

Am. Transp. Grp. Ins. Risk Retention Grp. v. MVT Ins. Servs. Inc., 2020 NCBC Order 43.

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 1487

AMERICAN TRANSPORTATION
GROUP INSURANCE RISK
RETENTION GROUP,

Plaintiff,

v.

MVT INSURANCE SERVICES,
INC., AMRIT SINGH, ELEAZAR
ROJAS, and SHAMSHER SINGH,

Defendants,
and

MVT INSURANCE SERVICES,
INC.,

Defendant and
Third-Party
Plaintiff,

v.

PALMETTO CONSULTING OF
COLUMBIA, LLC AND
MATTHEW A. HOLYCROSS,

Third-Party
Defendants.

**ORDER ON AMENDED MOTION FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION**

THIS MATTER comes before the Court upon Defendants Eleazar Rojas (“Rojas”) and Shamsheer Singh’s (“S. Singh”; collectively, for purposes of deciding this motion only, “Defendants”) Amended Motion for Temporary Restraining Order and

Preliminary Injunction. (“Motion for PI,” ECF No. 27.)¹ Defendants seek a preliminary injunction against Plaintiff American Transportation Group Insurance Risk Retention Group (“ATGI” or “Plaintiff”) prohibiting ATGI from: (a) conducting a special meeting of the shareholders of ATGI scheduled for October 9, 2020; (b) using any shareholder proxies obtained since March 2020; and (c) scheduling any shareholder meetings for the purposes of removing Defendants from the ATGI Board of Directors during the pendency of this litigation. (*Id.* at pp. 11–12.)

THE COURT, having considered the Motion for PI, the briefs filed in support of and in opposition to the Motion, the exhibits filed in support of and in opposition to the Motion, the arguments of counsel at the hearing, and other appropriate matters of record, CONCLUDES, in its discretion, that the Motion for PI should be DENIED, for the reasons set forth below.

I. FINDINGS OF FACT AND PROCEDURAL HISTORY²

1. The Court makes the following findings of fact for the limited purpose of resolving the Motion; the Court is not bound by these findings in subsequent orders. *See Lohrmann v. Iredell Mem’l Hosp., Inc.*, 174 N.C. App. 63, 75, 620 S.E.2d 258, 265 (2005) (“It is well settled that findings of fact made during a preliminary injunction

¹ Although styled as a motion for temporary restraining order and for preliminary injunction, the parties and the Court have treated the motion solely as a motion for preliminary injunction and, at this late date since its filing, the Court will decide the motion as one for preliminary injunction only.

² The facts have been drawn from the undisputed facts alleged in the Complaint, (ECF No. 2), the verified Motion, (ECF No. 27), the exhibits filed along with the verified Motion, (ECF Nos. 27.1–9), and affidavits filed in support of Plaintiff’s opposition brief (ECF Nos. 30.2–4).

proceeding are not binding upon a court at trial on the merits.”) (citing *Huggins v. Wake County Board of Education*, 272 N.C. 33, 40–41, 157 S.E.2d 703, 708 (1967)).

A. General Background

2. ATGI is a North Carolina corporation with its principle place of business in Wilmington, North Carolina. ATGI sells liability insurance, with a focus on providing cost-effective commercial automobile liability insurance coverage to small trucking companies and independent over-the-road truck operators. (Motion, ECF No. 27, at ¶¶ 1–2.) On July 2, 2018, the North Carolina Department of Insurance (“NCDOI”) licensed ATGI as a risk retention group (“RRG”). (*Id.* at ¶ 1.) A risk retention group (“RRG”) is a small insurance company permitted to issue liability insurance policies across the United States. Traditional insurance companies, in contrast, typically can only write insurance policies in their states of licensure. (Complaint, ECF No. 2, at ¶ 20.)

3. RRGs are authorized to operate by the federal Liability Risk Retention Act of 1986 (“LRRRA”), 15 U.S.C. §§ 3901-3906, which partially preempts state insurance laws to allow an RRG licensed in its home state to register in any other state and issue insurance policies to residents of those states. The LRRRA vests virtually all oversight over RRGs, including licensure and regulation, in the states. However, the LRRRA limits RRGs to writing only liability insurance coverage and require that all policy holders of an RRG be equity owners (shareholders) of the RRG. (*Id.* at ¶ 21.)

4. As a licensed RRG, ATGI is subject to strict regulation by the State of North Carolina. *See* N.C.G.S. § 58-22-1 et seq. ATGI also is a “captive insurance company” regulated under the North Carolina Captive Insurance Act. (ECF No. 27, at ¶ 1.) *See* N.C.G.S. § 58-10-335 et seq.

5. RRGs rely on contracted service providers to operate, including a managing general agent who usually runs the RRG’s day-to-day operations, makes underwriting decisions, and works with retail third-party agents to market and sell RRG policies. Defendant MVT Insurance Services, Inc. (“MVT”) is a California corporation. From ATGI’s inception until April 3, 2020, MVT served as ATGI’s managing general agent, responsible for marketing, underwriting, and other services pursuant to a service agreement between the parties. (Affidavit of Michael Hunter, ECF No. 30.2, at ¶ 4, Ex. 1.) Defendant Amrit (“Andy”) Singh is the principal of MVT and signed the service agreement as MVT’s “President.” (*Id.*)

6. North Carolina law, however, restricts the influence that any service provider may have over an RRG. *See* N.C.G.S. § 58-22-15(d)(2)a. (restricting term length of material service provider contracts and requiring approval of majority of independent directors to enter into such contracts); N.C.G.S. § 58-22(15)(d)(1)b. (requiring RRGs to have a majority of independent board members); N.C.G.S. § 58-34-2(1) (barring insurance companies from appointing to its board of directors any officer, director, employee, subagent or controlling shareholder of its managing general agent).

7. Rojas and S. Singh have been members of ATGI's Board of Directors ("Board") since its inception. (ECF No. 27, at ¶¶ 3–4.) Until March 13, 2020, Rojas, S. Singh, and Wesley Deaton were the only three members of ATGI's Board. (ECF No. 2, at ¶ 26.) From ATGI's inception until April 3, 2020, ATGI's officers were S. Singh (President and Treasurer), Parmveer Singh (Assistant Treasurer) and Eleazar Rojas (Secretary). (*Id.*; ECF No. 27, at ¶ 17.)

B. Compliance Issues with the DOI

8. As a condition of granting ATGI a license to operate in North Carolina, NCDOI required ATGI to maintain a net premiums-to-surplus ratio of 2 to 1. (ECF No. 30.2, at ¶ 7.) In June 2019, the NCDOI notified ATGI that it was violating this condition. (*Id.* at ¶ 8.) When ATGI's premiums-to-surplus ratio increased to 3.12 to 1 on June 30, 2019, the NCDOI ordered ATGI to either maintain a rolling 2 to 1 ratio or stop writing new policies. (*Id.* at ¶ 9.)

9. On September 12, 2019, ATGI entered into a Voluntary Settlement Agreement with NCDOI, and a revised VSA ("VSA") on October 4, 2019. (*Id.* at ¶ 10, Ex. 2.) The VSA required ATGI to achieve "a 12-month rolling net premiums to written surplus ratio of 2:1" on or before November 30, 2019. (*Id.*)

10. On December 11, 2019, ATGI notified the NCDOI that it was not meeting the premiums-to-surplus ratio requirements of the VSA. (*Id.* at ¶ 11.) The NCDOI therefore asked ATGI to voluntarily cease writing new insurance policies as required under the VSA by December 26, 2019. (*Id.*)

11. In or around December 2019, A. Singh retained Michael Hunter (“Hunter”), an accounting and insurance consultant, to assist ATGI with the ongoing regulatory issues. (*Id.* at ¶¶ 12–13; ECF No. 27, at ¶ 7.) In January of 2020, Hunter, on behalf of ATGI, hired Palmetto Consulting (“Palmetto”) and its managing member, Matt Holycross, to assist in addressing compliance issues with the NCDOI. (*Id.* at ¶ 17; ECF No. 27, at ¶ 7–8; Affidavit of Matthew Holycross, ECF No. 30.4, at ¶ 1.) Palmetto was to “review, investigate, and propose corrective actions to [ATGI] with the intent of assuming captive management responsibilities on or before March 15, 2020.” (ECF No. 27, at ¶ 8; ECF No. 30.4, at ¶ 3.)

12. To get ATGI to a satisfactory level of surplus, MVT executed surplus notes to ATGI for \$4 million from what MVT claimed was its share of fees and commissions on business it produced for ATGI. (ECF No. 30.2, at ¶ 21; Ex. 3). A surplus note is a mechanism for investing an insurance company through debt. However, an investigation later conducted by Hunter found the surplus notes were fraudulent, concluding that “the surplus notes MVT was contributing,” which inflated the surplus side of the premiums-to-surplus ratio “actually consisted of premium moneys already due to ATGI rather than fees and commission due to MVT.” (*Id.* at ¶ 23.) Accordingly, ATGI informed the NCDOI on March 6, 2020 that \$4 million in surplus notes were invalid. (*Id.* at ¶ 24.)

13. In or about March 2020, Hunter also learned that ATGI was not in compliance with North Carolina law requiring that that the majority of its Board members be independent. (*Id.* at ¶ 25.) As of March 2020, Rojas and S. Singh were

ATGI's only directors, and neither was independent. Rojas was employed by or an agent of MVT. (*Id.* at ¶ 26; Ex. 5.) S. Singh is the brother of Nirmal Kaur, an executive officer of MVT and A. Singh's wife. (*Id.* at ¶ 26.)

14. Hunter's investigation also determined that ATGI had never issued required stock to its insureds or maintained a shareholder list and had not held shareholder or board meetings. (ECF No. 30.2, at ¶ 47; ECF 30.4, at ¶ 5.) In an attempt to correct this deficiency, in April 2020 ATGI began contacting insureds and asking them to sign a subscription agreement so that properly recorded stock could be issued. The package of materials sent to insureds included both the subscription agreement and a general proxy whereby the policy holder/shareholders could give their proxy for any required shareholder vote. (*Id.* at ¶ 48.)

C. The March 13th and April 3rd Resolutions

15. In an attempt to address the compliance issues facing ATGI, including the lack of independent directors, on March 13, 2020 the Board took unanimous action by written consent in lieu of a Board meeting (the "March 13th Resolutions"). (ECF No. 30.2, Ex. 6.) Rojas and S. Singh approved and signed the March 13th Resolutions. (*Id.*) The March 13th Resolutions included, *inter alia*, a resolution appointing Ron Gionet, Scott Syphers, and E. Paul Schaefer to ATGI's Board as independent directors. (*Id.*)

16. On April 2, 2020, Rojas and Singh sent documents to ATGI attempting to revoke their written consents to the March 13th Resolutions (the "April 2nd Revocations"). (ECF No. 27, ¶¶ 14–15; Revocations, ECF No. 27.1.)

17. Regardless, on April 3, 2020, the newly composed Board held a special meeting and passed several additional resolutions (the “April 3rd Resolutions”).³ One of the April 3, 2020 Resolutions provided as follows:

RESOLVED: That the shareholders of the Company be issued a proxy request with the Board’s recommendation that the size of the Board of Directors be reduced to three members and that the current independent board members be elected to continue to serve on the board.

(ECF No. 30.2, at Ex. 8.) The resolution passed 3 to 1, with S. Singh voting against it. (*Id.*) Effectively, this resolution indicated the newly composed Board’s intention to remove Rojas and S. Singh. (ECF No. 27, at ¶ 17.)

18. The April 3rd Resolutions also terminated the service agreement between ATGI and MVT, terminated S. Singh as President and Rojas as Secretary of ATGI, and authorized Hunter “to consent to ongoing confidential administrative supervision by the North Carolina Department of Insurance should the Company be placed into supervision.” (ECF No. 30.2, at Ex. 8.)

D. The Order of Supervision and Initiation of Litigation

19. On April 3, 2020, the NCDOI issued a Summary Order placing ATGI under immediate confidential administrative supervision (the “Order of Supervision”). (ECF No. 30.2, Ex. 9.) The Order of Supervision restricts ATGI from taking any significant organizational or financial actions without prior written approval of NCDOI and requires ATGI to come into compliance with statutory and regulatory requirements. (*Id.*) Significantly, the Order of Supervision mandates that

³ S. Singh attended the April 3, 2020 meeting by telephone. Rojas did not attend the meeting.

ATGI hold a “meeting of stockholders, no less than annually, to vote on the board of directors” and that it “provide to the Department its proposed plan for holding its next stockholders meeting.” (*Id.* at ¶ 47, Ex. 9.)

20. The Order of Supervision also contained the following conclusion of the NCDOI regarding A. Singh’s involvement in ATGI:

Mr. Andy Singh, director of MVT, has exerted undue influence over [ATGI] although Mr. Singh holds no officer or director position within [ATGI]. In addition, Mr. Singh represented himself as a representative of American RRG, as evidenced by an email provided to the Department on March 30, 2020, by a prospective captive manager (“Prospective Captive Manager”) stating that they were engaged as the new captive manager of [ATGI]. On a call held by the Department with the Prospective Captive Manager, the Prospective Captive Manager stated that they were engaged by Mr. Singh and disclosed that Mr. Singh communicated to them that the current captive manager had been terminated. Mr. Singh also attempted to negotiate reinsurance on behalf of [ATGI]. Mr. Singh’s attempt to engage captive management services and negotiate reinsurance on behalf of [ATGI] were without authority from [ATGI] and were with blatant disregard of the use of the retained reinsurance intermediary.

(*Id.* at Ex. 9.)

21. On May 14, 2020, the NCDOI sent a letter to Hunter that stated, in relevant part, as follows:

This letter is to express the concerns of the North Carolina Department of Insurance (“Department”) regarding the actions of MVT Insurance Services, Inc. (“MVT”) and Amrit “Andy” Singh, each purporting to act on behalf of American Transportation Group Insurance Risk Retention Group, Inc. (“ATGI”), and the impact those actions may have on ATGI.

As you are aware, ATGI's license was approved by the Department subject to a license stipulation requiring ATGI to maintain a net written premium to surplus ratio of less than 2 to 1 unless determined otherwise by the Commissioner. As of March 31, 2019, ATGI's rolling annual net premiums written to surplus ratio was 3.05 to 1 and was 3.12 to 1 as of June 30, 2019. The Department determined that it was in the best interest of the public and the policyholders of ATGI to ensure adherence to the net written premium to surplus ratio license stipulation. On October 4, 2019, ATGI entered into a Voluntary Settlement Agreement ("VSA") with the Department agreeing that if noncompliance was identified with the license stipulation calculation, ATGI would immediately cease writing business.

ATGI notified the Department that its rolling net written premium to surplus ratio was 2:39:1 and 3.85:1 as of November 30, 2019 and December 31, 2019, respectively. Therefore, due to its noncompliance with the VSA, ATGI voluntarily ceased writing business. Cessation of writing new and renewal business was acknowledged by ATGI representatives on March 2, 2020.

In March of 2020, the Department became aware that two of ATGI's officers and directors failed to disclose certain relationships with one of ATGI's service providers, MVT. During licensure, Shamsheer Singh and Parmveer Singh represented in filed affidavits that they each were independent directors; however, both individuals failed to disclose affiliated and familial relationships with the owners of MVT. The Department requested that ATGI provide updated and correct biographical affidavits from both individuals, but the Department has yet to receive the requested information.

On April 2, 2020, the Department informed ATGI that it had completed its review of the biographical affidavits of three new independent directors of ATGI, Mr. E. Paul Schaefer, Mr. Ronald Y. Gionet, and Mr. Scott A. Syphers. In addition, the Department had also completed its review of the submitted biographical affidavit of Mr. Michael Hunter, who was elected to the position of Assistant Secretary.

...

With these additions, the ATGI board is in compliance with G.S. §§ 58-22-15(d) and 58-10- 380(e), as the ATGI board has a majority of independent directors and a North Carolina resident director.

On April 3, 2020 pursuant to the Commissioner's Summary Order ("Supervision Order"), ATGI was placed into immediate confidential supervision pursuant to the provisions of G.S. §§ 58-30-60 and 58-30-62. ATGI remains under the Department directive that it shall not write or renew insurance business without the prior written approval of the Department. Additionally, while the Supervision Order requires ATGI to obtain prior written approval from the Department before undertaking certain actions, the directors are still in charge of ATGI and must take all action legally possible to safeguard its policyholders and to recover assets that are due to ATGI.

...

On April 3, 2020, ATGI voted to terminate its contract with MVT. The Department authorized the board's action to terminate its contract with MVT. Since that time, representatives of ATGI have reported to the Department instances of MVT representatives seeking to withdraw money from ATGI bank accounts, attempting to obtain reinsurance on behalf of ATGI, sending emails using ATGI email addresses to solicit the writing of ATGI policies, pressing ATGI to write business, and offering incentives to policyholders to give shareholder proxies to MVT. By letter dated April 28, 2020, counsel for the Department advised counsel for MVT that MVT and ATGI are legally independent and separate entities. MVT's counsel was advised that MVT is not licensed as an insurance company, does not have authority to represent itself as an insurance company, and is to refrain from doing so. The letter further stated that MVT representatives are not representatives of ATGI and are not to present themselves as representatives of ATGI.

Because MVT is merely a service provider to ATGI and is not regulated by the Department, the Department has no authority to take action against MVT or Amrit Singh. Therefore, it is ATGI's responsibility to take action against MVT, its former service provider, to recover assets that are due to ATGI and to prohibit MVT and Amrit Singh from purporting to act on behalf of ATGI. ATGI must hold its current and former service providers accountable and keep the Department informed of any further developments.

(ECF No. 30.2, at ¶ 35, Ex. 11.)

22. Despite ATGI's actions and the NCDOJ's admonitions, A. Singh, S. Singh, Rojas, and other MVT representatives continued to communicate on behalf of ATGI with the NCDOJ and ATGI's insured after April 3, 2020 without ATGI's approval. (*Id.* at ¶¶ 34–43, Exs. 12–17.)

E. Notices of Cancellation and Solicitation of Proxies

23. On July 7, 2020, ATGI notified the NCDOJ that it was having difficulty obtaining the subscription agreements from their insureds in order to issue them stock in ATGI and meet other compliance obligations. (ECF No. 30.2, at ¶ 51, Ex. 21.) ATGI asked the NCDOJ for approval to send to its insured notices that their policies would be cancelled if the insured failed to return a subscription agreement within thirty-five (35) days. (*Id.*) On July 8, 2020, NCDOJ approved ATGI's request to issue notices of cancellation. (*Id.* at ¶ 51, Ex. 22.)

24. In July 2020, ATGI issued notices of cancellation to certain shareholders (the "NOC Package"). (*Id.* at ¶ 53, Ex. 23.) The NOC Package consisted of a cover letter, a "Cancellation Notice," and a single document containing both a "Subscription agreement" at the top of the page and a "Shareholder Proxy" at the bottom of the

page. (*Id.*) The cover letter accompanying the notices of cancellation contained the following relevant language:

I am writing to inform you that if you complete the required documentation (a subscription agreement) which is included in this mailing, and we receive it prior to the cancellation date referenced on the attached cancellation notice, we will reinstate the remainder of your policy term. **If you do not respond, your policy will terminate in accordance with the attached cancellation notice.**

(*Id.* at Ex. 23; emphasis in original.) The “Shareholder Proxy” reads, in pertinent part, as follows:

[T]he undersigned shareholder . . . hereby delivers and grants the American Transportation Group Association, Inc. (ATGA) . . . a revocable proxy to vote all of the shareholder’s shares held currently by me or subsequently acquired at any future meeting of the shareholders. My shareholder votes shall be case as directed by ATGA. I understand that this proxy is held indefinitely, unless revoked at any time by written notification to the Corporate Secretary of the ATGIRRG and that I may, if I choose to do so, attend in person any future meeting of shareholders and vote my share in person.

(*Id.*) The cover letter and Cancellation Notice make no mention of the “Shareholder Proxy.

25. Rojas and S. Singh have filed with the Court declarations from three ATGI insureds stating that they “understood the documentation from ATGI to mean the Policyholder needed to sign all parts of the documentation from ATGI in order for its insurance coverage to remain in place,” and that “[t]he shareholder proxy was only signed because Policyholder believed it was required to maintain coverage.”

(Declarations, ECF No. 27.4.) However, there is no evidence in the record that any of the three insureds revoked or attempted to revoke their proxies.

F. Special Shareholder Meeting

26. On August 24, 2020, Michael Hunter noticed a special meeting of the shareholders for September 4, 2020. The notice stated that the “purpose of the meeting is to consider and vote on a motion to remove Shamsheer Singh and Eleazar Rojas as members of the Board of Directors.” (ECF No. 30.2, at ¶ 65, Ex. 30.)

27. As of the record date for the special meeting (August 24, 2020), ATGI has received proxies from 262 shareholders, which amounted to more than ninety-eight (98) percent of the outstanding shares. (*Id.* at ¶ 71.) One hundred twenty-eight (128) of the proxies were obtained from insureds that received the NOC Package. (*Id.*) ATGI has not received any proxy revocations from its insured. (*Id.*)

G. The Lawsuit and The Motion

28. On May 6, 2020, ATGI filed the Complaint in this action (ECF No. 2). In the Complaint, ATGI makes a claim for declaratory judgment seeking the following declaration:

[T]hat the March 13th Resolutions are valid and binding on American Transportation, MVT, Rojas, S. Singh, A. Singh, as well as all of their agents, and that all actions taken therein are valid and binding; that the current valid Board of Directors of American Transportation consists of Rojas, S. Singh, Gionet, Syphers and Schaefer; and that all actions of the Board in the March 13th Resolutions and thereafter, including passage of the April 3rd Resolutions, are valid and binding.

(ECF No. 2, at ¶ 93.) In the Complaint, ATGI also makes claims against MVT for breach of contract, breach of fiduciary duty, and conversion; claims against Rojas and S. Singh for breach of fiduciary duties and aiding and abetting breaches of fiduciary duty; and a claim against A. Singh for conversion. (*Id.* at ¶¶ 94–118.)

29. On August 13, 2020, Rojas and Singh filed their Amended Answer and Counterclaims. (“Counterclaims,” ECF No. 14.) The Counterclaims assert three causes of action: (1) a claim for indemnity by ATGI; (2) a claim for access of the books and records of ATGI; and (3) a declaratory judgment that the March 13th Resolutions and the April 3rd Resolutions and subsequent resolutions were invalid and nonbinding on ATGI, Rojas, and S. Singh. (*Id.* at ¶¶ 28, 34, 49.)

30. On August 19, 2020, this case was designated and assigned to the undersigned by the Chief Justice of the Supreme Court of North Carolina pursuant to Rules 2.1 and 2.2 of the General Rules of Practice for the Superior and District Courts. (ECF No. 1.)

31. On September 1, 2020, Rojas and S. Singh filed a Motion for Temporary Restraining Order and Preliminary Injunction, seeking to restrain ATGI from convening the September 4, 2020 shareholders meeting, from using proxies obtained through sending the NOC Package, and from convening any further shareholder meetings until the pending lawsuit is resolved. (“Original Motion for TRO and PI,” ECF No. 18.) In a telephone conference with the Court on September 3, 2020, counsel for ATGI agreed to adjourn the September 4, 2020 shareholders meeting until after a hearing on the Original Motion for TRO and PI could be held. In the interim,

Defendants were permitted to file an Amended Motion for Temporary Restraining Order and Preliminary Injunction, which they filed on September 24, 2020, seeking the same relief. (ECF No. 27.) Defendants represent they “are seeking to preserve the status quo until the issues in the lawsuit can be determined.” (*Id.* at ¶ 51.) After multiple unanticipated intervening circumstances delayed the hearing on the Motion, the shareholders meeting is now set for October 9, 2020, and the parties consented to the Motion being decided without a hearing.

32. ATGI opposes the Motion (“ATGI’s Opp.”, ECF No. 30), arguing that the “status quo” which Defendants are attempting to preserve “has left ATGI non-compliant and teetering on the edge of failure.” (*Id.* at p. 23.) Currently, under the Order of Supervision, ATGI is unable to write or renew policies and is struggling to pay its reinsurance deposit, which could render ATGI insolvent. (ECF No. 30.2, at ¶¶ 55–56.) ATGI also has insurance policies that are set to expire before the end of the calendar year, which could force its insureds to find alternative insurance elsewhere. (Affidavit of Philip Winter, II, ECF No. 30.3., at ¶ 5.) Further, ATGI represents that their legal compliance with the NCDOI is put at risk by Rojas and S. Singh’s continued presence on the Board. (ECF No. 30.2, at ¶¶ 57–61.)

33. Of particular concern to ATGI are: S. Singh and Rojas’s signing of the fraudulent surplus notes from MVT, (*Id.* at ¶ 57); Defendants delay or failure in signing documents which are required under North Carolina law, and are necessary in order for NCDOI to lift its Order of Supervision (*id.* at ¶¶ 58–63); and ATGI’s independent auditor’s ultimate conclusion that under Defendants watch, “it [was]

questionable whether the [B]oard fulfilled its fiduciary responsibilities.” (*Id.* at ¶ 55, Ex. 24.)

34. Further heightening ATGI’s concern, on September 28, 2020, Rojas and S. Singh sent an email to ATGI and NCDOI announcing their intent to boycott all future Board meetings. (*Id.* at ¶ 72, Ex. 31.) On the same day, the NCDOI set a deadline of October 9, 2020, for ATGI to provide S. Singh’s updated biographical affidavit and an update on the shareholder meeting. (*Id.* at ¶ 73, Ex. 32.)

II. ANALYSIS

A. Standard of Review

35. A preliminary injunction may be issued during litigation when “it appears by affidavit that a party thereto is doing or threatens or is about to do . . . some act . . . in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual.” N.C. G.S. § 1-485(2). “A preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation.” *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983) (citation omitted). A preliminary injunction is proper only:

(1) if a [party] is able to show likelihood of success on the merits of his case and (2) if a [party] is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a [party’s] rights during the course of litigation.

Id. at 401, 302 S.E.2d at 759–60 (quoting *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)). Likelihood of success means

“a reasonable likelihood.” *Id.* at 404, 302 S.E.2d at 761. The movant bears the burden of establishing its right to a preliminary injunction, which “should not lightly be granted.” *Computer Designs & Integration, LLC v. Brown*, 2017 NCBC LEXIS 8, at *19 (N.C. Super. Ct. Jan. 27, 2017) (citation omitted); *Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975).

36. The issuance of an injunction is “a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities.” *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). A preliminary injunction “should not be granted where there is a serious question as to the right of the defendant to engage in the activity and to forbid the defendant to do so, pending the final determination of the matter, would cause the defendant greater damage than the plaintiff would sustain from the continuance of the activity while the litigation is pending.” *Bd. of Provincial Elders v. Jones*, 273 N.C. 174, 182, 159 S.E.2d 545, 551–52 (1968); *accord Cty. of Johnston v. City of Wilson*, 136 N.C. App 775, 780, 525 S.E.2d 826, 829 (2000) (noting that a court should weigh “the advantages and disadvantages to the parties” in deciding whether to issue a preliminary injunction).

B. Likelihood of Success

37. In determining the likelihood of success on the merits, this Court looks to Defendants’ Counterclaims. (ECF No. 14, at ¶¶ 26–49.) Preliminarily, the Court notes that in their brief in support of the preliminary injunction, Defendants do not make any argument in support of their first counterclaim for indemnity or their

second counterclaim for access to corporate records. (“Brief in Support of PI,” ECF No. 28, at pp. 9–12.) Instead, they argue only that they are likely to succeed on their third claim for a declaratory judgment that (1) the March 13th Resolutions was invalid and nonbinding on ATGI, Rojas, and Singh; and (2) that the April 3rd Resolutions and subsequent resolutions were invalid and nonbinding. (*Id.*) Therefore, the Court will analyze only Defendants’ likelihood of success on their declaratory judgment claim.

a. March 13th Resolutions

38. In their Brief in Support of PI, Defendants make no specific argument in support of their claim for a declaration that the March 13th Resolutions are invalid. (*Id.* at pp. 9–12.) Nevertheless, from their statement of facts in the Brief in Support of PI, the Court discerns what appear to be three possible arguments regarding the validity of the March 13th Resolutions: first, that the March 13th Resolutions are invalid because S. Singh and Rojas “were pressured to sign the document immediately as it was stated to them that this resolution was urgent” (ECF No. 28, at pp. 3–4); second, that they signed the March 13th Resolutions (agreeing to the appointment of three new directors to ATGI’s Board) based on incorrect legal advice from ATGI’s corporate counsel that “North Carolina law required a minimum of five (5) directors” (*Id.* at p. 3); and third, that the April 2, 2020 notices sent by Defendants twenty (20) days after they signed the March 13th Resolutions revoked their written consent. (*Id.* at p. 4.) None of these contentions have merit.

39. First, both S. Singh and Rojas admit they signed the March 13th Resolutions, and even if the Court were to consider an argument that they signed under duress, a mere allegation that Defendants were “pressured” to sign the document is insufficient. “Duress exists where one, by the unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will. . . . [A]n essential element of duress is a wrongful act or threat” *Link v. Link*, 278 N.C. 181, 194, 179 S.E.2d 697, 704–05 (1971). Here, the allegations that S. Singh and Rojas felt “pressured” and were told the March 13th Resolutions were “urgent” are not arguably sufficient to establish the type of wrongful act or threat necessary to establish duress.

40. Second, the legal advice that Defendants claim misled them into executing the March 13th Resolutions was, in fact, accurate. Prior to the March 13th Resolutions, the Board consisted of only two (2) directors—S. Singh and Rojas, neither of whom were independent. While it is true, as Defendants argue, that there is no general requirement under North Carolina law that a corporation’s board of directors have a minimum of five (5) directors, this is a classic “straw man” argument. North Carolina law requires that “[t]he Board of directors of [a] risk retention group shall have a majority of independent directors.” N.C.G.S. § 58-22-15(d)(1)(b) (2020). As an RRG, ATGI is required to have a majority of independent directors. Before the March 13th Resolutions, ATGI had two (2) directors—neither whom were independent. Thus, the reason for the increase to five (5) directors was to allow for

the appointment of three (3) independent directors, rendering the Board compliant with North Carolina law.

41. Finally, Defendants purported revocations of their consents to the March 13th Resolutions were ineffective. North Carolina law provides that, in actions taken without a meeting, an

[a]ction . . . is effective when one or more unrevoked consents signed by all of the directors are delivered to the corporation, unless the consents specify a different effective date. A director's consent to action may be revoked in a writing signed by the director and delivered to the corporation prior to the action becoming effective.

N.C.G.S. § 55-8-21(b) (2020). Here, S. Singh and Rojas delivered their signed copies of the resolution on March 13, 2020. Accordingly, the March 13th Resolutions became effective that day. Therefore, the subsequent revocation notices sent nearly three (3) weeks later are ineffective.

42. Therefore, the Court finds that the Defendants have not established a likelihood of success on their counterclaim requesting a declaratory judgment that the March 13th Resolutions were invalid and non-binding.

b. April 3rd Resolutions and Subsequent Resolutions

43. Given the Court's finding that Defendants have failed to establish a likelihood of success in obtaining a declaratory judgment that the March 13th Resolutions are invalid, this Court has little else to consider. Regarding the April 3rd Resolutions, Defendants argue:

Here, the dispute regarding the proper composition of the board is an issue that will be resolved in the current lawsuit. Rojas and S. Singh contend that the other

directors of the Board and the officers are illegitimate. Rojas and S. Singh, as the only directors, revoked their consent to the March 13 Resolution which added additional members to the Board. Thereby, any resolutions thereafter are null.

(ECF No. 28, at p. 10.)

44. Therefore, the validity of the Board's actions taken after the March 13th Resolutions, including the April 3rd Resolutions, are predicated on the validity of March 13th Resolutions. The Court has found that Defendants are not likely to establish that the actions taken by the Board in the March 13 Resolutions, including appointing the three (3) new directors, are invalid. Therefore, the Court finds that Defendants' likewise fail to establish a likelihood of success regarding their requests for a declaratory judgment with respect to the April 3rd Resolutions and all subsequent Board action.

45. Nevertheless, while it is not, strictly speaking, a separate declaration being sought by Defendants in this lawsuit, the Court will briefly address Defendants' contention that ATGI should be prohibited from exercising proxies obtained from ATGI's insured as a result of sending out the NOC Package. (ECF No. 28, at pp. 10–12.) At this stage of the case, the evidence presented by Defendants establishes that only three (3) of the one hundred twenty-eight (128) insureds who signed and returned proxies included with the NOC Package, or approximately 2%, believed they were required to sign the proxy or lose their insurance coverage. (ECF No. 30.2, at ¶ 71.) Further, the proxies are, by their very language, revocable by the insured at any time. There is no evidence that any of the one hundred twenty-eight (128) insureds

who signed and returned proxies included with the NOC Package have revoked their proxies. Thus, the Court is not persuaded by Defendants' arguments that the proxies obtained as a result of the NOC Packages are tainted.⁴

46. Having found that Defendants have not established a likelihood of success on the merits, the Court need not reach the question of whether they have established irreparable harm nor engage in a balancing of the equities. However, the Court notes that if it were required to reach the question, it would conclude that equities weigh heavily in favor of ATGI. The evidence before the Court at this time establishes that, if ATGI is not permitted to proceed with the shareholder meeting on October 9, 2020 and take necessary actions, it faces imminent financial and other peril, including the possibility that the NCDOI will dissolve the company. The removal of S. Singh and Rojas from the Board appears to be a necessary step towards coming back into compliance with the statutes and regulations governing ATGI's operations. Further, Defendants' removal from the Board also appears to be a necessary step in assuring the NCDOI that ATGI is headed towards more solid ground. In contrast, S. Singh and Rojas have stated their intent to boycott future meetings of the ATGI Board, and are unlikely to suffer any significant harm, let alone irreparable harm, from the failure to issue an injunction.

47. Therefore, for the reasons stated above, Defendants have not established a likelihood of success on their counterclaim seeking a declaratory

⁴ The Court also notes that it is unclear whether Defendants even have standing to raise the proxies issued since Rojas and S. Singh are not themselves shareholders or insureds of ATGI.

judgment, and the Court concludes, in its discretion, that the Motion for PI should be DENIED.

THEREFORE, IT IS ORDERED that the Motion for PI is DENIED, and the October 9, 2020 shareholders' meeting may be convened as scheduled.

SO ORDERED, this the 8th day of October, 2020.

/s/ Gregory P. McGuire
Gregory P. McGuire
Special Superior Court Judge for
Complex Business Cases