**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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| **CATAMARAN ACQUISITION CORP.** and **CORNERSTONE EQUITY INVESTORS, IV, L.P.**, | ) | |
| Plaintiffs, | ) | |
| 5. | ) | C.A. No. 00C-09-180-JRS |
| **SPHERION CORPORATION**, | ) | |
| Defendant. | ) | |

Date Submitted: April 24, 2001
Date Decided: May 31, 2001

**MEMORANDUM OPINION**

*Plaintiffs Motion to Amend Complaint*.
**GRANTED.**
*Plaintiffs Motion to Transfer to Court of Chancery.*
**GRANTED IN PART AND DENIED IN PART.**

Daniel V. Folt, Esquire, COZEN & O'CONNOR, Wilmington, Delaware, 19801. Attorneys for Plaintiffs.

Allen M. Terrell, Jr., Esquire; Frederick L. Cottrell, III, Esquire; Dominick Gattuso, Esquire, RICHARDS LAYTON & FINGER, Wilmington, Delaware, 19899. Attorneys for Defendant.

**SLIGHTS, J.**

## I. INTRODUCTION

The Court is called upon to undertake the often difficult task of determining whether the gravamen of a complaint sounds in law or equity. The distinction, of course, is critical in ascertaining this Court's jurisdiction over a controversy. The question is called in the context of a Motion to Amend Complaint and Motion to Transfer to the Court of Chancery filed by plaintiffs, Interim Healthcare, Inc. ("Interim"), Catamaran Acquisition Corp. ("Catamaran") and Cornerstone Equity Investors IV, L.P. ("Cornerstone")(collectively "plaintiffs").

The amendments to the complaint proffered by plaintiffs include new claims for reformation and equitable rescission of a contract between Interim Services, Inc., a wholly owned subsidiary of defendant, Spherion Corporation ("Spherion"), Catamaran, and Cornerstone. Spherion maintains that plaintiffs' equitable claims are not viable and that they are brought for the purpose of divesting this Court of jurisdiction and denying Spherion of its constitutional right to a trial by jury. The facts, addressed in relevant part below, read like a combined equity/civil procedure question on the Delaware bar examination.

## II. FACTS

On September 26, 1997, Spherion, Catamaran and Cornerstone entered into a Restated Stock Purchase Agreement (the "Agreement") which memorialized Spherion's sale of its stock in Interim to Catamaran. As is customary, the Agreement included various representations regarding Interim's pending liabilities and financial fitness.

In their initial complaint, filed on September 25, 2000, plaintiffs allege that Spherion breached the Agreement and committed fraud by failing to disclose during due diligence that litigation was pending against Interim involving alleged medical malpractice which resulted in

severe neurological compromise of a young child. Spherion's answer to the initial complaint, filed on December 13, 2000, denies liability on both counts principally on the ground that the malpractice claim was covered by insurance and, therefore, was excepted from the Agreement's required disclosures.

The Motion to Amend proposes sweeping amendments to the plaintiffs' initial pleading. The fraud claim is withdrawn in its entirety. The breach of contract claim relating to the failure to disclose the pending medical malpractice litigation is no longer the showcase claim. Indeed, in the proposed amended complaint, it now merits mention in only 22 paragraphs of a pleading containing 134 paragraphs. The primary factual predicate upon which plaintiffs now seek relief, and the only predicate for the equitable claims, is Spherion's alleged failure to disclose that, in the year prior to the Agreement, Interim had been overpaid approximately $18,400,000 in Medicare reimbursements. This overpayment, in turn, has created a substantial liability for plaintiffs who now must return the overpayments to Medicare.[1] The proposed amended complaint also sets forth causes of action for

[1]Spherion disputes the actual amount of the overpayments and represents that the matter is not resolved because plaintiffs have yet to pursue available appeals to the Health Care Financing Administration of the United States Department of Health and Human Services ("HCFA"). Moreover, according to Spherion, HCFA has already determined that the assessed overpayment as initially calculated was excessive and has adjusted the amount downward as much as $8 million.

breach of contract arising from Spherion's failure to disclose other pending or anticipated claims and liabilities. Spherion does not oppose the Motion to Amend as it relates to these claims.[2]

[2]The proposed amended complaint also appears to add Interim as a party plaintiff. This proposed amendment is not addressed by either party. The Court assumes, therefore, that it is unopposed.

The alleged Medicare overpayments are particularly relevant to the motions *sub judice* because they give rise to plaintiffs' contention that the purchase price for the Interim stock was grossly inflated.[3] Specifically, plaintiffs allege that the downward adjustment to Interim's revenue necessitated by the reimbursement to Medicare of overpayments to Interim should result in a reduction of the purchase price from $134,000,000 to $84,033,600. The innocent misrepresentation by Spherion that no overpayments had been received forms the basis of the equitable rescission claim. The parties' mistaken belief at the time they entered into the Agreement that no overpayments had been received by Interim forms the basis of the reformation claim.

## III. DISCUSSION

### A. The Parties' Contentions

Plaintiffs allege that a breach of contract claim is not an appropriate vehicle to recover the damages they have suffered flowing from the inflated stock purchase price.[4] And because the misrepresentations were "innocent," plaintiffs cannot even assert, much less recover, on a tort-based claim for misrepresentation. Legal rescission is also unavailable to the plaintiffs because they are not able to allege a requisite element: fraud or intentional representation. Accordingly, plaintiffs

[3]The purchase price was derived from a multiple of Interim's net income before interest, taxes, depreciation and amortization (EBITDA).

[4]Spherion does not oppose plaintiffs' motion to amend as it relates to their new claim for breach of contract which seeks indemnification from Spherion for any amounts plaintiffs are required to repay to Medicare as a result of the overpayments.

contend that their only recourse to address the inflated price they paid for Interim is to seek reformation or equitable rescission of the Agreement.

Spherion counters by emphasizing that money damages, available in this Court, can compensate plaintiffs for all the harm they allegedly have suffered at the hands of Spherion. Moreover, the timing of plaintiffs' motion to amend and the dramatic change in the focus and character of this litigation effectuated by the proposed amendments have prompted Spherion to question plaintiffs' motives and to urge the Court to scrutinize the pending motions carefully to discern their true purpose. In this regard, Spherion notes that the facts relating to the Medicare overpayments were well known to plaintiffs when they filed the initial complaint in September, 2000. The sudden shift to equity-based claims, according to Spherion, reflects plaintiffs' post-filing realization that their claims may play better at a bench trial than before a jury. Spherion urges the Court not to countenance plaintiffs' belated decision to shop its claims in another forum.

Plaintiffs dismiss as unfounded Spherion's characterization of their proposed amendments and request to transfer the case to Chancery as "gamesmanship." They claim that they delayed litigating the claims arising from the overpayments because they, along with Spherion, were attempting to negotiate a satisfactory resolution of the dispute with HCFA. Only when negotiations failed did they seek to amend the complaint to add these claims. Moreover, plaintiffs note that they have changed counsel since the first complaint was filed and argue that they should be afforded the opportunity to pursue their new counsel's strategy for the litigation.

**B. The Motion to Amend**

**1. The Standard of Review**

Leave to amend pleadings will be granted unless there is evidence of undue delay, bad faith or dilatory motive on the part of the movant, or the futility of the claims is evident on the face of the pleading.[5] The Court must exercise its discretion when balancing the desirability of resolving litigation on the merits of all available claims against the possible prejudice or surprise to the other party.[6]

[5] *Hess v. Carmine*, Del. Super., 396 A.2d 173, 177 (1978).

[6] *PNC Bank, Del. v. Turner,* Del. Super., 659 A.2d 222, 225 (1995).

The Court's analysis here will focus on futility. There is no credible evidence of bad faith or dilatory motive, nor has there been a significant delay in the filing of the motion to amend. This litigation commenced in September, 2000. Since then, the parties have not initiated discovery or, until now, engaged in motion practice. The Court has yet to issue a scheduling order. Moreover, the Court is satisfied with the plaintiffs' explanations for the delay in filing the instant motions and for the rationale which precipitated the proposed amendments. Spherion's argument that the proposed amendments will cause them prejudice to the extent they result in the denial of trial by jury is misplaced in the Rule 15 context.[7] The timely introduction of new equitable claims which arise from the same facts and circumstances giving rise to the legal claims cannot form the basis for an allegation of prejudice under Rule 15.[8]

The questions, then, for the Court to determine are whether the proposed amended claims which sound in equity are legitimate claims and, if so, whether their presence in the litigation requires that the entire controversy be transferred to the Court of Chancery.[9]

**2. The Equitable Rescission Claim**

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[7]Super. Ct. Civ. R. 15.

[8]*See Annone v. Kawasaki Motor Corp.,* Del. Supr., 316 A.2d 209, 211 (1974)(court's analysis of prejudice should be directed to the criteria set forth in Rule 15(c)).

[9]*See Guy v. Judicial Nominating Comm'n*, Del. Super., 659 A.2d 777, 786 (1995)(court will deny motion to amend when amended claim would not survive a motion to dismiss).

Plaintiffs' rescission claim is straightforward: Spherion knew of the possibility that a routine annual audit by an HCFA intermediary might discover significant overpayments by Medicare but honestly did not believe that overpayments had been received. Accordingly, Spherion represented that "there are no existing overpayments due and owing to HCFA. . . ."[10] Plaintiffs likewise did not believe overpayments would be found in the HCFA audit at the time they entered into the Agreement, and were comforted in the accuracy of their belief, i.e., induced, by Spherion's misstatement. The misrepresentation, innocent though it may have been, cost plaintiffs (particularly Catamaran) an additional $50,000,000 in the form of a higher purchase price for Interim. Plaintiffs have not pled fraud and, indeed, have gone to lengths to emphasize that they possess no facts which would allow them to do so. From plaintiffs' perspective, the proposed amended complaint describes the classic case of *scienta utrimque par pares contrahentes facit:* equal knowledge on both sides make contracting parties equal.[11]

[10]Dkt. 1, Ex. A, ¶ 3.17.

[11]The Court must disagree with Spherion's assessment that plaintiffs' recovery on the breach of contract claim would moot the rescission claim. The breach of contract claim seeks indemnification for amounts repaid to Medicare or others as a result of the Medicare overpayments. The rescission claim seeks to address the amount plaintiffs allegedly overpaid for Interim.

It appears that plaintiffs' survey of the legal landscape upon which they traverse is accurate. At common law, a misrepresentation is not actionable unless the plaintiff can allege that the person making the statement knew or should have known of its falsity.[12] On the other hand, a court of equity can grant relief, including rescission, based upon innocent misrepresentations.[13] Plaintiffs represent that they can ascribe no culpability to Spherion in connection with the representations relating to Medicare overpayments. Thus, legal theories such as fraud or even negligent misrepresentation[14] are unavailable to plaintiffs.[15] And if plaintiffs have no legal claims or remedies available to address their predicament, they must turn to equity for relief.[16]

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[12]*See In re Brandywine Volkswagon,* Del. Super., 306 A.2d 24, 28 (1973).

[13]*E.I. DuPont De Nemours & Co., v. HEM Research, Inc.*, Del. Ch., C.A. No. 10747, Allen, C. (Oct. 13, 1989)(Mem. Op. at 12 n.12)("It . . . should be noted that in cases involving a prayer for rescission based upon a claim of innocent misrepresentation, the equity court has exclusive jurisdiction.").

[14]*See Dial v. Astropower, Inc.*, Del. Super., C.A. No. 98C-08-150, Quillen, J. (June 20, 2000)(Letter Op. at 9)(defining elements of negligent misrepresentation)(citation omitted).

[15]It should be noted that in light of plaintiffs' admission that they cannot plead fraud, Spherion has questioned whether plaintiffs can sustain a *prima facie* case for equitable rescission. Specifically, Spherion argues that plaintiffs must plead and prove a knowing misrepresentation to prevail on their rescission claim because the contract at issue is "an executed contract." *See Wilson v. Pepper*, Del. Ch., C.A. No. 962, Chandler, V.C. (Dec. 21, 1989)(Mem. Op. at 6 n.2)("[It] has been stated that equity does not have jurisdiction to grant rescission of an executed contract absent fraud.")(citing *Holley v. Jackson,* Del. Ch., 158 A.2d 803, 806 (1959)). *But see Shore Builders, Inc. v. Dogwood, Inc.,* D. Del., 616 F. Supp. 1004, 1015-16 (1985)(predicting that the Delaware Supreme Court would not require a showing of fraud to rescind an executed contract and questioning whether *Holley* actually endorsed such a requirement); *Norton v. Poplos,* Del. Supr., 443 A.2d 1, 4 (1982)(stating that a contract may be rescinded for fraud, misrepresentation or mistake). Because the Court is not required to resolve this apparent conflict in the case law to dispose of the motions *sub judice*, it will leave resolution or reconciliation of the conflict, as the case may be, for another day.

[16]10 *Del. C.* §§ 341, 342; *Chateau Apartments Co. v. City of Wilmington,* Del. Supr., 391 A.2d 205, 207-08 (1978).

The boundaries of legal and equitable rescission have been well-charted by Delaware courts.

As Chancellor Allen observed:

> It is perhaps not commonly appreciated that rescission is a remedy awarded by law courts. A court of law may, upon adjudication of a contract dispute, determine, where the elements of the claim are proven, that a contract has been rescinded, and enter an order restoring plaintiff to his original condition by awarding money or other property of which he had been deprived. Equitable rescission, on the other hand, which is otherwise known as cancellation, is a form of remedy in which, in addition to a judicial declaration that a contract is invalid and a judicial award of money or property to restore plaintiff to his original condition is made, further equitable relief is required. Thus, the remedy of equitable rescission typically requires that the court cause an instrument, document, obligation or other matter affecting plaintiff's rights and/or liabilities to be set aside and annulled, thus restoring plaintiff to his original position and reestablishing title or recovering possession of property.[17]

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[17] *E.I. DuPont De Nemours, supra*, Mem. Op at 6-7 (citation omitted)

Rescission in its purest form, then, seeks to "unmake" or "cancel" an agreement and to return the parties to the *status quo ante*.[18] It does not appear from plaintiffs' proposed amended complaint that they want to "unmake" the Agreement. Rather, although they invoke the appropriate incantation, including a prayer for "cancellation" of the agreement, the plaintiffs' amended complaint focuses on recouping from Spherion some of the money they paid to acquire Interim.[19] According to plaintiffs, the amount they paid for Interim in excess of its actual value easily can be calculated based on a formula set forth in the Agreement. Nevertheless, the claim is couched in the proposed amended complaint as equitable rescission of the Agreement - - an agreement which memorializes a transaction consummated more than three years ago.

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[18] *Norton v. Poplos*, Del. Supr., 443 A.2d 1 (1982).

[19] *Compare Alejandro & Reinholz v. Hornung,* Del. Ch., C.A. No. 12442, Jacobs, V.C. (Aug. 12, 1992)(Mem. Op. at 7)(concluding that plaintiff's complaint failed to state a claim for equitable rescission because, despite its "incantation of magic words", it did not actually seek cancellation of the contract at issue); *McMahaon v. New Castle Assocs.*, Del. Ch., 532 A.2d 601, 603 (1987)("Chancery jurisdiction is not conferred by the incantation of magic words.... [The court must] go behind the facade of prayers to determine the true reason for the suit.").

The Court is satisfied (and agrees with Spherion) that the Court of Chancery would find it "impossible to 'unscramble the eggs'" by rescinding the Agreement.[20] And, therefore, the Court is satisfied that plaintiffs' equitable rescission claim - - at least in its current form - - is futile for purposes of Rule 15.[21] This conclusion does not end the inquiry, however. Rescissory damages may be appropriate when "the equitable remedy of rescission is impractical" but otherwise warranted.[22] Plaintiffs have alleged that they have suffered substantial monetary damages as a result of an innocent misrepresentation relating to a material term of the Agreement. The Court has already determined that it is unable, as a matter of law, to provide a legal remedy under these circumstances. Consequently, the Court is confronted with a rather perplexing question: can a plaintiff maintain a claim for rescissory damages (traditionally a legal remedy) in a court of equity even though he cannot do so in a court of law? Of course, the question places this Court in the awkward position of attempting to define the scope of equity's jurisdiction. Nevertheless, the procedural posture of

[20]*Harman v. Masoneilan International, Inc.,* Del. Ch., 418 A.2d 1004, 1006-07 (1980)(court can't "unscramble the eggs"); *Gimbel v. Signal Cos., Inc.,* Del. Ch., 316 A.2d 599, 603 (1974)(same). *See also Stegemeier v. Magness,* Del. Ch., 728 A.2d 557, 565 (1999)(declining to rescind land sale transaction because homes already had been built and sold to third parties); *Weinberger v. UOP, Inc.*, Del. Supr., 457 A.2d 701, 714 (1983)(finding rescission impractical to undo long completed cash out merger); *Lynch v. Vickers Energy Corp.,* Del. Supr., 429 A.2d 497, 501 (1981)(not feasible to unwind merger and other corporate changes).

[21]In light of this Court's determination, as explained below, that the rescission claim should be heard in the Court of Chancery, and considering the admittedly unusual circumstance where this Court is predicting the disposition of a claim by another trial-level court, there should be no question as to whether this Court's prediction rises to the level of a claim or issue preclusion determination. It does not. Plaintiffs are free to make their pitch for cancellation of the Agreement in the Court of Chancery within the confines of their Rule 11 obligations. This Court's prediction of the Court of Chancery's disposition of the cancellation claim was a necessary step in the logical progression (at least from one judge's perspective) of the Court's analysis of the jurisdiction issue.

[22]*See Stegemeier* ,728 A.2d at 565; *Lynch*, 429 A.2d at 501; *Strassburger v. Early,* Del. Ch., 752 A.2d 557, 581-82 (2000).

this case requires the Court to address the question, at least to some extent, to dispose of the motions *sub judice*. The Court concludes that the Court of Chancery may, under settled tenets of equity, entertain a claim for rescissory damages even if the claim could not be prosecuted at common law. Or, stated more aptly, the Court cannot conclude that plaintiffs' rescission claim would be futile in the Court of Chancery.

"[E]quity will not suffer a wrong without a remedy. . . ."[23] And "[e]quity's appropriate focus should be on the alleged wrong, not the nature of the claim which is no more than a vehicle for reaching the remedy for the wrong."[24] Thus, the mere existence of a possible remedy at law will not *ipso jure* divest the Court of Chancery of subject matter jurisdiction.[25] "To preclude concurrent equitable jurisdiction, the alternative legal remedy at a minimum must be available to the plaintiff as a matter of right and must offer full, fair and complete relief. . . ."[26] Here, the wrong alleged is an innocent misrepresentation relating to a material term of a contract. While breach of contract damages may be available, this Court cannot afford a complete remedy for all damages allegedly suffered by the plaintiffs as a result of the misrepresentation. The Court of Chancery, on the other hand, can afford full, fair and complete relief.[27] Accordingly, plaintiffs will have their opportunity

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[23]*Fischer v. Fischer*, Del. Ch., C.A. No. 16864, Steele, V.C. (Nov. 4, 1999)(Mem. Op. at 10).

[24]*Id.*

[25]*See El Paso Natural Gas Co. v. Transmission Gas Co.*, Del. Supr., 669 A.2d 36, 39 (1995).

[26]Wolfe & Pettinger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 2-3[b] at 2-43 (2000)(citations omitted).

[27]*See E.I. DuPont De Nemours & Co.*, *supra*, Mem. Op. at 12 n. 12 ("It should be noted that in cases involving a prayer for rescission based upon a claim of innocent misrepresentation, the equity court has exclusive jurisdiction")(citation omitted); *Dick v. Reeves,* Del. Supr., 206 A.2d 671, 674-75 (1965)(lack of knowledge of misrepresentation not a defense to rescission claim in equity). *See also DuPont v. Delaware Trust Co.*, Del. Ch., 364 A.2d 157, 160-61 (1975)(awarding rescissory

to seek rescission or rescissory damages in the Court of Chancery.[28]

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damages when cancellation was not practical).

[28]Spherion alleges that plaintiffs cannot justifiably contend that they were mistaken with respect to the possibility of a Medicare overpayment. Spherion argues that this fact alone renders plaintiffs' rescission claim futile, even if alleged innocent misrepresentations animate the claim. While this argument ultimately may prove dispositive, it is more appropriate at summary judgment. For now, the Court must accept the well plead allegations of the amended complaint as true. *Nix v. Sawyer,* Del. Super., 466 A.2d 407 (1983).

The Motion For Leave to Amend the Complaint to add a claim for Equitable Rescission is GRANTED. Plaintiffs may also amend their complaint to add a prayer for rescissory damages.

**b. The Reformation Claim**

In addition to rescission, plaintiffs seek reformation of the Agreement on the ground that all parties to the Agreement at the time of consummation were mistaken as to the existence of overpayments from Medicare. The reformation claim is pled as an alternative to equitable rescission as is permitted by the rules of this Court.[29] Reformation of a contract is undertaken for the purpose of rectifying a failure of the contract to reflect the true intent of the parties thereto. Thus, it has been said that "rescission differs from reformation in that reformation does not seek to 'unmake' or cancel an agreement but to enforce an agreement as intended, notwithstanding that the written instrument, as a result of fraud or mutual mistake, does not accurately reflect the agreement actually reached."[30] In essence, the court amends or rewrites the

[29]Super. Ct. Civ. R. 8(e)(2).

[30]Wolfe, *Corporate and Commercial Practice in the Delaware Court of Chancery*, §12.4[a], at 12-45 (2000).

instrument in accordance with its interpretation of the parties' expectations at the time the contract was made.[31]

That a party to the contract may have a claim for damages on either the unreformed or reformed contract does not extinguish a party's right to reformation.[32] Reformation of the agreement supplements or compliments the damages award; it does not substitute for damages or vice versa.[33] In Delaware, reformation is available only in the Court of Chancery.[34] Thus, assuming they have pled a viable reformation claim, plaintiffs may pursue reformation in the Court of Chancery notwithstanding the availability of rescissory damages or damages for breach of contract.

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[31]*In re Enstar Corp.*, Del. Supr., 604 A.2d 404, 413 (1992).

[32]*See The Travelers Indem. Co. v. North American Phillips Corp.*, Del. Ch., C.A. No. 12,029, Berger, V.C. (Aug. 26, 1992)(Mem. Op. at 3-4)(claim for declaratory relief, damages, and legal rescission did not extinguish claim for reformation); 66 *Am. Jur.2d* Reformation of Instruments, §78 at 600 (1973)("Although a party may bring his suit in the first instance for the reformation of the instrument and in the same proceeding ask for a decree for the damages he seeks, his election to obtain his remedy at law does not estop him from seeking reformation in equity").

[33]*Id.*

[34]*Hessler, Inc. v. Ellis,* Del. Ch., 167 A.2d 848, 850 (1961).

Spherion contends that plaintiffs' reformation claim is futile. Specifically, Spherion argues that plaintiffs cannot establish that either party to the Agreement was mistaken with respect to the potential that Interim may be assessed with overpayment liability to Medicare.[35] According to Spherion, overpayment liability was contemplated by both parties as a real possibility after the fiscal intermediary's audit of Interim's Medicare reimbursements. The proposed amended complaint, however, alleges that both parties labored under a mistake with respect to the existence of, (and/or the extent of) Medicare overpayments. The allegation is well pled and will be accepted as true.[36]

Plaintiffs' Motion to Amend Complaint to add a claim for reformation is GRANTED.

**B. The Motion to Transfer**

[35] *See Amer v. NVF Co.*, Del. Ch., C.A. No. 11812, Allen, C. (June 15, 1994)(Mem. Op. at 16)(mutual mistake or fraud requisite element of reformation).

[36] *Itek Corp. v. Chicago Aerial Indus., Inc.,* Del. Super., 257 A.2d 232, 233 (1969).

Because the Court has determined that plaintiffs may amend their complaint to add claims over which this Court has no jurisdiction, the Court must next determine whether to retain jurisdiction over any portion of this litigation or whether the entire controversy should be litigated in the Court of Chancery. Plaintiffs have requested that the entire matter be transferred to the Court of Chancery;[37] Spherion opposes the request because it wants to exercise its demand for a jury trial, at least with respect to the purely legal claims. Accordingly, Spherion suggests that the Court "bifurcate" the claims and transfer only the rescission and reformation claims to Chancery. Alternatively, Spherion suggests that I seek appointment as a Vice Chancellor so that I can preside over both the legal claims as they are tried to a jury, and the equitable claims as they are tried to the Court.[38]

Pursuant to the so-called "clean-up doctrine," the Court of Chancery, in its discretion, could hear all claims, both equitable and legal, and afford complete relief, including money damages if

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[37] 10 *Del. C.* § 1902.

[38] *See* Art. IV, Sect. 13(2) of the Delaware Constitution of 1897. *See e.g., Monsanto Company v. Aetna Casualty & Surety Co.,* Del. Super., C.A. No. 88C-JA-118, Martin, J. (Sept. 29, 1090)(Mem. Op. at 7)(Superior Court judge seeks appointment as Vice Chancellor to preside over severed legal and equitable claims).

appropriate.[39] The exercise of ancillary jurisdiction, however, is permissive; the Court of Chancery may decline to hear strictly legal claims and allow such claims to be presented to a jury.[40]

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[39]*American Appliance v. State ex rel. Brady,* Del. Supr., 712 A.2d 1001, 1003 (1998); *Herzing v. Priestly,* Del. Ch., C.A. No. 11704, Chandler, V.C. (Apr. 15, 1992)(Mem. Op.).

[40]*See, e.g., Getty Refining & Marketing v. Park Oil Co.,* Del. Ch., 385 A.2d 147, 151 (1978), *aff'd,* Del. Supr., 407 A.2d 533 (1979).

"[S]ince its inception in 1776, the Delaware Constitution has afforded its citizens the right to jury trials in both criminal and civil proceedings... expressly preserv[ing] all of the fundamental features of the jury system as they existed at common law."[41] "The *sine qua non* of that common law jurisprudence is the principle that either party shall have the right to demand a jury trial upon an issue of fact in an action at law."[42] And "[t]he fact that the plaintiff joins legal and equitable claims in a Complaint should not automatically deprive a defendant of the right to a trial by jury on the purely legal issues."[43] Of particular importance in the determination of whether to sever legal and equitable claims is the extent to which the claims are so "intertwined" as to make separation impractical or impossible.[44] While these concepts have been developed in the context of the Court of Chancery's ancillary jurisdiction over legal claims, the Court can discern no reason why the concepts would not apply equally to this Court's determination of whether to transfer legal claims (poised for trial by jury in this Court) to the Court of Chancery along with equitable claims over which this Court has no jurisdiction.

Counts I through IV of the Amended Complaint are breach of contract claims. Of these

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[41]*McCool v. Gehret*, Del. Supr., 657 A.2d 269, 282 (1995)(citation omitted).

[42]*Id.*

[43]*Getty Refining*, 385 A.2d at 151(citations omitted)(noting that to hold otherwise would allow a plaintiff to "deprive a defendant of a jury trial merely by adding spurious equitable claims").

[44]*Id.* at 150.

claims, only Count I addresses the Medicare overpayments. Counts II, III and IV address Spherion's alleged failure to disclose other material claims or liabilities in breach of the Agreement. These claims are purely legal and entirely separate from the equitable claims and the Court will order that they be severed from the remaining claims and retain jurisdiction over them. The inconvenience and expense caused by severance, if any, is outweighed by this Court's respect for the right to trial by jury of common law claims.

Count I presents a more complicated issue. It is clear that the rescission, reformation and breach of contract claims arising from the Medicare overpayments present factual issues in common including, but not limited to, the exact amount of the overpayment and the extent to which the overpayment was or should have been anticipated by both parties to the Agreement. Even Spherion tacitly has acknowledged that Count I is intertwined with the equitable claims when it observed at oral argument that the resolution of Count I may render moot Counts V (reformation) and VI (equitable rescission).[45] Severance of Count I from Counts V and VI would work an unmanageable hardship on the courts and the parties.

Finally, with respect to the equitable claims, clearly they must be severed and transferred to the Court of Chancery.

[45]Transcript at 26-27.

## IV. CONCLUSION

Based on the foregoing, the Motion to Amend is GRANTED. Plaintiffs may further amend the complaint to add a prayer for rescissory damages in accordance with this decision. The Motion to Transfer is GRANTED in part and DENIED in part. The Court will sever the claims, retain jurisdiction over Counts II through IV, and transfer Counts I, V, and VI to the Court of Chancery in accordance with 10 *Del. C.* §1902. Once these claims are transferred to the Court of Chancery, either party may petition for, or either court may *sua sponte* initiate, proceedings to consolidate the cases before one judge (or Chancellor) in accordance with Art. IV Sect. 13(2) of the Delaware Constitution of 1897.

**IT IS SO ORDERED.**

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Judge Joseph R. Slights, III