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

iGAMES ENTERTAINMENT, INC., et al.	**:**	**CIVIL ACTION**
Plaintiffs	**:**	
	:	
v.	**:**	**No. 04-CV-4179**
	:	
HELENE REGAN, et al.	**:**	
Defendants	**:**	

O P I N I O N

STENGEL, J. **November 9, 2004**

In this stock purchase agreement action, Plaintiffs filed a motion to strike the removal of this case and to remand the case to the state courts. Defendants filed a motion to transfer venue of this case to the United States District Court for the District of Delaware. For the reasons discussed in this opinion, I will deny Plaintiffs' motion and grant Defendants' motion.

BACKGROUND

This case concerns disputes over a stock purchase agreement ("Agreement") in which Plaintiff iGames Entertainment, Inc. agreed to purchase all of the outstanding stock of Plaintiff Available Money, Inc., from Helene Regen and Samuel Freshman for $6 million. In connection with the Agreement, Plaintiffs and the above sellers of the stock entered into a Covenant Not to Compete. Howard Regen ("Defendant"), husband of Helene Regen, also signed the Covenant Not to Compete.

On July 14, 2004, Mrs. Regen and Mr. Freshman filed suit against Plaintiffs in the United States District Court for the District of Delaware, alleging that Plaintiffs withheld more than $2 million in payments. (Helene Regen, et al. v. iGames Entertainment, Inc., et al., Civil Action No. 04-CV-0869). That action was brought in Delaware pursuant to a forum selection clause in the

Agreement, which provides:

> Submission to jurisdiction. **Each party submits to the jurisdiction of any state or federal court sitting in the State of Delaware, New Castle County in any action or Proceeding arising out of or related to this Agreement**; agrees that all claims in respect of the action or Proceeding may be heard and determined in any such court; **and agrees not to bring any action or Proceeding arising out of or relating to this Agreement in any other court. Each party waives any defense of inconvenient forum to the maintenance of any action or Proceeding so brought** and waives any bond, surety or other security that might be required of any other Party with respect thereto. Each party agrees that a final judgment in any action or Proceeding so brought shall be conclusive and may be enforced by suit on the judgment or in any other manner provided by law. The Parties agree that any or all of them may file a copy of this paragraph with any court as written evidence of **the knowing voluntary and bargained agreement between the Parties irrevocably to waive any objections to venue or to convenience of forum.** Process in any Proceeding referred to in the first sentence of this section may be served on any party anywhere in the world.

(Agreement at 43-44)(emphasis added). Similarly, the Covenant Not to Compete provides:

> Any action, suit or proceeding arising out of, based on, or in connection with this Covenant Not to Compete . . . may be brought only in the state courts of Delaware, **or in the United States District Court for the District of Delaware**.

(Agreement at 49)(emphasis added).

Plaintiffs, who are the defendants in the Delaware case, initially moved to dismiss or transfer the Delaware case to this court, but withdrew their motion in a letter filed on August 26, 2004, acknowledging that the Agreement "provides for exclusive jurisdiction and venue in Delaware."

Notwithstanding these clauses in the Agreement, Plaintiffs filed a Writ of Summons in the Court of Common Pleas of the County of Philadelphia on July 28, 2004 against Mr. Freshman, Mrs. Regen, and Defendant.[1] Plaintiffs served Defendant with pre-complaint

[1]On October 6, 2004, Plaintiffs filed a voluntary dismissal of all claims against Mrs. Regen and Mr. Freshman (without prejudice). Howard Regen remains in the instant case as the sole defendant.

discovery in the form of a notice of deposition and document requests related to Defendant's activities in conjunction with Coast ATM, a company Plaintiffs believed to have been recently formed by Defendant to compete with Plaintiffs in violation of the Covenant Not to Compete. Defendant removed the case from the Court of Common Pleas to this court on September 2, 2004.

Defendant now moves the court to transfer the case to the District of Delaware as required by the forum selection clauses in the Agreement and Covenant Not to Compete, so that all disputes among the parties can be litigated in a single, convenient forum. Defendant also contends that the "first-filed rule" also requires transfer to the District of Delaware, where this case can be consolidated with the case brought by Mrs. Regen and Mr. Freshman.

In response, Plaintiffs filed a motion to strike Defendant's removal as premature, a motion to remand to the state courts, and a motion for attorney's fees and costs. Plaintiffs contend that Defendant cannot meet his strict burden of establishing an amount in controversy of $75,000 or more. Therefore, Plaintiffs argue, the court does not have jurisdiction over the case and cannot transfer venue.

DISCUSSION

Plaintiff's Motion to Strike Removal, to Remand, and for Attorney's Fees and Costs

A matter originally filed in state court is removable only if the matter could have originally been brought in federal court. *See* 28 U.S.C. § 1441(a). When a defendant improperly removes an action, the plaintiff may move to remand it to the state court in which the matter was originally filed. *See* 28 U.S.C. § 1447(c). The district court must remand the action if at any time before final judgment it appears that it lacks jurisdiction. Id.

Defendant, as the removing party, bears the burden of demonstrating to a legal certainty the existence of federal diversity jurisdiction and the propriety of removal. *See* Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990). If there is any doubt as to the propriety of removal, that case should not be removed to federal court. Brown v. Francis, 75 F.3d 860, 865 (3d Cir. 1996)(citing Boyer v. Snap-On Tools Corp., 913 F.2d at 111). *See* Meritcare v. St. Paul Mercury Ins. Co., 166 F.3d 214, 217 (3d Cir. 1999)(Jurisdiction under 28 U.S.C. § 1332(a) rests upon not only diversity of citizenship but also in meeting the requisite amount in controversy; those constraints carry over to § 1441, which is to be strictly construed against removal, so that the congressional intent to restrict federal diversity litigation is honored). These principles recognize that "lack of jurisdiction would make any decree in the case void and the continuation of the litigation in federal court futile." Licursi v. Jamison Plastic Corp., No. 98-5262 (E.D. Pa.. Nov. 20, 1998) (Buckwalter, J.)(quoting Brown, 75 F.3d at 864-865).

Here, in objecting to the removal of the case to this court, Plaintiffs argue that Defendant's removal was premature because Defendant cannot meet the strict requirement of an amount in controversy of $75,000 or more. As support, Plaintiffs cite the Writ of Summons and Civil Cover Sheet[2] filed in this case which indicate that the amount in controversy is more than $50,000, but makes no other reference to a more specific amount. Plaintiffs insist that for removal to be proper, the original pleadings must clearly establish the existence of an amount in controversy of $75,000 or higher.

However, the court's determination of whether removal was proper is not confined to the

[2]The Writ of Summons and Civil Cover Sheet filed in the Court of Common Pleas require a plaintiff to check-off one of two choices for an amount in controversy: one for less than $50,000 or one for more than $50,000.

initial pleadings. To the contrary, according to the removal procedure set forth in 28 U.S.C. § 1446(b):

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order **or other paper from which it may first be ascertained that the case is one which is or has become removable**, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1446(b) (emphasis added).

This removal procedure provides two scenarios. The first paragraph describes the situation where a case's initial pleadings set forth claims that are clearly removable. The second paragraph, which is germane here, allows for the possibility that a case's removeability can be realized after an examination of other case-related documents. Here, Defendant insists that his removal was proper and supported by "other papers" pursuant to the second paragraph of § 1446(b). I agree.

In Cabibbo v. Einstein/Noah Bagel Partners, L.P., 181 F. Supp. 2d 428 (E.D. Pa. 2002), Judge Pollak wrote that while there was no governing authority in this circuit establishing whether certain materials were "other papers" for the purposes of the second paragraph of § 1446(b), there were two characteristics which have been significant to courts in making that determination. Id. at 431. Those characteristics are that the item in question was in writing and

that it was not typically filed with the court concurrently with being sent to opposing counsel. Judge Pollak surveyed cases where judges considered a variety of documents, and found that they constituted "other papers" under § 1446(b). Id. at 432. These documents include: attorney correspondence (Broderick v. Dellasandro, 859 F.Supp. 176, 179 (E.D. Pa. 1994)); a statement of damages (Vartanian v. Terzian, 960 F.Supp. 58, 62 (D.N.J. 1997)); deposition transcripts (S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 494 (5th Cir. 1996)); answers to interrogatories (Leboeuf v. Texaco, 9 F.Supp. 2d 661, 665 (E.D. La. 1998)); and responses to requests for admissions (Johnson v. Dillard Dept. Stores, Inc., 836 F.Supp. 390, 391 (N.D. Tex. 1993). In another case, a settlement demand letter qualified as "other paper." White v. Gould, 1992 U.S. Dist. LEXIS 289 (E.D. Pa. Jan. 9, 1992).

A careful review of the record in this case, including the initial pleading and other papers as contemplated under § 1446(b), reveals that the amount in controversy satisfies the requirement for federal diversity jurisdiction. For example, before the removal of the case, Plaintiffs requested pre-complaint discovery of Defendant in the form of document requests and a notice of deposition. Attached to this request was a press release referencing the $2 million fraud and breach of contract claims alleged in the Delaware case. The Civil Cover Sheet filed in state court indicates that Plaintiffs are suing Defendants for breach of contract and business tort, and are also seeking declaratory relief. These documents created a sufficient nexus between this case and the Delaware action, and put Defendants on notice that Plaintiffs' claims against them arise from the $6 million Agreement and Covenant Not to Compete. Thus, the documents associated with the Delaware case can be construed as "other papers" for purposes of removal. *See* Hamilton v. Hayes Freight Lines, Inc., 102 F.Supp 594, 596 (E.D. Ky. 1952)(a document filed in a collateral

proceeding fulfills the requirement of the removal statute as to a pleading or other paper "from which it may first be ascertained that the case is one which is or has become removable").

For example, in a letter dated May 18, 2004, Plaintiffs' counsel indicated that Defendant "is the individual primarily responsible for effecting the contract renewals the absence of which forms the basis for the withholding." In their motion to dismiss the Delaware case, Plaintiffs assert that they are entitled to a $150,000 holdback under the Agreement relating to the loss of those contract renewals.

Moreover, in correspondence dated June 30, 2004, Plaintiffs' counsel informed Mrs. Regen and Mr. Freshman that Plaintiffs were demanding reimbursement of $10,000 per month beginning in January 2004 as a result of "unauthorized actions of Howard Regen." At the time of removal, that reimbursement would have reached at least $80,000. In addition, counsel informed them that there was a likelihood that they had been overpaid and would need to make a repayment, and that they currently owed over $75,000 in expenses.

Plaintiffs argue that because they voluntarily dismissed all claims against Mrs. Regen and Mr. Freshman, the instant case has no connection with the Agreement, to which Defendant was not a party. However, Plaintiffs must live with the record as of the time of removal. Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 391 (1998)(holding that a later event does not destroy previously existing federal jurisdiction of a removed case). Here, at the time of removal, the Writ of Summons and Civil Cover Sheet clearly indicate that Plaintiffs were suing Defendant, Mrs. Regen, and Mr. Freshman for breach of contract and business tort. The contract in dispute was the Agreement along with the Covenant Not to Compete.

Therefore, I find that the record sufficiently demonstrated the existence of federal

jurisdiction based on the diversity of citizenship of the parties and an amount in controversy at or exceeding $75,000 pursuant to 28 U.S.C. § 1332(a)(1). I further find that Defendant properly removed this case from the Court of Common Pleas as was his right under 28 U.S.C. § 1441(a).

Plaintiffs request the court to award them attorney's fees and costs incurred in responding to Defendant's notice of removal pursuant to 28 U.S.C. § 1447(c). Section 1447(c) provides that "an order remanding the case may require payment of just costs and actual expenses, including attorney fees, incurred as a result of the removal." Because I have decided that Defendant's removal was proper, the issue of remanding the case to the state courts is moot. Thus, no attorney's fees or costs are required.

Defendant's Motion to Transfer Venue to the District of Delaware

Under 28 U.S.C. § 1404(a), a district court may transfer a civil case to another district where it might have been brought "for the convenience of parties and witnesses, in the interest of justice." Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an "individualized, case-by-case consideration of convenience and fairness." Stewart Org. Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988).

The United States Supreme Court has stated that the "presence of a forum-selection clause . . . will be a significant factor that figures centrally in the district court's calculus." Id. at 30. A forum selection clause is accorded "substantial consideration" and overcomes the court's usual deference to the plaintiff's choice of forum. Jumara, et al. v. State Farm Ins. Co., 55 F.3d 873, 880 (3d Cir. 1995). The significant weight accorded a forum selection clause reflects the fact that "a forum selection clause is . . . a manifestation of the parties' preferences as to a convenient forum." Id.

A forum selection clause is presumptively valid and will be enforced by the forum unless the party objecting to its enforcement establishes that: 1) it is the result of fraud or overreaching; 2) enforcement would violate a strong public policy of the forum; or 3) enforcement would in the particular circumstances of the case result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable. Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 202 (3d Cir. 1983). If the forum selection clause is valid, "plaintiffs bear the burden of demonstrating why they should not be bound by their contractual choice of forum." Jumara, et al. v. State Farm Ins. Co., 55 F.3d at 879.

Here, Plaintiffs have not attempted to rebut the validity of the forum selection clauses. Their only argument is that because Defendant's removal was improper, this court has no jurisdiction to rule on a motion to transfer venue. However, all of the parties have agreed to litigate their disputes concerning the Agreement and the Covenant Not to Compete in a Delaware forum. Plaintiffs acknowledged in their August 26, 2004 letter filed in the Delaware case that the forum selection clauses were valid. The Delaware forum would not be inconvenient to Plaintiffs, who maintain their principal places of business in King of Prussia, Pennsylvania. Also pursuant to the forum selection clauses, Plaintiffs have expressly waived any defense of inconvenient forum to the maintenance of any action brought in Delaware. Moreover, the District of Delaware would be equally convenient for witnesses, given the geographic proximity between Philadelphia, Pennsylvania and Wilmington, Delaware. Therefore, because Plaintiffs have not demonstrated why they should not be bound, I find that the forum selection clauses in the Agreement and the Covenant Not to Compete are valid and should be enforced.

An appropriate order follows.

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O R D E R

STENGEL, J.

AND NOW, this 9th day of November, 2004, upon consideration of Defendant's Motion to Transfer Venue (Document No. 3), and Plaintiffs' Motion to Strike Removal as Premature, to Remand to the State Courts, and for Attorney's Fees and Costs (Document No. 5), and all related

submissions,

IT IS HEREBY ORDERED that Defendant's Motion is **GRANTED** and Plaintiffs' motion is **DENIED**. This case is transferred to the United States District Court for the District of Delaware. The Clerk of Court shall marked this case closed for statistical purposes.

BY THE COURT:

/s/ Lawrence F. Stengel

LAWRENCE F. STENGEL, J.