IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EORHB, INC., a Georgia corporation, and COBY G. BROOKS, EDWARD J. GREENE, JAMES P. CREEL, CARTER B. WRENN and GLENN G. BROOKS, each as personal representatives and trustees of the estate of Robert H. Brooks,	
Plaintiffs,	
vs.	Civil Action No. 7409-VCL
HOA HOLDINGS LLC, a Delaware limited liability company, and HOA RESTAURANT GROUP, LLC, a Delaware limited liability company,	
Defendants and Counterclaim Plaintiffs,	
vs.	
EORHB, INC., a Georgia corporation, and COBY G. BROOKS, EDWARD J. GREENE, JAMES P. CREEL, CARTER B. WRENN and GLENN G. BROOKS, each as personal representatives and trustees of the estate of Robert H. Brooks,	
Counterclaim Defendants.	

Chancery Courtroom 12C
New Castle County Courthouse
Wilmington, Delaware
Monday, October 15, 2012
2:00 p.m.

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BEFORE: HON. J. TRAVIS LASTER, VICE CHANCELLOR

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MOTION FOR PARTIAL SUMMARY JUDGMENT
MOTION TO DISMISS COUNTERCLAIM
AND RULING OF THE COURT

APPEARANCES:

RICHARD P. ROLLO, ESQ.
JOHN MARK ZEBERKIEWICZ, ESQ.
Richards, Layton & Finger, P.A.
for Plaintiffs/Counterclaim Defendants

A. THOMPSON BAYLISS, ESQ.
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-and-
DOUGLAS H. HALLWARD-DRIEMEIER, ESQ.
CHRISTOPHER G. GREEN, ESQ.
AMY D. ROY, ESQ.
of the Massachusetts bar
Ropes & Gray LLP
for Defendants/Counterclaim Plaintiffs

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THE COURT: Welcome, everyone. Mr. Bayliss, how are you?

MR. BAYLISS: Good afternoon, Your Honor. Tom Bayliss on behalf of HOA Restaurant Group. I rise to introduce Mr. Douglas Driemeier, Chris Green and Amy Roy from Ropes & Gray.

THE COURT: Great. Welcome to all of you. Mr. Rollo, how are you doing?

MR. ROLLO: I'm doing well, Your Honor. Yourself?

THE COURT: Great.

MR. ROLLO: For the record, this is Rich Rollo of Richards, Layton & Finger, and I represent the plaintiffs in this action. With me at counsel table is my colleague, John Mark Zeberkiewicz.

THE COURT: Mr. Zeberkiewicz, how are you. Mr. Zeberkiewicz has not often darkened the doors of the courtroom.

MR. ZEBERKIEWICZ: Absolutely correct.

THE COURT: It's good to see you, a transactional lawyer learning how to make his way down to 500 King Street. You're always welcome here, Mr. Zeberkiewicz.

MR. ZEBERKIEWICZ: Thank you, Your

Honor.

MR. ROLLO: Your Honor, we're before the Court today on our motion for partial summary judgment and also a motion to dismiss. I know Your Honor is familiar with the papers, so I'll briefly summarize our position and then address any questions Your Honor may have.

We believe this case is relatively simple. Sophisticated parties negotiated a settlement that included the exchange of a specific release. Neither side claims they were tricked or defrauded or some mistake occurred that resulted in the release.

Rather, we simply disagree over what the words on the page mean. The release was executed in May 2011 which was about four months after the parties engaged in a merger transaction pursuant to which the buyers purchased the Hooters restaurant chain from the sellers.

A release was exchanged as part of a global settlement of a prior litigation before Your Honor involving, among other things, who had the right to purchase the restaurant chain.

At the time in May of 2011, the transaction had closed, but the parties had continuing

obligations under the merger agreement which we wanted to preserve. So we included a carveout. It's the scope and operation of that carveout that is the dispute before the Court today.

Now, the release is attached as Exhibit G to our opening brief. On the third page is the language that's disputed, the beginning of it. It starts, and it's a single sentence that begins with, I'll say, your typical laundry list identifying the types of claims and rights released, including the conflicting adjectives to include everything under the sun and make clear that there are no limitations.

Now, because this is a specific release, toward the bottom of the page, about five lines from the bottom, there is a limitation on that laundry list, and I'm paraphrasing, arising from or related to indirectly or directly any of nine enumerated categories. In clause five, it says the sale of Hooters. Now, I'm paraphrasing that as well, but it's the sale of Hooters pursuant to the merger transaction.

Those rights and any obligations under the merger agreement would have been eliminated without a carveout. So following the list of nine

categories, there are two provisos separated by semicolons. The first, about halfway down the page on the third page, begins "provided however," and it creates a specific carveout for enforcement of the settlement agreement. It doesn't purport to modify the definition of released claims. It says "provided however, nothing in this release."

Now, the second proviso begins four lines later and starts after the second semicolon with "provided further, however," and it creates a carveout for the merger and related transactions. That's followed by a carveback where it says "except that" and the carveback says released claims cannot be the basis for a breach of the merger agreement and won't result in a purchase price adjustment pursuant to the operative contract.

We think that the only reasonable read -- in fact, the only read of this language -- is that the parties agreed that they could, on a forward-looking basis, enforce the merger agreement and that any breach of contract claims that existed from that date back in time were released.

Now, the indemnifications we're here today about are predicated upon purported breaches of

the merger agreement that occurred before the release date; in fact, in or around January 2011 when the reps and warranties were supposed to have been true, and there's also one claim with respect to a pre-closing operation of the company, the pre-closing operations covenant. All of those were released, we say, under the operative agreement.

My friends make several arguments, and I'll respond to most of them on rebuttal, but there is one I'd like to address briefly. That's the argument that some temporal ambiguity exists in the document that precludes summary judgment. Briefly, and they'll state it for themselves, in the beginning part of the contract, there is a phrase that says "which now exists or heretofore after existed or may hereafter exist." I think I mangled that. I could say it again, but Your Honor understands the concept. Seven lines later, there's another phrase that says "in existence from the beginning of time to the date of this agreement."

Now, that alleged conflict -- and we, in our reply brief, say we don't believe it's a conflict, but let's assume that is a conflict. It doesn't matter in this case. We're not arguing about

breaches that supposedly occurred after execution of the release. We're arguing about breaches that existed on the date of the release under either definition. Under either temporal phrase, they fall within the definition of released claims. Because they fall within the definition of released claims, they were barred under the second part of the second proviso.

Now, I'm happy to address any of the arguments or questions Your Honor may have. I think it may be more efficient if my friends, since they have several arguments, would state the arguments and I can reply on rebuttal.

THE COURT: Let me ask you one thing before you sit down.

MR. ROLLO: Yes, Your Honor.

THE COURT: How do you pronounce the entity that is now successor to the estate, EORHB?

MR. ROLLO: EORHB is how I say it. It's the Estate of Robert H. Brooks.

THE COURT: The estate, as the predecessor to EORHB, signed a comparable release that is one of the ones that you collected, that is collected behind Exhibit E; true?

MR. ROLLO: Yes, Your Honor.

THE COURT: EORHB's claim to additional monies from the indemnification agreement arose at closing, right?

MR. ROLLO: I don't believe I agree with that, Your Honor. A certain amount of the consideration payable to us was set aside in an escrow account. And if valid claims were not presented under that, we received it when the escrow expired. That is a contractual obligation under the merger agreement and separately under the escrow agreement. And under the releases, there is a carveout for future enforcement of the merger agreement.

THE COURT: You think that claim for the access of the indemnification agreement falls under the enforcement of the merger agreement proviso?

MR. ROLLO: Yes, Your Honor.

THE COURT: You don't think that a right against the escrow agreement is a right that would fall under the definition of released claims?

MR. ROLLO: I don't, Your Honor, for two reasons. First, it is a contractual obligation under the escrow, and that if valid claims are not made against the escrow, the escrow agent is directed

to tender the rest of that money to us last summer. So if, at that point in time, $11 million remained, it's either given to us or it stays there presumably in perpetuity because the buyers wouldn't have a claim against it.

THE COURT: I hear you. Released claims means any and all claims. It means rights, blah, blah, blah, of any kind whatsoever, whether known or unknown. Well, this one was known. Fixed or contingent. Well, this is a little bit of both. As you say, it's a fixed contractual right of which the amount the contingent.

The definition of released claims, if one were to read it broadly to include everything related to the sale of HOA, it seems to me is sufficiently capacious to cover, in the first instance, EORHB's claim against the escrow fund.

MR. ROLLO: Perhaps I misunderstood Your Honor's earlier question. I believe the initial definition does. I think then it is saved by the second proviso that says "provided further, however, the foregoing shall not include any claims to enforce the terms and conditions of the merger agreement or directly related to the transaction contemplated

thereby."

THE COURT: Why doesn't it then founder again on the idea that receipt of that money would result in an adjustment to the merger consideration?

MR. ROLLO: Because receipt of that money, by definition on the bottom of the second proviso, does not result in a modification of the merger agreement. There is a --

THE COURT: It doesn't fall under the modification of the merger agreement, but --

MR. ROLLO: Purchase price adjustment. We expressly excluded that in the bottom of the second proviso. No release claim and no liability or payment under the accompanying settlement agreement --

THE COURT: The problem with that is Section 9.7 which says, "All payments made pursuant to this Article 9 shall be treated as adjustments to the merger consideration for tax purposes." I agree that's for tax purposes, but it would seem to say that the release of funds from the escrow would be an adjustment to the merger consideration.

MR. ROLLO: It would be an adjustment to the merger consideration and --

THE COURT: That would take it into the second "except" clause which would mean you'd be back to the idea that really what I ought to be doing is granting summary judgment for the other side saying that they released their claims to everything in the escrow fund.

MR. ROLLO: I disagree, because I think the second portion, Your Honor, is predicated on breaches of the merger agreement. The first is "obligations under," and the second is "breaches under." Future enforcement of contractual provisions is not a breach of the merger. If tomorrow we breached, it would fall within that provision, so I think there's a distinction in the first part between "obligations under" and "breaches under."

THE COURT: Walk me through that again.

MR. ROLLO: The indemnification obligation that my friends are seeking to pursue is predicated upon purported breaches of the merger agreement.

THE COURT: That's a problem for them under Romanette "i".

MR. ROLLO: Correct. But, for

example, I'll use an example --

THE COURT: I'm focused on Romanette "ii". I think your problem is the breadth of your argument as to released claims is so powerful that it seems to me that it runs into exception two. I agree with you your issue isn't that it's a breach under exception one.

What seems to me to be your problem is that you agree contractually that any additional money you got was going to be an adjustment to the merger consideration, and you're now telling me that you released anything that fit within the definition of released claims that could result in an adjustment to the merger consideration, and so by the force of your powerful interpretation of released claims, hasn't your fellow given up his adjustment to the merger consideration?

MR. ROLLO: I don't believe so, because as I read the second Romanette, it says "no released claims shall result in adjustment to the merger consideration."

Now, the merger consideration is a defined term under the merger agreement. The escrow didn't result in a lower amount. It was simply an

amount of money that was set aside and the merger consideration itself remained constant. That payment was just delayed. Had it resulted in a reduction, which I believe Your Honor is positing, that escrow amount would then be deducted from the overall merger consideration. That would then be barred by Romanette "ii". I believe Romanette "ii" operates to prevent the exact issue that Your Honor is raising.

There's a provision, I believe, at Section 9.3 that talks about how purchase price adjustments are made under the merger agreement. It's Section 2.3 of the merger agreement. Basically, it provides a process post-closing where either side can identify certain issues that would result in a change in the merger consideration.

Those adjustments aren't based upon a claim that we breached the merger agreement or that the other side breached the merger agreement. It was simply the accounting process in place. Romanette "ii" in the release is focused on that process.

In order for I believe what Your Honor is positing that the escrow functionally is waived, that would presuppose that by putting the escrow funds in escrow, it somehow impacts the merger

consideration, and I would submit to Your Honor it does not. The consideration is the consideration. 11.5 of that consideration was simply held for a period of time subject to the rights under 9.3 for indemnification.

THE COURT: It does create an interesting interpretive question because 2.1(b) says that your company membership interests that EORHB owned were converted into the right to receive Romanette "i", net merger consideration plus various other amounts which include amounts released from the escrow agreement, and it defines those latter amounts as contingent merger payments.

So, again, I look at that, and I think, okay, well, are contingent merger payments part of the merger consideration such that they represent an adjustment? They seem to be something other than net merger consideration. Then I get back here to 9.7, treatment of indemnity payments, and it says, "All payments pursuant to this Article 9 shall be treated as adjustments to the merger consideration for tax purposes."

I guess what you're telling me is that Section 9.7 is only intended to be payments to HOA and

folks, not releases from the escrow agreement.

MR. ROLLO: I think functionally that's correct, Your Honor, because the escrow agreement itself is a separate document that says if you don't have indemnification claims validly made against it, then, at the end of its term, those funds are released, and that in terms of merger consideration, whether that consideration is contingent or absolute, it's still merger consideration.

So that Your Honor's definition of 2.1(b), contingent merger payments, those are still part of the merger consideration. Then if you go back to the release Romanette "ii" it says that the settlement agreement and whatnot will not result in a modification of the merger consideration, paraphrasing, of course.

THE COURT: You obviously resist any broad construction of the release that gave up the escrow.

MR. ROLLO: Absolutely, Your Honor.

THE COURT: All right. Let me hear from the other side.

MR. ROLLO: Thank you, Your Honor.

MR. DRIEMEIER: Good afternoon, Your Honor. I think that it's important to begin with the context in which this release was entered. It was entered as part of a settlement of the ROFR litigation, the litigation about who was going to be able to purchase Hooters of America or whether it would be the Wellspring, NRI parties or our clients that would be able to spend the $223 million to acquire a very complicated enterprise of global reach.

It is really beyond logic to think that as part of a release that was executed in the context of tying up the loose ends of that litigation over those threshold questions of who would get to enter into the substantive agreement to purchase HOA, that our clients released all of their substantive rights under that $223 million agreement.

In fact, not only does the context suggest that that is highly unlikely; the text of the agreement provides a specific preservation of the claims under the agreement. Because after delineating -- of course, it's not a general release. After delineating categories of claims, specific categories of claims that are released, the agreement provides specifically that the foregoing, that list of

claims, shall not include any claims to enforce the terms and conditions of the amended and restated Holdings merger agreement.

Now, my friend would have the Court read into that clause a temporal limitation, a temporal scope; only those claims to enforce the terms and conditions going forward. He also wants to rewrite that language to eliminate the words "terms and conditions of the amended and restated merger Holdings agreement" as obligations because that comports with his temporal-only forward-looking view.

THE COURT: I don't think that's where he gets the temporal issue. Maybe I'm misunderstanding it, but I think that he agrees with you that there is a broad preservation of claims to enforce the merger agreement. I think the temporal issue comes into play because under the first and second exceptions, there are carveouts from that broad preservation, and the temporal issue comes from your inability to release future claims. So, therefore, those carveouts are limited to the date of the execution of the release.

Again, he can correct me, but I don't think the temporal limitation comes from the

preservation of the merger agreement enforcement right.

MR. DRIEMEIER: But based on that understanding, that the temporal limitation as provided by Delaware common law as they argue in the reply, then the proviso and the "except that" clause are wholly unnecessary because solely on the force of the release itself in the Romanettes, they would not have encompassed suits to enforce the agreement going forward and would only have released claims for past breach.

So the two clauses that the parties spent a lot of time negotiating, there's a lot of exchanges about how the "specifically included" becomes surplusage. But I would also point out that it's inconsistent, because under the agreement, it explicitly provides, among the scope of types of things that are released, the word "obligations," so, again, the argument that they advance really turns this into a circular exercise because obligations are released, because the word -- one of the first words in terms of the scope of the release is "any and all claims, demands, rights, actions, potential actions, causes of action, liability, damages, lawsuits,

obligations," so any extant obligation would be released.

Then there's the proviso, and they say the "except that" clause means that all that was released is still released so that "all obligations" which would include all obligations extant at that date, all obligations under the merger agreement are released.

And there's nothing to, on that view, the proviso which is clearly intended to do something. Both common sense and rules of construction of contracts provides that the Court should not adopt a construction that would render the language surplusage. On their view, that proviso which the parties spent so much time about, so many exchanges about, becomes a nullity.

And if there were any question about that, the fact that on the day before the agreement was signed we wrote to counsel for sellers and specifically said that it was our understanding that this proviso preserved our ability to bring typical buyer/seller claims, there was no rejection of that. There was no even question about what that term meant. The only response was one of agreement.

They recognized that the proviso preserved the right to enforce the terms and conditions of the merger agreement. Of course, one enforces the representations and warranties when the party does not make good on them by suing for breach, and that's what we're here today about.

I think that Your Honor's focus in your questions of my friend on the trouble that their interpretation has with making sense of the second Romanette of the "except that" clause is right. Because, really, they trip themselves up. If the release was as broad as they now contend, they would have asked for the escrow to have been returned to them because there really would have been virtually nothing for us to have asked for them that would have implicated the escrow.

More importantly perhaps, they would not have paid a purchase price adjustment in late May of that year based on facts that were alerted to them in March of 2011 and that involve a lot of the same types of issues that gave rise to the representation of the warranty claims.

Exhibit 24 of the Schulman affidavit that we submitted is the document relating to the

purchase price adjustment. If you look at the last few pages of that exhibit, it goes through a list of the types of items that were subsumed in the adjustment, and they include things like the North Carolina Dram Shop litigation. They include things like taxes. They include things like the fact that we were not getting the kinds of royalties that we had expected from Wings Over Germany. All of those issues were made part of a purchase price adjustment.

Then they would today say that -- I don't actually understand quite their explanation about why, under their theory of the release, they were not also released from paying that purchase price adjustment, and yet they did, just weeks after having signed the release.

So we have the contemporaneous communications between the parties. We have the conduct of the parties subsequent to the signing of the release. But more importantly from our view, because we don't think you even need to get to those, we have the context in which it was negotiated, and the fact that a very specific proviso was inserted to preserve precisely this type of claim, and that proviso is rendered meaningless on their

interpretation.

I think it's interesting to contrast the proviso and "except that" clause in the release that we're discussing now with the release that was included in the January 24 amended and restated merger agreement, because, there, there are two things that are notable. One is that the proviso preserves claims to enforce obligations, and it specifies obligations. It doesn't use the broader "terms and conditions" under the loan agreement that relate to conduct that was to occur after December 24th.

THE COURT: I thought I had flagged that provision in the first amendment. I remember it being in the seven's. 7.14. Okay. I got it now. Get back on your horse now.

MR. DRIEMEIER: So what we have is we have a distinction both because the temporal limitations are spelled out explicitly. It's limited to obligations, and it says obligations based on conduct after December 24th. So all of those features of the January 24th release are absent from the release that we see on May 3rd.

So it really, I think, highlights the extent to which one has to write into the May 3rd

release the kinds of limitations that the sellers are advocating today, and why it is that we had no expectation that that would be the interpretation.

In fact, it's interesting that the language that the sellers have seized upon, the sale of HOA, in the context of this list of Romanettes, it's really the emphasis that is on the sale of HOA to the private equity parties. Now, why is that included in our release with the sellers? Well, you do have to kind of go back to the history of the development of the release.

THE COURT: Go back and explain to me what is the business reason you think for -- what is the inference I should draw from the plain meaning of the distinction that you pointed out between 7.14(b) and the release found in Exhibit G? In other words, why in 7.14(b) do people go to the trouble of including the dates and not include them in the release? What was on peoples' minds at the time that 7.14 made them do that?

MR. DRIEMEIER: Well, I think with respect to 7.14, it was that there was a release of the kind of delay -- that was one of the big issues, the disputes between the parties, the delay on the

part of the sellers in signing the merger agreement and beginning to cooperate. They were willing to release -- the buyers were -- it was the sellers delay up until December 24th but not their delay thereafter. So it was a temporal distinction that the parties were drawing.

But with respect to the release on May 3rd, it's a substantive distinction that the parties are drawing. We are releasing, and we mean it, that's what the "except that" clause basically means, all of the claims relating to this dispute about who would buy HOA, would it be NRI, and you have the first of the Romanettes, the NRI merger agreement.

Now, mind you, one of the significant features of this list of Romanettes is that there is no Romanette that simply says "the amended and restated Holdings merger agreement." That is, I think, very significant. Then you have the separate and apart from the NRI merger agreement, the entering into or termination of the NRI merger agreement.

So already we think, okay, these clauses are pretty specifically crafted because there's some distinction that the drafters see between the NRI merger agreement and the entering into,

meaning like the fact of the entering into and the fact of the termination of.

THE COURT: Really, in your view of the Romanettes, you don't even need the second proviso.

MR. DRIEMEIER: True, Your Honor, but I think it's fair to say that we anticipated that we might be here without the proviso. We never anticipated that we would be here with the proviso. We thought the proviso was belt and suspenders and it provided the clarity that we needed.

When the other side said, well, wait a minute, you can't then turn around and urge that the delay and all those various things that we're resolving here as part of this release and settlement, you're not going to be able to come back and recharacterize those as the basis of a breach of contract claim based on the merger agreement.

Now, in their reply, the sellers said, well, that's meaningless because you couldn't breach an agreement that wasn't in force. But, in fact, it's a little too quick, a little too easy. If you look at the reps and warranties and other provisions of the amended and restated merger agreement, many of those

provisions have effective dates that predate December 1st, 2010, even October 29, 2010.

So I'm not suggesting that we would have done this, but the other side -- we could understand why the other side would be concerned that we would try to recharacterize these types of claims as a breach of the merger agreement which, of course, we thought was effective as of December 1.

We thought that when we sent them a signed merger agreement that was the equivalent of the agreement that they had entered into with NRI; that that constituted a binding contract as of that point. Of course, that too was an issue of dispute between the parties, but we understood why they wanted that clarification, and we gave it to them.

THE COURT: Remind me when the closing actually was.

MR. DRIEMEIER: January 24th, 2011.

THE COURT: The same day as the amended and restated agreement.

MR. DRIEMEIER: Yes.

I do want to, if I could, just go back again to the Romanettes, and as we were saying, they're kind of narrowly and specifically drawn,

"entering into" or "termination of" being different from the NRI merger agreement itself.

We then have "entering into" the Holdings merger agreement, our agreement, and of course, there was no termination of it, so there's no parallel there. But the effective equivalent of that, or an analogue would be the consummation of it. So we say the sale of HOA to our clients.

Now, these Romanettes were initially drafted as part of a release that was to be included in the agreement with NRI, and of course, that was critical that we have that language in a release that NRI was granting to us or granting to the sellers because that was, of course, the whole basis of their claim against the sellers, or against us; was that they sold HOA to us instead of selling it to NRI, so we had to have that included there to protect ourselves.

But there was never a thought that that would prevent us from enforcing the terms and conditions of the merger agreement itself, the merger agreement never being a Romanette by itself. And the proviso so specifies.

So, again, as I said, and I think Your

Honor's question was well put, we think that the Romanettes themselves, properly construed, protected us. But understanding how, months later, years later, the parties' views can evolve, we added that proviso for clarity, and we don't think that it fairly can be construed -- and certainly that contemporaneous correspondence when we made clear our understanding that it preserved traditional buyer/seller claims with no dispute from the other side, we think there is no question but that we have preserved our rights.

If Your Honor has no further questions.

THE COURT: I don't, thank you. Mr. Rollo.

MR. ROLLO: Thank you, Your Honor.

I tried to take notes on the various points, so I'll try and respond as best I can to each of them. I heard a lot about parol evidence, and I don't need to recite all the case law that says it can't be used to create an ambiguity.

In our reply brief, we walk through the history. My friend suggested, I think twice, there was a lot of negotiation around the second proviso. Where is that in the papers? He also

testified, he testified, that they had no understanding or belief.

Let me go back to kind of the fundamental concept. It really doesn't matter what they thought. It really doesn't matter if they believed or didn't believe that it operated this way, because the words on the page say what they say.

We talk about the spirit or intent or -- I forget the phrase they use as to how to rewrite the nine categories. But I didn't once hear that the plain words on the page for category five do not include the obligations under the merger agreement.

Now, there were several loose statements made during the argument, and I want to correct them because they are important. There is the suggestion that we are here contending that all of the obligations under the merger agreement were eliminated. That's not what we said. That's not what's in our papers.

Yes, the initial definition was everything, and then there is a carveback, and it says "your obligations." Those obligations are saved. But you can't sue us for a breach, a claim of breach based

upon what happened beforehand.

Now, my friends say that the second proviso, I think it is conceded, that under their interpretation, the second proviso is surplusage. They said that it is unnecessary. Well, that's a concession that their interpretation is inconsistent with Delaware law.

We give meaning to the second proviso. We give meaning to the second proviso in part if you look at the negotiating history because we're the ones who put it in. If you look at pages two through I think it's seven of our reply brief, we walk through the iterations. They proposed -- and I'm not suggesting Your Honor should use any of this information to create an ambiguity, but you can use it secondarily in order to confirm the conclusion that there is no ambiguity.

With that said, the first draft said the merger agreement and everything related to it is preserved in its entirety. I think it's an April 18th draft from Mr. Bueker. Paragraph eight, it breaks into two parts, 8-A, the lawsuit, or 8-B, a list of a bunch of different things, including the transaction.

Any suggestion that they really meant

there that, oh, everything after 8-B is really qualified by the lawsuit, it would have been worded differently. They wouldn't have said "or." They would have said "including but not limited to." They didn't do that.

We rejected that carveout. We then counter-proposed a carveout that contains functionally this structure. Now, there's some modifications that happened over time, but it didn't materially change.

The draft that we circulated back -- I believe it has a paragraph 8-E, and it's cited in our reply brief that makes clear how the ultimate definition of "released claims" was intended to operate because it didn't incorporate the definition of released claims initially. That's consistent with what we said.

I don't need to drag Your Honor through the negotiating history because I don't think Your Honor needs to get there, but I will say one thing about this whole forthright negotiator. We sent two emails. Both of them say -- and you can debate how it's worded -- that the operation of the second proviso prevented a warranty claim. Consistent with this side. Not even addressed.

Had they had a piece of paper where they said, "You're absolutely wrong, Mr. Rollo, you're crazy, you're lying to the Court," I imagine Your Honor would have it. This was a voicemail left near the close of business on a Friday when this deal was about to get done. And on a Monday morning, we get an email that's vaguely worded about typical buyer and seller claims.

I'll submit to Your Honor if I pass out a bunch of pieces of paper and pens and said, without talking to anybody, everyone write down in the room what a typical buyer and seller claim is, we wouldn't have agreement, not complete. We may have a general notion of what it is, but those words, they are critical to their position, do not show up in the settlement agreement. They don't show up in the release. They don't show up anywhere.

So while maybe you make a vague statement at the end of a negotiation to preserve an argument later that you want to create an ambiguity, that doesn't modify the agreement. They proposed a change. We rejected it. We counter-proposed. They accepted it. Done.

Now, we add a footnote about a comma,

and I know we haven't talked about punctuation today, and I don't think Your Honor needs to even address whether or not that comma is necessary. I haven't heard an argument today about the semicolons or lack of semicolons in the definitions, and I think all of that's laid out in the papers. I think Your Honor basically understands our position.

But let me address one or two other arguments. Your Honor asked about 7.14(b). I can tell you exactly what was on everyone's mind at the time. There were counterclaims, and those counterclaims said we refused to sign the merger agreement and as a result of it, we'd harmed them. All of that conduct occurred beforehand.

Now, Your Honor asked what were we thinking at the time. We had a deal with a different bidder. Same reps and warranties. Same restrictions. Now, things had happened between when we signed that deal and this time.

For example, they consented to certain things that violated the reps and warranties and covenants. Now, those concessions were binding on the prior bidder but not on my friends. So if we signed a document that says something has to be true and where

the other earlier counter party had breached the agreement, because as soon as we signed it, we breached the agreement, we needed something that said you couldn't sue us for that.

In their papers, they suggest that the dispute in the earlier lawsuit were additional claims against us. That's just not consistent with the record. The counterclaims say what they say. The counterclaims were filed before this release.

This release says basically it's the cooperation covenants and we had to do everything in our power to make sure this deal goes forward. They can suggest that they believe maybe there were some claims, but that's not what was at issue. Nor is there a single document that suggests that the second proviso was animated or included based upon those concerns.

I'm generally pretty simple when it comes to contract construction. There's a straightforward answer, and we think it's the one we put forward, and to reach an alternative conclusion, Your Honor has to go through machinations, some contortion of the language to reach the conclusion, and the ultimate conclusion my friends concede does

not give any meaning to the second proviso.

Now, there was one additional point concerning I'll call it the circularity in the second proviso, and it's included in the briefs, but I think today there was the suggestion that it was unnecessary. I want to address that point because I think it's just wrong.

The first part of the proviso says notwithstanding this broad definition, which would include the merger agreement and any obligations or breaches, there's a savings clause. Obligations under the merger agreement, and broader than that, transactions directly related thereto. It's a broad transaction.

The next one simply refers to claims for breach. That is a smaller subset. So even if you agree that that first clause, the savings clause, is broad, as broad as you'd like it to be, ultimately because there is a difference in the wording between the first clause and the second clause, they're not circular.

We submit that the reason they were worded the way they are is the merger agreement has obligations just like the escrow agreement, just like

everything else, and we wanted to insure that those were not eliminated, because they would have been. Without a proviso, our obligation to not use the Hooters trade name would have been eliminated.

Now, with respect to the escrow agreement which Your Honor raised initially about did we release that, there's money in escrow. What right would the buyers have to have the funds flow to them in Your Honor's hypothetical. None.

So while I understand Your Honor's hypothetical in terms of how you get there, it doesn't lead to the conclusion that the buyers would have an entitlement to that $11.5 million. So I don't think ultimately that example creates a flaw in our analysis, or alternatively, any ambiguity that would render summary judgment inappropriate.

I guess the final point, unless Your Honor has questions, one thing we haven't heard today and anywhere in the brief, is an alternative reasonable interpretation of the contract as a whole. The buyer's position is predicated, the whole thing, on the conclusion that the initial definition of "released claims" does not include the merger agreement obligations. They spend several pages on

that and that argument.

Now, I think that's flatly inconsistent with the negotiating history and the language in the contract. But if you eliminate that assumption, every other argument in the answering brief falls apart because there isn't a cohesive explanation of the contract.

How was it intended to operate? What did they think or what did they propose these conflicting temporal clauses mean? Nothing. They simply are trying to create an excuse to get to parol evidence. Then when you get to the parol evidence that they want to look at, it falls apart.

Now, one piece -- because Your Honor had questions on it on the purchase price adjustment. Back to what we said in our brief. The purchase price obligation -- the adjustment is an obligation under the contract. My friend pointed to I think it's Exhibit 24. I don't believe the word "breach" is in that document.

There is no claim for breach of the merger agreement. We had a contract that says here's how you adjust it. That is an obligation of the merger agreement that continued to be enforceable. It

is not within the second part of the proviso that says "except no release can be the basis for a breach of the contract." That's the distinction.

THE COURT: So you beat that one, but why wouldn't that then result in a released claim affecting an adjustment to the merger consideration?

MR. ROLLO: I would submit to Your Honor that release of the escrow is not a modification.

THE COURT: Purchase price adjustment. Purchase price adjustment is a modification to the merger agreement consideration because you're following one of these standard mechanisms. Yours was a three-day, pre-closing, you submit your estimates, and then within 60 days post-closing you do the true-up, and you were modifying the merger consideration to reflect what was really on the books at the time of closing as opposed to what was in the estimates.

So if the first half of the release encompasses claims for the merger agreement such that those are released claims, didn't you all accept that a released claim was used to make an adjustment to the merger consideration?

MR. ROLLO: I don't know if I agree with that assertion, Your Honor, since this is the first time I've kind of thought through it, that particular argument, because it's not raised in the papers. I think we talked about it earlier.

THE COURT: That's what I thought they were saying.

MR. ROLLO: I didn't get that from the papers, let me put it that way. That may be where Your Honor got it from; the papers. As I think I said in my reply brief, we didn't quite follow the argument.

So let me respond in two ways. First, even if we did make a payment we weren't obligated to make --

THE COURT: You're just good guys.

MR. ROLLO: Let's say we did. That's parol evidence. Post-execution conduct cannot be used to modify the terms of the agreement. Let's say we made that, and we had a right to say, "No, never mind," at best, that's a waiver argument, and there's the provision that says a waiver of one provision is not a waiver of anything else.

So while I think in terms of structure

we can walk through whether or not we could have said no around the same time we were agreeing to a settlement with our friends, I don't know if it ultimately impacts this question because it doesn't modify the text.

But I'm happy to address any other arguments or questions Your Honor has.

THE COURT: No, I don't have any other questions.

All right. Well, thank you both for your presentation. Let me give you a couple of thoughts. First, purely non-substantively, two things for the Delawareans to note for the future, and I give this same advice to some of the other outstanding firms, so don't take this personally. I really hate this footnote structure in briefs. I'll tell you why: Because I actually want to know what you're citing for these statements. To figure out what you're citing for these statements, I have to jump down to the footnotes. Perhaps somebody with better visual acuity than I is readily able to jump down from text to footnote to text to footnote to text to footnote, but I can't. So I get a quote that sounds really good. A good example is Footnote 70. That is one that was

such a good example that I wrote it down. So I'm reading along and this is -- let's get there. This is a great statement. "Indemnity, in its most basic sense, means reimbursement may lie when one party discharges" blah, blah, blah, Footnote 70."

I have to look down to the footnote to find out that that is an unreported Delaware Superior Court case from 2008. Now, I'm not saying there's anything wrong with an unreported Delaware Superior Court case. Certainly we like unreported cases here in Delaware, but I think it would be undisputed that that case would have more heft were it a reported Supreme Court case.

So it may be that my colleagues like this footnote style, and it eases their minds when they're reading because they don't have to actually look at where the sources are from or that type of thing. I find it very difficult to deal with. So just in terms of submissions to me, if it's going to be some lengthy string cite, you can put it down in the footnote, but otherwise put these things in the text, because, particularly in a section of the brief where there's carpet bombing of footnotes after every sentence, I'm bouncing down and back after every

sentence.

You'll notice that that's why I don't use the Garner footnote style in my opinions. It's because, again, I think it's ineffective for someone who is immersed in the law of the particular jurisdiction and therefore cares about what case you're actually citing for a proposition. If you were a lawyer who is itinerant and wanders from circuit to circuit and is not as concerned with particular case names or particular authorities, Garner is fantastic. Why bother? I mean, that footnote method is great. But I actually care about what cases you're citing for these principles and where things are coming from. Nobody should take it personally or anything like that. But that's a little constructive point on that.

The other thing is I do not understand why I got dueling transmittal affidavits where 80 percent of the documents were the same. Now, it turned out to be helpful because I read everything out of the Rollo affidavit. One of my cats decided that the Rollo affidavit was an appropriate litter box substitute. Because of that, I was glad to be able to resort to the Hannigan affidavit. Generally speaking though, I do not want to lug two things like this. I

mean, look, I've gotten to the point -- and the reason why, when Mr. Bayliss worked for me, he had to carry my bags was not because I was some crazy corner office partner who wanted somebody to carry my bags, but because I got tennis elbow. I didn't get tennis elbow from playing tennis. I like to play tennis. I got tennis elbow from carrying around a big heavy lit bag. The lit bag is twice as heavy when I have the Schulman affidavit and the Hannigan affidavit and the Rollo affidavit.

Now, the last affidavit did have a bunch of emails that weren't in the first two, but the first two, I would say 80 percent of those documents were the same. I got two copies of the merger agreement. I got two copies of the escrow agreement. I got two copies of the back and forth. I got two copies of the blooming pleadings from the December case. I don't need that.

So those are two practice points for you all going forward, idiosyncratic though they may be. Perhaps other members of the Court would like you to handle their documents differently. But if you would like me to be happy and smiling when I read your papers, those are two things to remember.

I am going to give you my ruling now. First of all, I want to start by giving you the factual background because I think the time line is important. I'll give you the punch line up front. I am denying the plaintiff's motion for summary judgment, and under the authority of Stroud V. Grace and XO Communications LLC versus Level 3 Communications, because I think the language of the contract is plain, I am granting summary judgment in favor of the defendants on the interpretation of the release.

So what that will leave, as far as I understand it, is a case about the counterclaims. I do believe that the counterclaims state a claim. I think even this odd claim for the airplane usage -- the airplane judgment -- is something that, frankly, I don't understand what's going on there. It's bizarre. It seems to me that it's the type of thing where conceivably one guy was in control of both entities, and he said, "You know what? I'd rather have this be a judgment against this one rather than that one."

If that pans out, and all I have is the pleadings right now, but if that pans out, it's conceivable to me that that could be a situation where

there would be grounds for indemnification. We'd have to run it through the merger agreement. We'd have to run it through the reps. We'd have to run it through the disclosure schedules. But it's reasonably conceivable. So I think but for the -- except for the release argument -- the counterclaims state claims.

Now I am going to address the release argument. The time line is that on October 29th of 2010, the plaintiffs originally signed up a deal to sell the Hooters restaurant chain to Neighborhood Restaurants Inc., which people refer to as NRI, and which was connected with Wellspring Capital Management; hence, those references in various documents to the Wellspring claims and things like that.

On December 1st, 2010, the private equity group that now owns the Hooters chain through HOA Holdings exercised a preexisting right of first refusal that it had under an outstanding loan document.

Six days later, on the 7th of December, the plaintiffs filed a suit claiming that they couldn't figure out whether the right of first refusal had been validly exercised. Three days later,

on December 10th, HOA, the second bidder private equity firm, filed counterclaims and cross claims.

In their answers to those, the plaintiffs suddenly found pellucid clarity as to whether the right of first refusal had been validly exercised and conceded that it had been. Based on that, on December 20th, 2010, I granted judgment on the pleadings as to the valid exercise, the concededly valid exercise of the right of first refusal. That led essentially to a situation where there were two merger agreements in play.

So, on December 22nd, 2012, there was a first amendment to the merger agreement with HOA. That's Exhibit C to the Rollo affidavit. That agreement extended the closing deadline, it cut back on the plaintiff's indemnification rights, facially because they had created the mess, and in that document, plaintiffs and the HOA Holdings group agreed to give each other mutual releases but with carveouts preserving rights under the operative transaction documents.

Notably, paragraph nine left in place the price adjustment provisions of the merger agreement but provided that payment of litigation

expenses relating to the then extant litigation wouldn't be treated as increasing current liabilities or indebtedness or as reducing cash or cash equivalents or otherwise. In other words, it wouldn't be treated as having an effect on the price adjustment provisions that were preserved.

On January 24, 2011, there was an amended and restated merger agreement between plaintiffs and HOA. That agreement superseded the first amendment to the original merger agreement and picked up and incorporated its provisions. A couple things are important about this merger agreement. First, it had an extensive section on indemnification for breaches and inaccuracies of reps and warrantees. The vast majority of the representations were extended for a year plus 180 days post-closing. Fundamental representations were extended forever. Tax representations were based on the expiration of the related tax oriented statute of limitations. A total of $61.5 million was put into escrows for various buckets of payments, and to govern that escrow arrangement and to provide for the indemnification, there was an escrow agreement dated January 24, 2011.

As I indicated in comments with

counsel, Section 2.1(b) of the merger agreement provided that the LLC interests -- to facilitate that transaction, the Hooters entity which originally was a corporation had been converted into an LLC -- the LLC interests were converted into the right to receive the net merger consideration plus amounts received from the shareholder escrow plus tax reimbursements. Section 2.2 provided for a price true-up mechanism. As I described earlier, it called for delivery three days pre-closing of estimates of cash, cash equivalents and indebtedness with a post- closing purchase price adjustment to be completed 60 days after closing based on actual figures.

Of importance to me at least, and to an understanding what was going on, is what the parties agreed to in the introductory paragraph of Article 4. All of the representations and warrantees that were set forth in the amended and restated merger agreement were qualified, recognizing the existence of the then still extant litigation, the Chancery litigation.

The obvious purpose of that was because the outcome of that litigation -- indeed, the existence of that litigation -- could have had

significant implications for various representations and warranties. Immediately jumping to mind are Section 4.5(b), the absence of any undisclosed liabilities other than those on the schedules. One could envision being tripped up by Section 4.6, the absence of certain changes; effectively, a "no MAE" clause. And Section 4.7, no other litigation.

There were also potential issues for the parties in terms of the conduct of business between signing and closing. So Section 6.1 listed a pretty extensive, very extensive, list of closing covenants in terms of the operation of the business, generally limiting the business to ordinary course of business activities. A lot of the items that are listed in there could have been affected by and breached by, created problems for by, the outcome of the then extant Chancery litigation.

In Section 7.4, what I interpret that to be, that's the release that I discussed with counsel, and it seems to be a release designed to resolve any of the disputes that had been generated by the Chancery litigation up until the date specified in that provision, but which otherwise preserved the right to enforce the transaction documents.

The merger closed promptly after the signing of the merger agreement. I understand from counsel it was, in fact, the same day. Now, four months later, just under four months later, on May 3rd, 2011, the Chancery litigation was settled. NRI got $9 million. Everybody else got releases. There was a side agreement among the folks in this room about how to divvy up the $9 million payment.

Now, this was one of these settlements where nobody actually wanted to have to ultimately show the full agreement whenever they wanted to invoke their releases, so rather than there just being an agreement containing the releases, people signed a settlement agreement and then signed a list of releases from each party to the other parties. That's what gets us to Exhibit G which is the specific release that HOA gave to the plaintiffs.

Then, finally, October 4th, 2011, within the schedule contemplated by the indemnification provisions of the merger agreement, HOA served the first of several notices for losses. That's a defined term, "Losses," for indemnification claims against the escrow fund based on alleged breaches of reps and warranties.

Now, we're here today because in response to those notices, the plaintiffs cited Exhibit G and said, "Sorry, HOA, even though we set aside this money for escrow, even though we had this expansive procedure in the merger agreement to handle post-closing indemnification claims, and even though there's nothing specifically addressing the giving of those up in the settlement agreement, when you granted your broad release found at Exhibit G, that language can actually be read to release any claim you might have for anything you might bring up in the next year plus 180 days for most representations, anything you might bring up forever for fundamental representations, and anything you might bring up for taxes at any point during the period before the expiration of the statute of limitations. You guys gave all that away."

Well, that was a claim with which HOA disagreed. It is also one with which I disagree.

The release has three pertinent parts. I decide this entirely based on plain language. The release has three pertinent parts. The first is an expansive definition of what qualifies as a Released Claim, and that is with a capital R, capital C.

The second important part has two provisos where, after the definition of Released Claim, there are two sections where the parties said "provided that."

Then finally there are two exceptions to the second proviso.

Let's start with the definition of released claims. It is typically expansive. It is plainly attempting to give broad and global releases as to everything related to the enumerated items. In other words, it has the type of language that one would see in a general broad universal release covering everything from the beginning of time with every adjective that any lawyer who ever touched the form language could find in the Thesaurus. But then rather than simply stopping with that broad language, it lists items that the claims have to relate to. It's, therefore, a specific release.

In my view, the plain language of the enumerated items facially reflect what actually was being settled; namely, the dispute over the then extant Chancery litigation about which the merger agreement had been validly entered into, how those events occurred, and what the consequences of those

events would be.

The plain language of the Exhibit G release, as well as the plain language of all of the mix-and-match releases that the parties entered into to implement this settlement agreement, drew distinctions between the original NRI merger agreement and the HOA merger agreement.

For example, Romanette "i" releases all claims relating to the NRI merger agreement. It's gone, done, over. Romanette "iii" releases all claims relating to the entering into or termination of the NRI merger agreement. Just in case you didn't realize from Romanette "i" that it was gone, over and done, Romanette "iii" is clear that anything related to the entering into of that transaction or the termination of that transaction is gone, over and done.

Contrast that with what it says about the Holdings merger agreement. Romanette "iv" only releases matters relating to the entering into of the Holdings merger agreement. What that distinction is plainly attempting to capture is the idea that the Chancery litigation focused on the events leading up to the entering into of the Holdings merger agreement.

Thus, while the parties were getting

rid of, in its entirety, the NRI merger agreement, everything relating to the entering into of that agreement, and everything relating to the termination of that agreement, all people were focused on, as shown by the plain language of Romanette "iv" was the entering into of the Holdings merger agreement.

Likewise, in Romanette "v" they were worried about the sale of HOA to a specific set of buyers; namely, the exercisers of the ROFR. Read in context, the plain language of that phrase distinguishes between the sale of HOA to the second set of buyers; namely, the exercisers of the ROFR, as contrasted to the first folks in the door, NRI.

Now, the problem with that is that although that is the plainest reading of what the romanettes said, the global release language that precedes the specific items that make it a specific release, is quite expansive. There could be uncertainty, particularly litigation-driven uncertainty, as to the interpretation of what would happen to the existing Holdings merger agreement. Prudent transactional attorneys might worry that if the romanettes were read too broadly, someone would argue that the Holdings merger agreement had been, in

fact, itself released.

So, hence, you have two provisos: The first proviso which was in all of the myriad mix-and-match release documents is that "Provided, however, that nothing in this release shall bar any party from taking any action necessary to enforce the terms of the accompanying settlement agreement," and that's the settlement agreement relating to the Chancery litigation. This first proviso was included because otherwise the release is so blooming broad that even the settlement agreement itself could be released. What that first proviso demonstrates is that the settlement agreement was not part of the defined term "Released Claims," so if you start out -- imagine a circle. Think Venn diagrams encompassing released claims. We are then taking a bite out of that circle relating to the enforcement of the settlement agreement.

We then get to the second proviso where it says, "Provided further, however, that the foregoing shall not include any claims to enforce the terms and conditions of the amended and restated Holdings merger agreement or directly relating to the transactions contemplated thereby." Again, otherwise

some litigation-minded parties potentially could argue that the amended and restated Holdings merger agreement itself had been covered and released.

Now, I agree with Mr. Rollo that in an ideal world perhaps, instead of "provided further however" someone truly channeling Brian Garner would have said, "for the avoidance of doubt," but I think that it is sufficiently plain from the "provided further," particularly when combined with the first "provided further" clause, that the intent of this construction was to carveout from the definition of Released Claims any claim for enforcement of the amended and restated Holdings merger agreement.

That is another bite out of the circle that otherwise would be Released Claims. In other words, if you had any doubt at all based on the structure of the nine romanettes, we are now confirming through this "provided further" clause that claims to enforce the merger agreement are not part of the Released Claims.

Now, this, however, created a problem for the sellers. Why? Because there were matters that were the subject of the Chancery litigation that could be used to claim indemnifiable breaches of the

reps and warranties or breaches of the covenants as to how the business was to be operated between signing and closing.

I discussed in my factual exposition why there are some relatively clear items that might jump out. Just to put a finer point on it, the $9 million payment to NRI, how would that fit into the liabilities and the need to disclose liabilities? It would be hard to call that a MAC, but we have seen weaker MAC claims. Would that have been -- would the agreement to do that, or the exposure of the company to that claim, be something that could be shoe horned into one of the closing covenants if not into one of the representations?

We, therefore, have the "except that" provisions. The first "except that" provision says "No released claim shall be the basis for any claim of breach of the amended and restated Holdings merger agreement." What that is saying is if you had any doubt that we were releasing the Released Claims, we really are giving them up, and you, HOA, as buyer, or this is a release from HOA, so it's we, as HOA, as buyer, will not claim that anything that happened and was at issue in that Chancery litigation about the

ROFR or the delay in payment or the incurrence of contingent liabilities that might thereby have been not adequately disclosed Liabilities, we're not going to claim that any of those are breaches of the merger agreement. We're letting those go.

You also have the second proviso which says that except that no Released Claim and no liability or payment under the accompanying settlement agreement shall result in any adjustment to the merger consideration due under the merger agreement. This is exactly the same concept spelled out slightly differently to make sure that no clever transactional lawyer, or clever private equity guy at the Karp firm, could try to get back some of his expenses incurred in the litigation or his piece of that $9 million payment as part of the price adjustment or as part of an indemnification claim.

This is saying, "No, we're not going to try to re-trade the settlement by saying that the expenditure of cash to pay that $9 million actually is something that we can then assert as an indemnification claim to come back on you."

It doesn't give up the entire indemnification framework because it would only give

up the entire indemnification framework if all of that article was part of the definition of Released Claim. As I have already said, for two independent reasons, that is not the case. That is not the case, first, because the plain language of the series of romanettes makes clear that they are not releasing claims for enforcement of the merger agreement, and to again avoid any litigation-oriented reinterpretation of the romanettes, the second proviso makes clear that claims to enforce the amended and restated Holdings merger agreement, including things like your indemnification rights, don't fall within the definition of Released Claims.

So, given all this, it is clear to me that the release does not mean what the plaintiffs are now arguing; namely, that claims for indemnification under the merger agreement are Released Claims and therefore can't be part of the indemnification process which includes the need to assert that there was some breach of a representation and warranty, thereby falling afoul of romanette "i" of the first exception, in plaintiff's view. Nor is it a Released Claim that would lead to an adjustment of the merger consideration and therefore running afoul of the

second exception, in the plaintiff's view.

Contrary to plaintiff's argument, the plain language of the settlement agreement carves out enforcement of the merger agreement from the definition of Released Claims. Contrary to the plaintiff's argument, the structure of the release as a whole was clearly intended to address the then extant Chancery litigation and the potential re-cycling of those claims through either a breach of the merger agreement assertion, or, more importantly, through the indemnification process.

Frankly, it is facially implausible and absurd, given the detailed indemnification provisions, given the sequence of events that led to this settlement, given the nature of the settlement payment, that in agreeing to these releases, the buying parties gave up an otherwise quite detailed indemnification article that entitled them to assert breaches of most reps and warranties for 545 days and other representations longer.

Now, I need not reach extrinsic evidence, but were I to do so, I think it's consistent with the plain meaning, and most importantly, I look at the parties' post-contracting behavior. I should

say post-contracting behavior prior to the buyers actually asserting a meaningful claim for indemnification at which point the sellers suddenly raised this release argument.

Prior to those events in October, the parties' post-contracting behavior was consistent with the plain meaning of the release and contrary to the plaintiff's position. So, first of all, there was no effort to shut down, or more likely, modify this indemnification escrow. Again, there was a lot of money in this thing, and even though there's a provision saying that it's capped for tax purposes at the amount that goes to EORHB at 20 million, 20 million is still a chunk of change.

The escrow agreement is a document that limits the type of things in which the escrow agent can invest. If EORHB and the clever fellows on that side of the deal really thought that they had gotten a release essentially giving up the ability, in which the buyers gave up their ability to raise breaches of reps and warranties under the theory that all of those had to occur or not occur pre-closing, I guarantee you that that event would have been followed quite promptly by a demand for some portion of the

escrow agreement based on the idea that there is no way that 20 million ought to be sitting in there for 545 days when virtually every rep and warranty claim and breach of covenant claim had been given up.

Separately and independently, the plaintiffs went forward with a price adjustment. The price adjustment provision is the short-term adjustment for which the indemnification section is the long-term adjustment. All of the same arguments that are being raised now about the indemnification issue could have been raised about the price adjustment with the exception -- I agree with Mr. Rollo on this -- that the argument would not be based on a breach. The argument would be based on romanette "ii" that said "all released claims were given up and shall have no effect as a price adjustment."

People went forward with the price adjustment blissfully -- perhaps not blissfully but blithely. Certainly blithely with respect to the idea that there had been some type of release of this mechanism and anything pre-closing that might have been a deviation from what the actual results were.

That confirms, in my mind, what the

plain language says and that this has been a -- perhaps it wasn't a late-adopted strategy. Perhaps it was an anticipated strategy. I don't know. I don't need to make that decision. But certainly nobody acted as if this was really a release until the big dollar indemnification claims came in, and one can almost imagine people saying, "Whoa, we got to figure out some reason why these aren't valid. How about those releases."

Lastly, although I do think that there are perhaps some contractual gymnastics that one can go through to preserve a claim, the full import of the plaintiff's theory in terms of the capaciousness of the release language could be read to give up their right to the escrow. The original language of the released claims is just so darn broad, and the link of that to price adjustments in the second exception is so problematic for price adjustments that are paid out of the escrow, particularly given the language of the merger agreement that defines those payments as price adjustments for tax purposes that, again, it renders, in my mind, highly implausible the argument that the plaintiffs are now advancing as the plain meaning of this release.

So, to come full circle, I am granting summary judgment for the defendants on Count I regarding the nature of the release. I'm not saying that it's ambiguous. I'm saying that, plainly read, it doesn't do what the plaintiffs say it does, and plainly read, it preserves the defendants' right to seek this type of indemnification claim that they have asserted.

Again, I am denying the motion to dismiss as to the counterclaims. Having reviewed the counterclaims, I think that but for the release argument, it is reasonably conceivable that they state a claim. It's also reasonably conceivable to me that there could be, depending on how the facts pan out, something relating to this litigation over the plane. So, as far as my view of the matter, and people can discuss this, but it seems to me the case is going forward only as to counterclaims.

Now, before I say that so definitively, Mr. Rollo, is there something other than the counterclaims that I am missing that would still be live given those rulings? I understand you disagree with those rulings. I'm not asking you to agree with them, but stuck as you are at least for the

present with those rulings, is there anything that you think would go forward other than the counterclaims?

MR. ROLLO: Not that I can recall.

THE COURT: Rise up.

MR. ROLLO: I apologize, Your Honor. Not that I recall.

THE COURT: Just the speaker.

MR. ROLLO: No, Your Honor; not that I am aware of at this point.

THE COURT: Thank you. Why don't you all talk about a scheduling order for the litigation on the counterclaims. This seems to me to be an ideal non-expedited case in which the parties would benefit from using predictive coding. I would like you all, if you do not want to use predictive coding, to show cause why this is not a case where predictive coding is the way to go.

I would like you all to talk about a single discovery provider that could be used to warehouse both sides' documents to be your single vendor. Pick one of these wonderful discovery super powers that is able to maintain the integrity of both side's documents and insure that no one can access the other side's information. If you cannot agree on a

suitable discovery vendor, you can submit names to me and I will pick one for you.

One thing I don't want to do -- one of the nice things about most of these situations is once people get to the indemnification realm, particularly if you get the business guys involved, they have some interest in working out a number and moving on. The problem is that these types of indemnification claims can generate a huge amount of documents. That's why I would really encourage you all, instead of burning lots of hours with people reviewing, it seems to me this is the type of non-expedited case where we could all benefit from some new technology use.

What else should we talk about today?

Mr. Rollo, from your side?

MR. ROLLO: At this point there is nothing else I think that we can talk about today.

THE COURT: Mr. Bayliss, anything that you'd like to discuss?

MR. BAYLISS: Nothing, Your Honor.

Thank you.

THE COURT: All right. Thank you all for coming in. It was very well briefed, and I appreciate you all getting me so prepared that I was

able to give you a ruling today.

We stand in recess.

(The Court adjourned at 3:35 p.m.)

CERTIFICATE

I, MAUREEN M. McCAFFERY, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 68 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Dover, this 17th day of October, 2012.

/s/Maureen M. McCaffery

Maureen M. McCaffery
Official Court Reporter
of the Chancery Court
State of Delaware