COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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VICE CHANCELLOR

New Castle County Court House
500 N. King Street, Suite 11400
Wilmington, Delaware 19801

Submitted: September 4, 2008
Decided: December 11, 2008

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RE: Aveta Inc., MMM Holdings, Inc. and Preferred Medicare Choice, Inc. v. Roberto L. Bengoa
C.A. No. 3598-VCL

Dear Counsel:

I have reviewed and considered the pleadings filed by the parties, as well as the briefs and oral argument in connection with the motion for judgment on the pleadings. For the reasons set forth below, the court will grant the plaintiffs' motion for judgment on the pleadings and issue an order compelling the parties to arbitrate. Because the defendant's counterclaims all fall within the arbitration clause, those counterclaims will be dismissed without prejudice so that they may be pursued in arbitration.

I.

The dispute between the parties arises out of the Agreement and Plan of Merger and Stock Purchase by and among MMM Holdings, Inc., PMC Holdings, Inc., Preferred Medicare Choice, Inc. ("PMC"), BER Health Partners Group, Inc., and various stockholders of Preferred Medicare and BER, dated as of May 2006. Pursuant to that agreement, MMM Holdings, a subsidiary of Aveta Inc., agreed to purchase PMC. That transaction closed on or about August 14, 2006. Due to the difficulty of calculating the exact purchase price before the closing date, the agreement requires certain post-closing adjustment payments to be made. In order to facilitate the adjustment calculation, and for the parties to come to an understanding concerning the adjustment, the agreement requires the buyer to deliver to the representative of the selling stockholders certain financial statements of the target company within a certain amount of time after closing.

The plaintiffs in this action (Aveta, MMM Holdings, and PMC) claim they have tendered this information, and more, to the defendant (Roberto L. Bengoa). The defendant has asked for more information and claims he still has not received all the information he requires. This back and forth process of the defendant demanding additional information and the plaintiffs proffering more while claiming they have fully complied with their obligations has been ongoing since October 2006, and little progress has been made during the intervening time.

The merger agreement provides for dispute resolution of the various accounting issues by a reviewing accountant. Although the parties executed an agreement dated March 27, 2007, designating Ernst & Young LLP as the reviewing accountant for the purpose of the merger agreement, the defendant has refused to proceed any further with the accounting review on the basis of his claim that he has not been provided with the necessary materials to participate productively therein. The plaintiffs, finally concluding that this back and forth process with the defendant had become unproductive, on March 6, 2008 delivered to the defendant a notice of intent to arbitrate. When the defendant refused to engage in arbitration, the plaintiffs filed this law suit. The defendant in his answer to the complaint has raised several counterclaims alleging breaches of the merger agreement, all of which are based on purported failures to deliver the required documents to perform the accounting reconciliation. The plaintiffs responded with a motion for judgment on the pleadings.

II.

> In determining a motion under Court of Chancery Rule 12(c) for judgment on the pleadings, a trial court is required to view the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party. A motion for judgment on the pleadings may be granted only when no material issue of fact exists and the movant is entitled to judgment as a matter of law.[1]

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[1] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund*, 624 A.2d 1199, 1205 (Del. 1993) (internal citations omitted).

Although the pleadings must be viewed in the light most favorable to the non-moving party, the court "need not blindly accept as true all allegations, nor must it draw all inferences from them in [the non-movant's] favor unless they are reasonable inferences."[2] Additionally, "judgment on the pleadings is a proper framework for enforcing unambiguous contracts because there is no need to resolve material disputes of fact."[3]

The plaintiffs seek an order compelling arbitration, pursuant to the Uniform Arbitration Act, as adopted by Delaware.[4] "A written agreement to submit to arbitration any controversy existing at or arising after the effective date of the agreement is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract . . . ."[5] The public policy of this state strongly favors the enforcement of validly contracted arbitrated agreements.[6] In *Worthy v. Payne*, then Vice Chancellor Steele quoted the United States Supreme Court favorably in its holding that "there is a presumption in favor

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[2] *Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988) (discussing the standard of review on a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).
[3] *Lillis v. AT&T Corp.*, 904 A.2d 325, 329-30 (Del. Ch. 2006).
[4] *See* 10 *Del. C.* § 5703(a).
[5] 10 *Del. C.* § 5701.
[6] *See Worldwide Ins. Group v. Klopp*, 603 A.2d 788, 790 (Del. 1992) (citing *Graham v. State Farm Mut. Auto Ins. Co.*, 565 A.2d 908, 911 (Del. 1989)); *see also Pettinaro Constr. Co. v. Harry C. Partridge, Jr. & Sons, Inc.*, 408 A.2d 957, 961 (Del. Ch. 1979).

of arbitration unless: 'it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'"[7]

In determining the arbitrability of a dispute, two varieties of questions can arise: questions of substantive arbitrability and questions of procedural arbitrability.[8] Questions of substantive arbitrability—"whether the dispute is one that, on its face, falls within the arbitration clause of the contract"[9]—are properly for the court to decide where the contract does not clearly and unmistakably reflect the parties' agreement to submit those questions to arbitration.[10] This is to prevent parties from being forced to arbitrate claims they never agreed to submit to arbitration.[11] In this case, nothing in the contract reflects such an agreement. On the other hand, questions of procedural arbitrability—whether the invocation of arbitration was proper, e.g., whether conditions precedent to invoking arbitration had been met—are left for the arbitrator.[12]

The merger agreement in this case contains three relevant arbitration provisions, each with identical language but focused on a different aspect of the

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[7] 1998 WL 82992, at *1 (Del. Ch.) (quoting *United Steelworkers of Am. v. Warrior Guy Navigation Co.*, 363 U.S. 574, 582-83 (1960)).
[8] *See SBC Interactive, Inc. v. Corporate Media Partners*, 714 A.2d 758, 761-62 (Del. 1998).
[9] *Id.* at 761.
[10] *See James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006); *SBC Interactive,* 714 A.2d at 761.
[11] *See, e.g.*, *Parfi Holding AB v. Mirror Image Internet, Inc.*, 842 A.2d 1245, 1259 (Del. Ch. 2004).
[12] *SBC Interactive,* 714 A.2d. at 762.

post-closing adjustment. Section 2.2, which specifies the amount of "Additional Consideration" to be paid post-closing (an earn-out provision) provides:

> (g) If Buyer and Shareholders' Representative are unable to reach agreement [with regard to the statements of 2006 and 2007 EBITDA required to calculate the earnout] within such 20-day period, then the resolution of all unresolved matters shall be resolved by Ernst & Young LLP, or if Ernst & Young LLP is unwilling or unable to perform such a role, then by another firm of independent certified public accountants of national reputation that is mutually acceptable to Buyer and the Shareholders' Representative (the "Reviewing Accountants"). The Reviewing Accountants shall be instructed to resolve any matters in dispute as promptly as practicable. The determination of the Reviewing Accountants will be final and binding.
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> (h) The Shareholders and Buyer shall each pay one-half of the fees and expenses of the Reviewing Accountants and shall cooperate with each other and the Reviewing Accountants in connection with the matters contemplated by this Section 2.2, including by furnishing such information and access to books, records (including, without limitation, subject to entering into customary agreements respecting such access, accountants work papers), personnel and properties as may be reasonably requested.

Section 2.3, covering "Closing IBNR," another aspect of the post-closing adjustment, contains the following nearly identical provisions:

> (d) If Buyer and the Shareholders' Representative are unable to resolve any dispute within such 20-day period, then the resolution of all unresolved matters shall be resolved by the Reviewing Accountants. The Reviewing Accountants shall be instructed to resolve any matters in dispute as promptly as practicable. The determination of the Reviewing Accountants will be final and binding.

(e) The Shareholders and the Principal Shareholders shall together pay one-half and the Buyer one half of the fees and expenses of the Reviewing Accountants and each shall cooperate with all of the others and the Reviewing Accountants in connection with the matters contemplated by this Section 2.3, including by furnishing such information and access to books, records (including, without limitation, subject to entering into customary agreements respecting such access, accountants work papers), personnel and properties as may be reasonably requested.

Section 2.4, covering the "Closing Day Balance Sheet," the final aspect of the post-closing adjustment, contains virtually identical language in sections 2.4(h) and 2.4(i).

The fundamental issues in dispute between the parties are, at least on their face, exactly those issues which the above clauses are meant to address. It is clear to the court from the pleadings, as well as the exhibits attached to the complaint containing the lengthy correspondence between the parties,[13] that the issues in dispute all focus on the correct value of the earn-out, the IBNR reconciliation, and the closing day balance sheet. Although there are, as the defendant argues, subsidiary disputes as to the adequacy of the documents provided by the plaintiffs in support of this reconciliation exercise, these documents are sought by the defendant not for their own sake but for the purpose of resolving the various disputes of the component values of the post-closing adjustment. As such, any

[13] *See* Compl. Exs. 3 and 4.

dispute about the adequacy of the documentation is likewise facially within the ambit of the above arbitration clauses. Because the defendant's counterclaims all relate to alleged failures to adequately supply this documentation, those counterclaims are also within the ambit of the arbitration terms.[14] Therefore, the court finds that the requirement of substantive arbitrability of the disputed issues is met, and that the counterclaims are also the proper subject of arbitration as part of the proceedings to follow.

In support of his position, the defendant argues first that, because the plaintiffs have allegedly not delivered to him the required documents (or that those documents were deficient) to engage in the reconciliation of the earn-out, the IBNR, and the closing day balance sheet, they have not satisfied the conditions precedent to arbitration.[15] Although the defendant tries to clothe this as a substantive issue, it relates not to the subject matter of the dispute but rather the entitlement of the plaintiffs to seek relief. Therefore, the issue clearly falls within the bounds of procedural arbitrability and is a matter for the arbitrator to determine.[16] The defendant also argues that because the arbitration clauses in the

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[14] The court also notes that, apart from a plea for attorneys' fees by the defendant, the only remedy the defendant seeks to these breaches is an order of specific performance of the terms of Sections 2.2, 2.3, and 2.4, exactly those sections which contain the arbitration clauses.
[15] Def.'s Br. 12-13.
[16] *See SBC Interactive,* 714 A.2d. at 762; *see also Falcon Steel Co. v. Weber Eng'g Co.*, 517 A.2d 281 (Del. Ch. 1986).

merger agreement are "narrow," the policy favoring alternative dispute resolution does not apply. No authority is cited for this proposition. It is, in any event, clear to the court that the disputed issues are within the ambit of the arbitration provisions, even narrowly construed.

The defendant also raises a variety of facts which he alleges are in dispute.[17] Because, the defendant argues, there are disputed facts between the parties, judgment on the pleadings is inappropriate. The court notes, however, that all of the allegedly disputed facts relate to the content and adequacy of the documents produced to the defendant by the plaintiffs and the plaintiffs' good faith in producing those documents. These are all fundamentally issues of procedural arbitrability in this case. As such, while the facts may be very much in dispute, they are not material to the court's inquiry, which focuses solely on the question of substantive arbitrability. Because the court finds that there is no disputed issue of material fact as to the substantive arbitrability of the claims, judgment on the pleadings is warranted.

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[17] Def.'s Br. 9-10.

For the foregoing reasons, the court will enter an order that the plaintiffs' motion for judgment on the pleadings is granted and the defendant's claims are dismissed without prejudice to be considered by the arbitrator.

/s/ Stephen P. Lamb
Vice Chancellor