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NOBLE, Vice Chancellor

Plaintiff, AM General Holdings LLC (“Holdco”), directly and derivatively on behalf of Nominal Defendant Ilshar Capital LLC (“Ilshar”), has moved for a mandatory preliminary injunction against Defendants The Renco Group, Inc. (“Renco”), Ira L. Rennert (“Rennert”), and ILR Capital LLC (“ILR”) (collectively, the “Defendants”). Specifically, Holdco seeks an order requiring the Defendants to cause ILR to comply with its obligations under Section 9.1(b) of the Amended and Restated Limited Liability Company Agreement of Ilshar (the “Ilshar Agreement”). For the following reasons, Holdco’s motion for a preliminary injunction is granted.

I. BACKGROUND

A. General History

In 2004, Renco agreed with MacAndrews & Forbes Holdings Inc. (“M&F”) to restructure its ownership interest in AM General LLC (“AM General”), a company that manufactures and sells trucks, most notably, the Humvee, to the United States Army.¹ Pursuant to their agreement, ownership of AM General was transferred to a newly created limited liability company, Holdco, of which Renco and MacAndrews AMG Holdings LLC (“AMG”), an affiliate of M&F, are the only members.² Also in 2004, and simultaneously with the formation of Holdco

¹ Affidavit of Edward P. Taibi (“Taibi Aff.”) ¶ 18, Affidavit of Ira L. Rennert (“Rennert Aff.”) ¶ 3.

² Taibi Aff. ¶¶ 3-4.

and the restructuring of AM General, the parties created Ilshar.³ Holdco and ILR, an affiliate of Renco controlled by Rennert, are the only members of Ilshar.⁴ ILR is the managing member of Ilshar and AMG is the managing member of Holdco.⁵

Under the Ilshar Agreement, ILR was granted the right to make investment decisions for Ilshar, subject to certain limited restrictions.⁶ In exchange for Holdco's capital contribution of approximately \$346 million made upon the formation of Ilshar, it is entitled to a preferred 8.25% return, compounded annually (the "Holdco Preferred Return").⁷ Ilshar is required by the Ilshar Agreement to pay the Holdco Preferred Return to Holdco on January 31, 2013, and each January 31 thereafter.⁸ Once received by Holdco, its Limited Liability Company Agreement (the "Holdco Agreement") requires that Holdco distribute the Holdco Preferred Return to its members "as soon as practicable." That distribution is generally 80% to Renco and 20% to AMG.⁹

In addition to the general distribution structure, the Holdco Agreement limits AMG's right to receive any distributions from Holdco if a distribution would cause AMG's "Revalued Capital Account" to be less than 20% of the aggregate value of

³ *Id.* at ¶ 5.

⁴ *Id.* at ¶ 5.

⁵ *Id.* at ¶¶ 4-5.

⁶ *Id.* at ¶¶ 5, 10.

⁷ *Id.* at ¶ 7.

⁸ *Id.* at ¶ 8, Ex. B. "The Company shall distribute cash to Holdco (i) on January 31, 2013, and on January 31st of each year thereafter an amount equal to the Cumulative Holdco Preferred Return"

⁹ Rennert Aff. ¶ 4, Taibi Aff. Ex. A (Holdco Agreement) § 9.1(b)(ii).

the Holdco members' Revalued Capital Accounts.¹⁰ If that occurs, then Renco may eventually elect to receive distributions that Holdco otherwise would have been required to make to AMG.¹¹

The parties also agreed that ILR, as the managing member of Ilshar, would be subject to a number of contractual obligations for the protection of Holdco, including restrictions on the types of investments, limitations on ILR's ability to cause Ilshar to enter transactions with Renco, Rennert, or its affiliates, and a duty to submit quarterly certifications of compliance.¹² According to Holdco, these protections were motivated in part by substantial credit and liquidity risks arising from various troubled companies affiliated with Rennert and Renco.¹³

Notwithstanding the undisputed and unambiguous contract language, ILR revealed in a October 12, 2012 letter to Holdco and AMG that it had distributed the Holdco Preferred Return in advance of January 31, 2013, and in contravention of the Ilshar Agreement.¹⁴ Instead of distributing the Holdco Preferred Return to

¹⁰ Rennert Aff. ¶ 10, Taibi Aff. Ex. A (Holdco Agreement) § 9.4(c). Similarly, the Holdco Agreement potentially limits AMG's right to receive any distributions from Holdco if AMG's "Revalued Capital Account" is already less than 20% of the aggregate value of the Holdco members' Revalued Capital Accounts.

¹¹ Rennert Aff. ¶ 12, Taibi Aff. Ex. A (Holdco Agreement) § 8.3(b).

¹² Taibi Aff. ¶ 10.

¹³ For example, Renco's mining and smelting business is subject, according to Holdco, to numerous civil litigations and regulatory inquiries seeking damages and penalties in the hundreds of millions of dollars. Affidavit of Robert A. Atkins ¶ 3. Also, Renco's magnesium business is subject to a federal environmental lawsuit seeking hundreds of millions of dollars. *Id.* at ¶ 5. Various other Renco affiliates have filed for bankruptcy, been sold, or are being liquidated. *Id.* at ¶¶ 4-7.

¹⁴ Taibi Aff. ¶ 11.

Holdco, ILR caused Ilshar to (1) pay \$49,033,826 directly to Renco, which is not a member of Ilshar, and use approximately \$208,880,261 as a credit to offset an obligation owed by Renco to Ilshar (collectively, the “Distributed Funds”) and (2) refuse to distribute \$48,658,515 to Holdco (the “Retained Funds”).¹⁵ Holdco does not contest that the money paid or credited to Renco (\$257,914,087) would have been distributed to Renco under the terms of the Holdco Agreement.¹⁶ Accordingly, only the rightful ownership (and possession) of the Retained Funds under the Holdco Agreement is in dispute.¹⁷

B. *Procedural History*

On June 20, 2012, Holdco initiated an action against Renco, Rennert, and ILR, directly and derivatively on behalf of Ilshar. Holdco asserted claims for breach of contract, breach of fiduciary duty, tortious interference with contract, and unjust enrichment based on allegations that Defendants, acting through Ilshar, (1) made a series of improper loans and guarantees to Renco and its affiliates, (2) made investments prohibited by the Ilshar Agreement, (3) failed to provide Holdco with certificates of compliance, and (4) denied Holdco access to Ilshar’s

¹⁵ *Id.* ILR caused Ilshar to use \$1,963,836 as a credit to pay a fee owed by Renco to Ilshar for a guarantee for an unnamed Renco affiliate and to use \$206,916,425 as a credit to pay principal and interest on loans Ilshar had extended to Renco.

¹⁶ Oral Arg. Tr. 30 (Dec. 10, 2012).

¹⁷ Thus, Holdco seeks an order directing the Defendants to cause ILR to comply with its obligations under Section 9.1(b) of the Ilshar Agreement to the extent that: (1) ILR shall pay Holdco the Retained Funds (\$48,658,515.00); and (2) the Distributed Funds (\$257,914,087) shall be deemed to have been distributed by Ilshar to Holdco and thereafter distributed to Renco.

books and records.¹⁸ After receiving the October 12 letter from ILR, Holdco filed the pending motion for injunctive relief on October 23, 2012, and amended its complaint on November 7, 2012 to allege that Ilshar has violated the express terms of the Ilshar Agreement by refusing to disburse the Retained Funds to Holdco.

On June 29, 2012 Renco filed its complaint (the “Renco Complaint”), a direct and derivative action on behalf of Holdco against AMG, M&F, and M&F’s chief executive officer, Ronald Perelman (“Perelman”) (collectively, the “M&F Defendants”).¹⁹ The Renco Complaint alleges that AMG and Perelman caused Holdco to breach the Holdco Agreement by improperly imposing royalties, excessive management fees, and engineering, research, and developments costs on General Engine Products LLC, a subsidiary of AM General, without Renco’s consent.²⁰ Among other things, Renco also alleges that the M&F Defendants breached their fiduciary duties to Renco and to Holdco by diverting profits from Renco’s capital account and by causing AM General to make prohibited self-dealing loans to M&F at below market rates.²¹

¹⁸ Pl.’s Verified Amended and Supplemented Complaint ¶¶ 5-9.

¹⁹ C.A. No. 7668-VCN. Both actions were consolidated on December 4, 2012. Renco amended its complaint on November 19, 2012, to include a request for a declaratory judgment that it is entitled to receive the Retained Funds.

²⁰ Renco Verified Amended Complaint (“Renco Complaint”) ¶¶ 33-47.

²¹ *Id.* at ¶ 10.

II. CONTENTIONS

Holdco argues that the Court should grant its motion for a mandatory preliminary injunction because ILR has violated its undisputed contractual duty under the Ilshar Agreement by not distributing the Holdco Preferred Return and that it will be irreparably harmed absent injunctive relief. Holdco contends that it faces a threat of imminent and irreparable harm for at least three reasons: (1) Defendants have deprived Holdco of the right to employ the Holdco Agreement appraisal process;²² (2) there is a risk that ILR, on behalf of Renco, will continue to misappropriate monies due to Holdco in violation of the Ilshar Agreement; and (3) Renco and its affiliates face significant credit and liquidity risks that raise doubt as to whether the Holdco Preferred Return is secure.²³ Holdco further contends that the Defendants have waived their objections to the entry of a preliminary injunction through Section 15.14 of the Ilshar Agreement, which generally provides that no party may object to specific performance or injunctive relief.²⁴

At the outset, Defendants argue that, as a matter of law, a harm that can be remedied by money damages is not irreparable for purposes of securing a

²² As discussed further below, the appraisal process is an alternate dispute resolution provision regarding the Revalued Capital Accounts, which are to be determined by AMG. Renco may elect to invoke the appraisal procedures. Taibi Aff. Ex. A. (Holdco Agreement) § 4.4 (“The Revalued Capital Accounts shall be reasonably determined by the managing member, provided however, that Renco may invoke the appraisal procedures in § 15.12. . .”).

²³ Holdco’s Memorandum of Law in Support of its Motion for a Preliminary Injunction (“Holdco’s Brief”) at 20-23.

²⁴ *Id.* at 19-20; Taibi Aff. Ex. B § 15.14.

preliminary injunction.²⁵ They buttress this argument by contending that Holdco is, in effect, seeking final relief through a preliminary injunction, which inappropriately asks the Court to issue an advisory opinion.²⁶ Defendants also claim that Holdco's alternative dispute resolution argument is without merit.²⁷ As for the risk that Ilshar will continue to divert monies owed to Holdco, the Defendants contend that, even if true, allegations of speculative damages or the potential for future harm are not sufficient under Delaware law to demonstrate an imminent threat of irreparable harm.²⁸ As to Holdco's credit and liquidity concerns, the Defendants contend, first, that Holdco is not entitled to the disputed amounts; second, that the funds are secured in Ilshar's bank account at J.P. Morgan Chase; and third, that Ilshar has assets substantially in excess of the \$48.7 million allegedly due to Holdco.²⁹ Moreover, the Defendants have offered to deposit the Retained Funds with the Court pending resolution of the various disputes.³⁰ Finally, the Defendants contend that Holdco's waiver argument misconstrues Section 15.14, which does not address, let alone resolve, the question of irreparable harm.³¹

²⁵ Defs' Memorandum of Law in Opposition to AM General Holdings LLC's Motion for a Preliminary Injunction ("Defs' Brief") at 17-18.

²⁶ *Id.* at 18-19.

²⁷ *Id.* at 19-20.

²⁸ *Id.* at 22-23.

²⁹ *Id.* at 24-25.

³⁰ Oral Arg. Tr. 32.

³¹ Defs' Brief at 25-27.

III. ANALYSIS

A. *Applicable Standard*

Because a preliminary injunction is an “extraordinary” remedy, “[t]he burden on the moving party is rigorous.”³² To prevail, the moving party must demonstrate: “(1) a reasonable probability of success on the merits; (2) that absent injunctive relief, immediate and irreparable harm will occur; and (3) that the harm the moving party will suffer if the requested relief is denied outweighs the harm the opposing party will suffer if the relief is granted.”³³ Although all three elements must be met, the standard is a flexible one, and “a strong showing on one element may overcome a weak showing on another element.”³⁴ A mandatory injunction, in contrast to a prohibitory injunction, requires that the applicant “clearly establish the legal right he seeks to protect or the duty he seeks to enforce.”³⁵

B. *Reasonable Probability of Success on the Merits*

Where, as here, Holdco seeks the remedy of specific performance, “the court must keep in mind, in assessing the reasonable likelihood of success, that [Holdco]

³² *Cardone v. State Dept. of Corrections*, 2008 WL 2447440, at *7 (Del. Ch. June 4, 2008).

³³ *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas S.A.*, 2011 WL 3273266, at *2 (Del. Ch. July 7, 2011).

³⁴ *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998).

³⁵ *Bertucci’s Rest. Corp. v. New Castle County*, 836 A.2d 515, 519 (Del. Ch. 2003) (internal quotations omitted).

will bear the burden of establishing its case by ‘clear and convincing evidence.’”³⁶

Although Holdco has made a variety of claims, including claims of tortious interference and conversion, the Court need only address Holdco’s breach of contract claim.

Holdco has established much more than a reasonable probability of success on its breach of contract claim and request for specific performance. Under Section 9.1(b) of the Ilshar Agreement, Ilshar is required to distribute cash to Holdco on January 31, 2013, equal to the Holdco Preferred Return.³⁷ In addition, Section 15.14 of the Ilshar Agreement provides that “any party by whom this Agreement is enforceable shall be entitled to specific performance” and that “each party waives any objection to the imposition of such relief.”³⁸ Defendants do not contest that language or their (or ILR’s) obligations under the Ilshar Agreement.³⁹ Instead, they argue that Holdco is not entitled to those funds, and that once Holdco receives those funds, AMG will inappropriately distribute them to itself. According to the Defendants, Renco is entitled to the Retained Funds because, pursuant to the Holdco Agreement, AMG’s “Revalued Capital Account” in Holdco is less than 20% of the aggregate value of the Holdco members’ Revalued Capital

³⁶ *Cirrus Holding Co. Ltd. v. Cirrus Indus., Inc.*, 794 A.2d 1191, 1201-02 (Del. Ch. 2001) (quoting *Asten, Inc. v. Wangner Sys. Corp.*, 1999 WL 803965, at *5 n.23 (Del. Ch. Sept. 23, 1999)).

³⁷ Taibi Aff. Ex. B (Ilshar Agreement) § 9.1(b).

³⁸ *Id.* at § 15.14.

³⁹ In their brief, Defendants effectively conceded the breach of the Ilshar Agreement, arguing only that Holdco is not harmed by the breach. *See* Defs.’ Brief at 29-31.

Accounts.⁴⁰ As such, Holdco (or AMG) will not allegedly suffer any damages on its breach of contract claim.⁴¹

Even if Renco is ultimately entitled to the Retained Funds,⁴² ILR has almost certainly violated Section 9.1(b) of the Ilshar Agreement and Holdco (and AMG) has been harmed as a result. Neither the Ilshar Agreement nor the Holdco Agreement gives ILR or Ilshar the ability to withhold the Holdco Preferred Return in the event that a dispute arises under the Holdco Agreement. Whether Renco is, in fact, entitled to the Retained Funds turns on the proper interpretation and application of the Holdco Agreement, not the Ilshar Agreement.⁴³ Depriving Holdco of the Retained Funds would defeat its contractual rights to determine the Revalued Capital Account and to disburse the funds in accordance with the Holdco Agreement. Accordingly, Holdco has “clearly establish[ed] the legal right [it] seeks to protect or the duty [it] seeks to enforce” and has shown a strong likelihood, if not certainty, that it will prevail on the merits of its breach of contract claim.⁴⁴

⁴⁰ Defs. Brief at 8-11.

⁴¹ *Id.* at 31.

⁴² Although both parties have offered arguments as to whether Renco or AMG is ultimately entitled to the Retained Funds, the Court need not address this matter because, regardless of who is entitled to the funds, Defendants have clearly violated the Ilshar Agreement and harmed Holdco (and AMG) as a result.

⁴³ Neither ILR nor Ilshar is even a party to the Holdco Agreement.

⁴⁴ *Bertucci's Rest. Corp.*, 836 A.2d at 519 (internal quotations omitted). Indeed, based on the facts in the record, Defendants have almost certainly breached the Ilshar Agreement.

C. Irreparable Harm

Irreparable harm is generally defined as harm for which there can be no remedy at law, which is “typically taken to mean that an award of compensatory damages will not suffice.”⁴⁵ However, under Delaware law, “[i]t is not necessary that the injury be beyond the possibility of repair by money compensation but it must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice.”⁴⁶ Thus, a harm that could be compensated by the payment of money does not necessarily preclude a finding of irreparable harm.⁴⁷

1. Waiver of Irreparable Harm

Under Delaware law, “a contractual stipulation of irreparable harm may suffice to demonstrate irreparable harm.”⁴⁸ Indeed, this Court has concluded “that

⁴⁵ Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* (“Wolfe & Pittenger”) §10.02(b)(4), at 10-17 (2012). See *In re Delphi Fin. Group S’holder Litig.*, 2012 WL 729232, at *18 (Del. Ch. Mar. 6, 2012) (“A harm that can be remedied by money damages is not irreparable.”).

⁴⁶ *State v. Delaware State Educ. Ass’n*, 326 A.2d 868, 875 (Del. Ch. 1974).

⁴⁷ For example, in *In re Cencom Cable Income Partners, L.P. Litig.*, 2000 WL 130629, at *8-9 (Del. Ch. Jan. 27, 2000), the Court enjoined a general partner from receiving advances of its litigation expenses from the partnership despite the fact that those advances could be recovered through an award of monetary damages.

⁴⁸ *Concord Steel, Inc. v. Wilmington Steel Processing Co., Inc.*, 2008 WL 902406, at *11 (Del. Ch. Apr. 3, 2008); see *True N. Commc’ns Inc. v. Publicis S.A.*, 711 A.2d 34, 44 (Del. Ch. 1997); *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 2012 WL 2783101, at *15 (Del. July 10, 2012); *Gildor v. Optical Solutions, Inc.*, 2006 WL 4782348, at *11 (Del. Ch. June 5, 2006) (“this court has held that a contractual stipulation of irreparable harm is sufficient to demonstrate irreparable harm.”).

contractual stipulations as to irreparable harm alone suffice to establish that element for the purpose of issuing preliminary injunctive relief.”⁴⁹

Holdco argues that under Section 15.14 of the Ilshar Agreement the parties contractually waived their objections to the irreparable injury requirement for preliminary injunctive relief. Section 15.14 provides that:

The parties hereto agree that any party by whom this Agreement is enforceable shall be entitled to specific performance in addition to any other relief or remedy. Such party may, in its sole discretion, apply to a court of competent jurisdiction for specific performance or injunctive relief or such other relief as such court may deem just and proper in order to enforce this Agreement or prevent any violation hereof and, to the extent permitted by applicable law, each party waives any objection to the imposition of such relief.⁵⁰

⁴⁹ *Cirrus Holding Co. Ltd.*, 794 A.2d at 1209; see *True N. Commc’ns Inc.*, 711 A.2d at 44; *Vitalink Pharmacy Servs., Inc. v. Grancare, Inc.*, 1997 WL 458494, at *9 (Del. Ch. Aug. 7, 1997); *SLC Beverages, Inc. v. Burnup & Sims, Inc.*, 1987 WL 16035, at *2 (Del. Ch. Aug. 20, 1987); Wolfe & Pittenger, *supra*, § 12.02(e) at 12-32 (“In the context of applications for interim injunctive relief, the Court of Chancery consistently has held that such a provision in an enforceable contract will be sufficient to establish a basis for finding irreparable harm and to bar a breaching party from contending the absence of irreparable harm.”). In *Kansas City Southern v. Grupo TMM, S.A.*, 2003 WL 22659332, at *5 (Del. Ch. Nov. 4, 2003), the Court rejected the proposition that a stipulation of irreparable harm alone—without a factual finding of irreparable harm—was not sufficient to establish a basis for finding irreparable harm. The Court explained: “Although a contractual stipulation as to the irreparable nature of the harm that would result from a breach cannot limit this Court’s discretion to decline to order injunctive relief, such a stipulation does allow the Court to make a finding of irreparable harm provided the agreement containing the stipulation is otherwise enforceable. If the facts plainly do not warrant a finding of irreparable harm, this Court is not required to ignore those facts, especially since the ‘parties cannot confer subject matter jurisdiction upon a court.’ But where there is no concern that the parties are attempting to improperly confer equitable jurisdiction upon this Court, a defendant cannot successfully argue that there is no irreparable harm.” *Id.* (footnotes omitted). See also Wolfe & Pittenger, *supra*, § 10.02(b)(4) at 10-39 (noting that although the Court seems to endorse the validity of the contractual stipulations as to irreparable harm, in practice it has supplemented the contractual stipulation with a finding of actual irreparable harm).

⁵⁰ Taibi Aff. Ex. B (Ilshar Agreement) § 15.14

Defendants argue that Section 15.14 does not resolve, let alone address, the existence of irreparable harm, and only stipulates that the parties waive their objections to the imposition of specific performance as a final remedy if the Court determines that a party is entitled to relief on the merits.⁵¹

The broad language of Section 15.14 does not explicitly state that money damages would not be a sufficient remedy for any breach of the Ilshar Agreement. In that regard, Section 15.14 is different from at least some of the contracts in which the Court has found that the irreparable harm requirement was waived for purposes of a preliminary injunction.⁵² However, this difference is not necessarily dispositive. There are no magic words required to waive the irreparable harm requirement or to stipulate to injunctive relief. Although Section 15.14 does not use the words “money damages would not be an adequate remedy for any breach,” it does provide—unambiguously—that a non-breaching party is entitled to injunctive relief. Furthermore, under its explicit terms, each party expressly waives any objection to the imposition of such relief.

⁵¹ Defs.’ Brief at 26.

⁵² *True N. Commc’ns Inc.*, 711 A.2d at 44 (parties explicitly agreed that “a breach of [the agreement] would cause a loss to [plaintiff] which could not be reasonably or adequately compensated in damages in an action at law”) (internal quotations omitted); *Gildor*, 2006 WL 4782348, at *11 (parties had explicitly agreed that “money damages would not be an adequate remedy for any breach of the provisions of this Agreement”); *Martin Marietta*, 2012 WL 2783101, at *15 (both parties stipulated that money damages would not be a sufficient remedy for any breach by either party). However, in both *True North Communications Inc.* and *Martin Marietta*, the Court seemingly also relied upon contractual language similar to Section 15.14: “the non-breaching party *shall be entitled to equitable relief*, including injunction and specific performance, as a remedy for any such breach.” *Martin Marietta*, 2012 WL 2783101, at *15 (emphasis in original); see *True N. Commc’ns Inc.*, 711 A.2d at 44.

Injunctive relief and the concept of irreparable harm, of course, are inextricably intertwined. Indeed, “[t]he quintessential guidepost for availability of specific performance . . . is inadequacy of the remedy at law.”⁵³ Thus, the broad language of Section 15.14 reasonably contemplates both the waiver of any objection to injunctive relief and a waiver of the irreparable harm requirement. Defendants’ interpretation that Section 15.14 is only applicable to a final remedy after a determination on the merits conflicts with the plain language of that section. The language—“prevent a violation hereof”—explicitly contemplates prospective injunctive relief to forestall continuing violations of the Ilshar Agreement before a final adjudication. As such, Section 15.14 encompasses preliminary relief, and can reasonably be construed to waive the requirement of irreparable harm on a motion for a preliminary injunction.⁵⁴

2. Loss of Contractually Bargained for Rights

Even if Section 15.14 does not waive the irreparable harm requirement, Holdco has demonstrated that it will suffer some harm that cannot otherwise be adequately remedied. Under the Ilshar Agreement, Ilshar is required to distribute the Holdco Preferred Return to Holdco on January 31, 2013.⁵⁵ Once received, the

⁵³ Wolfe & Pittenger, *supra*, § 12-3(b)(2), at 12-40.

⁵⁴ Holdco has also established that it would suffer imminent harm because, in light of Ilshar’s distribution of a substantial portion of the Holdco Preferred Return, the denial of the Retained Funds is immediate and ongoing. Furthermore, its (as well as AMG’s) inability to perform under the Holdco Agreement is likewise ongoing. *See infra* note 78.

⁵⁵ Taibi Aff. Ex. B (Ilshar Agreement) § 9.1(b).

Holdco Agreement requires Holdco to distribute the Holdco Preferred Return to its members as determined by its managing member, AMG.⁵⁶ Prior to that distribution, Holdco must notify AMG so that it can determine whether such distribution would cause its Revalued Capital Account to equal or be less than 20% of the Holdco members' Revalued Capital Accounts.⁵⁷ Renco may challenge AMG's determination of the Revalued Capital Accounts by invoking the appraisal procedure.⁵⁸

Under Delaware law, a deprivation of the corporate governance process⁵⁹ or the right "to use alternative dispute resolution" may constitute irreparable harm.⁶⁰ Here, money damages would not cure Defendants' improper bypass of Holdco's stipulated corporate governance process. ILR's breach of the Ilshar Agreement has deprived AMG of its contractually bargained for rights under the Holdco Agreement, first, to determine whether a distribution would equal or fall below 20% of the Revalued Capital Accounts, and second, to distribute the funds to Holdco's members.⁶¹ As a practical matter, this type of harm is admittedly

⁵⁶ Taibi Aff. Ex. A (Holdco Agreement) § 9.1(b), (b)(ii).

⁵⁷ *Id.* at § 9.4(c).

⁵⁸ *Id.* at § 4.4.

⁵⁹ See *In re H.F. Ahmanson & Co. v. Great W. Fin. Corp.*, 1997 WL 225696, at *3-4 (Del. Ch. Apr. 25, 1997) ("harm to the corporation's corporate governance process" may be irreparable).

⁶⁰ *KL Golf, LLC v. Frog Hollow, LLC*, 2004 WL 828377, at *3 (Del. Ch. Apr. 8, 2004) (noting that plaintiff would be subject to irreparable harm by "depriving [it] of its right to avoid court proceedings in favor of arbitration and potentially depriving it of its business premises . . .").

⁶¹ The Defendants seem to argue that Ilshar's failure to pay the Retained Funds to Holdco will not harm Holdco because those funds are not really Holdco's and, instead, would be distributed

unimpressive.⁶² Nevertheless, it represents some harm that cannot otherwise be adequately remedied except by injunctive relief.⁶³

3. Credit & Liquidity Risks

Holdco further argues that it is threatened with irreparable injury because Ilshar's retention of the Retained Funds subjects those funds to significant credit and liquidity risks. Given Defendants' misappropriation of the Holdco Preferred Return, Holdco contends that ILR may continue improperly to siphon money owed to Holdco to Renco and its affiliated entities, many of which allegedly face substantial financial turmoil. In response, the Defendants argue that the Retained Funds are held securely in Ilshar's bank account at J.P. Morgan Chase, and that, in any event, Ilshar has approximately \$325 million in assets from which it could cover the disputed amount. Defendants, in an attempt to assuage Holdco's

immediately following receipt. Holdco, however, is harmed because the missing Retained Funds deny it the ability to perform its express contractual obligation—the proper distribution of the Holdco Preferred Return. Holdco has a contractual right to payment. That it may (or must) promptly turn over those funds is not evidence that it is not being harmed.

⁶² See *Prime Computer, Inc. v. Allen*, 1988 WL 5277 (Del. Ch. Jan. 22, 1988) (preliminary injunction granted even though the Court acknowledged that plaintiff's "claim of irreparable injury [was] rather unimpressive.").

⁶³ Perhaps to some extent, absent injunctive relief, AMG would also be deprived of the appraisal process which Renco is arguably required to utilize if it decides to challenge AMG's determination. See *Maloney-Refaie v. Bridge at School, Inc.*, 2008 WL 2679792, at *7 (Del. Ch. July 9, 2008) (citing cases that have held that agreements stating that parties "may" arbitrate any claims arising therefrom provide for mandatory, not permissive, arbitration). Part of the reasoning of those cases is that the parties can always voluntarily submit a claim to arbitration; "therefore, making an agreement to arbitrate only if the parties later agree to do so is a meaningless promise." *Id.* at *8. This is consistent with the general rule that a contract should be interpreted so as not to make its provisions superfluous or meaningless. The Court noted that those cases have also reasoned that the "may" refers to a non-breaching party's option to either arbitrate or abandon its claim. *Id.* In any event, the Court does not need to address this issue.

concern, however, have offered to deposit the Retained Funds with the Court pending resolution of the parties' dispute on this issue.⁶⁴

Assuming for a moment that Holdco has suffered irreparable harm in this regard,⁶⁵ Defendants' offer to deposit the Retained Funds with the Court significantly diminishes, if not eliminates, the irreparable harm that Holdco might otherwise suffer. Indeed, that precaution would ensure no future misappropriation of the Retained Funds at issue and would alleviate any credit or liquidity risks related to those funds. As a result of this offer, which Holdco effectively declined, the Court declines to rule that Holdco would be irreparably harmed in this regard.

D. *Balancing of the Equities*

Due to the extraordinary nature of the relief afforded by a mandatory preliminary injunction, "even if a party has shown a reasonable likelihood of success on the merits and an imminent threat of irreparable injury, a preliminary injunction may issue only if that party proves that 'this Court's failure to grant the

⁶⁴ Oral Arg. Tr. 32.

⁶⁵ This assumption may not be unreasonable under the Court's decision in *In re Cencom Cable Income Partners, L.P.*, 2000 WL 130629, at *9. There, the movant sought a preliminary injunction based on a claim of wrongful advancement of funds in breach of a partnership agreement, and sought relief "consist[ing] of easily calculable dollar amounts." *Id.* The Court granted the preliminary injunction notwithstanding the fact that "the complaint seeks return of monies already paid." *Id.* The Court noted that the complaint "also seeks to prevent further actions breaching a clear agreement" that would "continue to deplete partnership assets at increasing risk to the limited partners." *Id.* at *8-9.

injunction will cause [that party] greater harm than granting the injunction will cause [the other party].”⁶⁶

Holdco argues that it will suffer substantial harm if an injunction is not issued. That harm allegedly includes the risk that the Retained Funds will be lost to Renco’s creditors,⁶⁷ that Defendants will continue to breach the Ilshar Agreement, and that Defendants’ actions will continue to deprive Holdco of its negotiated rights under the Holdco Agreement. Not surprisingly, Defendants similarly argue that AMG’s and Holdco’s own misconduct “demonstrates the likelihood that if they receive control over the [Retained Funds], they will engage in further misappropriation of Renco funds.”⁶⁸ They also argue that Holdco will not suffer any harm because the Retained Funds are being held by Ilshar securely in an interest bearing account.

Where, as here, “there is a reasonable probability” that a defendant breached an agreement, that defendant “cannot invoke general equity principles to save it from an injunction enforcing the [a]greement.”⁶⁹ Accordingly, as explained above, Holdco has shown more than a reasonable probability that ILR breached the Ilshar

⁶⁶ *N.K.S. Distributors, Inc. v. Tigani*, 2010 WL 2367669, at *5 (Del. Ch. June 7, 2010) (quoting *Cantor Fitzgerald, L.P.*, 724 A.2d at 587).

⁶⁷ In light of the Defendants’ willingness to deposit the Retained Funds with the Court, no weight is given to this contention.

⁶⁸ Defs.’ Brief at 28.

⁶⁹ *Kansas City Southern*, 2003 WL 22659332, at *5; see *In re Cencom Cable Income Partners, L.P.*, 2000 WL 130629, at *8 (finding that “the equities heavily favor the plaintiffs” who “raised colorable claims about the defendant’s conduct” which was “precisely the conduct that the Agreement sought to prevent”).

Agreement. Under the terms of the Ilshar Agreement, ILR “contracted away its right” to withhold the Holdco Preferred Return.⁷⁰ Defendants “cannot now assert that [they] will be harmed due to the Court’s enforcement of the rights and obligations for which [ILR] specifically bargained, and which were reduced to writing” in the Ilshar Agreement.⁷¹ Moreover, Defendants have a contractually stipulated means (*i.e.*, the appraisal process) to challenge indirectly Holdco’s distribution of funds, and, perhaps, the opportunity to seek a preliminary injunction enjoining any improper distribution of funds under the Holdco Agreement.⁷²

Where Holdco and AMG have only allegedly engaged in misconduct, and where, in contrast, ILR has almost certainly violated the express terms of the Ilshar Agreement, the balance of equities favors Holdco, which will suffer some irreparable harm if an injunction is not issued. Defendants, on the other hand, will suffer little, if any, immediate harm because they have various means to protect their financial interest, however limited, in the Retained Funds. Moreover, Defendants have not persuaded the Court that Holdco, or AMG acting on Holdco’s behalf, is likely to misappropriate those funds. Finally, the bond requirement, as discussed below, affords protection from an improvidently granted mandatory

⁷⁰ *Kansas City Southern*, 2003 WL 22659332, at *5.

⁷¹ *Id.*

⁷² Indeed, at oral argument, Defendants threatened to do just that—file their own motion for a preliminary injunction. Oral Arg. Tr. 29.

injunction.⁷³ As a result, the Court concludes that the balance of equities tips decisively in favor of Holdco.

E. *Posting of Security*

A prerequisite to the issuance of a preliminary injunction is the posting of a security pursuant to Court of Chancery Rule 65(c), which provides, in part:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the Court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.⁷⁴

Although the form and amount of security required by Rule 65(c) rests in the discretion of the Court, the amount of security should be sufficient to protect the enjoined party. The Delaware Supreme Court has emphasized that “a wrongfully enjoined party has no recourse other than the security.”⁷⁵ More specifically, in order to protect the enjoined party, the Supreme Court stated that “the trial court should set the bond at a level likely to meet or exceed a reasonable estimate of potential damages.”⁷⁶ It went on to say that “[i]t should be remembered that the

⁷³ “[T]he bond requirement can be viewed as an additional means of limiting the potential for undue harm to the party enjoined if the provisional injunction is ultimately found to have issued improvidently.” Wolfe & Pittenger, *supra*, § 10.05 at 10-66. “[T]he balance-of-the-equities analysis more typically involves potential harm that cannot be wholly cured by money damages.” *Id.*

⁷⁴ Del. Ch. Ct. R. 65.

⁷⁵ *Guzzetta v. Service Corp. of Westover Hills*, 7 A.3d 467, 470 (Del. 2010).

⁷⁶ *Id.* at 467.

bond does not entitle the enjoined party to *any* damages, and the cost of a bond typically is a very small fraction of its face value.”⁷⁷

Accordingly, in order to protect Defendants from the risks that the mandatory preliminary injunction is improperly issued and that Holdco disburses \$49 million and is left without sufficient funds, a bond with corporate surety is required. A corporate surety is particularly necessary here because Holdco is a pass-through entity with presumably no significant assets of its own. Because of the requirement in *Guzzetta* to set bond at a reasonable estimate of potential damages, the proper bond amount is the amount of the Retained Funds, together with interest at the lawful rate for a reasonable estimate of the time required to bring this matter to a conclusion: two years.

IV. CONCLUSION

The dispute over the Retained Funds should be resolved under the terms of the Holdco Agreement and with that money having been transferred to Holdco. Holdco has established that it will almost certainly succeed on its breach of contract claim.⁷⁸ Moreover, the balance of equities tips decisively in its favor. Although Holdco’s showing of irreparable harm is comparatively weak, the

⁷⁷ *Id.* at 471 (emphasis in original).

⁷⁸ Although the failure to distribute the Holdco Preferred Return before January 31, 2013 would not violate Section 9.1(b) of the Ilshar Agreement, Defendants have already distributed a substantial portion of the Holdco Preferred Return (in violation of the Ilshar Agreement), and therefore, as a matter of fairness, the Court will require Ilshar promptly to distribute the remaining portion of the Holdco Preferred Return (the Retained Funds) to Holdco.

parties' agreement regarding injunctive relief supports a finding of irreparable harm. In any event, "a strong showing as to one [element] can serve to overcome a marginal showing as to another [element]." ⁷⁹ Accordingly, the Court will grant Holdco's motion for mandatory preliminary injunctive relief.

An implementing order will be entered.

⁷⁹ Wolfe & Pittenger, *supra*, § 10.02(b)(1) at 10-6 ("In keeping with the fact that an application for preliminary injunctive relief is addressed to the court's discretion, there is no hard-and-fast rule or arithmetic formula for the relative weight that will be placed upon the individual components.").