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COURT OF APPEALS

STATE OF NEW YORK

MULACEK,

Appellant,

-against-

NO. 48

EXXONMOBILE CORPORATION,

Respondent.

20 Eagle Street
Albany, New York
April 16, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Chrishanda Sassman-Reynolds
Official Court Transcriber



1 CHIEF JUDGE WILSON: Next matter on the calendar
2 is Number 48, Mulacek v. ExxonMobile Corporation.

3 MS. KIM: Good afternoon, Your Honors. May I
4 reserve four minutes for rebuttal, please?

5 CHIEF JUDGE WILSON: Yes.

6 MS. KIM: Thank you. May it please the court?

7 So this case is essentially an earnout case.
8 It's a case where Exxon, in acquiring an oil and gas
9 exploration company called InterOil Corporation, promised
10 IOC shareholders cash up front and then a payment - - - a
11 second payment that was contingent upon a certified
12 estimate of natural gas resources in Papua New Guinea.

13 However, as we allege in our complaint, and as
14 you can see from the agreements that were attached to that
15 complaint, the determination of those natural gas resources
16 was very complicated and they were subject to manipulation
17 by Exxon and that Exxon had every incentive to manipulate
18 those estimates downwards, so that they could pay IOC
19 holders less.

20 In order to protect against that manipulation,
21 the key agreement in this appeal, which is the contingent
22 resource payment agreement, or the CRPA, placed express
23 good faith obligations on Exxon to ensure that the
24 determination of these natural gas resources were done in a
25 fair and accurate manner. And it's a breach of those

1 obligations - - -

2 CHIEF JUDGE WILSON: I guess I read it
3 differently, maybe. But correct me. I thought that the
4 way they protected that was to send it to an outside
5 independent agency to make that determination?

6 MS. KIM: So the way that appraisals are done out
7 in the field, Your Honor, is that basically you hire these
8 independent appraisers; that's true. The appraisers - - -

9 CHIEF JUDGE WILSON: But that's what the contract
10 says, right?

11 MS. KIM: That's what the contract says. But the
12 appraisers never go out in the field. All of the data that
13 the appraisers get - - -

14 CHIEF JUDGE WILSON: But - - - wait. So now
15 you're - - - is that in the records somewhere?

16 MS. KIM: That is. That's in the total sale
17 agreement.

18 CHIEF JUDGE WILSON: Um-hum.

19 MS. KIM: And in the total sale agreement it
20 actually provides that all the parties to the TSA, which
21 includes the Exxon sub, would be part of the TSA.
22 Basically says that the Exxon sub is required to provide
23 all reasonable and necessary data for the appraisers to do
24 their duty. And under our complaint, what we allege is
25 that Exxon didn't do that. They didn't provide all of that

1 reasonable and necessary and useful data for the appraisers
2 to actually come to the right conclusion.

3 CHIEF JUDGE WILSON: And the question, I guess,
4 is whether you can bring that or you need to have either
5 the - - - the holder committee or the required holders?

6 MS. KIM: Yes. The question on this appeal is
7 section 8.05 which everybody is calling a no-action clause.
8 And under section 8.05 the language in the second - - -
9 like, second-to-last sentence is, "only the required
10 holders or the holder committee with required holder
11 approval will have the right on behalf of all holders to
12 institute any action or proceeding at law or equity".

13 Right? And what we say, the only thing that the
14 plain meaning of these terms can mean is, that if you want
15 to bring an action on behalf of all the holders under this
16 agreement, then you have to get a twenty - - - you going to
17 have to get twenty-five percent of the holders of these
18 EVRs to approve it - - - to agree. You have to meet a
19 threshold requirement to bring a class action.

20 CHIEF JUDGE WILSON: Well, why can't you read it
21 to say, if you have twenty-five percent, that twenty-five
22 percent must bring the action on behalf of all holders, not
23 just themselves?

24 MS. KIM: The reason why you can't read it to say
25 that, would be I think - - - it would basically effectively

1 bar all actions and it would basically make the contract -
2 - -

3 CHIEF JUDGE WILSON: No. You just have to get
4 twenty-five percent.

5 MS. KIM: Well, you'd have to get twenty-five
6 percent, but then you'd have the - - - so - - -

7 CHIEF JUDGE WILSON: Isn't that kind of a common
8 device on lots of sort of commercial agreements, that
9 individuals are not allowed to bring actions? Either a
10 trustee can or, in many cases, there's some threshold
11 number of holders, where if you hit that threshold, they
12 can bring an action. But what you don't want them to be
13 able to do is bring an action just for themselves, is that
14 fair? I mean, they're - - - they're not a fiduciary like a
15 trustee because they're just twenty-five percent of the
16 holders, you don't want them to advantage themselves. Is
17 that common?

18 MS. KIM: It's common in indentures, Your Honor.
19 Which we would say are different. In indentures, right,
20 you have a trustee. They're set up to basically protect
21 the interests of the holders. Then an indenture, basically
22 what you're trying to - - -

23 CHIEF JUDGE WILSON: In here you have a holder
24 committee, which is kind of like the trustee?

25 MS. KIM: Actually, the holder committee is not

1 like a trustee. If you look at section 5.04 of the CRPA,
2 it says, "No holder committee member owes any duty of care
3 or will otherwise be liable to the holders in respect of
4 the performance of their duties."

5 CHIEF JUDGE WILSON: Well, then that even better
6 explains why, "on behalf of all holders" is there and
7 applies to both the holder committee and the twenty-five
8 percent fraction.

9 MS. KIM: Well, no. The holder committee can
10 only act with required holder approval, right?

11 CHIEF JUDGE WILSON: Right.

12 MS. KIM: So you have to get that - - - meet that
13 twenty-five percent.

14 CHIEF JUDGE WILSON: Right.

15 MS. KIM: And the holder committee has no
16 fiduciary or any other obligations to the holders. So the
17 difference - - -

18 CHIEF JUDGE WILSON: Except - - -

19 MS. KIM: - - - between this agreement - - -

20 CHIEF JUDGE WILSON: Um-hum.

21 MS. KIM: - - - and all of the other agreements
22 that - - - you know, this court has ruled upon that involve
23 indentures, a lot of RMBS indenture decisions too, right?
24 Is the fact that there, there is an entire process. There
25 is a trustee that's appointed to protect the rights of the

1 holders. You have to give notice to the trustee. You have
2 to provide indemnity to the trustee. And then, if the
3 trustee decides to act, then great. You know, trustee's
4 going to bring this action on behalf of all the holders.
5 If trustee decides not to act, then you're free to bring an
6 action. Right? I mean, that's how it works.

7 None of those protections are here. And if you
8 look at the CRP agreement - - -

9 CHIEF JUDGE WILSON: I guess - - -

10 MS. KIM: - - - vis-a-vis - - -

11 CHIEF JUDGE WILSON: - - - I guess what I'm
12 asking is, because none of those protections are here,
13 doesn't that lean you towards reading, "on behalf of the
14 holders", to provide that same kind of protection?

15 MS. KIM: It's, "on behalf of all holders", Your
16 Honor - - -

17 CHIEF JUDGE WILSON: Right.

18 MS. KIM: - - - and I - - -

19 CHIEF JUDGE WILSON: Right. Sorry.

20 MS. KIM: - - - don't think it provides the same
21 protection. Because if you actually - - - you know, this
22 court has held repeatedly, including in decision that was
23 issued last year, that you can look at similar contracts to
24 ascertain the meaning of the contract. If you look at
25 similar contracts - - - and Exxon has admitted that CVR

1 agreements, contingent value rights agreements, which
2 again, are premised on contingent payments sometime in the
3 future based on milestones or performance, right, are
4 similar to the CRPA here. If you look at the similar CVR
5 agreements which we cite - - - and we provide citations to
6 where you can find those in the reply brief - - - for three
7 different companies, you see that there's almost identical
8 language in those CVR agreements as in section 8.05 and in
9 section 8.04, which section 8.04 gives individual holders
10 the right to enforce. Right?

11 The difference is, is that in those agreements
12 there is another section, and it's called section 4.2. And
13 in section 4.2 a special committee is appointed and it is
14 given - - - I'm reading from one of these agreements. "A
15 special committee has the sole power and authority to act
16 on behalf of the holders in enforcing any of their rights
17 thereunder."

18 Exxon omitted that. Exxon is the one that
19 drafted the CRPA agreement. So in omitting that particular
20 section where the special committee basically has the right
21 to enforce an individual's holders rights to enforce the
22 agreement, Exxon was basically saying, okay, well that
23 omission means something. Under Quadrant that omission
24 means something. Exxon was basically saying, okay, well,
25 individual holders have the right to sue. Because

1 individual - - - individual holders did not have the right
2 to sue, section 6.02 would essentially be unenforceable.
3 Because unlike the indentures and RMBS and all of those
4 things, this is not something that happens over a long
5 period of time. We're not establishing a relationship
6 between investors and a trust or investors and a company.
7 This is where you're terminating shareholder rights and
8 you're doing that based on certain payments that are made.
9 And you want to make sure that that contingent payment is
10 done in a way that's fair and reasonable to the holders.
11 Right?

12 So in those other situations - - - in those other
13 situations, right, you have all of these protections for
14 the holders. Here, you also have those protections but
15 it's - - - you - - - it's apples to oranges when you're
16 comparing an indenture to basically this agreement or CVR
17 agreements.

18 JUDGE HALLIGAN: Can I - - - I want to make sure
19 I'm clear. When you refer to causes in other agreements,
20 right, you're not suggesting - - - but - - - but tell me if
21 I'm misunderstanding you - - - that there are other
22 agreements that have the same language we see here? I
23 thought you had indicated that this language here was
24 unique. Am I misunderstanding?

25 MS. KIM: This language here is unique. If you



1 compare them to any language that's found in no-action
2 clauses in decisions from this court or in New York State
3 courts, this language is unique and different from what you
4 find in indentures, which is really what a lot of the no-
5 action clause decisions are about. This language is not
6 unique if you compare it to CVR agreements which Exxon has
7 submitted are similar to the CRPA. That's cited in our
8 reply brief. I don't know the exact footnote, but I can
9 provide it to you on rebuttal. But it actually lists out
10 the CVR agreements. It's a - - - and it provides three
11 examples with citations to where Your Honors could find
12 them.

13 And in those CVR agreements, the language that's
14 found in section 8.05 and 8.04 is almost identical.

15 CHIEF JUDGE WILSON: So that ends up being really
16 a question of fact, right?

17 MS. KIM: Yes. But at the same time, if you - -
18 - if - - - in Quadrant and in IKB, this court has held that
19 you can look at similar contracts and see what the parties
20 decided to omit - - -

21 CHIEF JUDGE WILSON: Correct. That goes to what
22 - - -

23 MS. KIM: - - - in deciding - - -

24 CHIEF JUDGE WILSON: - - - that goes to
25 understanding what their intent was and how to interpret

1 the contract?

2 MS. KIM: Yes.

3 CHIEF JUDGE WILSON: Fair? And that's a factual
4 issue for a trier of fact.

5 MS. KIM: In Quadrant, this court decided that as
6 a matter of law, right? The - - - in - - - in Quadrant,
7 the court looked at similar RMBS contracts. In Quadrant,
8 the question was, well, you know, is a - - - can you bring
9 this action on behalf - - - can you bring an action for
10 securities or any other common law things that are not
11 covered by the indenture by this no-action clause? Because
12 the no-action clause only said - - - you know, under the
13 indenture essentially. Right? And what this court said
14 is, like, well, let's look at what other RMBS contract do -
15 - - or what other indentures do. And then comparing other
16 indentures, including a couple indentures from Delaware
17 Chancery Court decisions, you said, well, in these other
18 indentures it says the indenture or the securities. And
19 says, okay, in those situations, those bar all actions that
20 are brought on behalf of holders unless the holders go
21 through this trustee process. And so Your Honors actually
22 decided that as a matter of law.

23 And IKB was the RMBS case and in IKB, Your Honors
24 also decided that as a matter of law. And that had to do
25 basically with whether or not a trustee should be on the

1 hook for the repurchase obligation.

2 And because there was no specific language that
3 basically stated - - - basically said the parties have the
4 repurchase obligation; it's very vague. But Your Honor
5 looked - - - this court looked at different RMBS contract -
6 - - contracts, where the trustee is expressly listed as
7 somebody who has the repurchase obligation. And by making
8 that comparison, this court held, well, obviously, you know
9 how to do it. If you want to have the trustee have the - -
10 - a repurchase obligation, you can put that in there.

11 Similarly, Exxon knows how to use the word,
12 "required holders", right? I mean, they put that in
13 section 8.05, but they didn't put in section 8.04 which
14 gives individual holders the right to sue. They didn't put
15 it in section 3.05D, which carves out breaches of Exxon's
16 obligations under section 6.02 as something that holders
17 can dispute. It doesn't say required holders. It says
18 holders. Right?

19 CHIEF JUDGE WILSON: It carves it out of a
20 proviso there?

21 MS. KIM: Yeah. It carves out a proviso from the
22 ADR - - -

23 CHIEF JUDGE WILSON: From - - - the carve out is
24 of the proviso, I think. No? You don't agree with that?

25 MS. KIM: No. The carve out - - - the carve out

1 is not of the proviso. So the proviso basically - - -
2 because if the carve out was of the proviso, it would
3 basically mean that the whole - - -

4 CHIEF JUDGE WILSON: Because it says, "it being
5 understood that this proviso shall not prevent", and then
6 it goes on. So it's a restriction of the proviso, not a
7 restriction as to the whole agreement.

8 MS. KIM: Right. But I'm just saying that as an
9 example, right? It carves out. It says, "does not - - -
10 shall not prevent or restrict the holders from - - -

11 CHIEF JUDGE WILSON: Yeah. This - - - this
12 proviso shall - - - shall not, right?

13 MS. KIM: Yes.

14 CHIEF JUDGE WILSON: Okay.

15 MS. KIM: "That this proviso shall not", yes.

16 Thank you, Your Honors. My time is up.

17 CHIEF JUDGE WILSON: You have some rebuttal.

18 MR. DITCHFIELD: Good afternoon, Your Honors.
19 May it please the court? Andrew Ditchfield on behalf of
20 the respondents.

21 JUDGE TROUTMAN: Does this involve a
22 straightforward no-action clause?

23 MR. DITCHFIELD: Well, Your Honor, I think it - -
24 - it involves a straightforward contractual provision which
25 we've shorthanded as a no-action clause. Embracing the

1 idea that the intent of that provision, section 8.05
2 fitting in the broader context of the contingent rights
3 payment agreement more generally, was to limit the ability
4 - - - or limit the exposure of the parties to the
5 agreement, which were a rights agents and ExxonMobile.

6 JUDGE HALLIGAN: But is the language used in 8.05
7 specifically, including the sentence with the "on behalf of
8 all holders", is that something that appears in other
9 agreements or is conventionally used?

10 MR. DITCHFIELD: So I - - - I think the answer is
11 yes, recognizing that there's no talismanic formulation
12 that - - - or words that need to be used. And I had
13 thought coming in here, that the appellant's argument in
14 the reply brief, which is at page 13 to 14, in referencing
15 CVR agreements which - - - from our perspective are the
16 most similar types of agreement - - - had language that we
17 would describe - - - that they would describe as effective
18 no-action clauses that would prohibit individual actions
19 like the one that appellants brought here. And this is at
20 page 13 and 14 of their brief. And then they - - - they
21 cite a footnote 6, a - - - several CVR agreements,
22 including one from Unum Therapeutics.

23 And I took a look at Unum Therapeutics and just
24 wanted to read a couple of the provisions, Your Honor.
25 Section 4.2B says that, "the special committee shall now

1 owe fiduciary duties to the holders and shall not have any
2 liability to the holders for any actions taken." That's
3 very similar to section 5.04 of the CRP agreement that you
4 heard about.

5 And then section 4.2C says that, "the special
6 committee, notwithstanding the fact that the holders are
7 the intended third-party beneficiaries of that C - - - CVR
8 agreement - - - like in the case here - - - notwithstanding
9 that - - - that the holders have the ability to
10 specifically enforce the terms of the CVR agreement." That
11 the special committee has the sole power and authority to
12 act on behalf of the holders in enforcing their rights
13 hereunder.

14 The language of section 8.05 of the CRP agreement
15 says essentially the same thing, just in a different order.
16 What it says in section 8.04, is that the holders amongst
17 others, have the ability to enforce the agreement.

18 Section 8.05 starts from the premise that the
19 only rights that the holders have under the CRP agreement
20 are those expressly granted to them. Because remember,
21 this is a contract that they are not parties to; they're
22 third-party beneficiaries. And then it says,
23 notwithstanding anything to the contrary in the entire
24 agreement only, right, solely. The required holders, or
25 the holder committee with required holder approval, will

1 have the right on behalf of all holders - - -

2 JUDGE HALLIGAN: Let me - - - let me stop you
3 there, if I can.

4 MR. DITCHFIELD: Sure.

5 JUDGE HALLIGAN: What meaning do the words, "on
6 behalf of all holders" have under your understanding of the
7 contract?

8 MR. DITCHFIELD: Your Honor, the way that we read
9 the contract is that on behalf of all holders means that
10 the right that is invested in either the required holders
11 or the holder committee, is a right to in - - - to initiate
12 actions and they hold that right - - - those two bodies - -
13 - hold that right on behalf of all holders. And so I think
14 if you look at section 5.02 - - -

15 JUDGE HALLIGAN: Well - - -

16 MR. DITCHFIELD: - - - of the agreement.

17 JUDGE HALLIGAN: - - - I - - - I'm just - - -
18 specifically though, why would the meaning be different if
19 those words were not there as opposed to them being present
20 in - - - in the sentence?

21 MR. DITCHFIELD: Well, I think - - - I think what
22 those words do is clarify the purpose of this agreement and
23 the - - - the body - - - the bodies, the required holders,
24 or the holder committee that are authorized to act.

25 JUDGE HALLIGAN: I'm just trying to understand -

1 - -

2 MR. DITCHFIELD: Yeah.

3 JUDGE HALLIGAN: - - - the surplusage under your
4 reading.

5 MR. DITCHFIELD: I don't - - - I don't think it's
6 surplusage. I - - - I think what's it's doing is it's
7 clarifying that even though the holder - - - I'm just going
8 to use holder committee because it's easier to say - - - a
9 holder committee has the right to initiate an action. It
10 holds that right on behalf of all of the holders under the
11 agreement who are the beneficiaries of the agreement.

12 And I think that language, that clarifying
13 language, is then standing in contrast to the language at
14 the end of that sentence which says that no individual
15 holder or other group of holders will be entitled to
16 exercise such - - -

17 JUDGE HALLIGAN: But what independent meaning
18 does that last clause have under your reading that's not
19 surplusage?

20 MR. DITCHFIELD: The - - - you - - - the - - -
21 the no individual holder language, Your Honor?

22 JUDGE HALLIGAN: Yep.

23 MR. DITCHFIELD: Well, keep - - - keep in mind
24 here that the - - - the purpose of these agreements, under
25 this court's reasoning in the Quadrant case, is to limit

1 the exposure of the parties to this agreement. And so what
2 - - -

3 JUDGE HALLIGAN: So it's your view that it's belt
4 and suspenders, or clarifying or something like that?

5 MR. DITCHFIELD: Yes. I - - - I think what this
6 language is - - - is making absolutely clear, right, given
7 the broader context, right, which is the holders are third-
8 party beneficiaries. Under section 8.04 they have the
9 right to enforce the agreement but they can only act to
10 enforce those rights if they get twenty-five percent or
11 more of the holders to act together, either as the required
12 holders or through the holder committee, which requires
13 required holder approval.

14 And so what this language is doing, and this is
15 what Justice Ostrager understood and this is what the
16 majority of the First Department understood, is it's making
17 this provision, section 8.05, clear as day that there is a
18 right to sue here. There's a right to initiate any action
19 or proceeding at law an equity. That language, that you
20 can - - - that the holder committee or the required holders
21 have broad rights to initiate any action so long as it's
22 arising under the agreement. And there's no dispute that
23 the appellants' claim arises under the agreement.

24 And then that remaining language says no
25 individual holder. Even though the holders are the

1 beneficiaries and they have the right to enforce.

2 JUDGE HALLIGAN: What - - - what - - - what
3 meaning then, do you assign if you look at 8.04, which I
4 realize governs successors and assigns. But the first
5 sentence says this agreement will be binding upon and will
6 be enforceable by, et cetera, the holders. And - - - and
7 then it goes on and lists other categories.

8 So does that - - - what do we make of the fact
9 that 8.04 says that the agreement is enforceable by holders
10 and not required holder to the holders committee only?

11 MR. DITCHFIELD: I - - - I think what this is
12 saying, Your Honor, is that when you look at what the
13 agreement grants, which is a right to a contingent payment
14 on the part of the holders, right? That this is saying
15 that they're third-party - - - express third-party
16 beneficiaries, they have the ability to enforce this
17 agreement. Just like in the Unum Therapeutics CVR
18 provision 4.2C says, "The holder shall be intended third-
19 party beneficiaries and shall be entitled to specifically
20 enforce the terms hereof", provided that only the special
21 committee under the CVR can act to - - -

22 JUDGE HALLIGAN: So how would they enforce it
23 otherwise?

24 MR. DITCHFIELD: Well, they - - - the holders,
25 consistent with the purpose of the CRP agreement which is

1 to minimize the exposure to individual strike suits. The
2 holders would have to amass enough support - - -

3 JUDGE HALLIGAN: Okay.

4 MR. DITCHFIELD: - - - in order to comprise the
5 required holders, right? And - - - and I think that the -
6 - - the language as a whole, right? Both the language that
7 the parties used - - - that the contract uses is very
8 clear. And that the purpose of the statute is consistent -
9 - - sorry, the statute. The contract is consistent with
10 the reading that Justice Ostrager applied, that the First
11 Department majority applied - - -

12 JUDGE SINGAS: Well, why isn't the dissent
13 correct, if there's an ambiguity because of the failure to
14 include the standard no-action language?

15 MR. DITCHFIELD: For two reasons, Your Honor.
16 One is I don't think that there is standard language in a
17 contingent resource payment agreement, for no other reason
18 that I'm not aware of any other resource payment agreement.
19 And that's why we analogized to the contingent value right
20 agreement. But secondly, I think that the - - - the
21 majority was correct in saying that what's - - - what's
22 necessary, what's important is does the language that's
23 used make clear what the parties intended. And you don't
24 need to use any talismanic words. You don't need to have a
25 particular formatting. You just need to make clear what

1 the parties intended.

2 JUDGE SINGAS: And you think that's done?

3 MR. DITCHFIELD: I think that's absolutely done,
4 Your Honor. I think if you look at this language and you
5 take a look at, say, section 5.02 of the CRP agreement
6 which says that any time the holder committee brings a
7 lawsuit, any lawsuit, it does so - - - it has to do it in
8 its own name. So it's not a class action, per se. There's
9 not acting - - - you know, individually and on behalf of
10 all similarly situated.

11 And it does so - - - if it gets a recovery, it
12 has to distribute that recovery pro rata to all of the
13 holders. It is literally acting on behalf of all of the
14 holders as it acts as the holder committee authorized by at
15 least twenty-five percent of the overall holders. And so
16 when you - - - not only when you look at the language of
17 section 8.05 standing alone, but you look at that provision
18 in the context of the agreement as a whole, and you look at
19 the agreement in the context of the commercial arrangement
20 that was struck here, all of those support the reading that
21 the First Department majority applied and not the reading
22 that the dissent advocated which was, in their view, at
23 least there was an ambiguity. And I submit, Your Honors,
24 that reading this contract within that broader commercial
25 arrangement, to the extent that there's any ambiguity and I

1 don't believe that there is, eliminates any other reading.
2 Because the whole idea here, if you take a step back and
3 you look at this transaction, this was a 2017 transaction.
4 It was the second iteration of a transaction that one of
5 the appellants successfully objected to in front of a
6 Canadian court proceeding in 2016. That - - - that
7 transaction, which included both a fixed component of deal
8 consideration, forty-five dollars per share in Exxon stock,
9 plus a contingent right payment if the estimates, through
10 these independent appraisers that you heard about from my
11 friend Ms. Kim, came above a certain measurement - - - 6.2
12 trillion cubic feet equivalent of natural gas underground.
13 And this gas has been tested by appraisal values.

14 So you have the 2017, February 2017, agreement
15 signed up. It was subject to Canadian court approval. The
16 appellants and all other holders have the ability to forego
17 the right to obtain a contingent right payment and pursue
18 dissenters or appraisal proceeding in the Yukon courts in
19 Canada. And some holders did, and they lost. The - - -
20 the Canadian court concluded - - - the Canadian Court of
21 Appeal - - - the Yukon Court of Appeal concluded that the
22 forty-five dollars per share plus the payment that was made
23 to, under the - - - under the CRP agreement to holders, was
24 fair and reasonable. It reflected the fair value of
25 InterOil. And so what appellants did - - - let me take a

1 step back.

2 The - - - under the CRP agreement, ExxonMobile
3 funded an escrow account. And then it took that money out
4 as a loan per the terms of the escrow agreement, the CRP
5 agreement, and then it was responsible - - - once the
6 independent appraiser made the determination on - - - under
7 the total sale agreement of the estimate in - - - in the
8 fields of Papua New Guinea. That led to a calculation of
9 the contingent right payment. That payment was then made.

10 Under section 3.05D, the holders had the
11 opportunity to dispute that payment, right? And if they
12 did, they had to deliver a dispute notice. But if they
13 didn't deliver that dispute notice within thirty days, then
14 ExxonMobile's obligations under the CRP agreement were
15 concluded.

16 The whole idea here was to put in place a
17 structure that got holders the compensation that they were
18 entitled to under the InterOil and ExxonMobile merger
19 agreement. And then ExxonMobile moved on.

20 What that wasn't intended to do was allow
21 individual suits under the CRP agreement four years later,
22 like the appellants have brought, which is exactly what
23 section 8.05 was intended to curtail.

24 Unless Your Honors have any questions, I very
25 much appreciate your time.



1 CHIEF JUDGE WILSON: Thank you. Counsel, could I
2 ask you start with section 3.05D?

3 MS. KIM: Yes, Your Honor. Section 3.05D, Your
4 Honor, is not as Counsel contends, a section where you can
5 dispute the payment - - - the CR - - - the contingent
6 resource payment. What you can dispute is basically the
7 math. And it's very clear that under section 3.05D the - -
8 -

9 CHIEF JUDGE WILSON: Of the math, you mean the
10 calculation of the reserves?

11 MS. KIM: The - - - yes. Not the calculation - -
12 - no. Not the calculation of the reserves. There's
13 actually like specific formulas throughout the CRP
14 agreement that basically says, okay, well once the
15 calculation of the reserve come in, you take that, you
16 multiply it by X, you divide it by Y. You know, you take
17 it to the thirteenth power and then this is the actual
18 payment that you get. That's the math.

19 So basically, if you look at section 3.05D, it
20 says expressly - - -

21 CHIEF JUDGE WILSON: Um-hum.

22 MS. KIM: - - - if - - - if the required holders
23 dispute either the calculation of the distributable CRP
24 payment or loan proceed payment set forth in the
25 achievement certificate - - - the achievement certificate



1 means that there was more natural gas in 6.2 TCFE found in
2 the natural gas fields in Papua New Guinea. Or acquisition
3 companies - - - that's Exxon's - - - assertion in the non-
4 achievement certificate that the payment condition has not
5 been certified, which basically means we didn't find more
6 than 6.2 TCFE in the natural gas fields in Papua New
7 Guinea. Then you can basically put forward a dispute
8 notice. That's it. That's all you can do under section
9 3.05D.

10 It makes sense because I went through the math,
11 and you know, math wasn't my best topic which is why I'm a
12 lawyer. But I went through the math. It is lot of really
13 complicated calculations to figure out what the loan
14 proceeds payment is and what the CRP payment is. And so if
15 you get the CRP payment and you say, wait a minute, I did
16 the math. I took what the estimate of the reserves were, I
17 applied the formula that's in the CRP agreement, and it
18 turns out that you guys - - - you know, basically missed a
19 decimal point, right? Then you can basically dispute the
20 matter and then you set forth - - - and it says here how
21 you're supposed to do it. You're supposed to set forth the
22 proper calculation of the distributable CRP payment. You
23 can't put forth the proper calculation of the CRP payment
24 if it has to do with the amount of reserves in the natural
25 gas fields. Nobody knows that except for the people who

1 are out in the fields and the people who are appraising
2 based on good data that's provided to them from these
3 appraisal well.

4 I do want to address a couple of things that
5 Counsel read to Your Honor from the Unum CVR agreement.
6 You know, he claims that section 8.05 deals with everything
7 that's in 4.2 but that's not true. If you look at section
8 7 - - -

9 JUDGE HALLIGAN: Those - - - are those in the
10 record, Counsel, or no?

11 MS. KIM: They're - - - they're cited in the - -
12 -

13 JUDGE HALLIGAN: Yeah. I saw the cites, but.

14 MS. KIM: Yeah. They're cited in our reply
15 brief, Your Honor, at the pages I believe Counsel provided
16 to you.

17 But in section 7.5 of the CVR agreement, it's the
18 language identical almost to 8.4. It says, "The agreement
19 will be binding upon and will be enforceable by and are
20 solely to the benefit of the holders.", et cetera, et
21 cetera.

22 And then section 7.6 has the - - - almost the
23 identical language as section 8.05, "Except for the rights
24 of the rights agent set forth herein, the acting holders
25 will have the sole right on behalf of all holders by virtue



1 of or under any provision of this agreement to institute
2 any action preceding at law or in equity."

3 It's clear they used the CVR agreements as a
4 model, right? What they didn't include was section 4.2C
5 which specifically gives - - - it restricts an individual
6 holder's right to enforce the CRP agreement. It says, "The
7 special committee has the sole power and authority to act
8 on behalf of the holders in enforcing any of their rights
9 hereunder."

10 Exxon omitted that from the CRP.

11 CHIEF JUDGE WILSON: Why is - - - why is that
12 different from a no individual holder or other group of
13 holders who'd be - - - will be entitled to exercise such
14 rights?

15 MS. KIM: Because if you look at the - - - if you
16 look at the text of section 4.2C it says, "a special
17 committee has the sole power and authority to act on behalf
18 of the holders - - -

19 CHIEF JUDGE WILSON: Um-hum.

20 MS. KIM: - - - "in enforcing any of their rights
21 hereunder." And holder is defined as a person who holds a
22 security. It's the same definition in the CRPA, right? A
23 holder is a person who holds an EVR. If you read section
24 8.05 it says, "on behalf of all holders", right?

25 If you're going to read the CVR agreement that we

1 cited consistently, it means for individual holder who want
 2 to bring a lawsuit, they have to go through the special
 3 committee. If you want to bring a class action on behalf
 4 of all holders, you have to meet the threshold requirement
 5 which in Unum, very coincidentally, was also twenty-five
 6 percent of the holders.

7 So it's - - - in order to read all the provisions
 8 in the contract as a whole, as Counsel suggests, you have
 9 to read them all together. Because otherwise, it would
 10 basically mean that you're - - - the provisions would
 11 conflict, right? You'd say well the special committee has
 12 the right to enforce on behalf of all holders and the
 13 acting holders have the right to enforce a right on behalf
 14 of all holders. So what is it? Well, they used very
 15 specific language here. In section 4.2C it says, "the
 16 holders", right? The special committee has the right on
 17 behalf of the holders, individual holders. And in section
 18 8.05 it says, "on behalf of all the holders". There's only
 19 - - -

20 JUDGE CANNATARO: Does on behalf of all holders
 21 contemplate a class action as opposed to some more, sort of
 22 representative action?

23 MS. KIM: It would have to be class action, Your
 24 - - - Your Honor. Because I mean, there's no - - - there's
 25 no entity because I know Counsel keeps referring to the



1 holder committee, but the holder committee is basically the
2 former CEO of IOC and the chairman of the board of IOC.
3 They were trying to push this deal through, right? So it's
4 basically the required holders under that provision. And
5 the required holders have no fiduciary obligations to the
6 holders. How could they, right? It's an unidentified - -
7 -

8 CHIEF JUDGE WILSON: They could still have a - -
9 - they could have a contractual right without a fiduciary
10 obligation. No?

11 MS. KIM: Yes. But again, I'm - - - they don't -
12 - - they don't even have any contractual obligation to the
13 holders because the required holders, they're not - - -

14 CHIEF JUDGE WILSON: No, not a contractual
15 obligation to the holders. A contractual right to sue on
16 behalf of the holders.

17 MS. KIM: Right. But what require - - - the
18 required holders, again, is not one person or one entity.

19 CHIEF JUDGE WILSON: Right.

20 MS. KIM: It's just twenty-five percent of
21 unidentified holders. So in this situation - - - and this
22 is again why it's different from indentures, the EVRs are
23 nontransferable. Right? So what you have is what you get.
24 So let's say you have a required holder who holds thirty
25 percent of the EVRs, had - - - would have to be an

1 institutional investor, and they say, well, I want to bring
2 an action. And then Exxon says, well, that means you have
3 to bring an action on behalf of all holders. And the
4 required holder says, wait a minute. That's crazy because
5 that means that I have these fiduciary obligations that are
6 established under class action procedure and this contract
7 doesn't even provide me with indemnity. Indemnity is
8 something that is always provided in those other no-action
9 clauses in the indentures, right? And it's in order to
10 protect the trustee for all the actions that it takes on
11 behalf of all of the holders. That's not even provided.

12 No institutional investor, no required holder
13 would want to take on that liability without getting some
14 sort of indemnification. That's not provided here. So the
15 only reasonable interpretation is that section 8.05 sets a
16 threshold requirement if you want to bring a class action.
17 Makes sense.

18 There are fifty-one million EVRs that were
19 issued; that would have made the case against Exxon over a
20 billion dollars. Exxon wanted to prevent that. At the
21 same time, there is no way that this agreement would have
22 passed muster with the Yukon court for fair and
23 reasonableness if section 6.02 was not enforceable.

24 CHIEF JUDGE WILSON: Thank you.

25 MS. KIM: Thank you.



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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Mulacek v. ExxonMobile Corporation, No. 48 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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