

**FILED**

2004 APR -1 AM 8:18

*YV*

COURT  
MIDDLE DISTRICT OF FLORIDA

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

**STEPHANIE DEAN COWAN and ANNE DEAN,**

**Plaintiffs,**

**-vs-**

**Case No. 6:04-cv-28-Orl-22JGG**

**OUTPATIENT PARTNERS, INC.;  
OUTPATIENT EQUIPMENT PARTNERS,  
INC.; ANNE DEAN CONSULTANTS, LLC;  
ROBERT HAWEKOTTE; and BRUCE  
WALLACE,**

**Defendants.**

\_\_\_\_\_ /

**ORDER**

**I. INTRODUCTION**

This cause comes before the Court for consideration of the Plaintiffs' Motion for Order of Remand (Doc. 11), filed February 4, 2004, and the Defendants' Memorandum in Opposition (Doc. 18) thereto. Upon considering these submissions, the Court determines that it lacks subject matter jurisdiction over this action. Accordingly, the case must be remanded to state court.

**II. BACKGROUND**

The Plaintiffs in this action are Stephanie Dean Cowan and her mother, Anne Dean. They have sued the following Defendants: Outpatient Partners, Inc. ("OP"); Outpatient

*24*

Equipment Partners, Inc. (“OEP”); Anne Dean Consultants, LLC (“ADC”); Robert Hawekotte; and Bruce Wallace.<sup>1</sup>

The “Petition and Complaint” (Doc. 2) alleges the following facts: In 1985, Cowan and Dean (a registered nurse) incorporated Continuing Resources, Inc. (“CR”), a company that “provided consulting services to physicians and hospitals seeking to establish, develop or maintain” ambulatory surgery centers (“ASCs”). Doc. 2, ¶ 10, at 2.<sup>2</sup> In July 1992, Wallace approached the Plaintiffs and told them that he and Hawekotte were interested in investing in CR. Subsequently,

HAWEKOTTE and WALLACE created a plan which was to include the creation of the company OP, for the purpose [of] consolidating the consulting work offered by CR with an ASC equipment sales company such as OEP. OP was to be the parent company of OEP and a new company to be formed by HAWEKOTTE, WALLACE, DEAN and COWAN with the assets of CR and the name and reputation of DEAN.

Doc. 2, ¶ 12, at 3.

Following negotiations, the parties signed a Preincorporation Agreement on October 24, 2002.<sup>3</sup> Under that agreement, Dean, Hawekotte and Wallace were to serve as OP’s initial directors; all were to be issued stock in the company. Plaintiffs contend that Hawekotte and

---

<sup>1</sup>Unfortunately, as is evident, this case presents a veritable “alphabet soup” of acronyms.

<sup>2</sup>The Complaint alleges CR is a “currently administratively dissolved Florida corporation.” Doc. 2, ¶ 10, at 2.

<sup>3</sup>Although there are signature lines for Dean, Wallace and Hawekotte on the copy of the Preincorporation Agreement attached to the Complaint, only Dean’s and Cowan’s signatures appear on that document. *See* Doc. 2, Exhibit “A.”

Wallace also promised (1) to form Anne Dean Consultants, Inc. (“ADCI”) as a subsidiary of OP; (2) that Dean and Cowan would be shareholders and directors of ADCI; and (3) that Dean and Cowan would simultaneously receive equity in 5 different ASCs being developed by Hawekotte and Wallace. Although Plaintiffs allege there was an initial delay, on December 6, 2002, Dean was issued stock in OP and was appointed as a director of the corporation.

Plaintiffs allege “on information and belief” that they, ADC and CR executed an Asset Purchase Agreement on December 2, 2002, under which ADC was to purchase the assets of Plaintiffs’ company, CR. Doc. 2, ¶ 19, at 4.<sup>4</sup> Plaintiffs contend Hawekotte broke his promise to form ADCI as a traditional corporation, and instead created ADC, a limited liability company, to purchase CR’s assets. Plaintiffs say this event was “unrecognized” by them. *Id.*<sup>5</sup>

The Asset Purchase Agreement recites the following purchase price for CR’s assets: \$60,000 in cash, 4,000 shares of ADC stock (constituting 40% of ADC’s outstanding equity), and the assumption of certain of CR’s liabilities. *See* Doc. 2, Exhibit “C,” ¶ 1.5, at 2. Additionally, ADC agreed to loan CR \$30,000 to pay the latter company’s payroll taxes. *Id.* One of the assets ADC purchased was the exclusive right to use the names “Anne Dean and

---

<sup>4</sup>The signature lines are blank on the copy of the Asset Purchase Agreement attached to the Complaint. *See* Doc. 2, Exhibit “C.”

<sup>5</sup>If the Asset Purchase Agreement attached to the Complaint is the one Plaintiffs actually signed, it is difficult to conceive how they could not have realized that ADC, rather than ADCI, was the purchaser in the transaction, unless they simply did not read the document. The first and second pages of the document expressly identify “Anne Dean Consultants, LLC” as the “Buyer.”

Associates,' 'Continuing Resource, Inc.' and any variants or derivatives thereof[.]” Doc. 2, Exhibit “C,” ¶ 7.4, at 7.

The Asset Purchase Agreement contains a non-competition clause restraining Dean, Cowan and CR from engaging in competitive business activities for a period of 5 years. In its entirety, that provision states:

In connection with the sale to Buyer [ADC] of the Assets, the Shareholders [Dean and Cowan] and the Company [CR] agree that each of them shall not, either directly or indirectly, engage in or have any interest in any person, firm, corporation or business (whether as an employee, officer, director, agent, security holder, creditor, consultant or otherwise that as of Dean or the Company engagement or participation would become competitive with any aspect of the business presently conducted by the Company in the Continental United States (“the Territory”), for so long, but not exceeding a period of five (5) years from the termination of the employment of Shareholders by Buyer or its affiliates, or any person deriving title to the Assets from Buyer provided such purchaser carries on the business of the Company or a like business in the Territory. In addition, Company shall cause its employees and independent consultants to execute non-disclosure agreements in the form attached hereto as Exhibit A. Company shall assign such agreements to Buyer in connection with this transaction. Dean and the Company are entering into the foregoing covenant to assure Buyer of the transfer of the goodwill of the business being sold, and in order to induce Buyer to consummate the purchase contemplated by this Agreement.

Doc. 2, Exhibit “C,” ¶ 7.5, at 7.

Plaintiffs state that they became employees of ADC concurrent with the execution of the Asset Purchase Agreement. In connection with that employment, Plaintiffs were asked to sign a separate covenant-not-to-compete in favor of ADC. Plaintiffs say they are not sure they ever actually signed the “Proprietary Information and Inventions Agreement” containing the non-

compete clause; they have attached an unsigned copy of that document to their Complaint.<sup>6</sup> The specific non-compete language in that agreement reads as follows: “I agree that during the period of my employment by [ADC], and for one year thereafter, I will not, without [ADC’s] express written consent, engage in any employment or activity in any competitive business, other than for [ADC].” Doc. 2, Exhibit “D,” ¶ C, at 2.

After they entered into the Asset Purchase Agreement, the parties’ relationship began to deteriorate. Plaintiffs contend that Hawekotte and Wallace breached various promises they made to induce Plaintiffs to sign the Asset Purchase Agreement. Additionally, Plaintiffs say Hawekotte sexually harassed them and discriminated against them on the basis of their gender.<sup>7</sup> On October 3, 2003, ADC terminated Cowan’s employment and reduced Dean’s salary and other employment benefits.

Plaintiffs allege that on November 10, 2003, while Dean was away from ADC’s DeLand, Florida, office on business, Hawekotte and Wallace’s agents began removing Dean’s personal property from that office. This prompted Cowan, at Dean’s instruction, to have the locks on the premises changed that same day. Nevertheless, allege Plaintiffs, the following day Hawekotte and Wallace’s agents “performed self-help, broke and entered into the premises, and took all of the files, cabinets, books, and computers, as well as the personal effects of COWAN and

---

<sup>6</sup>See Doc. 2, Exhibit “D.”

<sup>7</sup>Despite this allegation, Plaintiffs have not actually brought a claim of sexual harassment or gender discrimination.

DEAN.” Doc. 2, ¶ 31, at 8.<sup>8</sup> Three days later, on November 14, 2003, ADC terminated Dean’s employment.

### III. PLAINTIFFS’ CLAIMS

The Complaint contains four counts.

Count I asserts a claim for declaratory relief pursuant to Fla. Stat. § 86.021, Florida’s declaratory judgment statute; no specific amount in controversy is alleged. By means of this count, Plaintiffs seek nullification of the non-compete clause embodied in the “Proprietary Information and Inventions Agreement.” They reiterate that they are not sure they actually signed the document. Assuming they did, they argue the non-compete is unenforceable because it fails to satisfy the requirements of Fla. Stat. § 542.335, a statute addressing enforcement of such arrangements. Plaintiffs further assert that they should be relieved from the non-compete agreement because ADC first breached the Asset Purchase Agreement, the company either caused or allowed them to be subjected to sexual harassment and gender discrimination, and the Defendants terminated them without cause. Accordingly, Plaintiffs “demand declaratory relief against ADC construing the Non-Compete to be invalid under Florida law and for temporary and permanent injunctive relief permitting DEAN and COWAN to engage in the business of ASC consulting, management and compliance, and any relief deemed appropriate by the Court.” Doc. 2 at 12.

---

<sup>8</sup>The Complaint lists specific items of Dean’s personal property Plaintiffs say were “stolen.” Doc. 2, ¶ 31.A-.M, at 8-9.

In Count II, Plaintiffs seek rescission of the Asset Purchase Agreement on the basis of Hawekotte's and Wallace's alleged misrepresentations; as with Count I, no specific amount in controversy is alleged. Plaintiffs maintain they "stand ready to return all sums advanced to them to date by ADC pursuant to the Asset Purchase Agreement." *Id.*, ¶ 53, at 12.

Count III advances a conversion claim arising from the alleged theft of Dean's personal property from ADC's DeLand office. This count alleges damages in excess of \$15,000, but not exceeding \$75,000. *See id.*, ¶ 55, at 13. In addition to damages, Plaintiffs seek an injunction compelling the return of Dean's property.

Finally, in Count IV, Dean asserts a claim for unpaid wages "in an amount greater than \$5,000[.]" Doc. 2, ¶ 62, at 14. More specifically, Plaintiffs allege:

ADC failed to pay DEAN any wages for the period of time from [ ] October 16, 2003, until November 14, 2003. ADC also failed to provide Dean with the PTO [paid time off] to which she was entitled. As a result, ADC is indebted to DEAN for her earned wages and PTO benefits.

*Id.*, ¶ 64, at 14.

#### **IV. THE PARTIES' POSITIONS**

Plaintiffs seek remand on the asserted basis that this Court lacks subject matter jurisdiction over this case. More specifically, they contend their claims do not meet the \$75,000 amount in controversy requirement for diversity jurisdiction purposes. Concerning their claims for declaratory relief and the equitable remedy of rescission, Plaintiffs argue that the value of "the object of the litigation" does not exceed \$75,000. Further, Plaintiffs stipulate that they neither seek, nor will they accept, damages in excess of \$75,000 on their conversion and unpaid

wages claims. Accordingly, they argue that the Defendants have failed to demonstrate that the requisite amount in controversy exists in this case.

In response, Defendants assert that they “have established to a legal certainty that the Plaintiffs’ claims, including the claims for injunctive and declaratory relief, have a monetary value to Plaintiffs far in excess of \$75,000.00.” Doc. 18 at 7. Defendants say they paid Plaintiffs “over \$150,000.00 in cash, including loans to Plaintiffs and payments to the Internal Revenue Service on their behalf.” Doc. 18 at 2. Defendants state they also granted Plaintiffs “interests in certain businesses, with such interests having a value in excess of \$75,000.00.” *Id.* More specifically, ADC CEO Hawekotte’s Supplemental Affidavit states:

If the Plaintiffs were permitted to rescind the Asset Purchase Agreement, the damage to the Defendants and the value to Plaintiffs would substantially exceed \$75,000.00. As part of the Asset Purchase Agreement pursuant to which Defendants bought out the business interests of DEAN and COWAN, the Defendants paid \$60,000.00 cash, approximately \$30,000.00 to the Internal Revenue Service on behalf of Plaintiffs and ownership interest in related entities. All this in the aggregate is more than \$75,000.00. In addition, Bruce Wallace personally and through a controlled entity made loans to Anne Dean & Associates in excess of \$65,000.00 as part of the acquisition to keep Plaintiffs’ business in operation pending the closing of the Asset Purchase Agreement.

Doc. 18, Exhibit 1, ¶ 6, at 2.

Additionally, Defendants state that after the parties entered into the Asset Purchase Agreement, Defendants “invested additional hundreds of thousands of dollars to develop the business and the brand name ‘Anne Dean.’” Doc. 18 at 3-4. In that regard, Hawekotte’s Affidavit states:

In addition to the consideration ADC paid for the intellectual property rights to the Anne Dean Name, ADC thereafter invested more than \$75,000.00 in cash and more than \$75,000.00 in labor to promote and develop the name and mark "Anne Dean," the business of ADC and the associated goodwill. This investment of cash and labor by ADC, by Bruce Wallace and me personally to promote the name "Anne Dean[,]" the business of ADC and the associated goodwill together substantially exceeds \$150,000.00 and all this would be lost if Plaintiffs' claims for rescission or declaratory relief were granted.

If Plaintiffs are allowed to use the name "Anne Dean Consultants" or some derivative thereof then the Plaintiffs would receive the benefits of this more than \$150,000.00 which Defendants have invested in developing and promoting the ADC name and business. On its face, therefore, the relief from the non-compete provisions which Plaintiffs seek in this action has a value to Plaintiffs in excess of \$150,000.00.

Doc. 18, Exhibit 1, ¶¶ 7 & 8, at 2-3.

In a separate affidavit, ADC Vice President Wallace states that the Defendants "have invested in excess of \$400,000.00 in marketing and developing the Anne Dean Name including developing the associated goodwill[;]" that "the value of the referrals from the Anne Dean Name under the terms of the Referral Agreement to ADC<sup>9</sup> is in excess of \$500,000.00 each year of the remaining term of the Referral Agreement[;]"<sup>10</sup> and that, "[a]ccordingly, the Anne Dean name has a value to ADC of well in excess of \$1,000,000.00." Doc. 18, Exhibit 2, ¶ 5, at 2.

---

<sup>9</sup>Wallace's affidavit states that the Referral Agreement is attached thereto as Exhibit "A." *See* Doc. 18, Ex. 2, ¶ 2, at 1. However, no such document is attached to the affidavit.

<sup>10</sup>Earlier in the affidavit, Wallace says that during the negotiation of the Asset Purchase Agreement, Dean and Cowan "estimated" that the dollar amount of the yearly referrals would exceed three times that figure. *See* Doc. 18, Ex. 2, ¶ 2, at 1-2.

Wallace maintains that if ADC loses the right to use the Anne Dean name, ADC will lose (and Plaintiffs will gain) at least that amount. *Id.*

Wallace also estimates that the “value of the accounts and accounts receivables [sic] purchased by ADC which were the result of ANNE DEAN’s personal contacts with the clients prior to the execution of the Agreement is in excess of \$250,000.00.” *Id.*, ¶ 7, at 3. He contends that if Dean is permitted to re-establish business relationships with these clients, ADC will suffer damages exceeding \$75,000.00. *Id.*

Defendants maintain Plaintiffs’ stipulation concerning damages constitutes an improper post-removal effort to reduce the amount in controversy below the \$75,000.00 threshold so as to avoid federal court jurisdiction. Defendants note that the amount in controversy must be examined at the time of removal, and argue that Plaintiffs’ stipulation must therefore be disregarded. In any event, say the Defendants, the stipulation does not address Plaintiffs’ claims for equitable relief.

Concerning those equitable claims, Defendants note that nearly 4 ½ years remain of the 5-year non-compete period set forth in the Asset Purchase Agreement. Defendants assert that “Plaintiffs’ prior business, CRI doing business as Anne Dean Consulting, made net revenues in excess of \$100,000.00 per year (projected to over \$400,000.00 during the remaining non-compete period).” Doc. 18 at 7. Defendants thus suggest that rescinding the non-compete obligation would benefit Plaintiffs to the tune of more than \$400,000.00; however, Defendants do not actually cite any evidence supporting that figure and the affidavits the Defendants have filed in this case do not substantiate it.

## V. RELEVANT LEGAL PRINCIPLES

Any discussion about the jurisdictional question confronting this Court must begin with the twin propositions that “[f]ederal courts are courts of limited jurisdiction,” *Federated Mut. Ins. Co. v. McKinnon Motors, LLC*, 329 F.3d 805, 807 (11<sup>th</sup> Cir. 2003) (quoting *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11<sup>th</sup> Cir. 1994)), and “[w]hile a defendant does have a right . . . to remove in certain situations, plaintiff is still the master of his own claim,” *Burns*, 31 F.3d at 1095. Moreover, “[d]efendant’s right to remove and plaintiff’s right to choose his forum are not on equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand.” *Burns*, 31 F.3d at 1095.

Where a plaintiff has alleged that her damages are less than the jurisdictional amount, the “defendant must prove to a legal certainty that plaintiff’s claim must exceed” the jurisdictional threshold in order to avoid remand. *Id.* In other words, a defendant must prove to a legal certainty that “opposing counsel is falsely assessing the case or is incompetently doing so.” *Id.* “[I]f there is a chance that a state court would award a prevailing plaintiff less than the jurisdictional amount, a federal court must remand the case.” *Id.* at 1096 n.9.

This “strict standard” imposes a “heavy” burden of proof; it is warranted because

[e]very lawyer is an officer of the court. And, in addition to his duty of diligently researching his client’s case, he always has a duty of candor to the tribunal. So, plaintiff’s claim, when it is specific and in a pleading signed by a lawyer, deserves deference and a presumption of truth. We will not assume--unless given reason to do so--that plaintiff’s counsel has falsely represented,

or simply does not appreciate, the value of his client's case. Instead, we will assume that plaintiff's counsel best knows the value of his client's case and that counsel is engaging in no deception. We will further presume that plaintiff's counsel understands that, because federal removal jurisdiction is in part determined by the amount of damages a plaintiff seeks, the counsel's choices and representations about damages have important legal consequences and, therefore, raise significant ethical implications for a court officer.

*Id.* at 1095 (footnote omitted).

On the other hand, “[w]here a plaintiff fails to specify the total amount of damages demanded, . . . a defendant seeking removal based on diversity jurisdiction must prove by a preponderance of the evidence that the amount in controversy exceeds the \$75,000 jurisdictional requirement.” *Leonard v. Enterprise Rent a Car*, 279 F.3d 967, 972 (11<sup>th</sup> Cir. 2002) (footnote omitted); *see also, McKinnon Motors*, 329 F.3d at 807. In such “indeterminate damages” situations, courts give “great deference” to, and even presume true, representations that a plaintiff does not seek, and will not accept, damages in excess of the jurisdictional floor. *McKinnon Motors*, 329 F.3d at 808. Again, this is because lawyers are officers of the court, “subject to sanctions under Federal Rule of Civil Procedure 11 for making a representation to the court for an improper purpose, such as merely to defeat diversity jurisdiction.” *Id.* (footnote omitted).

Where a plaintiff seeks declaratory or injunctive relief, “[t]he value . . . for amount in controversy purposes is the monetary value of the object of the litigation that would flow to the plaintiffs if the injunction were granted.” *Leonard*, 279 F.3d at 973 (citing *Ericsson v. GE Mobile Communications, Inc. v. Motorola Communications & Elecs., Inc.*, 120 F.3d 216, 218,

*reh'g and sugg. for reh'g en banc denied*, 130 F.3d 446 (11<sup>th</sup> Cir. 1997)); *see also, McKinnon Motors*, 329 F.3d at 807. However, this requirement is subject to the important condition that the monetary value must be measured solely from the plaintiff's perspective; this is known as the "plaintiff-viewpoint rule." *Ericsson*, 120 F.3d at 218-20; *see also, McKinnon Motors*, 329 F.3d at 807. Further, subject matter jurisdiction does not exist where any benefit plaintiff could receive from injunctive relief is "too speculative and immeasurable to satisfy the amount in controversy requirement." *Ericsson*, 120 F.3d at 221-22; *Leonard*, 279 F.3d at 973 ("If we determine that the monetary value of the injunctive relief to the class plaintiffs is 'too speculative and immeasurable to satisfy the amount in controversy requirement' we need not even reach the question of whether such relief must be considered in the aggregate or *pro rata*["];" quoting *Ericsson*, 120 F.3d 221-22).

Finally, the critical time for evaluating the amount in controversy is the point of removal. In other words, the jurisdictional facts supporting removal must be assessed at the time of the removal. *See Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 949 (11<sup>th</sup> Cir. 2000). However, this does not mean a court is limited to examining just the removal notice in ascertaining the amount at issue. Rather, a "more flexible approach" is permitted, under which district courts may "when necessary . . . consider post-removal evidence in assessing removal jurisdiction." *Sierminski*, 216 F.3d at 949. Under this approach, "[w]hen the complaint does not claim a specific amount of damages, removal from state court is proper if it is facially apparent from the complaint that the amount in controversy exceeds the jurisdictional requirement." *Williams v. Best Buy Co., Inc.*, 269 F.3d 1316, 1319 (11<sup>th</sup> Cir. 2001). "If the jurisdictional amount is not

facially apparent from the complaint, the court should look to the notice of removal and may require evidence relevant to the amount in controversy at the time the case was removed.” *Williams*, 269 F.3d at 1319. However, “[w]here the pleadings are inadequate, [a court] may review the record to find evidence that diversity jurisdiction exists.” *Id.* at 1320.

## VI. ANALYSIS

In their conversion count, Plaintiffs specifically allege that their damages do not exceed \$75,000 exclusive of costs, interest or attorneys’ fees. This characterization is entitled to a presumption of correctness. *See Burns*, 31 F.3d at 1095. Accordingly, unless the Defendants prove to a legal certainty that Plaintiffs’ claim exceeds the jurisdictional threshold, Plaintiffs’ estimate controls. *Id.*

The Defendants have failed to satisfy this heavy burden. It is unclear what value can reasonably be placed on the items of personal property identified in paragraph 31 of the Complaint. Notwithstanding Plaintiffs’ assertion that some of these materials are “priceless,” Doc. 2, ¶ 59, at 13, many of the items (e.g., bills, nursing books, payroll check stubs) seem hardly that. In any event, it is clear that there is more than a chance that a state court would award Plaintiffs less than the jurisdictional amount were they to prevail on this claim. Accordingly, Defendants are not entitled to defeat remand on the asserted basis that Plaintiffs’ alleged damages on their conversion claim exceed \$75,000.<sup>11</sup>

---

<sup>11</sup>The Court would reach the same result even if the lesser “preponderance of the evidence” burden of proof applies to the conversion count.

The same result applies to Dean's lost wages claim. Again, this Court must give "great deference" to Plaintiffs' representation that they do not seek, and will not accept, damages in excess of the jurisdictional floor. *See McKinnon Motors*, 329 F.3d at 808. However, since Dean has alleged indeterminate damages concerning this claim, the Defendants' burden is different; to defeat remand, they must prove by a preponderance of the evidence that Dean's damages exceed \$75,000. *See Leonard*, 279 F.3d at 972; *see also, McKinnon Motors*, 329 F.3d at 807.

The Defendants have not met this burden, either. A plain reading of the unpaid wages count discloses that Dean is seeking wages for a period of one month - from October 16 to November 14, 2003 - as well as unspecified paid time off. *See Doc. 2*, ¶ 64, at 14. Even if, as Defendants claim, Dean's "annual salary plus benefits under the Asset Purchase Agreement . . . exceeded \$100,000," *see Doc. 18*, Exhibit 1, ¶ 2, at 1,<sup>12</sup> and Dean is entitled to compensation for four full weeks of paid time off, *see Doc. 2*, ¶ 22.G, at 6, the sum Dean is allegedly due under the unpaid wages count is far less than the jurisdictional threshold. Accordingly, the Defendants cannot prevent remand on the asserted basis that Dean's unpaid wages count seeks damages exceeding \$75,000.

Concerning Plaintiffs' claims for declaratory and injunctive relief and rescission, the Court rejects Defendants' intimation throughout their filings that the value of the object of the litigation can properly be considered from the Defendants' perspective, as well as from the

---

<sup>12</sup>The Asset Purchase Agreement actually states that Dean's "compensation" was to be "\$100,000 per annum." *Doc. 2*, Exhibit "C," ¶ 7.3, at 7.

Plaintiffs' viewpoint. This suggestion runs contrary to binding precedent; the Eleventh Circuit has expressly rejected the "either-viewpoint" rule. *See Ericsson*, 120 F.3d at 220. To reiterate, the monetary value of the object of the litigation must be measured solely from the plaintiff's perspective. *Id.* at 218-20; *see also, McKinnon Motors*, 329 F.3d at 807. Accordingly, the financial loss the Defendants may suffer if the Asset Purchase Agreement and the separate Proprietary Information and Inventions Agreement are rescinded, and Plaintiffs are permitted to compete against the Defendants, is irrelevant. What does matter is the value of the benefit that will flow to the Plaintiffs if that relief is granted. This renders immaterial many of the seemingly impressive monetary figures Defendants have cited in their opposition papers.

Unfortunately, assessing the monetary value of the claims in this case from the Plaintiffs' perspective is extremely problematic because that value appears highly speculative. It is wholly unclear what income Plaintiffs may succeed in generating if they are relieved of their non-compete obligation. The record reflects that Plaintiffs' company (CR) was experiencing serious financial difficulties when the parties entered into the Asset Purchase Agreement. In that regard, an October 20, 2002 e-mail from Cowan to Hawekotte references current IRS difficulties. Although Cowan attempts to put a brave face on the situation - remarking that they are not looking for someone to "save" them - the e-mail also discloses recurring past IRS problems. Exhibit "A" to Declaration of Robert S. Hawekotte in Support of Defendants' Motion to Dismiss (Doc. 8). Similarly, in a complaint the Defendants filed in a companion action pending in California, they alleged upon information and belief that CR had been dissolved as a corporation, that the company was insolvent at the time of the parties'

business negotiations and had been operating at a net loss for years, that CR and its shareholders owed the IRS approximately \$90,000 in taxes, that Cowan and Dean were using CR's corporate funds to pay their personal expenses rather than pay current and past-due payroll taxes, and that CR was failing to reimburse employees for approved business expenses. *See* Doc. 8, Exhibit "D," ¶¶ 5, 13 & 39.<sup>13</sup> Given these circumstances, it is highly uncertain how successful Plaintiffs might be in their future business endeavors if they are permitted to compete against the Defendants.

Moreover, it is unclear what monetary benefit Plaintiffs would receive if the Asset Purchase Agreement were rescinded and their business assets were returned to them. In that regard, it is highly significant that Plaintiffs are bound to restore the Defendants to the *status quo* as a general condition precedent to obtaining rescission of the Asset Purchase Agreement. *See Great Harbour Cay Realty & Inv. Co. Ltd. v. Carnes*, 862 So.2d 63, 68 (Fla. 4<sup>th</sup> DCA 2003); *Turner v. Fitzsimmons*, 673 So.2d 532, 535 (Fla. 1<sup>st</sup> DCA 1996). Plaintiffs acknowledge this obligation; as previously noted, in their rescission count, they expressly state that they "stand ready to return all sums advanced to them to date by ADC pursuant to the Asset Purchase Agreement." Doc. 2, ¶ 53, at 12. In the Court's view, the value of the object of the litigation *from the Plaintiffs' perspective* cannot be determined without taking this circumstance into account. This prevents the Plaintiffs from receiving a windfall should they succeed on their

---

<sup>13</sup>These documents are properly considered under the Eleventh Circuit's flexible approach in determining the amount in controversy. *See Sierminski*, 216 F.3d at 949; *Williams*, 269 F.3d at 1320.

rescission claim, and greatly reduces the monetary value of the object in litigation from their standpoint.<sup>14</sup>

Further, the Defendants have taken the position both in this case and in the California litigation that the Plaintiffs essentially misrepresented the value of CR; i.e., that the business was not really worth as much as the Defendants paid for it. *See*, Doc. 8, ¶ 12, at 4 (“After entering into the Asset Purchase Agreement, [Hawekotte] learned that Plaintiffs falsely represented numerous facts concerning Plaintiffs’ Business, including inflating both the number and value of its contracts”); *see also, generally*, Exhibit “D” to Doc 8. Further, while the Defendants say they have spent considerable sums promoting the Anne Dean Name, it is also the case that they were, and are, experiencing financial problems themselves. In that regard, Hawekotte states that ADC, OP and OEP “are experiencing a substantial loss of revenue and increasing financial hardship,” that “[e]ven prior to commencing this litigation, ADC had trouble meeting its payroll obligations,” and that since commencing the California litigation, “ADC has had to lay-off numerous employees from its California operation.” Doc. 8, ¶ 17, at

---

<sup>14</sup>In *Rosen v. Chrysler Corp.*, 205 F.3d 918, 921 (6<sup>th</sup> Cir. 2000), the Sixth Circuit held that “in cases where a plaintiff seeks to rescind a contract, the contract’s entire value, without offset, is the amount in controversy.” Accordingly, in a case seeking rescission of automobile leases, the appellate court stated: “[T]he District Court erred by offsetting the amended complaint’s rescission claim by the resale value of the [automobile]. The amount in controversy is the full contract price paid by plaintiffs[.]” *Id.* at 922.

This Court believes strict application of *Rosen* would violate the Eleventh Circuit’s plaintiff-viewpoint rule. Accordingly, to the extent *Rosen* might be deemed applicable to the case at hand, this Court respectfully declines to follow it.

5-6.<sup>15</sup> Given these circumstances, the present value of the purchased business assets, including the Anne Dean name, is highly uncertain.

Based on the foregoing, the Court concludes that the monetary benefit Plaintiffs could receive were they to prevail on their claims for rescission and injunctive and declaratory relief is “too speculative and immeasurable to satisfy the amount in controversy requirement.” *Ericsson*, 120 F.3d at 221-22; *Leonard*, 279 F.3d at 973.

## VII. CONCLUSION

Considered in the aggregate, the value of Plaintiffs’ claims in this case is uncertain. That uncertainty must be resolved in favor of remand. For the reason that this Court lacks subject matter jurisdiction over this action, it is ORDERED as follows:

1. Plaintiffs’ Motion for Order of Remand (Doc. 11), filed February 4, 2004, is GRANTED.
2. This case is REMANDED to the Circuit Court, Seventh Judicial Circuit, in and for Volusia County, Florida.
3. The Clerk of this Court shall notify the Clerk of the Volusia Circuit Court that this case was assigned case no. 2003-12017-CIDL when it was previously pending in state court.

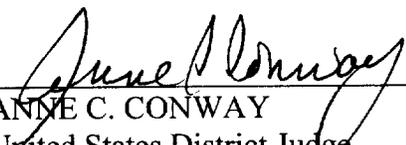
---

<sup>15</sup>Defendants attribute these financial problems to wrongdoing on Plaintiffs’ part.

4. The Defendants' Motion to Dismiss, Stay, or Transfer This Action, etc. (Doc. 7), filed February 2, 2004, is MOOT.

5. The Clerk shall close this case.

**DONE** and **ORDERED** in Chambers, in Orlando, Florida this 31<sup>st</sup> day of March, 2004.

  
\_\_\_\_\_  
ANNE C. CONWAY  
United States District Judge

Copies furnished to:

Counsel of Record  
Unrepresented Party  
Administrative Law Clerk  
Clerk, Circuit Court, Volusia County



F I L E C O P Y

Date Printed: 04/02/2004

Notice sent to:

— K. Judith Lane, Esq.  
Smith, Hood, Perkins, Loucks,  
Stout & Orfinger, P.A.  
P.O. Box 15200  
Daytona Beach, FL 32115-5200

6:04-cv-00028 lak

— Harold Cole Hubka, Esq.  
Cobb & Cole  
150 Magnolia Ave.  
P.O. Box 2491  
Daytona Beach, FL 32115-2491

6:04-cv-00028 lak

— Robert Taylor Bowling, Esq.  
Cobb & Cole  
150 Magnolia Ave.  
P.O. Box 2491  
Daytona Beach, FL 32115-2491

6:04-cv-00028 lak

4/2