IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Textron, Inc.	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 10C-07-103 JRJ CCLD
	)	
Acument Global Technologies, Inc.	)	
	)	
Defendant.	)	

Submitted: December 18, 2013
Decided: March 25, 2014

DECISION AFTER TRIAL
VERDICT FOR DEFENDANT

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C. Barr Flinn, Esquire, (argued), Benjamin Z. Grossberg, Esquire, Tammy L. Mercer, Esquire, Young Conaway Stargatt & Taylor LLP, Rodney Square, 1000 North King Street, Wilmington, Delaware, 19801. Attorneys for Defendant.

Jurden, J.

I. INTRODUCTION

This case stems from a 2006 purchase sale agreement, whereby Defendant Acument Global Technologies, Inc. ("Acument"), through its parent company, Platinum Equity, LLC ("PE"), purchased Plaintiff Textron, Inc.'s ("Textron") global fastening manufacturing business. The executed purchase sale agreement ("PSA") contained a "Tax Benefit Offset" provision, which is the genesis of the suit.

Textron asserts that based upon the term "assumed" within the "Tax Benefit" definition, a subsequent letter agreement, and various emails, the parties came to a mutual agreement that the Tax Benefit Offset provision applied a "hypothetical" tax break to Textron with each required pre-closing indemnification payment. Acument, however, claims that the Tax Benefit Offset only applied if Acument was entitled to receive a tax reduction based upon Textron's indemnification.

After carefully considering all the evidence introduced during the four-day bench trial, the parties' extensive and helpful briefing, and post-trial arguments, it seems that the parties were never on the same page. At times, it appears the parties had an "agreement," but several emails later, any glimmer of mutuality is decimated by the other's misunderstanding or interchangeable use of two different

concepts.[1] In light of this, and because each party introduced substantial evidence in support of their respective positions, this case was difficult and close.[2] Ultimately, Plaintiff has failed to prove by a preponderance of the evidence that the Tax Benefit Offset applies "hypothetically," regardless of whether Acument receives or recognizes a tax "reduction." Thus, for the reasons explained below, the Court finds for Acument on all counts.

II. FACTS[3]

A. The Players

1. Textron

Textron is a Delaware corporation that employs approximately 32,000 people in 25 countries, operating several "segment" businesses ranging from the

[1] In denying Textron's Motion for Judgment on the Pleadings, the Court held that the controlling documents at issue are ambiguous and susceptible to reasonable, different meanings. *Textron v. Acument*, 2011 WL 1326842, at *1 (Del. Super. Apr. 6, 2011) (Jurden, J.).

[2] The Court would like to acknowledge the parties' superb post-trial briefing. The Court also appreciates that the parties submitted electronic versions of the briefs, exhibits, and transcripts.

[3] Unless otherwise indicated, the facts are as the Court, sitting as fact-finder, finds by a preponderance of the evidence. *Cornell Glasgow, LLC v LaGrange Properties, LLC*, 2012 WL 6840625, at *9 (Del. Super. Dec. 7, 2012) (Slights, J.). As fact finder, the Court must weigh the evidence and assess the credibility of witnesses. *Id*. In weighing witness credibility, the Court may consider several factors, including: the believability of each witness; each witness's means of knowledge; the reasonableness or unreasonableness of the testimony; any bias, prejudice or interest of the witness; and, the witness's manner or demeanor upon the stand. *Id*. (citing *Dionisi v. DeCampli*, 1995 WL 398536, at *1 (Del. Ch. June 28, 1995 (Steele, V.C.)). The Court attempted to reconcile the testimony in order to "make one harmonious story of it all." *Dionisi*, 1995 WL 398536, at *1. To the extent the Court could not reconcile the testimony, it "gave credit to that portion of testimony which, in [the Court's] judgment, was most worthy of credit and disregarded any portion of the testimony which in [the Court's] judgment, was unworthy of credit." *Id*. For the sake of brevity, if the Court does not address testimony or a document in evidence, that is because the Court has deemed that evidence unpersuasive or immaterial to its findings.

manufacture and sale of various products to providing financial services.[4] In December 2005, Textron's board of directors resolved to sell its fastening manufacturing segment, Textron Fastening Systems ("TFS"), in order to advance its portfolio strategy of divesting non-core manufacturing businesses.[5] Headquartered in Michigan, TFS provides fastening systems to several industries around the globe.[6] In 2005, TFS's revenue approximated $1.8 billion.[7]

Textron had several people involved in the TFS transaction. At the top was Jack Curran ("Curran"), Esquire, vice president of mergers and acquisitions at Textron, who was "in charge of the [TFS] deal."[8] David Stonestreet, senior tax attorney of the TFS segment, negotiated the tax provisions in the TFS sale contract and advised Textron as to the tax implications after TFS was sold.[9] Andrew Spacone ("Spacone"), Esquire, Textron's senior associate general counsel, did not participate in TFS's sale, but was responsible for the post-sale indemnification payment process.[10]

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[4] *Textron,* 2011 WL 1326842, at *1.
[5] *Id.*; Joint Tr. Ex. ("JX") 13, 15.
[6] JX 13.
[7] *Id.*
[8] Apr. 24, 2013 Tr. Tans. ("Day I Tr. Trans.") 94:11-15; Apr. 25, 2013 Tr. Trans. ("Day II Tr. Trans.") 9:18-23 ("Jack Curran, as vice president of mergers and acquisitions was primarily responsible for all aspects of the transaction, including any negotiations that took place during the transaction.").
[9] *See* Stonestreet Depo. Trans. 30:8-24, 31:3-10, 79-81; Day I Tr. Trans. 95:3-11.
[10] Day II Tr. Trans. 4:6-7. Spacone's duties involved "overseeing and managing part of Textron's insured and uninsured litigation" and acting as "crisis manager." *Id.* 4:9-11. In regard to the TFS sale, Spacone's duties also included "making sure that Acument [] compl[ied] with the [PSA]" and overseeing the indemnification payment process. Day II Tr. Trans. 33:8-19.

2. Platinum Equity

PE is a global firm "specializing in the merger, acquisition, and operation of companies that provide services and solutions to customers in a broad range of business markets[….]"[11] Founded in 1995, PE is headquartered in Los Angeles, California and "has acquired more than 60 businesses with more than $13 billion in aggregate revenue."[12] PE recognized TFS as the ideal acquisition to expand its own manufacturing portfolio with a highly respected brand.[13]

PE's Johnny Lopez ("Lopez"), executive vice president of mergers and acquisitions, initiated negotiations with Textron and maintained a negotiating relationship with Curran.[14] Dan Krasner ("Krasner"), Esquire, vice president and assistant general counsel at PE, negotiated the transaction's terms with Curran.[15] Marc Yassinger, ("Yassinger"), Esquire, PE's director of mergers and acquisitions, was also involved in negotiating certain provisions.[16]

B. The Negotiations

Curran's first step in divesting TFS was to hire J.P. Morgan Securities, Inc. ("J.P. Morgan") and Rothschild, Inc. ("Rothschild") to identify potential buyers, and the Skadden, Arps, Slate, Meagher & Flom, LLP ("Skadden") law firm to draft

[11] *Id*.
[12] *Id*.
[13] JX 2.
[14] *See* JX 2.
[15] *See* Apr. 26, 2013 Tr. Trans. ("Day III Tr. Trans.") 102:10-16.
[16] *See id.* at 4:11-18.

documents and assist in the sale process.[17] With the help of several specialists, Skadden attorneys wrote a seller-friendly "bid draft" to be used as Textron's proposed purchase agreement, which was supplied within the data room for potential buyers to review and comment.[18] Merger and acquisitions partners, Margaret Cohen, Esquire, and Lou Goodman, Esquire, led the process from drafting Textron's proposed agreement to closing the deal with a buyer.[19] Textron's in-house counsel Stonestreet and Mike Cahn, Esquire, also participated in the negotiations.[20]

The TFS sale was a competitive auction involving two stages.[21] In the first stage, potential buyers expressed interest and negotiated a nondisclosure agreement with Textron.[22] Upon signing the nondisclosure agreement, the potential buyer was

[17] Day I Tr. Trans. 17:2-9; 22:8-12.
[18] *See* May 30, 2013 Tr. Trans. ("Day IV Tr. Trans.") 128:18-22.
[19] *See* Day IV Tr. Trans. 119:16-123. At the time, Cohen was the most senior non-partner working on the transaction.
[20] *See* JX 4 (teleconference notes, listing Mike Cahn as Textron's representative). Stonestreet's level of participation is hotly contested. Textron refers to Stonestreet as "a mid-level tax lawyer." Pltf. Op. Br. 10; *but see* Apr. 25, 2013 Tr. Trans. ("Day II Tr. Trans.") 19:23-20:17 (Textron witness admitting "Stonestreet had some involvement with the [Tax Benefit provision] of the PSA"). Acument refers to Stonestreet as "Textron's own primary negotiator of the Tax Benefit Offset provision." Deft. Post-trial Br. ("Deft. Op. Br."), Trans. ID 53264266, at 1-2. Stonestreet, as Senior Tax Attorney for the TFS segment, was moderately involved in the PSA negotiations and heavily involved in TFS's post-closing tax problems. Even though Stonestreet admitted he was "fired" from Textron after approximately 23 years, he did not appear to be a hostile witness. One witness described Stonestreet as a "non-linear" thinker and hard to understand. Day II Tr. Trans. 22:4-12. While that appears to be an accurate characterization, Stonestreet's testimony, while frustrating to all counsel, was clearly meant to address the questions posed. The Court found Stonestreet to be a difficult, yet forthright and otherwise credible, witness. *See infra*, section IV.C.2.b.i. Stonestreet.
[21] Day I Tr. Trans. 22:18-23:15.
[22] *Id*. 22:18-21.

given access to the data room, which enabled the prospective buyer to diligently assess TFS's business and finances.[23] After potential buyers completed due diligence, Textron selected the potential buyers which it "believe[d] offer[ed] a good value, and a good chance of closing a deal."[24] Once Textron selected its potential buyers, the bid draft was placed into the data room and the second stage of the auction commenced.[25] This process allowed Textron to evaluate and compare competing offers.[26]

The parties' dispute here centers on one clause and its related definition that appeared in the original bid draft:

> 6.1(d) Limitation of Liability. The obligations and liabilities of [Textron] and Purchaser under Sections 6.1(b) and (c), respectively, shall be subject to the following additional limitations: [...] (iii) Each Loss […] shall be reduced by (A) the amount of insurance proceeds payable to the Indemnified Party, (B) any indemnification, contribution or other similar payment payable to the Indemnified Party by any third party with respect to such Loss and (C) any Tax Benefit of the Indemnified Party attributable to such Loss [the "Tax Benefit Offset" or "Offset"].[27]
>
> "Tax Benefit" shall mean the present value of any refund, credit or reduction in otherwise required Tax payments, including any interest payable thereon, which present value shall be computed as of the Closing Date or the first date on which the right to the refund, credit or other Tax reduction arises or otherwise becomes available to be utilized, whichever is later, (i) using

[23] *Id*. 22:22-23:14.
[24] *Id*. 23:3-7.
[25] *Id*. 23:12-15.
[26] *Id*. 24:7-14.
[27] JX 151, Obligations after closing at 49.

> the Tax rate applicable to the highest level of income with respect to such Tax, (ii) using the interest rate on such date imposed on corporate deficiencies paid within thirty (30) days of notice of proposed deficiency under the Code, and (iii) assuming that such refund, credit or reduction shall be recognized or received in the earliest possible taxable period (without regard to any other losses, deductions, refunds, credits, reductions or other Tax items available to such party).[28]

PE entered the competitive auction on December 16, 2005, when Lopez sent a letter to J.P. Morgan and Rothschild expressing PE's desire to acquire TFS.[29] On March 10, 2006, Textron placed the bid draft in the data room, at which time PE and other potential buyers simultaneously received the document.[30] Around that same time, PE made initial bid of $900 million.[31]

On March 19, 2006, PE submitted its comments to the bid draft.[32] Textron rejected several of PE's edits, including a change to section 6.1(d)(iii), which eliminated subsection (C) in its entirety.[33] PE believed that section 6.1(d)(iii)(C),

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[28] *Id*. at 64
[29] JX 2.
[30] Pretrial Stipulation and Order, Facts Admitted Without Proof # 6 ("Stip. Fact"), Trans. ID 51799572; JX 151, March 10, 2006 bid draft.
[31] Day I Tr. Trans. 25:1-2; 35:1-9. PE's negotiations were led by Krasner, vice president and assistant general counsel, and Yassinger, PE's director of mergers and acquisitions. *See id.* at 4:11-18; Day III Tr. Trans. 102:10-16. While Krasner clearly handled the bulk of the negotiations, Lopez was somewhat involved, especially in maintaining a working relationship with Textron. *See* JX 8, 11. Krasner testified that Lopez's "primary activities or responsibilities involved evaluating the overall transaction and managing the individuals on the execution team as well as interacting with members of Textron's team." Krasner Depo. Trans. 37:1-5. Lopez was the person who would inform Textron about what PE was willing to pay and on what terms. *Id*.
[32] JX 153.
[33] Day I Tr. Trans. 27:1-17; Stip. Fact #9. PE also submitted comments on March 27, 2006 and April 10, 2006, which did not change the clauses at issue here. JX 154, 164. Yassinger admitted that 6.1(d)(iii)(C) was "very seller friendly." Day III Tr. Trans. 52:13-20; Stip. Fact #9.

the Tax Benefit Offset, was "very seller friendly" because it required a tax offset even when "no actual tax savings [that] year" would occur.[34] PE attempted to edit the agreement to reflect "an actual tax savings provision," meaning that if a deduction was available but could not be used in that tax period, the Tax Benefit Offset would not apply.[35] At no time during the PSA negotiations did either party claim the Tax Benefit Offset was "automatic" or "hypothetical."

Undaunted by Textron's rejection of these edits, the parties continued negotiations.[36] In a March 24, 2006 PE internal email, PE employees reviewed "financial sections" of the draft and listed eleven items at issue.[37] Of those eleven items were price adjustment considerations, workers compensation liability, and environmental and litigation indemnity.[38]

On April 2, 2006, Krasner, Cohen, and Goodman, among others, participated in a teleconference in which several issues were discussed.[39] As to price negotiations, PE advised Textron that it would only consider a downward price adjustment, as its original bid was based on PE's belief it was purchasing a growing business.[40] Textron addressed its concerns that PE's last draft shifted several liabilities onto Textron, including indemnification for litigation,

[34] Yassinger Depo. Trans. 117:1-19.
[35] *Id*.; Day I Tr. Trans. 72:6-9.
[36] Day I Tr. Trans 28:10-29:5, JX 167.
[37] JX 3.
[38] *Id*. ¶¶ 1-6, 10.
[39] JX 4.
[40] *Id*.

environmental and employment-related matters.[41] Intending to "flip" TFS after its acquisition, the parties discussed PE's request to allow assignment of the final purchase sale agreement.[42]

Between the April 2, 2006 teleconference and PE's next draft of the purchase sale agreement, the parties independently documented important negotiating issues, including several that focused on the amount of liability each party was willing to sustain.[43] As to PE, it sought the optimum deal – taking concessions for a lower purchase price; for instance, PE wanted to treat UK pension funding as debt.[44] Consistent with seeking to limit its overall cost, PE continued to seek indemnification on environmental matters, pre-closing restructuring, pre-closing litigation, and certain employee liabilities.[45] Textron believed PE's "one-way purchase price adjustment [was] unacceptable and inequitable,"[46] and Textron did not agree with PE's pre-closing liability shifting or PE's attempt to define items as debt that were not typically viewed as such.[47]

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[41] *Id*.
[42] *Id*.
[43] *See* JX 5, 6, 7.
[44] JX 5 at ¶1.
[45] *Id*. ¶¶ 17-18, 22, 25.
[46] JX 6 ("We are prepared to make the adjustment, two-ways, based purely on change in working capital between that shown on the October 1, 2005 balance sheet […] and the balance sheet as of the closing date [….]").
[47] *Id*.

Eventually, PE submitted an April 20, 2006 draft, which revived the original bid draft's Tax Benefit Offset clause, but deleted and replaced Textron's proposed "Tax Benefit" definition with:

> "Tax Benefit" shall mean the actual tax savings derived by a party from the relevant item in the first taxable year in which an item is properly includible in a tax return. The amount of any such benefit shall be computed by preparing the relevant tax return with and without the relevant item and comparing the tax due in each instance. In the event that the inclusion of the relevant item in first taxable year in which an item is included in a tax return does not result in a reduction in the tax liability of the relevant party, no Tax Benefit shall be deemed to exist even if such item produces a tax savings in a later taxable year.[48]

According to PE, the purpose of rewriting the Tax Benefit definition was to give an actual tax savings and to allow the loss and tax benefit offset to occur in the same year.[49] In addition to drafting the new language, PE drafted section 6.1(b), pre-closing liabilities, requiring Textron to shoulder pre-closing environmental and litigation losses.[50]

[48] JX 167; Stip. Fact #10.
[49] Day III Tr. Trans. 18:1-22.
[50] In an April 22, 2006 document titled "TFS – Open Points," a PE employee charted the deal issues, including "Litigation" and "Environmental," and listed PE's and Textron's position on each item. JX 7. As to "Litigation," PE's position was, "[w]e'll take for [price point] reduction Outstanding litigation; no insurance, we're not taking these;" Textron's position was, "they will retain disclosed litigation." *Id*. As to "Environmental," PE's position was, "[w]e'll take for [price point] reduction," and Textron's position was, "[t]hey will retain pre-close environmental."

On April 25, 2006, Curran emailed Lopez a proposal which Curran believed brought "certainty and clarity" to the agreement.[51] Notably, Curran's proposal listed a net asset value of approximately $674 million dollars.[52] Among the remaining eleven items, Curran noted that Textron felt it was "very important" that PE not have a financing contingency,[53] and agreed that Textron would retain pre-closing environmental and litigation matters.[54] Lopez forwarded the email to PE's CEO, but shortly thereafter, negotiations between Textron and PE ceased and Textron sought its opportunity with another buyer under an exclusivity contract.[55]

In early May 2006, Lopez and Curran again discussed the TFS deal. By May 2, 2006, the purchase price had dropped to $770 million with PE paying £90 million towards UK pensions, but reducing the cost by "debt-like items" and the net asset adjustment.[56] Curran advised PE that he continued to want "clarity and certainty" as to the materiality in the audit, the UK pension liability,[57] PE's

[51] JX 8. Important to the Court and discussed later, Curran often repeats the "certainty and clarity" mantra without explanation or elaboration.
[52] *Id*. ¶ 9 ("The ~$674MM net asset value would be adjusted to exclude the "debt like" items and other agreed upon items to calculate an adjusted net asset value as of October 1, 2005.").
[53] *Id*. ¶ 2.
[54] *Id*. ¶ 10 ("Textron would retain the environmental liability for pre-closing issues and for scheduled litigation issues and the removal of the reserves identified on the October 1, 2005 balance sheet from the closing date balance sheet would increase the net asset value as of the closing date.").
[55] Day I Tr. Trans. 31:9-21; Stip. Fact #11.
[56] JX 9.
[57] *Id*. ¶ 3 ("[Textron] want[s] us to take the entire liability and pay based on the UK Pension Regulatory schedule (e.g. possible [PE] could have to pay $90M at close)").

financing contingency,[58] TFS's reserves, debt-like item liability, and indemnity for litigation and environmental matters.[59]

On May 4, 2006, Lopez emailed Curran a comprehensive proposal, offering $630 million for TFS, while making several concessions on PE's behalf.[60] Lopez admitted that PE's proposal "shifted considerable risk to [PE]," but believed the proposal brought the "full clarity and certainty" that Curran wanted.[61] Among the proposed items, PE agreed to Textron's "definition of traditional 'indebtedness'" and assumed debt-like liabilities,[62] accepted the UK pension liability up to £52.2 million,[63] removed the financing contingency,[64] and addressed several "Net Asset Adjustment" items.[65] Around May 18, 2006, Textron's negotiations with the other potential buyer ended.[66] Textron then supplied PE with a new purchase agreement (the "May 18 draft") and gave PE a short time to conclude the transaction.[67]

[58] *Id*. ¶ 4 ("[Textron] want[s] it out of the Purchase Agreement").
[59] *Id*. ¶ 7 ("[Textron] want[s] us to pay more for full indemnity"). These items of negotiation are important to remember because Textron later boasts an argument based upon concessions made during this time that Textron asserts effected the final sale price.
[60] JX 11.
[61] *Id*.
[62] *Id*. ¶ 1 ("This eliminates any deductions from the purchase price (other than easily quantifiable items such as capital leases and bank indebtedness), gives [*sic*] Textron full certainty on the purchase price.").
[63] *Id*. ¶ 2.
[64] *Id*. ¶ 3.
[65] *Id*. ¶ 4.
[66] Stip. Fact #12. Curran testified that Textron "ran into issues with the second buyer with respect to terms of the agreement, [and] value." Day I Tr. Trans. 32:23-33:4.
[67] Stip. Fact #12.

Some time before May 24, 2006, PE informed Textron that it accepted the May 18 draft without edits.[68] Importantly, the May 18 draft contained substantially similar Tax Benefit Offset language and the exact same Tax Benefit definition as the original bid draft.[69] Krasner testified that he discussed the Tax Benefit definition with Cohen, and Cohen remarked that if PE were to receive a tax benefit, then it would be unfair for Textron to pay full indemnity.[70] Krasner conceded the point because he believed the provision was "fair."[71]

Notably, Curran testified that the Tax Benefit Offset acted as a "sharing" mechanism between the parties.[72] In an inarticulate fashion, Curran related the Tax Benefit Offset to his desire to avoid reviewing PE's tax returns and to avoid arguing with PE on pertinent tax law.[73] Curran claimed that the Tax Benefit

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[68] Stip. Fact # 13.
[69] Stip. Fact #8.
[70] Day III Tr. Trans. 109:12-18. The Court notes that Cohen denied discussing the Tax Benefit definition with Krasner. *Id*. 129:16-20. Cohen testified that any discussion regarding a specialized area, such as tax, would not have been conducted without tax counsel present. *Id*. 125-126. That said, one of the few pieces of evidence regarding negotiations lists Cohen and Goodman as participants in an April 2, 2006 teleconference with Krasner, PE's counsel, and Mike Cahn, in-house counsel for Textron. JX 4. The conference call notes do not list any specialized counsel, even though specialized areas were discussed. *Id*. While Cohen may not recall any conversation with Krasner in which Cohen referred to the Tax Benefit definition as "fair," it is possible such a discussion took place. In any event, Cohen admitted she directly negotiated provisions with Krasner, making the possibility of a tax provision discussion even more likely. *See* Day IV Tr. Trans. 132:8-16. Cohen testified that she conducts approximately four merger and acquisition transactions per year and, understandably, cannot recall specific conversations. *See Id*. 133:1-23, 137:22-23. Based on this evidence, the Court believes it is more probable than not that a discussion regarding the Tax Benefit definition took place between Cohen and Krasner.
[71] *Id*.
[72] *See, e.g.*, Day I Tr. Trans. 13:2-7, 16:8-15, 20:19-21:4.
[73] *Id*. 16:9-11; *but see* Stonestreest Depo. Trans. 76:2-77:16.

definition functioned "to bring clarity and certainty to this whole concept of tax benefit."[74] Based on the Tax Benefit definition's language, "assuming that such refund, credit, or reduction shall be recognized or received in the earliest possible taxable period,"[75] Curran testified that he believed and intended the Tax Benefit Offset acted as a "sharing provision [that] brought to us [] that clarity and certainty that we required."[76]

The May 18 draft was the final version that the parties executed on May 31, 2006.[77] The named purchaser was TFS Acquisition Corporation, wholly owned by PE affiliates.[78] After the sale closed, TFS Acquisition Corporation changed its name to Acument Global Technologies, Inc.[79]

The TFS sale involved entities in approximately 25 countries.[80] All non-U.S. entities were acquired through stock purchases.[81] As part of the deal, Textron

[74] *Id*. 15:18-20.
[75] PSA 8.1 "Tax Benefit" definition, at 89.
[76] Day I Tr. Trans. 16:8-15. Curran consistently testified that the provision brought "clarity and certainty," and indeed, that is consistent with his negotiations. *See e.g.*, 15:18-20, 16:8-14, 18:15-16, 18:20-22, 30:23-31:3, 31:14-15. The Court appreciates Curran's consistency, but notes that this vague claim of "clarity and certainty" simply begs the question: clarity as to what? Curran testified that he did not want to go through the buyer's tax returns, but he still fails to address the problem. He could have testified that it was to clarify that it was a "sharing provision" and was "automatic," but he did not. And, even if he did, his own undisclosed intentions have little bearing at this point. To the Court, Curran skirts the issue by ambiguously (and repeatedly) describing his own intention for "clarity and certainty" without explaining what that meant. Based on that, Curran's testimony as to the Tax Benefit Offset's purpose is unpersuasive.
[77] Stip. Fact #13, 14.
[78] Stip. Fact # 15.
[79] Stip. Fact # 19.
[80] Day III Tr. Trans. 22:19-21.
[81] *Id*. 22:21-23:4.

reorganized TFS's U.S. subsidiaries by transferring assets into limited liability companies, which then sold membership interests to TFS Acquisition/PE.[82] The U.S. entities were then purchased as single member LLCs treated as disregarded entities[83] or entities with section 338(h)(10) elections,[84] both of which are considered a "deemed asset sale."[85]

The deal closed on August 11, 2006.[86] In the end, the parties agreed to several indemnifications, including:

> 4.6(h) Indemnification by [Seller] [Seller] shall indemnify Purchaser from and against and in respect of any and all Losses incurred by Purchaser, which may be imposed on, sustained, incurred or suffered by or assessed against Purchaser, directly or indirectly, to the extend relating to or arising out of: (i) any liability for Taxes imposed on any of the FS subsidiaries as members of the "affiliated group" […]; (ii) any liability for Taxes imposed on any of the FS Subsidiaries for any taxable year or period that ends on or before the Closing Date […]; (iii) any liability, or increase in a liability, for Taxes imposed on Purchaser or any of its Affiliates as a result of any failure by Parent to perform or comply with its obligations under this Section 4.6 [Tax Matters].[87]

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[82] Day I Tr. Trans. 10:15-11:8.

[83] "A [disregarded entity] is a also [*sic*] a separate entity, which for tax purposes is ignored. If you're selling a disregarded entity the seller is selling an entity but for tax purposes is treated as selling all of the assets along with all of the liabilities going to the purchaser." Pltf. Expert Stephen F. Gertzman, Esquire, Day II Tr. Trans. 179:14-19.

[84] I.R.C. § 338(h)(10).

[85] Day III Tr. Trans. 22:21-23:4; Stip. Fact # 18. As a "deemed asset sale" in the U.S., Acument cannot deduct any indemnity payments made by Textron. *See* Day IV Tr. Trans. 77:22-78:12, 101:2-5.

[86] Stip. Fact # 17.

[87] PSA § 4.6(h), at 42. "'Taxes' shall mean any and all taxes, including any interest penalties, or other additions to tax that may become payable … [contains a non-exclusive list of examples]." PSA 89. "'Losses' of a[n Entity] shall mean any and all actual losses, liabilities, costs and expenses (including reasonable attorneys' fees and costs of investigation) […]" PSA 84.

> 6.1(b) Indemnification by [Seller] […] from and after the Closing Date, [Seller] shall indemnify Purchaser […] from and against and in respect of any and all Losses incurred by Purchaser […], which may be imposed on, sustained, incurred or suffered by or assessed against Purchaser … directly or indirectly, to the extent relating to or arising out of: (i) any breach of any of the representations or warranties of [Seller…] pursuant to Section 5.2(c) […]; (ii) any failure by [Seller] to perform or comply with its covenants and agreements contained in this Agreement […]; (iii) any Losses of the FS Business or any of the FS Subsidiaries related to any Remedial Work for pre-Closing Releases of any Hazardous Substance ("Environmental Losses") […]; (iv) any Litigation proceeding pending as of the date hereof […] ("Retained Litigation"); […].[88]
>
> 6.1(d) Limitation of Liability The obligations and liabilities of [Seller] and Purchaser under Sections 6.1(b) and (c), respectively, shall be subject to the following additional limitations: […] (iii) Each Loss (including Losses for which indemnification is required pursuant to Section 4.6) shall be reduced by (A) the amount of any insurance proceeds received by the Indemnified Party, (B) any indemnification, contribution or other similar payment paid to the Indemnified Party by any third party with respect to such Loss and (C) any Tax Benefit of the Indemnified Party or any of its Affiliates attributable to such Loss.[89]

There is no doubt that this transaction was even-handed. Both Textron and PE have vast in-house mergers and acquisitions knowledge and experience, evidenced by the parties' own in-house groups. Moreover, Textron's Curran and

[88] PSA § 6.1(b)(i)-(iv), at 67.

[89] PSA § 6.1(d)(iii), at 69. "Tax Benefit" is defined *supra*, in pertinent part, "shall mean the present value of any refund, credit or reduction in otherwise required Tax payments […] and (iii) assuming that such refund, credit or reduction shall be recognized or received in the earliest possible taxable period (without regard to any other losses, deductions, refunds, credits, reductions or other Tax items available to such party[ )]." PSA 89.

PE's Krasner and Yassinger all have extensive experience in mergers in acquisitions.[90] It is clear that the parties wanted to close the deal.[91] While some issues were deal breakers (i.e., financing contingencies, price adjustments, and certain liabilities), other terms were not "material" enough to warrant scrutiny during the negotiation period.[92] Like several deals of this magnitude, language that "seem[s] so esoteric and irrelevant"[93] can cause problems down the road.

C. Post-closing Problems

By December 2006, pre-closing liabilities started adding up, especially in Brazil. At this point, the individuals involved slightly shifted, and there were now three entities involved: Textron, PE, and Acument. PE was still behind the scenes with Krasner and Yassinger.[94] Curran and Stonestreet continued to work on TFS problems, with Spacone, Textron's senior associate general counsel, now entering the picture.[95] John Clark ("Clark"), Esquire, transitioned from executive vice

[90] *See* Curran Depo. Trans., Vol. I, 16:6-10; Day III (Yassinger) 5:14-18; Krasner Depo. Trans. 23:23-24:10.
[91] Krasner Depo. Trans. 143:2-5.
[92] *See* Krasner Depo. Trans. 143:12-144:10; Yassinger Depo. Trans. 125:4-13.
[93] JX 34.
[94] Yassinger testified that after closing, Acument's management handled day-to-day matters. Day III Tr. Trans. 59:16-60:13. Until the "Brazil matter popped up," Yassinger was not involved with Acument's post-closing dealings. *Id*.
[95] Day II Tr. Trans. 4:6-7. Spacone's duties involved "overseeing and managing part of Textron's insured and uninsured litigation" and acting as "crisis manager." *Id*. 4:9-11. In regard to the TFS sale, Spacone's duties also included "making sure that Acument [] compl[ied] with the [PSA]" and overseeing the indemnification payment process. Day II Tr. Trans. 33:8-19. The Court finds Spacone's testimony regarding the PSA's meaning is unpersuasive because Spacone was not a party to the negotiations and any knowledge he has regarding the PSA's meaning stems from Curran or Stonestreet. *See* Day II Tr. Trans. 18:20-19:4.

president and general counsel of TFS to the same title for Acument. Dan Modrycki ("Modrycki"), CPA, joined Acument in May 2007 as tax director.[96]

From this point on, the evidence at trial makes clear there was a general misunderstanding between the parties as to the meaning and operation of the Tax Benefit Offset. Correspondence between the parties fails to clearly support either party's instant position on this point, and the evidence establishes that each side suffered from a lack of "clarity," using "hypothetical tax rate" and "hypothetical tax benefit" interchangeably, although each term has a very different meaning.[97]

The confusion set in not long after the parties signed the PSA. Textron "mistakenly" paid approximately $500,000 in indemnity payments, directly to the beneficiary, without the Tax Benefit Offset.[98] Clearly noticing an issue, on December 26, 2006, Stonestreet emailed Spacone and advised, "[w]e should consider whether any part of each Loss suffered by TFS do [*sic*] Brazil could result in a tax deduction or credit."[99] That same day, Stonestreet sent another email to Spacone, discussing for the first time, a "hypothetical tax benefit."[100] It is important to note that the first use of "hypothetical" came from Textron's

[96] Day IV Tr. Trans. 67:4-9.
[97] *See infra*, fn. 292.
[98] *See* Day II Tr. Trans. 152:4-21. Spacone accepts responsibility for this "oversight." *Id.*
[99] JX 18 ("For example, payments related to product liability, employee compensation or any interest required … would give rise to a tax deduction. Other items, including certain foreign corporate income or value added taxes, give rise to a tax credit rather than a deduction.").
[100] JX 19 ("[PE] wanted to reduce the tax benefit language with a cut-off of 3 years (arguing they didn't expect to pay tax and planned to flip the business promptly), however we resisted that also and we ended up with our language based on a hypothetical tax benefit.").

Stonestreet, because he was the key player in defining the Tax Benefit Offset's function.

On January 4, 2007, Textron employee Brian Swiszcz ("Swiszcz") sent an internal email to Stonestreet and Stonestreet's boss, Norm Richter, among other employees.[101] Addressing several issues relating to a TFS Mexican subsidiary, Swiszcz wrote:

> David Stonestreet, who was the Textron tax attorney and primary tax contact on the [TFS] deal, has advised that Textron is responsible for the subject bond fee as a cost related to the tax Liability. We have communicated to TFS/[PE] that we believe we are only required to indemnify them net of tax benefit (i.e., FlexMex would be entitled to a tax deduction for the bond posting fee).[102]

Another Textron employee forwarded this email to Curran the next day.[103]

As mentioned previously, Acument Brazil's liabilities were accumulating. At the time of closing, the Brazil entity carried well over [REDACTED] in net operating losses ("NOLs").[104] That meant that Acument Brazil had tax deductions carrying over for several years. While Acument Brazil could get other deductions, it could not use them until the NOLs were gone.[105] Because Acument could not *use* the tax deductions it received from indemnified Loss payments, Acument did not

[101] JX 20; Stonestreet Dep. Tr. 24:4-6.
[102] JX 20.
[103] *Id*.
[104] Day III Tr. Trans. 36:7-20.
[105] *Id*.

want to pay Textron for them.[106] Acument fought Textron on this point, claiming that because Acument could not "recognize" a tax savings, it should not have to pay the Tax Benefit Offset.[107] This context is important in understanding the next correspondence.

On January 25, 2007, Spacone sent a letter to Clark "for settlement purposes only," with a "Retained Litigation" subject line (the "January 25 letter").[108] Spacone's January 25 letter addresses four items of contention: (1) the indemnification payment process; (2) Textron's settlement authority; (3) Tax Benefit reductions; and (4) Post-closing settlement taxes on pre-closing liabilities.[109] As to the indemnity payment process, Textron had paid settlements directly to the holder, in contradiction of the PSA;[110] Spacone took "responsibility for not clearly understanding how" the indemnification worked.[111] Spacone also stated that Textron would make payments directly as an "accommodation" to Acument on a case-by-case basis.[112]

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[106] *Id*.
[107] *Id*. 137:15-23; 141:3-11.
[108] JX 21, 22. The January 25 letter is important because the parties relied on it from the date of its creation through October 2007, when the parties executed the Letter Agreement.
[109] *Id*.
[110] *Id*.; PSA § 6.1(b).
[111] JX 21.
[112] *Id*. Because Aucment's cash flow was drastically less than Textron's, Acument asked Textron to cover large payments directly. *Id*.; Day II Tr. Trans. 45:5-9.

As to the Tax Benefit problem, Spacone queried: Are indemnity payments reduced by the Tax Benefit?[113] Answering his own question, Spacone wrote, "[y]es, any indemnity payment Textron is required to make is reduced by the Tax Benefit, whether or not Acument actually saves taxes.[114] Elaborating, Spacone noted,

> [Textron has] taken a close look at the section and the related definitions and we conclude that Acument is not required to actually save taxes for the reduction to kick in. When this provision refers to a "Tax Benefit" the definition makes it clear that this is a hypothetical benefit rather than a benefit actually realized at any point in time.
>
> There is no mention in the provision that Acument must actually recognize a tax benefit.[115]

Notably, the above language makes two claims: (1) the Tax Benefit Offset applies regardless of Acument's actual tax savings, and (2) the Tax Benefit Offset is "hypothetical" rather than a "benefit actually realized at any point in time." Spacone then reiterated that the benefit does not require that "Acument [] actually recognize a tax benefit."[116]

[113] JX 21.
[114] *Id.*
[115] *Id.*
[116] *Id.*

The Court finds a few items of correspondence sent during March 2007 require consideration at this juncture.[117] First, Spacone sent an email to Acument France regarding a Retained Litigation matter.[118] In that email, Spacone directed the recipient that "under Section 6 of the [PSA] Acument is obligated to reduce any Losses by any benefits which it receives," and "any judgment or settlement is reduced by the 'actual tax benefit' which Acument would obtain from the deduction."[119] Next is a March 19, 2007 email thread between Curran and Krasner regarding the Tax Benefit Offset in Mexico,[120] in which Krasner responded to Curran's inquiry, stating "re: Items 3 and 4 from [Spacone's] Jan 25 letter: I believe your position is correct re: application of Tax Benefit and this "credit" should be applied going forward."[121]

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[117] Spacone also sent a March 15, 2007 email to Clark regarding indemnity payments Textron made without applying the Tax Benefit Offset. JX 25. Spacone requested reimbursement from Acument for these payments.

[118] JX 24. The email opens with, "I have discussed [the current issue with] Skadden …" Although Skadden informed Spacone that the PSA did not address his immediate problem, Spacone represented that Skadden's opinion was:

> if Textron is responsible for any Losses arising from Retained Litigation […] it is only fair that Textron should get any recoveries arising from the matter as an offset [….] This is consistent with the […PSA….]

The above language conforms with Krasner's testimony regarding his conversation with Cohen – a Skadden attorney – during negotiations, i.e., that the provision is "fair." *See* Day III Tr. Trans. 109:12-18.

[119] JX 24.

[120] JX 26. Curran emailed Krasner asking for updates on several items, including "Tax calls with Mexico people."

[121] *Id*.

By April 2007, the unresolved tax issues clearly agitated Spacone, because he sent an email to Clark decrying Acument Brazil's management's refusal to pay the Tax Benefit Offset.[122] Clark responded that he was aware problems continued, but advised that Curran and Krasner were attempting to work them out.[123] In May 2007, the parties' problems continued, although they believed they had an agreement as to the Tax Benefit Offset's application.[124] At this point, the parties believed there was an agreement, and Textron asserted it had a "good position."[125] Still (and unfortunately), neither party articulated what the "agreement" or "position" was.

On June 1, 2007, Yassinger, Krasner, and Clark exchanged what has become known as the "Captain Cavemannnnnn!!!" email.[126] In response to a Retained Litigation list of issues sent by Spacone, Clark emailed Krasner, asking: Can we claim that we should not have to deduct any presumed tax benefits since in reality

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[122] JX 27.
[123] *Id.*
[124] JX 29. Curran wrote to Krasner:

> I believed the tax benefit we have agreed. The remaining issue is the tax related to the settlement of various social security items. I believe under the tax section of [the PSA] we have a reasonably good position on these issues. I suggest we split them 50/50. We also need your payment for the tax benefit of prior payments [….]

Krasner forwarded the 50/50 proposal to Clark and asked for his position and whether or not Clark knew "the magnitude of the amounts at issue." Clark responded that the 50/50 split was "a stretch" on Textron's part and he would hate to agree.
[125] *See* JX 30.
[126] JX 34.

there is no benefit?[127] Krasner forwarded this email to Yassinger, asking his advice regarding Brazil's NOLs.[128] In response, Yassinger attached section 6.1(d)(iii) of the PSA and the related Tex Benefit definition, noting:

> The very situation we didn't want to be in and unfortunately, we caved on this issue [*sic*]. [….] Note for the next time, these words in a purchase agreement that seem so esoteric and irrelevant do on occasion become operative. I know it is a package negotiation, but we need to call the other side's bluff sometimes where we know it will not cause the deal to fall apart. [….] Of all countries, Brazil is the last place we need more tax deductions.

After calling Yassinger "Captain Caveman," Krasner wrote, "[t]hat language is pretty clear."[129]

As June 2007 progressed, Spacone continued to request reimbursement of the Tax Benefit Offset on payments Textron made directly to beneficiaries. In a June 22, 2007 email to Clark, Spacone wrote that he "thought [the parties] resolved the hypothetical tax issue but were uncertain what the rate was in Brazil[.]"[130] Additionally, Spacone reminded Clark that Textron still had not been reimbursed Loss payments made without the Tax Benefit Offset, and that going forward, Acument was to pay directly, then invoice Textron net the Tax Benefit Offset.[131] Clark responded that the two were "basically in synch," but informed Spacone that

[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] JX 35.
[131] *Id.*

the indemnification payment Textron made directly to the beneficiary, reflected as income to Acument.[132] Because the payment was reflected as income, it resulted in a tax penalty against Acument.[133] Acument did want to pay Textron the Tax Benefit Offset on an indemnified Loss that resulted in a tax penalty.[134] Spacone responded that Textron made the payments per Acument's request "pending resolution of the hypothetical tax rate issue resolution."[135] Put simply, Spacone informed Clark that despite Acument's negative tax implication, the PSA required Acument to pay Textron the tax benefit on payments made.[136]

On June 28, 2007, Stonestreet sent Spacone an internal memo "explaining the Brazilian tax rate used to compute the Tax Benefit."[137] After setting forth the Tax Benefit definition, Stonestreet explained:

> The calculation of the Tax Benefit pursuant to the [PSA's definition] is hypothetical, rather than based on the actual situation of the Indemnified Party or Affiliate in any year. Specifically, in response to your question, we are required to use the Tax rate "applicable to the highest level of income"

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[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.* Spacone closed the email claiming he would not be surprised if Acument determines Brazil's "hypothetical tax rate" to be higher than 25 percent. Three days later, Clark responded to an email regarding Retained Litigation, which included Spacone as a recipient and indicated that "Textron will repay [Acument] net of the tax advantage we receive." JX 36. There is no response to this email in the record. Expanding on JX 36, also on June 25, 2007, Textron employee Larry LaSala emailed Clark, copying Spacone, regarding the German Müller settlement. JX 39. In that email, LaSala "assume[s the Müller settlement] will be handled the same way – namely, Acument Germany will pay the amount in advance and the Textron will repay Acument net of the tax advantage Acument receives." *Id.*
[137] JX 41.

> rather than the actual marginal or average rates paid. This rule is administratively convenient and reduces the hassle of the parties having to review tax returns and track audit changes over an unlimited period.[138]

Here, Stonestreet, the "person in the front" during negotiations on the PSA tax provisions[139] and the person overseeing the implementation of the Tax Benefit Offset after closing, referred to the Tax Benefit *calculation* as "hypothetical."[140]

Stonestreet testified that the Tax Benefit rate was "hypothetical" based on the parties' agreement to use the rate of the highest level of income in each applicable jurisdiction.[141] Stonestreet clarified that the "hypothetical" rate assured convenience because "one's [actual] rate goes up and down, depending upon the level of one's income,"[142] which would require Textron to review Acument's tax returns to determine the applicable tax rate.[143] Reinforcing the "hypothetical" nature, Stonestreet testified that setting the rate at a "hypothetical" level (which

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[138] *Id*.

[139] Stonestreet Depo. Trans. 31:3. Textron asserts that "the term 'hypothetical tax benefit rate' is a misnomer; the rate itself is not hypothetical but set at the highest effective tax rate of the jurisdiction in which the liability arose." Pltf. Proposed Findings of Fact, at 14 (*citing* Spacone's trial testimony, Day II Tr. Trans. 55:13-56:11). Textron's argument on this point is faulty in two respects: (1) it is blatantly contradicted by Stonestreet, the person involved in the negotiation of the PSA tax provision and Textron's own senior tax attorney, and (2) Spacone's testimony regarding the PSA's meaning is not reliable because he was not involved in the agreement's drafting or negotiations. *See* Day II Tr. Trans. 18:20-19:4.

[140] Other correspondence expands on the use of "hypothetical tax rate," including: JX 43 (Spacone emails Clark a list of "open issues," noting (1) "[h]ypothetical tax rate for Brazil, and (2) "[a]pplication of hypothetical tax rate to environmental loss payments," "loss payments for environmental are treated the same as Retained Litigation"); JX 44 (Spacone emails Clark on July 31, 2007, "[…]we would like to pay these invoices next Monday, and reserve out rights to recover the amount attributable to the hypothetical tax rate as part of your negotiations").

[141] Stonestreet Depo. Tran. 76:

[142] *Id*. 77:20-22.

[143] *Id*.

was based upon the applicable jurisdiction's actual law) was simple and convenient for the parties because it would permit Textron to avoid reviewing Acument's tax returns or monitoring Acument's audits and tax litigation.[144]

D. The Open Issues Summary and Letter Agreement

Through October 2007, the parties sought to resolve their "hypothetical tax rate" and Tax Benefit Offset disputes.[145] Using his January 25 letter as a basis, Spacone drafted a document titled, "Acument Open Issues Summary as of October 9, 2007" (the "Open Issues Summary").[146] Spacone testified that his Open Issues Summary represented "a joint acknowledgement" as to what the remaining issues were and "what major understandings [the parties] had achieved."[147] Notably, Textron does not claim that either Krasner or Yassinger were informed about this

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[144] *Id*. 76:16-77:16.

[145] Day II Tr. Trans. 41:13-15.

[146] JX 52; *see* Day II Tr. Trans. 39:19-40:11. The parties also refer to this document as "Andrew's Open Issues Summary." The preface to the summary reads:

> Acument has agreed the [PSA] provides that for any Textron indemnification obligations, Acument pays first, and then invoices Textron less any offset for the hypothetical tax benefit. Textron will consider on a case by case basis, as it did in DHB and Guillort, advancing its share of any significant payments less the tax offset as an accommodation to Acument.
>
> Also, there still appears to be confusion at Acument-Brazil on this process, as well as the issues discussed below. This situation needs to be corrected soon.

[147] Day II Tr. Trans. 42:7-9. Spacone further testified that the Open Issues Summary "was the next logical step in the process" of resolution. *Id*. 42:10-13. Curran testified that the Open Issues Summary was a "piece of paper so that we made sure we were discussing what both parties believed were the open issues." Day I Tr. Trans. 46:7-14.

document prior to this litigation.[148] While that could be innocuous because both Yassinger and Krasner were PE executives and Acument's own executives ran the day-to-day operations, the fact remains that Krasner and Yassinger negotiated the PSA, had first-hand knowledge regarding its meaning (as opposed to Spacone and Clark), and both Yassinger and Krasner were involved with Acument's post-closing problems. Moreover, the Court notes that the Open Issues Summary is an unsigned document that was drafted solely by Spacone.[149]

The Open Issues Summary set forth the few disputes the parties had previously resolved: (1) that Acument paid indemnity obligations first, then billed Textron net the Tax Benefit Offset (although the Tax Benefit Offset's application was still in dispute); (2) the Tax Benefit Offset was calculated by the highest income level percentage within the jurisdiction that the liability arose; and (3) interest rates in all countries except Brazil. Additionally, Spacone highlighted five issues that were still in dispute: (1) "Money owed by Acument" [listing Brazilian, French, German, and U.S. matters "that were not tax affected"]; (2) "Hypothetical tax rate for Acument locations;" (3) "Social security/income tax on

[148] Spacone emailed Clark various outlines "of how [Spacone saw] this all coming together." *See* JX 33, 42, and 43. While Spacone emailed his various versions of outstanding issues to Clark, Curran and Stonestreet, he did not email Krasner, despite one email's acknowledgment that the issues were "subject to finalization between [Curran] and [Krasner]." JX 33.
[149] Day II Tr. Trans. 132:21-133:1.

Labor/Employment Cases;" (4) "Tax Issues;" and (5) "Other."[150] Important here, number four "Tax Issues" recites, in pertinent part:

> b. Any tax liability payments [judgments; settlements] Textron is required to make, which <u>are tax deductible to Acument</u> [e.g., non-income tax such as PIS & COFINS], are offset by the 34% hypothetical tax rate.
>
> 1. and Acument pays first and bills Textron less 34%
>
> c. For judicial deposits or appeal bonds relating to tax proceedings, the same process as above applies if they are deductible: Acument pays the deposit and bills Textron less 34%, but for significant matters.[151]

Notably, Textron concedes that "tax liability payments […] which <u>are tax deductible to Acument</u> are offset by the 34% hypothetical rate."[152]

The next day, Curran emailed Clark, seeking to "conclude" the Open Issues Summary's section 4.b, detailed above.[153] Curran testified that the language in section 4.b was inserted at Acument's request[154] and that the section was an accommodation made by Textron.[155] While Curran attempted to prescribe Textron's "accommodation" to only deductible non-income taxes during his testimony,[156] the Open Issues Summary issue that he sought to conclude only listed

[150] JX 52.
[151] *Id*. at 4 (emphasis in original).
[152] *Id*. (emphasis in original).
[153] JX 56; Day I Tr. Trans. 147:12-15.
[154] Day I Tr. Trans. 147:23-148:7.
[155] *Id*. 154:9-15 (Curran testified that Textron did not agree that the PSA required a tax benefit offset for non-income taxes only if the non-income taxes were deductible).
[156] *Id*. 49:5-50:14.

non-income tax as an example. If Curran truly intended section 4.b to be exclusively limited to deductible non-income tax, he would not have concluded his "tax liability payments are subject to the tax benefit offset" statement with a non-exclusive example.[157]

On October 24, 2007, Textron and Acument executed an agreement (the "Letter Agreement") to clarify the parties' obligations and understandings at this point.[158] The Letter Agreement was negotiated by Clark, Spacone, and Curran.[159] Like the Open Issues Summary, neither Krasner nor Yassinger were involved in or otherwise notified about the Letter Agreement until 2008.[160] Also like the Open Issues Summary, the Letter Agreement was drafted solely by Spacone, with Clark and Curran's input and edits.[161]

[157] Curran continued to leave this "accommodation" open-ended. On October 11, 2007, Curran responded to Clark's claim that the Open Issues Summary was unclear by stating, "[e]ssentially, the tax benefit analysis we are using for retained litigation, environmental, also applies for purposes of non-income taxes such as property taxes, etc." JX 54. On October 15, 2007, Clark responded to Curran, stating that Acument "agree[s] that for non-income tax indemnity matters where we would have a deduction (e.g. a property tax) the tax benefit adjustment would be used as it is in other indemnity situations (e.g. litigation)." JX 56.
[158] JX 58.
[159] Day II Tr. Trans. 68:2-20, 69:9-16.
[160] JX 70 (March 5, 2008 email to Yassinger from Modrycki, attaching the Letter Agreement); Day II Tr. Trans. 66:15-16.
[161] Day II Tr. Trans. 69:9-16, 70:13-71:14.

The Letter Agreement began: "Using Andrew's Open Issues Summary, dated October 9, 2007, as the base line, we agree on the following [….]"[162] The Letter Agreement then set forth eleven paragraphs, the pertinent parts of which are:

> 1. With respect to the disputed hypothetical tax benefit rates for Brazil and France, we agree they are 34% and 34.43%, respectively.
>
> 2. The hypothetical tax benefit rate will be applied as an offset to Loss Payments for which Textron is obligated to indemnify Acument including, without limitation, deductible non income tax, labor/employment, civil and environmental indemnity obligations {"Indemnity Obligations"} per the terms of the P&S Agreement.
>
> 3. Acument has agreed to reimburse Textron for the hypothetical tax benefits associated with the past Loss Payments to Date [….]
>
> 4. Textron will be responsible for 100% of any social security and income tax awards or settlements relative to labor or employment claims for which it has an Indemnification Obligation. Also, as Loss Payments, any such awards or settlements made at any time, shall be subject to the offset for the hypothetical tax benefit. [….]

The Letter Agreement concludes, "this [agreement] does not alter or modify any other terms and conditions set forth in the [PSA], and clarifies those provisions

[162] JX 57. While the document states the Open Issues Summary is the "base line," Curran conceded that the Open Issues Summary "contains terms, or proposals, or descriptions that turned out differently in the Letter Agreement." Day I Tr. Trans. 110:19-23. Even Clark testified that the parties "tentatively agreed on some items" that "they weren't final, and there were still a number of [issues] that were still open, kind of hence the term 'open issues.'" Day IV Tr. Trans. 4:16-22.

relative to the matters discussed herein."[163] Both Curran and Clark signed the Letter Agreement.[164]

E. Post Letter Agreement Problems

By the end of November 2007, the parties' confusion continued. In an email thread regarding a Brazilian pre-closing matter, Spacone told Clark that:

> the hypothetical tax benefit offset applies to tax payments (to the extent they are deductible, which I believe ICMS is) as well as retained litigation, which I believe was spelled out in the recent letter agreement. And, the [PSA] appears (we are revisiting this in light of the Beigo situation, but let's operate from this assumption for now) to obligate Textron to indemnify Acument from any pre-closing liabilities, if which this is one.[165]

This email, artificially innocuous, represents that indemnified tax payments are subject to the Tax Benefit Offset *if* those taxes are deductible. Although the first sentence seems to differentiate between the treatment of "taxes" and "retained litigation," if that were truly the case, Spacone could have explicitly stated that qualification. Additionally, this is just one of several documents in which Spacone

[163] *Id*.
[164] *Id*.; Day I Tr. Trans. 48:6-10; Clark Depo. Trans. 155:4-12. The parties agree the Letter Agreement is binding and enforceable. Stip. Fact # 24.
[165] JX 61; *see also* JX 65 (Jan. 23, 2008 email from Stonestreet to Spacone and Modrycki, among others, regarding a Brazilian liability payment. Stonestreet notes that "the total amount due is R$635,643.73 of which R$73, 536.96 would represent a penalty and be non-deductible. The tax benefit […] of the deductible amount […] is R$191,116.30. Therefore the net payment due from Textron to Acument in R is $444,527.43.").

advises Retained Litigation and environmental indemnification items are treated the same as tax.[166]

By 2008, the Tax Benefit Offset problems, along with the tension between the parties, increased. At the beginning of 2008, Modrycki noticed Acument's cash flow vastly decreasing.[167] By March 2008, Modrycki corresponded with Yassinger regarding the Tax Benefit Offset and the parties' respective obligations.[168] In April 2008, while completing Acument's 2007 tax documents, Modrycki noticed Acument could not deduct the U.S. indemnity payments for which it had reimbursed Textron, net the Tax Benefit Offset.[169] Also around this time, Modrycki discussed indemnification payment tax treatment with Ernst & Young, Acument's outside accountants.[170] At this point, Yassinger enrolled the assistance of an outside tax attorney, David Anderson, Esquire.[171]

On May 7, 2008, Modrycki informed Clark that based on his research, all U.S. indemnity payments were not deductible to Acument and, therefore, should not be given a Tax Benefit Offset.[172] After further research, Modrycki emailed Stonestreet on June 2, 2008, informing him that Acument did not receive a tax benefit on U.S. indemnity payments and that "Textron is given the deduction for

[166] *See* JX 24, 35, 43, 124.
[167] JX 66.
[168] JX 70.
[169] Day IV Tr. Trans. 72:2-6.
[170] *See* JX 68, 69.
[171] *Id*.
[172] JX 78; *see* Stip. Facts # 21, 25, 26-27.

the cash reimbursement paid to Acument, thereby reducing [Textron's] gain or increasing its loss on [the] sale of [TFS]."[173] A few days later, Modrycki emailed Stonestreet a list of U.S. indemnification reimbursement payments Acument made to Textron net of the Tax Benefit Offset and requested reimbursement of the "assumed tax benefit."[174]

In February 2009, Yassinger and Clark decided to have Dave Anderson, Esquire, prepare a memorandum analyzing tax ramifications of U.S. indemnity payments paid directly by Acument and Textron.[175] The memorandum would act as "support to defend Acument's position with Textron that there is no tax benefit in either situation."[176] By late March 2009, Anderson emailed Yassinger a brief answer: "In both cases, I would assume the buyer gets no net tax benefit, but the route to that (especially explaining it) is more complicated in the second scenario."[177]

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[173] JX 81.

[174] JX 85. The U.S. payments were made by Acument up to nine months earlier. JX 49. Stonestreet responded to Modrycki's request with: "The letter agreement dated October 24, 2007 addressed the hypothetical "Tax Benefit" offset comprehensively. Please identify the language within the four corners of this letter agreement that supports your new position." *Id.* Modrycki responded, in pertinent part, "[i]n the SPA the "Tax Benefit" is explained in great detail as to who will receive the ultimate benefit, if one exists." *Id*. (emphasis in original). Also in June 2008, Stonestreet was working with Acument Mexico to resolve a tax audit. JX 87. In the long email thread, Stonestreet requested Acument Mexico verify if the required indemnity payment was deductible, to what extent, and if not, why. *Id*. In the end, only the penalty attached to the indemnification payment was not deductible. *Id*.

[175] JX 97.

[176] *Id*.

[177] JX 99.

By the beginning of 2010, it was clear the parties were heading towards litigation. Spacone sent Clark a demand letter on January 26, 2010, requesting over $2.6 million in "hypothetical tax benefits" for U.S. German, and French indemnity payments.[178] For the first time, Spacone defined Textron's understanding of "hypothetical tax benefit":

> the Letter Agreement makes clear that the [PSA] does not require that Acument actually realize a net tax benefit before Textron is entitled to a reduction of any indemnity payments. This is consistent with the plain meaning of "hypothetical" – i.e., conjectural and existing only in concept.[179]

Spacone went on to say that after the parties signed the Letter Agreement, Acument accepted its obligations, but "as of June 2008, Acument reversed course and began to dispute the application of the hypothetical tax benefit with respect to indemnity payments made in the [U.S.]"[180] Spacone then, again, reiterated that,

> [the PSA] does not require that Acument actually realize any net tax benefit for the reduction of indemnity payments to apply. Instead, the fact that Acument at some time in the future (or in the past) may be entitled (for whatever reason) to a tax deduction attributable to the United States claims that are indemnified by Textron, as conceded in Acument's June 2, 2008 e-mail, is enough to trigger the reduction in Textron's indemnity payments under the [PSA.][181]

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[178] JX 124 at 4.
[179] *Id*. at 2.
[180] *Id*. Spacone continues, "it appears that Acument has taken the position that the hypothetical tax benefit does not apply to these claims because, according to Acument, it does not actually obtain a net tax benefit when it pays [U.S.] claims that are indemnified by Textron. For the reasons discussed herein, this position is both illogical and untenable." *Id*.
[181] *Id*. at 2.

Spacone further claimed that prior to January 2010, Acument asserted "yet another new argument, this time with respect to indemnity payments made in Germany and France."[182] In the end, Spacone gave Acument thirty days to resolve the issues or face litigation in Delaware, pursuant to the PSA.[183] Acument responded and the parties attempted to negotiate further, but to no avail.

III. PROCEDURAL HISTORY

Textron filed suit against Acument on July 13, 2010, asserting breach of contract[184] and breach of the implied covenant of good faith and fair dealing,[185] seeking "to recover amounts due under the PSA and related Letter Agreement" regarding U.S. Loss payments.[186] Textron also seeks a declaratory judgment setting forth Acument's obligations under the PSA.[187] Acument filed an answer with counterclaims,[188] similarly asserting breach of contract,[189] breach of implied covenant of good faith and fair dealing,[190] and requesting a declaratory judgment.[191]

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[182] *Id*. at 2-3; *see also* JX 106 (a May 21, 2009 email from Spacone to Clark wherein Spacone wrote, "I spoke with David and he does not recall having any discussions with [Modrycki] concerning the non-application of the hypothetical tax benefit off set outside the U.S.").
[183] JX 124 at 4.
[184] Compl., Trans. ID 32084937, ¶¶ 25-30; Stip. Fact #36.
[185] *Id*. ¶¶ 31-38.
[186] *Id*. ¶ 2.
[187] *Id*. ¶¶ 39-45.
[188] Ans., Trans. ID 33236887.
[189] *Id*. ¶¶ 30-43.
[190] *Id*. ¶¶ 44-56.
[191] *Id*. ¶ 57.

On April 6, 2011, the Court denied Textron's Motion for Judgment on the Pleadings, holding that the Letter Agreement and PSA were ambiguous.[192] The Court further found it was unclear whether the Letter Agreement incorporated the Open Issues Summary and modified the PSA, as Textron asserted.[193]

Ultimately, the Court presided over a four-day trial in April and May 2013.[194] The parties submitted post-trial briefing and the Court held oral argument on November 7, 2013. The record closed on December 18, 2013.

IV. THE PARTIES' CONTENTIONS

A. Textron's Contentions

Textron contends that the TFS sale priced dropped from $900 million to $630 million based, in part, on the parties' agreement to partial indemnification.[195] Textron further contends that partial indemnification occurs under the PSA because Textron's obligatory indemnification payments are reduced by the Tax Benefit Offset.[196] Claiming the Tax Benefit Offset functions as a partial indemnification mechanism, Textron argues that the offset is "hypothetical," and its application, "automatic."[197] Whether or not the PSA requires full or partial indemnification, Textron asserts that Acument would receive an increase in basis

[192] *Textron*, 2011 WL 1326842, at *1.
[193] *Id*. at *6.
[194] The Court notes that this case was actively litigated. There was extensive discovery and multiple discovery disputes which prompted the Court to appoint a Special Discovery Master.
[195] Pltf. Post-trial Br. ("Pltf. Op. Br."), Trans. ID 53209045, at 3-6.
[196] *Id*.
[197] *Id*.

when an assumed pre-closing contingent liability is paid, giving rise to deductions or reductions immediately or in the future, or to a lower tax burden upon sale of the business.[198] To this end, Textron reinforces its "increase in basis" argument by differentiating between Acument's claim that the Tax Benefit Offset requires a narrow "deduction," rather than a "reduction," as the term is used in the Tax Benefit definition.

Buttressing its position for partial indemnification, Textron asserts several reasons in support of its "hypothetical tax benefit" argument. First, Textron claims that the PSA's negotiation history exhibits the parties' understanding that the "Tax Benefit" was "notional."[199] Second, Textron asserts that Curran, Stonestreet, Cohen, Yassinger, and Krasner all agree that the PSA requires only partial indemnification.[200] Third, the TFS price reduction supports an "assumed" Tax Benefit Offset.[201] Fourth, the Letter Agreement confirms the parties' agreement as to the "hypothetical" application of the Tax Benefit Offset.[202]

Textron's Letter Agreement argument involves several parts. First, Textron claims the parties' post-closing disputes and correspondence leading up to the

[198] Pltf. Op. Br. 5-7. Textron essentially argues that the Court does not need to determine whether the Tax Benefit Offset is hypothetical because, either way, Acument receives an increase in basis, resulting in a tax benefit. Nov. 7, 2013 Hr'g. Trans. ("OA Trans.") 11:20-12:12.
[199] *Id*. 8-10.
[200] *Id*. 10-12; *see* Day I Tr. Trans. 16:8-16 (Curran); Stonestreet Depo. Trans. 76:6-77:16; Day IV Tr. Trans. 127:18-128:8 (Cohen); Yassinger Depo. Trans. 145:8-146:9; Krasner Depo. Trans. 143:12-23.
[201] Pltf. Op. Br. 12-13.
[202] *Id*. 13-23.

Open Issues Summary consistently describe the Tax Benefit Offset as "hypothetical."[203] Second, Textron asserts the Open Issues Summary contained no indicia requiring deductibility before the Tax Benefit Offset applied, but did discuss the "Tax Benefit Reduction" which Textron alleges "was consistently referred to by the parties as the 'hypothetical tax benefit.'"[204] Third, Textron claims the Letter Agreement "shows that the parties intended what they referred to as the 'hypothetical tax benefit' to apply generally, without jurisdictional condition or limitation, and without regard to whether the loss payments were deductible to Acument."[205] Included in Textron's third point is the assertion that: (1) the Letter Agreement incorporated the Open Issues Summary by expressly using it as the "base line,"[206] (2) the "Tax Issues" section 4.b use of "deductible" only limits "non-income tax,"[207] (3) the Letter Agreement modifies the SPA,[208] and (4) Acument's payments net the Tax Benefit Offset for nearly a year after the Letter Agreement's execution is probative of the parties' intent.[209]

[203] *Id*. 13-15.
[204] *Id*. 15-16.
[205] *Id*. 16-23.
[206] *Id*. 17-18.
[207] *Id*. 18-20.
[208] *Id*. 20-21.
[209] *Id*. 21-23. Textron argues that Acument "is bound by the forthright negotiator principle" based upon its knowledge of "exactly what Textron thought [hypothetical] meant," and because the Court has already determined Textron's Tax Benefit Offset interpretation is reasonable. *Id*. at 23, fn. 22.

B. Acument's Contentions

Acument argues that based on the plain language of the PSA and the parties' conduct, a "right" to a deduction or other Tax reduction is required for the Tax Benefit Offset to apply.[210] Acument contends that the Tax Benefit Offset should be construed together with the other clauses of section 6.1(d)(iii), which together and individually, reduce indemnity payments by offsets received.[211] Acument relatedly contends that the Tax Benefit definition, when read as a whole, sets forth a calculation for determining the "present value" of any tax reduction received and does not "assume" a Tax Benefit Offset.[212]

Acument claims that its position is supported by the parties' conduct, including the intent and understanding of the PSA prime negotiators Yassinger and Stonestreet, pre-litigation conduct, and course of performance.[213] As to pre-litigation conduct, Acument asserts that Textron repeatedly referred to the Tax Benefit Offset only when a deduction was available.[214] Acument further claims that Textron's pre-litigation course of performance contradicts its current position that the parties agreed to partial indemnification.[215]

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[210] Deft. Op. Br. 4-14.
[211] *Id*. 5.
[212] *Id*. 6-8.
[213] *Id*. 9-20.
[214] *Id*. 12-13.
[215] *Id*. 13-14.

Acument further argues that the Letter Agreement did not modify the PSA with regard to requiring a deduction on Environmental and Retained Litigation Losses before a Tax Benefit Offset could be applied.[216] Acument claims that Textron concedes the point[217] and that Textron's position is contradicted by the evidence presented at trial.[218] Acument contends that because Textron conceded the Letter Agreement did not alter the PSA's terms regarding the Tax Benefit Offset, the PSA controls.[219] Acument also contends that, under the PSA, deductibility was always a prerequisite to the Tax Benefit Offset because: (1) Stonestreet's testimony confirms the deductibility prerequisite; (2) Textron's own documentary evidence supports it; (3) Textron's "non-income tax losses [argument] is a recent fabrication;" and (4) the Letter Agreement's use of "deductible" modifies a series of examples and its use of "hypothetical" modifies "rate."[220]

Finally, Acument argues that it cannot deduct indemnity payments in the U.S. (in accord with both parties' expert testimony)[221] and it did not commit waiver when it mistakenly allowed a Tax Benefit Offset on the first six U.S.

[216] *Id.* 14-20. Acument also argues that the Letter Agreement only related to Brazil. *Id.*
[217] *Id.* 14 (citing to Day II Tr. Trans 89:21-22).
[218] *Id.* 14-15.
[219] *Id.*
[220] *Id.* 15-20.
[221] *Id.* 20-23.

Losses.[222] Acument also requests attorney fees, based on Textron's "inability to maintain [its] new positions consistently at trial."[223]

V. APPLICABLE LAW

Delaware courts follow the objective theory of contract interpretation.[224] In construing a contract, the Court "gives the words chosen by the parties their ordinary meaning and construes it as an objective, reasonable third party would."[225] The "cardinal rule of contract construction" is that, where possible, the Court should give effect to all provisions in a contract.[226] A contract is ambiguous when "it is reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[227] Once a contract is deemed ambiguous, the Court may consider "all objective evidence: the overt statements and acts of the parties, the business context, prior dealings between the parties, and other business customs and usage in the industry."[228]

VI. DISCUSSION

A. Acument Did Not Commit Waiver

Initially, the Court finds that Acument did not commit waiver in its mistaken payment to Textron for the first six U.S. payments. Acument presented evidence

[222] *Id*. 23-24.
[223] *Id*. 25.
[224] *See, e.g., Sassano v. CIBC World Mrkts. Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008).
[225] *CorVel Enter. Comp., Inc. v. Schaffer*, 2010 WL 2091212, at *2 (Del. Ch. May 19, 2010).
[226] *E.I. DuPont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1114 (Del. 1985).
[227] *In re Explorer Pipeline Co.*, 781 A.2d 705, 714 (Del. Ch. 2001) (internal citations omitted).
[228] *Id*.

that the mistake was not captured until the Modrycki began processing the 2007 return.[229] When Acument's tax department discovered the mistake, it sought advice from PE and outside counsel.[230] Once Acument assured itself that Textron's U.S. indemnity payments were not deductible, it then sought reimbursement from Textron. Waiver requires an intentional relinquishment of a known right.[231] Textron has not proven that Acument knew the Offset was hypothetical and, therefore, waived its right to contest the Offset's applicability.[232]

B. The Letter Agreement Did Not Modify the PSA

The parties disagree as to whether the Open Issues Summary was incorporated by reference into the Letter Agreement. The parties also disagree as to whether the Letter Agreement "modified, clarified, and confirmed" the PSA. Several variables make this an important issue.

First, the Open Issues Summary declares that the Tax Benefit Offset applies where "tax liability payments Textron is required to make, [] are deductible to Acument."[233] That is an important concession on Textron's part because it

[229] Day IV Tr. Trans. 72:2-6.
[230] Day IV Tr. Trans. 72:7-20.
[231] *See Campbell v. Makin*, 1996 WL 769199, at *3 (Del. Super. Dec. 18, 1996) (Silverman, J.).
[232] The Court does not accept Textron's waiver argument in regard to Acument's delay in requesting reimbursement. The first U.S. indemnity payment net the Tax Benefit Offset was made in August 2007. Day IV Tr. Trans. 69:16-70:4. Modrycki learned the payments were not deductible to Acument in April 2008 when he was processing the 2007 tax work. *Id*. 72:2-6. After receiving verification regarding Acument's inability to deduct the payments, Acument then sought reimbursement. Acument did not delay or otherwise sit on its rights.
[233] JX 52.

implicates deductibility as the trigger for the Offset. Second, the Letter Agreement states that "the hypothetical tax benefit rate will be applied as an offset to Loss Payments for which Textron is obligated to indemnify Acument, including, without limitation, deductible non income tax, labor/employment, civil and environmental indemnity obligations."[234] Acument argues the placement of the term "deductible" applies to the remaining items in the series, while Textron asserts it was only a narrow concession that non-income tax liability payments had to be deductible for the Offset to apply.

1. The Open Issues Summary

Relying upon the Letter Agreement's preface, Textron asserts that, as a matter of law, the Open Issues Summary was incorporated by reference. As noted, the preface to the Letter Agreement states, "[u]sing Andrew's Open Issues Summary […] as the base line, we agree […]."[235] The question is then, whether the aforementioned phrase is sufficient to incorporate the Open Issues Summary.

According to *Realty Growth Investors v. Council of Unit Owners*, a contract "can be created by reference to the terms of another instrument if a reading of all documents together gives evidence of the parties' intention and the other terms are clearly identified."[236] *Realty Growth* relied on *State ex rel. Hirst*, in which Judge

[234] JX 57.
[235] JX 52.
[236] 231 A.2d 420, 456 (Del. 1982).

Layton held, "[w]here a contract is executed which refers to another instrument and makes the conditions of such other instrument a part of it, the two will be interpreted together as the agreement of the parties."[237] More recent case law sets forth that a mere reference to a separate document, without more, does not incorporate said document into the contract.[238]

Here, the Court is not satisfied that the parties intended to incorporate the Open Issues Summary into the Letter Agreement. The parties are sophisticated business entities represented by experienced legal counsel who knew how to write contracts and who knew how to expressly incorporate other documents or agreements by reference.[239] Also, the Open Issues Summary, detailed *supra*, is an unsigned document that sets forth a few U.S. matters for which Acument allegedly owed Textron the Tax Benefit Offset.[240] While the document lists amounts, those sections are silent as to deductibility, hypothetical or otherwise. The only mention of "hypothetical" is in regard to "hypothetical tax rate," which is a wholly different concept.

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[237] *State ex rel Hirst v. Black*, 83 A.2d 678, 681 (Del. Super. 1951).
[238] *Wolfson v. Supermarkets Gen. Holdings Corp.*, 2001 WL 85679, at *5 (Del. Ch. Jan. 23, 2001) (Jacobs, V.C.).
[239] Day II Tr. Trans. 70:15-71:14. Spacone testified that his "mindset as a lawyer" was to keep the Letter Agreement "simple." Taking his experience and the past dealings between the parties, Spacone knew or should have known that if he wanted to incorporate a separate document, he should have expressly stated that or at least considered referring to the document as more than a mere "base line." The Court's decision is reinforced by *State ex rel Hirst* because the Letter Agreement is not conditioned on any terms within the Open Issues Summary, the Letter Agreement only names it as "the base line."
[240] JX 52. According to Acument, this document was drafted during the "mistake" period when Acument believed U.S. Losses were deductible to it. Deft. Reply Br. 12-13.

2. The Letter Agreement

Turning to the Letter Agreement, the parties disagree as to whether it "modified, clarified, and confirmed" the PSA. The Letter Agreement is the only signed document containing both "hypothetical tax rate" and "hypothetical tax benefit," making its possible modification of the PSA an important consideration.[241] As mentioned, the Letter Agreement details eleven issues the parties sought to resolve.[242] The signed Letter Agreement concludes with, "this Letter Agreement does not alter or modify any other terms and conditions set forth in the [PSA], and clarifies those provisions relative to the matters discussed herein."[243]

The Letter Agreement's conclusion clearly indicates that the parties did not intend for it to modify the PSA. A simple deconstruction of the sentence confirms it. First, the conclusion begins with a negation – what the agreement does not do – "alter or modify any other terms and conditions." Second, it concludes with an affirmative clause, "and *clarifies* those provisions relative to the matters discussed

[241] The Court finds Acument's argument that the Letter Agreement only related to Brazil meritless. While Brazil was clearly a problematic jurisdiction for Acument, the Letter Agreement does not limit its application to Brazil and it addresses other countries and states.
[242] JX 58.
[243] JX 56.

therein."[244] The language of the Letter Agreement is plain, the Letter Agreement did not modify the PSA, rather it clarified it.[245]

C. The Tax Benefit Offset is Not "Hypothetical"[246]

Textron contends that the PSA sets forth a partial indemnification as evidenced, in part, by the price difference between Acument's initial offer and the final sale price, and the "hypothetical" Tax Benefit Offset. Textron also argues that regardless of the Court's finding regarding indemnification, Acument receives a "tax reduction" based upon an increase in basis following Textron's Loss payment for each contingent liability. That "tax reduction," as Textron argues, triggered the Tax Benefit Offset. Textron argued, and continues to argue, that the PSA does not "use the term 'deduction,'" rather the PSA utilizes the broader term, "reduction."[247]

The Court notes that despite Textron's "deduction" and "reduction" argument, the PSA does not contain the words "hypothetical" or "automatic." And, after carefully considering all the documentary evidence, the parties' positions during negotiations, and the parties' conduct after executing the PSA and Letter

[244] *Id*. (emphasis added).
[245] Notably, Stonestreet believed the Letter Agreement only clarified issues regarding the Tax Benefit Offset. *See* Stonestreet Depo. Trans. 74:1-23.
[246] Textron divides its "partial indemnification" and "hypothetical tax benefit" arguments, but the two are intertwined: Textron contends that the PSA sets forth partial indemnification based on the tax benefits Acument will receive from Textron's Loss payments. Because the two positions are intertwined, the Court will discuss them together.
[247] *See e.g.*, OA Trans. 73:7-11.

Agreement, the Court concludes that the Tax Benefit Offset applies only if Acument is entitled to a "deduction" upon the making of an indemnification payment.[248] The Court intentionally uses the term "deduction," as did the parties throughout their negotiations and up to the filing of this lawsuit.[249]

1. The PSA's Language

Although the express language of the PSA does not explicitly support either side's interpretation, it still offers guidance as to the parties' intent and positions during the negotiations. Preliminarily, the Court notes that the parties were well informed. Textron knew that PE was a firm seeking to flip companies and the parties do not deny that "flipping" TFS was PE's objective. That fact is memorialized in the negotiation documents where PE sought the assignability of Textron's seller's warranties.[250] The Court mentions this fact because Textron has emphasized Acument's "increase in basis" and the ultimate tax benefit it will recognize once the company decides to sell.[251] Even though the parties were aware that PE intended to "flip" TFS, there is no express language within the PSA to

[248] This does not limit or otherwise effect the PSA's own language regarding a credit and/or refund.

[249] Despite Textron's argument that the PSA utilizes the broader term of "reduction," as will be discussed, the parties tacitly agreed reduction meant deduction as exhibited in their pre-litigation conduct. Because the Court previously ruled the PSA and Letter Agreement are ambiguous, it is not limited to determining their meaning by a third party standard. *See Wilmington Firefighters Ass'n, Local 1590 v. City of Wilmington*, 2002 WL 418032, at *6, n. 33 (Del. Ch. Mar. 12, 2002) (Strine, V.C.) (*citing* Restatement (Second) of Contracts § 201(1)).

[250] *See* JX 4

[251] *See* Pltf. Op. Br. 3-7; Day II Tr. Trans. 208:16-210:3; Day IV Tr. Trans. 114:15-116:5.

support Textron's position that an increase in basis is what the PSA drafters intended to satisfy the Tax Benefit Offset.

The language within the PSA further belies that the parties intended for an increase in basis to satisfy the Offset. The Tax Benefit Offset provision, itself, is one of three limitations that reduce any indemnified Loss. Again, in pertinent part, section 6.1(d) reads:

> The obligations and liabilities of [Seller] and Purchaser […] shall be subject to the following additional limitations: […] (iii) Each Loss […] shall be reduced by (A) the amount of any insurance proceeds received by the Indemnified Party, (B) any [third party] indemnification, contribution or other similar payment paid and (C) any Tax Benefit of the Indemnified Party or any of its Affiliates attributable to such Loss.[252]

Subsection (A) reduces payments by insurance proceeds, subsection (B) reduces payments by third-party contributions, and subsection (C), as the third in a series, clearly reduces payments by "any Tax Benefit." None of the clauses contain language indicating the reduction is "automatic." And none of the clauses have language indicating a "sharing" or partial indemnification.[253] Considering the

[252] PSA § 6.1(d)(iii), at 69.

[253] Curran's testimony regarding his intention that the Tax Benefit Offset work as a "sharing" mechanism, thereby creating a partial indemnification, is unpersuasive because there is no evidence supporting that position and his subjective intent is irrelevant because that intent is not expressed in the terms of the PSA. *See CorVel Enter. Comp, Inc.*, 2010 WL 2091212, at *4; Pltf. Op. Br. in support of Mtn. for J. on the Pleadings, Trans. ID 35394923, at 15.

entire 6.1.(d)(iii) clause,[254] it reads as *possible* reductions to the amount of Loss Textron is required to indemnify.[255]

Additionally, the Tax Benefit definition does not support Textron's argument that the Tax Benefit Offset is "hypothetical." One of Textron's bases of support for the argument that the Offset is automatic stems from the word "assuming" found within romanette (iii) of the Tax Benefit definition.[256] Romanette (iii), however, is a requirement to determining the present value calculation. Reading the Tax Benefit definition in whole,[257] it instructs the reader on determining the proper "present value":

> […] present value shall be computed as of the Closing Date [or when the] right to the refund, credit or other Tax reduction arises […] whichever is later, (i) using [highest income tax rate], (ii) [interest rate on corporate deficiencies], and (iii) assuming that such refund, credit or reduction shall be

[254] *See E.I. DuPPont de Nemours & Co.*, 498 A.2d at 1114; *Fletcher Int'l, Ltd. v. ION Geophysical Corp.*, 2010 WL 2173838, at *4 (Del. Ch. May 28, 2010) (Parsons, V.C.) ("Because 'language in a vacuum may take on any number of meanings,' the Court examines contractual language in the context of the document 'as a whole' and 'gives each provision and term effect, so as not to render any part of the contract mere surplusage.' Indeed, a court will 'more readily assign contract language its intended meaning if it reads the language at issue within the context of the agreement in which it is located.'").

[255] *See* Day I Tr. Trans. 73:9-74:16.

[256] "'Tax Benefit' shall mean the present value of any refund, credit or reduction in otherwise required Tax payments, including any interest payable thereon, which present value shall be computed as of the Closing Date or the first date on which the right to the refund, credit or other Tax reduction arises or otherwise becomes available to be utilized, whichever is later, (i) using the Tax rate applicable […], (ii) using the interest rate on […] corporate deficiencies paid within thirty (30) days of notice […], and (iii) *assuming* that such refund, credit or reduction shall be recognized or received in the earliest possible taxable period (without regard to any other losses, deductions, refunds, credits, reductions or other Tax items available to such party)." (emphasis added).

[257] *See Fletcher Int'l*, 2010 WL 2173838, at *4.

> recognized or received in the earliest possible taxable period [….][258]

Notably, Curran agreed that the Tax Benefit definition sets forth calculation mechanisms.[259] It is clear to the Court that the parties' insertion of "assuming" was not meant to convert the Tax Benefit Offset into an automatic reduction, but rather the term was meant as an indicator for the parties to "assume" the period in which to calculate the tax.

The Court's finding that the Offset was not meant to be automatic is reinforced by the absence of the words "hypothetical" or "automatic" within the PSA. Again, the parties are well seasoned in mergers and acquisitions – they knew what they were doing.[260] If Textron and PE agreed to partial indemnification, the indemnification clause could have easily been written to limit Textron's liability either through explicit "partial indemnification" language or drafting 6.1(d)(iii) to read as "each Loss is partially indemnified subject to" instead of "each Loss shall be reduced by […."

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[258] *Id*.

[259] *See* Day I Tr. Trans. 83:13-87:3; *accord* Day III Tr. Trans. 23:13-25:4, 31:15-32:21. Curran 's testimony continues in support of Textron's position, but within this testimony, Curran did not deny that the Tax Benefit definition instructs that the reduction "shall be computed" by romanette "one, two, and three." *Id*. 83:13-22.

[260] *See e.g.*, *Leeds v. First Allied Connecticut Corp.*, 521 A.2d 1095, 1102 (Del. Ch. 1986) (noting that in large corporate deals, "the original negotiators will merely attempt to ascertain whether they see eye to eye concerning those aspects of the deal which seem to be most important from a business point of view") (internal citations omitted).

Lastly, Yassinger testified that the Tax Benefit Offset is a "typical provision" designed to limit indemnification payments and prevent "a windfall" to the indemnified party.[261] This correlates with Stonestreet's testimony regarding the purpose of section 6.1(d) in the PSA.[262]

2. Parties' Conduct Does Not Support "Hypothetical" Benefit

The parties' conduct during negotiations and leading up to the filing of this suit also belie Textron's position that the PSA encompasses only partial indemnification based upon a "hypothetical" Tax Benefit Offset.[263] As explained below, based upon the parties' conduct and correspondence, a Tax Benefit Offset only applies if Acument is entitled to a Tax deduction or reduction.

a. Conduct During Negotiations

In support of Textron's contention that the $270 million price reduction evidences an agreement for partial indemnification based upon the "hypothetical" tax benefit, Textron relies heavily on Curran's testimony and the documented negotiation "open points."[264] Specifically, Textron relies on PE's May 2, 2006

[261] Day III Tr. Trans. 23:-25:4.
[262] Stonestreet Depo. Trans. 97:6-98:4.
[263] While Textron places much weight on PE's attempt to rewrite the Tax Benefit definition, the Court finds that insignificant. PE attempted to draft the PSA to require an "actual savings" in the first taxable year the deduction would apply. JX 167; Day III Tr. Trans. 18:2-13. And the fact that Krasner testified that PE sought more than full indemnification is also insignificant (Day III 54:15-20) because it comes from the head of mergers and acquisitions of an equity firm which gains profit from "flipping" companies. *See* JX 13, 15. The fact that PE sought the best deal under the circumstances is not shocking.
[264] *See* JX 7, 8, 9. Textron also relies on Yassinger's testimony agreeing that section 6.1(d)(iii) reduces the indemnification. As discussed *supra*, the possibility of reduction, without more, does

"Ted French Talking Points" document that details the "open issues," including the following notation: "Litigation/Environmental Indemnity, [Textron wants] us to pay more for full indemnity."[265] While that notation indicates indemnification was an issue,[266] the "Ted French Talking Points" document does not support Textron's position that the price reduction occurred based upon a partial indemnification agreement. That finding is reinforced by an email drafted only two days after the "Ted French Talking Points," in which Lopez made a proposal to Curran that "shift[ed] considerable risk to [PE.]"[267] Notably, the email does not address or mention indemnification, rather it details several concessions by PE, including: removing the "debt-like liabilities" clause; PE's agreement to fund the UK pensions up to £52.2 million; and removing the financing contingency.[268] All of those concessions were important issues consistently addressed during Textron and

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not create a partial indemnification. Further, the fact that Krasner admitted PE sought full indemnification, or more, in its negotiation edits does not mean that the parties then tacitly agreed to partial indemnification. There is no evidence in the record to support that contention.

[265] JX 9.

[266] In fact, indemnification was an issue raised in most of the documentary evidence relating to the negotiations. *See* JX 3, 4, 5, 6, 7, 8, 9. That being so, indemnification was evidently not a factor which would prevent closing the deal. *See* JX 8 ("It is very important to Textron that you do not have a financing contingency […] It is very important to Textron that Textron delivers an audited statement of […] the closing 'net cash'/'Indebtedness' value with an appropriate materiality standard […."]) (Rather than claiming the importance of Acument "sharing" liability, Curran wrote "Textron would retain the environmental liability for pre-closing issues and for scheduled litigation issues […."]).

[267] JX 11.

[268] *Id*.

PE's negotiations.[269] And, Textron and PE have consistently stated that the Tax Benefit Offset (i.e., partial indemnification) was not a material issue with respect to the parties' ability to close the deal.[270]

Textron also asserts in support of its partial indemnification argument that Yassinger admitted section 6.1(d)(iii) of the PSA sets forth partial indemnification.[271] Textron relies on Yassinger's testimony when, in reference to section 6.1, he stated, "there are limitations here that one could read to mean that it's not a full indemnification […] I mean, every section here could read to be a limitation upon a full indemnity."[272] During trial, however, Yassinger testified that section 6.1(d)(iii) does not provide for full indemnification, rather it "provides limitation[s] on Textron's indemnification so that Acument is not more than 100% reimbursed."[273] That is consistent with the testimony of Stonestreet, Krasner, and Curran.[274]

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[269] *See* fn. 242, *supra*. Debt-like liabilities were discussed. *See* JX 3-9, 11. Funding the UK pension was negotiated. *See* JX 4-9, 11; Day II Tr. Trans. 111:9-14 (Krasner testified that "aside from the level of profitability […] two of the major issues in the transaction were who is going to assume responsibility for a UK pension, which we thought was under funded, we were not sure how much underfunded, but we knew it could be very, very large. And the other one was whether or not there was going to be a financing contingency on the [PSA]"). The financing contingency was an "important" issue for Textron throughout the negotiations. *See id.*, Day II Tr. Trans.; JX 3-9, 11.

[270] *See* Krasner Depo. Trans. 143:12-23.

[271] Pltf. Op. Br. 3-4 (citing Yassinger Depo. Trans. 145:8-146:9).

[272] Plt. Op. Br. 11 (quoting Yassinger Depo. Trans. 145:8-146:9).

[273] Day III 54:15-20. Yassinger testified further, "from the buyer's perspective, the buyer is being 100% reimbursed. The only variable[is] who is providing the reimbursemtn. It is 100% from the other party, or is the 100% from the insurance company, or is it a combination of the

Textron claims that PE's edits to the bid draft, specifically the striking of 6.1(d)(iii)(C), were an attempt to obtain full indemnification, and PE's failure to get those edits resulted in a partial indemnification.[275] Krasner admitted that he sought more than full indemnification, if possible.[276] Krasner also testified that although he sought the best language for PE, PE was determined to complete the transaction with less than favorable terms.[277] The fact that PE attempted to remove the Tax Benefit Offset language or reword it to require an "actual tax savings" does not prove that (and is not probative on the issue of whether) the parties agreed to partial indemnification or that the Offset applies in a "hypothetical" manner.

Textron's argument that the ultimate sale price reflected partial indemnification is undermined by the preponderance of the evidence. Although PE initially offered $900 million for TFS, that offer was based upon PE's own research without the benefit of TFS's financial documents.[278] By the end of April 2006, Curran wrote that TFS's net asset value was approximately $674 million.[279]

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two. From the buyer's perspective, the buyer has negotiated and bargained for being completely reimbursed for actions that happened as a result of the prior owner's behavior." *Id*. 56:12-19.

[274] *See* Stonestreet Depo. Trans. 44:17-45:1, 86:7-19; 88:4-89:12; Day I Tr. Trans. 73:6-15; Day III Tr. Trans. 105:13-106:5.

[275] Pltf. Op. Br. 11.

[276] Day III 121:22-122:2.

[277] Krasner Depo. Trans. 141:21-142:12. Yassinger admitted that the provision is "very seller-friendly" and "a provision that [PE] would typically not allow to be in a draft." Yassinger Depo. Trans. 97:6-14, 117:1-19.

[278] Krasner testified that after PE's initial $900 million offer, PE conducted "a lot of diligence […] and learned a lot more about the company" and "ultimately had a different view as to its level of profitability." Day II Tr. Trans. 110:20-111:3.

[279] JX 8. While not the determining factor for the price, the net asset value is a basis.

By the time the parties conducted the Ted French teleconference, the price had dropped to $770 million.[280] There were several variables involved in the ultimate sale price and the Court is not persuaded that a partial indemnification agreement was one of those variables.

Importantly, Curran testified that he was not involved in the drafting of the PSA tax provisions and he did not have any detailed conversations with PE regarding the Tax Benefit language.[281] Moreover, Curran testified that he did not recall *any* discussions with PE about reducing Textron's indemnification obligations.[282] As the Textron person "in charge of the deal,"[283] it is extremely difficult for the Court to reconcile Curran's testimony that a "sharing" existed based upon a "hypothetical" Tax Benefit Offset (thereby creating partial indemnification) with his testimony that he was unable to recall any discussions with PE on this point. Curran is the only witness involved in the PSA negotiations to use the term "sharing." Because it is clear that Curran never expressed his understanding that the PSA represented a "sharing" – either to PE or in the express terms of the PSA – the Court disregards Curran's testimony on this point and

[280] JX 9.
[281] Day I Tr. Trans. 94:3-13.
[282] *Id*. 94:22-95:2.
[283] *Id*. 94:11-15.

reiterates that the parties' negotiations do not reflect an agreement for partial indemnification or a "hypothetical" Offset.[284]

b. Post-closing Conduct

Textron's "hypothetical" argument is also belied by the post-closing conduct, during which Textron consistently referred to Acument's ability to deduct Loss payments; indeed, Textron's consideration of Acument's Loss payment deductibility is heavily documented.[285] Rather than regurgitate in chronological order all the evidence supporting Acument's position, the Court will address the post-closing conduct of the key players, listed in order of importance.

i. Stonestreet

Stonestreet, involved in negotiating the tax provisions of the PSA, consistently voiced concern regarding Acument's ability to deduct Loss payments.[286] Stonestreet was involved in several internal emails discussing Acument's ability to deduct Loss payments and the Offset stemming from the deductions,[287] but there are no emails from Stonestreet stating that the Offset applies regardless of Acument's ability to deduct because the Offset is "hypothetical." Specifically, after the PSA closed, Stonestreet informed Spacone

[284] *See Shiftan v. Morgan Joseph Holdings, Inc.*, 57 A.3d 928, 935 (Del. Ch. 2012) (an unexpressed view of a contractual provision is "of no legal consequence, as it is not proper parol evidence as understood in our contract law").
[285] *See* JX 20, 21, 24, 36, 39.
[286] *See e.g.*, JX 18, 20, 101.
[287] *See e.g.*, JX 18, 20, 39, 65, 101.

that Textron needed to "consider whether any part of each Loss […] could result in a tax deduction."[288]

Again, Stonestreet was the first to use the term "hypothetical," shortly after the closing.[289] Stonestreet testified that the reference to "hypothetical" referred to the *rate* the parties agreed to use to calculate any Offset.[290] Stonestreet elaborated that the "hypothetical tax rate" made the process convenient because it would not necessitate a review of Acument's tax records.[291] Stonestreet's testimony correlates with Curran's testimony regarding his intent for "certainty and clarity" and the need to avoid reviewing tax records.[292] Stonestreet's testimony as to the "hypothetical tax rate" corroborates the documentary evidence in which Stonestreet consistently referred to the Tax rate as hypothetical.[293]

Importantly, Stonestreet testified that Textron would indemnify Acument 100%, less any "deductible" Offset,[294] and that the Tax Benefit Offset language

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[288] JX 18.
[289] JX 19.
[290] Stonestreet Depo. Trans. 76:6-77:22.
[291] *Id*.
[292] Day I Tr. Trans. 15:10-16:15, 87:21-88:2. Curran's testimony regarding section 6.1(d)(iii) correlates with Stonestreet's. Curran stated that Textron, "did not want to get involved in a buyer's tax returns, and in their tax positions. We wanted to bring – we wanted to, you know, have clarity on when this sharing would apply." *Id*. In regard to the "hypothetical tax rate," Stonestreet testified that if the tax rate was not hypothetical, Acument "would have had to show me their returns and they wouldn't want to do that. They were competitors in some senses. And it would be a lot of work […]" Stonestreet Depo. Trans. 77:1-6. Curran admitted he did participate in drafting the tax provisions. *See* Day I Tr. Trans. 94:3-95:17. Thus, the Court finds Stonestreet's testimony more persuasive.
[293] *See* JX 41.
[294] *See* Stonestreet Depo. Trans. 112:7-18; 117:25-118:8; 120:22-121:5, 201:3-23.

was inserted into the PSA in order to reduce Textron's liability.[295] That is consistent with the documentary evidence in which Stonestreet consistently addressed Acument's ability to deduct Losses.[296] Furthermore, Stonestreet testified that the language of the Letter Agreement did not alter or modify the PSA, rather its terms are consistent with the those in the PSA.[297]

ii. Spacone

As the person responsible for processing the indemnification payments, Spacone's conduct post-closing is probative of the parties' understanding. Indeed, Spacone's knowledge and understanding of the indemnification process and the Tax Benefit Offset was limited, as exhibited by his "oversight" in improperly making indemnity payments shortly after the PSA closed.[298] Spacone's testimony mostly contradicts the documentary evidence. For instance, Spacone testified that the tax rate is not "hypothetical," in clear contradiction to Stonestreet and Stonestreet's internal memo.[299]

By way of further example, beginning with Spacone's January 25 letter, Spacone described the Tax Benefit Offset as "a hypothetical benefit rather than a

[295] *Id*. 97:6-98:4.
[296] *See e.g.*, JX 18, 20, 39, 41, 65.
[297] *See* Stonestreet Depo. Trans. 73:10-74:23.
[298] Day II Tr. Trans. 152:4-21.
[299] Spacone testified that the tax rate was only "hypothetical" because it was the parties' "shorthand" way to address the highest effective tax rate in an applicable jurisdiction. Day II Tr. Trans. 55:19-56:11. According to Spacone, "hypothetical tax rate" is synonymous with "hypothetical tax benefit offset." *Id*. That testimony directly contradicts Stonestreet and Stonestreet's internal memo issued in June 2007. JX 41.

benefit actually realized" and said that the PSA makes "no mention […] that Acument must actually recognize a tax benefit." By this letter, Spacone clarified that the Offset applied whether or not Acument will realize any actual tax savings. He did not enounce, however, that the Offset had a universal application, which is Textron's position now. Indeed, for months after his January 25 letter, Spacone either advised both Textron and Acument employees that Losses are reduced "by any benefit [Acument] receives," or tacitly agreed that the Offset is by Acument's ability to deduct a Loss payment.[300]

By way of further example, in October 2007, Spacone drafted the Open Issues Summary which notably declared, "any tax liability payments […] Textron is required to make, which <u>are tax deductible to Acument</u>, are offset by the 34% hypothetical tax rate."[301] Spacone did not qualify that statement by claiming the Offset applied generally, rather he explicitly described the Tax *rate* as "hypothetical." At this point, Spacone's conduct was consistent with Stonestreet's position.

Textron's argument that the Letter Agreement modified the terms of the PSA to limit the deductibility requirement to only non-income tax liability payments is contradicted by Spacone's other writings. First, in July 2007, Spacone emailed Clark a list of "open issues," one of which addressed "application of

[300] *See* JX 24; *see also* JX 18, 21, 36, 39, 50, 61, 65, 76.
[301] JX 52 (emphasis in original).

hypothetical tax rate to environmental loss payments," and declared that "loss payments for environmental are treated the same as Retained Litigation."[302] And, in November 2007, Spacone again emailed Clark and expressed that "the hypothetical tax benefit offset applies to tax payments [to the extent they are deductible] as well as retained litigation."[303] Spacone did not explicitly state that deductibility only applied to non-income tax and the email does not read that way.

It is not until Spacone's January 2010 demand letter when he explicitly declared that the Tax Benefit Offset is "hypothetical."[304] Spacone wrote that the PSA does not require "that Acument actually realize a net tax benefit" before the Offset applies, and "the fact that Acument at some time in the future (or in the past) may be entitled (for whatever reason) to a tax deduction attributable to the United States claims that are indemnified by Textron […] is enough to trigger the reduction in Textron's [] payments."[305] If the Offset was in fact "hypothetical," it would not require a trigger. In the end, this letter emphasized Spacone's confusion.[306]

Spacone's post-closing conduct does not establish that the parties intended or understood that the Tax Benefit Offset applied in a "hypothetical," universal manner. Spacone's conduct reinforces the parties' earlier understanding that

[302] JX 43; *see also* 54, 56.
[303] JX 61.
[304] *See* JX 124.
[305] *Id*.
[306] *See e.g.*, JX 18, 21, 50.

Acument did not have to receive an actual benefit from Textron's indemnification payments, rather if Acument was entitled to a deduction, then Textron was entitled to the Offset.

iii. Yassinger

As noted earlier, Yassinger was not involved with Acument post-closing because Acument's own executives ran the daily operations.[307] Yassinger testified that he did not associate with Acument until the Acument Brazil issues came onto his radar.[308]

The "Captain Cavemannnnnn!!!" email[309] originated from a "Retained Litigation" email thread from Spacone to Clark.[310] Clark forwarded it to Krasner asking if Acument could argue the Offset does not apply in Brazil because Acument does not recognize a benefit.[311] At the time the email was sent, Acument Brazil had been heavily discussed among the parties.[312] Clark asked Krasner about a new argument because the NOLs for Acument Brazil essentially voided any actual tax deduction.[313] It was in this context that Yassinger stated PE "caved" on the issue of the Tax Benefit Offset, indicating that "Brazil is the last place we need

[307] Day III Tr. Trans. 59:20-60:4.
[308] *Id*.
[309] JX 34; *See supra,* Post-closing Problems.
[310] JX 34.
[311] *Id*.
[312] Day III Tr. Trans. 57:18-13.
[313] JX 34.

more tax deductions."[314] Yassinger testified that his meaning behind saying PE "caved" was that the tax savings and the loss were not in the same period, which was what they had attempted to change in the edits to the original bid draft.[315] Yassinger claimed PE "caved" because it did not continue to demand language requiring an "actual" tax savings.[316] The "Captain Cavemannnnnn!!!" email does not support Textron's argument that the Tax Benefit Offset was hypothetical.

V. CONCLUSION

Based on the foregoing, the Court holds: (1) The Open Issues Summary was not incorporated into the Letter Agreement; (2) The Letter Agreement did not alter or modify the terms of the PSA; and (3) Acument did not commit waiver by paying Textron net the Tax Benefit Offset when Acument was not entitled to a deduction.

Also based on the foregoing, the Court finds: (1) Textron has failed to prove by a preponderance of the evidence that the Tax Benefit Offset, as defined by the Tax Benefit definition of the PSA, is "hypothetical"; (2) The Tax Benefit Offset applies only when Acument is entitled to a Tax deduction based on Textron's indemnification payments; (3) Acument has not breached the PSA by withholding the Tax Benefit Offset because it is not entitled to a tax deduction in the United

[314] *Id.*
[315] Day III Tr. Trans. 54:6-14. Krasner reinforces that position: "In this instance, it happened to come into play in a situation where we weren't in a tax-paying position, we weren't in a position to realize any benefit in 2007 from these losses […] we couldn't take advantage of any tax deduction in 2007 in light of the NOL position that we were in." Krasner Depo. Trans. 142:4-12.
[316] Day III Tr. Trans. 54:6-13; 93:18-22.

States; (4) Textron has breached the PSA by wrongfully withholding the Tax Benefit Offset on indemnity payments for which Acument does not receive a tax benefit; and (5) Textron owes Acument $251,937 for Tax Benefit Offset reimbursement. The Court will not award attorney fees.[317]

IT IS SO ORDERED.

Jan R. Jurden, Judge

[317] The Court does not find Textron litigated this matter in bad faith. *See Johnston v. Arbitrium (Cayman Is.) Handels AG*, 720 A.2d 542, 546 (Del. 1998).