

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

RIVERSIDE FUND V, L.P., and)	
RIVERSIDE AMCAD BLOCKER)	
CORP.,)	
)	
Plaintiffs,)	
)	
v.)	C.A. No.: N14C-10-038 EMD CCLD
)	
VISAGAR SHYAMSUNDAR,)	
JUPITER TECHNOLOGY)	
HOLDINGS, LLC, RONALD F.)	
CORNELISON, and EDWARD)	
BERKOWITZ,)	
)	
Defendants.)	

Submitted: May 4, 2015
Decided: August 17, 2015

*Upon Consideration of
Defendants Visagar Shyamsundar and Jupiter Technology Holdings, LLC's Motion to Dismiss
Contract Claim for Disregard of Contractual Provision or, in the alternative, to Hold the Entire
Action in Abeyance, and for Attorneys' Fees*

DENIED

Philip Trainer, Jr., Esquire, Marie M. Degnan, Esquire, Ashby & Geddes, P.A., Wilmington, Delaware, and Mark D. Cahill, Esquire, Jean-Paul Jaillet, Esquire, Choate Hall & Stewart LLP, Boston, Massachusetts, *Attorneys for the Plaintiffs Riverside Fund V, L.P. and Riverside AmCad Blocker Corp.*

Jeffrey S. Goddess, Esquire, Norman M. Monhait, Esquire, Rosenthal, Monhait & Goddess, P.A., Wilmington, Delaware, and Matthew J. MacLean, Esquire, Ashley L.T. Joyner, Esquire, Pillsbury Winthrop Shaw Pittman LLP, Washington, D.C., *Attorneys for Defendant Visagar Shyamsundar and Jupiter Technology Holdings, LLC*

DAVIS, J.

INTRODUCTION

This is a civil action assigned to the Complex Commercial Litigation Division of the Court. The action concerns the purchase of a majority interest in American Cadastre LLC (“AmCad”) by Plaintiffs Riverside Fund V, L.P. and Riverside AmCad Blocker Corp. (collectively, “Riverside”). On September 16, 2013, Defendants Jupiter Technology Holdings, LLC (“Jupiter”), Visagar Shyamsundar, and Ronald Cornelison sold their majority interest in AmCad to Riverside. The transaction was governed by an Equity Purchase Agreement (“EPA”) which was signed by several parties. At the time of the transaction, Mr. Shyamsundar was AmCad’s Chief Executive Officer and Mr. Berkowitz was AmCad’s Chief Financial Officer.

On October 3, 2014, Riverside filed this lawsuit. In the Complaint, Riverside alleges the following claims: (i) Fraud (against Jupiter and Mr. Shyamsundar); (ii) Aiding and Abetting Fraud (against Mr. Berkowitz); (iii) Civil Conspiracy (against Jupiter, Mr. Shyamsundar, and Mr. Berkowitz); and (iv) Breach of Contract – Indemnification (against Jupiter, Mr. Shyamsundar, and Mr. Cornelison).

On November 19, 2014, Mr. Shyamsundar and Jupiter jointly filed Defendants Visagar Shyamsundar and Jupiter Technology Holdings, LLC’s Motion to Dismiss Contract Claim for Disregard of Contractual Provision or, in the alternative, to Hold the Entire Action in Abeyance, and for Attorneys’ Fees (the “Motion”). On January 14, 2015, Riverside filed its Plaintiffs’ Answering Brief in Opposition to Defendants Shyamsundar and Jupiter’s Motion to Dismiss or Stay Contract Claim. Thereafter, Mr. Shyamsundar and Jupiter filed their Reply Brief in Support Defendants Visagar Shyamsundar and Jupiter Technology Holdings, LLC’s Motion to Dismiss Contract Claim for Disregard of Contractual Provision or, in the alternative, to Hold the Entire Action in Abeyance, and for Attorneys’ Fees (the “Reply”). The Court held a hearing on the

Motion, the Opposition and the Reply on May 4, 2015. After hearing arguments from the parties, the Court took the matter under advisement.

PARTIES' CONTENTIONS

Mr. Shyamsundar and Jupiter contend that: (i) Riverside's breach of contract claim ("Count IV") must be dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted because Riverside failed to abide by Section 9.5 of the EPA; (ii) alternatively, the Court should stay the litigation to allow the parties to adhere to "mandatory" pre-litigation negotiation procedures; and, (iii) Riverside is liable to Mr. Shyamsundar and Jupiter for attorneys' fees and cost because Riverside failed to abide by Section 9.5 of the EPA. In support, Mr. Shyamsundar and Jupiter claim that the EPA unambiguously requires the parties to negotiate in good faith for twenty (20) days to resolve any disputes between them before filing a lawsuit. Mr. Shyamsundar and Jupiter argue that as Riverside allegedly circumvented that requirement, the contract claim should be dismissed or the case held in abeyance until the parties have satisfied the EPA's twenty (20) day good faith negotiation requirement.

Riverside contends first, that the EPA contains no contractual language that forbids the filing of a lawsuit until after the twenty (20) day negotiation period. Riverside also claims that it was not obligated to engage in negotiations with parties that have already demonstrated a lack of good faith. Finally, Riverside contends that Delaware law does not require parties to engage in futile acts.

RELEVANT FACTS¹

RELEVANT SECTION OF THE EPA

On September 16, 2013, Jupiter, Mr. Shyamsundar and Ronald Cornelison sold their majority interest in AmCad to Riverside. The sale was governed by the EPA. Section 9.5 of the EPA provides:

Claims Between the Parties. If the claim is not asserted against, or sought to be collected by, a third party, and neither the Member's Representative (if the Member or any Member Beneficiary is the Indemnifying Party), nor any Buyer (if such Buyer is the Indemnifying Party), notifies the Indemnified Party within twenty (20) business days that the Indemnifying Party disputes such claim, the amount of such claim shall be conclusively deemed a liability of the Indemnifying Party hereunder. If an objection is made in writing, the Indemnifying Party shall have fifteen (15) business days to respond in a written statement to the objection. If, after such fifteen (15) business day period, there remains a dispute as to any claim, the Parties shall attempt in good faith for twenty (20) business days to agree upon the rights of the respective Parties with respect to each such claim. If the Parties should so agree, a memorandum setting forth such agreement and the agreed upon dollar amount of liability for such claim of the Party against whom the claim is made shall be prepared and signed by (or on behalf of) the Parties.

PRE-LITIGATION CONDUCT OF THE PARTIES

Through a 15 page correspondence dated August 7, 2014, Riverside submitted to Mr. Shyamsundar its claim for indemnification. The letter provides the following items:

- a detailed summary about the alleged misrepresentations as to AmCad's financial health
- a list of the EPA sections which Mr. Shyamsundar and Jupiter allegedly breached
- a copy of Mr. Shyamsundar's email to AmCad's COO stating that "we don't have very many happy cms client [sic]," and "the company is in bad shape."

¹ The Court is using facts from the Complaint and the two transmittal affidavits submitted by the parties: (i) Affidavit of Visagar Shyamsundar and (ii) Affidavit of Matthew J. MacLean. For purposes of the Motion, the Court must view the Complaint's alleged facts in a light most favorable to Riverside. *See, e.g., Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Acad., LLC*, 2010 WL 5825343, at *3 (Del. Super. Oct. 27, 2010).

- A detailed discussion of the poor relationship with Bexar County, Texas, one of AmCad's primary clients. This discussion includes specific emails which show that the program is behind schedule and minimally profitable
- A detailed discussion of the problems with AmCad's programs in Oklahoma; Brazos County, Texas; Nashville, Tennessee; U.S. Virgin Islands; and North Carolina
- Detailed breakdown of the false percentages of completion reflected in the financial statements of AmCad's clients
- A discussion of allegedly inaccurate accounts receivables
- A discussion and detailed information of related party assets, fictitious account entries, unrecorded liabilities, bad faith projections, uncollectible accounts receivable, unbilled revenue

Mr. Shyamsundar and Jupiter responded on August 25, 2014. The response was a one and a half paragraph letter objecting to and denying the claims made by Riverside. In addition, Mr. Shyamsundar, on behalf of Jupiter, rejected two of the invoices which were submitted, stating that AmCad paid the amounts at issue in the invoices.

Riverside responded on September 15, 2014, and stated that the August 25 letter provides no basis for a substantive response.

On October 3, 2014, Riverside filed its lawsuit.

LEGAL STANDARD

“Superior Court shall have jurisdiction of all causes of a civil nature, real, personal, and mixed, at common law and all the other jurisdiction and powers vested by the laws of this State....”² The Court has general jurisdiction to hear claims for monetary relief.³ Count IV is a breach of contract claim. Moreover, Riverside seeks monetary damages as relief under Count IV. Therefore, unless there is another reason not to exercise jurisdiction, this Court has competent jurisdiction over Count IV.

² DEL. CONST., ART. IV. §7.

³ *Am. Appliance, Inc. v. Delaware*, 712 A.2d 1001, 1003 (Del. 1998).

Upon a motion to dismiss under Civil Rule 12(b)(6), the Court (i) accepts all well-pleaded factual allegations as true, (ii) accepts even vague allegations as well pleaded if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) will only dismiss a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.⁴ However, the court must “ignore conclusory allegations that lack specific supporting factual allegations.”⁵

In considering a motion to dismiss under Civil Rule 12(b)(6), the court generally may not consider matters outside the complaint.⁶ However, documents that are integral to or incorporated by reference in the complaint may be considered.⁷ “If . . . matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”⁸

As a preliminary matter, all the parties here rely on documents outside the Complaint – *i.e.*, the affidavits of Mr. Shyamsundar and Mr. MacLean. Because the Motion seeks relief under both Civil Rule 12(b)(1) and (b)(6), the Court will consider the documents outside the Complaint in deciding this Motion.

DISCUSSION

Mr. Shyamsundar and Jupiter rely on *West IP Commc’ns, Inc. v. Xactly Corp.*,⁹ and contend that, based on this case, the Motion should be granted. In *West IP Commc’ns, Inc.* the Court granted a Civil Rule 12(b)(1) motion to dismiss in light of an ADR provision requiring the

⁴ *Cent. Mortg. Co.*, 27 A.3d at 536; *Cedars Acad., LLC*, 2010 WL 5825343, at *3.

⁵ *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

⁶ Super. Ct. Civ. R. 12(b).

⁷ *In re Santa Fe Pac. Corp. S’holder Litig.*, 669 A.2d 59, 70 (Del. 1995).

⁸ Super. Ct. Civ. R. 12(b).

⁹ *West IP Commc’ns, Inc. v. Xactly Corp.*, 2014 WL 3032270, at *5 (Del. Super. June 25, 2014).

parties to negotiate, mediate and arbitrate. However, in *West IP Commc'ns, Inc.* the contract had a specific ADR clause, binding the parties to mandatory arbitration. No such clause exists in the EPA.

While Delaware has a strong policy favoring alternative dispute resolution,¹⁰ the EPA does not contain an ADR or mediation clause, much less a binding arbitration provision. Section 9.5 provides for a type of claims resolution process but does not provide for any dispute resolution process in the event the parties cannot resolve the matters in the claims resolution process. Instead, section 9.5 only sets forth the timing of the process and what should happen if the parties come to an agreement on the dispute.¹¹

Mr. Shyamsundar and Jupiter also cite to *SIGA Tech., Inc. v. PharmAthene, Inc.*,¹² as support for their arguments. In *SIGA Tech., Inc.*, the Delaware Supreme Court enforced a contractual agreement to negotiate a license in good faith. However, that case did not involve a party potentially filing a lawsuit prematurely. It merely involved a provision that specifically addressed negotiating in good faith, and its enforceability in a situation where negotiations did not occur in good faith. Moreover, the Delaware Chancery Court, as affirmed by the Delaware Supreme Court, created a monetary remedy (or “equitable payment scheme”) to address the breach of the agreement to negotiate in good faith.¹³

The Court has reviewed the correspondence between the parties. On the very limited factual record presented in support of the Motion, the correspondence does not demonstrate that Riverside was acting in bad faith when it initiated the claims resolution process. The record also does not indicate that Riverside improperly failed to wait twenty (20) day given the short and

¹⁰ *Elf Atochem No Am. V. Jarrari*, 727 A.2d 286, 292 (Del. 1999).

¹¹ Compl., Ex. 1, at 32 (“9.5 Claims Between the Parties”).

¹² 67 A.3d 330 (Del. 2013).

¹³ *Id.* at 340-41.

very terse response by Mr. Shyamsundar and Jupiter on August 25, 2014 to Riversides' August 7, 2014 letter. As such, the reasoning articulated in *SIGA Tech, Inc.* does not seem to apply here.

Mr. Shyamsundar and Jupiter have not presented any case law which indicates that a cause of action should be dismissed or that that the Court lacks subject matter jurisdiction under the present facts. Moreover, there is nothing on the face of the contract that prevents a party from filing suit before the twenty (20) day negotiation time period. While it may have been the better practice for Riverside to have made additional attempts during the twenty (20) days after it received the August 25, 2014 correspondence from Mr. Shyamsundar and Jupiter, the Court will not dismiss or otherwise stay the litigation based on Riverside's purported breach, if any, of section 9.5.

CONCLUSION

For the reasons set forth above, the Court finds that Mr. Shyamsundar and Jupiter have failed to demonstrate cause for the relief sought in the Motion. Therefore, the Motion is denied.

IT IS SO ORDERED that the Motion is **DENIED**.

/s/ Eric M. Davis

Eric M. Davis, Judge