SAM GLASSCOCK III
VICE CHANCELLOR

COURT OF CHANCERY OF THE STATE OF DELAWARE

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Date Submitted: June 26, 2013
Date Decided: August 27, 2013

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Re: *Shareholder Representative Services LLC v. ExlService Holdings, Inc.*, Civil Action No. 8367-VCG

Dear Counsel:

This letter addresses the Defendant's Motion to Compel Arbitration and To Dismiss or Stay the Action. Because I find that the Plaintiff's claim for declaratory relief is a legal issue to be decided by the arbitrator, the Defendant's Motion to Compel Arbitration is granted.

A. Facts

The Motion relates to a merger agreement (the "Merger Agreement") signed by Defendant ExlService Holdings, Inc. ("EXL") and Plaintiff Shareholder Representative Services LLC ("SRS"). Under the Merger Agreement, EXL purchased Business Process Outsourcing, Inc. ("BPO") from its principal

shareholders—SRS—and BPO became a wholly-owned subsidiary of EXL.[1] EXL placed $5,000,000 of the total consideration to be paid in the merger in an escrow account to satisfy any indemnification claims arising under Sections 9 or 10 of the Merger Agreement.[2] The parties finalized this arrangement by signing a separate escrow agreement (the "Escrow Agreement") one month after the Merger Agreement was signed.[3] The Merger Agreement indicates that all indemnification claims must be submitted within twenty months from the signing of the Merger Agreement—that is, by December 31, 2012 (the "First Cut-Off Date")—or else the claims are waived.[4] The Escrow Agreement contains similar language. Since the parties entered into the Escrow Agreement one month after the Merger Agreement, it appears to impose a second cut-off date (the "Second Cut-Off Date") for indemnification claims of January 31, 2013, exactly one month after the First Cut-Off Date.[5]

On January 24, 2013, after the First Cut-Off Date, but before the Second Cut-Off Date, EXL submitted notice of a liquidated claim of $254,767 and a third-

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[1] Comp. ¶ 1.
[2] *Id.* ¶ 4.
[3] *Id.* ¶ 6.
[4] *Id.* ¶ 4; *see also* Ladig Aff., Ex. B § 9.2 ("The Representations and warranties contained in this Agreement and in any certificate delivered at the Closing pursuant to this Agreement shall survive the Closing until twenty (20) months from the date hereof (such date, or such other date described in the proviso to this sentence, the '***Cut-Off Date***.')").
[5] Ladig Aff., Ex. C § 2(a)(iv) ("Except as otherwise directed by the Company Agent in writing, on the date that is twenty (20) months after the date hereof (the '<u>Cut-Off Date</u>'), the Escrow Agent shall disburse to Paying Agent for the benefit of the Effective Time Holders, all of the funds remaining in the Escrow Fund . . . . The Escrow Agent shall retain in the Indemnity Escrow fund . . . any additional amount claimed by Parent . . . prior to the Cut-Off Date.").

party claim of an unidentified amount by former customer SCI Funeral & Cemetery Purchasing Cooperative, Inc. ("SCI").[6] EXL also served notice on the escrow agent, Wells Fargo Bank, N.A., to ensure that the escrow funds would not be released to stockholders.[7] SRS objected to EXL's indemnity notice by letter dated February 21, 2013,[8] and on February 27, SRS commenced this action.[9] SRS seeks the following relief: (1) a declaratory judgment determining "the rights of the parties under the Merger Agreement and Escrow Agreement,"[10] and that EXL "has breached the Merger Agreement and the Escrow Agreement by asserting untimely and invalid indemnification claims,"[11] and (2) an injunction ordering EXL to withdraw its indemnification notice and prohibiting EXL from filing additional indemnification claims under the Merger Agreement or Escrow Agreement.[12]

SRS asserts that EXL missed the Cut-Off Date to submit its indemnification claims[13] and, in the alternative, challenges the substance of EXL's claims, arguing that EXL did not submit the claims in the level of detail required by the Merger Agreement.[14] In response, EXL filed the Motion to Compel Arbitration and to

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[6] Compl. ¶ 7.
[7] *Id.* ¶ 8.
[8] *Id.*
[9] *Id.* ¶ 1.
[10] *Id.* ¶ 53.
[11] *Id.* ¶ 58.
[12] *Id.* ¶ 66(a)-(c).
[13] *Id.* ¶ 38.
[14] *Id.* ¶¶ 43-39.

Dismiss or Stay the Action at issue here.[15] EXL argues that because SRS's claims arise under the Merger Agreement, they must be resolved through arbitration per Section 11.8(a) of the Merger Agreement.[16]

SRS counters that, because it seeks equitable relief in the form of an injunction, SRS's claims fall under an exception carved out of the mandatory arbitration clause in Section 11.8(f) of the Merger Agreement.[17] SRS further contends that because the Merger Agreement provides that "[t]he Arbitrator shall have no power or authority to grant injunctive relief, specific performance or other equitable relief,"[18] the Court of Chancery must address these claims. Finally, SRS maintains that its claims are properly couched in terms of equitable relief because Section 11.10(a) of the Merger Agreement provides that "[t]he parties agree that *irreparable damage* will occur in the event that any of the provisions of [the merger agreement] are not performed in accordance with their specific terms or were otherwise breached."[19]

B. Analysis

This Court lacks subject matter jurisdiction to resolve legal claims where the

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[15] Def.'s Am. Mot. to Compel Arb. 1.
[16] Ladig Aff., Ex. B § 11.8(a) ("Matters in dispute under or relating to this Agreement shall be finally resolved by mandatory binding arbitration in accordance with this Agreement.").
[17] *See id.* at § 11.8(f) ("Nothing in Section 11.8 shall prevent either party from seeking an injunction or other equitable relief and any relief ancillary thereto from a court of competent jurisdiction.").
[18] *Id.*
[19] *Id.* at § 11.10(a) (emphasis added).

parties have agreed to resolve those claims through binding arbitration, because "arbitration provides an adequate legal remedy."[20] EXL concedes, and SRS does not dispute, that this Court, not the arbitrator, should determine the arbitrability of SRS's claims, because the arbitration clause of the Merger Agreement does not explicitly commit the determination of substantive arbitrability to the arbitrator.[21]

Accordingly, my only task is to determine the substantive arbitrability of SRS's claims. Section 11.8 of the Merger Agreement provides that:

> Matters in dispute under or relating to this Agreement shall be finally resolved by mandatory binding arbitration in accordance with the Agreement. . . .
>
> **(b) Submission to Mandatory Arbitration**. Any unresolved controversy or claim arising out of or relating to this Agreement (or the facts and circumstances relating hereto) shall be submitted to mandatory, binding arbitration by one arbitrator mutually agreed upon by the parties . . . . The award in the arbitration shall be final and binding. The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16, and judgment upon the award rendered by the Arbitrator may be entered by any court having jurisdiction thereof.[22]

The only limitation Section 11.8 imposes on the arbitrator's authority is that "[t]he Arbitrator shall have no power or authority to grant injunctive relief, specific

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[20] *Carder v. Carl M. Freeman Cmtys., LLC*, 2009 WL 106510, at *3 (Del. Ch. Jan. 5, 2009).
[21] Def.'s Op. Br. 8. *Cf. Viacom Int'l Inc. v. Winshall*, 2013 WL 3678786, at *3 (Del. July 16, 2013) ("in determining whether a claim is subject to arbitration, the court must distinguish between issues of substantive arbitrability and procedural arbitrability. Issues of substantive arbitrability are gateway questions relating to the scope of an arbitration provision and its applicability to a given dispute, and are presumptively decided by the court.") (quoting *Viacom Int'l, Inc. v. Winshall*, 2012 WL 3249620, at *12 (Del. Ch. Aug. 9, 2012).
[22] Ladig Aff., Ex. B § 11.8.

performance, or other equitable relief."[23]

The Delaware Supreme Court set forth in *Parfi Holding AB v. Mirror Image Internet, Inc.* the steps by which I am to assess arbitrability of a claim:

> First, the court must determine whether the arbitration clause is broad or narrow in scope. Second, the court must apply the relevant scope of the provision to the asserted legal claim to determine whether the claim falls within the scope of the contractual provisions that require arbitration. If the court is evaluating a narrow arbitration clause, it will ask if the cause of action pursued in court directly relates to a right in the contract. If the arbitration clause is broad in scope, *the court will defer to arbitration on any issues that touch on contract rights or contract performance*.[24]

In *Parfi Holding*, the Supreme Court held that an arbitration clause which provided that "any dispute, controversy, or claim arising out of or in connection with the Underwriting Agreement" would be arbitrable constituted a broad arbitration provision.[25]

Here, the arbitration clause in the Merger Agreement between SRS and EXL is similarly broad. By providing that "[a]ny unresolved controversy or claim arising out of or relating to this Agreement"[26] be submitted to binding arbitration, the parties here have clearly and unambiguously indicated that the arbitrator will resolve all issues "that touch on contract rights or contract performance."[27]

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[23] *Id.*, Ex. B § 11.8(f).
[24] *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 155 (Del. 2002) (emphasis added).
[25] *Id.* (internal citations omitted).
[26] Ladig Aff., Ex. B § 11.8(b).
[27] *Parfi Holding*, 817 A.2d at 155.

Accordingly, the arbitrator—not this Court—should decide what the proper cut-off date was.

I disagree with SRS's contention that I should enter a declaratory judgment as to the proper cut-off date because SRS has requested, in addition, purported equitable relief. SRS argues that the carve-out in Section 11.8(f)—which prevents the arbitrator from granting injunctive or other equitable relief, and which preserves the parties' rights to seek equitable relief from a court of competent jurisdiction—allows it to have its requests for injunctive and declaratory relief resolved in the Court of Chancery. SRS points out that this Court's opinion in *Willie Gary LLC v. James & Jackson LLC* dealt with a similar arbitration issue. In *Willie Gary*, two members of an LLC disagreed about their obligations under an LLC agreement. One of the members, Willie Gary, sought an injunction from this Court to compel the other member, J&J, to assent to a capital infusion by a third party which would have diluted J&J's membership interest.[28] J&J sought to dismiss the complaint on the grounds that the LLC agreement provided for all contractual disputes to be resolved by arbitration.[29] The Court denied J&J's motion, and held that the contract permitted the parties to seek injunctive relief in

[28] *Willie Gary LLC v. James & Jackson LLC*, 2006 WL 75309, at *3 (Del. Ch. Jan. 10, 2006), *aff'd*, 906 A.2d 76 (Del. 2006).
[29] *Id.* at *8.

the Court of Chancery.[30] The Court specifically rejected the notion that "[the LLC agreement] simply provides a party that has prevailed in arbitration to seek enforcement from a court."[31] The Court concluded that "[b]y its plain terms, the [LLC agreement] authorizes Willie Gary to do what it has done—come to a court with subject matter jurisdiction and press claims for injunctive relief and specific performance."[32]

It is true that *Willie Gary* stands for the proposition that otherwise-arbitrable issues may be resolved by a court of equity when the parties' contract so permits. Here, however, SRS's reliance on *Willie Gary* is misplaced, because SRS's purported claims for equitable relief are actually claims for legal relief. Semantic legerdemain does not transform a legal claim into an equitable claim.[33] SRS maintains that it seeks equitable relief in the form of injunction; such relief, however, is justified only where a plaintiff has demonstrated success on the merits; that absent injunctive relief, immediate and irreparable harm will result; and that

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[30] *Id.* at *9.
[31] *Id.*
[32] *Id.*
[33] *See IBM Corp. v. Comdisco, Inc.*, 602 A.2d 74, 78 (Del. Ch. 1991) ("It has been frequently said that this Court, in determining jurisdiction, will go beyond the 'façade of prayers' to determine the 'true reason' for which the Plaintiff has brought suit. By this it is meant that a judge in equity will take a practical view of the complaint, and will not permit a suit to be brought in Chancery where a complete legal remedy otherwise exists but where the plaintiff has prayed for some type of traditional equitable relief as kind of a formulaic 'open sesame' to the Court of Chancery").

the balance of the equities favors injunctive relief.[34]

Here, SRS has asked me to declare that its view of the contract with respect to the operative Cut-off Date is correct. Declaratory relief interpreting a contract is legal in nature, and available, in this instance, in the arbitration to which the parties are contractually bound. SRS also seeks an injunction requiring EXL to (1) release the escrow funds, (2) refrain from bringing additional indemnification claims, and (3) withdraw its indemnity notice and claim notice.[35] In other words, SRS asserts equitable jurisdiction by seeking to enjoin EXL from breaching the contract once SRS has prevailed on the legal claim as to that contract's meaning. But if that were the "open sesame" to Chancery, this Court would cease to be a court of limited jurisdiction. A plaintiff could always assert that a breaching party will breach again, or that equitable relief will be necessary to enforce a judgment. Such contingencies are insufficient to represent an equitable claim, and the bare assertion of such contingencies is not a sufficient basis to state a claim of irreparable harm necessary to assert a right to injunctive relief.

The parties here dispute the meaning of the Cut-Off Dates set out in the Merger and Escrow Agreements. EXL has proceeded consistent with its understanding, as SRS has with its. The parties have agreed by contract to place

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[34] *Koehler v. NetSpend Hldgs. Inc.*, 2013 WL 2181518, at *9 (Del. Ch. May 21, 2013) (citations omitted).
[35] Pl.'s Ans. Br. 4.

this issue before an arbitrator. The decision of the arbitrator will be final. There is no assertion in the Complaint suggesting that equitable relief will be required to ensure that the parties comply with their contractual obligations, once those are determined by the arbitrator. A plaintiff cannot "convert a claim for money damages arising from a breach of commercial contract . . . into a claim maintainable in equity by the expedient of asking that the defendant be enjoined from breaching such duty again."[36]

Nor does Section 11.10(a), which stipulates that a breach of the Merger Agreement will cause "irreparable damage," support a finding that SRS has brought an equitable claim. As then-Chancellor Chandler stated in *Kansas City Southern v. Grupo TMM S.A.*, the parties' ability to contract for equitable relief is limited:

> Although a contractual stipulation as to the irreparable nature of the harm that would result from a breach cannot limit this Court's discretion to decline to order injunctive relief, such a stipulation does allow the Court to make a finding of irreparable harm provided the agreement containing the stipulation is otherwise enforceable. *If the facts plainly do not warrant a finding of irreparable harm, this Court is not required to ignore those facts*.[37]

SRS argues that I should not consider whether its claims for injunctive relief are truly legal in nature, because such an analysis would "go to the merits of injunctive

[36] *McMahon v. New Castle Associates*, 532 A.2d 601, 606 (Del. Ch. 1987).
[37] *Kansas City S. v. Grupo TMM, S.A.*, 2003 WL 22659332, at *5 (Del. Ch. Nov. 4, 2003) (citations omitted) (emphasis added).

relief, not the issue of whether the Court can decide the issue of injunctive relief."[38] This is simply incorrect. SRS, as the plaintiff, has the burden of establishing a prima facie case for the equitable nature of its claims.[39] Because SRS's claims constitute a request for a declaration of contractual rights and monetary relief, they have failed to meet that burden.

Finally, SRS contends that the hypothetical possibility of a potential request *by EXL* for contract reformation—a claim which EXL *has not brought* and without which EXL asserts it may still prevail—is a sufficient basis to remove this dispute from arbitration and bring it to this court. However, because neither party has at this juncture asked for contract reformation, I need not consider the issue here.

C. Conclusion

For the foregoing reasons, the Defendant's Motion to Compel Arbitration is GRANTED, and the Plaintiff's claims are hereby DISMISSED without prejudice to the rights of the parties to seek future equitable relief arising from the contract.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III

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[38] Pl.'s Ans. Br. 12.

[39] *See Christiana Town Ctr., LLC v. New Castle Ctr.*, 2003 WL 21314499, at *3 (Del. Ch. June 6, 2003), *aff'd sub nom, Christiana Town Ctr., LLC v. New Castle Cnty.*, 841 A.2d 307 (Del. 2004).