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COURT OF APPEALS

STATE OF NEW YORK

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MORPHEUS CAPITAL ADVISORS LLC,

Respondent,

-against-

No. 109

UBS REAL ESTATE SECURITIES, INC.,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
May 6, 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 CHIEF JUDGE LIPPMAN: Number 109, Morpheus.  
2 Counselor?

3 MR. CARUSO: I would like to reserve three  
4 minutes, Your Honor?

5 CHIEF JUDGE LIPPMAN: Three minutes, yeah.

6 MR. CARUSO: Of my twelve, yes.

7 CHIEF JUDGE LIPPMAN: Go ahead.

8 MR. CARUSO: May it please the court,  
9 Kenneth Caruso for the appellant, UBS Real Estate  
10 Securities.

11 The contract in this case does not say that  
12 Morpheus will have a success fee on a sale by the  
13 owner. It follows that UBS RE, retained its right to  
14 sell its own property without liability, for a  
15 success fee, as long as UBS did not use a competing  
16 broker.

17 CHIEF JUDGE LIPPMAN: That - - -

18 JUDGE GRAFFEO: Is there any language in  
19 the contract that supports that?

20 MR. CARUSO: The language in the contract -  
21 - -

22 JUDGE GRAFFEO: In the agreement, is there  
23 - - -

24 MR. CARUSO: Yes.

25 JUDGE GRAFFEO: - - - somewhere that it

1 specifically indicates that they could sell it  
2 without having to pay the fee?

3 MR. CARUSO: Well, what it says here is,  
4 "Morpheus shall have the exclusive right to solicit"  
5 - - -

6 JUDGE GRAFFEO: What - - - what - - - what  
7 are you - - - what page of the appendix - - -

8 MR. CARUSO: A-60.

9 JUDGE GRAFFEO: - - - are you reading from?

10 MR. CARUSO: A-60.

11 JUDGE GRAFFEO: 60?

12 MR. CARUSO: A-60. The - - - at the bottom  
13 of that page, left-hand side of the - - - of the  
14 book. "Morpheus" - - - or MCA is what it called it  
15 in the contract - - - "MCA shall have the exclusive  
16 right to solicit counterparties for any potential  
17 transaction involving the student loan assets."

18 Under the case law, that is insufficient to  
19 give Morpheus what is called an exclusive right to  
20 sell on - - -

21 JUDGE READ: As opposed to an exclusive  
22 agency, that's - - -

23 MR. CARUSO: As - - - exactly. As - - -

24 JUDGE READ: Why is that insufficient?

25 MR. CARUSO: It's insufficient, because the

1 case law requires that the exclusive right to sell be  
2 conveyed in clear and unambiguous language. To - - -

3 JUDGE GRAFFEO: So it had to say, what?

4 MR. CARUSO: It had to say things like  
5 this: commission is due, even on sale by owner;  
6 commission is due no matter who makes the sale; or in  
7 some other Appellate Division cases, where the  
8 contract says, the owner must refer all inquiries to  
9 the broker.

10 JUDGE PIGOTT: You're at a 3211.

11 MR. CARUSO: I'm sorry, Your Honor?

12 JUDGE PIGOTT: You're at a 3211 stage,  
13 right?

14 MR. CARUSO: Indeed.

15 JUDGE PIGOTT: And your opponent in their -  
16 - - in their affidavit said that you're making fact-  
17 based arguments that are incomplete and self-serving.

18 MR. CARUSO: But we're not.

19 JUDGE PIGOTT: Well, in your affidavit, you  
20 say, "I have reviewed the relevant dec" - - -  
21 "documents; my review shows in summary," and then you  
22 summarize them. But the documents aren't there.

23 MR. CARUSO: Well, the documents were  
24 submitted. We - - - we summarized them because they  
25 were voluminous.

1                   JUDGE PIGOTT: But they're not - - - they  
2 weren't in the record.

3                   MR. CARUSO: They are part of the record.  
4 We - - - they were - - - they were produced in  
5 discovery. They were part of the record. They're  
6 not part - - -

7                   JUDGE PIGOTT: Are they in our record?

8                   MR. CARUSO: They're not part of the  
9 appendix, but they're part of the record.

10                  JUDGE PIGOTT: Well, I - - - how are we  
11 supposed to decide - - -

12                  MR. CARUSO: Well, because those documents  
13 - - -

14                  JUDGE PIGOTT: Because I looked at - - - I  
15 looked at what you said, and I said, my God, we got -  
16 - - we got press releases, which are of no value.  
17 We've got - - - we've got you saying you've reviewed  
18 documents and I'm going to summarize them for you, so  
19 you can make a determination, and I - - - the first  
20 thing that popped in my mind is, well, shouldn't we  
21 be reading these things and deciding that this is  
22 what they say?

23                  And that kind of gave credence to what your  
24 opponent was saying, is that it's incomplete - - -

25                  MR. CARUSO: If, Your Honor, please?

1 JUDGE PIGOTT: Yes.

2 MR. CARUSO: Those documents were relevant  
3 only to the claim about a post-determination  
4 transaction, which was at issue in the lower courts,  
5 and is not relevant here. I think the only facts you  
6 need to decide the appeal here, the way the Appellate  
7 Division framed it and sustained the complaint, are  
8 these and these alone: the contract does not give  
9 Morpheus a - - - in clear and unambiguous language,  
10 the right to a success fee, even on a sale by the  
11 owner. The owner, therefore, had the right to sell  
12 its property without liability - - -

13 CHIEF JUDGE LIPPMAN: What was their  
14 relation - - - what's - - - what's their role, if you  
15 had to sum up what - - - what their role was?

16 MR. CARUSO: The role was, in large part,  
17 to find a buyer to put together the financial  
18 analysis - - -

19 CHIEF JUDGE LIPPMAN: But they didn't have  
20 the exclusive right to sell?

21 MR. CARUSO: They did not have an exclusive  
22 right to sell. They had only what the case law calls  
23 an exclusive agency. I think it's important to rec -  
24 - -

25 JUDGE GRAFFEO: What does - - - what does

1 exclusive agency allow them to do that an exclusive  
2 right to sell - - - that's less than an exclusive  
3 right to sell?

4 MR. CARUSO: It's a question of what the  
5 exclusive agency allows my client to do, the owner.  
6 Under an exclusive right to sell, the broker, here  
7 Morpheus, would have a commission, even if a sale was  
8 made by the owner, without using a competing broker.  
9 But if there's an exclusive right to sell, then the  
10 owner retains its inherent right to sell its own  
11 property without liability for a commission, as long  
12 as it doesn't use another broker. And here, as the  
13 Appellate Division - - -

14 JUDGE GRAFFEO: So their responsibility is  
15 the same - - -

16 MR. CARUSO: Their duties are the same.

17 JUDGE GRAFFEO: - - - regardless they - - -

18 MR. CARUSO: Their duties are the same,  
19 that's right.

20 JUDGE GRAFFEO: Their duty is the same.

21 MR. CARUSO: That's right.

22 JUDGE GRAFFEO: The difference is whether  
23 you owe the fee or not - - -

24 MR. CARUSO: Correct.

25 JUDGE GRAFFEO: - - - depending on who

1 finds this - - - the purchaser?

2 MR. CARUSO: That's right, precisely. The  
3 - - - the broker has the same duties to go out and  
4 find a buyer, pull - - - pull together the financial  
5 analyses, et cetera. But with respect to an  
6 exclusive agency, the owner retains its inherent  
7 right to sell without liability for a commission, as  
8 long as there's no competing broker used.

9 And here, according to the Appellate  
10 Division majority, there was no competing broker  
11 used. This was the - - -

12 JUDGE GRAFFEO: And do we have any  
13 precedent that establishes this distinction - - -

14 MR. CARUSO: Ah.

15 JUDGE GRAFFEO: - - - between these two  
16 types of agency?

17 MR. CARUSO: You have eighty years of  
18 Appellate Division case law, that clearly establishes  
19 this choice - - - this issue.

20 JUDGE READ: But none of - - - but nothing  
21 that we've ever decided?

22 MR. CARUSO: No. This court has never  
23 decided that, and I think that's because the  
24 Appellate Division case law is so very clear, and so  
25 - - - and so uncontradicted. It's also the law in

1 just about every state that I'm familiar with. We  
2 cited fourteen other states in our briefs. We  
3 could've cited more. This is what Williston says the  
4 law is.

5 JUDGE GRAFFEO: Is there any particular  
6 decision you're - - - you would direct to - - -

7 MR. CARUSO: I - - -

8 JUDGE GRAFFEO: - - - which you would say  
9 that's the best articulation of the rule you're  
10 looking for us - - -

11 MR. CARUSO: The best articulation is - - -

12 JUDGE GRAFFEO: - - - to adopt?

13 MR. CARUSO: Yes. The best articulation is  
14 the Hammond Kennedy case, First Department, 1975,  
15 written by Judge Stevens then, formerly of this  
16 court. And that lays out - - - that lays out the - -  
17 - the test, this dichotomy, between an exclusive  
18 right to sell, and what that gives the broker, and  
19 what that - - - and an exclusive agency, and what  
20 that leaves in the hands of the - - - of the owner.

21 JUDGE RIVERA: Well, regardless of the  
22 terminology, the point is, what - - - what are the  
23 duties and obligations, and as you say, what - - - in  
24 many ways, what rights your client retains?

25 MR. CARUSO: Yes. Exactly, and - - -

1 JUDGE RIVERA: Okay. So then if I can ask  
2 along those lines, what is the point of the  
3 references to Morgan Stanley?

4 MR. CARUSO: Right, those - - - those  
5 references show exactly why this is an exclusive  
6 agency. The sen - - - there are two sentences about  
7 Morgan Stanley. The second sentence says that  
8 Morpheus shall have a success fee for a transaction  
9 to sell to Morgan Stanley.

10 JUDGE RIVERA: Um-hum.

11 MR. CARUSO: Now, that language would have  
12 been unnecessary if Morpheus already had an exclusive  
13 right to sell. If Morpheus had an exclusive right to  
14 sell, it would not have been necessary to say, oh,  
15 but you'll still get a fee on a sale by the owner to  
16 Morgan Stanley. What's that about?

17 JUDGE PIGOTT: Well, how are we supposed to  
18 figure that out?

19 MR. CARUSO: I'm sorry?

20 JUDGE PIGOTT: How are we supposed to  
21 figure that out? You say that. But, I mean, they  
22 say exactly the opposite.

23 MR. CARUSO: They don't say the opposite of  
24 that, Your Honor, because they - - - the - - - I  
25 think you figure it out from the language of the

1 contract. It's also - - - our also - - -

2 JUDGE PIGOTT: They say the "right to a  
3 success fee is not dependent on the plaintiff  
4 producing a ready, willing and able buyer. Rather,  
5 the agreement provides that the plaintiff shall be  
6 paid a success fee at the closing, whenever it  
7 occurred, and defendant completed a transaction  
8 involving the student loan assets, during a period in  
9 which the plaintiff had the exclusive right to  
10 solicit counterparties regardless of who brought the  
11 counterparty to the table."

12 MR. CARUSO: Right, but - - - but that - -  
13 - that right cannot be - - - cannot be based on this  
14 language. It's insufficient.

15 JUDGE PIGOTT: You say.

16 MR. CARUSO: Sorry?

17 JUDGE PIGOTT: You say that.

18 MR. CARUSO: Well, the case law says that.

19 JUDGE PIGOTT: They say the opposite.

20 MR. CARUSO: But I - - - Your Honor, I'm  
21 relying on the case law which says the general rule  
22 is exclusive agency. The owner doesn't give up his  
23 or her right to sell his own property - - -

24 JUDGE RIVERA: Could - - -

25 MR. CARUSO: - - - lightly.

1 JUDGE RIVERA: Couldn't not the language -  
2 - -

3 MR. CARUSO: It has to be clear and  
4 unambiguous.

5 JUDGE PIGOTT: I see.

6 JUDGE RIVERA: - - - could not these - - -

7 MR. CARUSO: Clear and ambiguous language  
8 given.

9 JUDGE RIVERA: - - - could not these two  
10 sentences be interpreted to mean that the first  
11 sentence refers specifically to credit swaps - - -  
12 credits defaults, excuse me.

13 MR. CARUSO: Right.

14 JUDGE RIVERA: And then the second sentence  
15 is simply to clarify that indeed, nevertheless, they  
16 retain their right to have - - - to - - - to get the  
17 commission fee. That the first sentence referring to  
18 the swaps, doesn't otherwise impinge or otherwise  
19 make them unable to get their fee?

20 MR. CARUSO: I think you have to look at  
21 both sentences. The first sentence says, no fee for  
22 a credit default swap. Fine. This was a transaction  
23 to sell. We retained them to sell.

24 JUDGE RIVERA: Well, only when those - - -  
25 only when it's JPMorgan, and it's not all the time,

1 right?

2 MR. CARUSO: Right. The second sentence  
3 says, but if there's a sale, a transaction to sell to  
4 Morgan Stanley, then they will get a success fee.

5 And I repeat - - -

6 JUDGE RIVERA: Well, actually not, right?

7 MR. CARUSO: No, it says - - -

8 JUDGE RIVERA: They will if they have  
9 performed substantially all the services.

10 MR. CARUSO: Correct. Right.

11 JUDGE RIVERA: So they'd still have to have  
12 done something.

13 MR. CARUSO: They'd still have to do - - -

14 JUDGE RIVERA: What's the something they  
15 had to have done?

16 MR. CARUSO: Well, substantial performance,  
17 I think, would be - - - depend on the facts of the  
18 case, but - - -

19 JUDGE RIVERA: Well, it says in Section 1.

20 MR. CARUSO: Section 1 lays out the - - -  
21 lays out the duties and the obligations to find a  
22 buyer, to - - - as - - - "identify and introduce  
23 buyers, conduct analysis of appropriate evaluation" -  
24 - -

25 JUDGE PIGOTT: Well, Mr. Gordon - - - Mr.

1           Gordon in his - - - in his affidavit - - - I forget  
2           when this is - - - said that you - - - that you, "the  
3           defendant, proposed adding terms to the draft that  
4           would permit it to dispose directly of the student  
5           loan assets itself in transactions with twenty  
6           companies and individuals without compensating  
7           Morpheus. And of course, such a change would be  
8           unnecessary if the contract already afforded the  
9           defendant the right to sell the student loan assets  
10          directly without obligation to Morpheus."

11                         MR. CARUSO:   Yup.

12                         JUDGE PIGOTT:  "I objected to this change  
13           in an e-mail, dated September 2nd, 2008, and they  
14           agreed to a very narrow carve-out, which would not be  
15           paid if the defendant consummated credit default  
16           swaps or any financing derivative."  How are we  
17           supposed to decide that?

18                         MR. CARUSO:  Because it's not a carve-out;  
19           it's a carve-in.

20                         JUDGE PIGOTT:  Well, you say.

21                         MR. CARUSO:  But - - - but it's the plain  
22           language of the agreement.  There - - -

23                         JUDGE READ:  Well, that's the parol  
24           evidence, right, that you - - -

25                         MR. CARUSO:  Right.  And first of all, the

1           parol evidence should not come in just because Your  
2           Honors first have to look at the four corners of the  
3           document.

4                       CHIEF JUDGE LIPPMAN:   And if - - -

5                       JUDGE READ:   Well, I guess your argument is  
6           - - - is that - - - is that if - - - that they have  
7           to say something - - - they have to take an exclusive  
8           right to sell.   That has to be clear and unambiguous  
9           on the face of it.

10                      MR. CARUSO:   On the face of the contract,  
11           right.

12                      JUDGE READ:   And if it's not, you win.

13                      MR. CARUSO:   Correct.

14                      JUDGE READ:   We don't say it's ambiguous  
15           and therefore we look at the parol evidence.

16                      MR. CARUSO:   Correct.   If there's ambiguity  
17           here, it's construed against the broker.   The case  
18           law is ample for that point.   The case law says that  
19           the broker can get an exclusive right to sell only if  
20           the contract gives that right in clear and  
21           unambiguous language.

22                      If there's ambiguity, then the contract is  
23           an exclusive agency, and the owner retains its right  
24           to sell the policy.   The reason is very clear,  
25           because the law - - - the owner has an inherent right

1 to sell, and the law says, we're not going to say  
2 that the owner gave up that right - - -

3 CHIEF JUDGE LIPPMAN: Okay.

4 MR. CARUSO: - - - except very clearly - -  
5 -

6 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's  
7 - - - let's hear from your adversary, and then you'll  
8 have your rebuttal.

9 MR. CARUSO: Yes - - - yes, Your Honor.  
10 Thank you.

11 CHIEF JUDGE LIPPMAN: Counselor?

12 MR. POLLARD: Good afternoon.

13 CHIEF JUDGE LIPPMAN: Is the language here  
14 ambiguous?

15 MR. POLLARD: No, the language is not  
16 ambiguous, because if you construct the contract,  
17 which is a requirement - - - construct the contract,  
18 the language of the contract clearly establishes that  
19 this was an exclusive right to sell.

20 CHIEF JUDGE LIPPMAN: Where - - - where  
21 does it say that?

22 MR. POLLARD: It says that, Judge, in  
23 looking at the provisions of the contract. We start  
24 with the language that says that Morpheus is entitled  
25 to a success fee upon closing the transaction. And

1 then you go to these sentences 1 and sentences 2.  
2 And those sentences would not be necessary if it was  
3 an exclusive agency, because one sentence says that  
4 if we do one type of transaction, we owe you nothing,  
5 but if we do another type of transaction, you earn  
6 your fee.

7 If they have the right to go out and sell  
8 these assets with no liability whatsoever, that  
9 provision is not necessary.

10 JUDGE RIVERA: Actually, again, the sec - -  
11 - but the second sentence says you have to  
12 substantially comply with one.

13 MR. POLLARD: Yes, and that's fact issue -  
14 - -

15 JUDGE RIVERA: So - - - so it doesn't look  
16 to me that it's automatic. It looks like you had to  
17 have to do something.

18 MR. POLLARD: But that - - - but if we  
19 performed, we were entitled to the fee. That's a  
20 fact issue, and this comes - - - this case comes to  
21 you on a motion to dismiss. There's been no fact  
22 finding, none whatsoever.

23 JUDGE RIVERA: But doesn't that show that  
24 the - - that the intent is not for you to have the  
25 commission automatically? I - - -

1                   MR. POLLARD: No, but if we substantially  
2 performed, we'd get the fee. If they do a  
3 transaction without us, we get the fee. That's a  
4 fact question that has to be resolved on remand. But  
5 this - - -

6                   JUDGE GRAFFEO: It is pretty clear that the  
7 Appellate Divisions have made a distinction between  
8 exclusive agencies and exclusive right to sell, and  
9 they've been doing it for quite a few decades. What  
10 do - - - what do we do with that? Do we just ignore  
11 that distinction?

12                   MR. POLLARD: No, you don't ignore the  
13 distinction. The question is what is this contract?  
14 There are two different concepts. No doubt about  
15 that. But what is this contract? And our position  
16 is that if you construct it - - - you know, you don't  
17 have to look for magic language, as we say in our  
18 brief.

19                   CHIEF JUDGE LIPPMAN: Yeah, but you agree  
20 it's got to be clearly laid out, this exclusive right  
21 to sell.

22                   MR. POLLARD: If it is - - - if you can  
23 discern the intent from the language, it doesn't  
24 matter what words are used. And I want to say one  
25 more word about this - - -

1 CHIEF JUDGE LIPPMAN: Yeah, yeah, but I  
2 asked you a different question. Does it have to be  
3 clearly laid out or just you discern it from all of  
4 the language - - -

5 MR. POLLARD: The last - - -

6 CHIEF JUDGE LIPPMAN: - - - in contact - -  
7 - in the prior Appellate Division cases, aren't they  
8 saying it has to be clear that you have the right - -  
9 - exclusive right to sell? Not just that you look at  
10 it all and figure it out?

11 MR. POLLARD: I disagree. I think you look  
12 at - - - I think the prior Appellate Division cases  
13 say - - -

14 CHIEF JUDGE LIPPMAN: Just mean that from  
15 the language - - -

16 MR. POLLARD: From the language.

17 CHIEF JUDGE LIPPMAN: - - - you got to be  
18 able to figure it out.

19 MR. POLLARD: Yes, that's - - - there does  
20 not have to be any magic language. But I want to  
21 come back to as you construct that language, there's  
22 one provision in there, that in preparing for  
23 argument, we looked at - - - I looked at - - - and  
24 thought about a little bit deeper, which I think is  
25 important. I wish I'd put it in my brief.

1           The UBS RE had the unfettered right to  
2 terminate the contract any time. To do what it  
3 wants. Unfettered right. It's in the record. It's  
4 A-62. But if they didn't terminate the contract,  
5 they had to live under its terms. That solves their  
6 problem about their being able to control their own  
7 assets. Terminate the contract. Say, letter - - -  
8 we're done; contract's over. They didn't do that.  
9 They didn't do that at all.

10           But I also want to talk about the  
11 unambiguous language as well.

12           JUDGE READ: Well, I - - - I guess I'm - -  
13 - I'm hung up on this point that you're asking us to  
14 look at parol evidence, right? And you're asking us  
15 to look at parol evidence to say something is - - -  
16 is not - - - is unambiguous. But the only reason we  
17 would look at parol evidence is if it's ambiguous.

18           MR. POLLARD: Yeah.

19           JUDGE READ: I mean, how do those - - - how  
20 does the - - - how does the parol evidence in our  
21 jurisprudence and parol evidence fit in with the  
22 Appellate Division case law here, that says it's got  
23 to - - - it has to be clear on its face, or you just  
24 lose?

25           MR. POLLARD: What we're saying - - - we're

1 not saying look at parol evidence without the qual -  
2 - - the proper qualification. We're saying that it  
3 is an unambiguous in our favor. But if it is - - -  
4 if the contract can be looked at as being ambiguous,  
5 then you go to parol evidence. And the case law on  
6 that issue is a blank slate for this court.

7 JUDGE READ: Are you making an alternative  
8 argument?

9 MR. POLLARD: I make the alternative  
10 argument and that's what's laid out in our brief.

11 CHIEF JUDGE LIPPMAN: You're saying it's a  
12 blank - - - it's a blank slate in this court. You're  
13 not saying it's a blank slate in the Appellate  
14 Division, right?

15 MR. POLLARD: No, I'm not saying - - -

16 CHIEF JUDGE LIPPMAN: The Appellate  
17 Division's - - -

18 MR. POLLARD: - - - it's a blank slate in  
19 the Appellate Division. But the Appellate Division  
20 has never really clearly articulated that you cannot  
21 use parol evidence. If you go and you look at Solid  
22 Waste - - - they're a big case - - - the Appellate  
23 Division criticized the plaintiff for not putting in  
24 parol evidence on his motion for summary judgment.

25 JUDGE PIGOTT: That was summary judgment,

1            though. This is 3211.

2                    MR. POLLARD: It doesn't - - - well, but  
3            the point is - - -

4                    JUDGE PIGOTT: It helps you.

5                    MR. POLLARD: The point is parol evidence  
6            could be used - - -

7                    JUDGE PIGOTT: Um-hum.

8                    MR. POLLARD: - - - to discern the intent  
9            if there was ambiguity. CV Holding does the same  
10           thing.

11                   JUDGE READ: But when did we ever - - -

12                   MR. POLLARD: Mercer does the same thing.

13                   JUDGE READ: When have we ever said that?  
14           When have we ever said you can use parol evidence to  
15           discern intent?

16                   MR. POLLARD: If there's ambiguity.

17                   JUDGE READ: If there - - - when - - -  
18           where - - - where have we ever said that? I thought  
19           our case law was almost diametrically opposed to  
20           that.

21                   MR. POLLARD: No, if - - - if the contract  
22           is ambiguous, if you make a determination the  
23           contract is ambiguous, then you can look at the parol  
24           evidence to figure out what was the intent of the  
25           parties.

1                   JUDGE READ: But you can't use it to  
2 determine whether or not the contract's ambiguous to  
3 begin with.

4                   MR. POLLARD: Agreed.

5                   JUDGE READ: Okay.

6                   MR. POLLARD: I'm not - - - I'm not making  
7 that argument.

8                   JUDGE READ: You're not making that  
9 argument.

10                  MR. POLLARD: I'm not making that argument,  
11 no. What I am saying is, that you can - - - if - - -  
12 if you were to read the contract differently from  
13 what we read it, we say then there has to be  
14 ambiguity, and then you go to parol evidence. And  
15 the parol evidence, with a moral certainty,  
16 demonstrates that this was - - - the intent of the  
17 parties was to have exclusive right to sell. If you  
18 look at the drafts that are in the record, I believe  
19 it's A-22 and 21 - - -

20                  JUDGE GRAFFEO: Who - - - who wrote - - -  
21 who wrote this final contract?

22                  MR. POLLARD: Well, the language at issue  
23 was written primarily by UBS RE. If you look at the  
24 draft, they have a carve-out - - - he says it's a  
25 carve-in - - - they have a carve-out for twenty

1 people, and UBS says you get no fee if we do a direct  
2 deal. If this was an exclusive right to sell intent,  
3 you don't need that. You look at that - - - at the  
4 draft, what they put in. You don't need that if it's  
5 an exclusive right to sell.

6 That is why we say that - - -

7 JUDGE RIVERA: Wait, wait. I'm sorry - - -  
8 are we talking about the same sentence regarding  
9 Morgan Stanley?

10 MR. POLLARD: No, we're talking about the  
11 predecessor. The Norman - - - the Morgan Stanley  
12 sentence was the final negotiated version of that.  
13 UBS RE wanted to take out twenty parties and say you  
14 don't get a fee, Morpheus, if we do a direct deal  
15 with them.

16 JUDGE RIVERA: With them.

17 MR. POLLARD: Morpheus objected and Judge  
18 Pigott read from Mr. Gordon's affidavit about that.  
19 The final negotiated language which UBS RE is  
20 primarily responsible for limited the carve-out to  
21 two people, to two companies, and specific types of  
22 transactions. Now, so, what we're saying is that if  
23 you look at all of the things that are in the  
24 contract, the intent is clear. It's an exclusive  
25 right to sell - - -

1 JUDGE GRAFFEO: You know, most real - - -

2 MR. POLLARD: - - - and we get a fee.

3 JUDGE GRAFFEO: - - - most real estate  
4 contracts involving the sale of real property would  
5 indicate that regardless of which party sells the  
6 property, the broker's entitled to the fee. Why - -  
7 - I mean, it would have been pretty simple to say in  
8 here, regardless of what party sells these student  
9 loan notes - - -

10 MR. POLLARD: Correct.

11 JUDGE GRAFFEO: - - - if the com - - - the  
12 settlement fee or what, success fee would be paid.

13 MR. POLLARD: I - - - I think - - - I think  
14 my friend Mr. Caruso would agree, that this contract  
15 could have been drafted better. I believe it could  
16 have been drafted better. But it does say what we  
17 say it says. And that's the important thing here.

18 Also, I want to make the point - - - what  
19 else the Appellate Division did. The Appellate  
20 Division said - - - it's - - - incorrectly, in our  
21 view, said - - - this is an exclusive agency, but  
22 there are terms in here that were breached. UBS RE  
23 only challenges one part of that holding. UBS RE  
24 says the exclusivity period in which we had the right  
25 to go out and solicit, it claims is subsumed in the

1 exclusive right to sell. It doesn't challenge the  
2 Appellate Division's find - - - holding that under  
3 the plain language of the agreement, Morpheus gets a  
4 fee.

5 JUDGE RIVERA: Can I - - -

6 MR. POLLARD: It doesn't challenge that at  
7 all.

8 JUDGE RIVERA: Can I just - - - let me just  
9 clarify how you see this contract would work. So  
10 they - - - they - - - they enter this arrangement  
11 with you, and then they come back and they say, hey,  
12 Switzerland is going to bail us out. And you - - -  
13 Switzerland is going to bail us out. And then you  
14 say, great, I have now an opportunity to go find  
15 someone else who will pay you even more than  
16 Switzerland.

17 Is that what you're saying this contract  
18 means?

19 MR. POLLARD: No. The - - - the fact that  
20 they could have - - -

21 JUDGE RIVERA: What does it mean? What  
22 does it mean "the opportunity"?

23 MR. POLLARD: Well, the opportunity - - -

24 JUDGE RIVERA: Yeah.

25 MR. POLLARD: - - - is exactly that.

1 JUDGE RIVERA: Yeah.

2 MR. POLLARD: A lot of time, effort and  
3 money is put in by investment bankers in trying to do  
4 deals like this. This is not selling a house. This  
5 is not selling petroleum. This is not selling a  
6 commodity or a simple standalone business, which is  
7 what most of the cases that are cited in the UBS  
8 brief - - -

9 JUDGE RIVERA: No, no, no, but I'm just  
10 trying to understand how you view the agreement  
11 works. Are you saying that they should not have  
12 taken the offer for the bailout?

13 MR. POLLARD: Well, they - - - they could  
14 do whatever they - - -

15 JUDGE RIVERA: Because you're still  
16 looking?

17 MR. POLLARD: They can do whatever they  
18 want - - -

19 JUDGE READ: They just owe you the fee.

20 MR. POLLARD: - - - they owe us the fee.  
21 Or - - - or they come and they say, we cancel the  
22 contract.

23 JUDGE RIVERA: No, no, no. But they - - -  
24 they don't - - - but your argument is not they don't  
25 - - - that they owe you the fee because a buyer has

1           been found. I thought your argument was they owe you  
2           the fee, because you didn't have a chance to go out  
3           and find someone else.

4                       MR. POLLARD: That's our second argument.  
5           The first argument is - - - is a buyer - - - that  
6           they - - - that they breached the exclusive right to  
7           sell.

8                       JUDGE RIVERA: Okay, so if we don't agree  
9           with you on that, are you still falling back on the  
10          second argument - - -

11                      MR. POLLARD: Then we go to the second  
12          argument.

13                      JUDGE RIVERA: - - - or is that lost too?

14                      MR. POLLARD: Then we go to the second  
15          argument, where - - -

16                      JUDGE RIVERA: But that's the one I'm  
17          saying I - - - is nonsensical to me. How can - - -  
18          how can it be that you're - - - that you're saying  
19          that they have to either come to you and say, see if  
20          you can find a better buyer than the entire country  
21          of Switzerland, or they have to reject the bailout,  
22          because they don't want to pay your fee.

23                      MR. POLLARD: They don't have - - - they  
24          don't have to reject the bailout. They could do - -  
25          - they could do one of two things. They could accept

1 the bailout, breach the contract, pay us the fee, or  
2 they could say - - -

3 JUDGE RIVERA: That's your first argument.

4 MR. POLLARD: - - - or they could say, we  
5 terminate the contract. What they cannot do - - -

6 JUDGE RIVERA: I want to go back to that  
7 question of the termination, because I take the  
8 termination provision to mean that - - - sure, they  
9 could terminate, but if you've complied with your  
10 duties and obligations and provided the services,  
11 which under your argument is, as long as they find a  
12 buyer, they're stuck - - - they've got to pay you the  
13 fee, what's the point of the termination? It still  
14 doesn't absolve them of what you're saying is their  
15 duty and obligation under this agreement to pay you.

16 MR. POLLARD: It depends. It depends on  
17 where they are. If they had - - - if we had produced  
18 a buyer that they had agreed to - - -

19 JUDGE RIVERA: Yes.

20 MR. POLLARD: - - - they then - - - they  
21 then cannot terminate the contract - - -

22 JUDGE RIVERA: Well - - - or is it that you  
23 have to actually have a transaction - - -

24 MR. POLLARD: But if - - - if they - - -

25 JUDGE RIVERA: - - - to sell? Just because



1 your second claim, right?

2 MR. POLLARD: No, that does address my  
3 second - - - what they cannot do is that when the  
4 Swiss came along and said, we want to, you know,  
5 arrange this bailout, you know, they cannot then  
6 breach the contract, deny us our exclusivity to go  
7 out and solicit and to find a buyer, without  
8 liability.

9 JUDGE RIVERA: A competitor to Switzerland.

10 MR. POLLARD: To compete with Switzerland  
11 or whatever. They cannot do that. They - - - so  
12 long as the contract is extant. That's what they  
13 can't do, and that's what the Appellate Division  
14 found that they breached.

15 JUDGE RIVERA: That - - - it'll be my last  
16 question on this. How - - - how long do they have to  
17 wait for you to find a competitor to the - - -

18 MR. POLLARD: The contract ran - - -

19 JUDGE RIVERA: - - - to Switzerland?

20 MR. POLLARD: The contract ran from  
21 September 19th to December 31.

22 JUDGE RIVERA: So this - - - this - - - I  
23 guess, I'm not telling the truth, it wasn't my last  
24 question. So despite the global emergency, they've  
25 got - - - everybody's got to wait.

1                   MR. POLLARD: Well, first of all, the  
2 global emergency was self-created. You know, that's  
3 - - - that's clearly in the record. But the second  
4 point is, you know, they never transferred out the  
5 sixty billion dollars that they originally were  
6 going to do with the Swiss. There was no reason  
7 whatsoever for them to have to - - - to take this  
8 half a billion dollars off of their books.

9                   But again, UBS RE could have done the deal  
10 without liability, if they had simply terminated the  
11 contract, but they can't have it both ways.

12                   CHIEF JUDGE LIPPMAN: Okay, counselor.  
13 Thanks.

14                   MR. POLLARD: Thank you.

15                   CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

16                   MR. CARUSO: Yes. I will rebut by  
17 answering questions posed by the court. Your Honors  
18 - - -

19                   JUDGE PIGOTT: All right, one of the other  
20 things you said that you also agreed to "a change  
21 permitting the defendant", you, "to jointly market  
22 student loan assets with the plaintiff taking the  
23 lead".

24                   MR. CARUSO: The joint marketing was not  
25 mandatory, nor was the marketing limited to joint

1 marketing.

2 JUDGE PIGOTT: I hate to sound like a - - -  
3 a pedantic, but that's why this 3211 seems very  
4 difficult to get over, because you're right. It's  
5 hard - - - it's hard to figure out, absent an answer  
6 from you, and then perhaps some discovery to find - -  
7 - to tee this up, and find out exactly, you know, who  
8 owed what duty to whom.

9 MR. CARUSO: I do not think that's  
10 necessary in light of the language of the contract.  
11 And that joint marketing provision, particularly it  
12 doesn't help them, because it doesn't say "only". It  
13 doesn't say UBS can engage only in joint marketing.  
14 It preserves the UBS right to sell.

15 JUDGE PIGOTT: That's what I mean.

16 MR. CARUSO: May I - - - I'm sorry.

17 JUDGE GRAFFEO: Could you have terminated  
18 the contract, or you think that also would have led  
19 to a claim that you still owed the fee.

20 MR. CARUSO: I - - - yes. I don't think  
21 that would have changed anything, and nor does it  
22 change the analysis from my point of view, whether  
23 the contract was terminated or - - - in October, or  
24 could have been, or whether it ran to its full term,  
25 UBS RE still had the right under an exclusive agency

1 to sell the property without liability as long as it  
2 didn't use another broker.

3 Chief Judge Lippman asked a question. Mr.  
4 Pollard said this gives us an exclusive right to  
5 sell. Your Honor said where does it say that? The  
6 answer is nowhere. It just doesn't say that. And  
7 the case law is clear that it has to give them - - -  
8 if they want that right it has to be given clearly  
9 and not - - -

10 CHIEF JUDGE LIPPMAN: The Appellate  
11 Division cases, yeah.

12 MR. CARUSO: The Appellate Division case  
13 law. Judge Graffeo then said, well, it would have  
14 been pretty simple to insert that language. Of  
15 course, that's exactly right. It would have been a  
16 perfectly simple matter for them to say a commission  
17 is due, even on sale by owner. They didn't say that.  
18 The contract doesn't say that. So I think that that  
19 pretty much is fatal to the exclusive right to sell.

20 Judge Read put your finger on the parol  
21 evidence point. Ambiguity here is fatal to the claim  
22 for an exclusive right to sell. If the contract does  
23 not - - - unambiguously give that right, then by  
24 default, so to speak, it's an exclusive agency and  
25 the owner can sell.

1                   Now, I think, Judge Rivera, you also made a  
2                   good point. How long must the defend - - - the sell  
3                   - - - the owner wait in these circumstances? This  
4                   interjects huge uncertainties into commercial  
5                   transactions, and there is absolutely no support for  
6                   it. And this court's case in 1875, the Wylie case  
7                   made it very clear - - - it's still good law - - -  
8                   made it very clear that the owner can sell to the  
9                   first buyer who comes along to offer the price, and  
10                  he has no further duty to wait. As the court put it,  
11                  the owner was under no obligation to wait any longer  
12                  to - - -

13                   JUDGE PIGOTT: What were they selling?

14                   MR. CARUSO: I'm sorry?

15                   JUDGE PIGOTT: What were they selling?

16                   Wylie?

17                   MR. CARUSO: That case was a sale of a  
18                   building. But these - - - these case - - - these  
19                   rules have been applied across the board. Contracts  
20                   for investment banking services to contracts for the  
21                   sale of a business; that's the Hammond Kennedy case I  
22                   mentioned. And that is - - - that's because these  
23                   rules flow from the law of agency, not the law of  
24                   real property. They have to do with the question of  
25                   whether the principal and the agent may compete with

1           each other, and therefore they are of general  
2           application.

3                         CHIEF JUDGE LIPPMAN:   Okay, counsel.

4                         MR. CARUSO:    Thank you, Your Honor.

5                         CHIEF JUDGE LIPPMAN:   Thank you both,  
6           appreciate it.

7                                 (Court is adjourned)

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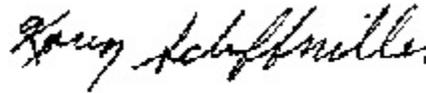
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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Morpheus Capital Advisors LLC v. UBS AG, No. 109, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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