IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	)	Chapter 11
COLT HOLDING COMPANY LLC, *et al.*,[1]	)	Case No. 15-11296 (LSS)
Debtors.	)	Jointly Administered
	)	**Re: Docket Nos. 225, 228, 232, 233 and 249**

OMNIBUS OBJECTION OF NPA HARTFORD LLC AND VALNIC CAPITAL REAL ESTATE FUND I LLC TO MOTIONS OF DEBTORS, CONSORTIUM, AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR EXAMINATIONS AND DOCUMENT PRODUCTION PURSUANT TO RULE 2004

NPA Hartford LLC ("NPA" or "Landlord") and Valnic Capital Real Estate Fund I LLC ("Valnic") submit this omnibus opposition to the motions submitted by the Ad Hoc Consortium of Holders of 8.75% Senior Notes due 2017 (the "Consortium"), Colt Holding Company LLC (together with its affiliated debtors and debtors-in-possession in the above-captioned Chapter 11 cases, the "Debtors"), and the Official Committee of Unsecured Creditors in these cases (the "Committee," and together with the Consortium and the Debtors, the "Movants") seeking an order, pursuant to Federal Bankruptcy Rule 2004 and Local Bankruptcy Rule 2004-1, directing NPA and Valnic to produce documents and to appear for deposition under oral examination.[2] The motions to which this opposition responds are docket numbers 225, 228, 232, 233 and 249 (collectively, the "Motions").

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are Colt Holding Company LLC (0094); Colt Security LLC (4276); Colt Defense LLC (1950); Colt Finance Corp. (7687); New Colt Holding Corp. (6913); Colt's Manufacturing Company LLC (9139); Colt Defense Technical Services LLC (8809); Colt Canada Corporation (5534); Colt International Cooperatief U.A. (6822); and CDH II Holdco Inc. (1782). The address of the Debtors' corporate headquarters is: 547 New Park Avenue, West Hartford, Connecticut 06110.

[2] The Movants also seek discovery from Sciens Capital Management LLC ("Sciens"). Sciens will submit its own opposition to the Motions, and NPA and Valnic join in the arguments made in Sciens' opposition.

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PRELIMINARY STATEMENT

1. Although the Landlord and Valnic believe the document requests in the Motions far exceed the reach of even rule 2004, they recognize the reality of the circumstances. Rule 2004 authorizes the discovery of a wide variety of information, and a "fishing expedition" to investigate potential causes of action of the estate – even far-fetched ones – usually falls within those broad parameters. However even rule 2004 has its limits. Rule 2004 is not permissible to invade the privacy of third parties, and is not permissible to harass or gain a litigation advantage. That said, in a continuing effort to be cooperative and to help build a constructive solution for the Debtors, the Landlord and Valnic are willing to participate in limited, focused, and appropriate discovery into the ownership and decision making structure of NPA and Valnic.

2. Nevertheless, it is important to recognize the fundamentally disingenuous nature of each Motion. The Movants claim that discovery is necessary because of the Landlord's alleged unreasonable refusal to extend the Lease (as defined in the Consortium's 2004 Motion), but that is simply not true. The Landlord has never refused to extend the Lease. Not at any point, not to any party. In this particular instance, the Landlord has not yet made any decision regarding an extension to the Lease because it has not received basic information about to whom it would be leasing and what the financial condition of the lessee would be.

3. Moreover, the one meeting in New York City referenced in the Motions (and discussed in more detail below) is the sum total of the Consortium's, the Committee's and the Debtors' efforts to resolve the issue surrounding the Lease. Other than that two hour meeting, which counsel to the Committee and Consortium did not bother to attend, there has not been any meaningful communication between the Landlord and any of the Consortium, the Committee or the Debtors. Not a single phone call. Not a single email. Not a single letter. To this day,

neither counsel to the Consortium nor counsel to the Committee has ever spoken a word to counsel to the Landlord.[3]

4. And yet the Movants assert that the Landlord is being unreasonable because it has not yet agreed to extend the Lease.

5. Moreover, the entire justification for this "emergency" is the pending Bid Procedures Hearing (as defined in the Motions) and the pending expiration of the Lease, each of which has been known by the Movants for months (if not years). And nothing has changed to create this "emergency." There have been no negotiations that just broke down. There have been no discussions that have finally proven fruitless. The Landlord has not called a default, moved for eviction, or otherwise tried to apply pressure to the Debtors. The Debtors, the Committee, and the Consortium have simply done absolutely nothing with respect to the Lease over the past two months, and now claim that an "emergency" that they have known about for months (if not years) justifies extraordinarily prejudicial relief.

6. The Motions claim to be based on the "concern" that Valnic and NPA are not independent. Both, in fact, are independent and, to the extent not already known, that independence is easily established without massive document productions or multiple depositions. Sciens (or, more accurately, its principals) own 30.16% of NPA, and the remaining 69.84% of the NPA membership interests are held by third party investors that are unaffiliated with Sciens. Valnic, on the other hand, is held by four investors, none of whom are affiliated with Sciens. These two facts can be definitively established with the production of two pieces of paper.

[3] To be fair, counsel for the Consortium has twice responded to emails from counsel for the Landlord.

7. The circumstances surrounding the filing of the Motions themselves are equally telling. The Consortium and the Committee gave less than 48 hours' notice of the massive document requests before filing the Motions, and the Debtors gave only slightly more notice.[4] Moreover, the Motions were filed in the middle of an email exchange between the Debtors (copying the other Movants) and NPA in an attempt to set up a meet and confer to discuss the document requests. The Movants simply stopped responding to emails, and instead filed the "emergency" Motions in direct violation of this Court's Local Rule 2004-1.

8. Finally, the purported justifications for the Motions are facially unsupportable. Each purported "claim" or "defense" that the Movants believe requires "investigation" is simple pretense – on its face, each is either entirely unrelated to the Debtors or is entirely untenable as a legal matter.

9. Nevertheless, as stated above, the Landlord is still willing to discuss a good faith, consensual exchange of information in the hopes that the Movants will put aside the diversions and distractions, and will focus on identifying and implementing a long term solution for the Debtors.

FACTUAL BACKGROUND

Prior to the Petition Date

10. NPA was formed ten years ago to purchase the West Hartford Facility (as defined in the Consortium's 2004 Motion). Although certain parties entirely funded NPA because of the time constraints associated with the initial transaction to acquire the West Hartford Facility, they subsequently offered participation in NPA on a pro rata basis to all of the Debtors' then equity holders. Many of these holders accepted that offer and became owners of NPA as well. As a

[4] The Debtors' efforts are only marginally better, providing NPA and Valnic with requests at 10pm on a Friday and seeking a response by the following Wednesday.

result, as of today, the principals of Sciens, through a separate LLC (discussed below), own 30.16% of NPA, with the remaining 69.84% held by entities unaffiliated with Sciens.[5]

11. Approximately four years later, the Debtors' 8.75% Senior Notes Due 2017 (the "Notes" and each holder thereof a "Noteholder") were issued. The offering memorandum (the "Offering Memorandum") for the Notes specifically identified one of the risk factors to the Debtors:

> We lease our West Hartford facility from an affiliate of one of our sponsors. The term of this lease expires October 25, 2012 [since extended to October 25, 2015]. **This lease does not provide for renewal of the terms and after the stated lease maturity we may not be able to continue to occupy that property on acceptable terms, or be able to find suitable replacement manufacturing facilities on satisfactory terms and conditions**.

Offering Memorandum, Page 19 (emphasis added). Moreover, the very first entry in the section of the Offering Memorandum disclosing "certain relationships and related party transactions" is as follows:

> Under a net lease dated as of October 26, 2005, we lease property in West Hartford, Connecticut, on which our headquarters and primary manufacturing facility are located, from NPA Hartford LLC until October 25, 2012 [now extended until 2015] . . . Certain of the principals of Sciens Capital Management and certain of our managers, officers, and employees (including General Heys and Messrs. Rigas and Standen) have a direct and/or indirect ownership interest in NPA Hartford LLC.

Offering Memorandum, page 89.

12. Moreover, this relationship has been continuously and openly discussed and disclosed in each form 10-K filed periodically by the Debtors. For example, the Debtors' 2013 10-K stated, among other things:

> We currently manufacture our products primarily at our facilities in West Hartford, Connecticut and Kitchener, Ontario, Canada. We lease our West Hartford facility from a

[5] Certain of these members are former Sciens employees or principals, but they have no continuing affiliation with Sciens.

> related party. The term of this lease has been extended to October 25, 2015. The lease does not provide for renewal of the term after the lease maturity and we may not be able to continue to occupy the property on acceptable terms or be able to find suitable replacement manufacturing facilities on satisfactory terms and conditions.

See page 11, 2013 Form 10-K of Colt Defense LLC.[6]

13. In other words, notwithstanding the Consortium's faux outrage and the endless litigious rhetoric, *prior to investing in the Notes*, every single member of the Consortium knew that NPA – not the Debtors – owned the West Hartford Facility, knew that NPA was affiliated with principals of Sciens, knew that the West Hartford Facility was leased to the Debtors, and knew that there was a risk that the Lease might not be renewed.

14. Throughout the years, the relationship between the Debtors and NPA has been a good one. Lease extensions were negotiated in good faith and without rancor, and issues that arise in the ordinary course of any business (i.e., environmental compliance, state audits, rent collection, etc.) were resolved consensually and constructively.

15. This relationship was absolutely critical to NPA. NPA is not a traditional commercial landlord. It has no independent back office, no independent staff, no independent accounting department. As a result, the relationship with the tenant is as important, if not more so, to NPA than is the economics of the Lease.

16. In the ten years after NPA was formed and the West Hartford Facility was purchased, most of the other NPA members disposed of their equity interests in the Debtors either in part or in their entirety through one mechanism or another. As a result, ten of the fourteen current members of NPA have no or negligible interests in Colt (in the aggregate, these ten NPA members hold more than 54% of NPA membership interests and less than 2.5% of the Debtors' equity).

[6] *Available at* http://www.sec.gov/Archives/edgar/data/1508677/000110465913024404/a12-29158_110k.htm.

17. NPA Management LLC, which is the entity owned and controlled by the Sciens principals, has acted as managing member of NPA. Although it has historically consulted with other members as appropriate with respect to major decisions, NPA Management LLC had authority to unilaterally act for NPA. Recently, however, although it had absolutely no duty to do so, in an effort to remove any doubt about self-dealing or conflict, NPA Management LLC vested Valnic, the largest member of NPA with no interest in the Debtors, with "sole final decision-making authority with respect to any extension or renewal of the Lease, or a potential lease for a tenant other than [the Debtors]." To be clear, as explained to the two Noteholders who ostensibly represented the Consortium during the single meeting in New York City, Valnic continues to consult with NPA Management with respect to the Lease and the West Hartford Facility (considering the wealth of experience and knowledge that NPA Management has with respect to the Lease, the West Hartford Facility, and the Debtors, it would be irresponsible to do otherwise), but that in no way impairs Valnic's sole exclusive decision making authority with respect to the renewal (or not) of the Lease. The authorizing resolution is attached to the Consortium 2004 Motion as Exhibit B.

18. Valnic is entirely independent. It is a limited liability company, with four members. Those four members – four friends from around the globe (one in London, one in Manila, one in New York, and one in Florida) – are not affiliated with Sciens or to the Debtors. They are not employees, members, founders, principals, or family members of Sciens or the Debtors.

19. In other words, both NPA and Valnic are entirely independent from Sciens and the Debtors, and are entitled to make whatever decision they believe to be in the best interest of NPA regarding an extension of the Lease.

The Bankruptcy Cases

20. The Debtors initiated these cases on June 14, 2015. On June 26, 2015, the Landlord confirmed in writing to the Debtors that it was willing to consider in good faith a potential lease extension for any party, and provided the Debtors with a list of basic information that it would need to evaluate that potential tenant. The information that the Landlord asked for was relatively straight forward, and was intended to identify who the tenant would be (and its owners), what the capital structure of that tenant would be, and what the expected financial performance of that tenant would be. No party has ever raised any concerns or objections about the Landlord's requests.

21. And no party (including the Debtors, Committee, and Consortium) has ever provided that information. In fact, until that single meeting in early July, the Landlord had not had any contact by the Debtors, the Consortium, or the Committee about a Lease extension. None at all.

22. As a result, the Landlord was hopeful that the meeting in New York City with the Consortium and the Debtors would be a starting point from which an extension would be discussed. It was anything but that.

23. The Landlord was not given any information before the meeting that it could analyze or discuss, and no attorney for the Committee or for the Consortium attended (although one attorney for the Consortium listened in by phone). At the meeting, the Debtors and the two individual Noteholders, who ostensibly represented the Consortium,[7] offered a "presentation" of sorts, which set forth some very basic information about the Debtors and an "Illustrative Capital Structure Comparison" between the "June 1, 2015 Exchange Offer" and a "Noteholder

[7] It is not entirely clear that these Noteholders represented the Consortium. Consortium counsel was not present at the meeting, and the Noteholders did not appear to be representing anyone's interest but their own. Even the Consortium's Motion refers to these Noteholders as "equity sponsors." See Consortium's Motion, Page 11.

Consortium Strawman." The Noteholder Consortium Strawman, though, was entirely inapplicable to any realistic potential emergence capital structure. The Noteholders admitted it was 'illustrative only,' and that it was not a legitimate proposal, and promised to provide an actual proposed capital structure. They have not yet done so.

24. In all, the presentation did not include any information that would help evaluate a potential tenant, and did not include any of the information that the Landlord had asked for. Among other things:

- It never identified who would own the Debtors upon emergence. The presentation suggested that one of the smaller Noteholders, along with a co-investor, would own the lion-share of the post-emergence Debtors, but it never explained how that was possible, what the structure of that holding would be, or who the other owners would be. To this date, no one has given the Landlord a definitive answer about who the owners of the reorganized Debtors would be.

- It never identified the capital structure of the post-emergence entity. Clearly the Landlord has no interest in leasing its only property to a business that has little chance to succeed, and the Consortium, to this very day, has not identified what the capital structure of the post-emergence company would look like.

- It did not address in any way the projected performance of the post-emergence company. As stated above, the Landlord will not lease the West Hartford Facility to a tenant that has little chance of success and is unwilling to demonstrate how it intends to pay the rent payments under any prospective lease.

Needless to say, since the meeting, the Landlord has not received any of the requested information from any party.

25. After the conclusion of the meeting in New York, counsel for the Landlord met briefly with counsel for the Debtors. At this brief meeting, the Debtors asked for a short extension to the Lease to allow for a little "breathing room" for the Debtors to resolve open issues in the pending cases. The Landlord quickly agreed in concept, and promised to send proposed terms for such a short-term extension.

26. Within two days, the Landlord sent proposed terms for the short-term extension. The proposed terms were intended to be non-controversial: they did not request an amendment fee, any waiver of defenses regarding eviction (notwithstanding the Consortium's positions taken in its pleadings), did not increase the rent, and did not seek a release for Sciens.

27. A few days later the Debtors responded that they were "disappointed" with the proposed terms, but that was it. The Landlord immediately responded with surprise, and proposed a call to discuss the proposal. The Debtors have never responded to that proposal or otherwise communicated again with the Landlord about a short-term extension.

28. Notably, the one meeting in New York City is the sum total of the Consortium's, the Committee's and the Debtors'[8] efforts to resolve the issue surrounding the Lease. Other than that two hour meeting, there has not been a single meaningful communication between the Landlord and any of the Consortium, the Committee or the Debtors regarding a long-term Lease extension. Not a single phone call. Not a single email. Not a single letter.

29. In fact, to this day, neither counsel for the Consortium nor counsel for the Committee has ever spoken a word to counsel for the Landlord.

ARGUMENT

30. NPA is willing to consider focused, good faith discovery requests from the Movants related to the independence and decision-making authority of NPA and Valnic, but object to the overbroad, unreasonable, and irrelevant requests that are not reasonably related to the Debtors' estates. These requests go well beyond the scope of what is permitted under Rule 2004 examinations and should not be allowed.

[8] Technically, the single email from the Debtors regarding the short term extension could be considered an 'attempt' to resolve Lease issues as well.

I. The Requests Go Far Beyond What is Allowed Under Rule 2004

31. As the Movants point out, Rule 2004 of the Federal Rules of Bankruptcy Procedure allows for discovery of third parties and allows for broad discovery requests. However, Rule 2004 is not unlimited, and it does not allow for the wholesale discovery of irrelevant information that the Movants seek from NPA and Valnic.

32. The purpose of a Rule 2004 examination is to assist the moving party to "investigate the debtor, and the assets of and claims against the bankruptcy estate, turn the assets into cash and distribute those funds to creditors" but "where a proposed examination goes beyond that purpose it should be carefully scrutinized." *Id.* at 822. *See also In re Continental Forge Co., Inc.*, 73 B.R. 1005, 1007 (Bankr. W.D. Penn. 1987) ("The examination of a witness as to matters having no relationship to the debtor's affairs or no effect on the administration of his estate is improper."). Additionally, any 2004 examination of a third party "should not be so broad as to be more disruptive and costly to the party sought to be examined than beneficial to the party seeking discovery." *In re DeShetler*, 453 B.R. 295, 302 (Bankr. S.D. Ohio 2011). *See also In re Wilcher*, 56 B.R. 428, 434 (Bankr. N.D. Ill. 1985) ("The examination of third parties is at best ancillary to [Rule 2004's] main purpose.").

33. Any Rule 2004 examination "is not permitted for matters not related to the financial condition of the debtor" and the moving party must demonstrate "good cause" for the examination. *DeShetler*, 453 B.R. at 302. Furthermore, the "burden of showing good cause is an affirmative one and is not satisfied merely by showing that justice would not be impeded by production of the requested documents." *Wilcher*, 56 B.R. at 435. Such burden on the moving party is of greater import where "the requested discovery is extensive and may place substantial compliance difficulties on [the third party]." *Id.* Critically, a Rule 2004 examination "may not

be used as a device to launch into a wholesale investigation of a non-debtor's private business affairs." *Continental Forge*, 73 B.R. at 1007.

34. *In re DeShelter* is useful as a guide for how the Court should evaluate the present Motions. In that case the United States Trustee (the "UST") sought broad discovery through a 2004 examination of a bank that had filed a proof of claim in the debtor's case based on its holding of a note against the debtor. The UST sought documents and a deposition from the bank that ostensibly were meant to evaluate the bank's standing to file a proof of claim, but went well beyond that purpose. The Court ultimately limited the discovery that the UST could receive from the bank to only those documents that were sufficient to establish the bank's ownership of the note and the chain of ownership that led to the bank's ownership of the note. 453 B.R. at 310.

35. Similarly here, any discovery of NPA and Valnic should be limited to the ownership structure of those entities and documents related to the authority vested in Valnic to exclusively make decisions regarding the Lease, as those are the only categories of information that bear on the true issues that impact the Debtors. The 2004 examination cannot be an open invitation to "launch into a wholesale investigation of a non-debtor's private business affairs." *Continental Forge*, 73 B.R. at 1007.

II. The Movants' Requests Are Overbroad, Unreasonable, and Not Relevant to the Debtors' Estate

36. Each of the Consortium, the Committee and the Debtors has made largely similar requests of NPA and Valnic that go far beyond any reasonable request for information (together the "Requests"). The Requests call for NPA and Valnic to complete a production of what would amount to essentially every document those entities ever created, and asks that the production be completed in the span of four days.

37. The alleged basis of the Motions is to establish the ownership interests of NPA and Valnic and the decision making authority within NPA with respect to the Lease. However, the Requests go well beyond this scope, and are not appropriate under Rule 2004.

38. As an initial matter, the Requests contain no date restriction and therefore request documents going as far back as 2005. In fact, since the Requests purport to relate to the Lease and the West Hartford Facility, the Movants are essentially asking for every document since the Debtors moved onto the property, which was before 2005.

39. Additionally, the Requests seek documents that on their face have nothing to do with the Lease or the West Hartford Facility. Indeed some examples of the over breadth of the Requests are:

- Documents related to NPA and Valnic's dealings with third parties who have no relation to the Debtors or the estate (Consortium Request No. 9; Debtor Request l);
- Documents related to NPA and Valnic's internal dealings, regardless of any relation to the Debtors (Consortium Request Nos. 14-16);
- Documents related to the zoning of the property owned by NPA (Committee Request No. 9);
- Documents related to the financial dealings of the various members of NPA regardless of relation to the Lease, the West Hartford Facility or the Debtors (Debtor request m); and
- Documents related to any relationship between or among NPA (and its members), Sciens (and its members), and Valnic (and its members) regardless of relation to the Lease, the West Hartford Facility or the Debtors (Consortium Request Nos. 10-12).

40. The Requests are made all the more egregious by the fact that the Movants did not comply with this Court's Local Rules requiring that they meet and confer with NPA and Valnic in an effort to find a consensual agreement regarding an exchange of information. Specifically, this Court's rules require the moving party, prior to filing any motion seeking rule 2004

discovery, to "attempt to confer (in person or telephonically) with the proposed examinee or the examinee's counsel [] to arrange for a mutually agreeable date, time, place and scope of an examination or production." Del. Bankr. Local Rule 2004-1. Not only did the Movants ignore this rule, they did so while NPA and Valnic were affirmatively attempting to schedule a meet and confer as contemplated by the rule. The Movants should not now be rewarded for their blatant disregard for this Court's rules by granting the Motions.

III. The "Justifications" Asserted by the Movants are Mere Pretense and Do Not Merit Discovery

41. Although this Court is not being asked to (and cannot) decide the merits of the purported "justification" for this discovery at this point, the Court can and should consider whether these purported "justifications" for the "investigation" are facially valid, whether they support the extraordinary delay, cost, and distraction proposed by the Movants, and whether they justify the "wholesale investigation of a non-debtor's private business affairs."

42. With that in mind, it is important to consider, at least facially, the actual "claims" and "defenses" that the Movants believe justify this extraordinary process. Specifically, the Movants offer four purported "justifications" for discovery of NPA and Valnic: Investigation into: (1) potential 'defenses' to eviction, (2) fiduciary duty claims against Sciens, (3) claims for tortious interference with a business relationship, and (4) whether a new lease has actually been entered into.

43. Although the Landlord is ready and willing to brief these topics in full if it would be helpful for the Court, each such "justification" is facially meritless for the following simple reasons.

A. The Expiration of the Lease Does Not Raise Any Discoverable Issues

44. The Landlord has never threatened to evict the Debtors[9] and the Landlord has never refused to extend the Lease. The Movants are not entitled to take discovery regarding defenses to an action that has never been threatened, much less filed. Once it is filed (if it is filed), they will then have an opportunity to take whatever discovery they are entitled to. The simple fact is that the Lease, which has been in effect since 2005, has an expiration date and contains no rights for the Debtors to extend or renew. No discovery is necessary on that fact.

45. Moreover, the "defenses" to the non-existent eviction proceeding have no bearing on the circumstance present here:

- The doctrine of *audita querela*, by Movants' own admission, is an equitable remedy "to inhibit the unconscionable use of a lawful judgment because of matters arising **subsequent to the judgment**." Consortium Motion ¶ 36 (emphasis added). There has of course been no judgment of eviction or attempt by the Landlord to evict the Debtors, so there are no matters that could have arisen "subsequent to" a judgment that has not been entered. In any event, the cases cited by Movants make clear that the focus of the inquiry for *audita querela* should be on the hardship to the **lessee** and not the lessor, making discovery of the lessor irrelevant.[10]

- The doctrine of equitable nonforfeiture applies in circumstances where a tenant is being evicted (for inequitable reasons) prior to the expiration of the lease, but does not apply to the natural expiration of a lease. *19 Perry Street, LLC v. Unionville Water Co.*, 987 A.2d 1009, 1022 (Conn. 2010).

- The duty of good faith and fair dealing involves "acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract [which] must have been taken in bad faith." *De La Concha of Hartford, Inc. v. Aetna Life Ins. Co.*, 849 A.2d 382, 388 (Conn. 2004). Clearly none of the Movants can claim that the Debtors have been denied a right of renewal of the Lease, because no such right ever existed. In fact, the Connecticut Supreme Court has held that a

[9] Only the Consortium would consider it "brazen" (Consortium Motion ¶ 33) for a landlord to actually expect its property back once a lease expires.

[10] Notably, even where the courts determined that the lessee would suffer harm, the relevant court granted only small stays of execution of the eviction. *See Westfarms Assoc. v. Kathy-John's, Inc.*, No. 851130901-733, 1986 WL 400555, at *2 (Conn. Super. Ct. Mar. 17, 1986) (focusing on the harm to lessee's business and granting a two month stay of execution); *Federation Square Assocs. v. Kaplan*, No. 8410-25567, 1985 WL 263904, at *2 (Conn. Super. Ct. Nov. 29, 1985) (focusing on the harm to lessee and granting a one month stay of execution).

> landlord does not breach the duty of good faith and fair dealing by not renewing a lease when it is "entitled, under the express provisions of the lease, to decline to the renewal of the lease." *Id.* at 392.

46. Indeed, because each of these purported "defenses" is equitable in nature, any discovery on these issues would necessarily have to be entirely mutual.

47. Needless to say, this Court need not decide these issues now. However the facial lack of realistic merit make the matters wholly inappropriate for discovery.

B. Alleged Claims of Breach of Fiduciary Duty Against Sciens Do Not Justify Discovery of NPA or Valnic

48. The Movants' also attempt to justify discovery as against NPA and Valnic based on a purported investigation into whether Sciens breached its fiduciary duties to the Debtors. In so arguing, the Movants' entirely ignore a rather fundamental point: Sciens' duty to the Debtors runs only to its actions on behalf of the Debtors. It goes without saying that Sciens has no obligation, fiduciary or otherwise, to make decisions on behalf of its investment in NPA that are for the benefit of the Debtors. The Debtors, in fact, explicitly acknowledge this distinction: "The assumption then was that *while NPA Hartford and Sciens were separate entities with distinct investors and fiduciary obligations owed to those investors*, NPA Hartford would permit extending the Lease without issue." Debtors' Motion ¶8 (emphasis added).

49. Presumably, the members of the Consortium will not assert to the contrary. Doing so would mean that each and every one of the Consortium members have the legal obligation to operate all of their other investments for the best interests of the Debtors, and that any decision with respect to a different investment that is not in the best interests of the Debtors is an actionable breach with respect to the Debtors. Obviously, that would be preposterous.

50. It is critical to keep this distinction in mind -- Sciens' duties to the Debtors are wholly different from its duties to NPA. And the actions which the Consortium and the

Committee claim may give rise to a claim against NPA or Valnic relate to Sciens' actions in its role with NPA. *See, e.g.*, Committee Motion ¶ 2 ("The Committee, like the Consortium, is gravely concerned that Sciens continues to control the Landlord…); Consortium Motion ¶ 4 (same). That Sciens may be acting in the best interest of NPA in connection with its role at NPA[11] cannot reasonably form the basis of any action against Sciens (or any discovery of NPA or Valnic).

C. A Tortious Interference Claim Against Sciens Does Not Justify Discovery of NPA or Valnic

51. The Movants' claim the need for discovery from Sciens to evaluate a potential claim for tortious interference with business relations based on "the Debtors and the Landlord hav[ing] a long-standing business relationship." Consortium Motion ¶ 58. Of course, a fundamental element in any claim for tortious interference with a business relationship is that a business relationship has been interfered with. *See Reyes v. Chetta*, 71 A.3d 1255, 1259 (Conn. App. Ct. 2013) ("A successful action for tortious interference with business expectancies requires the satisfaction of three elements: (1) a business relationship between the plaintiff and another party; (2) the defendant's intentional interference with the business relationship while knowing of the relationship; and (3) as a result of the interference, the plaintiff suffers actual loss.").

52. In this case, it is beyond frivolous to argue that failure to renew an expired lease is actionable interference with a business relationship.

[11] Nothing herein should be read to suggest that Sciens is making decisions for or controlling NPA or Valnic. These arguments merely reflect the reality that any such conduct on behalf of NPA would necessarily have to be in the best interests of NPA.

D. No New Lease Agreement or Modification to the Existing Lease Exists

53. Finally, the Movants argue that they need to investigate whether there is, in fact, already a new lease in place, but that none of the parties know about it. Although no real response to this legal theory is presumably necessary, it is worth pointing out that even this absurd argument would not justify discovery of Valnic or NPA. As acknowledged in the Motions, the formation of a new contract may be accomplished by "**mutual** assent" or by "informal writings **between** the parties." Consortium Motion ¶¶ 61-62 (emphasis added).

54. Accordingly, if the Consortium wants to hang the future of the Debtors on the argument that a new lease was somehow created, but that nobody knows it, it does not need any discovery from NPA or Valnic to do so. Either the Debtors have that "mutual assent," or it does not exist. Either way, no discovery is necessary.

IV. Any "Emergency" Is of the Movants' Making

55. The Movants' claim that the relief they request is necessary because "time is of the essence" and that "Sciens, the Landlord, and Valnic have the potential to do irreparable harm to the Debtors and their estates if they are not remedied immediately." *Id.* at ¶ 65.

56. As stated above, this "emergency" is entirely of the Movants' own making. The Debtors have known since 2012 (when the Lease was extended) that it expired in October. The members of the Consortium have known since the Notes were issued in 2009 that the Lease had an expiration date and might not be extended, and the "Consortium" itself has certainly known about the pending expiration since it was formed (apparently in the fall of 2014). And the Committee has known about the pending expiration since it was formed approximately a month ago.

57. Moreover, the Bid Procedures Hearing was actually scheduled by the very parties now claiming emergency, and has been pending since the very first day of this case.

58. It is very much worth noting that this course of action is not just inexplicable – it is affirmatively damaging to the Debtors' reorganization efforts. According to the Consortium, they likely will be the new owner of the Debtors upon emergence, and yet they have gone out of their way to prove, beyond any doubt, that they would be any commercial landlord's worst nightmare. They have on multiple occasions accused the Landlord of wrong-doing, even though they have never actually talked to the Landlord. They have insisted, on multiple occasions and in writing under the penalty of sanctions, that they intend to stay at the West Hartford Facility after the expiration of the Lease for as long as they can possibly do so, regardless of the terms of the contract, the requirements of law, and the damage that would befall the Landlord. And every single step along the way has been as adversarial, litigious, and burdensome as is possible.

CONCLUSION

59. The parties need to focus on a long term solution for these Debtors, not on investigating specious claims and hail-mary litigation. NPA and Valnic will voluntarily participate in focused, limited discovery relating to the ownership and decision making structure at NPA and Valnic. And NPA and Valnic remain willing and able to participate in constructive discussions around possible solutions for the long-term viability of the Debtors.

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POLSINELLI PC

/s/ Christopher A. Ward

Christopher A. Ward (Del. Bar No. 3877)
Shanti M. Katona (Del. Bar No. 5352)
222 Delaware Avenue, Suite 1101
Wilmington, Delaware 19801
Telephone: (302) 252-0920
Facsimile: (302) 252-0921
cward@polsinelli.com
skatona@polsinelli.com

-and-

Henry P. Baer, Jr., Esq.
Evan I. Cohen, Esq.
FINN DIXON & HERLING LLP
177 Broad Street
Stamford, CT 06901
Phone: (203) 325-5000
Fax: (203) 325-5001
hbaer@fdh.com
ecohen@fdh.com

Counsel to NPA Hartford LLC