

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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July 10, 2001

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**Re: U.S. Office Products Company and U.S. Office Products Mid-
Atlantic District, Inc. vs. Allied Office Supply, Inc.
Adv. Proc. No. 01-1040**

Dear Counsel:

This is with respect to the motion (Doc. # 30) of Joseph Kupprion, Ronald Dalessandro and Kenneth Gallagher ("Former Employees") to modify the Court's April 23, 2001 Order of Preliminary Injunction (Doc. # 26) ("Preliminary Injunction") as it relates to the Former Employees. An evidentiary hearing on the motion was held on May 22, 2001, followed by the submission of supplemental memoranda by the parties. I find merit in only one of the arguments put forth by the Former Employees, namely, changed circumstances warrant a modification of an injunction order. For the reasons briefly discussed below, I find it appropriate to modify the Preliminary Injunction because of changed circumstances.

The principal thrust of the Former Employees' motion is that the injunction unduly limits their income earning ability now and in the future. Specifically, the former employees claim that if the injunction is continued for a significant period of time, their ability to effectively come back into the marketplace as salespersons in the office products business will be severely handicapped.

The relevant portion of the Preliminary Injunction is that set forth on the third page which enjoins Allied Office Supplies, Inc. ("Allied"), including its agents and representatives, from "permitting Ron Dalessandro, Joseph Kupprion, Kenneth Gallagher, James Tisony, Debra Lafferty and Gary Keefer,

who are subject to a noncompete agreement with USOP, to solicit USOP customers and/or current USOP employees."

In pursuing the Preliminary Injunction the Plaintiffs ("USOP") claimed that absent injunctive relief the conduct of Allied and certain former employees of USOP would cause irreparable harm. Of course, showing of irreparable harm is an essential element to obtaining a preliminary injunction. In its memorandum of law in support of its motion for a preliminary injunction (Doc. # 24) USOP asserted that:

Allied's massive, illegal efforts threaten to undermine USOP and its pending reorganization and acquisition by Corporate Express, causing irreparable harm to USOP as well as to its creditors and employees. If left unchecked, Allied's conduct threatens to defeat the sale to Corporate Express and USOP's efforts to complete a successful reorganization, all to the substantial detriment of the estate and its creditors.[p. 5]

* * *

Without an injunction, Allied will admittedly continue its unlawful interference with USOP's business relationships. Allied is in the process of procuring numerous breaches of noncompetition agreements and misappropriating and using USOP's sensitive financial and strategic business information, as well as its customer lists and pricing information, in a blitzkrieg attempt to raid USOP's employees and its business, thereby jeopardizing the agreement with Corporate Express and impairing the reorganization of the debtor. By its illegal conduct Allied threatens to do substantial harm to USOP's sales revenues. As Jay Mutschler, President of USOP's Operating Division, USOP-North America, has stated in his declaration, if Corporate Express walked away from the agreement, "the harm to USOP, its creditors, its customers and its employees would be incalculable." [pp. 28-29]

The acquisition by Corporate Express was consummated on May 14, 2001. Thus, as it relates to the Former Employees, it seems to me that the threat of irreparable harm to USOP has been

abated. I am not aware of any facts which would suggest that a continued injunction as to the Former Employees would be of any benefit to USOP. A continued injunction as to the Former Employees may of course be a benefit to Corporate Express. In its supplemental memorandum (Doc. # 53) USOP so acknowledges:

It is, of course, up to Corporate Express to speak to its interests in enforcing the Former Employees' noncompete agreements and in the continuation of the preliminary injunction. Nonetheless, USOP notes that the preliminary injunction also should be continued for Corporate Express' benefit. Corporate Express is the undisputed, express beneficiary of, and a real party-in-interest with respect to, the noncompete agreements. [p. 19]

Although Corporate Express has filed a post hearing memorandum (Doc. # 54) identifying itself as "Intervenor Corporate Express", it acknowledges on page 5 of that memorandum that the motion to intervene (Doc. # 49) has not yet been considered by the Court. On June 21, 2001, Corporate Express filed a notice of withdrawal of its motion to intervene (Doc. # 61). I know of no authority which permits a court to grant relief specifically for the benefit of a non-party to the proceeding. Consequently, at this stage of the proceeding I cannot continue injunctive relief solely for the benefit of Corporate Express.

As Corporate Express points out in its post hearing memorandum at page 7, the noncompete agreements executed by the Former Employees have been assigned by USOP to Corporate Express pursuant to the terms of the Asset Purchase Agreement and as authorized by New Jersey law. Thus, USOP no longer has a property

interest in the subject noncompete agreements and I do not believe USOP even has standing at this time to seek injunctive relief against the Former Employees arising out of the noncompete agreements. Presumably, USOP has no legal obligation to Corporate Express regarding the enforcement of those agreements, other than possibly an obligation to cooperate with Corporate Express in the latter's pursuit of its rights under the agreements. Since Corporate Express is now the successor owner of the subject noncompete agreements, it is entitled to pursue whatever remedies it deems appropriate against the Former Employees and/or Allied.¹ Why should USOP spend estate assets in pursuit of enforcement of the Former Employees' noncompete agreements if the only beneficiary of that effort is Corporate Express?

The court has authority to modify an injunction when changed circumstances make the injunction unnecessary or inappropriate. Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, Inc., 312 U.S. 287, 298, 61 S.Ct. 552, 557 (1941) ("Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted."); Favia v. Indiana Univ. of Penn., 7 F.3d 332, 337 (3d Cir. 1993) (modification of injunction proper where circumstances changed from entry of the injunction which make continuance of injunction inequitable);

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I note that Corporate Express has already filed a multi count complaint against Allied in the District Court for the Western District of Pennsylvania.

United States v. United Tote, Inc., 1991 WL 24632 *3 (D. Del. 1991) ("It is well-established in this Circuit that the standard for assessing a motion to vacate or modify a preliminary injunction 'is whether the movant has made a showing that changed circumstances warrant the discontinuation of the order.'") quoting Franklin Tp. Sewerage v. Middlesex Cty. Utilities, 787 F.2d 117, 121 (3d Cir. 1986).

USOP argues that the changed circumstances proposition is not applicable here because (a) the changed circumstances were foreseeable and (b) the Former Employees are not entitled to equitable relief because of "unclean hands." I disagree.

As to the changed circumstances, I do not believe the case law supports the argument that modification of the injunction can only be granted if the changed circumstances were unforeseen at the time the injunction was entered. E.g., Huk-A-Poo Sportswear, Inc. v. Little Lisa, Ltd., 74 F.R.D. 621, 623 (S.D.N.Y. 1977) ("changed circumstances" refers to events which occurred subsequent to entrance of the order and which make it unfair to continue the injunction; court may apply general equitable principles in its discretion when reconsidering preliminary injunction); United Tote, 1991 WL 24632 at *4 ("The advisory committee notes to Federal Rule of Civil Procedure 60(b) state that motions for relief from 'interlocutory judgments are not brought within the restriction of [Rule 60(b)], but rather they are left subject to the complete power of the court rendering them to afford

such relief from them as justice requires.'"). Furthermore, that the closing of the sale transaction would take place was not a certainty at the time the injunction was entered. The Asset Purchase Agreement provided that Corporate Express had the right to walk away from the transaction in the event of specified adverse developments in the business. As to the unclean hands, I agree with USOP that the Former Employees engaged in self serving and duplicitous conduct and the record to date brings into serious question their credibility. Nevertheless, I cannot ignore the fundamental reason for enjoining the Former Employees, namely, to preserve the going concern value of USOP's business to ensure the consummation of the sale transaction. That reason no longer pertains.

I conclude that an appropriate remedy at this time is to enter an order modifying the Preliminary Injunction to delete from paragraph (iii) on page 3 the three names of Ronald Dalessandro, Joseph Kupprion and Kenneth Gallagher.

Enclosed is a copy of the order modifying the Preliminary Injunction. This ruling does not address the right of USOP to pursue an award of damages for any injuries caused by the conduct of Allied and others as alleged in the Verified Complaint.

Very truly yours,

Peter J. Walsh

PJW:ipm

Enc.

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
U.S. OFFICE PRODUCTS COMPANY,)	Case No. 01-00646 (PJW)
et al.,)	
)	
Debtors.)	
<hr/>		
)	
U.S. OFFICE PRODUCTS COMPANY)	
and U.S. OFFICE PRODUCTS MID-)	
ATLANTIC DISTRICT, INC.,)	
)	
Plaintiffs,)	
)	
vs.)	Adv. Proc. No. 01-1040
)	
ALLIED OFFICE SUPPLIES, INC.,)	
)	
Defendant.)	

**ORDER MODIFYING THE APRIL 23, 2001
ORDER OF PRELIMINARY INJUNCTION (DOC. # 26)**

For the reasons stated in the Court's letter ruling of this date, the Order of Preliminary Injunction (Doc. # 26) is hereby amended by deleting from subparagraph (iii) of the second decretal paragraph the names Ron Dalessandro, Joseph Kupprion and Kenneth Gallagher.

Peter J. Walsh
United States Bankruptcy Judge

Date: July 10, 2001