

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14 CVS 11860

ALLSCRIPTS HEALTHCARE, LLC)
Movant,)
v.)
ETRANSMEDIA TECHNOLOGY, INC.,)
Respondent.)

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

THIS MATTER comes before the Court on Allscripts Healthcare, LLC's ("Allscripts") Motion for Temporary Restraining Order and Preliminary Injunction ("Motion"). On December 16, 2015, the Court held a hearing on the Motion.

THE COURT, having considered the Motion, briefs in support of and opposition to the Motion, arguments of counsel, the record evidence filed by the parties, and other appropriate matters of record, FINDS and CONCLUDES as follows.

Factual and Procedural Background

1. Allscripts is a healthcare-related software provider with its primary offices in Raleigh, and in Chicago, Illinois. Among the products developed by Allscripts are practice management and electronic health record software systems for physician practices, including the MyWay and Professional software products. Allscripts' software offerings enable healthcare providers to comply with federal meaningful use requirements.

2. Etransmedia Technology, Inc. ("Etransmedia") delivers similar software programs to medical practices and health systems.¹ Etransmedia resold certain Allscripts products, including Allscripts' "MyWay" and "Professional" products, together with

¹ Agrawal Aff. (June 25, 2015) ¶ 3. Vikram Agrawal, CEO of Etransmedia, has submitted two affidavits bearing the same date, one of which is the subject of a pending motion to seal and is filed provisionally under seal. The unsealed version, cited here, is hereinafter referred to as "Agrawal Aff.," while the provisionally sealed version is cited as "Second Agrawal Aff."

additional Etransmedia services. Etransmedia would purchase product licenses from Allscripts and then resell them to end users.

3. On April 10, 2008, Etransmedia executed the Misys Partner Agreement ("Partner Agreement"). The Partner Agreement stated that it was entered into to govern purchase, promotion, resale, and hosting of "Products and/or Services," and provided the terms under which Etransmedia's would sell and service products, specifically including MyWay and several other products.² The Partner Agreement did not expressly mention the Professional product. Allscripts and Etransmedia subsequently agreed that Etransmedia would also sell the Professional product, but the parties never entered into a separate written agreement for sale of Professional. The Partner Agreement contained an arbitration clause, through which the parties agreed that any dispute "in connection with the negotiation, execution, interpretation, performance or non-performance" of the Partner Agreement would be subject to arbitration "in accordance with the law of the state of North Carolina and the rules of the American Arbitration Association."³

4. Etransmedia sold MyWay licenses from 2008 through 2012, and sold Professional licenses from 2009 through 2015.⁴ Until 2014, Allscripts requested, and Etransmedia agreed, that Etransmedia would pre-purchase MyWay and Professional licenses in bulk for resale. Allscripts required a reseller order form for each sale. The same form was used regardless of which product was being sold, and both products were occasionally sold on the same form.⁵

² Allscripts is a successor in interest to Misys Healthcare Systems, LLC ("Misys"). *See* Agrawal Aff. ¶ 5. Allscripts succeeded to Misys' right and obligations under the Partner Agreement in October, 2008,

³ Etransmedia Arbitration Demand ("Demand"), Ex. 1, ¶ 19(d).

⁴ Agrawal Aff. ¶ 6.

⁵ *Id.* at ¶ 7.

5. On October 5, 2012, Allscripts announced that it would phase out and discontinue the MyWay product. At the time of the announcement, Etransmedia had made a substantial investment in MyWay, had an existing customer base using the MyWay product, and held a substantial number of pre-purchased but unsold MyWay licenses. Accordingly, Etransmedia objected to Allscripts discontinuation of MyWay. Ultimately, the parties were not able to resolve the issues related to the MyWay product.

6. On August 7, 2013, Allscripts initiated an arbitration proceeding against Etransmedia ("First Arbitration") pursuant to the arbitration agreement in the Partner Agreement.⁶ In the arbitration Allscripts sought "resolution of 'any and all disputes between' " the parties.⁷ In response, Etransmedia asserted nine counterclaims.⁸ On August 14, 2014, an arbitration panel issued an award in favor of Etransmedia on its counterclaims of over \$9.7 million. Allscripts subsequently filed an action in Wake County Superior Court to modify the arbitration award, and Etransmedia filed a cross-action to enforce the award. On October 28, 2014, the Honorable Robert H. Hobgood entered an Order enforcing the award of the arbitration panel.

7. Following the arbitration award, Etransmedia alleges that:

Allscripts began taking several steps that frustrated Etransmedia's work on Professional. For example, Allscripts began refusing to upgrade Etransmedia's Professional clients' software, declined to activate unsold Professional licenses in Etransmedia's inventory, and refused to provide ancillary products to any of Etransmedia's professional clients. When Etransmedia protested, Allscripts claimed that its non-renewal of the Partner Agreement justified its actions. When clients complained about the impact of Allscripts' failure to update their Professional software, Allscripts demanded full retail payment up front and, for some clients, amended order forms with changed terms, including the elimination of mandatory arbitration. For several months, Etransmedia attempted to resolve the issues through direct discussions with Allscripts. Etransmedia was unsuccessful.⁹

⁶ AAA Case No. 31 20 1300 0233

⁷ Final Arbitration Award ¶ 14.

⁸ *Id.* at ¶¶ 5, 15.

⁹ Cons. Mem. Law Opp. Decl. and Inj. Relief 7.

8. On or about May 18, 2015, Etransmedia initiated a second arbitration¹⁰ proceeding ("Second Arbitration") against Allscripts under the arbitration agreement in the Partners Agreement.¹¹ As in the First Arbitration, Etransmedia contends that Allscripts engaged in deceptive conduct to induce Etransmedia into purchasing Professional software licenses, made additional false statements, and attempted to steer customers away from Etransmedia.¹² Etransmedia's demand in the Second Arbitration alleges, for the most part, the same claims with regard to the Professional product as Etransmedia raised regarding MyWay in the First Arbitration.

9. On June 9, 2015, Allscripts filed its Motion for Declaratory and Injunctive Relief ("Allscripts' Motion for Relief") in this Court seeking a declaration that the claims raised by Etransmedia in the Second Arbitration "are not subject to compulsory arbitration and are barred by *res judicata*."¹³ Subsequently, Etransmedia filed a Motion to Compel Arbitration (together with Allscripts' Motion for Relief, "Initial Motions"), contending that its claims are subject to arbitration and to the extent Allscripts raises a *res judicata* challenge to those claims, that challenge should be heard by the arbitration panel and not by this Court.¹⁴

10. On December 3, 2015, the panel of arbitrators assigned to the Second Arbitration issued a report and scheduling order.¹⁵ The panel scheduled a telephone hearing with the parties for December 29, 2015 to hear argument regarding the "jurisdictional issues" raised by Allscripts: "(1) that the Claimant's claims in this arbitration are barred by *res*

¹⁰ AAA Case No. 01-15-0003-5566.

¹¹ *See* Second Agarwal Aff. (June 25, 2015), Ex. R.

¹² *See generally id.*

¹³ Allscript's Mot. Relief 5.

¹⁴ Shortly after the filing of the Initial Motions, the parties filed their Joint Motion for Stay, which was granted by the Court and resulted in a stay of proceedings until late October 2015.

¹⁵ Mot. TRO and Prelim. Inj., Ex. 1.

judicata, allegedly because those claims have already been decided in a previous arbitration between these parties; and (2) that the claims asserted in this arbitration are not arbitrable, allegedly because they fall outside the scope of the parties arbitration agreement."¹⁶

11. On December 8, 2015, Allscripts filed the instant Motion. In the Motion, Allscripts seeks an order "barring Etransmedia from proceeding further with arbitration of the parties' dispute, including jurisdictional issues currently set for briefing and hearing before the AAA Panel on December 29, 2015" until this Court has resolved the merits of this action.

Discussion

12. As North Carolina courts have long recognized, a party may obtain a temporary restraining order or a preliminary injunction, "only if [the movant is] able to show likelihood of success on the merits of [its] case and (2) [the movant is] likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of [movant's] rights during the course of litigation." *Old Battleground Props. v. Cent. Carolina Surgical Eye Assocs., P.A.*, 2015 NCBC LEXIS 19, at *18 (quoting *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401 (1983)). Under this standard, "injury is irreparable where the damages are estimable only by conjecture, and not by any accurate standard." *A.E.P. Indus.*, 308 N.C. at 407. The burden is on the movant to establish its right to such relief, and such relief "should not be lightly granted." *Old Battleground Props.*, 2015 NCBC LEXIS 19, at *18 (internal citations omitted). Ultimately, the issuance of a preliminary injunction "is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *A.E.P. Indus.*, 308 N.C. at 400 (internal citations omitted).

¹⁶ *Id.*

13. Allscripts contends that the Motion should be granted because the claims raised in the Second Arbitration by Etransmedia are not subject to arbitration. In determining whether a dispute is subject to arbitration, North Carolina courts have looked, first, to "whether the parties have a valid agreement to arbitrate, and[, second, to] whether the subject of the dispute is covered by the arbitration agreement." *Bass v. Pinnacle Custom Homes, Inc.*, 163 N.C. App. 171, 175 (2004).¹⁷ There does not appear to be any dispute between the parties that, if the parties have a valid agreement to arbitrate disputes related to the Professional licenses, all of Etransmedia's claims in its arbitration demand would fall under such agreement. Instead, the Court must consider whether the parties had a valid agreement to arbitrate Professional product license disputes.

a. Likelihood of Success on the Merits

14. Allscripts bears the burden of showing a likelihood of success on the merits on its underlying Motion for Relief. Accordingly, Allscripts must demonstrate a likelihood of success on its declaratory action that Etransmedia's claims are not subject to arbitration and are barred by res judicata.

15. There is no dispute that the parties entered into a binding arbitration agreement in the Partner Agreement, and that the parties previously arbitrated a dispute between themselves regarding the MyWay product under that agreement. Allscripts, however, contends that Etransmedia's claims in the Second Arbitration regarding the Professional product "do not fall within the scope of the arbitration agreement" in the Partner Agreement.¹⁸ Allscripts argues that Etransmedia's Chief Executive Officer testified at the

¹⁷ To the extent that it is germane to consideration of the Motion, the Court concludes that the NCRUAA applies to this case because the parties agreed that both the Partner Agreement as a whole, and specifically the arbitration agreement, would be governed by North Carolina law. Partner Agreement §§ 19(c), (d). *Volt Information Sciences, Inc. v. Board of Trustees*, 484 U.S. 468 (1989).

¹⁸ Allscripts' Mem. Supp. Mot. TRO and Prelim. Inj., *passim*.

First Arbitration that he was not aware of any written agreement in place that expressly governed the purchase and resale of Professional licenses, and that this testimony is an admission that the arbitration provision of the Partner Agreement did not cover Etransmedia's claims.¹⁹ Allscripts also argues that the claims are not arbitrable because the Partner Agreement was terminated in April 2014.

16. As an initial matter, Allscripts reads far too much into the testimony at the First Arbitration. Etransmedia's CEO's merely testified in response to specific questions that the parties had not reduced to writing a separate agreement regarding sales or data hosting for the Professional product. The testimony presented to the Court does not state, or suggest, that he testified that the parties did not use the Partner Agreement to govern their relationship regarding the Professional product nor that the arbitration provision in the Partner Agreement could not be applied to disputes about the Professional product.

17. With regard to the termination of the Partner Agreement, Allscripts' letter notifying Etransmedia of the termination implies that Allscripts believed the Partner Agreement governed the parties' relationship on the Professional product.²⁰ The letter refers to the Partner Agreement and to various addenda to that agreement, including an addendum of August 31, 2010, entered into well after Etransmedia had started selling the Professional product. The letter stated that "effective April 10, 2014, . . . Etransmedia shall not be permitted to purchase additional products or services from Allscripts pursuant to the Partner

¹⁹ *Id.* at 5.

²⁰ Second Agrawal Aff., Ex. I. This exhibit is currently the subject of Etransmedia's pending Motion to Seal. The Court has reviewed this exhibit and concludes that the exhibit does not contain any proprietary or other confidential information such that would overcome the presumption that Court records are open to the public. *See Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 463 (1999). Accordingly, to the extent Etransmedia's Motion to Seal seeks to seal Exhibit I to the Second Agrawal Affidavit under seal, that motion is DENIED. The Court will consider the remainder of that motion, as well as Allscripts' Motion to Seal, in due course.

Agreement" (emphasis added), and did not limit such products or services to MyWay.²¹ The letter broadly reminded Etransmedia of its "existing obligations arising out of its sale of Allscripts' product licenses to existing end users." Most significantly, the notification letter reminded Etransmedia to replace existing MyWay licenses with Professional licenses pursuant to the terms of "the August 31, 2010 Addendum."²² The letter suggests that Allscripts considered the Partner Agreement and its addenda to be the agreement under which the parties' relationship, including sales and service of the Professional product, was governed.

18. The other record evidence also shows that Allscripts treated the Partner Agreement as applying to Etransmedia's purchase and resale of Professional licenses. For example, in internal emails, Allscripts' corporate counsel and other officials approved that sale of Professional licenses pursuant to the terms of the Partner Agreement after it was discovered that the parties had not entered into an agreement expressly covering the Professional product.²³

19. In addition, Allscripts itself broadly characterized the Partner Agreement in the First Arbitration as governing the parties' business relationship, without any limitation to the MyWay product.²⁴ In the First Arbitration, Allscripts sought a declaration from the arbitration panel regarding the amount owed by Etransmedia related to Professional license sales, and further requested that any award in the First Arbitration be offset by that amount.²⁵ Allscripts contention in this action that disputes regarding the Professional

²¹ *Id.*

²² *Id.*

²³ *See* Allscripts' Mot. Relief, Ex. D, First Arb. Ex. 17.

²⁴ *See* Allscripts' Mot. Relief, Ex. B, Allscripts' Pre-Hearing Memorandum 6 ("Since April 10, 2008, Allscripts' and Etransmedia's relationship has been governed by a Partner Agreement entered into between Misys and Etransmedia on that date . . .").

²⁵ Allscripts' Mot. Relief, Ex. B., Allscripts' Post-Hearing Memorandum 30.

product are not within the scope of arbitration agreement appears to the Court to be inconsistent with its position in the First Arbitration. The Court concludes that Allscripts has shown a likelihood of success on its position that the claims raised by Etransmedia in the Second Arbitration are not within the scope of the arbitration agreement contained in the Partner Agreement.

20. Allscripts also argues a number of the claims Etransmedia's raised in the Second Arbitration were, or could have been, actually litigated in the First Arbitration and are barred by the doctrine of *res judicata*. Allscripts contends that it is for this Court, and not the arbitration panel, to decide whether *res judicata* applies to these claims. The Court disagrees.

21. In support of its argument, Allscripts cites two North Carolina appellate cases holding that the question of whether *res judicata* applies to bar an arbitration proceeding is for the trial court and not the arbitrator. *See C & O Dev. Co. v. Am. Arbitration Ass'n*, 48 N.C. App. 548, 552 (1980); *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 23, (1985). Those cases, however, were decided prior to North Carolina's adoption of the Revised Uniform Arbitration Act ("RUAA"). North Carolina's RUAA "governs an agreement to arbitrate made on or after January 1, 2004." N.C. Gen. Stat. § 1-569.3(a) (hereinafter, references to the General Statutes will be to "G.S."). Section 6(c) of the RUAA provides that "[a]n arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable." G.S. § 1-569.6(c). This change was intended to bring the North Carolina Act in line with the FAA on this issue. The Official Comment to Section 6(c) explains that the provision was

intended to incorporate the holdings of the vast majority of state courts and the law that has developed under the FAA that, in the absence of an agreement to the contrary, issues of substantive arbitrability, i.e., whether a dispute is encompassed by an agreement to arbitrate, are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits,

notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.²⁶

Consistent with the conclusion that issues of procedural arbitrability are for the arbitrator, our court of appeals has specifically held that, "in the context of the FAA, the issues of *res judicata* and collateral estoppel must be decided initially by the arbitrator and not the trial court." *WMS, Inc. v. Alltel Corp.*, 185 N.C. App. 86, 92 (2007).

22. Accordingly, given the language of G.S. § 1-569.6(c), as informed by the purpose of that section of the RUAA to bring the North Carolina statute in line with decisions under the FAA, the Court concludes that Allscripts *res judicata* arguments must be decided in the first place by the arbitration panel.

23. Allscripts also contends that Etransmedia cannot arbitrate claims based on disputes arising after Judge Hobgood entered final judgment on the First Arbitration²⁷ because those disputes arose after Allscripts terminated the Partner Agreement effective April 10, 2014.²⁸ Allscripts, however, gave scant attention to this argument and provides the Court with no authority in support of the contention. More significantly, Allscripts has the burden of proof in seeking a preliminary injunction and did not provide the Court with any evidence that would support a conclusion that Allscripts is likely to succeed on this contention. Instead, as discussed *supra*, the evidence before the Court establishes that when Allscripts terminated the Partner Agreement it also sought to continue to hold Etransmedia to its obligations under the Agreement with regard to Etransmedia customers holding existing Professional and MyWay licenses. In addition, the evidence tends to show that Allscripts and Etransmedia continued some type of relationship with regard to the

²⁶ Revised Uniform Arbitration Act § 6, cmt. 2.

²⁷ Entered November 18, 2014.

²⁸ Allscripts' Mem. Supp. Decl. and Inj. Relief 14.

Professional product into at least 2015.²⁹ Allscripts, however, has not presented evidence that the parties did not continue to operate under the Partner Agreement with regard to the Professional licenses following the termination of the MyWay relationship. The Court concludes that Allscripts has not carried its burden of demonstrating a likelihood of success on this argument.

24. Ultimately, Allscripts has failed to satisfy its burden of showing a likelihood of success on the merits such that it would be entitled to temporary and preliminary injunctive relief.

b. Irreparable Harm

25. Even assuming that Allscripts had made a showing of likelihood of success, the Court concludes that Allscripts has failed to show it would suffer irreparable harm absent the issuance of an injunction. First, while forcing a party to arbitrate a dispute absent an agreement to do so could constitute "*per se* irreparable harm,"³⁰ Allscripts has failed to satisfy its burden of showing the absence of an agreement to arbitrate and cannot establish such harm here.

26. Second, Allscripts' contention that it may suffer irreparable harm should the arbitration panel rule on its jurisdictional arguments and immediately proceed to consider either the interim relief sought by Etransmedia or the merits of Etransmedia's demand also must fail. In such a circumstance, Allscripts would only suffer harm if it were being forced to arbitrate issues which it had not agreed to arbitrate, and, as noted above, Allscripts has failed to make a sufficient showing of the absence of an agreement at this stage of the proceeding. Allscripts will have an opportunity to present its arguments regarding jurisdiction to the

²⁹ See Agrawal Aff. ¶ 6.

³⁰ See *Cold Springs Ventures, LLC v. Gilead Sciences, Inc.*, 2014 NCBC LEXIS 10, at *15 (citing *Paine Webber, Inc. v. Hartmann*, 921 F.2d 507, 514 (3d Cir. 1990)).

AAA panel, and obviously will be able to defend Etransmedia's claims on the merits if the panel does not rule in its favor on the jurisdictional questions. To the extent Allscripts argues that the arbitration panel "may" proceed to substantive issues, it has not presented sufficient evidence to raise such a concern beyond speculation or otherwise justify the "extraordinary measure" of entering a preliminary injunction. *See A.E.P. Indus., Inc.*, 308 N.C. at 401. Accordingly, the Court concludes that Allscripts has failed to show irreparable harm in the absence of injunctive relief.

27. Ultimately, for the reasons stated above, the Court concludes that Allscripts has failed to satisfy its burden of showing its entitlement to injunctive relief at this stage and, therefore, the Motion should be DENIED.

THEREFORE, IT IS ORDERED that Allscripts' Motion for Temporary Restraining Order and Preliminary Injunction is DENIED.

This the 22nd day of December, 2015.

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