IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

HDS INVESTMENT HOLDING, INC. (f/k/a PRO ACQUISITION CORP.), a Delaware corporation,	)	
Plaintiff,	)	
v.	)	Civil Action No. 3968-CC
THE HOME DEPOT, INC., a Delaware corporation,	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: September 10, 2008
Date Decided: October 17, 2008

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CHANDLER, Chancellor

This case requires the Court to interpret the scope of an arbitration provision designed by the parties to send to a neutral auditor certain disputes regarding a post-closing purchase price adjustment. While this approach may work as intended in some instances, complications can arise because the potential disputes under a contract cannot be easily divided and assigned to separate decision-makers. As this case illustrates, the issues that arise under a contract are often interconnected in ways that make it difficult to divide them between a court and an arbitrator.

The present dispute arises out of the purchase of HD Supply, Inc ("HD Supply") by HDS Investment Holding, Inc ("HDS" or "plaintiff") from The Home Depot, Inc. ("Home Depot" or "defendant"). Home Depot and HDS designed a process by which the purchase price paid by HDS would be adjusted based on the working capital of HD Supply on the day before the closing. The parties agreed that certain disputes surrounding the purchase price adjustment feature would be resolved by arbitration before a neutral auditor. The parties now call on this Court to interpret the scope of the arbitration provision and determine which disputes should properly be submitted to arbitration.

HDS filed a complaint asking this Court to declare that certain of the parties' disputes are outside the scope of the arbitration provision and should be decided by the Court. HDS also filed a motion requesting that the Court enter a preliminary

injunction postponing proceedings before the arbitrator pending the resolution of proceedings before the Court. Home Depot filed a motion seeking dismissal of HDS's claims or, in the alternative, a stay of the proceedings in this Court pending the outcome of the arbitration proceedings.

The parties ask the Court to determine whether the following three disputes should be submitted to arbitration or resolved by the Court: (1) whether and how Home Depot must reimburse HDS for certain payments made to employees; (2) whether Home Depot has rights to cash left in HD Supply's bank accounts after the closing; and (3) whether the neutral auditor should be allowed to consider HDS's revised statement of its purchase price adjustment calculation.

For the reasons set forth below, I grant plaintiff's motion for a preliminary injunction and deny defendant's motion to stay the proceedings before this Court. Defendant's motion to dismiss is granted with respect to Count I because the parties now agree that the role of the American Arbitration Association ("AAA") is to appoint a neutral auditor and not to administer the arbitration. Defendant's motion to dismiss is denied with respect to Count II because the issue of whether the neutral auditor can consider the revised closing statement will be resolved when the Court reaches the merits of the contractual disputes. Count III survives because I have determined that the Court will resolve the issue regarding Home Depot's responsibility to reimburse HDS for certain payments made to employees.

Count V regarding the parties' conflicting claims to cash that remained in HD Supply's bank accounts is a contractual issue for the Court. Count VII involving plaintiff's claim for damages for breach of § 6.1 will also be resolved by the Court. Counts IV and VI (raising issues regarding the scope of the auditor's authority to calculate the Applicable Amount) will be addressed in the context of briefing on the contractual disputes to be resolved by the Court. Further explanation for these decisions follows a presentation of the pertinent facts.

I. BACKGROUND

Plaintiff HDS and defendant Home Depot are Delaware corporations headquartered in Atlanta, Georgia. On June 19, 2007, HDS and Home Depot entered into a Purchase and Sale Agreement (the "Agreement") whereby HDS would purchase HD Supply from Home Depot for an estimated purchase price of $8.5 billion. The deal was consummated on August 30, 2007 (the "Closing Date").

A. The Agreement

The Agreement provided for adjustment of the purchase price based on the working capital of HD Supply on August 29, 2007, the day before completion of the transaction. The purchase price was to be calculated before and after the

merger based on a calculation of the excess of current assets over current liabilities as defined in the agreement (the "Applicable Amount").[1]

The Agreement specified a process by which the parties would calculate the Applicable Amount and, ideally, reach an agreement regarding the purchase price adjustment. First, Home Depot was to prepare a schedule that represented a calculation of the Applicable Amount on April 29, 2007 (the "Applicable Amount Schedule") that would serve as a baseline for later adjustments to the purchase price. The price to be paid by HDS at the closing was based on a report, completed five business days prior to the closing, that constituted Home Depot's good faith estimate of what the Applicable Amount would be on the day prior to the closing (the "Preliminary Statement"). The purchase price to be paid at closing was to be based on the difference between the calculation of the Applicable Amount in the Applicable Amount Schedule and the calculation of the Applicable Amount in the Preliminary Statement.

[1] Under § 1.1 of the Agreement, current assets are defined as "the sum of accounts receivable, inventories and other current assets, in each case determined in accordance with GAAP using accounting policies and procedures consistent with those applied in the preparation of the Applicable Amount Schedule, excluding cash and cash equivalents . . . ." Current liabilities are defined as "the sum of accounts payable (excluding reclassified outstanding checks), accrued compensation and benefits, other accrued expenses and current installments of capital lease obligations in each case determined in accordance with GAAP applying accounting policies and procedures consistent with those applied in the preparation of the Applicable Amount Schedule . . . ." Because a motion to dismiss based on an arbitration clause goes to the Court's subject matter jurisdiction, the Court may consider documents outside the complaint in deciding the motion. *NAMA Holdings, LLC v. Related World Market Center, LLC*, 922 A.2d 417, 429 n.15 (Del. Ch. 2007).

After the closing, HDS was to submit a statement to Home Depot containing a calculation of the Applicable Amount as of the day prior to the Closing Date (the "Closing Statement"). The Agreement specified that the Closing Statement should be delivered "no later than" ninety days after the Closing Date.[2] If Home Depot disagreed with the calculations in the Closing Statement, then Home Depot could send a notice specifying any disagreement (the "Notice of Disagreement") to HDS within ninety days of the delivery of the Closing Statement and related schedules and work papers.

After the delivery of the Notice of Disagreement, the Agreement called for a thirty-day period (the "Resolution Period") during which the parties would use their reasonable best efforts to reach an agreement on the disputed amounts. If, at the end of this thirty-day period, the parties could not reach agreement, the amounts remaining in dispute would be submitted to a neutral auditor. The Agreement provided that Ernst & Young would serve as the neutral auditor. If Ernst & Young was unable or unwilling to serve as the neutral auditor and the parties could not agree on a neutral auditor within fifteen days of the end of the Resolution Period, the Agreement allowed either party to request that the AAA appoint a neutral auditor. The neutral auditor would then be required to reach a final determination within forty-five days of its selection.

[2] Agreement at § 2.5(a).

Once the final Applicable Amount was determined (the "Final Applicable Amount"), either by the parties' agreement or by the neutral auditor, the purchase price would be adjusted by comparing the Final Applicable Amount to the estimate of the Applicable Amount in the Preliminary Statement. The purchase price would be (1) increased dollar for dollar by the amount by which the Final Applicable Amount exceeded the Applicable Amount in the Preliminary Statement and (2) decreased dollar for dollar by the amount by which the Final Applicable Amount was less than the Applicable Amount in the Preliminary Statement.

Other provisions in the Agreement specified the parties' rights and obligations in connection with the sale. Section 5.4(b) gave Home Depot the right to remove cash and cash equivalents from HD Supply's bank accounts prior to the closing. Section 6.1 of the Agreement required Home Depot to reimburse HDS for certain bonuses and retention payments made to employees by HD Supply (the "Bonus and Retention Payments").

B. The Closing and Post-Closing Events[3]

Five days before the closing, Home Depot delivered the Preliminary Statement to HDS. The transaction closed on August 30, 2007. HDS sent a Closing Statement to Home Depot on November 27, 2007. On December 21,

[3] Since this Court is deciding the scope of the arbitration provision and whether to stay the current proceeding or enjoin the arbitration, the details of the post-closing activity are not particularly relevant. Accordingly, only a brief summary of the post-closing events is provided.

2007, Home Depot sent HDS a request for additional documents supporting the Closing Statement. On March 5, 2008, Home Depot's Vice President, Richard McPhail, sent a letter to Vidya Chauhan of HD Supply stating that Home Depot would not reimburse HDS for the Bonus and Retention Payments because Home Depot was concerned that the liability associated with the payments was included in the Closing Statement submitted by HDS. The letter invited HDS to submit a revised Closing Statement that did not include the Bonus and Retention Payment liability.

On March 28, 2008, HDS submitted to Home Depot a revised Closing Statement (the "Revised Closing Statement") along with eighteen binders of information. In an April 2, 2008 letter, Home Depot advised HDS that Home Depot would not consider the Revised Closing Statement because it was submitted more than 90 days after the closing. Home Depot submitted a Notice of Disagreement on June 26, 2008, detailing Home Depot's disagreement with the Closing Statement. Thus the thirty-day Resolution Period ran from June 26, 2008 to July 26, 2008. Home Depot and HDS were unable to agree on the items disputed in the Notice of Disagreement during this period. On August 11, 2008, Home Depot asked the AAA to appoint a neutral auditor.[4]

[4] Although the parties disagree on what Home Depot originally requested of the AAA, the parties now agree that the role of the AAA is to appoint a neutral auditor and not to administer the

HDS filed a complaint in this Court on August 13, 2008. In the complaint, HDS asks the Court to declare that certain issues that Home Depot seeks to submit to the neutral auditor are contractual issues not included in the arbitration provision in § 2.5(d) of the Agreement. On August 18, 2008, Home Depot filed a motion asking the court to dismiss the complaint or stay the action pending completion of the proceedings before the neutral auditor. On August 27, 2008, HDS filed a motion requesting that the Court issue a preliminary injunction preventing the parties from proceeding with arbitration pending resolution of proceedings in this Court.

II. ANALYSIS

In my view, both motions can be resolved by deciding which disputes, if any, should be decided by the Court instead of the neutral auditor. I begin this analysis by reviewing the standard under which the Court must review the arbitration provision. I will then address whether HDS has made the required showing for a preliminary injunction.

A. Home Depot's Motion to Dismiss or Stay Pending Arbitration

1. The Standard for Interpreting the Arbitration Provision

Home Depot moved to dismiss this action because the entire dispute is subject to arbitration or, in the alternative, stay the action pending resolution of

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arbitration. Accordingly, Count I of the complaint, requesting the Court to declare that the only role of the AAA is to appoint a neutral auditor, is dismissed.

proceedings before the neutral auditor. As explained below, this motion requires the Court to determine whether any or all of the parties' disputes should be decided by the Court before the parties are allowed to proceed before the neutral auditor.

Since the Agreement and the arbitration provision involve interstate commerce, the Federal Arbitration Act (the "FAA") governs consideration of this case.[5] The FAA is a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[6] Under the FAA, however, a court should apply ordinary state-law principles in deciding whether parties agreed to arbitrate a certain matter.[7] Although there is a policy under the FAA in favor of enforcing agreements to arbitrate, the United States Supreme Court "has determined that 'arbitration is a

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[5] 9 U.S.C. §§ 1-2; *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006) (citing *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273-74 (1995)); *McLaughlin v. McCann*, 942 A.2d 616, 621 (Del. Ch. 2008). The Delaware Uniform Arbitration Act does not apply in this case. According to 10 *Del. C.* § 5702(a), the Delaware Uniform Arbitration Act only applies when the parties execute an agreement "providing for arbitration in this State." *See TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Securities, Inc.*, C.A. No. 3603-CC, 2008 WL 2855116, at *2 n.5 (Del. Ch. July 24, 2008).

[6] *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

[7] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."); *Orner v. Country Grove Inv. Group, LLC*, C.A. No. 2245-VCS, 2007 WL 3051152, at *6 (Del. Ch. Oct. 12, 2007) ("To determine whether a dispute is governed by a contractual arbitration provision, courts acting under the FAA have been directed by the United States Supreme Court to apply the contract law of the state whose law governs the contract."); *Willie Gary LLC v. James & Jackson LLC*, C.A. No. 1781, 2006 WL 75309, at *5 (Del. Ch. Jan. 10, 2006) ("The FAA . . . simply requires that contracts with arbitration clauses be interpreted in accordance with the ordinary principles of contract interpretation that would otherwise govern and that no anti-arbitration state law policies override the intentions of commercial parties to contract to have their disputes resolved by arbitration.").

matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'"[8] The purpose of the FAA "was to make arbitration agreements as enforceable as other contracts, *but not more so*."[9] Because the Agreement contains a choice of law provision selecting New York law,[10] this Court must apply New York law to determine which disputes the parties agreed to arbitrate.[11]

In the end, however, the application of the FAA does not have a material effect on the outcome of this case. The federal policy of enforcing arbitration agreements is the same as the policy favoring enforcement of arbitration agreements under New York law.[12] The Court of Appeals of New York made this clear by stating that New York's "body of arbitration law . . . is not inimical to the policies of the FAA. Significantly, the FAA was modeled after New York's arbitration law."[13] Additionally, "no significant distinction can be drawn between the policies supporting the FAA and the arbitration provisions of the CPLR."[14] It

[8] *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)).
[9] *McDonell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825, 831 (2d Cir. 1988) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)).
[10] Agreement at § 11.4(a).
[11] *See Orner*, 2007 WL 3051152, at *6.
[12] *Smith Barney, Harris Upham & Co. v. Luckie*, 647 N.E.2d 1308, 1315 (N.Y. 1995).
[13] *Id.*
[14] *Id.*

should also be noted that Delaware's policy of enforcing arbitration agreements is substantially similar to the policies under the FAA and New York law.[15]

2. The Scope of the Arbitration Provision

The parties entered into a valid and enforceable arbitration agreement. The provision is located in § 2.5(d) of the Agreement, and calls for certain disputes to be resolved by a neutral auditor. As described above, § 2.5 outlines the procedure by which the parties were to reach agreement on the calculation of the Applicable Amount necessary for the purchase price adjustment. After each party submitted its calculation of the Applicable Amount, the Agreement provided for a thirty-day Resolution Period during which time the parties were directed to use their reasonable best efforts to reach agreement on disputed items or amounts. The Agreement then provided that the parties would resolve remaining disputes as follows:

> If at the conclusion of the Resolution Period there are any amounts remaining in dispute, then all amounts remaining in dispute may at any time thereafter be submitted to Ernst & Young . . . no later than the 15th day after the expiration of the resolution period. If Ernst & Young is unwilling or unable to serve . . . then [Home Depot and HDS] shall each have the right to request the American Arbitration Association to appoint the Neutral Arbitrators . . . . The Neutral

[15] *Orner*, 2007 WL 3051152, at *6 (stating that applicability of the FAA did not affect the outcome of the dispute because Delaware's policy would require enforcement of an arbitration provision as interpreted by the law of the state whose law governs the contract); *Willie Gary*, 2006 WL 75309, at *5 ("[T]he federal policy in favor of voluntarily-chosen arbitration is identical to the policy of [Delaware], which requires this court to enforce contracts to arbitrate and to resolve doubts about whether a claim must be arbitrated in favor of arbitration.").

> Auditors shall act as an arbitrator to determine, based solely on presentations by [Home Depot and HDS], and not by independent review, only those issues still in dispute. The Neutral Auditor's determination of any disputed amount shall not be higher than the highest amount proposed by either party or lower than the lowest amount proposed by either party.[16]

In determining the scope of an arbitration provision it is often helpful to distinguish between broad and narrow arbitration clauses.[17] An arbitration clause is broad if it refers all disputes under the agreement to arbitration and, in contrast, an arbitration clause is narrow if arbitration is limited to specific types of disputes.[18] When construing narrow arbitration clauses, courts must carefully determine which disputes the parties intended to be decided by arbitration and only send to arbitration those disputes that the parties expressly agreed should be arbitrated.[19] The presumption in favor of arbitration applies to narrow arbitration clauses; however, the Court must still consider the

[16] Agreement at § 2.5(d).
[17] *McDonell Douglas*, 858 F.2d at 832.
[18] *See id*; *Camferdam v. Ernst & Young Int'l, Inc.*, No. 02 Civ. 10100(BSJ), 2004 WL 1124649, at *1 (S.D.N.Y. May 19, 2004).
[19] *See Camferdam*, 2004 WL 1124649, at *1 ("[W]hen dealing with a narrow arbitration clause, the court must consider whether the disputed issue is, on its face, within the purview of the clause, and the court 'must be careful to carry out the specific and limited intent of the parties.'") (quoting *McDonnell Douglas*, 858 F.2d at 832); *Matter of Robert Stigwood Org., Ltd.*, 83 A.D.2d 123, 126 (N.Y. App. Div. 1981) ("An agreement to arbitrate must be express, direct and unequivocal as to the issues or disputes to be submitted to arbitration. This principle is particularly applicable in the instance of a limited arbitration clause.") (citation omitted).

boundaries of the arbitration provision and not require a party to arbitrate an issue they did not agree to arbitrate.[20]

The arbitration clause in the Agreement is narrow because it only refers to arbitration those issues regarding the calculation of the Applicable Amount in dispute after the Resolution Period.[21] The specification of Ernst & Young, an accounting firm, as the first choice as neutral auditor is further evidence that the parties did not intend the arbitration provision to encompass legal disputes arising out of other clauses in the Agreement.[22] Based on the language of the arbitration provision and its location in §2.5 of the Agreement, I conclude that the parties only agreed to arbitrate disputes regarding determination of the Applicable Amount that remained after the Resolution Period.

i. The Bonus and Retention Payments

Section 6.1 of the Agreement provides that Home Depot will reimburse HDS for certain Bonus and Retention Payments made to employees.[23] Home

[20] *Chevron U.S.A. Inc. v. Consol. Edison Co.*, 872 F.2d 534, 537-38 (2d Cir. 1989).
[21] *See Blue Tee Corp. v. Koehring Co.*, 999 F.2d 633, 634-35 (2d. Cir. 1993) (describing as a "narrow arbitration clause" a provision "requiring disputes regarding the computation of the final statement to be resolved by accountants"); *CAE Indus. Ltd. v. Aerospace Holdings Co.*, 741 F. Supp. 388, 392 (S.D.N.Y. 1989) (finding an arbitration provision narrow in scope where it required "'any objections Buyer may have to any of the matters set forth' in the Closing Date Balance Sheet 'be submitted to an independent accounting firm'").
[22] *See XL Capital, Ltd. v. Kronenberg III*, No. 04 Civ. 5496(JSR), 2004 WL 2101952, at *2 (S.D.N.Y. Sept. 20, 2004), *aff'd*, 145 F. App'x. 384 (2d Cir. 2005).
[23] Agreement at § 6.1(b)-(c) ("[Home Depot] shall contemporaneously reimburse [HDS] in an amount equal to the aggregate amount of the Retention Payments . . . . [Home Depot] shall

Depot, while acknowledging the obligation to reimburse the Bonus and Retention Payments, has refused to pay pending resolution of what Home Depot believes is a threatened "double payment" of these obligations. HDS included the liability associated with the Bonus and Retention Payments (the "Bonus and Retention Payment Liability") in its calculation of the Applicable Amount in its Closing Statement, and Home Depot disputed this inclusion in the Notice of Disagreement.

Home Depot argues that it will be forced to "double pay" if it reimburses the Bonus and Retention Payments in cash and the Bonus and Retention Payment Liability is reflected in the Closing Statement. Under the purchase price adjustment feature in the Agreement, an increase in liabilities on the balance sheet results in a decrease in the purchase price and a decrease in liabilities on the balance sheet results in an increase in the purchase price. Thus, according to Home Depot, if it reimburses the Bonus and Retention Payments in cash and the purchase price is reduced by the inclusion of the Bonus and Retention Payment Liability, Home Depot will be reimbursing the Bonus and Retention Payments twice. Home Depot argues that it could reimburse the Bonus and Retention Payments through the inclusion of the Bonus and Retention Payment Liability in the Closing Statement *or* through a cash payment to HDS.

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reimburse [HDS] for a portion of the annual bonuses in respect of the 2007 fiscal year of [Home Depot] representing service from the period commencing on January 29, 2007 and ending on the Closing Date . . . .").

Home Depot contends that since it disputed the inclusion of the Bonus and Retention Payment Liability in the Notice of Disagreement, the entire issue of the Bonus and Retention Payments should be decided by the neutral auditor. The payment requirement under § 6.1 and the calculation of the Bonus and Retention Payment Liability in the Closing Statement are, according to Home Depot, "inextricably linked" and must therefore both be submitted to the neutral auditor.

I disagree. Home Depot's line of reasoning would give to the neutral auditor contractual disputes that are clearly outside the scope of the arbitration provision. The parties included a narrow arbitration provision in § 2.5(d) that authorizes the parties to submit disputes regarding the calculation of the Applicable Amount to a neutral auditor. Nothing in the Agreement or the narrow arbitration provision in § 2.5(d) authorizes the neutral auditor to resolve disputes regarding § 6.1 of the Agreement. Home Depot cannot squeeze into arbitration disputes arising under other provisions in the Agreement by claiming that it is possible to settle these disputes through a purchase price adjustment and then challenging the purchase price calculation in the Notice of Disagreement.[24]

Under the guidance of the FAA and New York law, the Court should send to the neutral auditor only those disputes that the parties agreed would be submitted to arbitration. Under the narrow arbitration provision in the Agreement, the parties

[24] *See XL Capital*, 2004 WL 2101952, at *2.

agreed to arbitrate disputes regarding the parties' calculations of the Applicable Amount that remained unresolved after the Resolution Period. Thus, disputes arising under any other provisions in the Agreement are not properly brought before the neutral auditor, even if it is theoretically possible to resolve those disputes through the calculation of the Applicable Amount under § 2.5(d) of the Agreement. Accordingly, the Court will resolve the contractual dispute involving § 6.1 of the Agreement asserted in Count III of the complaint.

Nevertheless, out of the same respect for the intent of the parties, this Court will not decide issues that the parties clearly agreed would be decided by the neutral auditor. The policies of the FAA and New York law require the Court to carefully honor the intent of the parties when the parties clearly and expressly state in their agreement that certain disputes should be arbitrated. Thus, this Court will leave for the neutral auditor disputes regarding the Applicable Amount that the parties intended to send to arbitration. The Court will, therefore, not attempt to calculate the Applicable Amount or decide issues that the parties reserved for the neutral auditor in the arbitration provision in § 2.5 of the Agreement.

At this stage in the proceedings, however, it is impossible to determine whether the parties intended the Bonus and Retention Payment Liability to be included in current liabilities for purposes of calculating the Applicable Amount. That may be an appropriate issue for the neutral auditor. A more complete record

and further briefing will enable the Court to decide whether the neutral auditor retains authority to consider whether the Bonus and Retention Payment Liability should be included in current liabilities when calculating the Applicable Amount.

ii. The Cash Issue

Under § 5.4(b) of the Agreement, Home Depot was permitted to "remove all cash and cash equivalents from [HD Supply]" prior to the closing.[25] Ultimately, however, the cash was not removed from the bank accounts, and the parties disagree about whether Home Depot has a right to the cash. Home Depot takes the position that to the extent the cash was not returned, the issue could be remedied by "moving" cash into accounts receivable when calculating the Applicable Amount. Accounts receivable, unlike cash, are accounted for in the Applicable Amount because they are included in the definition of current assets in § 1.1 of the Agreement. Home Depot argues that this dispute is an issue for the neutral auditor because the accounting treatment of the cash was disputed in the Notice of Disagreement.

Home Depot alleges, in essence, that the issue of whether Home Depot has rights to the cash left in HD Supply's bank accounts should be decided by the neutral auditor because it is *possible* to return the cash by adjusting the purchase price. I am not convinced by this argument. A contractual issue does not come

[25] Agreement at § 5.4(b).

within the arbitration provision merely because it was disputed in the Notice of Disagreement and *could* be resolved by adjusting the purchase price.

Whether Home Depot has any rights to the cash left in HD Supply's accounts is a contractual issue for the Court to decide under § 5.4(b) of the Agreement. The narrow arbitration provision in § 2.5(d) should not be extended to include disputes under other provisions of the Agreement merely because it is *possible* to deal with those issues by adjusting the Applicable Amount. Although I am mindful of the policies favoring arbitration under the FAA and New York law, the arbitration provision should only be interpreted as broadly as the parties expressly intended it to be.

Consistent with my earlier determination regarding the issue under § 6.1 of the Agreement, I conclude that it is premature to consider whether the neutral auditor may consider the § 5.4(b) issue when resolving disputes regarding the Applicable Amount. Whether the neutral auditor will have authority to consider such arguments will become clear after further briefing or trial in this matter.

iii. The Revised Closing Statement

Both parties argue that this Court should decide the issue of whether the neutral auditor is permitted to consider the March 28, 2008 Revised Closing Statement that was submitted later than the allotted ninety days after the Closing

Date.[26] In the arbitration provision, the parties agreed to send disputes regarding the calculation of the Applicable Amount remaining after the Resolution Period to the neutral auditor. Section 2.5(d) provides that:

> The Neutral Auditors shall act as an arbitrator to determine, based solely on the presentations by [Home Depot and HDS], and not by independent review, only those issues still in dispute. The Neutral Auditor's determination of any disputed amount shall not be higher than the highest amount proposed by either party or lower than the lowest amount proposed by either party.[27]

Section 2.5(a) of the Agreement specifies that HDS should submit its Closing Statement with its calculation of the Applicable Amount "[a]s promptly as practicable but no later than ninety (90) days after the Closing Date . . . ."

Home Depot argues that the neutral auditor should not be permitted to consider the Revised Closing Statement submitted by HDS. HDS makes several arguments as to why the neutral auditor should be able to consider the Revised Closing Statement, notwithstanding the late submission. The only question presently before this Court is whether the Court or the neutral auditor should decide whether the neutral auditor can consider the Revised Closing Statement.

[26] It should be noted that this Court, in interpreting the arbitration provision, looks to the intent of the parties as evidenced by the written words and their context in the Agreement. The intent of the parties at the time of the agreement is controlling, and the agreement of the parties at the time of litigation is not dispositive. The role of this Court is to interpret the contract that the parties drafted, a document intended to be a representation of the agreement made by the parties.

[27] Agreement at § 2.5(d).

Whether the Revised Closing Statement can be considered by the neutral auditor is a contractual issue that should be decided by the Court.[28] As explained above, the arbitration provision in the Agreement is narrow and thus the Court should only send to arbitration those issues that the parties expressly agreed to arbitrate.[29] The neutral auditor is charged with resolving disputes regarding the calculation of the Applicable Amount that remain after the Resolution Period. Nothing in the arbitration provision indicates that the parties agreed that the neutral auditor would determine contractual issues regarding whether a revised or delayed Closing Statement could be considered by the neutral auditor. I will not expand the arbitration agreement beyond the express intent of the parties. Therefore, I will resolve the Revised Closing Statement issue presented in Count II of the complaint.

B. HDS's Motion for a Preliminary Injunction

Although I am required to apply New York law in interpreting the Agreement, Delaware law supplies the procedural standard for determining whether to grant a preliminary injunction.[30] A preliminary injunction may be

[28] *See In re Allegiance Telecom, Inc.*, 356 B.R. 93, 110-11 (Bankr. S.D.N.Y. 2006) (holding that post-deadline working capital adjustment could be considered by the accounting referee). *See also Nash v. Dayton Superior Corp.*, 728 A.2d 59, 63-64 (Del. Ch. 1998) (holding that the issue of whether a party was permitted to revise the closing balance sheet was not "clearly arbitrable" and was therefore an issue for the Court to decide).
[29] *See Camferdam*, 2004 WL 1124649, at *1; *Stigwood*, 83 A.D.2d at 126.
[30] *Deloitte & Touche USA LLP v. Lamela*, C.A. No. 1542-N, 2005 WL 2810719, at *5 (Del. Ch. Oct. 21, 2005).

granted where the moving party demonstrates: "(1) a reasonable probability of success on the merits at a final hearing; (2) an imminent threat of irreparable injury; and (3) a balance of the equities that tips in favor of issuance of the requested relief."[31] The moving party is required to make some showing for each element, and a "strong demonstration as to one element may serve to overcome a marginal demonstration of another."[32] A preliminary injunction is an extraordinary remedy that should only be granted sparingly.[33] For the reasons stated briefly below, I grant HDS's motion for a preliminary injunction.

1. Probability of Success on the Merits

In evaluating the first prong of the three-part test, the Court must not assess the reasonable probability of success on the ultimate dispute between the parties, but must consider whether the parties are required to submit these disputes to arbitration.[34] Thus, in order to show a probability of success on the merits HDS must only show that it will likely succeed on its claims that certain disputes that Home Depot seeks to send to the neutral auditor should be decided by the Court. As explained above, the Court, and not the neutral auditor, should decide (1) the Bonus and Retention Payment issue under § 6.1, (2) the cash issue under § 5.4(b), and (3) the Revised Closing Statement issue under § 2.5(a). Because I have found

[31] *Brown v. T-Ink, LLC*, C.A. No. 3190-VCP, 2007 WL 4302594, at *13 (Del. Ch. Dec. 4, 2007).
[32] *Id.*
[33] *Id.*
[34] *See id.*

that these issues are properly brought before the Court, HDS has met its burden of showing a probability of success on the merits.

2. Imminent Threat of Irreparable Injury

This Court has clearly held that a party faced with immediate arbitration of non-arbitrable issues is threatened with irreparable harm sufficient to warrant an injunction.[35] If the arbitration proceeds, HDS will be forced to arbitrate issues that this Court has determined are outside the scope of the arbitration provision. HDS has therefore met its burden of showing irreparable harm.

3. Balance of the Equities

In considering the balance of the equities, the Court must consider the potential harm in wrongfully granting the injunction, discounted by its probability, against the harm of wrongfully denying the preliminary injunction, discounted by its probability.[36] The balance of the harms in this case favors granting the injunction. If the injunction is not granted, HDS will be harmed by being forced to arbitrate non-arbitrable issues. If the injunction is granted then the parties will proceed before the Court on the non-arbitrable issues before proceeding before the

[35] *Id.* at *16 ("Delaware courts have consistently found that threatened, wrongful enforcement of an arbitration clause constitutes sufficient irreparable harm to justify an injunction."); *Parfi Holding AB v. Mirror Image Internet, Inc.*, 842 A.2d 1245, 1259 (Del. Ch. 2004) ("It is well settled that . . . the procession of an unwarranted arbitration poses the threat of irreparable injury to the party rightfully resisting arbitration.").

[36] *See Crown Books Corp. v. Bookstop, Inc.*, C.A. No. 11255, 1990 WL 26166, at *7 (Del. Ch. Feb. 28, 1990).

neutral auditor on the arbitrable issues. No great harm is threatened by proceeding in this order. Additionally, because I have already determined that three of the disputes are outside the scope of the arbitration provision and properly before this Court, the probability of wrongfully enjoining the arbitration in order for the Court to decide those issues is eliminated.

III. CONCLUSION

After considering the arbitration provision and the Agreement as a whole, I find three controversies under the agreement that do not fall within the bounds of the arbitration provision: (1) the Bonus and Retention Payment issue under §6.1; (2) the cash issue under § 5.4(b); and (3) the Revised Closing Statement issue under § 2.5(a). The most efficient way to proceed is for the Court to decide the contractual issues before the parties proceed with arbitration. The neutral auditor cannot properly proceed until the Court has decided the contractual issues, especially in light of the fact that one of the issues for the Court is whether the Revised Closing Statement can be considered by the neutral auditor.

For the reasons set forth above, I grant plaintiff's motion for a preliminary injunction and deny defendant's motion to stay the proceedings before this Court. Any and all arbitration proceedings in this matter are hereby enjoined pending the resolution of the contractual claims before this Court.

The parties should confer and submit a proposed scheduling order to resolve the contractual claims remaining before the Court. An Order has been issued consistent with this decision.