

Dueling Provisions and Incorporation by Reference

Even when the parties have the foresight to draft a written contract, the document can sometimes fail to provide needed clarity. The first case in this reading, *United Rentals, Inc. v. RAM Holdings, Inc.*, presents a court tasked with sorting out the priority of two conflicting provisions that lead to two different results when the buyer tries to walk away from a merger deal. In other instances, the court must determine which of multiple documents are properly incorporated into the parties' writing. That is the puzzle facing the court in the second case, *Grandis Family Partnership, Ltd. v. Hess Corp.*

United Rentals, Inc. v. RAM Holdings, Inc.

937 A.2d 810 (Del. Ch. 2007)

CHANDLER, Chancellor.

In classical mythology, it took a demigod to subdue Cerberus, the beastly three-headed dog that guarded the gates of the underworld. In his twelfth and final labor, Heracles journeyed to Hades to battle, tame, and capture the monstrous creature. In this case, plaintiff United Rentals, Inc. journeyed to Delaware to conquer a more modern obstacle that, rather than guards the gates to the afterlife, stands in the way of the consummation of a merger. Nevertheless, like the three heads of the mythological Cerberus, the private equity firm of the same name presents three substantial challenges to plaintiff's case: (1) the language of the Merger Agreement, (2) evidence of the negotiations between the parties, and (3) a doctrine of contract interpretation known as the forthright negotiator principle. In this tale the three heads prove too much to overcome.

First, the language of the Merger Agreement presents a direct conflict between two provisions on remedies, rendering the Agreement ambiguous and defeating plaintiff's motion for summary judgment. Second, the extrinsic evidence of the negotiation process, though ultimately not conclusive, is too muddled to find that plaintiff's interpretation of the Agreement represents the common understanding of the parties. Third, under the forthright negotiator principle, the subjective understanding of one party to a contract may bind the other party when the other party knows or has reason to know of that understanding. Because the evidence in this case shows that defendants understood this Agreement to preclude the remedy of specific performance and that plaintiff knew or should have known of this understanding, I conclude that plaintiff has failed to meet its burden and find in favor of defendants.

In its motion for summary judgment, [plaintiff United Rentals, Inc. (“URI” or the “Company”)] sought an order from this Court specifically enforcing the terms of the July 22, 2007 “Agreement and Plan of Merger” (the “Merger Agreement” or the “Agreement”) among URI and defendants RAM Holdings, Inc. (“RAM Holdings”) and RAM Acquisition Corp. (“RAM Acquisition” and, together with RAM Holdings, “RAM” or the “RAM Entities”).⁴

On December 13, 2007, this Court denied plaintiff’s motion for summary judgment, finding that the question was exceedingly close. A trial was therefore necessary to ascertain the meaning of the Agreement....

URI is a Delaware corporation with its principal place of business in Greenwich, Connecticut. Founded in 1997, it is a publicly traded company listed on the New York Stock Exchange. URI is the largest equipment rental company in the world based on revenue, earning \$3.64 billion in 2006....

Defendants RAM Holdings and RAM Acquisition are shell entities with *de minimis* assets that were formed solely to effectuate transactions contemplated under the Merger Agreement....

In the spring of 2007, URI’s board of directors decided to explore strategic alternatives to maximize stockholder value, including by soliciting offers from third parties to buy the Company. After an exhaustive effort that lasted several months, the board of directors authorized URI to execute the Merger Agreement, which it did on July 22, 2007. Under the Merger Agreement, RAM committed to purchase all of the common shares of URI for \$34.50 per share in cash, for a total transaction value of approximately \$7 billion, which includes the repayment or refinance of URI’s existing debt. Under the Merger Agreement, RAM Acquisition is to be merged into URI, which will be the surviving corporation.

The Merger Agreement contemplates that, in order to fund a portion of the Merger consideration, RAM Holdings will obtain financing through the sale of equity to [Cerberus, “CCM”] for an aggregate purchase price of not less than \$1.5 billion under the Equity Commitment Letter. The signatories to the Equity Commitment Letter are CCM and RAM

⁴ Both because RAM is controlled by Cerberus, as defined below, and because the witnesses’ testimony often does not distinguish among these Cerberus-controlled entities, I will sometimes refer to defendants as “Cerberus,” though Cerberus is *not* a party to this action....

Holdings. The terms of the Equity Commitment Letter were negotiated with and accepted by URI, but URI is neither a party to nor a beneficiary of the Equity Commitment Letter.

The Merger Agreement contains two key provisions at issue in this case. Section 9.10, entitled “Specific Performance,” provides:

The parties agree that irreparable damage would occur in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms or were otherwise breached. Accordingly, (a) [RAM] shall be entitled to seek an injunction or injunctions to prevent breaches of this Agreement by the Company and to enforce specifically the terms and provisions of this Agreement, in addition to any other remedy to which such party is entitled at law or in equity and (b) the Company shall be entitled to seek an injunction or injunctions to prevent breaches of this Agreement by [RAM] or to enforce specifically the terms and provisions of this Agreement and the Guarantee to prevent breaches of or enforce compliance.... *The provisions of this Section 9.10 shall be subject in all respects to Section 8.2(e) hereof, which Section shall govern the rights and obligations of the parties hereto (and of [Cerberus Partners], the Parent Related Parties, and the Company Related Parties) under the circumstances provided therein.*

Section 8.2(e), referred to in the specific performance provision in section 9.10, is part of Article VIII, entitled “Termination, Amendment and Waiver.” Article VIII provides specific limited circumstances in which either RAM or URI can terminate the Merger Agreement and receive a \$100 million termination fee. The relevant portion of section 8.2(e) of the Merger Agreement provides:

Notwithstanding anything to the contrary in this Agreement, including with respect to Sections 7.4 and 9.10, (i) the Company’s right to terminate this Agreement in compliance with the provisions of Sections 8.1(d)(i) and (ii) and its right to receive the Parent Termination Fee pursuant to Section 8.2(c) or the guarantee thereof pursuant to the Guarantee, and (ii) [RAM Holdings]’s right to terminate this Agreement pursuant to Section 8.1(e)(i) and (ii) and its right to receive the Company Termination Fee pursuant to Section 8.2(b) shall, in each case, be the sole and exclusive remedy, including on account of punitive damages, of (in the case of clause (i)) the Company and its subsidiaries against [RAM Holdings], [RAM Acquisition], [Cerberus Partners] or any of their respective affiliates, stockholders, general partners, limited partners, members, managers, directors, officers, employees or agents (collectively “Parent Related

Parties”) and (in the case of clause (ii)) [RAM Holdings] and [RAM Acquisition] against the Company or its subsidiaries, affiliates, stockholders, directors, officers, employees or agents (collectively “*Company Related Parties*”), for any and all loss or damage suffered as a result thereof, and upon any termination specified in clause (i) or (ii) of this Section 8.2(e) and payment of the Parent Termination Fee or Company Termination Fee, as the case may be, none of [RAM Holdings], [RAM Acquisition], [Cerberus Partners] or any of their respective Parent Related Parties or the Company or any of the Company Related Parties shall have any further liability or obligation of any kind or nature relating to or arising out of this Agreement or the transactions contemplated by this Agreement as a result of such termination....

In no event, whether or not this Agreement has been terminated pursuant to any provision hereof, shall [RAM Holdings], [RAM Acquisition], [Cerberus Partners] or the Parent Related Parties, either individually or in the aggregate, be subject to any liability in excess of the Parent Termination Fee for any or all losses or damages relating to or arising out of this Agreement or the transactions contemplated by this Agreement, including breaches by [RAM Holdings] or [RAM Acquisition] of any representations, warranties, covenants or agreements contained in this Agreement, and *in no event shall the Company seek equitable relief or seek to recover any money damages in excess of such amount from [RAM Holdings], [RAM Acquisition], [Cerberus Partners] or any Parent Related Party or any of their respective Representatives.*

The parties dispute the effect of section 8.2(e) on section 9.10....

Throughout the course of negotiation of the Merger Agreement, URI contends that it communicated to RAM’s principal attorney contract negotiator, Peter Ehrenberg of Lowenstein Sandler PC (“Lowenstein”), that URI wanted to restrict RAM’s ability to breach the Merger Agreement and unilaterally refuse to close the transaction. URI further maintains that URI’s counsel, Eric Swedenburg of Simpson Thacher & Bartlett LP (“Simpson”), made clear to Ehrenberg that it was very important to URI that there be “deal certainty” so that RAM could not simply refuse to close if debt financing was available.

On the other side of the negotiation table, the RAM entities argue that Ehrenberg consistently communicated that Cerberus had a \$100 million walkway right and that URI knowingly relinquished its right to specific performance under the Merger Agreement....

URI argues that the plain and unambiguous language of the merger agreement allows for specific performance as a remedy for the Ram Entities' breach. Section 9.10 expressly invests URI with a right to seek specific performance to enforce the Merger Agreement and to obtain an order enjoining RAM to (i) make reasonable best efforts to obtain financing and satisfy the Merger Agreement's closing conditions, and (ii) consummate the transactions when financing is available and has not been drawn down by RAM as a result of its breach of the Merger Agreement.

Section 9.10, however, explicitly states that it is "subject in all respects to Section 8.2(e) hereof, which Section shall govern the rights and obligations of the parties ... under the circumstances provided therein." Section 8.2(e) describes the \$100 million Parent Termination Fee payable to URI as the "sole and exclusive" remedy against RAM under the Agreement when there has been a termination of the Merger Agreement by URI. Further, section 8.2(e) provides that

In no event, whether or not this Agreement has been terminated pursuant to any provision hereof, shall [RAM or Cerberus Partners] ... be subject to any liability in excess of the Parent Termination Fee for any or all losses or damages relating to or arising out of this Agreement or the transactions contemplated by this Agreement, ... and in no event shall the Company seek equitable relief or seek to recover any money damages in excess of such amount from [RAM or Cerberus Partners]....

Relying heavily on the canon of construction that requires harmonization of seemingly conflicting contract provisions, URI contends that specific performance under section 9.10 remains a viable remedy despite the language of section 8.2(e). URI offers two chief reasons in support of this position. First, section 8.2(e)'s \$100 million Parent Termination Fee operates as the "sole and exclusive" remedy only if one of the parties terminates the agreement. Termination is a defined term in the Agreement, however, and it is not equivalent to a breach. URI contends (and RAM does not dispute) that neither party has terminated the agreement pursuant to section 8. Thus, the Termination Fee is not necessarily the "sole and exclusive remedy" in this case. Second, URI submits that the outright prohibition of equitable remedies in the last sentence of section 8.2(e) is limited to equitable remedies that involve monetary

compensation like restitution or rescission. The sentence commands that “in no event shall [URI] seek equitable relief or seek to recover any money damages in excess of [the \$100 million Termination Fee] from [RAM or Cerberus].” URI argues that the prepositional phrase (“in excess of the” termination fee) modifies *both* “equitable relief” and “money damages.” This reading is required, URI says, because otherwise this sentence would render section 9.10 “mere surplusage” devoid of any meaning in violation of longstanding principles of contractual interpretation. Moreover, URI points to the final sentence of section 8.2(a) as proof that the Agreement contemplates a right to specific performance: “The parties acknowledge and agree that, subject to Section 8.2(e), nothing in this Section 8.2 shall be deemed to affect their right to specific performance under Section 9.10.” According to URI, section 8.2(a) shows that the parties were aware of the “specific performance” remedy and could have expressly eliminated it. The Merger Agreement does not do so; instead, it explicitly provides that both specific performance and injunctive relief are available remedies.

The RAM Entities counter that URI’s interpretation is unreasonable. First, they argue, it is URI’s position that would render portions of the Agreement “mere surplusage.” If the operation of section 8.2(e) were in fact limited, as URI asserts, to circumstances in which the Merger Agreement had been properly terminated by either party, there would be no need to include a sentence in section 9.10 subjecting the specific performance provisions of section 9.10 to section 8.2(e) because specific performance, by law, would be unavailable in those circumstances; one cannot specifically perform an agreement that has been terminated. Thus, section 8.2(e) must have applicability outside the context of termination. Second, the RAM Entities argue [it] is unreasonable to limit the phrase “equitable relief” to those equitable remedies that include monetary damages.

Reading the Agreement as a whole and with the aid of the fundamental canons of contract construction, I conclude that URI’s interpretation is reasonable. The parties explicitly agreed in section 9.10 that “irreparable damage would occur in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms or were otherwise breached.” They further agreed that “the Company shall be entitled to see an injunction or injunctions ... to enforce compliance.” Given this clarion language supporting the existence and availability of specific performance, it is reasonable to read the limitations of section 8.2(e) in the manner URI has championed. RAM’s arguments to the contrary are ultimately unpersuasive. Neither party has terminated the Agreement pursuant to the termination provisions of section 8.1, and the context of the final sentence of section 8.2(e) allows one to reasonably conclude that “equitable relief” in that sentence means only equitable

relief involving monetary damages. URI's interpretation thus represents a reasonable harmonization of apparently conflicting provisions....

Though defendants fail to demonstrate that plaintiff's interpretation of the Merger Agreement is unreasonable as a matter of law, defendants do succeed in offering a reasonable alternative interpretation. In opposing URI's motion for summary judgment, defendants deny that the provisions of the Merger Agreement conflict so as to require harmonization. The relationship between sections 9.10 and 8.2(e), as set forth in section 9.10 is, defendants contend, clear: section 9.10 is "subject to" section 8.2(e). Section 8.2(e) then provides that "in no event shall [URI] seek equitable relief or seek to recover any money damages in excess of such amount [*i.e.*, the \$100 million termination fee] from [RAM or Cerberus]." RAM argues that section 8.2(e) operates to prohibit URI from seeking any form of equitable relief (including specific performance) under all circumstances, relegating URI's relief to only the \$100 million termination fee. [D]efendants contend that Delaware law specifically permits the parties to establish supremacy and subservience between provisions such that, where the terms of one provision are expressly stated to be "subject to" the terms of a second provision, the terms of the second provision will control, even if the terms of the second provision conflict with or nullify the first provision. Additionally, RAM argues, unlike plaintiff's interpretation, RAM's interpretation utilizes only the plain meaning of "equitable relief." As described above, plaintiff, in proposing a reconciliation of the section 8.2(e) limitation on equitable relief with the right of specific performance in section 9.10, urges this Court to read the words "equitable relief" and "money damages" as modified by the phrase "in excess of" the termination fee. Defendants' interpretation of this portion of the provision is, however, at least as reasonable as (if not more than) that of plaintiff. The phrase "in excess of" appears, grammatically, to modify only "money damages."

Plaintiff argues that if RAM had wanted to eliminate URI's rights to specific performance in all circumstances, it could have simply stricken out clause (b) of section 9.10. Though the Court has no doubt that this simple (and seemingly obvious) drafting approach would have been superior, on a motion for summary judgment, I cannot look beyond the text of the agreement to inquire into the motivations of the parties or to consider ways in which a particular end may have been more efficiently achieved and more clearly articulated. An interpretation of the Agreement that relies on the parties' addition of hierarchical phrases, instead of the deletion of particular language altogether, is not unreasonable as a matter of law.

Having considered all of plaintiff's arguments, I must conclude that plaintiff has not shown that defendants' interpretation is unreasonable as a matter of law. The contracting parties here

chose terms, such as “subject to,” that impose a hierarchy among provisions. Defendants’ interpretation of those terms and the provisions they affect is not, I conclude, unreasonable....

...Both URI and RAM have proffered reasonable readings of the Merger Agreement, and because “provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings, there is ambiguity.” Thus, plaintiffs and defendants’ arguments suffer the same flaw, which is fatal at this stage: each party is unable to demonstrate that its proposed interpretation of the Merger Agreement is the *only* interpretation of the Agreement that is reasonable as a matter of law. In such a case, summary judgment is inappropriate because the court is presented with a genuine issue of material fact: what was the intent of the parties? Therefore, I must consider extrinsic evidence to ascertain the meaning of the Merger Agreement....

The Court heard testimony from seven witnesses over a two-day trial in order to resolve the factual issue of what was the common understanding of the parties with respect to remedies in the Merger Agreement. The Merger Agreement, of course, is a contract, and the Court’s goal when interpreting a contract “is to ascertain the shared intention of the parties.”...

Having determined that the contract is ambiguous on account of its conflicting provisions, the Court permitted the parties to introduce extrinsic evidence of the negotiation process. Such extrinsic evidence may include “overt statements and acts of the parties, the business context, prior dealings between the parties, [and] business custom and usage in the industry.” This evidence may lead to “a single ‘correct’ or single ‘objectively reasonable’ meaning.” Restated, the extrinsic evidence may render an ambiguous contract clear so that an “objectively reasonable party in the position of either bargainer would have understood the nature of the contractual rights and duties to be.” In such a case, the Court would enforce the objectively reasonable interpretation that emerges.

...[I]n cases where an examination of the extrinsic evidence does not lead to an obvious, objectively reasonable conclusion, the Court may apply the forthright negotiator principle. Under this principle, the Court considers the evidence of what one party *subjectively* “believed the obligation to be, coupled with evidence that the other party knew or should have known of such belief.” In other words, the forthright negotiator principle provides that, in cases where the extrinsic evidence does not lead to a single, commonly held understanding of a contract’s meaning, a court may consider the subjective understanding of one party that has been objectively manifested and is known or should be known by the other party. It is with these fundamental legal principles in mind that I consider the factual record developed at trial....

The evidence presented at trial conveyed a deeply flawed negotiation in which both sides failed to clearly and consistently communicate their client's positions....

The parties began their negotiations very far apart. URI circulated a draft that included numerous provisions favorable to their side, including several mechanisms by which URI could specifically enforce the merger against Cerberus. RAM responded with a "heavy-handed" mark-up. Early conversations led to no agreement, and URI simply ignored many of the proposed changes that RAM initially made. Although RAM ultimately succeeded in striking many of the provisions entitling URI to specific performance, and although RAM did modify section 8.2(e) to try to limit the availability of equitable relief, section 9.10 in the final agreement continued to speak of the Company's right to specific performance. Testimony revealed that communications between the parties routinely skirted the issue of equitable relief and only addressed it tangentially or implicitly. The defendants put forth some evidence suggesting that by mid to late July Swedenburg had agreed to give up specific performance, but it was not conclusive. Mr. Seitz, URI's attorney, deftly questioned RAM's chief negotiator Ehrenberg about the clarity and wisdom of his curious editing of section 9.10, a provision Ehrenberg also contends he nullified, but this did not uncover "a single 'correct' or single 'objectively reasonable' meaning" for the Agreement. Indeed, because "a review of the extrinsic evidence does not lead the Court to an 'obvious' conclusion," I must apply the forthright negotiator principle to determine the proper interpretation of this contract....

Based on the evidence presented at trial, I find that the defendants understood the agreement to eliminate any right to specific performance and that URI either knew or should have known of defendants' understanding. Cerberus seems to have come to this transaction halfheartedly and unenthusiastic about committing....

Testimony from two of Cerberus's leaders, CEO Stephen Feinberg and managing director Steven Mayer, demonstrated that the firm believed it had the ability to walk away from this agreement relatively unscathed. Indeed, Feinberg [thought] "...to the extent we didn't complete the merger... what we'd have to come up with was a hundred million and that we could not be forced to close the deal." Mayer, who participated more directly in the negotiations and who reviewed the Merger Agreement both in drafts and in final form, testified that he "believe [s] there was an explicit understanding that Cerberus could choose not to close the transaction for any reason or no reason at all and pay a maximum amount of a hundred million dollars." In addition to the Cerberus executives, lawyers for Cerberus

testified to and produced contemporaneous notes corroborating their subjective understanding that the \$100 million termination fee was the “sole and exclusive” recourse available to URI in the event of a failure to close.

I also find that defendants communicated this understanding to URI in such a way that URI either knew or should have known of their understanding. Initially, Cerberus conveyed its position by means of the drafts and mark-ups it sent to Swedenburg. For example, on June 18, 2007, Ehrenberg sent [] his initial mark-ups to the draft circulated by URI. In that mark-up, Ehrenberg wrote, “OUR CLIENT WILL NOT AGREE TO A GUARANTEE.” Ehrenberg also removed a provision from section 6.10 “that would have required the buyer to take enforcement actions against the lenders and other persons providing the financing.” Finally, Ehrenberg struck portions of section 9.10(b) that would have allowed URI to specifically enforce the Equity Commitment Letter and the Guarantee and to specifically enforce the consummation of the transaction. While discussing these, Swedenburg told Ehrenberg that he would likely not incorporate many of the changes, would send it back, and would expect Cerberus’s next mark-up to be “less voluminous.”

Nevertheless, Ehrenberg persisted. In a conversation that occurred sometime between June 25 and July 10, Ehrenberg and Swedenburg discussed the extent of the defendants’ potential liability. During this conversation, Swedenburg indicated “that it was important for his client to assure that ... Cerberus and the RAM entities showed up at the closing.” Ehrenberg “explained to Mr. Swedenburg that that was a significant problem.” At a July 10 meeting of the attorneys, it was decided that the issue of liability needed to be decided by the principals, but that Cerberus would be willing to enter a limited guarantee agreement.

The next important meeting occurred on July 12, 2007. There, via telephone, Mayer represented to the URI team that “Cerberus would not proceed with the negotiations or with the deal unless there was an arrangement where, if the Cerberus parties, to include RAM, failed to close, the obligation would be to pay a fee.” Both Ehrenberg and Mayer testified that the URI team agreed to this point on the twelfth.

After this meeting, Ehrenberg and his team returned to the Merger Agreement and made several important revisions. The draft they produced was circulated early in the morning on July 15, 2007 along with new versions of the Equity Commitment Letter and the Limited Guarantee. I find several edits significant in these documents [including]:

[] section 9.10 was edited to remove references to the Equity Commitment Letter and the final sentence was added to make the provision subservient to section 8.2(e); and

[] section 8.2(e) was substantially rewritten to include a limitation on liability and to provide explicitly that “in no event shall the Company seek equitable relief....”

Although... these edits do not provide a perfectly clear expression of RAM’s position that the agreement bars specific performance, they are substantial enough that they should have at least put Swedenburg and URI on notice that RAM had a different understanding than URI did. Subsequent communications between the parties go substantively beyond this, and unquestionably convey RAM’s position.

Swedenburg made very few changes to this draft. He struck the provision about the Company’s ability to “seek equitable relief,” but he ultimately did not stand by this revision. When Ehrenberg received Swedenburg’s edits, he circulated an agenda for a meeting to discuss the Merger Agreement. On that agenda, Ehrenberg listed “limitation of liability in 8.2(e)” as a topic for discussion, and by this he “intended to address the deletion of the words equity relief.” At that meeting, Mr. Swedenburg spent his time lobbying for a higher break-up fee, one that would be “painful,” because the potential reputational harm Cerberus would suffer from walking away would not be enough to deter them from doing so. Perhaps more importantly, the RAM attorneys also explained to Swedenburg the importance of the words “equitable relief” that Swedenburg had stricken from the Merger Agreement: “it was important for us that the language that he struck be restored to reflect the agreement that the only remedy available to United Rentals, if Cerberus didn’t proceed with the closing, was the break-up fee—reverse break-up fee.” Testimony indicated that Swedenburg put up no fight on this issue. He tersely replied, “I get it.”

I find this testimony to be credible and I find that it is supported by certain of defendants’ exhibits and by Swedenburg’s testimony. First, the agenda that Ehrenberg circulated specifically references section 8.2(e). Second, Holt’s notes from the July 19 meeting support the proposition that this conversation happened and that Swedenburg assented. Third, Swedenburg essentially capitulated on this point during cross examination. Conceding that he quickly assented to the reinsertion of the language he had removed from section 8.2(e), Swedenburg then testified that he knew “equitable relief included specific performance,” that this was “probably why [he] did strike it,” admitted that Ehrenberg conveyed how important that provision was to Cerberus, and then concluded by suggesting he knew it would have been

a good idea to inquire further about why this provision was so important to Cerberus, but that he failed to so inquire because it “was at the end of an agenda, there was [sic] more negotiations to go, et cetera, et cetera.” I find it frankly incredible that Swedenburg could have recognized the import of the language he was striking and that Cerberus considered that language key but manifestly failed to make any further inquiry. Swedenburg, the original architect of this transaction, testified that one lynchpin of his “construct” was the seller’s ability to force the sale to close. By the end of this July 19 meeting, Swedenburg either knew or should have known that Cerberus’s understanding of the Agreement was fundamentally inconsistent with that construct.

If Swedenburg’s faltering on July 19 were not enough to put URI on notice of Cerberus’s understanding, the July 21 telephone conversation between representatives [of the financing bank] (McNeal and Kochman) and Mayer surely was. On that call, Mayer mentioned something about Cerberus’s ability to walk away from the deal. Kochman responded forcefully, declaring that his client, URI, would never agree to this deal if it were merely an option. Mayer reassured him that Cerberus was committed to the deal, but never conceded that the contract amounted to anything other than an option. McNeal and Kochman reported this conversation to Horowitz, and Brad Jacobs, then-CEO/Chairman of URI. Horowitz, who evidently cannot remember much of this deal, failed to raise this issue with Swedenburg, the chief negotiator, or with Ehrenberg. On July 22, the very next day, the Agreement was executed. At that time, I conclude that URI had ample reason to know that Cerberus understood the Agreement to bar the remedy of specific performance....

...As with many contract disputes, hindsight affords the Court a perspective from which it is clear that this case could have been avoided: if Cerberus had simply deleted section 9.10(b), the contract would not be ambiguous, and URI would not have filed this suit. The law of contracts, however, does not require parties to choose optimally clear language; in fact, parties often riddle their agreements with a certain amount of ambiguity in order to reach a compromise. Although the language in this Merger Agreement remains ambiguous, the understanding of the parties does not.

One may plausibly upbraid Cerberus for walking away from this deal, for favoring their lenders over their targets, or for suboptimal contract editing, but one cannot reasonably criticize the firm for a failure to represent its understanding of the limitations on remedies provided by this Merger Agreement. From the beginning of the process, Cerberus and its attorneys have aggressively negotiated this contract, and along the way they have communicated their intentions and understandings to URI. Despite the Herculean efforts of its litigation counsel

at trial, URI could not overcome the apparent lack of communication of *its* intentions and understandings to defendants. Even if URI's deal attorneys did not affirmatively and explicitly agree to the limitation on specific performance as several witnesses allege they did on multiple occasions, no testimony at trial rebutted the inference that I must reasonably draw from the evidence: by July 22, 2007, URI knew or should have known what Cerberus's understanding of the Merger Agreement was, and if URI disagreed with that understanding, it had an affirmative duty to clarify its position in the face of an ambiguous contract with glaringly conflicting provisions. Because it has failed to meet its burden of demonstrating that the common understanding of the parties permitted specific performance of the Merger Agreement, URI's petition for specific performance is denied.

IT IS SO ORDERED.

Notes and Questions

1. What does *United Rentals* teach you about resolving conflicts between two arguably inconsistent provisions in the same contract?
2. Adam Badawi characterizes the Delaware Chancery court as relatively "solicitous of extrinsic evidence... willing to hold an extensive trial, during which the court examined not only the terms of the contract, but also considered extensive evidence of the drafting history—including a close analysis of unexecuted drafts of the contract—and ultimately decided the case on the basis of evidence of what one party knew about the subjective intent of the other party." Adam B. Badawi, *Interpretive Preferences and the Limits of the New Formalism*, 6 BERKELEY BUS. L.J. 1, 6 (2009).
3. When firms merge, the deal is typically complex, and the resulting contract is as well. These deals are often drafted under significant time pressure. And each deal is idiosyncratic—the transaction is the only time the given firms will (attempt to) merge. *See* Badawi, 6 BERKELEY BUS. L.J. at 40. Complexity and time pressure were both present in the United Rentals merger. Do those features weigh in favor of textualism or contextualism?
4. Despite features that might militate in favor of contextual analysis, many commercial contracts include provisions selecting New York law and New York courts, and New York's law is interpreted by its courts to require fairly rigid textualist analysis in contract cases. Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073 (2009).

5. Vague provisions impose costs on our system of contract enforcement. They are more costly to litigate, and they increase the uncertainty of judicial outcomes, decreasing the likelihood of resolving a dispute on a motion for summary judgment. If contracts are useful as a tool in efficient business decision making, vagueness of contract terms may decrease the contract's usefulness.
6. But vagueness may provide some efficiencies as well. It is costly to pin down every detail in a sophisticated contract. If the likelihood of litigation is low, then expected litigation costs will be low, and it may be more efficient to leave some terms unspecified. Managers and transactional lawyers who negotiate the deal have different incentives than litigators who will be called on later to litigate over unclear provisions. A party that insists on pinning down every possible contingency may be seen as ensuring against litigation costs and thus more likely to litigate. And each party may be able to see what it wants to see in a vague provision.
7. Finally, if some defined provisions are, like other rules, over- or under-inclusive, a party might litigate to enforce a clear but mistargeted provision more often than is efficient. In comparison, if litigation costs are high enough to discourage nuisance suits, and if courts are relatively effective in correctly assigning risk of loss and construing vague provisions, the cost of litigation itself may provide clarifying information to parties and courts. In such a circumstance, a party will litigate to enforce a vague provision only when it estimates relief is likely. *See* Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848 (2010).

Grandis Family Partnership, Ltd. v. Hess Corp.

588 F. Supp. 2d 1319 (S.D. Fla. 2008)

WILLIAM J. ZLOCH, District Judge.

I. Background

Defendant Hess Corporation (hereinafter “Hess”) and Plaintiff Advanced Power Technologies (hereinafter “APT”) began working together in 2003, when Hess contracted with APT for it to service and maintain the lighting at many of Hess’s retail gas stations in Florida. Hess was pleased with their business relationship, and in June of 2007, Hess expanded its business with APT by purchasing several orders of lighting ballasts.

In the same year, Hess began accepting bids for a major renovation of its gas stations' outdoor lighting. It planned to replace the existing lighting and ballasts with more energy-efficient models. APT's bid was accepted, and in May of that year, the Parties began negotiating the terms of their agreement. When the Parties' formal agreement was memorialized on July 2, 2007, it consisted of an eleven-page written agreement, complete with eighty pages of appendices, schedules, and forms. However, for certain business reasons, APT began its performance on the project in late June of that year.

The first eleven pages of the Parties' contract was a form prepared by Hess's legal department, which it has used for over a decade. At the evidentiary hearing, John Garabino, the Hess representative who negotiated the contract with APT, testified that the eleven-page contract was used as a base for the contractual agreement with APT, while the appendices and schedules attached thereto made up the heart of the Parties' agreement. Despite the contract with its appendices and Schedules being seemingly exhaustive in their breadth and detail, it did not contain an arbitration clause or venue provision. Pertinent to the instant Motion, the contract contained a clause listing the documents that were to be incorporated by reference, DE 12, Ex. 1, ¶ 2, an integration clause, *id.* ¶ 29, and a choice-of-law clause, *id.* ¶ 32, whereby the Parties agreed that New York law governs any disputes.

After the Parties' agreement was formalized but before the project was completed, the Parties' relationship broke down. APT responded by filing suit in Florida state court, wherein it alleged that Hess was in breach of the contract. Hess timely removed the suit to this Court. With its Answer, it filed a counterclaim for breach of contract and conversion against APT. The factual basis for the counterclaim is immaterial to this Order.

After the case was at issue but before discovery had commenced, Hess filed the instant Motion. In it, Hess argues that any disputes arising from the contract must be referred to arbitration, despite the contract's silence concerning the same. In support of this position, Hess cites the terms and conditions referenced in the thirty-two Purchase Orders it sent APT for work performed under the contract. The face of the Purchase Order references the contract's Schedules and forms in several different areas, including each of the individual projects' start and completion dates, as well as forms APT was to complete with the work it performed. Directly under the Purchase Order's style was the following sentence, in bold:

THE PURCHASE ORDER TERMS AND CONDITIONS AS WELL AS THE
SHIPMENT ROUTING POLICY LOCATED AT

<http://www.hess.com/PO/HessMR.htm> ARE INCORPORATED BY REFERENCE IN THIS PURCHASE ORDER.

By viewing the website listed above, APT would see the additional terms and conditions that it was deemed to assent to by filling the Purchase Order. Among the terms and conditions located on the Hess website, one is of particular importance to this Motion: the arbitration clause. It states, in pertinent part, that “all disputes, claims, questions, or differences shall be finally settled by arbitration.”

Hess’s principal argument for referring this case to arbitration is that the Hess Purchase Order, complete with its terms and conditions on the Hess website, is incorporated by reference into the contract. New York adheres to the common-law principle that parties are free to incorporate into a contract terms that are contained in a separate, independent document. In order for the separate, referenced document to be incorporated, “it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms.” *Lamb v. Embart Corp.*, 47 F.3d 551, 558 (2d Cir. 1995). New York courts have expressed the rule as “requir[ing] that the paper to be incorporated into a written instrument by reference must be so referred to and described in the instrument that the paper may be *identified beyond all reasonable doubt*.” *PaineWebber, Inc. v. Bybye*, 81 F.3d 1193, 1201 (2d Cir. 1996) (quoting *Chiacchia v. Nat. Westminster Bank*, 124 A.D.2d 626, 628, 507 N.Y.S.2d 888 (N.Y. App. Div. 1986) (emphasis supplied in *Bybye*)). For the incorporated terms to be binding “it must be clear that the parties know of and consented to the terms to be incorporated by reference.” *Creative Waste Mgt. v. Capt. Env'tl. Servs.*, 429 F.Supp.2d 582, 602 (S.D.N.Y. 2006). An oblique reference to a separate, non-contemporaneous document is insufficient to incorporate the same into the contract. *Ryan, Beck & Co., LLC v. Fakih*, 268 F.Supp.2d 210, 223 (E.D.N.Y. 2003).

Hess cites both the language of the contract and APT’s prior notice of and dealings with the Purchase Orders to establish that the website’s terms are incorporated by reference into the contract....

Hess’s primary argument is based on the contract’s language: the term “purchase order” is used in Schedule C, and therefore, the Hess Purchase Orders are incorporated by reference into the contract. Schedule C states that “[a]fter receipt of a purchase order for each subproject the Contractor may submit a payment application for 30% of the purchase order value.” The

next paragraph states: “After receipt of an approved changed [sic] order Contractor may submit a payment application for the remaining value of the purchase order (total revised purchase order value less the 30% of original purchase order value previously paid).” *Id.* There is no other reference to purchase orders in the 91 pages that make up the Parties’ formal agreement.

To bolster its argument that the Purchase Orders are incorporated by reference, Hess introduced the testimony of John Garabino. He testified that he reviewed the contract with APT before entering into it and felt it was clear that the references to purchase orders in Schedule C was to the Purchase Orders used by Hess. He also testified that a sample Hess Purchase Order, complete with the terms and conditions on the website, was provided to APT representatives at a meeting held in late May with APT, Hess, and the supplier of the materials used on the project. In support, Hess introduced as Defendant’s Exhibit 1 an email with an agenda of the May 23, 2007, meeting attached. Garabino also testified that Purchase Orders with the bolded language quoted above, directing a reader to the Hess website, were sent to APT when Hess ordered ballasts in June of 2007. Hess also introduced into evidence an email APT sent it commenting on the Purchase Orders Hess sent in June of 2007 regarding the purchase of ballasts.

The precise issue for this Court to determine is whether the language of Schedule C clearly referenced the Hess Purchase Orders to make it clear, beyond a reasonable doubt to APT that the Hess Purchase Order was being incorporated by reference into the contract. *Bybyk*, 81 F.3d at 1201. Whether an extrinsic document is incorporated by reference is a question of law. *See Advanced Display Sys, Inc. v. Kent St. Univ.*, 212 F.3d 1272 (Fed. Cir. 2000). As such, the Court looks first to the language of the contract; if its language is ambiguous, then the Court will look to the “mutual knowledge and understanding on part of both parties [to determine] that reference by implication is clear.” *Newton v. Smith Motors, Inc.*, 122 Vt. 409, 175 A.2d 514, 516 (1961).

Looking first to the plain language of the contract, it is clear that the only reference to purchase orders is found in Schedule C. Hess argues that these references refer APT to the Hess Purchase Orders that they were previously provided with, complete with the reference to the Hess website. As noted above, to incorporate the Hess Purchase Orders by reference, Hess must establish that the contract’s language both identifies beyond all reasonable doubt the Hess Purchase Orders and makes clear that they are being incorporated by reference into the contract. *Bybyk*, 81 F.3d at 1201.

In contrast to the high bar set by New York caselaw, Schedule C's references to "purchase orders" speak in a vague and general sense. It does not reference a specific Purchase Order or specific form of purchase order, nor does the contract state that such a Purchase Order is being incorporated by reference. Grammatically, this general rather than specific reference is evidenced by the drafter's choice to refer to purchase orders as a common noun, rather than a proper noun. The latter would evidence a particular purchase order, one that any person reading the contract would either expect to be attached to the contract, or, if not attached, the use of a proper noun would lead APT to expect the purchase order referenced to have a definite form that they are either aware of or should take the time to apprise themselves of. This lack of specificity is confirmed by the drafter's use of the indefinite article "a" when first referring to "purchase orders" in Schedule C, rather than the definite article "the." As it stands, Schedule C's language refers to a generic form, purchase orders, that is common to most industries and does not immediately or clearly denote the specific Hess Purchase Orders, with their particular provisions....

The language of Schedule C does not make a deliberate attempt to alert the reader that the Hess Purchase Orders are being incorporated by reference, or that any purchase orders are being incorporated by reference. This failure is highlighted by contrasting the clauses throughout the contract incorporating other forms by reference with the reference to purchase orders in Schedule C. In the second provision of the contract it states:

This Contract consists of this document, together with the following listed documents as attached and any document incorporated herein by reference: (collectively, "this Contract")

- (1) Schedule A: "Basis and Scope of Work"
- (2) Schedule B: "Items to be Furnished By Owner"
- (3) Schedule C: "Progress Payments"
- (3) [sic] Schedule D: "Contractor's Affidavit"
- (4) Schedule E: "Change Order"

The five areas listed above correspond to many of the forms attached to the contract and are clearly incorporated therein. In Schedule D, the Contractor's Affidavit has a definite form that is referenced to as a proper noun, and it is attached. In Schedule E, the Change Order is referenced as a proper noun, and it is also attached to the contract. The clarity of the second

provision of the contract permits a party to the contract, or a court interpreting it, to know precisely the forms and terms that are being incorporated by reference into the contract.

Schedule C is unlike Schedules D and E. Both of those Schedules are stand-alone forms that have been formally incorporated by reference into the contract. In contrast, Schedule C contains numerous pages of information, the terms of which could be expected to be part of the Parties' agreement. A sensible reading as to the effect of Schedule C being listed among the documents incorporated by reference is that the entire Schedule, as a separate document, is incorporated by reference into the 11-page contract. This would be consistent with how Schedules B, D, and E operate: each Schedule is a separate document that has become part of the contract through its specific incorporation by reference in the second provision of the contract.

Hess is then, essentially, arguing that the Hess Purchase Orders are incorporated by reference into Schedule C and Schedule C is incorporated by reference into the contract. Nothing in Schedule C, however, indicates with any semblance of intention or clarity that it is incorporating a document by reference. It strains credulity to argue that every common noun referenced in each of the Schedules incorporates by reference a separate nonattached document into the contract.

Reading the contract as a whole and contrasting the purchase order language of Schedule C with the rest of the contract, it is clear that the drafter did not evidence an intent to formally incorporate by reference the Hess Purchase Orders into the contract. Even if the drafter personally intended to incorporate by reference the Hess Purchase Orders, the document's reference to purchase orders was oblique and did not "identif[y] beyond all reasonable doubt" the non-contemporaneous document he sought to incorporate by reference: the Hess Purchase Order. *Bybyk*, 81 F.3d at 1201. The Hess Purchase Orders were not among the items explicitly incorporated by reference in the second provision, they are not referred to as proper nouns, they were not attached to the contract, and the sole reference to "purchase orders" in Schedule C was both oblique and without any indication that it was incorporating a specific document by reference into the contract or Schedule C.

That is not to say that a form being referred to as a proper noun is a necessary condition to have a form incorporated by reference. It is possible that a form could be of such a unique nature that absent being set out with particularity it would be incorporated by reference into the contract because of the mutual knowledge and understanding of the parties. However, with the generic title "purchase order" used in Schedule C, there is nothing that would convey

to a person reading the contract a direct and specific indication that a particular document is being incorporated by reference. Purchase orders are a common form in the service industry. Without a definite understanding being set forth for the Parties, knowledge that “purchase orders” in Schedule C refers to the Hess Purchase Orders cannot be imputed to APT.

The language of the contract fails to clearly set forth that the term “purchase order” in Schedule C is meant to incorporate by reference the Hess Purchase Orders; nevertheless, for the benefit of the Parties and any reviewing court, the Court will look to what the Parties clearly understood “purchase orders” in Schedule C to mean, given their dealings in the formation of the contract. In considering parol evidence, Hess’s burden remains the same, namely some contract must identify beyond a reasonable doubt that the Hess Purchase Orders are being incorporated by reference. Hess can establish through testimony and documents outside the contract what APT understood the term “purchase orders” in Schedule C to mean. *See Newton*, 175 A.2d at 516. At the hearing, Garabino testified that APT was provided with the Hess Purchase Orders twice before the contract was signed: once at the May 27 meeting and again when Hess purchased ballasts through APT. Transcript pp. 12–22. Hess argues that this May 27 meeting establishes that APT knew precisely what the term “purchase order” in Schedule C referred to, because Hess presented APT with a sample Purchase Order complete with the link to the website that contained the arbitration clause.

At the evidentiary hearing, APT denied having any prior knowledge of the Hess Purchase Orders and the terms and conditions on the website. Several Hess Purchase Orders, complete with the website link, were sent to APT for the ballasts purchased in June of 2007. APT’s president Devin Grandis testified that the sale of ballasts was done as a courtesy for Hess, and because of that, he paid no attention to the Purchase Orders that were sent for the ballasts. APT’s vice president Fred die Manfredi testified that in the course of APT’s dealings with Hess he handled hundreds if not thousands of purchase orders from Hess, and not one of them contained a link to a website containing an arbitration clause. The administrative assistant, Cathy Cole, who dealt with the Purchase Orders for the ballasts also testified that she took no notice of the link to the website, she only paid attention to the fact that the wrong parts number was listed on the order. She mistakenly assumed that those Purchase Orders were like the others that she had processed from Hess.

All of the APT employees testified that in their previous dealings with Hess the purchase orders sent did not resemble those at issue here with the link to the website. This fact is critical because without actual knowledge of these prior Purchase Orders being sent for the ballasts, the term “purchase order” in Schedule C would not carry any significance for APT to know

that it incorporated by reference the Hess Purchase Orders with the additional terms. Thus, there was nothing in the prior Purchase Orders for ballasts that would have made APT representatives conscious of the website link and the additional terms contained therein when it signed the contract with Hess.

Additionally, APT's president Devin Grandis testified that neither the Purchase Orders nor the terms and conditions contained on Hess's website were provided to him at the meeting held between APT and Hess on May 27, 2008. Both Manfredi and Cathy Cole testified to this fact. After observing the demeanor of the witnesses for APT, the Court finds their testimony to be credible. In addition, on cross-examination Hess's representative Garabino was not positive that he provided a copy of the Purchase Orders to APT representatives at the meeting; he was only sure that the agenda reflected that they would be discussed. He testified that his assistant Sue Thompson was in charge of handing out the Hess Purchase Order and the terms and conditions on the website. He also believed that because the topics were on the agenda the APT representatives would have received a copy. However, Hess failed to call Sue Thompson, the person who did have actual knowledge of whether a sample Hess Purchase Order was actually distributed to APT. Based on the testimony and evidence, it is not clear whether APT was provided the Purchase Orders with the terms and conditions at the May 23, 2007 meeting, which would have given APT knowledge of what the term "purchase order" in Schedule C was referring to.

The high standard set by New York law to incorporate an independent document by reference into a contract demands that knowledge of the document's existence be mutual. The Court finds that the behavior and knowledge of the Parties prior to and through the course of formulating the contract fails to establish that the Hess Purchase Orders were identified beyond all reasonable doubt to APT. Thus, the Hess Purchase Orders are not incorporated by reference into the contract. Therefore, the arbitration clause contained on the Hess website is not a term of the contract, and for that reason it is not binding on APT.

Under New York law, all writings that form part of a single transaction may be read together.... This principle allows courts to read several contracts together, even when they do not refer to each other and are between different parties.... However, the ability of courts to broadly read contracts together is always conditioned upon the intent of the contracting parties....

New York courts look to many factors, including the form of the contracts, the parties' behavior, and the effect of each contract on the other when determining whether the separate documents should be read together. Here, the contract and the first Purchase Order were executed one week apart. The contract and the Purchase Orders deal with the same subject matter: the relighting of Hess gas stations. The Hess Purchase Orders also reference the contract and various Schedules contained therein. While much of this suggests that the two should be read together, there is nothing that establishes that the intention to read the documents together was mutual.

First, the testimony at the evidentiary hearing and the language of the contract itself do not evidence an intent to read the two documents together. There was no testimony that the contract was not self-executing or somehow dependent on the issuance of Purchase Orders. *Cf. JJ. Ryan & Sons, Inc.*, 863 F.2d at 321 (noting that without the later documents, all the parties would have had was an exclusive distribution agreement, without the obligation to purchase). In fact, Devin Grandis testified that APT began performing under the agreement before a Purchase Order was issued. The contract also had an integration clause evidencing that the document was meant to stand alone. Further, Hess never introduced any evidence that beyond a formal incorporation by reference these documents should be read together by implication.

Second, the divergent evidence produced by both Parties prevents the Court from finding a mutual intent by the Parties to read the two documents together. Hess believed that the Purchase Orders were incorporated by reference, which they were not. Hess's representative did not see the Purchase Orders as a "non-severable package." *Arviniaga*, 460 F.3d at 237. Garabino testified that he viewed the Purchase Orders as being incorporated by reference, not that they were mutually dependent documents or contracts. The distinction is subtle but important: just because a party desires to have a document incorporated by reference does not necessarily mean that the two documents have a symbiotic relationship that creates a "non-severable package." In this case they surely were not; APT was able to fulfill its duties under the contract without a Purchase Order being issued.

Additionally, APT's representatives testified that the Purchase Orders and terms were never shown to them prior to signing the contract, and that they never assented to the same. Thus, there was never any intent by APT to be bound by the terms and conditions with the Hess Purchase Orders, let alone to have them read together with the contract...

ORDERED AND ADJUDGED that Defendant Hess Corporation’s Motion And Incorporated Memorandum Of Law To Stay The Litigation And Compel Arbitration, Or, In The Alternative, To Transfer Venue (DE 12) be and the same is hereby **DENIED**.

Notes and Questions

1. Contract drafting costs might be economized by adopting modularity – breaking up a complex contract into discrete pieces that interact with the others in standardized ways. Compartmentalizing contract drafting may allow parties to interchange provisions more easily, offering increased opportunities for choice and private ordering while saving contracting costs. *See, e.g.,* Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175 (2006).
2. Incorporating external documents by reference is one means by which parties might achieve efficiencies through modularity. But in order for that to work, courts must know whether to include the additional language as part of the deal, or whether to treat the external documents as separate from the contract. If separate documents fail to send clear signals about how they interrelate, courts may treat similarly structured contracts differently. For example, the Missouri Supreme Court read all documents presented together in a contract for sale of a vehicle as falling under the “one contract” rule, meaning that instruments related to the same subject and presented at the same time “*will be construed together*, even in the absence of explicit incorporation, unless ‘the realities of the situation’ indicate that the parties did not so intend.” *Johnson ex rel. Johnson v. JF Enters., LLC*, 400 S.W.3d 763, 767 (Mo. 2013). The court in *Johnson* reached that conclusion even though the main document lacked an incorporation clause, a fact that the lower court noted in holding the additional documents were to be understood as separate. *Johnson v. JF Enterprises, LLC*, No. WD73990, 2012 WL 1034234, at *3 (Mo. Ct. App. Mar. 27, 2012).
3. In light of this phenomenon, Tal Kastner notes that “the deployment of discrete parts does not necessarily lead to reliable outputs. Instead, when contracts involve different levels of discrete parts, these modules can invite more than one understanding of the whole. Moreover, they can shape the possible operation of various parts in ways that might not be predictable or apparent to drafters as they seek to mobilize discrete forms *ex ante*.” Tal Kastner, *Systemic Risk of Contract*, 47 B.Y.U. L. REV. 451, 477 (2022).

4. New York courts are renowned for a textualist approach to contract interpretation. In construing the contract in *Grandis*, the court notes the following “one contract” approach adopted in New York. Do you view this as a textualist or a contextualist approach?

Under New York law, all writings that form part of a single transaction may be read together.... This principle allows courts to read several contracts together, even when they do not refer to each other and are between different parties.... However, the ability of courts to broadly read contracts together is always conditioned upon the intent of the contracting parties....

New York courts look to many factors, including the form of the contracts, the parties' behavior, and the effect of each contract on the other when determining whether the separate documents should be read together.