COURT OF APPEALS

STATE OF NEW YORK

SCHRON,

Plaintiff,

-against-

TROUTMAN SANDERS LLP,

Defendant.

MICH II HOLDINGS LLC, et al.,

Appellant,

-against-

No. 23

SCHRON, et al.,

Respondent.

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20 Eagle Street
Albany, New York 12207
January 10, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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Penina Wolicki
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CHIEF JUDGE LIPPMAN: Number 23.

Counselor?

MR. SHECHTMAN: May it please the court, Paul Shechtman; and I represent the SVCare appellants in this matter.

CHIEF JUDGE LIPPMAN: Do you want any rebuttal time, counsel?

MR. SHECHTMAN: My apology, Judge. Three minutes, if I could?

CHIEF JUDGE LIPPMAN: Sure, go ahead.

MR. SHECHTMAN: The issue here also relates to an option, and the issue is whether parol evidence should be admitted to interpret the words "other good and valuable consideration" in the SVCare option agreement.

CHIEF JUDGE LIPPMAN: Counsel, aren't mutual covenants the consideration here? Isn't that what it says?

MR. SHECHTMAN: Well, it says "mutual covenants and other good and valuable consideration." The First Department decided this case - - -

CHIEF JUDGE LIPPMAN: What's ambiguous about that?

MR. SHECHTMAN: Well, the First Department decided this case by saying what that means is the

100-million-dollar exercise price and the value on resale above 400 million. The first can't possibly be consideration, because it is the exercise price. The second can't be consideration, because it is a limit on your purchase in - - -

JUDGE SMITH: Suppose you're right that the agreement to make the loan was the consideration. Isn't it another step to say that the option is conditioned on the making of the loan?

MR. SHECHTMAN: Judge, I would - - - I would think the step was this: that if the loan is the consideration for the option, and the option wasn't made - - - and the loan wasn't made, then there is no consideration, and the option's void.

JUDGE SMITH: You don't have a defense of lack of consideration here. You don't even need consideration for an option.

MR. SHECHTMAN: You don't need consideration for an option. But if - - -

JUDGE SMITH: I mean, I can understand that the - - - that the consideration for the - - - theoretically, some separate agreement could be a consideration for an option, a separate agreement not otherwise referred to in the option itself. But it seems to me if the performance of one is going to be

a pre-condition to the obligation of the other, you ought to put that in there.

MR. SHECHTMAN: But, Judge, if I'm correct that the consideration here was the loan, and that's what the parties intended, and that there was a failure of consideration, I don't think it matters that in New York State you don't need consideration if the parties intended it here.

And our view is, unless that loan is consideration, then you gave an option to purchase this company for 100 million dollars - - -

JUDGE SMITH: Isn't it - - -

MR. SHECHTMAN: - - - for nothing.

JUDGE SMITH: - - - don't we - - - don't we judicially know that these words "for other good and valuable consideration" are very, very common in agreements?

MR. SHECHTMAN: We do. And I think we know two - - -

JUDGE SMITH: Aren't they essentially put in in a - - - to provide against a possible defense of lack of consideration? Isn't that what it's there for?

MR. SHECHTMAN: I think we know two things. I think we know, in some agreements they may just be

boilerplate. I think we know, in other agreements they may have great meaning. And the parties may choose to use those words rather than state what the consideration is, for a variety of reasons.

JUDGE GRAFFEO: But that's my - - - that's my concern. Because if we agree with you that the parties here can then go to parol evidence to show what that means, we've got thousands of contracts that use that clause. So is everyone going to start bringing in oral - - -

MR. SHECHTMAN: I don't - - -

JUDGE GRAFFEO: - - - oral testimony as to the meaning of their contract?

MR. SHECHTMAN: - - - I don't think so, Judge. I mean, I should back up and say the following. I think when I was quite young, I got a Black's Law Dictionary. I don't think I opened it until this case. And when I opened it, what you learn for the meaning of this word is, it can often be a way of stating other significant consideration where the parties, for whatever reason, don't want to say it.

CHIEF JUDGE LIPPMAN: How do we know, though?

MR. SHECHTMAN: If I could - - -

CHIEF JUDGE LIPPMAN: How do we know - - - why isn't every contract ambiguous if we - - -

MR. SHECHTMAN: Because - - -

CHIEF JUDGE LIPPMAN: - - - accept - - -

MR. SHECHTMAN: - - - typically, contracts state some consideration. Here, if we're right and the First Department is wrong, that the exercise price isn't consideration, that the limit isn't consideration, and respectfully, I don't think there can possibly be any doubt about that.

JUDGE GRAFFEO: Well, does that - - -

MR. SHECHTMAN: If - - -

JUDGE GRAFFEO: - - - require - - -

MR. SHECHTMAN: - - - if we're - - -

JUDGE GRAFFEO: - - - us to ignore the merger clause?

MR. SHECHTMAN: No. Because I think you say to yourself, look, in this agreement, if there isn't - - - if that term "other consideration" doesn't have meaning, then there is no consideration. That doesn't make sense. The economics of this deal say that that would be absurd. So therefore, this is a case - - - not all cases - - - but this is a case in which one says okay, what does it mean? And once you say what does it mean, the merger agreement

doesn't matter, because once you say - - -

CHIEF JUDGE LIPPMAN: What's the rule - - - what's the rule, counselor? Is it when you know that you have to say what does it mean?

MR. SHECHTMAN: I think you say what does it mean when the consideration reflected in the agreement is such, right, that no reasonable person could think that that is the parties' consideration, such that the words "other consideration" must have meaning. That's not just my rule.

There are scores of cases in which the phrase "other consideration" is given meaning - - -

JUDGE PIGOTT: You - - -

MR. SHECHTMAN: - - - when there's no other consideration in the agreement.

JUDGE SMITH: - - - you spoke about - - - you spoke about the economics. Let me see if I understand what's really going on here. Under the option, whether it's subject to a condition or not when he exercises it, he puts 100 million dollars into the issuer, of which he - - -

MR. SHECHTMAN: Well - - -

JUDGE SMITH: - - - of which he then owns 99.999 percent, right?

MR. SHECHTMAN: I don't - - - Judge, the

first time that I knew - - - I mean, I'm relatively new to this case, but I've read the pleadings below - - - the first time I knew, for example, that the excess above 400 went back to them - - -

JUDGE SMITH: Yes.

MR. SHECHTMAN: - - - was in their reply brief. The first time - - -

JUDGE SMITH: Well, that's - - - actually, I thought your brief says it, too.

MR. SHECHTMAN: Well, my - - -

JUDGE SMITH: The excess above 400, it says it goes to the issuer.

MR. SHECHTMAN: But my brief says I don't think they have any incentive to get above 400 because it would go to us. Now, we've always thought that we were the issuer at the time, and therefore it went to us. And - - -

JUDGE SMITH: The - - - let me just - - - this may be irrelevant, but let me just be sure I understand it. It says that if they buy the units and resell them, they have to give the excess above 400 to the issuer - - -

MR. SHECHTMAN: Right.

JUDGE SMITH: - - - which is the company they've just sold. That can't possibly be right, can

it?

MR. SHECHTMAN: It doesn't make sense to me that they have to give it to the company they just sold. That's in their - - -

JUDGE SMITH: But that is what it says?

MR. SHECHTMAN: That is what it says. It also seems to say that the 100 million dollars goes to the issuer. I don't think that makes sense. I think everybody has all - - -

JUDGE SMITH: Are you really asking for reformation of this thing?

MR. SHECHTMAN: No, I'm asking just for interpretation of it. Because otherwise, realize how good a deal this is.

JUDGE SMITH: I understand.

MR. SHECHTMAN: When - - -

JUDGE SMITH: But how do you interpret "100 millions shall be paid to the issuer"?

MR. SHECHTMAN: I don't think that issue is before this court. But realize, if they're right, for no consideration, you buy one of the most thriving healthcare companies in the country by putting 100 million dollars in, of which you get to keep, what, 999-whatever. But you also - - - if you sell it, and it's above 400 dollars (sic), that also

comes to you. That's a deal that's so good it couldn't possibly the deal. And the reason it couldn't poss - - -

JUDGE SMITH: Well, no, it doesn't - - -

JUDGE GRAFFEO: Let me ask you the same question I asked in the previous case. Who drafted these documents?

MR. SHECHTMAN: The documents were drafted by my side of the aisle, Your Honor. So - - - but that said, there's a provision in it that says it shouldn't be interpreted favorably to one side or the other. But be that as it may, if you come to the question who drafted, all right, then you're only coming there because you say to yourself, there's ambiguity here; that the logic of this deal is such that it couldn't be zero consideration.

JUDGE GRAFFEO: Well, it also has to do with the fact that they - - - someone could have inserted cross-reference language into this to make it clear that these agreements were - - -

MR. SHECHTMAN: Some - - - someone - - -

JUDGE GRAFFEO: - - - that there's - - -

MR. SHECHTMAN: - - - could have.

JUDGE GRAFFEO: - - - more than one agreement.

MR. SHECHTMAN: Someone could have. But if our parol evidence, which is in a footnote, is to be believed, it was taken out at Mr. Schron's request, because he didn't want reference to the loan in there. Now, that's parol evidence. That's what we would like to offer. And we'd like to offer it because this is ambiguous. You can't resolve - - -

CHIEF JUDGE LIPPMAN: You're really saying more than it's ambiguous. You're saying it can't mean this?

MR. SHECHTMAN: Well, it can't - - - it can't - - -

CHIEF JUDGE LIPPMAN: Is that really your argument?

MR. SHECHTMAN: It can't mean what the First Department said. It can't mean that the consideration is what you put in after you get the company. That's just wrong. And it certainly can't mean what has been suggested today that even the First Department got it wrong, because above four - - -

JUDGE SMITH: But apart - - - I grant there are some peculiarities in this agreement. But isn't it a fact that the words "for other good and valuable consideration" often are essentially meaningless?

MR. SHECHTMAN: Absolutely right. And I'll give you an example, all right? These options differ. The last agreement that you saw said ten dollars plus other good and valuable consideration. There is no one standing up here and saying to you that has meaning. Because that is an option whose structure is, we believe, and obviously Mr. Reiter believes, five-dollars option price. All right? I think it's five-dollar option price, because the parties who drafted here didn't know New York law that you didn't need to put any consideration - - - but five-dollar option price, 1,000 dollar exercise price, gets you a third. Into the agreement, you have to pay a third for the company.

Ours is the loan, right? Other consideration. That gets you the ability to exercise for 100,000 - - - 100 million dollars, such that the loan is outstanding, you can simply assume the debt. Right? It doesn't trigger 3.3 in our case, because you're getting the whole company. Right? So that 3.3 is inapplicable in our case.

They're very different. And what you learn from that difference is that "other good and valuable consideration" can be boilerplate. And the best sign that it's boilerplate is if the structure of the deal

says to you the parties have entered into an agreement here whose terms have sufficient clarity.

But here, where unless you give that term meaning, this is an absurd deal, this is you get it for free, and not only do you get it for free, what you pay to get it is yours, and that can't be right. And that says you've got to give meaning here. That says we ought to take parol evidence.

If we're right that the parol evidence is that the loan was there but it was taken out for tax reasons, then the loan should be there. So I can't agree with you more, Judge. There can be some cases in which it's boilerplate. This is not one. It's certainly not one for the reasons the First Department gave.

JUDGE READ: What about mootness?

MR. SHECHTMAN: I think the answer is - - -

JUDGE READ: You do have an argument in the First Department, I guess, coming up?

MR. SHECHTMAN: We do. And I think the answer to that is this. I was trying to see if there was a clean way of saying this. We're - - - this is - - - if this is the World Series, there are two games left, the sixth, which is here, and the seventh, which is in the First Department. We have

to win both of them. But that doesn't suggest that the sixth game is moot. It matters, right?

JUDGE READ: So if you lose - - -

MR. SHECHTMAN: And it matters - - -

JUDGE READ: - - - if you lose this one, Mr. Shechtman, is that one moot?

MR. SHECHTMAN: If we lose this one, then there's still a question in that one of whether there was - - - that they paid the 100 million dollars. This is probably not an answer to mootness. But my clients are watching this in New York City. They don't think this is academic. They think this matters greatly to them, because it's one of two cases that they have to win.

JUDGE SMITH: Let me ask you also about finality. I take it this is final as to Mich II and Cam III, or whatever it is.

MR. SHECHTMAN: It should be, yes.

JUDGE SMITH: Yes. But the other parties as - - - the other parties are still embroiled in more causes of action than I can count, are all affiliates, right?

MR. SHECHTMAN: That's exactly right, Your Honor. There's no doubt that that litigation going on in the First Department is related.

JUDGE SMITH: So - - - well, not only - - - it's all part of - - - part of the same lawsuit is still going on, right? Other causes of action in the same lawsuit?

MR. SHECHTMAN: Well, not the same - - - not the same lawsuit in the sense of you have two different actions here. You have Mich II, which sought the declaratory judgment. That is final. The only other thing - - -

JUDGE SMITH: Well, Mich - - - well, Mich II is the only - - - so far as I can tell Mich II is really the only one we have.

MR. SHECHTMAN: It's the only one you have.

JUDGE SMITH: Okay. But aren't there fifteen - - - didn't they just adjudicate the fifteenth cause of action in Mich II?

MR. SHECHTMAN: No. In Mich II, everything has been dismissed except what's before you, which is the fifteenth cause of action - - - that's the declaratory judgment matter - - - and the seventeenth cause of action, which is a defamation claim, which everybody agrees is collateral and severable.

JUDGE SMITH: And maybe - - -

MR. SHECHTMAN: So Mich II is - - -

JUDGE SMITH: Has it been expressly

severed?

MR. SHECHTMAN: It hasn't been expressly severed. But if you look at it and you apply Burke, it's plainly severable. They've never claimed otherwise. Their - - -

JUDGE SMITH: Okay, but - - -

MR. SHECHTMAN: - - - their argument - - -

JUDGE SMITH: - - - this gets esoteric. But it is true that there is an action pending between - - - to which an affiliate of Mich II is a party, that has not been expressly severed?

MR. SHECHTMAN: No. It's not a question of expressly severed. It's the following.

JUDGE SMITH: Well, suppose - - - but that was my question. Suppose the issue is express severance; you're not saying it has occurred?

MR. SHECHTMAN: No. I think what I'm saying is the following. Mich II is before you. It is final. It's a declaratory judgment action. The option is void for lack of consideration. That's final.

JUDGE SMITH: But that was not the only cause of action in the complaint.

MR. SHECHTMAN: Everything else is dismissed but for the defamation action, and that's

severable. There is, without a doubt, a trailing action here, Schron, that they filed separately. All right? That action, if it is determined that the 100-million-dollar loan was, in fact, paid, right, that will make this academic. That would - - -

JUDGE SMITH: I understand. I was switching from mootness to finality.

MR. SHECHTMAN: Understood. But there's no doubt that they are related. But the only way you could say that Mich II isn't final is if you say the language of the constitution, the language of the CPLR - - - which talks about - - - everything in the action being resolved or disposed of - - - the only way you could say this is not final is to say, well, that Schron action, that separate action, is so closely related, that we think finality should be cross-fertilized - - -

JUDGE SMITH: I don't see why you can't say the defamation action is another cause of action in the same complaint that hasn't been expressly severed.

MR. SHECHTMAN: Well, I don't - - - you have my apology. Because I don't know that you need to be expressly severed, because you could impliedly sever something where it doesn't grow out of the same

transaction. That's what Burke teaches.

CHIEF JUDGE LIPPMAN: Okay, counsel.

MR. SHECHTMAN: And this is so impliedly severed, Your Honor, it's just very, very different.

CHIEF JUDGE LIPPMAN: Okay, counsel. You have your rebuttal time.

Counselor, your adversary says that this agreement's absurd, that you definitely need some kind - - - to make it make sense, you have to say, what does it mean. What is your answer?

MR. LEVANDER: His argument is absurd. This option - - -

CHIEF JUDGE LIPPMAN: Why? Go ahead.

MR. LEVANDER: Okay. First of all, the law is settled in this court, in this state, that mutual covenants can be adequate consideration. But as Judge Smith pointed out, you don't ever get there, because an option under the General Obligation Law needs no consideration.

CHIEF JUDGE LIPPMAN: Right.

MR. LEVANDER: But - - -

JUDGE GRAFFEO: What were the mutual covenants if we were to look at that?

MR. LEVANDER: What are the mutual covenants?

JUDGE GRAFFEO: Yes.

MR. LEVANDER: Among other things, that there has to be a payment of 100 million dollars, plus a potential payment of hundreds of millions of dollars more. And I think it's very interesting, if we take a quick look at this court's decision in Holt v. Feigenbaum, 52 NY2d, it addressed the very issue that Mr. Shechtman has raised. "The central fallacy in defendant's argument is its implicit assumption that the abstract concept of legally sufficient consideration necessarily entails a benefit flowing to the promissor." Rather, this court reiterated, "We have expressly held that a promisee who has incurred a specific bargained-for legal detriment, may enforce a promise against the promissor, notwithstanding the fact" - - -

JUDGE SMITH: You mean it can be a bargained-for exchange, even it's only a dime or ten dollars?

MR. LEVANDER: And there's no benefit. But here there's tremendous benefit. And - - -

JUDGE SMITH: Well - - -

MR. LEVANDER: - - - the whole - - -

JUDGE SMITH: - - - we do have - - - but what's - - - it's not so much the amount of benefit.

What's the bargained-for exchange?

MR. LEVANDER: The bargained-for exchange, you have to - - - this is conceded. This is all in the record. This option was granted in the context of a billion-three transaction. Mr. Grunstein came to Mr. Schron, his client of twenty years, and said I think you ought to do this deal. Mr. Schron said, I don't want to be in the nursing home business. He said fine. This is what we'll do. You'll buy the real estate. We'll create a separate operating company as from the nursing home, a brand-new company. You'll finance everything, and you will get out of that the property plus an option for the operating company.

So to say it's for nothing, when Mr. Schron raised - - -

JUDGE SMITH: So you're really - - -

MR. LEVANDER: - - - a billion - - -

JUDGE SMITH: - - - saying that all the simultaneously entered agreements served as consideration for each other?

MR. LEVANDER: No, what I'm saying is, this option stands on its own. And an option agreement needs no consideration, and it's - - -

JUDGE SMITH: But if we - - - I mean, I

think he admits it needs no consideration, but he says nevertheless, the parties said there was some, so you have to go looking for it.

MR. LEVANDER: Right. If you were to go on that route, you would say it makes a lot of sense. There's a nonexistent operating company. It's got no financing. It's guaranteed by Mr. Schron. The money is raised by Mr. Schron, a billion-three. His clients put in zero.

JUDGE PIGOTT: But that's why it takes seven pages to say that this thing is clear on its face. The Appellate Division spent an awful lot of time trying to explain why this thing was clear on its face.

MR. LEVANDER: It is clear on its face. It says "mutual covenants". Those covenants put the burden on my client, if it wanted to take over the operating company - - -

JUDGE SMITH: I'm not sure it matters, but I would - - - if you could help me a little to understand the economics. If you exercise the option, you get the privilege of putting 100 million dollars into the company, the same company of which you then acquire 99.999 percent. What has happened?

MR. LEVANDER: Okay. So the - - - so the

considera - - - so the transaction is either you retire debt or you pay the cash for 100 million dollars. At the closing, one of two things happens. If you already put the 100 million dollars in, right, they've had a chance, which they did, to suck out the money as they operated over the years.

JUDGE SMITH: You mean as operators of the nursing homes?

MR. LEVANDER: Correct. And the - - -

JUDGE SMITH: So what they got - - - you're saying what they got, essentially, was a solvent - - - a solvent company.

MR. LEVANDER: Correct. And they took out ninety-six million dollars over the last - - -

JUDGE SMITH: Solvent out the door.

MR. LEVANDER: - - - year and a half.

JUDGE SMITH: Let me - - - now, isn't it - - - whatever else - - - isn't it obvious that there's something wrong with that resale provision which says you give the excess over 400 million to the issuer?

MR. LEVANDER: I'm not sure that's wrong, Your Honor, but obviously it's not before the court today.

JUDGE SMITH: Oh, okay.

MR. LEVANDER: But - - -

JUDGE SMITH: But just humor me for a minute. I understand that it's not before the court.

MR. LEVANDER: Okay. So - - -

JUDGE SMITH: You buy - - - you're going to buy these units.

MR. LEVANDER: Um-hum.

JUDGE SMITH: You sell them to me. I'm a total stranger to the transaction. I now own 99.99 percent of the issuer. You give the excess over 400 million back to the issuer, back to me?

MR. LEVANDER: The inference one could draw is, this operating company has lenders. These lenders demanded certain things for lending tons of money to both the operating company and the real estate company. And they could have insisted that over 400 million dollars, if you later sell it, some of that money's got to stay in the operating company.

JUDGE SMITH: So it essentially said to retire - - - has to be to retire debt of the issuer?

MR. LEVANDER: Yes.

JUDGE SMITH: It doesn't say that, but okay.

MR. LEVANDER: But we don't have to reach it, because 100-million-dollars obligation is enough consideration for an option which requires no

consideration. And the fact is that the refrain that we keep hearing from my learned adversary and friend is you got something for nothing. The person who got something for nothing are his clients, who got this operating company for nothing, literally. My client had to put in a billion-three between guarantees, loans, capital. And out of that, they got this unequivocal option.

And he has conceded here today, twice, that the language of "such other consideration" is boilerplate and meaningless in many cases. And they have not cited a single case in which a court has held that where there is a specific reference to consideration - - - mutual covenants, in this case - - - and the boilerplate, that the boilerplate is to be given meaning.

To the contrary. Every case that's been cited here is either of one of two categories. It is either a case in which that is the only description of consideration is the boilerplate language, and nothing else; or there is something else, and the courts have routinely rejected it. If you look at the Anicom case, the federal district court applying New York law, it was 300,000 dollars plus other valuable consideration. And the defendants, just

like the plaintiffs here - - - the defendants here - - - came into court and said, by the way, that other valuable consideration, you've got to give it some meaning. We're entitled to more shares than is in the agreement for the 300,000. And the court said, absurd.

The Eleventh Circuit case, there were two contracts. And the Eleventh Circuit said no, no, no. You cannot, through the peppercorn language, incorporate the obligations of the second contract, exactly what he wants to do here.

JUDGE PIGOTT: Do you agree of the opposite of what Mr. Shechtman said, though, that sometimes it does have meaning? It's not always boilerplate.

MR. LEVANDER: I think that in a case like Sharon Steel, which was not an option case, so you have to look at consideration, and the only thing in there was the peppercorn language, then the court properly admitted evidence to say what was the consideration.

JUDGE PIGOTT: So how do we make the determination to either treat it as boilerplate or not? Obviously the Appellate Division felt that it was simply jotting.

MR. LEVANDER: I think the simple answer

is, where there is specific consideration, or in this case where you need no consideration, then the integration clause or the merger clause, plus the basic contract law of New York, precludes them from trying to invent that you promised to deliver the Brooklyn Bridge as well as the mutual covenants for 100 million dollars.

JUDGE PIGOTT: But as Mr. Shechtman pointed out in his footnote, there were tax ramifications to whether or not certain language was going to be in the option or not. If we say sometimes it's boilerplate, sometimes it's not, how do we make that determination in light of things that are fairly innocuous, such as there's tax ramifications to such a thing as an option like this?

MR. LEVANDER: Whatever - - - my view is, you look to the parties' intent. What you have here - - - just to understand what Mr. Shechtman is arguing - - - and I would like to come back for at least a minute on the finality rule.

What he's arguing is the following. Ignore the fact that the law says an option needs no consideration. That's number one. Ignore the mutual covenants language which is express and unambiguous in the option. That's number two. Ignore - - - pick

up part of the peppercorn language, but ignore the part that says the other consideration which is acknowledged has been paid and received - - - okay, ignore that part of that language. Ignore the merger clause. And remember, Your Honors, that this option is the amended option granted in 2006.

Their theory and Braten of this court - - - the Braten decision of this court says, you apply common sense. You look to see what should have been there. Their theory is in 2004, my client came to the closing and didn't fund a loan that's fully documented for 100 million dollars. An absurd conclusion which Justice Sherwood has put to rest and is now on appeal in the First Department.

But let's assume, for the moment, we don't have Justice Sherwood's decision. There's a 100-million-dollar loan that's not funded. There's no documents complaining about that. To the contrary, in 2006, which is the operative document before this court, the option gets reissued and the loan gets restated. And in the loan document it says the loan was funded, it's outstanding, we have no defenses to it.

He wants you to pick up that loan obligation, but only the language about the loan

obligation; nothing about the restatement, which admits that it was paid, is funded, and is outstanding.

JUDGE SMITH: But you're saying that you ought to win this appeal in the First Department. But isn't he technically right that until you've won it, the case isn't moot?

MR. LEVANDER: No. Because you cannot say - - - you cannot say I'm going to pick up - - - as a document, I'm going to incorporate, despite the merger clauses, despite the express reference to mutual covenants, I'm going to pick up a loan document which says the loan's outstanding and has been funded and ignore that portion of it, but just let Mr. Shechtman's clients, who were the lawyers who drafted this document - - -

JUDGE SMITH: If I'm - - -

MR. LEVANDER: - - - make it up as they go along.

JUDGE SMITH: - - - if I'm understanding you right, at this moment, you're not arguing that it's moot, you're just arguing this is another reason for not buying his interpretation of the agreement?

MR. LEVANDER: That's correct. Let me get to finality. Finality, it's - - - in my view, it's

very clear. Mr. Shechtman has said something which is not accurate in terms of what our view is. There's no question that if this appeal were only in the Schron case then it would not be a final judgment. There's already been a trial, there are other pending claims, et cetera. So that would be easy.

It also is clear that if the Mich action were counter-claims in the Schron action, it would not be a final judgment. So the question before this court is, the fact that Mr. Shechtman's clients ran to the court and filed Mich II, and there's another action that was filed that is totally interlinked, arises out of the same - - -

JUDGE SMITH: But before you even get there, is - - - are all claims and counter-claims in Mich II dismissed?

MR. LEVANDER: No. So, I'm going to - - - I was about to say. So he's got to tell you that because of the fortuity of the first filing, that there is - - - there is this implied severance doctrine - - -

JUDGE SMITH: The actions have never been consolidated, right?

MR. LEVANDER: They were consolidated for

all - - - all discovery's been consolidated. The appeal was one appeal. Everything about it. There's no formal order of total consolidation.

JUDGE SMITH: Okay, but finality gets technical.

MR. LEVANDER: Okay, I gotcha. So let's get technical. In Mich II there is a counter - - - there is a pending cause of action; not decided, not severed. It relates to these same parties, the same - - -

JUDGE SMITH: That's the defamation claim?

MR. LEVANDER: Right. Same investment. It's - - -

JUDGE SMITH: You said the same parties. They're not nominally the same parties, but they're affiliates?

MR. LEVANDER: Well, Mr. Grunstein and Mr. Forman are parties to that action. And they claim that they were - - -

JUDGE SMITH: But the claim here is between somebody called Cam III and somebody called SVCare.

MR. LEVANDER: Right.

JUDGE SMITH: Yes. They - - - those - - - there are no claims pending between those parties, right?

MR. LEVANDER: The defamation action is Mr. Grunstein claims that in a meeting regarding this investment with the investors, about this investment, which is the subject of this appeal, there was a defamatory statement made about him by Mr. Schron.

JUDGE SMITH: Okay, I'm just making - - - again, I'm obsessing on what may seem a silly technicality.

MR. LEVANDER: It's not a silly technicality.

JUDGE SMITH: The entities in the two claims are different?

MR. LEVANDER: The entities over the option are different entities.

JUDGE SMITH: Or let's put it this way. All claims in the Mich II action by and against SVCare have been dismissed or finally adjudicated?

MR. LEVANDER: SVCare was the plaintiff in the - - - was a - - - all of the claims brought by Mich II on a derivative basis have been dismissed. But Mr. Grunstein's separate claim for defamation, as a plaintiff, relating to these - - - and the test for implied severance, it has - - - cannot be part of the same continuum of events. That's what this court said in the Burke case versus Crosson.

Even if - - - so just looking at the Mich II action alone, I do not believe it satisfies what the Burke court, your decision, emphasized was a very narrow exception to finality.

But I also think it blinks reality to say that you can separate these two integrally related cases, Mich and Schron, which have been litigated together, which every hearing is together, which all the discovery has been uniform and double captained, and say gee, it's technically final.

So I do believe that the finality rule should be applied here. But if you get to the merits, this court in Braten said common sense and looking at what the parties would have done, is a key for all of these contractual understandings.

It makes no sense that experienced lawyer - - - or ex-lawyer and investment banker would have put - - - signed the option, not once but twice, and never made a reference to an obligation of 100-million-dollar loan. And it's not just consideration. As Judge Smith pointed out, they're trying to make it a condition of the effectiveness of the option.

This court and the other courts have rejected that kind of tortured argument. The First

Department was right. We respectfully request that it be affirmed on the merits, if you get to that.

CHIEF JUDGE LIPPMAN: Okay, counselor, thanks.

MR. LEVANDER: Thank you.

CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

MR. SHECHTMAN: Three minutes, and I'll be quick.

One should start off by saying, and I don't think it's uncommon for this court, that nobody's really defending the First Department's logic, because I think everyone appreciates that the consideration cannot be the exercise price or the amount on resale. So that's an important starting point.

The second thing - - -

JUDGE SMITH: But why couldn't the consi - - - if this was one of a number of deals entered into at the same time, why can't they all be consideration for each other?

MR. SHECHTMAN: Well, that gets me to the point that the consideration is the 1.3 billion dollars. Because - - - that was put in. To get there, it would seem to me, you only get there if you say that's what the parties meant by this term. And

that sounds to me like somebody is using parol evidence. Because someone is saying, look, we can interpret this. It means the 1.3 billion dollars; it means all the other deals. But you can't get there unambiguously from this language. That really is - - -

JUDGE SMITH: But why - - - I mean, why - - - there are, as Judge Graffeo asked earlier, an awful lot of contracts that say "good and valuable consideration" in them. Why can't - - - why can't everybody who's a party to one of these say well, what that meant was X, and X is a pre-condition to my performance, so I don't have to perform?

MR. SHECHTMAN: Look, in some sense, the proof is in the pudding. The case before you has the exact language, and no one is saying it. So to a large extent, the very logic of these deals, what was paid for the option, is going to decide these questions.

You're told that, look, the words - - - the reason you don't have to worry about the words "other good and valuable consideration" is, and the reason you know it's boilerplate, is because this uses the phrase "mutual covenants and other good and valuable consideration", which seems to stand for the

proposition that if you use two completely vague terms, right, then you've stated corroboration. That can't be right.

What you're told in the briefs is "mutual covenants" means the procedural rights that were exchanged here: no jury trial and the like. So you have a very valuable option that was conferred for no consideration. And that should say to a court, I'd like to know something more, because that language that could be boilerplate in some circumstances, doesn't cry that out here.

Now, maybe the answer is it was the gestalt, it was the 1.3 billion dollars, it was everything else. But you can't come to that conclusion unless you say to yourself, I need to interpret. And as soon as you need to interpret, merger clauses don't matter, right, the parol evidence rule doesn't matter. What you need is evidence. And that's what was precluded here.

It was precluded for reasons that I think - - - and I'm being presumptuous - - - that I think - - - by the First Department - - - for reasons that we all think was wrong. And so now the question is, does one say Mr. Levander wins because his answer is it's the gestalt; or are we right that whether it's

the gestalt or the 100-million-dollar loan, a judge ought to take some evidence, including the person whose testimony is referenced in the footnote as to why this was removed from the contract. One should take some evidence.

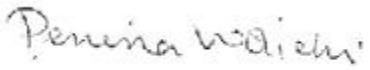
The one thing we agree on - - - and then I'll stop - - - is that like many cases, this one comes down to common sense. And the question becomes, do you get a company for either 100 million dollars, or on their new view, nothing. One of the most prosperous private companies in America, do you get it for nothing? That's their position. Ours is that can't be right. There must have been some consideration here for this option. Thank you.

CHIEF JUDGE LIPPMAN: Okay. Thank you both. Appreciate it.

(Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Schron v. Troutman Sanders LLP, Mich II Holdings LLC v. Schron, No. 23 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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