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Re: *Riley v. Brocade Communications Systems, Inc.*
C.A. No. 9486-VCN
Date Submitted: April 25, 2014

Dear Counsel:

Plaintiff David T. Riley (“Riley”) seeks advancement from Defendant Brocade Communications Systems, Inc. (“Brocade”), a Delaware corporation, as successor by merger to Foundry Networks, Inc. (“Foundry”), for attorney’s fees and expenses incurred in defending against criminal allegations of insider trading and misuse of Foundry’s confidential information. Brocade argues that Riley signed an Agreement and General Release of Claims (the “Release”),¹ through which Riley released his right to advancement. Brocade points to a broad

¹ Def.’s Mot. to Dismiss or, in the Alternative, to Stay, Ex. A (the Release).

arbitration provision in the Release and asks the Court to dismiss or stay Riley's action in favor of the arbitration forum. The Court first faces the question of who is to decide if this dispute is arbitrable: the Court or an arbitrator.

Parties to an agreement may agree that an arbitrator should decide the issue of arbitrability. To resolve whether an agreement's arbitration provision provides for such a result, the Court considers whether the parties agreed to arbitrate the issue of arbitrability by "clear and unmistakable evidence."² Clear and unmistakable evidence of the parties' decision to arbitrate this issue exists when (1) an arbitration clause generally provides for arbitration of all disputes; and (2) there is a reference to arbitration rules that empower an arbitrator to decide arbitrability.³

² *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 78 (Del. 2006).

³ *Id.* at 80. Riley, throughout his briefing, seemed to argue that *Viacom Int'l, Inc. v. Winshall*, 72 A.3d 78 (Del. 2013), was in tension with *Willie Gary*. *Viacom* explained the distinction between substantive and procedural arbitrability and confirmed that courts, rather than arbitrators, generally are to decide issues of substantive arbitrability as a "gateway" matter. *Id.* at 82. *Viacom* described the default rules for resolving issues of arbitrability which a court faces in the absence of guidance from the parties. *Willie Gary* sets forth the test for determining whether parties agreed that an arbitrator should decide the issue of arbitrability; this inquiry differs from the one pursued by the Court in *Viacom*. Brocade's argument that the parties agreed that an arbitrator would decide the issue of arbitrability implicates *Willie Gary* and its progeny.

Not long thereafter, *Willie Gary*'s test was expanded to include a third prong, which allowed the party seeking judicial relief to argue that the party seeking arbitration had essentially no non-frivolous argument about the substantive arbitrability of the dispute.⁴ When a non-frivolous argument in favor of substantive arbitrability exists and the first two prongs of *Willie Gary* are satisfied, the Court should defer to the arbitrator.

Here, the parties dispute whether the Release which Riley signed upon leaving Brocade also released his claim to advancement under Foundry's bylaws and the merger agreement.⁵ Paragraph 17 of the Release reads:

[T]he parties agree that any and all claims, disputes or controversies of any nature whatsoever arising out of, or relating to, this Agreement, the COC [Change of Control] Plan and/or the Participation Agreement, or their interpretation, enforcement, breach, performance or execution, Employee's employment with the Company, or the termination of such employment, shall be resolved, to the fullest extent permitted by law by final, binding and confidential arbitration as required by Paragraph 12 of the COC Plan.⁶

⁴ *McLaughlin v. McCann*, 942 A.2d 616, 626-27 (Del. Ch. 2008).

⁵ After oral argument on Brocade's motion, Riley's counsel submitted additional documentation addressing the question of whether Riley's right to advancement survived the merger of Foundry with Brocade. Letter of Michael W. McDermott, Esq., dated April 28, 2014. Brocade does not dispute that Riley's right to advancement, if he had such a right while at Foundry, continued after the merger. Letter of Tamika Montgomery-Reeves, Esq., dated April 30, 2014. The current question is whether the Release, executed after the merger, extinguished any right to advancement.

⁶ Release ¶ 17.

This language provides for arbitration of any and all disputes arising out of or relating to the Release or to Riley's employment with Foundry or its successor and therefore appears to satisfy the first prong of the *Willie Gary* test. Furthermore, the text uses the mandatory "shall" with respect to arbitration.

Riley argues that Paragraph 17 of the Release, which refers to Paragraph 12 of the Foundry Change of Control Plan (the "COC Plan"),⁷ is subject to an equitable carve-out appearing in Paragraph 12.⁸ He therefore contends that Paragraph 17 does not refer "all disputes" to arbitration and is otherwise not clear and unmistakable evidence of the parties' intention to arbitrate. However, this issue has been addressed. In *GTSI Corp.*, an agreement contained a general equitable remedy carve-out (as contrasted with a preliminary equitable remedy provision) in addition to a broad arbitration clause which mandated that any dispute between the parties "shall" go to arbitration.⁹ The Court determined that the terms of the arbitration provision using the phrase "shall" required an arbitrator

⁷ Def.'s Mot. to Dismiss or, in the Alternative, to Stay, Ex. B (the COC Plan).

⁸ *Id.* ¶ 12 ("This paragraph will not prevent either party from seeking injunctive relief (or any other provisional remedy) from any court having jurisdiction over the parties and the subject matter of their dispute relating to the Covered Employee's obligations under this Plan and the Company's form of confidential agreement.").

⁹ *GTSI Corp. v. Eyak Tech., LLC*, 10 A.3d 1116, 1118 (Del. Ch. 2010).

to determine the issue of arbitrability, despite the equitable remedy provision.¹⁰

This same result should apply here.

Riley also argues that the Release is temporally limited such that the advancement claim arose after Riley executed the Release and that because the Release refers to the COC Plan in setting forth its arbitration requirements, it cannot function as clear and unmistakable evidence of the parties' intent.¹¹ Riley also contends that the terms of the Release only cover Riley's employment relationship and certain limited agreements (which do not include Foundry's bylaws), and therefore Riley's right to advancement was not released. These arguments are all directed to the merits of the question of substantive arbitrability and do not directly inform the *Willie Gary* analysis. Here, the Court's focus is on the broad arbitration provision in Paragraph 17 of the Release which has satisfied the first prong of the relevant analysis; the Court thus proceeds to consider whether the second and third prongs of the test are met.

¹⁰ *Id.* at 1120.

¹¹ Paragraph 12 of the COC Plan requires that the "arbitrator must have the qualifications set forth in this paragraph." Riley argues that because no requirements are listed, the paragraph is incomplete and cannot indicate clear and unmistakable intent of anything. However, the clause simply requires that if any qualifications were set forth, they must be met; because no requirements are stated, the arbitrator need not meet any requirements aside from those otherwise specified.

Paragraph 12 of the COC Plan provides for arbitration through the Judicial Arbitration and Mediation Services (“JAMS”). JAMS rules empower arbitrators to decide issues of substantive arbitrability,¹² and thus *Willie Gary*’s second prong is satisfied.

Finally, Brocade has non-frivolous arguments for arbitration of these issues: whether Riley has a viable claim for advancement and whether he released any such claim.¹³ The arbitrator could conclude that Riley’s right to advancement arose from his status as an employee of Foundry (Brocade’s predecessor) and is therefore covered by the Release. Moreover, the arbitrator could conclude that the question of whether Riley’s advancement claim survived the Release is a “dispute[] relating to . . . this Agreement [*i.e.*, the Release].”¹⁴

Conversely, the arbitrator may conclude that Riley’s rights arising from the bylaws are not rights based upon his status as an employee or are otherwise outside

¹² See *Li v. Standard Fiber, LLC*, 2013 WL 1286202, at *6 (Del. Ch. Mar. 28, 2013) (citing Rule 11(c) of the JAMS Comprehensive Arbitration Rules and Procedures).

¹³ Under *Willie Gary*, a question may arise as to how courts should resolve a matter in which a legal claim (*e.g.*, advancement) should be resolved by the courts, but an affirmative defense (*e.g.*, a release) should be resolved by an arbitrator. This issue need not be addressed here because colorable arguments exist that the Release relates not only to whether Riley released his advancement claim, but also to whether Riley agreed that his advancement rights would be resolved through arbitration because those rights relate to his status as an employee.

¹⁴ Release ¶ 17.

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the scope of the Release. However, such arguments must be directed to an arbitrator because the minimal requirements of *Willie Gary* have been satisfied. Riley and Brocade agreed by clear and unmistakable evidence to submit to an arbitrator any matter concerning the Release, including its arbitrability, and Brocade has non-frivolous arguments concerning whether Riley agreed to arbitrate whether the Release absolved it from providing him advancement.¹⁵

Accordingly, this action will be stayed pending proceedings before JAMS.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

¹⁵ The point is not that the question of arbitrability may easily be resolved; instead, the counterarguments demonstrate that there are non-frivolous arguments on both sides of the issues.