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Re: *3850 & 3860 Colonial Blvd., LLC v. Griffin*
C.A. No. 9575-VCN
Date Submitted: March 19, 2015

Dear Counsel:

Plaintiff 3850 & 3860 Colonial Blvd., LLC ("Colonial") seeks certification of an interlocutory appeal of this Court's Letter Opinion and Order of February 26, 2015. There, the Court stayed proceedings pending arbitration, specifically awaiting resolution of the question of substantive arbitrability.

Interlocutory appeals are governed by Supreme Court Rule 42. In order to certify an interlocutory appeal, the Court must be persuaded that its decision determined a substantial issue and established a legal right. In addition, the would-be-appellant must satisfy one of several criteria, some of which are set forth

expressly in Supreme Court Rule 42(b) and some of which are incorporated by reference to Supreme Court Rule 41(b), which addresses certification of questions of law.

The facts in this case are unusual, and applying generally accepted principles of law to unusual facts can be a challenge. Here, Colonial acquired an interest in Rubicon Media, LLC ("Rubicon LLC"), a limited liability company controlled by Defendant Christopher E. Griffin ("Griffin"). Griffin carried out a recapitalization of Rubicon LLC which gave rise to Colonial's principal claims. Rubicon LLC's operating agreement, to which Colonial assented, required arbitration. Later, Griffin converted Rubicon LLC into Defendant Rubicon Media, Inc. ("Rubicon Inc."); its certificate of incorporation designated the Court of Chancery as the exclusive forum for stockholder fiduciary duty litigation (the "Exclusive Chancery Charter Provision"). The critical conduct, for purposes of this litigation, occurred during the existence of Rubicon LLC.[1]

[1] Colonial's claim is fundamentally against Griffin, and the corporation's function is primarily one of a nominal defendant, included as a party in order to effectuate any remedy that might be ordered. The Exclusive Chancery Charter Provision addresses issues involving the corporation's governance. There is nothing in that

The parties debate whether Colonial remains obligated to arbitrate or whether creation of the corporation as Rubicon LLC's successor (with a charter providing exclusively for litigation) eliminated any right or duty to arbitrate. The specter of unusual facts appears in this context. Griffin, who converted Rubicon LLC to Rubicon Inc., whose certificate of incorporation prescribed this Court as the exclusive forum for resolution of shareholder fiduciary duty claims, now wants to arbitrate.[2] Colonial, which agreed to arbitration when it accepted Rubicon LLC's operating agreement and which later only became a shareholder in Rubicon Inc. because of Griffin's unilateral efforts, now wants to litigate in this venue.

The substantial issue and legal right elements of Supreme Court Rule 42 "have been interpreted as requiring a matter that goes to the merits of the case."[3]

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provision reciting that it governs disputes arising before formation of the corporation.

[2] Perhaps Griffin should be deemed to have waived (or to be estopped from asserting) any right to arbitrate because of his conduct in changing the nature of the entity and its dispute resolution process. Colonial did not argue this in its briefs. There was a fleeting reference as a result of the Court's colloquy with counsel during argument. *See* Tr. of Oral Arg. at 24-26. In any event, this is a contention that Colonial did not develop in any detail.

[3] *TowerHill Wealth Mgmt., LLC v. The Bander Family P'ship, L.P.*, 2008 WL 4615865, at *2 (Del. Ch. Oct. 9, 2008).

The Court's decision was on substantive arbitrability: should Colonial's dispute be heard by an arbitrator or by a judge?[4] Significant issues were arguably implicated by the analysis; for example, one question was whether the change of the entity's form from a limited liability company to a corporation overrode the arbitration provision in the limited liability company's operating agreement.[5] Yet, the order

[4] The Court concluded that the arbitrator should determine whether the dispute between Griffin and Colonial should be arbitrated. Much of what Colonial argues relates to the question of whether it is obligated to arbitrate, not who is to determine whether the dispute is subject to arbitration. *Willie Gary* anticipates that the Court's determination of who should resolve the question of substantive arbitrability will not be a deep and searching inquiry. *See James & Jackson, LLC v. Willie Gary*, 906 A.2d 76 (Del. 2006).

[5] If the Exclusive Chancery Charter Provision controls, then it is clear that the dispute should remain in this Court. Whether it controls may be the determinative issue. Griffin and Colonial, however, agreed at one point to arbitrate disputes of the nature that is at the core of this action. Virtually all of the alleged wrongful conduct occurred while the entity was a limited liability company and that agreement required the entity, as well as Colonial and Griffin, to arbitrate. Griffin unilaterally converted the limited liability company to a corporation and changed the dispute resolution mechanism. Suppose the limited liability company agreement provided for exclusive jurisdiction in this Court, and Griffin unilaterally converted it to a corporation, but with a mandatory arbitration provision. Would Colonial, under those different facts, be required to arbitrate?

Colonial's position is not unreasonable. Colonial, of course, is correct that arbitrating the dispute, if arbitration is not the correct dispute resolution forum, would be an expensive, unnecessary, and time consuming drain of resources. That

from which an interlocutory appeal is sought was intended to stay this action to allow the arbitration forum to resolve the question of who should decide the merits.[6]

As this Court observed in *TowerHill Wealth Management, LLC*, "the issue of whether [the plaintiff's] claims should be heard in arbitration or this court does not go to the actual merits of those claims. And again, the Supreme Court has repeatedly denied attempts to appeal from unfavorable rulings on arbitrability."[7] Thus, as in *TowerHill Wealth Management*, Colonial satisfied neither the substantial issue prong nor the legal right prong of Supreme Court Rule 42.

Colonial points to two criteria to satisfy the final prong of Supreme Court Rule 42; in this Court's view, neither criterion invoked by Colonial has been met. First, Colonial claims to have presented a novel question of Delaware law. As far as the Court can tell, this case is the first instance of application of the *Willie Gary*

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would be true of every instance in which the Court determines that something must be arbitrated.

[6] If the arbitration forum is chosen for resolution of the dispute, then dismissal of this action might become appropriate.

[7] *TowerHill Wealth Mgmt., LLC*, 2008 WL 4615865, at *2 (citing cases). Colonial did not address this precedent.

standard to a factual setting approximating the one in which Colonial finds itself. That may, as a matter of policy, suggest that an appeal now would be efficient and would otherwise make sense, but it does not make the issue a novel one of law. The *Willie Gary* test applies to the facts because the Rubicon LLC operating agreement, in effect at the time of the bulk of the contested conduct, provides for arbitration; it was an agreement calling broadly for arbitration and incorporating rules that authorize the arbitrator to resolve the question of substantive arbitrability. Much of Colonial's motion is directed at what it views—perhaps correctly—as the Court's errors, but, however frustrating that might be for Colonial, it is not a substitute for the standards of Supreme Court Rule 42 which were presumably devised to reflect the policy that interlocutory appeals are to be rare.

Colonial also argues that the Court's decision conflicts with other decisions of this Court. Whether a later contract displaces entirely a prior contract depends upon the facts and circumstances. Some cases may go one way while other cases go the other way. For example, Colonial invokes the concept that a "'new contract

prevails to the extent [that] it is inconsistent with the old contract.'"[8] That principle, however, does not necessarily control here because arbitrating disputes that arose under the limited liability company's operating agreement is not necessarily inconsistent with the Exclusive Chancery Charter Provision. Whether the charter's provision applies to disputes that arose before the charter was adopted is a question that separately requires interpretation. This is the type of argument that should be resolved during the debate regarding substantive arbitrability before the arbitrator. It is the nature of the *Willie Gary* analysis that where the "new contract" does not expressly (or necessarily) supersede the "old contract" for past events, the question of substantive arbitrability—even when there may be a leaning toward viewing litigation as the forum the parties agreed to—still is for the arbitrator.

Whether a non-party to an agreement requiring arbitration, such as Rubicon Inc. in this instance, may be required to arbitrate also may be a difficult issue, but it

[8] Appl. for Certification of Interlocutory Appeal at 17 (quoting *Country Life Homes, Inc. v. Shaffer*, 2007 WL 333075, at *5 n.27 (Del Ch. Jan. 31, 2007)).

is not a novel question of law; instead, it requires application of a reasonably well-settled collection of principles of law to a specific set of facts.[9]

Colonial unsurprisingly disagrees with the Court's conclusion. The facts of this case are unusual, but ultimately, there is an arguable basis for arbitration and under *Willie Gary* and the terms of Rubicon LLC's operating agreement, that raises a question for resolution in the arbitration forum. For current purposes, certifications of interlocutory appeals from decisions regarding arbitration are rarely granted because their circumstances are not "extraordinary or exceptional,"[10] and Colonial has offered no reason to depart from that consistent approach. Thus, its application for certification of an interlocutory appeal is rejected.

[9] There is a suggestion that the Court could have dismissed this action to facilitate an appeal. Staying in favor of the arbitration venue in the interim was chosen as the better approach because, if this matter must be resolved through litigation as the arbitrator might determine, the case for that dispute is already on the Court's docket. This is the type of decision that would merit an interlocutory appeal only in the most unusual of circumstances, which are not present here.

[10] *See Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2861717, at *1 (Del. Ch. July 22, 2008) (setting out the standard for certification of an interlocutory appeal).

An implementing order will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K