IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ORCKIT COMMUNICATIONS LTD.,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	Civil Action
	:	No. 9658-VCG
NETWORKS INC., HUDSON BAY IP	:	
OPPORTUNITIES MASTER FUND LP,	:	
and HUDSON BAY MASTER FUND	:	
LTD.,	:	
	:	
Defendants.	:	

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Chancery Courtroom #2
38 The Green
Dover, Delaware
Wednesday, January 28, 2015
2:00 p.m.

- - -

BEFORE: HON. SAM GLASSCOCK, III, Vice Chancellor

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ORAL ARGUMENT DEFENDANTS' MOTION TO DISMISS

- - -

CHANCERY COURT REPORTERS
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APPEARANCES:

KURT M. HEYMAN, ESQ.
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Proctor Heyman LLP
-and-
MICHAEL C. MILLER, ESQ.
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-and-
LEAH M. QUADRINO, ESQ.
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for Plaintiff

GREGORY V. VARALLO, ESQ.
RICHARD P. ROLLO, ESQ.
Richards, Layton & Finger, P.A.
for Defendants

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THE COURT: Good afternoon.

MR. HEYMAN: Good afternoon, Your Honor. Kurt Heyman for plaintiff.

THE COURT: Welcome, Mr. Heyman.

MR. HEYMAN: Mr. Varallo and Mr. Rollo, my good friends, have allowed me to first make introductions although it's their motion today. Today we have people from not one but two different directions on the Amtrak. We have Mr. Michael Miller from Steptoe & Johnson in New York.

THE COURT: Welcome, Mr. Miller. I'm pleased were you able to get out of New York. It looked like for a while it was going to be cut off from the rest of the United States. I'm pleased that didn't happen.

MR. MILLER: Some people would welcome that, Your Honor.

MR. HEYMAN: Leah Quadrino from the Washington D.C. office of Steptoe & Johnson.

THE COURT: Welcome.

MS. QUADRINO: Thank you.

MR. HEYMAN: Your Honor knows Miss Crompton from my office.

THE COURT: Good afternoon, Miss

Crompton. Welcome.

MR. HEYMAN: I apologize, Your Honor. I'm a little under the weather since our last appearance together. Mr. Miller will be arguing for us when Mr. Varallo is done.

THE COURT: I'll be happy to hear from Mr. Miller.

Mr. Varallo.

MR. VARALLO: Good afternoon, Vice Chancellor.

THE COURT: Good afternoon.

MR. VARALLO: Greg Varallo for the defendants. I have with me Rich Rollo from my firm.

THE COURT: Welcome, Mr. Rollo. It's a pleasure to have you all here on both sides. I appreciate deeply your making the trek down here to Georgetown. It's a huge help to me.

MR. VARALLO: Your Honor, we had a delightful lunch at the Brick Hotel which is always a delightful place to pass a few moments, and I have to tell you that the waitress who served us was a young woman by the name of Montana, and when I asked a few questions, Montana said, "Well, first of all, are you a lawyer," and I said, "Yes," and she said,

"Overruled." I said I hope I do better where I'm going after lunch than I did during lunch.

Your Honor, this is a motion to dismiss a contract case. I represent defendants in the matter and have moved to dismiss. The plaintiff, represented by Mr. Heyman and the Steptoe firm is a company under the jurisdiction of the Israeli Bankruptcy Court.

The facts here are relatively straightforward. The parties entered into something called a Strategic Investment Agreement in March of 2013, and, Your Honor, we attached that as Exhibit A to our opening brief.

That agreement contemplated that Orckit, the plaintiff, would assign specifically enumerated patents to Networks3, my client, which would exploit the portfolio and attempt to cause infringers to pay license fees to practice the art covered by the patents.

In exchange for the patent transfer --

THE COURT: What area of industry were the patents?

MR. VARALLO: High technology, Your Honor. I'm not sure I can tell you much more than

that.

THE COURT: It has nothing to do with the motion, but I was curious.

MR. MILLER: This will be the last time I try to help. Telecommunications; very sophisticated stuff.

THE COURT: Thank you.

MR. VARALLO: In exchange for the patent transfer, Networks was to pay $8 million. It was to issue one million of its shares and its share in licensing revenue going forward. Orckit, in exchange, was to give us a note back for 500,000 U.S. dollars and issue 4.7 million, roughly, of its shares to us.

At least from the perspective of my clients, Your Honor, this was not a straightforward deal. This deal involved us buying intellectual property from an Israeli seller subject to a legal regime that, while it shares common roots with ours, is quite different in many respects.

Because Israeli law contemplates approval of someone called the chief scientist who is represented by the Office of the Chief Scientist, and I'll sometimes refer to that as OCS during my

argument, before technology can be transferred, the OCS has to give approval. My clients were concerned from the outset that any approval of the OCS be acceptable to us.

The letter from the OCS is one of a handful of documents at the very heart of our case, Your Honor. The amended complaint mentions a letter in at least paragraphs 18, 20, 21, 22, 37, 46 and 49. We have an English translation of it that I would like to hand up today, and with the Court's permission, will refer to it from time to time.

THE COURT: I'll be happy to take a look at that. I assume the plaintiffs have a copy of that letter.

MR. VARALLO: I will be happy to provide a copy.

MR. MILLER: Your Honor, I don't know if this is a new translation.

MR. VARALLO: This is the translation that we were provided with by our client.

THE COURT: Mr. Varallo, I'll be happy to look at it, but why is this pertinent to your argument which I thought was that because there's a "sole discretion" clause, it doesn't matter the reason

for which your client has exercised its right to disapprove the terms under which the OCS transferred the patents.

MR. VARALLO: That is correct, Your Honor, but I come with both belt and suspenders. My argument today is precisely as Your Honor has encapsulated it, but I intend as well to argue that even if Your Honor finds that some standard is appropriate, and the parties have differed on what that standard might be, that we should win even if Your Honor imposes some standard on us, and that is the purpose of the tender of this letter which I'll get to with Your Honor's permission.

THE COURT: Sure.

MR. VARALLO: Your Honor, I think a brief perusal of this letter will show that there were a number of issues dealt with in the OCS letter that were important to us from the business perspective.

Not only, Your Honor, did we want assurance that OCS itself was prepared to sign off on our deal, but we also wanted to know with a high degree of certainty what we would have to pay to the State of Israeli in the event we were able to license technology going forward.

THE COURT: I don't mean to cut you off, but doesn't the complaint allege that after this letter there was negotiation that took place?

MR. VARALLO: Indeed.

THE COURT: Well, let's assume that I find some standard that would make this letter pertinent. How can I, at this stage of the pleadings, determine that, post this letter, whatever that standard might be has, as a matter of law, been met?

MR. VARALLO: So, Your Honor, that's a great question. Let me get right at it.

My friends allege, in conclusory fashion in the complaint, I believe it's paragraph 38 of the complaint, that the concerns expressed by my client were "entirely pretextural." They don't say why they were pretextural. They just make the conclusory allegation that they were pretextural.

Your Honor, we think there's no standard, and I'm happy to get into that at great length, but in answer to Your Honor's question, if you determine that there is some standard, whether it be subjective good faith, reasonableness, commercial reasonableness, good faith and fair dealing, whatever standard Your Honor chooses to measure, the exercise

of our conduct in our sole discretion without good faith and fair dealing, whatever you choose to -- however you choose to view that, whatever lens you choose to apply to take a look at that, and we think there should be none, but in answer to Your Honor's question, we think that the well-pled facts in the complaint are enough to grant dismissal under either 12(b)(6) or any other relevant standard.

Let me tell you why. So if you look at the face of the complaint, let's assume you're applying some standard, be it reasonableness or something else, if you look at the face of the complaint, there's an allegation of pretext. It's conclusory.

And then what do you have? You have an allegation that on July 30, the OCS letter which I have tendered to Your Honor was provided to us soon after in translation, and then what happened? You have an express allegation in the complaint that two things happened. One, my client, Mr. Chernicoff, the CEO of Networks3 sent to the other side a letter saying "We have four concerns with this letter." It didn't say "We are merely exercising our right to walk away." It said "We have these concerns. They are

business concerns." I've got the letter to show Your Honor and to walk through if you'd like to see it.

Then what happens? Mr. Chernicoff flies from Seattle, Washington, literally as far around the world as you could go, to Tel Aviv, Israel, and he meets with the Office of the Chief Scientist and he negotiates his concerns with the Office of the Chief Scientist. That's right in the complaint that there was, in fact, a meeting.

So what do we know from the complaint? We know on the one hand the absolutely conclusory allegation of pretext. On the other hand we've got a letter, we've got express concerns raised, we've got the CEO flying around the world to negotiate. And then, within the seven-day window, we know that he's unable to achieve the level of satisfaction that he seeks. And so the exercise is made of the decision to terminate the contract.

And in the context of whatever standard you apply, the well-pled facts, the well-pled facts, are entirely different than pretext. They are, in fact, good proof and proof Your Honor ought to accept because they are well pled, of good faith, reasonableness, commercial reasonableness, good faith

and fair dealing, whatever standard you want to use.

THE COURT: I suspect if I am to apply, say, commercial reasonableness, given the pleadings in the complaint, even in light of what you've told me in this letter, that there may well be factual issues that would preclude dismissal. So let's turn, if we could, to the more absolute of the arguments, Mr. Varallo.

MR. VARALLO: Certainly.

Your Honor, let's start then with the idea that we've got a contract, and we start with the plain words of the contract. Section 5.3 of that contract, 5.3(c) in particular sets forth the parties' agreement on this particular condition.

It says that Networks3 must be satisfied with the OCS approval in its "sole discretion." But, Your Honor, it also expressly says that the exercise of that sole discretion will not be subject to the implied covenant of good faith and fair dealing.

So we start from the proposition that the case begins and ends with that. We need go no further than that. Delaware law acknowledges the right to contract for sole discretion. It gives life

to such contractual provisions, and, Your Honor, there is good law which I am happy to talk to you about in some detail, demonstrating that it is possible to contract around the duty of good faith and fair dealing as it applies to sole discretion clauses.

THE COURT: Is this effectively an option contract?

MR. VARALLO: No, it's not, Your Honor, because there was good consideration given here. The ability of my client to walk away from this deal, to terminate the deal, is found in I think Section 6.1 of the contract. It's a seven-business-day window that they can act in. Up until that point in time, they have obligations under the contract they performed. If that seven-day window closes, they have obligations under the contract they have to perform; clearly mutuality, exchange of consideration; clearly a firm contract, but a seven-day window that allows them to leave in the event that this OCS approval is not satisfactory to them in their sole discretion.

THE COURT: And since, in your view, sole discretion is not cabined by good faith or anything of the kind, they had, in effect, an absolute right to walk away during that window.

MR. VARALLO: Absolutely positively correct.

THE COURT: And it's your argument that they bargained for, that and it's clear from the language and that, therefore, I shouldn't enforce it otherwise.

MR. VARALLO: That's absolutely correct, Your Honor. You have gotten right to the heart of our argument, and that's our primary argument. I think that, Your Honor, my friends say in response to that, and I'll anticipate what the gentleman is going to say, my friends say, well, wait a minute, that contemplates that the Court ought to enforce a contract right that allows you to act in bad faith.

And the cases answer that, Your Honor. There is the VTR case in the Southern District of Manhattan that we have cited, and Nemec versus Shrader, a little bit closer to home as well. Those cases say that if you're acting pursuant to a right given to you in a contract, it, by definition, cannot be bad faith.

The question of bad faith and good faith just doesn't adhere here. If we have a right,

and we're acting pursuant to the right, that's the end of the story. There is no bad faith that flows from our exercise of an otherwise legal right. I'm talking about a malum in se. I'm talking about a contract to violate the law. We're talking about an otherwise legal right.

THE COURT: So the way you view this contract, it imposed obligations on your client that they complied with, gave them a right to walk away at a certain point, which they exercised, and they have no further obligations after that.

MR. VARALLO: That's correct.

THE COURT: Because that's how the contract was written.

MR. VARALLO: That's correct, Your Honor.

I would suggest to Your Honor -- I'm sure Your Honor has seen sole discretion contracts. Certainly our cases are replete with examples of sole discretion contracts. But as we searched to get ready for the argument and the briefs, I will tell you, I'll represent to you, and I think it's probably fair to say neither side has found a example anywhere in the written English case law, anywhere, where not only was

the language "sole discretion," but that sole discretion was further clarified with a parenthetical that said "to the extent available by law, we don't intend to include good faith and fair dealing," the covenant of good faith and fair dealing in connection with the exercise of that sole discretion clause.

THE COURT: It's certainly unique in my experience. I am more used to the what I consider more problematic formulation of sole discretion and then an attempt to cabin that by something like "for business purposes" or "reasonable" or something like that, terms that it seems to me are incompatible with one another. But I have not seen this language, and I had assumed it is not common.

MR. VARALLO: Your Honor, I think that should take me to my friend's 4.2 argument which I think Your Honor mentioned earlier, the commercial reasonableness question and whether that is a standard which adheres in the exercise of our sole discretion not cabined by good faith and fair dealing.

THE COURT: Now, you concede, do you not, that your client had an obligation to pursue the OCS permission with that standard.

MR. VARALLO: No, I don't concede

that.

THE COURT: Well, then explain that.

MR. VARALLO: I would direct Your Honor to Section 4.2(b) as we showed you of the agreement.

I have to tell you, Your Honor, that 4.2(b) I think directly answers Your Honor's question. I'm going to quote from it. "To the maximum extent permitted by law, Orckit," the other side, "Orckit will promptly take any and all steps necessary to avoid or eliminate each and every impediment under the R & D law asserted by any governmental entity or any other person with respect to the ownership, transfer, licensing or enforcement of rights under the patents under the R & D law, including satisfying the condition in Section 5.3(c)."

So, Your Honor, one of the reasons 4.2(a) commercial reasonableness doesn't apply to us is that in the first instance this contract assigns the obligation to satisfy Section 5.3(c) to the other side.

It says that they are the ones who are going to take the lead in making sure that there are no road blocks coming out of the OCS approval. That's

exactly what I just read to you. It goes on to say, interestingly enough, if the parties are unable to agree on any matter, Networks3 will be entitled to lead any negotiations with respect to the OCS approval, and it continues.

So, ultimately, it was our sole discretion backed up by this 4.2(b) provision which says, "Oh, and by the way, if you have to negotiate, you get to lead that negotiation." 4.2(b) pretty unequivocally says that they are going to be the ones to clear out the road blocks associated with 5.3(c).

Certainly we were supposed to cooperate with them. No doubt about that. In fact, Your Honor, the plain allegations of the complaint suggest we did because when we didn't get the letter we liked, what did we do? We flew all the way to Israel to negotiate and try to work it out. That is a factual matter asserted in the plain language of the complaint.

But in answer to Your Honor's question, in the first instance, this burden is placed upon my friends; not upon my client.

So let's talk about 4.2 for just a moment. Frankly, Your Honor, my colleague who wrote

the briefs here is a former philosophy professor, Professor Peach, and Peach teaches me that there's something called a category mistake in philosophy. He told me who it was -- who came up with the idea, and I frankly forget, but there's this idea of category mistake. And this is a category mistake. Let me see if I can't explain why.

Section 4.2(a) says the parties will use commercially reasonable efforts to satisfy the conditions in Article 5 and cause the closing to occur. But what my friends are saying to Your Honor is that my clients traded off getting excused from the implied covenant of good faith and fair dealing and swapped it out for a higher standard. They say sole discretion not bound by good faith and fair dealing, but we have to act commercially reasonably.

Your Honor, in commercial intercourse, that just doesn't make any sense. And I would suggest to Your Honor you're going to be very chary of anybody who says it does. After all, part of your job, or perhaps all of your job in this case, is to find the intent of the parties from the plain language of the agreement.

It makes no sense at all from a

commercial context to say "we're going to negotiate our way out of good faith and fair dealing and negotiate our way into commercial reasonableness." That just doesn't compute. No rational party would do that and substitute a higher standard.

But, Your Honor, focusing on the words themselves, they don't undercut our view of Section 5.3(c). Agreeing to take commercially reasonable efforts to cause the conditions of Article 5 to be complied with doesn't alter the standard baked into 5.3(c). If the parties wanted to, they could have said "in all events subject to 4.2," but they didn't do that.

Moreover, as we argued in our papers, commercially reasonable efforts just doesn't make sense when applied to a concept like sole discretion. What the other side is literally arguing is that we have to make commercially reasonable efforts to be satisfied, not only satisfied but satisfied in our sole discretion.

I would suggest, Your Honor, that a native English speaker will recognize immediately that we don't make efforts to be satisfied in our discretion. There's a disconnect. It's the category

mistake that my philosophy professor friend talked about.

We might make efforts to file papers. We might make efforts to get financing. We might make efforts to hold a closing before a drop dead date. But you don't make efforts to be satisfied, at least not in commercial intercourse. We either are satisfied or we're not satisfied.

Moreover, Your Honor, when you look at the language of 4.2(a) which my friends point to itself, it gives you three enumerated examples. Now, they don't preempt the field, but there are three examples where commercial reasonable efforts are called for. Example one is in the preparing and filing of documentation. Example two is in obtaining consents, and example three is in not taking action to delay or prevent consummation.

Those are the three categories of actions to which a standard like commercial reasonableness makes sense. But it doesn't make sense when you're talking about satisfaction and sole discretion.

You know, Your Honor, even if you were able to hold in your mind the incongruity of us

purposefully trading out a low standard for a high standard and what I would suggest is the linguistic torture involved in plaintiff's interpretation of 4.2(a), we have identified several canons of contract construction which ought to help Your Honor resolve the matter.

As then Vice Chancellor Chandler wrote in Katell against Morgan Stanley, when in interpreting contracts, specific governs over general. He explained why, and it makes perfect sense. What he said was that canon was getting at the idea that the more specific the contractual undertaking, that that undertaking more precisely reflected the intent and efforts of the parties than the broad, less specific provision.

Similarly, the Vice Chancellor in the same case recognized the canon holding that unequivocal language controls over qualified language. Here, sole discretion not bound by good faith and fair dealing is about as unequivocal as you're going to be able to find in your long and hopefully fruitful tenure as a judge.

We contend that you need not even get to the canons of construction. It's common sense.

It's the plain reading of the words on the page. Your Honor, that's as it should be. You can read 4.2 fairly to apply to any act required, an act of filing papers, an act of preparing for closing, an act of holding a closing by a date certain. That makes sense. What doesn't make sense is talking about sole discretion in the context of commercial reasonableness.

I mentioned as well that 4.2(b), same section that 4.2(a) is found in, assigns to Orckit the obligation to avoid or eliminate each and every impediment to satisfying the condition. But it also expressly says that we get to control the negotiation.

Your Honor, a fair reading of the whole contract demonstrates that satisfying Section 5.3(c) wasn't even our burden to begin with. Even if commercially reasonable efforts is the standard, that task is assigned to Orckit specifically in 4.2(b).

THE COURT: You didn't make that argument in the briefing though, did you, Mr. Varallo?

MR. VARALLO: I didn't make the 4.2 argument in the brief, Your Honor. I'll tell you why; because when I was preparing this morning, I found that provision as I was rereading the contract, and

Your Honor is right to call me on it.

THE COURT: That's fair enough. I appreciate that.

MR. VARALLO: So, Your Honor, let me turn to a separate question, which is what if there were some standard beyond sole discretion, not bounded by good faith and fair dealing. This is the suspenders part of the belt and suspenders argument. I'm happy to pass on it if Your Honor is convinced, but I thought it might be useful to Your Honor.

THE COURT: I'd like you to make it if you would like to briefly turn to it.

MR. VARALLO: So, Your Honor, I guess the question is then what standard would apply. My friends have argued that if commercial reasonableness and 4.2(a) doesn't apply, then perhaps it's good faith because good faith can never go away.

It's kind of an interesting argument they're making. They kind of admit that you can contract around good faith and fair dealing but only half of it; that you can contract around the fair dealing part but not the good faith part.

I think the answers start with what I told Your Honor earlier, and that's our law, including

Nemec versus Shrader, which says if you have a right to do it, it's not bad faith, so you're not running afoul of good faith there.

But, Your Honor, I think there are two other answers, and one I think starts with what good faith in this context means. Our Supreme Court in 2013 in a case called Policemans Annuity, which was discussed in the briefs, held that the removal of a general partner under a partnership agreement, in order to be in "good faith" had merely to survive the test utilized for generations as to whether the business judgment rule applied; that is, whether the challenged judgment was "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."

That's our Supreme Court in 2013.

Your Honor, if that is the lens you bring to trying to figure out this case, and for the reasons I earlier stated, I don't think you get there, but if Your Honor chooses to apply some standard, and good faith seems to be if you're going to pull a standard out of the air, it seems to be as reasonable a standard as any, good faith is measured by the business judgment rule test.

Your Honor, when you think about that test in the context of a motion to dismiss, the question is are there facts pled or reasonable inferences from those facts pled on which it's reasonably conceivable that my friends' version of the contract interpretation wins.

I would tell you based upon what we have before us today, the answer is no. You don't credit the assertion of pretext without more. And you do credit the actual factual allegations in the complaint; the factual allegation that we wrote a letter which addressed our specific concerns.

It's very interesting, when you look at that letter which is attached as Exhibit C, I believe to our opening brief, Your Honor, Mr. Chernicoff doesn't say, "I've got these concerns. We're done." He says, "I've got these concerns. Now, I want you to know I am not exercising our right under Article 6 to walk away at this point."

In other words, what he's doing is he's identifying the concern so his contract party, his counter-party, understands that there is an issue. And he doesn't exercise his right to walk away.

The next thing that happens that's

alleged in the complaint is he flies all the way to Israel to have a meeting with the OCS. He has a meeting with the OCS and he negotiates with the OCS.

Now, here's where it gets interesting. In the complaint -- that's paragraph 51 of the complaint. In the complaint itself, Your Honor, there is an allegation that as a result of that negotiation, the OCS agreed to everything that was within its power to agree. Here's where I want to bring you back to the document I handed up earlier, Your Honor. By the way, the complaint doesn't tell us what it agreed to, what was within its power.

THE COURT: Before we move into that, can you explain to me -- I assume under the terms of the contract that once an English translation is given to your client, whatever negotiation was going to do with the OCS had to be done within six days so that it could --

MR. VARALLO: Seven days.

THE COURT: So that it could exercise its rights if it could become satisfied.

MR. VARALLO: That's exactly right.

So when my friend -- he happens to be my friend as well, but when my client, Mr. Chernicoff,

tendered his -- when he got the English translation, it was analyzed, and what we know from the complaint is that he sent a letter back expressing four concerns. That letter is Exhibit C to the opening brief.

Those four concerns, when Your Honor looks at them, are business concerns. It has to do with the rate, how much we're going to have to pay the State of Israel, it has to do with the pending regulations that the OCS letter talks about, has to do with whether or not, when Networks3 is sold down the road, the State of Israel is going to come in and try to collect 120 million or more -- I'm sorry, 20 some million or more dollars.

What happened here was Orckit received funding from the State. The State has a program under which you pay back that funding under certain circumstances. There was a question among the parties as to whether it would be that amount plus interest or that amount plus interest plus something else; effectively, whether it was a capped number or an open ended number.

These are business concerns identified in Mr. Chernicoff's letter that arise from this OCS

letter. But one of the really key concerns here had to do with the regime of regulations. We were promised that we were going to get some regulations that made outbound licensing easier. If Your Honor looks at the chief scientist's letter, the translation from July 30, I would direct your attention to the penultimate paragraph on page two.

I won't read the whole thing to Your Honor, but I think it's important that we focus on a couple of things here. It says, in essence, that the chief scientist intends to issue regulations whose main points are of giving the possibility -- and a little gets lost in translation here, but giving the possibility to the recipients to grant authorization to use no outside Israel -- and I'm skipping a little. It's not a direct quote. But the idea is we're going to make it easier to do outbound licensing.

Then look at the last sentence. The chief scientist says, "Despite the fact that there is unanimity between the professional factors regarding the necessity of the regulations, completing the sub-legislation is dependent on the approval of the finance committee of the Knesset, with all that involves."

Now, Your Honor, I'm not a professional politician, but when a government bureaucrat writes to you and says, "Yeah, we're behind these regulations, but before we get these regulations which are going to make what you want to do feasible, you need to go through the finance committee of our parliament, 'with all that involves,'" I would suggest, Your Honor, to a reasonable person, that might be a red flag that these regulations aren't coming any time soon or in any particular form.

That was a concern of our clients, one of the concerns identified in Mr. Chernicoff's letter which should be in the record.

THE COURT: But isn't one of the allegations by the plaintiffs here that Networks got out of the contract for reasons that had nothing to do with the OCS and had everything to do with the Hudson Bay entities withdrawing their financing?

MR. VARALLO: They attempt to allege that. They allege it in a conclusory way, but let's assume it's not conclusory. Let's talk about that for a second.

Your Honor, this contract gives my clients the right to walk away effectively for any

reason or no reason. Let's assume for purposes of argument, entirely argument -- I'm not admitting anything today. I'm only attempting to answer Your Honor's question. Let's assume for purposes of argument that Hudson Bay had said to Mr. Chernicoff, "You know, Rich, we are not interested in funding this any more. We've got something better to do."

The fact that there may have been such motivation floating around in the background does not negate the fact that there were also business motivations floating around in the foreground.

Let me try to put it in the 220 context if I can. Your Honor will remember that the 220 law is if you have a predominant purpose; that is, a proper purpose, you win a 220 case even if you have other purposes that aren't reasonably related to your interest as a stockholder.

THE COURT: But in this case, wouldn't it be a fact that if the funding were withdrawn, that would be a reason that -- I don't know how -- is it Networks cube, Networks3, super three, couldn't go forward, correct? It wouldn't really matter at that point whether there were other business reasons. Wouldn't they be precluded from going forward?

MR. VARALLO: A couple of answers, Your Honor. If that was true and there was no other financing, the answer would be yes. But there is no allegation that there was no other financing, and there is no allegation on information and belief, or otherwise, that it was, in fact, the case that Hudson Bay was unwilling to fund.

What you have in the complaint is an alleged statement by Mr. Chernicoff which we'll dispute if we get to the facts, but an alleged statement by Mr. Chernicoff, according to the complaint, that he said words to the effect that he doesn't believe Hudson Bay wants to fund. Nothing in the complaint that says Hudson Bay had abjured its responsibility to fund under its commitment letters. Nothing in the complaint that says that Hudson Bay had walked away from those commitment letters.

THE COURT: Is that an inference I can reasonably draw under the 12(b)(6) standard?

MR. VARALLO: I don't think so, Your Honor, because you have to do so based on actual facts, well pled facts as opposed to conclusory ones.

THE COURT: Well, I've got a pleading that says that the principal reported that his source

of funding probably wasn't going to be available.

MR. VARALLO: A couple of problems with that, Your Honor. You're not tied in time in that allegation. It doesn't say that he said that during the negotiations or during the period between July 30 and August 8th.

THE COURT: But doesn't our case law say that even vague allegations put the defendant on notice of what's being alleged?

MR. VARALLO: Well, Your Honor, post-Central Mortgage, the case law I think is fairly read as saying while you don't have to plead with the same specificity you would under Rule 9(b), vague allegations really don't get you there; that the Court is -- let me put it this way; that the Court is not required to adopt vague allegations. And while the Court does draw inferences, fair inferences to be sure, those fair inferences have to flow from reasonably well-pled facts.

Now, my friends are going to stand up and say, well, Your Honor, it's pretext, how could we allege more. And the answer might very well be, yeah, how could you allege more, maybe you could have facts before you brought a case. But my friends don't tie

that alleged statement by Mr. Chernicoff to any time period.

And what do we know? We know that Chernicoff flew halfway around the world on the drop of a hat in a seven-business-day window to try to negotiate to get this behind us and to move on. That's what we know. That's what we know in time. That's what we know from the well-pled facts of the complaint.

Your Honor, there is only one inference I would suggest to you. Let me put it this way. You might draw the inference from that that Mr. Chernicoff decided to drop his business in Seattle and fly all the way to Tel Aviv and negotiate in good faith because he was really part of a conspiracy, a pretextural conspiracy to debunk my friends, to take away and to strip away their rights.

You could come to that conclusion, and perhaps you would also agree with the former First Lady that there was a vast right wing conspiracy to bring down her husband. But the fact of the matter is, Your Honor, you can draw inferences that are fair and that are from well-pled facts.

It is not, I would suggest to Your

Honor, a fair inference that Mr. Chernicoff flew all the way around the world to have a negotiation in the seven-day period in order to somehow engage in some conspiracy and somehow set up a window. If that's what they wanted to do, Your Honor, there was no need to send a letter saying "Here are the four principal business concerns we have." There was no need to negotiate.

If they were all about pretext, they would have said, when they got the English translation on or after July 30, very simply, "We're done. We're finished. We don't have to tell you why. We're simply done."

What the complaint alleges is inconsistent with that kind of behavior which might give Your Honor pause, or might give Your Honor a basis on which to draw inferences that could be deemed fair.

THE COURT: Let me ask this question. Let's assume that I find that this contractual provision gave your clients an absolute right to walk away at the OCS approval stage, and that it is sufficiently well pled that the reason that they exercised that absolute right was because the Hudson

Bay entities had indicated they were withdrawing funding in breach of their contractual obligations.

Does that plead a cause of action against those entities under the financing agreements to which the plaintiffs are third-party beneficiaries?

MR. VARALLO: I'm glad you asked, Your Honor, because I think you anticipated my last argument. The answer is no.

Those entities had a right to withdraw, to have their agreements go away. They terminated their agreements upon termination of the underlying contract. So if you find that Networks3 acted within the scope of its authority to terminate the contract, then the commitment letters automatically terminated on their face. They're attached at Exhibit D.

THE COURT: I understand that. My question is the ST-T P*U entertain sits we taught STEUT STPHAOFPLT repudiated their contracts before the termination of this contract, and that repudiation was a "but for" cause of the exercise of the absolute right to withdraw, does that state a claim for breach of contract against Hudson Bay entities by the plaintiffs here?

MR. VARALLO: Your Honor, if Your Honor found that they were third-party beneficiaries, and I believe that the letters indicate that there was an intention to make them so, although we reserve our right to argue otherwise later, but looking at the language of the paper, if Your Honor found they were third-party beneficiaries, I suspect the answer is yes.

But, Your Honor, you need pleading to get there. And the pleading you would need is that the repudiation occurred at some time period that it actually occurred and that there was some cause of action arising against Hudson Bay.

What you do not have -- you've got a statement, unbound in time, that Chernicoff says he thinks they're not going to fund or they said they're not going to fund and that Chernicoff may be looking for other funding. But it's unclear from that statement whether that happens in March, in April, or during the critical time period because it's not -- it's placed in the complaint in connection with the time period we've been talking about, but there is no allegation that it happened either while he was in Israel, before he went to Israel, after. It's just

floating. There's nothing you can anchor that to.

Your Honor, to close the loop on such an allegation, you would have to say -- it seems to me as a pleader, you would have to say "And not only was Chernicoff telling us this, but, in fact, they didn't go forward and fund, and they wrongfully repudiated and we have a cause of action against them."

It doesn't really make it on this complaint, Your Honor. You'd have to -- I would suggest you'd have to infer a bridge too far to find that cause of action against Hudson Bay based on the plain language of the pleading in front of you.

Whatever happens in the end, we'll have our point of view and they'll have their point of view. Your Honor will make decisions. But that's different than what's pled on the face of the complaint, and what's pled on the face of the complaint is not sufficiently specific to allow Your Honor to find a cause of action as stated as against Hudson Bay.

THE COURT: All right. Fair enough.

MR. VARALLO: Your Honor, there is perhaps more I could say, but let me close reserving anything else after my friend's argument. I have to

say the case is remarkable for the clarity of drafting of Section 5.3(c).

We've talked about Your Honor having seen sole discretion clauses before, but it simply is the case that nowhere in the annals of the English language juris prudence that we were able to find is there any provision quite like this that says "sole discretion" and not "good faith and fair dealing."

Against that context, to find that a boilerplate best commercial efforts provision in a separate part of the relevant contract effectively gutted the sole discretion provision just doesn't hunt from our perspective.

This is a case where "sole discretion" means "sole discretion." It's backed up by giving us the unilateral right to lead negotiations over 5.3(c) if it arises.

My clients exercised their discretion in the context of a contract which did not allow for second guessing or implied covenant review of our action. We terminated. Our contract right was clear, and there is no room for a disappointed Israeli bankruptcy trustee to second guess that termination.

Thank you, Your Honor, for taking the

time to hear us.

THE COURT: Thank you for the argument, Mr. Varallo.

Good afternoon again, Mr. Miller.

MR. MILLER: Good afternoon, Your Honor. Let me just say this is an enormous personal honor. I have never had the pleasure of arguing before the Chancery Court, and it is a pleasure.

THE COURT: I am very pleased to have you.

MR. MILLER: If I could start out by just noting that in many respects the arguments that you heard today are like two ships passing in the dark when compared with the arguments that were made in the briefs and the arguments that we have made.

I would say, from rough handicap, about half of what you heard today is nowhere in any brief that you have seen. There was no effort made in the briefs submitted by Networks cubed -- and we call them Networks cubed. They call them Networks3, and that's probably not our only factual difference of opinion. But there is no motion predicated on the notion that even if some standard is applicable we met it.

This letter that you have been given a copy of, I went back and I looked at every exhibit that's been filed before you. This is not before the Court. I don't believe I have seen this translation before.

THE COURT: Let me set your mind at ease because I think it surpassingly unlikely that I am going to grant a motion to dismiss after finding that some standard like commercial reasonableness applies to the decision of Networks3 or Networks cubed, and decide that as a matter of law the facts recited are such that they have met that standard. That just doesn't comport with my understanding of what my role is on a motion to dismiss.

So while that may very well prevail at summary judgment, I think what we're really -- I don't fault you for starting with it because Mr. Varallo did as well, but I think really today what I need to decide is whether the sole discretion right is cabined, in some respect, by a standard of conduct, and if it is not, then Mr. Varallo is probably correct. And if it is, then we probably go forward to discovery.

MR. MILLER: Let me turn then to that

issue. Your Honor, 4.2(a) is the pivotal language which speaks to the issue of commercially reasonable efforts, and if I could just take a moment and read that language to you.

It says, "Each of the parties will and will cause its subsidiaries and affiliates to use commercially reasonable efforts to take, or cause to be taken, all appropriate action, and to do or cause to be done all things necessary, proper or advisable to satisfy the conditions in Article 5 and consummate the transactions as promptly as practicable," and then there are three examples of that kind of behavior.

Two that I'd like to focus your attention on are number two and three which speak to taking reasonable steps to obtain such consents, and those consents refer back to the prior line which references "consents necessary or advisable to be obtained from any third party or governmental entity in order to consummate the transactions."

So you have to use commercially reasonable efforts to take all reasonable steps to obtain a consent necessary to consummate the transactions.

Lastly, both parties, all parties,

were obligated to use commercially reasonable efforts to not take any action which would have the effect of preventing or delaying the consummation of the transactions.

That's exactly what happened here if you look at the allegations in the complaint. The defendants decided, well before the OCS approval letter was issued, that they wanted to get out of the contract.

If you look at paragraphs 42, 43, 44 and 48 of the complaint that's before the Court, it's abundantly clear that decision was made before the OCS approval was issued. In fact, that's exactly what Rich Chernicoff told Orckit.

He said that there is no way the client is going to go forward with this transaction -- Hudson Bay will go forward with this transaction regardless of the outcome of the OCS letter application. So clearly it was before the application had been decided upon.

4.2(a) applies to all of the conditions set forth in Article 5. It doesn't carve out --

THE COURT: I don't mean to interrupt

you, but even if there was a breach of the duty to use commercially reasonable means to obtain OCS approval, there can't be damages for a breach of that if there is an unbounded right to deem that approval unsatisfactory, can there?

MR. MILLER: You know, there is a difference between an affirmative obligation or right to use sole discretion and an affirmative right to use that sole discretion tempered or bounded by an obligation to use commercial reasonable efforts to obtain a consent necessary to close the transaction.

So, yes, I would argue that if there is a failure to use commercially reasonable efforts to get a consent that will satisfy the preconditions in Article 5 and allow the transaction to go forward to avoid delaying the transaction from closing, to avoid preventing the transaction from closing, yes, that's a breach, and that does flow directly into the damages that we're claiming here.

THE COURT: How could any party read this language which says, "Networks3's obligations to affect the closing is subject to satisfaction or waiver at or before the closing date of each of the following conditions. C, the terms and conditions in

the OCS approval shall be satisfactory in the sole discretion, which, for purposes of this condition, shall not, to the extent permitted by law, be subject to the implied covenant of good faith and fair dealing of Networks3."

How could any party entering such a contract believe that he was entering anything other than a contract from which, at a particular time, the delivery of the OCS approval, the opposite party could walk away scot-free. How could anyone think that that language implied anything other than but a right to walk away from the contract at that point?

MR. MILLER: Because by reading 4.2(a) and 5.3(c) together, there is an obligation to use commercially reasonable efforts to arrive at that decision.

THE COURT: Then what is the point of disclaiming the covenant in that situation? If they have already imported into that paragraph a commercially reasonable standard, why do they bother to disclaim the covenant of good faith and fair dealing? What did that accomplish?

MR. MILLER: You know, as far as I can tell, it was belt and suspenders. The standard that

was applicable to Section 5.3 was commercially reasonable efforts, not good faith and fair dealing. So what it appears, upon review, is that they looked to back good faith and fair dealing out --

THE COURT: Why didn't they back that out of A, B, D, E? Why did they only back it out of C if that's the case?

MR. MILLER: Your Honor, --

THE COURT: Their pants were looser in C and they didn't need the suspenders as well?

MR. MILLER: I appreciate that, but you could turn the question around and you could ask, well, why did they make 4.2(a) applicable to all of Article 5.

THE COURT: Because it's applicable to all of Article 5 except where they carved out a specific exception.

MR. MILLER: This goes to the general specific language that my good friends for Networks Cubed were arguing about. The language of good faith and fair dealing is not the same thing as commercially reasonable efforts. You can carve that out and the commercially reasonable efforts is still applicable.

Good faith and fair dealing, under

Dunlap, and commercially reasonable efforts under the line of cases that have interpreted that here in Delaware are different consents.

THE COURT: Yes, but the commercially reasonable is a higher standard, is it not?

MR. MILLER: But when you look at the contract as a whole, that actually made a lot of sense. If you look at the contract as a whole, Orckit, an Israeli company, was in very bad financial condition.

There's a whole provision in there which talks about their financial condition and that Networks Cubed was on notice of their financial condition. It made sense, from Orckit's perspective, that -- I should add that there's also language in there that said that Orckit could do no business with anybody else. There was an exclusivity that was baked into this agreement.

So I think to conclude that they couldn't do business with anybody else -- they were in very difficult financial straits, so that if this deal did not happen, there would be measurable, immediate and substantial financial consequences for Orckit, and to basically interpret this agreement the way the

defendants have as essentially an option, they could walk away any time they want to as an entire agreement, that doesn't hang together.

I would point out that one of the interesting arguments that we heard today is that the right to walk away was during a seven-day window. The right to walk away that you were referring to is between the time the OCS approval letter was issued and the end of the seven-day window. If you don't act, you've waived that right. The defendants have conceded that was their window.

The complaint alleges they made that decision well before the OCS approval letter was issued. So even if you accept the proposition that they had some right during that seven-day window, which we don't accept, they clearly breached this agreement before the OCS approval letter was even issued.

THE COURT: All right. I understand. Anything else you want to tell me?

If not, maybe you could comment on the question that I asked Mr. Varallo, which is assuming that he is correct that this was an absolute walk-away right during the window that was exercised, assuming

that's the case, have you alleged enough in the complaint to keep in the Hudson Bay entities on a breach of their financing agreement contracts to which your client was a third-party beneficiary?

MR. MILLER: We would submit we have, Your Honor. The commitment letters created an affirmative obligation to provide Networks Cubed with the funds necessary to satisfy their obligations under the Strategic Investment Agreement.

The Strategic Investment Agreement clearly states that Networks Cubed was created for purposes of this transaction, that it lacked any assets, any financial conditions to satisfy the obligations without these Hudson Bay entities.

The commitment letters from the Hudson Bay entities explicitly identified Orckit as an intended third-party beneficiary, and explicitly stated that Orckit could rely on these commitment letters as an incentive, as an inducement to enter into the Strategic Investment Agreement.

The complaint then also alleges that they acted in concert; that Networks Cubed, Hudson Bay, the two funding sources and Hudson Bay Capital, which is based up in New York, all conspired to

essentially derail the Strategic Investment Agreement, to walk away from it before the OCS approval process had even matured.

In that respect, the allegation that we have made is that Hudson Bay funding sources violated their obligation of good faith and fair dealing. I think based on those well-pled facts in the complaint, the two funding sources are -- we respectfully submit are properly included in this complaint, and there is a factual basis for denying the motion to dismiss.

THE COURT: All right.

MR. MILLER: If I could --

THE COURT: I wasn't cutting you off. You can make whatever argument you want.

MR. MILLER: If I could say just a couple more minutes on some of the other points that were made in the briefs. One of the arguments the defendants have made, Your Honor, is that they had a right to enter into an agreement -- that the law in Delaware permits them to enter into an agreement where they have sole discretion untethered by any obligation whatsoever about how they exercise that sole discretion.

We have read their cases closely. I have not seen a case cited by the defendants, and we have not found a case in our own research, that says that under Delaware law, the contract that they want to say existed is enforceable.

The cases that we have seen do say that sole discretion can be tempered -- you can contract for language which imposes some other standard besides good faith and fair dealing. And there are cases that talk about that specifically in the context of sole discretion. But there are no cases that we have seen that hold that you can simply do away with good faith and fair dealing and substitute it for nothing.

THE COURT: Mr. Varallo's point is that if it's provided for in the contract that a breach of it is not a breach of good faith.

For instance, I don't know why you couldn't have a contract that said the buyer in this case, the defendant, shall use commercially reasonable efforts to engage in due diligence to garner all information necessary to consummation of this transaction, and on July 6th, shall have the opportunity to decide, in its sole discretion, whether

to go forward or not, after which point, if it agrees to go forward, it has certain other obligations.

You could have that contract, could you not?

MR. MILLER: Under the case law that I have seen, maybe. But our fact --

THE COURT: Why couldn't you? Why do you say maybe?

MR. MILLER: Well, I guess I'm looking at what we have, what's been posited by the defendants by the contract before us, which is there is a determination to be made, which is, in their sole discretion, is a particular letter satisfactory. So there's an element of what is satisfactory and what's not satisfactory. You've also got another section --

THE COURT: We know that it's sole discretion.

MR. MILLER: Right, but even in the context of sole discretion, there is an element -- it's a determination of whether something is satisfactory or not. And there's an overlay of commercially reasonable efforts that applies to the entirety of Article 5, and reading the contract as a whole, it has to mean something.

THE COURT: I understand that argument.

MR. MILLER: My point is effectively that we haven't seen any cases, and the two cases that were mentioned today, the VTR case out of the Southern District of New York appears for the first time in the briefing in footnote three of the defendants' reply brief.

It's clearly not the cornerstone of their argument, and it doesn't, at least even in footnote three, stand for the proposition that you can bargain away good faith and fair dealing without anything else coming in as another standard.

The Nemec case that they've cited they cite repeatedly from the dissent. It's not even the holding of the Court that they have been citing and quoting to.

I think the defendants agreed with you that the language in this particular contract is not common. I think it's fair to say that, at worst, there is some uncertainty about how these different provisions play off of each other.

I would submit to you that under Delaware law, that to the extent that there is some

uncertainty about how these provisions play off of each other, that the benefit of the doubt should go to the plaintiffs and not to the defendants. The defendants have an obligation to show that their interpretation is not just a better interpretation, but it's "the" interpretation, it's the only interpretation that flows from this contract.

THE COURT: You're right. I have to find it as a matter of law as the only interpretation, only reasonable interpretation.

MR. MILLER: Let me if I can just check my notes.

THE COURT: Take your time.

MR. MILLER: Just a couple of other points, Your Honor.

The defendants argued during their presentation to you that they were promised that they would get regulations that would make the outbound movement of the patents in this case easier. There is nothing to that effect in the contracts. There is nothing in the communications that are before the Court.

But I will tell you that what is before the Court is that the defendants, with

extremely capable Israeli counsel from the law firm called Meitar, which is identified in the complaint, met with the Office of the Chief Scientist before they entered into this Strategic Investment Agreement, and the complaint alleges that they had a full understanding of what it is the OCS, the Office of the Chief Scientist could do and what the Office of the Chief Scientist could not do.

So they entered into the Strategic Investment Agreement fully aware of all of the moving pieces within the four corners of what the Office of the Chief Scientist could do. And the complaint alleges that, at the end of the day, the Office of the Chief Scientist did everything that they asked them to do that were within the four corners of what he could do.

In fact, they terminated the agreement while he was reviewing a draft agreement that would have permitted them to enforce the patent infringement outside of Israel without triggering a larger payment due to the government.

THE COURT: What motive would the defendants have of walking away from this contract other than that they didn't think it was a good

business proposition?

MR. MILLER: My understanding is that they had done one prior transaction like this that worked out quite well. Then they had done another transaction that didn't work out quite as well. I think they decided, well into the process with the Strategic Investment Agreement, that they'd rather invest their money somewhere else.

But the Strategic Investment Agreement doesn't give them that right. It doesn't say -- this agreement could be about a third shorter if it said what the defendants say it said. They say it basically gave them the right to walk away if they decided that they wanted to put their money somewhere else, but that's not what the contract says and not what they agreed to.

THE COURT: All right. Thank you.

MR. MILLER: Thank you, Your Honor.

THE COURT: Mr. Varallo, anything you want to add?

MR. VARALLO: Very quickly, Your Honor. I know it's late in the day.

Just one or two quick points, Your Honor. My friend says that we hadn't made the

argument that we made in the briefs. He apparently didn't read from page 15 on the reply briefs. But I also Your Honor say loud and clear you don't want to hear more about that argument.

Let me say that it appears Your Honor has our arguments well in hand. Just a couple of clarifications. Twice my friend said that our position is that we could walk away at any time. That's just not true.

As I said earlier, and as I think we have acknowledged in our briefs, our ability to walk away was bounded by that seven-business-day period from the time we got the English translation to the end of the seventh business day.

THE COURT: There's no question in the record that your client attempted to exercise its rights during that window, correct?

MR. VARALLO: That's correct, Your Honor.

Just for the record, July 30th is the date of the OCS approval. We get it some undefined period of time later because we have to get the English translation. That's when the seven-business-day period starts. We've got the

meeting in Israel on August 5th.

THE COURT: What day triggered the seven days?

MR. VARALLO: Sometime after July 30, Your Honor. It's not the date of the OCS approval. It's the date we get the English translation. That date is not alleged.

THE COURT: Is it the day you receive the English translation?

MR. VARALLO: Correct, Your Honor.

THE COURT: So it's got to be at least the 30th. It can't be earlier.

MR. VARALLO: That's correct, but even if we measured from July 30, we terminate on August 8th, and we had seven business days. So we're within the window no matter how you count it, even if we got the translation on the 30th. And the complaint doesn't say when we got the translation.

Your Honor, my friend made a couple of points. He said, well, there's no case that really says what we're arguing here. I don't think Your Honor has to go beyond the one case that both parties spent a lot of ink arguing about in their briefs, and that's Wilmington Leasing versus Parrish.

Vice Chancellor Jacobs there dealt with whether a contract right to remove a general partner was, and I'm quoting the Vice Chancellor, "unqualified and unreviewable" or subject to a judicially implied condition.

And he concluded that it was subject to a judicial implied condition, and he said if you wanted to make it unqualified and unreviewable, he said the agreement "does not, for example, explicitly state that the limited partners' determination will be in their sole discretion," certainly implying that if it said that, it's unreviewable.

Finally, Your Honor, and I mean finally, my friend said, well, you know, we talked to the OCS before we entered into the Strategic Agreement in March of 2013. Well, Your Honor, perhaps that's precisely why Section 5.3(c) was drafted as it was.

I think Your Honor has my other points and I appreciate your time.

THE COURT: I think I do. Thank you, Mr. Varallo.

Mr. Miller, if there is anything else you want to say, I'm happy to hear you. I'm not insisting, but if there is anything else you want to

say, I'm happy to hear you.

MR. MILLER: At the risk of straining your patience.

THE COURT: Go ahead.

MR. MILLER: I do think that the Wilmington Leasing case is an intriguing and interesting case because what it does say is that in the context of a subjective decision like a sole discretion decision, it is appropriate to read into that obligation an obligation to act reasonably and in good faith, and while in dicta this decision does speak to the possibility that you could draft an agreement to permit removal, which was the decision at issue in Wilmington Leasing, without requiring the satisfaction of any predicate standard.

I just respectfully submit to you, Your Honor, there was a predicate standard and it was commercially reasonable efforts.

Thank you for your indulgence.

THE COURT: Thank you.

Counsel, I appreciate very much the argument. First let me thank you again for coming down to Georgetown. You can't imagine what a help it is. This is a particularly busy time. That's not

your problem. It's mine, but I'm glad I'm not facing an hour and a half or two-hour drive. I'm sorry you are, but not as sorry as I am happy as that I am not.

Second, Mr. Varallo, very fine argument. I appreciate it. Mr. Miller, I hope this is not your last argument here. I enjoyed it and it was a pleasure to see you and I hope I see you again. It was very helpful in clarifying the issues before me.

I think some of the motion I can resolve here from the bench and some of it I cannot. Let me start with what I think I can resolve.

Delaware is a contractarian state. We believe in the ability to self order, the ability to enter into contract rights and have those rights enforced, and we follow, as you are well aware, the objective theory of contracts under which it is the language that the parties have agreed to, not their subjective intent, that governs the enforcement of contracts.

This is a motion to dismiss. I have to draw all reasonable inferences in favor of the non-moving party, take the well-pled allegations as true, and if I cannot find, as a matter of law, that

the defendant is entitled to a judgment, I must deny the motion.

This really comes down to reading the contract, as I must, as a whole. How I interpret or understand the provisions of Section 5.3(c) in light of the more general obligation to, in a commercially reasonable fashion, move the matter forward to a consummation of the contract, that's a burden that is placed on both parties.

It applies to the obligations of Sub-section 5. It demands commercially reasonable actions that I assume would apply to such things as, in the OCS context, doing all those things to cause the OCS to issue its approval.

But the question is, the OCS, having issued its approval, what are the obligations then on Networks3 to go forward with the contract. That is answered specifically in 5.3(c). 5.3(c) says that as a condition to going forward, "The terms and conditions of the OCS approval shall be satisfactory, in the sole discretion, which, for purposes of this condition, shall not, to the extent permitted by law, be subject to the implied covenant of good faith and fair dealing of Networks3."

That language, to me, could not be any clearer. That's about as clear as it gets. It says, Networks3, once it has used commercially reasonable efforts to get a decision from the OCS, looks at that decision, and it has the sole discretion either to find that the decision of the OCS is satisfactory or it isn't.

The sole discretion there, so far from being cabined by commercial reasonableness, is not even subject to the implied covenant of good faith and fair dealing. That, to me, is a clear indication that the parties meant for this to be a decision that is unreviewable in the sense that, if it is timely taken, the defendant could then, under Section 6(a), terminate, which is what it did do.

The argument that this was a disclaimer and that it said sole discretion and disclaimed good faith and fair dealing but imported a higher standard is not, to me, a reasonable construction reading the contract as a whole.

It doesn't comply with the canons of construction because the specific here, which is obviously a bargained-for provision, controls the general, and it makes sense schematically to me that

the parties would have to use commercially reasonable efforts to tee up the OCS approval, but then Networks3 would have the sole discretion whether to choose to be satisfied with what it got from the OCS or choose not to be satisfied, in which case it could walk away from the contract, as it has.

So I am granting summary judgment on the counts that allege breach of this contract against Networks3.

There also, however, are financing commitments at issue here. The Hudson Bay entities agreed to provide financing to Networks3 to consummate this deal.

It is possible, and when I say "possible," I mean it is within the realm of possibility because I have not yet decided otherwise, that a breach of those promises by the Hudson Bay entities could have been the cause of Networks3 choosing to exercise its rights under 5.3(c), and that that breach caused damage to the plaintiffs.

I think that it would be helpful to me to have further briefing on that issue. I am going to allow supplemental briefing, if the plaintiff wishes to pursue it, on the issue of whether the pleading in

the complaint states a claim, based on Hudson Bay's alleged breach of the financing commitments, leading to Networks3 exercising its rights under 5.3(c), leading to damage to the plaintiff.

I will allow you to brief that on whatever schedule you want to. I want informal memoranda. I don't want to cause a whole other round of in-depth briefing, but I would like a little help with that issue. I will resolve that issue in writing unless, after looking at the submissions, I need further argument, and I think that's unlikely.

Was that clear, Mr. Varallo?

MR. VARALLO: Entirely, Your Honor. Thank you.

THE COURT: Was that clear, Mr. Miller?

MR. MILLER: Yes, Your Honor.

THE COURT: Once again, I enjoyed very much the argument. Mr. Heyman, I hope you feel better.

MR. HEYMAN: I apologize for running out, Your Honor.

THE COURT: You were very circumspect. It's clear to me you are not feeling particularly

well, and I appreciate your efforts to be here.

Anything else we can profitably do here this afternoon?

MR. VARALLO: Not today, Your Honor.

THE COURT: Thank you very much for the argument, and I hope you have a pleasant trip home.

(The Court adjourned at 3:10 p.m.)

CERTIFICATE

I, MAUREEN M. McCAFFERY, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 66 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Dover, this 4th day of February, 2015.

/s/Maureen M. McCaffery

Maureen M. McCaffery
Official Court Reporter
of the Chancery Court
State of Delaware