IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	
	:	**Chapter 11**
ADVANCED MARKETING	:	
SERVICES, INC., et al.,	:	**Case No. 06-11480 (CSS)**
	:	**(Jointly Administered)**
Debtors,	:	
	:	
SIMON & SCHUSTER, INC.,	:	
	:	
Plaintiff,	:	**Adv. Proc. No. 07-50004 (CSS)**
v.	:	
	:	**Re: Dkt. Nos. 8-10**
ADVANCED MARKETING	:	**Hrg. Date: 1/17/07 @ 2:00 p.m.**
SERVICES, INC.,	:	
	:	
Defendant.	:	

ADVANCED MARKETING SERVICES, INC.'S ANSWERING BRIEF IN OPPOSITION TO THE EMERGENCY APPLICATION OF SIMON & SCHUSTER FOR TEMPORARY RESTRAINING ORDER PURSUANT TO BANKRUPTCY RULE 7065

Dated: January 17, 2007
Wilmington, Delaware

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NATURE AND STAGE OF PROCEEDING

On December 29, 2006, Advanced Marketing Services, Inc. (the "Debtor"), one of the above-captioned debtors (collectively, the "Debtors"),[1] filed a voluntary Chapter 11 petition. That same day, Plaintiff Simon & Schuster, Inc. ("S&S") sent a reclamation demand to the Debtor. On January 5, 2007, S&S commenced this adversary proceeding by filing its Complaint for Reclamation of Goods Pursuant to 11 U.S.C. § 546(c) and Related Relief (the "Complaint"). The Complaint seeks reclamation of certain goods which S&S alleges were received prepetition by the Debtor (the "Goods"), to compel immediate payment to S&S of certain administrative expense claims and for an accounting.

A week following the filing of the Complaint, on January 11, 2007, S&S filed its Emergency Application of Simon & Schuster for Temporary Restraining Order Pursuant to Bankruptcy Rule 7065 [Dkt. No. 8] (the "Motion"). The Motion seeks the extraordinary relief of enjoining the Debtor from selling the Goods pending a final hearing on the merits. On January 12, 2007, after hearing the Debtor's preliminary objections (on less than one day's notice), the Court declined to hear the merits of the Motion that day, and instead set a hearing on the Motion for January 17, 2007, at 2:00 p.m., and an objection deadline of 10:00 a.m. on January 17, 2007.

This is the Debtor's brief in opposition to the Motion. Simultaneously herewith, the Debtor is filing the "Affidavit of Curtis R. Smith Submitted in Support of Advanced Marketing Services, Inc.'s Opposition to the Emergency Application of Simon &

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[1] The Debtors are the following entities: Debtor, a Delaware corporation, Publishers Group Incorporated, a California Corporation ("PGI") and Publishers Group West Incorporated, a California corporation ("PGW"). PGI is wholly-owned by Debtor, and PGW is wholly-owned by PGI. Debtor, PGI, and PGW are borrowers under the Senior Facility and the DIP Loan Agreement (defined below)

Schuster For Temporary Retraining Order Pursuant to Bankruptcy Rule 7065" (the "Smith Affidavit").[2]

SUMMARY OF ARGUMENT

S&S has failed to meet any of the four elements required for the entry of a temporary restraining order, even though S&S bears the burden of proof on each element.

1. **S&S has not demonstrated that it will suffer imminent or immediate irreparable harm if the Motion is not granted.** Each of the harms cited by S&S in its Motion plainly are compensable by money damages, or are remote and speculative harms which do not constitute imminent, irreparable harm. For example, S&S argues that it *may* suffer irreparable harm *if* the Debtor (or any potential buyer of the Debtor's assets) exercises its rights pursuant to contract or the Bankruptcy Code to return the Goods to S&S for some type of credit consistent with the "fully-returnable" terms upon which S&S sold the Goods. This alleged "irreparable" harm (if it even is a harm) is plainly capable of being quantified and remedied by money. It also is neither an actual or immediate harm, but at most a speculative "harm" based on conjecture, because it is unknown at this time whether or to what degree the Debtor will attempt any returns. Additionally, it is difficult to conceive of how the Debtor's potential utilization of rights it contracted for can constitute legally cognizable "harm" to S&S.

Similarly, S&S argues that it *may* incur irreparable harm if S&S has to incur the expense of shipping product to the Debtor's competitors. S&S does not and cannot explain how its "expense" harm qualifies as "irreparable" harm. An "expense" by

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[2] Due to the exigencies of time, the Smith Affidavit is being submitted without a notary public's seal. The Debtor will substitute a notarized version later today

definition is quantifiable by money, and thus not "irreparable" harm sufficient to justify the extraordinary remedy of a temporary restraining order.

2. **S&S is unlikely to succeed on the merits.** S&S is not likely to succeed on the merits of its reclamation claim because S&S's purported reclamation rights are subject to the Senior Lenders' (defined below) prior and perfected security interests in the Goods. By its express terms, section 546(c) does not provide any right to reclaim goods where those goods are subject, as here, to a prior and perfected security interest. Thus, under the Bankruptcy Code and applicable common law, S&S's claim fails because it is dwarfed by the amount of the Senior Lenders' prepetition and postpetition secured debt. Accordingly, S&S is not likely to prevail on its reclamation claim because it cannot demonstrate that it has an interest in the Goods that is superior to those of the Senior Lenders or that the value of the Goods exceeds the amount of the Senior Lenders' liens.

S&S also has not demonstrated that it is likely to succeed on the merits because it cannot establish the other elements required to reclaim goods under section 546(c). Indeed, S&S *admits* that it cannot demonstrate a likelihood of success that it will carry its burden to prove that the Debtor was insolvent at the time(s) the Debtor received any of the Goods. Given S&S's express reliance on the fact that the Secured Lender is oversecured, and the facts pled by the Debtor in the Petition and first day papers (as set forth in detail below), S&S's admission should be fatal to its request for emergency injunctive relief. Moreover, S&S has not shown that it is likely to prove that S&S was the "seller" of a large percentage of the Goods which it admits actually were published by others. Similarly, S&S has not shown that the Debtor in fact received all of the Goods prior to the Petition Date; indeed, the facts submitted by S&S suggest that at least certain

of the Goods were *not* received by the Debtor before the Petition Date. Accordingly, S&S simply has not carried it burden to prove that it is likely to succeed on the merits and its Motion should be denied.

3. **The Debtor will be irreparably harmed if the Motion is granted.** S&S has not been coy about the real motive behind its attempt to reclaim the Goods. As expressly stated in the Motion, S&S wants the Goods so that it can provide those Goods to the Debtor's competitors *"who are working to satisfy the demands of the Debtor's customers."* (Motion, ¶ 21) (emphasis supplied). In short, S&S wants to reclaim the Goods so that S&S can contribute to the Debtor's competitors' efforts to take market-share away from the Debtor. Accordingly, if S&S's Motion is granted, it is the Debtor who likely is to experience not only lost sales and profits, but loss of customer satisfaction and goodwill in the marketplace. Further, if the Motion is granted and other reclamation creditors then were to attempt to mirror S&S's actions, the Debtor's on-going business operations would be significantly impaired and the Debtor's reorganization efforts would be placed in serious jeopardy.

4. **The public interest also does not support the grant of injunctive relief.** As discussed above, the Debtor's continuing business operations and reorganization efforts will be impaired if the Motion is granted. "Public policy favors enabling a debtor to maximize its estate and successfully reorganize." Grimes v. Genesis Health Ventures, Inc. (In re Genesis Health Ventures, Inc.), 280 B.R. 339, 345 (D. Del. 2002). Accordingly, the public interest weighs in favor of protecting the Debtors' ability to pursue their reorganization efforts without the undue interference of creditors seeking extraordinary injunctive relief not mandated by the Bankruptcy Code.

5. **Injunctive relief should not issue without a bond.** S&S's request for the Court to waive its obligation to post an adequate bond is contrary to controlling Third Circuit law. Accordingly, if the Court were inclined to grant temporary injunctive relief, the Court should require S&S to post a bond in an amount sufficient to compensate the Debtor for the significant damages that will be incurred as a result of the injunction.

STATEMENT OF FACTS

A. Overview of The Debtor's Business Operations And its Business with S&S

Founded in 1982, the Debtor is a wholesaler of general interest books to membership warehouse clubs, including Costco Wholesale Corporation, SAM's Club (a unit of Wal-Mart Stores, Inc.), and BJ's Wholesale Club, as well as certain specialty retailers, e-commerce companies, traditional bookstores and bookstore chains.[3] The Debtor obtains most of the books it wholesales directly from publishers, primarily on a fully returnable basis, and it also sells such books primarily on a fully returnable basis. As of the date hereof, the Debtors serve approximately 1,078 membership warehouse locations in the United States.

S&S is one of the largest third-party publishers from whom the Debtor obtains books. S&S's imprints for sale and distribution include titles from AAA Travel Guides and Road Atlases, National Geographic Traveler, Harlequin, Folger Shakespeare Library, Little Simon (children's imprint), Reader's Digest and World Almanac Books. For fiscal Year 2006, S&S was AMS's 5th largest vendor, with gross sales of $72,437,342. Through the 2nd quarter of fiscal Year 2007 S&S was AMS's 3rd largest vendor, with

[3] The other Debtor businesses are not described herein because they are not relevant to this adversary proceeding.

vendor, with gross sales of $28,699,597.10. As with other publishers, the Debtor obtains books from S&S primarily on a fully-returnable basis.

B. Principal Indebtedness

The Debtor, PGW and PGI, as borrowers, the lenders party thereto (the "Senior Lenders") and Foothill, as agent, are parties to that certain Loan and Security Agreement, dated as of April 27, 2004 (as amended from time to time, the "Senior Facility"). The Debtors' obligations under the Senior Facility are secured by a floating lien on substantially all of their assets, including (importantly for the purposes of this adversary proceeding) inventory. As a result, the Senior Lenders' first priority security interest extends to the Goods subject of the Complaint. The Senior Facility is an asset-based lending agreement that provides for a revolving line of credit (the "Revolving Loans") up to a maximum commitment level of $90 million. Availability under the Senior Facility was determined by a borrowing base formula based upon the Debtors' accounts receivable and inventory (including inventory purchased by the Debtors from S&S), subject to adjustments and reserves established by Foothill and the Senior Lenders. The Senior Lenders assert, and the Debtors have stipulated and agreed, that as of the Petition Date, the Debtors were obligated to the Senior Lenders for the principal amount drawn on the Revolving Loans plus accrued and unpaid interest and certain additional unpaid fees and expenses in an amount not less than $41,514,347.58 (collectively, the "Senior Indebtedness"). The Senior Facility imposed numerous restrictions on the Debtors' ability to access their cash. Prior to the Petition Date (and continuing postpetition by way of the DIP Loan (defined below), also provided by Foothill), virtually all of the Debtors' cash from operations is swept daily into an account controlled by Foothill and applied to

the loans outstanding, then readvanced as loans in accordance with the borrowing base formula.

C. The Postpetition Financing Arrangement

On December 29, 2006, the Debtors filed a motion seeking an interim order for postpetition financing (the "Motion for Interim Order") and on January 3, 2007, this Court entered an interim order authorizing the Debtors to obtain postpetition financing (the "Interim DIP Order"). Pursuant to the Interim DIP Order and the related DIP Loan Agreement (as defined in the Interim DIP Order), the Debtors are able to continue to receive financing from Foothill and the other Senior Lenders including cash advances and other extensions of credit, but now in an aggregate principal amount of $75 million (the "DIP Loan"). The DIP Loan is governed by the DIP Loan Agreement. (Motion for Interim Order, ¶¶ 26, 27). The terms of the Debtors' postpetition financing did not extinguish the Debtors' obligations under the Senior Facility or discharge or release any related security interests. Instead, the DIP Loan Agreement contemplates the Debtors' satisfaction of their prepetition obligations to the Senior Lenders through application of Cash Collateral (as defined in the Interim DIP Order), which is derived primarily from the proceeds from the sale of the Debtors' inventory, all before payment of Debtors' postpetition obligations under the DIP Loan. (Interim Order, ¶ 1.4; Motion for Interim Order, ¶¶ 16, 33).

Pursuant to the DIP Loan, the Senior Lenders' prepetition lien is converted or "rolled" over time into a postpetition lien on all of the Debtors' prepetition, present and future assets, which lien is senior to all other liens other than validly perfected Prepetition Liens pursuant to sections 364(c)(2) and 364(c)(3) of the Bankruptcy Code. (Interim Order, ¶ 3.1.1). In addition, the Senior Lenders are granted a superpriority administrative

expense claim pursuant to section 364(c)(1) of the Bankruptcy Code senior to all other administrative claims. (Interim Order, ¶ 3.2).

D. Debtors' Amended Reclamation Motion

On January 8, 2007, the Debtors filed their Amended Motion of Debtors and Debtors in Possession for an Order Establishing Procedures for Reconciliation of reclamation Claims Pursuant to Sections 105(a) and 546(c) of the Bankruptcy Code [Dkt. No. 86] ("Amended Motion"). Pursuant to the Amended Motion, the Debtors have asked the Court to approve certain uniform procedures for the reconciliation and potential allowance of claims asserted by all reclamation creditors. (See Amended Motion, ¶ 31). As explained in more detail in the Amended Motion, the Debtors believe that those procedures are necessary to facilitate the continued operation of the Debtors' businesses, obviate any vendor's perceived need to initiate legal action to preserve or enforce its rights, minimize potential costs to the Debtors' estates in responding to such litigation and avoid the disruption to Debtors' reorganization efforts caused by having to administer and analyze reclamation claims during the first few weeks of these bankruptcy cases but at the same time protecting the rights of all reclamation claimants. (See Amended Motion, ¶¶ 32, 33, 39). By way of example only, the Amended Motion proposes that the Debtors would not take the position that an otherwise valid reclamation demand is rendered invalid by a reclamant's failure to take "self-help" measures or to institute an adversary proceeding and a motion for an injunction. (Amended Motion, ¶ 32).

ARGUMENT

I. LEGAL STANDARD FOR GRANTING A TEMPORARY RESTRAINING ORDER.

An injunction is "'an extraordinary remedy, which should be granted only in limited circumstances.'" Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co., 290 F.3d 578, 586 (3d Cir. 2002) (citations omitted). Because temporary restraining orders and preliminary injunctions are extraordinary remedies, such remedies are to be granted sparingly and only after a strong showing of necessity by the moving party. See Black & Decker Corp. v. Am. Standard, Inc., 682 F. Supp. 772, 787 (D. Del. 1988). "The requirements for the grant of a preliminary injunction are more stringent than those for specific performance." ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 227 (3d Cir. 1987). The "Third Circuit Court of Appeals has observed that 'upon an application for a preliminary injunction to doubt is to deny.'" Campbell v. City of New Kensington, 2006 WL 3308362, *1 (W.D. Pa. Oct. 16, 2006) (quoting Madison Square Garden Corp. v. Braddock, 90 F.2d 924, 927 (3d Cir. 1937)).

Generally, in determining the propriety of issuing a temporary restraining order, courts apply the standards used for granting a preliminary injunction. Tootsie Roll Indus., Inc. v. Sathers, Inc., 666 F. Supp. 655, 658 (D. Del. 1987). Accordingly, in order for S&S to obtain this extraordinary relief, S&S must convince the Court that it has met its burden with respect to the following factors: (a) that S&S will likely succeed on the merits of its reclamation claim; (b) that S&S will suffer imminent irreparable harm without the requested injunctive relief; (c) that the Debtor will not suffer irreparable harm if the injunction is issued (the so-called "balancing of the equities" test); and (d) that the

public interest weighs in favor of granting the injunctive relief. Novartis, 290 F.3d at 586 (citing Clean Ocean Action v. York, 57 F.3d 328, 331 (3d Cir. 1995)).

II. S&S HAS NOT DEMONSTRATED THAT IT WILL SUFFER IMMEDIATE IRREPARABLE HARM IF THE MOTION IS NOT GRANTED.

"In order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial. The preliminary injunction must be the only way of protecting the plaintiff from harm." Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801 (3d Cir. 1989). In order to qualify as "irreparable," an alleged harm must be actual, non-speculative and imminent. See Frank's GMC Truck Ctr. Inc. v. Gen. Motors Corp., 847 F.2d 100, 103 (3d Cir. 1988) (reversing grant of injunctive relief where movant did not "adduce proof of actual or imminent harm"). "[M]ere injury, even if serious or substantial, is not sufficient." U.S. v. Commonwealth of Pa., 533 F.2d 107, 110 (3d Cir. 1976). Moreover, "[e]stablishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a clear showing of *immediate* irreparable injury." ECRI, 809 F. 2d at 226 (emphasis supplied).

"The availability of adequate monetary damages belies a claim of irreparable injury." Frank's GMC Truck Ctr., 847 F.2d at 102; see also Acierno v. New Castle County, 40 F.3d 645, 653 (3d Cir. 1994) ("Economic loss does not constitute irreparable harm.") Accordingly, the Court should carefully scrutinize the nature of the alleged "irreparable harm(s)" to determine whether those harms can be remedied by money damages. See Frank's GMC Truck Ctr., 847 F.2d at 102 (reviewing claimed irreparable harm to determine if "*the harm flowing therefrom* is compensable by money damages") (emphasis supplied); ECRI, 809 F.2d at 226 ("it must be of a peculiar nature, so that

compensation in money cannot atone for it.") Moreover, an injunction should "not be issued merely to allay the fears and apprehensions or to soothe the anxieties of the parties." Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86, 92 (3d Cir. 1992). A moving party's inability to establish irreparable injury is, by itself, fatal to a TRO motion. Phillips Petroleum Co. v. U.S. Steel Corp., 616 F.Supp. 335, 337-38 (D. Del. 1985). S&S has failed to prove imminent, irreparable harm for at least seven independent reasons.

First, the alleged harm is speculative. S&S argues that emergency injunctive relief is necessary "to prevent any buyer of [Debtor's] assets from returning Goods back to Plaintiff and claiming a credit that they are not due." Motion, ¶ 20. S&S does not allege that the Debtor actually has returned books for which it is not entitled to a credit or that the Debtor even has threatened to return books or other goods for which it is not entitled to a credit. See id. Moreover, no "buyer" of the Debtor's assets currently exists. Clearly, this alleged harm is nothing more than guesswork, a potential "harm" which at this time is remote and speculative and therefore not the proper subject of injunctive relief. See Benitec Australia Ltd. v. Promega Corp., 2005 WL 549552, *6 (D. Del. Mar. 8, 2005) (movant did not establish irreparable harm where it did not establish that the harm was "non-speculative").

Second, S&S never explains how the Debtor's (or its successor's) potential proper exercise of its contract or other right to return the Goods for credit constitutes irreparable harm that is legally cognizable under the injunction test. See id.; see also NW. Indus., Inc. v. B.F. Goodrich Co., 301 F. Supp. 706, 711 (N.D. Ill. 1969) ("Even the greatest harm . . . will not support the issuance of a preliminary injunction if the defendant has

committed no legal or equitable wrong."). Where, as here, the Debtor obtained the Goods on a fully-returnable basis, S&S cannot argue that it will be irreparably harmed by the Debtor's exercise of its contractual rights in the future. See Hardin v. Houston Chronicle Publ'g Co., 434 F. Supp. 54, 57 (S.D. Tex. 1977) (exercise of right to terminate contract terminable at will cannot constitute irreparable harm). In an attempt to circumvent the obvious -- that a party's exercise of its legal rights does not constitute cognizable "imminent irreparable harm" to the counter-party, S&S argues that the Debtors might "claim [ ] a credit that they are not due." Motion, ¶ 20. But if the credit is not due, all S&S needs to do is contest the credit. Either way, there is no imminent irreparable harm.

Third, the identified "harm" -- wrongful utilization of returns for credit -- is capable of being remedied by money. It would be quite easy to compute the amount of "improper" credits as it only requires a simple mathematical calculation and a legal determination of whether the returns were proper or improper. See Motion, ¶ 20. S&S's other primary alleged harm -- the possibility that S&S might have to incur "additional expense to provide replacement Goods to the other distributors who are working to satisfy the demands of [Debtor's] customers" -- on its face bespeaks money damages. See id. (emphasis supplied).

Fourth, S&S's claim of irreparable harm lacks logical consistency. The primary harm it alleges is that it will be "stuck" with books if the Debtor (or a purchaser of the Debtor's assets) returns the books to S&S. However, this Motion seeks to enjoin the Debtor from selling those books for a potentially lengthy period until a trial on the merits of reclamation, which significantly increases the chance of such returns.

Fifth, the "imminent irreparable harm" would, in a very real sense, be created by the temporary restraining order itself. The Motion asks the Court to order the Debtor to immediately *stop* selling the Goods (which are property of the Debtor's estate and protected by section 362 of the Bankruptcy Code) to its customers. At the same time, S&S posits as "irreparable harm" its potential need to supply replacement goods to "other distributors who are working to satisfy the demands of [Debtor's] customers." Motion, ¶ 20. Of course, only if the Court were to grant S&S's Motion would the Debtor be unable to supply its customers with such Goods in the normal course of business, which in turn creates the very need for the Debtor's competitors "to satisfy the demands of [the Debtor's] customers." Id. S&S's irreparable harm, therefore, would be self-created.

Sixth, if the harm here really were imminent and irreparable, S&S would not have waited two full weeks after submitting a reclamation demand to pursue its Motion. That action has resulted in S&S's purported $5.1 million in shipments in the 45-day period being reduced to only approximately $808,000 left on hand as of today. There is no more palpable evidence of S&S's lack of belief in its own argument concerning imminent, irreparable harm than its own actions, delaying until almost 85% of the product was out the door and beyond any relief this Court could grant before seeking judicial intervention.

Seventh, given that the Senior Lenders are well oversecured, holders of allowed administrative expense claims in this case will surely be paid in full by the Debtor at the appropriate time, likely on the effective date of a confirmed plan of reorganization. As a result, should the Court later determine that (i) S&S has satisfied all of the criteria set forth in section 546(c) and (ii) S&S's reclamation claim has "value" in this case given the oversecured nature of the Senior Lender's indebtedness, the Court can certainly award

S&S an allowed administrative expense claim, thereby eliminating the alleged harm.[4] The Debtor has the ability to track the sale of all of the Goods and, as a result, the Court can determine with certainty the amount of S&S's claim arising under section 546(c). If the Court believes at the end of the day that this is the appropriate remedy, nothing in the Bankruptcy Code (including in section 546(c)) would prohibit the Court from doing so.

For all of these reasons, S&S has not demonstrated irreparable harm.

III. S&S HAS NOT DEMONSTRATED A HIGH PROBABILITY OF SUCCESS ON THE MERITS OF ITS RECLAMATION CLAIM.

In order to be eligible for injunctive relief, the movant must demonstrate a "strong probability of success on the merits of the litigation." Phillips Petroleum Co. v. U.S. Steel Corp., 616 F. Supp. 335, 337 (D. Del. 1985). Under section 546(c) of the Bankruptcy Code, S&S as the reclaiming seller has the burden of establishing each element of section 546(c). See Allegiance Healthcare Corp. v. Primary Health Sys., Inc. (In re Primary Health Sys., Inc.), 258 B.R. 111, 114 (Bankr. D. Del. 2001). "This burden has been described as 'stringent.'" The Scotts Co. v. Hechinger Co. (In re The Hechinger Investment Co. of Del.), 274 B.R. 402, 405 (Bankr. D. Del. 2001). Here, S&S has failed by its Motion to meet this heavy burden of proof.

A. S&S's Rights, if any, to Reclaim the Goods Are Subject to the Secured Liens and Claims of the Senior Lenders.

As described above, the Goods are subject to the Senior Lenders' first priority prepetition and postpetition liens and claims. While S&S erroneously claims that under post-BAPCPA section 546(c) this fact no longer is relevant, the Debtor demonstrates below that the existence of these prior liens and claims means that under *both* state

[4] To be clear, the Debtor believes that the Court should not allow administrative expense claims here. See infra Section III(B). However, that issue can be decided later because this is an administratively solvent case.

reclamation law or the applicable provisions of the Bankruptcy Code, S&S's right to reclaim the Goods fails.

A seller's right to reclamation in bankruptcy arises under section 546(c) of the Bankruptcy Code. See 11 U.S.C. § 546(c). Prior to the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), section 546(c) of the Bankruptcy Code expressly grounded a seller's right of reclamation in nonbankruptcy law.[5] Typically, the nonbankruptcy statutory basis of a seller's right to reclaim is a state's version of section 2-702 of the UCC.[6] Of note, section 2-703(3) of the UCC subjects "the seller's right to reclaim ... to the rights of a buyer in ordinary course of business or other good faith purchaser for value . . ." (emphasis added).

Thus, pursuant to pre-BAPCPA section 546(c)(1) and applicable state law, the rights of a reclaiming seller were inferior to those of a secured creditor with a security interest in the goods in question. Moreover, a secured creditor with a lien on the goods to be reclaimed qualifies as a "good faith purchaser for value" of those goods within the meaning of section 2-703(3) of the UCC. See Yenkin-Majestic Pain Corp. v. Wheeling-Pittsburgh Steel Corp. (In re Pittsburgh-Canfield Corp.), 309 B.R. 277, 283-288 (B.A.P. 6th Cir. 2004) (pursuant to pre-BAPCPA section 546(c) of the Bankruptcy Code and

[5] Prior to BAPCPA's effective date, section 546(c) of the Bankruptcy Code provided that "the rights and powers of a trustee under ... this title are subject to *any statutory or common-law right* of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods . ." (emphasis added). Thus, section 546(c) of the Bankruptcy Code historically had been viewed as a provision that "recognize[s] any right to reclamation that a seller may have under applicable nonbankruptcy law." Galey & Lord Inc. v. Arley Corp. (In re Arlco, Inc.), 239 B.R. 261, 266 (Bankr. S.D.N.Y. 1999) (citing In re Victory Markets Inc., 212 B.R. 738, 741 (Bankr. N.D.N.Y. 1997))

[6] Section 2-702 of the UCC (as amended in 2003) in relevant part provides that "(2) If the seller discovers that the buyer has received goods on credit while insolvent, the seller may reclaim the goods upon demand made within a reasonable time after the buyer's receipt of the goods [and] (3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course of business or other good faith purchaser for value under Section 2-403. Successful reclamation of goods excludes all other remedies with respect to them." U.C.C. § 2-702.

UCC section 2-702, sellers' reclamation claims in respect of goods sold to debtors were subject to senior secured lenders' floating lien on such goods); Primary Health Sys., Inc., 258 B.R. at 114 ("a creditor with a prior perfected security interest in inventory which contains an after-acquired property clause is a good faith purchaser under the UCC"); In re Arlco, Inc., 239 B.R. at 270-71 (same). Accordingly, under applicable state-law reclamation principles (which were incorporated into the pre-BAPCPA version of section 546(c) of the Bankruptcy Code), the existence of a prior lien is a viable defense to the right of a seller seeking to reclaim goods.

The BAPCPA amendments codified the holding of decisions such as In re Pittsburgh-Canfield Corp. Section 546(c)(1) of the Bankruptcy Code, as amended, is now explicit that the rights of a seller of goods are "subject to the prior rights of a *holder* of a security interest in such goods or the proceeds thereof." 11 U.S.C. § 546(c)(1) (emphasis supplied). The addition of express language subjecting reclamation rights to holders of prior liens makes clear that a prior lien continues to be superior to reclamation claims asserted under the Bankruptcy Code. Accordingly, pursuant to the express language of section 546(c)(1) of the Bankruptcy Code, the Senior Lenders' prepetition and postpetition liens on the Debtors' inventory are superior to S&S's purported reclamation claim. See id.

In these chapter 11 cases, the Debtors have stipulated that the Senior Lenders' prepetition liens are valid, binding, perfected, and enforceable first-priority liens against the collateral pledged to the Senior Lenders. See Interim DIP Order, ¶ D. The Goods and the proceeds derived therefrom are collateral subject to the Senior Lenders' interests. See Interim DIP Order, ¶¶ D, 1.1, 2.1; Motion for Interim Order, ¶ 16. In addition, the

DIP Loan grants the Senior Lenders a valid, binding, perfected and enforceable first-priority postpetition lien on the Goods and proceeds derived therefrom pursuant to sections 364(c)(2) and 364(c)(3) of the Bankruptcy Code.

For this reason alone, S&S has failed to establish its likelihood of success in demonstrating that it has a valid reclamation right under section 546(c) of the Bankruptcy Code. Accordingly, the Motion should be denied.

B. S&S's Motion Should be Denied Because its Reclamation Claim Is Valueless.

S&S's Motion should be denied because its reclamation claim is valueless. As described above, section 546(c) preserves nonbankruptcy law with respect to the primacy of prior liens over any reclamation claim.[7] Thus, S&S's reclamation right, if any, is subordinated to the rights of the Senior Lenders in the Goods and S&S ultimately is not entitled to a recovery on account of its reclamation claim greater than any recovery it might have been entitled to under nonbankruptcy law, which in this case is zero. See, e.g., Primary Health, 258 B.R. at 117; Toshiba Am., Inc. v. Video King of Ill., Inc. (In re Video King of Ill., Inc.), 100 B.R. 1008, 1017 (Bankr. N.D. Ill. 1989) (stating that, if a seller's reclamation rights "would be valueless outside of bankruptcy because the goods in question for whatever reasons would go first to satisfy [the secured lender's] claim, those rights are equally valueless in the bankruptcy context."); Victory Markets, 212 B.R. at 743 (stating that a reclaiming seller is "required to show that its claim has value beyond the claims of the priority secured lienholders.").

[7] As section 546(c) incorporates the primacy of prior holders of security interests in the goods or the proceeds thereof, the arguments set forth in this section would continue to apply even if the Court ultimately were to find that the amendments to section 546(c) under BAPCPA created a federal reclamation right. S&S's Motion does not address this issue.

Reclamation claims are valueless in the face of a prior perfected lien on the same property because a reclaiming seller is obliged to satisfy its reclamation claim only out of the already encumbered specific goods to be reclaimed. See In re Pittsburgh-Canfield Corp., 309 B.R. at 287-288 (stating that "a seller's right to reclaim goods ... only extends to the particular goods it sold to the buyer. Thus, its reclamation rights only extend[ ] to the goods or its traceable proceeds."). Because a reclamation claim must be satisfied out of the specific goods being reclaimed, where the value of a secured lender's claims exceeds the value of a seller's individual reclamation claim, the reclamation claim is valueless. See, e.g., In re Primary Health Sys., Inc., 258 B.R. at 117-118 (stating that "a reclaiming seller would not have been able to reclaim its goods if the goods were not worth more than the value of the floating lien, because the holder of the first lien would have asserted its rights and been entitled to all of the inventory."). Because the amount of indebtedness owed to the Senior Lenders (both prepetition and now postpetition) dwarfs S&S's reclamation claim,[8] the reclamation claim is valueless outside of bankruptcy. See also In re Dairy Mart Convenience Stores, Inc., 302 B.R. 128, 135-136 (Bankr. S.D.N.Y. 2003) (finding that reclamation claim was valueless because prepetition liens were released only in connection with postpetition financing and imposition of related liens).

S&S summarily argues that the Court should disregard the Senior Lenders' liens because the Senior Lenders are oversecured. See Motion, ¶ 18. S&S's argument fails to

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[8] While S&S asserts that it shipped $5.105 million in books to the Debtor during the 45 day period (Motion, ¶ 5), it also acknowledges that the Goods are, in a sense, perishable (Motion, ¶ 20). As of January 16, 2007, the Debtor estimates that only approximately $808,000 of inventory received from S&S prepetition remains on hand in the Debtor's warehouse. As described above, the Debtors' prepetition indebtedness to the Senior Lenders totaled approximately $41 million as of the Debtors' Petition Date, all of which was secured by the prepetition lien in favor of the Senior Lenders. Because the prepetition indebtedness owed to the Senior Lenders exceeds the value of S&S's reclamation claim (even in the amount asserted, and further still in the amount remaining in inventory), its reclamation claim is valueless.

discuss or distinguish those decisions which have held that the reclaiming creditor's claim is valueless even where the holder of a prior security interest in reclaimed goods is oversecured. See Pittsburgh-Canfield Corp., 309 B.R. at 288 (stating that the reclaiming seller's reclamation claim was entitled to recovery "only to the extent that the value of the *specific* inventory in which the reclaiming seller asserts an interest exceeds the amount of the floating lien in the debtor's inventory" and finding that the bankruptcy court did not abuse its discretion in holding that seller's reclamation claims aggregating $450,000 were valueless where the substantially oversecured prepetition lender was owed $130 million) (emphasis added); see also Primary Health Sys., Inc, 258 B.R. at 117-118 ("a reclaiming seller would not have been able to reclaim its goods if the goods were not worth more than the value of the floating lien").

This result is appropriate under the law because a reclamation claimant has no right to demand that a holder of a prior lien marshal the debtor's assets in a manner favorable to the unsecured reclamation claimant. See Pittsburgh-Canfield Corp., 309 B.R. at 291-292 ("unsecured creditors cannot invoke the equitable doctrine of marshaling"); Dairy Mart, 302 B.R. at 134 (explaining that marshaling is inapplicable to the relative rights of reclaiming creditors and prior secured parties because (a) reclamation claimants are not secured creditors, (b) marshaling is not a remedy against good faith purchasers and (c) of "the prejudice that would result to the senior creditor by the imposed delay, added cost or inconvenience in collecting on its claim when it has a more readily available method to collect the amount owed."). While junior secured creditors sometimes have the right to require the marshaling of collateral under applicable law, a reclamation claimant is not a secured creditor. See Arlco, 239 B.R. at 274 (finding

that a reclaiming seller "is not a secured creditor"). Most courts have "denie[d] unsecured creditors standing to invoke the doctrine of marshaling." In re Gibson Group, Inc., 151 B.R. 133, 134-35 (Bankr. S.D. Ohio 1993); see also Chittenden Trust Co. v. Sebert Lumber Co. (In re Vt. Toy Works, Inc.), 135 B.R. 762, 768 (D. Vt. 1991) ("Only secured creditors have the authority to invoke the doctrine of marshalling."). Because S&S has no legal right to direct the Senior Lenders to satisfy their claim out of goods other than the Goods, S&S has no ability to enforce its purported right to reclaim the Goods.[9]

In response, S&S cites but one case, In re Phar-Mor, Inc., 301 B.R. 482 (Bankr. N.D. Oh. 2003). See Motion, ¶ 18. Phar-Mor is readily distinguishable because the issue was not whether the vendors could reclaim their goods, but rather whether they were entitled to an administrative expense claim, as the motion was presented post-confirmation. Moreover, in Phar-Mor, the pre-petition loans were paid in full, and therefore the pre-petition liens were released by the time the court considered the motion. 301 B.R. at 489. S&S does not even to attempt to argue that this is the case here. Rather, S&S argues the novel position that "a creditors [sic] right to reclamation cannot be eliminated by simply maintaining a nominal secured debt on the books secured by collateral worth millions more than the debt." Motion, ¶ 18 (citing Phar-Mor). Simply put, Phar-Mor stands for no such proposition. Moreover, there is no proof in the record that the amount remaining under the pre-petition loans here is "nominal", and in fact it is not. Finally, S&S's argument that the pre-petition liens "will be ... fully satisfied" (id.

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[9] To the extent that the Court believes that the reclamation claims have some priority higher than unsecured claims notwithstanding Primary Health and the other foregoing authorities, that value at best should be an administrative expense claim. As set forth above, administrative expense claims will be paid in full in this case. See supra pp. 13-14.

emphasis supplied) is contrary to settled law in this District that the issue is whether the secured lender's "claim exceeded the value of the inventory at the time the reclamation demand was made." Primary Health, 25 B.R. at 118 (emphasis supplied).[10]

Moreover, S&S cannot claim surprise by this result. The liens and security interests of a prior lienholder must be perfected to make reclamation claims subject to such liens. See, e.g., Arlco, 239 B.R. at 267-68. Here, the Senior Lenders have held prepetition liens since 2004 and filed UCC-1 financing statements evidencing their liens, thereby putting S&S (and any other potential reclamation claimant) on notice that, nearly three years later, they were shipping goods subject to those liens that would immediately attach upon receipt by the Debtor. See Motion for Interim DIP Order, ¶ 15. Reclamation claimants thus had the opportunity to seek protections for themselves, such as by seeking purchase money security interests, requiring cash in advance or otherwise limiting available trade credit.

C. S&S Has Not Even Attempted to Demonstrate That the Debtor Was Insolvent at the Time the Debtor Received the Goods.

S&S is not entitled to the remedy afforded by section 546(c) of the Bankruptcy Code unless S&S can prove that the Debtor was insolvent at the time(s) the Debtor received the Goods. See 11 U.S.C. § 546(c)(1) (the reclaiming creditor must prove that "the debtor has received such goods while insolvent"). That section 546(c)(1) places insolvency in the elements of the case-in-chief of proving entitlement to reclamation is significant. Congress knows how to create a presumption of insolvency, thereby shifting the burden to the defendant to defend on the grounds of solvency. See 11 U.S.C. § 547.

[10] Phar-Mor also appears largely to have been driven by the fact that the debtor repeatedly took the position in a reclamation procedures motion, the disclosure statement and post-confirmation pleadings that reclamation claimants would be entitled to administrative expense claims, and then changed their position after vendors relied on that position. No such thing has happened in this case.

It did not do so in section 546; nor did the drafters of the UCC. The import is unmistakable: insolvency at the time the debtor received the goods is the reclamation creditor's burden of proof.

Notwithstanding its burden of proof, S&S's Motion is completely devoid of any evidence concerning the state of the Debtor's solvency at the time the Debtor received the Goods. See Motion. Indeed, S&S does not even *argue* that the Debtor was insolvent at the time the Debtor received the Goods *or* that S&S expects to demonstrate the Debtor's insolvency when the Court considers the merits of S&S's claims. See id. Accordingly, S&S's Motion should be denied because S&S has failed to meet its burden to prove, or even attempt to prove, that it is likely to demonstrate that the Debtor was insolvent at the time the Debtor received the Goods.

Instead of demonstrating that it is likely to prove the Debtor's insolvency, S&S asks this Court to relieve S&S of its evidentiary burden because, at this time, S&S does not have sufficient information to determine whether the Debtor was insolvent at the time the Debtor received the Goods. See Motion, ¶ 19. S&S's argument fundamentally is at odds with the *movant's* burden to demonstrate to the Court the necessity of immediate injunctive relief.[11] S&S's argument also is wholly unsupported by any rule, case or statutory authority. See id.

While in some cases an argument over who bears the burden of proving solvency or insolvency is merely a technicality because the debtor is hopelessly insolvent, the available evidence here demonstrates that the issue is a real one in this case. As the Debtor has noted in other settings, while the Debtor experienced a pre-petition liquidity

[11] Indeed, it is worth noting that S&S attempts to write the words "while insolvent" out of section 546(c)(1) just two paragraphs after trumpeting a "plain meaning" statutory interpretation scheme. See Motion, ¶ 17.

crisis due to its default under its credit facilities, the Debtor's petition and related first day affidavit show that even on a current asset value basis alone (accounts receivable and inventory) -- which is not the basis for determining solvency -- the Debtor's assets approached its liabilities.[12] Further, the proper basis for determining solvency is the going concern value of assets less face value of liabilities. See, e.g., Travellers Int'l AG v. Trans World Airlines, Inc. (In re TWA, Inc.), 134 F.3d 188 (3d Cir. 1998), cert. denied, 523 U.S. 1138 (1998). Going concern value nearly always is greater than an asset valuation. See, e.g., Brown v. Shell Canada, Ltd. (In re Tenn. Chem. Co.), 143 B.R. 468 (Bankr. E.D. Tenn. 1992), aff'd, 112 F.3d 234 (6th Cir. 1997). Given this record, S&S cannot meet its burden of proof as required by section 546(c) by simply citing to the circumstance that the Debtors have not yet provided statements and schedules.

D. S&S Lacks Standing to Bring Claims on Behalf of Other Publishers.

"It is a well-established tenet of standing that a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." Pa. Psychiatric Soc'y v. Green Spring Health Serv., Inc., 280 F.3d 278, 288 (3d Cir. 2002), cert. denied, 537 U.S. 881 (2002). Moreover "'third party standing is exceptional' and [ ] a litigant seeking to bring an action on behalf of a third party bears the burden of establishing that it has third party standing." Wheeler v. Travelers Ins. Co., 22 F.3d 534, 539 n.11 (3d Cir. 1994).

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[12] For example, the Debtors' Declaration Concerning the Debtors' List of Creditors Holding the Forty Largest Unsecured Claim, attached to the Debtor's Petition, identified approximately $224 million in general unsecured obligations to their top 40 unsecured creditors and the Debtors owed the Senior Lenders approximately $41 million as of their Petition Date, for approximately $265 million in aggregate potential claims to the combination of the senior lenders and top 40 unsecured creditors. As noted in the declaration of Curtis Smith submitted in connection with the Debtors' first-day motions, the Debtor's accounts receivable and inventory alone total approximately $220 million, without consideration of the Debtor's valuable interests in foreign subsidiaries, fixed assets and intellectual property. See Smith Affidavit, ¶ 24

Here, the remedy provided by section 546(c) is only available to "sellers of goods." See 11 U.S.C. § 546(c). S&S, however, admits that as to an unspecified portion of the Goods, it is not the "seller," but only (at best) the distributor of those Goods on behalf of other, non-affiliated entities. See Motion, ¶ 5. S&S avers that it is "authorized" to pursue the reclamation claims on behalf of those third parties, but it never says -- presumably because it cannot -- that those entities "sold" their Goods to S&S and S&S in turn "sold" them to the Debtors. See Motion, ¶ 5. Additionally, S&S's "authorization" argument is wholly-unsupported by any competent evidence. See id. And even if those other entities attempted to "authorize" S&S to file suit on their behalf in some contract, the fact remains that the publishers, not S&S, were the sellers and therefore the only entities with the rights to sue under section 546(c)(1). Simply put, S&S cannot make an end-run around standing requirements by obtaining "authorization" to sue. Were the law on standing otherwise, professional plaintiffs would flood Federal Courts with "purchased" tort and contract claims.

S&S does not even attempt to identify those goods as to which S&S did not act as a seller. See Motion, ¶ 5. Accordingly, S&S has provided no basis for this Court to conclude that S&S acted as a "seller" with respect to *any* of the Goods.[13] In short, S&S has failed to demonstrate that it is a seller of the Goods as required by section 546(c).

E. S&S Has Not Submitted Any Evidence That the Goods in Question Were Received During the Reclamation Period.

S&S also bears the burden to prove that each of the Goods was received by the debtor during the relevant reclamation period. See 11 U.S.C. § 546(c). "This is a fairly

[13] While the Debtor certainly acknowledges that S&S directly was the "seller" of a portion of the $5.1 million set forth in the Complaint, it is less clear that this is the case now that only approximately $808,000 remains. Certainly S&S has offered no evidence on the subject.

stringent requirement because a seller's evidence must indicate that this critical fact on which its recovery depends is true, and not merely that it is possible it is so." In re Adventist Living Ctrs., Inc., 52 F.3d 159, 163 (7th Cir. 1995) (internal quotation omitted).

To meet its evidentiary burden, S&S summarily refers the Court to Exhibits A and B of its Complaint. See Motion, ¶ 5. Exhibit A to the Complaint is a summary chart prepared by S&S which does not, on its face, purport to identify any date on which the Debtor purportedly received any of the Goods. See Complaint Exh. A. Exhibit B to the Complaint is comprised of invoices which S&S states relate to the Goods. As with Exhibit A, the invoices do not identify the dates on which the Debtor received any of the Goods.

This is no mere technicality. First, the chart and invoices include Goods admittedly shipped on the Petition Date, which by definition were received post-petition and therefore cannot be the subject of a valid reclamation demand. Second, several of the invoices demonstrate shipments within a day or two of the Petition Date, making receipt pre-petition unlikely. Third, as set forth above (supra fn. 8), only $808,000 of the $5.1 million, or approximately 15%, of the Goods remain in the Debtor's possession. Given that the most recent inventory is the most likely to remain on hand, the record is silent as to how much of that approximately $808,000, or all of it, comprises the shipments noted in this paragraph which the Debtor actually received post-petition and, therefore, for which reclamation is unavailable. Accordingly, S&S's Motion is devoid of any evidence as to whether any of the Goods which the Debtor still possesses were received during the reclamation period, and as a result, its Motion must be denied.

IV. THE BALANCE OF THE EQUITIES DOES NOT FAVOR THE GRANTING OF THE MOTION.

The third factor in the preliminary injunction analysis is the balance of the equities. In applying this factor, "a court should consider whether granting the requested relief will result in greater harm to the party on whom it is imposed than its denial will have on the party who seeks it." Farberware, Inc. v. Mr. Coffee, Inc., 740 F. Supp. 291, 304 (D. Del. 1990) (internal quotation and citation omitted); see also SI Handling Sys., Inc. v. Heisley, 753 F.2d 1244, 1254 (3d Cir. 1985).

The balancing of the equities here weighs entirely in favor of denying the TRO. As set forth elsewhere (see supra pp. 4-5 and infra pp. 27-28), the Debtor's ordinary business operations and reorganization efforts will be significantly impacted if the Court were to grant the Motion. At this early stage of the Debtors' reorganization cases (less than three weeks after they were commenced), the balancing of the harms reflects that the Debtor, not S&S, is most likely to suffer damages if the Motion were granted. And the reason is obvious. If the Debtor is unable to continue to sell its inventory to its customers, those customers, which are the lifeblood of the Debtor's operations, will have no choice but to look to the Debtor's competitors to fill their orders. This immediate erosion of market share and customer confidence will surely impact the going concern value of the Debtor's business and its efforts to maximize the value of its estate for all stakeholders.

On the other hand, S&S has failed to allege the existence of any cognizable harm from the Debtor's continued sale of the Goods. Moreover, any harm S&S might suffer from such continued sales can be more than adequately remedied by money damages. Accordingly, the balancing of the equities weights against the Motion.

V. THE PUBLIC INTEREST ALSO WEIGHS AGAINST GRANTING THE MOTION.

Public policy considerations do not weigh in favor of granting the Motion. While S&S argues that public policy is served by preserving statutory rights (Motion, ¶ 21), its argument begs the question of whether S&S in fact has any statutory rights -- an issue on which S&S bears the burden. See supra p. 14. Instead, Section 546(c) of the Bankruptcy Code requires S&S to prove several specific statutory elements *prior to* its enjoyment of the reclamation rights set forth therein. See 11 U.S.C. § 546(c) (reclaiming creditor must prove that it was a seller of the goods, the goods are not subject to a prior lien, and debtor was insolvent when the goods were received). As demonstrated above, S&S's Motion does not establish the likelihood that S&S will succeed on the merits of its claims. See supra, pp. 14-25.

In contrast, if the Motion were granted, the Debtor's on-going business operations would be disrupted, its reorganization efforts would be negatively affected and its interest in implementing fair and uniform procedures applicable to all reclamation creditors would be lost. See supra pp. 4-5, 26 and infra p. 28. Unlike the theory S&S posits -- for which it cites no authority (because there is none) -- this disruption of business factor and its corollary, that public policy favors reorganization, often have been cited as the primary public policy implicated by a motion for an injunction involving a debtor. See PHP Healthcare Corp. v. HIP Foundation, Inc. (In re PHP), Adv. No. A99-18 (MFW), slip op. at 9 (Bankr. D. Del. Mar. 31, 1999). In short, "[p]ublic policy favors enabling a debtor to maximize its estate and successfully reorganize." In re Genesis Health Ventures, Inc., 280 B.R. at 345. Where, as here, the movant has not met its burden of

proof and the harm to the chapter 11 Debtor's reorganization efforts is real, immediate and potentially profound, the public interest weighs in favor of denying the Motion.

VI. THE MOTION SHOULD NOT BE GRANTED IN THE ABSENCE OF A BOND IN AN AMOUNT SUFFICIENT TO COMPENSATE THE DEBTOR FOR THE HARM RESULTING FROM THE MOTION.

Perhaps nowhere has S&S overreached so much as in its request that it be permitted a TRO with no bond at all. Rule 65(c) of the Federal Rules of Civil Procedure provides that "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant". Fed. R. Civ. P. 65(c). Rule 65(c) is applicable to this action. See Fed. R. Bankr. P. 7065. Indeed, the Bankruptcy Rules only except "a debtor, trustee, or debtor in possession" from compliance with the posting of the security mandated by Rule 65(c). See id.

Consistent with the plain meaning of Rule 65(c), the Third Circuit has "long held that the posting of adequate security is a 'condition precedent' to injunctive relief." Scanvec Amiable Ltd. v. Chang, 80 Fed. Appx. 171, 176 (3d Cir. 2003) (citations omitted); see also Sprint Communications Co. v. CAT Communications Int'l, Inc., 335 F.3d 235, 239 (3d Cir. 2003) ("[g]enerally, a bond is a condition of preliminary injunctive relief."). The Third Circuit has "strictly interpreted the bond requirement of Rule 65(c)" and has noted that "the instances in which a bond may not be required are so rare that the requirement is almost mandatory." Scanvec, 80 Fed. Appx. at 175. Indeed, where the enjoined party may suffer a financial loss, "a district court commits reversible error when it fails to require the posting of a security bond by the successful applicant for a preliminary injunction." Sys. Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1145 (3d Cir. 1977); Frank's GMC Truck Ctr., Inc., 847 F.2d at 103 (reversing grant of injunctive relief issued without bond).

The Third Circuit also has noted that:

> It is true that a bond may create a barrier to the granting of a preliminary injunction. [However,] [t]he barrier fulfills one of the purposes of the bond requirement. Requiring plaintiff to post a bond departs from the usual American approach of keeping the cost of litigation down to encourage people to resort to courts. . . . The bond deters rash applications for interlocutory orders; the bond premium and the chance of liability on it causes plaintiff to think carefully beforehand.

Instant Air Freight Co., 882 F.2d at 804.

Indeed, the Court's grant of injunctive relief only upon the posting of an adequate bond is necessary because the bond may be the only resource available to the enjoined party to compensate it for harm resulting from the injunction. See Sprint Communications Co., 335 F.3d at 240 ("[T]he injunction bond provides a fund to use to compensate incorrectly enjoined defendants.") (internal quotations omitted). The bond "also generally limits the liability of the applicant and informs the applicant of the price it can expect to pay if the injunction was wrongfully issued." Id. Thus, prior to the grant of injunctive relief, the Third Circuit requires the moving party to carefully consider whether it wishes to expose itself to the potential risk of the loss of its bond. See id. ("The applicant then decides whether to accept the preliminary relief by posting the bond or to withdraw its request. The applicant may base its decision on whether it wants to expose itself to liability up to the bond amount.").

Notwithstanding the Third Circuit's unambiguous holdings, S&S surprisingly refers the Court to Moltan Co. v. Eagle-Picher Indus., Inc., 55 F.3d 1171, 1176 (6th Cir. 1995) to support its request for the Court to waive the posting of an adequate bond. See Motion, ¶ 24. Moltan was decided by the Sixth Circuit and thus is of no precedential force. The Sixth Circuit does not follow the Third Circuit's clear proscription against the

grant of injunctive relief without an adequate bond. See Moltan, 55 F.3d at 1176 ("the rule in our circuit has long been that the district court possesses discretion over whether to require the posting of security"); Great Lakes Consortium v. State of Mich. 2006 U.S. Dist. LEXIS 93942, *20 (W.D. Mich. Dec. 29, 2006) ("While . . . the language of Rule 65(d) appears to be mandatory, and many circuits have so interpreted it, the rule in our circuit has long been that the district court possesses discretion over whether to require the posting of security."). As S&S's only authority is inconsistent with Third Circuit law, S&S's request must be denied.

Here, the Debtor's ordinary business operations and reorganization efforts would be negatively affected if the Motion were granted. For example, if the Motion were granted, the Debtor will have to stop selling the Goods for a profit, dedicate employees to locate and segregate the Goods, monitor and provide access to S&S to the Debtor's facilities and prepare an accounting related to the Goods. See Motion, p. 12. These efforts will require time, effort, energy and resources, thereby distracting the Debtor from its business operations and reorganization efforts, as well as loss of vital profits from the Goods which the Debtor's would be enjoined from selling. Smith Affidavit, ¶¶ 18-22.

However, the economic harm to the Debtor from the TRO would be far more significant than just lost profits from the sale of these specific Goods and loss of management time. Smith Affidavit, ¶¶ 18-22. S&S admits that it seeks the return of the Goods in part so that S&S can channel on-going business to distributors other than the Debtor. See Motion, ¶ 20. In other words, it wants to reclaim the Goods and provide them to the Debtor's competitors so that they can compete with the Debtor, effectively preventing the Debtor from offering any S&S titles. Not only would customers consider

going elsewhere, they would be forced to use alternate distributors to obtain any books sold or distributed by S&S, including titles from AAA Travel Guides and Road Atlases, National Geographic Traveler, Harlequin, Folger Shakespeare Library, Little Simon (children's imprint), Reader's Digest and World Almanac Books. The need to obtain substitute suppliers would materially undermine customer confidence and goodwill. Thus, S&S's requested relief would hamper the Debtor's on-going effort to maximize the going-concern value of its estate. Moreover, S&S's Motion also is inconsistent with the relief requested by the Debtors in the Amended Motion, thereby eviscerating the equality of treatment of reclamation claimants sought in the Amended Motion.

CONCLUSION

For all of the foregoing reasons, the Debtor respectfully requests that the Court deny the Motion and award it such other and further relief as is just and proper.

Dated: January 17, 2007
Wilmington, Delaware

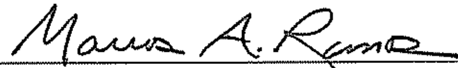

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EXHIBIT A

C
Benitec Australia Ltd. v. Promega Corp.D.Del.,2005.Only the Westlaw citation is currently available.
United States District Court,D. Delaware.
BENITEC AUSTRALIA LTD., Plaintiff,
v.
PROMEGA CORPORATION, Defendant,
v.
COMMONWEALTH SCIENTIFIC AND INDUSTRIAL RESEARCH ORGANISATION, Third Party Defendant.
No. Civ.A. 04-889 JJF.

March 8, 2005.

John W. Shaw, and Kevin Baird, of Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware, John P. Corrado, Barry E. Bretschneider, Charles C. Carson, of Morrison & Foerster LLP, McLean, Virginia, for Plaintiff, of counsel.
Michael F. Bonkowski, and Kimberly L. Gattuso, of Saul Ewing, Wilmington, Delaware, Grant C. Killoran, and Mary C. Turke, of Michael Best & Friedrich LLP, Milwaukee, Wisconsin, for Defendant, of counsel.
John W. Shaw, of Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware, for Third Party Defendant.

OPINION

FARNAN, J.
*1 Presently before the Court is the Motion For A Preliminary Injunction (D.I.26) filed by Defendant Promega Corporation ("Promega"). For the reasons set forth below, the Court will deny the Motion For A Preliminary Injunction (D.I.26).

BACKGROUND

I. Procedural History

Benitec is an Australian corporation that develops therapeutics to treat serious diseases using DNA-directed RNA interference ("ddRNAi"). Promega is a Wisconsin corporation that develops and markets biotechnology research products. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(2).

On July 22, 2004, Plaintiff Benitec Australia, Ltd. ("Benitec") brought this declaratory action against Promega Corporation ("Promega") alleging that Promega has improperly withheld certain sums from payments due to Benitec under a license agreement and that, as a result, Promega's license has been converted to a non-exclusive license. Benitec further alleges that any sublicenses granted by Promega have been transferred to Benitec as of May 1, 2004, along with the right to receive all future sublease income from the sublicenses.

On August 25, 2004, Promega served its Answer, Affirmative Defenses, Counterclaims (D.I.6) and Third Party Complaint (D.I.4). On September 17, 2004, Benitec and Third Party Defendant Ambion, Inc. ("Ambion") each filed Answers (D.I.10, 13) and moved for judgment on the pleadings (D.I.11, 14). Those motions are fully briefed and awaiting decision by the Court.

On November 10, 2004, Promega brought this Motion for a Preliminary Injunction (D.I.26) to preserve its rights as an exclusive licensee during the pendency of this lawsuit.

II. The License Agreements

On March 31, 2003, Benitec and Promega executed a "Benitec/Promega License Agreement for RNAi Technology" ("the Benitec license"). The license gave Promega the exclusive worldwide right to commercially develop, sell, and distribute ddRNAi products for use in research, and the exclusive right to grant sublicenses. Key provisions of the Benitec license state that Promega had to pay an upfront license fee of $350,000, a $50,000 UK patent fee, and a $100,000 European patent fee. Further, assuming that the license was still exclusive, Promega had to pay an annual minimum royalty of $50,000 no later than April 30th of each year. If Promega failed to timely pay the annual minimum royalty, the license would convert to non-exclusive status and Promega would lose its right to sublicense products. Upon conversion to a non-exclusive license, Promega would be required to assign all existing product sublicenses to Benitec and immediately pay all outstanding minimum royalty payments. (D.I. 32,

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App. A at ¶ ¶ 4.00, 4.01, 5.00, 5.01, and 7.00.) The Benitec license also provided that Promega would be liable for all taxes arising out of license payments other than "taxes imposed on Benitec's net income." (*Id* at ¶ 7.04.) Further, the Benitec license allowed Promega and Benitec to jointly grant commercial research licenses. (Id. at ¶ 7.03.)

***2** On or about March 31, 2003, Promega paid Benitec the $350,000 initial license fee. At some subsequent date, Promega satisfied the $50,000 UK patent issuance fee obligation.

On December 8, 2003, Benitec, Promega, and Commonwealth Scientific and Industrial Research Organization ("Commonwealth") executed a license ("the License"), which superseded the Benitec license. The provisions discussed above remained the same, except that § 4.00 of the license, which previously required payment of three license fees (initial $350,000, UK $50,000 and European $100,000) was changed to require only the $100,000 European patent issuance fee.

On May 26, 2004, ¶ 7.00 of the license was amended to define the effective date of the license was March 31, 2004 ("the Amendment").

III. The Tax Payments

At the time that Promega paid Benitec the $350,000 initial license fee, it also made a 10% U.S. income tax payment of $35,000 on Benitec's behalf pursuant to a U.S.-Australia tax treaty. Promega alleges that it did so because Benitec at that time had no U.S. place of business. Promega further alleges that under the License, Benitec was liable for its own income taxes, and, therefore, owed Promega $35,000. Benitec contends that Promega was responsible for making the U.S. income tax payment pursuant to the terms of the contract. On April 28, 2004, as its annual royalty payment, Promega paid Benitec $9,719, which included a setoff of $2,500 in taxes related to this royalty [FN1] and a setoff of the $35,000 prior tax payment plus 10% interest.

FN1. The treaty tax rate for withholding between the United States and Australia was 5% effective July 1, 2003.

On July 22, 2004, Benitec sent Promega a letter alleging that Promega's rights under the Benitec/Commonwealth license had become non-exclusive as of May 1, 2004. Benitec cited Promega's alleged failure to pay the annual minimum royalty due on April 30, 2004, as the reason for the conversion. Benitec filed this lawsuit against Promega shortly thereafter.

The primary issue in this lawsuit is whether Benitec rightly declared that the license had converted to non-exclusive status because Promega failed to make the minimum annual royalty payment for the 2004 fiscal year.

In support of the instant Motion, Promega contends that while this lawsuit for declaratory judgment as to Promega's status as a licensee is pending, Benitec is issuing product sublicenses and unilaterally granted a commercial research license in violation of Promega's exclusive product licensing rights.

DISCUSSION

In determining whether to grant a motion for a preliminary injunction, courts are to consider (1) whether the movant has shown a reasonable probability of success on the merits, (2) whether the movant will be irreparably injured by denial of the relief, (3) whether granting preliminary relief will result in even greater harm to the nonmoving party, and (4) whether granting the preliminary relief will be in the public interest. *Allegheny Energy, Inc. v. DOE, Inc.*, 171 F.3d 153 (3d Cir.1999).

I. Likelihood of Success on the Merits

***3** First, the party seeking a preliminary injunction must demonstrate a likelihood of success on the merits.

Promega contends that it has shown a likelihood of success on the merits. Promega first argues that it will prevail on its breach of contract counterclaim because the May 26, 2004, Amendment to the license confirms that Benitec was liable for the treaty taxes. Specifically, Promega contends that because the May 26, 2004, Amendment to ¶ 7.00 of the License applies only to the minimum royalty payments, it follows that, on May 1, 2004, Promega could not have become a non-exclusive licensee with no obligation for future minimum royalty payments. Thus, Promega asserts that Benitec's willingness to amend the License after Promega withheld the taxes from the April 2004 royalty payment proves that Benitec considered the taxes withheld "taxes imposed

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on ... net income" as set forth in ¶ 7.04. In response, Benitec contends that the purpose of the Amendment was to correct a clerical error.

Promega further contends that evidence of communications between Benitec and Promega executives confirms that Benitec was liable for the treaty taxes. Specifically, Promega contends that John McKinley, Benitec's CEO, told Richard Schiffreen, Promega's Director of Technology and Development, that Promega was not liable for Benitec's taxes. As evidence of Mr. McKinley's statement, Promega offers Dr. Schiffreen's contemporaneous notes of the conversation and an email from Mr. McKinley to Dr. Schiffreen dated June 22, 2003. Promega contends that, subsequent to the executives' conversation, Promega wired $47,500 to Benitec in satisfaction of the $50,000 UK patent issuance fee less $2,500 in income taxes that Promega had paid on Benitec's behalf. Promega alleges that Benitec accepted Promega's wire transfer of $47,500 without objection.

Promega also argues that even if Benitec did comply with the terms of the agreement in converting the License to non-exclusive status, Benitec's behavior leading up to and following the alleged automatic conversion constitutes a breach of the implied duties of good faith, fair dealing, and cooperation. Alternatively, Promega contends that Benitec's actions establish an accord and satisfaction. Finally, Promega contends that Benitec is equitably estopped from declaring Promega's license to be non-exclusive.

In response, Benitec contends that Promega's declarations and exhibits demonstrate an absence of evidentiary support for Promega's allegations. Further, Benitec contends that the four corners of the license contain clear and unambiguous contract language. In support of its position that the tax deductions in question were based on Benitec's gross income, Benitec offers the language of relevant tax statutes, treasury regulations, and treaties. Benitec further contends that is has not breached its duties of good faith and fair dealing, and that there was no accord and satisfaction.

After reviewing the contentions of the parties, the relevant facts, and the applicable law, the Court concludes that Promega has not shown a likelihood of success on the merits.

A. *Breach of Contract Claim*

*4 The Court finds that Promega has not shown a likelihood of success on the merits of its breach of contract claim. Section 7.04 of the License states that Promega as licensee shall pay and indemnify Benitec as licensor all taxes based on payments under the License other than those imposed or based on Benitec's net income. Section 7.04 goes on to state that all amounts payable by Promega shall be paid without deduction or withholding of any present or future tax, and that Benitec shall receive amounts equal to the amounts it would have received had not such deductions or withholding been required. Benitec contends that the $35,000 and $2,500 tax treaty payments that Promega withheld from its annual royalty payment were based on gross income, not net income, and, therefore, under ¶ 7.04 of the license, those payments were not attributable to Benitec. In support of its position, Benitec offers Treasury Regulation § 1.881-2(a)(2), Treasury Regulation § 1.1441-3(a) and U.S.-Australian Tax Treaty Article 12. Promega concedes that the income taxes at issue are technically levied on gross income, but asserts that gross income in this context is the same as net income because no deductions are allowable. Promega cites 26 C.F.R. § 1.881-2(a)(3) in support of this assertion.

The Court finds that the contract language is clear and unambiguous that Promega cannot withhold sums for tax payments unless based on Benitec's net income. At this point in the proceedings, the Court finds that Promega has not brought forth convincing evidence that the taxes in question were based on Benitec's net income. Thus, the Court finds that Section 7.04 is a "gross-up" provision that increases the amount of a royalty to compensate the licensor for the taxes withheld. The Court does not doubt that executives of Promega and Benitec discussed Promega's ability to recoup these payments at some point in the future. However, Promega's unilateral action in withholding the amount of the taxes from its minimum royalty payment appears to have had the effect of breaching the License.

Thus, the Court concludes that Promega has not shown a likelihood of success on the merits with regard to its breach of contract claim.

B. *Breach of Implied Warranty of Good Faith and Fair Dealing*

Delaware courts recognize an implied covenant in contracts requiring the parties to act with good faith

toward each other with respect to their contract. *Katz v. Oak Indus, Inc.*, 508 A.2d 873, 880 (Del. Ch.1986) (citing Restatement (Second) of Contracts, § 205 (1981)). A party must "act reasonably to fulfill the intent of the parties to the agreement." *Gloucester Holding Corp. v. U.S. Tape & Sticky Prod., LLC*, 832 A.2d 116, 128 (Del. Ch.2003) (quoting *Kelly v. McKesson HBOC, Inc.*, 2002 WL 88939 at *10 (Del.Super.Jan. 17, 2002)).

Delaware courts have used the following test when assessing whether the implied covenant has been breached: "is it clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith-had they thought to negotiate with respect to that matter." *Katz*, 508 A.2d at 880 (citing *Martin v. Star Publ'g Co.*, 126 A.2d 238 (Del.Supr.1956); *Danby v. Osteopathic Hosp. Ass'n.*, 101 A.2d 308 (Del. Ch.1953) *aff'd* 104 A.2d 903 (Del.Supr.1954); *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 957 (5th Cir.1981)). However, "[t]he implied covenant cannot contravene the parties' express agreement and cannot be used to forge a new agreement beyond the scope of the written contract." *Chamison v. HealthTrust, Inc.-Hospital Co.*, 735 A.2d 912, 921 (Del. Ch.1999) (citing *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 990 (Del.Supr.1998)).

*5 Promega contends that even if Benitec's construction of the License is correct, Benitec's silence and subsequent assertion that the License converted to non-exclusive status is a breach of the implied covenant of good faith and fair dealing. The Court finds that Promega is attempting to inject a new obligation into the contract, the obligation to warn the other party if any of its intended actions will breach the contract. The Court finds that the conditions for breach are expressly stated in the contract, and that the parties would not necessarily have agreed to the additional duty to warn that Promega requests.

Thus, the Court concludes that Promega has not shown a likelihood of success on the merits of its breach of implied warranty of good faith and fair dealing claim.

C. *Accord and Satisfaction*

The required elements for an accord and satisfaction in Delaware are that (1) a bona fide dispute among the parties as to the amount of the debt must honestly exist, (2) the debtor tendered an amount to the creditor in honest belief that such would constitute satisfaction of the debt, and (3) the creditor accepts such payment. *See Acierno v. Worthy Bros. Pipeline Corp.*, 693 A.2d 1066, 1068-69 (Del.1997); *CitiSteel USA, Inc. v. Connell Ltd. P'ship*, 758 A.2d 928 (Del.2000). An accord and satisfaction may not result from part payment of a liquidated claim in the absence of additional consideration. AMJUR ACCORD § § 7,28; *See, e.g., Trader v. Wilson*, 2002 WL 499888, *3-4 (Del.Super.). A liquidated claim is one which can be determined with exactness from the agreement between the parties, by an arithmetical process, or by the application of definite rules of law. *State, for Use of Warner Co. v. Mass. Bonding & Ins. Co.*, 9 A.2d 77, 80 (Del.Super.1939); AMJUR ACCORD § 7.

The Court finds that the $50,000 annual royalty payment owed by Promega was liquidated because it can be "determined with exactness from the agreement between the parties." AMJUR ACCORD § 7. Sections 5.00 and 7.00 of the License expressly stipulate that Promega must pay a minimum annual royalty of $50,000 no later than April 30th of each year. Thus, the Court concludes that the amount of Promega's payment was liquidated and that Promega's partial payment of it cannot, therefore, constitute an accord and satisfaction.

D. *Equitable Estoppel*

Under Delaware law, the doctrine of equitable estoppel may be invoked "when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment." *Waggoner v. Laster*, 581 A.2d 1127, 1136 (Del.1990). The party claiming estoppel must show that (1) he lacked the knowledge of the true facts or he lacked the means to obtain the truth; (2) he relied on the conduct of the party against whom the estoppel is claimed; and (3) he suffered a prejudicial change of position as a result of his reliance. *Id.* at 1136. The party seeking estoppel must be able to prove these elements by clear and convincing evidence. *Reeder v. Sanford School, Inc.*, 397 A.2d 139 (Del.Super.1979).

*6 To support its claim of equitable estoppel, Promega relies on oral statements that allegedly modified the terms of the written agreement between the parties. Delaware courts generally reject attempts to invoke equitable estoppel based on such oral

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statements. *See, e.g.*, Keene Corp. v. Hoofe, 267 A.2d 618 (Del. Ch.1970). In *Keene*, the defendant agreed in writing to accept stock options subject to restrictions providing for repurchase by his employer if his employment terminated before defendant was employed five years. The court in *Keene* held that, even though the defendant allegedly relied to his detriment on inducements to negotiate the terms of his employment, he did not act with reasonable diligence in discovering the restrictions and when employment was terminated in less than one year, the employer was not estopped from its asserting right to repurchase the stock.

Thus, the Court concludes that Promega cannot now be allowed to claim detrimental reliance when it had knowledge of the terms of the contract from the contract itself.

II. Irreparable harm

The Court must next consider whether Plaintiffs will suffer irreparable harm if the injunctive relief is not granted.

Promega contends that Benitec's sublicensing activities will cause harm to Promega's position in the RNAi market and that Promega will suffer the costs of lost opportunity. Promega further contends that its damages are complex and that any judgment may be uncollectible from Benitec. Promega argues that it is entitled to a presumption of irreparable harm because the right to exclude is at issue in this lawsuit.

In response, Benitec contends that Promega cannot show irreparable harm because Promega has delayed in seeking preliminary relief and because Promega's alleged harms are purely speculative and Promega has provided no objective evidence or expert opinion on market conditions.

Although a delay in seeking relief may constitute grounds for barring preliminary relief, in the instant case, the Court does not agree that Promega has delayed in filing for a preliminary injunction. Promega filed for preliminary injunctive relief shortly after it became apparent that Benitec was negotiating directly with potential sublicensees. However, where, as here, interests involving money damages are at stake, preliminary injunctive relief is not usually appropriate. *See* *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801-02 (3d Cir.1989)(harm was not deemed irreparable even though nature of the action involved lose of majority of business revenue). The Court finds that Promega has not shown that the non-economic injuries it alleges, such as of control of reputation, loss of trade and loss of goodwill, are reasonably imminent or otherwise non-speculative.

For these reasons, the Court concludes that Promega has not made a sufficient showing of irreparable harm to allow the Court to find that this factor weighs in favor of granting a preliminary injunction in this lawsuit.

III. Balance of Hardships

*7 Next, the Court must balance the harm that will occur to Plaintiffs if the injunction is denied with the harm Defendants will incur if the injunction is granted. *Clean Ocean Action v. York*, 57 F.3d 328, 331 (3d Cir.1995).

Promega contends that the balance of hardships favors it because enjoining Benitec's sublicensing activity will not harm Benitec. Rather, Benitec would be in the same position it was in before the breach. In support of this argument, Promega points to the $350,000 initial license fee it paid to Benitec. In response, Benitec contends that the balance of harms favors Benitec because the new sublicenses represent a source of revenue for it.

The Court finds that granting the Motion for Preliminary Injunction will cause Benitec only minimal hardship because doing so will leave Benitec in the same position it was shortly before the injunction was granted, i.e., not granting sublicenses and in receipt of the $350,000 initial license fee. Further, the Court finds that allowing Benitec to continue its sublicensing efforts in the ddRNAi market may cause Promega to lose revenue, market share and good will in the marketplace that it may find difficult to recover should it prevail on the merits in this action. For these reasons, the Court concludes that the balance of hardships tips in Promega's favor.

IV. Public interest

Finally, the Court must assess the impact of an injunction in Promega's favor on public interest concerns.

Promega contends that an injunction in these circumstances will not harm the public because Benitec was a party to an exclusive licensing

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agreement and received a hefty licensing fee. Promega further contends that, in the absence of injunctive relief, those seeking to license the ddRNAi technology will be confused as to whether to deal with Benitec or Promega and may decide to delay licensing or withdraw from the market entirely. Benitec responds that an injunction would end all sublicensing and would deprive the public of access to Benitec's technology.

While this is a private contractual dispute that has no substantial public impact, the Court finds that the public interest weighs in favor of enforcing a contract that has been shown to be valid at this preliminary juncture. For this reason, the Court concludes that granting a preliminary injunction in the instant case will not have a favorable impact on the public interest.

CONCLUSION

In sum, the Court concludes that Promega's failure to demonstrate likelihood of success on the merits and irreparable harm, and the impact on the public interest weigh against issuing a preliminary injunction. Thus, the Court concludes that a preliminary injunction should not issue. Accordingly, the Court will deny Defendant Promega's Motion For A Preliminary Injunction (D.I.26).

An appropriate Order will be entered.

ORDER

At Wilmington, this *8* day of March 2005, for the reasons discussed in the Opinion issued this date;

***8** IT IS HEREBY ORDERED that the Motion For Preliminary Injunction (D.I.26) filed by Defendant Promega Corporation is *DENIED*.

D.Del.,2005.
Benitec Australia Ltd. v. Promega Corp.
Not Reported in F.Supp.2d, 2005 WL 549552 (D.Del.)

END OF DOCUMENT

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EXHIBIT B

H
Briefs and Other Related Documents
Campbell v. City of New KensingtonW.D.Pa.,2006.Only the Westlaw citation is currently available.
United States District Court,W.D. Pennsylvania.
Craig CAMPBELL, Plaintiff,
v.
CITY OF NEW KENSINGTON, Donald E. Bowers, John W. Regoli Jr., Michael J. Langer, Douglas J. Aftanas, Frank E. Link Jr., Richard Jacobus, Charles Forman, Christopher E. Nichols, Defendants.
Civil Action No. 05-0467.

Oct. 16, 2006

Craig Campbell, Lower Burrell, PA, pro se.
Edmond R. Joyal, Jr., Law Office of Joseph S. Weimer, Robert L. Potter, Matthew S. Marquette, Timothy A. Fedele, Strassburger, McKenna, Gutnick & Potter, Pittsburgh, PA, for Defendants.

REPORT AND RECOMMENDATION
LISA PUPO LENIHAN, Magistrate Judge.

I. *RECOMMENDATION*

*1 It is respectfully recommended that Plaintiff's Motion for Temporary Restraining Order("TRO") at Doc. No. 54 be denied.

II. *REPORT*

A. *Relevant Facts*

Plaintiff, Craig Campbell, ("Plaintiff"), *pro se,* brings this action pursuant to 42 U.S.C. § 1983. Plaintiff filed a Second Amended Complaint ("Amended Complaint") against the City of New Kensington and eight public officials/employees relating to the allegedly improper removal of an awning from Plaintiff's property. In his Amended Complaint, Plaintiff avers that after the removal of the awning, he "filed a complaint with the D.A. office and was rejected." (Amended Complaint ¶ 6.) Plaintiff alleges that the Assistant District Attorney and other Defendants named in the Amended Complaint "are co conspirators [sic]" in allegedly denying certain of Plaintiff's Constitutional rights, and that "[t]hey stopped any prosecution of a felony in the theft of my awning...." (Amended Complaint ¶ 9.) More specifically, Plaintiff alleges that the "Assistant District Attorney acting as investigator" violated his Constitutional rights. (Amended Complaint ¶ 10.) Plaintiff continues that in "acting as an investigator and not one that is prosecuting me the assistant district attorney wears the investigating hat. He is not entitled to absolute immunity. The immunity goes with the job you are doing not by what title you hold." (Amended Complaint ¶ 11.) Plaintiff also alleges that "[t]he assistant district attorney and his inactions after finding my facts to be correct, he [sic] did not act on the victim's behalf but acted on the perpetrators [sic] behalf (Richard Jacobus)" and that such action violated Plaintiff's constitutional rights and "shows him to be a coconspirator." (Amended Complaint ¶ 12.)

Plaintiff filed, on October 10, 2006, a Motion for Temporary Restraining Order ("TRO") alleging that he is being harassed before a deposition in the above captioned case. The harassment alleged is a letter from the Office of Code Enforcement of the City of New Kensington advising that property owned by Plaintiff is in violation of certain portions of the local property maintenance code. The letter, attached as pages 4 and 5 of Document Number 54, requests that Mr. Campbell do the following within 16 days:
302.1 Please clean up brush accumulation in yard.
302.4 Please cut high weeds and vegetation in garage and alley area.
304.13 Please replace boarded-up windows in garage or paint board to match garage.

The letter further states that Mr. Campbell may file an appeal with the City within 15 days of receipt of the letter.

B. *Legal Standard*

In determining whether a temporary restraining order FN1 is warranted, a court must consider: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public

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interest. American Civil Liberties Union v. Reno, 217 F.3d 162, 172 (3d Cir.2000), *vacated on other grounds and remanded sub nom*, Ashcroft v. American Civil Liberties Union, 535 U.S. 564 (2002). More specifically with regards to the fourth prong, one seeking a TRO must show that the issuance of the injunctive relief would not be adverse to the public interest. Dominion Video Satellite, Inc. v. EchoStar Corp., 269 F.3d 1149, 1154 (10th Cir.2001). It "frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis deleted). Further, it is well established general law with respect to equitable injunctive relief that the Court is to bear constantly in mind that an "[i]njunction is an equitable remedy which should not be lightly indulged in, but used sparingly and only in a clear and plain case." Plain Dealer Publ'g Co. v. Cleveland Type. Union # 53, 520 F.2d 1220, 1230 (6th Cir.1975), *cert. denied*, 428 U.S. 909 (1976). As a corollary of this principle that preliminary injunctions should issue only in a clear and plain case, our Third Circuit Court of Appeals has observed that "upon an application for a preliminary injunction to doubt is to deny." Madison Square Garden Corp. v. Braddock, 90 F.2d 924, 927 (3d Cir.1937). *See also* Spirol Int'l Corp. v. Vogelsang Corp., 652 F.Supp. 160, 161 (D.N.J.1986). Moreover, it is plaintiff's burden to show that the "preliminary injunction must be the only way of protecting the plaintiff from harm." *See* Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86, 91 (3d Cir.1992). With respect to the "irreparable harm" prong of proving entitlement to a TRO, the Court of Appeals for the Third Circuit has emphasized that the "key aspect of this prerequisite is proof that the feared injury is irreparable; mere injury, even if serious or substantial, is not sufficient." United States v. Commonwealth of Pennsylvania, 533 F.2d 107, 110 (3d Cir.1976). Additionally, in carrying his burden to show irreparable harm, a plaintiff must make a clear showing that irreparable harm will occur immediately. *See* ECRI v. McGrawHill, Inc., 809 F.2d 223, 226 (3d Cir.1987). For "a showing of irreparable harm is insufficient if the harm will occur only in the indefinite future. Rather, the moving party must make a clear showing of *immediate* irreparable harm." Campbell Soup Co., 977 F.2d at 91 (internal quotations omitted) (emphasis added by *Campbell Soup Co.* court). Indeed, the Court of Appeals for the Third Circuit "insisted that the risk of irreparable harm must not be speculative." Adams v. Freedom Forge Corp., 204 F.3d 475, 488 (3d Cir.2000).

FN1. Because the standards for the grant of a preliminary injunction and a temporary restraining are the same, the court's analysis of the temporary restraining order would also dispose of any request by Plaintiff for a preliminary injunction. BABN Technologies Corp. v.. Bruno, No. 98-3409, 1998 WL 720171 at *3 (E.D.Pa.1998) ("The standard for a temporary restraining order is the same as that for a preliminary injunction. Bieros v. Nicola, 857 F.Supp. 445, 446 (E.D.Pa.1994)."); Cooper v. City of Philadelphia, 18th District, No. 93-3007, 1993 WL 274192 at *1 (E.D.Pa.1993) ("The standards for a temporary restraining order and a preliminary injunction are the same."). The distinguishing features between these two forms of injunctive relief are that temporary restraining orders may be issued ex parte without an adversary hearing and are of limited duration, whereas preliminary injunctions may be issued only after the opposing party receives notice and after some form of hearing, and are in force until the completion of the trial on the merits. BABN Technologies Corp., 1998 WL 720171 at *3.

C. *Discussion*

*2 It appears that Plaintiff is seeking to have this court enjoin the City of New Kensington from enforcing its ordinances relative to his property on the grounds that he is being harassed as a result of this lawsuit. He asserts little basis for the harassment, other than to argue that his property is in no worse condition than any other property. He does not argue, however, that his property is in compliance with the ordinances.

A determination of success on the merits would involve the Court undertaking a review of the ordinance in question as well as holding a hearing on the condition of the property to determine if he is indeed in violation and if it is his responsibility to remedy. This is so clearly outside of the jurisdiction of this court it requires no further analysis. More importantly, Plaintiff fails to show any irreparable harm, let alone the level of irreparable harm necessary to justify such extraordinary relief. He does not specify what the nature of this "irreparable injury" is, and "mere injury, even if serious or substantial, is not sufficient." United States v.

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Commonwealth of Pennsylvania, 533 F.2d at 110 (3d Cir.1976). In a worst case scenario, he could be fined, certainly not a harm that is irreparable. Furthermore, the relief he requests is that he be released from complying with any City property maintenance ordinances until the conclusion of this case. Such a request cannot be granted by this Court.

In addition, Plaintiff has failed to show that the issuance of a TRO is "the only way of protecting the plaintiff from harm." *See Campbell Soup Co.,* 977 F.2d at 91. The proper avenue of relief is to file an appeal with the City, as is indicated by the letter, and follow up with whatever appellate processes are outlined within the city ordinance.

For the foregoing reasons, Plaintiff's motion for TRO should be denied.

III. *CONCLUSION*

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) & (C), and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file written objections to this report. Any party opposing the objections shall have seven (7) days from the date of service of the objections to respond thereto. Failure to timely file objections may constitute a waiver of any appellate rights.

W.D.Pa.,2006.
Campbell v. City of New Kensington
Slip Copy, 2006 WL 3308362 (W.D.Pa.)

Briefs and Other Related Documents (Back to top)

- 2006 WL 1182190 (Trial Pleading) Answer & Defenses of Defendant Christopher E. Nichols to Plaintiff's Second Amended Complaint (Mar. 22, 2006) Original Image of this Document (PDF)
- 2005 WL 3284007 (Trial Motion, Memorandum and Affidavit) Motion of Defendant Christopher E. Nichols, Esq., to Dismiss Plaintiff's Second Amended Complaint Pursuant to Fed.R.Civ.P. 12(b)(6) (Oct. 28, 2005) Original Image of this Document (PDF)
- 2005 WL 3284008 (Trial Motion, Memorandum and Affidavit) Brief in Support of the Motion of Defendant Christopher E. Nichols to Dismiss Plaintiff's Second Amended Complaint Pursuant to Fed.R.Civ.P. 12(b)(6) (Oct. 28, 2005) Original Image of this Document (PDF)
- 2005 WL 3283902 (Trial Pleading) Complaint (Oct. 6, 2005) Original Image of this Document (PDF)
- 2:05cv00467 (Docket) (Apr. 8, 2005)

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EXHIBIT C

LEXSEE 2006 U.S. DIST. LEXIS 93942

GREAT LAKES CONSORTIUM, a consortium of Michigan public school districts, Plaintiff, v. STATE OF MICHIGAN, et al., Defendants.

File No. 5:06-CV-187

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2006 U.S. Dist. LEXIS 93942

December 29, 2006, Decided

COUNSEL: [*1] For Great Lakes Consortium, a consortium of Michigan public school districts, plaintiff: Kirk C. Herald, Roy H. Henley, LEAD ATTORNEYS, Thrun Law Firm, PC, E Lansing, MI.

For Michigan, State of, Michigan Department of Education, Michigan Department of Management and Budget, defendant: John Fitzgerald Szczubelek, LEAD ATTORNEY, MI Dept Attorney General (State Operations), State Operations Division, Lansing, MI.

For Northern Warehousing, Inc., Northern Food Service, Inc, intervenor-defendant: Jonathan E. Raven, Nicole L. Proulx, LEAD ATTORNEYS, Fraser Trebilcock Davis & Dunlap PC (Lansing), Lansing, MI.

JUDGES: Robert Holmes Bell, CHIEF UNITED STATES DISTRICT JUDGE.

OPINION BY: Robert Holmes Bell

OPINION:

This is an action filed by Great Lakes Consortium against the State of Michigan, its Department of Education ("MDE") and Department of Management and Budget ("DMB"), collectively, the "State of Michigan Defendants" or "State Defendants." The action originally was filed in the Traverse County, Michigan, Circuit Court and was removed to this Court on November 16, 2006 by the State Defendants. Contemporaneously with the filing of the complaint, Plaintiff filed a motion for temporary restraining [*2] order and preliminary injunction. The action was removed before the state court acted on the motion. Following removal, on November 21, 2006, the Court granted the temporary restraining order and issued an order to show cause why a preliminary injunction should not issue, setting a hearing on November 30, 2004. On November 27, 2006, Northern Warehousing, Inc. sought stipulated leave to intervene as a Defendant, which was granted on November 28, 2006. Also on November 28, 2006, Plaintiff and the State Defendants filed a proposed stipulated order to adjourn the show cause hearing, to modify certain provisions of the temporary restraining order, and to continue the temporary restraining order until an adjourned date to be determined by the Court. The Court signed the order granting the stipulation and adjourning the show cause hearing until February 1, 2007. On December 5, 2006, Northern filed an answer to the complaint. On December 19, 2006, Northern filed an emergency motion for hearing and to expedite the show cause hearing (Docket # 16). The Court granted the motion on December 20, 2006, setting the instant emergency hearing for December 22, 2006 at 8:30 a.m.

Upon review of the verified [*3] complaint and attached exhibits, the briefing and exhibits of all parties, and the argument presented in open court on December 22, 2006, the Court will deny Intervenor Defendant's motion to vacate the temporary restraining order. The Court will continue the temporary restraining order as a preliminary injunction. The Court will further deny Northern's request to expedite a full evidentiary hearing on the preliminary injunction, which will remain scheduled for February 1, 2007.

I.

Plaintiff Great Lakes Consortium is a cooperative consortium administered by the Traverse City Area Public Schools and including 260 public school districts, jointly performing school district food service functions under Section 11a(4) of the Michigan Revised School Code, *MICH COMP. LAWS § 380.11a(4)*. Great Lakes engages in the processing, warehousing, and delivery of federal surplus food commodities for student meals un-

der the National School Lunch Act ("NSLA"). For the 2006-07 school year, Great Lakes would be responsible for $ 12,362,616.80 of commodity entitlements.

The MDE's Office of School Support Services oversees and administers various food distribution programs, [*4] including the distribution of federal surplus commodity foods under the NSLA and its implementing regulations. Each year the USDA delivers to each state an amount calculated by statutory formula. *42 U.S.C. § 1755(b), (c)*. The State is a "distributing agency" under the NSLA. *See 7 C.F.R. § 250.3*. Great Lakes is a "school food authority," "recipient agency," "distributing agency," and "contracting agency" under the NSLA. *Id.* Because of its size, Great Lakes is able to directly receive shipments from the USDA, rather than have those shipments come through the state first.

Northern and the State entered into a requirements contract, under which Northern was retained by MDE as the primary distributor of commodities in Regions 1 and 3 in the State. The contract (Comp. Ex. A-3) provided, however, that "some recipients may have sufficient volume as to allow direct shipment from USDA. Direct shipment to recipients shall be at the discretion of MDE." (*Id.*, Sec. II-A.)

On December 23, 2004, Northern sued the State Defendants, Great Lakes, and SPARC (another public school cooperative) in the Michigan Court of Claims, asserting promissory [*5] estoppel and various tort claims against the MDE and State and further asserting that Great Lakes was an illegal entity. On January 14, 2005, Great Lakes and SPARC were dismissed from the litigation by stipulation. The litigation continued, and the Court of Claims issued a preliminary injunction requiring the State to cease and desist administering Great Lakes and other public school food cooperatives, except for the 15 original pilot program members previously existing. (Compl. Ex. A-7.) The Court of Appeals affirmed. (Compl. Ex. A-8.) However, on May 24, 2006, the Michigan Supreme Court summarily reversed, holding that a claim of promissory estoppal was not cognizable on a contract with an integration clause. (Compl. Ex. A-9.) The Supreme Court stayed the injunction and remanded. On remand, the Court of Appeals, after considering the remaining claims, denied the injunction. (Compl. Ex. A-10.) Thereafter, on October 30, 2006, the Court of Claims granted Defendants' motion for summary judgment. (Compl. Ex. A-11.)

After winning in the court of claims, the State entered into a Resolution Agreement with Northern, under which Northern waived its rights to appeal. The State granted Northern [*6] a 54% increase in its contract price for delivery during the remaining period of the contract. Paragraph 5 of the Resolution Agreement provided as follows:

> 5. School Districts Subject to Price Increase
>
> Attachment A identifies the school districts that will be serviced by Northern Warehousing, Inc. for the remaining duration of Contract No. 071B2001531. The identified districts are subject to the price increase.

(Compl. A-13.) Attachment A to the Resolution Agreement, however, mistakenly identified all school districts in Regions 1 and 3, including the school districts that were part of a cooperative, the very issue the State had just litigated and won. Although it does not affirmatively dispute that the attachment was a mutual mistake, Northern has taken the position that it is entitled to make all deliveries in the regions and that the State cannot authorize direct shipments to Great Lakes and other cooperatives.

After Northern advised the State Defendants of its position, on October 23, 2006, the MDE issued a memorandum to all school districts in Regions 1 and 3, stating that it had made an "inadvertent error" and that, in light of Northern's argument, all districts [*7] in Regions 1 and 3 were required to obtain commodities from Northern. (Compl. Ex. A-14.) The MDE then ceased authorizing the direct shipments to Great Lakes.

On November 10, 2006, Great Lakes filed the instant action in the Traverse County Circuit Court.

II.

Pursuant to *FED. R. CIV. P. 65(b)*, "every temporary restraining order granted without notice . . . shall expire by its terms within such time after entry, not to exceed 10 days . . . unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period." A temporary restraining order, like a preliminary injunction in general, is an equitable remedy, the purpose of which is to maintain the relative positions of the parties until proceedings on the merits can be conducted. *Univ. of Texas v. Camenisch, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981)*. In evaluating a request for injunctive relief pursuant to *Federal Rule of Civil Procedure 65(b)*, the Court must balance the following equitable factors: 1) whether the plaintiff [*8] has a strong likelihood of success on the merits; 2) whether an injunction will save the plaintiff from irreparable harm; 3) whether the injunction will cause substantial harm to a third party; and 4) whether the injunction will serve the public interest.

Chabad of Southern Ohio & Congregation Lubavitch v City of Cincinnati, 363 F 3d 427, 432 (6th Cir. 2004).

A proper consideration in the decision to grant preliminary injunctive relief is the good faith of the parties concerned. The doctrine of unclean hands is based on the principle that "since equity tries to enforce good faith in defendants, it no less stringently demands the same good faith from the plaintiff." *Dunlop-McCullen v. Local 1-S, AFL-CIO-CLC, 149 F 3d 85, 90 (2d Cir. 1998).* "[W]hile equity does not demand that its suitors shall have blameless lives, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy at issue." *Precision Instrument Mfg Co. v Auto Maint. Mach Co., 324 U.S. 806, 814-15, 65 S Ct 993, 89 L. Ed 1381, 1945 Dec. Comm'r Pat. 582 (1945). See also J-Rich Clinic, Inc. v Cosmedic Concepts, Inc., 98 F. App'x 444, 447 (6th Cir. 2004)* [*9]

A. Likelihood of Success on the Merits

In its complaint, Great Lakes raises six grounds for relief: (1) the Resolution Agreement is an ultra vires contract, not properly authorized by the MDE, and the DMB lacks authority to bind Great Lakes and its members under *MICH. COMP. LAWS 18.1101, et seq.*, (2) tortious interference with advantageous business relationships; (3) violation of NSLA rights; (4) denial of due process under the Michigan Constitution by terminating Great Lakes' statutory and contractual rights; (5) denial of equal protection under the Michigan Constitution; and (6) mandamus.

Looking to the single federal cause of action, the NSLA requires the Michigan Department of Education to manage funds disbursed by the USDA for reasons including processing, distributing, transporting and storing agricultural commodities on behalf of school district NSLA program participants. *42 U.S.C. § 1757.* By federal law, Defendants must consult with local schools regarding selection and distribution of commodity assistance. *42 U.S.C. § 1762a.* Plaintiff, in its status as a "contracting agency" under NSLA and [*10] the underlying regulations, is entitled to enter into food processing contracts and distribution contracts. *7 C.F.R. § § 250.3, 250.24, 250.30(b).* It also is a "distributing agency" under the regulations. *7 C.F.R. § § 250.3, 250.12, 250.24, 250.48.* Defendants act as the administrators of the USDA's NSLA commodity programs. By unilaterally terminating Plaintiff's commodity functions for its member districts, Defendants arguably violate Plaintiff's rights under the NSLA and its underlying regulations.

In addition, both the tortious interference with business relationships and the due process claims appear well supported. To prove a claim for tortious interference with advantageous business relationship, a party must show "the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff." *Badiee v. Brighton Area Schools, 265 Mich. App. 343, 695 N.W.2d 521, 538 (Mich. Ct. App. 2005)* [*11] (citing *Mino v. Clio School Dist., 255 Mich. App. 60, 661 N.W.2d 586, 597-98 (Mich. Ct. App. 2003); BPS Clinical Laboratories v. Blue Cross & Blue Shield of Michigan (On Remand), 217 Mich. App. 687, 552 N.W.2d 919, 925 (Mich. Ct. App. 1996)).* Here, Plaintiff squarely alleges intentional conduct by the State in terminating direct delivery of shipments to Plaintiff. Although the State argues that its agreement to the terms of the Resolution Agreement was not intentional, it does not dispute that the memorandum of the MDE ordering all districts to deal solely with Northern clearly was an intentional act. The State's mistake in signing the Resolution agreement unquestionably placed it on the horns of the dilemma, but the State intentionally sought to resolve that dilemma at Plaintiff's expense. The remaining elements of the intentional-interference-with-business-relationship claim are equally well supported by the verified allegations and the attached affidavits and they are undisputed by the State.

Plaintiff also has alleged a proper claim under the *Due Process Clause of the Michigan Constitution.*

> Both the Michigan Constitution and the United States Constitution preclude the government [*12] from depriving a person of life, liberty, or property without due process of law. U.S. Const., Am. XIV; Const. 1963, art. 1, § 17; *Hinky Dinky Supermarket, Inc. v. Dep't of Community Health, 261 Mich. App. 604, 605-606, 683 N.W.2d 759 (2004).* The principle of fundamental fairness is the essence of due process. *In re Adams Estate, 257 Mich. App. 230, 233-234, 667 N.W.2d 904 (2003).* Due process is a flexible concept, however, and determining what process is due in a particular case depends on the nature of the proceeding, the risks and costs involved, and the private and governmental interests that might be affected. *Genesco, Inc. v. Dep't of Environmental Quality, 250 Mich. App. 45, 56, 645 N.W.2d 319 (2002).* Generally, due process in civil cases requires notice of the nature of the proceedings and an opportunity to be heard in a meaningful time and manner by an impartial decisionmaker.

By Lo Oil Co. v. Department of Treasury, 267 Mich App 19, 703 N.W.2d 822, 831 (Mich Ct App 2005) (internal quotations omitted). Here, Plaintiff consortium had the right under both federal and state law to receive direct shipments from the [*13] USDA and to enter into contracts to process and distribute those food products to its member schools. The State had just litigated and prevailed on the question of whether its contract with Northern reserved Plaintiff's right to receive those shipments. The State, however, without notice to Plaintiff, inadvertently compromised that right through the Resolution Agreement and then acted intentionally, unilaterally and without notice to terminate Plaintiff's rights. Plaintiff therefore appears to have substantial likelihood of success on the merits of its due process claim.

Without addressing all six of the claims, the Court finds that Plaintiff has demonstrated a substantial likelihood of success on the merits of at least several of its claims.

B. Irreparable Harm to Plaintiff

Plaintiff Great Lakes does over $ 12 million in annual commodity business for its members. According to the verified facts of the Complaint and its supporting affidavit, during the pendency of the state proceedings and the state-court preliminary injunction, Great Lakes lost substantial revenues that would habe been generated by those commodity transactions. The State's action to cease its obligations to [*14] Plaintiff in order to fulfill its mistaken obligations to Northern will resume significant forfeitures of commodities by Plaintiff and its members, disrupting contractual arrangements with processors and distributors. Neither the State nor Northern have challenged either the immediacy or seriousness of the harm to Great Lakes caused by the MDE's October 23, 2006 memorandum. As a result, the Court finds Plaintiff and its members will be irreparably harmed absent continuation of the temporary restraining order as a preliminary injunction.

C. Substantial Harm to Third Party

Neither the State Defendants nor Northern will suffer irreparable harm as the result of the preliminary injunction. By the State's own admission, the contract language upon which Northern bases its claim for distribution rights was entered only through clerical mistake. After April 2006, when the Michigan Supreme Court vacated the preliminary injunction barring the State from servicing Plaintiff cooperative, Northern had no legal right to continue to distribute to consortium members. Moreover, in September 2006, when the Court of Claims granted summary judgment to the State on Northern's civil action, Northern [*15] had no expectation that it would be entitled to service Plaintiff and its members absent significant passage of time and limited likelihood of success on appeal. As a result, the status quo until the State's unilateral order was that the Consortium had the right to service its members and Northern had no exclusive right to distribute to those members. Issuance of the injunction will merely return both the State and Northern to their expectations when they entered into the Resolution Agreement: a 54% increase in price paid to Northern, but only for those districts not within Plaintiff consortium.

At oral argument, the Court pressed Northern on the negotiation of the Resolution Agreement and on Northern's understanding about the districts the parties intended to include in Attachment A. While counsel for Northern made vague representations that Northern did not know the final list of schools for which the parties intended the 54% increase, at no time, either in its pleadings or at oral argument, did Northern affirmatively assert that, during negotiations, it understood that the State had promised to grant Northern the exclusive right to service all districts in Regions 1 and 3, including [*16] those districts within Plaintiff cooperative. Further, counsel for Northern stated that, upon seeing the list, Northern asked the State whether the list was correct and asked the State to initial each page, undoubtedly because the list was far more generous than Northern anticipated. In sum, no serious question has been raised that, regardless of the enforceability of the contract, the list attached as Attachment A was a mistake. It is equally apparent that, rather than experiencing a substantial harm, Northern is merely being returned to the agreement apparently negotiated. Even if it may hold the State liable for damages for breach of the Resolution Agreement, Northern cannot demonstrate that it would be substantially harmed by the inability to deliver to Plaintiff members.

Moreover, it appears to this Court that Northern strongly suspected an error in contracting yet did not mention the error to the State and proceeded to take advantage of the State's error to its own advantage. Northern therefore does not come before this Court with clean hands. *See Performance Unlimited, Inc. v. Questar Publishers, Inc., 52 F.3d 1373, 1383 (6th Cir. 1995)*. The unclean-hands doctrine, [*17] like other equitable defenses, is appropriately considered by a court in determining whether to issue a preliminary injunction. *Id.* The doctrine is applied when a party seeking relief before the Court has itself engaged in misconduct related to the matter in litigation. *Id.* Although Northern may have an enforceable contract with the State, it's claim that it is being substantially harmed by being denied the right to actually service the Consortium districts (as opposed to receiving damages for breach of contract) is unpersuasive. n1

n1 Because of the existence of an integration clause, the mistaken attachment to the Resolution Agreement may be enforceable notwithstanding the mistake and possible silent fraud by Northern. *See Lash v. Allstate Ins. Co., 210 Mich. App. 98, 532 N.W.2d 869 (Mich. Ct. App. 1989).* However, the Court observes that there remains a significant question whether Paragraph 5 of the Resolution Agreement grants Northern the *exclusive* right to service all of the listed school districts. Indeed, the provision makes no reference to exclusivity and, instead, purports to identify those school districts subject to the price increase set forth in the Resolution Agreement. The Court is not persuaded that the language of the provision entitles Northern to make all commodities deliveries to the listed school districts or that the State is precluded from allowing direct deliveries to Great Lakes. The express term appears only to identify the districts that Northern has a right to service and that will be obligated to pay the increased price if so serviced.

[*18]

Further, the history of this case indicates that the State of Michigan Defendants, in consultation with Northern, consented to a modification of the TRO, entering into a stipulation to continue the TRO and delay the preliminary injunction hearing. The stipulation made specific changes to the TRO in order to protect Northern's interests. The modified TRO clearly reflected Northern's involvement in the negotiation of that agreement. In addition, the records submitted by Plaintiff make clear that Northern was a party to the modification, even if, as a party not yet permitted to intervene in the case, it did not sign the stipulation. Indeed, counsel for Northern conceded that Northern had participated in and agreed to the modification to the TRO. The order delaying the preliminary injunction hearing and continuing the TRO as modified was entered by this Court on November 30, 2006. While Northern filed an answer to the complaint on December 5, 2006, it took no action to challenge the TRO until filing an emergency motion on December 19, 2006.

The equitable defense of laches is applicable to a Court's consideration of a request for preliminary injunction. *See* 11A CHARLES ALLEN WRIGHT [*19] & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2946 (2d ed. 1995). Where, as here, Northern reserved its motion to challenge the stipulated continuation of the TRO until some three weeks after its entry, and until the eve of the Christmas holidays, the immediacy of Northern's claimed hardship is not credible.

For all the stated reasons, the Court finds that continuation of the TRO as modified as a preliminary injunction will not cause substantial harm to Northern.

D. Public Interest

Plaintiff Great Lakes does over $ 12 million in annual commodity business for its members, which are local school districts. The State's action to cease its obligations to Plaintiff in order to fulfill its mistaken obligations to Northern will resume significant forfeitures of commodities by those member school districts. In order to avoid those forfeitures, those member districts will be forced to pay a dramatically inflated cost to Northern for the commodities they receive. Further, the affidavits attached to the complaint support a finding that Northern is unable to adequately serve all of the districts within the region during the current, heaviest demand of the school year. As a result, [*20] because Plaintiff's 260 member-districts will both forfeit surplus commodities and pay more for those they receive, the public interest will be significantly harmed by the refusal to issue an injunction.

III.

Federal Rule of Civil Procedure 65(d) states that "no restraining order of preliminary injunction shall issue except upon the giving of security by the applicant . . . ." *Id.* "While . . . the language of *Rule 65(d)* appears to be mandatory, and many circuits have so interpreted it, the rule in our circuit has long been that the district court possesses discretion over whether to require the posting of security." *Moltan Co. v. Eagle-Picher Indus., Inc., 55 F.3d 1171, 1176 (6th Cir. 1995)* (citing *Roth v. Bank of the Commonwealth, 583 F.2d 527, 539 (6th Cir. 1978)*; *Urbain v. Knapp Bros. Mfg. Co., 217 F.2d 810, 815-16 (6th Cir. 1954)*.

In the instant case, the State of Michigan acknowledges its own responsibility for the competing financial hardships in issue in this action. Plaintiff has brought claims solely against the State of Michigan, and the State has itself consented to the [*21] continuation of the injunction in issue without security. Further, any financial consequences to Northern have been the subject of negotiations under which the State recognizes its own responsibility to pay. As a result, security from Great Lakes would appear to serve no purpose. The Court therefore waives the security requirement of *Rule 65(d)*.

IV.

For the foregoing reasons, Northern's motion to vacate the temporary restraining order issued by this Court on November 21, 2006 and modified by stipulation on November 28, 2006 is **DENIED.** The temporary restraining order as previously modified is hereby continued as a preliminary injunction pending full evidentiary hearing on February 1, 2007.

An Order consistent with this Opinion shall issue.

Dated: December 29, 2006

/s/ Robert Holmes Bell

CHIEF UNITED STATES DISTRICT JUDGE

EXHIBIT D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	CHAPTER 11
PHP HEALTHCARE CORPORATION, Debtor.	Case No. 98-2608 (MFW)
PHP HEALTHCARE CORPORATION, Plaintiff, v. HIP FOUNDATION, INC., HEALTH INSURANCE PLAN OF GREATER NEW YORK, MARSHA BRODERICK, CAROLYN HOFFMAN, BETTY GRAYSON KURZWEIL, ROBERT GRAYSON, and FLORENCE ROSENMAN, Defendants.	Adv. No. A99-18 (MFW)

OPINION[1]

I. PROCEDURAL BACKGROUND

This case is before us on the Motion of PHP Healthcare Corp. ("the Debtor") for a Preliminary Injunction, by which the Debtor seeks to stay certain actions against the Debtor's current and former officers and directors. The Motion is supported by the Creditors' Committee and opposed by the Plaintiffs in the three

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[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

actions. For the reasons set forth below, we grant the Debtor's Motion.

II. FACTUAL BACKGROUND

The Debtor filed a voluntary petition under chapter 11 on November 19, 1998. Prior to the petition, an action had been instituted in the United States District Court for the Central District of California by Marsha Broderick and Carolyn Hoffman against the Debtor and certain former and current officers and directors of the Debtor at C.A. No. 98-1658 ("the California Action"). Another action was commenced pre-bankruptcy in the Delaware Court of Chancery by Betty Grayson Kurzweil and Robert Grayson as Trustees under the will of Florence Rosenman against the Debtor, as nominal Defendant, and certain former and current officers and directors of the Debtor at C.A. No. 16582 ("the Delaware Action"). Post-petition, an action was filed in the Supreme Court of the Sate of New York by HIP Foundation, Inc. and Health Insurance Plan of Greater New York against certain former and current officers and directors of the Debtor at C.A. No. 99-CV 66 ("the New York Action").

On February 8, 1999, the Debtor filed a Complaint against the Plaintiffs in each of the above Actions seeking Declaratory and Injunctive Relief. The Debtor also filed a Motion for a Preliminary Injunction, which was heard on March 11, 1999. All

the Plaintiffs oppose the Motion. The Creditors' Committee supported the Motion. After argument, we held the matter under advisement.

III. DISCUSSION

To grant a preliminary injunction, we must consider:

1. The likelihood that the Debtor will prevail on the merits.
2. The extent to which the Debtor will suffer immediate and irreparable harm if the injunction is not granted.
3. The harm that the Plaintiffs in the Actions will suffer if an injunction is entered.
4. Whether issuance of the injunction is in the public interest.

See In re American Film Technologies, 175 B.R. 847, 849 (Bankr. D. Del. 1994), quoting Merchant & Evans, Inc. v. Roosevelt Building Products Co., 963 F.2d 628 (3d Cir. 1992).

A. Likelihood of Success on Merits

The basis for the Debtor's request is that the continuation of the actions will (1) reduce the proceeds of the insurance available for other creditors who may have such actions, (2) increase claims against the estate by creating indemnification

claims of such officers and directors, (3) expose the Debtor to collateral estoppel, adverse precedent, vicarious liability, or imputed admissions, (4) be disruptive to the estate by diverting the officers and others from the essential task of reorganization to address discovery and other issues in the Actions.

The Creditors' Committee supported the Debtor, primarily on the first ground. Because we agree that the Debtor is likely to succeed on the merits on this first ground, we do not address the others.

The Debtor and the Committee assert principally that the Actions should be stayed because they will otherwise dissipate proceeds of an insurance policy ("the Policy") which are available to pay all similar creditors and the indemnification claims which may be filed against the Debtor by the officers and directors. In support of this argument, they rely on the case of In re Sacred Heart Hospital of Norristown, 182 B.R. 14 (Bankr. E.D. Pa. 1995), where the court held that the proceeds of liability insurance are property of the estate and, therefore, enjoined creditors' actions. The court in Sacred Heart noted that the insurance policy provided coverage for both the debtor and for its officers and directors. See id. at 418. Therefore, the court concluded that because the debtor was an insured under the policy, it had a sufficient interest in the proceeds to make them property of the estate. See id. at 420. See also, In re

Circle K Corp., 121 B.R. 257 (Bankr. D. Ariz. 1990)(insurance policy which provides payment to the debtor of indemnification claims it may pay is property of the estate).

The Plaintiffs respond to that argument by citing the case of In re Louisiana World Exposition, Inc., 832 F.2d 1391 (5th Cir. 1987). The Louisiana World court focused on whether the proceeds of the policy are paid directly to the officers and directors and not to the debtor. See id. at 1399. If the proceeds are not paid to the debtor directly, the Louisiana World court held that they are not property of the estate. See id. Accord In re Zenith Lab., Inc., 104 B.R. 659, 665 (D.N.J. 1989)(where the insurance policy does not increase the debtor's worth or decrease its liabilities, it is not property of the estate).

Thus, the Debtor and Committee assert that the insurance proceeds are property of the estate and that the automatic stay prevents the Plaintiffs from proceeding to obtain those proceeds. Section 362(a)(3) stays any act to obtain possession of property of the estate. The Debtor and Committee also assert that the Actions should be stayed now (even before any danger that a judgment will be entered or payments be made under the policy) because to the extent the Actions proceed, the officers and directors will have ongoing, increasing claims for

indemnification of defense costs. The Policy covers defense costs and losses under the same $15 million limit of liability.

We agree with the holding of the court in Sacred Heart that the type of policy in question in this case is property of the estate. Under the express terms of the Policy in this case, the indemnification claims must first be paid by the Debtor, before they can be covered as a Loss: the Policy states it will pay the Debtor for indemnification claims made against it by its officers and directors "only when and to the extent that the [Debtor] has indemnified the Directors or Officers for such Loss pursuant to law . . . or By-laws of the [Debtor]. . . ." (Declaration of Hercenberg, Exhibit D at p. 4) Unlike the policy in Louisiana World, the policy here does affect the Debtor's worth. The Debtor's By-laws require indemnification of officers and directors. (See id. at Exhibit E, Article IX) Accordingly, regardless of the existence of the insurance policy, the Debtor will be "out-of-pocket" for any indemnification costs. The policy will make the debtor whole, thus increasing its worth.

Furthermore, we find that the Policy here, unlike the one in Louisiana World, provides entity coverage in addition to director

and officer coverage.[2] Thus, the Policy here is factually distinguishable from the policy in Louisiana World and more similar to that at issue in Sacred Heart.

Thus, we conclude that the proceeds of the Insurance Policy are property of the estate subject to the automatic stay. We also agree that the Actions should be stayed to prevent the dissipation of the Policy proceeds through the accrual of indemnification claims for defense costs. Thus, we find that the Debtor has a likelihood of success on the merits of its complaint for declaratory relief and an injunction.

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[2] Section 1 of the Policy, entitled "Insuring Agreements," under Coverage B provides Comprehensive Liability Insurance as follows:

> This policy shall pay the Loss of the Company arising from a:
>
> (i) Securities Claim first made against the Company, or
>
> (ii) Claim first made against the Directors or Officers,
>
> during the Policy Period or the Discovery Period (if applicable) and reported to the Insurer pursuant to the terms of this policy for any actual or alleged Wrongful Act, but, in the case of (ii) above, only when and to the extent that the Company has indemnified the Directors or Officers for such Loss pursuant to law, common or statutory, or contract, or the Charter or By-laws of the Company duly effective under such law which determines and defines such rights of indemnity. The Insurer shall, in accordance with and subject to Clause 8, advance Defense Costs of such Claim prior to its final disposition.

(See Hercenberg Affidavit, Exhibit D at p. 4)

B. Immediate and Irreparable Harm to the Debtor

The Plaintiffs in the Actions assert that there will not be any irreparable harm to the Debtor by the continuation of these suits. They argue that the cases are in their infancy and will not involve substantial discovery. In fact, in private securities litigation the filing of a motion to dismiss stays discovery. See Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 77z-1(b). The Plaintiffs argue that granting an injunction in these circumstances, where the burden on the estate is de minimus, is in effect extending the stay to all actions against officers and directors. While it may be true that the cases are young and discovery may not be extensive, we find that any action in those cases will have an adverse effect on the estate.

Because we find that the Policy proceeds are property of the estate, we find that continuation of the Actions will constitute immediate and irreparable harm to the Debtor. Specifically, to the extent that the Actions continue, there will be indemnification claims accruing against the estate which will be decreasing the value of the Policy. This is irreparable; to the extent the claims accrue, the Policy is irrevocably reduced. Thus, we conclude that the second prong is met.

C. Harm to the Plaintiffs

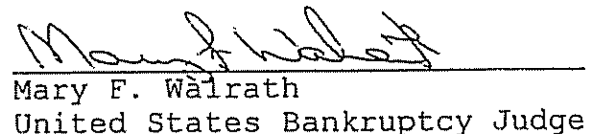
Correspondingly, we do not find that there will be significant harm to the Plaintiffs by entering an injunction here. As noted by the Plaintiffs, the Actions are in their infancy. None are ready for trial. A brief stay to permit the filing of a Plan in this case (which may deal with these claims and others like them) will not harm the Plaintiffs.

D. Public Interest

The Bankruptcy Code policies of preserving assets of the estate and distribution of those assets in accordance with the priorities set forth in the Code favor granting an injunction in this case.

An appropriate Order is attached.

BY THE COURT:



March 31, 1999

Mary F. Walrath
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: PHP HEALTHCARE CORPORATION, Debtor.	CHAPTER 11 Case No. 98-2608 (MFW)
PHP HEALTHCARE CORPORATION, Plaintiff, v. HIP FOUNDATION, INC., HEALTH INSURANCE PLAN OF GREATER NEW YORK, MARSHA BRODERICK, CAROLYN HOFFMAN, BETTY GRAYSON KURZWEIL, ROBERT GRAYSON, and FLORENCE ROSENMAN, Defendants.	Adv. No. A99-18 (MFW)

O R D E R

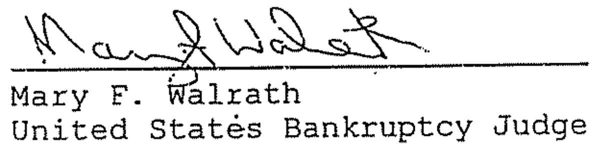
AND NOW, this 31ST day of MARCH, 1999, upon consideration of the Motion of PHP Healthcare Corporation for a Preliminary Injunction, the underlying Complaint for Declaratory and Injunctive Relief, and the Memoranda and Responses submitted by the interested parties, and after hearing argument by the parties on March 11, 1999, it is hereby

ORDERED that the Debtor's Motion for a Preliminary Injunction against the Defendants be, and the same hereby is, **GRANTED**; and it is further

ORDERED that the Defendants are hereby enjoined from taking any acts in furtherance of their Actions against certain former officers and directors of the Debtor, as those Actions are defined in the Complaint and on the Record of the March 11 hearing and the hearing held this date; and it is further

ORDERED that this Preliminary Injunction shall remain in effect until the trial on the Debtor's Complaint.

BY THE COURT:



March 31, 1999

Mary F. Walrath
United States Bankruptcy Judge

cc: See attached

CERTIFICATE OF SERVICE

I, Marcos A. Ramos, do hereby certify that on January 17, 2007, I caused a copy of the foregoing **Advanced Marketing Services, Inc.'s Answering Brief in Opposition to the Emergency Application of Simon & Schuster for Temporary Restraining Order Pursuant to Bankruptcy Rule 7065** to be served on the parties identified below in the manner indicated:

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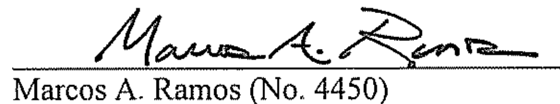

Marcos A. Ramos (No. 4450)