

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

GRAND RAPIDS E-CIGARETTE, LLC,

Plaintiff,

Case No. 16-02496-CKB

vs.

HON. CHRISTOPHER P. YATES

MITTEN VAPORS LLC; GR E LIQUID
LLC; JAMIE ZICHTERMAN; ANTHONY
WINTERS,

Defendants.

OPINION AND ORDER GRANTING PRELIMINARY INJUNCTION

This dispute presents a paradigmatic example of the difference between theory and practice. In a theoretical sense, Defendant Mitten Vapors LLC (“Mitten Vapors”) has nothing at all to do with Defendant GR E Liquid LLC (“GREL”), and Defendants Jamie Zichterman and Anthony Winters share only a coincidental connection as cousins. After all, Winters opened and then closed GREL, whereas Zichterman launched and now operates Mitten Vapors. But a raft of social media posts by Zichterman and Winters tell a completely different story, linking the cousins as business partners and leaving no doubt that Mitten Vapors is merely a continuation of GREL, albeit with a different name. In resolving a motion for a preliminary injunction filed by Plaintiff Grand Rapids E-Cigarette, LLC, the Court must decide whether to respect corporate niceties by regarding GREL and Mitten Vapors as separate legal entities, or instead to take the social-media posts of Zichterman and Winters at face value and treat the two entities as one and the same. The Court concludes that Mitten Vapors is just a continuation of GREL, so it is bound by GREL’s contractual obligations, but Zichterman does not labor under the restrictions assumed by GREL and imposed upon Mitten Vapors.

I. Factual Background

As millennials have come of age in a challenging economy, they have devised new business ventures that seem designed to appeal to untapped markets. The Court has presided over ferocious disagreements in the hydroponics industry, and now the Court must wade into its first contest over the burgeoning e-cigarette industry.¹ In late 2013, Vaughn Jurgens sold his hydroponics business, studied the e-cigarette industry, and then used the money from the sale of his hydroponics company to open and operate Plaintiff Grand Rapids E-Cigarette. See Hearing Tr (April 18, 2016) at 22-23. Based upon trial and error, Jurgens developed sources of supply in China and recipes for mixing the e-cigarette ingredients, *i.e.*, propylene glycol, vegetable glycerin, and nicotine. Id. at 23-24. Then he turned his blends on the world. That's when he turned the world around.

After developing his secret recipe book, Jurgens began working to set up franchises such as Defendant GREL. On May 20, 2014, Jurgens (acting on behalf of Grand Rapids E-Cigarette) signed a "License and Joint Purchase Agreement" with Defendant GREL. The terms of that agreement that Defendant Winters signed on behalf of GREL included stringent noncompetition requirements and deemed Jurgens's signature flavors "the sole and exclusive property of Grand Rapids E-Cigarette." See Defendants' Exhibit A (License and Joint Purchasing Agreement, §§ 2.2 & 10.1). Based on that agreement, Winters filed articles of organization for GREL with the State of Michigan in June 2014. See Plaintiff's Exhibit 2. Soon thereafter, Winters opened a GREL store at 1519 Plainfield Avenue, N.E., in the City of Grand Rapids.

¹ In simple terms, e-cigarettes are substitutes for conventional tobacco-based cigarettes, but e-cigarettes rely upon liquid-based nicotine delivery systems. E-cigarettes are often touted as a much healthier alternative to conventional cigarettes, although on occasion e-cigarettes spontaneously burst into flames.

On November 21, 2014, Plaintiff Grand Rapids E-Cigarette's attorney wrote to Defendant Winters alleging "that you have offered for sale items outside of your joint purchasing agreement" and demanding "that you remove these items from your inventory and cease and desist from further violations of the Agreement." See Plaintiff's Exhibit 5. Then, on February 2, 2015, Grand Rapids E-Cigarette's counsel sent another letter to Winters terminating the contractual relationship between Grand Rapids E-Cigarette and GREL and prescribing a process for winding up operations of GREL. See Plaintiff's Exhibit 6. The letter also reminded Winters of the noncompetition obligations in the agreement that prohibited GREL from engaging in any activities in competition with Grand Rapids E-Cigarette "within a fifty (50) mile radius of the main Grand Rapids E-Cigarette location" for two years following termination of the parties' agreement. See Defendants' Exhibit A (License and Joint Purchasing Agreement, § 10.1).

On February 12, 2015, just ten days after Plaintiff Grand Rapids E-Cigarette terminated its agreement with Defendant GREL, Defendant Zichterman filed articles of organization with the State of Michigan forming Defendant Mitten Vapors.² See Defendants' Exhibit C. Zichterman identified the business address for his new venture as "1519 Plainfield, Grand Rapids, Michigan," id., which is precisely the same location as the GREL e-cigarette store. And, in fact, Zichterman opened for business as Mitten Vapors at that location on Plainfield Avenue in March of 2015. To make matters even more frustrating for the plaintiff, Zichterman employed his cousin, Defendant Winters, at the Mitten Vapors store on Plainfield Avenue. Moreover, Mitten Vapors took over GREL's inventory and inherited many of its customers. Thus, Mitten Vapors seemed strikingly similar to GREL.

² The paperwork that Defendant Zichterman submitted to the State of Michigan states that Zichterman signed the articles of organization on February 5, 2015, which was only three days after Plaintiff Grand Rapids E-Cigarette's attorney sent the termination letter to Defendant Winters.

On March 17, 2016, Plaintiff Grand Rapids E-Cigarette filed this action against Defendant Mitten Vapors. Then, on April 25, 2016, the plaintiff filed a first amended complaint adding three new defendants – Defendants GREL, Winters, and Zichterman – and presenting five separate claims based primarily upon the noncompetition section of the “License and Joint Purchasing Agreement” between Grand Rapids E-Cigarette and GREL. The plaintiff also moved for preliminary injunctive relief to prevent all of the defendants from running a competing e-cigarette business. To address that motion, the Court heard two days of testimony and arguments. Now, the Court must decide whether Grand Rapids E-Cigarette has established a right to an injunction.

II. Legal Analysis

In its effort to obtain injunctive relief, the plaintiff must bear “the burden of establishing that a preliminary injunction should be issued[.]” See MCR 3.310(A)(4). An injunction “represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity.” Davis v Detroit Financial Review Team, 296 Mich App 568, 613 (2012). Our Court of Appeals “has identified four factors to consider in determining whether to grant a preliminary injunction.” Id. Those four factors are as follows:

(1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.

Davis, 296 Mich App at 613. In analyzing these four considerations, the Court must keep in mind that injunctive relief is only appropriate if “there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury.” Id. at 614.

A. Likelihood of Success on the Merits.

Plaintiff Grand Rapids E-Cigarette's likelihood of success on the merits depends upon how broadly the Court can impose the noncompetition obligation prescribed by the "License and Joint Purchasing Agreement," which requires GREL to abstain from competing with the plaintiff for two years after the termination of the agreement in February 2015. See Defendants' Exhibit A (License and Joint Purchasing Agreement, § 10.1). Thus, the plaintiff's success on its noncompetition claim against GREL is virtually assured if the plaintiff can prove that GREL has undertaken activities in competition with the plaintiff. But imposition of that noncompetition obligation upon the other three defendants requires a more challenging application of contract principles.

Defendant Winters provided his signature on the agreement between Plaintiff Grand Rapids E-Cigarette and Defendant GREL, but Winters did so in his capacity as the principal of GREL. "As a general rule, 'an individual stockholder or officer is not liable for his corporation's engagements unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice – once as an officer and again as an individual.'" See Geresy v Dommert, No 243468, slip op at 6 (Mich App June 3, 2004) (unpublished decision). In this case, therefore, the plaintiff would have a much stronger argument for enforcement of the noncompetition obligation upon Winters if he had signed the agreement with the plaintiff twice, rather than just once. Nevertheless, imposing the noncompetition obligation exclusively upon GREL, and not upon its one and only principal, makes no sense. First, GREL did not even come into existence until two weeks *after* Winters signed the "License and Joint Purchasing Agreement." Compare Defendant's Exhibit A with Plaintiffs' Exhibit 2. Winters could not sign that agreement on behalf of a limited liability company that did not yet exist, and "[a] person who signs a contract on behalf of a company that is

not yet in existence generally becomes personally liable on that contract.” Duray Development, LLC v Perrin, 288 Mich App 143, 151 (2010). Second, although GREL has ceased its operations, Winters still knows all of the trade secrets and operational practices of the plaintiff’s business. He reviewed and signed the agreement that contains the noncompetition obligation. The Court cannot permit him to discard the noncompetition agreement simply by shedding his corporate cloak and taking on a new corporate identity for the purpose of competing with Grand Rapids E-Cigarette. Therefore, the Court finds that Winters is bound by the noncompetition obligation.

Similarly, the Court concludes that Defendant Mitten Vapors must abide by the terms of the noncompetition section of the agreement between Plaintiff Grand Rapids E-Cigarette and Defendant GREL. Section 10.1 of that agreement broadly imposes the noncompetition obligation upon GREL “and its subsidiaries, successors and assigns” See Defendant’s Exhibit A, (License and Joint Purchasing Agreement, § 10.1). A corporate entity usually becomes a successor corporation through the purchase of stock or assets of its predecessor. See Foster v Cole-Blanchard Machine Co, 460 Mich 696, 702 (1999). Of course, no such formal transaction occurred here. But Defendant Mitten Vapors took over the inventory and premises of GREL, which plainly constituted the transfer of all of GREL’s assets to Mitten Vapors. Michigan law makes clear that an obligation of the predecessor transfers to the successor “where the new corporation is a mere continuance of the old” corporation. Shue & Voeks, Inc v Amenity Design & Manufacturing, Inc, 203 Mich App 124, 128 (1993); see also Foster, 460 Mich at 702. The transfer without cost of GREL’s assets to Mitten Vapors, coupled with social-media posts by Defendants Winters and Zichterman,³ e.g., Plaintiff’s Exhibits 17 & 18,

³ The best explanation Defendant Winters could provide for the problematic statements on social media was as follows: “There’s a lot of things I say on social media. Sometimes I don’t even mean them. I think that happens to a lot of people, though.”

leave no doubt that Mitten Vapors is ““a mere continuation or reincarnation”” of GREL. See Turner v Bituminous Casualty Co, 397 Mich 406, 417 n3 (1976). Accordingly, Mitten Vapors is bound by GREL’s noncompetition obligations as GREL’s successor.

In contrast, the Court cannot stretch the noncompetition obligations far enough to apply them to Defendant Zichterman, who did not sign the “License and Joint Purchasing Agreement” in either a personal or a representative capacity. As our Court of Appeals has noted: ““It goes without saying that a contract cannot bind a nonparty.”” AFSCME Council 25 v Wayne County, 292 Mich App 68, 80 (2011). Because Zichterman did not sign the agreement between GREL and Defendant Grand Rapids E-Cigarette, the Court finds no basis to conclude that he was ever a party to that agreement. Consequently, the Court concludes that Zichterman is not bound by the noncompetition obligations in that agreement, so the Court cannot enjoin Zichterman from opening and operating an e-cigarette business so long as that store does not constitute ““a mere continuation or reincarnation”” of GREL. See Turner, 397 Mich at 417 n3.

B. Irreparable Harm.

Under settled Michigan law, “a party need[s] to make a particularized showing of concrete irreparable harm or injury in order to obtain a preliminary injunction.” Michigan Coalition of State Employee Unions v Civil Service Comm’n, 465 Mich 212, 225 (2001). “The mere apprehension of future injury or damage cannot be the basis for injunctive relief.” Pontiac Fire Fighters Union Local 376 v City of Pontiac, 482 Mich 1, 9 (2008). Moreover, “relative deterioration of competitive position does not in itself suffice to establish irreparable injury.” Thermatool Corp v Borzym, 227 Mich App 366, 377 (1998). But loss of business coupled with the prospect of significant additional

erosion of a company's client base can support a finding of irreparable harm. See, e.g., Performance Unlimited, Inc v Questar Publishers, Inc, 52 F3d 1373, 1382 (6th Cir 1995). Beyond that, the Court must recognize the significance of Plaintiff Grand Rapids E-Cigarette's franchise arrangement.

By entering into the "License and Joint Purchasing Agreement" with Plaintiff Grand Rapids E-Cigarettes, Defendant GREL and its principal, Defendant Winters, joined the e-cigarette industry at the leading edge of the market. The plaintiff's principal, Vaughn Jurgens, taught Winters all that he knew about the e-cigarette business, and he gave Winters access to the secret recipe book devised by Grand Rapids E-Cigarettes. Turning Winters loose on the e-cigarette industry in the wake of his mind meld with Jurgens presents a very real risk that every benefit of the plaintiff's franchise system could be lost. Additionally, the transfer of Winters's e-cigarette business to his cousin – for whom Winters now works – raises the specter of further knowledge transfers unless the Court provides a measure of protection in the form of injunctive relief. Consequently, the Court finds that the plaintiff has presented a compelling case of potential irreparable harm in the absence of an injunction.

C. Balance of Harms to the Opposing Parties.

In assessing the relative harm to the opposing parties in the presence or absence of injunctive relief, see Davis, 296 Mich App at 613, the potential harm to Defendant Winters cannot be gainsaid. Similarly, an order barring Defendant Mitten Vapors from operating in its current location will cause temporary hardship. But the Court's concerns about those potential harms must be balanced against the risk to the plaintiff, which furnished Winters and Defendant GREL with vast knowledge of the e-cigarette business. Winters can find gainful employment in some other industry and Mitten Vapors can relocate, but nothing can repair the damage to the plaintiff if the Court allows Mitten Vapors and

its employee, Winters, to compete freely in the e-cigarette market. Without injunctive relief for the plaintiff, Winters can rely upon (and even impart to others) the knowledge that he obtained through GREL's short-lived franchise arrangement with Plaintiff Grand Rapids E-Cigarettes. The harm that flows from that situation could be immeasurable. Accordingly, the Court concludes that the balance of harms weighs in favor of injunctive relief.

D. Potential Harm to the Public Interest.

In considering potential harm to the public interest, the Court must take into account the right of e-cigarette consumers to have a significant number of choices in the marketplace. But the Court's approach to the plaintiff's request for injunctive relief permits Defendant Zichterman to own and run an e-cigarette business in Grand Rapids, albeit at a different location than the place where its current store does business. Thus, if Zichterman has genuine interest in running an e-cigarette business that is something other than a mere reincarnation of GREL's store at 1519 Plainfield Avenue, consumers will not be deprived of any options that presently exist in the greater Grand Rapids area, so the Court does not believe the public interest will suffer any harm if the Court grants a preliminary injunction that leaves room for Zichterman to run an e-cigarette business.

III. Conclusion

Although the Court can easily conclude that Defendants Winters and Zichterman have joined forces in the e-cigarette industry in the past, they may not do so in the future. Whereas Zichterman is free to run his own e-cigarette store, neither Winters nor his former business, Defendant GREL, may participate in the e-cigarette industry for two years from the date when Plaintiff Grand Rapids E-Cigarette terminated its "License and Joint Purchasing Agreement" with GREL. Additionally, the

Court shall prohibit Mitten Vapors from operating under its current name and at its current location. To ensure these results, **IT IS ORDERED that Defendants GREL, Mitten Vapors, and Winters are all prohibited and enjoined from participating in any e-cigarette business within 50 miles of the plaintiff's location at 1414 28t Street, S.E.,⁴ in Grand Rapids until February 2, 2017, or a further order of the Court, whichever comes first. Nothing in this injunctive order prevents Defendant Zichterman from owning or participating in any e-cigarette business so long as that business is neither conducted at 1519 Plainfield Avenue, N.E., in Grand Rapids nor identified by the name of Mitten Vapors.⁵**

IT IS SO ORDERED.

Dated: June 2, 2016



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

⁴ The “License and Joint Purchasing Agreement” provides that address for Plaintiff Grand Rapids E-Cigarette, see Defendants’ Exhibit A, but paragraph 1 of the first amended complaint lists the plaintiff’s address as 3959 28th Street, S.E., in Grand Rapids. Those two locations are not far enough apart to make a material difference, so the Court need not concern itself with identifying the most appropriate address. Instead, the Court shall simply rely upon the address in the agreement that the plaintiff and Defendant Winters signed.

⁵ In addition, to the extent that Plaintiff Grand Rapids E-Cigarette has demanded injunctive relief barring the defendants from “further disparaging E Cigarette,” that request must be rejected. “The term ‘prior restraint’ is used to describe an administrative or judicial order that forbids certain communications in advance of the time that the communications are to occur.” Truckor v Erie Twp, 283 Mich App 154, 169 (2009). “Temporary restraining orders and permanent injunctions, which actually forbid speech activities, are classic examples of prior restraints.” Van Buren Charter Twp v Garter Belt, Inc, 258 Mich App 594, 623 (2003). “Any system of prior restraints on expression bears a heavy presumption against its constitutional validity.” Id. at 622. Because commercial speech is entitled to protection under the First Amendment, see Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc, 425 US 748, 761-765 (1976), the Court must tread very carefully in affording injunctive relief that acts as a prior restraint upon commercial speech.