IN THE COURT OF COMMON PLEAS
WAYNE COUNTY, OHIO

State of Ohio, *ex rel.*	)	**CASE NO. 2016 CVC-G000353**
Michael DeWine	)	
Ohio Attorney General,	)	**JUDGE COREY E. SPITLER**
	)	
Plaintiff,	)	
	)	
v.	)	**DEFENDANTS' MEMORANDUM IN**
	)	**OPPOSITION TO PLAINTIFF'S**
Quasar Energy Group, *et al* ,	)	**MOTION FOR TEMPORARY**
	)	**RESTRAINING ORDER AND**
Defendants.	)	**PRELIMINARY INJUNCTION**
	)	

I. INTRODUCTION AND STATEMENT OF FACTS

Counsel for Defendants was notified on the evening of Saturday, July 16, 2016 that Plaintiff intends to file a Complaint seeking a Temporary Restraining Order ("TRO") on July 18, 2016 with this Court. Purportedly to meet its obligation under Ohio Civ. R. 65, Plaintiff sent its original "notification" to a law firm that no longer represents the Defendants.[1] In response, the undersigned counsel contacted Plaintiff's counsel by electronic mail on the afternoon of Sunday, July 17, 2016, to advise that the undersigned is legal counsel for the Defendants, and that the Defendants request the opportunity to be present and present evidence in opposition to Plaintiff's request for a TRO because it is not supported by the facts or applicable Ohio law.

[1] Plaintiff's sent its intention to seek a TRO on Friday, July 15, 2016 @ 6:03 P.M. in an email to Terry Finn of the Law Firm Roetzel & Andress.

In short, Plaintiff claims that the Defendants operate four anaerobic digester facilities in northeastern Ohio (Cleveland, Sheffield Village, and Secrest Road and Old Columbus Road in Wooster.) Plaintiff claims that the odors emanating from these facilities are causing a public nuisance that requires this Court to enter injunctive relief. However, Plaintiff does not share with the Court these important facts which require the denial of the request for injunctive relief:

1. Each of Defendants' facilities is co-located with a publicly owned wastewater treatment plant. Defendants' anaerobic digesters are only one small part of the operations of each wastewater treatment plant. Odors do emanate from time-to-time from the wastewater plants. However, most, if not all, of the odors described in Plaintiffs' Complaint do not originate with Defendants' operations, but rather from the operations of the adjoining publicly owned wastewater treatment plant that is treating human sewage. The owners of these wastewater treatment facilities were not named by Plaintiff as parties to this proceeding. For example, the City of Wooster has previously recognized that it will need to incur substantial public monies to abate the odors originating from human waste storage tanks located upon its public facility. Another example is the Three Creek Facility, a facility owned by five Ohio municipalities. At this location the municipalities own three large storage tanks (each having storage capacity exceeding one million gallons) that regularly store human sewage that have no covers or equipment installed to mitigate the emanating odors. The Defendants do not control, nor are they responsible for, these storage facilities owned by the municipalities. Conveniently, Plaintiff omits this information from its filings.

2. Defendants have been meeting on a quarterly basis with Ohio EPA ("OEPA"), and have submitted an odor mitigation plan to Ohio EPA which has been approved by the OEPA. Defendants have implemented corrective measures to reduce and abate odors at

Defendants' operations. In fact, the corrective measures being implemented are more than two months ahead of the schedule approved by the OEPA. More important, these Defendants' initiated corrective measures have been successful. For example, at the Wooster Facility, the Defendants have installed equipment, including but not limited to, biofilters and chemical scrubbers that have abated any odor originating from the Wooster Facility. If there are corrective actions that the OEPA wishes the Defendants to take, beyond what it has already approved, the OEPA has not communicated those corrective actions to the Defendants.

3. The corrective measures implemented by the Defendants at reducing or abating odors have been hailed by local communities as successful remedies, and the Defendants have been thanked by the locally elected representatives as being fully cooperative in this effort. For example, on June 13, 2016, a public hearing was held within the City of Wooster where members of the public praised Defendants for their efforts in abating any offensive odors originating from Defendants' operations at the Wooster Facility.

4. There is no emergency. The Defendants have not changed any of its operations at the facilities described in the Complaint--many of which have been in operation for over three years. In fact, OEPA has been quite satisfied with the work that the Defendants have completed to address odors from Defendants' operations at these four locations. Without warning, and after praising Defendants' work to date, Plaintiff has now filed this lawsuit and request extraordinary relief by way of a TRO.

5. There is no irreparable harm. Defendants have been working with the OEPA on an odor mitigation plan that will be used across the industry to assist in managing and abating odor issues from similar facilities throughout the State of Ohio. Defendants have implemented the previously approved OEPA odor mitigation plan at the Wooster Facility with great success

and will continue to implement that plan into the other facilities identified by the Plaintiff over the next few months. If the Plaintiff believes that the Defendants have somehow violated an Ohio statute, which Defendants deny, than the statute itself will proscribe the monetary or administrative remedy. Additionally, any interruption to Defendants' business operations will cause irreparable harm to the Defendants in that the biological component cannot be just "turned off". To do so would completely ruin the biological component that is essential to Defendants' operations and could potentially cause the dangerous conditions associated with a buildup of gas that is unable to be exported from the facilities.

II. LAW AND ARGUMENT

"A temporary restraining order is a form of injunctive relief intended to prevent the applicant from suffering immediate and irreparable harm." *Coleman v. Wilkinson,* 147 Ohio App. 3d 357, 358 (2002); *Garb-Ko, Inc. v. Benderson,* Franklin App. No. 12AP-430, 2013-Ohio-1249, at ¶ 32. "Irreparable harm is one for which there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete." *Keefer v. Ohio Dept. of Job & Family Serv.,* Franklin App. No. 03AP-391, 2003-Ohio-6557, at ¶17 (citing *Cleveland v. Cleveland Elec. Illum. Co.,* 115 Ohio App.3d 1, 12 (1996)).

"A party seeking a permanent injunction must demonstrate by *clear and convincing evidence* that they are entitled to relief under applicable statutory law, that an injunction is necessary to prevent irreparable harm, and that no adequate remedy at law exists." *Garb-Ko,* 2013-Ohio-1249, ¶ 32 (internal citations omitted). "In determining whether to grant a temporary restraining order, a trial court must consider whether the movant has a strong or substantial likelihood of success on the merits of his underlying claim, whether the movant will be irreparably harmed if the order is not granted, what injury to others will be caused by the

granting of the motion, and whether the public interest will be served by the granting of the motion." *Coleman,* 147 Ohio App. 3d at 358.

Applying these standards, Plaintiff is not entitled to any injunctive relief against Defendants in any form. Plaintiff cannot meet its burden of showing by clear and convincing evidence that it will suffer irreparable harm in the absence of the injunctive relief it seeks, that there is a substantial likelihood that it will prevail on the merits, that the equities favor granting such relief, or that the public interest will be served by granting injunctive relief against Defendants.

A. Plaintiff Cannot Show Irreparable Harm

In fact, the entry of injunctive relief will cause irreparable harm to Defendants. Hundreds of employees (both private and public) could lose their jobs. The anaerobic digester industry is in its infantile stages in the United States, but has proven to be a groundbreaking technology that assists wastewater treatment plants in their management of certain wastewaters that they process, while creating energy that runs the municipal operations of adjoining sewer plants. Moreover, the biological component in Defendants' process needs to be in continual operation and any extended interruption would jeopardize that process—not to mention possibly cause an unsafe buildup of flammable gas. Because the industry is developing, it is extremely competitive, and Plaintiff's allegations alone cast an unjustified negative cloud on a promising technology for which Defendants have received rave reviews by the wastewater treatment owners with which Defendants have partnered.

The essential element Plaintiff must show for issuance of temporary injunctive relief is immediate irreparable injury. *See Patio Enclosures, Inc. v. Herbst,* 39 F. App'x 964, 967 (6th Cir. 2002). Plaintiff must demonstrate by *clear and convincing evidence* actual irreparable

harm or the existence of an actual threat of such injury. *Id.* at 969. Here, there is no actual or actual threat of irreparable injury to Plaintiff or the citizens of Ohio because OEPA has already approved the odor mitigation plan that Defendants are implementing, and which is ahead of schedule. Plaintiff's request for a TRO is predicated solely on complaints from some residents who live in close proximity to a publically owned waste water treatment plant that has been in operation for years that things "smell bad". While Defendants have assisted, and will continue to assist, the local municipalities to mitigate any odor issues coming from the Defendants' facilities, these residential complaints do not legally rise to the level of "irreparable harm" as defined under Ohio law supporting a TRO.

B. Plaintiff cannot show that it is substantially likely to succeed on the merits

It is critical to emphasize the very high standards Plaintiff must meet for obtaining injunctive relief for a purported "odor nuisance." The party seeking to the relief has the burden of proving its case by *clear and convincing evidence. See Franklin Cty. Bd. of Health v. Paxson,* 152 Ohio App. 3d 193, 202 (Franklin 2003); *LCP Holding Co. v. Taylor,* 158 Ohio App. 3d 546, 553 (Portage 2004). That burden includes proving the existence of a "nuisance", as relied upon by Plaintiff in its Complaint, and as set forth in OEPA's regulations. Plaintiff must demonstrate, by clear and convincing evidence, that Defendants "emit such amounts of odor as to **endanger** the health, safety, or welfare of the public…" Ohio Adm. Code Sec. 3745-15-07(B). [Emphasis added.] Plaintiff cannot prove that the odors are originating from the Defendants' operations, let alone that the odors endanger anyone. The operation of the adjoining municipal human waste treatment plants is the likely point of origin, caused by the municipalities' failure to take the necessary action and expend the necessary funds to abate the odor.

Additionally, Plaintiff will be unable to support a claim against Defendant quasar energy group, llc ("quasar") as a matter of law. In particular, Plaintiff names quasar as a defendant because it purportedly holds an "ownership interest in" the facilities described in Plaintiff's Complaint. However, even if true, simply because quasar has an alleged ownership interest in the facilities cannot support a claim against quasar as a matter of law. Pursuant to R.C. 1705.48(B), "[n]either the members of the limited liability company nor any managers in the limited liability company are personally liable to satisfy any judgment, decree, or order of a court for, or are personally liable to satisfy in any other manner, a debt, obligation, or liability of the company solely by reason of being a member or manager of the limited liability company." *Sliman's Printing, Inc. v. Velo Internatl., Stark App. No. 2004CA00095, 2005-Ohio-173, 2005 WL 100963, ¶ 13.*

C. Plaintiff cannot show that it has no other adequate remedy

Defendants have presented, and the Plaintiff has approved, an odor mitigation plan to address any concerns regarding Defendants' operations. Defendants have implemented this approved plan at the Wooster Facility and have received praise for its results. While Plaintiff's filing of this lawsuit is perplexing given Defendants' past interactions with the OEPA, even assuming that the Plaintiff can prove its allegations, which it cannot, the remedy has already been approved by the Plaintiff in the form of an odor mitigation plan, or the monetary awards prescribed by the statutes cited by Plaintiff and the "compensatory damages" sought in the Complaint.

III. THE INJUNCTIVE RELIEF SOUGHT UNDER OHIO REVISED CODE 3767.04 IS NOT PROPERLY BEFORE THIS COURT.

Pursuant to Ohio Rev. Code § 3767.04(B)(3), the Complaint, request for a TRO and place and time of the hearing must be provided to the Defendants at least "five days" prior to any hearing. This mandatory statutory requirement was not complied with by the Plaintiffs.

IV. CONCLUSION

For the foregoing reasons, as well as the evidence and testimony that will be presented by the Defendants in a hearing on the matter, Defendants respectfully request that this Court deny the request for a TRO.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 18th day of July, 2016, a true and correct copy of the foregoing document was served by electronic mail to the following counsel of record in this case:

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