

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Transaction ID 29810902
Case No. 3598-VCL



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VICE CHANCELLOR

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March 1, 2010

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RE: Aveta, Inc., *et al.* v. Bengoa, C.A. No. 3598-VCL

Dear Counsel:

By letters dated February 5 and 12, 2010, the parties asked me to resolve a dispute over the scope of the arbitration being conducted by Ernst & Young LLP ("E&Y"). For factual background on E&Y's role and a discussion of the provisions governing the arbitration, see *Aveta Inc. v. Bengoa*, 986 A.2d 1166 (Del. Ch. 2009), *appeal docketed*, No. 37, 2010 (Del. Jan. 22, 2010) (the "Contempt Ruling"). For this Court's decision compelling the parties to arbitrate, see *Aveta Inc. v. Bengoa*, 2008 WL 5255818 (Del. Ch. Dec. 11, 2008), and *Aveta Inc. v. Bengoa*, C.A. No. 3598-VCL (Del. Ch. Dec. 11, 2008) (ORDER). Defined terms are used as defined in the Contempt Ruling.

The parties disagree about two aspects of the procedures for determining the Final Closing Date Balance Sheet. First, they disagree over whether E&Y is limited to addressing the objections to the Preliminary Closing Date Balance Sheet raised by the Shareholders' Representative, or whether E&Y has been charged with developing an accurate Closing Date Balance Sheet regardless of what issues were raised by objection. Second, they disagree over what information E&Y can consider in making its determinations.

As a threshold matter, the Shareholders' Representative argues that I have no power to rule on either issue because once a matter is consigned to arbitration, the merits of the claim are to be determined by the arbitrator, not the Court. *See, e.g., SBC Interactive, Inc. v. Corporate Media Partners*, 714 A.2d 758, 761 (Del. 1998). Not content with the authority of *SBC Interactive*, the Shareholders' Representative cites nine

other decisions standing for this straightforward and obvious proposition. But what Aveta seeks is not a ruling on the merits of a matter consigned to arbitration, but rather a determination as to the scope of the arbitration. As I explained in the Contempt Ruling, the validity and scope of an arbitration provision are for this Court to decide, absent a clear delegation to the arbitrator of the power to determine the scope of the arbitral proceeding. 986 A.2d at 1185 (citing 10 *Del. C.* § 5703 and *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 78-79 (Del. 2006)). The arbitration provisions in the Purchase Agreement are narrow, not broad, and this Court must determine their scope. *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 155 (Del. 2002).

The plain language of Section 2.4 of the Purchase Agreement establishes the scope of the arbitration. Section 2.4(d) assigns to Aveta the job of preparing the Preliminary Closing Date Balance Sheet “in good faith.” Section 2.4(e) provides for a 20-day period in which the Shareholders’ Representative can raise objections to Aveta’s Preliminary Closing Date Balance Sheet. Sections 2.4(f) and (g) create a mechanism for Aveta and the Shareholders’ Representative to attempt to reach agreements on any objections raised by the Shareholders’ Representative. Section 2.4(h) then provides as follows:

If Buyer and the Shareholders’ Representative are unable to resolve any dispute regarding the Preliminary Closing Date Balance Sheet within such 20-day period, then 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.

As demonstrated by the plain language of this provision, the “disputes” to be resolved by E&Y as Reviewing Accountant are those that were raised by the Shareholders’ Representative and still “unresolved” after the parties’ efforts to reach agreement. The scope of the arbitration is therefore limited to objections raised by the Shareholders’ Representative. Aveta cannot use that proceeding to re-open other aspects of the Preliminary Closing Date Balance Sheet.

Aveta urges that this result is inequitable because as a result of delay caused by the Shareholders’ Representative, discussed at length in the Contempt Ruling, Aveta has identified problems with its Preliminary Closing Date Balance Sheet. That may be so. If the arbitration had proceeded as contemplated and in timely fashion, Aveta could well have discovered issues subsequently that it would have liked to raise when it originally prepared the Preliminary Closing Date Balance Sheet. The procedure that the parties bargained for, however, does not give Aveta the right to re-open the Preliminary Closing Date Balance Sheet at a later date. I already granted a remedy for the delay caused by the Shareholders’ Representative by issuing the Contempt Ruling. I do not believe his

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contumacious conduct merits re-writing the Purchase Agreement to alter the arbitration mechanism negotiated by the parties.

Aveta also argues that in an agreement appointing E&Y as arbitrator (the “Appointment Agreement”), the Shareholders’ Representative agreed to a different procedure in which E&Y would construct the Final Closing Date Balance Sheet without being limited by the specific objections raised by the Shareholders’ Representative. The parties have not briefed whether the Shareholders’ Representative had authority to modify the provisions in the Purchase Agreement governing the calculation of the merger consideration, and I harbor serious doubts that the section of the Purchase Agreement appointing Bengoa as Shareholders’ Representative could confer that significant power upon him. I need not address that issue, however, because in paragraph 9 of the Appointment Agreement, the parties agreed that “the [] Purchase Agreement, shall continue to be legal, valid, binding and enforceable in accordance with its terms, and this Appointment Agreement shall not be interpreted as a waiver of any of the rights of each party under its provisions.” By its plain terms, therefore, the Appointment Agreement sought only to implement the arbitration provisions of the Purchase Agreement, not to modify their scope.

The second issue in dispute—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 Preliminary Closing Date Balance Sheet. I will not intrude on the arbitral process by ruling on this question.

Sincerely yours,

/s/ J. Travis Laster

J. Travis Laster
Vice Chancellor

JTL/krw