

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**

PART 39

Index Number : 650154/2007
INVESCO INSTITUTIONAL
vs
DEUTSCHE INVESTMENT
Sequence Number : 007
SUMMARY JUDGMENT

INDEX NO. 650154/07
MOTION DATE _____
MOTION SEQ. NO. 007
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/12/11


BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39**

-----x
INVESCO INSTITUTIONAL (N.A.), INC.,

Plaintiff,

-against-

DEUTSCHE INVESTMENT MANAGEMENT
AMERICAS, INC., RANDY G. PAAS,
STEPHEN M. JOHNSON, JAMES F. GUENTHER,
KENNETH R. BOWLING, AUSTIN C. MAYBERRY,
and J. RICHARD ROBBEN,

Defendant.
-----x

BARBARA R. KAPNICK, J.:

Motions sequence numbers 007, 008 and 009 are consolidated for disposition.

This case arises out of a purported scheme by defendant Deutsche Investment Management Americas Inc. ("Deutsche"), a competitor of plaintiff Invesco Institutional (N.A.), Inc. ("Invesco"), to effect a surprise mass defection of senior personnel from Invesco's Worldwide Fixed Income Group ("WFI") located in Louisville, Kentucky and London, England. Plaintiff claims that the alleged scheme was designed to coerce it into transferring its entire institutional fixed income business to Deutsche on terms dictated by Deutsche.

According to plaintiff, Deutsche convinced approximately 20 professionals to resign from Invesco and move to Deutsche,

DECISION/ORDER

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007, 008 and 009

including four senior executives who were Invesco "Global Partners" and were responsible for leading the WFI Group in Kentucky. Defendant Steven M. Johnson ("Johnson"), formerly WFI's Global Chief Investment Officer, was considered the most senior of the group. Defendant James F. Guenther ("Guenther") held the title of Director of Global Research. Defendant Kenneth R. Bowling ("Bowling") was in charge of US Fixed Income. Defendant Randy G. Paas ("Paas") was an Account Manager with overall responsibility for one of three sales regions within WFI. All four former Global Partners (referred to herein as the "GP Defendants") are currently Deutsche Managing Directors and each holds a senior executive position in Deutsche's institutional fixed income business.¹

Plaintiff claims that Deutsche also hired nine investment professionals who simultaneously resigned on March 26, 2007 and began work with Deutsche the following day, including defendant J. Richard Robben ("Robben"), who served as Invesco's Director of Information Technology ("IT") from 1996 through 2002. In 2002, Robben became a Portfolio Manager at Invesco, but continued to be actively involved in IT development by serving as a liaison between the WFI investment management team and the technical development

¹ The GP Defendants are alternatively referred to in the papers submitted as "WFI Global Partners", "Investment Managers" and the "IM Defendants".

group. Upon joining Deutsche in March 2007, Robben became a Portfolio Manager and Vice President of Deutsche Asset Management.

Deutsche hired defendant Austin C. Mayberry ("Mayberry") in May 2007 as Vice President and Head of Institutional Fixed Income Technology. Mayberry previously worked at Invesco as a Senior Applications Developer from January 2004 through March 2007. He had actually resigned from Invesco and joined another company a few weeks prior to the March 26, 2007 resignations.

In the First Amended Complaint, Invesco seeks to recover compensatory and punitive damages, as well as injunctive relief, for:

(i) breach of contract against the GP Defendants ("Count One");

(ii) tortious interference against defendant Deutsche ("Count Two");

(iii) breach of fiduciary duty and other duties against the GP Defendants and defendants Mayberry and Robben ("Count Three");

(iv) aiding and abetting breaches of fiduciary duties against defendant Deutsche ("Count Four");

(v) misappropriation of trade secrets against all defendants ("Count Five"); and

(vi) unfair competition against all defendants ("Count Six").

The GP Defendants have asserted counterclaims against Invesco for:

- (i) breach of contract ("Count I");
- (ii) breach of the implied covenant of good faith and fair dealing ("Count II");
- (iii) intentional infliction of emotional distress ("Count III");
- (iv) fraudulent inducement into signing certain Global Partnership Agreements ("Count IV"); and
- (v) wrongful injunction ("Count V").

In a prior action in the United States District Court for the Western District of Kentucky, Invesco Institutional (N.A.) Inc. v. Stephen M. Johnson, et al., 3:07-CV-175-R, Invesco moved to enjoin the four GP Defendants from joining Deutsche. By Decision dated June 26, 2007, the Hon. Thomas B. Russell, granted the motion to the extent of enjoining the GP Defendants from leaving Invesco for a period of four months from the date they tendered their resignation notice (i.e., March 26, 2007), or until July 27, 2007.²

² The Court made detailed findings concerning several meetings that occurred between the GP Defendants and Deutsche in October and November of 2006 and the contents of e-mail exchanges, in which Deutsche allegedly told the GP Defendants about its interest in filling a "hole" in its institutional fixed income business.

By Decision/Order dated July 27, 2007, the Hon. Helen E. Freedman granted a preliminary injunction in the instant case, in which she

ORDERED that defendant Deutsche will not use any of Invesco's trade secret and/or confidential information for six months until January 27, 2008; and ... further

ORDERED that defendant Deutsche will not solicit or recruit any new Invesco employees that have been specifically identified by the Global Partners; and ... further

ORDERED that Deutsche will honor the prohibitions imposed upon the Global Partners by the United States District Court for the Western District of Kentucky.

By Decision dated September 29, 2009 and Order entered on November 2, 2009, this Court granted a subsequent motion by Invesco for a preliminary injunction relating to the use of Invesco's software system, finding, after a lengthy evidentiary hearing, that:

(a) "plaintiff ha[d] met its burden of showing a likelihood of success on the merits on its claims that: (i) the Q-Tech system, and, specifically, the Alpha Sources and PIT modules, constituted a unique compilation of software tools which, as developed by plaintiff, gave rise to a trade secret which was of value to the competitive companies; and (ii) Deutsche misappropriated that trade secret in the development of the Alpha Workbench and Portfolio Workbench databases"; ...

(b) "plaintiff ha[d] met its burden of showing that it [would] suffer irreparable harm if a preliminary injunction barring defendant from the continued use of its trade secrets [was] not granted"; and

(c) the balance of the equities weighed in Invesco's favor.

The Order of this Court was unanimously affirmed by the Appellate Division, First Department on June 29, 2010 (74 AD3d 696).

The GP Defendants now move, under motion sequence number 007, for an order pursuant to CPLR 3212(e) granting summary judgment in their favor with respect to Counts One, Three and Six of plaintiff's First Amended Complaint.

Plaintiff moves, under motion sequence number 008, for summary judgment dismissing defendants' Counterclaims.

Defendants Deutsche, Mayberry and Robben (the "Deutsche Defendants") move, under motion sequence number 009, for summary judgment dismissing Counts Two, Three, Four and Six of plaintiff's Amended Complaint.³

³ Counsel for the Deutsche Defendants clarified during oral argument that events which occurred after March 26, 2007, which was the date that the employees gave notice to Invesco of

Plaintiff's Claims

Claims against the GP Defendants for breach of contract (Count One) and breach of fiduciary duty (Count Three)

Plaintiff alleges that the GP Defendants breached their fiduciary duties to Invesco, as well as the terms of their January 2001 Global Partnership Agreements ("GPAs"), including: (i) the notice provision, which required them to provide 12 months notice of their intent to resign; (ii) the non-solicitation provision, which prohibited them from soliciting the business relationships they developed or acquired while working for Invesco for a period of six months after the effective date of their terminations; and (iii) the confidentiality provision.

The GP Defendants argue initially that the GPAs are unenforceable because: (a) they were fraudulently induced into signing the documents; specifically, they claim that Edward Mitchell, the managing partner at Invesco responsible for all Global Partners, and George Baumann, Invesco's President, misrepresented that the agreements were "much friendlier" and "less

their intention to leave the Company, (the "lift-out" date) including factual allegations against Mayberry and Robben arising out of their involvement in software development which was the subject of the November 2, 2009 preliminary injunction Order, are not at issue in this motion. Specifically, defendants' counsel argues that this Court should separate the issues as a matter of chronology and grant summary judgment pursuant to CPLR 3212(e) with respect to those portions of plaintiff's claims based on events which occurred prior to March 26, 2007.

onerous" to employees and did not contain provisions that employees found "troubling" in their prior agreements; and (b) Invesco has repeatedly eschewed its own obligations under the contract by removing the GP Defendants from their contractually assigned duties and placing them on administrative leave after they submitted notices of intent to resign in March 2007.⁴

The GP Defendants further argue that there is no basis to find that they breached the GPAs or their fiduciary duties,⁵ because (a) the alleged actions by the GP Defendants were preparations to compete with Invesco once they left the company, which are not actionable; (b) Invesco has advanced no competent evidence that any information disclosed by the GP Defendants was confidential;⁶ (c) the agreements do not prohibit Invesco's employees from negotiating with other prospective employers or from competing with Invesco after their departure (*see, Lazard Debt Recovery GP, LLC v*

⁴ These allegations form the basis of certain counterclaims asserted by the GP Defendants against Invesco, which are the subject of motion sequence number 008.

⁵ Defendants contend that this Court must apply Delaware law in analyzing the tort claims since Invesco is incorporated in Delaware, but further contend that there are no significant differences between New York and Delaware law with respect to a claim for breach of fiduciary duty.

⁶ The GP Defendants contend that the information utilized by Deutsche during the interviewing and business planning process was already in the public domain.

Weinstock, 864 A2d 955 [Del.Ch. 2004]),⁷ and (d) there is no evidence that the GP Defendants conspired to coordinate a mass departure from Invesco to Deutsche.

The GP Defendants contend that Invesco has failed to produce any evidence showing that they exceeded their privilege to prepare to compete following their departure from Invesco. They claim that they merely interviewed with Deutsche and, in some cases, engaged in due diligence concerning the viability of a competing business in the fixed income industry. *Lazard Debt Recovery GP, LLC v Weinstock*, *supra*. See also, *Science Accessories Corp. v Summagraphics Corp.*, 425 A2d 957, 965 (Sup. Ct., Del. 1980), which found that the defendants therein "were free to make reasonable preparations to compete while still employed by [plaintiff, Science Accessories Corp.] SAC and after quitting SAC's employ, to compete with SAC."

Plaintiff, however, argues that the level of their activities went beyond merely preparing to compete, and that the record

⁷ In that case, the former employees were alleged to have plotted their departure from Lazard's Investment Fund "in order to seek what they perceived as a better opportunity elsewhere, and to have executed their departure in a manner that made it difficult for Lazard to continue to run the Fund itself and that therefore gave Lazard an incentive to accede to the suggestion that the Fund be transferred" to the employees' new firm. The Court found "this argument rather astounding." *Lazard Debt Recovery GP, LLC v Weinstock*, *supra* at 965.

contains evidence that the GP Defendants began performing important business activity for Deutsche as early as August 2006, notwithstanding the provision in paragraph 1 of their GPAs that during their employment with Invesco, the GP Defendants were "not allowed, without proper prior approval, to perform any business activities for any person or entity other than the Company [Invesco]..." (emphasis supplied).⁸

⁸ The GPAs also provide, in relevant part, that:

[a]s a Global Partner you have important duties to the Company: the duty to refrain from dealing in your self interest above that of the Company's, the duty to disclose any information that indicates that you may be exposed to a conflict of interest, the duty of loyalty, and the duty to refrain from using the Company's business opportunities for your own benefit. These fiduciary obligations and others arise because of the unique trust and confidence the Company places in you as a Global Partner.

* * *

A. Termination Effective After Expiration of Notice Period

Either You or The Company may terminate the employment relationship at any time during the initial term or any renewal, upon 12 ... months written notice to the other party. Notice of intent to terminate will be considered given upon mailing or actual receipt, whichever occurs first. Whether you or the Company give the notice of termination, your employment will continue for the entire notice period. The effective date of the termination of the employment relationship will be the last day of the notice period.

In addition, plaintiff claims that the GP Defendants violated the GPAs and their fiduciary duties by impermissibly soliciting Invesco employees and clients by, *inter alia*, identifying critical Invesco employees for Deutsche to pursue as part of a mass resignation of employees from Invesco's WFI Group (see, e.g., *Duane Jones Co. v Burke*, 306 NY 172 [1954]). Plaintiff points, in particular, to the deposition testimony of Bart Grenier, a senior executive at Deutsche, in which he admitted that Deutsche obtained the names of "Wave 2" Invesco employees from the Global Partners.

Plaintiff further argues that there are issues of fact as to whether the GP Defendants disclosed confidential proprietary Invesco information to Deutsche.

Plaintiff notes that on September 7, 2006 Bowling sent an e-mail to Munir Dauhajre, who was employed by Deutsche as a fixed income sales executive, in which he stated as follows:

Munir, please pass on that we are very interested in furthering conversations. My colleges [sic.] and I met today on the matter and wanted to pass on some general information, but wanted to keep such information contained to the 'public' domain. We would appreciate the opportunity to have more further detailed discussions face to face. If timing works out, we plan on being in NYC the 18th and 19th (possibly even 21st or 22nd). This is far less information than we discussed [emphasis supplied], but hopefully will be useful for dialog.

Plaintiff further contends that the e-mail also contained information, including Invesco's current areas of growth, which was not publicly available, and that Bowling subsequently provided detailed and highly confidential information to Deutsche in an internal dossier for its "Project Daniel Boone Financial Assumptions." See, *Ashland Mgmt. Inc. v Altair Invs. NA, LLC*, 59 AD3d 97, 104 (1st Dep't 2008), which held that

[v]iewing the evidence in the light most favorable to the party opposing summary judgment (citation omitted), it is for a jury to decide whether the targeted information was confidential or ascertainable through public records. Accordingly, defendants cannot demonstrate that they are entitled to dismissal of the complaint on the ground that they did not, as a matter of law, violate their confidentiality agreements with plaintiff by taking its trade secrets (citation omitted).

Based on the voluminous papers submitted and the lengthy oral argument held on the record on March 1, 2010, this Court finds that there remain triable issues of fact as to whether or not the GP Defendants breached the terms of the GPAs and/or their fiduciary duties, which cannot be decided on this motion.

Accordingly, those portions of the GP Defendants' motion seeking to dismiss Counts One and Three against them are denied.

Count Two - tortious interference against Deutsche

Defendant Deutsche argues that Invesco's claim against it for tortious interference with Invesco's contracts fails because the GP Defendants abided by their contracts and Deutsche did not utilize them to solicit other Invesco employees for Deutsche or to obtain any Invesco confidential information in the course of the interviewing and due diligence process.

Plaintiff, on the other hand, contends that Deutsche induced and participated in the individual defendants' breaches of their contractual and fiduciary duties to Invesco.

This Court has already determined that there are triable issues of fact as to whether or not the GP Defendants breached their duties to Invesco. This branch of defendant Deutsche's motion is, therefore, denied as premature.

Count Three - breach of fiduciary duty against defendants Mayberry and Robben

Defendants Deutsche, Mayberry and Robben argue that the third cause of action should be dismissed against Mayberry and Robben on the grounds that they were non-contractual, at-will employees who were not subject to any restrictive covenants upon the termination of their Invesco employment. Defendants contend that plaintiff has failed to allege any additional facts to show that Mayberry and Robben had a fiduciary relationship with Invesco and/or engaged in

any pre-resignation disloyalty to Invesco.⁹ See, *AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 11 NY3d 146, 158 (2008) which held that

"[a] fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation'" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 ... [2005], quoting Restatement [Second] of Torts § 874, Comment a). Determining whether a fiduciary relationship exists necessarily involves a fact-specific inquiry (see *id.*). "[E]ssential elements of a fiduciary relation are ... 'reliance, ... de facto control and dominance.'" (citation omitted). Stated differently, "[a] fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other" (citation omitted).

Plaintiff concedes that neither Mayberry nor Robben was a corporate officer, director or partner, but argues that they nonetheless owed fiduciary duties to Invesco based on their access to a plethora of proprietary, confidential and trade secrets information.

However, plaintiff has failed to allege any facts showing such "superiority and influence" and/or to set forth any other basis to support a finding that a fiduciary relationship existed between Invesco and Mayberry and Robben.

⁹ Mr. Mayberry claims that he was not even working at Invesco at the time he first discussed potential employment with Deutsche.

Accordingly, that portion of the motion seeking to dismiss Count Three against defendants Mayberry and Robben is granted.

Count Four - aiding and abetting breaches of fiduciary duties against defendant Deutsche

Defendant Deutsche argues that this claim must be dismissed because there is no evidence in the record through which plaintiff can establish that the GP Defendants breached a duty they owed to Invesco by interviewing with Deutsche and engaging in a due diligence process.

This branch of the motion is denied for the reasons discussed above.

Count Six - unfair competition against all defendants

Defendants argue that this claim does not present any triable issues of material fact because Deutsche was always free to compete with Invesco and that the individual defendants did not engage in any pre-departure acts of disloyalty.

Plaintiff argues that there are issues of fact as to whether or not Deutsche engaged in unfair competition which are demonstrated by the facts underlying the granting of the preliminary injunction.

For the reasons stated above and in this Court's prior decision of September 29, 2009, this branch of the motion is denied as premature.

GP Defendants' Counterclaims

Count I - breach of contract

Plaintiff argues that this counterclaim must be dismissed on the ground that the GP Defendants have suffered no damages as a result of Invesco's conduct, since the GP Defendants were well compensated for their work at Invesco prior to their resignation.

Invesco contends that Paas' termination with cause on March 27, 2007 put him in a better position because he immediately became eligible to receive bonuses and higher compensation from Deutsche. Invesco further contends that Johnson, Guenther and Bowling similarly suffered no damages because they continued to receive their salaries and bonuses from Invesco, remained eligible for bonuses, stock options and restricted stock awards throughout the notice period, and received significant signing bonuses from Deutsche.

Invesco further argues that the GP Defendants breached the agreements prior to any alleged breach by Invesco.

The GP Defendants, however, deny that they breached any provision of the GPAs, contending that Paas was wrongfully terminated, and that Johnson, Bowling and Guenther were damaged by the decision to remove them from the worksite prior to the end of the year since the majority of their compensation was in the form a year-end bonus which they did not receive. They also dispute that they breached any provision of the GPAs.

This Court finds that the amount of damages, if any, sustained by the GP Defendants cannot be determined on this record, and is rather an issue of fact to be determined at trial. Accordingly, this branch of plaintiff's motion for summary judgment is denied as premature.

Count II - breach of the implied covenant of good faith and fair dealing

Plaintiff argues that this counterclaim must also be dismissed because the GP Defendants have failed to prove damages (for the same reasons argued in connection with the Counterclaim for breach of contract) or to demonstrate the existence of a 'special relationship', as is required under the law of Kentucky.¹⁰ See,

¹⁰ Plaintiff contends that this Court must apply Kentucky law, since the GPAs contain a Kentucky choice of law provision. The GP Defendants contend that this Court should nonetheless apply New York law, because plaintiff has not honored the Kentucky forum selection clause of the contracts. This Court declines to find that the commencement of this action in New York

Ennes v H&R Block Eastern Tax Services, Inc., 2002 WL 226345 at *2 (W.D. Ky. 2002), in which the Court held that “[o]nly in contracts involving ‘special relationships’ not found in ordinary commercial settings do courts find a tort duty of good faith.”

The GP Defendants have failed to establish the existence of such a “special relationship”. Accordingly, that portion of plaintiff’s motion seeking to dismiss the second counterclaim is granted.

Count III - intentional infliction of emotional distress

Plaintiff argues that this counterclaim must be dismissed because: (a) the GP Defendants have failed to prove that Invesco’s conduct intentionally or recklessly caused them to suffer severe emotional distress (see, *Cromer v Montgomery*, 2009 WL 484999 [Ky. App. 2009]); (b) Invesco’s decision to place Johnson, Guenther and Bowling on paid temporary administrative leave, to terminate Paas’ employment and to sue the GP Defendants for their role in the “lift-out” fails to satisfy the standard for outrageous and intolerable conduct under Kentucky law (see, cf., *Brewer v Hillard*, 15 SW3d 1 [Ky. App. 1999]); and (c) the GP Defendants have failed

constitutes a repudiation of the choice of law provision agreed to by the parties and, therefore, shall apply Kentucky law in analyzing the counterclaims.

to prove that they suffered severe emotional distress as a result of Invesco's conduct.

The GP Defendants, on the other hand, contend that there is ample evidence that plaintiff acted intentionally and outrageously in the manner in which it terminated their employment, thus causing them to suffer severe emotional distress.

However, "the right to recover for the intentional infliction of emotional distress is a rather extraordinary one and must spring from conduct which is so extreme as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." *Hayes v Bakery Confectionary & Tobacco Workers Internat'l Union of America, Local 213 of Cincinnati, Ohio*, 753 F.Supp. 209, 215 (W.D. Ky. 1989).

This Court finds that the alleged conduct does not rise to this level. Accordingly, that portion of the motion seeking to dismiss the third counterclaim for intentional infliction of emotional distress is granted.

Likewise, this Court finds that the GP Defendants have failed to allege a basis for the imposition of punitive damages.

Count IV - fraudulent inducement

Plaintiff argues that the GP Defendants' counterclaim for fraudulent inducement must be dismissed because: (a) the GP Defendants have failed to prove that they were injured as a result of their purported reliance on Baumann and Mitchell's alleged statements, including Mitchell's representation that the new GPAs were a "much friendlier document" and a "vast improvement over the old one"; (b) vaguely stated beliefs by Baumann and Mitchell do not constitute material misrepresentations (*see, e.g., Papa John's Intern., Inc. v Dynamic Pizza, Inc.*, 317 FSupp 2d 740 [W.D. Ky. 2004]); and (c) the GP Defendants, who are sophisticated businessmen, have failed to prove that they reasonably relied upon Mitchell's statements of opinions (or "puffery") in executing the GPAs (*see, Flegles, Inc. v Truserv Corp.*, 289 SW3d 544 [Sup. Ct., Ky. 2009]).

The GP Defendants argue that in his letter encouraging them to execute the new GPAs, Mitchell not only expressed his opinion that they were "friendlier" but also misrepresented that they were "less onerous" and addressed the concerns raised about "troubling" provisions in the prior contract, which defendants contend relate to the non-compete provision. While there is no non-compete provision in the GPAs, the GP Defendants argue that no amount of business acumen on their parts could have led them to predict that

Invesco would use the notice provision as a disguised non-compete so as to remove them from the workforce for an entire year after they had stated their intention to resign.

The Court finds that whether or not Baumann and Mitchell made material misrepresentations on which the GP Defendants reasonably relied in entering into the agreements presents a triable issue of fact. Accordingly, this branch of the plaintiff's motion is denied.

Count V - wrongful injunction

This counterclaim is based on the GP Defendants' contention that Invesco wrongfully secured injunctive relief in the Kentucky federal action, as it was obtained without the posting of any bond or undertaking and violated the federal Norris-LaGuardia Act, 29 U.S.C. 101 et seq. Defendants also contend it was wrongfully secured because none of the defendants breached any contractual or common law duty to Invesco.

While defendants put forth other claims in their Memorandum of Law (i.e., that Invesco "used a series of injunction motions across different court systems to harass the [GP] Defendants and terrorize other employees considering alternative employment *before* any actual merits determinations could be made"), these allegations are not contained in the Answers and Counterclaims.

Moreover, the GP Defendants never appealed the Kentucky Order granting injunctive relief and the case was eventually dismissed for lack of subject matter jurisdiction.

Thus, there is no basis upon which this Court or a jury could determine that the granting of the injunction in Kentucky was wrongful. Accordingly, the fifth counterclaim must be dismissed.

This constitutes the decision and order of this Court.

Dated: April 12, 2011



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.