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Order on Various Motions (Justin Fouse et al.)

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DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JUSTIN FOUSE, as a representative shareholder of PALMETTO FITNESS, INC. and PALMETTO MIDWEST FITNESS, INC.,	)	**Civil Action File No. 2014CV242868**
Plaintiffs,	)	
v.	)	
STEPHEN DOW, PALMETTO FITNESS, INC., PALMETTO MIDWEST FITNESS, INC., and ATLANTA FITNESS HOLDINGS, INC.,	)	
Defendants.	)	

ORDER

On April 23, 2014, counsel appeared before the Court to present oral argument on the following motions:

- Plaintiff's Emergency Motion for Contempt, Renewed Motion for Appointment of Receiver, and Motion for Modification of Injunction and Brief in Support, and
- Defendants' Motion for Modification of Injunction and Response in Opposition to Plaintiff's Emergency Motion for Contempt, Renewed Motion for Appointment of Receiver, and Motion for Modification of Injunction.

Upon consideration of the argument of counsel, the briefs submitted on the motions, and the record of the case, this Court finds as follows:

Plaintiff Justin Fouse and Defendant Stephen Dow are shareholders of two companies, Palmetto Fitness, Inc. ("PAL") and Palmetto Midwest Fitness, Inc. ("PMF") (collectively, the

"Palmetto Entities"). These Palmetto Entities provide personal training services at various fitness facilities nationwide. Atlanta Fitness Holdings ("AFH") provides back-end support for the Palmetto Entities as well as several other non-party entities ("Dow Entities") of which Dow, but not Fouse, has shares. AFH is also believed to be controlled by Dow. Fouse claims that money has been improperly transferred in violation of two similarly worded Shareholder Agreements from PAL and PMF to AFH, Dow, and the Dow Entities in the form of various loan payments and management fees.

On March 5, 2014, Judge Brasher entered an order staying "***all financial transfers***" from or to PAL, PMF, and AFH for 60 days from the entry of the order. This stay is therefore set to expire on May 2, 2014. Judge Brasher also ordered mediation within 30 days and an accounting of the three companies within 90 days. Judge Brasher ***denied*** Plaintiff's request for Defendants to repay money, to reinstate Fouse's employment, or to enjoin Dow's right to make operational decisions or limit Dow's income or salary.

Fouse claims that Defendants violated Judge Brasher's Order by (1) transferring $91,873 from PAL and PMF to AFH on April 7, 2014; (2) paying Dow a salary from PAL and PMF; (3) increasing AFH's management fees for PAL and PMF from 8-12% to 16.5% of revenue; (4) making loan payments from PAL and PMF to AFH for loans made to the other Dow Entities managed by AFH; and (5) adding unprofitable operations of other Dow Entities to PAL. Defendants argue that the post-Order payments were necessary to sustain the businesses and were made pursuant to long-standing agreements. They also claim that Judge Brasher's Order exceeded the relief sought by Plaintiff who only sought a stay of transfer of funds "other than as necessary to maintain their day-to-day operations" and that Judge Brasher's Order should be modified to allow such transfers.

A. Plaintiff's Motion for Contempt

Plaintiff argues that financial transfers between the Palmetto Entities and AFH after March 5, 2014, violate the clear language of Judge Brasher's Order which stayed "all financial transfers" from or to PAL, PMF, and AFH. This Court agrees. Accordingly, Plaintiffs' motion for contempt is **GRANTED** and the Court orders AFH to return $91,873 to the Palmetto Entities within 15 days of this Order.

B. Plaintiff's Motion for Appointment of Receiver

Plaintiff argues that the Court should appoint a receiver, namely, Hays Financial, the consultant tasked with conducting the court-ordered accounting, due to Defendants' disregard for Judge Brasher's Order staying financial transactions. O.C.G.A. § 9-8-1 authorizes this Court to appoint a receiver when "the rights of either or both parties cannot otherwise be fully protected." The Court finds that Judge Brasher's injunction ordered on March 5, 2014, as amended below, should be sufficient to protect the funds at issue in this case. If it later appears that further relief is necessary, the Court shall revisit the issue at that time. Accordingly, Plaintiff's Renewed Motion for Appointment of Receiver is **DENIED**.

C. Plaintiff's and Defendants' Motions for Modification of Injunction

Both parties seek modification of the injunction issued in Judge Brasher's March 5 Order. Plaintiff seeks to modify the order to expressly enjoin Defendants from (1) paying or transferring any funds to Defendant Dow; (2) enjoining Defendants from adding any Dow Entities or their existing contracts to the Palmetto Entities; and (3) extend the injunction through the end of this case. Likewise, Defendants seek modification of Brasher's Order, but seek to modify the Order to make clear that payments to AFH necessary for continued operations may continue.

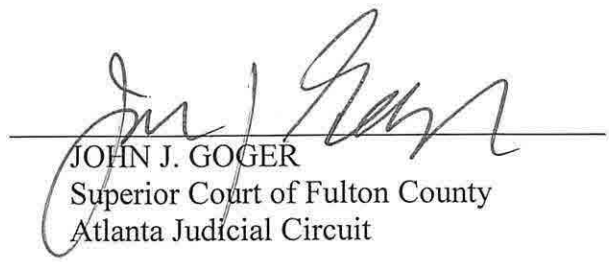
The Court finds that transfer of management fees from the Palmetto Entities to AFH is sufficient to avoid any business interruption. As such, the Palmetto Entities are ordered to pay

the March management fees of $45,000 and must continue to pay monthly management fees not to exceed 11% of revenue. Should the fee exceed 11%, it is the Defendants' burden to seek the approval of Plaintiff of the excess management fee. If the parties cannot agree on the management fee, the parties are instructed to notify the Court immediately. Otherwise, the injunction as set forth in Judge Brasher's Order is sufficiently protective and shall continue as written until the auditor's report is complete. Accordingly, Plaintiff's Motion for Modification of Injunction and Defendants' Motion for Modification of Injunction are **GRANTED IN PART AND DENIED IN PART** as stated above.

D. Briefing on the Applicable Shareholder Buy-out Provisions of the Shareholder Agreements

Though not the subject of the parties' motions, a contractual interpretation issue related to the valuation of Fouse's shareholder interest in the Palmetto Entities was raised by both Defendants and Plaintiff at the hearing. Namely, the parties disagree whether a shareholder buy-out formula in the Shareholder Agreements applies to Fouse following his termination. As such, the Court orders that Defendants file their briefing on this issue by **Tuesday, May 6, before 5:00 p.m.** Plaintiff must submit its briefing on the issue by **Friday, May 16, 2014, before 5:00 p.m.**

SO ORDERED this 28 day of April, 2014.



JOHN J. GOGER
Superior Court of Fulton County
Atlanta Judicial Circuit

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