IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SRG GLOBAL, INC., f/k/a GUARDIAN AUTOMOTIVE, INC.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 5314-VCP
ROBERT FAMILY HOLDINGS, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: August 4, 2010
Decided: November 30, 2010

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PARSONS, Vice Chancellor.

This matter involves a dispute between the parties to a Share Purchase Agreement ("SPA") as to whether issues related to the purchaser's claim for reimbursement of costs incurred in the environmental remediation of purchased properties is subject to resolution by an environmental expert in accordance with provisions of the SPA and a related escrow agreement. The case is currently before the Court on the seller's motion to dismiss Count I of the complaint for lack of subject matter jurisdiction, compel what they categorize as arbitration, and stay further proceedings on the remaining counts of the complaint pending the outcome of the arbitration. That motion raises the threshold question of whether the Court or the environmental expert should decide the various issues raised in the complaint regarding the parameters of the prescribed alternative dispute resolution proceeding. In particular, the purchaser contends the procedure the parties agreed to for resolving disputes related to the environmental costs does not involve arbitration, and even if it does, the issues are of a substantive nature and, thus, should be decided by the Court. The seller disagrees and contends the environmental expert or arbitrator should decide the issues because they are procedural in nature, and even if they are not, the parties exhibited a clear and unmistakable intent to have them submitted to the arbitrator.

For the reasons stated in this Memorandum Opinion, I conclude that the issues in dispute related to the subject environmental claims present questions of procedural arbitrability that the arbitrator should decide. Therefore, I grant the seller's motion to dismiss. As to the seller's motion to stay further proceedings as to Counts II and III of the complaint pending completion of the arbitration, I deny that motion because those

two claims involve different legal and factual issues than Count I regarding the environmental claims, and it is not clear that proceeding first on Count I would result in any significant savings in terms of the parties' or the Court's resources.

I. BACKGROUND

A. The Parties

Plaintiff, SRG Global, Inc. ("SRG"), formerly known as Guardian Automotive Inc., is a Delaware Corporation with its principal place of business in Michigan. Defendant, Robert Family Holdings, Inc. ("RFH"), is a Nevada Corporation with its principal place of business in Missouri.

B. Facts

Pursuant to a Share Purchase Agreement dated April 11, 2008, SRG (then Guardian Automotive) purchased all of the shares of Siegel-Robert, Inc. ("SRI"), a manufacturer of automotive trim parts, from RFH for $175,000,000.[1] At the time of purchase, SRI's business included multiple manufacturing locations which had actual and potential environmental liabilities. During the due diligence process SRG hired an environmental consulting firm whose investigation concluded there was groundwater and soil contamination throughout one of the locations in Portageville, Missouri, that would require remediation.[2] As a result of the known liabilities at Portageville, and the potential of liabilities at other locations, the parties decided that $169,000,000 would be paid at

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1 Am. Compl. Ex. A, SPA.

2 Am. Compl. ¶¶ 26-29.

closing, and $6,000,000 would be placed in escrow for possible post-closing claims by SRG.[3] Prior to closing, the parties further decided that SRG would be responsible for performing the remediation of the Portageville Property[4], and that RFH would reimburse SRG for its costs to the extent they exceeded $2 million. The amount of reimbursement, however, was capped at the amount held in escrow.[5] If the parties could not agree on the amount of the remediation costs, the SPA provided that an Environmental Expert would make the determination. The resolution process relating to the Portageville Property is outlined in Section 5 of the Escrow Agreement.[6] The parties decided the costs associated with the environmental cleanup of other locations also would be reimbursed by RFH, subject to the same escrow cap. Likewise, if the parties were unable to agree on the amount of these costs, an Environmental Expert would make the determination. The process for determining these environmental costs is stated in Section 9.09(b) of the SPA.[7]

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3 *Id.* ¶ 21. The total escrow amount is divided into two separate accounts; $2,000,000 was set aside as the "Environmental Escrow Amount," and $4,000,000 as the "Indemnity Escrow Amount." Pursuant to the SPA and Escrow Agreement, environmental claims can be satisfied out of the Indemnity Escrow Amount only after the Environmental Escrow Amount has been depleted. *See* SPA § 9.09(a); Am. Compl. Ex. B, the Escrow Agreement, § 5(e)(ii).

4 Unless otherwise noted, all terms in initial capitals are defined as indicated in the SPA or the Escrow Agreement.

5 Am. Compl. ¶ 47.

6 *Id.* ¶ 47(e)-(g).

7 *Id.* ¶ 47(d),(h).

The parties' dispute as to Count I, which is the focus of RFH's motion to dismiss, centers on the procedures for determining reimbursement amounts,[8] and on the issue of whether the reimbursement amount is limited by insurance. Before the closing, SRG obtained an environmental insurance policy from ACE American Insurance Co. ("ACE") that would insure future environmental contingencies, but not known environmental conditions.[9]

1. The Relevant Agreements

The procedure for obtaining reimbursement for some of the disputed Environmental Cost Claims is outlined in section 9.09 of the SPA. Section 9.09(b) states the procedure for reimbursement beginning with the delivery of an "Environmental Cost Notice" by SRG. If SRG believes "in good faith that it has identified or incurred any Environmental Liabilities with respect to any real property or improvements that are owned or leased by the Company . . . (other than the Portageville Property), which Environmental Liabilities are specifically excluded from coverage by the terms of the Environmental Policy . . ." then it must deliver written notice to RFH.[10] The Environmental Cost Notice must describe:

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8 SRG refers in their answering brief to the environmental cost they seek, whether incurred or expected, pursuant to the SPA or Escrow Agreement, as "Environmental Cost Claims." Pl.'s Answering Br. ("PAB") 1. For the sake of clarity, this Court uses the same nomenclature. As with the reference to "PAB," I refer to Defendant's opening and reply briefs as "DOB" and DRB," respectively.

9 Am. Compl. ¶¶ 66-72.

10 SPA § 9.09(b).

> the nature of such Environmental Liabilities and the course of action proposed to be taken by the Company or Purchaser to remediate or otherwise reasonably address, in either case under a risk based-corrective action process pursuant to the applicable state voluntary clean-up program, such Environmental Liabilities and providing a statement of the amount of the out of pocket cost of such remediation or additional actions, actually incurred as of the date of the Environmental Cost Notice and an estimate of the amount of the out of pocket cost of such remediation or additional actions expected to be incurred after such date.[11]

If RFH disagrees with the SRG's notice, it can deliver, within twenty business days, a written objection, identified as an "Environmental Cost Objection."[12] Within ten business days of SRG's receipt of the objection, the parties are to meet and "shall negotiate in good faith in an attempt to resolve the differences set forth in the Environmental Cost Objection."[13] Finally, if no resolution is reached within twenty business days of the first meeting, "the parties shall submit all unresolved issues to a qualified senior environmental specialist at ERM (the 'Environmental Expert')."[14] The SPA authorizes the Environmental Expert ("Expert") "to resolve such issues," and provides that his decision "shall be final and binding on the parties."[15] The Expert is to

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11 SPA § 9.09(b).

12 *Id.* The SPA does not specify what must be contained in this objection.

13 *Id.*

14 *Id.* "ERM" is identified in the Escrow Agreement as Environmental Resources Management. Escrow Agreement § 1.

15 SPA § 9.09(b).

determine "the amount of out of pocket costs of such remediation or additional actions."[16] The amount determined by the Expert or agreed upon by the parties constitutes Agreed Environmental Costs.[17]

The procedure for obtaining reimbursement for costs associated with the Portageville location are outlined in Section 5(e) of the Escrow Agreement. Although the overall process is similar to that outlined in § 9.09 of the SPA, there are a couple of key differences. Section 5(e)(i) begins with the delivery of a "Portageville Claim Notice," once SRG has "incurred or reasonably expect[s] to incur Portageville Remediation Costs or other Agreed Environmental Costs in an aggregate amount of at least Two Million Dollars ($2,000,000)."[18] "Portageville Remediation Costs" are defined as "out-of-pocket costs incurred or reasonably expected to be incurred by Purchaser or the Company in undertaking and completing the Portageville Remediation."[19] Unlike the definition of

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16 *Id.*

17 *Id.* The SPA defines Agreed Environmental Costs as: "Environmental Liabilities incurred or reasonably estimated to be incurred by the Company or Purchaser with respect to real property or improvements owned or leased by the Company or any Included Subsidiary as of the Closing Date, which Environmental Liabilities are (a) specifically excluded from coverage by the terms of the Environmental Policy, (b) identified to Seller by the Company or Purchaser in an Environmental Cost Notice delivered to Seller on or prior to the first anniversary of the Closing Date, and (c) in an amount that is agreed to by the Company and Seller (including through the dispute resolution procedure described in Section 9.09(b))." SPA § 1.01.

18 Escrow Agreement § 5(e)(i).

19 *Id.* § 1.

Agreed Environmental Costs in the SPA, this definition does not mention insurance coverage.

Similar to the SPA, the Escrow Agreement gives RFH twenty business days to object to a Portageville Claim Notice by delivering an "Objection Notice."[20] The Objection Notice is defined as a:

> written statement signed by an authorized officer of Seller objecting to the payment by the Escrow Agent of any Purchaser Claim Amount set forth in a Purchaser Certificate or any amount set forth in a Portageville Claim Notice and, in each case, setting forth in reasonable detail the basis for Seller's objection.[21]

Upon delivery of an Objection Notice, the parties have ten business days to begin "negotiat[ing] in good faith in an attempt to resolve the matters set forth in the Objection Notice."[22] If no agreement is reached within twenty business days, "all unresolved issues" are to be submitted to the Expert, who is tasked with resolving such issues, and the Expert's decision is "final and binding on the parties."[23] The Expert's decision is to be delivered in writing and to specify "the amount of Portageville Remediation Costs described in the applicable Portageville Claim Notice for which Purchaser is entitled to reimbursement under Section 9.09 of the Purchase Agreement."[24]

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20 *Id.* § 5(e)(iii).

21 *Id.* § 1.

22 *Id.* § 5(e)(iv).

23 *Id.*

24 *Id.*

2. Post-Closing Actions of the Parties

As expected, SRG determined that costs have been, or will be incurred at the Portageville location, as well as sites in Ripley, Tennessee ($953,885), and Farmington, Missouri ($8,250). On March 31, 2009, SRG sent RFH an Environmental Cost Notice outlining its costs, both incurred and expected, at the Farmington, Ripley, and Portageville sites, totaling $10,932,962.[25] The overwhelming majority of this total, $9,970,000, was for the Portageville remediation.[26] RFH responded with an Environmental Cost Objection on April 25, 2009,[27] reflecting their disagreement with SRG's "claim of out of pocket costs of the remediation and the additional proposed actions" as well as "the course of action proposed . . . ."[28] In relation to the Portageville costs, RFH stated, "Seller disagrees with and objects to Purchaser's cost claims (both with respect to costs incurred to date and estimated costs to be incurred) as well as the proposed remediation for the Portageville Remediation."[29] SRG sent its Portageville Claim Notice to the escrow agent on April 29, 2009, to which RFH responded on

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25 Am. Compl. Ex. K. SRG also sent RFH Indemnification Notices on March 31 and April 29, 2009, which have some relevance to Counts II and III of SRG's Amended Complaint. Am Comp. ¶ 90. RFH's motion to dismiss relates solely to Count I, which deals with the environmental reimbursement issues. Consequently, I will not recite the facts relevant to the indemnification dispute, but note that it involves issues that do not overlap with the issues presented by Count I.

26 Am. Compl. ¶ 88.

27 *Id.* Ex. O.

28 Am. Compl. ¶ 94.

29 *Id.*

March 22, 2009 with an Objection Notice.[30] This notice stated RFH's disagreement with SRG's "claim of out of pocket costs of the remediation and the additional proposed actions," as well as the course of action proposed by SRG.[31]

After the parties attempted unsuccessfully to resolve their differences, SRG submitted its claim to the ERM on July 22, 2009.[32] On February 19, 2010, RFH submitted a letter to the Expert, identifying what they perceived as some of the unresolved issues. These included whether the costs to be determined by the Expert should take into account insurance coverage, whether the Expert needed to communicate with regulatory authorities in determining the costs, whether there needed to be additional testing to determine these costs, whether some of the materials at the Portageville site are hazardous and, thus, must be removed, and whether SRG's estimated costs were reasonable or excessive.[33]

The parties continued to disagree about the scope and nature of the Expert's decision-making process and this litigation resulted.

C. Procedural History

SRG filed its initial Complaint on March 5, 2010, and sought expedited proceedings and preliminary injunctive relief. SRG withdrew those requests based on an

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30 Am. Compl. Ex. S.

31 *Id.*

32 Am. Compl. ¶ 111.

33 *See* Am. Comp. Ex. X

agreement between the parties, and later filed an Amended Complaint on April 20, 2010. The Amended Complaint has three counts. Count I seeks a declaratory judgment and injunctive relief as to the Environmental Cost Claims. More specifically, in Count I, SRG seeks to enjoin RFH from submitting any additional issues to the Expert and a declaration that insurance shall not be considered by the Expert and that the Expert should proceed with its cost determination pursuant to the agreements, without accepting any additional submissions.[34] Counts II and III seek declaratory relief as to certain indemnification claims unrelated to the Environmental Cost Claims that arose under separate provisions of the agreements.

RFH has moved to dismiss Count 1 for lack of subject matter jurisdiction. RFH further seeks to compel arbitration of the issues presented by Count I and to stay further proceedings relating to the indemnification claims in Count II and III until the arbitration is resolved. The parties have briefed and argued that motion. This Memorandum Opinion reflects my rulings on it.

D. Parties' Contentions

SRG first contends that the environmental resolution procedure described in the relevant agreements, which calls for such issues to be resolved by an environmental expert, does not constitute arbitration. Alternatively, if the procedure is found to constitute arbitration, SRG argues that all of the issues presented in Count I are substantive in nature and, thus, should be decided by this Court. Those issues involve

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[34] Am. Comp. ¶ 147.

SRG's assertions that: 1) RFH's objections were inadequate and should not be considered by the Expert; 2) the Expert is to make its decision solely based on the parties' submissions, not any extrinsic evidence the Expert gathers; and 3) the Expert cannot consider insurance coverage when determining the costs of cleanups. RFH asserts that all of these issues are procedural in nature and, thus, must be submitted to the arbitrator and not this Court for decision. Furthermore, RFH contends that even if the issues as to Count I raise questions of substantive arbitrability, the parties clearly and unmistakably agreed to arbitrate such questions.

As to RFH's motion to stay Counts II and III pending completion of the arbitration, RFH asserts that a stay is appropriate because going forward with Counts II and III at this time could prove wasteful and unnecessary. According to RFH, the $6 million in escrow represents the sole source for any recovery by SRG and would be exhausted by any award by the Environmental Expert in excess of that amount. SRG opposes a stay, arguing that the nonenvironmental Indemnity Claims do not involve the same factual and legal bases as the Environmental Cost Claims. Furthermore, there is no guarantee that the Environmental Cost Claims will be decided before the Indemnity Claims, and a stay could create a substantial risk that SRG will be deprived of prompt resolution of its claims.

II. ANALYSIS

A. Standard

In considering a motion to dismiss for lack of subject matter jurisdiction, this Court must address "the nature of the wrong alleged and the remedy sought to determine

whether a legal, as opposed to an equitable remedy, is available and adequate."[35] "If a claim is arbitrable, i.e., properly committed to arbitration, this Court lacks subject matter jurisdiction because arbitration provides an adequate legal remedy."[36] While Delaware's public policy strongly favors arbitration, arbitration is consensual.[37] Accordingly, if the parties agreed to submit the claims at issue to arbitration, I must dismiss Count I of the Complaint for lack of subject matter jurisdiction.[38]

B. Is the Referral of Disputes to an Environmental Expert Arbitration?

First, I address SRG's half-hearted contention that the dispute resolution procedure before the Expert does not constitute arbitration. They assert that the absence of the word "arbitration" in the relevant provisions of the SPA and the Escrow Agreements indicates that these sophisticated parties did not intend for the proceeding to be the equivalent of arbitration.[39] Rather, SRG characterizes the process as an arbitration analog providing for the Expert to resolve disputed reimbursement amounts as an

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35 *Carder v. Carl M. Freeman Cmtys. LLC*, 2009 WL 106510, at *3 (Del. Ch. Jan. 5, 2009) (citing *IMO Indus., Inc. v. Sierra Int'l, Inc.*, 2001 WL 1192201, at *2 (Del. Ch. Oct. 1, 2001)).

36 *Carder*, 2009 WL 106510, at*3.

37 *Id.*

38 *See Brown v. T-Ink, LLC*, 2007 WL 4302594, at *10 (Del. Ch. Dec. 4, 2007).

39 PAB 28-29.

"expert" based solely on the limited record presented with SRG's claims notices and RFH's objections.[40]

SRG itself, however, undermined this argument in their earlier filings by classifying the dispute resolution process here as arbitration.[41] Moreover, SRG has conceded that it does not make a "material difference" whether the resolution process is found to be arbitration.[42]

Having considered the parties' respective arguments, I conclude that the dispute resolution procedure outlined in the agreements does constitute arbitration. Indeed, a recent decision in *Avnet, Inc. v. H.I.G. Source, Inc.*, treated a similar procedure as arbitration.[43] *Avnet* involved a merger agreement which outlined a procedure for determining disputes relating to post-closing adjustments of the overall consideration paid in the merger. Without mentioning the word "arbitration," the merger agreement created a detailed four-step process for resolving such disputes, culminating in the submission of unresolved issues to an accountant for resolution.[44] Similarly, in this case, the fact that the decision maker is referred to as an "expert," rather than an "arbitrator" is

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40 PAB 28.

41 *See* Pl.'s Mot. for Expedited Proceedings ¶ 66 ("In this case, Section 9.09(b) is plainly a narrow arbitration clause.").

42 PAB 2-3 n.3.

43 *Avnet, Inc. v. H.I.G. Source, Inc.*, 2010 WL 3787581 (Del. Ch. Sept. 29, 2010).

44 *Id.* at *2. *See also Nash v. Dayton Superior Corp.*, 728 A.2d 59, 60 (Del. Ch. 1998) (contractual procedure that called for unresolved issues to be submitted to an accounting firm for "review and resolution" analyzed as an arbitration).

not dispositive.[45] Rather, because the resolution procedure constitutes arbitration, the dispute centers on whether the matters at issue should be decided in the first instance by the Court or the Expert.

C. Procedural Versus Substantive Arbitrability

To succeed on its motion to dismiss for lack of subject matter jurisdiction, RFH must show that the issues raised in the underlying dispute with SRG are to be decided by an arbitrator, in this case the Expert. In deciding whether a claim should be decided by an arbitrator as opposed to a court, Delaware courts focus on whether the questions presented involve "procedural" versus "substantive" arbitrability.[46]

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[45] *See McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 830-31 (2d Cir. 1998) ("[W]hat is important is that the parties clearly intended to submit some disputes to their chosen instrument for the definitive settlement of certain grievances under the Agreement . . . .") (alteration and internal quotation marks omitted) (omission in the original).

[46] *See James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006). A potential threshold issue is whether the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, or the Delaware Uniform Arbitration Act ("DUAA"), 10 *Del. C.* §§ 5701-5703, governs this dispute. Generally, "the FAA governs arbitral agreements made between parties in interstate commerce," but this presumption may be overcome "where the parties unequivocally demonstrate intent to displace the federal standard with some other rule." *Lefkowitz v. HWF Hldgs., LLC*, 2009 WL 3806299, at *4 (Del. Ch. Nov. 13, 2009). There is no dispute that the SPA involves interstate commerce. Therefore, in the absence of any language in the SPA stating the arbitration should occur and be governed by the DUAA, or any dealings of the parties implying as much, it appears this matter would be governed by the FAA. Neither party argues strongly otherwise. Furthermore, in this case, the application of the either federal or Delaware law likely would produce the same outcome because "Delaware arbitration law mirrors federal law." *Willie Gary, LLC*, 906 A.2d at 79.

Although the distinction is often "fine,"[47] this Court has attempted to flesh out the differences between procedural and substantive issues. For example, in *Julian v. Julian*, I used as an example an agreement providing that in order to arbitrate, a party must provide notice to the other party of its intent to arbitrate within thirty days.[48] In that situation, the adequacy of notice would present a procedural question, because whether a condition precedent to arbitration has been met, is a procedural issue.[49] Thus, issues such as "time limits, notice, laches and estoppel" have been found to be procedural.[50] Likewise, allegations of waiver, delay, and similar defenses to arbitrability also have been held to be procedural.[51]

Substantive arbitrability is more complicated.[52] Such issues are "gateway questions" that deal with the applicability of arbitration clauses, and include both determining the scope of an arbitration provision, as well as the broader issues of whether the contract or the arbitration clause is valid or enforceable.[53] The basic question that

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47 *Milton Invs., LLC v. Lockwood Bros., II, LLC*, 2010 WL 2836404, at *5 (Del. Ch. July 20, 2010).

48 *Julian v. Julian*, 2009 WL 2937121, at * 4 (Del. Ch. Sept. 9, 2009).

49 *RBC Capital Mkts. Corp. v. Thomas Weisel P'rs, LLC*, 2010 WL 681669, at *7 (Del. Ch. Feb. 25, 2010) (citing *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79, 84 (2002)).

50 *Brown v. T-Ink, LLC*, 2007 WL 4302594, at *12 (Del. Ch. Dec. 4, 2007).

51 *Avnet*, 2010 WL 3787581, at *4.

52 *Carder*, 2009 WL 3806299, at *3.

53 *Willie Gary*, 906 A.2d at 79.

must be answered is "whether the parties decided in the contract to submit a particular dispute to arbitration."[54]

Procedural arbitrability issues are for the arbitrator to decide.[55] In contrast, a presumption exists that substantive issues will be decided by the court, absent evidence that the parties clearly and unmistakably intended otherwise."[56] Thus, if RFH succeeds in showing that all of the issues raised in Count I are procedural, those issues will be directed to the Expert for decision, and I will grant the motion to dismiss.

D. Are the Issues in This Case Procedural or Substantive?

1. The adequacy of RFH's objections

The first issue is whether or not RFH's objections to SRG's notices are adequate and, if not, whether the Expert can consider them at all. RFH asserts that the adequacy of their objections is indistinguishable from the issue of whether notice is sufficient or any other condition precedent to arbitration has been satisfied.[57] Similarly, they contend that SRG's challenges to RFH's objections also could be viewed as arguing that RFH waived the right to present its case.[58] To the extent SRG asserts that RFH's objections are

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54 *Id.*

55 *See Willie Gary*, 906 A.2d at 79; *see also* T-Ink, 2007 WL 4302594, at *10 ("questions of procedural arbitrability are presumptively for the arbitrator, and not the court, to decide.").

56 *Avnet*, 2010 WL 3787581, at * 4 (internal quotation marks omitted).

57 DOB 21.

58 *Id.*

inadequate, that is a procedural matter for the arbitrator to decide.[59] Whether SRG's position is characterized as claiming RFH waived its right to raise such objections or failed to satisfy a condition precedent, the result is the same: the issue is procedural.[60] SRG argues that the agreements do not suggest that the parties intended the Expert to decide whether RFH waived an issue.[61] As noted, the resolution provisions in this case are substantially narrow. The relevant agreements, however, identify the objection notices as an important step within the contemplated dispute resolution procedure. SRG avers that RFH's objections are inadequate and RFH disagrees; thus, that constitutes an "unresolved issue" that should be presented to the Expert. The same reasoning applies to a claim that RFH waived an issue by failing to comply with a term of the arbitration clause, which is procedural.[62]

2. What the expert can look at in making his determination

I find that whether the Expert must make his decision based solely on the claim and objection notice, without taking into account any extrinsic evidence, also is a procedural issue.

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59 *T-Ink, LLC*, 2007 WL 4302594, at *12 (whether a letter provided adequate notice determined to be a procedural issue).

60 *See Willie Gary*, 906 A.2d at 79 (waiver and satisfaction of conditions precedent are examples of procedural issues).

61 PAB 39-40.

62 *See Carder*, 2009 WL 106510, at *3 ("Questions of procedural arbitrability deal with whether the parties have complied with the terms of the arbitration clause.").

According to RFH, deciding what the neutral Expert can look at in making his decision is solely procedural, and hence should be decided by the Expert. Yet, SRG contends that the SPA substantively limits what the Expert can consider in making his determination to SRG's notice and RFH's subsequent objection.[63] SRG further argues this limitation is substantive, essentially equating it with defining an arbitration provision's scope.

SRG confuses the issue in this instance. It correctly asserts that "if claims are not subject to arbitration, then the arbitrator cannot consider evidence or arguments in support of those claims."[64] Disputes about the cost of environmental cleanups, however, are subject to arbitration. Both the SPA and the Escrow Agreement provide that unresolved issues relating to the costs of actual or potential cleanups go to the Expert. The Expert then must decide the costs of such cleanups. In the absence of a clear indication to the contrary, how the Expert chooses to go about deciding a dispute and the information he considers is something within his discretion. This is essentially a question that grows out of the existing dispute over Environmental Cost Claims and, thus, is for the arbitrator to decide.[65] SRG does not argue that the resolution by expert provision is

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63 PAB 40.

64 *Id.* at 41.

65 *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) ("procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for the arbitrator, to decide.").

invalid or unenforceable, which would be a substantive issue,[66] but rather asks this Court to tell the Expert what to do, which the Court generally does not do.[67]

The recent decision in *Aveta Inc. v. Bengoa*[68] is instructive in this regard. That case involved a similar dispute resolution process. Aveta was responsible for preparing a Preliminary Closing Date Balance Sheet "in good faith."[69] The opposing party then had twenty days to object, and, if it did, the parties were to try to work out the objections. If no agreement was reached, the parties would submit "all unresolved matters" to "Reviewing Accountants," later determined to be Ernst & Young ("E&Y"), for a final and binding resolution of "all matters in dispute."[70] In ruling upon a dispute as to what information E & Y could consider, Vice Chancellor Laster stated:

> what information E & Y can consider . . . falls squarely within E & Y's authority as arbitrator. E & Y has discretion as arbitrator to determine what information it will consider in resolving the Shareholder Representative's objections to the

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66 *See Julian*, 2009 WL 2937121, at *4 (stating substantive arbitrability includes the broader issue of whether a clause is valid and enforceable). In fact, SRG initiated the ERM process. Am. Compl. ¶ 111. Furthermore, SRG is asking this Court to order the ERM process to proceed, but only in the limited form they seek. *See* Am. Compl. ¶ 147(e).

67 *See PPF Safeguard, LLC v. BCR Safeguard Hldg., LLC*, 2010 WL 2977392, at *7 n.64 (Del. Ch. July 29, 2010) (maintenance of subsidiary aspects of claims not strictly within the arbitration clause would risk "entangling" the court in matters properly before the arbitrator).

68 2010 WL 761203 (Del. Ch. Mar. 1, 2010).

69 *Aveta*, 2010 WL 761203, at *1.

70 *Id.* at *1-2.

> Preliminary Closing Date Balance Sheet. I will not intrude on the arbitral process by ruling on this question.[71]

In this case, the relevant agreements provide the Expert shall make a final determination of what the appropriate costs are. Deciding what he needs to arrive at his ultimate determination will not enmesh the Expert in deciding the scope of the arbitration clause. Rather, the question of what information the Expert may consider is procedural. Thus, disputes over what the Expert can consider in resolving issues and ultimately arriving at a determination of "the amount of out of pocket costs of [any disputed] remediation or additional actions"[72] are for the Expert to decide, not this Court.

This conclusion also comports with the holding in *Mehiel v. Solo Cup Co.*[73] Under the merger agreement in *Mehiel*, a neutral auditor was designated to act as an arbitrator to resolve disputes over a working capital estimate. The arbitrator's defined role was to "determine, based solely on presentations by Parent and the Stockholders' Representative, and not by independent review, only those items still in dispute."[74] Noting that the underlying dispute giving rise to the action before him involved a determination of the cost of capital, Chancellor Chandler held that the parties expressed an unequivocal intent to arbitrate that type of dispute. Accordingly, the Court held that "the parties' contentions concerning discovery [did] not raise questions of 'substantive

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71 *Id.* at *3.

72 SPA § 9.09(b).

73 2005 WL 1252348 (Del. Ch. May 13, 2005).

74 *Id.* at *5 (internal quotation marks omitted).

arbitrability.' Thus, the scope of the arbitrator's authority to compel discovery is a procedural question and one that must be addressed by the arbitrator . . . ."[75]

Here, the underlying dispute involves a determination of the amount of money properly attributable to SRG's Environmental Cost Claims. The language of the agreements shows the parties unequivocally agreed to submit the resolution of unresolved issues relating to an Environmental Cost of SRG to which RFH objected to the Expert.

SRG's argument that the plain language of the agreements limits the authority of the Expert as to how to decide such issues is not persuasive. The SPA and Escrow Agreement contain no limiting language, such as is found in *Mehiel*, where the agreement stated the arbitrator would determine "based *solely* on presentations by [the parties], *and not by independent review*, only those items still in dispute."[76] Thus, whether the Expert should accept additional submissions by the parties in relation to the costs of the cleanup, and what he does with them, is for the Expert to decide.

3. Who decides whether the Expert can look at insurance coverage in determining out of pocket costs

Similarly, whether the Expert can consider the scope of insurance coverage is an issue for him to decide, not this Court. Once again, the role of the Court at this juncture is to decide, "who decides" whether the Expert in this instance may consider insurance. RFH describes this issue as one of procedural arbitrability to be decided by the Expert.

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75 *Id.* at *6.

76 *Id.* at *5 (emphasis added) (internal quotation marks omitted).

SRG counters with several arguments as to why insurance cannot be looked at by the Expert. In fact, much of SRG's briefing and argument centers on the distinction between two different procedures prescribed in the relevant agreements for resolving disputes relating to Portageville, on the one hand, and the other properties, on the other. For this reason, I begin by recapping those procedures.

For properties other than Portageville, Section 9.09(b) of the SPA specifies the applicable procedure. That section states that if SRG "believes in good faith that it has identified or incurred any Environmental Liabilities with respect to any real property . . . (other than the Portageville Property), which Environmental Liabilities are specifically excluded from coverage by the terms of the Environmental Policy," then SRG can deliver an Environmental Cost Notice to trigger the reimbursement process.[77] The culmination of this process is a determination of the amount of out of pocket costs of remediation, which the SPA calls "Agreed Environmental Costs."

Section 5(e) of the Escrow Agreement, titled "Reimbursement for Portageville Remediation Costs," describes the procedure related to Portageville. Under this procedure, when SRG has "incurred or reasonably expects to incur Portageville Remediation Costs or other Agreed Environmental Costs in an aggregate amount of at least Two Million Dollars," SRG can deliver a Portageville Claim Notice to begin the

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[77] SPA § 9.09(b). The SPA defines "Environmental Policy" in Section 4.01(d), which provides that prior to closing, SRI, the business SRG was purchasing, "shall have obtained a pollution legal liability policy with respect to the real property owned or leased by the Company," on terms "reasonably acceptable to Purchaser and Seller."

reimbursement process.[78] Portageville Remediation Costs are defined as "out-of-pocket costs incurred or reasonably expected to be incurred by [SRG] in undertaking and completing the Portageville Remediation." SRG emphasizes that this definition differs from the language in Section 9.09(b) and the definition of Agreed Environmental Costs in the SPA in that it does not require that the claimed costs be "specifically excluded from coverage by the terms of the Environmental Policy."

SRG contends that this distinction makes any reference to insurance in Section 9.09(b) irrelevant to the Portageville claims. Furthermore, SRG argues that the absence of any reference to insurance in Section 5(e) of the Escrow Agreement precludes the Expert from considering insurance in determining Portageville Remediation Costs. SRG also asserts that Section 8.13 of the SPA, which defines the Portageville Remediation, does not reference insurance and, therefore, further supports drawing a distinction between costs related to Portageville and Agreed Environmental Costs.[79]

In response, RFH contends that the Portageville remediation procedure outlined in Section 5(e) of the Escrow Agreement is closely interrelated with Section 9.09(b) of the

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78 Escrow Agreement § 5(e).

79 Section 8.13 states that after closing, "the Company shall remediate any release (and/or presence) of any Hazardous Materials at the Portageville Property" and replace or repair "sources or other conditions" on the property that caused or contributed to the release of Hazardous Materials. It further states that "[t]he remediation, repair and replacement described in this Section 9.09(b) is referred to herein, collectively as the 'Portageville Remediation' []." SPA § 8.13(b), but SRG attempts to avoid that reference to Section 9.09(b) by characterizing it as a scrivener's error. RFH contests that allegation and SRG offered no evidence beyond the relevant agreements to support it.

SPA. Section 5(e)(iv), for example, states that the Expert's written decision must specify "the amount of Portageville Remediation Costs . . . for which Purchaser is entitled to reimbursement under Section 9.09 of the Purchase Agreement." In addition, RFH argues that, even if the first reference to Section 9.09 in Section 8.13 regarding the definition of Portageville Remediation was a scrivener's error, as SRG alleges, a second reference in Section 8.13 states that SRG shall be reimbursed, from the escrow account, for its "out-of-pocket costs incurred or reasonably expected to be incurred in connection with the Portageville Remediation in accordance with Section 9.09."[80] Thus, even though the statement of the procedure for determining the costs of Portageville Remediation under Section 5(e) of the Escrow Agreement does not explicitly reference insurance, RFH contends that considerations of insurance are inextricably intertwined with the Expert decision-making process as outlined in Section 9.09(b), which does reference insurance.

As to whether insurance may be considered in determining Portageville Remediation Costs, I conclude that RFH has shown that under one reasonable interpretation of the SPA and the Escrow Agreement, it can be. At the summary judgment stage of this proceeding, I find that SRG's contrary interpretation also may be reasonable. Thus, the agreements may be ambiguous on this point. The ambiguity, however, goes to what the nature of the relief will be on SRG's Portageville Remediation Claim. If it were clear from the agreements on their face that the Expert could not consider insurance, SRG arguably would be faced with the harm of arbitrating something

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[80] SPA § 8.13(b).

it did not intend to in the sense that the insurance issue would be outside the scope of the arbitration provision. It is not clear, however, that the agreements preclude the Expert from considering insurance for a number of reasons. First, the Expert, even if the Portageville resolution process is separate and distinct from that for the other properties, still is to resolve the issues related to the remediation claims and objections of the parties. As a practical matter, SRG claiming it will incur "out-of-pocket" costs of a certain amount, and RFH objecting because they believe SRG is not "out-of-pocket" because insurance will reimburse certain of those costs, presents an unresolved issue. Second, in both procedures the Expert has the ultimate authority to determine the amount of "out-of-pocket" costs. This reference to "out-of-pocket costs" in both sets of procedures suggests the parties did not intend to preclude the Expert from looking at insurance in making his ultimate determination of costs. Therefore, one reasonable interpretation of the term "out-of-pocket" is that it contemplates the consideration of insurance.[81]

SRG insists that the parties are sophisticated and would have included language explicitly stating the Expert would determine insurance costs, if they intended it to be within the procedure. Instead, they chose a resolution from a body acting as an "expert

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[81] Section 5(e)(i) of the Escrow Agreement states that SRG can deliver a Portageville Claim Notice once it has incurred or reasonably expects to incur "Portageville Remediation Costs or other Agreed Environmental Costs." A reasonable reading of this language, even if it may not be the only reasonable reading, is that Portageville Remediation Costs are a type of Agreed Environmental Costs. Because Agreed Environmental Costs are defined so as to exclude insurance coverage, this further supports allowing the Expert to decide to what extent, if any, insurance may be considered in determining Portageville Remediation Costs.

and not as an arbitrator" to make a limited determination about costs.[82] As previously noted, however, the plain language in the SPA does not limit the Expert's authority in that regard. This language is unlike that in *OmniTech Corp. v. MPC Solutions Sales, LLC,*[83] which SRG cites as supporting its position. In *OmniTech,* the United States Court of Appeals for the Seventh Circuit stressed that the agreement at issue stated that the decision-maker would "act as an *expert and not as an arbitrator*" and held that meant the expert would "resolve the dispute as accountants do . . . ."[84] The SPA contains no comparable language, and if SRG and RFH intended the Expert to be so limited, they easily could have said so in the agreements.

SRG also seems to contend that under the relevant agreements their good faith belief alone as to whether there should be a set-off for insurance is dispositive, and RFH may not raise an objection based on insurance in their Environmental Cost Objections.[85] In other words, SRG interprets the procedure established by the agreements as allowing RFH to object only to the amount of costs or SRG's proposed course of remediation, but not to SRG's insurance determination.[86] Yet, casting the issue that way makes it

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82 PAB 35.

83 432 F.3d 797 (7th Cir. 2005).

84 *Id.* at 799 (emphasis added).

85 *See* PAB 34-35.

86 PAB 3.

analogous to whether RFH is complying with the terms of the arbitration clause, which, as noted above, is a procedural issue.

Regardless of how the issue is characterized, I view the issue of insurance as inextricably intertwined with the resolution of the issue of costs. I agree with RFH that the issue about insurance is "part and parcel of the outcome-related arbitration process itself" and has "nothing to do with whether there will be an arbitration and everything to do with the result."[87] It is a not a new dispute or a new claim. It is an issue within a claim that is properly before an arbitrator. SRG and RFH's disagreement about whether insurance should be considered by the Expert grows out of the dispute between the parties and bears directly on the final disposition of the Expert as to what the out of pocket costs are. Courts long have held that such issues are procedural and should be decided by the arbitrator.[88] As noted *supra* Part II.D.2, this Court will not tell the arbitrator what it can and cannot look at in regard to a claim that is properly before him.

Because I find that all of the issues raised in Count I of SRG's Amended Complaint are procedural and should be decided by the Expert, I grant RFH's motion to dismiss Count I for lack of subject matter jurisdiction.[89]

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87 DRB 12.

88 *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964).

89 Because I find the issues raised in Count I of the Amended Complaint involve questions of procedural, as opposed to substantive, arbitrability, I need not address RFH's alternative argument that, even if those issues were substantive in nature, the parties clearly and unmistakably agreed to arbitrate such questions.

E. Motion to Stay

RFH also seeks to stay the remainder of the claims in SRG's Amended Complaint until the arbitration has concluded. This Court possesses the inherent power to manage its own docket, including issuing a stay pending the resolution of an arbitration on the basis of comity, efficiency, or common sense.[90] When considering a stay of claims that are not subject to arbitration, courts look to the preclusive effects of a pending arbitration elsewhere on the action before the court and vice versa, as well as the burden that litigating two related actions in two different fora would impose.[91]

RFH asserts that Counts II and III will be rendered moot if the arbitrator awards SRG an amount that exceeds the maximum amount in escrow. Anticipating that the disposition of the indemnification claims in Counts II and III will come down to a "battle of experts," RFH predicts very expensive litigation that, depending on the arbitrator's award, ultimately may prove unnecessary.[92] SRG dismisses this argument as entirely speculative, and points out that these sophisticated parties entered into an agreement that clearly contemplates any environmental and indemnification that disputes might proceed on parallel tracks. I agree with SRG.

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90 *See Salzman v. Canaan Capital P'rs, L.P.*, 1996 WL 422341, at *5 (Del. Ch. July 23, 1996) (citing *Gen. Foods Corp. v. Cyro-Maid Inc.*, 198 A.2d 681 (Del. 1964); *Phillips Petroleum Co. v. ARCO Alaska, Inc.*, 1983 WL 20283, at *2 (Del. Ch. Aug. 3, 1983) (granting stay in favor of pending arbitration based on "common sense")).

91 *Salzman*, 1996 WL 422341, at *4-5.

92 Tr. 22-23.

As a legal matter, the claims involved in Counts II and III involve entirely different legal and factual issues.[93] The only relation these indemnification claims have to the issues presented in Count I is that, if successful on these claims, SRG will have to seek payment from the same finite escrow accounts from which the Environmental Cost Claims are to be paid. A determination by the Expert, therefore, conceivably could deplete the Escrow Account completely, rendering SRG's indemnification claims moot. This Court cannot predict, however, what the Expert will decide as to the claims covered by Count I or when he will make his decision. Thus, the possibility of the environmental arbitration mooting SRG's indemnification claims is highly speculative. It, therefore, provides little basis for staying Counts II and III of this action until the arbitration is resolved.

RFH also relies on this Court's recent holding in *Paolino v. Mace Security International, Inc*.[94] as supporting a stay. In *Paolino*, the Court held it was "inefficient and wasteful for the parties [and judge] to deal with indemnification while the underlying landscape continue[d] to evolve."[95] In the context of a claim by a director for indemnification from the corporation he served, the court noted it is "generally premature

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93 SRG's claims for indemnification include losses stemming from RFH's alleged failures to report worker's compensation liability incurred and to account for, or disclose missing assets, and other disputes entirely unrelated to the alleged environmental liabilities. The total amount SRG claims in such losses is $8.6 million. Am. Compl. ¶ 91(a)-(d).

94 985 A.2d 392 (Del. Ch. 2009).

95 *Paolino,* 985 A.2d at 397.

to consider indemnification prior to the final disposition of the underlying action."[96] The rationale for that practice, however, is not present here. In the corporate context, success on the merits of the underlying litigation often determines whether a defendant director qualifies for indemnification. As previously noted, the claims in Counts II and III of SRG's Amended Complaint are not affected by any "underlying action," let alone Count I; they are separate and distinct claims. Hence, the *Paolino* decision is inapposite.

In summary, the usual considerations supporting a stay of related litigation, such as the possibility that a ruling in one proceeding or case will preclude further litigation in another, are not present in this case. In addition, the possibility that a final resolution of the environmental claims covered by Count I may moot the claims in Counts II and III is mere speculation. Moreover, Counts II and III could be resolved before the claims in Count I, which would hasten SRG's recovery of at least part of its alleged losses. As a result, I deny RFH's motion to stay Counts II and III pending arbitration.

III. CONCLUSION

For the reasons stated, I grant Defendant's motion to dismiss Count I of SRG's Amended Complaint for lack of subject matter jurisdiction. I deny, however, Defendant's motion to stay proceedings as to Counts II and III until the arbitration of the environmental claims is resolved.

IT IS SO ORDERED.

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96 *Id.*