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Case No. 5571-CS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GRT, INC., a Delaware corporation, Plaintiff, v. MARATHON GTF TECHNOLOGY, LTD., a Delaware corporation, and MARATHON OIL, CORPORATION, an Ohio corporation, Defendants.	)	Civil Action No. 5571-CS

MEMORANDUM OPINION

Date Submitted: April 11, 2012
Date Decided: June 21, 2012

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STRINE, Chancellor.

I. Introduction

The plaintiff GRT, Inc. and the defendant Marathon GTF Technology, Ltd. are both players in the nascent technology space dedicated to finding ways to convert methane gas into fuel. They entered into a joint commercial relationship in the hopes of furthering the development of certain gas-to-fuels technology. To that end, on July 18, 2008, GRT and Marathon signed a series of interrelated agreements governing their relationship, including a Securities Purchase Agreement, under which Marathon purchased $25 million of GRT's stock, a License Agreement whereby each party cross-licensed certain of the other's technology, and a Cooperative Development Agreement (the "Development Agreement"), which governed a planned collaboration to develop the gas-to-fuels technology.

At the time the parties entered into these agreements, Marathon was developing and building a multi-million dollar, experimental "Demonstration Facility" designed to test the gas-to-fuels technology on a large scale, along with a smaller scale research facility referred to as the "Pilot Unit." Rather than raise the funds to build its own equivalent facility, GRT obtained access rights to the Demonstration Facility and the ability to test and implement modifications to the Demonstration Facility subject to certain procedures set forth in the Development Agreement (the "Access Rights"). Under the Development Agreement, these Access Rights were to "expire" on December 31, 2012, as provided by § 3.3 of that Agreement.[1]

[1] Costa Aff. Ex. 1 (Development Agreement) § 3.3.

The Demonstration Facility was operational from late 2008 until mid-2009, during which time Marathon executed a run campaign that generated data that was shared with GRT. But, on November 18, 2009, before GRT had asked for any tests, Marathon decided to shut down the Demonstration Facility on a permanent basis because of operational difficulties in part due to the build-up of certain hazardous substances.[2] Marathon followed the procedures prescribed by the Development Agreement in the event that it decided to discontinue operations at the Demonstration Facility permanently, which included giving notice to GRT and extending it the right to make an offer to acquire the Demonstration Facility, subject to certain restrictions. GRT did not exercise that right. Although the Demonstration Facility is currently in a "mothballed" state, the Pilot Unit is operational, and both parties continue to test there to this day.

GRT alleges that Marathon breached GRT's Access Rights by discontinuing operations at the Demonstration Facility permanently before December 31, 2012.[3] Marathon has moved for summary judgment on this question, arguing that the Development Agreement does not obligate Marathon to operate the Demonstration Facility, and furthermore that GRT's Access Rights related to the Demonstration Facility may be terminated before December 31, 2012 in the event that Marathon takes the contractually contemplated action of shutting down the Demonstration Facility before that date. That is, according to Marathon, the Development Agreement only provides a maximum expiration date for the Access Rights, rather than a continuous survival right.

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[2] *See* Moffitt Aff. Ex. 9 (Julka Dep.) at 60; Moffitt Aff. Ex. 16 (Campaign 1 Run Plan Execution Report) at GRT_00356146; *see also* Tr. 55.
[3] *E.g.*, Compl. ¶ 60.

For its part, GRT would have the court deny Marathon's motion on the basis that the Development Agreement is ambiguous as to whether Marathon must operate the Demonstration Facility continuously through December 31, 2012. Under GRT's reading of the Development Agreement, the "expir[ation]"[4] of the Access Rights on December 31, 2012 means that they cannot be terminated before that date, and by discontinuing operations permanently at the Demonstration Facility in November 2009, Marathon deprived GRT of certain of its Access Rights that depend on being able to have access to and to test at an operating Demonstration Facility before the end of their contractual survival period. GRT argues that its competing interpretation of the Development Agreement is a reasonable one, making summary judgment in Marathon's favor inappropriate.

In this opinion, I find that the Development Agreement is not ambiguous and does not impose an affirmative duty on Marathon to operate the Demonstration Facility through December 31, 2012, and instead provides GRT protection from a closing of the Demonstration Facility before that date by, among other ways, obligating Marathon to negotiate with GRT in good faith over the acquisition of the Demonstration Facility. GRT's reading of the Development Agreement creates an internal inconsistency with the provision of the Agreement that contemplates permanent discontinuation of operations at the Demonstration Facility and does not restrict the date on which that may be done, and would require this court to subject that independent provision to an implicit condition limiting its applicability until on or after January 1, 2013. Marathon's reading of the

[4] Development Agreement § 3.3.

Development Agreement creates no such inconsistency, and presents an interpretation that reconciles all of the provisions and is faithful to the plain language of the contract. For these reasons, the Development Agreement can only be reasonably read in the way articulated by Marathon.

Even if I were to find the Development Agreement ambiguous, the undisputed extrinsic evidence submitted by the parties makes clear that GRT had pressed for the specific right to have the Demonstration Facility kept open by Marathon until December 31, 2012, but that it gave up that right in negotiations when Marathon would not agree to it. The extrinsic evidence does not raise genuine issues of material fact; rather, the undisputed documentary record of the parties' negotiations shows that GRT demanded and did not receive the right it now seeks to have me read into a contract whose plain words do not support its existence.

For these reasons, I conclude that Marathon did not violate GRT's Access Rights when Marathon discontinued operations at the Demonstration Facility permanently. Summary judgment in Marathon's favor on GRT's breach of contract claim, as set forth in Count II of its complaint,[5] is therefore required.

II. The Development Agreement And Its Relevant Terms

As noted above, the Development Agreement grants GRT certain access and testing rights related to the Pilot Unit and Demonstration Facility, which I have referred

[5] The operative complaint is GRT's "Verified Amended Complaint." For sake of economy, I refer to this only as the complaint.

to collectively as the Access Rights. Specifically, § 3.2 of the Development Agreement provides for certain of these Access Rights as follows:

> Marathon will provide GRT with reasonable access rights to its Demonstration Facility and Pilot Unit .... Upon GRT's reasonable advance written notice, Marathon will allow GRT (a) reasonable and timely access to the operating Pilot Unit and Demonstration Facility for direct observation of data collection, product formation, system components upon assembly and disassembly, and observation of routine and start-up information, (b) to obtain samples of product and byproduct streams for independent testing, and (c) reasonable and timely access to all information, data, materials test samples, and other typical and reasonable information generated by the Pilot Unit or Demonstration Facility ....[6]

As § 3.2 makes clear, the types of rights contemplated by that section are generally passive and observational. By contrast, if GRT wanted to conduct testing at the Pilot Unit or Demonstration Facility, it had to follow the procedures prescribed by § 6 of the Development Agreement, which sets forth a list of rules governing the timing and cost-sharing of any proposed test.[7] Section 6.1 also lists certain predicate requirements that must be satisfied before testing at the Demonstration Facility could occur, one of which includes "satisfactory testing at the Pilot Unit."[8]

The Development Agreement also makes clear that Marathon owns the Demonstration Facility,[9] and allocates Marathon the responsibility for making decisions related to the operation of the Demonstration Facility.[10] Importantly, the Development Agreement contains no express provision obligating Marathon to operate the

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[6] Development Agreement § 3.2.
[7] *See id.* § 6.
[8] *Id.* § 6.1.
[9] *Id.* § 6.6.
[10] *See id.* § 2.2 ("Except as otherwise provided herein, Marathon is responsible for all … operation, maintenance and repair of the Pilot Unit and the Demonstration Facility ….").

Demonstration Facility. Rather, Marathon represented only that the Demonstration Facility shall be designed for continuous operation.[11] Indeed, § 3.1 of the Development Agreement specifically addresses the set of procedures that Marathon must follow in the event of a prolonged or permanent discontinuation of operations at the Demonstration Facility, as follows:

> Marathon shall provide GRT [90] days' prior written notice of any prolonged discontinuation of the operation of the Demonstration Facility … or disposition of the Demonstration Facility (including planned sale to a third party or permanent abandonment or disposal) so that GRT may make a Qualifying Offer [] for the Demonstration Facility during such 90-day period.[12]

A "Qualifying Offer" is defined in part as an offer by GRT for the Demonstration Facility on an "as is" and "where is" basis.[13] Furthermore, if GRT exercises its right to make a Qualifying Offer under § 3.1, Marathon is obligated to negotiate with GRT in good faith to sell the Demonstration Facility to it.[14] This right to make a Qualifying Offer makes sense in view of the fact that GRT was interested in obtaining access to the Demonstration Facility as a substitute for building its own equivalent facility itself or with a partner.[15] By obtaining the right to make a Qualifying Offer for the Demonstration Facility in the event it was going to be shut down or sold to a third person and imposing on Marathon the contractual obligation to negotiate in good faith over its Offer, GRT

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[11] *See* Costa Aff. Ex. 2 (Securities Purchase Agreement) at § 4.6(b)(i)(B). The Development Agreement directs the parties to the Securities Purchase Agreement for all representations and warranties relating to the Demonstration Facility. *See* Development Agreement § 8.3.
[12] Development Agreement § 3.1.
[13] *Id.*
[14] *Id.*
[15] *See* Costa Aff. Ex. 5 (Sherman Dep.) at 30.

preserved for itself the opportunity to acquire the Demonstration Facility if it decided that was preferable to building a new one from the ground up, thereby subjecting itself to delays that might hinder its ability to experiment and demonstrate its technology.

The Development Agreement goes on to set an expiration date for GRT's Access Rights in § 3.3. That section provides, in relevant part, that "the Parties' respective rights and obligations with respect to access to the Demonstration Facility and testing at the Pilot Unit and Demonstration Facility and modification of the Demonstration Facility shall expire on December 31, 2012 …."[16]

III. Analysis

A. Standard of Review

A party is entitled to summary judgment under Court of Chancery Rule 56 when that party can show can there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.[17] In cases involving questions of contract interpretation, a court will grant summary judgment under either of two scenarios: when the contract in question is unambiguous,[18] or when the extrinsic evidence in the record fails to create a triable issue of material fact and judgment as a matter of law is appropriate.[19] A contract is unambiguous if, by its plain terms, the provisions in controversy are reasonably

[16] Development Agreement § 3.3.
[17] Ct. Ch. R. 56(c).
[18] *See GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 783 (Del. 2012); *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *9 (Del. Ch. May 2, 2007).
[19] *See Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 (Del. 1997); *see also HIFN, Inc.*, 2007 WL 1309376, at *9.

susceptible to only one meaning.[20] When interpreting a contract, a court must give effect to all of the terms of the instrument and read it in a way that, if possible, reconciles all of its provisions.[21] That is, a court will prefer an interpretation that harmonizes the provisions in a contract as opposed to one that creates an inconsistency or surplusage. When a contract is ambiguous, a court must look to extrinsic evidence to determine the shared intent of both parties.[22] But, the ambiguity may be resolved on a summary judgment motion based on extrinsic evidence "when the moving party's record is not ... rebutted so as to create issues of material fact."[23]

B. Marathon's Reading Of The Contract Is The Correct One: The Development Agreement, By Its Plain Terms, Does Not Require Marathon To Operate The Demonstration Facility Through December 31, 2012

Marathon's principal argument in support of its motion is that GRT's breach of contract claim is based on a contractual obligation that does not exist in the Development Agreement: an obligation by Marathon to operate the Demonstration Facility through December 31, 2012. For its part, GRT says that Marathon promised it access to the Demonstration Facility through December 31, 2012, and that Marathon cannot unilaterally deprive GRT of that right by shutting down the Demonstration Facility before that date without breaching § 3.3 of the Development Agreement governing the expiration of GRT's Access Rights, despite the absence of any date qualifier in § 3.1, the

[20] *See Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).
[21] *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385-86 (Del. 2012) (citation omitted).
[22] *Eagle Indus., Inc.*, 702 A.2d at 1232.
[23] *Id.* at 1233.

section addressing GRT's rights in the event of a permanent discontinuation of the Demonstration Facility's operations.

Marathon's position is correct as a matter of law. The Development Agreement does not contain any commitment by Marathon to operate the Demonstration Facility until a certain date,[24] or any representation that the Demonstration Facility will be operational. Instead, the Development Agreement contains language that specifically avoids making any commitments or promises relating to the operability of the Demonstration Facility.[25] Similarly, all of the representations related to the Demonstration Facility in the related Securities Purchase Agreement were drafted to focus on what the Demonstration Facility was designed to do, rather than what it would do.[26] Indeed, in that Securities Purchase Agreement, GRT represented that it "acknowledge[d] and agree[d] that the Demonstration Facility may be operated on an other than continuous basis."[27] Nor can GRT claim a right to control the operational decisions regarding the Facility, as the Development Agreement expressly allocates to Marathon the responsibility of operating the Demonstration Facility.[28] Consistent with

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[24] *Compare Shore Investments, Inc. v. Bhole, Inc.*, 2011 WL 5967253, at *4-5 (Del. Super. Nov. 28, 2011) (where the court found the defendant to have contractually obligated itself to operate the premises when the agreement provided in part that "[t]enant *shall conduct its business on the premises* at least during the regular and customary days, nights and hours for such type of business ….") (emphasis added).

[25] *E.g.*, Development Agreement § 8.3 ("Except as otherwise provided in the Securities Purchase Agreement, the Parties make no representation or warranty of any kind with respect to the Pilot Unit or the Demonstration Facility ….").

[26] *E.g.*, Securities Purchase Agreement § 4.6(b)(i)(B) (Marathon representing that it "had contracted for construction services" for a facility that "[h]as been designed … for continuous, steady-state integrated operation."); *see also id.* § 4.6(b)(i)(G).

[27] *Id.* § 4.6(b)(i)(B).

[28] Development Agreement § 2.2.

the lack of any covenant or representation addressing the operability of the Demonstration Facility, the Development Agreement addresses GRT's rights in the event that the Demonstration Facility's operations are permanently discontinued by giving GRT the right to make a Qualifying Offer for the Facility and to trigger Marathon's duty to negotiate with it in good faith to sell the Demonstration Facility to it.[29]

GRT seeks to find a right to have the Demonstration Facility kept operational in its Access Rights set forth in § 3.2 and § 6 of the Development Agreement, which the Development Agreement provides "shall expire on" December 31, 2012.[30] The heart of GRT's argument is that the contract provides that its Access Rights are to expire on December 31, 2012. GRT equates the term expiration with a guarantee that those Access Rights will for certain live until that date. Because many, although not all, of its Access Rights depend on having access to an operating Demonstration Facility, GRT further contends that Marathon may not discontinue operations at the Demonstration Facility permanently until January 1, 2013,[31] lest GRT's guarantee that its Access Rights would survive until December 31, 2012 be breached.[32]

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[29] *Id.* § 3.1.
[30] *Id.* § 3.3.
[31] Because under certain conditions, testing under § 6 of the Development Agreement could go beyond January 1, 2013, *e.g.*, *id.* § 6.4(e) (providing that GRT may extend the time period in which it may test at the Demonstration Facility beyond December 31, 2012 under certain circumstances), GRT's argument might even extend to prohibiting Marathon from permanently disposing of the Demonstration Facility even after January 1, 2013. This reality does not aid GRT, as it would subject Marathon to an even longer period of implicit restriction on taking action specifically contemplated by § 3.1.
[32] P. Ans. Br. at 13 (arguing that its Access Rights "obviously require that the Facility be 'operational' in the sense that it is not permanently shut down.").

When the actual contractual language is considered, however, GRT's argument fails for multiple reasons. For starters, a statement that contractual rights expire on a certain date is no guarantee that they will survive until that date if there are contractually contemplated circumstances that would terminate them sooner. Rather, a statement that rights will expire on a certain date acts to set a maximum life span for those rights. Although GRT would interpret an expiration date provision as the mirror image of a survival clause, to say that a right survives until a certain date creates a contractual obligation throughout the duration of that entire period. By contrast, an expiration date does not preclude other circumstances contemplated by the contract from shortening that period.[33] Indeed, as the reader will soon see, the Development Agreement elsewhere does specify that certain rights will affirmatively "survive" beyond a certain date,[34] in contrast to § 3.3's use of the word "expire."[35] This drafting demonstrates that the parties knew the difference between the terms "survive" and "expire," and when they wanted to provide for the survival of a right, they provided for the "surviv[al]" of that right.[36]

Here, consistent with its use of the word "expire,"[37] the Development Agreement specifically contemplates a circumstance that would cut short certain of GRT's Access

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[33] The dictionary definitions of the terms "survive" and "expire" illustrate this basic difference. *See Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/ (last visited June 21, 2012) (defining "survive" to mean "to remain alive or in existence: live on," and defining "expire" to mean "to come to an end").

[34] *E.g.*, Development Agreement § 11.4; *see also* Securities Purchase Agreement § 7.1 (providing that certain representations and warranties "shall survive until the expiration of the applicable statute of limitations …, and will thereafter terminate," and others yet "will survive for [12] months after the Closing Date, and will thereafter terminate …").

[35] Development Agreement § 3.3.

[36] *E.g.*, *id.* § 11.4; Securities Purchase Agreement § 7.1.

[37] Development Agreement § 3.3.

Rights. In particular, it contemplates the "permanent abandonment or disposal" of the Demonstration Facility as set forth in § 3.1.[38] In that event, the Development Agreement provides that GRT is entitled to certain rights. These include the right to make a Qualifying Offer and the right to obligate Marathon to negotiate with it in good faith over that Offer.[39] In addition, GRT has observational rights, including the right to "observ[e]" the "system components" upon "disassembly,"[40] a valuable right in light of the unique and experimental nature of the Demonstration Facility. GRT also continues to have the important right to test its technology at the Pilot Unit.[41] Thus, it is not the case that Marathon's permanent discontinuation of operations (*i.e.*, "permanent abandonment or disposal") at the Demonstration Facility eliminated all of GRT's Access Rights under the Development Agreement.[42] Given these realities, GRT's argument that Marathon owed

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[38] *Id.* § 3.1. In some situations, of course, the contract may not contemplate any other circumstances that may terminate the right at issue on an earlier date, and in that case the maximum expiration date may become the functional equivalent of a survival clause.
[39] *Id.*
[40] *Id.* § 3.2.
[41] *Id.* §§ 3.2, 6.
[42] In its papers, GRT raises the argument that if the Development Agreement is not read to include a requirement that the Demonstration Facility be kept operational through December 31, 2012, then GRT's contract rights under the Development Agreement would be rendered illusory because its Access Rights were "the only consideration GRT [received] from the [Development Agreement.]." P. Ans. Br. at 18. This argument is unconvincing for two reasons. First, that a sophisticated party does not like the bargain it made is not a reason for a court to rewrite the contract it in fact made to be as that party wished it was written. Second, GRT ignores the myriad benefits it received from the Development Agreement and the other related contracts it entered into contemporaneously with Marathon, which include, for example: (i) the right to have access to and to test at the Pilot Unit, *see* Development Agreement §§ 3.2, 6; (ii) the right to observe the disassembly of the Demonstration Facility, *see id.* § 3.2; (iii) the right to license certain of Marathon's technology, *see* Costa Aff. Ex. 3 (License Agreement) § 2; (iv) the right to receive $25 million from Marathon in exchange for GRT stock, *see* Securities Purchase Agreement § 1.1(a); and (v) in the event of a permanent discontinuation of operations at the Demonstration Facility, the right to make an offer and require Marathon to engage in good faith negotiations over that offer, *see* Development Agreement § 3.1, a right that could obviate the

it a duty to keep the Demonstration Facility open until December 31, 2012 is inconsistent with the plain terms of the Development Agreement. If a contract specifically contemplates that a party may take action, addresses the specific obligations the other party is owed when that happens, and then the party takes that action in full accordance with its attendant obligations, there is no proper basis to conclude that the party has breached the contract by doing what the objective terms of the contract authorize.[43]

GRT's argument also fails to give effect to all the provisions of the Development Agreement. Delaware law requires that this court attempt to give effect to the plain terms of all provisions of a contract, and to give them a harmonious reading.[44] In contrast to Marathon's reading, which is consistent with all of the contract terms, GRT's interpretation subjects an independent provision of the contract, § 3.1, to an implicit condition.[45] By its plain terms, § 3.1 contemplates that Marathon may "permanent[ly] abandon[] or dispos[e]" of the Demonstration Facility, at any time, so long as it accords GRT the right to make a Qualifying Offer and negotiates with GRT in good faith over its Offer.[46] Section 3.1 is not subject to any condition limiting Marathon from taking that action before December 31, 2012. Rather, § 3.1 "survives beyond" the expiration of

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need for GRT to design and construct its own facility. *See Restatement (Second) of Contracts* § 80 cmt. a (1981) ("Since consideration is not required to be adequate in value …, two or more promises may be binding even though made for the price of one. A single performance or return promise may thus furnish consideration for any number of promises.").

[43] *See Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *1 (Del. Ch. Nov. 8, 2007) ("Under Delaware law, courts interpret contracts to mean what they objectively say.").

[44] *See E.I. du Pont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1114 (Del. 1985).

[45] *See Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) (stating that a court will not imply a contract term when the conduct at issue is "authorized by the terms of the agreement."). Courts will not imply terms that are inconsistent with, and not supported by, the plain written terms of the contract. *See Nemec v. Shrader*, 991 A.2d 1120, 1125-26 (Del. 2010).

[46] Development Agreement § 3.1.

GRT's Access Rights on December 31, 2012.[47] Contrary to GRT's reading, the fact that § 3.1 "survives beyond" December 31, 2012 most sensibly suggests that the acts contemplated in § 3.1 could be undertaken before that date. Furthermore, § 3.1 is the very first provision in the section of the Development Agreement governing GRT's Access Rights; it even precedes the provision specifying that GRT was to have Access Rights. This placement in the Development Agreement indicates that Marathon's ability to shut down the Demonstration Facility was viewed by the parties as having some importance.

It would have been easy to write the Development Agreement in the way that GRT now urges that it should be read. This hypothetical contract would have provided for a two-stage process, whereby: (1) Marathon was expressly obligated to continue operating the Demonstration Facility through December 31, 2012, and all of GRT's Access Rights were guaranteed to "survive" until December 31, 2012; and (2) only beginning January 1, 2013 could Marathon then decide to terminate operations at the Demonstration Facility and accord GRT the remedy currently provided to it under § 3.1. But, this is not the contract that the parties wrote. Rather, the Development Agreement does not contain a provision obligating Marathon to operate the Demonstration Facility; it does not provide that GRT's Access Rights will be guaranteed through any date; and it does not limit the date on which Marathon may decide to "permanent[ly] abandon[] and dispos[e]"[48] of the

[47] *Id.* § 11.4.
[48] *Id.* § 3.1.

Demonstration Facility. Under Delaware law, courts will not rewrite contracts to read in terms that a sophisticated party could have, but did not, obtain at the bargaining table.[49]

Finally, GRT was uniquely protected from an unwarranted shutdown of the Demonstration Facility in the real, commercial sense that Marathon had every economic incentive to keep the Demonstration Facility open if it showed real promise. Marathon had invested many millions of dollars in the Demonstration Facility, and it would be depriving itself (not just GRT) of the ability to develop the gas-to-fuels technology if the Demonstration Facility were shut down improvidently.[50] Nor has GRT alleged that Marathon shut down the Demonstration Facility to punish GRT for other opportunistic reasons. Indeed, it would be nihilistic for Marathon to spend millions of dollars in developing the Demonstration Facility, enter into the Development Agreement with GRT, and then shut down the Facility and permanently abandon it just to spite its new contract partner.

For these reasons, I find that the Development Agreement is unambiguous and grant summary judgment in Marathon's favor.

C. Alternatively, The Uncontested Extrinsic Evidence Requires Summary Judgment In Favor of Marathon

Even if I were to find that the Development Agreement was ambiguous as to whether Marathon was contractually obligated to keep the Demonstration Facility open

[49] *See Nemec*, 991 A.2d at 1126.
[50] *See* Supp. Moffitt Aff. 41 (McFarland Dep.) at 123-24 ("Q. [Marathon's counsel] So Marathon put all this money into the facility; is that right? A. [GRT Representative] That's correct. Q. And had every incentive to give this thing a fair go, if there's any way to do it? A. Every technical incentive, yes.").

through December 31, 2012, which I do not, the uncontested extrinsic evidence mandates summary judgment in favor of Marathon. The ambiguity that GRT seeks to create is that, even though § 3.1 of the Development Agreement specifically contemplates that Marathon may shut down the Demonstration Facility regardless of the date, Marathon cannot exercise that right before December 31, 2012 because it contends that another provision of the Agreement, § 3.3, can be read as requiring that the Demonstration Facility be kept open until that date. But, this ambiguity must be resolved against GRT because of the key undisputed fact that GRT sought at the bargaining table a specific bar on Marathon's ability to shut down the Demonstration Facility before December 31, 2012 and it failed to obtain that right, as evidenced by the following undisputed facts.

In one of the final term sheet drafts sent by GRT to Marathon, GRT proposed adding a provision stating that "Marathon shall operate the … Demonstration Facility for use by both parties … through, at least, December, 2012."[51] But, Marathon removed this provision when it marked up GRT's draft.[52] When GRT questioned Marathon about this deletion, Marathon explained to GRT that it would not commit to keeping the Demonstration Facility open because the Facility was highly experimental and "things [could] go wrong."[53] Following this exchange with Marathon, GRT gave up that point. In other words, GRT tried to bargain for a "keep open" date regarding the Demonstration Facility, but it gave up that demand when Marathon would not agree to it. Even GRT's

[51] Supp. Moffitt Aff. Ex. 43 (Feb. 14, 2008 Draft Agreement) at GRT_00683603.
[52] *Compare id.*, *with* Supp. Moffitt Aff. Ex. 44 (Feb. 21, 2008 Draft Agreement) at MGTF 0042461.
[53] Moffitt Aff. Ex. 15 (McFarland Dep.) at 96.

principal negotiator of the term sheet acknowledged that fact.[54] This uncontested evidence makes plain that GRT lost the right to prohibit the very action that it now contends Marathon could not take without breaching § 3.3 of the Development Agreement.

Under basic principles of Delaware contract law, and consistent with Delaware's pro-contractarian policy, a party may not come to court to enforce a contractual right that it did not obtain for itself at the negotiating table.[55] This principle applies with particular force when the supposedly aggrieved party in fact sought the specific contractual right at issue in negotiations but failed to get it.[56] This is because a court's role in interpreting contracts is "to effectuate the parties' intent."[57] For a court to read into an agreement a contract term that was expressly considered and rejected by the parties in the course of negotiations would be to "create new contract rights, liabilities and duties to which the parties had not assented" in contravention of that settled role.[58]

Here, it is undisputed that GRT tried to get the right to require Marathon to operate the Demonstration Facility through December 31, 2012, but it failed to do so. Accordingly, interpreting the Development Agreement in the way urged by GRT would

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[54] *Id.*
[55] *See Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006); *Restatement (Second) of Contracts* § 5 cmt. a (1981) ("The terms of a promise or agreement are those expressed in the language of the parties or implied in fact from other conduct.").
[56] *Cf. Restatement (Second) of Contracts* § 203 (1981) ("[S]eparately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated.").
[57] *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).
[58] *Allied Capital Corp.*, 910 A.2d 1020, 1030 (Del. Ch. 2006); *see also Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

read into it an obligation that Marathon expressly rejected. Summary judgment for Marathon is therefore appropriate on this alternative ground.[59]

IV. Conclusion

For the foregoing reasons, Marathon's motion for summary judgment on the sole remaining count in GRT's complaint, Count II, is GRANTED.[60] This case is therefore DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

[59] Marathon raises several ancillary arguments in support of its motion for summary judgment, in addition to its core argument that the Development Agreement did not obligate Marathon to continue operating the Demonstration Facility through December 31, 2012. Because I find for Marathon on its core argument, I do not address those others.

[60] In its complaint, GRT also alleged that Marathon violated certain representations and warranties under the Development Agreement related to the design of the Demonstration Facility. On July 11, 2011, this court granted Marathon's motion to dismiss those allegations under Rule 12(b)(6). *See GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898 (Del. Ch. July 11, 2011). The allegations at issue here compose the sole remaining count of GRT's complaint.