EFiled: Oct 6 2009 3:35PM EDT
Transaction ID 27427130
Case No. 2742-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WEST WILLOW-BAY COURT, LLC, Plaintiff and Counterclaim Defendant, v. ROBINO-BAY COURT PLAZA, LLC and ROBINO-BAY COURT PAD, LLC, Defendants and Counterclaim Plaintiffs.	: : : : : : : : : : : :	**C.A. No. 2742-VCN**

MEMORANDUM OPINION ON REMAND

Date Submitted: September 16, 2009
Date Decided: October 6, 2009
Revised: October 6, 2009

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NOBLE, Vice Chancellor

I. INTRODUCTION

This dispute is based on a contract for the sale of a pad site at the Bay Court Plaza Shopping Center (the "Shopping Center") in Dover, Delaware. In accordance with the Real Property Purchase Agreement (the "Purchase Agreement"),[1] Defendants Robino-Bay Court Plaza, LLC and Robino-Bay Court Pad, LLC (collectively, "Robino") agreed to sell to Plaintiff West Willow-Bay Court, LLC ("West Willow") a parcel (the "Property") on which West Willow intended to erect a convenience store. Problems arose because a tenant in the Shopping Center refused to consent to the proposed project.

The Court first addressed the question of liability under the Purchase Agreement on cross-motions for summary judgment and concluded that the Second Amendment to the Purchase Agreement[2] imposed on Robino an unambiguous and unconditional obligation to obtain all necessary third-party consents.[3] Robino had breached the Second Amendment when it failed to obtain the approval of Value City, a tenant in the Shopping Center whose lease provided that its consent, not to be unreasonably withheld, was a prerequisite to certain improvements within the Shopping Center tract.[4] Thereafter, the Court tried the

[1] JX 3.
[2] JX 6.
[3] *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551 (Del. Ch. Nov. 2, 2007) ("*West Willow I*").
[4] Value City Lease, JX 1 at Art. XXIV.

question of damages and found that West Willow had incurred damages of $625,000.[5]

After entry of judgment to that effect, Robino appealed. The Supreme Court remanded the matter to this Court to determine whether the Purchase Agreement, as amended by the Second Amendment, should be reformed because of either mutual mistake or unilateral mistake.[6] Reformation, presumably, would lead to the conclusion that Robino's obligation to obtain Value City's consent was not unconditional; instead, it would have been Robino's obligation to have merely exercised its "best efforts" to secure that consent.[7] The parties amended their pleadings to frame this question and conducted limited, but expedited, discovery. This memorandum opinion sets forth the Court's findings of fact and conclusions of law following trial on remand.

II. BACKGROUND

The Purchase Agreement was executed in February 2004. In the course of the land use approval process, the City of Dover (and the Delaware Department of Transportation) conditioned approval of the necessary subdivision for the Property

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[5] *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, *8 (Del. Ch. Mar. 9, 2009) ("*West Willow II*").
[6] *Robino-Bay Court Plaza, LLC v. West Willow-Bay Court, LLC*, No. 136, 2009 (Del. Aug. 10, 2009) ("*West Willow III*").
[7] If the contractual standard is best efforts, it is likely that trial would be required to determine whether Robino had, in fact, exercised its best efforts.

upon Robino's granting of a cross-easement and the establishment of a public access road over its lands for the benefit of a tract owned by a third party and lying to the north of the Shopping Center. Robino considered the condition unreasonable and, as a result, Robino's attorney, Douglas M. Hershman, Esquire, wrote to Thomas B. McKee, West Willow's principal, on December 16, 2004, to advise that "the [Purchase] Agreement should be terminated and all deposit monies returned."[8] West Willow responded through its attorney, Lewis S. Wiener, Esquire, who wrote that West Willow would be willing to discuss a restructuring of the Purchase Agreement but that the Purchase Agreement would not support a termination on the basis cited by Hershman.

A few weeks later, McKee met with Michael Stortini, Robino's principal. The focus of their discussions was on the then-current obstacle: the access easement. Robino was reluctant to grant the easement without payment because it estimated the value of the easement to be $1.5 million. McKee was willing to contribute something to the effort, but he was also generally concerned about protecting West Willow's deal from other land use issues that might emerge and consequently allow Robino a way out of its bargain. West Willow agreed to increase the purchase price from $575,000 to $725,000.[9]

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[8] JX 23.

[9] At the same time, Robino was leasing another pad site within the Shopping Center for a restaurant, and its regulatory approval was also subject to a resolution of the access easement

McKee undertook to prepare, with some assistance from a second West Willow attorney, Mark Jackson, Esquire, a memorandum of understanding that would lead to an amendment of the Purchase Agreement reflecting the outcome of McKee's negotiations with Stortini.

The memorandum of understanding, in the form of a letter from McKee to Stortini, anticipated a formal amendment to the Purchase Agreement. McKee wrote:

> As per your discussions with Marc Geffroy and Brad Kotz, this will confirm that the Seller is amicable to restructuring the existing purchase contract under the terms and conditions detailed below. Please bear in mind that I offer these terms and conditions as a demonstration of good faith, but will not be bound by them until they are set forth in a formal amendment to the Agreement duly executed by both parties.
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> * * *
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> 2. <u>Seller Performance</u>: Seller shall remain expressly responsible for using its best efforts to obtain, at its sole cost and expense, any and all consents and approvals from all third parties, including existing tenants and lenders, necessary or desirable for Purchaser's acquisition of the Property and the development and intended use of the Property as a Wawa convenience store with gasoline service and such other amenities as Wawa desires. These consents and approvals include, but are not limited to, final subdivision and site plan approvals from the City of Dover; accordingly, Seller shall grant such easements and/or cross-access agreements required by the city, county or state (including specifically DelDOT) and promptly and fully satisfy, at its sole cost and expense, all other conditions precedent to the subdivision and site plan approval.

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issue. The restaurant owners agreed to increase the monthly lease payments by an amount that, over the term of the lease on a cash flow basis, would be roughly equal to the increase to which West Willow agreed. It is not clear whether West Willow was fully aware of this other arrangement.

> In the event Seller for any reason fails to deliver any and all necessary consents and approvals for Purchaser's intended use of the Property as a Wawa convenience store with gasoline service as aforesaid, Purchaser shall be entitled to any of its rights at law, in equity or under the Agreement, without regard to any contractual limitations.[10]

Stortini signed the memorandum of understanding, which was returned to McKee. MeKee then asked Jackson to prepare a formal amendment to the Purchase Agreement. Although the memorandum of understanding had characterized Robino's obligation to secure land use approvals as one requiring only "best efforts," that concept was not implemented in the Second Amendment as drafted by Jackson. The critical language of the Second Amendment read as follows:

> (b) Subdivision and Seller Performance. The last two (2) sentences of Paragraph 11 of the Purchase Agreement are hereby deleted in their entirety, and the following shall be substituted in lieu thereof:
>
> Anything contained herein to the contrary notwithstanding, Seller shall remain expressly responsible for obtaining, at its sole cost and expense, any and all consents and approvals from all third parties necessary or desirable for Purchaser's acquisition of the Property and the development and use of the Property as a . . . convenience store . . . .[11]

The Second Amendment was sent to Stortini, who signed it on behalf of Robino. Stortini read the Second Amendment, but not very carefully, and he did not forward it for review by Robino's attorneys. It did not register with him that

[10] JX 5.
[11] JX 6.

Robino was now unconditionally obligated to obtain the necessary land use approvals from third parties. The best efforts standard had been limited to the time of performance only.[12]

Value City refused to consent to West Willow's project. Robino offered certain concessions to Value City, but was unwilling to enhance its offer to Value City beyond that and did not file suit to test whether Value City's refusal to consent was "not unreasonably" withheld. West Willow was unwilling to move forward with its project without Value City's consent and filed this action for breach of the Purchase Agreement, as amended by the Second Amendment.

III. ANALYSIS

The issue on remand is whether the Second Amendment should be reformed to incorporate a "best efforts" standard by which to measure Robino's attempts to obtain Value City's consent to the proposed West Willow project. The Court starts with "the necessary assumption that an unambiguous written agreement is valid on its face and accurately reflects the intentions of the parties."[13] There are two pathways to reformation—mutual mistake and unilateral mistake:

> The first is the doctrine of mutual mistake. In such a case, the plaintiff must show that both parties were mistaken as to a material portion of the written agreement. The second is the doctrine of unilateral mistake. The party asserting this doctrine must show that it

[12] It is not the Court's purpose to revisit the analysis of the Second Amendment set forth in *West Willow I*.

[13] *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1156 (Del. 2002).

> was mistaken and that the other party knew of the mistake but remained silent. Regardless of which doctrine is used, the plaintiff must show by clear and convincing evidence that the parties came to a specific prior understanding that differed materially from the written agreement.[14]

Accordingly, in order to prevail, Robino must show: (1) that Stortini believed, when he executed the Second Amendment, that Robino would only be required to use "best efforts" in obtaining third-party consents; (2) either that West Willow (McKee) was also similarly mistaken, or that West Willow knew of Stortini's mistake and remained silent; and (3) that McKee and Stortini "had specifically agreed" or had come to a "specific understanding" that Robino would only be required to use best efforts in obtaining third-party consents.

1. <u>Was Robino Mistaken as to its Understanding of the Second Amendment's Requirements</u>?

Stortini and McKee met and negotiated what would become the Second Amendment in February of 2005. Their recall of that meeting is somewhat fuzzy.[15] The focus of the meeting was on an adjustment of the purchase price.

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[14] *Id.* at 1151-52 (citations omitted). The clear and convincing evidentiary standard is "an intermediary evidentiary standard, higher than mere preponderance, but lower than proof beyond a reasonable doubt." *Id.* at 1151 (citations omitted). In order to meet this standard, the party sponsoring the reformation claim must create "in the mind of the fact-finder a firm belief or conviction that the allegations and questions are true." *Id.* (quotation omitted).

[15] Although both sides suggest credibility concerns with respect to the testimony of the other side's witnesses, the Court is satisfied that the trial testimony set forth the witnesses' current, but perhaps somewhat incomplete, recollection of the key events more than four years ago. Stortini and McKee had been experiencing increased frustration with the progress of the land use approval process, and both may have made some unwarranted assumptions about what the other was willing to do.

Stortini was looking exclusively at the access easement. The access easement was one of McKee's principal concerns at the time, but he was also thinking beyond that one problem to a broader resolution of the responsibility for land use approvals.[16] He understood that the increase in the purchase price was in exchange for Robino's commitment to do everything necessary to allow the transaction to proceed. It is unlikely—although one cannot be sure—that any discussions were specifically directed toward a best efforts standard.

The Court finds that Stortini did believe Robino's obligation to obtain third-party consents to be in the nature of best efforts.[17] The Court accepts his testimony and acknowledges that, as a general matter, an individual with sophistication in real estate matters such as Stortini would typically be reluctant to undertake an unconditional obligation to acquire third-party consents. Moreover, the memorandum of understanding is consistent with his current testimony regarding

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[16] This perspective was driven, at least in part, by West Willow's frustration with Robino's attempts to renegotiate the deal. As Jackson stated in his deposition, "It was outrageous. . . . It was simply extortion. They already had a contract to do something at a fixed price, and the response of the seller was, we're not going to do it unless you pay us more. And rather than engage in litigation and fight, my client decided to take the high road and pay the money as long as it had assurances that everything else would be taken care of." JX 13 (Jackson Dep. (Apr. 25, 2007)) at 64.

[17] Robino understood that its obligation to provide the access easement was not so limited. West Willow asserts that the acceptance of a more rigorous duty with respect to the granting of the easement, coupled with failure to discuss a distinctly lower standard with respect to third-party consents, evidences that Robino, itself, was not mistaken with respect to its obligations. However, language in the memorandum of understanding recognizes distinct obligations with respect to granting the access easement and obtaining third-party consents. Thus, West Willow's argument fails.

the proper standard. The memorandum of understanding provides, in pertinent part, that: "[Robino] shall remain expressly responsible for using its best efforts to obtain, at its sole cost and expense, any and all consents and approvals from all third parties, including existing tenants and lenders necessary or desirable . . . ."[18]

That Stortini expected a best efforts standard in the Second Amendment before he received it does not show by itself that he was mistaken as to the terms of the Second Amendment. The operative text of the Second Amendment is roughly one page in length. The first new substantive sentence (following adjustment of the purchase price) addresses Robino's responsibility for obtaining any and all third-party consents, but the term "best efforts" is simply not found. A careful reading of that single sentence should have informed Stortini that there was something in the contract that he had not expected.[19] Despite this, the Court finds

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[18] The memorandum of understanding unambiguously provides that it is not enforceable and that a formal amendment would be necessary. That limitation does not mean, however, that one cannot look to the memorandum of understanding in an effort to comprehend what its signatories were thinking at the time.

[19] As Williston's treatise on contracts notes, "[t]he failure to read a contract provides no defense against enforcement of its provisions where the mistake sought to be avoided is unilateral and could have been deterred by the simple, prudent act of reading the contract." 27 *Williston on Contracts* § 70.113 (4th ed. 2009). This is exacerbated by Stortini's testimony that he noticed other changes in the Second Amendment: namely, the presence of "official legal stuff." JX 20 (Stortini Dep. (Sep. 8, 2009)) at 123. This should have put him on even greater notice of the importance of, first, reading the Second Amendment more carefully and, second, seeking review of the document by counsel before executing it.

that Stortini—sophisticated in real estate matters but not a lawyer—understood the Second Amendment to require only Robino's best efforts.[20]

2. Was West Willow Operating Under a Mistaken Understanding of the Second Amendment?

Both McKee and Jackson had concluded that the Second Amendment should assign the unconditional duty (and not merely best efforts) to Robino to obtain third-party consents. Jackson set out to draft the Second Amendment accordingly. The Second Amendment, at least as measured in *West Willow I*, did exactly what was intended by them with respect to obtaining third-party consents.[21] There was no mistake on the part of West Willow about the absence of the best efforts standard from the text of the Second Amendment establishing the nature of Robino's duty to obtain third-party consents.[22] Evidence cited by Robino to the

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[20] In light of the findings of Part III.3. of this memorandum opinion, the Court need not contemplate whether Stortini's conduct was reasonable under the circumstances or how that might affect the analysis. *See* note 19, *supra*.

West Willow argues that the doctrine of laches bars Robino's reformation claim. West Willow has shown no prejudice from any delay and, more importantly, in light of the conclusion that Stortini did not understand the full ramifications of the Second Amendment, it is difficult to chastise Robino for not having taken action sooner. In short, the Court rejects West Willow's argument based on laches.

[21] Jackson explained in his deposition that the modification of the language was a conscious effort to make explicit all of Robino's obligations, stating, "given what had gone on with the Robinos outright refusing to do what they were already contractually obligated to do and Tom [McKee] agreeing to pay money for things that he was already entitled to, Tom was certainly intent on…any settlement being fairly -- let me think of the right word -- tightly drafted, ironclad, something to that effect." JX 22 (Jackson Dep. (Sep. 10, 2009)) at 135-36.

[22] Robino's primary argument against this finding is premised upon a letter written by Wiener to Hershman (JX 8). Hershman, on August 27, 2006, informed Wiener (i) that Value City had refused to give its consent to the West Willow project and (ii) that, if West Willow nevertheless decided to close, Robino would insist upon an indemnification by West Willow against any claim that Value City might assert. Wiener replied by letter (JX 9) on September 14, 2006. His

effect that Jackson and McKee perhaps did not believe there to be a material difference between Robino's obligations in the memorandum of understanding and in the Second Amendment suggests mistake as to the meaning of the term "best efforts," not to the unconditional obligation imposed by the Second Amendment.

Because West Willow was not "mistaken" as to a material portion "of the Second Amendment," Robino's reformation claim based on the doctrine of mutual mistake fails.

3. Did West Willow Know of Robino's Mistake, Yet Remain Silent?

Robino, in order to obtain reformation under the unilateral mistake doctrine, must prove that West Willow knew of Robino's mistaken belief as to a best efforts standard. Robino, however, has failed to do so and, accordingly, its reformation efforts under that doctrine also fail.

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letter asserted, *inter alia*, that Robino "failed to use its best efforts to obtain [Value City's] consent, in breach of the Second Amendment." Robino seizes upon that language as evidence that West Willow understood Robino's obligation to be one of exercising best efforts; from that, it argues that West Willow was mistaken about the meaning to be ascribed to the Second Amendment. Even less persuasively, Robino argues, alternatively, that the letter is evidence that West Willow knew of Robino's mistake as to its obligation. Wiener's letter (that of a litigator and not of a real estate attorney) when fairly read, is not so limited. Indeed, in the following paragraph, he wrote: "Demand is hereby made on Robino to specifically perform its obligations pursuant to the terms of the Second Amendment and take whatever steps are necessary—at its sole cost and expense—to obtain Value City's consent to the proposed [West Willow project] . . . ." *Id.* at 2. Those are not the words of someone working with a best efforts contract. At most, the language cited by Robino from Wiener's letter introduces a smidgen of ambiguity; it does not materially aid Robino's argument that West Willow was operating under a mistake as to the prevalent standard of the Second Amendment. It certainly does not reach the level from where one can argue that correspondence from counsel binds the client. *See, e.g.*, *Willey v. Willey*, 2006 WL 2194733 (Del. Super. July 31, 2006) (letter from counsel with factual admissions on behalf of a client).

Robino has focused on the memorandum of understanding in which McKee wrote, "I offer these terms and conditions . . . ." Those terms and conditions recited a best efforts standard that Stortini "agreed and accepted." Robino argues that Stortini was entitled to rely upon the matters set forth in the memorandum of understanding. That argument fails to recognize that McKee, in the same document and in a transparent manner, also wrote that he "will not be bound by [the offered terms and conditions] until they are set forth in a formal amendment." McKee further wrote that "the provisions of [the memorandum of understanding] are expressly non-binding upon [West Willow]."[23] If the question were whether Stortini was reasonable in expecting that the Second Amendment would specify a best efforts standard, then Robino might be correct. The question, however, is whether West Willow knew that Robino, when it executed the Second Amendment, was mistaken. As to that, Robino has not met its burden of proof.

First, because the memorandum of understanding was, by its terms, non-binding, there was nothing that prevented West Willow from revising the nature of the responsibility for necessary approvals and consents.

Second, as noted above, the Second Amendment's operative text is approximately one page in length. It is a stand-alone document: its changes had

[23] Indeed, were the Court to recognize and treat the terms of the memorandum of understanding as binding, it would function to make the memorandum of understanding, itself, enforceable, which, by its clear terms, it was not.

not been incorporated into the text of a restated comprehensive purchase agreement. Robino's careful reading, which would have shown that the best efforts provision was missing from the first sentence of the paragraph dealing with land use approval, would have informed Robino appropriately. More importantly, West Willow was entitled to expect that Robino would read the Second Amendment with care. In addition, because of the involvement of at least two law firms in earlier negotiations of the Purchase Agreement, West Willow was entitled to expect that Robino would have had legal review of the Second Amendment.[24]

Third, it was not so obvious to West Willow that Robino was unwilling to accept unconditional responsibility for land use approval. Stortini had made it reasonably clear to McKee that he did not think that Value City's approval would be difficult to obtain.[25] As a result, McKee had no reason to be on notice that Stortini, on behalf of Robino, would not have undertaken that obligation.[26]

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[24] There were no pertinent discussions between Stortini and McKee between their February 2005 meeting and execution of the Second Amendment.

[25] Stortini testified that he "pretty much regarded the Value City consent at that time as a non-issue" and had told McKee "not to worry about it." Tr. at 98-99 (unofficial trial transcript copy); JX 12 (Stortini Dep. Apr. 18, 2007) at 63. As evidence that Stortini persisted in and continued to convey this belief, Stortini later offered to become McKee's partner and encouraged him to go ahead and just "build the store" after certain of West Willow's investors expressed concern over the failure of Robino to obtain the Value City consent, stating, "Value City is not going to do anything." Tr. at 85-86.

[26] Robino argues that West Willow should have provided Stortini with a redlined copy to demonstrate the changes between the memorandum of understanding and the Second Amendment, and that failure to do so violated a duty to disclose that arose from their prior custom or course of dealing, as well as a duty not to mislead. There are at least three answers to that contention. First, a redlined version was not sent, and Stortini obviously was aware of that. He could have inquired into its absence but did not. He could have read the Second Amendment

Thus, because West Willow did not know that Robino was acting under a mistaken belief, the requirements of the unilateral mistake doctrine have not been met.

4. Was There a Specific Prior Understanding?[27]

Although it appears that the notion of best efforts was not discussed by McKee and Stortini at that February 2005 meeting in advance of the memorandum of understanding, it is argued that both may be viewed as having reached an understanding—even if not an agreement—as to the use of a best efforts standard. McKee, in the memorandum of understanding, proposed a contractual duty framed in terms of best efforts and Stortini accepted that.

It does not appear that Stortini and McKee shared a prior specific understanding as to the meaning of the term "best efforts" and how that concept would be applied. McKee's description of best efforts diverges materially from

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more carefully, but apparently, also did not. Second, as noted, the Second Amendment was a stand alone, newly-created document. Although it derived some of its verbiage from the memorandum of understanding, there was no earlier draft of a second amendment on which to show changes. Finally, the parties had not been negotiating long enough that it could be said that they had adopted a particular custom or course of dealing. Furthermore, amending the Second Amendment to define more precisely the nature of Robino's obligation with respect to third-party consents was not misleading. It should also be noted that Stortini complains that Jackson failed to send a copy directly to his attorney. The exchanges between the two parties, such as they were, were not especially formal, and, more importantly, Stortini cannot shift his failure to supply a copy to his attorney for review off on Jackson.

[27] This aspect of the unilateral mistake doctrine is addressed for completeness. With the conclusion that West Willow cannot be charged with knowing silence, consideration of this issue is technically unnecessary.

Stortini's explanation of his understanding of best efforts.[28] Moreover, it is doubtful that there even is a broadly and commonly accepted meaning to be ascribed to the phrase.[29] At best, it is context-specific. Thus, if the Second Amendment were to be reformed to impose a best efforts standard on Robino, the standard would still need to be refined.

The pending question, however, is not whether Stortini and McKee had a prior specific understanding of the scope of a best efforts standard, generally speaking, but whether they had a common understanding as to the scope of Robino's obligation with respect to third-party consents. Even though McKee and Stortini may differ on their understanding of the concept of the best efforts, the text of the memorandum of understanding demonstrates that something other than an unconditional obligation was anticipated by both sides. Perhaps a best efforts standard approaches an unconditional obligation, or perhaps it diverges by some material distance from an unconditional obligation. Nonetheless, for purposes of this memorandum opinion, it suffices that the memorandum of understanding evidences that both Stortini and McKee had a prior specific understanding that

[28] Although McKee testified in court that he understood best efforts to be not "absolutely synonymous" to an absolute standard, his definition of "absolutely everything and anything necessary including spending money of unspecified sums" was undoubtedly closer to an absolute standard than Stortini's testimony that best efforts constituted "best efforts within reason." Tr. at 49-51, 69.

[29] *See, e.g.*, *Alliance Data Sys. Corp. v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, 763 n.60 (Del. Ch. 2009) (emphasizing that although the term "does not have a specific meaning," it is "clearly understood by transactional lawyers to be less than an unconditional commitment.").

Robino's efforts to obtain third-party consents were not unconditional, but instead would be governed by a less rigorous—even if not clearly defined—best efforts standard. Where they differed was in how much their own views of a best efforts standard departed from an unconditional obligation.

Accordingly, Robino has demonstrated, by clear and convincing evidence, that there was a prior understanding as to this specific issue.[30]

IV. CONCLUSION

For the foregoing reasons, neither the doctrine of mutual mistake nor the doctrine of unilateral mistake allows for reformation of the Second Amendment. Judgment in favor of West Willow and against Robino on Robino's counterclaim in reformation will be entered.

[30] For purposes of the unilateral mistake doctrine, it suffices that the prior understanding reaches the particular element of the agreement at issue. It is not essential that an entire, integrated agreement or understanding had been reached.