2009
NATIONAL PRETRIAL COMPETITION
PROBLEM

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
EREWHON DIVISION

Altiplex Materials Solutions, Inc.,
a Florida Corporation,

Plaintiff,

v. Civil Action No. 09-X832-CIV-R

Defendant Carbon Nano Craft, Ltd.,
a Georgia Corporation; Cameron Collins, Ph.D.,
individually; and Darryll Denton, individually,

Defendants.
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Minute Order
September 4, 2009

Before the Court are the Plaintiff's Motion to Remand this removed action and its Motion, urged in the alternative, for Preliminary Injunction. In keeping with the parties' joint characterization of the extremely time-sensitive nature of this dispute, the Court today heard preliminary arguments on both motions on the basis of uncontested facts as represented by counsel in open Court. For the reasons set out below, neither motion can be resolved without additional input from the parties. Accordingly, the Court orders a further hearing in this matter, together with the submission of stipulations, affidavits, and briefs on an expedited basis.

I. Background

This dispute arises from the purported violation by Dr. Cameron Collins of a settlement agreement with Altiplex Materials Solutions, Inc. ("AMS"). That settlement agreement ended an earlier civil action, one briefly litigated before this Court between those parties. The earlier action dealt with claims and counter-claims of infringement and misappropriation of various intellectual property rights in certain technologies that were developed at AMS while Collins was head of its nanoscale materials project.

The current dispute concerns Collins's use of one of those technologies, namely the Andrews-Collins Plasma Deposit ("ACPD"), in working for defendant Carbon Nano Craft, Ltd. ("CNC"). ACPD is a technique for fixing carbon nanotubes onto silicon substrates of the kinds used in computer chips. The specifics of ACPD and of the earlier claims are only tangentially relevant to the matters at bar because the parties agree that the settlement agreement is, in pertinent part, a restrictive covenant or noncompete clause within the meaning of Florida Statutes § 542.335. AMS contends that the noncompete clause forbids Collins to work for CNC.

Collins contends that the noncompete clause is inapplicable due to the nature of the use that CNC is making of ACPD. Specifically, CNC uses that technique to

affix nanotubes onto computer chips solely for the purpose of improving the chip's heat-dissipating characteristics. AMS uses the technique only to deposit nanotubes in such a way as to form tiny, highly efficient electrical pathways within computer chips. Thus, Collins argues that CNC's use of ACPD does not violate the noncompete clause because it concerns the transmission of heat rather than of electricity.

II. Jurisdiction

AMS filed suit against the defendants in Florida state court, seeking preliminary injunctive relief pending trial on the merits. The defendants removed the action to this Court pursuant to 28 U.S.C. § 1441 on the basis of diversity jurisdiction. This independent basis for subject-matter jurisdiction is essential. The settlement agreement resulted in a dismissal of the earlier lawsuit pursuant to Federal Rule of Civil Procedure 41, but neither the agreement nor the dismissal order purported to preserve the Court's subject-matter jurisdiction for purposes of policing or enforcing the settlement. Because the current action "is more than just a continuation or renewal of the dismissed suit, [it] requires its own basis for jurisdiction." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 378 (1994).

Ordinarily, the requisite complete diversity of citizenship would not be present, because defendant Darryll Denton is a resident and domiciliary of the State of Florida. The defendants contend, however, that this non-diverse

citizenship is excused under the "fraudulent joinder" doctrine:

> When a plaintiff names a non-diverse defendant solely in order to defeat federal diversity jurisdiction, the district court must ignore the presence of the non-diverse defendant and deny any motion to remand the matter back to state court. The plaintiff is said to have effectuated a fraudulent joinder, and a federal court may appropriately assert its removal diversity jurisdiction over the case. A defendant seeking to prove that a co-defendant was fraudulently joined must demonstrate either that: (1) there is no possibility the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court. The defendant must make such a showing by clear and convincing evidence.

Henderson v. Wash. Natl. Ins. Co., 454 F.3d 1278, 1281 (11th Cir. 2006) (citations and quotations omitted).

The defendants contend that there can be no cause of action against the diversity-destroying defendant, and at first blush, this seems to be true. Denton is the attorney who represented Collins in the prior lawsuit and negotiated the settlement agreement on Collins's behalf. However, Denton is also an officer and a major shareholder in CNC, and it is unclear precisely when and how this came to be. AMS contends that Denton's involvement with CNC renders Denton at least potentially liable for Collins's putative violation of the noncompete clause.

In any case, given the defendants' heavy burden in establishing fraudulent joinder, the Court is not inclined to rule on the jurisdictional issue in the absence of briefing from the parties regarding potential claims against Denton, as well as evidence concerning the nature and history of Denton's involvement with CNC.

III. Injunctive relief

Even if jurisdiction were securely established, immediate injunctive relief is unavailable. Normally, a party seeking a preliminary injunction must establish the following:

> (1) a substantial likelihood of success on the merits of the underlying case, (2) the movant will suffer irreparable harm in the absence of an injunction, (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction issued, and (4) an injunction would not disserve the public interest.

Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d 1242, 1246–1247 (11th Cir. 2002). With the possible exception of the claim against Denton discussed above, AMS has established the element of substantial likelihood of success on the merits. It has also satisfied the balance-of-hardships and public-interest elements.

The irreparable-injury element is less clear, both factually and legally. AMS's claim of irreparable injury appears to reduce largely to assertions of threatened losses of contract revenues. This claim is plausible, but largely irrelevant. The loss of readilycalculable sums of money can be remedied by an award of monetary damages. When a remedy at law is thus available, the equitable remedy of injunctive relief is ordinarily unavailable because it is unnecessary given the prospect of only *reparable* injury. Moreover, as the United States Supreme

Court has recently reminded us, "plaintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction. Issuing a preliminary injunction based only on a *possibility* of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Resources Def. Council, Inc.*, 129 S. Ct. 365, 375–376 (2008) (emphasis added; citations and quotations omitted).

AMS contends, however, that it is not required to prove irreparable injury due to a particular feature of the applicable Florida statute, which read in pertinent part: "The violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant." Fla. Stat. § 542.335(1)(j) (2009). In this diversity action, the *Erie* doctrine specifies that the applicable *substantive* law is that of Florida, but the applicable *procedural* law is federal. *See Ferrero v. Associated Materials Inc.*, 923 F.2d 1441, 1448–1450 (11th Cir. 1991). Neither *Ferrero*, nor any other mandatory authority known to the Court, establishes conclusively whether the presumption created by subsection (1)(j) is substantive or procedural under *Erie* on the facts at bar.

This uncertainity is due in part to Section 12 of the settlement agreement, which is titled "Choice of Law, Forum, and Remedies." Subsection (b)(2) reads as

follows: "Any party that breaches this Agreement may be enjoined from further breach preliminarily and/or permanently, so long as the party seeking injunctive relief satisfies the traditional and customary requirements for such relief of the Court in which the relief is sought." The effect of this language upon the choice-of-law question at bar is, to say no more, unclear. Due to their conflicting interpretations of "Court in which the relief is sought," each party to the agreement contends that this language accomplishes a waiver of an advantage that the other would otherwise have enjoyed.

Thus, the parties will brief the choice-of-law issue, but given the applicable time constraints, they will also brief, and submit evidence on, the substance of the irreparable-injury issue against the possibility that the Court may find that the Florida presumption is inapplicable.

IV. Conclusion

It is ORDERED, ADJUDGED, and DECREED that:

(1) The parties will submit to the Court, no later than Monday, September 7, 2009, a joint stipulation of all facts that the parties agree to be both undisputed and relevant to either pending motion;

(2) The parties will submit to the Court, no later than Wednesday, September 9, 2009, sworn evidence in affidavit form concerning all other facts upon which they intend to rely in their briefs on the pending motions;

(3) The parties will submit to the Court, no later than noon on Friday, September 11, 2009, briefs on the matters addressed in this Minute Order; and

(4) All documents are to be submitted as PDF files.

Done at Erewhon, Florida, this fourth day of September 2009.

/s/ Presiding Judge
UNITED STATES DISTRICT JUDGE

[SERVICE UPON COUNSEL NOTED]

UNITED STATES DISTRICT COURT
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Defendants.
_____/

Joint Stipulations

Pursuant to the Court's Minute Order dated September 4, 2009, undersigned counsel hereby submit their joint stipulation of all facts that they agree to be both undisputed and relevant to either pending motion:

1. All facts set out in the Court's Order and Reasons dated September 4, 2009 are correct, undisputed, and incorporated herein by reference.

2. The style of the civil action that gave rise to the settlement agreement now in dispute was "Altiplex Materials Solutions, Inc. v. Cameron Collins, Ph.D." (hereinafter "*AMS v. Collins*").

3. Dr. Collins's last day of employment with AMS was July 31, 2008. On

October 1, 2008, Dr. Collins received and read a "cease and desist" letter from AMS regarding Dr. Collins's efforts to enter into employment that would involve the use of ACPD. Subsequent negotiations failed to produce results satisfactory to AMS, which filed *AMS v. Collins* on November 17, 2008. The settlement agreement that brought *AMS v. Collins* to an end was executed on December 23, 2008.

4. Dr. Collins first retained Darryll Denton on May 3, 2008. Denton's services to Dr. Collins included the formation of CNC as a Georgia corporation. The incorporation took effect on August 1, 2008. CNC hired Denton as General Counsel on August 2, 2008.

5. On December 16, 2008, CNC executed a promissory note in favor of Denton in the amount of $186,000.00. On that same date, Dr. Collins executed a guaranty agreement to pay the note in the event of default by CNC.

6. On January 1, 2009, Denton became Vice President of CNC and accepted ownership of ten percent of CNC's outstanding stock in full satisfaction of the obligations imposed by the note and the guaranty. All of CNC's shares are a single class of common stock.

7. The only facts alleged in AMS's Complaint upon which AMS relies for its claims against Denton personally, rather than in any corporate capacity, are reproduced below verbatim. This stipulation lists those alleged facts solely for purposes of delimiting AMS's potential claims against Denton; the defendants do not stipulate to the alleged facts themselves:

(a) At all relevant times, Denton was aware that there was no realistic prospect of payment by Dr. Collins or CNC of any legal fees, of salaries, or of the promissory note (whether directly or via the guaranty) unless Dr. Collins made commercial use of ACPD.

(b) At all relevant times, Denton was aware of the plans and intentions of Dr. Collins and CNC to make commercial use of ACPD, and Denton assisted them in carrying out those plans and intentions in every way possible.

(c) Denton was directly responsible for persuading AMS's formerly loyal customer Crowley Exoprocessors, Inc. to enter into a contract with CNC instead of renewing its contract with AMS. Crowley's contract with AMS expired on December 28, 2008. But for Denton's efforts, in conjunction with those of Dr. Collins and CNC, Crowley would have remained an AMS customer.

(d) Denton was directly responsible for persuading AMS's formerly loyal customer ProCelerex, Inc. to enter into a contract with CNC instead of renewing its contract with AMS. ProCelerex's contract with AMS expired on February 25, 2009. But for Denton's efforts, in conjunction with those of Dr.

Collins and CNC, Crowley would have remained an AMS customer.

8. Ever since it learned of Dr. Collins's activities with CNC, AMS has consistently maintained a policy of refusing to enter into or renew any contract with any entity that has "improper dealings" with CNC. AMS defines "improper dealings" as those that involve goods to be produced or services to be rendered inconsistently with AMS's interpretation of its settlement agreement with Dr. Collins.

Jointly executed this seventh day of September 2009.

/s/ Attorney for Plaintiff

/s/ Attorney for Defendants

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Affidavit of Alva Andrews

STATE OF FLORIDA)
)
COUNTY OF HILLSBOROUGH)

PERSONALLY APPEARED before the undersigned officer, duly authorized to administer oaths, Alva Andrews, who, after being duly sworn, deposed and testified as follows:

1. My name is Alva Andrews. I am over 21 years old, am suffering under no legal disability, and am competent to give this Affidavit.

2. I am the Chief Executive Officer of Altiplex Materials Solutions, Inc. I am authorized in that capacity, as well as in my personal capacity, to give this

Affidavit. I do so on the basis of personal knowledge.

3. I am the co-inventor of ACPD process, and I am fully knowledgeable about both the process itself and the physical characteristics of the carbon nanotubes associated with the process.

4. In the course of developing ACPD, I never envisioned its use in conjunction with a processor chip's heat-dissipating components for the same reason that I would not envision filling a car's radiator with gasoline.

5. Under conditions that can foreseeably occur within a chip's normal operating lifespan, nanotubes deposited by Dr. Cameron's use of ACPD can abruptly transform from heat conductors to heat insulators. In that event, destruction of the chip would be certain, damage to the computer's motherboard would be probable, and electrical fire involving the entire computer (not to mention the building that housed it) would be possible.

6. This danger is the primary reason why AMS will not work with any company that uses ACPD for heat dissipation. To say nothing of the ethical issues involved, immense damage to AMS's reputation would result from even one fire attributable to a chip that could be associated with AMS in any way, even though the blame for the fire would lie elsewhere.

7. A secondary (but more than sufficient) reason for the policy against working with companies that use CNC's version of ACPD is simple respect for the

sanctity of contracts. Anyone who is willing to benefit from someone else's breach of a contract is not someone who can be counted upon to honor a contract with AMS when the going gets tough.

Further, affiant sayeth not.

/s/ Alva Andrews

[Properly notarized and dated September 9, 2009]

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Affidavit of Blair Baker

STATE OF FLORIDA)
)
COUNTY OF HILLSBOROUGH)

PERSONALLY APPEARED before the undersigned officer, duly authorized to administer oaths, Blair Baker, who, after being duly sworn, deposed and testified as follows:

1. My name is Blair Baker. I am over 21 years old, am suffering under no legal disability, and am competent to give this Affidavit.

2. I am the Director of Sales for Altiplex Materials Solutions, Inc. I am authorized in that capacity to give this Affidavit, and I do so on the basis of personal knowledge.

3. The continued use of ACPD by CNC is likely to cause reductions in AMS's sales that are both severe and all but impossible to quantify. While losses due to non-renewal of contracts can be calculated with some precision, losses due to impaired reputation cannot.

4. AMS's development of ACPD resulted in substantial gains in AMS's sales, not only of goods and services made possible by ACPD, but across the board. The prestige associated with ACPD made my job considerably easier, but only while AMS had exclusive practical control of ACPD. Since CNC began using ACPD, our sales in non-ACPD product and service lines have decreased.

5. Given the narrow and specialized nature of the market for AMS's products and services, this decrease in non-ACPD sales lines is very probably due to CNC's actions, and the decrease will probably only get worse. Unfortunately, due to the recent general downturn in economic activity, the decrease probably cannot be proved as a specific dollar figure by a preponderance of the evidence. Thus, while the damage caused by CNC's use of ACPD is substantial now, and will likely grow even worse, AMS is unlikely to be able to obtain adequate relief

for that damage via a monetary award.

Further, affiant sayeth not.

/s/ Blair Baker

[Properly notarized and dated September 9, 2009]

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_____/

AFFIDAVIT OF DR. CAMERON COLLINS

STATE OF GEORGIA *
*
COUNTY OF FULTON *

PERSONALLY APPEARED before the undersigned officer, duly authorized to administer oaths, Dr. Cameron Collins, who, after being duly sworn, deposed and testified as follows:

1. My name is Dr. Cameron Collins. I am over 21 years old, am suffering under no legal disability, and am competent to give this Affidavit on the basis of personal, factual knowledge.

2. I am the Chief Executive Officer of Carbon Nano Craft, Ltd. ("CNC"),

and I am fully authorized to make this Affidavit on its behalf as well as my own. At all times, I have owned at least eighty percent of that corporation's shares, and all of the actions that I have taken on its behalf, including my delegation of authority to others, have been with the scope of my authority as its CEO.

3. I authorized all of Darryll Denton's actions relating to matters referenced in AMS's Complaint. I did so either in my personal capacity, or in my capacity as the CEO of CNC, as applicable. More specifically, I authorized all of Denton's actions relating to matters referenced in subsections 7(a) through 7(d) of the Joint Stipulations.

4. Denton enjoys my full trust: with the exception of CNC's promissory note and the corresponding guaranty agreement, all of our dealings, whether personal or corporate, have been on a "handshake basis." Denton has thus always had, both from myself and from CNC, the widest possible authorization to act on our behalf at discretion.

5. The "irreparable injury" claimed by AMS is self-inflicted. The products and services that CNC provides cannot substitute for those that AMS provides. A computer processor chip can have the best heat-dissipating characteristics conceivable, but without electrical pathways, the chip would be no more than an adulterated flake of sand. AMS is only losing customers as a result of its refusal to contract with anyone who deals with CNC.

6. Despite tens of thousands of hours of testing, no chip enhanced with CNC's ACDP nanotubes has ever overheated. This testing has covered every thermal stress that a chip might encounter in the reasonably foreseeable use or misuse of a computer, including massive power surges, sustained overcharging, and overclocking by multiples from 1.1 to 4.0.

7. Despite the strenuous efforts of Alva Andrews to find one, no reproducible method for causing ACDP nanotubes to become heat insulators has ever been published in the peer-reviewed literature of the physical sciences.

Further affiant sayeth not,

/s/ Dr. Cameron Collins

[Properly notarized and dated September 9, 2009]

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Affidavit of Darryll Denton

STATE OF FLORIDA)
)
COUNTY OF HILLSBOROUGH)

BEFORE ME, the undersigned authority, on this day personally appeared Darryll Denton, and after being duly sworn, deposed and stated as follows:

1. My name is Darryll Denton. I am over 21 years of age, am suffering under no legal disability, and am competent to make this Affidavit on the basis of personal, factual knowledge.

2. I am an attorney at law, licensed to practice in both Georgia and Florida. I am also General Counsel for, and Vice President of, Carbon Nano Craft, Ltd.

("CNC"). I am authorized by CNC to make this Affidavit on behalf of it as well as on my own behalf.

3. I have never taken any action on behalf of Dr. Cameron Collins in my personal capacity. I have acted on behalf of Dr. Collins only in my capacity either as attorney for Dr. Collins, as General Counsel for CNC, or as Vice President of CNC, as applicable.

4. I have never taken any action on behalf of CNC in my personal capacity. I have acted on behalf of CNC only in my capacity either as attorney for Dr. Collins, as General Counsel for CNC, or as Vice President of CNC, as applicable.

5. I have never dealt with AMS, or with any actual or potential customer of AMS, in my personal capacity. I have done so only in my capacity either as attorney for Dr. Collins, as General Counsel for CNC, or as Vice President of CNC, as applicable.

6. Whenever I have interacted with anyone in my capacity as attorney for Dr. Collins, as General Counsel for CNC, or as Vice President of CNC, I have timely and clearly identified my principal.

Further affiant sayeth naught.

/s/ Darryll Denton

[Properly notarized and dated September 9, 2009]