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Re: *CC Finance LLC v. Wireless Properties, LLC*
C.A. No. 5927-VCN
Date Submitted: June 25, 2012

Dear Counsel:

Plaintiff CC Finance LLC ("Crown") loaned funds to Defendant Wireless Properties, LLC ("Wireless"). As part of their credit arrangement, Crown acquired the right to purchase fifteen telecommunications towers (the "Fifteen Towers") from Wireless, either within a specific period or otherwise in the event of default. Wireless and Crown also agreed that Crown, in its discretion, could lend additional funds that would help Wireless acquire or develop more towers. Crown, however, decided not to lend Wireless any more funds; instead, it elected to purchase the Fifteen Towers from Wireless.

Wireless, believing that Crown had failed to satisfy a commitment to lend Wireless more funds, sued in the Superior Court. Wireless lost; the Superior Court found that under the credit arrangement Crown had discretion over whether to consent to lending more funds to Wireless, and that Wireless had failed to establish that Crown had given consent. On appeal, Wireless again lost; the Delaware Supreme Court upheld the Superior Court's ruling. The Delaware Supreme Court concluded that any increase to the loan amount was in Crown's discretion and required Crown's written consent, which Crown had not given.

Crown now seeks a declaratory judgment for specific performance of its claimed contractual right to acquire the Fifteen Towers from Wireless. It has moved for summary judgment. Wireless, in its defense, relies primarily on its argument that the written agreement with Crown does not reflect the actual agreement which they reached. It seeks reformation based on either mutual or unilateral mistake. Other than Wireless's reformation-based contentions, little stands between Wireless and its obligation to convey the Fifteen Towers to Crown.

I. BACKGROUND

Plaintiff Crown, a Delaware limited liability company, finances the construction of cellular telecommunications towers throughout the United States. Defendant Wireless, a Delaware limited liability company, owns and operates cellular telecommunications towers.

A. *The Loan and Right to Purchase Agreements*

On September 18, 2006, Crown and Wireless entered into a series of agreements establishing a secured credit facility (the "Secured Credit Facility"), with Crown as lender and Wireless as borrower. The Secured Credit Facility consisted of a Loan and Security Agreement (the "Loan Agreement"),[1] a secured promissory note, and certain other collateral and security documents. The purpose of the Secured Credit Facility was to provide Wireless with capital for general corporate purposes, including the construction or acquisition of new cellular telecommunications towers, and the maintenance and operation of the Fifteen

[1] Bock Aff. Ex. B ("Loan Agreement").

Towers.[2] Funds advanced by Crown were secured by license income generated by the Fifteen Towers, among other collateral.[3]

The Loan Agreement set forth the terms and conditions upon which Crown was to advance funds to Wireless (the "Loan Commitment").[4] The Loan Agreement defined the initial amount of the Loan Commitment at $5,499,854.00, an amount that was advanced by Crown to Wireless.[5] The Loan Commitment was also capped at a maximum amount of $10,000,000.[6] Although the Loan Agreement provided that the "Loan Commitment may, from time to time, be increased or reduced" pursuant to its terms,[7] the parties continue to disagree on how these increases were to take place, if at all.

Section 2.2(a) of the Loan Agreement, entitled "Discretionary Adjustments to Loan Commitment," describes the terms upon which the Loan Commitment

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[2] *Id.* at Ex. A.
[3] Loan Agreement § 3.1-3.8.
[4] *Id.* § 1.2.
[5] *Id.*
[6] *Id.*
[7] *Id.*

may be increased, and specifically provides that the exercise by Crown of its discretion to increase the Loan Commitment had to be confirmed in writing.[8]

> The then-current Loan Commitment may be increased by Crown at any time and from time-to-time in the exercise of its sole discretion if, prior to the [maturity date,] Crown elects to loan additional funds to Wireless pursuant to this Agreement. . .[9]
>
> Anything to the contrary contained in this Agreement notwithstanding, any increase in the Loan Commitment shall be subject to the consent of Crown, which consent Crown may grant or withhold in its sole discretion, and such consent must be in writing.[10]

In return for Crown's extension of the Secured Credit Facility, Wireless was to repay all advances with interest[11] and to grant Crown preferential rights to purchase any or all of the Fifteen Towers during a specified option period.

Crown's preferential purchase rights were set forth in a Right to Purchase Agreement between the parties, dated the same day as the Loan Agreement, on September 18, 2006 (the "Right to Purchase Agreement").[12] The purchase price to be paid by Crown for the Fifteen Towers was based on a multiple of the net cash

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[8] *Id.* § 2.2(a).
[9] *Id.*
[10] *Id.*
[11] *Id.* § 2.4.
[12] Bock Aff. Ex. C ("Right to Purchase Agreement").

flow generated by license revenue for the towers to be purchased less qualifying expenses.[13] The purchase price and other material terms and conditions of sale were negotiated and agreed to by Crown and Wireless as part of the overall loan transaction.

Under Section 3.2 of the Right to Purchase Agreement, Crown was entitled to exercise its option to purchase any or all of the Fifteen Towers in the period from March 18, 2010 to March 17, 2011 (the "Option Period"), or upon the occurrence of an event of default, regardless of whether the event of default occurred during the Option Period.[14] Wireless's failure to pay interest under the Loan Agreement from December 2009 onwards provided Crown with a second, independent ground to exercise its option on the Fifteen Towers.[15]

On July 29, 2010, within the Option Period, and in accordance with Section 3.3 of the Right to Purchase Agreement,[16] Crown provided Wireless with

[13] *Id.* § 3.4.
[14] Right to Purchase Agreement § 3.2.
[15] *Id.* § 7.1; Bock Aff. Ex. H (the "July 29, 2010 Letter").
[16] Right to Purchase Agreement § 3.3. Section 3.3 of the Right to Purchase Agreement sets out the parties' respective rights and responsibilities upon Crown's exercise of its purchase rights. In order to exercise its option, Crown had to notify Wireless of the towers to be included and the date Crown desired to close the transaction. Within ten days after receiving the notification, the parties had to enter into an Asset Purchase Agreement, with Wireless providing all due diligence

written notice of its election to acquire the Fifteen Towers under the Right to Purchase Agreement, and set October 8, 2010, as the closing date.[17] Crown furnished Wireless with a draft of the Asset Purchase Agreement, the form of which Wireless and Crown had previously agreed to when the parties entered the Right to Purchase Agreement.[18] In addition, Crown requested that Wireless provide certain information and documentation necessary to complete the Asset Purchase Agreement, as Wireless was obligated to do pursuant to Section 3.3 of the Right to Purchase Agreement. Further, Crown requested that Wireless, within ten days, provide to Crown various due diligence materials relating to the Fifteen Towers.[19]

On August 4, 2010, Wireless, through its counsel, unequivocally declared its refusal to convey the Fifteen Towers under Section 3.3 of the Right to Purchase Agreement.[20] Wireless refused to provide any of the required information requested by Crown as detailed above or to cooperate in any way with Crown's

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materials reasonably requested by Crown relating to the applicable towers. The parties would then use their best efforts to consummate and close the purchase and sale of the towers, no later than by the date identified by Crown in its notification.

[17] Bock Aff. ¶ 16; July 29, 2010 Letter.

[18] July 29, 2010 Letter.

[19] *Id.*

[20] Bock Aff. ¶ 19, Ex. I.

exercise of its option to acquire the Fifteen Towers.[21] On September 10, 2010, Crown notified Wireless that its refusal to comply with its obligation to proceed with the sale of the Fifteen Towers under the Right to Purchase Agreement constituted an event of default.[22] Wireless did not respond to Crown's September 10, 2010 letter.[23]

On October 25, 2010, Crown filed its Complaint in this Court, seeking specific performance of the Right to Purchase Agreement, and to exercise its option to purchase the Fifteen Towers. In response, Wireless counterclaimed that the Loan Agreement and Right to Purchase Agreement were void and unenforceable and sought: (1) damages due to Crown's alleged fraudulent inducement of Wireless into entering those agreements,[24] and (2) reformation due to mutual mistake.[25]

On March 1, 2012, Crown moved for summary judgment to enforce the transfer of the Fifteen Towers from Wireless under the Right to Purchase

[21] *Id.*
[22] *Id.* ¶ 18, Ex. J.
[23] *Id.* ¶ 19.
[24] Def.'s Answer & Verified Countercl. ("Answer & Countercl.") ¶ 116-121.
[25] *Id.* ¶ 122-125.

Agreement, and to obtain the dismissal of Wireless's counterclaims.[26] In its response, Wireless dropped its fraudulent inducement claim,[27] but chose to proceed on its counterclaim for reformation due to mutual mistake.[28] Further, in its brief in opposition to Crown's summary judgment motion, Wireless introduced a claim for reformation due to unilateral mistake with knowing silence[29] and a claim for Crown's alleged violation of the covenant of good faith and fair dealing implicit in Crown's exercise of its discretion under the Loan Agreement.[30]

B. *The Prior Litigation*

On October 8, 2009, Wireless brought a breach of contract action in the Delaware Superior Court claiming that Crown had violated the Loan Agreement.[31] Wireless alleged that under the Loan Agreement Crown had agreed to advance to Wireless an aggregate amount not to exceed $10 million and that Crown had failed to honor its obligations under the Loan Agreement by refusing to make further

[26] Pl.'s Opening Br. in Supp. of its Mot. for Summ. J. ("Opening Br.") 1.
[27] Def.'s Answering Br. in Opp'n to Pl.'s Mot. for Summ. J. ("Answering Br.") 2 n.1.
[28] *Id.* at 21.
[29] *Id.* at 25.
[30] *Id.* at 27.
[31] *Wireless Props. LLC v. CC Fin. LLC*, No. 09C-10-085 (Del. Super., Oct. 9, 2009) (the "Superior Court Action").

advances to Wireless beyond the initial amount, when there were still substantial amounts remaining available for funding under the Loan Agreement.

On March 10, 2010, the Superior Court held that there was no breach of contract because the Loan Agreement provided that Crown's consent to any increase in the Loan Commitment was at its discretion.[32] The Superior Court dismissed Wireless's complaint, finding that Wireless did not adequately allege that it had received Crown's consent.[33] On appeal, Wireless argued that the Superior Court had erred in concluding that: (i) Crown's express consent to increases was required under the Loan Agreement, and (ii) Wireless failed to adequately allege that Crown consented to increases in the Loan Commitment.[34]

On October 28, 2010, the Supreme Court rejected both of Wireless's arguments on appeal. The Supreme Court held that the Loan Agreement unambiguously limited Crown's obligation to advance funds to an initial Loan Commitment amount of $5,499,854.00, and provided that any increase in that amount required Crown's written consent which could have been granted or denied

[32] Transcript, Superior Court Action, at 29 (Mar. 1, 2010).
[33] *Id.* at 32.
[34] Appellant's [Wireless's] Opening Br. in Supp. of its Appeal, 3 (*Wireless Props., LLC v. CC Fin. LLC*, No. 163, 2010 (Del.)).

in Crown's sole discretion.[35] Further, the Supreme Court held that any alleged failure by Crown to advance funds in amounts above $5,599,854.00 was not actionable, because Crown had the right to withhold its consent.[36]

In addressing the earlier litigation, Wireless concedes that the Delaware Supreme Court held that (1) under the Loan Agreement, Crown had no obligation to lend more than the initial Loan Commitment; (2) any increases in the Loan Commitment required Crown's written consent; (3) Crown had sole discretion to provide or withhold that consent, and (4) Wireless did not sufficiently allege that Crown had consented to increases in the Loan Commitment.[37]

II. ANALYSIS

In the litigation between Crown and Wireless now before the Court, Crown seeks to enforce the transfer of the Fifteen Towers under the Right to Purchase Agreement and to resolve Wireless's related counterclaims by way of summary judgment.[38] Under a plain reading of Section 3.2 of the Right to Purchase Agreement, Crown was entitled to exercise its option to purchase any or all of the

[35] *Wireless Props., LLC v. CC Fin. LLC*, 10 A.3d 613, 617 (Del. 2010).
[36] *Id.*
[37] Answering Br. 20-21.
[38] Opening Br. 1.

Fifteen Towers in the period from March 18, 2010 to March 17, 2011. Crown elected to acquire the Fifteen Towers within this period and provided Wireless with appropriate notice according to the procedures agreed upon by the parties in the Right to Purchase Agreement. Crown has satisfied its obligations in exercising its right to purchase.

The case, therefore, turns on the viability of Wireless's equitable counterclaims, and whether Wireless ought to be granted reformation of the Loan Agreement as coupled with the Right to Purchase Agreement.[39] In its response to Crown's motion for summary judgment, Wireless has tendered three arguments for why the Right to Purchase should not be enforced according to its terms. Wireless's first argument, that there was fraud in the inducement of the Loan Agreement and the Right to Purchase Agreement,[40] has been abandoned by Wireless.[41]

[39] Both the Loan Agreement and the Right to Purchase Agreement provide that they shall be governed by the laws of the State of Delaware. Loan Agreement § 12.1; Right to Purchase Agreement § 8.5.
[40] Answer & Countercl. ¶ 116-121.
[41] Answering Br. at 2, n.1.

Wireless's two remaining counterclaims are: (1) Crown did not exercise its discretion under the Loan Agreement in accordance with the implied covenant of good faith and fair dealing,[42] and (2) that when the agreements were made between them, there was either mutual mistake or unilateral mistake with knowing silence,[43] necessitating reformation of the Loan Agreement and the Right to Purchase Agreement.

The Court will address each of these two counterclaims in turn.

A. *Implied Covenant of Good Faith and Fair Dealing*

Wireless correctly states in its Answering Brief that, under Delaware law, every contract contains an implied covenant of good faith and fair dealing.[44] Wireless is also correct to state that the implied covenant is "particularly important . . . in contracts that defer a decision at the time of contracting and empower one party to make that decision later."[45] In such situations, the party exercising discretion must do so in good faith, or else it may "run afoul of the

[42] *Id.* at 27.
[43] *Id.* at 21-27.
[44] *Amirsaleh v. Bd. of Trade of City of N.Y., Inc.*, 2009 WL 3756700, at *4-5 (Del. Ch. Nov. 9, 2009).
[45] *Id.* (citing *Amirsaleh v. Bd. of Trade of the City of N.Y., Inc.*, 2008 WL 4182998, at *8 (Del. Ch. Sep. 11, 2008)); *see also Gilbert v. El Paso Co.*, 490 A.2d 1051, 1055 (Del. Ch. 1984), *aff'd*, 575 A.2d 1131 (Del. 1990).

implied covenant."[46] Wireless argues that because "Crown decided not to advance funds to Wireless and opted only to use the remaining capacity under the maximum Loan Commitment to cover interest on the loan,"[47] there is a question as to whether Crown violated the implied covenant of good faith and fair dealing.

The problem with Wireless's claim based on the implied covenant of good faith and fair dealing at this late stage is that Wireless raised the same claim in the earlier Superior Court action.[48] In its Amended Complaint before the Superior Court, Wireless alleged that:

> Implied in the Loan Agreement was a covenant that Crown would exercise good faith and deal fairly with Wireless.
>
> Crown has also breached the implied covenant of good faith and fair dealing present in the Loan Agreement by refusing to advance funds to Wireless other than for the purpose of applying advances to interest payments to pay itself.[49]

That is the same claim Wireless is making here.

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[46] *Id.*
[47] Answering Br. at 28-29.
[48] Superior Court Action, Am. Compl. ¶ 49.
[49] *Id.* ¶¶ 48-49.

Res judicata, or claim preclusion, constitutes "an absolute bar on all claims that were litigated or which could have been litigated in the earlier proceeding."[50] The doctrine applies where:

> (1) the original court had jurisdiction over the subject matter and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issues decided was the same as the case at bar; (4) the issues in the prior action must have been decided adversely to the appellants in the case at bar; and (5) the decree in the prior action was a final decree.[51]

The Superior Court dismissed Wireless's action in its entirety with prejudice, and the Supreme Court of Delaware affirmed. In its opinion, the Supreme Court held that Crown had the right to withhold its consent:

> The Loan Agreement unambiguously limits Crown's obligation to advance funds to an initial Loan Commitment amount of $5,499,854.00 and provides that any increase in the amount requires Crown's written consent which may be granted or denied in Crown's sole discretion.
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> The Amended Complaint admits that the original Loan Commitment amount was disbursed in full to Wireless. Accordingly, the Superior Court properly held that any alleged failure by Crown to

[50] *Hendry v. Hendry*, 2006 WL 4804019, at *8 (Del. Ch. May 30, 2006).
[51] Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n, 902 A.2d 1084, 1092 (Del. 2006) (citation omitted).

> advance funds in amounts above $5,599,854.00 is not actionable, because Crown had the right to withhold its consent.[52]

Because Wireless is raising a claim here that is identical to a claim it raised and lost in a prior action, and because the prior action was finally adjudicated on the merits, Wireless is barred by *res judicata* from relitigating its implied covenant of good faith and fair dealing claim.[53]

B. *Reformation due to either Mutual Mistake or Unilateral Mistake with Knowing Silence*

Wireless is left with its reformation claim: its argument that the Loan Agreement and the Right to Purchase Agreement ought to be reformed because they do not reflect the actual agreement Wireless reached with Crown, because of either mutual mistake or unilateral mistake with knowing silence.

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[52] *Wireless Properties, LLC*, 10 A.3d at 617.

[53] A contract which grants one party sole discretion with respect to a material aspect of the agreement may, through the implied covenant of good faith and fair dealing, require that the exercise of discretion be in good faith. *Amirsaleh*, 2009 WL 3756700, at *4. Wireless claims that Crown did not exercise its sole discretion in good faith. If this claim is considered different from the at least similar claim addressed in the prior litigation, it fails on the merits as well. Wireless has offered no factual basis for undermining Crown's good faith in meeting the terms of the Loan Agreement and the Right to Purchase Agreement. Wireless may have made a bad deal, but the covenant of good faith and fair dealing does not afford the unhappy contracting party an easily accessible exit.

1. Standard for Summary Judgment in Reformation Cases

Trial courts may take the governing substantive evidentiary standard into consideration when ruling on a summary judgment motion.[54] The test is whether "*any rational* finder of fact could find, on the record presented to the Court of Chancery on summary judgment, viewed in the light most favorable to the non-moving party, that the substantive evidentiary burden had been satisfied."[55] In a reformation case, "that substantive burden is that each of the elements of a claim of reformation must be proven by clear and convincing evidence."[56]

The clear and convincing standard is "an intermediate evidentiary standard, higher than mere preponderance, but lower than proof beyond a reasonable doubt."[57] The Superior Court's civil jury instructions on clear and convincing evidence require the proof to be "highly probable, reasonably certain, and free from serious doubt."[58] The Delaware Court on the Judiciary has described the clear and convincing standard as requiring "evidence which produces in the mind

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[54] *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1149 (Del. 2002) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986)).
[55] *Id.* at 1150 (emphasis in original).
[56] *Id.*
[57] *In re Tavel*, 661 A.2d 1061, 1070 n. 5 (Del. 1995).
[58] Del. P.J.I. Civ. Sec. 4.3 (2000).

of the trier of fact an abiding conviction that the truth of [the] factual contentions [is] highly probable."[59]

The "judge who decides the summary judgment motion may not weigh qualitatively or quantitatively the evidence adduced on the summary judgment record."[60] The "test is not whether the judge considering summary judgment is skeptical that the [party] will ultimately prevail."[61] The "judge as gate-keeper merely considers whether the finder of fact could come to a rational conclusion either way, not whether that conclusion would be objectively reasonable."[62] In a reformation case, the trial court must determine "whether the plaintiffs on the summary judgment record proffered evidence from which any rational trier of fact could infer that plaintiffs have proven the elements of a prima facie case by clear and convincing evidence."[63]

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[59] *In re Rowe*, 566 A.2d 1001, 1006 (Del. Jud. 1989) (citation and quotation marks omitted).
[60] *Cerberus*, 794 A.2d at 1149.
[61] *Id.*
[62] *Id.*
[63] *Id.*

2. Reformation of Contracts

In considering an effort to reform a contract, 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."[64] When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement.[65] Equity, therefore, will not rewrite a contract to save a party from its own negligence.[66] It is always tempting for a judge, particularly a judge sitting in equity, to impose a result that seems "fairer" than one the parties have imposed upon themselves through contract. However, if contract

[64] *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 3247992, at *3 (Del. Ch. Oct. 6, 2009) (citing *Cerberus*, 794 A.2d at 1156)).
[65] *Libeau v. Fox*, 880 A.2d 1049, 1056 (Del. Ch. 2005) ("When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract."); *cf. Maddock v. Greenville Retirement Cmty., L.P.*, 1997 WL 89094, at *7-8 (Del. Ch. Feb. 26, 1997) ("Only a very strong showing that a contract term is a gross violation of the policies embodied in this common law rule [that reasonable restraints be upheld] would permit [plaintiff] to escape the economic bargain that he entered.") (citations omitted).
[66] *Heartland Del. Inc. v. Rehoboth Mall Ltd. P'ship*, 2012 WL 3656440, at *5 (Del. Ch. Aug. 27, 2012).

rights were only to be enforced upon a balancing of the equities, there would be far greater mischief than is imposed by letting parties order their own affairs.[67]

As "equity respects the freedom to contract,"[68] reformation is therefore "appropriate only when the contract does not represent the parties' intent because of fraud, mutual mistake or, in exceptional cases, a unilateral mistake coupled with the other parties' knowing silence."[69] Wireless has abandoned its claim for fraud in the inducement. Its two remaining grounds for reformation are mutual mistake and unilateral mistake with knowing silence. To establish mutual mistake, the party seeking reformation must show that both parties were mistaken as to a material portion of the written agreement.[70] To establish unilateral mistake with knowing silence, the party seeking reformation must show that it was mistaken and that the other party knew of the mistake but remained silent.[71]

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[67] *Id.*
[68] *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 2012 WL 1605146, at *58 n. 283 (Del. Ch. May 4, 2012) (quoting *Asten, Inc. v. Wangner Sys. Corp.*, 1999 WL 803965, at *6 (Del. Ch. Sept. 23, 1999)).
[69] *Heartland*, 2012 WL 3656440, at *5 (quoting *James River–Pennington Inc. v. CRSS Capital, Inc.*, 1995 WL 106554, at *7 (Del. Ch. Mar. 6, 1995)).
[70] *See Collins v. Burke*, 418 A.2d 999, 1002 (Del. 1980) ("The Courts of this State have always insisted in reformation cases on a showing of mutual mistake or, in appropriate cases, unilateral mistake on plaintiff's part coupled with knowing silence on defendant's part.").
[71] *Id.*

Regardless of which doctrine is used, the party seeking reformation must show by clear and convincing evidence that the parties came to a specific prior understanding that differed materially from the written agreement.[72] Also, because courts generally assign the clear and convincing evidentiary burden to the entire request for reformation rather than to the specific "prior agreement" element of the mutual or unilateral mistake claim, the party seeking reformation must also prove each of the other elements of reformation by clear and convincing evidence.[73] At the summary judgment stage, the party seeking reformation must show that the summary judgment record, viewed most favorably toward the non-moving party, would support a finding by any rational trier of fact that each of the elements of reformation has been established by clear and convincing evidence.

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[72] *Hob Tea Room, Inc. v. Miller*, 89 A.2d 851, 857 (Del. 1952) ("Unless there was a clear understanding with which the formal contract conflicts, there is, of course, no comparative standard upon which to base a reformation, and the contract as executed must stand.")

[73] *See* Restatement (Second) of Contracts § 155 cmt. c (1979) (requiring "the trier of the facts to be satisfied by 'clear and convincing evidence' before reformation is granted"); *New Eng. Mut. Life Ins. Co. v. Lyons*, 1993 WL 455313, at *1 (Del. Ch. Nov. 1, 1993) ("The party alleging mutual mistake must establish all elements of its claim by clear and convincing evidence."); Arthur Linton Corbin et al., Corbin on Contracts § 614 (2001) ("Reformation will not be decreed unless the facts required for such a decree are proved convincingly and to the entire satisfaction of the court.").

3. Mutual Mistake

As the party seeking reformation due to mutual mistake at the summary judgment stage, Wireless must show the Court that a rational fact-finder, reviewing the summary judgment record, could find that the elements of reformation due to mutual mistake have been established under a clear and convincing standard. Mutual mistake occurs when "both parties were mistaken as to a material portion of the written agreement,"[74] or "when both parties are under substantially the same erroneous belief as to the facts."[75] Therefore, proof of a unilateral mistake on the part of only Wireless, with respect to a material provision of the Loan Agreement, will not satisfy the elements of a claim for mutual mistake. Wireless must show that a rational fact-finder could find, under a clear and convincing standard, that Crown was mistaken—that the definition of Loan Commitment as it appears in the final, executed Loan Agreement was something other than what Crown intended.

Wireless fails to establish that Crown was so mistaken. In the drafts of the Loan Agreement before July 13, 2006, the material portion of the Loan Agreement provided Crown with "reasonable discretion" as to whether to consent to increases

[74] *Cerberus*, 794 A.2d at 1151 (citations omitted).
[75] *Mehan v. Travelers Ins. Cos.*, 1988 WL 62793, at *2 (Del. Ch. June 16, 1988).

in the Loan Commitment. In the July 13, 2006 draft, Crown replaced "reasonable discretion" with "sole discretion," language that remained in the final version of the Loan Agreement. According to Crown's transaction attorney, this change to the definition of Loan Commitment was exactly what Crown intended.[76] Crown was the party that introduced "sole discretion" into the language of Section 2.2(a) of the Loan Agreement. It was to Crown's benefit that any subsequent increases to the Loan Commitment were "always subject to Crown's approval" at Crown's discretion.[77] Wireless has not shown, even under the summary judgment standard, why this was a mistake on the part of Crown, and therefore cannot establish mutual mistake.

4. Unilateral Mistake

As a party seeking reformation due to unilateral mistake at the summary judgment stage, Wireless must convince the Court that a rational fact-finder, reviewing the summary judgment record, could find that: (1) there was a specific prior understanding that differed materially from the written agreement, (2) Wireless was mistaken as to the terms of the final written agreement, (3) Crown

[76] C. Farmakis Dep. at 49-59, 67-71.
[77] A. Bock Dep. at 184-188, 222, 225.

had knowledge of Wireless's mistake, and (4) Crown, having this knowledge, remained silent.

Wireless, however, does not succeed in meeting even this threshold for unilateral mistake. First, the language of the material portion of the Loan Agreement that Wireless is seeking to reform is straightforward:

> The then-current Loan Commitment may be increased by Crown at any time and from time-to-time in the exercise of its sole discretion if, prior to the [maturity date] Crown elects to loan additional funds to Wireless pursuant to this Agreement. . .[78]
>
> Anything to the contrary contained in this Agreement notwithstanding, any increase in the Loan Commitment shall be subject to the consent of Crown, which consent Crown may grant or withhold in its sole discretion, and such consent must be in writing.[79]

It is hard to imagine Wireless's being unilaterally mistaken as to the meaning of the relatively clear terms "sole discretion" or "subject to the consent of Crown." Further, as a party with access to sophisticated counsel throughout the drafting process, Wireless had the opportunity to review this language, added by Crown in

[78] Loan Agreement § 2.2(a).
[79] *Id.*

the July 13, 2006 draft, before it became final. Wireless and its attorney were provided with a draft of Crown's July 13, 2006 changes on that same day.[80]

Even if the Court were to accept that Wireless was unilaterally mistaken as to these terms, a somewhat unlikely proposition, Wireless fails to create any question of fact regarding whether Crown knew Wireless to be mistaken and yet remained silent. Crown provided both Wireless and its attorney with its July 13, 2006 draft containing the "sole discretion" and "written consent" language, but there was no reason for Crown to know that both Wireless and its attorney were mistaken as to the meaning of these provisions.

The only facts provided by Wireless in its attempt to establish Crown's knowing silence are that the initial correspondence and drafts of the Loan Agreement do not correspond with the final version, and that Crown and Wireless never discussed the change in the definition of Loan Commitment reflected in the executed Loan Agreement.[81] These drafts are simply evidence of the usual "fluid process of negotiating, drafting, and arriving at a common understanding" that

[80] Answer & Countercl. ¶ 67, at 11.
[81] Answering Br. 25-27.

routinely occurs in commercial transactions.[82] They are insufficient to show that Crown was aware of a unilateral mistake on the part of Wireless and yet knowingly chose to remain silent.

5. Crown's request for specific performance

Crown has requested specific performance of the transfer of the Fifteen Towers from Wireless under the Right to Purchase Agreement.[83] Specific performance for the transfer of real property is an extraordinary remedy predicated upon the exercise of equitable discretion,[84] and the Court will not award it lightly.[85] A party must prove by clear and convincing evidence that it is entitled to specific performance,[86] and that it has no adequate legal remedy.[87] A party seeking specific performance must establish that (1) a valid contract exists, (2) it is ready, willing,

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[82] *MetCap Sec. LLC v. Pearl Senior Care, Inc.*, 2007 WL 1498989, at *9 (Del. Ch. May 16, 2007).
[83] Opening Br., 1.
[84] *Morabito v. Harris*, 2002 WL 550117, at *1 (Del. Ch. Mar. 26, 2002) ("Specific performance is a remedy predicated upon the exercise of equitable discretion. . . .").
[85] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010) (citing *Szambelak v. Tsipouras*, 2007 WL 4179315, at *1 (Del. Ch. Nov. 19, 2007) ("[S]pecific performance is an extraordinary remedy. . . .").
[86] *Id.* (citing *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 834 n. 112 (Del. Ch. 2007)).
[87] *Id.* (citing *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *12 (Del. Ch. Nov. 2, 2007)).

and able to perform, and (3) that the balance of equities tips in favor of the party seeking performance.[88]

First, a valid contract exists when (1) the parties intend that the contract would bind them, (2) the terms of the contract are sufficiently definite, and (3) the parties exchange legal consideration.[89] The only provisions in the Loan Agreement that Wireless disputes in terms of validity are those relating to Crown's discretion, and the Court has found that Wireless's arguments for reformation have failed and that these provisions are valid on their face.

Second, the Court will only order specific performance if a party is ready, willing, and able to perform under the terms of the agreement.[90] There is no argument that Crown was not ready, willing, and able to perform on July 29, 2010, when Crown provided Wireless with written notice of its election to acquire the Fifteen Towers under the Right to Purchase Agreement. Similarly, there is no dispute that Crown remains ready, willing, and able.

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[88] *Id.* (citing *Morabito*, 2002 WL 550117, at *2).
[89] *Id.* (citing *Carlson v. Hallinan*, 925 A.2d 506, 524 (Del. Ch. 2006) ("Three elements are necessary to prove the existence of an enforceable contract: 1) the intent of the parties to be bound by it, 2) sufficiently definite terms, and 3) consideration.")).
[90] *Id.*

Finally, the Court will only order specific performance if the balance of equities tips in favor of specific performance.[91] When balancing the equities, the Court "must be convinced that 'specific enforcement of a validly formed contract would [not] cause even greater harm than it would prevent.'"[92]

The balance of equities tips in favor of Crown and specific performance. The Court recognizes that real property is unique, and often the law cannot adequately remedy a party's refusal to honor a real property contract.[93] Further, equity respects the freedom to contract and teaches that parties should receive the benefit of their bargain through specific performance.[94] Crown and Wireless were sophisticated parties represented by counsel throughout the drafting process, and the Loan Agreement represents the bargain that they struck. While the Court does not discount the fact that the Fifteen Towers may be worth more than the purchase

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[91] *Id.* (citing *Morabito*, 2002 WL 550117, at *2).
[92] *Id.* (citing *Szambelak v. Tsipouras*, 2007 WL 4179315, at *7 (Del. Ch. Nov. 19, 2007) (quoting *Walton v. Beale*, 2006 WL 265489, at *7 (Del. Ch. Jan. 30 2006))); *see also Morabito*, 2002 WL 550117, at *2 ("The balance of equities issue 'reflect[s] the traditional concern of a court of equity that its special processes not be used in a way that unjustifiably increases human suffering.'") (quoting *Bernard Pers. Consultants, Inc. v. Mazarella*, 1990 WL 124969, at *3 (Del. Ch. Aug. 28, 1990)).
[93] *Osborn*, 991 A.2d at 1158 (citing *Szambelak*, 2007 WL 4179315, at *7 ("Real property is unique; thus, specific performance of a real estate sale contract is often the only adequate remedy for a breach by the seller, except in rare circumstances.")).
[94] *Loppert v. WindsorTech, Inc.*, 865 A.2d 1282, 1290 (Del. Ch. 2004).

price under the Right to Purchase Agreement, the "mere increase in land values, unaccompanied by other circumstances showing inequity, is not such hardship as justifies a court of equity in denying specific performance."[95]

III. CONCLUSION

For the foregoing reasons, neither the doctrine of mutual mistake nor the doctrine of unilateral mistake allows for reformation of the Loan Agreement. Judgment in favor of Crown and against Wireless on Wireless's counterclaim in reformation will be entered. Also, Wireless's claim under the implied covenant of good faith and fair dealing was resolved in earlier litigation. Further, because a valid contract exists and because the balance of the equities tips in Crown's favor, Crown's request for specific performance is granted.

Counsel are requested to confer and to submit an implementing form of order.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[95] *Osborn*, 991 A.2d at 1162 (citing *Cunningham v. Esso Standard Oil Co.*, 118 A.2d 611, 614 (Del. 1955)).