

CAUSE NO. 2014-2287-3

Jill Smith

BAYLOR UNIVERSITY,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
vs.	§	MCLENNAN COUNTY, TEXAS
	§	
BAYLOR UNIVERSITY	§	
ALUMNI ASSOCIATION,	§	
	§	
Defendant.	§	74TH JUDICIAL DISTRICT

PLAINTIFF BAYLOR UNIVERSITY’S RESPONSE TO DEFENDANT’S REQUEST FOR HEARING AND MOTION TO COMPEL

Plaintiff Baylor University (“Baylor”) files this Response to Defendant Baylor Alumni Association’s (“Defendant”) Request for Hearing and Motion to Compel (“Motion”) as follows.

I. BACKGROUND

1. Defendant’s acknowledgement at the outset of its Motion that this dispute has been “highly-publicized” supports Baylor’s decision to withhold irrelevant trade secrets and confidential documents from Defendant. *See* Motion at 1. As Baylor described in its Motion for Entry of Protective Order, Defendant has for years publicized confidential information about Baylor to further its own agenda. *See* Motion for Entry of Protective Order at 3. Baylor’s withholding of irrelevant trade secrets and confidential information from Defendant is warranted.

II. ARGUMENT

2. Defendant moves to compel: (1) the production of license agreements Baylor has entered into with third parties and answers to interrogatories concerning these agreements (Requests for Production Nos. 16-21 and Interrogatories Nos. 1-4); (2) an answer to an interrogatory concerning the basis for Baylor’s contention that Defendant is an express charitable trust (Interrogatory No. 6); and (3) an answer to an interrogatory seeking the identification of

communications that Baylor contends represent notice to Defendant of its breach (Interrogatory No. 8). Defendant's arguments in support of its Motion are without merit.

A. Defendant's Discovery Requests Regarding License Agreements Seek Irrelevant Information That Is Protected By The Trade Secret Privilege.

3. Defendant requests the identification and production of various trademark and license agreements between Baylor and third parties. Specifically, Defendant requests the production of each agreement pursuant to which Baylor granted a perpetual trademark or patent license; each license agreement that includes the word "perpetual" or phrases "fully paid" or "fully paid up;" each license agreement authorizing the use of the name "Baylor" to particular health care entities; each license agreement terminable at will by the licensee; and each license agreement that is indefinite in duration.¹ *See* Exhibit 1 to Defendant's Motion, Defendant's First Request for Production of Documents, Nos. 16-21.

4. In its interrogatories, Defendant requests that Baylor identify all of its trademarks and service marks; all entities with which Baylor has entered into a license agreement pertaining to the use of "Baylor" or "Baylor University;" any such agreements that are terminable at will; and "all written agreements" between Baylor and a third party including the words "perpetual," "irrevocable," or "fully paid up." *See* Exhibit 2 to Defendant's Motion, Defendant's First Interrogatories to Baylor, Nos. 1-4. These agreements are irrelevant to the subject matter of this suit and are protected by the trade secret privilege.

¹ Defendant also requested that Baylor produce each license agreement regarding trademarks and service marks that it has ever entered into. *See* Exhibit 1 to Defendant's Motion, Defendant's First Request for Production of Documents, No. 15. Defendant referred to Baylor's petition in which Baylor indicated that it has "adopted, used, and licensed others to use, various trademarks and service marks, many of which include the word 'Baylor.'" *See* Docket No. 1, Baylor's Original Petition. Baylor objected to this request as overly broad, unduly burdensome, outside the scope of relevant information, and protected by the trade secret privilege. *See* Exhibit 3 to Defendant's Motion, Baylor's Amended RFP Responses, No. 15. Defendant does not move to compel the production of documents responsive to this request. *See* Motion at 3.

(i) Defendant's requests seek irrelevant information

5. The general rule in Texas is that “transactions by one of the parties with other persons are irrelevant, immaterial and highly prejudicial.” *Tex. Farm Bureau Mut. Ins. Co. v. Baker*, 596 S.W.2d 639, 642 (Tex. App.—Tyler 1980, writ ref’d n.r.e.); *see also Cano v. N. Tex. Nephrology Assocs., P.A.*, 99 S.W.3d 330 (Tex. App.—Fort Worth 2003, no pet.). “Only when the intent with which an act is done is material may other similar acts of that party be admissible, ‘provided they are so connected with the transaction under consideration in point of time that they may all be regarded as part of a system, scheme, or plan.’” *Cano*, 99 S.W.3d at 338 (quoting *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 886 S.W.2d 294, 299-300 (Tex. App.—Houston [1st Dist.] 1994), *rev’d on other grounds*, 940 S.W.2d 587 (Tex. 1996)). Moreover, evidence relating to “dealings with a third party, rather than to prior dealings between the litigating parties” may only be admitted where “[s]ubsidiary evidence of parallelism [is] strong and convincing.” *H & W Indus., Inc. v. Occidental Chem. Corp.*, 911 F.2d 1118, 1122 (5th Cir. 1990) (alteration in original) (quoting *Cibro Petro. Prods. v. Sohio*, 602 F. Supp. 1520, 1551 (N.D.N.Y. 1985)) (applying Mississippi law); *see also Oakwood Mobile Homes, Inc. v. Cabler*, 73 S.W.3d 363, 375 (Tex. App.—El Paso 2002, pet. denied) (“For testimony of the routine practice of an organization to be admissible, it must show a regular response to a repeated specific situation.”).

6. In its Motion, Defendant asserts, citing no case law, that the third-party license agreements it seeks constitute “relevant evidence of the University’s contracting practices and its intent with respect to the 1993 License Agreement.” Motion at 3. Defendant requests production of these agreements irrespective of whether they are “connected with” the 1993 License Agreement “in point of time that they may all be regarded as part of a system, scheme or

plan.” *Cano*, 99 S.W.3d at 338. In fact, Defendant’s requests relating to license agreements make no reference to any particular period of time. These requests are therefore overly broad, as they are not calculated to lead to the discovery of admissible evidence. Tex. R. Civ. P. 192.3; *see Cano*, 99 S.W.3d at 338 (finding inadmissible “an employment contract between [the defendant] and another nephrologist” because “[i]t was not signed contemporaneously with or close in time to the [contract at issue] sufficient to make it part of a system, scheme, or plan”); *Hazel V. May Trust v. Lance*, No. 07-97-0033-CV, 1998 WL 111298, at *4 (Tex. App.—Amarillo 1998, no pet.) (finding inadmissible testimony regarding agreement entered into two years prior to relevant agreement: “We determine that Redwine’s testimony only supported May’s intent at the time she made her agreement with Redwine and is not relevant to the agreement between May and Lance”).

7. Additionally, Defendant’s requests are overly broad because they seek license agreements dissimilar to the 1993 License Agreement (such as agreements with for-profit entities or other institutions of higher learning, as opposed to an alumni association that is committed, through its organizational documents, to support the licensor, Baylor). Courts have found admissible third-party contracts where, for example, they were “virtually the same written agreement.” *Fed. Express Corp. v. Pan Am. World Airways, Inc.*, 623 F.2d 1297, 1301 (8th Cir. 1980). Defendant seeks license agreements without regard for this requirement of “strong and convincing” “subsidiary evidence of parallelism.” *H & W Indus., Inc.*, 911 F.2d at 1122. Its requests are thus not “reasonably calculated to lead to the discovery of admissible evidence.” Tex. R. Civ. P. 192.3.

(ii) Defendant’s requests seek documents protected by the trade secret privilege

8. Moreover, the license agreements Defendant seeks are protected by the trade

secret privilege. Rule 507 of the Texas Rules of Evidence provides that a party may refuse to disclose a trade secret owned by the person if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. Tex. R. Evid. 507; *In re Leviton Mfg. Co., Inc.*, 1 S.W.3d 898, 902 (Tex. App.—Waco 1999, orig. proceeding). “The trade secret privilege seeks to accommodate two competing interests. First, it recognizes that trade secrets are an important property interest, worthy of protection. Second, it recognizes the importance of the fair adjudication of lawsuits.” *In re Leviton Mfg.*, 1 S.W.3d at 902.

9. The Texas Supreme Court has developed the following framework for asserting the trade secret privilege:

First, the party resisting discovery must establish that the information is a trade secret. The burden then shifts to the requesting party to establish that the information is necessary for a fair adjudication of its claims. If the requesting party meets this burden, the trial court should ordinarily compel disclosure of the information, subject to an appropriate protective order.

In re Cont'l Gen. Tire, Inc., 979 S.W.2d 609, 613 (Tex. 1998).

10. The requesting party does not meet its burden through “a showing of relevance alone.” *In re Leviton Mfg.*, 1 S.W.3d at 902. “In each circumstance, the trial court must weigh the degree of the requesting party’s need for the information with the potential harm of disclosure to the resisting party.” *Id.* (citing *In re Cont'l Gen. Tire*, 979 S.W.2d at 613). This test cannot be satisfied merely by general assertions of unfairness; rather, a party “must demonstrate with specificity exactly how the lack of the information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat.” *In re Union Pac. R.R. Co.*, 294 S.W.3d 589, 592 (Tex. 2009) (quoting *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 732 (Tex. 2003)).

11. To determine whether information is a trade secret, Texas courts consider the following factors:

(1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of effort or money expended in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. at 593. “The party claiming a trade secret need not satisfy all six factors because trade secrets do not fit neatly into each factor every time.” *Reliant Hosp. Partners, LLC v. Cornerstone Healthcare Grp. Holdings, Inc.*, 374 S.W.3d 488, 499 (Tex. App.—Dallas 2012, pet denied) (citing *In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003)).

12. An analysis of these factors makes clear that the license agreements at issue qualify as trade secrets under Texas law. The agreements sought by Defendant are not made publicly available by the university. *See* Affidavit of Kit Riehl at ¶ 4, attached hereto as Exhibit 1. Baylor enters into these license agreements under the expectation that the licensees will maintain the confidentiality of these agreements. *See id.* at ¶ 5. Within Baylor, the only employees with access to the license agreements are members of the Office of General Counsel, the Director of Collegiate Licensing, and the Vice President for Marketing and Communications. *See id.* at ¶ 6. Baylor maintains the confidentiality of this information by restricting access to the servers on which the license agreements are kept. *See id.* at ¶ 6.

13. The license agreements are of great value to Baylor. Baylor has established its reputation and built up goodwill over the years. The general public widely recognizes such marks as symbols of quality. The license agreements protect Baylor’s reputation by ensuring the appropriate use of its trademarks. Baylor and its agents expend significant time and money developing relationships with its licensees and securing the license agreements at issue. *See id.* at ¶ 7. Baylor should not be made to risk the public disclosure of these agreements, hampering the university’s ability to negotiate with new licensees.

14. Taking into account the confidential nature of these agreements and their value to Baylor, it is apparent that they constitute trade secrets under Texas law.

15. Defendant has failed meet its burden of establishing that the production of these trade secrets is “necessary for a fair adjudication of its claims.” *In re Cont’l Gen. Tire, Inc.*, 979 S.W.2d at 613. Defendant offers no argument on this point in its Motion, contending only that the agreements constitute relevant evidence without citing any case law. Motion at 3. These agreements between Baylor and third parties are, as discussed above, irrelevant to the interpretation of the 1993 License Agreement and thus their non-production would in no way “impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat.” *In re Union Pac. R.R. Co.*, 294 S.W.3d at 592.

B. Defendant’s Interrogatories Nos. 6 and 8 Are Overly Broad And Attempt To Require Baylor to Marshal All Of Its Evidence.

16. Defendant also seeks to compel more complete answers to Interrogatories Nos. 6 and 8, which ask Baylor, respectively, to “explain the legal and factual basis for [its] contention that [Defendant] is an ‘express charitable trust . . .’” and “identify all communications which [it] contend[s] represent written notice to [Defendant] of the alleged [contractual] violation.” *See* Exhibit 4 to Defendant’s Motion, Baylor’s Interrogatory Responses, Nos. 6, 8. In response, Baylor objected to these interrogatories as improper because, *inter alia*, they seek to require Baylor to marshal all of its evidence and provide a statement in full of all factual bases for Baylor’s allegations. *See id.* Notwithstanding these objections, Baylor answered these interrogatories with a general description of the factual bases for its claims. *See id.* While contention discovery is permitted, all that is required is a basic statement of those contentions and the general factual basis for a party’s claims. Tex. R. Civ. P. 194.2(c); Tex. R. Civ. P. 197.1. The responding party is not required to marshal all of its available proof. Tex. R. Civ. P.

194.2(c); Tex. R. Civ. P. 192 cmt. 5; Tex. R. Civ. P. 197.1; *In re Gen. Motors Corp.*, No. 12-07-00387-CV, 2008 WL 541679, at *3 (Tex. App.—Tyler Feb. 29, 2008, orig. proceeding). Baylor, therefore, properly responded to these interrogatories. Additionally, discovery into this area is ongoing, and information which may be further responsive to these interrogatories is expected to be discovered through this process.

III. PRAYER

17. Baylor respectfully requests that the Court deny the relief requested by Defendant in its Request for Hearing and Motion to Compel.

Respectfully submitted,

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**ATTORNEYS FOR PLAINTIFF,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to all counsel of record pursuant to the Texas Rules of Civil Procedure, on this 13th day of February, 2015.

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/s/ Tony L. Visage _____
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AFFIDAVIT OF CHRISTOPHER "KIT" RIEHL

Before me, the undersigned notary, on this day personally appeared Kit Riehl, the affiant, a person whose identity is known to me. After I administered an oath to affiant, affiant testified:

1. My name is Kit Riehl. I am over 21 years old, I understand the nature of an oath, and I am otherwise competent to testify to the matters stated in this Affidavit. This testimony is based on my personal knowledge, and the facts stated herein are true and correct.

2. I am employed by Baylor University as an Associate General Counsel. I joined Baylor's Office of General Counsel in June 2002. My primary areas of responsibility include intellectual property, sponsored research, technology transfer, trademark licensing, and export control regulations.

3. I am knowledgeable about Baylor's practices in licensing others to use trademarks and service marks owned by Baylor, including the negotiation and drafting of such license agreements.

4. License agreements entered into by Baylor are not made publicly available by the university.

5. Baylor enters into license agreements with the expectation that the licensees will maintain the confidentiality of these agreements.

6. The only Baylor employees with access to license agreements entered into by the university are members of the Office of General Counsel, Nick Joos, Director of Collegiate Licensing, and John Barry, Vice President for Marketing and Communications. Electronic copies of the license agreements are stored in the Office of the General Counsel on a stand-alone server, accessible only by members of the office.

7. Baylor currently engages Licensing Resource Group ("LRG") as its agent for merchandising license management. Baylor and LRG expend significant time and resources developing relationships with licensees and securing license agreements.

8. Further Affiant Sayeth not.



Kit Riehl
Assistant General Counsel

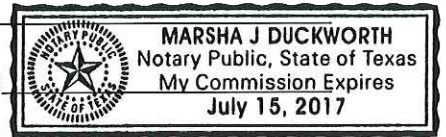
Sworn to and subscribed before me this 13th day of February, 2015.



Notary Public in and for the State of TEXAS

Print Name: _____

My Commission Expires: _____



(SEAL)