

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

SLM CORPORATION,)
)
 Plaintiff,)
)
 v.) C.A. No. 3279-VCS
)
 J.C. FLOWERS II L.P., JPMORGAN)
 CHASE BANK, N.A., BANK OF AMERICA,)
 N.A., MUSTANG HOLDING COMPANY, INC.)
 and MUSTANG MERGER SUB, INC.,)
)
 Defendants,)
)
 J.C. FLOWERS II L.P., JPMORGAN)
 CHASE BANK, N.A., BANK OF AMERICA,)
 N.A., MUSTANG HOLDING COMPANY, INC.)
 and MUSTANG MERGER SUB, INC.,)
)
 Counterclaim-Plaintiffs,)
)
 v.)
)
 SLM CORPORATION,)
)
 Counterclaim-Defendant.)

- - -
Chancery Courtroom No. 12
New Castle County Courthouse
Wilmington, Delaware
Monday, October 22, 2007
1:02 p.m.
- - -

BEFORE: HON. LEO E. STRINE, JR., Vice Chancellor.

- - -
SCHEDULING CONFERENCE
- - -

CHANCERY COURT REPORTERS
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1 APPEARANCES:

2 ANDRE G. BOUCHARD, ESQ.
Bouchard Margules & Friedlander

3 -and-

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JACOB W. BUCHDAHL, ESQ.
of the New York Bar
5 Susman Godfrey LLP
for Plaintiff and Counterclaim-Defendant

6 DAVID C. McBRIDE, ESQ.
7 BRUCE L. SILVERSTEIN, ESQ.
C. BARR FLINN, ESQ.
8 Young Conaway Stargatt & Taylor

-and-

9 BERNARD W. NUSSBAUM, ESQ.
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10 MARC WOLINSKY, ESQ.
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15 Sullivan & Cromwell
for Defendant-Counterclaim Plaintiff J.C.
16 Flowers II L.P.

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1 MR. BOUCHARD: Good morning, Your
2 Honor. I think Mr. McBride wanted to make a couple of
3 introductions first, and then I will do our side.

4 THE COURT: By the time we finish
5 introductions, it will be tomorrow.

6 MR. McBRIDE: It may be, Your Honor.

7 THE COURT: It's good to know how many
8 --

9 MR. McBRIDE: I will go as quickly --

10 THE COURT: -- people in America it
11 takes to screw in a light bulb or handle a scheduling
12 conference.

13 MR. McBRIDE: Well, here is our
14 lineup, Your Honor. From Wachtell, Lipton are Bernard
15 Nussbaum; Eric Roth; Marc Wolinsky, who will make the
16 presentation for us today; Elaine Golin; Carrie
17 Reilly; and Lauren Kofke; and from our clients, J.C.
18 Flowers, Sally Rocker and Ed Grebow; and from Bank of
19 America, Tricia Lawson; and my partners, Bruce
20 Silverstein and Barr Flinn.

21 MR. BOUCHARD: Good morning, Your
22 Honor. Andy Bouchard, for Sallie Mae. I will be much
23 briefer in the introductions. My co-counsel, who have
24 been admitted pro hac vice, that are with me today,

1 are Mr. Stephen Susman and Jacob Buchdahl, from Susman
2 Godfrey firm. And Mr. Lord, the chairman of Sallie
3 Mae, is also present in the courtroom, as are various
4 other representatives of the company.

5 Thank you.

6 THE COURT: You may proceed,
7 Mr. Susman.

8 MR. SUSMAN: Thank you, Your Honor.

9 THE COURT: I have read all the
10 papers, and I don't want, you know -- this really is a
11 scheduling conference, so just hit the high points.
12 And I think for you, you know, your friends are
13 saying, "Why can't you just all agree to terminate?"

14 MR. SUSMAN: We -- Your Honor, the
15 parties agree on four things. I'm going to be very
16 brief.

17 Number one, neither side apparently
18 wishes to unilaterally terminate, although both claim
19 the right to do so.

20 Number two, a critical issue of
21 contract interpretation divides the parties. We --
22 that is the meaning and scope of the MAE clause. We
23 have already filed, last week, our brief on that
24 issue.

1 The third thing we agree on is that no
2 extrinsic or parol evidence is necessary for you to
3 decide that issue.

4 THE COURT: What does that mean? I
5 mean, I always love when people say that. You say --
6 Sallie Mae says, "This is clear on its face. You
7 don't need to look at anything else, because it's
8 clear on its face, and you don't need..." -- and then
9 they say, "It's clear on its face. It means something
10 totally different."

11 Are you all stipulating to a paper
12 trial on this?

13 MR. SUSMAN: I think we -- I just said
14 we --

15 THE COURT: That is different. I'm --
16 you have to be very precise here. If people want me
17 to interpret this language and stipulate to me that
18 it's a trial record such that I have the same leeway,
19 as a judge, in interpreting this language as if I
20 would have had a full trial and I would have heard all
21 the parol evidence, in the event of ambiguity, then we
22 can go forward. But if it's one of those situations,
23 which we have all the time, which is, "It's clear.
24 It's perfectly clear that it means what I say, but if

1 it doesn't mean what I say, of course Your Honor has
2 to hear the parol."

3 Both sides then -- there is really no
4 utility by people telling me that both sides think
5 it's clear but it's just -- means totally opposite
6 things.

7 MR. SUSMAN: Well, let me see if I
8 make our position clear.

9 Our position is that if it doesn't
10 mean what we say it means, then you can decide -- I
11 mean, you can decide that issue. We do not need
12 discovery on what it means. Now, that does not end
13 the dispute, because it may mean what we would -- we
14 would take the position it may mean what they say it
15 means --

16 THE COURT: And there is still not --

17 MR. SUSMAN: -- and there is still not
18 a material adverse event.

19 THE COURT: They say even if it means
20 what you guys say it means, there has been an MAE.

21 MR. SUSMAN: Absolutely. So that part
22 -- but you have determined --

23 THE COURT: Why haven't you used --
24 isn't the key argument they were buying an MAE when

1 they bought your client?

2 MR. SUSMAN: Of course.

3 THE COURT: By definition.

4 MR. SUSMAN: Of course.

5 THE COURT: Because of the name of
6 your client.

7 MR. SUSMAN: Of course.

8 THE COURT: I mean, I figured --
9 lawyers as good as you, Mr. Susman, and Mr. Bouchard,
10 I thought that would have been Argument Number 1.

11 MR. SUSMAN: The third thing I think
12 -- I mean, I think we -- that is our position. And I
13 think I read their counterclaim as the same position.
14 Their position is basically -- I mean, I don't think
15 they have --

16 THE COURT: That is why I'm skeptical.
17 I'm skeptical of the supposed shortcut that you are
18 both answering -- you are both suggesting, because
19 it's one thing if we were to take a shorthand thing.
20 If either side was believing that my determination of
21 that issue would actually obviate the need for an
22 evidentiary hearing -- I think it's very clear from
23 their perspective that even if -- even if you prevail
24 on that, they are going to say that an appeal is

1 premature, that there is a factual question of whether
2 even the incremental effect of this legislation, plus
3 what has gone on in the credit markets, constitutes a
4 material adverse effect.

5 MR. SUSMAN: Absolutely. I did not
6 mean to suggest that you can resolve the whole case by
7 ruling on this issue. I think we both agree that -- I
8 think we both agree, as I understand their papers,
9 that you can interpret what the contract means as a
10 matter of law without hearing who said what to whom in
11 negotiations.

12 THE COURT: Right.

13 MR. SUSMAN: That kind of stuff is
14 parol evidence that -- extrinsic evidence that you
15 need not consider.

16 THE COURT: Right. I get that point.

17 MR. SUSMAN: You need never consider
18 it.

19 THE COURT: Unless I were to find that
20 actually --

21 MR. SUSMAN: Unless --

22 THE COURT: -- it's susceptible of
23 both readings, in which case you would both wish to
24 enter in evidence of the negotiations.

1 MR. SUSMAN: Absolutely. The -- that
2 was a possibility. You could, on your own motion,
3 say, "I find it ambiguous. I need some evidence."
4 But in any event --

5 THE COURT: Right. What I'm saying,
6 Mr. Susman, happens all the time. Everybody believes
7 that no evidence is admissible because their position
8 is exactly correct.

9 MR. SUSMAN: I --

10 THE COURT: And what I'm going to do
11 here -- pause for a second. Evan, there is always
12 people hanging out there. I don't know if they are
13 with the parties. I don't care if they stand along
14 the wall, but it's more annoying to see them lingering
15 out there. I don't know whether they are going to
16 come to arrest someone. I don't know what they can
17 hear, but I want to concentrate on Mr. Susman, what he
18 is saying, and them all doing this -- if they don't
19 want to come in, they can go away.

20 Okay. Thank you.

21 MR. SUSMAN: The fourth thing --
22 again, I think the parties agree -- seem to agree in
23 their papers that the construction of the contract,
24 the interpretation of it, is a critical issue in the

1 case; that once you decide it -- and you need not --
2 you need not have an evidentiary hearing or extrinsic
3 evidence to decide that construction -- that that will
4 further the resolution of this case, go a long way
5 towards furthering resolution. Therefore, we both
6 agree that you should rule first on that issue of
7 contract interpretation.

8 I came here -- and in their letter to
9 the Court today, they basically say that their
10 position is -- and I'm prepared to make a fifth
11 agreement, which will make this a very short hearing,
12 which is if you consent to a hearing on that issue
13 on -- maybe sometime next week, but quickly; set a
14 briefing schedule accordingly, so you can resolve that
15 -- then our request to expedite discovery and trial of
16 everything else can be, indeed, deferred to the end of
17 that hearing, which is what they -- they are
18 suggesting it be --

19 THE COURT: What do you mean, to the
20 end of that hearing? If I determine that it's
21 ambiguous --

22 MR. SUSMAN: Then we will have to --

23 THE COURT: -- then you are going to
24 ask for a normal schedule.

1 MR. SUSMAN: No. No. We would then
2 have the argument that we -- we would then have an
3 argument about the need for expedited discovery.
4 Depending on how you rule on that issue promptly, or
5 indicate your thinking about ruling, I think we can
6 determine at that time whether we should expedite the
7 rest of the proceeding.

8 That is my suggestion, Your Honor. I
9 mean, you understand the need for us to get this
10 resolved quickly.

11 THE COURT: Right. So I'm supposed to
12 issue -- you are going to get me briefs when?

13 MR. SUSMAN: Well, you have our brief.
14 If you could get them to give you their brief -- you
15 know, these are things they have been thinking about,
16 as we have, for a long time, as evidenced by the fact
17 that they filed a 50-page answer and counterclaim
18 within a few days. They would file their brief on,
19 say, Friday.

20 THE COURT: Let's deal -- why can't
21 you just mutually terminate? They say, "Agree to
22 mutually..." -- in front of this audience, we can even
23 treat it like -- I don't know -- it would be like the
24 opposite of a wedding, but we can ask if anyone in the

1 audience objects if these people mutually terminate
2 without prejudice. They just say do it at the same
3 time. They just need moral support. They need the
4 comfort, the moral comfort, of you doing this at the
5 same time.

6 MR. SUSMAN: Well, I think there is --
7 I mean, our hope, obviously, is that the transaction
8 will take place.

9 THE COURT: No. You said set a
10 closing date. Right?

11 MR. SUSMAN: And that -- if they see
12 the writing on the wall, that this is going to cost
13 them \$900 million to walk away from this transaction,
14 that they will come back to the bargaining table.
15 That is our hope. Maybe they would tell us when they
16 stand up that, "There is no way, blue jay. We are not
17 going to close even if it costs us \$9 billion."

18 THE COURT: In which case you are
19 saying they should terminate because it's not a
20 curable -- if they are saying it's not a curable MAE,
21 then they should just say it and get on with
22 terminating it themselves and, you know, live with the
23 moral force -- the effect of their moral convictions,
24 and then there is no reason to expedite. Right?

1 MR. SUSMAN: That's what we say, Your
2 Honor. We also say these parties -- I mean, you -- of
3 course, you know that they -- there is a \$60 deal.
4 They made an offer to us to settle for 50. The
5 parties still -- we have not begun talking to them,
6 but negotiation would be a thing that the parties
7 might do.

8 What you tell us the MAE clause means
9 is going to have a big facilitating effect, I predict,
10 on the parties' position during those negotiations.
11 And the effect of our terminating or their
12 terminating, by the way, and then deciding they want
13 to make up and kiss, that is not so easy, because I
14 understand that they would have -- the corporate
15 lawyers tell me if they terminate -- they can change
16 the price without having to repaper the entire deal
17 and go through the Hart Scott Rodino process. If they
18 terminate and make a new deal, then they have to --
19 the only way they can have a reconciliation would be
20 the approval -- going through the approval process
21 again, which takes months. So that is kind of a
22 practical --

23 THE COURT: They have been through it
24 once. Right?

1 MR. SUSMAN: We have been through it
2 once.

3 THE COURT: Did they get a second
4 request?

5 MR. SUSMAN: I don't know. No. The
6 answer is, I'm told, no.

7 MR. WOLINSKY: No.

8 THE COURT: You think -- is the FTC
9 just sitting around saying, "Man, I wish we had made
10 that second request. We get a second chance at it, we
11 are going to ask for truck loads of documents"?

12 MR. SUSMAN: I don't know what the
13 answer to that is, Your Honor. The point is that I
14 think -- our position is we don't want to terminate.
15 We want this deal to be done.

16 THE COURT: I take it your -- and your
17 position is if they want to cut it clean, cut it
18 clean, but they can't have it both ways.

19 MR. SUSMAN: That's correct. Another
20 thing they could do, which certainly -- I mean, would
21 take -- I hate to even suggest it, but it takes the
22 wind out of our sails somewhat. They could get up
23 here and say in public that they waive all of those
24 restrictions of Article VI, I believe it is, of the

1 agreement, which gives them control, basically, of the
2 company right now. If we -- I mean, they could avoid
3 terminating and just say, "We waive all those. We
4 don't have a right to control whether you pay a
5 dividend, what your salaries are, all that stuff, and
6 we will waive the no-shop provision, too."

7 So that, as you know, is part of our
8 basis for seeking --

9 THE COURT: When will the agreement
10 expire by its own terms if there is no closing?

11 MR. SUSMAN: I believe it's
12 February 15th. And Your Honor, that concludes my
13 presentation, basically. I mean, that is what we
14 would request the Court do.

15 MR. WOLINSKY: Good afternoon, Your
16 Honor. I think you put your finger right on it.
17 Where is the fire? What is the need for expedition?
18 We are prepared to mutually terminate. You find
19 yourself in a position where it's almost we are both
20 standing in front of the door and they are saying,
21 "You go first," and we say, "No. You go first."

22 THE COURT: Why do they have to
23 terminate when your client is the one refusing to
24 close?

1 MR. WOLINSKY: Your Honor, our
2 position has been consistent and very clear. If the
3 closing conditions were to be measured today, they
4 would -- could not be satisfied. There are two other
5 closing -- at least two other closing conditions that
6 are material that haven't been satisfied. One is the
7 requirement -- the receipt of FDIC approval for the
8 transfer of the industrial loan bank. Standing here
9 today, we all expect that to come in a month or two.
10 So I'm really -- we are really not hanging our hat on
11 that.

12 There is a second substantive
13 condition, which is the provision of required
14 information, capital R, capital I. The required
15 information are the pro formas, MD&A, and projections
16 that would be required to finance \$16.5 billion of
17 loans. That required information has not been
18 provided. Some of that --

19 THE COURT: Do they dispute that?

20 MR. WOLINSKY: Well, they can speak
21 for themselves. I think their position is our
22 requests are unwieldy and unnecessary and pretextual,
23 but you will hear from them. We don't think they are
24 unwieldy, we don't think they are unnecessary, and we

1 certainly don't think they are pretextual.

2 There are two aspects of the required
3 information. One is wrapped up in whether there has
4 been a material adverse change in the company. So,
5 for example, they have given us projections. We
6 challenge the assumptions behind those projections.
7 And actually, there was a meeting scheduled to further
8 get into those assumptions. So even if we accepted
9 their projections on face value, the bankers will tell
10 you they don't have sufficient information beneath
11 those projections to go to the marketplace. And
12 actually --

13 Actually, when I spoke with my client
14 before coming down here, he said, "You have to
15 understand. To sell \$16-and-a-half billion worth of
16 bonds, we are going to have the biggest -- the biggest
17 ballroom at the Waldorf. It's going to be packed with
18 five or 600 very skeptical bond buyers, and they are
19 going to put us through our paces." And my client,
20 standing here today, does not have the financial
21 information to conduct that meeting. And part of that
22 is because --

23 THE COURT: Aren't they just going to
24 rely, like when they give fairness opinions -- they

1 just rely, without any independent verification, upon
2 the information given to them.

3 MR. WOLINSKY: The guys who put their
4 money on the -- into the bonds, I'm told they don't
5 quite do that.

6 THE COURT: But the bank is saying
7 this. Right?

8 MR. WOLINSKY: The -- JPMorgan and
9 Bank of America are saying, "To sell these bonds, we
10 need more financial information."

11 THE COURT: That's what I'm saying.
12 It's a different standard than when they give a
13 fairness opinion.

14 MR. WOLINSKY: Absolutely.

15 THE COURT: I wanted to be clear.

16 MR. WOLINSKY: This is real money
17 changing hands.

18 THE COURT: A fairness opinion is just
19 a fairness opinion.

20 MR. WOLINSKY: A fairness opinion, you
21 know -- it's the Lucy sitting in the box: "Fairness
22 Opinions, 5 cents."

23 So it is wrapped up into the MAE
24 dispute, but it's not only that. There is MB&A

1 disclosure that just has not been provided. We have
2 pro formas from June 30th. It's now into October.
3 The pro formas we have for this company are not the
4 pro formas you would take out to the marketplace.

5 So the reason why we are not willing
6 to go through the door today and unilaterally
7 terminate is our fear that they will say, "You have
8 just waived all your defenses, all your other
9 defenses; you have unilaterally terminated; you have
10 repudiated the contract; and whatever other conditions
11 might have been satisfied, you have waived them."

12 THE COURT: Right. But you are
13 saying, though -- your client is -- there is nothing
14 curable, in your view, about the material adverse
15 effect.

16 MR. WOLINSKY: Congress does funny
17 things. It's between now and February 15th. And
18 legislation could be enacted to make it worse or
19 better. There is legislation pending right now that
20 in some respects would make it worse, but you don't
21 know.

22 THE COURT: No. Make it -- making it
23 worse isn't the issue.

24 MR. WOLINSKY: Yes. Making it better.

1 THE COURT: Ameliorative legislation
2 has been introduced?

3 MR. WOLINSKY: No. No.

4 THE COURT: Your clients -- I mean,
5 your clients are well-heeled. They have gotten a
6 lobbyist to introduce ameliorative legislation, in
7 cooperation with Sallie Mae, to make the deal go
8 forward?

9 MR. WOLINSKY: No. You are absolutely
10 right. Standing here today, there is nothing that we
11 think is going to happen that is going to change the
12 legislation.

13 THE COURT: And if the legislation --
14 the legislation is not curable except by --

15 MR. WOLINSKY: Act of Congress.

16 THE COURT: Right, which we won't
17 conflate with the sacred, but even if they get these
18 materials together, you are not going to close this
19 deal.

20 MR. WOLINSKY: Standing here today,
21 conditions would not be satisfied. There is an MAE.
22 We would not go forward. That's correct. We don't
23 formally have to make that decision until
24 February 15th or until the other conditions are

1 satisfied.

2 THE COURT: How about Mr. Susman's
3 suggestion you just waive all the things that are
4 restricting them from doing business?

5 MR. WOLINSKY: It's something we could
6 take up with the client. It's not far fetched at all.
7 It's something we could have discussed with them
8 before we came into this hearing, but it was not
9 something discussed -- suggested prior to that today.

10 THE COURT: I mean, your clients are
11 -- some of your clients are competitors, aren't they,
12 of Sallie Mae?

13 MR. WOLINSKY: Yes. Both BofA and
14 JPMorgan are competitors.

15 THE COURT: As of this date, you are
16 taking the position that Sallie Mae cannot look for
17 another buyer. Right?

18 MR. WOLINSKY: As of today, we are
19 happy to terminate the merger agreement and let them
20 go on their merry way.

21 THE COURT: Again, only if you hold
22 hands for one final --

23 MR. WOLINSKY: Jump off the bridge
24 together.

1 THE COURT: Exactly. Although you
2 have never been fully united, you will end it
3 consensually. Right?

4 MR. WOLINSKY: Yes. So, Your Honor --

5 THE COURT: How about this issue of
6 this -- the apparent clarity of this language?

7 MR. WOLINSKY: Your Honor, you have
8 been a judge long enough to know that people come up
9 to you and always say that "The contract is completely
10 unambiguous in my favor, and we don't need parol
11 evidence." That is the situation where you find
12 yourself today. You have the contract language in
13 front of you. You know what the parties' positions
14 are. If you said to me, "Thank you, very much. I
15 would like to go ahead and schedule a prompt
16 mini-trial -- relatively prompt mini-trial on the
17 issue of how to interpret this contract," we would
18 say, "Fine."

19 THE COURT: Why is this trial even
20 that substantially complicated? You have already --

21 MR. WOLINSKY: Yeah.

22 THE COURT: You got the Me Team
23 together now to deal with student loans. It's like a
24 reunion for you all. You already know what it is that

1 you think is a material adverse effect. I mean, what
2 kind of discovery is there going to be? They are
3 providing you with projections; right? You are going
4 to make your own projections of the differences. We
5 are going to get experts in here, and they are going
6 to talk about things. Appears like there has already
7 been a calculation of the impact of the legislation,
8 and it's not even clear that the parties differ that
9 substantially on their calculation of the impact.
10 Right?

11 MR. WOLINSKY: No. I think they
12 differ very markedly on the calculation of the impact.

13 THE COURT: What kind of discovery is
14 that going to be? You are going to get experts to
15 tell me what Congress --

16 MR. WOLINSKY: No. No. Here is what
17 I -- putting aside whatever they ask for from us, they
18 have been running numbers on the impact of this
19 legislation probably since before our clients showed
20 up on the scene. We know what their current
21 projections are. And their current projections we
22 think are faulty and flawed and have various problems
23 in them. But what we would really be looking for in
24 discovery is: "Show us the projections you generated

1 before you thought there might be an MAE issue."

2 The projections that they are going to
3 come in to court with are projections that reflect
4 their view of the world after they heard that there
5 might be an MAE. What we would be looking for are the
6 projections that were generated when they were
7 lobbying Congress, their internal projections when
8 they were looking at this deal.

9 THE COURT: Right. They would have to
10 give that to you.

11 MR. WOLINSKY: Yes.

12 THE COURT: How long -- I mean, they
13 obviously can't say, "Hurry up," and then not give you
14 the discovery.

15 MR. WOLINSKY: Right. That's true.
16 Then we would also want to take discovery of the
17 impact of the credit -- changed credit markets on it,
18 which again is very markedly different than what they
19 are saying here. Excuse me. What they everybody
20 saying in -- publicly. Right now they say the credit
21 markets are going to get better than they were before
22 we did the deal, starting in January. And we don't
23 think that is credible. And we think if we get into
24 discovery, we will gain admissions that it's not

1 credible.

2 So you have the discovery of their
3 internal projections, statements to Congress when they
4 were lobbying against these bills. And then you have
5 expert discovery, which would have to be -- experts
6 would have to be retained, prepared, cross-examined.
7 That is the scope of the issue that would have to be
8 prepared if we went to the whole MAE, the whole thing.

9 That is not going to happen in the
10 matter of a couple of weeks, especially with -- I
11 haven't talked about the discovery they would expect
12 of us. I have three clients. Banks are very, very
13 big and very paper-intensive organizations. We have
14 been running numbers for a very long time, some for
15 the client -- some for the counsel, some for the
16 clients. So making the kind of production they would
17 expect and Your Honor would expect from institutions
18 of this size is not going to happen in a matter of
19 weeks. Okay?

20 Anything else I can -- okay.

21 THE COURT: Thank you, Mr. Wolinsky.
22 Let me hear from Mr. Susman.

23 MR. SUSMAN: Your Honor, just a few
24 points. They keep saying -- I think they finally

1 admitted that basically, they are not going to close,
2 ever, regardless of what we give them or don't give
3 them, because in their view, an MAE has taken place,
4 and the only thing that can happen is Congress could
5 all of a sudden magically decide to change its mind.

6 So that position, that an MAE has
7 taken place, and that they do not have to abide by the
8 contract, is the repudiation, which under traditional
9 contract law excuses our further performance. Why
10 should we have to be doing a lot of things to give
11 them information on and on -- except in discovery, of
12 course we have to give them information -- if they
13 have already repudiated their obligation under the
14 contract?

15 The discovery in this -- I mean,
16 again, the interpretation of what the MAE clause means
17 is, I think, a legal matter. We can do briefs and get
18 the Court to resolve that as a matter of law very
19 quickly once you tell us what the rule is, the
20 standard is, for an MAE. The difference between the
21 parties -- there are two issues. It's very, very
22 simple, what it is. They say that if the legislation
23 that was passed is 1 or \$2 more adverse, then the
24 legislative proposals described in the 10-K -- that

1 then you have to consider the entire impact of that
2 legislation. We say, "No. It's just the incremental
3 impact that is considered. You knew about the
4 possibility. The baseline was what was disclosed, and
5 the delta is how much more adverse."

6 THE COURT: I get that.

7 MR. SUSMAN: You got the issue. The
8 only other issue is whether you look at the proposals
9 in the aggregate that were disclosed in the 10-K or
10 you pick one as the baseline. Do you just pick one of
11 those proposals, or do you look at the proposals in
12 the aggregate, particularly where several of them
13 could be enacted complementary of each other, not as
14 either/or proposals.

15 Those things -- once the Court rules
16 on it, I think discovery could be very quick. I will
17 tell you from our perspective what we are talking
18 about on the discovery. We think we only need three
19 depositions of fact witnesses. And I can identify who
20 those people are: Chris Flowers is the head of J.C.
21 Flowers. We need Greg Curl, who is at Bank of
22 America, and Charles Scharf, at JPMC. Those are the
23 people that were most intimately involved in this
24 transaction. Three depositions from our side.

1 Certainly, there will be experts, obviously. The
2 discovery is going to be mutual but basically project:
3 What were the people saying the impact of these
4 proposals was before they got in a fighting mode, and
5 what are they saying now, and what is right? But that
6 is not -- I mean, the document -- I could list, right
7 now, on the record five categories of documents or six
8 categories of documents that we need, and we think
9 they need, that we are willing to exchange and I'm
10 sure the parties can quickly exchange with each other.

11 So I don't think this is going to be
12 -- does not need to be -- even if the legal ruling
13 that we are urging you to make on an expedited basis
14 does not resolve the matter -- and it may, but if it
15 doesn't resolve the matter, I think the rest of it can
16 be dealt with pretty expeditiously.

17 Thank you, Your Honor.

18 THE COURT: Anything, Mr. Wolinsky?

19 MR. WOLINSKY: Yeah. Your Honor, at
20 the end of the day, this is still just a money issue.
21 We could turn JPMorgan, Bank of America and J.C.
22 Flowers upside down, conduct three, ten or twenty
23 depositions. It's still a question of: How fast are
24 they going to get to a \$900 million money judgment?

1 There is no articulated need for expedition.

2 THE COURT: Except that you have
3 extracted -- you have essentially stood before me with
4 clients who have no intention of closing this deal but
5 who have contractual rights of inhibition over an
6 industry competitor, and you know -- so you are tying
7 them up.

8 MR. WOLINSKY: Your Honor, give me one
9 second.

10 Your Honor, I just checked with
11 Ms. Rocker. We are happy to waive the covenants that
12 restrict their ability. They can shop -- God bless
13 them -- manage the business however they wish, no
14 requirement that they seek consents from us. Whatever
15 restrictions that are under the merger agreement are
16 lifted here and now.

17 THE COURT: Mr. Susman?

18 Whoever is leaving, you not leaving?

19 A MAN: No?

20 THE COURT: No. No way.

21 MR. BOUCHARD: Can we have a moment to
22 confer, Your Honor?

23 THE COURT: Yes. In fact, what I'm
24 going to do is we are going to get Reuters and

1 Bloomberg, and they are going to come up here, my
2 computer, and they can draft a joint release, inform
3 all the security holders at once to go -- whatever
4 they want to do, so there is no -- be one of the
5 slower track races I have seen, to see this group try
6 to flee quickly. I know you -- quick motion. It will
7 appear -- it will appear to be slow motion.

8 Do you need to --

9 MR. SUSMAN: I don't. Maybe they need
10 me.

11 THE COURT: Do you have your ear
12 piece, so they can call in plays from the sidelines?

13 MR. SUSMAN: I'm fine, Your Honor.
14 Obviously, we are thrilled to hear that news, that
15 they are waiving the covenants of --

16 THE COURT: There is your headline:
17 "Sallie Mae thrilled."

18 MR. SUSMAN: -- Article VI, and that
19 we -- they are waiving any restrictions on our right
20 to shop, and that we can conduct our business as if we
21 were free from the restraints of this agreement.
22 Makes us very happy.

23 We would urge the Court to,
24 nevertheless, go ahead and give us a prompt ruling on

1 the legal issue, and decide at that time whether there
2 is any need to expedite anything further, because I
3 think that will make -- we are still not terminating
4 the agreement, and I think there is a cloud over this
5 company by virtue of --

6 THE COURT: With having a potentially
7 \$900 million receivable, plus interest? I wish I had
8 a cloud like that.

9 MR. SUSMAN: Thank you, Your Honor.

10 THE COURT: Why don't I react? You
11 may sit down. I'm not going to -- let me, because I
12 have recently had parties tell me they had resolved
13 everything only -- I'm expecting to -- for this to be
14 papered, and by tomorrow. Absent that, we are going
15 to go to trial early in January. And the reason why
16 is pretty obvious. I think that it's not --
17 Mr. Susman was candid today. It's really -- what he
18 had to -- his client had to hang its position on is
19 the inhibiting effect of provisions in an agreement
20 when the other side has really publicly said, "There
21 is no way we are ever going to close the deal." And
22 given that we have competitors on the defense side who
23 were preventing the plaintiff from really -- they
24 couldn't make any changes in strategic direction.

1 They couldn't look for other buyers. They couldn't do
2 a lot of things that they ordinarily need to do, just
3 in order to run their business, without the permission
4 from competitors.

5 I believe even if you have got a
6 termination date of February 15th -- I don't know how
7 to measure that later on. I don't think, frankly, the
8 defendants want to be in a position where I make --
9 make defendant-friendly inferences about what, you
10 know, searching the marketplace might have produced
11 about that. I think it's better for people to have
12 certainty. If those things are waived, as I
13 understand they are going to be, we really are, absent
14 some concern, you know, about the solvency of the
15 defendants, or something like that -- you know, even
16 that, you can make arguments whether that is
17 justified. We really are in an ordinary kind of
18 situation.

19 It's nifty that the parties want my
20 guidance about their little clause that they
21 negotiated. I'm not sure that that justifies
22 expedition. I'm dubious about the likelihood that I
23 can find on its face that it's clear one way or the
24 other, and without a concession by -- I mean, I said

1 if you all want me to have a partial paper trial,
2 where you will stipulate that the only record is the
3 contractual language, and then I can draw the same
4 inferences on that paper record I would after a full-
5 blown trial that includes parol evidence, I will
6 consider doing that. But absent people actually
7 having the courage of their convictions to that
8 extent, I'm dubious about the efficiency, from a
9 judicial standpoint, of doing this, particularly when
10 I believe -- and I have got many, many witnesses who
11 can confirm whether my recollection is correct --
12 including our good court reporter will take it down
13 and I can read his transcript later. I believe both
14 sides said that they would still prevail even if I
15 ruled against them on this issue. That is, Sallie Mae
16 says, "Even if our reading of the contract is wrong,
17 there has still not been an MAE," and the defendants
18 say, "Even if our reading of the contract is wrong,
19 there still has been one." Very experienced people in
20 the room.

21 That is the circumstances in which the
22 benefits of a premature ruling in a hasty manner seem
23 to be the smallest. I mean, who is going away? I
24 mean, how does it clear the decks for anything? And I

1 actually am. I have to say, the defendants, the
2 weakness from their position is this idea that,
3 basically, one penny on top of what is outlined in the
4 agreement more makes you count the whole thing as an
5 MAE. That is not intuitively the most obvious reading
6 of this. On the other hand, the plaintiffs' position
7 could have been much more clearly drafted if they
8 wished to say that, essentially, all the legislation
9 was a baseline, and you measure the incremental
10 effect.

11 I'm not sure that this is the greatest
12 example of clear scrivenering from either side. I can
13 see -- you know, you have excellent, excellent lawyers
14 on both sides. People can probably make -- you can
15 make, and I have already -- I have spent some material
16 part of the weekend thinking about the linguistics of
17 this. I guess I -- I'm not sure -- what I'm saying is
18 in the event we don't need to go forth with the trial,
19 we can have a scheduling conference. I do think, you
20 know, we in Chancery move pretty quickly. There is a
21 \$900 million item hanging out there, which is probably
22 a fairly big thing for -- certainly a big thing for
23 Sallie Mae. I would think with respect to the
24 business of some of these -- that some of these

1 defendants are in, that even having that sort of thing
2 outstanding might be somewhat of an issue. I don't
3 know. If they have got that much spare change, then I
4 would think they would just do it as a matter of
5 sympathy for Sallie Mae, who they believe has been
6 dealt a huge body below.

7 I mean, didn't we lose Fannie Farmer
8 at one point? Now we have lost -- will we lose Sallie
9 Mae? If Betty Crocker goes, what will be left?

10 So anyway, that is my ruling. So let
11 me know tomorrow. If you don't have it all worked
12 out, then I'm going to give you a trial. I'm not
13 going to pick one of the weeks in January now, but
14 that will be the situation. I think if we are -- if
15 we are going forward in a normal time frame, the
16 parties are really -- I'm not saying if you don't come
17 to me jointly, upon reflection, and say -- that you
18 think it would be useful as a business matter for me
19 to do this summary judgment thing -- I'm not saying I
20 won't consider that. Obviously, our court is very
21 receptive if both sides think there is some utility.
22 I have a hard time understanding why I should do it in
23 five days or not have real briefing if it's important.

24 If we can get past this, then this

1 Court I think decides issues in -- about as promptly
2 as any going, but there is no need to impose the
3 burden on the lawyers. I -- obviously, Sallie Mae put
4 its brief out there, but Sallie Mae may want some
5 reasonable time for a reply after thinking about what
6 its friends say.

7 So I will be happy to meet with you
8 again, perhaps in a more intimate setting than this.
9 And so is there any lack of clarity?

10 MR. WOLINSKY: Your Honor, I just do
11 want clarity on one thing. We are agreeing to waive
12 Article VI of the merger agreement, which we will
13 document. And the other side is willing to accept
14 that waiver. And that is the documentation that you
15 expect. Article VI includes the no-shop.

16 MR. BOUCHARD: Your Honor, I think the
17 position Mr. Susman articulated before is the one we
18 were looking for. Article VI, the no-shop, and
19 anything in the agreement, in the merger agreement,
20 that in any way inhibits Sallie Mae from running its
21 own business. I can't sit here -- I didn't put the
22 document together.

23 THE COURT: No. What I need from
24 counsel -- I think what Mr. Wolinsky just needed was

1 the basic framework. I would urge you all, while you
2 are here, get the agreement. I don't want to hang
3 anybody up. The reality is these things are lengthy,
4 you know -- I mean, I want you to make sure you go
5 through them with each other so that nobody gets
6 tripped up, but I am thinking of things that are
7 materially inhibiting Sallie Mae from conducting
8 business or looking for other strategic alternatives.

9 MR. WOLINSKY: And so are we, Your
10 Honor.

11 MR. SUSMAN: And can we ask that they
12 waive the requirement that we continue to provide them
13 information?

14 THE COURT: I was assuming that -- I
15 don't know whether Mr. Wolinsky was, too. I was
16 assuming the things you had raised in your letters to
17 me, including this idea that they are essentially
18 continuing to get to look at everything you do -- that
19 that sort of stuff will go away. I think in fairness
20 to each other, as counsel, you should take the time to
21 go sit, go use the rooms for a half hour, look at the
22 agreement, go through it, and then come back and meet
23 and confer and make sure that you have covered
24 everything.

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MR. SUSMAN: Fine.

MR. WOLINSKY: Fine. Thank you.

THE COURT: Thank you, all.

(Recess at 1:45 p.m.)

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