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Case Number 450,2015

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 REPLY BRIEF

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Radio One's defense of the Superior Court's reasoning fails to demonstrate that, under the summary judgment standard, it was the "only reasonable interpretation" of the Agreement. Radio One also relies on *post hoc* material (such as the later trial testimony of its own officers, without acknowledging any of the rebuttal) that was not even before the Superior Court, to try to bolster that opinion.

I. The Superior Court Erred in Granting Summary Judgment on the Obligation to Use Commercially Reasonable Efforts.

A. The No-Payments Clause. Radio One makes several claims in favor of the Superior Court's position that the "no-payments" parenthetical in § 8.4(a)(ii) of the Agreement means the parties were not required to use commercially reasonable efforts to negotiate to try to cure obstacles to filing the FCC applications. None establishes that this is the "only reasonable interpretation."

First, Radio One argues that "any third party . . . consent" in § 8.4(a)(ii) means only station contract and site sublease consents shown on Schedules 2.1(c) & (d). Answering Brief ("AB") at 7-8. However, not a shred of evidence in the language of the Agreement indicates that the phrase "any third party . . . consent" is so limited. This seeks to add language not in the Agreement. Radio One counters Davis's description of the reasonable business purpose for limiting the parenthetical to station contracts by arguing that a similar rationale could apply to all third party consents. (AB at 21, n.7) This claim does nothing more than

demonstrate the existence of a factual dispute that should be resolved by a jury. Even so, Radio One's argument is faulty because experience has shown that vendor attempts to re-trade pre-negotiated station contracts have posed a special problem in station transfers, compared to contracts to be negotiated initially for the transfer. To address this well-recognized and specific challenge, clauses like the narrowly confined no-payments exception in § 8.4(a) have been developed. The fact that only station contracts merit a special clause, § 8.4(b), to deal with refusals to assign, supports the interpretation that the parenthetical is so limited.

Second, Radio One selectively cites deposition testimony of Davis's expert, Lee Shubert, purportedly to support its interpretation of the no-payments clause (AB at 9, n.3), but misleadingly fails to cite testimony in the same deposition in which Mr. Shubert explicitly rejected Radio One's interpretation.[1]

Third, Radio One invokes the principle that the specific reference governs the general to make a convoluted argument that the definition of "FCC Consents" in § 1.3 compels the interpretation of § 8.4 that parties are not required to try to remove obstacles to filing the FCC applications. (AB at 19) But the principle has no application here. Section 1.3 (which appears in Article 1, dealing with the Mod

[1] "Q. Do you have a view of whether the parenthetical that we just quoted, relates only to the phrase immediately before it or relates to the entire Section 8.4? . . .
A. It appears the parenthetical modifies the preceding phrase which is '. . . including for the assignment of any RO station contract. . .' So it seems limited to that particular element." (AR24 at 131:3-19) The parties' respective experts thus presented a direct factual dispute on this issue.

Applications) is not inconsistent with § 8.4(a) (which appears in the general "Joint Covenants" Article). Nothing in the definition of "FCC Consent" in § 1.3 compels the reading that using "commercially reasonable efforts to obtain FCC Consents" excludes using such efforts to file the Mod Applications that are the first step in obtaining such consent. Further, Radio One's argument ignores the general obligation in the first sentence of § 8.4(a) to use commercially reasonable efforts, the generality of which obligation is expressly not limited by Subsection (i) of 8.4(a) containing the phrase "FCC Consents." It also ignores Subsection (ii), which specifically requires efforts to obtain necessary third-party consents.

Fourth, Radio One asserts that the use of the word "including" after the comma in § 8.4(a)(ii) means that "assignment of any RO Station Contract" is but one example of "any third party . . . consent" and therefore the no-payments parenthetical applies to the whole subsection. (AB at 20) But nothing about the use of "including" compels that interpretation. Indeed, the use of "including" and the explicit reference to "any RO Station Contract" strongly indicates the opposite interpretation, namely that the parenthetical applies only to that specific category of consents. Otherwise, the phrase "including for the assignment of any RO Station Contracts" would have been omitted altogether.

Fifth, Radio One notes (as did Davis) that the "last antecedent rule" is not monolithic. (AB at 21) But, like the Superior Court, Radio One utterly fails to

show how "the sense of the entire [document]" is contrary to interpreting the no–payments clause to apply to the immediately preceding section. *NBC Universal v. Paxson Communications Corp.*, 2005 WL 1038997 at *6 (Del. Ch.) (Ex. A). In the absence of a clearly controlling exception to the last antecedent rule – and neither the Superior Court nor Radio One has identified one – the Superior Court's reading cannot be "only reasonable interpretation" of the Agreement.

Sixth, Radio One suggests in a footnote that Davis's reference to the stark inconsistency between Radio One's current position and the factual and legal allegations in its complaint is an "effort to divert attention" because it was raised "for the first time in its Opening Brief." (AB at 22, n.8) The simpler explanation is that the "no-payments" argument was "raised for the first time" in Radio One's Reply Brief at summary judgment (A298), and there was thus no prior occasion for Davis to point out that this argument is inconsistent with (i) the statement in Radio One's complaint (and its verified complaint in the Court of Chancery) that §§ 1.3 and 8.4 "required" the use of commercially reasonable efforts, and (ii) Radio One's allegations that it complied with that requirement by using commercially reasonable efforts to negotiate with third parties to remove the obstacle represented by the University filing. (A1020; A1025-29 at ¶¶ 19-34; A1081; A1099) This is relevant because the Superior Court, which had the pleadings before it, ignored the statements in Radio One's complaint in making its ruling, although prior

statements in pleadings are relevant to the court's determination. *Eagle Industries, Inc. v. De Vilbiss Health Care, Inc.*, 702 A.2d 1228, 1231 (Del. 1997). To affirm the summary judgment ruling, this Court must find, after *de novo* review, that the interpretation offered by the Superior Court is the "only reasonable interpretation." To so hold means that Radio One used an "unreasonable" interpretation of the Agreement in its complaints. The fact that Radio One took a conflicting position in its prior pleadings shows that there is a jury question on this issue.

Seventh, Radio One suggests (but does not elaborate) a kind of "changed circumstances" argument by asserting that the parties entered into the Agreement "based on th[e] understanding" of a "clear path" for the proposed FMAs. (AB at 6) But that is not what the Agreement says. There is absolutely no support in the Agreement that the filings of the FMAs are conditioned on a "clear path." Indeed, the option (but not requirement) to terminate under the Engineering Clause shows the parties contemplated proceeding even if an obstacle to a "clear path" emerged.

Finally, Radio One fails to address that even if there was no obligation to make "payments" to third parties, a party would still not be absolved of the obligation of "negotiating" with a third party, since non-cash bartering to remove obstacles is common, as demonstrated by Radio One's record in this case. (AB at 13 ($800,000 of "in-kind commitments" to Clark); AR1-5 (offer of AM station to EMF); AR6-7 (offer of future reference point); AR8 (offer of translator station)).

B. "Transactions Contemplated by This Agreement." The central argument offered by the Superior Court and Radio One for the secondary rationale behind the Court's summary judgment ruling is that, because the University filing was not a "transaction[] contemplated by this Agreement," there was no obligation to use any efforts to try to remove that obstacle. That conclusion is a non-sequitur. The "transactions contemplated by this Agreement" included, at a minimum: (i) filing the Mod Applications (contemplated at §§ 1.1, 1.2); (ii) diligently prosecuting the Mod Applications at the FCC (§ 1.3); and (iii) completing the steps necessary to move the two Atlanta stations, to assign the Charlotte stations to Davis, and to pay Davis $2 million (§§ 2.1, 9.7, 11.3, 11.7, 13.1, 13.2). The Superior Court's opinion simply reads (i) out of the Agreement. Nothing in the language of § 8.4(a) or the structure of the Agreement as a whole compels the interpretation that the necessary initial step of filing the Mod Applications was not a "transaction[] contemplated by this Agreement." And therefore, no basis exists for ruling on summary judgment that the "only reasonable interpretation" is that there was no obligation to use commercially reasonable efforts to resolve an obstacle to such "transaction."

Radio One argues that "[t]here is no provision stating how the parties were to prepare their applications or requiring the parties to remove unforeseen obstacles to such applications." (AB at 23) That is incorrect. Under § 8.4(a) the parties are

required to do so using commercially reasonable efforts. Two broadcast companies advised by FCC counsel certainly know how to file and prosecute an FCC application. Moreover, as the record amply demonstrates, the parties also know what steps to take to obtain consents that would remove obstacles presented by conflicting applications. The absence of specific language describing how to prepare applications or remove obstacles to filing the applications does not compel an interpretation that the general "commercially reasonable efforts" covenant necessarily included a carve-out for such actions.

Davis argued in its Opening Brief that exempting pre-filing actions from the general "commercially reasonable efforts" obligation leads to an unreasonable interpretation whereby the parties would proceed for months or longer making extensive efforts on nothing more than a handshake, with no obligation whatsoever to try to make the necessary FCC filings that are at the core of the transaction. Radio One's only response is that every Delaware contract contains an implicit "obligation to perform." (AB at 25) But, to perform what? If the Superior Court's (and Radio One's) interpretation of the Agreement is correct, the parties spent seven months trying to get Clark to remove an obstacle with no binding obligation to do so.[2] It is not reasonable that this is what the parties intended.

[2] What's more, under the Superior Court's ruling on the Engineering Clause (see 10-17, *infra*), during this seven month period either party could terminate the contract "at its discretion" at any moment because the engineering was

The test for interpreting contract language is whether "a reasonable person in the position of either party have no expectations inconsistent with" the proposed interpretation. *Eagle Industries*, 702 A.2d at 1232. Certainly if this were a reasonable interpretation (much less the "only reasonable interpretation"), Radio One would have stated the position that it had no obligation to negotiate with third parties in its complaint for declaratory judgment. The fact that it did not – but instead defended the "commercially reasonable efforts" expended in trying to remove the University filing as an obstacle – demonstrates that this is not the only reasonable interpretation of the Agreement.

Radio One states that the only support for the idea that it is a common occurrence to try to remove obstacles to the FCC filings is the "self-serving affidavit" of Howard Topel. (AB at 24, n. 9) But the record is replete with evidence of Radio One identifying solutions to obstacles, and (selectively) trying to implement them. (A592:8-593:4; A665; A699; A712:3-713:12) Moreover, the sworn affidavit of Mr. Topel, a primary negotiator of the Agreement, constitutes evidence no less probative than the trial testimony of Radio One's Mr. Liggins, cited at pages 8, 10, 13, 14, 15, 16, and 17 of the Answering Brief. Such conflicting testimony should preclude summary judgment on this issue.

"unacceptable." This would indeed be a "Zombie contract" with no obligations and terminable at will. This latter-day interpretation is both unreasonable and inconsistent with the parties' commercial behavior at the time.

In its Statement of Facts, Radio One selectively lists the "transactions contemplated by th[e] Agreement" to include Radio One's transfer of the Charlotte stations, Davis's moving of its Atlanta station to Suches, and Davis's assuming certain obligations of the Charlotte Stations, pointedly omitting the most significant "transaction," Radio One's filing of the FMA to move and upgrade its Atlanta station (contemplated at § 1.2). After providing this incomplete list, the Brief states definitively, "These are the transactions contemplated by the Agreement." (AB at 8) This hides the ball. The Agreement does not remotely support omitting the Radio One FMA from the list.

In its Opening Brief, Davis argued that the Superior Court's interpretation of the no-payments clause makes no business sense, because, taken literally, it would excuse Davis from building out its proposed transmitter site. Radio One responds by arguing that § 9.7 (which describes the Davis build-out as a condition of closing) trumps the no-payments clause and would require Davis to pay third parties to overcome obstacles to the build-out. (AB at 22) By the same logic, however, §§ 9.3 and 11.3, which also describe conditions of closing, require that the Radio One FMA be approved by the FCC, thus overriding the no-payments clause and requiring Radio One to pay third parties to overcome obstacles to preparing and filing its FMA.

II. The Superior Court Erred in Granting Summary Judgment on the Right to Terminate Under the Engineering Clause.

The Superior Court's ruling on summary judgment also prevented Davis from presenting to the jury its Counterclaim III that the termination right under the Engineering Clause had expired on September 15, 2011, and that the April 13, 2012 termination was improper. The Superior Court did not address the extrinsic evidence adduced by Davis for its interpretation, relying solely on the rationale that the contract's language ("the date of filing the Mod Applications") was susceptible to only one reasonable interpretation.

In its Answering Brief, Radio One does not dispute that 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). Radio One focuses instead on the superficial distinction between the defined term "Filing Date" (undisputed to be September 15) and the "date of filing" of the Mod Applications. But at the time of signing the Agreement, the two phrases can only have had the same meaning. This is apparent from the plain language of the Agreement, as the Agreement states unequivocally and without exception that the parties "will file" the Mod Applications "[o]n the Filing Date." §§ 1.1 & 1.2. There is no other "date of filing" that could have been intended when the Engineering Clause was inserted into the Agreement shortly before signing.

Radio One confuses the issue by maintaining, in effect, that because filing the Mod Applications on the Filing Date allegedly became impossible, the "date of filing" in the Engineering Clause shifted meaning to encompass a seven-month period (and potentially much longer) during which a termination right that indisputably was understood at signing to expire on or before September 15 extended for an indeterminate period. The Superior Court picked up on this argument and held that it was the "only reasonable interpretation" of the Engineering Clause, thereby ignoring the extrinsic evidence adduced by Davis that demonstrates the interpretation offered by Radio One was not the one it accepted at the time and was a latter-day justification for terminating after it decided it no longer wanted to be bound by the Agreement's 36-month term.

In support of the Superior Court's ruling, Radio One argues that the parties could have used a specific term of days in the Engineering Clause as was done in § 15.1(b), which allowed Davis "eight (8) business days" from the August 31, 2011 signing to terminate for two unrelated reasons. The suggestion is that the Davis termination right was pegged to a specific date while the Engineering Clause was not. But this is not true. In fact, the "date of filing" was defined to be a very-specific "two (2) business days" after Davis chose not to exercise its termination. § 2.6(a). The reason the Engineering Clause could not have identified a specific number of days after which the termination right expired is because the "date of

filing" existed on a sliding scale (with an outside date of September 15) that depended on the specific date (within the allotted eight business days) Davis chose to notice its intention not to exercise its rights. If, for instance, the Engineering Clause had specified that the right to terminate expired on "September 15" and Davis had chosen to notice its intentions on the fourth business day (September 6), thus triggering the date of filing on September 8, this would have left a period of seven days after the Mod Applications were filed during which either party could have terminated on grounds that the engineering exhibits were "unacceptable." This is nonsensical and was clearly not the intention. The failure to set a specific numeric expiration date in the Engineering Clause was not an indication that the date could extend indefinitely.

Radio One resorts to the dictionary to support its proposition that the word "then" in the Engineering Clause does not imply a temporal connection between the first (if the engineering is deemed unacceptable) and second (you may terminate) components. But the dictionary does not provide the definitive interpretation Radio One asserts. In fact, the primary definitions of the word "then" are "1. At that time" and "2. Next in time, space or order; immediately afterward." *The American Heritage Dictionary of the English Language*, (5th Ed. 2011) at 1804 & xxiv. Only after these primary (and other) definitions does the meaning Radio One favors appear, in fifth position ("5. In that case; accordingly").

Id. The primary definitions are consistent with Davis's reading, and the presence of the word "then" in the Engineering Clause raises at least a jury question as to its intended meaning. Indeed, Radio One's proposed interpretation would render the word surplusage, as the Clause would mean the same without it.

Radio One incorrectly suggests Davis is trying to "read the Agreement both ways." (AB at 29, n.12) To clarify, Davis's position is that the obligation to use commercially reasonable efforts to prepare and file the Mod Applications (including seeking solutions to filing obstacles) exists from the moment the Agreement is signed, but is subject to a termination right in the first two weeks if a party determines, in good faith, that the engineering hurdles are unacceptable. If the party decides to move forward, the obligation to use commercially reasonable efforts continues to apply for the length of the 36-month term of the Agreement. This is reasonable and corresponds to the parties' behavior in September 2011.[3]

Radio One says Davis's interpretation is unreasonable because a two-week window for termination on engineering grounds does not leave time to find and implement a solution. (AB at 30) This argument reverses the plain meaning of the

[3] Davis also argued at summary judgment, in the alternative, that even if the Engineering Clause did not expire September 15, the obligation to use commercially reasonable efforts still applied during the seven month period between the signing and the exercise of that termination right. (A893-894) This responded to Radio One's extraordinary attempt to bootstrap the Engineering Clause into a "commercially reasonable efforts" argument by contending that because Radio One had a right to terminate, it was not subject to the obligation to use commercially reasonable efforts, even before it terminated. (A927)

Agreement. The two-week window is designed to allow a party to determine whether any engineering issues exist that are significant enough to terminate the deal. If not, the parties are mutually bound for 36 months to try to find and implement a solution. By contrast, it is Radio One's interpretation that fails to allow sufficient time for a solution. Under Radio One's construction, Davis could have terminated on September 16, 2011, truly leaving the two-week inadequate time to cure. Moreover, by allowing one party unilaterally to terminate months after the engineering issue is discovered, and while potential solutions are being worked out, Radio One's interpretation offers no protection against months or years of wasted efforts. In fact, that is what happened here, where Radio One terminated after its preferred solution (but not others it failed to disclose) did not succeed.[4]

Radio One also leverages an incorrect factual finding by the Superior Court into an argument for extending the Engineering Clause by stating that the parties "agreed to delay" the Mod Application filings past the Filing Date, then arguing "[t]here is no reason such agreement would not apply" to the Engineering Clause.

[4] Radio One's own argument illustrates the point. Radio One states that the undisclosed solution involving WCKS was not viable because it could only be done after Clark had built its facility at Richland Tower, which did not occur until April 2013. (AB at 16, n.5) But April 2013 was still 17 months within the 36-month term of the Agreement, and the WCKS solution could have been effected consistently with the Agreement. As Radio One's CEO testified, "the table of allotments changes every day." (A542:15-16) A purpose of the 36-month term was to allow time for solutions not immediately apparent to come available.

(AB at 32) As noted in the Opening Brief, the Court's sole citation to Counterclaim 31 to support this factual assertion is an error. (OB at 31) Counterclaim 31 says no such thing. (A1050) Far from "agreeing" to delay the Filing Date, Davis explicitly "reserv[ed] its rights" on Radio One's failure to file timely. (A490) Further, the conclusion is wrong. Even if Davis had implicitly agreed to extend the Filing Date for purposes of §§ 1.1 and 1.2, there is excellent reason not to extend also the Engineering Clause, since doing so would allow one party to lay waste to the other's efforts to implement the Agreement. Diametrically opposed to Radio One's argument, "there is no reason" to assume agreement to a similar extension of the Engineering Clause (§ 15.1) absent clear evidence of specific intent, of which there is none.

With regard to the extrinsic evidence, which the Superior Court did not consider, Radio One utterly fails to address how the new termination right it proposed on September 15, 2011 in the "side letter" agreement (A487-89) is consistent with a belief that the termination right under the Engineering Clause remained in effect after that date. The best it can offer is to state that the "side letter" was intended to address two other points, which it did in sections (iii) and (iv)(A). But the fact remains that the side letter: (1) also proposed creating a new termination right in Section (iv)(B) which Radio One does not try to, and cannot, reconcile with alleged continued existence of a broader (and inconsistent)

termination right already in the Agreement, and (2) is a reflection of the intentions and understandings of the parties as of September 15, 2011, and unequivocally indicates that neither side believed the Engineering Clause termination right extended beyond that date. Moreover, the side letter is evidence supporting Davis's contention that the citation to the Engineering Clause in Radio One's April 2012 termination letter was a latter-day justification for a decision made on pretextual grounds other than engineering, evidence that Davis was prevented from presenting to the jury.

Radio One also makes much of the fact that Davis's contemporaneous communications with Radio One did not mention that the Engineering Clause had expired. (AB at 12, 30, 31, 32 n.15) The simple reason is that there was no call to do so. Radio One had not even hinted that it intended to exercise such a right, and offered the side letter which was inconsistent with such an interpretation. Indeed, the absence of any other communication on whether the Engineering Clause remained in effect supports Davis's interpretation. The Filing Date having passed without the Mod Applications being filed, Radio One offered the side letter to extend the Filing Date and create a new termination right, while Davis reserved all its rights regarding the failure to file. (A486-491) With both sides protecting their legal positions, the lack of any communication on the Engineering Clause speaks volumes in support of Davis's position that the right had expired.

III. Davis Is Entitled to a New Trial on Counterclaim II.

Radio One argues that Davis failed to preserve its rights to seek a new trial on Counterclaim II by failing to raise its objection at trial. But Davis had already preserved the underlying claims at summary judgment, and it was pointless and unnecessary to move the court for a new trial on the ground that the pre-trial legal rulings were erroneous. Moreover, it would have prejudiced Davis to do so. The trial judge had made clear that any direct testimony by Davis's witnesses to the effect that Radio One had an obligation to use commercially reasonable efforts and had no right to terminate would result in an immediate mistrial.[5] To have moved for a new trial on the ground that such rulings were erroneous would have served no purpose and antagonized the trial judge.

Radio One cites Davis counsel's suggestion that he be allowed to refer to the "rulings in the case" as evidence that Davis opened the door to Radio One's reliance on such argument. That is not accurate. Counsel's suggestion (made after Radio One had already opened on the rulings) rather sought to minimize the prejudicial effect of the summary judgment rulings and the likelihood of a mistrial

[5] "THE COURT: I'm concerned he's going to say that from a legal point of view, I believe it was an improper letter, which I've already ruled he can't say, and he's told me that he disagrees with me. That's his problem, not mine, and I'm not going to let him say it. . . . I mean – what I'm not going to let him do – and if he does, then we're going to be starting this over again – is that he believes that there was a legal – it was not a legal basis to terminate the agreement. If he goes down that road, I'm telling you right now, we're starting over." (AR32-33 at 176:1-17)

and was made in response to the Court having raised the issue *sua sponte* with Davis's witness.[6]

Radio One suggests that one line from Davis's closing argument ("This case isn't about obligation; it's about motivation.") effectively undid all the damage done by Radio One's repeated reliance on the erroneous summary judgment rulings to support its defense against bad faith. In fact, Davis's closing statement was an unsuccessful attempt to undo the damage done by the erroneous rulings.

These issues (obligation to use commercially reasonable efforts and expiration of termination right) were erroneously removed from Davis's use at trial by the Superior Court's summary judgment ruling. Meanwhile, Radio One was allowed to use the same rulings to influence the jury on the bad faith/pretext claim, while Davis was not allowed to rebut such use, on pain of mistrial. The rulings had a prejudicial effect on Davis's presentation at trial of its claim for bad faith/pretext.

[6] "THE COURT: . . . If you were asked is there any obligation under the contract for Radio One to resolve disputes that they may have had with third parties to be able to move forward with the contract, what would you say? THE WITNESS: Respectfully, Your Honor, I would say yes, but I know you ruled otherwise.
THE COURT: Well, that's not going to be the good answer at trial." (AR36 at 172:6-14)

IV. The Answering Brief Contains Misstatements of Fact.

The Answering Brief contains numerous misstatements of fact that Davis addresses below. Radio One states that it kept Davis "informed every step of the way" during its negotiating with Clark (AB at 13), but a central contention is that Radio One intentionally, and contrary to its obligation to use commercially reasonable efforts, failed to inform Davis of numerous other options (simpler to achieve than Clark) to resolve the University filing, and failed to pursue those options. Radio One states that WPMA "simply was not willing to negotiate" on compensation for a change in its reference point, but the record shows WPMA specifically asked Radio One to "make us your best offer," which Radio One refused to do. (A604) Radio One asserts that Davis "refused to assist" in its efforts to negotiate a solution with Clark (AB at 13), but the record shows Davis offered to contribute $100,000 to the Clark deal even though it had no obligation to do so. (AB at 13), (Agreement § 1.4). Radio One states that its CEO "learned" of the WPMA option after the April 19, 2012 meeting with Greg Davis (AB at 16), but the record shows that Radio One learned of the WPMA option as early as September 9, 2011 (AR9-11), and that Ms. Vilardo had specifically asked about it on March 12 and April 13, 2012, prior to terminating the Agreement. (A663, A665) Radio One states (accurately) that the broker Mark Jorgenson believed Radio One had a legal right to terminate the Agreement in April 2012 (AB at 15-

16), but fails to add that Jorgenson also believed Radio One's termination was based on "ulterior motives," including its revived business prospects in Charlotte. (AR29 at 89:8-17; AR31 at 155:5-19) Moreover, Mr. Jorgenson's layman's opinion that Radio One had a legal right to terminate even if it had "100 ulterior motives to not do the deal" (AR29 at 89:18 to AR30 at 90:4) was rejected by the Superior Court in its summary judgment ruling on Counterclaim II, which Radio One has not challenged. Radio One states it is "undisputed" that the University filing "blocked" the Mod Applications from being filed, but that is a factual issue very much in dispute as Davis's FCC expert Lee Shubert testified at deposition that Radio One could have filed an application with the FCC on the Filing Date on the ground that the 0.08 km short-spacing created by the University filing was *de minimis*, or that an FCC waiver of the short-spacing was appropriate in light of the considerable Rural Radio coverage benefits of the transaction. (AR14-22). Finally, Radio One in its opening footnote suggests that Davis has suffered no harm by the termination of the Agreement (AB at 4, n. 1), but Davis has been denied the two Charlotte stations, use of the Atlanta translator station, and $2 million in cash.