

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

USA CABLE,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 17983
)	
WORLD WRESTLING FEDERATION)		
ENTERTAINMENT, INC., VIACOM)		
INC., and CBS CORPORATION,)		
)	
Defendants.)	

MEMORANDUM OPINION

Date Submitted: June 22, 2000
Date Decided: June 27, 2000

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CHANDLER, Chancellor

This lawsuit involves a dispute over the meaning of rights of first refusal clauses in contracts between plaintiff USA Cable (“USA”) and defendant World Wrestling Federation Entertainment, Inc. (“WWFE”). As more fully described below, these clauses, which have been in every contract between the parties since 1983, grant to USA the right to match the elements of a third-party offer that are “with respect to” certain wrestling based programs televised on USA’s cable network and the subject of certain licensing agreements between USA and WWFE. Upon termination of the contract between WWFE and USA, WWFE may negotiate and receive offers from third parties for the wrestling programs. WWFE cannot accept such a third-party offer, however, without first providing USA with the opportunity to accept the terms of the third-party offer, pursuant to USA’s first refusal right.

When WWFE informed USA that it intended to accept a third-party offer from defendants Viacom, Inc. and CBS Corporation, USA responded by trying to match Viacom’s offer. Simultaneously, USA brought this action to enjoin consummation of the Viacom-WWFE agreement and to enforce specifically the “matched” contract that USA contends it has entered into with WWFE.

USA commenced this action on April. 12, 2000, and the parties engaged in expedited discovery. The Court held a four-day trial (from June 12-15), the parties

submitted post-trial briefs on June 21 and presented closing arguments on June 22.

This is the Court's decision on the merits.

For the reasons I set forth more fully below, I conclude that the rights of first refusal clauses in dispute in this case unambiguously granted to USA the right to match any bona fide third-party offer that related to the subject matter of the USA-WWFE agreements-namely the licensing rights to distribute certain television programs WWFE produces. Nevertheless, because USA failed to match certain material terms of Viacom's offer within the actual scope of the right of first refusal, USA's response did not qualify as a legally effective acceptance. Having failed to match properly the tendered Viacom offer, no contract has been formed between USA and WWFE. As a result, I deny USA's request for an injunction against the Viacom-WWFE agreement. Similarly, I deny USA's request for specific performance of its own failed effort to match that agreement.

I. FACTUAL BACKGROUND

A. The Parties

USA, a New York partnership with its principal place of business in New York, is a subsidiary of USA Networks Inc., a Delaware corporation. USA operates two domestic advertiser-supported 24-hour cable-television networks, USA Network and Sci-Fi Channel. USA Network reaches between 76 and 77 million households in the United States. USA Network is the number-one-rated basic ca-

ble television service in prime time, an achievement attributable in significant part to the popularity of the WWFE programming that it carries.

WWFE, formerly known as Titan Sports, Inc., is a Delaware corporation with its principal place of business in Stamford, Connecticut. WWFE is an integrated media and entertainment company, principally engaged in the development, production and marketing of television programming, pay-per-view programming and live events, and the licensing and sale of branded consumer products featuring its highly successful “World Wrestling Federation” brand.

Viacom, a Delaware corporation with its principal place of business in New York, is a diversified entertainment business that, among other things, owns the Paramount Pictures movie studio, the “MTV: Music Television” cable television network, the UPN broadcast television network, theme parks, the Simon & Schuster publishing house, and Famous Players theatres in Canada.

At the time this action was filed, CBS was a Pennsylvania corporation with its principal place of business in New York. Among other things, CBS owned the CBS television broadcast network, TNN (a cable television network featuring country lifestyle and entertainment programming), and Infinity Broadcasting. In September 1999, CBS entered into a merger agreement with Viacom that provided for the merger of CBS into Viacom. CBS and Viacom completed their merger on May 4, 2000.

B. USA Contracts with WWFE to Carry Wrestling

USA entered into its first direct contract with WWFE for a wrestling “series” in 1983. Stephen Brenner, the former General Counsel and President-Operations of USA Cable, provided the form contract for the original written agreements between USA and WWFE.

The 1983 agreement contained a “First Negotiation/First Refusal” clause at § 4(b), which became § 5(b) in later agreements. The same or substantially similar clause has appeared in every succeeding contract between USA and WWFE. The “First Negotiation” provisions of these clauses give USA the “opportunity to negotiate privately” with the program supplier (WWFE) to determine whether they can “come to an agreement regarding [an] extension, continuation, of whatever the program or programs are.” The “First Refusal” provisions give USA the right to match the terms that a third-party offers with respect to the Series programs.

Although there have been minor changes to the first refusal/first negotiation clause over the 17 year relationship between USA and WWFE, the clause’s substance has never changed. Two “negotiations” with respect to this clause, however, did occur recently. First, in connection with a discussion to renew the 1998 Agreement, WWFE’s talent agent, Mark Itkin of William Morris Agency, asked USA to agree to delete the first negotiation/first refusal clause in its entirety. Brenner refused, and the clause was retained. Second, in November 1999, the par-

ties agreed to remove the “first negotiation” provision of the clause, but maintain the “first refusal” provision of the clause. This second negotiation is discussed below in more detail.

C. The 1998 Licensing Agreement

In an agreement dated July 2, 1998, WWFE granted USA a license to distribute the WWF television series “WWF Raw/WWF War Zone,” “WWF Live Wire,” and “WWF Superstars.” In a companion agreement dated September 1, 1998, WWFE granted USA a license to distribute the WWFE television program “Sunday Night Heat.”² For ease of reference, the two agreements are collectively referred to herein as the “1998 Agreement” or simply the “Agreement.” The four programs are collectively referred to as the “Series.”

As noted, section 5(b) of the 1998 Agreement is a first negotiation/first refusal provision, the pertinent terms of which will be described in detail later in this opinion. It is almost identical to the same provision in the original 1983 agreement, except that more than one “Series” is referenced in the 1998 Agreement.

The 1998 Agreement, like all of its 15 predecessors, concerns licensing rights to certain WWFE-produced wrestling programs. Section 1 obligates WWFE

¹ Plaintiffs Ex. (“PX”) 1.

² Px2.

to “produce and deliver to USA a specified number of Programs of each Series during the Term. ...”³ Section 2 grants to USA “the exclusive right to distribute the Programs for [the] Series.”⁴

USA is not licensed to distribute any other’ WWFE programming or products. In fact, WWFE has separately licensed another wrestling series (known as “SmackDown!”) to UPN (a broadcast network now wholly-owned by Viacom). At the time that WWFE granted UPN broadcast rights to “SmackDown!,” Brenner recognized and advised his colleagues at USA that USA had no basis for objecting, even though “SmackDown!” contains the same characters and the same storyline as the four programs licensed to USA.⁵

D. Expansion of WWFE’s Business Strategy

The parties agree that WWFE’s “sports entertainment” programs represent “the crown jewel of cable television.” From a ratings perspective, this assertion appears justified. WWFE’s two-hour Monday night show “Raw Is War/War Zone,” which is treated as two separate one-hour shows for rating purposes, consistently has occupied the number-one and number-two positions on basic cable television, with an average Nielsen rating of about 6 during 1999. The show’s

³ PX1 at § 1; PX2 at § 1.

⁴ PX1 at § 2; PX2 at § 2.

⁵ Trial Tr. 133, 135-36, 195 (Brenner).

strong ratings numbers continued right up to and through the trial. “Sunday Night Heat” also has performed extremely well, often capturing the number-three ratings spot. WWFE programming has become especially popular with two groups in the United States that advertisers intensely covet: males aged 18 to 34 and teenagers aged 12 to 17.

The success of WWFE programming helped USA obtain its position as the number one-rated cable channel. The ratings of the WWFE shows contribute directly to USA’s ratings average, and indirectly by providing a promotional vehicle for its other shows. When WWFE programming fell behind its competition, Time Warner’s World Championship Wrestling (“WCW”), USA Network slipped to the number-two position. USA Network regained its number one position when WWFE recovered its audience and began consistently to surpass WCW in the ratings.

WWFE’s resurgence coincided with its recognition that it could not grow by restricting itself to being simply a cable television content provider. WWFE recognized that the formation of a strategic alliance with a multimedia partner that could cross-promote WWFE programming and provide new platforms to grow the WWFE brand would be critical to expanding its business and competing against the sizable resources of Time Warner’s WCW.

with a multimedia partner, WWFE's October 15, 1999 IPO prospectus identified as one of the key elements of its strategy the formation of "strategic relationships with other media and entertainment companies."⁶ As noted above, however, the 1998 Agreement contained an "exclusive negotiation" clause that prohibited WWFE from "negotiat[ing] with any third party with respect to any of the [four] Series prior to the end of [the] exclusive negotiation period."⁷

In early 1999, USA Co-President Stephen Chao recommended that WWFE meet with the Endeavor Agency, a Hollywood talent agency that Chao thought could help WWFE further its strategic goals. Endeavor confirmed WWFE's view that a strategic alliance with a large media company with multi-platform capabilities would best unlock WWFE's growth potential. Endeavor arranged for WWFE to meet with Twentieth Century Fox and Viacom in the spring and summer of 1999 for the purpose of exploring a potential strategic alliance along the lines that Endeavor had originally recommended.

By April of 1999, Endeavor had arranged a meeting between WWFE and Fox representatives to discuss the possibility of moving the four Series to Fox. By July, however, it was clear that Fox was not interested in pursuing a deal.

⁶ PX7.

⁷ PX1 at § 5(b); PX2 at § 5(b).

In July of 1999, Vince McMahon and Linda McMahon (Chairman and CEO, respectively, of WWFE) met with Kerry McCluggage, the Chairman of Viacom's Paramount Television Group. McCluggage was familiar with WWFE's programming as he had served on USA's executive committee until Viacom divested its interests in USA in 1997. McCluggage expressed an interest in acquiring the Series, which he characterized as consistent with Viacom's long-range goal to "either start from scratch or buy and repurpose a basic cable network."* Linda McMahon told McCluggage that the four Series could be available as early as fall 2000. These discussions between WWFE and Viacom continued into the fall of 1999 until the time of WWFE's initial public stock offering.

E. USA Waives Its Right to Negotiate Exclusively with WWFE

Shortly after WWFE's public offering in October 1999, WWFE's CEO Linda McMahon informed Brenner that WWFE intended to exercise the early termination right in the Agreement.⁹ When Brenner reported WWFE's intent to exercise its early termination right to his superiors, USA Networks' President and CEO, Barry Baker, became "apoplectic" and instructed Brenner to contact Ms. McMahon and convince her to delay sending the early termination notice. Brenner

⁸ Trial Tr. at 685-86.

⁹ Section 5(a) of the Agreement provided WWFE with an early termination that, if exercised, would trigger a 45-day period during which WWFE and USA would negotiate exclusively with each other over a new agreement.

contacted Linda McMahon and explained to her that Baker did not want WWFE to send the early termination notice until they talked.

Baker himself later called Ms. McMahon and asked her to amend the parties' Agreement, pushing back the early termination final notice date from November 30, 1999 to March 31, 2000. In return for this, Baker said USA would waive the 45-day exclusive negotiation period under § 5(b) of the Agreement. He explained that USA "was offering [WWFE] the ability to go out into the marketplace and get whatever offer [it] could." Baker told Ms. McMahon: "Look, I understand from a business perspective that you should go out and find out the value of your business and that you should get the best offer you can. I can tell you right now, nobody is going to give you a network, but bring it all back. And then I have a right to talk to you."¹¹

After Baker instructed WWFE to come back to USA with an offer that reflected the value of its business, Ms. McMahon asked Baker if he would waive the first refusal provision in § 5(b) of the Agreement so as not to dampen WWFE's negotiations with third parties. Baker agreed to waive USA's first refusal right, so that WWFE no longer would have to afford USA the right to match any "best offer" that WWFE could find in the marketplace.

¹⁰ Trial Tr. at 1023.

¹¹ Trial Tr. at 1023.

Baker's agreement to waive the first refusal provision led to a heated debate within USA. At the conclusion of this debate, it was decided that Baker should not have waived the right of first refusal, and the problem then was "dumped in [Brenner's] lap to solve."¹² In a later conversation with Linda McMahon, Brenner observed that the parties could not modify the 1998 Agreement orally, according to its terms. Ms. McMahon conceded this point.

As a result of these conversations, on November 19, 1999, Brenner sent Ms. McMahon a letter amendment to the 1998 Agreement that changed the early termination notice date from "on or before November 30, 1999" to "between March 1, 2000 and March 31, 2000," and eliminated the exclusive negotiation period.¹³ Section 5(b)'s first refusal language, however, was retained word for word. Linda McMahon acknowledged that there was no modification of the right of first refusal by virtue of these conversations and correspondence. No one discussed whether to modify the operation or substance of the right of first refusal. No one asked how the right of first refusal would operate in practice.

F. Negotiations Between WWFE and Viacom

With the exclusive negotiation provision eliminated, WWFE was now completely free to negotiate with Viacom or any other interested party. Viacom and

¹² Trial Tr. at 283.

¹³ Brenner understood that the November 19, 1999 letter amendment modified not only the Agreement but also the Sunday Night Heat Agreement. Brenner Dep. 205: 13-21.

CBS in turn were eager to obtain the four Series for TNN, CBS's country-living cable network, which Viacom would acquire through its merger with CBS. TNN was losing NASCAR programming and needed to restore its "must carry" status with cable operators. CBS and Viacom viewed the acquisition of the Series for TNN as a potential solution to TNN's problems.

To that end, Viacom and Endeavor, WWFE's talent agents, continued their discussions. In late November 1999, representatives of Endeavor told Viacom's Kerry McCluggage that WWFE had a "clean out" of its agreements with USA and could make the four Series available to Viacom in the fall of 2000. WWFE and Viacom continued their discussions at a December 2, 1999 meeting at the offices of Paramount Pictures in Hollywood. The parties specifically discussed the possibility of moving the four Series programming to TNN.

On January 6, 2000, WWFE and Viacom met again at WWFE's headquarters in Stamford, Connecticut. Following this meeting, McCluggage sent a discussion draft to Linda McMahon listing elements of a possible deal. McCluggage revised his discussion draft proposal following the January 6 meeting with Linda McMahon. He sent the revised draft to Ms. McMahon on January 18, 2000. The discussion draft proposal included a 4-5 year "joint venture/strategic alliance between WWF and Viacom" that would include a broadcast component (3-4 year renewal of Smackdown on UPN), a cable component (moving the Series

currently carried on USA to TNN), specials (6-7 one-hour specials annually to be broadcast on UPN, TNN, CBS, and MTV), a series featuring WWFE star Steve Austin, international distribution, coverage of WWFE's new football league (the XFL), home video distribution, a theatrical development fund, radio syndication, and Canadian in-theater pay-per-view.¹⁴ After McCluggage sent Linda McMahon his discussion draft, she contends that she informed him that USA had a first refusal right and was entitled to review the details of any offer that WWFE intended to accept.

*G. Negotiations with WWFE to Retain the Series
And to Broaden the Relationship*

Once USA waived the exclusive negotiation period in its agreements with WWFE, it had no contractual obligation to talk to USA until it had received a third-party offer that it intended to accept. Nonetheless, WWFE was willing to engage in broader discussions with USA. And it did so.

On February 17, 2000, USA delivered a broad presentation to WWFE involving various distribution capabilities, including the Home Shopping Network, the Sci Fi Channel, USA's internet and e-commerce sites, USA Video, USA Studios, and USA Broadcasting. USA organized the presentation based on some of the strategic objectives outlined in WWFE's October 1999 IPO prospectus. It

¹⁴ VX 229.

hoped to use the promise of a broader partnership (and the cross-promotional opportunities created thereby) to induce WWFE to renew its cable Series on USA. Following USA's receipt of WWFE's formal notice of early termination around March 1, 2000, Brenner sent an internal e-mail suggesting that he should call Linda McMahon to find out what WWFE was looking for rather than being put in a position to match the terms of a third-party offer. Brenner's suggestion was rejected. Instead, USA decided to wait and see what WWFE would bring back to USA to match.

H. Viacom's "Strategic Alliance" Offer

One week after USA's presentation, Viacom made its own presentation to WWFE. Viacom's presentation addressed a number of terms that appeared in earlier draft proposals, including telecast of WWFE's four existing cable Series on TNN, WWFE specials on Viacom's broadcast and cable networks, a WWFE drama series, coverage of XFL football, a multi-million dollar advertising campaign, a theatrical development fund, pay-per-view events, radio syndication, print publishing, and WWFE events at theme parks, among other things.

On March 10, 2000, Linda McMahon sent McCluggage a proposal in which she recommended that WWFE and Viacom first complete negotiations over the four Series. Against this background, WWFE and Viacom met again on March 16 to discuss the cable programming and other proposals set forth in Ms. McMahon's

March 10 letter. By the end of the March 16 meeting, the parties had reached agreement on transferring the four Series, while other proposals were left for later negotiation.

In an effort to memorialize the agreements reached regarding the four Series, Viacom and WWFE began drafting a formal agreement. Viacom prepared and then circulated an initial short form draft offer to WWFE's representatives on March 27. Representatives of both parties convened in Los Angeles on March 30-31 to negotiate a final document. The final document emerged as Viacom's offer letter dated April 2, 2000. The April 2 letter first established terms for the four Series programs to be transferred to TNN. It also addressed preexisting arrangements between WWFE and Viacom, such as UPN's right to "S mackdown!". The April 2 letter offer also mentioned a variety of other relationships, many of which were left to further negotiation. Finally, Viacom's offer letter described a series of terms relating to the coverage territory, preemption rights, a choice of law and forum selection provision, as well as a broadcast exclusivity provision, the significance of which will be explained later.

I. USA Responds to Viacom's Letter Offer

On April 3, 2000, WWFE notified USA that it intended to accept the Viacom offer and provided USA with a copy of that offer. USA spent the next ten days engaged in two principal activities: **(1)** quantifying the cost of matching the

Viacom offer that had been tendered by WWFE; and (2) meeting with outside counsel to determine a strategy for responding to that offer. USA was unclear about certain terms in Viacom's offer. For reasons that are not entirely apparent, USA made no effort to contact any representative of WWFE during this ten-day period.

On April 12, 2000, the last day of USA's ten-day response period under § 5(b), USA responded to Viacom's offer. It presented WWFE with a black-lined version of Viacom's offer letter that expunged many elements of Viacom's offer. By picking and choosing from the paragraphs in Viacom's letter, USA purported to bind WWFE to a five-year renewal of its licensing agreements concerning the Series programs, as well as other provisions related to the Series. On the same day (April 12) that USA "accepted" the tendered Viacom offer using selective matching, USA filed this lawsuit to enjoin consummation of Viacom's agreement and to compel WWFE to perform under USA's "matched contract"-a contract whose terms and conditions are an amalgamation of provisions appearing throughout Viacom's offer. USA proclaims its "match" to be a legally enforceable contract that relates to the Series pursuant to § 5 of the 1998 Agreement.

II. ANALYSIS

The narrow issue before this Court is whether USA, through its April 12, 2000 letter to WWFE, effectively exercised its right to match Viacom's April 2,

2000 offer to WWFE. To resolve this issue, the Court must answer two questions. First, what is the scope of USA's right of first refusal contained in § 5 of the 1998 license agreement between USA and WWFE? Second, did USA match the provisions contained in Viacom's April 2 offer to WWFE which fall within the scope of the right of first refusal contained in § 5?

A. *The Scope of the Right of First Refusal*

USA and WWFE have entered into a succession of license agreements to distribute various WWFE wrestling programs beginning in 1983. The duration of each license agreement has ranged between one and three years. With the exception of minor "wordsmithing," the language of the license agreements has remained generally constant for the life of the 17 year relationship between USA and WWFE.

As noted above, the parties amended § 5 through a November 19, 1999 letter which Brenner and Linda McMahon executed on behalf of their respective companies. The November 19 amendment eliminated USA's right to a 45 day exclusive negotiation period with WWFE for the extension of the license agreement. The amendment, however, did not in any way alter the language describing USA's right of first refusal. In other words, the November 19 amendment, by eliminating the exclusive negotiating period, transformed § 5 from a "First Negotiation/First Refusal" clause to exclusively a "First Refusal" clause. Section 5, as amended, is

set forth below in its entirety. The underscored text represents the first refusal language at issue:

5. The term hereof shall commence on September 28, 1998 and shall end on September 23, 2001 (the "Term"). Notwithstanding the foregoing, either party hereto may terminate this Agreement as of September 24, 2000, for any reason whatsoever, by written notice to the other, delivered between March 1, 2000 and March 31, 2000. In no event, however, may [WWFE] enter into any arrangement, understanding or agreement with any such third party with respect to any or all of the three Series without first giving to USA a right of first refusal, exercisable within ten (10) business days following receipt by USA of written notice detailing the terms of the third party offer(s), as to any such offer(s) which [WWFE] intends to accept. If USA does not meet such offer(s), [WWFE] will not enter into an Agreement with such third-party on terms less favorable to it than those contained in the offer(s) without again affording USA a first refusal as above provided.¹⁵

As the parties themselves make clear, this case is fundamentally a dispute over contract language. Specifically, the question I must answer is what exactly does an offer "with respect to any or all of the three Series" entail? Accordingly, the Court will apply general principles of contract construction in order to best elicit the meaning of the disputed clause.

In so doing, I begin with the primary rule of contract analysis that "[t]he interpretation of a written agreement begins with examination of its language."¹⁶

¹⁵ Plaintiffs Trial Ex. ("PX") 6JJ.

¹⁶ *U.S. v. Int'l Bhd. Of Teamsters*, 970 F.2d 1132, 1136 (2d Cir. 1992).

The law of New York, which is applicable to this dispute by virtue of the parties' choice-of-law provision,¹⁷ and the law of Delaware are in accord.¹⁸

I will not, however, analyze in isolation the explicit words of § 5. Language in a vacuum may take on any number of meanings. A Court can more readily assign contract language its intended meaning if it reads the language at issue within the context of the agreement in which it is located. Accordingly, while the canons of contract interpretation instruct an examination of the explicit contract language in order to determine the clause's meaning, one must simultaneously read that language within the context of the contract surrounding that language in order to best elicit the most appropriate meaning. Indeed, a New York court has recently observed that,

“[i]t has long been the rule that a ‘contract must be read as a whole in order to determine its purpose and intent, and ... single clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are a part. Words considered in isolation may have many and diverse meanings. In a written document the word obtains its meaning from the sentence, the sentence from the paragraph and the latter from the whole document.’”¹⁹

¹⁷See PX1, § 19.

¹⁸See *Serna v. Pergament Distributors, Inc.* 582 N.Y.S.2d 550,552 (N.Y. App. Div. 1992) (“It is a **fundamental** premise of contract law that contracts should be enforced in accordance with their terms”) and *Rainbow Navigation, Inc. v. Yonge*, Del. Ch., C.A. No. 9432, Allen, C., **mem.** op. at 6 (Apr. 24, 1989) (“[T]he attempt to define the legal meaning and effect of a contractual document must start in each instance with the language used in the contract itself.”).

¹⁹*Bijan Designerfor Men, Inc. v. Fireman's Fund Ins. Co.*, N.Y. App. Div., 705 N.Y.S.2d 30, 33 (1st Dep't 2000) (internal citations omitted).

All parties contend that the first refusal clause's meaning is facially apparent, and that despite a voluminous discovery record and four day trial on the merits, the Court need not look beyond the plain language of the contract. USA defines the scope of its matching obligation-if it elects to exercise its right of first refusal-restrictively, insisting that the plain language "with respect to the Series" limits the scope of the right of first refusal to the subject matter of the existing contract, a license to distribute the Series programs. Defendants Viacom and WWFE, on the other hand, argue that the scope of USA's matching right is quite broad, and generally contend that USA must match every item in a third party offer tendered in good faith.

The explicit language of the first refusal provision, examined in the context of the 1998 Agreement as a whole, reveals its intended meaning: the obligation to match is limited to the subject matter of the Agreement, the television license rights for the Series. In my opinion, the inclusion of the words "with respect to the Series" are intended as restrictive language. The holder of the right of first refusal must match all terms contained in a third party offer directly related to the Series itself. For example, USA must match terms detailing scheduling of the Series, licensing fees for the Series, advertising splits for the Series, and terms establishing the length of the contract for the right to distribute the Series. USA need not match

terms of a third party offer that relate to *other* subject matters. Other subject matters include the XFL, theme park events, and motion pictures, for example.

I must also note an important distinction in order to define clearly the outer boundary of the first refusal right's scope. The scope of the right is limited to the subject matter of the Agreement in which the right exists. Such subject matter is the licensing of *the Series*. The distinction one must keep clear is that the subject matter of the Agreement, the licensing of the Series, is very different from the subject matter of the Series themselves, the WWFE characters and story lines. The scope at issue is defined by the licensing of the Series, not the characters and story lines that exist within those Series. This is why, for example, USA need not match the terms in the Viacom offer relating to specials, such as "Wrestlemania." Although both the Series and "Wrestlemania" will inevitably involve the same characters and story lines, a special-a one time stand alone program-is not the same subject matter as the Series-the four specific programs that USA televises each week.

The plain language of § 5, when read in the context of the contract as a whole, compels this interpretation. The very first paragraph of the 1998 Agreement recites that it is an:

Agreement ... between USA Networks and [WWFE] *with respect to* the production of and grant of certain rights in *the [] Series* individually and collectively, of original television programs presently

entitled “WWF Raw/WWF War Zone” (“Raw”), “WWF Live Wire” (“Live Wire”), and “WWF Superstars” (“Superstar”).

The very first paragraph of the Agreement contains the words “with respect to the Series.” The Agreement employs these words here to indicate that the contract to follow is about the grant of certain rights in *the Series*. That is, the contract is about the Series. These exact same words, the primary words at issue in this case, appear verbatim in § 5. It is simply not reasonable to believe that the same words in the opening paragraph of the Agreement and in § 5 have different meanings. The words in the opening paragraph indicate that the contract defines the parties’ rights to *the Series*, not to any other subject matters, just as the words in § 5 indicate that the right of first refusal is limited to the same subject matter, *the Series*, and not to any other subject matter. The language at issue in § 5 does not take on a more expansive meaning.

Section 1 and 2 of the Agreement also mandate this restrictive textual reading of § 5. Section 1 of the Agreement sets forth WWFE’s obligations under the Agreement-to “produce” and “deliver” a “specified number of Programs of each Series during the Term.” The Agreement does not contain any obligation whatsoever to produce specials, theme park events, books, football games, etc., no matter how related (or unrelated) that programming or product may be to the Series licensed under the agreements.

Section 2 sets forth USA's chief right under the Agreement. This right is neither more nor less than an exclusive *license to distribute the Series*. Quite simply, the 1998 Agreement is a licensing agreement the subject matter of which is the four Series. Accordingly, it is eminently reasonable that the meaning of the phrase "with respect to the Series" in the Agreement's introductory paragraph, plus the language of § 1 and § 2 of the Agreement regarding the subject matter of the contract as a whole, illuminates the meaning of "with respect to the Series" in § 5 and the scope of the right of first refusal. These provisions indicate that the scope of the right of first refusal is limited to the subject matter of the contract containing the right.

To my mind, it is unreasonable to conclude that a right of first refusal clause in a contract for the distribution of certain television series would require the holder of the right of first refusal to match a package offer from a third-party for various properties that vastly exceed the scope of the property under the contract giving rise to the first refusal right. Nothing in the record suggests that a contrary scenario was *reasonably* in the minds of the parties at the time of drafting or amendment of the succession of agreements in question.

I find the defendants' broader interpretation of the first refusal right's scope unconvincing. Defendants argue, unreasonably in my opinion, that USA must match all reasonable terms contained in a third party offer which the seller

(WWFE) and the third-party (Viacom) have entered into in good faith. Defendants contend that Viacom's April 2 offer is an "arrangement, understanding or agreement with [a] third-party with respect to any or all of the three Series" and that USA's matching obligation runs to every item of a third party offer that WWFE "intends to accept."

Viacom argues that in order for an "arrangement, understanding or agreement" to be "with respect to any or all of the [four] Series," it is not necessary that the "arrangement, understanding or agreement" concern *solely* the four Series and no other programs WWFE produces or properties WWFE owns. Section 5 of the Agreement, argue Viacom and WWFE, does not contain the word "only" or "solely." The scope of § 5, therefore, is not limited to the Series.

Despite the absence of the words "only" or "solely," the scope of the right is not as broad as Viacom and WWFE argue it is. Under the broadest possible interpretation of the phrase "with respect to the Series," I still do not know how a provision regarding the XFL would ever fall within the scope of the right of first refusal. The XFL is a football league that has nothing to do whatsoever with professional wrestling beyond its association with WWFE.

Even if I give "with respect to the Series" its broadest meaning—*e.g.*, with reference, relating to, or pertaining to—the XFL does not "relate" to the Series. In fact, even if the scope of the right included anything relating to the characters or

story lines of the wrestling programs, the XFL would not fall within such a scope. The only way that the XFL would fall within the scope of the right of first refusal is if I interpreted “with respect to the Series” to mean an offer “*including* the Series.” No evidence compels me to reach such a result. Indeed, it is clearly more reasonable to interpret “with respect to the Series” to constitute limiting language, and not expansive language. Interpreting “with respect to the Series” to limit the scope of the right of first refusal to the subject matter of the contract even absent the words “only” or “solely” is clearly reasonable. Interpreting “with respect to the Series” to actually mean “*including* the Series” and to expand the scope of the right of first refusal to any terms Viacom and WWFE have entered into other than for the purpose of defeating USA’s first refusal rights, in my mind, robs § 5 of its intended meaning.

Viacom next argues that the structure of § 5 buttresses its expansive interpretation of the first refusal right’s scope. Viacom explains that § 5 requires the WWFE to tender the entire third party offer, not part of it, to USA because § 5 provides that WWFE must tender the offer it “intends to accept.” Because WWFE intended to accept all the provisions of Viacom’s offer, WWFE, therefore, also must tender the entire offer.. After obligating WWFE to tender the entire offer, § 5 does not explicitly allow USA to meet only portions of the third party offer. Implicitly, therefore, § 5 commands that USA meet “such offer” in its entirety. Con-

sequently, defendants **argue** that WWFE must tender Viacom's entire offer and USA must either match the offer entirely, or forfeit its first refusal right.

I find this argument unpersuasive. Section 5 provides that WWFE must tender "*such* offer" and USA must meet "*such* offer." "*Such* offer" refers to an offer "with respect to the Series." Therefore, WWFE must tender and USA must match an offer "with respect to the Series." The operation of this clause, however, still fails to explain how the phrase "with respect to the Series" affects the scope of the first refusal right. Although the defendants are correct that this is how the first refusal right operates according to the language in §5, its operation does not speak to the meaning of the phrase.

Just because WWFE seeks a strategic alliance, of which the four Series are a part, and tenders the entire strategic alliance offer to USA, it does not necessarily follow that the entire strategic alliance is an "offer with respect to the Series." Moreover, just because USA treated the Viacom offer as an offer "with respect to the Series" for purposes of triggering its right of first refusal, does not necessarily mean that every provision of the strategic alliance offer is "with respect to the Series." USA may have treated the Viacom offer as a triggering offer because within the broad strategic alliance package existed provisions that did, in fact, fall within the scope of the phrase "with respect to the Series." That is, the broad package did include provisions concerning licenses for the four Series programs. Presented

with the strategic alliance offer, USA attempted to match the part of the strategic alliance offer that it considered to be “with respect to the Series” according to its understanding of that language.

USA and WWFE likely did not anticipate a dispute over the scope of the right of first refusal, at the time of drafting, because they could not anticipate the significant changes in the media industry, particularly the industry’s rapid consolidation and move to a world of multi-platform conglomerates. Given the parties’ relationship and the state of the media industry in 1983, I am compelled to conclude that the drafters of § 5 did not anticipate a package offer of the kind Viacom has tendered, and this lack of anticipation has caused a tension in the manner § 5 operates.²⁰

Accordingly, I find the language of § 5, read in the context of the entire contract, clear on its face. Its only reasonable interpretation is that the scope of the first refusal right is limited to the subject matter of the Agreement.

Had the first principle of contract construction, the plain meaning rule, not resolved this dispute, the second principle of contract construction, the parol evidence rule, would have compelled the Court to adopt the same limited scope interpretation. The parol evidence rule holds that where the language of a contract is

²⁰ The manner in which § 5 operates in the context of a changed media industry, however, has no bearing on how I interpret the contractual language and the scope of the right of first refusal.

susceptible to more than one reasonable interpretation, the Court will consider proffered admissible evidence bearing on the objective circumstances relating to the background of the contract, including statements made during the course of the negotiation, courses of prior dealings between the parties, and practices in the relevant trade or industry.

Every contract between USA and WWFE since their first contract in 1983 has included the same contract language describing the right of first refusal. In fact, USA has insisted upon it. As the parties have used the same contract language (notwithstanding slight “wordsmithing”) in each contract since 1983, they have preserved the same meaning of that recurring language since 1983. Before USA and WWFE signed their first contract to televise a wrestling series in 1983, USA had previously only televised monthly wrestling shows performed at Madison Square Garden,, pursuant to a contract with Madison Square Garden. At that time, neither party has suggested that they contemplated the strategic partnership that WWFE currently seeks, and WWFE certainly did not possess the market power it presently holds. Accordingly, in 1983, when WWFE was first securing television distribution and did not enjoy the same level of popularity it does today, it is much more likely that the parties contemplated a right of first refusal limited to the subject matter of the contract containing that right of first refusal, as opposed to the open-ended right the defendants now allege prevails. The 1998 Agreement,

containing the same right of first refusal clause and the same language, therefore, does not have a different meaning than the identical provision the parties agreed to back in 1983.

WWFE's repeated attempts to eliminate the right of first refusal provision from its contracts with USA bolsters the limited scope interpretation. In 1998, WWFE's talent agent, Mark Itkin of the William Morris Agency, requested that USA agree to delete the first negotiation/first refusal clause in its entirety. Brenner refused.

In October 1999, Linda McMahon indicated that WWFE intended to exercise its early termination right. Brenner asked her to refrain from sending the early termination notice until she had further conversations with Baker. Linda McMahon, in return for postponing WWFE's exercise of its early termination right, requested that Baker agree to waive USA's rights of first negotiation and first refusal. According to Vince McMahon, WWFE understood that obtaining a waiver of the first-refusal right had "value" to WWFE.²¹ Ultimately, USA agreed to waive the first negotiation provision, but it reaffirmed its right of first refusal. The parties amended the 1998 agreement to reflect this modification.

²¹ V. McMahon Dep. 162-163, 169.

WWFE's repeated attempts to eliminate the right of first refusal clause indicates that WWFE viewed this clause as a serious hindrance. If the scope of the right of first refusal clause were truly as broad as WWFE and Viacom claim, then elimination of that provision would not have been as necessary. I assume that WWFE and Viacom would retort that *all* right of first refusal provisions, regardless of their scope, have a chilling economic effect. That is, third parties are less likely to negotiate with WWFE because the property at issue is subject to a right of first refusal.

I find this argument, in this instance, unconvincing, because WWFE already knew that Viacom had an interest in wrestling programming as early as July 20, 1999, three months before Linda McMahon requested that USA waive the right of first refusal. Thus, WWFE cannot contend that it needed the first refusal right waived in order to prevent a chilling economic effect-Viacom already had expressed its interest in acquiring the Series. Indeed, Vince and Linda McMahon, along with Endeavor, WWFE's agent, met with McCluggage at Paramount's offices in Hollywood on July 20, 1999 to discuss moving the Series from USA to Viacom. McCluggage's phone logs reflect ten incoming calls from Endeavor and WWFE from July through the end of October 1999, when Linda McMahon attempted to eliminate the right of first refusal provision.

WWFE and Viacom insist that McCluggage was not aware of the right of first refusal when the parties began negotiations. Implicitly, they argue that had he known of the refusal right, Viacom would have been less likely to pursue WWFE. Indeed, McCluggage testified that Endeavor told him that WWFE had a “clean out” of its contract with USA. Endeavor’s conversation with McCluggage regarding a “clean out” did not occur, however, until November 1999, more than three months after Viacom and WWFE began negotiations for the wrestling programming. I find it incredible that despite preliminary discussions in May, a meeting on July 20, and at least ten subsequent phone calls over the next three months, WWFE did not once mention USA’s right of first refusal.

In addition, I cannot believe that Viacom failed to inquire as to any contract restrictions on the four Series. It would seem to me that when a company is attempting to acquire rights to property, one of its first inquiries would be whether the property is in any way encumbered. That is, is the property readily available at the expiration of the current contract? These circumstances, in my opinion, undermine WWFE’s broad interpretation of the first refusal right.

The actions of USA executives also have neither altered the meaning of § 5 nor lent credibility to Viacom’s and WWFE’s overly broad interpretation of the scope of the right of first refusal. In November 1999, Baker and Chao encouraged Linda McMahon to go out into the marketplace and determine the value of her

company. They did so, no doubt, in the hope she would come back empty handed and, thus, with little bargaining leverage. In fact, Linda **McMahon** testified that Baker said, “nobody is going to give you a **network.**”²² USA was quite plainly mistaken. But the fact that USA executives told, indeed exhorted, Linda McMahon to go out and negotiate offers for WWFE programming (and for whatever else she wanted to, sell) did not work to alter or amend the language and purpose of the contract. It was, in fact, entirely in keeping with the contract, once USA waived the exclusive negotiation period.

Furthermore, the fact that USA pitched a broad, integrated offer to WWFE in February 2000 does not demonstrate a belief that it was required to match such an offer from a third party in the event its first refusal rights were triggered. The February pitch cannot be considered some sort of waiver of USA’s first refusal rights or an admission that it is required to meet a package deal offer under the terms of § 5. The February pitch is best understood as USA’s effort to head off the triggering of its first refusal right. And though much of USA’s testimony at trial and in deposition was equivocal at best and dissembling at worst, they consistently testified that they believed that no matter what kind of offer WWFE obtained, they had a “backstop” on the distribution rights to the Series. This view, to my mind, is consistent with the language of § 5.

²² **Tr. 1023: 10-11.**

I also find that certain language in Viacom's April 2 offer letter to WWFE demonstrates that Viacom believed its interpretation of § 5 to be more tenuous than it indicated during trial. The offer letter of April 2 states: "the various components of the proposed agreement.. .are being offered as a complete integrated package to WWFE, each dependent on the other, and are not offered otherwise."²³

Why would Viacom include this sentence in its offer letter? WWFE already knew that the offer constituted an integrated package because it sought out such a deal in the first place. WWFE also did not intend to pick and choose certain provisions of the offer, as it clearly coveted all the provisions contained in the offer. Thus, Viacom did not include that sentence for WWFE's benefit. Moreover, Viacom did not include the sentence for its own benefit because Viacom already knew that WWFE intended to accept the entire package; both parties negotiated the deal and had settled on its terms. Viacom did know that WWFE had to tender the offer to USA. The April 2 offer, therefore, likely contained the sentence for USA's benefit. In my opinion, the sentence constitutes an implicit threat to USA: this is an integrated package that you must accept in its entirety. The only reason to include such a sentence in an offer to WWFE is if Viacom and WWFE recognized that an issue existed regarding the scope of the first refusal right.

²³ Viacom Exhibit ("VX") **158**.

Based on the plain language of § 5, especially when read within the context of the Agreement as a whole, and the previously discussed par01 evidence, I find that the only reasonable interpretation of the first refusal right's scope is to limit it to the subject matter of the Agreement. I reject WWFE's and Viacom's interpretation of § 5. The meaning of the phrase "with respect to the Series" limits the scope of § 5 and is not intended to provide an open-ended matching obligation that includes unrelated subjects such as football telecasts, theme park events and radio syndication. The well-settled law of New York regarding rights of first refusal only serves to further bolster USA's interpretation.

New York courts construing right of first refusal clauses have uniformly held that a property owner cannot compel the holder of a right of first refusal to one property to match the terms of a package deal encompassing extraneous properties. *New Atlantic Garden v. Atlantic Garden Realty Corp.* commenced a long line of uninterrupted authority so holding.²⁴ In *Camp Systems, Inc. v. PHH Aviation Services, Inc.*,²⁵ the court held that the holder of a first refusal right relating to a software product could not be forced to match the terms of a third-party offer for substantially all of the seller's assets, including the software product.

²⁴ N.Y. App. Div., 194 N.Y.S. 34 (1st Dep't 1922), aff'd, N.Y., 143 N.E. 734 (1923) (lessee of movie theater with right of first refusal cannot be forced to match terms of third party's offer to buy from lessor a larger parcel including the theater).

²⁵ E.D.N.Y., C.A. No. 88-945, 1988 WL 70637 (May 31, 1988).

Likewise, in *Saab Enterprises v. Wladislaw Wunderbar*, the court held that a lessee of a car wash, with a right of first refusal, could not be forced to match the terms of a third-party offer to buy property including the car wash and a neighboring gas station.²⁶

Defendants' attempt to distinguish the litany of New York authorities cited in USA's brief by arguing that they are not a prohibition on package deals but, rather, stand only for the unremarkable proposition that specific contract language defines the scope of a matching obligation (and, in this case, such clear language is absent) is ineffective. Defendants take the contract language from *New Atlantic Garden* as an example. There, defendants argue the contract language provided a clear definition of the scope of the property the plaintiffs right of first refusal covered.

The clause in question in *New Atlantic Garden* provided that "in the event of a contemplated sale of *said premises* during the demised term, the landlord agrees to give to the tenant a notice in writing at least ten days before the contem-

²⁶ N.Y. App. Div., 554 N.Y.S.2d 657 (2d Dep't 1990); see also *Tarallo v. Norstar Bank, N.Y. App. Div.*, 534 N.Y.S.2d 485 (3d Dep't 1988) (lessee and holder of option to buy leased premises cannot be forced to match terms of third-party offer to buy larger parcel including the leased premises); *C & B Wholesale Stationery v. S. DeBella Dresses, Inc.*, N.Y. App. Div., 349 N.Y.S.2d 75 1,753 (2d Dep't 1973) ("The right which plaintiff enjoyed by virtue of the first refusal clause cannot be rendered nugatory by the device of attaching additional land to the leased premises and finding a buyer for the entire parcel"; lessor "improperly disregarded plaintiff's attempted exercise of the option as to the leased premises"); *Costello v. Hoffman, N.Y. App. Div.*, 291 N.Y.S.2d 116 (2d Dep't 1968) (lessee of restaurant with right of first refusal cannot be forced to match terms of third-party offer to buy building complex including the restaurant).

plated sale of the substance of the terms on which it is proposed to be made.. . [and] the tenant shall have the right to purchase *said premises* upon the terms and conditions proposed.”²⁷ Defendants’ contention, that the case currently before the Court is different from *New Atlantic Garden* because the contract in *New Atlantic Garden* specifically defined the property that plaintiffs’ first refusal right covered is unpersuasive.,

The first refusal language annexed above from *New Atlantic Garden* is in reality no more precise than the language found in § 5 of the 1998 Agreement. ‘*Said premises*’ in *New Atlantic Garden* is quite plainly the subject matter of the underlying contract, offers for which the holder of the right of first refusal has a right to match. Here, the subject matter of the 1998 Agreement is a license for the four Series. It thus stands to reason that a license for the four Series, and terms reasonably related thereto, define the scope of USA’s matching obligation.

Defendants’ reliance on *West Texas Transmission v. Enron Corp.*²⁸ is unavailing. There, two energy companies each owned a one-half interest in a gas pipeline subject to cross rights of first refusal in the event one of the owners chose to sell his interest to a third-party. **Enron** elected to sell its interest to a third-party and predicated such sale on the prospective buyer receiving regulatory clearance

²⁷ Emphasis *Viacom*’s.

²⁸ 907 F.2d1554 (5th Cir. 1990).

prior to sale. West Texas objected to this term and argued that Em-on breached its preemptive right by interjecting an intermediate condition (regulatory approval) into the purchase agreement that it should not be required to match. In very broad language, the *Court*, applying Texas law, held that plaintiff West Texas was required to meet this perfectly legitimate term in Enron's agreement with the prospective third-party purchaser because it was commercially reasonable and imposed in good faith.

Contrary to defendants' contentions, *West Texas Transmission* does not stand for the proposition that a third-party agreement, irrespective of its scope, is the sole determinant of a right of first refusal holder's obligation to match. The subject matter of the contract at issue in *West Texas Transmission* was an ownership interest in a pipeline. The scope of the first refusal right covered the same. Inclusion of a regulatory approval term did not in any way alter or add to the subject matter of the underlying contract nor force the preemptive right holder to match a "package deal" as is the case here. Rather, regulatory approval bore a direct relation to the subject matter of the contract and was, therefore, properly within the scope of the right holder's matching obligation.

Defendants cite only one decision running truly contrary to the consistent and overwhelming authority from New York and elsewhere proscribing package

deals: In *re New Era Resorts, LLC*.²⁹ In that case, a Bankruptcy Court construed Tennessee law to require the holder of a first refusal right to match the terms of a third-party package deal offer. In *re New Era Resorts* does not represent New York law on this subject.

Moreover, defendants have not asserted a compelling rationale or directed the Court to any legal authority stating that the well-settled body of New York law construing rights of first refusal should not apply in the context of television distribution rights. Defendants cite no authority for their contention that this contract should be treated differently because it relates to intellectual property. One New York court has construed a right of first refusal regarding intellectual property to prohibit the use of a package deal.³⁰ And in *CBS v. French Tennis Federation*,³¹ in the course of issuing a preliminary injunction, a New York trial court recognized that rights of first refusal are a common and essential element of television programming contracts. This Court made the same observation in *Dover Downs v. ESPN, Inc.*,³² a case decided under New York law. Courts in other jurisdictions

²⁹ 238 B.R. 381 (Bankr. E.D. Tenn. 1999).

³⁰ See *Camp Sys. v. PHH Aviation Servs., Inc.*, E.D.N.Y., C.A. No. 88-945, 1988 WL 70637 (May 31, 1988) (software).

³¹ N.Y. Sup. Ct., N.Y.L.J. 5 (Jan. 24, 1983).

³² Del. Ch., C.A. No. 11830, Jacobs, V.C. (April 26, 1991).

have also rejected the argument that the prohibition against the use of “package deals” to defeat a right of first refusal should be limited to the real estate context.³³

There is no doubt that WWFE sought out a strategic alliance with a multi-platform media conglomerate in complete good faith. Linda and Vince McMahon quite rationally believed, and indeed were so advised, that the most effective way to grow their company and increase the value of the WWFE franchise was through horizontal expansion of WWFE production.

The changed landscape of the media business since the WWFE and USA first entered into that original 1983 license agreement, and WWFE’s current desire to secure a strategic alliance do not, however, alter the meaning of § 5 of the contract between USA and the WWFE. In fact, the contract language has hardly changed since 1983 when the parties first entered into an agreement to distribute the Series. At that time, WWFE did not possess the market power it does today and was not seeking a strategic alliance. It also could not have anticipated the vast changes that have occurred in the media business. Changed circumstances, however, do not alter the meaning of contract language, especially when such language

³³ See, e.g., *Radio WEBS v. Teie-Media Corp.*, S.E.2d 712, 715 (1982) (“the cited lease

F l o r i d a ’ s F i r s t C S e r v s . a I s n t c .
v. Le-Jo Enters., E.D. Pa., C.A. No., 88-9413, 1989 WL 46102, at *3 (rejecting contention that package deal cases are limited to real estate). See also 3 *Corbin on Contracts* § 11.3, at 469 (Apr. 25, 1989) (while a right of first refusal “customarily, but not exclusively, arises in real property transactions . . . the subject matter may be anything which the parties may make the subject of a contract”).

has not only gone unchanged, but has indeed been reaffirmed by the parties as recently as November 1999. Business exigencies and changed circumstances are also not a proper basis for the Court to rewrite the parties' contract.

The clear meaning of the language of § 5 read in the context of the entire contract, relevant parol evidence, and well-settled New York case law supports the view that the scope of USA's matching obligation is limited by the subject matter of the Agreement, a license to distribute the four programs. And although I do not doubt the sincerity of Linda McMahon's testimony that she genuinely believed that she had the right and ability to go out and sign whatever deal she could and require USA to match every element of it, no matter how unrelated to the parties' current relationship, the language of the clause, particularly when read in the context of the entire contract, and informed by a reading of the relevant New York case law, simply cannot bear the weight of such a broad reading.

B. USA Has Not Unconditionally Matched Viacom's Offer

When WWFE presented to USA Viacom's April 2 offer, USA treated the offer as triggering its right of first refusal under the 1998 Agreement. USA responded by attempting to match those terms "with respect to the Series." To that end, USA crossed out those parts of the April 2 offer that were clearly extraneous to the subject matter of its licensing agreement with WWFE. Thus, USA properly blacklined terms and conditions regarding television rights for specials, the

“Smackdown!” series on UPN and the XFL. USA also properly excised provisions relating to theme park attractions, theatrical motion pictures, radio syndication, pay-per-view events in Canada, a publishing venture and a drama television series. These elements clearly exceeded the scope and subject of the earlier licensing agreements between WWFE and USA. Turning to the terms of the offer that did relate to the Series programs, the subject matter of the 1998 Agreement, USA listed the items that it would “match” and substituted “USA” for “Viacorn,” “TN-N,” “MTV” or “CBS” in each provision that dealt with the four Series.

The Court now must confront the second level of analysis in this matter. That is, when WWFE submitted Viacom’s April 2 offer to USA pursuant to USA’s right of first refusal, did USA accept those provisions that it was required to accept to enter into a binding and enforceable contract with WWFE? To determine whether USA accepted the offer, the Court must look to the objective manifestation of the parties’ intent as expressed by their words and deeds.³⁴ The offeree’s intention to accept is unimportant except insofar as it is overtly manifested.³⁵ Under New York law, a party’s manifestations of intent are viewed from the vantage point of a reasonable person in the position of the other party. In determining whether such manifestations constitute acceptance, disproportionate

³⁴ *See D o v e a r 16-17 w n s*

³⁵ *Id.*

emphasis must not be put on any single act, phrase or provision. Rather, the Court must consider the totality of all these, in light of the attendant circumstances, the situation of the parties, and the objectives they were striving to obtain?

Applying these principles to the facts of this case, I conclude that no reasonable person in WWFE's position could have viewed USA's letter and the blacklined version of Viacom's offer letter as an unconditional acceptance of Viacom's offer. USA's April 12 letter did state that USA treated Viacom's April 2 offer as triggering USA's right of first refusal, and that USA intended to exercise that right. But USA's letter, as well as the crossed out version of Viacom's offer, failed to accept unconditionally all of the material terms and conditions that related to the Series programs, the subject matter of the 1998 Agreement. Because USA's acceptance is at variance with its obligations under its right of first refusal, its April 12 letter operated as a counteroffer, not as a legally enforceable acceptance of an offer. I turn now to a brief discussion of the terms and conditions in the April 2 offer which were within the scope of the right of first refusal, but that USA failed to unconditionally accept.

First, I conclude that USA failed to match the territorial rights component of Viacom's offer for the television rights to the Series. As discussed at length above, a license for the four Series is the subject matter of the 1998 Agreement and

³⁶ *Id.*

defines the scope of the first refusal right. Specials, the “Smackdown!” series, the XFL, theme park attractions, theatrical motion pictures, radio syndication, pay-per-view in Canada, book publishing and a TV drama series are different subject matters and, thus, outside of the scope of USA’s first refusal rights and obligations. The territory covered under a prospective license agreement for the four Series, however, clearly is not a separate subject matter, but rather is a material term correlated to the four Series.

An example of USA’s flawed reasoning in this connection is Lynn’s explanation at trial: “I think that our current agreement talks about a license of the four series in a defined territory of the United States. And I think that that is I guess what I would call the subject of the agreement. And therefore, we didn’t have to – that is what our right of first refusal had to do with, was the subject of the agreement, being the license of the series in the territory. And this went beyond that scope; and therefore, I didn’t think we had to match it.”³⁷

USA’s mistake (as evidenced by the above testimony) is in assuming that Canada and the Caribbean are outside the scope of the first refusal right because the 1998 Agreement extended only to the territory of the domestic United States and its territories. But the limit of the first refusal right’s scope is not the four corners of the 1998 Agreement itself. Rather the limit is the subject matter of the

³⁷ Trial Tr. at 471 (Lynn).

Agreement (the four Series). Defining the scope of the first **refusal** right by the four comers of the Agreement transforms the first **refusal** sentence in section 5(b) into a right of renewal. In effect, under Lynn's misguided interpretation, USA's right of refusal would require any third party offer to mimic the terms of the 1998 Agreement, except for the price and time frame of the offer.

USA alternatively argues that, by crossing out the non-domestic territory in Viacom's offer, USA actually did WWFE a favor, as it enabled WWFE to sell distribution rights in Canada and the Caribbean for more money. But USA cannot place itself in the position of making strategic business decisions for WWFE. Nothing in the record supports USA's contention that territorial coverage of the television distribution of the series was unimportant to WWFE. To the contrary, the undisputed evidence is that WWFE was interested in arrangements that would diversify and expand its brand globally. The territorial coverage term in Viacom's offer was, therefore, clearly a material term relating to the Series that USA was obligated to match unconditionally. It failed to do so and, thus, effectively made a counteroffer to WWFE.

Second, I find that USA failed to match the choice of law and forum selection clauses in Viacom's offer. Viacom's offer provides that "[t]he strategic alliance (and all of the components thereof) shall be governed by New York law, and each party agrees to submit to the exclusive jurisdiction of the courts located in

New York.” USA struck these provisions in their entirety. Again, Richard Lynn testified that “the same basic concept” is captured in another provision of USA’s response, which provides that the terms of USA’s purported agreement with WWFE “shall be reflected in a long-form agreement (containing customary covenants, representations, warranties and indemnities) mutually satisfactory to USA and WWFE.”³⁸

WWFE, however, is entitled to USA’s unequivocal acceptance of the material terms of the tendered third party offer. Lynn’s explanation is irrelevant, because it does not account for the fact that the same language regarding a long-form agreement also appeared in Viacom’s offer *in addition to* the choice of law and forum selection provision that USA chose to strike. USA cites no authority that choice of law and forum selection clauses are immaterial terms of a contract. In fact, New York law holds that injection of a forum selection clause into a proposed contract is a material alteration of the contract.³⁹ Choice of law and forum are undoubtedly material terms. They appear in virtually every contract USA offered into evidence in this case. It is not enough, in my opinion, for a party to cross out such a material term and compel the other contracting party to accept

³⁸ Trial Tr. at 483-484.

³⁹ *General Instrument Corp. v. The Manufacturing, Inc.*, 517 F. Supp. 1231, 1235 (S.D.N.Y. 1981) (applying New York law); *Lorbook Corp. v. G&T Indus., Inc.*, 162 A.D.2d 69, 73 (N.Y. Supr. 1990).

assurances (made at trial, but not before) that a comparable term will be agreed to later. New York law teaches that overt manifestations of intent are what counts, not a party's (or its counsel's) self-serving statements of future intention, statements which USA did not make to WWFE on April 12 when it purported to accept the April 2 offer.⁴⁰ By striking the choice of law and forum selection terms of Viacom's offer, USA's response varied materially from that offer insofar as it related to the Series and, thus, USA failed to match.

Third, I find that USA failed to match the terms of Viacom's offer concerning certain cross-promotional obligations directly related to the Series programs. Viacom's offer requires that Viacom "cross-promote the WWFE programming contemplated hereunder across its various media platforms and outlets (including television: radio and billboards)." USA concedes that it could have purchased radio time and rented billboards so as to match Viacom's promotional commitment.⁴¹ Nonetheless, USA crossed out all of the cross-media promotional platforms in the tendered offer.

USA struck these explicit terms even though one of its executives, Baker, admits that billboards qualify as cross-promotion and that USA could have

⁴⁰ See *Brown Bros. Electrical Contractors, Inc. v. Beam Construction Corp.*, 361 N.E.2d 999, 1001 (N.Y. Ct. App. 1977); "*Industrial America, Inc. v. Fulton Industries, Inc.*, Del. Supr., 285 A.2d 412, 415 (1971).

⁴¹ Peterman Dep. at 193-195.

purchased them. Baker explained that USA deleted the reference to billboards, radio and television because USA did not want to be “specific.”⁴² During the trial, USA’s counsel argued that, although USA struck the words “television, radio, and billboards” from Viacom’s offer, USA added the phrase “as well as any additional promotion.” These words, counsel insisted, capture the same intention as the explicit terms that Viacom used. Finally, USA also contends that the cross-promotional terms referring to television, radio and billboards were illusory in any event, as Viacom’s offer did not guarantee a fixed amount of cross-promotional expenditures, but instead promised only to review annually the level of such promotion with WWFE.

These explanations and arguments fall victim again to the fundamental principle that a right of first refusal holder may not defend a refusal to match a term in the third party’s offer on the ground that the third party “didn’t mean it.” USA effectively treats cross-promotion as an immaterial term. It is not. No evidence in this case suggests that the specific forms of cross-promotion of the four Series included in Viacom’s April 2 offer is an insubstantial element of the consideration for the Series. To the contrary, the parties agree that cross-promotion is increasingly prevalent in a world of media conglomerates. Ultimately, therefore, I am not persuaded that USA’s equivocal match of portions

⁴² Baker Dep. at 56.

of the cross-promotion provision in Viacom's offer constitutes an unconditional acceptance. Instead, I find that USA effectively made a counteroffer to WWFE regarding the form and type of promotion it would provide under the agreement.

Fourth, based on my assessment of the testimony at trial and the situation of these parties, I find that USA failed to match the provision of Viacom's offer promising "no regularly scheduled preemption." WWFE has long suffered from USA's practice of preempting WWFE programming three weeks out of every year for the U.S. Open and Westminster Kennel Club Dog Show. As Linda McMahon testified at trial: "We have the world's longest running soap opera. When you interrupt the viewing pattern of your audience, even if it's just, as USA would refer to it, almost momentary, hiccup or blip, you can affect that viewing audience. [And] [t]hat affects the other parts of your business."⁴³ To make matters worse, because USA's preemptions are regularly scheduled well in advance, Time Warner's competing WCW is able to plan ahead to capture WWFE's audience when USA preempts WWFE's programs.

This situation strained the relationship between WWFE and USA. As a result, WWFE sought and obtained, as an element of the four Series license component of the proposed alliance with Viacom, a commitment from Viacom that there would be no regularly scheduled preemption of WWFE programming, absent

⁴³ Trial Tr. at 937.

an incident on the order of a national disaster. In other words, WWFE's Series would be televised at their regular times 52 weeks a year. Both WWFE and Viacom understand the words "no regularly scheduled preemption" to encompass this concept. This was the consistent, unequivocal testimony of McCluggage, Vince McMahon and Linda McMahon, and I find it persuasive and credible.

USA's position is that it is not preempting the WWFE series program when it televises the dog show and the U.S. Open. In USA's view, this is not a regularly scheduled preemption. I do not agree. The ordinary meaning of the words should govern. In the circumstances of this case, the words "regularly scheduled preemption" supports WWFE's position. The dog show and the U.S. Open appear on USA regularly. That is, USA televises them at the same time of year, every year. They are scheduled to be aired on USA and it is a regular appearance. USA knows it. WWFE knows it. And WCW knows it. No evidence at trial has persuaded me that these words have a special meaning in the entertainment industry, or a meaning contrary to that described above. Therefore, I will give the words their ordinary meaning in the context in which they are used.

Despite their plain meaning, USA argues that it matched this term because it chose not to strike the term "no regularly scheduled preemption." By not striking, USA contends that it has matched unconditionally the terms of Viacom's offer. But USA's executives have made clear that WWFE will "have to live with" the

regularly scheduled annual preemptions of WWFE's cable series for the U.S. Open and Westminster Dog Show if the Series remain on USA beyond the 1999-2000 television season? These statements have infuriated the McMahons, who have characterized USA's purported match of Viacom's no preemption term as "a lie."⁴⁵ Having assessed Lynn's trial testimony on this precise question, I agree that USA's literal acceptance of the "no regularly scheduled preemption" term is more sleight of hand than it is a good faith intention to accept unconditionally a material term of a third party offer. Stated simply, USA made it clear during the trial that it intends to televise the dog show. It also intends, in my opinion, to televise the U.S. Open, notwithstanding its last ditch argument that it could always pay off the Open and honor WWFE's no preemption clause.

In short, USA's eleventh hour arguments designed to minimize the importance of this term, or to assure its future intention to comply therewith, do not impress me more than the actual conduct of the parties over the past years. Accordingly, I find as a matter of fact and law that USA failed to match unconditionally the "no regularly scheduled preemption" term of Viacom's offer.

Finally, I pause to describe a striking example of USA's remarkably opportunistic effort to match Viacom's offer. As noted above, USA declined to match

⁴⁴ Trial Tr. at 122 I-22.

⁴⁵ Trial Tr. at 967-968; Trial Tr. at 1222.

material aspects of the territory and cross-promotion provisions of the Viacom offer. One underlying fact, common to both the territory and cross-promotion terms, is that USA lacked the “in house” capability to deliver on either provision. That is, its signal does not currently reach Canada and the Caribbean, territories covered under the Viacom offer, and it does not own radio or billboard assets, cross-promotional platforms promised in the Viacom offer.

These provisions of the Viacom offer, which USA was required to match, were burdensome to USA to the extent that they would require USA to enter into some sort of subcontracting relationship with a third-party in order to perform. To my mind, USA’s rationale for declining to match them is largely a pretext, the purpose of which was to excise from the April 2 offer provisions that it could not easily match, and “accept” the offer on its own terms-and not the exact terms of the third-party offeror.

USA’s rejection of these provisions, clearly related to the four Series and not constituting distinct subject matters, sits oddly next to its enthusiastic acceptance of an exclusivity provision in the Viacom offer. USA’s decision to match this term, a term painstakingly negotiated between Viacom and WWFE, smacks of opportunism. The exclusivity provision in the Viacom offer, among other things, grants to Viacom a “first negotiation/last refusal” right on any wrestling-based sports programming WWFE produces to air on a *broadcast network*.

Bargaining over this right led WWFE and Viacom to a compromise position in which Viacom would get a “first negotiation/last refusal” right with respect to new broadcast programming--a compromise position tied into the overall value Viacom was providing WWFE and only agreed upon, as a practical matter, because of Viacom’s significant broadcast assets in the CBS and UPN networks.

USA purported to match in full this exclusivity provision, including the clause granting “first negotiation/last refusal rights” for wrestling-based programming on broadcast networks. USA, however, *does not own a broadcast network*. When this scenario is taken to its logical, though admittedly perverse conclusion, USA has assumed a veto power over the WWFE’s ability to distribute wrestling-based programming over broadcast networks despite the fact that it does not own a broadcast network and does not itself intend to broadcast any wrestling programs whatsoever. This, to my mind, is nothing short of overreaching, and buttresses my view, expressed later in this opinion, that USA’s self-serving tactical decisions should not evoke judicial sympathy.

In the end, therefore, USA’s response to Viacom’s offer failed to constitute a legally effective acceptance under New York law. In all non-Uniform Commercial Code transactions, as in this case, New York follows the rule that a qualified ac-

ceptance is nothing more than a **counteroffer**.⁴⁶ “Indeed, whenever a purported acceptance is even slightly at variance with the terms of an offer, the qualified response operates as a rejection and termination of – and substitution for – the initially offered terms.”⁴⁷

Put differently, New York law holds that “[t]o conclude an agreement, the acceptance must meet and correspond with the offer in every respect, neither falling short of nor going beyond the terms proposed, but meeting them exactly at all points and closing them just as they stand.”⁴⁸ Under USA’s own interpretation of §5, which I agree limits the scope of its rights to the Series programs, USA’s “acceptance” failed to match each and every material term that related in a reasonable way to the Series and was contained in Viacom’s offer. Under established New York contract law, therefore, USA’s selective acceptance does not constitute a legally effective acceptance of Viacom’s offer.

The conclusion I reach, that USA failed to match the material terms of Viacom’s April 2 offer pursuant to USA’s right of first refusal, is required by the

⁴⁶ *Marlene Industries Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 332 (N.Y. 1978) (citing *Poel v. Brunswick-Balke-Collender Co.*, 216 N.Y. 3 10 (1915)).

⁴⁷ *Homayonuni v. Paribas*, 660 N.Y.S.2d 413, 414 (N.Y. App. Div. 1992); *Watts v. Carter & Sons, Inc.*, 202 N.Y.S. 852,854 (N.Y. App. Div. 1924).

⁴⁸ 22 NY *Jur.2d* Contracts § 52 (1999) (citing *Barber-Greene Co., Inc. v. M.F. Dollard, Jr., Inc.*, 269 N.Y.S.211, 215-16 (N.Y. App. Div. 1934)).

applicable New York contract law principles cited above. It is not, in my opinion, an inequitable or unfair result in light of all the circumstances. For example, I would note the high level of tactical maneuvering in this case, on the part of all the participants. In any event, USA had possible alternatives open to it that might have produced a different outcome.

When WWFE tendered the April 2 Viacom offer (an offer that USA undoubtedly knew was “in the wings”), USA had every right, indeed some authorities hold that it had an affirmative legal obligation,⁴⁹ to undertake a reasonable investigation of any terms or conditions of the third party offer that were unclear to USA. To the extent USA believed particular terms in the Viacom offer might not relate to the Series, and thus might not be within the purview of its right of first refusal, its recourse was to request additional information from WWFE. Notwithstanding the opportunity to seek clarification from WWFE during the ten day period between receipt of Viacom’s offer on April 3 and USA’s response on April 12, USA did not call a single WWFE representative to seek guidance on questionable deal points. Lynn testified at trial that USA was “afraid what would happen if we talked to them during this period.”⁵⁰ Whatever tactical thinking animated this de-

⁴⁹ See *John D. Stump & Assoc., Inc. v. Cunningham Memorial Park, Inc.*, 419 S.E.2d 699,706 (W. Va. Supr. 1992); *Koch Indus., Inc. v. Sun Co., Inc.*, 918 F.2d 1203, 1212 (5th Cir. 1990).

⁵⁰ Trial Tr. at 479-8 1.

cision to abjure direct communication with WWFE, it seems, from my commonsensical perspective, to have been destined to bear bitter fruit.

Additionally, USA clearly had the right and the opportunity to secure interpretive assistance from the courts before, rather than after, it responded to Viacom's offer. Rather than seek declaratory or injunctive relief as to whether Viacom's April 2 offer triggered its right of first refusal under § 5, USA chose to treat the offer as a triggering offer and attempted to match it. It seems that USA chose this avenue for tactical reasons (*i.e.*, USA could not have moved for specific performance otherwise, a remedy that might afford it a strategically superior contractual position). USA's actions, viewed in this light, do not evoke the sympathy of a court of equity and provide no basis for tempering the outcome required under controlling principles of New York contract law.

III. CONCLUSION

For all of the reasons stated above, I conclude that USA failed to match unconditionally a bona fide third party offer WWFE tendered to it concerning television distribution rights to the Series, in accordance with § 5 of the 1998 Agreement. Because USA cannot prevail on the merits of its claim, it is not entitled to injunctive relief against WWFE and Viacom or to specific performance.

An Order entering judgment in favor of defendants and against plaintiff has issued today, consistent with this Memorandum Opinion.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

USA CABLE,

Plaintiff,

v.

WORLD WRESTLING FEDERATION)
ENTERTAINMENT, INC., VTACOM)
INC., and CBS CORPORATION,)

Defendants.)

Civil Action No. 17983

ORDER

For the reasons set forth in this Court's Memorandum Opinion entered in this case on this date, it is

ORDERED that final judgment in this action is entered in favor of the defendants and against the plaintiff and the complaint is dismissed. Each party shall bear its own court costs.

William B. Chandler III

Chancellor

Dated: June 27, 2000