

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE: ) In Proceedings  
) Under Chapter 11  
CORRUGATED CONVERTING )  
EQUIPMENT, INC., ) No. BK 89-40853  
)  
Debtor. )  
)  
CORRUGATED CONVERTING )  
EQUIPMENT, INC., )  
)  
Plaintiff, )  
)  
v. ) ADVERSARY NO. 90-0016  
)  
PIONEER CONTAINER MACHINERY, )  
INC., MIKE McMILLAN, RICK )  
WAGGONER and AMERICAN )  
CORRUGATED MACHINE CORP.)  
)  
Defendants. )

Memorandum and Order

Following the District Court's denial of the defendants' motion for withdrawal of reference (No. 90 5070, S.D. Ill. June 25, 1990), this matter is before the Court for disposition of the defendants' remaining motions for abstention and dismissal.<sup>1</sup> These motions were filed in response to the complaint of debtor, Corrugated Converting Equipment, Inc., which seeks injunctive relief and damages from defendants, Pioneer Container Machinery, Inc. ("Pioneer"), Mike McMillan, Rick Waggoner, and American Corrugated Machine Corporation ("American"), by reason of the defendants' alleged transport and receipt of stolen trade secrets

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<sup>1</sup>By order of March 26, 1990, this Court stayed disposition of the defendants' motions for abstention and dismissal pending the District Court's determination of the motion for withdrawal of reference.

and the defendants, alleged unfair competition.

The debtor's complaint consists of four counts. Counts I and II assert violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. § 1961, et seq.) and Counts III and IV assert state law unfair competition claims. By their motions, defendants Pioneer, McMillan, and Waggoner seek discretionary abstention as to Counts I and II and both mandatory and discretionary abstention as to Counts III and IV. These defendants additionally seek dismissal of Counts III and IV because of the pendency of a state court action arising out of the same transaction, and they seek dismissal of the debtor's action or, alternatively, a determination of whether it is a core or noncore proceeding. Finally, defendant American has filed a motion to dismiss for lack of personal jurisdiction and improper venue.

Defendants McMillan and Waggoner are former employees of the debtor, which is in the business of manufacturing machinery used in the packing industry. The debtor filed for Chapter 11 bankruptcy protection in September 1989. In October 1989, McMillan and Waggoner terminated their employment with the debtor and formed their own company, Pioneer, which is similarly engaged in the manufacture of machinery for the packing industry. The remaining defendant, American, was a sales representative for the debtor until late October 1989, when it terminated its relationship with the debtor and became associated with defendants Pioneer, McMillan, and Waggoner.

On December 29, 1989, defendants Pioneer, McMillan, and Waggoner commenced a state court action seeking injunctive and declaratory relief. Count I of the defendants' complaint sought to enjoin the

debtor and the debtor's president, Stephen Gilbert, from contacting the defendants' customers and making false statements adversely reflecting on the defendants' business activities. In Count II, the defendants sought a declaratory judgment that they had not wrongfully taken customer and parts lists from the debtor and had not improperly contacted customers of the debtor.

On January 12, 1990, the debtor filed its four-count complaint in this Court against Pioneer, McMillan, Waggoner, and American. The complaint alleges that the defendants, while serving as employees or customer representatives of the debtor, obtained knowledge of confidential plans, drawings, specifications, and customer and parts lists owned by the debtor. The complaint further alleges that, after terminating their relationship with the debtor, the defendants used this information in the manufacture and sale of products "deceptively identical" to those being manufactured and sold by the debtor. Counts I and II of the complaint, based on RICO, seek treble damages in the amount of \$3 million for injuries resulting from the defendants' use of stolen trade secrets. Counts III and IV, stating the same factual background and allegations of "undue advantage" and "unfair competition," seek to enjoin the defendants from using confidential information obtained while in the debtor's employ (Count III) and request damages in the amount of \$1 million for injuries suffered as a result of the defendants' actions (Count IV).

Mandatory Abstention--Counts III and IV

The defendants seek mandatory abstention as to Counts III and IV because of the state court action filed by them subsequent to the

debtor's bankruptcy filing. Under 28 U.S.C. § 1334(c)(2), abstention is required where (1) a proceeding is based on a state law cause of action, (2) it is a noncore or "related to" proceeding, (3) there is no independent basis for federal jurisdiction, (4) an action has been commenced in state court, and (5) it can be timely resolved there.<sup>2</sup> The first three elements are fulfilled as to Counts III and IV, as they are admittedly based on a state law cause of action, they involve nonbankruptcy issues coming within this Court's "related to" jurisdiction, and there is no independent basis for federal jurisdiction.

The fourth element of a pending state court action generally requires that such an action has been commenced prior to the debtor's bankruptcy filing, as the automatic stay precludes the filing of an action against the debtor after bankruptcy. See In re Jackson Consolidated Industries, Inc., 18 C.B.C. 2d 431 (Bankr. N.D. Ill. 1988). In the present case, the defendants' state court action violates the automatic stay to the extent it involves claims arising

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<sup>2</sup>Section 1334(c)(2) provides in pertinent part:

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(c)(2).

prior to the debtor's bankruptcy filing. See 11 U.S.C. § 362(a). While the defendants' complaint relates in part to the debtor's post-bankruptcy actions, it necessarily involves consideration of the pre-filing conduct of both the debtor and the defendants. The debtor's adversary proceeding, on the other hand, relates directly to conduct that occurred prior to bankruptcy, and abstention in favor of the state court proceeding would result in determination of these matters in the state court action brought after the debtor sought bankruptcy court protection. The state court action, filed only two weeks before the debtor's adversary proceeding in this Court, bears the appearance of forum-shopping, and the Court finds that abstention is not required in this instance where it would allow the defendants to circumvent the automatic stay of § 362.

The defendants have additionally failed to establish that Counts III and IV can be timely adjudicated in state court. The parties represent that the state court action has not progressed beyond the initial pleading stage; no discovery has been taken and no rulings made. Indeed, this Court's abstention would create further delay in the state court proceeding because of the necessity of joining parties and causes of action not present in the defendants' state court action. The Court finds that the defendants have failed to establish the elements of mandatory abstention as to Counts III and IV and, accordingly, denies the defendants' motion under § 1334(c)(2).

#### Discretionary Abstention--Counts I-IV

The defendants assert that, even if mandatory abstention is not

applicable, the Court should exercise discretionary abstention under 28 U.S.C. § 1334(c)(1) as to the state law claims of Counts III and IV, as well as the RICO claims of Counts I and II. Section 1334(c)(1) allows for abstention "in the interest of justice, or in the interest of comity with state courts or respect for state law." 28 U.S.C. § 1334(c)(1).

While abstention may be appropriate for determination of difficult or unsettled issues of state law (see In re Republic Reader Is Service, Inc., 81 B.R. 422 (Bankr. S.D. Tex. 1987)), there has been no showing that the debtor's complaint presents complex or "first impression" issues that should be considered by the state court as a matter of comity or respect for state law. The state law unfair competition claims of Counts III and IV and the RICO claims of Counts I and II are matters well within this Court's competence. In view of the posture of the state court action and the delay that would be occasioned in the event of abstention, determination of the debtor's complaint by this Court, which has jurisdiction over the parties and causes of action without the need for further pleading, would result in a more efficient administration of the debtor's Chapter 11 bankruptcy estate. For these reasons, the Court denies the defendants' motions for discretionary abstention under § 1334(c)(1).

#### Motions to Dismiss

The defendants further seek dismissal of Counts III and IV under Illinois procedural law (Ill. Rev. Stat. ch. 110, ¶ 2619(a)(3)), which provides for dismissal of an action based on the pendency of another action between the same parties for the same cause. See General

Electric Co. v. Lofton, 675 F. Supp. 1107 (N.D. Ill. 1987); Byer Museum of Arts v. North River Insurance Co., 622 F. Supp. 1381 (N.D. Ill. 1985) The defendants acknowledge that federal cases in which this Illinois statutory provision was applied pursuant to the Erie doctrine were based on diversity jurisdiction, but contend that the principle of these cases should nevertheless apply to Counts III and IV, which involve issues of Illinois common law. The defendants' argument in this regard is completely without merit, and the Court denies their motion to dismiss without further discussion.

The defendants additionally request that the Court dismiss the debtor's complaint for failure to allege the core or noncore nature of the proceeding (see Bankr. Rule 7008(a)), or, alternatively, that the Court make such a determination. The Court denies the motion to dismiss and finds that the debtor's action is a noncore proceeding.

#### Motion to Dismiss--Lack of Personal Jurisdiction

Finally, defendant American asserts that it should be dismissed from the debtor's action because, as a North Carolina corporation, it is not subject to service of summons in Illinois. American argues that it does not have sufficient "minimum contacts" with the state of Illinois to justify this Court's exercise of personal jurisdiction over it.

American's argument is misplaced in that it disregards Bankruptcy Rule 7004(d), which allows for nationwide service of process in adversary proceedings "related to" a bankruptcy case. See Fed. Bankr. R. 7004(d). Under Rule 7004(d), a "minimum contacts" analysis is irrelevant. The Court finds that it may properly exercise personal

jurisdiction over American and, accordingly, denies its motion to dismiss for lack of personal jurisdiction and improper venue.

IT IS ORDERED that the motions of defendants Pioneer, McMillan, and Waggoner for discretionary and mandatory abstention and for dismissal are DENIED.<sup>3</sup> IT IS FURTHER ORDERED that the motion of defendant American to dismiss for lack of personal jurisdiction and improper venue is DENIED. The defendants are ordered to answer or otherwise plead within twenty days.

\_\_\_\_\_/s/ Kenneth J. Meyers\_\_\_\_\_  
U.S. BANKRUPTCY JUDGE

ENTERED: December 18, 1990

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<sup>3</sup>Section 1334(c)(2) was amended by the Judicial Improvements Act of 1990, Pub. L. No. 101-650, §309(b) (December 1, 1990), to provide that abstention determinations are not appealable to the courts of appeal pursuant to 28 U.S.C. §158(d) or otherwise. By implication, appeal of abstention determinations to the district court pursuant to 28 U.S.C. §158(a) is allowed, so that there is no necessity to file a report and recommendation in disposing of the defendants' abstention motions. Cf. Bankr. R. 5011(b) advisory committee note (1987): report and recommendation procedure adopted to avoid problem with nonappealability of abstention orders.