STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

TIMOTHY M. PARSLOW, MICHAEL F. PARSLOW,
PATRICK J. PARSLOW, HAROLD W. PARSLOW,
SR., and GRAPAR INC.,

Plaintiffs,

Case No.2011-5108-CZ

vs.

HAROLD W. PARSLOW, JR., JANET L. PARSLOW,
HAROLD W. PARSLOW III, and GREEN AGE
PRODUCTS & SERVICES, LLC,

Defendants.
______________________________________/

OPINION AND ORDER

Defendants have filed a motion for summary disposition of Plaintiff Harold Parslow Sr.'s claims pursuant to MCR 2.116(C)(8) and (10). Plaintiffs have filed a response and request that the motion be denied.

In addition, Plaintiffs have filed a motion for partial summary disposition pursuant to MCR 2.116(C)(8), (9) and (10). Defendants have filed a response and request that the motion be denied.

Factual and Procedural History

This matter involves a family shareholder dispute in relation to the family's business, Grapar, Inc. ("Grapar"). Grapar was founded in the 1960s/1970s and was originally owned by Plaintiff Harold Parslow, Sr. ("HPSR") and his wife, Mary Ann Parslow. Grapar manufactured automotive, agricultural, environmental and pharmaceutical machinery, parts and equipment. In 1993 HPSR sold Grapar to his four sons. The sale was memorialized via a Stock Purchase

Agreement and a Promissory Note (collectively, the "Sales Documents"). Pursuant to the Sales Documents, Defendant Harold Parslow, Jr. ("HPJR") and Plaintiff Timothy M. Parslow ("T. Parslow") each received a 30% interest in Grapar, and Plaintiffs Michael F. Parslow ("M. Parslow") and Patrick J. Parslow ("P. Parslow") each received a 20% interest.

Grapar operated on a parcel of real property situated in Warren, MI and located on Flanders Ave. (the "Subject Property"). On June 21, 1993, HPSR, as trustee of a trust, leased the Subject Property to Grapar (the "Lease"). The Lease does not include any personal guaranties.

In the 2000s Grapar, due to the poor economic conditions, obtained a $400,000.00 promissory note from Comerica Bank (the "Note"). The Note was secured by a mortgage encumbering the Subject Property, and by the personal guaranties of HPSR and his four sons. The mortgage was executed by HPSR.

In 2007 HPJR founded Defendant Green Age Products & Services, LLC ("GAPS"). Between 2007 and 2011, GAPS obtained and subcontracted some of its jobs to Grapar. In October 2011 Grapar shut down its operations. On March 27, 2012, HPSR sold the Subject Property and paid off the Note.

On February 28, 2014, Plaintiffs filed their third amended complaint against Defendants (the "Complaint"). The Complaint contains 17 counts but does not specify which counts are brought against which Defendant(s). On August 15, 2014, Defendants filed their instant motion for summary disposition of all claims brought by HPSR. On October 1, 2014, the Court held a hearing in connection with the motion. During the hearing, Plaintiffs' counsel clarified and conceded that HPSR's sole potential basis for recovery is his allegation that HPJR breached the Sales Documents by failing to make the required payments on or about June 21, 2003.

Accordingly, the Court's review will be limited to whether a genuine issue of material fact exists as to whether HPSR may recover on that claim.

On August 15, 2014, Plaintiffs filed their motion for partial summary disposition pursuant to MCR 2.116(C)(8), (9) and (10). On August 27, 2014, Plaintiffs filed an amended brief in support of their motion. Defendants have since filed a response and request that the motion be denied. Plaintiffs have also filed a reply in support of their motion. On October 1, 2014, the Court held a hearing in connection with the motion and took the matter under advisement.

Standard of Review

Summary disposition may be granted pursuant to MCR 2.116(C) (8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true. *Id.* If the defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery, then summary disposition under this rule is proper. *Id.* Further, a court may look only to the parties' pleadings in deciding a motion under MCR 2.116(C)(9). *Id.*

A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

1) Defendants' Motion for Summary Disposition of Harold Parslow Sr.'s Claim

In their motion, Defendants contend that HPSR's breach of contract claim based on the Sales Agreements is barred by the 6 year statute of limitations for all "actions to recover damages or sums due for breach of contract." *See* MCL 600.5807(8). In this case, the last payment made by HPJR was made in 2003. Accordingly, any breach of contract claim HPSR had based on HPJR's breach became barred in 2009 as the result of the operation of the 6 year statute of limitations. This matter was not filed until December 2011, over 2 years after the statute of limitations lapsed. Consequently, HPSR's claim for breach of contract is barred and Defendants' motion for summary disposition must be granted.

2) Plaintiffs' Motion for Partial Summary Disposition

Plaintiffs' motion is based on their claim that HPJR transferred trade names to himself from Grapar without the approval of the remaining shareholders of Grapar. The alleged trade name include Green Age, Agri-Motion and Power Tower. While HPJR concedes that he transferred applications for those trade names, he asserts that there was no violation because (1) the transfer was made with the acquiescence and consent of Grapar and its shareholders since the trade names were used to obtain work that was subcontracted to Grapar, (2) the Power Tower names was never used by Grapar in commerce, (3) Grapar abandoned the names through non-use and (4) the transfers were of applications, not registered names.

The state of trademark/trade name law, in relation to the abandonment of a mark, was recently discussed by the Michigan Court of Appeals in *Movie Mania Metro, Inc v GZ DVD's Inc*, ___ Mich App ___, ___ NW2d ___ (2014). In *Movie Mania,* the Court explained the state of trademark law as follows:

> Michigan law has offered protection of trademark rights for the benefit of business owners, and the consuming public. Business owners, who invested significant amounts of money and effort to convince consumers to identify their marks with their products and services, needed a remedy against competitors who sought to free-ride on this accumulated goodwill by copying or pirating already established marks. Consumers, who associated and expected a certain level of service and quality with certain marks, needed protection from those imposters who copied or pirated already-established marks to "pass off" their goods and services as those of the business associated with the already established marks. *[Janet Travis, Inc v. Preka Holdings, LLC,* ––– Mich.App ––––; ––– NW2d –––– (2014), (footnotes omitted).]
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> Trademark law therefore involves "the advancement of two distinct but related interests: the private right of the trademark holder to prevent others from using his mark to pass off their goods or services as his own, and the public right to protection from such market-related deceptive practices." *Travis*, slip op at *1–2. Because the right of a trademark holder to his trademark is a byproduct of these two interests, trademark rights are a special kind of intellectual property, in that the mark holder's right to exclusive use of his mark is tempered by and dependent on the perceptions of the consuming public. For a mark to serve as a trademark and be entitled to legal protection, the consuming public must be able to use the mark to "distinguish a good as originating from a particular source." *Travis,* slip op at *9, citing MCL 429.32(e). If the consuming public is unable to use the mark to "distinguish a good as originating from a particular source," the mark does not function as a trademark and is thus not entitled to legal protection. Trademark rights are thus inherently mutable, because they are dependent on whether the consuming public is able to use the mark to distinguish a good or service as originating from a particular source.
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> Consumer perception of a mark can be shaped by many factors, including the actions of the mark holder. Normally, as in *Travis,* the mark holder realizes the valuable nature of his trademark and will thus make every effort to ensure that, in the minds of consumers, his mark remains associated with his products and services, and his products and services alone. But on occasion, as here, a mark holder, through his own actions or omissions, destroys the value of his trademark, by severing the link in the mind of the consumer between the mark holder's mark and his particular product or service. In other words, a mark holder's actions can

> cause his mark to no longer function as a trademark, and thus not be entitled to legal protection.
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> One common way that a mark holder may engage in this mark-destroying process is "naked licensing," or the practice of "allowing others to use [its] mark without exercising reasonable control over the nature and quality of the goods, services, or business on which the [mark] is used by the licensee." *Eva's Bridal Ltd v Halanick Enterprises, Inc*, 639 F3d 788, 789 (CA 7, 2011). If other businesses are using the mark holder's mark, and operate independently and with little to no oversight from the mark holder, consumers will be unable to use the mark to distinguish goods and services bearing the mark as originating exclusively from the mark holder. In other words, a mark that is the subject of naked licensing can no longer function as a trademark, and is accordingly not the proper subject of legal protection. In the parlance of trademark law, naked licensing destroys a mark's "distinctiveness" and renders it "not valid" as a trademark.
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> Because this practice prevents consumers from being able to use the mark to identify goods and services as the products of a specific business, courts have refused to protect marks that are subject to naked licensing at common law, Michigan law, and federal law. Initially, both state and federal courts did so by holding that nakedly licensed marks were not valid trademarks, and thus not properly protectable under trademark law. After revisions to the federal Lanham Act in 1988, however, most federal decisions now hold that nakedly licensed trademarks have been "abandoned," while state courts continue to hold, under statute and common law, that nakedly licensed trademarks are not valid.
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> This case requires us to make this doctrinal distinction between state and federal law. The Lanham Act explicitly states that naked licensing constitutes "abandonment" of a trademark, in that trademark holders who engage in naked licensing relinquish all rights to their mark. 15 USC §1127(2) The Michigan Trademark and Service Mark Act ("Trademark Act"), MCL 429.31, et seq., does not state that naked licensing constitutes "abandonment" of a trademark, and instead defines "abandonment" to mean mere non-use, or implied non-use, of the trademark. Accordingly, a mark holder who engages in naked licensing of his trademark "abandons" his trademark under the Lanham Act, but does *not* "abandon" his trademark under the Trademark Act. Nevertheless, a mark holder who engages in naked licensing is not able to sustain a trademark-infringement claim under the Trademark Act or at common law, because the naked licensing of a mark renders that mark not valid as a trademark. MCL 429.31(i) states that a mark is "'abandoned' when its use has been discontinued with intent not to resume."

In this case, as in *Movie Mania*, Grapar, even if it at one time used one or more of the trade names in connection with its business, engaged in naked licensing of the marks by sitting by while GAPS utilized the Green Age and Agrimation names in connection with jobs, some of which were ultimately subcontracted to Grapar. Moreover, Grapar also abandoned the trade names when it ceased operations in 2008 with no intention to re-open. Further, for a mark to serve as a trademark and be entitled to legal protection, the consuming public must be able to use the mark to distinguish a good as originating from a particular source. *Movie Mania, supra*. In this case, the names at issue were only used by Grapar, if at all, on a rare occasion, which the Court is convinced is insufficient to allow the public to distinguish any particular product from Grapar. For all of these reasons, the Court is convinced that Defendants must be granted summary disposition of Plaintiffs' claims related to the trade names.

Conclusion

For the reasons set forth above, Defendants' motion for summary disposition of Plaintiff Harold W. Parslow, Sr.' claims is GRANTED. In addition, Plaintiff's motion for partial summary disposition as to its claims related to the trade names Green Age, Agri-Motion and Power Tower is DENIED. Further, Defendants are GRANTED summary disposition of Plaintiffs' claims related to the trade names pursuant to MCR 2.116(I)(2). Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last pending claim nor closes the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: October 21, 2014

JCF/sr

Cc: *via e-mail only*
John M. Rickel, Attorney at Law, jrickel@therickellawfirm.com
Linda McGrail-Belau, Attorney at Law, lmcgrailbelau@orlaw.com