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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,	§	
v.	§	On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 9360-VCN
CONSOLIDATED GLASS HOLDINGS, INC., (f/k/a GSG Acquisition, Inc.), a Delaware corporation, and G.A.A.G., LLC, (d/b/a Global Security Glazing), an Alabama limited liability company,	§	
Defendants Below, Appellees.	§	

APPELLEES' ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

This appeal arises from an ambiguous settlement agreement (the "Release"). In 2011, Appellee Consolidated Glass Holdings, Inc. ("Consolidated") insisted on a ten-year noncompetition agreement ("NCA") when it paid the individual Appellants ("Sellers") $35 million for their interests in Appellee G.A.A.G., LLC d/b/a Global Security Glazing ("GSG"). Consolidated purchased Sellers' LLC interests through a Limited Liability Company Membership Interest Purchase Agreement ("Purchase Agreement"). Two years later, Sellers, Consolidated, and GSG settled an indemnification dispute under the Purchase Agreement that had nothing to do with the NCA. The question in the trial court was whether as part of the indemnification-dispute settlement, Consolidated and GSG agreed to give up their rights under the NCA eight years early. The court denied Plaintiffs' summary judgment motion because a reasonable person reading the Release *could*, though did not have to, conclude that the parties did not agree to terminate the NCA. Following a three-day trial, based on the parties' acts, dealings, and correspondence before and during the settlement negotiations, the trial court found that any reasonable observer would *have* to conclude that the parties did not extinguish the NCA.[1]

[1] Like Appellants' Opening Brief, this brief refers to Appellants collectively as "Plaintiffs" and to Appellees as "Defendants."

Plaintiffs do not challenge the trial court's finding that the parties' actions and the business context underlying the settlement reflect a shared intent not to terminate the NCA. Instead, they argue that their actions and context do not matter because the contract's words supposedly terminate the NCA regardless. In essence, Plaintiffs argue that the sophisticated parties in this case unwittingly drafted and signed a contract whose words so clearly contradicted their manifested intent that *no* reasonable person could think the contract embodied the intent that *any* reasonable person would conclude their contemporaneous conduct showed they had. Far from establishing such an implausibility, Plaintiffs' Opening Brief shows the opposite: by continuing the pattern Plaintiffs have exhibited throughout this matter of offering multiple contract interpretations that differ from ones they asserted before, their brief confirms that the Release is not reasonably susceptible of only one interpretation.

Because a reasonable person could conclude that the Release did not terminate the ten-year NCA after only two years and because Plaintiffs do not contest the trial court's finding that the objective evidence supports Defendants' reading as "the sole correct interpretation," Opinion at 31, the judgment below should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The trial court did not err when it held that a reasonable person reading the Release could conclude that the parties did not terminate the NCA. Paragraph 2.1 of the Release, the main provision on which Plaintiffs rely, indisputably applies to the NCA, but only releases liabilities incurred "from the beginning of time through execution of this Release." A different provision of the Release, paragraph 1, does provide that the parties shall owe no "further," that is, post-Release, contractual obligations to one another, but only with respect to the Purchase Agreement, not the NCA. Underscoring this difference in scope is the fact that paragraph 2.1 applies to matters "in connection with the Purchase Agreement or the transactions contemplated thereby," whereas paragraph 1 only applies to matters "in connection with the Purchase Agreement." Plaintiffs admit that the NCA falls within the "transactions contemplated by the Purchase Agreement." A reasonable person viewing paragraphs 1 and 2.1 together, therefore, could understand the Release to set forth a scheme in which the parties settled and wiped the slate clean with respect to all matters between them up to the time of the Release but only terminated going-forward obligations under the Purchase Agreement, not ancillary agreements like the NCA. Plaintiffs' pattern of offering multiple, shifting, and even contradictory interpretations confirms that the Release is not reasonably susceptible of only one interpretation.

STATEMENT OF FACTS

The trial court's uncontested findings supply the case's factual background.

A. The Parties

Defendant GSG is a glass manufacturing company. Opinion at 2-3. Its business focuses on security glass products. *Id.* at 3. Before October 21, 2011, Sellers owned 100% of GSG's equity. *Id*. at 3-7. Sellers also owned and worked for, and today continue to own and work for, Plaintiff Standard Bent Glass Corp. ("Standard Bent"). *Id*. at 2. Standard Bent also specializes, in part, in manufacturing security glass. *Id.* At the times in question, Sellers Michael and Kent Hartley owned Plaintiff Coastal Glass Distributors ("Coastal Glass"), another glass-manufacturing company. *Id.*

Grey Mountain Partners ("Grey Mountain"), a private equity firm, formed GSG Acquisition, Inc. to acquire GSG. *Id.* at 3-4. GSG Acquisition later changed its name to Consolidated. *Id.* at 3. Consolidated is a holding company formed to assemble related businesses under one corporate roof. *Id*.

B. The 2011 Transactions

In 2011, Sellers put GSG up for sale. *Id.* at 3-4. The offer they ultimately accepted came from Grey Mountain. *Id.* at 4. In a letter of intent preceding contract negotiations, Grey Mountain demanded a "comprehensive covenant not to compete" that would last "for the maximum duration enforceable under applicable

law." Opinion at 5. It wanted such an NCA because Sellers were well positioned to compete with GSG, as they controlled two other glass companies (Standard Bent and Coastal Glass), and GSG's business model of maintaining a small number of large customers made it particularly vulnerable to the effects of customer-poaching. *Id.* In the ensuing negotiations, Sellers wanted a five-year term for the NCA but acquiesced in a ten-year term. *Id.* at 6. Of the $35 million Consolidated paid Sellers to acquire GSG, $1.5 million went into escrow for 18 months to cover the event that Sellers breached representations and warranties. *Id.* at 7. The Purchase Agreement was the instrument by which GSG changed hands. *Id.* At the same time, the parties entered into other ancillary contracts, including the NCA. *Id.* at 7-8. The Purchase Agreement calls these contracts "Transaction Documents." *Id.* The NCA prohibits Plaintiffs from competing with GSG for ten years except insofar as a carve-out provision allows Standard Bent to continue selling certain products to a small number of legacy customers. *Id.* at 8.

C. The 2013 Settlement

In the years following the Purchase Agreement, the parties remained in contact to resolve disputes of varying gravity. *Id.* at 9. Pertinent to this appeal, in April 2013, Brad Schoenfeld, an attorney representing Defendants, sent Standard Bent a letter nine days before the escrow funds were set to be released asserting that his clients were entitled to indemnification for warranty claim losses. *Id.* at 9-

10. The largest of the warranty claims related to the "Tidewater" project. *Id.* at 10. Sellers, through their lawyer, disputed Defendants' indemnification claim. *Id.*

The Tidewater claim gradually became the parties' sole focus. Opinion at 11. A series of communications culminated in Schoenfeld's sending Standard Bent a letter claiming that Defendants were entitled to $430,000 plus attorneys' fees. *Id.* The letter expressed a preference to try to settle, however. *Id.* Plaintiffs continued to reject Defendants' claims but agreed to a settlement meeting, which occurred in October 2013. *Id.* at 12-13. "The purpose of this meeting was to resolve the Tidewater dispute and determine how remaining escrow funds would be disbursed." *Id.* Sellers felt the Tidewater claim did not entitle Defendants to any payment. *Id.* Defendants claimed indemnification for $430,000. *Id.* at 13-14. At the end of the meeting, the parties settled on a payment of $240,000. *Id.* at 14. At no point did the parties discuss the NCA. *Id.* Schoenfeld circulated a draft release. *Id.* at 14-15. Both sides approved the draft and executed it without modification on November 7, 2013. *Id.* at 15.

D. Commencement Of This Litigation

Two-and-a-half months later, Frederick Tolhurst, Plaintiffs' counsel at trial and on appeal, notified Defendants that Plaintiffs intended to pursue business opportunities irrespective of the NCA on the theory that the Release excused Plaintiffs from any obligations under the NCA. *Id.* at 17. Schoenfeld disagreed

with Tolhurst's interpretation of the Release. *Id.* Plaintiffs filed this declaratory judgment action less than a month later. *Id.*

E. The Summary Judgment Ruling

Plaintiffs sought summary judgment, arguing that the Release unambiguously extinguishes the NCA. Opinion at 18. The trial court denied the motion. *Id.* The court held that summary judgment was inappropriate because ambiguities in the Release's plain text permit at least two reasonable interpretations. *Id.* On the one hand, a reasonable reader might conclude that paragraph 1 of the Release extinguishes the NCA because it terminates all future obligations "in connection with the Purchase Agreement" and, without considering the underlying circumstances, one might view the NCA as an "obligation" entered into "in connection with the Purchase Agreement." *Id.* "Paragraph 2.1 of the Release might achieve the same result because that provision might reasonably be read as forbidding the NCA's ongoing obligations from surviving 'through execution of [the Release]'—that is, any time after November 7, 2013"—"through," in this interpretation, meaning "in one end and out the other." *Id.* at 18-19, 23. "On the other hand, one might reasonably conclude that Paragraph 1 has no effect on the NCA because the phrase 'in connection with the Purchase Agreement' only affects the Purchase Agreement itself, and not the NCA, which is separate." *Id.* at 19. "Paragraph 2.1 is similarly inert if the phrase 'through

execution of [the Release]' is read as a temporal bound"—that is, limiting that provision to liabilities incurred up to and including, but not after execution on, November 7, 2013. *Id.*

F. The Post-Trial Ruling

Following trial, the court held that the evidence resolved the Release's textual ambiguity by showing that "the sole correct interpretation" a reasonably objective observer familiar with the parties' conduct and the underlying business context could have is that "the Release does not terminate the parties' ongoing obligations under the NCA." Opinion at 31-32. In so doing, the trial court expounded on its holding that the Release language is ambiguous. *See id.* at 25-26. After summarizing the parties' positions, the court explained:

> Each side's interpretation has strengths and weaknesses that are relevant to determining the contracting parties' shared intent. For example, Plaintiffs' readings of Paragraph 1's "obligation" as purely financial and Paragraph 2.1's "through" as a point of passage are, to some degree, strained given those words' common usage, and Defendants' interpretation denies the intuitively powerful supposition that the NCA is "in connection with the Purchase Agreement." Moreover, a broad review of the document, including, *inter alia*, its title ("General Release of Claims") and the sweeping lists of constituencies and liability types it purports to cover, supports Plaintiffs' interpretation. On the other hand, Defendants' argument regarding the temporal limitation of the Release that would preclude its application to subsequent conduct—such as Plaintiffs' planned competitive activities—carries significant weight as well.

Id. at 25. In the end, the trial court ruled that the "pre-settlement circumstances [did] not indicate that the NCA would be considered as part [of] the settlement";

"nothing that occurred during settlement discussions indicated that the parties were bargaining in part for release of the NCA"; and "the method by which the Release was drafted explains, to some extent, its awkward phrasing and disjointedness." Opinion at 26. More specifically, "the NCA was a valuable asset that Defendants would not have relinquished without comment or discussion." *Id.* The deterioration in the parties' relations that occurred by 2013 "would arguably cause Defendants to become *more* hesitant to release a formidable competitor from the NCA," not less. *Id.* at 28-29 (emphasis in original). "The [settlement] meeting was not about the NCA, the parties did not discuss the NCA, and the final terms of the settlement suggest that the parties meant to resolve the Tidewater dispute and not much else." *Id.* at 29. For these reasons and others, the trial court found that any reasonable observer would conclude that Defendants did not agree to give up their NCA rights eight years early. This appeal followed.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT A REASONABLE PERSON COULD UNDERSTAND THE RELEASE NOT TO TERMINATE THE NCA.

A. Question Presented

Did the trial court err when it held that one reasonable interpretation of the Release is that it excuses Plaintiffs from liability under the NCA only with respect to liabilities incurred up to the date the Release was signed? B33.

B. Standard And Scope Of Review

Whether a contract is ambiguous is subject to *de novo* review. *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

C. Merits Of Argument

Plaintiffs devote much of their Argument to explaining the alleged virtues of their contract interpretations. *See* Opening Br. at 13-27. But those purported virtues are beside the point. The trial court acknowledged that one reasonable interpretation of the Release—ignoring the parties' dealings, negotiations, and business context, and viewing the language alone—is that it terminates the NCA. To be entitled to reversal given the parties' contrary, unchallenged manifested intent, Plaintiffs must establish that their textual construction "is the *only* reasonable interpretation." *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d

810, 830 (Del. Ch. 2007) (emphasis in original); *see Appriva S'holder Litig. Co. v. ev3, Inc.*, 937 A.2d 1275, 1291-92 (Del. 2007) (holding that trial court erred in refusing to consider extrinsic evidence when its interpretation was "not the only reasonable interpretation"). Plaintiffs are not entitled to reversal if Defendants' interpretation—that the Release does not terminate the NCA—is also a reasonable possibility. For the reasons below, it plainly is.

1. Contract Interpretation Standards

Defendants agree with the standards of interpretation Plaintiffs' Opening Brief sets forth, as far as those standards go. *See* Opening Br. at 11-13. Plaintiffs' statement is materially incomplete, however. It omits that when interpreting a contract, courts should "construe the agreement as a whole and give effect to all its provisions." *Salomone v. Gorman*, 106 A.3d 354, 367-68 (Del. 2014). It also omits that "the meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan." *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985). And, courts generally should read contracts "so as not to render any part of the contract mere surplusage." *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010). Applying these principles, the Release does not unambiguously terminate the NCA.

2. Paragraph 2.1 Only Releases Liabilities Incurred "Through Execution Of This Release."

a. "Through Execution Of This Release" Limits Paragraph 2.1's Scope.

Plaintiffs' main argument relies on paragraph 2.1 of the Release. *See* Opening Br. at 11 ("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"). That paragraph states:

> 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-104-05 (italics added).[2] This provision applies to the NCA because, as Plaintiffs concede, "the NCA was a 'transaction contemplated' by the Purchase Agreement." Opening Br. at 23.

[2] Paragraph 3.1 is a parallel release by Sellers in favor of Defendants. *See* A-105.

Critically, however, paragraph 2.1 contains the time limitation "from the beginning of time through execution of this Release." A-105. A reasonable person could understand this language to limit the release to liabilities incurred up to and including, but not after, the date the Release was signed. Other courts have interpreted similar language this way. *See, e.g.*, *Harper v. Cronk*, 2013 U.S. Dist. LEXIS 154284, at *13-14 (D. Colo. Sept. 24, 2013) (settlement language releasing "any and all claims Plaintiff may have through the date this Agreement is signed by Plaintiff" released claims relating to events prior to execution). Under this reasonable interpretation of paragraph 2.1, Defendants cannot sue Plaintiffs for any breach of the NCA occurring through November 7, 2013. The paragraph does not terminate the NCA, however, or excuse Plaintiffs from continuing to perform under that agreement from November 8, 2013 until it expires on October 21, 2021.

Plaintiffs say it is unreasonable to read the term "from the beginning of time through execution of this Release" as a time limitation. *See, e.g.*, Opening Br. at 17 (arguing that trial court erred when it held that "'through execution of this Release' also could be reasonably interpreted as a temporal cutoff point"). According to Plaintiffs, "the dictionary definition of 'through' [is] 'in one side and out the opposite or another side of,' as in 'through a tunnel.'" *Id.* 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, '<u>past, present and future</u>.'" *Id.* (emphasis in original). This argument has several key flaws.

First and foremost, it is illogical. "In one side and out the other" makes sense when talking about a tunnel. If that interpretation applied here, however, paragraph 2.1's reference to the Release's time of execution would be pointless; it would be nothing more than one arbitrary example of an infinite number of "points of passage" between the beginning of time and the end of time. The paragraph just as logically (and absurdly) could have said that the parties release claims "from the beginning of time through the signing of the Declaration of Independence" or "from the beginning of time through Neil Armstrong's first step on the Moon." In fact, "through" has multiple dictionary definitions, one of which is "to and including." *Webster's Third New International Dictionary* 2384 (2002). An example of this usage appears on this Court's website, which states:

> The Court's regular business hours for accepting filings are 8:30 a.m. to 4:30 p.m., Monday through Friday.

www.courts.delaware.gov/help/appeals/SupremeCitizensGuide.stm. This does not mean that the Court is open on weekends, Friday being a "point of passage" to Saturday. It means it is open beginning Monday, to and including Friday. Likewise, a reasonable person could conclude that "from the beginning of time through execution of this Release" means up to and including, but not after, the date the Release was signed.

Furthermore, Plaintiffs did not present this interpretation of "through" in their complaint or summary judgment papers. *See* B3-14; B15-51; B52-87. They first raised it at trial. B159-60 at 525:8-526:17. Plaintiffs cannot plausibly assert as the Release's only reasonable interpretation one they did not come up with until trial.

Even worse, this interpretation diametrically opposes another that Plaintiffs presented earlier in the case. In their summary judgment reply brief, Plaintiffs acknowledged that "through execution of this Release" *is* a temporal cutoff. They just argued that it describes the time by which the contracts being terminated must have come into existence rather than the time by which a breach being excused must have occurred. *See, e.g.*, B65 (setting forth "Plaintiffs' Position" that "from the beginning of time through execution of this Release" means that the agreements and obligations being released "are those that existed at any time before execution of the Release").

For all these reasons, a reasonable person could understand "through" in this context to be a time limitation.

b. "Past, Present or Future" Must Be Interpreted In Light Of "Through Execution Of This Release."

Paragraph 2.1 also contains the phrase "past, present or future." *See, e.g.*, Opening Br. at 14; A-104-05. Plaintiffs say that these words mean that the paragraph's release extends to contractual obligations that arise after execution of

the Release. *See* Opening Br. at 14-15, 18-19. But the fact that paragraph 2.1 contains two temporal clauses, neither of which the other words in the paragraph explain, only highlights the provision's ambiguity.

One reasonably could understand the phrase "past, present or future" to refer to *when a released claim might be asserted*, that is, when the releasing party might *have* the claim. Thus, when paragraph 2.1 releases Plaintiffs from obligations and other liabilities "past, present or future, known or unknown, suspected or unsuspected, from the beginning of time through execution of this Release," the release applies whether the releasing party already has sought to enforce its rights, is presently enforcing its rights, and/or would seek to enforce its rights in the future, as long as the alleged breach occurred "from the beginning of time through execution of this Release."

Plaintiffs argue that such an interpretation is unreasonable because it "'infer[s] a connection [among the phrases in the paragraph] that does not expressly appear in words.'" Opening Br. at 18. But Plaintiffs do the same; they just infer a different connection. In substance, their argument is that the paragraph releases liabilities or obligations that might *come due* "past, present or future" rather than ones that the releasing party might *assert* "past, present or future." Plaintiffs must infer such a connection because paragraph 2.1 does not express how its phrases work together. Its definition of "Claims" simply places a series of

phrases side-by-side. "Claims" are (1) claims, demands, agreements, obligations, liabilities, etc.; (2) in law, equity or otherwise; (3) past, present, or future; (4) known or unknown; (5) suspected or unsuspected; (6) from the beginning of time through execution of this Release; (7) arising out of or in connection with the Purchase Agreement or the transactions contemplated thereby. A-104-05. *Any* interpretation of such a provision requires inferring connections that do not exist expressly in the words. One reasonable way to reconcile the references to "future" and "through execution of this Release," however, is to say that Defendants are giving up claims they might *make* in the future that *accrued* through execution of the Release.

c. "Through Execution Of This Release" Does Not Unambiguously Refer To The Time By Which Contracts Must Have Come Into Being.

Recognizing that "through execution of this Release" might be construed as a time limitation, Plaintiffs offer an alternative interpretation for this phrase. *See* Opening Br. at 19-20. In this interpretation, "through execution of this Release" refers to the time by which any contracts whose obligations are being released must have *come into existence*, rather than the time by which the obligations must have been owed or liabilities incurred. *See id.* Because the NCA "came into being as of October 21, 2011," Plaintiffs argue that the NCA was an "agreement" "from

the beginning of time through execution of [the] Release." *Id.* This argument also fails.

First, although this alternative interpretation is, at best, one grammatically plausible interpretation of the words "agreement" and "from the beginning of time through execution of this Release," it does not establish that Defendants' interpretation is unreasonable. Paragraph 2.1 does not *say* that "from the beginning of time through execution of this Release" describes the period by which contracts must have "come into being." This is simply another interpretive theory.

Second, when one considers the rest of paragraph 2.1, Plaintiffs' alternative interpretation becomes unreasonable. For one thing, as a practical matter, no release can discharge obligations in a contract that does not yet exist. If the parties were to enter into a new, post-Release contract, that later contract would supplant any contrary provision in the Release. It makes no sense, therefore, and certainly is not the only reasonable interpretation, to surmise that the parties inserted the phrase "from the beginning of time through execution of this Release" to ensure that paragraph 2.1 only released obligations under already-existing contracts. In addition, paragraph 2.1 says that the "Claims" being released include "agreements…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*." A-104-05 (emphasis added). If "agreements" in this

context meant whole contracts—the Purchase Agreement as a whole, the NCA as a whole, etc.—then paragraph 2.1 would be referring (in part) to "the Purchase Agreement . . . arising out of or in connection with the Purchase Agreement," which is absurd.

Another reasonable meaning of "agreements" is the promises that a contract contains. As *Black's Law Dictionary* explains, "[t]he term 'agreement,' although frequently used as synonymous with the word 'contract,' is really an expression of greater breadth of meaning and less technicality. Every contract is an agreement; but not every agreement is a contract." *Black's Law Dictionary* 78 (9th ed. 2009). The contract known as the Release, for example, contains *numerous* agreements: an agreement to forbear from commencing any lawsuit based on a released Claim, A-105 at ¶ 2.3; an agreement to execute further documents that are necessary to carry out the provisions of the Release, A-106 at ¶ 4.4; an agreement to hold the provisions of the Release in confidence, *id.* at ¶ 5.1; and so on. Similarly, the Purchase Agreement, the NCA, and the parties' other contracts can be understood to contain agreements to do and refrain from doing things through November 7, 2013 and agreements to do and refrain from doing things after November 7, 2013. Particularly given the absurdity described in the previous paragraph that arises from Plaintiffs' purported interpretation of "agreements," a reasonable person could conclude that paragraph 2.1 absolves the parties of their promises to do or

refrain from doing things up to the time of settlement (whether invoked past, present, or future), but not their promises to do or refrain from doing things after the date of the Release.

3. The Release As A Whole Supports Defendants' Interpretation.

Further supporting Defendants' interpretation is the scheme that arises from the Release as a whole. Plaintiffs erroneously say that paragraph 1 "is irrelevant to the construction of Section 2.1 and its effect on the NCA." Opening Br. at 21. This statement ignores the principle that contracts must be interpreted as a whole. *See supra* at 11. Together, paragraphs 1 and 2.1 show that the Release does not terminate the NCA.

a. Paragraphs 1 And 2.1 Are Complementary.

Paragraph 1 provides in pertinent part:

> 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. There are at least two key differences between this paragraph and paragraph 2.1 that are pertinent to this appeal. First, whereas paragraph 2.1 contains the time limitation "from the beginning of time through execution of this Release," paragraph 1 speaks only of terminating future contractual obligations:

"the parties shall owe no *further* amounts or obligations to one another in connection with the Purchase Agreement." *Id*. (emphasis added). Second, whereas paragraph 2.1 releases certain claims "arising out of or in connection with the Purchase Agreement *or the transactions contemplated thereby*," paragraph 1 says that the parties shall owe no further obligations "*in connection with the Purchase Agreement*"; it does not extend to "the transactions contemplated thereby." *Id*. (emphasis added). A reasonable person considering the two paragraphs together, therefore, could understand them to set forth a coherent scheme in which the parties (a) through paragraph 1, extinguished future contractual obligations under the Purchase Agreement but not under other executory contracts like the NCA and (b) through paragraph 2.1, wiped the slate clean with respect to all matters between them up to the time of settlement.

Importantly, this interpretation gives meaning to both paragraphs without rendering either one superfluous. In contrast, Plaintiffs' theory that paragraph 2.1 extinguishes future contractual obligations would render important language in paragraph 1 mere surplusage. If paragraph 2.1 extinguished future obligations under the Purchase Agreement and the transactions it contemplates, there would be no point to paragraph 1's providing that "the parties shall owe no further amounts or obligations to one another in connection with the Purchase Agreement." Paragraph 2.1 would cover that point and more.

Plaintiffs argue that Defendants' integrated, complementary view of paragraphs 1 and 2.1 is unreasonable because paragraph 1 "is not a 'release.' It is simply a statement of the settlement amount . . . and the effect of that payment." Opening Br. at 22. Noting that paragraph 1 is not titled "Release," Plaintiffs say that

> [i]t 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 <u>all</u> claims under the Purchase Agreement under Section 1 and then, after having released <u>all</u> claims, goes on in Section 2.1 to release only <u>some</u> claims under the Purchase Agreement (and other transactions), *i.e.*, claims "through the execution of this Release."

Id. at 22-23 (emphasis in original). This argument has at least four problems.

First, Plaintiffs' assertion that paragraph 1 is "simply a statement of the settlement amount and the effect of that payment" begs the question of what "effect" paragraph 1 says the settlement payment has. For the reasons above, a reasonable person could conclude that part of that effect is terminating future obligations under the Purchase Agreement only.

Second, Plaintiffs badly mischaracterize Defendants' position when they describe it as an interpretation "under which [the Release] releases <u>all</u> claims under the Purchase Agreement under Section 1." Opening Br. at 23 (emphasis in original). The apparent purpose of this mischaracterization is to portray

Defendants' interpretation as one that itself renders language superfluous. In fact, Defendants' consistent position has been that the plain language of paragraph 1 terminates *some* obligations under the Purchase Agreement, specifically "*further*"—*i.e.*, post-Release—obligations. A-104 (emphasis added). Paragraph 2.1 addresses *different* obligations under the Purchase Agreement, namely ones owed "through execution of the Release"—*i.e.*, pre-Release obligations—as well as pre-Release obligations regarding "the transactions contemplated [by the Purchase Agreement]," including the NCA. A-104-05. Together, this constitutes a sensible scheme under which, in paragraph 2.1, Defendants release Plaintiffs from a broad range of claims under the Purchase Agreement, the NCA, and all of the other "transactions contemplated [by the Purchase Agreement]," *but only for liabilities incurred "through execution of this Release,"* and in paragraph 1, the parties terminate future contractual obligations, *but only with respect to the Purchase Agreement*. *Id*.

Third, paragraph 1's title is irrelevant. In paragraph 5.7 of the Release, the parties agreed that "[d]escriptive headings used herein are used for convenience only and shall not be deemed to affect the meaning or construction of any provisions hereof." A-106. What matters is substance. Whatever one calls it, paragraph 1 expressly provides that the parties shall owe no further obligations to one another in connection with the Purchase Agreement. This complements

paragraph 2.1, which applies to matters "from the beginning of time through execution of this Release."

Finally, and contrary to Plaintiffs' naked assertion otherwise, *see* Opening Br. at 22-23, circumstances indeed exist that logically explain how an attorney could come to draft the Release to accomplish the kind of contractual scheme described above using the language this Release uses. For example, it could be the case that after the parties' settlement meeting, the attorney had an associate at his law firm who had not been at the meeting prepare a first draft by modifying a prior release from an unrelated transaction. The attorney then could have modified the draft to conform its terms with the parties' deal. In so doing, the attorney could have added the term "from the beginning of time through execution of this Release" to paragraph 2.1 to ensure that it only excused pre-Release breaches. He also could have included in paragraph 1 the statement that "the parties shall owe no further amounts or obligations to one another in connection with the Purchase Agreement" to reflect the discussions at the settlement meeting. But he could have chosen not to add to that sentence the words "or the transactions contemplated thereby," despite their being in paragraph 2.1, because the parties were not agreeing to terminate any contracts other than the Purchase Agreement.

This, of course, is no hypothetical. It is what actually happened. *See* Opinion at 31 ("[T]he process by which the General Release was drafted provides

clues as to why the document is less than clear. A person with no knowledge of the NCA prepared the first draft, which was later modified by Schoenfeld to twist existing terms into conformity with the deal as he understood it."); B139-55 at 465:2-481:17.

For these four reasons, Plaintiffs' assertion that "[n]o logical reason" supports Defendants' integrated interpretation of paragraphs 1 and 2.1 is meritless.

b. Paragraph 1 Does Not Apply To The NCA.

Yet another tack Plaintiffs take in response to Defendants' integrated interpretation is to offer another alternative argument: that paragraph 1 terminates the NCA in addition to paragraph 2.1. *See* Opening Br. at 24-27. This argument relies on paragraph 1's statements that the settlement payment "constitutes payment in full of all claims related to the Purchase Agreement" and that following receipt of the payment the parties shall owe no further obligations to one another "in connection with the Purchase Agreement." *See id*; A-104. According to Plaintiffs, "[t]he 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." Opening Br. at 25. Thus, Plaintiffs say that post-Release obligations under the NCA constitute "claims related to the Purchase Agreement" and "obligations . . . in connection with the Purchase Agreement" as to which the parties "owe no

further amounts or obligations to one another." *Id.* at 24-26. This argument, too, has multiple flaws.

For one thing, Plaintiffs did not raise this argument until their summary judgment reply brief; it appears in neither their complaint nor their summary judgment opening brief. *See* B3-14; B15-51. It again strains credulity for Plaintiffs to say that a reasonable observer must read paragraph 1 in a manner they themselves did not present until their summary judgment reply.

Furthermore, this interpretation renders the words "or the transactions contemplated thereby" in paragraph 2.1 surplusage. If obligations under contracts that "would not have gone into effect without the Purchase Agreement" and would not have existed "but for the Purchase Agreement" were deemed obligations "in connection with the Purchase Agreement," no purpose would be served by the special, additional language in paragraph 2.1 "or the transactions contemplated thereby." Under Plaintiffs' broad reading, transactions that the Purchase Agreement contemplates necessarily are "related to" and "in connection with" the Purchase Agreement. There would have been no need, therefore, to add "or the transactions contemplated thereby" in paragraph 2.1. Paragraph 2.1's use of the phrase "in connection with the Purchase Agreement" already would cover "the transactions contemplated thereby."

A reasonable person could believe that the parties omitted "or the transactions contemplated thereby" from paragraph 1 to limit that paragraph's termination of future contractual obligations to the Purchase Agreement itself. In this reading, "in connection with" the Purchase Agreement means "involving," "concerning," or "under" that contract, which is a perfectly sensible understanding of the phrase.

In an apparent attempt to get around the surplusage problem, Plaintiffs note that "[t]he 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.'" Opening Br. at 26. While Defendants agree with this statement, it does not get Plaintiffs around the problem because they do not explain how, if their broad reading of "in connection with the Purchase Agreement" were correct, any work would remain for the phrase "or the transactions contemplated thereby" to do. Plaintiffs did offer a theory on this subject in their opening post-trial brief, and might resurrect it in their reply brief here. *See* B112-13. So Defendants will address it anticipatorily.

Plaintiffs' theory went like this: The phrase "transactions contemplated thereby" includes "'waivers, ancillary agreements, membership transfer powers, certificates, and documents,'" which are "independent of and broader than the

Transaction Documents." B113 (quoting A-076 (Purchase Agreement) at § 9.13(a)(iii)). When paragraph 2.1 refers to claims "arising out of or in connection with the Purchase Agreement or the transactions contemplated thereby," therefore, it covers more than just the Transaction Documents, and thus more than the NCA. *See id.* As a result, when Plaintiffs interpret "in connection with the Purchase Agreement" in paragraph 1 to include the NCA, they do not render "or the transactions contemplated thereby" in paragraph 2.1 superfluous, because that phrase still can apply to things like waivers and ancillary agreements. *See id.*

This argument fails for at least two reasons. First, it conflicts with Plaintiffs' other statements. In substance, the argument says that the Release covers the NCA through the phrase "in connection with the Purchase Agreement" and *other things* (waivers, ancillary agreements, etc.) fall within "the transactions contemplated thereby." But Plaintiffs admit that "'transactions contemplated by the Purchase Agreement' as those words are used in Section 2.1 . . . *includes the NCA*." Opening Br. at 26 (emphasis added).

Second, the argument erroneously assumes that Plaintiffs' broad interpretation of "in connection with the Purchase Agreement" would not also sweep in waivers, ancillary agreements, and the like, and thus render "or the transactions contemplated thereby" meaningless just the same. In fact, Plaintiffs' "elastic" interpretation of "in connection with" necessarily would capture the

waivers, ancillary agreements, and other things on which Plaintiffs based this theory in the trial court. Notably, section 9.13(a)(iii) of the Purchase Agreement, which Plaintiffs cited in the trial court, talks about

> amendments, waivers, ancillary agreements, membership transfer powers, certificates and documents *that the Sellers' Representative deems necessary or appropriate in connection with the consummation of the transactions contemplated by the Transaction Documents, including any Transaction Document*.

A-076 (emphasis added). Under Plaintiffs' broad interpretation of "in connection with the Purchase Agreement," these items, which are specifically mentioned in the Purchase Agreement, would not exist but for the Purchase Agreement, and are said to be "in connection with the consummation of . . . any Transaction Document," necessarily would be "in connection with the Purchase Agreement."

In short, Plaintiffs cannot avoid the conclusion that their expansive interpretation of "in connection with the Purchase Agreement" would render "or the transactions contemplated thereby" meaningless. Under Delaware law, objectively reasonable persons avoid interpreting contract language as mere surplusage. *See, e.g.*, *Kuhn Constr., Inc.*, 990 A.2d at 396-97.

c. Paragraphs 2.2 And 2.3 Of The Release Do Not Terminate The NCA Either.

While claiming that paragraph 1 is "irrelevant to the construction of Section 2.1 and its effect on the NCA," Opening Br. at 21, Plaintiffs contend that two other

provisions are relevant to support their interpretation: paragraphs 2.2 and 2.3. *See id.* at 15-16. Neither makes Plaintiffs' position unambiguously correct.

In paragraph 2.2, Defendants acknowledge the possibility that after execution of the Release, they might "discover facts or incur or suffer claims that were unknown or unsuspected at the time th[e] Release was executed, and which if known by [them] at that time may have materially affected [their] decision to execute th[e] Release." A-105. They agree that they are "assuming any risk of such unknown facts and such unknown and unsuspected claims." *Id.* Nothing in this paragraph purports to extinguish the NCA, much less does so unambiguously. The paragraph simply precludes the parties from later trying to invalidate the Release by claiming mutual or unilateral mistake of fact because they were unaware of something when they signed the Release. As this Court has explained, "mutual mistake does not exist if the party adversely affected assumed the risk of the mistake." *Hicks v. Sparks*, 2014 WL 1233698, at *2 (Del. Mar. 25, 2014). "[A] party assumes the risk of a mistake where the contract assigns the risk to the party." *Id*. (citing Restatement (Second) of Contracts § 154(a)-(b)). The same applies to the doctrine of unilateral mistake of fact. *Crescent/Mach I P'ship, L.P. v. Dr. Pepper Bottling Co. of Tex.*, 2008 WL 2440303, at *5 n.47 (Del. Ch. June 4, 2008) (parties "voluntarily assumed the risk . . . and cannot now seek to undo that

decision based on unilateral mistake"), *rev'd on other grounds*, 962 A.2d 205 (Del. 2008).

Paragraph 2.3 merely provides that the parties will not file a lawsuit based on a released "Claim." *See* A-105 (Defendants "will forever refrain and forbear from commencing . . . any lawsuit . . . against [Plaintiffs] based on, arising out of, or in connection with any Claim, which is released and discharged by reason of the execution and delivery of this Release"). "Claim," however, is defined in paragraph 2.1. Like paragraph 2.2, paragraph 2.3 does not expand the scope of the obligations released and terminated in paragraphs 1 and 2.1.

For all of the reasons above, a reasonable person could interpret the Release as a whole not to terminate post-Release obligations under the NCA.

4. Plaintiffs' Evolving Interpretations Refute Their Contention That The Release Unambiguously Terminates The NCA.

Plaintiffs' assertion that their appellate interpretations are the only reasonable ones is belied by their own litigation conduct. Throughout this case they have presented multiple, shifting, and even contradictory theories as to why the Release supposedly terminates the ten-year NCA eight years early.

In the January 2014 letter to which Plaintiffs' Opening Brief refers, Plaintiffs' litigation counsel, Mr. Tolhurst, did not even mention paragraph 2.1 as a basis for concluding that the Release terminates the NCA. *See* B1-2. Nor did he

assert that paragraph 1 terminates the NCA on the theory that obligations under that contract are obligations "in connection with the Purchase Agreement." *Id*. Instead, he asserted that paragraph 1 extinguishes the NCA simply because the NCA is "part of the Purchase Agreement." B1.

In their complaint and opening summary judgment brief, Plaintiffs did invoke paragraph 2.1. But they offered no interpretation of the phrase "from the beginning of time through execution of this Release." *See* B12-13; B37-48.

In their summary judgment reply brief and oral argument, Plaintiffs disavowed their initial position that the NCA was "part of" the Purchase Agreement, asserted for the first time that the NCA falls within paragraph 1's termination of future contractual obligations because the NCA's obligations are "in connection with" the Purchase Agreement, and offered their first explanation of paragraph 2.1's time limitation: that it refers to the period in which the "agreements" being released must have come into existence. *See* B65; A-123 at 11:4-14; A-134 at 22:18-23:17.

At trial and in their post-trial briefs, Plaintiffs then asserted that "from the beginning of time through execution of this Release" is not a time limitation at all, because "through" means "point of passage," not "up to and including." *See*, *e.g.*, B108. This interpretation contradicts their assertion that the phrase *is* a time limitation but simply requires that the contracts being released have come into

existence by the time the Release was signed. Plaintiffs also argued, for the one and only time, that paragraph 1 only terminates future *financial* obligations "in connection with the Purchase Agreement," thereby leaving paragraph 2.1 to terminate future non-financial obligations (like the obligation under the NCA not to compete) without creating a surplusage problem. B110. Plaintiffs do not make that argument on appeal. *See* Opening Br. at 13-27.[3]

The fact that (1) Plaintiffs have presented multiple interpretations of the Release, (2) their Opening Brief itself contains multiple interpretations, and (3) none of the interpretations they present to this Court even appear in the letter by which their litigation counsel set up this declaratory judgment lawsuit confirms that no single interpretation exists of which the Release is reasonably susceptible. For Plaintiffs to prevail, not only would the trial court have to have acted unreasonably when it viewed Defendants' interpretation of the Release as plausible, and not only would the parties have to have signed a contract that no reasonable person could think reflected their manifested intent, but *Plaintiffs' litigation counsel himself would have to have acted unreasonably* in January 2014 by failing to recognize what he and his co-counsel now assert are the only

[3] Paragraph 1's plain text says that "the parties shall owe no further *amounts or obligations* to one another in connection with the Purchase Agreement," refuting any suggestion that it unambiguously covers only financial obligations. A-104 (emphasis added).

interpretations of the Release a reasonable person could have. This is not believable.

Throughout the matter Plaintiffs have thrown the proverbial spaghetti against the wall, hoping that one of their interpretations would stick. This behavior confirms that the trial court was correct when it held that reasonable people could read the Release differently. Because Plaintiffs do not dispute the court's findings that any reasonable observer considering the parties' acts, dealings, and correspondence before and during the settlement negotiations would conclude that the Release does not terminate the NCA, the trial court did not err in entering judgment for Defendants.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the judgment below be affirmed.

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