Alfandary et al v. Nikko Asset Management Co., Ltd. et al

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK CHRISTINA ALFANDARY, et al.,

Plaintiffs,, -against- NIKKO ASSET MANAGEMENT, CO., LTD.

Defendant.

No. 17 Civ. 5137 (LAP)

MEMORANDUM & ORDER

LORETTA A. PRESKA, Senior United States District Judge: Before the Court modify the Protective Order entered on December 16, 2019 1

and to enjoin or from pursuing certain legal action in Tokyo. 2 oppositions, (1) Defendant shall show cause why it should not be

sanctioned for use in the Tokyo Action of information obtained in discovery in this action in contravention of the Protective Order [dkt. no. 90], (2) and motion for an anti-suit injunction [dkt. no. 117] is DENIED. The Court reserves decision on the cross motions to modify the Protective Order

1 (See see also [dkt. no. 121].) 2 (See 2021 [dkt. no. 117]; see also [dkt. nos. 115, 117] pending resolution of the order to show cause.

I. Background background, which has been set forth in three prior Opinions.

(Opinion, dated Oct. 4, 2018 [dkt. no. 52]; Opinion, dated June 19, 2019 [dkt. no. 78]; and Opinion, dated Sept. 30, 2019 [dkt. no. 79].) The Court briefly recounts the facts here.

a. Facts Plaintiffs are former senior executives of either Nikko, its New York-based wholly owned subsidiary, Nikko Asset uropean operating , who contend Defendant intentionally undervalued their stock acquisition rights 26, 2019 [dkt. no. 91], ¶¶ 2, 190-231.) Defendant is a

privately held investment advisor and asset manager headquartered and incorporated in Tokyo, Japan. (Id. ¶ 25.) At issue in these specific motions are Plaintiff Mr. action Defendant filed against

him to enforce it. On December 14, 2020, Nikko sued Mr. Reidenbach in Tokyo District Court for violating his April 2015 Separation Agreement. (Mot. at 1; see also Response at 2.) In addition to designating Tokyo District Court as the exclusive forum for claims arising out of its provisions, the Separation Agreement provides, in relevant part, that Mr. Reidenbach: (i) shall not (with exceptions not applicable here) disclose to any third party any confidential information of Nikko which he obtained in his capacity as an employee or director of Nikko; (ii) agrees . . . to waive irrevocably and release and forever discharge Nikko from any and all . . . claims or demands whatsoever (whether existing, potential, in the future or otherwise) . . . ; and (iii) represents and warrants that he has not filed nor will file or will otherwise be involved in, directly or indirectly, any lawsuits, arbitrations or any other legal action . . . against [Nikko]. (Mot. at 1-2 (emphasis omitted) (quoting Separation Agreement, dated Apr. 30, 2015 [dkt. no. 115-1], ¶¶ 9, 14(Ex. 1)).) Defendant claims that Mr. Reidenbach breached the Separation Agreement by divulging confidential information to the Plaintiffs and by joining this lawsuit. 3

(See Mot. at 2.) Additionally, Defendant asserts that it neither used nor referenced any confidential discovery in this case when commencing the Tokyo Action and obtaining ex parte liens against 4

(Id.; see also Response at 2.)

3 Among other things, Defendant avers that Mr. Reidenbach to the valuation, based on his knowledge of that process as CFO - managem (Mot. at 2.)

4 Confidential Information hereafter produced or disclosed shall be used only in connection with this litigation, and shall not

(continued on following page) However, because some confidential discovery material allegedly relates to purported breaches of his Separation Agreement, Defendant asks the Court to modify the Protective Order i]n the interests of promoting judicial efficiency and avoiding duplicative discovery. 5

(Mot. at 2-3.) [and] discourag[ing] him through retaliatory threats from

pursuing this lawsuit Plaintiffs point out that, before commencing the Tokyo Action,

property without providing him with any notice or opportunity to

be heard. (Pls. Reply at 1.) Additionally, Plaintiffs emphasize the untimeliness of the Tokyo Action. Despite knowing (see Provisional Seizure, dated Dec. 14, 2020 [dkt. no. 117-1], at

(continued from previous page) be used in connection with any other lawsuit or for any other [dkt. no. 90], ¶ 9.) 5 Paragraph 18 of the Protective Order permits the parties to terms . . . or for any other relief

. . . regarding [the Order ¶ 18.) 11), confidential documents and until [Nikko] had the opportunity to

about topics relevant to the Tokyo Action to bring suit. (Pls. Reply at 1.) Plaintiffs, therefore, ask the Court to infer could not have done so without making use of confidential

Id.; see also Pls. Reply at 2.) To protect against the misuse of discovery materials available in this litigation, Plaintiffs seek to amend the Protective Order to prohibit the use of all discovery material--whether or not designated as confidential--for any purpose outside this litigation. (Response at 5.) Plaintiffs also request an anti-suit injunction to enjoin Nikko from pursuing the allegedly retaliatory Tokyo Action while this lawsuit is pending. (Id. at 5-7; see also Pls. Reply at 2.)

II. Legal Standards

a. Modification of a Protective Order Rule 26(c) of the Federal Rules of Civil Procedure authorizes federal courts to issue o person from annoyance, embarrassment, oppression, or undue

protective orders are subject to modification, and the decision whether to lift or modify a protective order is . . . S.E.C. v. TheStreet.com, 273 F.3d 222, 231 (2d Cir. 2001) (citation omitted). However, a protective order, . . . the court should not modify that order

some extraordinary circumstance or compelling need. Nielson

Co. (U.S.), LLC v. Success Sys., Inc., 112 F. Supp. 3d 83, 120 (S.D.N.Y. 2015) (quoting TheStreet.com, 273 F.3d at 229). In determining whether a party has reasonably relied on a protective order, courts consider (1) the scope of the protective order; (2) the language of the order itself; (3) the level of inquiry the court undertook before granting the order; and (4) In re Unseal Civ. Discovery Materials, No. 19-MC-00179 (SN), 2021 WL 1164272, at *3 (S.D.N.Y. Mar. 24, 2021) (citation omitted).

b. Issuance of an Anti-Suit Injunction Federal courts may enjoin the parties before them from pursuing litigation in foreign forums. Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc., 369 F.3d 645, 652 (2d Cir. 2004). However, in the interests of international comity, anti-suit injunctions should China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987) (internal quotation marks omitted). Accordingly, the Court of Appeals anti-suit injunction may only be granted where two threshold

requirements are met: first, the parties must be the same in both proceedings, and second, resolution of the case before the enjoining court must be dispositive of the action to be Eastman Kodak Co. v. Asia Optical Co., 118 F. Supp. 3d 581, 586 (S.D.N.Y. 2015) (articulating the China Trade test). Once China Trade two threshold requirements are satisfied, the Court of Appeals directs courts to consider additional factors, including: (1) the threat to the enjoining court's jurisdiction posed by the foreign action; (2) the potential frustration of strong public policies in the enjoining forum; (3) the

vexatiousness of the foreign litigation; (4) the possibility of delay, inconvenience, expense, inconsistency, or a race to judgment; and (5) other equitable considerations. Id. (citing Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 500 F.3d 111, 119-20 (2d Cir. 2007)). Although courts must consider all of the discretionary factors, . Karaha Bodas, 500 F.3d at 126.

III. Discussion Defendant has moved to modify the Protective Order to confidential discovery material from this case in the Tokyo Action. (Mot. at 2-3; Def. Reply at 2-3.) In response, Plaintiffs request the Court to modify the Protective Order to prohibit the use of any discovery materials in this case for any other purpose. (Response at 5; Pls. Reply at 2.) Separately, Plaintiffs request an anti-suit injunction to enjoin Defendant from pursuing the Tokyo Action. (Response at 5-7; Pls. Reply at 2.) The Court addresses each in turn.

a. The Motions to Modify the Protective Order While ordinarily a court will freely grant a party permission to use discovery in one case in a related case to Fed. R. Civ. P. 1, here the facts set out in

(Response at 4-5; Pls. Reply at 1-2) lead to a fair inference that Defendant misused confidential discovery materials from this case in commencing the Tokyo Action. The inference arises from both the timing and the substance of the Tokyo Action. As to the timing of the Tokyo Action, even though, as noted above, occurred in 2015 and reminded of the same in 2017 when the

three years--until discovery concluded in this litigation--to

commence the Tokyo Action. (Pls. Reply at 2.) As to both timing and substance, the Tokyo Action was filed just days after Defendant took depositions of nine Plaintiffs and questioned them about topics relevant to the Tokyo Action, including interactions with Mr. Reidenbach, as well as the extent to which

In light of these facts, the Court finds it to be a fair inference that Defendant commenced the Tokyo Action using confidential materials subject to the Protective Order. Accordingly, Defendant shall show cause why it should not be sanctioned for use in the Tokyo Action of information obtained in discovery in this action in contravention of the Protective Order.

b. The Motion to Enjoin the Tokyo Action -suit injunction fails to satisfy the threshold requirements of the China Trade test. It is undisputed that the first threshold requirement--that the parties are the same in both proceedings--is met. See Paramedics Electromedicina, 369 at F.3d at 652 (finding that the parties need not be exactly identical; similar the

second requirement, that this proceeding would be dispositive of the Tokyo Action, is not met. Although the Court of Appeals has not articulated precisely what it means for an action to be dispositive, it has instructed is the same in the two actions. See Karaha Bodas, 500 F.3d at

121. Where the cause of action alleged in the foreign action is distinct from that alleged in the domestic proceeding, the foreign action. See C.D.S., Inc. v. Zetler, 213 F. Supp. 3d

620, 628- Eastman Kodak,

118 F. Supp. 3d at 588 (citing Karaha Bodas, 500 F.3d at 121- 22). While the claims in this case and the Tokyo Action are concern different contracts. This case focuses on whether Nikko

breached the Allotment Agreement and Terms and Conditions of its stock option plans in connection with its valuation and (See Am. Compl. ¶¶ 2, 190- 231.) The Tokyo Action, on the other hand, examines whether Mr. Reidenbach breached his Separation Agreement by violating his confidentiality obligations and covenant not to sue. (Mot. at 1; see also Response at 2.) Because the two proceedings will turn on different issues, arguments, and evidence, a finding that Nikko on the Tokyo Action. (See Def. Reply at 4.) Plaintiffs contend that the second threshold requirement is satisfied because a judgment in the Tokyo Action could be dispositive of the claims in this case. (See Response at 6.) This analysis is precisely backwards. The law requires the resolution of the case before this Court to be dispositive of the subsequent foreign action--not vice versa. See Karaha Bodas, 500 F.3d at 121. See also C.D.S., 213 F. Supp. 3d at 628 Therefore, for the

reasons discussed above, Plaintiffs have failed to satisfy the threshold requirements of the China Trade test. Even if the resolution of the claims before this Court would be dispositive of the Tokyo Action, the most important discretionary factors counsel against issuing an anti-suit injunction. First, the Tokyo Action does not threaten this . By pursuing its claims in the only forum Response at 5.)

Second, public policy considerations do not appear to be substantially frustrated by allowing a substantively different lawsuit to proceed in the only forum where Defendant could enforce its contractual rights. (See Def. Reply at 5.) The Court that the Tokyo Action seeks to silence Mr. Reidenbach and punish him for blowing the See Response at 7; Pls. Reply at 2.)

However, the Court acknowled to be present whenever parallel actions are proceeding

China Trade, 837 F.2d at 36. Moreover, issuing an anti-suit injunction based on vexatiousness alone would undermine the policy that allows parallel proceedings to continue and disfavors anti- Id. [P]rinciples of international comity and reciprocity require a delicate touch in the issuance of anti-foreign suit injunctions Ibeto Petrochemical Indus. Ltd. v. M/T Beffen, 475 F.3d 56, 65 (2d Cir. 2007). Accordingly, even if Plaintiffs satisfied the China Trade requirements, the discretionary factors would counsel against

issuing an anti-suit injunction.

IV. Conclusion For the foregoing reasons, Defendant shall show cause why it should not be sanctioned for use in the Tokyo Action of information obtained in discovery in this action in contravention of the Protective Order [dkt. no. 90]. Counsel shall confer and inform the Court by letter no later than May 3, 2021, of a proposed briefing schedule on the order to show cause. Pending resolution of the order to show cause, the Court reserves decision on the cross motions to modify the Protective Order [dkt. nos. 115, 117]. motion for an anti-suit injunction [dkt. no. 117] is DENIED. The Clerk of the Court shall close the open motion.

SO ORDERED. Dated: New York, New York

April 22, 2021 _____ LORETTA A. PRESKA Senior United States District Judge