

STATE OF NORTH CAROLINA :
COUNTY OF WAKE :

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
06-CVS-08416

PAUL VERNON and JOEL WILLIAMS)
Individually and derivatively on behalf of)
TRIBOFILM RESEARCH, INC.,)

Plaintiffs,)

v.)

JEROME CUOMO, VINAY SAKHRANI,)
CHARLES TOMISINO, CHARLES K.)
CHIKLIS, ROBERT A. MINEO, and)
TRIBOFILM RESEARCH, INC.,)

Defendants.)

PLAINTIFFS'
MOTION TO BIFURCATE, OR IN THE
ALTERNATIVE, TO CONTINUE TRIAL

Pursuant to Rule 42(b)(1) of the North Carolina Rules of Civil Procedure, Plaintiffs, by and through their undersigned counsel of record, hereby move to bifurcate the trial of this case into separate proceedings on the issues of (1) the valuation and dissolution of Tribofilm Research, Inc. ["Tribofilm"] and (2) all other issues, including Plaintiffs' reasonable expectations claims, mismanagement and breach of fiduciary duty claims, stock dilution claims, and claims for unpaid commissions [the "Other Issues"]. Plaintiffs move the court to try all issues other than the valuation and dissolution of Tribofilm in this proceeding on July 28, 2008 and reserve issues of valuation and dissolution for subsequent hearing, if necessary, until a reasonable later time after resolution of the Other Issues. In the alternative, Plaintiffs move to continue the case in its entirety. In support of this motion, Plaintiffs show into the court the following:

1. Undersigned counsel has consulted with counsel for Defendants, who have indicated that they do not oppose relief in the form of bifurcation set forth above. Counsel for Defendants indicated that they do oppose relief in the form of a continuance of all issues.

2. Bifurcation on these issues is in the fair and efficient administration of justice and would promote convenience for the Court. If Defendants prevail on the reasonable expectations and stock dilution claims before the Court, the Court will not need to reach the valuation issue. Conversely, if Plaintiffs prevail on the reasonable expectations and stock dilution claims before the Court, the primary barrier to a settlement agreement previously discussed will be removed, and the parties may be likely to agree on a final settlement of the matter based on percentages of revenue obtained from licensing the technologies to third parties.

3. If a bifurcation is not allowed, the parties would be prejudiced in their ability to demonstrate the value of the technology, as explained in more detail below.

4. Plaintiffs are informed that Tribofilm's key assets are now ready to take to market, but Defendants claim that negotiations with third-party customers are in the early stages and no sales have yet been obtained. As such, setting the value of the company will be very difficult at this stage in the development of the technology even though all parties believe that the potential revenues from Tribofilm's technologies could be huge. All parties need additional time to gauge the value of the technologies.

5. Additionally, since Plaintiff minority shareholders have been shut out of all Tribofilm operations, Plaintiffs' ability to prove a value for Tribofilm's assets has been severely impeded.

6. Plaintiffs believe that additional documents exist that affect the valuation of Tribofilm and Plaintiffs need further opportunity to obtain these documents, whether from Defendants themselves or from third parties. When Plaintiffs have requested additional information from Defendants, they have repeatedly been informed that no documents can be located or no documents exist. However, Plaintiffs have reason to believe that this information is incorrect in certain cases.

a. For example, on April 17, 2007, Plaintiffs informally requested “Copies of all licensing agreements or joint development agreements in existence with respect to any technology developed by Tribofilm or by employees or contractors engaged by Tribofilm while working for Tribofilm.” Since all responsive documents were not forthcoming, Plaintiff Vernon used that identical language in a formal Request for Production served on August 15, 2007 [“Request No. 1”]. Defendants responded on October 23, 2007, that, subject to certain objections and the entry of a protective order, responsive documents would be produced in redacted format. Plaintiffs continued to communicate that Defendants’ production of documents was incomplete, which Defendants denied. On June 4, 2008, Defendants responded in writing as to Request No. 1 that, “Defendants have provided responsive documents . . . There are no other responsive documents.” Plaintiffs again followed up in an attempt to obtain additional information that had been first requested in April of 2007. Plaintiff still denied that additional documentation existed. Then, on July 1, 2008, Defendants stated in a letter that there was an additional agreement that was “no longer active” and another agreement that was “was terminated” implying that these agreements did in fact exist. Only after Plaintiffs specifically followed up on this issue, did the Defendants finally produce these documents to its counsel. These documents were produced to Plaintiffs yesterday, on July 7, 2008, despite the fact that the agreements were dated April 1, 2005 and August 30, 2005.¹

¹ Undersigned counsel would like to note that they have had a good relationship with counsel for Defendants and in no way wish to imply that counsel for Defendants has been intentionally withholding information. Undersigned counsel believes that counsel for Defendants has acted professionally in this matter, but has been misinformed by its clients.

b. Plaintiffs believe they still have not received additional documents first requested in April of 2007, despite that fact that Plaintiffs have continued to follow up in requesting these documents. For example, ledgers produced by Tribofilm show income to Tribofilm from various third parties from 2002 to 2007, including (among others) Abbott Laboratories, Amersham Health, Medrad, Inc., Schott Schweiz AG, Carl Zeiss Vision, West Pharmaceutical Services, Becton Dickinson and Company, Terumo Corp., Omega Optical, QIS, Inc., and Bosque Custom Designs. Defendants have not produced the agreements by which this money was brought into Tribofilm for any of these entities, and apparently claim that no such agreements exist, as stated above. However, Plaintiffs believe that additional documents do exist regarding these agreements, as evidenced by Tribofilm's receipt of funds from these entities and based on Plaintiffs' own recollections of negotiating and signing agreements with third parties while at Tribofilm. [Williams Aff. ¶13.]

7. The terms and conditions of prior and existing agreements are vital evidence that Plaintiffs must provide to the Court to demonstrate the value of Tribofilm.

8. Once all the relevant documents are obtained, Plaintiffs believe that an expert evaluation will be necessary to adequately determine value.

9. Plaintiffs now lack sufficient time to obtain all documents necessary to demonstrate valuation and to obtain an expert opinion on valuation before July 28, 2008.

10. For the foregoing reasons, a bifurcation of the valuation and dilution issues from the Other Issues would be in the fair and efficient administration of justice, while the parties would be prejudiced in their ability to demonstrate the value of the technology if a bifurcation is not allowed.

11. If a bifurcation is not allowed, a continuance of the hearing on all issues is necessary in order to obtain additional information on the valuation issue.

12. Additional information in support of this motion is provided in Plaintiffs' Joint Trial Brief, filed contemporaneously herewith.

This the 8th of July, 2008.

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Signed:

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Joel Williams

Paul Vernon
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing *Plaintiffs' Motion to Bifurcate, or in the Alternative, to Continue Trial* was duly served this day on all parties by forwarding a copy thereof enclosed in a postage paid envelope deposited in the United States mail, addressed as follows:

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This the 8th of July, 2008.

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