

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**ARTEK INDUSTRIES, INC, and
AMERIFORM ACQUISITION COMPANY, LLC,
Plaintiffs,**

v.

**Case No. 15-150253-CB
Hon. James M. Alexander**

**CONFLUENCE OUTDOOR, LLC, and
CONFLUENCE HOLDINGS CORP,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants’ Amended Motion to Dismiss. All parties are involved in the business of manufacturing and selling recreational kayaks. According to the Complaint, in early 2014, Plaintiff Artek engaged in due diligence for the potential acquisition of Defendant Confluence Holdings. As part of the same, Artek and Defendants entered into a January 17, 2014 “Letter of Intent” and “NDA Agreement.” Ultimately, the acquisition was never completed.

Sometime in the summer of 2014, an Artek-affiliated entity, Plaintiff Ameriform, introduced its new line of recreational kayaks. Plaintiffs claim that, almost immediately, Defendants “began publically disparaging [Plaintiffs] and the recreational kayak products manufactured by Ameriform, and began wrongfully interfering with [Plaintiffs’] relationships” with their customers and suppliers.

Plaintiffs generally claim that Defendants accuse them of violating the Letter of Intent and NDA Agreement – both of which contained provisions regarding confidential information and trade secrets. Based on this belief, Plaintiffs claim that Defendants told Plaintiffs’ existing and prospective customers and suppliers that they would not get Defendants’ business if they continued to conduct business with Plaintiffs because Plaintiffs unlawfully copied Defendants’ kayak designs.

And, Plaintiffs claim, after walking away from the proposed acquisition, Confluence “wished to rid itself of a competitor in the kayak market, and went about that course of action by falsely accusing Plaintiffs of copying Defendants’ kayak designs, thereby interfering with Plaintiffs’ ability to manufacture and sell their competing kayaks.”

Based on the foregoing allegations, Plaintiffs filed the present lawsuit on claims titled (Count I) declaratory judgment, (Counts II and III) tortious interference, (Count IV) business defamation, and (Count V) product disparagement.

In response, Defendants now seek summary disposition under MCR 2.116(C)(8), which tests the legal sufficiency of the complaint.¹ In the alternative, Defendants ask the Court to dismissed under (C)(6) or the doctrine of forum non conveniens because a South Carolina state action is pending and involves the same parties and operative facts.

1. Declaratory Relief (Count I)

Defendants first argue that they are entitled to dismissal of Plaintiffs’ claim for declaratory relief because the same is improper. According to their Complaint, Plaintiffs seek a

¹ A motion under this subrule may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). When considering such a motion, all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade*, 439 Mich at 162-163; *Lepp*, 190 Mich App at 730. Additionally, when considering such motions, the court considers only the pleadings. MCR 2.116(G)(5).

declaration that they have “not misused any of Confluence’s purported confidential information . . . so that it can continue manufacturing and selling its kayaks . . . free from Confluence’s tortious interference and baseless accusations.”

In other words, Plaintiffs seek a declaration of non-liability with respect to potential future claims of Defendants.

MCR 2.605(A)(1) provides: “In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.”

An “actual controversy” under MCR 2.605(A)(1) exists when a declaratory judgment **is necessary to guide a plaintiff’s future conduct in order to preserve legal rights**. The requirement prevents a court from deciding hypothetical issues. However, by granting declaratory relief in order to guide or direct future conduct, courts are not precluded from reaching issues before actual injuries or losses have occurred. The essential requirement of an “actual controversy” under the rule is that the plaintiff pleads and proves facts that demonstrate an adverse interest necessitating the sharpening of the issues raised. *Int’l Union UAW v Cent Mich Univ Trs*, 295 Mich App 486, 495; 815 NW2d 132 (2012) (internal quotations and citations omitted).

But in this case, Plaintiffs are not looking to guide their future conduct; they are looking to adjudicate their past conduct. This is not the purpose for a declaratory judgment claim. For this reason, the Court GRANTS Defendants’ motion with respect to Plaintiff’s Count I and DISMISSES said claim.

2. Tortious Interference (Counts II and III)

Defendants next move for summary disposition of Plaintiff’s tortious interference with a contract and tortious interference with a business expectancy claims.

The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, . . . (3) an unjustified instigation of the breach by the defendant [and (4) damages].

The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted. *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 89-90; 706 NW2d 843 (2005) (internal citations omitted) (paragraph breaks added for clarity).

Further, “[O]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another.” *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). “A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances.” *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992).

Further, Michigan Courts have long held that “defendants motivated by legitimate personal and business reasons are shielded from liability against this cause of action [tortious interference with a contractual or business relationship].” *Formall, Inc v Community Nat'l Bank*, 166 Mich App 772, 780; 421 NW2d 289 (1988); citing *Christner v Anderson, Nietzsche & Co, PC*, 156 Mich App 330, 348-349; 401 NW2d 641 (1986).²

Defendants argue that Plaintiffs’ tortious interference claims fail because, at most, Plaintiffs allege that (1) Defendants threatened legal action against any retailer carrying Plaintiffs’ line of kayaks, and (2) Defendants told a “major customer” that Plaintiffs stole their kayak designs. Neither of these things, Defendants argue, constitutes the required per se wrongful act.

² See also *Mino v Clio Sch Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003), quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996) (“Where the defendant’s actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.”).

In support, Plaintiffs cite *Dalley v Dykema Gossett*, 287 Mich App 296, 324; 788 NW2d 679 (2010) for the proposition that “[t]here is nothing illegal, unethical or fraudulent in filing a lawsuit, whether groundless or not.”

In response, Plaintiffs allege that Defendants defamed Plaintiffs to customers and suppliers, which is a per se wrongful act – citing *Heritage Optical Ctr, Inc v Levine*, 137 Mich App 793, 797; 359 NW2d 210, 212 (1984) (reasoning “[f]alse and malicious statements injurious to a person in his or her business are actionable per se.”).³ Plaintiffs also cite *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 377; 354 NW2d 341, 348 (1984) for the proposition that communicating false allegations is also unethical.

Indeed, Plaintiffs’ Complaint alleges that their tortious interference claims are founded on false accusations of theft of Defendants’ kayak designs that were published to Plaintiffs’ customers and suppliers. These allegations sufficiently establish a per se wrongful act, on which to base Plaintiffs’ tortious interference claims.

For the foregoing reasons, considering only the pleadings, and accepting all well-pled factual allegations as true, the Court finds that Plaintiffs have sufficiently pled their tortious interference claims such that the Court cannot conclude that the same are so clearly unenforceable as a matter of law that no factual development could justify a right of recovery. As a result, the Defendants’ motion for summary disposition of said claims under (C)(8) is DENIED.

The Court will note that Defendants only argued the lack of a per se wrongful act in their principal motion. But, for the first time in their Reply Brief, Plaintiffs raise the lack of a contract or expectancy to support the claims. Because this issue was not raised in their principal brief so

³ See also *Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 328; 539 NW2d 774, 780 (1995) (reasoning “[W]here a libel contains an imputation upon a corporation in respect to its business, its ability to do business, and its methods of doing business, the same becomes libelous per se.”).

that Plaintiffs had an opportunity to respond, the Court will not address the Defendants' new argument.

3. Business Defamation and Product Disparagement (Counts IV and V)

Finally, Defendants argue that Plaintiffs' defamation and product disparagement claims also fail because (1) the alleged statements were mere expressions of opinion and (2) said opinions were not published to third parties.

The Court will note that (just as it did with respect to Plaintiffs' tortious interference claims), Defendants again raise an additional ground for summary (judicial proceedings privilege) for the first time in their Reply Brief – despite never addressing the same in their principal brief.⁴ The Court will not consider Defendants' new argument.

With respect to defamation and product disparagement claims, the parties do not dispute that such claims may be brought by a corporation if “the matter *tends to prejudice it in the conduct of its business or to deter others from dealing with it...*” *Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 328; 539 NW2d 774 (1995); citing *Heritage Optical Center, Inc. v. Levine*, 137 Mich App 793, 797-798; 359 NW2d 210 (1984).

The elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).

⁴ For the first time in their Reply Brief, Defendants argue that the alleged defamatory statements are protected by the judicial proceedings privilege. Under this longstanding doctrine, “[s]tatements made by judges, attorneys, and witnesses during the course of judicial proceedings are absolutely privileged if they are relevant, material, or pertinent to the issue being tried.” *Oesterle v Wallace*, 272 Mich App 260, 264; 725 NW2d 470 (2006); citing *Mundy v Hoard*, 216 Mich 478, 491; 185 NW 872 (1921); and *Couch v Schultz*, 193 Mich App 292, 294-295; 483 NW2d 684 (1992).

As stated, Defendants first argue that the alleged statements were only inactionable expressions of opinion. In *Ireland v Edwards*, 230 Mich App 607; 584 NW2d 632 (1998), the Court of Appeals reasoned that, generally, “the determination of truth or falsity in defamation cases [is] a purely factual question which should generally be left to the jury.” *Id.* at 621-622; quoting *Locricchio v Evening News Ass’n*, 438 Mich 84, 137; 476 NW2d 112 (1991) (Cavanagh, J., concurring).

The *Ireland* Court, however, noted that “not all defamatory statements are actionable. If a statement cannot be reasonably interpreted as stating actual facts about the plaintiff, it is protected by the First Amendment.” *Ireland, supra* at 614, citing *Milkovich v Lorain Journal Co*, 497 US 1, 20; 110 S Ct 2695; 111 L Ed 2d 1 (1990); *Garvelink v Detroit News*, 206 Mich App 604, 608-609; 522 NW2d 883 (1994).

In other words, “a statement must be ‘provable as false’ to be actionable.” *Ireland, supra* at 616, quoting *Milkovich*, 497 US at 17-20. In addition, “a court may decide as a matter of law whether a statement is actually capable of defamatory meaning. Where no such meaning is possible, summary disposition is appropriate.” *Ireland, supra* at 619, citing *Sawabini v Desenberg*, 143 Mich App 373, 379; 372 NW2d 559 (1985).

As a result and based on the *Ireland* Court’s reasoning, the Court must first determine whether the alleged statements potentially actionable *and* capable of defamatory meaning.

The Court also recognizes that “a statement of ‘opinion’ is not automatically shielded from an action for defamation because ‘expressions of ‘opinion’ may often imply an assertion of objective fact.’” *Smith v Anonymous Joint Enter*, 487 Mich 102, 128; 793 NW2d 533 (2010), quoting *Milkovich*, 497 US at 18. In the end, the dispositive question is “whether a reasonable factfinder could conclude that the statement implies a defamatory meaning.” *Smith*, 487 Mich at

128, citing *Milkovich*, 497 US at 21.

Plaintiffs' Complaint alleges that

On August 6, 2014, at an Outdoor Retailer Show open to the public, Shelly Moore, Vice President of Sales for Confluence Outdoor, approached Plaintiffs' booth and heatedly accused Plaintiffs of taking Defendants' "Pungo" design and "dropping it into" Defendants' machine, and asking, "How does it feel to work for a company with no talent?" This statement was made openly at the Outdoor Retailer Show where numerous members of the public were present and overheard the Confluence Outdoor representative's false and defamatory statements. (Complaint, at ¶57).

Defendants published these false and other defamatory statements to third parties, including but not limited to, falsely accusing Plaintiffs of illegally copying Defendants' kayak designs. (Complaint, at ¶58).

Defendants' false and defamatory statements were made directly to Plaintiffs' existing and potential customers and suppliers. (Complaint, at ¶59).

Considering only the pleadings, and accepting all well-pled factual allegations as true, the Court finds that Plaintiffs have sufficiently pled that Defendants made statements that could be "reasonably interpreted as stating actual facts about the plaintiff." As such, Defendants' motion based on the argument that the alleged statements are mere expressions of opinion is DENIED.⁵

Next, Defendants argue that these statements were not published to third parties. But this argument simply ignores Plaintiffs' Complaint at paragraphs 17, 18, 19, 58, and 59. Because the Court cannot ignore well-pled factual allegations when ruling on a (C)(8) motion, Defendants' motion on this basis is also DENIED.

⁵ Quoting *Heritage Optical Center, Inc v Levine*, 137 Mich App 793, 798; 359 NW2d 210 (1984), Plaintiffs also argue that business defamation may also be established "[Where] a libel contains an imputation upon a corporation in respect to its business, its ability to do business, and its methods of doing business, the same becomes libelous per se."

4. Defendants' (C)(6) Motion and Forum Non Conveniens

Defendants next ask the Court to dismiss this action under MCR 2.116(C)(6), which considers whether “[a]nother action has been initiated between the same parties involving the same claim.”

But Defendants’ lawsuit in South Carolina was not pending when Plaintiffs filed the present action (November 19, 2015). Defendants’ South Carolina lawsuit was filed a day later (November 20, 2015). As such, dismissal under (C)(6) is unwarranted, and Defendants’ motion for the same is DENIED.

Next, “‘Forum non conveniens’ is defined as the ‘discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum.’” *Radeljak v Daimlerchrysler Corp*, 475 Mich 598, 604; 719 NW2d 40 (2006), quoting Black's Law Dictionary (6th ed.). The decision whether to grant or deny such a motion is within this Court’s discretion. *Id.* But the plaintiff’s choice of forum is accorded deference, and a party’s residence in Michigan is not dispositive. *Id.*

“‘[T]he ultimate inquiry is where trial will best serve the convenience of the parties [and the ends] of justice.’” *Id.* at 605, quoting *Cray v General Motors Corp*, 389 Mich 382, 396; 207 NW2d 393 (1973), and *Koster v American Lumbermens Mutual Casualty Co*, 330 US 518, 527 (1947).

The Court should analyze this motion based on the factors set out in *Cray* and readopted in *Radeljak*:

1. The private interest of the litigant.
 - a. Availability of compulsory process for attendance of unwilling and the cost of obtaining attendance of willing witnesses;
 - b. Ease of access to sources of proof;
 - c. Distance from the situs of the accident or incident which gave rise to the litigation;

- d. Enforceability of any judgment obtained;
- e. Possible harassment of either party;
- f. Other practical problems which contribute to the ease, expense and expedition of the trial;
- g. Possibility of viewing the premises.

2. Matters of public interest.

- a. Administrative difficulties which may arise in an area which may not be present in the area of origin;
- b. Consideration of the state law which must govern the case;
- c. People who are concerned by the proceeding.

3. Reasonable promptness in raising the plea of *forum non conveniens*. *Radeljak*, 475 Mich at 605-606; *Cray*, 389 Mich 382 at 396.

1. *Private Interest*

With regard to the first factor, “[t]he private interest of the litigant,” Defendants first admit that “the parties’ witnesses are likely balanced between South Carolina and Michigan.” Defendants also argue that much of the evidence of their designs and trade secrets is located in South Carolina. But the reverse is also true. Plaintiffs’ sources of proof reside in Michigan.

As a result, this factor does not weigh in either party’s favor.

2. *Public Interest*

With regard to the second factor, “matters of public interest,” Defendants argue that this case involves South Carolina law and a South Carolina business. In response, Plaintiffs argue that they assert claims under Michigan law, and they are Michigan businesses. As a result, this factor does not weigh in either party’s favor.

3. *Reasonable Promptness*

Finally, regarding the last factor, “Reasonable promptness in raising the plea of *forum*

non conveniens,” Defendants raised another action and *forum non conveniens* in the present motion (filed in lieu of an Answer after a court-ordered stay).

Considering the *Cray* factors, the Court finds that this case is appropriately litigated in Michigan. Defendants have not presented any compelling reason to send this action to South Carolina. As a result, Defendants’ motion based on *forum non conveniens* is similarly DENIED.

5. Summary/Conclusion

To summarize, Defendants’ Motion to Dismiss is GRANTED IN PART – but only with respect to Plaintiffs’ Count I for declaratory judgment, which is DISMISSED.

In all other respects, Defendants’ motion is DENIED.⁶

IT IS SO ORDERED

September 12, 2016
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge

⁶ The Court will also note that the parties agree that the United States District Court for the Eastern District of Michigan’s dismissal under Rule 12(b)(6) is void because said Court never had jurisdiction to enter such an order. *Altman v Nelson*, 197 Mich App 467, 472-473; 495 NW2d 826, 829 (1992) (concluding “When there is a want of jurisdiction over the parties or the subject matter, no matter what formalities may have been taken by the trial court, the action is void because of its want of jurisdiction. Consequently, its proceedings may be questioned collaterally as well as on direct appeal.” *Altman v Nelson*, 197 Mich App 467, 472-473; 495 NW2d 826, 829 (1992).