STATE OF NORTH CAROLINA

COUNTY OF GASTON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09-CVS-2201

TAI SPORTS, INC.,

Plaintiff,

vs.

JEFFREY LEE HALL, TRACI HALL, JEFF HALL SPORTS, INC., JEFFREY LEE HALL d/b/a "WORH SPORTS," "BAT-R-UP," "WSL," and/or "JEFF HALL GRAPHICS," TKL ELECTRICAL SERVICES, INC., C.H. & SONS CONSTRUCTION, INC., WORTH SPORTS, LLC, A subsidiary of the JARDEN CORPORATION, BRANDON ROBERTS a/k/a crestchargers13@yahoo.com, RODNEY WALKER, MIKE CALDWELL, TRACI P. BRADLEY, TED W. HARRIS, SHELLY A. ("MOE") NEAL, ANDREW BENFIELD, DEWEY McKINNEY, and MIKE CORNELL,

Defendants.

AND

JEFFREY LEE HALL, JEFF HALL SPORTS, INC., CH & SONS CONSTRUCTION, INC., TKL ELECTRICAL SERVICES, INC., and MIKE CALDWELL

Counterclaimants,

vs.

CARLOS G. VEGA, VEGA REAL ESTATE HOLDINGS, LLC and TAI SPORTS, INC.

Counterclaim Defendants.

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Defendants JEFFREY LEE HALL, TRACI HALL, JEFF HALL SPORTS, INC., JEFFREY LEE HALL d/b/a "WORH SPORTS," "BAT-R-UP," "WSL," and/or "JEFF HALL

GRAPHICS," TKL ELECTRICAL SERVICES, INC., C.H. & SONS CONSTRUCTION, INC., RODNEY WALKER, and MIKE CALDWELL (collectively "Defendants"), through the undersigned counsel, respectfully submit this Memorandum of Law to the Court in opposition to the motion of Plaintiff TAI Sports, Inc. ("TAI") for a preliminary injunction.

INTRODUCTORY STATEMENT

"Because a preliminary injunction is an extraordinary measure, it will issue only upon the movant's showing that: (1) there is a likelihood of success on the merits of his case; and (2) the movant will likely suffer irreparable loss unless the injunction is issued." *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 508, 606 S.E.2d 359, 362 (2004)(internal quotations and citations omitted)(emphasis added). Except for conclusory statements in paragraphs 47 and 54 of the amended complaint, TAI's complaint, brief, and supporting affidavits are devoid of any mention or evidence of irreparable harm in this case. Indeed, TAI's own admissions, through the report of Mr. Preciado, demonstrate that TAI has only alleged monetary damages – indeed, very specific monetary damages -- for which there is a complete remedy at law and for which the equitable remedy of an injunction is not available. *See, e.g., Frink v. North Carolina Bd. of Transp.*, 27 N.C. App. 207, 209, 218 S.E.2d 713, 714 (1975) (citation omitted) ("An injury is irreparable, within the law of injunctions, where it is of a peculiar nature, so that compensation in money cannot atone for it."). TAI's failure to offer evidence of irreparable harm is fatal to its request for an injunction. As a result, the Court need not even address the issue of whether there is a likelihood of success on the merits.[1] However, as demonstrated in the affidavits submitted in this case, TAI has also failed to meet its burden on this required showing because it has failed to offer any evidence of wrongdoing on the part of the undersigned Defendants.

[1] If the Court determines that TAI has not established irreparable injury, then the live testimony contemplated by TAI at the injunction hearing on June 1, 2009, which goes to the merits, would be unnecessary.

Moreover, the extraordinary relief requested by TAI in its preliminary injunction motion to freeze the assets of the Defendants, appoint receivers, or dissolve the Defendant corporations, would result in tremendous injury to the Defendants that outweighs any alleged benefit to the granting of an injunction. (Hall Affidavit, ¶31). "It is not error to deny an application for a temporary injunction where the injury likely to be sustained by the plaintiff from the continuance of the conduct of which he complains, pending the final hearing of the matter, is substantially outweighed by the injury which will be done the defendant by the prevention of such conduct . . ." *Huggins v. Wake County Bd. of Ed.*, 272 N.C. 33, 41, 157 S.E.2d 703, 708 - 709 (1967). "It is also proper for the court to take into account probable injuries to persons not parties to the action and to the public if such an injunction were to be issued." *Id.* In this case, freezing the assets of or dissolving the corporate Defendants would affect third-parties that rely on these companies, as well as the subcontractors of CH & Sons Construction, Inc., for wages and their livelihood. Accordingly, even if TAI could demonstrate it was entitled to an injunction, the harm resulting from that injunction would outweigh any alleged benefits to TAI.

As stated by the North Carolina Supreme Court, a "preliminary injunction . . . is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. *Ridge v. Community Investors, Inc. v. Berry* 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (emphasis added). Plaintiffs' requested relief here, however, far exceeds that purpose. Indeed, if the relief Plaintiffs seek is granted, it will *de facto* resolve the case because it will likely put Defendants out of business.

STATEMENT OF FACTS

A. Jeff Hall's Background and Promotional Agreement with TAI Sports, Inc.

Jeff Hall is a well known and respected professional slow pitch softball player that has consistently been in the top ten for overall batting average in the country for Super Major Open

Division. In November 2006, Jeff Hall was inducted into the U.S. Slow Pitch Softball Association Hall of Fame. (Counterclaim, ¶12). Due to Mr. Hall's popularity and success, Mr. Hall is sponsored by Worth, a maker of softball bats and equipment, and had been sponsoring and selling Worth product prior to meeting the Plaintiff in this matter in 2006. (Second Hall Affidavit, ¶6). Jeff Hall is also the owner of Jeff Hall Sports, Inc. and an owner of CH & Sons Construction, Inc. and TKL Electrical Services, Inc. (construction firms based in Gastonia, North Carolina). (Counterclaim, ¶10). Mr. Hall has never been employed by TAI, has never received any wage or salary from TAI, and has never acted as the "President of TAI's East Coast Division." (Hall Affidavit, ¶ 3; Bradley Affidavit, ¶3).

Jeff Hall's limited interaction with TAI came about due to his renown and popularity in professional slow pitch softball. During the 2006 Softball Major World Series, Carlos Vega, TAI's owner, approached Mr. Hall about wearing TAI's "Elite" brand of products during his softball appearances. (Counterclaim, ¶13). After subsequent discussions with Carlos Vega, Vega agreed to provide Jeff Hall with various products free of charge as well as services from TAI's employees and limited use of its planned Gastonia warehouse in partial exchange for Jeff Hall wearing TAI's "Elite" brand products during his softball appearances, and in partial exchange for TAI's use of Mr. Hall's name to promote its products. *Id.* In further consideration for these services, TAI also allowed Jeff Hall to process his sales of Worth products, which Mr. Hall had been making before meeting Carlos Vega, through TAI's warehouse. (Second Hall Affidavit, ¶ 6).

All of the Worth product sales by Jeff Hall were documented and properly accounted for by TAI's employees (not Jeff Hall as he did not have access to TAI's computers) in TAI's accounting system. (Second Hall Affidavit, ¶ 10; Bradley Affidavit, ¶ 4, 5, 8). In fact, TAI

made a profit from these sales. (Second Hall Affidavit, ¶ 10). Documentation supporting each of the payments made by TAI to Jeff Hall or any of his companies is attached to the Second Hall Affidavit as Exhibit B. Mr. Hall never received any direct monetary compensation for his promotion of TAI's products during the more than two years TAI used Mr. Hall's name to promote its products. (Hall Affidavit, ¶11, 12; Second Hall Affidavit, ¶ 6, 24)

In February 2007, TAI began leasing its Gastonia warehouse from Lakhani Investments, NCGP. (Ex. A to Lakhani Affidavit). CH & Sons subsequently subleased office space from the Lakhanis beginning in March 2007. (Hall Affidavit, ¶18). On June 26, 2007, Lakhani Investments sold the warehouse property to Vega Real Estate Holdings, Inc. ("Vega Holdings"), upon information and belief, a company owned by Carlos Vega. Thereafter, Cougar, Inc., one of Lakhanis' companies, leased back some of the property from Vega Holdings on that same date.

Carlos Vega was aware CH & Sons had sublet its office space from Lakhani prior to Vega Holdings purchasing that property. *Id.* Indeed, this arrangement was convenient for all of the parties because CH & Sons did regular maintenance to TAI's leased warehouse, and, again, TAI had agreed to allow Jeff Hall to process his Worth sales through TAI's warehouse in partial exchange for TAI's use of the Jeff Hall name in its promotions. *Id.* at ¶13, 14, 18 and 26.

As to the Cougar, Inc. sublease, Carlos Vega, through his sworn testimony, has purported that a rent check (No. 4269, $5,500) from Cougar, Inc. "was delivered . . . to Jeff Hall," but "was never deposited into TAI's account at Citizen's South," thus leading to at least an implied assertion that these funds were improperly taken by Mr. Hall. (C. Vega Affidavit, ¶12). However, an examination of TAI's own account records and deposit slips clearly shows that Carlos Vega's sworn testimony on this point is simply not true. Indeed, even a preliminary

review of TAI's account records would have shown that Cougar Check No. 4269 was in fact deposited into TAI's account. (Hall Affidavit, ¶19 and Ex. B).

Although Mr. Hall had agreed, as a courtesy, to be a signatory on a checking account TAI had a Citizens South Bank in Gastonia,[2] and thus had access to the account statements for this account, Mr. Hall never prepared any of the checks for TAI. (Hall Affidavit, ¶8, 9; Bradley Affidavit, ¶ 4, 5). Rather, Traci Bradley, the former office manager for TAI, prepared the checks and submitted them to Jeff Hall for signature at the express direction of Carlos Vega. (Bradley Affidavit, ¶ 4, 5). These checks were for legitimate business expenses of TAI and were properly entered into TAI's QuickBooks accounting system. *Id.* Attached as Exhibit B to Mr. Hall's Second Affidavit is an accounting of all of the checks from TAI to Mr. Hall or his companies that were identified in the report of Mr. Preciado. (Second Hall Affidavit, ¶ 4-8).

B. Defendant's Improvements to TAI's Warehouse and Conversion of Defendant's Property.

From time to time, TAI and its employees would request that CH & Sons perform certain repairs and improvements at TAI's Gastonia warehouse. (Counterclaim, ¶16). At a cost of at least $8,223.45, CH & Sons and Jeff Hall installed batting cages, machines, nets, pitching mounds, galvanized hoppers and screens at TAI's Gastonia warehouse and advanced insurance costs for TAI to develop a training facility at the warehouse. All of this was done with the knowledge of and/or at the specific request and approval of Carlos Vega. (Counterclaim, ¶17; Hall Affidavit, ¶14). In fact, the batting cage was shown by TAI in a commercial for its "Elite"

[2] As stated in Jeff Hall's Affidavit, Carlos Vega had asked him in early 2007 to be involved in TAI's warehouse operations and management. However, Mr. Hall declined this request because he was already employed full time between his professional softball and construction business. Still, Carlos Vega asked him to at least help TAI in a limited way by signing checks for TAI. Vega said he was making this request because he did not want to deal with the logistics of having checks from a Gastonia, NC bank sent to California for him to sign, and he did not have a relationship with the TAI employees that would be working at the warehouse in Gastonia. As a result, Mr. Hall agreed to help Carlos Vega in this limited way. (Hall Affidavit, ¶ 8).

clothing line, which generated much publicity for TAI. (Bradley Affidavit, ¶ 16, 17; Counterclaim, ¶17; Hall Affidavit, ¶14). The grand opening for the training facility was scheduled for sometime around April 2009. (Hall Affidavit, ¶14). Prior to that grand opening, TAI removed the Defendants from its warehouse and locked the door without compensating Jeff Hall and CH & Sons for its work on the facility. (Counterclaim, ¶26, 27). Upon information and belief, TAI, Carlos Vega and/or Vega Holdings are operating a batting cage business using the equipment and labor provided by CH & Sons and Jeff Hall. (Counterclaim, ¶17).

At the request of TAI, Carlos Vega and/or Vega Holdings, CH & Sons, TKL Electrical and Jeff Hall also made numerous improvements at TAI's warehouse for the benefit of TAI so that TAI could have an adequate showroom to sell its goods. This work included, without limitation, the following: 1) installed in the showroom an air conditioning and heating system at a cost of $1,790.00; 2) installed a canvas awning at a cost of $1,026.31; 3) installed steps for the second floor at a cost of $2,205.31; 4) installed in the showroom a partition wall at a cost of $7,193.03; 5) installed sheetrock at a cost of $4,200.00; 6) painted the batting cages and showroom at a cost of $5,500.00; 7) installed custom glass doors for the showroom at a cost of $5,100.00; 8) purchased a wireless credit card machine for TAI's use at a cost of $1,072.50; and 9) installed custom cabinets at a cost of $1,500.00. (Benfield Affidavit, ¶18; Counterclaim, ¶18-20). Jeff Hall, CH & Sons Construction, Inc., and TKL Electrical Services, Inc. provided the above referenced labor and improvements to TAI, Carlos Vega and/or Vega Holdings at their request and direction. (Counterclaim, ¶ 21).

In connection with these improvements and TAI's agreement with Jeff Hall regarding his sales of Worth equipment, TAI allowed certain other equipment and materials belonging to CH & Sons, Jeff Hall Sports, Inc., Jeff Hall and Mike Caldwell to be delivered and stored in the

empty space at TAI's warehouse that was not otherwise being used by TAI. (Counterclaim, ¶25-28). After TAI terminated all of its employees, it locked its warehouse and prevented Jeff Hall, Mike Caldwell and their companies from retrieving this property. *Id.* TAI also removed all of the signs relating to Jeff Hall and his companies from the Gastonia warehouse. (Hall Affidavit, ¶33). As a result, TAI has converted for its own use the above referenced improvements, equipment and materials, the value of which is in excess of $100,000.00. Jeff Hall retained Gastonia attorney, Douglas P. Arthurs, to demand the return of this property. (Counterclaim, ¶29). Mr. Arthurs subsequently sent this demand by hand delivery on April 9, 2009 with an April 17, 2009 deadline to comply. TAI then filed the instant preemptive and retaliatory action on April 17, 2009 in response to the demand.

C. Summary of Legitimate Business Transactions.

The report of Plaintiffs' expert, Paul Preciado, whom we believe is the regular accountant for TAI[3] (Second Hall Affidavit, ¶3), identifies numerous allegedly irregular transactions from TAI's accounting system -- which system Jeff Hall had no access to -- and states in a conclusory fashion that any irregularities must be the fault of Jeff Hall. (Bradley Affidavit, ¶8; Second Hall Affidavit, ¶24). As argued below, such unsupported conclusory statements fail to meet the high standard for the entry of an injunction. Moreover, many of the statements by Mr. Preciado are blatantly inaccurate. As specifically detailed in the affidavits and accompanying exhibits, these include, in part, as follows:

- Mr. Preciado's Memo – Finding 1: *See* Second Hall Affidavit, ¶4-8, Ex. B; Bradley Affidavit, ¶8;
- Mr. Preciado's Memo – Finding 2; *See* Second Hall Affidavit, ¶9-13, Ex. B;

[3] TAI's former office manager states in her affidavit that all of the journal entries she made on TAI's behalf, which Mr. Preciado is alleging are irregular, were done at the direction of TAI's accountants, Baroldi & Associates. Notably, Defendants have learned that Mr. Preciado is an employee of Baroldi & Associates, a fact not disclosed on his resume.

- Mr. Preciado's Memo – Finding 3; *See* Second Hall Affidavit, ¶14-17, Ex. B; Bradley Affidavit, ¶9;
- Mr. Preciado's Memo – Finding 4; *See* Second Hall Affidavit, ¶18-21, Ex. C;
- Mr. Preciado's Memo – Finding 5; *See* Second Hall Affidavit, ¶22-23, Ex. D; Shortridge Affidavit, ¶3-4; Traci Hall Affidavit, ¶3; Bradley Affidavit, ¶9.

ARGUMENT

I. STANDARD REQUIRED FOR PRELIMINARY INJUNCTION

The North Carolina Supreme Court has stated the high standard for issuance of a preliminary injunction as follows:

> A preliminary injunction, the relief here sought, is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation. (internal citations omitted)

Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). "The applicant for a preliminary injunction has the burden of proving the probability of substantial injury to the applicant if the activity of which it complains continues to the final determination of the action." *Knightdale v. Vaughn*, 95 N.C. App. 649, 651, 383 S.E.2d 460, 461(1989). "It is not enough that a plaintiff merely allege irreparable injury." *Id.* "Rather, the applicant is required to set out with particularity facts supporting such statements so the court can decide for itself if irreparable injury will occur." *Id.* (internal quotation and citation omitted). "A prohibitory preliminary injunction is granted only when irreparable injury is real and immediate." *United Tel. Co. of Carolinas, Inc. v. Universal Plastics, Inc.* 287 N.C. 232, 235, 214 S.E.2d 49, 51 (1975). Thus, TAI has to establish both that it will suffer irreparable harm

without an injunction, and that it is likely to prevail on the merits for an injunction to issue.[4] TAI can do neither.

II. TAI CANNOT ESTABLISH IRREPARABLE HARM

A. TAI has not Sufficiently Alleged Irreparable Harm

TAI is required to set out with particularity facts supporting an allegation of irreparable harm so the court can decide for itself if irreparable injury will occur; however, TAI has failed to meet this base requirement. Indeed, the verified amended complaint, brief and affidavits submitted by TAI are completely devoid of any specific allegation of irreparable harm. The only allegations of purported irreparable harm are contained in paragraph 47 of the amended complaint, and even those allegations are stated in a conclusory fashion, are monetary in nature for which a complete remedy at law is available, and/or are not occurring or likely to occur in the future. This renders TAI's motion for preliminary injunction facially deficient because it is not enough that a plaintiff merely allege irreparable injury, but must set out with particularity facts supporting such statements so the court can decide for itself if irreparable injury will occur. *Knightdale*, 95 N.C. App. at 651, 383 S.E.2d at 461 (holding that trial court had abused its discretion by granting an injunction where movant had made only conclusory allegations of irreparable harm).

Moreover, the supposed damages from the Defendants' alleged actions are, according to TAI and Mr. Preciado, specifically monetary in nature and capable of exact calculation. Indeed, in his affidavit Mr. Preciado values the damages at a very specific $1,102,560. (Presidio

[4] TAI incorrectly states in its brief that a lower standard for the issuance of an injunction exists, namely that "[a]n injunction may be issued, even when there are serious questions as to the existence of facts or the facts are disputed such that such factual issues must be determined by the jury." The cases cited by TAI do not stand for this proposition, but rather state that "It is the rule that in actions of this character, the main purpose of which is to obtain a permanent injunction, if the evidence raises a serious question as to the existence of facts which make for plaintiff's right, and sufficient to establish it, that a preliminary restraining order will be continued to the hearing." *Scott v. Gillis*, 197 N.C. 223, 148 S.E. 315, 316 (1929) (emphasis added). TAI, as the movant, has the burden of establishing both a likelihood of success on the merits and irreparable harm.

Affidavit, ¶ 4). "Ordinarily, an injunction will not be granted where there is a full, adequate and complete remedy at law, which is as practical and efficient as is the equitable remedy." *Frink v. North Carolina Bd. of Transp.*, 27 N.C. App. 207, 209, 218 S.E.2d 713, 714 (1975) (citation omitted). "An injury is irreparable, within the law of injunctions, where it is of a peculiar nature, so that compensation in money cannot atone for it." *Id.* TAI's claims are solely economic in nature, thus equitable relief in the form of an injunction in this case would be both unmerited and improper.

III. TAI IS NOT ENTITLED TO THE INJUNCTIVE RELIEF REQUESTED

A. Access to TAI's facility and removal of signage

In order to receive an injunction, the movant must demonstrate "irreparable loss unless the injunction is issued." *Ridge Community Investors,* 293 N.C. at 701, 239 S.E.2d at 574. By TAI's own admission, the Defendants have already been removed from TAI's facility on March 2, 2009 (Complaint, ¶34; Benfield Affidavit, ¶ 25). Thus, an injunction preventing access to TAI's facility would not prevent any injury, especially because there is no allegation that any of the Defendants are attempting or have attempted to access TAI's property. Moreover, CH & Sons, which had been occupying a portion of the property separate and apart from TAI's warehouse pursuant to a sublease entered into prior to Vega Holdings' purchase of the property, vacated the property on April 27, 2009 after its sublease with Cougar, Inc. was terminated, upon information and belief, at the direction of Carlos Vega effective April 30, 2009. (Hall Affidavit, ¶ 20).

With respect to TAI's demand for injunctive relief for removal of the signage from the TAI warehouse, this demand borders on the comedically ironic because Defendants have sought

and demanded the return of the signage since at least Mr. Arthur's April 9, 2009 letter to TAI's counsel. (Counterclaim, Exhibit A). However, TAI has not only failed and refused to comply with this demand, but has also made clear that Defendants should not attempt to access TAI's property for any reason, including the removal of the signs. Thus, TAI has purposefully prevented Defendants from taking the action it now demands. *See* Defendants' Counterclaim for Claim and Delivery, Conversion, Trespass to Chattels, etc. (Counterclaims, ¶26-27, 60-88). To add to the absurdity of this request for relief, Defendants have recently learned that TAI's agents have in fact already removed the signs from the Gastonia warehouse. (Hall Affidavit, ¶33).

While TAI might argue that granting an injunction prohibiting access to its property (yet also requiring the Defendants to remove signs) would not result in any harm to the Defendants, the actions taken by Carlos Vega and TAI demonstrate otherwise. Specifically, Carlos Vega has repeatedly and intentionally defamed Jeff Hall and his companies (Counterclaim, ¶35-39, 51-59; Daniels Affidavit) which has resulted in Jeff Hall losing his job at the WSL (World Softball League). (Counterclaim, ¶39; Daniels Affidavit). Specifically, John Daniels, the CEO of the World Softball League, states in his affidavit that Carlos Vega called him and "stated he is taking [Jeff Hall] and the employees of NC TAI [to court] and those employees do not have the funds to pay for legal and he stated he thought they would rather testify against [Jeff Hall] then [sic] pay legal fees, he seemed so confident that he was to the point of snickering thinking this was going to be his trump card in prosecuting [Jeff Hall]..."[5] (Daniels Affidavit, ¶2). John Daniels also states that Carlos Vega told him "[Jeff Hall] embezzled 1.2 Million dollars, would be in jail by end of summer." (Daniels Affidavit, ¶1). Carlos Vega also told John Daniels that "as long as Jeff Hall is an employee of SB-360 or WSL we will not do business with you." (Daniels

[5] It is noteworthy that Defendant Andrew Benfield, a former NC TAI employee, was dismissed with prejudice from this case on May 21, 2009, the very same day he signed his affidavit submitted by TAI in this matter.

Affidavit, ¶1). Unfortunately, due to these statements and other statements detailed in Mr. Daniels' affidavit, the WSL has terminated its $50,000 per year employment contract with Jeff Hall as a result of the false statements by Carlos Vega because the WSL cannot afford the negative publicity that Carlos Vega is spreading. (Daniels Affidavit, ¶5; Counterclaim ¶39). As Mr. Daniels states, "[Jeff Hall's] employment with us was partially based on a spokesperson, one of the premier players in the game being the General manager of WSL, [Carlos Vega's] statements of [Jeff Hall] being a thief is not portraying the model citizen I believe [Jeff Hall is], that does not change the facts he is out there doing all this damage and we are a very small company that cannot afford negative publicity." (Daniels Affidavit, ¶5). Upon information and belief, Carlos Vega would use any injunction granted against Defendants to further support his campaign to discredit Jeff Hall and his companies, Given that TAI has not established any attempt by the Defendants to access its property and has already removed the signs, the potential and very real harm to the reputation of the Defendants outweighs any benefit to TAI if the injunction is granted.

B. Directing Release of Bank Account Rights

Again, in order to receive an injunction, the movant must demonstrate "irreparable loss unless the injunction is issued." *Ridge Community Investors,* 293 N.C. at 701, 239 S.E.2d at 574. Jeff Hall has already been removed from TAI's Citizens South Bank account, and, upon information and belief, the account has been closed. (Hall Affidavit, ¶9). Upon further information and belief, because this was a corporate account, all that was necessary to remove Jeff Hall from TAI's account was the Consent to Action without Meeting of Directors and Shareholders of TAI Sports, Inc. dated March 18, 2009 that was submitted to Citizens South Bank by TAI requesting Jeff Hall be removed from the account. *Id.* Citizens South Bank has

informed Jeff Hall that he is no longer on the account. *Id.* Again, because TAI has already received the relief it requests, the damage to Jeff Hall's reputation from the issuance of any injunction outweighs any benefit to TAI from symbolically removing Jeff Hall a second time from a closed bank account.

C. Freezing the Defendants' Assets and Imposing a Constructive Trust

The extraordinary relief requested by TAI for an injunction freezing Defendants' assets, appointing receivers, or dissolving the Defendant corporations, would amount to a tremendous suffering, burden and injury of the Defendants that outweighs any alleged benefit in granting such an injunction. (Hall Affidavit, ¶31). Specifically, such an order would cause millions of dollars in losses (CH & Sons alone did over $8 million in business in 2008) and bankrupt these companies. *Id.* "It is not error to deny an application for a temporary injunction where the injury likely to be sustained by the plaintiff from the continuance of the conduct of which he complains, pending the final hearing of the matter, is substantially outweighed by the injury which will be done the defendant by the prevention of such conduct . . ." *Huggins*, 272 N.C. at 41, 157 S.E.2d at 708 - 709. "It is also proper for the court to take into account probable injuries to persons not parties to the action and to the public if such an injunction were to be issued." *Id.* In this case, freezing the assets of or dissolving the corporate Defendants would affect third-parties that rely on these companies, as well as the subcontractors of CH & Sons Construction, Inc., for wages and their livelihood. (Hall Affidavit, ¶31). Accordingly, even if TAI could demonstrate it was entitled to an injunction, the harm resulting from that injunction would outweigh any alleged benefits to TAI.

TAI, however, fails to offer any legal authority that would support the freezing of assets or imposition of a constructive trust in this situation. The cases cited by TAI are easily

distinguishable. In *Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co.*, 184 N.C. App. 292, 647 S.E.2d 102 (2007), the Court of Appeals affirmed an order "requir[ing] appellant to either repudiate its claim of rescission or return the assets it had received as part of the novation agreement to a qualifying trust for appellee's benefit." *Id.* at 294, 647 S.E.2d at 103-104. At issue in this case were reinsurance contracts that required the appellant to maintain significant assets in a trust for the appellee's benefit. *Id.* at 293, 647 S.E.2d at 103. Thus, the trial court entered a provisional remedy requiring the appellant to specifically perform the contract or return any assets received if appellant was rescinding the contract. *Id.* This was not the complete freezing of the appellant's assets, but merely an order requiring specific performance or a rescission of the contract.

In *First Presbyterian Church v. St. Andrews Presbyterian College, Inc.*, 254 N.C. 717, 119 S.E.2d 867 (1961), the Supreme Court affirmed an injunction "preventing the defendant from interfering with the control and operation of [a corporation which the plaintiff and defendant claimed they were entitled to control] pending determination of [the plaintiff's] right to reassume control." *Id.* at 718, 119 S.E.2d at 868. This injunctive relief did not freeze the assets of any corporation, but merely prohibited the defendant from interfering with the control and operation of that corporation. Moreover, a dispute over who was to control the corporation was at issue in this case. In the instant case, TAI has no claim over the control of any of the defendants.

Similarly, in *Barnes v. St. Rose Church of Christ,* 160 N.C. App. 590, 586 S.E.2d 548 (2003), the trial court had issued an injunction prohibiting the defendant from disposing of the assets of a church which the defendant had converted the legal status of from an unincorporated religious association to a non-profit corporation without proper authorization. In the instant case,

the legal status of TAI has not been changed. Rather, TAI is seeking to freeze the assets of third-parties over which it has no control based on mere, unsupported allegations that TAI's assets have been diverted to these companies, which the affidavits submitted by the Defendants show is not true. Moreover, the Court of Appeals did not affirm the granting of the injunction in *Barnes.* Rather, the Court of Appeals dismissed the appeal because the appellant failed to show that granting the injunction would affect a substantial right because the church could continue its operations (just not at the hands of the pastor who had converted the church's legal status). As explained above, freezing the assets of the Defendants would affect a substantial right in that it would cause millions in damages, force them into bankruptcy, and would put all of their employees out of work that count on these wages for their livelihood.

In *Tuckett v. Guerrier,* 149 N.C. App. 405, 407 561 S.E.2d 310, 311 at fn.1 (2002), the Court of Appeals opinion does not specify the exact relief granted for the injunction because the appeal of the grant of the injunction was abandoned on appeal. Moreover, the dispute in *Tuckett* was over who owned an architectural firm. In this case, there is no dispute over who owns the corporate defendants.

In *Webb v. Royal American Co.,* N.C. Super. Ct., October 17, 2006 (N.C. Business Court), the suit appears to be over assets of an LLC between the majority and minority members. TAI fails to include a correct citation to this case, so counsel for the Defendants is unable to find the case to review. Nevertheless, the dispute apparently at issue is control over a corporation, which is not at issue in this case.

In its brief, TAI states that the recovery of funds may be recovered through the imposition of a constructive trust and cites *Sara Lee Corp. v. Carter,* 351 N.C. 27, 519 S.E.2d 308 (1999). In *Sara Lee*, however, the imposition of a constructive trust was done, not through

an injunction, but after a trial on the merits. 351 N.C. at 31, 519 S.E.2d at 310. A constructive trust is not appropriate in an injunction. Moreover, as stated in *Yount v. Setzer*, 155 N.C. 213, 71 S.E. 209 (1911) cited by TAI, an injunction is not ordinarily issuable to restrain the transfer of assets unless the movant establishes the insolvency of the person or entity sought to be enjoined. TAI has offered no evidence of the insolvency of the Defendants, much less alleged that any of the Defendants are insolvent. Accordingly, a constructive trust over the Defendants' assets is premature and not available under the law at the injunctive stage.

Interestingly, TAI analogizes the freezing of assets to the relief sought in an attachment proceeding and cites N.C. Gen. Stat. § 1-440 *et seq.*[6] in support of this proposition. The remedy of attachment is not available to TAI in this case because the Defendants are not nonresidents or foreign corporations, nor is there any allegation or proof that the Defendants have removed or are about to remove property from this State as required for an attachment under N.C. Gen. Stat. § 1-440.3. Thus, TAI is attempting to accomplish an "attachment" through an injunction when it is not entitled to do so under North Carolina General Statutes. *See* N.C. Gen. Stat. § 1-440.1 *et seq.*

In *Virginia Carolina Tools, Inc. v. International Tool Supply, Inc.*, the Mecklenburg County Superior Court granted a temporary restraining order pending resolution of a motion to compel arbitration which barred International Tool from selling its assets outside the regular course of business. 984 F.2d 113, 116 (4th Cir. 1993) *cert. denied* 113 S.Ct. 2930, 508 U.S. 960, 124 L.Ed.2d 681. After the case was removed to federal court, Judge Potter refused to issue a preliminary injunction barring International Tool from selling its assets outside the regular course of business on the following grounds as explained by the Fourth Circuit:

> Here the district judge determined that the harms VCT alleges it will suffer if ITS is sold -- loss of distributor agreements, loss of sales, expenses incurred in

[6] N.C. Gen. Stat. ¶1-440 has been superseded by Session Laws 1947, c. 693, codified as § 1-440.1 *et seq.*

> relocation, injury to reputation, loss of profits, and loss of volume discounts -- were not irreparable. His finding that these highly speculative and largely economic injuries did not constitute irreparable harm cannot be said to be clearly erroneous. Nor can his finding that ITS might be driven to insolvency by a preliminary injunction. Having determined that VCT would not suffer irreparable harm from a denial of the injunction, the district judge did not err in declining to consider either the likelihood of success on the merits or the public interest.

Id. at 120. At issue in this case was whether Virginia Carolina had a valid option to buy the assets of International Tool. *Id.* at 115. The Fourth Circuit affirmed the denial of Virginia Carolina's injunction seeking to freeze the assets of International Tool despite the fact Virginia Carolina laid a claim to ownership of those assets through the option to buy. The injunction, Judge Potter reasoned, would inflict tremendous harm on the defendant, which might be driven to insolvency, and the plaintiff's losses were purely economic in nature and not irreparable. *Id.* at 120. Similarly, in this case, freezing the assets of the Defendants could result in their insolvency. Furthermore, TAI's injuries are economic and not irreparable.

Moreover, there is no evidence of any conversion, diversion or embezzlement of funds or assets of TAI by any of the Defendants. A full accounting and explanation of the alleged improper transactions can be found in the affidavits accompanying this brief and are incorporated by reference herein:

- Mr. Preciado's Memo – Finding 1: *See* Second Hall Affidavit, ¶4-8, Ex. B; Bradley Affidavit, ¶8;
- Mr. Preciado's Memo – Finding 2; *See* Second Hall Affidavit, ¶9-13, Ex. B;
- Mr. Preciado's Memo – Finding 3; *See* Second Hall Affidavit, ¶14-17, Ex. B; Bradley Affidavit, ¶9;
- Mr. Preciado's Memo – Finding 4; *See* Second Hall Affidavit, ¶18-21, Ex. C;
- Mr. Preciado's Memo – Finding 5; *See* Second Hall Affidavit, ¶22-23, Ex. D; Shortridge Affidavit, ¶3-4; Traci Hall Affidavit, ¶3; Bradley Affidavit, ¶9.

D. Accounting and Access to TAI's Records

TAI's request for an injunction allowing access to its records is perplexing to say the least. TAI clearly has access to its own records. Indeed, Mr. Preciado states in his affidavit that he has had the opportunity to review TAI's record in detail. Moreover, the Defendants are not in possession of any of TAI's accounting records other than the copies of documents related to their transactions with TAI, which were provided by TAI at the time of the transactions, most of which are attached to the affidavits submitted herewith. (Hall Affidavit, ¶23; Bradley Affidavit, ¶6, 8). In any event, any records maintained by the Defendants related to TAI are copies of documents on the accounting system that Mr. Preciado has purportedly reviewed. Accordingly any injunction for access to these records for which TAI already has access would not prevent an irreparable injury as required for the issuance of an injunction. *See Ridge Community Investors,* 293 N.C. at 701, 239 S.E.2d at 574 (recognizing that in order to receive an injunction, the movant must demonstrate "irreparable loss unless the injunction is issued.").

With respect to an accounting by the Defendants themselves, TAI is seeking a mandatory injunction that amounts to a request for the Defendants to prove their innocence, which flips the burden of proof required in this lawsuit on its head. Mandatory injunctions also have a much higher standard that must be met before they will be entered:

> Mandatory injunctions are disfavored as an interlocutory remedy. "As a general rule, since the purpose of an interlocutory injunction is solely to retain the status quo [pending final resolution on the merits], only a prohibitory injunction is proper [as opposed to a mandatory injunction, which would alter the status quo]." *Dobbyn* at 163; *see also Seaboard Air Line R.R. Co. v. Atlantic Coast Line R.R. Co.,* 237 N.C. at 96, 74 S.E.2d at 436 (temporary restraining order in the form of a mandatory injunction was improper because it would determine by an interlocutory order the ultimate relief sought in the action).

Roberts v. Madison County Realtors Ass'n, Inc., 344 N.C. 394, 400, 474 S.E.2d 783, 787-788 (1996). To the extent TAI is requesting a full accounting of every transaction by each of the

Defendants for the last three years, such a request is overly burdensome and expensive as well. , It seems more prudent for the parties to exchange documents in discovery as opposed to the granting of a mandatory injunction for this information. The Defendants have also attempted, given the limited time available, to provide TAI with a full accounting of the specific transactions indentified in the affidavit of Mr. Preciado. *See* Second Affidavit of Jeff Hall.

CONCLUSION AND PRAYER

TAI has not and cannot show either irreparable harm or a likelihood of success on the merits in this case, and thus is not entitled to an injunction that would place the Defendants in untenable financial hardship during the pendency of this action. As noted above, a "preliminary injunction . . . is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. *Ridge v. Community Investors, Inc. v. Berry* 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (emphasis added). Plaintiffs' unsupported request for such relief here far exceeds that purpose. Indeed, granting Plaintiffs' request would result in irreparable harm to Defendants. As a result, the undersigned Defendants respectfully pray that the motion for preliminary injunction be denied and for such other and further relief as the Court deems just and proper.

This the 28th day of May, 2009.

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CERTIFICATION OF COMPLIANCE WITH RULE 15.8

Counsel for the undersigned defendants certifies that this brief complies with the limitations of Rule 15.8 regarding the length of the Brief. In making this certification the undersigned relies on the word count of the Microsoft Word software.

This 28th day of May, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all parties and counsel of record by email where indicated and by depositing a copy thereof in the United States mail, postage prepaid and addressed as follows:

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