretion standard; however, when the district court bases its denial on the futility of the proposed amendments, we review the underlying legal conclusions de novo.'" *Munro v. Lucy Activewear, Inc.*, 899 F.3d 585, 588 (8th Cir. 2018) (citation omitted). "An amendment is futile if the amended claim 'could not withstand a motion to dismiss under" Fed. R. Civ. P. 12(b)(6). *Hilleshiem v. Myron's Cards & Gifts, Inc.*, 897 F.3d 953, 955 (8th Cir. 2018). This Court reviews the proposed amended claim under the standards for a Rule 12(b)(6) motion. *Id.* The standard of review for a motion to dismiss under Rule 12(b)(6) is discussed *supra* at p. 22 and incorporated here. The Court must "tak[e] the factual allegations in the complaint as true and afford[ ] the non-moving party all reasonable inferences from those allegations." *Munro*, 889 F.3d at 588 (citation omitted) (alterations in original).

* * *

If, taking its allegations as true and making all reasonable inferences in its favor, a party's proposed amended claim would state a claim on which relief could be granted, the district court has no discretion to deny the party leave to amend as "futile". Here, taking Weitz's allegations in its first amended complaint as true, Weitz satisfied Oklahoma's requirements for a claim for statutory rescission of the LSA. Nonetheless, the district court denied Weitz's motion to amend, holding solely that its statutory rescission claim was "futile." This was error, requiring reversal of the district court's judgment and remand for further proceedings on Weitz's first amended complaint.

A. A district court's discretion to deny leave to amend a complaint under Rule 15(a)(2), especially as "futile", is limited.

Fed. R. Civ. P. 15(a)(1) allows a party to "amend its pleading once as a matter of course within" either 21 days of serving that pleading or within 21 days after service of a responsive pleading or motion, whichever is earlier. Outside that limit, Rule 15(a)(2) provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave" but provides that "[t]he court should freely give leave when justice so requires."

Determining whether to grant leave to amend a complaint under Rule 15(a)(2) is within the district court's "broad discretion", and "there is no absolute right to amend …." *Baptist Health v. Smith*, 477 F.3d

540, 544 (8th Cir. 2007) (citation omitted). Nonetheless, given the plain language of Rule 15(a)(2) about freely giving leave when justice requires, the circumstances in which the Court can deny leave to amend are "limited." *Hillesheim*, 897 F.3d at 954. "[A] court may deny the motion based upon a finding of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies in previous amendments, undue prejudice to the non-moving party, or futility." *Baptist Health*, 477 F.3d at 544.

So, while the right to amend is not absolute, Rule 15(a)(2) makes for a "policy favoring liberal allowance of amendment." *Kozlov v. Assoc. Wholesale Grocers, Inc.*, 818 F.3d 380, 394 (8th Cir. 2016) (citation omitted). This is because "[r]esolution of claims on their merits is favored under [Rule] 15(a)(2), and 'decisions on the merits [should not] be avoided on the basis of … mere technicalities.'" *Ash v. Anderson Merch., LLC*, 799 F.3d 957, 962-63 (8th Cir. 2015) (alterations in original) (quoting *Foman v. Davis*, 371 U.S. 178, 171 (1962)). So, "[w]hen a complaint is dismissed for failure to state a claim, the district court has 'considerable discretion to deny a post-judgment motion for leave to amend because such motions are disfavored, but may not ignore the Rule 15(a)(2) considerations that *favor* affording parties an opportunity to test their claims on the merits.'" *Ryan v. Ryan*, 889 F.3d 499, 508 (8th Cir. 2018) (citation omitted) (emphasis added).

Here, the Court summarily determined that allowing Weitz leave to file a first amended complaint would be "futile" (Aplt.Appx. 290; Add. A11).[1] "Futility" means that the complaint, even as proposed to be amended, would fail to state a claim upon which relief could be granted. *Munro*, 899 F.3d at 589. Review for "futility" requires applying the same standard of legal sufficiency as applies to a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Munro*, 899 F.3d at 589. The district

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[1] In its order denying Weitz leave to amend, the district court quoted this Court in *Baptist Health* that "a court may deny the motion based upon a finding of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies in previous amendments, undue prejudice to the non-moving party, or futility" (Aplt.Appx. 283-84; Add. A4-5). But UMB did not argue, and the district court did not hold, that Weitz's motion for leave to amend was made with undue delay, bad faith, or for a dilatory motive. The district court only rested its decision to deny Weitz leave to amend solely on "futility" (Aplt.Appx. 290; Add. A11). To be sure, Weitz's motion for leave was not made with undue delay. Its original complaint was filed less than three months earlier, and its motion for leave was filed only 17 days after the 21-day time it would have been entitled to amend as a matter of right under Rule 15(a)(1)(b) (Aplt.Appx. 2-4). And only UMB had answered (Aplt.Appx. 2-4). Weitz's motion also was made in good faith. The purpose of its first amended complaint was to clarify that it also seeks the remedy of statutory rescission under 15 O.S. §§ 231-235 (Aplt.Appx. 230-31). Clarifying the claims and remedies sought is not evidence of bad faith. Finally, Weitz's motion was not made for any dilatory motive. Its timing and purpose noted rebut any such characterization. Nor is Weitz's first request to amend an indication of "repeated failure to cure deficiencies in previous amendments", *Baptist Health*, 477 F.3d at 544, as Weitz had not attempted any prior amendments.

court must "tak[e] the factual allegations in the complaint as true and afford[ ] the non-moving party all reasonable inferences from those allegations." *Id.* (alterations in original).

This means that the district court must grant the motion for leave to amend if the plaintiff shows "that such an amendment would be able to save an otherwise meritless claim." *Id.* (quoting *Jackson v. Riebold*, 815 F.3d 1114, 1122 (8th Cir. 2016)). The court may deny a motion to amend only where "any future amendment will be futile," *Asbury Square, L.L.C. v. Amoco Oil Co.*, 218 F.R.D. 183, 196 (S.D. Iowa 2003), and where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Robinson v. MFA Mut. Ins. Co.*, 629 F.2d 497, 500 (8th Cir. 1980) (citation omitted).

"The question, therefore, is whether in the light most favorable to the plaintiff, the [proposed amended] complaint states any valid claim for relief." *Id.* (citation omitted); *see also Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) ("The question therefore is whether in the light most favorable to the plaintiff *and with every doubt resolved in his behalf*, the complaint states any valid claim for relief." (emphasis added)).

B. The district court erred in denying Weitz leave to file a first amended complaint as "futile", because taking Weitz's allegations in its proposed first amended complaint as true and according it all reasonable inferences, it stated a proper claim for statutory rescission of the LSA under 15 O.S. §§ 231-235.

The district court combined its order granting UMB's motion to dismiss Weitz's original petition with its order denying Weitz leave to amend its petition (Aplt.Appx. 284-90; Add. A5-11). Its denial of leave to amend consists of two short paragraphs at the end of its order (Aplt.Appx. 290; Add. A11). It stated it did so based on the "plain language of the LSA" as it applied to the declaratory claim in Weitz's original petition (Aplt.Appx. 290; Add. A11). But the court never specifically addressed the potential application of Weitz's statutory Oklahoma rescission rights as alleged in Weitz's proposed first amended complaint (Aplt.Appx. 290; Add. A11).

This was error. Taking Weitz's allegations in its proposed first amended complaint as true and according it all reasonable inferences, Weitz stated a legally sufficient claim for statutory rescission under 15 O.S. §§ 231-235.

Title 15, Chapter 5, of the Oklahoma Statutes, titled "Extinction of Contracts", provides a statutory cause of action for rescission of a contract. 15 O.S. § 231 ("A contract may be extinguished in like manner with any other obligation, and also **in the manner prescribed by this article**" (emphasis added)); *see also* 15 O.S. § 233A (setting forth

procedures in action for rescission); 15 O.S. § 233B (setting forth the form of relief in an action for rescission). This is different than in many other states. For example, in the Eighth Circuit's two largest states, Minnesota and Missouri, rescission is a highly discretionary common law matter of equity, not a statutory right and cause of action. *See, e.g.*, *Beck v. Spindler*, 99 N.W.2d 684, 685 (Minn. 1959) (rescission is a purely equitable remedy in the trial court's discretion); *Ehlert v. Ward*, 588 S.W.2d 500, 503 (Mo. 1979) (same).

15 O.S. § 233 provides in relevant part:

> A party to a contract may rescind the same in the following cases only: …
>
> 2. If through the fault of the party as to whom he rescinds, the consideration for his obligation fails in whole or in part.
>
> 3. If such consideration becomes entirely void from any cause.
>
> 4. If such consideration, before it is rendered to him, fails in a material respect, from any cause ….

15 O.S. § 235, titled "Duty of party attempting rescission", further provides that a party seeking rescission of a contract "must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable, or positively refuses to do so."

Oklahoma courts many times have ordered rescission of contracts as a broad remedy of right under these statutes. *See, e.g.*:

- *Commer. Communs., Inc. v. State ex rel. Okla. Bd. of Pub. Affairs*, 613 P.2d 473, 474-75 (Okla. 1980) (where purchaser claimed intercom system that supplier installed did not conform to contract's specifications and supplier failed bid requirements, statutory rescission lay to restore the parties to their prior status);
- *M & W Masonry Const., Inc. v. Head*, 562 P.2d 957, 961 (Okla. Civ. App. 1977) (where the plaintiff substantially performed the contract, but the defendant failed to make progress payments to the plaintiff, the plaintiff was entitled to statutory rescission);
- *Medlin v. Okla. Motor Hotel Corp.*, 545 P.2d 217, 223 (Okla. Civ. App. 1975) (where party promised to finance and construct an authorized motel using the defendant's land as collateral for a construction loan and then failed to obtain the necessary financing, leading to the proposed motel never being constructed, this failure of consideration was sufficiently significant to destroy the contract and authorize its rescission; "Judicial termination of the agreement in this case is at the behest of faultless parties who not only fully performed their part of the agreement but to date have received naught but a lawsuit");
- *Telex Corp. v. AiResearch Aviation Co.*, 460 F.2d 215, 218 (10th Cir. 1972) (where contract failed to provide for a loss situation created by the unforeseen downturn in the executive jet market, the sale of a jet at a price less than its original sale price entitled

the plaintiff to rescission of the contract and recover the installment payments it had made until then);

- *Berland's, Inc.*, 378 P.2d at 865 (where owner failed to provide vehicle parking for location leased in strip mall and evidence showed the parking was an essential element of the lease and an important inducement for the plaintiff to enter into the lease, the plaintiff was entitled to rescission because as a result of the defendant's conduct it did not get what it contemplated receiving);
- *Davis v. Gwaltney*, 291 P.2d 820, 823-24 (Okla. 1955) (where plaintiffs had not received everything for which they entered into the contract, there was a partial failure of consideration, entitling the plaintiffs to rescission of the contract);
- *Davis v. Hastings*, 261 P.2d 193, 195 (Okla. Civ. App. 1953) (the defendant's promise to help the plaintiff undertaking a highly competitive business get started was "so essential a part of the bargain that the failure of it must be considered as destroying or vitiating the entire consideration of the contract"); and
- *G.A. Nichols, Inc. v. Hainey*, 122 P.2d 809, 811-12 (Okla. 1942) (the plaintiff's promise to pay the defendant's taxes was "of such a nature and of such importance that the contract would not have been made without it", so 15 O.S. § 233 authorized the plaintiff to rescind where, through no fault of his own, "the consideration for his obligation fails in whole or in part").

Per these decisions, 15 O.S. §§ 233 and 235 apply to remedy exactly what Weitz claimed in its proposed first amended complaint. Weitz claimed the completion of construction and initial occupancy of the Project and receipt of entrance fees by Epworth were an essential part of its bargain for the LSA, and it would not have entered into the LSA with that consideration omitted (Aplt.Appx. 234-35). It further claimed that UMB's actions prevented the completion of construction and initial occupancy of the Project, causing Weitz's essential purpose for the LSA to fail in whole, in part, or in material respect, or to become void (Aplt.Appx. 236, 238). Finally, it also claimed it provided written notice of rescission to Epworth and UMB, including an offer to return all prior payments made to Weitz under the LSA (Aplt.Appx. 237, 272).

Accordingly, taking Weitz's allegations as true, granting Weitz the benefit of all inferences from those allegations, and resolving every doubt in favor of Weitz, the law of Oklahoma is that Weitz stated a valid claim for statutory rescission of the LSA.

In Oklahoma,

> [c]ancellation of a contract may be ordered where that which was undertaken to be performed in the future was so essential a part of the bargain that failure of it must be considered as destroying or vitiating the entire consideration of the contract, or so indispensable a part of what the parties intended that the contract would not have been made with that condition omitted.

Wright v. Fenstermacher, 270 P.2d 625, 627 (Okla. 1954) (quoting *Davis*,

261 P.2d at 195); *see also Hurst v. Champion*, 244 P. 419, 421-22 (Okla. 1925). And the law of Oklahoma is that frustration of purpose of a contract "constitutes a failure of consideration and is therefore within statutory grounds for rescission." *Wagstaff v. Prot. Apparel Corp. of Am.*, 760 F.2d 1074, 1076 (10th Cir. 1985). Weitz claims exactly this frustration of the LSA's purpose. *See* Aplt.Appx. 270 ("[t]he purposes of the LSA no longer exist").

Below, UMB argued that the LSA's terms nonetheless superseded or waived these statutorily-granted rescission rights. UMB first quoted § 4.1 of the LSA, which provided that Weitz's obligations under it are

> absolute and unconditional and shall remain in full force and effect until the termination of this Support Agreement and … shall not be affected, modified or impaired upon the happening, from time to time, of any event, including, without limitation, … (e) the taking or failure to take the actions under or referred to in the Master Indenture, the Bond Indenture or the Loan Agreement …or (h) failure … of the Corporation to fully perform any of its obligations set forth in this Agreement, the Master Indenture or the Loan Agreement ….

(Aplt.Appx. 222) (quoting Aplt.Appx. 172; Add. A30). UMB argued that by these terms the LSA only could be terminated in two ways, "neither of which can be satisfied here" (Aplt.Appx. 224).

UMB's argument is without merit. None of the LSA's provisions that UMB cited provided a waiver of Weitz's rights under Oklahoma's rescission statutes, which removes these limitations by rescission of the

contract. *See* 15 O.S. § 232 ("A contract is extinguished by its rescission"). Weitz's proposed first amended petition did not seek to **terminate** the LSA; it sought to **rescind** it.

The law of Oklahoma is that "rescission" of a contract under 15 O.S. §§ 231-235 is far broader in scope than "termination" of a partially performed executory contract and "contemplates an annulment so that the contract is voided *ab initio* accompanied by restoration of the parties to the precontract status." *M & W Masonry*, 562 P.2d at 961 n.2 (citing *F. & M. Drilling Co. v. M. & T. Oil Co.*, 137 P.2d 575 (Okla. 1943)); *see also Huffman v. Saul Holdings Ltd. P'ship*, 194 F.3d 1072 (10th Cir. 1999). Nothing in the "plain language of the LSA" waives Weitz's rights to claim rescission otherwise allowed under Oklahoma law, and Weitz's rescission remedy is broader than the LSA's more limited termination provisions.

UMB also argued below that the completion of construction and initial occupancy of the Project was not the LSA's sole purpose, as the LSA also allows for use of the Weitz loan proceeds to pay interest on the bonds (Aplt.Appx. 223-24). UMB argued this additional purpose of the LSA necessarily rebuts Weitz's allegations that the essential purpose of the LSA no longer exists (Aplt.Appx. 223-24).

Again, UMB misses the point that the operation of the LSA is irrelevant if rescission is allowed by Oklahoma law. The real issue is whether the Oklahoma statutory requirements for rescission have been

met, not the operation of the LSA if it is not rescinded, as UMB argued.

Taking Weitz's allegations as true, granting Weitz the benefit of all inferences from those allegations, and resolving every doubt in favor of Weitz, Weitz has met the statutory requirements for rescission of the LSA under Oklahoma law.

In Oklahoma, even a *partial* failure of performance is ground for rescission of contract, provided that failure "concerns a matter of such importance that the contract would not have been made if default in that particular had been expected or contemplated." *Doenges Motors Inc. v. Bankers Inv. Co.*, 369 P.2d 611, 613 (Okla. 1962) (quoting *G.A. Nichols*, 122 P.2d at 809); *see also Davis*, 291 P.2d at 823; *Wallace v. Smith*, 240 P.2d 799, 803 (Okla. 1952).

In its proposed first amended complaint, Weitz claimed exactly this essential failure of purpose. It claimed a right to a return of its loan proceeds not under the terms of the LSA, but rather as a consequence of its Oklahoma statutory rescission rights. Essentially, UMB argued that the LSA's terms rebut any ability of Weitz to support Weitz's factual allegations made in the complaint. But under the standards for reviewing a motion to dismiss under Rule 12(b)(6), that would be improper. This Court must take Weitz's allegations as true and accord them the benefit of all reasonable inferences.

The purpose of Weitz providing funds under the LSA was "to provide support **for the project**" (Aplt.Appx. 163; Add. A21), its funds

only would apply as a safeguard after the Authority loan proceeds were first fully distributed, and after completion of construction any draws of Weitz's LSA funds would be repaid from entrance fees received after that completion. *Supra* at pp. 33-35. But taking all of Weitz's alleged facts as true and making reasonable inferences in Weitz's favor, UMB's unilateral actions prevented that from ever occurring, destroying the LSA's primary purpose. *Supra* at pp. 33-35. As in all the cases cited above, taking Weitz's allegations as true and according them the benefit of all reasonable inferences, Weitz stated a proper claim under the law of Oklahoma for statutory rescission of the LSA and consequently being returned to its status quo before the parties executed the LSA.

Denying Weitz the opportunity to pursue its statutory rescission remedy was error. Under the standards for evaluating a motion to dismiss under Rule 12(b)(6) and resolving any doubt in favor of Weitz, Weitz adduced facts in support of its claims that would entitle it to relief. *See Robinson*, 629 F.2d at 500. As a matter of law, taking Weitz's allegations in its first amended complaint as true, Weitz satisfied the requirements of Oklahoma law to state a statutory rescission claim.

The Court should reverse the district court's judgment and remand this case with instructions to grant Weitz's motion for leave to file a first amended complaint and for further proceedings on Weitz's first amended complaint.

Conclusion

The Court should reverse the district court's judgment and remand this case with instructions to grant Weitz's motion for leave to file an amended complaint and for further proceedings on all claims in Weitz's first amended complaint.

Respectfully submitted,

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by /s/Jonathan Sternberg

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I certify that this brief complies with the type-volume limitation of Fed. R. App., p. 32(a)(7)(B), because this brief contains 12,637 words excluding the parts of the brief exempted by Rule 32(f).

I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and typestyle requirements of Rule 32(a)(6), because this brief has been prepared in a proportionally-spaced typeface, Century Schoolbook size-14 font, using Microsoft Word for Office 365.

I further certify that the electronic copies of both this brief and its addendum filed via the Court's ECF system are exact, searchable PDF copies of the originals, that they were scanned for viruses using Microsoft Windows Defender, and that according to that program they are free of viruses.

/s/Jonathan Sternberg
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Certificate of Service

I certify that on January 28, 2019, I electronically submitted the foregoing to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by using the CM/ECF system.

/s/Jonathan Sternberg
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