STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

VINCENT JOHNSON, *et al*,

Plaintiffs,

Case No. 21-006110-CB

-v- Hon. David A. Groner

MICHIGAN MINORITY PURCHASING COUNSEL and MICHELLE ROBINSON,

Defendants.
_____/

OPINION AND ORDER

At a session of said Court,
Held in the City of Detroit,
County of Wayne, State of Michigan
on:
12/5/2022

This matter comes before the Court on Defendants' Motion to Dissolve Preliminary Injunction, on Plaintiffs' motion or summary disposition on Count VII of the third amended complaint, on Plaintiffs/Counterdefendants' motion for dismissal of Robinson's defamation claim, and on Defendant Robinson's motion to set aside default. For the following reasons, Plaintiffs' motion regarding Robinson's defamation claim is granted and Defendant Robinson's motion to set aside default is granted. Otherwise, the motions are denied.

I. *Motion to Dissolve Preliminary Injunction*

Defendants seek dissolution or modification of the pending preliminary injunction based on two affirmative defenses, i.e., that Plaintiffs cannot succeed on the merits because their claims are barred by certain releases and by First Amendment principles. Defendants also seek dissolution or modification of the preliminary injunction on grounds that Plaintiffs are unable to establish the traditional equitable factors applicable to requests for preliminary relief, i.e., likelihood of success on the merits on the pleaded theories of liability, irreparable harm, the balance of hardships, and the public interest.

A. Releases and First Amendment Principles

Defendants' argument regarding the releases is based on contract principles. Specifically, even Defendants de-certified the member entities in bad faith and with the intent of interfering with their business relationships, Plaintiffs cannot recover on this basis because when

the member entities applied for MBE certification they executed releases granting Defendants the right to do so. Defendants also claim that the Court of Appeals endorsed this argument when reviewing the preliminary injunction, and that those findings are binding on this court pursuant to the law of the case doctrine. Thus, Defendants ask that the preliminary injunction be dissolved on this basis.

In considering this argument, the Court first notes that Defendants presented it on two prior occasions, i.e., in response to Plaintiffs' original request for injunctive relief, and in support of a summary disposition motion. And in ruling on those motions, the Court expressed doubts about the enforceability of the releases. Specifically, the Court noted that the releases were *prospective* (i.e., they were obtained before the liability at issue arose), and that Defendants invoked them to defeat an *intentional tort* claim (i.e., tortious interference). Thus, if the releases were enforced as Defendants suggest, they would essentially operate as licenses, authorizing MMSDC to use its membership decisions to tortuously interfere with an applicant's business relationships. Even more troubling, Defendants did not support their argument with meaningful authority on the subject, i.e., examples from case law where a prospective release was successfully invoked to defeat an intentional tort claim. Plaintiffs, on the other hand, cited authority to the contrary, i.e., *Slater v Home Team Inspection Service,* unpublished per curiam opinion of the Court of Appeals, issued August 4, 2005 (docket no 260989) (a prospective release, no matter how broadly worded, will not defeat a properly pleaded intentional fraud claim, as the enforcement of the release in that context is against public policy). See also *Donajkowski* v *Alpena Power Co*, 219 Mich App 411 (1996) (public policy bars enforcement of a prospective release to defeat a claim for violation of a remedial statute, such as the Elliott-Larsen Civil Rights Act). Based on these concerns, the Court found that the releases were not sufficient to warrant summary disposition, nor did they undermine Plaintiffs' likelihood of success on the merits.

Next, the Court notes that the Court of Appeals did not address the public policy concerns when it reviewed the preliminary injunction. Or at least the Court of Appeals' majority did not address these concerns (they were, however, recognized as legitimate in a concurring opinion). Rather, the majority addressed only the scope of the releases, finding that they covered the claims Plaintiff asserted, and that this court erred in concluding otherwise. Nor did the majority's conclusions in that regard lead to the reversal of the preliminary injunction.

In other words, in no sense can the Court of Appeals be said to have addressed whether Michigan public policy tolerates the enforcement of a prospective release to defeat an intentional tort claim. If so, then the Court of Appeals' assessment cannot be deemed a "ruling" on that subject, much less a ruling that can be deemed the "law of the case." Moreover, even if the Court of Appeals' assessment could be read as a tacit endorsement of the releases' enforceability, the fact remains that the Court of Appeals *affirmed* the preliminary injunction despite this endorsement. Finally, the Court notes that in asserting this argument (for the third time), Defendants still have not supported their position with meaningful legal authority on the

subject, i.e., examples from case law demonstrating that a prospective release can be invoked to defeat an intentional tort claim.

In this context, Defendants' argument does not resolve this this Court's concerns regarding the enforceability of the releases, nor does it otherwise undermine Plaintiffs' likelihood of success on the merits.

The Court reaches a similar conclusion with respect to Defendants' argument under the First Amendment. To be sure, in many contexts the First Amendment's protections of freedom of speech and association will limit a Court's ability to impose liability a party. At the same time, however, such First Amendment protections have limited application in context of intentional torts. Nor have Defendants supported their position with meaningful authority on this subject, i.e., examples from case law where First Amendment concerns barred a court from imposing liability for an otherwise well pled intentional tort. Thus, this argument does not cause the court to question Plaintiffs' likelihood of success on the merits, nor does it otherwise suggest that injunctive relief is not appropriate.

In reaching this conclusion, however, the Court acknowledges that its public policy concerns might not be implicated with respect to Plaintiffs' negligence or breach of contract claims, as these are not intentional torts. This is particularly true in light of the Court's ruling in *Klann v Hess Cartage Co*, 50 Mich App 703 (1973), which Defendants correctly cite for the proposition that "an indemnity provision which would be invalid to indemnify a person from liability for his willful and wanton wrongdoing may, nevertheless, be validly applied to indemnify him from the liability for his negligent acts." Thus, the Court agrees that there are doubts as to Plaintiff's likelihood of success on the merits regarding these claims, and that absent a viable intentional tort claim there would be little basis for imposing injunctive relief.

In so ruling, the Court also notes that tortious interference appears to be the only viable intentional tort claim that Plaintiffs are asserting in this case. To be sure, Plaintiffs have asserted a fraud claim based on statements made by MMSD when soliciting membership, but in a prior summary disposition motion Defendant Robinson (and only Defendant Robinson) challenged the claim on grounds that it failed to state a claim, and the Court agreed. Thus, while that Count technically remains pending against MMSDC (since it has yet to challenge the claim), it appears unlikely that Plaintiffs can succeed on that theory.

Regardless, neither the releases nor Defendants' First Amendment concerns cause this Court to question the appropriateness of injunctive relief.

B. Traditional Equitable Factors

In light of the foregoing, the Court's primary focus in assessing the appropriateness of injunctive relief is on the viability of Plaintiff's tortious interference claim. In that regard, Plaintiffs have presented significant evidence, albeit circumstantial, suggesting that Defendants de-certified the member entities in bad faith and with the intent of interfering with their business relationships. That evidence concerns the growing animosity expressed by Defendant Robinson in the years leading up to the de-certifications, the scope and manner of Defendant's year-long investigation into Plaintiffs' MBE status, the timing of this investigation vis-à-vis Plaintiffs'

cessation of charitable contributions, and the inconsistent determinations made during that investigation, for which Defendants have provided only conclusory explanations.

On the other hand, it is now clear that Defendants have at least articulated a legitimate basis for their de-certification decisions, i.e., the departure of Mr Singhi from his role as COO/CFO of Piston Group (the parent company of the subsidiary entities). Initially, the Court considered Mr Singhi's departure to be relatively insignificant, as Mr Singhi did not work for any of the member entities, and Plaintiffs assured the Court that he was not involved in managing their day-to-day operations. It is now clear, however, that Mr Singhi's departure was significant, as in a series of emails years earlier Plaintiff Johnson explicitly cited Mr Singhi's hiring as proof of diversity in the member entities' management, thereby successfully resolving the concerns that MMSDC had raised informally. Thus, having previously relied on Mr Singhi's hire to demonstrate diversity, it is difficult to see how Plaintiffs can now credibly assert that his departure had no effect on the extent to which the entities qualified for MBE status, particularly when Mr Singhi was replaced by a white executive and the predominantly white management structure of the member entities was otherwise unchanged during this time.

With respect to the threat of irreparable harm, the primary question is whether Plaintiffs will, in fact, lose substantial amounts of business if their MBE certification is revoked. And this is a substantial concern, given the scope of Plaintiffs' operations in comparison to Defendants' ability to compensate Plaintiffs for such losses. At the same time, however, Plaintiffs provided relatively little evidence on this subject when they initially sought injunctive relief, as they cited only one specific relationship that would be lost without MBE certification.

Moreover, since then Plaintiffs have provided few additional specifics in this regard. For example, Plaintiffs claim to have retained an "expert on minority business enterprises" who is not only "a Black woman," but also "understands" the "financial impact to an MBE if they were to lose MBE certification," and "will testify" that the loss of certification "would have severe long-term financial consequences" to the Piston Companies." Plaintiffs' brief, however, does not describe this testimony (or the foundation for it), but merely refers to the expert's affidavit. That document, in turn, consists of little more than a description of the expert's credentials and an assertion that she reviewed the Piston Group financials and talked to its management, from which she concludes that the companies will lose business if they lose their MBE status, without elaborating in any way.

Nor do Plaintiffs cite affidavits or other evidence from specific customers indicating that they will stop doing business with the member entities if they lose their MBE certification. Rather, Plaintiffs rely only on vague allegations regarding how "the public discourse about the Piston Companies' potential decertification by MMSDC has caused problems with their customers," and "interfered" in unspecified ways with: (1) "the viability of DTS, a joint venture between V. Johnson Enterprises and Valeo," (2) "Irvin Products' relationship with a large global consumer electronic company;" and (3) "contract negotiations between Plaintiffs and one of the largest international automotive interior suppliers."

On the other hand, Plaintiff's inability to present evidence on this subject is somewhat understandable, as the preliminary injunction has prevented the member entities from losing their MBE status and, presumably, from losing any business. Furthermore, to a certain extent it is fair to simply assume that MBE certification results in additional business to MMSDC members, since obtaining business for its members is the primary purpose of that organization and there is every indication that the operation is successful.

Furthermore, from the inception of this case the Court has seen little hardship imposed on Defendants by virtue of the preliminary injunction. Specifically, it is undisputed that MMSDC is a regional chapter in a nationwide organization with thousands of members, and there is little indication that its operations (or those of the parent organization) have been detrimentally impacted by the injunction in measurable ways, such as by the loss of membership or difficulties in matching buyers to other MBE-certified entities. Rather, Defendants argument in this regard focuses on rather vague concerns about the loss of their rights "to assemble and speak freely," or the harm to their "core mission" of "supporting the creational of generational wealth in communities of color through entrepreneurship," without elaborating on these harms in any meaningful way. And while these are undoubtedly legitimate concerns, the lack of specificity in this regard makes them far from compelling.

In light of the foregoing, the Court finds that the case for preliminary injunctive relief is not as strong now as it was at the inception of this litigation, particularly as: (1) Plaintiffs have done little in the ensuing 18 months to demonstrate that they will, in fact, lose business if their MBE certification is not maintained; and (2) Plaintiffs have yet to explain how Mr Singhi's departure did not decrease the diversity in the member entities' management structure when several years earlier they explicitly claimed that his hiring did the opposite. At the same time, however, the Court continues to believe that there is a substantial threat of irreparable harm to Plaintiffs in the absence of injunctive relief, and that Plaintiffs have otherwise cited substantial evidence suggesting that Defendant's decertification decisions were undertaken in bad faith and with the intent of interfering with Plaintiff's business relationships. Moreover, the Court sees little hardship being imposed on Defendants by virtue of the injunction. In this context, the Court finds that it is appropriate to maintain the preliminary injunction. Thus, Defendants' motion to dissolve shall be denied.

II. *Plaintiff's Summary Disposition Motion Regarding Count VII*

Plaintiff's Count VII is titled "Declaratory Judgment as to MMSDC Only," and is based on allegations that MMSDC did not apply the correct criteria when it assessed the member entities' qualifications for MBE status, particularly with respect to the extent of minority participation in the management of "day to day operations." According to Plaintiffs, the correct criteria are spelled out in the national organization's Affiliate Handbook, which explicitly authorizes a minority executive/owner to delegate managerial authority to non-minorities without losing MBE certification. This is significant, Plaintiffs claim, because MMSDC based the disqualifications on the fact that Mr Johnson delegates managerial authority to white people. In terms of relief, this Count seeks neither money damages nor an order to compel the member

entities to be re-certified to MBE status. Rather, the relief sought is simply a judicial "declaration" that "establishes the necessary criteria the Piston Companies must meet to qualify for MBE Certification through MMSDC."

In the current motion Plaintiffs elaborate on the relief sought in this count, specifying that the "declaration" at issue is that "an MBE applicant like Mr Johnson may delegate 'management, policymaking, and daily operations of the company' to 'any other participants in the enterprise,' regardless of whether those participants are minorities." In terms of argument, Plaintiffs support this motion by citing to relevant language from the Affiliate handbook.

In considering this motion the Court first notes that there is no doubt that Mr Johnson, by virtue of his ownership of the Plaintiff entities, may delegate authority over their "management, policymaking, and daily operations" to anyone he pleases, so there is little need for the precise declaration Plaintiffs seek in their motion. Rather, at issue is the extent to which Defendants may rely on the ethnicities of Mr Johnson's delegees when assessing the entities' qualifications for MBE status, and the extent to which Defendants may defend the claim on this basis. In seeking such relief, however, Plaintiffs do not provide specifics of any kind regarding the consequences of such a "declaration" vis-à-vis their burden of proof, or the precise defenses which would be obviated by such a ruling. Rather, Plaintiffs simply request the declaration, leaving the consequences of its issuance to be fleshed out in further proceedings.

In other words, if the Court were to grant such a declaration, it is not at all clear how it would impact this case. This renders the current motion premature, and it shall be denied on that basis.

III. *Plaintiff's Motion for Summary Disposition of Robinson's Defamation Claim*

The defamation count in Robinson's counterclaim identifies two specific statements made by Plaintiffs and/or their agents. The first is a March 2020 email, in which Plaintiff's Group Vice President Governmental Affairs announced that he "was going to destroy that bitch," apparently in reference to Robinson. The second is a May 2021 press release, with a headline that read "President's vindictive decision to not to recertify [Piston Group] as a minority business enterprise," and a body which quotes the complaint's allegations of "vindictive, willful or malicious actions."

In this motion, Plaintiffs argue that the counter claim is not sufficient to state a claim for defamation, and the Court agrees with this assessment. Specifically, the Court finds that neither statement identified in the complaint can be deemed "untrue" for purposes of this theory of liability, but rather constitute expressions of an unflattering opinion. Thus, this Count fails to state a claim, and shall be dismissed on that basis pursuant to MCR 2.116(C)(8).

IV. *Defendant Robinson's Motion to Set Aside Default*

Defendant MMSDC timely answered Plaintiffs' original complaint, first amended complaint, second amended complaint, and third amended complaint. Defendant Robinson also timely answered Plaintiffs' original complaint, first amended complaint, and second amended complaint. Defendant Robinson did not, however, respond timely to Plaintiffs' third amended

complaint, after which Plaintiffs promptly obtained entry of a default. Defendant Robinson now moves to set aside the default.

In this regard, there is no dispute as to Defendant Robinson's ability to articulate a meritorious defense to the claim. Rather, the focus is on whether Defendant Robinson has articulated good cause for failing to timely answer the last of Plaintiffs' four complaints. And that regard, Plaintiffs have not identified any aspect of their fourth complaint that was unique to Defendant Robinson, or otherwise explained how her response to that document might be different than the responses she filed previously, much less how an untimely response would prejudice Plaintiffs' ability to overcome the defenses that Robinson has asserted. Rather, Plaintiffs seek the windfall of a default judgment against one co-defendant, based solely on that co-defendant's untimely response to one of their four complaints. In this unique procedural context, the Court accepts Defendant Robinson's explanation for her failure to timely respond to Plaintiffs' fourth complaint, and finds good cause to set aside the default. Thus, this motion shall be granted.

V.

In light of the foregoing, Defendants' motion to dissolve the preliminary junction is denied, as is Plaintiffs' motion for summary disposition on Count VII. On the other hand, Defendant Robinson's motion to set aside default is granted, as is Plaintiffs' motion for summary disposition Robinson's defamation counterclaim.

/s/ David A. Groner 12/5/2022

Hon. David A. Groner