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COURT OF APPEALS

STATE OF NEW YORK

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STONEHILL CAPITAL MANAGEMENT, LLC,  
ET AL.,

Appellants,

-against-

NO. 191

BANK OF THE WEST and  
MISSION CAPITAL ADVISORS, LLC,

Respondents.

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20 Eagle Street  
Albany, New York  
November 14, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The first matter on our  
2 calendar this afternoon is appeal number 191, Stonehill  
3 Capital Management v. Bank of the West and Mission Capital  
4 Advisors.

5 Counsel?

6 MR. EISENBERG: Good afternoon.

7 CHIEF JUDGE DIFIORE: Good afternoon.

8 MR. EISENBERG: May I have four minutes of  
9 rebuttal time, please?

10 CHIEF JUDGE DIFIORE: Yes, you may.

11 MR. EISENBERG: Martin Eisenberg, attorney for  
12 the appellants, Stonehill Capital. The hallmark of an  
13 auction is the formation of a binding agreement upon the  
14 seller's acceptance of the purchaser's winning bid. And  
15 where the material terms of that - - -

16 JUDGE RIVERA: Were you still negotiating the  
17 terms when you were going back and forth with the LSTA and  
18 the LSA?

19 MR. EISENBERG: No, Your Honor.

20 JUDGE RIVERA: No? Okay.

21 MR. EISENBERG: We're not negotiating the terms.  
22 The bank had agreed to use the LSTA document as the  
23 purchase and sale agreement and - - -

24 JUDGE RIVERA: Where is that agreement? In - - -

25 MR. EISENBERG: I beg your pardon?

1                   JUDGE RIVERA: Where is that agreement? In  
2                   counsel's email to you that there was a preference for that  
3                   particular form?

4                   MR. EISENBERG: Correct. That there was a  
5                   preference for that particular form, correct. And then the  
6                   form was sent over to counsel for the - - - for the bank,  
7                   and counsel for the bank did not make one contemporaneous  
8                   communication that it had any disagreement with any term.

9                   JUDGE RIVERA: But they didn't sign it, right?  
10                  They didn't say we agree. Did they ever send anything that  
11                  said we agree to these terms?

12                  MR. EISENBERG: They agree - - - the - - - the  
13                  entire concept of the - - - of the auction was for the  
14                  terms to be pre-negotiated. And so the whole purpose of  
15                  pre-negotiating the terms of sale through a pre-negotiated  
16                  purchase-and-sale agreement was to establish the material  
17                  terms of the sale so that when the acceptance was given,  
18                  the material terms were set and the contract became a  
19                  binding contract.

20                  JUDGE FAHEY: But - - - but I - - -

21                  JUDGE STEIN: If - - - if we assume for the  
22                  moment that there - - - there is some ambiguity in the  
23                  language, that "subject to", and - - - and - - - and that -  
24                  - - and that we're looking for intent based on - - - on  
25                  words and actions. Wha - - - what is it that indicates

1           that intent?

2                       MR. EISENBERG: Well, there's words. Well, let's  
3 start with the words, and then we'll go to the actions. As  
4 far as the words are concerned, none of the words that the  
5 bank used are legally sufficient to manifest an expressed  
6 intent not to be bound, absent a signed agreement. And all  
7 the cases hold that. The "subject to" language in the  
8 acceptance does - - - is legally insufficient. The  
9 language regarding merger clauses and a proposed agreement  
10 is insufficient. Withdrawal of the asset at any time is  
11 insufficient because this is an auction sale. Any time  
12 can't possibly mean any time. So there has to be a cutoff  
13 as to when any time ends.

14                    JUDGE PIGOTT: And that's - - - and that's when  
15 the gavel falls or - - -

16                    MR. EISENBERG: When the gavel falls. It - - -

17                    JUDGE FAHEY: You see, I - - - I am a little  
18 confused by that, because I thought - - - I thought that  
19 Stonehill was the one who originally objected to the  
20 proposed sales agreement subsequent to the auction. I  
21 thought that on Monday, April 23rd, 2012, Stonehill's  
22 counsel was the one who originally objected and sent them a  
23 redline that were - - - changes that were fairly  
24 substantial.

25                    MR. EISENBERG: Respectfully, I - - - I - - -

1 JUDGE FAHEY: Disagree.

2 MR. EISENBERG: We - - - we disagree, yeah.

3 JUDGE FAHEY: Sorry.

4 MR. EISENBERG: The original loan sale agreement  
5 that was sent over by the bank, which was supposed to be  
6 the pre-negotiated purchase-and-sale agreement, was  
7 insufficient to transfer a - - - this was a syndicated  
8 loan.

9 JUDGE FAHEY: Okay.

10 MR. EISENBERG: What - - - what the bank sent  
11 over was a loan transfer agreement for a bilateral loan.  
12 So at that point, Stonehill said you've got the wrong  
13 agreement; what would you like us to do? Would you like us  
14 to modify this agreement, to make it applicable to a  
15 syndicated loan? Or would you like to use the standard  
16 Loan Syndication & Trading Association form that everybody  
17 uses? Which would you prefer?

18 At that - - - after Stonehill made those  
19 communications, the bank accepted the bid, and a few hours  
20 after the acceptance of the bid, the bank's attorney said  
21 we prefer to use the loan sale agreement by the Loan  
22 Syndication & Trading Association. So Stonehill didn't  
23 reject any agreements. In fact, the agreement that was - -  
24 - that was agreed to by the parties was the very loan sale  
25 agreement that the bank requested. All Stonehill did was

1 send them the very agreement that the bank requested. And  
2 after Stonehill sent that agreement to the bank, the bank  
3 did not indicate any disagreement with that form.

4 JUDGE FAHEY: What about - - -

5 JUDGE RIVERA: Do you - - -

6 JUDGE FAHEY: - - - "subject to mutual execution  
7 of an acceptable loan sale agreement"?

8 MR. EISENBERG: Yes.

9 JUDGE FAHEY: That's the email on the 27th, so go  
10 ahead, okay.

11 MR. EISENBERG: That language, "subject to the  
12 mutual execution of a loan sale agreement" - - - acceptable  
13 - - - is insufficient to create an expressed condition that  
14 they would not be bound unless and until - - -

15 JUDGE FAHEY: And you're saying that's because  
16 there was a prior agreement to the form?

17 MR. EISENBERG: Well, here - - - here's what I  
18 say.

19 JUDGE FAHEY: Okay.

20 MR. EISENBERG: I say, the - - - when they  
21 accepted the bid subject to a mutual execution of a loan  
22 sale agreement, firstly, the bank had an obligation to  
23 negotiate in good faith to reach that loan sale agreement,  
24 because under *IDT v. Tyco*, where you have an agreement  
25 which is conditioned upon a further agreement, the parties

1 were obligated in good faith to negotiate to reach that  
2 further agreement.

3 So the bank sets forth auction terms, which state  
4 pre-negotiated agreement. They then accept the bid, and  
5 say, okay, accept the bid subject to negotiating the  
6 agreement. That im - - - at first instance, that imposes  
7 an obligation on both parties under IDT, to - - - to  
8 negotiate in good faith to reach an acceptable agreement.

9 JUDGE ABDUS-SALAAM: Counsel, is that your  
10 alternative argument or is your - - -

11 MR. EISENBERG: Correct.

12 JUDGE ABDUS-SALAAM: Yeah, because your original  
13 - - - I thought your initial argument is that there is an  
14 agreement as soon as the bank accepts Stonehill's highest  
15 bid. That's - - - that's the contract right there.

16 MR. EISENBERG: Correct, that's my fall back.

17 JUDGE ABDUS-SALAAM: Because - - - because - - -  
18 okay, I just wanted - - -

19 MR. EISENBERG: Yeah, that - - - that's my fall  
20 back.

21 JUDGE ABDUS-SALAAM: - - - to be clear about  
22 that.

23 MR. EISENBERG: And then when - - - when - - -

24 JUDGE RIVERA: Yeah, but if I understand that  
25 that's your fallback - - -



1 MR. EISENBERG: Yeah.

2 JUDGE RIVERA: - - - if I just want to clarify  
3 this point.

4 MR. EISENBERG: Sure.

5 JUDGE RIVERA: That - - - that's a fallback  
6 because you say the actually agreement was pre-negotiated,  
7 right?

8 MR. EISENBERG: Correct.

9 JUDGE RIVERA: Because the offering memo says  
10 there's a pre-negotiated agreement. You were aware of what  
11 it was.

12 MR. EISENBERG: Right.

13 JUDGE RIVERA: You knew that. When you sent in  
14 your bid, you understand that, but you have informed them,  
15 look, it's looks to me like you're using the wrong form.  
16 So it sounds to me like you're arguing, we understood the  
17 terms, we agreed to those terms when they accepted our bid,  
18 they - - - we all accepted the terms, and this about  
19 swapping out the forms with some technical changes back and  
20 forth.

21 MR. EISENBERG: That's - - - that's correct, Your  
22 Honor. That's - - - that's - - - that's our position.

23 So - - - and - - - and of - - - and of course,  
24 the bank's newfound disputes with the loan sale agreement  
25 after they get sued are completely - - - not only are they

1           disingenuous, but they're irrelevant, because under - - -  
2           under Brown, it's the subjective intentions of the parties  
3           at the time that they enter into the transaction that  
4           governs, not disputes that they contrive retroactively to  
5           make them nunc pro tunc to the time that - - - that - - -  
6           that the agreement was - - -

7                   JUDGE RIVERA: Well, well - - -

8                   JUDGE GARCIA: Counselor - - -

9                   JUDGE RIVERA: - - - what would happen when - - -  
10          when you - - - let me ask you this. You say they didn't  
11          respond when you sent them the - - - the proper form with  
12          whatever modifications. If they hadn't come back and - - -  
13          and disagreed with any of those, what - - - what happens  
14          then? Is there a breach on their side? What - - - what  
15          would that constitute?

16                   MR. EISENBERG: Well, if - - - if - - - if they  
17          come back and they say, well, we disagree with something -  
18          - -

19                   JUDGE RIVERA: Something.

20                   MR. EISENBERG: - - - first of all, I don't think  
21          they had the right to do that, because there was - - - they  
22          agreed to the pre-negotiated form. I don't think they had  
23          the right to - - - to mandate auction terms that said that  
24          the loan sale agreement is pre-negotiated, get the form  
25          that they request, and then say, okay, by the way, we want

1 to - - - we want to a pre-negotiate it.

2 I think they were bound - - -

3 JUDGE RIVERA: I'm sorry. Had you sent them the  
4 - - - what you're saying is the pre-negotiated form before  
5 they accepted, before the April 27th email?

6 MR. EISENBERG: They accepted - - -

7 JUDGE RIVERA: Um-hum.

8 MR. EISENBERG: They accepted the bid - - -

9 JUDGE RIVERA: Yes.

10 MR. EISENBERG: A few hours after they accepted  
11 the bid, they said we want to use the Loan Syndication &  
12 Trading Association form - - -

13 JUDGE RIVERA: That - - - that's what you're  
14 saying is the email from the bank's counsel - - -

15 MR. EISENBERG: Correct.

16 JUDGE RIVERA: - - - saying I prefer it to.

17 MR. EISENBERG: Stonehill didn't prefer it. The  
18 bank - - - it's the bank - - -

19 JUDGE RIVERA: No, no, no, I understand.

20 MR. EISENBERG: Yeah, I'm sorry.

21 JUDGE RIVERA: But the - - - but you're saying  
22 it's the bank counsel's email saying I prefer that form  
23 also.

24 MR. EISENBERG: Correct. That - - - so there you  
25 have the acceptance and then you have the agreement to use

1 the pre-negotiated purchase and sale agreement.

2 CHIEF JUDGE DIFIORE: Thank you, counselor.

3 MR. EISENBERG: I think my time is up, sorry.

4 CHIEF JUDGE DIFIORE: Counsel? Good afternoon,  
5 sir.

6 MR. CRICHLLOW: Good afternoon. May it please the  
7 court, I'm David Crichlow from Katten Muchin on behalf - -  
8 -

9 CHIEF JUDGE DIFIORE: Mr. Crichlow - - -

10 MR. CRICHLLOW: - - - of the respondents.

11 CHIEF JUDGE DIFIORE: - - - if the pre-negotiated  
12 sale agreement had been the proper document, would there  
13 have been a contract under these circumstances?

14 MR. CRICHLLOW: No, because what is surprising to  
15 me as a respondent and what is belied by the record is, on  
16 the one hand, counsel for the appellant spe - - - states  
17 something accurately, that it was supposed to be a pre-  
18 negotiated contract. Those who were purchasing pursuant to  
19 the auction terms knew it, and in exchange for getting a  
20 pool of distressed assets at twenty-seven cents on the  
21 dollar, they had to give a ten percent deposit. They had  
22 to execute the pre-negotiated, pre-arranged agreement.

23 What is undisputed is that is not what happened.  
24 Immediately, that loan sa - - - sale agreement was sent  
25 back marked up, and if you look at the record, there is an

1 email exchange where it is indicated by Stonehill that they  
2 intend to make minor, technical changes just because it's a  
3 syndicated loan.

4 JUDGE RIVERA: But - - - but didn't they tell you  
5 at the time that they put in their bid, that the form that  
6 Mission had circulated, made available, was not the proper  
7 form for this type of transaction?

8 MR. CRICHLLOW: I - - - I don't want to misstate  
9 the record, because the timing is a little tricky.

10 JUDGE RIVERA: Okay.

11 MR. CRICHLLOW: It's - - - it's around the same  
12 time. I don't know - - -

13 JUDGE RIVERA: But it's - - -

14 MR. CRICHLLOW: - - - whether it's before - - -

15 JUDGE RIVERA: Le - - - let me make it easier.  
16 Is it - - - it - - - they did that before the bank accepted  
17 the bid, isn't that correct?

18 MR. CRICHLLOW: I believe they did, but after - -  
19 -

20 JUDGE RIVERA: So why is the bank accepting, if  
21 they're already telling you it's the wrong form; this is  
22 not the form that's used for this kind of transaction.

23 MR. CRICHLLOW: But pursuant to the auction  
24 criteria, the bank is obligated by - - - by the offering  
25 memorandum to accept the highest bid. It's a conditional

1 auction, however. And it's been made clear - - -

2 JUDGE PIGOTT: Does that - - - I - - - I don't  
3 mean to interrupt you but - - -

4 MR. CRICHLLOW: Sure.

5 JUDGE PIGOTT: - - - does that mean that if - - -  
6 if the plaintiff in this case had said, you know what, we  
7 overbid, and - - - so we're - - - we're going to - - -  
8 we're going to call them up and say, you know, we - - - we  
9 didn't want - - - instead of 2.3, we really want to give  
10 you 1.9. Could you make them give you the 2.3?

11 MR. CRICHLLOW: That's an interesting question.  
12 That's - - - that's - - -

13 JUDGE PIGOTT: I - - - I think you can is my  
14 point.

15 MR. CRICHLLOW: That - - - that - - -

16 JUDGE PIGOTT: It - - - it seems to me if - - -  
17 if - - - either that - - -

18 MR. CRICHLLOW: Right.

19 JUDGE PIGOTT: - - - or we don't understand the  
20 industry.

21 MR. CRICHLLOW: Right, I - - -

22 JUDGE PIGOTT: And one of the things that's in  
23 the back of my mind is maybe we don't understand the  
24 industry is the question.

25 MR. CRICHLLOW: No, I - - - I think you do

1 understand it, and the reason I - - - I - - - I hesitate  
2 only because that - - - that issue is not before the court,  
3 but - - -

4 JUDGE PIGOTT: Well, it's not, but - - -

5 MR. CRICHLLOW: I think the answer is yes - - -

6 JUDGE PIGOTT: Let me - - - let me give you my  
7 full thought.

8 MR. CRICHLLOW: Sure.

9 JUDGE PIGOTT: You're saying, even though they  
10 said, you know, we're going to give you this money, and - -  
11 - and you're fighting over what seems to me to be a  
12 ministerial act of whether it's a quitclaim deed or a - - -  
13 or a - - - a full covenant deed, so to speak, on real  
14 property terms. In other words, the form is - - - is  
15 consequential but not - - - the deal has been made.

16 MR. CRICHLLOW: No, I would disagree with you, but  
17 I - - -

18 JUDGE PIGOTT: You're going to disagree with me,  
19 because - - -

20 MR. CRICHLLOW: Yes.

21 JUDGE PIGOTT: - - - otherwise if - - - if I  
22 said, you know, they - - - they - - - instead of 2.3 said,  
23 you know, it's 1.9, you said, oh, okay, then the bid is  
24 off. And everybody - - - everybody that bid is out of  
25 luck, and we're just going to - - - we're just going to

1 lick our wounds and take this loan back.

2 MR. CRICHLLOW: Well, it's an interesting point.  
3 It's one of the reasons why the offering memoranda and  
4 offering memoranda like this in the auction industry  
5 throughout the country reserves the same right that my  
6 client did, which is to take away the asking - - -

7 JUDGE PIGOTT: But I - - - I look at that right  
8 as being up to the point of the sale. In other words - - -

9 MR. CRICHLLOW: Up to the point of a consummated  
10 sale, pursuant to the terms.

11 JUDGE PIGOTT: Up to the point - - - up to the -  
12 - - I - - - he had a better way of saying it, but - - -

13 MR. CRICHLLOW: Yes.

14 JUDGE PIGOTT: - - - up to the point when the  
15 gavel falls, because now they're stuck. They better come  
16 up with the money or you're going to sue them, and you're  
17 going to - - - you're going to give them the loan, which  
18 they then can renegotiate which, obviously, they later did  
19 - - -

20 MR. CRICHLLOW: Right.

21 JUDGE PIGOTT: - - - renegotiate with the debtor,  
22 right?

23 MR. CRICHLLOW: Right. And - - - and now where I  
24 want to come back to, an area where you and I disagree, is  
25 it's not just ministerial terms. An agreement on forms is



1 not an agreement on terms.

2 JUDGE ABDUS-SALAAM: Could you have signed the  
3 LSA as you proposed it to them?

4 MR. CRICHLLOW: Would my client have?

5 JUDGE ABDUS-SALAAM: Yes.

6 MR. CRICHLLOW: Yes, they would have. I - - - I  
7 don't think the question is pa - - -

8 JUDGE ABDUS-SALAAM: But it would have been the  
9 wrong form.

10 MR. CRICHLLOW: No - - - well, not - - - not  
11 necessarily. There's - - - there's - - -

12 JUDGE ABDUS-SALAAM: But you - - - didn't - - -

13 MR. CRICHLLOW: You could have done - - -

14 JUDGE ABDUS-SALAAM: Didn't your counsel agree  
15 that it was the wrong form?

16 MR. CRICHLLOW: No, he agreed that he preferred -  
17 - - I want to be very, very precise on this. He agreed  
18 that in syndicated loan transactions, he too, preferred to  
19 use the LSTA agreement. The LSTA agreement is like an ISDA  
20 agreement or like a general - - -

21 JUDGE PIGOTT: So your counsel was - - - was  
22 operating outside of wha - - - of the instructions of his  
23 client?

24 MR. CRICHLLOW: At that point, I can't - - - I  
25 can't tell you what the instructions were. I think he was

1 giving advice that from his perspective if the terms using  
2 the LSTA form had remained the same would not have made a  
3 different - - -

4 JUDGE STEIN: But - - - but when he got that  
5 form, he didn't reject it. He - - - he didn't say, what  
6 are you doing here? We - - - we're not going based on this  
7 form. We want you to sign the LSA.

8 MR. CRICHLLOW: And nor does he have an obligation  
9 under New York Law, because what they did do and what was  
10 clear in both the LSA and in correspondence from the  
11 auction administrator, is there were terms to the  
12 agreement. The parties intended not to be bound, unless  
13 there was a written and executed - - -

14 JUDGE STEIN: Well, but - - -

15 MR. CRICHLLOW: - - - agreement. There's no  
16 obligation for my client to do anything, to negotiate in  
17 good faith or do anything. The offer was rejected.

18 JUDGE STEIN: But that's a good point.

19 MR. CRICHLLOW: Okay.

20 JUDGE STEIN: This rests on what you - - - you  
21 just said. It was the parties' intention. That is the  
22 question here, is it not? What was the parties' intention?  
23 You may feel that it - - -

24 MR. CRICHLLOW: Sure.

25 JUDGE STEIN: You may feel that it's - - - you

1           may feel that as a matter of law, it shows that it's - - -  
2           it's your client's intention, but that is the question.  
3           And isn't that usually a question of fact and isn't that  
4           we're talking about here, as you say one thing, they say  
5           another?

6                       MR. CRICHLLOW: Well - - - well, not - - - not  
7           here. And if you look at Scheck which is - - - which is  
8           instructive and - - - and has been followed - - - it is  
9           this court's decision. It's been followed for over - - -  
10          almost fifty years. Scheck takes situations like this and  
11          says, when the parties clearly envisit - - - evidence their  
12          intent through the contracts themselves, through the drafts  
13          to be bound only by a written agreement. And the  
14          interesting thing is, Your Honor, I want you to understand,  
15          this - - -

16                      JUDGE STEIN: But - - - but that's the question.  
17          Is - - - is - - - does this language express that intent  
18          clearly and unambiguously?

19                      MR. CRICHLLOW: Not only does the language in the  
20          agreements are promoted by my client, but if you look at  
21          the language in the drafts that are submitted by Stonehill,  
22          that's where I think the appellants suffer, because they  
23          indicate an agreement not to be bound unless in writing.

24                      JUDGE PIGOTT: Mr. - - - Mr. Ku - - -

25                      MR. CRICHLLOW: Yes?

1 JUDGE PIGOTT: - - - Kuwayama, am I pronouncing  
2 that correctly?

3 MR. CRICHLLOW: [Ku-a-yama].

4 JUDGE PIGOTT: Kuwayama?

5 MR. CRICHLLOW: Yes.

6 JUDGE PIGOTT: In his - - - in his April 27th  
7 email, said prefer to use the LSTA documentation to  
8 transfer the loan and would forward such documentation next  
9 week. Then a week later, he advised counsel he's working  
10 on getting them the documents.

11 MR. CRICHLLOW: Correct.

12 JUDGE PIGOTT: Sounds like he likes the LSTA.

13 MR. CRICHLLOW: As a form. Now I want to make it  
14 clear, my argument is an agreement on form is not an  
15 agreement on terms. You can use the LSTA the same way you  
16 can use any short form agreement - - -

17 JUDGE ABDUS-SALAAM: So what was the different  
18 term? That's what I'm trying to figure out.

19 MR. CRICHLLOW: Okay.

20 JUDGE ABDUS-SALAAM: What was the different term?

21 MR. CRICHLLOW: Well, if - - - if you think back  
22 on the record, one of the first things that Mission's  
23 counsel said when they received a markup is it's heavier  
24 than we thought, and then there was a three-page  
25 explanation that acknowledged that they were not minor

1 changes, but major. They refused to agree to  
2 indemnification protections that my client insisted upon in  
3 the sale, and they added an indemnification obligation to  
4 my client, which was not part of the offer. At that point,  
5 the offer's rejected. That's a material term.

6 They took a nonrefundable deposit and if you look  
7 at - - - and I can give you the record cite here in a  
8 second - - - the definitional change on - - - on record,  
9 page 189, when they changed the definition of deposit - - -  
10 they changed it from a nonrefundable deposit to a fully-  
11 refundable deposit, and with the right to get out of giving  
12 the deposit and make it clear that that deposit will not be  
13 given as opposed to being a condition precedent to the  
14 sale, until after their form and their terms - - -

15 JUDGE ABDUS-SALAAM: So you're - - - you're  
16 saying, counsel - - -

17 MR. CRICHLow: - - - are agreed to and fully  
18 executed. I'm sorry.

19 JUDGE ABDUS-SALAAM: You're saying that that - -  
20 - this sale would not have gone - - - this sale would not  
21 have gone through even if your client had not discovered  
22 that they were losing 1,800,000 dollars or thereabouts by  
23 accepting this offer?

24 MR. CRICHLow: Well, absolutely not, not on the  
25 terms. And that was made clear when you see the - - - the

1           correspondence from Mission, which was the auctioneer  
2           administrator, that said, in essence - - - and I'm  
3           paraphrasing now with colloquialisms - - - whoa, wait a  
4           minute; that's a lot bigger than I thought. I'm not sure  
5           the lawyers will agree to this.

6                    JUDGE RIVERA: I'm sorry; what's the date of  
7           that?

8                    MR. CRICHLow: That's upon receipt of the first  
9           markup of the LSA, so if you give me one second. I believe  
10          that's April 23rd.

11                   CHIEF JUDGE DIFIORE: Thank you, counsel.

12                   MR. CRICHLow: Thank you.

13                   CHIEF JUDGE DIFIORE: Counsel?

14                   Hold on, one second, sir.

15                   MR. CAVALERI: I'm sorry.

16                   MR. EISENBERG: Oh, I forgot.

17                   CHIEF JUDGE DIFIORE: You're jumping the line.

18                   MR. CAVALERI: Good afternoon, Your Honors.

19                   CHIEF JUDGE DIFIORE: Good afternoon.

20                   MR. CAVALERI: May it please the court, my name  
21          is Damian Cavaleri, of the law firm Hoguet Newman Regal &  
22          Kenney, representing respondent Mission Capital Advisors.

23                   So the issue before the court as Mr. Crichlow has  
24          explained is whether Bank of the West properly withdrew its  
25          loan prior to Stonehill meeting the conditions that Mission

1 set forth in the offering memorandum that was public - - -  
2 put in - - - put into publication in March of 2012. The  
3 Appellate Division said yes, and this court should say the  
4 same respectfully for three reasons.

5 First, Mission, throughout the auction process,  
6 made clear that it was Bank of the West's intention to only  
7 be bound by - - - by definitive, executed statements. This  
8 was in the offering memorandum and it was also included in  
9 the language in which Mission provided the confirmation  
10 email to Stonehill saying that it would be subject to the  
11 execution of a mutually-agreed-upon loan sale agreement.

12 JUDGE ABDUS-SALAAM: So you - - - you said that  
13 the Appellate Division agreed that there were conditions  
14 precedent to the formation of the contract. But I don't  
15 recall the Appellate Division addressing that issue at all.

16 MR. CAVALERI: Your Honor, the Appellate Division  
17 held that while the auc - - - the auction was a conditional  
18 auction. This means that there were certain conditions  
19 post the close the auction that were required to complete  
20 the loan sale. Those conditions were - - -

21 JUDGE PIGOTT: So you're saying that - - - that -  
22 - - that they could have pulled out. I - - - as I asked  
23 Mr. Crichlow, he said, they could have said, yeah, we bid  
24 2.3; we changed our mind; we're not doing it.

25 MR. CAVALERI: Well - - - well, actually here the

1 way the conditions were laid out was that it was on  
2 Stonehill to sign and provide a deposit.

3 JUDGE PIGOTT: So it's a - - - a yes. They could  
4 have said, you know, we bid 2.3; our mistake, never mind,  
5 bad - - - bad bid.

6 MR. CAVALERI: Yea - - - yes, Stonehill could  
7 have done that, much to the detriment of their status in  
8 the market. The question - - -

9 JUDGE PIGOTT: Well, what, whoa, whoa. I mean -  
10 - - you mean people would frown on them?

11 MR. CAVALERI: I - - - yes, I - - - I believe  
12 that the way Mission conducts their auctions, it's - - -

13 JUDGE PIGOTT: Suppose - - - suppose you had  
14 somebody who offered a - - - a debt, and agreed to a sale,  
15 and then realized that the person who bought the debt is  
16 going to get a better deal than they do, and they decide to  
17 re - - - revoke their - - - their consent to that sale.  
18 Would that - - - would that hurt them in the industry?

19 MR. CAVALERI: You're talking about - - - I just  
20 want to make clear I - - -

21 JUDGE PIGOTT: Yeah.

22 MR. CAVALERI: - - - understand your argument.  
23 You're talking about the buyer or the seller in this case?

24 JUDGE PIGOTT: I'm talking about the seller.

25 MR. CAVALERI: The seller here already - - - had



1 already provided their agreement to the buyer. The buyer  
2 need only sign the proposed agreement, the pre-negotiated  
3 agreement that they were provided with - - -

4 JUDGE PIGOTT: Mr. Crichlow just said there's no  
5 difference between the two. I mean, they - - - they could  
6 have signed either one, and - - - and I - - - I  
7 mispronounced the gentleman's name but he said that's a  
8 better - - - that's a better thing; let's - - - let's go  
9 with the LSTA.

10 MR. CAVALERI: Well, the LSTA was merely a  
11 starting point for the rest of the agreement. The LSTA is  
12 a form that you can then - - -

13 JUDGE PIGOTT: You know that I don't find that in  
14 the record. You know, I read all these emails, you know,  
15 and - - - and finally when they said we're not going  
16 through with this, they said we have the right to do this.  
17 They didn't say we don't - - - we don't like that - - -  
18 that you invented a - - - an indemnification. They don't  
19 say anything other than we've decided that we're not going  
20 to sign this. Why? Because you're making 1.8 million  
21 dollars that we wish we had made.

22 MR. CAVALERI: Well - - -

23 JUDGE PIGOTT: I thought.

24 MR. CAVALERI: Well, Judge Pigott, in - - - in  
25 the - - - this - - - A, this was the first time that

1 Mission had ever encountered an LSTA form. This is not  
2 something that is universally used through Mission's  
3 auction practice.

4 Second - - -

5 JUDGE PIGOTT: Is that because you're not  
6 familiar with that - - - with this type of bidding?  
7 Because LSTA in their amicus said this is the standard in  
8 the industry, right?

9 MR. CAVALERI: Right. Well, the LSTA - - - and  
10 the reason why we had to submit a separate brief, is that  
11 they were just incorrect in the way that Mission conducts  
12 their auctions. Mission conducts auctions using these pre-  
13 negotiated loan sale agreements, not LSTA forms.

14 JUDGE RIVERA: But counsel for the bank says, I  
15 prefer it too, and I've used these in the past, and oh, I  
16 didn't even realize it was that kind of a transaction; I  
17 was misled.

18 MR. CAVALERI: Right, and then what you'll see  
19 further down the line, is that there is a marked-up version  
20 of the LSTA form. I believe there's a - - - an email - - -

21 JUDGE RIVERA: Let me ask you a different  
22 question. If - - - if - - - if instead of Stonehill coming  
23 forward and saying, you know, that's the wrong form for  
24 this kind of transaction, if indeed after accepting the  
25 bid, the bank had said, oops, we realize it is the wrong -

1 - - with - - - without Stonehill even - - - even raising  
2 this - - - it's the wrong form and we need to use the  
3 correct form. Could Stonehill have said that's not what I  
4 bought into? Could Stonehill have then pulled out of this  
5 arrangement?

6 MR. CAVALERI: Well, Stonehill would have to sign  
7 the form that was proposed, because that was part of the  
8 conditional auction - - -

9 JUDGE RIVERA: That's what I'm saying. So the  
10 bank could - - - you're saying that nei - - - nobody could  
11 change this form, even if the bank itself had realized  
12 that's not the proper form.

13 MR. CAVALERI: Well, if they - - -

14 JUDGE RIVERA: They were bound to only sign that  
15 original form that was circulated - - -

16 MR. CAVALERI: Well, the - - - the - - -

17 JUDGE RIVERA: - - - by Mission during this memo  
18 offering process, correct? Is that what you're saying?

19 MR. CAVALERI: Well, I - - - I just want to make  
20 sure I understand Your Honor. So first you're saying that  
21 if - - - if Stonehill would have just signed the incorrect  
22 ver - - - I see my time is running - - - may I - - -

23 JUDGE RIVERA: Please.

24 CHIEF JUDGE DIFIORE: Please.

25 MR. CAVALERI: - - - complete my - - - my answer?

1           So if you - - - so - - - so I understand your question is,  
2           if Stonehill had just signed the pre-negotiated loan sale  
3           agreement that Bank of the West had proposed as part of the  
4           - - - of the agreement and provided the lo - - - the ten  
5           percent deposit, could they have completed the loan sale?  
6           Technically, based on the terms of the offering memorandum,  
7           they could have, but they did not here. They continued to  
8           negotiate the agreement and they utilized their position as  
9           the - - - as the buyer - - -

10                   JUDGE RIVERA: Well, I had actually asked  
11           something slightly different, so if I could go back to my  
12           original hypothetical, which was before they sign it, the  
13           bank realizes the wrong form, is Stonehill still bound to  
14           this arrangement, to actually buy this loan?

15                   MR. CAVALERI: So if - - -

16                   JUDGE RIVERA: If Stone - - - if - - - if the  
17           bank comes back and says, listen, I've got - - - it was the  
18           wrong form; this is the form we're going to use - - -

19                   MR. CAVALERI: And they provide the form for  
20           Stonehill to sign?

21                   JUDGE RIVERA: Correct. And Stonehill says,  
22           that's not what I agreed to. I'm - - - I was willing to  
23           sign the other form; I don't know about this form.

24                   MR. CAVALERI: And the parties continue to  
25           negotiate the terms of that - - - of that form for more - -

1 -

2 JUDGE RIVERA: Let's just stop - - - no, let's  
3 just end there. Forget the further negotiation. Can  
4 Stonehill pull out at that point, because it's not the form  
5 that they had originally seen before they bid?

6 MR. CAVALERI: I be - - - I believe so, Your  
7 Honor. They would have to sign the form, because all of  
8 this was contingent on a mutually executed loan sale  
9 agreement.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 MR. CAVALERI: Thank you.

12 CHIEF JUDGE DIFIORE: Mr. Eisenberg? What about  
13 Mr. Crichlow's argument that it wa - - - not only was the  
14 form chang - - - changed, but the material terms were  
15 changed as well?

16 MR. EISENBERG: I - - - I think my colleague is  
17 conflating forms. The first form that was sent over by  
18 Stonehill was the modified form, because the bank had sent  
19 over the - - - the wrong form. When the bank realized it  
20 was the wrong form, the bank picked the form, not  
21 Stonehill. So he's just trying to disown his own document.  
22 The - - - the - - - the indemnification clauses, the  
23 material terms, those were picked by the bank. It was the  
24 bank that said we would like to use this form. Well, now  
25 that 1.8 million dollars came in on a refinance, now they

1 say, you know what? Not a good form. We don't like it.

2 JUDGE RIVERA: I'm sorry.

3 JUDGE GARCIA: Counsel, can you - - -

4 JUDGE RIVERA: When did the bank say - - -

5 JUDGE GARCIA: I'm sorry. Can you explain to me  
6 the refinancing? How does that happen? I mean, it seems  
7 like that's a Stonehill entity that does the refinancing  
8 here?

9 MR. EISENBERG: Correct. There - - - this was  
10 not any issue that was discussed below, but I will tell you  
11 exactly - - -

12 JUDGE GARCIA: Please.

13 MR. EISENBERG: - - - what happened here. The  
14 bank entered into a - - - this is a syndicated loan, and  
15 there was a forbearance agreement entered into by the  
16 lenders and the bank, under which the bank - - - the - - -  
17 the lenders agreed not to foreclose on the loan, because it  
18 was in default, to give the - - - the borrower an  
19 opportunity to refinance, hopefully for ninety million  
20 dollars. So nobody was going to foreclose on the loan.

21 During the time that the - - - that the borrowers  
22 were trying to obtain their refinancing, it's important to  
23 note that the bank put the loan up for sale. The bank put  
24 the loan up at the auction knowing that the loan could be  
25 refinanced. So there's no surprise when it turns out that

1 the loan is going to be refinanced.

2 So the fact that the re - - - refinancing came  
3 from Stonehill or from any other third party really doesn't  
4 - - - really doesn't matter, because it's no surprise - - -  
5 it's no surprise to the bank that the loan could be refi -  
6 - - financed during the auction period, because they - - -  
7 they knew about it at the time the auction was put up.

8 JUDGE GARCIA: And forgive this basic question,  
9 but would you have - - - you're affiliated - - - would  
10 Stonehill have refinanced if they didn't think they were  
11 getting this loan?

12 MR. EISENBERG: My - - - my - - - my sense is - -  
13 - Stonehill was already a lender in the - - - in the  
14 facility.

15 JUDGE GARCIA: Okay.

16 MR. EISENBERG: My sense is, they didn't  
17 specifically commit to a 150-million-dollar refinancing of  
18 the entire syndicated loan so that it could - - -

19 JUDGE GARCIA: Right.

20 MR. EISENBERG: - - - make money on this  
21 particular transaction, so without - - -

22 JUDGE GARCIA: So it was a commitment for the  
23 entire - - -

24 MR. EISENBERG: It was a commitment for the  
25 entire sum - - -

1 JUDGE GARCIA: Understood, thank you.

2 MR. EISENBERG: Right.

3 JUDGE RIVERA: Could I - - - can I go back? You  
4 said that the bank sent its own forms. When - - - when did  
5 it do that?

6 MR. EISENBERG: I'm - - - I beg your pardon, Your  
7 Honor.

8 JUDGE RIVERA: When you said the bank responded  
9 with its own form - - -

10 MR. EISENBERG: Right.

11 JUDGE RIVERA: - - - what - - - when did they do  
12 that?

13 MR. EISENBERG: When the - - - well, they agreed  
14 to use - - - they said we'd like to use the LSTA documents  
15 and we'll send them over, okay. So we were waiting - - -  
16 Stonehill was waiting for the forms. And the bank said,  
17 I'll get it to you by Monday.

18 JUDGE RIVERA: All right.

19 MR. EISENBERG: And then they weren't coming up  
20 with the forms.

21 JUDGE ABDUS-SALAAM: While that was going on,  
22 counsel, could you have pulled out of this arrangement?

23 MR. EISENBERG: No. No, it - - - this - - - we -  
24 - - the bid was accepted. The pre-negotiated agreement was  
25 accepted. The parties were bound. This was - - - this was



1 an auction. You know, it's not an option. The bank is  
2 trying to treat this as a - - - as a one-way option, and  
3 that's just - - - that's just not - - - that's just not  
4 right. And I think one of the most telling indications  
5 that the bank recognized that the acceptance of the bid  
6 would bind them is the sale - - - is there's a - - - a  
7 memorandum from a bank - - - executive of the bank that  
8 says to his counsel, we need to get comfortable with the  
9 proposed loan sale agreement prior to the acceptance of the  
10 bid, okay.

11 So if the bank believed that it had no  
12 obligation, unless and until that loan sale agreement was  
13 signed, why did it need to get comfortable with the loan  
14 sale agreement prior to the acceptance of the bid? The  
15 reason why it needed to get comfortable prior to the  
16 acceptance of the bid is because it recognized that once  
17 the bid was accepted, it was bound to sell the loan.

18 I see my - - - my time is up.

19 CHIEF JUDGE DIFIORE: Thank you, sir.

20 MR. EISENBERG: Thank you, Your Honor.

21 (Court is adjourned)

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I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Stonehill Capital Management LLC v. Bank of the West, No. 191 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: November 21, 2016