CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

Exhibit A

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

LONDON COURT OF INTERNATIONAL ARBITRATION
CASE NO. 225609

In the matter of an arbitration under the 2014 LCIA Arbitration Rules between:

GLAZ LLC, POSEN INVESTMENTS LP, KENOSHA INVESTMENT LP ("Burford")

Claimants

vs.

SYSCO CORPORATION ("Sysco")

Respondent

Order on Claimants' Preliminary Injunction Application (corrected)

Tribunal
J. William Rowley KC
John J. Kerr, Jr.
Laurence Shore (Presiding Arbitrator)

Administrative Secretary
Letizia Santin

10 March 2023

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

Table of Contents

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

I. The Parties

I.A Claimants

1. Claimants in these proceedings are Glaz LLC, Posen Investments LP, and Kenosha Investments LP (collectively "**Burford**"). They are indirect subsidiaries of Burford Capital Limited, a Guernsey corporation that is publicly traded on the London Stock Exchange and the New York Stock Exchange and is in the business of litigation finance.

2. Claimants' address is 251 Little Falls Drive, Wilmington (DE 19808).

3. Claimants are represented in this arbitration by:

Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Tel: + 1 202 326 7931
dho@kellogghansen.com
kschumm@kellogghansen.com
cgoodnow@kellogghansen.com

Three Crowns, LLP
Washington Harbour
3000 K Street NW Suite 101
Washington, DC 20007-5109
Tel: +1 202 540 9500
liz.snodgrass@threecrownsllp.com

I.B Respondent

4. Respondent is Sysco Corporation ("**Sysco**"), corporation organized under the laws of Delaware, which operates in the field of distribution of food and related products.

5. Sysco's address is: 1390 Enclave Parkway, Houston (TX 77077).

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

6. Sysco is one of the plaintiffs currently engaged in a series of complex antitrust litigation against several food suppliers. In 2019, Burford agreed to invest in Sysco's antitrust cases in exchange for a share of the proceeds.

7. Sysco is represented in this arbitration by:

Cleary Gottlieb Steen & Hamilton LLP
One Liberty Plaza
New York, NY 10006
Tel: +1 212 225 2000
jrosenthal@cgsh.com
cmoore@cgsh.com
lbensman@cgsh.com
pswiber@cgsh.com

8. Claimants and Respondent are also referred to individually as a "**Party**" and jointly as the "**Parties**."

II. The Arbitral Tribunal ("Tribunal")

9. Burford nominated Mr. J. William Rowley KC, whose contact details are:

Twenty Essex
20 Essex Street
London WC2R 3AL (UK)
wrowley@twentyessex.com

10. Sysco nominated Mr. John J. Kerr Jr., whose contact details are:

Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017 (USA)
jkerr@stblaw.com

11. The LCIA appointed Mr. Laurence Shore as Tribunal President. Mr. Shore's contact details are:

BonelliErede
Via Michele Barozzi 1
20122 Milan (ITALY)

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

laurence.shore@belex.com

12. The Parties have not lodged any objection to any Tribunal member's service on the Tribunal.

13. With the consent of the Parties, the Tribunal engaged an Administrative Secretary to the Tribunal, Ms. Letizia Santin, whose contact details are:

BonelliErede
Via Michele Barozzi 1
20122 Milan, Italy
letizia.santin@belex.com

14. The Parties have not lodged any objection to the Administrative Secretary's services.

III. The Arbitration Agreement

15. The arbitration agreement is contained in the Second Amended and Restated Capital Provision Agreement signed on 22 December 2020 by Claimants and Respondent ("**CPA**"):

> 29(a) Any and all of the following shall (to the exclusion of any other forum except as set forth herein) be referred to and finally resolved by arbitration under the LCIA Arbitration Rules (2014) of the London Court of International Arbitration (the "Rules" and the "LCIA"), which Rules are deemed to be incorporated by reference into this clause: any dispute, controversy or claim arising out of or in connection with (i) this Agreement (including this Section 29); (ii) any other Transaction Document; (iii) any relationship or interaction between the Counterparty, on the one hand, and any Capital Provider(s), on the other hand; or (iv) a claim or assertion by any other Person of any right arising out of or in connection with this Agreement (including this Section 29) or any other Transaction Document, including, as to all such disputes, claims and controversies, any question regarding (x) the existence, arbitrability, validity or termination of this Agreement (including this Section 29) or

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

any other Transaction Document, (y) any relationship or interaction between the above identified parties, or (z) the obligation of any Person to arbitrate any such dispute.

29(b) Except as otherwise specifically provided in this Agreement (including this Section 29) or any other Transaction Document, (i) the arbitral tribunal (the "Tribunal") shall have the exclusive power to grant any remedy or relief that it deems appropriate, whether provisional or final, including but not limited to emergency relief, injunctive relief and/or any other interim or conservatory measures or other relief permitted by the Rules (collectively, "Conservatory Measures"), and any such measures ordered by the Tribunal shall, to the extent permitted by applicable law, be deemed to be a final award on the subject matter of such measures and shall be enforceable as such in any court of appropriate jurisdiction; and (ii) prior to the formation or expedited formation of the Tribunal (under Article 5 or 9A of the Rules), the provisions of Article 9B of the Rules shall apply to any request for Conservatory Measures.

29(c) The referral of a dispute to arbitration shall not suspend or interfere with the Counterparty's (or the Payment Agent's) obligation to make timely payment to the Capital Providers of the Capital Providers' Entitlement (or any portion thereof); provided that if the Counterparty disputes its (or the Payment Agent's) obligation hereunder to pay any amount to the Capital Providers, the Counterparty must (or, as applicable, cause the Payment Agent to) (i) commence an arbitral proceeding pursuant to this Section 29 within two (2) Business Days after the date such amount was (but for the dispute) due, (ii) make timely payment to the Capital Providers of any undisputed amounts and (iii) immediately deposit any and all disputed amounts in a dedicated account with the LCIA as fund holder, which amounts shall be released, including any interest thereon, as directed in writing by the Tribunal in any award, order or decision, unless the parties expressly agree otherwise in writing.

29(d) Any request for arbitration or response thereto submitted to the LCIA may be delivered by any means (including email) set forth in Section 18 (Notices) or any other means that is reasonably likely to achieve actual service.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

29(e) The number of arbitrators shall be three. Subject to Article 8 of the Rules, each party to the arbitration shall nominate one arbitrator and the two arbitrators nominated by the parties shall, within ten (10) days of the nomination of the second party-nominated arbitrator, agree upon and nominate a third arbitrator who shall act as Chairman of the Tribunal. If no agreement is reached within ten days or at all, the LCIA Court shall select and appoint a third arbitrator to act as Chairman of the Tribunal.

29(f) The seat, or legal place, of arbitration shall be New York, New York. Notwithstanding the terms of Section 27 (Governing Law), the U.S. Federal Arbitration Act shall govern the interpretation, application and enforcement of this Section 29 and any arbitration proceedings conducted hereunder. The language to be used in the arbitral proceedings shall be English.

29(g) In addition to the confidentiality requirements imposed on the parties by Article 30 of the Rules, each party is obligated to keep confidential the existence and content of any arbitral proceedings initiated hereunder and any rulings or award except (i) to the extent that disclosure may be required of a party to fulfill a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority, (ii) with the consent of all parties, (iii) where needed for the preparation or presentation of a claim or defense in such arbitral proceedings, (iv) where such information is already in the public domain other than as a result of a breach of this clause (g), or (v) by order of the Tribunal upon application of a party.

29(h) In addition to the authority conferred upon the Tribunal by the Rules, the Tribunal shall have the authority to order production of documents in accordance with the IBA Rules on the Taking of Evidence in International Arbitration as current on the date of the commencement of the arbitration. No other form of disclosure or discovery shall be permitted.

29(i) The judgment of any court of appropriate jurisdiction shall be entered upon any award made pursuant to an arbitration conducted pursuant to the terms of this Section 29.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

> 29(j) Any attempt by the Counterparty, a Capital Provider, or any other Person subject to this Section 29 to seek relief or remedies in any forum that contravenes this Section 29 shall constitute a breach of this Agreement and entitle the non-breaching party to damages, equitable relief, and full indemnification against all costs and expenses incurred in connection therewith.
>
> 29(k) The parties, being sophisticated commercial entities with access to counsel, irrevocably waive and forever and unconditionally release, discharge, and quitclaim any claims, counterclaims, defenses, causes of action, remedies and/or rights that they have or may have in the future arising from any doctrine, rule or principle of law or equity that this Agreement or any other Transaction Document, or any of the relationships and transactions contemplated hereby or thereby, (i) are against the public policy of any relevant jurisdiction; (ii) are unconscionable or contravene any laws relating to consumer protection; (iii) are usurious or call for payment of interest at a usurious rate; (iv) were entered into under duress; (v) were entered into as a result of actions by a Capital Provider that violated its obligations of good faith and/or fair dealing; (vi) constitute illegal gambling or the sale of unregistered securities; (vii) constitute malicious prosecution, abuse of process or wrongful initiation of litigation; or (viii) constitute champerty, maintenance, barratry or any impermissible transfer, assignment or division of property or choses in action. The parties specifically agree that any issues concerning the scope or validity of the foregoing waiver shall be within the exclusive jurisdiction of the Tribunal.

IV. Seat – Applicable Law – Language

16. Pursuant to Section 29(f) of the CPA, the seat or legal place of arbitration is New York, New York.

17. This arbitration is conducted according to the LCIA Rules in force as from 1 October 2014 ("**LCIA Rules**").

18. Section 28 of the CPA, titled "Governing Law", provides as follows:

> Except as set forth otherwise in Section 29, this Agreement shall be construed in accordance with, and this Agreement

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

> and all matters arising out of or relating in any way whatsoever to this Agreement (whether in contract, tort or otherwise) shall be governed by, the law of the State of New York (without reference to any conflict of law principles or choice of law doctrine that would have the effect of causing this Agreement to be construed in accordance with or governed by the law of any other jurisdiction).

19. Pursuant to Section 29(f) of the CPA, the language of the arbitration is English.

V. Procedural History

20. In this section, the Tribunal summarizes the procedural events in the arbitration. This summary does not purport to be an exhaustive listing of the entire procedural chronology or the entire record of communications with the Tribunal. Rather, the Tribunal reports on the major submissions to the Tribunal, as well as the Tribunal's major procedural rulings.

21. Burford commenced this arbitration by submission of its Request for Arbitration, dated 9 September 2022 ("**Request**"), together with Exhibits (1 to 7).[1] In the Request, Claimants nominated Gary Born as co-arbitrator, pursuant to Article 8 of the LCIA Rules. Mr. Born was replaced by Mr. William Rowley KC.

22. Sysco nominated Mr. Kerr as co-arbitrator.

23. On 6 October 2022, the LCIA Court notified the Parties that it had appointed Mr. Rowley KC, Mr. Kerr, and Laurence Shore (presiding arbitrator) to be the Tribunal in this arbitration.

24. On 7 October 2022, Claimants filed an Application for Interim and Conservatory Measures ("**Second PI Request**"), together with Fac-

[1] The Request was accompanied by an LCIA Article 9B application ("**Emergency Arbitrator**") and a preliminary injunction request ("**First PI Request**"). The LCIA denied the Article 9B Application and the First PI Request was not pursued.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

tual Exhibits, Legal Authorities, the Witness Statement of Christopher P. Bogart, and the Expert Report of Professor Samuel Issacharoff, accompanied by Exhibits and Appendices.

25. On 12 October 2022, the Parties informed the Tribunal that they were engaged in ongoing discussions to determine the possibility of resolving or narrowing the dispute. Accordingly, they agreed to hold Claimants' Second Application in abeyance and to postpone *sine die* the deadline for Sysco to file its Response to the Request for Arbitration.

26. On 31 October 2022, the Parties informed the Tribunal that their discussions had not led to a resolution of the dispute and requested that the Tribunal resume the proceedings. The Parties also agreed on 7 November 2022 as the deadline for Sysco to file its Response to the Request. Claimants confirmed to hold the Second PI Request in abeyance.

27. On 7 November 2022, Respondent filed its Response and Counterclaim to Claimants' Request for Arbitration ("**Response to the Request**"), together with Factual Exhibits and Legal Authorities.

28. On 23 November 2022, the Tribunal circulated a draft Procedural Order No. 1 and an agenda for a remote Case Management Conference ("**CMC**") to be held on 29 November 2022. The Tribunal further proposed Ms. Letizia Santin to serve as Administrative Secretary of the Tribunal.

29. On 29 November 2022, Respondent's lead counsel, Mr. Jeffrey Rosenthal, informed the Tribunal that, due to unexpected circumstances, he was unable to attend the CMC and asked the Tribunal to adjourn the CMC and provide alternative dates.

30. On the same day, the Tribunal President confirmed the postponement of the CMC and set 7 December 2022 as the new date for the CMC. Further, the Tribunal requested the Parties to exchange their respective procedural calendars and submit them to the Tribunal by noon (NY time) on 6 December 2022. The Tribunal also directed

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

Respondent to identify the "threshold issues" affecting the procedural calendar (mentioned in Respondent's email of 29 November 2022) by 2 December 2022.

31. On 2 December 2022, in accordance with the Tribunal's directions, Respondent sent a letter to the Tribunal and stated that "*Claimants' claims in this arbitration necessarily will require the adjudication of the merits and value of Sysco's antitrust claims since it is impossible for Burford to establish that it has been harmed (a necessary element for a breach of contract claim) by any settlement Sysco reaches or the extent of such alleged harm without a full hearing on the merits of such claims.*" Respondent thus contended that "*in order to fairly present its defense to Burford's claims in this arbitration, Sysco will need to have the opportunity to use the record in the antitrust cases to rebut any evidence Burford offers regarding the value of Sysco's antitrust claims.*"

32. On 6 December 2022, the Parties sent their comments on draft Procedural Order No. 1 to the Tribunal.

33. The same day, 6 December 2022, Claimants sent a letter to Respondent noting their concerns regarding the draft settlement agreement between Sysco and [redacted] and urged Respondent to comply with its contractual obligations arising out of the CPA.

34. On 7 December 2022, a CMC was held by videoconference.

35. On 12 December 2022, Claimants filed a renewed Application for Interim and Conservatory Measures and for an Immediate Temporary Restraining Order, ("**Third PI Request**" and "**TRO Request**"), together with Factual Exhibits (C-1 to C-62), Legal Authorities (CLA-1 to CLA-47), the Witness Statement of Christopher P. Bogart and the Expert Report of Professor Samuel Issacharoff, together with accompanying Appendices.

36. The same day, 12 December 2022, Respondent filed a letter opposing Claimants' Third PI Request and TRO Request, accompanied by Exhibits 1 to 11.

37. On 13 December 2022, Claimants filed a reply to Respondent's 12 December letter.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

38. On 14 December 2022, the Tribunal issued the following directions:

> 1. On the current record, the Tribunal considers that Claimants should have the opportunity for their preliminary injunction application to be heard and not mooted. Absent Respondent's identification of "compelling business reasons" for it to enter into the proposed settlement agreement before the preliminary injunction application to be heard, the Tribunal therefore directs Respondent not to enter into the proposed settlement agreement at this time. However, the Tribunal further considers that this restraint on Respondent shall be conditioned on Claimants' acceptance — to be immediately indicated to Respondent (copying the Tribunal) that (a) Respondent may inform [redacted] of the imposition of the restraint by this Tribunal; and (b) Respondent may inform [redacted] of the hearing (see below) regarding the preliminary injunction application.
>
> 2. Respondent may submit a brief by 12 noon New York time on 22 December 2022, or choose to appear orally before the Tribunal on that date, in which Respondent may seek to show reasons why the TRO should be lifted. If Respondent seeks to make a written submission or appearance on 22 December, it shall notify the contents of its submission or intended oral pleading to Claimants by 12 noon New York time on 21 December 2022, so that Claimants may, if they choose, make a reply submission or oral pleading immediately following that of Respondent. The Tribunal, on the basis of such submission or pleading, may reconsider the imposition of the TRO.

Further, in the event that the TRO remained in place, the Tribunal gave Respondent a choice of two scheduling options for a preliminary injunction hearing.

39. On 14 December 2022, Claimants requested the Tribunal to address the point in Respondent's letter of 12 December regarding the disclosure of OAEO material to Respondent's client.

40. The same day, 14 December 2022, Respondent replied to Claimants' correspondence regarding the disclosure of OAEO material.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

41. The Tribunal invited Claimants to file a letter in support of their OAEO position by 10 am (DC time) on 15 December 2022, with Respondent to respond by 7 pm (NY time) on 15 December 2022.

42. On 15 December 2022, the Tribunal requested the Parties to confirm that they had no objection to the appointment of Ms. Letizia Santin as Administrative Secretary. The same day, both Parties confirmed they had no objection.

43. On 15 December 2022, both Claimants and Respondent filed correspondence on their OAEO position, pursuant to the Tribunal's 14 December directions.

44. Also on 15 December 2022, the LCIA circulated the Statement of Independence and Consent to Appointment as Administrative Secretary signed by Ms. Santin.

45. The Tribunal denied Claimants' OAEO application on 16 December 2022. The Tribunal further directed the Parties "*to discuss and seek to agree, as soon as possible, an appropriate confidentiality regime in relation to the use of all information and documents disclosed in this arbitration.*"

46. On 18 December 2022, the Tribunal issued Procedural Order No. 1a ("**PO1a**") on the appointment of the Administrative Secretary.

47. On 19 December 2022, Respondent requested clarifications from the Tribunal on the procedure to be applied in the event Respondent wanted to challenge the TRO. The Tribunal responded the same day, with the requested explanations.

48. On 20 December 2022, Respondent informed the Tribunal of its intention to challenge the TRO at a hearing. Respondent also requested that the Tribunal order Claimants to disclose two categories of documents ("**Respondent's Disclosure Application**"). The Tribunal invited Claimants to reply on the same day.

49. Claimants responded to Respondent's Disclosure Application with a letter dated 20 December 2022. Also on 20 December 2022, Respondent replied to Claimants' letter of 20 December.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

50. On 21 December 2022, Claimants requested leave to reply to Respondent's correspondence dated 20 December 2022 and submitted their reply simultaneously. The Tribunal accepted Claimants' reply and stated that it did not wish to receive any further submission on Respondent's Disclosure Application.

51. On 21 December 2022, pursuant to the Tribunal's email of 19 December 2022, Respondent filed the outline of Respondent's primary talking points for 22 December TRO hearing. Later on 21 December 2022, Respondent sent the following letter to the Tribunal:

> […] we wish to advise the Tribunal that given the current state of Sysco's negotiations other than with [redacted], it is willing to moot the need for a TRO by representing that it will not execute any other settlement before 7 February 2023. Accordingly, as Sysco is prepared to remove any imminent threat of potential settlements other than with [redacted], there is no basis for a continued TRO or the imposition of a schedule that prevents Sysco from adequately presenting its defense to the preliminary injunction application with respect to [redacted] or any other potential settlement counter-party. We respectfully request that such TRO be lifted immediately, and we would proceed tomorrow solely with respect to [redacted].

52. Subsequently, on 21 December 2022, Respondent informed the Tribunal that the 22 December TRO hearing could be cancelled. Respondent also sent the Tribunal a proposed schedule for a hearing on Claimants' Third PI Request.

53. On 22 December 2022, the Tribunal asked the Parties for a timetabling conference.

54. On 22 December 2022, a timetabling conference was held by videoconference. Among the persons who attended the conference were the following:

- Laurence Shore, Tribunal President
- J. William Rowley KC, Co-Arbitrator
- John J. Kerr, Jr., Co-Arbitrator
- Letizia Santin, Administrative Secretary

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

- Derek Ho, Counsel for Claimants
- Christopher Goodnow, Counsel for Claimants
- Travis Edwards, Counsel for Claimants
- Dustin Graber, Counsel for Claimants
- Liz Snodgrass, Counsel for Claimants
- Katherine Shen, Counsel for Claimants
- Jonathan Molot, Burford Capital Limited
- Jeffrey A. Rosenthal, Counsel for Respondent
- Brian Byrne, Counsel for Respondent
- Christopher P. Moore, Counsel for Respondent
- Lina Bensman, Counsel for Respondent
- Paul Kleist, Counsel for Respondent
- Patrick Swiber, Counsel for Respondent
- Katerina Wright, Counsel for Respondent

55. Following the 22 December conference, the Tribunal issued timetable directions for Claimants' Third PI Request and Respondent's Disclosure Application.

56. On 23 December 2022, Respondent filed a further letter, together with Exhibits A and B, in support of its Disclosure Application (per the Tribunal's directions).

57. On 26 December 2022, Claimants filed a reply to Respondent's letter of 23 December 2022 on the Disclosure Application.

58. On 27 December 2022, Respondent filed correspondence in reply to Claimants' 26 December letter and requested that the Tribunal not "*consider anything new raised for the first time by Burford in its rejoinder letter.*"

59. On 30 December 2022, the Tribunal issued its ruling on Respondent's Disclosure Application.

i. Request No. 1 seeking documents "*concerning Burford's decision to withhold consent to Sysco's proposed settlements with* [redacted] *and* [redacted]*, including documents reflecting information*

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

about any other settlements with those defendants." The Tribunal denied "*the second clause of this general request ("including documents reflecting information about any other settlements") as overbroad.*" As to the first part ("documents concerning Burford's decision to withhold consent"), the Tribunal ordered as follows: "*Claimants shall produce documents concerning Claimants' decision to date to withhold consent to the proposed settlements (see Bogart Witness Statement at paragraph 39), including documents that discuss the reasons for Claimants' decision. Documents already in Respondent's hands (because sent to Respondent by Claimants) of course need not be produced. Responsive documents that contain information subject to confidentiality agreements or legal privilege shall be produced on a redacted basis.*"

ii. Request No. 1 (Subpart a). The Tribunal ordered that "*Claimants shall produce to Respondent's outside counsel of record in these proceedings and to its relevant experts retained in these proceedings (for their eyes only) the documents that they relied on in support of the allegations in paragraphs 11 and 96 of their PI Application, including any documents in their possession, custody or control that contradict the assertions in these two paragraphs. The Tribunal will then consider, based on any further information regarding privilege or work product or confidentiality, whether Respondent's counsel shall be permitted to disclose the documents to Respondent. Respondent's counsel shall, however, be permitted to disclose paragraphs 11 and 96 to Respondent, unless these paragraphs are withdrawn from the PI Application. If Claimants decline to produce such documents for the reasons stated in their 26 December 2022 Letter and also fail to withdraw paragraphs 11 and 96 from the PI Application, the Tribunal will not expect any part of the PI Hearing (or further submissions of the Parties concerning the PI) to address the content of these allegations, since Respondent will not in that event have been able to test the assertions in the two paragraphs based on the underlying documents* […]."

iii. Request No. 1 (Subpart b) seeking production of "*other documents concerning the value of the claims considered by Burford in making its decision.*" The Tribunal denied this Request for the following reasons: "*This category is overbroad for the purposes of the PI*

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

Application. It is also insufficiently precise ("considered by Burford in making its decision" could refer to every document that Claimants possess)."

iv. Request No. 1 (Subpart c) seeking production of "*documents regarding the value of the claims that were available to Burford but that Burford elected not to consider in making its decision.*" The Tribunal denied this request on the same grounds as Request No. 1 (Subpart b): overbreadth and imprecision.

v. Request No. 2. The Tribunal ordered as follows: "*The Tribunal understands from Claimants' Rejoinder Letter that Claimants have made voluntary production (Exhibit A) to satisfy this request. If Respondent nonetheless views Exhibit A as an inadequate response, it may seek reconsideration from the Tribunal.*"

vi. Request No. 3 described in footnote 1 of Respondent's 20 December 2022 letter as follows: "*We annex hereto as Exhibit A some passages from Burford's 2021 Form 20-F filed with the U.S. Securities and Exchange Commission describing the documents Burford generates to evaluate potential investments, including its due diligence, statistical models, analytical tools, asset return models and targeted risk-adjusted returns. Burford presumably utilized this information in evaluating the proposed settlement, as well as its analysis of objective events to drive valuation change, as its securities filings also tout.*" The Tribunal ordered as follows: "*The Tribunal notes, in relation to the final sentence in the above quotation, that Claimants in their Rejoinder Letter deny that Burford uses its investment models for the purpose of assessing appropriate settlement levels in these antitrust cases. Claimants also represent that they have not affirmatively relied on any such models in stating their case to the Tribunal that they reasonably withheld their consent. Since Respondent can only offer a presumption and Claimants, through counsel, have not only issued a denial but point to the absence of reliance on such models in their papers, the Tribunal determines, for the purposes of the PI Application, that this Request is denied.*"

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

60. On 6 January 2023, the Tribunal approved the Confidentiality Order circulated by the Parties, subject to any subsequent discussions as to paragraphs 8 and 9 of the same Order.

61. On 8 January 2023, Respondent filed a letter with the Tribunal regarding alleged deficiencies in Claimants' document production.

62. On 9 January 2023, the Tribunal invited Claimants to reply to Respondent's letter dated 8 January. Claimants replied with a letter dated 9 January 2023, accompanied by Exhibits A to N.

63. On 11 January 2023, Respondent requested that the Tribunal order Claimants to remove all redactions from the documents they produced. On the same day, Claimants responded to Respondent's request concerning the removal of the redactions from the documents produced, and Respondent provided further correspondence in support of its position.

64. On 11 January 2023, the Tribunal issued its Order on Document Production, subject to further consideration of the Parties' 11 January submissions and anything further that the Parties wished to add regarding confidentiality agreements.

i. Category one. The Tribunal ordered as follows: "*The Tribunal determines that at this stage of the arbitral proceedings, Respondent has not demonstrated that Claimants are withholding responsive documents under this production category. However, the Tribunal observes that while probabilistic models are not due to be produced, there is a distinction between the models themselves and data generated by the models that may have played a role in Claimants' decision to withhold consent. Accordingly, Claimants shall confirm by 13 January 2023, that they have produced documents and not redacted information that contain data generated by the models that played a role in the decision to withhold consent.*"

ii. Category two. The Tribunal ordered as follows: "*The Tribunal is concerned that Claimants now contend that their production does not withhold or redact documents or information that Claimants previously said they would not produce because privilege/confidentiality precluded them from producing. Accordingly, the Tribunal determines*

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

in relation to this category, that Claimants shall confirm, by 13 January 2023, that they have produced all responsive documents and they have not redacted responsive information. If Claimants are unable to issue such a confirmation, they shall explain why they cannot do so. In particular, in that event, Claimants shall identify what documents, if any, have been withheld."

iii. Category three. The Tribunal ordered as follows: "*The Tribunal determines that, in view of the rulings set out above and the circumstances of this PI phase of the arbitration, Respondent's log and/or OAEO and/or in camera review proposals are denied.*"

65. On 11 January 2023, Claimants filed a letter received from Respondent, in which Respondent requested Claimants' consent to the proposed settlement agreements between Respondent and [redacted].

66. On 12 January 2023, Claimants filed a further letter on the Confidentiality Agreement.

67. On the same day, 12 January 2023, Respondent submitted a further letter regarding the 11 January 2023 Tribunal's Order on Document Production. Respondent also filed a letter in response to Claimants' correspondence of 11 January 2023.

68. On 13 January 2023, the Tribunal invited Claimants to reply "*only on the question of clarification of the ruling dated 11 January 2023.*"

69. On 13 January 2023, Claimants submitted a letter to request the Tribunal's assistance in managing the arbitration proceedings and in maintaining the status quo pending the outcome of the hearing on Claimants' Third PI Request. Claimants also provided a letter on the question of clarification of the 11 January 2023 ruling, in accordance with the Tribunal's directions. Claimants filed a further letter regarding the Tribunal's requests for confirmation in its 11 January 2023 ruling. Respondent filed a letter in response to Claimants' request for the Tribunal's assistance in managing the proceedings and in maintaining the status quo.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

70. On 15 January 2023, the Tribunal issued the following directions on the matters raised by the Parties in their previous correspondence:

> The Tribunal sees no need to clarify, supplement, or otherwise amend any of its previous directions, rulings and orders, including those regarding confidentiality agreements. If Respondent so wishes, it may of course present arguments in its PI submissions concerning (a) inability to check data (allegedly) generated by models against the models that are not subject to production orders; and (b) confidentiality constraints.
>
> The Tribunal sees no need to take action on the matters raised by Claimants in their emails dated 11 January 2023 EST (L. Snodgrass) and 13 January 2023 (L. Snodgrass).

71. On 17 January 2023, Respondent filed its Opposition to Claimants' Application for Interim and Conservatory Measures ("**Respondent's Opposition**"), together with Factual Exhibits (R-18 to R-71), Legal Authorities (RL-22 to RL-129), the Witness Statement of Barrett G. Flynn and the Expert Reports of Professor Ali Yurukoglu, William J. Baer, Esq and Professor Maya Steinitz, together with accompanying Exhibits and Appendices.

72. On 24 January 2023, Claimants filed their Reply to Respondent's Opposition to Claimants' Application for Interim and Conservatory Measures ("**Claimants' Reply**"), together with Factual Exhibits (C-63 to C-114), Legal Authorities (CLA-48 to CLA-105), the Witness Statements of Jonathan T. Molot and Kelly M. Daley, the Reply Report of Professor Samuel Issacharoff and the Expert Reports of Michael P. Kenny, Esq., Professor Bruce A. Green and Professor Bradley Wendel, together with accompanying Exhibits and Appendices.

73. On 26 January 2023, Respondent submitted a letter requesting that the Tribunal take certain actions concerning Claimants' Reply submission.

74. On 27 January 2023, Claimants filed a response to Respondent's letter of 26 January 2023.

75. On 29 January 2023, the Tribunal issued its ruling on Respondent's Application dated 26 January 2023:

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

> The Tribunal considers that Claimants have not improperly withheld evidence and arguments until their Reply. While the Reply is lengthy, it is within the bounds of being responsive to a very lengthy opposition memorial filed by Respondent on 17 January 2023. Claimants' 27 January letter points to specific indicia of responsiveness, and the reasoning for the approach taken in Claimants' initial Application. While the Tribunal makes no comment on this stage regarding the approach taken by Claimants or Respondent, we note that these are matters to be addressed further in Respondent's Rejoinder and in the PI Hearing. Respondent's 26 January Application does not identify with specificity the allegedly non-responsive parts of Claimants' Reply memorial.

The Tribunal also issued PI hearing directions.

76. On 29 January 2023, Respondent filed a letter requesting that the Tribunal order Claimants to produce an unredacted version of one exhibit filed with Claimants' Reply dated 24 January 2023. The Tribunal invited Claimants to reply by 30 January 2023.

77. On 30 January 2023, Claimants filed a reply to Respondent's letter of 29 January 2023, in accordance with the Tribunal's directions.

78. On 31 January 2023, the Tribunal issued its ruling on Respondent's application of 29 January 2023 and denied Respondent's application: "[f]*or purposes of this stage of the proceedings (i.e. the PI hearing), the Tribunal has determined to deny the application*."

79. On 31 January 2023, Respondent filed its Rejoinder to Claimants' Application for Interim and Conservatory Measures ("**Respondent's Rejoinder**"), together with Factual Exhibits (R-72 to R-84), Legal Authorities (RL-130 to RL-153), a Second Witness Statement of Barrett G. Flynn and the Rebuttal Expert Reports of Professor Ali Yurukoglu, William J. Baer, Esq and Professor Maya Steinitz, together with accompanying Exhibits and Appendices.

80. On 2 February 2023, the Tribunal circulated a Virtual Hearing Protocol, and both Parties provided a list of factual and expert witnesses for cross-examination. The Tribunal requested that the Parties state the order in which they wanted to present their witnesses.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

81. Also on 2 February 2023, and pursuant to the Tribunal's directions, Respondent provided a list with the order in which it intended to present its witnesses. Claimants did the same by separate email.

82. On 3 February 2023, the Tribunal circulated hearing directions, in particular concerning the order of presentation of witnesses and sequestration of fact witnesses. Respondent provided its list of participants attending the PI Hearing. By separate email, Respondent designated Barrett Flynn as its party-representative and requested that Claimants designate their party-representative and circulate a new order of Claimants' witnesses. Claimants replied to Respondent's email regarding the order of their witnesses. Both Parties filed further correspondence on the same issue, dated 3 and 4 February 2023.

83. On 3 February 2023, Claimants provided their list of participants attending the PI Hearing.

84. On 4 February 2023, the Tribunal issued the following directions: "*In view of the entire text of the sequestration provision agreed by the Parties, and considering the purpose of sequestration, the Tribunal directs that Mr. Molot shall testify first among Claimants' fact witnesses.*"

85. On 4 February 2023, Sysco sent a letter informing the Tribunal of a possible challenge to the Tribunal's TRO in the New York courts.

86. On 4 February 2023, the Parties provided modifications to the Virtual Hearing Protocol, which the Tribunal accepted.

87. On 5 February 2023, the Tribunal circulated a Hearing Timetable Guide and the text for witness affirmations.

88. On 5 February 2023, Sysco informed the Tribunal that, due to time limitations, it would probably not call Professor Issacharoff and/or Professor Green for cross-examination.

89. On 5 February 2023, Claimants sent a reply letter to Respondent's letter of 4 February 2023, regarding the possible challenge of the Tribunal's TRO ruling in the New York courts.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

90. The Preliminary Injunction Hearing was held remotely on 6 to 7 February 2023 ("**PI Hearing**".)

91. The following persons participated in the PI Hearing:

i. For Claimants: the Kellogg, Hansen, Todd, Figel & Frederick P.L.L.C. firm (Derek Ho, Kylie Kim, Travis Edwards, Christopher Goodnow, Dustin Graber, Lisa Harger, Sean Sullivan, Kira Schumm, Kyler Wheeler) and the Three Crowns LLP firm (Liz Snodgrass, Jacob Omorodion, Katherine Shen, Kelly Renehan);

ii. For Respondent: the Cleary Gottlieb Steen & Hamilton LLP firm (Jeffrey Rosenthal, Lina Bensman, Christopher Moore, Brian Byrne, Paul Kleist, Patrick Swiber, Maria Manghi, Katerina Wright, Blair Kuykendall, Isabella Riishojgaard, Hani Bashour, Cathy Barron, Ronald Carroll, Kathryn Collar);

iii. Claimants' Witnesses and Party Representatives: Christopher Bogart, Kelly M. Daley, Jonathan T. Molot, Samuel Issacharoff, W. Bradley Wendel, Bruce A. Green, Michael P. Kenny, Rod Ganske (Assistant to Michael Kenny);

iv. Respondent's Witnesses and Party Representatives: Barrett Flynn, Maya Steinitz, Ali Yurukoglu, William J. Baer;

v. The Arbitral Tribunal: Laurence Shore, William J. Rowley KC, John J. Kerr Jr;

vi. The Administrative Secretary (Letizia Santin); and

vii. Opus 2 and IDRC (online service provider with transcript writers.)

92. On 6 February 2023, the Parties made their opening oral statements, followed by the examination of all fact witnesses: Jonathan T. Molot, Christopher Bogart, Kelly M. Daley, and Barrett Flynn.

93. After the first day of the PI Hearing, Sysco informed the Tribunal it did not wish to call Professors Issacharoff and Green for examination. By separate email, Sysco sent the PowerPoint presentation of Respondent's Opening Statement.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

94. On 7 February 2023, expert witnesses were examined: Professor W. Bradley Wendel was examined first, followed by Mr. William J. Baer, Mr. Michael P. Kenny, Professor Maya Steinitz, and Professor Ali Yurukoglu. After the examinations, the Parties made their closing arguments.

95. After the second day of the PI Hearing, Sysco sent the PowerPoint presentation of its Closing Statement.

96. On 10 February 2023, the Tribunal informed the Parties that it did not need further submissions regarding Claimants' PI Request.

VI. Brief Summary of the Parties' Positions[2]

VI.A Claimants' Application for Interim and Conservatory Measures and for an Immediate Temporary Restraining Order ("Claimants' PI Request")

97. On 31 March 2022, the Parties entered into Amendment No. 1 to the Second Amended and Restated Capital Provision Agreement ("**CPA**"). Under the Second Amended CPA (dated 22 December 2020), Burford provided capital to Sysco to finance certain of its food antitrust claims in exchange for a percentage of Sysco's proceeds from those claims. Importantly, the March 2022 amendment was the consequence, Claimants say, of Sysco's breach of the CPA. The amendment includes, *inter alia*, a new Section 5.3(b)(v), which states that Sysco "*shall provide immediate notice by email*" to Burford "*of any settlement offer made by the Adverse Party and shall not accept a settlement offer without Burford's prior written consent, which shall not be unreasonably withheld*, […]."[3]

[2] The Tribunal includes this section as general background to what the Parties have submitted. The salient arguments, legal and factual points, are discussed in the following section, "Analysis and Decision."

[3] Exhibit C-1; Claimants' PI Request, §§ 32 ff.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

98. Claimants allege that Sysco seeks to deprive Claimants of their contractual right to consent before Sysco settles any of its antitrust claims.

99. In particular, Claimants contend that Sysco seeks to enter into proposed settlements with [redacted] and [redacted] for an unreasonably low amount.[4] Claimants state that based on their knowledge of the antitrust cases – including from outside sources - the proposed settlements would cause both Sysco and Burford to lose hundreds of millions of dollars.[5]

100. Claimants initially filed an Application for Interim and Conservatory Measures on 7 October 2022 and later agreed to hold the Application in abeyance as Sysco promised it would not execute any settlements without Claimants' input. However, Sysco broke its pledge and is prepared to execute a settlement with [redacted].[6] Claimants were therefore forced to renew their Application for Interim and Conservatory Measures and seek immediate relief with a TRO.

101. Claimants request an order that, until the Tribunal issues an award addressing Claimants' claim for a permanent injunction, Sysco must refrain from settling its claims in the antitrust cases without Claimants' prior written consent. Claimants also seek an order that Sysco shall immediately provide an accounting of all settlement offers that Sysco has received to date in connection with the food antitrust claims, together with immediate, "as-they-happen" updates of that accounting.[7]

102. According to Claimants, once the settlements are executed, they cannot be undone, and the harm they inflict would be particularly

---

[4] Claimants' PI Request, § 10.

[5] *Id.*, § 11.

[6] *Id.*, § 15.

[7] *Id.*, § 2.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

serious. Claimants' expert, Professor Issacharoff, supports this view.[8]

103. Sysco's food antitrust claims have survived all of the judicial mechanisms employed by US courts to filter out meritless claims.[9] The strength of Sysco and all other plaintiffs' claims is further demonstrated by parallel criminal proceedings.[10]

104. Sysco used the antitrust claims as collateral to obtain nearly USD 140 million in financing from Claimants.

105. Sysco is prepared to enter into settlements that, not only were Claimants never informed of,[11] but would render Claimants' investment worthless, as the sum agreed in settlements is well below the value of the claims and the potential sum that Sysco can recover.[12] Further, Sysco's settlements would also prejudice Sysco's claims against other defendants in the antitrust cases.[13]

106. The negotiation strategy is left to Sysco and its counsel, but the settlement amount should reflect no less than "*what the market has consistently been for other plaintiffs*," namely, "[redacted]"[14]

107. As for the relevant test for the PI Request, the Tribunal should consider the LCIA Rules (Article 25.1(iii)) and applicable principles of international arbitration law and practice (in particular, Article 17(A)(1) of the UNCITRAL Model Law), and not the New York Rules applied by national courts, as they do not provide the applicable standard.[15]

---

[8] *Id.*, § 17; Issacharoff Report, §§ 45, 48.

[9] Claimants' PI Request, § 25; Issacharoff Report, § 28.

[10] Claimants' PI Request, § 26.

[11] *Id.*, §§ 42 ff; 46.

[12] *Id.*, § 40.

[13] *Id.*, §§ 50 ff.

[14] *Id.*, § 40; Exhibit C-19; Exhibit C-20.

[15] Claimants' PI Request, § 63.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

108. In particular, Article 25.1(iii) of the LCIA Rules vests the Tribunal with the power to order the interim and conservatory measures sought by Claimants and grants the Tribunal broad discretion over the granting of provisional measures.[16]

109. Pursuant to the relevant test, Claimants have established that the requested measures are necessary to preserve the status quo and prevent serious or irreparable harm. Claimants state that the proposed settlements will irreparably deprive Claimants of their right to participate in litigation decisions and the power to veto settlement agreements, and the loss Claimants will incur cannot be compensated by money damages.

110. Claimants rely, *inter alia*, on *Wisdom Import Sales Co. v. Labatt Brewing Co.*, and *Oracle Real Est. Holdings I LLC v. Adrian Holdings Co. I, LLC*, to argue that the only available remedy to maintain the status quo is to enforce the veto right.[17] Other cases support their position that denial of a participation and veto right constitutes irreparable harm.[18]

111. In addition, Claimants state that the proposed settlements with [redacted] and [redacted] will give third parties a contractual right to avoid joint-and-several liability and will revel confidential information protected by the CPA. "*Disclosing the existence of a litigation funder, even without identifying the name of the funder, violates the core purpose of the confidentiality provision because it creates the risk of significant negative effects to Sysco's claims defendants frequently exploit the disclosure of litigation funding arrangements to initiate satellite litigation over the discoverability of communications between the funder and the funded party, and over the enforceability of the terms of their litigation*

[16] *Id.*, § 62.

[17] *Id.*, §§ 66-67.

[18] *Id.*, § 68.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

funding arrangement."[19] Claimants submit that New York Courts often find disclosure of information to third parties to be irreparable.[20]

112. Moreover, the proposed settlements will give the other defendants in the antitrust cases access to Sysco's position, with resulting harm to Sysco's litigation position.[21]

113. The prejudice to Claimants is imminent and serious, while there is no prejudice to Sysco in preserving the status quo.

114. Claimants say they have established a *prima facie* case that Sysco's proposed settlements, without Claimants' prior consent, would constitute a clear breach of the CPA.[22]

115. Claimants request that the Tribunal:

i. order immediately that, until the Tribunal adjudicates this PI Request, Sysco refrain from executing the proposed settlement agreement with [redacted] or any other settlement without Claimants' consent;

ii. order that, until the Tribunal issues an award on Claimants' permanent injunction claim, Sysco refrain from settling its food-related antitrust claims without Claimants' consent;

iii. order that Sysco provide an immediate accounting of all settlement offers that it has received to date as well as "as-they-happen" updates of that accounting to include all such settlement offers received; and

iv. grant any further relief that the Tribunal deems appropriate.

---

[19] *Id.*, § 76.

[20] *Id.*; § 77.

[21] *Id.*, §§ 78 ff.

[22] *Id.*, §§ 91 ff.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

VI.B Respondent's Opposition to Claimants' Application for Interim and Conservatory Measures ("Respondent's Opposition")

116. Sysco contends that Burford's PI Request should be denied and the TRO granted by the Tribunal on 14 December 2022 should be immediately dissolved.[23]

117. Burford is now requesting information regarding the proposed settlements that it never requested before. Between March 2020 and January 2021 Sysco entered into various settlement agreements with certain defendants in the Broilers litigation. Burford never requested any information about these settlements beyond the monetary terms.[24]

118. Further, throughout the negotiations of both the CPA and the Amendment to the CPA, Sysco made it clear to Burford that it was concerned about losing control of its antitrust claims. Burford repeatedly assured Sysco that Sysco would not waive control of its claims through entering into a funding relationship.[25] In particular, during the Amendment negotiations in early 2022, Burford assured Sysco it would not lose control of its antitrust claims, nor the ability to settle those claims, and Sysco took comfort from the fact that the Amendment did not alter or remove the CPA provisions that grant Sysco control over its claims.[26]

119. For reasons entirely beyond Sysco's control, the antitrust proceedings have taken a downturn and these negative developments have altered Sysco's position and the value of its claims.[27]

120. In any event, Sysco's proposed settlements are commercially reasonable, and Sysco always kept Burford informed throughout the

---

[23] Respondent's Opposition, § 2.

[24] *Id.*, § 2.

[25] *Id.*, § 37; Flynn WS, § 9.

[26] Flynn WS, § 17.

[27] Respondent's Opposition, § 40.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

negotiation process about the settlements, the negotiation strategies and the offers exchanged.[28]

121. Claimants' PI Request should be decided in accordance with New York law.[29] In support of its position, Respondent claims that the CPA is clear in providing that ""*all matters arising out of or relating in any way whatsoever" to the CPA, "whether in contract, tort or otherwise," shall be governed by New York law*."[30] Since Claimants' PI Request arises out of and relates to the CPA, New York law, which is the Parties' express choice, shall apply.

122. Under New York law, a party seeking a preliminary injunction must establish: (i) a "clear" or "substantial" likelihood of success on the merits; (ii) a "strong showing" of irreparable harm if the injunctive relief is not granted; and (iii) that the equities are balanced in its favor.[31] Moreover, New York's heightened standard applies in this case because the preliminary injunction sought by Claimants would provide Burford with substantially all of the relief that it is seeking,[32] and because the injunction would force Sysco to continue to litigate its claims.[33] Under the New York heightened standard, Claimants' PI Request should be denied.

123. Burford has not shown that it will suffer irreparable harm if the injunctive relief is not granted, and economic loss – as the only possible loss that Burford will suffer – does not constitute irreparable harm.[34] Further, the consent right is purely economic and, therefore, does not constitute irreparable harm.

124. Claimants cannot demonstrate that their claims have a likelihood of success on the merits. The CPA does not give Burford a veto right

---

[28] *Id.*, §§ 41 ff. See also Flynn WS, §§ 21-39.

[29] Respondent's Opposition, §§ 55 ff.

[30] *Id.*, § 56.

[31] *Id.*, §§ 67 ff.

[32] *Id.*, § 69.

[33] *Id.*, §§ 72 ff.

[34] *Id.*, § 85; 86 ff.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

over the proposed settlements, as also demonstrated by the parol evidence,[35] and a contrary interpretation would violate law and public policy.[36] If a preliminary injunction contrary to public policy is issued, it will be unenforceable under New York law.[37]

125. Claimants' interpretation of the CPA not only would make the doctrine of champerty applicable, but it would also violate New York, which prohibits champerty.[38] Further, Claimants' interpretation violates the federal and New York policy encouraging the settlement of civil suits and would violate New York public policy protecting the right of a client to control the litigation.

126. The proposed settlements are the result of extensive negotiations and are not only commercially reasonable but also the best result that Sysco could have obtained. There is no basis for Sysco to expect to obtain higher settlement offers in the future, and a comparison between the proposed settlements with Sysco and other settlements obtained in similar cases demonstrates the reasonableness of Sysco's agreements ([redacted].)

127. Contrary to Claimants' position, Sysco claims that Burford has failed to prove that it has not unreasonably withheld consent, both from a qualitative (*i.e.*, the value of Sysco's claims, which is overestimated by Burford) and a quantitative point of view (*i.e.*, the evidence filed by Burford to support its position.) Instead, Burford has not used proper documentation such as internal analytical tools, in-house due diligence and financial models to evaluate Sysco's proposed settlements.[39]

128. A balance of equities favors Sysco's position. While Claimants' potential harm would only be economic, Sysco will be seriously

---

[35] *Id.*, §§ 111 ff.

[36] *Id.*, §§ 118 ff. See also Steinitz Report.

[37] Respondent's Opposition, § 123.

[38] *Id.*, §§ 126 ff.

[39] *Id.*, §§ 213 ff.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

harmed if the PI Request is granted, as the proposed agreements will be probably withdrawn, and Sysco will be forced to continue to litigate.[40]

129. Finally, Respondent argues that Claimants' PI Request was not adequately supported by documentation and witness evidence and Burford cannot belatedly file such evidence with the Reply.

130. For these reasons, Sysco requests that "*Burford's Application for Interim and Conservatory Measures and for an Immediate Temporary Restraining Order be denied.*"[41]

VI.C Claimants' Reply to Opposition to Claimants' Application for Interim and Conservatory Measures ("Claimants' Reply")

131. In reply, Claimants argue that Sysco's Opposition mischaracterizes crucial facts, namely (i) the Parties' negotiation of the 2022 Amendment to the CPA;[42] (ii) the fact that Sysco withheld material information from Claimants regarding the proposed settlements (particularly regarding [redacted]) and did not inform Burford of the negotiations with [redacted] and [redacted];[43] (iii) the developments in the antitrust litigations;[44] and (iv) Claimants' efforts to seek preliminary injunctive relief.[45]

132. As for the legal standard to be applied, Claimants argue that Respondent has misinterpreted the Parties' choice of law in the CPA and disregarded the arbitration agreement establishing the legal standard for preliminary injunction (in particular Section 29(f) of the CPA.)

---

[40] *Id.*, § 227.

[41] *Id.*, § 242.

[42] Claimants' Reply, §§ 34 ff; See also Daley WS.

[43] Claimants' Reply, §§ 44 ff.

[44] *Id.*, §§ 72 ff.

[45] *Id.*, §§ 78 ff.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

133. Under the LCIA Rules, arbitral tribunals have broad discretion in granting any appropriate remedy or relief and, in exercising their discretion, tribunals do not apply the same principles as courts, but refer to international arbitration principles and practices.

134. Even if New York law were to apply, the heightened standard claimed by Respondent would not be triggered.

135. The PI Request is necessary to preserve the status quo. The TRO is also consistent with arbitral practice, the LCIA Rules and New York law.

136. The PI Request is necessary to prevent serious or irreparable harm. It is not true, as Respondent contends, that Burford will suffer no harm that would warrant injunctive relief. According to Claimants, Sysco has misstated the standard of harm applicable to this case and it is wrong in asserting that Burford cannot suffer irreparable harm because it has an economic interest. Claimants argue that New York courts also regularly grant injunctions to protect financial interests.

137. The proposed settlements will give the other defendants in the antitrust cases a contractual right to avoid joint-and-several liability that cannot be undone.

138. In addition, and as explained by Professor Issacharoff, if Claimants were to lose their participation right, money cannot fully compensate this loss. Professor Issacharoff observes that the proposed settlement will irreparably alter the settlement market and affect Sysco's ability to settle other cases with other defendants. Even with the inclusion of [redacted], this risk will not be mitigated.[46]

139. Respondent's interpretation of the Amendment to the CPA is wrong; the parol evidence filed by Respondent cannot overcome the plain language of the CPA,[47] which is the starting point of contract

[46] *Id.*, § 114.

[47] *Id.*, §§ 120 ff.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

interpretation under New York law.[48] The CPA grants Claimants a limited veto right to withhold consent from a settlement that Sysco wishes to accept. Accordingly, Respondent cannot accept a settlement offer without Burford's prior written consent.

140. The presumption against illegality under New York law invoked by Respondent is inapplicable in the present case.[49] The consent provision does not violate New York champerty law, as demonstrated by Professor Wendel's Expert Report, and the policy encouraging the settlement cannot prevail over the contractual rights granted to the Parties, as shown by Professor Green.[50] As for Respondent's argument regarding professional conduct rules and ethical policies, these rules and policies do not pertain to this case.[51]

141. The burden to prove that Burford acted unreasonably when it objected to Sysco's proposed settlements is on Respondent, which has failed to demonstrate it, as shown by Claimants' expert Mr. Kenny. The new factual arguments presented with Respondent's Opposition were never disclosed to Burford prior to the filing of the Opposition and, in any event, do not support Sysco's allegation that Burford unreasonably withheld its consent.

142. The consent provision was agreed by the Parties because of Sysco's breaches of the CPA. Sysco cannot be permitted to continue breaching the CPA. Respondent's alleged harm of continuing to litigate the antitrust claims cannot justify the denial of PI Request.

143. For the foregoing reasons, Claimants request "*that the Tribunal grant the relief requested in Paragraph 104 in Claimants' PI* [Request]."[52]

---

[48] *Id.*, § 117.

[49] *Id.*, §§ 122 ff.

[50] *Id.*, §§ 135 ff. See also Wendel Expert Report and Kenny Expert Report.

[51] Claimants' Reply, §§ 137 ff.

[52] *Id.*, § 189.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

VI.D Respondent's Rejoinder to Claimants' Application for Interim and Conservatory Measures ("Respondent's Rejoinder")

144. Claimants abused their procedural rights and filed a completely new Application under the guise of a Reply. Among other things, the facts described in the Reply have been completely re-written and new experts submitted their expert reports even if Burford knew from the outset that the law and public policy regarding a litigation funder's ability to control a claim were the key issues in dispute.[53] In light of this, Sysco reserves all of its rights.[54]

145. Contrary to Claimants, Respondent maintain its position that the PI Request not only is subject to New York law as the substantive law of the CPA, but also to the New York's heightened PI standard.

146. Claimants' PI Request relates to the merits, as it is evident from a comparison between the relief sought in the PI Request and the relief in the Request for Arbitration – which are identical – and the fact that the PI Request raises numerous substantive issues.[55] Therefore, Claimants' reliance on Section 29(f) of the CPA is misplaced and New York law, which is the substantive law of the CPA, must apply for deciding Claimants' PI Request.

147. Under New York's heightened standard, Burford has, in fact, failed to make a strong showing of the irreparable harm it would suffer.[56] The only harm that Burford is likely to suffer is only economic, and therefore, it does not constitute irreparable harm.

148. As for Burford's argument that the PI Request is appropriate either to prevent irreparable harm or to preserve the Tribunal's effective jurisdiction, Sysco argues that Burford failed to submit any New

---

[53] Respondent's Rejoinder, § 15 ff.

[54] *Id.*, § 21.

[55] *Id.*, § 29.

[56] *Id.*, §§ 45 ff.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

York case endorsing this alternative standard.[57] In any event, Burford's alleged harms are entirely speculative.

149. Even if the Tribunal were to find that Burford has shown that it suffered irreparable harm, Burford has still failed to demonstrate any likelihood of success on the merits under any standard.[58] Burford's interpretation of the CPA is untenable, as Burford is asking the Tribunal to transform its limited consent right into an absolute right to veto Sysco's proposed settlements. Both the Parties' agreement and the parol evidence show that Burford has no such veto right. Additionally, and as already shown in Respondent's Opposition, Burford's interpretation is contrary to New York law and the public policies of all relevant jurisdictions, as demonstrated by Professor Steinitz.[59]

150. Burford, in its Reply, is trying to shift the burden of proof, which falls on Burford. Unlike Sysco – which has shown the reasonableness of the proposed settlements - Burford has never met this burden and therefore failed to prove its case. Burford's refusal to consent to the proposed settlements is the outcome of an unreasonable process and a breach of Burford's obligation to deal with Sysco in good faith.

151. By negotiating the proposed settlements, Sysco has maximized its realistic prospects of recovery, which can be demonstrated by a comparison with settlements entered into by other claimants in the antitrust cases with a position comparable to Sysco. Burford could not rebut Sysco's evidence, especially regarding [redacted].[60] Further, [redacted] is untenable.[61]

---

[57] *Id.*, § 52.

[58] *Id.*, §§ 78 ff.

[59] *Id.*, §§ 92 ff. See also Steinitz Rebuttal Report.

[60] Respondent's Rejoinder, §§ 110 ff. See also Yurukoglu Rebuttal Report.

[61] Respondent's Rejoinder, §§ 121 ff.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

152. Respondent asserts that Claimants have discussed at length in their Reply the conversations with Mr. Gant as a significant factor in Burford's decision to withhold consent. However, Claimants have never disclosed the content of such conversations, and in any event, Burford's characterization of Mr. Gant's statements raises serious ethical concerns and violates the most fundamental principles of the CPA.

153. By forcing Sysco to renounce to the proposed settlements and continue to litigate, Burford is improperly seeking to impose a commercially unreasonable result.[62]

154. Finally, and contrary to Claimants' position, the balance of equities favors Sysco; the PI Request will cause significant harm to Sysco, if granted.[63]

155. For the foregoing reasons, Sysco requests "*that Burford's* [PI Request] *be denied with prejudice*" and that Sysco is awarded fees and costs.[64]

VII. The Tribunal's Analysis and Decision

VII.A The Applicable Preliminary Injunction Standard

156. Three principal issues divide the Parties: (a) does the New York law or instead an international arbitral practice standard apply to this PI Request; (b) if the New York law standard applies, should it be the heightened standard; and (c) what is the appropriate definition of the "irreparable harm" element in the applicable standard (New York or international)?

---

[62] *Id.*, §§ 137 ff.

[63] *Id.*, §§ 139 ff.

[64] *Id.*, § 146.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

VII.A.1 New York law versus international practice

157. Burford contends that this Tribunal should apply "*factors commonly considered by international arbitral tribunals in determining whether it is appropriate to order*" the interim relief that Burford seeks.[65] Those factors include the risk of serious or irreparable harm, the balance of prejudice, and a preliminary consideration of merits issues.[66] Burford emphasizes that the preliminary consideration of merits issues requires that the Tribunal avoid pre-judging the merits but ensure that "*granting the relief is reasonable in the circumstances*."[67]

158. Burford further emphasizes that the Tribunal has the discretion to "*weigh these factors and even precisely how to formulate them*."[68] In particular, such discretion is not restricted by the New York law standard, pursuant to the terms of the CPA:[69]

- New York law governs the contract but not the arbitration agreement or arbitration procedure.
- CPA Section 29(f) provides that New York City is the seat of arbitration and the U.S. Federal Arbitration Act governs the arbitration agreement and proceedings.
- Accordingly, New York law "*does not govern the procedural question of what standard the Tribunal should apply in determining the PI Application*."
- The Federal Arbitration Act does not specify the standard for relief, and the Tribunal has wide discretion under the LCIA Rules and the terms of CPA Section 29(b) to grant provisional relief that it deems appropriate.
- Appropriate relief is based on principles and practices derived for and in international arbitration. These principles

[65] Claimants' Opening Submission, Tr. 1/13.

[66] *Ibid.*

[67] *Ibid.*

[68] *Ibid.*

[69] Claimants' Reply, pp. 33-35.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

> and practices focus on preservation of the status quo and either prevention of serious or irreparable harm or preservation of the Tribunal's effective jurisdiction.[70]

159. Sysco's opposing position is that the CPA unambiguously selects New York law and a New York seat. The provisions referring to the LCIA Rules and the Federal Arbitration Act are boilerplate, and both the Rules and the Act are silent on the PI standard. Sysco adds that "*the only legal regime mentioned in the contract that supplies the standards is New York law, so there's no reason to throw out New York law because of some irreconcilable provision that claimants claim somehow overrides it.*"[71] Sysco adds that Burford concedes that international standards do not, in any event, deviate from New York law; for example, UNCITRAL Model Law Article 17A "*adopts not the serious harm standard but the same irreparable harm requirement*" under New York law.[72]

160. Sysco's papers also argue that because (in Sysco's view) the PI Request is a claim on the merits, New York law and the New York standard for injunctive relief must apply, pursuant to the Section 28 of the CPA: "*Burford does not even argue that something other than New York law should apply if the requested relief could decide the ultimate issue in dispute.*"[73]

161. However, as indicated above, Sysco contends that even if the Tribunal concludes that the PI Request is a proper interim relief application and the question of the applicable standard is a procedural question, the Tribunal should nonetheless apply New York law. Sysco adduces the following reasons:[74]

- In the absence of guidance from the Federal Arbitration Act, there is no basis to apply anything other than New York law.

---

[70] *Ibid.*, p. 39.

[71] Respondent's Opening Submission, Tr. 1/29.

[72] *Id.*, Tr. 1/38.

[73] Respondent's Rejoinder, p. 12.

[74] *Id.*, pp. 14-16.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

- The New York seat and the United States nationality of all the Parties reinforce the idea that where the Federal Arbitration Act is silent, the appropriate legal source is not international principles – which are not found in the Federal Arbitration Act – but New York law.
- The LCIA Rules provide no support for Burford's position, since the LCIA Rules are not only silent on the standard to apply for interim relief but also require the Tribunal to apply the law chosen by the Parties.
- Moreover, where the Federal Arbitration Act is silent on an issue, arbitral tribunals are not accorded "unfettered discretion," "*but should look to the law of the seat* [here, New York law] *to fill in the gaps*." This is an approach commented on in *International Commercial Arbitration in New York*, which observes that while arbitrators need not apply the procedures or standards for preliminary relief that the courts apply, arbitrators often do so. Where the Parties have selected New York law and a New York seat and are all based in the United States, there "*is no principled reason* […] *to apply any lesser or more flexible international standard at this stage; if Burford cannot articulate a credible claim for injunctive relief now under New York law, how could it possibly establish such a claim later?*"

162. The Tribunal considers that, in exercising its discretion on the standard of preliminary injunctive relief applicable to this arbitration – discretion that is expressly provided for in Section 29(b) of the CPA[75] – New York law provides the appropriate elements. The Tribunal agrees with Sysco that silence or the lack of guidance on the standard leads, in the circumstances of this dispute, to the New York law standard rather than international principles. This is not because the Tribunal views the PI Request as being "a claim on the merits" or that the contractual references to the U.S. Arbitration Act and the LCIA Rules are mere "boilerplate" or that all Parties are in

[75] Under Section 29(b), the Tribunal's discretion as to conservatory measures authority is not expressly confined. However, the Tribunal observes that mandatory law at the seat of arbitration provides a boundary.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

the United States. Rather, the Tribunal considers that two overriding considerations point to adoption of the New York standard.

(i) The first arises from the terms of CPA Section 29(f): "*The seat, or legal place, of arbitration shall be New York, New York. Notwithstanding the terms of Section 27 (Governing Law), the U.S. Federal Arbitration Act shall govern the interpretation, application and enforcement of this Section 29 and any arbitration proceedings conducted hereunder. The language to be used in the arbitral proceedings shall be English.*" Since New York serves as the seat of arbitration, it should not come as a surprise to the Parties that, where the Federal Arbitration Act is silent on a procedural matter and the applicable institutional arbitration rules are similarly silent, procedures applied by the courts at the seat would be preferred to another set of *ad hoc* arbitration rules or international practice (inevitably, a slippery standard to grasp). New York courts are of course highly sophisticated, have a massive and lengthy experience in matters of interim injunctive relief, and the New York law standard for a preliminary injunction is highly developed and offers sound guidance for arbitral tribunals. The fact that judges rather than arbitrators have developed this standard does not militate against the use of the standard by arbitrators. Moreover, even if the New York law standard is regarded as more rigorous than international practice, and New York courts have acknowledged that in arbitrations seated in New York a less rigorous standard for such relief may be enforceable, the circumstances of this PI Request, which features a request to preliminarily enjoin Sysco's ability to conclude litigation in the U.S. courts, supports application of a U.S. standard – *i.e.*, the standard applied by the courts at the seat of arbitration.

(ii) Second, while the Tribunal does not accept Sysco's contention that the PI Request is a claim on the merits, the Tribunal considers that, in exercising its discretion on selection of the standard, there is some force in Sysco's position, quoted above, that "*if Burford cannot articulate a credible claim for injunctive relief now under New York law, how could it possibly establish such a claim later*?" The point here is that the linkage

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

> between the preliminary injunction on the one hand and, on the other, the declaration and permanent injunction (the actual merits claim) that Burford ultimately seeks under New York law is sufficiently strong that application of the New York law standard to the former phase is justified. Burford's foundational position in this arbitration is that it is entitled to prior-consent protection as a matter of contract interpretation under New York law. That position suggests, in the absence of any guidance under the LCIA Rules, the appropriateness of applying the New York law preliminary injunction standard when Burford seeks to preliminarily preserve its self-described "partial veto" right.

163. For these reasons, the Tribunal concludes that the New York law preliminary injunction standard shall apply to the assessment of Burford's PI Request: "[t]*o obtain a preliminary injunction, the moving party has the burden of showing 1) irreparable harm and 2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them fair grounds for litigation and a balance of hardships tilting decidedly towards the plaintiff.*"[76]

VII.A.2 Is the Heightened Standard Applicable?

164. In *Tom Doherty Associates, Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 33-34 (2d Cir. 1995),[77] the Second Circuit stated that while a party seeking injunctive relief ordinarily must show the elements as stated above (paragraph 163):

> However, we have required the movant to meet a higher standard where (i) an injunction will alter, rather than maintain, the status quo, or (ii) an injunction will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits.

165. The *Tom Doherty* Opinion further explains that:

---

[76] *Jayaraj v. Scappini*, 66 F. 3d 36, 38 (2d Cir. 1995) (RL-66) [emphasis in the original].

[77] Exhibit CLA 51; RL-101.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

- The typical preliminary injunction is prohibitory and generally seeks only to maintain the status quo pending a trial on the merits, while a mandatory injunction is said to alter the status quo by requiring a positive act. The latter calls for the movant to demonstrate a greater likelihood of success.
- The prohibitory-mandatory distinction is not without ambiguities.
- "*Confusion in breach of contract cases as to whether an injunction is mandatory or prohibitory may stem from the meaning of "status quo."*[78] *A plaintiff's view of the status quo is the situation that would prevail if its version of the contract were performed. A defendant's view of the status quo is its continued failure to perform as the plaintiff desires. To a breach of contract defendant, any injunction requiring performance may seem mandatory*."
- Preliminary relief that requires a defendant to do more than what is required by a contract arguably alters the status quo and is mandatory, calling for the heightened standard.
- The heightened standard also applies where an injunction of either type will provide the movant with substantially "all the relief sought." However, this term, read literally, appears to describe any injunction where the final relief for the plaintiff would simply be a continuation of the preliminary relief. The Court observes that the literal approach is hard to justify, as it means that the mere fact that the plaintiff would get no additional relief if it prevails at the merits trial could deprive it of interim relief. **Accordingly, the term must be supplemented "*by a further requirement that the effect of the order, once complied with, cannot be undone.***** *A heightened standard can thus be justified when the issuance of an injunction will render a trial on the merits largely or partly meaningless, either because of temporal concerns, say, a case involving the live televising of an event scheduled for the day on which preliminary relief is granted or because of the nature of the subject of the litigation, say, a case involving the disclosure of confidential information. The bottom line is that, if a preliminary injunction will make it difficult or impossible to render a meaningful remedy to a*

[78] The Tribunal discusses below further New York law on the meaning of "status quo."

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

defendant who prevails on the merits at trial, then the plaintiff should have to meet the higher standard of substantial, or clear showing of, likelihood of success to obtain preliminary relief. Otherwise, there is no reason to impose a higher standard." (Emphasis added.)

- In *Tom Doherty*, the Court stated that the requested injunction requires the defendant to "*give a license that will continue to allow "the plaintiff "to publish the one work in questio*n" even if the defendant ultimately prevails. The injunction thus gives the plaintiff rights "that cannot be undone," and the heightened standard applies.

166. The Tribunal thus needs to consider two elements – (i) "status quo" and (ii) "all the relief sought"/"cannot be undone" – to determine whether the New York law heightened standard applies in this arbitration.

167. Burford usefully cites case law on how to determine the status quo.[79] The instruction[80] is to consider "*the last, actual peaceable uncontested status which preceded the pending controversy*." Guided by this instruction, the Tribunal concludes that the preliminary injunction sought by Burford is prohibitory in nature pursuant to New York law, and the requested relief seeks to maintain the status quo. On this "status quo" basis, the heightened standard does not apply:

- Sysco was pursuing litigation prior to the issue arising over Burford's withholding of consent to settlement.
- Moreover, Sysco not only continues to litigate the antitrust cases against [redacted], pursuant to its contractual obligations,[81] but also continues to receive money from Burford to fund the litigation. Sysco's Mr. Flynn acknowledged this during cross-examination,[82] stating that

[79] Claimants' Reply, pp. 37-38; see also Claimants' Closing Submissions, Tr. 2/210-213.

[80] Exhibits CLA-53, CLA-54 and CLA-55.

[81] Exhibit C-1, Section 7.

[82] Tr. 1/187-188.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

drawing an instalment payment from Burford to fund the litigation is "a normal transaction."

- As Burford's counsel stated in closing,[83] "*the status quo is what the parties were doing before this arbitration began. And what the parties were doing before this arbitration began is that Sysco was actually litigating the cases that it had gotten USD 140 million on against* [redacted] *and* [redacted] *and it was the one that wants to alter the status quo by extinguishing those cases by executing the settlement.*"
- When asked by the Tribunal whether the litigation included settlement negotiations, Burford's counsel observed[84] that Burford does not seek to enjoin Sysco from entering into settlement negotiations and has no right to do so: "*I don't think the effect of the injunction would be to preclude Sysco from entering into settlement negotiations. Indeed, if they go back to the settlement table and Sysco is able to obtain a better deal we would certainly not mind* […] *I don't think that that fundamentally changes the fact that executing the settlements would be a fundamental change in the status quo , because that just not negotiation, that's actually extinguishing the claims that were the collateral for our investment.*"
- Sysco does not advance a status quo position in its Rejoinder that effectively rebuts the points made by Burford.[85] Sysco insists that that the preliminary injunction would require Sysco to take affirmative steps and therefore the injunction is mandatory. As set out above, there is nothing in the injunction request that would require Sysco to act outside the CPA or to deviate from the actions it has consistently been taking and must take pursuant to the CPA – *i.e.*, litigate zealously by using the funds supplied by Burford.

[83] Tr. 2/211-212.

[84] Tr. 2/212-213.

[85] Respondent's Rejoinder, §§ 41-44.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

168. Sysco's position on "all the relief sought"/"cannot be undone"[86] is more substantive than its status quo position, but it relies on a reading of *Tom Doherty* that does not sufficiently meet the central point in the Opinion, described above: once a license was given to the plaintiff through the injunction, nothing could be done at trial to prevent the plaintiff from continuing to use the license to publish the work in question. That is, the injunction would give the plaintiff rights that "cannot be undone." Sysco contends that, in this arbitration, it is a "virtual certainty" that the "settlement dynamic" that presently operates "*will be altered in one direction or another if the Tribunal grants the relief sought by Burford*." Sysco further asserts that this "*Tribunal is not likely to issue a final award for at least two years, if not longer, during which time there can be no reasonable dispute that the Proposed Settlements will no longer be available in their present form because one side perceives its position to be stronger (if they are not resolved altogether by then)*." Thus, Sysco concludes, the preliminary injunction would provide Burford with "*substantially all of the relief that it seeks – to permanently block the Proposed Settlements without ever proving satisfaction of its conditions precedent at a final merits hearing following disclosure and proper submissions – and for this reason alone, the heightened standard applies*."

169. Sysco is right that Burford wrongly points to 7 February 2023 as a relevant date for assessing whether the settlement proposals will disappear.[87] However, Sysco's above-described "cannot be undone" analysis is flawed in several respects, and therefore does not justify the application of the heightened standard. First, while the "settlement dynamic" could well be altered in the following months, the notion that settlement offers will disappear – and may be more attractive than the current Settlement Proposals – if the preliminary injunction is granted has not been demonstrated by Sysco (Mr. Flynn's evidence on this point is simply not persuasive, and neither is Sysco's account in its Opposition brief, paragraph 70.)

[86] Respondent's Rejoinder, §§ 39-40.

[87] Claimants' Reply, § 90.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

Second, while there were previous timetabling discussions between the Parties and the Tribunal that envisaged an arbitral proceeding leading to an award possibly two years from now, those discussions took place before the TRO was issued. Third, Burford's counsel correctly observed in his opening submission[88] that Burford sought expedited proceedings when bringing this dispute to the LCIA, "*in part in recognition of the fact that both parties have an interest in knowing what their rights are, and in having certainty around whether these settlements can go forward or not.*"

170. This last point, Burford's counsel's argument that Burford initially sought expedited proceedings is, in the Tribunal's view, pertinent to the question of timing of the merits procedure. As indicated at the conclusion of this Order, the Tribunal considers that a fast-track proceeding at the merits phase is feasible;[89] the merits phase need not entail the trial of an antitrust case. The Parties' procedural rights would need to be, and can be, fully protected in a fast-track process.

171. Because the Tribunal plans to institute a fast-track timetable, Sysco's "cannot be undone" position lacks sufficient strength to trigger application of the heightened standard. That is, if Burford does not prevail at the merits hearing, which the Tribunal will seek to hold in September 2023, Burford's consent right will not equate to limited veto right, and Sysco's ability to enter into a settlement will be unconstrained – though it may still be liable in money damages to Burford. Moreover, as indicated above and discussed further below, the issuance of a preliminary injunction would not prevent Sysco from continuing to engage in settlement negotiations and to potentially bring new and more attractive proposals to Burford.

---

[88] Tr. 1/22.

[89] Burford's counsel, in his closing submission, also stated (Tr. 2/187-188) that a final merits hearing does not need "*to be long in the future*. […] [W]*e think that the narrow issue for resolution at a merits hearing is whether claimants have acted reasonably in light of the information that they had at the time of their decision*. […] [W]*e are well down the road to a full vetting of that merits issue*."

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

172. For the foregoing reasons, the ordinary preliminary injunction standard under New York law, and not the heightened standard, shall apply to the PI Request lodged by Burford.

VII.A.3 Irreparable Harm

173. Sysco makes the following points on the New York law definition of irreparable harm:[90]

- This element is the single most important prerequisite for the issuance of a preliminary injunction.
- The movant must establish this element at the outset before other requirements for an injunction will be considered.
- To establish irreparable harm, the movant must show that the harm alleged is not capable of being remedied by money damages.
- Where money damages may provide adequate compensation, a preliminary injunction should not be issued.
- Economic loss that is compensable by money damages does not constitute irreparable harm.
- The movant must also show that the harm alleged is likely and imminent, not remote or speculative.
- A finding of irreparable harm is not warranted based on the alleged difficulty of calculating damages.
- Each case cited by Burford for the proposition that courts regularly grant injunctions to protect what are ultimately financial interests in fact involves decidedly non-financial interests, such as loss of customers, loss of goodwill or business opportunities, major business disruption, artistic success, trade name confusion, and threats to reputation, misappropriation of trade secrets, disclosure of confidential information.
- None of Burford's cases found protection of financial interests to be a sufficient basis for granting injunctive relief.

[90] Respondent's Opposition, §§ 81-85; Respondent's Rejoinder, §§ 58-60; Opening Statement Slides, p. 13, citing Exhibits RL-64, RL-73.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

174. Burford makes the following points on the New York law definition[91] (Burford's primary position is that international arbitral practice should be the guide, rather than New York law, but the Tribunal has already rejected Burford's arbitral practice position and therefore does not address irreparable harm under Burford's primary position):

- Sysco's view of irreparable harm is notably narrow.
- Under New York law, a preliminary injunction will be denied on the ground of existence of an adequate remedy at law only when the legal remedy is as satisfactory as an injunction.
- The only way to render a veto right truly viable is to enforce it.
- Where one party to a contract disregards the other party's right to veto certain transactions, the injury is irreparable as a matter of law.
- Denial of the right to participate in the management of a company constitutes irreparable harm.
- New York courts often hold that disclosure of confidential or proprietary information to third parties constitutes irreparable harm.
- New York courts regularly grant injunctions to protect what are ultimately financial interests because a damages remedy would not be as satisfactory as an injunction preventing the harm in the first place.[92]
    - A licensee threatened with unlawful termination of a licensing agreement can show irreparable harm through loss of customers, goodwill or business opportunities, even though these losses are financial in nature and could also be remedied by after-the-fact damages.

---

[91] Claimants' PI Request, §§ 66-85; Claimants' Reply, §§ 97-101; Claimants' Closing Submission, Tr. 2/193-196.

[92] As the Court in *Tom Doherty* put it (60 F. 3d at 38): "*These cases stand for the general proposition that irreparable harm exists only where there is a threatened imminent loss that will very difficult to quantify at trial.*"

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

- Misuse of trade secrets constitutes irreparable harm even though the victim can seek damages for their loss. The same is true for defamation, even though the victim could sue for damages for injury to reputation.
- There are many similar instances.[93]
- The law does not reduce every legal right to dollars and cents.
- The simple argument that financial harm is never irreparable is wrong.
- New York courts are particularly willing to find irreparable harm where the harm to the plaintiff will be felt *vis-à-vis* third parties.

175. The Tribunal has reviewed all the case law submitted by the Parties but confines its comments here to certain Opinions that assist most directly in understanding the concept of "irreparable harm" under New York law and how the concept should be applied in the context of this case.

176. Sysco adduces several cases in which New York courts emphasize that the "irreparable harm" element is a very high bar. For example, in *Ahmad v. Long Island University*, 18 F. Supp. 2d 245 (E.D.N.Y. 1998),[94] the Court notes that in order to obtain the extraordinary remedy of a preliminary injunction, the movant must prove that the injury it will suffer is likely and imminent, not remote or speculative, and is not capable of being fully remedied by money damages. Thus, in the specific circumstance of termination of employment, the District Judge Spratt (Eastern District of New York) observed that irreparable injury can only be established by a clear demonstration that the terminated employee has little chance of securing future employment, has no personal or family resources, has no private unemployment insurance, is unable to finance a loan privately, is ineligible for public assistance, and there are other compelling circumstances weighing heavily in favor of interim relief. The terminated employee must literally find himself being forced into the

[93] Claimants' Reply, § 101 and fn. 183.

[94] Exhibit RL-63.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

streets or facing the specter of bankruptcy for a court to find irreparable harm. Moreover, even though the employee will suffer some loss of reputation, since the lawsuit ultimately seeks damages for discrimination, the employee cannot demonstrate that his alleged injury is not capable of being fully remedied by money damages. The state court (Appellate Division) reiterates this final point in *Family-Friendly Media, Inc. v. Recorder Television Network*, 74 A.D.3d (N.Y. App. Div.2d Dep't 2010):[95] economic loss "*which is compensable by money damages does not constitute irreparable harm*."

177. Again, in the employment context, and predating *Ahmad*, the Second Circuit (*Jayaraj v. Scappini*, 66 F.3d 36 (2d Cir. 1995))[96] has stated that if monetary damages may provide adequate compensation, there can be no preliminary injunction.

178. Outside the employment context, New York courts have been adamant in emphasizing the general proposition that irreparable harm is a certain and imminent harm for which a monetary award does not compensate. It exists where, but for the grant of equitable relief, "*there is a substantial chance that the parties cannot be returned to the positions they previously occupied*." See *Carson Optical, Inc. v. Alista Corporation*, 2019 WL 3729460 (E.D.N.Y. 2019).[97] While the courts have also observed that harm may be irreparable where "*the loss is difficult to replace or measure*," the positions "previously occupied" are not necessarily to be taken literally: in *Ferraro v. Realty USA*, 209 WL 1098664 (N.D.N.Y. 2009),[98] the Northern District observed that the plaintiffs seeking to enjoin the sale of investment properties, not personal homes, "*have failed to show how monetary damages would not render them whole, if they were ultimately to succeed on the merits*. […] *Plaintiffs have not proffered nor is it clear to this Court why money damages would not be adequate compensation*."

---

[95] Exhibit RL-64.

[96] Exhibit RL-66.

[97] Exhibit RL-67.

[98] Exhibit RL-72.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

179. Sysco relies on *Union Capital LLC v. Vape Holdings Inc.*, 2016 WL 8813991 (S.D.N.Y. 2016),[99] for the proposition that alleged difficulty in calculating damages does not warrant a finding of irreparable harm.[100] However, the Tribunal notes that *Union Capital* does nothing more than indicate that proposition by repeating a previous order for which the context and parties' arguments (and potentially relevant authority) are not given: SDNY Judge Sullivan simply states that for "*the reasons stated in its order denying Plaintiff's request for a temporary restraining order, the Court rejects Plaintiff's arguments that a finding of irreparable harm is warranted based on the alleged difficulty of calculating damages*."

180. However, this question of the difficulty of calculating damages was previously addressed in some detail by SDNY Judge Conboy in *USA Network v. Jones Intercable, Inc.*, 704 F. Supp. 488 (S.D.N.Y. 1989).[101] The Court notes (citing and quoting NY Jur.) the general rule that "[o]*rdinarily, the innocent party to a breached contract is entitled only to compensatory damages obtainable in an action at law*," but also states that "*if, due to exceptional circumstances, an action at law cannot afford adequate relief, equity will specifically enforce the contract, if its terms are such that they do not impose upon the court any difficulty in enforcement, and the contract in other respects does not violate the rules pertaining to actions for specific performance, and there are no facts and circumstances connected with the inception or continuance of the contract which would render it contrary to equity to require its specific performance*."

181. The plaintiff in *USA Network* conceded that the issue was not corporate life or death but argued the "ripple effect" or consequential damages of the defendant's actions, which it contended "*will have a real but incalculable effect on its status and performance in the industry vis a vis other cable systems operators, advertisers and program suppliers*."

---

[99] Exhibit RL-73.

[100] Tr. 2/238.

[101] Exhibit RL-68.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

> In this regard, the Court acknowledged that "*if the court were convinced that USA* [the plaintiff] *would suffer the so-called ripple effect injuries to any significant degree, injunctive relief would, perhaps, be appropriate. Where damages are theoretically available but, because of the nature of the injury are not measurable with a reasonable degree of accuracy or are otherwise impractical, the legal remedy is inadequate*." The court added that it "*must be emphasized, however, that almost every contract breach will generate some consequential damages that are difficult to calculate*." Judge Conboy quoted previous Seventh and Second Circuit authority in explaining that the "*irreparability that comes from the difficulty of proving damages is not of the same order as that which comes from the uncollectibility of a damage judgment.* [. . .] *Consequently, the necessity in many cases of making an informed, perhaps rough, approximation of damages does not render the legal remedy inadequate. It is only where damages are clearly difficult to assess and measure that equitable relief is appropriate*." (emphasis in the original.)

182. The Court in *USA Network* found that the plaintiff was unable to make the required showing of ripple effect damages. However, the Tribunal considers that this Second Circuit case does diminish the reliability of Sysco's insistence on the flat proposition that the difficulty in calculating damages will not support a finding of irreparable harm. Based on *USA Network*, if Burford has demonstrated that damages are clearly difficult to assess and measure and the existence of ripple effect damages, Burford can be found to have satisfied the irreparable harm element of the New York law preliminary injunction test.

183. Many cases relied on by Burford appear to be less pertinent to the PI Request than *USA Network*.[102] While Burford's counsel[103] points to findings of irreparable harm in circumstances where there are disputes among commercial entities for what may *ultimately* be considered financial losses, the issue always remains whether monetary damages at trial will constitute adequate compensation. A

[102] Exhibit RL-68.

[103] Tr. 2/194-195.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

number of cases cited by Burford discuss circumstances that are, for the most part, substantially different from those of the present dispute and therefore do not assist in providing guidance to this Tribunal on the critical question of whether, absent the relief sought by Burford, Burford would be able to obtain adequate compensation if it prevails at a merits trial. Certain of Burford's cases, however, do provide useful general analyses of the irreparable harm element, and, together with *USA Network,* inform the Tribunal's assessment of the PI Request. *USA Network* remains singularly important in outlining the potential significance of "ripple effect" damages, which is effectively the "third-party harms" position advanced by Burford and its expert, Professor Issacharoff.

184. Among the cases relied on by Claimants that illustrate the above points, including those which are more helpful in providing irreparable harm guidance in the context of the PI Request, the Tribunal briefly discusses the following:

(i) CLA 17: *Wisdom Import Sales Co., L.L.C. v. Labatt Brewing Co., Ltd.*, 339 F.3d 101 (2d Cir. 2003).

The court found the breach itself to constitute a non-compensable injury, and therefore the compensable damages that might flow from the breach did not negate the existence of any irreparable harm. The breach concerned denial of the plaintiff's right to exercise a minority veto and thereby preserve the balance of power in the parties' joint venture. While the existence of a veto right suggests a potential comparison to the present dispute, the court's holding was specific and narrow: "*We hold only that the denial of bargained-for minority rights, standing alone, may constitute irreparable harm for purposes of obtaining preliminary injunctive relief where such rights are central to reserving an agreed-upon balance of power . . . in corporate management*." The right to participate in the management of a company is only distantly analogous to the veto right claimed by Burford in this arbitration. However, see below the discussion of *Empresas Cablevision,* an Opinion

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

by S.D.N.Y. Judge Rakoff, which extends the holding in *Wisdom Import* to denial of a veto right in circumstances that are much closer to the present arbitration.

(ii) CLA 18: *CanWest Global Communications Corp. v. Mirkaei Tiksheret Ltd.*, 9 Misc.3d 845 (2005).
This case also concerns loss of a right to participate in the management of a company, where the counterparty has proceeded to fire key employees and change the direction of the company. Again, these circumstances are distant from those in the present arbitration.

(iii) CLA 16: *Gerald Modell Inc. v. Morgenthau*, 196 Misc.2d 354 (2003).
Since this case concerns possession of jewelry and a possessory lien, it is not comparable to the present arbitration.

(iv) CLA 12: *Willis of New York, Inc. v. DeFelice*, 299 A.D.2d 240 (2002).
Willis of New York potentially bears on the present case, in that the court states that a loss of business (due to solicitation of plaintiff's clients) may be impossible, or very difficult, to quantify, in the absence of an injunction, and therefore the necessary showing of irreparable harm has been made out. This Opinion casts doubt, at very least, on Sysco's position that difficulty in calculating damages cannot support an irreparable harm claim.

(v) CLA 13: *Invesco Institutional (N.A.), Inc. v. Deutsche Inv. Management*, 74 A.D.3d 696 (2010).
Invesco adopts the *Willis of New York* "impossible or very difficult to quantify" basis for irreparable harm, though in the trade secret context, which is very distant from the present arbitration.

(vi) CLA 14: *North Atlantic Instruments, Inc. v. Haber*, 188 F.3d 38 (2d Cir. 1999).
North Atlantic is also a trade secret case, which stands for the proposition that a loss of trade secrets cannot be measured in

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

money damages – again, this is distant from the circumstances of the present arbitration.

(vii) CLA 42: *Oracle Real Estate Holdings I LLC v. Adrian Holdings Co. I, LLC*, 582 F. Supp.2d 616.
While Burford relies heavily on this case, the context – a bargained-for right to corporate control is only tangentially related to the present claimed-for limited veto right over settlement.

(viii) CLA 43: *Empresas Cablevision, S.A.B. de C.V. v. JPMorgan Chase*, 680 F. Supp.2d 625 (S.D.N.Y.).
As noted above, Judge Rakoff relies on and extends *Wisdom Import* in a manner that is relevant to the present arbitration. The pertinent passage is as follows:

> "*For the foregoing reasons, the Court concludes that plaintiff has shown a likelihood of success on the merits of its claim that JP Morgan breached its implied covenant of good faith and fair dealing under the Credit Agreement. Further, the Court finds that Cablevisión has shown a likelihood of irreparable harm if preliminary injunctive relief is not granted. Cablevisión has made such a showing here because the aforementioned features of the Participation Agreement emasculate Cablevisión's right to veto assignments of the loan, and this sort of injury is irreparable as a matter of law. See Wisdom Import Sales Co. v. Labatt Brewing Co., 339 F.3d 101, 114 (2d Cir. 2003). When a party has "expressly negotiated for and received the right to veto certain transactions with which it disagreed before those transactions commenced, a right that is irretrievably lost upon breach, and may not be compensable by non-speculative damages," "the only way to render* [such a] *provision truly viable is to enforce it." Id.; see also, e.g., CDC Group PLC v. Cogentrix Energy, Inc.*, 354 F.Supp.2d 387, 393-94 (S.D.N.Y. 2005) (applying *Wisdom Import Sales* to find irreparable harm in defendant's efforts to sell majority interest in subsidiary to a third party in violation of a letter agreement barring such a sale for seven years). Moreover, independent of this legal doctrine, there is as a factual matter a strong likelihood of irreparable harm arising from Inbursa's ability to seek and

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

obtain Cablevisión's confidential business information under the Credit Agreement and then use it to Cablevisión's detriment. *See, e.g., Muze, Inc. v. Digital-on-Demand, Inc.*, 123 F.Supp.2d 118, 130-31 (S.D.N.Y. 2000) (unauthorized use of proprietary information for competitive advantage held to cause irreparable harm).

(ix) CLA 51: *Tom Doherty Associates, Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27 (2d Cir. 1995).

The Tribunal discussed *Tom Doherty* above, for the guidance it provides on the heightened standard. In terms of the irreparable harm element, *Tom Doherty* is important, as the Second Circuit provides a description of New York cases that stand, when a party is threatened with the loss of a business, "*for the general proposition that irreparable harm exists only where there is a threatened imminent loss that will be very difficult to quantify at trial*" – again casting doubt on one of Sysco's primary propositions that difficulty in calculating damages cannot serve as a basis for satisfying the irreparable harm element. The Second Circuit adds, in another potentially relevant passage to this arbitration, that it would be unfair to deny an injunction to the plaintiff on the ground that money damages are available, only to confront the plaintiff at the merits trial with the rule that damages must be based on more than mere speculation.

(x) CLA 59: McKinney's CPLR § 6301. Grounds for preliminary injunction and temporary restraining order.

The hornbook discussion in McKinney's provides the useful reminder that an order on a preliminary injunction does not establish the "law of the case." McKinney's also provides for examples of New York court cases in which the holdings are: (a) the legal remedy of damages may be inadequate if the damages cannot be easily measured or promptly attained; and (b) to be adequate, the legal relief should be as practicable and efficient as an equitable remedy.

(xi) CLA 60: *Orange & Rockland Utilities, Inc. v. Amerada Hess Corp.*, 67 Misc.2d 560 (1971).

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

This case concerns a public utility and is too remote from the circumstances of the present arbitration to be useful to the Tribunal.

(xii) CLA 61: *Asa v. Pictometry Intern. Corp.*, 757 F.Supp.2d 238 (S.D.N. Y. 2010).

This case concerns unauthorized use of a trademark, possible major disruption of a business, and the risk of disclosure and dissemination of trade secrets; like *Orange & Rockland*, it is clearly too remote to be of use in this arbitration.

185. For the foregoing reasons, the Tribunal declines to follow the central propositions advanced by either side on the question of the definition of the irreparable harm element, and instead determines that certain New York court Opinions discussed above – in particular, *USA Network* (RL-68), *Empresas* (CL-43), and *Tom Doherty* (CL-5) – provide the relevant guidance for understanding and applying this element of the preliminary injunction test.

VII.B Has The PI Request Satisfied the New York Law Ordinary PI Standard?

VII.B.1 Has Burford Shown that it will suffer irreparable harm absent the requested injunction?

186. Burford's irreparable harm case may be summarized as follows:[104]

- Absent an injunction, Sysco will execute the settlement agreements, thereby mooting Burford's ability to have its "consent" case heard and turning the arbitration into a damages case.
- An injunction is therefore necessary to preserve the status quo.
- A remedy at law (*i.e.*, recovery of damages) would not be as satisfactory as an injunction, preventing harm in the first place (the harm being the loss of Burford's consent veto).
- The consent veto cannot readily be reduced to damages, just as

[104] See, *e.g.*, Claimants' Reply, pp. 38-64; Tr. 2/192-197, 209-210.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

issue of trade secrets cannot readily be reduced to damages, "*even though the victim can seek damage for their loss.*"

- Burford bargained for the right to participate in the conduct of Sysco's claims as a consequence of Sysco's prior breach of the anti-assignment provisions of the CPA. Money damages could not fully remedy the loss of that participatory right. The fact that the purpose of the consent right is protection of Burford's monetary interests does not mean that money damages can fully compensate for the loss of the consent veto.
- Moreover, financial harm can be considered irreparable harm.
- Courts are particularly willing to find irreparable harm where the harms to the plaintiff will be felt *vis-à-vis* third parties.
- Because of the defendants' Judgement Sharing Agreement ("JSA") in the *Broilers* litigation, the settlements would give the other JSA defendants a contractual right to avoid joint-and-several liability that could not be undone. Giving Burford a damages claim against Sysco could not adequately remedy the third-party harm.
- The settlements would irreparably alter the settlement market. As Professor Issacharoff describes it, the settlements would have the effect of setting the baseline expectation for settlement values, and the ripple effect of the settlements on the portfolio of potential settlements could not be repaired through money damages at trial.
    - That is, apart from the cascading effects of settlement on the claims against [redacted] and [redacted] and the other JSA defendants, the entire settlement market would be harmed.
    - Where there are harms that go beyond the contract between the parties and have large external effects, New York law recognizes the difficulty in quantifying such harms and accepts the appropriateness of a preliminary injunction.
- The existence of the [redacted] in the proposed settlements can

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

easily be circumvented and therefore does nothing to diminish the harms posed by the Sysco settlement proposals.

- Further, Mr. Baer, Sysco's expert, described the [redacted] as a "comfort paragraph";[105] he had to accept that [redacted]. He could not identify a circumstance in which there might be [redacted].
- In any event, if Sysco settles at an undervalued amount, its leverage in other cases will be diminished.

187. Sysco's argument against the existence of irreparable harm runs as follows:[106]

- Economic loss that is compensable by money damages does not constitute irreparable harm.
- Further, the alleged injuries must be imminent and not speculative.
- Burford is a litigation funder; its only interest is maximizing the return on its investment. It is a passive provider of external capital. Its entitlement and its interest start and end with money. Therefore, there can be no viable claim of irreparable harm.
- The only harm that Burford can conceivably suffer from the settlements would be a reduction in the economic value of the claims that might have been obtained absent those settlements. But it is axiomatic that economic loss does not constitute irreparable harm.
- Burford's attempt to recast part of its harm as non-economic is unavailing. The JSA joint-and-several liability issue, giving the JSA defendants access to the settlement positions, the deprivation of the so-called "right to participate" – these are still only

[105] Tr. 2/58.

[106] See, *e.g.*, Respondent's Opposition, pp. 37-46; Respondent's Rejoinder, pp. 25-33; Tr. 1/38-40.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

economic, and could be fully compensated through monetary damages.

- If Sysco [redacted].
- Any impact of the JSA is a reality all plaintiffs have to live with, now and forever in the future.
- In any event, Sysco's speculative JSA disadvantage through reduction of settlement leverage is, at most, purely economic and compensable with monetary damages.

- Burford's claim that the knock-on effect of the settlements would make it difficult to calculate harm is not demonstrated – Burford has refused to produce its models purporting to value claims. Moreover, any other claims that Burford has invested in are ones for which Burford has already calculated the expected future value. Even if Burford could establish difficulty in calculation, the irreparable harm element would not be met: courts have repeatedly held that economic harm does not transform into non-economic harm just because damages may be difficult to calculate.
- Burford's alleged prior consent right is purely monetary. Burford's business does not concern participating in management of a company, or the like. Its only participation "right" is recovery of money. Again, the harm would be purely economic.
- Burford's attempt to rely on cases such as *Orange & Rockland Utilities* underscores that the courts focus on non-financial interests in assessing whether irreparable harm exists.
- Burford's alleged harm is speculative. Burford can do no more than hope that Sysco will either obtain better settlements in the

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

future or obtain a better outcome at trial. This is inherently speculative. Further, Burford's theories are self-contradictory. After arguing that the settlements would create a benchmark that other defendants would rely on, Burford now argues that the benchmark is illusory, [redacted]. But this means that Burford's benchmark concern no longer applies, and that is the only knock-on concern that Burford identifies regarding the settlements. Burford can only offer conjecture that settlements with other defendants would necessarily be worse if Sysco enters into the proposed settlements.

188. As discussed in Section VII.A above, in the context of this arbitration and the competing positions of the Parties regarding the irreparable harm element, *USA Network*, *Empresas* and *Tom Doherty* Opinions provide a useful framework for evaluating the positions.

189. The Tribunal has already observed that under New York law economic harm may constitute irreparable harm in certain circumstances, and difficulty in calculating damages may support an irreparable harm assessment.

190. The Tribunal, by a majority, determines that, absent preliminary injunctive relief, a merits trial at which Burford could only obtain damages would not afford Burford adequate relief. Further, it would not be contrary to equity to enforce, at least on a preliminary basis, specific performance of Burford's prior consent right (see below the section on *prima facie* case on the merits). The principal considerations that lead the Tribunal majority to reach this conclusion are expressed most clearly and persuasively in Professor Issacharoff's two expert reports, where he explains the "ripple effect" of the settlements on the entire portfolio of the Parties' protein antitrust cases. [redacted], Professor Issacharoff's Second Report, at paragraphs 5-10,

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

persuasively demonstrates that a settlement that undervalues Sysco's claims would undermine Sysco's settlement position in other cases, [redacted], and customary contractual damages would not constitute adequate compensation.[107]

191. Here, the Tribunal, by a majority, considers that Burford has met its burden of showing that Sysco's proposed settlements would in fact affect the settlement market, and if the proposed settlements undervalued the claims, the ripple effect would be adverse and irreparable to Burford's interests. Further, Burford has shown that the complexities associated with this ripple effect would be extremely difficult to quantify at trial. Sysco's argument that quantification should not be regarded as difficult because Burford has modelled the expected value of claims that it invests is flawed on at least two grounds (i) customary contractual damages are highly unlikely to cover speculative future damages claims involving third parties; and (ii) modelling investment decisions is not equivalent to modelling settlement values in an uncertain and to some degree non-

[107] Paragraphs 5-10 of Issacharoff 2nd are lengthy, and the Tribunal refers to them without quoting them here. By way of thumbnail summary, Professor Issacharoff comments that: (i) Sysco's experts do not contest the fact that the proposed settlements will affect the settlement market; (ii) Sysco's experts accept the core proposition that the settlement market conditions the value of all outstanding claims; (iii) however, they misstate the scope and effect of [redacted]; (v) so, [redacted] and the settling plaintiffs can easily circumvent [redacted]; (vi) as for the baseline referred to by Sysco's experts arising from other settlements, we do not know what that baseline is on a global basis; (vii) thus, [redacted]; (viii) even assuming that the baseline has already been set for the chicken market, an undervalued settlement with [redacted] would be a signal to the settlement market and would affect Sysco's ability to settle other cases; and (ix) if other plaintiffs have settled at undervalued levels, this would support Professor Issacharoff's opinion rather than detract from it. See also the cross examination of Mr. Flynn (Tr. 1/247-252) where Mr. Flynn accepted, *inter alia*, (i) [redacted].

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

transparent settlement market, and again would undoubtedly be regarded by the trial court as an exercise in speculation. Ms. Daley, on cross-examination,[108] explained this last point as follows:

> Our calculations are on a risk-adjusted basis, so they are not – they are not static expectations of returns. So, yes, if you just gave us that number at a point where the case was resolving favourably, and there was no longer a risk of loss, then that number factors in a risk of loss that's no longer relevant at that point. So it matters when something resolves, it matters the context, it matters who else is resolving at the time, has somebody gone to trial. There are too many future unknowns, and then other market players will settle, and we will have no access to that information. We have some limited access to information from our counterparties, but we don't know what the whole market is getting. So you can say that our best guess is our money damages, but it's a guess, and my understanding is that's not how we calculate actual damages in litigation.

192. Sysco's response to this is twofold: (a) it is speculation on Burford's part that Sysco could obtain a better settlement or at least do better at trial; and (b) if damages are speculative, Burford would rightly be denied such damages at trial. The Tribunal refers to the section below, on "likelihood of success on the merits," for Burford's *prima facie* demonstration that its withholding of consent to the settlement proposals was not unreasonable, which replies to point (a).

193. As to response (b), Judge Rakoff's *Empresas* Opinion strongly indicates that the inadequacy of non-speculative damages would also support equitable relief. As set out above, in *Empresas* (citing a 2005 S.D.N.Y. Opinion), the Court observed that where a party has expressly negotiated for and received the right to veto certain transactions before those transactions commenced, a right that is irretrievably lost upon breach and may not be compensable by non-speculative damages, specific performance of the veto right is justified. While Burford's asserted veto right is not comparable to a right to participate in company management decisions, *Empresas* suggests

[108] Tr. 1/153-154.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

that it can nonetheless serve to justify preliminary equitable relief, if paired with inadequacy of non-speculative damages. The inadequacy of non-speculative damages in view of Professor Issacharoff's analysis is apparent. As the Second Circuit observes in *Tom Doherty*, it would be unfair to deny an injunction to the plaintiff on the ground that money damages are available, while confronting the plaintiff at the merits trial with the rule that damages must be based on more than mere speculation.

194. To summarize, the Tribunal, by a majority, considers that Burford has satisfied the irreparable harm element for the following reasons:

i. Absent the injunction, Sysco will execute the settlement proposals, which would overturn the status quo and permanently deprive Burford of the ability to seek specific performance of its prior consent contractual right.

ii. Absent the injunction, Burford, principally through its expert, Professor Issacharoff (whom Sysco chose not to cross-examine at the PI Hearing), has shown the likelihood of an adverse ripple effect (assuming an undervalued settlement) on the entire portfolio of protein antitrust cases in terms of Burford's interest in the value of those cases, which would include the involvement of third parties (the JSA defendants, for example).

iii. At the merits trial, the breach of contract damages that Burford would conceivably be able to prove would not constitute adequate compensation for the harm suffered.

iv. Under well-established New York law precedent, the above reasons justify preliminary injunctive relief.

195. Since the Tribunal finds, by a majority, that Burford has demonstrated the irreparable harm element of the preliminary injunction standard, the Tribunal now turns to the further two elements in the standard: *prima facie* case on the merits, and balance of equities.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

VII.B.2 Has Burford Demonstrated a Likelihood of Success on the Merits?

196. Amendment No. 1 to the Second Amended CPA[109] contains the following relevant provisions for purposes of analysing this element of the New York preliminary injunction standard:

i. Section 6(e) states that Burford shall receive [redacted] and Sysco [redacted] of all remaining Proceeds (in relation to a judgment or award against or settlement with an Adverse Party in a Claim).

ii. Section 7, headed "Maximization of Litigation Outcome; Non-Circumvention" (emphasis in the original), states as follows:

"(a) In addition to and without limiting the obligations of the Counterparty to the Capital Providers pursuant to Section 5.3(b) of the Existing Agreement, the Counterparty shall take such actions as are reasonable and appropriate to maximize the Proceeds received from each Claim, giving priority to cash Proceeds.

(b) Section 5.3(b)(v) of the Existing CPA shall be amended and restated in its entirety as follows:

(v) shall provide immediate notice by email to the Capital Providers of any settlement offer made by the Adverse Party and shall not accept a settlement offer without the Capital Providers' prior written consent, which shall not be unreasonably withheld, provided, however, that the Capital Providers (and their respective Affiliates) shall have no right to exercise control over the independent professional judgment of its Nominated Lawyers and shall not seek to impose a commercially unreasonable result with respect to settlement;

(c) The Counterparty shall not, directly or indirectly, by any acts or omissions circumvent, or attempt to circumvent, the obliga-

[109] Exhibit C-1.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

tions set forth in this paragraph 5 or in Section 5.3(b) of the Existing CPA or the intent of the transactions contemplated by the 2021 Amended CPA."

197. Two recitals in the Second Amended CPA[110] may bear some relevance:

i. "WHEREAS, the Capital Providers are each passive providers of external capital and have not become owners of, partners in, or parties to the claims or any part thereof or acquired any rights as to their control or resolution: consequently, while the Capital Providers will receive certain information with respect to the Claims and consult with the Counterparty thereon, the Counterparty remains in full control of the assertion and resolution of the claims; and

ii. WHEREAS, the parties are sophisticated and are entering into this Agreement freely and entirely of their own volition following independent legal advice from experienced counsel, and do not believe that this Agreement or the transactions it contemplates are inconsistent with any relevant law or public policy."

iii. "Claim Resolution" is a defined term (see "Exhibit A") in Exhibit C-2; it "means either full and final settlement of a Claim or the entry of a final, non-appealable and enforceable award or judgement, in either case resolving with prejudice all aspects and elements of a Claim." However, this defined term does not appear in the recital quoted above.

iv. Section 5.3(b)(v) in Exhibit C-2 states that the Capital Providers (and their respective Affiliates) "shall have no right to exercise control over the independent professional judgment of the Counterparty and its Nominated Lawyers and shall not seek to coerce the Counterparty and its Nominated Lawyers with respect to settlement." The new Section 5.3(b)(v), quoted above,

[110] Exhibit C-2.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

only refers to the independent professional judgment of the Nominated Lawyers.

v. The relevant authorities for the role of recitals in contractual interpretation under New York law are, *inter alia*, *Williams v. Barkley*, 165 N.Y. 48 (N.Y. 1900),[111] and (relying on *Williams*) *Jones Apparel Group v. Polo Ralph Lauren*, 16 A.D.3d 279 (2005). These Opinions state generally that contract recitals indicate only background information and form no part of the operative part of the contract. Where a recital is inconsistent with an operative covenant or promise and cannot be harmonized, the operative covenant or promise must prevail, if it is clear and unambiguous. If the operative covenant or promise is ambiguous and the recital is clear, the recital would govern the construction.

198. The initial question for the Tribunal is whether there is a *prima facie* basis for concluding that Section 7 of Exhibit C-1 (Amendment No. 1 to the Second Amended CPA) is unambiguous and provides Burford with a prior consent or limited veto right over the settlement proposals, such that Burford is entitled to prevent Sysco from entering into the proposed settlements. This is also the initial hurdle for Burford establishing a likelihood of success on the merits of its claim.[112]

199. Without pre-judging the subsequent merits determination of this issue, the Tribunal majority considers, on a preliminary basis, that Section 7 of Exhibit 1 unambiguously provides for the prior consent right or veto that Burford claims:

i. Section 7(a) states that Sysco shall take reasonable and appropriate actions to maximize proceeds, giving priority to cash proceeds;

ii. Section 7(b) states that Sysco shall immediately notify Burford of any settlement offer and Sysco "shall not accept a settlement

---

[111] Exhibit CLA-67.

[112] As quoted in paragraph 163 above (*Jayaraj v. Scappini*), this element is also described as "*sufficiently serious questions going to the merits*."

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

offer" without Burford's prior written consent, which shall not be unreasonably withheld. As a *prima facie* matter, it is at least apparent that, on the basis of this language, Sysco cannot settle without Burford's prior consent. If there is a dispute whether consent has been unreasonably withheld, this can be the subject of an arbitration – but the plain meaning of the text at least indicates that Sysco must first decline to settle if Burford does not consent.

iii. Section 7(b)(v) further states that Burford shall have no right to exercise control over the independent professional judgment of Sysco's lawyers and shall not seek the imposition of a commercial unreasonable settlement result, but this is not inconsistent with the previous clause, which establishes that Burford does have initial control over Sysco's ability to enter into a settlement agreement. As between Sysco and its lawyers, Sysco can tell its lawyers to settle and Burford cannot tell Sysco's lawyers to settle or not settle – but Sysco can make and has made, as a *prima facie* matter, an agreement with Burford to cede to Burford the initial determination on whether to accept or reject a settlement offer.

iv. Section 7(c) arguably reaffirms Sysco's obligation to adhere to Burford's prior consent right.

v. Sysco's contractual construction argument is that the Section 7(b)(v) consent provision is simply a contractual obligation such that if Burford proves "*that we have entered into a settlement that we shall not have entered into by virtue of the contract, then my client has breached the contract, if they prove all these elements. And they have the remedies available under New York law for breach of a contract. That remedy is your expectation damages that you can prove* […]."[113]

- However, as set out above, the Tribunal majority considers, at this stage of proceedings, that Sysco's reading of

[113] Tr. 1/30 (see also Respondent's Opposition, pp. 49-50: the CPA unambiguously provides that Sysco retains control over its claims).

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

Section 7(b)(v) and the CPA as a whole does not take into account the plain meaning of Section 7, and the arguable availability of specific performance as a remedy in relation to the consent provision in Section 7(b)(v).

200. Since, as a *prima facie* matter, Section 7 of Exhibit C-1 is unambiguous, there is no need to refer to the "resolution of claims" recital in Exhibit C-2, quoted above, which, in referring to Sysco remaining in full control of resolution of claims, is arguably inconsistent with Section 7(b)(v) as an operative term in Exhibit C-1.

201. Because the Tribunal majority concludes that Burford has shown, on a *prima facie* basis, that Section 7(b)(v) confers a prior consent or veto right on Burford, the Tribunal does not need to reach, and declines to address, the competing parol evidence adduced by the Parties concerning the meaning of this provision.

202. However, determining the meaning of Section 7(b)(v) for preliminary injunctive purposes is only part of the decision that the Tribunal must make regarding the "likelihood of success" element of the standard for interim relief. Burford must still show, on a *prima facie* basis, that (i) CPA Section 7(b)(v) is enforceable as a matter of New York law and does not violate New York public policy; and (b) Burford's withholding of consent was not unreasonable.[114]

203. The Tribunal expects to hear much more about the public policy issue at the merits stage. However, the battle of the experts (Wendel, Green, and Issacharoff for Burford and Steinitz for Sysco) at this stage leaves the Tribunal with making the determination that one set of professors has been more persuasive than the other in predicting what a New York court would do when faced with the questions

[114] For preliminary relief purposes, the Tribunal considers that Burford must demonstrate, *prima facie*, that its withholding of consent was not unreasonable; however, this requirement has no bearing on burden of proof issues at the merits stage. The Tribunal notes that it is unclear whether Sysco still pursues a "real-party-in-interest" challenge to the enforceability of the CPA (Respondent's Opposition, §§ 149-150). To the extent that Sysco maintains this position, the Tribunal majority considers that it has been successfully rebutted by Burford (Claimants' Reply, § 146; Issacharoff Second Report, §§ 20-22), for purposes of preliminary relief.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

whether Burford's asserted consent right violates New York champerty law, or federal and state policy encouraging settlement of lawsuits, or public policy and legal ethics codes concerning a client's right to control litigation. With great respect for Professor Steinitz's scholarship, the Tribunal majority nonetheless considers that Burford's experts have successfully shown, at this preliminary stage, that it is likely that Burford's asserted consent right does not fall foul of any champerty or public policy or legal ethics barriers.[115] Professor Issacharoff's general statement in his Second Report identifies the foundational point: "*Every litigant has the autonomy to decide when and whether to settle. Every litigant also has the autonomy to contract that right away unless there is some legal or ethical barrier to doing so.*" Whatever remains of champerty does not appear to pose such a barrier and, as noted below, lawyers' ethical rules do not appear to be relevant given the language of Section 7(b)(v) (prohibiting exercise of control over counsel's independent professional judgment).

204. Professor Wendel, on cross-examination[116] explained that the "*really important thing that has to be protected in a litigation financing transaction is the fiduciary duties owed by counsel to the plaintiff.*" Professor Wendel also observed[117] that what funders are telling the market is that the attorney-client relationship will remain intact, with its integrity. Further,[118] as "*between a lawyer and client, the client has the exclusive authority to make settlement decisions*," and Professor Wendel's further opinion is that if the funding agreement is with the

---

[115] As quoted above, a recital in the CPA states that the Parties are sophisticated and, having received independent legal advice from experienced counsel, "*do not believe that this Agreement or the transactions it contemplates are inconsistent with any relevant law or public policy*." This recital is consistent with Section 29(k), which states that the Parties waive any claim or defense on the basis that the Agreement or contemplated transactions constitute champerty or contravene the public policy of any relevant jurisdiction. In view of the language of Exhibit C-1, Section 7(b)(v) – "*shall not accept a settlement offer without the Capital Providers' prior written consent*" – Sysco would at least have had reason to reassess champerty and public policy matters in March 2022 before signing Amendment No. 1 to the Second Amended CPA.

[116] Tr. 2/13.

[117] Tr. 2/26.

[118] Tr. 2/31-32.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

claim owner and not the law firm, "*there is not the same risk of impact on the lawyer's fiduciary duties to the client*." As Professor Wendel elaborated,[119] "*it's certainly my opinion that a claim-owner can have a contract provision like the one with Burford and not run afoul of the concern that I was talking about earlier*." Professor Wendel acknowledged that there is not a case on point, which is why an expert is needed. As he states in his Report,[120] his opinion, which no court has ruled on one way or the other, is that contractual delegation of control by the claim-owner to the investor is permissible.

205. On redirect examination,[121] Professor Wendel also explained that New York law has a very specific statutory definition of champerty. His further opinion is that Section 7(b)(v), as interpreted by Burford, does not come within that definition and therefore does not violate New York champerty law.

206. Professor Steinitz, on cross-examination[122] agreed that there is no New York court decision holding that a settlement consent right violates New York's champerty statute (she first limited her answer to the litigation funding context, but then said she was not aware of any case where a settlement consent right fact pattern has come before the court.) Professor Steinitz also accepted that she has opined that Burford's interpretation of Section 7(b)(v) violates the animating principles of the prohibition on champerty, but she did not know whether there is any indication in the legislative history of New York's champerty statute that settlement control was an animating principle.

207. Professor Steinitz also accepted[123] that a 2011 opinion from the New York City Bar Association states that a client may agree to permit a

---

[119] Tr. 2/34.

[120] Discussed at Tr. 2/37.

[121] Tr. 2/40.

[122] Tr. 2/128-147.

[123] Tr. 2/143-147.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

financing company to direct the strategy or other aspects of a lawsuit but, absent client consent, a lawyer may not permit the company to influence her professional judgment regarding strategy. However, Professor Steinitz resisted the converse, which is that with client consent, a lawyer may permit the company to influence her decisions concerning settlement. Her resistance was based on the City Bar not being a regulator and not making a pronouncement on what the law currently is. She acknowledged that the document was a formal opinion of the City Bar on the interpretation of New York rules of professional conduct, but she reiterated that the City Bar is not a regulator.

208. Placing the experts' reports and examinations next to each other, in particular those of Professor Wendel and Professor Steinitz, the Tribunal majority concludes, on a *prima facie* basis, that Burford has shown that it is likely that its interpretation of Section 7(b)(v) – which, at present, has never in any analogous iteration been the subject of a New York court decision – would survive a challenge based on champerty or public policy or legal ethics grounds. Professor Wendel has persuasively shown that the narrow New York law definition of champerty would not capture Section 7(b)(v), and Professor Wendel and the New York City Bar have persuasively shown that legal ethics rules pose no bar to Section 7(b)(v). As for public policy, Sysco has thus far not adduced an effective rebuttal to Professor Issacharoff's opinion, quoted above, that every litigant has the autonomy to contract away its right to decide whether to settle, absent a legal or ethical barrier (no legal or ethical barrier having been demonstrated by Sysco). Accordingly, the Tribunal majority finds that Burford's claim of likelihood of success on the merits on the question of legal validity and enforceability of Section 7(b)(v) is sufficiently shown.

209. The remaining issue on this element of the New York preliminary injunction standard is whether Burford has established, on a *prima facie* basis, that its withholding of consent was not unreasonable.

210. The pertinent points that Burford makes on this issue are summarized at paragraph 148 of its Reply: (a) Burford's information was

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

that the proposed settlements were significantly lower in value [redacted]; (b) Sysco's external counsel expressed the view that the value was too low; and (c) the proposed amounts are below the floor that Sysco previously had set. Further, Burford contends that it correctly doubted that [redacted].

211. The evidence on all of these points will of course need to be explored in detail at the merits trial.[124] However, the examinations of Ms. Daley and Mr. Flynn at the PI Hearing[125] are helpful in assessing whether, on this issue, Burford has met the requirements for injunctive relief.

212. Ms. Daley testified [redacted]. Accordingly, this was the settlement range that Burford considered to be appropriate and which Sysco's proposed settlements fell well below. [redacted].

213. Ms. Daley also explained[126] how Burford factored in the criminal antitrust cases into the valuation of claims, and she commented that the individual acquittals affected timing expectations but did not impair value. She rejected the proposition that Burford knew, before commencing this arbitration, that [redacted] class settlement

[124] Moreover, if evidence subsequent to September 2022 is determined to be relevant by the Tribunal at the merits stage, the opinion evidence of Burford's expert, Mr. Kenny, *e.g.*, will need to be considered. On cross-examination, Mr. Kenny stated that what he attempted to do was to say, "*what would a diligent plaintiff attempt to do*" in circumstances where "*there are USD 21.9 billion of purchases in a 11-year period where the judge has already said direct purchasers have suffered injury*."

[125] Daley: Tr. 1/144-178; Flynn: Tr. 1/185-266.

[126] Tr. 1/158.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

was for [redacted] of sales, but the evidence on this point suffered from significant redactions. Similarly, as to settlement of chicken claims, [redacted]"

214. Mr. Flynn acknowledged that in June 2022, he wrote to Ms. Daley that Sysco would not entertain settlements for [redacted] at lower than [redacted] (for chicken, pork, beef). However, when Mr. Flynn approached [redacted], his demand was only [redacted]. He had difficulty[127] explaining how Sysco expected to achieve a [redacted] resolution by only starting at [redacted]. He further stated that when [redacted] came back at [redacted], he "pushed back" but could not identify Sysco's counteroffer, other than to say he needed [redacted]. However, [redacted] stayed at [redacted] and it was then clear to Mr. Flynn that "we'd hit a wall." Mr. Flynn also confirmed that he believed [redacted] was an important part of the settlement with [redacted]. However, he accepted that [redacted], and such settlement arrangements (including commercial considerations) were common.

215. Mr. Flynn accepted, in relation to [redacted], that he told Burford that his floor was [redacted], and he subsequently agreed to [redacted]. He acknowledged, after some hesitancy, that Ms. Daley expressed resistance to the [redacted] figure.

216. Mr. Flynn also provided some further background on the views of Sysco's external counsel, when that counsel stated in a meeting with Burford that he believed that the proposed Broilers settlement was too low.

217. The Tribunal, by a majority, concludes that placing Ms. Daley's evidence next to Mr. Flynn's is sufficient for Burford to establish, on a

[127] Tr. 1/234.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

prima facie basis, that its withholding of consent to Sysco's settlement proposals was not unreasonable. [redacted]. Further, [redacted]. Further, the [redacted] settlement proposal was below the floor that Mr. Flynn had identified to Ms. Daley, and Mr. Flynn has not provided a reasonable explanation for going beneath the floor. Finally, even Sysco's outside counsel expressed the view that the Broilers settlement value was too low.

218. Thus, the Tribunal finds, by a majority, that Burford has also satisfied all aspects of the "likelihood of success" element in the New York law preliminary injunction standard.

VII.B.3 Balance of Equities

219. Sysco argues[128] that a balancing of the equities favors Sysco for the following reasons:

i. If the injunction is granted, Sysco will have to continue litigating against its key suppliers in the hope, which is likely futile, that a higher settlement offer will appear, whereas any harm that Burford might suffer without an injunction would be economic and readily compensable with monetary damages.

ii. Sysco is at daily risk of the settlement offers being withdrawn by [redacted] and [redacted], both of which have stated that if Sysco is enjoined, they will withdraw the offers and proceed to trial.

iii. Sysco has a right, pursuant to public policy, not to be forced to continue to litigate against its will. Continuing to litigate in the coming months will entail engaging in discovery depositions that will inevitably create hostility between Sysco and its suppliers.

[128] Respondent's Opposition, pp. 107-114; Respondent's Rejoinder, pp. 69-72.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

iv. Burford's start-and-stop injunctive relief tactics and Burford's resistance to Sysco being able to inform [redacted] of these tactics have delayed an early resolution of this issue, thereby causing harm to Sysco's efforts to negotiate with [redacted] and [redacted].

v. The reason that the Parties entered into the March 2022 amendment is irrelevant to any issue before the Tribunal, as is the "unclean hands" doctrine.

vi. Without good supplier relationships, Sysco cannot grow its business.

220. Burford weighs the balance very differently:[129]

i. Burford holds [redacted] ([redacted] of proceeds; funding the litigation) of the claims.

ii. Sysco's complaint about being forced to continue to litigate is nothing more than a complaint against the status quo – which does not weigh against maintaining the status quo. Sysco has been engaged in litigation for nearly five years.

iii. As a predicate matter, Sysco has no basis to complain about continuing to litigate: the consent provision (Section 7(b)(v)) was a remedy for Sysco's prior blatant breaches of the CPA's prohibition against assignment of claims to third parties. This was part of Sysco's strategy to appease its key business relationships at Burford's expense.

iv. Withdrawal of settlement offers would not materially affect Sysco: Burford holds [redacted] of the economic benefit of the claims, so [redacted].

v. Sysco's belief that that the settlement offers will be withdrawn if an injunction is issued is not credible. [redacted]

[129] Claimants' Reply, pp. 85-88.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

[redacted]

vi. Burford did not sleep on its rights. Sysco first told Burford that an application would be premature. Sysco has now switched positions and says the application is too late. Sysco's tactics are the problem here, not those of Burford.

221. The Tribunal majority concludes, on the basis of the record to date, that equity favors Burford's preliminary injunction request.

222. The first point that moves the scale in Burford's favor is the background to the March 2022 Amendment of the CPA. This is not a matter of "unclean hands," nor does it matter whether it is directly relevant to the interpretation of the CPA. Rather, the relevant point is that Sysco accepted a consent provision and relinquished [redacted] proceeds to Burford because of Sysco's disregard – which Sysco has not denied – of the assignment provision in the original CPA. Equity, here, is not about Sysco having been a "bad actor"; instead, as a matter of equity, Sysco's continuing the litigation to maximize proceeds that Burford largely will receive is consistent with decisions that Sysco previously made and an agreement (the March 2022 Amendment) it entered into as a consequence of those decisions.

223. Second, as Burford observes, Burford, not Sysco, bears the direct economic risk of withdrawn settlement offers.

224. Third, Burford is funding the litigation that an injunction would require Sysco to continue.

225. Fourth, Sysco's principal point is that continuing the litigation will endanger its relationships with key suppliers. However, to the extent that is correct (given that the litigation has already spanned several years), that is why Sysco has little incentive to do anything other than settle for amounts that would not necessarily be "top dollar," particularly because Burford will receive [redacted] of any proceeds.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

226. Fifth, it is not apparent that an injunction will lead to the disappearance of settlement offers, particularly higher settlement offers, for the reasons given by Burford.

227. Sixth, as set out above, absent the injunction, the irreparable harm to Burford has been demonstrated.

228. Accordingly, the Tribunal, by a majority, finds that the "balance of equities" element of the New York preliminary injunction standard favors Burford.

VIII. Order

229. For the foregoing reasons, the Tribunal, by a majority, finds that Claimants have satisfied the New York law standard for a preliminary injunction.

230. The Tribunal therefore ORDERS that:

i. Until the Tribunal adjudicates Claimants' claim for a permanent injunction or unless otherwise permitted by the Tribunal or unless consented to in writing by Claimants, Respondent shall not enter into the two Proposed Settlements with [redacted] and [redacted].

ii. Pursuant to Section 7(b)(v) of Exhibit C-1, Respondent shall provide immediate notice by email to Claimants of any settlement offer made by an Adverse Party.

iii. The Parties are at liberty to apply for any clarification they may seek regarding this Order.

iv. This Order supersedes the TRO issued on 14 December 2022, which is vacated.

v. Costs are reserved.

231. Further, the Tribunal directs the Parties to confer on possible dates for a case management conference ("**CMC**"), with the CMC preferably to be held before the end of March 2023. The Parties shall inform the Tribunal by 15 March 2023 of such dates. The Parties shall

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

also confer on a merits "fast-track" procedural timetable, to be discussed at the CMC. At the CMC, the Tribunal will want to hear from the Parties on, *inter alia*, issues such as burden of proof and the scope of evidence needed in the merits proceeding, in view of the ruling by Judge Carter in *IGT v. HIGH 5 GAMES, LLC*, 380 F. Supp. 3d 390 (S.D.N.Y. 2019).

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

Date: 10 March 2023

Seat of Arbitration: New York, New York

J. William Rowley KC
Co-Arbitrator

John J. Kerr, Jr.
Co-Arbitrator

Laurence Shore
Presiding Arbitrator

This Order may be signed in counterparts, each of which shall be an original, with the same effect as if the signatures were upon the same instrument.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

Date: 10 March 2023

Seat of Arbitration: New York, New York

J. William Rowley KC
Co-Arbitrator

John J. Kerr, Jr.
Co-Arbitrator

Laurence Shore
Presiding Arbitrator

This Order may be signed in counterparts, each of which shall be an original, with the same effect as if the signatures were upon the same instrument.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

Dissent of John J. Kerr, Jr., Co-Arbitrator

1. I disagree that the circumstances of this case warrant the issuance of a preliminary injunction preventing Sysco from agreeing to the Proposed Settlements.

2. A party seeking a preliminary injunction under New York law is required to establish not only that the alleged harm is irreparable in the absence of an injunction, but also that the alleged threat of irreparable harm is not remote or speculative, but is actual and imminent. *Tom Doherty Associates, Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 37 (2d Cir. 1995); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.* 596 F.2d 70, 72 (2d Cir. 1979) (per curium); *USA Network v. Jones Intercable, Inc.*, 704 F.Supp. 488, 491 (SDNY 1989), *citing State of New York v. Nuclear Reg. Comm'n.* 550 F.2d 745 (2d Cir. 1977). Burford's claim in this case is for monetary damages it will suffer if Sysco enters into the Proposed Settlements. It is generally recognized that monetary damages by their nature are not irreparable. Here Burford contends that the prospect of a monetary award cannot be adequate compensation because its losses will be too difficult or impossible to calculate.

3. Burford's claim for damages articulates two kinds of damages. The first is that the amounts of the Proposed Settlements are lower than the value of the antitrust claims in the two litigations at issue. Burford's damages would be the difference between the Proposed Settlements and what Burford contends should be the settlement amounts. The second is that if the Proposed Settlements are too low, they will have a ripple effect decreasing future settlements in cases where Burford is a litigation funder, [redacted] Burford's damages would be the difference

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

between settlements in such cases and what the cases would have settled for but for the Proposed Settlements. These are the damages to which the test of irreparable harm must be applied.

4. The first kind of damage can be readily calculated. [redacted]. The Tribunal will have to weigh that market evidence, but the damage calculation is simple math. The second kind of damage is more challenging to calculate. There are two reasons. First, those settlements have not occurred. An unknown number of those cases may not settle and instead go to trial, and for those that do settle the amounts of the settlements will not be known until they occur, which could be years from now. In short, the alleged damages are remote. Second, many factors figure into a settlement, including the parties' particular situations, counsel's judgments about the strengths and weaknesses of a case, developments in the particular case including court rulings, the stage of the proceeding and so on. Proving causation – that the settlement amount in such cases is too low *because* of the Proposed Settlements here – will be a significant challenge. In those cases where Sysco is the plaintiff and Burford is the litigation funder, apparently a relatively small number of cases, both parties will have access to information about the settlements and Burford has the same ability to withhold consent to a settlement that it has here in this case. The damages calculation may be very similar to that in this case. [redacted] These alleged damages in this second category are speculative. In my view, the damages alleged by Burford here, like the alleged damages examined by the court in *Tom Doherty*, are either easily calculable or are too remote and speculative to qualify as irreparable harm.

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

5. Because I find that Burford has failed to establish the essential element of irreparable harm, there is no need for me to assess whether Burford has established that it is likely to succeed on the merits of its claim at the merits hearing. However, I note that the evidence put forward by Sysco at the preliminary injunction hearing about the market rate for settlements of chicken antitrust claims against [redacted] by large purchasers similar to Sysco was more robust and more compelling than the fragmentary and undocumented market evidence put forward by Burford. In addition, the [redacted]. Burford will have to address this evidence to prevail on its claim at the merits hearing.

6. With respect to the balance of the equities in this case, it is important to consider the impact of the requested injunction on the litigations pending in two U.S. federal courts. This Tribunal is being asked to enjoin the two settlements reached by the parties in those cases that would resolve those cases without a trial. Those parties have been litigating the cases for some three years, and, according to Sysco, there have been adverse developments in the protein antitrust cases that inform its judgement that the Proposed Settlements are reasonable. The requested injunction would have the effect (when considered together with the funding Agreement which requires Sysco to prosecute the cases until there is a settlement or a judgment) of compelling not only Sysco but the defendants in those cases to continue litigating against each other even though they are ready to execute the Proposed Settlements. Not only will the parties be compelled to continue litigating, but the federal courts will have to continue to devote judicial resources

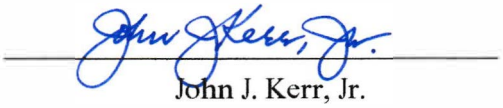
This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.

CAUTION: THIS DOCUMENT HAS NOT YET BEEN REVIEWED BY THE COUNTY CLERK. (See below.)

to these cases which may now go to trial notwithstanding the parties' desire to settle. The waste of resources is palpable. The alternative, to award compensatory damages to Burford in this arbitral proceeding if it is determined that its refusal to consent to these settlements was not unreasonable, avoids the need to compel the parties to continue litigating cases they have agreed to settle. As indicated above, Burford's main damage claim can be readily calculated, and its secondary consequential damage claim is too remote and speculative to constitute irreparable harm for purposes of a preliminary injunction. To issue the requested injunction would unwisely involve this Tribunal in the federal court proceedings, a result that can and should be avoided if possible.

7. I would deny the application for a preliminary injunction.

Date: 10 March 2023



John J. Kerr, Jr.
Co-Arbitrator

This is a copy of a pleading filed electronically pursuant to New York State court rules (22 NYCRR §202.5-b(d)(3)(i)) which, at the time of its printout from the court system's electronic website, had not yet been reviewed and approved by the County Clerk. Because court rules (22 NYCRR §202.5[d]) authorize the County Clerk to reject filings for various reasons, readers should be aware that documents bearing this legend may not have been accepted for filing by the County Clerk.