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Case No. 9360-VCN

IN THE COURT OF CHANCERY 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,	:	
Plaintiffs,	:	
v.	:	**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.	:	

MEMORANDUM OPINION AND ORDER

Date Submitted: June 15, 2015
Date Decided: September 30, 2015

Elizabeth A. Sloan, Esquire of Blank Rome LLP, Wilmington, Delaware and Frederick L. Tolhurst, Esquire and Curt Vazquez, Esquire of Cohen & Grigsby, P.C., Pittsburgh, Pennsylvania, Attorneys for Plaintiffs.

Philip Trainer, Jr., Esquire and Toni-Ann Platia, Esquire of Ashby & Geddes, P.A., Wilmington, Delaware and Paul Schwartz, Esquire and Alice Warren-Gregory, Esquire of Shoemaker Ghiselli + Schwartz LLC, Boulder, Colorado, Attorneys for Defendants.

NOBLE, Vice Chancellor

I. INTRODUCTION

This case involves a common but unfailingly ironic scenario: litigation over a general release contract. In 2011, defendants bought a glass company from plaintiffs and, as is customary in business acquisitions, the two sides executed a number of contracts. One of those contracts, a noncompetition agreement, forbids plaintiffs from competing with defendants' newly-acquired company for a period of ten years. A few years after the sale closed, however, a dispute over the payment of some pre-sale customer warranty claims drove the parties to execute a general release, the effect of which on the noncompetition agreement is the subject of this dispute. Plaintiffs argue that the release extinguishes certain obligations imposed the noncompetition agreement until 2021. Defendants disagree.

On February 18, 2014, plaintiffs filed a complaint seeking a declaratory judgment that their interpretation of the release is accurate. Thereafter, on January 30, 2015, plaintiffs moved for summary judgment on the grounds that the release's plain text unambiguously nullifies relevant portions of the noncompetition agreement. The Court denied that motion, holding that the release's language supports at least two reasonable interpretations. Accordingly, during the course of a three-day trial, the parties produced extrinsic evidence bearing on the contracting parties' objective intent and subjective understandings. In light of that extrinsic evidence and for reasons that follow, the Court concludes

that an objectively reasonable bargainer in the position of either party would conclude that the release does not nullify the noncompetition provisions from which plaintiffs seek release. Accordingly, plaintiffs' request for a declaratory judgment is denied.

II. FACTUAL BACKGROUND[1]

A. *The Parties*

D. Michael Hartley ("Mike Hartley"), D. Kent Hartley ("Kent Hartley"), and Jeffrey Nichols (together, "Individual Plaintiffs") own and operate Standard Bent Glass Corp. ("SBG"), a Pennsylvania corporation that makes, markets, and sells bent glass for normal architectural use, force-resistant glass for security applications, and other products including bullet-resistant glazing.[2] Mike and Kent Hartley used to own Coastal Glass Distributors ("Coastal," and, together with Individual Plaintiffs and SBG, "Plaintiffs"), a South Carolina corporation that sells commodity glass products, but not specialized security glass.[3]

Defendant G.A.A.G., LLC is an Alabama limited liability company that makes, markets, and sells a range of glass products under the moniker Global

[1] These facts are either undisputed or are as found by the Court after trial. *See Dionisi v. DeCampli*, 1995 WL 398536, at *1 (Del. Ch. June 28, 1995) (describing the court's approach to assessing trial testimony when acting as fact finder).
[2] Joint Pre-Trial Stipulation and Order ("Stip.") ¶ 4; Trial Transcript ("Tr.") 36–37, 117–19 (M. Hartley).
[3] Stip. ¶ 5; Tr. 174–75 (K. Hartley); JX 26 at 16–17.

Security Glazing ("GSG").[4] As its name implies, GSG's business focuses on security glass products. GSG is a wholly-owned subsidiary of Defendant Consolidated Glass Holdings, Inc. ("Consolidated," and, together with GSG, "Defendants"), a Delaware corporation formerly known as GSG Acquisition, Inc. ("GSG Acquisition").[5] Consolidated is a holding company formed to assemble related businesses under one corporate roof.[6]

B. *The Individual Plaintiffs Buy, Grow, and Try to Sell GSG*

Mike Hartley, sometimes along with Kent Hartley and Jeffrey Nichols, either started or bought at least seven companies in various industries between 1985 and 2011.[7] Some were ultimately sold.[8] Three—SBG, Coastal, and GSG—produced and sold glass products.

The Individual Plaintiffs acquired GSG in 2000 with the apparent goal of implementing accretive changes.[9] For about a decade after buying GSG, the Individual Plaintiffs invested in new equipment, changed product offerings, and implemented other changes whose net effect improved profitability and grew the

[4] Stip ¶ 6; Tr. 37, 113 (M. Hartley). For convenience, this opinion refers to G.A.A.G., LLC as GSG throughout.
[5] Stip. ¶ 7.
[6] Tr. 259 (Vincent).
[7] Tr. 35–38 (M. Hartley).
[8] Tr. 35–38 (M. Hartley).
[9] *See* Tr. 38–43 (M. Hartley).

company.[10] Then, in or around late 2010 and early 2011, two events relevant to this litigation took place. First, Tidewater Glazing ("Tidewater"), a contractor which had bought hundreds of pieces of GSG's security glass to install in a secure federal building near Washington, Dulles International Airport, brought a warranty claim against GSG upon discovering defects in some percentage of the glass it had bought.[11] In particular, the defective glass had begun to "delaminate"—a process by which two formerly bonded layers of glass separate.[12] Kent Hartley and other GSG personnel began investigating Tidewater's claim by, among other things, sending samples of the defective glass to offsite laboratories for testing.[13]

Second, the Individual Plaintiffs decided to put GSG up for sale.[14] With the help of a broker, GSG solicited and received a number of offers.[15] The offer GSG ultimately accepted came from Grey Mountain Partners ("Grey Mountain"), a Colorado-based private equity firm intent on building a portfolio of glass companies with GSG as its foundational "platform.[16] In its letter of intent of August 17, 2011, Grey Mountain acknowledged the value of buying businesses that, like GSG, produce "high-value, specialized products" and thereby enjoy the

[10] Tr. 42–43 (M. Hartley).
[11] Tr. 190–97 (K. Hartley).
[12] Tr. 192 (K. Hartley).
[13] Tr. 190–98 (K. Hartley).
[14] Tr. 46–47 (M. Hartley).
[15] Tr. 47 (M. Hartley).
[16] JX 1 (Letter of Intent); Tr. 90 (M. Hartley); Tr. 265–66, 273–75 (Vincent).

advantages that attend operating in an industry with "barriers to entry."[17] The letter went on to itemize a number of "key aspects" of Grey Mountain's proposal, many of which would eventually appear, in some form or another, in the parties' formal purchase agreement.[18]

For present purposes, the most notable provision Grey Mountain proposed was a "comprehensive covenant not to compete" that would last "for the maximum duration enforceable under applicable law."[19] A number of then-existing strategic realities substantiated—to some degree—Grey Mountain's apparent concern, including: (1) the Individual Plaintiffs were well-positioned to compete with GSG because they controlled two glass companies (SBG and Coastal) and were familiar with GSG's customers, price lists, and products;[20] and (2) GSG's business model of maintaining a small number of large customers made it particularly vulnerable to the effects of customer-poaching.[21] Notwithstanding the proposed noncompete provision's somewhat expansive scope, however, the letter of intent previewed Grey Mountain's willingness to negotiate carve-outs that would allow the

[17] Letter of Intent at FOX 000993.
[18] *See* Letter of Intent at FOX 000992–97 (listing nine items as "key aspects of [Grey Mountain's] proposal").
[19] Letter of Intent at FOX 000995.
[20] *See* Stip. ¶¶ 4, 10; JX 26 at 17; Tr. 119 (M. Hartley); Tr. 173–76 (K. Hartley).
[21] Tr. 120 (M. Hartley).

Individual Plaintiffs and their affiliates to continue to sell certain products to "approximately twelve legacy customers" SBG had serviced in the past.[22]

C. *The Parties Negotiate Terms of Sale and Execute a Purchase Agreement*

After the Individual Plaintiffs focused on Grey Mountain's offer, the parties began sculpting an operative contract of sale from the rough terms Grey Mountain set forth in its letter of intent. During these negotiations, two of the most heavily discussed provisions were the Transaction Services Agreement ("TSA") and Noncompetition, Nondisclosure and Non-Solicitation Agreement ("NCA"),[23] with the duration of the NCA's noncompetition provision becoming a particular point of contention.[24] The parties went back and forth several times over a period of "some weeks" as the sellers attempted to negotiate the buyers' demand of ten years downwards.[25] Although Mike Hartley originally wanted a five-year term, he and the sellers eventually acquiesced in the full ten.[26]

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[22] Letter of Intent at FOX 000996.

[23] Although witnesses on both sides agreed that both documents were heavily negotiated, it is unclear whether one document received more attention than the other. *See* Tr. 50-51 (M. Hartley) (asserting that "[t]here was far more time spent on the TSA . . . than there was spent on the [NCA]" but deferring to Kent on the question of how heavily the NCA was negotiated); Tr. 268 (K. Hartley) (admitting that the parties "had quite a lot of discussions about" the scope of the NCA); Tr. 272–73 (Vincent) (remembering that "[both] . . . were negotiated extensively," but failing to recall how the negotiations on each compared).

[24] Tr. 53 (M. Hartley); Tr. 268 (Vincent).

[25] Tr. 53 (M. Hartley); Tr. 267–68 (Vincent).

[26] Tr. 53 (M. Hartley); JX 4 (NCA) §§ 1(j), 4(a), 5(a).

On October 21, 2011, GSG changed hands upon the execution of a Limited Liability Company Membership Interest Purchase Agreement ("Purchase Agreement") by the Hartleys and Jeffrey Nichols ("Sellers")[27] and GSG Acquisition ("Purchaser"), Grey Mountain's holding company.[28] Purchaser paid Sellers about $35 million[29] to acquire GSG, but $1.5 million of that amount went into escrow for 18 months and was disbursable pursuant to the terms of an Escrow Agreement that, *inter alia*, obligated Sellers to indemnify Purchasers in the event Sellers breached representations and warranties.[30] Further, losses were only recoverable in the event they exceeded certain deductible amounts—including a $370,000 deductible for Purchaser's losses and a $75,000 reserve specifically set aside for losses resulting from Tidewater's warranty claim.[31]

The parties contemporaneously entered into a number of additional agreements that the Purchase Agreement defines as "Transaction Documents"—these include the TSA, the NCA, the Escrow Agreement, and a Real Estate

[27] The Individual Plaintiffs together owned 100% of GSG before the sale. Stip. ¶ 10. This opinion uses the terms "Sellers" and "Individual Plaintiffs" interchangeably hereinafter.
[28] JX 2 (Purchase Agreement) at 1, sched. A.
[29] The gross purchase price under the Purchase Agreement was $36,488,820. However, the ultimate amount paid at closing was $34,735,400 due to various adjustments. Stip. ¶ 14.
[30] Stip. ¶ 14.
[31] Purchase Agreement § 7.3(d)(i); *id*. sched. 4.22(c).

Purchase and Sale Agreement.[32] The Purchase Agreement also defines itself as a Transaction Document.[33] The TSA grants the newly-owned GSG access to former GSG employees, facilities, and records. Two provisions of the NCA are relevant for present purposes. The first, a noncompetition provision located in § 4, prohibits the Sellers, SBG, and Coastal[34] from competing with GSG for a period of ten years.[35] A carve out provision of the sort referenced in the letter of intent enables SBG to continue selling certain products to select constituencies.[36] Second, § 5 of the NCA includes a non-solicitation provision that, among other terms, prevented the Sellers, SBG, and Coastal from attempting to hire employees from GSG until October 21, 2013.[37] A reciprocal two-year limitation applied to GSG.[38]

[32] Purchase Agreement § 1.1.
[33] *Id*.
[34] The NCA assigns various rights and obligations by reference to parties it denotes as Purchaser, the Company, and Sellers/the Seller Parties. "Purchaser" is defined as GSG Acquisition. The "Company" is defined as GSG. The "Seller Parties" are defined as SBG and Coastal, as well as the "Sellers," who are not named in the same paragraph. NCA at 1. In the text accompanying this footnote, "Sellers" refers to the Individual Plaintiffs. Although Mike and Kent Hartley eventually sold Coastal, that sale did not take place until July of 2013. JX 26 at 17.
[35] NCA § 4(a); *id*. § 1(j) (defining the "Restriction Period" as ten years following the date of the NCA).
[36] *Id*. § 4(b)(i)–(ii).
[37] NCA § 5(a).
[38] *Id*. § 5(b).

D. *The Parties Address Lingering Post-Sale Issues*

In the ensuing months and years, the parties remained in contact to resolve token disputes of varying gravity. For example, in one email Mike Hartley sent to Jeffrey Vincent, a Managing Director at Grey Mountain who had written the letter of intent and helped negotiate the Purchase Agreement, Hartley expressed concern that Grey Mountain's recent acquisition of a new company threatened to place Grey Mountain in violation of the NCA.[39] Hartley added, though, that he had formed this opinion without advice of counsel, whom he had been struggling to contact that day.[40] As Hartley later admitted, his email reflected a clearly erroneous interpretation of the NCA.[41] Vincent never responded and nothing came of it.[42] Further, in 2013, a dispute over a working capital adjustment produced some degree of friction, but was eventually resolved.[43]

GSG's attempt to seek indemnification under the Escrow Agreement for certain customer warranty claims catalyzed a more contentious set of disagreements. An email volley among the parties and their respective lawyers between April and September 2013 chronicles an escalating degree of discord. Brad Schoenfeld, Esq., an attorney representing Grey Mountain, Consolidated, and

[39] JX 7.
[40] *Id*.
[41] Tr. 54–55 (M. Hartley).
[42] *See* JX 7.
[43] Tr. 120–22 (M. Hartley); Tr. 281 (Vincent) (testifying that these negotiations were "sometimes contentious").

GSG,[44] sent SBG a letter dated April 12, 2013—nine days before the escrow funds were set to release—asserting that his clients projected their warranty claim losses would amount to $1,282,314 and accordingly claimed $722,962 from the escrowed funds after subtracting an aggregate deductible.[45] An attachment to this letter itemized five purportedly compensable dollar amounts connected to particular warranty claims, the two largest of which were "Dulles Discovery 1 (Tidewater)" in the amount of $629,360 and "Dulles Discovery 2 (Edco Peterson Co.)" in the amount of $562,285.[46] The Sellers, through Thomas King, Esq., disputed Defendants' escrow claim in a letter dated May 1, 2013, asserting that three warranty claims Schoenfeld identified—including Dulles Discovery 1 and Dulles Discovery 2—were "fully negated" by customers' conduct.[47] In particular, Defendants believed customers had caused the defects in question by "utiliz[ing] the wrong silicone and cleaners with respect to the products."[48]

[44] Tr. 447–48 (Schoenfeld).
[45] This deductible included the $370,000 deductible, the $75,000 Tidewater reserve, and an "Other Warranties Reserve" of $114,352. JX 9.
[46] *Id*.
[47] JX 10 at KIN 000043.
[48] *Id*. Kent Hartley described the customers' actions in greater detail at trial. He claimed that, after reviewing maintenance records for the building in question, he discovered that owners of the building had "pressure washed [the building] with a material that was a citrus-based cleaner that had a chemical in it called lamaline . . . [which] attacks the bond between urethane and polycarbonate." Tr. 199–200 (K. Hartley). Also contributing to the delamination problem, he claimed, was that "the caps that were used to press the glass into place and cover the outside of the

As discussions progressed, the Tidewater claim gradually became the parties' sole focus. In June, July, and early September, Mike Hartley sent a series of emails to Schoenfeld setting forth Sellers' position that none of the warranty claims warranted disbursement of escrowed funds and requesting updates on GSG's ongoing settlement negotiations with Tidewater.[49] Schoenfeld sent a formal response to SBG in mid-September, shortly after GSG's Chief Financial Officer had circulated an internal email calculating the Tidewater claim's net indemnifiable losses as $430,000 based on actual expenses, projected future costs, and the $75,000 Tidewater reserve.[50] In his letter to SBG, Schoenfeld claimed GSG was entitled to $430,000 plus attorneys fees and further asserted:

> Based on our investigation, including, but not limited to, discussions with Tidewater personnel, we believe that the Sellers knew that the potential exposure related to the Tidewater Claims fair exceeded the $75,000 reserve set forth in the [Purchase] Agreement . . . .
> . . . .
> We believe that Sellers' false representations regarding the Tidewater Claims constitute fraud, which would remove the Tidewater Claims from the deductible set forth in the Agreement.[51]

The final paragraph of this letter expressed Defendants' preference to meet and settle the matter.[52]

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glass were cut very short on some windows," which would "allow more of the chemical to penetrate into the edges of the product." Tr. 201 (K. Hartley).

[49] See JX 11; JX 12; JX 15.

[50] JX 13; JX 14; Stip. ¶ 18.

[51] JX 14.

[52] *Id*.

In a reply letter dated September 13, 2013, King claimed his clients were "disappointed" and "particularly offended by [Defendants'] ridiculous claim of 'false representations' and 'fraud'" and asserted that Defendants' escrow claim amounted to bad faith.[53] King further demanded that Defendants disclose, among other documentation, whatever fruits of Defendants' investigation corroborated their fraud claims.[54] The letter concluded with a reservation of rights phrased as follows:

> Short of a successful resolution, our client reserves all of its rights with respect to this matter, including recovery of not only the escrow balance, but also its own attorneys' fees, as well as damages incurred to its reputation and with respect to the false claims being made as evidenced by your letter.[55]

Subsequent communications between the parties' counsel reveal that, as the parties careened towards a settlement meeting that would eventually take place on October 16, 2013, Defendants remained dissatisfied with Plaintiffs' refusal to disclose certain documents.[56] By this point, the parties' relationship had clearly deteriorated.[57]

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[53] JX 16.
[54] *Id*.
[55] *Id*.
[56] *See* JX 17; JX 18.
[57] *See, e.g.*, Tr. 360 (Vincent) (admitting that prior disputes resulted in "some difficult discussions" and that eventually things were not "as friendly as when . . . [the parties] closed the deal").

E. *The Parties Negotiate and Execute a General Release*

The settlement meeting took place at King's office in Cranberry Township, Pennsylvania and lasted about two hours.[58] King, Mike Hartley, and Kent Hartley attended on behalf of the Sellers and Schoenfield (via conference call), Paul Cody (Consolidated's CEO), Mark Levine (Consolidated's CFO), and Lance Cotton (a GSG employee) attended on behalf of the Purchaser.[59] The purpose of this meeting was to resolve the Tidewater dispute and determine how remaining escrow funds would be disbursed.[60]

The parties' September correspondence reflected the negotiations' starting point: Sellers felt the Tidewater claim did not entitle Purchasers to any payment from remaining escrowed funds and Purchasers claimed indemnification for

[58] *See* Tr. 230–31 (K. Hartley); Tr. 384 (Cody).
[59] Stip. ¶ 18.
[60] Testimony from witnesses on both sides confirms this characterization of the meeting's purpose as accurate. *See* JX 26 at 140–41 (agreeing that "100 percent of the conversation about the disputes that were occurring between the sellers on the one side and Consolidated on the other was about the Tidewater issue"); Tr. 79 (M. Hartley) (describing the "primary subject of the meeting" as "Tidewater and releasing the escrow funds"); Tr. 381–83 (Cody) (characterizing the issue for resolution as "the Tidewater settlement issue which would, in turn, lead to escrow funds release"). Further, almost every preceding piece of correspondence described above seemed to focus exclusively on Tidewater, as evidenced by both sides' repetitive use of the word "Tidewater" or the phrase "Dulles Discovery 1" in the messages' "Subject:" and "Re:" lines. *See, e.g.*, JX 11; JX 12; JX 13; JX 14; JX 16; JX 17; JX 18. Further, subsequent correspondence between and amongst the parties referred to the release itself as the "Tidewater Settlement Agreement." JX 19; JX 20; JX 23.

$430,000.[61] Although the record provides conflicting evidence on ensuing discussions' particulars,[62] Cody provided undisputed testimony that the following bargaining process repeated several times: the parties would separate into different rooms, discuss options amongst themselves, and then reconvene.[63] That process ultimately produced an agreement that Purchasers would receive $240,000 from the escrow account and that Schoenfeld would draft a release.[64] Discussion about the release itself was extremely limited, but included a brief exchange between Schoenfeld and King that a release was needed and that Schoenfeld would write the first draft.[65] At no point during the October meeting did the parties discuss the NCA, the TSA, the Real Estate Purchase and Sale Agreement, or an Intellectual Property Ownership Agreement ("IP Agreement") the parties had entered into.[66]

After the meeting, a document ultimately termed General Release of Claims ("General Release" or the "Release") was drafted, reviewed, and signed by both sides relatively quickly and without incident. The drafting process began when

[61] *See also* Tr. 384 (Cody); Tr. 460 (Schoenfeld).
[62] *See, e.g., infra* note 64.
[63] Tr. 386–87 (Cody).
[64] *See* JX 21 (General Release) 1; Tr. 237 (K. Hartley); Tr. 389 (Cody). Mike Hartley testified that Schoenfeld stated this document would be a "full, comprehensive general release." Tr. 81 (M. Hartley). Cody and Schoenfeld admitted only that a release was briefly discussed, and denied that the release was ever characterized in such broad terms. Tr. 389 (Cody); Tr. 462–63 (Schoenfeld).
[65] *See* JX 28 at 15–17; Tr. 462 (Schoenfeld).
[66] Stip. ¶ 19; *See* Tr. 84–85 (M. Hartley); Tr. 235–36 (K. Hartley); Tr. 387–88 (Cody).

Schoenfeld instructed Melissa Mellen, Esq., an associate at Schoenfeld's law firm, to prepare a first draft by modifying a prior release from an unrelated transaction.[67] Mellen was not at the settlement meeting and had no knowledge of the NCA when she carried out this task.[68] Schoenfeld made several edits and circulated the General Release to both sides on October 18, 2013, two days after the settlement meeting.[69] Both sides approved the October 18 draft and executed it without modification on November 7, 2013.[70]

The General Release directs the parties'[71] escrow agent to transmit $240,000 from the escrow account to GSG and all remaining funds to Mike Hartley on behalf of Kent Hartley and Jeffrey Nichols.[72] Paragraphs 1 and 2.1 of the General Release contain additional language central to the present litigation. Paragraph 1, titled "Settlement Payment," provides, in relevant 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

[67] Tr. 465 (Schoenfeld).
[68] Tr. 622 (Schoenfeld).
[69] *See* JX 19.
[70] *See id.*; General Release; JX 26 at 28.
[71] The General Release apportions various rights and obligations by reference to parties it defines as "Sellers," GSG, and "Purchaser." "Sellers" are defined as Mike Hartley, Kent Hartley, and Jeffrey Nichols. "Purchaser" is defined as Consolidated. General Release at 1.
[72] General Release at ¶ 1.

> obligations to one another **in connection with the Purchase Agreement**.[73]

Paragraph 2.1, titled "Release of Claims," provides:

> 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 thereof.[74]

Two of the changes Schoenfeld made to Mellen's draft appear in Paragraph 2.1: he added (1) the phrase "from the beginning of time through execution of this Release" and (2) the phrase "or the transactions contemplated thereby."[75] Notably,

[73] *Id*. (emphasis added).
[74] *Id.* ¶ 2.1 (emphasis added).
[75] Tr. 476, 480–81 (Schoenfeld).

the General Release also provides that the Individual Plaintiffs release GSG and its affiliates "from any and all Claims."[76]

F. *Post-Release Events*

On or around December 17, 2013, King and Schoenfeld had a telephone conversation during which King expressed the view that the General Release discharged Plaintiffs' remaining obligations under the NCA.[77] Schoenfeld disagreed and later sent King copies of the NCA and Purchase Agreement by email.[78] About a month later, Frederick Tolhurst, Esq., an attorney representing SBG, sent a letter dated January 22, 2014 to Cody, Vincent, and Schoenfeld asserting that the General Release "released [the parties of] their respective obligations under the [NCA]" and notifying the recipients that the Individual Plaintiffs intended to "pursue such business opportunities that may present themselves, irrespective of any former obligations under the [NCA]."[79] Defendants again replied in disagreement.[80] This lawsuit was filed less than one month later.[81]

[76] General Release ¶ 3.1.
[77] Tr. 484–85 (Schoenfeld); *see also* JX 22 (providing evidence that King and Schoenfeld had recently discussed the Purchase Agreement and the NCA as of December 17, 2013).
[78] Tr. 484–85 (Schoenfeld); JX 22.
[79] JX 24.
[80] JX 25.
[81] *See* Verified Compl. ("Compl.").

G. *Procedural History*

Plaintiffs' complaint requested an order "[d]eclaring that the General Release applies to the Noncompetition Agreement and releases Plaintiffs and their Affiliates from any and all obligations under § 4(a) of the Noncompetition Agreement (relating to noncompetition) and under § 5(a) of the Noncompetition Agreement (relating to non-solicitation)" and assessing the fees and costs of this action against Defendants.[82] Thereafter, Plaintiffs sought summary judgment on the grounds that the General Release unambiguously supported the interpretation such an order would sponsor.

This Court denied Plaintiffs' motion in a bench ruling issued March 5, 2015.[83] There, the Court held that summary judgment is inappropriate in this case because ambiguities in the General Release's plain text permit at least two reasonable interpretations.[84] On the one hand, a reasonable reader might conclude that Paragraph 1 extinguishes the NCA because the NCA is an "obligation" entered into "in connection with the Purchase Agreement."[85] Paragraph 2.1 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 General

[82] Compl. ¶¶ A, B.
[83] *Hartley v. Consolidated Glass Hldgs., Inc.*, C.A. No. 9360-VCN, at 60 (Del. Ch. Mar. 5, 2015) (TRANSCRIPT).
[84] *Id*. at 60.
[85] *Id*. at 58–59.

Release]"—that is, any time after November 7, 2013.[86] 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.[87] Paragraph 2.1 is similarly inert if the phrase "through execution of [the General Release]" is read as a temporal bound.[88]

III. DISCUSSION

A. *Applicable Legal Standards*

At issue is the meaning of an ambiguous contract. The following principles of contract interpretation guide the Court's determination of that meaning.

When faced with a question of contract interpretation, Delaware courts' central task is determining the parties' shared intent.[89] To do that, the court first looks to the contract's plain text.[90] If a reasonable person in either party's position could only assign the disputed language one clear meaning, the court will enforce that meaning.[91]

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[86] *Id*. at 59.
[87] *Id*.
[88] *Id*.
[89] *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008).
[90] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).
[91] *Id*.

If, on the other hand, the language permits more than one reasonable interpretation, the court may broaden its search for common intent by looking beyond the four corners of the document and considering relevant outside facts.[92] Delaware follows the objective theory of contracts.[93] Accordingly, at this stage of the analysis, "the private, subjective feelings of the negotiators are irrelevant and unhelpful to the Court's consideration of a contract's meaning."[94] Instead, the Court will consider extrinsic evidence that includes "statements made during negotiation, courses of prior dealings between the parties, and practices in the relevant trade or industry."[95] The weight of such objective indicia "may permit a court to ascribe a single 'correct' or single 'objectively reasonable' meaning to a contract term."[96] If so, the court constructs the contract's meaning "in the way that

[92] *In re Mobilactive Media, LLC*, 2013 WL 297950, at *14 (Del. Ch. Jan. 25, 2013) ("When interpreting a contract, the court's ultimate goal is to determine the shared intent of the parties."); *Julian v. Julian*, 2010 WL 1068192, at *5 (Del. Ch. Mar. 22, 2010) ("When faced with a contractual ambiguity, the court's 'primary search' remains to find the parties['] shared intent or common meaning.").
[93] *Osborn ex rel Osborn v. Kemp*, 991 A.2d 1153 (Del. 2010).
[94] *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 835 (Del. Ch. 2007).
[95] *U.S. West, Inc. v. Time Warner Inc.*, 1996 WL 307445, at *10 (Del. Ch. June 6, 1996).
[96] *Id*.; *United Rentals*, 937 A.2d at 835 ("[T]he extrinsic evidence may render an ambiguous contract clear so that an objectively reasonable party in the position of either bargainer would have understood the nature of the contractual rights and duties to be. In such a case, the Court would enforce the objectively reasonable interpretation that emerges." (citing *U.S. West*, 1996 WL 307445, at *10) (internal quotation marks omitted)).

best carries out the reasonable expectations of the parties that contracted in those circumstances."[97]

If extrinsic evidence renders no "single, commonly held understanding of a contract's meaning,"[98] that meaning might instead derive from operation of the forthright negotiator principle, which provides that one side's objectively reasonable interpretation becomes enforceable if the other party knew or had reason to know of the first's interpretation.[99] Thus, through this rule, subjective intent may be relevant.[100]

Finally, if neither extrinsic evidence nor application of the forthright negotiator principle produces an enforceable interpretation, "the parties have failed to contract on the subject and no contractual rights have been created."[101]

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[97] *Bell Atl. Meridian Sys. v. Octel Commc'ns Corp.*, 1995 WL 707916, at *6 (Del. Ch. Nov. 28, 1995).
[98] *United Rentals*, 937 A.2d at 835–36.
[99] *U.S. West*, 1996 WL 307445, at *10.
[100] *United Rentals*, 937 A.2d at 835 (holding that, under the forthright negotiator principle, "the Court considers evidence of what one party *subjectively* believed the obligation to be, coupled with evidence that the other party knew or should have known of such belief" (quoting *U.S. West*, 1996 WL 307445, at *11) (internal quotation marks omitted)).
[101] *U.S. West*, 1996 WL 307445, at *11.

B. *Does the General Release Extinguish the NCA?*

1. Plain Text

Although this Court has already held that the General Release is susceptible to two reasonable interpretations, the Release's language nonetheless provides relevant, objective evidence of the parties' intent. Thus, analysis begins with a description and assessment of disputed terms.

Words and phrases that appear in Paragraphs 1 and 2.1 of the Release are the parties' primary battlegrounds. Instead of reproducing full sentences from these two key paragraphs, which appear above, discussion is best served by distilling each Paragraph down to its root operative language, free of intermediate verbiage that might obscure the key words of interest. These truncated versions are as follows:

> **Paragraph 1**: Following receipt of the Settlement Payment, the parties shall owe no further amounts or obligations to one another in connection with the Purchase Agreement.
>
> **Paragraph 2.1**: Purchaser and GSG hereby fully release Sellers from any and all agreements and liabilities of whatever kind or nature, past, present, or future, known or unknown, from the beginning of time through the execution of this Release arising out of or in connection with the Purchase Agreement or the transactions contemplated thereby.[102]

[102] For purposes of clarity, each of these versions is presented without the typical indicators of omissions (*e.g.*, ellipses) and alterations (*e.g.*, brackets). For full, unmodified text, see *supra* notes 73–74 and accompanying text.

Plaintiffs argue that these Paragraphs' net effect is to release the NCA in its entirety. To avoid interpreting the Release in a way that would permit redundancy, however, Plaintiffs assign Paragraph 1 the role of terminating *financial or payment-based* liabilities the NCA might impose and Paragraph 2.1 the role of terminating all remaining obligations under the NCA.[103] Paragraph 1 achieves as much, they argue, because the NCA creates "obligations" and is "in connection with the Purchase Agreement." Indeed, the NCA would not exist without the Purchase Agreement and was an important condition of the GSG's sale. Further, Plaintiffs point out that the IP Agreement's recitals explicitly state that the Individual Plaintiffs "entered into" the NCA "in connection with [the] Purchase Agreement."[104] Finally, surrounding language suggests that only financial "obligations" are released; Paragraph 1's heading is "Settlement Payment" and preceding text sets forth the amount and method of payment.[105]

Paragraph 2.1 finishes the deed, argue Plaintiffs, for two primary reasons. First, the phrase "through the execution of the Release" ought to mean "until the end of time" because the best interpretation of "through" in this context is "in one end and out the other." If the parties had wanted "through the execution of this Release" to denote an end date, they would have done so in clearer terms; just such

[103] *See* Pls.' Opening Post-Trial Br. 20; Pls.' Answering Post-Trial Br. 32 & n.6.
[104] JX 6 (IP Agreement) at 1; *see also infra* note 107.
[105] *See* General Release ¶ 1.

a precise temporal bound appears in the Purchase Agreement.[106] Second, interpreting the phrase "in connection with the Purchase Agreement" as referring to the Transaction Documents does not render the phrase "or the transactions contemplated thereby" surplusage, Plaintiffs argue, because the latter refers to an additional set of "waivers, ancillary agreements . . ." etc. referenced elsewhere in the Purchase Agreement.[107] Accordingly, Paragraph 2.1 affects three classes of agreements (the Purchase Agreement itself, Transaction Documents, and ancillary documents), whereas Paragraph 1 affects only two (the Purchase Agreement and Transaction Documents).

Defendants dispute the meaning of each term discussed above. On their reading, "obligation" in Paragraph 1 is not limited to payments, "in connection with the Purchase Agreement" refers only to the Purchase Agreement and documents incorporated by reference therein, "through" means "until," and "the transactions contemplated thereby" only includes the Transaction Documents. According to Defendants, then, Paragraph 1 has no effect on the NCA and

[106] *See* Purchase Agreement § 7.3(a) (specifying the expiration date of certain representations and warranties as "5:00 p.m. New York Time upon, the date that is 18 months after the Closing Date").

[107] *See id*. § 9.13(a)(iii) (giving Mike Hartley authority "to execute and deliver al amendments, waivers, ancillary agreements, membership transfer powers, certificates and documents that [he] deems necessary or appropriate in connection with the consummation of the transactions contemplated by the Transaction Documents, including any Transaction Document.").

Paragraph 2.1 only releases liability for NCA claims that arose no later than execution of the Release.

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[108] and liability types[109] 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. Against this backdrop,

[108] *E.g.*, General Release ¶ 2.1 ("Purchaser and GSG, on behalf itself and its affiliates, officers, directors, stockholders, members, managers, employees, representatives, attorneys, agents, successors, heirs, and assigns . . . hereby fully and forever releases and discharges Sellers and Sellers' affiliates, employees, representatives, attorneys, agents, successors, heirs, and assigns . . . and their respective affiliates, officers, directors, stockholders, members, employees, representatives, attorneys, agents, successors, heirs and assigns . . . .").

[109] *E.g.*, *id*. (listing "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 . . . .").

the Court now looks to other objective indicia of the parties' intent—extrinsic evidence—to determine whether one interpretation emerges as the Release's "single objectively reasonable meaning."[110]

2. Extrinsic Evidence

Evidence of the circumstances surrounding the negotiation and signing of the Release discredits Plaintiffs' interpretation for three primary reasons: (1) pre-settlement circumstances do not indicate that the NCA would be considered as part at the settlement; (2) nothing that occurred during settlement negotiations indicated that the parties were bargaining in part for release of the NCA; and (3) the method by which the Release was drafted explains, to some extent, its awkward phrasing and disjointedness. The Court addresses each in turn.

First, evidence of the parties' overt acts, dealings, and correspondence that took place before the parties negotiated the Release suggests that the parties did not intend to dispense with the NCA in October 2013. Instead, objective indicia show that the NCA was a valuable asset that Defendants would not have relinquished without comment or discussion.

The most compelling evidence supporting this conclusion is the fact that Defendants' pre-dispute treatment of NCA negotiations was, at all times, consistent with their contemporaneous strategic incentives. Before the Plaintiffs

[110] *United Rentals, Inc.*, 937 A.2d at 835.

selected Grey Mountain as a buyer, the Defendants had already determined that an NCA would be an important term of sale, as evidenced by the relevant passages of their August 2011 letter of intent. That letter, which proposed a noncompetition provision lasting "the maximum duration enforceable under applicable law," accurately previewed Grey Mountain's consistent refusal to accept an NCA term under ten years during the course of eventual Purchase Agreement negotiations. Although the parties seem to agree that the industry norm is in the range of five to seven years,[111] Grey Mountain, for whatever reason, made clear before and after the sale that an NCA of average duration would not suffice.

Grey Mountain's desire for an expansive NCA is consistent with the deal's underlying business context because Plaintiffs posed a credible competitive threat to GSG throughout the relevant time period. Coastal, which produced commodity glass products and was eventually sold, is and was less of a concern than SBG. SBG, however, is a diversified glass manufacturer whose customers and product lines both overlap with GSG's.[112] Further, the Plaintiffs had direct knowledge of GSG's business and operations as its prior owners and have maintained contacts in the industry.[113] Because companies in this space tend to have a small number of large customers, Defendants were justifiably worried about Plaintiffs' capacity to

[111] *See* JX 26 at 110; Tr. 484 (Schoenfeld).
[112] Tr. 116–19 (M. Hartley).
[113] *See* Tr. 116 (M. Hartley) (testifying about his position on the board of the glass fabrication company that bought Coastal).

steal business given their background and access to at least one, and at times two, operational glass product manufacturing companies.

Plaintiffs' various efforts to show that Defendants did not, in fact, value the NCA miss the mark. Although, as Plaintiffs point out, the Defendants never mentioned the NCA during the two-year interim between executing the Purchase Agreement and General Release, the record provides no plausible reasons to expect they would. Plaintiffs admit that they did not violate the NCA during that time, and although certain GSG actions—namely, hiring SBG employees within a few days of § 5's two-year expiration date[114]—implicated the NCA, Plaintiffs do not allege that Defendants were in some way obligated to give notice. Further, Vincent's failure to correct Mike Hartley's confused interpretation of the NCA as stated in Hartley's October 12, 2012 email does not, in itself, evidence indifference for two reasons: the misunderstanding did not concern the NCA obligations at issue in this case (*i.e.*, Plaintiffs' promise not to compete or solicit employees and customers) and Vincent could have reasonably expected that Hartley would realize his error after conferring with counsel.[115] Finally, Plaintiffs' related argument that the

[114] Tr. 57 (M. Hartley).

[115] *See* JX 7. At trial, Plaintiffs offered several other theories to substantiate the claim that GSG did not consider the NCA a valuable asset. One supposed that Consolidated's recent business acquisitions indicated it intended to change its strategic approach in ways that would render an NCA useless. Another pointed to GSG's *de minimis* use of the TSA, a document that was seemingly critical during Purchase Agreement negotiations, as proof that GSG's bargaining efforts do not

parties' deteriorating relationship created a mutual desire for a clean break at the October settlement meeting is inconclusive. New hostility—to the extent it existed—would arguably cause Defendants to become *more* hesitant to release a formidable competitor from the NCA.

Second, neither the content of negotiation discussions discernible on the record nor underlying circumstances in place at the time of the settlement meeting indicate that the NCA's remaining obligations were in play as a bargaining chip. The 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.

The parties debate whether the $240,000 settlement payment reflects an approximate 50/50 compromise between the Plaintiffs' and Defendants' respective starting points of $0 and $430,000.[116] Defendants argue that because terminating

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reflect their value judgments. The factual basis for each drew conflicting testimony. *Compare* Tr. 92–93 (M. Hartley) (suggesting GSG was moving its business "in a different direction" in light of certain recent acquisitions) *with* Tr. 273–74 (Vincent) (explaining that Consolidated's acquisitions were in keeping with its strategic plan); *compare* Tr. 50 (M. Hartley) ("We spent considerable time and money negotiating [the] TSA, and it was used practically zero") *with* Tr. 272 (Vincent) (testifying that the TSA was used in a number of ways).

[116] Mike Hartley provided conflicting testimony on this point. *Compare* Tr. 79–80, 159 (M. Hartley) (testifying that Plaintiffs paid $240,000 "[t]o get done with the defendants," not to pay for the Tidewater claim, which they deemed worthless) *with* JX 26 at 145 ("Q. And then would it be fair to say that during the 90 minutes of the settlement meeting, a few offers were made on each side, where they came down and you came up, and ultimately you met in the middle on the Tidewater

the remaining eight years of the NCA would have jeopardized, in their *post hoc* estimation, millions of dollars in sales,[117] a reasonable party in their position would not have accepted $240,000 had it known it was giving up the NCA. Plaintiffs respond that Defendants' calculus ignores additional consideration they received: Plaintiffs' relinquishment of a defamation claim they might have brought in the wake of Defendants' accusations of fraud. Plaintiffs' contention lacks evidentiary support.

Evidence of the parties' pre-settlement correspondence and face-to-face discussions at the October meeting suggests that Plaintiffs' argument overstates the materiality of a potential defamation claim. King's "reservation of rights" in his September 13, 2013 letter fell short of an unequivocal threat to sue and no subsequent communications preceding (or post-dating) the settlement meeting rekindled dialogue on the fraud accusation.[118] No witness testified that the fraud claim was discussed at the meeting. Further, Plaintiffs' theory that the speed with

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claim of $240,000? A. Correct. Q. Basically, you split the difference on the Tidewater claim? A. Close to that, yes.").

[117] Tr. 391–92 (Cody).

[118] Subsequent communications do address the related issue of Plaintiffs' dissatisfaction with Defendants' failure to disclose documents substantiating their allegation of fraud. *E.g.* JX 18 at KIN 000134. However, evidence on the question of the extent and sufficiency of Defendants' disclosures—and the implications thereof—is inconclusive. *See, e.g.*, JX 18 (email from King requesting disclosures from Defendants as of September 25, 2013); Tr. 451 (Schoenfeld) (claiming Defendants were "continually sending information" about the Tidewater claim for several weeks in early May).

which Defendants drafted and approved the Release betrayed an urgent desire to defuse a defamation lawsuit is conceivable, but implausible given the lack of independent supporting evidence. For all of these reasons, it appears unlikely that fraud came up at the meeting or cast a specter that affected the parties' unspoken decision calculus. Even if one assumes *arguendo* that fraud had been top of mind, concluding that Defendants in turn intended to give up the NCA requires intermediate logical premises—for example, that the NCA and potential defamation claim shared comparable values—that lack evidentiary support.

Third and finally, the 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. And because Schoenfeld was not involved in drafting either the Purchase Agreement or the NCA,[119] it is somewhat less likely that he purposefully incorporated phrases that appear in those documents—for example, "in connection with"—into the General Release to denote consistent meaning.

Even if the Plaintiffs' reading of the Release's plain text is viewed as slightly stronger, the Court is satisfied that the totality of objective evidence supports a contrary reading as the sole correct interpretation—that the Release does

[119] Tr. 492 (Schoenfeld).

not terminate the parties' ongoing obligations under the NCA. Application of the forthright negotiator principle is therefore unnecessary.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' obligations under § 4(a) and § 5(a) of the NCA shall remain in place. Plaintiffs' request for a declaratory judgment seeking to avoid those constraints is denied. The parties shall bear their own costs.

IT IS SO ORDERED.

/s/ John W. Noble
Vice Chancellor