

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TOTALLY EVERYTHING, INC., and	:	CIVIL ACTION
HI-TEK INTERNATIONAL, INC.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
ATX RESEARCH, INC./	:	
ATX TECHNOLOGIES, INC.,	:	
	:	
Defendant.	:	No. 97-6981

**MEMORANDUM OF FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Reed, J.

December 3, 1997

Plaintiffs Totally Everything, Inc. (“Totally Everything”) and Hi-Tek International, Inc. (“Hi-Tek”) filed a complaint in this Court on November 13, 1997 against ATX Research, Inc./ATX Technologies, Inc. (“ATX”) entitled Plaintiffs’ Complaint Requesting Temporary Restraining Order, Preliminary Injunction and Enforcement of Arbitration Under Federal Arbitration Act. The following day, November 14, 1997, plaintiffs filed a Petition for Temporary Restraining Order and Preliminary Injunction and To Enforce Arbitration. Totally Everything and Hi-Tek claimed that ATX breached its agreement with them to be exclusive distributors of ATX’s OnGuard product within the Philadelphia and Washington D.C. areas when ATX

sold the product to Pep Boys Automotive Supercenters (“Pep Boys”) for resale to the public within plaintiffs’ exclusive areas. A hearing was held on plaintiffs’ petition for a temporary restraining order on November 14, 1997, at the conclusion of which the request for a temporary restraining order was denied by this Court. After a period of expedited discovery, the parties presented their arguments and evidence at a preliminary injunction hearing on December 1, 1997, which lasted from approximately 10:00 A.M. until 8:00 P.M. Upon consideration of the evidence presented at that hearing and the memoranda submitted by the parties, this Court will deny the petition for a preliminary injunction based on the following findings of fact and conclusions of law:¹

1. This Court has diversity jurisdiction over this case pursuant to 28 U.S.C. § 1332. In addition, this Court has subject matter jurisdiction to entertain a petition for a preliminary injunction even though the parties have agreed to arbitrate the underlying dispute. See Ortho Pharmaceutical Corp. v. Amgen, Inc., 882 F.2d 806 (3d Cir. 1989).
2. ATX designs, manufactures, and sells an electronic device called the OnGuard system. Designed to be installed and used in automobiles, the OnGuard functions in combination with Global Positioning Satellites (“GPS”), cellular telephone technology, and a 24-hour operator located in ATX’s Response Center to provide the consumer with a variety of tracking, security, and convenience features, including obtaining directions or roadside assistance and having the car doors

¹ In addition, on November 20, 1997, ATX filed a Motion to Dismiss Plaintiffs’ Complaint for Failure to State a Valid Claim and For Failure to Join an Indispensable Party Whose Joinder Would Divest This Court of Subject Matter Jurisdiction. The issues raised in defendant’s motion of whether Pep Boys is an indispensable party and whether this Court can compel the parties to arbitrate will be addressed in a separate Order ruling on the motion to dismiss.

- automatically unlocked if the keys are locked inside.
3. Jay Milgram (“Milgram”), Office Manager and CEO of Totally Everything, initiated a business relationship with ATX in early 1996, after reading about the OnGuard product in a trade magazine. Milgram subsequently contacted Pete Chambers (“Chambers”), owner of Hi-Tek, to see if he would also be interested in becoming involved in a possible business arrangement with ATX.
 4. After initial discussions between the parties, ATX and the plaintiffs negotiated the terms of a distribution agreement.² Negotiations regarding the terms of the agreement were conducted primarily by Milgram and Chambers, on behalf of the plaintiffs, and by Jesse Flores and Terry Hookstra, on behalf of ATX. The parties signed the agreement in August of 1996.
 5. Section 1 of the agreement grants Totally Everything and Hi-Tek exclusive rights to distribute the OnGuard system in defined regions. Section 3.05(B) of the agreement provides that “[plaintiffs] will not receive commissions for sales of product or for monthly monitoring fees received from [ATX’s] international accounts, national accounts or from any of [ATX’s] governmental accounts unless actually sold by [plaintiffs].”
 6. Under the agreement, ATX began selling the OnGuard product to plaintiffs for \$360-\$460. Although ATX’s suggested retail price for the OnGuard product is \$899, plaintiffs have been selling the products to the public at a significant markup, for \$1495. Totally Everything has sold approximately 225 OnGuard

² Totally Everything and Hi-Tek each signed a separate distribution agreement; however, the language of the two agreements is substantively identical except for the geographic areas over which each party has exclusive rights. Thus, they will be referred to hereinafter as a singular agreement for simplicity.

units to date. Hi-Tek has sold approximately 22 units. ATX has suggested to plaintiffs that they would be able to operate more profitably if they would start selling the OnGuard products at the lower suggested price.

7. Before it contracted with plaintiffs, ATX established a managerial position for, and expended efforts to, market the OnGuard products through national retail chain resellers, such as Sears and Western Auto. In or around late September 1997, ATX sold approximately 250 units of the OnGuard security system to Pep Boys. ATX shipped those units in late October 1997 to six of Pep Boys' distribution centers across the country. Pep Boys began advertising and selling the OnGuard systems on or around November 3, 1997 in plaintiffs exclusive areas at the advertised price of \$899.
8. Pep Boys' advertising campaign does not feature the OnGuard products solely and does not always reference the OnGuard name. ATX has not paid any money for Pep Boys' advertisements of the OnGuard products. Other than the vendor-vendee relationship described above, ATX is not legally affiliated in any way with Pep Boys, that is, Pep Boys is not an distributor, dealer, or other related entity of ATX, and vice-versa. As of November 26, 1997, Pep Boys had sold only two OnGuard units through its stores.
9. Notwithstanding the sales by defendant to Pep Boys and the advertising campaign of Pep Boys, sales by Totally Everything have improved and will improve.³ Totally Everything has completed sales on 100 OnGuard units in November of 1997, after having sold only 125 units total since it began selling the product.

³ Hi-Tek's sales have been consistently low, a trend which continues now.

Another order to Totally Everything from its customers for an additional 40 to 50 units is expected to be confirmed. In addition, plaintiffs presented no persuasive proof that Pep Boys would continue an advertising campaign for the OnGuard product in the future. While understandable, the expressed subjective fears of Milgram that the sales and profits of Totally Everything will be devastated and that Totally Everything will be unable to compete with Pep Boys are not supported by credible evidence in the record and do not persuade this Court that irreparable harm will occur to plaintiffs pending arbitration.

10. The parties presented at the preliminary injunction hearing, without objection by either side, competing parole evidence as to the intent of the parties regarding the use of the term “national accounts” in section 3.05(B) (such as whether the term means only end users) and whether section 3.05(B) modified section 1 of the agreement. This Court finds that the weight of evidence presented at this stage of the proceedings on both sides of the contract interpretation issue to be evenly balanced.
11. Plaintiffs have not made a sufficient showing that they will be unable to establish their damages at the time of the arbitration if they are successful on the merits of their breach of contract claim, nor have they established that they will suffer any damages other than potential monetary loss. It appears highly unlikely from the evidence presented that ATX will be selling any more units to Pep Boys in the near future given that Pep Boys currently has sold only two of the 250 it purchased. Thus, adequate records will be available at the time of arbitration for plaintiffs to establish any damages to which they are entitled.

12. To determine if a request for a preliminary injunction should be granted, a court should consider the following factors:

(1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

Geradi v. Pelullo, 16 F.3d 1363, 1373 (3d Cir. 1994). A request for preliminary relief should only be granted if the court is convinced that all factors favor the relief. See Opticians Association of America v. Independent Opticians of America, 920 F.2d 187, 192 (3d Cir. 1990). Indeed, “the grant of relief is an extraordinary remedy, which should be granted only in limited circumstances.” Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989) (quoting Frank’s GMC Truck Ctr., Inc. v. General Motors Corp., 847 F.2d 100, 102 (3d Cir. 1988)).

13. In an opinion from the Court of Appeals for the Third Circuit reversing a district court’s grant of a preliminary injunction and finding that plaintiff did not establish the requisite irreparable harm, the court noted that “more than a risk of irreparable harm must be demonstrated. The requisite for injunctive relief has been characterized as a clear showing of immediate irreparable injury, or a presently existing actual threat; [an injunction] may not be used simply to eliminate a possibility of a remote future injury. . . .” Acierno v. New Castle County, 40 F.3d 645, 655 (3d Cir. 1994) (quoting Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351 (3d Cir. 1980) (internal quotes omitted)); see also Campbell Soup Co. v. Conagra, Inc., 977 F.2d 86, 91-92 (3d Cir. 1992)

- (noting that a remote risk of future harm is not sufficient to show irreparable harm).
14. Equitable relief should not be granted if a legal remedy is available. “The availability of adequate monetary damages belies a claim of irreparable injury.” Frank’s GMC Truck Ctr., 847 F.2d at 102-103 (holding that a finding that a plaintiff would lose customers and sales, and thus profits, if defendant’s activity was not enjoined did not establish irreparable harm).
 15. Having found in ¶ 10, supra, that evidence on the meaning of the term “national accounts” and the interpretation of the agreement is in equilibrium and thus plaintiffs have not shown a reasonable probability of successfully proving that ATX, by entering into a purchase agreement with Pep Boys, breached the agreement, Totally Everything and Hi-Tek have not met their burden of proving a reasonable probability of success on the merits of the contract dispute.
 16. Plaintiffs have not met their burden of proving that they will suffer irreparable injury if an injunction is not issued because they have failed to make a clear showing that there is an imminent threat of immediate irreparable harm pending arbitration. See ¶ 9, supra.
 17. Having found in ¶ 11 that adequate records will be available at the time of arbitration for plaintiffs to establish any damages to which they are entitled, plaintiffs have not met their burden of proving that they will suffer irreparable injury if an injunction is not issued because a legal remedy will be available in the form of monetary damages at the arbitration.
 18. Because the plaintiffs were unable to convince this Court that they will suffer

irreparable harm or that they have a reasonable probability of success on the merits of their underlying claim,⁴ the petition for preliminary injunction will be denied. An appropriate Order follows.

⁴ Plaintiffs' failure to satisfy the first and second factors, reasonable probability of success on the merits and irreparable harm, is sufficient to deny the petition for a preliminary injunction. In addition, the third and fourth factors, potential harm to the nonmoving party or to the public, are not particularly relevant to this case; hence, analysis and discussion of these factors is not necessary for this Court's decision. See Acierno, 40 F.3d at 653 (noting that a plaintiff has the burden to make the requisite showings on the first two factors and that a district court should consider the last two when they are relevant).

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TOTALLY EVERYTHING, INC. and	:	CIVIL ACTION
HI-TEK INTERNATIONAL, INC.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
ATX RESEARCH, INC./	:	
ATX TECHNOLOGIES, INC.,	:	
	:	
	:	
Defendant.	:	NO. 97-6981

ORDER

AND NOW, this 3rd day of December, upon consideration of the Motion of plaintiffs Totally Everything, Inc. and Hi-Tek International, Inc. for a Preliminary Injunction (Document No. 2), the evidentiary hearing on the merits of plaintiffs' request for a preliminary injunction held on December 1, 1997, and the pretrial memoranda of both parties (Document Nos. 12 and 15), and based on the findings of fact and conclusions of law set forth in the accompanying memorandum, it is hereby **ORDERED** that the motion is **DENIED**.

LOWELL A. REED, JR., J.