UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-22616-CIV-SEITZ

JERRY POWERS, an individual,	:
	:
Plaintiff,	:
	:
v.	:
	:
NICHE MEDIA HOLDINGS, LLC,	:
A Nevada limited liability company,	:
	:
Defendant.	:
	:

PLAINTIFF'S *EMERGENCY* MOTION FOR PRELIMINARY INJUNCTION AND INCORPORATED MEMORANDUM OF LAW

Plaintiff Jerry Powers, pursuant to Rule 65, Federal Rules of Civil Procedure, respectfully moves this Court to issue an emergency preliminary injunction against Defendant Niche Media Holdings, LLC ("Niche Media"), and all those in active concert or participation with it, a) enjoining Niche Media from interfering with the planned September 8, 2009 publication of a not-for-profit magazine created by Mr. Powers and a group of 19 teenage students as part of a Summer youth project; and b) preventing Niche Media from enforcing a restrictive covenant beyond its November 1, 2009 expiration date.

INTRODUCTION

Mr. Powers is seeking emergency relief because interference by Niche Media is preventing the long-planned September 8, 2009 publication of *IE2: Inspire, Enrich & Empower* ("*IE2*"), a not-for-profit magazine created and produced by Mr. Powers and a group of students from the Overtown Youth Center as part of a Summer project to foster a sense of accomplishment and achievement among inner-city youth. *IE2* is complete and ready to be

printed and distributed. The printing and distribution cannot be accomplished because of the actions of Niche Media, whose representatives are interfering with its publication by claiming that Mr. Powers' involvement with *IE2* violates the non-competition and non-solicitation provisions in an Employment Agreement. As we show below, based on the clear and unambiguous language of that restrictive covenant, Mr. Powers' involvement and participation in the publication of *IE2* does not violate the terms of the restrictive covenant in the Employment Agreement or any other agreement between the parties.

IE2 is a "back to school" magazine which has long been scheduled for publication on September 8, 2009. While a brief delay beyond September 8th will not be irreparable, delaying the resolution of this matter pending a trial on the merits will mean that *IE2* is rendered untimely and out of date. An out of date publication will nullify the goal of empowering these teens by eliminating one of the key markers of their accomplishment: an on-time, relevant publication. The unhindered participation of Mr. Powers is essential to the publication. Additionally, the continued delay or denial of *IE2's* publication threatens to prevent Mr. Powers from completing his commitment to the teens involved in this special project and chills the First Amendment free speech rights of Mr. Powers and the teens.

Niche Media's recent actions regarding the *IE2* magazine have illuminated another point of contention between Mr. Powers and Niche Media: the expiration date of Mr. Powers' non-competition and non-solicitation restrictions. Mr. Powers contends that his restrictive covenant expires on November 1, 2009, while Niche Media apparently claims that Mr. Powers is bound to those obligations until February 17, 2011. Mr. Powers — who has been in the media industry for 42 years — is planning to resume work in the for-profit, luxury magazine publishing business on

November 1, 2009. A delay of 15 months will unreasonably prevent Mr. Powers from pursuing gainful employment in his chosen area of expertise, and will chill his First Amendment rights.

Thus, emergency relief is warranted and Mr. Powers respectfully requests that this Court conduct an emergency hearing and enter a preliminary injunction enjoining Niche Media from interfering with the publication of *IE2*, and also preventing Niche Media from seeking to enforce the operative non-competition and non-solicitation provisions beyond November 1, 2009.

FACTUAL ALLEGATIONS

The relevant facts are set forth in the Verified Complaint for Declaratory and Injunctive Relief (the "Verified Complaint"), which are incorporated herein in the interest of brevity and economy.

ARGUMENT

A preliminary injunction is warranted when a movant establishes the following four elements: (1) a substantial likelihood of success on the merits; (2) irreparable harm in the absence of an injunction; (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction is issued, and (4) an injunction would not disserve the public interest. *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1246-47 (11th Cir. 2002). Mr. Powers satisfies these elements.

Although preliminary injunctions are often a device to preserve the status quo:

> [i]f the currently existing status quo itself is causing one of the parties' irreparable injury, it is necessary to alter the situation so as to prevent the injury . . . . The focus always must be on the prevention of injury by a proper order, not merely on preservation of the status quo.

Canal Authority v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974) (internal citations omitted). The focus of Mr. Powers' motion is the prevention of injury by Niche Media's actions.

I. Mr. Powers Is Entitled to Injunctive Relief Allowing Publication of *IE2*.

Mr. Powers is substantially likely to succeed on the merits of his claim that his involvement in the *IE2* magazine project does not violate the express terms of the non-competition and non-solicitation restrictions set forth in the Asset Purchase Agreement and the Employment Agreement. Mr. Powers will suffer irreparable harm if publication of *IE2* is delayed, because his inability to bring this community outreach project to a successful conclusion will cause harm to him and those involved in the project, and will damage his reputation among the teens, his associates and community leaders. The extent of this injury is not quantifiable in monetary terms. Moreover, Niche Media will suffer no harm from the publication of *IE2*, a not-for-profit magazine intended to empower inner-city teens and raise awareness among supporters of the Overtown Youth Center of its ongoing activities. Finally, there is no disservice to the public in granting an injunction allowing this project to be completed.

A. Mr. Powers Is Substantially Likely to Succeed on the Merits of His Declaratory Judgment Claim that the Restrictive Covenants Do Not Apply to His Involvement in the *IE2* Project.

Count I of Mr. Powers' Verified Complaint seeks a declaratory judgment that his involvement with the IE2 magazine project does not violate the restrictive covenants of the Asset Purchase Agreement ("the APA") or the Employment Agreement.[1] Mr. Powers is substantially likely to succeed on the merits of that argument, because the restrictive covenants contained in these agreements do not cover the publication of *IE2*. The dispute over that is ripe and in need of resolution.

[1] Copies of the Asset Purchase Agreement and the Employment Agreement are attached as Exhibits 1 and 2, respectively, to the Verified Complaint. [DE 1].

Miami Design District, 4141 Northeast 2nd Avenue, Suite 201, Miami, FL 33137 • Telephone: 305-571-8550 Fax: 305-571-8558 • www.abbrclaw.com

To grant a declaratory judgment, a court must be satisfied that a dispute is "'definite and concrete, touching the legal relations of parties having adverse legal interests'; and that it be 'real and substantial' and 'admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937)). This dispute is definite and concrete because Niche Media's threats have temporarily halted the planned September 8th publication of *IE2*. The dispute also concerns the adverse legal relations of Mr. Powers and Niche Media, since the dispute centers on the operative language of valid contracts. The dispute is real and substantial, since it threatens to derail the publication of *IE2*, which has ramifications for both Mr. Powers and the teens involved in this project. Finally, the relief requested is conclusive because by determining that restrictive covenants in the APA and the Employment Agreement do not preclude Mr. Powers' involvement with *IE2*, the shroud of uncertainty surrounding its publication will be lifted and *IE2* will be published.

Most importantly, Mr. Powers is substantially likely to succeed on the merits of his argument because the clear, unambiguous language of the APA and the Employment Agreement demonstrate that the restrictive covenants contained therein do not extend to Mr. Powers' involvement in *IE2*. "When contractual language is clear and unambiguous, courts cannot indulge in construction or interpretation of its plain meaning." *Detroit Diesel Corp. v. Atlantic Mut. Ins. Co.*, --- So. 3d ---, 2009 WL 1675850 at *2 (Fla. 4th DCA 2009) (quoting *BMW of N. Am., Inc. v. Krathen*, 471 So. 2d 585, 587 (Fla. 4th DCA 1985)). Moreover, when it comes to interpreting non-competition agreements, "such contracts will not be construed to extend beyond their proper import or further than language of the contract absolutely requires." *Marx v. Clear*

Channel Broad., Inc., 887 So. 2d 405, 406 (Fla. 4th DCA 2004) (citing *Zimmer v. Pony Exp. Courier Corp. of Fla.*, 408 So. 2d 595, 597 (Fla. 2d DCA 1981), *review denied*, 418 So. 2d 1280 (Fla.1982)). In other words, non-competition covenants are strictly construed, and the only "proper import" of the restrictive covenants at issue here compels the conclusion that they do not apply to the publication of *IE2*, nor do they apply at all after November 1, 2009.

1. The APA Non-Competition and Non-Solicitation Provisions Do Not Apply.

In relevant part, Section 8.10 of the APA states:

> (a) Noncompete. Seller and each Principal agrees that, during the two-year period following the Closing Date (the "Noncompete Period"), he or she shall not, directly or indirectly, either for himself, herself or for any other Person (other than Buyer) participate ***in the Business*** anywhere in the United States of America other than on behalf of Buyer. . . . (emphasis added).

Article XI of the APA expressly defines the "*Business*" as "the luxury magazine publication business." *IE2* is not a luxury magazine, and is not an ongoing, for-profit "publication business."

IE2 is a not-for-profit magazine by, for, and about teens and the issues facing inner city youth. (Verified Complaint, ¶¶ 27-29). *IE2* is the polar opposite of Niche Media's *Ocean Drive*. *Ocean Drive*, which is decidedly targeted at wealthy, privileged people living a luxury lifestyle, features stories about the opening of the luxury hotels in South Beach, "supermodel" pictorials, and interior design. *IE2*, on the other hand, is targeted at inner city youth and features articles such as a "School Survival Guide" and interviews with inner-city teen role models such as Alonzo Mourning. (Verified Complaint, ¶ 29, Exh. 3). *IE2* is obviously ***not*** a regional luxury magazine, and Niche Media's own definition of its business as the "luxury magazine business" cannot be extended beyond that clear definition, because no language in the APA supports any such extension.

Section 8.10(b) of the APA also states, in relevant part, the following:

> (b) Nonsolicitation. During the Noncompete Period, each Principal shall not, directly or indirectly . . . (ii) induce or attempt to induce any customer or supplier of Buyer or Seller ***to cease doing business with Buyer*** or Seller. . . . (emphasis added).

Mr. Powers has not induced anyone to cease doing business with Niche Media, and no customer or supplier of Niche Media has ceased doing business with Niche Media as a result of *IE2*. (Verified Complaint, ¶¶ 21, 28). As set forth in the Verified Complaint, with the assistance of Mr. Powers' staff, the teens sold approximately 25 advertisements for placement in *IE2*. (Verified Complaint, ¶ 28). The advertisers, some of whom were or are customers of Niche Media with whom Mr. Powers and his staff have longstanding personal and/or professional relationships, were advised that this publication was a not-for-profit, student mentoring project, and that all funds would be used to defray the cost of printing the magazine, and any remaining funds would be donated to the Overtown Youth Center. (*Id*.). Nearly all of the ads ranged in cost from $200 to $500, and the total amount of ads sold was approximately $10,000. (*Id*.).

In contrast, ads in *Ocean Drive* typically cost thousands of dollars per page. Niche Media cannot claim, in good faith, that any of the 25 ads sold by these teens to some Niche Media clients induced any of its clients to cease doing business with it, or represented an attempt by Mr. Powers to convince these clients to cease doing business with Niche Media.

In short, the APA's Non-Competition and Non-Solicitation provisions do not preclude Mr. Powers' involvement in this not-for-profit project.

2. The Employment Agreement's Restrictive Covenant Also Does Not Apply.

Section 9(a) of the Employment Agreement, titled "*Restrictive Covenant*," states in

relevant part that Mr. Powers shall not:

> either directly or indirectly, for himself or any third party canvass, contact, solicit or accept business from any customer of the Company with whom the Executive has had business contact on behalf of the Company, ***except*** if such canvassing, contacting, solicitation or acceptance of business relates to ***business ventures or opportunities*** which ***do not constitute a Competing Business*** and does not directly or indirectly relate to the ***loss of any business or business opportunities*** for the Company. (emphasis added).

Section 9(a) of the Employment Agreement clearly does ***not*** apply where Mr. Powers' conduct does not involve a "Competing Business" and does not result in the loss of business to Niche Media. First, *IE2* is not a "business venture or opportunity" since it is a not-for-profit project whose purpose is limited to teaching and empowering inner city teens and raising awareness about the activities of the Overtown Youth Center. (Verified Complaint, ¶¶ 25-26). The Employment Agreement does not preclude Mr. Powers from engaging in charitable work in the community. But even if *IE2* could be thought an "opportunity," it is clearly not a "Competing Business" vis-á-vis Niche Media and its publication will not cause any loss of business or business opportunity to Niche Media.

The Employment Agreement limits its reach to "Competing Businesses," which are defined as those that are the same or essentially the same as Niche Media's business. The Employment Agreement expressly defines the "[Niche Media's] Business" as the "business of publishing regional luxury magazines for circulation in various markets including but not limited to South Florida . . . ." Even on the most basic level of "business," Niche Media is a company in the business of publishing magazines for profit. In stark contrast, *IE2* is a not-for-profit teaching exercise, not a business. However Niche Media may attempt to suggest a link between *IE2's* purpose and its own business, the two undertakings are, literally, worlds apart.

The only possible connection between *Ocean Drive* and *IE2* is that a small number of Niche Media customers who advertise in *Ocean Drive* were solicited to support the *IE2* project by purchasing advertisements at nominal cost. (Verified Complaint, ¶ 28). But Niche Media cannot show that the solicitation of the nominally-priced *IE2* ads resulted in a loss of business or business opportunities.

B. Mr. Powers Will Suffer Irreparable Injury in the Absence of an Injunction.

Under Florida law, "[i]rreparable injury may be established where damages are estimable only by conjecture." *Travelers Ins. Co. v. Conley*, 637 So. 2d 373, 374 (Fla. 5th DCA 1994). *See also, e.g., ABC Charters, Inc. v. Bronson*, 591 F. Supp. 2d 1272, 1309 (S.D. Fla. 2008) (a party that "cannot be made whole by the payment of monetary damages alone" is irreparably injured). The injury that will result to Mr. Powers (and his mentees) from the continued delay of *IE2*'s publication cannot be calculated in monetary terms, and qualifies as irreparable injury under Florida law. Delaying it much beyond September 8, 2009 will mean that *IE2* will be out of date and untimely. Publishing a "back to school" magazine in the winter, or later, defeats one of the fundamental objectives of *IE2*. If *IE2* becomes irrelevant while awaiting a trial on the merits, the project and all those involved, including Mr. Powers, will be injured in a manner that cannot be quantified in monetary terms, since the goal of *IE2* was to empower these teens to succeed, not to make money in an ongoing enterprise.

Second, Mr. Powers has personally nurtured and mentored the entrepreneurial aspirations of the teenagers who have routinely experienced disappointments and setbacks in their lives. The *IE2* teens placed their trust in Mr. Powers to successfully guide them to the project's finish line, and the planned September 8th publication of the magazine represents the culmination of those efforts. Niche Media's derailment of *IE2* will immediately injure Mr. Powers'

relationships with youngsters who depended on him. In addition, the inability to timely publish by virtue Niche Media's threats of legal action against Mr. Powers creates a chilling effect on the protected speech of all those involved in *IE2*.

C. Niche Media Will Not Suffer Any Injury by the Grant of this Injunction, and this Injunction Serves the Public Interest.

Niche Media will ***not*** suffer any harm if the Court issues an order allowing the publication of *IE2* to move forward without delay. As previously discussed, *IE2* does ***not*** compete with any Niche Media publication, and will ***not*** result in the loss of any business to Niche Media.

II. Mr.Powers Is Entitled to a Preliminary Injunction Allowing Him to Re-Enter the Luxury Magazine Publishing Business on November 1, 2009.

A. Mr. Powers Is Substantially Likely to Succeed on the Merits of His Claim that the Restrictive Covenants Expire on November 1, 2009.

As previously set forth in Section I, A, above, Mr. Powers meets the standard for issuing a declaratory judgment, and is substantially likely to succeed on the merits of his claim that the APA controls the November 1, 2009 expiration of his non-competition and non-solicitation obligations to Niche Media. Non-competition agreements are to be strictly construed, and not extended beyond their plain meaning. *See Marx*, *supra*. The clear and unambiguous language of the Employment Agreement states that the APA controls the expiration of Mr. Powers' restrictive covenants, and that date is November 1, 2009.

Under section 12.6 of the Employment Agreement, Mr. Powers is bound to its restrictive covenant for a period of two years from the termination of his employment. But this section also states:

> To the extent there are any inconsistencies ***during the first two (2) years of this Agreement*** with the corresponding Asset Purchase Agreement, ***the Restrictive Covenants related to Non Competition and Non Solicitation under the Asset Purchase Agreement shall be controlling***. (emphasis added).

Mr. Powers' employment with Niche Media was terminated on February 17, 2009, during the first two years of the Employment Agreement (which was dated November 1, 2007). (Verified Complaint, ¶ 20). Thus, the expiration date specified under the APA controls because it is inconsistent with the Employee Agreement's expiration date, it is embodied within the APA's Non-competition clause, and this inconsistency occurred during the first two years of the Employment Agreement.

Section 8.10(b) of the APA clearly and unambiguously states that the restriction period is two years from the November 1, 2007 Closing Date on the sale of ODMG's assets to Niche Media. Therefore, the restriction period expires on November 1, 2009. Under Florida law, the clear and unambiguous language of the contract controls, and non-competition clauses are not to be construed broader than their language allows. Thus Mr. Powers is substantially likely to succeed on the merits of his claim that the restrictive covenant at issue here expires on November 1, 2009.

B. Mr. Powers Will Suffer Irreparable Injury if the November 1, 2009 End Date is Extended.

Mr. Powers will suffer irreparable harm in the absence of a preliminary injunction determining that the non-competition and non-solicitation restrictions placed upon him expire on November 1, 2009. The November 1, 2009 date was bargained for by the parties. As it stands, the Severance Agreement and Release of Claims expressly states that paragraph 12 of the

Employment Agreement, mandating that the APA controls the expiration date, is unmodified by the Severance Agreement and Release of Claims.[2]

Mr. Powers is 62 years old and has been in the publishing business for 42 years. (Verified Complaint, ¶ 5). The publishing business is his life's work. (*Id*.) A delay in his ability to re-enter his lifelong career cannot be quantified in monetary terms and will cause him irreparable injury. *See Travelers Ins. Co. v. Conley, supra*. He faces both advancing age and professional irrelevance in an ever changing industry, and Mr. Powers' ability to rely on his associates and business contacts will erode with each passing month that he is kept out of his profession. Thus, no adequate remedy at law exists because the ability to ascertain money damages due to Niche Media preventing him from re-entering the luxury magazine publishing business at the time the parties agreed to is difficult, if not impossible.

C. The Balance of Harms Strongly Favors Mr. Powers.

Niche Media will suffer no harm by the granting of an injunction that prevents the enforcement of the non-competition and non-solicitation agreement beyond November 1, 2009 because Niche Media clearly contemplated and expressly agreed to the November 1, 2009 deadline when it executed the APA. Niche Media also clearly contemplated and agreed to the November 1, 2009 deadline when it executed the Employment Agreement with a provision explicitly ceding control of the deadline back to the APA under the facts present here. Thus, the November 1, 2009 expiration is not a surprise, and was foreseen by Niche Media, and cannot serve as a basis for harm.

[2] The Severance Agreement and Release of Claims is not attached to the Complaint based on a confidentiality provision, but will be filed under seal.

Furthermore, the public interest is not disserved by granting the requested injunctive relief to Mr. Powers because Florida's public policy is that restrictive covenants in employment agreements must be reasonable and serve legitimate business purposes. *See* Fla. Stat. 542.33 (2009). It is not reasonable to extend Mr. Powers' obligations beyond the date expressly agreed to by the parties in the operative provisions, and violation of the express provisions by Niche Media serves no legitimate business purpose. Moreover, preventing Mr. Powers from returning to work in his lifelong profession as a magazine publisher also implicates his fundamental First Amendment freedoms by chilling his speech.

CONCLUSION

Jerry Powers is entitled to preliminary injunctive relief enjoining Niche Media from actions that delay or inhibit the planned September 8, 2009 publication of *IE2*, and preventing Niche Media from enforcing the non-competition and non-solicitation clauses beyond November 1, 2009.

Dated: September 2, 2009.

BRUCE S. ROGOW
ROBERT C. GILBERT
ALTERS BOLDT BROWN
RASH & CULMO, P.A.
4141 NE 2nd Avenue, Suite 201
Miami, Florida 33137
Tel: (305) 571-8550
Fax: (305) 571-8558

BY*: s/Bruce S. Rogow*
Bruce S. Rogow
Florida Bar No. 067999
brogow@rogowlaw.com
Robert C. Gilbert
Florida Bar No. 561861
bobby@abbrclaw.com
Attorneys for Jerry Powers