DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street Denver, CO 80202	
Plaintiff: **VAIL RESORTS, INC**., a Delaware corporation **Defendants:** **PENINSULA ADVISORS, LLC**, a Delaware limited liability company; **TALISKER CORPORATION**, a Canadian corporation; **TALISKER CANYONS FINANCE CO., LLC**, a Delaware limited liability company; **AMERICAN SKIING COMPANY**, a Delaware corporation; and **ASC Utah**, a Maine corporation.	σ **COURT USE ONLY** σ Case Number: 07CV7264 Ctrm.: 8

AMENDED ORDER DENYING PRELIMINARY INJUNCTION

THIS MATTER is before the Court on Plaintiff Vail Resorts, Inc.'s ("Vail") request for a preliminary injunction under Colo. R. Civ. P. 65 to restrain and enjoin Talisker Corporation and Talisker Canyons Finance Co., LLC (collectively "Talisker") and Peninsula Advisors, LLC from (a) closing on a Purchase Agreement, entered into on July 15, 2007, with American Skiing Company ("ASC") to purchase all of ASC's stock in ASC Utah ("ASCU"); and (b) from taking any other steps in furtherance of the terms of that Purchase Agreement. Having considered the motion, the submissions, the applicable law, and after a hearing conducted on September 20, 2007, the Court **DENIES** the motion and **HEREBY ORDERS THAT**:

BASIS FOR ORDER

A. Findings of Facts:

The assets of ASCU, whose stock is wholly owned by ASC, consists of The Canyons, a Utah ski resort, and its accompanying development rights for land underlying and surrounding the resort. The actual fee interest of the development rights of the property underlying and surrounding The Canyons is held by Wolf Mountain Resorts (the "Wolf Property").

Wolf and ASCU have often been in conflict and litigation over the Wolf Property. Re-uniting the development rights of ASCU and the fee interests of the Wolf Property presents a unique and valuable real estate opportunity.

Peninsula signed a Transfer Agreement with Wolf to acquire the Wolf Property on October 31, 2006. Peninsula signed a letter of intent with ASC on March 2, 2007 to acquire ASCU. On May 31, 2007 Peninsula and Vail entered into an Exclusivity Agreement that required both parties to work exclusively and in good faith with each other to acquire the both the Wolf Property and ASCU. It included a cessation of negotiating with any other party regarding any competing transaction; not entering into any agreements with any other party relating to any competing transaction; informing each other of competing offers from other entities; and furnishing information regarding the contemplated transaction to aid other competing proposals.
By June 6, 2007, Peninsula began negotiating over the exact assets contemplated in the Exclusivity Agreement with Talisker, including providing Talisker information regarding Vail's progress on obtaining ASCU.

Talisker has been discussing a potential acquisition of The Canyons with ASC since as far back as 2005, long before Vail came into the picture. In 2006, Talisker conducted extensive due diligence and negotiated with ASC regarding such a transaction. It ceased active negotiations with ASC in the fall of 2006. In spite of its cessation of active negotiations with ASC, Talisker remained interested, and Bistricer maintained communication with Steve Gruber, Chairman of the Board of ASC, consistent with their long-standing relationship.

On June 22, 2007, Peninsula entered into a Joint Venture Agreement with Talisker to acquire those same assets that were the subject of the Exclusivity Agreement, with Talisker to receive a ninety percent interest in the joint ASCU/Wolf Property assets and Peninsula to receive ten percent that would be divisible between Mark Robbins and Ed Davies, both of whom are Peninsula members.

Vail did not learn of the June 22, 2007 Agreement or the negotiations between Talisker and Peninsula until after the commencement of this lawsuit. Vail argues that the negotiations leading up to the June 22 Joint Venture Agreement made it clear to Talisker that Peninsula already had an agreement with Vail regarding precisely the same rights being negotiated between Peninsula and Talisker.

Talisker claims it did not know of the existence of the Exclusivity Agreement until June 26, at which time Talisker understood it to be a “non-contravention” agreement that restrained only Vail. Further, according to Talisker, by the time Talisker finally saw an actual copy of the Exclusivity Agreement, it was already in negotiations with Peninsula and Vail.

Talisker and Peninsula met with Vail on June 27, which allegedly resulted in an agreement to jointly pursue the same assets by Talisker, Peninsula, and Vail. The failure of that agreement according to Talisker and Peninsula was because of Vail and, according to Vail it was because of

Talisker and Peninsula. Talisker engaged in no activity from June 27 to July 8 that was inconsistent with pursuing the June 27 agreement with Vail.

Vail reasserted its rights under the Exclusivity Agreement multiple times to both Talisker and Peninsula between June 27 and July 1, 2007. By July 6, there was a Vail/ASC agreement for Vail to purchase ASCU. Steven Gruber, ASC's Chairman, stated in an email that "last night we cut a deal with Vail to sell [Vail] the Canyons . . ."

By July 9, 2007 Talisker and Peninsula concluded Vail was pursuing ASCU. The Vail agreement to purchase ASCU failed, which Vail believed resulted from misrepresentations by omission by Talisker; however it is ASC's position that the reason the deal with Vail did not materialize was based solely on Vail's conduct in concluding the deal.

On July 15, 2007 a purchase agreement for ASCU between ASC and Talisker was executed. According to ASC, this agreement was entered into by ASC, without consideration of any deal there may have been between Talisker and Peninsula. However, ASC was very concern about Vail' failure to provide information about the Exclusivity Agreement.

On July 15, 2007, Peninsula and Talisker were still operating under the belief that their June 22, 2007 Agreement would be fully consummated with the acquisition of ASCU. After this request for injunctive relief was filed, Talisker and Peninsula created a document that they backdated asserting that on July 15, 2007, Peninsula had disclaimed any interest in ASCU. Peninsula and Talisker dispute Vail's claim that the backdating was part of a cover up scheme by Peninsula and Talisker. According to Talisker and Peninsula, they reached an agreement on or about July 12 that Peninsula would have no interest in Talisker's acquisition of The Canyons. That agreement was later memorialized in a letter dated July 15 to coincide with the date of the ASC/Talisker transaction and signed on July 31.

B. Legal Analysis.

A preliminary injunction may issue if the moving party can show: (1) a reasonable probability of success on the merits; (2) danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) that the balance of equities favors the injunction; (4) there is no plain, speedy, and adequate remedy at law; (5) granting a preliminary injunction will not disserve public interest; and (6) the injunction will preserve the status quo pending a trial on the merits. *See Rathke v. MacFarlane*, 648 P.2d 648, 653–54 (Colo. 1982); *City of Golden v. Simpson*, 83 P.3d 87, 96 (Colo. 2004).

1. Reasonable Probability of Success.

A reasonable probability of success as to one claim is sufficient to support injunctive relief. *See American Television & Commc'ns Corp. v. Manning*, 651 P.2d 440, 444 (Colo. App. 1982). Although Vail has shown a reasonable probability as to at least one and possibly two of its three claims[1], it is only a factor in the Court determination to grant or deny the request for the injunction.

a. Breach of Contract.

Vail has shown they have a reasonable probability of success that Peninsula breached the May 31, Exclusivity Agreement which was its first claim for relief in Vail's July 27, 2007, Complaint. For this cause of action, Vail must show that (1) the agreement was a valid contract, (2) Vail performed its obligations under that agreement or that its nonperformance was justified), (3) Peninsula materially breached its obligations, and (4) Vail was damaged as a result. *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992). There is sufficient evidence in the record to find that the contract was validly entered into; that Vail was performing its obligations up until the time it gave Peninsula notice that Peninsula was in breach; Peninsula breached the Agreement by secretly negotiating with Talisker, informing Talisker of Vail's progress on acquiring the ASCU assets and then signing the June 22, 2007 Joint Venture Agreement.

b. Intentional Interference with Contractual Relations.

To prevail on this claim Vail must show that (1) Vail entered into a valid contract with Peninsula; (2) Talisker was aware, or should have been aware, of this contract; (3) Talisker intended Peninsula to breach the contract; (4) Talisker took action to induce Peninsula to breach the contract; and (5) Vail was damaged as a result. *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d 1048, 1115 (D. Colo. 2004); *Krystkowiak v. W.O. Brisben Cos., Inc.*, 90 P.3d 859, 871 (Colo. 2004); *cf. Monte Vista Potato Growers' Co-Op v. Bond*, 252 P. 813, 814–15 (Colo. 1927) (enjoining performance of agreement entered into for the purpose of allowing one of the parties to escape his obligations with plaintiff). In addition, Talisker must have acted "improperly" in causing this result. *See Krystkowiak*, 90 P.3d at 871.

Vail and Peninsula entered into a valid exclusivity contract on May 31, 2007. Talisker was aware of this contract no later than June 26, 2007; however, the Court is not convinced that Talisker was aware of the exclusivity agreement before that time. Certainly, there is sufficient evidence based on the correspondence between Talisker and Peninsula that Talisker was aware that there were dealings or an agreement between Peninsula and Vail before June 26, 2007. However, it is unclear to what extent Talisker had knowledge of the terms of that agreement. There are

[1] There are other claims alleged in the Complaint. This order is limited to the three claims argued by Vail in support of its Motion for Preliminary Injunction.

numerous factual issues that need to be determined, which can affect the outcome of this claim. In the context and limitations of a preliminary injunction hearing, it would be pure speculation for this Court to say there is or is not a reasonable chance of success on this claim.

c. Intentional Interference with Prospective Economic Relations.

Third, Vail has not shown a reasonable probability of success as to its intentional interference with prospective economic relations claim which was Vail's sixth claim for relief in Vail's Complaint. To prevail on its claims for intentional interference with prospective economic relations, Vail must show that Talisker and Peninsula improperly caused ASC not to enter into a prospective relation with Vail, or that Talisker and Peninsula otherwise improperly prevented Vail from entering into that relation. *See Nobody in Particular Presents*, 311 F. Supp. 2d at 1117–18; *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 500 (Colo. 1995); *see also Occusafe, Inc. v. EG&G Rocky Flats, Inc.*, 54 F.3d 618, 622 (10th Cir. 1995) (noting that Colorado recognizes this tort); RESTATEMENT (SECOND) OF TORTS § 766B.

The Court finds the evidence does not support this claim.

2. There is No Danger of Immediate Irreparable Harm.

Vail has no contractual right under the Exclusivity Agreement to acquire the ASCU stock. ASC was not a party to the Exclusivity Agreement and is not compel by that agreement to negotiate with Vail or anyone else.

Vail’s only contract right and obligation relating to ASCU pursuant to the Exclusivity Agreement was to negotiate together with Peninsula to acquire the ASCU stock. Peninsula’s breach of its obligation to negotiate did not prevent Vail or Talisker from contracting with ASC.

Vail attempts to argue, but falls short, that it will suffer irreparable harm in the absence of relief, which “is the single most important prerequisite for obtaining a preliminary injunction.” *Bray v. QFA Royalties LLC*, 486 F. Supp. 2d 1237, 1247 (D. Colo. 2007).

Vail is correct that because real property is considered unique, the loss of one’s right to acquire real property constitutes “per se irreparable injury.” *Sportsmen’s Wildlife Defense Fund v. U.S. Dept. of the Interior*, 949 F. Supp. 1510, 1523 (D. Colo. 1996). *See also United Church of the Med. Cir. v. Medical Ctr. Comm’n*, 689 F.2d 693, 701 (7th Cir. 1982) (“It is settled beyond the need for citation . . . that a given piece of property is considered to be unique, and its loss is always an irreparable injury.”). And, since ASC wants to sell The Canyon by selling all of ASCU’s stock, the sell of all the stock is effectively a transfer of an interest (leasehold estate) in property held by ASCU, which is unique. *Cf. Crow Winthrop Operating P’ship v. County of Orange*, 13 Cal. Rptr. 2d 696, 701 n.6 (Cal. Ct. App. 1992) (“[P]urchase or transfer of ownership interests in legal entities, such as corporate stock or partnership interests, shall not be deemed to constitute a transfer of the real property of the legal entity so long as the purchaser does not receive a *majority* *ownership interest* as the latter would be a change of ownership of property" (citations and internal quotation marks omitted, emphasis added)). However, Vail's alleged right is not an interest in land. It is only **an opportunity to negotiate** exclusively with Peninsula to buy the stock of a corporation that has a leasehold estate in land.

Also, Vail is attempting to use the requested preliminary injunction to obtain a remedy that is not available to it even if it is successful on the merits of its claim that Peninsula breached the Exclusivity Agreement and its claim against Talisker for Intentional Interference with Contractual Relations. If successful on the merits of its claims against Peninsula and Talisker, Vail would not have a right to prevent the sale of the ASCU to Talisker.

Vail admits that the motion for preliminary injunction does not seek to enforce the Exclusivity Agreement; instead it is seeking to block *another* agreement—namely, the July 15, 2007 agreement to acquire ASCU—on the ground that that agreement arose out of the unlawful breach of and tortious interference with the Exclusivity Agreement. Vail claims it is seeking only to create a level playing field to ensure that all interested parties may compete openly and on equal terms for the right to acquire ASCU, unencumbered by Talisker and Peninsula's wrongdoing.

Vail does not argue that Talisker, even if Peninsula is benefiting from the ASCU stock sell, obtained some sort of advantage, improper or otherwise, based on the alleged breach of Exclusivity Agreement or interference with the Agreement. It simply argues that Talisker would not have bid if Peninsula had not breached it's the Exclusivity Agreement, based on Talisker's past negotiations with ASC. Both Talisker and Vail submitted bids to ASC, which was considered by ASC and, ultimately, Talisker was the successful bidder.

Vail cannot show a danger of real, immediate and irreparable harm. It has no contract to acquire ASC's interest in The Canyons. Thus, a preliminary injunction merely restores Vail to its previous position as someone seeking to do a deal with ASC. ASC has no obligation to sell The Canyons to Vail. Thus, Vail's claimed injuries are too speculative to support a preliminary injunction.

3. The Balance of Hardships Does Not Favor the Issuance of the Preliminary Injunction.

The balance of equities weighs against an injunction. While the ASC parties are accused of no wrongdoing, and Vail asserts no claim against them, they would bear the brunt of an injunction, potentially losing a deal they feel is favorable, possibly irreplaceable, transaction. At the very least, the ASC parties would suffer an unwarranted delay in the sale of ASCU. Vail disregards the substantial harm that would befall the ASC parties if the sale to Talisker were enjoined, claiming that the denial of an injunction "risk harm to ASC's common shareholders." Vail bases this on its assertion that denial of an injunction may "deprive the shareholders of" what it considers to be a "topping offer" by Vail. *Ward v. Walsh*, 1 F.3d 873, 879–80 (9th Cir. 1993) (appropriate to consider harm to non-parties in weighing the equities for injunctive relief).

Maybe there is something to the proverb that, “a bird in the hand is worth two in the bush.” Vail has no assurances that its “topping offer” will be accepted by ASC or its shareholders. It is seeking an opportunity to make an offer, in addition to the one it previous made, which fell short.

4. There is an Adequate Remedy Available at Law

Vail has a “plain, speedy, and adequate remedy at law.” *Rathke*, 648 P.2d at 654. Vail effectively concedes that it would suffer no irreparable harm absent a preliminary injunction. In its September 10 offer, Vail projected that a 30% net cash flow interest in The Canyons, which it offered to ASC, “could produce up to $650 million in incremental cash for ASC through 2020,” for which Vail will be “providing the details of the calculation . . . under separate cover.” If Vail can calculate the value of this opportunity with enough precision to publish it in an SEC filing, a damages expert could certainly do so as well. This readily available legal remedy by itself also defeats Vail’s claim for injunctive relief.

Monetary damages are an adequate and appropriate remedy in the event Vail should prevail on any of its claims in this action. With any harm plainly reparable, Vail’s Motion for Preliminary Injunction must be denied regardless of the substantive merits of its claims.

5. A Preliminary Injunction Will Harm the Public Interest.

“Where an important public interest would be prejudiced [by granting an injunction], the reasons for denying the injunction may be compelling.” *City of Harrisonville v. W.S. Dickey Clay Mfg. Co*., 289 U.S. 334, 338 (1933); see also *People ex rel. Alexander v. District Court*, 68 P.2d 242, 249 (Colo. 1901). Here, an injunction would disserve the public interest in at least two respects.

First, as a general matter, public interest favors competition. See, e.g., *MedSpring Group Inc. v. Feng*, 368 F. Supp. 2d 1270, 1280 (D. Utah 2005) (issuance of a preliminary injunction would adversely affect public interest in encouraging competition); *American Phytotherapy Research Lab Inc. v. Impact Nutrition, Inc*., 201 F. Supp. 2d 1145, 1151 (D. Utah 2002) (rejecting preliminary injunction, in part, because “public interest favors competition in its various forms”); *Mountain Med. Equip., Inc. v. Healthdyne, Inc*., 582 F. Supp. 846, 850 (D. Colo. 1984) (same). This case fundamentally concerns a free market competition between businesses for an economically promising opportunity. Talisker prevailed, not as a result of any wrongdoings alleged by Vail, in that competition by offering what ASC considered to be a superior deal. Vail should not be permitted to undermine Talisker’s legitimate competitive success simply to resurrect its own unsuccessful efforts to obtain a deal with ASC.

Second, the preliminary injunction would be adverse to the public interest in preserving freedom of contract. See, e.g., *Steele v. Drummond,* 275 U.S. 199, 205 (1927) (“it is a matter of great public concern that the freedom of contract be not lightly interfered with”). Talisker and

ASC have voluntarily entered into a Stock Purchase Agreement that will be thwarted if the Court issues a preliminary injunction enjoining the closing. Moreover, abrogating the Stock Purchase Agreement is futile because even if Vail gets an injunction, neither Vail nor this Court can force ASC to contract or even negotiate with Vail. See, e.g., *Sprint Corp. v. DeAngelo*, 12 F. Supp. 2d 1188, 1196 (D. Kan. 1998) (a court should not order "the drastic remedy of a preliminary injunction to enforce [contractual] terms which are not clearly shown to have been agreed" to by the parties to the contract).

6. A Preliminary Injunction Will Not Serve to Maintain the Status Quo.

Finally, the requested injunction will not preserves the status quo until the merits of this case can be sorted out by trial or summary judgment. *See Rathke*, 648 P.2d at 654. A preliminary injunction would interfere with ASC's right to consummate the transaction it has entered into with Talisker. Vail admitted relief is to undo the agreement between ASC and Talisker, so that it can have its "topping offer" considered.

IT IS THEREFORE ORDERED based on the foregoing finding that Vail's Motion for Preliminary Injunction is hereby **DENIED**.

DONE THIS 25th DAY OF October, 2007

BY THE COURT:

/s/ R. Michael Mullins

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DISTRICT COURT JUDGE