IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

FRANK J. BEHM,	)	
Plaintiff,	)	
	)	
	)	
v.	)	**C.A. No. N10C-10-013 MJB**
	)	
	)	
AMERICAN INTERNATIONAL	)	
GROUP, INC., et al.,	)	
Defendants.	)	
	)	

Submitted: April 2, 2013
Decided: July 30, 2013

Upon Defendant Ernst & Young LLP's Motion to Dismiss, **GRANTED in Part.**

OPINION AND ORDER

David H. Williams, Esq, P. Clarkson Collins, Jr., Esq., Bruce W. Tigani, Esq., James H. McMackin, III, Esq., Jason C. Jowers, Esq., Morris James, LLP, Wilmington, Delaware, Attorneys for Plaintiff Frank J. Behm.

William R. Firth, III, Esq., Zarwin Baum DeVito Kaplan Schaer Toddy, P.C., Wilmington, Delaware, Attorney for Defendant Ernst & Young, LLP.

Steven M. Farina, Esq., William P. Ashworth, Esq., James H. Weingarten, Esq., Williams & Connolly, LLP, Washington, DC, Of Counsel for Defendant Ernst & Young, LLP.

Aleine Porterfield, Esq., John L. Reed, Esq., DLA Piper LLP, Wilmington, Delaware, Attorneys for Defendants American International Group, Inc., AIG Global Real Estate, Asia Pacific, Inc., AIG Global Real Estate Investment Corp., AIG Investment Corporation, AIG Capital Corporation, and AIG Global Asset Management Holdings Corp.

BRADY, J.

INTRODUCTION

This is the Court's ruling on Defendant Ernst & Young, LLP's ("EY") Motion to Dismiss the Second Amended Complaint as against EY for lack of subject matter jurisdiction pursuant to Superior Court Rule 12(b)(1). The issue surrounds two Terms of Service Agreements executed by the parties on August 21, 2009 ("2009 Agreement") and March 27, 2010 ("2010 Agreement")(collectively, the "Agreements") that govern the services EY provided to Plaintiff Frank J. Behm ("Behm").

Upon considering the briefs of the parties, supplemental memoranda and the oral arguments of the parties at two hearings, the transcript of the last hearing received by the Court on April 2, 2013, the Court has determined that it does not have subject matter jurisdiction over some of Behm's claims against EY. The Court will not dismiss the Third Amended Complaint as against EY in its entirety.[1] Instead, the Court orders that Behm must submit to an arbitrator, in accordance with the Dispute Resolution provisions of the Agreements, his claims against EY over which this Court does not have jurisdiction. The litigation between Behm and EY is stayed pending resolution of issues in accordance with the Dispute Resolution provisions in the Agreements.

PROCEDURAL HISTORY

Behm commenced this action as to EY on July 6, 2011 with the filing of his Second Amended Complaint. EY filed its Motion to Dismiss on August 29, 2011 with a Memorandum of Law attached. The parties stipulated to a briefing schedule on the

[1] The Court previously granted Behm's Motion to Amend the Second Amended Complaint. *See* June 6, 2013 Court Order, Transaction ID 52649205 (June 6, 2013). Behm's claims against EY remain unchanged from the Second Amended Complaint to the Third Amended Complaint. *See* Pl. Behm's Mot. to Am. the Second Am. Compl., at ¶ 10.

Motion to Dismiss. Behm filed his answering brief with the Court on January 23, 2012 and EY filed its Reply Brief on February 24, 2012.

The Court heard oral argument on the Motion on March 26, 2012. At the conclusion of oral argument, the Court found that the provisions of the Agreements were not retroactive to the date of the signing of the Agreements.[2] Specifically, the Court held that the Agreements did not cover Behm's claims against EY arising from conduct which occurred before August 21, 2009. Behm and the AIG Defendants had an arbitration hearing scheduled for May 1, 2012, to potentially resolve Behm's claims against AIG. The Court requested counsel to notify the Court of the outcome of the arbitration hearing between Behm and the AIG Defendants.[3]

Behm and the AIG Defendants proceeded with the arbitration hearing, conducted post-hearing briefing and kept the Court informed of the status of that proceeding. The arbitration panel issued its Final decision on November 16, 2012, and the parties notified the Court on December 7, 2012.[4] The parties informed the Court that the matter was not completely resolved and there were still issues to be decided by the Court, however, the parties were in process of settlement discussions.[5]

At a status conference on January 10, 2013, the Court set March 14, 2013 as the date for oral argument on a *Pro Hac Vice* motion, which was opposed, and supplemental oral argument on EY's Motion to Dismiss.[6] Issues relating to the *Pro Hac Vice* motion were resolved by the parties. After oral argument was held on EY's Motion to Dismiss on March 14, 2013, the Court reserved decision.

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[2] Mar. 26, 2012 Court Order, Transaction ID 43297330 (Mar. 26, 2012).
[3] *Id*.
[4] Status Report, Transaction ID 48251682 (Dec. 7, 2012).
[5] *Id*.
[6] Jan. 10, 2013 Court Order, Transaction ID 48930250 (Jan. 15, 2013).

BACKGROUND FACTS[7]

Behm alleges gross negligence and accounting malpractice against EY in a Second Amended Complaint filed on July 6, 2011. Behm's claim against EY arises out of the preparation and filing of U.S. and Japanese tax returns. Specifically, Behm claims that EY should have discovered errors in 2006 and 2007 returns prepared for Behm by Price Waterhouse Cooper, that EY was negligent in preparing Behm's 2009 U.S. and Japanese tax returns, and that EY incorrectly prepared tax equalization and related calculations. Behm claims EY caused him to suffer damages in the form of increased tax liability, penalties and interest, reduced tax refunds, and an audit by the Japanese authorities. Behm additionally claims EY acted in concert with AIG to deprive Behm of contractual rights and employment benefits by siding with AIG and preparing taxes in a manner that favored AIG.[8]

As part of Behm's compensation for taking the position heading AIG's Global Real Estate Group in Japan and Asia-Pacific, AIG agreed to provide Behm with tax equalization and preparation services. In May, 2008, EY replaced Price Waterhouse Coopers ("PWC"), who originally was engaged to provide these services to Behm. EY was to prepare Behm's tax returns for tax years 2008 forward as well as perform other tax services for Behm.

The Terms of Service Agreements were "clickwrap" agreements.[9] Each was called a consent form. Behm signed them by logging into his myEYonline account for

[7] Unless otherwise noted, the facts have been taken from the Statement of Facts section of Plaintiff Behm's Answering Brief in Opposition to EY's Motion to Dismiss and the accompanying appendix. *See* Pl.'s Answ. Br. in Opp'n to EY's Mot. to Dismiss, 3-8, App.

[8] Pl.'s Answ. Br., at 8; Compl. ¶ 64, 67. Behm's allegations against AIG, claiming AIG refused to pay Behm's tax liability and to file amended returns prior to deadlines are not a part of this Decision.

[9] An automatic window that pops up showing scrollable text of an agreement, commonly used for licensing agreements.

his EY services, clicking the form in the "Important Info" section, and completing the form. Although Behm alleges he has no recollection of completing these forms, Behm signed other consent forms for EY in 2008, 2009, and 2010.[10]

The 2009 Agreement was to commence work on Behm's 2008 tax returns,[11] and the 2010 Agreement was to disclose Behm's tax return information.[12] As to each, Behm logged into his online account and completed the forms, which were posted in an "Important Info" section. Behm alleges that the March, 2010 agreement was presented as a welcome message with instructions to complete a "Terms of Service Agreement," with a link below.[13] Behm acknowledges he opened the document, clicked "yes" and submitted it.

The Agreements are virtually identical and include specific language regarding "Dispute Resolution:"

> Any controversy or claim arising out of or relating to the services covered by this agreement and provided to you shall be submitted first to voluntary mediation, and if mediation is not successful, then to binding arbitration, in accordance with the Rules for Non-Administered Arbitration of the International Institute for Conflict Prevention and Resolution ("Rules") as in effect on the date of this agreement. Judgment on any arbitration award may be entered in any court of appropriate jurisdiction.[14]

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[10] *See* Pl.'s Answ. Br., at 6; B35-43, 48-49, 50-51, 60-67.

> It was common for E&Y to ask Behm to sign consent forms at various times throughout the representation. In addition to the 2008 Consent Form sent to Behm in December and the "consent form" in March 2009, E&Y also presented Behm with additional consents for signature later in 2009 and again in 2010. On November 21, 2009, Behm signed two consents. On was a data privacy consent notice and the other was a myEYonline privacy statement. . . . On March 27, 2010, the same day as the 2010 Agreement was submitted, Behm signed yet another consent to disclose his tax return information.

Pl.'s Answ. Br., at 6 (citations to appendix omitted).

[11] B44.

[12] B77.

[13] *See* Pl. Behm's Opp'n to Def. EY's Mot. to Dismiss, at 7.

[14] EY's Mot. to Dismiss, Ex. A and B. (hereinafter "arbitration clauses/provisions").

EY sent Behm three emails with headings, "Important 2008 US Tax Return Instructions," in March, June, and July 2009, reminding him to log on to myEYonline to input information into the 2008 Tax Organizer Software. Behm, finally, on August 21, 2009 did so and completed the consent form. Each email informed him to go to the Important Info section and complete the consent form, and that the consent form must be signed returned before any service could be provided.[15]

New York law governs the parties' agreement.[16] Delaware and New York favor and encourage arbitration and enforce valid arbitration agreements.[17]

PARTIES' CONTENTIONS

EY contends it is entitled to dismissal pursuant to the arbitration provisions in the Agreements setting forth that any controversy or claim arising out of or related to the services covered by the agreement would be first submitted to voluntary mediation, then binding arbitration, and then a court. The Agreements cover preparation of several categories of tax returns: U.S. state and local, foreign annual individual income, U.S. tax equalization, final tax gross-up calculations on applicable Tax Equalization calculations, representation on routine correspondence with revenue authorities, on-time filing of all returns and disclosure of information. EY contends a stay of discovery is appropriate, pending resolution of this motion and of the dispute in arbitration.

Behm opposes the motion, contending that the Terms of Service Agreements on which EY bases its motion are unenforceable due to (1) lack of reasonable notice, (2) failure of consideration, and (3) fraud in the execution. Behm contends that, unlike

[15] B54-56, 57-58, 59.
[16] "This Agreement shall be governed by, and construed in accordance with, the law of the State of New York applicable to agreements made and fully performed therein by residents thereof." *See* EY's Mot. to Dismiss, Ex. A and B. (2009 Agreement, p. 5 Governing Law; 2010 Agreement, p. 2 Governing Law).
[17] *See DMS Properties-First, Inc. v. P.W. Scott Associates, Inc.*, 748 A.2d 389, 391 (Del. 2000); *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 49, 689 N.E.2d 884, 890 (1997).

agreements for software, online purchases, and website use, "clickwrap" should not be used to memorialize engagements for professional services, such as accounting.

At the March 14, 2013 oral argument, Behm contended that EY, as the moving party, elected to litigate arbitrability – to have the Court determine substantive arbitrability – by not raising the issue of substantive arbitrability in its Motion to Dismiss or the accompanying Memorandum of Law. Behm contended that EY then changed its position in its Reply Brief and argued that the parties contracted to arbitrate arbitrability.[18] Behm contended that by failing to raise this issue in its opening brief, EY had waived its election to arbitrate arbitrability. Behm further contended that, because the Court had ruled on retroactivity, his claims against EY arising from conduct which occurred before August 21, 2009, could be separated from his claims against EY arising from conduct occurring after August 21, 2009. Therefore, Behm contended, the Court should retain jurisdiction over claims arising before the August 21, 2009 Agreement was executed.

EY contended that the issue of arbitrability should be decided by the arbitrator and not the Court, and that this argument was not waived in its Opening Brief. EY contended that it proceeded properly with its Motion to Dismiss and asked that the entire claim go to arbitration. EY contended that it was not until Behm raised issues regarding the scope, the retroactivity and the validity of the arbitration clauses that EY responded to these issues, and that this did not constitute electing to litigate arbitrability.

STANDARD OF REVIEW

EY seeks to dismiss Behm's claims pursuant to Superior Court Civil Rule 12(b)(1) for lack of subject matter jurisdiction, based on the binding arbitration

[18] Mar. 14, 2013 Hearing Tr., 7:8-9:19.

provisions in the Agreements. "Because a motion to dismiss based on an arbitration clause goes to the Court's subject matter jurisdiction, the Court may consider documents outside the complaint in deciding the motion.[19] "Delaware courts lack subject matter jurisdiction to resolve disputes that litigants have contractually agreed to arbitrate."[20]

DISCUSSION

Despite the Court's ruling after the March 26, 2012 oral argument, the parties still dispute the temporal scope of the arbitration clauses.[21] The Agreements each contain a clause stating the agreements are effective as of the date of Behm's signed electronic acceptance and for the whole period EY is engaged to provide him services. The Court is satisfied now, as it was then, that the Agreements and the provisions within the Agreements are not retroactive from the date of execution. Therefore, the Court again holds that the arbitration clauses do not apply to claims arising *before* August 21, 2009. The Court will retain jurisdiction over claims arising from conduct occurring before August 21, 2009.

At the March 14, 2013 oral argument the Court stated:

> I don't think I've ruled yet on anything except whether the terms are retroactive and whether I should decide the scope of arbitration. And I think I have ruled on that, that the arbitrator should decide the scope of arbitration, which may mean that if I

[19] *HDS Holding, Inc. v. Home Depot, Inc.*, 2008 WL 4606262, *2 n.1 (Del. Ch. Oct. 17, 2008)(citing *NAMA Holdings, LLC v. Related World Market Ctr, LLC*, 922 A.2d 417, 429 n.15 (Del. Ch. 2007)).
[20] *NAMA Holdings, LLC*, 922 A.2d at 429(citing *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 295 (Del. 1999)).
[21] EY contends first that the scope of the clause is a determination for an arbitrator, and second, the clauses apply to Behm's entire claim against EY, without temporal limitation, because the scope is for EY's services and not the agreements.
Behm contends the language does not have retroactive effect, and therefore any of Behm's claims arising prior to the 2009 agreement are outside the scope of the arbitration provision. Behm contends that, since EY began preparing Behm's 2008 tax returns in December 2008 and early 2009, EY had the opportunity to review Behm's 2006 and 2007 tax returns and failed in late 2008 to early 2009 to fulfill its professional duty by amending the 2006 and 2007 returns, thus the claim as to that failure arose prior to the 2009 agreement. Behm also contends that, if the Court finds the 2009 agreement is invalid but the 2010 agreement is valid, the facts underlying the claims occurred prior to the 2010 agreement.

> stay this matter and send it down for them, the arbitrator might very well consider, because if there's work going on and there are matters that are in flux and under review and subject to additional modification, the arbitrator may decide that the matters before me are arbitrable.[22]

The Court also stated:

> It seems . . . that the most practical way to proceed is to still stay this action, send what should be arbitrated to arbitration, and then address the remaining issues, if any, because in arbitration and mediation, you may resolve all of them . . . when you conclude the arbitration process.[23]

Substantive Arbitrability

In Delaware, there is a strong presumption in favor of arbitration, therefore contractual arbitration clauses are generally interpreted broadly by the courts.[24] Arbitration is the preferred mechanism for resolving disputes in this State and the court should "ordinarily resolve any doubt as to arbitrability in favor of arbitration."[25] Despite this presumption, "arbitration is a mechanism of dispute resolution created by contract" and "no matter how broadly construed, can only extend so far as the series of obligations set forth in the underlying agreement."[26] Only claims that "bear on the duties and obligations under the [a]greement" should be submitted to arbitration."[27] "The policy that favors alternative dispute resolution mechanisms, such as arbitration, does not trump

[22] Mar. 14, 2013 Tr. 25:14-26:1.
[23] *Id*., 24:20-25:3.
[24] *See NAMA Holdings, LLC v. Related World Mkt. Ctr., LLC.*, 922 A.2d 417, 430 (Del. Ch. 2007)(citations omitted); *Brown v. T-ink, LLC*, 2007 WL 4302594, *10 (Del. Ch. Dec. 4, 2007).
[25] *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 156 (Del. 2002).
[26] *Id*. at 156. *See also Wilcox v. Feltzer, Ltd. v. Corbett & Wilcox*, 2006 WL 2473665, *3 (Del. Ch. Aug. 22, 2006); *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 584 (Del. Ch. Dec. 6, 2006).
[27] *Id*.

basic principles of contract interpretation."[28] In other words, one cannot be forced to arbitrate a claim absent a contractual or equitable duty to do so.[29]

In this case, the dispute is not over whether or not the claims are arbitrable, but rather, whether this Court or an arbitrator is to determine the arbitrability of the claims. The Dispute Resolution provisions in both the 2009 and 2010 Agreements incorporate the Rules for Non-Administered Arbitration of the International Institute for Conflict Prevention and Resolution (the "Rules"). The Rules provide:

> Rule 8: Challenges To The Jurisdiction Of The Tribunal:
> 8.1 The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.[30]

Adopting the majority view, that incorporation of a set of rules to determine arbitrability is clear and unmistakable evidence that the parties contracted to have the arbitrator decide substantive arbitrability, the Court finds there is clear and unmistakable evidence that Behm and EY contracted to have an arbitrator decide substantive arbitrability.

The threshold question regarding the validity of an arbitration agreement is to determine substantive arbitrability.[31] The issues of substantive arbitrability are "gateway questions about the scope of an arbitration provision and its applicability to a given dispute."[32] "Delaware arbitration law mirrors federal law."[33] "The general rule, as announced by the United States Supreme Court and followed by [Delaware courts], is that courts should decide questions of substantive arbitrability. There is an exception,

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[28] *Id*.
[29] *NAMA Holdings*, 922 A.2d at 430.
[30] Rules for Non-Administered Arbitration of the International Institute for Conflict Prevention and Resolution, Rule 8, available at http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/600/2007-CPR-Rules-for-Non-Administered-Arbitration.aspx (last visited June 27, 2013).
[31] *James Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006)(hereinafter *Willie Gary*).
[32] *Id*.
[33] *Id*.

however, when there is 'clear and unmistakable evidence' that the parties intended otherwise."[34]

Most courts, in applying the "clear and unmistakable" standard have held that, "when . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."[35] In *Willie Gary*, the Delaware Supreme Court adopted "the majority federal rule that reference to the [American Arbitration Association ("AAA")] rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator."[36] The Court did note a limitation to this rule in that it does not "mandate that arbitrators decide arbitrability in *all* cases where an arbitration clause incorporates the AAA rules. Rather, it applies in those cases where the arbitration clause generally provides for arbitration of all disputes and also incorporates a set of arbitration rules that empower arbitrators to decide arbitrability."[37]

The arbitration provision at issue in *Willie Gary* stated:

> 12.12 Arbitration
> Any controversy or claim arising out of or relating to this Agreement or the breach of this Agreement shall be settled by arbitration ... in accordance with the then-existing rules of the American Arbitration Association ("AAA")....Each Member agrees with the other Members that the other Members would be irreparably damaged if any of the provisions of this Agreement are not performed in accordance with their specific terms.... Accordingly, it is agreed that, in addition to any other remedy to which the nonbreaching Members may be entitled, at law or in equity, the nonbreaching Members *shall be entitled to injunctive relief to prevent breaches of the provisions of this Agreement and*

[34] *Id.* at 78 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).
[35] *Id*; *Contec Corp. v. Remote Solution Co., Ltd.,* 398 F.3d 205, 208 (2d Cir.2005). *See, e.g.: Terminix Int'l Co., L.P. v. Palmer Ranch L.P.,* 432 F.3d 1327 (11th Cir.2005); *FSC Securities Corp. v. Freel,* 14 F.3d 1310 (8th Cir.1994); *Apollo Computer, Inc. v. Berg,* 886 F.2d 469 (1 Cir.1989);*Citifinancial, Inc. v. Newton,* 359 F.Supp.2d 545 (S.D.Miss.2005).
[36] *Willie Gary*, 906 A.2d at 80.
[37] *Id*.

> *specifically to enforce the terms and provisions hereof in any action instituted in any court of the United States or any state thereof having subject matter jurisdiction thereof.*[38]

The Delaware Supreme Court held that the parties did not intend to arbitrate arbitrability despite the incorporation of the AAA rules.[39] The Court held that the parties must have intended for the courts to determine arbitrability.[40] The Supreme Court based its holding on the fact that the arbitration provision also included injunctive relief as a remedy for nonbreaching Members.[41] The Supreme Court held that:

> Since this arbitration clause does not generally refer all controversies to arbitration, the federal majority rule does not apply, and something other than the incorporation of the AAA rules would be needed to establish that the parties intended to submit arbitrability questions to an arbitrator. There being no such clear and unmistakable evidence of intent, the trial court properly undertook the determination of substantive arbitrability.[42]

The Supreme Court further noted that its decision, and the Chancery Court's decision, was "under specified circumstances."[43]

In the present case, the "Dispute Resolution" provisions in the Agreements incorporate a set of arbitration rules:

> Any controversy or claim arising out of or relating to the services covered by this agreement and provided to you shall be submitted first to voluntary mediation, and if mediation is not successful, then to binding arbitration, in accordance with the Rules for Non-Administered Arbitration of the International Institute for Conflict Prevention and Resolution ("Rules") as in effect on the date of this agreement. Judgment on any arbitration award may be entered in any court of appropriate jurisdiction.[44]

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[38] *Id*. at 79-80(*emphasis added*).
[39] *Id*.
[40] *Id*. at 81.
[41] *Id*. The Supreme Court noted that the Chancery Court based its holding on the same principle.
[42] *Id.*(citing *Howsam*, 537 U.S. at 83). The Delaware Supreme Court also pointed to the dissolution portion of the agreement which included "judicial determination" language within it. *Id*. at 81-82.
[43] *Id*. at 81.
[44] EY's Mot. to Dismiss, Ex. A and B. (hereinafter "arbitration clauses/provisions").

Unlike the arbitration section in *Willie Gary*, there is no mention of any judicial remedy or remedy of any kind.

The Court of Chancery, in *Legend Natural Gas II Holdings, LP v. Hargis*,[45] decided that substantive arbitrability would be decided by an arbitrator. The Court concluded that "*Willie Gary* articulated a two-prong test that requires: (1) an arbitration clause that generally provides for arbitration of all disputes; and (2) a reference to a set of arbitration rules that empower arbitrators to decide arbitrability, such as the [AAA] rules."[46] The Court held that the arbitration clause in the employment agreement in that case provided "clear and unmistakable evidence of the parties' intent to arbitrate the question of arbitrability, *and* the employee [had] a colorable and non-frivolous argument that the dispute is arbitrable."[47] The arbitration clause in *Legend* provided:

> [A]ny dispute, controversy or claim between [Hargis] and the Company [Legend] arising out of or relating to this Agreement will be finally settled by arbitration in Houston, Texas before, and in accordance with the rules then obtaining of the American Arbitration Association.[48]

The *Legend* Court, finding no carve-outs similar to the ones the courts found in *Willie Gary*, and, that the AAA rules provide for an arbitrator to rule on his or her own jurisdiction, held that both prongs of *Willie Gary* were met.[49]

The Court noted, however, that in the developing case law since *Willie Gary* had been decided, a third factor, or prong had been added. Courts had addressed "a

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[45] 2012 WL 4481303 (Del. Ch. Sept. 28, 2012)(hereinafter *"Legend*").
[46] *Id*. at *4.
[47] *Id*. at *1(*emphasis added*).
[48] *Id*. at *2.
[49] *Id*. at *5 ("Section 17(a) of the Employment Agreement specifically refers to the AAA rules, which state that 'an arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." AAA Employment Arbitration Rules and Mediation Procedures § 6(a), *available at* http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_ 004362.).

preliminary question of whether or not there is a colorable basis for the court to conclude that the dispute is related to the agreement."[50] The *Legend* Court further noted a similar approach was reached in *McLaughlin v. McCann*,[51] where "[t]he Court suggested that: [A]bsent a clear showing that the party desiring arbitration has essentially no *non-frivolous* argument about substantive arbitrability, to make before the arbitrator, the court should require the signatory to address its argument against arbitrability to the arbitrator."[52] In line with these decisions, the *Legend* Court held that if the party seeking arbitration has presented a colorable, "non-frivolous argument that the underlying dispute is arbitrable," then the party seeking to avoid arbitration "must submit questions of substantive arbitrability to an arbitrator."[53] The Court of Chancery called this a "low threshold."[54]

Behm's claims are for gross negligence and accounting malpractice which arise from the tax preparation service EY provided to Behm. Because the Dispute Resolution explicitly covers claims or controversies regarding EY's services and because they are both part of Terms of Service Agreements, the Court finds that the underlying dispute is related to the Agreements. Therefore, the Court finds that EY has a colorable, non-frivolous argument that Behm's claims are arbitrable.

No Waiver of Arguments

Finally, a dispute arose over whether or not EY had waived its ability to arbitrate arbitrability. EY's original Motion to Dismiss was only one page requesting that the Court dismiss the action against it. EY included an accompanying memorandum of law

[50] *Id*.(citing *Julian v. Julian*, 2009 WL 2937121, *7 (Del. Ch. Sept. 9, 2009).
[51] 949 A.2d 616 (Del. Ch. 2008).
[52] *Legend*, 2012 WL 4481303, at *6 (citing *McLaughlin*, 949 A.2d at 626-27).
[53] *Id*. at *1, *7, *9.
[54] *Id.* at *9.

in support of its motion. Behm raised many issues in his Answering Brief regarding the validity and enforceability of the arbitration clauses and the Agreements themselves, and it was not until those arguments were raised then EY responded with further argument in support of the validity of the Agreements. The Court finds that EY has not waived its ability to arbitrate substantive arbitrability as EY has constantly maintained its position that the entire case between Behm and EY must be submitted to arbitration. Behm, having cited no caselaw in support of its position, has not persuaded the Court otherwise.

Behm's Claims that the Agreements are Unenforceable

The Rules for Non-Administered Arbitration of the International Institute for Conflict Prevention and Resolution, referenced in the 2009 and 2010 Agreements, empower the arbitrator to decide certain issues. Among those are:

- To hear and determine challenges to its jurisdiction
- To hear and determine objections with respect to the existence, scope or validity of the arbitration agreement
- To determine the existence, validity or scope of the contract of which the arbitration clause forms a part.[55]

Accordingly, issues as to the existence, scope and/or validity of the arbitration clauses in the Agreements; the existence, scope and/or validity of the Agreements themselves; and

[55] Rule 8: Challenges To The Jurisdiction Of The Tribunal:

> 8.1 The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.
> 8.2 The Tribunal shall have the power to determine the existence, validity or scope of the contract of which an arbitration clause forms a part. For the purposes of challenges to the jurisdiction of the Tribunal, the arbitration clause shall be considered as separable from any contract of which it forms a part.
> 8.3 Any challenges to the jurisdiction of the Tribunal, except challenges based on the award itself, shall be made not later than the notice of defense or, with respect to a counterclaim, the reply to the counterclaim; provided, however, that if a claim or counterclaim is later added or amended such a challenge may be made not later than the response to such claim or counterclaim.

Rules for Non-Administered Arbitration of the International Institute for Conflict Prevention and Resolution, Rule 8, available at http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/600/2007-CPR-Rules-for-Non-Administered-Arbitration.aspx (last visited July 8, 2013).

Behm's claims for (1) lack of reasonable notice, (2) failure of consideration, and (3) fraud in the execution, are to be decided by the arbitrator. Therefore, the Court will not address Behm's contentions that the Agreements are unenforceable.

CONCLUSION

For all the foregoing reasons, EY's Motion to Dismiss is **GRANTED in part**. The Court concludes that it does not have jurisdiction over disputes that are subject to the Dispute Resolution provisions in the 2009 and 2010 Agreements. The Court will retain jurisdiction over the pre-August 21, 2009 claims. The Court notes this ruling does not preclude the parties or the arbitrator from considering the totality of the dispute. Such an approach would facilitate the parties' ability to resolve all of the issues at the conclusion of the arbitration process.

The parties are hereby ordered to commence alternative dispute resolution regarding Behm's claims against EY in accordance with the Dispute Resolution provisions in the 2009 and 2010 Agreements. The Court will still retain jurisdiction over claims arising from conduct occurring prior to August 21, 2009.

This case, as it pertains to the dispute between Behm and EY, is stayed pending resolution in accordance with the Dispute Resolution provisions in the Agreements.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge