IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

E.A. RENFROE & CO., INC.	§	
	§	
Plaintiff,	§	**No. 2:06-cv-1752-WMA**
	§	
v.	§	
CORI RIGSBY and KERRI RIGSBY,	§	
	§	
Defendants.	§	

DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR BREACH OF CONTRACT

COME NOW defendants Cori Rigsby and Kerri Rigsby ("Rigsbys" or "Defendants"), by and through their undersigned counsel, and submit the following supplemental brief in support of their Motion for Summary Judgment on Plaintiff's Claim for Breach of Contract:

INTRODUCTION

On December 3, 2007, Defendants filed their Motion for Summary Judgment on Plaintiff's Claim for Breach of Contract, along with their brief in support of this Motion. Subsequently, additional depositions were taken and the Court ordered that the parties could supplement their summary judgment briefs by June 23, 2008. Defendants incorporate their initial

Motion, along with their Brief in Support of this Motion, as if fully stated herein. Additionally, Defendants show as follows:

NARRATIVE SUMMARY OF ADDITIONAL UNDISPUTED FACTS

1. The Renfroe employment agreement at issue as it relates to Cori Rigsby and Kerri Rigsby states that "[e]mployee will be employed by RENFROE from the time he is checked in at the assignment location until the time he is checked out at the assignment location." (See, e.g., Exh. 2 to Cantrell Depo., Cori Moran's employment agreement with Renfroe dated November 18, 2004, attached hereto as Exh. "A")[1]

2. The Renfroe check-in form provides that "Employment does not begin until this form is completed and returned to the Home Office." (See, e.g., Exh. 3 to Cantrell Depo., Cori Moran's check-in form for Katrina disaster, attached hereto as Exh. "B")

3. Renfroe employees who have signed an employment agreement with Renfroe can work for other companies when not on an assignment for Renfroe. (Jana Renfroe Depo. at 161:15 – 162:9, relevant excerpts from which are attached hereto as Exh. "C")

[1] The Rigsbys maintain, and do not waive, their contention that the employment agreements they signed in 2004 apply to their employment with Renfroe as adjusters on the Katrina disaster.

4. In fact, Renfroe employees do not receive benefits unless they have "checked in" to work on an assignment, and Renfroe is aware that Renfroe employees not working on an assignment seek unemployment benefits. (Jana Renfroe Depo. at 159:4-159:20; Gene Renfroe Depo. at 144:5 – 146:13, relevant excerpts from which are attached hereto as Exh. "D")

5. Cori Rigsby's check out form related to the Katrina disaster states that she checked out on June 20, 2006. (See Exhibit 5 to Mr. Cantrell's Depo. attached hereto as Exh. "E"; see also Exh. 12 to Mr. Cantrell's Depo., attached hereto as Exh. "F")

6. Kerri Rigsby's check out form related to the Katrina disaster states that she checked out on June 27, 2006. (See Exh. 6 to Mr. Cantrell's Depo., attached hereto as Exh. "G"; see also Exh. "F")

7. Gene Renfroe acknowledged that on June 23, 2006 both Cori and Kerri Rigsby had resigned from the Katrina project. (Gene Renfroe Depo. at 189:5 – 190:9)

8. Neither Cori nor Kerri Rigsby performed any additional services as Renfroe employees after June 23, 2006. (See Gene Renfroe Depo. at 190:6 – 190:9)

SUPPLEMENTAL ARGUMENT

V. Even Assuming It Can Prove A Breach of Contract, Renfroe Cannot Establish Any Damage for its Breach of Contract Claim.

A. Plaintiff's Claim for Injunctive Relief Should be Dismissed Because The Employment Agreement at Issue Provides that Any Confidentiality that May Attach to the Claims-Related Documents Expires Two Years from the Date of Termination of The Rigsbys Employment.

Plaintiff contends that the Rigsbys breached a provision in their employment agreements that provide that they must maintain the confidentiality of certain information for a period of two years after employment. (See Exh. "A" at 2, ¶ 6(a)) The employment agreement unambiguously states that "employees will be employed by RENFROE . . . until the time he is checked out at the assignment location." (Id. at 2(a)) Assuming for the sake of argument that the employment agreements are enforceable, Cori Rigsby's employment ended on June 20, 2006 when she checked out of the Katrina assignment. (See Exhs. "E" and "F") Kerri Rigsby's employment ended on June 27, 2006 when she checked out of the Katrina assignment. (See Exhs. "F" and "G") Thus, any injunctive relief sought under this provision expired on June 20, 2006 against Kerri Rigsby

and will expire on June 27, 2006, against Cori Rigsby.[2] Consequently, Renfroe's claim for injunctive relief should be dismissed.

B. Plaintiff Cannot Recover "Restitution" Damages for Breach of Contract Because It Would Place Renfroe In a Better Position Than IT Would Have Been If A Breach Had Not Occurred .

Renfroe admits it is not seeking breach of contract damages based on any economic damages caused by the alleged breach of contract by Defendants. (Dkt. #302 at page 5; see also First Supplement to Plaintiff's Initial Disclosures, Dkt. #302-3). Renfroe argues that it can recover "restitution" damages under its claim for breach of contract. As an initial matter, Renfroe's supplemented initial disclosure attached as an exhibit to Renfroe's response brief appears to indicate that Renfroe is seeking restitution related to its trade secrets claim, but not its breach of contract claim. (*See* Dkt. #302-3 at ¶3(a)).

Even assuming Renfroe has made a claim for restitution damages for breach of contract, there is no legal support in Alabama that such damages in the form sought by Renfroe are recoverable for breach of contract.

[2] To the extent that Renfroe contends that the Rigsbys' took documents which contain trade secrets, such documents are not trade secrets as discussed in the Rigsbys' Motion for Summary Judgment, Brief in Support of Motion for Summary Judgment, and Supplemental Brief in Support of Motion for Summary Judgment. Thus, any such documents are subject to the two-year limitation found in the employment agreement in ¶ 6(a).

Defendants addressed this issue recently in their *Response to Renfroe's Motion to Compel Discovery Responses.* (Dkt. #309). As argued by Defendants in that response, under Alabama law, for a claim of breach of contract, the

> damages should return the injured party to the position he would have been in had the contract been fully performed. . . . However, the injured party is not to be put in a better position by a recovery of damages for the breach than he would have been in if there had been performance.

Garrett v. Sun Plaza Devel. Co., 580 So. 2d 1317, 1320 (Ala. 1991) (emphasis added); see also, Clark v. Liberty Nat'l Life Ins. Co., 592 So. 2d 564, 567 (Ala. 1992). Further, the Eleventh Circuit has recognized that "disgorgement of profits earned is not a remedy for breach of contract." Burger King Corp. v. Mason, 710 F. 2d 1480, 1494 (11th Cir. 1983). In particular, allowing Renfroe to recover restitution damages would put Renfroe in a better position than had Defendants not breached the contract in the first place, a result contrary to Alabama law.

In its response to Defendants' Motion for Summary Judgment for Lack of Subject Matter Jurisdiction, Renfroe cited *one* Alabama *trial court case* as support for its argument that restitution benefits *may be* available under Alabama law for breach of contract. (Dkt. # 302 at page 5, citing Snow v. Compass Bancshares, Inc., 2000 WL 33598653 (*rev'd* 823 So. 2d

667 (Ala. 2001)). Snow was a class-action brought by bank customers of Compass Bank who incurred certain charges regarding insufficient funds in their bank accounts. Snow, 2000 WL 33598653 at *1. However, the portion of Snow discussing whether the defendant in that case should be required to disgorge benefits it obtained involved a discussion of the "common questions of law and fact" that were common to the class. Id. at *3. The trial court noted that one of the six common questions of law and fact was: "whether, as a result of Defendant's conduct, Defendant should be required to disgorge the benefits it obtained." Id. at *3. The trial court did not discuss the issue of disgorgement (or restitution), nor did the trial court discuss whether the "disgorgement" of the benefits related to the claims for breach of contract, fraudulent suppression, or conversion. Id. at *3. Moreover, the trial court cited no law from Alabama or any other jurisdiction concerning the issue of restitution being an available recoverable damage for breach of contract. Id. Thus, Renfroe's reliance on Snow for support that it can seek restitution damages for its breach of contract claim is misplaced.

Renfroe also contended in that response brief that a Texas decision, Quigley v. Bennett, 227 S.W.3d 51, 56 (Tex. 2007), supports its position that restitution damages are available for a breach of contract claim. Putting aside that the case was decided under Texas law, not Alabama law, Quigley

did not even involve a breach of contract claim. Rather, it involved claims for fraud, unjust enrichment and conversion. 227 S.W.2d at 53. Further, the portion of Quigley cited by Renfroe was not the majority holding but rather a concurring (in part)/dissenting (in part) opinion. Id. at 55-56.[3]

Finally, in that response, Renfroe relied on a Connecticut decision, David M. Somers & Assoc., P.C. v. Busch, 927 A.2d 832 (Conn. 2007), for its argument that restitution damages are available for a breach of contract action. (Dkt. # 302 at page 5). However, the Court in Somers specifically held that restitution-based damages in that case were not available for breach of contract, but rather were a damage available under a quasi-contract/unjust enrichment/quantum meruit theory. 927 A.2d at 841. Thus Somers stands for the proposition that restitution based damages are available under a quasi-contract theory to a breaching party, but in no way supports Renfroe's position that restitution damages are available for under a traditional breach of a written contract, which is the situation in our case.

[3] While the concurring/dissenting opinion generally discussed that "American law has traditionally recognized three damage measures for breach of contract" (citing Restatement (Second) of Contracts §344), it cited another Texas *quantum meruit* case for support that restitution damages are available for *quantum meruit* (as opposed to breach of contract) actions. 227 S.W.2d at 56, citing Murray v. Crest Constr., Inc., 900 S.W.2d 342, 345 (Tex. 1995) (nothing that quantum meruit recovery provides "amount of benefits conferred" on defendant)).

In Renfroe's Reply to Defendants' Response to Motion to Compel Discovery Responses (Dkt. # 331), Renfroe cited three additional cases from Alabama which they contend support its argument that it could somehow claim as recoverable damages in this case the consulting fees paid to Defendants by Mr. Scruggs and the attorneys' fees paid to counsel for Defendants. (Dkt. #331 at pp. 6-7). However, the cases cited by Renfroe do not support its claim in this case because each of those cases merely refunded money paid by the Plaintiff as opposed to placing the plaintiff in a better position that the plaintiff would have been had the defendant not breached the contract.

Campbell v. Campbell, 371 So. 2d 55 (Ala. Ct. App. 1979) was a divorce case. The parties had previously been married and divorced, attempted to reconcile and were remarried, and then sought a second divorce. 371 So. 2d at 57. Upon remarriage the husband deeded to the wife a one-half interest in his home. Id. He requested that the court set aside this conveyance alleging the wife had fraudulently induced him to agree to deed a one-half interest to her. Id. The court essentially ordered that the husband and wife return to the same position they were in as a result of their first divorce agreement. Id. Campbell does not support Renfroe's claim that is should somehow be allowed to be placed in a better position than in it were

in prior to the alleged breach of contract by Defendants, which is exactly what would happen if Defendants are allowed to recover the damages apparently sought by Renfroe here, i.e., the consulting fees paid to Defendants or the attorneys' fees paid to counsel for Defendants on Defendants' behalf. In fact, the Campbell court specifically notes that "this divestiture left the parties in essentially the same position regarding their property and finances as they stood after their first divorce, a position which they reached by agreement." 371 So. 2d. at 59.

Further, Henry v. Homeside Lending, Inc., 1996 W.L. 943939 (N.D. Ala. 1996) (not cited in the Federal Reporter) and Pipes v. American Security Ins. Co., 1996 WL 928197 (N.D. Ala. 1996) (not cited in the Federal Reporter) are each cases wherein the Plaintiff's recoverable damages were "fees it unlawfully charged" to the plaintiff. Thus the plaintiffs were merely given back money they had paid.

In Henry, plaintiff sued a lender for unauthorized and hidden residential mortgage related charges. The court analyzed the plaintiff's unjust enrichment claim and noted that it was founded on the principle that "no one should be permitted to retain money that rightfully belongs to another." Id. at *3. The court then stated "the measure of any restitution that might be ordered is the amount by which the defendant has been

unjustly enriched with fees it unlawfully charged the individual members of the putative class." Id. The court then found that "the measure for restitution [under the unjust enrichment claim] and the measure of damages under the breach of contract claim will be identical." Id. Thus, Henry does not stand for the proposition sought by Renfroe in this case, that a party may recover damages for breach of contract that puts the now breaching party in a better position than it would have been if there had been no breach. Instead, in Henry, the damages sought would merely refund the payments made by the plaintiff that were in violation of the contract.

In Pipes, plaintiff sought to recover excess premiums plaintiff paid on credit property insurance from a credit insurance company. Pipes did not involve a claim for breach of contract, but rather the court simply noted that the plaintiff's damages sought on its claim for violation of the Alabama mini-code (refund of excess premiums paid) were "similar to restitution in a breach of contract claim." 1996 W.L. 928197 at *2. Again, similar to Henry, the damages sought by the plaintiff were premiums plaintiff had paid and sought to recover. Thus, plaintiff would not be placed in a better position that plaintiff would have been had the contract not been breached.

In sum, none of these cases support Renfroe's argument that it can somehow be placed in a better position than it would have been had the

alleged breach of contract not occurred. In fact, Alabama law is to the contrary. As such, Renfroe cannot recover any damages for its breach of contract claim in this matter.

CONCLUSION

WHEREFORE PREMISES CONSIDERED, based on its initial Motion for Summary Judgment, Brief in Support, and this Supplemental Brief, the Rigsbys request that the Court dismiss Renfroe's Claim for Breach of Contract.

Respectfully submitted,

Robert E. Battle

Robert E. Battle (ASB-7807-T67R)
Harlan F. Winn, III (ASB-7322-N73H)
Jon H. Patterson (ASB-4981-J69P)
Attorneys for Defendants, Cori Rigsby and Kerri Rigsby

OF COUNSEL:

BATTLE FLEENOR GREEN WINN & CLEMMER LLP
The Financial Center
505 North 20th Street, Suite 1150
Birmingham, Alabama 35203
Telephone: (205) 397-8160
Fax: (205) 397-8179
Email: rbattle@bfgwc.com
hwinn@bfgwc.com
jpatterson@bfgwc.com

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2008 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Barbara Ellis Stanley
One City Centre, Suite 1290
1021 Main Street
Houston, Texas 77002
bstanley@helmsgreene.com

John W. Keker
Keker & Van Nest LLP
710 Sansome Street
San Francisco, CA 94111
jwk@kvn.com

Jack Held
J. Rushton McClees
Sirote & Permutt
2311 Highland Avenue
Birmingham, Alabama 35203
Post Office Box 55727
Birmingham, Alabama 35201
jackheld@sirote.com
rmcclees@sirote.com

Michael Beers
A. David Fawal
Beers, Anderson, Jackson, Patty, & Fawal, P.C.
250 Commerce Street, Suite 100
Montgomery, Alabama 36104
mbeers@beersanderson.com

Rex K. Linder
Gregory J. Rastatter
Heyl, Royster, Voelker & Allen
124 S.W. Adams, Suite 600
Peora, IL 61602

Frank M. Bainbridge
Bainbridge Mims Rogers & Smith LLP
P.O. Box 530886
Birmingham, AL 35253
fbainbridge@bainbridgemims.com

And, I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: None

Robert E. Battle
OF COUNSEL