

TRIALS DIGEST®

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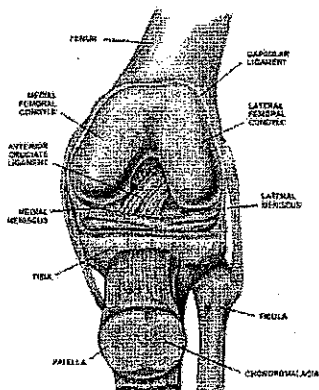
Notable Cases in This Week's Issue...

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Trial Report No.: 32

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CONTRACTS

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Electronics company files suit against former employees for RICO violations**CONTRACTS**

Breach

FIDUCIARY DUTY

Business Organizations

RICO

Civil

CENTRAL DISTRICT FEDERAL COURT

Arrow Electronics Inc. v. Martin, Docket number: 07CV00070(JVS), Santa Ana. Judge: James V. Selna. Trial type: Jury: 2 weeks. Verdict/Judgment date: 7/1/2009.

VERDICT: DEFENSE

The jury ultimately concluded that Arrow had actual and/or constructive knowledge of the facts prior to January 17, 2003, thereby invoking the statute of limitations defense. Vote: 8-0. Deliberations: 3 hours.

COUNSEL

Plaintiff: Gary E. Scalabrini, Gibbs, Giden, Locher & Turner, Los Angeles. Gerald A. Griffin, Gibbs, Giden, Locher & Turner, Los Angeles.

Defendant: Brodie H. Smith, Lanza & Goolsby, Irvine. Anthony Lanza, Lanza & Goolsby, Irvine. Lewis T. Mann, Lanza & Goolsby, Irvine. Stephen A. Madoni, Law Offices of Stephen A. Madoni, Newport Beach.

FACTS/CONTENTIONS

According to defendant: In June 2006, defendant Doug Martin obtained an award of \$1,520,579 against his former employer, plaintiff Arrow Electronics Inc. of Melville, New York. On January 17, 2007, Arrow filed a separate lawsuit against Martin, [REDACTED], and Inteltek Electronics Inc. for alleged violations of the Racketeer Influenced Corrupt Organizations Act (RICO), breach of contract, breach of fiduciary duty, and related causes of actions, claiming that Arrow discovered during testimony in the underlying trial that Martin had accepted illegal kickbacks from an Arrow customer, Inteltek. On September 10, 2007, Arrow filed an amended complaint joining new defendants Richard McCauley and Marrich Inc.

Arrow alleged that, during Martin's employment with Arrow, he developed a scheme to defraud Arrow by arranging to sell certain "allocated" computer memory chips products called "flash memory" to an electronics broker, in spite of the manufacturer's alleged prohibition of sales to brokers. Arrow alleged that flash memory was in short supply during 1999 and 2000 and, thus, could only be sold to

approved buyers, pursuant to the manufacturer's policy. Arrow further alleged that Martin, McCauley, and [REDACTED] developed a scheme whereby an approved buyer, defendant McCauley, would order more than his requirement of flash memory and re-sell the excess to a broker, defendant [REDACTED]. Arrow further alleged that Martin, McCauley, and [REDACTED] all conspired to split the profits from [REDACTED] resale of the flash memory.

Plaintiff Arrow alleged that defendant Martin breached his employment contract with Arrow by accepting payments from [REDACTED], whose company, Inteltek, was Arrow's customer. Arrow offered the testimony of its general counsel, Wayne Brody, who testified that the company's employee manual specifically prohibited such payments as impermissible conflicts of interest. Plaintiff's counsel argued that the employee manual set forth the terms of Martin's employment contract. He argued that Martin was a fiduciary of Arrow and that Martin breached his duty of loyalty to the company by failing to inform Arrow of the payments from [REDACTED]. Arrow also argued that defendants McCauley, [REDACTED] Marrich, and Inteltek interfered with Martin's employment contract and aided and abetted Martin in breaching his fiduciary duty.

Finally, Arrow alleged that all defendants conspired together, as a RICO enterprise, to defraud Arrow by ensuring that Arrow sold flash memory to McCauley with the intention that McCauley would sell excess flash to [REDACTED].

Defense counsel argued that Arrow's lawsuit was filed in retaliation for Martin's 2006 judgment against Arrow and that the suit was an effort to offset Martin's \$1.5M judgment against Arrow.

Each of the three individual defendants testified that they never met in person as a group or conducted any group communications. Defendants testified that the payments by [REDACTED] to Martin and [REDACTED] to McCauley resulted from two separate agreements. Defendants contended that McCauley's flash memory sales resulted from his legitimate inventory management practices and not from a scheme to buy flash memory for the sole purpose of reselling it. These circumstances were all inconsistent with any alleged RICO scheme or enterprise.

Defendants presented additional evidence showing that most of the flash memory that McCauley sold to [REDACTED] came from IBM, not Arrow. In support of this, defendants pointed to the testimony of a former employee of the product's manufacturer, who testified that the flash memory probably could have been traced using date and lot codes. Defendants argued that plaintiff's failure to trace the product amounted to intentional ignorance and a failure of proof.

Defense counsel also argued that Arrow's alleged policy against selling allocated flash memory to brokers was either nonexistent or routinely breached by Arrow. Defendants presented extensive evidence of Arrow's own sales of allocated flash memory to brokers during the relevant time pe-

riod on hundreds of occasions, resulting in roughly \$5.5 million in gross revenues.

Defendants also asserted affirmative defenses based on statute of limitations, waiver, estoppel, and unclean hands. Defendant Martin offered evidence that Arrow was aware that Martin received money from an Arrow customer during the relevant time period but failed to act on this information. Specifically, Martin's former assistant at Arrow, Angela Borgogna, testified that Martin told his direct supervisor, Don Campbell, of the payments from Intelek and that Campbell expressed indifference. Two other former management-level Arrow employees, Roya Colwell and Randy Kippert, testified that they were also aware of Martin's alleged side business and that Colwell reported it to Arrow's human resources department. Arrow, on the other hand, maintained that it was unaware of Martin's receipt of payments until June 2006, during the trial of the first action.

CLAIMED INJURIES

NA

CLAIMED DAMAGES

According to defendant: \$1,050,450 lost profits and loss of goodwill; \$1.6 million kickbacks; Martin's wages; restocking fees Martin allegedly waived; treble damages and attorney fees under RICO.

SETTLEMENT DISCUSSIONS

According to defendant: Plaintiff's lowest demand was \$2 million. Defendants' highest collective offer was \$610,000. On April 4, 2007 Martin tendered a statutory offer for entry of judgment under FRCP 68 in the amount of \$405,000, which was rejected by Arrow. On May 18, 2007, Martin tendered a higher statutory offer of \$475,000, which was also rejected by Arrow. On January 2, 2009, McCauley and Marrich Inc. tendered a statutory offer in the amount of \$135,000, which was also rejected by Arrow.

EXPERTS

Plaintiff: Jason A. Engel, C.P.A., certified public accountant, Engel & Engel, Los Angeles (310) 277-2220.

Defendant: Deborah Dickson, C.P.A., certified public accountant, Irvine (949) 553-1020.

EXPERT TESTIMONY

According to defendant: Plaintiff's expert accountant and fraud examiner, Jason Engel, testified that Arrow suffered lost profits and loss of goodwill of \$1,050,450 due to Arrow's missed opportunity to sell the flash memory to other customers who may have been willing to pay more than McCauley's company (plus other economic theories).

Defendants' expert, Deborah Dickson, testified that Arrow's damage calculations were flawed and that Arrow actually gained from its sales of flash memory to McCauley's company in the amount of \$33,524.

COMMENTS

According to defendant: Stephen A. Madoni represented defendant [REDACTED] Anthony Lanza, Lewis T. Mann, and Brodie H. Smith represented defendants Martin, McCauley, and Marrich Inc. Brodie H. Smith provided the information for this report.

31 TD 12TH 5

Prospective business partner obtains confidential information, interferes with option contract

CONTRACTS

Breach

FRAUD & MISREPRESENTATION
Business/Fraud

INTERFERENCE WITH ECONOMIC ADVANTAGE

LOS ANGELES COUNTY SUPERIOR COURT

Auerbach Acquisition Associates Inc. v. Daily, Docket number: BC285134, Downtown. Judge: Victor E. Chavez. Trial type: Jury. Verdict/Judgment date: 7/13/2009.

VERDICT: \$350,000,000

\$300,000,000 compensatory; \$50,000,000 punitive, plus \$5,178,082 interest on compensatory and \$808,219 interest on punitive against defendant Daily.

The jury found in favor of plaintiff on its claims of intentional misrepresentation, concealment, intentional interference with contractual relations, and intentional interference with prospective economic advantage. The outcome of the breach of contract claim was not reported. Vote: Not reported. Deliberations: Not reported.

COUNSEL

Plaintiff: Pierce O'Donnell, O'Donnell & Associates, Los Angeles. Steven J. Aaronoff, O'Donnell & Associates, Los Angeles. Jennifer L. Keller, Keller Rackaukas, Irvine. Joel Kozberg, Kozberg & Bodell, Los Angeles. Henry Gradstein, Gradstein, Luskin & Van Dalsem, Los Angeles. Joel M. Kozberg, Gradstein, Luskin & Van Dalsem, Los Angeles.

Defendant: James N. Penrod, Morgan, Lewis & Bockius, San Francisco. Amy M. Spicer, Morgan, Lewis & Bockius, San Francisco. David J. Brown, Morgan, Lewis & Bockius, San Francisco. Steven N. Holland, Morgan, Lewis & Bockius, San Francisco. Theo J. Emison, Morgan, Lewis & Bockius, San Francisco.

FACTS/CONTENTIONS

According to court records: IPayment Technologies Inc. provided credit card transaction processing services, acting as an intermediary between merchants and credit card companies such as Visa and MasterCard.