IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

WORLD MARKET CENTER VENTURE, LLC and RELATED WORLD MARKET CENTER LLC,	:	
Plaintiffs,	:	
vs.	:	Civil Action No. 5131-VCL
NAMA HOLDINGS, LLC	:	
Defendant.	:	

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Chancery Courtroom No. 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Tuesday, September 4, 2012
2:00 p.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

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ORAL ARGUMENT ON MOTION TO COMPEL AND THE COURT'S RULING

APPEARANCES:

KEVIN M. COEN, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
-and-
STACIE E. TOBIN, ESQ.
of the Maryland Bar
DLA Piper LLP (US)
for Plaintiffs

STEPHEN C. NORMAN, ESQ.
DAWN M. JONES, ESQ.
Potter, Anderson & Corroon LLP
-and-
RONALD C. COHEN, ESQ.
of the California Bar
Sidley Austin LLP
for Defendant

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THE COURT: Welcome, everyone.

ALL COUNSEL: Good afternoon.

THE COURT: Mr. Cohen, how are you, sir?

MR. COHEN: I'm fine. Thank you.

THE COURT: There are two Cohens. There you go. All right.

MR. COEN: Good afternoon, Your Honor. Kevin Coen from Morris Nichols on behalf of the plaintiffs. With me at counsel table is Stacie Tobin from DLA Piper.

THE COURT: Welcome back.

MS. TOBIN: Good afternoon, Your Honor. Thank you.

MR. COEN: With Your Honor's permission, Ms. Tobin will be speaking today on behalf of plaintiffs.

THE COURT: All right.

Mr. Norman, how are you?

MR. NORMAN: Good, Your Honor. How are you?

THE COURT: I'm doing well.

MR. NORMAN: I would like to introduce Mr. Ron Cohen from the Sidley Austin firm. He is

going to be making the argument on behalf of NAMA.

THE COURT: Welcome back.

MR. COHEN: Thank you, Your Honor.

MR. NORMAN: Does Your Honor have a preference? We have two motions to compel. Do you have a view as to how you want to do this?

THE COURT: I'm happy to go with -- have you all discussed it? Do you think one takes priority over the other?

Ms. Tobin, do you have strong feelings?

MS. TOBIN: I do. Mine was the earlier filed motion, Your Honor.

THE COURT: We will give you the lead then. I have to tell you it seemed like both of you were wallowing in discovery intransigence. Since both sides seem to be taking the low road, I don't know if there is any reason to go first, but I am happy to hear your's first.

MS. TOBIN: Thank you.

MR. NORMAN: Thank you, Your Honor.

MS. TOBIN: Your Honor, I do have one preliminary matter that I would like to bring to the Court's attention that relates to the pleading in this

case. As you know in Your Honor's ruling on the Rule 60 motion, just over a year ago, you affirmed the prior ruling on the plain meaning of the 2007 Delaware order but --

THE COURT: I stood by it. I don't think I have the power to affirm. Well, I guess I have the power to affirm Master's reports. But you're right. I stood by it. I did not change my mind on it.

MS. TOBIN: Fair enough. You did grant nominal relief on Count II of its counterclaim, which is for the breach of the implied duty for the implied covenant of good faith and fair dealing. That count is the only count that's active or open in this case at this moment.

In looking at the plaintiffs' counterclaim, it appears that that counterclaim has been brought against only Related World Market Center, and so my appearance today is on behalf of Related World Market Center, which I believe is the only defendant in the case. To the extent that any of the discovery issues relate to World Market Center Venture, we will withdraw any motion we made on behalf of that entity, and our motion to compel relates only

to Related World Market Center.

We are here on a fundamental dispute that arises in the wake of Your Honor's ruling on the Rule 60 motion. And really the dispute is what obligation does NAMA have at this juncture of the case to state its contentions in the matter and identify the facts that support its contentions. And that dispute arises here in a somewhat different context because it arises after the motion for relief was granted in part.

Related issued interrogatories in this case because it was unclear as to what the scope of NAMA's contentions in the matter are. As you will remember, in the hearing, there was discussion of a particular theory that would support -- or at least theoretically or potentially support the breach claim.

And Your Honor, as I understood the ruling, permitted NAMA to conduct discovery in relation to that theory. And the theory, as I understood it, based on colloquy between you and Mr. Cohen and his argument, was that there may have been some additional duty imposed on Related as a result of the fact that Mr. Samson and Mr. Kashani were dismissed from the arbitration. We believe,

respectfully, that there is no such claim, but we understood what Your Honor's ruling was and we understood that you agreed to allow NAMA the opportunity to conduct discovery on that issue.

When we issued interrogatories, we asked NAMA to state what its contentions in the case are after Your Honor's ruling, to identify the facts that support those contentions, and to identify documents that support or relate to those contentions. And what we got were discovery responses that essentially said, "Go look at our pleadings and go look at our appellate briefs." And we believed that was insufficient to enable us to determine what the contentions are that NAMA makes at this point in time in light of your ruling on the plain meaning. And so we asked NAMA's counsel to supplement or amend their answers and disclose what their contentions are, and they refused to do that in answers to interrogatories.

Now, in their reply brief in support of their own motion to compel, they make a number of statements about the fact that their claim is based on the dismissal of Samson and Kashani from the arbitration. If that's so, so be it. We should be right back where we were a year ago, except that

Related is entitled to have that in a sworn answer to an interrogatory as opposed to a brief from counsel. And we are also entitled to be told that's the sole basis for their claim. And if we can just get that simple response to our reasonable interrogatories, then we can have discussions about how to conduct discovery related to that claim.

Unfortunately, they have been unwilling, for reasons that aren't entirely clear, to provide us with that simple sworn answer to an interrogatory.

THE COURT: What do you mean, "You are entitled to be told that it's the sole basis for their claim?"

MS. TOBIN: If that's all they're basing their current claim on, then that's the scope of discovery that we should be engaged in. I understand --

THE COURT: You don't mean that they can't have more than one theory, do you?

MS. TOBIN: I do not. I just want to know, if there is more than one theory, what are the other theories.

THE COURT: They even conceivably

could have a couple good theories now, and in the course of the discovery, legitimately related to exploring those theories, come across something that gives them another theory.

MS. TOBIN: I agree. And if that happens, their obligation, of course, is to supplement their answers to interrogatories. No objection to that.

What they're not entitled to do is evade disclosing their theories as a tactic for getting as broad a discovery scope as they can possibly get so that they can then try to fish around to see if they can find another theory or to see if they can get information or documents that they might use in the New York action that's still pending. Given the history that we've got here, I think that's what's happening, one of those two things.

So our perspective, supported by the rules and the law, is that they should identify what their contentions are. We understand we will be engaged in discovery on those contentions, but they're not entitled to an unlimited scope of discovery that is completely detached from whatever contentions they have.

THE COURT: What is the status in New York?

MS. TOBIN: The status in New York, as I understand it, is discovery is open. But, as far as I've heard, very little has been happening. I did hear that there was a status conference last week. I am not aware of whether there are any pending requests for discovery or depositions taken, but the case is open. And as you know, Related is no longer a party in that matter so I don't get regular service of pleadings and the like.

You know, I heard you say that we have been wallowing intransigence. I understand why you would reach that conclusion. But the reality is that we have been facing, for years now, discovery requests and demands that consistently go well beyond the pleadings in whatever case it is that we are trying to defend. And, unfortunately, we have learned that no good deed goes unpunished and that we need to restrict discovery and proceedings to the matters that have been pled.

And here, many of the matters that have been pled are now foreclosed by Your Honor's ruling on the plain meaning. And so if we have a

single theory here, which is the theory that was discussed in the hearing, that is a very reasonable scope of discovery. And it seems to me that once that theory is disclosed and we have a verified answer to an interrogatory telling us what the gap is in the contract, and why the implied duty fails that gap, and what facts there are to suggest that the implied duty should fill that gap, then we can go forward. And we can craft a scope of discovery that says NAMA is entitled to communications about the dismissal of Samson and Kashani from the arbitration.

THE COURT: That's the thing. See, some of this stuff was going to be subject to discovery regardless, right, like communications about the dismissal of Samson and Kashani from the arbitration?

MS. TOBIN: That's what I thought. That's what I thought at our hearing. But I can't reach that conclusion anymore because their answers to interrogatories don't even incorporate the transcript of that hearing.

THE COURT: Well, this is going to blur a little bit into your responses. You guys didn't say that in your responses. You didn't say,

"Well, some of this stuff is going to be subject to discovery and easily gotten. Therefore, we will give it to you." I mean, what you did was not give them anything.

MS. TOBIN: And so allow me to address the chronology and timing of how events in discovery here came to pass. Plaintiffs issued their document requests to my client as broad -- literally as broad as they could be. They asked for everything related to the underlying disputes that gave rise to the 2009 -- 2006 litigation -- excuse me. They asked for everything related to the New York litigation, to the California arbitration, broad, broad scope.

We looked at their requests. We objected to many of them because of over breadth. We agreed to produce those things that were related, it seemed, reasonably related, to the theory of the case as expressed at the hearing last August. In the meantime, we served our interrogatories to them, and the answers we got back were the evasive answers that don't identify what they're contending in this case.

So it was literally impossible to determine from their answers whether they were standing by the theory that Your Honor articulated

really for them in the hearing last August, because they didn't refer to it. They didn't incorporate the transcript from the hearing. They merely said, "Look at our pleadings."

And so from that perspective, we weren't even certain anymore that the theory that was discussed last August is the theory that they intend to pursue, and it was for that reason that we said to them, "Until we know what your claim is, we can't even determine that the things that we thought we were going to provide are indeed related to what you think this case is about." We have asked repeatedly for them to tell us whether that's their claim.

Now, as I said, in their reply to their motion to compel, they make several illusions to the fact that is their claim. If that's the case, then there's no problem, and we are perfectly happy to produce the documents that we expected we would produce in light of Your Honor's ruling at the hearing last year. But so far they haven't truly adopted that theory as their contention in this case.

THE COURT: Well, I am having trouble finding the copy of your all's responses that I marked up. Had you all done that or had you all produced the

documents that were obviously covered, then I would think you would have the high ground. And had you made specific objections, like, we are not going to give you this because it doesn't relate or it goes to the underlying case, but we are going to give you this because it's communication about the final decision, that would have been constructive.

But instead, what I have from you -- and I was all ready to jump up and down and yell at you for it, but then your friends on the other side make the same kind of ridiculously broad and non-specific general objection that they then incorporate in their brief -- in their specific answers. So I couldn't really yell at you for it.

You didn't really tell them anything. You didn't give them anything. So remind me where -- because I can't lay my hands on this -- where is the exhibit that has your responses to it? Maybe this is it. Yeah, it's D. So if you go through Document Request No. 1. Some of this stuff is -- I would have thought -- pretty clearly fair game. Now, you might have gone back and said, "No. We are not giving you internal communications, but we will give you communications." How -- why isn't one something that

you guys would have just gone ahead and produced as fairly culpable?

MS. TOBIN: Sure. Are you looking, Your Honor, at Document Request No. 1, subpart Romanette (i), just to make sure we are on the same page?

THE COURT: I am.

MS. TOBIN: I agree that there is a piece of that category that is discoverable assuming that the claim is, as it was offered to be a year ago. And the piece that is discoverable is communications related to the disputed amounts and perhaps to the NAMA 12.18(g) notices up to a certain point.

The concern that I had about this category is their use of the language "the disputed items," which they define to mean the underlying disputes that led to the 2006 litigation and the arbitration.

THE COURT: But see that's the great thing about making an objection. If an objection is made that actually tells the other side what you are doing, then, it's a real objection. So in your response to Request No. 1, what you said is, "Plaintiffs object to this request on the ground that

it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence, and instead appears calculated to obtain evidence for use in other proceedings and/or against other parties, which in some cases this Court and other courts already have refused. Plaintiffs will not produce documents in response to this Request as it is currently drafted, but will meet and confer with NAMA in an effort to clarify or narrow this Request."

That says nothing. All that says is we are not giving you stuff because we think it's overly broad, for reasons we won't say why, unduly burdensome, for reasons we won't say why, and not reasonably calculated to lead to the discovery of admissible evidence, when we know as to parts of it, as you just conceded, that's wrong. Parts of it obviously are calculated to lead to the discovery of admissible evidence.

MS. TOBIN: If the claim is as they stated --

THE COURT: Yes.

MS. TOBIN: -- as they stated at the hearing, but we still don't know that from their

answers to interrogatories.

THE COURT: So what I have is a completely unproductive response that, again, is partially flat wrong. And, you know, there is no way to tell, like, you go back to -- let's say what -- you just said your beef was how they described the disputed amount. So let's go back.

General objection number one. "Plaintiffs object to the Requests, including the "Definitions" and "Instructions" contained in the Requests, to the extent that they seek to impose on Plaintiffs any obligation or duty greater than that imposed by the Court of Chancery Rules." Where in that does it say what you just told me?

MS. TOBIN: Your Honor, Mr. Norman and I had multiple -- two meet and confers.

THE COURT: See Mr. Norman shouldn't have to -- what Mr. Norman did was he served you a request. And then your job, when framing objections in response to that request, is to say what you're going to do and not what you are not going to do. In other words, what you are objecting to. It's not Mr. Norman's job to then have to write a series of letters just to figure out what you are saying. That

is discovery gamesmanship, and it maybe --

Look, as I say, I was quite perturbed by the type of general objections and lack of specificity that was involved in this case. But then I looked at your friends and they made exactly the same type of absolutely non-substantive, inscrutable, general objections that do nothing but make associates furious because they have to write ridiculous discovery letters saying things like, "Do you really mean this," or, "What do you really mean by this?" So that's what I mean you guys are both wallowing in discovery intransigence. I actually wish one of you had taken the moral high road and actually done objections well, so that I could wallop the other one for these silly, general objections.

What does that mean? What does objection number one mean?

MS. TOBIN: What it means is that we could not connect the discovery request for all of these documents relating to the disputed items to the claim that was offered.

THE COURT: That's what it means to say "imposed on plaintiffs any obligation or duty greater than that imposed by the Court of Chancery

Rules?"

MS. TOBIN: I'm sorry.

THE COURT: That's what it means when you said that, "You object to the request to the extent that they seek to impose on plaintiffs any obligation or duty greater than that imposed by the Court of Chancery Rules?"

MS. TOBIN: Rule 26 provides that the scope of discovery shall be limited to matters that are relevant to the claim at issue. And because of the answers to interrogatories that we have in this case, we are still uncertain as to what is the claim at issue. And so there is no way for us to determine whether the information that's being requested, in this long laundry list of 19 subparts of document request number one, is, in fact, related or relevant to the claim at issue.

THE COURT: Well, can you understand why that comprehensible and articulate multi-phrase answer did not immediately spring to mind from the phrase "any obligation or duty greater than that imposed by the Court of Chancery Rules," which happens to be a rather boilerplate objection that people just seem to throw in any response just because that's what

they've always done?

MS. TOBIN: I can, Your Honor.

THE COURT: So -- okay. We can go through a lot of this stuff, but you know, I just -- even where you said you would produce documents, I mean, like, we get to request number three, "Subject to and without waiving any of the foregoing General Objections, Plaintiffs will produce non-privileged documents responsive to this Request to the extent such documents exist and are within their possession, custody, or control." But you didn't.

MS. TOBIN: Because when we got their answers to interrogatories we were no longer certain as to whether they were relying on the claim that they had expressed to you in the hearing because they refused to endorse that as their statement of the case. So in light of their refusal to state what the case was about, we were no longer able to say that the documents that they were asking for and that we intended to produce were, in fact, relevant to the subject matter. Because when we answered the interrogatories, we relied on the statements at the hearing about what this case was about, and what we got, in response, was an evasion and a refusal to

embrace that as the statement of the case.

THE COURT: All right. Let me hear from your friends.

MR. COHEN: Thank you, Your Honor.

Let me start by, frankly, apologizing at the form of our responses, including the objections, was not what we intended or helpful to the Court. But the big difference, however, between our responses and the plaintiffs' responses is that in terms of the document request, as to virtually every one, we agreed to produce responsive documents and we have already engaged in the production. So while we did have objections, the bottom line on our responses was that we were producing, without objection, and in fact, we have started that production already.

THE COURT: Again, it's one of these things that lawyers love to do, but it's part of what makes the practice of law miserable. None of these objections actually say anything. So you guys have to go through three rounds of letter campaigns and two meet and confers just to find out if anybody actually meant anything by the general objection.

MR. COHEN: Right.

THE COURT: It's silly.

MR. COHEN: In fact, that's what happened here. You're absolutely right. It's a frustrating process. It seems like it's a waste of time for everybody.

THE COURT: It may happen for other people. I don't want it to happen for me. I actually want you people to make objections that mean something, if you are going to make objections, and actually stand by them, if you think they're right, and then resolve them. Look, you have good points in two about arguments not being raised in the meet and confer. I believe in that too.

But, you know, why on your interrogatory responses you guys started to give the germs of your theories in the argument in front of me, why can't you flush these out based on what you believe to date?

MR. COHEN: Your Honor, I think we more than started. Because of the posture of the case at the time, summary judgment having been granted, and the burden on us to convince you that you should open the record and vacate the summary judgment order, we laid out in every bit of detail we had, not only our theory, but the evidence that supported that theory.

We put in every document that we uncovered on our own that supported our theory. We laid out in more detail than anybody ever gets at the beginning of discovery what our theory was. They weren't under any illusion as to what that theory was, and Your Honor didn't just recognize one possible theory when we had the hearing in front of us. In fact, there were three prongs to the theory.

THE COURT: I counted three.

MR. COHEN: Right. Number one was the gap filler argument that, as you said, no one would have thought had they thought to negotiate that what these turkeys pulled would actually end the dispute. That was prong number one.

Prong number two, this Court recognized that we had an argument that willful misconduct could violate the implied covenant of good faith and fair dealing, particularly since the contract itself accounted for liability in cases of bad faith.

And third, the Court recognized that their claim of some sort of common interest was potentially incompatible with their duties as an escrow, and an escrow doesn't engage in a common

interest with one of the parties to the detriment of the other party, and that that was another problem of what we were pursuing.

All of that was recognized in the hearing before Your Honor. All of that was the predicate for us getting discovery into those areas, and we went back and immediately served very narrowly, tailored document requests that went right to the heart of that. And when they raised the objection, which we are still hearing today, that, "Oh my goodness, you are actually seeking all of the information relating to the underlying disputes," there is nothing in here that says anything about underlying disputes, not in the definitions, not in the document requests themselves.

And in that meet and confer process, we immediately disabused them of that myth. We told them explicitly we don't want the documents related to the underlying dispute. We want to know when you talked to each other about the fact that there were these disputes.

THE COURT: Why don't your interrogatory responses say, in marginally more detail than what you said at Page 16 of the transcript, you

know, the World agreement and the discussion -- and here is one key thing that I think you need to tell them, which I don't even know -- and I didn't go back and honestly read your appellate briefs. I don't know if you said this stuff with the Supreme Court or not. But one way to make an implied covenant claim is to say that you have these express provisions of the agreement and when you read the agreement as a whole, it implies this additional obligation.

Another way to say it would be, back in the day the facts surrounding the negotiation were such that, and so and so said this to somebody else, and the context was such that reading the agreement in that context it was obvious to everyone that we meant X. As far as I know, you could be doing either.

MR. COHEN: Or both.

THE COURT: Or both. I just don't know. So, like, you know, the first one I found I start with Page 16 where you are talking to me and you say, "It matters a lot that they got out in bad faith because the parties could not have contemplated that the rights under 12.18(g) could be eviscerated, the escrow blown up, the monies released by parties who get out of the arbitration in bad faith." That to me

is an implied covenant theory.

But I don't get why you couldn't say in your interrogatory response, "We have multiple theories. Discovery may show more, but the first of these theories is that the World agreement talked about dismissal. Nobody at the time discussed dismissal where parties obtained their dismissal through bad faith. Had the parties thought to negotiate about whether somebody could create a release event by being dismissed through their own bad faith, the parties obviously would have said heck no." And then tell them we rely -- we base this on the structure of the agreement. Or if you have something more, go on and tell them that.

I don't know if you were the lawyer who negotiated this, but let's just hypothetically -- obviously, you would be a fact witness. Let's say Mr. Jones. During the negotiations, Mr. Jones actually said to Mr. Smith of Related, "You know, I have a lot of faith in arbitration. Arbitration is always on the up and up. So we won't have any problem with this." Thereby evidencing if anybody had raised the possibility of the bad faith issue, they never would have agreed with this. That's theory number

one.

Why can't you say that? Why didn't you say that?

MR. COHEN: Well, in part, Your Honor, just bringing the Court back to the agreement itself, 12.18 is an agreement between Related and Network to form World Market Center Venture. We, NAMA, are not parties to that agreement. We are third-party beneficiaries under 12.18. We had some tangential knowledge of the negotiations of 12.18, including documents that we produced to them, but we weren't the negotiators of it.

So to understand -- clearly the purpose of it was plain from everything else you said, the context of the whole agreement. The point of 12.18, which has now been eviscerated, et cetera, but that sort of thing -- the discovery into what the parties actually said to each other when they were negotiating it is mostly in their possession not ours.

THE COURT: Do you have some inkling about what went down though?

MR. COHEN: Yeah. The inkling is mostly because the purpose of the provision makes no sense. It actually just makes no intrinsic sense if

you can eviscerate it in such a bad faith manner that tells me that just on its face no one would have expected that result. No one would have negotiated that, and certainly had they thought about it, they would have negotiated around that.

THE COURT: That's a great interrogatory response. That's a great one.

MR. COHEN: Your Honor, I will tell you that in our view -- and maybe that you are going to order us to go back and do interrogatories --

THE COURT: I am. Yeah, I am.

MR. COHEN: Okay. In our view, having laid that out in the briefs because of the posture of the case, we had to tell you our theory from A to Z. We had to put in all the evidence we had uncovered in support of that theory in order to convince you that we had enough to go forward. At that point, we laid out everything we knew, and to get an interrogatory response back that essentially asks us for more and withholds the documents on which we would base that interrogatory answer, it would put us in an endless loop here. We told you everything. There is nothing more to tell you. This is it.

THE COURT: But the endless loop also

created an escalation of mutual frustration. We are not telling you anything until you tell us. All of a sudden, you know, we have something that is usually described with, you know, more bathroom oriented terminology.

You go to Page 17. I think you have a second implied covenant argument, and that's that there's never been an adjudication. You know you said, "Number one, there has never been an adjudication; number two, the only way they avoided it was getting out in bad faith." I don't know -- again, if you are going to stand by these or if they are really supported -- I'm not suggesting there's merit to them. But when I look at this, this is the type of thing that you easily could have articulated in an interrogatory response which is to say, "The implied agreement -- the agreement implied that their actually would be a decision on the merits." It doesn't say decision on the merits, and you and I had a lot of back forth about whether it really meant decision on the merits, but we believe it was clear from all the surrounding context that it implied a decision on the merits, not a procedural dismissal. And then you say -- but like we said before, again, if you got

insight to what the people were negotiating, you tell them a little bit of that. But if not, you say structure of the agreement.

Now, you may have more theories. You know, one of the things that when you get onto Page 19 and you make the theory about it's not just -- it doesn't adjudicate all, but they got it in August and they later changed their minds. I mean, you could make something of that as a different theory. But I don't get why you don't have to lay these out for them. I hear what you are saying is they were all in our briefs, but did you tell them -- and as I say I haven't gone back to it -- did you say in the briefs, "Look, this is the implied obligation that we think existed," and it can't just be an obligation, you know, not to be bad guys. You have to actually say what you think the implied obligation was.

MR. COHEN: Your Honor, again, we thought we had. Just because of the nature of this case it wasn't like we just filed a complaint, and they were asking contentions in interrogatories to spell it out. We had gone through intensive scrutiny of whether we could state a claim and whether we had enough evidence to vacate a summary judgment order.

We had gone through more scrutiny then any other cases that are out there that say: You know what? Courts often allow parties to delay answering contention interrogatories until they have actually received some information.

In our case, we were asking for that, but we are doing it in a posture that we had already been put under a microscope. It seemed like it was just a futile act on our part to regurgitate everything that we had already laid out, and number two, it appeared that what they were trying to do was set this thing up for yet another argument that we don't have a claim. And it would be sort of a back-door argument in the guise of resisting discovery.

THE COURT: I do worry about that too. The next thing is going to be a motion for summary judgment or something based on --

MR. COHEN: My interrogatory responses.

THE COURT: -- on this particular theory. We are not doing that. We are past that. Part of the irony, though, is the fact that you have already gone into doing all this stuff in your brief.

It actually made it easier.

MR. COHEN: In a way it did, as long as we weren't going to somehow go through that -- a redo on the ruling that you already issued. We were going to put this stuff out there and then have them come back and say, "Well, that's not a theory. So, therefore, we don't have to give you discovery." We are going to be back in that endless loop. That is what we were trying to avoid.

We told them everything. They were under no prejudice whatsoever to just produce the documents. We had gone through their objections to the document request and narrowed every single one of them as to which they claimed we were seeking the moon to say, "No, we are not. We explicitly aren't. Just give us these, and then we can supplement our interrogatory answers."

Your Honor, I hear you. If you want us to go back first and do the exercise that you just described and flush out our interrogatory answers -- six of our interrogatory answers, we did actually say more.

THE COURT: You said a little bit. Here is an example of what I think matters, right? I

shouldn't ask you right. You haven't heard me yet. You might say wrong.

So the way I look at it, there are basically three disparate time periods. The World operating agreement gets signed April 27th, 2004. So there is some period of negotiation leading up to that. The Delaware stipulation and order is May 13th, 2007. And then the time period about the release is the second half of 2009. So, you know, your implied covenant claim -- the part where I think -- and this is why I was a little bit short with Ms. Tobin -- the part that is going to be relevant in any event is August through October 2009 because that's when you say they did the bad stuff. That's when they acted contrary to the implied obligations that you say they had. They said they haven't.

What would be helpful to pin down is which, if any, time periods you rely on for the source of the implied obligations. So, you know, you might, for example, be able to eliminate the need for discovery and the negotiating history of the World agreement if you don't think anything about that agreement is supportive of your implied covenant claim, and it's actually all about the Delaware

stipulation and order when you were more closely involved and you were in a position to actually say to the other side, "No. No. We looked you guys in the eye. It was clear -- it should have been clear to you that we actually wanted to get the money. We wouldn't have negotiated this blooming stipulation order if we thought you were going to shoot the money in a way that got them into these guys pockets."

It seems to me like there are potentially differences between these time periods that could shape the scope of discovery.

MR. COHEN: Our theory is that it violated both. In fact, they came back and asked us for documents relating to the meaning of 12.18 of the World Market Center Venture agreement, and we have gone through the exercise of looking for a needle in a haystack and finding every draft of the World Market Center Venture and 12.18 that somehow landed in our possession to turn it back over to them. They already embraced that 12.18 was relevant. We have been responding on that theory.

The time frames are a little broader than that. I don't know if the Court wants to go into it.

THE COURT: I wasn't trying to be exact.

MR. COHEN: Okay.

THE COURT: I was just trying to say to my mind there are three buckets. And who knows? I am also not trying to say that there couldn't be some other examples of action consistent with or inconsistent with your respective theories of the case. But when I was reading this back and forth, it did occur to me that there could be some beneficial function to you framing your theories more directly, if, for example, you were going to be able to carve out or limit some of these time periods or that type of thing.

MR. COHEN: I think the time periods are actually somewhat self-defined because, for example, if we ask for communications or correspondence about the New York action, well, that New York action had its own specific time frame. It didn't start a hundred years ago. It started at a particular time and then when they said that was too broad, we carved out.

Listen, we don't want your internal communications after you became a party, but there was

a period of time before Related became a party where Samson and Kashani were parties. The disputed items had been transferred from the arbitration to the New York action, and what these people were saying to each other about the pendency of those disputed items and that they had not been resolved and that they wouldn't be resolved until the New York action is centrally relevant to the issue about whether anybody believed or would have thought that those actions pending there, after a bad faith dismissal of the arbitration, somehow allowed the funds to be released.

Every single one of these -- I agree we could put time frames on them, but they sort of define their own time frames because they are discreet events in and of themselves.

THE COURT: This is the type of thing -- again, you all ought to be -- maybe I should just require you guys to do it -- but it seems to me that you ought to be able to do this type of thing. So to the extent Ms. Tobin's beef is you haven't given her time periods, can you cut out the time period from the signing of the World operating agreement or let's say shortly thereafter through whenever the dispute started brewing or some intervening period where all

was quiet on the western front?

MR. COHEN: There may be. It may be possible to go from the World Market Center Venture signing, as you noted, to the point in late December 2006 where we gave notice of the disputed items.

THE COURT: Right.

MR. COHEN: I would agree that it's probably unlikely that they were having a lot of discussions about the meaning of 12.18 in that intervening year and a half. I don't know for sure, but that would probably be less fruitful then once we served the disputed items -- notice of disputed items then I would expect there to be activity on what do these mean. What are the obligations? What are we supposed to do at that point? Then, there are other hot periods of time. No question when Samson and Kashani got dismissed. What were these people saying to each other about the effect of that? When they got sued in New York, what were these people saying to them about the effect of that on what remained as a disputed item, et cetera, et cetera?

THE COURT: That's what it seemed to me. Again, part of this depends on the theory -- the

basis for the implied covenant that you articulate. Because if the basis for the implied covenant that you articulate -- and again, I am not trying to put words in your mouth -- but let's say, hypothetically, you didn't know squat about what went down in the 2004 negotiations, and all you were relying on there was the plain language of the agreement and the structure, but darn it, you had a really good idea of what went down in the Delaware stipulation. There was no doubt in your mind on the Delaware stipulation. That was when there was back and forth discussion and expectations were set, and nobody needed to talk about some type of bad faith release event because it was obvious to everybody in the room. If it had come up, everybody would have said, "My God, no. Nobody would ever think that." If that was that dichotomy, one could imagine a situation where Ms. Tobin would respond thoroughly to the second period. But in the first period, if you are just relying on the plain language of the agreement to create the implied obligation, that's it.

Now, I hear you. You say she's opened the door on the earlier one, but that's part of what -- when I read a response that says, "Hey pound

sand. Look at our briefs." It seems to me to overlook some of these more constructive discussions that could have been had about what really was at issue in the case and whether the scope of discovery could have been focused.

MR. COHEN: I think -- the other thing I don't want to ignore just because we will all look back at this as being helpful, is the other major prong, which is how this went down. The notion, as the Court recognizes, there could be willful misconduct or bad faith in the release of the funds brings into play everything these people were saying to each other about what they understood their obligations to be. Because if they are saying to each other, "Hey, look, we get it. We really can't release this, but, you know, what? We are going to release it anyway and take a shot."

THE COURT: I hear you.

MR. COHEN: Then that's, you know, centrally relevant.

THE COURT: But for that -- again, Related gets a copy of the arbitration award on August 10, 2009 -- based on my little time line I put together.

MR. COHEN: Yes, that's correct.

THE COURT: So sometime -- my reaction to that and I am happy to be disabused or have you tell me it's not true, but it seemed to me sort of your bad faith issues ought to be coming up early 2009-ish, or is there an earlier period where you start to think that the seeds of bad faith are being sown?

MR. COHEN: Well, I think you need the context for what happened in 2009. And the context would be when Samson and Kashani got dismissed from the arbitration, which is, I believe, November of 2008, at that moment that's a watershed event. What does this mean? They immediately got sued in New York in December of 2008. What does that mean? You at least have to go back to that because it's the context of that. And what did this all mean that Related then gets the arbitration award and has to sought through, okay, has a release event actually occurred here, because I know what happened to Samson and Kashani. I know they are not in the arbitration. I know they have been sued in New York.

In the intervening period, I know they went to Federal Court to try to get themselves back

into the arbitration, and the Federal Court said unh-unh that was a bad faith move you made. If they know all of that, have all of that in their conscious when that arbitration award comes down, and then they do what they did, that, I think, is highly probative of whether or not that was in bad faith or not. So you have to at least go back to there, but I agree there was some dead periods.

THE COURT: Thin it down a little bit. There are periods.

MR. COHEN: I can find some dead periods probably where I would think the likelihood of there being discussions between these people about their obligations are less. I can't say they didn't. They were holding funds in escrow for a long period of time, and we know, for example, that Samson and Kashani desperately wanted those funds. They wanted them to fund their own litigation. So you could imagine that they were going back to Related and saying, you know, "We have to get at this stuff. When is the earliest we can get at it?" They could have been having discussions in that intervening period which you just can't dismiss.

I would think, Your Honor -- just one

other point -- as you noted in the hearing when we were here a year ago, there ought to be a very limited number of people involved in the discussions.

THE COURT: That's the next thing I was going to ask you. You have Samson, Kashani, their agents. Who all is the world?

MR. COHEN: I don't know who the world is over at Related who was involved in this. I know only what I know because we uncovered it. We uncovered the fact that counsel was involved. This is in the release event right there in 2009. Counsel was involved. Michael Beretta, who is an executive at Related, was involved in those e-mails. A World Market Center Venture accountant or controller was involved. We only know that because we dug up evidence that we had never seen before and convinced you to open up the record. They're the ones who know. They're the ones who know who was involved in these discussions. They are the ones who can tell us whether this is burdensome or not.

THE COURT: As to that phase.

MR. COHEN: Sure.

THE COURT: But as to the two earlier phases, as to the Delaware stipulation to the extent

there is some implied understanding that you're contending there, you have people who are involved in that, didn't you?

MR. COHEN: We know who was involved face-to-face in the negotiations. What was being said to third parties outside of those negotiations, we don't know.

THE COURT: Sure. You have an interrogatory response that doesn't name anybody from your side.

MR. COHEN: Well, that's true. We said in our answer that we thought the interrogatory was going at the 2009 events, and those were all the people that we had uncovered that were involved in the 2009 events. Obviously, our clients were involved in discussions with us about what this stuff meant.

THE COURT: But even back in 2004, you said your guys had some -- and I don't know how much -- tangential involvement as a third-party beneficiary in the 12.18, and that was some human, right?

MR. COHEN: Yes. Your Honor, we just dug up those documents and produced them now. I can pull names off of the e-mail lists that we will name a

bunch of Greenberg Traurig lawyers, a bunch of DLA Piper lawyers who were involved in negotiating this 12.18 back in 2004. We weren't there.

THE COURT: Who was your client rep back then? Is there somebody that you can ask and say, like, who were the main men and women when you were dealing with this?

MR. COHEN: Probably.

THE COURT: I am not just saying you ought to do this. I am saying both sides ought to do this. Am I wrong -- this is $5.3 million in dispute, right?

MR. COHEN: I don't have the number exactly.

THE COURT: I think it's part of the case.

MR. COHEN: I thought it was something slightly under six.

THE COURT: In the ballpark. So when we are doing discovery, part of what we have to think about is how to efficiently fight about just under $6 million in dispute.

MR. COHEN: That's how much is in dispute in terms of what was wrongfully transferred.

So, yeah, there are other ways to calculate the damages, which, in fact, we added to our interrogatory answer. But I hear your point. We need to be economical about this. So we were trying to be economical, and we wanted to get the documents, and then we will tell you if there is more to the theory than what we already told you before.

But, Your Honor -- if Your Honor wants us to go back and redo our interrogatory responses, we will do it. The single thing we wanted to avoid -- and you are telling us we don't need to worry about this -- is that we were just going to end up in a redo of the motion that we already won a year ago where they're saying, "You know what? None of these theories entitled them to any discovery." So guess what? Grant summary judgment again without discovery, and we are back in that loop. We will go back and do it if that will be a predicate to actually getting some real information.

THE COURT: Well, no. We will have Ms. Tobin back in a second here, but I want these things to happen simultaneously. So if you all were -- I joke with you about cutting and pasting. Theoretically, obviously, you go back and control X

your whole Supreme Court brief, your whole brief in front of me, and then paste it into your interrogatory response.

But let's assume in my utopian dream, I envision, perhaps, a three- to four-page interrogatory response. There is no magic about that. I don't want a motion to compel if he comes in at two and a half pages or a motion for protective order if he comes in at six. But it seems to me like somebody might in three to four pages be able to say, "Here are our three that I suggested" -- maybe you have a fourth, maybe you have a fifth -- "main theories. Here is basically what we implied and rely on them for right now," and that ought to be good for that.

Now, that is something that I would think that you would be able to do in two to three weeks, isn't it?

MR. COHEN: Absolutely.

THE COURT: And the same with the people with knowledge.

MR. COHEN: Yes, to the extent we know.

THE COURT: Right. And you will supplement if something happens. If you have to

supplement, you supplement.

MR. COHEN: Of course.

THE COURT: All right. Now, I am going to talk to Ms. Tobin about how we get stuff out of them because clearly -- and, Ms. Tobin, you have been hearing me to talk to Mr. Cohen about the three time periods. I had it sometime in early 2009. He says November-ish, October-ish, 2008. That is a time period that is going to be in play. How fast can you all gather those types of things?

MS. TOBIN: We have -- one of the reasons that I wanted to determine what the scope of discovery is is that Related's in-house searching capabilities for documents are quite limited, and I think will not be comprehensive enough. They can only search, for example, using a single search term. So if I were to put in Samson into their system, I would get every e-mail and every document that mentions Mr. Samson, which is not a productive way of going about discovery.

So as a practical matter, if we have a better handle on the scope of discovery, I need an outside vendor who can do time parameters and multiple search terms, which I think will, in fact, produce a

very limited number of documents. But under the scope that we had based on the requests that were issued to us, there was no efficient way for me to conduct a discovery search given what I had and using Related's system.

That's a long way of saying I need to talk to an outside vendor and see how quickly we can get things turned around. But I have a list of vendors that are capable of doing that, and I am happy to do that as promptly as I can so that we can get the data downloaded and start doing a search.

I have asked Related -- there are very, very few hard copy documents. Really what we are talking about is conducting an electronic discovery search. So with a better handle on the time period that we are looking at and the issues that truly are discoverable, we can arrive at a list of search terms, and I can get going on that search.

But I do need, for example, to have an understanding, Your Honor, of -- just by way of example, one of their requests asked for anything related to the definition of "release event." I understood that to be a precluded issue that Your Honor's ruling on the plain meaning has already

determined that a release event occurred. So that seemed to me something that we did not need to conduct a search for unless it relates in some way to their articulation of the implied covenant claim.

And so sitting here at this moment, I am not entirely sure what I am going to get in terms of a discovery response as Your Honor has asked NAMA to provide, but I would like to receive something that does not put back into play the plain meaning issues because that makes it more difficult for us to have an appropriate scope of discovery.

THE COURT: This is generally the problem with implied covenant claims. I don't know to what degree you are going to be able to rule that out at the discovery phase. Let's assume that -- I don't know what happened. I am not trying to suggest anything happened, but if the people negotiating the Delaware stipulation had some discussion along the lines of expressing their high degree of confidence that the arbitration would result in a merits oriented ruling, then the definition of release event has been determined by me to be plain, but the implied covenant argument would be based on Mr. Jones and Mrs. Smith's conversation in which they mutually expressed the

100 percent expectation that the arbitration would result in a decision on the merits. It was clear that no one contemplated at the time a dismissal on procedural grounds, much less bad faith procedural grounds, therefore, it was not discussed. And it would be clear to anyone from that context that, had it been discussed, no one would have ever agreed that a release event based on bad faith procedural dismissal would be in the game.

So I can't tell you that this is out of bounds because that -- and that type of conversation might have been face-to-face between the good attorneys involved.

MS. TOBIN: I understand. You know, one of the reasons that I hoped, frankly, that we would get an interrogatory response that said breach of the implied covenant claim is as stated in the August 25th hearing. For me, in terms of discovery, that's an easy search because I need to search for the word arbitration and dismiss. That is not going to produce a mammoth scope of documents. I am sure it will produce documents that relate to other arbitrations that were dismissed because Related is a company large enough that it talks about other cases.

But at least, then, I can review them and determine which one actually relates to this arbitration and which does not.

When I start getting the more bland, non-specific allegations of willful misconduct, and I've not been told what the supposed willful misconduct is, there is no way for me to do a search, and there is no way for me to determine if anything is responsive. So if I get a discovery response that says, "Here is our complaint. This is what you should have done that you didn't do," or "Here is what you did that you shouldn't have done," it's much easier for me to identify and get my client to turn over to me things that relate to that subject matter.

THE COURT: See I have greater confidence in you. And, again, when people aren't involved in urinary escalations in which they try to find more and more ways to say no to each other, people can come up with efficient ways of figuring things out. So, yeah, that's one way of doing it.

But we talked about time periods. We can talk about custodians. You know when I said Sherman's March to the Sea, I was thinking more along the lines of it doesn't seem to me that in a $5.3

million dispute you all ought to each be deposing 20 people or 15 people or things like that.

And again, my concept of this is that this is a periodic issue. I mean, look, it's entirely possible that on -- to pick a random date, September 9th, 2008, when nothing whatsoever was going on in Delaware, it was sort of middle of the arbitration-type stuff, that somebody might have randomly picked up the phone and given somebody a call and said, "You know what? I was just pondering 12.18. I just want to chat with you about it." We can't rule out that type of possibility, and we are not in a case about $5.3 million. That's real money, real money, but also the type of money that your fine firms could readily burn through a third of that trying this case quite easily. You are going to have to pick your spots, and I think that you all can discover this case by focusing more precisely on things.

As I say, that's why I went -- when they say, "No, we are not telling you anything." And you guys say, "Well, we aren't giving you anything until you tell us something." It's not productive. As I say, my only wish was that one of you had taken the moral, high ground so that I could slam the other

one. I would have liked to shift some fees and issue some rulings overruling some things because when people do this type of silliness it's just not productive.

Now, you ought to be able to get a discovery vendor lined up in a week. I would think that's easy enough to do.

MS. TOBIN: Yes.

THE COURT: You ought to be able to get the discovery vendor to capture the necessary files. Does Related have some type of central depository where it's internal documents --

MS. TOBIN: Unfortunately not. So we have to look at individual custodian drives and servers.

THE COURT: Then you have to have a conversation. But, you know, look. Think of a reasonable number. It's hard for me to believe that for a dispute like this -- you know, I am going to pull a number that you all can push me off of, but I am going to start with ten. You know, that's not magic. If you get into this and you really have to go to 12 or 14 custodians to be reasonable, that's fine. But something like 30 would be disproportionate. It

would be crazy.

But you have three different time periods here. You have to cover it. I hope there are some common players. Go ask your clients who the main people were in this. There may be a lot of Greenberg people in the e-mails, but some of them were probably just along for the ride. So if you get a discovery vendor up in a week -- I mean, can you all have a productive meet and confer so that by the end of two weeks so we can have electronic material gathered and in the vendor's hand for processing, so that then you all can figure out at that point, you know, what searches to run and how to best handle that data, but at least the collection side of it could be done? That seems to me to be the type of thing that is doable.

MS. TOBIN: I don't have any objection to it, Your Honor. I just need to confer with my client to see if that's something that they can do on their end with their in-house people in terms of downloading and cooperating with the vendor.

THE COURT: Well, again, if it's their in-house IT people who aren't involved as potential witnesses or defendants or things like that, those are

sort of techie types who I don't have as much concern about. But if the people who are going to be doing it -- because you don't have any central place -- are the people who are the key witnesses who are testifying and about the collections, your vendor, under your supervision or Mr. Coen's supervision, is going to have to be the one that is doing the work. They can talk to you. They can tell you, yeah, I keep these folders on my drive. No, I don't keep anything here, and no, I never used my home e-mail. But they can't do their own collections. Does that make sense?

MS. TOBIN: Yes.

THE COURT: Mr. Coen, I am just going to tell you this generally.

MR. COEN: Yes.

THE COURT: We definitely -- and this goes for Mr. Norman too. You can sit down, Mr. Coen. I appreciate you standing up, but we do want the Delaware folks to be involved in these discovery collection efforts. You guys cannot just hand this off. It's not that your forwarding counsel isn't tremendously competent and doesn't do this all the time. We understand that. But you know, we have some expectations in Delaware about the degrees of

cooperation and communication that may be different than what exists elsewhere. So spot check them. I'm not saying you have to look at every document.

MR. COEN: I absolutely understand, Your Honor. Ms. Tobin and I have worked together for a long time. We have a good relationship, and we understand that is how the process works.

THE COURT: Wonderful. So basically absent some really good reason why, in two weeks everything will be mounted up at a good discovery vendor. And during that time, you all can be talking about ways to narrow this so that it doesn't generate ridiculous amounts of information. Run some practice searches. If your terms generate ridiculous amounts, narrow them. But then, hopefully, in two weeks from now you all will be in a position to start doing that. If there's not a lot of hard copy stuff, that ought to roll.

And then you are going to get them some meaningful interrogatory responses, yes?

MR. COHEN: Yes, Your Honor.

THE COURT: Okay.

MS. TOBIN: And the e-discovery obligations, Your Honor, are mutual? In other words,

they should be conducting the same search that we are conducting.

THE COURT: Yeah. This is all positive two-way street stuff. Look, I want you guys to confer and talk. And if you all sit down and say, "You know what? Laster's a little nuts. One week for a discovery vendor we can do that, but really to get all this stuff copied and mounted up at the vendor's site for both of us we actually need two weeks for that." I am fine with that. Don't think that you are going to fundamentally offend me. But let's get this going.

Why don't you also talk about a schedule so that this action can move forward, and we can hopefully have some eventual closure. So is this something where in eight or nine months I can see you all for trial?

MS. TOBIN: It seems to me it shouldn't take that long.

THE COURT: If you guys want to do it faster, that's sort of my -- I was trying to be generous in terms of outside time. But would you please talk to each other then about fact discovery cutoffs.

Are you guys going to have experts in this? Mr. Cohen, are you inspired to have an expert on something?

MR. COHEN: Maybe damages. That's the one thing that comes to mind, but to me, even on that score, it's probably almost an accounting type of decision but.

THE COURT: Why don't you all talk about it. But why don't we target, you know, realistically for you guys to get everything done seems to me like five to six is fast, and eight to nine is eminently doable but also the outside of what it should take. So why don't you all put together a schedule. Let's get this thing moving.

Who knows maybe once people start writing checks for lawyers' fees, you guys will work out your differences.

MS. TOBIN: Very well, Your Honor.

THE COURT: Thank you everyone for coming in. We stand in recess.

(Hearing adjourned at 3:10 p.m.)

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CERTIFICATE

I, CHRISTINE L. QUINN, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 58 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand this 6th day of September, 2012.

/s/ Christine L. Quinn

Official Court Reporter
of the Chancery Court
State of Delaware

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