

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CHARLOTTE BROADCASTING, LLC)
NEW MABLETON BROADCASTING)
CORPORATION and RADIO ONE OF)
NORTH CAROLINA, LLC,)

Plaintiffs/Counterclaim-Defendants,)

v.)

C.A. No. 13C-04-143-WCC CCLD

DAVIS BROADCASTING OF)
ATLANTA, L.L.C.,)

Defendant/Counterclaim-Plaintiff.)

Submitted: March 11, 2015

Decided: June 10, 2015

**On Plaintiffs' Motion for Summary Judgment
GRANTED in part, DENIED in part**

OPINION

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CARPENTER, J.

Before the Court is Charlotte Broadcasting, LLC, New Mableton Broadcasting Corporation and Radio One of North Carolina, LLC's ("Plaintiffs") Motion for Summary Judgment on their Complaint and on Davis Broadcasting of Atlanta, L.L.C.'s ("Defendant") Counterclaims. The Court finds that Plaintiffs had the right to terminate an Asset Exchange Agreement (the "Agreement") and, in doing so, the Agreement did not require Plaintiffs to use commercially reasonable efforts. However, Plaintiffs were required to comply with the implied covenant of good faith and fair dealing when they terminated the Agreement. Whether Plaintiffs breached the implied covenant and whether Defendant suffered damages as a result of the breach remain issues of fact for trial. Accordingly, Plaintiffs' Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part.

FACTUAL AND PROCEDURAL BACKGROUND

On August 31, 2011, Plaintiffs and Defendant entered into the Agreement.¹ Under the Agreement, Plaintiffs agreed to pay a compensation package to Defendant worth approximately \$16 million, including two FM radio stations in Charlotte, North Carolina (WQNC and WPZS), access to a Plaintiffs-owned translator station in Atlanta, and \$2,000,000 in cash.² In exchange, Defendant agreed to move its Atlanta radio station, WLKQ, to a new location in northern

¹ Compl. ¶ 10, *Charlotte Broadcasting, LLC v. Davis Broadcasting of Atlanta, L.L.C.*, C.A. No. 13C-04-143 (Del. Super. Apr. 15, 2013) (No. 51795688); Counterclaims ¶ 11, *Charlotte Broadcasting*, C.A. No. 13C-04-143 (May 9, 2013) (No. 52207380).

² Compl. ¶ 13; Counterclaims ¶ 7.

Georgia, which permitted Plaintiffs to upgrade their Atlanta radio station, WPZE, from an FCC designated Class A to an FCC designated Class C3 station.³ WLKQ's relocation would increase WPZE's audience reach.⁴

Plaintiffs and Defendant acknowledged that the Agreement could be completed only if the Federal Communications Commission ("FCC") approved the station transmitter relocations, changes in community of license, channel upgrades, and station assignments.⁵ The Agreement provided that each party would file simultaneous facilities modification applications (the "FMAs") with the FCC for approval.⁶ The FMAs required engineering exhibits to be completed by both parties, which included maps identifying the potential relocations as well as the available allotment sites that would provide the required signal strength to comply with FCC regulations.⁷ The FMAs could not be finalized unless the engineering exhibits were complete.⁸

At the time of the Agreement, neither party had completed their engineering exhibits.⁹ Nevertheless, both parties showed a willingness to enter into the Agreement. Accordingly, the parties agreed to add a termination provision, provided in Section 15.1, which permitted either party—in its sole discretion—to

³ Compl. ¶¶ 12–13; Counterclaims ¶ 12.

⁴ Compl. ¶ 7; Counterclaims ¶ 5.

⁵ Compl. ¶ 14; Counterclaims ¶ 15.

⁶ The FMAs could not be approved unless both were approved. Compl. ¶ 16; Counterclaims ¶ 13.

⁷ Compl. ¶¶ 35–40; Counterclaims ¶ 20.

⁸ See Compl. ¶ 24.

⁹ Compl. ¶ 41; Counterclaims ¶ 23.

terminate the Agreement if the engineering exhibits were unacceptable (the “Engineering Clause”).¹⁰ Under Sections 1.1 and 1.2, the parties agreed to file the FMAs along with the engineering exhibits on the “Filing Date.”¹¹ It is undisputed that the Filing Date is defined in the Agreement to occur no later than September 15, 2011.¹²

On or about September 8, 2011, a few days after the parties entered into the Agreement, but before the Filing Date, Plaintiffs learned that Clark Atlanta University filed an application with the FCC on August 31, 2011 to relocate its radio station transmitter.¹³ The University’s filing effectively precluded the Agreement between the parties because the Agreement’s WPZE proposed relocation would violate FCC spacing regulations.¹⁴ The parties presumed the FCC would not consent to the relocation after the University’s filing because the University filed its application first.¹⁵

It is undisputed that, pursuant to the Engineering Clause, Plaintiffs could have terminated the Agreement immediately after learning the University’s filing

¹⁰ Counterclaims ¶ 23.

¹¹ Under Section 2.6, “Filing Date” means “two (2) business days after the earlier of (i) written notice from Davis to Radio One Entities that Davis has completed to its satisfaction the due diligence described in Section 15.1(b) and obtained the lender consent described in such Section and (ii) the expiration of the due diligence and lender consent periods set forth in § 15.1(b) without Davis giving the RO Entities written notice of Davis’ termination of the Agreement pursuant to Section 15.1(b).”

¹² Counterclaims ¶ 16.

¹³ Compl. ¶ 19; Counterclaims ¶ 28.

¹⁴ Compl. ¶¶ 23–24; Counterclaims ¶ 30.

¹⁵ *Id.*

interfered with the Agreement.¹⁶ However, despite the University's filing, the parties were eager to complete the Agreement. The parties agreed to delay filing the FMAs until they could determine whether the obstacle created by the University's filing could be removed.¹⁷ The Filing Date passed without either party filing the FMAs.

For several months Plaintiffs negotiated with the University in an effort to persuade it to relocate its station, which would enable the engineering exhibits to comply with FCC regulations.¹⁸ Plaintiffs met with the University in person on several occasions as well as negotiated via email and telephone.¹⁹ After the meetings and correspondences, Plaintiffs offered the University a compensation package valued at approximately \$1.3 million, including a \$500,000 cash payment.²⁰ Defendant was informed of the communications; however, Defendant did not directly negotiate with the University and only offered to contribute \$100,000 in installments over a three-year period for the University's station relocation.²¹ However, the parties were unable to reach an agreement.²²

¹⁶ Defendant's expert witness stated: "If the Agreement is terminated, it's terminated. That means all elements of the Agreement are terminated." Deposition Transcript of Lee Warner Shubert, Esq. at 55 (Oct. 17, 2014).

¹⁷ Compl. ¶¶ 29–31; Counterclaims ¶ 31.

¹⁸ Plaintiffs offered a compensation package of \$1.3 million to the University. Compl. ¶ 28; Counterclaims ¶ 34. However, the University ultimately declined the offer. Compl. ¶¶ 31–32; Counterclaims ¶ 35.

¹⁹ Compl. ¶ 31; Counterclaims ¶ 33.

²⁰ Compl. ¶ 28; Counterclaims ¶ 34.

²¹ Compl. ¶¶ 27, 31.

²² Compl. ¶¶ 31–32; Counterclaims ¶ 35.

Plaintiffs next determined that the parties could obtain FCC approval of the engineering exhibits without relocating the University's station by negotiating with another third party, Educational Media Foundation ("EMF").²³ If EMF filed an application with the FCC to change the allotment point for its radio station, then WPZE could be upgraded while remaining in compliance with the FCC's spacing regulations.²⁴ Among other things, EMF requested 10 percent of the value of the proposed WPZE upgrade, estimated to be approximately \$500,000.²⁵ Unlike the University option, EMF would not be required to relocate its station in any potential agreement.²⁶ Similar to the University negotiations, Defendant was informed of the communications, but it was not directly involved in the communications.²⁷ However, the parties were unable to reach an agreement.²⁸

On April 13, 2012—after approximately seven months of attempting to remove the obstacles to the filing of an acceptable engineering exhibit, Plaintiffs provided written notice to Defendant terminating the Agreement pursuant to the Engineering Clause.²⁹ The termination notice stated that the engineering exhibits were not acceptable because the specified community of license was not feasible

²³ However, this alternative would not allow Plaintiffs to locate WPZE to their preferred location. Compl. ¶¶ 32–34; Counterclaims ¶¶ 36–38.

²⁴ Compl. ¶ 32; Counterclaims ¶ 36.

²⁵ Compl. ¶ 34; Counterclaims ¶ 37.

²⁶ *Id.*

²⁷ Compl. ¶ 33; *see* Counterclaims ¶ 37.

²⁸ Compl. ¶ 34; Counterclaims ¶ 38.

²⁹ Compl. ¶ 46; Counterclaims ¶ 48.

from a technical perspective and failed to comport with applicable FCC rules.³⁰ Despite the termination notice, the parties continued to attempt to salvage the deal, which ultimately proved unsuccessful.

On June 1, 2012, Defendant informed Plaintiffs that the termination was invalid³¹ and subsequently sent a default letter in July.³² On August 17, 2012, Plaintiffs filed suit in the Court of Chancery seeking a declaratory judgment that they properly terminated the Agreement and used commercially reasonable efforts in attempting to complete the Agreement.³³ On April 8, 2013, the Court of Chancery dismissed the case for lack of jurisdiction and transferred the matter to this Court.³⁴

On April 15, 2013, Plaintiffs filed the instant action with this Court. Plaintiffs seek a declaratory judgment that they (1) properly terminated the Agreement; and (2) used commercially reasonable efforts in attempting to complete the Agreement. On May 9, 2013, Defendant filed its Answer and Counterclaims. Defendant seeks Counterclaims for (1) breach of contract for failure to diligently prosecute and failure to use commercially reasonable efforts; (2) breach of the implied covenant of good faith and fair dealing; (3) breach of

³⁰ Compl. ¶ 43.

³¹ Counterclaims ¶ 57.

³² *Id.* ¶ 58.

³³ Verified Complaint, *Charlotte Broadcasting, LLC v. Davis Broadcasting of Atlanta, L.L.C.*, C.A. No. 7793 (Del. Ch. Aug. 17, 2012) (No. 45965245).

³⁴ Election to Transfer and [Proposed] Order, *Charlotte Broadcasting, LLC*, C.A. No. 7793 (Apr. 8, 2013) (No. 51660104).

contract for wrongful termination; and (4) specific performance as provided as a remedy in the Agreement. Trial is scheduled to begin on July 13, 2015.

STANDARD OF REVIEW

In reviewing a motion for summary judgment pursuant to Rule 56, the Court must determine whether any genuine issues of material fact exist.³⁵ The moving party bears the burden of showing that there are no genuine issues of material fact so that he is entitled to judgment as a matter of law.³⁶ The Court must view all factual inferences in a light most favorable to the non-moving party.³⁷ Summary judgment will not be granted if it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate.³⁸

When addressing a motion for summary judgment on the interpretation of a contract, the threshold question is whether the contract is ambiguous.³⁹ A contract is ambiguous if the provisions at issue “are fairly susceptible of different interpretations or may have two or more different meanings.”⁴⁰ Summary judgment may not be granted if the language is ambiguous and the moving party fails to offer undisputed evidence as to the proper interpretation.⁴¹

³⁵ Super. Ct. Civ. R. 56(c); *Wilm. Trust Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).

³⁶ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

³⁷ *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).

³⁸ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. 1962), *rev'd in part* on procedural grounds and *aff'd in part*, 208 A.2d 495 (Del. 1965).

³⁹ *See, e.g., Premcor Ref. Grp. Inc. v. Matrix Serv. Indus. Contractors, Inc.*, 2008 WL 2232641, at *6 (Del. Super. May 7, 2008); *Klair v. Reese*, 531 A.2d 219, 222 (Del. 1987).

⁴⁰ *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

⁴¹ *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 784 (Del. 2012).

A contract term or phrase is not ambiguous merely because the parties dispute its proper construction.⁴² In such circumstances, if one party's "interpretation better comports with the remaining contents of the document or gives effect to all the words in dispute, the court may, as a matter of law and without resorting to extrinsic evidence, resolve the meaning of the disputed term in favor of the superior interpretation."⁴³ Similarly, "[a]mbiguity does not exist where a court can determine the meaning of a contract without any other guide than knowledge of the simple facts on which, from the nature of language in general, its meaning depends."⁴⁴

When interpreting a contract, the Court will give effect to the parties' intent based on the parties' words and the plain and ordinary meaning of those words.⁴⁵ In doing so, the Court measures the intent based on what a reasonable person in the same or similar circumstances of the parties would have thought the contract language means.⁴⁶ Generally, extrinsic evidence should not be used when a contract term is facially unambiguous.⁴⁷ However, if the words of the contract can only be appreciated through context and circumstances, a court must not disregard extrinsic evidence relating to the parties' intent.⁴⁸

⁴² *Lorillard Tobacco Co. v. Amer. Legacy Foundation*, 903 A.2d 728, 739 (Del. 2006).

⁴³ *Wills v. Morris, James, Hitchens & Williams*, 1998 WL 842325, at *2 (Del. Ch. Nov. 6, 1998).

⁴⁴ *Rhone-Poulenc Basic Chems. Co. v. Amer. Motorists Ins. Co.*, 616 A.2d 1192, 1195–96 (Del. 1992).

⁴⁵ *Lorillard Tobacco*, 903 A.2d at 739.

⁴⁶ *Rhone-Poulenc*, 616 A.2d at 1195–96.

⁴⁷ *Smartmatic Int'l Corp. v. Dominion Voting Sys. Int'l Corp.*, 2013 WL 1821608, at *4 (Del. Ch. May 1, 2013).

⁴⁸ *Id.*

DISCUSSION

The parties' motions can be simplified into three issues involving: (1) the Right to Terminate; (2) the Implied Covenant of Good Faith and Fair Dealing; and (3) the Commercially Reasonable Efforts Clause.

I. The Right to Terminate

Count I of Plaintiffs' Complaint seeks a declaratory judgment that they properly terminated the Agreement on April 13, 2012.⁴⁹ Plaintiffs argue the right to terminate under the Engineering Clause remained valid on that date. Counterclaim III seeks damages for breach of contract for wrongful termination.⁵⁰ Defendant argues the right to terminate expired on September 15, 2011. The Court finds the Engineering Clause is unambiguous and the plain language permitted Plaintiffs to terminate the Agreement because they decided that the engineering exhibits were unacceptable.

Section 15.1 generally sets forth the parties' rights to terminate the Agreement. The last clause of Section 15.1, the Engineering Clause, provides:

The engineering exhibits detailing the Davis FMA and the RO Mableton FMA have not been prepared as of the date hereof. In addition to the termination rights set forth above, if between the date hereof and *the date of filing the Mod Applications* either Davis or the

⁴⁹ Compl. ¶¶ 58–60.

⁵⁰ Counterclaims ¶¶ 87–95.

Radio One Entities deem that either of the engineering exhibits is not acceptable in its *sole discretion*, then it may terminate this Agreement upon written notice to the other.⁵¹

The instant issue revolves around the language, “the date of filing the Mod Applications,” which is not expressly defined in the Agreement.

Plaintiffs contend “the date of filing” means the *actual* date the Mod Applications are filed with the FCC. They assert the Engineering Clause’s right to terminate never expired because the Mod Applications were never actually filed with the FCC. Accordingly, they argue they properly terminated the Agreement in their sole discretion because the engineering exhibits were not acceptable.

Defendant argues “the date of filing” means the date on which the Mod Applications “*will be* filed.” They contend the phrase “will be filed” is incorporated in the Engineering Clause by reading the Agreement as a whole. Under Section 4.2(i), “Mod Applications” means the “Davis FMA”⁵² and the “RO Mableton FMA.”⁵³ Under Sections 1.1 and 1.2, the Davis FMA and the RO Mableton FMA are required to be filed with the FCC on the “Filing Date.” Under Section 2.6, “Filing Date” means two business days after “the expiration of the due diligence and lender consent periods”⁵⁴ According to Section 2.6, the latest

⁵¹ (emphasis added). The Engineering Clause was added at the last minute to the Agreement. The parties do not dispute that the addition is valid. It is similarly undisputed that the date of the Agreement (i.e., “the date hereof”) preceded Plaintiffs’ termination.

⁵² Davis Broadcasting’s facilities modification application.

⁵³ Radio One’s facilities modification application.

⁵⁴ Section 2.6 also provides an alternative meaning to the “Filing Date”; however, it is undisputed that the alternative meaning is not applicable in this case.

the Filing Date could occur was September 15, 2011. Therefore, Defendant argues the parties' termination rights under the Engineering Clause expired on September 15, 2011 because the Filing Date came and went without either party filing the FMAs with the FCC.

Here, the Court agrees with Plaintiffs and finds that the only reasonable interpretation of "the date of filing the Mod Applications" is the actual date of filing the FMAs. "This Court will not ignore a contract's language and choice of punctuation when doing so would essentially constitute 'add[ing] a limitation not found in the plain language of the contract.'"⁵⁵ Similarly, a defined term is limited to its express meaning.⁵⁶

The Court cannot ignore that the plain language of the Engineering Clause does not include the capitalized term "Filing Date." Critically, the term "date of filing" is all lower-cased. Defendant's argument that "the date of filing" means the date the FMAs "will be filed" improperly adds words that do not appear on the face of the Engineering Clause; whereas, Plaintiffs interpretation is found by a plain reading of the Engineering Clause. Similarly, if the Court imputed the defined term "Filing Date" into the Engineering Clause, or read the phrase to mean

⁵⁵ *Silver Lake Office Plaza, LLC v. Lanard & Axilbund, Inc.*, 2014 WL 595378, at *7 (Del. Super. Jan. 17, 2014) (quoting *Rag Am. Coal Co. v. AEI Res., Inc.*, 1999 WL 1261376, at *5 (Del. Ch. Dec. 7, 1999)). See also *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 746 (Del. 1997) ("Contract interpretation that adds a limitation not found in plain language of the contract is untenable.").

⁵⁶ *Mehiel v. Solo Cup Co.*, 2005 WL 1252348, at *5 (Del. Ch. May 13, 2005).

the date the FMAs “will be filed,” the Court would be adding a time restriction not found in the plain language.

Additionally, Section 2.6, the provision that defines the “Filing Date,” does not reference the Engineering Clause. Section 2.6 explicitly references Section 15.1(b)—not all of Section 15.1. The narrow inclusion of subsection (b) cannot be read as imputed to all of Section 15.1.

Defendant argues that if Plaintiffs’ interpretation is adopted then the parties’ termination rights extend for an indefinite period of time. It is true that Delaware generally disfavors contracts with an indefinite duration.⁵⁷ Nevertheless, the parties here clearly understood the significance of a clean engineering exhibit and the difficulty in obtaining FCC approval without it. Under these circumstances the Engineering Clause’s termination right is reasonable and the Court will honor the unambiguous terms of the Agreement. If the parties wanted a concrete date on which the Engineering Clause would expire, the parties should have included the time restriction in the Agreement.

Reading the Agreement as a whole confirms that “the date of filing” does not mean the “Filing Date.” It is clear that the drafters knew how to draft a provision with a specific time restriction. For example, in Section 15(b), Defendant could terminate the Agreement “within eight (8) business days from the

⁵⁷ *Silver Lake*, 2014 WL 595378, at *8.

date hereof” if Defendant was not satisfied with the results of its due diligence of the Charlotte stations. Therefore, the omission of a time restriction in the Engineering Clause must be read as an unambiguous omission of a time restriction other than the actual filing of the FMAs. If the parties wanted the defined term “Filing Date” to be represented in the Engineering Clause, they would have used that exact term with the same punctuation instead of “the date of filing.”

The parties anticipated that filing the engineering exhibits would be a relatively easy task. However, the parties did not anticipate the University’s filing. The purpose of including the Engineering Clause was to provide a mechanism for either party to terminate the Agreement in its sole discretion if the engineering exhibits were unacceptable prior to actually filing the FMAs with the FCC. While the parties may have intended for the right to terminate to be for a short period of time, the parties also intended the FMAs would be filed in a short period of time. With the benefit of hindsight, the parties should have anticipated a scenario where an obstacle would have precluded filing the engineering exhibits. However, the parties did not anticipate such a scenario, and the Court will not rewrite the Agreement to do so. Therefore, under the circumstances, permitting the termination right to exist after September 15, 2011 is consistent with the parties’ intent to allow either party the right to terminate the Agreement if the engineering exhibits were unacceptable before actually filing the FMAs.

The Court finds no genuine issue of material fact that Plaintiffs had the right to terminate the Agreement on April 13, 2012 because Plaintiffs' written termination notice came after the date of the Agreement, but before the parties actually filed the FMAs. Under the Engineering Clause, the termination rights of the parties did not expire until the parties actually filed the FMAs with the FCC. Plaintiffs' Motion for Summary Judgment on Count I of Plaintiffs' Complaint is granted; and Plaintiffs' Motion for Summary Judgment on Defendant's Counterclaim III is granted.

II. The Implied Covenant of Good Faith and Fair Dealing

Counterclaim II seeks damages for breach of the implied covenant of good faith and fair dealing.⁵⁸ Defendant contends even if termination was proper under the Engineering Clause, Plaintiffs breached the implied covenant of good faith and fair dealing because Plaintiffs terminated the Agreement for pretextual reasons. Plaintiffs argue they are entitled to summary judgment on Counterclaim II because the implied covenant does not apply to the Agreement; or alternatively, Plaintiffs did not breach the implied covenant. The Court finds that the implied covenant is applicable to the Agreement and a genuine issue of material fact exists as to whether Plaintiffs terminated the Agreement for pretextual reasons.

⁵⁸ Counterclaims ¶¶ 77–86.

“Every contract in Delaware has an obligation of good faith and fair dealing, which is implied into the agreement by law. This implied covenant was created to promote the spirit of the agreement and to protect against one side using underhanded tactics to deny the other side the fruits of the parties’ bargain.”⁵⁹ “The covenant is ‘best understood as a way of implying terms in the agreement,’ whether employed to analyze unanticipated developments or to fill gaps in the contract’s provisions.”⁶⁰ However, existing contract terms control such that the implied covenant does not create a “free-floating duty . . . unattached to the underlying legal document.”⁶¹

To state a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must identify a specific implied contractual obligation, a breach of that obligation, and damages resulting from the breach.⁶² The court’s focus is whether, at the time of contract formation, the parties would have prohibited the conduct had they contemplated it or thought to negotiate about it.⁶³ A plaintiff must allege the breaching party’s actions were motivated by an improper purpose

⁵⁹ *Kelly v. McKesson HBOC, Inc.*, 2002 WL 88939, at *10 (Del. Super. Jan. 17, 2002).

⁶⁰ *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) (quoting *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 443 (Del. 1996)).

⁶¹ *Dunlap*, 878 A.2d at 441.

⁶² *Fitzgerald v. Cantor*, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998).

⁶³ *Cincinnati SMSA Ltd. P’ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998); *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986).

reflecting bad faith.⁶⁴ Applying the implied covenant in Delaware has been described as a “cautious enterprise.”⁶⁵

The implied covenant particularly applies where the contract permits a party to exercise sole discretion.⁶⁶ Delaware case law requires a party to exercise such discretion reasonably and in good faith.⁶⁷ In *Chamison v. HealthTrust, Inc.*,⁶⁸ the agreement between the parties contained an indemnification obligation.⁶⁹ A counsel selection provision was inherent in the obligation.⁷⁰ This provision gave sole discretion to the indemnitor to select counsel for the indemnitee.⁷¹ In exercising this discretion, the indemnitor selected inferior counsel that the indemnitor knew the indemnitee would reject.⁷² This selected counsel effectively permitted the indemnitor to escape the indemnification obligation.⁷³ The court found that the implied covenant applied and that it must inquire into the

⁶⁴ *Dunlap*, 878 A.2d at 442.

⁶⁵ *Cincinnati SMSA*, 708 A.2d at 992.

⁶⁶ *Amirsaleh v. Bd. of Trade of City of New York, Inc.*, 2008 WL 4182998, at *7 (Del. Ch. Sept. 11, 2008); *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1155 (Del. Ch. 1984) (“The application of a good faith or subjective standard to the enforcement of conditions is appropriate where either the definition or the declaration of occurrence of the condition is left to the sole discretion of the invoking party.”), *aff’d*, 575 A.2d 1131 (Del. 1990).

⁶⁷ *Airborne Health, Inc. v. Squid Soap, L.P.*, 984 A.2d 126, 146–47 (Del. Ch. 2009). *See also Amirsaleh*, 2008 WL 4182998, at *8 (“Simply put, the implied covenant requires that the ‘discretion-exercising party’ make that decision in good faith.”); *Gilbert*, 490 A.2d at 1055 (“[I]f one party is given discretion in determining whether the condition in fact has occurred that party must use good faith in making that determination.”).

⁶⁸ 735 A.2d 912 (Del. Ch. 1999).

⁶⁹ *Id.* at 920.

⁷⁰ *Id.*

⁷¹ *Id.* at 921.

⁷² *Id.* at 921–22.

⁷³ *Id.*

reasonableness of the indemnitor's interpretation of the provision based on the circumstances.⁷⁴

Here, Defendant has identified a specific implied contractual obligation. The Engineering Clause, as cited in full above, permits either party—in its sole discretion—to terminate the Agreement, upon written notice to the other party, if the engineering exhibits are not acceptable. Plaintiffs purportedly invoked this provision by providing written notice to Defendant that they were terminating the Agreement because the engineering exhibits were not acceptable. Under *Chamison*, its predecessors, and its progeny, Plaintiffs must exercise this discretion in good faith. Clearly if the parties had thought to negotiate for it, the parties would have prohibited terminating the Agreement under the Engineering Clause for pretextual reasons.

Plaintiffs argue the implied covenant is inapplicable according to two cases. However, under both cases, the contract provisions at issue were measurable based on objective criteria. In *Brywill, Inc. v. STP Corp.*,⁷⁵ the defendant could terminate under the contract if the plaintiff failed to produce specific savings in defendant's product distribution costs over a 12-month period.⁷⁶ Defendant did not possess a

⁷⁴ *Chamison*, 735 A.2d at 923–24 (holding that the indemnitor was estopped by the implied covenant from forcing the indemnitee to use inferior counsel under the agreement).

⁷⁵ 1980 WL 77945 (Del. Ch. July 15, 1980).

⁷⁶ *Id.* at *1.

purely discretionary option to terminate.⁷⁷ Similarly, in *Hifn, Inc. v. Intel Corp.*,⁷⁸ the court found that the seller committed a material breach of the contract when it took more than three times longer than the negotiated production target date to complete the contract.⁷⁹ Again, the buyer–defendant did not possess a purely discretionary option to terminate.⁸⁰

Here, the termination provision could be invoked based on the purely subjective belief of each party. Either party could terminate if it found the engineering exhibits were unacceptable. The subjective discretion involved in the Engineering Clause places it squarely under the ambit of *Chamison*, rather than *Brywill* or *Hifn*.⁸¹ Therefore, the Court finds that even though Plaintiffs had the right to terminate the Agreement, Plaintiffs still had an overarching obligation to comply with the implied covenant to terminate in good faith.

Simply, Plaintiffs had the right to terminate the Agreement, but they had to do it for the right reason. As such, there remains genuine issues of fact as to whether Plaintiffs terminated solely because the engineering exhibits were unacceptable, or whether Plaintiffs terminated for some other pretextual reason. Therefore, the issues of whether Plaintiffs breached the implied covenant, whether

⁷⁷ *See id.*

⁷⁸ 2007 WL 2801393 (Del. Ch. May 2, 2007).

⁷⁹ *Id.* at *11–13, *17.

⁸⁰ *See id.*

⁸¹ Additionally, if the Court were to hold that the implied covenant did not apply, and instead, permitted Plaintiffs to have the unfettered ability to terminate under the Engineering Clause for any reason, such an interpretation would frustrate the plain language of the Agreement. The Engineering Clause plainly states a party may terminate only if either party “deem[s] that either of the engineering exhibits is not acceptable.”

Defendant suffered damages as a result of the breach, and what damages are recoverable by Defendant remain questions of fact for trial. Plaintiffs' Motion for Summary Judgment on Defendant's Counterclaim II and Counterclaim IV are denied.

III. The Commercially Reasonable Efforts Clause

Count II of Plaintiffs' Complaint seeks a declaratory judgment that Plaintiffs used commercially reasonable efforts to cause the transactions contemplated by the Agreement before they properly terminated. Alternatively, they argue commercially reasonable efforts were not required under Sections 1.3 and 8.4(a) because the FMAs were never filed with the FCC. Counterclaim I seeks damages for breach of contract for failure to diligently prosecute and failure to use commercially reasonable efforts. Defendant contends even if Plaintiffs properly terminated on April 13, 2012, they were still obligated to use commercially reasonable efforts to complete the Agreement including negotiating and paying third parties. The Court finds that the only reasonable interpretation of Sections 1.3 and 8.4(a) is that commercially reasonable efforts were not required because the FMAs were never filed with the FCC.

Section 1.3, entitled "Diligent Efforts," provides in pertinent part:

Each of Davis and RO Mableton shall diligently prosecute the Davis FMA and the RO Mableton FMA and otherwise use their commercially reasonable efforts to obtain the FCC Consents (defined below) to those applications as soon as possible 'FCC Consent'

means an order of the FCC, or its staff pursuant to delegated authority, granting its consent and/or approval to an application filed with the FCC

Section 8.4(a), entitled “Commercially Reasonable Efforts/Consents,” provides in pertinent part:

The parties shall use commercially reasonable efforts to cause the transactions contemplated by this Agreement to be consummated in accordance with the terms hereof, and, without limiting the generality of the foregoing, use their commercially reasonable efforts to obtain (i) all necessary FCC Consents, (ii) any third party or other governmental consents necessary in connection with this Agreement and the transactions contemplated hereby, including for the assignment of any RO Station Contract (which shall not require any payment to any third party)

Section 15.1(e) provides that either party can terminate the Agreement if the Closing does not occur within 36 months after the date of the Agreement.

Defendant argues that, read together as a whole, Sections 1.3, 8.4(a), and 15.1(e) imposed an ongoing 36-month duty to use commercially reasonable efforts to complete the entire transaction. Defendant asserts that this contractual duty required the use of commercially reasonable efforts to negotiate with the University and any other third party that posed an obstacle to completing the Agreement. Defendant contends that Plaintiffs breached this contractual duty by failing to pursue other reasonable options available to Plaintiffs other than negotiating with the University; and failing to disclose to Defendant the other options available.

Plaintiffs respond that under the same provisions they were not required to use commercially reasonable efforts to negotiate with the University or any other third parties. They argue, under a plain reading of Section 1.3, the 36-month provision was not triggered until the FMAs were actually filed with the FCC. Since the FMAs were never filed, the 36-month provision to prosecute the Agreement before the FCC was never triggered. Similarly, they contend Section 8.4 only requires commercially reasonable efforts in relation to FCC Consents and other consents contemplated by the Agreement such as lender consents. Lastly, they argue the plain language of Section 8.4 does not require negotiating with or paying compensation to any third party.

The Court finds that Sections 1.3, 8.4(a), and 15(e) did not place on Plaintiffs the obligation to use commercially reasonable efforts until the FCC filing occurred. Section 1.3 requires commercially reasonable efforts to be used only to obtain “FCC Consents.” Under Section 1.3, “FCC Consents” means an “approval to an application filed with the FCC.” This definition plainly requires that an application actually be filed with the FCC in order to diligently prosecute it. Section 1.3 plainly does not require that the parties use commercially reasonable efforts initially to file the FMAs.

Similarly, Section 8.4(a) explicitly provides that commercially reasonable efforts “shall not require any payment to any third party.” Therefore, Section

8.4(a) cannot be read to place on Plaintiffs an obligation to use commercially reasonable efforts to negotiate with the University or any other entity because doing so would require Plaintiffs to provide payment to a third party.

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

Having made this finding, the Court is not ruling that commercially reasonable efforts have no relevance to the issues remaining to be tried. Further, the Court’s finding on this issue does not prohibit either party from arguing at trial that the opposing party did not use commercially reasonable efforts. In the same light, the Court’s finding also does not prohibit either party from arguing at trial that it used commercially reasonable efforts. While there is no independent obligation under the Agreement to use commercially reasonable efforts, the issue of whether a party used commercially reasonable efforts to resolve the barriers to the Agreement or not may be relevant to each party’s implied covenant arguments.

Accordingly, Plaintiffs' Motion for Summary Judgment on Count II of Plaintiffs' Complaint is granted; and Plaintiffs' Motion for Summary Judgment on Defendant's Counterclaim III is granted.

CONCLUSION

Therefore, Plaintiffs Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.