

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELECTRO MEDICAL EQUIPMENT LTD.

v.

HAMILTON MEDICAL AG, et al.

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CIVIL ACTION  
No. 99-579

O'Neill, J.

May , 2000

**MEMORANDUM**

Presently before me is counterclaim defendants' motion to dismiss Counts III, IV, V, and VI of the counterclaims pursuant to Fed. R. Civ. P. 12(b)(6). The motion will be DENIED.

**BACKGROUND**

The background to this to this case was described at length in my previous Memorandum and Order regarding personal jurisdiction. See Electro Med. Equip. Ltd. v. Hamilton Med. AG, No. 99-579, 1999 WL 1073636, at \*1-2 (E.D. Pa. Nov. 16, 1999). By Memorandum and Order dated March 27, 2000, I denied counterclaim defendants' motion to dismiss without prejudice and with leave to renew once the choice of law issue was settled. See Electro Med. Equip. Ltd. v. Hamilton Med. AG, No. 99-579, 2000 WL 325954, at \*3 (E.D. Pa. Mar. 28, 2000). On April 18, 2000, I approved the parties' stipulation that Pennsylvania law applies to the counterclaims.<sup>1</sup> The renewed motion to dismiss is now ripe for decision.

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<sup>1</sup> This stipulation was entered into without prejudice as to the later application of other jurisdictions' laws to the remaining claims.

## DISCUSSION

### A. Standard for Dismissal under Rule 12(b)(6)

Rule 8(a) requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” See Fed. R. Civ. P. 8(a)(2). The Rules “do not require a claimant to set out in detail the facts upon which he bases his claim,” but rather merely require that the defendant have “fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” Conley v. Gibson, 355 U.S. 41, 47 (1957). For this reason, dismissal under Rule 12(b)(6) “is limited to those instances where it is certain that no relief could be granted under any set of facts that could be proved.” Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990).

### B. Unfair Competition

Count III pleads unfair competition. Counterclaim defendants argue that this count should be dismissed because counterclaim plaintiffs did not specify “what aspect of unfair competition is allegedly implicated” or whether the claim arose under state or federal law. See E.M.E.’s Mem. at 16. However, Count III specifically alleges that the acts complained of “are an unauthorized appropriation of Hamilton-Nevada’s reputation, trademarks, names, and goodwill, and constitute common law unfair competition.” See Counterclaim ¶ 54 (emphasis added). This averment satisfies Rule 8(a).

### C. Intentional Interference with Contractual Relations

Count IV pleads intentional interference with contractual relations. Counterclaim

defendants argue that this count fails because counterclaim plaintiffs did not adequately allege interference with the intent to harm, which is a necessary element of the tort under Pennsylvania law. According to counterclaim defendants, “[counterclaim plaintiffs] merely allege that the actions were intentional for the purposes of causing prospective customers not to purchase the Aladdin II, not that the actions were directed at [counterclaim plaintiffs] to harm them.” See E.M.E.’s Mem. at 10. This argument might succeed if for the purposes of this tort “intent to harm” meant “spite” or “ill will.” Clearly, it does not. See Ruffing v. 84 Lumber Co., 600 A.2d 545, 549-550 (Pa. Super. 1991) (“purpose or intent to harm” does not mean “malevolent spite”); Geyer v. Steinbronn, 506 A.2d 901, 910 (Pa. Super. 1986) (intent does not require a showing of “ill will or bad motive”). Rather, the intent to harm element “must be understood as requiring only an intention to interfere with plaintiff’s prospective contractual relation.” Ruffing, 600 A.2d at 550; Geyer, 506 A.2d at 910. Counterclaim defendants concede that such an intention was plead.

Counterclaim defendants further argue that this count fails because counterclaim plaintiffs have failed to plead the identity of the third party contracts with which counterclaim defendants have allegedly interfered. In support of this argument, counterclaim defendants cite Frempong-Atuahene v. Redevelopment Auth. of Philadelphia, No. 98-0285, 1999 U.S. Dist. Lexis 3608, at \*18 (E.D. Pa. Mar. 25, 1999),<sup>2</sup> but that case is distinguishable from the circumstances here. In Frempong-Atuahene, the plaintiff failed to plead “with any particularity

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<sup>2</sup> Counterclaim defendants also cite Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1015 (3d Cir. 1994) and Gen. Sound Tel. Co., Inc. v. AT&T Communications, Inc., 654 F. Supp. 1562, 1565 (E.D. Pa. 1987). However, these cases are not instructive because neither deals with the pleading requirements for a claim of intentional interference with contractual relations.

or specificity” that a prospective contractual relationship existed or could possibly exist. Id. In this case counterclaim plaintiffs have plead that counterclaim defendants interfered with “prospective and existing customers” and have described their customer base. See Counterclaims ¶¶ 22 and 58-59. These averments give counterclaim defendants fair notice of the claims against which they must defend and therefore satisfy Rule 8(a).

#### D. Civil Conspiracy

Count V pleads civil conspiracy. Counterclaim defendants argue that this count should be dismissed because its description of the overt acts is “vague” and it gives no specifics as to the “time, object or method of the alleged conspiracy.” E.M.E.’s Mem. at 12-13. However, the introductory paragraphs of the counterclaim, which were incorporated into the conspiracy count by reference (Counterclaim ¶ 62), specifically address each of these points. See Counterclaim ¶ 32 (alleging the duration of the conspiracy to be “upon introduction of the ALADDIN II . . . to this day”); Id. (describing the object of the alleged conspiracy as “a campaign of conduct intended to disparage the ALADDIN trade name”); Id. ¶ 35 (alleging fourteen instances of commercial disparagement that could also qualify as overt acts in furtherance of the conspiracy). These averments give counterclaim defendants fair notice and satisfy Rule 8(a).

#### E. Commercial Disparagement

Count VI pleads defamation. Counterclaim defendants argue that this count should be dismissed because it fails to allege who received the defamatory statements and what those recipients understood of the defamatory statements. See E.M.E.’s Mem. at 13-14.

Although all parties have looked to the law of defamation in examining this claim, it is clear to me that it is a claim for commercial disparagement,<sup>3</sup> not defamation. In U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 924 (3d Cir. 1988), the Court of Appeals found that Pennsylvania courts follow the “time honored” distinction between defamation and commercial disparagement. A claim for defamation lies where the defamatory statement “imputes to the corporation fraud, deceit, dishonesty, or reprehensible conduct.” Id., quoting Nat. Ref. Co. v. Benzo Gas Motor Fuel Co., 20 F.2d 763, 771 (8th Cir. 1927). A claim for commercial disparagement lies where “the publication on its face is directed against the goods or product of a corporate vendor.” Id. In this case, counterclaim plaintiffs have alleged fourteen different defamatory statements. See Counterclaim ¶ 35. All but one of those are clearly directed at the ALADDIN II product, not its manufacturer.<sup>4</sup> Therefore, Count VI is more properly analyzed as a claim for commercial disparagement.

Unlike the cause of action for defamation, the tort of commercial disparagement does not require counterclaim plaintiffs to plead who received the defamatory statements or what those recipients understood of the defamatory statements. In order to maintain such an action, a

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<sup>3</sup> The tort of commercial disparagement goes by a variety of names, including: injurious falsehood, disparagement of property, slander of goods, product disparagement, and trade libel. See W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 128 at 963 (5th ed. 1984).

<sup>4</sup> The one possible exception is the allegation that counterclaim defendants “stated that Hamilton-Nevada was acting unlawfully in selling the ALADDIN II, though it was acting lawfully.” See Counterclaim ¶ 35(h). Under ordinary circumstances, an accusation of illegality is defamation per se. However, in this context the accusation that Hamilton-Nevada was acting “unlawfully” obviously referred to the underlying intellectual property dispute. Such a dispute does not impute Hamilton-Nevada with “fraud, deceit, dishonesty, or reprehensible conduct” for the purposes of the distinction drawn by U.S. Healthcare. Therefore, even this statement should be analyzed under the law of commercial disparagement.

plaintiff need only prove: “1) that the disparaging statement of fact is untrue or that the disparaging statement of opinion is incorrect; 2) that no privilege attaches to the statement; and 3) that the plaintiff suffered a direct pecuniary loss as a result of the disparagement.” See U.S. Healthcare, 898 F.2d at 924, citing Menefee v. Columbia Broadcasting Sys., Inc., 329 A.2d 216 (Pa. 1974). Count VI pleads these elements adequately.

An appropriate Order follows.

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**ORDER**

AND NOW, this                    day of May, 2000, after consideration of counterclaim  
defendants' motion to dismiss Counts III, IV, V and VI of the counterclaims, and counterclaim  
plaintiffs' response thereto, it is hereby ORDERED that the motion is DENIED.

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THOMAS N. O'NEILL, JR., J.