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Re: *Abington Savings Bank v. Open Solutions Inc.*
C.A. No. 6329-VCN
Date Submitted: April 12, 2011

Dear Counsel:

Defendant Open Solutions Inc. ("OSI") provides data management services to Plaintiff Abington Savings Bank ("Abington") that involve Abington's confidential customer information. Abington is scheduled to merge with Susquehanna Bank ("Susquehanna") on July 29, 2011. In order to integrate the banking needs of Abington's customers with Susquehanna's information management system, a period of testing and reconfiguration is essential for a seamless transition. The process of harmonizing the data and its formatting and facilitating the transfer to a different service provider is called "deconversion."

The Verified Complaint alleges that Susquehanna needs an initial set of test data files and layout information to conduct data mapping before it receives a "month-end" data set reflecting Abington's data as of April 29, 2011.[1] Abington, thus, requires OSI's deconversion services.

OSI has invoked various provisions in its agreement with Abington (the "2001 Services Agreement")[2] to impede that effort. Bluntly, OSI seeks to take advantage of Abington's need to move quickly in this matter and its dependence on OSI for its deconversion services.[3] Abington brought this action to seek mandatory interim injunctive relief requiring OSI to meet its contractual obligations to assist with the deconversion process.

On April 6, 2011, the Court heard Abington's motion for interim injunctive relief. The initial problem was how much OSI would charge for its deconversion services—$250,000 was the number quoted by OSI. OSI is supposed to charge for

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[1] Verified Complaint ¶ 70.
[2] *Id.* Ex. A.
[3] OSI has insisted that Abington pay all sums that it may owe OSI, including those sums arising under a contract other than the 2001 Services Agreement. The amount claimed under the other agreement is in excess of $5 million. The amount claimed by OSI under the 2001 Services Agreement is approximately $2.4 million.

such services in accordance with its "then current Deconversion rate schedule."[4] OSI refused to provide that rate schedule because of confidentiality concerns. The Court directed the parties to enter into a non-disclosure agreement that would protect OSI's confidential and proprietary information while allowing Abington access to the rate schedule—presumably, the first step in the greater process of deconversion.

Abington, apparently because of its worries about the passage of time, abandoned—at least for a while—its efforts to acquire the rate schedule and, instead, straightforwardly proposed to OSI that it would pay all sums purportedly due under the 2001 Services Agreement, some $2.4 million. With that, Abington thought that it could promptly obtain the services and data it had requested for its deconversion efforts. OSI responded, however, with various objections and insisted upon the execution of a deconversion services agreement. Negotiations did not progress well. When it became convinced that OSI was not acting in good faith, Abington, by letter of its counsel, dated April 11, 2011, sought the Court's assistance and asked that the Court order OSI "to provide the requested data,

[4] 2001 Services Agreement § 8B.

information, and services immediately upon Abington's payment of $250,000 to OSI, and then to provide updated data, information, and services again as of April 29, 2011."

Although Abington's request makes commercial sense, it is inconsistent with the terms of the 2001 Services Agreement, which at Section 8B provides in part: "Payment for Deconversion together with all other payments which are due, and which will become due pursuant to the provisions of this [i.e., the 2001 Services] Agreement shall be paid to [OSI] prior to delivery of such Client Files."

The Court, of course, must give the words of the 2001 Services Agreement their plain and usual meaning.[5] Abington agrees that the deliverables which it seeks from OSI constitute "Client Files" within the meaning of the 2001 Services Agreement. Although there may be some minor disagreement, it is reasonable to infer that Abington owes, or will owe, OSI more than $2 million under the 2001 Services Agreement. Thus, Abington has no current right to insist that OSI perform its deconversion services without prior payment of the sums due under

[5] *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008). The Court has not reflected upon—and the parties have not addressed—which state's law governs the 2001 Services Agreement. One suspects that the general principle of law set forth above can find support wherever.

that agreement. Because Abington seeks OSI's performance of the deconversion services with only a payment of $250,000, Abington has not satisfied a contractual condition precedent to OSI's performance. The Court may not rewrite the agreement. Instead, the Court must apply the agreement in a manner consistent with its clear and unambiguous terms. Thus, Abington's motion, as framed in the letter of its counsel, dated April 11, 2011, must be denied.[6]

IT IS SO ORDERED.[7]

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[6] Abington—with its compelling description of the consequences of delay that likely will result from OSI's failure to act in a timely fashion, including the inability to complete the merger as anticipated—has demonstrated that it would satisfy the required showing of irreparable harm.

[7] Ordering OSI to perform its deconversion services upon payment by Abington of the sums due under the 2001 Services Agreement may be appropriate. That relief has not been requested at this stage, and the Court expresses no view on that approach. The granting of mandatory injunctive relief compelling the performance of services is something that should not be undertaken lightly. Of particular concern is the difficulty that can arise if the Court is called upon to define the terms of performance or to supervise the work. However, given the unique services that OSI provides and its control of Abington's critical, confidential, customer information and data, such relief might be available in these circumstances.