IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

C-E Minerals, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION FILE
	)	
CARBO Ceramics Inc.,	)	NO.: 1:11-CV-2574-JOF
	)	
Defendant.	)	

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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I. <u>CARBO's "Unclean Hands" and "Laches" Defenses Cannot Render Paragraph 5 Prospectively Enforceable</u>.

The rule for antitrust cases is simple and not disputed by any authority CARBO cites: contract provisions that violate the antitrust laws are not prospectively enforceable. Either contracting party may challenge them and obtain relief. *See* C-E Injunction Br. (Dkt. No. 10) at 17-19, 25 & n.7.

Tellingly, CARBO does not cite a single antitrust case to support its unclean hands and laches defenses. *Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co.*, 324 U.S. 806, 816 (1945) held that inequitable conduct can bar relief in a case to enforce patent rights (private rights that restrict competition and that can be freely waived or traded away by agreement). *Angel Flight of Ga., Inc. v. Angel Flight Am., Inc.*, 522 F.3d 1200 (11th Cir. 2008) was a trademark case holding that laches and other equitable defenses do *not* preclude an injunction against prospective conduct where there is risk to a *public* interest (as is true of a contract that violates the antitrust laws). *Id.* at 1208.[1]

[1] *Rinks v. Courier Dispatch Group, Inc.*, 2001 WL 34090167, at **2-4 (N.D. Ga. Apr. 11, 2001) denied injunctive relief on a Georgia-law-only claim because (1) the plaintiff had signed a post-employment release of all claims, including claims related to her non-compete and (2) the non-compete was most likely enforceable anyway. As to unclean hands, the Court merely commented in passing that the plaintiff faced the additional hurdle that she had accepted payment under the post-employment release a mere month before filing suit on a released claim.

Aside from failing under the law, CARBO's unclean hands and laches arguments ignore key, undisputed facts. C-E gave CARBO clear written notice over five years ago that it regarded Paragraph 5 as invalid. When CARBO protested, C-E's final word, by letter of August 7, 2006, was that it would comply with all provisions *except Paragraph 5*. *See* Fortier Decl. Ex. E. While CARBO criticizes C-E for not suing in 2006, it cites no case holding that a party must file suit in order to effectively repudiate an unlawful agreement. Nor did the "failure" to file suit prejudice CARBO. C-E's written repudiations were sufficient to give CARBO the right to seek specific performance, or to terminate the contract and find a new supplier, *see Baldwin v. Panetta*, 4 So.3d 555, 562 (Ala. Civ. App. 2008), or at least to take the never-specified measures it now claims that it would have taken to protect its allegedly confidential information. Ultimately, CARBO, like C-E, is charged with knowledge of the law, and it cannot have reasonably relied upon any contract provision that violates the antitrust laws.

II. Paragraph 5 Is a *Per Se* Violation of Sherman Act Section 1.

A. Paragraph 5 Is Not Subject to the Rule of Reason Simply Because It Is Contained in an Otherwise Lawful Agreement.

CARBO notes that the *per se* rule applies "to only a very few, narrow types of restraints." CARBO Br. at 9. Yet as recently as 2007, the Supreme Court has confirmed that horizontal market allocation, just like horizontal price-fixing, falls within this rule. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 904 (2007). Calling Paragraph 5 a "covenant not to compete" does not magically avoid that rule. *Every* agreement governed by Sherman Act Section 1 is a "covenant not to compete," including *per se* violations such as horizontal price fixing (a covenant not to compete on price) or horizontal market allocation (a covenant not to compete on specified products or within a certain territory). The cases CARBO cites for the proposition that covenants not to compete are governed only by the rule of reason invariably involve covenants in employment contracts or the sale of an ongoing business.[2] These cases do not allow horizontal competitors to allocate markets (for years after their relationship ends) without fear of the *per se* rules, so long as they do so in a "non-compete" in a materials supply agreement.

Paragraph 5 meets every objective criterion for a horizontal market allocation. It allocates the market for selling raw clay to the refractory industry to C-E and the market for making and selling ceramic proppants to CARBO. And, as

[2] *See Consultants & Designers, Inc. v. Butler Serv. Group, Inc.*, 720 F.2d 1553, 1559 (11th Cir. 1983) (employment contract); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265-68 (7th Cir. 1981) (sale of ongoing business); *National Soc. of Prof'l Eng'rs v. U. S.*, 435 U.S. 679, 689 (1978) (dictum regarding covenants in an "employment contract or the sale of a going business"); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 n. 3(1988) (dictum, sale of a business). *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57-59 (1977) involved downstream restraints in a *vertical* manufacturer-distributor relationship. *See* C-E Injunction Br. at 8-9 (explaining why vertical restraint rules do not apply).

CARBO does not dispute, C-E was at all relevant times at least a potential horizontal competitor in the manufacture of ceramic proppants. *See* C-E Injunction Br. at 4. So Paragraph 5 falls squarely within the *per se* rule that actual or potential competitors cannot divide markets between them. *Id.* at 6-9 & nn. 1-2.

In trying to distinguish C-E's cases, CARBO muddles the concept of a "naked" restraint. Supposedly *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46 (1990) involved a "naked" restraint because the parties had already competed before BRG purchased the license for HBJ's copyrighted bar review materials. CARBO reads *Palmer* as a "pretext" case, whereby the *per se* rule applies to a provision allocating markets (or, by logical extension, fixing prices or any other *per se* offense) only if the rest of the agreement is merely a sham. CARBO Br. at 10. Yet the copyright license in *Palmer* transferred a valuable right to use (in Georgia) materials developed by HBJ – "the Nation's largest provider of bar review materials and lecture services" – along with HBJ's nationally-established trade name "Bar/Bri." 498 U.S. at 46-47. Indeed, the lower courts believed that the market division was "not a 'naked agreement,'" *Palmer v. BRG of Ga., Inc.*, 874 F.2d 1417, 1424 (11th Cir. 1989), just as CARBO urges of Paragraph 5 here.

In reversing, the Supreme Court did not question that the copyright license itself was a productive endeavor. That was not the basis of its holding that the market allocation provision was a *per se* unlawful, naked restraint. 498 U.S. at 49-50. The prospect that, absent market allocation, BRG could have used information derived from HBJ's copyrighted materials to compete outside of the geographic bounds of the license did not, for example, trigger "rule of reason" analysis.

Contrary to CARBO's implicit premise, a restraint does not become "ancillary" (and thus subject only to lenient rule of reason analysis), rather than "naked" (and subject to the *per se* rule) whenever it is contained in an otherwise legitimate contract. "Ancillary" means that the "restraints on competition are *essential* if the product is to be available *at all*." *American Needle, Inc. v. NFL*, 130 S.Ct. 2201, 2216-17 (2010) (emphasis added).[3] "[A] restraint is not saved from the 'naked' classification simply because it is included in some larger joint venture arrangement that is clearly efficient." 11 Areeda & Hovenkamp, Antitrust Law ¶ 1908b at 284 (3d ed. 2011). "The question is whether the restraint is *necessary* for the *existence* of the product." *National Bancard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 592, 601 (11th Cir. 1986) (emphasis added). Thus, joint ventures and comparable endeavors "normally are subject to rule of reason analysis because whatever restraint they impose is ancillary and counterbalanced by

[3] *See also Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1416 (7th Cir. 1995) ("[T]his is not one of those cases in which a division of markets or other cartel-like activity is *actually essential* to the provision of a lawful service.") (emphasis added).

otherwise *unattainable* procompetitive benefits." *Id.* (emphasis added).

So CARBO misses the mark by arguing simply that the parties' supply agreement was a productive arrangement under which both sides benefitted from the sale and purchase of clay. To be an ancillary restraint (and avoid *per se* treatment), Paragraph 5 must be *necessary* and *essential* to *otherwise unattainable* pro-competitive benefits from that agreement. CARBO cannot make that case.

B. Paragraph 5 Cannot Qualify as an Ancillary Restraint, Subject Only to the Rule of Reason.

CARBO cites a letter in which a lay C-E employee loosely referred to the parties' supplier-purchaser relationship as a "partnership." But the 1995 and 2003 supply contracts did not create anything akin to a legal partnership or joint venture. C-E simply sold raw clay to CARBO for a set price, and CARBO was free to do whatever it liked with that clay for its sole loss or profit. Edmunds Decl. Exs. 1, 4.

That is not a partnership or joint venture of the sort that has triggered rule of reason treatment. In *National Bancard*, for example, the Eleventh Circuit rejected *per se* analysis because the parties partially integrated their functions "to develop a product—the VISA card—that none of its members could produce individually. The product, then, 'is truly greater than the sum of its parts.'" 779 F.2d at 602 (quoting *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 21-22 (1979). In *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 189-90 (7th Cir. 1985), cited by

CARBO, competitors pooled resources and formed a joint venture to build a new retail facility that would have been uneconomical for either to build alone. In *Broadcast Music*, 441 U.S. at 23, it would have been impossible to create a blanket broadcast license unless all copyright holders jointly agreed. Nothing like that is true here. CARBO does not cite one case where a post-contract, horizontal market allocation was treated as ancillary to a supply agreement remotely like this one.

On the face of Paragraph 5, the "justification" for C-E's agreement not to make proppants is the concomitant agreement of CARBO not to sell clay. Now CARBO tries to portray this bargain as some surrogate confidentiality provision intended to protect the allegedly secret specifications of the clay sold under the contract. But the objective facts, as well as the law, forbid this fiction.

First, the Agreement says *nothing* about confidentiality, non-use or non-disclosure. C-E could have sold anything it learned to a CARBO competitor. Trying to explain that away, CARBO claims that it considers confidentiality agreements unreliable. Yet it clearly uses them when it actually perceives some risk to its proprietary information. CARBO has now produced two "Record of Visitation of Invitees, Contractors, Licensees, Vendors and Others" forms signed by C-E employee Paul Hall (and apparently *all* visitors) when he visited CARBO's facility in 2005. Edmunds Decl. Ex 8; Second Hall Decl. ¶¶ 2-3. That is ten years *after* the parties entered their first supply agreement in 1995 and two years *after* they entered their second supply agreement in 2003. Edmunds Decl. Exs. 1, 4.

The single paragraph in the visitation form regarding confidentiality covers only what the visitor is "permitted to observe" or which "may be disclosed to [the visitor] during or because of [his] entry upon the Owner's Property." *Id.* Ex. 8 ¶ 1. It does not purport to cover the specifications of the clay that C-E had been selling to CARBO for years prior to Mr. Hall's visits, something that he and other C-E employees knew without setting foot in a CARBO facility. If anything, these forms undercut any idea that CARBO would rely on non-competition agreements, rather than confidentiality agreements, to protect truly proprietary information.

Second, CARBO's account of Paragraph 5 collides with the fact that the parties' first seven-year clay supply agreement says nothing about confidentiality *and* does not preclude C-E from manufacturing proppants. Edmunds Decl. Ex. 1. Anticipating that snag, CARBO urges that the 2003 contract included some Andersonville, Georgia clay, in addition to the Alabama clay C-E had sold CARBO since 1995. But the only difference is the 2003 contract allowed *CARBO* to specify that up to 25% of the clay would be 47% alumina clay from Andersonville, *provided that* the average delivery for each 1000 tons still met the underlying alumina (Al_2O_3) and iron oxide (Fe_2O_3) specifications in Appendix A.

Id. Ex. 4 ¶ 2(c). Those specifications are virtually unchanged from the 1995 contract. *Id*. Ex. 1 Appendix A & Ex. 4 Appendix A.

Whether the clay comes entirely from Alabama or also from Georgia, the supposed “secret” is the chemical composition of clay suited for making proppants. That is revealed by the 1995 agreement. Clearly, a non-competition clause was not essential to a viable supply relationship between these parties, since they operated for seven years without one. Moreover, in 2003, CARBO entered a 20-year agreement with another *Georgia* clay supplier, who also would necessarily learn the type of clay preferred by CARBO. *See* Lowrey Decl. ¶¶ 22-24 & Ex. 12. Yet that supply contract says *nothing* about confidentiality or non-competition. *Id.*

Third, multiple, now-expired patents filed by CARBO and others years before the parties’ first supply agreement contain detailed information about the composition and characteristics of the clay best suited for making proppants. *Id.* ¶¶ 10-19 & Exs. 5-10. This includes work confirming the suitability *of C-E’s own Andersonville clay deposits* for this purpose. *Id.* Indeed, C-E has openly advertised to customers for at least eight years that the base material from which C-E is now making proppants was suitable for that purpose. Fortier Decl. ¶ 11.

Fourth, CARBO offers nothing to show that it has protected the supposed confidentiality of the characteristics of the clay it was purchasing. As noted, the site visit forms Mr. Hall signed in 2005 did nothing to preserve any secrecy regarding the specifications or sources of clay C-E delivered to CARBO under the 1995 or 2003 supply agreements. CARBO fails to come forward with a single document in which it ever even identified that information as confidential – let alone sought or obtained any protection for it – even though such proof would be within its control. That eliminates any protectable interest in confidentiality as a matter of law. *See* C-E Injunction Br. at 14 n.4. On top of this, CARBO affirmatively disclosed the source and specifications of the clay it was purchasing from C-E by publicly filing that information as early as 1996.[4]

In sum, Paragraph 5 was not necessary to create some new, otherwise unattainable product, as CARBO must show here. It is absurd to suggest that, absent a market allocation agreement, a party in CARBO's position would have forsaken the manufacture of proppants, rather than rely on confidentiality agreements (and the potent body of law enforcing those agreements) to protect any genuinely proprietary information. CARBO cannot avoid the *per se* rule against contractual market allocations simply by swearing now that it would not have bought clay from C-E without one (as it did from 1995-2003 and evidently still

[4] Appendix A to the parties' 1995 agreement reveals the source and specifications of the clay purchased by CARBO. *See* Edmunds Decl. Ex 1. CARBO filed that document publicly with the S.E.C., redacting only the *price* terms, not the clay information. Hockensmith Decl. Ex. 1 (Dkt No. 10-5 at 13-18).

does from another Georgia clay supplier). C-E Injunction Br. at 14.

Indeed, CARBO fails to cite even one case holding that horizontal competitors can protect proprietary information by allocating markets. *Id*. at 15-16 (collecting contrary law). Its only try is *Baker's Aid v. Hussman Food Service Co.*, 730 F. Supp. 1209 (E.D.N.Y. 1990), which favors C-E's position. There, the plaintiff hired the defendant to develop manufacturing specifications for rack ovens and then produce them for the plaintiff. The specifications would remain the plaintiff's property. *Id.* at 1211. The defendant agreed to refrain from (1) competing in the manufacture or sale of rack ovens *using the specifications it had developed for hire* and (2) from *any* competition in the manufacture or sale of rack ovens within the U.S. or Canada during a specified period after termination. *Id.* at 1213. The court upheld *only the first covenant*, striking down and severing the second one under state law as overbroad. *Id.* at 1214-16. So the court *struck* the only covenant resembling the outright prohibition on manufacturing or sale in Paragraph 5 here. Turning to federal law, the court did not analyze whether the already-severed *second* covenant would have been subject only to rule of reason analysis. *Id.* at 1217 (upholding covenant only "as reformed by this Court").[5]

[5] CARBO's only other supposedly pro-competitive rationale for Paragraph 5 cannot possibly justify the three-year ban on *post-termination* competition. There is no danger of C-E favoring its own clay needs over CARBO's or otherwise

II. <u>Paragraph 5 Is Unenforceable Under State Law</u>

A. <u>Paragraph 5 Is Subject to Strict Scrutiny Under Georgia Law</u>.

Hoping to escape strict scrutiny, CARBO stitches together language – not holdings – from various Georgia cases. But of the Georgia cases it cites, the only ones that actually applied anything less than strict scrutiny involved the sale of a business or professional partnership agreements. *See* CARBO Br. at 13-16 & n.9.

The raw materials supply contract here cannot be subject to any less scrutiny than the far more collaborative agreement between obviously sophisticated parties in *Amstell, Inc. v. Bunge Corp.*, 443 S.E.2d 706, 706-07 (Ga. App. 1994). There, one party was not only supplying the other, but doing so with goods it manufactured using the other's proprietary formula, all pursuant to an express confidentiality agreement. *Amstell* applied the same strict scrutiny applicable to employment agreements, specifically refusing either to apply the looser scrutiny that applies to the sale of business assets or to allow any "blue pencil" reformation of the covenant. *Id.* Contrary to CARBO's suggestion, neither holding depended on a discussion of bargaining power, sufficiency of consideration or any other

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failing to perform in good faith after it is no longer CARBO's supplier. *See* Edmunds Decl. ¶ 31(b) & (c). CARBO does not cite one case where factors like those rendered a post-termination market allocation (or any other agreement subject to *per se* illegality) as merely ancillary to a raw materials supply contract. If loose notions like supplier "loyalty" can avoid *per se* treatment even of post-contract horizontal market divisions, then there is little to the *per se* rule.

factor that CARBO argues in its effort to avoid strict scrutiny here.

B. <u>Paragraph 5 Cannot Survive Strict (or Intermediate) Scrutiny</u>.

First, a covenant cannot survive either strict or intermediate scrutiny where, as here, it lacks any geographic limitation. *See* C-E Injunction Br. at 19 n.6; *OnBrand Media v. Codex Consulting, Inc.*, 687 S.E.2d 168, 173-74 (Ga. App. 2009) (voiding covenant under intermediate scrutiny for lack of "specific territorial limits"). CARBO claims that a world-wide restraint is allowed here because it sells proppants to fifty countries. *See* Gallagher Decl. ¶ 37. But fifty countries is not even a third of the countries in the world. And even if the territory covered by Paragraph 5 had been limited to countries in which CARBO sold during the term of the contract, that would have been unenforceable. *See, e.g., Taylor Freezer Sales Co. v. Sweden Freezer Eastern Corp.*, 160 S.E.2d 356, 358-59 (Ga. 1968). No Georgia case we can find has enforced a worldwide ban on competition.

Second, "'[t]he restrictions imposed upon the promisor must not be larger than necessary for the protection of the promisee.'" *Taylor*, 160 S.E.2d at 358-59. "Restrictions which place greater limitations than are necessary to protect the [promisee] render the contract void and unenforceable." *Watkins v. Avnet, Inc.*, 177 S.E.2d 582, 584 (Ga. App. 1970). Again, this is true under intermediate scrutiny as well. *Physician Specialists in Anesthesia, P.C. v. MacNeill*, 539 S.E.2d

216, 223-24 (Ga. App. 2000). The only interest CARBO suggests to justify the post-contract ban on competition is protecting allegedly proprietary information regarding clay specifications. Yet Paragraph 5 is not limited to preventing the use of this or any other information. It prohibits C-E from making ceramic proppants using *any* method or clays mined far from Georgia or Alabama. *See* CARBO Br. at 17 (noting that C-E and affiliates have clay reserves in 18 countries). It would even prevent C-E from selling proppants manufactured by an unrelated third party.

A covenant cannot go beyond protecting genuinely proprietary information and broadly restrict competition by any methods. *Rollins Protective Servs. Co. v. Palermo*, 287 S.E.2d 546, 550-51 (Ga. 1982) reversed such an injunction:

> [T]he injunction imposed by the trial court is far broader than either of the non-disclosure clauses in the employment agreement, and goes beyond protecting a trade secret or confidential information. … As such it is an injunction against competition.

If Paragraph 5 actually was a confidentiality provision, it would be a void and overbroad one: such provisions are invalid unless limited to information that is genuinely proprietary. *See, e.g., Prudential Ins. Co. v. Baum*, 629 F. Supp. 466, 471-72 (N.D. Ga. 1986); *MacGinnitie v. Hobbs Group, LLC*, 420 F.3d 1234, 1242 (11th Cir. 2005). So a ban on post-contract competition not even purportedly tied to the use of proprietary information cannot possibly pass muster under Georgia law as a surrogate confidentiality protection. Even CARBO's "best" case

(*Baker's Oven*) struck down that sort of covenant as overbroad.

C. <u>Paragraph 5 is Unenforceable Under Alabama Law</u>.

First, CARBO fails even to address C-E's argument that Paragraph 5 violates Alabama Code §§ 8-10-1 and 8-10-3. *See* C-E Injunction Br. at 21-22. Because Paragraph 5 is an agreement limiting the quantity of proppants manufactured and clay sold in Alabama (and elsewhere), it violates § 8-10-1.

CARBO limits its discussion to cases applying Alabama Code § 8-1-1, which flatly *prohibits* restraints on trade in subsection (a), subject to exceptions in subsections (b) and (c) for partial restraints (1) in sales of the goodwill of a business, (2) prohibiting an employee's solicitation of a former employer's clients, and (3) prohibiting competition by former partners in the business of a partnership. "Section 8-1-1(a) provides for a general prohibition on covenants not to compete subject only to the limited exceptions provided by sub-sections (b) and (c) of Section 8-1-1." *Concrete Co. v. Lambert*, 510 F. Supp. 2d 570, 579 (M.D. Ala. 2007). CARBO cites a number of cases – primarily employment cases – falling within these express exceptions. But it cites no case enforcing a prohibition on post-contract competition in an arm's length supply contract like this one.

It cannot be enough, as CARBO argues, that Paragraph 5 allows C-E to sell non-ceramic proppants, *i.e.*, sand (*see* Gallagher Decl. ¶¶ 11-17). By that logic, any restraint could be described as partial, merely by pointing to some product that it does not cover. "Partial" does not simply mean that a restraint could be broader. Instead, even restraints that fall literally within the statutory exceptions to § 8-1-1 are not enforceable as "partial" unless *the party seeking enforcement* shows "a protectable interest," that "the restriction is reasonably related to that interest" and that "the restriction is reasonable in time and place." *Concrete*, 510 F. Supp. 2d at 579-80; *Calhoun v. Brendle, Inc.*, 502 So. 2d 689, 691-92 (Ala. 1986).

Even if the parties' supply contract qualified for analysis as a partial restraint, Paragraph 5 flunks this test. It lacks any geographic limitation. And the outright prohibition on making proppants from *any* clay by *any* means is not reasonably limited to preventing use of confidential information – the only "protectable interest" CARBO suggests to justify the post-termination restraint. Moreover, "[t]o be protectable, [information] must be treated in a confidential manner." *Concrete*, 510 F. Supp. 2d at 583. Under Alabama law, information not preserved as confidential cannot justify enforcement of a non-compete.[6] And, here, CARBO has not proved or protected the confidentiality of any information.

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[6] *Id*. (voiding non-compete on this ground); *Calhoun*, 502 So. 2d at 691-92 (same holding); *Unisource Worldwide, Inc. v. South Central Ala. Supply, LLC*, 199 F. Supp. 2d 1194, 1203-04 (M.D. Ala. 2001) (explaining Alabama law); *Birmingham TV Corp. v. DeRamus*, 502 So. 2d 761, 764 (Ala. Civ. App. 1986) ("secrets" easily obtainable by others cannot support non-compete).

III. C-E Is Entitled to a Preliminary Injunction.

Whatever the theoretical chance that CARBO could ever prevail on its strained portrayal of Paragraph 5 as a lawful, ancillary restraint meant to protect confidentiality, it is not enough to negate C-E's substantial likelihood of success. And, under circuit law, the loss of competitive opportunities due to an unlawful restraint on trade constitutes an irreparable injury to a party and the public that requires preliminary injunctive relief. *See MacGinnitie*, 420 F.3d at 1241-43. CARBO cannot overcome circuit precedent with its unsubstantiated assertion that C-E could later quantify and recover all of its losses through monetary damages.[7]

CARBO argues that an injunction under Georgia law (as opposed to federal antitrust law) must be limited to Georgia. But Georgia is where C-E will make the proppants. Fortier Decl. ¶ 10. Further, the Eleventh Circuit has clarified that a *declaratory judgment* invalidating a restrictive covenant under Georgia law *must* extend nationwide. *See Palmer & Cay, Inc. v. Marsh & McLennan Cos.*, 404 F.3d 1297, 1309-10 (11th Cir. 2005). C-E is seeking declaratory judgment on the same claims addressed above. Preliminary injunctive relief would simply mirror the

[7] CARBO argues that an injunction would allow use of its confidential information. But it has failed either to prove or preserve any protectable interest in any information. Nor has it shown any reason to believe that C-E is using any CARBO information. *See* Fortier Decl. ¶ 11. The suitability of various clays for making proppants, including C-E's own Andersonville clay, is public information contained in patents filed by the early 1990s. *See* Lowrey Decl. ¶¶ 3-19.

effect of the declaratory judgment that is substantially likely to come.[8]

Nor would enjoining enforcement of Paragraph 5 violate CARBO's First Amendment rights. As demonstrated by multiple cases, including *MacGinnitie*, a federal court can issue injunctive and declaratory relief conclusively establishing the non-enforceability of a restrictive covenant as between the parties before the court. *See also Bryan v. Hall Chem. Co.*, 993 F.2d 831 (11th Cir. 1993). By CARBO's novel reasoning, these decisions violated the losing party's "constitutional right" to petition other courts to enforce those covenants.

Finally, CARBO pleads for a bond covering the profits it predicts C-E would make (rather than any losses by CARBO). Yet it cites no case that disgorgement of profit is a remedy for breach of contract. "The amount of security required [for an injunction] is a matter for the discretion of the trial court; it may elect to require no security at all." *Corrigan Dispatch Co. v. Casa Guzman, S. A.*, 569 F.2d 300, 303 (5th Cir. 1978). Given the likelihood that Paragraph 5 is an unlawful restraint of trade, imposing a large bond would simply amount to a tax on competition. C-E asks that the Court either take up the amount of the bond after ruling on the merits or simply exercise its discretion to require a minimal bond or none at all.

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[8] *See, e.g.*, *Sheet Metal Div. v. Local Union 38*, 63 F. Supp. 2d 211, 213-14 (N.D.N.Y. 1999) (declaratory judgment voiding contract provision under antitrust laws has "the same practical effect" as an injunction protecting competition).

Respectfully submitted, this 31st day of October, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, a true and correct copy of the foregoing **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** was electronically filed with the Clerk of Court using the Court's electronic filing system which will automatically send e-mail notification of such filing to the following attorneys of record:

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This 31st day of October, 2011.

/s/ Frank M. Lowrey IV
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