IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

UNION OIL COMPANY OF CALIFORNIA, a California corporation, Plaintiff, v. MOBIL PIPELINE COMPANY, a Delaware corporation, Defendant.	)	C.A. No. 19395-N

MEMORANDUM OPINION

Date Submitted: September 25, 2006
Date Decided: December 15, 2006

Kenneth J. Nachbar, Esquire, Megan Ward Cascio, Esquire, Susan W. Waesco, Esquire, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware, *Attorneys for Plaintiff.*

Jesse A. Finkelstein, Esquire, John D. Hendershot, Esquire, RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; Jay H. Calvert, Jr., Esquire, Brian W. Shaffer, Esquire, Maria I. Gonzalez, Equire, MORGAN, LEWIS & BOCKIUS LLP, *Attorneys for Defendant.*

STRINE, Vice Chancellor.

I. Introduction

The defendant in this contract dispute, Mobil Pipeline Company ("Mobil") is a long time shareholder in Cook Inlet Pipeline Company ("Cook"), a joint venture among four oil companies that owns an oil pipeline in Alaska. From 1966 to 1995, Mobil also, under a contract with Cook, acted as the operator of the pipeline. This case involves Mobil's attempt to get out of this joint venture and escape the liabilities associated with its involvement in it by selling its shares in Cook. The problem is that Mobil, as a past operator of the pipeline, is itself jointly and severally liable with Cook for certain environmental clean-up costs and, as a Cook shareholder, Mobil is enmeshed in a web of contractual obligations with its co-venturers.

Cook faces substantial environmental clean-up costs in the near future and massive contingent liabilities in the event of an environmental catastrophe. To the extent that Cook is unable at any time to meet any of those costs, Mobil and the other shareholders are contractually obligated to Cook, and to each other, to pay their pro rata share of the shortfall. Mobil cannot avoid that obligation simply by selling its Cook shares because, under the terms of the relevant contracts, the other shareholders are not required to let Mobil pass its obligations off onto a third party that does not have "adequate financial responsibility" to meet them.

In trying to sell its shares, Mobil has chosen to deal with a buyer, Forest Oil Corporation ("Forest Oil"), that is highly-leveraged and has a below-investment-grade debt rating. Forest Oil has agreed to assume Mobil's contractual obligations to Cook and the other shareholders, but Mobil is concerned about the contingent secondary liability it will face if Forest Oil defaults. In this lawsuit, Mobil seeks to force the plaintiff, Union Oil Company of California ("Unocal"), the current operator of the pipeline and the only other remaining Cook shareholder besides Mobil and Forest Oil, to release it from that secondary liability on grounds that it is unreasonable for Unocal not to do so. In other words Mobil seeks to force Unocal to bear Forest Oil's substantial default risk so that Mobil does not have to.

The parties have filed cross motions for summary judgment on the issue of whether Unocal acted reasonably in withholding its consent to Forest Oil's financial responsibility. In this decision, I grant Unocal's motion for summary judgment, finding that it has no contractual duty to consent to Forest Oil as Mobil's successor.

Also at issue in this case is Unocal's attempt to exercise a contractual right of first refusal to purchase half of the shares that Mobil is trying to sell. Unocal has already bought and paid for the shares that it is entitled to purchase, but Mobil claims that Unocal is not entitled to delivery of those shares until Unocal agrees to release Mobil from Mobil's contractual obligations and to indemnify Mobil for any liabilities associated with Mobil's past involvement in Cook. Mobil believes it is entitled to these concessions because those terms were allegedly part of its original deal with Forest Oil. But Unocal was unaware of those terms when it exercised its right of first refusal. Unocal met the terms specified by Mobil in its contractually-required notice to Unocal and Mobil accepted Unocal's payment (by depositing the check) without ever mentioning the other terms to Unocal. And, in fact, those terms were not even part of Mobil's contract with Forest Oil at the time it gave Unocal an opportunity to exercise its first refusal rights.

Unocal has also moved for summary judgment on this issue, arguing that it has a binding right to half the shares Mobil desired to sell, without having to agree to the side terms. Because Mobil is attempting to impose terms upon Unocal that are not included in the valid contract between the two, I also rule for Unocal on this issue.

II. Factual Background[1]

A. Cook Inlet Pipeline Company

In 1966, Mobil, Unocal, and two other companies, Atlantic Richfield Company ("ARCO"), and Marathon Oil Company ("Marathon") formed Cook, a Delaware corporation, to run a pipeline system (the "Cook Pipeline") on the western side of Cook Inlet, Alaska from the Granite Point oil production area to Drift River, Alaska. The Cook Pipeline gathers crude oil from on-shore production facilities and delivers it to Drift River where the crude is loaded onto ships.

The Cook Pipeline is a highly regulated common carrier. Cook is required by law to permit shippers to move their crude through the Cook Pipeline at set per-barrel tariffs. As a result, Cook's business is only marginally, though consistently, profitable. Moreover, the Granite Point oil production area is nearing the expected end of its life. The oil fields will run dry, though no one knows exactly when that will happen. What is certain is that when it does, the Cook Pipeline will shut down and Cook will be out of business. At that time, Cook will be legally obligated, under federal and state

[1] I construe the facts in the light most favorable to Mobil, the non-moving party on Unocal's motion for summary judgment because Unocal's motion is the one I ultimately grant. Citations to the record are to the summary judgment exhibits submitted by Unocal ("Unocal Ex.") and Mobil ("Mobil Ex."). Where both parties have submitted the same document, I refer to Unocal's exhibit numbers for brevity and consistency.

environmental statutes, to pay for Dismantling, Removal, and Restoration ("DR&R") of the pipeline and its surrounding environs. That liability is currently estimated at $40-50 million, and Cook has cash reserves to fund only a portion of that cost.[2] Further, on-shore oil transportation is a risky endeavor. As a result, Cook faces massive contingent liabilities in the event of an environmental catastrophe. In 1997, Unocal estimated that the potential damages from an on-shore oil spill from the Cook Pipeline could exceed $500 million.[3] As a result, at this point, any investment in Cook has serious downside risk and very limited upside potential. The parties who are staying in the joint venture are doing so primarily to protect their other interests in the area — to ensure that a viable system of transportation continues to exist for whatever amount of oil remains in the Granite Point production fields.

B. The Shareholders Agreement And The Right Of First Refusal

The relationship among Cook's shareholders is governed by a shareholders agreement that was executed on March 22, 1966 (the "Shareholders Agreement"). Article 6 of that agreement, entitled "First-Refusal on Transfer of Shares" (the "ROFR") requires that before a Cook shareholder may accept a bona fide offer to transfer its Cook stock, the selling shareholder must offer the remaining Cook shareholders a right of first refusal to purchase those shares. The precise language of the ROFR and the mechanics by which it operates are important to the resolution of this dispute. The ROFR reads as follows:

[2] Unocal Ex. 29 at 11-12.
[3] Unocal Ex. 26 at 2.

> Any Shareholder desiring to dispose of any of its shares of [Cook] stock . . . shall give notice to each other Shareholder . . . ; shall specify the number of shares to be disposed of, the price per share, and the name and address of the proposed transferee; and shall state that such proposed transfer is in good faith. Each other Shareholder shall thereupon have the irrevocable option to purchase the nearest whole number of such shares which bears the same percentage to the total thereof as the number of shares then owned by it bears to the total number of shares then owned by all optionee Shareholders; *and the purchase price of such shares shall be the price per share set forth in such notice.* Within thirty (30) days after the giving of such notice, each optionee Shareholder . . . shall give notice to the optionor Shareholder that it elects to purchase all, or a specified number less than all, or none of the shares it is entitled to purchase, and shall tender therewith full payment for the shares, if any, it elects to purchase . . . . Any optionee Shareholder's . . . election to purchase none or less than all of the shares it is entitled to purchase, shall constitute an option in favor of the other optionee Shareholders to purchase all or the remainder, as the case may be, of such shares . . . .[4]

The ROFR is structured as an option. Once a selling shareholder receives a bona fide offer to buy its shares, the selling shareholder must notify the other shareholders of the offer, and state the "price per share" (the "ROFR Notice"). The other shareholders then have an irrevocable thirty-day option to purchase their proportionate percentage of the shares being sold for the price specified in the ROFR Notice. If any shareholder chooses not to exercise its option, the shares it was entitled to purchase are re-optioned to the other shareholders.

[4] Unocal Ex. 1 at 12-14 (emphasis added).

C. Pipeline Operations And The Funding And Guaranty Agreements

Cook itself has never run the day-to-day operations of the Cook Pipeline. Instead, from its inception, until 1995, Cook contracted with Mobil to do that. Mobil acted as operator of the Cook Pipeline for nearly 30 years, and, as a result, Mobil itself, by virtue of its operator status, is potentially jointly and severally liable with Cook for any DR&R or other environmental clean-up costs that will eventually be incurred.[5]

Sometime in 1994, Mobil indicated that it no longer desired to act as operator of the Cook Pipeline and asked that Cook identify a new operator. Due to the environmental liabilities that can potentially fall on a pipeline operator, a queue of eager volunteers did not form. The other Cook shareholders were reluctant to take on the responsibility. As a result, Cook was faced with the possibility of having to hire a third party to run the Cook Pipeline. Eventually, however, Unocal agreed to do the job. In return, it demanded and received certain concessions from Cook and certain assurances from the other shareholders.

First, under an operating agreement between Unocal and Cook (the "Unocal Operating Agreement"), Cook indemnified Unocal for any liabilities Unocal might incur as a result of its operation of the Cook Pipeline.[6] Also, to ensure that the other shareholders would stand behind Cook with respect to Cook's obligations to Unocal, all of the Cook shareholders executed a Funding Agreement and a Guaranty Agreement

[5] Under relevant environmental statutes, such as the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), liability for environmental clean-up costs falls on both any owner and any operator of a vessel or facility. 42 U.S.C. § 9607. Cook faces liability as owner of the Cook Pipeline. Mobil faces liability as an operator.
[6] Unocal Ex. 23.

(collectively the "F&G Agreements").[7] The F&G Agreements require the Cook shareholders to make cash contributions to Cook whenever Cook is unable to meet any of its financial obligations, including obligations to Unocal under the Unocal Operating Agreement. The amount of each shareholder's required contribution is based on the shareholder's percentage of ownership at the time of the cash call.

The F&G Agreements were signed by Cook, Mobil, ARCO, Marathon and Unocal, and became effective January 1, 1995. They provide that all parties will remain bound under them even if a shareholder sells its stock in Cook unless: (1) the purchaser of the stock expressly assumes the seller's obligations under the Agreements; and (2) "all non-selling [shareholders] unanimously consent to the proposed purchaser as having adequate financial responsibility to meet the obligations of [the selling shareholder] under [the F&G Agreements], such consent not to be unreasonably withheld."[8] Therefore, if a shareholder sells to a third party who does not have adequate financial responsibility, the seller remains secondarily liable under the F&G Agreements, and will have to pay if the buyer defaults. Of course, in a situation where the buyer is a party to the F&G Agreements, express assumption of the contractual obligations is a mere formality because the amount of the required contribution is based on percentage ownership at the time of a cash call and therefore the shareholder-buyer will automatically be liable for its full share based on its increased pro rata shareholdings. But it remains necessary for the

[7] Unocal Exs. 2, 3.
[8] *Id.*

seller to obtain consents to the financial responsibility of the shareholder-buyer in order to be released from secondary liability.

D. The Cook Shareholders Start To Sell

The ownership of Cook stock remained unchanged from Cook's initial formation until the late 1990's when a flurry of selling activity began to occur. In December 1996, Marathon received a bona fide offer from Forcenergy, Inc. ("Forcenergy") to purchase all of its Cook shares, which constituted a 30% ownership interest in Cook.[9] None of the other shareholders exercised rights under the ROFR, and Forcenergy purchased Marathon's Cook shares in early 1997. Forcenergy assumed Marathon's obligations under the F&G Agreements, but the other shareholders refused to consent to Forcenergy's financial responsibility.[10] In deciding whether to give such consent, Unocal hired Ernst & Young, an independent financial advisor, to evaluate Forcenergy's financial condition. Ernst & Young concluded that, with a non-investment-grade long-term debt rating of "Ba2" (as rated by Moody's), Forcenergy lacked the adequate financial responsibility to assume Marathon's obligations under the F&G Agreements — at least not without imposing substantial risk upon the other shareholders.[11] Forcenergy later became insolvent, filed for bankruptcy, and eventually merged into Forest Oil, which continues to hold the shares. Marathon remains secondarily liable, behind Forest Oil, under the F&G Agreements with respect to the 30% interest in Cook that it used to own.

[9] Unocal Ex. 4.
[10] Unocal Ex. 5.
[11] Unocal Ex. 26 at 5.

In March 2000, ARCO received a bona fide offer from Phillips Petroleum Company ("Phillips") to purchase all of its Cook shares, which represented a 20% ownership interest in Cook. Again, none of the other shareholders elected to exercise rights under the ROFR. Phillips assumed ARCO's obligations under the F&G Agreements and the other shareholders consented to Phillips' financial responsibility.[12] As a result, ARCO has been released from all liability under the F&G Agreements.

Following the Marathon and ARCO sales, Mobil owned 20% of Cook's stock, Unocal owned 30%, Forest Oil owned 30%, and Phillips owned the remaining 20%.

Mobil began its efforts to sell its Cook shares in late 2000. In doing so, Mobil's parent company, ExxonMobil Corporation ("ExxonMobil"), originally contemplated a combined sale of both the Granite Point oil production facility (the "ExxonMobil Facility") owned by another of ExxonMobil's subsidiaries, and Mobil's 20% interest in Cook. In December 2000, ExxonMobil sent out a bid package to prospective purchasers that included a draft Purchase and Sale Agreement[13] for the ExxonMobil Facility. That draft PSA, by its terms, did not apply to the Cook stock and did not mention it in any way. Mobil was not named as a party to it.[14] Further, the bid package did not contain a draft PSA for the Cook stock and did not state that any specific terms would apply to a sale of the stock.[15]

---

[12] Mobil Ex. 10.
[13] For brevity's sake, in this opinion, I abbreviate Purchase and Sale Agreement as PSA without intending that term to refer to any particular agreement or document.
[14] Unocal Ex. 7.
[15] *Id.*

Both Unocal and Forest Oil bid on the ExxonMobil Facility and the Cook shares, but ExxonMobil changed its mind about selling the ExxonMobil Facility and asked Unocal and Forest Oil to re-submit bids for the Cook shares alone. Both did so. Unocal bid $300,000 for Mobil's Cook shares. Forest Oil bid $1.2 million. The low dollar value attached to these offers is initially startling. Cook was, after all, a multi-million dollar enterprise that paid substantial dividends.[16] One might expect a 20% interest in a major domestic oil pipeline to be worth more than $1.2 million, and certainly more than $300,000. But any initial surprise vanishes once the liabilities under the F&G Agreements are accounted for. A 20% ownership interest in Cook carried with it substantial DR&R exposure and potentially crushing liability in the event of an environmental catastrophe. In fact, Unocal's low-end estimate for the value of 20% of Cook's stock was zero dollars.[17] That is, based on its risk-reward analysis of the liabilities it would be assuming by buying Mobil's Cook shares, Unocal concluded that Cook's equity was worth next to nothing. Forest Oil concluded that it was worth somewhat more than that.

Mobil rejected Unocal's offer and began negotiating with Forest Oil. Forest Oil revised its bid upward to $1.35 million, agreed to assume Mobil's obligations under the F&G Agreements, and agreed to indemnify Mobil with respect to any liability Mobil

---

[16] Unocal Ex. 26. In the 1997 Ernst & Young report prepared in connection with Marathon's sale of its shares to Forcenergy, Ernst & Young assumed that the Cook Pipeline would operate for approximately another four to nine years, and that it would pay between $16 million and $25 million in dividends during that time period.

[17] Unocal Ex. 36 at 131, 151. Unocal's high-end estimate for the value of Mobil's 20% interest in Cook was $600,000. *Id.*

might incur as a result of its past involvement in Cook. Mobil was prepared to accept Forest Oil's offer on those terms. The sale, however, was expressly conditioned on Forest Oil's obtaining all consents required under the F&G Agreements for Mobil to be released from any existing or future liability under those Agreements.[18]

By letter dated November 12, 2001, as required by the ROFR, Mobil notified Forest Oil, Unocal, and Phillips that it had received a bona fide offer from Forest Oil to purchase Mobil's Cook stock.[19] The ROFR Notice stated only that Mobil had received the offer from Forest Oil, and that the purchase price was $1.35 million ($168.75 per share). It made no mention that Forest Oil had agreed to indemnify Mobil with respect to any liabilities, that Forest Oil had agreed to assume Mobil's obligations under the F&G Agreements, or that the sale was expressly conditioned on Forest Oil's obtaining all consents necessary for Mobil to be released from its obligations under the F&G Agreements. The ROFR Notice also made no reference, and gave not even a hint, that an ROFR purchaser would be required to execute a PSA containing those terms.

Pursuant to the ROFR, each of Unocal, Forest Oil, and Phillips had the right to purchase their proportionate share of Mobil's Cook shares for the price specified in the ROFR Notice. Under the terms of the ROFR, even Forest Oil, the entity that made the bona fide offer to purchase Mobil's shares, was required to act under the ROFR or else risk that those shares would be bought by another shareholder pursuant to the ROFR's "re-optioning" provision. Forest Oil thus exercised its rights under the ROFR.

---

[18] Mobil Ex. 22.
[19] Unocal Ex. 9.

In deciding whether to exercise its ROFR rights, Unocal was concerned about the prospect of Forest Oil acquiring a controlling stake in Cook. In particular, Unocal was worried that Forest Oil might try to take over as the operator of the Cook Pipeline. Unocal had substantial environmental liability exposure both as a shareholder of Cook, and as the current operator of the Cook Pipeline. And, as a result of its oil production interests in the Granite Point region, it had a vested interest in ensuring that the Cook Pipeline remained a viable transportation system. Unocal felt that Forest Oil did not have sufficient experience to run the Cook Pipeline and did not trust Forest Oil to oversee the process of dismantling it when it came time for Cook to shut the Cook Pipeline down.[20] As a result, even though $168.75 per share was more than twice what Unocal thought Cook's stock was worth, Unocal elected to exercise its option under the ROFR and tendered full payment for the shares it was entitled to purchase on November 30, 2001.[21] Mobil immediately deposited Unocal's check.

Phillips elected not to exercise its ROFR rights. Instead, it was itself in the process of selling its Cook shares, and shortly thereafter notified Unocal that it had received a bona fide offer from Forest Oil to purchase its 20% interest in Cook.[22] Unocal exercised its ROFR rights with respect to the Phillips sale, and Unocal and Forest Oil each ended up purchasing half of Phillips' shares. Those transactions (the "Phillips Transactions") closed without incident. Notably, Phillips did not condition the Phillips Transactions on Forest Oil's and Unocal's consenting to the other's financial

[20] Transcript of June 23, 2006 Oral Argument at 21-22.
[21] Unocal Ex. 17.
[22] Unocal Ex. 21.

responsibility. Unocal did not consent to Forest Oil's financial responsibility with respect to the Phillips Transactions. As a result, Phillips remains secondarily liable under the F&G Agreements on the shares it sold to Forest Oil.

Because Phillips elected not to exercise its ROFR rights with respect to the Mobil sale, the shares it would have been entitled to purchase were re-optioned to Unocal and Forest Oil. On December 14, 2001, Mobil notified Unocal of its entitlement to purchase half of the re-optioned shares.[23] This second ROFR Notice, like the first one, merely stated the purchase price for the shares. It made no reference to any other terms of sale, and again, it gave no indication that execution of a PSA containing those terms would be required. On December 21, Unocal notified Mobil of its election to purchase the re-optioned shares, and tendered full payment.[24] Mobil again immediately deposited Unocal's check. Forest Oil also elected to purchase half of the re-optioned shares. In effect, both Unocal and Forest Oil each agreed to buy half of Mobil's Cook shares. If those sales had gone through, each would own 50% of Cook's equity.

E. Mobil Refuses To Transfer The Shares To Unocal Without A PSA

Even though it accepted and deposited Unocal's checks, Mobil has refused to surrender the shares to Unocal because Unocal has refused to execute a PSA regarding those shares. The PSA to which Mobil seeks to bind Unocal includes the following terms that Unocal considers objectionable:

> (1) Unocal must secure all necessary parties' consents to Unocal's adequate financial responsibility to assume Mobil's obligations under the F&G

[23] Unocal Ex. 10.
[24] Unocal Ex. 18.

> Agreements such that Mobil will be relieved of secondary liability under those Agreements with respect to the shares it sells to Unocal;
>
> (2) Unocal must release Mobil from all liability under the F&G Agreements (including consenting to Forest Oil's financial responsibility), and secure similar releases from all other parties to those Agreements; and
>
> (3) Unocal must indemnify Mobil against any liability to any party under the F&G Agreements or arising from Mobil's acts or status as former operator of the Cook Pipeline.[25]

Mobil contends that those terms are a material part of the deal that it struck with Forest Oil, and that Unocal must match them to exercise its ROFR rights. But Mobil admits that neither of the two ROFR Notices mention those terms at all. In fact, the earliest mention of the PSA issue in the record is testimony by Jeff Ray, a Mobil employee, who testified that he likely first discussed a PSA with Joe Monroe, his counterpart at Unocal, sometime in December 2001.[26] But Ray could not remember the actual occurrence or details of any specific conversation. He also did not testify as to whether any specific PSA terms were discussed.[27] Indeed, in an email from Monroe to Ray on January 9, 2001, Monroe expressed Unocal's surprise regarding the PSA topic, stating: "You are not expecting Unocal to be a party to your Purchase and Sale Agreement with Forest are you?"[28] In response to Monroe's email, Ray indicated that other employees of Unocal and Mobil had discussed, for the first time, the issue of the PSA only the day before — January 8, 2001.[29] It is undisputed that Mobil did not send a

---

[25] Mobil Ex. 22.
[26] Unocal Ex. 36 at 170-72.
[27] *Id.*
[28] Unocal Ex. 12.
[29] *Id.*

draft PSA to Unocal until January 9, 2001[30] — more than a month after Unocal had responded (with payment) to Mobil's first ROFR Notice, and almost three weeks after it had responded (with payment) to Mobil's second ROFR Notice.

Finally and importantly, it is undisputed that the PSA that Mobil contends was a condition of its deal with Forest Oil and that Unocal had to match *did not even exist* as of the time Mobil sent the two ROFR Notices to Unocal on November 12 and December 14. That PSA was not executed until December 20, 2001.

F. The Forest Oil Sale Does Not Close

Forest Oil, unlike Unocal, has conceded that it must execute the original PSA that it agreed to as part of its bona fide offer in order to exercise its ROFR rights. Notably, Mobil and Forest Oil executed an amended PSA on January 11, 2002 to clarify that the terms and conditions attached to Forest Oil's bona fide offer would also apply to any shares purchased under the ROFR.[31] That amendment and its timing is telling and reinforces the "oh-by-the-way" nature of Mobil's demand that Unocal sign the same PSA as Forest Oil. Nonetheless, Mobil has not completed its sale to Forest Oil because Forest Oil has failed to satisfy one of the conditions attached to the sale — that Forest Oil secure Unocal's and the other shareholders' consents to its financial responsibility under the F&G Agreements, and that it secure a general release of Mobil from all liability under those Agreements by all parties.

---

[30] Unocal Ex. 16.
[31] Mobil Ex. 22.

Unocal has refused to consent to Forest Oil's financial responsibility because Forest Oil has a poor credit rating. When Unocal learned of Forest Oil's bona fide offer to purchase Mobil's Cook shares, Unocal had its treasury department perform a full credit-worthiness review of Forest Oil.[32] In summarizing the results of that review, Unocal's treasury department concluded that "[g]iven the counterparty's tight cash position and [its] less than investment grade debt ratings, Forest Oil has to be considered a higher than average credit risk."[33] Indeed, Forest Oil had a long term debt rating of "BB," as rated by Standard & Poors, "5A3," as rated by Dun & Bradstreet, and "Ba2," as rated by Moody's — essentially junk bond status.[34] Since that time, Forest Oil's credit rating has declined further and its outlook is negative.[35]

III. The Procedural History Of The Case And The Pending Motions

On February 5, 2002, Unocal filed suit in this court seeking to force Mobil to turn over the Cook shares that it believes it validly purchased in November and December 2001.[36] Unocal claims that Mobil breached the Shareholders Agreement by failing to tender the shares that Unocal purchased under the ROFR. In making this argument, Unocal contends that: (1) the ROFR, whose terms require only that the optionee shareholder match "price," allows Unocal to exercise the right without matching any non-

[32] Unocal Ex. 22.
[33] *Id.*
[34] *Id.* Each of the three rating agencies use different criteria and different nomenclature to describe the credit risk of the company being rated. Each of the three ratings for Forest Oil are considered below-investment-grade, which means that Forest Oil presents a "moderate-high to high [credit] risk." Deposition of Mike Adamec at 44-45.
[35] Unocal Ex. 30 at 5.
[36] For a variety of reasons — including a long period when the parties were supposedly seeking to settle the case and the geographic location of witnesses — this case moved with less than ideal speed.

price terms; and (2) Mobil's failure to include the non-price terms in the two ROFR Notices allowed Unocal to exercise its ROFR rights without being required to match terms of which it was unaware when it tendered, and Mobil accepted, its payment. Alternatively, Unocal claims that Mobil's November 12 and December 14 ROFR Notices constituted an offer to sell the Cook stock on the terms contained in the ROFR Notices (which did not include any non-price terms), and Unocal validly accepted those offers, thereby creating an enforceable contract of sale that did not include the omitted terms. Unocal also asserts a claim for conversion based on Mobil's failure to turn over the shares that Unocal believes it rightfully purchased.

For its part, Mobil contends that Unocal did not validly exercise its ROFR rights because it has refused to match the terms of the bona fide offer. Mobil also asserts a counterclaim against Unocal for breach of the F&G Agreements, claiming that Unocal unreasonably withheld its consent to Forest Oil's financial responsibility.

This opinion resolves the parties' cross motions for summary judgment. Mobil has moved for summary judgment on its counterclaim, asking the court to hold that Unocal's failure to consent to Forest Oil's financial responsibility was unreasonable as a matter of law. Mobil's primary contention in this regard is that Unocal failed to perform a comparative credit review comparing Mobil's and Forest Oil's respective financial conditions. Mobil's argument is that if Mobil is no more capable than Forest Oil of satisfying the obligations under the F&G Agreements, then Unocal would not be injured by the sale, and thus Unocal is acting unreasonably in preventing it. Unocal has filed a cross motion for summary judgment on this issue, claiming that a comparison of Forest

Oil's and Mobil's credit worthiness is not required by the plain language of the F&G Agreements, which concern themselves only with the buyer's ability to perform the F&G Agreement obligations regardless of the seller's ability or inability to do so.

Unocal has also moved for summary judgment on its affirmative claims against Mobil, asking the court to declare that it validly purchased the Cook stock. Mobil contends that there are disputed issues of fact with respect to whether Unocal validly purchased that stock — specifically, whether Unocal in fact knew about, or should have known about, the other terms of Forest Oil's bona fide offer — such that summary judgment is inappropriate on this issue. Mobil contends that the circumstances surrounding the ROFR Notices, particularly the original bid package sent out by Mobil, put Unocal on notice of the existence of additional terms to the deal, and subjected Unocal to a duty to inquire into the nature of those additional terms such that it must be bound to them in order to exercise ROFR rights.

In resolving this dispute, I first address the cross motions with respect to the reasonableness of Unocal's withholding of consent to Forest Oil's financial responsibility. I then turn to Unocal's motion for summary judgment on the issue of whether it validly exercised its ROFR rights and whether it is entitled to delivery of the Cook shares that it paid for.

IV. Legal Standard

These cross motions for summary judgment are governed by Court of Chancery Rule 56.[37] Under this familiar standard, judgment will be granted when a movant demonstrates that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law.[38] The burden is on the moving party to prove the absence of a material issue of fact and the court must review all evidence in the light most favorable to the non-moving party.[39] But once the moving party puts facts into the record, which, if undenied, entitle it to summary judgment, the burden shifts to the opposing party to present some evidence to show the existence of a material factual dispute.[40] If the opposing party is unable to do so, summary judgment must be granted.[41]

In deciding this motion, I also apply Delaware's familiar principles of contract interpretation to interpret the relevant language of the Shareholders Agreement and the

---

[37] In determining the proper summary judgment standard in this case, I note that both parties have filed motions for summary judgment on Mobil's consent counterclaim, which might normally trigger Court of Chancery Rule 56(h). That rule deems cross motions for summary judgment to be the equivalent of a stipulation for decision on the merits based on the record submitted. But in response to Unocal's motion, Mobil has argued, albeit unpersuasively, that factual issues exist, precluding summary judgment against it. That argument prevents me from relying on Rule 56(h), which only applies when the parties "have not presented argument to the Court that there is an issue of fact material to the disposition of either motion." Therefore, I am not relieved of my duty to determine whether a material factual dispute exists. *Chambers v. Genesee & Wyoming, Inc.*, 2005 WL 2000765, at *5 (Del. Ch. 2005) ("Because both sides have alleged that there are outstanding issues of fact material to the resolution of the other's motion, Rule 56(h) does not apply by its own terms.").

[38] *E.g. Scureman v. Judge*, 626 A.2d 5, 10 (Del. Ch. 1992).

[39] *Id.* at 10-11.

[40] *E.g., Tanzer v. Int'l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979); Court of Chancery Rule 56(e) ("When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.")

[41] *E.g., Feinberg v. Makhson*, 407 A.2d 201, 203 (Del. 1979).

F&G Agreements.[42] Summary judgment is the proper framework for enforcing unambiguous contracts because there is no need to resolve material disputes of fact.[43] A determination of whether a contract is ambiguous is a question for the court to resolve as a matter of law.[44] Delaware adheres to the "objective" theory of contracts — a contract's construction should be that which would be understood by an objective, reasonable third party.[45] "Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language."[46]

V. Unocal's Withholding Of Consent To Forest Oil's Financial Responsibility Was Reasonable As A Matter Of Law

In determining whether Unocal reasonably or unreasonably withheld its consent to Forest Oil's financial responsibility, I must highlight the oddity of Mobil's posture in this litigation. Mobil's admitted goal here is to erase the liabilities associated with its former involvement in Cook, not to secure the modest purchase price for its Cook shares. Its primary concern in that respect is avoiding liability under the F&G Agreements. A simple sale of its Cook shares goes a long way toward accomplishing that goal. Indeed, once the buyer assumes the F&G Agreement obligations, which both Unocal and Forest Oil have agreed to do, Mobil ceases to be the primary obligor. With respect to the shares

[42] Both the Shareholders Agreement and the Funding Agreement expressly provide that they are to be governed by Delaware law. Although the Guaranty Agreement does not contain a similar choice of law provision, neither party has argued that the laws of any other jurisdiction apply.

[43] *E.g.*, *Pellaton v. The Bank of New York*, 592 A.2d 473, 478 (Del. 1991).

[44] *E.g.*, *Reardon v. Exch. Furniture Store, Inc.*, 188 A. 704, 707 (Del. 1936).

[45] *E.g.*, *Cantera v. Marriott Senior Living Services, Inc.*, 1999 WL 118823, at *4 (Del. Ch. 1999).

[46] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

it sells to Forest Oil, Mobil will face liability under the F&G Agreements only if Forest Oil defaults. That is, if Mobil sells to Forest Oil even though Unocal refuses to consent to Forest Oil's financial responsibility, Mobil is still only secondarily liable because Forest Oil becomes the primary obligor on that portion of Cook's equity. But Mobil wants more than that — it wants a release from Unocal (in the form of an agreement that Forest Oil has adequate financial responsibility to assume Mobil's F&G Agreement obligations) that would require Unocal, as the only other remaining Cook shareholder, to assume all of the liability if Forest Oil defaults on its share. Therefore, Mobil is litigating this case primarily to avoid being exposed to liability in the event that Forest Oil is unable to perform. It would seem that Mobil is very concerned about Forest Oil's financial responsibility because it has expended serious time, effort, and expense seeking a ruling by this court relieving it of its duty to stand behind Forest Oil. And yet at the same time, Mobil is contending that it is unreasonable for Unocal to exercise its contractual right to avoid the very same fate — if Forest Oil defaults, and Mobil is not there to pick up the slack, the liability will fall on Unocal, the operator of the Cook Pipeline and the only other shareholder in Cook. Mobil's very litigation posture, therefore, suggests why Unocal might have withheld its consent.

Indeed, the undisputed facts show that Unocal has acted well within the relevant confines of reasonableness as courts have understood it in this context, which is that a party may properly withhold consent to a transaction when the decision is made for a legitimate business purpose — i.e., where it has a legitimate concern over the buyer's financial abilities.[47] The F&G Agreements explain the concept of "adequate financial responsibility" as the ability "to meet the obligations of the [selling shareholder] under [the F&G Agreements]." The import of this language is that Unocal has the right to withhold consent if, after a reasonably diligent factual investigation, it concludes that there is a real risk that Forest Oil will default on the F&G Agreement obligations. If such a risk exists, there is nothing unreasonable in asking Mobil to stay on the hook for obligations that it voluntarily incurred. Unocal's withholding of consent does not prevent Mobil from selling to Forest Oil — Mobil can always waive the condition that requires Forest Oil to get Unocal's consent. It only requires Mobil to step up to the plate if it turns out that Forest Oil cannot.

When Unocal learned of an intended sale to Forest Oil, Unocal performed a comprehensive credit check on Forest Oil. The results of that check were that Forest Oil was a highly-leveraged company with a junky debt rating. Indeed, Forest Oil's Moody's rating of "Ba2" was the same as Forcenergy's rating when Unocal refused to consent to Forcenergy's financial responsibility in connection with the 1997 Marathon sale. Forest Oil's credit rating has since declined. Shortly after Forcenergy bought Marathon's shares, it became insolvent and filed for bankruptcy. Given Forest Oil's far from solid pedigree (it is the successor to the insolvent Forcenergy) and the inherent riskiness of the

[47] *Commonwealth Assoc. v. Providence Health Care, Inc.*, 1993 WL 432779, at *7 (Del. Ch. 1993) (citing *Bonady Apts. v. Columbia Banking Fed. Sav. & Loan Ass'n*, 465 N.Y.S.2d 150, 154 (N.Y. Sup. Ct. 1983), *modified* 472 N.Y.S.2d 221 (N.Y. App. Div. 1984)).

oil production and exploration market segment in which Forest Oil acts,[48] it is not unreasonable for Unocal to be concerned that the same fate might one day befall Forest Oil, and to ask that Mobil stand in the shoes of its buyer if indeed that does happen.

In ruling on this aspect of the parties' motions, I note that contractual reasonableness is a fact question that cannot always be resolved on a summary judgment motion.[49] But as a result of undisputed facts — Forest Oil's sub-par credit rating and Cook's substantial liabilities and risks — Unocal has made a strong showing that withholding its consent to Forest Oil's financial responsibility was reasonable. I conclude that Mobil has not, as required by Court of Chancery Rule 56(e), adequately rebutted that showing here. The only evidence Mobil has put forward with respect to Forest Oil's financial responsibility is a preliminary expert report (the "Gorowsky Report") concluding that Forest Oil has adequate financial responsibility to satisfy 10% (the amount of Cook's equity that Forest Oil will purchase in the transaction) of Cook's DR&R liability.[50] But the Gorowsky report ignores the fact that as a 50% owner of Cook, Forest Oil would incur a full 50% of the DR&R liabilities at once. The Gorowsky report does not suggest that Forest Oil will be able to cover the full 50%. Further, the Gorowsky Report completely ignores the potentially massive liability (estimated at as

---

[48] Unocal Ex. 30 at 7. In its Rebuttal Expert Report of Roger E. Reyna, Unocal explains the volatility of Forest Oil's business model, stating that "companies, such as Forest, that participate in the exploration and production ("E&P") segment of the petroleum industry . . . are subject to the extreme price volatility of global and regional commodity markets, which can adversely impact earnings and asset value." *Id.*

[49] *See, e.g., Vague v. Bank One Corp.*, 2004 WL 1202043, at *1 (Del. 2004) (holding that the reasonableness of a plaintiff's reliance on certain misrepresentations was a question of fact that required a trial).

[50] Unocal Ex. 29 at 12.

much as a half-billion dollars) that would be incurred in connection with an environmental catastrophe. Nowhere — neither in the Gorowsky Report nor otherwise — does Mobil suggest that the highly-leveraged Forest Oil has adequate financial responsibility to assume (or has adequately insured against) that liability.

Finally, I reject Mobil's contention that Unocal could not reasonably withhold consent without performing a comparative analysis of Forest Oil's and Mobil's relative financial strengths. Such a comparative analysis requirement is plainly absent from the F&G Agreements, which frame the inquiry as whether the *buyer* has adequate financial responsibility to meet the selling shareholder's obligations. That is, the F&G Agreements specifically concern themselves only with the financial responsibility of the buyer — not that of the seller.

Mobil argues that it is unreasonable for Unocal to withhold consent because if Mobil is in no better a position than Forest Oil to satisfy the F&G Agreement liabilities then Unocal is not disadvantaged by the sale. But the F&G Agreements do not require Unocal to consent to a buyer's financial responsibility based solely on whether or not it will be disadvantaged by the sale. Had the parties chosen to include a comparative analysis requirement, they could have easily included language to that effect in the F&G Agreements. Delaware law will not create contract rights and obligations that were not part of the original bargain, especially where, as here, the contract could easily have been drafted to expressly provide for them.[51] Rather, as evidenced by the plain language of the

[51] *E.g., Moore Business Forms, Inc. v. Cordant Holdings Corp.*, 1995 WL 662685, at *8 (Del. Ch. 1995); *see also Harris Trust and Savings Bank v. E-II Holdings, Inc.,* 926 F.2d 636, 644 (7th

F&G Agreements, the parties agreed that a shareholder need not release a seller from the obligations that the seller, for valid consideration, voluntarily undertook unless the shareholder is reasonably satisfied that the buyer can fully perform all of those obligations — and the shareholder is not required to consider the seller's own financial strength or weakness in making that determination. Under Mobil's reading of the F&G Agreements, a seller that was on the brink of bankruptcy could sell to an equally risky buyer and contend that, because of its own financial inadequacy, it should be released from liability under the F&G Agreements. But a seller's own financial inadequacy cannot cure the buyer's shortcomings, which is the relevant contractual measure.[52]

Both Marathon and Phillips are standing behind Forest Oil with respect to the shares that they used to own. Before asking that Mobil do the same with respect to the 10% interest it is selling to Forest Oil, Unocal informed itself of the publicly available information on Forest Oil's finances. Its research suggested that Forest Oil was a fairly serious credit risk and not soundly positioned to bear the substantial liabilities and risks

---

Cir.1991) ("Implying the covenant requested by the Trustees would also be 'troublesome' in view of the fact that the Indentures could easily have been drafted to incorporate expressly the terms the Trustees now urge this court to imply.")(internal quotations omitted); *Allied Capital v. GC-Sun Holdings, L.P.*, --- A.2d ---, 2006 WL 3437507, at *10 (Del. Ch. 2006).

[52] Because I conclude that a comparative analysis of Mobil's and Forest Oil's financial conditions is irrelevant to the question of whether Unocal reasonably withheld consent, I need not address, at length, Mobil's contention that in deciding whether to consent to Forest Oil's financial responsibility, Unocal improperly accounted for Mobil's status as a subsidiary of ExxonMobil. Given that the major financial risk for Cook's shareholders was the possibility that Cook would have a major spill causing a half-billion dollars in environmental damages, that factor was not an illegitimate or unreasonable one for Unocal to consider. I am dubious that ExxonMobil would blithely invoke a corporate shield in that context when Cook (and likely Mobil itself) is clearly not capitalized to address that risk, or that it would prevail in doing so. In any event, the comparative exercise Mobil argues for is not required by the F&G Agreements. The question is whether it is indisputably reasonable for Unocal to conclude that Forest Oil lacks adequate financial responsibility to assume Mobil's obligations. The answer is obviously yes.

associated with Cook's operations. On those facts, and given Mobil's failure to put forward any evidence that Unocal's decision was made in bad faith, I conclude that Unocal did not act unreasonably in withholding consent to Forest Oil's financial responsibility and that it is entitled to summary judgment on that issue.

VI. Unocal Validly Purchased The Cook Shares

I now turn to the issue of whether Unocal validly purchased the disputed shares of Cook stock. Resolution of that issue requires an application of the plain meaning of the language of the ROFR, which provides that once the non-selling shareholder receives the ROFR Notice, it "shall thereupon have the irrevocable option to purchase the [applicable percentage of shares]; and the purchase price of such shares shall be the price per share set forth in such notice."[53] The parties do not dispute that once Unocal received the ROFR Notices, it had the right to purchase the disputed Cook shares. The issue is whether Unocal has paid what it is required to pay. That question turns on whether Unocal has paid the price per share set forth in the ROFR Notice.

A. "Price" Includes All Material Terms

Initially, I reject Unocal's contention that because the ROFR requires it only to match the "price" per share, it need not match any non-price terms. Preemptive rights like rights of first refusal are contractual in nature and courts closely scrutinize the contract language to ascertain the scope of the right.[54] Unocal points out that many rights of first refusal expressly require the holder of the right to match both the "price and

[53] Unocal Ex. 1 at 12-13.
[54] *E.g., West Texas Transmission, L.P. v. Enron Corp.,* 907 F.2d 1554, 1562 (5th Cir. 1990).

terms" of the bona fide offer. It cites to cases that expressly rely on the reference to "price *and terms*" when they require a purchaser to match all terms.[55] Unocal then concludes that because the ROFR does not require it to match "terms," Unocal must only match "price," which it narrowly interprets to mean "cash price."

Unocal's argument ultimately has no firm support in the case law of this or any other jurisdiction,[56] and is based on an overly simplistic reading of the term "price" that is not warranted in the context of a transaction between these sophisticated business entities. The absence of the word "terms" from the contract language is not material enough to warrant the extreme interpretation that Unocal asserts. That interpretation would prohibit a seller from negotiating a deal with a third party that involved any consideration other than cash. But among sophisticated business entities, the word "price" does not simply mean "cash." "Price" is essentially equivalent to "consideration,"[57] and in the context of the ROFR, it simply refers to all of the material things that the seller will get in the deal — i.e., all of the consideration-related terms.

---

[55] *See, e.g., Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del. Ch. 1985) (finding that the rightholder validly exercised its right of first refusal, which required it to match all terms and conditions of the third-party offer, because it "was cast in the same terms and conditions as the [third-party] offer it sought to match").

[56] Unocal cites a number of cases from various jurisdictions involving rights of first refusal whose language required the rightholder to match only the "price" of the bona fide offer. *See, e.g., Kroehnke v. Zimmerman*, 467 P.2d 265, 266 (Colo. 1970); *Schmidt v. Downs*, 775 P.2d 427, 431 (Utah App. 1989). Yet in none of these cases was the seller seeking to impose a non-price term on the rightholder, and no case that Unocal cites to actually holds that the holder of a "price only" right of first refusal need not match a material non-price term. To the extent that the United States Court of Appeals for the Fifth Circuit, in *West Texas*, 907 F.2d at 1564, stated that "some courts have allowed purchasers to exercise their preemptive rights by duplicating solely the price term offered by the third party," that is dictum, and further, *West Texas* does not cite to any case that was actually resolved on that proposition.

[57] *See* BLACK'S LAW DICTIONARY 1226 (8th ed. 2004) (defining "price" as "the amount of money *or other consideration* asked for or given in exchange for something else.") (emphasis added).

Although other legal principles prevent Mobil from imposing those terms on Unocal in this case, the mere absence of the word "terms" from the ROFR does not, by itself, allow Unocal to ignore a material aspect of the consideration or to exercise its first refusal right in a materially different deal than the one in the bona fide offer that triggered the right.[58]

[58] The fact that "price" includes all material terms does not mean that, even with timely notification, Mobil would be unrestricted in imposing additional deal terms on Unocal, or that the ROFR's failure to use the phrase "price and terms" is insignificant. The law is clear that when a first refusal right is involved, all deal terms must be commercially reasonable, imposed in good faith, and not specifically designed to defeat the preemptive right. *E.g., Seessel Holdings, Inc. v. Fleming Companies, Inc.*, 949 F. Supp. 572, 576 (W.D. Tenn. 1996). That well-established contractual limitation is emphasized here by the absence of the word "terms" from the ROFR. Through its exclusive use of the word "price," the ROFR makes clear that not only must all deal terms be imposed in good faith, but also that imposition of any non-cash terms must result in an equal price match. Unocal's more forceful argument (which it does not precisely make) is that it is not being asked to match exactly Forest Oil's price, but to overbid Forest Oil substantially. Why? Because the terms that Mobil seeks to impose require each of Unocal and Forest Oil to do something different. If the Mobil transactions went through, Unocal and Forest Oil would be the only remaining Cook shareholders. By asking Forest Oil to release it from liability under the F&G Agreements, Mobil asks Forest Oil to take on the risk that Unocal will default. By asking the same of Unocal, Mobil asks Unocal to take on the risk that Forest Oil will default. Unocal and Forest Oil are different companies with very different credit profiles, and thus present materially different default risks. Given Forest Oil's sub-par credit rating and its risky business model, its default risk is higher than the more financially-robust Unocal. A materially equal match of these terms is therefore not possible unless Forest Oil pays an additional performance bond to equalize the inequality or otherwise insures against the risks that it is assuming (if that is even possible). Further, in a typical right of first refusal situation, a seller will get the same amount of consideration regardless of whether the rightholder exercises its right or not. But here, by seeking to get full indemnification from both Unocal and Forest Oil, Mobil would get more in the deal than it would under only the bona fide offer. It will get two indemnifications instead of one — and the indemnification from the far more credit-worthy Unocal is more valuable than the Forest Oil indemnification that Mobil would get under the bona fide offer. In real economic terms, Unocal is thus being asked to pay a price (dollar per share plus release and indemnity) that is materially more costly to Unocal than it is to Forest Oil, and more valuable to Mobil than the bona fide offer. Under the ROFR, Mobil must allow Unocal to match Forest Oil's price. But by demanding that Unocal match the release and indemnification terms later agreed to by Forest, Mobil would require Unocal to pay substantially more than Forest Oil in order to exercise its first refusal right. That is likely impermissible under both the commercial reasonableness standard and the plain language of the ROFR, which requires an equal price match. Because Unocal never made this precise argument, though, and because I rule for Unocal on other grounds, I do not premise my ruling on that basis.

B. Unocal Need Not Match Any Terms Omitted From The ROFR Notices

Putting that preliminary issue aside, I now address Unocal's main argument, which is that Mobil cannot bind it to terms that were not included in the two ROFR Notices, and that Mobil's failure to notify Unocal of those terms (and its having silently accepted Unocal's payment) permitted Unocal to purchase the Cook stock without being required to agree to the non-disclosed terms.

My conclusion above — that Unocal was required to match all material consideration-related terms — presupposes that those terms (which are part of the "price") must be adequately communicated before they can be matched. Indeed, communication is one of the primary concerns of the ROFR, as illustrated by the fact that it is structured around the ROFR Notice. Once a selling shareholder receives a bona fide offer to buy its shares, it is required to notify the other shareholders and to state the price per share being offered. The other shareholders must then act quickly, within a limited thirty-day time frame, in deciding whether to buy the shares or not. The ROFR Notice plays an important role in allowing the other shareholders to make an informed decision, which necessitates that the shareholders be aware of all of the bona fide offer's material terms, if any such terms exist, and if the seller expects them to be matched.

The ROFR recognizes this informational need by utilizing the ROFR Notice as the mechanism through which the ROFR operates, and by explicitly giving the non-selling shareholders an option to buy the shares for the price set forth in the ROFR Notice without regard to the terms of the bona fide offer — the ROFR states: *"the purchase* *price of such shares shall be the price per share set forth in such notice*."[59] In other words, the ROFR makes clear that the seller is the master of its offer — and that it is bound by it. If the seller expects the rightholder to match a given term, that term must be stated in the ROFR Notice. Principles of general fairness would, in fact, presume that a rightholder cannot be expected to match terms that it has no reason to suspect exist and that it cannot be expected to make an informed decision of whether or not to buy based on an incomplete description of the deal's terms.

A right of first refusal is an inchoate, textually-based contract right that ripens into an option upon the occurrence of the event specified in the underlying contract.[60] The terms of the option are strictly construed in accordance with the contract provision that created the right.[61] The triggering event here was Mobil's giving of the ROFR Notices, which under the terms of the ROFR act as irrevocable thirty-day offers. The ROFR is clear that the offer's terms are the terms specified in the ROFR Notices. Here, the only

---

[59] Unocal Ex. 1 at 13 (emphasis added).

[60] *Bateman v. 317 Rehoboth Ave., LLC*, 878 A.2d 1176, 1183-84 (Del. Ch. 2005) ("Unlike an option . . . which an option holder can proactively exercise, a right of first refusal can be exercised only when the [seller] . . . entertains an offer from a third party to purchase the property."), *aff'd*, 889 A.2d 283 (Del. 2005); *see also Beiger Heritage Corp. v. Kilbey*, 667 N.E.2d 184, 186 (Ind. Ct. App. 1996) ("Once [the rightholder] received notice of the offer from [a third party], the right of first refusal was transmuted into an option. An option is a continuing offer whose duration and method of exercise is strictly controlled by the agreement that created it."); *Lake Cable, Inc. v. Tritler*, 914 S.W.2d 431, 435 (Mo. Ct. App. 1996) ("The notice of the desire to sell transforms the holder's right of first refusal into an option to purchase the stock in accord with the terms of the Agreement.").

[61] *E.g., Kilbey*, 667 N.E.2d at 186 ("[T]he exercise of an option is effective only if it strictly adheres to the terms stipulated in the contract."); 1 WILLISTON ON CONTRACTS § 5:18 (4th ed. 2006) ("When the optionee decides to exercise his option, he must act unconditionally and according to the terms of the option, and as soon as the acceptance is so made, the optionor becomes bound. . . . [T]he general attitude of the courts is to construe the attempt to accept the terms offered under the option strictly.").

term in the ROFR Notices was a cash price of $168.75 per share. Unocal accepted the offer on that term thereby creating a valid contract which Unocal has fully performed.[62] And even if any question remained at that point as to whether a valid contract containing only that single term existed, Mobil answered that question and locked the deal's terms by depositing Unocal's checks before ever informing Unocal of the other terms Mobil sought to impose. Mobil cannot now hold out for more consideration.

C. Unocal Was Not On Notice Of The Objectionable Terms

Despite its failure to include the objectionable terms in its ROFR Notices, Mobil nonetheless posits that Unocal was on notice of and should have known about the terms that were admittedly missing from its ROFR Notices, or at least that there is a remaining factual question in that regard. But I discern no factual dispute in the record over whether Unocal was on notice of terms that were never communicated to it. The ROFR expressly permits Unocal to exercise its preemptive right for the price specified in the ROFR Notice. Mobil's hypothesis — that Unocal had a duty to inquire into the terms missing from the ROFR Notices — has no support in the text of the ROFR or Delaware case law.

But even assuming that Delaware law places an affirmative duty of inquiry on the holder of a right of first refusal, such a duty cannot attach until the seller has made some attempt to communicate the bona fide offer's terms. Mobil relies on *Koch Industries,*

[62] *In re Estate of Messick*, 1989 WL 101866, at *4 (Del. Ch. 1989) ("An option is merely a continuing offer, and all that is needed to create a binding contract is the acceptance of that offer, an affirmative expression of the acceptor's desire to be bound.") (citing Restatement (Second) of Contracts § 25 (1981)).

Inc. v. Sun Company, Inc.[63] in support of its inquiry notice argument. But as that case put it, "[t]he [seller] has an initial duty to make a 'reasonable' disclosure of the offer's terms."[64] Only then does the rightholder have "a subsequent duty to undertake a 'reasonable' investigation of *any terms unclear to him*."[65]

This is not a case about Unocal's failure to clarify terms that it did not understand. Rather, Mobil did not satisfy its initial burden of reasonable disclosure of the terms of the Forest Oil PSA in its ROFR Notices. Those terms would have required Unocal: (1) to release Mobil from liability with respect to the shares Forest Oil will purchase; (2) to obtain similar releases from all other parties to the F&G Agreements; and (3) to indemnify Mobil for any liability associated with Mobil's past involvement in Cook. Mobil never gave Unocal any reason to believe that those terms existed, let alone that they were essential to the deal. In fact, it never even mentioned them.

Further, Mobil premises its inquiry notice argument on the fact that Unocal should have known it would be expected to execute a PSA with respect to the shares it was buying, pointing primarily to the existence of the draft PSA that accompanied ExxonMobil's initial bid package. That draft PSA, however, covered only the ExxonMobil facility. It had nothing at all to do with the Cook stock and Mobil was not even listed as a party to it. As a result, the bid package did not create a reason for Unocal to believe that a PSA would be required for the purchase of the Cook stock. Mobil has put forward no evidence that it had any communication regarding a PSA with Unocal

[63] 918 F.2d 1203 (5th Cir. 1990).
[64] *Id.* at 1212.
[65] *Id.* (emphasis added).

before Unocal paid for the Cook shares. Taking the evidence in the light most favorable to Mobil, the earliest evidence of such a communication is deposition testimony by Jeff Ray about a conversation that occurred *sometime in December* in which he "would have assumed [the PSA issue] would have come up."[66] That does not establish that Unocal had any awareness that it would be required to execute a PSA before it tendered payment for the shares. Indeed, on January 9, 2001, Joe Monroe expressed surprise that a PSA would be required. In response, Ray was able to point only to a conversation between other Unocal and Mobil employees that occurred on January 8, 2002 — long after the deal was already done. Ray's vague recollections about a conversation that he assumed he had at some point in time do not create a triable issue of fact. *That is especially so because Mobil has failed to identify that the PSA it demands even existed, in draft or final form, as of November 12 and December 14 when Mobil made its offers to Unocal.* As noted, that contract with Forest Oil was not executed until December 20, 2001.[67] Unocal cannot be expected to match a contract that did not exist at the time it was forced to make a speedy decision of whether or not to exercise its ROFR rights.

In any event, regardless of Mobil's weak evidentiary showing, the issue is not, as Mobil frames it, whether Unocal should have known that it would be expected to execute a PSA. I can assume (even though Mobil deposited Unocal's checks without broaching the PSA topic) that it is reasonable to expect Unocal to enter into a formal agreement

---

[66] Unocal Ex. 36 at 170-72.

[67] Furthermore, the later January 11, 2002 amendment also suggests Mobil was scrambling after-the-fact to obtain terms regarding liability exposure reduction it had not secured before the ROFR Notices were sent to Unocal.

memorializing the stock purchase transaction in a customary manner on the terms set forth in the ROFR Notices themselves. The issue though is whether Unocal was on notice of the precise terms to which it objects, which are admittedly material, and which were admittedly omitted from the ROFR Notices. Mobil has presented no evidence that either it or Forest Oil even casually suggested those terms to Unocal before Mobil sent Unocal a draft of the Forest Oil PSA on January 9, 2002 — again, long after the deal was already done. Indeed, Unocal's staunch refusal, in the face of this now five-year-old lawsuit, to consent to Forest Oil's financial responsibility illustrates the fact that Unocal was ignorant of the term in the Forest Oil PSA that would require it to do just that. Unocal would never have agreed to that term had it been aware of it.

Mobil's suggestion that Unocal knew it would be expected to assume Mobil's liabilities under the F&G Agreements with respect to the shares it was buying is equally unpersuasive. Unocal has agreed to assume that liability. Indeed, assumption of that liability is a mere formality because Unocal, as a party to the F&G Agreements, will be liable to full extent of its newly increased shareholdings anyway. Unocal has even agreed to release Mobil from secondary liability with respect to the shares it is buying, and has never contended that it did not have to do that. But those logical and commercially-reasonable concessions do not change the fact that Mobil cannot force Unocal to accept other terms that Unocal had no reason to suspect, and which are not simple boilerplate terms that would typically be expected to be contained in a formal PSA.

D. Mobil Has Not Established A Unilateral Mistake Claim

As a final consideration, even if Unocal should have been aware of the missing terms, that factually-unsupported conclusion would not help Mobil in this case. Mobil is seeking reformation of a valid contract based on its own failure to communicate adequately to Unocal the terms of the bona fide offer. That, as Mobil knows, is a claim of unilateral mistake. The reason Mobil has avoided casting its claim in those terms is that Delaware law sets a very high bar for unilateral mistake claims, requiring the party seeking reformation to prove by clear and convincing evidence that the other party had actual knowledge of the mistake, but nonetheless remained silent.[68] In other words, Mobil must prove that Unocal knew Mobil was demanding that Unocal accept the objectionable terms and that it had mistakenly failed to include that demand in its two ROFR Notices. Mobil, having put forth no evidence that Unocal knew of those terms before it accepted Mobil's offer, falls far short of that bar.

Even if there were a remaining factual question regarding whether Unocal should have known about the missing terms (and there is not), Mobil, who is at least as culpable as Unocal for the misunderstanding, would at best be entitled to cancellation of the contract,[69] which is not what Mobil, having failed to return or offer to return Unocal's payment, appears to be seeking. In fact, such a remedy would deny Mobil the release and indemnification it is fighting for here. Simply put, if Mobil had adequately

[68] *E.g., Cerberus International, Ltd. v. Apollo Management, L.P.*, 749 A.2d 1141, 1151 (Del. 2002).

[69] *See* 13 AM. JUR. 2D *Cancellation of Instruments* § 28 (2006) (noting that some, but not all, courts will cancel a contract for unilateral mistake where the other party should have known of the mistake).

communicated the terms of the bona fide offer, Unocal would not have gone along with those terms, and it would not have consented to Forest Oil's financial responsibility. The Forest Oil deal would therefore not have gotten done because it was conditioned on that consent from Unocal.[70] In that instance, Unocal would have been content to remain a 40% shareholder with Forest Oil owning 40% and Mobil owning the last 20%. What Mobil appears to be trying to do here is use its own failure to adequately communicate its third-party deal as an offensive ploy to get Unocal to release it from the F&G Agreements, and otherwise to force Unocal to agree to terms Unocal never would have agreed to in an arms-length deal. Mobil's attempts to conjure and enforce contract terms it initially failed to disclose, and to ask this court to bind Unocal to terms it had no obligation, or practical business need, to accept fails.

VII. Conclusion

For the reasons stated, Unocal's motion for summary judgment on both its affirmative claims against Mobil and Mobil's counterclaims is granted. Mobil's motion for partial summary judgment on its counterclaims is denied. Mobil is ordered to surrender to Unocal the 4000 disputed shares of Cook stock that Unocal bought and paid for. IT IS SO ORDERED.

---

[70] If Mobil later chose to waive that condition, it would have had to re-submit the revised deal to Unocal in accord with the terms of the ROFR.