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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVIS BROADCASTING OF ATLANTA, L.L.C.,	)	
Appellant, Defendant, Counter-Plaintiff Below,	)	No. 450, 2015
v.	)	Appeal from Superior Court C.A. No. N13C-04-143 WCC (CCLD)
CHARLOTTE BROADCASTING, LLC, *et al.*,	)	
Appellees, Plaintiffs, Counter-Defendants Below.	)	

APPELLANT'S CORRECTED OPENING BRIEF

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Dated: October 12, 2015

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NATURE OF PROCEEDINGS

Davis Broadcasting of Atlanta, LLC ("Davis"), appeals from two summary judgment rulings dismissing counts involving interpretation of an Asset Exchange Agreement (the "Agreement") it executed with three subsidiaries of Radio One, Inc. (collectively, "Radio One"). Davis also appeals the trial verdict against it on the remaining count because the erroneous summary judgment rulings prejudiced Davis's presentation and the jury's full and fair consideration of that count.

Davis and Radio One entered the Agreement August 31, 2011. Although the contract had a 36 month term, Radio One terminated seven months later, on April 13, 2012. Davis alleged that Radio One breached the Agreement by: (1) failing to use commercially reasonable efforts to cause the transactions to be consummated, as the Agreement required; (2) violating the covenant of good faith and fair dealing by terminating on pretextual grounds; and (3) wrongfully terminating by invoking a termination clause that had expired on September 15, 2011. The Superior Court granted summary judgment to Radio One on Claims 1 and 3, holding that the "only reasonable interpretation" of the Agreement was that the "commercially reasonable efforts" clause never came into effect, and that the termination right extended past September 15, 2011. At the trial of Claim 2, Radio One made the erroneous summary judgment rulings on 1 and 3 the centerpiece of its defense, prejudicially precluding both full and fair presentation and jury consideration of Davis's case.

SUMMARY OF ARGUMENT

1. In holding that the Agreement's obligation to use commercially reasonable efforts never came into effect, the Superior Court improperly relied on a parenthetical clause that is grammatically limited to one specific circumstance, and misapplied it to the entire paragraph. Moreover, it interpreted the phrase "contemplated by this Agreement" in a way that yields an unreasonable reading of the Agreement taken as a whole. The Court did not apply all reasonable inferences in favor of the non-moving party and improperly removed this issue from the jury.

2. The Superior Court erroneously held that the "plain language" of the Agreement allowed for only one interpretation of when the right to terminate under the Engineering Clause expired, where the Agreement, as a whole, showed there were at least two reasonable interpretations. By ruling on the so-called "plain language," the Court failed to consider extrinsic evidence that showed the parties intended and understood the termination right to expire on September 15, 2011.

3. At the trial of the remaining claim, Radio One told the jury repeatedly that Radio One had "no obligation" to use commercially reasonable efforts and had the "right to terminate" the Agreement. Davis, which was required to show bad faith, could not offer rebuttal evidence or argument, and was thereby prejudiced in presenting its claim for breach of the covenant of good faith and fair dealing, while the jury weighed that issue on incomplete and misleading evidence and allegations.

STATEMENT OF FACTS

A. The Parties. Appellant Davis is a family-owned and run radio broadcast company based in Columbus, Georgia, which owns stations in Atlanta and Columbus. In particular, Davis owns WLKQ, a Class A station in the Atlanta radio market. Davis's president is Gregory A. Davis.

Radio One, Inc, the parent company of Appellees, is a publicly-traded radio and television company based in Silver Spring, Maryland. Radio One owns radio stations throughout the nation, and is the country's premier broadcaster of African-American-oriented media content. In the Atlanta market, Radio One owns WPZE, a Class A radio station. In the Charlotte market, Radio One owns stations WQNC and WPZS, both Class A stations at the time of the transaction. Radio One has since upgraded WQNC to Class C3. The CEO of Radio One is Alfred C. Liggins.

B. The Asset Exchange Agreement. In early 2011, Radio One and Davis began negotiating a deal that would move Davis's WLKQ out of Atlanta and allow Radio One's WPZE to upgrade at a new location in the Atlanta area. Mark Jorgenson served as broker for the deal. At the time, Radio One considered Charlotte to be an "unprofitable market." (A499:2-4) Liggins told Jorgenson that Radio One wanted to exit the Charlotte market. (A500:10-15) Under the deal, both of Radio One's Charlotte stations would be assigned to Davis. The parties spent

half a year negotiating the terms of a letter of intent and then the definitive Agreement.

Davis and Radio One entered into the Agreement on August 31, 2011. (A40-66) The Agreement provided for: (1) the relocation and upgrade of Radio One's Atlanta WPZE; (2) the relocation of Davis's Atlanta station WLKQ outside the Atlanta market; (3) the assignment of Radio One's two Charlotte stations, WQNC and WPZS, as well as the use of a Radio One translator in Atlanta, to Davis; and (4) payment of $2,000,000 from Radio One to Davis. The Agreement had a term of 36 months (A61 §15.1(e)), during which the parties would use their "commercially reasonable efforts to cause the transactions contemplated by this Agreement to be consummated." (A54 §8.4(a)) These efforts included "obtain[ing] . . . any third party . . . consents necessary in connection with this Agreement." *Id*.

The Agreement provided that each party "will file" a Facility Modification Application ("FMA" or "Mod Application") with the FCC for the proposed changes to their respective Atlanta stations. (A40 §1.1, A41 §1.2) By the last week of August, 2011, Davis had created and sent its FMA for Radio One's review, but Radio One had not yet decided on a location for WPZE to move. Radio One personnel convened a call August 25 to decide on the location. (A548:22-549:11, A634) Radio One CEO Liggins preferred a location called the Richland Tower over one called the Crown Pointe Building because it provided greater coverage of

African American population. (A502:5-11, A505:7-17, A590:2-10) When Radio One's outside engineer explained that identifying Richland would require relocation of another station (A589:13-17, A635), Radio One decided it would move WPZE to the Crown Pointe site as an "interim" or "step one" measure, before relocating it later to its "preferred" location at Richland in a "phase II." (A504:11-505:6, A590:11-22, A633, A636, A632) Radio One did not disclose to Davis its plans ultimately to move to the Richland Tower. Once the WPZE site had been chosen, Radio One could prepare its engineering exhibits.

The Agreement provided that FMAs would be prepared and filed on or before September 15, 2011, defined as the Filing Date. (A40 §1.1, A41 §1.2, A45 §2.6(a)) Because the engineering exhibits were still in preparation at the time of execution, Radio One requested inclusion of the "Engineering Clause" that would allow the parties to terminate the Agreement before "the date of filing the Mod Applications" if the engineering turned out to be "unacceptable." The Engineering Clause was appended to Section 15.1. It stated:

> The engineering exhibits detailing the Davis FMA and the RO Mableton FMA have not been prepared as of the date hereof. In addition to the termination rights set forth above, if between the date hereof and the date of filing the Mod Applications either Davis or the Radio One Entities deem that either of the engineering exhibits is not acceptable in its sole discretion, then it may terminate this Agreement upon written notice to the other.

(A61) (emphasis supplied)

The purpose of the "Engineering Clause" was to allow the parties a short period of time, before the filing date of September 15, to finalize their engineering studies and terminate if it seemed technically prohibitive to get the deal done. (A906 ¶2) The parties understood at the time of signing that the date of filing of the Mod Applications would be on or before September 15. (A340, A559:8-560:3) If that date passed without a valid termination, the parties were committed to moving forward under the terms and obligations of the Agreement. (A907)

C. Clark University Filing and Response. On September 8, 2011, while preparing the engineering exhibit for its FMA, Radio One discovered Clark Atlanta University radio station WCLK had filed an application to relocate to the Richland Tower (the "University filing"). The University filing created a spacing issue for WPZE, eliminating the area for a "fully-spaced reference point" for its proposed move to the Crown Pointe Building. A "reference point" is a hypothetical location for a radio station's transmitter, often not the same location as the actual transmitter. In many cases, a station can change its reference point by submitting a simple filing to the FCC, without requiring any change to its actual operations. (A710:16-711:5)

Although the University filing was discovered one week before "the date of filing the Mod Applications," Radio One did not terminate under the Engineering Clause, but instead charged its engineers to find solutions to the University filing.

(A637-661, A697-698) Within days, Radio One had identified at least three solutions to obtain consents from other stations that would allow the transaction to go forward (A654), and identified a fourth in December 2011. (A699) These were: (1) "switching places" with WCLK, i.e., obtaining the University's consent to move its station to Crown Pointe, which would allow Radio One to move its station to Richland Tower; (2) obtaining consent from radio station WZCH, owned by Educational Media Foundation ("EMF"), to file for a new reference point; (3) obtaining consent from radio station WPMA to file for a new reference point; and (4) obtaining consent from radio station WCKS to file for a new reference point. (A592:8-593:4, A665, A699, A712:3-713:12) Although options 2-4 only required "paper changes" by the stations involved, and likely would require less compensation than option 1, Radio One pursued just the first option with Clark for the next six months. Unlike options 2-4, which would only allow WPZE to locate at the Crown Pointe site as specified in the Agreement, the Clark option would allow WPZE to locate at its original "preferred" site, Richland Tower. (A653-655) Radio One did not disclose the second option (EMF) to Davis until after the Clark deal failed in March 2012, and never disclosed options 3 (WPMA) and 4 (WCKS) to Davis. (A908)

Meanwhile, on September 13, Davis, having completed its due diligence of the Charlotte stations as specified in Section 15.1(b), notified Radio One that it

would not be exercising its right to terminate under that section, and demanded that the FMAs be filed two days later on the Filing Date of September 15, as required under Section 2.6 of the Agreement. (A486) Radio One did not inform Davis of its discovery of the University filing until the next day, September 14, but said it had found a solution that could be implemented in the short term. (A599:2-5, A600:9-10) Radio One did not disclose to Davis the other solutions it had identified.

Radio One also informed Davis that due to the University filing, it would not file its Mod Application on September 15. With the date of filing the Mod Applications thus arriving and no party terminating the Agreement for an unacceptable engineering exhibit, the termination right in the Engineering Clause expired on September 15.

Radio One wasted no time trying to replace the expired termination right. On September 15, Radio One sent Davis a proposed side letter agreement that would delay the Filing Date. (A487-489) The side letter also included a provision that would restore the expired termination right:

> (iv) if … circumstances have not changed (including the parties not agreeing to a reasonably acceptable alternative with respect to the RO Mableton FMA) to permit grant of the RO Mableton FMA prior to ___, 2011, then either Davis or the Radio One Entities may terminate the Agreement upon written notice to the other.

(A488) Davis responded that the side letter was "unacceptable" and explicitly reserved Davis's rights for Radio One not having filed its FMA on September 15.

(A490) Radio One wrote to Davis stating that it would "take the lead in finding a solution" to the University filing and stating that it would let Davis know "if and in what ways Davis's participation could be helpful." (A491)

Radio One spent the next six months trying to obtain consent from Clark Atlanta University for the "switching places" solution, ultimately offering Clark a package of compensation worth in excess of $1.3 million, approximately $500,000 of which was cash and the rest in-kind compensation (such as assistance with university fund-raising, offering internships to Clark students, etc.). (A1026 ¶28, A690-691) Radio One's offer of $1.3 million to Clark was "commercially reasonable." (A562:8-12) During the six months it spent negotiating with Clark, Radio One made no effort to determine whether the other stations it had identified for a new reference point would be willing to do so.

Although the Agreement specified (A41 §1.4) that each party was responsible for the costs associated with its own FMA, and the Davis FMA had no engineering issues, Davis offered to contribute $100,000 to Radio One's package of incentives to Clark. (A662) Clark ultimately rejected the deal in early March 2012. (A570:21-571:9)

After the Clark rejection, Radio One failed to pursue the other options diligently and never offered more than $35,000 to obtain the necessary consent for a new reference point. The other three options would allow Radio One to upgrade

at Crown Pointe (as per the Agreement), but would deny Radio One a subsequent move to its "preferred" tower location at Richland, as the Clark application would still block such a move. (A583:18-584:15)

At the same time, Radio One was also changing its business strategy with regard to the Charlotte market and the surrender of its stations there to Davis. (A627) In February 2012, Radio One learned that WNOW-FM, a powerful Charlotte station it had previously explored purchasing, was being offered at a significantly reduced price. (A731:5-24, A732:6-733:3, A619-620) Radio One was to pursue negotiations with WNOW-FM over the succeeding months and execute a letter of intent for the purchase of WNOW in May 2012. (A611-617)

In mid-March 2012, Radio One informed Davis of the existence of the second option involving consent to a change of reference point by WZCH, the station owned by EMF. After spending six months negotiating with Clark, Radio One spent less than two weeks negotiating with EMF. Radio One offered EMF $25,000-$35,000 to change its reference point. (A574-575) On March 28, EMF responded with "some initial thoughts," including a proposal that Radio One pay EMF a percentage of the increase in the value of WPZE due to the upgrade. (A664) Radio One valued that proposal at approximately $500,000. (A1028 ¶34) Although this equaled the cash component of the "commercially reasonable" offer it had made to Clark, and was considerably less in overall compensation, Radio

One rejected the EMF offer and made no further attempt to identify a cash amount that EMF would accept. (A718:3-720:2) By March 31, Radio One had abandoned negotiations with EMF. (A1028-1029 ¶34)

D. Termination. On April 13, 2012, without having made any efforts to pursue its third (WPMA) and fourth (WCKS) options, and without disclosing those options to Davis, Radio One's Vice President Linda Vilardo sent Davis a letter noticing termination of the Agreement. (A423-425) The termination letter cited the University filing as the reason the engineering exhibits for the Mableton FMA were "not acceptable" and stated that the upgrade was "not feasible," even though Radio One had known about the University filing for seven months.

On the same day Radio One terminated the Agreement, informing Davis that the FMA was "not feasible," Ms. Vilardo asked engineer Greg Strickland whether there was any way to upgrade WPZE at Crown Pointe. Strickland responded with three options, including obtaining consent from WPMA for a new reference point. (A665) That same day, Strickland's analysis was reviewed and confirmed by Radio One's outside engineer, Jeff Reynolds, who had prepared the technical exhibits to the termination letter that purported to show the upgrade was "not feasible from a technical perspective." (A666-672) After termination, Radio One continued (outside Davis's knowledge) to pursue obtaining consent from WPMA, WZCH (EMF) and WCKS. (A721:17-727:9, A602-610) Radio One still needed

Davis to relocate its station, WLKQ, in order to upgrade WPZE. (A517:7-17, A581:13-582:13) Radio One expected that if it could obtain one of the necessary third-party consents, it could then go back to Davis and execute a new deal to allow for the upgrade of WPZE. (A582:1-13)

Meanwhile, Gregory Davis informed Radio One of his position that Radio One should continue to perform under the Agreement, and attempted to salvage the deal. (A626 ¶9) Two meetings took place between Gregory Davis and Alfred Liggins in April and May 2012, at which Radio One personnel stated that the original deal was "off the table" and that Radio One "might not want to get out of the Charlotte market after all." (A626-627 ¶9)

Radio One made an offer to Davis to purchase WLKQ in a stand-alone transaction for $7 million, without the transfer of the two Charlotte stations. (A623, A538:1-7) Davis rejected the offer as an attempt to renegotiate the deal on less favorable terms that did not adequately compensate Davis. (A623)

E. Litigation. On June 1, 2012, Davis's attorneys informed Radio One that the termination was invalid (A813-814) and in July sent a default letter. (A815-821) In August 2012, Radio One filed suit in the Court of Chancery seeking declaratory judgment that it had not breached the Agreement. Davis moved to dismiss the case for lack of jurisdiction in Chancery and the case was refiled in Superior Court, where it was placed on the Complex Civil Litigation Docket for a

jury trial. Davis filed an answer and counterclaims alleging: (1) breach of contract for failure to use commercially reasonable efforts to obtain the necessary consents; (2) breach of the covenant of good faith and fair dealing for terminating the Agreement on the pretextual ground of unacceptable engineering; and (3) wrongful termination for purporting to terminate under a clause that had expired on September 15, 2011.

Radio One moved for summary judgment on all counts. On June 10, 2015, the Superior Court granted summary judgment to Radio One on Counterclaims (1) "commercially reasonable efforts" and (3) expiration of termination right. (Ex. A) The Superior Court denied summary judgment on Counterclaim 2, breach of the covenant. Trial was held before a jury on Counterclaim 2 commencing July 13, 2015, resulting in a verdict for Radio One on that issue. (Ex. B)

ARGUMENT

I. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT ON WHETHER RADIO ONE BREACHED THE COMMERCIALLY REASONABLE EFFORTS CLAUSE.

A. Question Presented

Whether the Superior Court erred in granting summary judgment to Radio One on the issue whether Radio One breached the Agreement for failure to use commercially reasonable efforts? This issue was preserved below. (A862-903)

B. Scope of Review

This Court reviews *de novo* questions of contract interpretation. *Eagle Industries, Inc. v. DeVilbiss Healthcare, Inc.*, 702 A.2d 1228, 1231 (Del. 1997) (holding questions of contract interpretation reviewed *de novo*).

C. Merits of the Argument

In Section 8.4(a) of the Agreement, the parties agreed to a general obligation to use "commercially reasonable efforts" to effectuate the terms of the Agreement:

> The parties shall use commercially reasonable efforts to cause the transactions contemplated by this Agreement to be consummated in accordance with the terms hereof, and, without limiting the generality of the foregoing, use their commercially reasonable efforts to obtain (i) all necessary FCC Consents, (ii) any third party or other governmental consents necessary in connection with this Agreement and the transactions contemplated hereby, including for the assignment of any RO Station Contract (which shall not require any payment to any third party) and (iii) execution of a reasonable estoppel certificate by the lessor under a RO Leased Real Property lease, but no such consents or estoppel certificates are conditions to Closing except for the Required Consents.

The Superior Court erroneously read this obligation entirely out of the transaction, holding that the general obligation to use commercially reasonable efforts was limited to actions taken after the FMAs were filed and, because they were never filed, no such obligation ever existed. The Court wrongly held this was the "only reasonable interpretation" of Section 8.4(a) (A990), citing two reasons: (i) the parenthetical "no-payments" clause, and (ii) the phrase "contemplated by this Agreement." Neither reason supports that interpretation.

1. The "No-Payments" Clause is Limited to Assignment of Contracts.

Section 8.4(a) is clear about the parties' obligations to use commercially reasonable efforts – there is no language suggesting a prior condition that the FMAs be filed before the obligations take effect. Nonetheless, after analyzing Section 1.3, the Superior Court stated:

> Similarly, Section 8.4(a) explicitly provides that commercially reasonable efforts "shall not require any payment to any third party." Therefore, Section 8.4(a) cannot be read to place on [Radio One] an obligation to use commercially reasonable efforts to negotiate with the University or any other entity because doing so would require plaintiffs to provide payment to a third party.

(A992-993) Thus, the Court's decision that the "commercially reasonable efforts" obligation did not apply was based on the language that plaintiffs were "not required [to make] any payment to a third party." But that is wrong for several reasons. First, the "no-payments" clause, which appears in parentheses, at the end of an isolated clause set off by a comma, is grammatically limited to one specific

circumstance, payments made in connection with the assignment of a Radio One Station Contract.[1] On its face, it does not apply to the paragraph as a whole, or the general obligation to use commercially reasonable efforts. The "no-payments" clause is further cabined from the general obligation by the phrase "without limiting the generality of the foregoing," which separates the first part of the sentence, containing the general obligation, from the second part, containing the no-payments clause. Although the Court elsewhere cited the maxim that "a court will not ignore a contract's language and choice of punctuation" (A982), the Court plainly departed from that maxim here.

The general rule of construction is that "ordinarily, qualifying words or phrases, where no contrary intention appears, usually relate to the last antecedent." *Rag American Coal Co. v. AEI Resources, Inc.*, 1999 WL 1261376, at *4 (Del. Ch.), *quoting*, *Patton v. Simone*, 1992 WL 183064, at *5 (Del. Super.). Although this "last antecedent rule" is not inflexible, the Superior Court in this case ignored the principle and cited to no support that the general rule did not apply. *See*, *e.g.*, *E.I. DuPont de Nemour & Co. v. Green*, 411 A.2d 953, 956 (Del. 1980) (holding last antecedent rule may be limited "[w]hen the sense of the entire [agreement] requires that a qualifying word apply to several preceding or succeeding sections.")

[1] The "RO Station Contracts" are defined at Section 2.1(d) as contracts relating to the two Charlotte stations to be assigned to Davis under the Agreement. (A42)

Here, the Superior Court made no finding that Section 8.4(a) called for any such exception.

Indeed, there is a simple and clear business rationale for limited application of the no-payments clause to the "RO Station Contracts." The Agreement provided that contracts associated with the two Charlotte stations would be assigned to Davis in connection with assignment of the stations. To avoid the situation where a counterparty to a station contract may want to re-trade the existing station deal to obtain additional payments, the no-payments clause carves out a limited exception to the general "commercially reasonable efforts" obligation. Meanwhile, the very next Section, 8.4(b), compensates for the exception by providing that if the Station Contracts cannot be assigned, the parties will arrange for Davis to perform (or pay) the contract and receive the benefits. (A55 §8.4(b)) Even if – contrary to its grammatical construction – the no-payments clause were ambiguous as to whether it applied to the paragraph as a whole, such ambiguity should have been resolved in favor of Davis on summary judgment and the issue presented to a jury.

Second, the Superior Court's reading of the no-payments clause is directly contrary to the position that Radio One took in its own Complaint, where it stated that "Plaintiffs further seek a declaration that they used commercially reasonable efforts, as required by the Agreement, to cause the transactions contemplated by the Agreement to be consummated. ..." (A1020) (emphasis supplied). The

Complaint devotes 15 paragraphs (A1025-1029 ¶¶19-34) to describing how Radio One used commercially reasonable efforts prior to filing of the FMAs to remove the issue posed by the University filing. Likewise, the prayer for relief seeks a declaration that "in compliance with Articles 1.3 and 8.4(a) of the Agreement, Plaintiffs used commercially reasonable efforts to cause the transactions contemplated by the Agreement to be consummated." (A1034 ¶63) (emphasis supplied).[2] Courts may consider a party's prior positions as relevant to contract interpretation. *See Eagle Industries*, 702 A.2d at 1231 (noting that although plaintiff alleged contract was unambiguous at summary judgment, complaint stated provision was susceptible to two meanings).

Similarly, Radio One did not cite the no-payments clause as a defense to Davis's Counterclaims. Indeed, Radio One did not even advance this argument – the position taken by the Superior Court as the "only reasonable interpretation" – in its Opening Brief for Summary Judgment. The argument that the no-payments clause meant there was no obligation to use commercially reasonable efforts was first advanced in Radio One's Reply Brief. (A928)

Third, even if the Superior Court were correct that the no-payment clause applied to the entire paragraph 8.4(a), that cannot support the Court's ruling that

[2] Likewise, in its Complaint and First Amended Complaint in the Court of Chancery, Radio One stated that it "used commercially reasonable efforts, as required by the Agreement." (A1081, A1099) The pleadings in the Court of Chancery were verified and constitute sworn evidence. (A1095-1097)

there was no obligation to negotiate for such consents "because doing so would require plaintiffs to provide payments to a third party." In fact, radio station owners can and do obtain third party consents resolving allotment issues for in-kind concessions without exchanging cash payments. Radio One's own offer of $1.3 million in compensation to Clark Atlanta University comprised both cash and non-cash elements, with the non-cash elements predominating.[3]

Fourth, the Superior Court's interpretation of the no-payment clause makes no commercial sense. The Court's interpretation would call for a prohibition on cash payments for any required third-party consent, but the Agreement contemplates that reasonable cash payments may be required. For instance, the Agreement at Section 9.7 requires Davis to build out its proposed transmitter site in Suches, Georgia, a site that was owned by a third party. Under the Court's interpretation, Davis could scuttle the deal by refusing to pay a reasonable rent payment for use of the site. There is no evidence the parties intended such a result.

The Court's ruling wrongly "added a limitation not found in the plain language of the Agreement" and removed entirely from the jury's consideration a legitimate issue upon which Davis had adduced clear and significant evidentiary support, whether Radio One failed to use commercially reasonable efforts.

[3] The Complaint states: "The value of the proposed concessions and commitments to Clark Atlanta exceeded $1.3 million, approximately $500,000 of which would be a cash payment." (A1026-1027 ¶28)

2. The Superior Court Applied an Unreasonable Interpretation to the Phrase "Transactions Contemplated by this Agreement."

The second ground offered by the Superior Court for its ruling on the commercially reasonable efforts obligation is equally unavailing.

> Moreover, a plain reading of section 8.4(a) indicates commercially reasonable efforts did not apply to the University filing or other similar obstacles. The critical phrase of the first clause in Section 8.4(a) is: "the transactions *contemplated* by this Agreement." The parties do not dispute that the University filing, and the other options available, were not anticipated, or contemplated, at the time of drafting or signing the Agreement. The Court finds that Plaintiffs did not need to use commercially reasonable efforts before filing the FMAs with the FCC because there is no language in the Agreement that triggered that obligation.

(A993) (emphasis in original).

The last sentence of the Court's reasoning does not follow logically from what comes before. First, the "transactions contemplated by this Agreement" included the preparation and filing of the FMAs. Doing so was at the core of the Agreement. The University filing was not a "transaction[] contemplated by this Agreement," but rather a potential obstacle to such transaction. The "other options available" that Radio One had identified all involved obtaining "third party . . . consents necessary in connection with this Agreement." (A54 §8.4(a)) The plain language of Section 8.4(a) quite reasonably obligated the parties to use reasonable efforts to obtain such consents to remove an obstacle to the contemplated transactions.

Obtaining such consents is common in radio transactions. (A907 ¶5) While the parties may not have anticipated the specific filing by Clark Atlanta University, they were certainly aware that intervening filings could impinge on the transactions contemplated by the Agreement, and that parties could remove such obstacles by obtaining third-party consents. Thus, for instance, prior to signing the Agreement, Radio One had tried to obtain the consent of radio station WCKS to return an FCC permit that Radio One believed blocked the proposed upgrade of WPZE, authorizing up to $250,000 to obtain such consent.[4] (A625 ¶4, A539)

Likewise, Radio One's Chief Executive was aware of the possibility of intervening applications by other parties.[5] Both parties were represented by seasoned FCC counsel. Radio One's counsel, Mark Lipp, was the former head of the FCC Allocations Branch. Davis Broadcasting's counsel, Howard A. Topel, testified that it is common for radio stations to negotiate with third parties (often other stations) to remove technical impediments that arise from their applications, and that the 36 month term of the Agreement was intended not only to obtain FCC approval but also to allow time to negotiate such concessions if necessary. (A907)

[4] Radio One later learned the WCKS permit did not in fact create an obstacle.

[5] CEO Alfred Liggins: "[T]he table of allotments changes every day." (A542:15-16); "So stations move around all the time, and spaces get opened up or closed off. . ." (A497:21-498:1); "[Y]ou wait around too long, somebody else does something that shuts down your opportunity." (A542:2-3)

Second, it is certainly not the case that the Court's reading of the language of Section 8.4(a) is the "only reasonable interpretation." To the contrary, the section speaks of a general obligation to use commercially reasonable efforts, without reference to any limitations. The second part of the sentence specifically states that it is not intended to limit "the generality of the foregoing" obligation to use commercially reasonable efforts. In fact, the limitation imposed by the Court makes little commercial sense; if an issue were to arise before the filing of the FMAs that could be resolved through commercially reasonable efforts, it is hard to imagine the parties intending that the obligation should not apply.

Third, the Court's interpretation of Section 8.4(a) leads to a contract without obligations, an unnatural and unreasonable result. Once the University filing was discovered and Radio One chose not to terminate under the Engineering Clause prior to September 15, under the Court's reading, the parties proceeded under a contract that could technically remain in effect for 36 months, but that would impose no concrete obligations on either party. Until the FMAs were filed, either party could – or could not, at its discretion – use commercially reasonable efforts to find a solution that would allow the transactions contemplated by the Agreement to be consummated. As applied to the present case, during the seven months Radio One negotiated with the University and EMF, it had no obligation to do so, nor did Davis have an obligation to take reasonable steps to implement its requirements for

closing, such as preparing its own FMA, meeting its lender's reasonable payment terms for providing lender consent, or building out its own transmitter site. The Agreement existed and was in effect, but no one had an obligation to act reasonably to effectuate it. "The true test [of contract interpretation] is what a reasonable person in the position of the parties would have thought it meant." *Eagle Industries*, 702 A.2d at 1233. It is unreasonable that the parties intended an interpretation that would lead to this result.

The Superior Court elsewhere cited the principle that a contract should not be read to add a limitation not found in the plain language (A982), yet it did just that with Section 8.4(a), adding two exceptions to the commercially reasonable efforts clause: (i) for payments to third parties that would facilitate filing the FMAs, and (ii) for any actions at all prior to the filing of the FMAs.

Davis accumulated considerable evidence that while Radio One spent months pursuing its preferred option with Clark University, it utterly failed to use commercially reasonable efforts to secure consents – which were likely easier to obtain – from other stations it had identified but which would not allow it to go to its preferred location, failed to notify Davis of those options, and failed to seek Davis's help in securing such consents. The Court's erroneous ruling prevented Davis from presenting this issue to the jury.

II. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT ON WHETHER RIGHT TO TERMINATE EXPIRED.

A. Question Presented

Whether the Superior Court erred in granting summary judgment on the issue whether the termination provision of the Engineering Clause had expired prior to April 13, 2012? This issue was preserved below. (A862-903)

B. Scope of Review

This Court reviews *de novo* questions of contract interpretation. *Eagle Industries*, 702 A.2d at 1231.

C. Merits of the Argument

The Engineering Clause was "added at the last minute" (A981 n.51) and provided a right to terminate "between the date hereof [*i.e.*, August 31, 2011] and the date of filing the Mod Applications." (A61) The Agreement required that "the date of filing the Mod Applications" be on or before September 15, 2011. (A40 §1.1, A41 §1.2, A45 §2.6(a)) The parties understood the same. (A340, A559:8-560:3) Nonetheless, the Superior Court held as a matter of law that the right to terminate did not expire because the FMAs were never filed. To hold as it did on summary judgment, the Court had to find that there was only one reasonable interpretation. But the plain language of the Agreement, taken as a whole, allows for more than one reasonable interpretation, and the extrinsic evidence (which the

Superior Court did not consider) demonstrates that the parties at the time of signing understood the right to terminate to expire on September 15.

In interpreting a contract, "the role of the court is to effectuate the parties' intent." *AT&T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008). The court "must construe the agreement as a whole, giving effect to all provisions therein." *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012). "The meaning inferred from a particular provision cannot control the meaning of the entire agreement if such an inference conflicts with the agreement's overall scheme or plan." *Id*. Where "the words of the contract can only be appreciated through context and circumstances, a court must not disregard extrinsic evidence relating to the parties' intent." *Smartmatic Int'l. Corp. v. Dominion Voting Systems, Inc.*, 2013 WL 1821608, at *4 (Del. Ch.)

Where the term or phrase in dispute is "fairly susceptible of different interpretations or may have two or more different meanings," it is deemed to be ambiguous, and the court "must look beyond the language of the contract to ascertain the parties' intentions." *GMG Capital Investments*, 36 A.3d at 780. To succeed on a motion for summary judgment, a party "must establish that its construction of the [ ] agreement is the *only* reasonable interpretation." *United Rentals, Inc. v. Ram Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007) (emphasis in original).

1. **The Plain Language Supports Davis's Interpretation.**

The termination right in the Engineering Clause does not expire upon "filing the Mod Applications," but rather upon "the date of filing the Mod Applications," and the Agreement provides that such "date" will occur on or before September 15. (A41 §1.1, A42 §1.2; A45 §2.6(a)). Sections 1.1 and 1.2 state that the parties "will file" the FMA's (*i.e.*, the Mod Applications) on the Filing Date, and Section 2.6(a) defines the Filing Date as occurring on or before September 15, 2011. Thus, by "the date of filing the Mod Applications" the parties can only have meant a date on or before September 15, 2011. The Agreement does not provide for any other date on which the Mod Applications could be filed. Nor does the Agreement contain any "impossibility" or *force majeure* clause that might allow for filing at a later date. The court "must give effect to the intent of the parties as revealed by the language of the [agreement] and the circumstances surrounding its creation and adoption." *Airgas, Inc. v. Air Products and Chemicals, Inc.*, 8 A.3d 1182, 1190 (Del. 2010). When considering "the intent of the parties," there is no other date the parties could have intended under the plain language of the contract.

In *GMG Capital*, this Court noted that where an agreement states that a party "shall" make certain payments, such mandatory language "makes it even more difficult" to read the contract language in a way that would override the obligation to make such payments. 36 A.3d at 782. Likewise, the unequivocal obligation in

Section 1.2 that Radio One "will file" the FMA on the Filing Date (*i.e.*, on or before September 15, 2011, per Section 2.6), makes it "even more difficult" to conclude that the "only reasonable interpretation" of the Engineering Clause is one that would eviscerate that obligation.

The Superior Court's focus on the distinction between a defined term (the "Filing Date") and the term "the date of filing" is misplaced, because in this case the two terms mean the same thing. Different terms in a contract, even defined terms, do not necessarily imply different meanings. In *Airgas*, this Court found that the trial court erred when it "heavily relied on the different wording [of two defined terms] . . . to arrive at its conclusion that different wording equates to different meaning" and "failed to give proper effect" to extrinsic evidence establishing that the terms "mean the same thing." 8 A.3d at 1194.

Furthermore, the Engineering Clause by its plain language requires that the exercise of the termination right occur "then" – *i.e.*, at the time the party deems the exhibit unacceptable, not months later. As anticipated at signing, the parties prepared the engineering exhibits within the first two weeks, and it was during that two-week period that Radio One discovered the University filing, the basis on which it deemed the engineering exhibits "unacceptable" when it terminated seven months later. To allow the Engineering Clause to be invoked as a ground for termination months after the supposed defect is discovered is to transform the

Engineering Clause to a termination-at-will clause, a result for which there is no evidence of the parties' intent. Here, although the parties argued conflicting interpretations of "then" (A883-884, A917), the Superior Court improperly gave no meaning to the term, rendering it surplusage.[6] Yet, use of "then" gives the Engineering Clause on its face the temporal element that the Court erroneously deemed missing, *i.e.*, termination had to occur contemporaneously with the finding of the engineering issue, which makes sense. At the least, the two conflicting constructions of "then" create ambiguity that requires resort to extrinsic evidence.

Because the Engineering Clause is at least "fairly and reasonably susceptible to more than one interpretation," the Superior Court should have looked to extrinsic evidence to determine the parties' intent at the time of signing.

2. <u>The Extrinsic Evidence Supports Davis's Interpretation</u>.

The record contains compelling evidence that at the time they executed the Agreement, the parties intended that the termination right under the Engineering Clause would be exercised, if at all, on or before September 15. First, the parties explicitly confirmed that meaning on the very date of execution. On August 31, 2011, Radio One counsel stated, in relevant part:

> By my count, these are the relevant dates under the Radio One/Davis Agreement: . . . <u>All FCC filings would be made</u> 2 business days after

[6] The Court "will not adopt an interpretation of a contract that would render one or more of its terms surplusage." *Berdel, Inc. v. Berman Real Estate Management, Inc.*, 1997 WL 793088, at *3. (Del. Ch.).

> the earlier of the end of the due diligence period or waiver of the Davis termination right, so no later than September 15.
> Please confirm you see it the same.

(A340) (emphasis supplied) Howard Topel, counsel for Davis, confirmed that understanding by reply email less than 10 minutes later. *Id*. Likewise, Radio One Vice President Linda Vilardo testified that the parties "most likely" understood at signing that all filings would be made on the Filing Date and that the parties never agreed to change the Filing Date. (A559:8-560:3, A561:3-8)

Second, the "side letter" agreement that Radio One proposed on September 15, 2011 that would have added a replacement for the expired termination right (and which Davis rejected as "unacceptable") demonstrates conclusively that Radio One understood the termination right did not extend past September 15. Clause (iv) of the side letter agreement (*supra*, at 8) proposed a new right of the parties to terminate the Agreement "if . . . circumstances have not changed . . . to permit grant of the RO Mableton FMA" by a date certain in the future. (A488) But if Radio One understood the Engineering Clause to allow for an open-ended termination right up to the time the Mod Applications were actually filed anytime within three years – as it now argues and the Superior Court held – Clause (iv) of the side agreement, creating the new termination right, would have been unnecessary and superfluous, pure surplusage providing less than what Radio One

already had.[7] "[W]hen a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight." *Radio Corp. of America v. Philadelphia Storage Battery*, 6 A.2d 329, 340 (Del. 1939).

The extrinsic evidence therefore favors Davis's interpretation of the disputed phrase. At the least, the "Agreement is susceptible to two equally reasonable, but conflicting interpretations" which "gives rise to an unresolved issue of material fact that renders summary judgment inappropriate." *GMG Capital*, 36 A.3d at 784.

The Court's reading of the Engineering Clause is also unreasonable because it leads to perverse results. First, it would enable a party to eviscerate all of the efforts made to effectuate the Agreement on a moment's notice. For example, had Radio One's six month negotiation with Clark borne fruit and Clark were poised to sign a contract that would allow Radio One to go to its preferred Richland Tower site, it is an unreasonable interpretation that would have allowed Davis to pull the rug out from under that contract by terminating the Agreement on engineering grounds the day before a Radio One-Clark signing. The more reasonable reading is

[7] Nor was Clause (iv) designed to eliminate a pre-existing termination right under the Engineering Clause until some future date, because the Clause does not do that. Clause (iv) adds rights; it does not eliminate them. By its terms, the side letter agreement would not alter existing provisions of the Agreement. ("Except as set forth herein, the Agreement has not been modified or amended." (A488)) Thus, the Engineering Clause of Section 15.1 – and its termination provision – would have remained in full effect even if the side letter agreement had been executed.

that the Agreement created a structure that gave the parties a finite time to decide whether they wanted to proceed based on the engineering exhibits, or terminate and move on to other business, followed by a three-year term to make the Agreement work if they chose to proceed.

Second, the Court's interpretation allows a party to extend the expiration date of a termination right beyond the original intentions of the parties by failing to perform a required obligation under the Agreement. Under the Court's reading, by not filing its FMA on or before the deadline set by the Agreement, Radio One effectively extended its right to terminate by an indefinite length of time. It is unreasonable to conclude this was the intention of the parties at signing.[8]

Finally, the Court states that the "parties agreed to delay filing the FMAs until they could determine whether the obstacle created by the University's filing could be removed." (A975) In fact, whether the parties "agreed to delay filing the FMAs" is a factual issue very much in dispute, not an uncontested fact as the Court would have it, and the Court's citation to Counterclaim ¶31 (A975 n.17) does not support the statement. (*See* A1050 ¶31) Although Davis urged Radio One to file as

[8] This reading also violates Delaware's "Prevention Doctrine," which holds that a party to a contract who wrongfully causes the non-performance of an obligation (here, filing of FMAs) cannot avail itself of the non-performance it caused and loses any right held to terminate the contract. *Mobile Communications Corp. of America v. MCI Communications Corp.*, 1985 WL 11574 (Del. Ch.); *W&G Seaford Assoc., L.P. v. Eastern Shore Markets, Inc*., 714 F. Supp. 1336, 1341 (D. Del. 1989).

soon as possible after being alerted to the University filing, Davis rejected the proposed side letter agreement to delay the Filing Date and explicitly reserved its rights regarding the failure to file (A490). Moreover, the Agreement itself requires that any amendment, waiver of compliance, or consent be expressly made in writing and signed by the party against whom it is enforced.[9] (A63 §16.5)

But even if the Court could properly have concluded, as a matter of law, that Davis agreed to a delay of the obligation to file the FMAs by September 15, as defined in Sections 1.1, 1.2 and 2.6, there is absolutely no evidence that Davis also agreed to extend the originally-understood expiration date of the right to terminate under the Engineering Clause of Section 15.1 by a similar time period. Because the original understanding of "the date of filing the Mod Applications" was on or before September 15, to impute a modification of that understanding requires evidence of a specific intent to do so, and there is none. The correspondence concerning the filing is silent as to the Engineering Clause, and neither party mentioned it until Radio One cited it as grounds for termination months later.

For the foregoing reasons, the Superior Court erred in granting summary judgment on whether the right to terminate in the Engineering Clause had expired before Radio One invoked it, and that issue should have been presented to a jury.

[9] Davis has never stated a claim of breach against Radio One for failure to file its FMA on September 15. The issue is only relevant to the extent Radio One alleges that Davis's "consent" to a later filing date also extended the right to terminate.

III. The Superior Court's Erroneous Rulings on Summary Judgment Fatally Prejudiced Davis in Presenting its Case on the Remaining Issue at Trial.

A. Question Presented

Whether the Superior Court's erroneous summary judgment rulings prejudiced Davis at trial on the claim for breach of the covenant of good faith, requiring a new trial on that issue? This issue was preserved below. (A862-903)

B. Scope of Review

Review of the summary judgment rulings is *de novo*. *Eagle Industries*, 702 A.2d at 1231. Where error of law is "prejudicial" to a party at trial, a new trial must be awarded. *DeAngelis v. Harrison*, 628 A.2d 77, 81 (Del. 1993); *Beck v. Haley*, 239 A.2d 699, 702 (Del. 1968); *Wagner v. Shanks*, 194 A.2d 701, 708 (Del. 1963); *Robelen Piano Company v. Di Fonzo*, 169 A.2d 240, 248 (Del. 1961).

C. Merits of the Argument

The Superior Court's erroneous summary judgment rulings prejudiced Davis at trial by allowing Radio One to present unrebutted argument and testimony to the jury that it had no obligation to negotiate or use commercially reasonable efforts to seek solutions to the University filing, and that it "had the right to terminate" the Agreement. The Court instructed the jury on Davis's remaining claim:

> Davis Broadcasting contends that Radio One acted in bad faith by failing to explore fully available options it was aware of before terminating the agreement, by failing to disclose such options to Davis Broadcasting and for allegedly terminating on the basis of unacceptable engineering.

(A1015) (emphasis supplied) Thus, the jury was instructed that Davis had to demonstrate Radio One acted in bad faith by, *inter alia*, failing to explore available options and not disclosing them to Davis. Yet, at the same time, the Court's summary judgment rulings allowed Radio One to tell the jury it had no obligation to explore such options. Radio One made the erroneous summary judgment rulings the centerpiece of its opening and closing arguments to the jury on bad faith:

> Radio One's good faith is shown by its significant efforts it undertook to complete the transaction with no obligation to do so. If Radio One was not acting in good faith, it would not have undertaken these extraordinary efforts and put additional money on the table.

(A998 at 60:23-61:5) (emphasis supplied).

> Davis Broadcasting has the burden of proof in this matter, which they acknowledge. And to meet that burden, they must prove that Radio One acted in bad faith. You've heard the witnesses in this matter. Radio One is not acting in bad faith. To the contrary, Radio One has done more than is required under the parties' agreement. . . It is also undisputed that neither party was required to negotiate with Clark Atlanta or any other third party to complete the upgrade. Despite these undisputed facts, Radio One negotiated in earnest with third parties in an effort to complete this deal. That is the definition of good faith. That's not bad faith.

(A1011-1012) (emphasis supplied).[10]

In addition, Radio One's executives incorporated the erroneous summary judgment rulings into their direct testimony:

[10] Radio One's counsel referred five more times in opening and closing to Radio One's having no obligation to make efforts to resolve the University filing. (A996 at 42:9-11, A997 at 51:14-15, A997 at 53:19-20, A1013, A1014)

> And even though we didn't have an obligation to negotiate with anybody and to go any further, we could have terminated at the time that Clark Atlanta fell apart, we decided let's give it a try.
>
> * * *
>
> And we had negotiated with a number of parties even though there wasn't an obligation to do so and we weren't able to get a deal done.
>
> * * *
>
> By a clear path I mean that we couldn't accomplish the transaction as originally contemplated without going to some third party, which we had no obligation to do to get their cooperation.

Linda Vilardo (A1003 at 3:8-9, A1005 at 30:15-16, A1006 at 61:19-20)

> And so I felt that I had exhausted all of our options and the engineering could not be accomplished, still today can't be accomplished and we have the right to terminate. We had no obligation to do what we did, and that's what we did.

Alfred Liggins (A1008 at 154:20-21)

In all, Radio One made at least sixteen references to the jury to its having no obligation to resolve the University filing. (*See also*, A1000:20-23, A1001:5-7, A1004 at 16:9-10, A1005 at 30:15-16, A1006 at 61:19-20) Bad faith involves a subjective standard, requiring the jury to make a determination about the state of mind of the Radio One principals. The Court's erroneous summary judgment rulings allowed Radio One to present the actions of its principals as purely voluntary and beneficent acts, not compelled by any provision of the Agreement, which prejudiced Davis's ability to present its case of bad faith termination and compromised the jury's full and fair consideration of the issue.

The prejudice entitles Davis to a new trial on its Counterclaim 2.