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COURT OF APPEALS

STATE OF NEW YORK

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BDC FINANCE LLC,

Respondent,

-against-

BARCLAYS BANK PLC,

No. 5  
(Record sealed)

Appellant.

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20 Eagle Street  
Albany, New York 12207  
January 06, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: So let's proceed with  
2 number 5.

3 Counsel, you want any rebuttal time?

4 MR. SCOTT: Yes, two minutes, please, Your  
5 Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes. Go  
7 ahead. You have it. You're on.

8 MR. SCOTT: Good afternoon. And may it  
9 please the court, Jeffrey Scott from Sullivan &  
10 Cromwell for the appellant Barclays. As the court  
11 knows from the parties' brief, this case arises from  
12 BDC's purported termination of a swap transaction  
13 with Barclays in October 2008.

14 JUDGE READ: Does this whole case turn on  
15 the question of whether the master confirmation  
16 modifies only the transfer timing provisions or the  
17 CSA? Is that the - - - is that what it turns on?

18 MR. SCOTT: No, it does not, Your Honor.

19 JUDGE READ: It's not that. Okay.

20 MR. SCOTT: There are two - - - there are  
21 two - - - we believe there - - - in order for BDC to  
22 prevail on summary judgment concerning their  
23 termination, BDC must prove, as a matter of law, two  
24 separate and independent facts. First, that Barclays  
25 breached the agreement. And second, that BDC's

1           October 8th notice sufficiently identified that  
2           breach so that Barclays would have an opportunity to  
3           cure.

4                       CHIEF JUDGE LIPPMAN: Does it depend on  
5           BDC's theory of recovery?

6                       MR. SCOTT: It - - -

7                       CHIEF JUDGE LIPPMAN: Is - - - is - - -  
8           isn't about pay first and dispute later?

9                       MR. SCOTT: It does not, Your Honor. The  
10          "pay first, dispute later" theory, which we discuss  
11          extensively in our papers - - -

12                      CHIEF JUDGE LIPPMAN: Right.

13                      MR. SCOTT: - - - has nothing to do with  
14          their theory of recovery. In fact, as we argue, that  
15          theory is inconsistent with the plain language of the  
16          agreement. It's - - -

17                      CHIEF JUDGE LIPPMAN: So how does that  
18          impact on what we're dealing with now?

19                      MR. SCOTT: Your Honor, the "pay first,  
20          dispute later" theory is simply a theory that had  
21          been invented by BDC's expert - - - she conceded this  
22          at deposition - - - and that she told the parties  
23          that - - - of that theory, told BDC's counsel after  
24          the litigation was commenced. And so we would argue  
25          that because it was not provided as a ground for the



1 the pattern of conduct that's - - -

2 MR. SCOTT: Yes, abs - - - absolutely, Your  
3 Honor. We sent an e-mail, most importantly, on  
4 October 7th that said, "Barclays agrees to return 5  
5 million" - - - "5,080,000 dollars for margin call  
6 made on 10/6." That was BDC's margin call. Now,  
7 this e-mail constituted a notice of dispute because,  
8 as we note in our papers, it was exactly how BDC's  
9 treasurer told BDC's chief operations officer and  
10 also told Barclays' employees on a call that BDC  
11 notified Barclays of the disputes. It was the same  
12 exact language.

13 JUDGE PIGOTT: That - - - that - - - that -  
14 - - all the way through this it seems to me that - -  
15 - that there is - - - all I could get and think about  
16 was an implied covenant of good faith on both of the  
17 parties. And it was difficult to find. And I  
18 realize that, you know, you wanted summary judgment  
19 and they wanted summary judgment on these very  
20 specific things. But if the - - - if the collateral  
21 was dim - - - was dim - - - diminishing in price, you  
22 were entitled to demand more. If it was increasing  
23 in price, they were entitled to demand more, and this  
24 is going back and forth. And apparently, for a  
25 fairly decent amount of time, everything was happy.

1 And then something happened, either the collateral  
2 started to drop and everybody, you know, got upset or  
3 - - - and all of a sudden, what used to be a fairly  
4 regular way of doing business because this - - - you  
5 know, on the 6th, on the 7th, on the 8th, on the  
6 14th, and - - - you know, I'm demanding - - - no,  
7 that's not a real demand. I - - - you know, are - -  
8 - are you asking for a dispute resolu - - - you know,  
9 and - - - and you're right to bring up, you know, the  
10 language of the thing. But why - - - why isn't this  
11 at some point going to have to get tried?

12 MR. SCOTT: I would agree, Your Honor. And  
13 we think that's the primary reason the Appellate  
14 Division majority, the three-judge majority, erred  
15 here. If BDC's interpretation of the October 8th  
16 notice is to be accepted even though it's  
17 inconsistent with the plain language of that notice,  
18 and if BDC's interpretation of the agreements are to  
19 be accepted even though they're inconsistent with the  
20 plain language, what we have is two sets of competing  
21 reasonable interpretations which result - - - which  
22 would require - - -

23 CHIEF JUDGE LIPPMAN: What are the - - -  
24 what are the factual issues that we would try?

25 MR. SCOTT: Your Honor, it would be first,

1 with respect to the October 8th notice, BDC argues -  
2 - - argued in the Appellate Division and argues here  
3 - - - that that notice told Barclays the only way it  
4 was cure - - - could cure is by the paying the entire  
5 return amount. That's entirely inconsistent with the  
6 plain language. And so they'd first have to be able  
7 to establish that that's a reasonable interpretation.  
8 But if they did establish that, Barclays'  
9 interpretation, as the two dissenting justices found  
10 and as the Commercial Division found, is just as  
11 reasonable. So the court would have to interpret  
12 based on the e-mail communications, the telephone  
13 calls, BDC's October 16th letter which no less than  
14 nine times - - -

15 JUDGE RIVERA: So we'd have to agree with  
16 you that - - - that it's ambiguous. If we agree with  
17 them that it's unambiguous, you lose?

18 MR. SCOTT: No, that's - - - that's  
19 incorrect, Your Honor, because I don't think there's  
20 any reasonable interpretation of the agreements with  
21 respect to the "pay first, dispute later" provision -  
22 - -

23 JUDGE RIVERA: Um-hum.

24 MR. SCOTT: - - - or the October 8th  
25 notice, that Barclays' interpretation of the

1 agreement of that not - - - or that notice are - - -  
2 is incorrect or unreasonable. The - - - the actual  
3 return - - - the October 8th notice says - - - and  
4 this is what it specifically says and this is why the  
5 Appellate Division dissenting justices found that  
6 they gave Barclays the option to pay the return  
7 amount or pay the undisputed amount. It actually  
8 says that, "Barclays was required either to pay the  
9 relevant return amount or notify BDC that it disputed  
10 the calculation of the return amount and pay the  
11 undisputed amount." And if that failure continued  
12 for two days, then there would be an event to  
13 default. So the dissenting justices, what they said  
14 was - - - they correctly found that the notice gave  
15 Barclays the opportunity to cure by either paying the  
16 return amount or the undisputed amount.

17 JUDGE ABDUS-SALAAM: Counsel, the dissent  
18 also found an issue of fact about whether Barclays  
19 had paid the disputed or undisputed amount of  
20 5,080,000 dollars, right?

21 MR. SCOTT: They - - - they did find there  
22 was a - - - there was - - - was a factual dispute  
23 around that issue, as well, and the rea - - -

24 JUDGE ABDUS-SALAAM: But is there - - - is  
25 there a factual dispute around that?

1                   MR. SCOTT: No, we don't believe so, Your  
2 Honor. First of all, no one where in the notice in  
3 cure provision, the October 8th notice, does BDC  
4 complain that Barclays paid the incorrect amount or  
5 paid it late. Indeed, when they sent us their  
6 October 16th letter, they said that Barclays had paid  
7 the excess collateral or the undisputed amount of  
8 5.08 million. And the reason they said that is  
9 because Barclays paid the 5 million dollars. It then  
10 made a collateral call which is reduced by 80,000.  
11 BDC then funded it. So by the time October 9th  
12 rolled around, Barclays had credited BDC with 5.08  
13 million. That's why, in their contemporaneous  
14 document of October 16th, they said that Barclays had  
15 paid 5.08 million. This was an - - -

16                   JUDGE READ: There's - - - there's no  
17 dispute about whether that was late? Because I  
18 thought there was - - - there was testimony on both  
19 sides of that that there was testimony that there  
20 were - - - that - - - that - - - that Barclays was  
21 told oh, forget about it. It was a technical  
22 difficulty and it was not going to get in until the  
23 8th. And then the person in the BDC said no, I never  
24 said any such thing?

25                   MR. SCOTT: That - - - that's correct, Your

1 Honor. There is a - - - they - - - they had a phone  
2 call on the 7th and BD - - - and Barclays told them  
3 we're having an issue of credit, you know, processing  
4 the payment.

5 JUDGE READ: Is that not important or not?  
6 That's ineffectual?

7 MR. SCOTT: We believe - - - we believe  
8 it's not important in a basis - - - it should not be  
9 a basis of termination or a proper basis of  
10 termination, because under New York law, where a  
11 contract has a termination provision that requires  
12 notice and an opportunity to cure, the party who  
13 claims the breach must give notice of the specific  
14 breach.

15 And I would argue that this case is Exhibit  
16 A as to why these types of provisions should be  
17 enforced by this court. Because there is only one  
18 theory at the time on which BDC tried to terminate  
19 the agreement. They tried to argue that Barc - - -  
20 Barclays' clear e-mails, where we said we disagree  
21 with their call, we show that you owe us, we don't  
22 owe you - - - they're trying to argue that that  
23 wasn't notice of a dispute because some magic or  
24 talismanic words had to be used to invoke the dispute  
25 mechanism provision, Your Honors. They're trying to

1 pretend that they didn't receive notice, notice of a  
2 dispute.

3 And once it became obvious in the discovery  
4 that that was not going to carry the day because  
5 under New York law, the question is whether or not  
6 notice is clear and you have reason to know based on  
7 all the facts and circumstances - - - so under New  
8 York law that clearly is a notice. So what they've  
9 done now is they've switched to three new theories.  
10 We paid short, we paid late, and this "pay first,  
11 dispute later", which BDC itself concedes their  
12 expert invented and created after the discovery - - -  
13 after discovery in this case had commenced. And - -  
14 -

15 JUDGE ABDUS-SALAAM: Well, if we agree with  
16 you, counsel, that there are no issues of fact  
17 regarding whether Barclays violated this agreement,  
18 you also, Barclays, has its own summary judgment  
19 motion. Are there issues of fact on that?

20 MR. SCOTT: We - - - we do not believe so  
21 be - - - because we believe that the e-mails, the  
22 three e-mails that we sent on October 6th and October  
23 7th, clearly notify them of a dispute. Mr. Deckoff,  
24 the principal of BDC, actually testified at  
25 deposition that he thought Mr. Nisbet was trying to

1           dispute. But I guess BDC is taking the position that  
2           there has to be some magic or formal words used.  
3           Well, they now know that under New York law that our  
4           three e-mails constitute a notice of a dispute, and  
5           that's because under New York law it doesn't - - -  
6           it's not based on the subjective intent of the  
7           Barclays employees. And that's because the question  
8           is whether or not the receiver of the notice had  
9           reason to know that the other side was disputing.

10                   JUDGE RIVERA: Do - - - do you have - - -

11                   MR. SCOTT: And in this case they did have  
12           reason to know.

13                   JUDGE RIVERA: Do you have to - - - in  
14           invoking the - - - this dispute process, do you have  
15           to inform the other party of how much you dispute?  
16           Or do you just have to say I dispute?

17                   MR. SCOTT: There - - - there's nothing in  
18           paragraph 5 that says you have to - - -

19                   JUDGE RIVERA: An exact amount.

20                   MR. SCOTT: - - - say how much you're - - -  
21           you're disputing. You simply - - -

22                   JUDGE RIVERA: What about the practice  
23           between the parties?

24                   MR. SCOTT: The practice between the  
25           parties is that sometimes they would send an e-mail

1 saying how much they were returning and in other  
2 cases they would simply return what they believed was  
3 the undisputed amount. And - - -

4 JUDGE RIVERA: And the other side would  
5 understand that that means you're disputing the  
6 remainder?

7 MR. SCOTT: Absolutely. They said to us,  
8 Your Honor - - - and it's - - - it's not disputed by  
9 BDC; on a September 26 conference call, which is in  
10 the record - - - we saved the audio recording - - -  
11 their treasurer told their chief operations officer,  
12 Mr. Nahas, and Barclays employees - - - Mr. Nahas  
13 said how - - - we're in a formal dispute now, how do  
14 we dispute? And what Melinda Muller, the treasurer,  
15 said, is you dispute by sending an e-mail which tells  
16 them how much we owe them. And that day they sent an  
17 e-mail saying we owe you X amount, and they said that  
18 that constitutes notice of dispute. That's exactly  
19 what Barclays did.

20 Now, I think when BDC filed its case, it  
21 wasn't aware that that audio recording existed. And  
22 so that was very damaging evidence to their theory -  
23 - - it was very damaging evidence to their theory  
24 that Barclays hadn't provided an adequate notice of  
25 dispute. And so their expert came up with some new

1 theory which was this "pay first, dispute later".  
2 The Commercial Division correctly rejected that  
3 theory, because it's inconsistent with the plain  
4 language of the agreement. It's inconsistent with  
5 basic canons of contract, contract interpretation.  
6 And it's also inconsistent with three-and-a-half  
7 years of the parties' course of dealing.

8 This court should not affirm a div - - - a  
9 decision interpreting the agreement in a way that  
10 none of the parties - - - none of the parties - - -  
11 believe the agreement operated until the litigation  
12 was commenced. The basic and first canon of contract  
13 construction is the court should search for the  
14 intent of the parties based on the plain language of  
15 the agreement. And here, the plain language to the  
16 agreement, all the delivery of collateral provision  
17 does is it affects the timing. And it overrides  
18 paragraph 4B of the CSA.

19 JUDGE RIVERA: Could I ask, on - - - on - -  
20 - so on Tuesday, October 7th, the morning of Tuesday,  
21 October 7th, everybody goes to their offices. Was  
22 Barclays under the understanding at that point that  
23 BDC did not owe anything to them because BDC had made  
24 this payment the day before?

25 MR. SCOTT: And what's the date, Your

1 Honor, October - - -

2 JUDGE RIVERA: It's Tuesday, October 7th.

3 MR. SCOTT: There was a conference call  
4 incon - - - in - - - in - - - consistent with the  
5 consultation provision. I see my red light is on.

6 CHIEF JUDGE LIPPMAN: Finish your answer.

7 MR. SCOTT: But consistent with the  
8 consultation provision.

9 JUDGE RIVERA: Um-hum.

10 MR. SCOTT: Two employees, one from  
11 Barclays and BDC, had a call on October 6th. They  
12 had a call on October 7th. They were talking about  
13 the collateral calls, and the collateral calls relate  
14 to the same underlying loan. So although BDC argues  
15 that their call was independent of our call, that's  
16 impossible. They're based on the same valuation of  
17 the loans. And during the October 7th call, that is  
18 where the two employees agreed, after BDC had wired  
19 some additional money - - -

20 JUDGE RIVERA: The prior day.

21 MR. SCOTT: - - - that Barclays had to  
22 return 5.08 million.

23 CHIEF JUDGE LIPPMAN: Okay, counselor.  
24 You'll have your rebuttal. Let's hear from your  
25 adversary.

1 MR. SCOTT: Thank you.

2 CHIEF JUDGE LIPPMAN: Thank you.

3 MR. NEWMAN: Good afternoon. May it please  
4 the court, Craig Newman on behalf of BDC Finance.

5 CHIEF JUDGE LIPPMAN: Counsel, are there no  
6 factual issues that remain to be resolved here? It's  
7 kind of a - - - very much a Frick and Frack on every  
8 step of the way here, on every one of these calls on  
9 - - - on every issue, it seems.

10 MR. NEWMAN: Ac - - - actually - - -

11 CHIEF JUDGE LIPPMAN: Is it all - - - is it  
12 all easily answerable without having a trial?

13 MR. NEWMAN: Absolutely, Your Honor. There  
14 is - - -

15 CHIEF JUDGE LIPPMAN: Why?

16 MR. NEWMAN: - - - absolutely nothing - - -

17 CHIEF JUDGE LIPPMAN: What's the bas - - -

18 MR. NEWMAN: - - - here to try.

19 CHIEF JUDGE LIPPMAN: What's the basic  
20 reason why you prevail without going to trial?

21 MR. NEWMAN: The - - - the Appellate  
22 Division had two separate and independent grounds for  
23 its ruling. This court should affirm on either  
24 ground. Let's start the first ground and that is the  
25 plain language of the CSA, that's paragraph 5, the

1           dispute provision that Barclays claims that they  
2           engaged in.

3                         Under paragraph 5 - - - these are express  
4           conditions - - - when you engage in a dispute, just  
5           under the plain language of that agreement, the  
6           disputing party has to do three things. It has to  
7           provide notice of the dispute. It has to consult.  
8           And then it has to pay the undisputed amount, and it  
9           has to pay that amount on time, Your Honor.

10                        JUDGE ABDUS-SALAAM: So which of these  
11           three things that you say Barclays did not do?

12                        MR. NEWMAN: For - - - for purposes of this  
13           argument, let's assume that Barclays dis - - -  
14           provided a notice of dispute and, in fact, consulted.  
15           They didn't - - - and even the trial court doubted  
16           their evidence. But to make it easy, let's take  
17           those two issues off the table. There is still a  
18           third requirement in this standard form agreement  
19           that's used every day in the financial markets. And  
20           that's the requirement to pay the undisputed amount  
21           and to pay that amount on time.

22                        JUDGE PIGOTT: Let me ask you  
23           hypothetically - - -

24                        MR. NEWMAN: That's what you must do to  
25           suspend payment.

1                   JUDGE PIGOTT: - - - about that. Because  
2 you - - - you made the demand for 40 million plus on  
3 the - - - on the 6th. On the 8th, they demanded 20.5  
4 million from you. So how do we decide how much money  
5 is supposed to change hands between the two?

6                   MR. NEWMAN: It - - - it - - - it's very  
7 simple, Your Honor. In this contract each of the  
8 parties were known as valuation agents. And that  
9 means that Barclays had the right to call for  
10 delivery amounts from BDC. BDC, on the other hand,  
11 had the right to call for return amounts against  
12 Barclays. So we each had our own right to call  
13 collateral.

14                   On October 6th, prior to 1 o'clock, we sent  
15 Barclays a notice for demand for return amount for 40  
16 million dollars. That amount was due for transfer  
17 and payment under the plain language of the  
18 agreement. Whether you're looking at the delivery of  
19 collateral clause or paragraph 5, that amount was due  
20 for payment by close of business on the 7th.  
21 Barclays has already judicially admitted in their RFA  
22 responses - - - RFA response number 35 - - - that  
23 that 40 million dollars was never paid. It wasn't  
24 paid on the 7th, never paid after the 7th.

25                   JUDGE READ: They paid 5.08 on the 8th,

1 right?

2 MR. NEWMAN: Correct.

3 JUDGE READ: 5 point - - - 5 on the 8th.

4 MR. SCOTT: Correct, Your Honor. What - -  
5 - what - - - what happened - - -

6 JUDGE RIVERA: Is that - - - is that  
7 towards the 40 million or are they disputing the  
8 whole 40 million? I guess if you dispute the whole  
9 amount, there's no undisputed amount to transfer,  
10 correct?

11 MR. NEWMAN: Well, under the delivery of  
12 collateral clause, Your Honor, Barclays was required  
13 to transfer the entire 40 million dollars by close of  
14 business on the 7th. They fail - - -

15 CHIEF JUDGE LIPPMAN: Whether they disputed  
16 or not?

17 MR. NEWMAN: They failed - - -

18 CHIEF JUDGE LIPPMAN: Whether they disputed  
19 or not?

20 MR. NEWMAN: That is correct, Your Honor.  
21 This is what is known as a "pay first, dispute later"  
22 clause. And - - -

23 JUDGE READ: Where do we find that or how  
24 do we know that?

25 MR. NEWMAN: That's in the delivery of

1 collateral clause. That is in the record, Your  
2 Honor, at 958. And I would draw your attention to  
3 paragraph 6, because in that paragraph - - - and this  
4 is a specifically negotiated document.

5 CHIEF JUDGE LIPPMAN: Do you - - - do you  
6 have the obligation to do the same or that only  
7 applies to them on the - - -

8 MR. NEWMAN: The - - - the - - - the way  
9 the document reads, Your Honor - - -

10 CHIEF JUDGE LIPPMAN: Yeah.

11 MR. SCOTT: - - - is that in the first part  
12 of the delivery of collateral clause, BDC made a  
13 concession to Barclays. They agreed to pay for  
14 trades earlier than they normally would have to. In  
15 the second provision, Barclays agreed to pay return  
16 amounts by the next - - -

17 CHIEF JUDGE LIPPMAN: But if you have a  
18 dispute - - -

19 MR. NEWMAN: - - - business day.

20 CHIEF JUDGE LIPPMAN: - - - with - - - with  
21 them, do you have to - - - if - - - if there's a  
22 dispute on what you're supposed to pay, do you have  
23 to pay first and dispute later?

24 MR. NEWMAN: No, it - - - this - - - this  
25 is a - - -

1 CHIEF JUDGE LIPPMAN: Isn't that unbalanced  
2 that they have to and you don't? You're both big  
3 boys and you're - - -

4 MR. NEWMAN: In - - - in - - -

5 CHIEF JUDGE LIPPMAN: - - - negotiating an  
6 agreement.

7 MR. NEWMAN: Indeed, Your Honor, both of  
8 the parties - - - and that's a fair point. Both of  
9 the parties are very, very sophisticated. Both of  
10 the parties were well counseled when they - - -

11 CHIEF JUDGE LIPPMAN: So why would they - -  
12 -

13 MR. NEWMAN: - - - negotiated this  
14 agreement.

15 CHIEF JUDGE LIPPMAN: - - - agree to such  
16 an uneven - - -

17 MR. SCOTT: Be - - -

18 CHIEF JUDGE LIPPMAN: - - - what seems like  
19 such an uneven - - -

20 MR. NEWMAN: Because - - -

21 CHIEF JUDGE LIPPMAN: - - - arrangement?

22 MR. NEWMAN: Because if we look back to  
23 this court's precedents, we can look to the Jade  
24 Realty case or we can even look to the most recent  
25 term, two cases who came down before - - - after

1 briefing was closed, and that's the Quadrant  
2 Structured Finance case as well as the Duke Ellington  
3 Royalty case. When you have contracts like this,  
4 even though in some cases, like in the Ja - - - Jade  
5 case, the court said, you know, it was a novel  
6 interpretation, the courts have still applied the  
7 plain language of what the parties agreed to.

8 JUDGE READ: So what you're saying, it - -  
9 - it may appear - - - it may appear unbalanced, but  
10 there was some concession somewhere else - - -

11 MR. NEWMAN: Abs - - -

12 JUDGE READ: - - - in the agreement?

13 MR. NEWMAN: It - - - it - - -

14 JUDGE READ: Or we - - - or we should  
15 assume that because the parties were sophisticated  
16 and well counseled?

17 MR. NEWMAN: Your Honor, you don't have to  
18 assume that. You can simply look at the plain  
19 language of the master confirm paragraph 6, because  
20 in the first paragraph BDC made a concession to  
21 Barclays. In the second paragraph, Barclays made a  
22 concession to - - - to BDC. These are big boys. If  
23 - - -

24 JUDGE PIGOTT: Let's - - - let's assume  
25 they - - - that they owe you 40 million dollars. You

1 say they owe you 40 million dollars. They say well,  
2 we think they don't - - - that we - - - all we owe  
3 them is 5, so we'll send them the 5.

4 MR. NEWMAN: If Barclays had wanted to  
5 suspend their right to pay the 40 million dollars - -  
6 - first of all, we would have to put the delivery of  
7 collateral clause - - -

8 JUDGE PIGOTT: Right.

9 MR. NEWMAN: - - - aside to even get to  
10 that argument. But just putting that aside for the  
11 moment and looking solely at paragraph 5, which is  
12 the dispute resolution mechanism, as I said, Barclays  
13 had to cut square corners. Those were all express  
14 conditions because they were subject to - - - there's  
15 paragraph 3, which is the return amount provision, is  
16 subject to paragraph 5.

17 JUDGE PIGOTT: But, all right. So put my  
18 mind at ease. Let - - - I mean why couldn't you make  
19 up a number and say you know what, we got to get out  
20 of this thing. Let's de - - - let's demand 50  
21 million dollars?

22 MR. NEWMAN: Because the - - -

23 JUDGE PIGOTT: And they got to pay it to us  
24 and then when this thing is finally done, we'll give  
25 it back. But right now, you know, we get 50 million



1 requires. These are contracts between sophisticated  
2 parties, and they're form agreements that are used by  
3 financial players - - -

4 JUDGE ABDUS-SALAAM: Are we supposed to - -  
5 -

6 MR. NEWMAN: - - - every day in the  
7 markets.

8 JUDGE ABDUS-SALAAM: Counsel, are we  
9 supposed to put aside the course of dealing between  
10 these two parties? Judge Pigott keeps alluding to  
11 the big event that happened. It's the Lehman  
12 Brothers collapse, right? It's their bankruptcy that  
13 caused all of this. And so everybody was, I guess,  
14 scrambling to try to get out of these - - - what were  
15 now not-so-lucrative contracts. So - - - so are we  
16 supposed to just set aside what you've been doing - -  
17 -

18 MR. SCOTT: The - - -

19 JUDGE ABDUS-SALAAM: - - - for three-and-a-  
20 half years and now rely on what you think you should  
21 have been doing within a two - - - one or two-day  
22 period?

23 MR. NEWMAN: The - - - the course of  
24 dealing here, Your Honor, doesn't matter, because up  
25 until the fall of 2008 when Lehman bankruptcy took

1 place, all of the discussions between the two  
2 parties, there were minor reconciliations. Nothing  
3 ever rose to the level of BDC using its - - - its  
4 authority as a valuation agent and calling that 40  
5 million dollars back.

6 JUDGE PIGOTT: Well, sort this out for me.  
7 Because you - - - when you were talking about the - -  
8 the - - - you said in the records - - - at 908, I  
9 think; I can't even read my own writing - - - you  
10 said this was a closely negotiated document. Then  
11 you said these are standard form agreements.

12 MR. NEWMAN: Because there - - - there are  
13 two different contractual provisions at play here,  
14 Your Honor. And the Appellate Division had affirmed  
15 - - - and - - - and we believe that they should be  
16 affirmed on both grounds. Looking solely at the  
17 standard form provision, that's - - - that's section  
18 5; that's the dispute provision - - - it is clear  
19 because of Barclays own judicial admissions that they  
20 did not satisfy the dispute provision. They did not  
21 pay the undisputed amount and they did not pay that  
22 amount on time. That is in the record in their own  
23 request for admissions - - -

24 JUDGE PIGOTT: And by - - - by on time you  
25 mean within - - -

1 MR. NEWMAN: - - - 38 and 40.

2 JUDGE PIGOTT: I'm sorry.

3 MR. NEWMAN: It was due by - - - by close  
4 of business on the 7th.

5 JUDGE PIGOTT: Doesn't that strike you - -  
6 - maybe - - - your answer's probably going to be no,  
7 but all of a sudden everybody's saying, you know,  
8 within twenty-four hours, you've got to do this. And  
9 by the way, you missed that time so we're calling the  
10 whole thing off.

11 MR. NEWMAN: Not - - - not at all - - -

12 JUDGE PIGOTT: It strikes the - - - the - -  
13 - the layman as rather strange that when you're  
14 dealing in multimillion-dollar transactions for  
15 three-and-a-half years, all of a sudden, you know,  
16 the clock on the wall determines whatever - - - what  
17 happens.

18 MR. NEWMAN: That - - - not at all, Your  
19 Honor. I think actually the contrary. It would be  
20 unfair and would contravene the policy and law of  
21 this court.

22 JUDGE ABDUS-SALAAM: So, counsel, are you  
23 saying that if Barclays had paid the 5,080,000  
24 dollars by close of business on the 7th, we would not  
25 be here?

1 MR. NEWMAN: If Barclays had done  
2 everything that paragraph 5 requires, had they  
3 provided a notice of dispute - - -

4 JUDGE READ: Well, I thought we were going  
5 to assume those first two things.

6 MR. NEWMAN: Had they consulted and had  
7 they paid the undisputed amount on time, which they  
8 judicially admitted they failed to do, which meant  
9 they had no right to withhold transfer.

10 JUDGE PIGOTT: Is that the 5,080,000?

11 MR. NEWMAN: If - - - I'm sorry, Your  
12 Honor?

13 JUDGE PIGOTT: Is that the 5,080,000  
14 dollars?

15 MR. NEWMAN: Yes.

16 JUDGE PIGOTT: Okay.

17 JUDGE READ: So your answer to Judge Abdus-  
18 Salaam is yes?

19 MR. NEWMAN: Is if they had done all three  
20 of those things, we admittedly were not focused on  
21 the delivery of collateral clause at that time.

22 JUDGE PIGOTT: So we're talking about a  
23 80,000-dollar dispute?

24 MR. NEWMAN: No, Your Honor. We are - - -

25 JUDGE PIGOTT: And - - - and - - -

1 MR. NEWMAN: - - - at a 40-million-dollar  
2 issue, because our collateral call was for 40-million  
3 dollars. But to get back to your question, had  
4 Barclays followed the contract and had they made the  
5 undisputed amount payment on time, which they've  
6 already conceded they haven't, it is likely we would  
7 have gone to market as we're required to do - - -

8 JUDGE RIVERA: But could you - - -

9 MR. NEWMAN: - - - by 1 o'clock on - - -

10 JUDGE RIVERA: Counsel.

11 MR. NEWMAN: - - - Wednesday the 8th.

12 JUDGE RIVERA: Counsel. Counsel. Can you  
13 clarify something? I'm a little confused.

14 MR. NEWMAN: Sure, Your Honor.

15 JUDGE RIVERA: It's your position that  
16 paragraph 5 in section 6 can be harmonized or is your  
17 position that section 6 supersedes paragraph 5?

18 MR. NEWMAN: They can be harmonized, Your  
19 Honor.

20 JUDGE RIVERA: Okay. So harmonize this for  
21 me.

22 MR. NEWMAN: It is - - -

23 JUDGE RIVERA: If one section says - - -

24 MR. NEWMAN: It - - - it - - - it - - -

25 JUDGE RIVERA: - - - all you have to do is

1 pay the undisputed amount and you argue - - -

2 MR. NEWMAN: It - - -

3 JUDGE RIVERA: - - the other side says you  
4 have to pay it all off.

5 MR. NEWMAN: It - - - it - - - it comes  
6 down to something very simple.

7 JUDGE RIVERA: What's that?

8 MR. NEWMAN: And that is this is a "pay  
9 first, dispute later" clause. And what happens is -  
10 - -

11 JUDGE RIVERA: Pay first everything?

12 MR. NEWMAN: Pay first to the return  
13 amount, so it's the 40-million dollars.

14 JUDGE RIVERA: So pay first everything.  
15 Okay. But that - - - that's what I'm saying. If  
16 paragraph 5 says you pay the undisputed amount, how  
17 do you harmonize this?

18 MR. NEWMAN: Because paragraph - - - the  
19 not - - - the delivery of collateral clause says  
20 notwithstanding anything in the CSA to the contrary.  
21 It doesn't say not withstanding paragraph 4B, the  
22 transfer timing provision. It's - - -

23 CHIEF JUDGE LIPPMAN: And notwithstanding  
24 means pay first - - -

25 MR. NEWMAN: Dispute later.

1 CHIEF JUDGE LIPPMAN: - - - dispute later?

2 MR. NEWMAN: And the important point, Your  
3 Honor, to remember is that once they make - - - had  
4 they made that 40-million-dollar transfer, Barc - - -

5 JUDGE RIVERA: Then you're saying it  
6 supersedes the third requirement as opposed to all  
7 three?

8 MR. NEWMAN: They would - - - if Barclays  
9 had transferred the 40-million dollars, they would  
10 have - - - they would have retained every right they  
11 had to dispute - - -

12 JUDGE RIVERA: But that's not - - -

13 MR. NEWMAN: - - - this call.

14 JUDGE RIVERA: I'm sorry. That's not my  
15 que - - - I'm trying to understand your explanation  
16 of how you harmonize paragraph 5 in section 6. And  
17 it sounds to me like you're saying everything in  
18 paragraph 5 applies except the section that says you  
19 only have to pay the undisputed amount. Which,  
20 frankly, I don't know how either of you knew what it  
21 was since no one seems to articulate what it is. But  
22 let's hold that for a moment. But section - - -  
23 you're saying so section 6 supersedes that last  
24 requirement because section 6 says you - - -

25 MR. NEWMAN: Says "notwithstanding".

1 JUDGE RIVERA: - - - have to pay  
2 everything?

3 MR. NEWMAN: And - - - and - - - it says  
4 notwithstanding anything.

5 JUDGE RIVERA: Notice to try to resolve it  
6 but you must pay everything.

7 MR. NEWMAN: And - - - and - - - but the  
8 practical consequence is - - -

9 JUDGE RIVERA: And only one side must pay  
10 everything. So does that mean that that BDC would  
11 pay the undisputed amount because it doesn't  
12 supersede?

13 MR. NEWMAN: If - - - if - - - if BDC was  
14 in a dispute situation, it would pay the undisputed  
15 amount. But the important point to - - -

16 JUDGE RIVERA: And in a - - - I'm sorry.  
17 And in a disputed situation, Barclays would have to  
18 pay the whole thing?

19 MR. NEWMAN: They - - - they would have to  
20 pay the return amount and the only consequence of  
21 that, however, is during the pendency of the dispute  
22 - - - and remember, these are on very, very tight  
23 time fuses, these are very carefully calibrated  
24 times. What it means is that BDC would simply hold  
25 the return amount for between forty-eight and

1           seventy-two hours. That is the consequence. So  
2           during the pendency of the dispute, BDC would hold  
3           that 40-million dollar return amount. If the parties  
4           had gone to market and it was recalculated, the  
5           market movements changed, there - - - there would be  
6           a recalculation and they - - -

7                        CHIEF JUDGE LIPPMAN: But that's not such a  
8           minor consequence, though, right?

9                        MR. NEWMAN: Of a holding - - -

10                      CHIEF JUDGE LIPPMAN: It's not such a minor  
11           consequence for - - - for you to be holding their 40-  
12           million dollars, is it?

13                      MR. NEWMAN: It - - - it - - - given the  
14           size of this transaction, Your Honor, and the relat -  
15           - - and the size of a 1.5-billion-dollar swap, it's  
16           relatively insignificant, because it's only for  
17           between forty-eight and seventy-two hours. And the  
18           more important point, though, is at this - - -

19                      JUDGE RIVERA: You can make a lot of money  
20           or lose a lot of money in forty-eight hours.

21                      MR. NEWMAN: Well, that - - - that's why -  
22           - -

23                      JUDGE RIVERA: As many people did.

24                      MR. NEWMAN: That's why you have to stick  
25           to the time frame.

1 JUDGE RIVERA: Um-hum.

2 MR. NEWMAN: Because these are fast-moving  
3 markets and every day, you could get millions of  
4 dollars in - - - in fluctuation. But the important  
5 point is - - -

6 JUDGE RIVERA: Doesn't that make it even  
7 more striking that only one side would have to pay  
8 everything?

9 MR. NEWMAN: Not - - - not at all, Your  
10 Honor. I think this is totally consistent with this  
11 court's decision in Jade and in - - - in the  
12 Structured Products case last term. But the - - -  
13 the final point I want to make, Your Honor, is that  
14 this money, the 302,000,000 dollars that's being  
15 wrongfully held by Barclays, this is not the money  
16 that belongs to some hedge fund mogul. This is money  
17 that belongs to BDC's investors. These are public  
18 and private employee and retirement plans. These are  
19 ordinary people, and Barclays has been wrongfully  
20 holding this money - - -

21 CHIEF JUDGE LIPPMAN: Okay, counsel.

22 MR. NEWMAN: - - - for more than six years  
23 now.

24 CHIEF JUDGE LIPPMAN: Thanks, counsel,  
25 appreciate it.

1 MR. NEWMAN: Thank you very - - - thank you  
2 very much, Your Honor.

3 CHIEF JUDGE LIPPMAN: Counselor, is it a  
4 big deal that they hold 40-million dollars for forty-  
5 eight to seventy-two hours?

6 MR. SCOTT: Yes, Your Honor, because  
7 Barclays - - -

8 CHIEF JUDGE LIPPMAN: Why is it a big deal?

9 MR. SCOTT: Barclays was the only secured  
10 party here. We were the party - - - party providing  
11 the finance. We were the ones who needed to be  
12 protected by the - - - by the collateral that was  
13 posted. Your Honor asked, why did this all happen?  
14 It happened because the day that the BDC sent its  
15 collateral call, it changed the level by which it was  
16 valuing the loans to the midlevel. We had always  
17 used bid, and in order to get some money back, they  
18 changed the level after three-and-a-half years of  
19 using bid. That's why the only reason they were  
20 entitled to send their collateral call, and that's  
21 why within one minute BDC's head of the desk said we  
22 don't agree with this call. You're not entitled to  
23 any money. In fact, we call you for money because  
24 the prices dropped again. So that's why this all  
25 happened.

1           I want - - - I just want to make two final  
2 quick points, Your Honor. They say that they're  
3 entitled to terminate now because we didn't pay  
4 80,000 dollars in connection with a 5-million-dollar  
5 collateral call in connection with a billion-dollar  
6 transaction. And they say that because they say that  
7 the - - - in this court they make the argument that  
8 the notice in cure provision in paragraph 7.1 doesn't  
9 apply.

10           But what did BDC argue to the Commercial  
11 Division in making their summary judgment motion? If  
12 you look at record page 548, they argued that if you  
13 pay the incorrect undisputed amount, it's a - - - it  
14 - - - it is an event of default under 7.1, and thus  
15 you're entitled to the notice in cure.

16           And so, again, they're switching their  
17 positions to the convenience of their litigation  
18 positions, Your Honor. That's all that's happening  
19 here. 7.1 applies to - - - and so Barclays had two  
20 additional days to pay the 5.08 million. We paid the  
21 5 million and we credited them 80,000. When they  
22 wrote their October 16th letter, they said we paid  
23 them the 5.08 million.

24           JUDGE RIVERA: And - - - and so do you say  
25 there's a way to harmonize paragraph 5 in section 6

1 or - - -

2 MR. SCOTT: Absolutely, Your Honor. I  
3 believe - - -

4 JUDGE RIVERA: There is.

5 MR. SCOTT: - - - that it can be  
6 harmonized. For three-and-a-half years, no one  
7 believed that the delivery of collateral provision  
8 overrode paragraph 5. And I'll end on this point.  
9 This is actually the point I wanted to end on was  
10 that to demonstrate the absurdity of their position,  
11 paragraph 13 contains a subsection, paragraph 13(f),  
12 and we note this in our papers. You make an election  
13 as to how parties resolve disputes. On the same day,  
14 they say that we executed the delivery of collateral  
15 provision that supposedly overrode our rights to  
16 dispute even though we're the only secured party, the  
17 parties elected to use paragraph 5.

18 JUDGE RIVERA: Okay.

19 MR. SCOTT: That makes no sense, and that's  
20 why they only came up with theory a year-and-a-half  
21 into the litigation, because they understood Barclays  
22 had given proper notice. And because of that  
23 Barclays - - - they could not have terminated  
24 Barclays.

25 JUDGE ABDUS-SALAAM: Counsel, you say it's

1 a theory, but if you read the plain language of the  
2 provision, as counsel for BDC suggested, could you  
3 say that it's not - - - it is what it says it says,  
4 that you have to pay in a - - -

5 MR. SCOTT: I don't believe you - - -

6 JUDGE ABDUS-SALAAM: - - - dispute?

7 MR. SCOTT: I don't believe you can, Your  
8 Honor, because if you read paragraph - - - that's  
9 paragraph B - - -

10 JUDGE ABDUS-SALAAM: Yes.

11 MR. SCOTT: - - - of the delivery of  
12 collateral provision, it uses the defined term  
13 "return amount". Return amount is in paragraph 3B,  
14 and it says it's subject explicitly to paragraph 5.  
15 And on the day they executed the agreements, they  
16 elected, under 13(f) of the CFA - - - of the CSA to  
17 resolve disputes through paragraph 5.

18 This is a post hoc justification that the  
19 Commercial Division and the two dissenting justices  
20 rightfully rejected. This court should reject it as  
21 well. And not only should it reverse the Appellate  
22 Division and reverse the summary gra - - - grant to  
23 BDC, it should enter it to Barclays. Because at the  
24 time they terminated the agreement, they left - - -  
25 they left Barclays with a billion dollars in loans

1           that were declining in value and 300 million dollars  
2           in losses. That's why we kept the money.

3                       CHIEF JUDGE LIPPMAN: Okay, counsel. Thank  
4           you both.

5                       MR. NEWMAN: Thank you, Your Honor.

6                       CHIEF JUDGE LIPPMAN: Appreciate it.

7                       (Court is adjourned)

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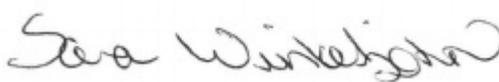
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of BDC Finance L.L.C. v. Barclays Bank PLC, No. 5 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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