IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

UNITED HEALTH ALLIANCE, LLC, a Delaware limited liability company,	)	
Plaintiff/ Counterclaim Defendant,	)	C.A. No. 7710-VCP
v.	)	
UNITED MEDICAL, LLC, a Delaware limited liability company,	)	
Defendant/ Counterclaim Plaintiff.	)	

MEMORANDUM OPINION

Submitted: August 21, 2013
Decided: November 27, 2013

Jeffrey M. Weiner, Esq., LAW OFFICES OF JEFFREY M. WEINER, Wilmington, Delaware; James S. Green, Sr., Esq., SEITZ, VAN OGTROP & GREEN, P.A., Wilmington, Delaware; *Attorneys for Plaintiff/Counterclaim Defendant United Health Alliance, LLC.*

Adam L. Balick, Esq., Melony R. Anderson, Esq., BALICK & BALICK, LLC, Wilmington, Delaware; *Attorneys for Defendant/Counterclaim Plaintiff United Medical, LLC.*

PARSONS, Vice Chancellor.

This matter is before the Court on Defendant/Counterclaim Plaintiff's Motion to Enforce Settlement Agreement (the "Motion to Enforce"). The facts relevant to the Motion to Enforce are similar to those previously set out in my evidentiary ruling striking certain hearsay evidence.[1] Thus, I recite here only those facts necessary to this decision.

The parties to this action mediated their dispute and appeared to reach an oral settlement agreement. After the mediation, however, and during the parties' attempts to implement the settlement, a dispute arose regarding the breadth of the release to which they orally had agreed. Defendant contends that Plaintiff offered to provide a general release of all its claims, known or unknown, against Defendant. Plaintiff denies that it offered a general release. Rather, it suggests that the Defendant may have misinterpreted as referencing a general release Plaintiff's counsel's statements to the effect that, by agreeing to Plaintiff's settlement terms, Defendant would reduce the potential for later claims—by Plaintiff and third parties—arising from Defendant's ongoing failure to provide Plaintiff with certain services. In addition, Plaintiff argues that, even if the parties had formed an enforceable settlement agreement, it is excused from all duties and obligations under the agreement because Defendant materially breached it.

For the reasons stated in this Memorandum Opinion, Defendant has failed to prove that the parties entered into an enforceable settlement agreement. Therefore, I deny Defendant's Motion to Enforce.

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[1] *United Health Alliance, LLC v. United Med., LLC*, 2013 WL 1874588, at *1–2 (Del. Ch. May 6, 2013).

I. BACKGROUND

A. The Parties

Plaintiff, United Health Alliance, LLC ("UHA"), is a Delaware limited liability company that provides administrative, management, and billing services for the medical services industry. Defendant, United Medical, LLC ("UM"), is a Delaware limited liability company and is an authorized distributor of PowerWorks Practice Management, a software application in the healthcare services industry.

B. Facts

1. The Mediation

On July 20, 2012, UHA filed a complaint in this Court, seeking, among other relief, a temporary restraining order compelling UM to provide to UHA eight days of access to UM's medical billing software system (the "Cerner System"), and an award of $48,875 to cover UHA's damages caused by UM's alleged breach of a sublease agreement. In October 2012, the parties agreed to participate in voluntary mediation and retained former judge Vincent J. Poppiti, Esq. (the "Mediator") to mediate the claims. During the mediation on October 25, 2012 (the "Mediation"), the parties appeared to reach an oral agreement to settle the dispute. In the days following the Mediation, the parties attempted, through email communications, to implement the settlement agreement. During these communications, however, a disagreement arose concerning both the terms of the settlement and UM's insistence that the agreement be reduced to writing. In particular, the parties disagreed over the breadth of the release and the claims that the settlement would extinguish.

2. Defendant's Motion to Enforce

On December 7, 2012, UM filed its Motion to Enforce. A dispute arose, however, as to the admissibility of certain evidence proffered by UM. On May 6, 2013, after hearing brief argument, I granted UHA's motion to strike, as inadmissible hearsay, an email communication from the Mediator to counsel.[2] Then, at the parties' request, I held an evidentiary hearing on UM's Motion to Enforce on July 26 and August 21, 2013.

Although I granted UHA's motion to strike, I also held that, by introducing confidential mediation communications in support of its motion, UHA waived its right to assert the confidentiality privilege that typically attaches to mediation.[3] At the evidentiary hearing, UHA objected to UM's introduction of evidence as to what the Mediator said during the Mediation. I address UHA's objection in more detail below, but I note that my previous holding that the Mediator is unavailable for hearsay analysis purposes constitutes the law of the case.[4]

a. The Evidentiary Hearing

UM presented three witnesses—one of its attorneys in this litigation and two of its senior executives—all of whom understood UHA's settlement offer as including a general release of all claims, known or unknown. For its part, UHA also presented three

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2 *United Health Alliance, LLC*, 2013 WL 1874588, at *4–5.

3 *Id.* at *4.

4 *See Advanced Litig., LLC v. Herzka*, 2006 WL 4782445, at *5 (Del. Ch. Aug. 10, 2006) (applying the law of the case doctrine to a prior, unappealed ruling in the same litigation).

witnesses—two of its attorneys in this litigation and its managing member. These witnesses denied that UHA ever offered an expansive release of the kind UM claims. UHA asserts that, instead, its representatives encouraged the settlement by explaining that providing UHA with access to the Cerner System would mitigate UM's potential exposure to claims not yet asserted but likely to arise from various nonparties because of UHA's continued lack of access to the system.

As a preliminary matter, I note that I will consider UM's testimony as to what the Mediator said during the Mediation regarding UHA's negotiating position, but only to the extent that it is presented for non-hearsay purposes. Under Delaware Rule of Evidence ("D.R.E." or "Rule") 802, "[h]earsay is not admissible except as provided by law or by these Rules." Rule 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." UM seeks to introduce evidence of the Mediator's out-of-court statements describing the terms of UHA's settlement offer to UM's witnesses at least in part for the purpose of proving that UHA did offer exactly those terms. Such evidence is hearsay to the extent it is introduced for that purpose. Thus, it is inadmissible for that purpose unless one of the exceptions to the hearsay rule applies.[5]

UM asserts that the Mediator's statements are admissible as present sense impressions. Under D.R.E. 803(1), these are "statement[s] describing or explaining an event or condition made while the declarant was perceiving the event or condition, or

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[5] *Morris v. State*, 795 A.2d 653, 663 (Del. 2002).

immediately thereafter." "Contemporaneous statements do not have to occur at precisely the same moment in time as the triggering event, but must occur shortly thereafter in response to the event."[6] I disagree with UM that the Mediator's statements in issue fall within this exception to the hearsay rule. The Mediator may have communicated his statements close enough in time to his UHA meetings not to permit much, if any, reflection, and presumably described what UHA represented to him. The Delaware Supreme Court has held, however, that "relaying part of a conversation to another is not the equivalent of making a statement about one's own immediate perception of a condition or event."[7] Thus, the proffered statements of the Mediator would not qualify for the present sense impression exception.

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6 *Green v. St. Francis Hosp., Inc.*, 791 A.2d 731, 736 (Del. 2002).

7 *Doochack v. Hobbs*, 645 A.2d 568, at *3 (Del. 1994) (TABLE) (citing D.R.E. 803(1)). Furthermore, my previous holding that the Mediator is unavailable strengthens the basis for my finding that the Mediator's statements are inadmissible under D.R.E. 803. *See United Health Alliance, LLC*, 2013 WL 1874588, at *4–5. Admittedly, the unavailability of a declarant itself is not a firm barrier to the admissibility of present sense impressions. *See Green*, 791 A.2d at 736 (explaining that the present sense impression exception is firmly rooted in the Delaware and federal constitutions; therefore, such evidence may be received into evidence without requiring the actual declarant's presence) (citations omitted). But, I previously granted UHA's motion to strike from the record an email from the Mediator primarily because "UHA would be unable to cross-examine the Mediator regarding it[, and such] circumstances are precisely those against which the hearsay rule is designed to protect." *Id.* at *4 (citing *Anderson v. United States*, 417 U.S. 211, 220 (1974)). Here, allowing the Mediator's statements to be introduced as evidence in the context of UM's Motion to Enforce would create similar concerns.

Finally, I note that none of the hearsay exceptions under D.R.E. 804 that usually apply in cases where the declarant is unavailable are applicable in this case.

UM contends alternatively that the Mediator's statements are admissible under the residual exception embodied in D.R.E. 807. Under that Rule:

> [a] statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness is not excluded by the hearsay rule, if the court determines that: (A) The statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.[8]

Here, I find that the proffered evidence about the Mediator's statements regarding what UHA explained to him as to their offer terms do concern a material fact. This evidence, however, is not more probative than any other evidence UM already has or could present. As discussed *infra*, the record demonstrates that Adam Balick, Esq., counsel for UM, participated in the discussions with counsel from UHA during which UHA purportedly offered the expansive release, and that Balick joined with the Mediator in explaining UHA's settlement terms to UM.[9] In addition, UM has not demonstrated the "circumstantial guarantees of trustworthiness" that D.R.E. 807 requires. UM argues that, because the Mediator's statements were witnessed by its three testifying witnesses and are supported by contemporaneously handwritten notes by two of the witnesses, the

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[8] D.R.E. 807.

[9] *See* Tr. 5–6 (Balick); Tr. 31–32 (Erkan). Citations in this format are to the evidentiary hearing transcript. Where, as here, the identity of the testifying witness is not clear from the text accompanying the footnote, the witness's surname is indicated parenthetically.

testimony as to the Mediator's statements is reliable. The basis for UM's Motion to Enforce, however, is that those witnesses and UHA's witnesses disagree completely as to the release-related settlement terms that they conveyed to one another and, indeed, what those terms meant. Furthermore, if UM presents such evidence for the truth of the matter asserted, UHA cannot cross-examine the Mediator regarding it.[10] Under these circumstances, I am not satisfied that there are sufficient guarantees of trustworthiness to warrant admitting the challenged evidence.

Nevertheless, I will consider, as non-hearsay, evidence as to the Mediator's statements regarding UHA's offer terms that he made during the Mediation, but only for the limited purpose of proving what UM understood the Mediator to have said.[11] I will not consider such evidence for the purpose of proving the truth of the Mediator's statements, *i.e.*, that UHA actually communicated the offer terms to the Mediator in the same way that UM avers the Mediator communicated those terms to UM. What weight I accord this evidence is another matter.[12]

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[10] *United Health Alliance, LLC v. United Med., LLC*, 2013 WL 1874588, at *1–4 (Del. Ch. May 6, 2013) (finding that the Mediator is unavailable as a witness).

[11] D.R.E. 105.

[12] D.R.E. 104(e).

b. The Parties' Pre-Mediation Conduct[13]

On October 24, 2012, before the Mediation and further depositions, William Martin, Esq., counsel for UHA, sent to Balick a letter outlining UHA's final pre-mediation settlement offer.[14] In the letter, UHA demanded roughly the same relief as it sought in its complaint, including that UM restore UHA's access to the Cerner System for eight days. In addition, UHA offered to exchange mutual releases "with respect to all Non-Monetary claims set forth in the Complaint and Counterclaim," and proposed that "the parties agree to a Formal Stay of all other aspects of the litigation . . . in order for the economic issues set forth in the Complaint and Counterclaim to be submitted to . . . [a form of alternative dispute resolution]."[15] On realizing the parties would not settle on October 24, Martin sent Balick an email in which he stated:

> Adam . . . I guess it comes down to we don't think there are any good defenses to the equitable claims. Settling now on that point saves both parties time and money and allows UHA to try and mitigate the financial damages that have flowed from the refusal to turn over the data in a meaningful

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13 Where a contract term is ambiguous, as the scope of the release is in this case for the reasons discussed *infra*, this Court may consider "undisputed background facts to place the contractual provision in its historical setting." *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 n.7 (Del. 1997).

14 JX B. Citations in the form "JX __" are to the Joint Exhibits offered into evidence at the evidentiary hearing. I also note that the parties agree that JX B was sent on October 24, 2012, even though it is misdated November 12, 2012. Pl. UHA's Aug. 21, 2013 Hr'g Binder, cover pg.

15 JX B. In the contemplated settlement, the parties agreed to retain the Mediator to arbitrate the respective monetary claims.

> manner. Presumably a mutual release on those issues is valuable.[16]

c. The Parties' Conduct at the Mediation[17]

The parties generally agree as to the sequence of events at the Mediation and that they reached a settlement agreement, although they disagree as to the terms of that agreement. In addition, the parties also agree they contemplated that UM would receive a release of some sort. As noted earlier, however, they disagree as to the scope of the release.

The scope of the release first arose in Meeting 1. During that meeting, Balick asserted that UM would gain nothing from UHA's proposed settlement terms. He claims that Weiner responded that the release was valuable in its relation to "a claim that had not been raised in the complaint, a claim for lost ability to submit or to be paid for medical bills," perhaps valued somewhere around $300,000.[18]

Weiner and Martin agree that UHA broached the topic of potential liability, but they characterize it differently than Balick. For example, Weiner claims that he

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16 JX A at 6 (ellipses in original).

17 The bulk of the relevant mediation communications occurred in the final few hours of the Mediation. During that time period, at least four meetings took place. First, the Mediator met with Balick, Martin, and Jeffrey Weiner, Esq., co-counsel for UHA ("Meeting 1). Second, counsel conferred individually with their respective clients ("Meeting 2"). Third, the Mediator met with Balick and the UM principals, Kamel Erkan and Susan Andersen ("Meeting 3"). Finally, the Mediator again met with counsel for both parties ("Meeting 4"). The UHA and the UM business representatives at the Mediation did not meet directly during the relevant time period.

18 Tr. 6.

responded that, by granting access to the Cerner System sooner, "[UM is] getting a mitigation of [its] exposure to this potential damages for the end users, [Christiana Medical Group, PA ("CMG")] and [Bayhealth Hospitalists, LLC ("BHH")]."[19] On this, Weiner apparently added that protracted litigation would exacerbate these claims, *i.e.*, with a post-trial decision from this Court potentially well into the following year, granting UHA access to the Cerner system in Fall 2012 would minimize UM's exposure to the third-party billing issues.[20] Weiner claims that he never used the word "release" in this context, and that, in any event, UHA would not be the primary claimant in any such damages claims.[21] From UM's perspective, Balick claims that this argument, in the context of the protracted litigation risk, rang flat.[22]

Following Meeting 1, the parties' actual treatment of the release diverged. Joanne Brice, UHA's managing member, claims that, according to her notes and recollection, Martin never conveyed to her that he had proposed a general release to Balick or the Mediator.[23] Both Erkan and Andersen, however, testified that, during Meeting 3, after

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19 Tr. 70–71.

20 Tr. 91–92, 95–96. Martin concurred with Weiner's account, adding that either he or Weiner suggested that, if UM acquiesced to the remaining negotiated terms, he would recommend to UHA to halve its "high" arbitration figure for purposes of the anticipated high-low arbitration. Tr. 145.

21 Tr. 67, 86–87, 105. *See also id.* at 170 (Martin noting that, aside from the mutual release itemized in his October 24 letter, the parties never discussed any release).

22 Tr. 17–19.

23 *See* Tr. 126–30.

Erkan rebuffed the need for a release, Balick and the Mediator explained that UHA's proposed release, in fact, would cover both current and potential claims.[24] Indeed, Erkan and Andersen believed that the proposed release itself was the fractious business relationship's death knell.[25] Erkan and Andersen stated that UM would not have settled with UHA without such an expansive release.[26]

Martin claims that, on commencing Meeting 4, he placed his October 24 letter on the table and "walked through the points," meanwhile taking notes on it regarding "what [he] understood the parties' agreements to be."[27] Martin bracketed Items 1 through 4—UHA's non-monetary claims—and noted "agreed."[28] Of import here is Item 4, which reads: "[t]he parties would exchange Mutual Releases with respect to all Non-Monetary claims set forth in the Complaint and Counterclaim."[29] In addition, Martin wrote:

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[24] Tr. 27–28, 32–35 (Erkan); Tr. 56 (Andersen). Erkan explained that his understanding of the effect (and thus the value) of the release came from the Mediator's statements. Tr. 34 (Erkan purportedly quoting the Mediator as saying: "Okay. So you don't want anything to do with it. Then this is a general release, so this really means something. It may not mean anything today, but this is something that they are giving to you.").

[25] *See* Tr. 34, 43 (Erkan's notes reading "[Erkan] doesn't want to deal with [Brice] ever" and "Release from UHA. This will take care of all potential outstanding items"); Tr. 56 (Andersen's notes reading "Release UHA, global.").

[26] Tr. 35 (Erkan); Tr. 56 (Andersen).

[27] Tr. 148–49.

[28] Tr. 151; JX C.

[29] JX C.

"access start Mon. after opinion."[30] This note, in part, reflects the parties' agreement to the following sequence of events: (1) counsel would submit arbitration position papers on the economic issues to the Mediator on the Monday and Tuesday following the Mediation; (2) the Mediator would issue his arbitration decision within forty-eight hours of receipt;[31] and (3) UHA's eight days of access to the Cerner System would commence the Monday following the arbitration decision.[32] Under this plan, UHA's Cerner System access could have started as early as November 12, 2012. The parties harbor polarized understandings of the application of this term. UHA asserts that, because the parties agreed to proceed sequentially, November 12 was firm. Thus, when UM failed to grant access to the Cerner System on that date, UHA claims it breached the agreement. On the other hand, UM argues that the sequence of events represents a series of milestones, each conditioned on the completion of the former.[33] Thus, according to UM, because the Mediator did not issue his arbitration decision, UM is not yet required to grant UHA access to the Cerner System. I address the parties' arguments below.

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30 *Id.*

31 To date, the Mediator has not issued his arbitration decision. Balick's office was tardy in remitting UM's portion of the Mediator's arbitration retainer, which caused a delay in his decision. Tr. 10–11, 25 (Balick). Then, after the parties reached an impasse regarding the settlement, Martin requested that the Mediator withhold any action on his arbitration decision. Tr. 161.

32 Tr. 155.

33 *E.g.*, Tr. 10–12, 23 (Balick). *See also* Tr. 13 (Balick noting that, as he understood it at the time of the hearing, "Erkan [] understood that [UM was not] going to give [UHA] access until [the Mediator] had issued the decision.").

d. The Parties' Post-Mediation Conduct

On November 3, 2012, Weiner asked Balick, "[a]ssuming a decision next week, how does UM look for November 12 start?"[34] Balick replied: "[w]e can do that."[35] On November 12, 2012, however, the deal broke down when UM—for the first time, and out of an abundance of distrust—demanded a written settlement agreement before granting UHA access to the Cerner System. In response to Balick's draft terms, Martin objected to Term 6, which read, in part: "the parties will exchange Mutual Releases with respect to all claims between UHA and UM, known or unknown."[36] In an email response at 5:21 p.m. on November 12, Balick indicated that UHA must have intended a general release:

> Jeff argued that the benefit of the release that UHA was willing to provide UM was that, in the event UHA determined it had lost the ability to submit and be paid for medical claims as a result of being cut off from the PM system, the release would waive UHA's claims. Jeff speculated that the claim could be in excess of $100,000, maybe even as much as $300,000. This is *not* a claim that UHA brought in the [instant action] . . . .[37]

At 5:38 p.m., Martin replied:

> Jeff was specifically addressing monetary claims that other non-parties to the litigation would have, *i.e.*, [CMG, BHH, and St. Francis Hospitalists, L.L.C.].

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34 JX A at 32.

35 *Id.* at 31.

36 *Id.* at 29–31.

37 *Id.* at 29.

> UHA could not and did not bring those monetary claims in the subject action.
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> By settling the case, however, we hope to mitigate any such financial damages . . . which we believe to be in everyone's best interests.[38]

The parties were not able to resolve their differences or salvage the settlement agreement after this exchange.

II. ANALYSIS

In Delaware, the "formation of a contract requires a bargain in which there is manifestation of mutual assent to the exchange and consideration."[39] Put another way, the parties must come to a complete meeting of the minds, *i.e.*, each must mutually assent to all essential terms.[40] On this, Delaware courts apply the objective theory of contracts.[41] That is, "a contract's construction should be that which would be understood

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38 *Id.* at 28 (ellipses in original).

39 *Ramone v. Lang*, 2006 WL 905347, at *10 (Del. Ch. Apr. 3, 2006) (citing *Wood v. State*, 815 A.2d 350 (Del. 2003)).

40 *Id.* (noting also that Delaware has adopted the mirror-image rule) (citing *Friel v. Jones*, 206 A.2d 232, 233–34 (Del. Ch. 1964), *aff'd*, 212 A.2d 609 (Del. 1965)); *PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1015 (Del. Ch. 2004)); *Diamond Elec., Inc. v. Del. Solid Waste Auth.*, 1999 WL 160161, at *3 (Del. Ch. 1999).

41 *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *2 (Del. Ch. Nov. 8, 2007).

by an objective, reasonable third party."[42] Thus, "[o]vert manifestations of assent rather than subjective intent control contract formation."[43]

Here, as a factual matter, both UM and UHA aver that the Mediation concluded in an oral settlement agreement.[44] Thus, I must determine whether each manifested assent to all the same terms.

A. UHA and UM did not form an enforceable settlement agreement at the Mediation

Procedurally, "[t]he burden of proving that a valid contract existed—and its terms—is on the party seeking to enforce the contract, as well as the burden to convince this Court that specific performance is equitably warranted."[45] UM, therefore, bears the burden of proving the existence of a valid settlement agreement by a preponderance of the evidence.[46] On this record, I find that UM has not shown that UHA and UM ever

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42 *BAE Sys. Info. & Elec. Sys. Integration, Inc. v. Lockheed Martin Corp.*, 2009 WL 264088, at *4 (Del. Ch. Feb. 3, 2009).

43 *Ramone*, 2006 WL 905347, at *10 (citing *Restatement (Second) of Contracts* § 17 (1981) [hereinafter *Restatement*]; E. Allen Farnsworth, *Farnsworth on Contracts* § 3.6, at 210 (3d ed. 2004)).

44 That Delaware law supports the parties' collective ability to form a valid settlement agreement orally is not in dispute. *See Rowe v. Rowe*, 2002 WL 1271679, at *3 (Del. Ch. May 28, 2002) ("Oral settlement agreements reached among the parties to a dispute are binding.") (citing *Corbesco, Inc. v. Local No. 542*, 620 F. Supp. 1239, 1244 (D. Del. 1985)).

45 *DeMarie v. Neff*, 2005 WL 89403, at *4 (Del. Ch. Jan. 12, 2005) (citing *Kowal v. Clark*, 2000 WL 739250 (Del. Ch. June 2, 2000)).

46 *Heiman Aber & Goldlust v. Ingram*, 1998 WL 442691, at *2 (Del. Super. May 14, 1998) (citing *Knowles v. Massey*, 81 A. 470 (Del. Super. 1908)).

came to a complete meeting of the minds on the release issue. Thus, I hold that no enforceable settlement agreement exists here.

As an initial matter, it appears that, at the Mediation, the parties agreed to substantially the same terms, which largely tracked Martin's October 24 letter. As noted at length above, the heart of the current dispute involves the scope of the release UHA agreed to grant to UM.

UM's claim that UHA offered it a general release is based primarily on two communications: (1) the mitigation explanation Weiner made during Meeting 1; and (2) Balick's and the Mediator's statements made during Meeting 3 describing UHA's settlement offer. As to the former, UM argues that Weiner's explanation expanded upon the corresponding term in Martin's October 24 letter to include a waiver of potential claims stemming from the inability of certain third party providers to collect from secondary payors. UHA counters that Weiner never used the word "release" in the meeting. Rather, it avers that he merely provided context for UHA's position that hastening its access to the Cerner System would *mitigate* UM's exposure to upwards of $300,000 in potential claims that might be asserted against UM by certain third party providers, if the lack of access to the Cerner System caused them to be unable to bill secondary payors for their services. On the latter point, in addition to claiming that Balick and the Mediator stated that UHA offered an expansive release, UM points to Erkan's and Andersen's contemporaneously handwritten notes to support its position that the release that UHA offered (as explained by counsel during Meeting 3) encompassed

all current and potential future claims.[47] For its part, UHA denies that Weiner ever described such an expansive release to Balick or the Mediator.

UM has not demonstrated by a preponderance of the evidence that the parties agreed to a settlement of the action that includes a general release of all of UHA's claims against UM, known or unknown. First, Martin's October 24 letter formed the basis or starting point for UHA's negotiating positions. Martin circulated the letter to counsel and the Mediator the evening before the Mediation and, in fact, Martin marked up a copy of the letter to reflect the final terms of the parties' agreement during Meeting 4. Item 4 under the non-monetary claims reads: "[t]he parties will exchange Mutual Releases with respect to all Non-Monetary claims *set forth in the Complaint and Counterclaim*."[48] Second, the record demonstrates that it is more likely than not that Martin and Weiner never offered a general release before, during, and after the Mediation. I note in this regard that, despite possessing Martin's October 24 letter, UM did not dispute the language it contained regarding a release at any point until November 12, 2012. In these circumstances, UM's claim that UHA offered to release it from all claims "known and unknown" is unpersuasive

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[47] As noted above, I consider evidence of what the Mediator allegedly communicated regarding UHA's offer terms only for the purpose of proving that the Mediator stated what UM claims he stated, not as evidence of what the terms of UHA's offer actually were.

[48] JX C (emphasis added).

In addition, having carefully considered the documentary and testimonial evidence presented, I am convinced that Weiner essentially said what he (with Martin's agreement) claims he said. The documentary evidence introduced by UHA supports this conclusion.[49] The point Weiner was attempting to make regarding the benefits to UM of mitigating potential claims against it by promptly giving UHA eight days' access to the Cerner System may have become garbled or otherwise lost in translation. At a minimum, it appears that both Balick and the Mediator may have misunderstood Weiner's comments. Even assuming Weiner confusingly made some reference to a release, however, there is insufficient evidence to show he or UHA ever offered a general release of all claims against UM, whether known or unknown. Nor can I find, on this dearth of supporting evidence, that an objective, reasonable third party would have understood UHA to have offered to waive upwards of $300,000 in later, unascertainable claims against UM, including those that could stem from claims brought by third parties.

Ultimately, the record demonstrates that the release was a material term, and that the parties failed to reach a meeting of the minds regarding it. Therefore, because the parties did not reach agreement on all material terms of the settlement, I conclude that they did not form an enforceable agreement.[50]

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[49] *See* JX A at 7–8, 28–30; JX C.

[50] *See Ramone v. Lang*, 2006 WL 905347, at *10 (Del. Ch. Apr. 3, 2006). UHA advances an alternative argument that, if the parties did form an enforceable agreement, its performance is excused because UM materially breached it by withholding access to the Cerner System on November 12, 2012. Because I have

III. CONCLUSION

For the foregoing reasons, I deny UM's motion to enforce the settlement agreement. In addition, I hereby lift the stay of the underlying action imposed on December 19, 2012. As a result, the previously filed motion to intervene and motion to amend the complaint are ripe for consideration. If any party or prospective intervenor wishes to have argument on those motions, they should notify my chambers by December 6, 2013.

IT IS SO ORDERED.

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concluded that there is no enforceable settlement agreement, I do not reach UHA's alternative claim of breach.