IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

SEAFORD GOLF AND COUNTRY CLUB, a Delaware Corporation,	:	C.A. No. 05C-07-009(THG)
Plaintiff,	:	
v.	:	
E.I. duPONT de NEMOURS AND COMPANY, a Delaware Corporation,	:	
Defendant.	:	

DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

PLAINTIFF'S MOTION DENIED

DEFENDANT'S MOTION GRANTED

DATE SUBMITTED: July 26, 2006

DATE DECIDED: August 23, 2006

David R. Hackett, Esquire, Griffin & Hackett, P.A., 116 West Market Street, P.O. Box 612, Georgetown, Delaware 19947, Attorney for Plaintiff Seaford Golf and Country Club.

Arthur L. Dent, Esquire, and Sarah E. DiLuzio, Esquire; Potter, Anderson, & Corroon, LLP; Hercules Plaza, Sixth Floor, 1313 N. Market Street, P.O. Box 951, Wilmington, Delaware 19899, Attorneys for Defendant E.I. duPont deNemours and Company.

Graves, J.

Pending before the Court are the Parties' Cross-Motions for Summary Judgment.

Statement of the Case

The Seaford Golf and Country Club (Club), Plaintiff, filed its Complaint in this matter on June 22, 2005, seeking a declaratory judgment interpreting certain provisions of a Deed, a Ground Lease, and a Memorandum of Lease Agreement relating to certain real property located in Seaford, Delaware. Plaintiff specifically seeks a judgment construing, ascertaining, interpreting, and determining the meaning of the term "Plant" when used in the phrase "Seaford, Delaware Plant" as it appears in the above listed documents. Plaintiff seeks to avoid the application of the Deed Restriction and the Right of First Refusal included in the above-named documents.

E.I. duPont de Nemours and Company (duPont), Defendant, timely answered the Complaint. In addition to answering the Complaint, Defendant filed a counterclaim requesting a declaration stating that the Deed Restriction and Right of First Refusal remain in effect and an order preventing Plaintiff from conveying the property in issue. Plaintiff answered the counterclaim denying that Defendant was entitled to such relief.

The parties executed a Stipulation and Order Maintaining the Status Quo Pending Resolution of All Claims, which this Court approved on November 18, 2005. The Plaintiff filed a motion for summary judgment on April 10, 2006, and the Defendant filed a motion for summary judgment on May 10, 2006. Briefing is at an end and oral argument took place on July 26, 2006.

For the reasons stated herein, the Court denies the Club's motion for summary judgment and grants duPont's motion for summary judgment.

Statement of Facts

Prelude

The Environmental Protection Agency (EPA) and duPont entered into a Consent Order with an effective date of February 25, 1992. The Consent Order provided actions that were to be taken by duPont to prevent or relieve threats to human health or the environment. It also provided that an investigation was to be done to determine the extent of any release of hazardous materials on the property owned or controlled by duPont and what corrective measures are to be taken. The Consent Order contains the following findings of fact:

> Respondent owns and operates a nylon textile manufacturing plant located at 400 Woodland Road, Seaford, Delaware. The Plant, the property on which the plant is located and all contiguous property under the ownership of control of Respondent, is referred to in this Consent Order as the "Facility". The Facility has been owned and operated by Respondent since commencement of production in 1939.

Negotiation of Agreements

DuPont sent a letter dated February 23, 1994 to the Club offering to sell the property in Seaford, Delaware, subject to the terms and conditions as set forth in the letter. The offer contained a Deed Restriction that stated "[if DuPont should in the future divest itself entirely of the Seaford Plant, then we will agree to remove the restriction." A Right of First Refusal was also included in this letter which stated that "DuPont will relinquish the right of [first refusal] upon total divestiture of the Seaford Plant." The Club rejected the initial offer and made a counteroffer contained in an April 28, 1994, memorandum which included the terms and conditions under which the Club would purchase the property and lease another parcel. The counteroffer allowed for a Deed Restriction as stated below.

> Grantor may include in the Deed a restriction restricting use of the property to golf, country club and related purposes until the first of the following events should occur: (a) The expiration of 25 years from the date of the Deed; or (b) Grantor's total divestiture (to be defined) of the Seaford Plant.

On April 28, 1994, the counteroffer was accepted by duPont except the 25 year term of restriction was deleted.

On June 2, 1994, duPont's property manager, Harry S. Thomas, sent to David R. Hackett, the Club's attorney, an Agreement of Sale and a Ground Lease to review. The Agreement of Sale provided that the Deed would include "a restriction restricting the use of all but a portion of the property along Locust Street to golf and country club related activities for as long as DUPONT continues to own any of DUPONT's Seaford, Delaware Plant." Even though the counteroffer and acceptance required that the restriction be in place until duPont's "total divestiture of the Seaford plant", the Agreement of Sale did not use the term "total divestiture". Further, the Right of First Refusal was not mentioned in either the Agreement of Sale or the Ground Lease.

A revised Agreement of Sale was prepared by the Club's counsel. However, the Revised Agreement was likely not sent to duPont until March 7, 1995.

Negotiations continued during the summer of 1994. A September 27, 1994, letter from the Club's attorney to Fred Ayers, duPont property manager, summarized the Club's understanding of the terms of the transaction agreed to by the parties as of August 26, 1994. This letter referenced the Deed Restriction and the Right of First Refusal and discussed the inclusion of the "total divestiture" language discussed in the counteroffer and acceptance.

Further negotiations were held to restructure the transaction so that the current lease of the Club's property would be amended to add an option to purchase and an interim lease would be

entered into pending the exercise of the option. In a January 5, 1995, letter duPont expressed its nonbinding intention to enter into a lease amendment with an option to purchase. In response, the Club submitted a new offer on January 10, 1995. In this offer, the Club again used the "total divestiture" language in relation to the Deed Restriction and the Right of First Refusal. In a February 24, 1995, letter, the Club's counsel offered to prepare the option agreement with the long term lease and interim lease. DuPont did not accept the Club's counsel's offer to do so.

In a March 7, 1995, letter, the Club requested that the option to purchase include the Right of First Refusal section from the June 24, 1994, revised Agreement of Sale. This section included the "total divestiture" language as discussed above. This section also stated that "DuPont's total divestiture shall mean when DuPont no longer holds legal interest in the DuPont Plant Property." DuPont chose instead to use the language as it appears in the Deed Restriction and the Right of First Refusal throughout all future drafts of the documents used in this transaction.

On May 2, 1995, the Club sent a draft Ground Lease to duPont. This draft provided that the Right of First Refusal would terminate "upon DuPont's total divestiture of its interest in the Plant Property." This draft also defined the term "Plant Property" as:

> DuPont is the owner in fee simple of that certain tract, piece and parcel of land, located in Seaford, Sussex County, Delaware, being more particularly described in a Deed to it dated ___ ___ of _____, A.D. 199__ , and recorded in the Office of the Recorder of Deeds, Georgetown, Sussex County, Delaware, in Deed Book ___ , ___ , on which it currently operates its Seaford, Delaware nylon plant (the "Plant Property")[.]

DuPont chose not to use the Club's draft Ground Lease.

DuPont conveyed unto the Club via a Deed dated December 26, 1995, the land containing 100.25 acres with improvements as described in the Deed. The Deed was recorded in the Office of

the Recorder, in and for Sussex County, on December 1, 1997. The Deed contained a clause that restricted what the conveyed property may be used for. The language of the clause is provided below.

> GRANTEE, its successors and assigns agree to limit the use of the Property for golf, country club, and related purposes as long as GRANTOR continues to own its Seaford, Delaware Plant; provided however, that this restriction shall not apply to the portion of Property described as follows: [description of 4.1578 acres of land located on Locust Street, Seaford, Delaware].

There is no definition of the term "Seaford, Delaware Plant" or "Plant" provided in the Deed.

Additionally, duPont leased two parcels of land, totaling 107.5745 acres in Seaford, Delaware, to the Club by a Ground Lease dated November 26, 1997. A nine-hole golf course sits on the leased land. A Memorandum of Ground Lease also dated November 26, 1997, was recorded on December 1, 1997.

Provided in Paragraph 3 of the Memorandum is a "Right of First Refusal". The language of Paragraph 3 is provided below.

> DUPONT reserves a Right of First Refusal to match within thirty (30) days any offer to purchase the Original Parcel as defined in the Option Agreement between the parties hereto dated October 18, 1995 and the leasehold interest in the LEASED PREMISES that is acceptable to SGCC. Said Right of First Refusal will terminate upon refusal by DUPONT to purchase and/or DUPONT transfers all of its title and interest in and to the Seaford, Delaware Plant. This right shall not apply to the unrestricted property along Locust Street described in the deed from E.I. DUPONT DE NEMOURS AND COMPANY to SGCC bearing even dated herewith describing the Original Parcel. A mortgage foreclosure on the Original Parcel and LEASED PREMISES shall not be deemed to be an offer of sale subject to the aforesaid Right of First Refusal, but shall be subject to the restrictions as set forth in SECTION 14 of the Lease.

The Right of First Refusal is also included in Section 2(f) of the Ground Lease. The termination provision of the Ground Lease's Right of First Refusal clause has similar language to the one

included in the Memorandum. The term "Seaford, Delaware Plant" or "Plant" is also not defined in the Memorandum or Ground Lease.

While the above contains a history concerning the question at issue, it is noteworthy the communications between the parties involved many contested issues, but there is no specific mention of the present issue. In other words, language was suggested, but neither party was emphatic about it.

Years later, duPont sold to Arteva all "Improvements", "Equipment", and other "DTI Business Assets" utilized in the business activities of its nylon business comprising the Textiles and Interiors business segment of duPont and others located in Seaford, Delaware, pursuant to a November 16, 2003, purchase agreement. These terms were defined in the purchase agreement. This above transaction was consummated with the execution and delivery of the April 30, 2004, Instrument of Assignment and Bill of Sale; the March 30, 2004, Ground Lease; and the April 30, 2004, Memorandum of Ground Lease. The Ground Lease provided that duPont leased the Seaford, Delaware "Plant Site" as defined in the Ground Lease to Arteva. The Memorandum stated that the leased land is "also known as the Seaford Plant Site."

The Club received an offer from East Bay Homes, LLC and Vision Builders, Inc. (Buyers), to purchase a 2.41 acres portion of the property that the Club purchased from duPont in 1995. The Club entered into a contract with the Buyers to sell a parcel of property consisting of 3.3515 acres.

On October 5, 2004, duPont contacted the Club addressing the proposed sale by the Club to the Buyers. DuPont stated that its position is that until it actually sells the land, the Deed Restriction and Right of First Refusal are still in effect. Additionally on December 14, 2004, duPont notified

the Club that it had failed to abide by the terms of the Right of First Refusal contained in the Ground Lease and duPont views this failure as a default.

On December 16, 2004, the Club responded via its counsel that it did not default on any of the terms of the Ground Lease because the Deed Restriction and Right of First Refusal terminated when duPont sold its nylon plant operation in Seaford, Delaware, to Arteva. Even though the Club argued that the Right of First Refusal had terminated, it still offered to sell to duPont a portion of the property at the terms proposed by the Buyers. DuPont chose not to respond to the Club's offer.

On January 11, 2005, duPont's counsel sent to the Club's counsel a letter stating that the Club's position that the Deed Restriction and the Right of First Refusal had terminated, based upon the transaction between duPont and Arteva, was unsupportable. DuPont stated that the Deed Restriction and the Right of First Refusal were not terminated because duPont sold certain assets to Arteva, but it did not convey title of the land to Arteva.

Standard of Review

Summary judgment only will be granted when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of material fact.[1] Once a moving party has met its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.[2] Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.[3] If, after discovery, the non-moving party cannot make a sufficient showing

[1] *Moore v. Sizemore,* 405 A.2d 679, 680 (Del. 1979).
[2] *Id.* at 681.
[3] DE R S Ct Rule 56 (e); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986).

of the existence of an essential element of his or her case, summary judgment must be granted.[4] If, however, material issues of fact exist, or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, summary judgment is inappropriate.[5] The evidence is viewed in the light most favorable to the non-moving party.[6]

"When opposing parties make cross motions for summary judgment, neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law."[7] "Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[8]

At oral argument, both parties advised the Court that a trial was unnecessary as nothing additional would be offered to assist the Court, as the trier of the facts, in making the decision.

Applicable Law

"Delaware courts adhere to the "objective" theory of contracts."[9] The objective theory provides that a contract's construction is judged to be what an objective reasonable third party would understand the terms to mean.[10] "A court must accept and apply the plain meaning of an unambiguous term in the context of contract language and circumstances insofar as the parties themselves would have agreed *ex ante*."[11]

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[4] *Burkhart v. Davies,* 602 A.2d 56, 59 (Del. 1991), *cert. denied,* 504 U.S. 912 (1992); *Celotex Corp., supra.*
[5] *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del. 1962).
[6] *Merrill v. Crothall-American, Inc.,* 606 A.2d 96, 99-100 (Del. 1992).
[7] *Emmons v. Hartford Underwriters Ins. Co.,* 697 A.2d 742, 745 (Del. 1997).
[8] DE R S Ct Rule 56 (h).
[9] *Sanders v. Wang,* 1999 WL 1044880, *6 (Del. Ch.).
[10] *Id.*
[11] *Lorrillard Tobacco Co. v. American Legacy Foundation,* 2006 WL 2035682, *8 (Del. Supr.).

When the Court is charged with interpreting a contract, it "first reviews the language of the contract to determine if the intent of the parties can be ascertained from the express words chosen by the parties or whether the terms of the contract are ambiguous."[12] "The words employed by contract drafters must be evaluated in light of the apparent purposes of the drafters."[13] "A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole."[14]

Only when the language of a contract is ambiguous may the Court use extrinsic evidence to interpret the intent of the parties.[15] The Court cannot deem a contract ambiguous unless the term is "reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[16] The language of a contract is not ambiguous simply because the parties to the contract differ as to its meaning or its proper construction.[17]

When determining whether a contract term is ambiguous, the Court will consider the language used within the context of the entire contract without "resorting to conflicting dictionary definitions, inapposite treatise definitions, judicial disagreement or drafting history."[18] Contractual terms must be accorded their plain and ordinary meanings.[19] "When contractual language is reasonably susceptible to more than one meaning, all objective extrinsic evidence is considered: the

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[12] *Telcom-SNI Investors, L.L.C. v. Sorrento Networks, Inc.,* 2001 WL 1117505, *5 (Del. Ch.).
[13] *Id.* at *6.
[14] *Council of the Dorset Condominium Apartments v. Gordon,* 801 A.2d 1 (Del. 2002).
[15] *Telcom,* 2001 WL 1117505 at *6.
[16] *In re Explorer Pipeline Co.,* 781 A.2d 705, 714, (Del. Ch. 2001) quoting *Rhone-Poulenc Basic Chemicals Co. v. American Motorists Insurance Co.,* 616 A.2d 1192, 1196 (Del. 1992).
[17] *Sanders,* 1999 WL 1044880 at *6.
[18] *E.I. duPont De Nemours and Co. v. Admiral Insurance Co.,* 711 A.2d 45, 60 (Del. Super. Ct.).
[19] *Id.*

overt statements and acts of the parties, the business context, prior dealings between the parties, and the business customs and usage in the industry."[20]

"Delaware courts look to dictionaries for assistance in determining the plain meaning of the terms which are not defined in the contract."[21] "[D]ictionaries are the customary reference source that a reasonable person in the position of a party to a contract would use to ascertain the ordinary meaning of words not defined in the contract."[22] "Dictionary definitions change over time, provide the contemporary meaning of ordinary words, and note when a particular definition of a term has become obsolete."[23] "When a term's definition is not altered or has 'no 'gloss' in the [relevant] industry it should be construed in accordance with its ordinary dictionary meaning.'"[24] Case law provides "a basic understanding of the [contract] term as it has been used historically" even if it does not provide a black letter law definition.[25]

Parties' Contentions

Plaintiff's Contentions

The Club argues that the clear, plain, ordinary meaning of a term can be determined by looking at the dictionary definition of that term. It states that the simple dictionary definition of the term "Plant" almost always does not include real property. The Club provides the *Black's Law Dictionary*, 4th edition, definition for the term "plant" which is defined as "[t]he fixtures, tools, machinery, and apparatus which are necessary to carry on a trade or business." The Club points out

[20] *Bell Atlantic Meridian Systems v. Octel Communications Corp.,* 1995 WL 707916, *6 (Del. Ch.) citing *Klair v. Reese,* 531 A.2d 2219, 223 (Del. 1987).
[21] *Lorrillard,* 2006 WL 2035682 at *7.
[22] *Id.*
[23] *Id.*
[24] *Id.* at *8 quoting *USA Cable v. World Wrestling Fed'n Entm't, Inc.,* 766 A.2d 462, 474 (Del. 2000).
[25] *American Legacy Foundation v. Lorillard Tobacco Co.,* 886 A.2d 1, 21 (Del. Ch. 2005).

that this definition does not expressly mention the real estate on which a plant sits. The Club also includes the definition of "plant" from *Ballentine's Law Dictionary*, 3rd Edition, which defines "plant" as "[a] factory or place where an industry is conducted, inclusive of the machines and instrumentalities therein contained."

The Club references non-legal dictionaries for more definitions of the term "plant". Specifically, the Club provided definitions from *The Heritage Dictionary of the English Language,* 4th Edition, and the *Merriam-Webster Online Dictionary*. The *Merriam-Webster* states:

> 2a: the land, buildings, machinery, apparatus, and fixtures employed in carrying on a trade or an industrial business b: a factory or workshop for the manufacture of a particular product c: the total facilities available for production or service d: the buildings and other physical equipment of an institution.

However, the Club does not accept all definitions for "plant" as relevant to this case. Specifically, the *Merriam-Webster* definition includes "land" in section 2(a) of the definition of "plant". The Club argues that section 2(b) should be used because it "most accurately describes the situation involved in the case at hand."[26] This subsection fits the Club's arguments the best, but it is not clear if it is the most accurate. The Club believes that section 2(a) is an unreasonable definition for this situation because "plant" is defined in the context of "carrying on a trade or an industrial business." The Court considers this definition to be just as acceptable as the definition contained in section 2(b) because producing nylon can be considered the carrying on of an industrial business.

The Club states that the Deed does not contain definitions for the terms "Seaford, Delaware Plant" or "Plant", but that the Deed contains a reference to "GRANTOR'S Plant operation which adjoins the Property." Thus, the Club reconciles these facts to argue that the terms "Plant"

[26] Plaintiff's Opening Brief in Support of Motion for Summary Judgment, page 19.

or "Seaford, Delaware Plant" as used in the Deed Restriction must mean specifically the nylon manufacturing operation and not to include the land or in reference to the operations generally.

Further, the Club points out that the Ground Lease and Memorandum of Lease also do not define the terms "Seaford, Delaware Plant" or "Plant". The Club argues that duPont in the Ground Lease draws a distinction between the Plant and the real property upon which the Plant is located because Section 11(a) of the Ground Lease discusses the Consent Order that duPont signed with the EPA. Section 11(a) contains the language "on the DUPONT Seaford Plant Property". Additionally, the Club raises the fact that the Consent Order, attached to the Ground Lease as Exhibit C, which the EPA drafted and duPont signed off on, contains the language "The Plant, the property on which the plant is located, and all contiguous property". Based on these facts, the Club wants the terms "Plant" and "Seaford, Delaware Plant" as used in the Right of First Refusal, to be interpreted as being used in the context of manufacturing nylon textile fiber and not in the context of referring to land and operations generally when reading the Ground Lease as a whole. Further, the Club argues that the term "plant" refers to the manufacturing operation as being separate and distinct from the real property on which this operation sits.

The Club states that interpreting the term "Plant" to not include real property, but to mean only the nylon manufacturing operation in context of the Deed Restriction and the Right of First Refusal is the correct interpretation. The Club claims that duPont had no need to retain ownership to the real property once it sold the nylon manufacturing operation while duPont states that it retained ownership to complete remediation with respect to the "Existing Contamination" as defined in the purchase agreement between duPont and Arteva. The Club asserts that there is no apparent

reason why duPont would need to retain control and ownership of the real property in connection with its remediation activities.

The Club next attempts to establish the plain meaning of the term in issue through case law. The Club cites to *Xavier Chemical Co. v. United States*[27] for the holding that the term "plant" as used in facilities agreement "was used in the context of manufacturing sulfuric acid.…[and] not….in the context or referring to land and operations generally."[28] However, this case does not provide any further guidance on how "plant" should be defined here because it is distinguishable. First, in *Xavier*, it is a facilities agreement and not a deed or Ground Lease. Second, the facilities agreement controls storage and hauling of the sulfuric acid rather than how the land relates to term "plant". Finally, the term "plant" as used in *Xavier,* even though it is not defined in the agreement, clearly means the operation and not the land because the language of the agreement states "ICI hereby grants [Xavier] a License to use certain facilities at VAAP….for use as a sulfuric acid plant".[29]

The Club cites *Consolidated Solubles Co. v. Consolidated Fisheries Co.*[30] because the Court when interpreting the term "plant" never suggests that land was included in the definition of this term. However, whether land was included in the definition of the term "plant" was not in issue in this case. The issue was whether the term "plant" as contained in a construction contract included the building only, or if it included in addition to the building "the machinery, equipment, pipes, tanks, and what-ever else was necessary for the proper construction of the plant".[31] Therefore, this

[27] 128 Fed.Appx. 112 (Fed. Cir. 2005).
[28] *Id.* at 115.
[29] *Id.* at 115.
[30] 107 A.2d 639 (Del. Ch. 1954) *aff'd and rev'd in part on other grounds by* 112 A.2d 30 (Del. 1955).
[31] *Id.* at 644.

case is distinguishable and not informative as to whether the term "plant" as used here includes the real property that the nylon manufacturing operation sits.

Also cited to interpret the ordinary meaning of the term "Plant" is *Maxwell v. Wilmington Dental Mfg. Co.*[32] In this case, the Court used two dictionaries to define the term "plant" and neither dictionary definition included land or real property as being part of a "plant".[33] The petitioner in this case claimed that the term "plant" inserted in a mortgage "covers every description of property which belonged to" the mortgagor.[34] The issue before the Court was whether "plant" and "undertaking", which had been interpreted in an earlier case, had the same meaning.[35] The Court found that these words were not equivalents.[36] The Club attempts to use this case because the petitioner wanted the term "plant" to include real estate, and the Court said that it did not, based on definitions it cited. However, this case actually turned on whether the mortgage was secured by after-acquired property.[37] Therefore, this case does not actually help define the term "plant" as it was used here.

The Club goes on to cite other cases where the term "plant" was defined as not including real property or land. These cases use the term "plant" in various contexts including an employment statute, what constituted building a "plant" on a leased property, and determining when a payment is due on a sales contract for an engine. The Club argues that the Courts' decisions support its stance that "Plant" does not include real estate.

[32] 77 F. 938 (C.C.D. Del 1896).
[33] *Id.* at 941.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*

The Club claims that the cases duPont has cited do not support duPont's interpretation of the term "plant". First, the Club argues that the Court in *United States v. G. Heileman Brewing Co.*[38] does not support duPont's position because the Court's definition of "brewery" distinguishes between the "manufacturing plant" and "real property" as being separate and distinct parts of a brewery. Second, the Club believes that the *Berks County v. Penn Ohio Steel Corp.*[39] court did not have to interpret the term "plant" because it was defined in the documents.

The Club next addresses how the Court should interpret/define the term "Plant" if it is deemed ambiguous. The Club states that when looking at the extrinsic evidence of the parties' negotiations, the Court should find that the intent of the parties was to not include real property in the definition of the term "Plant". The Club points out that it informed duPont on numerous occasions that the language controlling the extinguishment of the Deed Restriction and Right of First Refusal needed to be clarified. Specifically, the Club wanted the "total divestiture" language clarified or defined and it suggested language that would have included both the assets and the real estate. The Club claims that duPont rejected these requests, and chose to use the language as it appears in the documents, which the Club alleges is less restrictive.

Additionally, the Club raises the fact that duPont used the term "Plant" instead of "Plant Property". The Club argues that this must mean that duPont's reasonable understanding of the term "plant" did not include real property. Thus, the Club believes that duPont must have intended for the Deed Restriction and Right of First Refusal to terminate when the assets of the nylon manufacturing operation were sold or transferred, not when the assets and land were sold or

[38] 1983 WL 1827 (D.Del).
[39] 1952 WL 4508 (Pa.Com.Pl.).

transferred. The Club claims that it is obvious that it did not consider the term "Plant" to include the land because it was suggesting another term, "Plant Property". The Club argues that because duPont chose not to use the term "Plant Property", both parties knew or should have known that the term "Plant" was not intended to be inclusive of the land.

The Club seeks to have the rule of contra preferentum be applied to this case. This rule requires that ambiguities in a contract be interpreted against the drafter. DuPont did draft the final documents at issue. Thus, the Club argues that the term "plant" must be construed against duPont here and in the Club's favor. However, the documents were a result of both sides' negotiations, and duPont was just charged with the actual recording of the parameters of the transaction in these documents so this rule will not be applied here.

The Club attacks the Deed Restriction based on Delaware's public policy which favors the free use of one's property. The Club asserts that ambiguities in such restrictions are construed strongly against the grantor. Thus, the Club argues that no matter who the drafter was, the restriction has to be construed against duPont as the grantor.

With respect to the Ground Lease and memorandum, the Club cites the rule that where language is ambiguous, the grantee or lessee should be favored when the language is construed. Therefore, the Club argues that the definition of the term "plant" should be construed against duPont as the lessor.

The Club believes for the above stated reasons that the term "plant" does not include real property, but only the assets of the nylon manufacturing operation.

Finally, the Club argues that even if the term "Plant" is defined as duPont seeks, duPont still forfeited its Right of First Refusal when it rejected the Club's offer to sell. The Club bases this

argument on the language of the Right of First Refusal which states "Said Right of First Refusal will terminate upon the refusal by DUPONT to purchase".

Defendant's Contentions

DuPont argues that the plain meaning of the term "Seaford, Delaware Plant" includes the land where the nylon manufacturing operation sits. DuPont points out that the term "plant operation" is also found in the Deed. It argues that "plant operation" is clearly limited to the nylon manufacturing operation and buildings and appurtenances necessarily involved in that process. DuPont asserts that by distinguishing between "plant operation" and the "Seaford, Delaware Plant", the deed implies that "Seaford, Delaware Plant" includes more than the manufacturing facility meaning the land. DuPont argues further that if the parties intended the term "Seaford, Delaware Plant" to only encompass the nylon manufacturing operation, it is only reasonable to conclude that the parties would have used the term "plant operation".

DuPont states that standard dictionary definitions also support its interpretation of the term at issue. First, it provides the definition for "plant" from Merriam-Webster Online Dictionary. "Plant" is defined as the "land, buildings, machinery, apparatus, and fixtures employed in carrying on a trade or industrial business." Second, it cites the Shorter Oxford English Dictionary, 5th edition, which defines "plant" to include "machinery, fixtures, and apparatus used in an industrial or engineering process; a single machine or large piece of apparatus. Also, the premises, fittings, and equipment of a business or institution; a factory." Additionally, duPont states that because the parties are sophisticated business entities, business dictionaries should also be looked to for guidance in determining the definition of "plant". Several of these dictionaries support duPont's interpretation. Finally, duPont attacks the Club's reliance on Black's Law Dictionary because it cited

a 1957 edition even though the four most recent editions do not include the term "plant", so the definition provided by the Club should not be accorded any weight in this matter.

DuPont states that its above interpretation is supported by relevant case precedent. It cites the *Heileman Brewing* case which defined "Brewery" as the "manufacturing plant, real property, capital equipment, and any other interests, tangible assets or improvements, associated with a facility for brewing and packaging beer."[40] However, this case does not support duPont's argument because the term "brewery" is defined and the term "plant" is not.

DuPont also directs the Court to see the *Berks County* case which states that a manufacturing plant was comprised of "land, buildings, machinery and necessary equipment and some personal property considered as part of the plant."[41]

DuPont attacks the cases cited by the Club as not supporting the Club's interpretation. First, duPont states that some of the cases cited are from the early 20th century and deal with the application of statutes for the protection of injured employees in which the courts had to decide what tools were included in the term "plant" as provided in the statutes. Next, duPont points out those other cases cited looked at whether certain instrumentalities qualified as part of a "plant". Additionally, duPont argues that none of the cases above considered whether the land on which the manufacturing plant sat was properly included within the term "Plant".

According to duPont, the *Xavier* case which interpreted a facilities agreement does not provide support for the Club's interpretation because the agreement referenced the manufactured product, the term "plant" was limited to the facility used to make the product. DuPont argues that

[40] *Heileman,* 1983 WL 1827 at *2.
[41] *Berks County,* 1952 WL 4508 at *2.

the documents here do not refer to a "nylon plant", but rather the physical location of the "Plant", unlike in the *Xavier* case.

Next, duPont states that the *Consolidated Solubles* case is not helpful here because there was no issue involving real property before the court. Further, the term "plant" is modified by the term "stickwater", the material that is produced, which duPont argues limits the meaning of the term "plant".

Further, duPont asserts that the *Maxwell* case did not address whether the term "plant" includes real estate. DuPont states that the court did not need to define plant because it was already defined in the agreement and thus distinguishable from the case here. DuPont also declares that the *Chesapeake Utilities* case does not stand for the proposition that the term "plant" excludes real estate. DuPont points out that the court was only interpreting the term "utility plant" as contained in a regulatory statute, and nothing in the definition the court used excluded land.

DuPont pronounces that the fact that the Club sought to define "total divestiture" as duPont no longer holding legal interest in the duPont Plant Property, shows that the Club understood that duPont intended to retain the right to enforce the Deed Restriction as long as duPont owned the land where the nylon manufacturing operation sits. DuPont goes on to argue that it is unreasonable for the Club to argue that duPont would eschew a broad definition of its rights in favor of a narrower interpretation. DuPont states that the language as it exists can only be reasonably interpreted to include real property as it had always sought.

Further, duPont argues that the Club cannot and does not attempt to distinguish the meanings of "total divestiture" and the transfer of "all title and interest". DuPont asserts that both phrases have the same meaning, that when duPont has no interest at all in the property at issue, then the Deed

Restriction and Right of First Refusal terminate. Therefore, duPont believes that the Club cannot escape the Deed Restriction and Right of First Refusal because it is undisputed that duPont still owns the land on which the nylon manufacturing facility sits.

Finally, duPont finds the Club's argument that duPont failed to exercise its right is without merit. The only way duPont believes that the Club can escape the Right of First Refusal is if the Court finds that the sale to Arteva constituted a "transfer of all of its title and interest to the Seaford, Delaware Plant".

Discussion

Both parties have provided dictionary definitions and case law supporting their variant interpretations of these terms. For the Court's purposes, the definitions and cases are not helpful as there is no clear objective definition. Ultimately, "[t]he words employed by contract drafters must be evaluated in light of the apparent purposes of the drafters."[42]

Here, in looking at all the documents and using each to help construe the other, I find the plain meaning of the terms "Seaford, Delaware Plant" and "Plant" include land along with the nylon manufacturing operation. First, a reasonable third party would interpret these terms as a place not the operations. A place includes the land. The description is the Seaford, Delaware Plant. Second, the parties used the language "transfers all of its title and interest in and to" and "as long as GRANTOR continues to own". The words objectively mean that the parties understood the conditions and restrictions to remain in place until duPont was rid of all of its interest. The use of this broad encompassing language supports duPont's position. Thus, when applying the ordinary plain meaning to the term "Seaford, Delaware Plant", duPont cannot be found to have "transferred

[42] *Telcom*, 2001 WL 1117505 at *6.

all of its title and interest in" or not "continue[d] to own its Seaford, Delaware Plant" when it stills holds title to the land that the nylon manufacturing operation is located on. Therefore, the Deed Restriction and Right of First Refusal are continuing to be in effect, and the Club is not entitled to continue with its transaction to sell a parcel of land for residential development.

Alternatively, after reviewing the documents containing the terms "Seaford, Delaware Plant" and "Plant", if it was determined that these terms are ambiguous, then the negotiations are further evidence that the land was to be included in the term "Seaford, Delaware Plant".

The Court will look at the parties' intentions when they entered into the agreements. For the subsequent reasons, the Court interprets these terms to include the land on which the nylon manufacturing operation sits. DuPont included in its earliest communications that the restrictions would remain until "total divestiture". The Club even suggested that "total divestiture" as used in the negotiations meant including the land. Thus, the Club contemplated and knew that the restrictions would continue as long as duPont owned the land on which the nylon manufacturing operation sits. The Club cannot now say that if the definition they suggested was not included, or their exact wording was not used, then duPont must have meant for the terms not to include the land. This rationale is inappropriate because the Club believed and understood that the land was included at the time the negotiations took place and when the agreements were drafted. Further, it is unreasonable to believe that duPont would want to read the restrictions more narrowly than its original position and with less protection than what the Club had communicated to duPont through the Club's suggested language. There is nothing in the record to suggest that this was even an important issue in the negotiations. The parties were on the same page as to intent, even if duPont did not formally adopt the Club's language. Therefore, alternatively, even if the terms are deemed

to be ambiguous, they are interpreted to include the land, so the Right of First Refusal and the Deed Restriction are still in place.

Finally, in accordance with the above interpretation of the term "Seaford, Delaware Plant", the Deed Restriction continued to be in effect at all times, including after duPont sold the nylon manufacturing operation to Arteva. Therefore, the Club's argument about the Right of First Refusal is moot.

Conclusion

For the above, stated reasons duPont's Motion for Summary Judgment is granted and the Club's Motion for Summary Judgment is denied as to construing Seaford, Delaware Plant.