

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-002274

09/14/2015

HON. RANDALL H. WARNER

CLERK OF THE COURT

K. Ballard

Deputy

ANDREW PROVENCIO

SAL J RIVERA

v.

TIFFANY YOUNG, et al.

JEFFREY C MATURA

IRA M SCHWARTZ

LAWRENCE E WILK

UNDER ADVISEMENT RULING

The court held an evidentiary hearing on September 3 and 10, 2015 to determine which assets belong to DMC and are therefore subject to the receivership, and also to decide the Receiver's June 25, 2015 Motion to Compel Turnover of Receivership Assets, for Sanctions and for Authority to Pay Pre-Receivership Expenses. Based on the evidence presented, the court makes the following findings, conclusions and orders.

I. BACKGROUND.

This corporate dispute over a medical marijuana business has been ongoing since January 2015. The company, Desert Medical Campus, Inc. ("DMC"), is an Arizona corporation being operated on a not-for-profit basis. Its shareholders and directors are Plaintiff Andrew Provencio and Defendant Tiffany Young.

On February 9, 2015, the court issued a temporary restraining order and set a preliminary injunction hearing. On March 24, 2015, the court issued a preliminary injunction and directed that a receiver would be appointed. On April 10, 2015, the court appointed Kevin Singer as Receiver.

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Following the appointment, disputes have continued over what property belongs to DMC and what property is owned by other companies or by the parties. The court set the evidentiary hearing to resolve these issues, and to decide whether Ms. Young and Defendant Matthew Young are in contempt for violating court orders regarding DMC.

II. FINDINGS.

1. Andrew Provencio and Tiffany Young formed DMC as a medical marijuana company. DMC holds a certificate from the Department of Health Services (“DHS”) to operate a medical marijuana dispensary.

2. Mr. Provencio and Ms. Young formed numerous other companies to participate in operating the medical marijuana business. But DMC is the only one of those companies authorized to engage in the medical marijuana business. *See* A.R.S. § 36-2801(11) (defining “nonprofit medical marijuana dispensary” as “a not-for-profit entity that acquires, possesses, cultivates, manufactures, delivers, transfers, transports, supplies, sells or dispenses marijuana or related supplies and educational materials to cardholders”).

3. The additional companies they formed include:

- a. A & T Management, LLC, owned by Ms. Young and Mr. Provencio.
- b. Uncle Herb’s Gift Shop, LLC, owned by Ms. Young and Mr. Provencio.
- c. Uncle Herb’s Kitchen, LLC, owned by Ms. Young, Mr. Young and Mr. Provencio.
- d. Sunlight and Soil, LLC, owned solely by Mr. Young.
- e. Golden Tomatoes, LLC, which is owned by Mr. Provencio’s cousin, and which did business as Monster Garden.

4. Mr. Provencio and Ms. Young were both involved in the management of DMC and the related entities. Both were aware of and approved of the creation of these entities. Both were aware of and approved of regular transfer of funds among those entities.

5. The court finds credible the conclusions of Darin Guthrie, CPA in his August 4, 2015 audit report concerning, among other things, the lack of financial controls and the comingling of funds among various entities.

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6. Mr. Provencio and Ms. Young intended to use A & T Management as a management entity for DMC. But they in fact used it as an operating entity. Many of the assets DMC used for the day-to-day growing of marijuana, manufacture of marijuana projects and sale of marijuana and related products were owned by A & T Management. The majority of income DMC generated from the sale of products was transferred to A & T Management. And the majority of expenses of DMC were paid by or through A & T Management. The court makes this finding based on the evidence presented and without the benefit of a full accounting, which has not been undertaken yet.

7. The court finds that A & T Management was operated as a part of DMC and not as a separate entity. Therefore, all assets and liabilities of A & T Management were and are assets of DMC subject to the receivership.

8. Uncle Herb's Gift Shop was created for the purpose of operating a "head shop" or paraphernalia store on the same premises as the dispensary.

9. Based on the evidence presented at the hearing, the court finds that the finances and operations of Uncle Herb's Gift Shop were not kept separate from that of DMC. Therefore, all assets and liabilities of Uncle Herb's Gift Shop were and are assets of DMC subject to the receivership.

10. Uncle Herb's Kitchen was created for the purpose of developing and making marijuana-based products to be sold at DMC.

11. Uncle Herb's Kitchen does not have a medical marijuana certificate from the Department of Health Services. Mr. Young testified that it was able to operate "under" DMC's certificate. But the court is unaware of any law or regulation that allows a dispensary to license out its right to grow marijuana and make marijuana products.

12. The court therefore concludes that Uncle Herb's Kitchen is a part of DMC. All assets and liabilities of Uncle Herb's Kitchen were and are assets of DMC subject to the receivership.

13. After Ms. Young ousted Mr. Provencio from DMC in December 2014, she and Mr. Young created M & T Management, LLC to act as a management company for DMC. M & T Management is owned solely by Ms. Young and Mr. Young.

14. For a short time between December 2014 until the Receiver was appointed, Ms. Young caused DMC to pay M & T Management.

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15. Mr. Provencio did not approve of the creation of M & T Management or of using it as a management company for DMC.

16. The court previously ruled that Ms. Young had no authority to oust Mr. Provencio. She therefore had no authority to unilaterally hire her own company, M & T Management, to replace A & T Management.

17. Payments Ms. Young caused DMC to make to M & T Management were unauthorized. The Receiver therefore properly assumed control over the assets of M & T Management.

18. Sunlight and Soil was created to operate a hydroponic supply store that would sell growing supplies to DMC and to the general public.

19. Sunlight and Soil had a store at 102 East Main in Payson, Arizona.

20. Mr. Provencio agreed that Sunlight and Soil would be solely owned by Mr. Young.

21. One purpose of creating Sunlight and Soil was to obtain growing supplies for DMC at wholesale prices that it could not obtain on its own. The reason is that the supplier refused to sell wholesale to a marijuana dispensary. Mr. Provencio, Ms. Young and Mr. Young figured out that they could circumvent this requirement by creating Sunlight and Soil for the purpose of buying growing supplies.

22. Sunlight and Soil operated from 2013 through early 2014 until the supplier learned that it was passing supplies through to a medical marijuana dispensary. After that, the supplier refused to sell wholesale to Sunlight and Soil.

23. The parties therefore decided to create another hydroponic supply company, Golden Tomatoes, which would be owned by Mr. Provencio's cousin.

24. Mr. Provencio testified that his cousin played no part in the company, but rather allowed his name to be used so that DMC could circumvent the supplier's prohibition against supplying wholesale to marijuana dispensaries.

25. In early 2014, Sunlight and Soil stopped doing business, and Golden Tomatoes, doing business as Monster Garden, took over its operations at 102 East Main.

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26. At this time, there was property at the 102 East Main location that belonged to Sunlight and Soil, including computers, shelves and inventory.

27. These assets were never transferred to Golden Tomatoes, although it used them and sold the inventory with Mr. Young's acquiescence.

28. At some point in 2014, Sunlight and Soil closed its bank account and Mr. Young took its remaining funds. This was proper, since he owns Sunlight and Soil.

29. The Receiver did not take or exercise control over any bank account or moneys belonging to Sunlight and Soil.

30. The Receiver did take possession of all personal property at the 102 East Main store which, by 2015, was being operated by Golden Tomatoes, d/b/a Monster Garden. Most of that property is in storage at the DMC facility.

31. Much of this personal property may belong to Sunlight and Soil. If any item was purchased with funds from the Sunlight and Soil bank account, then it belongs to Sunlight and Soil. But there was insufficient evidence at the hearing to permit a determination of this issue. To the extent Mr. Young can demonstrate to the Receiver that property was purchased with funds from the Sunlight and Soil bank account, the Receiver should return the property to Mr. Young.

32. The court makes no ruling on whether the funds used to start Sunlight & Soil came from Ms. Young or Mr. Provencio.

33. Golden Tomatoes, though nominally owned by Mr. Provencio's cousin as a straw man, was part of DMC. All of its assets are subject to the receivership.

34. On February 9, 2015, the court issued a temporary restraining order. Among other things, the order prohibited either party from making decisions "other than day-to-day expenditures consistent with the budget and this court's order" without the written consent of Mr. Provencio, Ms. Young and Mr. Young.

35. On March 24, 2015, following a preliminary injunction hearing, the court issued a preliminary injunction. The court ordered that the TRO would remain in effect until 8:00 a.m. on April 6, 2015, at which time the preliminary injunction would go into effect.

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36. The preliminary injunction prohibited either Mr. Provencio or Ms. Young from acting in any way on behalf of DMC or causing DMC to do anything except with the other's written consent.

37. Between March 24 and April 6, Ms. Young took \$47,274.46 in cash out of DMC.

38. Ms. Young testified that the purpose of the cash withdrawal was to purchase marijuana seeds. She testified that she had an agreement with a seller to purchase those seeds.

39. Ms. Young did not know the seller's name. But she testified that she trusted the seller because she knew the person who referred her to that seller.

40. Ms. Young testified that she exchanged the cash for marijuana seeds from the seller in a parking lot.

41. This transaction was not in the ordinary course of business and was not a "day-to-day expenditure" of DMC.

42. Ms. Young did not ask Mr. Provencio to agree to this transaction. She knew he would not have agreed if asked.

43. Ms. Young knew this transaction violated the TRO, the purpose of which was to preserve the status quo until the preliminary injunction became effective.

44. Ms. Young knew this transaction violated the preliminary injunction.

45. Ms. Young testified that she put down a deposit on the marijuana seeds before April 6, but paid the remainder of the price and received the seeds after April 6 when the preliminary injunction was in effect.

46. By engaging in this transaction, Ms. Young willfully and knowingly violated both the TRO and the preliminary injunction. The court finds Ms. Young in contempt.

47. Ms. Young must return to the Receiver the \$47,274.46 she took from DMC.

48. Ms. Young and Mr. Young testified that they have the seeds. They testified that the seeds have a value well in excess of \$47,274.46. Because Ms. Young bought the seeds in violation of the court's orders, the seeds do not belong to DMC. Ms. Young is free to dispose of the seeds in any lawful manner she deems appropriate.

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49. On or about April 4, 2015, Ms. Young caused DMC to sell approximately \$169,000 worth of products to “Harvest of Tempe” at a 90% discount. Harvest of Tempe is a company in which an attorney who represented Ms. Young in another court action has an ownership interest.

50. Mr. Provencio did not agree to this transaction.

51. This transfer of \$169,000 worth of DMC’s inventory was not a “day-to-day expenditure.”

52. By engaging in this transaction, Ms. Young willfully and knowingly violated the TRO. The court finds Ms. Young in contempt for this violation as well.

53. As permitted by the February 9, 2015 order, Mr. Provencio took possession of a GMC truck that belonged to DMC.

54. He sold the truck for approximately \$8,000 in excess of the loan amount on it.

55. That approximately \$8,000 belongs to DMC. Mr. Provencio must sign over the check to the Receiver.

56. The court makes no ruling on whether Mr. Provencio may have a claim against DMC for reimbursement of payments made on the truck.

57. DMC purchased two extraction machines from Extraction Tek Sales. The money to purchase those two machines came from A & T Management.

58. Mr. Young testified that one of the machines was purchased for him individually with funds from Sunlight and Soil. The documentary evidence does not support this claim.

59. Mr. Young has one of the two extraction machines in his possession or control. That machine belongs to DMC and must be delivered to the Receiver.

60. The court does not find Mr. Young in contempt for taking this machine.

61. The Receiver claims that a Polaris vehicle in Mr. Young’s possession is property of DMC. The evidence presented at the hearing does not support this claim.

62. The Subaru currently being used for DMC’s business is property of DMC and, therefore is properly under the Receiver’s control.

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63. The domain names listed at pages 3-4 of Tiffany Young and Matthew Young's Pretrial Brief are Mr. Young's property except for estrain.com, which belongs to DMC.

64. Testimony regarding tools and equipment that Mr. Young claims are his, or that he and Ms. Young claim belong to M & T Management was not sufficient to permit a determination regarding ownership.

65. The court makes no ruling on how much DMC or its affiliate companies may owe any of the parties or how much any of the parties may owe DMC or its affiliate companies. This will all be determined if and when an accounting is done.

III. CONCLUSIONS AND ORDERS.

The court has found that certain property is DMC's and therefore should be within the Receiver's control. To the extent the Receiver already has control over that property, no further orders are necessary. To the extent it does not, the court will order that property turned over to the Receiver.

Having found Defendant Tiffany Young in contempt, the court must determine the remedy. Two remedies are appropriate. First, with respect to the \$47,274.46 in cash, the court will order that Ms. Young may purge the contempt by returning that money to the Receiver no later than **October 15, 2015**.

Second, the Receiver will be entitled to recover from Ms. Young reasonable attorneys' fees for the hearing in connection with the two issues as to which Ms. Young was found in contempt. This should only be for part of the total fees incurred in the hearing, much of which involved issues other than contempt.

With respect to the \$169,000 in product sold at a 90% discount, the court will consider that transaction subsequently in whatever final accounting is made.

IT IS ORDERED granting in part the Receiver's June 25, 2015 Motion to Compel Turnover of Receivership Assets, for Sanctions and for Authority to Pay Pre-Receivership Expenses.

IT IS FURTHER ORDERED as follows:

1. Ms. Young shall deliver \$47,274.46 to the Receiver no later than **October 15, 2015**.

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2. Mr. Provencio shall sign over to the Receiver no later than **October 15, 2015** the approximately \$8,000 check received for the GMC truck.

3. Mr. Young shall deliver the extraction machine to the Receiver no later than **September 25, 2015** at the place and time the Receiver directs.

IT IS FURTHER ORDERED awarding the Receiver against Ms. Young reasonable attorneys' fees incurred at the hearing in connection with (1) Ms. Young's taking of \$47,274.46 in cash from DMC, and (2) Ms. Young's sale of approximately \$169,000 in product at a 90% discount.

IT IS FURTHER ORDERED denying Plaintiff's September 9, 2015 Application for Entry of Contempt of Court Order and Request for Sanctions as moot.

IV. THE RECEIVERSHIP.

The court appointed the Receiver for the purpose of preserving DMC pending resolution of the parties' dispute concerning its management. It appears that the Receiver has accomplished that purpose. Because the court cannot supervise operation of this business indefinitely, it must determine when the Receivership will end. A related question is whether, due to the parties' deadlock, DMC must be dissolved or sold.

A.R.S. § 10-1430(B)(1) authorizes judicial dissolution of a corporation in a proceeding brought by a shareholder if "[t]he directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock and irreparable injury to the corporation is threatened or being suffered or the business and affairs of the corporation cannot be conducted to the advantage of the shareholders generally because of the deadlock." A.R.S. § 10-1432(A) authorizes the court to appoint a receiver in a dissolution action "to wind up and liquidate or manage the business and affairs of the corporation."

Having now held multiple evidentiary hearings regarding the operation of DMC, and with one more to go, it is time to establish a schedule for bringing this dispute to resolution. The court will order the parties to file a status memorandum addressing the following questions.

IT IS ORDERED that, on or before **October 15, 2015**, each party shall file a status memorandum addressing the following:

1. Does the party seek dissolution of DMC under A.R.S. § 10-1430(B)(1) or on some other basis? If not, does the party object to dissolution?

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2. If the court does dissolve DMC, what schedule does the party propose for winding up and liquidating DMC's business and affairs?
3. If the court does not dissolve DMC, when should the receivership end?
4. When should the court schedule trial on the following:
 - a. An accounting of (1) what Mr. Provencio and/or Ms. Young owe DMC and its related entities; (2) what DMC owes Ms. Young and/or Mr. Provencio; and (3) what, if anything, DMC owes to or is owed by non-parties.
 - b. Who owns what equity interest in DMC.
 - c. Any claim for damages asserted by one party against another, or asserted by or against DMC. As to each claim, the parties should state whether there is a right to and demand for a jury trial.
 - d. Any other issues a party thinks must be tried.

Because the court is issuing injunctive orders, it signs this minute entry.

FILED: Exhibit Worksheet

/s/ RANDALL H. WARNER

JUDGE OF THE SUPERIOR COURT