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COURT OF APPEALS

STATE OF NEW YORK

IDT CORP., et al.,

Respondents,

-against-

No. 96

TYCO GROUP, S.A.R.L., et al.,

Appellants.

20 Eagle Street
Albany, New York 12207
April 29, 2014

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.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 JUDGE GRAFFEO: Number 96, IDT Corporation
2 v. Tyco Group.

3 MR. DEWEY: May it please the court, Tom
4 Dewey - - -

5 JUDGE GRAFFEO: Counsel, do you want to
6 reserve time for - - -

7 MR. DEWEY: Yes, I'd like to reserve three
8 minutes for rebuttal, Justice Graffeo.

9 JUDGE GRAFFEO: Go ahead.

10 MR. DEWEY: In addition to placing these
11 parties in a commercially impossible position, the
12 Appellate Division decision directly conflicts with
13 well established New York law in multiple respects.

14 JUDGE GRAFFEO: Well, this - - - this
15 settlement agreement was, what, fourteen years ago,
16 correct?

17 MR. DEWEY: Exactly, Your Honor.

18 JUDGE GRAFFEO: So you're back - - - we're
19 back again looking at - - - looking at this case?

20 MR. DEWEY: Rather like Groundhog Day, Your
21 Honor.

22 JUDGE GRAFFEO: Wasn't - - - wasn't - - -
23 since we affirmed the Appellate Division in 2009 - -
24 -

25 MR. DEWEY: Yeah.

1 JUDGE GRAFFEO: - - - wasn't there an
2 expectation that the parties were going to negotiate
3 something here and settle this case?

4 MR. DEWEY: Well, Your Honor, that's what
5 we've been trying to do. And I think that the error
6 - - -

7 JUDGE GRAFFEO: I - - - I thought your
8 posture was that we decided that you had no further
9 obligations.

10 MR. DEWEY: That is absolutely our posture,
11 Your Honor. And I think you get there no matter what
12 doctrinal lens you use. This court saw the case as a
13 condition case, unlike the parties or the prior
14 Appellate Division panel. The court held that the
15 handover of capacity was subject to the condition of
16 further negotiations.

17 The court also held that that condition had
18 not been satisfied. To use the court's precise
19 words, "never became enforceable". And the court
20 must have concluded that Tyco was not responsible for
21 the nonfulfillment of that condition, because it - -
22 -

23 JUDGE ABDUS-SALAAM: So are you saying,
24 counsel, that you were better off not engaging in
25 negotiations after the Court of Appeals' decision - -

1 - original decision here? If you had just not done
2 anything, you'd be better off?

3 MR. DEWEY: Well, it's the triumph of hope
4 over experience, Your Honor. We actually do want to
5 get them to capacity, and it's really extraordinary
6 to me that we're, frankly, being in the position of -
7 - - of - - - and the way the First Department looked
8 at it, being criticized for doing something that it
9 was our position we had no legal obligation to do.

10 JUDGE GRAFFEO: But the fact that - - -
11 that our court in 2009 determined that summary
12 judgment wasn't warranted because a condition hadn't
13 been met, does that mean that Tyco was absolved of
14 all responsibility to continue with good faith
15 negotiations?

16 MR. DEWEY: It means that after negotiating
17 on and on for a period of over three and a half
18 years, both within the context of the settlement
19 agreement and, at their request, outside of the
20 context of the settlement agreement, our obligation
21 to negotiate had been discharged.

22 JUDGE PIGOTT: How do we know that? I - -
23 - you know, I - - - I have this picture that this
24 case is going to go on and on so that, at some point,
25 when people were arguing about whether there's a team

1 of horses that they have to be bought, and we're now
2 in the automobile age. I mean, technology is going
3 to overtake this case, it just seemed to me.

4 MR. DEWEY: And that's an important point,
5 Judge Pigott. To a certain extent, it already has,
6 because these IRUs aren't really out there. But let
7 me see if I can answer - - -

8 JUDGE PIGOTT: But my - - - my - - - my
9 quest - - - that was just kind of a preamble to my
10 question. An IRU, we have no clue as to what that
11 is. I mean, it kind of sounds like what it is. You
12 seem to be saying, we offered them the standard;
13 here's - - - you know, here's our deed, you know,
14 it's signed on the bottom, you know, happy trails.

15 And they're saying, no, no, no, no, there's
16 more to this IRU than what you're saying in your
17 standard one, and we want certain bells and whistles
18 or something. And I don't know how we're supposed to
19 figure that out.

20 MR. DEWEY: Okay, I think the court already
21 figured it out, with great respect, Judge Pigott.
22 When you have a condition - - -

23 JUDGE PIGOTT: Who'd I vote for? Yeah, go
24 ahead.

25 MR. DEWEY: When you have a condition, the

1 condition is not satisfied without fault of the
2 alleged breaching party, in this case, Tyco. It is
3 black-letter law that the conditional duty is
4 discharged. We - - -

5 JUDGE GRAFFEO: So what's - - - what's - -
6 - what's the condition that you're saying makes this
7 impossible to resolve?

8 MR. DEWEY: Well, there again, I think the
9 Appellate Division looked at it the wrong way.

10 JUDGE GRAFFEO: Is it the availability of
11 the capacity? Is that what you're talking about?

12 MR. DEWEY: The condition was the
13 negotiations. We can't give them the IRU - - -

14 JUDGE RIVERA: So you're basically arguing
15 that because you're at impasse, you're discharged of
16 any further duties.

17 MR. DEWEY: What we're saying - - -

18 JUDGE RIVERA: You've reached the impasse.
19 There's no way to resolve this. We cannot reach a
20 negotiated posture, where we come to an agreement on
21 certain terms that were outstanding - - - the
22 condition precedent, as you're calling it - - -

23 MR. DEWEY: Right.

24 JUDGE RIVERA: - - - therefore, we can all
25 walk away from the table. That sounds to me like

1 your argument. Am I misunderstanding?

2 MR. DEWEY: No, I think that's right, Judge
3 Rivera. And the only - - -

4 JUDGE RIVERA: Okay, so at what point - - -
5 what - - - what is our role in - - - in figuring out
6 whether or not you're correct - - -

7 MR. DEWEY: Okay.

8 JUDGE RIVERA: - - - in this conclusion
9 that you are at impasse, and that there's really
10 nothing left to negotiate?

11 MR. DEWEY: Well, I think that our point is
12 - - - our fundamental point is that the court already
13 made that conclusion. In other words, if you have a
14 condition that's not satisfied without fault of the
15 party being charged - - -

16 JUDGE SMITH: We - - - we said - - -

17 MR. DEWEY: - - - the conditional
18 obligation is discharged.

19 JUDGE SMITH: - - - we said in 2009 that
20 the negotiations finally came to an end in March
21 2004. That's what you're referring to, essentially?

22 MR. DEWEY: That round of negotiations,
23 correct, Judge Smith, yeah.

24 JUDGE SMITH: Yeah, is it - - - is it - - -
25 is it technically - - - is that binding, that is, are

1 we - - - did we adjudicate that the negotiations were
2 at an end, or is that just a, sort of, an incidental
3 fact that we recited in our opinion?

4 MR. DEWEY: I think - - - I think that you
5 adjudicated that Tyco had discharged its obligations.

6 JUDGE SMITH: Well, we certainly
7 adjudicated that Tyco was not at fault - - -

8 MR. DEWEY: Yes, right.

9 JUDGE SMITH: - - - at that stage. Did we
10 adjudicate whether there was a continuing obligation
11 or not?

12 MR. DEWEY: I believe you did by finding
13 that a condition precedent had not been satisfied
14 without fault to Tyco.

15 JUDGE GRAFFEO: If - - - if - - - if we
16 disagree with you on that premise - - -

17 MR. DEWEY: Yeah, yeah.

18 JUDGE GRAFFEO: - - - is there still some
19 claim for money damages here then?

20 MR. DEWEY: If - - -

21 JUDGE GRAFFEO: I mean, if you - - -

22 MR. DEWEY: Well - - -

23 JUDGE GRAFFEO: - - - if you can't provide
24 the IRU - - -

25 MR. DEWEY: Yeah.

1 JUDGE GRAFFEO: - - - is there - - - I
2 thought that more recently the negotiations have
3 involved a discussion of monetary damage, as opposed
4 to IRUs.

5 MR. DEWEY: We've negotiated for close to a
6 decade inside the framework of the settlement
7 agreement, and at their request, outside the
8 framework of the settlement agreement. And the law
9 both of condition, but also of the duty to negotiate,
10 is very, very clear that if, after good-faith
11 negotiations, a final agreement is reached, without
12 fault of either party - - -

13 JUDGE SMITH: You mean, no final agreement.

14 JUDGE READ: No final agreement.

15 MR. DEWEY: Thank you very much. With no
16 fault of either party, the duty to negotiate has been
17 discharged. And I think this points of the danger of
18 the Appellate Division decision.

19 JUDGE RIVERA: But in part, I think you're
20 - - - you're arguing, it might not be your fault you
21 haven't reached an agreement, but it's their fault
22 you haven't reached an agreement.

23 MR. DEWEY: Well, I think that what the
24 duty to negotiate cases say is you have to make the
25 judgment, as we think this court made the judgment,

1 that the positions we took were good-faith positions,
2 and that we are not at fault - - -

3 JUDGE SMITH: From - - - from - - -

4 MR. DEWEY: - - - for not reaching a
5 condition.

6 JUDGE SMITH: - - - from your point of
7 view, it doesn't matter whether they were at fault or
8 not, as long as you weren't.

9 MR. DEWEY: No, that's - - - that's exactly
10 right, Judge Smith. And the danger, as I was saying,
11 of leaving the Appellate Division decision
12 uncorrected, is that you'll have the law out there
13 saying, if there's no expiration date - - -

14 JUDGE READ: There's endless negotiations.

15 MR. DEWEY: - - - you have to negotiate
16 forever.

17 JUDGE RIVERA: But - - - but aren't you
18 only - - - but don't - - - aren't you only not at
19 fault if the positions they take are unreasonable?

20 MR. DEWEY: Well, the - - -

21 JUDGE RIVERA: Because otherwise, if
22 they're reasonable, then you would be at fault for
23 not accepting the position, right?

24 MR. DEWEY: What was at issue in the prior
25 litigation are the same issues, which goes to our

1 preclusion arguments, that came up the last time
2 around. They said, your decommissioning provision is
3 a violation of the settlement agreement. We said,
4 no, it's not; this court found we didn't breach our
5 obligations. They all then come around again to say,
6 hah, your decommissioning provision; it's a violation
7 of the settlement.

8 JUDGE SMITH: Is it - - - on Judge Rivera's
9 - - -

10 MR. DEWEY: It really is Groundhog Day.

11 JUDGE SMITH: Following up on Judge
12 Rivera's question - - -

13 MR. DEWEY: Yeah.

14 JUDGE SMITH: - - - is it possible to have
15 a case where neither party is unreasonable, and yet
16 the negotiations come to an end and nobody can sue
17 anybody?

18 MR. DEWEY: Absolutely right, Your Honor.
19 If you look at the Teachers case of Judge Leval's,
20 which is one of the seminal duty to negotiate case,
21 he hypothesizes precisely that circumstance, where
22 both parties take good-faith positions, they happen
23 not to agree, and therefore, the negotiations end.
24 And there are a bunch of cases we cite in our brief,
25 Cauff, Teachers, and others, where that sort of fact

1 pattern played out. The Snakepit case.

2 JUDGE GRAFFEO: So what do you want us to
3 say in this case? What are - - - what are you asking
4 us to declare?

5 MR. DEWEY: I'm asking you to declare that
6 this court's opinion in the prior case ended the
7 parties' obligations under the settlement agreement.
8 Otherwise, we will - - - actually will be having to
9 negotiate for the entire fifteen-year term of the
10 IRU.

11 JUDGE PIGOTT: Does that - - - does that
12 mean that the - - - that your standard IRU becomes
13 effective?

14 MR. DEWEY: I'm sorry, Judge Pigott; I
15 don't follow.

16 JUDGE PIGOTT: Well, they're - - - they're
17 entitled to this - - - this IRU because of the
18 settlement of all the other claims, right?

19 MR. DEWEY: That's one of the things that -
20 - -

21 JUDGE PIGOTT: Right.

22 MR. DEWEY: - - - they were entitled to.

23 JUDGE PIGOTT: All right, so - - -

24 JUDGE SMITH: But you're saying, not
25 anymore.

1 MR. DEWEY: No, because we negotiated over
2 a period of years. We were unable to resolve it.

3 JUDGE RIVERA: So - - - so - - - so you
4 take - - - I think you're taking - - - maybe I'm
5 wrong, but correct me - - - I think you're taking the
6 position that you entered a settlement, but embedded
7 in the settlement was the risk that you'd reach
8 impasse.

9 MR. DEWEY: I think that's right. And - -
10 -

11 JUDGE RIVERA: And you gave up - - - you
12 gave up those - - -

13 MR. DEWEY: Very well put - - -

14 JUDGE RIVERA: - - - that litigation - - -

15 MR. DEWEY: That's exactly right, Judge
16 Rivera.

17 JUDGE RIVERA: - - - with this risk in
18 mind.

19 MR. DEWEY: Anytime you have a duty to
20 negotiate, you're assuming the risk that you un - - -
21 you're unable to actually reach a final agreement.

22 JUDGE PIGOTT: But wasn't part of that
23 settlement offer that you made that they would have
24 this IRU for fifteen years?

25 MR. DEWEY: Well, it certainly was the case

1 that we would - - - had to negotiate, as this court
2 held, to document the IRU and all the other
3 agreements. There's no question we had to negotiate
4 - - -

5 JUDGE PIGOTT: So - - -

6 MR. DEWEY: - - - to reach that. But there
7 - - -

8 JUDGE PIGOTT: That's on the table. You
9 say they're being unreasonable in not accepting it.

10 MR. DEWEY: Yeah, but what we're saying is
11 we negotiated for three years - - -

12 JUDGE PIGOTT: And now you're saying
13 there's a statute of limitations or some limitation
14 on how long you have to negotiate, and that has been
15 passed and they now have blown the opportunity to get
16 an IRU for fifteen years for free?

17 MR. DEWEY: Yeah, I mean, I think if you
18 look at the conclusion of the prior Appellate
19 Division decision, the last paragraph of this court's
20 decision, it's very clear that after years of
21 negotiations inside the framework of the settlement
22 agreement - - - outside of the settlement of the
23 framework - - - the framework of the settlement
24 decision, there's no agreement.

25 And at some point, the duty to negotiate

1 has to be discharged. It has to be within a
2 reasonable time. And the last time I checked, three-
3 plus years, much - - - not to speak of ten years, was
4 a reasonable time to finalize a contract.

5 I reserve the balance of my time.

6 JUDGE GRAFFEO: Counsel?

7 MR. PARNES: May it please the court,
8 Hillel Parnes for respondents. Let me just begin
9 with where Mr. Dewey ended. Five justices of the
10 Appellate Division disagreed with Mr. Dewey when he
11 said that they had discharged - - -

12 JUDGE SMITH: That - - - that's - - -

13 MR. PARNES: - - - Tyco from any further
14 response - - -

15 JUDGE SMITH: - - - that's why he's taking
16 an appeal.

17 MR. PARNES: I'm sorry?

18 JUDGE SMITH: So he - - - yeah, he's taking
19 an appeal.

20 MR. PARNES: Right, so he's taking an
21 appeal, yes, Your Honor, but - - -

22 JUDGE GRAFFEO: So what are - - - what are
23 you asking us to declare?

24 MR. PARNES: Well - - -

25 JUDGE GRAFFEO: He's explained what he

1 wants us to do. What do you want us to do?

2 MR. PARNES: Right. So we - - - we're
3 here on a motion to dismiss, the standard being did
4 we have substantial pleadings - - - assuming the
5 facts are found in our fa - - - assumed to be in our
6 favor? Justice Schweitzer in his decision, it turned
7 on one point: the words of your decision, saying
8 that you and the Appellate Division had discharged
9 Tyco. The justices said that was error, that there's
10 nothing in the record to suggest that discharge was
11 brought up or discussed or concluded, and - - -

12 JUDGE SMITH: Well, what about our - - -
13 what about our statement - - - I don't know whether
14 it's a finding or a holding or just a comment: "The
15 negotiations finally came to an end in March 2004"?

16 MR. PARNES: Yes.

17 JUDGE SMITH: First of all, is that right
18 or wrong?

19 MR. PARNES: Does it say that or not? It
20 does - - - no, you're - - -

21 JUDGE SMITH: I'm quoting. No, yeah, yeah
22 - - - I - - - I know it says it. Were we right or
23 wrong when we said that?

24 MR. PARNES: It does say that and that is
25 true, because IDT then sued. They ended - - -

1 JUDGE SMITH: Well, if - - - "the
2 negotiations finally" - - - the word "finally" is in
3 there - - - "came to an end in March 2004".

4 MR. PARNES: Okay. Well, we actually - -
5 - nobody's focused on those words up until now, but
6 I'm happy to focus on them. I think it's a
7 recitation of facts that those negotiations had gone
8 on for a few years. Perhaps you were saying finally
9 - - -

10 JUDGE SMITH: I mean, if it's - - - if it's
11 - - -

12 MR. PARNES: - - - to say it's been a
13 while.

14 JUDGE SMITH: If that - - - if it's a fact
15 and if it's also a fact or a law or something, that
16 Tyco was at that point not at fault, because that - -
17 - we did hold that, then, how - - - why - - - how can
18 the duty of good-faith negotiation continue?

19 MR. PARNES: Well, again, as we've laid
20 out in our papers, Your Honor, this court's opinion
21 and the Appellate Division's opinion in 2009 and
22 2008, turned on the question of whether Tyco had
23 insisted on its terms and conditions, or whether it
24 merely proposed them. That was argued here - - - you
25 and Mr. Dewey had an exchange about it in 2009 - - -

1 JUDGE GRAFFEO: But I think I'm - - - I
2 think I'm kind of confused.

3 MR. PARNES: Yes.

4 JUDGE GRAFFEO: I thought your posture was
5 that you were arguing they were not negotiating in
6 good faith after our 2009 decision.

7 MR. PARNES: Okay, so - - -

8 JUDGE GRAFFEO: Am I right or wrong about
9 that?

10 MR. PARNES: You're correct. I was
11 answering a different question. I apologize.

12 In the first lawsuit, and in the second
13 lawsuit, in both situations, IDT claimed that Tyco
14 was not negotiating in good faith under different
15 factual circumstances.

16 In the first case, there were different
17 arguments about what the agreement required or didn't
18 require. You may recall there was a Type I-Type II
19 discussion. That's well behind us. We now
20 understand it was - - - it's a condition precedent
21 contract. The contract requires not just the
22 standard agreements, but it's the standard agreements
23 not inconsistent with the terms of the settlement
24 agreement.

25 JUDGE SMITH: But does the - - - but does

1 the contract require you to negotiate forever?

2 MR. PARNES: It does not, Your Honor.

3 JUDGE SMITH: I mean - - - I mean, is in
4 prin - - - I mean, as Judge Rivera kept asking, in
5 principle, is it right that the parties can reach an
6 impasse and their obligations will be over?

7 MR. PARNES: In principle, that would be a
8 highly - - -

9 JUDGE SMITH: What - - - what in this
10 record tells us that that did not happen?

11 MR. PARNES: What in this record tells us
12 that it did not happen? Well, I actually would ask
13 the question the other way. Nothing in the record
14 tells us that it did happen, Your Honor.

15 JUDGE SMITH: You say - - - yeah.

16 JUDGE GRAFFEO: It's fourteen years. So
17 how much longer does this go on?

18 MR. PARNES: Well, let's - - - let's
19 remove eleven of those, since we've been in front of
20 the various courts. As the Appellate Division said
21 just now in 2012, eleven of those fourteen years were
22 just the course of litigation.

23 JUDGE SMITH: Was that - - - is that - - -
24 is that the law? You're doing the negotiation in
25 good faith. You can bring a lawsuit, which

1 ultimately gets thrown out for saying that they were
2 not in good faith, and the court ultimately holds
3 you're wrong, and you say, okay, we took those eleven
4 years off, now start again?

5 MR. PARNES: In - - - on the facts of this
6 case, Your Honor, what happened here, IDT sued Tyco
7 in 2004, think - - - assume - - - taking the
8 position, among others, that Tyco had advanced
9 inconsistent positions with the settlement agreement.

10 What the Appellate Division said in 2008
11 and what you said in 2009, was that Tyco had merely
12 proposed its positions, without reaching the issue -
13 - - and the Appellate Division said this very clearly
14 in 2012, that they didn't reach the issue and you
15 didn't reach the issue, in their view - - - you never
16 reached the issues of the substance of the
17 inconsistencies. You did not get to them because
18 your decisions turned - - - their decision and yours
19 - - - turned on whether Tyco had insisted or merely
20 proposed - - -

21 JUDGE SMITH: But - - - but now I'm going
22 to ask this. You may - - - may have had a perfectly
23 decent lawsuit when you - - - in 2004, made a
24 perfectly reasonable case, although you lost it.
25 People lose cases. You decided to - - - to walk away

1 from the table and sue. Didn't you?

2 MR. PARNES: In 2004, yes, after trying.

3 JUDGE SMITH: Yeah, I mean, what - - - what
4 - - - is it really reasonable to say you can walk
5 away from the table, sue, spend eleven ye - - - it
6 really isn't eleven yet, but it's been a long time -
7 - - spend X-years suing; lose the law suit, and say,
8 okay, there goes that lawsuit. Let's go back to the
9 table.

10 MR. PARNES: Without the characterization
11 Your Honor just laid upon it, respectfully, yes, we
12 think that's a reasonable approach. We sued think -
13 - - thinking that Tyco had breached the contract.
14 What your decision turned on and the Appellate
15 Division's decision turned on in 2009 and 2008 was
16 that Tyco had merely proposed positions, even though
17 the parties had argued - - -

18 JUDGE ABDUS-SALAAM: So you're saying now
19 it's very clear that they're saying we're not going
20 to propose anything different than we did in 2001
21 through '4. And so, now you're saying they've
22 actually breached the contract? Is that what you're
23 saying?

24 MR. PARNES: Actually, not - - - not
25 entirely, Your Honor. So in 2009, you instructed us,

1 after the Appellate Division instructed us, that
2 merely proposing terms is not enough to give rise to
3 a breach, and that's where your decision ended. We
4 went back to the table with that "roadmap", as I call
5 it in my briefs. The roadmap was, keep going until
6 somebody's insisting.

7 The record is incomplete, because we're at
8 a motion to - - -

9 JUDGE RIVERA: Does that mean keep going
10 until someone's unreasonable?

11 MR. PARNES: That means keep going until
12 someone is insisting on their position and won't
13 budge from their position.

14 JUDGE GRAFFEO: But you don't want us to
15 claim that they're now in breach?

16 MR. PARNES: I would love it if - - -

17 JUDGE GRAFFEO: You're saying it's still
18 premature to do that?

19 MR. PARNES: I don't think you have - - -
20 I think you could do that, but I don't think you have
21 the right record in front of you.

22 JUDGE GRAFFEO: Tell - - - tell me what's
23 left for the two of you to negotiate, because they
24 can't offer you an IRU anymore, right?

25 MR. PARNES: Well, that - - -

1 JUDGE GRAFFEO: That capacity isn't there.

2 MR. PARNES: Oh, no, that's not true, Your
3 Honor. That's not true.

4 JUDGE GRAFFEO: Okay, so - - - so - - -

5 MR. PARNES: That's not true at all.

6 JUDGE GRAFFEO: Tell us what it is you
7 would like to negotiate?

8 MR. PARNES: I need - - - I must correct
9 one - - - one point that Judge Abdus-Salaam just
10 said.

11 JUDGE GRAFFEO: Okay.

12 MR. PARNES: The inconsistencies the
13 second time around, are different than the
14 inconsistencies the first time around. You can see
15 it at the record page 307, but I don't think we need
16 to go there today. I think it's a factual discussion
17 that's best left to the trial court, which I don't
18 think should be before you today.

19 But if you look at record 307 as opposed to
20 record 296, that Mr. Dewey has referenced. In record
21 307, you see one of the major inconsistencies was
22 they had sold their network. Tyco sold their network
23 to an Indian company called VSNL. And I believe it's
24 item number 2 - - -

25 JUDGE GRAFFEO: Right, so how can they

1 offer you an IRU if they don't own it anymore?

2 MR. PARNES: Ah, they claim that in their
3 agreement with VSNL, they reserved the right for us
4 to keep using the capa - - - the network is still
5 there. The capacity is still there. And they claim
6 they reserved the right for us to use it. In the
7 second round of negotiations - - -

8 JUDGE SMITH: Suppose - - - suppose they
9 sold it without reserving it, in the middle of the
10 lawsuit, while, you know, between - - - where you're
11 between the Appellate Division and the Court of the
12 Appeals. You say that even though they - - - even
13 though you had brought a lawsuit that we later
14 determined not to be a meritorious lawsuit, you're
15 saying they had to hang on the capa - - - they had to
16 hang on the capacity, in case you wanted to come back
17 to the table?

18 MR. PARNES: Well, I think they actually
19 agree with that point, Your Honor. That's why they
20 reserved it. I suppose they could have put money
21 aside. They could have put money aside, but they - -
22 -

23 JUDGE GRAFFEO: Well, I thought - - - I
24 thought in the more recent negotiations, you were
25 asking for monetary damage, as opposed to access. Am

1 I wrong?

2 MR. PARNES: No, no, the negotiations all
3 the way through October - - - there may have been
4 references to money here and there, but if you read
5 the - - - read them all the way through the final
6 e-mails, right, and if you read our complaint through
7 paragraph 50, which we talk about the final meeting -
8 - -

9 JUDGE GRAFFEO: But why don't you answer my
10 previous question, which is, what's left to
11 negotiate? What are you asking from them? Just
12 humor us. Give us some idea.

13 MR. PARNES: Oh, in the negotiation before
14 we sued?

15 JUDGE GRAFFEO: If we agree with you - - -
16 no, now. If we agree with you, what's left to
17 negotiate? What are you asking for?

18 MR. PARNES: If you - - - if you agree
19 with us, we are back in front of the Supreme Court
20 seeking money damages for their breach. The Supreme
21 Court will have to determine - - -

22 JUDGE GRAFFEO: Okay, so it is monetary
23 damage. That's what I - - -

24 MR. PARNES: Yes, no, we're not seeking -
25 - -

1 JUDGE GRAFFEO: - - - I think I asked
2 twice.

3 MR. PARNES: I'm sorry; we're not - - -
4 and I misunderstood you; I apologize.

5 JUDGE SMITH: You - - - you say that they
6 have now walked away from the table.

7 MR. PARNES: We say that they have
8 insisted - - - which was the standard you gave us in
9 2009 - - - keep negotiating until someone insists.
10 If they insist then the factual question for the
11 Supreme Court - - -

12 JUDGE SMITH: So let's - - - let's - - -
13 let's suppose - - - let's suppose you prevail here,
14 and you do exactly what you said. We go back to the
15 Supreme Court and - - - 2015, 2016, you have a - - -
16 you have a trial, and you lose. And they say that
17 their positions were not all that unreasonable. Do
18 you call them up and say, okay, let's keep
19 negotiating; let's do the 2017 round?

20 MR. PARNES: I hope we don't have to do
21 that, Your Honor, but I - - - I - - -

22 JUDGE SMITH: But you say you would have a
23 right to do that?

24 MR. PARNES: Well, I was thinking about
25 that question, Your Honor. I think that in every

1 case, including the nineteen cases that they cited on
2 conditions precedent, every case turns on the facts.
3 Their cases do not stand for the proposition that - -
4 - that Mr. Dewey's - - -

5 JUDGE GRAFFEO: So what ends this case?
6 What - - - what could conceivably happen that ends
7 this case?

8 MR. PARNES: Well, what could - - - this
9 case will - - -

10 JUDGE GRAFFEO: Other than, obviously if we
11 agree with your adversary that ends this case.

12 MR. PARNES: Well, if you agree with my
13 adversary on discharge - - -

14 JUDGE GRAFFEO: In your mind, if we agree
15 with you, what ends this case?

16 MR. PARNES: If you agree with me, we go
17 back to the Supreme Court. We have very limited
18 factual discovery, very limited expert discovery on
19 the value of the - - - the capacity. And - - - and
20 the Supreme Court will decide did Tyco insist on its
21 positions, and if so, were those positions
22 inconsistent, which are - - - which is the second
23 question, which nobody got to the first time around,
24 except Justice Ramos who ruled for us the first time
25 in 2007.

1 JUDGE SMITH: Is there any answer to Judge
2 Graffeo's question, other than eventually you have to
3 win a lawsuit?

4 MR. PARNES: No, I think that if we're in
5 front of the Supreme Court, Tyco is certainly able to
6 raise the question of discharge - - - read the
7 question of discharge - - -

8 JUDGE SMITH: I - - - no, they can - - -
9 yeah. It can come out any way that if you come in
10 front of the Supreme Court. What ends the - - -
11 what, other than a victory for you, will end this
12 negotiation? Are the negotiations going to go on to
13 the twenty-second century?

14 MR. PARNES: Well, again, you're talking
15 about in your hypothetical that - - -

16 JUDGE GRAFFEO: Can they hand you a check?

17 MR. PARNES: I would - - - it might depend
18 on the size, Your Honor, but - - -

19 JUDGE RIVERA: Well, I thought - - - I
20 thought you made an offer. They didn't want to give
21 you the - - - whatever it was - - - the thirty-three
22 million, I can't even remember anymore.

23 MR. PARNES: That was a number of years
24 ago. That was a number of years ago.

25 JUDGE RIVERA: Well, I guess now you want a

1 lot more.

2 MR. PARNES: Well, it was a number of
3 years ago - - -

4 JUDGE RIVERA: Essentially so.

5 MR. PARNES: It was a number of years ago,
6 and actually - - -

7 JUDGE RIVERA: I think I'm - - - okay.

8 MR. PARNES: - - - it was their offer, and
9 I don't think it's on the table anymore.

10 JUDGE RIVERA: So if I'm - - - if I'm - - -
11 if I'm following you right, what's going on here is,
12 they - - - they want something - - - or they refuse
13 to give you what you want. You say that whatever
14 they are putting on the table is in violation of the
15 settlement agreement.

16 And I take that your argument now is, no
17 one has ever decided this question of whether or not
18 they are being reasonable and that that's what's
19 outstanding and has to be decided. That you're not
20 at impasse, because someone has to tell you or you or
21 both of you, that - - - that what they are requesting
22 is or is not unreasonable, and - - - and as you say,
23 inconsistent with the settlement agreement.

24 Until you get that decision, right, there's
25 no - - - we cannot rule that there is an impasse or

1 isn't an impasse - - -

2 MR. PARNES: I don't - - -

3 JUDGE RIVERA: - - - or some court cannot
4 rule that way.

5 MR. PARNES: I partially agree with you,
6 Your Honor, and I partially disagree with you.

7 JUDGE RIVERA: Good to hear. We'll see if
8 I agree with you. Go ahead.

9 MR. PARNES: I partially agree. In the
10 first - - - there were inconsistencies in the first
11 round of negotiations. There were inconsistencies in
12 the second round of negotiations. They are different
13 inconsistencies.

14 JUDGE RIVERA: Okay.

15 MR. PARNES: The big one being - - -

16 JUDGE RIVERA: Okay.

17 MR. PARNES: - - - that was what I was
18 going to say to Justice - - - Judge Abdus-Salaam
19 before - - - the big one being item number 2, that
20 the provider now is VSNL. They - - - they've removed
21 themselves from the contract and put in VSNL. You
22 don't have the drafts, and you don't have the
23 correspondence from the second round of negotiations.
24 You have bits and pieces. You do not have the whole
25 thing. You don't even have the draft - - -

1 JUDGE GRAFFEO: So your posture is there
2 needs to be further fact finding? Is that - - -

3 MR. PARNES: We haven't even - - -

4 JUDGE GRAFFEO: - - - before there's a
5 determination of unreasonableness - - -

6 MR. PARNES: Well, yes, again, Your Honor
7 - - -

8 JUDGE GRAFFEO: - - - is that your posture?

9 MR. PARNES: - - - we're at the motion-to-
10 dismiss stage. We haven't even exchanged documents
11 with each other.

12 JUDGE PIGOTT: You haven't even answered
13 your 3211.

14 MR. PARNES: Correct. We haven't - - - we
15 haven't done any - - - they - - - they have answered.
16 After the Appellate Division reversed. They put in
17 their - - -

18 JUDGE RIVERA: But your position there
19 can't be a determination on impasse because someone's
20 got to resolve this question that you say is
21 outstanding, whether or not what they demand is, as
22 you say, inconsistent with the agreement.

23 MR. PARNES: Well, again, yes, and the
24 first time around, you told us that nothing we put
25 before you - - -

1 JUDGE RIVERA: Right.

2 MR. PARNES: - - - rose to the level of
3 insisting on a final position. And so we went back
4 to the table and kept pressing Tyco in documents
5 that, frankly, you don't have, because we haven't
6 exchanged documents yet, over and over again, in
7 documents and in e-mails, and in our complaint - - -
8 I'm sorry; in documents, and in meetings, and in our
9 complaint, Tyco, are you insisting on these positions
10 or not? If you are insisting, we have to go to
11 court, and Tyco kept not answering the question,
12 until we finally said it's enough.

13 JUDGE SMITH: So if we - - - if we were - -
14 - if we were to - - - I think, and they argue here, I
15 guess, as an alternative argument, they say their
16 positions in this that they've taken so far are
17 perfectly reasonable. And if we were to agree with
18 them and reverse, and you lose the case again, then
19 the next step is to go back to the negotiations, and
20 see if they - - - see what you can do for another few
21 years?

22 MR. PARNES: Well, first of all - - -

23 JUDGE SMITH: And bring another lawsuit?

24 MR. PARNES: - - - first of all, Your
25 Honor, we would want to go back to the table with the

1 cloud of their discharge argument lifted. Our point
2 of view, and I believe the Appellate Division agreed
3 with us, was that by coming to the table - - -

4 JUDGE SMITH: Well, whether bright or
5 cloudy, you could be at the negotiation table for a
6 long time yet.

7 MR. PARNES: Well, but I do think, Your
8 Honor, that just like the nineteen cases they cited,
9 some of which had a date certain - - - ours doesn't
10 have a date certain - - - some of which had a date
11 certain by which the condition precedent couldn't be
12 fulfilled anymore. Ours doesn't have that. But in
13 some of the other cases - - - very few of them talk
14 about discharge, but when they do, it's a factual
15 determination.

16 And I think that if they went back to
17 Justice Schweitzer, or whoever the justice is the
18 third time around, in your hypothetical - - - I hope
19 there isn't a third time, Your Honor - - - in your
20 hypothetical, if there is a third time around, they
21 could go to a court and say we want a ruling that
22 we've been discharged. Here are the nineteen cases
23 that say that we've been discharged. Our facts line
24 up with those facts. Here's the factual record.

25 None of that's happened. They didn't do it

1 the first time. The citations they give you in their
2 brief are not correct citations - - -

3 JUDGE GRAFFEO: Okay, counsel, we've gone
4 well beyond your red light. Thank you.

5 MR. PARNES: Okay. Thank you.

6 JUDGE GRAFFEO: Your rebuttal?

7 MR. DEWEY: Thank you, Your Honor. At the
8 risk of running afoul of the advocate witness rule, I
9 was here the last time. And what you're hearing is a
10 gross mischaracterization of the record in the prior
11 case. They did indeed argue that the mere act of
12 proposing a draft IRU, that they claimed was
13 inconsistent with the settlement agreement, was a
14 breach.

15 JUDGE PIGOTT: Well - - -

16 MR. DEWEY: They did argue that. But they
17 also argued that our insistence on many of these
18 provisions was also a breach.

19 JUDGE PIGOTT: But the fact of the matter
20 is, I mean, you settled this huge lawsuit way back
21 when, and - - - and part of it was you were giving
22 them something. Right? You were going to give them
23 this IRU.

24 And your argument seems to be if we play
25 rope-a-dope long enough, it'll disappear. Our

1 obligation to give that consideration, which was part
2 of this agreement, we're going to exchange - - -
3 we're going to - - - we going to get rid of all of
4 our claims, the cross-claims and everything else, and
5 you're going to give us an IRU free for fifteen
6 years, that somehow that's going to disappear because
7 you just haven't - - - you say, we've been
8 reasonable, and they haven't, and therefore we win.
9 We don't have to pay what we were going to pay on
10 that original agreement where we were giving them
11 this IRU for fifteen years. Right?

12 MR. DEWEY: Judge Pigott, the supreme irony
13 in this case, is that they have breached the duty to
14 negotiate in every way you actually can. They've
15 walked away from the negotiating table. This is in
16 the prior record - - -

17 JUDGE PIGOTT: Let's assume - - - let's
18 assume that you had a week to negotiate this thing
19 way back in 2004, and the week was over. Somebody is
20 going to evaluate the value of a fifteen-year IRU and
21 say, because you offered it, you have to pay that
22 amount. It's either the fifteen IRU or it's this
23 amount.

24 MR. DEWEY: And that's exactly why we're
25 here. They don't want the IRU; they want a lawsuit.

1 Because of the radical drop in the value of the
2 capacity, they'd rather have a lawsuit - - -

3 JUDGE PIGOTT: But you've got to pay them -
4 - -

5 MR. DEWEY: - - - then actually have the
6 IRU.

7 JUDGE PIGOTT: But my - - - but my only
8 point is, you're the one that's - - - you're the
9 payor in this thing. You're - - - you're the one
10 that made the offer of - - - of this thing of value.
11 And you want to say, because it's been so long, for
12 whoever - - - you know, we win. And they want to
13 say, it's because you - - - you're saying they're
14 delaying, and they're saying you're delaying. And I
15 don't know why at a 3211 we have to make that
16 determination.

17 MR. DEWEY: It's - - - it's not because
18 it's been so long. It's because we have tried and
19 this court adjudicated that we in good faith, took
20 positions that they are attempting to relitigate.
21 The claim that they're - - -

22 JUDGE GRAFFEO: But how did - - - how did
23 our court ever examine, and do we even have the
24 authority to examine, the conditions that you put on
25 the fifteen-year IRU?

1 MR. DEWEY: You did and you can.

2 JUDGE GRAFFEO: Plus - - -

3 MR. DEWEY: Decommissioning. Let's take
4 decommissioning. This court's opinion expressly
5 references decommissioning.

6 We said we want this decommissioning
7 provision. They said that's inconsistent with the
8 settlement agreement. This court, noting the fact
9 that they actually agreed to our provision, only to
10 then claim it was a breach, clearly ruled that our
11 proposal of that decommissioning provision couldn't
12 be a breach, when it found we didn't breach any of
13 our obligations.

14 There are really only two ways you can
15 breach the duty to negotiate, if you think about it.
16 You can walk away, which they've done five times, and
17 we never have, or you can insist on inconsistent
18 terms. It was very clear in the prior record that we
19 needed a decommissioning provision. They accepted
20 it. This court validated it, and we found ourselves
21 sued again, for the same provision.

22 And you can go through the prior record and
23 the current record and they have the exact same
24 issues, point by point by point. Some of them don't
25 even pass the straight face test - - -

1 JUDGE SMITH: As a technical matter, the
2 prior record is theoret - - - I mean, I realize it's
3 not - - -

4 MR. DEWEY: Yeah.

5 JUDGE SMITH: - - - printed here, but we
6 can look at it, can't we?

7 MR. DEWEY: Absolutely, Your Honor.

8 JUDGE SMITH: Same lawsuit.

9 MR. DEWEY: Same lawsuit.

10 JUDGE ABDUS-SALAAM: Well, your adversary
11 says the current record is incomplete, and we can't
12 compare the prior record with the current record,
13 because they're saying there are now ten different
14 inconsistencies, and they're not fully discussed in
15 the record, because they don't think that they need
16 to get there. That's premature.

17 MR. DEWEY: Their complaint referenced in
18 precise detail all the communications between
19 counsel. We put those communications in the record.
20 They can't have it both ways. They can't reference
21 the communication, and then say, well, the court
22 can't look at the substance of the communication.

23 JUDGE GRAFFEO: Thank you.

24 MR. DEWEY: Thank you very much.

25 JUDGE GRAFFEO: No, there's no surrebuttal.

(Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of IDT Corp., et al. v Tyco Group, S.A.R.L., et al., No. 96, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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