IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DENNIS MEHIEL, as Stockholders' Representative of SF HOLDINGS GROUP, INC.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 851-N
SOLO CUP COMPANY,	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: February 23, 2005
Date Decided: May 13, 2005

Alan J. Stone, David J. Teklits, and Thomas W. Briggs, Jr., of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware; OF COUNSEL: James E. Brandt, Seth Friedman, and George Royle V, of LATHAM & WATKINS LLP, New York, New York, Attorneys for Plaintiff.

Edward P. Welch and Randolph K. Herndon, of SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Wilmington, Delaware; OF COUNSEL: Matthew R. Kipp, Donna L. McDevitt, and Laura D. Cullison, of SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Chicago, Illinois, Attorneys for Defendant-Counterplaintiff.

CHANDLER, Chancellor

This case involves the interpretation of a merger agreement (the "Agreement") between Solo Cup Company ("Solo"), Solo Acquisition Corporation ("Acquisition Sub") and SF Holdings Group Inc. ("SFH"). Plaintiff, Dennis Mehiel, is the designated stockholder representative of SFH, and asserts that he is contractually entitled to a report prepared, at the request of Solo, by the accounting firm, KPMG LLP ("KPMG"). This report was generated during Solo's own calculation of SFH's working capital and was used by Solo in determining the merger consideration that it would pay to SFH's stockholders.

Plaintiff's complaint contains four counts. Count I of the complaint seeks "specific performance of . . . [Solo's] obligation to execute an engagement agreement" with Ernst & Young, the neutral auditor chosen by both sides to serve as an arbitrator.[1] Count II seeks a judgment declaring that section 3.9 of the Agreement authorizes Ernst & Young, in its discretion, to allow discovery in the arbitration proceedings.[2] Count III requests a judgment declaring that the Agreement entitles plaintiff to "full access to records relating to Solo's determination of Closing Working Capital, and to all employees who participated in such determination,

[1] Am. Compl. ¶ 28.
[2] *Id.* ¶ 31.

including records and personnel of KPMG."[3] Finally, Count IV of the complaint seeks an order requiring "defendant's to give plaintiff full access to all records relating to Solo's determination of Closing Working Capital, as well as all employees who participated in such determination, including records and personnel of KPMG."[4]

Defendants have answered the complaint by raising four defenses,[5] and by asserting four counterclaims. Count I of the counterclaim seeks a judgment declaring, "Solo has no obligation under the terms of the Merger Agreement to provide Mehiel with access to KPMG's books, records or employees, or to the books, records or employees of any entity other than SFH."[6] Count II of the counterclaim seeks a judgment declaring, "the parties have no rights under section 3.9(c) of the Merger Agreement to engage in discovery or call witnesses at any hearing before the Neutral Auditor."[7] Count III of the counterclaim seeks an order requiring Mehiel to sign the Neutral Auditor's engagement letter in the form the defendant has

[3] *Id.* ¶ 36.
[4] *Id.* ¶ 41.
[5] Defendant's Answer contends that: (1) the complaint fails to state a claim; (2) that relief should be barred under the doctrine of unclean hands; (3) that the shareholders have suffered no injury; and (4) to the extent the SFH stockholders were injured, such injury was caused by Mehiel and not Solo. *See* Answer at 6-7.
[6] Countercl. ¶ 58.
[7] *Id.* ¶ 62.

presented.[8] Count IV of the counterclaim seeks an order requiring Mehiel to submit "SFH's presentation to the Neutral Auditor prior to the expiration of 30 days set forth in Section 3.9(c) of the Agreement, counted from the date that the engagement letter is signed, to allow the Neutral Auditor to complete his duties within the time allotted."[9]

Both parties have moved for summary judgment on their respective claims and the matter has been fully briefed. For the reasons described below, I dismiss the relief plaintiff requests in Counts I and II of the complaint. Counts III and IV of the complaint are denied. For defendant, I grant the relief requested in Count I. The relief requested in Count II of the counterclaim is denied. Counts III and IV of the counterclaim are dismissed.

I. BACKGROUND

Sweetheart Cup Company ("Sweetheart") is a producer and marketer of disposable paper, plastic, and foam foodservice and food packaging products in North America. Before the Merger Agreement, Sweetheart was a wholly-owned subsidiary of Sweetheart Holdings, which in turn, was a wholly-owned subsidiary of SFH. Plaintiff, Dennis Mehiel, served as Chairman and Chief Executive Officer of Sweetheart, Sweetheart Holdings and SFH. Pursuant to the Agreement, Mehiel is designated the stockholder

[8] *Id*. ¶ 68 & Ex. B. ("Def.'s Draft Engagement Letter").
[9] *Id*. ¶ 73.

representative and is authorized to make any decision required or permitted to be taken under the Agreement.[10]

On February 22, 2004, Solo acquired control of Sweetheart by causing its Acquisition Sub to merge with SFH. The merger consideration was in part based upon an internal estimation of SFH's working capital ("Estimated Working Capital"), which Mehiel was entitled to submit two days prior to the closing of the deal. Within sixty days after closing, Solo was entitled to perform its own calculations of SFH's Working Capital ("Closing Working Capital"). Anticipating the potential for divergence between the Estimated Working Capital and the Closing Working Capital, the parties contracted for several mechanisms to protect their respective interests. The first was an escrow account, where Solo deposited $15 million. Under the terms of the Agreement, these funds were to be distributed to Mehiel on a schedule, with the first disbursement due six months after closing. The amount of the escrow deposit could be reduced, on a dollar-for-dollar basis, if Solo's determination of the Closing Working Capital was less than the Estimated Working Capital. Because the parties have yet to agree on the final working capital of SFH, no disbursements have been made.

[10] *See* Am. Compl. Ex. 1 (Agreement § 11.1(a)).

The next contractual protection provided Solo with full access to all relevant books and records and employees of SFH in preparing its estimation. Mehiel was guaranteed the same access in completing his review of Solo's calculation.[11] The final contractual provision granted each party the right to submit disputes concerning the working capital estimation to a neutral auditor, who "based solely on the presentations of [Solo] and [Mehiel], and not by independent review,"[12] would determine the working capital of SFH. If there was no consensus within thirty days of Solo's submission, either party could trigger this right to arbitration.

On February 19, 2004, Mehiel submitted the Estimated Working Capital, which he determined to be $247,991,000. Upon receipt of SFH's estimation, Solo retained KPMG to assist it and, on April 26, a Closing Working Capital of $219,703,000 was submitted to Mehiel—an amount reflecting a proposed $28,288,000 decrease in the purchase price for the company. Pursuant to the Agreement, Mehiel now had thirty days to review Solo's Closing Working Capital estimation. Mehiel appointed his former Chief Operating Officer of Sweetheart, Thomas Uleau, to coordinate this review.

[11] *Id.* § 3.9(a), (b).
[12] *Id.* § 3.9(c).

Beginning in early May, Mehiel and Uleau began their review of Solo's estimation. During the 30-day review period, Mehiel discovered that Solo's estimation was in large part predicated upon KPMG's work. Uleau speculated that the difference between SFH's Estimated Working Capital and Solo's Closing Working Capital was in part caused by the accounting methodologies KPMG employed, which Uleau contended were inconsistent with SFH's historical accounting modes and in breach of the Agreement.[13] To test this assertion, Uleau and Mehiel made numerous requests for access to KPMG's work product and employees. To each request, Solo refused in short order, contending that KPMG's work product was not part of the books and records of SFH and the Agreement only guaranteed each party "full access to all relevant books and records and employees of [SFH] . . . ."[14] The dispute over access to KPMG's work product continued for two months and the parties were unable to resolve their differences.

On July 24, 2004, the parties agreed to exercise their right to arbitrate the dispute over SFH's working capital and agreed to appoint Ernst & Young to act as the arbitrator. Once retained, Ernst & Young requested the parties to agree on the particulars of the appointment and the arbitration

[13] *See* affidavit of Thomas Uleau ("Uleau Aff.") ¶ 7; *see* Agreement § 3.9(a) ("The Closing Working Capital Statement [*i.e.*, Solo's calculations] shall be prepared in good faith in conformity with GAAP applied on a basis consistent with the Target Working Capital.").

[14] Agreement § 3.9(a), (b).

proceedings. On September 21, 2004, Ernst & Young submitted the first draft engagement letter, which contained the following language concerning discovery:

> At the request of a party or on his or her own initiative, the Neutral Auditor shall have authority to direct the production of particular documents or other materials by the parties, or by non-parties (including to require a party to make an employee or ex-employee available for questioning by the other party), at any time prior to the issuance of his or her determination in this matter.[15]

This provision concerning Ernst & Young's discretion to order discovery became the major point of contention between Solo and Mehiel, and for two additional months, various versions of the engagement letter, either broadening or limiting the arbitrator's discretion, were circulated between the parties. Unable to agree on the scope of Ernst & Young's discretion, Mehiel submitted a final draft engagement letter on November 9. That letter removed the provision outlined above and substituted a provision that would empower the arbitrator to resolve the discovery dispute. On November 15, 2004, Solo submitted its final version of the engagement letter and removed all references to the arbitrator's ability to order discovery. Mehiel filed his complaint with this Court the next day.

[15] Draft Engagement Letter Attachment D ¶ 6.

II. ANALYSIS

The relief sought in plaintiff's complaint and defendant's counterclaims can be distilled into two categories of relief: declaratory judgment and specific performance. The parties have developed a sufficient record to resolve the issues before the Court and have submitted their cross-motions for summary judgment.

When the Court is faced with cross-motions for summary judgment the same standard is applied to each party's motions: if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, then summary judgment is appropriate. The mere existence of cross-motions, however, does not necessarily indicate that summary judgment is appropriate for either party.[16] Thus, a movant will be granted relief only if the Court determines that the record does not require a more thorough development to clarify the facts or the law's application to the case.[17] There are no disputed material facts in this case. Moreover, the issues in dispute concern the interpretation of the Agreement and the rights springing

[16] *Kronenberg v. Katz*, 2004 Del. Ch. LEXIS 77, at *38 (Del. Ch. 2004).
[17] *Id.*

therefrom. Therefore, the Court finds that the standard set forth in Chancery Rule 56(c)[18] is met and the action may be decided on the existing record.

A. The Parties' Requests for Declaratory Judgments

Both Mehiel and Solo ask this Court to determine the rights arising under the Agreement. Count III of the complaint seeks a judgment declaring that the Agreement entitles plaintiff to "full access to records relating to Solo's determination of Closing Working Capital, and to all employees who participated in such determination, including records and personnel of KPMG."[19] Count I of the counterclaim, mirrors the request in Count III of the complaint and seeks a judgment declaring, "Solo has no obligation under the terms of the Merger Agreement to provide Mehiel with access to KPMG's books, records or employees, or to the books, records or employees of any entity other than SFH."[20] Count II of the complaint seeks a judgment declaring that section 3.9 of the Agreement authorizes Ernst & Young, in its discretion, to allow discovery in the arbitration proceedings.[21] Count II of the counterclaim seeks a judgment declaring, "the parties have no rights

[18] CH. CT. R. 56(c).
[19] Am. Compl. ¶ 36
[20] Countercl. ¶ 58.
[21] Am. Compl. ¶ 31.

under section 3.9(c) of the Merger Agreement to engage in discovery or call witnesses at any hearing before the Neutral Auditor."[22]

The Court's determination of the rights arising under the Agreement is expressly authorized under 10 *Del. C.* § 6502.[23] Four elements must be met for the Court to consider a controversy suitable for declaratory judgment: (1) the controversy must involve a claim of right or other legal interest of the party seeking declaratory relief; (2) the claim of right or other legal interest must be asserted against one who has an interest in contesting the claim; (3) the conflicting interests must be real and adverse; and (4) the issue must be ripe for judicial determination.[24] Because of the dispute concerning Mehiel's alleged right to access KPMG's report, Mehiel and Solo have been unable to agree to the final calculation of SFH's working capital and $15,000,000 of the purchase price has been tied up in escrow for over a year. Count III of the complaint and Count I of the counterclaim are therefore suitable for declaratory judgment. The Court concludes, however, that neither Count II of the complaint nor Count II of the counterclaim is suitable for a declaratory judgment because the Court lacks subject matter

[22] Countercl. ¶ 62.
[23] "Any person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status or other legal relations thereunder." 10 *Del. C.* § 6502.
[24] *Gannett Co. v. Bd. of Managers of the Del. Crim. Justice Info. Sys.*, 840 A.2d 1232, 1237 (Del. 2003).

jurisdiction over the claims raised in those counts. I will elaborate on these conclusions in turn.

1. Mehiel's Contractual Right to KPMG's Report

The dispute between Mehiel and Solo arises from the interpretation of three separate provisions found in the Agreement, sections 3.9(a), (b) and (c). Mehiel contends that his contractual right to have KPMG's report springs from sections 3.9(a) and (b) of the Agreement. Section 3.9(a) provides in part:

> The Stockholders' Representative and its representatives shall have full access to all relevant books and records and employees of the Company in connection with Parent's preparation of the Closing Working Capital Statement.

Section 3.9(b) provides in part:

> After receipt of the Closing Working Capital Statement, the Stockholders' Representative shall have 30 days to review the Closing Working Capital Statement. The Stockholders' Representative and its representatives shall have full access to all relevant books and records and employees of the Company to the extent required to complete its review of the Closing Working Capital Statement.

Mehiel reads these provisions as including all relevant books and records and employees of not only SFH, but also Solo and any agent Solo may have used in its calculation of the Closing Working Capital.[25] Mehiel further contends that it was the intent of the parties to "supply Mehiel with 'full

[25] *See* Pl.'s Mem. of Law in Supp. of Mot. for Summ. J. ("Pl.'s Opening Mem.") at 12.

access' to all information material and relevant [to the] preparation of the Closing Working Capital Statement to enable him to make an educated decision about the correctness of Solo's conclusions."[26]

Mehiel's right to have Solo turn over the KPMG report is a matter of contract interpretation. As such, I will begin my analysis by looking at the language the parties used in drafting the instrument. When a contract is unambiguous in its language, the Court will not proceed to interpret it or to search for the parties' intent behind the plain language employed.[27] In this case, I find no ambiguity in the language employed in either section 3.9(a) or (b) of the Agreement. The provision authorizing access to SFH's books and records is clear on its face: Mehiel is entitled to "all relevant books and records and employees of the *Company*."[28] "Company" as used in this Agreement is a defined term and its meaning is expressly limited to SF Holdings Group, Inc.[29] Mehiel's attempt to introduce the parties intent into the record is unavailing. If Mehiel wanted a contractual right to access a broader range of material, then he should have contracted for it. Accordingly, Solo has no obligation under the terms of either section 3.9(a) or (b) of the Agreement to provide Mehiel with access to KPMG's books,

[26] *Id.*
[27] *Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 343 (Del. 1983).
[28] Agreement § 3.9(b) (emphasis added).
[29] *See* Agreement at 1.

records, or employees, or to books, records, or employees of any entity other than SFH. The relief requested in Count III of the complaint is therefore denied. The relief requested in Count I of the counterclaim is granted, but the Court limits its judgment to the rights flowing from sections 3.9(a) and (b) alone, and will not extend this decision to interfere with the discretion of the arbitrator.[30]

2. The Auditor's Powers to Compel Discovery

The next point of contention between the parties arises from the disagreement concerning the scope of Ernst & Young's discretion to compel discovery. Because arbitration is a creature of contract, I first turn to section 3.9(c) of the Agreement, which provides in relevant part:

> If at the conclusion of the Resolution Period there are amounts still remaining in dispute, then all amounts remaining in dispute shall be submitted to PricewaterhouseCoopers, LLP or another firm of nationally recognized independent public accountants reasonably acceptable to Parent and the Stockholders' Representative (the "NEUTRAL AUDITOR"). Parent and the Stockholders' Representative agree to execute, if requested by the Neutral Auditor, a reasonable engagement letter . . . .
>
> . . . .

[30] I pause here to address Mehiel's First Affirmative Defense of Failure to State a Claim raised in his answer to the counterclaim. When a failure to state a claim defense is raised, and resolution of the issue depends on matters outside the pleadings, Chancery Rule 56(c) is applicable. I have applied this standard to Count I of the counterclaim and have concluded that Solo is entitled to relief. Mehiel's affirmative defense therefore will not bar recovery.

> . . . The Neutral Auditor shall act as an arbitrator to determine, based solely on presentations by Parent and the Stockholders' Representative, and not by independent review, only those items still in dispute. The Neutral Auditor's determination shall be made within 30 days of its engagement, shall be set forth in a written statement delivered to Parent and the Stockholders' Representative and shall be final, binding and conclusive.

Mehiel contends that this arbitration provision should be "governed and construed in accordance with Delaware law" and that the Delaware Uniform Arbitration Act[31] (the "DUAA") controls.[32] Mehiel further contends that under the DUAA, arbitrators "may compel the attendance of witnesses and the production of books, records, contracts, papers, accounts, and all other documents and evidence, and shall have the power to administer oaths."[33]

Solo counters Mehiel's argument in two ways. First, Solo asserts that the DUAA does not apply because the Agreement does not provide that the arbitration is to take place in Delaware.[34] Solo points to *Gen. Elec. Co. v. Star Techs. Inc.*,[35] to support its proposition.[36] Next, Solo contends that

---

[31] 10 *Del. C.* § 5701
[32] Pl.'s Opening Mem. at 9.
[33] 10 *Del. C.* § 5708; *see also* Pl.'s Opening Mem. at 10.
[34] Def.'s Mem. of Law In Supp. of Summ. J. ("Def.'s Opening Mem.") at 15.
[35] 1996 Del. Ch. LEXIS 78, at *13-14 (Del. Ch. 1996) ("Since the parties agreement in this action did not provide for arbitration in Delaware and since the arbitration was held in the District of Columbia, the Court of Chancery does not have subject matter jurisdiction and cannot hear this matter.").
[36] Def.'s Opening Mem. at 15.

regardless of the DUAA's applicability, "[u]nder the plain language of Section 3.9(c) of the Merger Agreement, the parties neither provided for nor contemplated extensive discovery or the presentation of witnesses and cross-examination with respect to the working capital dispute."[37] According to Solo, three points support this assertion: (1) section 3.9(c) limits the arbitrator's power to conduct discovery because the arbitrator may consider only the submissions of the parties and may not make an independent review of SFH's working capital;[38] (2) the parties did not contemplate extensive discovery under section 3.9(c) because the arbitrator is required to reach a decision within thirty days of the parties' submissions;[39] and (3) the Agreement must be read as a whole, and because section 3.9(c) was a specific carve out from the arbitration procedures from all other indemnification disputes, a plain reading of the section necessarily forecloses the arbitrator's power to order discovery.[40]

I begin my analysis of this issue by observing that it is not necessary to reach the question of the applicability of the DUAA. By its own terms,

[37] *Id*. at 17.
[38] *Id*.
[39] *Id*.
[40] *Id*. at 14-15.

the DUAA applies to arbitration that occurs in Delaware[41] and the parties have not designated Delaware, or any state for that matter, as the location for the arbitration. Cases considering the applicability of state arbitration rules suggest that absent a clear delineation of state arbitration rules, the Federal Arbitration Act will apply to arbitration agreements that touch upon interstate commerce.[42] Nevertheless, the Agreement evinces a clear intent of the parties to have the Agreement, and the disputes arising thereunder, resolved in accordance with Delaware law and the applicability of the DUAA is not determinative of the Court's authority to apply substantive decisional law to the issues raised.[43]

---

[41] 10 *Del. C.* § 5702 ("The making of an agreement described in § 5701 providing for arbitration in this State confers jurisdiction on the Court to enforce the agreement under this chapter.").

[42] *See Sovak v. Chugai Pharm. Co*., 280 F.3d 1266, 1269 (9th Cir. 2002) ("Parties may agree to state law rules for arbitration even if such rules are inconsistent with those set forth in the Federal Arbitration Act (FAA), 9 U.S.C.S. § 1 *et seq*. However, parties must clearly evidence their intent to be bound by such rules. In other words, the strong default presumption is that the FAA, not state law, supplies the rules for arbitration."). *See also Mastrobuono v. Shearson Lehman Hutton, Inc*., 514 U.S. 52, 61-62 (1995) (same); *Volt Info. Sciences, Inc., v. Bd. of Trustees*, 489 U.S. 468 (1989) (same).

[43] *See* Agreement § 11.12 ("This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware without giving effect to the principles of conflicts of law thereof."). *See Sovak*, 280 F.3d at 1270 (concluding that a general choice-of-law clause within an arbitration provision does not trump the presumption that the Federal Arbitration Act, supplies the rules for arbitration, but rather, the court will interpret the choice-of-law clause as simply supplying state substantive, decisional law, and not state law rules for arbitration.). *See also Dresser Indus. v. Global Indus. Techs.*, 1999 Del. Ch. LEXIS 118, at *13-14 (Del. Ch. 1999) (applying general state law principles of contract interpretation to an arbitration agreement within the scope of the United States Arbitration Act).

In Delaware, the question whether parties have agreed to arbitrate is one for the courts (*i.e.*, substantive arbitrability), and not for the arbitrators;[44] resolution of procedural questions *(i.e.*, procedural arbitrability), however, will be left to the arbitrator.[45] Here, the actual dispute giving rise to this action is over the calculation of SFH's working capital. Accordingly, section 3.9(c) of the Agreement is applicable and unequivocally states that "all amounts remaining in dispute shall be submitted to . . . the [neutral auditor]." In the face of an unambiguous intent to arbitrate this dispute, I must conclude that the parties' contentions concerning discovery do not raise questions of "substantive arbitrability." Thus, the scope of the arbitrator's authority to compel discovery is a procedural question and one that must be addressed by the arbitrator,[46] who will determine, based upon

[44] *SBC Interactive v. Corporate Media Partners*, 714 A.2d 758, 761 (Del. 1998).

[45] *Id.* at 762; *see also University of Delaware v. Wyman Elec. Serv. Co.*, 1994 Del. Ch. LEXIS 153, at *10 (Del. Ch. 1994) *quoting John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 556-59 (1964) ("Once it is determined that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions that grow out of the dispute and bear on its final disposition should be left to the arbitrator.").

[46] The Delaware courts have not specifically addressed whether the power to compel discovery is a procedural question. This rather straightforward conclusion is supported in numerous other jurisdictions. *See e.g.*, *Int'l Union, UMW v. Marrowbone Dev. Co.*, 232 F.3d 383, 389 (4th Cir. 2000) ("An arbitrator typically retains broad discretion over procedural matters and does not have to hear every piece of evidence that the parties wish to present."). *See also Metalex Corp. v. Sunline Shipping Co.*, 2000 U.S. Dist. LEXIS 17462, at *6 (S.D.N.Y. 2000) ("The arbitrator is the judge of the admissibility and relevance of evidence submitted in an arbitration hearing"); *Int'l Brotherhood of Electrical Workers, et al.*, 1993 U.S. Dist. LEXIS 2961, at *17 ("When a subject matter is arbitratable, "procedural" questions, such as evidence issues, are left to the arbitrator") (N.D. Ill. 1993); *Cullen v Paine Webber Group, Inc.*, 689 F. Supp. 269 (S.D.N.Y. 1988)

the language of the contract, and the procedures the parties submit to, what that authority is. In this circumstance, arbitration is an adequate legal remedy and this Court is without jurisdiction to resolve this issue.[47] Count II of the complaint and Count II of the counterclaim are therefore dismissed.

3. The Parties' Request for Specific Performance

Count I of the complaint seeks an order of the Court "requiring specific performance of . . . [Solo's] obligation to execute an engagement agreement" with Ernst & Young, the neutral auditor chosen by both sides to serve as an arbitrator.[48] Count IV of the complaint seeks an order of the Court requiring "defendant's to give plaintiff full access to all records relating to Solo's determination of Closing Working Capital, as well as all employees who participated in such determination, including records and personnel of KPMG."[49] Count III of the counterclaim seeks an order of the Court requiring Mehiel to sign the Neutral Auditor's engagement letter in

("The arbitrators' failure to order production of the document appears to be within their discretion; 9 U.S.C. § 7 (1982) provides that arbitrators may require that specified documents be provided.").

[47] *Yuen v. Gemstar-TV Guide Int'l, Inc*., 2004 Del. Ch. LEXIS 96 (Del. Ch. 2004), at *6-7; *Nash v. Dayton Superior Corp*., 728 A.2d 59, 64 (Del. Ch. 1998). Neither party has raised the issue of the Court's jurisdiction, nevertheless, the Court is confident in its ability to dismiss an action *sua sponte* when it discovers it lacks subject matter jurisdiction. *See, e.g.*, *Christiana Town Ctr. LLC v. New Castle County*, 2003 Del. Ch. LEXIS 60, at *7 (Del. Ch. 2003) (stating that judges in the Delaware Court of Chancery are obligated to decide whether a matter comes within the equitable jurisdiction of this Court regardless of whether the issue has been raised by the parties).

[48] Am. Compl. ¶ 28.

[49] *Id*. ¶ 41.

the form the defendant have presented.[50] Count IV of the counterclaim seeks an order requiring Mehiel to submit "SFH's presentation to the Neutral Auditor prior to the expiration of 30 days set forth in section 3.9(c) of the Agreement, counted from the date that the engagement letter is signed, to allow the Neutral Auditor to complete his duties within the time allotted."[51]

Delaware law requires a party seeking specific performance to prove by clear and convincing evidence the existence and terms of an enforceable contract,[52] and the Court will not decree this relief if the contract terms are unclear and indefinite—there must be no need for the Court to supply meaning to essential elements of the contract.[53]

For simplicity sake, I begin this section of my analysis with Count IV of the complaint. Since that Count stems from the relief sought in Count III of the complaint (*i.e.* Mehiel's putative contractual right to KPMG's report) and since I have determined Mehiel is not entitled to that relief, I deny Count IV of the complaint. A party cannot be entitled to specific performance of a contractual right they do not possess. Turning to Count I of the complaint and Count III of the counterclaim, those claims are predicated upon the

---

[50] Countercl. ¶ 68 & *id*. Ex. B ("Def.'s Draft Engagement Letter").
[51] *Id*. ¶ 73.
[52] *Cirrus Holding Co. Ltd. v. Cirrus Indus., Inc*., 2001 Del. Ch. LEXIS 92, at *25 (Del. Ch. 2001).
[53] *N.F. v. F*., 172 A.2d 274 (Del. Ch. 1961); *Morgan v. Wells*, 80 A.2d 504 (Del. Ch 1951).

rights flowing from section 3.9(c) of the Agreement, which provides that the "Parent and the Stockholders' Representative agree to execute, if requested by the Neutral Auditor, a reasonable engagement letter." Two factors influence my decision to deny the relief requested in both Count I of the complaint and Count III of the counterclaim. First, the obligation to enter into a "reasonable engagement letter" is the second procedural step in the Agreement when a party wishes to submit the working capital dispute to the arbitrator. The first step, of course, is notice to the opposing party, a requisite found in section 3.9(b) of the Agreement. After notice, the parties must agree on an arbitrator and then the arbitrator, in its discretion, may request a reasonable engagement letter. Ernst & Young was selected by the parties to serve as the arbitrator and on September 22, 2004, it submitted its draft engagement letter. That engagement letter began the process of outlining the arbitration procedures that would be employed,[54] and is a contractual procedure provided for in the arbitration of the working capital calculation; consequently, the Court is without jurisdiction to adjudicate

[54] *See* Uleau Aff. Ex. G ("E&Y Draft Engagement Letter") (Sept. 22, 2004).

disputes concerning the arbitration proceedings,[55] and it is the parties or the arbitrator who must resolve disputes concerning the scope of that letter.[56]

Secondly, even if the Court had jurisdiction over this issue, specific performance would not be granted. The standard for this equitable remedy is clear: the Court will not supply essential terms to the contract.[57] At this juncture, it is impossible for the Court to attribute meaning to the phrase "reasonable engagement letter." The parties have yet to define for themselves the most basic guidelines for this arbitration. In this vacuum, the Court cannot divine the meaning of "reasonable engagement letter" and will not substitute its interpretation for that of the parties. Accordingly, I conclude that plaintiff has not established by clear and convincing evidence the meaning of "reasonable engagement letter." Defendants similarly fail to meet this burden with respect to Count III. For these reasons, Count I of the complaint and Count III of the counterclaim must be dismissed.

---

[55] *See SBC Interactive*, 714 A.2d at 762 (Del. 1998) (finding that questions concerning the proper invocation of arbitration are procedural and are left to the arbitrator).

[56] The fact that § 11.8 of the Agreement expressly waives the defense of adequacy of a remedy at law does not change this analysis. First, that section is predicated upon the parties' assent that monetary damages would not make the parties whole. Arbitration, without regard to monetary damages, presents an adequate remedy at law. Additionally, it is a well-settled principle that this Court's equity jurisdiction cannot be conferred by contract. *See, e.g., El Paso Natural Gas Co. v. Transamerican Natural Gas Corp.*, 669 A.2d 36, 39 (Del. 1995).

[57] *See supra* n.53.

The final claim for relief is Count IV of the counterclaim where defendant asks the Court to issue an order requiring "SFH's presentation to the Neutral Auditor [be made] prior to the expiration of 30 days set forth in Section 3.9(c) of the Agreement, counted from the date that the engagement letter is signed, to allow the Neutral Auditor to complete his duties within the time allotted."[58] For the reasons discussed above, I conclude that this request for relief touches upon the procedures for arbitrating the dispute over SFH's working capital and must be resolved by the arbitrator. Additionally, even if I were to determine that I could hear this claim, specific performance is not appropriate when the contractual provision underlying Count IV has not been breached.[59] Because no engagement letter has been signed, the 30-day time frame for SFH's submissions is not yet triggered. Therefore, the claims underlying Count IV of the counterclaim are not ripe. Accordingly, Count IV of the counterclaim is dismissed.

III. CONCLUSION

For the reasons set forth above, I conclude that an adequate remedy at law exists as to Counts I and II of the complaint and Counts II, III and IV of the counterclaim. Those Counts are therefore dismissed**.** Counts III and IV

[58] Countercl. ¶ 73.

[59] *See Bissell v. Marriott Family Restaurants*, 1994 Del. Ch. LEXIS 225, at *11 (Del. Ch. 1994) (denying landlord's claim for specific performance on ripeness grounds when tenant had intended to act in breach of the lease agreement but had not yet acted).

of the complaint are denied**.** Count I of the counterclaim is granted to the extent sections 3.9(a) and (b) of the Agreement limit Mehiel's right to access any books and records and employees of SFH used in connection with Solo's preparation of the Closing Working Capital Statement or Mehiel's review of such preparation. Nothing herein shall be interpreted as limiting or expanding the arbitrator's discretion to compel the production of such documents in an arbitration proceeding.

Counsel shall confer and agree upon a form of Order to implement this decision.