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Submitted: October 14, 2005
Decided: November 3, 2005

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Re: *Mehiel v. Solo Cup Co.*
Civil Action No. 1596-N

Dear Counsel:

Pending before this Court is plaintiff's motion for summary judgment. Plaintiff, the shareholder representative for the shareholders of an acquired company, seeks a declaration barring defendant, the acquiror, from raising two claims before an American Arbitration Association ("AAA") arbitrator. Plaintiff argues these claims have already been raised and dismissed in their proper forum and that, as a matter of substantive arbitrability, this Court

should bar their further arbitration. After careful consideration of the parties' submissions, the Court hereby denies plaintiff's motion for summary judgment.

I. BACKGROUND FACTS

This case arises out of the February 27, 2004, acquisition by Solo Cup Company ("Solo Cup") of SF Holdings Group, Inc. ("SF Holdings"). Solo Cup acquired SF Holdings pursuant to a merger agreement dated December 22, 2003 (the "Merger Agreement"). The Merger Agreement provided for an adjustment to the purchase price based on changes in SF Holding's working capital balance from a date prior to the closing to a date at the closing. So called "working capital adjustments" are fertile ground for dispute "because they embody the intersection of complex legal and accounting concepts and virtually always have an economic impact on the parties."[1]

In order to resolve any working capital adjustment disputes quickly and fairly, Solo Cup and SF Holdings (the "parties") agreed that working capital disputes would be arbitrated by a nationally recognized independent accounting firm. The Merger Agreement also created a second arbitration procedure for resolving disputes involving breaches of the representations

[1] Mark B. Tresnowski, The Anatomy of Working Capital Purchase Price Adjustment Provisions in Acquisition Agreements, 1494 PLI/Corp 55, 61 (2005).

and warranties ("R&W"). The parties agreed to arbitrate any claims for breach of the R&W before the AAA.

After completion of the merger, there arose, as anticipated by the parties, multiple disputes regarding both the working capital adjustment and the R&W. Among these disputes were two that could be characterized as both working capital disputes and as R&W disputes. The first involved SF Holdings' inclusion in cash of over $9 million in proceeds from the sale of its Somerville, Massachusetts, facility (the "Somerville Claim"). Solo Cup asserted that the proceeds from the sale should not have been included in the computation of SF Holdings' "cash" because the proceeds had been pledged to secure SF Holding's obligations to a third party. The second dispute involved whether SF Holdings had recorded an adequate reserve in connection with litigation with Trigen Energy Development Corporation ("TEDC"). Contrary to representations made to Solo Cup, SF Holdings allegedly had previously made a settlement offer to TEDC that exceeded the amount of the reserve by $3,252,409, and had received a response that this offer was inadequate (the "Trigen Claim").

Solo Cup first tried to raise the Somerville and Trigen Claims in the working capital adjustment arbitration. This attempt, however, was frustrated by the fact that Solo Cup failed to comply with the agreed upon

procedures for arbitrating working capital disputes. The Merger Agreement set forth detailed procedures for arbitrating working capital disputes. First, Mehiel and Solo Cup were to correspond in order to establish which items were in dispute. Next, the parties were to attempt to negotiate with regard to those items for a period of sixty days. If these negotiations failed, then a "Neutral Auditor" would be appointed to resolve "the items still in dispute." The Merger Agreement provided that the Neutral Auditor's determinations with respect to those items "shall be final, binding, and conclusive."

On July 24, 2004, negotiations between the parties having failed, Ernst & Young was appointed the Neutral Auditor. At this point in the procedure, Solo Cup had never corresponded or attempted to negotiate the Somerville and Trigen Claims. Therefore, when Solo Cup attempted to submit these claims to the Neutral Auditor, the Neutral Auditor refused to hear the Somerville and Trigen Claims on the grounds they were outside the limits of what the Merger Agreement empowered the auditor to consider. The Neutral Auditor did not consider the merits of either claim.

While the parties were arbitrating working capital disputes before the Neutral Auditor, the parties were simultaneously engaged in R&W arbitration before an AAA arbitrator. Solo Cup submitted the Somerville and Trigen Claims for consideration by the AAA arbitrator. In response,

plaintiff filed a motion asking the R&W arbitrator to dismiss those two claims on the grounds that they had already been dismissed by the Neutral Auditor and that the Neutral Auditor's resolution of those claims should be "final, conclusive, and binding" as dictated by the Merger Agreement. Plaintiff also filed a complaint asking this Court to issue an injunction barring the AAA Arbitrator from hearing the Somerville and Trigen Claims on the grounds that the Merger Agreement did not contemplate their arbitration. In September 2005, the AAA arbitrator issued a letter opinion withholding judgment on whether he is permitted to hear the Somerville and Trigen Claims, pending a decision by this Court.

II. ANALYSIS

A. Substantive versus Procedural Arbitrability

Whether the parties agreed to arbitrate a dispute is a question of "substantive arbitrability" and is generally one for the courts to decide.[2] In considering issues of substantive arbitrability, I am confined to ascertaining whether a given dispute falls within a particular arbitration clause.[3] The issue of substantive arbitrability in this case is whether the Somerville and Trigen Claims fall within the R&W arbitration clause. This is an issue of contract interpretation.

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

When interpreting a contract, I will first look to the "four corners" of the contract to ascertain whether the intent of the parties can be determined from its express language.[4] The basic rule of contract interpretation is to give priority to the intentions of the parties. This intent is construed by looking at the document as a whole, rather than at any specific parts in isolation.[5] Accordingly, I must consider the interaction of the two arbitration clauses, and whether they coexist on equal footing, or whether one clause is exclusive of the other.

B. The Scope of the Arbitration Clauses

The Merger Agreement states that the Neutral Auditor's determinations "shall be final, binding, and conclusive." Plaintiff asserts that this clause bars Solo Cup from arbitrating the Somerville and Trigen Claims before the R&W arbitrator. Section 3.9(c) of the Merger Agreement states:

> 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*.[6]

[4] *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 399 (Del. 1996).
[5] *E.I. duPont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).
[6] Ex. to Pl.'s Compl. (emphasis added).

The Neutral Auditor's arbitration power is limited to "those items still in dispute," *i.e.*, those items that had been negotiated but not resolved. The Somerville and Trigen Claims were not "items still in dispute;" rather, these claims were raised well after negotiations and the original submission of the items still in dispute. Therefore, the Neutral Auditor had no power to make any determination with regard to those claims, and the Neutral Auditor correctly declined to address those items. Because the Neutral Auditor could make no determination with regard to those claims, there is now no determination that can be "final, binding, and conclusive."

Read in context, the words "final, binding, and conclusive" operate to prevent either party from arbitrating a claim to a final determination in one arbitration forum, and then attempting to re-arbitrate the same claim in the other forum. If the Neutral Auditor had made a determination on the merits of the Somerville and Trigen Claims, I would issue an order barring further arbitration of those claims before the AAA arbitrator. In fact, Solo Cup never arbitrated the Somerville and Trigen Claims in the working capital arbitration.

The Neutral Auditor did determine that the Somerville and Trigen Claims were waived on procedural grounds. That determination is indeed "final, binding, and conclusive." The Neutral Auditor's determination that

the claims were waived for the purposes of the working capital arbitration, however, has no bearing on whether the claims were waived for purposes of the R&W arbitration. Furthermore, whether a claim has been waived in the AAA arbitration is an issue of procedural arbitrability that this Court must leave for the AAA arbitrator to decide.[7] Therefore, I cannot make a determination as to whether the Somerville and Trigen Claims have been waived for purposes of the R&W arbitration.

On its face, the Merger Agreement does not discuss whether a claim procedurally waived in the working capital arbitration is also waived for purposes of the R&W arbitration. The Merger Agreement creates two arbitration forums and seems to give the parties a choice of either forum. The Merger Agreement does not say that either forum is the exclusive forum in which to arbitrate disputes that can be characterized as either working capital or R&W disputes. Solo Cup negotiated for a broad set of R&W protections, not limited by any carve-out for issues involving working capital. In the absence of carve-out or exclusivity terms in the contract language, I will not now step in and rewrite the contract in order to limit those protections.

[7] *SBC Interactive, Inc. v. Corporate Media Partners*, 714 A.2d 758, 762 (Del. 1998) (issues of waiver must ordinarily be decided by an arbitrator).

My reading of the Merger Agreement does not permit Solo Cup to arbitrate the same issues twice in two forums. On the contrary, if either arbitrator makes a determination with regard to a dispute, that determination is "final, conclusive, and binding." Here, no "determination" was ever made with regard to the Somerville and Trigen Claims or whether they can be raised in the R&W arbitration.

III. CONCLUSION

For the reasons set forth above, I deny plaintiff's motion for summary judgment. The Merger Agreement contemplated that, when a claim could be construed as either a working capital issue or a claim for breach of the representations and warranties, such a dispute could be arbitrated in either arbitration forum.

Very truly yours,

William B. Chandler III

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