IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WEST WILLOW-BAY COURT, LLC, a Delaware limited liability corporation, Plaintiff, v. ROBINO-BAY COURT PLAZA, LLC, a Delaware limited liability corporation, and ROBINO-BAY COURT PAD, LLC, a Delaware limited liability corporation Defendants.	: : : : : : : : : : : : :	**C.A. No. 2742-VCN**

MEMORANDUM OPINION

Date Submitted: June 19, 2007
Date Decided: November 2, 2007

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NOBLE, Vice Chancellor

I. INTRODUCTION

Judges are frequently called upon to read and apply contracts. Their goal is to find the common, shared intent of the contracting parties. They are instructed, however, not to consider extrinsic evidence unless the contract is ambiguous—reasonably susceptible of two (or more) plausible interpretations. In addition, extrinsic evidence may not be used in determining whether the contract is ambiguous. This case requires the application of those two venerable principles. The contract at issue, hardly the proverbial model of clarity, is not easy to read, but it is not ambiguous. That conclusion ultimately prevents the Court from considering the extrinsic evidence that arguably would have led to a different result. In short, this case tests how far a court should go to avoid an outcome required by a fair reading of the agreement, although one that may not implement an intent shared by both parties.

This action arises out of a purchase agreement (the "Purchase Agreement") between Plaintiff West Willow-Bay Court, LLC ("West Willow") and Defendant Robino-Bay Court Plaza, LLC ("Robino-Bay Court"). The purpose of the Purchase Agreement was to transfer a pad site (the "Property"), currently owned by Defendant Robino-Bay Court PAD, LLC,[1] at the Bay Court Plaza Shopping Center (the "Shopping Center") in Dover, Delaware to West Willow so that West

[1] For convenience, "Robino" is used at times to refer to both Robino-Bay Court and Robino-Pad.

Willow could lease the Property to Wawa, Inc. ("Wawa") for the development of a Wawa convenience store with gasoline service (the "Proposed Wawa"). West Willow asserts that Robino has failed to obtain a third party consent to its proposed project required under the Purchase Agreement, as amended (the "Amended Purchase Agreement"), and asks for specific performance. The parties' chief disputes concern the nature of Robino's obligation to secure the third party consent under the Amended Purchase Agreement and the suitability of specific performance as a remedy. They have filed cross-motions for summary judgment.

II. BACKGROUND

A. *The Shopping Center and the Value City Lease*

Robino-Bay Court acquired the Shopping Center in 1997.[2] Michael Stortini, a managing member of Robino-Bay Court and a twenty percent equity owner, led Robino's efforts in the acquisition.[3] At the time, the Shopping Center had approximately a half-dozen tenants, including the department store Value City.[4] As part of the acquisition, Robino-Bay Court assumed the leases then in effect, including Value City's lease.[5]

[2] *See* Pl.'s Opening Br. in Supp. of Mot. for Summ. J., Deposition of Michael Stortini 12 (hereinafter "Stortini Dep.").
[3] *See id.* 7, 8, 12.
[4] *See id* 13.
[5] *Id.* 13-14.

Executed in 1976, Value City's lease (the "Value City Lease") addresses, among other things, future development in the Shopping Center.[6] Article XXIV provides:

> [N]either Lessor, its principal officers nor its shareholders will by sale or lease of any parcel of the land acquired in connection with any contemplated development of the Exhibit A shopping center or now existing and acquired to any person, firm or corporation permit any construction other than as shown on Exhibit A on such parcel by Lessor or the purchaser or lessee thereof, or his agents, lessees or transferees, without the consent of the Lessee, not to be unreasonably withheld. Said restriction shall be subject to Exhibit A, attached hereto. Any permitted building shall be no more than one story in height and shall only have normal commercial signs.

Thus, certain improvements in the Shopping Center were subject to Value City's prior consent, a consent that it could not unreasonably withhold. "Exhibit A" is an attachment depicting a proposed bank and liquor store at the front of the Shopping Center tract.[7] After the Value City Lease was executed, a liquor store was constructed on the proposed liquor store pad but has since been torn down. The Proposed Wawa would be erected where the liquor store was located. The Value City Lease, with extension options, expires on April 30, 2016.[8]

[6] *See* Stortini Dep., Ex. 1, at Art. XXIV (the Value City Lease). When the lease was entered into in 1976, the premises housed a Wilmington Dry Goods department store.
[7] *Id.* Ex. 1, at Ex. A. For convenience, this exhibit will be referred to hereinafter as "Exhibit A."
[8] *Id.*, at Third Amendment to Lease Agreement.

B. *The Plan to Develop Further the Shopping Center*

Seneca Properties ("Seneca") managed the Shopping Center for Robino in 2002.[9] Although Seneca was not directed to find potential buyers for property at the Shopping Center, Seneca's President, Marc Geffroy, mentioned to Thomas McKee at a trade show that a pad (the Property) was available at the Shopping Center.[10] McKee is the principal of West Willow Development LLC, which in turn owns West Willow, and is its sole employee, responsible for its real estate development activities.

After inspecting the site, McKee told Geffroy that West Willow was interested in acquiring the Property because it might be a good location to relocate an existing Wawa convenience store, which did not have gas dispensing capabilities; a store located at the Shopping Center could have gasoline service.[11]

As the result of preliminary discussions, West Willow, on September 10, 2003, sent Robino a letter of intent, outlining the terms under which it would purchase the Property.[12] The letter related that West Willow intended to transfer the Property to Wawa, by ground lease, for the construction of a Wawa store with gasoline service.[13] The letter did not create a binding obligation, but it did

[9] Stortini Dep. 24-25.
[10] Pl.'s Opening Br. in Supp. of Mot. for Summ. J., Deposition of Thomas McKee 10-12 (hereinafter "McKee Dep."); *see* Stortini Dep. 24-25.
[11] McKee Dep. 11-12.
[12] *See* McKee Dep. Ex. 1 (letter of intent); McKee Dep. 13-14.
[13] McKee Dep. 15-16.

contemplate a later purchase and sale agreement. Stortini, in response, signed the letter on Robino's behalf.[14] Negotiations ensued, and the parties entered into the Purchase Agreement on February 11, 2004.[15]

C. *The Purchase Agreement*

Under the Purchase Agreement, Robino agreed to sell and West Willow agreed to purchase the Property for $575,000, provided that certain conditions were met, again with the understanding that West Willow intended to develop the property for use as a Wawa store with gasoline service.[16] West Willow was required to make a $25,000 deposit, as well as "procure[] . . . all permits, licenses, variances, and approvals that Purchaser [West Willow] deems necessary or desirable to permit Purchaser to construct and operate" the Proposed Wawa.[17] In

[14] *See* McKee Dep. Ex. 1, at 6.

[15] *See* McKee Dep. 10; Stortini Dep. Ex. 3, at 20 (the Purchase Agreement). While negotiating with West Willow about the Property, Robino was also discussing the possibility of developing a Buffalo Wild Wings restaurant on the other pad site at the front of the Shopping Center with another party. Stortini Dep. 27.

[16] *See* Purchase Agreement.

[17] *Id.* at §§ 2, 7(b)(ii). Subsection 7(b)(ii) provides as follows:

> For purposes hereof, the term "Purchaser Approvals" means and includes (A) the procurement of all permits, licenses, variances, and approvals that Purchaser deems necessary or desirable to permit Purchaser to construct and operate Purchaser's Retail Store, including, without limitation, any and all approvals pertaining to site plan approval, buildings, site work, occupancy, signs (including, without limitation, buildings signs and a pylon sign), curb cuts (including a curb cut on Route 113), driveways (including ingress and egress to public thoroughfares), wetlands and environmental matters and all DOT and local traffic permits and approvals, and (B) all building permits for Purchaser's Retail Store and other portions of the Project (including fuel islands and underground fuel tanks).

turn, Robino was to secure the Property's subdivision from the Shopping Center and to obtain the rezoning that would permit construction of a gas station on the Property.[18]

If either party failed to meet the conditions contained in the Purchase Agreement within the specified time limit, West Willow could either extend the time for performance by a total of 180 days or terminate the agreement and reclaim its deposit.[19] If West Willow elected to extend the agreement and the parties again failed to meet all the conditions, West Willow would have the option of either waiving the conditions or terminating the Purchase Agreement.

In effect, the Purchase Agreement, as originally executed, gave West Willow an option to buy the Property. Although Robino was obligated to use "due diligence and good faith efforts" to secure subdivision and rezoning, West Willow was free to terminate the Purchase Agreement if it could not obtain any "desirable"

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[18] *Id.* at § 7(b)(i). Subsection 7(b)(i) provides:

> For purposes hereof, the term "Seller Approvals" means and includes: (A) the subdivision or resubdivision of the Property from the balance of the land currently owned by Seller in the manner depicted on Exhibit "A", as more particularly set forth in Section 11 below; and (B) the rezoning of the property to the SC-2 classification or such other zoning classification acceptable to Purchaser which permits as a matter of right the construction and operation of a convenience gas station at the Property.

In Section 11, the Purchase Agreement addresses the issue of subdivision more fully. Section 11, as later amended, is set out in its entirety below in Part II.E.2.

[19] *See id.* at § 7(b)(vi).

permit, license, variance or approval. The original agreement contained no express provision for third party consents and did not address the rights of Value City.[20]

D. *The Wawa Lease*

West Willow entered into a land lease agreement with Wawa (the "Wawa Lease") on June 30, 2004.[21] The Wawa Lease originally provided that Wawa would construct a convenience store with gasoline service on the Property and thereafter begin paying rent to West Willow.[22] Subject to certain conditions, West Willow was responsible for obtaining "all zoning, construction and other land development approvals and permits, including, without limitation, a building permit, and all use approvals and permits . . . , necessary for [Wawa] to construct, use and operate . . . a retail food market and gasoline dispensing facility in accordance with [Wawa's] plans . . . ."[23] If West Willow failed to obtain the

[20] Although the Purchase Agreement, as originally executed, did not include a term explicitly addressing third party consents, it did feature provisions that could arguably be read to encompass the Value City consent. For instance, the Purchase Agreement's Section 7, setting forth conditions precedent to closing, includes as a condition precedent the truth and accuracy of Robino's warranties and representations. *See* Purchase Agreement at § 7(d)(ii). Looking to Section 10, which sets forth those warranties and representations, at least two could be tenably read to touch upon the Value City Lease's consent provision. First, subsection 10(n) requires Robino to represent that "[t]here are no agreements or understandings (whether written or oral) relating to the Property" except for certain listed (and not applicable) exceptions. Second, section 10(p) requires Robino to represent that it "has made no commitments to any . . . third party . . . to subject the Property to any restrictions." The Purchase Agreement provides that the consequence of failure of a condition precedent is the agreement's termination (and Robino's return of West Willow's deposit less $100). *See id.* at § 7(e). These contractual provisions were not expressly revised by amendment of the Purchase Agreement.

[21] *See* McKee Dep. Ex. 3 (the Wawa Lease).

[22] *Id.* at ¶¶ 5-6.

[23] *Id.* at ¶ 6.

necessary permits and approvals by June 30, 2005, Wawa or West Willow could terminate the lease agreement. No mention was made of third party tenant consents in the Wawa Lease.

E. *The Subdivision Approval Process and Amendment of the Purchase Agreement*

1. The City's Conditional Approval

After executing the Purchase Agreement, Robino and West Willow began working to obtain the approvals, submitting applications for site plan and subdivision approval to the City of Dover (the "City"). Robino submitted the plans for the Property at the same time it submitted plans for the adjacent Buffalo Wild Wings restaurant. By then, Robino had already entered into a ground lease agreement with Buffalo Wild Wings.

Although the City initially approved the site plan application in November 2004, and extended the final approval deadline until November 30, 2006, the subdivision approval process met with difficulties. The City informed the parties on October 26, 2004, that it would not approve Robino's application for subdivision in its original form. Instead, the City conditioned subdivision approval on Robino's granting a cross access easement in favor of the owners of adjacent parcels.[24]

[24] *See* Defs.' Opening Br. in Supp. Mot. for Summ. J., Affidavit of Stephen Brauerman Ex. 7 (hereinafter "Brauerman Aff.") (letter from the City's Planning Commission).

Because Robino estimated the easement's value to be some $1.5 million, it regarded the City's conditional approval as an effective denial of the subdivision plan.[25] Accordingly, Robino notified West Willow, by letter dated December 16, 2004, that it wished to terminate the Purchase Agreement.[26] West Willow responded on December 30, informing Robino that it was willing to cooperate in opposing the City's easement requirement, but in any event Robino did not have the right to terminate the Purchase Agreement.[27] That exchange prompted further discussions between Robino and West Willow. As the result of negotiations in early 2005, Robino agreed to grant the easement in exchange for an increase in the purchase price from West Willow and a rent increase from the Buffalo Wild Wings restaurant.[28] At the same time, West Willow raised concerns about Value City's consent to the Proposed Wawa. Stortini, before the Second Amendment was executed, did not anticipate that securing Value City's consent would be a problem.[29] Thus, West Willow's concerns were addressed in the same negotiations that resolved the access easement question and resulted in an increased purchase price.

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[25] Stortini Dep. 61; McKee Dep. Ex. 4 (letter from Robino's attorney).
[26] McKee Dep. Ex. 4.
[27] *See* Pl.'s Opening Br. in Supp. of Mot. for Summ. J., Deposition of Douglas Hershman Ex. 1 (hereinafter "Hershman Dep.") (letter from West Willow's attorney).
[28] *See* Stortini Dep. 62-63.
[29] *See id*. 63-64 ("[I]f required, we could get [Value City's] consent, and if not required, [West Willow] could go ahead and build . . . .).

2. The February Letter and the Second Amendment to the Purchase Agreement

By letter dated February 28, 2005, addressed to Stortini (the "February Letter"), West Willow set out the terms under which the parties had agreed to move forward with transferring the Property and obtaining subdivision approval.[30] The letter, though sent by McKee, contained language in large part provided by one of West Willow's attorneys.[31] In the February Letter, West Willow agreed to increase the purchase price to $725,000. In exchange, Robino would

> [R]emain expressly responsible for using its best efforts to obtain, at its sole cost and expense, any and all consents and approvals from all third parties, including existing tenants and lenders, necessary or desirable for Purchaser's [West Willow's] acquisition of the Property and the development and intended use of the Property as a Wawa convenience store with gasoline service and such other amenities as Wawa desires. These consents and approvals include, but are not limited to, final subdivision and site plan approvals from the City of Dover; accordingly, Seller [Robino-Bay Court] shall grant such easements and/or cross-access agreements required by the city, county or state (including specifically, DelDOT) and promptly and fully satisfy, at its sole cost and expense, all other conditions precedent to the subdivision and site plan approval.[32]

The February Letter was not to be binding; instead, a binding agreement would take effect only upon the execution of a formal amendment to the Purchase

[30] *See* Brauerman Aff. Ex. 10 (the February Letter).
[31] McKee Dep. 44-46; *see* Pl.'s Opening Br. in Supp. of Mot. for Summ. J., Deposition of Mark Jackson 62-63 (hereinafter "Jackson Dep.").
[32] Brauerman Aff. Ex. 10 at 1.

Agreement.[33] Stortini signed the February Letter on Robino's behalf and returned it to West Willow.

West Willow's attorneys eventually prepared a Second Amendment to the Purchase Agreement (the "Second Amendment")[34] and sent it to Robino for execution.[35] Acting for Robino, Stortini executed the Second Amendment on April 5, 2005, without consulting counsel, believing that it merely formalized the terms of the February Letter.[36] Specifically, Stortini expected that the Second Amendment would only obligate Robino to use "best efforts" to obtain Value City's consent, if obtaining Value City's consent was necessary.[37] Between Robino's receipt of the February Letter and the execution of the Second Amendment, the parties had not negotiated or discussed terms.[38] As executed, the Second Amendment reads, in pertinent part:

> Anything contained herein to the contrary notwithstanding, Seller shall remain expressly responsible for obtaining, at its sole cost and expense, any and all consents and approvals from all third parties necessary or desirable for Purchaser's acquisition of the Property and the development and use of the Property as a Wawa convenience store with gasoline service and such other amenities as Wawa desires. These consents and approvals include, but are not limited to, final subdivision and site plan approvals from the City of Dover as contemplated above. Accordingly, Seller specifically covenants and

[33] *Id.* at 1.
[34] Brauerman Aff. Ex. 11 at ¶ 2(b) (hereinafter the "Second Amendment"). The First Amendment to the Purchase Agreement altered terms not related to the present controversy.
[35] Jackson Dep. 72-73.
[36] *See* Stortini Dep. 68-69, 71-72.
[37] Stortini Dep. 70-71.
[38] McKee Dep. 48; *see* Jackson Dep. 73.

> agrees to grant such easements and/or cross-access easements required by the city, county or state (including specifically, DELDOT) and to promptly and fully satisfy, at its sole cost and expense, all other conditions precedent to the subdivision and site plan approval. . . . Seller shall use due diligence and its best efforts to fully satisfy all of the requirements set forth in this paragraph as soon as possible.

The Second Amendment further provides:

> In the event Seller for any reason fails to deliver and procure any and all necessary approvals for Purchaser's intended use of the Property as a Wawa convenience store with gasoline service as aforesaid and/or to fully and timely satisfy all conditions precedent thereto, Purchaser shall be entitled to exercise any of its rights at law, in equity or under this Agreement (including, without limitation, the right to specific performance and/or monetary damages), without regard to any contractual limitations.

When integrated into the Purchase Agreement, the Second Amendment amended Section 11 to read, in germane portion, as follows:

> 11. Subdivision.[39] [1] The parties acknowledge that the Shopping Center currently consists of a single lot recognized only by preliminary subdivision. [2] In this regard, following the expiration of the Inspection Period, *Seller shall, at its sole cost and expense, use due diligence and good faith efforts to cause the Shopping Center to be subdivided or resubdivided so that (i) the Property shall become a single and separately subdivided and recorded lot or parcel for all purposes and (ii) the Property shall have the configuration substantially as shown on the Site Plan attached hereto.* [3] All documents to be submitted by Seller to governmental authorities in connection with such subdivision effort after the Effective Date shall be subject to Purchaser's prior review and written approval . . . .

[39] The bracketed numbers are used for ease of reference to the various sentences of Section 11 as amended ("Amended Section 11"). Although Amended Section 11 carries the caption of "Subdivision," it is not limited to subdivision matters, and the Purchase Agreement contains a provision that captions are for "reference purposes" only. *See* Purchase Agreement § 27.

[4] Purchaser covenants to respond to any to any request for consent to any subdivision documents within ten (10) business days . . . . [5] In the event Purchaser is unwilling to consent . . . then either Purchaser or Seller may terminate this Agreement . . . . [6] Seller covenants that it shall not voluntarily pursue or advocate any subdivision . . . which would impose conditions upon the Property which would require Purchaser to seek a variance to construct or operate the Project or would otherwise adversely affect . . . Purchaser's ability to procure all Approvals or to construct or operate the project. [7] Seller shall notify Purchaser upon the date the subdivision of the Property has been finally completed . . . . [8][40] *Anything contained herein to the contrary notwithstanding, Seller shall remain expressly responsible for obtaining, at its sole cost and expense, any and all consents and approvals from all third parties necessary or desirable for Purchaser's acquisition of the Property and the development and use of the Property as a Wawa convenience store with gasoline service and such other amenities as Wawa desires.* [9] These consents and approvals include, but are not limited to, final subdivision and site plan approvals from the City of Dover as contemplated above. [10] Accordingly, Seller specifically covenants and agrees to grant such easements and/or cross-access easements required by the city, county or state (including specifically, DELDOT) and *to promptly and fully satisfy*, at its sole cost and expense, *all other conditions precedent to the subdivision and site plan approval.* [11] The foregoing obligations include, without limitation, the obligation (i) to cause to be instated the proceedings in the City of Dover for Minor Subdivision Plan approval . . . , as well as the proceedings in the City of Dover for Site Plan Approval . . . , [and] (ii) to fully satisfy all conditions imposed as outlined in the Development Advisory Committee Report . . . . [12] *Seller shall use due diligence and its best efforts to fully satisfy all of the requirements set forth in this paragraph as soon as possible.*

[13] *In the event Seller for any reason fails to deliver and procure any and all necessary approvals for Purchaser's intended use* of the Property as a Wawa convenience store with gasoline service as

[40] The Second Amendment deleted the final two sentences of the original Section 11 and substituted its text. Sentence 8 is the first sentence with its language supplied by the Second Amendment.

> aforesaid and/or to fully and timely satisfy all conditions precedent thereto, Purchaser shall be entitled to exercise any of its rights at law, in equity or under this Agreement (including, without limitation, the right to specific performance and/or money damages), without regard to any contractual limitation.[41]

Significantly, the "best efforts," language of the February Letter, describing the nature of Robino's obligation to obtain third party consents, does not appear in the Second Amendment.

3. Subdivision Approval

With the Second Amendment in place, Robino executed an easement agreement satisfying the conditions the City had placed on subdivision approval in October 2005.[42] Although the City eventually approved the subdivision application, because the necessary approvals had not been obtained by summer 2005 as required by the original Wawa Lease, West Willow and Wawa had executed a First Amendment to the Wawa Lease.[43] The amendment gave West Willow an additional 180 days to secure the necessary permits and approvals.

F. *Value City*

1. West Willow's Concerns About Value City

As noted above, early in the approval process, McKee learned from Geffroy that Value City might be able to object to the Proposed Wawa based on the terms

[41] *See* Purchase Agreement (emphasis added); Second Amendment (emphasis added).
[42] Brauerman Aff. Ex. 12 (the Access Easement Agreement); Stortini Dep. 60.
[43] Pl.'s Opening Br. in Supp. of Mot. for Summ. J., Deposition of Alexander Krowzow 22; (hereinafter "Krowzow Dep."); Krowzow Dep. Ex. 2 (First Amendment to Wawa Lease).

of its lease with Robino-Bay Court.[44] In 2004, McKee discussed Value City's rights under the lease with both Geffroy and Robino's counsel overseeing the subdivision process. Geffroy, on behalf of Robino, wrote Value City's President, Edward Arndt, on September 20, 2004, requesting that Value City approve the Proposed Wawa.[45] Arndt responded, declining to give Value City's consent to the proposed sale of the Property and the Proposed Wawa.[46]

From 2004 to 2006, Stortini had numerous conversations with Geffroy about securing Value City's consent.[47] Geffroy wanted to get Value City's consent, but Stortini did not consider it necessary.[48]

After execution of the Second Amendment to the Purchase Agreement and the First Amendment to the Wawa Lease, West Willow began pressing Robino on the Value City consent.[49] In an email dated September 21, 2005, McKee told Tom Cekine, a Robino project manager, that West Willow was "running into a real time crunch with regard to its delivery requirements with Wawa."[50]

On December 23, 2005, West Willow and Wawa executed a Second Amendment to the Wawa Lease, extending the permit and approvals period to

[44] McKee Dep. 28-29.
[45] Stortini Dep. Ex. 5.
[46] *Id.*
[47] Stortini 46.
[48] *Id.*
[49] *See, e.g.*, Stortini Dep. Ex. 11 (email ascertaining the status of Value City's consent).
[50] *Id.*

June 30, 2006.[51] At the time, Wawa was not aware of West Willow and Robino's difficulties in securing Value City's consent or of what was preventing West Willow and Robino from closing on the Property. Instead, Wawa executed the Second Lease Amendment in order to give itself more time to secure municipal approvals.[52]

In discussions in early 2006, Robino informed West Willow that it did not think Value City's consent was necessary.[53] In addition, Robino's attorneys were afraid that Value City might attempt to "take advantage of the situation."[54] Robino based its opinion that Value City's consent was unnecessary on two considerations. First, because the Value City Lease permitted the two stores in the parking lot of the Shopping Center, delineated in Exhibit A, and the Proposed Wawa was to be built on one of the sites set forth in Exhibit A (the proposed liquor store site), Robino believed Value City did not have a right to object.[55] Second, a Buffalo Wild Wings restaurant had been constructed, opened, and operated without Value City's protest, on the site of the proposed bank shown in Exhibit A.[56]

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[51] Krowzow Dep. Ex. 3 (Second Amendment to Wawa Lease).
[52] Krowzow Dep. 32-34.
[53] Stortini Dep. 78-79; *see* Hershman Dep. 31-33.
[54] Hershman Dep. 32.
[55] Hershman Dep. 27-31, 34-36; *see* Stortini Dep. 27-28. *See also* Exhibit A (depicting a proposed bank and liquor store on outer pads in the Shopping Center); text accompanying *supra* notes 7-8 (describing Exhibit A).
[56] *See* Stortini Dep. 27-28, 40; Hershman Dep. 34.

Nonetheless, by May 10, 2006, West Willow had made clear that it believed Value City's consent was necessary. In an email sent that day, West Willow's attorney informed Robino's attorney that it interpreted the Value City Lease to require Value City's consent.[57]

Eventually, Robino and West Willow "agreed to disagree" over whether or not Value City's consent was necessary. Nevertheless, Robino's attorney agreed to seek it, although he was not aware that Geffroy had unsuccessfully approached Value City some two years earlier.[58]

West Willow and Wawa executed a Third Amendment to the Wawa Lease around June 30, 2006, which extended the permit period to December 31, 2006.[59] At this point, Wawa was aware that Value City's withheld consent was preventing Robino and West Willow from closing on the Property.

2. Negotiations with Value City

Robino asked for Value City's consent in a letter dated July 10, 2006.[60] Fearing that the proposed Wawa would reduce Value City's visibility, Arndt withheld consent in a letter dated July 13, 2006, but mentioned that Value City might be more amenable if Robino would renovate Value City's exterior

[57] *See* Hershman Dep. Ex. 3.
[58] *See* Hershman Dep. 18-19, 31-33, 70-71. Robino had terminated its relationship with Seneca and Geffroy in 2004. Stortini Dep. 30-31.
[59] Krowzow Dep. Ex. 4 (Third Amendment to Wawa Lease).
[60] Brauerman Aff. Ex. 14 (letter from Robino's attorney).

storefront, provide it with lease renewal options and release a third party, a Value City affiliate, from liability under the lease.[61] Robino and Value City then engaged in another round of correspondence, Robino arguing that Value City was unreasonably withholding its consent and Value City reiterating its previous position.

Because Robino found Value City's conditions unacceptable, it informed West Willow's attorney that it could not obtain Value City's consent. In reply, West Willow's attorney objected that Robino had failed to use its best efforts, stating, "[p]ursuant to the terms of the Second Amendment, Robino is specifically obligated to use its best efforts, which it has not done, to obtain any third party consent that West Willow deems desirable."[62]

After receiving West Willow's letter, Robino approached Value City again. Robino offered Value City $75,000 toward the construction of a new storefront façade, as well as to extend the Value City Lease for two additional five-year terms at $5.75 per square foot.[63] Robino also offered to release the third party affiliate.[64] Value City countered, proposing that Robino offer it a termination fee "in the millions" in exchange for terminating the lease.[65] After several negotiation

[61] Brauerman Aff. Ex. 15 (Arndt's response).
[62] Brauerman Aff. Ex. 19 (West Willow's attorney's response).
[63] Brauerman Aff. Ex. 20 (email from Robino's attorney to Value City).
[64] *Id.*
[65] Brauerman Aff. Ex. 21 (reply email from Value City).

sessions, Value City withdrew its counteroffers and on November 6, 2006, Robino informed West Willow by letter that it could not obtain Value City's consent.[66] West Willow did not respond.

Value City reopened negotiations on November 7, 2006, offering to approve the Property's sale and the Proposed Wawa in exchange for a new façade, the release of the third party affiliate, and either one additional five year renewal option at $1.50 per square foot or two additional five year options, with a rental rate of $3.00 per square foot for the first option period and a rental rate of $4.00 per square foot for the second option period.[67]

Robino responded by offering $100,000 toward the new storefront, agreeing to release the third party affiliate, and proposing two additional five year options of $5.00 per square foot for the first option period and $6.00 per square foot for the second option period.[68] The option rent rates, in Robino's opinion, were below even the then-current market rate.[69] By Robino's estimate, its offered concessions package had a present value of at least $650,000. Nevertheless, Value City discontinued negotiations again on November 14, 2006,[70] and Robino, therefore, has been unable to obtain its consent.

[66] Brauerman Aff. Ex. 22 (email from Robino's attorney to West Willow's attorney).
[67] Brauerman Aff. Ex. 23 (email from Value City to Robino's attorney).
[68] Brauerman Aff. Ex. 24 (reply email from Robino's attorney to Value City).
[69] *Id.*
[70] Brauerman Aff. Ex. 25 (letter from Value City to Robino's attorney).

3. Wawa's Unwillingness to Proceed Without Value City's Consent

The permit period under the Third Amendment to the Wawa Lease expired on December 31, 2006. Although Wawa has drafted a Fourth Amendment, that document has not been executed.[71] Wawa has indicated that it will not close on the lease until Value City confirms that it will not object to the Proposed Wawa.[72]

III. CONTENTIONS

West Willow asks that the Court declare (1) that Robino has breached the Amended Purchase Agreement by failing to obtain Value City's consent and by terminating its efforts to do so and (2) that West Willow is entitled to specific performance of Robino's obligation to secure Value City's consent.

A. *The Nature of Robino's Obligation*

West Willow contends that the plain language of the Second Amendment, clear and unambiguous, imposes an unqualified obligation on Robino to obtain Value City's consent. It supports this argument by citing the Amended Purchase Agreement which provides that Robino "shall remain expressly responsible for obtaining, at its sole cost and expense, any and all consents . . . necessary or desirable for [West Willow's] acquisition of the Property and [its development and use] as a Wawa convenience store." West Willow emphasizes that under the

[71] *See* Krowzow Dep. Ex. 45 (draft Fourth Amendment to Wawa Lease); Pl.'s Br. in Supp. of Mot. for Summ. J., Affidavit of Alexander Krowzow ¶¶ 5-6.
[72] Krowzow Dep. 46.

language of the clause, Robino's obligation is not constrained by any "best efforts" language.

Conversely, Robino urges that the clear and unambiguous plain language of the Amended Purchase Agreement requires it only to use "best efforts" to obtain Value City's consent. In support, Robino contends that Sentence 2, unaltered by amendment and providing that the "Seller shall, at its sole cost and expense, use due diligence and good faith efforts" to secure subdivision approval,[73] supports a best efforts standard. Additionally, Robino submits that Sentence 12 is not merely a timing provision but that it also qualifies Robino's obligation to obtain the consents and approvals discussed in Sentence 8, requiring Robino only to use its best efforts to secure Value City's consent. [74]

Finally, Robino argues in the alternative that if Amended Section 11 is found to be ambiguous, the extrinsic evidence supports a best efforts standard. West Willow answers that the extrinsic evidence supports an unconditional obligation.

B. *Robino's Conformity with the Amended Purchase Agreement*

Robino maintains it has met its best efforts obligation under the Amended Section 11 by attempting to secure Value City's consent.[75] West Willow, in turn,

[73] Purchase Agreement at § 11.

[74] Sentence 12 states that "Seller shall use due diligence and its best efforts to fully satisfy all the requirements set forth in this paragraph as soon as possible."

[75] Robino argues that its negotiations with Value City, culminating in an offer to provide concessions that Robino values at $650,000, constituted best efforts. The question of whether Robino exercised its best efforts has not been submitted for the Court's consideration.

argues that the governing standard is unconditional, and that because Robino has failed to secure Value City's consent and is not taking any further action toward that end, Robino has breached the Amended Purchase Agreement.

C. *The Suitability of Specific Performance as a Remedy*

Finally, if Robino is held to have breached the Amended Purchase Agreement, the parties dispute specific performance's appropriateness as a remedy. West Willow argues that specific performance is appropriate because the sale of real property is at issue. Robino replies that specific performance is inappropriate because West Willow has an adequate remedy at law; an order of specific performance would include a personal services component; and finally, crafting a specific performance order in this case would necessarily entail a great deal of the Court's supervision.

IV. ANALYSIS

A. *Standard Applicable on Cross-Motions for Summary Judgment*

Court of Chancery Rule 56 governs motions for summary judgment.[76] Where, as here, the parties have filed cross-motions for summary judgment without presenting argument that an issue of material fact exists with regard to either motion, Court of Chancery Rule 56(h) directs "the Court [to] deem the

[76] *O'Neill v. Town of Middletown*, 2007 WL 1114019, at *5 (Del. Ch. Mar. 29, 2007).

motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[77]

B. *Some General Principles*

Determining the nature of Robino's obligation under the Purchase Agreement to obtain Value City's consent is the crux of this matter and an exercise in contract interpretation. The proper interpretation of a contract, although analytically a question of fact, is considered a question of law.[78]

The goal of contract interpretation is to ascertain the shared intention of the parties.[79] Contracts must be construed as a whole.[80] Where contract language is "clear and unambiguous," the ordinary and usual meaning of the chosen words will generally establish the parties' intent.[81] The presumption that the parties are bound by the language of the agreement they negotiated applies with even greater force when the parties are sophisticated entities that have engaged in arms-length

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[77] Ct. Ch. R. 56(h); *see O'Neill*, 2007 WL 1114019, at *5 n.34 (noting that Court of Chancery Rule 56(h) "treats cross-motions for summary judgment in the absence of identified factual issues as the practical equivalent of a stipulation for decision on the merits based on the record submitted . . . ").

[78] *Pellaton v. Bank of New York*, 592 A.2d at 473, 478 (Del. 1999).

[79] *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).

[80] *Nw. Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996). "[T]he meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan." *Shell Oil Co.*, 498 A.2d at 1113.

[81] Delaware adheres to the objective theory of contracts, under which it is presumed that contract language governs in the absence of ambiguity. *Progressive Int'l Corp. v. E.I. du Pont de Nemours & Co.*, 2002 WL 1558382, at *7 (Del. Ch. July 9, 2002). Under the objective theory of contract, "'intent does not invite a tour through [a party's] cranium, with [the party] as the guide.'" *Id.* (quoting E. ALLAN FARNSWORTH, CONTRACTS § 3.6 (2d ed. 2000)).

negotiations.[82] Only where contract language is ambiguous will a court consider extrinsic evidence in interpreting an agreement,[83] and a court will not disturb a bargain because, in retrospect, it appears to have been a poor one.[84]

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[82] It should be noted that both parties' are sophisticated entities and their agents are sophisticated businesspersons. They both have had extensive experience in real estate development and both have had ample access to counsel. It is a basic principle of contract law that a person is bound by the terms of a contract he signs, even if he has not read the agreement or is otherwise unaware of its terms. *See Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 913 (Del. 1989); s*ee also Pellaton*, 592 A.2d 473 (Del. 1991) (enforcing contract terms despite the signing party's assertion that he did not read the document before signing). Thus, Robino's suggestion that Stortini executed the Second Amendment without having first scrutinized its terms is unavailing. Also, that Stortini executed the agreement without the advice of counsel is of little moment: there is no general requirement that contracts be executed under the guidance of counsel, especially when the signor is a sophisticated businessperson like Stortini.

[83] *E.g.*, *NAMA Holdings v. World Mkt. Ctr. Venture, LLC*, 2007 WL 2088851, at *6 (Del. Ch. July 20, 2007).

The Delaware Supreme Court has declared that if a contract "is *clear and unambiguous* on its face," a court may not consult extrinsic evidence in interpreting its provisions. *Pellaton*, 592 A.2d at 478 (emphasis added). In a similar vein, but employing slightly different words, this Court has stated,

> When the language of a contract is *plain and unambiguous*, binding effect should be given to its evident meaning. Only where there are ambiguities may a court look to collateral circumstances; otherwise, only the language of the contract itself is considered in determining the intentions of the parties.

Majkowski v. Am. Imaging Mgmt. Servs., LLC, 913 A.2d 572, 581 (Del. Ch. 2006) (emphasis added). Hence, in determining whether to turn to extrinsic evidence, Delaware courts are to decide at the outset whether or not the contract language is "clear and unambiguous" or "plain and unambiguous." Although this language seems to suggest two inquiries—first, whether the language is "clear" or "plain," and second, whether the language is "unambiguous"—the terms of art "clear and unambiguous" and "plain and unambiguous" collapse into a single query centering on "ambiguity" alone. *See, e.g.*, *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) ("If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity."); *City Investing Co. Liquidating Trust v. Cont'l Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993) ("If a writing is plain and clear on its face, *i.e.*, its language conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent. However, if the words of the agreement can only be known through an appreciation of the context and circumstances in which they were used a court is not free to disregard extrinsic evidence of what the parties intended. *In that situation the language used by the parties is subject to different meanings and*

C. *The Nature of Robino's Obligation Under the Amended Purchase Agreement*

Because the pending dispute focuses on Sentence 8 of Amended Section 11, it is worth repeating:

> Anything contained herein to the contrary notwithstanding, Seller shall remain expressly responsible for obtaining, at its sole cost and expense, any and all consents and approvals from all third parties necessary or desirable for Purchaser's acquisition of the Property and the development and use of the Property as a Wawa convenience store with gasoline service and such other amenities as Wawa desires.

A review of the sentence's component parts will be helpful in reaching an understanding of the parties' intent.

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is, thus, ambiguous, or more precisely, not reflective of the parties shared intent." (internal citations and quotations omitted) (emphasis added)); *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del. 1992) ("Absent some ambiguity, Delaware courts will not destroy or twist [contract] language under the guise of construing it."); *Carlson v. Hallinan*, 925 A.2d 506, 527 (Del. Ch. 2006) ("A court may only resort to extrinsic evidence to ascertain the meaning of the contract if it is ambiguous."); *Progressive Int'l Corp.*, 2002 WL 1558382, at *7 ("[T]he language of a contract governs when no ambiguity exists."); E. ALLAN FARNSWORTH, CONTRACTS § 7.12, at 465 (4th ed. 2004) (using "clear" and "ambiguous" as antonyms); SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §§ 30:4-30:7, at 37-92 (4th ed. 1999) (discussing ambiguity alone as the criterion to be employed in determining whether or not it is proper for a court to consult extrinsic evidence).

Naturally, "[t]here may be occasions where it is appropriate for the trial court to consider some undisputed background facts to place the contractual provision in its historical setting without violating this principle." *Eagle Indus., Inc.*, 702 A.2d at 1233 n.7. "But the trial court must be careful in entertaining background facts to avoid encroaching on the basic principles [concerning extrinsic evidence] set forth herein." *Id.* A fair reading of a contract requires an understanding of the context, but that factual background cannot be allowed to serve as a substitute for extrinsic evidence and thereby divert appropriate attention from the words employed by the parties.

[84] *See, e.g.*, *Fed. Sav. & Loan Ins. Corp. v. Grand Forks Bldg. & Loan Ass'n*, 85 F. Supp. 248, 252 (D. N.D. 1949) ("[The] Court has no authority to re-make or revamp an executed contract, nor to indulge in any artificial or unreal construction in order to relieve the defendant of the seeming burdens of its contract.").

At the outset, it should be noted that Sentence 8 is given special prominence within Amended Section 11. Its introductory clause, "[a]nything to the contrary notwithstanding," allows Sentence 8 to trump any other provision that might conflict with it. No other term within Amended Section 11 benefits from a comparable booster.

As for its substantive content, Sentence 8 directs Robino to obtain "consents and approvals from all third parties necessary or desirable." This language presents two threshold issues for determination: first, is Value City a third party within the scope of the Amended Purchase Agreement, and second, is its consent necessary or desirable? A third party is simply "[o]ne not a party to an agreement, a transaction, or an action but who may have rights therein."[85] Value City is clearly a third party by virtue of the consent clause in its lease with Robino-Bay Court.

Whether or not Value City's consent is necessary or desirable is a question only a shade less facile. The Value City Lease provides that Robino-Bay Court may not cause any construction in the Shopping Center as the result of a sale other than the construction of the proposed bank and liquor store depicted in Exhibit A without Value City's consent, which cannot be unreasonably withheld.

[85] BLACK'S LAW DICTIONARY 1479 (6th ed. 1990).

In construing this provision for the purposes of this litigation,[86] Value City's consent appears to be necessary. West Willow is not seeking to develop a liquor store on the proposed pad, nor is the Proposed Wawa likely to have the same (relatively minor) effect on visibility that a liquor store would have.[87] Moreover, Wawa apparently will not go forward without Value City's consent.[88]

The question "remains" of how to view the phrase, "[Robino] shall remain expressly responsible for obtaining any and all consents and contracts from all third parties necessary or desirable."[89] The critical word, of course, is "remain." "Remain" is frequently understood to mean "staying the way it was or continuing." It can also have a meaning of "to be something yet to be shown, done, or treated."[90]

If the first meaning was intended, the sentence firmly and without a hint of textual ambiguity establishes that the obligation to obtain the Value City consent

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[86] The Court, of course, supplies no definitive construction of the Value City Lease; instead, it offers only a plausible reading of that agreement to the extent necessary to frame the issues before it.

[87] The Court takes notice that unlike liquor stores, modern convenience stores with gasoline dispensing facilities usually have towering overhead shelters above their pumps. Value City's Arndt wrote that compared to the proposed bank and liquor store depicted on Exhibit A, "[t]he Wawa Project is much larger in scope." Brauerman Aff. Ex. 15.

[88] If these factors do not make Value City's consent necessary, they certainly make it desirable to eliminate the risk of litigation over the Proposed Wawa under the Value City Lease.

[89] Perhaps more to the point, the question is whether use of the word "remain" renders the key provision of the Amended Purchase Agreement ambiguous. "[A] contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible to different interpretations or may have two or more different meanings." *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 288 (Del. 2001).

[90] WEBSTER'S THIRD INT'L DICTIONARY 1919 (3d ed. 1993).

was Robino's responsibility before the Second Amendment and continues as its responsibility after that amendment. That interpretation, of course, may be at odds with the undisputed fact that Robino never (at least before the Second Amendment) had any expressly delineated duty to obtain Value City's consent.[91] By the time of the February Letter, the parties had agreed—albeit without any formal binding resolution—that Robino would use its best efforts to obtain Value City's consent. That, however, is of little help to Robino because the history of how the parties reached the current language constitutes extrinsic evidence which cannot be used to alter the meaning of otherwise clear and unambiguous language.

Even if the history—showing that Robino had no prior binding obligation to obtain the consent—is used, the alternative definition of "remain" serves the necessary purpose by instructing that the job of obtaining the consent is something yet to be done by Robino, another unambiguous reading and only a slightly

[91] Another possible explanation is that the parties understood from the outset that Robino was to secure third party consents and approvals other than those identified in subsection 7(b)(ii). *See supra* note 20 (discussing the original Purchase Agreement's required warranties and representations). Although extrinsic evidence cannot be used to guide the interpretation of clear and unambiguous contract language (*see Shell Oil Co.*, 498 A.2d at 113; text accompanying *supra* notes 81-84), this position also finds some support in the deposition of the West Willow attorney who drafted the Second Amendment. Jackson Dep. 72-73. In his deposition, he noted that Robino may have been required to get Value City's consent under the original Purchase Agreement's warranties and representations section, as well as the title requirements section. Jackson Dep. 50. Additionally, he stated that the Second Amendment was designed, in part, to eliminate ambiguity, *see* Jackson Dep. 68-69, which could be argued to include underscoring the parties' understanding from the beginning that Robino was to obtain consents. Finally, he implied that the original Section 11 might have encompassed the Value City consent as well. *See* Jackson Dep. 51-52. The deposition, however, also offers support for the contrary view: addressing the Second Amendment, West Willow's attorney stated that it was intended to obligate Robino to do something more than what was originally intended. *See id.* at 65.

strained interpretation of the words.[92] That two separate meanings for remain can be found applicable does not make the sentence ambiguous because the ultimate result remains the same: that is, that Robino has the obligation to secure Value City's consent.

Moreover, contrary to Robino's position, Sentence 8 is not qualified by any "best efforts," "reasonable efforts," or "good faith efforts" language.[93] As the *Restatement (Second) of Contracts* teaches:

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[92] Of course, as the Court recognizes, *supra* notes 20 (discussing the textual argument that the Purchase Agreement's required representations and warranties encompassed the Value City Lease consent clause) and 91 (discussing in passing the extrinsic evidence concerning the opinion of West Willow's attorney), there is an argument that Robino was obligated to obtain Value City's consent under the original Purchase Agreement. It could further be asserted that if Robino was always required to obtain Value City's consent as a condition precedent to closing pursuant to the required warranties and representations, and Amended Section 11's Sentence 13 reserves all available remedies only if Robino fails to obtain necessary "approvals," that failure to obtain a required "consent" under Amended Section 11 would only invoke the original Purchase Agreement's remedy for failure to meet all conditions precedent: termination of the Purchase Agreement. The Court ultimately finds this reasoning unpersuasive because it depends on a distinction between "approvals" and "consents," terms that the Purchase Agreement itself shows the parties have used interchangeably at times. For instance, Section 11 of the original Purchase Agreement provides that "[a]ll documents to be submitted by [Robino] to governmental authorities . . . shall be subject to [*West Willow's*] prior review and *written approval*." Purchase Agreement, at § 11 (emphasis added). Addressing those same contemplated written approvals, the very next sentence provides, "[*West Willow*] *covenants to respond to any request for consent* . . . ." *See id.* Thus, the fact that remedies are expressly reserved for breaches relating to "approvals" without mentioning "consents" is not of great significance.

[93] Although Sentence 8 spells out Robino's obligation clearly in regard to securing Value City's consent, in the main, Amended Section 11 is certainly not a fine example of precise contract drafting. For example, a more difficult question of contract interpretation, one that is not before the Court, is what Robino's obligation was in regard to securing subdivision approval. Sentence 2 requires Robino to use "best efforts," while Sentence 8 provides, "Anything contained herein to the contrary notwithstanding, Seller shall remain expressly responsible for obtaining . . . [all] approvals . . . ." This language, particularly given the "anything to the contrary notwithstanding" clause, would arguably vitiate the express best efforts language of Sentence 2. No comparable tension within Amended Section 11 exists with respect to third party consents because only Sentence 12 deals explicitly with that topic.

> Contract liability is strict liability. It is an accepted maxim that *pacta sunt servanda*, contracts are to be kept. The obligor is therefore liable in damages for breach of contract even if he is without fault and even if circumstances have made the contract more burdensome or less desirable than he had anticipated . . . . *The obligor who does not wish to undertake so extensive an obligation may contract for a lesser one by using one of a variety of common clauses: he may agree only to use his "best efforts"; he may restrict his obligation to his output or requirements; he may reserve a right to cancel the contract; he may use a flexible pricing arrangement such as a "cost plus" term; he may insert a force majeure clause; or he may limit his damages for breach.*[94]

Because Sentence 8 is not limited by any "best efforts" language, Robino agreed, without qualification, to secure Value City's consent to the Proposed Wawa.

Robino's alternative construction is unpersuasive. Robino looks to Sentence 2, unchanged by the Second Amendment, but it does not establish an umbrella "best efforts" standard for the remainder of Section 11. Stating that "Seller shall . . . use due diligence and good faith efforts to cause the Shopping Center *to be subdivided*," Sentence 2's qualified obligation is limited to subdivision approval and has no bearing on Robino's obligation to obtain Value City's consent.

Similarly, the Second Amendment's use of the word "remain" in Sentence 8 does not merely reconfirm the "due diligence and good faith efforts" standard that was preserved from the original Section 11 in Sentence 2 as Robino suggests. Construing "remain" in this fashion would strain the Second

[94] RESTATEMENT (SECOND) OF CONTRACTS ch. 11 introductory cmt. (emphasis added).

Amendment's text, because, as discussed above, the "due diligence and good faith efforts" standard applies only to subdivision approval, while the Second Amendment, by way of the new Sentence 8, imposes a new, express obligation on Robino: to obtain necessary or desirable consents from third parties.[95]

Robino's assertion that Sentence 12 is more than a timing provision, qualifying Robino's obligation to obtain the requisite consents and approvals, similarly fails. Read naturally, the sentence (stating "Seller shall use due diligence and its best efforts to fully satisfy all of the requirements set forth in this paragraph as soon as possible") can only be read as a timing provision. No deadline is set; Robino must use its "best efforts" to meet its obligation "as soon as possible." This interpretation, does not, as Robino contends, render Sentence 10's "promptly and fully" language repetitive or mere surplusage. Delaware courts do prefer to interpret contracts to give effect to each term rather than to construe them in a way that renders some terms repetitive or mere

[95] Robino does not sponsor a plausible alternative meaning for "remain." Instead, its argument ultimately reduces down to a contention that Sentence 8 does not make any sense because of its verb. If "remain" is read in the sense of "staying the way it was," Sentence 8 in Robino's view makes no sense, because it could not stay responsible for an obligation (third party consents) which it never had explicitly before the Second Amendment. Adopting that view, one not without some appeal, especially in light of the extrinsic evidence, *see infra* note 98, would lead the Court to read the section out of the agreement. Where the words can be read to describe a contractual duty in an unambiguous—even if somewhat awkward—fashion, the Court's function is not to substitute its subjective view of what the parties might have intended but, instead, it is to give meaning to the words used by the parties.

surplusage.[96] Nonetheless, a simple reading of Sentence 10, stating "[Seller] . . . agrees to grant such easements and/or cross-access agreements required by the [city, county and state government] . . . and to promptly and fully satisfy . . . all other conditions precedent to *the subdivision and site plan approval*," reveals that this timing provision addresses only the government approvals (and possibly private parties' actions necessary to satisfy the various regulatory requirements), while Sentence 8 addresses "all of the requirements set forth in [Section 11's first paragraph]," including the third party consents.[97]

The Amended Purchase Agreement is clear and unambiguous in regard to Robino's obligation to secure third party consents; therefore, the Court declines to consider extrinsic evidence and holds that the plain meaning of Section 11 imposes on Robino the otherwise unqualified duty to secure Value City's consent to the Proposed Wawa.[98]

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[96] *See, e.g.*, *O'Brien*, 785 A.2d at 287 ("Delaware Courts have consistently held than an interpretation that gives effect to each term of an agreement is preferable to any interpretation that would result in a conclusion that some terms are uselessly repetitive.").

[97] Another argument—one not squarely presented by Robino—that might be seen as aiding Robino proceeds as follows. Sentence 8 merely reinforces that it is Robino who must obtain the third party consents. Sentence 8 does not set any performance standard, such as, for example, an unqualified duty or best efforts. Elsewhere, in Amended Section 11, a standard—best efforts—is prescribed for certain tasks, but no standard is established for the Sentence 8 responsibilities. Thus, there is a void in the Amended Purchase Agreement that constitutes an ambiguity and may be filled by reference to extrinsic evidence. That argument fails, however, because the standard of performance in a contract—in the absence of any qualification—is understood for what it is: a binding and unqualified obligation—one which, the Court has concluded, was imposed upon Robino by the Amended Purchase Agreement for those matters within the scope of Sentence 8.

[98] The extrinsic evidence, if it could be considered, would favor Robino primarily because the February Letter (containing terms that were not negotiated thereafter) anticipates only Robino's

D. *A Few Words About "Absurdity"*

Robino's contention that such a construction is hyper-technical and would work an absurd result, an argument occupying the interstices between the text and extrinsic evidence, deserves comment. At root, Robino argues that holding it entered into an agreement guaranteeing the consent of a third party beyond its control, whatever the cost, works an absurd result, an agreement that would be commercially disadvantageous to Robino and, hence, one unreasonable for Robino to enter into. Although not without some appeal, this argument is ultimately unpersuasive. A wide gulf exists between construing an ambiguous contract as commanding an absurd result and simply enforcing the language of a revised contract that appears to be a poor bargain based upon a close and careful reading of its terms.

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best efforts to secure Value City's consent. Indeed, that understanding was reflected in a demand letter written by West Willow's counsel which reminded Robino that it was "specifically obligated [by the terms of the Second Amendment] to use its best efforts, which it has not done, to obtain any third party consent . . ." Brauerman Aff. Ex. 19 (letter from West Willow's attorney to Robino's attorney). Most (if not all) of the additional compensation paid to Robino under the Second Amendment can fairly be allocated to the cost of providing the easement to adjacent owners. Thus, Robino received little, if any, compensation for taking on the risk of obtaining Value City's consent. On the other hand, Robino may not have appreciated the risk and may not have sought additional payment because Stortini thought that obtaining Value City's consent would not be difficult. *See* Stortini Dep. 57, 63-64. Also, Sentence 8 was first composed for the Second Amendment. As such, it must be taken as reflecting the parties' latest and most focused effort to define the terms of their contractual relationship. Finally, the best efforts language of the February Letter was not carried forward to the Second Amendment; its deletion suggests that the less burdensome standard would not define the nature of Robino's duties.

"[T]here is . . . a strong American tradition of freedom of contract, and that tradition is especially strong in our State, which prides itself on having commercial laws that are efficient."[99] Freedom of contract enables parties to enter into all sorts of agreements, advantageous and disadvantageous. Where, as here, the parties have voluntarily ordered their relationship through a binding contract, "Delaware law is strongly inclined to respect their agreement . . . ."[100]

In this vein, a court will not read a reasonableness or "best efforts" requirement into a contract entered into by sophisticated parties,[101] nor will one

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[99] *Abry P'ners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1059-60 (Del. Ch. 2006) (footnotes omitted).

[100] *Libeua v. Fox*, 880 A.2d 1049, 1056 (Del. Ch. 2005), *aff'd in pertinent part*, 892 A.2d 1068 (Del. 2006); *accord Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 172 (Del. Ch. 2005) (recognizing the "fundamental principle that parties should have the freedom to contract and that their contracts should not easily be invalidated"); *Texas Instruments Inc. v. Tandy Corp.*, 1992 WL 200604, at *5 (Del. Ch. Aug. 13, 1992) (acknowledging a "powerful presumption in favor of freedom of contract"); *State v. Tabasso Homes, Inc.*, 28 A.2d 248, 252 (Del. Gen. Sess. 1942) ("[T]he right to contract is one of the great, inalienable rights accorded to every free citizen. . . . [F]reedom of contract is the rule and restraints on this freedom the exception, and to justify this exception unusual circumstances should exist."). *See also Fleming v. U.S. Postal Serv. AMF O'Hare*, 27 F.3d 259, 261 (7th Cir. 1994) (Posner, J.) (noting that "a premise of a free-market system is that both sides of the market, buyers as well as sellers, tend to gain from freedom of contract"). The *Libeua* Court went on to note that a court will only interfere with the parties' bargain "upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than the freedom of contract. Such public policy interests are not to be lightly found, as the wealth-creating and peace-inducing effects of civil contracts are undercut if citizens cannot rely on the law to enforce their voluntarily-undertaken mutual obligations." *Libeua*, 880 A.2d. at 1056-57 (footnotes omitted).

[101] *See Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co.*, 2006 WL 2521426, at *6 (Del. Ch. Aug. 25, 2006) ("A court should not read a reasonableness requirement into a contract entered into by two sophisticated parties. It is imperative that contracting parties know that a court will enforce a contract's clear terms and will not judicially alter their bargain, so courts do not tramp/trump the freedom of contract lightly.") (quotations and footnotes omitted). *See also supra* note 84**.**

strain to find ambiguities in order to reach that result, even to abjure imposing an exacting obligation on a party. A party is not discharged from the binding language of a contract simply because its obligation under that language turns out to be difficult or burdensome.[102] Robino agreed, without any qualification, to secure Value City's consent, and it cannot look to the Court for relief from that obligation. "[I]t is not for some judge to substitute his subjective view of what makes sense for the terms accepted by the parties."[103]

E. *The Suitability of Specific Performance*

With the conclusion that Robino is contractually obligated to secure Value City's consent under the Amended Purchase Agreement, the Court turns to whether specific performance of that obligation, as urged by West Willow, is appropriate.

Specific performance is an equitable remedy designed to protect a party's expectations under a contract by compelling the other party to perform its agreed

[102] *See Safe Harbor Fishing Club v. Safe Harbor Realty Co.*, 107 A.2d 635, 638 (Del. Ch. 1953) ("Courts cannot alter contracts merely because they work a hardship. A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform.").

[103] *Matria Healthcare, Inc. v. Coral SR LLC*, 2007 WL 763303, at *1 (Del. Ch. Mar. 1, 2007). Robino invokes *Horizon Personal Commc'n, Inc. v. Sprint Co.*, 2006 WL 2337592 (Del. Ch. Aug. 4, 2006), in which the Court, applying Kansas law, observed that it would not rigidly construe the terms of a contract so as to "make[] performance impossible and produce[] an absurd result." *Id.* at *21. The result here is not absurd if one accepts Stortini's view, later proven to be mistaken, that obtaining Value City's consent would not be a problem. Additionally, Robino may have anticipated that, because Value City's consent could not be "unreasonably withheld" under the Value City Lease, it would not be difficult to obtain.

upon obligation.[104] Specific performance is an extraordinary remedy, appropriate where assessing money damages would be impracticable or would fail to do complete justice.[105] As West Willow points out, specific performance is particularly appropriate for enforcing contracts for the sale of real property.[106] The party seeking specific performance must show that there is no adequate remedy at law.[107]

A party is never absolutely entitled to specific performance; the remedy is a matter of grace and not of right, and its appropriateness rests in the sound discretion of the court.[108] In general, equity will not grant specific performance of a contract if it cannot "effectively supervise and carry out the enforcement of the

[104] *See Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *6 (Del. Ch. Jan. 24, 2005).
[105] *Collins v. Am. Int'l Group, Inc.*, 1998 WL 227889, at *6 (Del. Ch. Apr. 29, 1998).
[106] *See, e.g., Lee Builders v. Wells*, 95 A.2d 692, 693 (Del. Ch. 1953) ("[I]n the case of an agreement for the sale of land, courts will assume that money damages do not constitute an adequate remedy for the breach of such a contract and take jurisdiction without the necessity of an actual showing that such is the case. . . . It is almost a matter of course that a court of equity will enforce specific performance of contracts concerning land, for all land is assumed to have a peculiar value to those who contract as to it, so that damages for breach of the contract is not an adequate remedy.") (quotation and citation omitted), *rev'd on other grounds*, 99 A.2d 620 (Del. 1953).
[107] *Minnesota Invco of RSA # 7, Inc. v. Midwest Wireless Holdings LLC*, 903 A.2d 786, 793 (Del. Ch. 2006).
[108] *See Safe Harbor Fishing Club*, 107 A.2d at 638. *See also Morabito v. Harris*, 2002 WL 550117, at *3 (Del. Ch. Mar. 26, 2002) ("[T]here is no 'entitlement' to specific performance, even when a contract breach involving unique goods is admitted.").

order."[109] Moreover, the balance of the equities must favor granting specific performance.[110]

Ultimately, granting specific performance is inappropriate in this context because the Court could not effectively and fairly ensure or compel Robino's compliance. An order of specific performance would require Robino to secure Value City's consent. Whether or not Value City consents to the sale and the Proposed Wawa is, although subject to Robino's influence, out of its control. The Value City Lease provides that Value City's consent may not be "unreasonably withheld," a term that, at least arguably, may mean that if Value City's concerns over reduced visibility are indeed reasonable, Value City may be entitled to withhold consent no matter what concessions are offered by Robino. In short, because Robino cannot be compelled to force an independent third party to act, especially under circumstances where the third party may have no duty to act, specific performance is inappropriate.[111] Perhaps, more to the point, the

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[109] *Bryson v. J.T.B., Inc.*, 1977 WL 23826, at *7 (Del. Ch. Aug. 15, 1977); s*ee Bali v. Christiana Care Health Servs., Inc.*, 1999 WL 413303, at *3 (Del. Ch. June 16, 1999); *see also N. Delaware Indus. Dev. Corp. v. E.W. Bliss Co.*, 245 A.2d 431, 434 (Del. Ch. 1968) ("[P]erformance of a contract for personal services, even of a unique nature, will not be affirmatively and directly enforced. This is so, because, . . . the difficulties involved in compelling performance are such as to make an order for specific performance impractical."). The difficulty in enforcing and supervising a specific performance remedy is particularly acute when the contract to be enforced involves personal services.

[110] *Morabito*, 2002 WL 550117, at *2.

[111] In fact, West Willow appears to have all but conceded the specific performance issue in its answering brief. *See* Pl.'s Answering Br. in Supp. of Mot. for Summ. J. 17 ("As a practical matter, however, specific performance need not be ordered. . . . [T]he Court should not hesitate to declare a breach and allow the parties to proceed toward determining the appropriate

Court's authority to protect Robino from Value City's taking unfair advantage of its bargaining position is limited. Accordingly, West Willow is not entitled to an award of specific performance.

V. CONCLUSION

For the reasons set forth above, (1) West Willow is entitled to a declaration that Robino has breached the Purchase Agreement, as amended, by not obtaining Value City's consent, and (2) specific performance is not a suitable remedy.[112]

Counsel are to confer and to submit an implementing order within ten days.

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damages."). The Court also questions whether a remedy requiring it to closely monitor or supervise Robino's effort to negotiate with Value City regarding its consent would be practicable. *Cf. Bali*, 1999 WL 413303, at *3

[112] Additional proceedings to determine West Willow's damages will be necessary.