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PUBLIC VERSION

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GPC XLI L.L.C., Rockview Trading, Ltd., KS Capital Partners, L.P., Murray Capital Management, Inc., Watershed Capital Institutional Partners, L.P., Watershed Capital Partners (Offshore), Ltd., Watershed Capital Partners, L.P.,

Plaintiffs,

v.

Loral Space & Communications Inc., Loral Skynet Corporation, Loral Skynet International, L.L.C., Loral Asia Pacific Satellite (HK) Limited, Loral SpaceCom Corporation, Loral Skynet Network Services, Inc., Loral Communications Services, Inc., Loral Ground Services, L.L.C., Loral CyberStar International, Inc., Loral CyberStar Services, Inc., Loral CyberStar Holdings, L.L.C., Loral Skynet Network Services Holdings L.L.C., Loral CyberStar, L.L.C., CyberStar, L.L.C., and Loral Satellite, Inc.,

Defendants.

C.A. No.: 3022-VCS

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PRELIMINARY STATEMENT

This is the case of a nonexistent breach of a nonexistent contract term, brought by so few plaintiffs that they have no right to sue in the first place. The case arises as follows: In order for Loral Space & Communications Inc. ("Loral" or the "Company") to consummate a significant business combination with Telesat Canada ("Telesat"), Loral's subsidiary, Loral Skynet Corporation ("Skynet"), needed to redeem its 14% Senior Secured Cash/PIK Notes Due 2015 (the "Notes"). Those Notes had a "hard call" provision giving Skynet the unfettered right to redeem them for cash on October 15, 2009, for a premium of 10%. But 2009 would have been too late for the Telesat deal.

Fortunately, the Notes also contained another redemption provision, sometimes referred to as the "provisional call," giving Skynet the right to redeem the Notes ahead of the hard call date with a 10% premium unless the holders of at least two-thirds of the outstanding Notes registered an objection. After notice was given in accordance with the indenture governing the Notes (the "Indenture"), less than half of the holders of outstanding notes objected -- below the two-thirds required to stop the redemption. Thus, the Notes were duly redeemed for $141 million in cash on September 5, 2007.

Prominent among the Noteholders not objecting to redemption were several investment funds managed by MHR Fund Management LLC ("MHR"). MHR also held over 36% of the outstanding common stock of Loral, more than any other stockholder. Plaintiffs will urge this Court to read into the Securities Purchase Agreement between

Loral and MHR dated October 17, 2006 (the "SPA") some valuable consideration flowing from Loral to MHR in exchange for its agreement, under certain circumstances, not to object to redemption of the Notes. But the facts will prove otherwise.

No payment was made to secure MHR's agreement not to object, nor would any such payment be necessary, because MHR's equity stake in Loral would compel it -- as a rational economic actor -- to favor consummating the Telesat transaction and to consent to the redemption of the Notes. In fact, at the time that MHR actually provided its non-objection to the redemption of the Notes, it was not even compelled to do so under the terms of the SPA. The SPA would have bound MHR to consent to redemption of the Notes at the closing of the Telesat deal, which didn't happen until two months later. In short, MHR simply consented to redemption without being paid for it.

Even if the non-existent payment had in fact been made, plaintiffs still cannot make out a breach of contract claim based on any terms of the Indenture or the Notes, nor can they manufacture a claim by relying on the implied covenant of good faith and fair dealing. As an initial matter, plaintiffs contend that, by entering into the SPA with MHR, Loral breached the Indenture and the Notes. But Loral is not a party to, a guarantor of, or otherwise bound by the Skynet Indenture -- only Skynet and its subsidiaries are so bound. Loral cannot breach a contract to which it was not even a party, through a payment or otherwise.

In addition, the express terms of the Indenture provide explicitly for both the provisional call itself, and for Notes owned by MHR to count for voting and consent

purposes. Notably absent is any covenant prohibiting unequal payments for consent, despite the appearance of just such a covenant in the Indenture's first circulated drafts. The implied covenant of good faith and fair dealing has no application to provisions, like this one, that the negotiating parties actually considered and then determined to exclude.

Finally, plaintiffs' case is barred by the Indenture's "Limitation on Suits" clause. That contract term generally deprives individual Noteholders, like plaintiffs, of the ability to maintain an action, except for suits to enforce a right to payment of principal and interest when due. Plaintiffs' claim for a share of an alleged "consent payment" cannot be dressed up into an action to enforce payment of principal or interest, since all principal and interest on the Notes was paid in full on September 5, 2007. An exception exists if the holders of more than 40% of the outstanding Notes make a proper written request to the Trustee. But these plaintiffs owned only 36.3% of the outstanding Notes at the time of their demand to the Trustee.

In sum, plaintiffs' case has no merit and should be dismissed.

STATEMENT OF FACTS

A. Loral's Bankruptcy

Following the demise of numerous Internet and telecommunications companies in 2001 and 2002, the market for telecommunications products, including commercial satellites, weakened substantially.[1] Those market conditions, in conjunction with a decline in worldwide satellite orders and the decline of the utilization of services by the leading customers of Loral Space & Communications Ltd. ("Old Loral"), greatly weakened Old Loral's financial position, forcing it and certain of its subsidiaries to commence reorganization proceedings in the Bankruptcy Court in the Southern District of New York on July 15, 2003 (the "Loral Bankruptcy").[2]

B. Negotiation of the Notes

In connection with the Loral Bankruptcy, a Creditors' Committee was established to review the Company's business operations and negotiate the Plan of

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1 Disclosure Statement for Debtors' Fourth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, dated June 3, 2005 (the "Disclosure Statement") at 21, Gibson Aff. NJX 1 (stating that "following the demise of numerous Internet and telecommunications companies ... in 2001 and 2002[,] [t]he market for [telecommunications] products, including commercial satellite[s] . . . weakened substantially").

2 Disclosure Statement at 21-22, Gibson Aff. NJX 1 (describing the factors that adversely affected Loral's financial position prior to its filing for bankruptcy, including those cited in the text).

Reorganization (the "Plan") on behalf of Old Loral's creditors.[3] MHR, Old Loral's largest unsecured creditor and potential future stockholder, was appointed chairman of the Creditors' Committee.[4] Akin Gump Strauss Hauer Feld LLP ("Akin Gump") acted as counsel to the Creditors' Committee,[5] and MHR retained its own counsel, Stroock & Stroock & Lavan LLP ("Stroock"), to participate in the negotiations relating to the Plan.[6] All of these parties, as well as Weil, Gotshal & Manges LLP and Willkie Farr & Gallagher LLP as counsel to the Company, participated in negotiating the Indenture and the Notes.[7]

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3 Disclosure Statement at 22-23, Gibson Aff. NJX 1 (stating that on July 24, 2003, the United States Trustee for the Southern District of New York appointed the members of the Creditors' Committee for the Reorganization which would participate actively in reviewing the Debtors' business operations and negotiating the Plan).

4 Disclosure Statement at 99, Gibson Aff. NJX 1 (stating that MHR was the Chairman of the Creditors' Committee and disclosing MHR's significant holdings of Loral's common stock, preferred stock, and Loral Skynet's Notes).

5 Rachesky Dep. Vol. II at 257:5-12 (stating that Akin Gump was counsel to the Creditors' Committee).

6 Goldstein Dep. Vol. I at 65:6-20 (stating that Stroock attorney Doron Lipshitz represented MHR in connection with the negotiation of the Indenture); Yeung Dep. Vol. II at 429:15-17 (same).

7 Rachesky Dep. Vol. II at 257:5-12 (stating that Akin Gump was counsel to the Creditors' Committee); Yeung Dep. Vol. II at 415:8-22, 429:15-17 (stating that Weil Gotshal and Willkie Farr were counsel to Loral, and Stroock was counsel to MHR).

As part of the Plan to emerge from bankruptcy, Skynet -- a wholly-owned subsidiary of Loral -- was to issue the Notes in a rights offering to the unsecured creditors.[8] Those unsecured creditors, including MHR and most of the plaintiffs here, were largely investment funds specializing in distressed debt instruments.[9] Thus, the holders of debt issued by Skynet's predecessor, Loral Orion Inc. -- that is, the unsecured creditors -- were granted the right, but were not required, to purchase their *pro rata* share of the Notes.[10] To provide the Company with the certainty of receiving the requisite amount of cash, MHR and one other creditor agreed for a fee payable in additional Notes to backstop the rights offering by purchasing any remaining Notes that other unsecured creditors did not purchase.[11]

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8 Disclosure Statement at 51-52, Gibson Aff. NJX 1 (describing how the Notes would be issued to the holders of debt issued by Loral Orion).

9 Murray Dep. Vol. I at 52:4-10 (stating that Murray Capital specializes in distressed debt); Picco Dep. at 139:23-140:14, 162:3-13 (stating that Mr. Picco handled KS Capital's distressed portfolio).

10 Disclosure Statement at 54-56, Gibson Aff. NJX 1 (stating that the "holders of Orion General Unsecured Claims as of the Voting Record Date have the right, but not the obligation, to participate in the Rights Offering").

11 Disclosure Statement at 57, Gibson Aff. NJX 1 (stating that "[a]ny amount of New Skynet Notes that are not subscribed for pursuant to the Rights Offering shall be purchased by the Backstop Purchasers pursuant to the Backstop Commitment Agreement" and that the Backstop Purchasers would be entitled to a fee in consideration for making that purchase).

1. First Negotiated Point: Optional Redemption Provision

Negotiation of the Indenture and Notes was a "balancing act" between the interests of the future Noteholders and the Company.[12] As future Noteholders, it was in MHR's interest, and in the interest of the other unsecured creditors, for the economic terms of the Notes to be as attractive as possible, while it was in the Company's interest -- and in the interest of the unsecured creditors as future stockholders -- for the terms of the Notes to be as flexible as possible.[13] Accordingly, on the one hand, the Notes required Skynet to pay the Noteholders 14% interest on the principal amount of the Notes.[14] On the other hand, the Notes included redemption provisions that would enable Skynet to free itself from the Notes' interest burden and, if it were able, to replace the Notes by issuing new debt at a lower interest rate or with more favorable terms.[15] Redemption would also free Skynet from both the liens on its assets serving as collateral and the

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[12] Kuhn Dep. at 68:25-70:9 (explaining that the "balancing act" was a result of trying to include provisions that were favorable to the creditors in their capacity as future stockholders as well as in their capacity as future Noteholders).

[13] Kuhn Dep. at 68:25-70:9 (discussing balancing act for creditors as Noteholders versus stockholders); Disclosure Statement at 50, Gibson Aff. NJX 1 (stating that stock would be distributed to holders of unsecured claims and the Notes offered to such holders for purchase in the rights offering).

[14] Nov. 21, 2005 Executed Indenture at Disclosure Page 100, Gibson Aff. NJX 2 (setting forth the timing of interest payments on the 14% Notes).

[15] Nov. 21, 2005 Executed Indenture at Disclosure Pages 100-102, Gibson Aff. NJX 2 (describing terms on which the Notes could be financed and redeemed); Mastoloni Dep. Vol. I at 291:10-16, 295:6-18 (discussing how the Notes could potentially be refinanced at a lower interest rate).

restrictive covenants contained in the Indenture,[16] all of which would have severely hampered any sort of strategic transaction involving the fixed satellite services business.[17]

In particular, the Notes included a provisional call that permitted Skynet to call the Notes ahead of the hard call date of October 15, 2009, with a ten percent premium, unless two-thirds of the outstanding Notes objected:

> Subject to the right of the Holders to object, as set forth below in this paragraph, prior to October 15, 2009, the Company may elect to redeem all or a portion of the Notes upon not less than 30 nor more than 60 days' notice, at the redemption price of 110% of the principal amount thereof plus accrued and unpaid interest to the Redemption Date . . . . If within twenty (20) Business Days following the date that such redemption notice is sent to the Holders, written notice is received by the Company from the Holders of at least two-thirds (2/3) in principal amount of the then outstanding Notes objecting to such redemption . . . then the Company shall not consummate such redemption.[18]

2. Second Negotiated Point: MHR's Vote Counts

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16 Nov. 21, 2005 Executed Indenture at Disclosure Pages 70, 77-88, 81-82, Gibson Aff. NJX 2 (providing for release of collateral and discharge of Indenture upon redemption); Nov. 21, 2005 Executed Indenture at Disclosure Pages 40-57, 78-88, Gibson Aff. NJX 2 (containing covenants restricting the ability of Skynet to become subject to indebtedness, liens, *et al.*; provisions relating to collateral securing the Notes); Nov. 21, 2005 Security Agreement, Gibson Aff. NJX 49 (providing for the assets of Skynet to be used as collateral to secure the Notes).

17 Mastoloni Dep. Vol. I at 315:16-316:22 (observing that the Notes would have to be redeemed in order to free the Skynet assets to be included in a strategic transaction).

18 Nov. 21, 2005 Executed Indenture at Disclosure Page 102, Gibson Aff. NJX 2.

Recognizing MHR's role as both a large creditor and soon-to-be stockholder, the Indenture provided an exception from the common provision disregarding the Notes of affiliates of the issuer for voting purposes.[19] Thus, Section 12.06 of the Indenture explicitly provided that -- while Notes held by Skynet and its affiliates would generally be disregarded for voting purposes -- MHR and its affiliates could vote on the optional redemption and other issues, whether or not they were deemed to be affiliates of Skynet: "Notes owned . . . by MHR or any Related Party thereof shall not be so disregarded so long as such notes are owned by MHR . . . ."[20]

Since MHR was expected to own at least 41% of the Notes based on its commitment to buy its *pro rata* share of the Notes, Loral understood and disclosed in the bankruptcy proceeding that MHR effectively controlled Skynet's option to effect the provisional call.[21] As Loral's Disclosure Statement explained:

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19 Disclosure Statement at 99-100, Gibson Aff. NJX 1 (describing MHR's ownership in Loral); Kuhn Dep. at 18:17-19:19 (stating that MHR wanted to include the last sentence of Section 12.06 because MHR might be considered an affiliate and MHR did not want its Notes to be disregarded).

20 Nov. 21, 2005 Executed Indenture at Disclosure Page 90, Gibson Aff. NJX 2

21 Nov. 21, 2005 Executed Indenture at Disclosure Pages 101-02, Gibson Aff. NJX 2 (describing terms on which the Notes will be financed and redeemed); Disclosure Statement at 99-100, Gibson Aff. NJX 1 (stating that "the holders of the New Skynet Notes would not be able to cause (i) such interest to be paid in Cash or (ii) such redemption during the first 48 months after the Effective Date not to be effected, without the approval of MHR.").

> Under the Plan, MHR Fund Management LLC and/or one or more of its affiliates ("MHR"), Chairman of the Creditors' Committee, is expected to own or control . . . at least 41% of the aggregate outstanding principal amount of the New Skynet Notes . . . . So long as MHR owns at least one-third (1/3) of the aggregate outstanding principal amount of the New Skynet Notes, the holders of the New Skynet Notes would not be able to cause . . . such redemption during the first 48 months after the Effective Date not to be effected, without the approval of MHR.[22]

3. Third Negotiated Point: No Restriction on Unequal Consent Payments

As revealed in publicly filed drafts, the parties negotiating the Indenture -- including Akin Gump, on behalf of the unsecured creditors, and Stroock, on behalf of MHR -- specifically considered whether to allow unequal payments for consent by the Noteholders. In one of the first drafts of the Indenture, Akin Gump included a restrictive covenant that, had the covenant survived into the final Indenture, would have prohibited Skynet from offering Noteholders unequal consent payments:

> Payments for Consent. The Company will not, and will not permit any of its Restricted Subsidiaries to, directly or indirectly, pay or cause to be paid any consideration to or for the benefit of any Holder for or as an inducement to any consent, waiver or amendment of any of the terms or provisions of this Indenture, the Notes or any Collateral Document unless such consideration is offered to be paid and is paid to all Holders that consent, waive or agree to amend in

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22 Disclosure Statement at 99-100, Gibson Aff. NJX 1.

> the time frame set forth in the solicitation documents relating to such consent, waiver or agreement.[23]

This early draft of the Indenture was made publicly available in an SEC filing by Loral Orion Inc. on June 8, 2005.[24]

Stroock, negotiating for MHR, subsequently proposed the reverse provision to explicitly authorize unequal Payments for Consent.[25] Stroock and Akin Gump went back and forth, with each reinserting their opposing versions of the Payments for Consent provision.[26] In the end, the parties decided to remove the restrictive covenant altogether.[27] Because the Indenture had undergone significant changes since the first draft was publicly filed on June 8, 2005 -- including the deletion of the covenant

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[23] June 8, 2005 Email from L. Silber Attaching Draft Indenture at 46, Gibson Aff. NJX 58 (draft to be filed as T-3); see also Nov. 12, 2004 Draft Indenture at 62, Gibson Aff. NJX 3; Kuhn Dep. at 15:20-17:14 (discussing Akin Gump creating first draft and filing as T-3).

[24] June 8, 2005 Loral Orion, Inc. Form T-3 at 71, Gibson Aff. NJX 4 (including the draft Indenture that contained the Payments for Consent provision).

[25] June 16, 2005 Email from Stroock Attaching Revised Draft Indenture at SSL-NH-0007120, Gibson Aff. NJX 5 (blacklined version showing changes in language from "will not" to "may" permit payment for consent and not requiring payments to be offered on the same terms to all Noteholders).

[26] June 24, 2005 Email from Akin Gump Attaching Revised Draft Indenture at AKIN0047318, Gibson Aff. NJX 6 (editing the Payments for Consent provision); June 26, 2005 Email from Stroock Attaching Revised Draft Indenture at 58, Gibson Aff. NJX 45 (same).

[27] June 27, 2005 Email from Akin Gump Attaching Revised Draft Indenture at SSL-NH-0007836, SSL-NH-0007953, Gibson Aff. NJX 7 (blackline showing the Payment for Consent provision deleted from drafts).

restricting unequal payments for consent -- the parties decided to file a draft with the bankruptcy court to inform the unsecured creditors of the revisions.[28]

Thus, a blackline copy of the draft Indenture striking the "Payments for Consent" term was filed and made publicly available in connection with Loral's bankruptcy on June 30, 2005.[29] At least one of the plaintiffs, KS Capital, reviewed this blackline draft and discussed it with Akin Gump in July 2005, well before deciding to invest in the Notes.[30] Consequently, when the Notes were issued in November 2005, the purchasers, including all plaintiffs here, had ample notice that the Indenture had initially included, but now did not include, a provision prohibiting the issuer from making consent payments to certain Noteholders, but not others.[31]

4. Anticipated Redemption For Strategic Transaction

The high, 14% rate of interest on the Notes led Michael Targoff, who would become Loral's CEO, to tell Mark Rachesky, the head of MHR -- which would

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[28] Kuhn Dep. at 58:20-60:10 (acknowledging deletion of "Payments for consent" covenant and explaining reasons for publicly filing a blackline).

[29] June 30, 2005 Loral Bankruptcy Filing at 56, Gibson Aff. NJX 8 (including a draft Indenture indicating that the Payments for Consent provision was removed).

[30] Jan. 5, 2006 Email from G. Picco to M. Alam at 1-2, Gibson Aff. NJX 50 (discussing review of 6/30/05 blackline and discussion with Akin Gump and Lehman Brothers).

[31] See generally Nov. 21, 2005 Executed Indenture at Article IV, Gibson Aff. NJX 1 (demonstrating that the Indenture contained no Payments for Consent provision).

become Loral's largest stockholder[32] -- that it would be good for the Company if the Notes could be redeemed promptly following emergence from bankruptcy.[33] This led to further discussions of the interests of MHR and the Company in early redemption of the Notes, in the context of the terms of the Indenture, discussed above, giving any holder with more than one-third of the outstanding Notes, such as MHR, the power to permit Skynet to effectuate redemption.[34] And after Loral emerged from bankruptcy, Dr. Rachesky told Mr. Targoff that MHR would not object to a redemption of the Notes in connection with a large strategic transaction that would help the Company grow -- but until that time MHR was content to collect its interest on the Notes.[35]

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32 See Nov. 9, 2007 Loral 10-Q for the Quarter Ending Sept. 30, 2007 at 39, Gibson Aff. NJX 59 (stating MHR held 35.5% of Loral's common stock as of September 30, 2007); March 15, 2007 Loral 10-K at 25, Gibson Aff. NJX 60 (stating MHR is Loral's largest stockholder).

33 Targoff Dep. Vol. I at 56:21-58:23 (discussing Targoff's desire, on behalf of the Company, to redeem the Notes dating back to even before they were issued); Rachesky Dep. Vol. II at 288:18-291:20 (discussing Targoff's frequently stated desire to redeem the Notes).

34 Targoff Dep. Vol. I at 56:21-57:21 (describing discussion with MHR in which Targoff said that it would be good for the Company if the Notes could be redeemed prior to the call date, which discussion led to the provisions giving Skynet the right to call the Notes with the concurrence of MHR).

35 Targoff Dep. Vol. I at 60:8-62:14 (describing Rachesky's response that MHR would agree to redemption in connection with a transaction, and that it was clear that, given the scale of Loral's fixed satellite services business, it was appropriate for the Company to consider a transaction); 68:8-69:17 (describing conversation with Richard Mastoloni where Targoff said Rachesky would agree to redemption only in connection with a transaction).

C. The Securities Purchase Agreement and the Telesat Deal

Even before Loral emerged from bankruptcy in late 2005, and in order to stay competitive in the satellite industry, Loral began to search for just such a strategic transaction, as well as the additional capital to finance a deal.[36] The first such opportunity was the possible acquisition of another satellite company, New Skies Satellites Holdings Ltd. ("New Skies").[37] In late 2005, shortly after it emerged from bankruptcy, in connection with its attempt to put in a bid for the acquisition of New Skies, Loral sought MHR's agreement to not object to redemption of the Notes.[38] But

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[36] Mastoloni Dep. Vol. I at 93:2-95:6 (explaining the reasons for and requirements for structuring such financial transactions).

[37] Mastoloni Dep. Vol. I at 162:9-163:13 (discussing consideration of the New Skies deal in November - December of 2005); Targoff Dep. Vol. II at 222:4-17 (discussing the first time MHR was approached to provide Loral with an equity infusion, which was in the context of the New Skies deal); Jan. 17, 2006 New Skies Satellites Holdings Ltd. Sched. 14A, Proxy Statement at 22, Gibson Aff. NJX 47 (discussing approach of New Skies by Company D, which is Loral).

[38] Dec. 10, 2005 Email from W. Hiller at 1-2, Gibson Aff. NJX 61 (explaining need for MHR's non-objection as part of financing the New Skies acquisition); Dec. 11 Email from W. Hiller and Attached Letter, Gibson Aff. NJX 46 (attaching draft consent letter).

At one point during these negotiations, MHR's counsel requested from Loral's counsel that Loral agree to consider, at a later date, a fee to be paid in consideration for MHR's non-objection. Dec. 12, 2005 Email from D. Lipshitz and Attached Letter, Gibson Aff. NJX 48 (requesting recognition that fee is customary and agreement to negotiate fee in good faith); Dec. 13, 2005, Email from Stroock Regarding MHR's Consent to Redemption, Gibson Aff. NJX 64. But Loral never agreed to that request. Yeung Dep. Vol. III at 514:24-515:17, 520:16-521:16, 526:18-527:14, 532:3-18 (draft proposal by MHR requesting that Loral consider fee did not impose any obligation on Loral to pay such fee; draft

shortly thereafter, New Skies rejected Loral's bid due to concerns over both Loral's ability to obtain the requisite financing and its recent emergence from bankruptcy.[39] Consequently, Loral began negotiations with MHR a few months later in early 2006 regarding a possible cash infusion to, among other possible uses, facilitate a future strategic transaction.[40] These negotiations quickly resulted in a proposal by MHR to purchase convertible preferred securities via the SPA.[41]

1. MHR Includes a Non-Objection Provision in the Very First Term Sheet to Loral

From the beginning of the SPA discussions, it was part of MHR's proposal that it would cooperate with a provisional call of the Notes in connection with a significant M&A transaction, thereby negating the prospect of any consent fee.[42] Indeed,

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Board resolution to approve consideration of fee to MHR was never presented to Board); Targoff Dep. Vol. IV at 691:22-692:3 (no recollection of being presented with a request to consider paying a fee).

39 Jan. 17, 2006 New Skies Satellites Holdings Ltd. Sched. 14A, Proxy Statement at 23, Gibson Aff. NJX 47 (discussing reasons for rejecting bid of Company D, which is Loral).

40 May 16, 2006 Offer Letter from MHR to Loral at 1, Gibson Aff. NJX 9 (letter from MHR attaching a proposed term sheet for a $300 million investment by MHR in Loral).

41 May 16, 2006 Offer Letter from MHR to Loral at 1, Gibson Aff. NJX 9 (letter from MHR attaching a proposed term sheet for a $300 million investment by MHR in Loral).

42 Targoff Dep. Vol. I at 60:8-23 (describing Rachesky's statement that MHR would agree to redemption in connection with a transaction); 68:8-69:17 (describing

the very first term sheet provided to the Company in conjunction with a proposed SPA included an agreement by MHR not to object to the redemption of the Notes in the event that the Company entered into a strategic transaction of a billion dollars or more.[43] Over the intervening months, this provision -- which would become Section 5.01 of the final SPA -- was negotiated downward to be triggered in the event the Company consummated a smaller strategic transaction.[44] Accordingly, the final-proposed SPA included an agreement by MHR not to object to optional redemption of the Notes if redemption was made at or following the closing of a transaction valued at $600 million or more.[45]

2. The Board Approves the MHR SPA

After extensive negotiations and after receiving a recommendation from a special committee of its Board of Directors established to review and negotiate potential

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conversation with Richard Mastoloni where Targoff said Rachesky would agree to redemption only in connection with a transaction).

[43] May 16, 2006 Offer Letter from MHR to Loral at 7, Gibson Aff. NJX 9 (attaching proposed term sheet including a provision relating to MHR's consent to the redemption of the Notes).

[44] Harkey Dep. Vol. II at 461:20-462:24 (stating that the $1 billion threshold was too high and so the Special Committee countered at approximately $500 million); Mastoloni Dep. Vol. II at 402:15-25 (stating that he believed that one of the items being negotiated was the threshold); Oct. 16, 2006 Email from Stroock to King & Spalding, Willkie Farr, and Loral at 23, Gibson Aff. NJX 10 (attaching a draft of the SPA that adds the language "subject to the consummation of such Acquisition" to Section 5.01).

[45] Oct. 17, 2006 SPA at 22-23, Gibson Aff. NJX 11 (setting forth the provisions regarding redemption of Skynet Notes).

financing arrangements, Loral's Board voted on October 17, 2006 to enter into a securities purchase agreement with MHR.[46] Pursuant to that agreement, MHR was to provide Loral a cash infusion of $300 million and, in exchange, MHR would acquire shares of convertible preferred stock and receive a placement fee of $6.75 million and reimbursement of its legal and advisory fees upon closing.[47]

No separate consideration was provided to MHR in exchange for its agreement not to object to the optional redemption of the Notes. Rather, the non-objection provision was simply included as part of the overall deal.[48] Moreover, under these circumstances, Mr. Targoff would not authorize any separate consideration to be

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46 Oct. 17, 2006 Board Minutes at 1-2, Gibson Aff. NJX 13 (stating that the Board was prepared to move forward with the SPA).

47 Oct. 17, 2006 SPA at 10-11, 22, 37, Gibson Aff. NJX 11 (setting forth the provisions regarding purchase/sale of securities, agreements between Loral and its investors, and fees); Jacquin Dep. Vol. II 529:13-530:10 (stating that the Special Committee decided to provide a placement fee because the Company would have had to pay a placement fee in connection with any underwritten transaction).

The preferred stock that MHR was to receive pursuant to the SPA was convertible into Loral common stock at a strike price of $30.1504 per share of common stock, and entitled MHR to receive PIK dividends through at least January 2011. Oct. 17, 2006 SPA at 10-11, Gibson Aff. NJX 11 (setting forth the provisions regarding the purchase and sale of securities); Oct. 17, 2006 Email Attaching Loral Press Release Regarding the SPA, Gibson Aff. NJX 52 (summarizing the terms of the SPA).

48 Apr. 17, 2006 Email from Willkie to Loral, Gibson Aff. NJX 14 (Targoff states that the "[non-objection provision] would be part of any equity deal and there would be no payment for the 'proxy'"); Targoff Dep. Vol. I at 204:9-22 (same); Katz Dep. at 148:7-12 (stating that he is unaware of any monetary value ascribed to non-objection provision).

paid to MHR for its agreement not to object to optional redemption,[49] because a material strategic transaction was in the best interests of MHR as a stockholder, and therefore, he believed MHR would agree to redemption regardless of any contractual obligation.[50] Indeed, Dr. Rachesky himself explained that, while the non-objection provision in the SPA may have harmed MHR as a Noteholder in the short term, a large strategic transaction was in the best interests of Loral and its stockholders, including MHR.[51]

3. A Potential Rights Offering Is Discussed

Following the announcement of the SPA, plaintiff Murray Capital objected to terms of the SPA and requested that Loral's Board consider alternative proposals that would be offered to all stockholders.[52] Murray Capital's objections focused on the financial terms of the SPA and never mentioned MHR's agreement not to object to

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49 Targoff Dep. Vol. I at 104:17-105:3; 106:7-107:15 (stating that "I . . . wouldn't pay for a proxy or waiver" as it relates to MHR's consent to redemption of Notes).

50 Targoff Dep. Vol. I at 108:15-23 (expressing doubt that the non-objection provision needed to be included to obtain MHR's non-objection).

51 Rachesky Dep. Vol. II at 281:7-282:6 (explaining why it was in Loral and MHR's best interest to do a large, long-term transaction); see also Rachesky Dep. Vol. II at 306:8-308:10, 308:19-309:23 (explaining the various risk factors regarding the satellite business and the Notes in the context of MHR's agreement not to object to redemption); Targoff Dep. Vol. I at 106:7-107:15, 116:21-117:14, 124:14-16, 204:23-205:22 (stating that Loral would not pay for non-objection provision because it was "ice in the winter" and MHR would have consented regardless in connection with a transaction).

52 See October 25, 2006 Letter from Murray Capital to Loral's Board, Gibson Aff. NJX 12 (letter from Murray Capital expressing its "deep concern" regarding the financial terms of the SPA).

optional redemption of the Notes.[53] In response to this and other concerns raised by its stockholders, Loral requested that MHR propose an alternative to the SPA that would include the participation of all interested stockholders,[54] although Loral recognized (both publicly and expressly to Murray Capital) that the SPA was still an enforceable agreement if no alternative agreement was reached.[55]

On November 15, 2006, MHR proposed such a potential alternative transaction, which contemplated a rights offering that would allow all of Loral's stockholders to participate.[56] Loral thought that any such alternative agreement should include a non-objection provision regarding optional redemption similar to Section 5.01

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53 See October 25, 2006 Letter from Murray Capital to Loral's Board at 1, Gibson Aff. NJX 12 (letter from Murray Capital expressing its "deep concern" regarding the financial terms of the SPA).

54 See October 27, 2006 Loral Press Release, Gibson Aff. NJX 15 (requesting that MHR consider an alternative "that would include the participation of all interested shareholders").

55 See Dec. 18, 2006 Final Transcript: Loral Merger and Acquisition Announcement at 9, Gibson Aff. NJX 17 (Targoff states that "[w]e have a contract with MHR. We would expect that the - that contract or an alternative will be completed prior to this - closing of this transaction"); Dec. 20, 2006 Email from John McCarthy to Marti Murray, Gibson Aff. NJX 53 (stating that "we still have a deal with MHR for the preferred. Obviously, that's being looked at and like Mickey said at the S/H meeting, he sees a positive alternative . . . .").

56 See Nov. 15, 2006 Email from MHR to Loral's Board Attaching Rights Offering Term Sheets, Gibson Aff. NJX 18 (email attaching term sheets related to a rights offering that was intended to permit stockholders to participate in that transaction).

of the SPA.[57] In the end, however, the alternative transaction was shelved before negotiation of final documents -- including a non-objection provision -- and MHR elected to proceed with the SPA.[58] Loral and MHR thereafter consummated a slightly modified Amended and Restated SPA on February 27, 2007.[59]

With this capital commitment in hand following the execution of the SPA, Loral and its Canadian equity partner, the Public Sector Pension Investment Board, announced on December 18, 2006 that they had formed a joint venture that had agreed to acquire Telesat -- a deal valued at $2.8 billion.[60] The agreed transaction required Loral to contribute the assets of Skynet to the new joint venture unencumbered by the lien of the

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57 See Yeung Dep. Vol. II at 449:16-454:24 (stating that while MHR's initial proposed rights offering did not include a term that would require MHR to submit its non-objection regarding the redemption of the Notes, she "wanted to make it clear that the [non-objection] provision would survive").

58 Harkey Dep. Vol. II at 496:1-13 (stating that MHR was unwilling to modify the terms of the rights offering proposal, and the parties ultimately did not reach agreement on the rights offering); see also Capers Dep. Vol. I at 198:6-199:17 (stating that the Special Committee had a number of problems with MHR's proposal but that the attempts to engage in conversations with MHR failed); Rachesky Dep. Vol. II at 298:6-299:12 (rejecting the idea that MHR excluded the non-objection provision because the terms of the rights offering proposals were not as favorable to MHR as the SPA); 305:13-24 (stating that MHR felt that, given the stock price increase, it had a fiduciary duty to its investors not to pursue alternatives to the SPA).

59 Feb. 27, 2007 Amended and Restated SPA, Gibson Aff. NJX 19.

60 Dec. 18, 2006 Loral Press Release at 2, Gibson Aff. NJX 20 (the article "Loral and PSP Investments Agree to Acquire Telesat Canada" summarizing the terms of the Telesat deal).

Notes, requiring their redemption before or in conjunction with the closing of the Telesat deal.[61] Thus, on December 18, 2006, Loral disclosed its plan to exercise its rights under the Indenture to redeem the Notes.[62]

D. Plaintiffs Object to Redemption

After these announcements, plaintiffs and other Noteholders formed an Ad Hoc Committee with the apparent intention of blocking the provisional call.[63] Through their counsel, Goodwin Procter, the Ad Hoc Committee began a letter-writing campaign expressing various theories under which they objected to the redemption of the Notes and

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61 Dec. 18, 2006 Loral Press Release at 1-2, Gibson Aff. NJX 20 (stating that Skynet would transfer its assets to the new Canadian company and that the Notes would be redeemed in connection with the transaction).

62 Dec. 18, 2006 Final Transcript: Loral Merger and Acquisition Announcement at 7, 11-12, Gibson Aff. NJX 17 (stating that Skynet's debt would be refinanced in connection with the Telesat deal and that assuming the required consents were obtained the redemption would occur at 110%); Dec. 18, 2006, Loral Press Release at 2, Gibson Aff. NJX 20 (stating that Skynet intended to retire the Notes).

63 Jan. 5, 2007 Email from Watershed Attaching Article Regarding the Ad Hoc Committee, Gibson Aff. NJX 21 (stating that the Ad Hoc Committee's call would be focused on "rallying opposition from other holders against Loral's plan to redeem the notes"); Jan. 11, 2007 Email from Watershed Attaching Article Regarding the Ad Hoc Committee, Gibson Aff. NJX 22 (stating that the holders of the Notes would wait to send their letter to Loral opposing the redemption of the Notes until the notice of redemption is distributed); Feb. 15, 2007 Ad Hoc Committee Voting Agreement at AHC00000001-2, Gibson Aff. NJX 23 (the voting agreement entered into between the members of the Ad Hoc Committee that required each member to object to any redemption scenario where Loral offered 110% or less to the Noteholders in connection with the optional redemption).

requesting that the Trustee commence legal action.[64] The Trustee disagreed with the Ad Hoc Committee's version of the facts and concluded that it would not commence legal action.[65] On June 5, 2007, Loral issued a press release announcing that, pursuant to the express terms of the Notes, Skynet had initiated the process to redeem all of the outstanding Notes at a redemption price equal to 110% of the principal amount of the notes, plus accrued and unpaid interest.[66]

Plaintiffs continued with their efforts to extract additional value from Loral by trying to thwart the redemption of the Notes and the closing of the Telesat deal.[67] On

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64 Feb. 15, 2007 Letter from Goodwin Procter to Loral at 1-2, Gibson Aff. NJX 24 (expressing the belief that the Notes held by MHR would not be counted under the Indenture or applicable law for the purposes of determine whether the 2/3 threshold has been met); Mar. 27, 2007 Letter from Goodwin to the Trustee at 1-2, Gibson Aff. NJX 25 (expressing the belief that certain fees were provided to MHR for its agreement not to object to the redemption of the Notes and that constitutes an Event of Default); Apr. 19, 2007 Letter from Goodwin to the Trustee at 1-2, Gibson Aff. NJX 26 (expressing the belief that the implied covenant of good faith and fair dealing has been breached).

65 Apr. 11, 2007 Letter from Bryan Cave to Goodwin Procter at 2, Gibson Aff. NJX 27 (requesting that Goodwin Procter provide additional information regarding the events that resulted in a default); April 24, 2007 Letter from Bryan Cave to Goodwin Procter at 1-2, Gibson Aff. NJX 51 (finding no event of default).

66 June 5, 2007 Loral Press Release at 1, Gibson Aff. NJX 28 ("Skynet to Redeem 14% Senior Secured Notes").

67 June 11, 2007 Email from Denis Smith to Marti Murray, Gibson Aff. NJX 29 (forwarding email from Mark Fein stating that this would be an "unwinnable case" and "I understand if you all feel it is a fight worth fighting perhaps for holdout value but we see no merit in it"); May 18, 2007 Email from M. Alam to M. Fein at 1, Gibson Aff. NJX 62 (Fein states "Marti told that a bunch of you were trying

June 13, 2007, plaintiffs initiated this action, and on June 29, 2007, they filed a Motion for Preliminary Injunction seeking to prevent Loral from redeeming the Notes.[68] This Court, however, ruled that a preliminary injunction was not warranted, thereby denying plaintiffs the ability to capture any hold-up value.[69]

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to get some differential treatment for the secured bonds"); Murray Dep. Vol. II at 458:7-18 (stating that Murray Capital did not think that the litigation was brought to obtain any holdup value; rather, it was brought to prevent the redemption).

Even after learning that the Notes would be redeemed and that MHR would not object, Murray Capital purchased additional Notes through May 2007, and even sought to purchase MHR's Notes in July 2007 as a way to try to stop the redemption. Nov. 16, 2007 Plaintiff Murray Capital Management, Inc.'s Answers to Defendants' First Set of Interrogatories at 4-5, Gibson Aff. NJX 30 (responding that Murray Capital purchased additional Notes in December 2006, January 2007, February 2007, and May 2007); Murray Dep. Vol. II at 418:18-419:8 (stating that Murray Capital contemplated objecting to the redemption of the Notes as of December 2006, but subsequently purchased additional Notes); July 2, 2007 Letter from Murray Capital to MHR, Gibson Aff. NJX 31 (letter from Murray Capital offering to purchase $40,000,000 worth of Notes from MHR); July 5, 2007 Letter from Murray Capital to MHR, Gibson Aff. NJX 32 (letter from Murray Capital following up on the July 2nd letter).

68 June 13, 2007 Complaint, Gibson Aff. NJX 33 (complaint initiating this action); June 29, 2007 Plaintiffs Motion for Preliminary Injunction, Gibson Aff. NJX 34 (plaintiffs' preliminary injunction motion).

69 July 16, 2007 Teleconference Transcript Before Hon. Leo E. Strine, Jr. at 19, Gibson Aff. NJX 35 ("I'm going to grant expedited proceedings, but I'm not going to hold anything before August 13th. This is going to be dependent on the defendants putting up the security they mentioned").

Shortly after that ruling, Loral announced that it had not received objections from the holders of the requisite two-thirds in principal amount of the Notes.[70] In fact, only 43% of the outstanding Notes objected, with MHR providing notice of its non-objection to Loral on July 3, 2007.[71] Consequently, all of the outstanding Notes were redeemed on September 5, 2007.[72] The Telesat deal closed nearly two months later, on October 31, 2007, following regulatory approvals.[73] The liens on collateral for the Notes having been released, Loral contributed Skynet's assets to the Telesat joint venture.[74]

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70 Aug. 9, 2007 Loral 10-Q for the Quarter Ending June 30, 2007 at 25, Gibson Aff. NJX 36 ("On July 12, 2007, the Trustee reported that objections to the proposed redemption had been received from holders of Skynet Notes representing less than two-thirds of the outstanding Skynet Notes, and, on July 16, 2007, at the request of Skynet, the Trustee issued an unconditional Notice of Full Redemption. Consequently, the Skynet Notes will be redeemed on September 5, 2007").

71 August 1, 2007 Email from W. Hiller Attaching Redemption Materials at WFG0000381, Gibson Aff. NJX 63 (showing objections from $52.3 million out of $120.3 million outstanding); July 3, 2007 Email from MHR to Loral and Willkie, Gibson Aff. NJX 37 (Email from Hal Goldstein of MHR stating that MHR was providing its non-objection as to all of the Notes that it owned).

72 Sept. 6, 2007 Loral 8-K at 2, Gibson Aff. NJX 38 ("On September 5, 2007, the Company completed the Note Redemption pursuant to the Indenture, dated as of November 21, 2005 . . . . Accordingly, the Indenture has been satisfied and discharged").

73 Oct. 31, 2007 Loral Press Release at 1, Gibson Aff. NJX 39 ("Loral and PSP Investments Complete CAD 3.25 Billion Acquisition of Telesat Canada").

74 Oct. 31, 2007 Loral Press Release at 1, Gibson Aff. NJX 39 (Skynet contributed its assets to fund Loral's purchase of 64% of Telesat).

With the closing of the Telesat deal, Loral had transformed its regional fixed satellite services business into the fourth largest operator in the world.[75]

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75 Oct. 31, 2007 Loral Press Release at 1, Gibson Aff. NJX 39 (Targoff is quoted as saying that "With the new Telesat, Loral has transformed its regional fixed satellite services business into a 64 percent interest in the fourth largest FSS operator in the world").

ARGUMENT

Plaintiffs' case fails for three reasons.

First, no express covenant or term of the Indenture or Notes would be breached even if consideration is deemed to have flowed to MHR in connection with its non-objection.

Second, defendants did not, in fact, provide any consideration to MHR in exchange either for MHR's agreement in the SPA not to object to a provisional call under certain circumstances, or for MHR's withholding objection to the redemption in question here.

Third, plaintiffs have failed to comply with the Limitation on Suits provision in the Indenture, which by itself precludes any suit by these plaintiffs under the Indenture or the Notes.

I. DEFENDANTS DID NOT BREACH ANY COVENANT OR TERM OF THE INDENTURE OR THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The Indenture is governed by New York law,[76] under which the "construction and interpretation of an unambiguous written contract is an issue of law within the province of the court." Hatch v. NYCO Minerals, Inc., 666 N.Y.S.2d 296, 298 (N.Y. App. Div. 1997). Plaintiffs allege that "Defendants' payments to MHR in exchange

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76 Nov. 21, 2005 Executed Indenture at Disclosure Page 90, Gibson Aff. NJX 2 (Indenture and Notes governed by New York law).

for MHR's non-objection to the below make-whole redemption without offering similar benefits to other Holders constitutes breach of a covenant of the Indenture and breach of the Notes."[77] The facts, however, reveal no such breach,[78] and plaintiffs' reliance on the doctrine of the implied covenant of good faith and fair dealing is equally misplaced.

A. DEFENDANTS HAVE NOT BREACHED ANY EXPRESS TERM OF THE INDENTURE OR THE NOTES

In their response to an interrogatory requesting identification of "each and every provision, term or covenant of the Indenture or the Notes that you contend that the Defendants have breached," plaintiffs identified four provisions:

- Section 5 of the Notes, which governs optional redemption,
- Section 6.01 of the Indenture regarding "Events of Default,"
- Section 6.07 of the Indenture regarding "Rights of Holders to Receive Payment," and
- Section 12.06 of the Indenture regarding "When Notes Disregarded."[79]

In response to the subsequent interrogatory asking for a description of the acts or omissions that constituted the purported breach of each such provision, plaintiffs

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77 June 13, 2007 Complaint at ¶ 78, Gibson Aff. NJX 33.

78 Cf. January 23, 2008 Plaintiffs' Answers to Defendants' Third Set of Interrogatories to Plaintiffs at 3-4, Gibson Aff. NJX 40 (stating that defendants breached Section 5 of the Notes and Sections 6.01, 6.07, and 12.06 of the Indenture).

79 January 23, 2008 Plaintiffs' Answers to Defendants' Third Set of Interrogatories to Plaintiffs at 3-4, Gibson Aff. NJX 40.

responded only with a general reference to the SPA, specifying Section 5.01 and "the events involved in its negotiations, signing and consummation as well as to Defendants' exercise of the optional redemption of the Notes in August 2007."[80]

As an initial matter, the actions that plaintiffs allege constituted a breach of the Indenture -- the execution of the SPA and the alleged payment of consideration to MHR -- were undertaken by Loral, which is not even a party to the Indenture. The actions of a non-party cannot constitute a breach of a contract. See Blank v. Noumair, 658 N.Y.S.2d 88, 88 (N.Y. App. Div. 1997) ("the plaintiff's breach of contract cause of action was properly dismissed inasmuch as the defendant was not a party to the agreements in question"). Here, Skynet is the issuer of the Notes and the entity subject to the terms of the Indenture, not Loral.[81] Moreover, the Indenture provisions plaintiffs cite do not prohibit payments for consent -- even if they came from Skynet.

1. The Provisional Call: Section 5 of the Notes

Section 5 of the Notes gives the issuer the right to redeem the Notes prior to 2009 at a redemption price of 110% of the principal amount, unless two-thirds of the Noteholders object.[82] On June 5, 2007, Loral announced that it would seek to redeem the

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80 January 23, 2008 Plaintiffs' Answers to Defendants' Third Set of Interrogatories to Plaintiffs at 4-5, Gibson Aff. NJX 40.

81 Nov. 21, 2005 Executed Indenture at Disclosure Pages 2, 75, Gibson Aff. NJX 2 (identifying Skynet as Issuer; listing Loral subsidiaries (but not Loral) as Guarantors).

Notes pursuant to this provision in order to consummate the Telesat deal.[83] After due notice, fewer than two-thirds of the Noteholders objected, and -- following the denial of plaintiffs' motion for a preliminary injunction -- the Notes were redeemed on September 5, 2007.[84]

All of this occurred in accordance with the express terms of the Indenture and any reasonable expectations of the parties who negotiated it. Indeed, although the Noteholders are bound by the terms of the Indenture whether or not they have read its terms, Metropolitan Life Insurance Co. v. RJR Nabisco, Inc., 716 F. Supp. 1504, 1509 (S.D.N.Y. 1989),[85] the publicly-available offering documents sent to the unsecured creditors went out of their way to point out the fact that MHR's expected ownership of more than one-third of the Notes gave it effective control over the provisional call.[86]

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82 Nov. 21, 2005 Executed Indenture at Disclosure Page 101-02, Gibson Aff. NJX 2.

83 June 5, 2007 Loral Press Release at 1, Gibson Aff. NJX 28.

84 Sept. 24, 2007 Loral 8-K at 2, Gibson Aff. NJX 41 (stating that the Notes were redeemed on September 5, 2007).

85 "[H]olders of public bond issues, like plaintiffs here, often enter the market after the indentures have been negotiated and memorialized . . . . What remains equally true, however, is that underwriters ordinarily . . . . negotiate in part with the interests of the buyers in mind. Moreover, these indentures [are] not secret agreements foisted upon unwitting participants in the bond market." Metro. Life, 716 F. Supp. at 1509.

86 Disclosure Statement at 99-100, Gibson Aff. NJX 1.

In addition, defendants strictly complied with all of the procedures set forth in Section 5 of the Notes to effectuate the provisional call, and plaintiffs cannot claim otherwise. Yet, plaintiffs appear to contend that Section 5.01 of the SPA -- a contract between Loral and MHR only -- somehow violated Section 5 of the Notes. MHR promised Loral in Section 5.01 of the SPA that it would not object to a provisional call under specified circumstances,[87] and Section 5 of the Notes is what gives Skynet the right to effect the provisional call unless two-thirds of the Noteholders object. Section 5 contains not a word suggesting any limitation on the means that Skynet or any other party to the Indenture may employ to induce Noteholders to agree not to object, and *a fortiori* does not prohibit a non-party, Loral, from purchasing such agreements.

2. Events of Default and Rights of Holders to Receive Payment: Sections 6.01 and 6.07 of the Indenture

Plaintiffs' general reference to Section 6.01 of the Indenture ("Events of Default") adds nothing to their claim. The ten events of default listed in that section essentially cross-refer to other provisions of the Indenture and the Notes, none of which contain a prohibition on payments for consent, and none of which purport to bind Loral in any way.[88] As to Section 6.07, that provision provides that the Noteholders' right to

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[87] Feb. 27, 2007 Amended and Restated SPA at 24, Gibson Aff. NJX 19.

[88] Nov. 21, 2005 Executed Indenture at Disclosure Page 59-60, Gibson Aff. NJX 2. Section 6.01 also contains a provision relating to breach of any covenant or other agreement in the Notes or the Indenture (No. 4). Basing a breach of contract

receive payment of principal and interest on the Notes "shall not be impaired or affected without the consent of such Holder."[89] In total, these provisions embody the Noteholders' benefit of the bargain under the Indenture and the Notes: the right to receive principal and interest owed to them, subject to the provisional call. And that is what plaintiffs received in full on September 5, 2007, with a ten percent premium to boot.[90]

3. When Notes Disregarded: Section 12.06 of the Indenture

Plaintiffs also apparently allege a breach of Section 12.06, which calls out MHR by name as a Noteholder whose votes will count. Under this provision, Notes held by the issuer or its affiliates -- defined as "any Person directly or indirectly controlling or controlled by or under direct or indirect common control with the Company" -- are to be disregarded in determining whether the holders of the required principal amount have concurred in any direction, waiver, or consent.[91] However, in the course of negotiation of the Indenture, a final sentence was added to Section 12.06 to ensure this provision did not

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action on that provision, though, requires plaintiffs to show that another term of the Notes or the Indenture was breached -- which they cannot do.

89 Nov. 21, 2005 Executed Indenture at Disclosure Page 59-60, Gibson Aff. NJX 2.

90 Murray Dep. Vol. I at 160:4-7 (plaintiffs were paid 110% plus all accrued interest upon redemption); June 13, 2007 Notice of Redemption, Gibson Aff. NJX 42 (stating that the Notes would be redeemed at 110% plus accrued and unpaid interest).

91 Nov. 21, 2005 Executed Indenture at Disclosure Page 90, Gibson Aff. NJX 2.

apply to MHR.[92] In short, there simply was no breach here of this or any other express provision of the Indenture or the Notes.

B. LORAL DID NOT BREACH ANY IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Every contract governed by New York law, including the Indenture at issue here, is subject to the doctrine of the implied covenant of good faith and fair dealing. See Hartford Fire Insurance Co. v. Federated Dep't Stores, Inc., 723 F. Supp. 976, 991 (S.D.N.Y. 1989) (citing Rowe v. Great Atl. & Pac. Tea Co., 385 N.E.2d 566, 569 (N.Y. 1978)). But contrary to how plaintiffs would ask the Court to employ it, the doctrine of the implied covenant of good faith and fair dealing does not swallow the rest of contract law whole, giving litigants free rein to rewrite contracts as they might have wished them to be.

On the contrary, the doctrine is one that respects and advances the underlying business deal, sometimes referred to as the "fruits" of the agreement, as evidenced within the four corners of the agreement in question. See Hartford Fire, 723 F. Supp. at 991 (covenant of good faith and fair dealing "does not provide a court *carte blanche* to rewrite the parties' agreement," or to "imply a covenant inconsistent with

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92 Nov. 12, 2004 Draft Indenture at 62, Gibson Aff. NJX 3 (omitting the provision); June 8, 2005 Loral Orion Inc. Form T-3 at 71, Gibson Aff. NJX 4 (including the provision).

terms expressly set forth in the contract."); Metro. Life Ins. Co. v. RJR Nabisco, Inc., 716 F. Supp. 1504, 1517 (S.D.N.Y. 1989).

Ironically, as plaintiffs themselves noted in their preliminary injunction motion, an implied restrictive covenant exists where it is "clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith -- had they thought to negotiate with respect to that matter."[93] Katz v. Oak Indus., Inc., 508 A.2d 873, 880 (Del. Ch. 1986); see also In re Bennett, 154 B.R. 140, 154 (Bankr. N.D.N.Y. 1992) (observing that covenant applies in situations "that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties.") (citations omitted). This rule does not help the plaintiffs, who evidently invoked it prior to becoming aware of the public record evidencing the fact that the parties had indeed "thought to negotiate with respect to that matter."

Even if this were not a case where the parties had expressly negotiated the provision in question out of the Indenture, the implied covenant of good faith and fair dealing should not be used to write it into the Indenture, because it is not "clear from what was expressly agreed upon that the parties would have agreed to proscribe" unequal

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[93] June 29, 2007 Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 11, Gibson Aff. NJX 43.

payments for consent. Katz, 508 A.2d at 880. Such provisions are hardly unheard of,[94] but are found in only a minority of indentures -- as a computer search of indentures on EDGAR bears out[95] -- making it the opposite of "clear" that the parties would have agreed to it. The implied covenant of good faith and fair dealing has no application to a restrictive covenant, like a no-payments-for-consent term, that sophisticated parties only agree to in exceptional cases.

Of course, the actual history of Indenture negotiations is that the very covenant that plaintiffs would ask the Court to imply was, in fact, considered and rejected during negotiations. The first draft of the Indenture that was publicly filed contained just such a covenant.[96] MHR's counsel, however, objected to this clause and initially

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94 For the Court's convenience, defendants have provided a compendium of fifty publicly filed indentures containing a provision precluding unequal payments for consent. See In re GM (Hughes) S'holder Litig., 897 A.2d 162, 171 (Del. 2006) (proper for the Court of Chancery, pursuant to Delaware Rule of Evidence 201, to take judicial notice of the publicly available facts, as reported in filings with the SEC). Defendants would again be happy to provide more examples should the Court find it helpful. See also Yeung Dep. Vol. II at 404:20-25, 405:11-406:15 (stating that provisions prohibiting unequal consent payments are common in indentures); Mastoloni Dep. Vol. II at 486:19-489:10 (same); Kuhn Dep. at 31:2-19 (same).

95 For the Court's convenience, defendants have provided a compendium of indentures publicly filed in the five months prior to the issuance of the Notes in this case. Of that sample, approximately ten percent contained a provision precluding unequal payments for consent. Defendants would be happy to provide a sample from other time periods should the Court find it helpful.

96 June 8, 2005 Loral Orion Inc. Form T-3 at 71, Gibson Aff. NJX 4 (including the Payments for Consent provision).

suggested reversing the provision by explicitly permitting Loral to pay unequal consideration for consents.[97] The final Indenture went MHR's way on this point, by striking the prohibition on unequal payments for consent altogether.[98]

Because the payments-for-consent provision not only could have been contemplated, but was actually negotiated out of the Indenture by the parties and their sophisticated advisors and counsel,[99] the doctrine of the implied covenant of good faith and fair dealing has no application here. See Reiss v. Fin. Performance Corp., 764

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97 June 16, 2005 Email from Stroock Attaching Revised Draft Indenture at 47, Gibson Aff. NJX 5 (providing that Skynet may pay consideration for consents).

98 Nov. 21, 2005 Executed Indenture Art. IV, Gibson Aff. NJX 2 (no covenant regarding consideration for consent); June 30, 2005 Loral Bankruptcy Filing at 56, Gibson Aff. NJX 8 (blackline showing deletion of provision). See generally Greenfield v. Phillies Records, Inc., 780 N.E.2d 166, 168 (N.Y. 2002) (holding record producer had unconditional right to redistribute artists' performances in any technological form absent "an explicit contractual reservation of rights by the artists"); City of Yonkers v. Otis Elevator Co., 844 F.2d 42, 46, 45-48 (2d Cir. 1988) (finding manufacturer not obliged to continue manufacturing in City of Yonkers after change in circumstances where "[n]one of the agreements or other documents . . . includes any specific commitment by Otis to continue production at its Yonkers facility"); Hiller Dep. at 168:9-17 ("[An] indenture is a contract. It contains restrictions on the ability of the issuer to engage in actions. This is part of the covenant provision or covenant article in the indenture. If there is no restriction on the ability of the company to do something, then the company can do it unless [it's] prohibited by law.")

99 That the parties considered conflicting provisions regarding unequal consideration for consent in no way creates an ambiguity as to whether Loral could offer unequal consideration. Under New York law, ambiguity in a contract "never arises out of what was not written at all, but only out of what was written so blindly and imperfectly that its meaning is doubtful." Tr. of Freeholders & Commonalty of Southampton v. Jessup, 65 N.E. 949, 951 (N.Y. 1902).

N.E.2d 958, 961 (N.Y. 2001) ("this court will not imply a term where the circumstances surrounding the formation of the contract indicate that the parties, when the contract was made, must have foreseen the contingency at issue and the agreement can be enforced according to its terms"); Hartford Fire Ins. Co., 723 F. Supp. at 992 (implied covenant not breached because "the Indenture could easily have been drafted to incorporate expressly the terms the plaintiffs now urge this court to imply").[100]

II. MHR RECEIVED NO CONSIDERATION FOR NOT OBJECTING TO THE PROVISIONAL CALL AND ANY CONSIDERATION IT COULD BE DEEMED TO HAVE RECEIVED CAME FROM LORAL AND NOT FROM SKYNET

Leaving the legal deficiencies in plaintiffs' claim to one side for the moment, the fact remains that there was no price tag on MHR's agreement in Section 5.01 of the SPA not to object to a provisional call under certain conditions,[101] and all consideration to MHR under the SPA flowed in any event from Loral -- and not from Skynet or any other Indenture obligor. In addition, carefully read, Section 5.01 of the SPA actually left MHR free to object under the circumstances in question, but MHR nonetheless withheld its objection without demanding any fee.

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[100] See also Metropolitan Life Ins. Co., 716 F. Supp. at 1522 ("courts are properly reluctant to imply into an integrated agreement terms that have been and remain subject to specific, explicit provisions, where the parties are sophisticated investors").

[101] Feb. 27, 2007 Amended and Restated SPA at 24, Gibson Aff. NJX 19.

Pursuant to the SPA, Loral agreed to provide MHR with a variety of rights in exchange for MHR's cash infusion, but it did not set aside any separate consideration to be provided to MHR for its agreement not to object to redemption. In the words of Mr. Targoff, because of the importance to Loral of a strategic transaction and MHR's equity stake in Loral, MHR's agreement not to object to a provisional call in connection with such a transaction was "ice in the winter" -- that is, something one can get for free because it is there for the taking.[102] MHR's large equity interest in Loral meant that it had a significant potential upside resulting from any strategic transaction.[103] Thus, redemption of the Notes and the resulting release of the liens on the collateral assets in the context of such a transaction made economic sense to MHR as a stockholder,

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[102] June 3, 2006 Email from Michael Targoff to Arthur Simon, Gibson Aff. NJX 16 ("I think the current offer with the $1bn is 'ice in the winter'"); see Kraus Dep. at 126:7-127:4 ("ice in the winter" means "something that is so abundant and easy to have . . . . It's a free good because it's just there to be picked up.").

[103] Targoff Dep. Vol. I at 58:8-60:23 (stating that when Targoff asked Rachesky whether redemption of the Notes would be in MHR's financial interest as a result of MHR's common stock holdings, Rachesky replied that MHR will agree to redemption when Loral does a transaction); Simon Dep. Vol. II at 422:16-423:8 ("That was -- that was in the original terms and it was a dead give-away. So I didn't have to -- don't have to negotiate things that are given to me."); Simon Dep. Vol. III at 452:10-453:15 (stating that MHR's non-objection was a "giveaway" by MHR).

outweighing any concerns as a Noteholder.[104] In this context, it was the responsible course for Loral to obtain MHR's non-objection in writing, as it was there for the taking.

Any claim that the MHR placement fee negotiated late in the transaction was a disguised payment in exchange for Section 5.01 is refuted by the facts.[105] The non-objection provision ultimately reflected in Section 5.01 of the SPA was actually included in the very first term sheet for this agreement and finalized early during the SPA negotiations, months before the key economic terms of the deal.[106] In addition, the Special Committee of the Board of Directors negotiating the SPA concluded that it was appropriate to pay a placement fee to MHR because the Company would have had to pay

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[104] Rachesky Dep. Vol. II at 281:7-283:14 (a large enough transaction provides an advantage for shareholders; without such transaction, the Company may have deteriorated such that it could have affected the value of the Notes).

[105] June 13, 2007 Complaint at ¶ 3, Gibson Aff. NJX 33. Other than this allegation in their Complaint, plaintiffs have failed to identify exactly what consideration MHR allegedly received in exchange for its agreement not to object to optional redemption. GPC's Answers To Defendants' First Set of Interrogatories at 3-4, Gibson Aff. NJX 57 (referring only to the Complaint and stating that defendants and MHR have knowledge of applicable information); Watershed's Answers To Defendants' First Set of Interrogatories at 3-4, Gibson Aff. NJX 54 (same); Rockview's Answers To Defendants' First Set of Interrogatories at 3-4, Gibson Aff. NJX 55 (same); Murray Capital's Answers To Defendants' First Set of Interrogatories at 3-4, Gibson Aff. NJX 30 (same); KS Capital's Answers To Defendants' First Set of Interrogatories at 3-4, Gibson Aff. NJX 56 (same).

[106] Yeung Dep. Vol. I at 301:16-305:9 (discussing existence of non-objection provision in first version of term sheet from MHR).

a similar fee if the transaction had been underwritten.[107] None of the witnesses in this case -- and plaintiffs took over twenty-five separate days' worth of depositions -- has identified any consideration for the non-objection provision.

The centerpiece of plaintiffs' theory of this case, Section 5.01 of the SPA, did not in fact compel MHR to withhold its objection to the provisional call.[108] Carefully read, that provision left MHR with a free choice, which it nonetheless exercised in favor of non-objection. Section 5.01 of the SPA indeed required MHR not to object to a provisional call in connection with an acquisition of $600 million or more, but that agreement is expressly "subject to the consummation of such Acquisition."[109] Thus, MHR was free to object to a redemption that consummated before the acquisition in question closed. In this case, objections to the proposed redemption, which were required to be unconditional, were due on July 12, 2007, with redemption to occur on September 5, 2007, well before the closing of the Telesat transaction, which ultimately occurred on

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107 Jacquin Dep. Vol. II at 529:13-530:10 (stating that the Special Committee came around to the idea of paying a placement fee because the Company would have had to pay a placement fee in connection with any underwritten transaction).

108 Kraus Dep. at 47:9-52:21 (explaining that MHR's non-objection was not required under the SPA); cf. June 13, 2007 Letter from B. Kraus of Willkie Farr, Gibson Aff. NJX 44 (while requesting MHR's non-objection and reminding MHR of the provisions in the SPA, not expressly stating that its non-objection is required).

109 Feb. 27, 2007 Amended and Restated SPA at 24, Gibson Aff. NJX 19.

October 31, 2007.[110] Nonetheless, MHR delivered its certificate of non-objection without requesting or receiving any consideration at all,[111] further confirming Mr. Targoff's view that MHR's interest as a stockholder overrode its incentives as a bondholder.[112] Just as MHR agreed in Section 5.01 of the SPA not to object to the provisional call under other circumstances, MHR provided its non-objection in the context of the actual provisional call without asking for or receiving any consideration.

III. PLAINTIFFS FAILED TO COMPLY WITH THE INDENTURE'S LIMITATION ON SUITS PROVISION

In addition to the reasons set forth above, judgment should be entered in favor of defendants because plaintiffs do not hold enough Notes to maintain an action under the Indenture's Limitation on Suits provision. Except as to actions to enforce the payment of principal and interest when due, only holders of more than 40% of the outstanding Notes have the right to assert claims under the Indenture or Notes. And at no

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110 June 13, 2007, Redemption Notice, Gibson Aff. NJX 42 (stating that objection deadline is July 12, 2007); Sept. 24, 2007 Loral 8-K at 2, Gibson Aff. NJX 41 (Notes were redeemed on September 5, 2007); Oct. 31, 2007 Loral Press Release at 1, Gibson Aff. NJX 39 (announcing the closing of the Telesat transaction).

111 July 12, 2007, Email from the Bank of New York Attaching MHR's Non-Objection Notice, Gibson Aff. NJX 65.

112 Targoff Dep. Vol. I at 106:7-107:15, 204:23-205:22 (explaining that MHR would have agreed to redemption in connection with a large transaction without any payment or agreement to do so).

time have these plaintiffs or other members of the Ad Hoc Committee collectively held more than 38% of the outstanding Notes.[113]

Limitation on Suits provisions generally delegate "the right to bring a suit enforcing rights of bondholders to the trustee, or to the holders of a substantial amount of bonds, and by delegating to the trustee the right to prosecute such a suit in the first instance." Feldbaum v. McCrory Corp., C.A. Nos. 11866, 11920, and 12006, 1992 WL 119095, at *6 (Del. Ch. June 1, 1992). These provisions serve "to protect issuers from the expense involved in defending lawsuits that are either frivolous or otherwise not in the economic interest of the corporation and its creditors" and to protect "against the risk of strike suits." Id.

Section 6.06 of the Indenture contains just such a limitation on suits:

> Limitation on Suits. Except to enforce the right to receive payment of principal or interest when due, no Noteholder may pursue any remedy with respect to this Indenture or the Notes unless . . . the Holders of at least 40% in outstanding principal amount of the Notes make a written request to the Trustee to pursue the remedy[.][114]

Granted, Noteholders with fewer than 40% of the outstanding Notes may bring actions to enforce their right to receive payment of principal or interest when

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113 June 29, 2007 Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 3 n.1, Gibson Aff. NJX 43.

114 Nov. 21, 2005 Executed Indenture at Disclosure Page 61-62, Gibson Aff. NJX 2 (emphasis added).

due.[115] But that's simply not what this lawsuit is about: all principal and interest on the Notes was paid in full upon redemption on September 5, 2007.[116] And plaintiffs' counsel itself represented to the Court that this action is not about "the value of an interest stream" at all, but is an attempt by plaintiffs to capture the same consent payment that MHR allegedly received.[117]

Where, as here, plaintiffs allege no fraud in the inducement, both Delaware and New York courts will strictly enforce Limitation on Suits provisions "to foreclose bondholder suits under the indenture, where plaintiff has not complied." Feldbaum, 1992 WL 119095, at *5, 8-9 (dismissing plaintiffs' claims related to indenture, including breach of implied covenant of good faith, for failure to comply with Limitation on Suits

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115 Nov. 21, 2005 Executed Indenture at Disclosure Page 61-62, Gibson Aff. NJX 2 (carving out principal and interest from No-Action Clause).

116 Nov. 9, 2007 Loral 10-Q at 17 ("On September 5, 2007, Loral Skynet paid $141.1 million in the aggregate to redeem the notes at a redemption price of 110% including accrued and unpaid interest from July 15, 2007 of $2.45 million").

117 July 16, 2007 Teleconference Transcript Before Hon. Leo E. Strine, Jr. at 3:22-4:04, Gibson Aff. NJX 35 ("[W]hat plaintiffs are losing is the right to negotiate a redemption. . . . It is not the value of an interest stream, but rather the value of what Loral, under today's circumstances, should do to redeem the notes, when it has no contractual right to."); id. at 15:12-24 ("No rational holder would have consented while the holders possessed the contractual right to block the redemption at an amount below an economic calculation of the interest stream. . . . However, we don't contend that that's a measure of damages. You could only know what the damages were if a vote was allowed to occur without the controlling insider being bought off."); see June 13, 2007 Complaint ¶¶ 30, 46 and at 28, Gibson Aff. NJX 33 (discussing unequal consent payment).

clause; applying New York law).[118] Plaintiffs simply do not hold enough Notes to satisfy the Indenture's Limitation on Suits provision. Judgment should be entered against them on this ground alone.

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118 See also Feder v. Union Carbide Corp., 530 N.Y.S.2d 165 (N.Y. App. Div. 1988) (dismissing suit where plaintiffs failed to comply with limitation on suits provision); Victor v. Riklis, No. 91 Civ. 2897, 1992 WL 122911, at *6 (S.D.N.Y. May 15, 1992) (same); Lange v. Citibank, No. Civ A. 19245-NC, 2002 WL 2005728, at *7 (Del. Ch. Aug. 13, 2002) (same).

CONCLUSION

Defendants have submitted this pre-trial brief to provide the Court with a roadmap of the evidence expected to be developed at trial and of the legal doctrines that pertain to that evidence. For the reasons set forth herein, and which will be set forth in the trial record, defendants urge the Court to reject plaintiffs' claims and to enter judgment in favor of defendants in this matter.

Dated: February 22, 2008

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CERTIFICATE OF SERVICE

I, Sara Beth A. Reyburn, Esquire hereby certify that on April 8, 2008, a copy of the foregoing was served on the following counsel in the manner indicated below:

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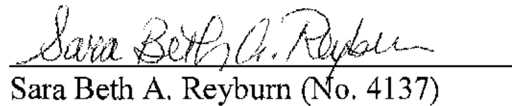

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