



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

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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.
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Ropes & Gray LLP
for Defendants/Counterclaim Plaintiffs

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

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

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

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

11 THE COURT: Great.

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

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

19 MR. ZEBERKIEWICZ: Absolutely correct.

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

24 MR. ZEBERKIEWICZ: Thank you, Your

1 Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MR. ROLLO: Yes, Your Honor.

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

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

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

1 MR. ROLLO: Yes, Your Honor.

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

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

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

17 MR. ROLLO: Yes, Your Honor.

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

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

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

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

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

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

1 thereby."

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

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

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

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

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

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

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

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

16 THE COURT: Walk me through that
17 again.

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

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

24 MR. ROLLO: Correct. But, for

1 example, I'll use an example --

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

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

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

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

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

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

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

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

1 consideration, and I would submit to Your Honor it
2 does not. The consideration is the consideration.
3 11.5 of that consideration was simply held for a
4 period of time subject to the rights under 9.3 for
5 indemnification.

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

14 So, again, I look at that, and I
15 think, okay, well, are contingent merger payments part
16 of the merger consideration such that they represent
17 an adjustment? They seem to be something other than
18 net merger consideration. Then I get back here to
19 9.7, treatment of indemnity payments, and it says,
20 "All payments pursuant to this Article 9 shall be
21 treated as adjustments to the merger consideration for
22 tax purposes."

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

1 folks, not releases from the escrow agreement.

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

11 So that Your Honor's definition of
12 2.1(b), contingent merger payments, those are still
13 part of the merger consideration. Then if you go back
14 to the release Romanette "ii" it says that the
15 settlement agreement and whatnot will not result in a
16 modification of the merger consideration,
17 paraphrasing, of course.

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

21 MR. ROLLO: Absolutely, Your Honor.

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

24 MR. ROLLO: Thank you, Your Honor.

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

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

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

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

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

12 THE COURT: I don't think that's where
13 he gets the temporal issue. Maybe I'm misunder-
14 standing it, but I think that he agrees with you that
15 there is a broad preservation of claims to enforce the
16 merger agreement. I think the temporal issue comes
17 into play because under the first and second
18 exceptions, there are carveouts from that broad
19 preservation, and the temporal issue comes from your
20 inability to release future claims. So, therefore,
21 those carveouts are limited to the date of the
22 execution of the release.

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

1 preservation of the merger agreement enforcement
2 right.

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

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

1 obligations," so any extant obligation would be
2 released.

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

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

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

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

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

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

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

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

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

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

1 interpretation.

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

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

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

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

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

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

12 THE COURT: Go back and explain to me
13 what is the business reason you think for -- what is
14 the inference I should draw from the plain meaning of
15 the distinction that you pointed out between 7.14(b)
16 and the release found in Exhibit G? In other words,
17 why in 7.14(b) do people go to the trouble of
18 including the dates and not include them in the
19 release? What was on peoples' minds at the time that
20 7.14 made them do that?

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

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

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

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

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

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

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

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

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

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

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

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

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

16 THE COURT: Remind me when the closing
17 actually was.

18 MR. DRIEMEIER: January 24th, 2011.

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

21 MR. DRIEMEIER: Yes.

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

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

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

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

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

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

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

11 If Your Honor has no further
12 questions.

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

15 MR. ROLLO: Thank you, Your Honor.

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

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

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

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

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

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

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

1 upon what happened beforehand.

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

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

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

24 Any suggestion that they really meant

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

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

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

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

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

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

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

24 Now, we add a footnote about a comma,

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

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

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

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

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

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

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

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

1 not give any meaning to the second proviso.

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

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

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

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

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

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

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

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

1 that and that argument.

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

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

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

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

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

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

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

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

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

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

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

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

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

16 THE COURT: You're just good guys.

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

24 So while I think in terms of structure

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

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

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

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

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

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

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

1 sentence.

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

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

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

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

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

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

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

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

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

7 Now I am going to address the release
8 argument. The time line is that on October 29th of
9 2010, the plaintiffs originally signed up a deal to
10 sell the Hooters restaurant chain to Neighborhood
11 Restaurants Inc., which people refer to as NRI, and
12 which was connected with Wellspring Capital
13 Management; hence, those references in various
14 documents to the Wellspring claims and things like
15 that.

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

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

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

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

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

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

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

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

24 As I indicated in comments with

1 counsel, Section 2.1(b) of the merger agreement
2 provided that the LLC interests -- to facilitate that
3 transaction, the Hooters entity which originally was a
4 corporation had been converted into an LLC -- the LLC
5 interests were converted into the right to receive the
6 net merger consideration plus amounts received from
7 the shareholder escrow plus tax reimbursements.

8 Section 2.2 provided for a price true-up mechanism.

9 As I described earlier, it called for delivery three
10 days pre-closing of estimates of cash, cash
11 equivalents and indebtedness with a post- closing
12 purchase price adjustment to be completed 60 days
13 after closing based on actual figures.

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

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

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

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

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

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

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

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

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

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

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

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

5 Then finally there are two exceptions
6 to the second proviso.

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

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

1 events would be.

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

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

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

24 Thus, while the parties were getting

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

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

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

1 fact, itself released.

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

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

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

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

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

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

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

4 I discussed in my factual exposition
5 why there are some relatively clear items that might
6 jump out. Just to put a finer point on it, the
7 \$9 million payment to NRI, how would that fit into the
8 liabilities and the need to disclose liabilities? It
9 would be hard to call that a MAC, but we have seen
10 weaker MAC claims. Would that have been -- would the
11 agreement to do that, or the exposure of the company
12 to that claim, be something that could be shoe horned
13 into one of the closing covenants if not into one of
14 the representations?

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

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

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

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

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

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

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

1 second exception, in the plaintiff's view.

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

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

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

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

5 Prior to those events in October, the
6 parties' post-contracting behavior was consistent with
7 the plain meaning of the release and contrary to the
8 plaintiff's position. So, first of all, there was no
9 effort to shut down, or more likely, modify this
10 indemnification escrow. Again, there was a lot of
11 money in this thing, and even though there's a
12 provision saying that it's capped for tax purposes at
13 the amount that goes to EORHB at 20 million,
14 20 million is still a chunk of change.

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

1 escrow agreement based on the idea that there is no
2 way that 20 million ought to be sitting in there for
3 545 days when virtually every rep and warranty claim
4 and breach of covenant claim had been given up.

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

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

24 That confirms, in my mind, what the

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

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

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

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

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

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

3 MR. ROLLO: Not that I can recall.

4 THE COURT: Rise up.

5 MR. ROLLO: I apologize, Your Honor.

6 Not that I recall.

7 THE COURT: Just the speaker.

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

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

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

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

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

14 What else should we talk about today?

15 Mr. Rollo, from your side?

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

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

20 MR. BAYLISS: Nothing, Your Honor.

21 Thank you.

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

1 able to give you a ruling today.

2 We stand in recess.

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

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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