

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

BLUE WATER SPORTS MANAGEMENT, LLC  
d/b/a, MICHIGAN ELITE VOLLEYBALL ACADEMY  
a Michigan Limited Liability Company,

Plaintiff,

vs.

Case No. 2013-4805-CZ

ULTIMATE VOLLEYBALL GROUP, LLC a/k/a  
TEAM DETROIT VOLLEYBALL a/k/a  
VOLLEymASTERS TRAINING SYSTEMS, a  
Michigan Limited Liability Company, JEFFREY D.  
GABEL, PAIGE GABEL, LAWRENCE WYATT,  
AMBER WYATT, EDWARD RUHL, BRANDON  
PARSLEY, JOHN KALUGAR, and SHILO STEWART,  
jointly and severally,

Defendants.

\_\_\_\_\_ /

OPINION AND ORDER

Plaintiff has filed a motion for a preliminary injunction. Defendants have filed a response and request that the motion be denied.

*Facts and Procedural History*

In 2010, Elite Sports Center, Inc. (“Elite Sports”) defaulted on certain financial obligations to Ellmor properties II, LLC (“Ellmor”). In June 2010, Ellmor foreclosed on all of Elite Sports’ assets. In July 2010, Ellmor sold the assets to Plaintiff pursuant to an asset purchase agreement (“Purchase Agreement”). Pursuant to the Purchase Agreement, Ellmor retained a security interest in the subject assets. After purchasing the assets Plaintiff began operating its own volleyball and athletic training facility in Warren, MI.

Plaintiff hired Defendants Lawrence Wyatt, Amber Wyatt, Edward Ruhl, Brandon Parsley, John Kalugar and Shilo Stewart as coaches/employees (“Employee Defendants”). In 2013, the Employee Defendants allegedly began working on setting up Team Detroit Volleyball. Plaintiff also alleges that the Employee Defendants used its client and player information lists and email lists to build their new business and to take away Plaintiff’s customers.

On December 4, 2013, Plaintiff filed its complaint in this matter against Defendants alleging: Count I- Civil Conspiracy; Count II- Concert of Action; Count III- Conversion; Count IV- Business Defamation; Count V- Misappropriation of Trade Secrets; Count VI- Tortious Interference with an Advantageous Business Relationship of Expectancy, and; Count VII- Preliminary Injunction. Plaintiff’s business defamation claims and a portion of its trade secrets claim have since been dismissed.

Plaintiff has also requested that the Court enter a preliminary injunction against Defendants. On February 26, 2014, Plaintiff filed a brief in support of its request in lieu of an evidentiary hearing. On April 7<sup>th</sup> and 20<sup>th</sup>, 2014, the Court held an evidentiary hearing, at which Defendants were given an opportunity to present evidence in opposition to Plaintiff’s request for a preliminary injunction. At the conclusion of the hearing the Court took the matter under advisement and ordered the parties to file summaries in support of their positions. Both sides have each filed a summary as requested by the Court. The Court has reviewed the pleadings, as well as the arguments advanced at the hearing, and is now prepared to make its decision.

#### *Standard of Review*

Injunctive relief is an extraordinary remedy that is ordered by a court only when justice requires, there is no adequate remedy at law, and there is real and imminent danger of irreparable harm. *Acer Paradise, Inc v Kalkaska County Rd Comm’n*, 262 Mich App 193; 684 NW2d 903

(2004). In determining whether to issue a preliminary injunction, a court must consider (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. *Campau v McMath*, 185 Mich App 724, 729; 463 NW2d 186 (1990). The moving party has the burden to establish that a preliminary injunction should be granted. MCR 3.310(A)(4).

### *Arguments and Analysis*

#### 1) Plaintiff's likelihood of prevailing on the merits of its claims.

With regards to Plaintiff's motion for a preliminary injunction, the Court must first determine whether it is likely to prevail on the merits of its claim that Defendants breached the Agreement. *Campau, supra*, at 729. The Court will address Plaintiff's claims in turn.

#### *A. Conversion*

Common law conversion is "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). Statutory conversion is governed by MCL 600.2919a, which provides, in pertinent part:

(1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:

(a) Another person's stealing or embezzling property or converting property to the other person's own use.

(b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen,

embezzled, or converted property knew that the property was stolen, embezzled, or converted.

Plaintiff has alleged that the Employee Defendants have removed, and that the other Defendants have received its proprietary, confidential and business information and/or business assets without its permission. (Complaint, at ¶68.) Specifically, Plaintiff contends that Defendants unlawfully took and used, or aided in the taking and use of, its customer contact lists, team rosters, program brochures, player/parent forms, schedules and trade names. In support of its contention, Plaintiff relies on a July 2, 2013 email sent from Defendant Brandon Parsley to Defendants Paige Gabel, Jeff Gabel, Amber Wyatt and Larry Wyatt in which Mr. Parsley states: “See attached for a large group of contacts that I pulled from my personal MEVBA file...and from all of the googledocs from the past couple of years....there are 6800+ email addresses in here...but also a lot of duplicates I’m sure....I’m hoping the software can figure that out...” (See Plaintiff’s Exhibit 6.) In their pleadings and during the evidentiary hearing, the only googledocs discussed were Plaintiff’s access-controlled googledocs containing its customer lists. Accordingly, there is little question that Defendant Brandon Parsley took Plaintiff’s customer lists from its googledocs and sent them to the other Defendants. Moreover, Defendant Jeffrey Gabel acknowledged in a July 3, 2013 email that he would merge the contacts lists with Defendants existing lists in order to create their master list for email blasts, which evidences that the other Defendants received and used the customer lists. (See Plaintiff’s Exhibit 8.)

Based on the above-referenced emails, the Court is convinced that Plaintiff is likely to succeed on the merit of its conversion claims. The July 2, 2013 email indicates that Mr. Parsley took Plaintiff’s customer list after he left his employment with Plaintiff, sent lists to the other Defendants, and that the customer lists were ultimately used to send email blasts. For these reasons, Defendants likely converted Plaintiff’s customer lists.

*B. Misappropriation of Trade Secrets*

Plaintiff's misappropriation claims with respect to the customer lists are based on their contention that their customer lists constitute a trade secret. Under MUTSA:

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:

- (i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. [MCL 445.1902(d).]

A claim for misappropriation of trade secrets under this act requires the following:

- (i) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.
- (ii) Disclosure or use of a trade secret of another without express or implied consent by a person who did 1 or more of the following:
  - (A) Used improper means to acquire knowledge of the trade secret.
  - (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it, acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use.
  - (C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake. [MCL 445.1902(b); see also *McKesson Medical-Surgical, Inc v Micro Bio-Medics, Inc*, 266 F Supp 2d 590, 596-597 (ED Mich 2003).]

With respect to the customer lists, Defendants cite that "[c]ustomer lists developed by a former employee and information relating to a customer's needs are not 'trade secrets' under MUTSA, unless the employee is bound by a confidentiality agreement." *Hayes-Albion v Kuberski*, 421 Mich 170, 183; 364 NW2d 609 (1984). However, the Court in *Hayes-Albion* also noted that the customer list at issue had been compiled by the defendant and that defendant had

not stolen a list of customers that plaintiff had kept secret. *Id.* at 183. In this case, unlike in *Hayes-Albion*, Brandon Parsley's July 2013 email indicates that at least a portion of the lists he provided were taken from Plaintiff's googledocs rather than from a list that he had compiled on his own. Moreover, Joyce Doyle and Scott Conrad both testified that access to the googledocs was limited to a small number of Plaintiff's employees. Accordingly, the Court is convinced that the allegations in this case are distinguishable from those presented in *Hayes-Albion*.

In addition, the Michigan Court of Appeals has held that customer lists are subject to trade secret protection where they are not easily ascertainable and are "developed and nurtured from much investigation." *Kubik, Inc v Hull*, 56 Mich App 335, 365; 224 NW2d 80 (1974). Moreover, the Court in *Kubik* held that injunctive relief is appropriate where there is evidence that a defendant physically misappropriated tangible customer lists owned by the plaintiff. *Id.* at 366, citing *Shwayder Chemical Metallurgy Corp v Baum*, 45 Mich App 220; 206 NW2d 484 (1973) (Holding that defendants should be enjoined from competing with customers they obtained from plaintiff's customer lists).

In this case, Plaintiff compiled its customer lists by purchasing Elite Sports' assets in 2010 and by obtaining potential customers' contact information since that time. The value of the information in the lists is evidenced by the fact that it was purchased for value in 2010 and that access to the information has been restricted since that time. In addition, as discussed above, Defendant Brandon Parsley physically took Plaintiff's customer lists from the protected googledocs and provided the information to the other Defendants. While Defendants contend that the lists do not amount to trade secrets as they could have been obtained/had been obtained by fair means, the Michigan Court of Appeals has held that even if information can be obtained by a fair and legal means it does not justify obtaining the information by conversion or other

unfair means. *Kubik, supra*, at 354-355. Accordingly, the availability of the customer lists through fair means does not negate the lists' status as a trade secret or excuse Defendants' misappropriation of the lists. For these reasons, the Court is convinced that Plaintiff is likely to prevail on its misappropriation claim with respect to the customer lists.

With respect to the brochures, other printed materials and advertising tools and schedules, the Court has already held, in its March 4, 2014 Opinion and Order, that such items are not trade secrets. The remaining bases for Plaintiff's misappropriation claims are its trade names, team names and coaching plans. However, Plaintiff has not addressed the alleged misappropriation of its team names or coaching plans in its motion; As a result, those allegations may not form the basis for an injunction.

The trade names at issue consist of names such as "Snoball" or "Fallball" that Plaintiff uses as the names for certain seasonal programs. While Plaintiff contends that Defendants have improperly utilized the names for their own programs, Plaintiff has failed to establish that the names were kept secret. Indeed, the names are displayed on the marketing materials for the programs, which are disseminated to the potential customers on their contact lists. Accordingly, the Court is convinced that these names are not trade secrets and may not form the basis for their misappropriation claims.

### *C. Plaintiff's remaining claims*

For the reasons discussed above, the Court is convinced that Plaintiff is likely to prevail on its conversion and misappropriation claims. Accordingly, it is not necessary to address Plaintiff's remaining claims at this time.

### 2) Irreparable Harm and Risk of Harm

Next, the Court will address whether Plaintiff has established it will suffer irreparable harm if the preliminary injunction is not issued. See *Campau, supra*, at 729. An injunction should not be entered “upon a mere apprehension of future injury or where the threatened injury is speculative or conjectural.” *Dunlap v City of Southfield*, 54 Mich App 398, 403; 221 NW2d 237 (1974). Plaintiff contends that if an injunction is not entered it will suffer additional harm in the form of lost customers and damage to its goodwill and reputation and that such harm is not easily quantifiable. “[L]oss of customer goodwill can be considered irreparable injury because the damages that come from that loss are difficult to estimate.” *Kelly Services v Eidnes*, 530 F Supp 2d 940, 951 (ED Mich 2008) (citation omitted). In this case, the goodwill Plaintiff had built will likely continue to be diminished so long as Defendants continue to contact Plaintiff’s current and former clients. Accordingly, the Court is satisfied that the second element weighs in favor of entering a preliminary injunction.

With respect to risk of harm, Defendants will be harmed to the extent that they will be unable to contact the potential customers whose contact information is contained in Plaintiff’s contact lists. However, there are numerous other potential clients in Michigan alone that Defendants could attempt to obtain business from. Moreover, if a preliminary injunction is not entered Plaintiff will continue to be harmed in the form of losing its goodwill with its former or current clients. Accordingly, the Court is satisfied that this factor also weighs in favor of entering a preliminary injunction.

### 3) Public interest

The final factor this Court must address is whether granting or denying the motion is in the public interest. *Campau, supra*, at 729. Plaintiff contends that granting the requested relief promotes the public’s interest because enforcing legislatively enacted provisions, such as the



Michigan Uniform Trade Secrets Act, is in the public's interest. *Kelly Services, Inc v Noretto*, 495 F Supp 2d 645, 661 (ED Mich 2007).

In response, Defendants contend that the public's interest is best served by denying the motion as it is in the public's interest to have access to a larger selection of services. Specifically, Defendants contend that the injunction would primarily affect the athletes who are enrolled with the Defendant entities as it would prevent them from participating in the current and upcoming seasons, which would negatively affect the scope of exposure they would receive from college recruiters.

While there are competing public interests at issue in this case, the Court is particularly concerned about the negative impacts any preliminary injunction would cause to the young girls/women involved in these programs who did not engage in any wrongdoing. Accordingly, the public interest factor weighs against the issuance of a preliminary injunction. However, the Court is also confident that the athletes' and parents' interests can be protected by limiting the scope of the injunction.

In particular, the Court is convinced that while a preliminary injunction is appropriate which would prevent Defendants from continuing to utilize the customer lists at issue, the athletes which are already participating/enrolled in Defendants' programs should be permitted to continue their relationships with Defendants if they so choose.

#### *Conclusion*

Based on the evidence and testimony presented by the parties, the Court finds that Plaintiffs motion for a preliminary injunction should be GRANTED, IN PART and DENIED, IN PART. Defendants are hereby enjoined and restrained, directly and indirectly, whether alone or in concert with others, including any officer, agent, employee, and/or representative, until further

order of this Court, from sending communication, soliciting or otherwise utilizing the information contained in Plaintiff's Exhibits 6 and 8. However, Defendants may continue communicating with any athletes currently enrolled in or participating in their programs. In addition, Defendants may enroll any athletes that contact them as the result of causes other than Defendants' use of the information contained in Exhibits 6 and 8.

The remainder of Plaintiff's request for a preliminary injunction is DENIED.

In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case.

IT IS SO ORDERED

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

Dated: April 21, 2014

JCF/sr

Cc: *via e-mail only*  
Robert W. Kirk, Attorney at Law, [bkirk@khlblaw.com](mailto:bkirk@khlblaw.com)  
Michael Robert Wolin, Attorney at Law, [mike@tishlaw.com](mailto:mike@tishlaw.com)