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COURT OF APPEALS

STATE OF NEW YORK

MAK TECHNOLOGY HOLDINGS,

Respondent,

-against-

ANYVISION INTERACTIVE TECHNOLOGIES,

Appellant.

NO. 61

20 Eagle Street
Albany, New York
May 15, 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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Brandon Deshawn
Official Court Transcriber



1 CHIEF JUDGE WILSON: The next case on the
2 calendar is Number 61, MAK Technology Holdings v. Anyvision
3 Interactive Technologies.

4 (Pause)

5 MR. LESSER: Good afternoon. May it please the
6 court. Leonard Lesser, for the appellant, Anyvision. Your
7 Honor, I would respectfully request two minutes for
8 rebuttal.

9 CHIEF JUDGE WILSON: Yes.

10 MR. LESSER: In its divided ruling, the First
11 Department panel in this case violated a fundamental
12 principle of contract interpretation by failing to give
13 effect to a defined term in the parties' agreement. Here,
14 the parties deliberately used capitalized defined
15 terminology as distinguished - - -

16 JUDGE TROUTMAN: So does it matter here - - -

17 MR. LESSER: - - - from non-capitalized defined
18 terms.

19 JUDGE TROUTMAN: - - - that you have a 3211
20 motion?

21 MR. LESSER: I'm sorry, Your Honor.

22 JUDGE TROUTMAN: Does it matter the posture of
23 the case that was before the court? It's a 3211, so you
24 have to conclusively demonstrate, as a matter of law, that
25 your position is the right one.



1 MR. LESSER: And this is a 3211(a)(1). So we
2 did, as we presented the court, with the parties'
3 agreements with their clear, unmistakable terms, as well as
4 the corresponding documentation. And that's the posture
5 that the court ruled on.

6 JUDGE TROUTMAN: And that the intent is clear and
7 that there's no other interpretation?

8 MR. LESSER: Not with respect to the terminology
9 at issue in this case. Article 8 - - - we'll go back to
10 the referral agreement. This is - - -

11 JUDGE TROUTMAN: But you do admit there was
12 typographical errors here?

13 MR. LESSER: Yeah. There's a typographical
14 error. But as this court has refused - - -

15 CHIEF JUDGE WILSON: So how do we know - - -

16 MR. LESSER: - - - to be admonished a
17 typographical error - - -

18 CHIEF JUDGE WILSON: Excuse me a second. Excuse
19 me a second.

20 MR. LESSER: Yes.

21 CHIEF JUDGE WILSON: How do we know that the
22 typographical error does not include a lack of
23 capitalization where capitalization was intended?

24 MR. LESSER: Well, therein lies the - - - the
25 issue, Your Honor.



1 CHIEF JUDGE WILSON: Right.

2 MR. LESSER: The parties here in the phraseology
3 that they used in their agreement for the definition of
4 term - - -

5 CHIEF JUDGE WILSON: Right.

6 MR. LESSER: - - - it's article 8, entitled term
7 and terminology - - -

8 CHIEF JUDGE WILSON: Right.

9 MR. LESSER: - - - then subsection 8.1 - - -

10 CHIEF JUDGE WILSON: Right.

11 MR. LESSER: - - - that's entitled Term, capital
12 T-E-R-M underlined, that says this agreement shall commence
13 on the effective date, which is a capital defined - - -

14 CHIEF JUDGE WILSON: Right.

15 MR. LESSER: - - - term and shall remain enforced
16 for a period of three years unless earlier terminated - - -

17 CHIEF JUDGE WILSON: So - - - so - - -

18 MR. LESSER: - - - in accordance with - - -

19 CHIEF JUDGE WILSON: I understand that.

20 MR. LESSER: - - - section 8.2.

21 CHIEF JUDGE WILSON: So my - - - my - - - right.
22 My question is this: there's a piece of the amendment and
23 the second amendment that's repeated verbatim, but I think
24 we can all agree is gobbledygook, right? It is not what
25 somebody - - - nobody meant to write those words the way

1 they are; is that fair?

2 MR. LESSER: It's fair that there's a
3 typographical error.

4 CHIEF JUDGE WILSON: Fine.

5 MR. LESSER: But an error is not an - - -

6 CHIEF JUDGE WILSON: That's fine. So how do we
7 know that the error there wasn't - - - that the words that
8 were intended to be put there didn't also include the
9 capitalization of the words E, Effective and D, Date?

10 MR. LESSER: Because in this case the second
11 amendment section 1, the introductory amendment could not
12 have been clearer. In section 1 in italicized language,
13 emphasized, deliberate, italicized language, it says,
14 "Unless otherwise defined, capitalized terms used herein
15 shall have the meaning ascribed to them - - -"

16 CHIEF JUDGE WILSON: Right. And so - - -

17 MR. LESSER: "- - - under the agreement."

18 CHIEF JUDGE WILSON: And so if you - - - if you -
19 - - let's - - - let's make it a little bit different.

20 MR. LESSER: Sure.

21 CHIEF JUDGE WILSON: Let's suppose we knew that
22 the language that is - - - you call a typographical error
23 was meant to have E, Effective, and D, Date, capitalized in
24 there in that - - - in paragraph 2. Let's suppose we
25 assume that. I don't know if that's true, but let's - - -

1 let's assume that from a hypothetical. Why wouldn't that
2 constitute a redefinition of effective date - - -

3 MR. LESSER: First of all, it is - - -

4 CHIEF JUDGE WILSON: - - - under - - - under the
5 paragraph you just read me?

6 MR. LESSER: Because of the language in paragraph
7 1 that italicized admonishment where the sophisticated
8 parties are saying if we're - - -

9 CHIEF JUDGE WILSON: The sophisticated parties -
10 - -

11 MR. LESSER: - - - going to change to change a
12 definition - - -

13 CHIEF JUDGE WILSON: The - - - I mean, one of the
14 things that - - - that I find really incredible is the
15 sophisticated parties represented by counsel wrote
16 unintelligible words twice. They repeat this. And it's
17 not like this is a 200-page agreement in single space;,
18 this is a two-page agreement then - - - worth millions of
19 dollars that nobody bothered to read?

20 MR. LESSER: They read it. It has two
21 typographical - - -

22 CHIEF JUDGE WILSON: The typos did not cater - -
23 -

24 MR. LESSER: - - - errors, Your Honor - - -

25 JUDGE HALLIGAN: Counsel?

1 MR. LESSER: - - - sandwiched in between section
2 1, where the parties deliberately stated an admonishment
3 that if we are going to change a capitalized defined term
4 in the agreement, we are expressly going to do it.

5 JUDGE HALLIGAN: Counsel?

6 MR. LESSER: There's a typo - - -

7 JUDGE HALLIGAN: Can I - - -

8 MR. LESSER: - - - in paragraph 2 - - -

9 JUDGE HALLIGAN: Can I ask you - - -

10 MR. LESSER: - - - that doesn't implicate
11 paragraph 1. Yes, Your Honor.

12 JUDGE HALLIGAN: Does the record tell us who
13 drafted the first amendment and the second amendment?

14 MR. LESSER: It does not.

15 JUDGE HALLIGAN: Okay.

16 MR. LESSER: And it's - - -

17 JUDGE HALLIGAN: Thank you.

18 MR. LESSER: In - - - in the context of this
19 case, it really doesn't make a difference because it is
20 indisputable that we're dealing with sophisticated parties.
21 The plaintiff, by its complaint, is referring multimillion
22 dollar deals on behalf of - - - and this is Exhibit A to
23 the referral agreement, its clients. Plaintiffs' clients
24 include MSG, Madison Square Garden, the New York City
25 Transit Authority, stadiums in Texas, California, and

1 otherwise. These are sophisticated parties. Yes.

2 JUDGE TROUTMAN: So again - - -

3 MR. LESSER: There is a typo in paragraph 2, but

4 - - -

5 JUDGE TROUTMAN: So Counsel, again, like the
6 Chief Judge said, if they are so sophisticated, couldn't it
7 be expected that they would, with precision, go through the
8 contract and make sure that it was as it was supposed to be
9 represented?

10 MR. LESSER: What these parties did do in section
11 1 in that admonition and italicized language was make very
12 clear that if we are changing a capitalized defined term,
13 we are going to so state it. Yes, there is an error in
14 that one clause in section 2, but that is sandwiched in
15 between section 1 that has the expressed admonition and
16 section 6, which makes it very clear, unless there's a
17 change in the amendment, the referral agreement controls.
18 So there - - -

19 JUDGE RIVERA: So - - -

20 MR. LESSER: - - - could be no - - -

21 JUDGE RIVERA: So may I - - -

22 MR. LESSER: - - - dispute - - -

23 JUDGE RIVERA: So - - -

24 MR. LESSER: - - - over what's seems - - -

25 JUDGE RIVERA: Excuse me.

1 MR. LESSER: - - - to be part of paragraph 1
2 meant.

3 JUDGE RIVERA: Counsel, to clarify - - -

4 MR. LESSER: Yes.

5 JUDGE RIVERA: - - - just to clarify, then what
6 is your understanding, because you keep referring to the
7 typographical error, of what two must mean - - - what - - -
8 how exactly it should read? Because that's the only way
9 you're going to win on the motion.

10 MR. LESSER: And that - - -

11 JUDGE RIVERA: There can be no other reading.

12 MR. LESSER: Right. And that's what - - -

13 JUDGE RIVERA: So what is that reading?

14 MR. LESSER: - - - Justice Friedman - - -

15 JUDGE RIVERA: I know. I'm asking you - - -

16 MR. LESSER: Yeah. The - - -

17 JUDGE RIVERA: - - - what is the reading?

18 MR. LESSER: I read it the way Justice Friedman
19 read, that everybody - - -

20 JUDGE RIVERA: Go ahead, what is that reading?

21 MR. LESSER: That is the start date that you take
22 the new - - -

23 JUDGE RIVERA: No, no, no. You're not - - -

24 MR. LESSER: - - - Exhibit B - - -

25 JUDGE RIVERA: You're not helping me.



1 MR. LESSER: Yes.

2 JUDGE RIVERA: Is your point you cross out the
3 gobbledygook or you do something else?

4 MR. LESSER: You can look at it. You can take
5 the word, the, out or you can consider the word, the, with
6 the, with. And all it says is that that's the start point
7 when you take the new exhibit B and you replace the old
8 Exhibit B into it.

9 JUDGE RIVERA: Okay. So you're not - - -

10 MR. LESSER: It does not - - -

11 JUDGE RIVERA: You're still - - - I'm sorry.

12 MR. LESSER: Yeah.

13 JUDGE RIVERA: Judge Halligan, I'm sorry, I just
14 need to clarify this. I just want to understand what you
15 say is the only possible reading of two. Is it each of the
16 undersigned hereby agrees that as of the date hereof? Is
17 it that you would cross out the with effect?

18 MR. LESSER: You could even keep the, the, in
19 there because it doesn't change the import - - -

20 JUDGE RIVERA: That the of the?

21 MR. LESSER: It doesn't change the import of that
22 phrase. Now, when you're looking at a contract - - -

23 JUDGE RIVERA: Yeah. But that's the point. If
24 you can have all these different readings, how are you
25 going to succeed on the motion?

1 MR. LESSER: Because it's only one clause. If
2 you look at that clause myopically - - -

3 JUDGE RIVERA: Seems to have meaning - - -

4 MR. LESSER: - - - outside of the scope of the
5 rest of the agreement and ignore the admonishment in
6 paragraph 1, where the parties say very clearly, if we're
7 going to change a capitalized defined term, we're going to
8 say so.

9 CHIEF JUDGE WILSON: How do we know that the
10 thing you're calling a typographical error isn't actually a
11 botched attempt to change the definition as provided for in
12 paragraph 1?

13 MR. LESSER: Because the parties said in the
14 prior paragraph, the admonition, if we're going to change a
15 capitalized defined term - - -

16 CHIEF JUDGE WILSON: I understand - - -

17 MR. LESSER: - - - we're going to do it. So we -
18 - -

19 CHIEF JUDGE WILSON: I understand that. But how
20 do we know that that's not exactly what they tried to do
21 and they messed it up?

22 MR. LESSER: Because when parties say something
23 like this, it was clear that they - - -

24 CHIEF JUDGE WILSON: Parties don't - - -

25 MR. LESSER: - - - contemplated - - -



1 CHIEF JUDGE WILSON: Parties don't usually say
2 something like this.

3 MR. LESSER: The - - - well, if you look at
4 paragraph 1, and then italicized admonishment - - -

5 CHIEF JUDGE WILSON: So that's in paragraph 2,
6 counsel.

7 MR. LESSER: - - - there's no question that the
8 parties considered what to do about the capitalized defined
9 terms in the referral agreement. So the fact that in the
10 very next paragraph, notwithstanding the gobbledygook, the
11 - - - the - - - the extraneous the and the common
12 replacement of the A for the E. You look at the agreement
13 in total, you look at that warning in paragraph 1, you look
14 at the agreement and its context, there was no - - -
15 there's nothing in paragraph 2 or paragraph 3 or anything
16 else that indicates any intent by the parties to change the
17 definitions, the capitalized defined terms. If that
18 italicized admonishment was not included in paragraph 1,
19 then I think I'd have a more difficult argument for you,
20 Your Honors. But because of that admonishment and because
21 the rest of the agreement uses the capitalized defined
22 term, capital T-E-R-M, that means that that defined term in
23 the referral agreement in article 8, subsection 1 applies.
24 You can't have it any other way.

25 What the majority did was take that one clause

1 with the extraneous the and the A instead of the E, and
 2 imposed a capitalized defined term and amendment to a
 3 capitalized defined term. That you can do. Because in the
 4 context of the agreement, the parties expressly conceded
 5 that if we're going to change a capitalized defined term,
 6 we're going to so state. For the majority to then
 7 interpret a typo and say we're going to put it as a
 8 reasonable interpretation the parties must have meant to
 9 redefine - - -

10 JUDGE TROUTMAN: So couldn't one argue - - -

11 MR. LESSER: - - - either effective date or term
 12 - - -

13 JUDGE TROUTMAN: Counselor?

14 MR. LESSER: - - - that's too far of a stretch.

15 JUDGE TROUTMAN: Counselor, so could one argue
 16 that since there were two interpretations, neither
 17 interpretation should have been done in the first instance
 18 whether you call it typographical or not?

19 MR. LESSER: The reason I don't agree with that
 20 is because what the court looks at is not any
 21 interpretation, it's any reasonable interpretation. And
 22 the court - - -

23 JUDGE TROUTMAN: Would an absurd result have
 24 occurred with one interpretation or the other here?

25 MR. LESSER: Well, certainly if the court is



1 going to judicially change a capitalized defined term,
2 notwithstanding the admonishment of the parties in section
3 1, that's beyond what a court - - -

4 CHIEF JUDGE WILSON: I think - - - I think
5 Justice - - -

6 MR. LESSER: - - - can judicially do.

7 CHIEF JUDGE WILSON: I think Justice Troutman is
8 asking something different.

9 MR. LESSER: Sure.

10 CHIEF JUDGE WILSON: From - - - is there - - -
11 from a - - - are you arguing, I guess, from a business
12 perspective, that the reading that you don't like is one
13 that would have been nonsensical?

14 JUDGE TROUTMAN: Correct.

15 CHIEF JUDGE WILSON: That's what she's asking.

16 MR. LESSER: Yes. The reading that the majority
17 is doing is not a reasonable interpretation.

18 JUDGE TROUTMAN: Why?

19 JUDGE CANNATARO: What makes it unreasonable?

20 MR. LESSER: Because the court then is redefining
21 a capitalized - - -

22 JUDGE HALLIGAN: Not with respect - - - no.

23 MR. LESSER: - - - defined term.

24 JUDGE GARCIA: Counsel, I think the question - -
25 - let me try. I think the question is: if we read it the

1 way they want to read it - - - forget the language for now.
2 If the contract means that, is that absurd in terms of your
3 business arrangement?

4 MR. LESSER: If you read it the way it's written,
5 not at all. Because all it means is - - -

6 JUDGE GARCIA: I'm sorry.

7 MR. LESSER: No. I'm - - - I'm sorry if I'm - -
8 - if I'm mishearing you. If you read it the way the court
9 did, if you change the capitalized defined term - - -

10 JUDGE GARCIA: Forget the changing the language.
11 As a business matter - - -

12 MR. LESSER: Right.

13 JUDGE GARCIA: - - - if you read it that way,
14 does that give you an absurd business effect? Is it - - -
15 is it absurd to read that type of term into this type of
16 business arrangement? Forget the language.

17 MR. LESSER: Absolutely not. The - - - the - - -
18 the phraseology in paragraph 2, on its face, even with the
19 extraneous the and the misspelling of the A, only indicates
20 that that's the start date of - - -

21 JUDGE GARCIA: You missed the - - -

22 MR. LESSER: - - - the second amendment.

23 JUDGE GARCIA: - - - the language part of my
24 question, right? So would the reading they - - - I'm
25 sorry, one more time. Forget the language of this

1 contract. Would the reading that your opponent wants to
2 give this language result in an absurd business
3 relationship?

4 MR. LESSER: It would change the parties'
5 agreement, which is an absurd thing because the parties
6 expressly agreed that if they were going to change the
7 definition of term defined in the agreement, they were
8 going to say so specifically. And they didn't do that.

9 CHIEF JUDGE WILSON: Thank you, Counsel.

10 MR. LESSER: So to take that - - - to take the -
11 - - the way the majority has - - - has taken the provision
12 and the way that the plaintiff interprets it, yes, it's
13 absurd because - - -

14 CHIEF JUDGE WILSON: Good point. Your - - -

15 MR. LESSER: - - - you're creating a new
16 definition.

17 CHIEF JUDGE WILSON: Your red light is on,
18 Counsel. Thank you. You have your rebuttal.

19 MR. LESSER: Thank you so much, Your Honor.

20 MR. HEISENBERG: Good afternoon. May it please
21 the court. Christoph Heisenberg, for the respondent. In
22 this case, we certainly agree with the assertion that the
23 language is gobbledygook and - - -

24 JUDGE GARCIA: But Counsel, let's go to that for
25 a second. And maybe to get back to something that Chief

1 Judge was asking your opposing counsel. If we look at
2 this, which clearly seems to me garble in the language, to
3 me in ambiguity to be relevant legally has to be I think
4 this term means X, you think it means Y. The ambiguity
5 gives you room to say it's either X or it's Y. And I'm
6 having trouble understanding how this garble, ambiguous as
7 it may be in an abstract sense, gives you a possible
8 reading the way you want it.

9 MR. HEISENBERG: Sure. There are four reasons
10 for that. Fundamentally, I think one thing that has - - -
11 was not addressed is that the argument about what the
12 definition means and that that would support his case isn't
13 true. The length - - - the definition of the word term
14 that the parties adopted is simply a period of three years.
15 It does not include the first component of that sentence,
16 which says the original agreements' effective date, which
17 is where his defined term comes in.

18 JUDGE GARCIA: But is effective date a
19 capitalized term?

20 MR. HEISENBERG: It is, but that - - - that - - -
21 it's a compound sentence, compound predicate. That element
22 is not part of the definition in 8.2. When you look at the
23 definition in 8.2, using a standard rule of grammar called
24 the rule of the last antecedent or the nearest reasonable
25 reference that this court has used, it is the - - - the

1 item that comes right before the definition. And in 8.2
2 that is a period of three years only. The more remote part
3 of that sentence, which includes the effective date is not
4 part of that - - -

5 JUDGE GARCIA: So in the - - -

6 MR. HEISENBERG: - - - defined term.

7 JUDGE GARCIA: - - - original agreement, forget
8 the amendments for a second, effective date means what?

9 MR. HEISENBERG: The effective date, as
10 capitalized in the original agreement, is simply when that
11 original agreement becomes effective, not to - - -

12 JUDGE GARCIA: Which is a certain - - - date
13 certain?

14 MR. HEISENBERG: Date certain. However, the
15 defined term, the capital T, is simply a period of three
16 years. And it's conditioned or its impact is conditioned
17 on when something starts.

18 JUDGE SINGAS: Yeah. But now the rest of the
19 contract didn't say anything about that. Aren't you really
20 creating your own three-year term without explicitly saying
21 so?

22 MR. HEISENBERG: No. So again, I refer to the
23 rule of the last antecedent. When you look at what the
24 term is, it's three years. However, there's also several -
25 - -

1 JUDGE HALLIGAN: But doesn't that ignore that
2 effective date is itself a capitalized term?

3 MR. HEISENBERG: No. It excludes, from the
4 definition of term, any - - - any effective date. In other
5 words, the - - - the three-year period of term was left to
6 be contextual just like a presidential term is four years.
7 However, President Bush's four-year starts at a different
8 time than President - - -

9 JUDGE HALLIGAN: But doesn't the definition
10 itself - - - I'm looking at 8.1 from the referral
11 agreement. Doesn't the definition of term tether it - - -
12 maybe you're saying the - - - the last antecedent rule
13 helps you get out of this box, but I'm not sure I see how.
14 It tethers the term, not just to three years as you say,
15 but it commences on the effective date. So isn't it the
16 effective date, which is a defined capitalized term, which
17 I think is November 23rd of '17 plus three?

18 MR. HEISENBERG: I think Your Honor has put her
19 finger on it, which is that it is not tethered to the first
20 part of that sentence. The - - -

21 JUDGE HALLIGAN: Why not?

22 MR. HEISENBERG: The very - - - the rule of the
23 last antecedent speaks to this. It says when there are
24 several things in a sentence, the definition is only of the
25 thing that precedes it immediately.

1 JUDGE HALLIGAN: The three years has to be
2 anchored to something, right? It's three years from X.
3 And it seems to me that the most natural reading - - -
4 let's set to the side the gobbledygook and whether that - -
5 - that introduces sufficient ambiguity to help you. But
6 three years is not free floating, it's three years from X.
7 And so I don't see how last antecedent does the work you
8 think it can do here.

9 MR. HEISENBERG: Well, I think that's the very
10 point here, is it was intended to be a floating term
11 because it's used in several contexts. If you look at the
12 third sentence of this, it refers to a transaction having a
13 term and this agreement having a term, meaning that there
14 were going to be different starting points. And the third
15 sentence specifically was negotiated to address the
16 situation in which there is a transaction which has a
17 three-year term that exceeds the original agreement's
18 three-year term.

19 JUDGE HALLIGAN: So if we disagree with you that
20 the - - - that the last antecedent rule achieves that, then
21 do you lose? Do you have to prevail on that point?

22 MR. HEISENBERG: No. Because this third sentence
23 distinguishes between a transaction's term and - - -

24 JUDGE HALLIGAN: I guess I didn't phrase my
25 question very well. If we disagree with your parsing of

1 8.1, do you lose or are you also arguing that the
2 gobbledygook, to use a, you know, perhaps appropriate term,
3 independently allows you to proceed here?

4 MR. HEISENBERG: It - - - it does because there
5 is language in the amendment which says that it would have
6 effect as of that point, notwithstanding anything to the
7 contrary in the original agreement. That is standard
8 language that would override the - - -

9 JUDGE CANNATARO: And that effect is to change
10 the effective date of the underlying agreement?

11 MR. HEISENBERG: No. And this is why when we're
12 talking about a floating term, the original agreement would
13 still be in place. However, the transactions under it have
14 their own starting point.

15 JUDGE GARCIA: So why do you need the ambiguity -
16 - -?

17 MR. HEISENBERG: We - - - we don't believe we do.
18 We think it's rather straightforward. The - - -

19 JUDGE GARCIA: So your argument is really the way
20 that original agreement is written, this doesn't - - -
21 isn't subject to what are the specific terms and effective
22 date of the original agreement?

23 MR. HEISENBERG: Correct. That the - - - the
24 original agreement specifically contemplated that there
25 will be follow on transactions that would have their own

1 starting points. And that therefore the three years of
2 those transactions would exceed the original agreement - -
3 -

4 JUDGE CANNATARO: So - - -

5 MR. HEISENBERG: - - - starting from a - - -

6 JUDGE CANNATARO: So essentially - - - just - - -
7 I'm sorry, just so I understand, the qualified - - -
8 qualified transactions by virtue of, I think, the third
9 sentence of 8.1 have their own terms - - -

10 MR. HEISENBERG: Yes.

11 JUDGE CANNATARO: - - - essentially?

12 MR. HEISENBERG: And that was specifically
13 negotiated. Now that we've had discovery - - - the benefit
14 of discovery, what was referred to in the last - - - why
15 this was included was that each transaction would have its
16 own three-year window. And my client pointed out to their
17 client that because those would naturally come later on
18 once the clients were approved, those would extend past the
19 original agreement's term, and that in those circumstances,
20 the transaction's three-year term should supersede the
21 original agreement's.

22 JUDGE GARCIA: I take that argument. But let's
23 say that - - - and I - - - and I understand it now. But
24 let's say that we would disagree with that, and then we
25 say, okay, effective date means three years from that



1 original date, how would this ambiguity change that?

2 MR. HEISENBERG: The - - - I'm not sure I fully -
3 - -

4 JUDGE GARCIA: How can you fit your view - - -
5 all right. We're going to assume 8.1 means effective date
6 is three years from - - - you know, the term is three years
7 from now effective date - - -

8 MR. HEISENBERG: Right.

9 JUDGE GARCIA: - - - which was November 2017,
10 whatever it was. Now you want to read this amendment and
11 this ambiguity to change that effective date. And again,
12 putting aside your argument that you don't need to change
13 it. But if you did, how could you read this garble, this
14 ambiguity, to support the parties, particularly given the
15 italicized language right before, to support the argument
16 that - - - because even if you read capitalization in
17 there, you just read that as the original term unless
18 you've specifically changed it. So the fact that effect -
19 - - affect - - - may be effective and date may be
20 capitalized just gets you the original term. And if we're
21 not reading the original term the way you're reading it,
22 that's three years from November 2017.

23 MR. HEISENBERG: However, the - - - the
24 gobbledygook sentence continues on that specifically says,
25 notwithstanding anything to the contrary in the agreement,

1 so - - -

2 JUDGE GARCIA: All right. But what has - - -
3 they still have to change something that means
4 notwithstanding anything. You think that that means you
5 don't have to comply with, if we really want to change
6 italicized term, we have to make that clear, or you can
7 just use a new italicized term notwithstanding anything in
8 the original agreement?

9 MR. HEISENBERG: No. The - - - the - - -
10 however, given that the language here is the - - - the very
11 impact of it is to set a new starting point for when the
12 amendment comes in - - -

13 JUDGE GARCIA: You say that, but how am I reading
14 that in this language? How am I reading - - - if we assume
15 effective date term means not what you say but something
16 else, how can we read any - - - this language any way to
17 indicate that they've changed that - - -

18 MR. HEISENBERG: The - - -

19 JUDGE GARCIA: - - - they've agreed to change?

20 MR. HEISENBERG: The intent and the purpose of
21 this language, which comes into - - - which also the
22 evidentiary record comes in - - -

23 JUDGE GARCIA: Tied to what is actually on this
24 page?

25 MR. HEISENBERG: Yes. And the last bit that I

1 would add here is that the parties that drafted this and
2 know it best, the practical construction that they placed
3 on it is that this would extend the - - - the payment
4 obligations of this into 2021. There was an admission by
5 their CEO.

6 CHIEF JUDGE WILSON: We don't really have this in
7 our record though, right?

8 MR. HEISENBERG: Well, it is in the complaint
9 that their - - - that their president CEO in late 2020 told
10 my client that she would be paid upon this transaction in
11 2021.

12 JUDGE HALLIGAN: But are we - - - are we
13 considering here that sort of extrinsic evidence or just
14 what's on the four corners of these agreements?

15 MR. HEISENBERG: Well, so in - - - in the event -
16 - - to show whether - - -

17 JUDGE HALLIGAN: Because I would think it would
18 be the latter.

19 MR. HEISENBERG: - - - to show whether there is
20 an ambiguity, you can see what the parties intended and
21 look at extrinsic evidence for that purpose, I would
22 submit. So obviously, if you find that it is, you know,
23 completely clear and there's absolutely no ambiguity in
24 this agreement, then the ordinary - - -

25 JUDGE HALLIGAN: So - - -



1 MR. HEISENBERG: - - - rules will exclude that.

2 JUDGE HALLIGAN: - - - to return to - - - to
3 Judge Garcia's question if I - - - if I can, just so I'm
4 clear, are you arguing that the gobbledygook in the second
5 amendment, also in the first amendment has some effect and
6 introduces some ambiguity? Or are you relying only on
7 whatever extrinsic evidence you say is referenced in the
8 complaint? I understand you're also making an argument
9 about 8.1 and the effective date, but if - - - if we set
10 that to the side.

11 MR. HEISENBERG: Right. So to - - - I'm not sure
12 I fully understood what we're setting aside and not.

13 JUDGE HALLIGAN: Sorry. Let me - - - let me try
14 to be clear. If we were to disagree with you on your
15 reading of 8.1 and the last antecedent rule on the third
16 sentence, and we were to focus instead on the gobbledygook
17 and what impact the gobbledygook has on the obligations and
18 the term of the contract, are you arguing that it has some
19 independent effect aside from your 8.1 argument or no?

20 MR. HEISENBERG: Yes. We certainly agree with
21 the analysis of both Supreme Court and the Appellate
22 Division. That is that this is more than just a
23 typographical error. This was poorly written, crafted
24 language by their attorney - - -

25 JUDGE HALLIGAN: That is intended to do what?

1 MR. HEISENBERG: And it was intended to create a
2 new starting point because this was a brand-new
3 transaction. This was a part - - - the earlier agreement
4 related to the sale of services and goods. This was a
5 brand-new creation of duties with respect to investors.

6 JUDGE SINGAS: But for us to get there, don't we
7 have to add terms to this contract that aren't there?

8 MR. HEISENBERG: I don't really - - -

9 JUDGE SINGAS: I don't see how we get there. And
10 is it significant at all that that part of the contract
11 that we're calling gobbledygook was in the preamble to the
12 second amendment? It's not even in the portion that would
13 - - - that requires us to look if we're looking for
14 amendments to it in the referral agreement. Is there any
15 significance to that?

16 MR. HEISENBERG: I don't believe there is because
17 the - - - the purpose of having a new effective date is as
18 to when the obligations are created and from when the - - -
19 that they would extend three years into the future.

20 CHIEF JUDGE WILSON: And - - - and so the way
21 that I have understood the Appellate Division majority's
22 alternative, I'm going to call it, impossible
23 interpretation of this language, was that it might have
24 been meant to read that with the effective date hereof.
25 And that effective date might have been capitalized, and

1 that if - - - if people had written it the way they wanted
2 to and then that would have meant there's a new effective
3 date here - - - hereof, right?

4 MR. HEISENBERG: Yes.

5 CHIEF JUDGE WILSON: As of this date.

6 MR. HEISENBERG: And I think that is - - -

7 CHIEF JUDGE WILSON: That's how I understood
8 their alternative argument.

9 MR. HEISENBERG: And I think that that is exactly
10 how one would interpret the - - -

11 JUDGE RIVERA: Well, how - - -

12 CHIEF JUDGE WILSON: Or maybe not.

13 JUDGE CANNATARO: Counsel, I mean - - -

14 JUDGE RIVERA: Well, how is that - - - let me
15 just - - - let me get the point he was - - - I think I
16 understood he was making. How - - - how is - - - why
17 wouldn't that be nonsensical? And why wouldn't the - - -
18 the - - - perhaps the more logical read be that the problem
19 isn't all these words? It's not really gobbledygook. The
20 problem is the word the. It's one additional word that
21 throws everything else into confusion. And you would read
22 it as, agrees that with effect as of the date hereof. It
23 may not sound grammatically beautiful but you get the
24 point, which is different from saying - - - well, the whole
25 problem is you've got the with effect and that whole thing

1 sounds strange because then you really are changing effect
2 into something else. You're changing with effect into
3 something else.

4 MR. HEISENBERG: I - - - I think it's still
5 lacking a - - - a noun. And so it's not just excluding a -
6 - - the word the as an extraneous word. It really has to
7 be that this amendment - - - and it's lacking the word
8 amendment in there. But - - -

9 JUDGE RIVERA: I don't understand. At the end
10 you've got, shall be amended as. Each of the undersigned
11 agree - - - hereby agrees that - - - that with effect as of
12 the date hereof and notwithstanding anything to the
13 contrary in the agreement, the agreement shall be amended
14 as follows. And then you've got whatever they - - - they -
15 - -

16 MR. HEISENBERG: Yes.

17 JUDGE RIVERA: - - - claim to have agreed that
18 they are amending.

19 MR. HEISENBERG: And it's the the - - - the with
20 effect as of the date hereof needs to be - - - to be
21 tethered to a noun. What - - - what is the thing that has
22 effect as of the date thereof? And that is this amendment.

23 JUDGE GARCIA: But counsel - - - I'm sorry, may I
24 ask?

25 CHIEF JUDGE WILSON: Of course.

1 JUDGE GARCIA: What did this - - - just
2 generally, what did this amendment do?

3 MR. HEISENBERG: So the earlier - - - the initial
4 agreement addressed getting payment for referring
5 customers.

6 JUDGE GARCIA: Right.

7 MR. HEISENBERG: This amendment suddenly converts
8 a new set of obligations. That is, if the - - - someone
9 wants to invest in the company, you're also entitled to a
10 fee. So this created a brand-new scope of payment right.

11 JUDGE GARCIA: And isn't that kind of - - - it
12 seems to me what the purpose of with the effect of the date
13 hereof would be, they're not going to do this retroactively
14 for the term that's already expired, they're going to have
15 these new obligations prospectively for whatever's left.

16 MR. HEISENBERG: Not quite. Because the
17 introduction had already taken place. What happened was a
18 customer had not said - - - not only said I'm interested in
19 this as a product, but I'd like to invest in your company.

20 JUDGE CANNATARO: When you say introduction, do
21 you mean an introduction for an equity investment or an
22 introduction for one of the - - - whatever was contemplated
23 in the original agreement? I think you called them
24 referrals or something else.

25 MR. HEISENBERG: Right. It was - - - it was a



1 referral for buying the product. But during the course of
2 that referral, the - - - the - - - the customer - - -
3 potential customer said, this sounds like a great product.
4 Can I invest? So the introduction had already occurred.

5 JUDGE CANNATARO: Okay.

6 MR. HEISENBERG: This was to - - - to - - -

7 JUDGE CANNATARO: And my understanding is that
8 both amendments covered the compensation structure for the
9 equity investments, not for the referrals that were under
10 the original agreement.

11 MR. HEISENBERG: Correct. Those remained, which
12 is why - - - again, the point of why you had to keep the
13 original effective date in place for that - - - or the
14 original services. However, you're creating a new time
15 frame for these new obligations.

16 JUDGE CANNATARO: Okay. So then why would you
17 need to even, you know, to the extent that you're arguing
18 that paragraphs - - - you know, amendment 2, paragraph 2
19 with the - - - the gobbledygook paragraph changes the
20 effective date of the referral agreement, why would that
21 even be a necessity if there's a different set of rules in
22 place for equity investments versus product referrals?

23 MR. HEISENBERG: And - - - and we don't believe
24 that it was changing the - - - the - - - changing the
25 effective date for the original services. It's creating a

1 new starting date for these for the new term three-year
2 period - - -

3 JUDGE CANNATARO: But wouldn't that be an
4 argument in support of what Judge Rivera just said, which I
5 think is something, like, that with effect as of the date
6 hereof and notwithstanding anything to the contrary, et
7 cetera, et cetera? That would seem to be the most
8 reasonable reading if that's the way you view the
9 distinction between the referral agreement and these
10 amendments.

11 MR. HEISENBERG: And they're starting a new
12 starting date for a three-year period for these new service
13 is - - - was the intent.

14 JUDGE CANNATARO: Okay.

15 MR. HEISENBERG: And I believe it follows from
16 the words, which is that if term is simply a three-year
17 period, this is simply creating a new starting point for
18 these new services going forward. It does not change the
19 three-year period for the prior services. And that was - -
20 -

21 JUDGE RIVERA: If I may, I just want to make sure
22 I understand a response to - - - to some of the questions
23 with respect to the purpose of this amendment. So if I'm
24 understanding you correctly, you're saying it's, you know -
25 - - we're resetting the clock of the term period. But it

1 would apply to investments prior to the new three-year
2 clock or only prospective, which I think was Judge Garcia's
3 point in this?

4 MR. HEISENBERG: It changed the - - - the first
5 amendment - - -

6 JUDGE RIVERA: Yes.

7 MR. HEISENBERG: - - - was to capture the - - -
8 the prior introduction.

9 JUDGE RIVERA: Okay.

10 MR. HEISENBERG: When they breached that first
11 amendment by not paying - - -

12 JUDGE RIVERA: Yes.

13 MR. HEISENBERG: - - - the second novation
14 effectively wiped out the first amendment.

15 JUDGE RIVERA: Okay.

16 MR. HEISENBERG: This then creates a new starting
17 point for the new services going forward because it's not
18 just with respect to the one investor - - -

19 JUDGE RIVERA: That's what I mean, so then it is
20 - - - it is this equity interest moving forward as opposed
21 to where someone may have shown an interest in the past?

22 MR. HEISENBERG: Yes. It's a three-year period,
23 meaning - - -

24 JUDGE RIVERA: So again, I don't understand why
25 if you just take out the word the, he's not right.

1 MR. HEISENBERG: Oh. I mean, I - - - I certainly
2 think that that was the intent. What I was pointing out is
3 that the statement of saying that - - -

4 JUDGE RIVERA: Well, if that's the intent, why
5 are we talking about the might be effective instead of - -
6 -

7 MR. HEISENBERG: Well, because - - -

8 JUDGE RIVERA: - - - affective, and it's a
9 capital E? I don't - - - I'm not understanding that.

10 MR. HEISENBERG: Because the Appellate Division -
11 - -

12 JUDGE RIVERA: Yes.

13 MR. HEISENBERG: - - - took a different tact of
14 finding an ambiguity - - -

15 JUDGE RIVERA: Yes.

16 MR. HEISENBERG: - - - to our view, the rule of
17 the last antecedent says the term is simply a three-year
18 period, and - - -

19 JUDGE RIVERA: Yes.

20 MR. HEISENBERG: - - - for the original agreement
21 - - -

22 JUDGE RIVERA: Yes.

23 MR. HEISENBERG: - - - it starts from then.

24 JUDGE RIVERA: Okay.

25 MR. HEISENBERG: However, for this new set of

1 services - - -

2 JUDGE RIVERA: Yes.

3 MR. HEISENBERG: - - - there's a new starting
4 point, and you don't change the earlier - - -

5 JUDGE HALLIGAN: But are you - - - are you
6 disavowing the Appellate Division's approach or not?
7 That's what I - - - I am not clear I'm getting an answer
8 from.

9 MR. HEISENBERG: We think it was unnecessary
10 because we think the language - - -

11 JUDGE HALLIGAN: I appreciate that but - - - but
12 - - -

13 MR. HEISENBERG: - - - follows.

14 JUDGE HALLIGAN: Do you think that - - - are you-
15 - - are you adopting it? Are you asking us to adopt it?
16 Or are you relying solely on the last antecedent?

17 MR. HEISENBERG: We're not relying solely.
18 Obviously, we believe that the - - - the analysis by the
19 Appellate Division was also correct. However - - -

20 JUDGE HALLIGAN: Thank you.

21 MR. HEISENBERG: - - - we don't think you need to
22 get there.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. HEISENBERG: Thank you.

25 MR. LESSER: Thank you very much. Just picking

1 up on this concept that - - - that you heard that the
2 capital defined effective date is not part of the capital
3 defined term in section 8.1 of the agreement, nothing could
4 be further from what is written on the page. 8.1, page 195
5 of the record, starts with the word capital Term, capital
6 T-E-R-M underlined. It then says, "This agreement shall
7 commence on the effective date, initialized, capitalized
8 effective date, and shall remain in force for a period of
9 three years unless earlier terminated in accordance with
10 section 8.2, paren, quote, bold, and initial cap "Term."
11 It then says significantly, the term, singular, capital T-
12 E-R-M, the defined term tethered to the defined effective
13 date of November 23rd, 2017, may be extended. That's the
14 word used by the written agreement of both parties, end
15 quote.

16 What counsel is trying to say, to create even
17 more of a gobbledygook, is that we should ignore that
18 completely and that notwithstanding the admonition in
19 italicized in section 1 of the second amendment, that the
20 word extended is irrelevant. The singularity of the word
21 term is irrelevant, and somehow some way we can redefine
22 ordinary words, date and effect, to create a new
23 definition. That's just not - - - not there.

24 I understand that counsel is now not really
25 arguing what the majority argued. But what they did was

1 that they looked myopically just at this one paragraph with
2 the extraneous the and created a new definition, which
3 isn't there. Because as you pointed out, Your Honor, the
4 second paragraph of the second amendment says, The
5 agreement is amended as follows: And what follows is
6 paragraph 3. Paragraph 3 makes clear it is the replacement
7 Exhibit B. And the only reference to any defined term is
8 the word - - - singular word, capital T-E-R-M, meaning
9 additional equity transactions within the term.

10 This was not a standalone agreement as counsel
11 stated. This is the second amendment. The first amendment
12 had already been executed. This is the second amendment,
13 which deliberately spoke to additional - - - "additional"
14 investment transactions within the defined term, which is
15 defined clearly in the agreement as starting on the defined
16 effective date, November 23rd 2017, and lasting three
17 years. There was no amendment to that.

18 And for the court to implicitly create a new
19 capitalized defined term, notwithstanding the admonition in
20 the italices in paragraph 1 makes no sense. Because
21 paragraph 2, as Your Honor points out, can be read even
22 with the extraneous the as not being absurd. It just means
23 this is the day, we're taking out the old Exhibit B from
24 amendment 1 and putting in the new one. And any additional
25 equity investment within the capitalized defined term will

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result in an additional day.

CHIEF JUDGE WILSON: Thank you.

MR. LESSER: Thank you very much, Your Honors.

(Court is adjourned)



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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of MAK Technology Holdings v. Anyvision Interactive Technologies, No. 61 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

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