

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
13 CVS 5366

ADRIAN ESPOSITO, AS THE TRUSTEE)
FOR THE ADRIAN ESPOSITO)
REVOCABLE TRUST, MARIANO)
ESPOSITO, and ANTHEM LEATHER, INC.)
Plaintiffs)

v.)

LUCIO ESPOSITO, ROBERT WILSON,)
MARK WILSON and CREST LEATHER,)
LLC,)
Defendants)

**ORDER ON AMENDED AND
RESTATED MOTION FOR
TEMPORARY INJUNCTIVE RELIEF**

THIS MATTER comes before the court upon Plaintiffs' Amended and Restated Motion for Temporary Injunctive Relief ("Motion"), seeking a temporary restraining order and preliminary injunction pursuant to Rule 65 of the North Carolina Rules of Civil Procedure ("Rule(s)"); and

THE COURT, having considered the Motion, briefs in support of and in opposition to the Motion, affidavits, arguments of counsel and other appropriate matters of record, makes the following FINDINGS and CONCLUSIONS, only for the limited purpose of determining this Motion:

Factual and Procedural History

1. Plaintiffs and Defendants have been in business together for at least sixteen years, dating back to 1997 when Plaintiff Anthem Leather, Inc. ("Anthem") was founded. Anthem's core business involves the buying of leather from tanneries and selling it to its customers for various uses.

2. Plaintiffs Adrian Esposito, as Trustee for the Adrian Esposito Revocable Trust ("Adrian"), and Mariano Esposito ("Mariano") together are 60% owners of Anthem. Defendants Lucio Esposito ("Lucio") and Robert Wilson ("Robert") together own the remaining 40% of Anthem. Defendant Mark Wilson ("Mark") does not own any interest in Anthem.

3. At the time of the disputed transaction that gave rise to this civil action, Lucio, Robert and Mark comprised Anthem's board of directors, with Robert serving as chairman. Lucio also served as president of Anthem and Mark served as both chief financial officer and treasurer.

4. At times material, a fracture in the relationships began to develop among the Anthem owners, with Adrian and Mariano aligned together and Lucio and Robert aligned together. As a result, sometime in late 2012, Adrian, Mariano, Lucio and Robert (collectively, "Shareholders") began to discuss the possibility of a buy-sell arrangement, wherein Adrian and Mariano would sell their ownership in Anthem to Lucio and Robert or, vice versa, Lucio and Robert would sell their ownership in Anthem to Adrian and Mariano. Following appraisal of Anthem and several months of negotiations, the Shareholders were not able to come to an agreement.

5. Despite their existing differences, the Shareholders remained in business together and Anthem continued to operate. In October of 2012, the Shareholders discussed the possibility of forming a new business with Crest Leather UK that focused on the distribution of contract leather.¹ Anthem had never been in the business of distributing contract leather to its customers. The parties disagree over the facts that

¹ Contract leather is leather that is used in institutional furniture, most notably offices, hotels and hospitals.

surround the new business idea and to which entity and persons the opportunity belonged.

6. Plaintiffs contend that thereafter, they were presented with a new contract leather business proposal wherein Anthem would own 50% of the new business and Crest Leather UK would own the other 50%. Plaintiffs further contend that the proposed new business was an opportunity that belonged to Anthem because the contract leather business was a natural area of growth for Anthem. Defendants contend that the contract leather business was an entirely different business from Anthem's core business. Defendants argue that in January of 2013, Lucio informed Plaintiffs that he and Robert were going to pursue the new business idea with Crest Leather UK without any involvement from Adrian, Mariano or Anthem and that Plaintiffs never objected to this plan. Plaintiffs contend that they were never told of Lucio and Robert's plan to pursue the business opportunity without involvement from Plaintiffs.

7. In January 2013, Crest Leather, LLC ("Crest") was formed with Lucio and Robert owning 50% and Crest Leather UK owning 50%. Following formation, Crest began business operations selling contract leather. Plaintiffs allege that they learned of the formation of Crest sometime in February of 2013, after Crest had already been formed.

8. Plaintiffs filed their Complaint and this Motion on April 30, 2013, upon their alleged discovery that Defendants were using Anthem's resources to operate Crest.

9. Plaintiffs also allege that upon discovering that Defendants were using Anthem resources to operate Crest, Plaintiffs held a Shareholders' meeting on May 1, 2013, and replaced Lucio, Robert and Mark as directors of Anthem.

10. On May 20, 2013, Defendants attempted to assign their interest in Crest to Anthem.

11. The Complaint alleges fourteen claims for relief against Defendants. Notably, Plaintiffs allege breach of fiduciary duty to Anthem, constructive fraud, misappropriation of trade secrets and conversion. In addition, the Motion seeks to enjoin Defendants from (a) contacting Anthem's employees or sales representatives, (b) contacting or selling leather to Anthem's largest customers, (c) contacting or purchasing leather from Anthem's suppliers, (d) contacting Anthem's lenders for the purpose of interfering with Anthem's lending relationships and (e) destroying Anthem's or Crest's property removed from Anthem's facility. Plaintiffs also seek the return of any property taken from Anthem's facilities by Defendants.

Discussion²

12. A preliminary injunction is an extraordinary measure that "should not be lightly granted." *Travenol Lab., Inc. v. Turner*, 30 N.C. App. 686, 692 (1976). It is an ancillary remedy that only will be issued if a moving party is able to show (a) a likelihood of success on the merits of its case and (b) that it is likely to sustain irreparable loss unless the injunction is issued; or if, in the opinion of the court, in weighing the respective interests of the parties, issuance is necessary for the protection of the moving party's rights during the course of litigation. *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401 (1983). The burden is on the moving party to establish its right to a preliminary injunction. *Id.*; *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701 (1977); *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 466 (2003); *Pruitt v.*

² The court agrees with the parties that Delaware law applies to Plaintiffs' claim for breach of fiduciary duties under the internal affairs doctrine, while the doctrine of *lex loci* applies for Plaintiffs' tort claims. With regard to the standards for issuing or denying injunctive relief, North Carolina law applies.

Williams, 25 N.C. App. 376, 379 (1975); *Smith v. N.C. Motor Speedway, Inc.*, 1997 NCBC 5, ¶ 26 (N.C. Super. Ct. Nov. 12, 1997); *see also* G.S. 1-485.

13. Defendants primarily contend that the Motion should be denied because Plaintiffs cannot satisfy the requirement that there is a likelihood of success on the merits. The court agrees with Defendant, with the exception of Plaintiffs' claim for breach of fiduciary duty.

14. Plaintiffs allege that Defendants breached their fiduciary duties owed to Anthem by usurping a corporate opportunity belonging to Anthem. Under Delaware law, it is a breach of fiduciary duty for an officer or director to have "misused power over corporate property or processes in order to benefit [themselves] rather than advance corporate purposes." *Dweck v. Nasser*, 2012 Del. Ch. LEXIS 7, *34 (Del. Ch. Jan. 18, 2012). Specifically, it is a breach of fiduciary duty for an individual director or officer to usurp an opportunity belonging to the corporation. To succeed on a claim for usurpation of a corporate opportunity, the plaintiff must show that:

- (1) the corporation is financially able to exploit the opportunity;
- (2) the opportunity is within the corporation's line of business;
- (3) the corporation has an interest or expectancy in the opportunity; and
- (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation.

Id. at *34-35. The court concludes that Plaintiffs have shown a likelihood of success on their claim for breach of fiduciary duty. Defendants likely usurped a corporate opportunity belonging to Anthem when they established Crest and began pursuing the business of distributing contract leather before Anthem chose not to pursue the opportunity.

15. Defendants further contend that the Motion should be denied because Plaintiffs cannot show that irreparable harm will occur in the absence of the injunction. Specifically, Defendants contend that by voluntarily assigning their Crest interests to Anthem they mooted any showing of irreparable harm to Plaintiffs. The court does not agree.

16. A preliminary injunction is a measure taken by a court to preserve the status quo of the parties during litigation. *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 227 (1990). An "injunction is generally framed so as to restrain the defendant from permitting his previous act to operate, or to restore conditions that existed before the wrong complained of was committed." *Anderson v. Waynesville*, 203 N.C. 37, 46 (1932); *see also Rauch Indus., Inc. v. Radko*, No. 3:07-cv-197-C, 2007 U.S. Dist. LEXIS 79311, *19 (W.D.N.C. Oct. 25, 2007) (characterizing the status quo between the parties as "the time that the allegedly unlawful acts complained of reasonably may be believed to have occurred"). Defendants' voluntary assignment of their Crest interests to Anthem does not cure the possibility that Plaintiffs still can be irreparably harmed by Defendants' breach of fiduciary duty. On this requirement, the court concludes that Plaintiffs have shown they are likely to sustain irreparable harm in the absence of an injunction.

Accordingly, the court CONCLUDES that the Motion should be GRANTED, in part.

NOW THEREFORE, based upon the foregoing FINDINGS and CONCLUSIONS, it hereby is ORDERED that:

17. Plaintiffs' Amended and Restated Motion for Temporary Injunctive Relief is GRANTED, in part, as reflected below.

18. Effective upon the date of this Order, and until final resolution of this civil action or until otherwise ordered by this court, Defendants and its officers, agents, servants, employees, attorneys and those persons in active concert or participation with Defendants who receive actual notice of this Order are RESTRAINED, ENJOINED and FORBIDDEN from:

(a) Accessing Anthem's facilities located at 512 Townsend Avenue, High Point, North Carolina 27263 ("Premises");

(b) Accessing Anthem's computer systems;

(c) Contacting Anthem's employees or sales representatives;

(d) Contacting or selling leather or leather products to persons or entities who were customers of Anthem on or before May 1, 2013;

(e) Removing Anthem's personal property from the Premises or elsewhere;

(f) Removing property nominally owned by Crest Leather, LLC from the Premises;

(g) Destroying Anthem's personal property on the Premises or elsewhere;

(h) Contacting Anthem's lenders, including but not limited to BB&T, without prior consent of Plaintiffs or order of this court and

(i) Holding themselves out as Anthem's executives, board members or employees.

19. Pursuant to the provisions of Rule 65(c), and as a condition of this Order, on or before Tuesday, June 4, at 5:00 p.m., Plaintiffs shall post security ("Security") in

the amount of FIFTY THOUSAND Dollars (\$50,000). Said Security shall be in the form of a surety bond or other undertaking satisfactory to the Clerk of Superior Court of Guilford County, for the payment of such costs and damages as may be incurred or suffered by Defendants if they are found to have been wrongfully enjoined or restrained by this Order.

20. Except as granted by the terms of this Order, the Motion is DENIED.

This the 31st day of May, 2013 at 4:30 p.m.

/s/ John R. Jolly, Jr.
John R. Jolly, Jr.
Chief Special Superior Court Judge for
Complex Business Cases