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Case Number 591,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

D. MICHAEL HARTLEY, D. KENT HARTLEY, JEFFREY B. NICHOLS, STANDARD BENT GLASS CORP., a Pennsylvania corporation, and COASTAL GLASS DISTRIBUTORS, a South Carolina corporation,	)	No. 591, 2015
Plaintiffs-Below, Appellants,	)	Court Below: Court of Chancery C.A. No. 9360-VCN
v.	)	
CONSOLIDATED GLASS HOLDINGS, INC., (f/k/a GSG Acquisitions, Inc.), a Delaware corporation, and G.A.A.G., LLC, (d/b/a Global Security Glazing), an Alabama limited liability company,	)	
Defendants-Below, Appellees.	)	

APPELLANTS' CORRECTED OPENING BRIEF

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Dated: December 16, 2015

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NATURE OF PROCEEDINGS

Appellants, Plaintiffs-Below, filed their Verified Complaint in the Court of Chancery (the "Trial Court") on February 18, 2014. The Verified Complaint sought a declaratory judgment that the General Release of Claims (the "General Release") applied to a previously entered-into noncompetition agreement (the "Noncompetition Agreement" or "NCA") and, therefore, released Plaintiffs from any further obligations under the NCA. On January 30, 2015, Plaintiffs moved for summary judgment, under the plain, unambiguous language of the General Release.

After briefing and argument, the Trial Court denied Plaintiffs' summary judgment motion on March 15, 2015. The Trial Court recognized that Section 2.1 of the General Release was the "most important provision of the release and that "the sellers [i.e., the individual Plaintiffs] sponsor a reasonable reading of the release" under which Section 2.1 released all remaining obligations under the NCA. The Trial Court, however, found two ambiguities related to the effect of the General Release on the NCA: (i) the meaning of the phrase "through the execution of this Agreement" as used in section 2.1; and (ii) the difference between the meaning of "in connection with the Purchase Agreement" as used in Section 1 (which the Trial Court found could "very plausibly" include the NCA) and the meaning of "in connection with the Purchase Agreement or the transactions

contemplated thereby" as used in Section 2.1 (which Trial Court found definitely included the NCA).

Having decided that the General Release was ambiguous as to its effect on the NCA, a bench trial took place over three days, March 31 to April 2. Following post-trial briefing, on September 30, 2015, the Trial Court issued the Memorandum Opinion and Order ("Opinion") at issue in this appeal. A copy of the Opinion is attached hereto as Exhibit A. In the Opinion (at 18-19), the Trial Court reiterated its previous conclusion that the General Release was ambiguous and, based on the evidence received at trial, denied Plaintiffs' request for a declaratory judgment.

Plaintiffs filed a timely notice of appeal.

SUMMARY OF ARGUMENT

I. The Trial Court erred in concluding that the General Release was ambiguous with respect to its effect on the NCA. Consequently, the Trial Court erred by considering extrinsic evidence to interpret the General Release. Defendants conceded that Section 2.1 of the General Release releases *some* obligations under the NCA. However, as a matter of law, the plain language of Section 2.1 released *all* of Plaintiffs' obligations under the NCA, whether the phrase "through the execution of this Release" is defined as a "temporal bound" (in the Trial Court's words) or otherwise. Further, Section 1 does not imbue the plain words of Section 2.1 with any ambiguity about the scope and effect of Section 2.1's release of the NCA.

STATEMENT OF FACTS[1]

G.A.A.G., LLC ("G.A.A.G."), d/b/a Global Security Glazing ("Global"), is an Alabama limited liability company that makes and sells security glass products. (Opinion, 2-3).

The Purchase Agreement

Appellants Michael Hartley ("Mike Hartley), his son, D. Kent Hartley ("Kent Hartley") and Jeffery B. Nichols acquired G.A.A.G. in 2000. (Opinion, 3). In 2011, the Hartleys and Mr. Nichols (the "Sellers") sold 100% of their limited liability membership interests in G.A.A.G. to GSG Acquisition, Inc. (now named Consolidated Glass Holdings, Inc.) (the "Purchaser"). (Opinion, 3). The Purchase Agreement, dated October 21, 2011, governed the sale. (A-022); (Opinion, 7).

As part of the sale, a number of companion agreements, referred to in the Purchase Agreement as the "Transaction Documents," also were consummated. In addition to the Purchase Agreement itself, the Transaction Documents included a "Transition Services Agreement," a "Real Estate Purchase and Sale Agreement," and an "Escrow Agreement," which reserved a portion of the purchase price to cover post-closing adjustments and contingencies. (Opinion, 7-8). The NCA (formally denominated as the "Noncompetition, Nondisclosure and Non-Solicitation Agreement") (A-090) was also a Transaction Document. (Opinion, 7).

[1] The facts needed to put this contract interpretation dispute in context are few and are undisputed, as found by the Trial Court.

The Noncompetition Agreement

The NCA was entered into between the Purchaser, on the one hand, and on the other hand, the Sellers and their affiliates, Standard Bent Glass Corp. ("Standard") and Coastal Glass Distributors, Inc. ("Coastal"), collectively referred to in the agreement as the "Seller Parties." (A-090).

The Purchase Agreement refers to the NCA by name and makes delivery of the NCA a condition of closing of the Purchase Agreement for both Purchaser and Sellers. Specifically, Section 2.3 of the Purchase Agreement provides:

> Closing Obligations of the Purchaser. Concurrently with the execution of this Agreement:
>
> > * * *
> > (vi) Purchaser has delivered to Sellers' Representative executed copies of the noncompetition agreement (each, a "Noncompetition Agreement") among Purchaser and the Company, on the one hand, and the Sellers, SBG and CGD, on the other hand;
> >
> > * * *
>
> Closing Obligations of the Company and Sellers. Concurrently with the execution of this Agreement:
>
> > * * *
> > (x) Each of the Sellers has delivered, and shall cause SBG and CGD to deliver, a duly executed copy of the Noncompetition Agreement.

(A-037).

The Purchase Agreement and the NCA each provide that those agreements together are part of the integrated agreement of the Parties to sell all of the limited liability membership interests in G.A.A.G. to the Purchaser:

- Section 9.2 of the Purchase Agreement provides:

  > This Agreement, including the Schedules attached hereto, and the other agreements referred to herein constitute the entire agreement among the Parties with respect to the matters covered hereby and supersede all previous written, oral or implied understandings among them with respect to such matters. (A-073)(emphasis added).

- As noted above, section 2.3 of the Purchase Agreement specifically refers to the Noncompetition Agreement as a condition of closing. (A-037).

- Paragraph 15 of the Noncompetition Agreement provides:

  > This Agreement and the Purchase Agreement, including the Schedules attached thereto, and the other agreements referred to herein constitute the entire agreement among the parties hereto with respect to the matters covered hereby and supersede all previous written, oral or implied understandings among them with respect to such matters. (A-098)(emphasis added).

Under the NCA, Standard and Coastal are both "Seller Parties" and "Affiliates" of the Sellers. Paragraph 1(b) of the NCA defines "Affiliate" as:

> with respect to any party … an entity which is owned by or has common ownership with such party, or which is otherwise controlled by or is under common control with such other party. As used herein, any entity (other than the Company) that would be deemed an Affiliate as of the date hereof shall continue to be deemed an Affiliate

> hereunder regardless of any change of ownership or control. (A-090).

The Parties specifically recognized that Standard and Coastal were controlled by two of the Hartleys. The recitals of the NCA provided:

> WHEREAS, Messrs. D. Kent Hartley and D. Michael Hartley collectively own a controlling interest in each of SBG [Standard Bent Glass Corp.] and CGD [Coastal Glass Distributors, Inc.]. (A-090).

The NCA provides that the Seller Parties would not, directly or indirectly, manufacture, market or sell certain products defined as "Flat Security Products" and as "Security Glazing Products." (A-091-092). The term of noncompetition was for ten years from October 21, 2011. Restricted territory included the United States and any foreign country where G.A.A.G. had a facility, sold products or regularly serviced customers. *Id.* The NCA further provides that, for ten years from October 21, 2011, the Seller Parties would not solicit or trade with any of G.A.A.G.'s customers. (A-092-093).

The Warranty Dispute

After the October 2011 closing, a dispute arose between the Sellers and the Purchaser about the release of funds remaining in the account established by the Escrow Agreement. (Opinion, 7-12). The dispute concerned primarily customer warranty claims, the largest of which was a claim by Tidewater Glazing, Inc. ("Tidewater"). (Opinion, 10). The Purchaser sought to withhold a portion of the escrowed funds to offset the Tidewater claim. *Id.* The Sellers objected on the

grounds that the claim was insufficiently documented and, in any case, baseless. *Id.*

The Settlement Meeting

In October 2013, representatives of the Sellers and the Purchaser met in Cranberry, Pennsylvania to discuss resolution of their dispute over the Tidewater claim. (Opinion, 12-13). At the meeting, the parties reached a settlement under which the Purchaser would retain $240,000 of the amount in escrow for the Tidewater claim and the balance of the account would be released to the Sellers. (Opinion, 14). At the close of the meeting, the Purchasers were tasked with preparing a draft of a general release. (Opinion, 14). The draft was circulated to both sides a few days later and executed without modification or revision by either side. (Opinion, 14-15).

The General Release

The parties to the General Release (A-104) are, on the one hand, Defendants G.A.A.G, LLC d/b/a Global Security Glazing (referred to as "GSG"), Consolidated Glass Holdings, Inc. f/k/a GSG Acquisition, Inc. (the "Purchaser") and, on the other hand, the individual Plaintiffs (here referred to collectively as the "Sellers"). The General Release is dated as of October 2013.

Section 1 of the General Release provides for payment (from the escrow account) of a $240,000 "Settlement Amount" to GSG, and further states:

> The parties hereto hereby acknowledge and agree that the Settlement Payment constitutes payment in full of all claims related to the Purchase Agreement, including without limitation, warranty claims of Tidewater Glazing, Inc. or otherwise, and that following receipt of the Settlement Payment, the parties shall owe no further amounts or obligations to one another in connection with the Purchase Agreement. (A-104).

Section 2 of the General Release is captioned "Release, Waiver and Forbearance by GSG and Purchaser." *Id*. Section 2.1, titled "Release of Claims," provides for a very broad release by the Purchaser and GSG in the following terms:

> Upon payment of the Settlement Payment, each of Purchaser and GSG, on behalf of itself and its affiliates, officers, directors, stockholders, members, managers, employees, representatives, attorneys, agents, successors, heirs, and assigns, (collectively, the "GSG Parties"), hereby fully and forever releases and discharges Sellers and Sellers' affiliates, employees, representatives, attorneys, agents, successors, heirs, and assigns (collectively, the "Seller Parties"), and their respective affiliates, officers, directors, stockholders, members, employees, representatives, attorneys, agents, successors, heirs, and assigns from any and all claims, demands, actions, agreements, suits, causes of action, obligations, controversies, debts, costs, attorneys' fees, expenses, damages, judgments, orders and liabilities of whatever kind or nature in law, equity or otherwise, past present or future, known or unknown, suspected or unsuspected, from the beginning of time through execution of this Release arising out of or in connection with the Purchase Agreement or the transactions contemplated thereby (collectively, the "Claims"), except for any claims arising out of this Release and enforcement hereof.

Id.

In January 2014, Plaintiffs sent a letter to Defendants confirming Plaintiffs' position that the General Release applied to the NCA and released all further obligations under that agreement. (Opinion, 17). Defendants' attorney, in a letter dated January 27, 2014, disputed Plaintiffs' interpretation of the impact of the General Release on the NCA. *Id.* This lawsuit followed.

ARGUMENT

I. The Trial Court Erred as a Matter of Law in Concluding that Section 2.1 of the General Release Did Not Unambiguously Release the Appellants from the Noncompetition Agreement

A. Question Presented

Whether Section 2.1 of the General Release unambiguously released the Appellants from any past, present or future obligations under the Noncompetition Agreement. (Opinion, 1).

B. Standard of Review

The Trial Court's determination that Section 2.1 of the General Release was ambiguous is subject to *de novo* review by this Court. *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

C. Merits of the Argument

1. Standards for Contract Interpretation in Delaware.

a. General Standards of Interpretation

This Court set out in detail the rules for construing contracts in the *Rhone-Poulenc* case:

> Clear and unambiguous language in [a contract] should be given its ordinary and usual meaning…. Absent some ambiguity, Delaware courts will not destroy or twist policy language under the guise of construing it…. [W]hen the language of a … contract is clear and unequivocal, a party will be bound by its plain meaning ….

616 A.2d at 1195-96. (internal citations omitted).

Expanding on "ambiguity," the Court observed that

> [a] contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings…. Ambiguity does not exist where the court can determine the meaning of a contract without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends…. Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty.

616 A.2d at 1196. (internal citations omitted).

The mere existence of different definitions of a word in a contract does not create an ambiguity. *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 59 (Del. Super. Ct. 1995). Further, ambiguity does not exist simply because the parties disagree about what the contract means. *Northwestern Nat. Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996)

Finally, and most importantly for purposes of this appeal, extrinsic evidence cannot be used to manufacture an ambiguity or to construe a contract that is otherwise not ambiguous under the standards discussed above. As this Court has stated, "if a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity." *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).

b. Standards for Interpreting Releases

As this Court has acknowledged, "[u]nder Delaware law, general releases are common and their validity is unchallenged." *Riverbend Comm., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 336 (Del. 2012). Releases are interpreted according to the same rules as other contracts. Thus, "[i]n construing a release, the intent of the parties as to its scope and effect are controlling, and the court will attempt to ascertain their intent from the overall language of the document." *Id.* (internal quotations omitted). Where the only reasonable reading of a release is that it is a waiver of all claims, the release will be enforced. *Id.*

2. Section 2.1 of the General Release Released Plaintiffs' and Their Affiliates' Obligations under the NCA

a. Section 2.1 Unambiguously Released Plaintiffs from All Obligations in Connection with the Transactions Contemplated by the Purchase Agreement

In Section 2.1 of the General Release, the Purchaser and G.S.G. released the Sellers and their affiliates from any and all "Claims" as defined therein, including all "demands, actions, agreements…[and] obligations of any kind, whether "past, present or future, known or unknown," "arising out of or in connection with the Purchase Agreement or the transactions contemplated thereby." (A-104). Section 2.1 provides:

> 2.1 Release of Claims
>
> Upon payment of the Settlement Payment, each of Purchaser and GSG, on behalf of itself and its affiliates,

> officers, directors, stockholders, members, managers, employees, representatives, attorneys, agents, successors, heirs, and assigns, (collectively, the "GSG Parties"), hereby fully and forever releases and discharges Sellers and Sellers' affiliates, employees, representatives, attorneys, agents, successors, heirs, and assigns (collectively, the "Seller Parties"), and their respective affiliates, officers, directors, stockholders, members, employees, representatives, attorneys, agents, successors, heirs, and assigns from any and all claims, demands, actions, agreements, suits, causes of action, obligations, controversies, debts, costs, attorneys' fees, expenses, damages, judgments, orders and liabilities of whatever kind or nature in law, equity or otherwise, past present or future, known or unknown, suspected or unsuspected, from the beginning of time through execution of this Release arising out of or in connection with the Purchase Agreement or the transactions contemplated thereby (collectively, the "Claims"), except for any claims arising out of this Release and enforcement hereof. (A-104).

This broad language leaves no doubt that Section 2.1 operated as a release of the NCA – "past, present or future." The Noncompetition Agreement, and the obligations imposed thereunder, came into existence as of October 21, 2011. (A-090). They were in existence on the execution date of the General Release in 2013. Therefore, the NCA was an "agreement … from the beginning of time through execution of this Release." The Trial Court found, that "arising out of or in connection with the Purchase Agreement or the transactions contemplated thereby" included the NCA. (A-170). ("The non-competition agreement is an agreement or obligation. It was entered into in connection with the transaction contemplated by the purchase agreement."). Thus, as of the execution of the

Release, Section 2.1 released the NCA and necessarily released all the promises and obligations under that agreement.

On summary judgment, Defendants argued that Section 2.1 released only liability for claims under the NCA arising after execution of the General Release. (Opinion, 25). However, Defendants' arguments cannot negate the fact that Section 2.1 also released "liabilities of whatever kind or nature in law, equity or otherwise, past, present, or future." (A-104) (emphasis added). Under the plain meaning of the words used therein, Section 2.1 releases the Noncompetition Agreement and the obligations imposed by that agreement.

Reinforcing the point that the General Release is a final resolution of present and future claims, Section 2.2, "Waiver of Other Claims," provides:

> Purchaser and GSG acknowledge that there is a possibility that subsequent to the execution of this Release, Purchaser or GSG may discover facts or incur or suffer claims that were unknown or unsuspected at the time this Release was executed, and which if known by Purchaser or GSG at that time may have materially affected Purchaser's or GSG's decision to execute this Release. Purchaser and GSG acknowledge and agree that by reason of this Release, Purchaser and GSG are assuming any risk of such unknown facts and such unknown and unsuspected claims. (A-105).

Section 2.2 accords with Delaware law that a general release is one which is intended to cover everything – what the parties presently have in mind, as well as

what they do not have in mind, but what may, nevertheless, arise. *Hob Tea Room, Inc. v. Miller*, 89 A.2d 851, 856 (Del. 1952).

The permanence and comprehensiveness of the release in Section 2 is also highlighted in Section 2.3 of the General Release, which provides:

> Each of Purchaser and GSG, on behalf of itself and the GSG Parties, agrees that Purchaser, GSG and the GSG Parties will forever refrain and forbear from commencing, instituting or prosecuting any lawsuit, action or other proceeding of any kind whatsoever by way of action, defense, set-off, cross-complaint or counterclaim, against Sellers and any of the Seller Parties based on or arising out of, or in connection with any Claim, which is released and discharged by reason of the execution and delivery of this Release, except for actions commenced to enforce any rights conferred in this Release. (A-105).

In accordance with the foregoing, the General Release unambiguously precludes the Purchaser and GSG from prosecuting suits and actions for Claims "arising out of or in connection with the Purchase Agreement or the transactions contemplated thereby."

b. The Release in Section 2.1 Extends to all of the Plaintiffs Here

The release in Section 2.1 applies to the "Sellers and Sellers' affiliates." (A-104). The "Sellers" are, of course, the individual Plaintiffs-Below/Appellants. Moreover, as discussed above, under the NCA, the corporate Plaintiffs, i.e., Standard Bent Glass Corp. and Coastal Glass Distributors, are "affiliates" of

Sellers Mike Hartley and Kent Harley. Therefore, the scope of the release in Section 2.1 extends to each of the Plaintiffs-Below/Appellants.

3. The Phrase "Through Execution of this Release" as Used in Section 2 Does Not Preserve Any Obligations Under the Noncompetition Agreement or Make Section 2.1 Ambiguous

The Trial Court agreed that a reasonable reader could interpret Section 2.1 as cancelling all obligations of any kind, past, present, or future, under the NCA. (Opinion, 18). To quote the Trial Court, Section 2.1 "might reasonably be read as forbidding the NCA's ongoing obligations from surviving 'through execution of [the General Release'] – that is, any time after November 7, 2013." (Opinion, 19). This interpretation of the phrase "through execution of this Release is supported by the dictionary definition of "through" as "in one side and out the opposite or another side of," as in "through a tunnel." Under this definition the phrase "through the execution of this Release" is not a temporal cutoff but a point of passage and Section 2.1 wiped out all of Plaintiffs' obligations under the NCA, "past, present and future."

The Trial Court agreed with this analysis. The Trial Court erred, however, when it credited Defendants' argument that "through execution of this Release" also could be reasonably interpreted as a temporal cutoff point or, in the Trial Court's words, a "temporal bound" and that, when so construed, Section 2.1 does not apply to future obligations under the NCA. (Opinion, 25). The problem with

this conclusion is twofold. First, the language of Section 2.1 cannot be interpreted as Defendants argue without, in effect, rewriting Section 2.1. Second, even when the phrase "through the execution of this Release" is thought to define a "temporal bound," the interpretation of Section 2.1 as to its effect on the NCA does not change. On November 7, 2013 when the General Release came into effect, Section 2.1 "fully and forever release[d] and discharge[d]" Sellers and their affiliates from "any and all obligations…past, present and future" under the NCA. (A-104-105).

a. Defendants' Interpretation of "Through Execution of this Release" Is Unreasonable on Its Face.

With respect to the first point, Defendants' interpretation of "through execution of this Release" imported words not found in Section 2.1, ignored words that are found therein and "infer[red] a connection that does not expressly appear in words." Defendants argued to the Trial Court that Section 2.1 released the Noncompetition Agreement only to the extent of "liabilities arising and obligations or agreed performance due up to and including, but not after, the date the Release was signed." (A-111). However, Section 2.1 does not use the word "performance" or the phrase "due up to and including but not after." Those terms do not appear in Section 2.1 and cannot support Defendants' interpretation of "through execution of this Release."

Moreover, Defendants' interpretation is contrary to the words that are used in Section 2.1. For example, Defendants' construction is inconsistent with the specific reference to the "future" nature of the "obligations" and "agreements" that Section 2.1 releases and the fact that those obligations are being released "fully and forever." Defendants' interpretation of "through execution of this Release," thus, runs afoul of the Delaware rule of contract interpretation that requires contracts to be interpreted according to the words that the parties chose and the plain meaning of those words. *See, e.g., Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 779 (Del. 2006).

b. Even If "Through the Execution of this Release" Is a Temporal Bound or Cutoff, Section 2.1 Released Completely the NCA and the Sellers' Obligations Thereunder

As discussed above, to support their definition of "through execution of this Release," Defendants rewrote Section 2.1. However, even if "through execution of this Release" is defined as a temporal cutoff or bound, it still does not alter the construction of Section 2.1 as a full and complete release of the NCA and the Selling Parties' obligations thereunder.

The NCA and the obligations under that agreement, which where all future obligations, came into being as of October 21, 2011 when the NCA was signed. (A-090). That was approximately two years before the effective date of the General Release in 2013. (A-104). Thus, "through execution of [the] Release,"

the NCA was an "agreement" "arising out of or in connection with the Purchase Agreement or the transactions contemplated thereby" and was released. Likewise, all of the "obligations" imposed by the NCA, including "future" "obligations," were released.

Defendants' interpretation of "through execution of this Release" is untenable and not reasonable. Even if one were to interpret the phrase as a temporal cutoff, the Court erred in concluding that the different meanings attributed to the phrase "through the execution of this Release" by Plaintiffs and Defendants support different constructions of Section 2.1. They do not. Under either Plaintiffs' or Defendants' interpretation of "through execution of this Agreement," Section 2.1 "fully and forever released and discharged" the Sellers and their affiliates of all obligations under the NCA.

4. Section 1 of the General Release Does Not Limit the Scope of the Only "Release" in the General Release, Section 2.1

Section 1 of the General Release provides:

> The parties hereto hereby acknowledge and agree that the Settlement Payment constitutes payment in full of all claims related to the Purchase Agreement, including without limitation, warranty claims of Tidewater Glazing, Inc. or otherwise, and that following receipt of the Settlement Payment, the parties shall owe no further amounts or obligations to one another in connection with the Purchase Agreement.

(A-104). As noted above, in denying Plaintiffs' motion for summary judgment, the Trial Court found an ambiguity in Section 1 of the General Release as well as in Section 2.1. Section 1 provides that on payment of the Settlement Amount specified in the General Release, "the parties shall owe no further amounts or obligations to one another in connection with the Purchase Agreement." (A-104). The ambiguity was said to relate to whether the NCA was "in connection with the Purchase Agreement." The Trial Court again referred to the perceived ambiguity in Section 1 in the Opinion (at 18).

Plaintiffs argued below that the NCA was indeed "in connection with the Purchase Agreement," and the Trial Court found this position to be very plausible. However, the question whether the NCA is or is not "in connection with the Purchase Agreement" is irrelevant to the construction of Section 2.1 and its effect on the NCA. Any ambiguity with respect to the scope of Section 1 has no bearing on and does not make ambiguous the plain, unequivocal release language of Section 2.1. Construing Section 2.1 by asserting that there is ambiguity in Section 1 is contrary to the warning of *Rhone-Poulenc* against "tortur[ing] contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty." 616 A.2d at 1196. Whether the phrase "in connection with the Purchase Agreement" in Section 1 includes the NCA does not determine whether the NCA is released under Section 2.1.

On summary judgment, Defendants contended that the General Release contained two operative "release" sections: Section 1 and Section 2.1. According to Defendants, Section 1 "released" all obligations under the Purchase Agreement, while Section 2.1 served to release only some obligations under the Purchase Agreement and the transactions contemplated thereby, including the NCA. That is, according to Defendants, General Release should be construed in such a way as to release the Purchase Agreement twice. A decision that the General Release was ambiguous on such reasoning is unsupportable for several reasons.

First of all, Section 1 is not a "release." It is simply a statement of the settlement amount ($240,000), the mechanics of the settlement payment and the effect of that payment. (A-104). Where the General Release purports to "release" a claim, it does so clearly under sections headed "Release of Claims," e.g., Sections 2.1 and 3.1. By contrast, Section 1 is titled "Settlement Payment," not release. (A-104). While Section 2.1 states that it "fully and forever releases Sellers" from certain claims, the word "release" is used only once in Section 1, where it directs the Escrow Agent to "release" the Settlement Amount to GSG. *Id*.

Defendants' "holistic" view of redundant "releases" in the NCA is also infirm for a second reason. It is not reasonable to assume that the attorney who drafted the General Release provided for different releases, under separate sections, one called "Release of Claims" and the other called "Settlement

Payment." No logical reason supports an interpretation of the General Release under which it releases all claims under the Purchase Agreement under Section 1 and then, after having released all claims, goes on in Section 2.1 to release only some claims under the Purchase Agreement (and other transactions), *i.e.*, claims "through the execution of this Release." Such an interpretation would make Section 2.1 redundant and, thus, would violate the rule of contract interpretation that disfavors interpretations that render terms in a contract "illusory or meaningless." *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992).

Contrary to the interpretation that Defendants urged on the Trial Court, Section 1 does not imply an unstated, implied interaction with Section 2.1. On the contrary, Section 1 is made "subject to the terms and conditions of this Release, including of course the actual "release" in Section 2.1, while Section 2.1 is not "subject to" anything aside from payment of the Settlement Amount.

Finally, it does not matter whether Section 1 is fairly interpreted as a release of the Purchase Agreement (as Defendants argue) or not. Nor does it matter whether the NCA was or was not "in connection with the Purchase Agreement" as those words are used in Section 1. As noted above, Defendants conceded, and the Trial Court found that, in Section 2.1, the NCA was a "transaction contemplated" by the Purchase Agreement. And for reasons previously stated herein, Section 2.1

unambiguously released Appellants from the NCA, including all future obligations thereunder.

5. If Defendants' Interpretation of Section 1 as a Release Is Accepted, then Section 1 "Released" the Noncompetition Agreement as an "Obligation in Connection with the Purchase Agreement"

Defendants argued to the Trial Court that Section 1 of the General Release was an absolute release of all obligations "in connection with the Purchase Agreement" but that the NCA was not a document "in connection with the Purchase Agreement." The logical corollary of Defendants' argument is that if the NCA is within the scope of Section 1, then all obligations under the NCA were released.

The Trial Court correctly decided that viewing the NCA as imposing obligations "in connection with the Purchase Agreement" was "a very plausible interpretation." (A-171). However, the Trial Court erred when it went on to conclude that was not the only reasonable interpretation and, hence, that the scope of Section 1 is ambiguous.

In the first place, the Trial Court ignored the plain language of Section 1 which states that the "Settlement Payment is payment in full of all "claims *related to* the Purchase Agreement." (A-104) (emphasis added). Any claim brought under the NCA would be a claim "related to the Purchase Agreement." Courts in this state have recognized that phrases such as "related to" and "in connection with"

have the effect of broadening the meaning of the object to which they refer – in this case, the Purchase Agreement. The phrases "relating to" and "in connection with" are highly elastic. *See DeLucca v. KKAT Mgm't, LLC*, 2006 WL 4762856, at *10 and n.33 (Del. Ch. Jan. 23, 2006) (describing such phrases as "far reaching terms often used by lawyers when they wish to capture the broadest possible universe.").

The NCA was "related to" the Purchase Agreement if for no other reason than the NCA would not have gone into effect without the Purchase Agreement and but for the Purchase Agreement, there would have been no NCA. As the Trial Court noted "[i]ndeed, the non-competition agreement was made a deliverable under the purchase agreement." (A-170). (*See also*, Section 2.3(a)(vi) of the Purchase Agreement). Even Defendants admitted that the Purchase Agreement and the NCA are "related agreements." (A-112) (quoting the resolution authorizing the company to enter into agreements). A "claim" under a "related agreement" is *ipso facto* a claim "relating to" the Purchase Agreement.

In addition to ignoring the "related to" language in Section 1, the Trial Court erred in deciding that the phrase "in connection with the Purchase Agreement" was colored by, and made ambiguous by, the phrase "in connection with the Purchase Agreement or the transactions contemplated thereby" in Section 2.1. For the same reasons that "claims" under the NCA are "related to" the Purchase Agreement,"

"obligations" under the NCA Agreement are "obligations . . . in connection with the Purchase Agreement."

There is no tension between Section 1 and Section 2. The NCA was both "related to" and "in connection with" the Purchase Agreement within the scope of Section 1. The scope of Section 2.1 is broader than the scope of Section 1 in that Section 2.1 applies not only to agreements and obligations "in connection with the Purchase Agreement" but also to agreements and obligations under "the transactions contemplated by the Purchase Agreement. It is irrelevant, however, that the "reach" of Section 2.1 extends beyond that of Section 1 because the NCA is unambiguously covered by both sections. As explained above, it is "related to the Purchase Agreement" under Section 1.

The NCA is also "in connection with" the Purchase Agreement" as used in both Sections 1 and 2.1. The "transactions contemplated by [the Purchase Agreement]" as those words are used in Section 2.1 also includes the NCA, as the Trial Court found.

The Trial Court did not expressly endorse Defendants' argument that Section 1 is a "release" only of the Purchase Agreement and did not have to decide that question because it determined that, while it was plausible that the NCA was "in connection with the Purchase Agreement," that was not the only reasonable interpretation. This determination was error. The NCA is plainly included in and

covered by Section 1. Thus, if this Court, in the exercise of *de novo* review accepts, as Defendants argued below, that Section 1 is a full release of matters within its scope, then that release must extend to the NCA and all obligations imposed under the NCA.

CONCLUSION

Section 2.1 of the General Release is an unambiguous release of the NCA and any obligations of Appellants/Plaintiffs-Below under that agreement. In concluding otherwise, and in receiving and considering extrinsic evidence to interpret Section 2.1, the Trial Court erred. Accordingly, the final order of September 30, 2015 should be reversed, and the Trial Court instructed to enter judgment in favor of Appellants/Plaintiffs-Below.

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