IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CONCORD STEEL, INC. a Delaware Corporation as a successor in interest to CRC WILMINGTON ACQUISITION, LLC, a Delaware limited liability company,	)	
Plaintiff/Counterclaim Defendant,	)	
v.	)	Civil Action No. 3369-VCP
WILMINGTON STEEL PROCESSING CO., INC. a Delaware corporation, KENNETH NEARY, and WILLIAM WOISLAW,	)	
Defendants/Counterclaim Plaintiffs.	)	

MEMORANDUM OPINION

Submitted: March 17, 2008
Decided: April 3, 2008

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PARSONS, Vice Chancellor.

Plaintiff Concord Steel, Inc. ("Concord") seeks to enjoin defendants Wilmington Steel Processing Co., Inc. ("WSP"), Kenneth Neary, and William Woislaw (collectively, "Defendants") from ongoing conduct in alleged violation of restrictive covenants in an Asset Purchase Agreement ("APA") between Concord and WSP. Concord's Verified Complaint ("Complaint") asserts claims for breach of contract and indemnification. The matter is currently before me on Concord's motion for a preliminary injunction.

Concord bases its breach of contract claim on restrictive covenants of noncompetition and nonsolicitation in the APA. Its arguments under both covenants depend on whether Concord can prove WSP engaged in "Competitive Business," a defined term under the APA. Although I find the covenants in question ambiguous in certain respects, I conclude Concord has shown a reasonable probability of success on its claim WSP engaged in "Competitive Business" in violation of its covenant of noncompetition. I also find Concord has shown an imminent threat of irreparable injury, and that the balance of the equities is neutral or tips slightly in its favor. Thus, I grant Concord's motion for a preliminary injunction.

I. BACKGROUND[1]

A. The Parties

Concord is a Delaware corporation with operations in Pennsylvania, Ohio, and Illinois. Concord has been in the steel fabrication business since 1928. It manufactures steel counterweights and structural weldments or similar steel plate products that are

[1] Unless stated otherwise, the facts recited herein come from the Complaint.

incorporated into aerial work platforms, cranes, elevators, material handling equipment, and other industrial equipment. Paul Allen Vesey is president of Concord.[2]

WSP is allegedly a Delaware Corporation with its principal place of business in Pennsylvania. WSP was founded in 1987 and manufactures steel plate products; WSP purchases steel plates and processes them into other products.[3] Neary is the president and founder of WSP;[4] Woislaw is its vice president of sales.[5]

B. Concord enters into the APA with WSP

In 2006, Concord, at the behest of its future parent company, Net Perceptions, Inc. (now known as Stamford Industrial Group, Inc.) was considering a purchase of all of WSP. Instead, due to environmental concerns, Concord decided to acquire only certain assets of WSP. In particular, Concord was concerned about WSP's facility being located in a naval shipyard.[6]

In connection with the negotiation of the APA, both Concord and WSP retained sophisticated counsel. The negotiation process was "long and involved," encompassing

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2 Vesey Dep. at 6.

3 Neary Dep. at 4-5.

4 *Id.* at 4.

5 Tr. at 61 (Woislaw). Citations in the form "Tr." are to the transcript of argument held on March 17, 2008. To the extent the Court refers to witness testimony, the identity of the witness is indicated parenthetically.

6 *See* Vesey Dep. at 18, 21.

"[r]ewrite after rewrite," and generating approximately twenty-five drafts.[7] On September 19, 2006, Concord entered into the APA and, for $4,000,000, purchased certain assets of WSP.[8]

WSP was to continue as a separate entity after the APA. In fact, Concord initially leased the WSP facility until February 2007 when its independent facility in Essington, Pennsylvania began production.[9]

C. High Definition Plasma Cutting for Ryerson, Skytrak, and JLG

Contemporaneously with the APA, WSP began in June or July 2006 to pursue the acquisition of equipment to cut steel using a high definition plasma technique.[10] Neary had informed Concord of WSP's plan to acquire that equipment.[11] Concord has never engaged in, and does not currently have the capability to engage in, high definition plasma cutting.[12]

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7 Neary Dep. at 16-17, 20, 22, 142.

8 The parties to the APA are CRC Wilmington Acquisition, LLC, WSP, and CRC Acquisition Co. LLC, a Delaware limited liability company ("CRC"). CRC was the parent company of Concord at the time of the APA. Concord was later sold to a different company, Net Perceptions, in October 2006. *See* Vesey Dep. at 10.

9 *See* Vesey Dep. at 24-28.

10 Tr. at 74-76 (Neary).

11 *See* Neary Dep. at 73.

12 Vesey Dep. at 37. WSP admits, however, that Concord is contemplating acquiring such a capability. *See* DAB at 12.

High definition plasma is one of several techniques for cutting steel. It achieves higher tolerances than other methods such that, for example, there would not be deviation of more than a few millimeters over 600 to 700 inches.[13] In contrast, oxyfuel cutting equipment utilizes a technique more than a hundred years old and is not suitable for high-precision cutting.[14] The equipment Concord purchased from WSP included its oxyfuel system.[15] The only steel cutting equipment WSP currently has is its high definition plasma equipment.[16]

JLG has been Concord's largest customer for the past twenty years; Ryerson has been a customer of Concord for five years. Together, JLG and Ryerson account for 44% of Concord's annual revenue. At the same time, WSP claims it and "Ryerson-Philadelphia have a longstanding, ongoing business relationship in the specialized business of supplying high definition plasma cutting parts."[17]

In October 2007, Concord discovered WSP was cutting steel frames for Ryerson, who in turn was supplying them to JLG for its Skytrak vehicle.[18] The parties'

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13 *See* Neary Dep. at 71-72.

14 Tr. at 69 (Neary).

15 *Id.* at 69.

16 Woislaw Dep. at 13.

17 DAB at 27; *see also id.* at 12, 21 (discussing WSP's historical customer relationship with Ryerson).

18 Vesey Dep. at 28, 46-47. WSP, however, uses the high definition plasma equipment for customers besides Ryerson. Neary Dep. at 73.

disagreement over the propriety of this relationship under the APA led to this litigation. WSP alleges Ryerson approached it to cut these steel parts, and that WSP did not solicit Ryerson's business.[19]

D. Procedural History

Concord commenced this action on November 21, 2007, and requested a preliminary injunction against WSP, Woislaw, and Neary. On January 8, 2008, Defendants filed their Answer and Affirmative Defenses, and later, on January 22, they filed an Amended Answer and Counterclaim against Concord, alleging tortious interference and defamation. On February 7, 2008, Concord replied to Defendants' Counterclaim. After preliminary discovery and briefing, the Court heard argument on Concord's motion for a preliminary injunction on March 17, 2008.

At argument, I stated my inclination to grant the preliminary injunction, but indicated I would make a more formal ruling shortly. On March 26, 2008, Defendants sought leave to file supplemental affidavits from two witnesses, Neary and Raymond DeLuca, a Fabrication Sales Manager for Ryerson, in opposition to Concord's preliminary injunction motion. In a letter the next day, Concord urged the Court to strike those supplemental affidavits.

E. Parties' Contentions

Concord asks the Court to preliminarily enjoin WSP and Neary from: "disrupting and/or attempting to disrupt Concord's relationship with Ryerson, JLG and others";

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[19] *See* Woislaw Dep. at 14-15.

soliciting, calling on and accepting, and engaging in a "Competitive and/or Competing Business"; and "hiring employees, consultants or agents of the Company and/or the Acquired Business."[20] Concord's principal argument is that WSP's business with Ryerson constitutes "Competitive Business," and therefore violates the noncompetition and nonsolicitation covenants in the APA.

WSP and Neary reply that such an interpretation of the APA "would improperly expand the contractual restrictive covenant to something that Concord never paid for and to something WSP never agreed to."[21] WSP and Neary also allege Concord knew of WSP's high definition plasma cutting for Ryerson, and therefore waived its right to invoke the restrictive covenants against that activity.

The APA is a complicated, 53 page agreement, and the nonsolicitation and noncompetition covenants are particularly convoluted. With the benefit of hindsight, Concord characterizes those restrictive covenants as limiting WSP's and Neary's post-APA activities, absent Concord's written consent, to the defense, ship building, and wind power generation industries. Defendants vigorously oppose that interpretation and argue the APA includes an equally broad exception that would enable them to use their new steel cutting equipment, which involves high definition plasma cutting, virtually without

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[20] Concord's Mot. for Prelim. Inj. (Nov. 21, 2007). Concord presented no evidence of, or argument about, "hiring" by WSP in violation of the APA. I therefore assume it is no longer pursuing that aspect of its motion, and will not discuss it further.

[21] DAB at 10.

restriction. Defendants reason that because Concord currently does not use high definition plasma steel cutting equipment, WSP's use of that equipment for work requiring strict tolerances is not competitive with Concord's business. To evaluate Concord's motion, therefore, I must closely examine the relevant restrictive covenants.

II. ANALYSIS

A. Legal Standard

1. Preliminary injunction standard

This Court has broad discretion in granting or denying a preliminary injunction.[22] "A preliminary injunction may be granted where the movants demonstrate: (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."[23] "The moving party bears a considerable burden in establishing each of these necessary elements. Plaintiffs may not merely show that a dispute exists and that plaintiffs might be injured; rather, plaintiffs must establish clearly each element because injunctive relief will never be granted unless earned."[24] However, "there is no steadfast

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[22] *Data Gen. Corp. v. Digital Computer Controls, Inc.*, 297 A.2d 437, 439 (Del. 1972) (citing *Richard Paul, Inc. v. Union Improvement Co.*, 91 A.2d 49 (Del. 1952)).

[23] *Nutzz.com v. Vertrue, Inc.*, 2005 Del. Ch. LEXIS 101, at *20 (July 6, 2005) (internal citations omitted).

[24] *La. Mun. Police Emps.' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1185 (Del. Ch. 2007) (internal citations omitted).

formula for the relative weight each deserves. Accordingly, a strong demonstration as to one element may serve to overcome a marginal demonstration of another."[25]

Moreover, "preliminary injunctive relief should not be granted if the injury may be adequately compensated for after a full trial on the merits, either by an award of damages or by some form of final equitable relief."[26] The injury "must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice."[27]

2. Contract interpretation standard

The court's ultimate goal in contract interpretation is to determine the parties' shared intent.[28] "A determination of whether a contract is ambiguous is a question for the court to resolve as a matter of law."[29] Delaware adheres to the objective theory of contracts.[30] In that respect, "the court looks to the most objective indicia of that intent:

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25 *Alpha Builders, Inc. v. Sullivan*, 2004 Del. Ch. LEXIS 162, at *11 (Nov. 5, 2004) (citing *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998)).

26 *Id.* at *11.

27 *State v. Del. St. Educ. Ass'n*, 326 A.2d 868, 875 (Del. Ch. 1974).

28 *Sassano v. CIBC World Mrkts. Corp.*, 2008 Del. Ch. LEXIS 5, at *19 (Jan. 17, 2008).

29 *HIFN, Inc. v. Intel Corp.*, 2007 Del. Ch. LEXIS 58, at *29 (Del. Ch. May 2, 2007) (citing *Reardon v. Exch. Furniture Store, Inc.*, 188 A. 704, 707 (Del. 1936)).

30 *See United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 835 (Del. Ch. 2007) (citing *Seidensticker v. Gasparilla Inn, Inc.*, 2007 Del. Ch. LEXIS 155, at *1 (Nov. 8, 2007)).

the words found in the written instrument."[31] "As part of this initial review, the court ascribes to the words their common or ordinary meaning, and interprets them as would an objectively reasonable third-party observer."[32] A contract is not rendered ambiguous solely because parties do not agree as to its construction.[33] Contract language must be susceptible to two or more reasonable interpretations to be deemed ambiguous.[34] "Moreover, extrinsic, parol evidence cannot be used to manufacture an ambiguity in a contract that facially has only one reasonable meaning."[35]

Under the parol evidence rule, "where the language of a written integration is susceptible to more than one reasonable interpretation, the court will consider proffered

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31 *Sassano*, 2008 Del. Ch. LEXIS 5, at *20. In determining the intent of the parties, the court looks first at the relevant document, read as a whole. *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2008 Del. Ch. LEXIS 9, at *33 (Jan. 16, 2008) (quoting *Matulich v. Aegis Comm'cns Group, Inc.*, 2007 WL 1662667, at *12 (Del. Ch. May 31, 2007)).

32 *Sassano*, 2008 Del. Ch. LEXIS 5, at *20 (providing extensive citations); *see also PharmAthene*, 2008 Del. Ch. LEXIS 9, at *33-34.

33 *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

34 *Id.*

35 *United Rentals*, 937 A.2d at 830 (citing *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).

However, "[i]n some cases, determining whether a contract is susceptible to more than one interpretation requires an understanding of the context and business circumstances under which the language was negotiated; seemingly unequivocal language may become ambiguous when considered in conjunction with the context in which the negotiation and contracting occurred." *U.S. West, Inc. v. Time Warner, Inc.*, 1996 Del. Ch. LEXIS 55, at *31 n.10 (June 6, 1996).

admissible evidence bearing upon the objective circumstances relating to the background of the contract."[36] "Such extrinsic evidence may include 'overt statements and acts of the parties, the business context, prior dealings between the parties, and business custom and usage in the industry.'"[37] Generally, the court evaluates such evidence with respect to the existence of a disputed contractual right under the preponderance of the evidence standard;[38] the burden of persuasion to obtain specific performance, however, is by a "clear and convincing evidence" standard.[39] Upon examination of the relevant extrinsic evidence, "a court may conclude that, given the extrinsic evidence, only one meaning is objectively reasonable in the circumstances of [the] negotiation."[40]

With these standards in mind, I address the parties' contentions. As stated earlier, to obtain a preliminary injunction Concord must demonstrate: (1) a reasonable probability of success on the merits; (2) an imminent threat of irreparable injury; and (3) that the balance of the equities tips in favor of issuance of its requested relief.

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36 *U.S. West*, 1996 Del. Ch. LEXIS 55, at *31. "A preliminary consideration of extrinsic evidence may be necessary to determine whether this sort of hidden or latent ambiguity exists." *Id.* at *31 n.10 (citing *Bell Atl. Meridian Sys. v. Octel Commc'ns Corp.*, 1995 Del. Ch. LEXIS 156, at *18 n.5 (Nov. 28, 1995)); *see also Eagle Indus.*, 702 A.2d at 1232 n.7.

37 *United Rentals*, 937 A.2d at 834-35 (quoting *Supermex Trading Co. v. Strategic Solutions Group, Inc.*, 1998 Del. Ch. LEXIS 66, at *9 (May 1, 1998)).

38 *See id.* at 834 n.112 (citing *Carlson v. Hallinan*, 925 A.2d 506, 524 (Del. Ch. 2006)).

39 *See id.* (citing In re *IBP, Inc., S'holders Litig.*, 789 A.2d 14, 52 (Del. Ch. 2001)).

40 *U.S. West*, 1996 Del. Ch. LEXIS 55, at *32.

B. Has Concord Shown a Reasonable Probability of Success on the Merits?

Concord alleges WSP's business with Ryerson (hereinafter the "Ryerson Transactions") breaches two provisions of the APA, WSP and Neary's covenants of nonsolicitation and noninterference in Section 7.7(a) and noncompetition in Section 7.7(b).

The first step in evaluating Concord's breach of contract claim is to determine whether the covenants are valid and enforceable. A contract is valid if it manifests mutual assent by the parties and they have exchanged adequate consideration. There is no dispute the APA, and in particular the covenants in question, are valid. The parties' execution of the APA after twenty-five drafts manifests mutual assent. The sale of WSP's assets (including goodwill) for approximately $4 million suggests all parties received adequate consideration.[41]

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[41] In that context, respected commentators have observed:

> An important part of many transactions is the buyer's obtaining the seller's agreement not to compete with the business being sold to the buyer for some period after the closing. This can be particularly critical in the sale of a private company where the principal stockholder may have been the founder of the company and be closely associated with its products or services. . . . The ability of such a person or group of persons to use their knowledge and contacts within the industry could be devastating to the buyer's new enterprise.

LOU R. KLING & EILEEN T. NUGENT, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 18.06 (2001).

A covenant not to compete, as a restraint on competition, is subject to the additional requirements that it: (1) be reasonable in geographic scope and temporal duration, (2) advance a legitimate economic interest of the party seeking its enforcement, and (3) survive a balancing of the equities in order to be enforceable.[42] Furthermore, in order to obtain specific performance of a covenant not to compete, Concord must establish these elements by clear and convincing evidence.[43] WSP and Neary make no argument the covenants are unenforceable on these grounds; thus, the Court assumes at this preliminary juncture the covenants in question are reasonable and enforceable.

Instead of contesting the provisions' enforceability, WSP contends the covenants of nonsolicitation and noncompetition, as written and therefore intended, do not preclude it from engaging in the Ryerson Transactions. I therefore turn to the pertinent provisions, Sections 7.7(a) and (b) of the APA.

1. APA § 7.7(a): Nonsolicitation and noninterference

Concord contends the Ryerson Transactions violate Section 7.7(a) of the APA because they "involve[] business with a company" that "formerly was a customer of WSP," "was and is a customer of Concord," "will become a customer of WSP," and "was

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42 *Hough Assocs. v. Hill*, 2007 Del. Ch. LEXIS 5, at *47-48 (Jan. 17, 2007) (citing *All Pro Maids, Inc. v. Layton*, 2004 Del. Ch. LEXIS 116, at *8-9 (Aug. 9, 2004); *TriState Courier & Carriage, Inc. v. Berryman*, 2004 Del. Ch. LEXIS 43, at *40 & n.126 (Apr. 15, 2004)).

43 *Id.* at *48 (citing *Cirrus Holding Co. v. Cirrus Indus., Inc.*, 794 A.2d 1191, 1201 (Del. Ch. 2001)); *Am. Homepatient, Inc. v. Collier*, 2006 Del. Ch. LEXIS 79, at *5 (Apr. 19, 2006); *TriState Courier & Carriage*, 2004 Del. Ch. LEXIS 43, at *35 n.120.

a customer's customer of Concord."[44] Defendants answer that the Ryerson Transactions do not constitute "Competitive Business" under the APA.[45]

Section 7.7(a) is a covenant for nonsolicitation and noninterference. It states in pertinent part:

> [F]or a period of four (4) years . . . , neither [WSP] nor [Neary] shall, directly or indirectly, for their own account or jointly with or for or on behalf of any other Person, as principal, agent or otherwise *call upon and accept Competitive Business* from, *or solicit the Competitive Business* of any Person who is, or who had been at any time during the preceding (4) years, or will become, a customer, a customer's customer, known prospective customer, or supplier of [Concord], [WSP] or [the] Acquired Business (including but not limited to, JLG and Johnstown Welding, unless [Concord] in writing specifically authorizes [WSP] or [Neary] to do so . . . .[46]

Concord asserts WSP's acceptance of Ryerson's business for high definition plasma cutting violated the APA because Ryerson was a customer of WSP and Concord, will be a customer of WSP, and was a customer's customer of Concord within the meaning of Section 7.7(a). That section, however, appears to require more than the acceptance of business to make out a breach. In particular, Section 7.7(a) prohibits WSP and Neary from "call[ing] upon and accept[ing] Competitive Business from, or solicit[ing] the Competitive Business of any Person" who meets certain requirements.

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44 POB at 12-14.

45 *See* DAB at 16.

46 APA § 7.7(a) (emphasis added). The APA is reproduced in full at Daichman Aff. Ex. 3.

The preliminary injunction record fails to convince me Concord is likely to succeed in meeting its burden to prove by clear and convincing evidence WSP "call[ed] upon and accept[ed] Competitive Business from, or solicit[ed] the Competitive Business of" Ryerson.[47] To the contrary, the evidence indicates Ryerson solicited WSP to do the steel plate cutting for it. The facts ultimately adduced at trial may support a different conclusion. For purposes of the pending motion, however, Concord has not demonstrated a reasonable probability of success of showing the Ryerson Transactions violated APA § 7.7(a).

2. APA § 7.7(b): Noncompetition

Section 7.7(b) of the APA, the parties' noncompetition covenant, is at the heart of this dispute. The issue is ultimately whether the Ryerson Transactions constitute "Competitive Business" under the APA. Section 7.7(b) states in pertinent part:

> [WSP] acknowledges that in order to assure [Concord] that [it] will retain the value of the Acquired Business as a "going concern," [WSP] on and subject to the terms set forth in this Section 7.7, shall not utilize its special knowledge of the Acquired Business to compete with the Purchaser by engaging in Competitive Business. As of the Initial Closing

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[47] The APA broadly uses "business" to encompass three distinct concepts depending on the context: (1) a commercial enterprise or establishment, (2) a commercial transaction(s), and (3) a synonym for "commerce," "trade," and "industry." *See* BLACK'S LAW DICTIONARY 211 (8th ed. 2004); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 252 (4th ed. 2000); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 190 (1987).

In the context of Section 7.7(a), "Competitive Business" appears to refer to a set of transactions or a commercial relationship, and not a particular industry or an ongoing commercial enterprise.

> and for a period of four (4) years beginning on the Initial Closing Date, *[WSP] and [Neary] shall not engage in or have an interest*, anywhere in the world . . . whether through the investment of capital, lending of money or property, rendering of services or capital, or otherwise, *in any Competitive Business*. The Seller acknowledges that compliance with the restrictions set forth in this Section 7.7(b) will not prevent any Person from earning a livelihood.[48]

Under this provision, WSP and Neary agreed "not [to] engage in . . . Competitive Business." I read Section 7.7(b) to refer to "Competitive Business" both as a type of commercial relationship or transaction, and as an ongoing commercial enterprise. That is, WSP and Neary are precluded from engaging in particular types of transactions or enterprises related to the steel industry.

Concord contends the Ryerson Transactions constitute "Competitive Business" in violation of the APA. The APA defines "Competitive Business" as follows:

> Competitive business shall collectively mean any business (on a worldwide basis) that is engaged in (i) the design, manufacture and sale of (a) counterweights, elevator weights, stage weights, counterbalances, test weights and crane weights made of any material and (b) steel components for heavy equipment as engaged in or to be engaged in by Purchaser, [WSP] or the Acquired Business prior to and after the Effective Time, or (ii) any other business competitive with the type of business engaged in by Purchaser, [WSP] and the Acquired Business at any time prior to or after the Final Effective Time, except for the Defense Business, Ship Building, Wind Power Generation and Other Permitted Businesses.[49]

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[48] APA § 7.7(b) (emphasis added).

[49] APA § 1.

This definition contains three important clauses. The first two are subparagraphs (i) and (ii), which delineate two kinds of businesses constituting "Competitive Business," and the third is the carve-out, "except for the Defense Business, Ship Building, Wind Power Generation and Other Permitted Businesses."

a. Do the Ryerson Transactions constitute "Competitive Business" under subparagraph (i)?

"Competitive Business" under subparagraph (i) of the APA's definition is "any business . . . engaged in (i) the design, manufacture and sale of (a) [weights] . . . made of any material and (b) steel components for heavy equipment as engaged in or to be engaged in by Purchaser, [WSP] or the Acquired Business prior to and after the Effective Time . . . ."[50] Before addressing the parties' arguments, I note certain ambiguities on the face of this subparagraph. For example, because of a dearth of punctuation in the definition of "Competitive Business," it is not clear if the modifying phrases at the end of subparagraph (i) modify both clauses (a) and (b), or just clause (b). Further, it is unclear whether the phrase, "as engaged in or to be engaged in by Purchaser, [WSP] or the Acquired Business prior to and after the Effective Time" includes the situation where, for instance, the Purchaser only conducts an activity before the Effective Time, and WSP only conducts that activity after the Effective Time.[51] For purposes of deciding Concord's motion for a preliminary injunction, I need not address all of these potential

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50 *Id.*

51 A colorable argument also exists that the temporal limitation, "prior to and after the Effective Time," modifies only "Acquired Business."

ambiguities. I note, however, that Delaware courts construe restrictive covenants narrowly as written.[52]

WSP contends the language of subparagraph (i) requires that, to amount to "Competitive Business," the commercial relationship or enterprise must be engaged in the design, manufacture, and sale of weights *and* of steel components for heavy equipment.[53] Under this interpretation, a commercial relationship or enterprise that involved only weights or only steel components for heavy equipment, but not both, would not constitute "Competitive Business" under subparagraph (i). Concord replies, however, that because a counterweight is a component of heavy equipment, such a reading would render clause (a), of the definition of "Competitive Business," superfluous.[54] I disagree. Clause (a) explicitly applies to weights "made of any material"; unlike clause (b), it is not limited to "steel components." Furthermore, Concord did not present sufficient evidence to show a likelihood that the requirements of clause (a) of subparagraph (i) have been met. In particular, Concord did not show the

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[52] "Restrictive covenants are carefully negotiated and our law requires that their unambiguous terms be given effect." *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1024 (Del. Ch. 2006). "Restrictive covenants in contracts . . . limit[ing] the commercial freedom otherwise available to the parties cannot reasonably be read in [a] squishy and uncertain manner . . . ." *Id.*

[53] *See* Tr. at 26-27.

[54] *See* Tr. at 49. In that regard, "a contract should be interpreted in such a way as to not render any of its provisions illusory or meaningless." *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992).

steel plate cutting for Ryerson involves counterweights, or any of the other enumerated weights.

Alternatively, Concord effectively urges this Court to read out the conjunctive "and" connecting clauses (a) and (b) in subparagraph (i), by broadly asserting that a commercial relationship or enterprise engaged in the design, manufacture and sale of *either* counterweights *or* steel components for heavy equipment would constitute "Competitive Business."[55] In effect, Concord argues in this instance, at least, that "and" means "or." This would suggest the meaning of "and" is ambiguous. Usually, one would interpret "and" only in the conjunctive, joining two or more elements in a list and requiring all of those elements;[56] the other extreme would be to interpret "and" as

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[55] *See* POB at 10-11.

[56] In that regard, the following discussion by Judge Kozinski of the Court of Appeals for the Ninth Circuit exemplifies this approach:

> As a linguistic matter, "and" and "or" are not synonyms; indeed, they are more nearly antonyms. One need only start the day with a breakfast of ham or eggs to be duly impressed by the difference. While "and" and "or" are both small words, and are occasionally seen joined with a slash, when they stand alone, they have substantially different meanings with dramatically different effects. We give our language, and our language-dependent legal system, a body blow when we hold that it is reasonable to read "or" for "and." While I don't foreclose the possibility of substituting the two words for each other where it is necessary to avoid a patent absurdity or correct a drafting error . . . , I can't agree that the substitution is permissible in ordinary circumstances.

MacDonald v. Pan Am. World Airways, Inc., 859 F.2d 742, 746 (9th Cir. 1988) (dissent).

including the disjunctive "or."[57] A third approach would interpret each occurrence of "and" as part of a conjoined list contextually, determining its meaning based on the elements of the list and the surrounding words.[58]

Because the definition of "Competitive Business" uses "or" elsewhere, and reading the "and" connecting clauses (a) and (b) in the conjunctive would not lead to an absurd result, I consider it unlikely Concord would succeed on this contention. Furthermore, if the Court were to accept Concord's interpretation, then any commercial relationship involving the design, manufacture and sale of weights, even if they were made of concrete, stone or glass, for example, would be "Competitive Business," as clause (a) states that such weights could be "made of any material." Assuming, however, that "and" takes its normal conjunctive definition, such that the requirements of both clauses (a) and (b) must be met, the addition of clause (b)'s reference to "steel components for heavy equipment" would narrow significantly the scope of subparagraph (i).[59]

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[57] In the analogous statutory interpretation context, courts occasionally have construed "and" to mean the disjunctive "or" to avoid an incoherent reading of a statute. *See Officemax, Inc. v. United States*, 428 F.3d 583, 589-90 (6th Cir. 2005) (extensive citations to federal law omitted).

[58] In that vein, Judge Sutton stated in his dissent in *Officemax* that "[t]wo meanings may be possible when elements are conjoined by 'and' because of ambiguity as to whether the surrounding words apply to the conjoined elements separately or only together." *Officemax*, 428 F.3d at 603 (Sutton, dissenting).

[59] Concord points to nothing in the APA, or otherwise, suggesting that clauses (a) and (b) should be considered separately. "[C]ourts should be most chary about implying a contractual protection when the contract could easily have been drafted

Even if this Court were to accept Concord's disjunctive interpretation of subparagraph (i), the Ryerson Transactions would have to qualify as involving "heavy equipment" under clause (b) because they did not qualify under clause (a). "Heavy equipment" is not a defined term under the APA. Without burdening the reader with the details, both parties submitted extrinsic evidence as to (1) what "heavy equipment" means, and (2) whether the Skytrak vehicle constitutes "heavy equipment." At this preliminary stage, the competing definitions of the parties each appear reasonable. Thus, the term "heavy equipment" is likely to be found ambiguous. Based on the record to date, Concord has not shown by clear and convincing evidence that it is more likely to succeed in proving the Ryerson Transactions involve heavy equipment, than WSP is in proving they do not.

Thus, Concord has not shown a reasonable probability of success of proving the Ryerson Transactions were "Competitive Business" under subparagraph (i) of the APA's definition.

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to expressly provide for it." *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1035 (Del. Ch. 2006). If the parties meant to use "or," or even "and/or," between the clauses (a) and (b), they easily could have. I express no opinion at this preliminary stage of the litigation as to whether every single occurrence of "and" within the APA or even the definition of "Competitive Business" itself should be construed in the conjunctive. The context conceivably could dictate otherwise.

b. Do the Ryerson Transactions constitute "Competitive Business" under subparagraph (ii)?

Concord contends the "restrictive covenant plainly prohibits the type of work WSP is performing for Ryerson and allows only such work to be done in the context of the Defense, Shipbuilding and Wind Power Generation businesses — regardless of how the work is performed (by laser, by plasma, by shearing or by saw)."[60] "Competitive Business," as defined in subparagraph (ii), is "any business . . . engaged in . . . any other business competitive with the type of business engaged in by Purchaser, [WSP] and the Acquired Business at any time prior to or after the Final Effective Time . . . ."[61] In comparison to subparagraph (i), subparagraph (ii) is fairly expansive.

Concord reads subparagraph (ii) to mean that "Competitive Business" includes any business competitive with the type of business engaged in by WSP before or after the acquisition, subject to the enumerated exceptions in the carve-out. WSP makes no direct response to this reading, except to deny the parties ever agreed that, "no matter what Wilmington Steel does in the future, that's deemed competitive."[62] Instead, WSP focuses on the high definition plasma cutting it now is doing for Ryerson and argues it is not "competitive" with what Concord's business, because it involves a different product entirely.[63]

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60 PRB at 13-14.

61 APA § I.

62 Tr. at 38.

63 *See, e.g.*, DAB at 22-23.

First, I note that "competitive" may be ambiguous. One plausible definition is that "competitive" refers to a situation where "two or more commercial interests [try] to obtain the *same* business from third parties."[64] This definition emphasizes a competition for the same contract. Under it, if WSP's high definition plasma cutting of steel at a higher tolerance is a type of manufacturing Concord does not perform, it arguably would not be "competitive" with Concord, which uses the less precise oxyfuel cutting technique.[65] Another plausible definition of "competitive" would include a rivalry for a broader relationship with a particular customer, not for an individual contract.[66] Under this broader definition, WSP's Ryerson Transactions would be "competitive" with Concord's overall commercial relationship with Ryerson and JLG, and with its steel cutting activities. I find Concord has a reasonable probability of succeeding in showing the parties intended subparagraph (ii) to cover this latter construction of "competitive," and that the Ryerson Transactions constituted "Competitive Business."

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64 BLACK'S LAW DICTIONARY 302 (8th ed. 2004) (emphasis added); *see also* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 268 (1987) (defining competition as "two or more parties acting independently to secure the business of a third party by offering the most favorable terms.").

65 Although Vesey testified that Concord could fulfill the Ryerson orders using its existing oxyfuel cutting system, the preliminary record suggests Concord's system is not fully competitive in that regard. *See* Vesey Dep. at 95-102.

66 *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 376 (4th ed. 2000) (defining competition as a "[r]ivalry between two or more businesses striving for the same customer or market.").

Moreover, subparagraph (ii) defines "Competitive Business" not as business "competitive" with the precise business engaged in by Purchaser, WSP and the Acquired Business, but rather as business "competitive" with the "*type of* business" engaged in by "Purchaser, [WSP] and the Acquired Business." The APA's use of "type of" broadens the sphere of activity defined as "Competitive Business." Thus, the issue here is whether the APA prevents WSP from engaging in the Ryerson Transactions because they involve business that is "competitive with the type of business engaged in by Purchaser, [WSP] and the Acquired Business at any time prior to or after the Final Effective Date." I find that Concord is likely to succeed in proving the Ryerson Transactions represent business that is competitive with steel cutting, whether through the use of high definition plasma, laser, saw, or oxyfuel, which is a "type of business" engaged in by WSP before and after the effective date of the APA, September 19, 2006.[67] The question remains whether the Purchaser and the Acquired Business also engaged in steel cutting at any of the relevant times.[68]

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[67] *See* APA at 1 and § 1.

[68] None of the parties discussed the implication of "and" in this context. Because the APA conspicuously uses "or" in subparagraph (i)'s parallel clause, I infer the parties purposefully used "and" in subparagraph (ii) to mean that for a commercial relationship or enterprise to be "Competitive Business," it must be competitive with the type of business engaged in by "Purchaser, [WSP] and the Acquired Business" concurrently, either before or after September 19, 2006.

Under the APA, the "Purchaser" is CRC Wilmington Acquisition, LLC.[69] Concord is the sole stockholder of and successor in interest to CRC Wilmington Acquisition, LLC.[70] The record indicates Concord engaged in the cutting of steel parts both before and after the Effective Date of the APA,[71] which I have concluded is likely to be shown to be a type of business with which the Ryerson Transactions are competitive. I now turn to the "Acquired Business."

"Acquired Business" is defined in the APA as follows:

> **"***Acquired Business" shall mean the business of designing, manufacturing and selling counter weights and plate steel products***,** *including without limitation*, sub assembly components for the following: man lifts, shipbuilding, military applications and forestry as well as *other components made from plate steel that a customer might require (but excluding the Defense Business, Shipbuilding, Wind Power Generation and Other Permitted Businesses*).[72]

First, consistent with clause (b)'s reference to other commercial enterprises (*e.g.*, WSP and the Purchaser), I interpret "the business of designing, manufacturing and selling . . ." in the definition of "Acquired Business" as referring to an ongoing commercial enterprise (and not a commercial relationship). Second, I interpret the phrase, "including without limitation" to mean the enumerated components following that phrase are examples only.

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69 *See* APA at 1.

70 Compl. ¶ 1.

71 *See id.* ¶¶ 5, 7, 19. *See also* Vesey Dep. at 13, 19-20, 40, 70-71.

72 APA § 1 (emphasis added).

The only limitation, then, is the parenthetical carve-out excluding the defense,[73] shipbuilding, and wind power generation businesses. I therefore find preliminarily that the cutting of steel plates through the use of high definition plasma, oxyfuel, or other known means is a type of business the Acquired Business engaged in both prior to and after the Final Effect Time.

Thus, I conclude Concord has shown a reasonable probability of success of demonstrating the Ryerson Transactions are "Competitive Business" under subparagraph (ii). The Court still must address the carve-out, however, to determine if the Ryerson Transactions are subject to Section 7.7(b) of the APA.

c. Is the Ryerson Business an "Other Permitted Business[]"?

The Ryerson Transactions do not fall under the carve-out, "except for the Defense Business, Ship Building, Wind Power Generation and Other Permitted Businesses."[74] Neary admitted WSP's relationship with Ryerson would not qualify as being part of the

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[73] Although the "Defense Business" is explicitly carved-out, the preceding clause refers to "military applications" as an example of "Acquired Business." These clauses do not appear to conflict, however, because the APA defines "Defense Business" as "the manufacture, design and sale of steel parts and sub assemblies designed and used exclusively in the construction of military vehicles or ballistic resistant compounds." APA § 1. The universe of products with military applications is probably broader than the exclusion for military vehicles and ballistic resistant compounds.

[74] The parties did not address whether the carve-out applies to both subparagraphs (i) and (ii), or only to subparagraph (ii). For purposes of this preliminary injunction opinion only, I assume, without deciding, the carve-out applies to both subparagraphs.

defense, ship building, or wind power generation industries.[75] Thus, the only way the Ryerson Transactions could fall within the exclusionary clause would be if they qualified as "Other Permitted Businesses."

WSP and Neary contend the Ryerson Transactions fall under the defined term "Other Permitted Businesses," and thus are not "Competitive Business."[76] In that regard, the APA provides: "'Other Permitted Businesses' shall mean, *subject to the written consent and agreement between [Concord] and [Neary]*, the manufacture, design and sale of steel parts and services, but excludes in all cases the business of CRC as of the date hereof."[77] Under this definition, for any business to be considered "Other Permitted Business[]," there must be a written agreement between Concord and Neary to that effect. The record contains no evidence of any such agreement; hence, the Ryerson Transactions do not qualify for the carve-out as "Other Permitted Businesses."

I therefore hold Concord is reasonably likely to succeed in proving the Ryerson Transactions were prohibited "Competitive Business" in breach of WSP and Neary's obligations under the APA. Before turning to the other requirements for preliminary injunctive relief, *i.e.*, a threat of imminent, irreparable harm, and the balance of the equities, however, I briefly address Defendants' waiver argument.

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75 *See* Neary Dep. at 31.

76 *See* DAB at 10-12.

77 APA § 1 (emphasis added).

3. Has Concord waived its right to enforce the restrictive covenants?

WSP and Neary contend Concord waived its right to enforce the restrictive covenants because it "allowed WSP to provide high definition plasma cutting to Ryerson-Philadelphia for nearly a year without any . . . objection."[78] Concord replies that WSP and Neary never advised Concord that they would be taking Ryerson's orders for high definition plasma cutting, and that Concord was unaware of WSP's commercial relationship with Ryerson until October 2007.[79]

The parties presented conflicting evidence as to when Concord learned about WSP's Ryerson business involving high definition plasma cutting. In December 2006, when Concord was working out of WSP's facility, Woislaw claims that he notified two Concord employees of the Ryerson order, which required use of a high definition plasma machine, and that sometime thereafter he discussed the Ryerson order with Vesey.[80] At that time, nobody from Concord informed Woislaw that WSP's acceptance of that kind of work from Ryerson would violate the APA.[81] Neary claims either he or Woislaw informed Concord of WSP's Ryerson business around February 2007, and Concord at

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78 DAB at 23.

79 *See* PRB at 14-16.

80 Woislaw Dep. at 20-21; Tr. at 62-63 (Woislaw). Woislaw's discussions of the Ryerson order took place before WSP quoted the Ryerson order. *See* Tr. at 62 (Woislaw).

81 *See* Tr. at 64 (Woislaw).

least knew of WSP's commercial relationship with Ryerson.[82] Nothing in the record, however, shows that after accepting Ryerson's order in February 2007, WSP told Concord of its ongoing commercial relationship with Ryerson.[83] Indeed, Concord's Vesey denies knowing of that relationship until October 2007, when an ex-employee, Enrique Benavides, told him WSP was working on an order for Ryerson.[84]

Based on this conflicting testimony and related factual disputes, and the absence of either a written authorization under the "Other Permitted Businesses" carve-out or a specific disclosure to Vesey of the Ryerson Transactions, I conclude Concord is likely to succeed in rebutting Defendants' waiver defense. I therefore hold that Concord has shown a reasonable probability of success on its breach of contract claim against WSP and Neary.[85]

C. Is There an Imminent Threat of Irreparable Injury?

Delaware courts have "consistently found a threat of irreparable injury in circumstances when a covenant not to compete is breached," and "use injunctive relief as

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82 Neary Dep. at 78.

83 *See* Tr. at 62 (Woislaw); Woislaw Dep. at 30-32; *see also* Neary Dep. at 62 (stating the Ryerson business began in February 2007).

84 *See* Vesey Dep. at 28.

85 At this early stage of the litigation, none of the parties has made a sufficient showing on their respective claims of unclean hands to make them germane to this decision on Concord's preliminary injunction motion. *Compare* DAB at 27 *with* PRB at 19.

the principal tool of enforcing covenants not to compete."[86] "Unless parties . . . realize that injunctive relief should be expected in the event of a clear breach, non-competition agreements will not produce their intended effect, breaches will proliferate, and complicated damage inquiries into the 'what might have been' world will ensue."[87]

The irreparable harm allegedly caused by the Ryerson Transactions "is the loss (or foreseeable loss) of client goodwill, and [Concord's] suffering of the use of [WSP's] client connections against it."[88] Furthermore, on a motion for a preliminary injunction, a contractual stipulation of irreparable harm may suffice to demonstrate irreparable harm.[89] In that respect, Section 7.7(b) of the APA states in pertinent part:

> [WSP] and [Neary] acknowledge that the Purchaser would be irreparably harmed and that monetary damages would not provide an adequate remedy to Purchaser in the event the covenants contained in this Section 7.7 were not complied with in accordance with their terms. Accordingly, [WSP] and [Neary] agree that any breach or threatened breach by any of them of any provision of this Section 7.7 shall entitle Purchaser to injunctive and other equitable relief to secure the

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86 *Hough Assocs. v. Hill*, 2007 Del. Ch. LEXIS 5, at *64-65 (Jan. 17, 2007) (citing *Tristate Courier & Carriage, Inc. v. Berryman*, 2004 Del. Ch. LEXIS 43, at *55 n.147 (Apr. 15, 2004); *Singh v. Batta Envtl. Assocs., Inc.*, 2003 Del. Ch. LEXIS 59, at *33 (May 21, 2003); *Vitalink Pharmacy Servs., Inc. v. Grancare, Inc.*, 1997 Del. Ch. LEXIS 116, at *43-44 (Aug. 7, 1997)).

87 *Id.* at 66.

88 *See Tristate Courier & Carriage*, 2004 Del. Ch. LEXIS 43, at *55.

89 *See Gildor v. Optical Solutions, Inc.*, 2006 Del. Ch. LEXIS 110, at *38 (June 5, 2006) (citing *Kan. City S. v. Grupo TMM, S.A.*, 2003 Del. Ch. LEXIS 116, at *20-21 (Nov. 4, 2003); *Cirrus Holding Co. v. Cirrus Indus., Inc.*, 794 A.2d 1191, 1209-10 (Del. Ch. 2001); *True N. Commc'ns, Inc. v. Publicis S.A.*, 711 A.2d 34, 44 (Del. Ch.), *aff'd*, 705 A.2d 244 (Del. 1997)).

> enforcement of these provisions, in addition to any other remedies . . . which may be available to the Purchaser.[90]

Defendants have not advanced any persuasive reason for this Court to refuse to give effect to this provision. Thus, I find Concord has sufficiently demonstrated an imminent threat of irreparable injury.

D. Does the Balance of the Equities Favor Issuance of the Requested Relief?

The third prong of the test for preliminary injunctive relief is the balance of equities. The Court must balance the harm Concord would suffer if relief is denied against the harm to WSP and Neary if the preliminary injunction is granted.

In the circumstances of this case, the balance of the equities is neutral or tips slightly in Concord's favor. Neary testified that, at the time of the argument, WSP had completed all of Ryerson's purchase orders.[91] Nothing in the record developed as of the conclusion of the argument suggests WSP's services to Ryerson were unique or so specialized that Ryerson or JLG would be seriously harmed, if their source for that service were interrupted briefly, while they found an alternate supplier. In contrast, the failure to issue an injunction reasonably could lead to irreparable harm to Concord. At a minimum, Concord's bargained for contractual right to preclude Neary and WSP from competing in "Competitive Business" would be lost in the absence of an injunction. The damage from Concord's loss of that right likely would be difficult to quantify.

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90 APA § 7.7(b).

91 *See* Tr. at 73.

E. Defendants' Post-Argument Supplementary Submissions

After having had a full opportunity to be heard at the March 17, 2008 hearing on the preliminary injunction motion, Defendants sought leave on March 26 to file two supplemental affidavits from its previous affiants, Neary and Raymond DeLuca of Ryerson, in opposition to Concord's motion. By letter dated March 27, Concord objected to that request and asked that the supplementary affidavits be stricken. For the reasons stated below, I hold that the supplementary affidavits are untimely and therefore should be stricken. Furthermore, even if I were to have considered those affidavits, they would not have caused me to change my decision to grant the preliminary injunction.

Concord commenced this action on November 21, 2007, and promptly moved for a preliminary injunction. The parties engaged in fairly extensive discovery and agreed to a court-approved schedule calling for a hearing on Concord's motion on March 4, 2008. In mid-February, Defendants requested a postponement of the hearing based on certain family obligations of one of its counsel. In a telephone conference on February 21, 2008, the Court entered a revised scheduling order moving the hearing date to March 17 and extending the dates for completion of the related briefing. By letters dated March 12 and 13, 2008, Defendants' counsel sought leave to present live testimony from some of their witnesses at the hearing and to file an affidavit from an additional witness, Raymond DeLuca. Over Concord's objection, I granted both of those requests.

Against this background, there is no question Defendants had a full and fair opportunity to present their case in opposition to the preliminary injunction motion on March 17. The evidence they submitted in connection with that hearing included the

affidavits of Neary and DeLuca and live testimony of Neary and Defendant Woislaw. Nevertheless, after hearing the Court was inclined to grant the preliminary injunction, Defendants sought leave on March 26 to file additional affidavits from Neary and DeLuca. Concord opposed that request as untimely and not based on any newly discovered evidence or other claim the additional information in the affidavits was not available earlier. I consider Concord's objections well taken and will strike the supplementary affidavits on those grounds.

In addition, I note that there are inconsistencies among at least some of the statements in the supplementary affidavits and the other evidence previously presented by Defendants. At a minimum, these apparent inconsistencies undermine the reliability of the new affidavits and most likely would necessitate additional discovery, which would be inconsistent with the expedited and interim nature of a preliminary injunction proceeding. Assuming the new allegations are true and accurate, they indicate that WSP and its employees will suffer serious consequences as a result of a preliminary injunction and that nonparty Ryerson will be inconvenienced by having its source of supply interrupted for up to 120 days. In the context of the thoroughly negotiated APA and the importance of the restrictive covenants in Section 7.7 to Concord as part of the underlying transaction, the alleged harm to WSP and Ryerson is not so significant that it would cause the balance of the equities to tip materially in Defendants' favor or warrant denial of the preliminary injunction motion.

III. CONCLUSION

For the reasons stated, I grant Concord's motion for preliminary injunction. The Court is entering the attached Preliminary Injunction Order concurrently with this memorandum opinion. Based on the terms of § 7.7 of the APA, I also have determined that no bond need be posted.[92]

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[92] In response to a question the Court raised at argument as to whether a bond would be required for any preliminary injunction, Concord submitted a letter, dated March 31, 2008, noting that § 7.7(b) of the APA provides: "If any party brings an action to enforce this Section 7.7 or to obtain damages for a breach thereof, *such party shall not be required to post bond.*" APA § 7.7(b) (emphasis added). Concord argues that, although Court of Chancery Rule 65 requires a bond to accompany injunctive relief, Defendants contractually agreed to waive that requirement in the APA. Defendants contend there is no Delaware authority that even suggests parties could extinguish the security requirement of Rule 65 by agreement or otherwise. The only case on point cited by either party is *Diaz v. John Adcock Ins. Agency*, 729 So.2d 465 (Fl. App. 2d Dist 1999), which recognized a contractual waiver of a bond requirement virtually identical to that in Rule 65. Because the APA represents an agreement between sophisticated, well represented parties, including corporations, and Defendants have not articulated any reason to disregard the parties' express agreement to waive a bond, I consider *Diaz* persuasive precedent and will enforce that agreement. *See also AmeriSpec, Inc. v. Metro Inspection Servs.*, 2001 U.S. Dist. LEXIS 9259, at *21-22 (N.D. Tex. July 3, 2001). Therefore, Concord will not be required to post a bond. I do not intend the absence of a bond requirement, however, to diminish in any way Concord's potential liability for any damages Defendants incur, if the preliminary injunction proves to have been granted improvidently. *Cf. Helene Curtis, Inc. v. Nat'l Wholesale Liquid.*, 890 F. Supp. 152, 160-61 (E.D.N.Y. 1995).