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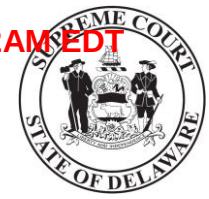

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WINDSOR I, LLC, Below Plaintiff, Current Appellant, v. CWCAPITAL ASSET MANAGEMENT LLC, and U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, N.A., AS TRUSTEE, SUCCESSOR TO WELLS FARGO BANK, N.A. AS TRUSTEE FOR THE REGISTERED HOLDERS OF COBALT CMBS COMMERCIAL MORTGAGE TRUST 2007-C2, COMMERCIAL MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2007-C2, Below Defendants, Current Appellees.	)	Case Number 443,2019 Appeal from the Superior Court of the State of Delaware

REPLY BRIEF OF APPELLANT, WINDSOR I, LLC

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The Superior Court did not take into consideration, or reference, Robert Stella's Affidavit in its September 27, 2019 decision, but did acknowledge it at the hearing on Below Defendants' Motion.[1]

Appellees/Below Defendants' unyielding effort to minimize the significance of the Stella's Affidavit reflects why it is so compelling. Otherwise, Below Defendants would not have focused such concentrated efforts to minimize its import. While they refer to the affidavit as an "unauthorized sur-reply," in fact it was submitted in response to Below Defendants' introduction of additional facts in the Affidavit of Victor Gutierrez ("Gutierrez's Affidavit" [D.I. 39]) intended to support their reliance on the "General Release." Appellant/Below Plaintiff ("Windsor") also requested, and received, permission from the Superior Court prior to filing Stella's Affidavit. In all events, Stella's Affidavit was appropriate and relevant to this issue raised by Below Defendants because the information contained in the Affidavit was "integral" to Windsor's claim.[2]

> If purportedly extraneous matter is presented, Rule 12(b) implies that the Court may, sua sponte, exclude it and hear the motion to dismiss, consider it and convert the motion into one for summary judgment, or conclude it is not extraneous but rather integral to the claims and then

[1] Capitalized terms not defined herein shall have the same meaning ascribed to them in Windsor's Opening Brief.

[2] *See In re Gardner Denver, Inc. S'holders Litig.*, 2014 Del. Ch. LEXIS 27, at *12 (Del. Ch. Feb. 21, 2014); *see also Xcell Energy & Coal Co., LLC v. Energy Inv. Grp., LLC*, 2014 Del. Ch. LEXIS 115, at *5 (Ch. Jun. 30, 2014).

> proceed with the motion to dismiss. Indeed, this Court frequently does determine these issues sua sponte in its disposition of the underlying motion.
>
> Nothing in the rule, however, expressly prohibits a plaintiff from moving to ask the Court to define the relevant universe of facts and documents integral to the complaint.[3]

Here, the Superior Court did not exclude the Stella Affidavit, and in fact, referenced it at the oral argument in conjunction with Below Defendants' Gutierrez's Affidavit.[4] Nevertheless, the lower court did not consider – or even reference Stella's Affidavit in its *written* decision. The Superior Court incorrectly concluded the General Release "bars Windsor's claims even though Windsor's claims arise from the Proposed Transaction."[5] That decision was predicated on the conclusory statement "As a condition of bidding, Mr. Stella executed [the Auction T&C]."[6] But that conclusion did not take into account Stella's Affidavit, which attests he did not execute the Auction T&C. Below Defendants' efforts to recast Stella's Affidavit as something less meaningful or credible are insufficient – certainly at the 12(b) stage of proceedings – and the dismissal should be reversed.

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[3] *In re Gardner Denver, Inc. S'holders Litig.*, 2014 Del. Ch. LEXIS 27, at *14.
[4] "I mean, you can make the argument as to why there is a release, but, clearly, the first question that hits the Court I have dueling affidavits in a 12(b). Should I just deny the thing in the first instance, and let you guys go at it in discovery? Why should I be trying to determine who is right and who is wrong in dueling affidavits on a 12(b) motion?" Tr. at 15-16.
[5] September 27, 2019 Opinion ("Op.") at 7.
[6] Op. at 4.

The Court's decision neither considered nor referenced Stella's Affidavit, which supports Windsor's well-pleaded contentions and refutes the conclusion Windsor "would not be entitled to recover under any reasonably conceivable set of circumstances."[7] In contrast, the Superior Court did reference the Shevlin Affidavit that Below Defendants incorporated in their Motion in support of the assertion Stella presumably did electronically-sign the Auction T&C.[8] But, if Below Defendants were certain Stella had entered the Auction T&C, why were they unable to provide the Court with the best evidence – a copy of the electronically-signed Auction T&C? If one existed, presumably Below Defendants would have included it with the "supporting" affidavit.

The "reasonable inference" from Stella's Affidavit is that he did *not* provide the knowing and intelligent waiver upon which the trial court's decision relies:

> Because I was not permitted to access the due diligence documents otherwise available to bidders after they clicked-through the Bidder Registration Certification and RealINSIGHT Marketplace Auction Sale Terms and Conditions/Bidder Confidentiality [the "Auction T&C"] referenced in the Reply; my access to the Auction was enabled by a different procedure, which did not include reviewing and accepting the Auction T&C.

[7] *RBC Capital Mkts., Ltd. Liab. Co. v. Educ. Loan Tr. IV*, 87 A.3d 632, 639 (Del. 2014).
[8] Op. at 5, n. 15.

> As noted above, I accepted terms and conditions for using the RealINSIGHT website and received a copy of that electronically-signed document.
>
> My records do not reflect receiving an electronically-signed copy of the Auction T&C, which [Below] Defendants claim I had to accept to participate in the Auction. In fact, my understanding is that the document [Below] Defendants claim I had to accept relates only to bidders who had access to the "document room," which I did not have.[9]

At minimum, Windsor's factual assertions to the contrary should have militated against granting the Motion. In fact, the Superior Court acknowledged the "dueling affidavits" at oral argument but overlooked Stella's Affidavit in its written decision. Because Delaware law requires all reasonable inferences to be drawn in favor of the non-moving party, Stella's Affidavit should have been included in the Superior Court's consideration of the Motion as part of Windsor's well-pleaded factual allegations. And, because the affidavit directly contradicts Below Defendants' contention on which the trial court based its decision, *i.e.*, the existence of a knowing and intelligent general waiver, an essential issue of fact remains in dispute, and the lower Court's decision should be reversed and remanded.[10]

[9] Stella's Affidavit at ¶¶10-12.

[10] *See Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 541 (Del. 2011).

Even assuming *arguendo* Stella had electronically signed the "General Release" to participate in the online Auction as referenced in the Superior Court's decision, the waiver was ineffectual because it was not knowing and voluntary. And, the General Release was ambiguous and focused on claims arising from the Auction itself. A separate comprehensive release required by Below Defendants in the event FCS were the successful bidder at the Auction further indicates that the generic Auction release did not contemplate waiver of claims related to the Proposed Transaction.

Below Defendants are correct – Delaware courts recognize the validity of general releases.[11] However, "'The standard for finding waiver in Delaware is quite exacting.' 'Waiver is the voluntary and intentional relinquishment of a known right . . . . It implies knowledge of all material facts and intent to waive.'"[12] "[B]ecause waiver is redolent of forfeiture, 'the facts relied upon to demonstrate waiver must be unequivocal.'"[13]

> It is well-settled that a party may waive her contractual rights; as our Supreme Court has explained, "[w]aiver is the voluntary and intentional relinquishment of a known right." Delaware Courts will find a waiver upon a showing "(1) that there is a requirement or condition capable of being waived, (2) that the waiving party knows of that requirement or condition, and (3) that the waiving party intends to waive that requirement or condition." Waiver involves "knowledge of all material

[11] Answering Brief ("Ans. Br.") at 26 (*citing Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1163 (Del. 2010); *Chakov v. Outboard Marine Corp.*, 429 A.2d 984, 985 (Del. 1981) (*en banc*).

[12] *In re Mobilactive Media, LLC*, 2013 Del. Ch. LEXIS 26, at *39-40, n. 152 (Del. Ch. Jan. 25, 2013) (*internal citations omitted*)

[13] *Simon-Mills II, LLC v. Kan Am United States XVI Ltd. P'ship*, 2017 Del. Ch. LEXIS 50, at *100-01 (Del. Ch. Mar. 30, 2017).

> facts and an intent to waive, together with a willingness to refrain from enforcing those contractual rights."[14]

Here, Windsor (via its associated company, FCS) did not voluntarily and intentionally relinquish its claims against Below Defendants related to enforcement of the Proposed Transaction. As in *Simon-Mills II*, the underlying facts relied upon to demonstrate waiver are not unequivocal.[15]

Although the Superior Court concluded "Mr. Stella accepted the terms and conditions on behalf of FCS," and "had notice of the terms and conditions," its conclusion did not consider Stella's Affidavit evidencing the contrary. Even if Stella had been required to navigate through the online auction portal to bid online, a bidder would have to purposefully navigate away from the bid portal and the Auction T&C to review and agree to additional "terms and conditions posted on the Property's webpage at the time of the Bid" ("Property T&C"), which were incorporated by reference into the Auction T&C before placing an electronic bid for the Loan.[16]

Below Defendants concede the Property T&C do *not* appear on the bidder page or in the Auction T&C, nor is a hyperlink to them provided – they are merely *referenced* with no integrated mechanism for the bidder to review prior to agreeing

[14] *Id.*
[15] *Id.*
[16] *See* Exhibit A at 1 (Also at A-22 of Windsor's Appendix).

to proceed with a bid. The structured difficulty in locating and reviewing the vaguely referenced Property T&C further demonstrates Stella was not presented with the complete terms and conditions, regardless of whether he had "accepted" the Auction T&C, and could therefore not have constituted a knowing and voluntary waiver under either scenario.[17]

As in *Starke v. Squaretrade, Inc.*, Stella was not provided with the *complete* terms and conditions "in a clear and conspicuous way" prior to participating in the online auction and thus did not have reasonable notice of the full terms and conditions on which Below Defendants rely.[18] "In the context of a web-based transaction, to determine whether the plaintiff had reasonable notice of the arbitration provision, courts must analyze whether the provision was provided in a clear and conspicuous way."[19] Here, by the very language of the Auction T&C on which Below Defendants rely, "the terms and conditions posted on the Property's webpage at the time of the Bid" did *not* appear on the portal to bid, were *not* conspicuous, *nor* were they *accessible* via hyperlink. "The reasonable notice

[17] *See Anand v. Heath*, 2019 U.S. Dist. LEXIS 109076 (N.D. Ill. June 28, 2019).
[18] 913 F.3d 279 (2d Cir. 2019).
[19] *Id.* at 289. *See also Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014) ("Where the link to a website's terms of use is buried at the bottom of the page or tucked away in obscure corners of the website where users are unlikely to see it, courts have refused to enforce the [ ] agreement."); *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 23 (2d Cir. 2002) (refusing to enforce terms of use that "would have become visible to plaintiffs only if they had scrolled to the next screen.").

standard has governed online contracts across jurisdictions since the early days of the internet, and the inquiry has always been context- and fact-specific."[20]

In *Anand*, the court concluded the online agreement – a "hybridwrap"[21] – was unenforceable "because nothing expressly linked the 'I understand and agree . . .' language to the 'Continue' button. There was no 'notice informing the user that, by clicking the button, the user [was] agreeing to' the terms and conditions."[22] As in *Anand*, Stella was not presented with an "I agree" box after being presented with a *complete* list of terms and conditions of use – inclusive of the Property T&C – and therefore, could not manifest assent. And, unlike the plaintiff in *Anand* who took the affirmative step of clicking the "Continue" button to proceed to the at-issue survey, Stella's Affidavit contends that he did not click through to bid, as Below Defendants contend. Tellingly, Below Defendants are unable to refute the application of *Anand* to the facts here and fail to discuss *Anand* in their Answering Brief.

Here, "looking at the design and content of the relevant interface," Stella did not have reasonable notice, and the purported waiver was not made in a knowing and intelligent manner. With this important factual detail in conflict, the Superior

[20] *Bekele v. Lyft, Inc.*, 918 F.3d 181, 187 (1st Cir. 2019).
[21] A "hybridwrap" online agreement typically prompts the user to manifest assent after merely presenting the user with a hyperlink to the terms and conditions, rather than displaying the terms themselves. 2019 U.S. Dist. LEXIS 109076, at *12.
[22] *Id.*

Court should have denied the Motion.[23]

Moreover, a release must be "clear and unambiguous" to be effective. "In determining whether a release is ambiguous, the intent of the parties is controlling as to the scope and effect of the release. It must appear a plaintiff, or a reasonable person in the place of the plaintiff, understood the terms of the release. A court determines the parties' intent from the overall language of the document."[24] Here, the General Release is not clear and unambiguous.[25] The phrase "inclusive of any and all claims of which bidder is currently unaware, regardless of whether such

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[23] *Simon-Mills II*, 2017 Del. Ch. LEXIS 50, at *100-01.

[24] *Deuley v. DynCorp International, Inc.*, 8 A.3d 1156, 1163 (Del. 2010).

[25] EACH BIDDER RELEASES CW REDS, RI AND THEIR EMPLOYEES, AGENTS, AFFILIATES, DIRECTORS, AND SUBSIDIARIES ("REPRESENTATIVES") FROM ANY CLAIMS, WHETHER CURRENT OR FUTURE, AGAINST CW REDS, RI OR THEIR REPRESENTATIVES. THIS WAIVER IS INCLUSIVE OF ANY AND ALL CLAIMS OF WHICH BIDDER IS CURRENTLY UNAWARE, REGARDLESS OF WHETHER SUCH CLAIMS WOULD AFFECT BIDDER'S RELEASE OF CW REDS AND/OR RI.

EACH BIDDER WAIVES THE PROVISIONS OF CALIFORNIA CIVIL CODE SECTION 1542 (AND ANY OTHER SUBSTANTIALLY SIMILAR STATE STATUTES), WHICH PROVIDES: "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."

claims would affect bidder's release of CW REDS and/or RI" is fundamentally inconsistent with the concept of a knowing and intelligent waiver.

In that regard, Below Defendants claimed language in the Auction T&C constituted a waiver against CWCAM as an "affiliate" of CW REDS. Below Defendants did not disclose that relationship in the Auction T&C, and Windsor did not voluntarily and intentionally waive its right to pursue claims unrelated to the Auction. Similarly, the referenced terms and conditions do not specify U.S. Bank, which had no involvement with the Auction, as a released party; and therefore, there can be no waiver as to claims against U.S. Bank, or CWCAM acting as U.S. Bank's servicer.

The Purchase Release[26] CWCAM forwarded to Windsor – which required Windsor and each Loan guarantor to sign if the Loan were purchased – related to the potential purchase of the Loan at auction and was comprehensive and specifically tailored to cover the Proposed Transaction. CWCAM would not have prepared and required the execution of the Purchase Release if it believed the generic Auction T&C release already covered the Proposed Transaction. Here, the trifecta of: (1) Stella's Affidavit, (2) the ambiguous General Release, and (3) the conflict between the Auction T&C and the Purchase T&C shows the underlying facts relied upon to demonstrate waiver were not unequivocal, and the Motion

[26] *See* Exhibit B (Also at A-41 through A-44 of Windsor's Appendix).

should have been denied.

The PNA does not apply; the Proposed Transaction is the governing document.

Below Defendants are wrong – the PNA is inapplicable here. In the Chancery litigation, Windsor sought to enforce the PNA to require CWCAM to negotiate in good faith. Further, the PNA addresses only loan modifications, not a sale of the Loan. In all events, the PNA is not the controlling document in this litigation – the Offer and Proposed Transaction are. This action on appeal addresses Below Defendants' duty to act in good faith with respect to their promise to sell the Loan after Windsor performed, based on equitable concepts of promissory estoppel and unjust enrichment. The Court of Chancery concluded the PNA did not require CWCAM to negotiate with Windsor, but CWCAM did – on its own volition – resulting in the Proposed Transaction. Windsor accepted CWCAM's proposal to sell the Loan for $5,288,000, and satisfied all of CWCAM's pre-closing conditions. Then, without explanation, CWCAM reneged.

CWCAM's conduct, on behalf of U.S. Bank, belies Defendants' argument the PNA applies. At oral argument in Chancery, CWCAM affirmatively stated the PNA was terminated:

> We [CWCAM] did on a certain level deem the filing of litigation against CWCapital to be effectively and practically a Notice of Termination by the borrower, but there isn't any reason why -- there is nothing irrevocable

> preventing the borrower and CWCapital to have additional discussions should they all choose to.[27]

CWCAM specifically acknowledged Windsor's filing of the Chancery Complaint constituted a "Notice of Termination." The fact that CWCAM further represented that nothing prevented Windsor and CWCAM from having "additional discussions should they all choose to" demonstrates the Proposed Transaction was separate, outside the parameters of the PNA. The PNA was over.

Moreover, the PNA could not apply to the Proposed Transaction because CWCAM's Offer did not follow the procedures it required, *e.g.*, a letter of intent, approval by "senior management," and receipt of an "Authorization Notice." The detailed process described in the PNA was never cited in the Offer and could not have reasonably been completed within 30 days as the Offer required, further undercutting Defendants' position. The Offer was made "subject to credit committee approval, adequate proof of the borrower's ability to fund, execution of appropriate documentation and closing by May 30." CWCAM did not reference, or adhere to, the PNA because it was already terminated. And, because CWCAM required closing within approximately 30 days, it would be untenable for settlement to occur within that window if the PNA's procedures applied.

[27] Am. Comp. at ¶39 (*citing* Chancery hearing transcript at 13, ¶¶6-11).

Below Defendants are incorrect – the Amended Complaint does state claims for Unjust Enrichment and Promissory Estoppel because Below Defendants' inequitable conduct supports both claims, which were properly pled and supported by the attendant facts.

Below Defendants' questionable conduct also supported Windsor's claim for recovery under both unjust enrichment and promissory estoppel. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[28] To survive a motion to dismiss a claim for unjust enrichment, a plaintiff must allege: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law.[29] All of these elements were effectively pled. CWCAM clearly benefited from its inequitable conduct. It received ongoing service fees because it failed to honor its obligations, along with the auction commission received by CWCAM or its affiliates. Below Defendants ignored these economic benefits and possibly others that discovery will disclose. Windsor reasonably relied on Below Defendants' promise to sell the Loan if the conditions were met, and took action to its detriment.

[28] *1 Oak Private Equity Venture Capital Ltd. V. Twitter, Inc.*, 2015 Del. Super. LEXIS 978, at *36-37 (Nov. 20, 2015) (*internal citation omitted*)
[29] *Id*.

Below Defendants *retroactively* claimed they had concerns about lease information at the time of the Offer. Indeed, Below Defendants did not ask for prospective tenant information prior to or at the time of the credit committee's purported rejection of the Proposed Transaction. Below Defendants ignored the fact they did not request tenant information until January 19, 2018 – nearly nine months *after* CWCAM extended the Offer and eight months after Below Defendants first notified Windsor of the credit committee's refusal. At the very least, Below Defendants' revisionist explanation raised material issues of fact and further suggests Below Defendants' unclean hands.

Furthermore, Below Defendants misconstrued Windsor's position with respect to CWCAM's duties to its bondholders; Windsor's claim was based upon CWCAM's lack of good faith in rejecting the Proposed Transaction, not whether it fulfilled its fiduciary obligation to bondholders. And, Below Defendants' reliance on "business judgment" to defend the credit committee was misplaced. Business judgment does not justify decisions made in the absence of good faith; even if, as Below Defendants incorrectly stated, Windsor were challenging "governance of the Trust."[30] In fact, by invoking the business judgment standard, Below Defendants effectively acknowledge owing a duty *to Windsor*.

[30] *See Brehm v. Eisner* (*In re Walt Disney Co. Derivative Litig.*), 906 A.2d 27 (Del. 2006).

If the rejection by the credit committee had no reasonable, analytical connection with the obligation to obtain the highest and best return for Investors, its decision would be persuasive evidence of a bad faith rejection. The details of the subsequent sale to WM were relevant to whether CWCAM acted in good faith.

In addition, all of the necessary elements for a promissory estoppel claim were pled:

> "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." A promise must be definite and certain. Under the doctrine of promissory estoppel, a plaintiff must prove by clear and convincing evidence that: "(1) a promise was made; (2) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (3) the promisee reasonably relied on the promise and took action to his detriment; and (4) such promise is binding because injustice can be avoided only by enforcement of the promise." [31]

Below Defendants promised to sell the Loan for $5,288,000 subject to certain conditions Windsor met, coupled with "credit committee" approval. As a commonly used term in the lending industry (including CWCAM's use in this case), "credit committee" reflects the premise to employ an orderly, analytical process. Below Defendants attempted to excuse the arbitrary and capricious decision to reject the Proposed Transaction because it was "subject to credit

[31] *1 Oak*, 2015 Del. Super. LEXIS 978, at *33.

committee approval." This ignored the requirement that the credit committee make such a decision in good faith. The promise to sell the Loan was "definite and certain,"[32] but the credit committee's arbitrary conduct inequitably removed it from that universe.

And, in that regard, Below Defendants' reliance on *G&F Assocs. Co. v. Brookhaven Beach Health Related Facility*, is misplaced.[33] Below Defendants do not include an important factual distinction associated with their application of *G&F* – that plaintiff's argument (rejected by the court) was based on an *alleged oral* promise and a claim of fraud. Here, the promise was made in writing with the predicate the credit committee would act in good faith. And, in *G&F*, the New York court stated an "allegation of fraud based upon a statement of future intention must allege facts sufficient to show that at the time the promissory representation was made, the party never intended to honor or act on the statement." Here, the credit committee's refusal to consummate the Proposed Transaction – in the absence of a credible explanation as discussed *supra* – indicates it never intended to honor the commitment.[34] "A 'desire to reach agreement' constitutes good faith

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[32] *See id.*

[33] 249 A.D.2d 441, 443 (NY 1998).

[34] As discussed *supra*, Below Defendants rely on an implausible explanation as to why the credit committee allegedly refused to proceed with the Proposed Transaction, *i.e.*, a purported refusal to provide tenant information. Such request

bargaining," and conversely "a 'desire not to reach an agreement' is bad faith."[35] Merely going through the motions is not good faith.[36] Contrary to the Superior Court's finding, it *was* the reasonable expectation of Below Defendants to induce Windsor to action.[37] As plainly stated in the Amended Complaint and supported by Stella's Affidavit:

> 47. Based on customary, commercial lending practices, and CWCAM's expressed, urgent need for the purchaser's loan commitment coupled with the short-term closing requirement, such approval initially appeared to be a formality.

1 Oak is on-point. Equity should not permit Below Defendants to avoid performing if the credit committee did not act in good faith. Windsor spent money, obtained its lender's approval, and implemented discussions with prospective tenants in reliance on the Offer it accepted with a 30-day closing requirement, in exchange for what it believed was CWCAM's promise to conduct itself in good faith and to sell the Loan to Windsor.

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for tenant information was made eight months *after* Below Defendants first notified Windsor the credit committee had refused to consummate the sale.

[35] *Helferstay v. Creamer*, 473 A.2d 47, 53 (Md. Ct. Spec. App. 1984).

[36] *See AFGE v. Trump*, 2018 U.S. Dist. LEXIS 144592, at *117-18 (D. D.C. Aug. 25, 2018), *rev'd and vacated on other grounds by AFGE v. Trump*, 929 F.3d 748 (D.C. Cir. 2019).

[37] Op. at 23.

In fact, in response to discovery requests, Below Defendants produced no documents evidencing any analytical consideration by the credit committee on whether to accept or reject the Proposed Transaction.

Promissory estoppel no longer functions solely as a substitute for contract principles. The principal question in Delaware promissory estoppel cases is 'whether injustice could be avoided only by enforcement of the promise.'"[38] "The prevention of injustice is the 'fundamental idea' underlying the doctrine of promissory estoppel."[39] Here, the elements of promissory estoppel are present and enforcing the terms of the Proposed Transaction would prevent the injustice referenced in *Grustein* and *Chrysler Corp.*

Further analogizing to contract law, "Where the performance of a contract depends upon the satisfaction by one party with the commercial performance of another, the party holding the power to determine whether or not performance is satisfactory must exercise that judgment in good faith."[40] Below Defendants have consistently refused to provide the true motivation for the credit committee's purported rejection of the Proposed Transaction. Unlike the lender in *Int'l Minerals,* where, after extensive due diligence, bank officials ultimately

[38] *Grunstein v. Silva*, 2011 Del. Ch. LEXIS 12, at *37-38 (Del. Ch. Sept. 5, 2014).
[39] *Chrysler Corp. v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1034 (Del. 2003).
[40] *Int'l Minerals & Mining Corp. v. Citicorp North America, Inc.*, 736 F. Supp. 587, 595, n. 7 (D. N.J. 1990).

determined they could no longer recommend approval of a loan to the plaintiff; here there is no evidence of any due diligence.[41] In *Int'l Minerals*, the District Court wrote, "There can be no doubt that [the lender] fulfilled its duties under the agreement to reasonably investigate the proposed transaction."[42] Unlike the lender in *Int'l Minerals*, there is no evidence that CWCAM, through its credit committee, made an earnest, well-informed decision to reject the Proposed Transaction.[43]

"A covenant of good faith and fair dealing is implied in every contract as a matter of law, absent an express disavowal. *Good faith between contracting parties requires one vested with contractual discretion to exercise it reasonably and not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.*"[44] The parallel concept should apply in the promissory estoppel/unjust enrichment context.

Similarly, by parallel, under the forthright negotiator principle, a court "considers the evidence of what one party subjectively 'believed the obligation to be, coupled with evidence that the other party knew or should have known of such belief. In other words, the forthright negotiator principle provides that, in cases where the extrinsic evidence does not lead to a single, commonly held

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[41] *See id.*
[42] *Id.* at 595.
[43] *See id.* at 595-96.
[44] *State Nat'l Bank v. Academia, Inc.*, 802 S.W.2d 282, 293 (Tex. App. 1990) (*emphasis added*).

understanding of a contract's meaning, a court may consider the subjective understanding of one party that has been objectively manifested and is known or should be known by the other party."[45]

Here, Below Defendants knew, or should have known, Windsor expected the credit committee's decision would be substantive and analytical, otherwise the Offer would not have been extended coupled with such a tight closing date (30 days). Both Below Defendants and Windsor anticipated approval and closing from the outset. If, in fact, CWCAM did not anticipate approval, its conduct is even more egregious.

Regardless, the credit committee's purported refusal to consummate the Proposed Transaction was arbitrary and capricious – a point Below Defendants did not attempt to meaningfully refute. Instead, they incorrectly argued the Amended Complaint did not state a claim for promissory estoppel or unjust enrichment, and Below Defendants' business judgment in rejecting the Proposed Transaction "is not an appropriate area of inquiry for Windsor or the Court." No substantive explanation for the credit committee's purported rejection was provided. While CWCAM may not have been obligated to make the Offer to Windsor after the PNA was terminated, it nevertheless did.

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[45] *United Rentals, Inc. v. Ram Holdings, Inc.*, 937 A.2d 810, 835-36 (Del. Ch. 2007).

In doing so, all parties were required to conduct themselves in good faith, and Windsor reasonably relied on the Offer and immediately arranged for the components of the transaction CWCAM had required.[46] This demonstrates why the Superior Court's conclusion Windsor "has not shown that it was the reasonable expectation of the Defendants to induce Windsor to action" was not correct.[47] Similarly, Windsor *has* shown that it "*reasonably* relied on Defendants' alleged promise to affirm the Acceptance."[48]

The Court also found, "the terms of the PNA specifically state that the parties may not rely on the representations that the parties' make in their negotiations regarding the sale of the Loan. So, even if the Defendants had promised Windsor to sell Windsor the Loan, Windsor could not have relied on this promise."[49] However, as discussed *supra*, Below Defendants acknowledged the PNA was "dead" prior to the Proposed Transaction,[50] and the Superior Court's decision effectively supported that determination. Had it applied, why did Below Defendants not follow the strictures of the PNA? Why did the Proposed

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[46] *See Liquor Exch. Inc. v. Tsaganos*, 2004 Del. Ch. LEXIS 166, at *12 (Del. Ch. Nov. 16, 2004).
[47] *See* Op. at 23.
[48] *See id.* (*emphasis in original*).
[49] *Id.*
[50] *See also* Amended Complaint at ¶39; Tr. at 63.

Transaction make not a single reference to the PNA? Simply stated, the PNA did not control.

Windsor had a loan acquisition agreement drafted, coordinated with its proposed lender and potential tenants for the Property, and spent money to comply with CWCAM's terms.[51] But as noted above, three weeks after the parties had agreed, CWCAM notified Windsor the credit committee rejected the Proposed Transaction. No explanation was provided, nor did CWCAM pursue an increased purchase price, which would be expected based on industry practice if CWCAM was, in fact, seeking to generate the "highest and best" recovery for Investors.

In any event, as pled, the arbitrary and capricious decision to reject the Proposed Transaction should permit recovery against Below Defendants – either under promissory estoppel or unjust enrichment – and Below Defendants' Motion should have been denied.

[51] This, in and of itself, contradicts the Superior Court's conclusion "Windsor's sole argument is that the parties only allotted a thirty-day window for closing, so Windsor had to obtain funding from its lender to buy the Loan in order to meet the closing deadline. But, the fact that the credit committee had not approved the sale suggests that Windsor had no reason to believe it would obtain the Loan." Op. at 23.

CONCLUSION

The Superior Court's decision to grant Below Defendants' Motion was incorrect. The Court did not draw all reasonable inferences in favor of Windsor, which on the face of the Amended Complaint, reflect well-pleaded claims. The combination of: (1) Stella's Affidavit, (2) the ambiguous General Release, and (3) the conflict between the Auction T&C and the Purchase T&C shows the underlying facts relied upon to demonstrate waiver were not unequivocal, and the Motion should have been denied. And, Below Defendants' arbitrary and capricious decision to reject the Proposed Transaction constitutes a recoverable action. Applying the *de novo* standard that controls this appeal, the Superior Court's decision granting the Motion should be reversed.

Respectfully submitted,

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