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June 3, 2004

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Re: The Liquor Exchange, Inc. v. Tsaganos  
C.A. No. 19312-NC  
Date Submitted: June 2, 2004

Dear Counsel:

Defendant Nicholas Tsaganos ("Landlord") leased a rental unit in the Summit Village Shopping Center, near Middletown, Delaware, to Plaintiff The Liquor Exchange, Inc. ("Tenant"). Tenant brought this action seeking: (i) a construction of the lease to provide for an additional four-year extension and specific performance of that right; and (ii) an order compelling Landlord to honor a provision in the lease requiring him to negotiate with the Tenant about a larger rental unit, if one became available. This latter

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claim includes Tenant's allegation that Landlord breached his implied covenant of good faith and fair dealing. Landlord has now moved for summary judgment.<sup>1</sup>

1. Duration of Leasehold Rights

The lease began on December 1, 1998, with a one-year term. Landlord interprets the lease to allow for four options for one-year extensions, which Tenant exercised. With those extensions, according to Landlord, Tenant's right to possession expired on November 30, 2003. Tenant, however, maintains that the lease entitles it to an additional four years of possession. Landlord, rejecting Tenant's interpretation of the lease, has filed a proceeding in the Justice of the Peace Court for summary possession.<sup>2</sup>

The question of whether a rental agreement has expired is a fundamental question in summary possession proceedings.<sup>3</sup> Whether Tenant has any additional time under the lease by virtue of the options in the lease, is, of course, the functional equivalent of whether the lease has expired. In light of the pendency of the summary possession proceeding brought by Landlord, Tenant's avowed willingness to have its claims resolved in that forum, and the legislative policy that the Justice of the Peace Court is the favorite forum for resolving such disputes, the Court declines to resolve the questions of whether

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<sup>1</sup> Summary judgment may be granted when there is no material fact in dispute and the moving party is entitled to judgment as a matter of law. Ct. Ch. R. 56.

<sup>2</sup> 25 *Del. C. Ch. 57*.

<sup>3</sup> See 25 *Del. C. § 5702(1)*.

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the lease expired as of November 30, 2003, and, whether Tenant could prevail in its effort to secure specific performance of contractual rights to future possession of the unit.<sup>4</sup>

2. Right to Other Space

The question of whether the court should address the viability of Tenant's claim with respect to negotiating a lease for a different unit stands on different footing. Injunctive relief to remedy a breach of the implied covenant of good faith and fair dealing depends on issues beyond whether the Tenant has a continuing right to occupy the rental unit under the base lease.

Tenant claims a "right of first refusal" and, while that may be the label applied by the drafter of the lease, the provision is more accurately characterized as a "right of first negotiation." Paragraph 28 of the lease provides:

In the event other leaseable space becomes available for rent in the Summit Village Shopping Center at any time during the first one-year term and any of the four one-year option periods, if any, of this Lease, the Tenant shall have the first chance and opportunity to rent the additional leaseable space provided the Landlord and Tenant agree upon all terms of the lease for the additional leaseable space.

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<sup>4</sup> Trial has been scheduled in the summary possession proceeding in the near future. Thus, there now appears to be an adequate remedy at law available to the Tenant and the need for a specific performance remedy, assuming that there is a right to support such a remedy, is not readily apparent. This is not a question of divesting this Court of any subject matter jurisdiction that it may have had; instead, it is yet another reason for deferring to the other forum.

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Landlord, citing *VS&A Communications Partners, L.P. v. Palmer Broadcasting Limited Partnership*,<sup>5</sup> which applied New York law, argues that an agreement to negotiate in good faith is unenforceable if material aspects of the contract to be negotiated remain open. Because there is no guidance at all in the lease, Landlord argues, as to any of the terms of any potential lease for other rental space, the contractual obligation, in this instance, to negotiate in good faith is illusory. While it is easy to have serious doubts about whether the right to negotiate under the lease can ever be given any substantive value and, thus, further proceedings would be an unwarranted expenditure of resources, the Court declines to grant Landlord summary judgment. First, Landlord's summary judgment motion focused upon whether or not the lease ended as of November 30, 2003.<sup>6</sup> The covenant of good faith and fair dealing and the arguments related to other rental space were raised directly only in post-argument memoranda. Second, the Court in *VS&A Communications* reached its decision after trial.<sup>7</sup> Third, through the Amended Complaint, which was verified, Tenant set forth the following facts:

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<sup>5</sup> 1992 WL 339377 (Del. Ch. Nov. 16, 1992).

<sup>6</sup> If there were a vested right to lease another unit as of that date, Landlord could not avoid this obligation through delay. Whether there is any such right, of course, is the ultimate question.

<sup>7</sup> I acknowledge that the Court reflected in its post-trial opinion that it may have been permissible to have granted summary judgment. *Id.* at \*3. Nevertheless, this suggests that prudence may lead to the conclusion that claims of this nature may need the trial setting for sorting them out.

1. “The Landlord has had additional space which is larger than [Tenant’s] current location and . . . [as to which, Tenant] has attempted to exercise [its] right of first refusal.”

2. “The Landlord . . . threatened [Tenant] that he would do everything in his power to make [Tenant] leave and he would never rent additional space to [Tenant] under any circumstances.”

3. Landlord has rented space under terms which were not the same as offered to Tenant.

4. “The Landlord clearly has not acted in good faith in regard to the right of first refusal and [has] done and will continue to do everything in [his] power to make the [Tenant] leave the shopping center . . . .”<sup>8</sup>

These “facts” create a factual question as to whether the Landlord has breached his covenant of good faith and fair dealing to Tenant. Finally, Landlord has relied primarily upon New York law. In *Gillenardo v. Connor Broadcasting Delaware Co.*,<sup>9</sup> the Superior Court suggested that Delaware law is much more amenable to such claims than is the law of New York. In any event, application of Delaware law to the “facts” can be accomplished more accurately after Landlord’s conduct has been evaluated in a fact-

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<sup>8</sup> Amended Compl. ¶¶ 10, 11, 14 & 15.

<sup>9</sup> 2002 WL 991110, at \*7 (Del. Super. Apr. 30, 2002).

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finding proceeding and a similar opportunity has been afforded for assessing the intent of the parties when they signed the provision regarding the right to negotiate for another unit.<sup>10</sup>

For the foregoing reasons, Landlord's motion for summary judgment is denied.

**IT IS SO ORDERED.**

Very truly yours,

*/s/ John W. Noble*

JWN/cap  
cc: Register in Chancery-NC

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<sup>10</sup> The Court does not foreclose the possibility that the language of the lease is so vague as to render unenforceable the "right of first negotiation." This would include whether Landlord's absolute refusal, as asserted by Tenant, to negotiate at all gives rise to a good faith and fair dealing claim.