Case Update – Agilent v. Twist Litigation

Summary of Recent Developments

- On May 10, 2019, the Court issued rulings on several pending motions.

- Agilent had challenged Twist's cross-complaint, filed on January 29, 2019. Twist's cross-complaint alleged claims against Agilent for defamation, defamation per se, libel, libel per se, slander and slander; intentional interference with prospective economic advantage; and unfair competition, and also sought declaratory relief against Agilent. Agilent asked the Court to dismiss each of these claims, including on the grounds that its conduct was protected from suit under California's anti-SLAPP statute.[1] **The Court rejected in its entirety Agilent's attempt to dismiss Twist's cross-complaint.**

- Twist had challenged various aspects of Agilent's second amended complaint, filed on December 13, 2018. As part of its ruling, **the Court granted Twist's request to strike from the case Agilent's non-solicitation allegations against Twist's CEO Emily Leproust**, holding that Agilent cannot maintain a breach of contract claim based on the asserted non-solicitation provision in Agilent's employment contract. **The Court ordered all such allegations dismissed from Agilent's complaint with prejudice.**

- Additionally, earlier this month, the parties also received numerous favorable rulings from the specially-appointed Discovery Referee on pending discovery motions. **The Referee denied Agilent's sole motion to compel, and granted Twist and Leproust relief from four out of five of their motions to compel.**[2]

Key Takeaways from the Court's Rulings, and Excerpts from the Rulings

1. The Court agreed that Twist's cross-claims alleged facts showing Agilent had engaged in bad faith conduct on the eve of Twist's October 31, 2018 IPO

"Here, the timing and content of Agilent's letter to the SEC, and its subsequent publication of the letter, suggest that Agilent was not motivated by a good faith and serious belief that Twist's securities filings were deficient. Agilent does not address this issue in its moving papers . . . ." (Order, at 12.)

"Twist and Leproust plausibly allege that Agilent submitted the SEC letter, not with good faith intention to prompt action by the SEC, but in order to interfere with its competitor's IPO." (Order, at 17–18.)

"The sham exception to the *Noerr-Pennington* doctrine applies where facts are alleged to show that 'defendants complained to the SEC, not out of any desire to protect their investments or

[1] California Code of Civil Procedure Section 425.16.

[2] These orders have been posted at: https://investors.twistbioscience.com/agilent-v-twist-litigation

instigate official action, but solely out of a desire to block the public offering.' [] This is exactly the theory that Twist and Leproust allege here." (Order, at 18 (citation omitted).)

2. **The Court further agreed with Twist and Leproust that Agilent's non-solicitation breach of contract claim against Leproust violated California law because it was an illegal restraint on trade**

"The Court agrees with defendants and with the federal opinions that have considered the issue that *AMN*, read in connection with *Edwards v. Arthur Anderson LLP* (2008) 44 Cal.4th 937, stands for the proposition that employee non solicitation provisions are generally no longer valid under California law, at least insofar as they would prohibit former employees from solicitation after their employment has terminated." (Order, at 27.)

"The Court accordingly follows *AMN* and finds that the non solicitation provision at issue here is invalid as applied to Leproust's post-resignation recruitment" (Order, at 28.)

3. **The Court struck the relevant allegations regarding non-solicitation from Agilent's complaint "without leave to amend," meaning Agilent now has no opportunity to revive this claim**

4. **As to Twist's claims against Agilent for defamation, intentional interference, and unfair competition, the Court ruled that California's anti-SLAPP statute did not apply because Agilent's anti-competitive conduct did not "arise out of any protected activity"**

"[C]ritical to the Court's analysis here, *ComputerXpress* addressed the plaintiff's argument (also advanced by Twist and Leproust) that statements by a company against its competitor are not subject to the anti-SLAPP statute as speech connected to an issue of public interest. . . . [I]t is apparent that Agilent was acting as a competitor rather than as an investor in publicizing its letter to the SEC . . . ." (Order, at 14.)

"Considering the facts in this case, the Court concludes that the public interest prong of the anti-SLAPP statute does not apply. Acknowledging that Twist had disclosed its litigation with Agilent in SEC filings, Agilent complained to the SEC that Twist did not characterize specific disputed facts in the litigation in the manner most favorable to Agilent. Agilent provides no evidence it was 'speaking as an investor' to other investors rather than as Twist's competitor. The Court does not conclude that this is the unique case where such competitive battling qualifies as speech regarding an issue of public interest." (Order, at 15.)

"Agilent accordingly fails to show that the anti-SLAPP statute applies to the fourth and fifth [cross-claims, i.e., defamation and intentional interference]." (Order, at 15.)

"A major portion of the sixth [cross-claim, i.e., unfair competition] arises from the same conduct underlying the fourth and fifth causes of action. . . . Under the circumstances, the gravamen of the Cross-Complaint does not arise from protected activity." (Order, at 15.)

5. **The Court refused to accept, as even "substantially true," Agilent's unfounded allegation that Twist employees had purposefully taken proprietary documents to develop Twist technology**

"Defendants' allegations raise an issue of fact regarding whether Agilent's statement that 'Twist employees have admitted to taking and retaining hundreds of confidential Agilent documents for years while developing the Twist technology' is substantially true. For one thing, Agilent cites no admission by defendants that they took documents 'while developing the Twist technology.' Further, Twist and Leproust persuasively argue that the 'gist or sting' of [Agilent's] statement is that defendants admitted to actively or knowingly taking documents while developing the Twist technology, which is a material mischaracterization of their position. The truth of this statement is an issue of fact not properly resolved on demurrer." (Order, at 19.)

6. **As to Twist's declaratory judgment claims against Agilent, the Court also ruled that these claims were not subject to the anti-SLAPP statute, and that Agilent's challenge on that basis failed**

"Here, a dispute exists between the parties over the legality of defendants' actions. It is this underlying dispute, rather than Agilent's lawsuit or pre-litigation conduct, that gives rise to defendants' claim for declaratory relief [i.e, first through third cross-claims]." (Order, at 10–11.)

7. **The Court rejected all of Agilent's demurrer attacks on the legal sufficiency of Twist's cross-complaint, allowing Twist and Leproust to maintain each of their cross-claims against Agilent**

"Agilent demurs to each cause of action in the cross-complaint for failure to state a claim, incorporating the merits arguments in support of its anti-SLAPP motion. [citation omitted] . . . Agilent's demurrer is OVERRULED in its entirety." (Order, at 16, 20.)

8. **The discovery rulings on April 29, 2019 included the following:**

- An order granting Twist's motion to compel discovery related to Agilent's alleged damages, in which the Referee found that Agilent had not provided complete answers to numerous written requests for information

- An order requiring Agilent to respond to Twist's Requests for Admissions (RFAs) and accompanying written requests for information

- An order denying Agilent's motion to compel forensics information from Twist and Leproust, and finding that Agilent had not complied with its obligations under the Court-ordered stipulation requiring forensics

- An order granting Twist and Leproust's motion to compel discovery relating to Agilent's interference in Twist's IPO, including the identities of the individuals involved

- An order granting Twist and Leproust's motion to compel discovery regarding the bases for Agilent's allegations, including because Agilent had "not provided

complete and straightforward responses" to numerous written requests for information

9. **On May 16, 2019, Agilent filed a notice of appeal, indicating its intent to appeal the Court's rejection of Agilent's anti-SLAPP motion to strike. Defendants intend to oppose the appeal and to defend the Court's well-reasoned and correctly-decided ruling on that motion.**