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COURT OF APPEALS

STATE OF NEW YORK

WHITEBOX CONCENTRATED CONVERTIBLE
ARBITRAGE PARTNERS, L.P.,

Appellant,

-against-

SUPERIOR WELL SERVICES, INC.,

Respondent.

No. 176
20 Eagle Street
Albany, New York 12207
September 12, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Jessica B. Cahill
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Whitebox Concentrated
2 Convertible Arbitrage Partners.

3 Counselor, you want rebuttal time?

4 MR. ORENSTEIN: I'd like three minutes of
5 rebuttal time, please.

6 CHIEF JUDGE LIPPMAN: Three minutes. Sure,
7 go ahead.

8 MR. ORENSTEIN: Thank you. Good afternoon.
9 The ambiguity in this contract can be summarized this
10 way. It tells you if there's a fundamental change if
11 a tender offer occurs. It tells you what happens if
12 a merger occurs. But if you have an acquisition that
13 includes both, the same language can be read in
14 multiple ways with multiple outcomes. That's why - -
15 -

16 CHIEF JUDGE LIPPMAN: How do you read the
17 language?

18 MR. ORENSTEIN: Okay. So there - - -

19 CHIEF JUDGE LIPPMAN: What's your
20 interpretation of fundamental change, and the merger
21 language, and who - - - who survives?

22 MR. ORENSTEIN: Right.

23 CHIEF JUDGE LIPPMAN: Tell us what you
24 think it means, concisely.

25 MR. ORENSTEIN: Okay.

1 JUDGE CIPARICK: And is there one joint
2 transaction or two separate transactions?

3 MR. ORENSTEIN: Because I'm the plaintiff,
4 and I've just filed a complaint, I don't have - - - I
5 can have alternative theories, and I do.

6 CHIEF JUDGE LIPPMAN: No, no, that's fine.
7 Go ahead.

8 MR. ORENSTEIN: I'll give them to you. One
9 is that the tender offer triggered it, period. The
10 tender offer was an acquisition of ninety-two and a
11 half percent of the shares, and it triggers the
12 fundamental change under clause 1, which is the
13 value.

14 CHIEF JUDGE LIPPMAN: End of story?

15 MR. ORENSTEIN: That's one way to look at
16 it.

17 JUDGE SMITH: Well, there's an exception in
18 clause 1.

19 MR. ORENSTEIN: No, no.

20 JUDGE SMITH: No?

21 MR. ORENSTEIN: Let me - - - clause 1 is on
22 page 4 of our brief, and I'm going to kind of
23 paraphrase it and walk through it.

24 It says a fundamental change happens if a
25 person, and a person would be Nabors or Diamond,

1 directly or indirectly, acquires more than fifty
2 percent of the common stock in Superior, and that
3 happened. So - - -

4 JUDGE PIGOTT: That happened, what, when
5 Diamond did it?

6 MR. ORENSTEIN: Diamond did it with Nabors'
7 money.

8 JUDGE PIGOTT: Right, but it was Diamond
9 that made the acquisition, right?

10 MR. ORENSTEIN: That's right.

11 JUDGE PIGOTT: So that's what we're talking
12 about.

13 MR. ORENSTEIN: It announces to the world
14 we're buying your stock, and the world delivers. Now
15 you - - -

16 CHIEF JUDGE LIPPMAN: So one theory is end
17 of story?

18 MR. ORENSTEIN: Yes.

19 JUDGE SMITH: What happened to the provided
20 clause at the end of 1?

21 MR. ORENSTEIN: In order to sustain that
22 position, I have to say that the provided clause,
23 which kicks you into clause 3 doesn't apply. So what
24 is the provided clause? It says, this clause doesn't
25 apply to a transaction covered in clause 3 below.

1 What is covered in clause 3 below? A
2 merger or a consolidation, and a tender offer is not
3 a merger, and a tender offer is not a consolidation.
4 It's plainly neither one.

5 Now, the answer to that on the part of
6 Superior leads us to another way to look at it.
7 Superior says, yeah, but you can't look at the tender
8 offer in isolation; that's not fair. You have to
9 look at it as part of an overall process. So now I
10 have - - - I have two ways that I legitimately look
11 at this.

12 One, the overall process was Nabors'
13 acquisition of Superior and, sure, there are steps in
14 it and the step includes this merger of merger-sub
15 into Superior. But nobody would say that what this
16 transaction was, was merger-sub into Superior.

17 JUDGE PIGOTT: When you say merger-sub
18 you're saying Diamond?

19 MR. ORENSTEIN: I'm sorry, that's Diamond.
20 And in the agreement among these entities it's called
21 merger-sub.

22 JUDGE PIGOTT: Right, so Diamond and
23 Superior merge.

24 MR. ORENSTEIN: Right, Diamond merges into
25 Superior.

1 CHIEF JUDGE LIPPMAN: What's your bottom
2 line, counselor, that in this case the acquirer
3 became the parent, as the - - -

4 MR. ORENSTEIN: That's right.

5 CHIEF JUDGE LIPPMAN: I mean, is that the
6 bottom line of all of this language?

7 MR. ORENSTEIN: Yeah, that is the bottom
8 line.

9 CHIEF JUDGE LIPPMAN: In effect, they
10 control, they are the - - -

11 MR. ORENSTEIN: What I'm saying is this is
12 a change-in-control clause.

13 JUDGE SMITH: Well, can I - - - okay, but
14 if I can - - - let me - - - another way of
15 paraphrasing this is you say you can look at it as a
16 series of transactions, and if it's a series of
17 transactions you have no problem, because the
18 transactions become separable and the merger
19 transaction is not the same as the purchase
20 transaction, or you also say, okay, well, one
21 transaction, but when you look at the essence of it,
22 it's a purchase not a merger?

23 MR. ORENSTEIN: And I have a third way.

24 JUDGE SMITH: And those are your two
25 alternative arguments?

1 MR. ORENSTEIN: Well, I do have a third.

2 JUDGE SMITH: Go ahead.

3 MR. ORENSTEIN: There's something called a
4 reverse triangular merger. If you look at just the
5 merger step, it's called a reverse triangular merger
6 all over the place. And another, I guess, simple,
7 but I think accurate way to say that is it involves
8 three parties. Three parties. And this clause says
9 that a merger triggers the fundamental change unless
10 it's a merger in which Superior is the surviving
11 entity. And that's why you see so much in my brief
12 about whether it's the surviving entity.

13 CHIEF JUDGE LIPPMAN: Well, they survive,
14 but - - -

15 MR. ORENSTEIN: Right.

16 CHIEF JUDGE LIPPMAN: - - - they're not the
17 surviving entity.

18 MR. ORENSTEIN: No, they're not the sole
19 surviving entity, and I do read it to say that,
20 because I think that's the system.

21 CHIEF JUDGE LIPPMAN: And of the surviving
22 entities who - - -

23 MR. ORENSTEIN: They're Nabors and
24 Superior.

25 CHIEF JUDGE LIPPMAN: - - - who controls

1 who?

2 MR. ORENSTEIN: Nabors.

3 CHIEF JUDGE LIPPMAN: Yeah, Nabors through
4 its subsidiary?

5 MR. ORENSTEIN: Well, the subsidiary
6 Diamond, in the end, disappears.

7 CHIEF JUDGE LIPPMAN: I see.

8 JUDGE PIGOTT: Let's assume - - -

9 MR. ORENSTEIN: Actually, Nabors directly
10 controls Superior.

11 JUDGE PIGOTT: Let's assume for a minute
12 the Appellate Division is right. In other words,
13 they say it says two, but it's really one.

14 MR. ORENSTEIN: Um-hum.

15 JUDGE PIGOTT: If that were the case can -
16 - - you've got Nabors over here saying we'd really
17 like to get a hold of Superior, because its business
18 is booming, but if we do it straight up it's going to
19 cost us 54 million dollars, because those people out
20 there are going to try to convert their preferred
21 stock. But if we do it this way, we can avoid that
22 and all we have to do is give them 22 dollars a share
23 for their stock.

24 If you consider that nefarious, it
25 nevertheless is all right, right? I mean all they're

1 doing is, you know, avoiding paying you money.

2 MR. ORENSTEIN: If they do it within the
3 contract, God bless them.

4 JUDGE SMITH: Suppose they had done just an
5 old-fashioned merger, a merger between Nabors and
6 Superior in which Superior survives, the result would
7 be the stockholder - - - the former stockholders of
8 Nabors would now be in control of Superior, right?

9 MR. ORENSTEIN: Correct.

10 JUDGE SMITH: A change in control in
11 ordinary sense. But nevertheless you'd lose then,
12 because you'd be - - - that's a merger with Superior
13 as the surviving corporation.

14 MR. ORENSTEIN: Well, if that had happened,
15 if Nabors had moved into Superior, it would kick into
16 the second exception to clause 3. There are two
17 exceptions. One of them has never been involved in
18 this case.

19 JUDGE SMITH: Yeah, and I can figure it
20 out.

21 MR. ORENSTEIN: But exception 2 is that
22 basically the shareholders change, the controlling
23 shareholders. Oh, I'm sorry, the - - - now, I have
24 to look at it for just a second. Exception 1 is
25 surviving entity. Exception 2, the holders of more

1 than 50 percent of all the shares of Superior
2 maintain their control.

3 If I had one of those situa - - - both of
4 these situations are geared to try to define when
5 Superior is still okay.

6 JUDGE SMITH: Well, I'm not so sure I see
7 that 3(b) does apply.

8 MR. ORENSTEIN: Okay.

9 JUDGE SMITH: This is - - - I'm talking
10 about a simple transaction. Big company and little
11 company merge with little company surviving, but the
12 former shareholders, the big company, at the end of
13 the day, have most of the shares.

14 MR. ORENSTEIN: Um-hum.

15 JUDGE SMITH: So that's a change in
16 control. But the - - - it's not a fundamental change
17 within this definition, is it?

18 MR. ORENSTEIN: It may not be, but if it
19 isn't, you know, I can't tell you that this is a
20 perfectly drafted provision. I can only tell you
21 it's an ambiguous provision.

22 JUDGE SMITH: Do you have any idea why it
23 was drafted the way it was drafted?

24 MR. ORENSTEIN: That's what I want to find
25 out. I have drafts.

1 JUDGE SMITH: I suppose you could write the
2 - - - write some parol evidence for me that makes
3 sense out of this clause.

4 MR. ORENSTEIN: Well - - - write some parol
5 evidence. I have drafts - - -

6 JUDGE SMITH: Yeah, make up your ideal
7 facts.

8 MR. ORENSTEIN: Okay, I have drafts, and I
9 show them to the draftsman and the people who
10 negotiated this. It was actually negotiated between
11 an original holder - - - not our clients - - - and
12 the company. And I would want them to say, well, of
13 course we thought that if a parent took over the
14 company it would be a fundamental change.

15 JUDGE SMITH: Yeah, but once they're asked
16 the question why did you write it exactly the way you
17 wrote it, you mean - - -

18 MR. ORENSTEIN: Yeah.

19 JUDGE SMITH: I think the short answer is
20 you don't really have a clear coherent answer to that
21 one, do you, even an imaginary one?

22 MR. ORENSTEIN: I haven't come up with my
23 ideal gloss on this provision from the mouths of the
24 witnesses. It just never works that way in real
25 life, so I haven't.

1 JUDGE READ: But you're saying, what, that
2 the complaint should be reinstated, and you should be
3 given an opportunity to go to trial?

4 MR. ORENSTEIN: To develop the case. To
5 develop the record. This will come before the
6 commercial part on a full record if we have our
7 chance, and - - -

8 JUDGE PIGOTT: What it comes down to is
9 that when your shareholders bought the preferred
10 stock they're sidelined, I mean, because preferred
11 just sit there and make money, I suppose, but their
12 concern was that they would be talking to somebody
13 else and that's what a fundamental change is, and
14 your point is that Nabors is a fundamental change,
15 Diamond was a fundamental change, and therefore you
16 were entitled to have your stock relief.

17 MR. ORENSTEIN: Well, at least that Nabors
18 was a fundamental change.

19 JUDGE PIGOTT: Yeah.

20 MR. ORENSTEIN: You know, the change for
21 holders of convertible preferred is twofold. One is
22 that it's not the same company. Its whole business
23 objectives are different, and the other is it's not
24 the same security, because it had something that was
25 really a stock option plus kind of a bond, a four

1 percent bond, and now it's not a stock option
2 anymore.

3 So, yeah, that is their concern, and they
4 have these clauses in one form or another in multiple
5 securities, convertible bonds and preferred. So it
6 matters.

7 Now, I guess I should take a minute to talk
8 about the Noddings case, and why I think it is not
9 controlling.

10 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

11 MR. ORENSTEIN: The Noddings case - - - in
12 effect, I think the defendant-respondents turned it
13 on its head. In Noddings you have a merger and a
14 spinoff, and a bunch of warrant holders are told
15 congratulations you get the benefit of the merger,
16 but not the spinoff. The court says, no, they're all
17 part of one. You get the contractual benefit of both
18 steps.

19 In this case, we have the company saying
20 they're all part of one, you get the contractual
21 benefit of one step and that is the tail on the dog,
22 the merger that kind of wraps up the acquisition.
23 And, by the way, that benefit is zero.

24 I think that twists this equitable doctrine
25 of looking at the essence of the transaction. Unless

1 there are more questions.

2 JUDGE GRAFFEO: Is this language about
3 fundamental change common, or is this pretty much an
4 agreement-specific determination that you're asking
5 us to make here?

6 MR. ORENSTEIN: Their fundamental change
7 provisions are common, change-of-control provisions
8 are common, but they don't all read the same way.

9 JUDGE SMITH: You ever seen one that looked
10 like this other than - - -

11 MR. ORENSTEIN: Not exactly, no.

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. ORENSTEIN: I've seen some that have
14 elements of this, but this is kind of juggled in, in
15 a new way.

16 CHIEF JUDGE LIPPMAN: Okay, counselor.
17 Let's hear from your adversary, and you'll have
18 rebuttal time.

19 MR. ANGIOLILLO: Good afternoon, may it
20 please the court. Bruce Angiolillo for the
21 respondent, Superior Well Services.

22 CHIEF JUDGE LIPPMAN: Counsel, in terms of
23 the - - - what would seem to be the purpose of this
24 provision, what really happened here that - - - how
25 can you make work the purpose of the provision and

1 MR. ANGIOLILLO: No, that's exactly the
2 point and that's where - - - that's where the
3 appellants break down. They are trying to turn this
4 into a generic change-of-control provision.

5 The purpose of this provision, Your Honor,
6 and the reason why it appears often, and is
7 negotiated, and, Judge Smith, the reason why this
8 provision - - - we don't need parol evidence is
9 because all you have to do is read it. What it
10 provides is, is that if there is a merger, if there
11 is a fundamental change, when the dust settles
12 Superior still exists as an entity with its own
13 business with its integrity.

14 JUDGE SMITH: Why - - -

15 CHIEF JUDGE LIPPMAN: Go ahead, Judge
16 Smith.

17 JUDGE SMITH: Why would it make sense for
18 the parties to agree that everything turned on who
19 the surviving entity was in the merger?

20 MR. ANGIOLILLO: That's a contract. It's
21 not a contract to prevent - - - to protect - - -

22 JUDGE SMITH: I understand you're saying it
23 says what it says, but can you imagine a situation
24 under which parties would sit down and deliberately
25 write it that way for a reason?

1 MR. ANGIOLILLO: Oh, absolutely, Your
2 Honor.

3 JUDGE SMITH: Go ahead.

4 MR. ANGIOLILLO: Okay. If it was to
5 protect against the change of a majority shareholder,
6 it would have been written very differently.

7 JUDGE SMITH: Okay.

8 MR. ANGIOLILLO: What this - - -

9 JUDGE SMITH: But what was it done for?

10 MR. ANGIOLILLO: What it was done for is
11 that if the majority shareholder changes, under
12 certain circumstances, for example, if there's a
13 merger, Superior has to survive. Superior still has
14 to be there.

15 JUDGE SMITH: I don't think you're
16 addressing my question, which is - - -

17 MR. ANGIOLILLO: Sorry.

18 JUDGE SMITH: - - - why the parties decided
19 to make - - - I mean, I understand you said it says
20 that perfectly clearly. Well, let's suppose you're
21 right. I'm just asking you, out of curiosity, why
22 did they write this nice, clear language?

23 MR. ANGIOLILLO: Oh, because there is a
24 degree - - - preferred shareholders, their rights
25 exist by contract. Now, when they entered into this

1 contract there is a range of protections. There is a
2 protection which would mean if there is ever a
3 majority shareholder we have the right to take
4 another look and withdraw.

5 JUDGE SMITH: Unless that majori - - -
6 unless it's part of the same transaction as a merger
7 in which Superior survives.

8 MR. ANGIOLILLO: No, what I'm talking about
9 right now, Judge Smith, is when you're asking the
10 question about how to draft a contract, why would you
11 draft it certain ways, the most protection that a
12 preferred shareholder could negotiate in such
13 circumstances is if the majority shareholder changes,
14 I get the right to put my shares back. This is
15 something less.

16 JUDGE SMITH: Are you saying this was some
17 kind of compromise that if one wanted maximum
18 protection, one wanted minimum protection, they split
19 the difference?

20 MR. ANGIOLILLO: This is a reflection of an
21 arm's-length agreement which provides not as much
22 protection as a complete change-of-control provision.
23 It protects fundamental changes as defined in this
24 agreement.

25 So there's a degree - - - in a commercial -

1 - - in the context of a - - -

2 JUDGE SMITH: Now, that doesn't sound
3 greatly differently from what I said: they
4 compromised.

5 MR. ANGIOLILLO: I agree with you. I agree
6 with Your Honor, but - - -

7 JUDGE GRAFFEO: What was the benefit to the
8 shareholders? Why would they - - - what was the
9 benefit to the shareholders in the scenario you're
10 positing? What advantage was there for them to agree
11 to that?

12 MR. ANGIOLILLO: What advantage is - - -
13 the advantage that they have is, is that if there is
14 a circumstance where the transaction that takes place
15 results in Superior Well no longer being the
16 continuing corporation, they don't want to - - - they
17 want to have the opportunity to remove themselves and
18 get paid out. And so - - -

19 JUDGE SMITH: But isn't it largely a matter
20 of form who is the surviving corporation? Why should
21 it make such a big difference?

22 MR. ANGIOLILLO: No, Your Honor, if
23 Superior Well is not the survivor and disappears and
24 becomes part of something else, then they really - -
25 - then to argue the preferred shareholders' position

1 - - -

2 JUDGE SMITH: That's what I'm saying. It's
3 not - - - in the corporate world a mouse can merge
4 with an elephant, and they can agree that the mouse
5 will be the survivor, and in form the mouse will have
6 survived, but in the real world, the elephant ate the
7 mouse. Why would they make the outcome turn on form?

8 MR. ANGIOLILLO: I'm sorry, Your Honor,
9 you're - - - I think, respectfully, you're mixing two
10 different things. The mouse in your hypothetical,
11 we're talking about who owns.

12 Now, what we're talking about here is the
13 company itself. This company passes through the
14 merger intact and continues to operate its business
15 with its licenses, with its permits, with its
16 employees.

17 CHIEF JUDGE LIPPMAN: They have no real
18 power; wouldn't they sort of exist in name only? How
19 does it make sense, again in terms of the purpose; if
20 they're totally controlled by the other entity, how
21 does it make sense in terms to what this is supposed
22 to be about, and as was just said, why would - - -
23 why would you agree to that? Why would the
24 shareholders agree to that?

25 MR. ANGIOLILLO: Well, at this point - - -

1 CHIEF JUDGE LIPPMAN: If the acquirer is
2 now in the position of really running the company,
3 why wouldn't that be the kind of thing that this
4 whole provision was designed to address?

5 MR. ANGIOLILLO: Well, it clearly wasn't,
6 Your Honor, because going back to Judge Smith's
7 hypothetical to my adversary when he was up, if this
8 were a merger where - - - you can do mergers one of
9 two ways in Delaware. Under 251 long form, you put
10 it to a shareholder vote.

11 Judge Smith was proposing that scenario,
12 which is basically Nabors, through Diamond, enters
13 into a merger agreement, there's a shareholder vote
14 and the merger closes, but Superior Well survives.
15 Diamond merges into it, but Nabors is a hundred
16 percent shareholder. Everybody agrees, everybody
17 agrees that's exactly - - -

18 JUDGE SMITH: So strictly speaking the
19 former shareholders of Nabors dominated, or you're a
20 little more complicated, you're merging with the sub
21 not the - - - suppose - - - I mean I know it doesn't
22 happen this way, but simplify it: Nabors - - - there
23 isn't any Diamond; Nabors and Superior just merge.

24 MR. ANGIOLILLO: Right.

25 JUDGE SMITH: They can have either one

1 survive they want to, right? It's a matter of
2 shuffling paper.

3 MR. ANGIOLILLO: That's right, but as this
4 provision provides, the fundamental change provision
5 under - - - as Your Honor went through it before, if
6 Nabors - - -

7 JUDGE SMITH: Yeah, that's what I keep
8 asking. It's purely a matter of form which one
9 survives. Why was this written to make that matter
10 of form so important?

11 MR. ANGIOLILLO: It's not a matter of form
12 in that we must respect the fact that Superior is a
13 corporation with a business, and it survives under
14 one scenario, and it does not under another.

15 JUDGE PIGOTT: It sounds like, though, that
16 you're talking about control to some extent, because
17 if now that Nabors owns it completely it could pledge
18 it for a loan, and you get preferred shareholders
19 watching their company being used as security for a
20 transaction over which they have absolutely no
21 control.

22 MR. ANGIOLILLO: Your Honor, with respect
23 to who owns the company - - -

24 JUDGE PIGOTT: Yeah.

25 MR. ANGIOLILLO: - - - the owners of the

1 company could do things that the preferred
2 shareholders might feel they suffer an economic
3 disadvantage, but the fundamental change provision
4 does not protect them against who owns Superior.
5 That's not what the contract provides.

6 CHIEF JUDGE LIPPMAN: But isn't it a
7 technicality whether Superior survives having nothing
8 to do with the realities of the - - - the acquirer
9 now controls Superior. So Superior survives, but
10 those shareholders in Superior have been
11 disadvantaged, right, I mean, according to the
12 general designs of what this provision would seem to
13 address.

14 MR. ANGIOLILLO: Well, Your Honor, it is -
15 - -

16 CHIEF JUDGE LIPPMAN: Can you just use the
17 shell, just the name and say, let's say they really
18 didn't exist at all, totally nothing, but they call
19 it Superior, and it had nothing to do with the old
20 Superior. Is that still okay in the - - -

21 MR. ANGIOLILLO: That's - - - Your Honor,
22 that's a sham. What we're talking about here - - -
23 we're talking about a business that existed and a
24 business that entered into a merger - - -

25 CHIEF JUDGE LIPPMAN: They just don't

1 control their own fate anymore.

2 MR. ANGIOLILLO: Well, but they didn't
3 bargain for that, because the provision does not
4 provide for that. They bargained for a protection
5 which is somewhat less than that.

6 And so, again, if I - - - before my time
7 expires - - -

8 CHIEF JUDGE LIPPMAN: But why would they
9 bargain for that? Just because they couldn't get,
10 you mean, a better provision.

11 MR. ANGIOLILLO: Your Honor, Your Honor,
12 they get a coupon that reflects an economic return
13 that is dependent upon what rights they have.

14 CHIEF JUDGE LIPPMAN: But don't they leave
15 all the cards in the other player's hands? They
16 really have no - - - with that kind of provision, if
17 that's what it means, they're leaving - - - they're
18 helpless, basically.

19 MR. ANGIOLILLO: No, I don't believe so,
20 Your Honor. They've enjoyed an economic return that
21 reflects the contract that they made. Now, what Your
22 Honor is suggesting is what we're hearing now, all
23 right. Is what we're hearing now is, you know, we
24 would like something more than the contract provides.
25 We would like not just projection against situations

1 where there are mergers, but Superior survives. We'd
2 like - - - let's strip through all of this. We want
3 - - -

4 CHIEF JUDGE LIPPMAN: You think this is so
5 clear that on 3211 motion - - -

6 MR. ANGIOLILLO: Absolutely, Your Honor.

7 CHIEF JUDGE LIPPMAN: - - - that this is
8 the end of the - - -

9 MR. ANGIOLILLO: Absolutely, Your Honor,
10 because - - before I - - -

11 CHIEF JUDGE LIPPMAN: This provision is
12 crystal clear?

13 MR. ANGIOLILLO: Your Honor, this provision
14 is plain and unambiguous. It provides that if there
15 is a change of control, but there is also a merger
16 where Superior survives, then this provision is not
17 tripped.

18 JUDGE SMITH: But what it actually says - -
19 - the words are provided that this clause A - - -
20 they mean this clause 1, they say "this clause A
21 shall not apply to a transaction covered in clause 3
22 below, including any exception thereto."

23 Your whole argument does depend on reading
24 transaction to include a closely linked series of
25 transactions, right?

1 MR. ANGIOLILLO: My argument is twofold.
2 One is, is that transaction in the paragraph that you
3 just read is not capitalized to define it in a narrow
4 sense, and then is followed by covered, and you go
5 below.

6 So I don't believe you have to go through
7 the analysis of a step transaction.

8 JUDGE SMITH: Well, then, why - - - I mean,
9 he - - - if you're doing a literalistic analysis of
10 the language he's going to say, okay, this clause
11 doesn't apply to a transaction covered in clause 3
12 below, it doesn't apply to the merger, but there was
13 another transaction in this case. There was a tender
14 offer, there was an acquisition, and it does apply to
15 that one. So I win. Why is that an impossible
16 reading of the language?

17 MR. ANGIOLILLO: It is an impossible
18 reading of the language, because the tender offer in
19 this case and the second step merger, were in the
20 merger agreement which is undisputed, which is in the
21 record. The tender offer does not occur without the
22 second step.

23 JUDGE SMITH: And they're interdependent
24 transactions. So what, there's still two, not one.

25 MR. ANGIOLILLO: No, the tender offer does

1 not happen unless the merger follows.

2 JUDGE SMITH: Okay. One transaction
3 doesn't happen unless the other transaction happens.
4 There's still two transactions or at least there can
5 be two transactions. Why not?

6 MR. ANGIOLILLO: Well, Your Honor, if the
7 second transaction - - - if more than ninety percent
8 did not tender, then the tender doesn't close, there
9 is no transaction.

10 JUDGE SMITH: Okay. I understand.

11 MR. ANGIOLILLO: So - - - yeah.

12 JUDGE SMITH: I realize that, but the fact
13 that one does not exist without the - - - you know,
14 you can have two symbiotic beasts that can't exist
15 without the other, but there's still two beasts.

16 MR. ANGIOLILLO: Well, I understand what
17 you're saying, Your Honor. I don't mean to quarrel
18 with you, but if the tender offer doesn't actually
19 happen unless 90 percent tender so that the second
20 set merger occurs it may sound a little bit
21 metaphysical, but you don't have one without the
22 other, so I'm not sure that they're symbiotic. The
23 first just never happens.

24 And so in that regard, as in the Nodding
25 case, as well as - - - which cites the Second

1 Circuit, that in situations where you have two steps
2 inextricably linked, interdependent, and one will not
3 happen with the other, and they're bound by contract
4 that you don't split them apart artificially - - -

5 CHIEF JUDGE LIPPMAN: Okay, counsel.

6 MR. ANGIOLILLO: - - - but you have to
7 consider it as one transaction.

8 CHIEF JUDGE LIPPMAN: Okay, thank you,
9 counsel.

10 MR. ANGIOLILLO: Thank you, Your Honor.

11 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

12 MR. ORENSTEIN: Just a few things. Counsel
13 moved from saying that this is not a change-in-
14 control clause to it's not a generic change-in-
15 control clause. That's where I've always thought we
16 actually agreed. It's not a generic change-of-
17 control clause. But while clauses 1 through 5 deal
18 with various kinds of fundamental change, clauses 1
19 and 3 surely deal with change and control.

20 JUDGE GRAFFEO: Why wasn't the word
21 "control" used anywhere in these provisions if that's
22 at the heart of what you were trying to achieve?

23 MR. ORENSTEIN: I often find in drafting
24 that that happens. People think in technical terms.
25 And so the layman's term that's important doesn't

1 appear.

2 It may also be that control has securities
3 - - - federal securities overtones so that when they
4 filed after this transaction was done, when they
5 filed what's called an 8-K with the SEC, a report on
6 what happened, one of the sub heads was change in
7 control in registrant. That's a - - - control is a
8 term of art for various reasons.

9 JUDGE PIGOTT: What's the fundame - - - you
10 own preferred stocks, so you're - - - you know,
11 you're sitting there, as Mr. Angiolillo says, with
12 your coupons, and you can convert, but what - - -
13 Superior is doing what it did before, is Mr.
14 Angiolillo's - - - I mean, there is no fundamental
15 change in that. It's just, you know - - -

16 MR. ORENSTEIN: Well, we don't know that
17 they're doing what they did before, because now
18 everything they do is supposed to serve the interest
19 of Nabors. I mean let's say, just for an example,
20 Superior may have some wonderful growth ideas, but
21 Nabors might say that's not where we want to put this
22 money. In fact, we'll ask you to dividend something
23 up to us, so we can use it elsewhere in our
24 organization. And the security is different. You
25 weren't just clipping coupons before; you had a stock

1 option. Your stock option is gone.

2 The clients I have, they're not that
3 interested in four percent clipping coupons. They're
4 interested in hybrids like this.

5 JUDGE PIGOTT: Today?

6 MR. ORENSTEIN: They don't have one. Well,
7 today is different, but this was a few years ago. I
8 think that's all I care to say. Thank you very much.

9 CHIEF JUDGE LIPPMAN: Okay, thanks,
10 counsel. I appreciate it. Thank you both.

11 (Court is adjourned)

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C E R T I F I C A T I O N

I, Jessica B. Cahill, certify that the foregoing transcript of proceedings in the Court of Appeals of Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Services, Inc., No. 176 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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