

# The Texas Lawbook

Free Speech, Due Process and Trial by Jury

## \$49M Battle Over Fracking Sand Container Designs Heads to Next Phase

By Natalie Posgate

(Nov. 12) – In 2014, Houston-based SandBox Logistics retained Illinois-based Arrows Up LLC to design a plastic fracking sand container. Little did either party know that the simple business deal would result in a contentious legal battle that is just getting started despite a four-week jury trial that has already occurred.

Last Thursday, Arrows Up took its first step to fight a \$49 million judgment against it when it asked Houston District Judge Steven Kirkland for a new trial against its former client.

The filing comes a month after Judge Kirkland affirmed a jury verdict that found Arrows Up and its CEO, John Allegretti, wrongfully used information that SandBox provided under a non-disclosure agreement to design their own fracking sand container now competing with SandBox's products.

Judge Kirkland's final judgment also declared that all frac sand containers Arrows Up has manufactured, sold or leased since January 2015 are "owned solely and exclusively" by SandBox because key features of Arrows Up's containers were derived from SandBox's design. The verdict found Arrows Up liable for fraud and breach of the NDA it made with SandBox.

While SandBox views the controversy as a betrayal by a vendor to create the copycat products, Arrows Up considers itself the victim. In a press release issued shortly after the final judgment was issued, the company asserts that it is only the latest target of "SandBox's

demonstrated pattern of lawsuits against competitive innovation within the frac sand logistics industry."

If it does not have luck with its motion for a new trial, Arrows Up is expected to appeal the final judgment.

After the verdict, Arrows Up hired Gibson Dunn appellate partner Allyson Ho, who says restraints included in the SandBox NDA agreement are "unlawful under well-settled Texas law."



Matthew Whitley

Beck Redden partner Matthew Whitley, who represented SandBox at trial, said his client and his firm's trial team "were very happy with the jury's verdict and the final judgment entered by the court. The result was consistent with the evidence presented at trial and the applicable law, so we look forward to defending the judgment on appeal."

Whitley said several jurors told his team after the four-week trial that "they did not believe Arrows Up's witnesses told the truth" when they testified.

"For example, they pointed out how Arrows Up's CEO had 'photoshopped' SandBox's logo out of pictures of SandBox containers, and then he told customers that the altered images depicted Arrows Up's original container design," Whitley said. "That evidence of Arrows Up's behavior seemed to resonate with the jurors who spoke to us."

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Arrows Up argues that Judge Kirkland should grant its motion for a new trial on several grounds, including an improper disgorgement finding by the jury (that SandBox failed to plead to begin with), the improper omission of certain questions on the jury charge, unreliable experts and insufficient evidence that Arrows Up misused confidential SandBox information.

“SandBox went for broke before the jury... But now, like the dog that’s caught the car, SandBox must face the consequences of its overreach,” the motion asserts. “If not entitled to reverse and render, Arrows Up is entitled to a new trial on every issue, because each of the jury’s findings is either against the great weight of the evidence or is unsupported by factually sufficient evidence.”



Allyson Ho

## The Deal

SandBox is in the business of manufacturing specially-designed boxes for oil and gas clients that store proppants – particularly, the sand used in hydraulic fracturing. In earlier days frac sand would be transported in the back of 18-wheeler trucks, but SandBox’s system provides a number of unique features that facilitates the process, including stackable boxes, a conveyor belt system and a specially designed truck chassis that offers efficient delivery.

The boxes are made of weatherproof steel, which is popular among clients due to its durability. But because each box weighs around 54,000 pounds when filled with sand, SandBox was interested in designing a lighter plastic box so that clients could transport more sand at once (since there are weight limits on how many boxes each truck can transport).

The legal battle dates back to 2014, when SandBox retained Arrows Up to help it design a plastic alternative. Arrows Up was known for

designing collapsible containers for moving lighter materials, such as pellets or clay, court documents say.

When the two agreed to work together, SandBox required Arrows Up to sign a “standard” NDA that it requires from its vendors and customers before providing any information about its business.

The NDA, according to SandBox, had multiple elements, including Arrow’s Up’s agreement to not manufacture, sell or distribute a product that incorporates any of SandBox’s features and designs; and its agreement to not use any of the information provided by SandBox for any purpose beyond facilitating the business arrangement defined in the NDA.

After Arrows Up signed the NDA, it built four plastic prototypes and sent them to SandBox for

testing. The designs did not quite measure up to par with SandBox’s standards, and because the company was focusing on opening its Colorado operations, SandBox decided to put the effort on the back burner. SandBox paid Arrows Up for its work on the prototypes and said it would be in touch later.

## ‘Betrayal by a Vendor’

In late 2014, SandBox learned that Arrows Up was advertising a new plastic container capable of holding 48,000 pounds of sand “that appeared identical to the prototypes developed under the NDA,” court documents say.

SandBox filed suit against Arrows Up, and the two parties reached a settlement in January 2015. Arrows Up agreed to pay SandBox \$10,000 for attorney’s fees. It also agreed to not use any information from the NDA, turn over everything it manufactured or developed under the NDA

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and agreed to not sell any containers that “incorporate refer to, or otherwise are associated by SandBox under the NDA,” according to court documents.

But then, SandBox discovered that Arrows Up had violated the settlement agreement and was again marketing its “knock off” SandBox products, court documents say. What’s more, SandBox said, was it discovered while visiting one of its clients, RockPile Energy Services, that Arrows Up had sold the “knock off” products to RockPile.

## Lawsuit 2.0

SandBox sued again, which resulted in the most recent trial that occurred over the summer.

The stakes grew higher in the second trial. Both parties were acquired in 2016 by much larger companies: Arrows Up by Colorado-based Omnitrax, SandBox by Katy, Texas-based U.S. Silica. SandBox alleged this caused Arrows Up to drum up even more business from its copycat products.

At trial, SandBox argued that Arrows Up breached the NDA because it was under financial pressure after their original deal got postponed. SandBox also presented many internal emails at trial, as well as evidence that Arrows Up had photoshopped out the SandBox logo in the marketing materials of its own plastic box product.

The jury sided with SandBox, and on July 3 delivered a \$49 million verdict – \$21.6 million in disgorgement and \$27.5 in punitive damages.

Ho, the Arrows Up appellate lawyer, called the issue of financial pressure “a distraction from the real issue here, which is whether these agreements are lawful.”

She said that question was not one included on the jury charge since it is an issue that “only a court can answer.”

“We look forward to presenting those legal arguments and others challenging the verdict on these very grounds,” she said.

She explained that the Texas economy “is built on free competition, so Texas law doesn’t tolerate restraints on competition that doesn’t further legitimate business interests, trade secrets or truly confidential information.”

“In our view, the only interests furthered by SandBox... are preserving its own monopoly power, stifling competition and reducing consumer choice – all of which are illegitimate interests.”

Asked how SandBox’s NDA compares to other she’s reviewed, Ho called this one “particularly egregious.”

“Texas courts have repeatedly held agreements like these unlawful,” she said.

At trial, Arrows Up was represented by Houston partners Allen Rustay, Stephen Loftin, Stewart Hoffer and senior counsel Nicholas Zugaro of Hicks Thomas.

In addition to Whitley, the Beck Redden trial team included partner Michael Richardson and associates Leslie Tronche and Seepan Parseghian. Partner Russell Post and associate Parth Gejji are providing appellate assistance.

## Lawsuit 3.0

As each year passes, the bad blood thickens between the two parties. SandBox and Arrows Up are sparring in a separate patent infringement case in federal court, but this time, Arrows Up is the plaintiff.

Last summer, while the parties were in the middle of discovery in state court, Arrows Up sued SandBox in the U.S. District Court for the Southern District of Texas. Arrows Up alleges that the designs of SandBox’s frac sand

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containers “began to transition” into an exact match of an Arrows Up design published as a patent application in 2012.

Arrows Up alleges that the features in its design – which received patent approval in 2017 – match the very features that SandBox touts: stackable designs, “cube-like in shape,” a “base designed to receive forklift tines, a lower sliding gate” and “external wall-support elements,” the Arrows Up complaint says.

Whitley, who is also representing SandBox and U.S. Silica in this lawsuit, says his client believes Arrows Up only secured these patents as a litigation tactic to try to obtain settlement leverage.

“Our position in that case, first and foremost, is that SandBox doesn’t infringe on the Arrows Up patents,” he said. “But more fundamentally, Arrows Up can’t enforce these patents against SandBox because Arrows Up drafted them by using information it received from SandBox

under the NDA.”

“Just as the state court ruled that the containers Arrows Up claims as its invention were actually based on SandBox’s design, making them SandBox’s property,” Whitley continued, “we believe the federal court will conclude that Arrows Up used SandBox’s design information to draft the patents and is therefore required to assign the patents to SandBox.”

Holland & Knight is representing Arrows Up in the federal suit. The team includes Houston attorneys Lawrence Bradley Hancock and Ashley Kristine Soppet, Dallas attorney Robert Sean Hill and Boston attorney Allison Lucier.

**The state case is No. 2016-03483 in Harris County.**

**The federal case is No. 4:17-cv-01945 in the Southern District of Texas.**