



COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Submitted: December 30, 2005
Decided: March 30, 2006

Michael P. Stafford, Esquire
Young Conaway Stargatt & Taylor, LLP
The Brandywine Building
1000 West Street, 17th Floor
Wilmington, DE 19801

Huey-Shen Wu
25 Harris Circle
Newark, DE 19711

RE: *W.L. Gore & Associates, Inc. v. Huey-Shen Wu, et al.*
C.A. No. 263-N

Dear Counsel and Mr. Wu:

In this action for breach of a noncompetition agreement and misappropriation of trade secrets, among other things, the Court has entered a temporary restraining order, a stipulated preliminary injunction and on May 5, 2005, over defendant Huey-Shen Wu's objection, a revised preliminary injunction order (the "Preliminary Injunction"). In a letter opinion entered on November 14, 2005, the Court granted in part Wu's motion for reargument as to the Preliminary Injunction and ordered plaintiff, W.L. Gore & Associates, Inc. ("Gore), to submit a list of the fluoropolymers it believes are covered by paragraph 2 of the Preliminary Injunction, so that the prohibition in paragraph 2 could be limited to those fluoropolymers.

On November 30, 2005, Gore filed two separate lists: the first listed the non-TFE containing fluoropolymers Wu worked on during his employment with Gore and the second list identified the TFE containing polymers on which Wu worked. Gore filed both lists under seal, but served only the first on Wu. Gore filed the second list “for the Court’s eyes only,” claiming it is “highly confidential and proprietary to Gore.”¹ In addition, Gore urged the Court to adopt an interpretation of the Preliminary Injunction that would render the second list unnecessary. In the alternative, Gore requested leave to file the second list under seal and for attorney’s eyes only, thereby precluding Wu from having access to it. Wu objected to both lists and renewed, yet again, certain previously rejected challenges to the scope of the Preliminary Injunction.

This letter opinion contains my rulings on the parties’ latest round of submissions on the Preliminary Injunction.

I. BACKGROUND AND PROCEDURAL HISTORY²

Beginning in 1990, Wu worked as a scientist for Gore, which researches, develops, manufactures and sells polymer products. During Wu’s tenure at Gore he worked on numerous TFE containing polymers and fluoropolymers. In February 2004,

¹ Letter to Court from Martin S. Lessner, Esq., dated November 30, 2005, at 2.

² For more background facts see *W.L. Gore & Assocs., Inc. v. Wu*, 2005 WL 3111998 (Del. Ch. Nov. 14, 2005); Apr. 29, 2005 Tr. of ruling on cross-motions to modify preliminary injunction.

Gore terminated Wu after receiving information that he had breached his noncompetition agreement and misappropriated Gore trade secrets.

Gore commenced this action against Wu on February 18, 2004. The Complaint alleges that Wu, ABC Health International, Inc. (“ABC”),³ Fountain Technology, LLC (“Fountain”), and Fulfill America Inc. (“Fulfill America”) are liable for breach of contract, breach of the duty of loyalty, conversion, tortious interference with contract and business relations, misappropriation of trade secrets, violating the Delaware Deceptive Trade Practices Act, aiding and abetting and civil conspiracy.⁴

On February 19, 2004 I issued a temporary restraining order prohibiting Wu from disclosing any confidential, proprietary or trade secret information he gained as a scientist at Gore and from competing with Gore.⁵ Subsequently, on March 10, 2004 the parties stipulated to a preliminary injunction order in lieu of a preliminary injunction hearing. Beginning several months later and continuing to the present time, Wu has vigorously opposed the scope of the preliminary injunctive orders because he believes they are too broad and prevent him from obtaining employment.

³ Default judgment was entered against ABC on November 11, 2005. Therefore, I accept all factual allegations in the Complaint against ABC as true.

⁴ On May 24, 2005 I ordered default judgment entered against Fountain and Fulfill America for failure to appear. Consequently, I take all factual allegations in the Complaint against Fountain and Fulfill America as true.

⁵ TRO (Feb. 19, 2004).

Wu first moved to amend a preliminary injunction order on September 1, 2004, and then filed a follow up motion for similar relief on April 6, 2005. At that time the parties were operating under a stipulated preliminary injunction order that provided in relevant part that:

Defendants, and all persons acting in concert or participation with them, are hereby restrained and enjoined, until further order of the Court from:

....

(2) engaging in any business activity which is in competition with Gore, including without limitation the research, development, manufacture, and sale of products made from, derived from, or related to fluoro ionomers and flouropolymers⁶

The Court treated Wu's motions to amend as reflecting his intention to retract his prior agreement to the stipulated preliminary injunction order. Because the parties entered into that stipulated order at a time when a settlement appeared likely and circumstances later changed, the Court required Gore, in response to Wu's motions, to prove that it was entitled to a preliminary injunction. Following argument, I granted Gore's request for preliminary relief on May 5, 2005 and entered the Preliminary Injunction, thereby denying Wu's motions to amend. Paragraph 2 of the Preliminary Injunction enjoined Wu from "engaging or participating in any business activity involving the manufacturing, purchasing, selecting, transporting, selling, or research and

⁶ Prelim. Inj. Order (Mar. 12, 2004).

development of TFE containing polymers and other fluoropolymers that Dr. Wu worked on or with during his employment with Gore.”

Dissatisfied with the May 5 ruling, Wu moved to reargue. On November 14, 2005 I issued a letter opinion denying reargument, except with respect to a modification of paragraph 2 of the Preliminary Injunction.⁷ Specifically, I directed Gore to file with the Court a list of TFE containing polymers and other fluoropolymers Wu worked on at Gore and stated:

After reviewing Gore’s list of fluoropolymers, the Court will make that list, subject to any modifications that may be appropriate, Exhibit A to the Revised Preliminary Injunction Order and revise paragraph 2 of the Order [quoted above] to insert the following language at the end of that paragraph: “that are identified in confidential Exhibit A attached hereto.”⁸

As described previously, Gore’s November 30 submission pursuant to that order included two separate lists: one limited to TFE containing fluouropolymers Wu worked on or with while at Gore and the other identifying other fluoropolymers Gore alleges Wu worked on or with while in their employ.

Roughly contemporaneously with my November 14, 2005 ruling the parties entered into a consent judgment and order for permanent injunction and other relief (the “Consent Judgment”). In that document, Wu admitted all factual allegations in the

⁷ *Gore*, 2005 WL 3111998, at *4.

⁸ *Id.*

verified complaint. The parties left open for trial and other proceedings, however, the scope of “injunctive relief, if any, regarding a prohibition on Dr. Wu engaging in or participating in any activity, either alone or in association with any other person or entity, related to polymers he worked on or with while he was employed by Gore and all TFE-containing polymers”⁹ The Court conducted a three day trial on those issues on November 16, 17, and 18, 2005, amassing a 633 page transcript.

As a result of the Consent Judgment Wu has admitted a number of material facts, including fraudulently using Gore intellectual property and other resources in direct competition with Gore, misappropriating Gore trade secrets, violating his non-competition agreement, attempting to delete information relevant to this lawsuit from his computer and that he cannot be trusted.

At trial Gore presented evidence in support of the various forms of relief it seeks based on Wu’s wrongdoing. In terms of the breaches of the non-competition agreement, Gore has urged the Court to enter a final injunction prohibiting Wu from working on or with (1) any polymers Wu worked on or with at Gore for a term as long as ten years, (2) all TFE-polymers for a term as long as five years and (3) protective fabric coatings or membranes for apparel, fuel cell membranes and membrane electrode assemblies

⁹ Consent J. ¶¶ 10, 11.

technologies for a period of ten years.¹⁰ Post-trial briefing is ongoing and the Court is scheduled to hear post-trial argument on May 3, 2006.

The issues currently before the Court relate to the scope of the Preliminary Injunction. For purposes of resolving those issues I have relied to a limited extent on the admissions in the Consent Judgment; unless otherwise indicated, I have not considered the evidence presented at trial.

II. ANALYSIS

A. Interpretation of the Preliminary Injunction

Gore contends that paragraph 2 of the Preliminary Injunction was intended to prohibit Wu from working on any TFE containing polymers (regardless of whether he worked on or with such polymers at Gore), as well as any other fluoropolymers that Wu worked on or with at Gore. Gore misinterprets the Preliminary Injunction. Consistent with my comments at the August 9, 2005 argument¹¹ and in the November 14 letter opinion¹² and the plain language of paragraph 2 of the Preliminary Injunction, I construe the reference in that paragraph to TFE containing polymers to be limited to all such polymers that Wu worked on or with during his employment with Gore. Thus, I hereby direct Gore to file its list of such compounds in the record subject to the confidentiality

¹⁰ See Proposed Final Order for Additional Injunctive Relief as to Defendant Huey-Shen Wu, filed January 27, 2006.

¹¹ Tr. at 30.

¹² *Gore*, 2005 WL 3111998, at *3.

safeguards discussed later. This decision relates only to the Preliminary Injunction, however, and is without prejudice to the parties' respective arguments regarding the appropriate scope of any final injunction.¹³

B. Wu's Due Process Objection

Wu contends that he has a constitutional right to see the list of TFE containing polymers that Gore submitted in camera. Specifically, Wu argues that not allowing him to examine that list violates his procedural due process rights under the Fourteenth Amendment of the United States Constitution. Gore responds that Wu already has received due process. Gore further asserts that it would be irreparably harmed if the Court provided Wu with the list of TFE containing polymers he worked on at Gore, because Wu cannot be trusted to keep the list secret.

Assuming this case implicates the Fourteenth Amendment, Wu already has received adequate process. The Court uses a balancing test to determine which

¹³ Gore argued, in the alternative, that the Consent Judgment and the evidence presented at trial support extending the prohibition of paragraph 2 of the Preliminary Injunction to all "TFE-containing polymers" without qualification. I am not willing to expand the scope of the preliminary relief proceedings so broadly.

The Court has considered Wu's admissions in the Consent Judgment together with the extensive record from the preliminary injunction proceedings, however, in concluding that the Preliminary Injunction, as modified herein, should remain in effect, notwithstanding that it has now been over two years since Gore terminated Wu's employment.

procedures will be required to assure an individual receives due process in a particular context.¹⁴

In *Mathews v. Eldridge*¹⁵ the Supreme Court stated that it considers three factors in determining what process is due: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail.¹⁶

The amount of process required to safeguard an individual's due process rights varies greatly depending on the facts and issues involved in each case. In some cases due process does not require an evidentiary hearing.¹⁷ And even when required, a hearing need not be tantamount to a trial.¹⁸ At other times, however, in addition to notice and the opportunity to be heard, due process also may require further procedural safeguards such

¹⁴ Ronald Rotunda and John Nowak, *Treatise on Constitutional Law Substance and Procedure*, § 17.8 at 110 (2005).

¹⁵ 424 U.S. 319 (1976).

¹⁶ See 424 U.S. at 335.

¹⁷ *In re Application of Waterfront Comm'n*, 160 A.2d 832 (N.J. 1960) (Due process does not always require an administrative agency to hold an evidentiary hearing before it goes about the business it was created to conduct.).

¹⁸ K. Davis, 1982 Supplement to Administrative Law Treatise, *supra*, § 13:0 at 235.

as the opportunity to confront and cross-examine adverse witnesses, oral argument, presentation of evidence, and the right to retain an attorney.¹⁹

In this case Wu seeks to examine a piece of evidence presented by Gore — the list of TFE containing polymers Wu worked on at Gore. Yet, even assuming that due process requires the Court to give Wu access to the list, Wu has been sufficiently afforded that right. In particular, Gore requests only that it be granted leave to file the list of TFE containing polymers under seal and for attorneys' eyes only. Thus, Wu's attorney would have access to the list. The Court recognizes that recently Wu has been proceeding pro se. Nevertheless, he still has the ability to retain an attorney for the limited purpose of evaluating the list and advising him with respect to it generally and in connection with any job opportunity that might develop in the same or a related area.

Furthermore, if Wu has no counsel and obtains an offer of employment involving research, development or manufacture of TFE containing polymers or products made from them, counsel for his prospective employer can contact Gore's outside counsel to assure that Wu's new employment will not run afoul of the Preliminary Injunction. If a problem arises in that context, Gore or Wu can contact the Court and arrange for

¹⁹ *Goldberg v. Kelly*, 397 U.S. 254 (1970) (requiring the above listed safeguards before public assistance payments to a welfare recipient can be discontinued).

additional proceedings, as appropriate. Such a mechanism would enable Wu to obtain a resolution of any dispute regarding the list that adversely impacts his employability by a particular prospective employer.

In addition, I find that the potential harm to Gore from disclosure of the TFE containing polymer list to Wu outweighs the risk of an erroneous deprivation of Wu's rights through use of the procedures currently available to him. Wu will only suffer limited harm from being unable to examine the list himself. Conversely, Gore faces the potential of irreparable harm if I provide a copy of the list to Wu. In particular, I already have held that the list is a valuable trade secret. Moreover, through the Consent Judgment Wu has admitted that Gore has valuable trade secrets and that he cannot be trusted. Indeed, Wu admitted all the allegations in the Complaint including, among other things: breaching his employment agreement, breaching his fiduciary duties to Gore, converting Gore property, tortiously interfering with contract and business relations, misappropriating Gore trade secrets, violating the Delaware Deceptive Trade Practices Act and engaging in a civil conspiracy. Thus, there is a serious risk that Wu would use the information contained in the list against Gore if I gave him access to it. I therefore conclude that Gore is entitled to file the list of TFE containing polymers under seal and on an attorney's-eyes-only basis. In so ruling, I reject Wu's argument that proceeding in that fashion will deprive him of due process.

C. Objections to Specific Entries on Gore's List of Other Fluoropolymers

In Wu's December 5, 2005 letter to the Court, he raised a number of specific objections as to the list of other fluoropolymers that he allegedly worked on at Gore. In particular, Wu raised specific objections to entries 5, 6, 10, 14, and 15. Gore responded to these objections in a letter filed on December 22. In that letter Gore acknowledged as to entry 6 that it did not have any documentation to verify its claim the Wu worked on or with that compound. Therefore, Gore withdrew entry 6 from the list. As to entry 15 Gore admitted that there was an error in the original list, corrected it in their December 22 letter and identified the evidentiary basis for their belief that it was something that Wu worked on. Having considered Wu's response to that correction in his letter of December 30, as well as all of his other objections and the parties subsequent correspondence about them, I conclude that no other modification to the list is necessary beyond the deletion of entry 6.

III. CONCLUSION

For the reasons stated, I hereby direct Gore to submit a revised form of Preliminary Injunction in which paragraph 2 is amended to add at the end: "that are

identified in confidential Exhibit A and confidential, attorneys-eyes-only Exhibit B attached hereto.” Gore also shall modify Exhibit A in accordance with the discussion above.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor