

STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF MONROE

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CONCORD INSURANCE AGENCY, LLC and  
THE SHAMROCK GROUP, LLC,

Plaintiff,

DECISION and ORDER

v.

INDEX No. 2006/00665

ROBERT COYLE,

Defendant.

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Defendant, Robert Coyle ("Coyle"), has moved by Order to Show Cause for a preliminary injunction and temporary restraining order enjoining plaintiffs from directly or indirectly: (1) disclosing any of Coyle's and/or the Coyle-Merz Insurance Agency, Inc.'s ("Coyle-Merz") confidential and proprietary information including defendant's book of business, expirations, and customers, (2) contacting Coyle's and/or Coyle-Merz's customers in order to solicit them to discontinue business relations with defendant and/or his Agency or to do business with plaintiffs, (3) contacting any of the insurance companies with whom Coyle and/or Coyle-Merz conducts business in order to solicit them to discontinue their business relations with defendant or his Agency, (4) contacting any of the aforesaid insurance companies concerning any commissions earned by Coyle and/or Coyle-Merz, (5) making disparaging remarks or representations against Coyle and/or Coyle-Merz to said insurance companies or to past or

present customers of Coyle and/or Coyle-Merz, (6) interfering with the mail posted to Coyle and/or Coyle-Merz, (7) depositing or holding commission checks made payable to Coyle and/or Coyle-Merz for servicing customers as of July 19, 2005 or present customers of Coyle and/or Coyle-Merz, (8) accepting electronic funds transfers from insurance companies for commissions due to Coyle and/or Coyle-Merz for customers as of July 19, 2005 or present customers. Although defendant requested a Temporary Restraining Order pending the hearing of this motion, the court declined to issue one.

In addition, defendant requests an order requiring plaintiffs to: (1) return to Coyle and Coyle-Merz their book of business, expirations, customer lists, any and all files and equipment of Coyle and/or Coyle-Merz, (2) provide to Coyle and Coyle-Merz the plaintiffs' books and records as well as the corporate books and records of Coyle-Merz, (3) pay to Coyle all commissions received as a result of insurance coverage for any payment of premiums by customers as of July 19, 2005 and by present customers of Coyle and/or Coyle-Merz, (4) account to Coyle for all commissions received by reason of the placement of insurance coverage for and payment of premiums by customers as of July 19, 2005 and by present customers of Coyle and/or Coyle-Merz, and (5) account and reveal to Coyle the status of each customer of Coyle and/or Coyle-Merz as of July 19, 2005.

The action was commenced on January 20, 2006, via summons and complaint. At Special Term on March 29, 2006, the court granted defendant's motion to compel service of a late answer and to relieve defendant of its default, and also denied plaintiffs' motion for a default judgment. Plaintiffs allege breach of contract, and defendant's proposed answer contains 13 affirmative defenses and 15 counterclaims against plaintiffs.

Concord Insurance Agency, LLC ("Concord") was formed on February 13, 2002, pursuant to an Operating Agreement, and thereafter a Restated Operating Agreement of Concord was executed in December 2003 by five individuals, including defendant Coyle.<sup>1</sup> According to the Restated Operating Agreement, these five members each had previously established their own insurance agency, and the purpose of forming Concord was to consolidate their business efforts to share expenses and develop a larger commonly owned insurance agency. Defendant Coyle was the sole shareholder and owner of Coyle-Merz Agency, Inc. when he formed Concord, and according to defendant, Coyle-Merz has not dissolved and continues to operate to date, an arrangement contemplated by the Restated Operating Agreement. Concord is licensed as a general

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<sup>1</sup> The five members of Concord were Robert Coyle, Thomas Glanton, Sean T. Kelly, Craig Smith, and Shavonne G. Smith. Craig Smith voluntarily withdrew from Concord after the execution of the Restated Operating Agreement. Each members' initial percentage interest in Concord was 20%. Glanton and Kelly are the managing partners of Concord.

insurance brokerage, and insures against, *inter alia*, fire and liability in New York.

The Shamrock Group, LLC ("Shamrock") was formed by three individuals,<sup>2</sup> including defendant Coyle, and Shamrock's Operating Agreement was signed on April 24, 2002. Per the Operating Agreement, Shamrock's purpose includes acquiring, owning, managing, selling, leasing, renting, mortgaging and otherwise dealing with real property and improvements within and without New York. The Operating Agreement provides that a person shall cease to be a member of Shamrock, *inter alia*, upon the withdrawal, retirement or expulsion of a member, or if a member ceases to be a member of Concord. Both Concord and Shamrock have their offices located at 6270 Dean Parkway, Ontario, New York, and according to defendant, Shamrock owns the real property located at this address.

Plaintiffs allege that defendant breached the two aforementioned Operating Agreements. Specifically, plaintiffs allege that defendant acted in a manner detrimental to Concord dating back to the second and third calendar quarters of 2004. The detrimental activities that plaintiffs allege include: a lack of follow-up on commercial accounts, unsatisfactory revenue

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<sup>2</sup> The three members of Shamrock are Robert Coyle, Thomas Glanton, and Sean T. Kelly, with the latter two serving as Managing Members. Each members' initial membership interest was 33 1/3%.

production, and acting as a consultant to Webster School District without requisite authority from the New York School Insurance Reciprocal. Furthermore, plaintiffs allege that, upon failed negotiations to resolve the parties' differences, defendant "withdrew" from Concord, breached several provisions of the operating agreements, and, as a result, defendant owes plaintiffs withdrawal monies. In support of plaintiff's contention that defendant "withdrew," plaintiffs refer to a letter, dated October 21, 2005, from defendant to plaintiffs, wherein defendant states: "I will not be selling Coyle & Merz Agency, Inc. to the Concord Insurance Agency, LLC. I will be exercising my right per the Concord operating agreement to remove my agency [from] the LLC."

In contrast, defendant alleges that the managing members of the plaintiffs requested that he resign and sell his business (Coyle-Merz) to them, but when defendant failed to resign as requested, the plaintiffs expelled the defendant on July 19, 2005, in violation of the Concord Restated Operating Agreement, which allows Concord to expel a member if (a) a member loses an insurance license or commits a felony, (b) a member fails to reach his performance goals for three (3) consecutive years, or (c) a member's substance abuse problems have a deleterious effect on Concord or his Agency. Concord's Restated Operating Agreement § 18. Defendant asserts that Concord has failed to provide any reason for his expulsion that would be in accordance with § 18.

In addition, defendant asserts that, after the alleged expulsion, plaintiffs locked him out of their place of business at 6270 Dean Parkway by changing the locks and refusing to return his property, notwithstanding the fact that defendant owns 33.33% of the building. Moreover, defendant alleges that, since he was expelled, Concord refused to provide him with any commissions earned by him or by Coyle-Merz, that Concord has not provided an accounting of gross commissions earned or received by Concord or of commissions earned or received on behalf of Coyle-Mertz or defendant, and that at no time did defendant assign or sign over any rights to Concord relative to Coyle-Merz or otherwise.

In support of his contention that he was wrongfully expelled, defendant refers to a letter and an email from plaintiffs to defendant. See Exhibits To Order To Show Cause, Exhibit D. The letter, dated July 19, 2005, states in pertinent part: "We are therefore notifying you that due to lack of communication, your refusal to withdraw from Concord and the prospect of not closing by August 1, 2005 [for the sale of Coyle-Merz], we are treating this as an immediate expulsion from Concord Insurance Agency, LLC. This is in accordance with the terms of our operating agreement." The email, dated August 2, 2005, further states that the reason for the expulsion was because "you have not met certain financial criteria as set forth in the Concord Operating Agreement," and "we did not receive a

response to our offer to purchase your agency and for you to withdraw from Concord.”

Defendant is now affiliated with the Alliance Group of Western New York, Inc., an insurance group, which is alleged to be a competitor of Concord. The remaining members of Concord and Shamrock have elected to continue both LLCs.

### Analysis

In order for a party to obtain a preliminary injunction, the party must establish that (1) there is a likelihood of ultimate success on the merits, (2) that there is a prospect of irreparable harm if the relief is not granted, and (3) that the balance of equities favor the moving party. Doe v. Axelrod, 73 N.Y.2d 748 (1988). It is also a general rule that a preliminary injunction is a drastic remedy and should be issued cautiously. Uniformed Firefighters Assn. of Greater New York v. City of New York, 79 N.Y.2d 236 (1992).

“[A] likelihood of ultimate success must not be equated with a final determination on the merits.” Times Square Books, Inc. v. City of Rochester, 223 A.D.2d 270, 278 (4th Dept. 1996). See also, Bingham v. Struve, 184 A.D.2d 85 (1st Dept. 1992).

Moreover, if a litigant can be fully recompensed by a monetary award, then the litigant has an adequate remedy of law, and thus is not irreparably harmed. D&W Diesel, Inc. v. McIntosh, 307 A.D.2d 750, 751 (4th Dept. 2003); Main Evaluations, Inc. v. State

of New York, 296 A.D.2d 852, 854 (4th Dept. 2002); Elpac Ltd. v. Keenpac North America Ltd., 186 A.D.2d 893, 895 (3d Dept. 1992). Finally, where it is demonstrated that the opposing party would be likely to suffer more damage than the movant, then the balancing of equities rests with the non-moving party and thus a preliminary injunction should not be issued. Price Paper and Twine Co. v. Miller, 182 A.D.2d 748, 750 (2d Dept. 1992).

As the defendant seeks to enjoin plaintiffs from performing a myriad of acts, each alleged act will be discussed in turn.

#### Commission Checks

Defendant alleges that after he was expelled from Concord on July 19, 2005, plaintiffs have refused to release commissions made payable to Coyle-Merz, have refused to release commissions paid to Concord but were produced by either Coyle-Merz or Coyle, have deposited commission checks made payable to Coyle-Merz into a Concord bank account, have fraudulently endorsed commission checks in the name of Coyle-Merz, and have filed an "Authorization for Direct Deposit of Monthly Commissions" form in the name of Coyle-Merz to change the depositing of commissions into Concord's Bank Of America account without any authority or permission to do so. Defendant also alleges that plaintiffs have not paid him his commissions earned in violation of § 2120 of the Insurance Law.

Defendant has supported its allegations in the form of eight

cancelled checks made payable to Coyle-Merz but endorsed and deposited by plaintiffs (see Exhibits To Order To Show Cause, Exhibits E - H; Reply Affidavit of Robert Coyle, Exhibit D), and has also included a copy of the alleged unauthorized "Authorization for Direct Deposit of Monthly Commissions" form signed by Thomas Glanton of the plaintiffs (see Exhibits To Order To Show Cause, Exhibit I) which has allowed plaintiffs to receive defendant's commissions electronically via direct deposit instead of by paper check. Defendant asserts that the cancelled checks are just a few examples of the many commission checks that have been converted by plaintiffs, and that only he and not Thomas Glanton has authority to sign for and bind Coyle-Merz.

Moreover, defendant asserts that he has sent Concord and Concord's bank (Bank of America) letters in an effort to stop the alleged wrongdoing of plaintiffs regarding the commission checks, but it has not stopped plaintiffs' actions. See Exhibits To Order To Show Cause, Exhibits J and K. Moreover, defendant states that some insurance companies, such as Kemper, have agreed to hold the commission checks in escrow until the parties agree upon who is entitled to these commission checks. See Exhibits To Order To Show Cause, Exhibit L. However, since this deprives both defendant and plaintiffs of commissions, defendant alleges that Concord thereafter moved his clients so that his clients are now in the Concord name and therefore Concord will receive the

commission checks.

In response to defendant's allegations regarding the commission checks, plaintiffs allege that all the commission checks of Coyle and Coyle-Merz legally belong to Concord. See Affidavit of Thomas G. Glanton, ¶ 21. Plaintiffs do not deny that they have been depositing the commission checks of Coyle and Coyle-Merz into their bank account, nor do they deny the allegations that they fraudulently endorsed commission checks in the name of Coyle-Merz or that they filed an electronic funds transfer direct deposit form in the name of Coyle-Merz without any authority to do so.

Disparaging Remarks/Misleading Contact with Insurance Companies

Defendant alleges that plaintiffs are also making misrepresentations to the insurance agencies with whom defendant and Coyle-Merz do business. Specifically, defendant alleges that, in December 2005, plaintiffs represented to CNA Surety that the Coyle-Merz Agency, Inc. account should be closed because it was being merged with Glanton Associates, Inc., and that Glanton is in the process of a name change to Concord Insurance, LLC. See Exhibits To Order To Show Cause, Exhibit P. Defendant also alleges that upon information and belief, plaintiffs have misrepresented defendant's status or the status of his customers to enumerated insurance agencies, and that alternatively, if plaintiffs have not already done so, the plaintiffs are either in

the process of making such misrepresentations or will do so soon.

Defendant also alleges that, when anyone calls Concord, the staff tells the interested party that they do not know where defendant is or how to reach him, and/or that defendant is not licensed anymore. This is not true, according to defendant, since plaintiffs know where defendant is now doing business; it is alleged in their complaint that defendant has set up business with the Alliance Group of Western New York at 1341 Fairport Road, Fairport, New York, and that defendant is still a licensed insurance broker.

#### Conversion of Defendant's Clients

Defendant alleges that plaintiffs are converting his clients in violation of Concord's Restated Operating Agreement, which provides that the members of Concord agreed not to solicit the clients of other members or use any information acquired in the business in a manner that would be adverse to the other members. In addition to soliciting defendant's and Coyle-Merz' clients via letters containing misleading and inaccurate information, defendant alleges that plaintiffs are converting his and Coyle-Merz' customers, without his advance notice and consent, by directly transferring them from one insurance company (i.e., Kemper) to another (i.e., Travelers). In addition, defendant alleges that plaintiffs are converting his customers by transferring his customers from the Coyle-Merz code with a

specific insurance company to the Concord code or to the Agencies of the managing members of plaintiffs (either the Edward F. Kelly Agency, Inc., agency of Sean Kelly, or to Glanton & Associates, agency of Thomas G. Glanton).

Furthermore, defendant asserts that plaintiffs have been transferring his customers without even informing said customers, all in violation of the customers' rights. Defendant alleges that this confused his customers, and attaches letters from three of his former clients wherein they assert that their signatures have been forged and/or the actions taken by plaintiffs are unauthorized. See Exhibits To Order To Show Cause, Exhibits M - O. Defendant asserts that these client letters are just three examples of over 100 unauthorized conversions that have been performed by plaintiffs. In addition, defendant alleges that in the event that his customers intercede to stop these unauthorized conversions, the plaintiffs send these clients a letter which seeking to cause them to transfer back their insurance to plaintiffs, in violation of paragraph 7E of the Restated Operating Agreement.

Finally, defendant alleges that plaintiffs are doing a "book roll" of his customers from Kempers to Travelers, which is when a company, such as Travelers, at the request of plaintiffs, transfers accounts from one insurance company (i.e., Kemper) to another (i.e., Travelers) without requiring photo inspections as

required by New York State law. Defendant asserts that he has a client retention rate in excess of 90%, and that the partial list attached as Exhibit G to the Reply Affidavit of Robert Coyle shows that over 40 Kemper customers of his that have been "cancelled."

Defendant states that, due to plaintiffs' conversion of his clients, not only does it result in the payment of commissions earned by defendant being made to Concord, but that it also results in defendant being unable to access information about his customers from the various insurance companies.

Proprietary and Confidential Information

Defendant alleges that plaintiffs have prevented him from having access to his client information and files that he possessed prior to his expulsion from Concord. Defendant asserts that plaintiffs and its members have access to and still retain Coyle's confidential and proprietary information concerning the Coyle-Merz "book of business," and that plaintiffs have misappropriated and utilized such confidential information in contacting and soliciting the customers of defendant and of Coyle-Merz. Also, it is alleged that not only are the members of plaintiffs possessing and openly using the defendant's book of business, but so are the insurance agencies of the members i.e., Glanton & Associates and the Edward F. Kelly Agency, Inc.

Defendant explains that his "book of business" and

"expirations" contain such information as the names, addresses, telephone numbers, and contact persons for the defendant's customers, the date of the insurance policies, the date of expirations of the insurance policies and therefore the date of renewal, the property or other risks covered by the policies, the terms of the insurance coverage, the premium to the customer, commission amounts, and the claims and loss ratio history. Moreover, defendant alleges that this information is known only to the defendant and the plaintiffs, including plaintiffs' members, member insurance agencies, and employees, and is not available to the public. Defendant asserts that the confidential information is of an incalculable value to defendant and his company, and also extremely valuable to plaintiffs, plaintiffs members, and their members' agencies who have used that confidential information to steal away and convert defendant's customers. In addition, defendant asserts that this information and customer base has been developed by him during his 25 plus years as an insurance agent, that he has spent countless hours working to develop his book of business, and that there is no dollar value that could adequately compensate him for the value of his book and damage that has been done to it by plaintiffs.

Furthermore, defendant alleges that it was his understanding that the plaintiffs would not interfere with or solicit defendant's customers or otherwise use that confidential

information for their own benefit or to his detriment. Also, defendant asserts that the Restated Operating Agreement at paragraph 7(E) determines this issue, wherein it states that "[t]he Members agree not to solicit the clients of other Members or use any information acquired in the business in a manner that would be adverse to other Members."

Defendant relies on the Clarion and Corning cases in support of its argument that it will likely be successful on the merits because of the longstanding customs and traditions in the insurance industry and in New York State regarding a "book of business" or "expirations." See Clarion Associates, Inc. v. D.J. Colby Co., Inc., 1999 NY Misc Lexis 274 (Sup. Ct. Suffolk Co., 1999); aff'd. 276 A.D.2d 461, 462-63 (2d Dept. 2000); Matter of Estate of Corning, 108 A.D.2d 96, 99-100 (3 Dept. 1985). The Corning case states:

Contrary to the operation of normal agency principles, whereby the principal has ownership rights in the lists of customers and other similar data obtained during the agency, it is the custom and practice in the insurance field that, *in the absence of a contract to the contrary*, the independent insurance agent owns the expirations at the termination of his agency. The practice is a protection of the work product of the individual agent and represents a valuable asset in the nature of goodwill (citations omitted). This universal custom is a main premise under which the American insurance industry functions and is known as the American Agency System (citations omitted). Such a custom has been recognized in New York for many years.

Id. 108 A.D.2d at 99-100 (emphasis supplied). Defendant alleges

that he has shown a likelihood of success on the merits based on the Clarion and Corning cases, the allegations concerning plaintiffs' conversion of defendant's clients, and plaintiffs' alleged violations of section 2120 of the Insurance Law regarding commissions.

However, plaintiffs point out that defendant is ignoring the emphasized part of the Corning text quoted above: "in the absence of a contract to the contrary." Plaintiffs argue that, irrespective of the insurance industry customs, the parties in an insurance agency relationship are free to enter into a contract to determine who retains ownership of the expirations, book of business, and other confidential information at the conclusion of the relationship. Plaintiffs assert that they had such an agreement in the Restated Operating Agreement addressed to the case of a member electing to terminate his relationship and withdraw from Concord, and thus Clarion and Corning do not apply. Plaintiffs assert that the Restated Operating Agreement clearly states that a withdrawing member, who fails to agree to the restrictive covenant, must pay the cost of that withdrawal as well as an amount equal to the member's share of Concord's expenses incurred in the previous 12 months, and since defendant failed to pay these amounts, he has surrendered any rights or claims to the ownership of any confidential information or commissions generated from this information. See § 17 of the

Concord Restated Operating Agreement.

Section 17 regarding "Withdrawal" also states that, "providing the disabled Member consents, in writing, to comply with the Restrictive Covenants in Section 20 of this Agreement [sic - the restrictive covenant is in § 19, not § 20], the company's purchase of the Member's Interest and Agency shall be made in accordance with Section 15 as if the withdrawing or retiring Member had died." Plaintiffs allege that defendant refused to provide written consent to comply with the Restrictive Covenants, and therefore the other provision of § 17 applies, namely that defendant owes plaintiffs the withdrawal payments and is not entitled to his client information until he makes them.

However, in arguing that defendant withdrew from Concord pursuant to the October 21, 2005 letter, and in relying on § 17 as the basis for plaintiffs' entitlement to defendant's book of business and corresponding commissions, plaintiffs conveniently ignore the fact that they first expelled defendant on July 19, 2005 via letter, and confirmed the expulsion in an email detailing the grounds for defendant's expulsion, dated August 2, 2005. Moreover, even if the October letter was interpreted as a "withdrawal" by defendant within the meaning of § 17, a contention which defendant disagrees with, defendant has since rescinded the purported withdrawal in a letter dated April 5, 2006, which was well within the required six month written

notification of withdrawal provision of § 17.

On the other hand, plaintiffs' stated reasons for expelling defendant, as set forth in the July 19, 2005 letter and confirmed in the email dated August 2, 2005, do not correspond with the provisions of § 18 of the Restated Operating Agreement, entitled "Expulsion," which states in pertinent part:

A Member may be expelled from the Company by the unanimous vote of the other Members upon the happening of any of the following (i) a Member's loss of an insurance license or the commission of a felony, (ii) the failure of a Member to reach his or her performance goals for three (3) consecutive years, or (iii) the Member's substance abuse which has a deleterious effect on the Company or his/her Agency.

Plaintiffs' stated reasons for expelling defendant included a lack of communication, a refusal to withdraw from Concord, the prospect of not closing [the sale of Coyle-Merz] by August 1, 2005, and not meeting certain financial criteria, but not for three consecutive years as set forth in the Concord Operating Agreement (Concord had been in existence less than three years at the time of the relevant events thus rendering it temporally impossible for defendant to have violated subsection (ii) of § 18, even if plaintiffs' allegations were true that defendant failed to reach his performance goals). Because plaintiffs expelled defendant for a reason other than the three enumerated in § 18, defendant's counterclaim that he was wrongfully expelled from Concord depends on whether the agreement contemplates expulsion of a member for other meritorious reasons, or if not

whether the Limited Liability Company Law permits expulsion in the circumstances, and whether, if the answer to either question is "yes," the agreement, or the LLCL (as the case may be), provides any basis for the relief defendant requests.

The language of section 18 contemplates that an expulsion of a member can occur for other than the three enumerated reasons, wherein it states: "[a] Member may be expelled . . . upon the happening of any of the following . . ." (emphasis supplied). In addition, section 21 of the Restated Operating Agreement, entitled "Withdrawal Events and Election to Continue the Company," contemplates an expulsion of a member, and also the termination of a member, for "any other" reason "pursuant to the laws of New York." Section 21 states:

In the event of the death, retirement, withdrawal, expulsion, or dissolution of a Member . . . or the occurrence of any other event which terminates the continued membership of a Member in the Company pursuant to the laws of New York, the Company shall terminate 180 days after notice to the Members of such Withdrawal Event unless the business of the Company is continued as hereinafter provided.

Furthermore, section 701(b) of the LLCL itself contemplates that a member may be expelled from an LLC:

Unless otherwise provided in the operating agreement, the death, retirement, resignation, expulsion, bankruptcy or dissolution of any member or the occurrence of any other event that terminates the continued membership of any member shall not cause the limited liability company to be dissolved or its affairs to be wound up, and upon the occurrence of any such event, the limited

liability company shall be continued without dissolution, unless within one hundred eighty days following the occurrence of such event, a majority in interest of all of the remaining members of the limited liability company or, if there is more than one class or group of members, then by a majority in interest of all the remaining members of each class or group of members, vote or agree in writing to dissolve the limited liability company.

Accordingly, when determining whether defendant was expelled or withdrew, the court is not limited by the criteria of § 18, and finds that there is no issue of fact but that defendant was expelled from Concord, and did not withdraw as plaintiff maintains. Plaintiffs' argument drawn from § 17 of the Restated Operating Agreement, that defendant must pay withdrawal penalties before plaintiffs will return defendant's clients, is without merit. Section 17 is inapplicable in determining who is entitled to the defendant's book of business. That section, together with § 15 (which contains the buyout terms applicable when the withdrawing member agrees to the restrictive covenant) does not deal with what happens to the Agency's business during the interim between the date of the purported withdrawal and the actual buyout of the withdrawing member's interest in Concord and in his Agency., nor does it explicitly contemplate a situation, as here, where the withdrawing member elects to take his Agency with him. Most certainly, it does not provide, as plaintiffs contend, that the withdrawing member's interest in Concord and his Agency is forfeited until the payments described in § 17(a)-

(b) are made. Instead, § 17(c) only provides that Concord may withhold the balance of the withdrawing member's capital account, his business records, client information, and the like, and § 17(d) relieves the Company from any further financial obligation to the withdrawing member. But nothing in the agreement authorizes the conversion of Coyle-Mertz's client accounts/commissions, and defendant's theretofore earned interest in Concord, that is established on this undisputed record.

Section 7, entitled "Business Operations," together with section 13, provide the guidance on the question who, in the circumstances, owns defendant's Agency commissions and book of business. When read as a whole, it is clear that defendant Coyle and his agency Coyle-Mertz own the book of business that he brought into Concord, and that any new customers brought in after the formation of Concord belong to Concord. Moreover, as defendant stresses, plaintiffs are prohibited from usurping defendant's Agency book of business and/or soliciting defendant's clients. Specifically, section 7 provides in pertinent part:

7A. Common Facility. The Members will share a common office facility at 6270 Dean Parkway . . . where each Member will exclusively locate his or her Agency, and where the business operations of the Company will take place.

7B. Business Allocation. Each Agency shall retain its existing customers and all "account rounding." All other business, including referrals from existing Agency clients, shall be placed through and belong to the Company.

\* \* \*

7D. Contingency Income. Each Member will collect and retain all revenues generated by his or her Agency. Each Member will receive profit sharing from the next profits of the Company based upon the Member's total contribution to the Company for that year . . .

7E. Mutual Cooperation. The Members agree to cooperate with each other and act at all times for the benefit of the Company. The Members agree not to solicit the clients of other Members or use any information acquired in the business in a manner that would be adverse to other Members.

Section 7B, therefore, preserves to each member commissions from "its existing customers and all 'account rounding,'" and allocates to Concord commissions resulting from "referrals from existing agency clients" and "[a]ll other business." Moreover, the agreement prohibits members from soliciting clients of other members or otherwise acting "in a manner that would be adverse to other members." Section 13 further provides: "Each Member, . . . , shall maintain his or her Agency, providing all revenue therefrom is reported to the Company so that allocations of income and expenses hereunder can be determined."

Finally, with respect to "withdrawal events" not covered by sections 17 and 18, and section 21 clearly contemplates the same ("withdrawal, expulsion" and "the occurrence of any other event which terminates the continued membership of a Member pursuant to the laws of New York"), the agreement provides for dissolution ("the Company shall terminate") within 180 days after notice to

the members of the "withdrawal event" unless continuation is approved "by the unanimous vote or consent of the Members (other than the Member who caused the Withdrawal Event)." (emphasis supplied). It is on this record a sharply disputed fact whether defendant by his three enumerated transgressions, or the remaining members by their wrongful expulsion in the summer of 2005, "caused the Withdrawal Event." Accordingly, it is impossible on the current record to determine whether the company must be dissolved and terminated (because plaintiffs caused the withdrawal event by wrongful termination and thereby could not elect to continue the company as the *innocent* remaining members (§ 21, second paragraph)), or whether the plaintiffs may elect to continue the business of Concord despite the withdrawal event last Summer (because defendant caused the withdrawal event). Moreover, in either event, defendant is entitled to retain commissions generated by his own Agency, "and all account rounding," as provided under Section 7B. Concord only has a right to "[a]ll other business, including referrals from existing Agency clients." For these reasons, no hearing is required under CPLR 6312(c), and an injunction may be ordered accordingly.<sup>3</sup>

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<sup>3</sup> Compare Town of Tully v. Valley Realty Dev. Co., Inc., 254 A.D.2d 835, 836 (4<sup>th</sup> Dept. 1998); Independent Health Assoc., Inc. v. Murray, 233 A.D.2d 883, 884 (4<sup>th</sup> Dept. 1996). "The court needs to resolve only those factual issues presented in the case whose resolution is necessary to decide the preliminary injunction motion." 13 Weinstein, Korn, & Miller, New York Civil Practice ¶5312.08, at p.63-183.

### Irreparable Harm

Defendant alleges that the actions of plaintiffs, their members, and their members' agencies have caused and continues to cause irreparable harm to him by "hampering, destroying, and impacting relations with his customers." In addition, defendant states that he does not currently have access to his book of business and expirations as the plaintiffs refuse to release the same, and that this information is not readily available elsewhere and it is not public information. Defendant alleges that unless the plaintiffs are enjoined from using such information, defendant's relationship with his customers will be destroyed and money damages will be unable to compensate him for the loss of commissions in the years to come. Defendant also alleges that the theft of his commissions and the failure and refusal of plaintiffs to release commissions earned by defendant has deprived him of his sole source of income, and that he will be irreparably harmed because money damages will not be available for a lengthy period of time which will probably force defendant into bankruptcy. Since defendant has established that he is entitled to maintain and keep his Agency's customers after expulsion from Concord, whether wrongful or not, defendant has shown that he has been irreparably harmed based on the damage caused by the destruction of his relationships with his Agency's clients. The same analysis would apply, for the reasons stated

above, even if plaintiffs' contention that defendant withdrew had merit (which on this undisputed record it clearly does not).

Balancing of Equities

Defendant alleges that the plaintiffs' course of fraudulent activity, including the forging of client signatures on policy cancellations and of endorsements on commission checks, and the misrepresentations to insurance companies (direct deposit form) are outrageous and intolerable, and will render any ultimate judgment ineffectual since the plaintiffs' actions will destroy the defendant's insurance agency and permanently alienate his customers. In essence, defendant asserts that it is plaintiffs' goal to drive defendant out of business and ruin his Coyle-Merz agency. Since defendant has established that these clients were his to take once his relationship ended with Concord for whatever reason, either covered by sections 17 and 18 or not, see § 21, and that all corresponding Agency commission checks belong to him, the balance of equity lies in favor of defendant.

CONCLUSION

Accordingly, defendant is entitled to a preliminary injunction enjoining plaintiffs from depositing or otherwise accepting any direct deposit of commissions produced by defendant and his agency Coyle-Merz, and are enjoined from contacting, soliciting, or converting defendant's clients and from contacting the insurance companies with whom defendant does business in

order to solicit them to discontinue business relations with defendant. The injunction does not reach any of Concord's clients, defined in section 7B as "[a]ll other business, including referrals from existing Agency clients." However, since defendant alleges that most of his clients have been wrongfully converted to Concord clients, the relevant time for determining the parties' rights to the commissions and clients is July, 2005, when the expulsion, i.e., the section 21 withdrawal event, occurred. An accounting must be performed to determine which current clients of Concord and the Members' Agencies, specifically Glanton and Associates and the Edward F. Kelly Agency, Inc., were clients of defendant and Coyle-Merz at the time of the expulsion on July 19, 2005, along with other issues such as which referrals to Concord came from the Coyle-Mertz Agency's clients pursuant to § 7B.

SO ORDERED.

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KENNETH R. FISHER  
JUSTICE SUPREME COURT

DATED: April 18, 2006  
Rochester, New York