United States Court of Appeals

for the

Third Circuit

Case No. 24-2319

EHI ACQUISITIONS, LLC,

Plaintiff/Appellant,

– v. –

UNITED STATES OF AMERICA,

Defendant/Appellee.

ON APPEAL FROM AN ORDER OF THE DISTRICT COURT FOR THE DISTRICT OF THE VIRGIN ISLANDS IN NO. 3-22-CV-00044, HONORABLE CHERYL ANN KRAUSE, CIRCUIT JUDGE

REPLY BRIEF FOR PLAINTIFF/APPELLANT

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I. Introduction.

This appeal concerns the meaning of the phrase "an offer," used in an indenture to refer to an offer to convey a commercial resort. The question is whether "an offer" includes an offer for value.

In its response brief, the Government concedes that the ordinary meaning of "offer" includes an offer for value. Because words in contracts are interpreted in accordance with their ordinary meaning (unless some special, term-of-art meaning applies), that concession effectively ends the issue.

The Government nevertheless argues that the Court should not interpret "an offer" in accordance with its ordinary meaning. It argues that the context of the indenture shows—as a matter of law—that "an offer" means something other than its ordinary meaning. It says that "an offer" excludes an offer for value because the parties intended the Improvements (i.e., the resort) to be a gift to the Government. This argument fails for several reasons.

First, the parties expressly carved out the Improvements from the gift of the land. So the parties' donative intent for the *land* does not transfer to the *Improvements*. In its opening brief, EHI demonstrated that the only way to make sense of the exclusion of the Improvements from the gift is that the parties intended to leave open the possibility that a for-profit commercial operator could offer the Improvements for value. The Government does not even attempt to

address this argument, because it cannot explain why the parties left the Improvements out of the gift if they intended the Improvements to be a gift.

Second, the phrase "an offer" appears in the part of the indenture containing provisions dedicated to ensuring the successful operation of a commercial resort. EHI's opening brief explained that the majority of the indenture is devoted to that commercial purpose. And the phrase "an offer" appears in a provision essential to that purpose, because it provides an incentive for a third-party, for-profit purchaser to invest money to buy the Improvements and renovate and maintain them. The Government's response brief fails to address any of this.

Third, although its ordinary meaning already encompasses an offer for value, "offer" is also a term of art that means a proposal for a bargained-for exchange. And in the indenture, "offer" appears precisely in the context where it carries that special meaning: in a provision about the formation of a contract, paired with the term "acceptance." The Government fails to show that "offer" does not carry this term-of-art meaning in the indenture.

Fourth, for the Government to win, controlling Virgin Islands law requires a clear, unmistakable, and unequivocal intent to donate the Improvements. But, as explained in EHI's opening brief, no such clear, unmistakable, and unequivocal intent to donate the Improvements (as opposed to the land) is evident—much less as a matter of law.

Because the government cannot overcome the plain language of the contract and controlling law, it resorts to reliance on extrinsic evidence. But that reliance on extrinsic evidence is neither appropriate (given the unambiguous meaning of "an offer") nor relevant to the question at issue (the meaning of "an offer").

For each of these reasons, and the reasons set forth in EHI's opening brief, the district court's ruling should be reversed. This outcome is required under controlling law. And it is also the best outcome for the Virgin Islands community, which strongly supports EHI's efforts in this lawsuit. *See* Br. 10 -11 (explaining that EHI has committed to assign title to the resort to a charitable trust for the benefit of the people of the Virgin Islands, and has committed to rebuilding Caneel Bay as a five-star resort).

II. The Government concedes that the ordinary meaning of "an offer" includes an offer for value.

The Government does "not dispute that the meaning of the term 'offer' is broad enough to include both a gratuitous transfer and a transfer for value." Resp. 28. So the Government concedes that the ordinary meaning of the word "offer" encompasses an offer to transfer for value, like the one made by EHI.

This is an important concession. Under controlling Virgin Islands law, the intent and meaning of a contractual provision is derived from the words the parties selected and agreed to. *Phillip v. Marsh-Monsanto,* 66 V.I. 612, 624-25 (2017). And a court must give those words their ordinary meaning: "what [the contract's]

words would mean in the mouth of a normal speaker of English, using them in circumstances in which they were used." *Id.* at 625 (internal quote omitted); *see Arvidson v. Buchar*, 72 V.I. 638, 651 (Super. Ct. 2020) ("The Court will not rewrite the contract or give it a construction that conflicts with the plain, ordinary, and accepted meaning of the words used.") (cleaned up). So because the ordinary meaning of "offer" includes an offer to transfer for value, so does paragraph 8 of the 1983 Indenture.

Therefore, when EHI made an offer to transfer title to the Improvements for fair market value, that was "an offer" under paragraph 8.

III. The Government's argument that the Court should ignore the ordinary meaning of "an offer" fails.

As described above, the Government does not dispute that the ordinary meaning of the words in the contract encompass EHI's offer to transfer the Improvements for value. *Supra* § II. Instead, the Government argues that the Court should ignore the ordinary meaning of the words. It contends that the Court should give them a meaning that is different from their ordinary meaning—one that does not encompass an offer for value.

This argument contradicts Virgin Islands law governing contract interpretation. *See, e.g.*, *Arvidson*, 72 V.I. at 651 ("The Court will not rewrite the contract or give it a construction that conflicts with the plain, ordinary, and accepted meaning of the words used.") (cleaned up). It is true that words can have

multiple ordinary meanings that vary with context (which is why dictionaries present multiple definitions for words). And while "an offer" does have multiple ordinary meanings (including one as a term of art, *see infra* § IV), the Government does not contend—much less demonstrate—that one of these ordinary meanings precludes a proposed exchange for value. Instead, the Government concedes the exact opposite: that the applicable ordinary meaning "of the term 'offer' is broad enough to include both a gratuitous transfer and a transfer for value." Resp.28.

Moreover, the Government is wrong that the context of the phrase "an offer" contradicts its ordinary meaning. The context of the phrase is entirely consistent with its ordinary meaning. In EHI's opening brief, EHI showed that the phrase "an offer" appears in a commercial context. Br. 5-8, 18-21. As EHI pointed out, the parties executed an indenture, not a deed of gift. Br. 18-19. And that indenture contained numerous provisions designed to protect the long-term operation of a commercial resort using the Improvements. Br. 19-21 (describing these provisions spanning four pages of the indenture). Specifically, the phrase "an offer" is found in paragraph 8, which furthers the commercial purpose of the indenture by providing an incentive for new commercial owners to purchase, renovate, and maintain the Improvements with the ability to recover their capital investments. Br. 6-7, 21-23.

The Government's response brief fails to address any of this. In fact, the Government does not engage at all with EHI's argument that paragraph 8 serves this commercial purpose. Instead, the Government simply asserts that "[a]n offer to transfer for value is not consistent with [the] donative and philanthropic intent," without addressing the pages of commercial provisions that appear in the indenture. Resp. 30. The Government does not respond to EHI's argument because it has no response.

Further, the Government's appeal to the indenture's "donative and philanthropic intent" mistakenly conflates JHPI's intent for the *land* and JHPI's intent for the *Improvements*. The Government assumes that because JHPI intended to donate the land, it also intended to donate the Improvements. Resp. 29-30. But as described at length in EHI's opening brief, JHPI had different intents for the land and the Improvements: it wanted the *land* to go to the Government for free, while at the same time ensuring that the *Improvements* continued to be maintained as a long-term commercial resort. Br. 5-8, 43-47. That is why the indenture expressly carved out the Improvements from the grant, and why it contained four pages of commercial provisions designed to protect the operation of the commercial resort (including paragraph 8). Appx695-699. Those commercial provisions reflect an agreed-upon commercial, not philanthropic, intent.

In EHI's opening brief, EHI established that its interpretation of "an offer" is the only interpretation that makes sense of the exclusion of the Improvements from the initial conveyance. Br. 34-39. The parties could have included the Improvements in the initial conveyance, and made them subject to the Retained Use Estate just like the land. Br. 35. Instead, they expressly excluded the Improvements because they wanted a for-profit commercial operator to be able to recoup its investments in them. The Government's response brief does not even attempt to address this argument.

Notably, when discussing the indenture's "philanthropic intent," the Government consistently refers to the "land" or the "Premises," a defined term that means the land exclusive of the Improvements. *See, e.g.*, Resp. 29 ("The *land* gift is contingent on the inclusion of the *land* in the Park. Appx699. And the indenture required the preservation of the *land* … so that the *Premises* could become part of the Park.") (emphasis added); Appx695 (defining "Premises" as "the land . . . exclusive of all other improvements thereon" apart from "landscaping, walkways, roads, road systems, and automobile parking areas"). EHI agrees with the Government that the indenture "reflects JHPI's intent to gift to the United States the rights the United States acquired under the 1983 Indenture." Resp. 29. But the "rights the United States acquired" were just the rights to the land, subject to the commercial provisions which protected the operation of a commercial resort.

Indeed, as just described, the indenture expressly carved out the Improvements from the donative grant. Appx 695. So when the indenture stated that "[t]his conveyance is by way of gift," the "conveyance" referred to the transfer of the land, not the Improvements. Appx700.

There is nothing inconsistent about transferring land for free while also requiring the Government to pay for the Improvements under specified circumstances. Br. 42-44. As described in EHI's opening brief, this is no different than the traditional "buy one, get one free" deal: the Government gets the land for free, but to keep it, it may have to pay fair market value for the Improvements (and only for the Improvements).

The Government incorrectly states that applying the ordinary meaning of "an offer" "could require the Government to pay a non-nominal sum for the land to retain the land in the future." Resp. 30. This assertion is false. Under no scenario would the Government pay a non-nominal sum "for the land." At most, the Government would pay fair market value for the *Improvements,* and would keep the *land* for no additional payment at all (other than the $1 nominal sum in the 1983 indenture).

The Government is also wrong that applying the ordinary meaning of "an offer" "would nullify the land donation." Resp. 31. The Government asserts that this would allow EHI to "demand an outrageous sum from the Government,

knowing that the Government would not pay that sum, and then claim title to the entire Caneel Bay property." Resp. 31. But EHI would not be able to demand an "outrageous sum" for the Improvements. The covenant of good faith and fair dealing would prevent EHI from making such an "outrageous" offer. *See Chapman v. Cornwall*, 58 V.I. 431, 441 (2013) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.") (internal quote omitted). And in fact, EHI's offer to convey the Improvements for $70 million was at or below fair market value. Appx354-405 (expert reports); *see* Appx1020 (the Government did not present any evidence to dispute this). In any event, no matter how much the Government pays for the Improvements, it would still be getting the land for free.

The Government next argues that allowing EHI to make an offer for value is inconsistent with JHPI's commitment to bear the "cost[s] and expense[s]" for the Improvements. Resp. 31. But it is perfectly consistent for a party to bear the costs and expenses of improvements, and then sell those improvements for fair market value. Who bears costs and expenses is just about who pays for the "renovations," "alterations," etc. Appx697 (1983 Indenture). It does not mean that the owner of the Improvements cannot later sell the Improvements for fair market value. It happens all the time that an owner bears the costs and expenses of building, renovating, or maintaining property, and then sells the property for fair market

value. For example, that is the entire business model of real estate developers. As another example, a private party operating a hotel concession on National Park land may have to pay the costs and expenses of capital improvements on the hotel, but the party is still given, at the end of the concession term, the right to payment for those capital improvements. Appx396 (Engle Summary of Facts and Opinions). And here, as described in EHI's opening brief, the ability to recover the capital expenditures made in renovating and maintaining the Improvements was a necessary incentive to ensure the operation of a successful commercial resort, as JHPI intended. Br. 6-7, 21-23.

The Government also argues that the absence of words such as "offer to convey for value" or "offer to sell" means that the phrase "an offer" does not encompass an offer to transfer for value. Resp. 31-32 (emphasis added). But as described above, and as the Government concedes, the ordinary meaning of "an offer" includes an offer to transfer for value. *Supra* § II; *see* Br. 39-41 (explaining how the Government's argument relies on circular reasoning). The parties did not add additional language such as "for value" or "to sell" because they did not need to; this concept is already included in the plain and ordinary meaning of "an offer." Moreover, there was good reason not to expressly limit the offer to one "for value." That is because it was not guaranteed that JHPI would sell its rights to a commercial operator, and the parties wanted to leave the option open for JHPI to

offer the Improvements to the Government for free. *See* Br. 50. Consistent with its ordinary meaning, the phrase "an offer" meant that the Improvements could be offered either for value (if the Improvements were sold to a commercial operator, who would have an incentive to recover its investment) or for free (if the Improvements were not sold to a commercial operator).

The Government also argues that "acceptance of an offer is used interchangeably with acceptance of a conveyance," and therefore "the offer cannot require acceptance of anything more than the conveyance." Resp. 32. This argument also fails. Paragraph 8 makes clear that the Government's acquisition of the Improvements depends on "acceptance by Grantee *of such offer*"—i.e., the offer made by the owner, including an offer to convey the Improvements for value. Appx698 (emphasis added). Similarly, the phrase "accept *such conveyance*" means that the Government must accept the conveyance described in the offer—i.e., the conveyance subject to the terms of the offer. Appx699. Moreover, the Government's argument that the offer "cannot require acceptance of anything more than the conveyance" leads to the absurd result that the offer could not contain any additional terms whatsoever—including, for example, terms governing when the conveyance would occur.

Finally, the Government argues that paragraph 8's requirement that any mortgage on the Improvements be "satisfied or discharged" prior to conveyance

means that "the parties did not intend for the United States to pay for the improvements." Resp. 32-33. This is a non-sequitur. That the parties did not want the Government taking title to the Improvements subject to a mortgage does not indicate—much less establish as a matter of law—that they intended that the Government get the Improvements *for free* in all circumstances. Getting property free and clear from any mortgages is not the same thing as getting property for free. The typical commercial real estate transaction includes a term that requires the seller to convey the property free of any mortgages, but this does not imply that the buyer gets the property for free. And there may be any number of reasons why the Government taking the Improvements subject to a mortgage debt would create impracticalities (including, for example, legal limitations on the Government taking on debt or the lender's ability to foreclose on its secured interest).

IV. The Government fails to show that "an offer" is not a contractual term of art.

As described above, EHI wins under the ordinary meaning of "an offer," which the Government concedes includes a proposed transfer for value. *Supra* §§ II-III. In addition, the Government fails to rebut EHI's argument that "an offer" is a term of art that includes a proposed exchange for value. Br. 24-29.

The Government acknowledges that there are "numerous cases where similar terms have been used in the context of a transfer for value." Resp. 34. And it also acknowledges that there are cases explicitly stating that "the term 'offer' is a

term of art in contract law." Resp. 34; *see Trading Techs. Int'l v. Ibg Llc*, 2020 U.S. Dist. LEXIS 259896, at *14 (N.D. Ill. Oct. 21, 2020) ("the term 'offer' is a term of art in contract law"); *Zinner v. Olenych*, 108 F. Supp. 3d 369, 390 n.7 (E.D. Va. 2015) ("offer is a term of art").

The Government dismisses these cases because, it asserts, they did not conduct a "detailed analysis" of whether "offer" is a term of art. Resp. 34. But the fact that a "detailed analysis" was not necessary for those courts to conclude that "offer" is a term of art actually shows the self-evident nature of that proposition. Indeed, it is indisputable that "offer" is "a word or phrase having a specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts," which makes it a "term of art." Black's Law Dictionary 1610 (9th ed. 2009) (defining "term of art"); *see* Br. 24-25 (citing Virgin Islands law giving "offer" a special meaning, and explaining that "the terms 'offer' and 'acceptance' are such deeply entrenched terms of art, they have been adopted by every jurisdiction in this country."). And the Government provides *absolutely no* analysis for its claim that "offer" is not a term of art.

The Government next argues that even though "offer" may be a term of art, the Court should not apply that meaning to the 1983 Indenture. Resp. 34-35. But "[t]echnical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according

to their peculiar and appropriate meaning." *Defoe v. Phillip*, 56 V.I. 109, 121 (2012) (quoting 1 V.I.C. § 42) (emphasis added). So when "an offer" is used in the context of a legal contract, it must be given its term-of-art meaning.

Moreover, the Government's arguments that "an offer" should not be given its term-of-art meaning are unpersuasive. The Government argues that the cases EHI cites do not "indicate that when the term 'offer' is used in an already-existing contract, the term is used in the same manner as it is used when determining whether a contract exists." Resp. 34. But courts apply term-of-art meanings to words used in existing contracts all the time. Indeed, one of the primary uses of terms of art is to determine the meaning of a word in an existing contract. And here, the phrase "an offer" in the indenture clearly refers to its term-of-art meaning regarding the formation of a contract. It appears when discussing the formation of a contract between the Government and the owner of the Improvements, and it pairs the "offer" with an "acceptance," which are both terms of art in the context of contract formation. *See* Br. 25-26 (explaining why "it would be highly anomalous for the parties to have used the well-known terms of art 'offer' and 'acceptance' if they did not intend those words to be understood as terms of art").

The Government also argues that "context shows that the word 'offer' was not used as a term of art." Resp. 35. But as just described, the context of the word—i.e., its use when discussing the formation of a contract, in conjunction with

the word "acceptance"—demonstrates that the parties *did* intend it to carry its term-of-art meaning. And that is supported by the overall context of paragraph 8, which is a commercial provision meant to ensure the successful operation of a commercial resort. *Supra* § III.

Finally, the Government argues that applying the term-of-art meaning of "an offer" would "exclude a transfer without cost," and that there is "no reason to believe that the parties intended to insert a term that prohibited a transfer without cost." Resp. 35. But construing "an offer" in paragraph 8 according to its term-of-art meaning would not "prohibit" a transfer without cost. The owner of the Improvements could still offer the Improvements to the Government for free if it so desired, and nothing in paragraph 8 (or any other part of the indenture) would preclude that.

V. The Government fails to rebut controlling Virgin Islands law that requires clear, unmistakable, and unequivocal intent to donate the Improvements.

As described in EHI's opening brief, Virgin Islands law requires that to "substantiate donative intent, the donee must demonstrate a clear, unmistakable, and unequivocal intention on the part of a donor to make a gift of his or her property." *Drayton v. Drayton*, 65 V.I. 325, 343-44 (V.I. 2016) (internal quote omitted); *Chestnut v. Goodman*, 59 V.I. 467, 473-74 (V.I. 2013); *see* Br. 41-42. There is no clear, unmistakable, and unequivocal intention to donate the

Improvements (as opposed to the *land*). Indeed, the Improvements were expressly carved out of the donative grant. And the early termination provision does not contain any clear, unmistakable language showing donative intent, such as "by way of gift" or "without consideration." *See* Br. 42.

The Government contends that the indenture "donated … a present interest in the land and rights to the improvements as delineated in the termination clause." Resp. 36. But the "rights to the improvements as delineated in the termination clause" are just the rights to accept an offer made by the owner of the Improvements. Appx698-699 (1983 Indenture). And (without assuming the Government's conclusion) that offer could be a proposed exchange for value. So the rights to the Improvements are no more than a right of first refusal, which could hardly be described as "donative intent"—much less donative intent that is "clear, unmistakable, and unequivocal." *Drayton*, 65 V.I. at 343-44; *Chestnut*, 59 V.I. at 473-74. The Government's right to accept an offer for value does not demonstrate the necessary donative intent for the Improvements.

The Government next argues that the "the face of the contract" and the "extrinsic evidence" reflect a clear, unmistakable and unequivocal intention "to transfer the improvements without charge to the United States under the termination provision." Resp. 36-37. But as just described, "the face of the contract" says nothing clear or unequivocal about donative intent for the

Improvements. In fact, as described above, the early termination provision has a commercial context and serves the purpose of ensuring the successful operation of a commercial resort. *Supra* § III. And the extrinsic evidence, if it could be considered, does not show any such clear, unmistakable, and unequivocal intent to donate the Improvements either. *Infra* § VI.A.

VI. The Government's reliance on extrinsic evidence fails.

A. The Government's extrinsic evidence cannot be considered and is unpersuasive.

When contractual language is unambiguous, "[r]esort to extrinsic evidence … is … unnecessary and even inappropriate." *McDonald v. Davis*, No. 2004-93, 2009 U.S. Dist. LEXIS 17309, at *20 (D.V.I. Mar. 5, 2009). Here, as described above, the contractual language "an offer" unambiguously includes a proposed transfer for value. The Government expressly concedes that the ordinary meaning of "an offer" includes a proposed transfer for value. *Supra* § II. And the term-of-art meaning applicable to "offer" in the contractual context also encompasses a proposed transfer for value, i.e., a bargained-for exchange. *Supra* § IV. So under either its ordinary meaning or its term-of-art meaning, "an offer" unambiguously encompasses EHI's offer.

In the face of this unambiguous language, the Government argues that extrinsic evidence "establish[es] an ambiguity" in the contract. Resp. 41. Certain types of extrinsic evidence may be considered in determining whether there is a

latent ambiguity in a contract. *See Employees' Ret. Sys. of the Gov't of the V.I. v. Best Constr.*, No. ST-08-CV-490, 2012 V.I. LEXIS 129, at *4 (Super. Ct. Feb. 24, 2012); *McDonald*, 2009 U.S. Dist. LEXIS 17309, at *20-23 n.11. But to be considered, that extrinsic evidence must show "the parties' objectively manifested linguistic reference regarding the ambiguous term, not their expectations." *Employees' Ret. Sys.*, 2012 V.I. LEXIS 129, at *4 (internal quote omitted); *see McDonald*, 2009 U.S. Dist. LEXIS 17309, at *20-23 n.11 ("[T]he key inquiry in this context will likely be whether the proffered extrinsic evidence is about the parties' objectively manifested linguistic reference regarding the terms of the contract, *or is instead merely about their expectations.*") (internal quote omitted). Extrinsic evidence showing "objectively manifested linguistic reference regarding the ambiguous term" is the "right type of extrinsic evidence for establishing latent ambiguity." *Employees' Ret. Sys.*, 2012 V.I. LEXIS 129, at *5 (internal quote omitted). Evidence about the parties' expectations "is not." *Id.*[1]

The extrinsic evidence relied on by the Government is exactly the type of extrinsic evidence about the parties' expectations that cannot establish a latent

1 The Government contends that this distinction between types of extrinsic evidence does not apply because it originally was stated in cases applying Pennsylvania law. Resp. 42-43. But as the Government acknowledges, courts in the Virgin Islands have adopted this distinction. *See Employees' Ret. Sys.*, 2012 V.I. LEXIS 129, at *4-5; *McDonald*, 2009 U.S. Dist. LEXIS 17309, at *20-23 n.11.

ambiguity. The Government cites pieces of extrinsic evidence to show the parties' *expectations* about what would happen to the Improvements at the expiration of the Retained Use Estate ("RUE")—that JHPI would donate the Improvements to the Government. *See* Resp. 38-39. This evidence is, at most, evidence of the parties' expectations, which "is not" the "right type of extrinsic evidence for establishing latent ambiguity." *Employees' Ret. Sys.*, 2012 V.I. LEXIS 129, at *5 (internal quote omitted). The Government does not cite to any "objectively manifested linguistic reference" regarding the term "an offer." *Id.* This is true for multiple reasons.

First, as just described, the evidence cited by the Government does not contain any "linguistic reference" at all (much less a linguistic reference to the "offer" and "acceptance" provision in paragraph 8). The Government's evidence is not about the meaning of the words in the contract. It is instead about what JHPI expects will happen to the Improvements at the expiration of the RUE. But a party's expectations about some future event are precisely the kind of extrinsic evidence that may not be considered.

Second, what happens to the Improvements at the expiration of the RUE has no bearing on the meaning of "an offer" in the early termination provision, because the early termination provision is not about what happens at the expiration of the RUE. To the contrary, the early termination provision is about precisely the

opposite: an *early termination* of the RUE. So whatever JHPI expected would happen to the Improvements at the expiration of the RUE is not relevant to the meaning of the term "an offer" in the early termination provision.

Third, the expectations that the Government relies on are all contingent on JHPI keeping its rights to the Improvements, rather than selling those rights to a commercial operator. *See, e.g.*, Appx97 (1982 Rockefeller letter to Interior Secretary) (stating that at the expiration of the RUE, "JHPI would also donate the buildings and other facilities"). But the indenture expressly allowed JHPI to sell its interests in the Improvements to a for-profit commercial operator. *See* Br. 6; Appx697. And it set forth provisions to ensure the profitable operation of the resort if that occurred. Br. 6-8; Appx696-699. So the parties' expectations about what would happen if JHPI kept the Improvements has no bearing on the meaning of a term which contemplates the sale of improvements to a for-profit commercial operator.

For these reasons, the Government's extrinsic evidence is not only inappropriate; it is also entirely unpersuasive. At most, it shows that the parties expected that JHPI would donate the Improvements to the Government at the expiration of the RUE if JHPI did not sell the Improvements to a commercial operator. It has no bearing on the language of a provision effectuating an early

termination of the RUE and contemplating the sale of the Improvements to a commercial operator.

The Government's other arguments invoking extrinsic evidence also fail. The Government argues that it would not make sense for a transfer for value to "compensate JHPI (or its assignee), rather than Caneel Bay, Inc. (or its assignee), for the value of the improvements." Resp. 39. But JHPI and Caneel Bay, Inc. were affiliates sharing the same economic interest. For the same reason, the Government is wrong that the lack of compensation for Caneel Bay, Inc. in the 1977 lease shows that it was not "necessary to compensate the operator of the resort for its investment in the improvements." Resp. 39. And the parties certainly understood that any commercial operator acquiring the resort from JHPI would be acquiring both the rights of JHPI and Caneel Bay, Inc. (which in fact happened each time the resort was transferred), meaning the value received for the Improvements would compensate the commercial operator. Plus, an outside purchaser would not only have to renovate and maintain the Improvements; it would have to *purchase* them. So an outside purchaser would have an additional large capital expenditure to recoup that Caneel Bay, Inc. would not.

The Government's reliance on the 1986 indenture is also misplaced. The Government contends that if an operator were allowed to offer the Improvements for value, there would be no reason to require the operator to convey the

Improvements to the Government without compensation at the expiration of the RUE. Resp. 39-41. But this provision in the 1986 indenture just ties up the loose end that would otherwise result if the current operator did not end up making an offer to the Government under paragraph 8. It does not (and could not) change the plain language of the 1983 indenture. Indeed, the Government ignores the most relevant part of that provision in the 1986 indenture, which expressly states that it does not apply if the operator makes an early termination offer. Appx836.

B. Any ambiguity resulting from extrinsic evidence would require reversal of summary judgment for the Government.

"If a court's review of extrinsic evidence causes a contract to be latently ambiguous, summary judgment must be denied and 'the trier of fact [must] resolve the ambiguity in light of the extrinsic evidence.'" *Employees' Ret. Sys.*, 2012 V.I. LEXIS 129, at *5 (quoting *White v. Spenceley Realty, LLC*, 53 V.I. 666, 678 (2010)). So the Government's argument that extrinsic evidence creates a latent ambiguity is actually grounds for reversal, not affirmance.

There is an exception to this rule if the extrinsic evidence is "undisputed." *White*, 53 V.I. at 678. Here, however, the extrinsic evidence of the parties' intent is disputed. In its response to the Government's statement of material facts, EHI expressly disputed the Government's assertions regarding intent based on extrinsic evidence. *See* Appx248-250, 262-264. And as described above, the extrinsic evidence cited by the Government has no bearing on the parties' intent with regard

to what happens to the Improvements if they are sold to a commercial operator who makes an early termination offer under the put procedure. *Supra* § VI.A.

The Government disagrees, and argues that "the extrinsic evidence … compellingly establishes that the 1983 Indenture did not contemplate a transfer for value." Resp. 41. But "compelling" is not the same as "undisputed." And for the reasons described above, the Government's extrinsic evidence is not even "compelling"—it is irrelevant to the meaning of "an offer" in paragraph 8. *Supra* § VI.A. It is certainly not enough to overcome the plain language of the contract, which the Government concedes encompasses an offer for value. *Supra* §§ II-IV.

VII. EHI's proffered material facts must be accepted as true for purposes of summary judgment.

At summary judgment, the nonmoving party's version of the facts must be accepted as true. *Anglemeyer v. Ammons*, 92 F.4th 184, 188-89 (3d Cir. 2024). So for purposes of the Government's motion for summary judgment, the facts EHI set forth in opposition to that motion—with supporting evidence—must be accepted as true. *See* Appx273-297. The district court erred by not accepting these facts as true for purposes of the Government's motion.

In addition, for purposes of EHI's motion for summary judgment, the Government failed to adequately dispute many of the material facts EHI set forth in support of its motion. Br. 14-15 (establishing that the Government failed to adequately dispute these material facts). In response, the Government does not

claim that it did in fact dispute these facts with evidence, as it was required to do under the rules. Br. 14-15; *see, e.g.*, *SEC v. Bonastia*, 614 F.2d 908, 914 (3d Cir. 1980) ("Denials in the form of legal conclusions, unsupported by documentation of specific facts, are insufficient to create issues of material fact that would preclude summary judgment."). Instead, the Government argues that it did not have to dispute those facts, because they were either "essentially legal conclusions," "opinion[s] as to the purpose behind various provisions in the 1983 Indenture," or "not material." Resp. 26.

It is true that the Government does not have to respond to "legal conclusions" in a statement of facts. But the facts that it failed to respond to were not "legal conclusions." They were material factual issues relevant to contract interpretation. Indeed, the Government concedes that some of those facts stated the "purpose behind various provisions in the 1983 Indenture." Resp. 26. The purpose behind various provisions is a fact that is relevant to contract interpretation, and the Government was required to respond to these asserted facts with evidence if it disputed them. Its failure to do so means that those facts are effectively undisputed for purposes of EHI's summary judgment motion. *See, e.g.*, *Jersey Cent. Power & Light Co. v. Lacey*, 772 F.2d 1103, 1109-10 (3d Cir. 1985) (arguments of counsel "are not evidence and cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion").

For example, EHI set forth facts establishing that the purpose of the put procedure in paragraph 8 was to protect the commercial success of the resort by allowing the operator to recover its investments in purchasing, constructing, renovating, and maintaining the Improvements. Appx671-672 (facts 24-26). EHI supported those facts with supporting evidence. *Id.* And in response, the Government did not cite any facts or supporting evidence. Appx1058-1059. Instead, it merely said that "[n]o response is required" and "[t]o the extent a response is required, it is disputed." *Id.* But the purpose of the put procedure is a material fact that is relevant to the interpretation of the words in that provision—most notably, "an offer." The Government's failure to dispute the purpose of that provision means that these facts should be deemed undisputed.

Indeed, in its statement of material facts, the Government included precisely the same types of facts that it claims are inappropriate. For example, the Government asserted that paragraph 2 of the 1983 indenture was included to "ensure there was no doubt regarding [JHPI's] future plans for the Premises." Appx252 (fact 10). That statement, too, is a statement of the "purpose behind [a] provision[] in the 1983 Indenture." Resp. 26. And rather than failing to respond to that statement (like the Government did), EHI disputed that statement and set forth evidence supporting its position and contradicting the Government's position.

Appx252-253. The Government's failure to do the same thing for EHI's statements of fact renders those facts undisputed.

VIII. Conclusion.

For the foregoing reasons, in addition to those stated in EHI's opening brief, the Court should reverse the district court's summary judgment ruling and enter summary judgment in favor of EHI.

Dated: January 10, 2025

Respectfully submitted,

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CERTIFICATION OF BAR MEMBERSHIP

Pursuant to the Third Circuit Local Appellate Rule 46(e), I hereby certify that I am a member of the bar of this Court.

DATED: January 10, 2025

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CERTIFICATIONS

Pursuant to Fed. R. App. P. 32 and the 3d Cir. L.A.R. 32, I hereby certify that the foregoing document was prepared using 14-point Times New Roman font, which is proportionately spaced. I further certify that the foregoing Appellant's Reply Brief contains 6,116 words, excluding the cover page, table of contents, table of citations, certifications of counsel, and signature blocks.

Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copies, and that this document was scanned using a virus detection program, Vipre Virus Protection, version 3.1, and that no virus was detected.

DATED: January 10, 2025

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CERTIFICATE OF FILING AND SERVICE

I, Elissa Diaz, hereby certify pursuant to Fed. R. App. P. 25(d) that, on January 10, 2025, the foregoing Reply Brief for Plaintiff/Appellant was filed through the CM/ECF system and served electronically.

Unless otherwise noted, seven copies will be filed with the Court within the time provided in the Court's rules via Federal Express.

/s/ Elissa Diaz
Elissa Diaz