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.	Civil Action No.: 3022-VCS

DEFENDANTS' PRE-TRIAL REPLY BRIEF

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PRELIMINARY STATEMENT

This case is now solely about a non-existent covenant, as plaintiffs appear to agree, having made no mention in their pretrial brief of their previously-asserted, but now dropped, breach of contract claim. But the doctrine of implied covenants of good faith and fair dealing, on which plaintiffs now exclusively rely, exists in the law to advance and validate the business deal reached by the parties as expressed in a written contract. It does not allow one party to a contract to take that contract's benefits free and clear of the associated burdens.

The deal that permitted Loral to exit bankruptcy included a rights offering of the Notes. Both sides agree that the Notes bore an above-market interest rate. The trade-off for that high rate was a provisional call feature that enabled Skynet, the issuer of the Notes, to free itself of this interest burden ahead of the Notes' hard call date, absent the objection of holders of two-thirds or more of the principal amount of the Notes. The implications of this provision -- in the context of MHR's prospective ownership of at least one-third of the Notes, and the express preservation of MHR's right to give or withhold consents, and the deletion of a covenant that would have prohibited Skynet from making unequal payments -- were made plain to every participant in the bankruptcy proceeding, including all offerees in the rights offering.

Plaintiffs have failed to show that Loral made the very payment for consent of which they complain. And they have also failed to show that a no-unequal-payments-for-consent covenant, whether implied or expressed, would have prohibited a payment by

Loral which, unlike Skynet, was not a party to the Indenture, and not bound by any of its other terms. This amplifies and illustrates why the law is reluctant to imply covenants, and refuses to do so when the parties have otherwise agreed: a contrary rule would leave parties, and even non-parties, subject to limitless obligations. Plaintiffs' version of the doctrine of implied covenants of good faith and fair dealing is little more than a plea to substitute the plaintiffs' attachment to their high interest rate for the express terms of the contract concerning when that interest rate comes to an end.

ARGUMENT

I. THE NEGOTIATION HISTORY OF THIS INDENTURE AND MODERN INDENTURE PRACTICE PRECLUDE PLAINTIFFS' INVOCATION OF THE DOCTRINE OF IMPLIED COVENANTS OF GOOD FAITH AND FAIR DEALING.

Plaintiffs' case rests upon two misguided propositions:

First, that the doctrine of the implied covenant of good faith and fair dealing permits and even requires the Court to imply a covenant that the parties considered and agreed not to include.

Second, that the covenant in question is absent from all other Indentures and must therefore be implied in all of them.

A. A Payments for Consent Provision Was Considered and Deleted.

Plaintiffs themselves put the history of the negotiation of this Indenture into issue by their very invocation of the doctrine of implied covenants. As their own cases

show,[1] courts in applying this doctrine must look to what the parties "thought to negotiate," Katz v. Oak Industries, Inc., 508 A.2d 873, 880 (Del. Ch. 1986), and look to the negotiations to determine whether the negotiating parties "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. Eastern 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."[2] Id. This case presents the opposite situation, replete as it is with publicly filed uncontroverted evidence that the parties actually considered, but chose not to include, a provision that would have prohibited the parties to the Indenture from engaging in the conduct plaintiffs seek to ascribe to Loral.[3] Where, as here, the evidence of what the negotiating parties considered

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1 Noteholder Plaintiffs' Pre-Trial Brief ("Plaintiffs' Brief") at 42-44.

2 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).

3 See, e.g., June 8, 2005 Loral Orion, Inc. Form T-3 at 71, Gibson Aff. NJX 4 (publicly disclosing draft Indenture that contained the Payments for Consent provision);

is clear, the doctrine of implied covenants has no application. As the Katz court concluded, the question is whether "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." 508 A.2d at 880.[4]

The history here is the opposite of the "secret negotiations" alleged by plaintiffs.[5] Whereas the typical indenture is negotiated solely between underwriters, issuers, and their counsel and is nonetheless binding on direct and aftermarket purchasers, 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

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June 30, 2005 Loral Bankruptcy Filing at 56, Gibson Aff. NJX 8 (publicly filed blackline draft Indenture indicating that the Payments for Consent provision was deleted).

4 None of this would be any different even if plaintiffs were not aware of and involved in the negotiations, as plaintiffs would nevertheless be bound by the parties' negotiations as after-market purchasers, particularly since Akin Gump was negotiating directly on behalf of the creditors and future Noteholders. See Metro. Life Ins. Co. v. RJR Nabisco, Inc., 716 F. Supp. 1504, 1509 (S.D.N.Y. 1989) (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); 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).

5 Plaintiffs' Brief at 67.

the bankruptcy court itself.[6] In fact, 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 before Watershed purchased any Notes.[7] These are rather notable exceptions to plaintiffs' claim that "no one in the marketplace . . . reads drafts of indentures."[8]

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6 Indeed, because all parties were on notice regarding the negotiation and terms of the Indenture, plaintiffs' cases based on unlawful, intentional or deliberate misconduct intended to deceive or harm investors have no application here. See Richbell Info. Services, Inc. v. Jupiter Partners, L.P., 765 N.Y.S.2d 575, 587-88 (N.Y. App. Div. 2003) (denying motion to dismiss where joint venture partner engaged in "bad faith targeted malevolence in the guise of business dealings" by "invok[ing] its veto power over the IPO" in order to obtain a larger share of the profits); Wertheim Schroder & Co. v. Avon Prods., Inc., No. 91 Civ. 2287, 1993 WL 126427, at *11-12 (S.D.N.Y. Apr. 1, 1993) (finding the implied covenant applied where issuer allegedly "manipulated" an "extraordinary dividend" in order "to inflate the price of the common stock" in connection with a stock redemption); Breakaway Solutions, Inc. v. Morgan Stanley & Co., No. Civ. A. 19522, 2004 WL 1949300, at *2, *12 (Del. Ch. Aug. 27, 2004) (denying motion to dismiss where underwriter allegedly received "kickbacks" from investors who bought in plaintiffs' IPO); see also Gross v. Empire Healthchoice Assurance, Inc., No. 602848-05, 2006 WL 1358474, at *4-5 (N.Y. Sup. Ct. May 16, 2006); Van Gemert v. Boeing Co., 520 F.2d 1373, 1383-86 (2d Cir. 1975) Wallace v. Merrill Lynch Capital Services, Inc., No. 602604, 2005 WL 3487809, at *4-5 (N.Y. Sup. Ct. Dec. 14, 2005)

7 Jan. 5, 2006 Email from G. Picco to M. Alam at 1-2, Gibson Aff. NJX 50 (discussing review of 6/30/05 blackline and discussion with Akin Gump and Lehman Brothers); Plaintiffs' Brief at 10-11 (KS Capital initially obtained Notes in Nov. 2005; Watershed "began to purchase the Notes in February 2006").

8 Plaintiffs' Brief at 62. Indeed, the review of the draft Indenture by these sophisticated plaintiffs creates a stark contrast to the cases cited by plaintiffs involving unsophisticated parties subject to contracts of adhesion or who were not involved in or aware of the contract negotiations. See Dalton v. Educ. Testing Serv., 663 N.E.2d

B. Unequal Payments Are Prohibited in Other Indentures Where the Parties So Intend.

Plaintiffs rest their case for writing the missing covenant back into the Indenture on their repeated assertion that no other indenture contains a covenant of this kind. Thus, plaintiffs make the astounding statement that unequal payments for consent are "not prohibited in any other indenture."[9] This is simply incorrect. It turns out that several plaintiffs themselves owned Notes pursuant to indentures that contained just such a restrictive covenant -- the Loral Orion indenture, ownership of which provided plaintiffs the opportunity to participate in the rights offering.[10] Defendants submitted a

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289, 293 (N.Y. 1995) (involving contract of adhesion between student test-taker and administrators of the SATs who refused to release student's scores without a reasonable basis); 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 773 N.E.2d 496, 500 (N.Y. 2002) (involving co-op sponsor who refused to sell shares and kept units for himself; "purchasing tenants and sponsors do not deal as equals either in terms of access to information or business acumen and thus, tenants often lack equal bargaining power") (quotations and citation omitted). In contrast, these plaintiffs 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. Vol. I at 52:4-10 (stating that Murray Capital specializes in distressed debt); Picco Dep. at 139:23-140:14, 162:3-13 (stating that Mr. Picco handled KS Capital's distressed portfolio).

9 Plaintiffs' Brief at 42.

10 Dec. 21, 2001 Loral Cyberstar, Inc. 10% Senior Notes Indenture, Burstein Aff. NJX 257 at Section 4.23 (prohibiting unequal consent payments); Schweitzer Dep. at 26:12-22 (GPC and Rockview owned 10% Orion [Cyberstar] Notes); Murray Dep. Vol. II at 400:16-402:11 (indicating that Murray Capital may have owned Loral Cyberstar 10% 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, Burstein Aff. NJX 258 (stating that effective January 8, 2002 the registrant's name would be changed from Loral Cyberstar, Inc. to Loral Orion, Inc.).

compendium of fifty publicly filed indentures containing such a provision and have offered to submit more at the Court's request.

Furthermore, Plaintiffs cite the absence of a No-Unequal-Payments-For-Consent provision from the "Model Simplified Indenture" for their proposition that no Indentures contain such provisions,[11] blithely ignoring that model's warnings 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."[12] Meanwhile, an example indenture for senior debt promulgated by the Practicing Law Institute contains precisely the provision at issue here.[13]

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[11] Plaintiffs' Brief at 49 n.196.

[12] Model Simplified Indenture, 38 Bus. Law. 741, 743 (1983), Bromberg Aff. NJX 137; see also Revised Model Simplified Indenture, 55 Bus. Law. 1115, 1115 (2000), Bromberg Aff. NJX 140 (focus of the revisions to model indenture "was on the non-covenant provisions of a 'standard' convertible, subordinated indenture."). Plaintiffs also cite to various academic texts and scholarly articles in their brief. See, e.g., Plaintiffs' Brief at 46-47 n. 190-91, 62-63 & n. 250-51, 67 n. 261. However, while public policy arguments about what the law ought to be may be an interesting exercise, they do not replace the common law of contracts. Nor are the academics' qualified assertions even relevant here, as the negotiating parties' understanding here was not only in accordance with market practice regarding payment-for-consent covenants, but was clearly disclosed through the publicly filed drafts of the Indenture. See, e.g., Plaintiffs' Brief at 67, n. 261 (quoting article arguing that it is a "difficult question" whether the marketplace understandings of terms should govern conflicting understandings of particular issuers).

[13] 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:

This provision has even been litigated in Delaware. The court in Oaktree Capital Mgmt. LLC v. Spectrasite Holdings, Inc., C.A. 02-548 JJF, 2002 WL 32173072 (D. Del. June 25, 2002), enforced just such an express provision, requiring the issuer "to pay consideration to all consenting holders . . . ." Id. at *6. There is no suggestion in the Oaktree case that the outcome would have been the same regardless of whether the covenant in question was included in the Indenture or not, and the absence of the provision in one of the model indentures cited above but not the other suggests that its inclusion or exclusion indeed makes a difference.

Different indentures mean different things, and defendants' compendia of publicly filed indentures shows that in the five months prior to the issuance of the Notes, approximately 10% of indentures contained a Payments for Consent covenant. And notwithstanding plaintiffs attempts to put a spin on an early draft of the Indenture in which Stroock proposed express permission for unequal consent payments,[14] the fact remains that the final Indenture was drafted without any restrictive covenant regarding Payments for Consent. In the absence of an agreed restriction, a party is free to act. See, e.g., Greenfield v. Phillies Records, Inc., 780 N.E.2d 166, 168 (N.Y. 2002) (holding

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Protecting Your Client's Interests in Difficult Times, 1307 PLI/Corp. 197 (2002) (article on the basic components of indentures and attaching "[a]n example of an open (base) indenture" for senior notes).

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

record producer had unconditional right to redistribute artists' performances in any technological form absent "an explicit contractual reservation of rights by the artists").

C. The Noteholders Had No Reasonable Expectation that the Notes Would Remain Outstanding Through the Hard Call Date.

Academic literature notwithstanding, there is no law that entitles the plaintiffs to write the provisional call out of the Notes or to write the No-Unequal-Payments-For-Consent provision back in.[15] Plaintiffs admit that they bought the Notes knowing full well that they carried an above-market rate of interest[16] and full knowledge of the terms of the provisional call and MHR's ownership position.[17] Against these

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[15] 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, cases cited by plaintiffs involving defendants that owed heightened duties to plaintiffs are not applicable here. See Don King Prods., Inc. v. Douglas, 742 F. Supp. 741, 768 (S.D.N.Y. 1990) (denying summary judgment of an implied covenant claim against boxing promoter who advocated that his client was knocked out where alleged facts implicated promoter owed fiduciary duties to client); 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 773 N.E.2d 496, 500-01 (N.Y. 2002) (finding implied covenant breached where co-op sponsor refused bona fide purchase offers for shares and kept units as rentals despite "sponsor's duty imposed by the Attorney General not to abandon the offering plan").

[16] Plaintiffs' Brief at 3 ("all parties, Loral included, agree that the Notes paid an above-market rate of interest.").

[17] Murray Dep. Vol. II at 386:16-388:5, 403:19-404:9 (prior to investing, witness was aware of provisional call and two-thirds objection requirement and that MHR would own over one-third of the Notes); Schweitzer Dep. at 79:22-80:19, 94:20-96:9 (same); Picco Dep. at 92:20-93:18, 95:18-25 (prior to investing, witness was aware that MHR held over one-third of Notes and that it would be impossible to stop redemption without MHR's agreement); Alam Dep. at 51:19-52:10, 65:7-66:19 (same). As a case cited by plaintiffs points out, the implied covenant of good faith and fair dealing "does not extend so far as to undermine a party's 'general right to act

admitted facts, plaintiffs are free to assert that they somehow "expected" that they would be paid 14% interest on the Notes at least until October 2009,[18] but such an expectation cannot be deemed reasonable as a matter of law. Even less reasonable is reliance on conversations alleged to have taken place long after the Notes were issued[19] -- especially since the creditors and future Noteholders were on notice that the negotiating parties

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on its own interests in a way that may incidentally lessen' the other party's anticipated fruits from the contract." M/A-Com Sec. Corp. v. Galesi, 904 F.2d 134, 136 (2d Cir. 1990) (citations omitted).

[18] Plaintiffs' Brief at 45 ("The Noteholders reasonably expected that they would be paid 14% interest on the Notes at least until October 2009.").

[19] Based only on Marti Murray's purported notes from a May 3, 2006 meeting with "Mickey" Targoff that "2/3 of the bondholders could block a call at 110 which Mickey suggested would likely happen," May 19, 2006 E-mail from Marti Murray of Murray Capital, Bromberg Aff. NJX 83 (emphasis added), plaintiffs allege that Targoff told Murray "that the Company could not redeem the Notes before 2009 because no Noteholder would accept 110 for the Notes." Plaintiffs' Brief at 4, 20-21. These notes are themselves suspect, as they were inexplicably written sixteen days after her meeting with Targoff. May 19, 2006 E-mail from Marti Murray of Murray Capital, Bromberg Aff. NJX 83. Moreover, the record indicates that Murray and at least one other plaintiff were contemplating litigation prior to the time that Murray's notes were written. See, e.g., Oct. 31, 2007 Plaintiffs' Privilege Log, Burstein Aff. NJX 256 at entries 153, 360 (reflecting communications by Murray Capital and Watershed prior to 5/19/06 relating to potential litigation). Two other people who attended that meeting do not recall any such a statement by Targoff. McCarthy Dep. at 258:6-24 (stating that he does not recall the subject of the Notes coming up in the May 2006 meeting with Murray); Targoff Dep. Vol. I at 90:21-92:17 (stating that he does not recall discussion of the Notes in the May 2006 meeting, but if such discussion had come up, he would have told Murray the fact that if two-thirds voted against redemption, the Company could not redeem the Notes).

intentionally chose not to include a Payments for Consent term restricting unequal consent payments.[20]

D. Loral and Skynet Did the Right Thing for Both the Noteholders and Stockholders By Redeeming the Notes and Accomplishing the Telesat Transaction.

Whether there was some breach of the implied covenant of good faith and fair dealing should be evaluated with an eye on the big picture. The Notes were acquired via a rights offering to the same entities that acquired the stock in the Old Loral bankruptcy. Initially, most of the Noteholders owned Notes in roughly the same percentage as they owned stock.[21] While there was some trading after the bankruptcy exit, co-ownership of both instruments continued to be the case, and most of the plaintiffs in this case have also been stockholders.[22]

As stockholders, the plaintiffs had the same interest as MHR in seeing the Notes redeemed so that the liens could be released and the Telesat transaction could proceed. While the calculation differs from one plaintiff to another, several were in a position such that an increase in the price of the stock by only a small amount would

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

[21] Disclosure Statement at 47, 50, 51, 54, Gibson Aff. NJX 1 (describing the securities to be issued under the plan of reorganization).

[22] Picco Dep. at 137:12-138:17 (stating that KS Capital owned Loral stock prior to redemption of the Notes); Alam Dep. at 70:21-71:21 (same as to the Watershed plaintiffs); Oct. 25, 2006 Letter From Marti P. Murray at 5, Gibson Aff. NJX 12 (asserting Murray Capital is a significant shareholder of Loral).

exceed any amount of Note interest they would receive through the October 2009 "hard call" date. And, if a strategic transaction could lead to a stock price increase, the gain to these Noteholders via their stock interest could easily exceed their potential Note interest through the October 2009 call by an order of magnitude.[23]

Why then would sophisticated hedge funds in such a position sue to enjoin the redemption? The simple answer, to borrow a term used by the Court during a hearing in this matter, is "leverage games."[24] With a well-timed lawsuit and an injunction motion timed to potentially interrupt a critical transaction, the plaintiffs could hope to extract a payment for hold-up value, then get redeemed, and also get the equity bump from seeing the strategic transaction go through. The cost would be borne by those noteholder-shareholders who did not join in the hold-up game and by shareholders who owned no or

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[23] For example, when the Telesat transaction and intended redemption was announced on December 18, 2006, plaintiff Murray Capital was a Loral stockholder, owning approximately 447,000 shares. Murray Capital Stock Holdings Statements, Burstein Aff. NJX 250 (showing that total holdings across five Murray Capital funds to be 447,502 as of November 30, 2006). On the other hand, Murray Capital then owned only approximately 1.7% of the Notes, and purchased the majority of its Notes in the months that followed. Nov. 16, 2007 Plaintiff Murray Capital Management Inc.'s Answer to Defendants' First Set of Interrogatories at 5, Gibson Aff. NJX 30. Based on its portion of the Notes at that time, Murray Capital only needed an increase of $0.89 per share to cover the interest payments that could have been received through the Hard Call date. In fact, because the stock price went up $1.06 per share on announcement of the Telesat deal, Murray Capital's purportedly-lost interest as a Noteholder was more than covered by its equity position on that day alone.

[24] July 16, 2007 Teleconference Transcript Before Hon. Leo E. Strine, Jr. at 20, Gibson Aff. NJX 35.

few Notes. Unfortunately for plaintiffs, that game ended here when the Court denied the preliminary injunction.

The Indenture here gave Loral a mechanism to minimize such hold-up games through obtaining the consent to a provisional call from MHR. When the opportunity arose in the context of a separate transaction to obtain such consent without any incremental payment, it was the responsible thing to do for Loral to take that opportunity. (Indeed, it would have been the responsible thing to do even if some payment to MHR had been involved, but that was not the case here.)

II. IMPLIED COVENANTS DO NOT BIND NON-PARTIES ANY MORE THAN EXPRESS ONES DO.

Plaintiffs employ a definitional sleight-of-hand in an attempt to obscure another flaw in their case: the doctrine of implied covenants cannot bind a party that is not subject to the contract's express covenants. Plaintiffs define their term "Loral" to lump together both the parent company -- not a party to or otherwise bound by the Indenture or the Notes -- together with Skynet and its subsidiaries, which are so bound.[25] Absent this illegitimate definition, plaintiffs' arguments are incorrect even at a basic, syntactical level, since the only allegation of a disguised payment is one coming from the

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[25] Plaintiffs' Brief at 2.

parent company Loral to MHR under the SPA, to which neither Skynet nor any of the other Indenture parties is bound.[26]

The actions of a non-party, such as Loral here, do not constitute a breach of contract, and this is all the more true in the case of implied covenants as it would be in the case of express contract terms. See Blank v. Noumair, 658 N.Y.S.2d 88, 88 (N.Y. App. Div. 1997); La Barte v. Seneca Resources 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") (citations omitted). "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 Saratoga, Inc. v. Blue Cross Blue Shield of Central N.Y Inc., 660 N.Y.S.2d 236, 236 (N.Y. App. Div. 1997).

III. PLAINTIFFS HAVE IDENTIFIED NO CONSIDERATION RECEIVED BY MHR FOR NOT OBJECTING TO THE PROVISIONAL CALL.

Plaintiffs agree that Section 5.01 of the SPA only applied to a redemption "at or following the closing of a transaction valued at $600 million or more"[27] -- which could not apply to the redemption of the Notes effectuated two months before the closing

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

[27] Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 2, Burstein Aff. Ex. 1.

of the Telesat deal.[28] As plaintiffs complain only about "the payment to MHR for the agreement contained in Section 5.01 of the SPA,"[29] they cannot point to any consideration for the non-objection that was actually given by MHR in this case. Faced with this problem, plaintiffs range far afield, to discussions of deals that never went to contract and never closed, shedding no light on the events at issue here. But in the end, plaintiffs also have not and cannot point to any separate consideration MHR received for the agreement contained in Section 5.01 of the SPA, even if MHR's non-objection had been provided pursuant to Section 5.01.

A. MHR's Non-Objection in Connection With a Strategic Transaction.

At the time the MHR preferred stock deal was under negotiation, Loral CEO Michael Targoff colorfully described the nugatory value of an MHR promise not to object to a redemption of the bonds in connection with a large strategic transaction:

> The points we discussed are primarily in two groups: financial or terms.
>
> Financial points are: rate, premium, fee and call date. While they are somewhat fungible, I would think that premium (ie "no less than 10% above market" is both financially and conceptually important) and call ability prior to five years with a grid are the two highest priorities. Fee and rate are pure dollar items. The consent to call on the 14% notes is a pure dollar item and should be cooupled [sic] with

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[28] See Defendants' Pre-Trial Brief at 25 & n.72-73.

[29] Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 3, Burstein Aff. Ex. 1.

> these. I think the current offer with the 1bn transaction threshold is "ice in the winter"[30]

In his deposition, Mr. Targoff explained that when he called the "consent to call" on the Notes a "pure dollar item," he meant that if the Special Committee "can get the consent to call without a transaction, then it will save a lot of money, and we can value that."[31] This explains why in his next sentence, Targoff states that by contrast, the consent to call with a $1 billion transaction threshold is "ice in the winter," meaning that such consent had no value because it was a free good: MHR would have consented in the context of such a transaction regardless of any agreement to do so in the SPA.[32] Of course, Mr. Targoff's opinion was proven right, because MHR in fact waived objection to the provisional call without consideration when asked to do so by Loral,[33] even though

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30 June 3, 2006 E-mail from Targoff to Simon, Gibson Aff. NJX 16.

31 Targoff Dep. Vol. I at 123:10-17 (emphasis added) (explaining what he meant when he wrote "consent to call" is a "pure dollar item").

32 Targoff Dep. Vol. I at 123:18-124:16 (explaining "ice in the winter" reference).

33 Plaintiffs' assertion notwithstanding, Willkie Farr never "instructed MHR that it was obligated not to object to the redemption," nor did MHR "accede[] to Loral's demand." Plaintiffs' Brief at 31. In fact, Loral's counsel, aware that the condition to the applicability of Section 5.01 was not satisfied, sent a carefully worded letter requesting cooperation. Kraus Dep. Vol. I at 49:14-19, 51:6-52:21 (stating that, as an advocate, he tried to imply that MHR was required not to object to redemption in the "hope and belief" that MHR would not object); June 13, 2007 Letter from B. Kraus of Willkie Farr, Gibson Aff. NJX 44. The requested non-objection notice was duly sent, despite the fact that MHR's counsel said he disagreed with any implication in the Kraus letter that MHR was under any obligation to do so. Kraus Dep. Vol. I at 51:6-52:21 (stating that Hal Goldstein did not agree with statements in letter).

Section 5.01 only applied if the redemption was made at or following the closing of the transaction,[34] and therefore did not require the consent given in this case.

Plaintiffs now limit their claim to the "value of the interest payments lost as a result of the allegedly improper redemption,"[35] thus abandoning their earlier claims for a share of the so-called consent fee paid to MHR.[36] This is doubtless in recognition of the fact that plaintiffs do not own enough bonds for them to sue for anything else.[37] But adding in plaintiffs' agreement that Section 5.01 of the SPA only required MHR's non-objection "at or following the closing of a transaction valued at $600 million or more,"[38] even plaintiffs' remaining claim for interest must disappear. That is because the very wrong of which plaintiffs complain -- "the payment to MHR for the agreement contained in Section 5.01 of the SPA"[39] -- is simply beside the point when MHR's non-objection

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34 Feb. 27, 2007 Amended and Restated SPA, Gibson Aff. NJX 19 at 24 (providing that MHR's agreement not to object to redemption of the Notes is "subject to the consummation of such Acquisition"); see also Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 2, Burstein Aff. Ex. 1 (stating that Section 5.01 applies to "situations in which redemption was made at or following the closing of a transaction valued at $600 million or more").

35 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 3, Burstein Aff. Ex. 1.

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

37 See Defendants' Pre-Trial Brief at 41-44.

38 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 2, Burstein Aff. Ex. 1.

39 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 3, Burstein Aff. Ex. 1.

was given outside of any duties imposed by Section 5.01, as the non-objection was not provided "at or following the closing of a transaction."[40]

B. Loral Never Agreed to Pay MHR for Not Objecting to Redemption in Connection with Loral's Earlier, Failed New Skies Transaction.

The record of Loral's failed attempt to acquire New Skies in 2005 also demonstrates the truth of Mr. Targoff's observation that MHR's consent in connection with a strategic transaction was "ice in the winter." Plaintiffs' assertions to the contrary, the record shows that MHR neither "demanded" nor that "Loral agreed to pay" a fee for MHR not to object to redemption of the Notes in connection with that deal.[41]

Instead, the record reflects MHR's willingness to consent promptly and without consideration in the context of a large, time-critical strategic transaction. MHR's initial request was for Loral simply to work in good faith with MHR to determine an appropriate fee,[42] a request that appears to have been promptly watered down even further. Plaintiffs make much of a set of "initial draft" Board resolutions transmitted by email at 4:18 AM by a Willkie Farr associate just prior to the time that negotiations on the New Skies deal collapsed[43] that were never reviewed by Loral officers, in-house

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40 Feb. 25, 2008 Joint Pre-Trial Stipulation and Order at 2, Burstein Aff. Ex. 1.

41 Plaintiffs' Brief at 12, 17, 58.

42 Dec. 12, 2005 E-mail from D. Lipshitz, Gibson Aff. NJX 48 (attaching draft consent to redemption and side letter).

43 E-mail from Getachew to Katz, Yeung, and Lawrence, dated December 13, 2005, 4:18 AM at WFG0000812, Bromberg Aff. NJX 71(stating that the Company will

counsel or directors, much less adopted.[44] Plaintiffs conveniently ignore the prompt response of a Stroock attorney representing MHR stating that the resolutions were unnecessary and advising that MHR's consent would be forthcoming nonetheless:

> MHR's granting its consent w/ only request being that the Board consider paying a fee, and that such decision be made at a future date. We don't need the whole non-MHR subset of the board to meet, make a decision, etc, so we don't need that set of [resolutions].[45]

C. The Lack of a Non-Objection Agreement in MHR's Rights Offering Proposals Is Not Indicative of Separate Consideration in the SPA.

While it is true that MHR's preliminary proposals to replace its preferred stock investment with a rights offering did not include a non-objection provision,[46] there is no basis for plaintiffs' claim that this omission was "because the economics of the deal had changed so much that MHR wanted to retain the valuable Notes."[47] These are preliminary proposals that were never subject to a full negotiation process, let alone ever agreed to by Loral, and it is not appropriate to draw any inference from them as to what

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work in good faith with MHR to determine a consent fee); Yeung Dep. Vol. III at 526:18-527:14 (stating that Loral learned the next day that it did not get New Skies).

44 E-mail from Getachew to Katz, Yeung, and Lawrence, dated December 13, 2005, 4:18 AM, Bromberg Aff. NJX 71; Yeung Dep. Vol. III at 526:18-527:14 (stating that draft resolutions did not include comments from Yeung, and Loral learned the next day that it did not get New Skies).

45 Dec. 13, 2005 E-mail from Mark Getachew of Willkie Farr, Gibson Aff. NJX 64 (forwarding email from Brett Lawrence of Stroock).

46 Plaintiffs' Brief at 27.

47 Plaintiffs' Brief at 27.

terms MHR would have agreed to in a final contract. In any event, Dr. Rachesky, when asked at his deposition, flatly denied that "the rights offerings did not offer MHR terms that were as favorable to MHR as the SPA and, therefore, MHR was not willing to offer the non-objection provision."[48]

Equally implausible and unsupported by the record is plaintiffs' subsequent assertion that the rights offering proposals foundered over the non-objection provision.[49] In fact, neither Dr. Rachesky nor his partner, Hal Goldstein, could recall at their depositions why the non-objection provision wasn't contained in the rights offering proposals.[50] While it may be literally true that "[a]fter King & Spalding sought to negotiate for the inclusion of the covenant not to object to the redemption, MHR refused to negotiate,"[51] these two facts had very little to do with one another. Deposition testimony demonstrates that there were many disputed points between the Special Committee and MHR regarding the rights offering proposals, and that the deal died

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48 Rachesky Dep. Vol. II at 298:19-299:2 (stating that he does not believe such a statement is correct).

49 Plaintiffs' Brief at 29.

50 Rachesky Dep. Vol. II at 299:3-302:10 (the omission of the non-objection provision may have been an oversight, but Rachesky does not recall one way or the other; Rachesky does not recall intentionally omitting the non-objection provision for any reason); Goldstein Dep. Vol. I at 168:14-170:4, 171:6-13 (no recollection of why non-objection provision was omitted from rights offering proposals, and Goldstein cannot think of a reason why these proposals would not have included such provision).

51 Plaintiffs' Brief at 29.

because MHR wanted to proceed with the original SPA.[52] By all accounts, the negotiation relating to the non-objection provision in the rights offering proposals had little significance.[53]

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[52] Harkey Dep. Vol. II at 496:1-13 (stating that MHR was unwilling to modify the terms of the rights offering proposal, and the parties ultimately did not reach agreement on the rights offering); Capers Dep. Vol. I at 198:6-199:17 (stating that the Special Committee had a number of problems with MHR's proposal but that the attempts to engage in conversations with MHR failed); Rachesky Dep. Vol. II at 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).

[53] Capers Dep. Vol. I at 198:20-199:17 ("I don't have any specific recollection about the no objection provision as part of these conversations" involving the rights offering proposals); Paci Dep. Vol. I at 69:16-70:13 ("MHR's and Stroock's general approach on negotiating [the rights offering proposals] was that it was pretty much take it or leave it, and there wasn't going to be much to negotiate. And that attitude therefore would have extended to the nonobjection provision"); Simon Dep. Vol. III at 455:8-16 ("never even thought about" absence of non-objection provision in rights offering); Harkey Dep. Vol. II at 496:1-13 (no specific recollection of MHR's response to Special Committee's request to include non-objection provision in rights offering); Targoff Vol. I at 153:22-154:15, 156:19-160:7 (no recollection of discussing non-objection provision in connection with rights offering); Yeung Dep. Vol. II at 441:9-23, 449:3-451:10 (no recollection of absence of non-objection provision in rights offering proposals).

CONCLUSION

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

Dated: February 26, 2008

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CERTIFICATE OF SERVICE

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

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