STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21 CVS 5801
TOTAL MERCHANT SERVICES, LLC, Plaintiff, v. TMS NC, INC. AND CHRISTOPHER COLLINS, Defendants.	**ORDER AMENDING ORDER ON PLAINTIFF TOTAL MERCHANT SERVICES' SECOND AMENDED MOTION FOR PRELIMINARY INJUNCTION**

1. **THIS MATTER** is before the Court *sua sponte* under North Carolina Rule of Civil Procedure 60(a) ("Rule(s)") to amend certain conclusions of law the Court reached in its Order on Plaintiff Total Merchant Services, LLC's ("Plaintiff" or "TMS") Second Amended Motion for Preliminary Injunction (the "PI Order"), (ECF No. 98), entered in the above-captioned case on 6 May 2022.

2. Paragraphs 59 and 61 of the PI Order each construe the first sentence of paragraph 4(b) of the Sales Representation Agreement (the "Agreement") that TMS's predecessor entity, Total Merchant Services, Inc., entered into with Defendant TMS NC, Inc.'s ("TMS NC") legal predecessor, M&C Business Consulting Inc., on 20 February 2008. (Verified Compl. ¶ 13 [hereinafter "Compl."], ECF No. 2; Def. TMS NC's Answer with Countercl. and Third-Party Claims ¶ 13 [hereinafter "TMS NC's Ans."], ECF No. 34; Compl. Ex. A [hereinafter "Agreement"].)

3. The first sentence of paragraph 4(b) of the Agreement provides as follows:

> 4. Covenants, Representations and Warranties: [TMS NC] covenants, represents and warrants to TMS:
>
> . . .
>
> (b) that [TMS NC] will provide TMS current and updated credit reports (or the authorization to obtain such reports), bank and trade references, financial and other information on [TMS NC] and its directors, officers, shareholders, partners or principals as TMS may reasonably request, during the term of the Agreement, as follows: (I) semiannually (by February 1 and August 1) for the first two years of this Agreement; and (II) annually thereafter (by February 1).

(Agreement ¶ 4(b).)

4. In construing this provision in the PI Order, the Court concluded, in relevant part, as follows:

> The first sentence of paragraph 4(b) of the Agreement obligates TMS NC to provide TMS with "current and updated credit reports. . . , bank and trade references, financial and other information on [TMS NC] and its directors, officers, shareholders, partners or principals" on an annual basis if TMS requests such information by February 1 of a calendar year. (Agreement 4(b).) Access to this information is time-limited in two ways: first, TMS must demand inspection by February 1 and second, TMS NC need only provide the "*current and updated*" versions of such information upon each annual request. (Agreement ¶ 4(b) (emphasis added).) Also, the first sentence of paragraph 4(b) requires TMS NC to affirmatively "provide TMS" with these documents upon TMS's reasonable and timely request. (Agreement ¶ 4(b).)

(PI Order, ¶ 59 (emphasis and alteration in original; footnote 23 omitted).)

5. The Court further concluded at paragraph 61:

> Plaintiff has provided evidence that it requested to inspect TMS NC's financial information on 19 March 2021. (Compl. Ex. D.) While the plain terms of the first sentence of paragraph 4(b) of the Agreement make this request untimely for the 1 February 2021 deadline, the request was clearly made before this year's deadline of 1 February 2022. Accordingly, TMS has effectively requested TMS NC's "current and updated credit reports. . . , bank and trade references, financial and

> other information on [TMS NC] and its directors, officers, shareholders, partners or principals" as of 1 February 2022. (Agreement ¶ 4(b).)

(PI Order, ¶ 61 (alteration in original).)

6. The Court entered the PI Order on 6 May 2022. The Court heard Defendants' Motion to Dismiss, or in the alternative, Motion for Summary Judgment (ECF No. 68) on 18 May 2022. In reviewing the briefs in preparation for the hearing on the latter motion, and upon the Court's further review of Plaintiff's briefing on Plaintiff's Amended Motion for Preliminary Injunction (the "PI Motion"), (ECF Nos. 72, 75, 83), the Court realized that it had misunderstood Plaintiff's argument construing the first sentence of paragraph 4(b) of the Agreement in Plaintiff's briefing. Although the Court mistakenly believed Plaintiff and Defendants construed that sentence identically and simply disagreed over whether Plaintiff had complied with its terms, the Court's further review of Plaintiff's and Defendants' briefing on the PI Motion and on other pending motions has made clear to the Court that Plaintiff and Defendants actually disagreed over the sentence's proper construction. (*See* Pl.'s Resp. Opp'n Defs.' Mot. Dismiss or in the Alternative Mot. for Summ. J. 4, 17, ECF No. 92; Mem. Supp. Second Am. Mot. for Preliminary Injunction 7; Defs.' Mem. Supp. Mot. Dismiss or in the Alternative Mot. for Summ. J. 14–15, ECF No. 69.)

7. Paragraphs 59 and 61 of the PI Order reflect the Court's mistaken belief concerning the parties' agreement and adopt what the Court now realizes is the construction of the sentence advanced only by Defendants, not by both parties (although the Court disagreed with Defendants over Plaintiff's compliance with the sentence's requirements).

8. The Court therefore amends the PI Order to delete paragraphs 59 and 61, including footnote 23, and to supersede and replace them with the new paragraphs 59 and 61 set forth below:

> 59. According to Defendants, the first sentence of paragraph 4(b) of the Agreement currently obligates TMS NC to provide TMS with "current and updated credit reports. . . , bank and trade references, financial and other information on [TMS NC] and its directors, officers, shareholders, partners or principals," but only if TMS makes a timely and reasonable request for such information by February 1 of each calendar year. (Defs.' Mem. Supp. Mot. Dismiss or in the Alternative Mot. for Summ. J. 14–15, ECF No. 69.) Plaintiff disagrees with Defendants' construction and contends instead that the first sentence of paragraph 4(b) currently operates to require TMS NC to produce the described documents automatically by February 1 of each year—regardless of whether TMS makes a request. (Pl.'s Resp. Opp'n Defs.' Mot. Dismiss or in the Alternative Mot. for Summ. J. 4, 17, ECF No. 92.)
>
> . . .
>
> 61. Plaintiff has shown a likelihood of success applying either side's construction of the first sentence of paragraph 4(b). If Plaintiff is correct, Plaintiff was not required to make a request, and Defendants breached that provision by failing to provide the information described in that sentence by February 1 of either 2021 or 2022. As to Defendants' narrower construction, Plaintiff has provided evidence that it requested to inspect TMS NC's financial information described in both the first and fourth sentences of paragraph 4(b) on 19 March 2021. (Compl. Ex. D.) If the Court were to adopt Defendants' construction of the first sentence, Plaintiff's March 19 request, while not timely for 2021, was clearly made before this year's deadline of 1 February 2022, satisfying any obligation TMS may have had to make a timely request for the information described in the first sentence of paragraph 4(b).

9. These amendments also require that the Court delete the introductory phrase "By contrast" in the first sentence of paragraph 60 and to amend the last paragraph of the PI Order to reflect that Plaintiff has paid the required security to support the PI Order and the amended PI Order.

10. Rule 60(a) permits a judge to correct, upon his or her own initiative, "[c]lerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission." "Under this rule, the trial court generally cannot make modifications to an order or judgment which affect the substantial rights of a party." *Levin v. Jacobson*, 2016 NCBC LEXIS 66, at *5 (N.C. Super. Ct. Aug. 25, 2016) (citing *Spencer v. Spencer*, 156 N.C. App. 1, 10–11 (2003)). "While Rule 60[(a)] allows the trial court to correct clerical mistakes in its order, it does not grant the trial court the authority to make substantive modifications to an entered judgment." *Food Service Specialists v. Atlas Restaurant Management*, 111 N.C. App. 257, 259 (1993). "A change in an order is considered substantive and outside the boundaries of Rule 60(a) when it alters the effect of the original order." *Buncombe County ex rel. Andres v. Newburn*, 111 N.C. App. 822, 825 (1993).

11. In *Schultz v. Ingram*, 38 N.C. App. 422, 427 (1978), the Court of Appeals affirmed a trial court's decision to amend under Rule 60(a) a preliminary injunction order to clarify the reasons for granting the injunction, explaining:

> The Third Circuit has held that Rule 60(a) "permits the correction of irregularities which becloud but do not impugn" the judgment. *United States v. Stuart*, 392 F. 2d 60, 62 (3d Cir. 1968). In the present case, the correction did not alter the effect of the order but did clarify the record for appeal. The defendant was not prejudiced by this correction because he was well aware of the facts in the case which would support the injunction. We, therefore, hold that the Rule 60(a) motion was proper to reform the order to comply with Rule 65(d).

12. In *Danny's Towing 2, Inc. v. N.C. Dep't of Crime Control & Pub. Safety*, 213 N.C. App. 375, 379-80 (2011), the Court of Appeals approvingly cited *Schultz* and

suggested that if a court issues an injunction without adequately explaining the reasons for its issuance, the court may fix that deficiency under Rule 60(a):

> We first note that the injunctive portion of the order does not set forth the reasons for its issuance as required by statute. Under N.C. Rule of Civil Procedure 65(d), "[e]very order granting an injunction . . . shall set forth the reasons for its issuance." N.C. Gen. Stat. § 1A-1, Rule 65(d) (2010) (emphasis added). However, "an injunctive order which does not state the reasons for its issuance is merely irregular, not void." *Poor Richard's, Inc. v. Stone*, 86 N.C. App. 137, 139–40, 356 S.E.2d 828, 830 (1987), *rev'd on other grounds*, 322 N.C. 61, 366 S.E.2d 697 (1988). Such irregular orders are properly corrected by a motion made before the trial court and will not be corrected on appeal. *Schultz v. Ingram*, 38 N.C. App. 422, 426, 248 S.E.2d 345, 349 (1978).

13. In *Newburn*, the Court of Appeals distinguished between substantive and clerical modifications by focusing mainly on whether the court has modified the relief ordered. *Newburn*, 111 N.C. App. at 825. The Court of Appeals reversed the entry of an amended order under Rule 60(a) because the amended order affected the plaintiff's substantive right to collect payment. *Id.* at 826. In reversing, the Court of Appeals distinguished *In re Peirce*, 53 N.C. App. (1981), a case in which the trial court properly amended an order under Rule 60(a) to elaborate on the reasons for terminating parental rights while leaving the termination intact, from the situation in *Newburn* where the amended order forbade the plaintiff from recovering payments that plaintiff was entitled to collect under the original order, thus altering the relief awarded in the original order. *Id.*

14. Applying the principles from these cases here, the Court concludes that it may properly amend the PI Order under Rule 60(a). The Court's amendments are necessary because the Court mistook the parties' respective positions concerning the

proper construction of the first sentence of paragraph 4(b). The amendments do not effect a change in the Court's conclusions that Plaintiff is entitled to a preliminary injunction in the form ordered and on the grounds stated and, in particular, do not impact or require modification of any other provisions in the PI Order, including the Court's determinations (i) that "Plaintiff has shown a likelihood of success in establishing its breach of contract claim against TMS NC for failing to comply with its inspection demand," (PI Order ¶ 63), (ii) that Plaintiff has satisfied its burden to show that the case is "urgent," that its right is "clear," and that its injury is "immediate" and "irreparable," thereby justifying the mandatory injunction entered to protect Plaintiff's inspection rights (PI Order ¶ 65), and (iii) that Plaintiff is entitled to the entirety of the relief awarded at paragraph 70 of the PI Order.

15. Specifically as to Defendants, the Court concluded in the PI Order, as it concludes again in the amendments it makes through this Order, that Plaintiff complied with any requirement imposed by Defendants' construction of the first sentence of paragraph 4(b) to make a timely and reasonable request for the information described in that sentence. As such, the Court's amendments simply reflect Plaintiff's correct position on the PI Motion, have no substantive effect on the PI Order, and impact Defendants no differently than the PI Order did.

16. Based on the foregoing, the Court concludes that the amendments do not "alter the effect of the original order," *Newburn*, 111 N.C. App. at 825, "do not have a substantive effect," *In re M.M.*, 230 N.C. App. 225, 227 (2013), and therefore do not affect a substantial right of any party. Therefore, the Court concludes that an

amended preliminary injunction order is properly entered *sua sponte* under Rule 60(a).

17. Accordingly, the Court will enter an amended preliminary injunction order in the form attached as Exhibit A hereto promptly upon the filing of this Order.

SO ORDERED, this the 19th day of May, 2022.[1]

/s/ Louis A. Bledsoe, III

Louis A. Bledsoe, III
Chief Business Court Judge

[1] The Court notes that Defendants filed a Notice of Appeal purportedly appealing the PI Order on 12 May 2022. (ECF No. 101.) The interlocutory appeal was made, however, to the North Carolina Court of Appeals, rather than the Supreme Court of North Carolina, and is therefore made to the wrong appellate court and without legal effect. *See* N.C.G.S. §7A-27(a)(3); *see generally ALC Mfg. v. J. Streicher & Co., LLC*, 2020 NCBC LEXIS 91, at *10 (N.C. Super. Ct. July 30, 2020).

EXHIBIT A

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21 CVS 5801
TOTAL MERCHANT SERVICES, LLC, Plaintiff, v. TMS NC, INC. AND CHRISTOPHER COLLINS, Defendants.	**AMENDED ORDER ON PLAINTIFF TOTAL MERCHANT SERVICES' SECOND AMENDED MOTION FOR PRELIMINARY INJUNCTION**

THIS AMENDED ORDER is filed in accordance with the Court's Order Amending its 6 May 2022 Order on Plaintiff Total Merchant Services, LLC's ("Plaintiff" or "TMS") Second Amended Motion for Preliminary Injunction (the "PI Order"), which was filed on 19 May 2022 in the above captioned case, (ECF No. 115).

1. **THIS MATTER** is before the Court on Plaintiff's Second Amended Motion for Preliminary Injunction (the "PI Motion")[2] pursuant to Rule 65 of the North Carolina Rules of Civil Procedure ("Rule(s)") in the above-captioned case. Having considered the PI Motion, the briefs, exhibits, and timely affidavits filed in support of and in opposition to the PI Motion, the arguments of counsel at a hearing held on the PI Motion, and other relevant documents of record, the Court hereby **GRANTS in part and DENIES in part** the PI Motion as set forth herein.

[2] (Second Am. Mot. Preliminary Injunction [hereinafter "2nd Am. PI Mot."], ECF No. 72.)

I.

PROCEDURAL HISTORY

2. Plaintiff TMS initiated this action in Wake County Superior Court on 28 April 2021, asserting claims against Defendants TMS NC, Inc. ("TMS NC") and TMS NC's owner Christopher Collins, ("Collins") (together, "Defendants") for breach of contract, indemnification, specific performance, preliminary and injunctive relief, and declaratory judgment arising out of Defendants' alleged breach of an exclusive sales agreement and TMS's attempts to enforce its inspection rights. (*See generally* Verified Compl. [hereinafter "Compl."], ECF No. 2.) Contemporaneously with the Complaint, TMS filed a Motion for Preliminary Injunction. (Mot. Preliminary Injunction, ECF No. 4.)

3. Before the Motion for Preliminary Injunction was heard, Defendants removed the case to the United States District Court for the Eastern District of North Carolina, Western Division, on 8 June 2021. (Notice of Removal, ECF No. 29.) The case was later remanded to the Superior Court of North Carolina on 16 December 2021 upon the federal court's conclusion that the case had been improperly removed and the federal court's resulting imposition of sanctions against Defendants. (Order, ECF No. 56.)

4. After remand, on 18 January 2022, TMS filed an Amended Motion for Preliminary Injunction.[3] The Amended Motion for Preliminary Injunction was heard by the Honorable John W. Smith on 17 March 2022. (*See* Notice of Hr'g, ECF No. 20.)

[3] (Am. Mot. Preliminary Injunction [hereinafter "Am. PI Mot."], ECF No. 17.)

Judge Smith did not resolve the Amended Motion for Preliminary Injunction and, at Judge Smith's recommendation, on 21 March 2022, the Chief Justice of the Supreme Court of North Carolina designated this action as a complex business case under Rules 2.1 and 2.2 of the General Rules of Practice for the Superior and District Courts and assigned the case to the undersigned.[4]

5. On 4 April 2022, TMS filed the PI Motion with supporting affidavits from Meredith Taunt, (Aff. Meredith Taunt [hereinafter "Taunt Aff."], ECF No. 73), and Ryan Malloy, (Aff. Ryan Malloy [hereinafter "Malloy Aff."], ECF No. 74). On 20 April 2022, TMS submitted a Proposed Preliminary Injunction Order ("Proposed PI Order") to the Court.[5]

6. After full briefing, the Court held a hearing on the PI Motion on 22 April 2022 (the "Hearing"), at which all represented parties were represented by counsel.

7. Five days after the Hearing, on 27 April 2022, Defendants filed three supplemental affidavits in further support of their opposition to the PI Motion.[6] The following day, Plaintiff filed its Objections to Untimely Affidavits Filed by Defendants ("Objections").[7]

---

[4] (Designation Order, ECF No. 1; Order Staying Case Until Bus. Ct. Accepts or Rejects, ECF No. 24.)

[5] (Proposed Preliminary Injunction Order [hereinafter "Proposed PI Order"], ECF No. 85.)

[6] (Supplementary Exhibits to Defs.' Mem. Opp'n Pl.'s Mot Preliminary Injunction, ECF No. 86; Aff. Christopher Collins, ECF No. 87; Aff. Michael Garland, ECF No. 88; Aff. Monica Collins, ECF No. 89.)

[7] (Pl.'s Objections to Untimely Aff. Filed by Defs. [hereinafter "Pl.'s Objections to Affs."], ECF No. 90.)

8. The PI Motion is now ripe for resolution.

II.

FINDINGS OF FACT[8]

9. The Court makes the following findings of fact, which are made solely for the purposes of deciding the PI Motion and are not binding in any subsequent proceedings in this action. *See Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75 (2005) ("It is well settled that findings of fact made during a preliminary injunction proceeding are not binding upon a court at a trial on the merits.").

10. Plaintiff TMS is a limited liability corporation that sells payment-card processing services and programs to its customers through a nationwide network of sales representatives. (Taunt Aff. ¶ 2.) On 20 February 2008, TMS's predecessor entity, Total Merchant Services, Inc., entered into a Sales Representative Agreement (the "Agreement") with Defendant TMS NC's legal predecessor, M&C Business Consulting Inc.[9] Under the Agreement, in exchange for selling and marketing TMS's products and services, TMS NC is paid a "residual share," the difference between certain rates and fees charged to each business-customer that TMS NC solicits on behalf of TMS and certain rates and fees that TMS pays to third party credit card associations and other related vendors for those services. (Compl. ¶ 14; TMS NC's

[8] Any determination later stated as a Conclusion of Law that should have been stated as a finding of fact is incorporated in these Findings of Fact.

[9] (Compl. ¶ 13; Def. TMS NC's Answer with Countercl. and Third-Party Claims ¶ 13 [hereinafter "TMS NC's Ans."], ECF No. 34; Compl. Ex. A [hereinafter "Agreement"], ECF No. 2.)

Ans. ¶ 14.) Defendant Collins signed the Agreement on behalf of TMS NC's predecessor and Collins is currently an officer and owner of TMS NC.[10] The Agreement is governed by Colorado law. (Agreement ¶ 10(h).)

11. The first sentence of paragraph 4(b) of the Agreement obligates TMS NC to provide certain financial information to TMS under certain conditions:

> 4. Covenants, Representations and Warranties: [TMS NC] covenants, represents and warrants to TMS:
>
> . . .
>
> (b) that [TMS NC] will provide TMS current and updated credit reports (or the authorization to obtain such reports), bank and trade references, financial and other information on [TMS NC] and its directors, officers, shareholders, partners or principals as TMS may reasonably request, during the term of the Agreement, as follows: (I) semiannually (by February 1 and August 1) for the first two years of this Agreement; and (II) annually thereafter (by February 1).

(Agreement ¶ 4(b).)

12. Sentences three and four of paragraph 4(b) of the Agreement, in relevant part, grant TMS certain inspection rights:

> [TMS NC] will allow TMS or its representatives or regulators . . . access to the premises of [TMS NC] upon reasonable notice at reasonable times with respect to the performance by [TMS NC] of the Services.[11] During the term of this Agreement, and for a period of one year thereafter, representatives of TMS may, during normal business hours, make copies of [TMS NC]'s books, accounts, records and files pertaining to [TMS NC]'s performance of the Services.

(Agreement ¶ 4(b).)

---

[10] (Compl. ¶ 9, 13; Def. Collins' Answer and Mot. Dismiss, ¶ 9, 13, ECF No. 33.)

[11] In the Agreement, "Services" refers to TMS NC's promise to, among other things, "actively market" Plaintiff's program, "actively recruit businesses" for Plaintiff, "assist businesses in completing [Plaintiff's] application," and "provide other ongoing support to [Plaintiff.]" (Agreement ¶ 1.)

13. In paragraph 4(d) of the Agreement, TMS NC also agreed to keep "complete and detailed records relating to the performance of the Services and its obligations under [the] Agreement, which [TMS NC] shall make available upon request of TMS at reasonable times and intervals." (Agreement, ¶ 4(d).)

14. Paragraph 5 of the Agreement, in relevant part, governs the termination terms:

> 5. Term and Termination: (a) Unless otherwise terminated as provided herein, this Agreement shall continue in effect for a period of three (3) years after the date hereof, and shall automatically renew for successive one (1) year periods, unless either party gives written notice of termination at least ninety (90) days prior to the next scheduled renewal date. Either party hereto may terminate this Agreement upon the occurrence of any "Event of Default" specified in Subsection 5(c) which is not cured as provided herein.
>
> . . .
>
> (c) Each of the following acts will constitute an Event of Default under this Agreement:
>
> > (i) Either party fails to pay the other when due any payment, credit or other amount due under this Agreement, and such failure continues for a period of fifteen (15) business days after written notice has been sent to the nonpaying party.
> >
> > . . .
> >
> > (iv) Either party fails to perform any material obligation or covenant specified in this Agreement, or in any terms, policies or procedures established pursuant to this Agreement, and such failure is not cured within thirty (30) days of written notice to the defaulting party specifying the breach[.]
>
> . . .
>
> (d) Upon the occurrence of an Event of Default, the nondefaulting party will have the right to: (i) immediately terminate this Agreement *in*

> *whole or in part* upon written notice; and (ii) pursue all other remedies available at law or in equity which the non-defaulting party may elect to pursue, either successively or concurrently, all such remedies being cumulative[.]

(Agreement ¶ 5 (emphasis added).)

15. In paragraph 8 of the Agreement, each party agrees to "indemnify . . . and hold the other party harmless from . . . all claims, loss, damages, expense, liability, or judgments (including attorneys fees and costs) arising from or related to . . . its acts or omissions . . . [and its] breaches of [the] Agreement." (Agreement ¶ 8.)

16. Paragraph 9(a) of the Agreement, in relevant part, bars TMS NC from soliciting TMS's competitors:

> Non-Solicitation of Merchants: (a) During the period from the date of this Agreement to and including the fifth (5th) anniversary of the date of the termination of this Agreement, [TMS NC] shall not, directly or indirectly, though [sic] any agent or representative, on behalf of himself or any other person or entity, in any capacity whatsoever, without the prior written consent of TMS, (i) cause or induce any Merchant to do business with any competitor of TMS . . . or to cease doing business with, reduce business with, or divert busine from TMS, or (ii) in any way interfere with the relationship between any of the Merchants, on the one hand, and TMS . . . , on the other hand, or attempt to do any of the foregoing.

(Agreement ¶ 9(a).)

17. Paragraph 10(e) of the Agreement establishes a procedure for written notice:

> (e) All notices required to be given hereunder shall be in writing and shall be deemed to have been given or made when personally delivered, delivered by facsimile with an answer confirmed back or by express courier or mailed postage prepaid return receipt requested (unless a different address is designated).
>
> . . .

If to TMS : Total Merchant Services, Inc.
255 Gold River Road
3rd Floor
Basalt, CO 81621
ATTN: President

(Agreement ¶ 10(e).)

18. Effective 1 October 2018, the parties entered into an addendum to the Agreement (the "Exclusivity Addendum"), which increased TMS NC's residual share to 70%. (Taunt Aff. ¶ 13; Compl. Ex. B ¶ 1 [hereinafter "Exclusivity Addendum"], ECF No. 2.) In consideration for the higher residual share, TMS NC agreed to become an exclusive marketer and seller of TMS's products:

> 4. Exclusive Commitment: (a) In the absence of TMS'[s] prior written authorization in each case (which may be granted or withheld in [TMS's] sole discretion), [TMS NC] agrees that it will not, directly or indirectly through any Affiliate (as hereinafter defined) or in any capacity whatsoever, market, promote or sell any processing program that competes (or would reasonably be expected to compete) with [TMS's] Processing Program (a "Competing Program"), or solicit or encourage any businesses or financial institutions to join or apply for admission into any such Competing Program—it being the intent of the Agreement that [TMS NC] shall submit to TMS all merchant card business that it secures, directly or indirectly through any Affiliate.

(Exclusivity Addendum ¶ 4(a).)

19. The Exclusivity Addendum also extended the term of the Agreement for three years (until 1 October 2021) with automatic one-year renewals thereafter unless the Agreement was terminated according to its termination provisions. (Exclusivity Addendum ¶ 6.)

20. Beginning in November 2019, TMS NC periodically emailed TMS to complain that TMS NC was being paid less than the 70% residual share promised in

the Exclusivity Addendum.[12] Defendants contend that TMS's chronic failure to pay the 70% rate was an Event of Default under paragraph 5 of the Agreement and that Defendants were therefore entitled to immediately terminate the Exclusivity Addendum. (Defs.' Opp'n 6.)

21. In 2020, Collins emailed TMS purporting to terminate the Exclusivity Addendum and reinstate the original terms of the Agreement.

22. First, on 15 June 2020, Collins emailed TMS employees the following message, in relevant part:

> Since I asked to dissolve my exclusive relationship several weeks ago, this seems reasonable. However, I have not rec'd [sic] confirmation that the exclusive agreement has been accepted by anyone in your management team with the authority to do so.
>
> Kirk/David,[13] I'd assume one of you two can give me something that would state that as of say this Friday the latest agreement I signed in late 2018 is dissolved and it reverts back to the prior agreement starting July 1 2020 please.

(Defs.' Opp'n Ex. M; *see also* Defs.' Opp'n 7–8.)

23. Later, on 5 August 2020, Collins emailed TMS employees requesting confirmation from TMS that the Exclusivity Addendum had been terminated: "It's been six weeks and change since I first asked to be officially released from the agreement I signed . . . and revert back to my old 65% split and not have any exclusive

---

[12] (Mem. Opp'n Pl.'s 2nd Am. PI Mot. 7–8 [hereinafter "Defs.' Opp'n"], ECF No. 82.; Defs.' Opp'n Exs. D–T, ECF No. 82.1.)

[13] Kirk Haggarty and David Greenberg are employees of North American Bancard, an affiliate of TMS. (Taunt Aff. ¶ 1; Defs.' Opp'n Ex. O.)

arrangement as well with EPX going forward." (Defs.' Opp'n Ex. O; *see also* Defs.' Opp'n 8.)[14]

24. On 10 August 2020, TMS confirmed receipt of Collins' 15 June 2020 and 5 August 2020 emails. (Defs.' Opp'n Ex. O.) As a result, Defendants contend that the Exclusivity Addendum was terminated by 5 August 2020 at the latest. (Defs.' Opp'n 8.)

25. On 14 September 2020, TMS positively adjusted TMS NC's residual compensation by $75,594.31 to account for incorrect "calculations" that dated back to August 2018, an action that Defendants contend is an acknowledgment by TMS that it was in default until that point.[15]

26. Plaintiff contends that Defendants have repeatedly breached the non-solicitation and exclusivity provisions in the Agreement as amended by the Exclusivity Addendum. (2nd Am. PI Mot. ¶ 3.)

27. On 27 January 2021, Collins forwarded an email to TMS containing an email chain of TMS NC's internal communications. (Compl. Ex. C.) In the email chain, Collins directed another employee of TMS NC to "switch [the customer] over to the Clover system as you and I have discussed." (Compl. Ex. C.) The "Clover system" refers to a point-of-sale payment-card processing system manufactured by

---

[14] Defendants' Opposition Exhibits M and O both refer to an initial communication from Collins requesting that Defendants be released from the Exclusivity Addendum, but neither party has put evidence of the contents and form of this initial communication into the record. (*See* Defs.' Opp'n Exs. M, O.)

[15] (Defs.' Opp'n Ex. T; Defs.' Opp'n 7; *compare* Reply Br. Supp. Second Am. Mot. Preliminary Injunction 10 n.7 [hereinafter "Pl.'s Reply"], ECF No. 83.)

the Clover Network, Inc.[16] TMS has offered evidence showing that Defendants are prohibited from offering Clover to TMS customers or prospective customers because it is a "Competing Program" under the Exclusivity Addendum. (Taunt Aff. ¶ 17.)

28. On 21 March 2021, TMS sent an inspection demand to Defendants stating that TMS was concerned that Defendants had violated the Exclusivity Addendum and requesting access to TMS NC's books, accounts, records, and files pertaining to Defendants' performance of the Agreement. (Compl. ¶ 35; Compl. Ex. D.)

29. On 31 March 2021, Defendants replied with a refusal to comply with the inspection demand, contending that, because TMS made its request after February 1, its request was untimely and that TMS's warning that it may potentially seek claims against Defendants made it an unreasonable time for TMS to access Defendants' books and records. (Compl. Ex. E.)

30. Since this litigation has begun, Defendants have periodically expressed their belief that the Exclusivity Agreement has been terminated.

31. On 1 November 2021, counsel for Defendants stated in an email that the Exclusivity Addendum was "over[.]" (Am. PI Mot. Ex. 4.) In that same email thread, counsel for Defendants refused to confirm whether Defendants would comply with the Exclusivity Addendum and "disagree[d]" that the Exclusivity Addendum remained enforceable. (Am. PI Mot. Ex. 4.)

---

[16] (Taunt Aff. ¶ 17; Mem. Supp. Second Am. Mot. Preliminary Injunction 12 [hereinafter "Pl.'s Supp. Br."], ECF No. 75.)

32. In a 22 October 2021 email, Collins instructed an employee of a TMS affiliate to "[j]ust trash the [customer] account. We'll take [the customer account] elsewhere[.]" (Malloy Aff. Ex. 2, ECF No. 74.2; *see also* Malloy Aff. ¶ 1.) Plaintiff contends that this email is direct evidence that Defendants are placing potential customers with competitors. (Pl.'s Supp. Br. 17.)

33. On 22 January 2022, Collins emailed a TMS employee, stating that "[Collins and TMS NC] are not bound to any sort of exclusive agreement with [TMS] any longer." (Malloy Aff. Ex. 3, ECF No. 74.3.)

34. In a 22 February 2022 email, Collins stated that he plans to "ask HT what they use also," continuing that "[w]e may have to make a move over there." TMS has offered evidence showing that "HT" refers to HarborTouch, a direct competitor of TMS, and that this email shows Defendants moving an existing customer over to HarborTouch in violation of the Agreement. (Malloy Aff. Ex. 4, ECF No. 74.4.)

35. Despite Defendants' belief that the Exclusivity Addendum has been terminated, TMS has offered evidence that Defendants have continued to accept payment at the 70% rate established in the Exclusivity Addendum. (Taunt Aff. ¶¶ 14–15; Pl's Reply 14.)

36. In sum, Plaintiff contends that Defendants have violated (i) the non-solicitation provision in the Agreement[17] and the exclusivity provision in the

[17] (Agreement ¶ 9(a).)

Exclusivity Addendum[18] by referring customers and potential customers to competitors of TMS; and (ii) TMS's inspection rights under the Agreement[19] by refusing to comply with TMS's request to inspect and copy certain books, accounts, records, and files. (2nd Am. PI Mot. ¶¶ 2–3.) As a result, Plaintiff contends it is entitled to (i) enjoin Defendants from selling competing products to customers and potential customers; (ii) inspect and copy certain of TMS NC's books, accounts, records, and files; and (iii) recover indemnification[20] from Defendants against the cost of pursuing this relief. (2nd Am. PI Mot. ¶ 4.)

37. In opposition, Defendants assert that Plaintiff caused an Event of Default that allowed Defendants to immediately terminate the Exclusivity Addendum and that termination of the Exclusivity Addendum also caused Plaintiff to forfeit its inspection rights. (Defs.' Opp'n 2.) Defendants further contend that even if the Exclusivity Addendum were in effect, Plaintiff's inspection demand was unreasonable, overly broad, and unduly burdensome on Defendants and should therefore not be enforced. (Defs.' Opp'n 2.)

[18] (Exclusivity Addendum 4(a).)

[19] (Agreement ¶¶ 4(b), 4(d).)

[20] (Agreement ¶ 8.)

III.

CONCLUSIONS OF LAW

38. BASED UPON the foregoing FINDINGS OF FACT, the COURT makes the following CONCLUSIONS OF LAW.[21]

39. "The purpose of a preliminary injunction is ordinarily to preserve the status quo[.]" *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400 (1983) (quoting *State v. School*, 299 N.C. 351, 357–58 (1980)). When seeking a preliminary injunction, the moving party must show (i) a "likelihood of success on the merits" and (ii) that the moving party is "likely to sustain irreparable loss unless the injunction is issued, or[,]" that an injunction "is necessary for the protection of [the moving party's] rights during the course of litigation." *Id.* at 401 (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701 (1977)); *see also* N.C. R. Civ. P. 65; N.C.G.S. § 1-485. The issuance of a preliminary injunction "is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities[,]" *id.* at 400 (quoting *State v. School*, 299 N.C. at 357–58), but it cannot be issued "unless the movant carries the burden of persuasion as to each of these prerequisites[,]" *Air Cleaning Equip., Inc. v. Clemens*, 2016 NCBC LEXIS 199, at *17 (N.C. Super. Ct. April 29, 2016).

40. To prove irreparable loss or injury,

> it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law.

[21] Any Findings of Fact that are more appropriately deemed Conclusions of Law are incorporated by reference into these Conclusions of Law.

A.E.P. Indus., Inc., 308 N.C. at 407 (quoting *Barrier v. Troutman*, 231 N.C. 47, 50 (1949)).

41. As an initial matter, the Court considers Defendants' efforts to augment the PI Motion record with supplemental affidavits after the Hearing.[22] Plaintiff objects to the Court's consideration of the affidavits because they are (i) untimely under the Court's Scheduling Order of 25 March 2022, (ECF No. 65), which directed Defendants to submit their response and supporting material by 14 April 2022; (ii) untimely under Rule 6(d), which requires any opposing affidavits be served "at least two days before the hearing;" (iii) prejudicial because they have been filed after Plaintiff had a chance to respond with its own testimony, cross-examination, or argument; and (iv) provided without proof of "excusable neglect," which is necessary for a party to submit late affidavits under Rule 6(b). (Pl.'s Objections to Affs.) The Court finds each of Plaintiff's Objections meritorious and, in the exercise of its discretion, will not consider Defendants' untimely affidavits for purposes of this Order.

42. The Court next considers whether Plaintiff has shown a likelihood of success on the merits of its claims for (i) breach of the Agreement's non-solicitation provisions and the Exclusivity Addendum and (ii) breach of paragraphs 4(b) and 4(d) of the Agreement concerning TMS's inspection rights.

---

[22] (*See* Supplementary Exhibits to Defs.' Mem. Opp'n Pl.'s Mot Preliminary Injunction; Aff. Christopher Collins; Aff. Michael Garland; Aff. Monica Collins.)

43. Under Colorado law, the elements for breach of contract are: (1) the existence of a contract; (2) performance by the party claiming breach of its duties under the contract (or justification in failing to perform); (3) that the breaching party failed to perform the contract; and (4) resulting damages. *Long v. Cordain*, 343 P.3d 1061, 1067 (Colo. Ct. App. 2014) (citation omitted).

A. Whether Injunctive Relief is Warranted for Breach of Non-Solicitation Provisions and Exclusivity Addendum

1. Whether a Contract Exists

44. The parties dispute whether the Exclusivity Addendum is still in effect. Defendants contended at the Hearing that Collins' 15 June 2020 and 5 August 2020 emails effectively terminated the Exclusivity Addendum because the Exclusivity Addendum is severable from the Agreement and because Plaintiff received actual notice via email of Defendants' notice of termination of the Exclusivity Addendum. Plaintiff responds that the Exclusivity Addendum and the Agreement are an inseverable instrument and that Defendants' emails were inadequate notice of default, let alone a termination notice, under the express terms of the Agreement. (Pl.'s Reply 2–9.) Plaintiff separately argues that Defendants have waived their argument that the Exclusivity Addendum is terminated because there is unrebutted evidence that Defendants continue to be paid their 70% residual share pursuant to the Exclusivity Addendum. (Pl.'s Reply 10–11.)

45. Defendants base their severability argument on language in paragraph 5(d) of the Agreement stating that "[u]pon the occurrence of an Event of Default, the nondefaulting party will have the right to . . . immediately terminate this Agreement

in whole or in part upon written notice[.]" (Agreement ¶ 5(d).) Defendants contend that Plaintiff's supposed default permitted Defendants to terminate the "part" of the Agreement requiring TMS NC to exclusively sell TMS products. Plaintiff responds that the Exclusivity Addendum is not severable from the Agreement because paragraph 4(b) of the Exclusivity Addendum states that "[t]he foregoing exclusive commitment will continue for the entire term of the *Agreement*." (Pl.'s Reply 6–9 (quoting Exclusivity Addendum ¶ 4(b)) (emphasis added).)

46. For their notice argument, Defendants rely on *Suss Pontiac-GMC, Inc. v. Boddicker*, 208 P.3d 269 (Colo. Ct. App. 2008), to contend that Colorado law does not require strict compliance with a written notice provision if the recipient receives actual written notice. In *Boddicker*, the Colorado Court of Appeals affirmed a trial court's decision to grant summary judgment to a purchaser who notified the seller via first-class mail that he was exercising an option to purchase real estate even though the option contract required that notice be delivered by certified mail. 208 P.3d at 270. The *Boddicker* Court noted that "even in jurisdictions that require strict compliance with the terms of an option contract, courts hold that an alternative delivery method is sufficient if it serves the same function as the method specified." *Id.* at 271.

47. Plaintiff contends in response that the Agreement establishes a specific procedure for notice in paragraph 10(e) and that Collins' emails do not meet the criteria for notice under the Agreement. (Pl.'s Reply 3–5.) Plaintiff distinguishes *Boddicker*, where a party sent notice by an alternative type of formal mail delivery to

the agreed-upon address, from the instant case, where Defendants try to pass off electronic emails as personally-delivered written notice to the agreed address. *Id.* In support of that distinction, Plaintiff argues that email notice can easily be overlooked or mistaken for something other than official notice, while written notice mailed in accordance with paragraph 10(e) unambiguously announces itself as a notice of default or termination.

48. The Court concludes that Plaintiff has shown a likelihood of success in establishing the existence of a valid contract for several reasons.

49. First, even if the Court were to consider email notice effective under the Agreement as Defendants urge, Collins' emails reflect a conditional notice of termination because Defendants tied the notice to their offer to revert back to the earlier payment terms in exchange for TMS abandoning the exclusivity portion of the contract. Defendants offer no evidence, however, that TMS agreed to Defendants' proposed reversion to the earlier terms, rendering Defendants' conditional notice ineffective as a notice of termination under the Agreement.

50. Next, Defendants cite no case law to support their interpretation of the "in whole or in part" language in paragraph 5(d) of the Agreement to mean that a nonbreaching party to a contract may unilaterally pick which "part[s]" of the contract to turn on or off and the Court cannot conclude that the parties intended such a result by including this language. While the Court is mindful that, under Colorado law, it should "seek[ ] to harmonize and give effect to all of [the Agreement's] provisions so that none will be rendered meaningless," *People v. Jacobs*, 465 P.3d 1, 11 (Colo. 2020),

the Court's "primary goal in contract interpretation is to determine and give effect to the intent of the parties[,]" *id*. To do that, the Colorado courts instruct that "the court should ascertain the meaning of the contract by examining the entire instrument and not by viewing clauses or phrases in isolation." *Copper Mt., Inc. v. Indus. Sys.*, 208 P.3d 692, 697 (Colo. 2009) (cleaned up). Considering the Agreement as a whole, together with the Exclusivity Addendum, the Court cannot conclude that Defendants' interpretation reflects the parties' intent in entering the Agreement. Indeed, Defendants' interpretation could easily lead to absurd results—such as the nonbreaching party terminating duties or obligations that go to the heart of the parties' bargain—and the Colorado courts make clear that "[a] contract should never be interpreted to yield an absurd result." *EnCana Oil & Gas (USA), Inc. v. Miller*, 405 P.3d 488, 496 (Colo. Ct. App. 2017) (citation omitted).

51. Finally, the current evidence shows that, even after Collins delivered his 15 June 2020 and 5 August 2020 emails, Defendants have continued to perform under the contract without providing any written notice of default or termination. By so acting, Defendants have waived their argument that TMS was in default, a prerequisite to effective termination under the Agreement as amended by the Exclusivity Addendum. *See Carleno Coal Sales v. Ramsay Coal Co.*, 129 Colo. 393, 398 (1954) (noting that if an employer who had the option to terminate a contract by serving a sixty-day notice "elected not to give such notice then the default was waived.").

52. Having concluded that Defendants' arguments in support of termination are not likely to succeed, the evidence is otherwise undisputed that Plaintiff and Defendants entered into the Agreement and the Exclusivity Addendum, each of which remains binding and in effect.

2. Whether Plaintiff Has Performed Under the Contract

53. Plaintiff has put forth unrebutted evidence that it has continued to pay Defendants under the terms of the Exclusivity Addendum, establishing its performance under the Agreement for purposes of this order. (Taunt Aff. ¶ 15.)

3. Whether Defendant Breached the Contract

54. Because Plaintiff has put forth compelling evidence that Defendants have offered competing programs like the Clover system to customers and potential customers and that Defendants have repeatedly stated their belief that the Exclusivity Addendum has been terminated, the Court concludes that TMS has established a likelihood of success on its claim that TMS NC has breached the non-solicitation provision in the Agreement and the exclusivity provision in the Exclusivity Addendum.[23]

4. Whether Damages Have Resulted from the Breach

55. Defendants contend that Plaintiff's damages are purely speculative because TMS has failed to show it has lost even a single customer because of Defendants' actions. (Defs.' Opp'n 10–12.) North Carolina courts, however, recognize that the potential loss of customers is a type of harm warranting injunctive relief.

[23] (Agreement ¶ 9(a); Exclusivity Addendum 4(a); Pl.'s Supp. Br. 19–24.)

See, e.g., *Sandhills Home Care v. Companion Home Care - Unimed*, 2016 NCBC LEXIS 156, at *9 (N.C. Super Ct. March 29, 2016) (listing "the potential loss of current . . . customers" as a type of "immediate and irreparable harm" and awarding an injunction partly on that basis); *Bayer CropScience LP v. Chemtura Corp.*, 2012 NCBC LEXIS 43, at *23 (N.C. Super. Ct. July 13, 2012) (collecting cases and noting that "North Carolina federal courts have ruled that harms such as the . . . [']threatened loss of existing and potential customers' are the types of injuries that satisfy the irreparable harm requirement.") (citation omitted).

56. Moreover, the record shows that, unless enjoined, TMS NC will continue to act in conformance with its belief that the Exclusivity Addendum is "over" and cause TMS irreparable harm by threatening the loss of TMS's customers. (Am. PI Mot. Ex. 4.) Though TMS has not yet reported that it has lost a customer, the Court concludes that threatened loss of existing and potential customers TMS faces from Defendants' conduct is an "injury . . . to which [TMS] should not be required to submit or [Defendants] permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *A.E.P. Indus., Inc.*, 308 N.C. at 407. The Court further concludes that a preliminary injunction enjoining TMS NC from breaching the Exclusivity Addendum is necessary to protect TMS's contractual rights to exclusivity and non-solicitation and that any harm to TMS NC from this injunction is outweighed by TMS's potential loss of customers.

B. Likelihood of Success on the Merits for Specific Performance of Inspection Rights

1. Whether a Contract Exists and Whether Plaintiff Has Performed Under the Contract

57. As discussed above, Plaintiff has shown a likelihood of success in establishing (i) the validity of the Agreement as amended by the Exclusivity Addendum, including the portions of the Agreement creating inspection rights, and (ii) TMS's compliance with the Agreement as amended by the Exclusivity Addendum.

2. Whether Defendant Has Breached the Contract

58. TMS contends that TMS NC has failed to perform the contract by refusing TMS's demand to inspect TMS NC's books, accounts, records, and files. (Pl.'s Supp. Br. 22–23.) In opposition, Defendants contended at the Hearing that TMS's inspection demand, as expressed in its Proposed PI Order, is both untimely because it was made after 1 February 2021 and overbroad because TMS requests information that should only be disclosed through discovery.

59. According to Defendants, the first sentence of paragraph 4(b) of the Agreement currently obligates TMS NC to provide TMS with "current and updated credit reports. . . , bank and trade references, financial and other information on [TMS NC] and its directors, officers, shareholders, partners or principals," but only if TMS makes a timely and reasonable request for such information by February 1 of each calendar year. (Defs.' Mem. Supp. Mot. Dismiss or in the Alternative Mot. for Summ. J. 14–15, ECF No. 69.) Plaintiff disagrees with Defendants' construction and contends instead that the first sentence of paragraph 4(b) currently operates to

require TMS NC to produce the described documents automatically by February 1 of each year—regardless of whether TMS makes a request. (Pl.'s Resp. Opp'n Defs.' Mot. Dismiss or in the Alternative Mot. for Summ. J. 4, 17, ECF No. 92.)

60. Paragraph 4(d) and the third and fourth sentences of paragraph 4(b) of the Agreement are not time limited and instead restrict TMS's access to TMS NC's "complete and detailed records *relating to the performance of the Services and [TMS NC's] obligations under [the] Agreement*[,]" (Agreement ¶ 4(d) (emphasis added)), and "books, accounts, records and files *pertaining to [TMS NC's] performance of the Services*[,]"[24] (Agreement ¶ 4(b) (emphasis added)). The plain language of these provisions contemplates unlimited access to TMS NC's "books, accounts, records[25] and files" so long as TMS provides reasonable notice, conducts its inspection at reasonable times and intervals, and limits its copying to those "books, accounts, records and files pertaining to [TMS NC's] performance of the Services." (Agreement ¶¶ 4(b), 4(d).) Also, these provisions flip the production burden established in the first sentence of paragraph 4(b) by putting the onus on TMS to "make copies" of the

[24] Because the list lacks an Oxford comma, "pertaining to [TMS NC's] performance of the Services" could conceivably modify only TMS NC's files, i.e., TMS may access any of TMS NC's books, accounts and records whether or not they pertain to TMS NC's performance of the Services but may only access those files pertaining to TMS NC's performance of the Services. (Agreement ¶ 4(b).) However, at the Hearing, Plaintiff rejected this broader reading of paragraph 4(b) and expressly limited its request to those books, accounts, records, and files that pertain to TMS NC's performance of the Services.

[25] Because paragraph 4(d) and sentences three and four of paragraph 4(b) refer to TMS NC's "records" and restrict TMS's access to only those records "relating" or "pertaining" to TMS NC's performance of the Services, it appears that the records made available under each provision are identical. (Agreement ¶¶ 4(b), 4(d).)

relevant documents; TMS NC must merely "allow . . . access to [its] premises" at the appropriate time. (Agreement ¶ 4(b).)

61. Plaintiff has shown a likelihood of success applying either side's construction of the first sentence of paragraph 4(b). If Plaintiff is correct, Plaintiff was not required to make a request, and Defendants breached that provision by failing to provide the information described in that sentence by February 1 of either 2021 or 2022. As to Defendants' narrower construction, Plaintiff has provided evidence that it requested to inspect TMS NC's financial information described in both the first and fourth sentences of paragraph 4(b) on 19 March 2021. (Compl. Ex. D.) If the Court were to adopt Defendants' construction of the first sentence, Plaintiff's March 19 request, while not timely for 2021, was clearly made before this year's deadline of 1 February 2022, satisfying any obligation TMS may have had to make a timely request for the information described in the first sentence of paragraph 4(b).

62. In its 19 March 2021 inspection demand, however, Plaintiff requested access to information that paragraphs 4(b) and 4(d) of the Agreement do not expressly require TMS NC to provide, for example "a listing (or other evidence) of all merchants [TMS NC] has signed up for Card processing services or programs with any processor other than TMS" and various sets of correspondence between TMS NC and other entities.[26] While TMS NC must make available "books, accounts, records and files pertaining to [TMS NC's] performance of the Services[,]" the Agreement does not

[26] (Compl. Ex. D; *see also* Proposed PI Order ¶ 3(e)–(i), (k).)

require TMS NC to create documents from scratch (or create bespoke compilations of existing documents, for that matter) as if it were responding to a discovery request. (Agreement ¶ 4(b).) To be sure, TMS, after inspecting and making copies of the relevant documents, may create its own list of, say, merchants that it suspects TMS NC has improperly recommended to customers, but the burden of creating such a list (or compiling documents that constructively make up such a list) lies with TMS. And, of course, TMS may request discovery responses on information it does not uncover via the Agreement's inspection rights provisions.

63. Defendants were not so exacting in their refusal of TMS's inspection demand and openly acknowledge that they have not provided TMS with any information under paragraphs 4(b) or 4(d) of the Agreement. (Defs.' Opp'n 9; Compl. Ex. E.) They contend that TMS has no reasonable basis to inspect TMS NC's financial records because, in Defendants' view, the exclusive relationship no longer exists. (Defs.' Opp'n 9.) Even if Defendants were correct, however, TMS's inspection rights still remain under the Agreement.[27] Though its request was overbroad, Plaintiff has timely sought to exercise its inspection rights and Defendants have refused to comply in any capacity. Accordingly, Plaintiff has shown a likelihood of success in establishing its breach of contract claim against TMS NC for failing to comply with its inspection demand.

[27] At the Hearing, Defendants contended that the inspection rights provisions in the Agreement are void because the Plaintiff allegedly defaulted under the Exclusivity Addendum as early as 2018. As explained above, however, the Court finds that Plaintiff has shown a likelihood that the Agreement as amended by the Exclusivity Addendum is still in effect.

3. Whether Damages Have Resulted from the Breach

64. For Plaintiff to prevail in obtaining a mandatory injunction to enforce its inspection rights, "the case must be 'urgent'; the right must be 'clear'; and the injury must be 'immediate, pressing, irreparable, and clearly established.' " *Ford v. Jurgens*, 2020 NCBC LEXIS 60, at *3 (N.C. Super. Ct. May 6, 2020) (quoting *Auto. Dealer Res., Inc. v. Occidental Life Ins. Co.*, 15 N.C. App. 634, 639 (1972)).

65. Here, the case is urgent because Plaintiff has sought relief for over a year to no avail; the right is clear because the contract unambiguously entitles TMS to inspect certain documents; the injury is immediate because TMS is presently unable to exercise its contractual right to oversee TMS NC's performance of the Agreement and Exclusivity Addendum; and the injury is irreparable because TMS lacks an adequate remedy at law to redress the loss of its inspection rights. *See, e.g.*, *RLI Ins. Co. v. Nexus Servs.*, Civil Action No. 5:18-CV-00066, 2018 U.S. Dist. LEXIS 110609, at *27, *43 (W.D. Va. July 2, 2018) (granting a preliminary injunction and ordering defendant to provide "full and unfettered" access to certain records because denying interim contractual rights constitutes an injury meriting equitable relief); *Ohio Cas. Ins. Co. v. L.H. Eng'g Co.*, No. SACV 13-01249-CJC(ANx), 2014 U.S. Dist. LEXIS 200273 (C.D. Cal. Jan. 2, 2014) (granting a preliminary injunction motion to compel indemnitors to provide access to their books, records and accounts, including financial statements).

66. Accordingly, the Court concludes that TMS meets the higher standard for a mandatory injunction and that any potential harm to TMS NC from complying

with the injunction is outweighed by the continued harm facing TMS due to TMS NC's breach. Further, as explained more fully below, the Court has narrowed the permissible scope of Plaintiff's inspection request which further mitigates Defendants' burden.

C. Plaintiff's Request for Attorneys' Fees and Costs

67. Plaintiff seeks recovery of its expenses in bringing the PI Motion pursuant to the indemnity agreement in paragraph 8 of the Agreement. (2nd Am. PI Mot. ¶ 6; Agreement ¶ 8.) The Court concludes, however, that awarding fees and costs at this juncture is premature. A preliminary injunction is not a final ruling on the merits, and awarding indemnity would compensate Plaintiff when Defendants' alleged breaches of the contract have not yet been conclusively established.

D. Bond

68. The Court next considers an appropriate bond. When setting a bond:

> The trial court has power not only to set the amount of security but to dispense with any security requirement whatsoever where the restraint will do the defendant no material damage, and where the applicant for equitable relief has considerable assets and is able to respond in damages if the [enjoined party] does suffer damages by reason of a wrongful injunction.

Red Valve, Inc. v. Titan Valve, Inc., 2018 NCBC 31A, at *42 (N.C. Super. Ct. Apr. 17, 2018) (quoting *Stevens v. Henry*, 121 N.C. App. 150, 154 (1995)) (cleaned up).

69. Having carefully considered the evidence of record and the briefs and arguments of counsel, the Court, pursuant to Rule 65(c), and as a condition of this Order, in the exercise of its discretion, concludes that a bond of $1,000.00 is a proper

security, without prejudice to either party's right to request that the amount of the bond be increased or decreased for good cause shown.

70. **WHEREFORE**, for good cause shown, it is hereby **ORDERED** that the Motion is **GRANTED in part and DENIED in part**. Defendants TMS NC and Collins are **PRELIMINARILY ENJOINED** during the pendency of this case, and are hereby **ORDERED** as follows:

a. From the date hereof until the earlier of (a) the entry of a final judgment in this case or (b) the termination of the Agreement between TMS and TMS NC's predecessor, as amended by the Exclusivity Addendum effective as of 1 October 2018, TMS NC and Collins shall not in any capacity whatsoever, market, promote or sell any processing program that competes (or would reasonably be expected to compete) with TMS's processing program, including without limitation the Clover system.

b. From the date hereof until the earlier of (a) the entry of a final judgment in this case or (b) the termination of the Agreement between TMS and TMS NC's predecessor, as amended by the Exclusivity Addendum effective as of 1 October 2018, TMS NC and Collins shall not, directly or indirectly, without the prior written consent of TMS, cause or induce any customer of TMS to do business with any competitor of TMS or to cease doing business with, reduce business with, or divert business from TMS.

c. TMS NC, within seven days from the entry of this Order, shall allow TMS access to the premises of TMS NC and provide TMS with full and unfettered access to the books, records, accounts, and files of TMS NC pertaining to TMS NC's performance of the Services for the purpose of TMS inspecting and copying those items. These books, records, accounts, and files shall include:

i. Pursuant to paragraph 4(d) and the third and fourth sentences of paragraph 4(b) of the Agreement, financial statements, including profit and loss statements and balance sheets, and all other documents showing the assets, liabilities, costs, expenditures, receipts, and other such related matters of TMS NC, for the period 1 October 2018 to the present.

ii. Pursuant to paragraph 4(d) and the third and fourth sentences of paragraph 4(b) of the Agreement, documents evidencing the financial compensation of all of TMS NC's subagents for the period 1 October 2018 to the present as they pertain to TMS NC's performance of the Services.

iii. Pursuant to paragraph 4(d) and the third and fourth sentences of paragraph 4(b) of the Agreement, any other books, accounts, records, and files of TMS NC relating to TMS NC's performance of the Services and its obligations under the Agreement for the period 1 October 2018 to the present.

d. TMS NC, within seven days from the entry of this Order, shall provide TMS current and updated financial and other information on TMS NC and its directors, officers, shareholders, partners, or principals. This financial and other information shall include and be limited to:

   i. Pursuant to the first sentence of paragraph 4(b) of the Agreement, documents sufficient to identify TMS NC's current directors, officers, shareholders, partners, members, or principals.

   ii. Pursuant to the first sentence of paragraph 4(b) of the Agreement, current and updated documents evidencing the financial compensation paid by TMS NC to TMS NC's directors, officers, shareholders, partners, members, or principals for the annual period ending 31 December 2021, the quarterly period ending 31 March 2022, and the period beginning 1 April 2022 through the present or such other periods as the parties may agree.

   iii. Pursuant to the first sentence of paragraph 4(b) of the Agreement, current and updated account statements for any bank account operated, maintained, or controlled by TMS NC, and all deposit slips, wires, checks, or other evidence of payments into or out of those accounts for the period 1 January 2022 through the present.

e. On 6 May 2022, TMS paid or caused to be paid into the Office of the Clerk of Superior Court of Wake County, the sum of One Thousand Dollars ($1,000.00), which the Court deemed sufficient to cover the costs

and damages that Defendant TMS NC may sustain by reason of the PI Order if the Court ultimately decides that TMS was not entitled thereto. The Court concludes that the previously paid security remains sufficient to cover the costs and damages that Defendant TMS NC may sustain by reason of this Amended Order, and therefore, in the exercise of its discretion, the Court shall not require TMS to pay further security at this time under N.C. Gen. Stat. § 1A-1, Rule 65(c).

It is **SO ORDERED**, this the 19th day of May, 2022.

/s/ Louis A. Bledsoe, III

Louis A. Bledsoe, III
Chief Business Court Judge