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OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
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Date Submitted: October 23, 2013
Date Decided: October 25, 2013

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Re: *Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd., et al.*
Civil Action No. 8980-VCG

Dear Counsel:

In this matter, the Plaintiff has set itself the difficult task of demonstrating entitlement to specific performance of a merger agreement, consummation of which is complicated by labor strikes at its manufacturing facilities in the US and China. This Letter Opinion addresses a discrete subset of that issue: whether the Plaintiff is disabled from receiving specific performance as a matter of law, given the plain language of the Merger Agreement and the allegations in the Complaint. I conclude that the answer to this question is no.

Due to the nature of this action, the parties face the near-Herculean task of conducting discovery and preparation for trial on an extremely compressed

schedule. In an attempt to alleviate that effort, I permitted the Defendant to file this Motion for Judgment on the Pleadings, and have attempted to resolve it on a similarly expedited schedule. Therefore, I addressed this Motion in part from the bench, and I address the remainder in this informal Letter Opinion, under the belief that a quick decision, in rough-and-ready form, will be more useful to the parties than a more polished opinion at a later time.

A. *Facts*

This action involves a $2.5 billion merger transaction, in which Defendants Apollo (Mauritius) Holdings Pvt. Ltd., Apollo Tyres B.V., and Apollo Acquisition Corp. (collectively, "Apollo") contracted to purchase Plaintiff Cooper Tire & Rubber Co. ("Cooper") for $35.00 per share. After the merger was announced, labor unions at Cooper's Chinese joint venture, Chengshan (Shandong) Tire Company, Ltd. ("CCT"), went on strike.[1] As a result, according to Cooper's Complaint, filed on October 4, 2013, "[t]he CCT labor union has since allowed CCT to resume limited production at the manufacturing facility, but has refused to produce Cooper-branded tires, blocked certain Cooper-appointed managers from accessing CCT's facility, barred Cooper from obtaining certain of CCT's business and financial records, and is preventing CCT from inputting certain financial data

[1] Compl. ¶ 8.

into computer systems to which Cooper has remote access."[2] In addition, as a result of the merger announcement, Cooper's domestic union, United Steelworkers ("USW"), filed grievances alleging that the Merger Agreement violated the union's collective bargaining agreements for Cooper's Findlay and Texarkana plants.[3] In response to an arbitration decision requiring that those collective bargaining agreements be renegotiated, Cooper seeks to compel Apollo to use its best efforts to negotiate a new contract with USW.[4] Ultimately, Cooper seeks an order compelling Apollo to specifically perform its obligations under the Merger Agreement, or in the alternative, awarding money damages for breaches of this Agreement.[5]

Cooper seeks specific performance under Section 9.10 of the Merger Agreement, which provides:

> The parties hereto hereby agree that irreparable damage would occur in the event that any provision of this Agreement were not performed in accordance with its specific terms or were otherwise breached, and that money damages or other legal remedies would not be an adequate remedy for any such damages. Notwithstanding the foregoing or any

[2] *Id.* at ¶ 8. *See also id.* at ¶ 67 ("Further, the union has been seeking to disrupt the Merger by physically barring certain Cooper-appointed managers from accessing CCT's facility or from obtaining certain of CCT's financial books and records . . . .").
[3] *Id.* at ¶ 72 ("Specifically, the USW asserted that the Merger Agreement contemplated the 'sale' of the Findlay and Texarkana plants within the meaning of the collective bargaining agreements, and that Cooper had violated those collective bargaining agreements by entering into the Merger without the plants' buyer, Apollo, having (1) agreed to recognize the USW as the bargaining unit, and (2) entered into an agreement establishing the terms and conditions of employment at those plants.").
[4] *Id.* at ¶¶ 11-12.
[5] *Id.* at ¶¶ 1, 141.

> other provision hereof to the contrary, it is agreed that . . . [Cooper] may seek specific performance of [Apollo's] obligations to consummate the Merger if and only in the event that (i) all conditions in **Sections 7.1** and **7.2** have been satisfied . . . .[6]

Section 7.1 provides that consummation of the merger is conditioned on stockholder approval, governmental approvals, and the absence of court orders enjoining the transaction.[7] Section 7.2 sets out conditions to Apollo's obligation to perform under the Merger Agreement. Relevant to Apollo's current Motion for Judgment on the Pleadings, Section 7.2(b) states that "[Cooper] shall have in all material respects performed or complied with the covenants and agreements contained in this Agreement to be performed or complied with by it prior to or on the Closing Date."[8] Section 7.2(b) is *not* limited such that breaches of covenants or agreements constitute the failure of a condition *only if* such a breach amounts to a Material Adverse Effect,[9] as defined in Section 10.2.[10] Section 7.2(c) does,

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[6] Merger Agmt. § 9.10.

[7] *Id*. at § 7.1(a)-(c). The parties have not argued that these conditions have not been met.

[8] *Id.* at § 7.2(b).

[9] *But see id* at § 7.2(a) ("The representations and warranties of the Company set forth herein shall be true and correct in all respects . . . except where the failure of such representations and warranties to be so true and correct would not reasonably be expected to have or result in, individually or in the aggregate, a Material Adverse Effect . . . ."); *id.* at § 7.2(c) ("Except for any event, state of facts or circumstances disclosed in the Company Disclosure Letter, since December 31, 2012, there shall not have occurred any event, state of facts or circumstances which, individually or in the aggregate, would reasonably be expected to have a Material Adverse Effect.").

[10] *Id.* at § 10.2(i)(F) (exempting from the definition of Material Adverse Effect "the execution and delivery of this Agreement or the public announcement or pendency of the Merger or any of the other Transactions or the Financing, including the impact thereof on the relationships, contractual or otherwise, of the Company or any of its Subsidiaries with employees, labor unions, customers, suppliers or partners . . . .").

however, provide as a condition to Apollo's obligations that "there shall not have occurred any event, state of facts or circumstances which, individually or in the aggregate, would reasonably be expected to have a Material Adverse Effect."[11] Notably, the parties defined Material Adverse Effect to explicitly exclude circumstances attributable to the parties' execution of the Merger Agreement and the announcement of the merger, including the resulting impact on relationships between Cooper and its subsidiaries, and their "employees, labor unions, customers, suppliers or partners."[12]

Article IV of the Merger Agreement sets forth the covenants to which the parties agree, and the applicable standards governing the parties' satisfaction of those covenants. Section 5.1, for example, provides that:

> [Cooper] shall, and shall cause each of its Subsidiaries to, conduct its business in the ordinary course of business consistent with past practice and in compliance in all material respects with all material applicable Laws, and shall, and shall cause each of its Subsidiaries to, use its commercially reasonable efforts to preserve intact its present business organization . . . ."[13]

Section 5.2 states that "[Cooper] shall, and shall cause each of its Subsidiaries and Representatives to" cease solicitation of the Company.[14] Article VI of the Merger Agreement sets forth "Additional Agreements" binding the parties, and provides

[11] *Id.* at § 7.2(c).
[12] *Id.* at § 10.2.
[13] *Id.* at § 5.1(a).
[14] *Id.* at § 5.2.

different standards of compliance in each subsection.[15] The parties before me dispute the application and interpretation of certain Additional Agreements—specifically, Sections 6.5 and 6.11—as conditions to Apollo's obligation to consummate the merger under Section 7.2(b).

On October 18, 2013, Apollo filed this Motion for Judgment on the Pleadings, asserting that Cooper had failed to comply with Section 5.1(a) of the Merger Agreement, which governs the interim business operations of both Cooper and Apollo. As a result of this failure, according to Apollo, Cooper had failed to satisfy a condition to closing in accordance with Section 7.2(b), and therefore could not seek specific performance of the merger under Section 9.10. I heard oral argument on that Motion telephonically on October 21, and denied it from the bench. However, because Apollo asserted for the first time an additional argument in its response to Cooper's opposition brief—namely, that Cooper's failure to comply with Section 6.5 of the Merger Agreement also absolved Apollo of its obligation to consummate the merger—I permitted the parties to further brief this issue, and indicated that I would issue a written decision thereon without further

[15] *See, e.g. id.* at § 6.1(a) ("[Cooper] will use reasonable best efforts to cause the Proxy Statement to be disseminated to the holders of the Shares . . . ."); *id.* at § 6.2(a) ("Subject to Section 5.2(a), [Cooper] shall take all actions in accordance with applicable Law . . . ."); *id.* at § 6.4 ("Subject to applicable Law, [Cooper] shall give prompt notice to [Apollo], and [Apollo] shall give prompt notice to [Cooper] . . . ."); *id.* at § 6.11(a) ("Subject to the terms and conditions of this Agreement, [Apollo] shall use their respective reasonable best efforts to take (or cause to be taken) all action and to do (or cause to be done) all things, necessary, proper, or advisable to obtain the Financing contemplated by the Financing Documents . . . .").

oral argument. Apollo filed a letter brief on October 21. Cooper replied to this brief, and Apollo filed a response on the evening of October 23. For the reasons that follow, I deny Apollo's Motion for Judgment on the Pleadings.

B. *Standard*

A motion for judgment on the pleadings will be granted only where "there are no material issues of fact and the movant is entitled to judgment as a matter of law."[16] In considering such a motion, the Court must draw all reasonable inferences in favor of the non-moving party.[17] Under this standard, a motion for judgment on the pleadings provides the "proper framework for enforcing unambiguous contracts because there is no need to resolve material disputes of fact."[18]

When analyzing a contract on a motion for judgment on the pleadings, this Court will grant such a motion only if the contract provisions at issue are unambiguous. "Ambiguity does not exist simply because the parties disagree about what the contract means. Moreover, extrinsic, parol evidence cannot be used to manufacture an ambiguity in a contract that facially has only one reasonable meaning. Rather, contracts are ambiguous when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or

[16] *McMillan v. Intercargo Corp.*, 768 A.2d 492, 499 (Del. Ch. 2000).
[17] *Id.*
[18] *Lillis v. AT & T Corp.*, 904 A.2d 325, 329-30 (Del. Ch. 2006).

more different meanings."[19] Multiple reasonable interpretations may arise where, for instance, a contract "requires harmonization of seemingly conflicting contract provisions."[20] Importantly, "[w]hen interpreting contracts, we construe them as a whole and give effect to every provision if it is reasonably possible."[21] As the moving party here, Apollo has the burden of establishing that its interpretation of Section 6.5 is the only reasonable interpretation.[22] In other words, if both Apollo's and Cooper's interpretations of the Merger Agreement are reasonable, then Apollo's Motion for Judgment on the Pleadings must be denied, and the Court must determine the intent of the parties at trial.

C. The Parties' Interpretations of the Merger Agreement

Apollo asserts that Cooper has failed to fulfill a condition to Apollo's obligation to close the merger under Section 7.2(b) because Cooper has failed to satisfy its agreement under Section 6.5.[23] That provision states:

> Subject to the Confidentiality Agreement and applicable Law relating to the sharing of information, [Cooper] agrees to provide, and shall cause its Subsidiaries to provide, [Apollo] and its Representatives, from time to time prior to the earlier of the Effective Time or the termination of this Agreement, reasonable access during normal business hours to (i) [Cooper's] and its Subsidiaries' respective

[19] *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007) (internal citations omitted); *see also Impact Investments Colorado II, LLC v. Impact Holding, Inc.*, 2012 WL 3792993, at *5 (Del. Ch. Aug. 31, 2012).
[20] *United Rentals, Inc.*, 937 A.2d at 831.
[21] *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013).
[22] *Id.* at 830.
[23] The availability of specific performance is also conditioned on fulfillment of Section 7.2(b). Merger Agmt. § 9.10.

> properties, books, Contracts, commitments, personnel and records and (ii) such other information as [Apollo] shall reasonably request with respect to [Cooper] and its Subsidiaries and their respective businesses, financial condition and operations, in each case, to the extent related to the consummation of the Transactions or the ownership or operation of the respective businesses of [Cooper] and its Subsidiaries from and after the Closing . . . .[24]

Apollo argues that it is clear from the face of the Complaint that Cooper has failed to provide "reasonable access" to its property, books and records, since Cooper admits that due to the CCT strike, Cooper cannot provide *any* access to CCT's physical plant or records.[25] Apollo notes that "Section 6.5 includes no limitation regarding 'commercially reasonable efforts,' no reference to other matters contemplated by the Merger Agreement, and no Material Adverse Effect limitation."[26] Further, Apollo emphasizes that, unlike Section 7.2(a) governing representations and warranties, Section 7.2(b) is not limited such that breaches of covenants or agreements constitute the failure of a condition only if such a breach amounts to a Material Adverse Effect.[27]

Conversely, Cooper contends that Apollo's requests for records are governed by Section 6.11(e) rather than Section 6.5.[28] Cooper asserts that Section

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[24] *Id.* at § 6.5. This provision also includes a limitation to protect against disclosure of confidential information and trade secrets. *Id.*
[25] *See* Compl. ¶ 67 ("[T]he union has been seeking to disrupt the merger by physically barring certain Cooper-appointed managers from accessing CCT's facility or from obtaining certain of CCT's financial books and records . . . .").
[26] Apollo's Mot. for J. on the Pleadings (§6.5) at 2.
[27] *Id.* at 3.
[28] Cooper's Opp'n to Apollo's Mot. for J. on the Pleadings (§6.5) at 1-3.

6.5 does not apply to records related to financing the transaction, because the Merger Agreement defines "Transactions" as "the Merger and the other transactions contemplated by this Agreement, *other than the Financing*."[29] Instead, Cooper maintains that Section 6.11(e) applies to Apollo's requests; that Section provides that:

> Prior to the Closing Date, [Cooper] shall use reasonable best efforts to provide and to cause its Subsidiaries and Representatives, including legal, finance and accounting, to provide, to [Apollo], at [Apollo's] sole expense, all cooperation reasonably requested by [Apollo] that is customary in connection with the arrangement of the Financing or any permitted replacement, amended, modified or alternative financing (provided that such requested cooperation does not unreasonably interfere with the ongoing operations of [Cooper] and its Subsidiaries), including [the types of requests enumerated in Section 6.11(e)(i) through (xv)].[30]

Alternatively, Cooper argues that even if Apollo's record requests are governed by Section 6.5, the terms "reasonable access" and "shall reasonably request" require a determination of fact not appropriate on a Motion for Judgment on the Pleadings.[31] Importantly, while Apollo argues that "reasonable access" presumes *some* access to the books and records, Cooper contends that in some circumstances, no access could be reasonable, and that "the circumstances surrounding the parties' negotiations and expectations in signing the agreement [are] highly relevant to

[29] Merger Agmt. § 10.2 (emphasis added).
[30] *Id.* at § 6.11(e).
[31] Cooper's Opp'n to Apollo's Mot. for J. on the Pleadings (§6.5) at 3-4.

evaluating the reasonableness of access."[32] In other words, Cooper suggests that the term "reasonable access" reflects the understanding of the parties that in some circumstances—anticipated by the parties, and therefore carved out of the Material Adverse Effect definition—no access is reasonable access.[33]

D. *Discussion*

The Complaint avers that Cooper cannot provide Apollo with access to the property, documents and records contained at the CCT facility.[34] In Section 6.5 of the Merger Agreement, Cooper agrees to provide, and to cause its subsidiaries (including CCT) to provide, reasonable access to:

> (i) . . . properties, books, Contracts, commitments, personnel and records and (ii) such other information as [Apollo] shall reasonably request with respect to [Cooper] and its Subsidiaries and their respective businesses, financial condition and operations, in each case, to the extent related to consummation of the Transactions or the ownership or operation of the respective businesses of [Cooper] and its Subsidiaries. . . .[35]

"Transactions" is a term defined in Section 10.2 of the Agreement, and generally refers to the transactions required by the Merger Agreement, *excluding* "the Financing."[36] Thus, a reasonable reading of Section 6.5 is one suggested by Cooper, that, *upon Apollo's reasonable request*, Cooper must permit Apollo

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[32] *Id*. at 4.
[33] *See id.* ("The [Material Adverse Effect] provision, in other words, informs the reasonableness inquiry under [Section 6.5].").
[34] *See* Compl. ¶¶ 8, 67.
[35] Merger Agmt. § 6.5.
[36] *Id.* at § 10.2.

reasonable access to CCT's property, documents and records, as they relate to this transaction but *excluding inspections related to the financing of the merger*. This makes sense in terms of the Agreement, because Section 6.11(e) addresses access to the latter. The Section imposes on Cooper the obligation to:

> use reasonable best efforts to provide and to cause its Subsidiaries and Representatives . . . to provide, to [Apollo] . . . all cooperation reasonably requested by [Apollo] that is customary in connection with the arrangement of the Financing . . . including . . . (A) financial statements, financial data and other pertinent information regarding [Cooper] and its Subsidiaries of the type required by SEC Regulation S-X and SEC Regulation S-K under the Securities Act . . . and (B) information relating to [Cooper] and its Subsidiaries . . . customary for the placement, arrangement and/or syndication of loans as contemplated by the Financing Documents, to the extent reasonably requested by [Apollo] . . . .[37]

Apollo does not move for judgment on the pleadings with respect to Cooper's performance under Section 6.11(e); indeed, it could not successfully do so, since whether Cooper has used its "reasonable best efforts" to provide financial data and information would present an issue of fact not amenable to such a motion. Instead, Apollo seeks in this Motion a finding that Cooper, unable to provide *any* access to the CCT facility, must therefore have failed to provide *reasonable* access to CCT's property, documents and records. Thus, argues Apollo, Cooper has materially failed to comply with Section 6.5. But this argument also must fail under a motion for judgment on the pleading standard because of a disputed issue

[37] *Id.* at § 6.11(e).

of fact. As I have described above, a reasonable reading of Section 6.5 is that Cooper's obligations are only triggered by a request for access by Apollo.[38] Apollo, however, points to nothing in the pleadings demonstrating that it has made such a request for access under Section 6.5. Cooper in its brief concedes that Apollo has requested documents relating to the financing of the merger, triggering Cooper's obligation under Section 6.11(e) to use "reasonable best efforts" in response. It denies, however, that Apollo requested access to the property, data or documents of CCT under Section 6.5; that issue, therefore, remains for trial. Even should that question be answered affirmatively, Apollo would still have to demonstrate that Cooper's failure to provide access was *unreasonable* in the context of a strike on CCT, which the Merger Agreement indicates was an occurrence contemplated by the parties.[39] Because, under a reasonable reading of the language at issue, fact issues remain for trial, Apollo is not entitled to a judgment on the pleadings.

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[38] Apollo argues that the "reasonable request" requirement only applies to a request for "other information" under Section 6.5(ii). It contends that no request requirement attaches to Section 6.5(i), the access-to-properties-and-records covenant. Apollo's Response to Cooper's Opp'n at 3. This reading of the Merger Agreement, however, would require me to find that the parties intended that Cooper be in material breach of the access requirement if it found itself at any time unable to provide such access *despite the fact that Apollo never made a request for such access*. That construction does not appear likely. Cooper has only promised reasonable access, and it is difficult to see how access has been unreasonably denied in the absence of a request. In any event, for purposes of this Motion, it is sufficient that I find that Cooper's reading, applying the reasonable request trigger, is a reasonable reading of the contractual language.

[39] *See* Merger Agmt. § 10.2; Compl. ¶¶ 59-60, 90.

Because my analysis above is sufficient to deny Apollo's Motion for Judgment on the Pleadings, I need not reach Cooper's additional contractual arguments.

E. *Conclusion*

For the foregoing reasons, I cannot determine from the pleadings that Cooper is in material breach of Section 6.5 of the Merger Agreement. Therefore, Apollo's Motion for Judgment on the Pleadings is DENIED. To the extent that the foregoing requires an Order to take effect, IT IS SO ORDERED. I anticipate no further pre-trial case dispositive motion practice.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III