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RE: Bavless v. Davox Corn.. C.A. No. 17560

Dear Counsel:

The representatives of the class of stockholders who owned shares of capital stock of AnswerSoft, Inc. as of May 6, 1998 (the "Class") brought this action to enforce the Class's alleged right to 238,445 shares of Davox Corporation stock (the "Escrowed Shares"). The Escrowed Shares constituted 10% of the total shares of Davox common stock which were to be received by the Class in a merger of AnswerSoft and Davox.

Under the merger agreement and an escrow agreement, the Escrowed Shares were set aside as security for certain post-merger claims Davox might

assert. Absent Davox's compliance with the procedures for asserting and proving claims under the agreements, the Escrowed Shares were to be paid to the Class on a "Release Date." The Class contends that, as of the Release Date, Davox had no contractual claim on the Escrowed Shares and that all of those shares should have been paid over to the Class.

Davox, however, contends that the Class cannot make that argument in this court because it and the Class agreed to arbitrate any disputes about who was entitled to the Escrow Shares. Thus Davox seeks dismissal of the complaint.

In this opinion, I conclude that the Class's claims in this action "aris[e] out of, or relat[e] to" the escrow agreement between Davox and the Class.' All disputes arising under that escrow agreement are to "be settled by arbitration[.]"[2] The fact that the Class relies upon a particular provision of the merger agreement in support of its claims is unavailing, because that provision of the merger agreement is expressly incorporated into the escrow agreement. As a result, all of the contractual provisions relevant to the

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[1] Escrow Agreement (hereinafter "EA") § 14(g). The escrow agreement is signed by class representatives approved by AnswerSoft stockholders in their merger vote (and defined in the escrow agreement as the "Stockholder Representatives") on behalf of the Class (defined in the escrow agreement as the "Stockholders"). *Id.* § *12.*

[2] *Id.*

claims before this court are contained in the escrow agreement, and the escrow agreement sets forth a comprehensive scheme governing the Class's and Davox's respective rights regarding the Escrowed Shares. Therefore, the escrow agreement's arbitration clause is best read as encompassing the Class's claims.

Given Delaware's public policy of enforcing valid agreements to arbitrate, the Class must be held to its bargain to arbitrate all disputes which "arise out of" *or* "relate to" the escrow agreement. The complaint in this action raises such a dispute. Thus I grant Davox's motion to dismiss.

I. The Relevant Contractual Provisions

This dispute turns on the interrelationship between and meaning of the merger agreement and the escrow agreement. Those agreements were not executed by identical parties. The merger agreement was signed by Davox, Davox's acquisition vehicle, and AnswerSoft but not by the Class. Like the merger agreement, the escrow agreement was signed by Davox and its acquisition vehicle. But the other parties were the Class and American Stock & Transfer Agent, which was the escrow agent under the contract.

Under both agreements, the purpose of setting aside the Escrowed Shares is clear and undisputed — it was to provide Davox with protection

against any breach of the merger agreement by AnswerSoft, including of any covenants whereby AnswerSoft agreed it would be responsible for claims of third parties.[3] The Escrowed Shares were Davox's sole source of security, and Davox agreed that it could not seek any further relief from the Class or other affiliates of AnswerSoft.[4] The heart of this concept is articulated in Article X of the merger agreement, which is expressly incorporated into the escrow agreement. Under Article X, Davox could draw upon the Escrowed Shares by filing "a Notice of Claim (as defined in the Escrow Agreement) identifying Actual Damages" equal to or in excess of $100,000 and by having such "amount . . . determined pursuant to . . . Article X and the Escrow Agreement to be payable . . . ."[5]

The escrow agreement was entered into by Davox, the Class, and the escrow agent to implement this basic intent. As therefore might be expected, the escrow agreement sets forth a comprehensive process through which Davox could establish claims which it could cover by drawing against

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[3] Merger Agreement (hereinafter "MA") §§ 10.2, 10.3.
[4] MA § 10.7.
[5] MA § 10.4.

the Escrowed Shares ("Covered Claims"). By way of an incomplete example:

- § 2 of the escrow agreement specifies the formula for determining the number of Escrow Shares to be released to the Class on the Release Date and defines the term "Release Date";
- § 5 specifies the necessary contents of a "Notice of Claim";
- § 6 details how uncontested and contested Notices of Claims shall be handled by Davox and the Class;
- § 11 incorporates Article X of the merger agreement in full as to Davox and the Class; and
- § 13 addresses the proper delivery of all notices under the escrow agreement, including Notices of Claims.[6]

Both the merger agreement and the escrow agreement contain dispute resolution clauses. For its part, the merger agreement states:

> Consent to Jurisdiction. Each of AnswerSoft, Davox, and [Davox's acquisition vehicle] hereby irrevocably submits to the exclusive jurisdiction of any state or federal court in the State of Delaware over any suit, action or proceeding brought against it by any of the other parties hereto and arising out of or relating to this [merger] Agreement and the transactions contemplated hereby.[7]

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[6] EA §§ 2, 5, 6, 11, 13.

[7] MA § 11.14.

Meanwhile, § 14(g) of the escrow agreement (the "Arbitration Clause") states:

> **Arbitration.** Davox and the Stockholders [i.e., the Class] agree that any controversy or claim arising out of, or relating to, this Agreement or the breach of this Agreement will be settled by arbitration by, and in accordance with the applicable Commercial Arbitration Rules of the American Arbitration Association and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction. The arbitrator(s) will have the right to assess, against a party or among the parties, as the arbitrator(s) deem reasonable, (i) administrative fees of the American Arbitration Association, and (ii) compensation, if any, to the arbitrator(s). Arbitration hearings will be held in the county where the principal office of the Escrow Agent is located.[8]

II. The Allegations Of The Class In This Litigation

In its complaint, the Class asserts that Davox could not file Notices of Claim or perfect imperfectly tiled Notices of Claims after the Release Date specified in the escrow agreement. According to the Class complaint, the Release Date is "the earlier of: (1) the delivery by Davox's auditors of their report on Davox's financial statements for the year ended December 3 1, 1998; or (2) May 6, 1999. Upon information and belief, the Release Date was in late January, 1 999."[9]

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[8] EA § 14(g).

[9] Compl. ¶ 10.

The Class asserts that Davox improperly filed four Notices of Claim on January 11 and January 25, 1999 (the “Disputed Claims”). The defects in the Disputed Claims allegedly include Davox’s failure to: (1) comply with the provisions of the escrow agreement requiring notice to the Class; (2) make a good faith estimate of the value of three of the Disputed Claims; and (3) as to the fourth of the Disputed Claims, refrain from filing any Claim worth less than $100,000.

The complaint further alleges that Davox sent written instructions to the escrow agent on February 26, 1999 asking the agent to deliver all the Escrowed Shares to it. When the Class representatives got wind of this on March 1, 1999, they notified the escrow **agent** that they did not agree to the transfer because they had received no prior notice of the Disputed claims, As noted in the complaint, this dispute put a freeze on the Escrowed Shares because “[u]nder Section 6 of the Escrow Agreement, the Escrow Agent may not release any portion of the Escrow[ed] Shares until any disputed claims are resolved or uncontested.“”

[10] Compl. ¶ 15.

Through this action, the Class seeks to remedy that stalemate by obtaining a determination that the Disputed Claims "were not timely, are not compensable under the Merger Agreement and are without merit."[11] In addition, the Class seeks an order requiring Davox to do anything necessary to obtain the release of the Escrowed Shares to the Class and an award of damages to remedy any harm to the Class as a result of their not receiving the Escrowed Shares on the Release Date.

III. Procedural Framework

Davox has moved to dismiss on the grounds that the claims the Class seeks to litigate in this court are arbitrable under the escrow agreement. To the extent that Davox can persuade me that the claims are arbitrable, I, of course, must grant its motion.

This court "will not 'accept jurisdiction over' claims that are properly committed to arbitration since in such circumstances arbitration is an adequate legal remedy."[12] This refusal also reflects the public policy of this State, which favors the voluntary resolution of claims through agreed-upon

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[11] *Id.* ¶ 19.

[12] *Dresser Industries, Inc. v. Global Industrial Technologies, Inc.,* Del. Ch., C.A. No. 16967, mem. op. at 9, Strine, V.C. (June 9, 1999, corr. June 11, 1999) (*quoting McMahon v. New Castle Assocs.,* Del. Ch., 532 A.2d 601, 603 (1987)).

dispute resolution mechanisms and which is respectful of the congressional mandate (expressed in the Federal Arbitration Act) prohibiting states from exerting jurisdiction over claims which contracting parties committed to arbitration.[13]

To determine whether to dismiss a complaint because it raises claims that are arbitrable, the court is to accept the allegations in the complaint as true[14] and determine whether the claims supported by those allegations are arbitrable.[15] In this respect, our Supreme Court has recently stated:

> In determining arbitrability, the courts are confined to ascertaining whether the dispute is one that, on its face, falls within the arbitration clause of the contract. Courts may not consider any aspect of the merits of the claim sought to be arbitrated, no matter how frivolous they appear. Any doubt as to arbitrability is to be resolved in favor of arbitration. A court will not compel a party to arbitrate, however, absent a clear expression of such an intent.[16]

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[13] *Id.* at 9-10; *see also SBC Interactive, Inc. v. Corporate Media Partners,* Del. Supr., 714 A.2d *758,* 761 (1998); *Elf Atochem North America, Inc. v. Jaffari*, Del. Supr., 727 A.2d 286,295 (1999). This case is not governed by the Delaware Uniform Arbitration Act, but may well be governed by either the FAA (as a contract potentially involving interstate commerce) or New York's arbitration statute (because New York is where any arbitration under the escrow agreement is to occur). The parties have not focused on which statute governs, and essentially agree on the public policies that must inform my decision.

[14] *Dresser Industries,* mem. op. at 5 (citation omitted).

[15] *Nash v. Dayton Superior Corp.,* Del. Ch., 728 A.2d 59, 63 (1998).

[16] *SBC Interactive*, *714* A.2d at 761 (citation omitted).

This inquiry necessarily requires an examination of the contract containing the allegedly controlling arbitration clause and the parties' submissions regarding its proper interpretation.[17] In this case, both the Class and Davox rely upon the merger agreement and the escrow agreement, both of which are integral to and referenced in the complaint. Thus I may consider their plain terms in ruling on this motion.” I turn to that task now.

IV. Are The Counts Of The Complaint Arbitrable?

Consideration of whether the counts in the complaint are arbitrable properly begins with an examination of whether the counts fall squarely within the Arbitration Clause of the escrow agreement. The answer to this critical question is a clear yes.

The Arbitration Clause covers "any controversy or claim arising out of, or relating to" the escrow agreement.[19] The complaint clearly alleges that Davox breached several specific provisions within the escrow agreement,

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“*See, e.g., SBC Interactive,* 714 A.2d at 761 (affirming trial court for properly applying the rules of contract interpretation to determine whether a claim was arbitrable); *Nash, 728* A.2d at 63-64 (interpreting contract to determine arbitrability); *Dresser Industries,* mem. op. at 11-17 (same).

[18] *Vanderbilt Income and Growth Associates, L.L.C. v. Arvida/JMB Managers, Inc.,* Del. Supr., *691* A.2d *609, 613 (1996); Cincinnati SMSA L.P. v. Cincinnati Bell Cellular Systems Co.,* Del. Ch., C.A No. 15388, mem. op. at 7 n.12, Chandler, C. (Aug. 13, 1997), *aff'd,* Del. Supr., 708 A.2d 989 (1998). Neither the Class nor Davox contends that extrinsic evidence is necessary to construe the agreements.

[19] EA § 14(g).

including §§ 2, 5, 6, and 13. Moreover, to the extent the complaint contends that Davox breached Article X of the merger agreement, it also asserts that Davox breached the escrow agreement, which in § 11 incorporates Article X. Because Davox allegedly committed these breaches and did not follow the procedures set forth in the escrow agreement, the complaint contends that the Class should have received the Escrowed Shares on the Release Date set forth in the escrow agreement. Finally, the complaint alleges that as a result of Davox's breach of the escrow agreement and the dispute between the Class and Davox, the escrow agent is prevented by § 6 of the escrow agreement from releasing the Escrowed Shares. The Class therefore seeks judicial relief sufficient to permit the escrow agent to accomplish that act.

As is evident, all of the counts in the complaint "arise out of' the escrow agreement. And if one might quibble and say that some of the counts do not "arise out of' the escrow agreement, they all clearly "relate to" the escrow agreement.

The Class attempts to address this problem by citing to the dispute resolution clause of the merger agreement, which states that Davox "irrevocably submits to the exclusive jurisdiction" of the Delaware courts

"over any suit . . . arising out of or relating to" the merger agreement.[20] Because the merger agreement is the central document in the merger between AnswerSoft and Davox, it should, the Class asserts, be seen as the preeminent contract and the escrow agreement should be viewed as merely a subsidiary document delineating the duties of the escrow agent. The Arbitration Clause in the escrow agreement, under this reading, should simply govern disputes arising out of the relationship among the Class, Davox, and the escrow agent.

For several reasons, I find this attempt to limit the scope of the Arbitration Clause unconvincing. First, the limitation draws no support from the terms of the escrow agreement itself. The escrow agreement sets forth a comprehensive scheme for addressing post-merger Covered Claims against the Escrowed Shares. Among other things, the escrow agreement details how, when, and what type of Covered Claims can be asserted by Davox and articulates how the Class may contest such Claims. The arbitration clause is a clear expression of Davox's and the Class's intent to resolve their disputes about Covered Claims through the arbitration process.

[20] MA § 11.4.

The proposition that the Arbitration Clause was inserted solely to govern beefs with the escrow agent, whose role is primarily ministerial and whose obligations mostly hinge on the resolution of Covered Claims as between the Class and Davox, draws no support from the text of or the process set up by the escrow agreement.

Second, the Arbitration Clause is much more specifically focused on the precise type of claims pled in the Class complaint than is the merger agreement's dispute resolution clause. Thus the Arbitration Clause is a more reliable expression of the parties' intent as to how they wished to resolve disputes regarding the Escrowed Shares.[21] In this regard, it is important to note that the Class is not referenced in the dispute resolution clause of the merger agreement, which binds only AnswerSoft, Davox, and Davox's acquisition vehicle. The Class (through the Class representatives) is not even a signatory to the merger agreement. But the Class (through its representatives) is a signatory to the escrow agreement, and the Arbitration Clause is expressly binding upon the Class. It seems extraordinarily

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[21] *See Sonitrol Holding Co. v. Marceau Invetissements,* Del. Supr., 607 A.2d 1177, 1184 (1992) ("' [W]here there is an inconsistency between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provisions.'") *(quoting Stasch v. Underwater Works,* Inc., Del. Super., 158 A.2d 809, 812 (1960)).

unlikely that Davox agreed to allow the Class to sue it in the Delaware courts when the Class had a grievance regarding the Escrowed Shares, while relegating itself to the arbitration process.

That the dispute resolution clauses of the merger and escrow agreements have different parties is understandable. The merger agreement was subject to stockholder approval, and a myriad of disputes regarding it could have arisen if, for instance, the merger was not consummated. In particular, the merger's failure could have given rise to litigation between Davox and AnswerSoft (for example, if AnswerSoft had terminated and there was a tight about the propriety and implications of that termination). The escrow agreement, meanwhile, deals precisely with the post-merger relationship between the Class and Davox regarding the Escrowed Shares. It seems sensible that the Class would be party to the latter agreement's dispute resolution clause and not the former agreement's.

Third, the fact that Article X is part of the merger agreement cannot save the Class from arbitration. The Class concedes that Article X is an integral part of the escrow agreement. By agreeing to arbitrate claims arising out of the escrow agreement, the Class consented to arbitrate claims arising out of Article X as well. And the incorporation of Article X

expressly into the escrow agreement ensured that ***all*** of the contractual provisions relevant to a fight over the Escrowed Shares were fully set forth in that contract and could be interpreted by the arbitrator.

Fourth, acceptance of the Class's argument would lead to a great deal of inefficiency. All of the Class's counts can be arbitrated. In the face of the escrow agreement's unambiguous Arbitration Clause and the requirement that this court refrain from adjudicating arbitrable claims, I see no basis for this court to adjudicate the Class's claims that §§ 2, 5, 6, and 13 of the escrow agreement have been breached. At best, therefore, this court could adjudicate any alleged breach of Article X (which is also $11 of the escrow agreement), and then only by relying upon a very strained interpretation of the merger agreement's scope and by ignoring the fact that the Class is not a party to the merger agreement's dispute resolution clause.[22] The reading of the two agreements that best harmonizes them is one that gives primacy to the Arbitration Clause when disputes between the Class

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[22] Grudgingly, the Class conceded at oral argument that the Arbitration Clause might cover disputes regarding whether Davox had complied with the procedural requirements for asserting Covered Claims but not to disputes regarding whether a Covered Claim was substantially proper under Article X of the merger agreement, which is § 11 of the escrow agreement. Adoption of this approach requires the court to assume that Davox and the Class intended to create a very inefficient dispute resolution process whereby parts of the same dispute would be arbitrated and other parts would be litigated. This rather odd intention is not supported by the language of the contracts as issue.

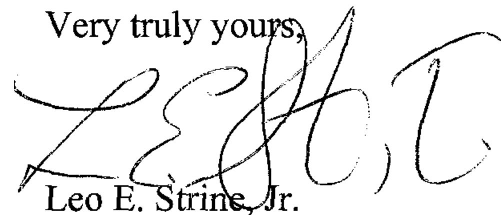
and Davox arise about the Escrowed Shares and that allows the dispute resolution clause of the merger agreement to govern disputes arising under the merger agreement that do not implicate the escrow agreement.[23]

Lastly, to the extent that the scope of the Arbitration Clause is ambiguous, any doubts I have must be resolved in favor of arbitration.[24]

V. Conclusion

For the foregoing reasons, I find the counts in the complaint are arbitrable and therefore grant Davox's motion to dismiss. IT IS SO ORDERED.

Very truly yours,



Leo E. Strine, Jr.

oc: Register in Chancery

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[23] *Cf. Elf Atochem,* 727 A.2d at 294 (where there was a very broad forum selection clause in an limited liability company agreement for claims "arising out of," "in connection with," or "related to" that agreement, disputes arising under a separate distributorship contract were sufficiently connected to the LLC agreement as to be covered by its forum selection clause).

[24] *E.g., Elf Atochem*, 727 A.2d at 295.