

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

JOHN GAMMINO,

Plaintiff,

v.

SBC COMMUNICATIONS, INC., AMERITECH
ADVANCED DATA SERVICES – ILLINOIS, INC.,
AMERITECH ADVANCED DATA SERVICES -
INDIANA, INC., AMERITECH ADVANCED DATA -
MICHIGAN, INC., AMERITECH ADVANCED DATA
SERVICES – OHIO, INC., AMERITECH ADVANCED
DATA SERVICES – WISCONSIN, INC., AMERITECH
COMMUNICATIONS, INC., D & L
COMMUNICATIONS, ILLINOIS BELL TELEPHONE
COMPANY, INDIANA BELL TELEPHONE
COMPANY, MICHIGAN BELL TELEPHONE
COMPANY, NEVADA BELL, OHIO BELL
TELEPHONE COMPANY, PACIFIC BELL, SBC
ADVANCED SOLUTIONS, INC., SBC TELECOM,
INC., SOUTHERN NEW ENGLAND TELEPHONE
COMPANY, SOUTHWESTERN BELL TELEPHONE
COMPANY, WISCONSIN BELL TELEPHONE
COMPANY, WOODBURY TELEPHONE COMPANY,

Defendants.

NO. 03-CV-6686

GREEN, S.J.

March 29 , 2005

MEMORANDUM

Presently pending is the following Defendants’ Motion to Dismiss for lack of personal jurisdiction and improper venue:

SBC Communications Inc.
Ameritech Advanced Data Services of Illinois, Inc.
Ameritech Advanced Data Services of Indiana, Inc.
Ameritech Advanced Data Services of Ohio, Inc.
Ameritech Advanced Data Services of Michigan, Inc.
Ameritech Advanced Data Services of Wisconsin, Inc.
Ameritech Communications Inc.
Illinois Bell Telephone Company
Michigan Bell Telephone Company
Indiana Bell Telephone Company
Nevada Bell Telephone Company
Ohio Bell Telephone Company
SBC Advanced Solutions, Inc.
Southern New England Telephone Company

Southwestern Bell Telephone, L.P.
Wisconsin Bell Telephone Company
Woodbury Telephone Company

Defendants SBC Telecom and Pacific Bell did not file motions to dismiss and instead have filed Answers to the Complaint. Also before the court are Plaintiff's Memorandum in Opposition, the replies and sur-replies thereto. For the reasons set forth below, Defendant's motion will be granted, with respect to all moving Defendants with the exception of SBC Communications, Inc. ("SBC"). SBC's motion to dismiss will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff John Gammino, filed a Complaint against Defendant SBC and many of SBC's directly or indirectly owned subsidiaries. The Complaint alleges that the Defendants have infringed upon - and continue to infringe upon - two patents registered and owned by Plaintiff. The patents allegedly cover techniques for blocking international telephone calls.

For purposes of the instant motion, Defendants have divided themselves into four categories, namely: SBC, the holding company; Incumbent Local Exchange Carriers (ILECs); high-speed data providers, and Ameritech Communications, Inc., an entity Defendants assert no longer exists.

Defendants move for SBC's dismissal asserting that it is a holding company that does not provide telecommunications services to any customer in any state, and also that SBC has never done business in Pennsylvania, owns no property in Pennsylvania and is not registered to do business in Pennsylvania.

Defendants also posit that the moving ILECs (Illinois, Indian, Michigan, Nevada, Ohio, Southern New England, Southwestern, Wisconsin, and Woodbury Telephone Companies) are best described as the established local telephone companies for a state or region. The ILEC Defendants therefore assert that none of the moving ILECs provide local telephone service in Pennsylvania and accordingly should be dismissed. Defendants further maintain that six of the moving defendants are high speed providers of only data - as opposed to voice, pay phone, or wireless - service. Defendants assert that because the high

speed data providers have no offices or employees who reside, work, or are assigned business responsibilities in Pennsylvania, and also because they own no property and are not registered to do business in Pennsylvania, they too should be dismissed. Finally, Defendants assert that because Ameritech Communications, Inc. does not exist as a legal entity and has no contacts with Pennsylvania, it should be dismissed from this action. Plaintiff has not responded to Defendants contention that Ameritech Communications, Inc.'s does not exist.

A. Motion to Dismiss

Defendants assert that they should be dismissed pursuant to Fed.R.Civ.P 12(b)(2) and argue that the court cannot properly exercise either general or specific personal jurisdiction over them. They state that they do not have the requisite minimum contacts with Pennsylvania in order to support an exercise of general personal jurisdiction. They further contend that despite Plaintiff's assertions to the contrary, the moving Defendants are not alter egos of Pacific Bell Telephone Company nor SBC Telecom, Inc. - the non-moving Defendants who have filed answers to the Complaint - and should not be subject to personal jurisdiction in Pennsylvania based upon an alter ego theory of jurisdiction. The moving Defendants also argue that SBC's website, www.sbc.com does not confer personal jurisdiction over them in Pennsylvania. Finally Defendants conclude that venue is not proper because the moving Defendants are not subject to this court's jurisdiction, are not residents of Pennsylvania, and have not committed acts of infringement here.

In response, Plaintiff argues that this court has personal jurisdiction over all of the Defendants based upon Plaintiff's assertions of Defendants' continuous and systematic contacts with Pennsylvania including, SBC's internet contacts. Plaintiff further asserts that Defendants are subject to the personal jurisdiction of this Court based upon an alter-ego theory of jurisdiction. In this regard Plaintiff maintains that Defendant SBC and the remaining moving Defendants are - despite their separate legal corporate

status - a single functioning entity. Plaintiff concludes that because SBC is the parent and alter-ego of the Defendant subsidiaries, they are all subject to personal jurisdiction in this forum.

II. DISCUSSION

This court has subject matter jurisdiction over Plaintiff's claims due to the presence of a federal question and diversity of citizenship. See 28 U.S.C. §§ 1331, 1332. A federal district court can exercise personal jurisdiction over a nonresident of the state in which the court sits to the extent constitutionally authorized by the law of the state. See Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n, 819 F.2d 434, 436 n.1 (3d Cir. 1987). "Under Pennsylvania's long-arm statute, jurisdiction may be exercised to the fullest extent allowed under the Constitution of the United States." 42 Pa. Con. Stat. Ann. § 5322(b). "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.1 (1985).

"When a defendant raises the defense of lack of personal jurisdiction, the plaintiff has the burden of establishing sufficient facts to show that jurisdiction is proper." Carteret Sav. Bank v. Shushan, 954 F.2d 141, 146 (3d Cir. 1992). "A plaintiff meets this burden by establishing with reasonable particularity sufficient contacts between the defendant and the forum state." Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992). A plaintiff's allegations that defendant has sufficient contacts with the forum state to warrant a court's exercise of personal jurisdiction over the defendant must be supported with affidavits, documents, or other evidence, because a Rule 12(b)(2) motion "requires resolution of factual issues outside the pleadings." Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F. 2d 61, 67 n.9 (3d Cir. 1997). In order for this court to exercise general personal jurisdiction over a defendant, a plaintiff must demonstrate that the defendant has "continuous and substantial contact with the forum state." Pennzoil Products Company v. Colelli & Associates, Inc., 149 F.3d 197, 200 (3d Cir. 1998). To exercise specific personal jurisdiction over a defendant, three

elements must exist: the defendant must have “minimum contacts” with the forum state; the cause of action “must arise from the defendant’s forum related activities;” and the exercise of jurisdiction must be reasonable or fair. North Penn Gas Co. v. Corning Natural Gas Corp., 897 F.2d 687, 690 (3d Cir. 1990). Plaintiff does not rely upon specific personal jurisdiction as the causes of action do not arise from forum related activities. While Plaintiff has demonstrated that SBC has established sufficient contact with Pennsylvania to support this court’s exercise of general personal jurisdiction over SBC, Plaintiff has not established that SBC is the alter-ego of any of the remaining moving Defendants, nor that any of the remaining moving defendants have any contacts with Pennsylvania.

A. Personal Jurisdiction Over SBC

SBC is incorporated in Delaware and has its principal place of business in San Antonio, Texas. Plaintiff claims that this court may properly exercise personal jurisdiction over SBC because SBC’s interactive website gives rise to jurisdiction in this court. Toys “R” Us, Inc. et al. v. Step Two, S.A., et al., 318 F.3d 446, 454 (3d Cir. 2003), sets forth the Third Circuit’s standard for determining when and whether internet contacts confer jurisdiction. “[T]he mere operation of a commercially interactive website should not subject the operator to jurisdiction anywhere in the world. Rather there must be evidence that the defendant ‘purposefully availed itself of conducting activity in the forum state by directly targeting its website to the state, knowingly interacting with residents of the forum state via its web site or through sufficient other related contacts.’” Id. I conclude that SBC has purposefully availed itself of conducting activity in Pennsylvania by directly targeting its website to Pennsylvania and knowingly interacting with residents of Pennsylvania. As Plaintiff properly points out, a Pennsylvania resident logging onto SBC’s website can enter the requested information to for self-identification as a resident of this state. Such a person is then directed to a web page and is provided with the following statement: “Though SBC does not currently provide all of our services in your area, we do offer a variety of products and services to meet both residential and business needs.” The court construes this statement

as an admission by SBC that it can and does provide services and products to Pennsylvania residents. SBC argues that as a parent holding company it does not provide products or services directly to any consumers. Assuming arguendo that the aforementioned is true SBC nevertheless advertises and promotes products and services - albeit on behalf of its subsidiaries - directly and specifically targeted to Pennsylvania residents. Pennsylvania residents can enter the SBC website seeking residential and business telecommunication products and services. SBC, acting in essence, as a solicitor and agent for its subsidiaries, then describes the services an SBC subsidiary can provide to a Pennsylvania resident and subsequently directs and links said residents to the appropriate subsidiary's website and/or provides other contact information. This is done every time a Pennsylvania resident enters the requested information onto SBC's home page. Clearly, the website is not merely a passive site but solicits internet contacts for the benefit of SBC subsidiaries not parties to this action, for example Cingular Wireless. See www.sbc.com. The court concludes that this evidences that SBC's internet contacts are for the purposeful availment of conducting business with Pennsylvania residents. Such purposeful availment consequently subjects SBC to the general personal jurisdiction of this court.

B. Alter-Ego Jurisdiction.

Plaintiff essentially asks the court to pierce the corporate veil for jurisdictional purposes and to conclude that an alter ego relationship exists between SBC, the ILECs, high-speed data providers, and Ameritech Communications, Inc. Defendants herein. This court must apply Pennsylvania law - the law of the forum state - to determine whether SBC is the alter ego of these Defendants. See Genetic Implant Syst, Inc. v. Core-Vent Corp., et al., 123 F3d 1445 (Fed. Cir. 1997). In Pennsylvania, "If the record demonstrates that the subsidiary is the "alter ego" of the parent to the extent that domination and control by the parent corporation renders the subsidiary a mere instrumentality of the parent; under such extreme circumstances the parent corporation may be held to be doing business within the state under the facade of the subsidiary." Botwinick v. Credit Exch., Inc. 213 A.2d 349, 353 (Pa. 1965). "Neither the similarity

of names between the parent and subsidiary corporation, nor the total ownership of the stock of the subsidiary by the parent, nor the fact that a single individual is the active chief executive of both corporations will per se justify a court in piercing the corporate veil if each corporation maintains a bona fide separate and distinct corporate existence.” Id.,213 A2d 353-54 (citations omitted).

Plaintiffs heavily rely on another decision issued by this court in Directory Dividends Inc. v. SBC Communication, Inc. Et al, 2003 U.S. Dist LEXIS 12214, *6 (E.D Pa 2003) wherein the court concluded, based on the evidence presented to it, that SBC was the alter ego of its subsidiaries named in that case. Plaintiff now argues that many of the factual findings in Direct Dividends apply here and asserts that under the holding in Direct Dividends, the court must find jurisdiction over SBC and the remaining Defendants. Pl Br. at 20. However, the court cannot so find. Unlike the extensive evidence discussed in Direct Dividends leading the court to conclude that SBC and its subsidiaries were both vertically and horizontally well integrated, the court here has no such evidence in relation to the Defendants named in this case. Moreover, none of the parties in Directory Dividends are parties herein.

Viewing the evidence before the court in the light most favorable to Plaintiff, it is clear that the instant subsidiaries are in whole or in part owned by SBC, and that they and SBC may utilize a unified marketing brand, image, identity, or logo. In addition, two of SBC’s subsidiaries - not movants herein - have consented to the jurisdiction of the court.¹ Plaintiff has also recently submitted to the court evidence it asserts is an admission of SBC that SBC and its subsidiaries operate as a single entity pointing to SBC’s request to the Federal Trade Commission to treat SBC and its subsidiaries as a single entity for purposes of paying fees for access to the national Do-Not-Call-Registry. Nevertheless, Plaintiff has not demonstrated that SBC and the subsidiary Defendants in this matter are a single functioning

¹Pacific Bell Telephone Company and SBC Telecom, Inc. have answered the Complaint, thereby subjecting themselves to this court’s jurisdiction. Plaintiff argues that because two of its subsidiaries have consented to the jurisdiction of this court, SBC is also subject thereto because SBC and its subsidiaries are one single functioning entity. (Pl.’s Resp. at 19).

entity, under unified control, such that SBC should be considered the alter ego of the subsidiaries. The ten factors this court has considered when determining whether a subsidiary is an alter ego of a parent are: 1) ownership of all or most of the stock of the subsidiary; 2) common officers and directors; 3) a common marketing image; 4) common use of a trademark or logo; 5) common use of employees; 6) an integrated sales system; 7) interchanges of managerial and supervisory personnel; 8) subsidiary performing business functions which the principal corporation would normally conduct through its own agents or departments; 9) subsidiary acting as a marketing arm of the principal corporation, or as an exclusive distributor, and 10) receipt by the officers of the related corporation of instruction from the principal corporation. Arch v. American Tobacco Co., Inc. 984 F.Supp. 830 (E.D. Pa., 1997); (citing, Lucas v. Gulf & Western Indus., Inc., 666 F.2d 800, 805-806) (3d. Cir. 1981). There is some evidence of a common marketing strategy, but no evidence to support control by common officers and directors. The facts herein are quite distinguishable from the court's extensive findings in Directory Dividends regarding the significant common use of employees and interchange of managerial and supervisory personnel, centralized legal department and operations, and mandatory corporate directives SBC issued to the Directory Dividends subsidiaries. None of the defendants in Directory Dividends are named defendants in this case. Moreover, Plaintiff has not presented the court with any such evidence of vertical or horizontal integration, or of corporate control by SBC over the named subsidiary Defendants herein. With the exception of similar branding and SBC's website, Plaintiff has failed to provide the court with evidence to demonstrate that the instant subsidiary Defendants should be found to be the alter egos of SBC or vice versa. Therefore, the court cannot make a determination that SBC is the alter ego of the instant subsidiaries based on Directory Dividends. Pennsylvania law states that only in extreme circumstances and upon a sufficient showing that the parent exercised such dominion and control of the subsidiary to render it a mere instrumentality of the parent will the corporate veil be pierced to subject the parent or subsidiary to the jurisdiction of the state. See Botwinick at 213 A.2d 354. Consequently,

having found that SBC is not the alter ego of the moving subsidiaries, the court also concludes that it does not have personal jurisdiction over the moving subsidiaries. Accordingly, the subsidiaries' motion to dismiss will be granted.

B. Venue

Defendants argue that because this court lacks jurisdiction over them, venue does not lie here. Having determined that dismissal of the moving subsidiary Defendants is proper, the court has also concluded, however that it has personal jurisdiction over SBC. Venue in patent infringement matters is proper in any judicial district where the defendant resides or where the defendant has committed acts of infringement and has a regular and established place of business. 28 U.S.C. § 1400(b). For venue purposes the residence of corporate defendants in patent infringement actions is governed by 28 U.S.C. § 1391(c). Hoover Group, Inc. v. Custom Metalcraft, Inc., 84 F.3d 1408 (C.A.. Fed. 1996) (citing, VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574,(Fed.Cir.1990)). A corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction. 28 U.S.C. § 1391(c). Therefore venue is proper in this district as to SBC.

III. CONCLUSION

The court concludes that it has personal jurisdiction over SBC due to SBC's internet contacts and purposeful targeting of Pennsylvania residents, but does not have jurisdiction over the remaining Defendant subsidiaries. Furthermore, there is no basis for this court to exercise alter-ego jurisdiction over the Defendant subsidiaries because Plaintiff has not offered evidence that SBC and its subsidiaries are a single functioning entity. Finally, the court concludes that venue is proper in this district as to SBC.

IT IS FURTHER ORDERED that Defendants SBC Communications, Inc., Pacific Bell Telephone Company and SBC Telecom, Inc. shall remain as the Defendants in this matter.

BY THE COURT:

S/_____

Clifford Scott Green, S.J.