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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.	)	
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' REPLY BRIEF

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PRELIMINARY STATEMENT

The parties agree that an agreement is unambiguous if it is not open to more than one reasonable interpretation. Defendants, however, ignore well-settled Delaware law that the decision as to whether an agreement is ambiguous or not is made on the face of the contract, without reference to extrinsic evidence. *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) (admonishing that "extrinsic evidence may not be used . . . to create an ambiguity."). Instead, Defendants refer to extrinsic evidence, improperly citing the Trial Court's factual findings to inject ambiguity where none exists. Ans. Br. at 9, 24-25. This Court must reject Defendants' improper use of extrinsic evidence to create an ambiguity.

When Defendants' argument starts running afoul, Defendants also attempt to construct ambiguity from hypothetical definitions that are invented for the sake of argument, but that no reasonable person would understand to be supported by the words that are actually used. The test for ambiguity is *not* whether more than one definition can be found for the words that are used in the contract or whether an opposing argument for construction can be offered. If that were the test, no agreement would ever be unambiguous. The test is whether a person viewing the words that are actually used in the document would *reasonably* arrive at an

alternative construction as to the effect of the words that are used. Defendants' interpretation of the General Release fails this test.

ARGUMENT

A. The Question Whether the NCA Is Ambiguous Must Be Answered Without Resort to Extrinsic Evidence.

Delaware law is clear. Only if the words of the contract support more than one *reasonable* interpretation may the court consider extrinsic evidence of the parties' intent. *Salamone v. Gorman*, 106 A.3d 354, 374 (Del. 2014). And while a court does not need to decide contract interpretation in a vacuum, a "court must be careful in entertaining background facts to avoid encroaching on the basic principles" concerning reliance on extrinsic evidence. *Eagle Indus.*, 702 A.2d at 1233, n.7

Defendants' Answering Brief goes beyond placing the contract at issue in this appeal – the General Release– in context. Defendants' Answering Brief is replete with extrinsic evidence and citations to the Trial Court's factual findings. Defendants' attempt to divert this Court's attention to extrinsic evidence to support their interpretation of the General Release is improper. "[I]f 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 at 1232. That is exactly what Defendants have attempted to do here.

B. Plaintiffs' Interpretation of the Release, Stated by Plaintiffs

In their Answering Brief, Defendants have deconstructed and inaccurately paraphrased Plaintiffs' interpretation of the General Release. Plaintiffs' interpretation of the release is clear and consistent with their arguments at the Trial Court level.

First, Section 2.1 of the Release released all of Plaintiffs' obligations under the Noncompetition Agreement (the "NCA"). Anchored by the words of Section 2.1, the NCA was an "agreement" "from the beginning of time through execution of this Release" that imposed "past, present and future" "obligations." As Defendants concede, the NCA was "in connection with the transactions contemplated by [the Purchase Agreement]." Ans. Br. at 3. Section 2.1 thereby released such agreements and obligations in the past, in the present and in the future. Accordingly, as of "the execution of the Release," Plaintiffs had no obligations to Defendants of any kind under the NCA: no past obligations, no present obligations and no future obligations. This result follows whether the phrase "through execution of this Release" is interpreted as a temporal stopping point or a point of passage. In either case, the sole reasonable construction is the same.

Second, Section 1 is not a release. Section 1 simply describes the "Settlement Payment [$240,000]" and explains that, upon payment of the

Settlement Payment, the parties would have no further amounts or obligations to each other under the Purchase Agreement. Plaintiffs did not need to pay any more money or do anything further, and Defendants did not owe any money or obligations to Plaintiffs.

Third, it does not matter whether the NCA is "in connection with the Purchase Agreement" in Section 1 because Section 2.1 unambiguously releases the NCA. Even if, as Defendants contend, Section 1 operates as a release, then the release of the NCA under Section 1 is completely consistent with the release of the NCA under 2.1.

C. Defendants' Interpretation of the Release as a Whole Is Wholly Unreasonable.

1. Section 2.1 Released Plaintiffs from All Obligations Under the NCA.

The NCA is a "transaction contemplated by the Purchase Agreement" as those word are used in Section 2.1. Defendants' only argument for an ambiguous construction of Section 2.1 is based on the meaning of the phrase "from the beginning of time through execution of the Release." Plaintiffs' construction is detailed in Plaintiffs' Opening Brief (at 13-20). "Through," as used in "from the beginning of time through execution of the Release," is reasonably interpreted as a point of passage as "in one end and out the other". Defendants argue that "through

execution of this Release" can only reasonably be interpreted as a temporal stopping point that runs through but not beyond the execution date or the Release.

The essential point is that under either definition of "through" there is only one reasonable construction of Section 2.1. [1] If Plaintiffs' definition is accepted, the Release applies to all future obligations under the NCA. If Defendants' definition of "through" is accepted, the same construction follows. The Release still applies to future obligations under the NCA because on the day the Release was executed, "future" "obligations" under the NCA were released. Applying either Plaintiffs' or Defendants' definition of "through," neither the NCA nor any of the obligations imposed thereby survived "the execution of [the] Release." The NCA imposed obligations on Plaintiffs that were in force at the time of the Release, primarily the obligation not to compete with Defendants in the past, present or future. Section 2.1 released all agreements and obligations "past, present and future" through execution of the Release. Thus, as of the execution of

[1] The distinction between contract "construction" and contract "interpretation" is important to keep in mind here. Interpretation involves determining the meaning of the words used in a contract. Construction involves the legal effect that will be given the words—in this case, the effect of the General Release on the NCA. Plaintiffs and Defendants disagree about the interpretation of "through." Defendants argue that it can only mean "to and including." It is also possible reasonably to interpret "through" to mean something else. But whichever *interpretation* of "through execution of this Agreement" is accepted, the *construction* of Section 2.1 is the same: Section 2.1 released Plaintiffs from all obligations under the NCA, past, present, or future.

the Release, Section 2.1 necessarily released Plaintiffs from all "past" obligations not to compete, all "present" obligations not to compete and all "future" obligations not to compete.

Defendants' attempts to support their interpretation fail. First, Defendants assert that support for their interpretation of "through execution of this Release" exists in *Harper v. Cronk*, 2013 WL 5799907 (D. Colo. Oct. 28, 2013). It does not. In addition to being factually distinguishable and not precedential, *Harper* did not decide, or even involve, the effect of the phrase "through the execution of this Release" on post-release obligations of one party to another under a contract. Thus, it is inapplicable here.

Defendants distort and misquote Plaintiffs' position. Contrary to Defendants' claim, Plaintiffs do not "say it is unreasonable to read the term 'from the beginning of time through execution of this Release' as a time limitation." Ans. Br. at 13. Plaintiffs' unchanged position is that even if "through execution of this Release" is found to be a temporal cutoff that includes the date that the Release was executed, the one reasonable construction of Section 2.1 is the same.[2] Section

[2] Defendants misquote Plaintiffs' Opening Brief by cutting off a key point of a quote without any ellipses or other signal. The quote from p. 17 of Plaintiffs' Opening Brief, in full, states as follows:

> 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

2.1 released any future obligations that Plaintiffs had under the NCA as of the execution date.

Defendants argue that "through execution of this Release "can be nothing other than a temporal cutoff." Ans. Br. at 14. But, that interpretation goes against the plain and ordinary meaning. And, in any event, no tension in reasonable construction arises out of the common dictionary definition of "through" as a point of passage or as a temporal cutoff. In contrast, Defendants' construction of "through execution of this Release" is not supported by either definition.

To garner support for their interpretation, Defendants attempt to re-write the contract, adding words to distort the plain meaning. Defendants have tried to connect "through execution of this Release" and their proposed construction of Section 2.1 by adding words and phrases that are not found in Section 2.1. For example, Defendants assert that explain that "through execution of this Release" releases "liabilities incurred up to and including, but not after, the date the Release was signed," and "Defendants cannot sue Plaintiffs for any breach of the NCA occurring through November 7, 2013". Ans. Br. at 13. However, the quoted

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Court's words, a 'temporal bound' *and that, when so construed, Section 2.1 does not apply to future obligations under the NCA*. (Emphasis added.)

language and the terms "incurred," "but not after" and "breach" do not exist in Section 2.1.

Similarly, Defendants attempt to explain the reference in Section 2.1 to "future" obligations by rewriting what Section 2.1 actually says. According to Defendants, "past, present or future" signifies "when a released claim might be asserted, that is when the releasing party might have the claim." Ans. Br. at 16. Even more expansively, Defendants explain that "past, present and future" means that the "release applies whether the releasing party already has sought to enforce its rights, is presently enforcing its right and/or would seek to enforce its rights in the future as long as the breach occurred 'from the beginning of time through execution of this Release'" *Id.*

Defendants' alternative construction has no support in the actual words of Section 2.1. The simple phrase "past, present or future" does not support or suggest any such construction. Indeed, Defendants concede that their interpretation rests on inferences, as opposed to plain language. But they argue that "*any* interpretation [of Section 2.1] requires inferring connections that do not exist expressly in the words." Ans. Br. at 17-18. On the contrary, Plaintiffs' proposed construction of Section 2.1, unlike Defendants', does not require inferences, the improper importation of additional words or a wholesale rewriting of the plain language of the General Release.

Defendants attack Plaintiff's interpretation by stating "no release can discharge obligations in a contract that does not yet exist" and, therefore, Plaintiffs' interpretation leads to an absurd result. Ans. Br. at 18. But Plaintiffs have not argued that Section 2.1 applies to contracts that were not in existence as of the execution of the Release. Just the opposite: Section 2.1 apples to "agreements" and "obligations" that were in existence at the time of the release and obligations to do or refrain from doing something in the future are still "obligations."

In an attempt to create ambiguity by sowing confusion, Defendants assert that while every contract is an agreement, not every agreement is a contract and that the NCA contained "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." Ans. Br. at 19. Actually, that is not the way the NCA is written. But even if that was an accurate portrayal of Section 2.1, it does not get Defendants where they need to go; it does not show that Defendants' construction of Section 2.1 is reasonable. Simply stated, while not all agreements are contracts, the NCA is, like all contracts, an "agreement." By releasing all "agreements" Section 2.1 necessarily released all "contracts", including the NCA.

Moreover, Defendants' "contract/agreement" dichotomy again resorts to revising the words of Section 2.1 as "absolving the parties of their promises from

doing things up to the time of settlement (whether invoked past, present or future) or to refrain from doing things after the date of the Release." Ans. Br. at 20. Those are simply not the words of Section 2.1. And, this is not an inference that can be reasonably supported by the words actually used in Section 2.1.

2. The Release as a Whole Provides No Support for Defendants' Interpretation of Section 2.1.

Defendants attempt to shore up their unsupported construction of Section 2.1 by enlisting the rule that contracts should be read as a whole. Citing this rule, Defendants conjure up a "coherent scheme," under which, Section 1 released "future contractual obligations under the Purchase Agreement" while 2.1 released "all matters between them up to the time of settlement." Ans. Br. at 21.

The initial problem with Defendants' proffered construction is that Section 1 does not say that it is a release and, more importantly, does not by its words release anything. After qualifying itself as "subject to" the other terms of the Release, Section 1 simply identifies the amount of the Settlement Payment ($240,000) and confirms that the Release requires nothing more from the parties insofar as the Purchase Agreement is concerned. That is, the Settlement Payment "constitutes payment in full of all claims related to the Purchase Agreement" and provides that "the parties shall owe no further amounts or obligations to one another in connection with the Purchase Agreement." According to Section 1, after the

Settlement Payment, no more payments will be due from either party and no more obligations will be owing under the Purchase Agreement.

Even if Section 1 could be reasonably construed as a release, Defendants' vision of a complementary interaction between Sections 1 and 2 is an illusion that is not supported by the words of the Release. Section 1 cannot be reasonably interpreted as being limited to *future* amounts or obligations. *The word "future" is not found in Section 1*. Instead, the parties used "*further*." "Further," according to common dictionary definition, is not limited to "future" but means "more distant in degree, time, or space" or simply "additional." *Am. Heritage College Dictionary* (3d ed.). (That is the way the word is used in the first sentence of Section 1("as further described").) Thus, Section 1 means that, aside from the Settlement Payment, no additional payment or obligation is or will be required of the parties at any time.

The reference to "further" amounts in Section 1 accentuates the difference between Section 1 and Section 2.1, which *does* use the word "future." Reasonable construction does not warrant attributing an identical meaning to the different words "further" and "future" as both those words are used in the General Release.

Defendants' interest in persuading the Court that Section 1 and Section 2.1 are complementary parts of a complex "scheme" is obviously self-serving. Defendants argue that Section 1 releases future obligations under the Purchase

Agreement so that, in that context, Section 2.1 reasonably could be construed as not releasing future obligations. For the reasons discussed, this is an unreasonable construction. The Court must interpret the words actually used. Defendants' restated rendition of the Release does not alter the unambiguous language that is actually used in Section 2.1.

D. If Section 1 Is a Release, then the Release Applies to the NCA.

In their Opening Brief, Plaintiffs explained that the release in the General Release is Section 2.1. Plaintiffs went on to show, however, that if, as Defendants contend, Section 1 were viewed as a release, then that release would also apply to the NCA because the NCA imposes obligations "in connection with the Purchase Agreement."

Defendants quarrel that Plaintiffs did not raise this point until the reply brief phrase at summary judgment proceedings. Timing of Plaintiffs' response to that issue has nothing to do with the construction that the Court is asked to decide. Timing of that issue derives from the fact that Plaintiffs were not informed of Defendants' proposed interpretive "scheme" until they received Defendants' summary judgment answering brief.

Turning to the merits, Defendants argue that if the NCA is "in connection with" the Purchase Agreement (Section 1) then the phrase "transactions contemplated by [the Purchase Agreement]" in Section 2.1 becomes surplus

because everyone agrees that the NCA was a "transaction contemplated by the Purchase Agreement." The response to this critique, as Defendants themselves discuss, is that "transactions contemplated by the 'Purchase Agreement,' while it encompasses the NCA, also encompasses other transactions such as waivers and ancillary agreements that are specifically contemplated by the Purchase Agreement." *See* Ans. Br. at 28. Thus, the NCA is an obligation "in connection with the Purchase Agreement" in Section 1 and Section 2.1. The NCA is also indisputably a "transaction contemplated by" the Purchase Agreement under Section 2.1, along with other transactions. "Transactions contemplated by the Purchase Agreement" overlaps "in connection with the Purchase Agreement" but it does not have the same meaning and it is not made meaningless by interpreting "in connection with" the Purchase Agreement" to also include the NCA.

Defendants attempt to quote two alleged "problems" by confusing that simple truth. First, Defendants contend that the NCA cannot be "in connection with the Purchase Agreement" (as used in Sections 1 and 2.1) because, as everyone agrees, the NCA was one of the "transactions contemplated by the Purchase Agreement" (as used in Section 2.1). Defendants, though, have not offered any reasoning in support of that contention. "Transactions anticipated by the Purchase Agreement" in Section 2.1 may be redundant to the extent that it includes the

NCA, but it is not superfluous, because it includes "transactions" other than the NCA.

Shifting 180 degrees, Defendants next argue that "transactions contemplated by" as used in Section 2.1 cannot be read to encompass waivers, ancillary agreements and the like because Plaintiffs' "elastic" interpretation of "in connection with" would "capture" waivers and ancillary agreements. Ans. Br. at 29-30. No principle of contract interpretation is violated by reading "transactions contemplated by" as confirmation that Section 2.1 released not only the NCA, but waivers and ancillary agreements, totally wiping the slate clean.

Defendants' microanalysis of "in connection with" and "transactions contemplated by" presumes a much higher degree of drafting precision than the 9-page General Release merits. Defendants' portrayal of Section 1 as a part of a complex "scheme" is, thus, doubly unreasonable. It is unreasonable to view Section 1 as a release (or even more awkwardly, a release only of "future obligations") and it is equally unreasonable to conclude that the NCA, as an obligation "in connection with the Purchase Agreement" would be outside the scope of the purported release.

E. Sections 2.2 and 2.3 Reinforce Plaintiffs' Interpretation of Section 2.1.

Defendants' penultimate argument responds to a position that Plaintiffs have not taken. Plaintiffs do not claim that Section 2.2 of the General Release ("waiver

of other claims") and Section 2.3 ("Forbearance of Suit") independently "terminate the NCA." Rather, as explained in Plaintiffs' Opening Brief, these provisions support the interpretation that the Release – which is found in Section 2.1 – terminated the relationship between the parties in all respects. Taken as a whole the General Release cannot reasonably be construed to be a jury-rigged, disconnected collection of partial releases that is built on unstated inferences and not the language that is actually used.

CONCLUSION

For the foregoing reasons, and the reasons stated in Appellants'/Plaintiffs' Opening Brief, the final order of September 30 should be reversed.

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