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.	**PUBLIC VERSION** **DATED: June 23, 2008** Civil Action No.: 3022-VCS

DEFENDANTS' POST-TRIAL BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

In early 2007, Loral Space & Communications Inc. ("Loral" or the "Company") was planning a $2.8 billion business combination between its subsidiary, Loral Skynet Corporation ("Skynet"), and Telesat Canada ("Telesat"). To clear the way for the Telesat deal, Skynet redeemed its 14% Senior Secured Cash/PIK Notes Due 2015 (the "Notes") on September 5, 2007. Skynet proceeded with the redemption following a process allowed by the indenture governing the Notes (the "Indenture") which included due notice to Noteholders and the receipt of objections from the holders of less than two-thirds of the outstanding principal amount of the Notes.

Among the Noteholders declining to object to the redemption were investment funds managed by MHR Fund Management LLC (collectively, "MHR"). In the Complaint, filed on June 13, 2007, plaintiffs alleged that an unlawful "consent fee" -- indefinite, but certainly, they implied, large in amount -- should be read into the Securities Purchase Agreement between Loral and MHR dated October 17, 2006 (the "SPA"). The SPA provided for a $300 million preferred stock investment in Loral by MHR, and contained one minor provision in which MHR agreed not to object to the redemption of the Notes under certain circumstances.

After filing the Complaint, plaintiffs quickly moved to enjoin the redemption of the Notes -- a hold-up tactic that could have scuttled the entire Telesat deal -- and demanded their share of the supposedly large consent fee. Following argument on July 16, 2007, the Court denied plaintiffs' motion after Loral offered to place an amount in escrow for any lost interest on the Notes that might ultimately be

awarded in this case. The parties proceeded to discovery, with plaintiffs taking over twenty-five days of deposition, and then participated in a six-day trial from March 3 to March 7, 2008, and again on May 12, 2008.

Now that the trial record is closed, plaintiffs have abandoned any request for a share of the so-called consent fee paid to MHR, limiting their prayer for relief to the net present value of the interest payments they supposedly lost after the Notes were redeemed. Plaintiffs also have abandoned their prior claim that Loral violated any express terms of the Indenture, resting their case now entirely on the duty of good faith and fair dealing. Even so, plaintiffs have not proven their case.

PRELIMINARY STATEMENT

The Notes were issued in a rights offering to creditors as part of Loral's emergence from bankruptcy proceedings in 2005. The Notes and the Indenture were heavily-negotiated and had three notable attributes, plainly disclosed to all offerees:

- The Notes -- which were unconditionally redeemable on October 15, 2009 (the "Hard Call" date) for a premium of 10% -- also contained an early redemption provision, sometimes referred to as a "soft call" or "provisional call," giving Skynet the right to redeem the Notes at any time so long as the holders of at least two-thirds of the outstanding Notes did not object.

- The Indenture -- in an exception to the boilerplate prohibition on the voting of Notes held by the issuer and its affiliates -- expressly allowed MHR to vote its Notes on any direction, waiver or consent.

- The Indenture contained no prohibition on unequal payments for consent.

Thanks to these features, what happened in this case was not just an unintended but permissible consequence. It was the deal between the parties.

After notice was given in accordance with the Indenture, the Company received objections from the holders of less than the two-thirds required to prevent a redemption. Prominent among the Noteholders not objecting to redemption was MHR -- which also held over 36% of the outstanding common stock of Loral, more than any other stockholder. MHR had indeed agreed with Loral in the SPA that, under certain circumstances, it would not object to Skynet's redemption of the Notes. But plaintiffs' case nonetheless fails for the following reasons.

First, Loral is not a party to, a guarantor of, or otherwise bound by the Skynet Indenture -- only Skynet and its subsidiaries are so bound. No payment by Loral, imputed or otherwise, can be deemed to breach a covenant, express or implied, in a contract Loral never even signed.

Second, the doctrine of implied covenants of good faith and fair dealing may not be invoked to insert a contract provision that the negotiating parties actually contemplated, considered, and then agreed to exclude. And that is exactly the situation here: a restrictive covenant that would have prohibited Skynet and its subsidiaries from making unequal consent payments was included in the Indenture's first publicly-circulated drafts, but not in the final version -- changes made plain to all interested parties in the context of the bankruptcy proceeding.

Plaintiffs claim that "market understandings" should be implied and enforced like written covenants, and that there is a market understanding that unequal payments for consent are always prohibited, whether the Indenture in question prohibits them or not. Their opening attempt at proof was their odd and demonstrably false claim

that unequal payments for consent were "not prohibited in any other indenture." A quick EDGAR search however showed that, in fact, a substantial minority of contemporaneous indentures include such a provision. Plaintiffs' back-up plan for proving their alleged "market understanding" consisted of nothing more than the self-serving testimony of the plaintiffs themselves. But that fared no better when their witness, Marti Murray, was forced to backtrack under cross-examination and questions from the Court.

Third, plaintiffs failed to prove that MHR received any payment at all in return for not objecting to the Notes' redemption. Section 5.01 of the SPA ("Section 5.01") only bound MHR not to object to a redemption of the Notes simultaneously with or following the closing of a deal like the Telesat deal -- but the Telesat closing did not occur for three-and-a-half months after the due date for objections to redemption, and nearly two full months after the Notes were actually redeemed. Thus, when MHR provided its non-objection, it was not compelled to do so by Section 5.01. Instead, like the other 16% of Noteholders that submitted notice of non-objection (many of which were also stockholders), it did so without payment. Plaintiffs have also adduced no evidence that even one peppercorn of consideration flowed to MHR in exchange for Section 5.01 of the SPA.

Plaintiffs' case fails three times over.

STATEMENT OF FACTS[1]

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.[2] 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").[3]

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 The trial record in this action includes joint trial exhibits ("NJX"), trial testimony ("Tr."), and deposition testimony ("Dep."). For the convenience of the Court, we are submitting herewith a compendium of those exhibits, transcripts, and other court filings that are cited in this Opening Post-Trial Brief.

2 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, NJX 1 (stating that "following the demise of numerous Internet and telecommunications companies . . . in 2001 and 2002[,] [t]he market for [telecommunications products and satellites] . . . weakened substantially").

3 Disclosure Statement at 21-22, NJX 1 (describing the factors that adversely affected Loral's financial position prior to its filing for bankruptcy).

Reorganization (the "Plan") on behalf of Old Loral's creditors.[4] MHR, Old Loral's largest unsecured creditor and potential future stockholder, was appointed chairman of the Creditors' Committee.[5] Akin Gump Strauss Hauer Feld LLP ("Akin Gump") acted as counsel to the Creditors' Committee,[6] and MHR retained its own counsel, Stroock & Stroock & Lavan LLP ("Stroock"), to participate in the negotiations relating to the Plan.[7] All of these parties, along with Weil, Gotshal & Manges LLP and Willkie Farr & Gallagher LLP as counsel to the Company, participated in negotiating the Indenture and the Notes.[8]

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.[9] Those unsecured creditors, including MHR and most of the plaintiffs here,

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4 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 4 ¶ 3.

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

6 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 4 ¶ 3.

7 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 4-5 ¶ 3.

8 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 5 ¶ 3.

9 Disclosure Statement at 51-52, NJX 1 (describing how the Notes would be issued to the holders of debt issued by Loral Orion); Trial Tr. at 867:21-868:18 (Mr. Targoff stating that the Notes were issued through a rights offering to debtholders of Orion, and that there was a high degree of overlap between the Noteholders and the individuals who would receive Loral common stock out of the bankruptcy).

were largely investment funds specializing in distressed debt instruments.[10] 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.[11] 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.[12]

1. First Negotiated Point: Optional Redemption Provision

Negotiation of the Indenture and Notes involved a balance between the interests of the future Noteholders and the Company.[13] 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 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

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10 Murray Dep. 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).

11 Disclosure Statement at 54-56, 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").

12 Disclosure Statement at 57, NJX 1 (stating that Notes "that are not subscribed for . . . shall be purchased . . . pursuant to the Backstop Commitment Agreement" and that the Backstop Purchasers would be entitled to a fee).

13 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).

Notes to be as flexible as possible.[14] Accordingly, on the one hand, the Notes required Skynet to pay the Noteholders 14% interest on the principal amount of the Notes.[15] On the other hand, the Notes included redemption provisions that would enable Skynet to free itself from the Notes' interest burden and replace the Notes by issuing new debt with more favorable terms.[16] Redemption would also free Skynet from both the liens on its assets serving as collateral and the restrictive covenants contained in the Indenture,[17] all of which would have severely hampered any sort of strategic transaction involving the fixed satellite services business.[18]

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14 Kuhn Dep. at 68:25-70:9 (discussing balancing act for creditors as Noteholders versus stockholders); Disclosure Statement at 50, 52, NJX 1 (stating that holders of unsecured claims would receive stock and could purchase Notes in rights offering).

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

16 Nov. 21, 2005 Executed Indenture at Disclosure Pages 100-102, NJX 2 (describing terms on which the Notes could be financed and redeemed); Trial Tr. at 865:13-866:11 (Mr. Targoff's testimony that provisional call was in company's interest given that debt was "very expensive"); Mastoloni Dep. at 291:10-16, 295:6-18 (discussing how Notes could potentially be refinanced at a lower rate).

17 Nov. 21, 2005 Executed Indenture at Disclosure Pages 70, 77-88, 81-82, NJX 2 (providing for release of collateral and discharge of Indenture upon redemption); id. at Disclosure Pages 40-57, 78-88 (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, NJX 49 (providing for the assets of Skynet to be used as collateral to secure the Notes).

18 Trial Tr. at 871:6-872:2 (Mr. Targoff's testimony that liens on assets, as well as having Notes outstanding, would hamper Loral's ability to do a strategic transaction); Trial Tr. at 1322:2-14 (Dr. Rachesky's testimony that financing a strategic transaction would be "potentially impossible" without redemption).

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 10% 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.[19]

2. Second Negotiated Point: MHR's Vote Counts

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.[20] 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

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19 Nov. 21, 2005 Executed Indenture at Disclosure Page 102, NJX 2.

20 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).

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 . . . ."[21]

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.[22] As Loral's Disclosure Statement explained:

> 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.[23]

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

22 Nov. 21, 2005 Executed Indenture at Disclosure Pages 101-02, NJX 2 (describing terms on which the Notes will be financed and redeemed); Disclosure Statement at 99-100, NJX 1 ("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").

23 Disclosure Statement at 99-100, NJX 1. See also Trial Tr. at 866:12-22 (Mr. Targoff stating that provisional call was structured to allow MHR alone to consent).

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 it 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 the time frame set forth in the solicitation documents relating to such consent, waiver or agreement.[24]

This early draft of the Indenture was made publicly available in an SEC filing by Loral Orion Inc. on June 8, 2005.[25]

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

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

Stroock, negotiating for MHR, subsequently proposed the reverse provision to explicitly authorize unequal Payments for Consent.[26] Stroock and Akin Gump went back and forth, with each reinserting their opposing versions of the Payments for Consent provision.[27] In the end, the parties decided to remove the restrictive covenant altogether.[28] Because the Indenture had undergone significant changes since the first draft was publicly filed on June 8, 2005 -- including the deletion of the covenant restricting unequal payments for consent -- the parties decided to file a draft with the bankruptcy court to inform the unsecured creditors of the revisions.[29]

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.[30] 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

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26 June 16, 2005 Email from Stroock Attaching Revised Draft Indenture at SSL-NH-0007120, NJX 5 (blacklined version showing changes in language from "will not" to "may" permit payments for consent).

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

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

29 Kuhn Dep. at 58:20-60:10 (acknowledging deletion of Payments for Consent covenant and explaining reasons for publicly filing a blackline).

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

invest in the Notes.[31] 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.[32]

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 become Loral's largest stockholder[33] -- that it would be good for the Company if the Notes could be redeemed promptly following emergence from bankruptcy.[34] This led to further discussions of MHR's and the Company's interests in early redemption -- which became embodied in the terms of the Indenture giving any holder with more than one-third of the

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

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

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

34 Targoff Dep. at 56:21-58:23 (discussing Mr. Targoff's desire, on behalf of the Company, to redeem the Notes dating back to even before they were issued); Rachesky Dep. at 288:18-291:20 (discussing Mr. Targoff's frequently stated desire to redeem the Notes); Trial Tr. at 877:12-878:5 (Mr. Targoff stating that he spoke with Dr. Rachesky or Mr. Goldstein and was told that MHR would consent to redemption of the Notes in connection with a strategic transaction). But see Trial Tr. at 1323:23-1324:1 (Dr. Rachesky stating that MHR did not agree to allow redemption of the Notes outside of the SPA).

outstanding Notes, such as MHR, the power to permit Skynet to effectuate redemption.[35] 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.[36]

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.[37] The first such opportunity was the possible acquisition of another satellite company, New Skies

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35 Trial Tr. at 864:6-865:12 (Mr. Targoff describing discussions with Creditors' Committee counsel to allow redemption with MHR's consent); Targoff Dep. at 56:21-57:21 (describing discussion with MHR in which Mr. Targoff said that it would be good for the Company if the Notes could be redeemed prior to the call date, which led to the provisions giving Skynet the right to call the Notes with the concurrence of MHR).

36 Targoff Dep. at 60:8-62:14 (describing Dr. 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 Mr. Targoff said Dr. Rachesky would agree to redemption only in connection with a transaction). But see Trial Tr. at 1323:23-1324:1 (Dr. Rachesky stating that MHR never agreed to allow redemption of the Notes outside of the SPA).

37 Mastoloni Dep. at 93:2-95:6 (explaining the reasons for and requirements for structuring such financial transactions).

Satellites Holdings Ltd. ("New Skies").[38] 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 not to object to redemption of the Notes.[39] But shortly thereafter, New Skies rejected Loral's bid due to concerns over both its ability to obtain the requisite financing and its recent emergence from bankruptcy.[40] Consequently, Loral contacted MHR a few months later in early 2006 regarding a possible cash infusion

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38 Mastoloni Dep. at 162:9-163:13 (discussing consideration of the New Skies deal in late 2005); Targoff Dep. 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 Sched. 14A, Proxy Statement at 22, NJX 47 (discussing approach of New Skies by Company D, which is Loral).

39 Dec. 10, 2005 Email from W. Hiller at 1-2, 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, 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, NJX 48 (requesting recognition that fee is customary and agreement to negotiate fee in good faith); Dec. 13, 2005, Email from Mark Getachew of Willkie Farr, NJX 64 (forwarding Stroock email regarding MHR's consent to redemption). But Loral never agreed to that request. Yeung Dep. 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 Board resolution to approve consideration of fee to MHR was never presented to Board); Targoff Dep. at 691:22-692:3 (no recollection of being presented with a request to consider paying a fee); Trial Tr. at 974:6-974:16 (Mr. Targoff stating he did not believe he saw Board resolutions in connection with New Skies).

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

to, among other possible uses, facilitate a future strategic transaction.[41] This contact by Loral resulted in a proposal by MHR in May 2006 to purchase convertible preferred securities via a securities purchase agreement.[42]

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.[43] Indeed, 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.[44] Over the intervening months, the threshold for this provision -- which would become Section 5.01 of the final SPA -- was negotiated downward to be triggered in the event the

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

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

43 Targoff Dep. at 60:8-23 (describing Dr. Rachesky's statement that MHR would agree to redemption in connection with a transaction); 68:8-69:17 (describing conversation with Richard Mastoloni where Mr. Targoff said Dr. Rachesky would agree to redemption only in connection with a transaction).

44 May 16, 2006 Offer Letter from MHR to Loral at 7, NJX 9 (attaching proposed term sheet with a provision relating to consent to the redemption of the Notes).

Company consummated a smaller strategic transaction.[45] Accordingly, the final-proposed SPA included an agreement by MHR not to object to optional redemption of the Notes if redemption were made at or following the closing of a transaction valued at $600 million or more.[46]

2. Loral's 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 financing arrangements, Loral's Board voted on October 17, 2006 to enter into a securities purchase agreement with MHR.[47] 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.[48]

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45 Harkey Dep. 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. 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, NJX 10 (attaching a draft of the SPA that adds: "subject to the consummation of such Acquisition" to Section 5.01).

46 Oct. 17, 2006 SPA at 22-23, NJX 11 (setting forth the provisions regarding redemption of Skynet Notes).

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

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

As Dr. Rachesky himself testified, no separate consideration was provided to MHR in exchange for its agreement not to object to the optional redemption of the Notes.[49] Rather, the non-objection provision was simply included as part of the overall deal.[50] Moreover, under these circumstances, Mr. Targoff would not authorize any separate consideration to be paid to MHR for its agreement not to object to optional redemption,[51] 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.[52] 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,

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connection with any underwritten transaction); Oct. 17, 2006 Email Attaching Loral Press Release Regarding the SPA, NJX 52 (summarizing SPA terms).

49 Trial Tr. at 1324:14-1325:1 (Dr. Rachesky's testimony that there was no separate consideration provided to MHR for its agreement not to object to redemption).

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

51 Targoff Dep. 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).

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

a large strategic transaction was in the best interests of Loral and its stockholders, including MHR.[53]

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.[54] Murray Capital's objections focused on the financial terms of the SPA and never mentioned MHR's agreement not to object to optional redemption of the Notes.[55] 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,[56] although Loral recognized and

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53 Rachesky Dep. 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. 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. 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).

54 See October 25, 2006 Letter from Murray Capital to Loral's Board, NJX 12 (Murray Capital letter noting "deep concern" regarding the SPA's financial terms).

55 See October 25, 2006 Letter from Murray Capital to Loral's Board at 1, NJX 12 (Murray Capital letter noting "deep concern" regarding the SPA's financial terms).

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

stated (both publicly and expressly to Murray Capital) that if no alternative agreement was reached, the SPA would still be an enforceable agreement.[57]

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.[58] Loral thought that any such alternative agreement should include a non-objection provision regarding optional redemption similar to Section 5.01 of the SPA.[59] In the end, however, discussions over an alternative proposal ended before the negotiation of final documentation -- including a non-objection provision.[60] Loral

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57 See Dec. 18, 2006 Final Transcript: Loral Merger and Acquisition Announcement at 9, NJX 17 (Mr. 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 [Telesat] transaction"); Dec. 20, 2006 Email from John McCarthy to Marti Murray, 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 . . . .").

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

59 See Yeung Dep. 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").

60 Harkey Dep. 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. 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 had failed); Rachesky Dep. at 298:6-299:12 (rejecting the idea that MHR had excluded the non-objection provision because the terms of the rights offering proposals were not as favorable to MHR as the

and MHR thereafter consummated a slightly modified Amended and Restated SPA on February 27, 2007.[61]

With a 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.[62] The agreed transaction required Loral to contribute the assets of Skynet to the new joint venture unencumbered by the lien of the Notes, necessitating their redemption before or in conjunction with the closing of the Telesat deal.[63] Thus, on December 18, 2006, Loral disclosed its plan to exercise its rights under the Indenture to redeem the Notes.[64]

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).

61 Feb. 27, 2007 Amended and Restated SPA, NJX 19.

62 Dec. 18, 2006 Loral Press Release at 2, NJX 20 (summarizing the terms of the Telesat deal).

63 Dec. 18, 2006 Loral Press Release at 1-2, NJX 20 (stating that Skynet would transfer its assets and that the Notes would be redeemed).

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

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.[65] 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 requesting that the Trustee under the Indenture commence legal action.[66] The Trustee considered the Ad Hoc Committee's allegations and request and concluded that it would not commence legal action.[67] On June 5, 2007, Loral issued a press release announcing

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65 Jan. 5, 2007 Email from Watershed Attaching Article Regarding the Ad Hoc Committee, 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, 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 was distributed); Feb. 15, 2007 Ad Hoc Committee Voting Agreement at AHC00000001-2, NJX 23 (the voting agreement entered into between the members of the Ad Hoc Committee requiring objection to any redemption scenario where Loral offered 110% or less to the Noteholders).

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

67 Apr. 11, 2007 Letter from Bryan Cave to Goodwin Procter at 2, NJX 27 (requesting that Goodwin Procter provide additional information regarding the

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.[68]

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.[69] On June 13, 2007, plaintiffs commenced this action, and on June 29, 2007 filed a Motion for Preliminary Injunction seeking to prevent Loral from redeeming the Notes.[70] This Court, however, ruled that a preliminary injunction was not warranted, thereby denying plaintiffs the ability to capture any hold-up value.[71]

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events that resulted in a default); April 24, 2007 Letter from Bryan Cave to Goodwin Procter at 1-2, NJX 51 (finding no event of default).

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

69 June 11, 2007 Email from Denis Smith to Marti Murray, 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, NJX 62 (Mr. Fein stating in email chain that "Marti told me that a bunch of you were trying to get some differential treatment for those secured bonds"); Murray Dep. 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).

70 June 13, 2007 Complaint, NJX 33 (complaint initiating this action); June 29, 2007 Plaintiffs' Motion for Preliminary Injunction, NJX 34.

71 July 16, 2007 Teleconference Transcript Before Hon. Leo E. Strine, Jr. at 19, NJX 35 ("I'm going to grant expedited proceedings, but I'm not going to hold anything before August 13th.").

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.[72] MHR provided its notice of its non-objection to redemption on July 3, 2007.[73] Consequently, all of the outstanding Notes were redeemed on September 5, 2007.[74] The Telesat deal closed nearly two months later, on October 31, 2007, following regulatory approvals.[75] The liens on collateral for the Notes having been released, Loral contributed Skynet's assets to the Telesat joint venture.[76] With the closing of the Telesat deal, Loral had transformed its regional fixed satellite services business into the fourth largest operator in the world.[77]

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72 Aug. 9, 2007 Loral 10-Q for the Quarter Ending June 30, 2007 at 25, NJX 36 ("objections to the proposed redemption had been received from holders of Skynet Notes representing less than two-thirds of the outstanding Skynet Notes . . . ."); Aug. 1, 2007 Email from W. Hiller Attaching Redemption Materials at WFG0000381-82, NJX 63 (showing objection notices received from $52.3 million out of $126 million outstanding).

73 July 3, 2007 Email from MHR to Loral and Willkie Farr, NJX 37 (stating that MHR was providing its non-objection).

74 Sept. 6, 2007 Loral 8-K at 2, NJX 38 ("On September 5, 2007, the Company completed the Note Redemption pursuant to the Indenture . . . . Accordingly, the Indenture has been satisfied and discharged").

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

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

77 Oct. 31, 2007 Loral Press Release at 1, NJX 39 ("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 at least three reasons.

First, Loral's agreement with MHR regarding redemption of the Notes could not constitute a breach of the Indenture, or the implied covenant of good faith and fair dealing, because Loral -- a non-party to the contract -- is bound by neither the express nor the implied terms of the Indenture.

Second, plaintiffs have failed to show that unequal payments for consent to MHR would have violated the duty of good faith and fair dealing. Such a restriction cannot be universally implied in a marketplace where many indentures go out of their way to include the prohibition expressly. In fact, some of the plaintiffs actually reviewed a draft of the Indenture that showed just such a restrictive covenant being stricken from its text. Plaintiffs certainly cannot have reasonably assumed that unequal payments for consent remained prohibited nonetheless, especially after being expressly warned that MHR had complete power to cause the Notes to be redeemed.

Third, plaintiffs have failed to satisfy their burden -- and it is their burden -- to show the existence of the "payment for consent" they claim was made in consideration for Section 5.01 of the SPA. Nor have plaintiffs met their burden of proving causation between the provisions of that Section and the actual redemption of the Notes.

For each of these reasons, plaintiffs fail to prove their case.

I. AS A NON-PARTY TO THE INDENTURE, LORAL WAS NOT BOUND BY EITHER ITS EXPRESS OR IMPLIED TERMS

Although all New York contracts come equipped with an implied covenant of good faith and fair dealing, that implied covenant binds only the parties to the contract -- the same ones that are subject to the contract's express covenants. Plaintiffs have been attempting to obscure this fatal flaw in their case through a definitional sleight-of-hand. They have artfully defined the term "Loral" in their papers to include both the parent company -- which is not a party to or otherwise bound by the Indenture or the Notes -- and Skynet and its subsidiaries, which are bound by the Indenture but which are not parties to the SPA.[78] Absent this illegitimate definition, plaintiffs' arguments are incorrect at the most basic, syntactical level, since the only claim of a hidden consent fee for MHR purportedly comes from the parent company, Loral.[79]

There is no uncertainty about the fact that Loral is not a party to, or otherwise bound by, the Indenture -- the Indenture is very specific about which entities are subject to its terms. For instance, a specific set of "Guarantors" as of the "Issue Date" are listed in the Indenture, and Loral is not one of them.[80] The Indenture further states

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78 See, e.g., Plaintiffs' Pre-Trial Opening Brief at 2.

79 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 3 ("Plaintiffs allege that Loral compensated MHR for the agreement contained in Section 5.01 of the SPA"); see id. at 1-2 (defining "Loral" as "Loral Space & Communications Inc." for purposes of Joint Pre-Trial Stipulation and Order).

80 Nov. 21, 2005 Executed Indenture at Disclosure Page 75 § 10.01(b), NJX 2.

that Skynet will cause each of its "Wholly Owned Subsidiaries" to be "Guarantors" under the "Indenture" -- again, this does not include Loral.[81] Further limitations are placed on the "Restricted Subsidiaries" of Skynet, including a prohibition against assuming any "Indebtedness."[82] But this does not place any limitation on Loral, which is crystal clear from the fact that each capitalized term is specifically defined in the Indenture and is meant to be construed using the "meaning assigned to it."[83] In fact, even plaintiff Marti Murray conceded this rule of construction for reading an indenture's terms.[84]

There is not even an allegation of -- much less any proof of -- any consent payment by Skynet or any of the other parties bound by the Indenture,[85] for neither Skynet nor any of its subsidiaries were parties to the SPA. The actions of a non-party, such as Loral here, do not constitute a breach of an implied covenant any more than they could breach an express contract term. See Blank v. Noumair, 658 N.Y.S.2d 88, 88 (N.Y. App. Div. 1997) (affirming dismissal of breach of contract claim on the grounds

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81 Nov. 21, 2005 Executed Indenture at Disclosure Page 54 § 4.11(a), NJX 2.

82 Nov. 21, 2005 Executed Indenture at Disclosure Page 49 § 4.07, NJX 2.

83 Nov. 21, 2005 Executed Indenture at Disclosure Page 33 § 1.04(1), NJX 2.

84 Trial Tr. at 1260:5-18 ("Now, do you understand when you see those capital letters [on Company and Restricted Subsidiaries], that means it's a defined term; right? A. Correct. Q. And you have to go back and look up the definitions to figure out who is restricted and who is not. Is that right? A. Correct.").

85 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 3 ("Plaintiffs allege that Loral compensated MHR for the agreement contained in Section 5.01 of the SPA"); see id. at 1-2 (defining "Loral" as "Loral Space & Communications Inc." for purposes of Joint Pre-Trial Stipulation and Order)

that defendant was not a party to the agreements in question). "There being no contractual relationship, neither can there be any 'covenant of good faith and fair dealing' implied which itself is based on the existence of a legal contractual obligation." Four Winds of Saratoga, Inc. v. Blue Cross & Blue Shield of Cent. N.Y. Inc., 660 N.Y.S.2d 236, 237 (N.Y. App. Div. 1997) (affirming dismissal of breach of contract claim on the grounds that plaintiff failed to establish contractual privity with defendant).[86]

Loral and Skynet are distinct legal entities, each of which entered into different agreements and took different actions. This undisputed fact constitutes a fundamental flaw in plaintiffs' case, and one which plaintiffs ask the Court to simply ignore as an affirmative defense required to have been set forth in detail in the answer.[87] This rejoinder is misplaced. An answer's simple, general denial is sufficient to require plaintiffs to prove each element of their purported cause of action; new allegations and excuses outside the scope of the complaint are affirmative defenses that need to be pleaded separately.[88] This is not a case of a defendant admitting a plaintiff's allegations

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86 See also La Barte v. Seneca Res. Corp., 728 N.Y.S.2d 618, 620 (N.Y. App. Div. 2001) (dismissing implied covenant claims against contracting party's affiliates "with whom [plaintiffs] were not in privity").

87 Plaintiffs' Pre-Trial Reply Brief at 22-23.

88 See also 5 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure 3d § 1271 (2008) ("Generally speaking, [Rule 8(c)'s] reference to 'an avoidance or affirmative defense' encompasses two types of defensive allegations: those that admit the allegations of the complaint but suggest some other reason why there is no right of recovery, and those that concern allegations outside of the plaintiff's

but suggesting another reason why plaintiffs' claims fail. Here, plaintiffs have simply failed to prove or even properly allege a threshold element of their claim: any contract at all with Loral, the party they claim breached the contract.[89] See, e.g., Elliott & Frantz, Inc. v. Ingersoll-Rand Co., 457 F.3d 312, 320-21 (3d Cir. 2006) (holding that manufacturer's assertion of right to terminate distributorship agreement without cause was not an affirmative defense, but was a general defense that would negate distributor's prima facie case for breach of contract). Plaintiffs' case fails on this point alone.

II. DEFENDANTS DID NOT BREACH THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Plaintiffs' case is now based solely on the "covenants of good faith and fair dealing."[90] They appear to have abandoned their previous position that some alleged "payment to MHR for the agreement contained in Section 5.01 of the SPA"[91] constituted a breach of any of the Indenture's express terms.[92] Every contract governed by New York law, including the Indenture, is subject to the doctrine of the implied covenant of good

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prima facie case that the defendant therefore cannot raise by a simple denial in the answer.").

89 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 3 ("Plaintiffs allege that Loral compensated MHR for the agreement contained in Section 5.01 of the SPA"); see id. at 1-2 (defining "Loral" as "Loral Space & Communications Inc." for purposes of Joint Pre-Trial Stipulation and Order).

90 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 3.

91 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 3.

92 Plaintiffs' Pre-Trial Reply Brief at 3 ("Plaintiffs do not allege any such breach of an express provision of the Indenture.").

faith and fair dealing. See Hartford Fire Ins. 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 the doctrine of implied covenants 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 Ins. Co., 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 terms expressly set forth in the contract" (citation omitted)); Metro. Life Ins. Co. v. RJR Nabisco, Inc., 716 F. Supp. 1504, 1517 (S.D.N.Y. 1989). It is clear that the possibility of a consent payment to MHR -- even if it had been made -- was part and parcel of the package of rights and obligations to which the Noteholders subscribed in the first place.

A. IT WAS PART OF THE DEAL THAT MHR ALONE COULD GIVE A CONSENT TO REDEEM THE NOTES IN ORDER TO ADVANCE ITS OWN INTERESTS

Three points should have been clear to anyone purchasing the Notes. First, unlike the common situation where ownership is too diverse for any one holder to determine when a class of notes will be redeemed, MHR's expected ownership of more

than one-third of the Notes gave it effective control over the provisional call,[93] a fact that the Disclosure Statement spelled out.[94] Second, unlike many indentures where affiliates of the issuer are precluded from voting, this Indenture specifically provided that MHR's vote would count.[95] And third, while many indentures in the marketplace prohibit unequal payments for consent,[96] this Indenture did not. Putting those facts together adds up to a clear message to anyone buying the Notes: when and if the time came, MHR had complete power to cause the Notes to be redeemed in order to advance its own interests.

As previously submitted to the Court, defendants' compendium of publicly-filed indentures shows that in the five months prior to the issuance of the Notes, approximately 10% of indentures contained a provision prohibiting unequal payments for

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93 Disclosure Statement at 99-100, NJX 1. See, e.g., Trial Tr. at 1268:14-1269:14 (Ms. Murray's testimony that she was aware of MHR's control position based on the information provided to her in the Disclosure Statement).

94 Disclosure Statement at 99-100, NJX 1 ("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").

95 Nov. 21, 2005 Executed Indenture at Disclosure Page 90, NJX 2 ("Notes owned . . . by MHR or any Related Party thereof shall not be so disregarded so long as such notes are owned by MHR . . . .").

96 For the Court's convenience, defendants previously provided a compendium of fifty publicly filed indentures containing a provision precluding unequal payments for consent. See In re GM (Hughes), 897 A.2d 162, 171 (Del. 2006) (stating that it is proper, pursuant to Delaware Rule of Evidence 201, to take judicial notice of the publicly available facts, as reported in filings with the SEC). See also Yeung Dep. at 404:20-25, 405:11-406:15 (stating that provisions prohibiting unequal consent payments are common in indentures).

consent.[97] The current situation, with the unusual facts of a single Noteholder with enough Notes to consent to redemption -- a Noteholder with the explicit power to vote on the issue -- would have cried out for use of this common restrictive covenant if it had been intended. Thus, even apart from the actual negotiation history of the Indenture in question, the absence of this common clause is an extremely telling indication that the intent was to omit this restriction. Hartford Fire Ins. Co., 723 F. Supp. at 992 (holding that 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").[98]

Noteholders are bound by the terms of an indenture whether or not they have studied its words. Metro. Life Ins. Co., 716 F. Supp. at 1509.[99] But in this case it was abundantly clear to anyone purchasing the Notes that one Noteholder, MHR, could provide sufficient consents to allow redemption of the Notes, and that the final Indenture

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97 For the Court's convenience, defendants previously 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 10% contained a provision precluding unequal payments for consent.

98 See also Metro. Life Ins. Co., 716 F. Supp. at 1522 (stating that "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").

99 "[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.

contained no restriction on unequal payments for consent. And in the absence of an agreed restriction, a party is free to act. See, e.g., Greenfield v. Philles Records, Inc., 780 N.E.2d 166, 168 (N.Y. 2002) (record producer had unconditional right to redistribute artists' performances in any technological form absent "an explicit contractual reservation of rights by the artists").[100]

B. THE INDENTURE'S NEGOTIATION HISTORY MAKES IT CLEAR THAT MHR COULD UNILATERALLY CAUSE REDEMPTION TO ADVANCE ITS OWN INTERESTS

On top of the explicit Indenture provision allowing MHR to vote, and the Disclosure Statement warning that MHR's non-objection alone could lead to redemption, the publicly-disclosed contract negotiations showed removal of the potential provision prohibiting unequal payments for consent. It is apparent that unequal consent payments were not meant to be prohibited because a restrictive covenant which would have done just that was proposed, considered, and rejected in the course of negotiations. The first publicly filed draft of the Indenture contained this very provision.[101] MHR's counsel, however, objected to this clause and initially suggested reversing the provision by

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100 Under New York law, a corporate bond represents a purely contractual entitlement that does not impose upon the issuer fiduciary obligations to noteholders. Metro. Life, 716 F. Supp. at 1524. Thus, defendants were under no duty other than to perform the contract according to its terms.

101 June 8, 2005 Loral Orion Inc. Form T-3 at 71, NJX 4 (including a Payments for Consent provision).

explicitly permitting Loral to pay unequal consideration for consents.[102] The final Indenture accomplished the same purpose as MHR's draft by striking the prohibition on unequal payments for consent altogether.[103]

As plaintiffs themselves argued when moving for a preliminary injunction, a court may imply a restrictive covenant into an agreement when 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."[104] 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 the covenant applies in situations "that could not have been contemplated at the time of drafting, and which therefore [were] not resolved explicitly by the parties") (citations omitted).

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

103 Nov. 21, 2005 Executed Indenture Art. IV, NJX 2 (no covenant regarding consideration for consent); June 30, 2005 Loral Bankruptcy Filing at 56, NJX 8 (blackline showing deletion of provision). See generally Greenfield, 780 N.E.2d at 168 (holding that 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, 45 (2d Cir. 1988) (finding that manufacturer not obliged to continue manufacturing in 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").

104 June 29, 2007 Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 11, NJX 43.

As plaintiffs' own cases show,[105] courts in applying this doctrine can look to the parties' negotiations to determine whether they "considered that the issuer might be free to offer consideration to bondholders who would agree to an amendment but not to bondholders who would decline to consent." Kass v. E. Air Lines, Inc., 1986 WL 13008, at *5 (Del. Ch. Nov. 14, 1986). In Kass, it was the absence of a factual record that made "such questions . . . nearly impossible to address with confidence."[106] Id. This case presents the opposite situation, replete as it is with publicly filed uncontroverted evidence that the parties and their sophisticated advisors and counsel contemplated, considered, and rejected a provision that would have prohibited the parties to the Indenture from engaging in the very conduct plaintiffs seek to ascribe to Loral.[107]

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105 June 29, 2007 Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 12, NJX 43.

106 It was in the context of this lack of evidence regarding the negotiations that the Kass court stated in dicta that:

> [Had] Eastern not made its offer to all bondholders on the same terms, but had it privately paid money to sufficient holders to carry the election, one would, without more, feel some confidence in concluding, provisionally at least, that such conduct . . . constituted a violation of what must have been the reasonable expectations of the contracting parties.

1986 WL 13008, at *5 (emphasis added).

107 See, e.g., June 8, 2005 Loral Orion, Inc. Form T-3 at 71, NJX 4 (publicly disclosing draft Indenture that contained the Payments for Consent provision); June 30, 2005 Loral Bankruptcy Filing at 56, NJX 8 (publicly filed blackline draft Indenture indicating that the Payments for Consent provision was deleted).

In fact, whereas the typical indenture is negotiated solely between underwriters, issuers, and their counsel and is nonetheless binding on direct and aftermarket purchasers,[108] the genesis of this Indenture in Loral's bankruptcy proceeding meant that it was negotiated in plain, public view, with interim drafts marked to show changes filed with the bankruptcy court itself for all interested parties to review.[109] And review them they did: Giac Picco of plaintiff KS Capital reviewed the very blackline showing the removal of the Payments for Consent covenant prior to investing in the Notes, discussed the changes with Akin Gump and others, and then later forwarded his insights from his review of the blackline to Munir Alam of plaintiff Watershed Capital.[110]

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108 See Metro. Life Ins. Co., 716 F. Supp. at 1509 (explaining how the terms of publicly traded indentures are enforced against bond purchasers that were not involved in face-to-face negotiations related to the indenture); see also Kuhn Dep. at 9:5-8, 9:13-10:23, 70:10-16 (stating that Akin Gump was counsel to the Creditors' Committee and acted on behalf of the Committee during the negotiations of the Indenture).

109 It deserves note that the plaintiffs here are highly sophisticated hedge funds that focus on distressed debt instruments, such as the Notes and Indenture at issue here. See, e.g., Murray Dep. 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).

110 Jan. 5, 2006 Email from G. Picco to M. Alam at 1-2, NJX 50 (discussing 6/30/05 blackline and discussion with Akin Gump and Lehman Brothers); see also Trial Tr. at 1513:3-18 (Prof. Stowell stating that Loral shareholders are very sophisticated banks and hedge funds, which likely received information in the bankruptcy).

Forced by the facts to retreat from their previously-touted Delaware caselaw,[111] plaintiffs now seek refuge in an alleged split of authority between Delaware and New York regarding the duty of good faith and fair dealing.[112] Citing an article written by an IRS attorney in 1991,[113] plaintiffs claim that the negotiations of the Indenture must be entirely disregarded because the "Katz 'negotiations test'" from Delaware would supposedly not be followed by a New York court. Instead, according to plaintiffs, a New York court would use the "fruits of the agreement" test that would focus only on the objective "expectations of the marketplace."[114]

To the contrary, both Delaware and New York courts actually use a "fruits of the agreement" analysis when deciding whether to invoke the implied covenant of good faith and fair dealing. Compare 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 773 N.E.2d 496, 500 (N.Y. 2002) ("which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract") with Fisk Ventures, LLC v. Segal, 2008 WL 1961156, at *10 (Del. Ch. May 7, 2008) ("which has the effect of preventing the other party to the contract from receiving the fruits of the bargain" (internal citations omitted)).

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111 June 29, 2007 Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 11, NJX 43 (citing Katz).

112 Plaintiffs' Pre-Trial Reply Brief at 5.

113 Plaintiffs' Pre-Trial Reply Brief at 5 & n.11 (citing NJX 139).

114 Plaintiffs' Pre-Trial Reply Brief at 5.

Moreover, a New York court analyzing whether to imply a term into a complex and extensively negotiated written agreement would, like its Delaware counterpart, find it highly relevant that the contracting parties considered and then rejected the term in question. See, e.g., Reiss v. Fin. Performance Corp., 764 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" (citation omitted)). The facts of the case have dealt plaintiffs' claims a mortal blow under both the Delaware and New York precedents.

C. PLAINTIFFS' PURPORTED EVIDENCE OF MARKET EXPECTATION -- EVEN IF IT WERE RELEVANT -- IS UNCONVINCING AND ERRONEOUS

Even if the provisions of the Indenture -- its negotiating history, and the context that other indentures and model forms provide -- permitted an exploration of "market expectation" as to unequal payments for consent, plaintiffs have offered no convincing evidence of any expectation of this kind. Plaintiffs first try to prove up this alleged "market expectation" with the peculiar (and demonstrably false) contention that unequal payments for consent are "not prohibited in any other indenture."[115] Regardless of the logic of this argument, plaintiffs' factual predicate is dead wrong, as demonstrated by defendants' compendium of fifty publicly-filed indentures containing just such a

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[115] Plaintiffs' Pre-Trial Opening Brief at 42.

restrictive covenant. Plaintiffs themselves, to the extent they purchased their Notes upon initial issuance, must be deemed on notice of such provisions, since they held the right to participate in the rights offering due to their ownership of Loral Orion notes, issued under an indenture that contained a restrictive covenant of this kind.[116]

Plaintiffs also tout the absence of such a provision in the "Model Simplified Indenture,"[117] ignoring the drafters' warning that it "has been prepared for an issue of unsecured convertible subordinated debt," and that for "a secured issue, such substantial additions would be required that the prospective user would probably be well advised to start elsewhere."[118] Had plaintiffs reviewed a model indenture for senior debt from the Practicing Law Institute, they would have found precisely the provision at issue here.[119]

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116 See Trial Tr. at 1256:7-1256:12 (Ms. Murray admitting that the Cyberstar indenture addressed "unequal payments for consent"); see also Dec. 21, 2001 Loral Cyberstar, Inc. 10% Senior Notes Indenture, NJX 257 at Section 4.23 (prohibiting unequal consent payments); Schweitzer Dep. at 26:12-22 (GPC and Rockview owned 10% Orion [Cyberstar] Notes); Picco Dep. at 14:21-15:9 (KS Capital owned Loral bonds issued prior to Loral's bankruptcy); Jan. 8, 2002 Loral Cyberstar, Inc. 8-K at 1, NJX 258 (stating that the registrant's name would be changed from Loral Cyberstar, Inc. to Loral Orion, Inc.).

117 Plaintiffs' Pre-Trial Opening Brief at 49 n.196.

118 Model Simplified Indenture, 38 Bus. Law. 741, 743 (1983), NJX 137; see also Revised Model Simplified Indenture, 55 Bus. Law. 1115, 1115 (2000), NJX 140 (stating that focus of the revisions to model indenture "was on the non-covenant provisions of a 'standard' convertible, subordinated indenture").

119 See D. Weiser, Vulture Capital & Corporate Restructuring: Protecting Your Client's Interests in Difficult Times, 1307 PLI/Corp. 285, 291, 330 (2002) (attached model indenture); see also D. Weiser, Vulture Capital & Corporate Restructuring: Protecting Your Client's Interests in Difficult Times, 1307 PLI/Corp. 197 (2002) (attaching "example of an open (base) indenture").

Plaintiffs further promised to produce evidence that, in their personal collective market experience, they themselves did not recall "ever having seen any provision in any indenture that addresses payments for consent."[120] But their witness on this subject, Marti Murray, was forced to admit on questioning by the Court that a Payments for Consent term "is sometimes in a document" after all.[121] And when confronted by the fact that Murray Capital had owned notes where the indenture specifically prohibited payments for consent, Ms. Murray could only defend her lack of knowledge on the subject by admitting that this section of an indenture "wouldn't have been something that I would have looked at."[122]

Ms. Murray continued insisting that a Payments for Consent term is "just implied in most indentures" based on the fact that she has "been doing this for 20 years, and this is just not something that [she's] seen in the past."[123] But the Court pointed out the irrelevance of Ms. Murray's anecdotal observations: Ms. Murray had never in her

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120 Plaintiffs' Pre-Trial Reply Brief at 48.

121 Trial Tr. at 1265:9.

122 Trial Tr. at 1254:24-1255:1; see also id. at 1265:16-19 (Ms. Murray conceding, upon the Court's inquiry, that she would not look for a Payments for Consent provision when reviewing an indenture). For yet another example of such a provision, the Court could look to the indenture governing the notes issued by Exide Technologies -- an indenture that Ms. Murray claims that she never read, despite owning $5,000,000 in notes and despite commencing litigation against Exide based, in part, on ownership of the notes. See Trial Tr. at 1261:15-1262:6, 1263:16-1264:12; Complaint in Murray Capital v. Exide, NJX 261 at ¶¶ 3, 69, 73 (Murray Capital purchased $5,000,000 of 10.5% senior notes due 2013); Exide Technologies Indenture, NJX 263 at § 4.19 (Payments-for-Consent provision).

123 Trial Tr. at 1251:19-1252:1.

experience "seen a single party control a consent."[124] So regardless of her purported experience, Ms. Murray had never confronted the situation where the presence or absence of a Payments for Consent term would matter in the way it does here.

That's the extent of plaintiffs' proffered "proof" of "market expectations." Plaintiffs offered nothing more -- from Ms. Murray or any other market participant or expert -- to support the "market expectation" that plaintiffs are required to prove as a matter of fact. Lacking such proof, plaintiffs' case fails once again.

III. MHR'S NON-OBJECTION NOTICE WAS NOT REQUIRED BY SECTION 5.01 OF THE SPA, AND PLAINTIFFS HAVE NOT PROVEN ANY SEPARATE CONSIDERATION TO MHR FOR THAT SECTION

Plaintiffs' case rests on their claim that "Loral compensated MHR for the agreement contained in Section 5.01 of the SPA."[125] While it is undisputed that MHR agreed in Section 5.01 of the SPA not to object to the provisional call under certain circumstances, plaintiffs have not pointed to any separate consideration paid to MHR for that promise, nor have they shown any increase in consideration received by MHR as a result of Section 5.01. Moreover, Section 5.01 of the SPA actually left MHR free to

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[124] Trial Tr. at 1266:3-4; see also id. at 1266:10-12 (answering "no" to the Court's question: "So you haven't seen anyone with essentially a control position over a vote before."). Ms. Murray also testified that she was aware of MHR's control position based on the information provided to her in the Disclosure Statement. Trial Tr. at 1268:14-1269:14.

[125] Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 3.

object to redemption at the critical time, but MHR nonetheless submitted its non-objection notice without demanding or receiving a fee.

A. PLAINTIFFS HAVE FAILED TO PROVE THAT MHR RECEIVED ANY CONSENT PAYMENT

Because of the importance to Loral -- and therefore to MHR, Loral's largest shareholder -- of a strategic transaction, MHR's agreement not to object to a provisional call in connection with such a transaction was, in the words of Mr. Targoff, "ice in the winter" -- that is, something one gets for free because it is there for the taking.[126] Therefore, while Loral agreed in the SPA to provide MHR with a fee and a wide variety of rights in exchange for MHR's cash infusion, there was no separate consideration to MHR "for the agreement contained in Section 5.01 of the SPA."[127]

At trial, Mr. Targoff explained that, in the context of a strategic transaction, "[i]t wasn't necessary for [Loral] to pay for [MHR's consent]" because "MHR would be incentivized to consent without any payment whatsoever."[128] MHR's large equity interest in Loral meant that it had a significant potential upside resulting from any strategic

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126 June 3, 2006 Email from Michael Targoff to Arthur Simon, NJX 16 ("I think the current offer with the $1bn is 'ice in the winter'"); see Trial Tr. at 884:8-885:8 (Mr. Targoff explaining that "[i]ce in the winter means something you don't really need. You can get it anywhere."); 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.").

127 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 3.

128 Trial Tr. at 880:24-881:20, 884:8-885:21.

transaction.[129] Thus, from Mr. Targoff's perspective, redemption of the Notes and the resulting release of the liens on the collateral assets in the context of such a transaction made sense to MHR as a stockholder, outweighing any of its narrower interests as a Noteholder.[130] Accordingly, it was the responsible course for Loral to obtain MHR's agreement not to object in the broadest terms it could negotiate, when it had the opportunity to do so, 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.[131] The non-objection provision ultimately reflected in Section 5.01 of the SPA was actually included

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129 Targoff Dep. at 58:8-60:23 (stating that when Mr. Targoff asked Dr. Rachesky whether redemption of the Notes would be in MHR's financial interest as a result of MHR's common stock holdings, Dr. Rachesky replied that MHR will agree to redemption when Loral does a transaction); Simon Dep. 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. at 452:10-453:15 (MHR's non-objection was a "giveaway" by MHR).

130 Shareholder plaintiff Highland Capital appeared to agree with this reasoning. See Trial Tr. at 1211:15-1213:18 (Mr. Dondero stating that he does not think that Highland objected to redemption of the Notes and that Highland's "standpoint was from that of an equity holder's"); see also Rachesky Dep. at 281:7-283:14 (large transaction provides an advantage; without such transaction, the Company may have deteriorated, which could have affected the value of the Notes).

131 Plaintiffs have failed to identify exactly what separate consideration MHR received in exchange for its Section 5.01. GPC's First Interrogatory Responses at 3-4, NJX 57 (referring only to the Complaint and stating that defendants and MHR have knowledge of applicable information); Watershed's First Interrogatory Responses at 3-4, NJX 54 (same); Rockview's First Interrogatory Responses at 3-4, NJX 55 (same); Murray Capital's First Interrogatory Responses at 3-4, NJX 30 (same); KS Capital's First Interrogatory Responses at 3-4, NJX 56 (same).

in the very first term sheet for this agreement.[132] 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 a similar or larger fee if the transaction had been underwritten.[133]

Further, none of the fact witnesses in this case -- and plaintiffs took over twenty-five separate days of depositions, not to mention the six days of trial testimony -- has identified any separate consideration provided to MHR "for the agreement contained in Section 5.01 of the SPA."[134] Dr. Rachesky himself testified at trial that MHR received no separate consideration for its agreement not to object to redemption.[135] In fact, as of the time the SPA was signed in October 2006, no one at Loral had attributed any specific value to the agreement contained in Section 5.01, or even tried to assess the likelihood of

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

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

134 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 3. At trial Ms. Murray provided her personal speculation that a consent payment was made. See Trial Tr. at 1248:24-1249:4; see also id. at 1249:5-9 (Ms. Murray stating, "Well, because I do not think that they would have agreed to be taken out at 110 without such payment."). On the other hand, the expert retained by the shareholder plaintiffs, Mr. Ross, took a contrary view. See Ross Dep. at 517:4-12 (Mr. Ross stating that "it's not clear to me that [MHR] provided any value in agreeing [not to object to redemption] since given the facts and circumstances it would have been in their interest to not object even if they had made no agreement to do so").

135 Trial Tr. at 1324:14-1325:1 (Dr. Rachesky's testimony that there was no separate consideration provided to MHR for its agreement not to object to redemption).

the contingency contemplated by Section 5.01 -- "the closing of a transaction valued at $600 million or more"[136] -- coming to pass before the hard call date.

Plaintiffs' own expert never attempted to value the agreement contained in Section 5.01 as of the date the SPA was signed on October 17, 2006.[137] Instead, plaintiffs' expert admitted the difficulty in assessing value as of that date:

> [Y]ou can't value what you gave up until you set a date for when you are going to give it up. So as of the date you are talking about, October 2006, as far as I know, there had not been a decision on the early call, so it would have been impossible, you know, to make a valuation for a date that didn't exist . . . .[138]

No one will deny that the covenant contained in Section 5.01 was advantageous to Loral -- it surely was. But just because it was advantageous does not mean that "Loral compensated MHR for the agreement contained in Section 5.01 of the SPA."[139] Plaintiffs' failure to adduce any evidence for such separate compensation -- or even any evidence that someone (even their own expert) evaluated how much Section 5.01 was worth to Loral on the date that the SPA was signed -- means that plaintiffs have not satisfied their burden of proving yet another key element of their case: the existence of any consent payment at all.

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136 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 2.

137 Jarrell Dep. Vol. II at 15:7-10 (responding "correct" to the question: "You don't have anything in your report that values Section 501 when the SPA was signed on October 17, 2006, correct?").

138 Jarrell Dep. Vol. II at 16:12-18; see Jarrell Demonstrative at 271-021, NJX 271.

139 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 3.

B. PLAINTIFFS HAVE FAILED TO SHOW A CAUSAL CONNECTION BETWEEN ANY PURPORTED CONSENT PAYMENT AND THEIR ALLEGED HARM

Plaintiffs make much of Section 5.01 of the SPA, which required MHR not to object to a provisional call in connection with an acquisition of $600 million or more -- but only "subject to the consummation of such Acquisition."[140] That Section, on a careful reading in the context of this case, did not in fact compel MHR to withhold any objection to the provisional call it may have had at the time that MHR issued its non-objection notice on June 13, 2007.[141] MHR was free to object to a redemption consummated before the acquisition in question closed.[142]

Objections to the proposed redemption, which were required to be unconditional, were due on July 12, 2007,[143] with redemption to occur on September 5, 2007 -- well before the closing of the Telesat transaction, which ultimately occurred on

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140 Feb. 27, 2007 Amended and Restated SPA at 24, NJX 19 (MHR's agreement not to object to redemption is "subject to the consummation of such Acquisition").

141 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, 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).

142 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 2 ("Section 5.01 of the SPA provided that MHR would not object to a Provisional Call of the Notes if the redemption was made at or following the closing of a transaction valued at $600 million or more." (emphasis added)).

143 June 13, 2007, Redemption Notice, NJX 42 (stating July 12, 2007 deadline).

October 31, 2007.[144] Nonetheless, like many other Noteholders, possibly even shareholder plaintiff Highland Capital,[145] MHR delivered its certificate of non-objection without requesting or receiving any separate consideration at all.[146] Therefore, the only wrong of which plaintiffs complain -- "the payment to MHR for the agreement contained in Section 5.01 of the SPA"[147] -- has no causal connection to MHR's non-objection, which was given outside of obligations of Section 5.01.[148] Again, plaintiffs' claims fail.

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144 Sept. 24, 2007 Loral 8-K at 2, NJX 41 (Notes were redeemed on September 5, 2007); Oct. 31, 2007 Loral Press Release at 1, NJX 39 (announcing the closing of the Telesat transaction).

145 Trial Tr. at 1211:15-1213:18 (Mr. Dondero stating that he does not know if Highland objected and that their "standpoint was from that of an equity holder's").

146 July 12, 2007 Email from Bruce Kraus of Willkie Farr, NJX 65 (forwarding email from the Bank of New York attaching MHR's non-objection notice). See Trial Tr. at 1387:12-1388:14 (Dr. Rachesky stating that if MHR had retained the right to object to a redemption of the Notes, MHR could have hypothetically objected to redemption of the Notes in connection with the transaction and entered into a dialogue with the Company).

147 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 3.

148 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 2.

IV. EVEN IF PLAINTIFFS PROVE LIABILITY -- WHICH THEY CANNOT DO -- THEIR DAMAGES ARE INFLATED

Following pre-trial briefing, plaintiffs abandoned their earlier claims for a share of the so-called consent fee paid to MHR,[149] and now limit their prayer to the "value of the interest payments lost as a result of the allegedly improper redemption."[150] But even if plaintiffs can prove their breach of contract case, which they cannot, their estimate of those lost interest payments, ranging "between $9 million and $17.9 million,"[151] is grossly overstated.

Plaintiffs' $9 million figure -- really $8.982 million[152] -- estimates damages based on the assumption that the Notes would have remained outstanding to the hard call date.[153] Plaintiffs' $17.9 million figure, on the other hand, estimates damages based on the assumption that the Notes would have remained outstanding until maturity on October 15, 2015.[154] But given the Company's stated intention to redeem the Notes, as

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149 See Defendants' Pre-Trial Opening Brief at 43 & n.117.

150 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 3 ("Plaintiffs seek the value of the interest payments lost as a result of the allegedly improper redemption.").

151 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 3.

152 Jan. 24, 2008 Report of Gregg A. Jarrell at 25 ¶ 71 , NJX 131 (damages based on a "Similar Risky Investment" analysis); id. at Ex. 4 n.14, NJX 131 (calculating purported losses of $8,982,008).

153 Jan. 24, 2008 Report of Gregg A. Jarrell at Ex. 4 n.7, NJX 131.

154 Jan. 24, 2008 Report of Gregg A. Jarrell at Ex. 5, NJX 131.

well as its unconditional right to defease the Notes at any time,[155] there is no plausible reason to believe that the Notes would have remained outstanding to October 15, 2015 -- as even plaintiffs' own expert was forced to concede.[156]

Yet, even the $8.982 million estimate to the hard call date is too high. That figure reflects purported damages for all non-MHR Noteholders, not just the plaintiffs.[157] Plaintiffs' expert conceded that to calculate damages for the plaintiffs -- who only owned approximately two-thirds of the non-MHR-held Notes -- one would need to multiply his damages estimate by two-thirds.[158] That would reduce the figure for the plaintiffs' damages from $8.982 million to $5.988 million.[159]

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155 Jan. 24, 2008 Report of Gregg A. Jarrell at 16 ¶ 47(ii), NJX 131.

156 Jarrell Dep. Vol. II at 22:25-23:5 ("Q. So, in fact, sir, you have no basis to conclude that the 14 percent notes would have remained outstanding until October 15, 2015, correct? A. Correct.").

157 Jan. 24, 2008 Report of Gregg A. Jarrell at 1 n.3, NJX 131.

158 Jarrell Dep. Vol. I at 28:9-20.

159 In addition to the $8.982 million loss calculated using a "Similar Risky Investment" analysis, plaintiffs' expert also calculated damages to the hard call date based on a "Defeasance Calculation." Jan. 24, 2008 Report of Gregg A. Jarrell at 20, NJX 131. The total non-MHR loss calculated under this method is $13.389 million, as opposed to the $8.982 million under the Similar Risky Investment model. Id. at Ex. 3 n.14, NJX 131. The plaintiffs' two-thirds of this $13.389 million figure would be $8.926 million. But plaintiffs' expert gives no explanation as to why the damages from his Defeasance Calculation are a more appropriate measure than those from his Similar Risky Investment model.

CONCLUSION

For the reasons set forth herein, and which were further 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.

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