

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

VS&A COMMUNICATIONS )  
PARTNERS, L.P., )

Plaintiff, )

v. )

PALMER BROADCASTING LIMITED )  
PARTNERSHIP and PALMER )  
COMMUNICATIONS INCORPORATED, )

Defendants. )

Civil Action No. 12521

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MEMORANDUM OPINION

*Richards, Layton & Finger*

Date Submitted: July 30, 1992  
Date Decided: November 13, 1992

William D. Johnston, Esquire and Maureen D. McGlynn, Esquire, of YOUNG, CONAWAY, STARGATT & TAYLOR, Wilmington, Delaware; OF COUNSEL: Bruce E. Fader, Esquire, Charles S. Sims, Esquire and Stephen D. Solomon, Esquire, of PROSKAUER, ROSE, GOETZ & MENDELSON, New York, New York; Attorneys for Plaintiff.

C. Malcolm Cochran, IV, Esquire, David L. Zicherman, Esquire and Helen M. Richards, Esquire, of RICHARDS, LAYTON & FINGER, Wilmington, Delaware; OF COUNSEL: Michael D. Hays, Esquire, of DOW, LOHNES & ALBERTSON, Washington, D.C.; Attorneys for Defendants.

ALLEN, Chancellor

This is my decision following trial of this contract case, seeking specific performance of an alleged agreement to negotiate in good faith. For the reasons that follow, the complaint will be dismissed, as will the counterclaim, each party to bear its own costs.

I.

This action arises out of failed negotiations looking towards the purchase and sale of certain broadcasting assets owned by Palmer Broadcasting Limited Partnership. The assets in question include television stations in Des Moines and Oklahoma City and radio stations in Des Moines and Naples, Florida ("the Stations").

Plaintiff is the prospective buyer, VS&A Communications Partners, L.P. ("VS&A"). VS&A is an affiliate of the investment banking firm Veronis, Suhler & Associates, Inc. It was founded in 1987 with the mission to generate capital gains for its limited partners, through the leveraged acquisition of controlling interests in broadcasting companies, the operation of such companies for three to five year periods, and the selling of them thereafter at a profit.

In the summer of 1991, VS&A learned of Palmer's interest in selling the Stations. An acquisition of the Stations would fit perfectly into VS&A's plan. The firm thus opened discussions with Palmer which lead to the submission of two written proposals in September of 1991. Further negotiations

followed. By November 5, 1992 great progress had been made and a detailed document of that date was executed by both parties. That document does not purport to be a final agreement. It expressly states that it is "a preliminary understanding" and in material part "non-binding".

Following the signing of the November 5 document, further negotiations proceeded in good faith. At some point, perhaps in late February or early March, the chemistry of the negotiations began to change. From Palmer's point of view several factors contributed to this, in my opinion. VS&A's representatives were aggressive negotiators on relatively small points. By late February that approach was beginning to affect the psychology of the seller's representatives. In addition, financing the transaction was proving more difficult than Palmer had expected it would be. Time, which was a concern to Palmer, was passing. Then Palmer was surprised in early March to learn the terms that were being proposed for the seller's note that would form part of its consideration. For good reason or not, trust was diminished. The Stations themselves were performing better by 1992 and by March alternative ways to generate cash for Palmer shareholders seemed relatively more attractive.

In all events, after giving VS&A several extensions in order to arrange financing, Palmer decided in March 1992 to go no further. When this became clear to VS&A in later March, its hard bargainer posture collapsed. In an effort to save its

deal it attempted to capitulate on all open points. It committed more of its own money to the deal and, at the last available moment, on April 1, 1992 presented what it said were the financial undertakings necessary to show it could finance a closing.

By this time, however, Palmer, in my judgement, had no further genuine interest in selling the Stations to VS&A. It rejected the financial commitments as not in the usual form and walked away from the negotiations.

## II.

This suit was filed on a novel theory. Plaintiff acknowledges that no final agreement respecting the sale of the Stations was signed. It claims, however, that all of the material terms of the sale were negotiated and agreed upon in fact. Moreover, and most importantly, it claims that the November 5 writing that the parties did sign must be construed to contain an enforceable promise to negotiate in good faith towards the execution of a final agreement. Plaintiff asserts that the nature of that obligation is that once the parties have reached consensus with respect to a particular term of the proposed transaction, they are legally obligated to move on to another aspect of the proposed transaction, in order to try to reach agreement on that, and, in that fashion, to proceed through all open items in order to try in good faith to reach final agreement. What this obligation of good faith means to

plaintiff is that a party may not in good faith repudiate the de facto agreements already reached on a negotiated aspect of the transaction, before the parties have finished their attempt to negotiate all of the open terms.

On this view a host of agreements (e.g. price) reflected, for example, in the November 5 writing, are beyond the power of Palmer rightfully to repudiate even though that writing expressly makes them non-binding. The consequence of this theory, as applied to VS&A's vision of the relevant facts of this case, is that virtually all of the terms of an agreement of sale have been agreed to. They could not on April 1 in good faith be repudiated. Plaintiff asserts that since it had agreed with Palmer or capitulated on all material points by April 1, 1992, all that Palmer had legal power to do on that date, was to make a good faith determination whether VS&A's financial commitments, which were furnished then, were "in the usual form". Since, in plaintiff's view, they were, Palmer had the legal obligation (created by its November 5 agreement) to accept them and to complete any further details necessary to execute a final contract. In failing to do this, it is claimed that Palmer breached the obligation it created on November 5.

VS&A does not seek damages for this alleged breach, such as amounts it expended in pursuing the negotiations. (See Paragraph 10, at p. 9 infra.) Rather it seeks to achieve the aim of the contract itself, the acquisition of the Stations. It does this by requesting an order requiring Palmer to further

negotiate with it in good faith. Since VS&A does assert that all material terms have been agreed to and that Palmer has no legal right to simply terminate the relationship, it is apparent that the relief sought is simply a veiled effort to achieve an order requiring defendants to transfer the Stations to VS&A in exchange for the consideration it stood ready to pay on April 1, 1992. (The significance of that date is explained below.)

To all of this Palmer offers an anxiously lengthy list of answers.<sup>1</sup> I find it unnecessary to discuss a good deal of Palmer's argument, finding it peripheral and unimportant to the central and dispositive issues the case raises. It may be that, taking the view of this case that I now do, it would have been permissible to grant summary judgment of dismissal to defendants. That course would have saved the substantial effort and expense entailed in the trial that has now been completed. I declined to do so. The written document was not a final integrated agreement<sup>2</sup> and it did seem incumbent upon me to consider such admissible evidence as the parties might

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<sup>1</sup>Palmer's position is that the November 5 letter is merely an agreement to negotiate that is unenforceable because Palmer has not reached a binding agreement with VS&A on any of the material terms of the proposed asset purchase. Palmer also claims that, to the extent any binding agreement to negotiate did exist, VS&A has failed to live up to its own obligations by repudiating the agreement and failing to provide the required financing commitments. In addition, Palmer argues that its agreement to the November 5 letter, and subsequent extensions of the deadline for obtaining financing, was induced by fraudulent representations on the part of VS&A that it could obtain the financing required to perform the transaction at the price stated in the letter.

<sup>2</sup>Compare Pellaton v. Bank of New York, Del. Supr., 592 A.2d 473, 478 (1991).

submit in support of their claims or defenses. Klair v. Reese, Del. Supr., 531 A.2d 219 (1987). Having now heard and evaluated that evidence, however, I find that it does not establish the existence of the right to relief that plaintiff claims.

### III.

Since this case most centrally does involve the legal meaning of the November 5 writing, I start by excerpting its terms. Thereafter a brief account of events following the signing of that paper is set forth.

#### A. The November 5 Letter Agreement

It is marked Joint Trial Exhibit 1 ("JTX1") and takes the form of a letter from Palmer Communications Incorporated ("PCI") to Jeffrey T. Stevenson of VS&A. PCI is the general partner of Palmer Broadcasting, L.P. The letter was, however, drafted by VS&A's counsel. JTX1 is slightly more than 6 single space, typewritten pages in length. It is, according to its terms: "to confirm the preliminary understanding... for the sale... of commercial television stations WHO-TV... and KFOR-TV and commercial radio stations WHO-AM and KLYF-FM...".

Paragraph 1 sets forth, in four paragraphs, the price and terms of payment. ("Purchaser will purchase the assets of the Stations from Palmer for a total consideration of \$70,500,000 .... In addition, Palmer will retain an interest up to \$280,000 a year for five years, in... tower rental income....

Payment to Palmer shall be made in the following manner...".) This paragraph is made "not binding" by Paragraph 11 of the letter.<sup>3</sup>

Paragraph 2 is a price adjustment mechanism designed to adjust the purchase price, according to a stated formula, if the 1991 financial results (gross operating profit) for the Stations was greater than or less than \$9,100,000. This paragraph is made "not binding" by Paragraph 11 of the letter.

Paragraph 3 sets forth generally the property subject to the agreement. This paragraph is made "not binding" by Paragraph 11.

Paragraph 4 states that Purchaser shall use reasonable efforts to provide Seller with "written financing commitments in the usual form which provide for all financing necessary to consummate the transaction" within 60 days but in any event in no less than 90 days. It was this provision that was extended from time to time, finally to expire on April 1, 1992. Paragraph 4 concludes:

In the event Purchaser fails to provide Palmer satisfactory financing commitments within the above-described period, Palmer

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<sup>3</sup>In my opinion the parties never agreed to bind themselves to the price term of a contract. I thus reject as not the best, most coherent interpretation of the whole document, VS&A's argument that the binding nature of Paragraph 14 (see below) does have that effect. In any event, the existence of a binding commitment concerning price would not be critical to the analysis I make of this case. Most fundamentally what defeats plaintiff's theory is the absence of an agreement by Palmer to be bound to sell. This defect would not be cured by a "binding" agreement on price or on any one or more terms standing alone. See Field v. Golden Triangle Broadcasting Inc., Pa. Supr., 305 A.2d 689, 692 (1973) ("... what is necessary is that the parties agree to all essential terms and intend the letter to be binding on them.").

may terminate its negotiations of this transaction.

This paragraph is made "binding on the parties" by Paragraph 11.

Paragraph 5 provides that if "Purchaser provides the financing commitments..., within five days thereafter the parties will complete the negotiation and execution of a definitive agreement on terms and conditions mutually agreeable to the parties." This paragraph is made "not binding" by Paragraph 11.

Paragraph 6 provides for the payment of earnest money (\$1 million) upon execution of "the definitive asset purchase agreement". That future deposit was to act "as liquidated damages for Palmer in the event of default". ("Not binding.")

Paragraph 7 contemplates the drafting of a non-compete agreement. ("Not binding.")

Paragraph 8 provides that "After the date hereof and until closing... and/or termination of the definitive agreement, Palmer will conduct the business of the Stations in the ordinary course...". This paragraph is "binding on the parties" under Paragraph 11.

Paragraph 9 is a standstill which provides, in part, that

between the date hereof and the signing of a definitive agreement, Palmer... shall not... solicit, initiate or encourage submissions of proposals or offers... or negotiate or pursue discussions with any other person or entity.... Palmer may, however, respond to any telephone inquiry by stating that Palmer has entered into an agreement for the sale of the Stations...

and that if it doesn't close for any reason Palmer will get in touch with the entity making the inquiry."

The paragraph is made "binding" by Paragraph 11.

Paragraph 10 provides that each party is responsible for its own transaction fees and expenses, whether or not the proposed transaction is consummated. Paragraph 10 is "binding."

Paragraph 11 addresses the question of the binding or non-binding character of the obligations set forth in the November 5 writing:

It is understood that this letter of intent merely represents our present understanding with respect to the intended transaction described herein and is not binding upon and creates no rights, either expressed or implied, in favor of any party, except that the provisions of Paragraphs 4, 8, 9, 10, 12, 13 and 14 shall be binding upon the parties. Except for those provisions, binding commitments and obligations with respect to the transaction will arise only upon the execution of the definitive agreement on mutually acceptable terms.

Paragraph 12 governs confidentiality and is "binding".

Paragraph 13 affords VS&A access to facilities, personal and financial records of the Stations and is "binding".

Paragraph 14 provides for cooperation in connection with required FCC applications. In the event approval for the transfer of radio licenses is not possible because Purchaser cannot arrange timely and satisfactory assurance of its financial qualification to purchase the Stations, "Purchaser may elect either to (a) terminate the transaction... (b)

acquire ... only the television stations... or (c) acquire the television stations, with an option... to acquire the radio stations in a separate transaction...". The paragraph contains a price adjustment mechanism for use in the event that one of the options provided is elected. In addition it provides an express obligation, in that event, to "negotiate in good faith any issue that results from the separation of the businesses of the stations...". Paragraph 14 is listed as "binding on the parties" in Paragraph 11.

B. The Parties' Negotiations Following the Signing of the November 5 Letter

After the signing of the November 5 letter, Mr. Ryan, the CEO of Palmer, informed the Palmer Board that "[c]onsistent with the decision of the Board at our last meeting October 23, 1991, we have finalized negotiations with Veronis Suhler, and today executed a letter of understanding between the parties." (PTX 16).<sup>4</sup> A subordinate officer of Palmer issued a press release stating:

Palmer Communications Incorporated has reached an agreement in principle with Hughes Broadcasting Partners, a television station group financed by VS&A Communications Partners L.P.... to acquire WHO-TV, Des Moines, Iowa and KFOR-TV, Oklahoma City, both NBC affiliates, and radio stations WHO/KLYF, Des Moines, Iowa.

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<sup>4</sup>Defendants assert that Ryan was without authority to bind the corporation, despite the existence of minutes of the board of directors purporting to confer that power. I skip over the issue that testimony raises concerning the validity of those minutes, as I conclude that given the transaction, the officer (CEO) and the circumstances, VS&A reasonably believed that Mr. Ryan had authority. Thus the doctrine of apparent authority has application here. E.g. Greene v. Hellman, N.Y.Ct.Apps., 433 N.Y.S.2d 75 (1980).

(PTX 59); (see also Tr. 121).

After signing the November 5 letter, VS&A began arranging financing for the acquisition. (See Tr. 123). VS&A, with the help of two of the Stations' senior managers who were expected to participate with VS&A in the acquisition, MacQueen and Adams, prepared a private placement memorandum and contacted dozens of prospective lenders. (See *id.*). The memorandum describes the transaction outlined in the November 5 letter, and sets forth the expected sources and uses of funds for the transaction.<sup>5</sup> The amounts stated are consistent with the representations made to Palmer in the November 5 letter.

Mr. Stevenson, VS&A's CEO, testified that VS&A met with twenty of its prospective lenders at least once and sometimes as many as seven times each. (Tr. 146). Two of the lenders (Bank of Boston and Norwest) became strongly interested in the transaction. (Tr. 147). By late December 1991, VS&A realized, however, that raising the full \$50 million in senior bank financing that it had said it could obtain, would be difficult, if not impossible. (Tr. 153-55). Bank of Boston had indicated

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<sup>5</sup>Sources of funds:

Senior-secured debt (a)	\$ 50,000,000
Subordinated debt [mezzanine]	6,000,000
Seven year non-interest bearing promissory note issued to Seller	7,000,000
Equity funds	<u>13,000,000</u>
	\$ <u>76,000,000</u>

Uses of funds:

Cash paid at closing	\$ 63,250,000
Seven year non-interest bearing promissory note issued to Seller	7,000,000
Transaction fees and related expenses	3,250,000
Additional working capital	<u>2,500,000</u>
	\$ <u>76,000,000</u>

(JTX 27 at 02269).

that it would be comfortable lending \$20 million as part of a syndicated \$45 million secured loan. But even if VS&A obtained an additional \$3 million loan from other sources, this plan would still leave VS&A \$2 million short of its \$50 million goal. (Tr. 155).

Meanwhile negotiations continued between the parties concerning the Definitive Asset Purchase Agreement. Realizing that it could not meet the approaching deadlines for obtaining financial commitments sufficient to allow FCC filings to be made and to satisfy the requirements of Paragraph 4 of the November 5 letter, VS&A contacted Palmer and requested an extension. VS&A's Stevenson gave Ryan a "somewhat guarded, optimistic report" of the status of VS&A's discussions with potential lenders. (PTX 18); (Ryan Cross, Tr. 1141). Pursuant to that report, Ryan granted an extension to January 15 for VS&A to provide the FCC with reasonable assurance<sup>6</sup> and to February 15 for obtaining financing commitments. (JTX 2). Mr. Ryan claims that Palmer would not have granted this extension but for Mr. Stevenson's optimistic report that: "We're almost there.... We are close. We're very optimistic. There are some problems, but we are going to get them resolved. It looks good." (Ryan Cross, Tr. 1141).

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<sup>6</sup> The reasonable assurance filing is a statement to the FCC that a proposed buyer is reasonably assured of obtaining the necessary financing. Such a filing allows the FCC to begin the process of determining whether the proposed transfer will be approved.

On January 3, 1992, Bank of Boston sent term sheets to VS&A proposing to extend loans but proposing the inclusion of an Excess Cash Flow Recapture provision. This provision would require VS&A to pay 50% of the Stations' excess cash flow<sup>7</sup> to the secured lenders and therefore required that Palmer could receive payment on its \$7 million seller's note only to the extent of the remaining 50% of excess cash flow.<sup>8</sup>

VS&A did not inform Palmer of Bank of Boston's position on an Excess Cash Flow Recapture Provision until March 11. (Stevenson Dir., Tr. 190) (Ryan Cross, Tr. 1182, 1190) When he learned of it, Ryan reacted as if the fundamental economics of the deal had been changed and he had been deceived. I am inclined to believe that many businessmen or women, who were otherwise happy with the deal, would not believe the proposed excess cash flow provision was, in the financial circumstances, so important as defendants now would make it appear. But, nevertheless the Bank's position did represent a change in Palmer's perception of the deal and one that it was under no legal obligation to accept.

In retrospect Palmer would like now to paint the whole course of negotiations by VS&A as deceptive. This too I find

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<sup>7</sup> Excess cash flow being defined as operating income plus non-cash expenses, required debt service, changes in working capital and capital expenditures.

<sup>8</sup>The practical impact of this provision, given the Stations' projected earnings, is that it could result in Palmer not receiving payment on the \$7 million note at the previously "agreed" rate of \$1 million per year at least during year one. In addition, whether or not Palmer would receive full payment thereafter would to some extent be at the discretion of VS&A, because VS&A would have the option of increasing capital expenditures and thereby reducing the amount of cash flow available to pay Palmer.

to be unfounded, litigation-inspired reconstruction. I cannot accept as accurate Palmer's characterization of these negotiations. Plainly Stevenson was trying to negotiate the best feasible financing he could on one side, while negotiating the best acquisition contract he could on the other. In this process, the law constrains him from making untruthful or misleading statements of material fact. But I do not conclude from the evidence that Stevenson sought to deceive Mr. Ryan as to relevant facts.

In all events, On March 11, VS&A took three positions that would lead ultimately to the termination of the negotiations. First, VS&A requested that Palmer agree to provide senior secured financing of \$2-3 million as suggested by the Bank of Boston, on top of the seller note. According to Mr. Ryan, VS&A stated that if Palmer refused to do so, it would likely back out of the transaction. I accept Mr. Ryan's testimony as factual. Second, also on March 11, VS&A informed Palmer about the Excess Cash Flow Recapture Provision and, finally, it also stated that the only way by which the financing for the transaction could be obtained would be if Palmer's proposed \$7 million seller note were converted to preferred stock. According to Palmer, VS&A presented this proposal as the best that could be arranged given the financing market. I accept this as true as well.<sup>9</sup>

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<sup>9</sup>Palmer characterizes VS&A's stance as a repudiation of the terms of the November 5 letter which calls for a \$7 million seller note. I cannot agree with that characterization. Surely, these positions were not so final and

In reaction to these positions, Ryan, in my judgment finally soured on VS&A completely. He called an emergency meeting of the Palmer Board for March 19 at O'Hare Airport in which he explained the new positions taken by VS&A. At the meeting, the Palmer Board voted to terminate its discussions with VS&A and to take the Stations off the market altogether.

Although Palmer had decided to terminate its negotiations, it did not inform VS&A of this fact. In a March 20 conversation with Mr. Stevenson from VS&A, Mr. Ryan merely stated that the Board had rejected VS&A's proposals and that it was especially concerned by the proposed conversion of the seller note to preferred stock.

Almost immediately, VS&A began to offer numerous concessions to Palmer in order to close the transaction. On March 20, (PTX 32) VS&A offered to pre-pay \$3 million of the seller note and provide collateral for the remaining \$4 million in the form of first mortgages on Iowa real estate. According to Ryan, Palmer was stunned by VS&A's sudden reversal of position. Given the early statement that it could not improve its offer, Ryan testified that he now lost all faith in VS&A's credibility.

On March 23, VS&A again improved its bid by offering to contribute additional equity to the deal, although it had previously stated that no further equity could be obtained.

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unequivocal as to permit a reasonable negotiator to think that the other side of the negotiation was repudiating the earlier agreements, rather than, in effect, seeking to re-negotiate them.

The increased equity would allow the entire discounted present value of the seller note to be pre-paid, at a 12.5% annual discount. This potentially removed the important question of the amortization of the seller's note from the negotiations.

But by this time VS&A simply could not do enough to placate Palmer and capture the Stations. In response to VS&A's sweetened offer, Palmer called a special Board meeting for March 27. At the meeting the Board discussed the merits of the VS&A proposal, noting that the station's performance had improved such that their market valued had increased by \$7-10 million. Palmer maintains that at this point it believed it could no longer trust VS&A to live up to any of its commitments, and if it continued to negotiate, it could again be confronted with much less favorable terms at closing. Whatever its motivations, the Palmer Board voted to reject VS&A's sweetened offer on March 27. Ryan sent a one sentence letter to that effect to VS&A, and in effect ended all discussions.

VS&A nevertheless secured commitment letters and faxed them to Palmer on April 1, the day of the deadline in Paragraph 4 of the amended November 5 letter. On April 2, Palmer sent a letter to VS&A stating that the November 5 letter had expired because VS&A had failed to provide the financing commitments as required by Paragraph 4 of the letter. Palmer argues that the letters are not binding commitments as required by the November 5 letter, and are also insufficient in amount

and that therefore the letter agreement has expired by its own terms because VS&A has failed to obtain the required financing.

Faced with Palmer's refusal to continue discussions, VS&A filed this action seeking to compel them to do so.

#### IV.

At the core of this dispute, as I perceive it, are the questions whether the November 5 letter agreement creates a legal obligation on the part of Palmer to negotiate in good faith with VS&A; if so, what specifically does that obligation entail; has any such obligation been breached and, if so, what remedy may be available.

##### A. Obligations to Negotiate

Generally, under applicable New York law, obligations to negotiate are said to be invalid or unenforceable where material aspects of the contract remain open. See e.g., Candid Productions Inc. v. International Skating Union, 530 F.Supp. 1330, 1336-37 (S.D.N.Y. 1982) (holding that contracts for first negotiation in good faith are "so vague and indefinite that they are unenforceable"); Jillcy Film Enterprises, Inc. v. Home Box Office, Inc., 593 F.Supp. 515, 521 (S.D.N.Y. 1984) (holding a contract to "negotiate exclusively and in good faith with respect to the terms... relating to the... exploitation of [a] documentary [film]" to be unenforceable on grounds of uncertainty and vagueness because no definite objective

criteria were provided in the agreement).<sup>10</sup> Courts are especially reluctant to grant injunctive relief to enforce agreements to negotiate in good faith. Joseph Martin, Jr., Delicatessen v. Schumacher, N.Y.Ct. App., 436 N.Y.S. 2d 247, 249 (1981) (the rule that a mere agreement to agree is unenforceable "applies all the more... when... the extraordinary remedy of specific performance is sought"); Candid, at 1336-37, ("to issue a decree of specific performance [to enforce a good faith negotiation clause] would require the court to enter into the realm of conjecture"); Necchi, S.p.A. v. Necchi Sewing Machine Sales Corp., 348 F.2d 693 (2d. Cir. 1965) (rejecting as unenforceable a good faith negotiation clause because it is impossible to say what relief would be appropriate or to assess any damages)

At the same time, an agreement to negotiate a contract in good faith may be enforced if all the material terms of the contract have been agreed to by the parties. For example, in Teachers Ins. & Annuity Ass'n of America v. Tribune Co., 670 F.Supp. 491, 499 (S.D.N.Y. 1987), damages were awarded against a borrower who had signed a loan commitment and thereafter refused to agree to a resolution of the minor terms, such as appropriate documentation. In the loan commitment letter, both

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<sup>10</sup> See also Pinnacle Books, Inc. v. Harlequin Enterprises, Ltd., 519 F.Supp. 118 (S.D.N.Y. 1981) (agreement to use best efforts to reach agreement on renewal option, before contacting other parties, unenforceable because no objective standards by which efforts are to be measured); Mocca Lounge, Inc. v. Misak, N.Y. Supr., 462 N.Y.S. 704 (1983) (implied promise to use reasonable good faith efforts to negotiate lease held unenforceable where no agreement as to material terms had been reached)

parties had agreed to be bound to all substantive economic terms of the transaction, including the interest rate, principal amount and collateral involved in the loan.

In another case involving the same plaintiff, Teachers Ins. & Annuity Ass'n of America v. Butler, 626 F.Supp. 1229 (S.D.N.Y. 1986), a borrower who had signed a loan commitment was held to have assumed a binding obligation to negotiate the remaining non-essential terms of the transaction in good faith. The Court ordered the borrower to pay damages in the amount of the difference between the interest rate specified in the commitment letter and the lower interest rate the borrower secured by breaching its obligations. Again, the commitment letter which the parties had signed bound the parties to all of the essential economic terms of the transaction including interest rates, principal amount, and a "Lock-in Period" during which prepayment of the loan was prohibited. The borrower refused to negotiate with the lender concerning the amount of a prepayment penalty, designed to prevent the borrower from frustrating the lender's prepayment rights. Nevertheless, the court concluded that all essential terms of the loan contract had been agreed to between the parties, and held the defendant liable for failing to fulfill its obligation to negotiate in good faith. There exist other instances in which a covenant to negotiate has been held valid.<sup>11</sup>

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<sup>11</sup> See, e.g., Channel Home Centers Div. of Grace Retail Corp. v. Grossman, 795 F.2d 291 (3d Cir. 1986) (agreement to negotiate final lease agreement in good faith held enforceable where all material terms: annual rent for

While courts applying New York law have, on occasion, enforced contractual obligations to negotiate in good faith, an absolute precondition to such enforcement has been the existence of a binding agreement between the parties as to all of the essential terms of the contract. The courts have recognized that:

"[n]otwithstanding the intention of the parties at the time, if the agreement [which is the subject of negotiations] is too fragmentary, in that it leaves open terms of too fundamental importance, it may be incapable of sustaining binding legal obligations.

Tribune, 670 F.Supp. at 497.

B. What obligation is created by Paragraph 4 of the letter agreement?

The November 5 letter agreement does contain an express agreement to negotiate in good faith with respect to the details of a price adjustment (see ¶14 above), but that provision is not in issue here. As concerns this case, there is no express covenant to continue negotiations, but there is in Paragraph 4 inescapably an inferential obligation of that sort. Paragraph 4, which was made "binding", recognizes a conditional right to "terminate... negotiations". See p. 7 supra. I conclude that the last sentence of the paragraph cannot be accorded its plain meaning unless the parties intended that absent such condition Palmer had no legal right to terminate negotiations.

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next 25 years, option to extend lease and responsibility for maintenance and taxes, had been agreed to in a letter of intent and thus were sufficiently definite.); Sommer v. Hilton Hotels Corp., 376 F.Supp. 297 (S.D.N.Y. 1974)

But what further obligations does a duty to continue negotiations encompass? Plaintiff asserts that it means that Palmer had a duty to go forward from the points that had been agreed to (albeit in a non-binding fashion) in the November 5 letter, to address remaining open issues and that neither Palmer nor it could go back to re-open those items agreed upon in that letter. This is a radical interpretation of the November 5 letter that is obviously inconsistent with the characterization of the letter in its first paragraph (a "preliminary understanding") and, more importantly, inconsistent with the express provisions making all of the agreements concerning the substantive terms of the proposed transaction non-binding.

If Paragraph 4 does not imply an obligation to be bound by all of the substantive terms of the November 5 agreement conditionally on reaching agreement on remaining (unagreed upon) points, what does it mean? In my opinion Paragraph 4 does create an implied obligation prior to the expiration of the time stated, most importantly, to keep the Stations off the market and not offer to sell or negotiate with others concerning their sale. In addition, Palmer was obligated to continue to assist the negotiation process in specific ways: to afford information for example. These obligations are real and they would have value to one negotiating to buy the Stations. But the obligation implied by Paragraph 4 does not go so far as to constitute a concession from seller of its

right as a property owner to change its mind concerning the disposition of its property prior to the time it agrees to bind itself legally to a sale.

What is critical in this case is not whether the parties had in fact reached agreement on all material terms of a sale or not. What is critical is whether the parties reached an agreement to be bound with respect to those material terms. The distinction is vital. As was noted in an earlier case in this court decided under New York law:

The assumption of contractual liability — that is, the creation of a contract — is, of course, a voluntary act. It remains, in each instance, for the parties themselves to determine what are the preconditions for the creation of such liability. Where one of the contracting parties states that he will not be bound until an event — such as the signing of a memorandum that might not otherwise be required — occurs, he will not be bound before that condition is satisfied, even though an agreement on all material terms of the contract has been reached. In Williston's words "[i]t is everywhere agreed that if the parties contemplate a reduction to writing of their oral agreement before it can be considered complete, there is no contract until the writing is signed." 1 Williston on Contracts §28 pp. 66-67.

Transamerican Steamship Corp. v. Murphy, Del. Ch., C.A. 10511, Allen, C., slip op. at 3 (Feb. 14, 1989).

Palmer never agreed to be bound legally to any of the substantive terms (e.g. price) agreed to in the November 5 letter. It specifically withheld such agreement. Therefore one cannot treat this case as one in which the parties have

reached agreement with respect to all of the material terms of the deal.

C. Palmer did not breach the obligation that Paragraph 4 does imply

Given my interpretation of the limited scope of the implied obligation of Paragraph 4, I cannot conclude that any breach occurred. I do not believe that Palmer was any longer interested in selling the Stations to VS&A after mid March. But while nevertheless it did, until April 1, continue to have obligations to VS&A - not to negotiate with others, etc. - it had, in my opinion, no legal duty to commit itself legally to terms it had earlier negotiated (e.g. price) but had expressly not bound itself to legally. Thus, it is in my opinion legally irrelevant whether the financing commitments furnished on April 1 were in the usual form or not. Palmer maintained a privilege not to be bound to the proposed transaction until it expressly consented to be so bound.<sup>12</sup> Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 261-62 (2d. Cir. 1984); United Acquisition Corp. v. Banque Paribas, 631 F.Supp. 797, 806-08 (S.D.N.Y. 1984). In this instance it never did so.

It is, in my view, unimportant if, or to what degree, the Palmer's board was motivated on March 19 or March 27 simply to hold instead of sell its broadcasting assets. Palmer preserved

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<sup>12</sup>Or more accurately, until it indicated its assent to be bound by an act or word that a reasonable person, in the circumstances present, would have understood as constituting assent to be bound by contract. See Leeds v. First Allied Connecticut Corp., Del. Ch. 521 A.2d 1095 (1986) (objective theory of contracts).

its legal right to change its mind and it did not breach the obligation implied by Paragraph 4, or any other provision of the November 5 letter, in doing so.

Markets change. Negotiating a complex transaction is always subject to the risk that a material change in a relevant market will suddenly make a proposed deal uneconomic from one side of the transaction or the other. That risk inevitably exists until a party is legally bound. Negotiators can create certain binding protections against the risk that moving markets present. They can, for example, negotiate binding provisions with respect to transaction cost reimbursement before they reach agreement on the transaction itself. See e.g. Ogden Martin Sys. of Tulsa v. Tri-Continental Leasing Corp., 734 F.Supp. 1057, 1062 (1990). This was not done here and the parties therefore must be deemed to have accepted the risk that a change in market values prior to the creation of an enforceable obligation to buy and sell might render their efforts wasteful.

V.

Defendant has charged in a counterclaim that VS&A has attempted to defraud it by making untrue statements (such as those concerning its ability to finance the proposed transaction) upon which it relied to its detriment. It claims that its legal fees in this case constitute damages.

I cannot conclude that the evidence would support a finding that VS&A induced the November 5 letter by knowingly making false statements. Nor has counterclaimant shown that any statements made before November 5 were negligently made. Nor do I find any such statement prior to the granting of the final extension. Since the damage theory offered contemplates recovery of transaction costs that would (assertedly) have been saved if the allegedly false statements had not been made, I need not consider statements made after the grant of the last extension, as further statements did not arguably induce reliance by Palmer.

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For the foregoing reasons the complaint and the counterclaim must be dismissed. It is so ordered.

  
Chancellor

DATE: