IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHARTIS WARRANTYGUARD, INC., Plaintiff, v. NATIONAL ELECTRONICS WARRANTY, LLC, Defendant.	)	C.A. No. 5764-VCP

MEMORANDUM OPINION

Submitted: October 20, 2010
Decided: January 28, 2011

Donna L. Culver, Esquire, MORRIS, NICHOLS, ARSHT & TUNNELL, LLP, Wilmington, Delaware; *Attorneys for Plaintiff Chartis WarrantyGuard, Inc.*

P. Clarkson Collins, Jr., Esquire, MORRIS JAMES LLP, Wilmington, Delaware; *Attorneys for Defendant National Electronics Warranty, Inc.*

PARSONS, Vice Chancellor.

This dispute is the result of a disagreement between two business partners involved in providing retailers with consumer warranty programs. Defendant, National Electronics Warranty, LLC ("NEW"), served as the administrator on contracts that were a part of this partnership. NEW, along with the AIG global property-and-casualty business (since renamed Chartis), entered into a joint venture that created plaintiff, AIG Warranty Guard, which later was renamed Chartis Warranty Guard ("CWG" or the "Company") to serve as an obligor on retailer service contracts. Certain AIG insurance affiliates provided the insurance coverage for the Company's obligations (collectively the "Chartis Affiliated Insurers").[1]

In the course of administering the various retailer service contracts, NEW has collected a large volume of data. This information includes publicly available information, such as product name and SKU number, as well as more commercially sensitive information, such as that relating to pricing. NEW apparently has provided some of this information to competitors of CWG and the Chartis Affiliated Insurers, and it allegedly will allow these competitors to compete more effectively with CWG and the Chartis Affiliated Insurers. Moreover, NEW itself allegedly has used this information in its effort to set up its own obligor entity to compete directly with CWG.

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[1] Section 11.1 of the Cooperation and Services Agreement (the "CSA") defines AIG Insurers as any member company of AIG that provides a Program Policy. This section of the CSA also grants these insurers third party beneficiary status under that agreement. AIG subsequently renamed its AIG property-and-casualty insurance line Chartis. Hence, for purposes of this Memorandum Opinion, Chartis Affiliated Insurers has the same meaning as AIG Insurers in the CSA.

The issue now before the Court is whether NEW has an ownership right in this data, and thus is entitled to use and share the information. The Company argues that the CSA grants it exclusive ownership of all the data relating to the programs collected by NEW, while NEW contends that CWG has, at most, a nonexclusive right to use this information. The parties agreed in the CSA that an arbitrator ultimately will determine disputes such as the current one over the ownership of the contested information. In the interim, however, CWG seeks a preliminary injunction from this Court preventing NEW from continuing to share the information with third parties or using it itself to compete with CWG for business.

For the reasons stated in this Memorandum Opinion, I grant CWG's motion for a preliminary injunction in aid of arbitration.

I. BACKGROUND

A. The Parties

Defendant, NEW, is a leading professional administrator of extended service contracts. NEW is involved with most aspects of the service contract process including creating, marketing, designing, and administering the programs.

Plaintiff, CWG, is the result of a joint venture between NEW and Chartis and functions as a service contract obligor. All of the revenue generated by CWG, after payment to NEW of its fees for administrative services, is passed along to Chartis Affiliated Insurers.

B. Facts

In 1996, NEW and Chartis entered into a joint venture agreement (the "JVA"), through which they created CWG.[2] Shortly thereafter, NEW and CWG entered into a July 19, 1996 Services Agreement setting forth their respective rights and responsibilities with respect to the retailer service contracts (the "Services Agreement"). Under the JVA, the relationship between Chartis, NEW, and CWG was nonexclusive, meaning that the parties were free to compete with each other, which they did. Between 1996 and 2006, both NEW and CWG obtained and cultivated various retailer relationships that they added to the Services Agreement.

Generally speaking, CWG and NEW act as partners in providing service contract programs. Retailers offer customers an extended warranty on certain consumer goods, such as a television, that provides for repair or replacement of the good in the event that it fails for certain reasons. Although a given service contract is sold by a retailer, CWG, as obligor, has a direct contractual relationship with the individual purchaser of the service contract and is responsible for all of the obligations arising out of such contract sold under a program for which it serves as obligor. In its role as the service contract obligor, CWG functions as the general agent of the Chartis Affiliated Insurers, which means that it solicits, binds, writes, and administers insurance on the behalf of them. To cover its liabilities as obligor, CWG purchases insurance from a Chartis Affiliated Insurer. Yet,

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[2] Under the terms of the JVA, AIG owned 80% of CWG while AIWG Partners L.L.C., an affiliate of NEW, owned the remaining 20%.

CWG and Chartis Affiliated Insurers act as a single operational unit within the Chartis Warranty Division, with the premium underwritten, revenue generated, and losses being attributable to the Chartis Affiliated Insurers. CWG is a pass through entity—it has no net income, but rather passes all of its revenue on to the Chartis Affiliated Insurers.

NEW, in its role as service administrator, performs a wide variety of tasks on service contracts. NEW is involved, for example, in creating, marketing, designing, and administering the program from both the contracts and claims sides, managing the service networks, interacting with regulators, and completing all of the financial work.[3]

In September of 2006, CWG and NEW expanded their contractual relationship by entering into the CSA. The parties also executed an addendum for each retailer program, which designated the program as either a NEW Program or a CWG Program. The CSA defines a NEW Program as "a service contract program operated by a Service Contract Retailer with respect to which (a) NEW has entered into a contractual relationship with such Service Contract Retailer . . . and (b) an Addendum has been executed with respect to such program."[4] Similarly, the CSA defines a CWG Program as a "service contract program operated by a Service Contract Retailer with respect to which (a) [CWG] has entered into a contractual relationship with such Service Contract Retailer . . . and (b) an

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[3] Defs.' Ans. Br. ("DAB") 5. Similarly, Plaintiffs' Amended Opening Brief and Reply Brief are referred to as "POB" and "PRB," respectively.

[4] Aff. of Katherine J. Neikirk ("Neikirk Aff.") Ex. 3, CSA, § 1.1.

Addendum has been executed with respect to such program."[5] Collectively, NEW Programs and CWG Programs are referred to as Programs. Under both NEW Programs and CWG Programs, the relationship between the parties was the same: NEW served as administrator and CWG served as the obligor and purchased insurance from a Chartis Affiliated Insurer.

The CSA's restrictive covenants limit each party's ability to compete for Programs designated explicitly as the other party's. For example, under § 7.1 of the CSA NEW is not permitted to:

> directly or indirectly, solicit to sell, or offer administrative or insurance services or any other type of service relating to the administration of home, consumer or other agreed upon service contract programs or the provision of insurance services in connection therewith to any Service Contract Retailer under [a CWG Program].[6]

Section 7.2 imposes parallel restrictions on CWG.[7] Other than the restrictions in these two provisions, the parties were free under the JVA to compete for existing Programs.

As part of its duties under the CSA, NEW collected and maintained a wide variety of data relating to the Programs, including the SKU number, product description, price band, retail selling price, term of contract, loss rates, historical loss information, customer demographics, contracts sold, service costs, profitability, type of coverage, effective date

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5 *Id.*

6 *Id.* § 7.1.

7 *Id.* § 7.2.

of the service contract, and manufacturer's warranty terms.[8] Section 8.2 of the CSA contains certain provisions regarding the books, records, and accounts relating to the Programs subject to the CSA. Sections 8.2 (b) and (c) provide in pertinent part:

> (b) All books, records and accounts relating to each of the Programs, with the exception of computer software and software documentation, are the property of [CWG] whether paid for by [CWG] or not.
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> (c) NEW shall maintain a separate copy of all computer stored data relating to each Program which shall be available at all times to [CWG], a copy of which shall be furnished within a reasonable period of time after a request is made by [CWG].

Section 9.1 of the CSA further stipulates that NEW would "not disclose Confidential Information to any third party . . . without the prior written approval of [CWG]." NEW principally provided data to CWG through a database called "Profit Cube," but also supplied CWG with confidential information through other informal communications.[9]

In 2008, NEW sought to create its own obligor entity to replace CWG.[10] Initially, NEW's plan was to have the obligor backed by AIG insurance paper. NEW alleges that after the near implosion of AIG (and the resulting risk of default under the Program service contracts), it decided to look for other possible alternatives. NEW's plan was to

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8 Frankel Dep. 233-34, 245, 247; Neikirk Aff. Ex. 37. Unless otherwise noted, the deposition excerpts cited in this Memorandum Opinion are contained in the POB Compendium of Deposition Transcript Excerpts.

9 Frankel Dep. 236.

10 Aff. of Kim Reinecke ("Reinecke Aff.") ¶ 4; Frankel Dep. 152-53.

utilize a NEW-owned obligor entity for its Programs, which would hold the unearned reserves, bear the primary risk associated with service contract programs to the extent of its reserves, and obtain excess of loss insurance coverage from an insurance company to cover the excess risk.[11] NEW identified a number of its service contract Programs that it planned to move (collectively, the "Threatened Programs") to its revised program structure.[12] In a meeting on November 19, 2009, NEW presented its proposed restructuring to AIG and told CWG that other insurers were submitting proposals for insuring the Threatened Programs.[13] NEW again met with representatives of CWG and various Chartis Affiliated Insurers on January 19, 2010 to discuss further the Threatened Programs and the open competition among insurers.[14]

As part of the restructuring process, NEW sent a Request for a Proposal ("RFP") for excess of loss insurance to Chartis Affiliated Insurers, as well as other insurers. NEW claims that as part of the RFP process it had to share historical information related to the Threatened Programs with potential bidders.[15] NEW, therefore, admits having shared

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11 Nader Dep. 140-43; Frankel Dep. 129; Burns Dep. 102; Reinecke Aff. ¶ 5.

12 Reinecke Aff. ¶ 5. The programs NEW has sought to move to its revised structure, including the approximately thirteen Threatened Programs, are: Office Depot, Overstock.com, American TV & Appliance, Verizon, B&H Photo, Meijer, BJ's Wholesale, HH Gregg, JC Penney, DirecTV, Luxotica, Shopko, Target, Rogers Enterprises, Fingerhut, Ingram Micro, Guitar Center, and Wal-Mart.

13 Nader Dep. 28-29, 36, 199, 238.

14 Nader Dep. 248-49; Shangold Dep. 226-27.

15 DAB Compendium of Deposition Transcript Excerpts, Nader Dep. 144-45; Frankel Dep. 208-12, 220-21.

performance data it collected, including loss ratio performance, profitability, and earnings curves relating to the seven largest NEW Programs: DirecTV, Wal-Mart, HH Gregg, JC Penney, Kmart, Target, and Office Depot.[16] CWG vigorously disputes NEW's alleged need to share this information and denies having had any knowledge the information was shared until much later.

On April 22, 2010, NEW informed CWG that it had decided to utilize CNA Financial Corp. ("CNA") as the insurer for the NEW-owned obligor in its revised program structure on a go-forward basis. At this point, CWG advised NEW that the Chartis Affiliated Insurers were interested in obtaining a loss portfolio transfer ("LPT").[17] This is because the Chartis Affiliated Insurers hold a portfolio of service contracts that have a remaining tail period before they will expire.[18] These are contracts for which Chartis Affiliated Insurers already have received the premium payments but which still have a period of coverage during which the insurers will have to make payments. Moreover, those payments are likely to exceed the retained premiums. An LPT agreement with CNA, for example, would transfer the risk of such future losses under the existing contracts to CNA or a third party in exchange for the Chartis Affiliated Insurers making a payment to CNA. Hence, in order for CNA to consider taking on an LPT, CNA

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16 Nader Dep. 160, 191; Aff. of Brian M. Lutz ("Lutz Aff.") Ex. 5; *see* Shangold Dep. 179, 181.

17 Nader Dep. 269-70.

18 Burns Dep. 123-24; Frankel Dep. 225.

would have to determine the amount of exposure it potentially would accept.[19] NEW expressed a willingness to assist the Chartis Affiliated Insurers in effectuating such an LPT.[20]

NEW's decision to transition numerous contracts away from CWG created tension between the parties. This tension increased in the spring of 2010 when NEW hired away Matthew Frankel, CWG's long-time president. Unbeknownst to CWG, NEW and Frankel had been in negotiations regarding his move since January of 2010 while Frankel simultaneously was leading CWG's negotiations with NEW as to the restructuring program and the possible use of Chartis Affiliated Insurers in it.[21] On April 30, 2010, Frankel resigned from CWG and commenced work at NEW a few weeks later.

In a June 7, 2010 meeting, CWG, through its in-house counsel, Frank LaVaglia, told NEW that CWG believed NEW had no right to keep data related to the NEW Programs and that CWG might require that the data be returned or destroyed.[22] NEW promptly expressed its disagreement with CWG's claim.[23] Then, on June 14, 2010, LaVaglia sent a letter to NEW, stating the Company's belief that NEW's contemplated

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19 Burns Dep. 133-34; Frankel Dep. 225-26.

20 Nader Dep. 285-86; Burns Dep. 133-34.

21 *See* Frankel Dep. 135-73; Nader Dep. 313-14, 330-31; Lutz Aff. Exs. 21-22, 24-28.

22 Nader Dep. 272-73; Shangold Dep. 274; LaVaglia Dep. 216.

23 Nader Dep. 273-74; *see* Shangold Dep. 274.

replacement of CWG as program obligor for NEW Programs would breach the CSA and reminding NEW that CWG owns the data.[24]

Throughout the summer of 2010, NEW continued moving the NEW Programs to the NEW-owned obligor and kept both CWG and Chartis Affiliated Insurers apprised of that process.[25] The switching costs involved, including printing costs, legal costs, filing fees, and client related transfer costs, exceeded one million dollars.[26] All of the NEW Programs, with the possible exception of Wal-Mart, now have been transitioned to the NEW-owned obligor. On August 5, 2010, CWG learned from Paul Shangold, NEW's CFO, that NEW had already shared historical performance information of the kind at issue here with CNA. Soon thereafter, on August 26, 2010, CWG filed this action.

Section 14.1 of the CSA provides for a dispute resolution process. After receipt of written notice from the complaining party, the parties must attempt to resolve their dispute in accordance with certain intermediate procedures set forth in this provision. If that fails, either party is entitled to seek binding arbitration. Under Section 14.2, the arbitration proceeding is to occur before the American Arbitration Association and be governed by their Commercial Arbitration Rules. The CSA, however, also authorizes a party to seek a preliminary injunction in court pending resolution of the arbitration.[27] In

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24 Lutz Aff. Ex. 29.

25 Burns Dep. 151-52, 157-58; LaVaglia Dep. 217-18.

26 Reinecke Aff. ¶ 7; Nader Dep. 235-37.

27 CSA § 14.8.

or around October 2010, CWG filed a demand for arbitration in accordance with Section 14.

C. Procedural History

On August 26, 2010, CWG filed a Complaint seeking to preliminarily enjoin NEW during the pendency of an anticipated arbitration from using information that had been collected by NEW in its role as administrator of the various service contracts. Count I of the Complaint accuses NEW of breaching the CSA by sharing Protected Information with third parties, in violation of Section 9.1.[28] Count II alleges that NEW misappropriated trade secrets, while Count III claims that NEW engaged in unfair competition by improperly using CWG's Protected Information to compete as an obligor with CWG. Concurrent with filing its Complaint, CWG moved for a preliminary injunction until completion of the arbitration to prevent NEW from: (1) using CWG's Protected Information for any purpose other than fulfilling its duties under the CSA; (2) using CWG's Protected Information in connection with any bid or proposal for a warranty service program; (3) disclosing CWG's Protected Information to third parties; and (4) entering into or performing under any contract whose performance by NEW would involve the use of CWG's Protected Information. On October 20, this Court heard

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[28] In its Complaint, CWG defines "Protected Information" to include the data NEW provided to CWG through populating the so-called Profit Cube and the enormous amount of what CWG alleges is highly confidential data relating to the details of tens of millions of claims made in the context of the CSA against service contracts on which CWG and Chartis Affiliated Insurers have served as the service contract obligor and underwriters for the past fourteen years. Compl. ¶¶ 27-29.

arguments on Plaintiff's motion. This Memorandum Opinion reflects my ruling on that motion.

D. Parties' Contentions

CWG asserts that Section 8.2 of the CSA makes clear that ownership of all records relating to the Programs exclusively resides with CWG. As a result, Plaintiff contends that NEW breached the CSA by sharing Protected Information with third parties for the purpose of replacing CWG as obligor. Plaintiff further contends that NEW has used and will continue to use the Protected Information for its own benefit to unfairly compete with CWG for obligor business. Moreover, CWG claims that it will be irreparably harmed if NEW is allowed to continue misusing its Protected Information because it will suffer competitive injury to its ability to win new business and to its business goodwill and brand name. Lastly, CWG avers that the balance of the equities tilts in its favor, thus warranting the granting of a preliminary injunction.

In opposing a preliminary injunction, NEW claims that Section 8.2 of the CSA grants CWG only a nonexclusive ownership interest in the data. According to NEW, it would be nonsensical for the CSA to give CWG sole ownership of data that NEW collected. Additionally, NEW contends that, even if the Court concludes that the CSA unambiguously grants CWG an exclusive ownership interest in the data, CWG's claim is barred by laches due to its unreasonable delay in asserting it. NEW alleges that it suffered prejudice from the delay because, for example, it has expended more than a million dollars in switching the NEW Programs to the new obligor entity. By contrast, NEW disputes CWG's contention that it will suffer irreparable harm. Rather, NEW

argues that any alleged damages suffered by CWG can adequately be remedied by money damages. NEW also claims that the equities weigh in its favor because without the ability to use the data in question it would be nearly impossible for NEW to fulfill its contractual obligations.

II. ANALYSIS

Plaintiff seeks to preliminarily enjoin NEW's use of the Protected Information pending proceedings before and a ruling from an arbitral tribunal. Generally, a party moving for a preliminary injunction must demonstrate: (1) a reasonable probability of success on the merits; (2) that they will suffer irreparable injury if an injunction does not issue; and (3) that the balance of the equities favors the issuance of the injunction.[29] When, as here, an injunction is sought in aid of arbitration, however, the "likelihood of success" prong must be examined on two levels: (1) the moving party's entitlement to arbitration; and (2) the merits of its arbitration claims.[30] In this case, it is undisputed that CWG must arbitrate its claims against NEW.[31] Thus, as this Court held in *Eastman Kodak*, "where the right to arbitration is clear, the analysis of the merits of the underlying claims may be more limited."[32] Under this more limited standard, a party seeking a

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29 *Revlon v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 179 (Del. 1986).

30 *Eastman Kodak Co. v. Cetus Corp.*, 1991 WL 255936, at *5 (Del. Ch. Dec. 3, 1991).

31 CSA § 14.2.

32 1991 WL 255936, at *5.

preliminary injunction must demonstrate "a reasonable probability that its arbitration position is sound."[33]

A. Likelihood of Success on the Merits

1. Breach of contract claim

CWG alleges that NEW breached the CSA by misusing the Company's Protected Information. The CSA provides that disputes arising out of or relating to the CSA shall be governed by New York law.[34] To prove a breach of contract claim, a party must demonstrate (1) the specific terms of the agreement, (2) consideration, (3) plaintiff's

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[33] *Flight Options Int'l, Inc. v. Flight Options, LLC*, 2005 WL 2335353, at *6 (Del. Ch. July 11, 2005) (movant succeeded "under the relaxed standard associated with preliminary injunction in aid of arbitration in demonstrating a likelihood of success) (quoting *Kansas City S. v. Grupo TMM, S.A.*, 2003 WL 22659332, at *2 (Del. Ch. Nov. 4, 2003)); *see also Eastman Kodak*, 1991 WL 255936, at *5 (finding that "viable" and "plausible" arbitration claims satisfied preliminary injunction requirement of establishing reasonable likelihood of success on the merits).

NEW disputes CWG's contention that the applicable standard for success on merits is more relaxed because the relief it seeks is an injunction during the pendency of an arbitration. Indeed, NEW argues that the relief sought by CWG constitutes a mandatory injunction and therefore requires an even higher standard than usual, *i.e.*, that CWG prove that it is entitled to judgment as a matter of law on its claims. DAB 34 (citing *Pitts v. City of Wilmington*, 2009 WL 1204492, at *3 (Del. Ch. Apr. 27, 2009)). But that contention is unconvincing. The relief sought by CWG is more limited than suggested by NEW; therefore, the applicable standard is that articulated by CWG. Moreover, even if I applied the general standard for a preliminary injunction and required CWG to prove a likelihood of success on the merits of its claim, the result here would be the same.

[34] CSA § 14.4.

performance, and (4) defendant's breach of the agreement.[35] New York law requires that agreements be construed in accordance with the parties' intent.[36] Thus, where a written agreement is complete, clear, and unambiguous on its face, it must be enforced according to the plain meaning of its terms.[37] In New York, as in Delaware, "[t]he construction and interpretation of an unambiguous written contract is an issue of law within the province of the court."[38]

It is undisputed that the CSA is a binding agreement entered into by the parties in exchange for mutual consideration. Therefore, to succeed on its breach of contract claim, CWG must show that NEW breached specific terms of the CSA.

CWG contends that the language of § 8.2(b) clearly and unambiguously gives it an exclusive ownership interest in the data collected by NEW under the CSA regarding the Threatened Programs. NEW counters that the contract gives CWG, at most, a nonexclusive ownership interest in that data. Alternatively, NEW asserts that the CSA is ambiguous in that regard and seeks to introduce extrinsic evidence to prove its case.

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35 *Sylmark Hldgs. Ltd. v. Silicone Zone Int'l Ltd.*, 783 N.Y.S.2d 758, 769 (Sup. Ct. N.Y. Cty. 2004).

36 *See, e.g.*, *Greenfield v. Philles Records, Inc.*, 780 N.E.2d 166, 170-71 (N.Y. 2002) (noting that the best evidence of what the parties intend is what they say in their writing); *Law Debenture Trust Co. of N.Y. v. Petrohawk Energy Corp.*, 2007 WL 2248150, at *5 (Del. Ch. Aug. 1, 2007) (citing *Reiss v. Fin. Performance Corp.*, 715 N.Y.S.2d 29, 34 (N.Y. App. Div. 2000)), *aff'd*, 947 A.2d 1121 (Del. 2008).

37 *See, e.g. Greenfield*, 780 N.E.2d at 170-71; *R/S Assocs. v. N.Y. Job Dev. Auth.*, 771 N.E.2d 240, 242 (N.Y. 2002).

38 *Petrohawk Energy Corp.*, 2007 WL 2248150, at *5.

Extrinsic evidence of the parties' intent may be considered only if the contract is ambiguous.[39] That is, a court first must decide whether a contract is unambiguous as a matter of law, and, if it so finds, it must restrict its analysis to the four corners of the document.[40] Clear contractual language does not become ambiguous, however, simply because the parties to the litigation put forth different interpretations of it.[41] Rather, a contract is ambiguous "where its terms suggest more than one meaning when viewed objectively by a reasonably knowledgeable person who has examined the context of the entire integrated agreement."[42] Conversely, a contract is unambiguous "if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.'"[43] Thus, if an agreement is reasonably susceptible on its face of only one meaning, a court may not reshape the contract to fit its personal notions of

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39 *Greenfield*, 780 N.E.2d at 170-71.

40 *R/S Assocs.*, 771 N.E.2d at 242-43 (extrinsic evidence is generally inadmissible to add to, vary, or create an ambiguity in a written agreement); *see also Master-Built Const. Co. v. Thorne*, 802 NY.S.2d 713, 714 (N.Y. App. Div. 2005).

41 *See Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 869 N.Y.S.2d 511, 517 (N.Y. App. Div. 2008), *aff'd*, 13 N.Y.3d 398, 920 N.E.2d 359 (N.Y. 2009).

42 *See, e.g.*, *Minerals Techs., Inc. v. Omya AG*, 406 F. Supp. 2d 335, 337 (S.D.N.Y. 2005) (citing *Scholastic, Inc. v. Harris*, 259 F.3d 73, 82 (2d Cir. 2001)); *Riverside S. Planning Corp.*, 869 N.Y.S.2d at 516 (noting that a contract is ambiguous "if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings").

43 *Greenfield*, 780 N.E.2d at 170-71.

fairness and equity.[44] In determining whether a contract is ambiguous, New York courts give words and phrases employed in the contract their plain and commonly-accepted meaning.[45]

a. Is the CSA ambiguous?

CWG has made a prima facie showing that Section 8.2 of the CSA gave it an ownership interest in the "books, records and accounts" of the Programs. As CWG points out, this Court previously has found that contractual references to "all books and records" are to be construed in "broad" terms.[46] This conclusion is bolstered by the fact that the parties explicitly carved out two exceptions—for NEW's computer software and software documentation. Moreover, testimony of NEW's own witnesses support the conclusion that these exceptions do not include historical data.[47] Thus, based on the plain language of § 8.2(b), which provides that "[a]ll books, records and accounts relating to

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44 *Id*.

45 *Law Debenture Trust Co. of N.Y. v. Petrohawk Energy Corp.*, 2007 WL 2248150, at *6 (Del. Ch. Aug. 1, 2007) (citing *Kass v. Kass*, 91 N.Y.2d 554, 566-67 (N.Y. 1998)), *aff'd*, 947 A.2d 1121 (Del. 2008).

46 *See, e.g.*, *Mickman v. Am. Int'l Processing L.L.C.*, 2009 WL 2244608, at *2 (Del. Ch. July 28, 2009).

47 *See* Nader Dep. 71 ("Q. And to your understanding, does software, would that entail the data on—collected on that software? A. Gosh. . . . I guess not. Q. Okay. What about Software documentation? . . . A. That would be the documentation as to how the code was written, and all the work that the technical guys do when they create software to document why they did what they did and how they put it all together."); Shangold Dep. 22 ("Q. What's your understanding, your best understanding of what software documentation is? A. If you are going to create a program, you would document either what that program would do or the actual coding for the program.").

each of the Programs, with the exception of computer software and software documentation, are the property of [CWG] whether paid for by [CWG] or not," Plaintiff has demonstrated a reasonable probability that its arbitration position, that the historical Program data collected by NEW falls within the "books, records, and accounts" owned by CWG, is sound.

Furthermore, CWG has presented evidence to show that it acted consistently with this interpretation in that it undertook reasonable efforts to maintain the confidentiality of the Protected Information. For example, Burns testified that access to Profit Cube is restricted tightly to a small circle of employees including a few members of the actuarial team and the IT department.[48] Moreover, Burns was periodically reminded by CWG of the confidential nature of the Protected Information and CWG further protected access to such information by using password and ID card restrictions.[49]

By contrast, NEW claims that CWG's interpretation of Section 8.2 is "unreasonable."[50] NEW asserts that CWG's construction would require NEW to relinquish any right to data it had collected during more than fifteen years of serving as a

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48 Aff. of Pat Burns ("Burns Aff.") ¶ 33.

49 *Id.* ¶ 34.

50 DAB 40.

contract administrator and even would allow CWG to instruct NEW to destroy its information.[51] According to NEW, this would be an impermissible and absurd result.

I disagree. First, the CSA relates only to actions NEW has taken pursuant to that agreement. It does not cover, for example, information NEW collected before it entered into the CSA or in connection with business outside the scope of the CSA. Second, the CSA provides for the payment of a fee by CWG to NEW for its services as the administrator on all of the Programs under the agreement. Thus, in collecting the Protected Information, NEW simply is performing the work it agreed to do under the CSA and for which it is being paid. According to the plain language of Section 8.2(b), the ownership of that information rests with CWG, not NEW. In addition, I note that NEW evidently still owns a minority interest in CWG. Third, as to the hypothetical possibility that CWG could instruct NEW to destroy the Protected Information, that may be true in the abstract, but there is no evidence that CWG has taken or is likely to take any such action. Therefore, I find unpersuasive NEW's argument that CWG's interpretation of the CSA as giving it ownership over the Protective Information would lead to an "absurd result."

Furthermore, NEW has not offered a reasonable alternative as to what the phrase "all books, records and accounts" within Section 8.2(b) means if it does not mean what

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[51] Indeed, NEW suggested that CWG's claim even might extend to information NEW collected before it had any relationship with CWG or maintained completely outside the scope of the CSA. DAB 44-45. CWG, however, has disclaimed any contention that it owns such unrelated data or seeks injunctive relief regarding it. Transcript of October 20, 2010 Argument ("Tr.") 137-38.

CWG contends. Rather than providing a clear interpretation of what Section 8.2(b) *does* mean, NEW focuses on what it *does not* mean. NEW first contends that "all books, records and accounts" does not include historical data. In support of this argument, NEW points to Section 8.2(c) of the CSA, which requires NEW to "maintain a separate copy of all computer stored data relating to each Program which shall be available at all times to [CWG]." NEW argues that because computer stored data is not specifically referenced in Section 8.2(b), books, records, and accounts do not include this information. I consider this argument dubious because there is nothing inconsistent between the language of Sections 8.2(b) and (c). The former addresses the parties' ownership rights in the disputed information, but Section 8.2(c) makes no mention of ownership interests at all. Instead, that subsection imposes a particular duty on NEW, in its role as contract administrator, to make "a copy of all computer stored data . . . available at all times to [CWG]."

NEW further argues that Section 8.2(b) of the CSA confers upon CWG, at most, a nonexclusive ownership interest in the Protected Information. I also find this argument unpersuasive. In comparison to this provision's plain statement that the "books, records and accounts . . . are the property of [CWG] whether paid for by [CWG] or not," NEW has produced no evidence in support of the argument that it also has an ownership interest in the historical data.

Accordingly, I find that there is a reasonably sound basis for CWG's claim that the CSA gave it an unambiguous and exclusive ownership interest in the Protected Information.

b. If the CSA is ambiguous, would the outcome of the analysis be different?

Even if I agreed with NEW that the meaning of "all books, records, and accounts" in Section 8.2(b) is ambiguous—thereby allowing it to introduce extrinsic evidence—I still would find that CWG has shown a sufficient likelihood of success on the merits of its breach of contract claims to support a preliminary injunction. In contending that the parties did not intend for § 8.2(b) to create an exclusive ownership interest, NEW relies, among other things, on testimony indicating that CWG and NEW never discussed the CSA giving exclusive ownership of all the information stemming from service contract Programs to CWG and that NEW's counsel never had that understanding.[52] NEW also downplays Section 8.2(b) as mere boilerplate. In that regard, NEW suggests, without producing any compelling evidence in support, that the parties included § 8.2(b) only to give CWG access to the data it would need to fulfill its regulatory obligations.[53]

The only probative evidence NEW cited pertains to CWG's agreement with New Hampshire Insurance Company ("NHIC"), one of the Chartis Affiliated Insurers. Section 14 of that agreement provides that:

> The General Agent [CWG] shall keep complete and accurate records of the business transacted by him under this agreement, including but not limited to all policy and premium records during the term of this Agreement . . . . All books, accounts, or other documents relating to the business of the Company [NHIC], except computer software systems,

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52 Aff. of Simrun Gialleonardo ("Gialleonardo Aff.") ¶¶ 4-5.

53 Tr. 85.

> are the property of the Company [NHIC] whether paid for by it or not. . . .[54]

Although the similarities between this provision and § 8.2(b) of the CSA provide some support for viewing § 8.2(b) in the nature of boilerplate, that does not deprive the section of meaning or render it less enforceable. At most, the similarities to Section 14 of the CWG/NHIC agreement might be sufficient, when considered together with § 8.2(c) on which NEW also relies, to keep alive its argument that § 8.2(b) is ambiguous in the sense that a second reasonable interpretation of it is that it merely confers a nonexclusive ownership interest on CWG.[55]

In either case, I need not decide for purposes of CWG's pending motion for a preliminary injunction whether NEW's arguments in favor of allowing extrinsic evidence

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[54] Lutz Ex. 36, CWG agency agreement with NHIC, § 14.

[55] NEW also contends that if the language in Section 14 of the CWG/NHIC agreement, discussed *supra*, that is similar to § 8.2(b) is not mere boilerplate and has the meaning CWG asserts, it would deprive CWG of standing to pursue this action. This argument is unconvincing for at least two reasons. First, NEW did not cite any authority for its lack of standing argument and essentially ignores the fact that CWG and NHIC are corporate affiliates. *See* Williamson Dep. 56-57; Frankel Dep. 17-18. In that regard, CWG avers that NHIC is prepared to formally assign to CWG all rights NHIC may have to the Protected Information. PRB 19-20 n.17. Second, as a party to the CSA, CWG has standing to seek redress from the other party, NEW, for a breach of that agreement. *See, e.g.*, *Fox v. Paine*, 2009 WL 147813, at *4 & n.19 (Del. Ch. Jan. 22, 2009); *Hajdu-Nemeth v. Zachariou*, 309 A.D.2d 578, 578 (N.Y. App. Div. 2003). Indeed, the CSA further provides that NHIC and other Chartis Affiliated Insurers "are third party beneficiaries of all covenants, representations and warranties" under the CSA. Lutz Aff. Ex. 2 § 11.1. Hence, CWG also would have standing to bring this action to enforce NHIC's rights as an intended third-party beneficiary. *See, e.g.*, *Fox*, 2009 WL 147813, at *4 & nn.21-22; *accord Nassi v. Joseph DiLemme Constr. Corp.*, 250 A.D.2d 658, 659 (N.Y. App. Div. 1998).

are valid. That is because CWG has adduced enough evidence to support its straightforward interpretation of the questioned "books, records and accounts" provision as giving it exclusive ownership of the disputed information. As previously discussed, NEW's reliance on § 8.2(c) to support a contrary interpretation is dubious. Therefore, even though it is possible that ultimately NEW might convince an arbitral tribunal that its interpretation of the CSA should control, at this preliminary stage I conclude that CWG certainly has met the relaxed standard of demonstrating that its arbitration position is sound and probably has satisfied the more general likelihood of success on the merits standard, as well.

2. Misappropriation of trade secrets and unfair competition

CWG also alleges that NEW's use of its Protected Information constituted both misappropriation of trade secrets and unfair competition. To establish a misappropriation of trade secrets claim, a claimant must show: (1) that it possesses a trade secret, and (2) that defendants are using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means.[56]

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[56] *Sylmark Hldgs. Ltd. v. Silicone Zone Int'l Ltd.*, 783 N.Y.S.2d 758, 771 (Sup. Ct. N.Y. Cty. 2004); *see also DoubleClick Inc. v. Henderson*, 1997 WL 731413, at *4 (Sup. Ct. N.Y. Cty. Nov. 7, 1997); *Anacomp, Inc. v. Shell Knob Servs., Inc.*, 1994 WL 9681, at *6 (S.D.N.Y. Jan. 10, 1994). While CWG contends that New York law governs all its claims based on the choice of law provision in the CSA, NEW argues that either Delaware, Virginia, or Illinois law applies to the misappropriation of trade secrets and unfair competition claims, because they sound in tort, and not contract. *See* DAB 48 & n.42. Article 14 of the CSA states that all "dispute[s] or disagreement[s] arising out of or relating to the Agreement" are subject to binding arbitration, and that "the arbitrators shall give effect to the substantive law of the State of New York" in adjudicating all such claims. CSA

Under this analytic framework, CWG may be able to demonstrate that its Protected Information, either discretely, in the aggregate as a compilation, or both, constitutes a trade secret that gives it a competitive advantage in pricing retailer service contracts or otherwise administering or obtaining insurance for such contracts. Moreover, the evidence of record indicates that the Company may be able to prove that it has taken adequate steps to prevent disclosure of the Protected Information and that, if improperly disclosed, the information would be valuable to competitors. Although NEW disputes those allegations and ultimately may be able to show that no trade secrets exist because, for example, the Protected Information was disseminated widely or fails to provide CWG with a competitive advantage, I find that, at a minimum, CWG has demonstrated a reasonable probability that its arbitration claim for misappropriation is sound.

Similarly, CWG asserts that NEW's use of the Protected Information constitutes unfair competition. Such a "cause of action . . . may be predicated upon . . . the alleged bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information or trade secrets."[57] Even where the underlying

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§§ 14.1, 14.2, 14.4. I consider NEW's argument in favor of applying New York law to the contract claims and the law of another state to the pending tort claims to be inconsistent with both Article 14 and the sensible administration of justice. *See Abry P'rs V, L.P. v. F & W Acq. LLC*, 891 A.2d 1032, 1047-48 (Del Ch. 2006). Accordingly, for purposes of CWG's preliminary injunction motion, I have applied New York law to all of CWG's claims.

[57] *Out of Box Promotions, LLC v. Koschitzki*, 55 A.D.3d 575, 578 (N.Y. App. Div. 2008).

information does not rise to the level of a trade secret, the unauthorized taking and exploitation of company documents for the taker's use in business is actionable as unfair competition.[58] CWG accuses NEW of engaging in unfair competition by using Protected Information to win contracts for its newly created obligor business. NEW counters by repeating its denial that CWG exclusively owns the Protected Information and alleging that CWG consented to NEW's competing with it for business serving as an obligor.

While I express no definitive or conclusive opinions on the ultimate merits of CWG's claims for misappropriation of trade secrets or unfair competition, I find that CWG has made a sufficient showing on these claims to support the issuance of a preliminary injunction in aid of arbitration. In reaching that decision, I accept as true NEW's averment that much of the Protected Information is available within the public domain. I consider it unlikely, however, that all of the discrete information is publicly available or that the compilation of such information as NEW maintains it for purposes of the CSA may be readily discovered by proper means. NEW also implicitly argues that the Protected Information is of little practical value. But, this argument rings hollow as NEW also states that insurers will not bid or have greater difficulty bidding for the service contracts without such information. Thus, CWG has adduced sufficient evidence to show that it is reasonably likely that its claims in arbitration for misappropriation of trade secrets and unfair competition are sound.

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[58] *Anacomp, Inc.*, 1994 WL 9681, at *6; *DoubleClick Inc.*, 1997 WL 731413, at *4.

B. Irreparable Harm

A preliminary injunction is an extraordinary remedy that should not be issued in the absence of a clear showing of imminent irreparable harm to the plaintiff.[59] To make such a showing, a plaintiff must demonstrate harm for which he has no adequate remedy at law and that a refusal to issue an injunction would be a denial of justice.[60] The alleged harm must be imminent and genuine, as opposed to speculative.[61] A threat of irreparable harm may be found, for example, "in cases where an after-the-fact attempt to quantify damages would 'involve [a] costly exercise[ ] in imprecision' and would not provide full, fair, and complete relief for the alleged wrong."[62]

CWG alleges that it will be irreparably harmed by NEW's use of the Protected Information in soliciting new business in its relatively new obligor business, including from retailers who had been under a CSA Program. CWG further asserts that NEW's use of its confidential data will cause injury to CWG's business goodwill and brand name. NEW responds that any injury suffered by CWG can be remedied by money damages and that a preliminary injunction is thus unnecessary.

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59 *See Baxter Pharm. Prods., Inc. v. ESI Lederle Inc.*, 1999 WL 160148, at *4 (Del. Ch. Mar. 11, 1999) (noting that a preliminary injunction should be issued only with the full conviction on the part of the court of its urgent necessity).

60 *See Aquila, Inc. v. Quanta Servs., Inc.*, 805 A.2d 196, 208 (Del. Ch. 2002).

61 *See id*.

62 *N.K.S. Distribs., Inc. v. Tigani*, 2010 WL 2367669, at *5 (Del. Ch. June 7, 2010).

Having carefully considered the evidence and arguments presented, I find CWG's position to be more convincing. In denying a motion to dismiss in *BCE Emergis Corp. v. Prison Health Services, Inc.*, the court held that injunctive relief might be appropriate where the "alleged use of the proprietary information is ongoing as part of the continuing . . . solicitation process."[63] Here, the evidence shows that the alleged wrongdoer, NEW, intends to continue using the Protected Information for its commercial advantage.[64] While it might be possible to make a reasonable estimate of the monetary damages stemming from the previous transfer of the Threatened Programs, it probably will be far more difficult to determine the damages CWG will suffer if NEW continues to use the Protected Information to compete with CWG for new business or otherwise undermine its competitive position. Under such a scenario, a damages remedy may not be available at all, if the arbitrators must make speculative assumptions, such as those relating to CWG's and NEW's likelihood of success on new bids. Therefore, CWG is likely to suffer irreparable injury because it may not have any adequate remedy at law.

C. Balance of the Equities

In addition to considering the required showings as to a likelihood of success on the merits and an imminent threat of irreparable harm, a court will not issue a preliminary injunction unless the plaintiff proves that "th[e] Court's failure to grant the injunction will

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63 2001 WL 695538, at *2 (Del. Ch. June 8, 2001).

64 *See* Frankel Dep. 184-85; Nader Dep. 342, 348.

cause [that party] greater harm than granting the injunction will cause [the other party]."[65] Thus, I also must engage in a pragmatic balancing of the equities based on the facts of this case.[66]

Based on the extensive submissions of both parties, I am persuaded that the balance of the equities tilts in favor of CWG. As previously noted, the calculation of any damages suffered by CWG may be too indefinite and speculative in nature because of the uncertainty involved in predicting the level of success that the NEW-owned obligor entity will have in winning new business and the likely gain to NEW or loss to CWG that would result. In addition, CWG probably would have a difficult time winning back any CWG Programs or prospective retailers NEW gained through the use of CWG's Protected Information.

Lastly, any harm suffered by NEW is likely to be limited in scope for two reasons. First, the preliminary injunctive relief would only apply prospectively and would allow NEW to continue its use of the Protected Information for the purpose of fulfilling its contractual obligations under the CSA. The Threatened Programs that have switched to a NEW-related obligor would be able to continue with NEW, but NEW no longer would be able to disclose to the retailers or insurers involved or use for their or NEW's own benefit the Protected Information gathered under the CSA. Second, the injunction will remain in

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65 *See, e.g.*, *N.K.S. Distribs., Inc.*, 2010 WL 2367669, at *5; *Braunschweiger v. Am. Home Shield Corp.*, 1989 WL 128571, at *1008 (Del. Ch. Oct. 26, 1989).

66 *In re Holly Farms Corp. S'holders Litig.*, 564 A.2d 342, 348 (Del. Ch. 1989).

place only until the completion of what I expect to be an expeditious arbitration proceeding.

D. Should CWG be Denied Relief on the Basis of Laches?

NEW urges this Court to deny CWG's motion for a preliminary injunction, even if it otherwise would be entitled to one, because it delayed unreasonably in seeking such relief. Defendant claims that CWG has had notice of its purported claims since at least January 2010 yet failed to bring this suit until late August. For its part, CWG denies those allegations and asserts that it did not have actual or constructive notice of NEW's breach until early August of 2010. It filed this action three weeks later.

In asserting a laches defense, NEW has the burden of persuasion as to two requisite conditions: (1) that the plaintiff waited an unreasonable length of time before bringing its suit; and (2) that the delay unfairly prejudices the defendant.[67] "What constitutes unreasonable delay and prejudice are questions of fact that depend upon the totality of the circumstances."[68]

Under the less than fully developed set of facts presented to me, I am not convinced that NEW is likely to succeed in meeting its burden to prove that CWG delayed unreasonably in bringing its action. The record reflects a serious factual dispute over when CWG had at least constructive notice of the claims that it now seeks to pursue

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[67] *Hudak v. Procek*, 806 A.2d 140, 153 (Del. 2002) (citing *Fike v. Ruger*, 752 A.2d 112, 113 (Del. 2000)).

[68] *Id*. (citing *Hudak v. Procek*, 727 A.2d 841, 843 (Del. 1999) (quoting *Fed. United Corp. v. Havender*, 11 A.2d 331, 343 (Del. 1940)).

in arbitration. It is possible that NEW may be able to prove in arbitration that CWG had notice of the grounds for its claims sometime between January and June 2010 and that by waiting until August to bring those claims it caused an unjustified and prejudicial delay. I consider it at least equally likely, however, that CWG will be able to prove that it did not have actual or constructive notice until August 5, 2010.

To buttress its position that CWG knew that the Protected Information had been shared with third parties well before August 2010, NEW relies primarily on the testimony of CWG's former president, Matt Frankel, now employed by NEW.[69] Frankel, however, who says he *assumed* that NEW shared Protected Information with other insurers, also acknowledged that he never expressed this belief to anyone at CWG. Given Frankel's obvious conflicts of interest during the relevant time period, I question the reliability of his testimony. Moreover, CWG has adduced sufficient evidence to support its contrary position that CWG reasonably believed that the Protected Information had not been shared until on or about August 5, 2010, when NEW first told it about such disclosures.[70]

From as early as January 2010, Frankel and CWG both knew that NEW intended to compete with CWG. Frankel testified in his deposition that he inferred from that that NEW must have been disclosing CWG's Protected Information to the prospective insurers, such as CNA, that would support NEW as the obligor to the retailers involved in

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69 Frankel Dep. 227.

70 See, *e.g.*, Burns Dep. 160-61; LaVaglia Dep. 221-22.

the Threatened Programs, because that was common practice in the industry.[71] CWG vigorously disputes that allegation and submitted probative and credible evidence that such insurers and others would have been able to bid on the business in question without having access to the Protected Information.[72] At the same time, CWG acknowledges that insurers generally prefer to have as much information as they can before making a bid. Having considered the evidence presented, I find reasonable CWG's position that knowing NEW intended to begin competing with CWG for business as an obligor would not have put CWG on notice that NEW intended to disclose or had disclosed CWG's Protected Information to third parties in that process. Lastly, the record shows that NEW never explicitly informed CWG that it was supplying the disputed information to third parties until August 5, 2010.

Moreover, by limiting its requested relief to only prospective actions, CWG has ameliorated NEW's claims that it will be unfairly prejudiced because it already has spent large amounts of money transitioning the Threatened Programs to new obligor entities. Therefore, laches do not provide a basis for denying CWG's request for a preliminary injunction. Instead, it is more appropriate for the ultimate fact finder—in this case the arbitrators—to resolve NEW's defense of laches on a fully developed record.

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71 Frankel Dep. 208-09.

72 Shangold Dep. 215-16; Nader Dep. 147-48.

III. CONCLUSION

For the reasons stated, I grant Plaintiffs' motion for a preliminary injunction in aid of arbitration. An appropriate form of order implementing this ruling is being entered concurrently with this Memorandum Opinion.

Under Court of Chancery Rule 65(c), the Court must include in a preliminary injunction a requirement that the applicant give security in an amount the Court deems proper for the payment of such costs and damages as may be incurred or suffered by the enjoined party if it is determined that the injunction was improvidently granted. In this case, it appears that NEW already has converted most, if not all, of the Programs it initially targeted and, in doing so, incurred costs over approximately the last year in the range of a million dollars. Presumably, NEW will continue to solicit new business, but nothing in the record suggests that it is likely to sustain the same level of activity and rate of success in the immediate future as it did in pursuing the Threatened Programs. The transition costs NEW has incurred to date may not relate directly to the likely degree of harm to NEW if it is improperly enjoined, but they give some indication of the scale and scope of the business involved. The harm NEW is likely to suffer if it is wrongfully enjoined during the course of the arbitration would include the additional costs it will incur to comply with the injunction and possible damages related to increased strain on its relations with its newly acquired Programs and the possible loss of new business opportunities between now and the conclusion of the arbitration. Because these damages may be significant, I will require CWG to post a secured bond in the amount of $500,000.