

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF HORRY ) FIFTEENTH JUDICIAL CIRCUIT  
CIVIL ACTION NO: 2014-CP-26-03459

Pirate Adventures, Inc., Sean Bond, and  
Ryan Powers,

Plaintiffs,

v.

Ryan Mendez and Barefoot Pirates, LLC,

Defendants.

**RECEIVED**

NOV 04 2014

ORDER

**SC Court of Appeals**

FILED  
HORRY COUNTY  
2014 JUN 25 PM 12:31  
MELANIE HUGGINS-WARD  
CLERK OF COURT

**BACKGROUND**

On June 4, 2014, a hearing was held pursuant to Plaintiff's Motion for a Temporary Injunction filed May 28, 2014 in the Horry County Court of Common Pleas. Present at the hearing were Plaintiffs Sean Bond and Ryan Powers, together with their counsel, Benjamin A. Baroody, Esq. Also present at the hearing was Defendant Ryan Mendez, together with his counsel, James K. Gilliam, Esq. and Michael H. Wells, Esq. For the reasons set forth herein below, I hereby grant Plaintiff's Motion for a Temporary Injunction in an effort to preserve the status quo for trial.

**FINDINGS OF FACT**

Based on the record before me I make the following findings of fact. Pirate Adventures, Inc., owns and operates a unique, pirate-themed, interactive excursion for young children and families out of the Crazy Sister Marina in Murrells Inlet, South Carolina. Pirate Adventures has been since its inception and remains today the sole and exclusive pirate-themed boat tour/excursion of its kind along the Grand Strand. Pirate Adventures markets and advertises its business throughout the Grand

Strand area, from Little River to McClellanville, South Carolina. Pirate Adventures spends between seventy-five percent (75%) and eighty percent (80%) of its marketing and advertising budget in the Myrtle Beach and North Myrtle Beach areas and is a member of the Myrtle Beach Chamber of Commerce. Barefoot Landing is located in the North Myrtle Beach market targeted by Barefoot Pirates and was being considered by Pirate Adventures as a second location from which the business could operate as late as the fall of 2013.

Pirate Adventures operates its business pursuant to an Exclusive License Agreement with Pirate Adventures Corporation, a Massachusetts corporation that developed the pirate adventure business model out of Cape Cod, Massachusetts. Pursuant to the agreement, Pirate Adventures Corporation has granted Pirate Adventures an exclusive license to operate its business within a forty (40) mile radius of Murrells Inlet, South Carolina. The franchise agreement strictly prohibits "... others to use the Marks, trade dress or any other Intellectual Property belonging to Licensor without the express written consent of Licensor."

Mendez is a shareholder, director, and officer of Pirate Adventures, a corporation comprised of only three shareholders, each of whom serves on the Board of Directors and is an officer. Evidence exists to show that Mendez, by and through Barefoot Pirates, LLC, intends to operate a competing business out of Barefoot Landing beginning in the immediate future, using the same or substantially similar marketing model, business model, and themes, scripts, costumes, and characters as those used by Pirate Adventures pursuant to its exclusive license with Pirate Adventures Corporation. Mendez has, to-date, organized Barefoot Pirates, LLC, ordered a pirate ship, registered with the Myrtle Beach Chamber of Commerce to market his new business, applied for a business

license from the City of North Myrtle Beach and negotiated an agreement with Barefoot Landing to operate a pirate adventure business out of Barefoot Landing. At the hearing, Mendez did not deny he was in the process of opening a the same or substantially similar business at Barefoot Landing. Mendez did not notify Pirate Adventures of the new venture. Bond an Powers confronted Mendez about the venture, and Mendez refused to cease from operating. This action followed and this Court filed a Temporary Restraining Order on May 28, 2014.

### **CONCLUSIONS OF LAW**

Directors and officers of a corporation owe the corporation and their fellow officers, directors, and shareholders a duty to act in good faith, with due care, and in the best interest of the corporation and its shareholders. S.C. Code Ann. § 33-8-300, 33-8-420 (Code of Laws 1976, as amended). Furthermore, “officers and directors . . . owe a duty of loyalty to the corporation . . . This duty of loyalty requires an officer or director to not engage in self-dealing and usurp corporate opportunities.” Worldwide Wholesale Lumber, Inc., 378 B.R. 120, 127, 2007 WL 4162820 (Bankr. D.S.C. 2007).

As an officer and director of Pirate Adventures, Inc., Mendez owes Pirate Adventures, Inc., Sean Bond, and Ryan Powers the aforementioned fiduciary duties. No evidence exists in the record to show that Mendez’s actions were made in good faith or in the best interest of the corporation or its shareholders. It further appears that Mendez’s actions will be harmful to the corporation and, if allowed to continue, they will cause irreparable harm to the corporation.

“The . . . purpose of an injunction is to preserve the status quo to avoid possible irreparable injury to a party pending litigation.” Peek v. Spartanburg Regional Healthcare System, 367 S.C. 450,

455, 626 S.E.2d 34, 37 (Ct. App. 2005). “To obtain an injunction, the plaintiff must allege facts sufficient to constitute a cause of action for injunction and demonstrate the injunction is reasonably necessary to protect the legal rights pending in the litigation.” Id. “To establish a cause of action for injunction, the plaintiff must show “(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law.” Id. at 454-55, 36. “Before granting an injunction, the trial court should look at the particular facts of each case and the equities of each part and determine which side, if any, its more entitled to equitable relief.” Id.

The first element, irreparable harm to the plaintiff, is determined on a case-by-case basis. “Whether a wrong is irreparable, in the sense that equity may intervene . . . is not decided by narrow and artificial rules.” Peek at 367 S.C. 455, 626 S.E.2d 36 (Ct. App. 2005).

The second element, a likelihood of success on the merits, does not have to be established with certainty by the party seeking the injunction. Rather, “the plaintiff need only present a fair question to raise as to the existence of such a right.” Id. at 456, 37 (citing Williams v. Jones, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912)).

The final element, an inadequate remedy at law, should not be interpreted literally. See Columbia Broadcast System v. Custom Recording Co., 258 S.C. 465, 189 S.E.2d 305 (1972) (noting that a party’s ability to seek monetary damages does not preclude injunctive relief). Rather, the purpose of a temporary injunction should be considered, which is to preserve the status quo during the pendency of the litigation pending trial. Peek, 367 S.C. at 457, 626 S.E.2d at 37 (Ct. App. 2005).

First, the Plaintiffs have shown that they will suffer irreparable harm without an injunction. There is ample evidence in the record that Pirate Adventures, Inc., will lose both business and a corporate opportunity if Mendez opens Barefoot Pirates, LLC in North Myrtle Beach as planned. Pirate Adventures has spent time and money marketing the business and currently operates as the only pirate-themed, boat-based excursion/tour marketed to young families and children in the Grand Strand. Pirate Adventures would be deprived of these efforts if Mendez were allowed to open a the same or substantially similar business as Pirate Adventures from a location within the same marketplace in which Pirate Adventures does and markets its business.

Second, the Plaintiffs have shown a likelihood of success on the merits. The Plaintiffs have presented ample evidence of Mendez's actions to operate the same or a substantially similar business that Pirate Adventures currently operates. These actions appear likely to be in breach of Mendez's duties of loyalty, to act in the best interest of the corporation and its shareholders, to act in good faith, and to not usurp a corporate opportunity. Therefore, I find that the Plaintiffs would be likely to succeed on the merits of their claims.

Third, I find there is no adequate remedy at law, for, without a temporary injunction, the status quo of the case as it exists now will be significantly altered by the time a trial is scheduled on the merits of this case and there is likely to ensue harm and damage for which a legal remedy will not adequately recompense.

Based upon the foregoing, I am compelled to GRANT Plaintiffs' Motion for a Temporary Injunction. As such, it is hereby ORDERED that, until such time this Court enters a subsequent Order modifying the terms hereof or the final disposition of this case, whichever occurs first:

1. Mendez and Barefoot Pirates, LLC are hereby restrained from operating the same or substantially similar business operated by Pirate Adventures within a forty (40) mile radius of Murrells Inlet, South Carolina. This restriction includes operating an interactive, scripted, pirate-themed excursion by boat which is marketed to young families and children that is the same or substantially similar in name, appearance, and model as that operated by Pirate Adventures, Inc. This restriction shall apply to Mendez and Barefoot Pirates, LLC during the pendency of this action whether Mendez remains a director and officer of the corporation or resigns<sup>1</sup> therefrom.
2. Mendez and Barefoot Pirates, LLC are hereby restricted from utilizing any trademarks and/or trade dress, including any themes, scripts, costumes, and characters, owned by Pirate Adventures Corporation and exclusively licensed to Pirate Adventures.
3. Pirate Adventures, Inc. shall post a bond with the Horry County Clerk of Court in the amount of \$ 15,000<sup>or 20k</sup> within twenty (20) days of the filing of this Order. If no bond is posted, this Order shall be of no further force or effect. Upon the posting of this bond, the Horry County Clerk of Court is hereby directed to refund Plaintiffs' cash bond posted to obtain the Temporary Restraining Order.

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<sup>1</sup>This Court will not allow Mendez to circumvent this Order by resigning after the date of the hearing on this Motion and then operating the same or substantially similar business within Pirate Adventures' targeted marketplace.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Larry B. Hyman", written over a horizontal line.

Honorable Larry B. Hyman  
Chief Administrative Judge

Conway, South Carolina

June 23, 2014

STATE OF SOUTH CAROLINA )  
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 COUNTY OF HORRY )  
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 Pirate Adventures, Inc., Sean Bond, and )  
 Ryan Powers, )  
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 Plaintiffs, )  
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 v. )  
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 Ryan Mendez and Barefoot Pirates, LLC, )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 FIFTEENTH JUDICIAL CIRCUIT  
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ORDER  
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On August 14, 2014, a hearing was held on the following pending motions: 1) Defendants' Motion for Reconsideration, filed July 7, 2014; 2) Plaintiffs' Alternative Motion for a Temporary Injunction, filed August 1, 2014; and 3) Defendants' Motion for Reconsideration of the Order Reinstating the Temporary Injunction. Present at the hearing to present oral arguments to the Court were Benjamin A. Baroody, Esq. for the Plaintiffs and James K. Gilliam, Esq. for the Defendants. Based upon the record before me, this Court hereby grants in-part and denies in-part Defendants' Motion for Reconsideration of July 7, 2014 and grants in-part and denies in-part Defendants' Motion for Reconsideration of August 1, 2014. This Court further finds Plaintiffs' Alternative Motion for a Temporary Injunction moot in light of its ruling upon the foregoing motions.<sup>1</sup>

First, with regard to Defendants' Motion for Reconsideration, filed July 7, 2014, in which Defendants request this Court reconsider its order granting Plaintiffs' Motion for a Temporary Injunction, I find that the order should be modified to increase the bond amount from \$15,000.00 to

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<sup>1</sup> While finding Plaintiffs' Motion moot, this Court nonetheless reviewed the Affidavit testimony of Sean Bond filed August 1, 2014, including the signed License Agreement attached thereto, which confirms and verifies information in the record previously at issue.

\$50,000.00. Plaintiffs shall have twenty (20) days from the date of the hearing, August 12, 2014, to post such a bond with the Horry County Clerk of Court. The Horry County Clerk of Court shall thereafter cancel and return Plaintiffs' previously-posted bond of \$15,000.00. Based upon the record before me and the arguments of counsel, the remaining grounds for reconsideration set forth in Defendants' motion are denied.

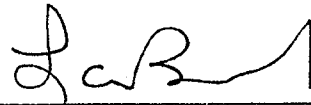
Second, with regard to Defendants' Motion for Reconsideration of the Order Reinstating the Temporary Injunction, filed August 1, 2014, I hereby vacate my Order Reinstating the Temporary Injunction, filed July 18, 2014. Based upon the record before me and the arguments of counsel, I find that Plaintiffs substantially complied with my Order filed June 25, 2014, wherein I granted Plaintiffs' motion for a temporary injunction. In that order, I instructed Plaintiff Pirate Adventures, Inc. to post a bond with the Horry County Clerk of Court in the amount of \$15,000.00 "within twenty (20) days of the filing of this Order. If no bond is posted, this Order shall be of no further force or effect." I find that Plaintiff was ready, willing, and able to comply with the order in a timely fashion, and that, but for its reliance upon information from representatives of the Horry County Clerk of Court's office, the bond would have been posted as instructed by me in my order. Instead, it was posted the following day. In my discretion as the trial court who has presided over all matters in this case to-date and reviewed the complete record before me, inclusive of Plaintiff's pending Alternative Motion for a Temporary Injunction, I find that equity, fairness, and judicial economy command that the injunction I granted Plaintiffs against Defendants by Order filed June 25, 2014 remain in full force and effect. I find no evidence that the status quo as it existed at the hearing of June 4, 2014 has changed such that the temporary injunction should not be reinstated and of effect. Therefore, it

is hereby ordered that my order of June 25, 2014 is hereby ratified, affirmed, and ordered to remain in full force and effect, except as modified hereinabove.

Third, with regard to Plaintiffs' Alternative Motion for a Temporary Injunction, filed August 1, 2014, I find it moot, except to the extent considered by me in ruling upon Defendants' Motion to Reconsider, filed August 1, 2014 as set forth above. However, I have reviewed the Affidavit of Sean Bond filed August 1, 2014 as part of the record before me. While I find that the Affidavit further supports and bolsters Plaintiff's request for a temporary injunction in this case, I would have issued the same rulings upon each of the pending motions in this case without consideration of the Affidavit.

In sum, based upon the record before me, this Court finds that its Order filed June 25, 2014, in which it granted Plaintiffs' Motion for a Temporary Injunction, should have been granted at the previous hearing and should remain in full force and effect until its modification or vacation by subsequent order of this Court.

IT IS SO ORDERED.



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THE HONORABLE LARRY B. HYMAN  
Presiding Judge

Conway, South Carolina

~~August~~ 13, 2014  
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