STATE OF NORTH CAROLINA ROWAN COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 17 CVS 798
DAVID B. POST, Individually and as Sellers' Representative, Plaintiff, v. AVITA DRUGS, LLC, a Louisiana limited liability company, Defendant.	**ORDER ON MOTION TO COMPEL ARBITRATION AND TO STAY**

1. This case arises out of a dispute related to the sale of Plaintiff David Post's business, MedExpress Pharmacy, Ltd. to Defendant Avita Drugs, LLC in 2014. The parties' Stock Purchase Agreement ("SPA") provided a formula for determining Avita's payment obligation to Post based on the calculation of "Adjusted EBITDA." The SPA also provided a procedure for resolving disputes related to the calculation of Adjusted EBITDA via submission to an independent accountant.

2. The question here is whether that independent accountant process is an "arbitration." Avita contends that it is and has moved to compel arbitration as to the calculation of Adjusted EBITDA and to stay aspects of this litigation pending the arbitral proceedings. Post contends that the independent accountant process is not an arbitration and, accordingly, that the motion should be denied.

BACKGROUND

3. Post is a resident of Rowan County, North Carolina. (Compl. ¶ 1, ECF No. 1.) He formed MedExpress as a North Carolina corporation in 2001. (Compl. ¶ 1.) Avita is a Louisiana limited liability company with its principal place of business in

Dallas, Texas. (Compl. ¶ 2.)

4. Avita and Post, as well as MedExpress's two other shareholders, entered into the SPA on June 30, 2014. (Compl. ¶¶ 16, 18; *see also* Notice of Filing, ECF No. 34 ["SPA"].) Post subsequently acquired the rights under the SPA of the other shareholders. (Compl. ¶ 20.)

5. Under the SPA, Avita acquired all outstanding shares of common stock in MedExpress in exchange for a purchase price that included, among other things, "the deferred payment of an EBITDA-based amount (the 'Earnout Amount') to be paid no later than forty-five days after" the one-year anniversary of the sale. (Compl. ¶ 19; SPA § 2.06(d)(i).) Adjusted EBITDA is the only variable in the Earnout Amount equation requiring calculation. (*See* SPA § 2.06(a)(vii).) Otherwise, the Earnout Amount, which is capped at $5,500,000, is equal to "six times (6x) the difference between: (a) Adjusted EBITDA; and (b) $925,000." (Compl. ¶ 21; SPA § 2.06(a)(vii).)

6. "The SPA provides a detailed definition of Adjusted EBITDA and a procedure for its determination," including in the event the parties reached an impasse over Adjusted EBITDA. (Compl. ¶ 21; SPA § 2.06(a)(1).) Specifically, the SPA provides that "determination of Adjusted EBITDA shall be submitted promptly to the Independent Accountant for determination in accordance with this Agreement." (SPA § 2.06(d)(ii).) Post and Avita "shall execute any engagement agreement . . . reasonably required by the Independent Accountant to accept engagement pursuant to this Agreement." (SPA § 2.06(d)(ii)(A).) "[T]he determination of the Independent Accountant shall be binding and conclusive for

the purposes of this Agreement absent manifest error by the Independent Accountant." (SPA § 2.06(d)(ii).)

7. On August 14, 2015, Avita submitted its calculation of the Earnout Amount and Adjusted EBITDA to Post. (*See* Compl. ¶ 32; SPA § 2.06(d)(i) to (ii).) Post "timely objected to Avita's determination" in accordance with the SPA. (Compl. ¶ 33; *see also* SPA § 2.06(d)(i) to (ii).) According to Post, Avita depressed the Adjusted EBITDA by using accounting practices that were inconsistent with the SPA's standard and by engaging in management and operational conduct inconsistent with the SPA. (*See*, *e.g.*, Compl. ¶¶ 34–43.) Although the parties attempted to engage Dixon Hughes Goodman LLP to calculate the Adjusted EBITDA in accordance with the terms of the SPA, they were unable to agree to the terms of engagement. (*See* Br. in Supp. of Mot. to Compel Arbitration and to Stay 1–2 ["Avita Br."], ECF No. 13.)

8. On April 3, 2017, Post filed this action. The complaint alleges numerous breaches of the SPA, alleges violations of N.C. Gen. Stat. § 75-1.1, and seeks a declaratory judgment as to the Earnout Amount under the SPA.

9. On June 29, 2017, Avita moved to "compel Post to submit to the Independent Accountant Process" and to "stay all proceedings in this action that directly address whether Avita correctly computed the Adjusted EBITDA" including Post's request for "a declaratory judgment regarding the calculation of the 'Earnout Amount.'" (Mot. ¶¶ 7–8, ECF No. 12.)

10. Prior to the conclusion of briefing, on August 1, 2017, the parties reached an agreement and engaged Dixon Hughes Goodman to serve as the Independent

Accountant under section 2.06(d)(ii) of the SPA. (*See* Def.'s Reply Br. in Supp. of Its Mot. to Compel Arbitration and to Stay ["Avita Reply"], ECF No. 27, Ex. H.) Accordingly, Avita's request to "compel Post to submit to the Independent Accounting Process" is moot. (Mot. ¶ 7.) The parties continue to dispute the appropriateness of a stay pending that process. The Court held a hearing on August 16, 2017, and the issue is ripe for determination.

ANALYSIS

11. In evaluating Avita's request for a stay, the Court must first determine whether the Independent Accountant Process, which has now begun, is an arbitration. If it is, the Court must determine whether a stay is appropriate and, if so, the scope of the stay.

12. This issue is governed by the substantive law of the Federal Arbitration Act ("FAA"). *See Gaylor, Inc. v. Vizor, LLC*, 2015 NCBC LEXIS 102, at *10–12 (N.C. Super. Ct. Oct. 30, 2015) ("The FAA applies to any 'contract evidencing a transaction involving commerce;'" the word 'involving" "signals an intent to exercise Congress' commerce power to the full." (citations omitted)). Nevertheless, "state law fills procedural gaps in the FAA as it is applied in state courts." *Cold Springs Ventures, LLC v. Gilead Sciences, Inc.*, 2014 NCBC LEXIS 10, at *8 (N.C. Super. Ct. Mar. 26, 2014) (citing *Carter v. TD Ameritrade Holding Corp.*, 218 N.C. App. 222, 226, 721 S.E.2d 256, 260 (2012)).

13. "[W]hether what has been agreed to amounts to 'arbitration' under the Federal Arbitration Act depends on what Congress meant by the term in the federal statute." *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6 (1st Cir.

2004); *see also Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 697 (4th Cir. 2012). Although the FAA does not define the term "arbitration," courts routinely consider "how closely the specified procedure resembles classic arbitration." *Fit Tech.*, 374 F.3d at 7. The question is whether the agreement exhibits the "common incidents of arbitration": a final determination by "an independent adjudicator," "substantive standards," "and an opportunity for each side to present its case." *Id.* at 7; *see also Wilbert, Inc. v. Homan*, 2013 U.S. Dist. LEXIS 170237, at *7 (W.D.N.C. Dec. 3, 2013) (unpublished) (stating that focus is "whether the parties agreed to be bound by the decision of the third party as to the particular issue in dispute").

14. The SPA's Independent Accountant Process meets this standard. First, and most importantly, the parties agreed to submit the dispute to an independent expert for a "binding and conclusive" determination "absent manifest error." (SPA § 2.06(d)(ii).) This is strong evidence of an agreement to arbitrate. *See Fit Tech.*, 374 F.3d at 7 (noting finality of accountant determination); *see also Alstom v. GE*, 228 F. Supp. 3d 244, 253–54 (S.D.N.Y. 2017) (finding agreement to arbitrate where decision of independent accounting firm was binding absent "manifest error").

15. In addition, the SPA requires the Independent Accountant to apply substantive standards—the standards set forth in the SPA for calculating Adjusted EBITDA. *See* SPA § 2.06(d)(ii) (Adjusted EBITDA calculated "in accordance with this Agreement"). And it further establishes procedural guidance, including, among other things, the process for selecting an independent adjudicator and providing each side "the opportunity to present" any written materials "such party deems

relevant." (SPA § 2.06(a)(ix), (d)(ii)(B).)

16. Federal courts routinely determine that similar agreements constitute arbitration agreements. *See Fit Tech.*, 374 F.3d at 7; *Pureworks, Inc. v. Unique Software Solutions, Inc.*, 554 Fed. App'x 376, 378–79 (6th Cir. 2014); *Wilbert*, 2013 U.S. Dist. LEXIS 170237, at *7–10; *Harker's Distrib., Inc. v. Reinhart Foodservice, L.L.C.*, 597 F. Supp. 2d 926, 936–37 (N.D. Iowa 2009); *Hodges v. Medassets Net Revenue Sys., LLC*, 2008 U.S. Dist. LEXIS 12254 (N.D. Ga. Feb. 19, 2008) (unpublished); *see also Alstom*, 228 F. Supp. 3d at 248 ("[C]ourts have consistently found that purchase price adjustment dispute resolution provisions . . . constitute enforceable arbitration agreements."); *Martin Ankeny Corp. v. CTB Midwest Inc.*, 2016 U.S. Dist. LEXIS 179355, at *29 (S.D. Iowa Mar. 18, 2016) (unpublished) ("[C]ourts routinely remit disputes like this one to arbitration before accountants.").

17. Accordingly, the Court concludes that the SPA's Independent Accountant Process is an arbitration as contemplated by the FAA. The remaining question is whether to stay any aspect of this litigation.

18. Where a claim is subject to arbitration, "the court on just terms shall stay any judicial proceeding," and if the claim "is severable, the court may limit the stay to that claim." N.C. Gen. Stat. § 1-569.7(g). The Court has broad discretion to determine the appropriateness and nature of a stay. *See Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 485, 583 S.E.2d 325, 334 (2003) ("The decision to grant or deny a stay rests within the discretion of the trial court").

19. The scope of Dixon Hughes Goodman's review is narrow and does not extend to all claims in this litigation. As Avita concedes, the only issue properly

before Dixon Hughes Goodman is whether Avita applied proper accounting principles when calculating its Adjusted EBITDA. (*See* Avita Reply, Ex. H at 1 ("The Parties are engaging Dixon Hughes Goodman . . . to make a determination of whether Adjusted EBITDA . . . was correctly computed and, if not, to determine the correct amount.").) Other issues raised by Post in this lawsuit—issues related to the breaches of the SPA regarding the operation of the business and the effect of those breaches on Adjusted EBITDA—are not subject to the Independent Accountant Process.

20. As a result, Avita seeks a stay of "any accounting matters affecting Adjusted EBITDA," but it agrees that "'separate, substantive breaches of the SPA that are not subject to the Independent Accountant Process may proceed without intrusion' before this Court." (Avita Reply 8, 11.) Post contends that this is unworkable. In Post's view, discovery in this litigation may proceed on parallel tracks with the arbitration, but the Court should not make any final determination as to damages or issue a declaratory judgment prior to the conclusion of the Independent Accountant Process. (*See* Pl.'s Br. in Opp'n to Def.'s Mot. to Compel Abitration and to Stay 7–8 ["Post Opp'n Br."], ECF No. 20.)

21. In view of all the circumstances, and in its discretion, the Court agrees with Post. It is appropriate to enter a stay for the limited purpose of withholding a final resolution of Post's declaratory-judgment action and of any judicial resolution of damages. These issues are inextricably bound-up with Dixon Hughes Goodman's determination.

22. But a stay should not extend to discovery. Even Avita acknowledges that discovery can and should go forward as to the parties' legal claims. (*See* Avita Br. 10–11; Post Opp'n Br. 10–11.) It would be unworkable to permit discovery related to claims retained by the Court while staying discovery as to issues before the Independent Accountant. There is no clear line between the two. Indeed, at the hearing, Avita's counsel acknowledged that staying discovery related to the issues before Dixon Hughes Goodman would likely require extensive management by the parties and oversight by the Court. In the absence of any clear prejudice to Avita in moving forward with discovery, the Court declines to impose an unworkable stay that seems, from the outset, destined to fail. *See*, *e.g.*, *Forsythe v. Black Hills Corp.*, 2005 U.S. Dist. LEXIS 4183, at *5–6 (N.D. Ill. Mar. 21, 2005) (unpublished) (denying stay); *Hodges*, 2008 U.S. Dist. LEXIS 12254, at *26 (same).

23. Accordingly, in the exercise of its discretion, the Court **GRANTS** Avita's motion in one limited respect: the Court will stay any final determination of damages and any resolution of Post's declaratory-judgment claim, pending completion of the arbitration by Dixon Hughes Goodman. The Court **DENIES** the request for a stay of discovery. The Case Management Order, also issued today, reflects these rulings. Except as stated, Avita's motion is **DENIED**.

Effective this the 1st day of September, 2017.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases