

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 08-cv-00332-RPM

REINER RIEZLER and
SEVERI MED GmbH,

Plaintiffs,

v.

ROBERT H. ALLEN,
SALLY P. STABLER,
ROBERT H. ALLEN, AS TRUSTEE OF THE ROBERT H. ALLEN REVOCABLE TRUST,
and
METABOLITE LABORATORIES, INC.,

Defendants.

ORDER DENYING MOTION BY ROBERT H. ALLEN,
IN HIS CAPACITY AS TRUSTEE OF THE ROBERT H. ALLEN REVOCABLE TRUST,
TO DISMISS ALL CLAIMS ASSERTED AGAINST HIM
IN THE SECOND AMENDED COMPLAINT

The Second Amended Complaint, filed January 12, 2010, alleges the following six claims for relief: (1) correction of inventorship under 35 U.S.C. § 256 with respect to inventorship of U.S. Patent No. 5,563,126 (the '126 Patent); (2) correction of inventorship under 35 U.S.C. § 256, with respect to patents related to the '126 Patent; (3) fraudulent non-disclosure under Colorado law with respect to the filing, prosecution and issuance of the '126 Patent; (4) fraudulent non-disclosure under Colorado law with respect to the filing, prosecution and issuance of patents and applications for patents related the '126 Patent; (5) unjust enrichment under Colorado law with respect to benefits flowing from inventorship and ownership of the '126 Patent, and (6) unjust enrichment under Colorado law with respect to benefits flowing from

inventorship and ownership of the related patents and patent applications. The named Defendants are Robert H. Allen, in his individual capacity; Sally P. Stabler; Robert H. Allen, as Trustee of the Robert H. Allen Revocable Trust, and Metabolite Laboratories, Inc.

On January 26, 2010, Defendant Robert H. Allen, individually and in his capacity as Trustee of the Robert H. Allen Revocable Trust, and Defendant Sally P. Stabler moved to dismiss all claims asserted against them in the Second Amended Complaint.

The Defendants' motion asserts immunity defenses previously asserted by Dr. Allen and Dr. Stabler in response to the First Amended Complaint. Those arguments were rejected by this Court and are now the subject of an appeal to the United States Court of Appeals for the Federal Circuit. The pending appeal divests this court of jurisdiction over Dr. Allen and Dr. Stabler in relation to the issues on appeal. The Plaintiffs acknowledge this procedural status, stating that "as individuals, Robert H. Allen and Sally P. Stabler are not required to answer the Second Amended Complaint until their pending appeal is resolved and the court's jurisdiction over them is revived." (Pls.' resp. br. at 1.)

Dr. Allen, in his capacity as Trustee of the Allen Trust, argues that the immunity defenses previously asserted in his individual capacity apply equally to him in his capacity as Trustee of the Allen Trust. This argument fails. The Allen Trust's status as a shareholder of Metabolite is the factual basis for naming Dr. Allen, in his capacity as Trustee of the Allen Trust, as an additional Defendant. If the Plaintiffs prevail on their claims, they seek to recover profits that Metabolite reaped from its ownership of the disputed patents, including monies paid to Dr. Allen individually or in his capacity as Trustee of the Allen Trust. The facts that would support such a remedy are distinct from the factual bases for the immunity defenses asserted by Dr. Allen in his

individual capacity. The Plaintiffs' alter ego allegations are a sufficient basis for naming Dr. Allen, in his capacity as Trustee of the Allen Trust, as a party to the Plaintiffs' request for a constructive trust remedy.

Accordingly, it is

ORDERED that the motion by Robert H. Allen, in his capacity as trustee of the Robert H. Allen Revocable Trust, to dismiss all claims asserted against him in the Second Amended Complaint is denied.

Because this Court is presently without jurisdiction over the claims asserted against Defendants Sally P. Stabler and Robert H. Allen in his individual capacity, determination of their motion to dismiss must await the conclusion of their pending appeal.

Dated: March 18, 2010

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge