IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EMPLOYERS INSURANCE OF WAUSAU,
A MUTUAL COMPANY,

Plaintiff,

v.

CONTINENTAL CASUALTY COMPANY,

Defendant.

OPINION AND ORDER

13-cv-024-wmc

Plaintiff Employers Insurance of Wausau, a mutual company ("Wausau"), filed this lawsuit seeking a declaratory judgment and an order enjoining defendant Continental Casualty Company ("Continental") from proceeding with separate arbitrations on certain individual claims Wausau contends are already before an existing arbitration panel. The same day Wausau filed its complaint, it also filed a motion for temporary restraining order (dkt. #5), which is presently before the court. The court will deny Wausau's motion, because (1) this issue is itself properly decided by the arbitration panel in the first instance; (2) Wausau has failed to demonstrate irreparable harm; and (3) Wausau is unlikely to prevail on the merits.

ALLEGATIONS OF FACT

Wausau and Continental are parties to a number of reinsurance agreements governed by a sweeping arbitration provision, which requires any dispute "be submitted to three arbitrators, one to be chosen by each party, and the third by the two so chosen." (Affidavit of Keith A. Dotseth ("Dotseth Aff."), Ex. 11 (dkt. #7-11) 28.) If a party

"refuses or neglects to appoint its own arbitrator within thirty days of receipt of a written request to do so," then "the requesting party may appoint two arbitrators." (*Id*.)

In a letter dated September 19, 2011, Continental requested arbitration "to recover amounts currently owed under the above-referenced treatises for losses paid by [Continental] on asbestos-related claims and on environmental pollution claims under pre-1989 policies, as well as to obtain a declaration of Wausau's payment obligations in the future." (Dotseth Aff., Ex. 1 (dkt. #7-1) 2-3.) Continental attached an Exhibit A to the letter, which contained a list of "asbestos-related claims and environmental pollutions claims under pre-1989 policies," but noted that Continental "seeks to recover all presently outstanding amounts and other amounts that become due under any one of these treaties [the ones listed in the "Re" line of the letter]." (*Id.* at 3.) In response, both sides timely appointed its own arbitrator.

The parties also entered into a Consolidation Agreement, providing additional terms for the arbitration itself. Material to the present dispute, the parties agreed "that the arbitration contemplated in this Agreement will address (1) the accounts and billings identified in Exhibit A attached to this Agreement (the 'Accounts'), and (2) any further billings on those Accounts submitted to Wausau by Continental under the Reinsurance Agreements while this arbitration is pending." (Dotseth Aff., Ex. 4 (dkt. #7-4) 3.) The Exhibit A attached to the Consolidation Agreement is different than the Exhibit A attached to Continental's written notice initiating arbitration. The Consolidation Agreement further provided that "[w]ithin 10 business days of the date of the execution of this Agreement, Continental shall provide Wausau with the date of loss, claim number and amount alleged to be presently due for each such Account." (*Id.*)

Wausau alleges that on June 1, 2012, Continental provided Wausau this list of claims by Account. (Dotseth Aff., Ex. 5 (dkt. #7-5.) This list contains twenty separate claims for Robert A Keasbey Co. (*Id.* at 6.) The Keasbey claims are not on the Exhibit A attached to Continental's original arbitration demand, nor were these claims listed on the Exhibit A attached to the Consolidation Agreement.

After the third arbitrator was selected, the parties met with the arbitration panel on October 11, 2012. At that time, the panel ordered the parties to confer as to each claim. As a part of that effort, the parties exchanged information about the claims. In at least one email exchange about the claims, sent on November 12, 2012, Continental referenced the Keasbey claims. (Dotseth Aff., Ex. 7 (dkt. #7-7) 2.)

On December 14, 2012, Continental sent a letter to Wausau demanding arbitration "to recover all unpaid billings issued under the treaties with respect to the Robert Keasbey account." (Dotseth Aff., Ex. 8 (dkt. #7-8).) Three and a half weeks later, on January 8, 2013, Wausau responded to Continental's letter, stating its position that the Keasbey claims "have previously been asserted by [Continental] against Wausau in arbitration already underway and currently before a Panel for resolution." (Dotseth Aff., Ex. 9 (dkt. #7-9).) Wausau requested that Continental withdraw its December 14, 2012, arbitration demand or "provide Wausau with an indefinite extension of time for the selection of its party-appointed arbitrator so that Wausau may seek the guidance of our current Panel regarding its jurisdiction over the Keasbey claim, allowing Wausau the right to make its appointment when and if the current Panel chooses to divest itself of jurisdiction over the Keasbey claims." (*Id.*)

Continental responded the next day, (1) informing Wausau that it disagreed with Wausau's position, (2) explaining the basis for its disagreement, and (3) expressing an intent to proceed with the arbitration commenced on December 14, 2012. (Dotseth Aff., Ex. 10 (dkt. #7-10.)

On January 11, 2013, Wausau commenced this action and filed its motion for a TRO. That same day, Wausau sent a letter to the arbitration panel, alerting the panel of Continental's December 14, 2012, demand for arbitration of the Keasbey claims, and requesting that the panel order Continental "to cease from any further efforts to splinter this arbitration and divest this Panel of the jurisdiction that has been granted to it." (Dotseth Aff., Ex. 12 (dkt. #7-12).)

Also on January 11, 2013, this court held a telephonic hearing with the parties to address Wausau's motion for TRO. During the hearing, the court directed Wausau to request that the arbitration panel consider the parties' coverage dispute on an expedited basis. On January 16, 2013, Wausau did so. (Second Affidavit of Keith Dotseth ("2d Dotseth Aff."), Ex. 13 (dkt. #10-1).) That same day, Continental also sent an email to the panel informing them of its position and confirming that Continental "does agree as a practical matter that this Panel has the authority to decide whether it has jurisdiction to award account-specific relief on the Keasbey bills." (2d Dotseth Aff., Ex. 14 (dkt. #10-2).)[1]

On January 13, 2013, Wausau named its arbitrator in the Keasbey arbitration "[w]ithout in any way waiving or relinquishing its position that Continental Casualty's

[1] Continental reiterated this position in a January 16, 2013, email to Wausau. (Olsan Aff., Ex. C (dkt. #14-3) 2.)

arbitration demand is defective[.]" (Affidavit of Michael S. Olsan ("Olsan Aff."), Ex. A (dkt. #14-1).) On January 15, 2013, Continental named its arbitrator in the Keasbey arbitration. (Olsan Aff., Ex. B (dkt. #14-2).) In the same letter informing Wausau of its pick, Continental also proposed a "thirty-day stay of umpire selection in the Keasbey arbitration to allow time for the Wobbeking Panel to decide Wausau's motion," conditioned on a stay of all matters pending before this court. (*Id.* at 2.) Wausau refused Continental's proposal. (Olsan Aff., Ex. C (dkt. #14-3) 2.)

Finally, this court is advised that the arbitration panel issued a ruling yesterday that the pending arbitration "will include the Keasbey claims listed on the April 28, 2012 spread sheet."

PRELIMINARY MATTER

Before turning to Wausau's TRO motion, there is one other motion currently before the court. In filing its complaint and TRO, Wausau also filed a motion to impound arbitration information, specifically requesting that the court permit the filing under seal of the complaint, motion for temporary restraining order, and other documents. (Dkt. #2.) In support of this motion, Wausau explains that these filings contain information and documents that relate to the arbitration proceeding, which is itself subject to a confidentiality order. (Pl.'s Br. (dkt. #3) 1.)

"[T]he presumption [is] that judicial proceedings are public." *In re Cudahy*, 294 F.3d 947, 952 (7th Cir. 2002); *see also United States v. Foster*, 564 F.3d 852, 853 (7th Cir. 2009) ("Information that affects the disposition of litigation belongs in the public record unless a statute or privilege justifies nondisclosure."). While the court will consider

allowing the parties to file certain confidential documents under seal, the court will not seal the complaint or motion for temporary restraining order. The court will, therefore, deny plaintiff's motion to impound arbitration information.

OPINION

Wausau has moved for a temporary restraining order pursuant to Federal Rule of Civil Procedure 65(b). By definition, a temporary restraining order under Rule 65(b) is issued *ex parte*, without notice to the opposing party. When an opposing party receives notice of an application for a TRO, the court treats the motion as a request for a preliminary injunction. *See, e.g.*, *Levas & Levas v. Antioch*, 684 F.2d 446, 448 (7th Cir. 1982) (approving the district court's treatment of the TRO -- of which the defendants had notice and contested at hearing -- as a preliminary injunction and affirming the district judge's decision to forego a second evidentiary hearing to decide the preliminary injunction issue); *Milwaukee County Pavers Ass'n v. Fiedler*, 707 F. Supp. 1016, 1018 n.3 (W.D. Wis. 1989) ("Where the opposing party has notice of the application for a temporary restraining order . . . such order does not differ functionally from a preliminary injunction.") (citing 11 Wright & Miller, *Federal Practice and Procedure* § 2951). Accordingly, this opinion addresses a motion for preliminary injunction to allow Wausau to appeal, however ill-advised or unnecessary that might be.

Regardless of the label, Wausau, as the party seeking such relief, "must show that it is reasonably likely to succeed on the merits, it is suffering irreparable harm that outweighs any harm the nonmoving party will suffer if the injunction is granted, there is

no adequate remedy at law, and an injunction would not harm the public interest." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006).

I. Irreparable Harm

Wausau contends that it will be irreparably harmed if the TRO is not granted because "it will be deprived of its right to select it own party-appointed arbitrator and it will be forced to engage in a serial litany of separate arbitrations in direct contravention of the parties' arbitration agreement." (Pl.'s Br. (dkt. #6) 1.) Since making this statement, Wausau -- as the court suggested -- named its own party-appointed arbitrator. As such, any harm caused by naming an arbitrator has already occurred.

Perhaps Wausau was initially reluctant to name its arbitrator to this new panel for fear that such an action could be interpreted as waiver of any objection to a new panel deciding the Keasbey claims. Arguably, this reluctance should have been, and perhaps was, allayed by Continental's representation during the telephonic hearing, and its recognition in subsequent communications, that Wausau's naming of an arbitrator in the Keasbey arbitration does not waive its right to contest this separate proposed arbitration. To that extent, perhaps Wausau's motion served a purpose though ultimately denied.

As the court expressed during the January 11, 2013, hearing, the court is nevertheless dubious of Wausau's position that the naming of the arbitrator itself constitutes irreparable harm. In support, Wausau cites to *Lefkovitz v. Wagner*, 395 F.3d 773, 780 (7th Cir. 2005), for the proposition that "[s]election of the decision maker by or with the consent of the parties is the cornerstone of the arbitral process." Wausau, however, was never prevented from choosing its party-appointed arbitrator. Second,

Wausau contends that Continental's move to initiate separate arbitration with respect to the Keasbey claims signals some grander scheme to "splinter" the claims subject to the current arbitration panel. The possibility that Continental may seek arbitration for other claims Wausau believes are subject to the current arbitration is simply too speculative to support a finding of irreparable harm. *See E. St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 705-06 (7th Cir. 2005) ("[A] plaintiff cannot obtain a preliminary injunction by speculating about hypothetical future injuries.").

II. Likelihood of Success on the Merits

In the court's eye there are two hurdles that Wausau must pass for the court to find any reasonable likelihood that it will succeed on the merits. First, Wausau must demonstrate a reasonable likelihood that this dispute is properly before this court. Second, Wausau must demonstrate a reasonable likelihood that Wausau will prevail in its argument that the Keasbey claims should be decided by the current arbitration panel.

While the question of whether a dispute is arbitrable is typically for judicial determination, *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986), the question posed by the parties' current dispute in this court is different. Here, the parties dispute whether the current panel should decide the Keasbey claims or whether a separate arbitration panel should decide. Importantly, the parties do *not* dispute that the Keasbey claims *are* subject to arbitration. In other words, the parties' dispute is not a question of substantive arbitrability. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (limiting the phrase "question of arbitrability" to "the kind of narrow circumstance where contracting parties would likely have expected a court to have

decided the gateway matter"). Rather, it appears to be a "procedural" question, meaning an issue "which grow[s] out of the dispute and bear[s] on its final disposition," and these type of issues are "presumptively not for the judge, but for an arbitrator, to decide." *Howsam*, 537 U.S. at 94 (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, (1964) (holding that an arbitrator should decide whether the first two steps of a grievance procedure were completed, where these steps are perquisites to arbitration)).[2]

Indeed, the parties concede that the current arbitration panel has the authority -- and, is in the best position -- to decide whether the parties intended to have it decide the Keasbey claims or not. Given that it seems unlikely that this court even has the authority to decide which arbitration panel may consider the Keasbey claims, the court need not consider fully the issue of whether Wausau's position that the Keasbey claims should be considered as part of the current arbitration is likely to be successful. The court pauses, however, to note that it has no quarrel with the arbitration panel's conclusion that it should. While the plain language of the Consolidation Agreement contemplates the arbitration panel's consideration of the Accounts listed in Exhibit A of that agreement -- and the Keasbey claims were not on that list -- and only offers Continental the opportunity to provide additional information on "each such Account," that same Agreement allowed Continental "ten business days of the date" of its execution to identify "any further billings" that would be at issue in that arbitration. That Continental allegedly did identify a number of additional, disputed billings, including

[2] All of this, of course, begs the question as to whether this action should be dismissed, but that question, should it be necessary to decide at all in light of the arbitration panel's decision yesterday, can await another day and another decision.

certain claims related to Robert A. Keasbey, certainly bolsters plaintiff's position. (*See* Dotseth Aff., Ex. 4 (dkt. #7-4) 3.)

Moreover, the obvious efficiencies and general purpose of the controlling arbitration clause of the parties' reinsurance agreement would support allowing a single panel to treat all pending claims on a consolidated and uniform basis. Regardless, the arbitration panel has now held the Keasbey claims *are* included, making any ruling on the merits by this court appear both unnecessary and ill-advised.

ORDER

IT IS ORDERED that:

1) Plaintiff Employers Insurance of Wausau's motion to impound arbitration information (dkt. #2) is DENIED; and

2) Plaintiff Employers Insurance of Wausau's motion for temporary restraining order (dkt. #5) is DENIED.

Entered this 29th day of January, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge