# EXHIBIT B

**UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF DELAWARE**

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| In re: | ) | Chapter 11 |
| | ) | |
| WOMEN FIRST HEALTHCARE, INC. | ) | Case No. 04-11278 (MFW) |
| | ) | |
| Debtor. | ) | |
| | ) | |
| | ) | **Ref. No. 23** |
| | ) | |

**ORDER PURSUANT TO 11 U.S.C. §§ 105(a), 363 AND 365 AND FED. R. BANKR. P. 2002, 6004, AND 6006 AUTHORIZING THE SALE OF THE DEBTOR'S *VANIQA*® ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS AND ENCUMBRANCES, AND THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS IN CONNECTION THEREWITH**

THIS MATTER having come before the Court upon the motion, dated May 3, 2004 (the "Motion"), of Women First HealthCare, Inc. (the "Debtor" or the "Seller") for entry of an order pursuant to sections 105(a), 363(b), (f) and (m), and 365(a), (f) and (k) of title 11 of the United States Code (the "Bankruptcy Code") and Rules 2002, 6004 (a), (c) and (g) and 6006(a) and (d) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") authorizing the sale of certain assets of the Debtor's pharmaceutical business relating to *Vaniqa*® Cream as set forth in the Agreement (as defined below) (the "Acquired Assets"), free and clear of all liens, claims and encumbrances and other interests, and the assumption by the Debtor and assignment to the Purchaser (as defined below) of certain executory contracts pursuant and subject to the terms and conditions of that certain Amended and Restated Asset Purchase Agreement, dated June 24, 2004 (including all exhibits and agreements ancillary thereto, the "Agreement," in the form substantially of that attached hereto as Exhibit A) by and among Women First HealthCare, Inc., a Delaware corporation, and SkinMedica, Inc., a Delaware corporation, and/or its designee (the "Purchaser"), subject to higher and better offers;

And the Court having held a hearing on May 18, 2004 and entered an order, dated May

18, 2004 (the "Bidding Procedures Order"), pursuant to which the Court, *inter alia*:

(i) approved the "Bidding Procedures" specified therein (the "Bidding Procedures") and the form and manner of notice of the proposed sale and bidding procedures;

(ii) established the deadline by which parties may object to the proposed assumption and assignment of executory contracts and assert claims for the payment of cure amounts;

(iii) authorized and scheduled an auction to sell certain assets of the Debtor free and clear of liens, claims and encumbrances;

(iv) established the date and time for the auction to be held by the Debtor for bids on the Acquired Assets (the "Auction");

(v) established the date and time for the hearing on the Motion; and

(vi) approved the Break-Up Fee and Expense Reimbursement.

And the Auction having been held on June 24, 2004 pursuant to the Bidding Procedures Order, after which Purchaser was determined to have submitted the highest and best offer for the Acquired Assets;

And a hearing having been held before this Court on June 25, 2004 to consider the proposed sale (the "Sale") of the Acquired Assets in connection with the Agreement (the "Sale Hearing"), at which time all parties in interest were afforded an opportunity to be heard;

And the Court having heard testimony and received evidence, including the transcript of the Auction filed with the Court on June 24, 2004 [Docket No. 195], in support of approval of the Sale, the Debtor's ability to assume and assign the Assumed Contracts to Purchaser pursuant to section 365 of the Bankruptcy Code, Purchaser's ability to consummate the Sale, Purchaser's establishment of adequate assurance of future performance and Purchaser's good faith status pursuant to section 363(m) of the Bankruptcy Code;

And due and sufficient notice of the Motion, the Bidding Procedures, the Sale and the Sale Hearing having been given in accordance with the Bidding Procedures Order, as evidenced by the affidavits of service heretofore filed with the Court;

And objections having been filed by the Official Committee of Unsecured Creditors, Cardinal Healthcare, the Gillette Company, UPS Supply Chain, and CVS/Pharmacy, Inc. (collectively, the "Objections");

NOW, THEREFORE, based upon the Court's review of all of the evidence proffered or adduced at, memoranda and Objections filed in connection with, and arguments of counsel made at, the Sale Hearing, and its review of the entire record of the Auction and the Sale Hearing and in this Chapter 11 case;

And after due deliberation thereon; and good cause appearing therefor,

IT IS HEREBY FOUND AND DETERMINED THAT:[1]

(a) Capitalized terms used herein that are not otherwise defined in this Order shall have the meanings ascribed to such terms in the Agreement.

(b) This Court has jurisdiction to hear and determine the Motion pursuant to 28 U.S.C. § 1334.

(c) Venue of this case in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409(a).

(d) Determination of the Motion is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (M) and (N). The statutory predicates for the relief requested herein are sections 105, 363 and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, and 6006.

1 Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. See Fed. R. Bankr. P. 7052.

(e) On April 29, 2004 (the "Petition Date"), the Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code. Since the Petition Date, the Debtor has continued in possession and management of its businesses and properties pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the Debtor's Chapter 11 case. On May 11, 2004, the Office of the United States Trustee appointed an official committee of unsecured creditors pursuant to section 1102 of the Bankruptcy Code (the "Committee").

(f) As evidenced by the affidavits of service and affidavit of publication previously filed with this Court, proper, timely, adequate and sufficient notice of the Motion, the Bidding Procedures, the Auction, the Sale Hearing and the proposed Sale has been provided in accordance with sections 102(1), 363 and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004 and 6006 and the Bidding Procedures Order, and no other or further notice of the Motion, the Auction, Sale Hearing or of the entry of this order is required.

(g) The Bidding Procedures and the Auction afforded a full, fair and reasonable opportunity for any entity to make a higher and better offer to purchase the Acquired Assets and no higher or better offer has been made. The Bidding Procedures approved in the Bidding Procedures Order have been fully complied with in all respects.

(h) The Debtor may sell the Acquired Assets free and clear of all Liens and Interests (as defined below) (other than the Permitted Liens or Assumed Liabilities) because, in each case, one or more of the standards set forth in section 363(f)(1)-(5) of the Bankruptcy Code has been satisfied. Those holders of Liens or Interests (other than the Permitted Liens or Assumed Liabilities) who did not object, or who withdrew their objections, to the Motion are deemed to have consented pursuant to section 363(f)(2) of the Bankruptcy Code. Those holders of Liens or

Interests (other than the Permitted Liens or Assumed Liabilities) who did object are adequately protected by having their Liens or Interests, if any, attach to the proceeds of the Sale.

(i) A reasonable opportunity to object or be heard with respect to the Motion and the relief requested therein has been afforded to all interested persons and entities, including: (i) the Office of the United States Trustee; (ii) counsel for the Purchaser; (iii) counsel for the Committee; (iv) counsel for the Lenders; (v) all entities known to have expressed a bona fide interest, within the last (6) months, in acquiring the Acquired Assets; (vi) all entities (or counsel therefor) known to have asserted any lien, claim, encumbrance, right of refusal or other interest in or upon the Acquired Assets; (vii) all federal, state, and local regulatory or taxing authorities or recording offices or any other governmental authorities that, as a result of the Sale of the Acquired Assets, may have claims, contingent or otherwise, in connection with the Debtor's ownership of the Acquired Assets or have any reasonably known interest in the relief requested by the Motion; (viii) all parties, if any, who are known to claim interests in any Assumed Contracts; (ix) all Persons who are parties to any litigation threatened against, or pending with, the Debtor; (x) the United States Attorney's office; (xi) The Securities and Exchange Commission; (xii) the Internal Revenue Service; (xiii) the U.S. Food and Drug Administration; (xiv) all state and local environmental agencies in any jurisdiction where the Seller owns or has owned or used real property; (xv) all parties who have filed a Notice of Appearance or Request for Service of Papers in the Debtor's Chapter 11 case through and including May 18, 2004; and (xvi) all other persons entitled to notice under applicable law, including Bankruptcy Rule 2002.

(j) The Assumed Contracts are assignable notwithstanding any provisions contained therein to the contrary and the Purchaser has demonstrated and has provided adequate assurance of its future performance of obligations arising after the Closing under the Assumed Contracts.

The Debtor has provided for the cure, or at the Closing of the Agreement will pay such cure amounts from the proceeds of the Sale, of any monetary defaults under the Assumed Contracts, and the Debtor has compensated, or have provided adequate assurance thereof, to the non-debtor parties to Assumed Contracts for the actual pecuniary loss, if any, resulting from a default, if any, under such Assumed Contracts prior to the date hereof. The Cure Costs, if any, are the sole amounts necessary to cure all defaults and to pay all established actual and pecuniary losses that result from such defaults, within the meaning of section 365(b)(1)(A) and (B) of the Bankruptcy Code. No defaults exist in the Debtor's performance under the Assumed Contracts, as of date of this Order, other than as a result of the Debtor's failure to previously pay the aforesaid amounts. The Assumed Contracts being assigned to the Purchaser constitute an integral part of the Acquired Assets and, therefore, the Purchaser's assumption and assignment thereof enhances the value of the Debtor's estate and does not result in unfair discrimination among the Debtor's creditors.

(k) The Debtor has demonstrated that approval of the Agreement and consummation of the Sale at this time is in the best interests of the Debtor, the estate and creditors. The Debtor has advanced good and sufficient business justification supporting the sale of the Acquired Assets to the Purchaser pursuant to sections 105, 363, and 365 of the Bankruptcy Code and outside of a plan of reorganization, as set forth in the Motion and at the Sale Hearing, and it is a reasonable exercise of the Debtor's business judgment to consummate a sale of the Acquired Assets on the terms and conditions set forth in the Agreement, and to execute, deliver and perform its obligations thereunder. Sound business judgment includes, but is not limited to, the fact that (i) there is a risk of immediate and irreparable loss of value of the Acquired Assets if the Sale is not consummated, (ii) there is a substantial risk of further deterioration in the Debtor's

relations with key customers, (iii) it is difficult for the Debtor in the bankruptcy environment to establish new customer relationships and maintain normal terms with suppliers and (iv) the consummation of the transaction contemplated under the Agreement presents the best opportunity to realize the value of the Acquired Assets to avoid further decline and devaluation thereof.

(l) The Agreement is not a *sub rosa* Chapter 11 plan for which approval has been sought without the protections a disclosure statement would afford.

(m) With the consent of the parties thereto, which consent has been received, the Assumed Contracts are assignable notwithstanding the absence of any language on assignability or the existence of any provisions contained therein to the contrary. Regardless of the existence of such consent, the Assumed Contracts are assignable notwithstanding the absence of any language on assignability or the existence of any provisions contained therein to the contrary.

(n) The Debtor has full corporate power and authority to execute and deliver the Agreement, and documents contemplated thereby and to perform the transactions contemplated thereby; no consents or approvals, other than those expressly provided for in the Agreement, are required for the Debtor to consummate the Sale.

(o) The consideration to be paid by the Purchaser under the Agreement constitutes adequate and fair value for the Acquired Assets and the terms and conditions of the Agreement are fair and reasonable under the Bankruptcy Code and under the laws of the United States, any state, territory or possession of the United States or the District of Columbia.

(p) The Debtor has good title to the Acquired Assets, and accordingly the transfer of such Acquired Assets, including the assumption and assignment of the Assumed Contracts, to the Purchaser pursuant to the Agreement will be a legal, valid and effective transfer of the

Acquired Assets, including the Assumed Contracts.

(q) The Agreement was negotiated, proposed and entered into in good faith, from arm's-length bargaining positions by the Debtor and the Purchaser and constitutes the highest or otherwise best offer for the Assumed Contracts and the Acquired Assets received by the Debtor after a period in which third parties had ample opportunity to seek information and enter into discussions or negotiations with the Debtor and its retained advisors concerning a sale of the Acquired Assets (both before and after the Petition Date). The Purchaser is entitled to the protections of a good faith purchaser pursuant to section 363(m) of the Bankruptcy Code with respect to the transactions approved hereby.

(r) The Purchaser would not have entered into the Agreement and would not consummate the transactions contemplated thereby, thus adversely affecting the Debtor, its estate and its creditors, if the sale of the Acquired Assets to the Purchaser and the assignment of the Assumed Contracts and Assumed Liabilities to the Purchaser was not free and clear of all Liens and Interests (other than the Permitted Liens or Assumed Liabilities) of any kind or nature whatsoever, or if the Purchaser would, or in the future could, be liable for any of the Liens or Interests (other than the Permitted Liens or Assumed Liabilities), including, without limitation, the Excluded Liabilities.

(s) The Debtor does not have any interest in Purchaser or any party affiliated with Purchaser.

(t) The Purchaser is not an "insider" of the Debtor or any party affiliated with Debtor, as that term is defined in section 101 of the Bankruptcy Code.

(u) The Sale and Auction conducted by the Debtor and its retained advisors was non-collusive, fair and reasonable and conducted in good faith.

(v) With respect to Seller's obligations related to Liability to Customers and Repurchase Liability, the Seller has (i) made commercially reasonable efforts to adequately notify customers or wholesalers and to establish the sum of Liability to Customers and Repurchase Liability, (ii) reasonably informed Purchaser of such efforts and (iii) established reasonable and appropriate deadlines and procedures.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion is granted, as more fully described below.

2. Any objections to the Motion or the relief requested therein including, without limitation, the Objections, that have not been withdrawn, waived or settled, and all reservations of rights included therein, are overruled on the merits.

3. The terms and conditions of the Agreement (including all exhibits and schedules thereto) are hereby approved in all respects,[2] and the sale of the Acquired Assets of the Debtor pursuant to the Agreement is hereby authorized under sections 105, 363 (b) and (f) of the Bankruptcy Code and the assumption and assignment of the Assumed Contracts in connection therewith is likewise approved and authorized pursuant to section 365 of the Bankruptcy Code.

4. The Debtor is authorized and directed, pursuant to sections 105(a) and 363(b) and (f) of the Bankruptcy Code, to execute and deliver, and empowered to fully perform under, consummate and implement, the Agreement, together with all additional instruments and documents that may be reasonably necessary or desirable to implement the Agreement and to take all further actions as may reasonably be requested by the Purchaser for the purpose of

[2] The omission in this Order of specific reference to any provision of the Agreement shall not impair or diminish the efficacy, propriety and approval of such provision, it being the intent of the Court that the Agreement be authorized and approved in its entirety.

assigning, transferring, granting, conveying and conferring to the Purchaser, or reducing to the Purchaser's possession, any or all of the Acquired Assets. The Debtor's obligations under the Agreement shall constitute administrative expenses of the Debtor's estate under sections 503(b) and 507(a)(1) of the Bankruptcy Code.

5. Neither the purchase of the Acquired Assets by Purchaser nor the transactions contemplated hereby will cause the Purchaser or any of its affiliates to be deemed a successor in any respect to the Debtor's business within the meaning of any federal, state or local revenue, pension, ERISA, tax, labor or environmental law, rule or regulation or under any products liability law or doctrine with respect to Debtor's liability under such law, rules, regulations or doctrines. In addition, except as expressly provided in this Agreement, and, to the greatest extent permitted by law, Purchaser does not acquire or assume any of the Debtor's or any other person's liabilities, including, without limitation, any of the Debtor's obligations under any employment or collective bargaining agreement and in no event shall Purchaser (a) be deemed the successor of the Debtor, (b) have, de facto or otherwise, merged with or into the Debtor or (c) be a mere continuation of the Debtor or the enterprises of the Debtor. To the greatest extent permitted by law, the Purchaser shall have no liability or obligation under the WARN Act (29 U.S.C. §§ 2101 et seq.) or the Comprehensive Environmental Response Compensation and Liability Act or any federal, state or local environmental law by virtue of the Purchaser's purchase of the Acquired Assets.

6. Pursuant to section 363(f) of the Bankruptcy Code, as of the Closing and pursuant to the terms of the Agreement, the transfer of the Acquired Assets to the Purchaser will be a legal, valid, enforceable, and effective transfer of the Acquired Assets, and will vest the Purchaser with all right, title, and interest of the Debtor in the Acquired Assets free and clear of

all Liens and all liens, claims, encumbrances and interests (other than the Permitted Liens or Assumed Liabilities), including, but not limited to: (i) those that purport to give to any party a right or option to effect any forfeiture, modification, right of first refusal, tag-along rights, restrictions on sales to competitors, rights based on a change of control as a result of the transactions contemplated in the Agreement, or termination of the Debtor's or the Purchaser's interest in the Acquired Assets, or any similar rights, (ii) those relating to taxes arising under or out of, in connection with, or in any way relating to the operation of the Acquired Assets prior to the Closing, (iii) all mortgages, deeds of trust, security interests, conditional sale or other title retention agreements, pledges, liens, judgments, demands, encumbrances, options, rights of first refusal or charges of any kind or nature, if any, including, but not limited to, any restriction on the use, voting, transfer, receipt of income or other exercise of any attributes of ownership, and (iv) all debts arising in any way in connection with any agreements, acts, or failures to act, of the Debtor or any of the Debtor's predecessors or affiliates, claims (as that term is defined in the Bankruptcy Code), obligations, liabilities, demands, guaranties, options, rights, contractual or other commitments, restrictions, interests and matters of any kind and nature, whether known or unknown, contingent or otherwise, whether arising prior or subsequent to the commencement of these bankruptcy cases, and whether imposed by agreement, understanding, law, equity or otherwise, including but not limited to claims otherwise arising under doctrines of successor liability (collectively, the "Interests") on such Acquired Assets, with any Liens or Interests (other than the Permitted Liens or Assumed Liabilities) in such Acquired Assets to attach to the proceeds of the sale, including without limitation, any and all escrows established in connection therewith, in the order of their priority, with the same validity, force and effect which they now have as against such Acquired Assets. Except as set forth herein, the proceeds of the Sale,

including any escrowed amounts established pursuant to this order which are not agreed upon by the parties or determined by the Court in accordance with this order to be payable to such non-Debtor party, shall be applied and distributed in accordance with the Amended final Order (1) Authorizing Post-Petition Financing on a Secured and Super-Priority Basis Pursuant to Sections 364(c) and (d) of the Bankruptcy Code, (2) Authorizing Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code and (3) Granting Adequate Protection Pursuant to Sections 363 and 364 of the Bankruptcy Code [Docket No. 158].

7. Except as may be expressly permitted by the Agreement, all persons and entities holding Liens or Interests (other than the Permitted Liens or Assumed Liabilities) of any kind and nature with respect to the Acquired Assets of the Debtor are hereby barred from asserting such Liens or Interests (other than the Permitted Liens or Assumed Liabilities) against the Purchaser, its successors or assigns, or the Acquired Assets.

8. If any person or entity that has filed financing statements or other documents or agreements evidencing encumbrances on the Acquired Assets of the Debtor shall not have delivered to the Debtor prior to the Closing (in proper form for filing and executed by the appropriate parties), termination statements, instruments of satisfaction, releases of all encumbrances that the person or entity has with respect to such Acquired Assets, the Purchaser is hereby authorized to execute and file such statements, instruments, releases and other documents on behalf of the person or entity with respect to such Acquired Assets.

9. As evidenced by the affidavits of service and affidavit of publication previously filed with this Court, proper, timely, adequate and sufficient notice of the proposed Sale has been provided by the Debtor to all relevant parties, and no other or further notice is required.

10. The foregoing notwithstanding, the provision of this Order authorizing the sale and assignment of the Acquired Assets of the Debtor free and clear of Liens and Interests (other than the Permitted Liens or Assumed Liabilities) shall be self-executing, and notwithstanding the failure of the Debtor, the Purchaser, or any other party to execute, file or obtain releases, termination statements, assignments, consents or other instruments to effectuate, consummate and/or implement the provisions hereof or the Agreement with respect to the sale and assignment of such Acquired Assets, all Liens and Interests (other than the Permitted Liens or Assumed Liabilities) on such Acquired Assets, if any, shall be deemed released and shall attach to the proceeds of the Sale pursuant to paragraph 6 of this Order, with the same priority, force and validity as existed at the time of sale subject to all defenses, claims and objections. All persons or entities that presently or at the time of the Closing are in possession of any of the Acquired Assets of the Debtor are hereby directed to surrender possession of such Acquired Assets to the Purchaser, or its designee (a) at the Closing or (b) prior to Closing if requested in writing by the Debtor, and any such person's Lien, if any, with respect to such Acquired Asset(s) shall continue with full force and effect until the Closing with respect to such Acquired Assets only and, thereafter, shall attach to the proceeds of the Sale (except to the extent the Agreement expressly provides otherwise), with the same priority, force and validity as existed at the time of sale subject to all defenses, claims and objections, if any. If, in accordance with this paragraph, Acquired Assets are transferred to the Purchaser prior to the Closing, then the Purchaser shall segregate such Acquired Assets until the Closing and, during such time, Purchaser shall hold such Acquired Assets in trust for the Debtor. If the Closing does not occur, then the Purchaser shall promptly return any Acquired Assets in its possession or control to the Debtor.

11. With respect to and in resolution of the Objection filed by UPS Supply Chain Solutions ("UPS"): (a) the Debtor is directed to retrieve all of the Debtor's product currently held by UPS, unless otherwise agreed upon by the parties or ordered by the Court, and UPS is directed to cooperate in connection therewith by delivering the inventory by order of its expiration (earlier date first); and (b) the Debtor shall escrow $300,000 at Closing to secure the secured claim(s) alleged by UPS and UPS's alleged liens, if any, in the inventory shall attach to such escrowed amount with the same priority, force, and validity as existed at the time hereof subject to all defenses, claims and objections, if any. The UPS Escrow shall be held by the Debtor subject to (i) an agreement by the parties, with the consent of the Committee, or (ii) subsequent order of this Court regarding the extent, validity and priority of such claims.

12. This Order shall be binding upon and govern the acts of all entities, including without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, federal, state and local officials, and all other persons or entities who may be required by operation of law, the duties of their office or contract to accept, file, register or otherwise record or release any documents or instruments, or who may be required to report to or insure title or state of title in or to any of the Acquired Assets of the Debtor (including the Assumed Contracts). Each and every federal, state and local governmental agency or department is hereby directed to accept any and all documents and instruments necessary and appropriate to consummate the transactions contemplated by the Agreement, including without limitation, documents and instruments for recording in any governmental agency or department required to transfer to the Purchaser any and all licenses under the Debtor's ownership necessary

for the operation associated with the Acquired Assets, and county and state offices wherein termination statements under the Uniform Commercial Code are authorized to be filed.

13. Subject to the closing of the transactions contemplated by the Agreement and any amendments to the schedules thereto, the Debtor is authorized to assume the Assumed Contracts to which it is a party, and to thereupon assign the Assumed Contracts to the Purchaser in accordance with the terms of the Agreement, pursuant to sections 365(a), 365(f) and 363(m) of the Bankruptcy Code, and the requirements of section 365(b)(1) with respect thereto are deemed satisfied. As reflected in the Agreement, the Assumed Contracts include all four (4) of the Gillette Agreements described in the Objection filed by the Gillette Company to the Assumption and Assignment of Executory Contracts (the "Gillette Objection") [Docket No. 175]. The Debtor's assumption and assignment of the Gillette Agreements is subject to and in accordance with the Assignment, Assumption and Consent Agreement entered into between the parties, which Consent Agreement is substantially in the form and substance of Exhibit A to the Gillette's Objection, and no cure amounts are due and owing by the Debtor or the Purchaser in connection therewith.

14. With respect to the Assumed Contracts: (a) the Assumed Contracts shall be transferred and assigned to, and following the Closing of the Sale remain in full force and effect for the benefit of, the Purchaser in accordance with their respective terms, notwithstanding any provision in any such Assumed Contract (including those of the type described in sections 365(b)(2) and (f) of the Bankruptcy Code) that prohibits, restricts, or conditions such assignment or transfer and, pursuant to section 365(k) of the Bankruptcy Code, the Debtor shall be relieved from any further liability with respect to the Assumed Contracts after such transfer and assignment to the Purchaser; (b) that are executory contracts of the Debtor under section 365 of

the Bankruptcy Code, the Debtor may assume such Assumed Contracts in accordance with section 365 of the Bankruptcy Code; (c) the Debtor may assign each Assumed Contract in accordance with sections 363 and 365(f) of the Bankruptcy Code, and any provision in any Assumed Contract that prohibits or conditions the assignment of such Assumed Contract or allows the non-debtor party to such Assumed Contract to terminate, recapture, impose any penalty, condition renewal or extension, or modify any term or condition upon the assignment of such Assumed Contract, shall constitute an unenforceable anti-assignment provision that is void and of no force and effect; (d) all parties to the Assumed Contracts and all relevant Third Parties have consented to the assignment of the Assumed Contracts; (e) all other requirements and conditions under sections 363 and 365 of the Bankruptcy Code for the assumption and assignment by the Debtor to the Purchaser of each Assumed Contract have been satisfied; and (f) upon Closing, in accordance with sections 363 and 365 of the Bankruptcy Code, the Purchaser shall be fully and irrevocably vested in all right, title and interest of each Assumed Contract.

15. Upon the closing of the transactions contemplated by the Agreement, the Purchaser shall assume the Assumed Liabilities in accordance with the express terms of the Agreement, including all responsibilities of the Debtor under the Assumed Contracts that arise from and after the Closing Date as defined and more specifically provided in the Agreement. All monetary defaults of the Debtor under the Assumed Contracts arising or accruing prior to the closing of the transaction contemplated under the Agreement (without giving effect to any acceleration clauses or default provisions of the kind specified in section 365(b)(2) of the Bankruptcy Code) have been cured or shall promptly be cured by the Debtor from the proceeds of the Sale, such that, other than the Assumed Liabilities, the Purchaser shall not have any liability for any claims or liabilities, including, without limitation, any cure amounts under

section 365(b) of the Bankruptcy Code, against the Debtor or any of the Debtor's predecessors or affiliates of any kind or character, whether known or unknown as of the closing, now existing or hereafter arising, whether fixed or contingent, under the laws of the United States, any state, territory or possession of the United States or the District of Columbia.

16. Each non-debtor party to an Assumed Contract is hereby barred from asserting against the Debtor or the Purchaser any default existing as of the date of the Sale Hearing if such default was not raised or asserted prior to or at the Sale Hearing.

17. At the Closing, the Purchaser shall tender to the Debtor, to be held in trust for the benefit of the applicable customers, the amount necessary to pay all Repurchase Liability and Liability to Customers as set forth on Exhibit B annexed hereto, whether or not resolved, and the Debtor shall deposit such funds into a segregated, interest-bearing escrow account (the "Customer Claim Escrow Account"). The undisputed amount of each customer's claim constituting Repurchase Liability and Liability to Customers, as set forth on Exhibit B annexed hereto, shall be paid from the Customer Claim Escrow Account within ten (10) days after the Closing; provided, however, that Purchaser may instead pay any undisputed amounts on the Closing Date directly to the applicable customer.

18. In addition to the amounts provided in paragraph 17 hereof, the disputed customer claims of CVS/Pharmacy, Inc., Amerisource Bergen, Cardinal Healthcare and McKesson Corporation constituting Repurchase Liability and Liability to Customers, the amounts of which have not been resolved by agreement of the Debtor and the customer on or before June 25, 2004 (the "Disputed Customer Claims"), as set forth on Exhibit B annexed hereto, shall be held in the Customer Claim Escrow Account. The funds in the Customer Claim Escrow Account shall be paid on the later of (a) the date such claims are agreed to by the customer and the Debtor (in

consultation with the Purchaser), (b) the tenth (10th) day after the Closing Date, and (c) entry of a final, non-appealable order entered by the Bankruptcy Court determining the amount of such claim. Any Disputed Customer Claim not paid within twenty (20) days after the Closing shall receive a pro rata portion of the accrued interest on the Customer Claim Escrow Account to the extent principal is paid to such customer. To the extent that the customer and the Debtor fail to reach an agreement as to the allowed amount of the Disputed Customer Claim by July 15, 2004, then thereafter either party may request that the Bankruptcy Court determine the allowed amount, if any, of the subject Disputed Customer Claim. Such determination shall be made pursuant to a motion in accordance with Bankruptcy Rule 9014. In any event, Amerisource Bergen, Cardinal Healthcare and McKesson Corporation shall provide the Debtor and the Purchaser with all documentation supporting its alleged Disputed Customer Claim on or before July 30, 2004 (which date may be extended by written agreement between the parties without further order of the Court), unless the parties (in consultation with the Purchaser) resolve the relevant Disputed Customer Claim before such date.

19. From and after entry of this Order, none of the Debtor, the Purchaser, or any creditor or other party in interest shall take or cause to be taken any action that would interfere with the transfer of the Acquired Assets of the Debtor to the Purchaser in accordance with the terms of this order.

20. From and after the closing of the transactions contemplated by the Agreement, the Debtor shall be released from any and all obligations, claims and liabilities the Purchaser may incur under the Assumed Contracts; provided, however that the Debtor shall be liable for any cure costs incurred on account of their assumption and assignment of the Assumed Contracts and

determined with the procedures set forth herein or in the Agreement. The Debtor shall have all the benefits and protections provided under section 365(k) of the Bankruptcy Code.

21. No bulk sales law or any similar law of any state or other jurisdiction shall apply in any way to the transactions authorized herein.

22. Because the Court finds that Purchaser is a good faith purchaser within the meaning of section 363(m) of the Bankruptcy Code, in the event that the parties to the Sale consummate the transactions contemplated thereby while an appeal of this order is pending, the Purchaser shall be entitled to rely upon the protections of section 363(m) of the Bankruptcy Code, absent any stay pending appeal granted by a court of competent jurisdiction prior to such consummation.

23. The Agreement and any related agreements, documents or other instruments may be modified, amended or supplemented by the respective parties thereto in accordance with the terms thereof without further order of the Court, provided that any such modification, amendment or supplement (i) is not material and adverse to the Debtor and (ii) does not modify the list of Assumed Contracts on Exhibit E to the Agreement to the extent that Shire is a party to such Assumed Contract, provided further that prior notice thereof is provided to counsel to (i) the Committee and (ii) any debtor-in-possession lenders, and any such modification, amendment or supplement shall be filed with the Court.

24. As the Sale and Auction conducted by the Debtor and its retained advisors was non-collusive, fair and reasonable and conducted in good faith, and the transactions contemplated by the Agreement have been bargained for and undertaken by the Debtor and Purchaser at arm's length and without collusion, the Sale approved by this Order is not subject to avoidance pursuant to section 363(n) of the Bankruptcy Code.

25. Any amounts that become payable by the Debtor to Purchaser pursuant to the Agreement (and related agreements executed in connection therewith) (a) shall constitute administrative expenses of the Debtor's estate under sections 503(b) and 507(a)(1) of the Bankruptcy Code and (b) shall be paid by the Debtor in the time and manner provided for in the Agreement (and such related agreements) without further Court order.

26. The Debtor is authorized to execute such other documents as are necessary or desirable to implement this Order.

27. Nothing contained in any plan of reorganization (or liquidation) confirmed in these cases or the order of confirmation confirming any plan of reorganization (or liquidation) shall conflict with or derogate from the provisions of the Agreement or the terms of this Order. Further, the provisions of this Order and any actions taken pursuant hereto shall survive the entry of any order which may be entered or converting the Debtor's case from Chapter 11 to a case under Chapter 7 of the Bankruptcy Code.

28. The terms and provisions of the Agreement, together with the terms and provisions of this Order, shall be binding in all respects upon, and shall inure to the benefit of, the Debtor, its estate, any trustee appointed in this case (whether in Chapter 7 or Chapter 11), its creditors, the Purchaser and its respective affiliates, successors and assigns, and any affected third parties, including but not limited to, any and all persons asserting a claim against or interest in the Debtor's estate or any of the Acquired Assets. This Order shall also bind affected third parties, including, but not limited to, the non-Debtor parties to the Assumed Contracts and all persons asserting claims in the Bankruptcy Case against the Debtor or its assets.

29. As provided by Bankruptcy Rules 6004(g), 6606(d) and 7062, because time is of the essence, this Order shall be effective and enforceable immediately upon entry.

30. The provisions of this Order are nonseverable and mutually dependent.

31. This Court shall retain jurisdiction (i) to enforce and implement the terms and provisions of the Agreement and all amendments thereto, any waivers and consents thereunder, and of each of the other agreements (including all Assumed Contracts) executed in connection therewith, (ii) to resolve any disputes arising under or related to the Agreement, except as otherwise provided therein, (iii) to compel payment of the Cure Amounts or the Assumed Liabilities, (iv) to compel delivery of the Acquired Assets directly or indirectly to the Purchaser, (v) to protect the Purchaser against any Liens and Interests against the Debtor or on the Acquired Assets which are not part of the Permitted Liens or the Assumed Liabilities, and (vi) to interpret, implement and enforce the provisions of this Order.

Dated: Wilmington, Delaware
June 25, 2004

MARY F. WALRATH
CHIEF UNITED STATES BANKRUPTCY JUDGE

**EXHIBIT A**

[The Vaniqa APA has been attached as Exhibit A to the Objection]

**EXHIBIT B**

**EXHIBIT "B"**

| | Liability to Customers | | Repurchase Liability | |
|---|---|---|---|---|
| McKesson | $3,487,600.00 | Agreed | $29,611.00 | Agreed |
| | $656,184.00 | Disputed | $0.00 | Disputed |
| Cardinal | $161,557.00 | Agreed | $37,469.78 | Agreed |
| | $259,443.00 | Disputed | $3,749.90 | Disputed |
| QK Healthcare | $0.00 | Agreed | $403,585.00 | Agreed |
| | $0.00 | Disputed | $0.00 | Disputed |
| Amerisource Bergen | $0.00 | Agreed | $169,922.00 | Agreed |
| | $46,673.00 | Disputed | $46,673.00 | Disputed |
| CVS/Pharmacy, Inc. | $300,000 | Disputed | | |

# EXHIBIT C

| Vaniqa Sales Invoices not paid | | |
|---|---|---|
| 39911 | $ | 1,016 |
| 39901 | | 45,706 |
| 39900 | | 2,031 |
| 39899 | | 3,047 |
| 39898 | | 1,016 |
| 39897 | | 1,016 |
| 39895 | | 2,031 |
| 39894 | | 1,016 |
| 39893 | | 67,035 |
| 39892 | | 2,031 |
| 39891 | | 1,016 |
| 39890 | | 1,016 |
| 39779 | | 1,016 |
| 39216 | | 527,193 |
| **TOTAL** | **$** | **656,184** |

# EXHIBIT D

## Schedule 3.14(a)

## CUSTOMERS AND REPRESENTATIVES

| Top 10 Customers by Revenue (in thousands) 2003 | | |
|---|---|---|
| **Customer** | | **Amount** |
| QK Healthcare, Inc. | $ | 1,321 |
| Amerisource Bergen Corp. | | 1,027 |
| Wal-Mart Stores | | 476 |
| Walgreen Co. | | 366 |
| Cardinal Health Inc. | | 354 |
| CVS, Inc. | | 199 |
| Cobb Surgical & Medical Supply | | 193 |
| Eckerd Drug | | 104 |
| Kinray, Inc. | | 56 |
| D&K Healthcare Resources | | 38 |
| McKesson Drug Co. | | (1,074) |
| | *Total $ | 3,058 |

* = Gross revenue before any reserves required for GAAP accounting.

# EXHIBIT E

# Unreported Cases

ASSOCIATED DIESEL SERVICE & EQUIPMENT COMPANY, Plaintiff-Counter-Defendant-Appellant, v. TEREX CORPORATION, Defendant-Counter-Claimant-Appellee. ASSOCIATED DIESEL SERVICE & EQUIPMENT COMPANY, Plaintiff-Counter-Defendant-Appellee, v. TEREX CORPORATION, Defendant-Counter-Claimant-Appellant.

No. 93-55410, No. 93-55469

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1995 U.S. App. LEXIS 1176

August 1, 1994, Argued and Submitted, Pasadena, California
January 20, 1995, FILED

**NOTICE:**
**PUB-STATUS:** [*1] THIS DISPOSITION IS NOT APPROPRIATE FOR PUBLICATION AND MAY NOT BE CITED TO OR BY THE COURTS OF THIS CIRCUIT EXCEPT AS PROVIDED BY THE 9TH CIR. R. 36-3.

**SUBSEQUENT HISTORY:** Reported in Table Case Format at: 46 F.3d 1138, 1995 U.S. App. LEXIS 7179.

**PRIOR HISTORY:** Appeal from the United States District Court for the Central District of California. D.C. No. CV 89-07102-IH. Irving Hill, Senior District Judge, Presiding.

**DISPOSITION:** AFFIRMED.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Plaintiff diesel company challenged the decision of the United States District Court for the Central District of California, which granted defendant corporation's motion for judgment on its counterclaim under Fed. R. Civ. P. 50(a)(1). Defendant cross-appealed the judgment of the district court, which offset plaintiff's award against defendant's award on the counterclaim and denied interest to defendant.

**OVERVIEW:** Plaintiff diesel company filed suit against defendant corporation for fraud and breach of contract. Defendant counterclaimed, alleging that plaintiff never paid $ 159,380 for parts ordered and received. At the close of evidence, the district court granted defendant's motion for judgment on its counterclaim under Fed. R. Civ. P. 50(a)(1). The jury awarded plaintiff approximately $ 1.68 million on the fraud claim and $ 415,800 on the contract claim. The district court then granted defendant's motion for a new trial on damages subject to a $ 415,800 remittitur. Upon the second trial, the jury awarded plaintiff damages in the amount of $ 180,000, whereupon the district court offset plaintiff's award against defendant's on the counterclaim, denying interest to defendant. The court affirmed and held that the district court did not abuse its discretion in ordering a new trial on damages. The district court did not abuse its discretion in setting the amount of the remittitur because California courts have not stated which amount was proper. As to defendant, the court held that the district court did not err in denying defendant prejudgment interest on its counterclaim.

**OUTCOME:** The court affirmed the district court's judgment, holding that the district court did not abuse its discretion in ordering a new trial on damages, and in setting the amount of the remittitur. Also, the court held that the district court did not err in reversing its earlier order granting defendant corporation interest on its counterclaim award.

**CORE TERMS:** new trial, remittitur, bargain, jury awarded, counterclaim, setoff, tab, abuse of discretion, breach of contract, per curiam, termination, elected, entitled to prejudgment interest, contract theory, sole issue, ordering, abused

**LexisNexis(TM) Headnotes**

***Civil Procedure > Relief From Judgment > Motions for New Trial***

[HN1]The grant of a new trial is confided almost entirely to the exercise of discretion on the part of the trial court. The trial court's decision should not be reversed unless there is an abuse of discretion. Under the abuse of discretion standard, the court may not reverse unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. The court cannot simply substitute its judgment for that of the lower court.

***Civil Procedure > Relief From Judgment > Motions for New Trial***

[HN2]A new trial should be ordered where the verdict is contrary to the clear weight of the evidence or to

prevent a miscarriage of justice. A new trial may be granted where there are erroneous or inadequate jury instructions. These are separate and distinct grounds for granting a new trial.

***Civil Procedure > Relief From Judgment > Motions for New Trial***

***Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders***

[HN3]Questions involving whether a new trial should have been ordered are appealable after the second trial.

***Civil Procedure > Relief From Judgment > Additurs & Remittiturs***

[HN4]Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is clear and indisputable.

***Civil Procedure > Costs & Attorney Fees > Judgment Interest***

[HN5]Under California law, setoffs are governed by principles of equity.

**COUNSEL:** For ASSOCIATED DIESEL SERVICE & EQUIPMENT COMPANY, Plaintiff-counter-defendant - Appellant (93-55410): Michael F. Wright, Esq., CASE, KNOWLSON, MOBLEY, BURNETT & LUBER, LOS ANGELES, CA.

For TEREX CORPORATION, Defendant-counter-claimant - Appellee (93-55410): William T. DelHagen, Esq., BELCHER, HENZIE & BIEGENZAHN, Los Angeles, CA. Robert A. Olson, Esq., GREINES, MARTIN, STEIN & RICHLAND, Beverly Hills, CA.

For ASSOCIATED DIESEL SERVICE & EQUIPMENT COMPANY, Plaintiff-counter-defendant - Appellee (93-55469): Michael F. Wright, Esq., CASE, KNOWLSON, MOBLEY, BURNETT & LUBER, LOS ANGELES, CA.

For TEREX CORPORATION, Defendant-counter-claimant - Appellant (93-55469): William T. DelHagen, Esq., BELCHER, HENZIE & BIEGENZAHN, Los Angeles, CA. Robert A. Olson, Esq., GREINES, MARTIN, STEIN & RICHLAND, Beverly Hills, CA.

**JUDGES:** Before: BROWNING, FARRIS, and LEAVY, Circuit Judges.

**OPINION:** MEMORANDUM *

---------- Footnotes ----------

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

---------- End Footnotes----------

This appeal and cross-appeal arise from Terex Corporation's ("Terex") termination of its Dealer Sales and Service Agreement with Associated Diesel Service & Equipment Company ("Associated"). After the termination, Associated filed this action against Terex for fraud and breach of contract. Terex counterclaimed, alleging that Associated never paid $ 159,380 for parts ordered and received. At the close of the evidence in a jury trial, the court granted Terex's motion for judgment on its **[*2]** counterclaim under Federal Rule of Civil Procedure 50(a)(1). The jury awarded Associated approximately $ 1.68 million on the fraud claim and $ 415,800 on the contract claim.

Terex moved for judgment as a matter of law or, in the alternative, for a new trial on liability and damages. The court granted a new trial on damages subject to a $ 415,800 remittitur.

Associated rejected the remittitur. The sole issue on retrial was compensatory damages for fraud (the contract theory was not retried); the jury was told to assume Terex had committed fraud. The jury awarded Associated damages in the amount of $ 180,000. The court offset Associated's award against Terex's award on the counterclaim, denying interest to Terex.

**1. Whether the District Court Abused Its Discretion in Ordering a New Trial on Damages**

[HN1]"The grant of a new trial is 'confided almost entirely to the exercise of discretion on the part of the trial court.'" Murphy v. City of Long Beach, 914 F.2d 183 at 186 (quoting Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36, 66 L. Ed. 2d 193, 101 S. Ct. 188 (1980)). The trial court's decision **[*3]** should not be reversed unless there is an abuse of discretion. Id. Under the abuse of discretion standard, we may not reverse unless we have a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. United States v. Plainbull, 957 F.2d 724, 725 (9th Cir. 1992) (reviewing dismissal on abstention grounds); Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538, 1546 (9th Cir. 1988) (per curiam) (reviewing imposition of discovery sanctions). We cannot simply substitute our judgment for that of the

lower court. United States v. Egbuniwe, 969 F.2d 757, 761 (9th Cir. 1992).

[HN2]A new trial should be ordered where the verdict is contrary to the clear weight of the evidence or to prevent a miscarriage of justice. Moist Cold Refrigerator Co. v. Lou Johnson Co., 249 F.2d 246, 256 (9th Cir. 1957), cert. denied, 356 U.S. 968, 2 L. Ed. 2d 1074, 78 S. Ct. 1008 (1958). A new trial may **[*4]** be granted where there are erroneous or inadequate jury instructions. Murphy v. City of Long Beach, 914 F.2d 183, 187 (9th Cir. 1990) (citing Cleveland v. Southern Pac. Co., 436 F.2d 77, 80-81 (9th Cir. 1970)). These are separate and distinct grounds for granting a new trial. See id.

The district court recognized that there are various grounds for ordering a new trial when it said a new trial "may . . . be granted apart from this matter of contrary to the clear weight of the evidence. A new trial may also be granted if there was some material error of law at the trial." Appellant's Excerpt of Record ("ER"), tab "7/9/92 Hearing," at 9-10.

After setting $ 415,800 as the damages which plaintiff could accept to avoid a new trial, the court said:

I have adopted that figure after considerable thought. Its rationale is this. In this particular case, on these particular facts, in my view, the measure of fraud damages should be the same as the measure of contract damages. It's worthwhile, counsel, for us to go back over the instructions that I gave this jury on the measure of damages on each of the two theories. They were **[*5]** agreed instructions.

On fraud, the agreed instruction was really wide open, and in retrospect it was of minimal value in terms of guidance. The instruction in essence said, "That the jury should award" -- and I'm quoting now -- "all damages legally caused by the fraud." Then we close quote there.

That particular language comes from BAJI 12.57. BAJI contains a further elaboration and guidance for fraud damages, but neither of you asked me to give it. It is found in a later paragraph in that same BAJI instruction, 12.57. The later paragraph can be summarized this way. "The measure of damages is the benefit of the bargain."

Well, all lawyers in California recognize benefit of the bargain as a contract measure of damages also, but as the second or later paragraph of BAJI shows, in California it is also approved as a measure of damages for fraud in certain kinds of cases.

Our case, in my view, is one of the types of cases for which it is an appropriate measure.

Now, when I instructed the jury on contract damages, the agreed instruction told the jury that plaintiff was to obtain the benefit of expected performance of the contract that was breached. As best I can make out, that is simply **[*6]** synonymous for saying the plaintiff was to have the benefit of the bargain.

For that reason I have adopted the verdict figure reached by the jury on contract, as to which in my view there was ample supporting evidence, as the remittitur figure for the fraud verdict.

ER, tab 7/9/92 Hearing, at 12-13.

An examination of the damage theories and the instructions given show that the jury must have been confused when it awarded such different amounts under the contract and fraud theories. In responding to the court's statement that "the measure of [fraud] damages should [have been] the same as the measure of contract damages," appellant's counsel said he was mystified that the jury did not award lost profits under the contract theory. ER, tab 7/9/92 Hearing, at 16.

The court's decision that the instruction on fraud damages was inadequate, when faced with such disparate awards and an approved California jury instruction allowing benefit of the bargain damages for fraud, was not an abuse of discretion.

**2. Whether the Court Abused Its Discretion in Setting the Amount of the Remittitur**

Associated asks us to set a new amount of remittitur. Terex argues that the amount of the remittitur **[*7]** is not subject to appellate review.

If Associated had accepted the remittitur, it could not have appealed the order for a new trial. Donovan v. Penn Shipping Co., 429 U.S. 648, 650, 51 L. Ed. 2d 112, 97 S. Ct. 835 (1977); Denholm v. Houghton Mifflin Co., 912 F.2d 357, 359 (9th Cir. 1990), cert. denied, 501 U.S. 1212, 115 L. Ed. 2d 986, 111 S. Ct. 2814 (1991). But where Associated rejected the remittitur in favor of a new trial, it is established that an order for a new trial is interlocutory and cannot be immediately appealed. Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 34, 66 L. Ed. 2d 193, 101 S. Ct. 188 (1980) (per curiam); DePinto v. Provident Sec. Life Ins. Co., 323 F.2d 826, 838 (9th Cir. 1963), cert. denied, 376 U.S. 950 (1964). Thus, [HN3]questions involving whether a new trial should have been ordered are appealable after the second trial. Cf. DePinto at 838-39 (the grant of a new trial is reviewable **[*8]** after the second trial).

There is a difference of opinion on the standard by which a court should be guided in determining the amount of a remittitur. 11 Charles A. Wright & Arthur

R. Miller, Federal Practice and Procedure § 2815, at 104 (1973 & Supp. 1994). Some courts have held it should be set at the minimum amount the jury could have awarded; some courts have set it at the highest amount; and others have set the remittitur at whatever the court itself thought the jury should have allowed. See id. (citing cases). Arguably, the $ 415,800 could be any one of these amounts. In any case, it was the amount the jury awarded for a breach of contract with an instruction for "benefit of the bargain." Because neither California courts nor this circuit have stated which amount is proper, the district court could not have abused its discretion in setting the amount it did. [HN4]"Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is "clear and indisputable." Allied Chem., 449 U.S. at 36, (quoting Will v. Calvert Fire Ins. Co., 437 U.S. 655, 665-66, 57 L. Ed. 2d 504, 98 S. Ct. 2552 (1978) **[*9]** (plurality opinion)).

**3. Whether Associated May Now Elect the Contract Remedy**

Associated argues that because it lacks resources for any further trials, and because a key witness is dead, if we should decide not to reinstate the $ 1.68 million damage award for fraud, it has the right to elect the contract remedy at the end of this appeal.

Neither common sense nor California law requires us to permit such an election. Having elected to retry only on the fraud theory and abandoning the contract remedy at that point, Associated may not undo the choices it made. The prejudice to Terex is obvious: it would have to pay $ 235,800 more than the second jury awarded simply because Associated did not like the choice it made. The California Court of Appeals has rejected a similar request by parties after the fact: "By their conduct, the [appellants] elected to pursue a tort remedy and waived their right to pursue the . . . contract remedy." Helm v. K.O.G. Alarm Co., Inc., 4 Cal. App. 4th 194, 204 n.10, 5 Cal. Rptr. 2d 615, 620 n.10 (Cal. Ct. App. 1992).

**4. Associated's Remaining Issues**

Associated "reluctantly requests" that the judgment **[*10]** be affirmed if we deny its requests 1) that the $ 1.68 million verdict be permitted to stand, 2) alternatively that we set a remittitur in an amount consistent with the maximum amount the evidence could sustain, 3) as a further alternative that it have judgment for the contract verdict less the setoff.

Since in no event does Associated seek a third trial, we do not decide the issues presented by Associated's arguments that there were errors in the second trial.

**5. Terex's Claim for Prejudgment Interest on the Counterclaim**

The sole issue upon which Terex asks us to reverse, in the context of a setoff, concerns whether it is entitled to prejudgment interest on its counterclaim against Associated for $ 159,380 for parts. After the second trial the court reversed its earlier order granting Terex interest on this amount.

[HN5]Under California law, setoffs are governed by principles of equity. See, e.g., Jess v. Herrmann, 26 Cal. 3d 131, 142, 161 Cal. Rptr. 87, 93, 604 P.2d 208, 214 (1979). We cannot say that there was any error in the district court's reliance on Burgermeister Brewing Corp. v. Bowman, 227 Cal. App. 2d 274, 285-86, 38 Cal. Rptr. 597, 604 (Cal. Ct. App. 1964), **[*11]** when, after reconsideration of the issue, the court decided that Terex was not entitled to prejudgment interest where a setoff was involved.

AFFIRMED.

IN RE: LASON, INC., et al.

Chapter 11, Case No.: 01-11488 (MFW), Jointly Administered

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

314 B.R. 296; 2004 Bankr. LEXIS 1349; 43 Bankr. Ct. Dec. 162

September 15, 2004, Decided

**DISPOSITION:** Motion of claimant Dependable Mail Services, Inc., for allowance and immediate payment of administrative expense claim, granted in part.

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Creditor filed a motion, pursuant to 11 U.S.C.S. § 503(b), for allowance and immediate payment of an administrative expense claim against debtor, to which the debtor objected. Creditor also filed a proof of claim for pre-petition services provided to debtor.

**OVERVIEW:** Creditor provided mail automation and pre-sorting services to debtor. Subsequently, the parties agreed that the first invoice would be voided if debtor continued to do business with creditor and debtor signed the agreement. Although the parties performed under the agreement, it was never signed. When debtor moved its facility farther away from creditor's location, debtor orally agreed to pay the increased costs associated with transporting the mail the extra distance. Contemporaneously, creditor and debtor entered into a separate oral agreement by which debtor provided image and data capture services to creditor. Creditor never paid debtor's invoices. After debtor filed for relief under Chapter 11, creditor filed its claim for an administrative expense. The court held that, despite the fact that the contract was never signed, the oral agreement between the two parties and their performance under that agreement created an enforceable contract. The court, however, reduced creditor's claim by an amount that was actually for services performed pre-petition. The court also permitted debtor to set off an amount that represented services it performed for creditor post-petition.

**OUTCOME:** The court granted creditor's motion in part. The court allowed creditor an administrative claim in a certain amount and a pre-petition claim in a certain amount.

**CORE TERMS:** invoice, set-off, post-petition, pre-petition, mail, modification, conversation, modify, transportation, correction, administrative expense, apparent authority, parties agreed, negotiated, void, bind, actual authority, allowance, totaling, principal-agent, enforceable, unsigned, services rendered, services provided, oral agreement, flat rate, firsthand, credible, screen, waived

**LexisNexis(TM) Headnotes**

***Contracts Law > Formation > Formation Generally***

[HN1]A valid contract exists when there is a manifest intent by both parties to bind themselves and that contract shall be enforced as long as no rule of law would be violated.

***Contracts Law > Contract Modifications***

[HN2]Persons of competent authority can modify a contract if there is an agreement to do so. However, there must be new consideration for the modification.

***Business & Corporate Entities > Agency > Agency Established > Express & Implied Agency***

[HN3]A principal-agent relationship is established when a party expressly or implicitly authorizes another to act for him or subsequently ratifies his actions. A person acting as an agent has the ability to create obligations for the principal to third parties. Whether this relationship has been established and the extent of the authority is a question for the trier of fact. A principal-agent relationship can arise under either actual authority or apparent authority.

***Business & Corporate Entities > Agency > Authority to Act > Apparent Authority***

[HN4]Apparent authority exists when the principal's actions lead a third party to reasonably believe that the person has the authority to bind the principal, and the third party reasonably acts in reliance. A finding of apparent authority is permissible even where there is not a manifestation from the principal that the party is, in fact, an agent for the principal.

***Contracts Law > Contract Conditions & Provisions > Conditions Precedent***

[HN5]A condition is an event which is not certain to occur but must occur before performance is due. An agreement is not enforceable by either party if a condition to that agreement has not been met.

***Bankruptcy Law > Creditor Claims & Objections > Types of Claims > Administrative Claims***

[HN6]A claim is entitled to administrative expense claim status under 11 U.S.C.S. § 503(b) if services were performed post-petition which provided a benefit to the bankruptcy estate.

***Bankruptcy Law > Creditor Claims & Objections > Types of Claims > Administrative Claims***

[HN7]The burden of proof is on the claimant to show that the claim is entitled to administrative expensive treatment.

***Bankruptcy Law > Setoff***

[HN8]Georgia state law permits set-off when two parties mutually owe a debt. Ga. Code Ann. § 13-7-1 (2004). This right to set-off is preserved by 11 U.S.C.S. § 553.

***Bankruptcy Law > Setoff***

[HN9]The burden of proof is on the party asserting the right to set-off.

**COUNSEL:** **[**1]** For Lason, Inc., Debtor: Alfred Villoch, III, Young Conaway Stargatt & Taylor LLP, Wilmington, DE. Annette Kerlin McBrayer, Epstein Becker & Green, P.C., Atlanta, GA. Bernard George Conaway, Fox Rothschild LLP, Wilmington, DE. Curtis J Crowther, Young Conaway Stargatt & Taylor LLP, Wilmington, DE. Edward J. Kosmowski, Young Conaway Stargatt & Taylor, Wilmington, DE. Michael R. Nestor, Young Conaway Stargatt & Taylor, Wilmington, DE. Robert S. Brady, Young Conaway Stargatt & Taylor LLP, Wilmington, DE. Thomas G. Macauley, Zuckerman and Spaeder LLP, Wilmington, DE. Timothy Edward Lengkeek, Young Conaway Stargatt & Taylor, Wilmington, DE.

For United States, Debtor: Wendy S. Tien, U.S. Department of Justice, Washington, DC.

For Yogi Parikh, Glenn Amurgis and Meenakshi Karuppiah, Defendant: John B. Alfs, Cox, Hodgman & Giarmarco, P.C., Troy, MI.

For Richard Coleman, Richard Coleman Trust, Defendant: Kevin W. Gibson, Gibson & Perkins P.C., Media, PA.

For Official Committee of Unsecured Creditors, Creditor Committee: John K. Sherwood, Lowenstein Sandler, Roseland, NJ. Thomas G. Macauley, Zuckerman and Spaeder LLP, Wilmington, DE.

For Kofax Imaging Products, 3rd Party **[**2]** Plaintiff: Sean A. O'Keefe, Winthrop Couchot Professional Corp., Newport Beach, CA.

Lason, Inc., 3rd Pty Defendant.

**JUDGES:** Mary F. Walrath, United States Bankruptcy Judge.

**OPINIONBY:** Mary F. Walrath

**OPINION:** **[*298]** **OPINION** n1

---------- Footnotes ----------

n1 This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

---------- End Footnotes ----------

Before the Court is the Motion of the claimant, Dependable Mail Services, Inc. **[*299]** ("Dependable Mail"), for allowance and immediate payment of an administrative expense claim against Lason, Inc. ("the Debtor") in the amount of $ 72,613.84. The Debtor objected to Dependable Mail's administrative expense claim and claimed a set-off right against Dependable Mail, arguing that, in fact, Dependable Mail owed it $ 84,851.06. An evidentiary hearing was held on October 31, 2003. For the reasons set forth below, **[**3]** we will grant Dependable Mail's Motion in part.

## I. FACTUAL BACKGROUND

Dependable Mail provides mail automation and pre-sorting services to businesses. The commingling of its customers' mail enables Dependable Mail to process the mail at a discounted rate, and then pass those savings on to its customers.

In 1999, the Debtor and Dependable Mail agreed that Dependable Mail would provide these mail automation and pre-sorting services to the Debtor. The agreement between the parties provided that the Debtor would pay a set price per unit of mail plus any additional upgrade charges. The agreement also provided free mail pickups from the Debtor's place of business. This agreement was reached after several discussions between Charles K. Smith, the Chief Executive Officer of Dependable Mail, Michael D. Reeves, a Vice President of Dependable Mail and W. Frank Wilson, the Operations Manager of the Debtor's facility, and it was reduced to a writing entitled the Dependable Mail

Service, Inc. Agreement ("the Service Agreement"). Although the Service Agreement was to be signed by Smith for Dependable Mail and both Wilson and Allan Wiggins, a Vice President of the Debtor, representing the **[**4]** Debtor, both parties performed under the agreement without anyone actually signing the agreement.

Subsequent to reaching this agreement, the parties agreed that the first invoice issued by Dependable Mail (Invoice # 948621 for $ 20,221.65) n2 would be voided if (1) the Debtor continued to do business with Dependable Mail and (2) the Debtor signed the Service Agreement.

---------- Footnotes ----------

n2 This invoice was issued on February 28, 2000, for services rendered for the month of January 2000.

---------- End Footnotes ----------

Thereafter, Dependable Mail provided services for the Debtor and issued invoices for those services. The Debtor, however, failed to pay some of the invoices shortly after entering into the Service Agreement. Dependable Mail contacted the Debtor on several occasions in 2000 to ascertain the problems with payment. While the contacts prompted the Debtor to make some payments to Dependable Mail, many invoices continued to go unpaid. Sometime between June and August 2001, during another conversation over delinquent payments, Dependable Mail was advised **[**5]** by the Debtor that it was reorganizing its business operations and that the Debtor would eventually pay Dependable Mail for its services.

In August or September 2001, the Debtor moved its operations from Atlanta to Kennesaw, Georgia. This move increased the distance between Dependable Mail's location and the Debtor's location by 35-40 miles. The Debtor's move also caused it to have problems putting the correct date on its mail. The Debtor asked Dependable Mail to correct these problems. As a result, the parties agreed to modify the Service Agreement whereby the Debtor agreed to pay the increased costs associated with transporting the mail the extra **[*300]** distance, correcting the dates and re-spraying the bar codes on the mail. Thereafter, Dependable Mail continued to provide services to the Debtor. However, at the Debtor's request, Dependable Mail stopped sending invoices to the Debtor by the end of 2001.

Contemporaneously, Dependable Mail and the Debtor entered into a separate oral agreement by which the Debtor was to provide image and data capture services to Dependable Mail. This agreement was reached in conversations involving Smith and Reeves for Dependable Mail and Wilson for the **[**6]** Debtor. In the summer of 2001, the Debtor began providing those services to Dependable Mail and sent invoices at regular intervals. Upon receiving the Debtor's first invoice, Dependable Mail contacted the Debtor to complain about being over-billed. The Debtor agreed to correct the problem, but continued to provide the services until August 2002 without changing the disputed prices. Dependable Mail has yet to pay the Debtor's invoices.

On December 5, 2001, the Debtor, and several affiliates, filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Dependable Mail subsequently filed a Motion for Allowance of an Administrative Expense for services performed post-petition under the Service Agreement. It also filed a proof of claim for pre-petition services provided to the Debtor. The Debtor responded that Dependable Mail actually owned it money after set-off of amounts due to the Debtor for work performed for Dependable Mail. An evidentiary hearing was held on October 31, 2003. The matter has been briefed and is ripe for decision.

## II. JURISDICTION

This Court has jurisdiction over this matter as a core proceeding pursuant to 28 U.S.C. §§ 1334 **[**7]** & 157 (b) (2) (A), (B), (C) & (O).

## III. DISCUSSION

### A. Services Agreement

The "cardinal rule of contract construction" is that [HN1]a valid contract exists when there is a manifest intent by both parties to bind themselves and that contract shall be enforced as long as no rule of law would be violated. Rushing v. Gold Kist, Inc. 256 Ga. App. 115, 567 S.E. 2d 384, 387 (Ga. Ct. App. 2002); Peterson v. First Clayton Bank & Trust Co., 214 Ga. App. 94, 447 S.E. 2d 63, 65-66 (Ga. Ct. App. 1994). n3 Here, there was an oral agreement between the parties that Dependable Mail would provide services to the Debtor. Through their briefs and witnesses, both parties acknowledge that there was an intent to contract and an intent to be bound by the unsigned Services Agreement. In fact, both parties substantially performed according to the terms of the unsigned agreement. Despite the fact that the contract was never signed, the oral agreement between the two parties and

their performance under that agreement creates an enforceable contract. The written Services Agreement, though unsigned, is evidence of the terms of the parties' agreement.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n3 The Services Agreement, which both parties intended to govern their relationship, has a choice of law provision stating that Georgia law governs.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

**[**8]**

B. Agreement on Extra Charges

1. Permissibility of Modification

[HN2]Persons of competent authority can modify a contract if there is an agreement to do so. Thomas v. Garrett, 265 Ga. 395, 456 S.E. 2d 573, 574-75 (Ga. 1995). However, there must be new consideration for **[*301]** the modification. Ranger Const. Co. v. Robertshaw Controls Co., 166 Ga. App. 679, 305 S.E. 2d 361, 363 (Ga. Ct. App. 1983). Here, there is consideration for the alleged modification of the Services Agreement between Dependable Mail and the Debtor. In exchange for increased payments to Dependable Mail, the Debtor received increased services in the form of additional transportation and mail correction services.

2. Authority to Bind the Debtor

The Debtor argues, however, that it is not bound by the modification of the Services Agreement because it was not approved by anyone with actual authority. Dependable Mail's Vice President, Reeves, testified that the modification was agreed to by Wilson, the Debtor's Operations Manager. The Debtor argues that Wilson had neither actual nor apparent authority to modify the Services Agreement on the Debtor's behalf. The Debtor asserts that **[**9]** company policy precluded Wilson, as Operations Manager, from entering into contracts on the Debtor's behalf. It further argues that Dependable Mail was put on notice that Wilson lacked such authority because the Services Agreement required the signatures of both Wilson and Wiggins, a Vice President of the Debtor.

[HN3]A principal-agent relationship is established when a party expressly or implicitly authorizes another to act for him or subsequently ratifies his actions. Southern Exposition Management Co. v. Genmar, 250 Ga. App. 702, 551 S.E. 2d 830, 832 (Ga. Ct. App. 2001). A person acting as an agent has the ability to create obligations for the principal to third parties. Stallings v. Sylvania Ford-Mercury, Inc. 242 Ga. App. 731, 533 S.E. 2d 731, 733 (Ga. Ct. App. 2001). Whether this relationship has been established and the extent of the authority is a question for the trier of fact. Southern Exposition, 551 S.E. 2d at 832. The Georgia Courts have found that a principal-agent relationship can arise under either actual authority or apparent authority. Dix v. Shadeed, 261 Ga. App. 145, 581 S.E. 2d 747, 748 (Ga. Ct. App. 2003).

While Wilson **[**10]** may have lacked actual authority to modify the agreement, we find that the Debtor's actions gave the impression that Wilson had the apparent authority to modify the agreement. [HN4]Apparent authority exists when the principal's actions lead a third party to reasonably believe that the person has the authority to bind the principal, and the third party reasonably acts in reliance. Bresnahan v. Lighthouse Mission, 230 Ga. App. 389, 496 S.E. 2d 351, 354 (Ga. Ct. App. 1998). A finding of apparent authority is permissible even where there is not a manifestation from the principal that the party is, in fact, an agent for the principal. Id.

In this case, despite the Debtor's assertion to the contrary, its actions were consistent with the existence of a principal-agent relationship between the Debtor and Wilson. The Debtor used Wilson as one of its primary negotiators in reaching the original agreement between the parties. Moreover, the Debtor was aware that Wilson was negotiating modifications to the Services Agreement since it was Wilson who negotiated with Dependable Mail to void the first invoice under certain conditions. The Debtor was aware of the agreement to void **[**11]** the first Dependable Mail invoice and, in fact, seeks to enforce that modification. In so doing, the Debtor admits that Wilson had the authority to modify the Services Agreement and to bind the Debtor to those modifications.

Additionally, it was Wilson who negotiated for the Debtor the subsequent agreement by which the Debtor was to provide services to Dependable Mail. The Debtor **[*302]** does not dispute his authority to do so in that instance either.

Finally, there is nothing in the record to suggest that the Debtor informed Dependable Mail that, despite Wilson's apparent authority to modify some portions of the Services Agreement, he lacked the authority to modify provisions dealing with additional transportation and correction costs. Whether or not Wilson had actual authority, the Debtor permitted him to act on its behalf in several related dealings. Therefore, we conclude that Dependable Mail reasonably believed that Wilson was an agent of the

Debtor with authority to agree to the additional transportation and correction costs.

3. Terms of the Modification

Even if Wilson had the authority to modify the Services Agreement, however, the Debtor argues that the parties did not agree **[**12]** to extra charges for transportation and mail date correction.

In weighing the evidence presented at the hearing, we find that Dependable Mail presented the more credible and reliable evidence of the parties' agreement on this point. Dependable Mail's witness, Reeves, had firsthand knowledge of conversations with Wilson in which the Services Agreement was modified to include the increased services and costs. That testimony was not refuted by the Debtor during the hearing. Instead, the Debtor presented the testimony of James Reynolds, the Debtor's accountant, who did not have firsthand knowledge of the conversations between Reeves and Wilson. In fact, Reynolds had not even discussed the matter with Wilson prior to his testimony. Instead, Reynolds' testimony was based largely on the fact that he could not find any documentation of this agreement during his audit of the Debtor's books and that the timing of the issuance of the invoices was "suspicious." His testimony, however, does little to determine the actual terms agreed upon during the conversations between Reeves and Wilson. Therefore, we accept Reeves' testimony as credible and reliable. Consequently, we conclude that the parties **[**13]** agreed to the increased transportation and mail correction charges.

Accordingly, Dependable Mail is entitled to payment for the extra costs associated with transportation and date corrections as reflected on its invoices per the oral modification to the Services Agreement negotiated by Reeves and Wilson.

C. Agreement to Void Invoice # 948621

The Debtor argues that invoice # 948621 from Dependable Mail should be voided pursuant to the agreement between Wilson and Reeves. That agreement provided that the invoice would be voided if (1) the Debtor continued to do business with Dependable Mail and (2) the Debtor signed the agreement. The Debtor argues that although it did not sign the contract, Dependable Mail waived its right to collect the invoice because it did not attempt to enforce the condition sooner. Dependable Mail argues, however, that the agreement was clear and, since the Debtor did not meet the second condition, the invoice is still enforceable.

[HN5]A condition is an event which is not certain to occur but must occur before performance is due. First National Bank of DeKalb County v. National Bank of Georgia, 249 Ga. 216, 290 S.E. 2d 55, 57 (Ga. Ct. App. 1982). **[**14]** An agreement is not enforceable by either party if a condition to that agreement has not been met. Lee v. Greenland Co., Inc., 245 Ga. App. 558, 538 S.E. 2d 189, 192 (Ga. Ct. App. 2000).

Here, both parties agreed that invoice # 948621 would be void if the two conditions **[*303]** were met. However, the second condition (that Debtor sign the contract) clearly was not met. The Debtor's argument that Dependable Mail waived this condition because it did not attempt collection until now is unconvincing. Dependable Mail did not attempt collection on any of the Dependable Mail invoices, and the Debtor correctly does not assert that Dependable Mail waived its right to get paid for those invoices. Moreover, none of Dependable Mail's actions manifested an intent to waive the condition attached to this invoice.

The Debtor further argues that the condition is void because there was a provision in the Service Agreement that permitted rescission on sixty (60) days notice. Consequently, the Debtor argues that Dependable Mail's assertion that it wanted to have a signed contract to bind the parties was incorrect, thus weakening the effect of the condition. We also find this argument unavailing. **[**15]** Whether the condition was as effective as Dependable Mail intended it to be is immaterial to whether the condition was valid and enforceable. There was still a condition, and that condition had to be met before Dependable Mail was obligated to void the invoice. Therefore, we conclude that invoice # 948621 is still due by the Debtor.

D. Improper Classification of Dependable Invoices

[HN6]A claim is entitled to administrative expense claim status under section 503(b) if services were performed post-petition which provided a benefit to the bankruptcy estate. Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy, Inc.), 181 F.3d 527, 532-533 (3d Cir. 1999). Here, the Debtor does not contest the fact that the Dependable Mail performed post-petition services which conferred a benefit on the estate. Therefore, Dependable Mail's post-petition claim is a valid administrative expense claim.

The Debtor contends, however, that Dependable Mail failed to properly classify its invoices which totaled $ 324,841.47.

We agree with the Debtor. Invoices totaling $ 253,223.90 were purported to be for pre-petition services and invoices totaling $ 72,613.84 were purported to be for post-petition services. **[**16]** Invoice # 991995 for $ 994.28 and invoice # 991996

for $ 996.17 were listed as post-petition services. On closer examination, however, those invoices, show that they were, in fact, for pre-petition services.

Additionally, invoice # 991988 for $ 11,447.94 was also listed by Dependable Mail as a post-petition expense. However, the services for that invoice were performed between December 3 and 7, 2001, which straddles the bankruptcy filing date. [HN7]The burden of proof is on the claimant to show that the claim is entitled to administrative expensive treatment. In re Smith Corona Corp., 210 B.R. 243, 245 (Bankr. D. Del. 1997) (citing In re Continental Airlines, 146 B.R. 520, 526 (Bankr. D. Del. 1992)). Here, Dependable Mail failed to provide any evidence that invoice # 991988, or any portion thereof, was for post-petition services that would entitle the claim to administrative status. As such, we will classify it as a pre-petition claim.

Accordingly, we find that Dependable Mail's pre-petition invoices total $ 266,662.29 and post-petition invoices total $ 59,175.06.

E. Failure to Give Credit for Payments Made

The Debtor also asserts that Dependable **[**17]** Mail failed to credit the Debtor for payments that it made. At the hearing, through cancelled checks made out to Dependable **[*304]** Mail and through the attached stubs, the Debtor presented credible evidence that several of the invoices were, in fact, already paid in whole or in part. The evidence was convincing and was not refuted by Dependable Mail. Therefore, we find that Dependable Mail did not properly credit the Debtor for those payments. Therefore, Dependable Mail's pre-petition claim should be reduced by that amount.

After reduction for payments made, we find that Dependable Mail's valid pre-petition claim totals $ 237,748.65 and its valid post-petition claim totals $ 59,175.06.

F. Right to Set-off

[HN8]Georgia state law permits set-off when two parties mutually owe a debt. Ga. Code Ann., § 13-7-1 (2004). This right to set-off is preserved by section 553 of the Bankruptcy Code. 11 U.S.C. § 553. Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 18, 133 L. Ed. 2d 258, 116 S. Ct. 286 (1995). Both parties agree that the Debtor has a set-off right for the services it performed for Dependable Mail. Moreover, Dependable **[**18]** Mail concedes that it has not paid the Debtor for the services it provided. The dispute is over the amount of set-off to which the Debtor is entitled.

The Debtor, through Reynolds' testimony, contends that its invoices accurately reflect the parties' agreement that the Debtor would charge varying rates depending on the size of the paper. Dependable Mail contends that the Debtor's invoices are for more than the negotiated price. Dependable Mail's witness, Reeves, testified that the parties agreed to one flat rate of $ .105 per page (except for inserts which would be charged at a rate of $ .08). Thus, Reeves testified that all entries for $ .16 and $ .20 on the Debtor's invoices should have been $ .105 per their agreement.

As was the case with the Services Agreement, Reynolds also was not present during any of the meetings or conversations in which the Debtor's services agreement was negotiated. His belief that the Debtor's invoices accurately reflect the agreement is based solely on his review of the Debtor's records and past business practices. It is not, however, based on firsthand knowledge or even on conversations with any of the parties involved.

In contrast, Reeves testified **[**19]** that he and Wilson verbally agreed that the Debtor would charge a flat rate of $ .105 per unit. That testimony was not contradicted by anyone else who was privy to the conversations that formed the basis of the agreement. Therefore, we find Reeves' testimony more reliable and credible on this matter. Accordingly, we find that the agreement between Dependable Mail and the Debtor was the Debtor would provide services at a flat rate of $ .105 per page and not varying rates depending on the size of the page. Therefore, while the Debtor does have the right to set-off its invoices against Dependable Mail's invoices, the Debtor's invoices must be corrected before the set-off right is exercised.

The Debtor also seeks to include invoice # 303 as part of its asserted set-off rights. However, the Debtor did not produce that invoice. Instead, the only evidence of invoice # 303 produced at trial is a copy of a "screen shot." n4 Dependable Mail argues, however, that invoice # 303 should not be included because the Debtor failed to provide the actual invoice.

---------- Footnotes ----------

n4 The "screen shot" was a copy of a computer screen image which showed the total amount due for several invoices. However, the image showed neither a breakdown of services nor a breakdown of rates charged for those services.

---------- End Footnotes ----------

**[**20]**

[HN9] **[*305]** The burden of proof is on the party asserting the right to set-off. See, e.g., Barnett Bank v. Tower Envtl. (In re Tower Envtl.), 217 B.R. 933, 937 (Bankr. M.D. Fla. 1997); In re Kennedy Mortg. Co., 23 B.R. 466, 471 (Bankr. N.J. 1982). The Debtor has failed to meet its burden with respect to invoice # 303. Specifically, the "screen shot" does not provide any detail of the services rendered or prices charged for those services. Therefore, it provides insufficient information to enable this Court to calculate the proper amount of set-off rights. Consequently, we conclude that the Debtor does not have set-off rights for that invoice and is only entitled to set-off those invoices that it produced at the hearing. Those invoices will be reduced as follows to reflect the correct prices for the services rendered:

| Invoice Number | Asserted Set-off Right | Corrected Set-off Right after Reduction (including sales tax) |
|---|---|---|
| INV000187 | $ 33,308.09 | $ 19,117.19 |
| INV000271 | $ 12,742.77 | $ 19,746.63 (credit $ 3,258.97) n5 |
| INVMRC000331 | $ 23,266.03 | $ 12,740.40 |
| INVMRC000381 | $ 6,942.78 | $ 4,722.48 |
| INVMRC000428 | $ 57,695.27 | $ 29,181.46 |
| INVMRC000520 | $ 2,201.30 | $ 2,201.30 |
| INVMRC000567 | $ 31,523.57 | $ 17,618.11 |
| INVMRC000595 | $ 3,239.97 | $ 2,207.94 |
| INVMRC000676 | $ 29,273.28 | $ 16,157.74 |

n5 Dependable Mail previously paid $ 23,005.60 for this invoice. Therefore, Dependable Mail should receive a credit of $ 3,258.97 for this invoice.

**[**21]**

Accordingly, the Debtor's total pre-petition set-off right is $ 100,687.65. Applying the Debtor's pre-petition set-off claim against Dependable Mail's pre-petition claim of $ 237,748.65 results in an allowable pre-petition claim of Dependable Mail totaling $ 137,061.00.

The Debtor's post-petition invoices will similarly be reduced as follows:

| Invoice Number | Asserted Set-off Right | Corrected Set-off Right after Reduction (including sales tax) |
|---|---|---|
| INVMRC000725 | $ 2,449.32 | $ 1,675.97 |
| INVMRC000783 | $ 27,330.95 | $ 14,750.04 |
| INVMRC000824 | $ 1,233.00 | $ 839.89 |
| INVMRC000893 | $ 3,082.51 | $ 2,317.87 |
| INVMRC000989 | $ 122.08 | $ 122.08 |

Accordingly, the Debtor's total post-petition set-off claim is $ 19,705.85. Applying the Debtor's post-petition set-off claim against Dependable Mail's post-petition claim of $ 59,175.06 results in an allowable post-petition claim of Dependable Mail totaling $ 39,469.21.

For the reasons set forth above, after the Debtor's right to set-off for its unpaid invoices, we conclude that Dependable Mail has a pre-petition claim in the amount of $ 137,061.00 and a post-petition administrative claim in the amount of **[**22]** $ 39,469.21. **[*306]** We will grant Dependable Mail's Motion to that extent.

IV. CONCLUSION

An appropriate order is attached.

BY THE COURT

Dated: September 15, 2004

Mary F. Walrath

United States Bankruptcy Judge

**ORDER**

AND NOW, this 15th day of **SEPTEMBER, 2004,** upon consideration of the Motion Dependable Mail Services, Inc. ("Dependable Mail") for allowance of and immediate payment of administrative expenses, and of its proof of claim and the response of Lason, Inc., for the reasons set forth in the accompanying Opinion, it is hereby

**ORDERED** Dependable Mail's Motion for allowance of administrative expense is **GRANTED** in part; and it is further

**ORDERED** that Dependable Mail is allowed an administrative claim in the amount of $ 39,469.21 for post-petition services provided to the Debtor; and it is further

**ORDERED** that Dependable Mail is allowed a pre-petition claim in the amount of $ 137,061.00 for services provided to the Debtor pre-petition.

BY THE COURT:

Mary F. Walrath

United States Bankruptcy Judge

cc: Bernard George Conaway, Esq. n1

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n1 Counsel is to distribute a copy of this Order to all interested parties and file a Certificate of Service with the Court.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

**[**23]**

USA CABLE, Plaintiff, v. WORLD WRESTLING FEDERATION ENTERTAINMENT, INC., VIACOM INC., and CBS CORPORATION, Defendants.

Civil Action No. 17983

COURT OF CHANCERY OF DELAWARE, NEW CASTLE

2000 Del. Ch. LEXIS 87

June 22, 2000, Submitted
June 27, 2000, Decided

**SUBSEQUENT HISTORY:** [*1] As Amended July 3, 2000. Released for Publication by the Court July 3, 2000.

**DISPOSITION:** Judgment entered in favor of defendants and against plaintiff.

## CASE SUMMARY

**PROCEDURAL POSTURE:** Plaintiff cable TV network brought an action to enforce specifically a "matched" contract that plaintiff contended it had entered into with defendant integrated media and entertainment company in exercise of a right of first refusal in their existing programming licensing contracts, and to enjoin consummation of an agreement between the defendant integrated media and entertainment company and the defendant diversified entertainment business.

**OVERVIEW:** Defendant integrated media and entertainment company produced four highly successful program series which plaintiff cable TV network distributed under programming licensing contracts. The contracts contained a right of first refusal granting plaintiff the right to match the offer that defendant had received from defendant integrated media and entertainment company with respect to those series. The agreement between defendants contained matters unrelated to the series. Plaintiff sought to enforce specifically a "matched" contract that plaintiff contended it had entered into in exercise of the right of first refusal and to enjoin consummation of the agreement between the defendants. The court declined to specifically enforce the "matched" contract or to enjoin consummation of defendants' agreement. The right of first refusal was enforceable and not waived. The right of first refusal scope was limited to "any and all of the four series." Although plaintiff did not have to accept the matters unrelated to those series, it did not unconditionally accept all matters within the scope, omitting territorial rights, choice of law and forum, cross-promotion, and program preemption terms.

**OUTCOME:** The court declined to specifically enforce the "matched" contract or to enjoin consummation of defendants' agreement. The right of first refusal was enforceable and not waived. The right of first refusal scope was limited to "any and all of the four series." Plaintiff, however, did not unconditionally accept all matters within the scope, omitting territorial rights, choice of law and forum, cross-promotion, and program preemption terms.

**CORE TERMS:** match, right of first refusal, first refusal, subject matter, negotiation, programming, third-party, strategic, third party, alliance, television, broadcast, network, license, wrestling, distribute, preemption, package, holder, media, radio, regularly scheduled, contract language, territory, licensing, matching, termination, sentence, tendered, rating

**LexisNexis(TM) Headnotes**

***Contracts Law > Contract Interpretation > Interpretation Generally***

[HN1]The primary rule of contract analysis is that the interpretation of a written agreement begins with examination of its language. The law of New York and the law of Delaware are in accord with this rule. New York law states that it is a fundamental premise of contract law that contracts should be enforced in accordance with their terms. Delaware law states that the attempt to define the legal meaning and effect of a contractual document must start in each instance with the language used in the contract itself.

***Contracts Law > Contract Interpretation > Interpretation Generally***

[HN2]Language in a vacuum may take on any number of meanings. A court can more readily assign contract language its intended meaning if it reads the language at issue within the context of the agreement in which it is located. Accordingly, while the canons of contract interpretation instruct an examination of the explicit contract language in order to determine the clause's meaning, one must simultaneously read that language

within the context of the contract surrounding that language in order to best elicit the most appropriate meaning.

***Contracts Law > Contract Interpretation > Interpretation Generally***

[HN3]A New York court recently observes that it has long been the rule that a contract must be read as a whole in order to determine its purpose and intent, and single clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are a part. Words considered in isolation may have many and diverse meanings. In a written document the word obtains its meaning from the sentence, the sentence from the paragraph and the latter from the whole document.

***Contracts Law > Formation > Rights of First Refusal***

***Real & Personal Property Law > Sales, Exchanges & Remedies > Options***

[HN4]New York courts construing right of first refusal clauses have uniformly held that a property owner cannot compel the holder of a right of first refusal to one property to match the terms of a package deal encompassing extraneous properties.

***Contracts Law > Formation > Rights of First Refusal***

[HN5]The holder of a first refusal right relating to a software product cannot be forced to match the terms of a third-party offer for substantially all of the seller's assets, including the software product.

***Contracts Law > Formation > Rights of First Refusal***

***Real & Personal Property Law > Sales, Exchanges & Remedies > Options***

[HN6]A lessee of a car wash, with a right of first refusal, cannot be forced to match the terms of a third-party offer to buy property including the car wash and a neighboring gas station.

***Contracts Law > Formation > Rights of First Refusal***

***Real & Personal Property Law > Sales, Exchanges & Remedies > Options***

[HN7]A lessee of movie theater with right of first refusal cannot be forced to match terms of third party's offer to buy from lessor a larger parcel including the theater.

***Contracts Law > Formation > Rights of First Refusal***

***Real & Personal Property Law > Sales, Exchanges & Remedies > Options***

[HN8]A lessee and holder of option to buy leased premises cannot be forced to match terms of third-party offer to buy larger parcel including the leased premises.

***Contracts Law > Formation > Rights of First Refusal***

***Real & Personal Property Law > Sales, Exchanges & Remedies > Options***

[HN9]The right which plaintiff enjoys by virtue of the first refusal clause cannot be rendered nugatory by the device of attaching additional land to the leased premises and finding a buyer for the entire parcel.

***Contracts Law > Formation > Rights of First Refusal***

***Real & Personal Property Law > Sales, Exchanges & Remedies > Options***

[HN10]A lessee of restaurant with right of first refusal cannot be forced to match terms of third-party offer to buy building complex including the restaurant.

***Contracts Law > Formation > Rights of First Refusal***

[HN11]In New York a right of first refusal regarding intellectual property prohibits the use of a package deal.

***Contracts Law > Formation > Rights of First Refusal***

[HN12]New York courts recognize that rights of first refusal are a common and essential element of television programming contracts.

***Contracts Law > Formation > Rights of First Refusal***

[HN13]Courts reject the argument that the prohibition against the use of "package deals" to defeat a right of first refusal should be limited to the real estate context.

***Contracts Law > Formation > Rights of First Refusal***

[HN14]While a right of first refusal customarily, but not exclusively, arises in real property transactions the subject matter may be anything which the parties may make the subject of a contract.

***Contracts Law > Contract Interpretation > Interpretation Generally***

[HN15]Business exigencies and changed circumstances are not a proper basis for a court to rewrite the parties' contract.

***Contracts Law > Formation > Acceptance***

[HN16]The offeree's intention to accept is unimportant except insofar as it is overtly manifested. Under New York law, a party's manifestations of intent are viewed from the vantage point of a reasonable person in the position of the other party. In determining whether such manifestations constitute acceptance, disproportionate emphasis must not be put on any single act, phrase or provision. Rather, the court must consider the totality of all these, in light of the

attendant circumstances, the situation of the parties, and the objectives they were striving to obtain.

***Civil Procedure > Venue***

***Contracts Law > Formation > Acceptance***

[HN17]New York law holds that injection of a forum selection clause into a proposed contract is a material alteration of the contract.

***Contracts Law > Formation > Acceptance***

[HN18]New York law teaches that overt manifestations of intent are what counts for contract acceptance, not a party's (or its counsel's) self-serving statements of future intention.

***Contracts Law > Formation > Acceptance***

***Contracts Law > Formation > Rights of First Refusal***

[HN19]There is a fundamental principle that a right of first refusal holder may not defend a refusal to match a term in the third party's offer on the ground that the third party "didn't mean it."

***Contracts Law > Formation > Acceptance***

[HN20]In all non-Uniform Commercial Code transactions New York follows the rule that a qualified acceptance is nothing more than a counteroffer. Indeed, whenever a purported acceptance is even slightly at variance with the terms of an offer, the qualified response operates as a rejection and termination of and substitution for the initially offered terms.

***Contracts Law > Formation > Acceptance***

***Contracts Law > Formation > Rights of First Refusal***

[HN21]New York law holds that to conclude an agreement, the acceptance must meet and correspond with the offer in every respect, neither falling short of nor going beyond the terms proposed, but meeting them exactly at all points and closing them just as they stand.

***Contracts Law > Formation > Rights of First Refusal***

[HN22]Some authorities hold that the holder of a contractual right of first refusal has an affirmative legal obligation to undertake a reasonable investigation of any terms or conditions of the third party offer that are unclear to the holder.

***Contracts Law > Formation > Rights of First Refusal***

[HN23]The holder of a contractual right of first refusal clearly has the right and the opportunity to secure interpretive assistance from the courts before, rather than after, it responds to an offer from a third-party offeror.

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**JUDGES:** CHANDLER, Chancellor.

**OPINIONBY:** CHANDLER

**OPINION: MEMORANDUM OPINION**

CHANDLER, Chancellor

This lawsuit involves a dispute over the meaning of rights of first refusal clauses in contracts between plaintiff USA Cable ("USA") **[*2]** and defendant World Wrestling Federation Entertainment, Inc. ("WWFE"). As more fully described below, these clauses, which have been in every contract between the parties since 1983, grant to USA the right to match the elements of a third-party offer that are "with respect to" certain wrestling based programs televised on USA's cable network and the subject of certain licensing agreements between USA and WWFE. Upon termination of the contract between WWFE and USA, WWFE may negotiate and receive offers from third parties for the wrestling programs. WWFE cannot accept such a third-party offer, however, without first providing USA with the opportunity to accept the terms of the third-party offer, pursuant to USA's first refusal right.

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

USA commenced this action on April 12, 2000, and the parties engaged in expedited discovery. The [*3] Court held a four-day trial (from June 12-15), the parties submitted post-trial briefs on June 21 and presented closing arguments on June 22. This is the Court's decision on the merits.

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

## I. FACTUAL BACKGROUND

*A. The Parties*

USA, a New York partnership with its principal place of business in New York, is a subsidiary of USA Networks [*4] Inc., a Delaware corporation. USA operates two domestic advertiser-supported 24-hour cable-television networks, USA Network and Sci-Fi Channel. USA Network reaches between 76 and 77 million households in the United States. USA Network is the number-one-rated basic cable television service in prime time, an achievement attributable in significant part to the popularity of the WWFE programming that it carries.

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

Viacom, a Delaware corporation with its principal place of business in New York, is a diversified entertainment business that, among other things, owns the Paramount Pictures movie studio, the "MTV: Music Television" cable television network, the UPN broadcast television network, theme parks, the Simon & Schuster publishing house, and Famous [*5] Players theatres in Canada.

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

*B. USA Contracts with WWFE to Carry Wrestling*

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

The 1983 agreement contained a "First Negotiation/First Refusal" clause at § 4(b), which became § 5(b) in later agreements. The same or substantially similar clause has appeared in every succeeding contract between USA and WWFE. The "First Negotiation" provisions of these clauses give USA the "opportunity to negotiate privately" with the program supplier (WWFE) to determine whether [*6] they can "come to an agreement regarding [an] extension, continuation, of whatever the program or programs are." The "First Refusal" provisions give USA the right to match the terms that a third-party offers with respect to the Series programs.

Although there have been minor changes to the first refusal/first negotiation clause over the 17 year relationship between USA and WWFE, the clause's substance has never changed. Two "negotiations" with respect to this clause, however, did occur recently. First, in connection with a discussion to renew the 1998 Agreement, WWFE's talent agent, Mark Itkin of William Morris Agency, asked USA to agree to delete the first negotiation/first refusal clause in its entirety. Brenner refused, and the clause was retained. Second, in November 1999, the parties agreed to remove the "first negotiation" provision of the clause, but maintain the "first refusal" provision of the clause. This second negotiation is discussed below in more detail.

*C. The 1998 Licensing Agreement*

In an agreement dated July 2, 1998, WWFE granted USA a license to distribute the WWF television series "WWF Raw/WWF War Zone," "WWF Live Wire," and "WWF Superstars." n1 In a companion [*7] agreement dated September 1, 1998, WWFE granted USA a license to distribute the WWFE television program "Sunday Night Heat." n2 For ease of reference, the two agreements are collectively referred to herein as the "1998 Agreement" or simply the

"Agreement." The four programs are collectively referred to as the "Series."

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n1 Plaintiff's Ex. ("PX") 1.

n2 PX2.

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

The 1998 Agreement, like all of its 15 predecessors, concerns licensing rights to certain WWFE-produced wrestling programs. Section 1 obligates WWFE to "produce and deliver to USA a specified number of Programs of each Series during the Term . . . ." n3 Section 2 grants to USA "the exclusive right to distribute the Programs for [the] **[*8]** Series. n4

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n3 PX1 at § 1; PX2 at § 1.

n4 PX1 at § 2; PX2 at § 2.

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USA is not licensed to distribute any other WWFE programming or products. In fact, WWFE has separately licensed another wrestling series (known as "SmackDown!") to UPN (a broadcast network now wholly-owned by Viacom). At the time that WWFE granted UPN broadcast rights to "SmackDown!," Brenner recognized and advised his colleagues at USA that USA had no basis for objecting, even though "SmackDown!" contains the same characters and the same storyline as the four programs licensed to USA. n5

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n5 Trial Tr. 133, 135-36, 195 (Brenner).

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*D. Expansion of WWFE's Business Strategy*

The parties agree that WWFE's "sports entertainment" programs represent "the crown jewel of cable television." From a ratings perspective, this assertion appears justified. WWFE's two-hour Monday **[*9]** night show "Raw Is War/War Zone," which is treated as two separate one-hour shows for rating purposes, consistently has occupied the number-one and number-two positions on basic cable television, with an average Nielsen rating of about 6 during 1999. The show's strong ratings numbers continued right up to and through the trial. "Sunday Night Heat" also has performed extremely well, often capturing the number-three ratings spot. WWFE programming has become especially popular with two groups in the United States that advertisers intensely covet: males aged 18 to 34 and teenagers aged 12 to 17.

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

WWFE's resurgence coincided with its recognition that it could not **[*10]** grow by restricting itself to being simply a cable television content provider. WWFE recognized that the formation of a strategic alliance with a multimedia partner that could cross-promote WWFE programming and provide new platforms to grow the WWFE brand would be critical to expanding its business and competing against the sizable resources of Time Warner's WCW.

Consistent with its desire to grow its business through a strategic alliance with a multimedia partner, WWFE's October 15, 1999 IPO prospectus identified as one of the key elements of its strategy the formation of "strategic relationships with other media and entertainment companies." n6 As noted above, however, the 1998 Agreement contained an "exclusive negotiation" clause that prohibited WWFE from "negotiating with any third party with respect to any of the [four] Series prior to the end of [the] exclusive negotiation period." n7

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n6 PX7.

n7 PX1 at § 5(b); PX2 at § 5(b).

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In early 1999, USA Co-President Stephen Chao recommended that WWFE **[*11]** meet with the Endeavor Agency, a Hollywood talent agency that Chao thought could help WWFE further its strategic goals. Endeavor confirmed WWFE's view that a strategic alliance with a large media company with multi-platform capabilities would best unlock WWFE's growth potential. Endeavor arranged for WWFE to meet with Twentieth Century Fox and Viacom in the spring and summer of 1999 for the purpose of exploring a potential strategic alliance along the lines that Endeavor had originally recommended.

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

In July of 1999, the McMahons met with Kerry McCluggage, the Chairman of Viacom's Paramount Television Group. McCluggage was familiar with WWFE's programming as he had served on USA's executive committee until Viacom divested its interests in USA in 1997. McCluggage expressed an interest in acquiring the Series, which he characterized as consistent with Viacom's long-range goal to "either start from scratch or buy and repurpose a basic cable network." n8 Linda McMahon **[*12]** told McClugagge that the four Series could be available as early as fall 2000. These discussions between WWFE and Viacom continued into the fall of 1999 until the time of WWFE's initial public stock offering.

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n8 Trial Tr. at 685-86

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*E. USA Waives Its Right to Negotiate Exclusively with WWFE*

Shortly after WWFE's public offering in October 1999, WWFE's CEO Linda McMahon informed Brenner that WWFE intended to exercise the early termination right in the Agreement. n9 When Brenner reported WWFE's intent to exercise its early termination right to his superiors, USA Networks' President and CEO, Barry Baker, became "apoplectic" and instructed Brenner to contact Ms. McMahon and convince her to delay sending the early termination notice. Brenner contacted Linda McMahon and explained to her that Baker did not want WWFE to send the early termination notice until they talked.

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n9 Section 5(a) of the Agreement provided WWFE with an early termination that, if exercised, would trigger a 45-day period during which WWFE and USA would negotiate exclusively with each other over a new agreement.

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**[*13]**

Baker himself later called Ms. McMahon and asked her to amend the parties' Agreement, pushing back the early termination final notice date from November 30, 1999 to March 31, 2000. In return for this, Baker said USA would waive the 45-day exclusive negotiation period under § 5(b) of the Agreement. He explained that USA "was offering [WWFE] the ability to go out into the marketplace and get whatever offer [it] could." n10 Baker told Ms. McMahon: "Look, I understand from a business perspective that you should go out and find out the value of your business and that you should get the best offer you can. I can tell you right now, nobody is going to give you a network, but bring it all back. And then I have a right to talk to you." n11

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n10 Trial Tr. at 1023.

n11 Trial Tr. at 1023.

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After Baker instructed WWFE to come back to USA with an offer that reflected the value of its business, Ms. McMahon asked Baker if he would waive the first refusal provision in § 5(b) of the Agreement so as not to dampen WWFE's **[*14]** negotiations with third parties. Baker agreed to waive USA's first refusal right, so that WWFE no longer would have to afford USA the right to match any "best offer" that WWFE could find in the marketplace.

Baker's agreement to waive the first refusal provision led to a heated debate within USA. At the conclusion of this debate, it was decided that Baker should not have waived the right of first refusal, and the problem then was "dumped in [Brenner's] lap to solve." n12 In a later conversation with Linda McMahon, Brenner observed that the parties could not modify the 1998

Agreement orally, according to its terms. Ms. McMahon conceded this point.

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n12 Trial Tr. at 283.

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As a result of these conversations, on November 19, 1999, Brenner sent Ms. McMahon a letter amendment to the 1998 Agreement that changed the early termination notice date from "on or before November 30, 1999" to "between March 1, 2000 and March 31, 2000," and eliminated the exclusive negotiation period. n13 Section 5(b)'s first refusal language, **[*15]** however, was retained word for word. Linda McMahon acknowledged that there was no modification of the right of first refusal by virtue of these conversations and correspondence. No one discussed whether to modify the operation or substance of the right of first refusal. No one asked how the right of first refusal would operate in practice.

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n13 Brenner understood that the November 19, 1999 letter amendment modified not only the Agreement but also the Sunday Night Heat Agreement. Brenner Dep. 205:13-21.

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*F. Negotiations Between WWFE and Viacom*

With the exclusive negotiation provision eliminated, WWFE was now completely free to negotiate with Viacom or any other interested party. Viacom and CBS in turn were eager to obtain the four Series for TNN, CBS's country-living cable network, which Viacom would acquire through its merger with CBS. TNN was losing NASCAR programming and needed to restore its "must carry" status with cable operators. CBS and Viacom viewed the acquisition of the Series for TNN as a potential **[*16]** solution to TNN's problems.

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

On January 6, 2000, WWFE and Viacom met again at WWFE's headquarters in Stamford, Connecticut. Following this meeting, McCluggage sent a discussion draft to Linda McMahon listing elements of a possible deal. McCluggage revised his discussion draft proposal following the January 6 meeting with Linda McMahon. He sent the revised draft to Ms. McMahon on January 18, 2000. The discussion draft proposal included a 4-5 year "joint venture/strategic alliance between WWF and Viacom" that would include a broadcast component (3-4 year renewal of Smackdown on UPN), a cable component (moving the Series currently carried on USA to TNN), specials (6-7 one-hour **[*17]** specials annually to be broadcast on UPN, TNN, CBS, and MTV), a series featuring WWFE star Steve Austin, international distribution, coverage of WWFE's new football league (the XFL), home video distribution, a theatrical development fund, radio syndication, and Canadian in-theater pay-per-view. n14 After McCluggage sent Linda McMahon his discussion draft, she contends that she informed him that USA had a first refusal right and was entitled to review the details of any offer that WWFE intended to accept.

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n14 VX 229.

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

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

On February 17, 2000, USA delivered a broad presentation to WWFE involving various distribution capabilities, including the Home Shopping **[*18]** Network, the Sci Fi Channel, USA's internet and e-commerce sites, USA Video, USA Studios, and USA Broadcasting. USA organized the presentation based on some of the strategic objectives outlined in WWFE's October 1999 IPO prospectus. It hoped to use the promise of a broader partnership (and the cross-promotional opportunities created thereby) to induce WWFE to renew its cable Series on USA. Following

USA's receipt of WWFE's formal notice of early termination around March 1, 2000, Brenner sent an internal e-mail suggesting that he should call Linda McMahon to find out what WWFE was looking for rather than being put in a position to match the terms of a third-party offer. Brenner's suggestion was rejected. Instead, USA decided to wait and see what WWFE would bring back to USA to match.

*H. Viacom's "Strategic Alliance" Offer*

One week after USA's presentation, Viacom made its own presentation to WWFE. Viacom's presentation addressed a number of terms that appeared in earlier draft proposals, including telecast of WWFE's four existing cable Series on TNN, WWFE specials on Viacom's broadcast and cable networks, a WWFE drama series, coverage of XFL football, a multi-million dollar advertising **[*19]** campaign, a theatrical development fund, pay-per-view events, radio syndication, print publishing, and WWFE events at theme parks, among other things.

On March 10, 2000, Linda McMahon sent McCluggage a proposal in which she recommended that WWFE and Viacom first complete negotiations over the four Series. Against this background, WWFE and Viacom met again on March 16 to discuss the cable programming and other proposals set forth in Ms. McMahon's March 10 letter. By the end of the March 16 meeting, the parties had reached agreement on transferring the four Series, while other proposals were left for later negotiation.

In an effort to memorialize the agreements reached regarding the four Series, Viacom and WWFE began drafting a formal agreement. Viacom prepared and then circulated an initial short form draft offer to WWFE's representatives on March 27. Representatives of both parties convened in Los Angeles on March 30-31 to negotiate a final document. The final document emerged as Viacom's offer letter dated April 2, 2000. The April 2 letter first established terms for the four Series programs to be transferred to TNN. It also addressed preexisting arrangements between WWFE and Viacom, **[*20]** such as UPN's right to "Smackdown!". The April 2 letter offer also mentioned a variety of other relationships, many of which were left to further negotiation. Finally, Viacom's offer letter described a series of terms relating to the coverage territory, preemption rights, a choice of law and forum selection provision, as well as a broadcast exclusivity provision, the significance of which will be explained later.

*I. USA Responds to Viacom's Letter Offer*

On April 3, 2000, WWFE notified USA that it intended to accept the Viacom offer and provided USA with a copy of that offer. USA spent the next ten days engaged in two principal activities: (1) quantifying the cost of matching the Viacom offer that had been tendered by WWFE; and (2) meeting with outside counsel to determine a strategy for responding to that offer. USA was unclear about certain terms in Viacom's offer. For reasons that are not entirely apparent, USA made no effort to contact any representative of WWFE during this ten-day period.

On April 12, 2000, the last day of USA's ten-day response period under § 5(b), USA responded to Viacom's offer. It presented WWFE with a black-lined version of Viacom's offer letter that **[*21]** expunged many elements of Viacom's offer. By picking and choosing from the paragraphs in Viacom's letter, USA purported to bind WWFE to a five-year renewal of its licensing agreements concerning the Series programs, as well as other provisions related to the Series. On the same day (April 12) that USA "accepted" the tendered Viacom offer using selective matching, USA filed this lawsuit to enjoin consummation of Viacom's agreement and to compel WWFE to perform under USA's "matched contract"--a contract whose terms and conditions are an amalgamation of provisions appearing throughout Viacom's offer. USA proclaims its "match" to be a legally enforceable contract that relates to the Series pursuant to § 5 of the 1998 Agreement.

## II. ANALYSIS

The narrow issue before this Court is whether USA, through its April 12, 2000 letter to WWFE, effectively exercised its right to match Viacom's April 2, 2000 offer to WWFE. To resolve this issue, the Court must answer two questions. First, what is the scope of USA's right of first refusal contained in § 5 of the 1998 license agreement between USA and WWFE? Second, did USA match the provisions contained in Viacom's April 2 offer to WWFE which **[*22]** fall within the scope of the right of first refusal contained in § 5?

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

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

As noted above, the parties amended § 5 through a November 19, 1999 letter which Brenner and Linda McMahon executed on behalf of their respective companies. The November 19 amendment eliminated USA's right to a 45 day exclusive negotiation period

with WWFE for the extension of the license agreement. The amendment, however, did not in any way alter the language describing USA's right of first refusal. In other words, the November 19 amendment, by eliminating the exclusive negotiating period, transformed § 5 from a "First Negotiation/First Refusal" clause to exclusively a "First Refusal" clause. Section 5, as amended, is set forth below in its entirety. The underscored text represents **[*23]** the first refusal language at issue:5. The term hereof shall commence on September 28, 1998 and shall end on September 23, 2001 (the "Term"). Notwithstanding the foregoing, either party hereto may terminate this Agreement as of September 24, 2000, for any reason whatsoever, by written notice to the other, delivered between March 1, 2000 and March 31, 2000. In no event, however, may [WWFE] enter into any arrangement, understanding or agreement with any such third party with respect to any or all of the three Series without first giving to USA a right of first refusal, exercisable within ten (10) business days following receipt by USA of written notice detailing the terms of the third party offer(s), as to any such offer(s) which [WWFE] intends to accept. If USA does not meet such offer(s), [WWFE] will not enter into an Agreement with such third-party on terms less favorable to it than those contained in the offer(s) without again affording USA a first refusal as above provided. n15

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n15 Plaintiff's Trial Ex. ("PX") 6JJ.

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**[*24]**

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

In so doing, I begin with [HN1]the primary rule of contract analysis that "the interpretation of a written agreement begins with examination of its language." n16 The law of New York, which is applicable to this dispute by virtue of the parties' choice-of-law provision, n17 and the law of Delaware are in accord. n18

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n16 *U.S. v. Int'l Bhd. Of Teamsters*, 970 F.2d 1132, 1136 (2d Cir. 1992).

n17 *See* PX1, § 19.

n18 *See Serna v. Pergament Distributors, Inc.* 182 A.D.2d 985, 582 N.Y.S.2d 550, 552 (N.Y. App. Div. 1992) ("It is a fundamental premise of contract law that contracts should be enforced in accordance with their terms") and *Rainbow Navigation, Inc. v. Yonge*, Del. Ch., 1989 Del. Ch. LEXIS 41, *7, C.A. No. 9432, Allen, C. (Apr. 24, 1989) ("The attempt to define the legal meaning and effect of a contractual document must start in each instance with the language used in the contract itself.").

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**[*25]**

I will not, however, analyze in isolation the explicit words of § 5. [HN2]Language in a vacuum may take on any number of meanings. A Court can more readily assign contract language its intended meaning if it reads the language at issue within the context of the agreement in which it is located. Accordingly, while the canons of contract interpretation instruct an examination of the explicit contract language in order to determine the clause's meaning, one must simultaneously read that language within the context of the contract surrounding that language in order to best elicit the most appropriate meaning. [HN3]Indeed, a New York court has recently observed that,"it has long been the rule that a 'contract must be read as a whole in order to determine its purpose and intent, and . . . single clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are a part. Words considered in isolation may have many and diverse meanings. In a written document the word obtains its meaning from the sentence, the sentence from the paragraph and the latter from the whole document.'" n19

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n19 *Bijan Designer for Men, Inc. v. Fireman's Fund Ins. Co.*, N.Y. App. Div., 264 A.D.2d 48, 705 N.Y.S.2d 30, 33 (1st Dep't 2000) (internal citations omitted).

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**[*26]**

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

The explicit language of the first refusal provision, examined in the context of the 1998 Agreement as a whole, reveals its intended meaning: the obligation to match is limited to the subject matter of the Agreement, the television license rights for the Series. In my opinion, the inclusion of the words "with respect to the Series" are intended as restrictive language. The holder of the right of first refusal must match all terms contained **[*27]** in a third party offer directly related to the Series itself. For example, USA must match terms detailing scheduling of the Series, licensing fees for the Series, advertising splits for the Series, and terms establishing the length of the contract for the right to distribute the Series. USA need not match terms of a third party offer that relate to *other* subject matters. Other subject matters include the XFL, theme park events, and motion pictures, for example.

I must also note an important distinction in order to define clearly the outer boundary of the first refusal right's scope. The scope of the right is limited to the subject matter of the Agreement in which the right exists. Such subject matter is the licensing of *the Series*. The distinction one must keep clear is that the subject matter of the Agreement, the licensing of the Series, is very different from the subject matter of the Series themselves, the WWFE characters and story lines. The scope at issue is defined by the licensing of the Series, not the characters and story lines that exist within those Series. This is why, for example, USA need not match the terms in the Viacom offer relating to specials, such as **[*28]** "Wrestlemania." Although both the Series and "Wrestlemania" will inevitably involve the same characters and story lines, a special--a one time stand alone program--is not the same subject matter as the Series--the four specific programs that USA televises each week.

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

> Agreement ... between USA Networks and [WWFE] *with respect to* the production of and grant of certain rights in *the* [] *Series* individually and collectively, of original television programs presently entitled "WWF Raw/WWF War Zone" ("Raw"), "WWF Live Wire" ("Live Wire"), and "WWF Superstars" ("Superstar").

The very first paragraph of the Agreement contains the words "with respect to the Series." The Agreement employs these words here to indicate that the contract to follow is about the grant of certain rights in *the Series*. That is, the contract is about the Series. These exact same words, the primary words at issue in this case, appear verbatim in § 5. It is simply not reasonable to believe that the same words **[*29]** in the opening paragraph of the Agreement and in § 5 have different meanings. The words in the opening paragraph indicate that the contract defines the parties' rights to *the Series*, not to any other subject matters, just as the words in § 5 indicate that the right of first refusal is limited to the same subject matter, *the Series*, and not to any other subject matter. The language at issue in § 5 does not take on a more expansive meaning.

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

Section 2 sets forth USA's chief right under the Agreement. This right is neither more nor less than an exclusive *license to distribute the Series*. Quite simply, the 1998 Agreement is a licensing agreement the subject matter of which is the **[*30]** four Series. Accordingly, it is eminently reasonable that the meaning of the phrase "with respect to the Series" in the Agreement's introductory paragraph, plus the language of § 1 and § 2 of the Agreement regarding the subject matter of the contract as a whole, illuminates the meaning of "with respect to the Series" in § 5 and the scope of the right of first refusal. These provisions indicate that the scope of the right of first refusal is limited to the subject matter of the contract containing the right.

To my mind, it is unreasonable to conclude that a right of first refusal clause in a contract for the distribution of certain television series would require the holder of

the right of first refusal to match a package offer from a third-party for various properties that vastly exceed the scope of the property under the contract giving rise to the first refusal right. Nothing in the record suggests that a contrary scenario was *reasonably* in the minds of the parties at the time of drafting or amendment of the succession of agreements in question.

I find the defendants' broader interpretation of the first refusal right's scope unconvincing. Defendants argue, unreasonably in **[*31]** my opinion, that USA must match all reasonable terms contained in a third party offer which the seller (WWFE) and the third-party (Viacom) have entered into in good faith. Defendants contend that Viacom's April 2 offer is an "arrangement, understanding or agreement with [a] third-party with respect to any or all of the three Series" and that USA's matching obligation runs to every item of a third party offer that WWFE "intends to accept."

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

Despite the absence of the words "only" or "solely," the scope of the right is not as broad as Viacom and WWFE argue it is. Under the broadest possible interpretation of the phrase "with respect to the Series," I still do not know how a provision regarding the XFL would ever fall within the **[*32]** scope of the right of first refusal. The XFL is a football league that has nothing to do whatsoever with professional wrestling beyond its association with WWFE.

Even if I give "with respect to the Series" its broadest meaning--*e.g.*, with reference, relating to, or pertaining to--the XFL does not "relate" to the Series. In fact, even if the scope of the right included anything relating to the characters or story lines of the wrestling programs, the XFL would not fall within such a scope. The only way that the XFL would fall within the scope of the right of first refusal is if I interpreted "with respect to the Series" to mean an offer "*including* the Series." No evidence compels me to reach such a result. Indeed, it is clearly more reasonable to interpret "with respect to the Series" to constitute limiting language, and not expansive language. Interpreting "with respect to the Series" to limit the scope of the right of first refusal to the subject matter of the contract even absent the words "only" or "solely" is clearly reasonable. Interpreting "with respect to the Series" to actually mean "*including* the Series" and to expand the scope of the right of first refusal to **[*33]** any terms Viacom and WWFE have entered into other than for the purpose of defeating USA's first refusal rights, in my mind, robs § 5 of its intended meaning.

Viacom next argues that the structure of § 5 buttresses its expansive interpretation of the first refusal right's scope. Viacom explains that § 5 requires the WWFE to tender the entire third party offer, not part of it, to USA because § 5 provides that WWFE must tender the offer it "intends to accept." Because WWFE intended to accept all the provisions of Viacom's offer, WWFE, therefore, also must tender the entire offer. After obligating WWFE to tender the entire offer, § 5 does not explicitly allow USA to meet only portions of the third party offer. Implicitly, therefore, § 5 commands that USA meet "such offer" in its entirety. Consequently, defendants argue that WWFE must tender Viacom's entire offer and USA must either match the offer entirely, or forfeit its first refusal right.

I find this argument unpersuasive. Section 5 provides that WWFE must tender "*such* offer" and USA must meet "*such* offer." "*Such* offer" refers to an offer "with respect to the Series." Therefore, WWFE must tender and USA must match **[*34]** an offer "with respect to the Series." The operation of this clause, however, still fails to explain how the phrase "with respect to the Series" affects the scope of the first refusal right. Although the defendants are correct that this is how the first refusal right operates according to the language in § 5, its operation does not speak to the meaning of the phrase.

Just because WWFE seeks a strategic alliance, of which the four Series are a part, and tenders the entire strategic alliance offer to USA, it does not necessarily follow that the entire strategic alliance is an "offer with respect to the Series." Moreover, just because USA treated the Viacom offer as an offer "with respect to the Series" for purposes of triggering its right of first refusal, does not necessarily mean that every provision of the strategic alliance offer is "with respect to the Series." USA may have *treated* the Viacom offer as a triggering offer because within the broad strategic alliance package existed provisions that did, in fact, fall within the scope of the phrase "with respect to the Series." That is, the broad package did include provisions concerning licenses for the four Series programs. Presented **[*35]** with the strategic alliance offer, USA attempted to match the part of the strategic alliance offer that it considered to be "with respect to the Series" according to its understanding of that language.

USA and WWFE likely did not anticipate a dispute over the scope of the right of first refusal, at the time of

drafting, because they could not anticipate the significant changes in the media industry, particularly the industry's rapid consolidation and move to a world of multi-platform conglomerates. Given the parties' relationship and the state of the media industry in 1983, I am compelled to conclude that the drafters of § 5 did not anticipate a package offer of the kind Viacom has tendered, and this lack of anticipation has caused a tension in the manner § 5 operates. n20

---------- Footnotes ----------

n20 The manner in which § 5 operates in the context of a changed media industry, however, has no bearing on how I interpret the contractual language and the scope of the right of first refusal.

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Accordingly, I find the language of § 5, **[*36]** read in the context of the entire contract, clear on its face. Its only reasonable interpretation is that the scope of the first refusal right is limited to the subject matter of the Agreement.

Had the first principle of contract construction, the plain meaning rule, not resolved this dispute, the second principle of contract construction, the parol evidence rule, would have compelled the Court to adopt the same limited scope interpretation. The parol evidence rule holds that where the language of a contract is susceptible to more than one reasonable interpretation, the Court will consider proffered admissible evidence bearing on the objective circumstances relating to the background of the contract, including statements made during the course of the negotiation, courses of prior dealings between the parties, and practices in the relevant trade or industry.

Every contract between USA and WWFE since their first contract in 1983 has included the same contract language describing the right of first refusal. In fact, USA has insisted upon it. As the parties have used the same contract language (notwithstanding slight "wordsmithing") in each contract since 1983, they have preserved the **[*37]** same meaning of that recurring language since 1983. Before USA and WWFE signed their first contract to televise a wrestling series in 1983, USA had previously only televised monthly wrestling shows performed at Madison Square Garden, pursuant to a contract with Madison Square Garden. At that time, neither party has suggested that they contemplated the strategic partnership that WWFE currently seeks, and WWFE certainly did not possess the market power it presently holds. Accordingly, in 1983, when WWFE was first securing television distribution and did not enjoy the same level of popularity it does today, it is much more likely that the parties contemplated a right of first refusal limited to the subject matter of the contract containing that right of first refusal, as opposed to the open-ended right the defendants now allege prevails. The 1998 Agreement, containing the same right of first refusal clause and the same language, therefore, does not have a different meaning than the identical provision the parties agreed to back in 1983.

WWFE's repeated attempts to eliminate the right of first refusal provision from its contracts with USA bolsters the limited scope interpretation. In **[*38]** 1998, WWFE's talent agent, Mark Itkin of the William Morris Agency, requested that USA agree to delete the first negotiation/first refusal clause in its entirety. Brenner refused.

In October 1999, Linda McMahon indicated that WWFE intended to exercise its early termination right. Brenner asked her to refrain from sending the early termination notice until she had further conversations with Baker. Linda McMahon, in return for postponing WWFE's exercise of its early termination right, requested that Baker agree to waive USA's rights of first negotiation and first refusal. According to Vince McMahon, WWFE understood that obtaining a waiver of the first-refusal right had "value" to WWFE. n21 Ultimately, USA agreed to waive the first negotiation provision, but it reaffirmed its right of first refusal. The parties amended the 1998 agreement to reflect this modification.

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n21 V. McMahon Dep. 162-163, 169.

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WWFE's repeated attempts to eliminate the right of first refusal clause indicates that WWFE viewed this clause as **[*39]** a serious hindrance. If the scope of the right of first refusal clause were truly as broad as WWFE and Viacom claim, then elimination of that provision would not have been as necessary. I assume that WWFE and Viacom would retort that *all* right of first refusal provisions, regardless of their scope, have a chilling economic effect. That is, third parties are less likely to negotiate with WWFE because the property at issue is subject to a right of first refusal.

I find this argument, in this instance, unconvincing, because WWFE already knew that Viacom had an

interest in wrestling programming as early as July 20, 1999, three months before Linda McMahon requested that USA waive the right of first refusal. Thus, WWFE cannot contend that it needed the first refusal right waived in order to prevent a chilling economic effect--Viacom already had expressed its interest in acquiring the Series. Indeed, Vince and Linda McMahon, along with Endeavor, WWFE's agent, met with McCluggage at Paramount's offices in Hollywood on July 20, 1999 to discuss moving the Series from USA to Viacom. McCluggage's phone logs reflect ten incoming calls from Endeavor and WWFE from July through the end of October **[*40]** 1999, when Linda McMahon attempted to eliminate the right of first refusal provision.

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

In addition, I cannot believe that Viacom failed to inquire as to any contract restrictions on the four Series. It would seem to me that when a company is attempting to acquire rights to property, one of its first inquiries would be whether the property is in any way encumbered. That is, is the property readily available at the expiration of the current **[*41]** contract? These circumstances, in my opinion, undermine WWFE's broad interpretation of the first refusal right.

The actions of USA executives also have neither altered the meaning of § 5 nor lent credibility to Viacom's and WWFE's overly broad interpretation of the scope of the right of first refusal. In November 1999, Baker and Chao encouraged Linda McMahon to go out into the marketplace and determine the value of her company. They did so, no doubt, in the hope she would come back empty handed and, thus, with little bargaining leverage. In fact, Linda McMahon testified that Baker said, "nobody is going to give you a network." n22 USA was quite plainly mistaken. But the fact that USA executives told, indeed exhorted, Linda McMahon to go out and negotiate offers for WWFE programming (and for whatever else she wanted to sell) did not work to alter or amend the language and purpose of the contract. It was, in fact, entirely in keeping with the contract, once USA waived the exclusive negotiation period.

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n22 Tr. 1023: 10-11.

---------- End Footnotes ----------

**[*42]**

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

I also find that certain language in Viacom's April 2 offer letter to WWFE demonstrates that Viacom believed its interpretation of § 5 to be more tenuous than it indicated during trial. The offer letter of April 2 states: "the various components of the proposed agreement...are being offered as a complete integrated package to WWFE, each **[*43]** dependent on the other, and are not offered otherwise." n23

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n23 Viacom Exhibit ("VX") 158.

---------- End Footnotes ----------

Why would Viacom include this sentence in their offer letter? WWFE already knew that the offer constituted an integrated package because it sought out such a deal in the first place. WWFE also did not intend to pick and choose certain provisions of the offer, as it clearly coveted all the provisions contained in the offer. Thus, Viacom did not include that sentence for WWFE's benefit. Moreover, Viacom did not include the sentence for its own benefit because Viacom already knew that WWFE intended to accept the entire

package; both parties negotiated the deal and had settled on its terms. Viacom did know that WWFE had to tender the offer to USA. The April 2 offer, therefore, likely contained the sentence for USA's benefit. In my opinion, the sentence constitutes an implicit threat to USA: this is an integrated package that you must accept in its entirety. The only reason to include such a sentence in an offer to WWFE is if **[*44]** Viacom and WWFE recognized that an issue existed regarding the scope of the first refusal right.

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

[HN4]New York courts construing right of first refusal clauses have uniformly held that a property owner cannot compel the holder of a right of first refusal to one property to match the terms of a package deal encompassing extraneous properties. *New Atlantic Garden v. Atlantic Garden Realty Corp* commenced a long line of uninterrupted authority so holding. n24 In *Camp Systems, Inc. v. PHH* **[*45]** *Aviation Services, Inc.*, n25 [HN5]the court held that the holder of a first refusal right relating to a software product could not be forced to match the terms of a third-party offer for substantially all of the seller's assets, including the software product. Likewise, in *Saab Enterprises v. Wladislaw Wunderbar*, the court held that [HN6]a lessee of a car wash, with a right of first refusal, could not be forced to match the terms of a third-party offer to buy property including the car wash and a neighboring gas station. n26

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n24 N.Y. App. Div., 201 A.D. 404, 194 N.Y.S. 34 (1st Dep't 1922), aff'd, N.Y., 237 N.Y. 540, 143 N.E. 734 (1923) ([HN7]lessee of movie theater with right of first refusal cannot be forced to match terms of third party's offer to buy from lessor a larger parcel including the theater).

n25 1988 U.S. Dist. LEXIS 6346, E.D.N.Y., C.A. No. 88 CIV 945, 1988 WL 70637 (May 31, 1988).

n26 N.Y. App. Div., 160 A.D.2d 931, 554 N.Y.S.2d 657 (2nd Dep't 1990); *see also Tarallo v. Norstar Bank*, N.Y. App. Div., 144 A.D.2d 157, 534 N.Y.S.2d 485 (3d Dep't 1988) ([HN8]lessee and holder of option to buy leased premises cannot be forced to match terms of third-party offer to buy larger parcel including the leased premises); *C & B Wholesale Stationery v. S. DeBella Dresses, Inc.*, N.Y. App. Div., 43 A.D.2d 579, 349 N.Y.S.2d 751, 753 (2d Dep't 1973) ("[HN9]The right which plaintiff enjoyed by virtue of the first refusal clause cannot be rendered nugatory by the device of attaching additional land to the leased premises and finding a buyer for the entire parcel"; lessor "improperly disregarded plaintiff's attempted exercise of the option as to the leased premises"); *Costello v. Hoffman*, N.Y. App. Div., 30 A.D.2d 530, 291 N.Y.S.2d 116 (2d Dep't 1968) ([HN10]lessee of restaurant with right of first refusal cannot be forced to match terms of third-party offer to buy building complex including the restaurant).

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**[*46]**

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

The clause in question in *New Atlantic Garden* provided that "in the event of a contemplated sale of *said premises* during the demised term, the landlord agrees to give to the tenant a notice in writing at least ten days before the contemplated sale of the substance of the terms on which it is proposed to be made...[and] the tenant shall have the right to purchase *said premises* upon the terms and conditions proposed." n27 Defendants' contention, that the case currently before the Court is different from *New Atlantic Garden* because the contract in *New Atlantic Garden*

specifically defined the **[*47]** property that plaintiffs' first refusal right covered is unpersuasive.

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n27 Emphasis Viacom's.

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

Defendants' reliance on *West Texas Transmission v. Enron Corp.* n28 is unavailing. There, two energy companies each owned a one-half interest in a gas pipeline subject to cross rights of first refusal in the event one of the owners chose to sell his interest to a third-party. Enron elected to sell its interest to a third-party and predicated such sale **[*48]** on the prospective buyer receiving regulatory clearance prior to sale. West Texas objected to this term and argued that Enron breached its preemptive right by interjecting an intermediate condition (regulatory approval) into the purchase agreement that it should not be required to match. In very broad language, the Court, applying Texas law, held that plaintiff West Texas was required to meet this perfectly legitimate term in Enron's agreement with the prospective third-party purchaser because it was commercially reasonable and imposed in good faith.

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n28 907 F.2d 1554 (5th Cir. 1990).

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Contrary to defendants' contentions, *West Texas Transmission* does not stand for the proposition that a third-party agreement, irrespective of its scope, is the sole determinant of a right of first refusal holder's obligation to match. The subject matter of the contract at issue in *West Texas Transmission* was an ownership interest in a pipeline. The scope of the first refusal right covered the same. Inclusion **[*49]** of a regulatory approval term did not in any way alter or add to the subject matter of the underlying contract nor force the preemptive right holder to match a "package deal" as is the case here. Rather, regulatory approval bore a direct relation to the subject matter of the contract and was, therefore, properly within the scope of the right holder's matching obligation.

Defendants cite only one decision running truly contrary to the consistent and overwhelming authority from New York and elsewhere proscribing package deals: *In re New Era Resorts, LLC.* n29 In that case, a Bankruptcy Court construed Tennessee law to require the holder of a first refusal right to match the terms of a third-party package deal offer. *In re New Era Resorts* does not represent New York law on this subject.

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n29 238 B.R. 381 (Bankr. E.D. Tenn. 1999).

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Moreover, defendants have not asserted a compelling rationale or directed the Court to any legal authority stating that the well-settled body of New York law construing **[*50]** rights of first refusal should not apply in the context of television distribution rights. Defendants cite no authority for their contention that this contract should be treated differently because it relates to intellectual property. [HN11]One New York court has construed a right of first refusal regarding intellectual property to prohibit the use of a package deal. n30 And in *CBS v. French Tennis Federation*, n31 in the course of issuing a preliminary injunction, [HN12]a New York trial court recognized that rights of first refusal are a common and essential element of television programming contracts. This Court made the same observation in *Dover Downs v. ESPN, Inc.*, n32 a case decided under New York law. [HN13]Courts in other jurisdictions have also rejected the argument that the prohibition against the use of "package deals" to defeat a right of first refusal should be limited to the real estate context. n33

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n30 *See* Camp Sys. v. PHH Aviation Servs., Inc., 1988 U.S. Dist. LEXIS 6346, E.D.N.Y., C.A. No. 88 CIV 945, 1988 WL 70637 (May 31, 1988) (software).

n31 N.Y. Sup. Ct., N.Y.L.J. 5 (Jan. 24, 1983).

n32 1991 Del. Ch. LEXIS 76, Del. Ch., C.A. No. 11830, Jacobs, V.C. (April 26, 1991).

**[*51]**

n33 *See, e.g., Radio WEBS v. Tele-Media Corp.*, Ga., 249 Ga. 598, 292 S.E.2d 712, 715 (1982) ("the cited lease cases [are] applicable to sales of businesses; to find otherwise would facilitate defeat of contractual rights of first refusal by inclusion of extraneous matters."); *Florida's First Coast Servs., Inc. v. Le-Jo Enters.*, 1989 U.S. Dist. LEXIS 4471, E.D. Pa., C.A. No., 88-9413, 1989 WL 46102, at *3 (1989) (rejecting contention that package deal cases are limited to real estate). *See also 3 Corbin on Contracts* § 11.3, at 469 (Apr. 25, 1989) ([HN14]while a right of first refusal "customarily, but not exclusively, arises in real property transactions . . . the subject matter may be anything which the parties may make the subject of a contract").

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There is no doubt that WWFE sought out a strategic alliance with a multiplatform media conglomerate in complete good faith. Linda and Vince McMahon quite rationally believed, and indeed were so advised, that the most effective way to grow their company and increase the value of the WWFE franchise was through horizontal expansion of WWFE production. **[*52]**

The changed landscape of the media business since the WWFE and USA first entered into that original 1983 license agreement, and WWFE's current desire to secure a strategic alliance do not, however, alter the meaning of § 5 of the contract between USA and the WWFE. In fact, the contract language has hardly changed since 1983 when the parties first entered into an agreement to distribute the Series. At that time, WWFE did not possess the market power it does today and was not seeking a strategic alliance. It also could not have anticipated the vast changes that have occurred in the media business. Changed circumstances, however, do not alter the meaning of contract language, especially when such language has not only gone unchanged, but has indeed been reaffirmed by the parties as recently as November 1999. [HN15]Business exigencies and changed circumstances are also not a proper basis for the Court to rewrite the parties' contract.

The clear meaning of the language of § 5 read in the context of the entire contract, relevant parol evidence, and well-settled New York case law supports the view that the scope of USA's matching obligation is limited by the subject matter of the Agreement, **[*53]** a license to distribute the four programs. And although I do not doubt the sincerity of Linda McMahon's testimony that she genuinely believed that she had the right and ability to go out and sign whatever deal she could and require USA to match every element of it, no matter how unrelated to the parties' current relationship, the language of the clause, particularly when read in the context of the entire contract, and informed by a reading of the relevant New York case law, simply cannot bear the weight of such a broad reading.

*B. USA Has Not Unconditionally Matched Viacom's Offer*

When WWFE presented to USA Viacom's April 2 offer, USA treated the offer as triggering its right of first refusal under the 1998 Agreement. USA responded by attempting to match those terms "with respect to the Series." To that end, USA crossed out those parts of the April 2 offer that were clearly extraneous to the subject matter of its licensing agreement with WWFE. Thus, USA properly blacklined terms and conditions regarding television rights for specials, the "Smackdown!" series on UPN and the XFL. USA also properly excised provisions relating to theme park attractions, theatrical motion pictures, **[*54]** radio syndication, pay-per-view events in Canada, a publishing venture and a drama television series. These elements clearly exceeded the scope and subject of the earlier licensing agreements between WWFE and USA. Turning to the terms of the offer that did relate to the Series programs, the subject matter of the 1998 Agreement, USA listed the items that it would "match" and substituted "USA" for "Viacom," "TNN," "MTV" or "CBS" in each provision that dealt with the four Series.

The Court now must confront the second level of analysis in this matter. That is, when WWFE submitted Viacom's April 2 offer to USA pursuant to USA's right of first refusal, did USA accept those provisions that it was required to accept to enter into a binding and enforceable contract with WWFE? To determine whether USA accepted the offer, the Court must look to the objective manifestation of the parties' intent as expressed by their words and deeds. n34 [HN16]The offeree's intention to accept is unimportant except insofar as it is overtly manifested. n35 Under New York law, a party's manifestations of intent are viewed from the vantage point of a reasonable person in the position of the other party. In determining **[*55]**

whether such manifestations constitute acceptance, disproportionate emphasis must not be put on any single act, phrase or provision. Rather, the Court must consider the totality of all these, in light of the attendant circumstances, the situation of the parties, and the objectives they were striving to obtain. n36

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n34 *See Dover Downs* at 16-17.

n35 *Id.*

n36 *Id.*

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Applying these principles to the facts of this case, I conclude that no reasonable person in WWFE's position could have viewed USA's letter and the blacklined version of Viacom's offer letter as an unconditional acceptance of Viacom's offer. USA's April 12 letter did state that USA treated Viacom's April 2 offer as triggering USA's right of first refusal, and that USA intended to exercise that right. But USA's letter, as well as the crossed out version of Viacom's offer, failed to accept unconditionally all of the material terms and conditions that related to the Series programs, the subject matter of the 1998 Agreement. Because USA's **[*56]** acceptance is at variance with its obligations under its right of first refusal, its April 12 letter operated as a counteroffer, not as a legally enforceable acceptance of an offer. I turn now to a brief discussion of the terms and conditions in the April 2 offer which were within the scope of the right of first refusal, but that USA failed to unconditionally accept.

First, I conclude that USA failed to match the territorial rights component of Viacom's offer for the television rights to the Series. As discussed at length above, a license for the four Series is the subject matter of the 1998 Agreement and defines the scope of the first refusal right. Specials, the "Smackdown!" series, the XFL, theme park attractions, theatrical motion pictures, radio syndication, pay-per-view in Canada, book publishing and a TV drama series are different subject matters and, thus, outside of the scope of USA's first refusal rights and obligations. The territory covered under a prospective license agreement for the four Series, however, clearly is not a separate subject matter, but rather is a material term correlated to the four Series.

An example of USA's flawed reasoning in this connection is Lynn's **[*57]** explanation at trial: "I think that our current agreement talks about a license of the four series in a defined territory of the United States. And I think that that is I guess what I would call the subject of the agreement. And therefore, we didn't have to--that is what our right of first refusal had to do with, was the subject of the agreement, being the license of the series in the territory. And this went beyond that scope; and therefore, I didn't think we had to match it." n37

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n37 Trial Tr. at 471 (Lynn).

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USA's mistake (as evidenced by the above testimony) is in assuming that Canada and the Carribean are outside the scope of the first refusal right because the 1998 Agreement extended only to the territory of the domestic United States and its territories. But the limit of the first refusal right's scope is not the four corners of the 1998 Agreement itself. Rather the limit is the subject matter of the Agreement (the four Series). Defining the scope of the first refusal right by the four corners of the Agreement **[*58]** transforms the first refusal sentence in section 5(b) into a right of renewal. In effect, under Lynn's misguided interpretation, USA's right of refusal would require any third party offer to mimic the terms of the 1998 Agreement, except for the price and time frame of the offer.

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

Second, I find that USA failed to match the choice of law and forum selection clauses in Viacom's **[*59]** offer. Viacom's offer provides that "the strategic alliance (and all of the components thereof) shall be governed by New York law, and each party agrees to submit to the exclusive jurisdiction of the courts located in New York." USA struck these provisions in their entirety. Again, Richard Lynn testified that "the

same basic concept" is captured in another provision of USA's response, which provides that the terms of USA's purported agreement with WWFE "shall be reflected in a long-form agreement (containing customary covenants, representations, warranties and indemnities) mutually satisfactory to USA and WWFE." n38

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n38 Trial Tr. at 483-484.

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WWFE, however, is entitled to USA's unequivocal acceptance of the material terms of the tendered third party offer. Lynn's explanation is irrelevant, because it does not account for the fact that the same language regarding a long-form agreement also appeared in Viacom's offer *in addition to* the choice of law and forum selection provision that USA chose to strike. USA **[*60]** cites no authority that choice of law and forum selection clauses are immaterial terms of a contract. In fact, [HN17]New York law holds that injection of a forum selection clause into a proposed contract is a material alteration of the contract. n39 Choice of law and forum are undoubtedly material terms. They appear in virtually every contract USA offered into evidence in this case. It is not enough, in my opinion, for a party to cross out such a material term and compel the other contracting party to accept assurances (made at trial, but not before) that a comparable term will be agreed to later. [HN18]New York law teaches that overt manifestations of intent are what counts, not a party's (or its counsel's) self-serving statements of future intention, statements which USA did not make to WWFE on April 12 when it purported to accept the April 2 offer. n40 By striking the choice of law and forum selection terms of Viacom's offer, USA's response varied materially from that offer insofar as it related to the Series and, thus, USA failed to match.

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n39 *General Instrument Corp. v. Tie Manufacturing, Inc.*, 517 F. Supp. 1231, 1235 (S.D.N.Y. 1981) (applying New York law); *Lorbrook Corp. v. G&T Indus., Inc.*, 162 A.D.2d 69, 73, 562 N.Y.S.2d 978 (N.Y. Supr. 1990).

**[*61]**

n40 *See Brown Bros. Electrical Contractors, Inc. v. Beam Construction Corp.*, 41 N.Y.2d 397, 361 N.E.2d 999, 1001, 393 N.Y.S.2d 350 (N.Y. Ct. App.1977); *"Industrial America," Inc. v. Fulton Industries, Inc.*, Del. Supr., 285 A.2d 412, 415 (1971).

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Third, I find that USA failed to match the terms of Viacom's offer concerning certain cross-promotional obligations directly related to the Series programs. Viacom's offer requires that Viacom "cross-promote the WWFE programming contemplated hereunder across its various media platforms and outlets (including television, radio and billboards)." USA concedes that it could have purchased radio time and rented billboards so as to match Viacom's promotional commitment. n41 Nonetheless, USA crossed out all of the cross-media promotional platforms in the tendered offer.

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n41 Peterman Dep. at 193-195.

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USA struck these explicit terms even though one of its **[*62]** executives, Baker, admits that billboards qualify as cross-promotion and that USA could have purchased them. Baker explained that USA deleted the reference to billboards, radio and television because USA did not want to be "specific." n42 During the trial, USA's counsel argued that, although USA struck the words "television, radio, and billboards" from Viacom's offer, USA added the phrase "as well as any additional promotion." These words, counsel insisted, capture the same intention as the explicit terms that Viacom used. Finally, USA also contends that the cross-promotional terms referring to television, radio and billboards were illusory in any event, as Viacom's offer did not guarantee a fixed amount of cross-promotional expenditures, but instead promised only to review annually the level of such promotion with WWFE.

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n42 Baker Dep. at 56.

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These explanations and arguments fall victim again to [HN19]the fundamental principle that a right of first refusal holder may not defend a refusal to match a term in the third **[*63]** party's offer on the ground that the third party "didn't mean it." USA effectively treats cross-promotion as an immaterial term. It is not. No evidence in this case suggests that the specific forms of cross-promotion of the four Series included in Viacom's April 2 offer is an insubstantial element of the consideration for the Series. To the contrary, the parties agree that cross-promotion is increasingly prevalent in a world of media conglomerates. Ultimately, therefore, I am not persuaded that USA's equivocal match of portions of the cross-promotion provision in Viacom's offer constitutes an unconditional acceptance. Instead, I find that USA effectively made a counteroffer to WWFE regarding the form and type of promotion it would provide under the agreement.

Fourth, based on my assessment of the testimony at trial and the situation of these parties, I find that USA failed to match the provision of Viacom's offer promising "no regularly scheduled preemption." WWFE has long suffered from USA's practice of preempting WWFE programming three weeks out of every year for the U.S. Open and Westminster Kennel Club Dog Show. As Linda McMahon testified at trial: "We have the world's longest **[*64]** running soap opera. When you interrupt the viewing pattern of your audience, even if it's just, as USA would refer to it, almost momentary, hiccup or blip, you can affect that viewing audience. [And] that affects the other parts of your business." n43 To make matters worse, because USA's preemptions are regularly scheduled well in advance, Time Warner's competing WCW is able to plan ahead to capture WWFE's audience when USA preempts WWFE's programs.

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n43 Trial Tr. at 937.

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This situation strained the relationship between WWFE and USA. As a result, WWFE sought and obtained, as an element of the four Series license component of the proposed alliance with Viacom, a commitment from Viacom that there would be no regularly scheduled preemption of WWFE programming, absent an incident on the order of a national disaster. In other words, WWFE's Series would be televised at their regular times 52 weeks a year. Both WWFE and Viacom understand the words "no regularly scheduled preemption" to encompass this concept. This **[*65]** was the consistent, unequivocal testimony of McCluggage, Vince McMahon and Linda McMahon, and I find it persuasive and credible.

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

Despite their plain meaning, USA argues that it matched this term because it chose not to strike the term "no regularly scheduled preemption." By not striking, USA contends that it has matched unconditionally the terms of Viacom's **[*66]** offer. But USA's executives have made clear that WWFE will "have to live with" the regularly scheduled annual preemptions of WWFE's cable series for the U.S. Open and Westminster Dog Show if the Series remain on USA beyond the 1999-2000 television season. n44 These statements have infuriated the McMahons, who have characterized USA's purported match of Viacom's no preemption term as "a lie." n45 Having assessed Lynn's trial testimony on this precise question, I agree that USA's literal acceptance of the "no regularly scheduled preemption" term is more sleight of hand than it is a good faith intention to accept unconditionally a material term of a third party offer. Stated simply, USA made it clear during the trial that it intends to televise the dog show. It also intends, in my opinion, to televise the U.S. Open, notwithstanding its last ditch argument that it could always pay off the Open and honor WWFE's no preemption clause.

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n44 Trial Tr. at 1221-22.

n45 Trial Tr. at 967-968; Trial Tr. at 1222.

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In short, **[*67]** USA's eleventh hour arguments designed to minimize the importance of this term, or to assure its future intention to comply therewith, do not impress me more than the actual conduct of the parties over the past years. Accordingly, I find as a matter of fact and law that USA failed to match unconditionally the "no regularly scheduled preemption" term of Viacom's offer.

Finally, I pause to describe a striking example of USA's remarkably opportunistic effort to match Viacom's offer. As noted above, USA declined to match material aspects of the territory and cross-promotion provisions of the Viacom offer. One underlying fact, common to both the territory and cross-promotion terms, is that USA lacked the "in house" capability to deliver on either provision. That is, its signal does not currently reach Canada and the Caribbean, territories covered under the Viacom offer, and it does not own radio or billboard assets, cross-promotional platforms promised in the Viacom offer.

These provisions of the Viacom offer, which USA was required to match, were burdensome to USA to the extent that they would require USA to enter into some sort of subcontracting relationship with a third-party in order **[*68]** to perform. To my mind, USA's rationale for declining to match them is largely a pretext, the purpose of which was to excise from the April 2 offer provisions that it could not easily match, and "accept" the offer on its own terms--and not the exact terms of the third-party offeror.

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

Bargaining over this right led WWFE and Viacom to a compromise position in which Viacom would get a "first negotiation/last refusal" right with respect to new broadcast programming--a compromise position tied into the overall value Viacom was providing WWFE and only agreed upon, as a practical matter, because of Viacom's significant broadcast assets in the CBS and UPN **[*69]** networks.

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

In the end, therefore, USA's response to Viacom's offer failed to constitute a legally effective acceptance under New York law. [HN20]In all non-Uniform Commercial Code transactions, as in this case, New York follows the rule that a qualified acceptance is nothing more than a counteroffer. n46 "Indeed, whenever a purported acceptance is even slightly at variance with the terms of an offer, the qualified response operates as a rejection **[*70]** and termination of - and substitution for - the initially offered terms." n47

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n46 *Marlene Industries Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 332, 408 N.Y.S.2d 410, 380 N.E.2d 239 (N.Y. 1978) (citing *Poel v. Brunswick-Balke-Collender Co.*, 216 N.Y. 310, 110 N.E. 619 (1915)).

n47 *Homayouni v. Paribas*, 241 A.D.2d 375, 660 N.Y.S.2d 413, 414 (N.Y. App. Div. 1992); *Watts v. Carter & Sons, Inc.*, 207 A.D. 656, 202 N.Y.S. 852, 854 (N.Y. App. Div. 1924).

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Put differently, [HN21]New York law holds that "to conclude an agreement, the acceptance must meet and correspond with the offer in every respect, neither falling short of nor going beyond the terms proposed, but meeting them exactly at all points and closing them just as they stand." n48 Under USA's own interpretation of § 5, which I agree limits the scope of its rights to the Series programs, USA's "acceptance" failed to match each and every material term that related in a reasonable way to the **[*71]** Series and was contained in Viacom's offer. Under established New York contract law, therefore, USA's selective acceptance does not constitute a legally effective acceptance of Viacom's offer.

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n48 22 NY Jur.2d Contracts § 52 (1999) (*citing* Barber-Greene Co., Inc. v. M.F. Dollard, Jr., Inc., 239 A.D. 655, 269 N.Y.S. 211, 215-16 (N.Y. App. Div. 1934)).

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The conclusion I reach, that USA failed to match the material terms of Viacom's April 2 offer pursuant to USA's right of first refusal, is required by the applicable New York contract law principles cited above. It is not, in my opinion, an inequitable or unfair result in light of all the circumstances. For example, I would note the high level of tactical maneuvering in this case, on the part of all the participants. In any event, USA had possible alternatives open to it that might have produced a different outcome.

When WWFE tendered the April 2 Viacom offer (an offer that USA undoubtedly knew was "in the wings"), USA had every right, indeed [HN22]some **[*72]** authorities hold that it had an affirmative legal obligation, n49 to undertake a reasonable investigation of any terms or conditions of the third party offer that were unclear to USA. To the extent USA believed particular terms in the Viacom offer might not relate to the Series, and thus might not be within the purview of its right of first refusal, its recourse was to request additional information from WWFE. Notwithstanding the opportunity to seek clarification from WWFE during the ten day period between receipt of Viacom's offer on April 3 and USA's response on April 12, USA did not call a single WWFE representative to seek guidance on questionable deal points. Lynn testified at trial that USA was "afraid what would happen if we talked to them during this period." n50 Whatever tactical thinking animated this decision to abjure direct communication with WWFE, it seems, from my commonsensical perspective, to have been destined to bear bitter fruit.

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n49 *See* John D. Stump & Assoc., Inc. v. Cunningham Memorial Park, Inc., 187 W. Va. 438, 419 S.E.2d 699, 706 (W. Va. Supr. 1992); Koch Indus., Inc. v. Sun Co., Inc., 918 F.2d 1203, 1212 (5th Cir. 1990).

**[*73]**

n50 Trial Tr. at 479-81.

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Additionally, [HN23]USA clearly had the right and the opportunity to secure interpretive assistance from the courts before, rather than after, it responded to Viacom's offer. Rather than seek declaratory or injunctive relief as to whether Viacom's April 2 offer triggered its right of first refusal under § 5, USA chose to treat the offer as a triggering offer and attempted to match it. It seems that USA chose this avenue for tactical reasons (*i.e.*, USA could not have moved for specific performance otherwise, a remedy that might afford it a strategically superior contractual position). USA's actions, viewed in this light, do not evoke the sympathy of a court of equity and provide no basis for tempering the outcome required under controlling principles of New York contract law.

III. CONCLUSION

For all of the reasons stated above, I conclude that USA failed to match unconditionally a bona fide third party offer WWFE tendered to it concerning television distribution rights to the Series, in accordance with § 5 of the 1998 Agreement. Because USA cannot prevail on the merits **[*74]** of its claim, it is not entitled to injunctive relief against WWFE and Viacom or to specific performance.

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

**ORDER**

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

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

William B. Chandler III, Chancellor

Dated: June 27, 2000