

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

INDEPENDENT BUSINESS OWNERS
ASSOCIATION INTERNATIONAL,
a Michigan non-profit corporation,

Plaintiff,

v.

ORRIN WOODWARD, BILLY FLORENCE,
DON WILSON, RANDY HAUGEN, CHRIS
BRADY and CHUCK GOETSCHER
individually,

Defendants.

File No. 07-08513-CZ

Hon. Paul J. Sullivan

OPINION & ORDER

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Defendants are former Board members of plaintiff. As part of their membership, defendants were required to sign written confidentiality and non-disclosure agreements and also take an oath whereby they affirmed that they would not disclose any discussions or decisions made by the Board. It is alleged by plaintiff that subsequent to their service on the Board, defendants utilized the confidential information they became privy to and disseminated that information to the public through a Complaint filed in federal court in California. *See Woodward v Quixtar, Inc*, No CV07-05194 (C D Cal). On August 14, 2007, a temporary restraining order [“TRO”] was entered enjoining defendants from

disclosing to any unauthorized party Confidential Information as defined in the written agreements, based upon plaintiff's allegation that defendants were planning to further disseminate confidential information. Plaintiff now seeks entry of a preliminary injunction as provided by MCR 3.310(A).

A grant of injunctive relief is an extraordinary remedy. *Kernen v Homestead Development Co*, 232 Mich App 503, 509 (1998). In order to justify the imposition of a preliminary injunction, the Court must weigh four factors: (1) the likelihood that the party seeking the injunction will succeed on the merits; (2) 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; (3) the harm to the public interest if the injunction is issued; and (4) demonstration that the applicant will suffer irreparable injury if the injunction is not issued. *Fruehauf Trailer Corp v Hagelthorn*, 208 Mich App 447, 449 (1995). The party seeking a preliminary injunction has the burden of establishing that the relief should be granted. MCR 3.310(A)(4); *Campau v McGrath*, 185 Mich App 724, 727-728 (1990).

Success on the Merits. The underlying issues in this action are to what extent the information defendants were made privy to is to be considered "confidential" and whether the agreement entered into is too vague to be enforceable. It is noteworthy that defendants do not appear to dispute that they learned of confidential information or that such information was disclosed. Rather, they argue that due to the language contained within the document signed, they should not be bound by the requirements therein.

The agreement entered into was written and signed by each of the defendants. It specifically required that defendants "keep in confidence all Confidential Information" to which they gained knowledge and also required them to agree "not to make any use whatsoever of Confidential Information except for the purpose specified" therein. [emphasis in original] Further, in the Oath of Office for Board Members, which none of the defendants have disputed having taken, defendants agreed "to not disclose to any third party the substance of discussions at meetings of said groups and will not disclose the decisions made by said groups unless and until authorized to do so by the group involved." This language, on its face, is clear and unambiguous. Based upon the exhibits attached to plaintiff's brief, defendants appear to have already violated their obligations by, at a minimum, disclosing to third parties contents of discussions which occurred during Board meetings.

Defendants knowingly and voluntarily signed the confidentiality agreements at issue in this case, and took the Oath of Office for Board Members. It appears to the Court that while serving on the Board they became privy to confidential information and that information was subsequently disclosed without authorization of plaintiff. This disclosure was in direct violation of the agreement willingly entered into and, as such, defendants are responsible for the resulting consequences. Considering the signed agreements and the actions taken by defendants, it is the Court's opinion that plaintiff does, in fact, have a likelihood of success on the merits.

Harm to Plaintiff versus Harm to Defendants. There is no dispute that at some point during their service on plaintiff's Board defendants became privy to confidential information. To allow defendants to disclose such information would harm plaintiff more than defendants as the written agreements already require that such information not be disclosed. The harm to defendants is that they have to abide by the obligations they agreed to whereas plaintiff would be harmed by having confidential information disclosed to the public, thereby interfering with its ability to competitively participate in the marketplace. Accordingly, the Court finds this factor to favor plaintiff.

Harm to the Public Interest if Injunction Issues. Although the public has an interest in the disclosure of information, it also has an interest in the enforcement of written agreements. Before written contracts are entered into, considerable thought, legal analysis and expense are likely to have been expended in drafting and reviewing such agreements. Presumably, all parties had the ability to read the proposed agreement, to have it reviewed by legal counsel if they so desired, and to contemplate and consider whether they wanted to be bound by its provisions. If unsatisfied with the terms, they could have proposed changes or refused to sign.

No one is forced to sign such agreements, and persons entering into written contracts generally understand the need to thoroughly read and study the provisions they are binding themselves to, especially members on a Board. Written agreements, signed by the persons to be bound, provide clarity, direction, and guidance as to the intent of the parties, much more so than oral agreements where parties are forced to rely on their memories of the surrounding circumstances. Given the time and energy expended by the parties in carefully crafting written agreements and deciding whether to enter into them, it is not in the public's interest for the Court to lightly disregard and set aside the terms which the parties had the opportunity to reflect upon before signing. Therefore, public policy in this case favors the entry of a preliminary injunction in plaintiff's behalf.

Irreparable Injury to Plaintiff. To establish irreparable injury, plaintiff must demonstrate a noncompensable injury for which there is no legal measurement of damages or where damages cannot be determined with a sufficient degree of certainty. *Thermatool Corp v Borzym*, 227 Mich App 366, 377 (1998). Economic injuries can be remedied by damages at law and are therefore not irreparable. *Acorn Building Components, Inc v Local Union No. 2194 UAW*, 164 Mich App 358, 366 (1987).

When entering into the confidentiality agreement with plaintiff, defendants specifically agreed that if confidential information is improperly disclosed, "such disclosure will be considered as causing irreparable harm to the Association and/or to Quixtar and may form the basis for the Association or Quixtar to seek injunctive relief." Therefore, by signing the agreement when they became Board members, defendants acknowledged that disclosure of such information would constitute irreparable injury to plaintiff and that an injunction was a possible remedy to prevent further disclosure. This acknowledgement, in conjunction with the loss of goodwill and competitive losses potentially suffered by the inappropriate disclosure of information, causes this factor to weigh on the side of plaintiff.

Conclusion. A balancing of the factors set forth above establishes to the Court that injunctive relief is an appropriate remedy to prevent plaintiff from further harm. This relief is consistent with the written agreement entered into by the parties and underscores the need to comply with the provisions previously agreed to by defendants upon becoming a part of plaintiff's Board.

To the extent that confidential or proprietary information has previously been disclosed through the filing of the class action in California, that injury already has occurred and cannot now be prevented by the issuance of injunctive relief. With respect to the pending federal litigation in California, if plaintiff is concerned about ongoing disclosure it should attempt to intervene in that action or take the necessary steps to prevent further dissemination. From a practical standpoint, this Court cannot and will not attempt to dictate the content of federal court pleadings, or under what circumstances said pleadings should be subject to protective order or filed under seal.

Accordingly, it is the order of the Court that defendants abide the terms of the confidentiality agreements entered into with defendant and not make unauthorized disclosures to third parties, unless such disclosures are required by law, direct court order, or are filed in good faith in conjunction with the federal lawsuit in California. Further, defendants shall return all confidential information in their possession to counsel for plaintiff not later than 4pm on Tuesday, August 28, 2007. Upon receipt of that information, plaintiff is directed to safeguard and segregate those documents so that they are readily identifiable and ascertainable in the event that they are discoverable during the course of further litigation.

DATED: August 24, 2007

Paul J. Sullivan, Circuit Judge (P24139)