IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WAVEDIVISION HOLDINGS, LLC and MICHIGAN BROADBAND, LLC, Plaintiffs, v. MILLENNIUM DIGITAL MEDIA SYSTEMS, L.L.C.; SUMMIT CABLEVISION, LP; CP NW1, L.L.C.; and CP NW2, L.L.C., Defendants.	)	C.A. No. 2993-VCS

MEMORANDUM OPINION

Date Submitted: June 18, 2010
Date Decided: September 17, 2010

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STRINE, Vice Chancellor.

I. Introduction

The plaintiffs WaveDivision Holdings LLC and Michigan Broadband LLC (collectively, "Wave") bring this action against Millennium Digital Media Systems, LLC, Summit CableVision, LP, CP NW1, LLC, and CP NW2 LLC (collectively, "Millennium") for breach of contract.

Millennium and Wave are both broadband cable operators. Since 2000, Millennium had gone through a series of refinancings to try to stay afloat in an increasingly competitive market. By 2005, however, its creditors had had enough and demanded that Millennium sell assets in order to repay its debt.

Wave was in the business of acquiring and upgrading "fixer-upper" cable systems. On February 8, 2006, with the blessing of Millennium's secured creditors (the "Senior Lenders") and the holders of its high-yield senior increasing rate notes (the "IRNs," and the "IRN Holders"),[1] Millennium and Wave executed an Asset Purchase Agreement for the sale of a cable system in Michigan (the "Michigan System," and the "APA"), and a largely identical Unit Purchase Agreement for the sale of cable systems in Oregon and Washington (the "Northwest Systems," and the "UPA") (collectively, the "Agreements"). The Agreements, and the Letter of Intent that preceded them, contained no solicitation provisions, and the Agreements also contained a provision requiring Millennium to use reasonable best efforts to obtain the consent of its lenders to the sale.

The signing of the Agreements with Wave, however, did nothing to slow Millennium's pursuit of another refinancing deal — a pursuit it continued the day after

[1] *See* JX-13 (SNC Review Summary Memorandum (April 15, 2005)) at 2.

the Agreements were signed. In the months following the execution of the Agreements, Millennium continued to actively look at refinancing alternatives, especially with the IRN Holders who would receive no immediate debt repayment from the asset sale to Wave, and would have been dependant on Millennium's remaining assets to deliver them any value in the future.

These IRN Holders, led by the private equity firm Trimaran Fund Management LLC ("Trimaran"), spent the months after the Agreements were signed negotiating a refinancing and restructuring of Millennium from both sides of the bargaining table. Trimaran was not just an IRN Holder, but also had two members on Millennium's governing body, the management committee (the "Management Committee") — the same Management Committee that approved the Agreements with Wave. Throughout the period in which Millennium was bound by its Agreements not to solicit any alternative transaction, it repeatedly acted in violation of its duties by brainstorming with the IRN Holders about a possible refinancing and even retaining a consultant at its own expense to help develop a refinancing plan as an alternative to the sale to Wave.

These efforts of Millennium and the IRN Holders to cook up an alternative to the sale to Wave paid off, and in July 2006, Millennium executed refinancing and restructuring agreements that transferred control of the company to its former creditors. The same day, Millennium terminated its Agreements with Wave.

Wave brought this breach of contract action alleging that Millennium breached the Agreements' no solicitation and reasonable best efforts provisions which obligated Millennium not to shop for any other transactions and required it to use its reasonable best efforts to obtain the consent of the same lenders to which it ultimately transferred the assets.

In this post trial opinion, I find that Millennium breached both provisions of the Agreements and that Wave is therefore entitled to damages.

II. Background Facts

These are the facts as I find them after trial.

A. The Parties

The plaintiff, Wave, is a provider of broadband cable services formed in 2002 and based in Kirkland, Washington. Under the leadership of Wave's founder and CEO, Steven Weed, Wave acquired several cable systems, upgraded those systems, and marketed upgraded cable services to expand the systems' customer bases. Wave completed its first four cable system acquisitions in 2003, and has since completed nine additional acquisitions.[2] Wave currently provides services to parts of Washington, California, and Oregon, totaling 138,000 video customers, 124,000 data customers, and 48,500 telephone subscribers.[3]

Weed had experience in the cable industry before forming Wave. In the 1990s, Weed had been the Chief Operating Officer of Summit Communications, Inc., which sold all of its cable systems to Millennium in 1999, including the Northwest System.[4] Weed

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[2] Pretrial Stip. ¶ 2.
[3] *Id*. ¶ 3.
[4] Tr. at 8 (Weed).

remained with Millennium from 1999 to 2003, serving as its Northwest Region Vice President.[5]

Millennium was formed in April 1998 to acquire, develop, and operate cable systems.[6] In 1998 and 1999, Millennium acquired the four systems that make up most of its cable system holdings today. Those systems are located in three regions: the Central Region (Michigan), the Mid-Atlantic Region (Maryland), and the Northwest Region (Oregon and Washington).

Millennium Digital Media Systems LLC, which is based in Missouri, is one entity that makes up Millennium's overall cable business. Millennium Digital Media Systems LLC is currently owned by Millennium Digital Media Holdings LLC.[7]

B. The Management Of Millennium

Before addressing the events leading to the breach of the Agreements, it is necessary to discuss the management structure of Millennium and the role it played in shaping those events. In 2005 and 2006, Millennium Digital Media Holdings LLC was owned by TSG Cable Investment Corp. ("TSG"), Caravelle Millennium Investment Corp. ("Caravelle"), and Millennium Partners LLC.[8] Each of these three entities appointed individuals to Millennium's Management Committee, which was effectively the governing organ for all of Millennium's entities.[9] TSG's Committee representatives

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[5] *Id*.
[6] Tr. at 304 (Westbrook).
[7] Pretrial Stip. ¶ 6.
[8] *Id*. ¶ 9.
[9] Phoenix Dep. at 14.

were Darryl Thompson, Cleve Christopher, and Mark Inglis.[10] Caravelle's representatives were William Phoenix and Andy Heyer of Trimaran.[11] Kelvin Westbrook was Millennium Partners LLC's representative on the Management Committee, and also served as Millennium's CEO.

Millennium states that its day to day operations were run by a team of employees led by Westbrook.[12] But in truth, Millennium was also managed by someone who was not even a Millennium employee — Darren Fredette. Fredette, an employee of Trimaran who reported directly to Millennium Management Committee member Phoenix, enjoyed unfettered access to Millennium's confidential information, helped plan Millennium's responses to various outside parties on important issues, and co-presented with Westbrook during Millennium's updates to its lenders. Despite Millennium's claim that Westbrook was the manager in charge, I am convinced that at all relevant times Fredette was also acting as not only an agent of the Management Committee but also as a fiduciary of Millennium. In essence, he was empowered as a de facto manager of Millennium, and wielded great influence over other Millennium managers, including Westbrook, precisely because he was given that role by key members of the Management Committee. Fredette's conduct, therefore, is properly charged to Millennium.

[10] *Id*. ¶ 10.
[11] Trimaran, which was Caravelle's advisor, was a private equity company owned by Trimaran Capital Partners, LLC.
[12] Pre-Trial Stip. ¶ 11 (stating that the day to day operations of Millennium were managed by: Westbrook as CEO; John K. Brooks as VP and COO; Gil Nichols as Senior VP of Operations; and Tim Valley as Senior VP of Finance and Accounting).

C. Millennium Enters Into The IRN Agreement And An Amended Credit Agreement

In the late 1990s, the cable industry became increasingly competitive and Millennium sought additional funding to upgrade its networks. To fund these upgrades, Millennium sold $70 million of unsecured high-yield senior increasing rate notes on October 5, 1999.[13] The holders of the IRNs included investment funds held or controlled by Trimaran Advisors LLC ("Trimaran Advisors"), Credit Suisse First Boston, Cerberus California, Inc., and Highland Capital Management ("Highland"). Highland was also a Senior Lender; it made its first purchase of Millennium's senior debt in February 2005 and owned approximately $50 million (25%) of the senior debt in January 2006.[14]

Under the terms of the agreement between Millennium and the IRN Holders (the "IRN Agreement"), the IRNs initially bore interest at the greater of 12.125% and LIBOR plus 6.50%, payable quarterly, with the interest rate increasing at periodic intervals to its current maximum rate of 16.375% and LIBOR plus 10.75%.[15] The IRNs, which had a maturity due date of March 31, 2009 were intended to serve as bridge financing for Millennium until the cable markets improved.[16]

Notably, the IRN Agreement gave the IRN Holders certain rights relating to Millennium's assets and access to Millennium's company information. Specifically, with regard to information rights the Agreement provided that:

> [Millennium] shall, and shall cause its Subsidiaries to, furnish to each [IRN] Noteholder any information which such holder may from time to

[13] JX-1 (Note Purchase Agreement (October 5, 1999)) ("IRN Agreement").
[14] Walls Dep. at 39, 44.
[15] *Id.* ¶ 1.
[16] Tr. at 305-06 (Westbrook).

> time reasonably request concerning any covenant, provision or condition of the Documents or any matter in connection with [Millennium's], or any of its Subsidiaries', business and operations.[17]

And with regard to an asset sale the Agreement provided that:

> [Millennium] shall not, and shall not permit any of its Subsidiaries to, directly or indirectly, in a single transaction or a series of related transactions, sell, lease, transfer or otherwise dispose of or suffer to be sold, leased, transferred, abandoned or otherwise disposed of, all or any part of its assets except:
> (i) [Millennium can sell inventory in the ordinary course of business];
> (ii) [Millennium's subsidiaries can sell assets to Millennium or other subsidiaries]; and
> (iii) [Notwithstanding the foregoing provisions, Millennium can sell its assets so long as: 1) it receives consideration "at least equal to the fair market value;" 2) the consideration in the sale is at least 80% cash; and 3) the sale of the assets would not have a material adverse effect.][18]

Additionally, Millennium extended credit to its Senior Lenders under a First Amended and Restated Credit Agreement (the "Credit Agreement"), which it entered into on December 29, 2000.[19] The Credit Agreement gave the Senior Lenders a first priority lien on substantially all of Millennium's assets, including over the IRN Holders. Like the IRN Agreement, the Credit Agreement gave the Senior Lenders the following disclosure and consent rights:

> [Millennium] covenants and agrees that . . . neither [Millennium] nor any Subsidiary will, directly or indirectly . . . [s]ell, lease, transfer or otherwise dispose of its properties, assets, rights, licenses and franchises to any Person . . . [excluding dispositions in the ordinary course] . . . [except] with the prior written consent of the Required Lenders, in their sole and absolute discretion . . . .[20]

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[17] IRN Agreement ¶ 5C.
[18] IRN Agreement ¶ 6D.
[19] JX-2 (First Amended and Restated Credit Agreement (December 29, 2000)) (the "Credit Agreement").
[20] *Id*. § 7.03.

D. At The Request Of The Senior Lenders, And With The Consent Of The IRN Holders, Millennium Pursues A Sale Of Its Assets, And Wave Offers To Buy Millennium's Systems

Despite the IRN Agreement and the Credit Agreement, Millennium was unable to upgrade its aging cable systems.[21] In 2004, Millennium received a letter of intent, offering to purchase its assets for $200 million.[22] Rather than pursuing a sale at that time, Millennium elected to attempt to refinance its debt in 2004 and 2005, but was unable to obtain favorable terms.[23]

By 2005, Millennium was highly leveraged and under strong pressure from the Senior Lenders to meet its repayment obligations under the Credit Agreement. Thus, Millennium's senior management and the Senior Lenders decided that a sale of Millennium's assets was Millennium's best option.[24] Both the Management Committee and the IRN Holders approved the plan to pursue a sale of Millennium's assets.[25] In furtherance of that decision, Millennium and the Senior Lenders entered into a Fifth Amendment to the Credit Agreement on March 31, 2005, which required Millennium to sell all or substantially all of its assets in order to repay the Senior Lenders.[26] The Fifth Amendment lowered the required Senior Lender consent for any sale of Millennium's

[21] Tr. at 452 (Westbrook).
[22] JX-11 (Credit Approval Memorandum modification).
[23] Tr. at 308, 453 (Westbrook).
[24] *Id*. at 308-09 (Westbrook).
[25] JX-13 (SNC Review Summary Memorandum (April 15, 2005)) at 2.
[26] JX-12 (Fifth Amendment to the First Amended and Restated Credit Agreement (March 31, 2005)).

assets from 66 ⅔%, as it had been in the Credit Agreement, to 51%.[27] Millennium's senior credit facility was now set to mature on June 30, 2006.

Millennium hired Daniels & Associates ("Daniels") to solicit offers for Millennium's cable systems.[28] In March 2005, Daniels distributed sales materials to a variety of prospective buyers nationwide,[29] and obtained multiple purchase offers from various interested parties. The IRN Holders and Senior Lenders were obviously aware of this open opportunity to make a strategic proposal — and none made any offer. On December 15, Wave made an offer to purchase Millennium's Northwest Systems, and Michigan System (collectively the "Systems") for $157 million (the "Letter of Intent") — a price higher than any other expression of interest.[30] Wave's Letter of Intent included a clause relating to the "Exclusivity of Negotiation:"

> Seller and Buyer agree that for a period of 30 days from the signing of this agreement, or earlier if the parties mutually determine that they are unable to agree to the terms of an agreement, (i) Seller shall not offer, seek to offer, or entertain or discuss any offer, to sell, directly or indirectly, the Systems, nor shall it permit its affiliated entities or its or their partners, officers or directors (collectively, the "Seller Parties") to offer, seek to offer, or entertain or discuss any offer, to sell, directly or indirectly any interest in the Systems (collectively, a "Competing Transaction"), and (ii) neither Buyer or Seller shall disclose to any persons (other than a party's financing sources, investors, attorneys or financial advisors) the terms of this letter agreement or the fact that the parties are in discussions with respect to the Systems.[31]

[27] *Id.* §§ 1.19(C), 1.22(A).
[28] Tr. at 323 (Westbrook).
[29] JX-16 (Daniels sales materials for Millennium (March 1, 2005)).
[30] JX-25 (Letter Of Intent between Wave and Millennium (December 15, 2005)).
[31] *Id.* at 4.

After receiving a draft of the Letter of Intent on December 12, 2005, Westbrook emailed the Management Committee members from TSG and Trimaran acknowledging that the Letter contained an exclusivity agreement.[32]

Two days later, on December 14, Management Committee member Phoenix instructed Fredette, his employee, to work with Westbrook to put together a presentation to the IRN Holders regarding the sale of Millennium to Wave.[33] Westbrook suggested that the meeting with the IRN Holders be scheduled "sooner rather than later."[34] On December 19, 2005, Millennium, through Westbrook, signed the Letter of Intent, agreeing to Wave's offer to purchase the Systems for $157 million and binding itself to the Exclusivity of Negotiation of clause.[35]

E. Millennium Meets With The IRN Holders

One day after signing the Letter of Intent, Millennium sent a letter to the IRN Holders requesting a meeting at Trimaran's New York office on January 5, 2006.[36] In that letter, Millennium explained that the meeting was being held "for the purpose of providing an update on recent developments related to Millennium's financial position, operations, and strategic initiatives."[37] The letter did not mention that Millennium had signed a Letter of Intent accepting Wave's offer to purchase the Systems.

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[32] JX-23 (email from Kelvin Westbrook to Darryl Thompson, Darren Fredette, and William Phoenix (December 12, 2005)).
[33] JX-24 (email from Darren Fredette to Kelvin Westbrook (December 14, 2005)).
[34] *Id*.
[35] JX-25.
[36] JX-28 (letter from Bruce Beard to IRN Holders (December 20, 2005)).
[37] *Id*.

At the January 5 meeting, Westbrook discussed the financial state of Millennium and its systems.[38] He told the IRN Holders that Millennium was losing subscribers, that its revenue was flat, and informed the IRN Holders that Millennium's management was recommending that the sale to Wave be approved.[39] But the discussion at the meeting veered from the topic of the sale to Wave to Millennium's other options, including a possible capital infusion from the IRN Holders. Westbrook explained that Millennium needed an additional $79 million for network upgrades and improvements.[40] Westbrook's notes from the meeting state that Westbrook needed to provide the IRN Holders with a "more detailed analysis re: [return on investment] for new capital," and projections for at least five years, which Westbrook would discuss with "restructuring counsel."[41]

The same day, Fredette, illustrating his wide-ranging influence, informed his Trimaran colleagues that he had instructed Millennium management to begin gathering this information including "historical financial results along with projections assuming an incremental $30 MM capex spend."[42] In other words, despite being bound by the Exclusivity of Negotiations clause not to "offer, seek to offer, or entertain or discuss any offer, to sell, directly or indirectly, the Systems," Millennium management immediately began generating analysis of the viability of an alternative transaction whereby instead of Wave buying the Systems, Millennium would retain the Systems and a refinancing

[38] JX-35 (presentation materials for January 5, 2006 IRN Holder meeting).
[39] JX-36 (presentation materials with Westbrook's notes); Tr. at 355 (Westbrook).
[40] JX-35 at TRI-WAV 670.
[41] JX-38 (Westbrook's notes from January 5, 2006 IRN Holder meeting).
[42] JX-39 (email from Darren Fredette to Jim Russo (January 5, 2006)).

partner would be given a security interest, either direct or indirect, in those assets. Notably, Millennium was not giving the IRN Holders only extant information; rather, its management was coming up with new estimates of the effect of an alternative transaction involving a capital infusion. That is, it was doing the sort of business planning work that investment bankers and in-house financial staff do related to new capital investments, and to develop and stimulate new transactions.

F. Millennium Embarks On "Parallel Paths" And Pursues Refinancing Options

Thus, although Millennium continued to pursue the sale with Wave, it also began to again pursue refinancing as a realistic option.[43] On January 11, 2006 Fredette emailed Phoenix, mentioning that Fredette had spent "some time talking about the refinancing" with Westbrook, and that Westbrook felt that pursuing the deal with Wave was Millennium's best option.[44] Fredette and the IRN Holders weren't so sure; they believed that Wave's $157 million offer was "inadequate," and that they were "leaving a ton of money on the table."[45]

Despite being bound not to "entertain or discuss any offer, to sell, directly or indirectly any interest in the Systems" under the Letter of Intent, Westbrook and Fredette, using confidential Millennium information, did exactly that on behalf of Millennium. They began developing scenarios for cash infusions by the IRN Holders that would allow Millennium to retain the Systems so as to provide security and an investment upside for

[43] JX-47 (email from David Lakoff to David Millison (January 27, 2002)) (noting that Westbrook stated that Millennium was "operating on a parallel path regarding the sale of the NW and Central regions" and refinancing); Tr. at 497 (Westbrook).
[44] JX-41 (email from Darren Fredette to William Phoenix (January 11, 2006)).
[45] *Id*.

the IRN Holders and others involved in the refinancing instead of selling them to Wave. To that end, Millennium put together projections based on a $30 million capital infusion by the IRN Holders. Westbrook presented these projections to the IRN Holders during a January 27 teleconference and explained that, given the projections, a $30 million infusion was a "plausible scenario."[46] On the call, Jay Bloom of Trimaran reiterated his desire to pursue various refinancing options. Westbrook assured the IRN Holders that Millennium was operating on a "parallel path" with regard to the sale of the Systems and a refinancing option.[47]

G. Millennium Executes The Agreements With Wave

At the same time that Millennium was actively — and secretly — pursuing refinancing options despite the Letter of Intent, it pushed ahead with the sale to Wave. On January 27 — the same day that Westbrook held the teleconference with the IRN Holders regarding the plausibility of refinancing — Beard, Millennium's General Counsel, emailed consent forms to all members of the Management Committee regarding the execution of the purchase agreement between Millennium and Wave.[48] Beard informed the Management Committee that the agreement required "the applicable consents of the [Senior Lenders] and the IRN holders prior to any closing."[49] Beard

[46] JX-49 (notes of Kelvin Westbrook from the January 27 phone call with the IRN Holders).
[47] JX-47 (internal Trimaran email summarizing January 27 call).
[48] JX-51 (email from Bruce Beard to Diana LeBeau (January 27, 2006)).
[49] *Id*.

further informed Phoenix that, by executing the agreement, the senior lenders and IRN Holders would be given a "two month 'option' on the Transaction . . . ."[50]

The Management Committee unanimously consented to authorize the sale of the Systems to Wave on February 8, 2006, and simultaneously the Asset Purchase Agreement for the sale of the Michigan System, and a largely identical Unit Purchase Agreement for the Northwest System.[51]

Under the terms of the Agreements, Millennium agreed to use its best efforts to obtain any consents required for the sale to close:

> 5.5 <u>Reasonable Best Efforts</u>
>
> (a) Following the execution hereof, *Sellers shall use commercially reasonable efforts at its expense*, and Buyer shall cooperate in good faith with Sellers, *to obtain all Seller Required Approvals in form and substance reasonably satisfactory to buyer* and will deliver to Buyer copies of such Seller Required Approvals promptly after they are obtained, provided, however, that Sellers will afford Buyer the reasonable opportunity to review, revise and approve (which approval shall not be unreasonably withheld) the form of Seller Required Approval and Sellers will make every reasonable effort to incorporate Buyer's comments prior to delivery to the party whose consent is sought. . . .
>
> (b) Sellers and Buyer *shall cooperate and use their respective best efforts* to fulfill as promptly as practicable the conditions precedent to their obligations hereunder to the extent that they have the ability to control the satisfaction of such obligations.[52]

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[50] JX-52 (email from Bruce Beard to William Phoenix (February 6, 2006)).
[51] JX-53 (Asset Purchase Agreement (February 8, 2006)) ("APA"); JX 54 (Unit Purchase Agreement (February 8, 2006)) ("UPA").
[52] APA § 5.5 (emphasis added).

Such consent was clearly required from the Senior Lenders.[53] As to the IRN Holders, the Agreement had more give, as the text highlighted below illustrates:

> 6.3 Conditions to the Obligation of the Sellers. The obligation of Sellers to effect the Closing is subject to the satisfaction (or waiver by Sellers) prior to the Closing of the following conditions: . . .
>
> (c) (ii) Sellers shall have obtained the consent of their lenders and IRN Holders to the transactions contemplated by this Agreement and the Ancillary Agreements; *provided, that the consent of the IRN Holders shall be deemed to have been obtained if Sellers and Buyer reasonably conclude that such consent is not required*.[54]

The Agreements also contained a "No Solicitation" provision which provided that:

> 5.9 No Solicitation. Seller *shall not*, and shall cause its *employees, agents, and representatives* (including, without limitation, any investment banker, attorney, or accountant retained by Seller) not to, *initiate, solicit or encourage, directly or indirectly, any inquiries or the making of any proposal* with respect to any transaction to acquire the Business, any of the Systems or the Transferred Assets, engage in any negotiations concerning, or *provide to any other Person any information or data Related to the Business or relating to any of the Systems or the Transferred Assets* for the purposes of, or have any discussions with any Person relating to, or *otherwise cooperate in any way with or assist or participate in, facilitate or encourage, any inquiries or the making of any proposal* which constitutes, or may reasonably be expected to lead to, any effort or attempt by any other person to seek or effect the acquisition of the Business, any of the Systems or the Transferred Assets.[55]

The Agreements also provided that Millennium could terminate the Agreements, so long as Millennium's termination was not a result of it having breached the Agreements: "[t]his Agreement may be terminated at any time prior to the Closing by

[53] *Id.* § 6.3 (c)(ii).
[54] *Id.* § 6.3 (emphasis added).
[55] *Id.* § 5.9 (emphasis added). The no solicitation provision of the UPA is virtually identical and contains only cosmetic changes related to the fact that a Washington LLC was to be formed by Millennium in order to effectuate the sale of those systems.

Sellers, by written notice to the Buyer if (a) the Closing shall not have occurred by June 30, 2006 *so long as the Sellers are not the Proximate Cause Party* . . . ."[56] "Proximate Cause Party" was defined to mean "either party, if such party has breached in any material respect any of its representations, warranties or covenants under th[e] Agreement[s] in any manner that shall have *proximately contributed* to the failure of the Closing to occur."[57] Additionally, Wave was given the right to terminate the Agreement if the "Sellers shall have failed to obtain the consent of their lenders and IRN Holders" by April 7, 2006,[58] but Millennium was not given the right to terminate the Agreements at that time simply because its lenders' consent was withheld.

H. Millennium Continues To Actively Pursue Refinancing, And Retains Barrier Advisors At Its Expense To Help The IRN Holders Develop Alternative Transactions

The day after signing the Agreements, Westbrook began drafting a letter to the IRN Holders to update them on the situation.[59] In this letter, sent on February 10, 2006, Westbrook informed the IRN Holders that Millennium was "*actively pursuing various alternatives, including refinancing options as suggested by the IRN [H]olders*. . . ."[60] The Agreements, Westbrook claimed, "preserve[d] the [sale of the Systems transaction] and provide[d] the IRN [H]olders with an opportunity . . . to evaluate [the Systems sale] *as well as other alternatives* and determine whether they want to consent. . . ."[61]

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[56] *Id*. § 8.5 (emphasis added).
[57] *Id*. § 1.117 (emphasis added).
[58] *Id*. § 8.4(e).
[59] JX-58 (draft of letter to IRN Holders).
[60] JX-57 (letter from Westbrook to the IRN Holders (February 10, 2006)) (emphasis added).
[61] *Id.* (emphasis added).

On February 15, Fredette communicated with Dave Walls of Highland about funneling possible suitors in a refinance deal — CSFB and Bear Stearns — into meetings with Millennium's management but was concerned that Millennium's management was not being as aggressive in their projections as they could be.[62] To remedy this, Fredette and Walls decided that Millennium should pay for a financial advisor — i.e., investment banker — to help the IRN Holders better evaluate the benefits that a refinancing of Millennium might provide.[63] In the course of this conversation about a refinancing deal, Fredette learned that Highland had been purchasing debt from the Senior Lenders.[64]

Ultimately, Fredette and Walls settled on Barrier Advisors as the appropriate consultant to evaluate the merits of a Millennium refinancing. On March 2, Fredette emailed Westbrook to suggest that Barrier be hired "on behalf of the company [i.e. Millennium]."[65] Fredette explained the purpose of the engagement as two-fold: to allow the banks to become more comfortable with the growth prospects of the Systems so that they knew whether to expect a return on the capital they would invest in a refinancing deal; and to allow the IRN Holders to make a better informed decision about whether to consent to the sale of the Systems to Wave.[66]

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[62] JX-71; JX-66.
[63] JX-66 (email from Fredette to Jay Bloom (February 15, 2006)).
[64] *Id.*
[65] Millennium emphasizes the pretext that Barrier was nominally retained by the IRN Holders and not Millennium. This fact, however, does not aid Millennium. In Millennium's view, it is better for it to have paid the fees of, and provided confidential information and unlimited managerial access to, an investment banker that the IRN Holders selected to cook up alternative transactions than for Millennium to have hired Barrier to advise itself. That is not the case.
[66] JX-82 (email from Fredette to Westbrook (March 2, 2006)).

On March 6, Millennium sent a letter to Barrier acknowledging Barrier's retention "to act as financial and operational advisor in connection with a review of potential investments in the capital structure of [Millennium] . . . ."[67]

Millennium attempts to frame the retention of Barrier simply as part of Millennium's plan to obtain the consent of the IRN Holders by providing them with more information about Millennium's operations. This pretext is undermined by the fact that Westbrook never informed Wave about the extent of Barrier's engagement.[68] Westbrook's excuse also ignores that Barrier's retention to "review potential investments in the capital structure" of Millennium was a clear violation of Millennium's promise not to have an investment bank[69] "initiate, solicit or encourage, directly or indirectly, any inquiries or the making of any proposal" that would interfere with the asset sale by involving someone other than Wave acquiring ownership of the Systems.

I. Highland Proposes That Millennium Refinance And Restructure Its Senior Credit Facility And Millennium Agrees To Pay For Barrier

On March 8, 2006, Highland sent Millennium a non-binding proposal outlining an offer to refinance the company. After Highland sent the proposal, Walls emailed Westbrook thanking him for Millennium's cooperation with Barrier.[70]

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[67] JX-87.
[68] Tr. at 383-90 (Westbrook).
[69] Fredette and Walls refer to Barrier as an "industry expert/consultant," but the services that Barrier was providing were those of a financial advisor. *See e.g.*, JX-82 (Barrier Advisors introductory presentation) at DEF0041133 ("Barrier was formed to address the deficiencies in the financial advisory market."). Further, on its website, Barrier Advisors advertises that it provides "special situations *investment banking* services. . . ." Barrier Advisors Homepage, *available at* http://barrieradvisors.com/ (emphasis added).
[70] JX-95.

A week later, Westbrook informed Fredette that Millennium had decided that it would be proper for it to reimburse the IRN Holders for their expenses incurred related to Millennium's request that the IRN Holders consent to the Wave sale, namely Barrier's $137,500 per month fee. Westbrook now reframed the Barrier engagement as being for the two narrower purposes of: 1) educating the IRN Holders about Millennium and its operations; and 2) assisting the IRN Holders in making an informed decision about Millennium's request for their consent to the Wave sale.[71] But Westbrook goes on to say that *"[i]n the event that the IRN Holders interest is formally converted into equity of [Millennium]*, as part of a refinancing or otherwise, the expansion of the scope and term of the consulting agreement with Barrier would be within their authority and purview. . . ."[72] But, in apparent recognition that the retention of Barrier violated the Agreements, Westbrook cautioned that Millennium had been advised that "until such conversion occurs" it would be improper for Millennium to fund the expansion of Barrier's engagement beyond that relating to obtaining the IRN Holders' consent to the Wave sale.[73] In other words, Westbrook tried to create the appearance that Barrier was not acting as a strategic advisor helping the IRN Holders to evaluate an investment inconsistent with the sale of the Systems to Wave, when Barrier had plainly been retained to do just that.

In fact, on March 16, Millennium's Management Committee unanimously approved the reimbursement to the IRN Holders for the Barrier engagement. Exhibit A to the

[71] JX-97 (email from Westbrook to Fredette and others (March 14, 2006)).
[72] *Id.* (emphasis added).
[73] *Id.*

unanimous written consent form was the March 6 letter plainly describing Barrier's role "to act as financial and operational advisor in connection *with a review of potential investments in the capital structure of [Millennium]. . . .*"[74]

J. Meanwhile, The Senior Lenders Send A Draft Consent To The APA And UPA As Millennium Continues To Pursue "Parallel Paths"

While the IRN Holders and Millennium were discussing a refinancing, Millennium was also in talks with the Senior Lenders about their consent to the sale of the Systems. On March 8, counsel for Bank of America, the Senior Lenders' agent, sent Millennium a draft consent. By March 16, Millennium had reviewed the consents and identified changes, but rather than send these revisions back to Bank of America or to Wave which would have been expected if Millennium was working in good faith to obtain the consent as it was required to do, Millennium, through Beard, sent them to Fredette so that the IRN Holders could comment upon them.

On March 20, twelve days after initially receiving the draft consent, and having still never informed Wave that it had received it, Millennium sent its comments back to Bank of America.

K. Millennium Pushes Ahead With A Refinancing Deal With Highland And The IRN Holders

On March 22, Millennium was scheduled to meet with the IRN Holders. To prepare for that meeting, Fredette suggested that Westbrook have Millennium prepare materials comparing the expected returns for the IRN Holders if Millennium sold the Systems to

[74] JX-102 (emphasis added).

Wave with the returns if Millennium executed the Highland refinancing proposal.[75] That is, Westbrook and Fredette were again developing analyses for the IRN Holders using confidential Millennium information and the subjective thoughts of Millennium's management to help facilitate development of an alternative to the Wave sale.

The agenda for the March 22 meeting had Westbrook and Fredette splitting the role of presenter. Westbrook provided updates about the sale of the Systems to Wave and Fredette focused on the refinancing process.[76]

Less than a week after the meeting, Fredette was convinced that Millennium should refinance with Highland instead of selling the Systems to Wave. On March 28, he emailed Westbrook saying that Trimaran would "like [Millennium] to execute Highland's proposal."[77] Westbrook responded that Millennium was putting comments together to give to Highland. Fredette then passed along Trimaran's comments to Highland's proposal and asked Westbrook that he send Fredette Millennium's comments before sending them to Highland.

L. The IRN Holders And Senior Lenders Ultimately Refuse To Consent To The Systems Sale

On April 7, Trimaran and Highland sent Millennium a letter informing it that they did not consent to the sale of the Systems to Wave.[78] These IRN Holders claim to have based their decision not to consent on their own internal analysis of Millennium and "*a*

[75] JX-106 (email from Fredette to Westbrook (March 19, 2006)).
[76] JX-110 (email from Bryant to Westbrook and Fredette (March 21, 2006)).
[77] JX-120.
[78] JX-137.

detailed review of Barrier's independent assessment."[79] But, they of course had received cash flow and other estimates prepared by Millennium management specifically to help them develop a refinancing alternative. And, Millennium had also paid for Barrier to help them in that endeavor. Instead of the Wave sale, Highland and Trimaran suggested that Millennium pursue a refinancing along the lines that Millennium had been helping them develop and create. Thus, Highland and Trimaran pointed to Highland's refinancing proposal as the best path available, stating that it would provide the IRN Holders with "potential upside above and beyond their expected returns under the current proposal for the sale of the Systems."[80]

That same day, Westbrook emailed Weed, not to break him the bad news, but instead to tell him that Millennium had had further discussions with the IRN Holders and to "[h]ang in there" and that there was "more work to do."[81] Weed offered to help if there was anything Wave could do to assist with the consent process. April 7 ended without Millennium having obtained the consent of its Senior Lenders or the IRN Holders. Under the Agreements, therefore, Wave was at that point free to terminate the Agreements at its discretion. Millennium, however, was not and remained bound by both the reasonable best efforts and no solicitation clauses.

Two weeks later, on April 21, Highland, which had accumulated over 51% of the senior debt over the previous month, notified Millennium that it would not consent to the

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[79] *Id.* (emphasis added).
[80] *Id.*
[81] JX-138 (Email from Westbrook to Weed (April 7, 2006)).

sale of the Systems to Wave.[82] Millennium, through Fredette, was aware that Highland had been making purchases. Consistent with its stealthy conduct throughout, Millennium never gave Wave notice of the retention of Barrier, Millennium's extensive involvement in helping the IRN Holders develop alternative transactions, or the fact that Highland was buying senior debt in order to obtain a blocking position.

On the same day that Highland notified Millennium it would not consent to the sale, Wave sent Millennium a letter indicating that Wave did not believe the consent of the IRN Holders was required under the Agreements.[83] Millennium disagreed, and on April 26, finally sent Wave the non-consent that it had received from the IRN Holders on April 7 along with Highland's April 21 objection on behalf of the Senior Lenders.

M. Millennium Works To Get Refinancing Agreements Drafted Before June 30 And Continues The Parallel Sales Process

Throughout April, Millennium continued to negotiate with Highland about a possible refinancing. On April 14, Barrier provided Millennium and the IRN Holders with an additional assessment of Millennium.[84] A week later, on April 21, Fredette emailed Westbrook again encouraging him to pursue a refinancing deal with Highland and telling him that Barrier was "working on a detailed business plan around their initial analysis" that would put Millennium in a position to create value for the IRN Holders.[85]

[82] JX-153.
[83] JX-151.
[84] JX-147.
[85] JX-152.

On April 26, Highland sent Millennium a term sheet for a refinancing.[86] This sparked a flurry of credit agreement drafting activity in which Millennium, Highland and Trimaran worked to finalize a refinancing deal. The draft agreements exchanged during this time period illustrate that which was clear all along — that any refinancing would be accompanied by a restructuring in which the equity of Millennium would be transferred to the debt holders and its assets, including the Systems to be transferred to Wave,[87] would be subject to new liens making them unavailable for a sale to Wave.[88]

While the lawyers at Highland and Millennium were busy ironing out the financing agreements, Weed again reached out to Westbrook to try to help obtain the consents of Millennium's lenders. Weed wanted to know "on what basis they would agree to sign the consents."[89] The IRN Holders agreed to speak with Wave but felt that they "had nothing to settle with them."[90]

On May 18, Westbrook wrote to Trimaran and Highland explaining Millennium's situation. Millennium's current credit facility was set to mature on June 30, 2006 and if a

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[86] JX-157.

[87] *See e.g.,* JX-157 (Highland's refinancing proposal term sheet (April 26, 2006)) (listing as collateral for the new loan "all of [Millennium's] now owned or hereafter acquired property and assets. . .").

[88] *See e.g.,* JX-157 (Highland's Proposed Term Sheet) at DEF0021938 (listing as a condition precedent to closing: "Simultaneous closing of a Second Lien Credit Facility, and exchange of Increasing Rate Note holders' securities for equity."); JX-170 (Letter from Millennium to Highland in response to refinancing proposal (May 9, 2006)) (stating that Highland would be providing Millennium with "the support to rebuild a company in which [Highland has] a significant stake."); JX-172 at DEF0033633 (Millennium mark-up of Highland's refinancing proposals (May 9, 2006)) (listing as a condition precedent to closing: "Full debt to equity swap of all of the securities related to the [IRN Agreement]. . . "); JX-176 at TRI-WAV002395 (May 12 draft of Millennium restructuring term sheet) (stating that Millennium "shall take all steps necessary to cancel the [Wave] transactions").

[89] JX-177 (email from Weed to Westbrook (May 12, 2006)).

[90] JX-175.

sale or refinancing did not occur before then Millennium would be in default — June 30 was a "drop dead date."[91] Westbrook told Trimaran and Highland that Millennium was "extremely excited" about a refinancing deal but that the company remained obligated under its current credit agreement and the APA/UPA Agreements to continue the sales process.[92] "Pursuing these dual paths" was difficult Westbrook said, but he thought Millennium had no choice. Jay Bloom from Trimaran agreed: "[w]e have no alternative but to pursue parallel tracks - - [refinance] and sales."[93]

On June 2, Barrier produced another report modeling the future cash flows of Millennium. On the 7th, Fredette urged Westbrook to keep Barrier engaged because it was "*important in getting a deal done with Highland*."[94]

N. Millennium Agrees To A Refinancing With Highland And Terminates Its Agreements With Wave

Throughout the course of June, Millennium and its lenders worked to try to finalize the necessary refinancing agreements before the impending June 30 deadline. On June 13, Millennium and Highland executed a term sheet for a new senior secured second lien credit facility.[95] It became clear that Millennium would not be able to complete a refinancing before the June 30 deadline, but Millennium was able to receive a 31 day extension of the maturation date.

[91] Tr. at 315 (Westbrook).
[92] JX-180 (email from Westbrook to Highland and Trimaran (May 18, 2006)).
[93] JX-181 (email from Bloom to Westbrook, Fredette and others (May 18, 2006)).
[94] JX-190 (email from Fredette to Westbrook (June 7, 2006)) (emphasis added).
[95] JX-197.

Negotiations between Millennium and its lenders continued in July,[96] and Barrier continued to help by providing new modeling.[97] By the end of July, the refinancing and restructuring agreements were coming together and Millennium needed to make a decision about what do to about its Agreements with Wave. To that end, on July 26, Westbrook emailed Fredette and Bloom asking them their thoughts on how to handle Wave. Westbrook began by stating the obvious — that in connection with the refinancing, which was predicated on the assets being retained as a source of future growth potential for the IRN Holders, Millennium would need to terminate the Agreements with Wave. Even this late in the refinancing process, Westbrook wanted to leave Wave dangling on the hook as a last-gasp option. He suggested that if the lenders wanted to maintain some flexibility, the termination of the Agreements could be rescinded if Wave agreed to waive some of the provisions of the Agreements so that Millennium could begin the refinancing process.[98] Further, in keeping with his desire to pursue both paths as long as possible, Westbrook said that Millennium expected to send the notice of termination to Wave immediately before the closing of the refinancing.[99]

Trimaran told Westbrook that it thought that preserving flexibility so late in the process was not necessary. Fredette advised Westbrook that "we should terminate the Wave agreement *and not string them out any longer*."[100] Fredette reasoned that "we

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[96] *See e.g.*, JX-202; JX-205; JX-206; JX-208.
[97] JX-207.
[98] JX-210 (email from Westbrook to Fredette, Bloom and others (July 26, 2006)).
[99] *Id.*
[100] JX-211 (email from Fredette to Westbrook (July 27, 2006)) (emphasis added).

needed the flexibility up until the refinancing got finished," but that it was no longer necessary.[101] Westbrook agreed.

On July 28, contending that it was entitled to do so under the terms of the Agreements, Millennium sent notice to Wave terminating both the APA and UPA under § 8.3(a) of the respective Agreements.[102] That same day, Millennium closed on the refinancing deal resulting in the ownership of Millennium being transferred to the IRN Holders.[103]

O. After Millennium Terminates The Agreements, Wave Purchases Two Other Cable Systems

After Millennium terminated the Agreements with Wave, Wave purchased two cable systems in the first quarter of 2007 for a total price of $147.1 million.[104] Specifically, on January 4, 2007, Wave acquired substantially all of the assets of Starstream Communications, Inc. (the "Rocklin System") and on March 13, 2007, Wave acquired substantially all of the assets of RCN Telecom Services, Inc. (the "San Mateo System").

P. Wave Files This Lawsuit

On June 1, 2007 Wave filed this lawsuit alleging that Millennium's action violated the Agreements and seeking damages. Count I of the complaint alleges that

[101] *Id.*
[102] JX-212 (Notices of Termination). Again, the provisions of § 8.3(a) of the APA and UPA were identical and both allowed Millennium to terminate the Agreements if closing had not occurred by June 30 so long as Millennium had not proximately caused the closing's non-occurrence. JX-53 § 8.3(a); JX-54 § 8.3(a).
[103] JX-213.
[104] Beaton Aff. Ex. A at 18.

Millennium's conduct in dealing with the IRN Holders was a breach of § 5.05 (reasonable best efforts) and § 5.09 (no solicitation) of the Agreements. Count II of the complaint alleges that Millennium breached the implied covenant of good faith and fair dealing inherent in the Agreements. I will now address these claims.

III. Analysis

A. Millennium Breached Its Agreements With Wave

The Agreements are governed by Delaware law.[105] Under Delaware law, the elements of a breach of contract claim are: 1) a contractual obligation; 2) a breach of that obligation by the defendant; and 3) a resulting damage to the plaintiffs.[106] Millennium does not deny that at all relevant times it was bound by the Agreements. In addressing Wave's breach of contract claim, therefore, I will focus on the issues of breach and causation.

Wave's argument is simple. Millennium's conduct, beginning as soon as it began discussions with Wave and continuing unabated through the signing of the Letter of Intent and Agreements, clearly violated the no solicitation (§ 5.9) and reasonable best efforts (§ 5.5) clauses of the Agreements and proximately caused the non-consent of the lenders and the ensuing refinancing. Specifically, Wave argues that Millennium breached the no solicitation clause and the reasonable best efforts clause of the Agreements by consciously facilitating a refinancing transaction with the very lenders whose consent Millennium was supposed to be working to obtain. From the get-go,

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[105] JX-53 (APA) § 9.11; JX-54 (UPA) § 9.11.
[106] *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003).

Millennium's conduct related to the refinancing clearly involved "assisting," "facilitating," "encouraging," and "cooperating" with the "making of any proposal" which could reasonably be expected to lead to the acquisition of the Systems by someone other than Wave. Millennium even engaged an "investment banker" to "encourage" the alternative transaction, an action blatantly inconsistent with § 5.9. Even if Millennium claims that Barrier's retention was not designed to directly encourage a refinancing, § 5.9 also prohibits Millennium or its investment bank from *indirectly* encouraging such an alternative transaction. Finally, all of Millennium's conduct in this regard flies directly in the face of the portion of § 5.9 prohibiting Millennium or its investment bank from "provid[ing] to any other Person any information or data Related to the Business or relating to any of the Systems or the Transferred Assets for the purposes of [making any proposal which may reasonably be expected to lead to an alternative transaction]."[107]

Millennium responds to this argument in two ways. First, it claims that its actions were not intended to facilitate a refinancing but rather were solely aimed at obtaining its lenders' consent to the sale. In making this argument, Millennium assumes that the consent of the IRN Holders was required to consummate the sale of the Systems to Wave. Because I find that Millennium breached the Agreements regardless of whether the IRN Holders consent was needed, I too will assume that it was for purposes of this analysis.[108]

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[107] APA § 5.9.

[108] There is, however a colorable argument that the IRN Holders consent was not needed. Although Wave admits that broadly speaking the consent of the IRN Holders is required under the terms of the Agreements, Wave argues that the IRN Holders' ability not to consent is restricted by the express terms of the IRN Agreement. Pl. Op. Br. at 31-32. Under the IRN Agreement, Millennium is granted permission to sell assets without the consent of the IRN

Westbrook claims that he genuinely hoped it could obtain these consents and proceed with the sale of the Systems to Wave. Of course, Westbrook's subjective intent does not matter because this is a breach of contract action against *Millennium*, but even if it did, both Westbrook and Fredette and, as important, Millennium's Management Committee, looked the Agreements in the face multiple times and consciously decided to violate them. The fact that they were at times pessimistic that their alternative planning would pan out is not a contractual excuse nor do I find their denial of an interest in a refinancing convincing. Through their improper actions, Millennium insiders, including Westbrook and Fredette, and Fredette's Management Committee superiors from Trimaran intentionally brought about the very eventuality that they were not permitted to cook up, an alternative transaction. Furthermore, I am not at all persuaded that Westbrook, Fredette, and the Management Committee preferred the sale. Rather, I believe it more likely than not that they were to glad to have the sale as a fallback option but actually

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Holders so long as: 1) the assets are sold at fair market value; 2) the consideration paid for the assets is at least 80% cash or cash equivalents; and 3) the sale does not have a material adverse effect on Millennium. JX-1 (IRN Agreement) at 00717. In their notice of non-consent to Millennium, the IRN Holders stated that the reason for their non-consent is that the sale would "not be in the best interests of the IRN Holders or the other creditors. . . ." JX-137 at DEF 0000421. This, Wave argues, is an impermissible reason under the IRN Agreement because the IRN Holders' consent is being withheld not because of a material adverse effect of the sale on Millennium, but because of an adverse effect on the IRN Holders. Realizing that a fair market value sale of assets after an open auction might not, by itself, be a material adverse event to Millennium, the IRN Holders have come up with the post hoc litigation-only argument that the sale would have triggered a mandatory repayment of Millennium's debt under the IRN Agreement — payments that Millennium would not be able to make — and would place Millennium in a position where it would be unable to meet the EBITDA requirements of the IRN Agreement, thus creating a material adverse event for Millennium. Of course, without the sale the creditors had desired or another transaction, Millennium would have faced similar, if not more extreme, problems.

preferred to refinance and keep the Systems, as they had tried to do in the year leading up to the agreement to sell to Wave.

Indeed, Westbrook, Fredette and the Management Committee were consciously treating the Agreements as something they could retain as an option. They believed Millennium could violate the no solicitation clause at will and caused it to do so, while keeping the breaching conduct concealed from Wave.

Second, Millennium argues that its lenders, in particular Highland as a Senior Lender, would not have consented to the sale under any circumstances and that the failure of that condition excuses Millennium's performance thereby rendering any potential breach by Millennium moot. But, Millennium cannot rely on the failure of a condition to excuse its performance when its own conduct materially caused the condition's failure.[109] It is an established principle of contract law that "[w]here a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused."[110] Further, it is not necessary that the consent would have been given "but for" Millennium's conduct, but only that Millennium's actions contributed materially to the non-consent of the lenders.[111] The language of the

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[109] *See* 13 WILLISTON ON CONTRACTS § 39:4 ("In effect, where one improperly prevents the performance or the happening of a condition of his or her own promissory duty, the offending party thereby eliminates it as a condition. . . .").

[110] RESTATEMENT (SECOND) OF CONTRACTS § 245; *Moore Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717, 725 (4th Cir. 2000) ("The prevention doctrine is a generally recognized principle of contract law according to which if a promisor prevents or hinders fulfillment of a condition to his performance, the condition may be waived or excused.").

[111] *See* RESTATEMENT (SECOND) OF CONTRACTS § 245 cmt. b ("Although it is implicit in the rule that the condition has not occurred, it is not necessary to show that it would have occurred but for the lack of cooperation. It is only required that the breach have contributed materially to the non-occurrence."); *Ne. Drilling, Inc. v. Inner Space Services, Inc.*, 243 F.3d 25, 40 (1st Cir.

Agreements drives home this point. The Agreements define "proximate cause party" as a party that has "*proximately contributed* to the failure of the Closing to occur," and removes from such a party the ability to terminate the Agreements.[112]

Millennium argues that application of this principle unfairly shifts the burden of proof by relieving Wave of its burden of showing that Millennium's conduct resulted in damages to Wave. But once it has been determined that Millennium breached the Agreements, the burden of showing that that breach did not materially contribute to the lenders' non-consent is properly placed on Millennium.[113]

1. Millennium Breached The No Solicitation Clauses In The Agreements

Millennium's actions in pursuing the "parallel paths" of exploring a refinancing while at the same time pursuing the sale of the Systems to Wave violated the no solicitation provision of the Agreements.[114] Millennium attempts to frame its unusual and duplicitous conduct in the months after signing the Agreements as an elaborate attempt to obtain the consent of its lenders.[115] I am, to put it in an understated way, not convinced.

2001) ("Under the so-called prevention doctrine, a contractual condition precedent is deemed excused when a promisor hinders or precludes fulfillment of a condition and that hindrance or preclusion *contributes materially* to the nonoccurrence of the condition.") (emphasis added).

[112] JX-53; JX-54 (APA/UPA) §§ 1.117, 8.5.

[113] *See* RESTATEMENT (SECOND) OF CONTRACTS § 245 cmt. b ("[I]f it can be shown that the condition would not have occurred regardless of the lack of cooperation, the failure of performance did not contribute materially to its non-occurrence and the rule does not apply. The burden of showing this is properly thrown on the party in breach.").

[114] JX-53 § 5.9; JX-54 § 5.9.

[115] *See* Def. Ans. Post-Tr. Br. at 16-21. The plaintiffs and defendants expend a great deal of effort arguing about whether the consent of the IRN Holders was necessary under the Agreements. Because I decide that Millennium's conduct proximately contributed to the

Millennium was under an obligation not to "cooperate in any way with or assist or participate in, facilitate or encourage, any inquiries or the making of any proposal" which may reasonably have been expected to lead to the sale of the company or the transfer of the assets to another entity.[116] To this end, Millennium was not allowed to "provide to any other Person any information or data Related to the Business or relating to any of the Systems. . . ."[117] Millennium was also obligated not to allow its "employees, agents, and representatives (including, without limitation, any investment banker, attorney, or accountant retained by Seller)" to engage in conduct that would violate the no solicitation clause. Millennium repeatedly and persistently breached this provision by acting as a financial advisor helping to cook up an alternative transaction, not only by using its own managerial expertise and company confidential information, but also by retaining an independent consultant whose retention explicitly included exploring the viability of the very transactions expressly covered by the no solicitation clause. Millennium's strange defense to all of this misconduct is that it adopted as its good faith (but secret from Wave) strategy to obtain consent the engagement in activity explicitly violative of § 5.9 of the Agreements.

Millennium's argument that its conduct was aimed at obtaining the consent of the IRN Holders seeks to create a false conflict between the reasonable best efforts clause and the no solicitation clause. But, there is no conflict that excuses Millennium's duty to

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inability to obtain those consents, I need and therefore will not decide the issue of whether that consent was required.

[116] JX-53 § 5.5; JX-54 § 5.5.

[117] *Id.*

comply with the no solicitation clause. Far from being inconsistent, the no solicitation and reasonable best efforts clauses relate to each other. Indeed, the no solicitation clause is clearly designed to make obtaining consent more likely and thus buttresses the reasonable best efforts clause. It is clear that one way to increase the likelihood of consent is to require Millennium to use its reasonable best efforts to obtain it. It is also clear, however, that forbidding Millennium from engaging in certain behavior in order to limit the emergence of an alternative to the sale encourages consent to be given as well. Further, as a matter of contract law, because there is nothing inconsistent about the two provisions they should both be given effect.[118] Millennium was required to use its reasonable best efforts to obtain the necessary consents, *and* was forbidden from violating the no solicitation clause.

a. <u>Millennium's Assistance To The IRN Holders In Crafting A Refinancing Proposal And The Retention Of Barrier Violated The No Solicitation Provision</u>

Two days after signing the Agreements, Westbrook wrote to the IRN Holders to reassure them that despite having just agreed to sell the Systems to Wave, that Millennium was "actively pursuing various alternatives, including refinancing options. . . ."[119] To that end, Millennium engaged in two courses of conduct that violated the no solicitation provision.

First, Millennium acted as an in-house banker for the IRN Holders, assisting them to analyze a possible refinancing by developing financial models comparing the results of

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[118] *Council of Dorset Condo. Apartments v. Gordon*, 801 A.2d 1, 7 (Del. 2002) ("A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole.").
[119] JX-57.

a sale with refinancing and restructuring plans in which Millennium and the IRN Holders would retain ownership of the Systems. Although the IRN Agreement did provide the IRN Holders with a right to receive certain Millennium information related to the operation of its business,[120] there is a difference between providing extant information and developing *new* cash flow projections and new management analyses based on confidential, proprietary Millennium information to examine the effect of various levels of capital infusion and help assess the viability of a refinancing. This is especially so when the IRN Holders — who were represented on the Management Committee — knew that Millennium could not engage in such activity. The informational rights of the IRN Holders were subject to a restriction. The IRN Holders, who approved the sales process that resulted in the signing of the Agreements with Wave, could not demand that Millennium create non-extant information designed to help facilitate transactions in violation of the no solicitation provisions in those same Agreements. Millennium did not simply allow the IRN Holders to examine its books and records. Rather, Millennium used company resources including managerial expertise to estimate its future performance under various scenarios and develop financing models for the IRN Holders. This conduct went far beyond what was required under the disclosure provisions of the IRN Agreements and "assisted," "encouraged," and "facilitated" a refinancing in contravention of § 5.9 of the Agreements. Even more clearly, Millennium "provide[d] to any other Person any information or data Related to . . . the Systems," again violating the no solicitation clause.

[120] JX-1 (IRN Agreement) ¶ 5C.

Second, Millennium retained Barrier on behalf of the IRN Holders specifically to "act as financial and operational advisors in connection with a review of potential investments in the capital structure of [Millennium]." This was a clear beach of the no solicitation provision because the retention of Barrier "assisted," "facilitated," and "encouraged" an alternative transaction and Millennium provided Barrier with whatever information it needed. In determining not to consent and to instead prefer the refinance option, the IRN Holders cited specifically to the work done by Barrier as a source of guidance for their decision.[121] Additionally, Barrier was an "investment bank" and an agent of Millennium[122] and therefore Barrier's conduct in aid of the refinancing efforts can be charged to Millennium as a violation of the no solicitation provision as well.

Millennium of course, argues that although Millennium's management, including Fredette, and an investment banker, Barrier, helped develop and analyze the refinancing that was eventually implemented, the natural relationship between this work and that outcome was not foreseeable and that in its absence, consent could not have been obtained anyway. That argument does not persuade me. Indeed, if Millennium had

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[121] JX-137 (notice of non-consent from IRN Holders (April 7, 2006)) ("Based upon our internal analysis of [Millennium], [and] *a detailed review of Barrier's independent assessment* . . . we do not const to the proposed sale of the Systems.") (emphasis added).

[122] The Third Restatement of Agency defines the agency relationship as: "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." RESTATEMENT (THIRD) OF AGENCY § 1.01. Although for pretextual reasons Barrier was nominally hired by the IRN Holders, Barrier was paid by Millennium because Millennium was pursuing a dual track strategy of keeping Wave on the line while prospecting for a better deal. To that end, Millennium retained Barrier at its own expense to act as a financial advisor (i.e., an investment banker) to help develop an alternative transaction to the sale, with Barrier receiving full access to Millennium's management and confidential information.

played it straight and had from the get-go told its Senior Lenders and the IRN Holders that it was bound by and would honor the no solicitation clause, could not help develop alternatives, would not hire Barrier and would not develop projections related to refinancing alternatives, then the Senior Lenders and IRN Holders would have had to do their own work and come to their own conclusions. Instead, Millennium management and Barrier — a financial advisor paid for by Millennium — put intellectual energy, using non-public information, into shaping up an alternative for them. Had Millennium operated as it should have, the Senior Lenders and IRN Holders who had refused to propose a refinance or alternative purchase option since 2005, even during an open auction for the sale of the Systems, would have had a strong incentive to consent and engage in gain-sharing and pain-sharing. By breaching the no solicitation provision — a provision designed with just this in mind — Millennium relieved all that pressure.

In other words, Millennium's retention of Barrier in contravention of the no solicitation provisions materially contributed to the lenders' failure to consent to the sale. Millennium is therefore precluded from using this lack of consent to abrogate its responsibility to compensate Wave for Millennium's breach.

Millennium also argues that the no solicitation provision cannot be enforced against it as a matter of law because doing so would have forced the Management Committee to breach its fiduciary duties to its creditors. This argument makes no economic or legal sense. Millennium decided to sell the System precisely at the behest of its Senior Lenders and with the approval of the IRN Holders. The IRN Holders were also well represented on Millennium's Management Committee, which negotiated and authorized the Letter of Intent and Agreements, both of which they knew contained no solicitation clauses. Millennium cannot now claim that its duties to those lenders excuse its performance under the same Agreements. Further, the whole point of the Agreements was to sell the Systems and help pay off the creditors as the creditors had themselves demanded, thus Millennium cannot now use its duty to the creditors as a reason *not* to go through with the sale. As important, despite the existence of some admittedly odd authority on the subject, it remains the case that Delaware entities are free to enter into binding contracts without a fiduciary out so long as there was no breach of fiduciary duty involved when entering into the contract in the first place.[123] To generate wealth for investors, fiduciaries must be able to bind the entity to contracts.[124] The argument that the governing body of an entity whose senior creditors press for a sales process and who

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[123] *See e.g., Sample v. Morgan,* 914 A. 2d 647, 672-73 (Del. Ch. 2007) ("Rather than condemn [contracts limiting a board's future discretion] as illegal, Delaware law uses equity, in the form of principles of fiduciary duty, to ensure that directors do not injure their corporations. Corporate acts thus must be "twice-tested"-once by the law and again by equity. If a contract with a third-party is premised upon a breach of fiduciary duty, the contract may be unenforceable on equitable grounds and the third-party can find itself lacking the rights it thought it had secured. But the basis for that determination is the fact-intensive one demanded by equity, not a bright-line ruling that the contract is invalid simply because it delimited the range of discretion the directors otherwise had under the law to act.").

[124] *Cf.* *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 948 (Del. 2003) (Steele, J., dissenting) ("We should not encourage proscriptive rules that invalidate or render unenforceable precommitment strategies negotiated between two parties to a contract who will presumably, in the absence of conflicted interest, bargain intensely over every meaningful provision of a contract after a careful cost benefit analysis."); Stephen M. Bainbridge, *Precommitment Strategies In Corporate Law: The Case of Dead Hand And No Hand Pills*, 29 J. CORP. L. 569, 612-623 (arguing that boards of directors should be able to enter into self-disabling transactions and that when the law respects such precommitment behavior, value is generated for entities and their investors); Sean J. Griffith, *The Costs And Benefits Of Precommitment: An Appraisal Of Omnicare v. NCS*, 29 J. CORP. L. 569 (2004) (concluding that a board's ability to bind itself to transactions serves as an important bargaining chip that, when properly employed, increases shareholder value).

act at all times in good faith and with due care cannot agree to conduct an open sales process and enter into an ensuing sales contract with the high bidder containing a no solicitation clause is frivolous. That is especially so when the governing body included strong representation from the other key creditors, the IRN Holders, when those Holders supported the open sales process, and when all the body's decisions were unanimous and thus had the blessing of the IRN Holders' representatives on that body.

2. Millennium Breached The "Reasonable Best Efforts" Clauses In The Agreements

In the Agreements, Millennium covenanted to "use commercially reasonable efforts at its expense . . . to obtain all Seller Required Approvals. . . ."[125] Millennium again attempts to frame its conduct in the months after signing the Agreements as an elaborate attempt to obtain the consents of its lenders.[126] As noted, I am not convinced.

Millennium's reaction to three communications it received regarding consent illustrates its lax attitude towards the consent process and the amount of effort it was expending to obtain the consents. First, when Millennium received the draft consents from the Senior Lenders, its first reaction was to send them to the IRN Holders, not Wave, and not quickly back to the Senior Lenders' agent to work out any problems. Second, when Millennium received the notice of non-consent from Trimaran and Highland, it made no effort to contest it and again did not even notify Wave until two weeks later. Third, when Millennium received Highland's non-consent to the sale as a Senior Lender, Millennium again did nothing to try to persuade Highland otherwise, nor

[125] JX-53 § 5.5; JX-54 § 5.5.
[126] *See* Def. Ans. Post-Tr. Br. at 16-21.

did Millennium express any sort of surprise at the fact that Highland had all of a sudden become the owner of 51 % of its senior debt — because Millennium already knew, but did not inform Wave until sending Wave Highland's non-consent, that Highland had been making purchases to achieve a blocking position. These three incidents reflect the reality that Millennium did not make much of an effort at all to obtain the necessary consents.

Of course, the clearest evidence that Millennium did not comply with its duty to use its reasonable best efforts to obtain consent was that it spent most of its energy and resources helping to develop an alternative to the sale, efforts designed to thwart, not obtain, consent. That is, instead of working in good faith with Wave to obtain the necessary consents, Millennium kept Wave in the dark and on a string so it could prospect for a better deal. Despite Wave's repeated offers to assist Millennium with gathering the necessary consents, Millennium never told Wave about its involvement in stimulating an alternative refinancing deal, the issues that the IRN Holders had raised about the sale, the fact that Highland was engaged in efforts to buy up senior debt, or that Millennium had retained Barrier to develop possible refinancing alternatives. This clandestine approach employed by Millennium, through Westbrook and Fredette, guts its claim to have been actively pursuing consents in good faith.

Thus, Millennium did not use its reasonable best efforts to secure the consent of its lenders, instead, it actively pursued a course of action that made the lenders' consent less likely.

Additionally, as discussed earlier, Fredette played multiple roles throughout the process — he was an agent of the Management Committee through his work for Phoenix, he steered Millennium through the refinancing process alongside Westbrook, and he represented the IRN Holders' interests in the negotiations. Clearly, Fredette's conduct blurred the line between working for Millennium and representing the interests of Trimaran as an IRN Holder.

Yet, it is clear that Millennium allowed Fredette to direct its management team and even determine how Millennium would deal with Wave on issues relating to the sale and consent process.[127] Fredette was in fact the main man guiding Millennium's behavior, not Westbrook, because Fredette had the clout of the Trimaran representatives on the Millennium Management Committee behind him.

Similarly, Millennium relies on the fact that Highland — as a senior lender — would have refused to consent to the sale no matter what, thereby negating any breach of contract claims because of a lack of causation. Millennium goes to great lengths to make clear that it had no idea that Highland was buying up senior debt or that it planned to not consent to the transaction. This argument fatally ignores two things.

First, I do not believe that Westbrook was not kept abreast of Highland's machinations by Fredette. But in any event, Fredette and his Management Committee superiors certainly were and Fredette was clearly acting on Millennium's behalf with its blessing and support. Members of Millennium's Management Committee cannot turn on

[127] For instance, when Westbrook finally decided it might be time to cut Wave loose and terminate the Agreements, he turned to Fredette for advice about how to handle the situation. JX-210 (email from Westbrook to Fredette and others (July 26, 2006)).

and off their fiduciary duties and responsibilities as Millennium agents depending on their self-interest.

Second, before the ink on the Agreements had dried, Millennium was pursuing a refinancing proposal inconsistent with consummation of the sale in violation of the no solicitation provisions, conduct that is utterly inconsistent with taking commercially reasonable steps to obtain consent. Had Millennium not blatantly breached the no solicitation clauses, Highland would have had much less reason to think a refinancing was truly viable and to try to block the sale. Likewise, if Millennium had more diligently sought Senior Lender approval, that consent would likely have been obtained before Highland could have obtained a blocking position. Again, Millennium cannot now claim that a likely consequence of its breaching behavior — Highland's non-consent — excuses it from performing under the other provisions of the Agreements.

B. The Implied Covenant Of Good Faith And Fair Dealing Does Not Come Into Play Because The Agreements Established The Terms Of The Parties' Relationship

Because the conduct at issue was governed by written agreements, Wave's claim for breach of the implied covenant of good faith and fair dealing fails. Although under Delaware law the implied covenant of good faith and fair dealing inheres in every contract, it cannot be invoked to override the express terms of an agreement.[128] In this case, Millennium's conduct that Wave alleges harmed it — helping the IRN Holders with refinancing plans etc. — is clearly covered by the Agreements.[129] In fact, it is addressed

[128] *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009).

[129] For instance, § 5.5 of the Agreements provides that Millennium must use its reasonable best efforts to obtain the lenders' consent and is clearly implicated by Wave's claim that Millennium

by the provisions that Millennium violated. Therefore, for the same reasons that Wave prevails on its express breach of contract claims, its implied contract claims must fail.

IV. Wave Is Entitled To Damages

Because Millennium breached the Agreements and caused harm to Wave, Wave is entitled to damages.[130] The proper measure of damages for breach of contract is "based upon the reasonable expectations of the parties *ex ante*."[131] Millennium must put Wave in as good a position as they would have been had Millennium not breached.[132] Importantly, the damages suffered by Wave should be measured from its perspective based upon the value of the bargained for Agreements to Wave,[133] and should be measured at the time of breach.[134]

Of course, Wave is only entitled to recover the net loss it has suffered because of Millennium's breach.[135] In broad strokes, therefore, Wave should be entitled to recover the value it expected to realize from the Agreements minus any cost avoided by not

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hindered the consent process, and § 5.9 of the Agreements forbids Millennium from "facilitating" or "encouraging" a transfer of its assets to anyone other than Wave and is clearly implicated by Wave's claim that Millennium's conduct made a refinancing by the IRN Holders more likely.

[130] *See* 23 WILLISTON ON CONTRACTS § 63:8 ("[T]he obligation to pay damages arising from an unexcused breach of a contract is implied by law.").

[131] *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001).

[132] *See e.g., Id.*; RESTATEMENT (SECOND) OF CONTRACTS § 344.

[133] *See West-Willow Bay Court, LLC v. Robino-Bay Court Plaza, LLC,* 2009 WL 458779, *4 (Del. Ch. Feb. 23, 2009) (suggesting that the "extent of the loss is determined in reference to the plaintiff's particular circumstances"); 24 WILLISTON ON CONTRACTS § 64:2 (reasoning that "basing damages on an amount equal to what the promisor, and, *especially, the promisee,* believed the promise to be worth, reflects better than any other measure the loss caused by the breach. . . .") (emphasis added).

[134] *See Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 17 (Del. Ch. 2003) ("Damages are to be measured as of the time of breach.").

[135] RESTATEMENT (SECOND) OF CONTRACTS § 347.

having to perform (most obviously, the purchase price) and minus any mitigation that Wave was able to achieve by purchasing the Rocklin and San Mateo cable systems in the first quarter of 2007.

Unsurprisingly, Millennium and Wave presented very different estimates of Wave's damages. Millennium says it did Wave a favor by not selling it the Systems and that Wave is not entitled to any damages. Meanwhile, Wave says that the Systems would have grown in value greatly under its stewardship and it should receive $85,513,000 in damages.

In addressing this question of the value to Wave of the Systems at the time of breach, I proceed in three steps. First, I address whether the Michigan System should be included in the damages calculation. Second, I briefly address the methodology used by each of the parties' experts. Third, I reach a valuation that I believe best estimates Wave's reasonable expectations at the time of breach.

A. The Michigan System Should Be Included In The Damages Calculation

Millennium claims that the Michigan System should not be included in the expected damages calculation because Wave was planning on selling the system shortly after the purchase.[136] As evidence of this, Millennium points to the fact that Wave originally wanted to purchase only the Northwest System but Daniels made it clear that to buy the Northwest System they would have to bid on the Michigan System as well. Millennium also notes that Wave had entered into an agreement to negotiate exclusively

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[136] Def. Ans. Br. at 43-44.

with a potential buyer of the Michigan System, Spectrum Equity Investors, and that Wave had obtained pre-consent from its lenders for the sale of the System.

These arguments have two flaws. First, as Millennium itself points out, it was the party that insisted on including Michigan in the sales Agreements with Wave, but now wants to exclude the system for purposes of calculating Wave's damages as a result of Millennium's breach of the same Agreements. Millennium cannot have it both ways. Second, Wave, being a rational economic actor, would likely have not sold the Michigan system for a price less than what it reasonably believed the system to be worth. Wave's expectations about the value of the Michigan system is best captured by simply including the system in the rest of the damages calculation.

B. The Parties' Experts And Their Analyses Of The Value Of The Systems

Wave's expert was Neil J. Beaton, the National Partner in Charge of Valuation Services at Grant Thornton, LLP.[137] Millennium countered with its expert, Robert E. Ott, a Managing Director in the New York office of Duff & Phelps, LLC.[138] Both Ott and Beaton are Chartered Financial Analysts and both have experience valuing cable systems.[139]

1. Beaton's Analysis

Beaton arrived at a value for the Systems by using a multiples analysis based on the Systems' EBITDA. In his initial report on November 17, 2008, Beaton calculated a

[137] Beaton Aff. Ex. B.
[138] JX-248 (Ott Report).
[139] *Id.*; Beaton Aff. Ex. B.

value for the Systems before mitigation and adjustment of $324.8 million.[140] He arrived at that number by using a multiple of 8.8 and an annualized EBITDA estimate as of September 30, 2008 of $36.9 million.[141] To calculate the EBITDA for 2008, he began by choosing three of Wave's previously acquired cable systems that he felt best paralleled the Systems in terms of growth potential and capital expenditure requirements. He then calculated an average growth rate for those systems in the 2.25 years between June 30, 2006 and September 30, 2008 of 48.5%. Finally, he applied that growth rate to the annualized EBITDA for the Systems for 2006, $24.9 million, to arrive at his $36.9 million annualized EBITDA figure for September 30, 2008. Beaton selected his 8.8 multiple by looking at two acquisitions of cable companies that occurred between 2005 and 2008 and examining the implied valuation multiples used in those deals. In November 2008, Beaton's Systems valuation of $324.8 million resulted in a damages calculation of $101.9 million after mitigation and other adjustments.[142]

On February 5, 2010 Beaton provided a supplemental expert report in which he made changes to his previous valuation model. Beaton's basic approach remained the same: he selected three of Wave's previous acquisitions; calculated the growth rate of their cash flow from 2006-2009; applied that growth rate to the cash flows of the Systems; and then used a multiple of that cash flow to estimate the value of the systems as of December 31, 2009. Using this technique, Beaton arrived at an estimated EBITDA number for 2009 of

[140] Beaton Aff. Ex. A at 18.
[141] *Id.* at 17.
[142] Beaton subtracted from the $324.8 million: the purchase price (plus costs), the Systems' estimated negative free cash flow, the carrying cost of debt, and the operating cash flow derived from Wave's purchase of the Rocklin and San Mateo Cable systems as mitigation.

$42.4 million. Beaton also adjusted his 8.8 multiple downwards to 7.8 to address the impact of the economic downturn. He accomplished that by indexing the multiples used at the time of acquisition to guideline public company values. Based on his new EBITDA and multiple, Beaton estimated the value of the Systems to be $332.2 million. This translated into damages of $85.5 million after mitigation and adjustments.

2. Ott's Analysis

Rather than use a multiple of EBITDA to calculate the value of the Systems like Beaton, Ott used a discounted cash flow analysis. Ott chose to value the Michigan and Northwest systems separately because of differences in their operating characteristics.[143] Ott looked at three basic sources of data: Wave's projection that it provided to its bank to obtain financing in conjunction with the Millennium purchase (the "Base Case");[144] a July 12, 2006 report by Barrier;[145] and cable industry analyst forecasts, which he used to make adjustments to the Base Case that he felt were necessary.[146]

Ott determined that the Base Case should be adjusted in four primary ways. These changes related mostly to Wave's earnings estimates in the Base Case for its digital voice and high-speed internet services. Ott felt that the Base Case projections were unrealistically optimistic with regard to both the revenue per user and penetration for digital voice, and with regard to the penetration for digital voice.[147] Ott also reduced the

[143] JX-248 (Ott Report) at 3.
[144] JX-259.
[145] JX-207.
[146] JX-248 at 4.
[147] Penetration refers to the percentage of the cable systems basic subscribers that subscribe to the additional service — such as digital voice or high-speed internet.

"system cash flow" by 3% of revenue to account for corporate overhead to arrive at the proper measure of EBITDA.

Ott then used his adjusted Base Case numbers and the projections from the July 12 report by Barrier to perform two different DCF analyses using a weighted average cost of capital for each of the Northwest and Michigan systems of 11.75%[148] and growth rates of 3.3% and 3% in the terminal years of his model respectively. Using his adjusted Base Case, Ott's DCF analysis produced a value as of July 28, 2006 of $63 million for the Northwest systems and $77.4 million for the Michigan system.[149] When Ott used the numbers from the Barrier report, which were slightly more conservative than his adjusted base case, his DCF analysis produced values of $54 million for the Northwest System and $68 million for the Michigan System. Ott, therefore, concluded that because the total value of the Systems under his adjusted Base Case DCF calculation ($140.4 million) or his DCF using the Barrier projections ($122 million) was less than the purchase price Wave paid ($157 million), Wave was not entitled to any damages.

C. Wave's Damages

Wave's damages must be calculated based on its reasonable expectations at the time of breach. Because a buyer often intends to operate a business in a way that will change its cash flows,[150] its expectancy damages are the profits it expected to make, if it

[148] JX-248 App. II.
[149] JX-248.
[150] *See e.g., Cinerama, Inc. v. Technicolor, Inc.* 663 A.2d 1134, 1143 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995) ("The components of value in an acquisition might be considered to be two: the going concern value of the firm as currently organized and managed and the "synergistic value" to be created by the changes that the bidder contemplates (*e.g.,* new

can prove them up with reasonable certainty.[151] Millennium, on the other hand, appears to argue that Wave should only be entitled to recover based on how the market would have valued the Systems at the time of breach. Millennium's technique of valuing the Systems as of July 2006 and adjusting the Base Case to industry expectations is based on the assumption that the damages should be calculated by assuming Wave was going to sell the Systems immediately after purchasing them, and using what an appropriate sale price might be to calculate damages. In other words, Wave would not be entitled to any damages so long as the fair market value of the Systems as a going concern under current management at the time was the same as what Wave paid for it. If this were the proper measure of damages, buyers would be reluctant to ever purchase anything because so long as the sales process was market-based there would be by definition no injury to the jilted buyer if the seller reneged. Wave bought the Systems to improve them using its expertise and experience and then cash in on those improvements, either by selling the Systems at a profit or running them and enjoying the increased profitability.

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management, cost efficiencies, etc.). This second component will vary to some extent among bidders. It is the expectation of such synergies that allows a rational bidder to pay a premium when he negotiates an acquisition."); *see generally* SHANNON P. PRATT, ROBERT F. REILLY, ROBERT P. SCHWEIHS, VALUING A BUSINESS: THE ANALYSIS AND APPRAISAL OF CLOSELY HELD COMPANIES 349 (McGraw-Hill, 4th ed. 2000) (noting that controlling interests have greater value "because of the purchaser's ability to effect changes in the overall business structure and to influence business policies.").

[151] *See e.g.,* 24 WILLISTON ON CONTRACTS § 64:5 (4th ed.) ("Since the plaintiff is generally the injured party, the fundamental inquiry as to the amount of damages recoverable in the event of a breach of contract is the value to the plaintiff of the performance of the contract. This might be quite different from the value to the general public.").

1. <u>Wave's Base Case Projections Are The Best Estimate Of Its Reasonable Expectations At The Time Of Breach</u>

There is no doubt that Wave hoped that it would be able to upgrade and profit from the Systems like it has with its acquisitions in the past. Beaton's approach assumes that Wave will be able to replicate its past success and uses the growth rates from Wave's previous success stories to calculate future earnings for the Systems. Ott's approach assumes that even Wave's Base Case that it presented to the bank is overly optimistic and tempers those expectations based on the overall state of the industry. Neither of these approaches commends itself to me. Wave's approach extrapolates continued success from a small sample size and is not grounded in anything specifically related to the acquired Systems. Millennium's approach relies on unreliable, self-interested, and thinly justified reductions in Wave's Base Case and therefore deprives Wave of all of the expected benefit of its bargain by focusing on how the market valued the Systems in Millennium's hands as of the sale date instead of what Wave would reasonably be able to accomplish with them.

Wave's Base Case projections that it provided to its lenders are the fairest representation of Wave's expectations in the record. Wave argues that the projections it gave the bank are overly conservative and that Wave actually expects to beat those projections, especially in the out years.[152] I understand that when Wave presents its projections to a bank it has an incentive to be conservative. It may have been that Wave subjectively expected that the Systems would grow at a higher rate than the bank

[152] Tr. at 733-35 (Weed).

projections. If it had actually prepared another case professionally and in tangible form at the time of the deal, it might be a nice question whether a court could rely on those higher projections as Wave's actual base case if it told a bank, for reasons having to do with conservatism and not wanting to exaggerate, that its best estimate of future results was lower.[153] The fact is, however, that no such projections exist in the record.[154] In their absence, the Base Case projections provided to the bank provide a sound, conservative estimate of Wave's expectations at the time of breach. These estimates have the added benefit of having been relied upon by a party — the bank — with a strong interest in getting repaid. And, they are not materially out of line with Barrier's projections of the Systems' operating cash flow that were prepared in July 2006.[155]

2. <u>A Multiple Of EBITDA Analysis Should Be Used With A Multiple Of 7.8</u>

Of course, these Base Case projections could be used to perform either a DCF analysis or multiple of EBITDA analysis. Millennium contends that there is no reason to deviate from the "standard" DCF analysis.[156] Wave counters that it is common in the cable industry to value systems using a multiple of EBITDA analysis,[157] and more

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[153] *See e.g.,* 18 U.S.C. § 1014 (making it illegal to "knowingly make[] any false statement or report, or willfully overvalue[] any land, property or security, for the purpose of influencing in any way the action of" of a bank).
[154] Tr. at 744 (Weed).
[155] *Compare* JX-248 Ex. B-1 (predicting operating cash flow for the Systems in 2009 of $30 million), *with* JX-259 (Base Case) (predicting operating cash flow for the Systems in 2009 of $34 million after appropriate adjustments for corporate overhead).
[156] Def. Ans. Br. at 35.
[157] Beaton Aff. ¶ 8.

importantly, that Wave, the IRN Holders, and Millennium itself used the multiple of EBITDA approach to value cable systems when looking at possible transactions.[158]

For present purposes, I find it appropriate to use a multiple of EBITDA analysis to calculate the value of the Systems to Wave. That is the technique upon which Wave based its expectations and there is ample evidence in the record that other cable companies, including Millennium itself, were using a multiple of EBITDA analysis to value cable systems.[159]

Further, Beaton's use of a 7.8 multiple of EBITDA was proper. Wave's damages must be based on its reasonable expectations and there is nothing in the record that suggests Beaton's selection of 7.8 as a multiple is unreasonable. When Barrier was looking at comparable company multiples in April 2006, it noted a range of 7.8-13.1 with a median of 9.4. Indeed, in January 2006, internal Millennium emails regarding the value of the Systems use multiples in the range of 6.5-9.[160] Finally, 7.8 is below the range that Wave was using to value transactions at the time.[161]

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[158] *See e.g.,* Tr. at 749 (Weed) (explaining how Wave would use multiples to calculate the value of the Systems at a given exit year).
[159] *See e.g.,* JX-45 (internal Millennium email from Melvin Bryant to Westbrook and other (January 21, 2006)) (recounting various scenarios regarding the Systems presented to the IRN Holders based on various multiples of cash flow); JX-144 (emails between Fredette and Barrier (April 11, 2006)) (chronicling an exchange between Fredette and Barrier in which Fredette asks Barrier to provide "comparable company market multiples" and Barrier provides them).
[160] JX-45.
[161] Tr. at 752-53 (Weed) (claiming that Wave was using multiples of 9 or 10 at the time of the Millennium transaction).

3. Wave's Reasonably Expected Exit Value For The Systems As Of December 31, 2009 Is $265,299,000

In his calculations based on the Base Case projections, Beaton uses an annualized 2009 EBITDA as of December 31, 2009 of $36.318 million. Millennium correctly points out, however, that this figure does not include corporate overhead and is really a measure of "system cash flow" not EBITDA, as Beaton claims. At trial, Beaton explained that he would have included the corporate overhead, but that Wave would not incur any additional overhead stemming from the acquisitions. That is not supported by the record.

In August 2005, Wave predicted corporate overhead for 2006 of $2.5 million,[162] when Wave again predicted its 2006 corporate overhead for 2006 in February 2006, after it had agreed to purchase the Systems, the estimate had risen to $4.1 million.[163] In other words, there is an additional $1.6 million of overhead attributable to the addition of the newly contracted for Systems. For 2006, this $1.6 million represents 2.67% of the expected revenue from the Systems. For 2009, therefore, corporate overhead can be expected to be $2.306 million — 2.67% of the $86.324 million of expected revenue for 2009. This means that the proper figure for 2009 EBITDA as of December 31, 2009 is $36.318 million less the $2.306 million of expected corporate overhead, or $34.013 million. Multiplying this figure by the 7.8 multiple yields an exit value as of December 31, 2009 of $265,299,000. In other words, at the time of the breach, Wave could have reasonably expected the Systems to be valued at $265,299,000 as of the end of 2009.

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[162] JX-20 at 893 (showing estimated system cash flow for 2006 of 34.5 million and estimated EBITDA of $32 million).
[163] JX-259 at 29922 (showing estimated system cash flow for 2006 of 58.5 million and estimated EBITDA of $54.4 million).

4. Wave Is Entitled To Damages Of $14,872,000

To calculate Wave's measure of damages, three things must be subtracted from this 2009 exit value of the Systems to account for mitigation and any costs that Wave avoided by not acquiring the systems.[164]

First, after Millennium breached its Agreements with Wave, Wave purchased two cable systems in the first quarter of 2007 to mitigate its damages. The mitigating operating cash flows that Wave has derived from those systems is $45.743 million.[165] That must be subtracted from the 2009 exit value.

Second, the carrying costs of the indebtedness that Wave would have incurred in conjunction with the purchase of the Systems must be subtracted out as a cost that Wave has avoided. That amount is $44.684 million.[166]

Finally, the $157 million purchase price of the Systems from Millennium plus an estimated $3 million in closing costs must be subtracted out as other costs that Wave has avoided.

Subtracting these three amounts from the 2009 exit value of $265,299,000 yields damages of $14,872,000 as of December 31, 2009. Wave is also entitled to pre-judgment interest at the statutorily prescribed level starting on January 1, 2010.

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[164] *See* RESTATEMENT (SECOND) OF CONTRACTS § 247.
[165] JX-249 Ex. 4-1 (Ott Report). In his calculation of the mitigating operating cash flow, Beaton fails to include the estimated cash flows for the Rocklin and San Mateo systems for the fourth quarter of 2009. The proper cash flow number, therefore, is $45.743 million, not $41.306 million as Beaton had indicated. JX-280 (revised Schedule 1 to Beaton's report).
[166] JX-280.

V. Conclusion

For these reasons, I find that Millennium breached its Agreements with Wave and that Millennium must pay damages in the amount $14,872,000 plus pre-judgment interest at the statutorily prescribed level starting on January 1, 2010. Wave, shall within five days submit an implementing Final Order, upon notice as to form to Millennium.