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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CYPRESS ASSOCIATES, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 1607-N
	)	
SUNNYSIDE COGENERATION ASSOCIATES PROJECT, SUNNYSIDE HOLDINGS I, INC., and SUNNYSIDE II, L.P.,	)	
	)	
Defendants.	)	

OPINION

Date Submitted: January 11, 2006
Date Decided: March 8, 2006

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STRINE, Vice Chancellor

This is a dispute between a bondholder and the borrower that succeeded to most of the issuer's duties and rights. The parties are dueling over the extent to which the borrower may amend certain contracts without approval from the bondholders. The plaintiff bondholder has refused to provide its assent to an amendment the borrower desires because it believes that the amendment would lower the value of its bonds. The other bondholders support the amendment.

In this opinion, I address the borrower's motion to dismiss. Because it would be futile for the plaintiff bondholder to seek to have the bond trustee sue on its behalf in a situation when the trustee has given approval to the contested amendment and where all the other bondholders support the amendment, I reject the borrower's contention that the plaintiff bondholder lacks standing to sue.

On the merits, I deny the borrower's motion to dismiss the bondholder's contention that the trust indenture required the borrower to obtain approval of 80% of the outstanding bonds as a requirement for effecting the amendment. The bondholder — who owns enough bonds to thwart 80% approval unilaterally — has convincingly demonstrated why the relevant instruments support its contention that approval at that super-majority level is required. Because the bondholder has not cross-moved for judgment on the pleadings, however, I do not enter judgment for the bondholder now but simply find that its reading of the relevant instruments is a reasonable one and that the motion to dismiss therefore must be denied.

By contrast, I grant the borrower's motion to dismiss the bondholder's contention that the amendment in question must receive unanimous bondholder approval for adoption. As to that contention, the carefully negotiated provisions of the instruments governing the requirements for the approval of particular amendments rule out a finding that the amendment in question — which does not literally fall within the class of amendments for which unanimous approval is required — cannot be approved without unanimous consent because of the implied covenant of good faith and fair dealing. The relevant instruments carefully delineate those amendments that can be approved by the borrower and trustee acting alone, those that can be approved by the borrower and the trustee with the support of an 80% vote of the bondholders, and those that can only be approved by the borrower and the trustee with the unanimous approval of the bondholders. To sustain the bondholder's unanimous vote claim would involve an exercise in after-the-fact judicial contracting, whereby a judge broadens the class of amendments subject to unanimous approval in a context where sophisticated parties chose not to take that course when they actually made their bargain. The implied covenant of good faith and fair dealing provides no license for judicial action of that kind.

I.

As required, the facts are drawn from the complaint and the documents it incorporates.

On December 1, 1987, Carbon County, Utah issued $80 million in bonds (the "1987 Bonds"). The 1987 Bonds were issued to finance the construction of a solid waste disposal facility (the "Waste Facility") in Carbon County.

Carbon County itself, however, did not intend to build or operate the Waste Facility. Rather, by the issuance of the tax-exempt 1987 Bonds, Carbon County was seeking to obtain favorable financing terms that would enable it to further its public purposes (the building of the Waste Facility to abate pollution) by loaning the Bond proceeds to the for-profit entity, Sunnyside Power Corporation ("SPC") that would build the Facility. The loan was accomplished through a loan agreement also dated December 1, 1987 (the "Loan Agreement").

Although Carbon County remained the Issuer, it had very limited rights and obligations regarding the 1987 Bonds. SPC took on most of the responsibilities and had most of the rights traditionally associated with an issuer. SPC had a duty to repay the Bondholders in accordance with the Loan Agreement and if SPC defaulted, there was no recourse against Carbon County. Eventually, SPC's obligations were assumed by defendant Sunnyside Cogeneration Associates Project ("SCA"). For the sake of clarity, I will primarily refer to SCA and its successors (as described below) as the "Borrower."

The Borrower refinanced the 1987 Bonds several times between 1987 and 1999. The last refinancing resulted in the issuance of the currently outstanding bonds (the "Bonds"). These included $59 million in Series A Bonds and $18 million in Series B Bonds. According to the complaint, $48.7 million of the Series A Bonds remain outstanding and all of the $18 million in Series B Bonds are still outstanding.

The Bonds were issued through an "Exchange Offer" consummated in accordance with an "Exchange Agreement," and an amended and restated trust "Indenture," both dated August 1, 1999. Simultaneous with the Exchange Offer's completion, defendants Sunnyside Holdings I, Inc. and Sunnyside II, L.P. and their affiliates acquired SCA's interests and obligations regarding the Waste Facility and the Bonds. The defendants thus became the Borrower. As with the original issuance, after the Exchange Offer, the Borrower, rather than Carbon County, the Issuer, held the most important rights and responsibilities relating to the Bonds. To illustrate that point, the Bondholders must look to the Borrower for repayment of principal and interest, without recourse to Carbon County as Issuer.

The Series A and Series B Bonds do not have identical rights. The Series A Bonds are entitled to fixed payments of principal and interest that accrue semiannually. By contrast, the Series B Bonds are not guaranteed any interest as a percentage of the $18 million in Series B Bonds outstanding. Instead, the Series B Bondholders are entitled to annual payments equal to the funds generated by the Borrower's operations after the payment of operating expenses, debt service on the Series A Bonds, capital expenditures, and certain other fees. In other words, the Series B Bonds derive much of their value from their right to share in the upside profits of the Borrower. To the extent that the Borrower is profitable, the Series B Bondholders share in those gains. But to the extent that the Borrower simply covers costs (some of which includes payments to the Borrower for its management services), the Series B Bondholders do not receive any annual payment. Principal on the Series B Bonds is payable in a single lump on maturity, which does not occur until August 15, 2024.

This disparity between the interests of the Series A and Series B Bondholders is what in large measure inspires this suit. In November 2004, the Borrower and the Utah Power & Light Company agreed in principle to an "Amendment" to the Power Purchase

Agreement or "PPA." The PPA regulates the prices for energy delivered by the Waste Facility to Utah Power & Light.

On December 15, 2004, the Borrow sent the Series A and B Bondholders a letter seeking their approval of the Amendment to the PPA. The letter references § 9.4 of the Loan Agreement, subtitled "Amendments, Changes, and Modifications," which states in pertinent part that:

> Subsequent to the initial issuance and delivery of the Refunding Bonds and prior to their payment in full (or provision for payment thereof having been made in accordance with the provisions of Article IX of the indenture), this Loan Agreement may not be amended, changed, modified or altered except as provided in Section 10.07 of the Indenture or by an instrument in writing signed by the Issuer and the Borrower and consented to by the Trustee and the Required Percentage of Bondholders. *In addition, except as otherwise permitted or provided by the Deed of Trust or the Security Agreement, the Borrower agrees that it will not terminate or amend in any material respect or permit any termination or material amendment of any of the Facility Documents without the prior written consent of the Trustee and the Required Percentage of Bondholders, which consent shall not be unreasonably withheld or delayed.*[1]

Under the Loan Agreement, the PPA is indisputably a "Facility Document" for purposes of the Loan Agreement. Moreover, the term "Required Percentage of Bondholders" is defined in § 1.2 of the Loan Agreement as "Bondholders of eighty percent (80%) or more in aggregate principal amount of the Outstanding Bonds," consistent with the definition in the Indenture.[2]

The letter sent by the Borrower regarding the proposed Amendment to the PPA stated explicitly:

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[1] Loan Agreement § 9.4 (emphasis added).
[2] Indenture § 1.01 ("Definitions").

> We are requesting your expedited review and approval of these documents as required by Section 9.4 of the Loan Agreement between Carbon County, Utah [the Issuer] and Sunnyside Cogeneration Associates [the Borrower].[3]

The Amendment purports to resolve a dispute between the Borrower and Utah Power & Light regarding the price for energy. The Amendment includes floor and ceiling prices capping the downside and upside price at which the Borrower sells energy. According to the complaint, the Amendment would work a major change in the Borrower's potential profits, as the ceiling in the Amendment allegedly would reduce the recently paid prices for energy by the Utah Power to the Borrower by more than 50%.

Cypress — which holds approximately 74.4% of the Series B Bonds — viewed the Amendment as injurious to the value of the Series B Bonds. Because the ceiling capped the upside potential of the Borrower, Cypress believed that the Amendment would diminish or even eliminate the annual payments to the Series B Bondholders. For that reason, Cypress refused to give its assent to the Amendment.

As a result of Cypress's refusal, the Amendment did not receive the Required Percentage of Bondholders under § 9.4 of the Loan Agreement. In the face of Cypress's dissent, however, the Borrower decided that it did not need the Required Percentage of Bondholders to adopt the Amendment, but instead advanced the position that under § 7(h) of the Security Agreement the Trustee could effect the Amendment after it was proposed by the Borrower. After securing letters of support from a majority, but not 80%, of the Bondholders and promising to indemnify the Trustee, the Borrower received

[3] Compl., Ex. H.

written approval from the Trustee. The Borrower then submitted the Amendment to the Utah Public Service Commission for approval.

This lawsuit then ensued. In its complaint, Cypress has made two distinct contentions regarding the Amendment.

First, Cypress argues that § 9.4 of the Loan Agreement requires that the Amendment be approved not only by the Trustee but also by the Required Percentage of the Bondholders. Because that has not occurred, Cypress contends that the Amendment has not been properly adopted.

Alternatively, Cypress contends that the Amendment's likely effect on the profits of the Borrower and therefore the payments to the Series B Bondholders is so substantial as to amount to a de facto amendment to the Indenture and Loan Documents. The Indenture and Loan Documents require unanimous consent of the Bondholders whenever: (i) the stated maturity, redemption rights, or any installment of interest on the Bonds as set forth in the Indenture are changed;[4] (ii) the principal amount, redemption premium, or the rate of interest on the Bonds as set forth in the Indenture are reduced;[5] or (iii) the Loan Documents are amended or modified in a manner that changes the amount or the time when Loan Payments are required to be made.[6] Cypress claims that the Amendment contested in this case has a substantive effect very similar to those amendments that must be approved unanimously. Therefore, Cypress claims that the Amendment also must

[4] Indenture § 10.02.
[5] *Id.*
[6] *Id.* at § 10.08. Included in the Loan Documents are the Loan Agreement, Notes, Deed of Trust, and Security Agreement.

receive unanimous approval before adoption. Because Cypress has not consented, it contends that the Amendment has not been validly adopted.

Cypress and the Borrower have stipulated to a stay of the proceedings for approval of the Amendment before the Utah Public Service Commission pending the resolution of the Borrower's motion to dismiss the complaint for failure to state a claim.

II.

The Borrower seeks dismissal on the grounds that the plain terms of the Loan Agreement and the myriad contracts related to it (the "Relevant Instruments"[7]) make clear that the Borrower has the authority to effect the Amendment solely with consent from the Trustee and that no Bondholder approval is required. In order for the Borrower to succeed, it therefore must demonstrate that the Relevant Instruments may only be reasonably read in the manner advanced by the Borrower. In the event that the Relevant Instruments may be reasonably read in another manner, the motion to dismiss must be denied.[8]

The Relevant Instruments are all, per their own terms, governed by the law of Utah. As is the case in Delaware, in Utah contracts are to be interpreted as written and parol evidence is inadmissible as an interpretive aid when the contractual language is

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[7] The Relevant Instruments are the Facility Documents (which include the PPA), the Loan Documents, and the Indenture. The dispute centers on how amendments to the Relevant Instruments proposed by the Borrower (or by the Borrower in conjunction with the Issuer), in this case the Amendment to the PPA, are to be effected.

[8] *E.g.*, *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 614-15 (Del. 2003) ("In deciding a motion to dismiss, the trial court cannot choose between two differing reasonable interpretations of ambiguous provisions. Dismissal, pursuant to Rule 12(b)(6), is proper only if the defendants' interpretation is the *only* reasonable construction as a matter of law."); *Vanderbilt Income and Growth Assocs. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996) (same).

unambiguous in the sense that it is susceptible to only one reasonable reading.[9] Moreover, as this is a motion to dismiss, the only relevant facts are those set forth in the complaint itself. In this context, the most critical facts of record are the plain terms of the Relevant Instruments, which are incorporated by reference in the complaint.

III.

The Borrower's first two arguments are related, and I address them together. For starters, the Borrower alleges that Cypress cannot maintain this action because the Loan Agreement that contains, in § 9.4, the 80% vote provision addressing certain amendments to the Facility Documents was executed between the Issuer and the Borrower, and the Bondholders are not third-party beneficiaries of that Agreement. Relatedly, the Borrower argues that provisions of the Indenture addressing when Bondholders can assert claims for remedy under the Indenture apply here, that Cypress has not complied with those provisions, and that Cypress therefore has no standing to bring this action. I find neither of these arguments meritorious, for reasons I now explain.

As to the first argument, it is clear from the text of § 9.4 of the Loan Agreement that Bondholders are not simply incidental beneficiaries of that section, but intended beneficiaries. To the extent that § 9.4 prohibits the Borrower from amending the Facility Documents, including the PPA, without the Required Percentage of Bondholders, it specifically gives the Bondholders the contractual right to inhibit amendments that do not achieve the Required Percentage support. Furthermore, § 9.4 also imposes the

[9] *See Central Florida Inv., Inc. v. Parkwest Assoc.*, 40 P.3d 599, 605 (Ut. 2002); *Ward v. Intermountain Farmers Assoc.*, 907 P.2d 264, 268 (Ut. 1995); *Gillmor v. Macey*, 1221 P.3d 57, 63, 65 n.8 (Ut.App. 2005).

contractual duty on Bondholders not to unreasonably withhold their consent to a proposed amendment.

Under the law of Utah, § 302 of the Restatement of Contracts has been looked to for guidance as to when a contract confers third-party beneficiary status.[10] Under § 302, "a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promise intends to give the beneficiary the benefit of the promised performance."[11] Those conditions are satisfied here, as § 9.4 was obviously intended to provide the Bondholders with enforceable rights of self-protection.[12] Moreover, no provision of the Loan Agreement is inconsistent with the proposition that the Bondholders were intended beneficiaries of § 9.4, certainly not the provision cited by the Borrower, § 9.7, which merely states that the Loan Agreement "shall inure to the benefit of and shall be binding upon the Issuer, the Borrower and their respective successors and assigns . . . ."[13] Nothing in that section or in any other portion of the Loan Agreement clearly precludes third-party beneficiary status for Bondholders, and to read such an implied exclusion into § 9.7 would gut the clear import of § 9.4's

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[10] *E.g.*, *Continental Ill. Nat'l Bank v. Allen*, 811 P.2d 168, 172 (Ut. 1991); *Ron Case Roofing & Asphalt Paving v. Blomquist*, 773 P.2d 1382, 1386 (Ut. 1989); *Clark v. American Standard, Inc.*, 583 P.2d 618, 620 (Ut. 1978).

[11] Restatement (Second) of Contracts § 302 (2005).

[12] *See Wasatch Bank of Pleasant Grove v. Surety Ins. Co. of Cal.*, 703 P.2d 298, 300 (Ut. 1985) ("Whether a third party is a beneficiary of a contract is determined by the intent of the parties to the contract."); *Tracy Collins Bank & Trust v. Dickamore*, 652 P.2d 1314, 1315 (Ut. 1982) ("Generally, the rights of a third-party beneficiary are determined by the intentions of the parties to the subject contract."); *Richards Irrigation Co. v. Karren*, 880 P.2d 6, 10 (Ut. App. 1994) (noting Utah courts look to intent of parties to determine third party beneficiary status).

[13] Loan Agreement § 9.7.

terms, which plainly invest the Bondholders with rights and corresponding responsibilities.

Likewise, the Borrower's argument that Cypress may not proceed with this action because it has failed to comply with the no-action provision in the Indenture is without merit. That provision states:

> **Section 7.10 Limitations on Rights of Bondholders.**
>
> (a) No Bondholder shall have any right to pursue any other remedy under this Indenture unless: (1) an Event of Default shall have occurred and is continuing; (2) the holders of at least fifty-one percent (51%) of the principal amount of the Outstanding Bonds have requested the Trustee, in writing, to exercise the powers hereinabove granted or to pursue such remedy in its or their name or names; (3) the Trustee has been offered indemnity satisfactory to it against reasonable costs, expenses and liabilities reasonably anticipated to be incurred; (4) the Trustee has declined to comply with such request, or has failed to do so, within sixty (60) days after its receipt of such written request and offer of indemnity; and (5) no direction inconsistent with such request has been given to the Trustee during such 60-day period by the holders of at least fifty-one percent (51%) of the principal amount of the Outstanding Bonds.
>
> (b) The provisions of subsection (a) of this Section are conditions precedent to the exercise by any Bondholder of any remedy hereunder. The exercise of such rights is further subject to the provisions of Sections 7.09, 7.11 and 7.14 hereof. No one or more Bondholders shall have any right in any manner whatever to enforce any right under this Indenture, except in the manner herein provided. All proceedings at law or in equity with respect to an Event of Default shall be instituted and maintained in the manner herein provided for the equal and ratable benefit of the Bondholders of all Bonds Outstanding. [14]

By its admission, Cypress did not attempt to follow the steps outlined in § 7.10 of the Indenture for pursuing a remedy under the Indenture. It contends that it was not required to do so for two reasons: 1) Cypress is attempting to enforce its rights under the Loan

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[14] Indenture § 7.10.

Agreement and not the Indenture; and 2) in any event, recourse to the procedures in § 7.10 would be futile. I need not reach the first argument, which has color, because the second argument is obviously meritorious.

As the undisputed facts show, all of the other Bondholders gave their assent to the Amendment. Cypress, which holds enough Bonds of its own to block the attainment of an 80% vote, is the reason the Amendment did not pass in the first place. In these circumstances, it would be futile to expect that Cypress would attain the support of a majority of the Bondholders — who supported the Amendment — to press a claim that the Amendment was not validly adopted. Likewise, the Trustee would be forced to place itself at odds with a majority of the Bondholders by pressing such a claim. Indeed, in this respect, the obvious lack of fit between the provisions of § 7.10 helps explain Cypress's argument as to why the provisions of § 7.10 of the Indenture do not pertain to a claim under § 9.4 of the Loan Agreement. By its plain terms, § 9.4 — when it applies — invests a minority of 20% or greater with the power to block an amendment favored by a majority of the Bondholders. A provision like § 7.10 that is designed to limit suits on behalf of all holders unless a majority supports the suit arguably does not speak at all to claims under provisions like § 9.4 which are brought only for the benefit of the dissenting minority.

Regardless of whether that is so, the law is clear that no-action clauses such as § 7.10 do not present an insuperable barrier to all suits not brought in strict conformity with their terms. Rather, the law has read no-action clauses as an important, but surmountable, barrier to suits. They may be overcome when it is plain that procession under the suit would be futile, a line of reasoning that draws on the law of derivative suits. As Chancellor Allen stated in *Feldbaum v. McCrory Corp.*:

> I do not mean to imply that courts will apply no-action clauses to bar claims where misconduct by the trustee is alleged. For the same reason that equity has long recognized that, in some circumstances, corporate shareholders will be excused from making a demand to sue upon corporate directors, but will be permitted to sue in the corporation's name themselves, bondholders will be excused from compliance with a no-action provision where they allege specific facts which if true establish that the trustee itself has breached its duty under the indenture or is incapable of disinterestedly performing that duty.[15]

Feldbaum remains good law and has been embraced on several occasions by this court since.[16] *Feldbaum's* sound approach, which has been embraced by courts in other jurisdictions,[17] would likely be adopted by the courts of Utah and be used by them to permit suit by Cypress. Cypress does not seek to bring a claim that will inure to all Bondholders pro rata to their ownership, it seeks to vindicate its minority rights. It would be a futile exercise for Cypress to ask the majority of the Bondholders who disagree with it to join with it in a suit to declare an Amendment they support invalid. Thus, § 7.10 does not bar this suit.

I therefore turn to the merits of the interpretive dispute at the heart of this motion to dismiss.

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[15] *Feldbaum v. McCrory Corp., et. al.*, 1992 WL 119095, at *7 (Del. Ch. June 2, 1992).

[16] *E.g.*, *U.S. Bank Nat'l Assoc. v. U.S. Timberlands Klamath Falls*, 864 A.2d 930, 940-42 (Del. Ch. 2004); *U.S. Bank Nat'l Assoc. v. U.S. Timberlands Klamath Falls*, 2004 WL 1699057, at *5 (Del. Ch. July 29, 2004); *Lange v. Citibank, N.A.*, 2002 WL 2005728, at *1, *6-*7 (Del. Ch. Aug. 13, 2002).

[17] *E.g.*, *Metropolitan West Asset Mgmt. v. Magnus Funding*, 2004 WL 1444868, at *5 (S.D.N.Y. Jun. 25, 2004); *In re Oakwood Homes Corp.*, 2004 WL 2126514, at *3 (Bankr.D.Del. Sept. 22, 2004); *In re Envirodyne Indus.*, 174 B.R. 986, 993 (Bankr.N.D.Ill. Dec. 1, 1994).

IV.

The Borrower finds itself in a rather odd position. After all, it sent the Bondholders a letter seeking their approval for the Amendment on the basis that such approval was "required" by § 9.4 of the Loan Agreement. Then, when that approval was not received, the Borrower searched through the Relevant Instruments and concluded that the Trustee had the unilateral authority to adopt the Amendment. In order to get the Trustee to act, the Borrower provided to it written statements of support for the Amendment from the Bondholders other than Cypress and a promise to indemnify the Trustee for approving the Amendment.

The supposed authority of the Trustee to adopt the Amendment proposed by the Borrower is said to emanate from § 7(h) of the Security Agreement and not from the Loan Agreement itself. Section 7(h) states:

> Except as otherwise permitted under the Loan Agreement, the Grantor shall not without the prior written consent of the Trustee, (i) modify, amend, terminate, waive, or supplement any provision of any Facility Document, (ii) fail to exercise promptly and diligently each and every material right which it may have under each Facility Document (other than any right of termination), or (iii) fail to deliver to the Trustee a copy of each material demand, notice, or document received or given by it relating in any way to any of the Facility Documents.[18]

According to the Borrower, § 7(h) permits the Grantor (now, the Borrower for these purposes) to amend any Facility Document — including the PPA — so long as the Trustee provides prior written consent. Because the Trustee has provided such consent to the Amendment, the Borrower says it is validly approved. Essentially, the Borrower

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[18] Security Agreement § 7(h).

reads § 7(h) as authorization for it to amend, with the Trustee's prior written consent, any provision of the Facility Documents.

As Cypress points out, that reading of the Relevant Instruments is arguably not even colorable, and certainly not the only reasonable reading of the Instruments. To start with, § 7(h) is not by its own terms an affirmative empowerment of the Borrower to amend the Facility Documents so long as it has prior written approval of the Trustee. Rather, § 7(h) is a check on the Borrower's power that functions to prohibit the Borrower from making such an amendment — unless otherwise permitted by the Loan Agreement — without the prior written approval of the Trustee. To the extent that other provisions of the Relevant Instruments require Bondholder support for an amendment, § 7(h) of the Security Agreement does not conflict with these additional conditions of approval.

Here, as Cypress points out, there is a plain provision of the Loan Agreement, § 9.4, that seems clearly to condition approval of a "material amendment" of the PPA on the "prior written consent of the Trustee and the Required Percentage of the Bondholders . . . ." In other words, § 9.4 of the Loan Agreement deals with a narrower set of amendments than § 7(h) of the Security Agreement — those amendments to Facility Documents that are material in nature. Section 7(h) of the Security Agreement is broader and requires (except when the Loan Agreement otherwise permits) the Issuer to receive the prior written approval of the Trustee for all amendments to the Facility Documents, even if immaterial. By this method, § 7(h) of the Security Agreement permits the Borrower to make ministerial or linguistic changes to the Facility Documents more flexibly, while still giving Bondholders the comfort of prior written approval by the Trustee.

Under the Borrower's recent reading, § 9.4 is simply an illusory protection that runs not to the Bondholders but to the Borrower itself and the Trustee. According to the Borrower, it can employ § 9.4 when it desires the added moral or liability-limiting assurance of Bondholder approval but need not seek such assurance if it chooses simply to adopt an amendment with prior written approval of the Trustee only. This is an odd argument that finds little resonance in the text of the Relevant Instruments or in commercial logic. Certainly it is insufficient to justify dismissal.

Although there are other reasons why the Borrower's reading is obviously not the only reasonable reading of the Relevant Instruments, I need not burden the reader with them now, as Cypress has not cross-moved for judgment on this issue. For now it suffices to say that Cypress's contention that the Amendment was a material one that, per § 9.4 of the Loan Agreement, could only be adopted by the Required Percentage of Bondholders rests on a reasonable reading of the Relevant Instruments. Therefore, the Borrower's motion to dismiss Count I of the Complaint, which seeks a declaration that the Amendment has not been validly adopted, is denied insofar as that Count alleges that the Amendment must be passed with the support of the Required Percentage of Bondholders, i.e., to obtain the consent of 80% or more of the outstanding Bonds. Likewise, the Borrower's motion to dismiss Count II, which seeks an order requiring the Borrower to submit the Amendment to a vote of the Bondholders as a condition of any subsequent attempt at approval, is denied.

V.

I come to the final issue on this motion. As noted, Cypress claims that the Amendment, which directly modifies one of the Facility Documents, constitutes a de facto amendment to the Loan Documents and Indenture, and therefore that unanimous consent of the Bondholders is required. Cypress premises that argument on §§ 10.02 and 10.08 of the Indenture, which prohibit the Borrower from modifying the Indenture or Loan Documents (including the Loan and Security Agreements) in a manner that changes the amount or timing of principal and interest payments to Bondholders without the express consent of all affected Bondholders. Specifically, Cypress claims that the floor and ceiling on energy prices contained in the Amendment caps the upside potential to the Series B Bondholders in a manner that "does such violence"[19] to the bargained for risk/return structure that it must be considered a de facto amendment to the interest rate of the Series B Bonds.

Frankly, Cypress's briefs on this issue read more like a college economics primer than a legal brief. Cypress cited no Utah or other case law supporting its "de facto is de jure" argument. Therefore, at oral argument, I inquired of Cypress whether its de facto amendment argument was essentially a claim based on breach of the implied covenant of good faith and fair dealing. Counsel for Cypress agreed with that assessment.

That is, Cypress agrees that its argument asserts that the implied covenant of good faith and fair dealing in the Indenture and Loan Agreement precludes the Amendment because the Amendment does de facto what it could not do de jure absent unanimous

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[19] Cypress Br. at 17.

approval. Cypress supports this argument with the economic rationale that the Series B Bondholders are in reality equity participants who share in the profits via cash-flow sharing and that therefore the Amendment alters the payment structure or the risk/reward structure fundamentally such that the benefits of the contract fashioned with the Borrower no longer exist.

As the Borrower points out, the Amendment does not literally change the rate of interest of the Series B Bondholders as the language in the Indenture and Loan Documents that governs the entitlement of the payments of interest remains the same and the impact of the Amendment remains entirely hypothetical. As a result, the Borrower correctly points out that the Indenture does not literally require that the Amendment be approved by unanimous consent of the Bondholders. Recognizing this reality, Cypress necessarily fell back on the argument that the Amendment constitutes a de facto change to the Indenture. Because the Series B Bondholders only receive annual payments once a number of other costs (like interest payments to the Series A, the Waste Facility's costs of operations, etc.) are covered and profits are generated, Cypress contends that the ceiling in the Amendment fundamentally alters the risk/reward calculus for the Series B Bonds and should be read as a change to the interest rate paid to the Bondholders.

But this contention does not state a cognizable contract claim. By any measure, the Relevant Instruments reflect the detailed consideration of sophisticated parties of multiple factors bearing on the interests of the Issuer, the Borrower, and the Bondholders. As just discussed, the Loan Agreement can be reasonably read to require 80% or more of the Bondholders to approve the Amendment.

What is not reasonable is to conclude that the parties intended for the judiciary to analyze amendments that do not implicate the plain terms of the Relevant Instruments to determine whether they have the same de facto effect as an amendment for which unanimous consent was required and to rewrite the Instruments to impose a unanimous consent requirement upon such amendments. The implied covenant of good faith and fair dealing does not exist as a license for the judiciary to rewrite contracts, which is what the Borrower essentially seeks here without reference to Utah case law to support its position.

The Delaware Supreme Court has recognized that implying contract terms is an "occasional necessity"[20] to ensure that parties' reasonable expectations are fulfilled, but that this "quasi-reformation . . . should be [a] rare and fact-intensive exercise, governed solely by issues of compelling fairness"[21] and that "only when it is clear from the writing that the contracting parties 'would have agreed to proscribe the act later complained of . . . had they thought to negotiate with respect to that matter' may a party invoke the covenant's protections."[22] Thus, a claim for breach of an implied covenant generally cannot be based on conduct authorized by the terms of the agreement.[23] Likewise, under

[20] *See Dunlap v. State Farm Fire & Casualty Co.*, 878 A.2d 434, 442 (Del. 2005); *Chrin v. Ibrix Inc.*, 2005 WL 2810599, at *7 (Del. Ch. Oct. 19, 2005) ("[T]he implied covenant of good faith and fair dealing requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain.").
[21] *Dunlap*, 878 A.2d at 442 *quoting Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992-93 (Del. 1998).
[22] *Dunlap*, 878 A.2d at 442 *quoting Katz v. Oak Industries, Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986).
[23] *Dunlap*, 878 A.2d at 441-42 ("[E]xisting contract terms control . . . such that implied good faith cannot be used to circumvent the parties' bargain, or to create a free-floating duty . . .

Utah law, an implied covenant of good faith and fair dealing cannot be read to establish new independent rights or duties to which the parties did not agree,[24] and cannot create rights and duties inconsistent with the express contractual terms.[25]

Those principles refute the proposition that the Borrower breached an implied covenant of good faith and fair dealing in this case. The sophisticated parties to the Relevant Instruments carefully delineated several categories of amendments. Each category required the Borrower (acting alone or in some cases with the Issuer) to obtain different approvals as a prior condition of effecting amendments it desired. Three of these categories established in the Relevant Instruments are the most pertinent. They are: (1) immaterial amendments to the Facility Documents that require the Trustee's approval;[26] (2) material amendments to the Facility Documents that require the Trustee's approval and the approval of 80% of the outstanding Bondholders;[27] and (3) actual changes to the redemption provisions, payment structure, and terms of the Bonds made in

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unattached to the underlying legal documents."); *Bonham v. HBW Holdings, Inc.*, 2005 WL 3589419, at *11 (Del. Ch. Dec. 23, 2005) (same).

[24] *See Oakwood Village LLC v. Albertsons, Inc.*, 104 P.3d 1226, 1240 (Ut. 2004) (explaining an implied covenant of good faith and fair dealing cannot be construed to establish new independent rights or duties not agreed to by the parties ex ante); *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 55 (Ut. 1991) (same).

[25] *See Oakwood Village LLC*, 104 P.3d at 1240; *Brehany*, 812 P.2d at 55 (noting that an implied covenant of good faith and fair dealing cannot be used to nullify a right granted by a contract to one of the parties or to require a party vested with a contract right to exercise that right in a manner contrary to that party's legitimate self-interest); *Rio Algom Corp. v. Jimco, Ltd.*, 618 P.2d 497, 505 (Ut. 1980) (stating an express agreement or covenant relating to a specific contract right excludes the possibility of an implied covenant of a different or contradictory nature).

[26] Security Agreement § 7(h).

[27] Loan Agreement § 9.4.

the Indenture or the Loan Documents that require the Trustee's approval and unanimous Bondholder approval.[28]

There is no unfairness to be rectified simply because the Borrower seeks to use its bargained-for flexibility to amend the PPA, assuming that the Borrower complies with the approval requirements in the Loan Agreement, which do not require unanimous approval. Had the contracting parties wanted any bondholder to have a veto right over any amendments to the PPA or other Facility Documents that might affect the Bondholders' returns, they could have provided for unanimous approval for any amendment that "*might* have the effect of changing the rate of interest or influencing the payments received by the Series B Bondholders." No such promise was extracted by the Bondholders. And Cypress may not now broaden the class of amendments that require unanimous approval by claiming that the implied covenant of good faith and fair dealing was breached by the Borrower.[29] By doing so, Cypress asks the court to widen the class of amendment subject to unanimous approval despite the failure of sophisticated parties to choose this course for themselves. This is essentially asking the court to write a new contract.

[28] Indenture §§ 10.02, 10.08(a).
[29] *See Eggett v. Wasatch Energy Corp.*, 94 P.3d 193, 198 (Ut. 2004) ("[T]he degree to which a party to a contract may invoke the protections of [an implied] covenant [of good faith and fair dealing] turns on the extent to which the contracting parties have defined their expectations and imposed limitations on contract terms.").

But the implied covenant of good faith and fair dealing does not grant a judicial license for the court to write a new contract.[30] To do so would be inequitable. Cypress has no bargained-for expectancy of unanimous approval that would be taken away by the Borrower's proposed conduct. Rather, to rewrite the contract would defeat the Borrower's expectancy that it could amend the PPA without unanimous approval unless an amendment fell within the express contractual language defining when unanimous approval was required.[31]

Doubtless the Borrower makes decisions every day that affect the risk/reward calculus of the Bondholders. For example, to the extent that the Borrower hazards risk in order to increase its level of profitability, it arguably places at risk the Series A Bondholders, who are essentially interested in assuring that the Borrower remains solvent and able to repay principal and interest. In this regard, it is important to note that the Series A Bondholders might tend to suspect the Borrower of having a risk tolerance more in line with that of the Series B, as the Borrower shares in the profits with the Series B Bondholders. Given the daily instances of such tradeoffs of risk and reward in the operation of a Waste Facility, it is implausible to believe that an interstitial voting protection of the kind Cypress advocates was intended by the contracting parties, as it would give wide license to the Series A and Series B Bondholders to use their conflicting

[30] *See Rio Algom Corp.*, 618 P.2d at 505 ("A court will not, however, make a better contract for the parties than they have made for themselves.").
[31] Of course, as noted, the Borrower may well be required to obtain approval of 80% of the Bondholders. That is, the literal terms of the relevant instruments already likely provide strong protection to Cypress.

economic incentives to demand unanimous consent to any number of measures, when the plain terms of the Relevant Instruments do not require such consent.

Put simply, had the sophisticated scriveners of the Relevant Instruments wished to require unanimous consent of any amendment to a Facility Document that had the potential for influencing the extent or probability of payments to the Bondholders, they could have done so. They did not. Thus, the Borrower's motion to dismiss Count I of the Complaint is granted to the extent to which that Count seeks a declaration that unanimous approval of the Amendment is required in order for the Amendment to be validly adopted.

VI.

For the foregoing reasons, the Borrower's motion to dismiss Count I is DENIED IN PART and GRANTED IN PART as articulated in this opinion. The Borrower's motion to dismiss Count II of the Complaint is DENIED. IT IS SO ORDERED.