UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ARGONAUT INSURANCE COMPANY,

Plaintiff,

v. **Case No. 6:23-cv-1378-CEM-LHP**

CM GLAZING, LLC, BASSO CM GLAZING HOLDINGS, LLC, GELLEIN CM GLAZING HOLDINGS, LLC, WALTER BASSO, JR., WALTER BASSO, SR., CAROL A. BASSO, BASSO ENTERPRISES, LLC, and 20 NASHVILLE, LLC,

Defendants.
_____/

ORDER

THIS CAUSE is before the Court on Plaintiff's Motion to Compel Deposit of Collateral Security and Books and Records ("Motion," Doc. 33), to which Defendants filed a Response in Opposition (Doc. 41). The Court held an Evidentiary Hearing on the Motion. (*See generally* Min. Entry, Doc. 46; Hr'g Tr., Doc. 51). For the reasons stated herein, the Motion will be granted.

I. BACKGROUND

Plaintiff is an insurance company that issues construction bonds and stands as a surety for contractors. (Compl., Doc. 1, at 5). Defendant CM Glazing, LLC d/b/a Acme Glass Contract Glazing ("CM Glazing") is a commercial glass company that performs work on construction projects and often requires surety bonds to secure its payment and performance obligations. (*Id.*). Defendant Walter Basso, Jr. ("Basso, Jr.") is the president of CM Glazing. (Doc. 51 at 66:12–13).

On July 10, 2017, CM Glazing, Basso, Jr., and Defendants Basso CM Glazing Holdings, LLC, Gellein CM Glazing Holdings, LLC, Basso Enterprises, LLC, 20 Nashville, LLC ("20 Nashville"), Walter Basso, Sr. ("Basso, Sr."), and Carol A. Basso (collectively, the "Indemnitors") entered into a General Agreement of Indemnity (the "Agreement," Doc. 33-2) with Plaintiff, and in Plaintiff's favor, as a condition for the issuance of surety bonds for CM Glazing's involvement in construction projects, (Doc. 1 at 5). The Agreement applies to all bonds Plaintiff has executed on behalf of CM Glazing, including all bonds executed before and after the Agreement. (*Id.*).

As part of the Agreement, the Indemnitors agreed to "indemnify, hold harmless, and exonerate [Plaintiff] from and against any and all Losses, as well as any other expenses that [Plaintiff] may incur or sustain as a result of or in connection with the furnishing, execution, renewal, continuation, or substitution of any

Bond(s).” (Doc. 33-2, at 2). The Indemnitors also agreed to a collateral security provision, which provides that:

> [i]n lieu of fully collateralizing the Bonds prior to their issuance and in consideration for the execution, and/or delivery of one or more Bonds, Indemnitors agree to deposit with [Plaintiff], upon demand, an amount of money or other collateral security acceptable to [Plaintiff], as soon as liability exists or is asserted against [Plaintiff], whether or not [Plaintiff] shall have made any payment therefor, equivalent to such amount that [Plaintiff], in its sole judgment, shall deem sufficient to discharge any Losses or to protect it from any potential or anticipated Losses.

(*Id.*). Additionally, the Agreement defines Losses as:

> any and all (a) sums paid by [Plaintiff] to claimants under the Bonds, (b) sums required to be paid to claimants by [Plaintiff] but not yet, in fact, paid by [Plaintiff], by reason of execution of said Bonds, (c) all costs and expenses incurred in connection with investigating, paying or litigating any claim under the Bonds, including but not limited to legal fees and expenses, technical and expert witness fees and expenses, (d) all costs and expenses incurred in connection with enforcing the obligations of the Indemnitors under this Agreement including, but not limited to interest, legal fees and expenses, (e) all accrued and unpaid premiums owing to [Plaintiff] for the issuance, continuation or renewal of any Bonds and/or (f) all other amounts payable to [Plaintiff] according to the terms and conditions of this Agreement.

(*Id.* at 2). The Agreement also provides that “in the event [Plaintiff] receives a claim under any Bond or establishes, in its sole discretion” that it anticipates

incurring losses, Plaintiff "shall have the right to reasonable access to the books, records, and accounts of the Indemnitors." (*Id.*).

CM Glazing was a subcontractor on the Florida Senate Office Project, the Villages High School Project, the JEA Headquarters Project, and the Bonnet Creek Project (collectively, the "Projects"). (Doc. 1 at 7–8; Doc. 33 at 6–7). For its involvement in the Projects, Plaintiff issued bonds (the "Bonds") naming CM Glazing the principal and the respective general contractor on each project the obligee. (Doc. 1 at 7–8; Doc. 33 at 6–7). Plaintiff alleges that CM Glazing's subcontractors, sub-subcontractors, suppliers, and vendors have since made claims against the Bonds "due to CM Glazing's failure or refusal to fulfill its performance and payment obligations," which exposes Plaintiff to liability. (Doc. 1 at 8–9). On June 26, 2023, Plaintiff sent CM Glazing and Basso, Jr. a demand for $3,000,000.00 in unencumbered collateral "to protect [Plaintiff] from suffering losses on the Bonds." (*Id.* at 10). CM Glazing and Basso, Jr. did not respond to the demand. (*Id.*).

Plaintiff filed this action bringing claims of specific performance (Count I), breach of contract (Count II), exoneration (Count III), common law indemnity (Count IV), equitable subrogation (Count V), and quia timet (Count VI). (*Id.* at 11–18). On November 27, 2023, Plaintiff made the same demand for $3,000,000.00 to the other Indemnitors, who all also failed to respond. (Doc. 33 at 9).

Plaintiff now moves for a preliminary injunction requiring Defendants to post $11,060,000.00 in collateral; prohibiting Defendants from "transferring, selling, disposing of, or encumbering any of their assets until they collectively post" the requested collateral; and ordering Defendants to "turn over, or grant [Plaintiff] full access to, books and records concerning their finances, assets, and liabilities." (*Id.* at 26).

Following the Evidentiary Hearing, the Court allowed the parties to file supplemental briefing "that addresse[d] whether Defendants should post collateral based on estimated potential liability pursuant to the [Agreement], and if so, how much and how to arrive at that specific amount." (April 18, 2024 Endorsed Order, Doc. 50). Both parties filed supplemental briefs. (*See generally* Df.'s Suppl. Brief, Doc. 53; Pl.'s Suppl. Brief, Doc. 54). The Motion is now ripe for review.

II. THE PROJECTS

A. Florida Senate Office Project

The general contractor of the Florida Senate Office Project sought $768,707.15 from Plaintiff for its expenses incurred in correcting CM Glazing's work after it was terminated from the project. (Doc. 51 at 31:20–24; Allstate Construction Emails, Doc. 49-31, at 1–4). Plaintiff contracted with a consulting firm to "verify and review the line items of compensation" that the general contractor sought from Plaintiff. (Doc. 51 at 32:5–8; *see* Guardian Group Review, Doc. 49-31,

at 5). Plaintiff made a partial payment of $491,198.65 to the general contractor, (Doc. 51 at 32: 9–14; Doc. 49-31 at 1–5), leaving $277,508.50 of the claim that Plaintiff "expects to suffer loss on," (Doc. 51 at 33–8; Doc. 49-31 at 5).

B. Villages High School Project

Plaintiff paid the general contractor of the Villages High School Project $1,105,456.04 "as reimbursement for certain costs . . . incurred . . . completing [CM Glazing's] scope of work on the [p]roject." (Feb. 26, 2024 Wharton-Smith Letter, Doc. 49-40, at 1; *see* Remediation Costs, Doc. 49-40, at 2). The general contractor agreed that Plaintiff's payment of $1,105,456.04 would "serve[] as a dollar-for-dollar reduction" of the penal sum of the performance bond, leaving $2,959,345.12 of outstanding exposure on the performance bond. (Doc. 49-40 at 1).

Plaintiff contracted with a consulting firm to evaluate the work CM Glazing performed and to "determine whether generally the work performed to the contract documents [and] whether the materials met the specifications of the subcontract." (Doc. 51 at 40:20–24; *see generally* Gale Evaluation Report, Doc. 49-41). The consulting firm determined after evaluating one building within the Villages High School Project that "the existing window systems were not installed in a manner consistent with the manufacturer's installation instructions, and in many cases, installation did not coincide with the installation contractor's shop drawings." (Gale Discussion and Opinions, Doc. 49-42, at 1). Based on this evaluation, Plaintiff

believes the entire balance of the penal sum of the performance bond is at risk. (Doc. 51 at 42:15–21).

A different glass company performed remediation work after CM Glazing to "temporary insulat[e] windows and doors and other items that were necessary . . . to have the building sealed such the students could attend" the school. (Doc. 51 at 59:6–18). The final insulation is yet to be installed. (*Id.*).

B. JEA Headquarters Project

The general contractor of the JEA Headquarters Project contracted with a consulting firm to investigate the source of water intrusion issues on the site. (Sept. 21, 2023 Ryan Letter, Doc. 49-44, at 1). That consulting firm determined that "the root cause" was CM Glazing's "faulty workmanship." (*Id.*). The general contractor provided CM Glazing notice of default "for defective and non-conforming work," and informed CM Glazing that it would be seeking reimbursement of "all costs and expenses arising from such defective work." (*Id.*).

After further investigation by the consulting firm, it determined that the quality of CM Glazing's workmanship was worse than originally believed and the significant "defects and nonconforming conditions [were] pervasive throughout the entire structure." (Nov. 13, 2023 Ryan Letter, Doc. 49-46, at 1). The general contractor terminated CM Glazing "for default for failure to comply with the material terms of the [s]ubcontract and failing to pay [its] debts as they become due."

(*Id.*). The general contractor affirmed that it would be seeking "recovery from all available parties . . . for all losses arising from [CM Glazing's] defective and nonconforming work." (*Id.* at 2).

Plaintiff's Vice President and Head of Surety Claims, Harold McKee, testified that he believes Plaintiff has an overpayment defense available to them because the general contractor "overpaid CM Glazing for the work it performed." (Doc. 51 at 45:19–22). McKee's "view [was] that [Plaintiff] will not have liability for this project." (*Id.*). On redirect examination, McKee clarified that the overpayment defense could potentially be a full exoneration or a dollar-for-dollar reduction. (*Id.* at 61:14–18). If the overpayment defense is a dollar-for-dollar reduction, it was McKee's "understanding that [Plaintiff] would still be exposed to liability" in "excess of $3 million" on the JEA Headquarters Project. (*Id.* at 61:19–62:24).

C. Bonnet Creek Project

In the Bonnet Creek Project, CM Glazing "failed to pay, when due, for materials, supplies, labor, etc. that were used in connection with the work," and the general contractor "was forced to issu[e] joint checks to [CM Glazing's] vendors." (Nov. 9, 2023 Whiting-Turner Letter, Doc. 49-48, at 1). The general contractor found CM Glazing in default for failing to cure financial breaches. (Nov. 14, 2023 Whiting-Turner Letter, Doc. 49-49, at 1). The general contractor also "supplement[ed] [CM Glazing's] hardware crew with additional resources in the

field," and found that that "[s]ome of the hardware [was] fabricated wrong and being installed incorrectly." (Dec. 6, 2023 Whiting-Turner Letter, Doc. 49-50, at 1). The general contractor informed CM Glazing that "any costs associated with this additional workforce and necessary materials will be the responsibility of [CM Glazing]." (*Id.*). The general contractor then made a formal claim to Plaintiff on the performance bond "as a result of [CM Glazing's] defaults and breaches" for $1,100,00.00, (Doc. 51 at 48:18–49:7; *see* Dec. 8, 2023 Whiting-Turner Letter, Doc. 49-51, at 1–2), which Plaintiff believes is entirely at risk.

Basso, Jr. testified that the Bonnet Creek Project has since completed construction and that there is a balance owed to CM Glazing which would extinguish "any outstanding supplier claims." (Doc 51 at 78:19–79:3).

III. LEGAL STANDARD

"The grant or denial of a preliminary injunction is a decision within the sound discretion of the district court." *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983). To obtain a preliminary injunction, the movant must sufficiently establish that (1) "it has a substantial likelihood of success on the merits;" (2) "irreparable injury will be suffered unless the injunction issues;" (3) "the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party;" and (4) "the injunction would not be adverse to the public interest." *Forsyth Cnty. v. U.S. Army Corps of Eng'rs*, 633 F.3d 1032, 1039 (11th Cir. 2011)

(quoting *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc)). "A preliminary injunction, moreover, 'is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the burden of persuasion as to the four requisites.'" *Llovera v. Fla.*, 576 F. App'x 894, 896 (11th Cir. 2014) (per curiam) (quoting *Forsyth Cnty.*, 633 F.3d at 1039). "To carry its burden, a plaintiff seeking a preliminary injunction must offer proof beyond unverified allegations in the pleadings. Moreover, vague or conclusory affidavits are insufficient to satisfy the plaintiff's burden." *Palmer v. Braun*, 155 F. Supp. 2d 1327, 1331 (M.D. Fla. 2001), *aff'd*, 287 F.3d 1325, 1327 (11th Cir. 2002).

Failure to satisfy even one element for a preliminary injunction is fatal to issuance of the injunction. *Llovera,* 576 F. App'x at 896. If the Court finds that Plaintiff has failed to carry their burden as to a single element, the Court need not consider the remaining elements. *Henry v. Nat'l Hous. P'ship*, No. 1:06-cv-008-SPM, 2006 WL 8443138, at *1 (N.D. Fla. Sept. 19, 2006) ("Where a plaintiff has not carried his burden as to any one of the elements required for a preliminary injunction, it is unnecessary to address the remaining elements." (citing *Jefferson Cnty.*, 720 F.2d at 1519)).

IV. ANALYSIS

There are two types of injunctions, prohibitive and mandatory, and both are requested by Plaintiff. (*See* Doc. 33 at 26). "A typical preliminary injunction is

prohibitive in nature and seeks simply to maintain the status quo pending a resolution of the merits of the case." *Haddad v. Arnold*, 784 F. Supp. 2d 1284, 1295 (M.D. Fla. 2010); *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1284 (11th Cir. 1990) ("The chief function of a preliminary injunction is to preserve the status quo until the merits of the controversy can be fully and fairly adjudicated."). Plaintiff's request that Defendants be enjoined from disposing of their assets until they post collateral is prohibitive in nature. However, "[w]hen a preliminary injunction is sought to force another party to act, rather than simply to maintain the status quo, it becomes a 'mandatory or affirmative injunction' and the burden on the moving party increases." *Haddad*, 784 F. Supp. 2d at 1295. Plaintiff's request that Defendants specifically perform their obligations under the Agreement by posting collateral and turning over financial records are mandatory injunctions.

"Where a mandatory injunction is sought, 'courts apply a heightened standard of review; plaintiff must make a clear showing of entitlement to the relief sought or demonstrate that extreme or serious damage would result absent the relief.'" *Verizon Wireless Pers. Commc'ns LP v. City of Jacksonville, Fla.*, 670 F. Supp. 2d 1330, 1346 (M.D. Fla. 2009) (quoting *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 99 F. Supp. 2d 381, 389 (S.D.N.Y. 2000)); *see Powers v. Sec'y, Fla. Dep't of Corr.*, 691 F. App'x 581, 583 (11th Cir. 2017) ("Mandatory preliminary relief, which goes

well beyond simply maintaining the status quo[,] is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party.") (quoting *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976)); *Harris v. Wilters*, 596 F.2d 678, 680 (5th Cir. 1979) ("Only in rare instances is the issuance of a mandatory preliminary injunction proper.").[1]

Actions brought by sureties to enforce collateral security clauses against indemnitors are precisely the "rare instances in which the facts and law are clearly in favor of the moving party." *Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 441 F.2d 560, 561 (5th Cir. 1971) (internal quotation omitted). Mandatory injunctions are commonly granted in cases that bear similarity to the instant action. *See e.g.*, *Travelers Cas. & Sur. Co. of Am. v. Design Build Eng'rs & Contractors, Corp.*, No. 6:14-cv-1636-Orl-31, 2014 WL 7274803, at *7 (M.D. Fla. Dec. 22, 2014) (issuing a preliminary injunction and ordering the defendants to post $1,479,022.00 in collateral); *Travelers Cas. & Sur. Co. of Am. v. Indus. Com. Structures, Inc.*, No. 6:12-cv-1294-Orl-28, 2012 WL 4792906, at *4 (M.D. Fla. Oct. 9, 2012) (issuing a preliminary injunction and ordering the defendants to post $300,000.00 as collateral); *Devs. Sur. & Indem. Co. v. Hansel Innovations, Inc.*, No. 8:14-cv-425-T-23TBM, 2014 WL 2968138, at *8 (M.D. Fla. July 1, 2014) (adopting report and

[1] *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (holding that all decisions of the "old Fifth" Circuit handed down prior to the close of business on September 30, 1981, are binding precedent in the Eleventh Circuit).

recommendation and issuing a preliminary injunction); *Hanover Ins. Co. v. Holley Const. Co. & Assocs.*, No. 4:11-cv-41 CDL, 2012 WL 398135, at *7 (M.D. Ga. Feb. 7, 2012) (issuing a preliminary injunction and ordering the defendants to post $6,604,328.21 as collateral)*; Devs. Sur. & Indem. Co. v. Elec. Serv. & Repair, Inc.*, No. 09-21678-CIV, 2009 WL 3831437, at *2 (S.D. Fla. Nov. 16, 2009) (issuing a preliminary injunction and ordering the defendants to post $370,000.00 as collateral).

Defendants concede that Plaintiff is likely to succeed on the merits. (Doc. 41 at 16). Regardless, the Court must still decide whether Plaintiff has met its burden as to the first prong.

A. Likelihood of Success on the Merits

The first prerequisite—substantial likelihood of success on the merits—"is generally the most important." *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1383 (M.D. Fla. 2005), *aff'd*, 403 F.3d 1223, 1229 (11th Cir. 2005). "A substantial likelihood of success on the merits requires a showing of only likely or probable, rather than certain, success." *Id.* (emphasis omitted). Nevertheless, "the movant may also have his motion granted upon a lesser showing of a substantial case on the merits when the balance of the equities . . . weighs heavily in favor of granting the stay." *Garcia–Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986).

Under Florida law,[2] "[a] decree of specific performance is an equitable remedy granted at the discretion of the trial court." *Invego Auto Parts, Inc. v. Rodriguez*, 34 So. 3d 103, 104 (Fla. 3d DCA 2010). "Specific performance shall only be granted when 1) the plaintiff is clearly entitled to it, 2) there is no adequate remedy at law, and 3) the judge believes that justice requires it." *Castigliano v. O'Connor*, 911 So. 2d 145, 148 (Fla. 3d DCA 2005).

1. Entitlement to Specific Performance

"In order for a contract to be subject to specific performance, it must appear from the writing constituting the contract that the obligations of the parties with respect to conditions of the contract and actions to be taken by the parties are clear, definite and certain." *Brown v. Dobry*, 311 So. 2d 159, 160 (Fla. 2d DCA 1975); *De Vaux v. Westwood Baptist Church*, 953 So. 2d 677, 682 (Fla. 1st DCA 2007) (holding same). Plaintiff asserts that the terms of the Agreement relating to indemnification and collateralization are clear, definite, and certain. (Doc. 33 at 15–16). This Court agrees. Thus, Plaintiff is clearly entitled to specific performance.

2. No Adequate Remedy at Law

[2] "As a federal court sitting in diversity jurisdiction, [this Court] appl[ies] the substantive law of the forum state . . . alongside federal procedural law." *Horowitch v. Diamond Aircraft Indus.*, 645 F.3d 1254, 1257 (11th Cir. 2011) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). It is undisputed that Florida law applies to Plaintiff's claim for specific performance.

Plaintiff argues that it has no adequate remedy at law absent enforcement of the collateral security provision. (Doc. 33 at 18). Courts have found that a surety's loss of its right to collateralization cannot be adequately remedied through monetary damages. *See Hansel* Innovations, 2014 WL 2968138, at *6; *Liberty Mut. Ins. Co. v. Aventura Eng'g & Const. Corp.*, 534 F. Supp. 2d 1290, 1322 (S.D. Fla. 2008) (concluding that the plaintiff had no adequate remedy at law while the defendant "engag[ed] in a pattern of uncollateralization"). "[T]he nature of the injury in collateral security provision cases is the lack of collateralization while claims are pending, and nothing can remedy that injury after the fact." *Indus. Com. Structures*, 2012 WL 4792906, at *3. The Court finds Plaintiff's rationale to be persuasive and concludes that it does not have an adequate remedy at law for its claim for specific performance of the Agreement's collateral security provision.

3. Justice Requires Specific Performance

"Sureties are ordinarily entitled to specific performance of collateral security clauses . . . because if a creditor is to have the security position for which he bargained, the promise to maintain the security must be specifically enforced." *Indus. Com. Structures*, 2012 WL 4792906, at *2 (cleaned up and quotation omitted). Plaintiff argues that the instant case is no different and that justice requires specific performance. (Doc. 33 at 20–21). Courts routinely enforce a surety's right to collateral security through specific performance. *See, e.g.*, *Great Am. Ins. Co. v.*

Brewer, No. 6:16-cv-63-Orl-37KRS, 2017 WL 8314689, at *11 (M.D. Fla. Aug. 23, 2017) (granting summary judgment to the plaintiff on its claim for specific performance); *Cincinnati Ins. Co. v. Water Equip. Servs., Inc.*, No. 8:07-cv-1641-T-17MSS, 2008 WL 11446467, at *4 (M.D. Fla. July 8, 2008) (granting surety's motion to compel specific performance and issuing a permanent injunction); *Aventura Eng'g*, 534 F. Supp. 2d at 1322–23 ("[S]ince specific performance is a recognized remedy for surety's seeking to enforce its contractual right to collateralization, a final decree of specific performance is necessary in this case to protect the surety's contractually acquired rights."). Thus, Plaintiff has established a substantial likelihood of success on all three elements of its specific performance claim.

B. Necessary to Prevent Irreparable Harm

Plaintiff must also establish that it will suffer irreparable injury absent issuance of an injunction. *Forsyth Cnty.*, 633 F.3d at 1039. "A showing of irreparable injury is the *sine qua non* of injunctive relief." *Hoop Culture, Inc. v. Gap Inc.*, 648 F. App'x 981, 984 (11th Cir. 2016) (citing *Siegel*, 234 F.3d at 1176). "An injury is 'irreparable' only if it cannot be undone through monetary remedies." *Ne. Fla. Chapter of Ass'n of Gen. Contractors v. Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). An injury must be actual and imminent not remote or speculative. *Id.* "Mere injuries, however substantial, in terms of money . . . are not enough." *Id.*

(quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974); *accord United States v. Jefferson Cnty.*, 720 F.2d 1511, 1520 (11th Cir. 1983)).

Plaintiff argues that it will suffer irreparable injury without a preliminary injunction because it has been deprived of its negotiated right to collateral security. (Doc. 33 at 21–22). Plaintiff asserts that it continues to incur losses on the Bonds that Defendants contracted to collateralize. (*Id.*). Plaintiff also argues that Defendants' efforts to dissipate assets and place assets out of Plaintiff's reach are "ample evidence" of irreparable harm. (*Id.* at 23 (citing *Frankenmuth Mutual Ins. Co. v. Pac Comm, Inc.*, No. 1:20-cv-24064, 2021 WL 1204975, at *6 (S.D. Fla. Mar. 19, 2021)). Plaintiff asserts that 20 Nashville and Basso, Jr. both sold real property for a combined amount of $3,300,000.00 after Plaintiff demanded collateral security from them. (*Id.* at 9 (citing Parcel Sales History, Doc. 33-4, at 5)).

Defendants admit that 20 Nashville sold real property after receiving Plaintiff's demand for collateral and agree that enjoining that entity from any further dissipation of assets "may be appropriate." (Doc. 41 at 13).[3] Regarding the other real property sale, Defendants argue that although Basso, Jr. was on the warranty deed transferring title of that property, (*see* Warranty Deed, Doc. 33-3, at 2), it "was never titled in the name of [Basso, Jr.], but solely in his wife Nikki Basso's name." (Doc.

[3] It is undisputed that 20 Nashville sold real property to 20 Nashville Ave, LLC for $1,100,000.00. (Doc. 33 at 9). That entity then sold the property to 20 Nashville Properties, LLC. (*Id.*).

41 at 14). Defendants further argue that a blanket injunction that enjoins the selling or encumbering of assets is not appropriate against all Defendants, but rather, that the injunction should be tailored for 20 Nashville only. (*Id.* at 13).

Defendants' attempt to distinguish 20 Nashville from the rest of the Indemnitors is ludicrous. The registered agent and authorized person listed in 20 Nashville's corporate filing with the Florida Department of State is Basso, Sr. (20 Nashville Corporate Filing, Doc. 1-6, at 2). Indeed, every Defendant in this case is either a member of the Basso family or an entity controlled by them. (*See generally* Corporate Filings, Doc. Nos. 1-2, 1-3, 1-5; *see also* Doc. 41 at 13 (discussing that Basso, Sr. and Basso, Jr. bought Gellein CM Glazing Holdings, LLC)). Moreover, Basso, Jr. admitted that even though the private residence that was sold was only titled in his wife's name, it was his homestead, (Doc. 51 at 80:14–22), where he lived with his wife, (*id.* at 82:16–18). Thus, any attempt to isolate the dissipation actions to just 20 Nashville is futile.

Defendants also argue that Plaintiff has failed to establish that it will suffer irreparable harm without $11,060,000.00 in collateral security. (Doc. 41 at 15–18). Defendants' argument is best characterized as attacking the amount of Plaintiff's requested injunction, which implicitly concedes that Plaintiff has established it will suffer irreparable harm without *some amount* of collateral security. (*See* Doc. 41 at 19 (conceding that "Defendants may be required to post some collateral")). The

Court will address the exact amount of the collateral below. For the reasons discussed, Plaintiff has sufficiently satisfied the irreparable injury prong.

C. Balance of Harms

The Court must balance the harms faced by both Plaintiff and Defendants. Plaintiff argues that Defendants will suffer little harm because any posted collateral that is not used to cover losses will be returned to them. (Doc. 33 at 24). Plaintiff asserts that Defendants' harm is merely the loss of use of the money while in Plaintiff's possession, which is measured by the prevailing interest rate of that amount. (*Id.* at 24–25). Thus, Plaintiff argues that Defendants' harm is inconsequential in comparison to the uncollateralized liability it currently faces. (*Id.*).

Defendants argue in response that the balance of harm weighs in their favor if they are required to post collateral in an amount that exceeds their obligations under the Agreement. (Doc. 41 at 19). Defendants also argue that Plaintiff fails to appreciate the length of time "a significant amount of money" may be tied up. (*Id.* at 19–20, n. 6). Defendants claim that posting eleven million dollars "would cripple the business to such a degree that it could no longer perform work," (*id.* at 20), thereby ensuring Defendants' inability to pay off debts.

Courts often find that the balance of harms favors the surety because it "is only asking the Court to require [the d]efendants to do that which [the d]efendants

contractually agreed to do." *Indus. Com. Structures*, 2012 WL 4792906, at *4; *see Holley Const.*, 2012 WL 398135, at *6 ("Although [the d]efendants may suffer harm as a result of the injunction, this harm is the result of enforcement of an Indemnity Agreement which [the d]efendants entered; an injunction would only require [the d]efendants to do that which they agreed to do."). Defendants' first argument relies on the faulty assumption that they will be compelled to post more collateral than what the Agreement requires of them. And although the alleged potential impact on Defendants' business is certainly grave, "[b]oth parties are at risk of financial harm due to the situation that has arisen." *Philadelphia Indem. Ins. Co. v. Therma Seal Roof Sys., LLC*, No. 21-80306-CIV, 2022 WL 1664183, at *5 (S.D. Fla. Mar. 9, 2022). However, Plaintiff faces being "stripped of its bargained-for right to collateral and therefore have[ing] the status of an unsecured creditor," *id.*, and "Defendants must be held to the Agreement and the contractual provisions therein that served to induce Plaintiff to issue the bonds." *Id.* Thus, the balance of harm favors Plaintiff.

D. Public Interest

Finally, the Court considers the public's interest in this case. Plaintiff argues that forcing it to incur unsecured loss until the end of this suit would run contrary to the public interest because "other sureties would hesitate to issue construction bonds." (Doc. 33 at 25). "[T]he public interest is served by enforcing the terms of the contract and by protecting the solvency of sureties whose work is a benefit to the

public." *Hansel Innovations*, 2014 WL 2968138, at *3. Indeed, the public's "interest would be in seeing that contractual agreements between parties are upheld and in the continued solvency of surety companies for the public benefit." *Elec. Serv. & Repair*, 2009 WL 3831437, at *2. Defendants did not address whether an injunction would be adverse to the public interest.

Plaintiff has sufficiently satisfied the fourth and final prong for obtaining a preliminary injunction. Accordingly, having satisfied all four prerequisites, Plaintiff will be granted a preliminary injunction. The Court must now decide the amount of collateral Defendants will be compelled to post.

E. Collateral Security Amount

The parties stipulated that Plaintiff has already incurred net losses of $1,916,925.59, which include $1,320,270.90 Plaintiff paid to resolve payment bond claims and $1,596,654.69 Plaintiff paid to resolve performance bond claims, offset by $1,000,000.00 received from indemnitors no longer involved in this suit. (Doc. 51 at 24:20–25:3; *see generally* Pl.'s Stip. of Dismissal, Doc. 43). Plaintiff claims that its anticipated losses, or current liability, is $7,336,853.62 which is a "result of ongoing and unresolved performance bond claims," (Doc. 54 at 7), including $277,508.50 on the Florida Senate Office Project, $2,959,345.12 on the Villages High School Project, $3,000,000.00 on the JEA Headquarters Project, and $1,100,000.00 on the Bonnet Creek Project, (*id.* at 8).

Defendant argues that it should only be required to post $1,916,925.59 and that "no additional collateral is necessary because [Plaintiff] failed to present sufficient evidence to make a clear showing that it remains exposed to any further liability." (Doc. 53 at 2–3). Specifically, Defendants argue that the evidence is insufficient to definitively establish the amount of liability left on the performance bonds because McKee was unable to testify to or Plaintiff was unable to provide updated documentation on certain remediations or outstanding work and tests to be performed. (*Id.* at 4–8).

The Agreement requires Defendants to deposit collateral with Plaintiff "as soon as liability exists or is asserted against [Plaintiff], whether or not [Plaintiff] shall have made any payment therefor, equivalent to such amount that [Plaintiff], in its sole judgment, shall deem sufficient to discharge any Losses or to protect it from any potential or anticipated Losses." (Doc. 33-2 at 2). Included in the definition of Losses are "sums required to be paid to claimants by [Plaintiff] but not yet, in fact, paid by [Plaintiff]" and "all amounts payable to [Plaintiff] according to the terms and conditions of this Agreement." (*Id.*).

In a strikingly similar case, *Holley Construction Company*, the defendants argued that "the 'mere assertion of claims' against the bonds [did] not give rise to an obligation for [the d]efendants to deposit collateral," which the court rejected based off the "plain language of the Indemnity Agreement." 2012 WL 398135, at

*5. In fact, the provision discussed in *Holley Construction Company* is identical to the one in the instant case. *Id.* (explaining that the indemnification contract provides that the defendants must make payment to the surety "as soon as liability exists or is asserted against [the surety], whether or not [the surety] shall have made any payment therefore"). In the context of another comparable indemnification agreement, the court in *Developers Surety and Indemnity Company v. Manga Construction, Inc*. held that the agreement did not require claims made against bonds to be "valid or proper before [the plaintiff] may exercise [its] contractual rights" for indemnity and exoneration. No. 07-22753-CIV, 2008 WL 11333900, at *6–7 (S.D. Fla. Sept. 16, 2008). In other words, the surety's rights arise without the need to establish that it will incur actual liability because it is sufficient that it "determines in its sole discretion that it may incur potential liability." *Id.* (discussing that the indemnification contract gives the surety "sole and absolute discretion to determine whether any claims under a Bond shall be paid, compromised, defended, prosecuted or appealed"). Thus, the Agreement in the instant case entitles Plaintiff to collateralization on incurred losses, on liability due to claims made on Bonds but not yet paid, and on liability due to anticipated losses that Plaintiff may determine in its sole discretion.

The record evidence reveals that $277,508.50 remains on the claim made against the Florida Senate Office Project performance bond and that $1,100,000.00

remains on the claim made against the Bonnet Creek Project performance bond.[4] Additionally, in light of the consulting firm's investigation, Plaintiff determined that $2,959,345.12 of liability remains on the Villages High School Project performance bond based on the extensive faulty workmanship of CM Glazing and the projected costs required for remediation. However, as to the JEA Headquarters Project performance bond, Plaintiff's claim that an excess of $3,000,000.00 of liability remains is unsubstantiated, particularly because McKee credibly testified that no liability exists due to an overpayment defense that may fully exonerate the remaining penal sum of the performance bond. (*See* Doc. 51 at 45:19–22). The conflicting evidence of any liability on the JEA Headquarters Project performance bond fails to meet the standard set out by the Agreement. Therefore, Plaintiff's potential losses to which it is entitled to collateralization is $4,336,853.62, which combined with the stipulated incurred losses equates to $6,253,779.21 in collateral security that Plaintiff is owed.

F. Injunction Bond

Federal Rule of Civil Procedure 65(c) states, *inter alia*, that "[t]he court may issue a preliminary injunction . . . only if the movant gives security in an amount that

[4] Although Basso, Jr. testified that the Bonnet Creek Project has finished and that funds due to it will eliminate any further liability of Plaintiff, (*see* Doc 51 at 78:19–79:3), there is no other evidence on the record to support those statements. On balance, the Court does not find Basso, Jr.'s testimony to be sufficiently credible to rebut the evidence that $1,100,000.00 remains liable on the claim made against the Bonnet Creek Project performance bond.

the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." However, "it is well-established that the amount of security required by the rule is a matter within the discretion of the trial court . . . [, and] the court may elect to require no security at all." *BellSouth Telecomms.*, 425 F.3d at 971 (citation and internal quotations omitted). "Furthermore, '[a] bond may not be required, or may be minimal, when the harm to the enjoined party is slight.'" *Lepper v. Franks*, No. 5:18-cv-644-Oc-41PRL, 2019 U.S. Dist. LEXIS 5468, at *7 (M.D. Fla. Jan. 11, 2019); *Tancogne v. Tomjai Enters. Corp.*, 408 F. Supp. 2d 1237, 1252 (S.D. Fla. 2005).

An injunction bond is appropriate in the instant case because "the requirement to post security with [Plaintiff] is undoubtedly onerous." *Hansel Innovations*, 2014 WL 2968138, at *7.[5] Therefore, in accordance with Rule 65(c), Plaintiff will be ordered to file an injunction bond in the amount of $100,000.00. *See Indus. Com. Structures*, 2012 WL 4792906, at *4 (ordering the plaintiff to file an injunction bond of $100,000.00); *Elec. Serv. & Repair*, 2009 WL 3831437, at *2 (holding same).

V. CONCLUSION

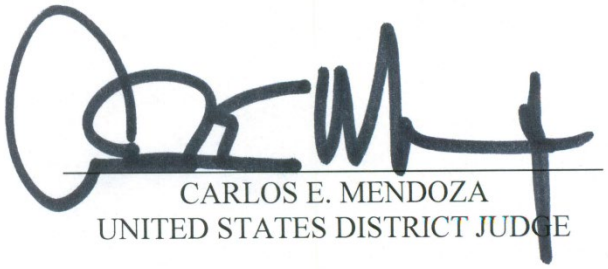
[5] The Motion contemplates Plaintiff posting an injunction bond, (*see* Doc. 33 at 11 (asking that Defendant be required to post collateral after Plaintiff posts an injunction bond)), but neither party directly addressed Rule 65(c)'s requirement that the movant provide security during the pendency of the requested injunction.

In accordance with the foregoing, it is **ORDERED** and **ADJUDED** as follows:

1. Plaintiff's Motion to Compel Deposit of Collateral Security and Books and Records (Doc. 33) is **GRANTED**.
2. Defendants shall:
    a. **As soon as possible, but no later than May 23, 2024**, turn over, or grant Plaintiff full access to, books and records concerning Defendants' finances, assets, and liabilities;
    b. **On or before July 8, 2024**, post collateral with Plaintiff in the amount of $6,253,779.21 as security against incurred and anticipated losses in connection with the subject bonds.
3. If there are compelling reasons that Defendants are unable to comply with the **July 8, 2024** deadline despite due diligence, it must notify the Court **on or before 5:00 PM on June 27, 2024**.
4. Defendants are **PRELIMINARY ENJOINED** from transferring, selling, disposing of, or encumbering any of their assets until they collectively post $6,253,779.21 in collateral.
5. **On or before July 8, 2024**, Plaintiff shall file an injunction bond in the amount of $100,000.00 issued by a surety approved by the Clerk of the United Staes District Court for the Middle District of Florida to

compensate Defendants should it later be found that this injunction was improvidently issued. The bond filed in this matter shall be retained by the Clerk pending further order of this Court.

DONE and **ORDERED** in Orlando, Florida on May 9, 2024.



Copies furnished to:

Counsel of Record