IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

REALOGY HOLDINGS CORP.,	:	
	:	
Plaintiff,	:	
	:	
v	:	Civil Action
	:	No. 2020-0311-MTZ
SIRVA WORLDWIDE, INC., NORTH AMERICAN VAN LINES, INC., MADISON DEARBORN CAPITAL PARTNERS VII-A, L.P., MADISON DEARBORN CAPITAL PARTNERS VII-C, L.P., and MADISON DEARBORN CAPITAL PARTNERS VII EXECUTIVE-A, L.P.,	:	
	:	
Defendants.	:	

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Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Friday, July 17, 2020
1:32 p.m.

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BEFORE: HON. MORGAN T. ZURN, Vice Chancellor.

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ORAL ARGUMENT AND RULINGS OF THE COURT VIA ZOOM ON DEFENDANTS' MOTION TO DISMISS

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APPEARANCES: (via Zoom)

EDWARD B. MICHELETTI, ESQ.
CLIFF C. GARDNER, ESQ.
JESSICA R. KUNZ, ESQ.
BONNIE W. DAVID, ESQ.
RUPAL K. JOSHI, ESQ.
Skadden, Arps, Slate, Meagher & Flom LLP
for Plaintiff

WILLIAM M. LAFFERTY, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
-and-
ANDREW A. KASSOF, P.C., ESQ.
TIMOTHY W. KNAPP, P.C., ESQ.
of the Illinois Bar
Kirkland & Ellis LLP
for Defendants

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THE COURT: Good afternoon, Counsel. Thanks for coming together in this strange format and in these strange times. I appreciate everyone's flexibility as we move to a platform appropriate for our times.

Let's start with introductions, and I'll begin with Delaware counsel for the plaintiff.

MR. MICHELETTI: Thank you, Your Honor. With me today from Skadden -- this is Ed Micheletti. May it please the Court. Ed Micheletti for plaintiff Realogy. I'm with my partner, Cliff Gardner, and my associates Jessica Kunz, Bonnie David, and Rupal Joshi. My paralegal, to the extent we use a demonstrative, is also on. His name is D.J. Aranda. And from my client Realogy, I have Lynette Gladdis, who's the senior vice president of litigation and regulatory affairs, as well as Sean Campbell, who is an executive legal counsel at Realogy Holdings.

THE COURT: Thank you.

MR. MICHELETTI: Thank you.

THE COURT: And Delaware counsel for the defendants?

MR. LAFFERTY: Yes, Your Honor. It's Bill Lafferty from Morris, Nichols, Arsht & Tunnell on

behalf of the defendants. And my colleagues, Andrew Kassof and Timothy Knapp from Kirkland & Ellis, are on. And Mr. Kassof, who I think you can see on the Zoom feed, is going to do the speaking on behalf of the defendants today.

THE COURT: Thank you.

And, Mr. Kassof, you may proceed.

MR. KASSOF: Thank you, Your Honor. I appreciate it. Thank you for doing this with us this afternoon.

As I previewed on the motion to expedite, our motion to dismiss Realogy's claim for specific performance turns entirely on the plain text of Section 13.8(b) of the purchase agreement, Realogy's April 27th complaint, and the equity commitment letter. Just those three documents. It has nothing to do with the MAE issues in the case. It doesn't turn on anything in discovery, and it doesn't turn on any evidence at trial.

It is a matter-of-law determination for the Court based on an unambiguous contract provision and the direct contractual consequences of what Realogy alleged and requested in its April 27th complaint.

As Your Honor knows, Section 13.8(b) defines if and when a specific performance remedy is available in this transaction. And what we're asking for the Court to do is enforce the specific and plain terms of that provision.

What I want to focus my argument on today is section -- the requirements in Section 13.8(b)(ii)(B). Our papers fully address the points on (b)(ii)(A) as well, but those really follow from the core fundamental reasons why there can be no specific performance in this case under 13.8(b)(ii)(B).

And I think it's critically important, Your Honor, to walk through the specific language, because what we saw in the briefing on the motion is that Realogy wants to change, delete, and excuse the specific words on the page. And we're asking the Court to simply apply those words strictly and literally as courts say it must.

So, first, under 13.8(b)(ii)(B), the first issue is the timing. Now, as -- the parties have a dispute as to when the conditions need to apply. And what 13.8(b)(ii)(B) says is, it says, quote, that the "Seller shall be entitled to bring an

Action to specifically enforce Buyer's obligation to consummate the Closing and Buyer's rights under the Equity Financing Commitments to cause the Equity Financing to be funded" -- and I'll come back to that in a second -- "if (and only if and for so long as)," and then there's (A) and (B).

So specific performance by Realogy, as this says, can be pursued if and only if and for so long as each of the conditions in (A), (B), (C), and (D) are met, and each one of them has to be met.

Now, Realogy argues that the conditions of 13.8(b) apply only when Realogy files suit, but then in its words, quote, "are not required at any time after that." Not when it filed its amended complaint, after the debt financing terminated, not even when the Court awards a specific performance remedy through a mandatory injunction. Under Realogy's view, it could file a complaint and have all of the specific performance requirements under 13.8(b)(ii)(B) disappear and still have the Court order a mandatory specific performance injunction, even though it couldn't allege and pursue that very relief.

And it says that because it has to say

that, because it knows and recognizes, of course, that the debt financing expired by its own terms on May 7th -- and we argue, and I'll get into it in detail today -- that Realogy caused that financing to terminate with its April 27th filing.

Now, there are two reasons why Realogy's interpretation is directly, directly contrary to the provision in Section 13.8(b). And there's two. One is, it says, "if (and only if ...)," and then it has all of the conditions. That means each has to exist. And it says, "... and for so long as)." And, actually, I looked up that phrase, and it means only the case for as long as what follows is the case and not the case if it no longer does, which makes sense.

Now, Realogy never addresses the "for so long as" language anywhere in its brief. It's inconsistent with its theory because what it means is that all the conditions have -- they can only -- they have to apply and they can only apply for -- they can only get their specific performance relief for so long as they also they apply. So that's the first point, is that it's their theory that it can just be when they file the complaint and nevermore is inconsistent

with the "for so long as" language that requires the Court to excise that.

The second one is equally important and very, very clear, which is the very last sentence of 13.8(b). And it reinforces the "for so long as" language in what it says is a, quote, "For the avoidance of doubt" sentence. And what that says is, quote, "For the avoidance of doubt" -- and you go to (b), and it says, "in no event shall Seller be entitled to seek to specifically enforce any provision of this Agreement or to obtain an injunction or injunctions, or to bring any other Action in equity in connection with the transactions contemplated by this Agreement, against Buyer other than against Buyer and, in such case, only under the express" -- "only under the circumstances expressly set forth in ... Section 13.8."

Now, as this court has said in its many cases -- and this is from the *Oxbow Carbon Unitholder Litigation*, quote, "A decree of specific performance is a mandatory injunction implementing a particular contractual provision." The *CompoSecure* case says that specific performance is, quote, "... simply a mandatory injunction directing a party

to comply with a contractual obligation." That's not a controversial point, I don't believe, that specific performance is a mandatory injunction.

Now, Realogy submitted a chart on Wednesday as a demonstrative, and one of the key points that they made was this very issue. They said -- and it's the third -- it's the third box down on what they point to in their answering brief. In the third box down, they write that the "... conditions in Section 13.8(b) apply only to Realogy's right 'to bring an Action to specifically enforce [SIRVA's] obligation to consummate the Closing ....'" And then it goes on and it says -- and this is from their brief -- "Those conditions are not required to be satisfied at the time the Court enters an order of specific performance after trial (*i.e.*, when Realogy will," quote, "'obtain' specific performance)."

That is directly contrary, directly contrary to the last sentence of 13.8(b), which makes crystal-clear that there has to be all conditions met for Realogy to obtain -- quote, "obtain" a -- an injunction under Section 13.8(b).

So the timing, in our view, is crystal-clear, both in terms of the "for so long as"

language, as well as that "For the avoidance of doubt" sentence, that those conditions, each of (A) through (D), have to exist at all times when they file the complaint seeking specific performance, as they pursue it, and as the Court then enters a decree of a mandatory injunction of specific performance at all times. That's what the contract -- that's what the parties agreed to in the contract.

So that's the timing issue. No question to us that it carries forward for that whole period.

So then you have to go down to (B), and that sets the stage. When you go to (B), this, to us, is the key provision more than anything else. And what it says is, as Your Honor's very familiar with now, is that the condition applies -- they can seek specific performance and then obtain that injunction if and only if and for so long as -- and it's (B) -- "the proceeds of the Debt Financing (or any alternative debt financing) have been funded to Buyer ...," and it goes on and says, "... or ... has irrevocably confirmed in writing [the agent for the Debt Financing Sources ... has irrevocably confirmed in writing to Buyer that the Debt Financing will be

funded ...."

So the requirement for specific performance is that the debt financing proceeds must either have been funded or been irrevocably confirmed in writing that it will be funded. And it has to be funded or irrevocably confirmed in writing both at the time they file suit, throughout the time they pursue it, and at the time the Court would order the relief consistent with the "for so long as" provision and the "For the avoidance of doubt" sentence. And that's, of course, the key problem that Realogy faces, because the debt financing expired and terminated by its own terms on May 7th and, as I'm going to walk through, with Realogy's filing on April 27th.

And it also is important in considering the -- Realogy submitted an e-mail as an exhibit that they said they'd reference in the hearing. And what it -- and the reason why I think that's important is because what it shows is that there's no need for any discovery at all on this issue. That's confirmed by Realogy's own e-mail alone because the e-mail doesn't help, not even a little, because on this issue, on 13.8(b), for so many reasons.

No. 1 -- and I'll get to what it actually says in a minute. But, most importantly, it's an e-mail that was on April 24th. And it's an e-mail that was apparently among the lenders that was then forwarded to MDP on April 24th. And it doesn't help Realogy, given the "so" -- the "for so long as" requirement and the "For the avoidance of doubt" sentence of 13.8(b) because specific performance can only be sought if and only if and for so long as it's been funded or irrevocably confirmed in writing or -- and that's the only time that they can obtain it. And the debt financing expired on May 7th. And I'm going to get to the April 27th filing as well. So whatever it says on April 24th, really whatever that document is doesn't help at all once we're past May 7th or, in our view, past April 27th.

Second is, on this April 27th issue, which I'm going to talk about, is that three days after this e-mail, Realogy filed its action, which we contend blew up the financing to the transaction long before it terminated on its own terms. So what the advancing agent said on April 24th in an e-mail, it doesn't matter if we're right on the April 27th filing if that blew up the equity commitment which

then blows up the debt as well.

Three is, those two points show that how Realogy really can't square this timing issue with its own arguments, because you remember, Your Honor, Realogy says the conditions only need to be satisfied when they filed suit or when they pursue the specific performance remedy, not later. Well, they filed that on April 27th in that complaint. That's the complaint that we say blew up the equity financing. That's the very complaint that they tell the Court now has, quote, "no legal effect." That's what it says in its brief. And they ask the Court to ignore that because of our argument that says, "You blew up the financing with that complaint." And they say, "Well, no, no. Well, we filed an amended complaint on May 17th."

But that's where the tension comes, because even if they were right on this timing issue, on May 17th, that's after the debt financing had already terminated by its terms. So it clearly wasn't funded and was irrevocably confirmed in writing on May 17 when it filed it.

So, either way, the April 24th e-mail can't help Realogy avoid the contractual consequences of its April 27th filing or the termination of the

debt on May 7th. The e-mail itself, but just looking at it, it doesn't matter what it says because of these arguments and what's important on the motion; but it certainly doesn't say it irrevocably confirmed anything anyway.

I just feel compelled to say that. Totally irrelevant to this motion today, though.

So, in short, on the -- on this May 7th issue, once May 7th comes and goes and the debt financing expires by its own terms, that means that Realogy can't satisfy any longer the irrevocably-confirmed-in-writing or funded condition under 13.8(b)(ii)(B). But what's critically important to us is that that's not the only reason why that debt financing condition can't be satisfied now and can't ever be satisfied; but it's also because of the direct, the very direct contractual consequences that flow from Realogy's April 27th filing.

Now, I walked through this before, but it's important because it has lots of consequences, this April 27th filing. And there is, in our view, nothing that could give Realogy a pass and sanction this, just ignoring what it is that they specifically ask the Court for. And the reason is because it would

eliminate and change direct contract rights for Madison Dearborn Partners regarding its obligation to fund the equity, when that obligation, quote, "automatically and immediately" terminated with that filing. And, again, for this, we just ask the Court to look at what they allege and then what are the direct and immediate contractual consequences of that filing.

Just walking through it just briefly, because I know the Court is familiar with this, is that Realogy in that April 27th filing, they defined "Defendants" as SIRVA and Madison Dearborn Partners. Count III asked for a declaratory judgment. Paragraph 112 of that complaint asked for declaratory judgment on six requests. And what they asked for was, it says, "... Realogy requests a declaratory judgment that:" And the first one says, "Defendants" -- that's defined as SIRVA and Madison Dearborn Partners -- "have breached their obligations under the Purchase Agreement ...," and it goes on.

And then in the fifth declaratory judgment request it says, quote, "SIRVA has no right to terminate the Purchase Agreement." And then in the sixth request it says, "the Defendants" -- SIRVA and

MDP as defined by Realogy -- "are not excused from performing their obligations under the Purchase Agreement."

So they use "Defendants" to be MDP and SIRVA in the first request. They changed it in the fifth to be just SIRVA, and they went back to "Defendants" in the sixth request. And what they're saying to the Court is, they're asking for declaratory judgment that defendants, SIRVA and MDP, breached their obligations under the purchase agreement. That's deliberate. That is, just from their own pleading, changing from "Defendants" to SIRVA is clearly a conscious decision.

But the truth is -- and it's important -- is that their intent doesn't matter. Really, if they say "We didn't mean it and we want a pass," it doesn't matter, because they defined it and it's what it said. It's just what it said. And they reiterated again in the prayer for relief (a), the very first request Realogy asks for the Court to order. It says that, quote, "... SIRVA" -- same sentence -- "... SIRVA has no valid basis to terminate the Purchase Agreement, the Defendants" -- that's SIRVA and MDP -- "are not excused from performing

their obligations under the Purchase Agreement, and that the Defendants" -- that's SIRVA and MDP -- "committed material breaches of the Purchase Agreement ...." They ask the Court to enter that relief. Again, it distinguishes between SIRVA and MDP in the very relief that they alleged.

And it's not -- in our view, that's not a scrivener's error typo. That's a deliberate change. How do we know that Realogy meant it? And, again, I'm going to go back to why the intent doesn't matter, but it's just -- we're compelled to point it out. They meant it because they issued a press release on the very same moment that they filed it, doubling down on exactly what they say is a typographical error. The headline to their press release, issued to the media, put out on a website, says, "Realogy Files Litigation Against Madison Dearborn Partners And SIRVA Worldwide To Enforce Commitments Under Purchase Agreement." That's their headline. And in the body of the press release it said exactly what it now tells the Court was a scrivener's error. It said, quote, "MDP and SIRVA," leading again with MDP, "have made false claims in an attempt to avoid their obligations under the purchase

agreement." And they vowed that they will, quote, "pursue all legal remedies to ensure that SIRVA and MDP honor the commitments made under the purchase agreement."

In their briefing -- at the motion to expedite hearing there was no response to this press release and no reconciling how it could be the same thing alleged as to what they're saying is a scrivener's error; and then in the answering brief by Realogy, they never explained how you can reconcile what they're saying is a scrivener's error with what's exactly then repeated in a press release for the media. And that's why we highlighted that.

Now, I made a point that said that their intent doesn't matter. And the reason why is, no matter its intent, even if, again, Realogy says, "Well, we didn't mean it," no matter its intent, the April 27th filing had immediate contractual consequences that the Court isn't just free to ignore. This isn't the situation where the Court is looking at a pleading and saying whether a defendant is adequately put on notice of a claim or whether -- how to construe a certain claim or another. There's a contractual consequence of what is alleged.

Section 3 of the equity commitment letter says that Madison Dearborn's obligation to fund the equity, quote, "automatically and immediately" terminates. "automatically and immediately" terminates. If and when -- and it goes to (c), the seller, Realogy, files or commences an action other than for retained claims against Madison Dearborn. The declaration and requested relief asking for a g21 that MDP committed material breaches of the purchase agreement, that's not a retained claim. There's no way there could be a dispute about that. If you ask the Court, MDP's not a party to the purchase agreement. Realogy asks the Court to find that Madison Dearborn Partners committed material breaches of the purchase agreement that's filing -- that is asking for and filing and inserting a nonretained claim. And they asked it both in their request for a declaratory judgment in Count III as well as the prayer for relief asking for the Court.

Again, this isn't just this issue about, like, the doctrine of liberal leading versus substantial justice and everything else. This is direct contractual consequences of just the words that they used on the filing that triggered an automatic

and immediate termination.

And I'll address another point that Realogy argued in its papers, which is this cure provision. There is absolutely no cure provision at all with respect to the equity commitment letter. Again, this is just torturing the actual language used in the documents. The termination of the equity was automatic and immediate. That's the language on the page -- upon the filing. It couldn't be more emphatic or explicit.

The limited guaranty relating to MDP's obligation to backstop the $30 million termination fee, that has a cure provision. That could prevent the termination of the limited guaranty. The ECL, the equity commitment letter, it doesn't have a cure provision. In fact, it says it's automatic and immediate termination. Realogy tries to say, well, the limited guaranty cure provision is somehow incorporated into the ECL.

A few points. One, there's nothing about the cure provision spelled out anywhere in the ECL. There's no incorporation language spelled out anywhere in the ECL. The notion of a cure provision is directly contrary and inconsistent with the

automatic and immediate termination language in the ECL. It literally can't be reconciled. And their argument that the cure provision that applies solely to prevent the termination of the limited guaranty gets silently transposed into the ECL to prevent what it says is the automatic and immediate termination of the equity doesn't make any sense. It's taking the cure provision and the limited guaranty and expanding it to the ECL when there is no cure provision in the ECL. The termination is, quote, "automatic and immediate."

So it doesn't make any sense with the language. And even the language that they cite, that they point to doesn't say anything like that. The language that they point to says that the obligations under the ECL, it talks about when -- how under (c), Realogy asserts any action against MDP relating to the various agreements under -- other than retained claims as defined in the limited guaranty, and it goes on. It says that "... in each case, subject to all the terms, conditions ... limitations, herein and therein." That obviously means it's talking about the proper filing of retained claims subject to all the terms and conditions and limitations in each of those

agreements. It certainly doesn't mean that Realogy can file nonretained claims under the purchase agreement against MDP; not have it automatically and immediately terminate the equity commitment, just as the language actually says; and then use a cure provision from the limited guaranty to transpose it into the ECL to somehow then eliminate that automatic and immediate termination. That is -- there's no way that that reading is consistent with the plain language, Your Honor.

So our -- under -- our view is, once Realogy asked the Court on April 27th to declare that MDP committed, quote, "material breaches of the Purchase Agreement" and asked for a declaration on it and asked it in their prayer in relief -- that's explicitly what they allege -- that's a nonretained claim having nothing to do with the limited guaranty or the cure provision in that agreement and it, quote, "automatically and immediately" terminated the equity commitment. That's the plain contractual consequences of what they chose to write, allege, and request from the Court, and then they issued a press release reiterating it.

And without the equity, there's no

debt financing and there's no way to ever get specific performance under 13.8(b)(ii)(B). Realogy itself acknowledges -- it alleges that the lenders' obligations under the debt commitment is subject to the condition that SIRVA receives a $125 million equity commitment from MDP. That's a condition of the (Inaudible). That's at amended complaint paragraph 59.

So when the filing automatically and immediately terminated the equity commitment, it also then unraveled and terminated debt financing as well. That's long before it terminated by its own terms. And so 13.8(b)(ii)(B) can't ever be satisfied, ever, both because of the April 27th filing, which has direct contractual consequences that courts aren't free to just rewrite, and the May 7th expiration of the debt.

Now, that leads into my next point, which is alternative financing. Realogy put it at the very back of its brief. Not sure it's pushing it anymore, but it's worth addressing.

THE COURT: Before you go there, just to put a bow on your previous arguments, has there been a written demand for withdrawal by the buyer

under the limited guaranty's cure provision?

MR. KASSOF: No, Your Honor. No, because -- we did not, because the limited guaranty, to the -- if -- they have a claim against SIRVA that it owes the termination fee, we don't think that's valid. We're going to fight about that. And to the extent that -- and SIRVA is going to -- if Your Honor actually ordered to us pay that, which we don't think we're going to have to, but if it did, then SIRVA's got to stand behind that. And MDP has the limited guaranty, which does have a cure provision, which they filed an amended complaint, but we never even said that they needed to. We hadn't planned on walking away from that. The point we were saying is the termination of the equity commitment, that's not -- that can't be undone. That's not undone, and that's triggered, automatically and immediately, according to the language in the ECL.

THE COURT: Thank you.

MR. KASSOF: Okay. So on alternative financing. So there's -- if the equity is terminated -- and it is, from what we say, automatically, contractually automatically, from Realogy's April 27th filing -- then there's no obligation to

seek alternative debt financing for a deal that can never close. And we lay that out in our opening brief at pages 38 to 40. Realogy didn't dispute any of it. So I'm just going to hit on the high points. They didn't address it at all in their brief. I'll just address the high points.

And that is that SIRVA is only required to use its reasonable best efforts to arrange and obtain alternative financing in amounts sufficient to pay, it says, "... when added to the Equity Financing and the remaining Debt Financing ..., the Required Amount." That's Section 7.3(c)(A). The equity financing is now gone forever, in our view, because Realogy filed nonretained claims. So there's nothing for alternative financing to be additive to. And Realogy acknowledges, as I said, the MDP's equity commitment, that's a condition of the debt financing. And that equity commitment is now terminated.

And there's no obligation -- there's expressly no obligation on SIRVA to get any additional equity financing. That's 7.3(e). It's expressly that they don't have to. So the equity financing is gone. That's a key piece of the financing to the transaction and a condition of the debt financing, which is now

eliminated.

And the debt financing itself says that it's subject to the terms and conditions expressly set forth in the amended DCL, including the amounts set forth therein, for purposes of funding the transaction.

So the alternative financing obligation itself only applies to the amounts that were set forth in the original debt financing, that's what it expressly says, and that still leaves a hole. And there's no obligation to get anything more than that because the equity financing has now blown up. You don't have to fill that gap, and there's no obligation to get new equity financing.

So this whole notion of alternative financing, it blew up when they blew up our equity. Once they filed that against MDP, that eliminated the equity to the deal, and that equity is a condition of the debt.

So under -- our view is, when you just look at this under just the agreements, just the plain language of what the agreements say, every provision, plus the plain language of what they said in their April 27th complaint, you apply those and, in our

view, it eliminates specific performance. The only -- the only other argument, apart from the text that Realogy has pointed to, is this prevention doctrine. That's -- that came up in their answering brief. And that's to say, "Judge, Your Honor, we're asking you to use the prevention doctrine, rewrite and eliminate the agreed-upon conditions to the specific performance remedy under this doctrine." And that fails for several independent reasons, all equally strong.

First and fundamentally, when Realogy filed these nonretained claims against MDP, they did that on their own, and they blew up the equity and they blew up -- which then blew up the debt. And nothing we did caused or prevented that from happening. No action we took dictated Realogy's choice of litigation strategy, deciding who to sue for what. There's no line to be drawn, none, between SIRVA sending Realogy a letter about concerns of the deal on April 25th and Realogy's choice to sue Madison Dearborn Partners to enforce the purchase agreement on April 27th. They promised that they'd never do that ever under any circumstances, and they did. They didn't even have to sue MDP at all. They didn't have to, but they did and they chose that, and that filing

had automatic and immediate consequences.

So there's no role for the prevention doctrine to play just on even if the doctrine applied, which I'm going to get to in a minute, that it couldn't apply here. Even if it did, there's no way that it applies here anyway.

No. 2, they allege the opposite of this now new prevention doctrine that they came up with in their answering brief. The complaint alleges the opposite, okay. This is another example, in our view, where Realogy has to tie itself in knots to avoid the plain language of the agreement. They alleged that we wrongfully said on April 25th that there was an MAE and that we wrongfully said we wouldn't close, right. They said that that was improper. And -- but they also allege that the debt financing -- and this was the quote -- "was available throughout the period leading up to the scheduled Closing Date and thereafter" and that one of the banks committed -- quote "committed to funding the Transaction" on April 27th, two days after the April 25th letter.

So it cannot possibly be that SIRVA prevented the debt financing condition of specific

performance on April 25th, when Realogy alleges that the debt financing remain available after April 25th, all the way, quote, "through Closing and thereafter." Its own allegations don't draw a line between the April 25th letter, of course, and the debt financing condition.

Third reason, Your Honor, is that their theory on this prevention doctrine, it's actually directly inconsistent with the express terms of Section 13.8(b)(ii) itself. What it says is, they say that the Court should excuse the conditions of 13.8(b)(ii)(B), right, because we failed to close the transaction on the date required because we claimed an MAE. And they say because of that, that it somehow then prevented the conditions to performance in 13.8(b)(ii)(B). That's their theory, in essence.

But what they're arguing is exactly the circumstances when the contract says they're authorized to bring the specific performance right under 13.8(b)(ii)(A). (A). And what I mean by that is, if you look at (A), it says they can bring the specific performance claim when they've satisfied all of their obligations and covenants and, quote, "... Buyer fails to consummate the Closing on the date

required ...." That's what they say we did here.

So that's -- so under (A), that gives rise to their claim for specific performance. It can't possibly be the case that the agreement allows for specific performance under (A) and those very circumstances somehow prevent the condition in (B). Otherwise, (B) doesn't make any sense at all. You would never have that in (B). If (A) means we didn't consummate the closing on the date required could then eliminate (B), then (A) and (B), you wouldn't have the two of them at all. And that's what they're arguing. They're saying that we didn't close when we should have, and that somehow prevented the financing and eliminates the requirement in (B). That can't be the case.

Fourth reason is that the prevention doctrine doesn't apply to conditions to a remedy that only come into play when there is a breach at all. The confusion is that we're not trying to excuse liability for an alleged breach based on a failure of a condition. That's what all those cases that they cite say. These are conditions to a remedy that are only at issue after and based on the alleged breach.

So what they're arguing is that the

very breach that they're alleging that we committed is what prevents the conditions to the remedy of specific performance because of that alleged breach. It's just a circular way to rewrite the limitation on specific performance remedy. And that's why we pointed out that no court's ever held that. The prevention doctrine can apply to excuse conditions to a specific performance remedy, a remedy for a breach because of that breach. It's circular. And, thus, those cases all talk about conditions to closing, conditions to performance, conditions to liability, not as to when a particular remedy in a contract, especially when there's a contract that talks about two different remedies, specific performance and a termination fee, comes into play. None of those cases say that at all.

And --

THE COURT: Is there a case that draws the line that you're proposing? I read the cases that you supplied the same way that you do to be talking about conditions precedent to performance. But it seems to me that where you want me to draw the line is perhaps a new proposal.

MR. KASSOF: No.

THE COURT: (Inaudible) --

MR. KASSOF: So --

THE COURT: Go ahead.

MR. KASSOF: Yeah. The prevention doctrine cases, we have been scouring it. They all apply in those circumstances. The form of what we've seen is the conditions to performance, conditions to closing. And we haven't found any, any at all, that apply it to conditions to a remedy as to when a remedy would apply because of the alleged breach.

Now, I think what Your Honor's asking is, "Well, have you found a case that says it can't?" right? And that -- I hadn't seen a case that's been on point like that where they said, "Well, no. Like, what we're telling the Court, their theory that they're coming up with to avoid the contractual language doesn't apply here," I haven't seen something where a court has addressed that squarely, right, one way or the other.

But what we're saying is, "You can't allege that we breached and, because we breached, when you have a remedy in light of that breach, that those conditions can't apply because we somehow" -- "because we breached, we prevented the remedy." It doesn't make sense. It follows from the alleged breach

itself, which is what the provision says. It provides when you can bring a specific performance claim.

And the last point is --

THE COURT: It seems to me that directionally applying the prevention doctrine to a remedy as well as to performance is consistent. If a defendant has caused the failure of a condition that would otherwise -- that is required for their duty to be triggered, they're not excused from their duty. And so the defendant has caused failure of a condition to the plaintiff's remedy that, similarly, the defendant should not get relieved of the plaintiff's ability to pursue specific performance but for the defendants' (Inaudible) with the condition.

If the prevention doctrine is meant to ensure accountability despite a defendant's interference with a condition, I'm not tracking why that shouldn't also apply in Realogy's situation and, in particular here, where the condition to performance is, in many cases, the same as the condition to specific performance.

MR. KASSOF: Well, here -- I guess I'll take it in two parts, Your Honor, if I may.

Here, it's -- there is -- it is --

there's a big disconnect because of the arguments that I laid out before I got to this one, which is, one, their April 27th filing blew up the financing, so you can't have prevention on that.

Two, they actually allege -- they don't even allege that, the connection because they allege the opposite. They allege that we refused to close, but then the financing was still in place and that Barclays remain committed. So they expressly allege the opposite of the connection.

And then, third, its use of this doctrine is actually inconsistent with 13.8(b)(ii)(A) and (B), because what they're saying exactly is the circumstances where the parties contracted that you have a specific performance remedy under (A), they're saying, "Well, when we have that specific performance remedy under (A) where the conditions are ready to" -- "ready for a closing and you refuse to," they're contractually allowed to bring a right of specific performance, they say, "Then that prevents the conditions to be." Well, then, the parties never needed to agree on (B). It's inconsistent with the language that the parties agreed to.

Now, in the abstract, in some other

circumstance, because it's not here, but in some other circumstance could there be a case where some party does something to prevent a remedy under the prevention doctrine? Now, it stems from the Restatement, and it talks about eliminating that party's duties, right? So I'm trying to come up with an example where it's -- where a remedy is eliminated because it's -- you're prevented something based on your own duty to perform. And I'm struggling to come up with something on the fly.

But this, to me, is such an extension of the prevention doctrine because these are a remedy that the parties contractually agreed to say specific limitations or requirements -- you can call it a condition -- but conditions to that remedy, and they either apply or they don't apply, but there's nothing that a party can do or not. It's whether -- it's the remedy for the alleged breach. In other words, it only comes into play when there's an alleged breach. The parties contractually agreed to that. They say -- and you can get certain remedies under certain circumstances, and some may apply and some may not. But this doctrine itself, where it's -- talks about the -- you doing something to prevent your own

nonperformance, I just view that as something entirely different.

The last one, if I didn't convince you on my first four, my fifth argument on the prevention doctrine is that the exception would apply. So, here, we cited that case law which says that, quote, "well-recognized exception," exception, that the doctrine, quote, "doesn't apply where, under the contract, one party assumes the risk that fulfillment of the condition precedent will be prevented."

And, here, we'd say there's two reasons why that would apply. No. 1 is, Realogy fully assumed the risk that there would be no debt financing if May 7th came and went. That was the terms of the deal. They assumed that risk. And now we're after May 7th. You can't say, "Well, we're going to prevent that anyway" and excuse that fact and just ignore it because it went. That was -- they assume that risk, that they had to get the financing before May 7th.

Second is, they fully assumed the risk. There would be no financing if they filed nonretained claims on April 27th, which they for sure did. And that happened and they assumed the risk there, too. So, in our view, even if the doctrine

could now apply in this case, which we think is barred both by the allegations, the filing on April 27th, and the contract, three different ways to bar it, it wouldn't apply here either if Your Honor said, "Well, I think it could apply to a remedy."

Last issue is just on timing. Unless Your Honor has additional questions, we think this is, if it's based on unambiguous contract provisions with unambiguous language in the 13.8(b) ECL and Realogy's filing, those are the only three documents, it is appropriate, for sure, to resolve that issue now. That's why we went forward with the briefing. We asked Your Honor to do that.

Then the *Draper* case makes clear that it's entirely appropriate at the pleading stage where that court dismissed a specific performance -- dismissed the claim for specific performance at the pleading stage based on the contract's plain language. And other cases, like *Allied Capital*, says it's at the motion to dismiss is the proper framework for determining the meaning of the contract language. And that's exactly what we're asking Your Honor to do here. And we walked through in our brief all of the good prudential reasons why that makes sense here.

THE COURT: Thank you. I don't have any further questions, and I'll give you the floor again after speaking with Mr. Micheletti.

MR. KASSOF: Thank you, Your Honor.

THE COURT: Mr. Micheletti.

(No response)

THE COURT: Unmute, Mr. Micheletti.

MR. MICHELETTI: A lot of people say that's my favorite status, or it's their favorite status.

May it please the Court. Ed Micheletti, Skadden Arps, on behalf of plaintiff Realogy.

Your Honor, respectfully, the motion to dismiss should be denied. This is an MAE case at core. It also involves serious questions about whether or not SIRVA complied with reasonable-best-efforts obligations to close the deal and as to financing. It also involves, just by hearing Mr. Kassof's arguments here this afternoon, issues involving materiality, intent, causation, who caused conditions to fail. And, you know, I can go on a little bit about that, about the reference to the e-mail that we submitted to show that we had a good

faith basis to make the allegations we did around financing in our amended complaint and that it was a Rule 11 issue. That's why we submitted that issue to Your Honor.

You know, the -- when characterizing our use of four defined terms in the tail end of the initial complaint, capital D Defendant, he described that as deliberate. He described that as a conscious decision. He's referencing documents that are outside the amended pleading. That's the operative -- that houses the operative facts for purposes of considering the motion to dismiss.

And in terms of the causation argument in response to Your Honor's questions about the prevention doctrine, which I will get to in a bit, you know, he's arguing that -- essentially, that assuming SIRVA complies with all the reasonable-best-efforts provisions and they had nothing to do with the conditions being denied -- and those are clear fact issues that need to be tried -- they can't be resolved on a pleading-stage motion.

You know, in addition, the parties are engaged in significant discovery. That's how we got the Barclays e-mail we submitted to the Court.

We're producing documents. We're exchanging interrogatories. Depositions are forthcoming. Trial is scheduled in four and a half months. The motion to dismiss here is focused entirely on whether or not there's an equitable remedy to use specific performance to consummate the deal. And deciding that now -- and we cite cases to this effect, both from Delaware and outside of Delaware. Your Honor, it's just not an efficient approach. We're not aware of any case that has put the cart before the horse like that in a matter involving an MAE or reasonable-best-efforts clauses, all of which we've addressed in our amended complaint, especially where discovery is ongoing and we've got trial in just four and a half months. And SIRVA hasn't identified one, other than it would be convenient for them not to have to deal with specific performance after trial. At least for purposes of consummating the deal.

So, Your Honor, for those reasons, we think the Court could deny the motion, let the parties get to a full trial record, and the Court can decide the matter on a full trial record, which is the same path that former Vice Chancellor Lamb took in *Hexion* and Chancellor Bouchard recently found in *Channel*

Medsystems, and in so many other MAE cases we cited.

THE COURT: Does it matter that we are in the context of an alleged MAE? Why does the *Draper* framework not apply simply because this is a contractual matter?

MR. MICHELETTI: That's a good question. Well, I mean, primarily it involves the sale of land. It's just the provisions that are associated with that case are unlike the ones that we have here, where, like, for example, in *Hexion*, reasonable-best-efforts obligations required parties to take steps to solve problems and consummate the transaction. And, failing to do so, it was held to be a lack of good faith constitutes bad faith. There's issues, I think, associated with an MAE case that make it different.

But the primary reason is because the contract -- and this is totally lost, I think, on my friends at SIRVA -- which is, the primary reason is, the contract was terminable at will by both parties, right? So either party could terminate at will. And so the Court on its own, *sua sponte*, raised the issue about specific performance and said, "If both parties can terminate this contract at will by definition, I

can't award specific performance."

And so that's completely inapposite from the situation we have here. We have -- and I will get to this, Your Honor. But we have broad specific performance rights set out in this section that you didn't hear anything about today during Mr. Kassof's argument, which is Section 13.8(a). And there's -- and -- which, among other things, indicates that we can use specific performance to force SIRVA, based on their breaches, to take all the iterative steps up to the point of closing and only then would Section 13.8(b) kick in for purposes of whether or not we can use it to consummate the transaction.

So I don't think -- I think *Draper* is inapposite, and it's inapposite based on the contract in that case.

I want to spend a little time, Your Honor, given that this is a motion to dismiss on our own amended complaint and the facts that we allege in it, because there's been nothing that's said about that today, and it's directly relevant to the issue of specific performance. I kind of described it in my own mind as the elephant in the room that SIRVA is not talking about. I do think it's worth discussing.

You know, first, the factual allegations in the amended complaint obviously provide the record for the motion to dismiss. That's the operative pleading.

SIRVA focuses, myopically I would say, on Section 13.8(b) of the purchase agreement to the exclusion of a host of a bunch of other highly relevant provisions, including 13.8(a). And all those provisions, in addition to our allegations, form the basis for our request for specific performance here and specifically address the 13.8(b) issue that Mr. Kassof is raising.

But let me start with the facts. I want to talk a little bit about some of the purchase agreement provisions that have been left to the wayside by SIRVA and a myopic focus on 13.8(b), and then I'll talk about the prevention doctrine, Your Honor, because I think it's important.

We have a 220-paragraph, six-count amended complaint that's loaded with detailed factual allegations. And we clearly state a claim against SIRVA for breach of the purchase agreement for engaging in a bad faith scheme -- that's what we call it -- to torpedo the deal based on buyer's remorse.

In essence, based on a false or bogus MAE claim at the 11th hour four days before closing, right. If our amended complaint does nothing else, we go over that in painstaking detail with fact after fact in our amended complaint. I'm not going to repeat the paragraphs here. We have a detailed narrative of the facts in Realogy's opposition brief at pages 6 through 27. The narrative's all laid out there, but I do want to summarize a few points that are relevant.

Interestingly, Realogy's argument about the cascading effect or chain reaction associated with Section 13.8(b) starts with the filing of our complaint on April 27th. But they ignore all of the facts and all of the things that we actually alleged in the complaint -- both the initial complaint and the amended complaint, frankly -- that lead to that point, that lead to the point in time we file the complaint, which includes SIRVA, at the behest of its hundred percent owner, which is Madison Dearborn Partners, deciding on or around March 20 -- March 2020 that it no longer wanted to close the purchase agreement because of buyer's remorse. Madison Dearborn Partners does not believe the combined company would provide -- our theory is that it would

not provide an attractive rate of return on its short-term investment strategy, and they wanted out of the deal. And the ostensible reason was the COVID-19 prices and the impact that was having on SIRVA, frankly, and also on other companies that were similarly situated in that industry, including Realogy's entity, Cartus. That was the subject of the purchase agreement.

You know, we allege over and over in the amended complaint that SIRVA repeatedly and intentionally violated its best-efforts obligations while executing on the scheme, and that included the -- their obligation to use best efforts as to closing the deal and as to financing. And this is the critical point, which puts it into the category of *Hexion* and *Channel Medsystems* and their conclusion that failure to comply with best efforts indicates a lack of good faith, or bad faith.

SIRVA never revealed any aspect of its true plan to Realogy or its buyer's remorse or its interest in getting out, or even that there was a potential MAE at any time prior to April 25th. And we make that clear. And on Friday, April 24th, prior to SIRVA executing on its plan on the 25th, Realogy sends

a letter to SIRVA saying, "We're prepared to close. All conditions are satisfied, and let's close next week." I think it was the 29th or the 30th.

The next morning, for the first time, is when we heard -- we, Realogy, heard -- that SIRVA was not going to close the deal because of an MAE. It was disclosed for the first time in an early morning seven-minute phone call between Realogy's CEO and Tom Souleles, who is a director of SIRVA in the Madison Dearborn Partners. It was a seven-minute phone call. It was explained by Mr. Souleles to our company's CEO that there was an MAE and that "We will not close this deal." And what we allege about that in particular is that it was a repudiation on that date.

Later that day, SIRVA sent a letter that followed up with some more specific details about the MAE claim that they purportedly had, which included a disproportionate effect of COVID-19 on Cartus, the Realogy subsidiary that's being sold, as well as the fact that Realogy, who's subject to performing on a transaction agreement postclosing, was going to be insolvent and wouldn't be able to perform under that agreement. We think both of those arguments are makeweight and were just an ostensible

excuse to satisfy buyer's remorse.

The most important part about that April 25th SIRVA letter that communicated that, is that they describe those pieces, the MAE, the purported Realogy insolvency, as conditions to closing because it rose to the level of an MAE; that provided -- that were incurable, right? So mirroring sort of the repudiation from Mr. Souleles earlier in the day but, most importantly, tying it to a provision in the purchase agreement, Section 11.1(c), that provided SIRVA with potentially an immediate termination right for the purchase agreement due to incurable closing conditions.

So we then filed our complaint. We worked -- people worked the rest of the weekend and filed the complaint on the morning of April 27th in light of that, out of fear that if they terminated the agreement before we could get our request for specific performance on file, we'd be hearing a different argument from SIRVA, you know, that we waited too long. So we moved expeditiously, which is how I understand the Court of Chancery would like us to proceed in circumstances like that. Most recently from Vice Chancellor Slights in the *Juweel* case made

that point.

When we filed the initial complaint, it is our position -- and it is still our position -- in the operative complaint, which is the amended complaint, that at the time we filed the complaint, all the conditions -- well, first of all, we have the right to use specific performance to require SIRVA to comply with their best-efforts obligations, including the best efforts to consummate the deal, which takes us right to consummation. Subsequent to that -- or following that, we also, under Section 13.8(b), allege that all the conditions to closing were either satisfied at the time we filed our complaint, thus allowing us to bring the action for specific performance, or SIRVA's bad faith conduct and its repeated and flagrant violations of the reasonable-best-efforts provisions are what caused those conditions to fail. That is the central thesis of our amended complaint, Your Honor, and this was the thesis of our original complaint, although we added a lot more detail and facts and things of that nature in the amended complaint.

So on a motion to dismiss, this is the stage in which SIRVA decided to raise these remedy

issues. On a motion to dismiss, the allegations in our amended complaint have to be accepted by the Court as true, and all inferences flow in our favor on a 12(b)(6) motion. And that's all this is. SIRVA doesn't get the benefit of the factual inferences here. We do, based on what we've alleged in the complaint. And I think other than maybe one or two casual references, I didn't hear any mention of any of the allegations we raised in our amended complaint whatsoever on this motion. So far today.

Let me talk about some of the provisions that SIRVA ignores while myopically focusing on 13.8(b). I mentioned 13.8(a) provides Realogy with an extremely burrowed right to specific performance. And, again, expressly in 13.8(a), it also provides Realogy with the ability to use specific performance to force SIRVA to take the steps necessary to close the transaction. And you can see that language, Your Honor, right in the first sentence of Section 13.8(a), where it says, "The Parties hereby expressly recognize and acknowledge that immediate, extensive and irreparable damage for which monetary damages, even if available, would not be an adequate remedy, would occur in the event that the Parties do

not perform the provisions of this Agreement (including failing to take such actions as are required of it hereunder to consummate the Transaction) ...," which, from SIRVA's standpoint, are all of the reasonable-best-efforts provisions that bound them to take steps to solve problems and consummate the deal or consummate the financing, as the case may be.

The only suggestion in the briefing on the motion to dismiss from SIRVA in response to that is those -- that would be futile. But the contract expressly permits our use of Section 13.8(a) for that purpose, and they're actually in breach of Section 13.8(a) if you keep -- if we keep reading, from arguing otherwise, because they said in 13.8(a) they would not oppose specific performance on the grounds that it is not an appropriate remedy. And they say it's futile, nobody has ever done this before, it can't -- it doesn't make sense under the context here because of their myopic focus on 13.8(b).

But *Hexion* did exactly that. And in *Hexion*, it's very interesting to me because *Hexion* was the case I thought of when this first -- when I first read these provisions. *Hexion* actually has -- in

Hexion, Vice Chancellor Lamb after trial, of course, awarded specific performance to the seller to force the buyer -- to essentially specifically force the buyer to take all of the steps up to closing and comply with the reasonable-best-efforts obligations, including as to financing and then right up to consummation.

And the reason why -- and so it lines up with what was expected in Section 13.8(a).

The reason why in *Hexion* Vice Chancellor Lamb couldn't go the extra step, because, based on all the findings -- I think he was clearly prepared to do that if he could -- but the parties expressly agreed, with stark language that we don't have here in this purchase agreement, it effectively said the parties agree not to use specific performance to consummate the transaction, right? It was, like, a literal statement like that.

We don't have that here, right? 13.8(b) focuses on -- yes, it focuses on the consummation of closing, but it authorizes Realogy to be able to use that to consummate the closing if the four conditions are satisfied. And that's ultimately how we get to the prevention doctrine here, Your

Honor, in terms of how this works. We allege that SIRVA's bad faith acts through their -- essentially through their sabotage of the deal four days before closing, raising the MAE claim we think is meritless, effectively -- and the failure to comply with the reasonable-best-efforts clause has caused the conditions of 13.8(b) to fail.

So we are trying in Count I, for example, of our amended complaint, enforce all of their obligations up to closing. And then because we believe we alleged and we will prove that the condition (Inaudible - dead air space) conditions to fail, we can use specific performance to actually consummate the deal under 13.8(b) as well.

Now, let me just point out to the Court again because -- if I don't point this out, Your Honor, I'm happy to rely on the brief, if you're comfortable with that. But I want to point out the fact that we didn't hear any mention about the reasonable-best-efforts obligations that SIRVA is under. We heard about one argument about 7.3(e) but none of the provisions that we raise in our complaint that actually state our claim.

So, for example, Section 7.6(a)

requires SIRVA to use reasonable best efforts to close and specifically to cause the closing conditions to be satisfied and to cause the closing to occur, right? That's the so-called reasonable-best-efforts-to-close provision. Section 7.3(a) requires SIRVA to use its reasonable best efforts to obtain debt financing. Section 7.3(d) has a reasonable-best-efforts obligation on SIRVA to maintain, in effect, the equity commitments. And Section 7.3(c) requires SIRVA to use its reasonable best efforts to promptly arrange and obtain alternative financing, right, based on the provisions.

But these are all reasonable-best-efforts obligations relating to closing and financing that SIRVA was bound by under the agreement. And we allege in our amended complaint and in the initial complaint but the amended complaint is operative, we allege that -- in the amended complaint that they've violated repeatedly, and those violations directly led to the conditions failing in Section 13.8(b).

THE COURT: If Realogy filed a nonretained claim, what does SIRVA -- what do their reasonable best efforts look like to you to obtain

that financing and alternative financing?

MR. MICHELETTI: Well, I actually -- that's a great question. And one of the things you did not -- and I'd like to sort of tie this together for the Court in that regard.

One of the things you did not hear from SIRVA is a holistic reading of the purchase agreement that takes into account all these provisions and how they operate with 13.8(b), right? In SIRVA's world, they want to read 13.8(b) as existing on an island and operating independently from all of these other provisions. And it doesn't work that way under the agreement. For example, the Court, in construing a contract, right, or a party construing a contract has to give meaning to the various provisions in the contract as a whole and can't just focus on one to the exclusion of others, right?

So -- and they've never provided that to the Court because they've ignored steadfastly these other provisions, Section 13.8(a) and the reasonable-best-efforts provisions, because they're not consistent with their argument on a motion to dismiss because they're fact intensive and they know what our complaint alleges; but they don't want to

deal with that, either.

But the way -- if you're reading the entire contract and you're reading it holistically, the only time Section 13.8(b) comes into play or is triggered is presumably when SIRVA has complied with all of its reasonable-best-efforts obligations relating to financing and to closing to get to that point where you're prepared to consummate the transaction. And that reading is the only reading that makes sense here because it's consistent with 13.8(a), which expressly says that specific performance can be used to force SIRVA to take those steps to get up to that point. And it also gives meaning to all the reasonable-best-efforts obligations, which Delaware courts, including the recent *Williams* decision from Vice Chancellor Glasscock, identifies as -- along with *Hexion*, *Channel Medsystems*, a number of MAE cases that explain reasonable-best-efforts clauses are important provisions and they have teeth if you don't comply with them and you blow them off because of buyer's remorse, right? In *Hexion*, *Channel Medsystems*, it's bad faith, it's a lack of good faith. That's the only holistic reading that makes sense when you're

considering all of those various obligations and the interlocking responsibilities by the contract parties relating to financing, closing, et cetera.

Now, let me just give you the other side of that so you understand -- just to put some emphasis on this. In SIRVA's view, based on this motion, right, they can do the following: They can breach their best-efforts obligations for nearly two months, as we've alleged in the complaint, with impunity. They can raise false MAE claims based on buyer's remorse for the first time four days before closing in communications that repudiate the agreement and characterize the MAE claims as incurable closing conditions, and ignore all of that to argue in a factual vacuum that the conditions to using specific performance for consummating the deal in Section 13.8(b)(ii)(B) aren't satisfied, and then argue that the remedy should be dismissed at the pleading stage, regardless of all the allegations we've raised in our amended complaint that they ignore, that demonstrate that SIRVA caused those conditions to fail through its violations of the best-efforts obligations and their duty and obligation to use reasonable best efforts to close.

So 13.8(b) shouldn't even come into play here in terms of the specific, quote/unquote, "chain of events." At a minimum, until we sort out at trial who caused the conditions to fail, right now, on a pleading stage, our facts are the only ones that control. Our facts dictate that it was SIRVA, based on its repeated violations of its reasonable-best-efforts clauses and its false use of an MAE for buyer's remorse.

And that's the reason why SIRVA, you know, has spent all of its time on 13.8(b) and tries to isolate the universe of facts and provisions in the contract down to basically just that provision, right? And it's because of the prevention doctrine and the way the law operates in this area.

You know, look, I mean, they challenge the prevention doctrine a little bit, Your Honor; but it's a well-established venerable contract doctrine that's been recognized in every Delaware court, Delaware Supreme, Delaware Chancery Court, Delaware Superior Court, District of Delaware. It's been recognized by the U.S. Supreme Court, courts around the country, and it's also recognized at Section 245 of the Restatement of Contracts.

This, in my view, is the quintessential circumstance for when the prevention doctrine should apply, right? The elements are very straightforward. It applies when there's, one, a contract provision with a condition. And this is an extrapolation from the case law that we cite. And, by the way, my friends on the other side didn't cite (Inaudible) case to support any of their prevention doctrine arguments whatsoever. We're the only ones that cited the cases.

The prevention doctrine applies, No. 1, when a contract provision contains a condition; No. 2, when a party to the contract seeks to rely on the failure of such condition -- that would be SIRVA -- No. 3, the other party, meaning Realogy here, to the contract alleges that the party seeking reliance is the cause of the condition's failure, right, which is what I've just been discussing; and then the fourth element is the party that's seeking reliance on the failed condition has to prove at trial that it did not materially cause the condition to fail, right? So it's got issues about causation, issues of materiality, all fact issues that need to be addressed.

The interesting thing about it, because I did a lot of studying into this doctrine, comes, in my mind, from 13 Williston on Contracts, Section 39:6, Fourth Edition. It's got equitable foundations, the prevention doctrine. You know, we're in the Court of Chancery, so I found it interesting. It's based on the long-established principle, according to Williston's, of law that "a party should not be able to take advantage of its own wrongful act." And that's essentially the core of our argument here, that SIRVA's bad faith breaches of its best-efforts obligations, essentially in a design to scuttle the deal, caused the conditions to fail the specific performance. For purposes of this motion, that's what's important. And if they caused those conditions to fail, as we've alleged, they shouldn't benefit from that and the prevention doctrine should apply, right?

There's no -- just to close the loop, there's no argument that -- and we heard it today -- Section 13.8 contains four conditions. SIRVA's relying on the failure of two of them, (b)(ii)(A) and (b)(ii)(B). Realogy's alleged that to the extent those conditions has failed, SIRVA caused those

conditions to fail for all the reasons I've discussed. And, as a result -- and this is the interesting part about the way the doctrine works -- the burden now shifts from us to prove that we didn't cause it to SIRVA to prove that they didn't cause it the way the prevention doctrine operates and didn't -- and that we didn't -- and that we, to the extent they're going to argue we caused it, that it was caused to a material effect, right, to a material level. That's what the -- that's how the prevention doctrine operates.

We've laid that out in the complaint. And their arguments about it, frankly, just -- they don't make much sense to me anyway, and I don't think -- they're not consistent with any case law because they didn't cite any.

But the argument about the remedy versus performance I think is a red herring, right? That's the central argument they raise in their papers. And that's because the prevention doctrine focuses on reliance. Is the party relying on a failed condition the one that caused that failed condition, right? The focus of the prevention doctrine is on reliance, not on the end result or whether it's performance or whether it's remedy focused. It's got

an underpinning of equity to it. Is the party trying to rely on the condition that failed the one that caused the failure? And they have to disprove at trial that they are the one that caused the failure based on their allegations here.

THE COURT: Where specifically in the amended complaint are those allegations that SIRVA is the entity that caused those conditions to fail?

MR. MICHELETTI: Well, the entire -- I'm happy to go through it, but the entire narrative of our complaint is that they wanted -- and I'm -- let me just grab my copy of the amended complaint. Your Honor, I apologize. My --

THE COURT: That's all right. Go ahead.

MR. MICHELETTI: Okay. Apologies, Your Honor. I'm in a small space, so I didn't have a lot of room.

THE COURT: We're doing our best.

MR. MICHELETTI: Yep.

I mean, I think, you know, it starts from -- again, I don't think I can point you to one paragraph, right, that is going to capture it all. There are a few summation paragraphs in here. But the

whole gist of our amended complaint, the central thesis of it is that SIRVA, at the behest of its 100 percent owner, Madison Dearborn Partners, wanted out of the deal because it wasn't consistent with their -- it wasn't consistent with their investment strategy for the combined company postclosing, and because SIRVA was getting hit particularly hard with the COVID-19 impact on the relocation industry and its business. And, as a result, they came up with this plan to do whatever they could to get out of the deal. And that meant stopping closing, right?

And whether it was trying to avoid closing instead of complying with reasonable best efforts -- and we go through this principally from paragraphs -- let's see, roughly from paragraphs 105 -- I don't want to discount, Your Honor, any of the other paragraphs that I'm saying here on the fly. But, I mean, the narrative starts about paragraph 105, and it goes all the way through the chronology through April and explains all this right up through, what I tried to summarize, you know, right up through about paragraph 162.

And then we go on to say that to the extent -- and we actually expressly say at one point

in here, as we get closer towards the end, that -- you know, paragraph 153, for example, is where we saw all the closing conditions were satisfied, right? And now, here, they are saying they were not satisfied. And our position was at the time we -- as we get closer to the time frame of April 25th, by the time they get to that point where they deliver their denouement of the scheme regarding the false MAE, at that point they had no plan to do anything to try to get to closing. And so their bad faith efforts to take the obligations to comply with the obligations to get to closing, solve problems, et cetera, never happened.

I think it's -- on the way we've pled this and if it turns out to be true, I think it's bad faith, on its face, in the *Hexion* context, and they had no intention of closing. And so to the extent that conditions failed, right, that's within their purview, some of these things, right? We're not a party to the debt financing commitment. We're not a party to the debt financing commitment, either. To the extent they did something there that caused them to fail, we think that's consistent with their overall scheme.

So that's the issue. That's what we've laid out. And I think at this point, Your Honor, all the inferences are drawn in our favor. They can't be drawn in SIRVA's favor on an amended complaint -- out of an amended complaint on a motion to dismiss.

THE COURT: What, if any, is the role of a concept akin to proximate causation? I mean, if we're looking at sort of dominoes started to fall as we got -- can you hear me?

MR. MICHELETTI: No. I'm having trouble. I'm sorry.

THE COURT: Okay.

MR. MICHELETTI: See if I can raise it up a bit. There we go.

THE COURT: All right. I'll speak up.

What is the role of the causation analysis here? You've got sort of a line of dominoes that started to fall, and the last domino was the filing of a nonretained claim. What is the relevance of the nature of all of the dominoes that preceded it?

MR. MICHELETTI: Well, because, again -- are we talking about the prevention doctrine or just we get down to the end at trial? Because, I

mean, if the prevention doctrine -- can I point Your Honor to paragraph 184, by the way, of the amended complaint? which I think essentially concisely lays out all the paragraphs -- summarizes all the paragraphs that precede it. I'm happy to read it to Your Honor.

THE COURT: I have it.

MR. MICHELETTI: Yeah. But, I mean, that basically is what summarizes the argument in general.

But, I mean, again, the way I think about the causation issue or the, you know, cascading events or chain link or whatever you want to think of causation, SIRVA's bad faith conduct led to our filing of the complaint, right? On April 24th we sent a letter saying all conditions were satisfied. On April 25th, SIRVA ambushed us on the morning of the 25th with their letter saying, "MAE, incurable closing conditions." We filed the lawsuit on the 27th out of concern that they were going to terminate immediately and we would lose our right to specific performance, and we thought that all the conditions were satisfied at that point. And if they weren't, it was because of SIRVA's bad faith conduct.

And then in terms of the retained claim, I mean, I think you -- we could keep going. It might be one of their defenses at trial when they're trying to disprove causation, because we don't have all the facts on that. We can't do that here on this record. Maybe one of the facts will be we filed this claim and it had four, you know, defined terms with a capital D at the end of the complaint that obviously made clear that SIRVA was being sued for breach of the purchase agreement and Madison Dearborn Partners was being sued in the alternative to enforce what was permissible relating to the limited guaranty for purposes of a termination fee.

You know, maybe that will -- maybe they'll make that argument at trial to try to break the causal link. But under the prevention doctrine, at the pleading stage, based on our facts and what we've alleged, including paragraph 184 and all the paragraphs that preceded it, those are the facts that they have to contend with now on this motion. And they lay the case out for the prevention doctrine to apply, which means they bear the burden of disproving causation on this issue.

I mean, I'm happy to move on, Your

Honor, to SIRVA's arguments and talk about them specifically, if that would be --

THE COURT: Sure. Go ahead.

MR. MICHELETTI: Yeah. Is there one you want me to start with in particular? Would you like me to start with the issue of nonretained claims?

THE COURT: Dealer's choice.

MR. MICHELETTI: Okay. Okay. So let's start with SIRVA's timing argument. Apologies. I just want to take a quick sip of this.

SIRVA's timing arguments. So ... Yeah, to me, I feel -- and I should just note this before I -- you know, again, I feel at this point it's premature to be dealing with all this because the prevention doctrine, it's their obligation to disprove causation, et cetera; but contract interpretation I think is, you know, understandable, so long as it's not ambiguous on a motion to dismiss. I do think we're the only party that's provided a holistic reading of the agreement that takes into account all the moving parts that are interrelated and, you know, I think that really should control here.

And so, in general, I caveat what I'm talking about when I'm starting now to get down into

the weeds, you know, like SIRVA has been with its motion. I just throw that out there.

But 13.8(b), in terms of timing, says, if you look at 13.8(b)(ii), the lead-in to that sentence, "Seller shall be entitled to bring an Action to specifically enforce Buyer's Obligation to consummate the Closing and Buyer's rights under the Equity Financing Commitments to cause the Equity Financing to be funded if (and only if and for so long as)." The emphasis in this provision in terms of timing is on the phrase "entitled to bring an Action," right? And that means in terms of the focus for when these conditions should be gauged is at the time the action is brought or filed, which would be April 27th. And, again, we allege that the conditions were satisfied then, or if they weren't, it was due to SIRVA's bad faith conduct.

They try to elevate "bring an Action" to pursue, maintain. They use all these buzzwords. I heard a little bit of that today in Mr. Kassof's presentation. But the express language is "entitled to bring an Action." And if you look above in the very section above 13.8(b)(i), they've got some timing language in there as well, which says, "in no event

shall Seller or any of its Representatives (including the Acquired Companies prior to ... Closing) be entitled to, or permitted to seek, specific performance against Debt Financing Sources, ..." and it goes on, right?

So in that section there's actually two timing components. Are you permitted to seek specific performance and are you entitled to specific performance? And the entitlement part is what's absent from Section 13.8(b)(ii). The focus is solely on "entitled to bring." And, again, at the time we filed, we think the conditions were satisfied. If they weren't, SIRVA is the one that caused them to fail.

But if you keep going, they also talk about the parenthetical, right? So "if (and only if and for so long as)." Their argument about that is extremely strained because it doesn't take into account that that whole preamble into the conditions is focused on "Seller shall be entitled." It's a mandatory statement by -- in terms of Realogy's rights to bring an action. It doesn't have any express limitation in there that suggests that you also have to have those conditions satisfied at a time when

you're trying to enforce it or at the time when the Court adjudicates and enters the judgment.

The "if (and only if and so long as)" parenthetical, the best way I think that can be interpreted in the context of that sentence is that it's a window for when you can bring the action, right? If at the time you bring the action, if those four conditions are satisfied, right, if those four conditions are satisfied, then you're able to bring your action and you can seek specific performance, but if and only if so long as, right? So if one of the conditions were to fail, right, then you wouldn't -- you know, on the -- then you can't bring the action on that date, right? So the window can open, the window can close.

And, again, the way I read this is assuming that -- let me just give you an example and why I think this is the most commonsense reading of this. If SIRVA -- let's assume for a moment, which is inconsistent with our allegations in the complaint what we think actually happened, but assume SIRVA complied with all their reasonable-best-efforts obligations right up to closing. And on day one SIRVA says, of the ability for us to consummate the

transaction and the window opens, SIRVA says "We're not closing," right? "We will never close." We could file the suit for specific performance, bring the action because the window opened, all four conditions are satisfied. We could use specific performance to consummate the deal.

Now, again, let's push the hypothetical out one day. Assume SIRVA has complied with all of its reasonable-best-efforts obligations to get to closing. Now we're on day two. We didn't use the window on day one. Now we're on Delaware two, and Barclays calls and says, "We've been wiped out. We can't fund the deal." The window closes, right? So you could have used it on day one to file the suit to bring the action, which is the language, but on day two the window closes, you're no longer able to use it.

I think that's the only way this can work, given the language about "bring an Action," and you look at other provisions, including right in this same section, that talks about multiple timing points and not just the one.

So that's what we think the right focus is here, is "bring an Action."

Now, I mean, I think it's clear that that's the case. You know, if it's ambiguous, it's a fact issue and it's not something that can be decided at the pleading stage.

Maybe -- Your Honor, maybe I'll talk about the retained claim issue. Yeah. So ... I mean, this really kind of rises and falls, Your Honor, on the issue of the use of the four capital D Defendant defined terms in the initial complaint, which I think is completely overdone. I do want to point out, though, again, the way we read the contract, the focus is on what was -- were the four conditions for 13.8(b) satisfied at the time we filed the complaint. At the time we filed the complaint, right, the only condition that SIRVA made us aware of that may potentially be an issue is the MAE. We disagree. We thought that condition was satisfied.

So they're pivoting at this point. They're hanging their hat post our filing of the case. So post after we bring the action, so to speak, as 13.8(b), you know, discusses, and we're now focusing on the use of these four defined terms.

So let me just go over that. And on that one, Your Honor, I know I have the regular

complaint, the initial complaint. Excuse me. So on its face, the initial complaint makes clear over and over again that SIRVA, not Madison Dearborn, was sued for breach of the purchase agreement and specific performance related to the purchase agreement -- we make that clear over and over again -- and that Madison Dearborn was sued for purposes of enforcing the limited guaranty only as it related to the termination fee.

Now, I don't want to read this into the record but I'd be happy to, but we have bullet points, and I can go through each and every one of the obligations in the initial complaint that make that clear. I personally think -- and it's at page 43 to 45 of our answering brief. I'm happy to rely on that, but we go over that by point by point by point.

And, in essence, Your Honor, their argument is, the Court, which is supposed to, under Rule 8, do substantial justice when construing a pleading, would read the pleading from the beginning all the way through, all the way through Count I, which clearly states and explains that the breach of contract claim is against SIRVA, specifically noting that SIRVA is the party being sued for breach of the

purchase agreement. You'd have to even read through Count II, which I think most clearly delineates the difference and what we intended when we filed this complaint for breach of contract against all defendants. Count II is how it's described, except in the paragraphs it says SIRVA breached the purchase agreement and Madison Dearborn is being sued in the alternative solely for purposes of enforcing the limited guaranty to obtain the termination fee. It could not be clearer.

And there is no narrative that the -- that SIRVA's relying on to be able to make this argument, which is, frankly, their entire argument in many respects on the -- on their myopic 13.8(b) motion to dismiss. You know, there's no narrative in Count III or in the request for relief that suggests capital D Defendants was supposed to elevate, means something so vastly different to everything else that came before it, right. I think, at most, it's a scrivener's error when you read the complaint, although I will note that Section 13.13 of the purchase agreement incorporates the limited guaranty into the purchase agreement by way of definition. So, I mean, it's technically accurate on some level. But,

you know, that's a hindsight point, Your Honor, that we would make, although I think it's technically accurate, but, at most, it's a scrivener's error.

THE COURT: Is the *Envo* case on that point?

MR. MICHELETTI: What's that?

THE COURT: Will you address the *Envo* case on that point that defendants cited?

MR. MICHELETTI: Sure. Yeah. So we don't think it's -- we think it's in inapposite, right? We don't think it applies.

The main distinction is that in that case there was a contract between commercial parties and where a defaulted corporation -- where there was an attempt to reform an agreement based on a, quote/unquote, "scrivener's error" to make a defaulted company's stockholders liable on the contract, right? And that's the -- I mean, in terms of facts and in terms of what was actually trying to be done there is far different, I mean, for two reasons.

One, this is a court pleading. Rule 8 controls, right? The Court's, you know, common practice of reading the pleading in its entirety and understanding its meaning and sort of divining the

meaning from the allegations of the complaint, not just getting hung up on one word or buzzwords I think controls.

And, No. 2, trying to enforce liability on somebody there based on a purported scrivener's error. It's just much different. So I don't think that applies, and we think it's inapposite.

You know, the other piece that we did not hear from SIRVA during their main presentation on this is that in order to get the cascading effect going that they want to have occur, you have to look to Section 10.2(b). And Section 10.2(b) contains a materiality qualifier. And Section 10.2(b) talks about, if we flip to that, a closing condition and conditions of the -- it's under Section 10.2, "Conditions [of] the [Obligation] of Buyer," (b), "Performance. Seller shall ... [perform] and [comply] with, in all material respects, each covenant and obligation required by this Agreement to be so performed or complied with by Seller on or before the Closing."

So there is a materiality component to this. I think they haven't even tried to demonstrate

materiality. In the reply brief, they said sometimes materiality can be decided on a pleading record. I would posit, Your Honor, based on what we allege in our amended complaint, I don't think they've got the ability -- and the fact that they're raising that without any case law authority associated with it in their reply brief on that point, I would posit that that's not something they can do here, right? They have to show that the breach is material, to the extent there was one. And, again, I don't think it was because that wasn't the intent of the initial complaint, I think it's clear, to have those defined terms somehow override the entire pleading. But certainly they haven't -- and they aren't able to show materiality about those issues here.

I mean, in terms of, like, the policy arguments they make in the amended complaint about no recourse provisions and the like, there's just no basis for the Court to conclude here at the pleading stage that the amended complaint opened Madison Dearborn up to greater liability than it otherwise bargained for in the no-recourse provision, that it suffered any other type of harm from the filing.

The press release issues, Your Honor,

that's -- those aren't in the complaint. Those aren't pled in the complaint. I think the focus and the issue behind them is what, quote/unquote, "we intended." In the reply brief, they describe them as proof. They describe them as not being an accident, it was intentional. Those are all issues of fact. You know, if that's going to be part of their causation argument after trial, I think it's got to be based on a full factual record where both sides can be heard on that, if it even gets to that.

And then the other reason why this argument fails is because they -- they're playing cute with the cure provision in the limited guaranty and the language in the equity commitment letter that sweeps in the limited guaranty's terms and other obligations into the equity commitment letter.

So let me just explain that one. Section 6(b) of the limited guaranty contains a cure limitation, providing that if Realogy ever asserted a nonretained claim, that Realogy would have 10 business days after receipt of a written demand for such withdrawal to dismiss any such nonretained claim. And defendants never made a written demand. I think we heard that today, that there was no demand made based

on the limited guaranty. And they concede as much in Footnote 6 of their reply brief.

However, their argument is there's no cure provision in the equity commitment letter which automatically and immediately terminated. But, again, Section 3 of the equity commitment letter incorporates the definition of "Retained Claim" into the equity commitment letter and all the terms, conditions, and limitations from the limited guaranty, which includes the cure provision. The cure provision wasn't taken and dropped into the equity commitment letter, but they incorporated all the terms, conditions, and limitations. That included the retained claims and any limitations on that as well.

Their argument just doesn't make sense. I mean, if it doesn't mean that, what does it mean? It really doesn't make sense any other way. And, frankly, under the terms of the agreement, it does make sense. I mean, the reason that it's in the limited guaranty is if the parties to the limited -- if Madison Dearborn or the party -- or SIRVA or the parties to the limited guaranty did not want to invoke the cure period, it meant that it wasn't a nonretained claim. That's the only way that can be read or, at

bare minimum, that it wasn't material or important to them, right?

And I think it was -- I think the way to read that is that it wasn't a nonretained claim. That's the assumption. If the equity commitment contains that same letter, it doesn't automatically -- or same condition, excuse me, it doesn't automatically and immediately terminate upon the filing of a nonretained claim. That is not withdrawn in the cure period limitation in the limited guaranty. They would have had to send their notice. They didn't. And I'm sure, you know, if they had, we would have immediately withdrawn, just like we amended the issue to make sure it was all clear and clarified for the amended complaint. But they didn't do that.

And, you know, their attempt to run from that is cute, it's too cute by half, right? It works for the limited guaranty. The language gets incorporated, including the definition and all the terms, conditions, and limitations, into the equity commitment letter; and the one piece of it they don't include as part of that is the cure provision.

And here's the interesting fact about this, Your Honor. That is -- that agreement is --

Realogy isn't a party to that agreement. That agreement is between SIRVA and Madison Dearborn Partners, its hundred percent owner, right? And, of course, they're going to take whatever position they're going to take in terms of construing their own self-interested agreement in a manner that suits them for this purpose, right? That's what -- you know, we raise that in our answering brief.

But I think the most important piece of it, though, is the most commonsense reading of that equity commitment letter and that language about all terms, conditions, and limitations is, is that it sweeps in the cure provision. They didn't invoke it. The same result should occur as the limited guaranty that we've heard about today from Mr. Kassof, that it didn't terminate because the cure provision wasn't invoked.

You know, the only other argument they make, Your Honor, is about the financing condition, 13.8(b)(ii)(B). Again, at the time that we brought the action, we allege that the proceeds of the debt financing were funded to buyer, irrevocably confirmed in writing to buyer. Again, just because I think I've been going on for awhile -- and I apologize for that,

Your Honor -- page 53 and page 54 in the answering brief covers those allegations. We think it's well-pled. But, regardless, whether or not the funding had occurred or was irrevocably confirmed, I mean, just by reference from Mr. Kassof before who was testifying about that part in his e-mail from April 24th, it's a fact issue, right? And, again, this is a pleading-stage motion. The full facts will come out. We can have these issues down the road.

And the final point I want to make is, because I think sometimes it's lost in the way SIRVA's made their argument, Section 13.8(b)(ii)(B) fails, according to SIRVA, because of the nonretained claim, right? It's a cascading effect. So, in other words, the nonretained claim -- we -- the -- assuming for a second that we filed the nonretained claim in the initial complaint, right, that breached the contract, it triggered the termination provision in the limited guaranty, they didn't send a cure. So that one is okay.

But their argument, then, is, it also automatically terminated the equity commitment letter, which in turn has a cascading effect on the debt financing letter as well. And that's why their

argument is the financing failed. But, again, at the time we filed, it was fine. To the extent it failed, it's -- as we allege in our amended complaint and as I've talked about, our amended complaint alleges that to the extent that any of these conditions fail, it's part and parcel to the bad faith scheme to ambush the deal and not close by SIRVA.

And so that is our argument for that provision as well, Your Honor.

So the bottom line here -- and I'm sorry it was so long-winded, but there was a lot to unpack, and I wanted to make sure that we got our argument out in full because, you know, if it was up to SIRVA, you wouldn't hear anything about the actual facts in the amended complaint and other aspects of the agreement.

But these are all arguments that SIRVA can raise down the road, right, after trial. We're four and a half months away. Discovery is ongoing. I said this at the outset but I think it's true. These would all be better decided after a full trial record.

But, Your Honor, for all the reasons I've stated, we ask, respectfully, that the motion to dismiss be denied and that we proceed to trial on our

claims.

THE COURT: Thank you very much.

You know, don't we take a 10-minute break, and then I'll hear from Mr. Kassof.

MR. KASSOF: Thank you, Your Honor.

MR. MICHELETTI: Thank you, Your Honor.

(Recess taken from 3:17 p.m. until 3:34 p.m.)

THE COURT: Counsel, thank you very much.

Mr. Kassof.

MR. KASSOF: Thank you, Your Honor.

I guess, I'm -- I'd like to start, if okay with Your Honor, exactly where I started the last time, which is on the timing issue, because Mr. Micheletti did not address at all the last sentence of 13.8(b). The issue, we think, is squarely determined by the contract as to when these four conditions for the remedy of specific performance need to be in place. It says, "if (and only if and for so long as)." And I described exactly what "for so long as" means in the common language. The description that my friend argued just reads it out. It makes it the exact same as if and only if, right? It says if,

it's at the time I bring the action, for so long as the time that I bring the action. That's no different than the "if (and only if ...)." That just means bringing the action doesn't have the "for so long as." All the conditions don't have to apply for so long as you bring the action. Bringing an action is exactly what they did here.

And then, secondly, there's nothing addressing the very last sentence, which was spelled out as the parties agreed as a "For avoidance of doubt." And there was this distinction between bringing an action versus obtaining an injunction, obtaining the relief. And the last sentence of 13.8(b) says explicitly that it's "For the avoidance of doubt, ... in no event shall Seller be entitled to seek to specifically enforce any provision of this Agreement or to obtain an injunction or injunctions ...." And then it goes on, "... or to bring any ... Action in equity ...," et cetera, "... only under the circumstances expressly set forth in ... Section 13.8."

So there's no credible dispute as to what this plain language means. It means that the four conditions, (A), (B), (C), and (D), need to be in

place when you bring the action, for so long as you're bringing your action, and to obtain the injunction or injunctions, to specifically enforce any provision. It all has to be in place. So that's 13.8(b).

The reason why we're so focused on 13.8(b), the specific performance remedy conditions and requirements is because that's all that we're raising on this motion. That's why we're myopically focused, so to speak, but we're zeroed in on it because they all have to apply.

And the -- I think what was most telling is the response on the April 27th complaint, because Your Honor asked a pointed question, which is, "Well, what is the" -- "what effect would the filing, if I find that you filed nonretained claims, what effect would that have on the issues here and then also on the prevention doctrine?" And there's no -- the answer, respectfully, was sort of all over, okay. So I want to take it in pieces.

The first point that was made -- one of the points that was made was that "Actually our complaint is technically accurate because we are asserting breaches under the limited guaranty as well." Well, that's not what the complaint says.

And, again, I'm -- all -- what we're asking on this motion for the Court is to apply just the language that they used, strictly the language that they used in the April 27th complaint and what the effect is on that -- by filing that on the various obligations that are at issue that impact 13.8(b). And what they said was, "Defendants have breached their obligations under the Purchase Agreement, specifically including their obligations to close the Transaction ...." That's not related to the $30 million termination fee. That relates to what they said, their language, their allegation, that Madison Dearborn and SIRVA, defined as "Defendants," which they did, breached their obligations under the agreement, specifically including to close the transaction.

Then it says, okay, well, what's the impact of that? And I walked through it before. They focus on all sorts of other parts of their complaint where they allege things about SIRVA. They do. But what they allege in 112, paragraph 112, in their declaratory judgment count, and what they allege in their prayer is against SIRVA and Madison Dearborn Partners. And then the question becomes, okay, well, what happens? If we just apply the words on the page,

just the words on the page of what they allege, what is the impact on that -- those words for purposes of this motion today? And the impact is very clear, and it's -- a lot of it isn't even disputed.

What happens is -- and I'm going to get to the fact that it immediately -- automatically and immediately terminated the equity; but a couple points just to make clear, because it's not in dispute, hasn't been in dispute in the briefing, it's not in dispute today.

If they filed nonretained claims and it blew up the equity, which we think there's no way to read it otherwise from the April 27th complaint, then that blew up the financing. They don't dispute that if the -- that the debt financing has a condition, the equity commitment from Madison Dearborn Partners. There's expressly not an obligation to seek alternative equity financing from anybody else. And if there's no equity from anybody else, they don't dispute that the debt financing -- that the financing that's required for this transaction doesn't exist because that's the hole -- the equity is -- now has a hole that's not going to be filled by anyone else. We have no obligation to fill it by anybody else. The

parties expressly agreed to that, and the condition to the debt is now blown up and gone. And there's no requirement to get more debt at all. And I walked through that before, and that's never been disputed in any of the briefing or even today.

So I pause there, because it's this issue -- this isn't an issue about causation at all. Causation has nothing to do with what we're talking about. If they filed nonretained claims on April 27th, the effect is it blew up the equity. If they filed at this time, it blew up the equity. We think it's crystal-clear from the April 27 complaint. They can say it's a scrivener's error, they can say they really didn't mean it, notwithstanding their -- the fact that they flip back and forth from SIRVA in their press release. Their intent doesn't matter. If they filed it, it blew up the equity.

Now, going to the ECL. They have absolutely no -- they do not address and have no answer for what automatic and immediate termination could possibly mean if there's somehow silently transposed into the ECL a cure limitation. They say, well, we're playing games with the language. I looked back at the language again, and there's -- there's

nothing that says -- the word "incorporate" isn't in here at all. It doesn't say it incorporates anything. It doesn't say it incorporates a cure provision. It doesn't say it's somehow -- the cure provision comes to life. And the cure provision and limited guaranty, again, applies to the Madison Dearborn Partners obligation on that limited guaranty, the $30 million backstop. That cure limitation doesn't apply beyond the $30 million backstop at all. It's just specific to prevent that. We have to give them a right to cure if we're going to say "You filed nonretained claims that blew up the limited guaranty." They can cure it on that 30 million but not on the equity commitment. And that's what the parties -- that's what it says in the language.

Here it says -- and then on the "subject to" language, what it actually says is -- and the reason why I'm going so -- taking such time to look at the words, because the words don't support their argument on it. What paragraph 3 of the ECL says is, that "The obligation of the Investors to fund the Commitment shall, in each case, automatically and immediately terminate," automatically and immediately terminate, "upon the earliest to occur of, ..." and

then you go down to (c), "Seller or any of its Representatives asserting, filing or otherwise commencing any Action against, any Investor Affiliate (as defined below) relating to this ... agreement, the Limited Guaranty (as hereinafter defined), the Purchase Agreement, the Debt Financing Commitments or any transaction contemplated hereby or thereby other than Retained Claims (as defined in, and to the extent permitted under, the Limited Guaranty), in each case" -- this is referring to the retained claims -- "in each case, subject to all ... the terms, conditions and limitations herein and therein."

That doesn't incorporate a cure provision that somehow means that you can file a nonretained claim under the purchase agreement, which is what we're saying they did here, and it automatically and immediately terminates, as the language says it does. No other explanation for that, automatically and immediately terminates, but somehow that the cure provision preventing the termination of the limited guaranty gets transposed from not terminate immediately and automatically Madison Dearborn's equity commitment to the deal. It doesn't say anything remotely close that. It just says, "...

Retained Claims ... subject to all ... the terms, conditions and limitations herein and therein" as to what the retained claims are. That makes sense, but it doesn't secretly, silently impose a cure limitation. And you cannot reconcile that with automatically and immediately terminates.

Why is all that so important and we've been so worked up on that issue is because they filed the complaint on April 27th. This notion of the prevention doctrine, which is -- again, they say we don't cite any cases. We walked through in detail all of their cases. They are asking Your Honor to be the first court, the first to apply it to a remedy limitation, a remedy limitation that kicks in in the event of a breach because of that breach. Never happened. And the *Hexion* case that they cite, that case, if there is ever a case that was going to look to the prevention doctrine, it would have been that one.

They said that *Hexion* had knowingly and intentionally breached its covenants and obligations. It deliberately blew up the debt financing by creating some insolvency opinion. The Court didn't say a word about the prevention doctrine,

a word. And, in fact, said instead that it had to apply the specific performance language as it read -- and it was impenetrable language, the Court said -- and said, "You cannot get specific performance to close."

So that case says the opposite.

But the reason why we're so focused on this is, if they blew up the equity on the April 27th filing, the second they filed the suit, the instant they filed the suit, there's no causation issue here. The equity is gone and the debt is gone. Then you look at 13.8(b)(ii) if we're right, that all of those conditions have to be in place at the time they file suit, throughout the suit and to get, obtain the injunction as the language says, then there's no financing, there's absolutely no financing because there's no equity. We don't have to get new equity, and the debt financing is gone because of it, and there's nothing that requires us to fill the gap. We've spelled it out. They don't dispute it.

So if there's not -- it's not a fight as to, like, well, who caused it, we didn't close when we should have, and did that cause any of these conditions to not apply. They filed suit and it blew

it up, and we're asking the Court to apply the language that they used in their April 27th complaint, the specific language. It -- just by reading it, and the ECL language. And if the Court concludes that they filed nonretained claims on April 27th based on use of the word "Defendants," saying we committed material breaches of the purchase agreement, if that's a nonretained claim, which it is, then it immediately -- automatically and immediately terminated the equity, and the financing is gone for this transaction now and forever more.

On the -- let me see if there's anything else on the prevention doctrine.

I guess the other point -- I hit a bunch of my points all at once. I'm just not going to take up Your Honor's time.

The only other point I'll say is that this case is -- Your Honor asked about *Draper* and why wouldn't *Draper* apply to this. *Draper* does apply. Yes, that dealt with the contract of land, but it was clear and unambiguous language on the specific performance issue. And the Court ruled on it at the pleading stage, which is exactly what we're asking the Court to do now. So the principle is the exact same,

and it applies.

May 7th came and went, right. We have to live in a world where we are now. We're so focused on April 27th because it takes out all of these other arguments that they have. They talk about our other -- all of our obligations under the agreement. We're focused on whether we have to close the transaction under what they alleged based on a April 27th filing and the fact that the financing disappeared -- expired by its own terms on May 7th.

And everything -- the reason why we're so honed in on 13.8(b)(ii)(B) is because that financing is gone and never can come back. It can never come back because the filing -- this isn't the situation where the Court can say, "Well, I'm going to construe the complaint liberally so the defendant is on notice" or "I'm going to let you amend your complaint" or anything else. It has -- there are contractual consequences to what they filed, and those direct -- there are no facts on it. There's no facts that require discovery. It's what they filed on April 27th. It blew up the equity, which eliminates the debt financing, which means they can never satisfy 13.8(b)(ii)(B) ever. There's no financing. We're not

required to go get new equity. So, from our perspective, there are no facts that are left to be discovered.

I focus on the April 24th e-mail that I pointed to. The whole argument on that is based on, well, it's on April 24th. And here's what they said. Let's just assume that what you allege is right. Let's -- they allege this, this bad faith scheme and that we told them at the last minute. The conditions say under 13.8(b)(ii)(A), if you've satisfied your conditions -- we don't think they have. That's what we're going to fight with respect to the rest of the issues in this case -- and we fail to consummate the closing, you can bring an action for specific performance. That's what they say we did wrong by -- by our letter on April 25th and telling them that we're not going to close because we believe there to be an MAE. That means they have a right under 13.8(b)(ii)(A). It doesn't mean that you say doing exactly that eliminates the 13.8(b)(ii)(B) requirement. There's nothing in the contract that says that because we can't -- because of (A), that means we've prevented (B) from applying. It's an explicit contractual requirement that they have to

satisfy, not just when they file suit, under the clear language when they file it and forever more thereafter, and to obtain the injunction.

And under the plain language of what they filed on April 27, put aside the fact that the debt has terminated by its own terms anyway on May 7th -- that's just the letter and the calendar -- but by what they filed on April 27th, that filing blew up the equity, which eliminated the debt and the financing to the deal, which means they can never satisfy 13.8(b)(ii)(B), which is why we feel it's entirely ripe for Your Honor's decision now, as a matter of law, because there's no issues of -- there are no materiality issues.

There's a reference to 10.2(b) with respect to whether this was material with what they filed. Has nothing to do with 10.2(b). It is the filing, what it means under the equity commitment. And if the equity is blown up, which it absolutely is by filing a nonretained claims, then what happens to the financing for the deal? It has nothing to do with 10.2(b) and conditions to closing. It is all about the financing.

Unless Your Honor has additional

questions, I think I probably hit everything that I intended to.

THE COURT: Thank you.

I think I'd like to take another short recess just to make sure I have all of my questions answered. So if you-all wouldn't mind giving me a couple more moments, please.

MR. KASSOF: Of course, Your Honor.

THE COURT: Thank you.

(Recess taken from 3:51 p.m. until 4:14 p.m.)

THE COURT: Thank you Counsel. Thank you for your patience.

In view of the expedited nature of these claims, I am prepared to give you my answer today.

As I listened to the presentations, I found that Mr. Kassof's exposition, explanation, and reasoning aligned with what I would write in a written opinion. And so I will save everyone the wait and duplicative effort and adopt his presentation today as my grounds for granting defendants' motion to dismiss on Counts I and II, with two exceptions.

First, I do not reach the abstract or doctrinal boundaries of the prevention doctrine

because I believe that Realogy, and not SIRVA, caused the conditions to fail by filing the Non-Retained Claims. And, second, I want to elaborate on or clarify how I read the timing aspects of Section 13.8.

I agree with SIRVA's interpretation of the language "for so long as" and its interpretation of the clause "for the avoidance of doubt" regarding obtaining an injunction. Reading the provision as Realogy suggests would read out the contractual consequences of filing a Non-Retained Claim, which I believe would be an absurd result. And more globally, reading Section 13.8 to have the narrow window of time that Realogy suggests would lead us to the fundamental quandary we discussed at the motion to expedite of ordering specific performance without the contractually requisite equity financing.

And so with these modifications, the motion to dismiss is granted for the reasons that SIRVA provided at argument today.

Is anything unclear, Mr. Micheletti?

MR. MICHELETTI: No, Your Honor.

THE COURT: Mr. Kassof, anything unclear?

MR. KASSOF: No, Your Honor. Thank

you.

THE COURT: All right. Thank you all very much. Is there anything else that I can help you with while we're all here together today?

MR. MICHELETTI: Not at this time, Your Honor, from my standpoint.

MR. KASSOF: Same here. No. We're good. Thank you, Your Honor.

THE COURT: Thank you very much. Take care, everyone, and be well.

MR. KASSOF: You too.

THE COURT: Bye.

(Court adjourned at 4:17 p.m.)

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CERTIFICATE

I, NEITH D. ECKER, Chief Realtime Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 100 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, except for the rulings at pages 98 through 100, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 21st day of July 2020.

/s/ Neith D. Ecker

Chief Realtime Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter