

**DIRECTV, LLC v Nexstar Broadcasting, Inc.**

2023 NY Slip Op 32446(U)

July 15, 2023

Supreme Court, New York County

Docket Number: Index No. 653733/2019

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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DIRECTV, LLC

Plaintiff,

- v -

NEXSTAR BROADCASTING, INC.,

Defendant.

INDEX NO. 653733/2019

MOTION DATE N/A

MOTION SEQ. NO. 013 014

**DECISION + ORDER ON  
MOTION**

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 013) 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 325, 326, 327, 328, 329, 330

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 331, 332, 333, 334, 335, 336

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

In motion sequence number 013, plaintiff DIRECTV, LLC (DIRECTV) moves, pursuant to CPLR 3212, for summary judgment in its favor on the first, second and fourth causes of action in the amended complaint and for summary judgment dismissing the counterclaims asserted by defendant Nexstar Broadcasting, Inc. (Nexstar). In motion sequence number 014, Nexstar moves, pursuant to CPLR 3212, for summary judgment in its favor on its counterclaims and for summary judgment dismissing the amended complaint.

## Background

DIRECTV is a multichannel video programming distributor, or MVPD, that provides multiple television channels to its subscribers. (NYSCEF Doc. No. [NYSCEF] 315, Nexstar's Response to DIRECTV's Rule 19-A statement ¶ 2.) Nexstar owns numerous television stations across the country. (*Id.* ¶ 3.)

In July 2015, DIRECTV and Nexstar executed a retransmission consent agreement (Agreement) whereby DIRECTV would retransmit television signals of numerous television broadcast stations (Stations) owned by Nexstar (*id.* ¶¶ 4, 6) for a three-year term commencing July 3, 2015 through July 2, 2018, with an option to renew for a fourth year, and pay fees to Nexstar to do so. (NYSCEF 252, Agreement at 2<sup>1</sup>.) Exhibit A to the Agreement identifies 77 Stations with each Station's call letters, "Local Territory," and affiliations with the "Big Four" television broadcast networks, defined as ABC, NBC, CBS, and FOX (collectively, Network or Big Four), or with the CW, MyNetworkTV (MNT), CMT, or Telemundo television broadcast networks.<sup>2</sup> (*Id.* at 26-28.) The Agreement was a renewal of a previous retransmission consent agreement between DIRECTV, Nexstar and two nonparties, which was in effect from July 3, 2011 to July 2, 2015 (2011 Agreement). (NYSCEF 259, 2011 Agreement at 2 and 8.) Linda Burakoff, DIRECTV's Vice President, Programming Acquisitions,<sup>3</sup> represented DIRECTV in the negotiations. (NYSCEF 204, tr at 17:4-11 [Burakoff depo].) Perry

<sup>1</sup> NYSCEF pagination.

<sup>2</sup> "Big-6 Network" is defined as ABC, CBS, FOX, NBC, CW, and MNT. (NYSCEF 252, Agreement at 2.)

<sup>3</sup> At the time of Burakoff's 2020 deposition, Burakoff was Vice President, Content and Programming for AT&T; DIRECTV was a wholly-subsiary of AT&T. (NYSCEF 204, tr at 16:1-16 [Burakoff depo].)

Sook, Nexstar's CEO, and Elizabeth Ryder, Nexstar's General Counsel, represented Nexstar. (NYSCEF 260, tr at 6:2-4 [Sook depo]; NYSCEF 206, tr at 187:8-13 [Ryder depo].)

Section 7 of the Agreement provides as follows:

“NETWORK AFFILIATION AND PROGRAMMING RIGHTS.  
The parties acknowledge that the Stations' affiliations as identified on Exhibit A are the essence of this Agreement. Accordingly, if a Station changes network affiliations, it shall be subject to the License Fees set forth in Section 8 for its new network affiliation. Notwithstanding anything to the contrary in this Agreement, if a Stream ceases to be affiliated with the network listed in Exhibit A (and does not affiliate with another Network) during the Term, DIRECTV may cease carriage of such Stream if continued carriage would prevent DIRECTV from retransmitting the station or signal that replaced the lost network affiliation due to capacity constraints in the applicable Local Territory.”

(NYSCEF 252, Agreement at 13.)

Section 8, titled “LICENSE FEES,” provides that DIRECTV shall pay Nexstar a monthly “License Fee” for each DIRECTV “Subscriber” authorized to view a “Stream” in the Local Territory.<sup>4</sup> (*Id.*) The Agreement specifies different rates depending on whether a Station was affiliated with a Network or with CW or MNT. (*Id.* at 2 and 14.) License Fees are calculated based on the average number of Subscribers in the month in which the fees accrued. (*Id.* at 14.) Section 8 also accounts for a rate change if the CW network ceased operating. (*Id.*) In that event, if a “Former CW Station” did not become affiliated with a Network or MNT, then, provided that certain conditions were

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<sup>4</sup> “Stream” is defined as “each individual channel of full-screen video and audio programming in ATSC high-definition (‘HDTV’) format and/or non-HDTV (‘SDTV’) format, together with all Program-Related Material.” (NYSCEF 252, Agreement at 4 [Section 2 (k)].)

satisfied, DIRECTV would pay Nexstar one-half of the then-current License Fee rate.

(*Id.*)

There is no dispute that, during negotiations for the Agreement, Nexstar represented that Station WHAG (WHAG) was an NBC affiliate (NYSCEF 315, Nexstar's Response to DIRECTV's Rule 19-A statement ¶¶ 14 and 17); WHAG is also listed as "WHAG-TV," an NBC affiliate in the Washington, D.C.-Hagerstown territory, in Exhibit A to the Agreement. (NYSCEF 252, Agreement at 27.) Admittedly, DIRECTV was not interested in carrying WHAG on its service, as it already carried another NBC affiliate in the same market and lacked satellite capacity to carry both. (NYSCEF 315, Nexstar's Response to DIRECTV's Rule 19-A statement ¶ 16; NYSCEF 296, DIRECTV's response to Nexstar's Rule 19-A statement ¶¶ 30-31; see also NYSCEF 254, tr at 44:4-12 [Burakoff depo].) Nevertheless, Section 4 (a) (v) of the Agreement states: "Launch of WHAG. DIRECTV shall in good faith consider launching Station WHAG (NBC, Washington, D.C.) during the Term, taking into account applicable capacity constraints and market factors." (NYSCEF 252, Agreement at 7.) DIRECTV also agreed to launch Stations KYLE-TV in Waco, Texas and KKEY-LD in Bakersfield, California within a certain time period, provided both remained affiliated with MNT or Telemundo, respectively. (*Id.* at 7 [Sections 4 (a) (vi) and (vii)].) Unlike those two Stations, there was no deadline by which DIRECTV had to launch WHAG nor a requirement tying WHAG's launch to a Network affiliation. Section 8 contained a separate provision for License Fees related to WHAG, which reads:

"In addition to the License Fees set forth above, DIRECTV shall pay License Fees at the foregoing Network rate on an aggregate of 220,000 Subscribers (the 'Unlaunched Station Fee') until such time as DIRECTV launches Station WHAG

in the Washington, D.C. Local Territory. Upon such launch, payment of the Unlaunched Station Fee shall cease and Station Group shall receive License Fees for Station WHAG based on the actual number of subscribers receiving WHAG.”

(*Id.* at 14.)

Sook characterized the Unlaunched Station Fee as a penalty for DIRECTV failing to launch WHAG and to generate compensation for WHAG. (NYSCEF 202, tr at 41:8-9, 44:2-15 [Sook depo].) Sook testified that the Unlaunched License Fee was based on the Big 4 Network rate because “it yielded the highest economics [for Nexstar]” and the fact that WHAG was an NBC affiliate “didn’t hurt.” (*Id.* at 54:15, 55:5.) Sook explained that Nexstar had a general “carry-one-carry-all approach” for its full-power primary streams, stating that “if you want to do business with the company[,] you’ll carry every full-power station that we have and pay something for every full-power station ... there’s no ability to cherry-pick our station lineup.” (*Id.* at 42:10-16.) Ryder, though, testified that Nexstar has not required every MVPD to carry WHAG or other satellite stations. (NYSCEF 262, tr at 213:7-9, 215 [Ryder depo].) Burakoff stressed at her deposition that the “primary reason [DIRECTV] entered re-trans agreements is because of their Big Four network affiliations. We have very little interest in stations that are not affiliated, and given that we couldn’t ... launch [WHAG] at that time, we agreed, as a compromise ... to pay [Nexstar] the unlaunched station fee ... because [WHAG] was affiliated with the NBC Network.” (NYSCEF 204, tr at 324:1-9 [Burakoff depo].) Burakoff also stated that WHAG’s Network affiliation was a key component of that fee. (*Id.* at 325:13-14.)

According to an NBC Affiliation Agreement Proposal dated December 9, 2014 (NBC Agreement), nonparty NBC Television Network, a division of NBCUniversal

Media, LLC, agreed to amend and extend an existing affiliation agreement it had with Nexstar related to 13 Nexstar stations, including WHAG. (NYSCEF 218, NBC Agreement at 2.) The NBC Agreement provided for a four-year term for all stations except for WHAG, and reads:

**“Term:** Commencing January 1, 2015 and terminating December 31, 2019, except that, WHAG Hagerstown shall be renewed as a transition period for only a term equal to the earlier of completion of the first round of the FCC spectrum auction and eight (18) months (i.e., 1/1/15-6/30/16) ... and the parties acknowledge and agree that there will be no further extensions.”

(*Id.*) A confidentiality provision in the NBC Agreement states that “Stations agree to keep the terms and conditions of this term sheet and any resulting agreement between the parties strictly confidential except as may be required by law. Further, Stations agree not to publicly announce the affiliation agreement without prior written consent by NBC.” (*Id.* at 5). The NBC Agreement contemplated the execution of a “definitive agreement” (*id.*), but a long form agreement was never executed. (NYSCEF 315, Nexstar’s Response to DIRECTV’s Rule 19-A statement ¶¶ 77.) Nonetheless, the NBC Agreement was undisputedly binding on Nexstar and NBC, despite the use of the term “proposal” in the document’s title. (*Id.* ¶ 78.) Ryder and Jean M. Dietze, Executive Vice President for NBC Affiliate Relations, executed the NBC Agreement. (NYSCEF 218, NBC Agreement at 7-8.)

Nexstar maintains its Network affiliation agreements are confidential, though it has disclosed the existence of such agreements in its securities filings. (NYSCEF 315, Nexstar’s Response to DIRECTV’s Rule 19-A statement ¶¶ 81-82; NYSCEF 296, DIRECTV’s response to Nexstar’s Rule 19-A statement ¶¶ 19-21.) Nexstar’s Form 10-k

for the 2014 fiscal year states that 16 stations were affiliated with NBC and that one unidentified station's arrangement with NBC was set to expire in June 2016. (NYSCEF 250, Form 10-k at 5 and 13.)

Nexstar did not furnish DIRECTV with a copy of the NBC Agreement during the parties' negotiations. (NYSCEF 315, Nexstar's Response to DIRECTV's Rule 19-A statement ¶ 86.) Although the affiliation agreements are filed with the FCC, Ryder testified that information pertaining to the terms of those agreements, including expiration dates, are redacted. (NYSCEF 206, tr at 208-210 [Ryder depo].) Ryder added that the expiration dates listed in the NBC Agreement were confidential. (*Id.* at 196:12.) Ryder was unaware if Nexstar was "unable" to share that information with DIRECTV, and testified, "[w]e keep our confidential information confidential." (*Id.* at 196:17.)

Sook testified that Nexstar first learned NBC would not extend the affiliation agreement for WHAG at least one year before the term expired. (NYSCEF 260, tr at 105:2-5 [Sook depo].) Dietze informed Sook that NBC did not wish to extend or renew WHAG's affiliation because NBC owned its own station in the Washington, D.C. market and wanted to eliminate duplicate affiliates operating in the same market. (*Id.* at 106:17-107:2.) Sook expressed that he had an expectation that NBC would renew. (NYSCEF 202, tr at 82:16-24 [Sook depo].) However, Dietze testified that NBC did not have any discussions with Sook about extending WHAG's affiliation after the NBC Agreement was executed. (NYSCEF 221, tr at 38-39 [Dietze depo].) Dietze further testified that NBC never advised Nexstar that its position regarding the termination could change. (*Id.* at 39:18-20.) Rhonda Brockmann of NBC, who was involved in

negotiating and drafting the NBC Agreement, testified that the NBC Agreement reflected the parties' position that there would be no further extensions of WHAG's affiliation with NBC after June 30, 2016. (NYSCEF 222, tr at 27:4-7 [Brockmann depo].) Burakoff testified that Nexstar failed to disclose the date on which WHAG's affiliation with NBC would end during their negotiations of the Agreement. (NYSCEF 204, tr at 309:1-4 [Burakoff depo].) Sook explained that he "did not feel" he was required to disclose WHAG's termination date even though he was aware of that probability. (NYSCEF 202, tr at 122:19-23, 124:11-15 [Sook depo].)

On June 30, 2016, WHAG lost its NBC affiliation and was not affiliated with any Big-6 Network after that date. (NYSCEF 315, Nexstar's Response to DIRECTV's Rule 19-A statement ¶ 24.) The separation was reported in a news article published in the Herald Mail on February 18, 2016 and in Broadcasting & Cable's newsletter on February 19, 2016. (NYSCEF 267, Herald Mail Article; NYSCEF 267, Broadcasting & Cable's Newsletter.) Nexstar subsequently changed WHAG's call letters to WDVM on July 1, 2017. (NYSCEF 315, Nexstar's Response to DIRECTV's Rule 19-A statement ¶ 25.) Nexstar did not notify DIRECTV that WHAG had lost its NBC affiliation or that WHAG had changed its call letters; however, Nexstar asserts that it had no obligation to do so under the Agreement. (*Id.* ¶ 26.)

On January 30, 2017, DIRECTV exercised its option to extend the term of the Agreement to a fourth year. (NYSCEF 296, DIRECTV's Response to Nexstar's Rule 19-A statement ¶ 61.) In 2018, Karen Griet, a DIRECTV employee, informed Burakoff that WHAG had lost its NBC affiliation. (NYSCEF 204, tr at 20:21-22 [Burakoff depo].)

By letter dated November 13, 2018, DIRECTV advised Nexstar that it had learned WHAG, now known as WVDM, was no longer affiliated with NBC as of July 1, 2016, and that it would no longer pay Nexstar a “non-carriage fee”<sup>5</sup> for that Station. (NYSCEF 208, DIRECTV November 13, 2018 Letter at 2.) DIRECTV further advised that it had overpaid the non-carriage fee, which was calculated from the date WHAG lost its Network affiliation to August 2018 (Overpayment), and offered to offset the Overpayment from further payments or for Nexstar to remit the Overpayment separately. (*Id.*) In its November 27, 2018 response, Nexstar disagreed with DIRECTV’s interpretation of the Agreement, asserting that there was no requirement that WHAG be a Network station to receive the Unlaunched Station Fee. (NYSCEF 210, Nexstar November 27, 2018 Letter at 2.)

On June 26, 2019, DIRECTV commenced this action by filing a summons and complaint asserting causes of action for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, and a judgment declaring that DIRECTV had no obligation to pay the Unlaunched Station Fee after WHAG lost its Network affiliation and that Nexstar is not entitled to retain the Overpayment or continue receiving the Unlaunched Station Fee. (NYSCEF 1-2, Summons and Complaint.) Upon motion, the court granted DIRECTV leave to amend its complaint to plead a cause of action for fraudulent inducement based on Nexstar’s fraudulent misrepresentations or omissions with respect to WHAG. (NYSCEF 155, Decision and Order [mot. seq. no. 009]; *see also DirectTV, LLC v Nexstar Broadcasting, Inc.*, 199 AD3d 561, 562 [1st Dept 2021] [affirming].)

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<sup>5</sup> This term is not referenced in the Agreement.  
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Nexstar alleges two counterclaims in its amended answer for breach of contract predicated on DIRECTV's failure to pay the Unlaunched Station Fees and for a judgment declaring that DIRECTV has no claim to the return of the Overpayment. (NYSCEF 161, Amended Answer ¶¶ 19-26.)

DIRECTV now moves for summary judgment on its first cause of action for fraudulent inducement, the second cause of action for breach of contract and the fourth cause of action for a declaratory judgment, although DIRECTV acknowledges that granting summary judgment on the first cause of action obviates the need to resolve the two latter claims. DIRECTV also moves for summary judgment dismissing Nexstar's counterclaims. Nexstar also moves for summary judgment on its counterclaims and for summary judgment dismissing the amended complaint.

### **Discussion**

A party moving for summary judgment under CPLR 3212 "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) The "facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) Once this prima facie burden has been met, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact. (*Alvarez*, 68 NY2d at 324.) The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*)

### **DIRECTV's First Cause of Action for Fraudulent Inducement**

Plaintiff alleges in the amended complaint that Nexstar represented WHAG was an NBC-affiliated Station on multiple occasions; the representations were materially incomplete or were misleading partial disclosures, as Nexstar was aware WHAG would lose its affiliation with NBC on July 1, 2016; Nexstar was aware that NBC was unwilling to renew WHAG's affiliation; Nexstar leveraged WHAG's affiliation with NBC to induce DIRECTV to agree to the Unlaunched Station Fee provision based on a misleading or materially incomplete representation that WHAG would continue its affiliation; Nexstar was aware DIRECTV was acting on the basis of these misleading statements; DIRECTV justifiably relied on Nexstar's representations, even though Nexstar knew DIRECTV did not have the capacity to launch or carry that Station; and DIRECTV was damaged as a result. (NYSCEF 154, Amended Complaint ¶¶ 53-63.)

A cause of action for fraudulent inducement requires the plaintiff to show: "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury."

(*United States Life Ins. Co. in the City of N.Y. v Horowitz*, 192 AD3d 613, 614 [1st Dept 2021], quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996].)

#### ***Present Fact versus a Future Event***

Nexstar argues that an expectation of a future event cannot sustain a fraudulent inducement claim. Nexstar's characterization of the impending loss of WHAG's NBC affiliation as a future event, as opposed to a present existing fact, is unpersuasive.

While a fraudulent inducement claim cannot be predicated upon future conduct or events (*Yablon v Stern*, 161 AD3d 594, 595 [1st Dept 2018]), the decision to terminate WHAG's NBC affiliation occurred months before DIRECTV and Nexstar began negotiating the Agreement. The NBC Agreement, which was entered into months before the Agreement, clearly states that WHAG's affiliation with NBC would not be renewed or extended beyond June 30, 2016. Although Sook testified that he sought an extension of WHAG's affiliation up until the expiration date in 2016 (NYSCEF 202, tr at 114 [Sook depo]), the NBC Agreement is clear on its face.

Further, Nexstar fails to present evidence that NBC ever reconsidered its decision to terminate the affiliation after the NBC Agreement was executed. To the contrary, Brockmann testified that she did not recall any such conversations after execution of the NBC Agreement. (NYSCEF 222, tr at 27:13-17 [Brockmann depo].) Dietze also testified that she did not recall any further conversations. (NYSCEF 221, tr at 42:5-22 [Dietze depo].) Dietze also was clear that the NBC Agreement was the final word on this issue and that NBC never departed from the position it took as to the expiration of NBC affiliation, memorialized in the NBC Agreement. (*Id.* at 43:5-16.)

***Material Misrepresentation or Omission***

DIRECTV asserts that Nexstar failed to disclose a material fact, namely WHAG's loss of its NBC affiliation. Nexstar contends that issues of fact exist on materiality precluding summary judgment. It argues that Burakoff's self-serving testimony that DIRECTV agreed to the Unlaunched Station Fee because of WHAG's NBC affiliation is insufficient to establish materiality. Nexstar also contends that WHAG's Network affiliation cannot have been material, since DIRECTV did not carry the Station on its

service, did not protect itself by inquiring as to term of the affiliation or include protective language in the Agreement, and opted to renew the Agreement for a fourth year.

A material fact is one that goes to the “very essence of the bargain” (*Junius Const. Corp. v Cohen*, 257 NY 393, 400 [1931]), and is one that is likely to influence a plaintiff’s decision-making. (*Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 96 [1st Dept 2009]; *2 Fifth Ave. Tenants Assn. v Abrams*, 183 AD2d 577, 578 [1st Dept 1992] [stating that omitted material is important if the person viewing it would have seen it as significantly altering the total mix of available facts].) “A fact may not be dismissed as immaterial unless it is ‘so obviously unimportant ... that reasonable minds could not differ on the question of [its] importance.’” (*Swersky v Dreyer & Traub*, 219 AD2d 321, 328 [1st Dept 1996], *rearg denied* 232 AD2d 968 [1st Dept 1996], *appeal withdrawn* 89 NY2d 983 [1997], quoting *Allen v Westpoint-Pepperell, Inc.*, 945 F2d 40, 45 [2d Cir 1991].) Materiality is normally an issue for the jury to determine. (*See Brunetti v Musallam*, 11 AD3d 280, 281 [1st Dept 2004].)

Here, Section 7 of the Agreement states that the “Stations’ affiliations as identified on Exhibit A are the essence of this Agreement” (NYSCEF 252, Agreement at 14), and Exhibit A identifies WHAG as an NBC affiliate. Thus, any misrepresentation or omission as to station affiliation is material. Nexstar fails to raise an issue of fact.

### ***The Duty to Disclose***

DIRECTV maintains that Nexstar had a duty to disclose that WHAG would lose its NBC affiliation on two grounds. First, DIRECTV characterizes Nexstar’s repeated flaunting of WHAG’s NBC affiliation as an actionable half-truth, and that Nexstar had a duty to disclose the full facts of that affiliation. Second, DIRECTV contends that

Nexstar's possession of superior knowledge regarding WHAG's NBC affiliation triggered a duty to disclose. Nexstar posits that it had no duty of disclosure under either the special facts doctrine or the misleading partial disclosure doctrine.

When a claim for fraud is predicated upon an act of concealment or an omission, the plaintiff must establish the same elements for fraud and also show that the defendant had a duty to disclose material information but failed to do so. (*Gansett One, LLC v Husch Blackwell, LLP*, 168 AD3d 579, 579 [1st Dept 2019], citing *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179 [2011].) An affirmative duty of disclosure arises when the parties are in a confidential or fiduciary relationship. (See *Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006].) Therefore, “[a]bsent a confidential or fiduciary relationship, there is no duty to disclose, and [a defendant’s] mere silence, without identifying some act of deception, does not constitute a concealment actionable as fraud.” (*FNF Touring LLC v Transform Am. Corp.*, 111 AD3d 401, 402 [1st Dept 2013] [internal quotation marks and citation omitted].)

The parties do not dispute that they did not enjoy the type of confidential, fiduciary relationship that would trigger a duty of disclosure. Nevertheless, an affirmative duty of disclosure may arise in the absence of a fiduciary relationship under the special facts doctrine (see *Sports Tech. Applications, Inc. v MLB Advances Media, L.P.*, 188 AD3d 619, 620 [1st Dept 2020]) or where a party makes a misleading partial disclosure. (See *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014].)

A misleading partial disclosure gives rise to a claim for fraud when a party is dependent upon the defendant for relevant facts, and “if the withheld facts are proven to

have been material.” (*Juman v Louise Wise Servs.*, 254 AD2d 72, 74 [1st Dept 1998].) Indeed, “once a party has undertaken to mention a relevant fact to the other party it cannot only give half of the truth,” particularly where only a partial or ambiguous statement has been made. (*Brass v American Film Tech., Inc.*, 987 F2d 142, 150 [2d Cir 1993], citing *Junius*, 257 NY at 400; see also Restatement [Second] of Torts, § 529 [“[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation”].)

As applied here, Nexstar had a duty to disclose based on a misleading partial disclosure. The record shows that Nexstar represented that WHAG was an NBC affiliate but withheld the additional information that the affiliation with NBC would terminate on June 30, 2016 and would not be renewed. By email dated May 22, 2015, Burakoff asked Sook and Ryder for a full Station list as DIRECTV had questions regarding changes from the 2011 Agreement. (NYSCEF 228, Email at 3-4.) Ryder responded four days later with a Station list, writing “[the list] reflects the two new affiliations which are effective July 1” (*id.* at 3.) The Station list included WHAG as an NBC affiliate. (NYSCEF 294, Stations Attachment at 5.) In further correspondence about the Stations DIRECTV was transmitting, Ryder clarified that one Station may be part of the Agreement due to a possible transfer to a new owner. (NYSCEF 228, Email at 1.) No mention was made of any changes related to WHAG in this email correspondence. Despite Nexstar’s alleged hope that NBC would reconsider its decision to end its affiliation with WHAG, the NBC Agreement definitively states that Nexstar and NBC agreed the affiliation would not be extended, and Nexstar was aware

of this fact. Nexstar never disclosed this fact even though it repeatedly represented that WHAG was an NBC affiliate in a top market. This representation could conceivably give rise to a false impression that WHAG would remain an NBC affiliate throughout the Agreement's term.

Moreover, such information would have likely affected DIRECTV's "conduct in the transaction in hand." (*Striker v Graham Pest Control Co.*, 179 AD2d 984, 985 [3d Dept 1992], *lv dismissed* 79 NY2d 1040 [1992] [internal quotation mark and citation omitted].) WHAG lost its Network affiliation within one year of the Agreement's effective date, yet DIRECTV continued to pay the Unlaunched License Fee at the Network rate even though it was not required to pay License Fees for unaffiliated, independent stations. Thus, Nexstar's representation that WHAG was an NBC affiliate "was only as 'good as far as it [went]' and was 'accompanied with such a suppression of facts as [made] it convey a misleading impression.'" (*Scharf v Tiegerman*, 166 AD2d 697, 698 [2d Dept 1990] [citations omitted].) As such, Nexstar's omission of a key fact related to WHAG's affiliation with NBC is arguably an actionable half-truth. (*See Orchard Hotel LLC v D.A.B. Group LLC*, 172 AD3d 530, 531 [1st Dept 2019]; *Juman*, 254 AD2d at 74 [duty to disclose "[g]iven plaintiffs' total dependency on defendant for the relevant facts"].)

The special facts doctrine is also applicable, as information about WHAG was material to the transaction, and the end date for WHAG's affiliation is not information that is easily or readily ascertainable with reasonable diligence. "Under the special facts doctrine, a duty to disclose arises where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair." (*Swersky*, 219 AD2d at

327 [internal quotation marks and citations omitted].) The party invoking the doctrine must demonstrate that “the material fact was information peculiarly within [the] knowledge of [the other party],” and “the information was not such that could have been discovered by [the party invoking the doctrine] through the exercise of ordinary intelligence.” (*Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 278 [1st Dept 2005] [internal quotation marks and citation omitted].)

Here, information pertaining to the expiration date on the NBC Agreement was within Nexstar’s superior knowledge, and, as explained earlier, such information could not have been obtained from the publicly filed documents. The two articles discussing the loss of WHAG’s NBC affiliation were published in February 2016, several months after the Agreement was executed. Furthermore, although DIRECTV had a duty to inquire (*id.* at 278), it is unclear whether Nexstar would have disclosed that information as Ryder testified that such information is confidential (NYSCEF 206, tr at 196:17 [Ryder depo]; see *e.g. Swersky*, 219 AD2d at 327 [question as to “how candid” a witness would have been].)

### ***Intent to Defraud***

DIRECTV asserts that Nexstar intentionally omitted the fact that WHAG was losing its NBC affiliation for the purpose of inducing DIRECTV to agree to the Unlaunched Station Fee. Nexstar posits that DIRECTV cannot demonstrate a fraudulent intent to deceive because the NBC Agreement contained a provision prohibiting its disclosure and because Nexstar had no notice that the duration of WHAG’s affiliation was important to DIRECTV.

“The element of scienter, that is, the requirement that the defendant knew of the falsity of the representation being made to the plaintiff, is ... the element most likely to be within the sole knowledge of the defendant and least amenable to direct proof.” (*Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 98 [1st Dept 2003].) The intent to defraud may be divined from surrounding circumstances (*see Oster v Kirschner*, 77 AD3d 51, 56 [1st Dept 2010]), such as “the failure to disclose material facts that one is obligated to disclose.” (*Anderson v Meador*, 56 AD3d 1030, 1039 [3d Dept 2008].)

DIRECTV’s proof on this element falls short of the clear and convincing evidence standard. DIRECTV relies on Sook’s testimony in which he admitted he did not feel he was required to disclose that WHAG would no longer be affiliated with NBC after June 2016. Sook further testified that the Network rate on which the Unlaunched Station Fee was based on yielding the highest economics for Nexstar, but “the motive to earn fees alone is, without more, insufficient for the court to infer scienter.” (*Basis Pac-Rim Opportunity Fund (Master) v TCW Asset Mgt. Co.*, 40 Misc 3d 1240[A], 2013 NY Slip Op 51494[U], \*5-6 [Sup Ct, NY County 2013], *affd* 124 AD3d 538 [1st Dept 2015].) DIRECTV complains that Ryder did not relay the future change in WHAG’s affiliation to Burakoff in the May 2015 emails, but Ryder also testified that she did not track when Nexstar’s agreements expired. (NYSCEF 206, tr. at 186-187 [Ryder depo].) Thus, DIRECTV has not dispelled all triable issues of fact on the issue of intent to defraud or deceive. (*Clarke v Fifth Ave. Dev. Co., LLC*, 211 AD3d 460, 461 [1st Dept 2022].)

At the same time, Nexstar has not demonstrated its entitlement to summary judgment. As explained earlier, Section 7 states that the essence of the Agreement is the Stations’ affiliations, and Nexstar agreed to the inclusion of this language in the

Agreement. Thus, it cannot be said that Nexstar was unaware that WHAG's NBC affiliation was important to DIRECTV. Nexstar's failure to disclose when WHAG's NBC affiliation would end gives rise to a reasonable inference of an intent to defraud. In any event, the intent to defraud or deceive "is ordinarily a question of fact which cannot be resolved on a motion for summary judgment." (*Shisgal v Brown*, 21 AD3d 845, 847 [1st Dept 2005] [citation omitted].)

### **Reliance**

Triable issues of fact also exist as to this element. The element of reliance requires the plaintiff to show that it was induced to act or refrained from acting based on the alleged misrepresentation or omission to its detriment. (*Shea v Hambros PLC*, 244 AD2d 39, 46 [1st Dept 1998].) The alleged misrepresentation need only be a substantial, but not exclusive, cause of the plaintiff's action. (*Curiale v Peat, Marwick, Mitchell & Co.*, 214 AD2d 16, 27 [1st Dept 1995].) "The question of what constitutes reasonable reliance is always nettlesome because it is so fact-intensive." (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 155 [2010] [internal quotation marks and citation omitted].) Whether a plaintiff's reliance was reasonable is ordinarily a jury question (see *Brunetti*, 11 AD3d at 281) unless "the facts in the case ... present a rare circumstance in which the issue of reasonable reliance can be resolved at the stage of summary judgment." (*Global Mins. & Metals Corp, v Holme*, 35 AD3d 93, 99 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007].)

Generally, "[t]he element of justifiable reliance is lacking where a sophisticated party enters into an arms-length transaction and, with the exercise of ordinary diligence, could have protected itself through due diligence concerning the transaction."

(*Rapaport v Strategic Fin. Solutions, LLC*, 190 AD3d 657, 657-658 [1st Dept 2021] [internal quotation marks and citation omitted].) DIRECTV does not dispute that it is familiar with retransmission agreements, as it was the second largest MVPD provider in the United States (NYSCEF 251, DIRECTV Form 10-k at 6) and had executed the 2011 Agreement. Similarly, Burakoff testified that both in-house and outside counsel assisted in drafting the Agreement. (NYSCEF 290, tr at 70 [Burakoff depo].) DIRECTV was aware that Network affiliations may expire (NYSCEF 255, tr at 174:3-8 [Burakoff depo].) Further, when asked whether Burakoff asked Nexstar when WHAG's affiliation with NBC would end, Burakoff responded "[n]o." (*Id.* at 172:4.)

Nevertheless, triable issues of fact exist as to whether DIRECTV reasonably relied on Nexstar's omission. First, it is unclear whether DIRECTV could have learned of the expiration date through the exercise of ordinary diligence. Contrary to Nexstar's contention, Nexstar's 2014 Form 10-k does not publicly disclose the identity of which of its stations would lose its affiliation with NBC in June 2016. (NYSCEF 250, Nexstar Form 10-k.) Nexstar admitted that the expiration dates are redacted on the affiliation agreements filed with the FCC. (NYSCEF 206, tr at 208-210 [Ryder depo].) The record shows that NBC would not have disclosed when WHAG's affiliation with it would have ended. Nor is it clear that, had DIRECTV directly asked, Nexstar would have disclosed the termination date. Burakoff testified that "station groups often will not tell us when their affiliation dates expire" (NYSCEF Doc No. 255 at 172) and Ryder testified that such information is kept confidential. (NYSCEF 206, tr at 196:17 [Ryder depo].) Thus, it appears that the expiration date was not peculiarly within DIRECTV's knowledge, and

the exercise of ordinary diligence likely would not have disclosed that fact. (See *Swersky*, 219 AD2d at 327.)

Even if DIRECTV had a general awareness that affiliation agreements may end, Nexstar's Form 10-k states that Nexstar expected those agreements would be renewed. Additionally, Burakoff testified that "never occurred" to DIRECTV to ask Nexstar about the expiration date because of "the way they were emphasizing the affiliation" with NBC. (NYSCEF 204 at 331.) Further, it is undisputed that it is rare for Big Four Networks to lose their affiliation. (NYSCEF 315, Nexstar's Response to DIRECTV's 19-A Statement ¶ 89.) Robin Flynn, Nexstar's designated expert, concurred and cited only 16 instances between 2010 and 2018 where a station lost its Big Four affiliation across 1,300 to 1,400 stations per year. (NYSCEF 233, tr at 243:25-244:9 [Flynn depo].)

While Nexstar maintains that DIRECTV's failure to include language in the Agreement about Nexstar's representations and warranties negates any claim of reliance, citing *Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.* (17 NY3d 269, 279 [2011]) (*Centro Empresarial*), *Centro Empresarial* "does not impose a duty on plaintiffs to insist on a 'prophylactic provision' in agreements." (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1045 [2015], *revg* 106 AD3d 494 [1st Dept 2013], *revg* 35 Misc 3d 1217[A], 2012 NY Slip Op 50723[U] [Sup Ct, NY County 2012].) As is the case here, the plaintiff in *ACA* did not allege that it was relying on the defendant's representation; rather, the defendant had concealed information that was not publicly available to it. (2012 NY Slip Op 50723[U], \*13). Accordingly, the part of DIRECTV's motion for summary judgment on the first cause of action is denied, and the

part of Nexstar's motion for summary judgment dismissing this cause of action is also denied.

**DIRECTV's Second Cause of Action and Nexstar's First Counterclaim for Breach of Contract**

In its second cause of action, DIRECTV alleges that Nexstar breached the Agreement by collecting the Overpayment to which it was not entitled; failing to inform DIRECTV that WHAG had lost its Network affiliation and had changed its call letters to WVDM; withholding the Overpayment; and demanding additional amounts for the Unlaunched License Fee (NYSCEF 154, Amended Complaint ¶¶ 68-70). In its first counterclaim, Nexstar alleges that DIRECTV breached the Agreement by failing to pay Unlaunched Station Fees owed to Nexstar. (NYSCEF 161, Amended Answer ¶ 22 [counterclaims].)

DIRECTV contends that a plain reading of the Unlaunched License Fee provision establishes that it was not obligated to pay a fee at the Network rate once WHAG lost its NBC affiliation. Nexstar argues that DIRECTV's breach of contract claim must be dismissed because the Agreement refers to two types of Licenses Fees – fees for Stations DIRECTV carried and a fee for DIRECTV not to carry WHAG. Nexstar concedes that, if WHAG lost its NBC affiliation after DIRECTV launched it and did not affiliate with another Network, CW or MNT, then DIRECTV was not required to pay a fee, though Nexstar would still have been able to generate revenue from advertisements. However, DIRECTV never launched WHAG, and Nexstar claims that the only way DIRECTV could have ceased paying the Unlaunched Station Fee was to carry WHAG on its service. Nexstar also asserts that DIRECTV knew how to address the risk of a lost Big-6 Network affiliation, as it had included specific clauses elsewhere

in the Agreement, such as Section 4 (a) (viii) discussing “Multiplexed Programming” (NYSCEF 252, Agreement at 8), but failed to insert similar language regarding WHAG.

A cause of action for breach of contract requires the existence of a valid contract, the plaintiff’s performance, the defendant’s breach, and damages. (*Fawer v Shipkevich PLLC*, 213 AD3d 408, 408 [1st Dept 2023].) The “[court’s] role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract.” (*Evans v Famous Music Corp.*, 1 NY3d 452, 458 [2004].) “If that intent is discernible from the plain meaning of the language of the contract, there is no need to look further.” (*Id.*) Importantly, the court cannot “add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.” (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [internal citations and quotations omitted].) “[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.” (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002].)

Nexstar asks the court to isolate the Unlaunched Station Fee provision from the rest of the Agreement to determine that DIRECTV must pay the Unlaunched Station Fee whether or not WHAG was an NBC affiliate. However, “[a] contract should be read ‘as a harmonious and integrated whole’ so as to ‘give effect to its purpose and intent,’ and ‘must be construed in a manner which gives effect to each and every part, so as not to render any provision meaningless or without force or effect.’” (*HTRF Ventures, LLC v Permasteelisa N. Am. Corp.*, 190 AD3d 603, 607 [1st Dept 2021] [internal quotation marks and citation omitted].) “[P]articlar words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the

parties as manifested thereby.” (*Riverside S. Planning Corp. v CPR/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009] [internal quotation marks and citation omitted].)

Reading the Agreement, as a whole, shows that the parties contemplated charging License Fees only for those Stations that were affiliated with a Network or with CW or MNT, and that the Unlaunched Station Fee provision does not require DIRECTV to pay License Fees for an unaffiliated, independent WHAG. The Unlaunched Station Fee is comprised of License Fees payable at the Network rate for 220,000 Subscribers, and DIRECTV was required to pay License Fees until it launched WHAG. Section 8 describes the rate structure under which DIRECTV would pay License Fees and sets forth a specific per-Subscriber rate based on whether a Station was affiliated with a Network, CW or MNT. Because Section 8 ties the collection of License Fees to Station affiliations with a Network, CW or MNT, it follows that Nexstar cannot collect a License Fee for a Station that is not affiliated with a Network, CW or MNT. The only instance where Nexstar may collect License Fees for an unaffiliated Station relates to a former CW-affiliated Station. This interpretation is supported by the language in Section 7 which provides that a Station that changes network affiliations shall be subject to License Fees based on its new network affiliation. Section 7 does not call for payment of License Fees for Stations that lose their network affiliations during the term of the Agreement. WHAG was an NBC affiliate when the Agreement was executed, and its term as an NBC affiliate ended on June 30, 2016. WHAG was not affiliated with a Network, CW or MNT as of July 1, 2016. Thus, the Agreement does not require DIRECTV to pay the Unlaunched Station Fee after July 1, 2016.

Nexstar's argument that DIRECTV intentionally omitted language to relieve itself of its obligation to pay the Unlaunched Station Fee if WHAG lost its NBC affiliation is unpersuasive. If parties omit contract terms that are readily found in other, similar contracts, then under the maxim *expressio unius est exclusio alterius*, the parties must have intended the omission. (*Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 560 [2014].) However, License Fees, as that term is defined in Section 8, refers to fees for affiliated Stations, only, and the Unlaunched Station Fee provision must be read in accordance with that definition.

Nexstar's contention that Section 7 applies only to Stations DIRECTV chose to carry is equally unpersuasive. The first sentence in that section states that Station affiliations were the essence of the Agreement, and as stated earlier, WHAG was an NBC affiliate when the Agreement was executed. The next sentence discusses rate changes if a Station changes networks, but it does not state whether it applies only to Stations carried by DIRECTV, as Nexstar has argued. The third sentence mentions carriage and provides that DIRECTV may cease carrying an unaffiliated station "if continued carriage would prevent DIRECTV from retransmitting the station or signal that replaced the lost network affiliation due to capacity constraints in the applicable Local Territory." (NYSCEF 252, Agreement at 13.). This last sentence makes no reference to the payment of License Fees for an unaffiliated station, and contrary to Nexstar's assertion, does not distinguish License Fees for launched Stations from License Fees for unlaunched Stations, such as WHAG.

Accordingly, the part of DIRECTV's motion for summary judgment on DIRECTV's second cause of action is granted on the issue of Nexstar's liability. The part of

DIRECTV's motion for summary judgment dismissing Nexstar's first counterclaim is granted, and the first counterclaim is dismissed. The part of Nexstar's motion for summary judgment dismissing DIRECTV's second cause of action and for summary judgment on Nexstar's first counterclaim is denied.

**DIRECTV's Third Cause of Action and Nexstar's Second Counterclaim for a Declaratory Judgment**

DIRECTV and Nexstar both seek a declaration concerning their rights to the Overpayment.

"[A] declaratory judgment action should not be entertained where it 'parallel[s]' a breach of contract claim, and 'merely seek[s] a declaration of the same rights and obligations.'" (*Colfin SNP-1 Funding, LLC v Security Natl. Props. Servicing Co., LLC*, 199 AD3d 406, 407 [1st Dept 2021], quoting *Apple Records v Capitol Records*, 137 AD2d 50, 54 [1st Dept 1988]). Here, DIRECTV's second cause of action and Nexstar's first counterclaim, both for breach of contract, offer adequate, alternative remedies to a declaratory judgment. (See *Nationstar Mtge., LLC v Ocwen Loan Servicing, LLC*, 194 AD3d 490, 493 [1st Dept 2021].) Accordingly, the part of DIRECTV's motion for summary judgment on DIRECTV's fourth cause of action and for summary judgment dismissing Nexstar's second counterclaim is denied. The part of Nexstar's motion for summary judgment dismissing DIRECTV's fourth cause of action and for summary judgment on the second counterclaim is denied.

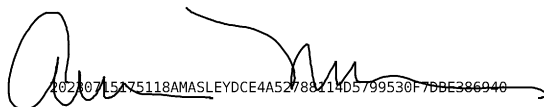
The court has considered the other arguments raised by the parties and finds them unavailing.

Accordingly, it is

ORDERED that the motion for plaintiff DIRECTV, LLC for summary judgment (motion sequence no. 013) is granted to the extent of granting plaintiff summary judgment on the issue of defendant Nexstar Broadcasting, Inc.’s liability on the second cause of action, and granting plaintiff summary judgment dismissing defendant’s first counterclaim, and the first counterclaim is dismissed, and the balance of the motion is otherwise denied; and it is further

ORDERED that the motion of defendant Nexstar Broadcasting, Inc. for summary judgment (motion sequence no. 014) is denied; and it is further

ORDERED that the parties are to appear for a Trial Scheduling Conference on August 7, 2023 at 9:30 am. Motions in limine are due September 14, 2023. Parties shall review the Part 48 Trial Procedures.



<u>7/15/2023</u> DATE					<u>ANDREA MASLEY, J.S.C.</u>			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE