STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

ARIZONA INSTRUMENT, INC.,

Plaintiff,

v

File No. 99-19605-CK
HON. PHILIP E. RODGERS, JR.

PLASTICS PRODUCT REVIEW,

Defendant.

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Kevin Abraham Rynbrandt (P46699)
Attorney for Plaintiff

Paul T. Jarboe (P34343)
Eric W. Phelps (P55375)
Attorneys for Defendant

DECISION AND ORDER DENYING PLAINTIFF'S REQUEST FOR PRELIMINARY INJUNCTION

INTRODUCTION

Arizona Instrument, Inc. ("AZI") is an Arizona corporation that manufactures and sells moisture analyzers that measure the moisture levels in a variety of plastic parts. Plastic Products Review ("PPR") is a Michigan corporation located in Traverse City. PPR is a plastic injection mold industry magazine. It tests various industry products and publishes comparison evaluations.

PPR solicited AZI to test its moisture analyzer, along with its competitor's (Omnimark) moisture analyzer. AZI agreed to participate in the testing under certain conditions which were allegedly discussed over the telephone and then documented in AZI's letter dated July 13, 1999. (Exhibit H to Defendant's Response). PPR's confirmation of the conditions was contained in its fax dated July 14, 1999. (Exhibit I to Defendant's Response). The terms and conditions of their agreement as contained in these two letters appear to be virtually identical.

After rescheduling the testing several times to accommodate AZI, the testing finally took place on August 25, 1999. AZI's representative, Deneen Brown, was present for the testing and operated AZI's machine. During the testing, the AZI machine did not perform well.

On August 27, 1999, AZI advised PPR that "[t]he testing . . . was not scientific in nature, and a number of variables prevented the data generated from being representative of each instrument's performance." Further, AZI advised PPR that "AZI never agreed upon any test procedure for this evaluation, since it was never furnished to us in the first place" and "AZI is NOT giving its permission for publication or dissemination to any outside source." (Exhibit J to Defendant's Response).

Pursuant to the parties' July 13 and 14 letters confirming the terms and conditions of their agreement, PPR was to provide AZI with the test procedures in advance. AZI contends they never received them, but Defendant's letters to AZI (Exhibits G dated June 29, 1999 and the second page of Exhibit K[1] dated July 26, 1999) purport to be the testing procedures.

PPR released a prototype of the evaluation article to Omnimark. Omnimark distributed the prototype to a potential customer.

PPR offered AZI the opportunity for a retest. The parties do not agree on why, but the retest never took place. PPR also offered AZI the opportunity to publish a manufacturer's comment in its publication along with the test results. AZI drafted such a statement. (Exhibit V to Defendant's Response). Shortly before publication, however, PPR received a letter dated October 14, 1999 from AZI's attorneys insisting that "PPR refrain from publishing . . . an article . . . detailing the results of an unscientific and biased evaluation of moisture analysis equipment." (Exhibit W to Defendant's Response).

On October 19, 1999, AZI filed a Verified Complaint against PPR alleging breach of contract, misappropriation of confidential information, tortuous interference with business relationships and expectations, and misrepresentation. Along with its Complaint, AZI filed an Ex Parte Motion for Temporary Restraining Order and Order to Show Cause. On October 20, 1999, this

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[1] Subsequent to the hearing, the parties exchanged letters indicating that the second page of Exhibit K should actually be part of Exhibit R according to the Plaintiff and part of Exhibit L according to the Defendant.

Court granted the Ex Parte Motion for Temporary Restraining Order. The show cause hearing was held on December 13, 1999. PPR filed a Hearing Brief on December 14, 1999.

LAW AND ANALYSIS

The leading case in Michigan on injunctive relief is *Michigan State Employees Ass'n v Mental Health Dep't,* 421 Mich 152, 157-158; 365 NW2d 93 (1984). Our Supreme Court states in *MSEA* that preliminary injunctive relief can be granted only after considering four factors:

(1) harm to the public interest if an injunction issues,

(2) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted,

(3) the strength of the applicant's demonstration that the applicant is likely to prevail on the merits, and

(4) demonstration that the applicant will suffer irreparable injury if the relief is not granted.

See also, *Caterpillar, Inc v Treasury Dep't*, 440 Mich 400, 413; 488 NW2d 182 (1992).

Other considerations surrounding the issuance of a preliminary injunction are whether it will preserve the status quo so that a final hearing can be held without either party having been injured and whether it will grant one of the parties final relief before a hearing on the merits. The trial court's decision must not be arbitrary and must be based on the facts of the particular case. *Michigan State AFL-CIO v Sec'y of State*, 230 Mich App 1, 14; 583 NW2d 701 (1998) quoting *Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998).

I.

Harm to the Public Interest if an Injunction Issues

The first factor the Court must consider in deciding whether to issue an injunction is the harm to the public interest if an injunction issues.

AZI claims that it had a contract with PPR. AZI further claims that pursuant to that contract, AZI paid for the testing, "owns the test results" and publication of the data was permitted only so long as certain conditions were met. AZI further claims that PPR breached the contract by failing

to provide AZI with the documented test protocol or proper resin samples in advance of the testing and improperly administering the test.

AZI further claims that "[t]his is a breach of contract case." "This is not a free speech or a freedom of the press case" because it "is merely dealing with commercial speech." (Plaintiff's Hearing Brief at p 15).

PPR claims that the public interest will be harmed by the granting of an injunction because it publishes "objective third-party evaluations of commercial equipment marketed for use in [the plastic injection molding] industry" that businesses rely upon "to help them make educated purchasing decisions." PPR further claims that granting AZI injunctive relief would be tantamount to "an impermissible prior restrain on free expression." (Defendant's Response at p 14).

A prior restraint is "that [which] prohibit[s] the publication or broadcast of particular information or commentary * * * that [which] impose[s] a 'previous' or 'prior' restraint on speech." *Nebraska Press Ass'n v Stuart*, 427 US 539, 556; 96 S Ct 2791, 2801; 49 L Ed 2d 683 (1976). Freedom of speech and of the press are guaranteed by federal and state constitutional provisions. US Const, Ams I, XIV; Const 1963, art 1, § 5. As prior restraints on publication are the most serious and least tolerable infringement of First Amendment rights, the party seeking to justify a prior restraint must overcome a heavy presumption of unconstitutionality. *Near v Minnesota ex rel Olson*, 283 US 697; 51 S Ct 625; 75 L Ed 1357 (1931), *Nebraska Press Ass'n v Stuart, supra.* See also, *Midland Publishing Co Inc v District Court Judge,* 420 Mich 148, 154-157; 362 NW2d 580 (1985).

Admittedly, this is a breach of contract case. However, it also involves a request for an injunction that would prohibit PPR from publishing the subject test results. Prohibiting the publication of information before the fact is "prior restraint." See, e.g., *New York Times Co v United States,* 403 US 713; 91 S Ct 2140; 29 L Ed 2d 822; *Nebraska Press Ass'n v Stuart*, 427 US 539; 96 S Ct 2791; 49 L Ed 2d 683. But, compare, *Snepp v United States,* 444 US 507; 100 S Ct 763; 62 L Ed 2d 704 (1980).

AZI contends that, even if the requested injunction would constitute prior restraint, restraint is permissible because what is involved here is merely commercial speech.

In *Ohralik v Ohio State Bar Ass'n,* 436 US 447, 455-456; 98 S Ct 1912; 56 L Ed 2d 444 (1978), the United States Supreme Court set out the law regarding First Amendment protection for commercial speech. The Court said:

> Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently. In rejecting the notion that such speech 'is wholly outside the protection of the First Amendment,' *Virginia Pharmacy, supra,* at 761, 96 S Ct at 1825, we were careful not to hold 'that it is wholly undifferentiable from other forms' of speech. 425 US at 771, n 24; 96 S Ct at 1830. We have not discarded the 'common-sense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

Commercial speech is "speech proposing a commercial transaction." In other words, commercial speech is business advertising. *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc,* 425 US 748; 96 S Ct 1817; 48 L Ed 2d 346 (1976). In *Virginia,* the United States Supreme Court addressed the issue of whether there is a First Amendment exception for "commercial speech."

> Our question is whether speech which does 'no more than propose a commercial transaction,' *Pittsburgh Press Co v Human Relations Comm'n*, 413 US at 385; 93 S Ct at 2558; 37 L Ed 2d, at 677, is so removed from any 'exposition of ideas,' *Chaplinsky v New Hampshire,* 315 US 568, 572; 62 S Ct 766, 769; 86 L Ed 1031, 1035 (1942), and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' *Roth v United States*, 354 US 476, 484; 77 S Ct 1304, 1308; 1 L Ed 2d 1498, 1506 (1957), that it lacks all protection.

The Court held that "commercial speech, like other varieties, is protected." It can, however, at times be regulated. *Id* at 770.

In the instant case, the information which AZI requests that this Court prohibit PPR from disseminating is not, by definition, "commercial speech." It does not merely "propose a commercial transaction." Rather it is research data regarding equipment used in the plastic injection molding industry. The data pertains to a commercial enterprise and contains commercial information, but is not "commercial speech." Consumers and society as a whole have a strong interest in the free flow of commercial information. *Virginia, supra* at 763-764. Therefore, this information does not have limited First Amendment protection.

Even if the subject research data were determined to be commercial speech, it would still be protected by the First Amendment. In *Central Hudson Gas & Electric Corp v Public Service Comm of NY,* 447 US 557; 100 S Ct 2343; 65 L Ed 2d 341 (1980), the United States Supreme Court addressed the issue of whether and to what extent the Commission could prohibit commercial speech. The Court defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Id* at 561, citing *Virginia Pharmacy Board v Virginia Citizens Consumer Council*, 425 US 748, 762; 96 S Ct 1817, 1825; 48 L Ed 2d 346 (1976); *Bates v State Bar of Arizona*, 433 US 350, 363-364; 97 S Ct 2691, 2698-2699; 53 L Ed 2d 810 (1977); *Friedman v Rogers*, 440 US 1, 11; 99 S Ct 887, 895; 59 L Ed 2d 100 (1979).

The Supreme Court held:

> The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. *Virginia Pharmacy Board*, 425 US, at 761-762, 96 S Ct, at 1825. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech. '[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them. . . .' *Id* at 770; 96 S Ct, at 1829, see *Linmark Associates, Inc v Willingboro,* 431 US 85, 92; 97 S Ct 1614, 1618; 50 L Ed 2d 155 (1977). Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some *accurate information is better than no information at all. Bates v State Bar of Arizona, supra* at 374; 97 S Ct at 2704.

Likewise, in *Proctor & Gamble Co v Bankers Trust Co*, 78 F3d 219 (6th Circuit, 1996), an investor brought an action against a securities broker, alleging fraud in the inducement to enter into and remain in complex leveraged derivative transactions. The parties stipulated to a discovery protective order which allowed the parties to file allegedly confidential information under seal. After issuing temporary restraining orders, the United States District Court for the Southern District of Ohio, issued a permanent injunction prohibiting a magazine publisher from publishing an article disclosing the contents of documents placed under seal by the parties. Addressing the issue of whether the injunction against the publisher constituted an impermissible prior restraint, the United States Court of Appeals for the 6th Circuit said:

> It has long been established that a prior restraint comes to a court 'with a heavy presumption against its constitutional validity.' *Bantam Books v Sullivan*, 372 US 58, 70; 83 S Ct 631, 639; 9 L Ed 2d 584 (1963). In this case, the news magazine Business Week obtained information from a confidential source and prepared a story on a matter of public concern. Following standard journalistic protocol, Business Week sought comment from the parties and proceeded to take the story to print. Instead, the magazine received a facsimile transmission from a Federal District Court prohibiting publication of the information and citing 'irreparable harm' as the reason. J.A. at 23.
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> The critical starting point for our analysis, therefore, is that we face the classic case of a prior restraint. Indeed, '[p]rohibiting the publication of a news story . . . is the essence of censorship,' and is allowed only under exceptional circumstances. *Providence Journal,* 820 F2d at 1345. Justice Blackmun recently summarized the state of prior restraint doctrine as follows:
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>> Although the prohibition against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in 'exceptional cases.' Even where questions of allegedly urgent national security, or competing constitutional interests, are concerned, we have imposed this 'most extraordinary remedy' only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures.
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> CBS v. Davis, --- U.S. ----, ----, 114 S Ct 912, 914, 127 L Ed 2d 358 (1994) (Blackmun, J., in chambers) (citations omitted). Thus, we ask **whether Business Week's planned publication of these particular documents posed such a grave**

threat to a critical government interest or to a constitutional right as to justify the District Court's three injunctive orders.

* * * *

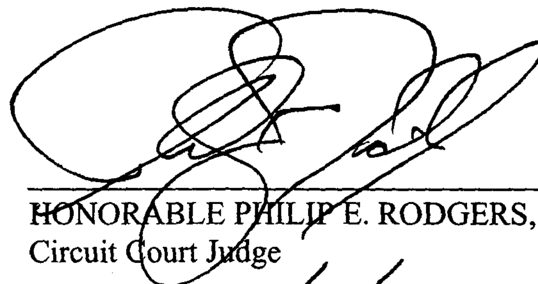
. . . Far from falling into that 'single, extremely narrow class of cases' where publication would be so dangerous to fundamental government interests [or constitutional rights] as to justify a prior restraint, *New York Times Co v United States*, 403 US 713, 726; 91 S Ct 2140, 2147-48; 29 L Ed 2d 822 (1971) (Brennan, J. concurring), the documents in question are standard litigation filings that have now been widely publicized. The private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint. (Emphasis supplied).

Based on these authorities, even if the moisture analyzer test results are "merely commercial speech," they are speech which is protected by the First and Fourteenth Amendments. Prohibiting PPR from publishing the results would constitute an impermissible prior restraint.

CONCLUSION

After considering the first factor which the Court must analyze in deciding whether to issue an injunction, to-wit: the harm to the public interest if an injunction issues, and finding that publication of the moisture analyzer test results does not fall within the "single, extremely narrow class of cases where publication would be so dangerous to . . . foundational constitutional rights as to justify a prior restrain," the Court hereby denies the Plaintiff AZI's request for a preliminary injunction.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 1/04/00