

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

SOUTHERN OCEAN SEAFOOD :
COMPANY :
 :
v. : CIVIL ACTION
 : NO. 96-5217
 :
HOLT CARGO SYSTEMS, INC. :

O'Neill, J.

August , 1997

MEMORANDUM

Plaintiff Southern Ocean Seafood Company ("SOS"), a New Zealand corporation, brought this action against Holt Cargo Systems ("Holt") to recover payment under a guarantee agreement which provided that Holt would be liable to SOS for the debts of Dockside International Fish Co., Inc. ("Dockside") under a distributorship agreement between SOS and Dockside. Jurisdiction is based on diversity of citizenship and the requisite amount in controversy.

Holt and Dockside filed an answer asserting nine counterclaims against SOS, its corporate parent Salmond Smith Biolab ("SSB"), and three other New Zealand entities, Chatham Processing Limited ("Chatham"), Karamea Holdings Limited ("Karamea"), and Treaty of Waitangi Fisheries Commission ("TOWFC"). The counterclaims arise out of a series of transactions in which TOWFC and Karamea acquired control of SSB and SOS and negotiated a transfer of SOS's fishing rights to Chatham, disrupting the distributorship arrangement between SOS and Dockside.

In Counts I and II Dockside alleges that SOS breached the distributorship agreement between SOS and Dockside and the duty of good faith and fair dealing arising under that agreement.

In Count III and IV Holt alleges that SOS breached an agreement to arbitrate disputes arising under the guarantee agreement and breached a duty of good faith and fair dealing.

In Counts V, VI and VII Dockside alleges that SSB, Chatham, Karamea and TOWFC intentionally interfered with the distributorship agreement between SOS and Dockside and with Dockside's contractual relations with customers in the United States.

In Counts VIII and IX Dockside alleges that SOS and SSB are liable for fraud and negligent misrepresentation for failing to disclose the events in New Zealand that disrupted the arrangements under the distributorship agreement.

Counterclaim defendants moved to dismiss or strike the counterclaims. In considering their challenges to the Court's jurisdiction I must review the evidence and resolve questions of jurisdictional fact. Robinson v. Dalton, 107 F.3d 1018, 1021 (3d Cir. 1997). In considering their motions to dismiss the counterclaims for failure to state a claim I must accept as true the well-pleaded factual allegations in the counterclaims, construe them in the light most favorable to counterclaim plaintiffs, and dismiss the counterclaims only if counterclaim plaintiffs could not prevail under any set of facts that could be proved consistent with their allegations. Hishon v. King & Spalding, 467 U.S. 69,73 (1984); Colburn v. Upper Darby Township, 838 F.2d 663, 664-65 (3d Cir. 1988).

I. Intervention

Counterclaim defendants contend that Dockside is not entitled to assert counterclaims because it has not moved to intervene pursuant to Federal Rule of Civil Procedure 24(c). Rule 24(c) provides that "a person desiring to intervene shall serve a motion to intervene upon the parties.... The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." Dockside's pleadings, although not styled as a Rule 24(c) motion to intervene, clearly state the grounds for intervention and the claims for which intervention is sought.

Under Rule 24(b)(2), "[u]pon timely application anyone may be permitted to intervene in an action ... when an applicant's claim or defense and the main action have a question of law or fact in common." Dockside's claims, which arise from the distributorship agreement, have questions of law and fact in common with the main action in which Holt's liability as a guarantor of Dockside's debts turns on Dockside's debts and liabilities under the distributorship agreement. Because Dockside's pleadings notify all parties of the facts warranting Dockside's intervention, it would not serve the interests of "the just, speedy and inexpensive determination of this action" to require further motions on the subject. See Fed.R.Civ.P. 1. Dockside may assert its counterclaims.

II. Joinder

A. Joinder of Counterclaim Defendants

Counterclaim defendants object to the assertion of claims against SSB, Chatham, Karamea and TOWFC who have not been joined with SOS as parties to this action. Federal Rule of Civil Procedure 13(h) provides that "[p]ersons other than those made parties to the original action may be made parties to a counterclaim ... in accordance with ... [Fed.R.Civ.P.] 20." Rule 20(a) provides that "[a]ll persons ... may be joined in one action ... if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action." The counterclaims alleged against SSB, Chatham, Karamea and TOWFC arise out of the same events as the counterclaims against SOS and involve common questions of law and fact. These counterclaims are appropriately resolved in the same action. I will exercise my discretion under the Federal Rules to permit Holt and Dockside to join SSB, Chatham, Karamea and TOWFC as additional counterclaim defendants in their counterclaims against SOS. See In re Texas Eastern Transmission Corp., 15 F.3d 1230, 1237 n.5 (3d Cir. 1994).

However, under Rule 13(h) a counterclaim "may not be directed solely against persons who are not already parties to the original action, but must involve at least one existing party." FDIC v. Bathgate, 27 F.3d 850, 873 (3d Cir. 1994). In Counts V and VI Dockside seeks to assert counterclaims solely against parties other than SOS. I will therefore dismiss Counts V and VI.

B. Joinder of SSB as an Indispensable Party Plaintiff

Holt moves, under Federal Rule of Civil Procedure 19, to join SSB as an indispensable party or to dismiss SOS's claim against Holt for failure to join an indispensable party. Rule 19(a) provides that a person:

shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Holt contends that it believes that SSB "owns [the] claim" asserted by SOS under the guarantee agreement, and thus that SSB's absence from the action will subject Holt to the risk of incurring double or inconsistent obligations under the guarantee agreement it entered with SOS. Holt avers that its "only interest is that the proper plaintiff or plaintiffs be made parties to this action."

A "non-party to a commercial contract ordinarily is not a necessary party to an adjudication of rights under the contract." Conntech Dev. Co. v. University of Conn. Educ. Properties, Inc., 102 F.3d 677, 682 (2d Cir. 1996); Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043 (9th Cir. 1983). While Holt identifies communications suggesting that SSB has interests under the guarantee agreement, SSB has submitted an affidavit disclaiming any interest under the guarantee agreement and confirming those interests belong to SOS. SSB attests:

SSB does not claim the right to receive funds from Holt Cargo Systems, Inc. under the Guarantee, or the right to receive funds from Dockside under the Distributorship Agreement entered into between Southern Ocean Seafood

Company and Dockside. SSB acknowledges that such rights are held by ... Southern Ocean Seafood Company.¹

Moreover, SOS attests that the debt from Dockside which gives rise to Holt's obligations under the guarantee agreement remains a receivable payable to SOS, confirming that the liabilities between Holt and SOS, which did not originally involve SSB, have not subsequently been assigned to or otherwise acquired by SSB. Plaintiff's Opposition, Ex. B.

Joinder is warranted based on a non-party's interests only where "the absent party claim[s] a legally protected interest relating to the subject matter of the action." Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41, 49 (2d Cir. 1996). It is not warranted where, as here, the absent party "has clearly declined to claim an interest in the subject matter of the dispute," Conntech, 102 F.3d at 683, or has "expressly disclaimed" such an interest. Boczon v. Northwestern Elevator Co., Inc., 652 F. Supp. 1482, 1486 (E.D. Wis. 1987) (citations omitted); Seiler v. E.F. Hutton Co., Inc., 102 F.R.D. 880, 883-84 (D.N.J. 1984).

Because Rule 19 requires a "substantial risk" of double liability based on "the practical and not the theoretical," SSB's potential interests do not justify its joinder where it "has filed an affidavit ... disclaiming any interest." Morgan Guar. Trust Co. of New York v. Martin, 466 F.2d 593, 597 (7th Cir. 1972). In this case where both SOS and SSB attest on the record that SOS owns the claim and SSB does not, their statements, which I regard as judicial admissions, "foreclose any `substantial risk'" that Holt will incur double liability if SSB is not made a party to the claim by its subsidiary against Holt. Id.² SSB is neither necessary nor indispensable to resolution of the claims between SOS and Holt.³ I will deny Holt's motion to join SSB as a party

¹ Plaintiff's Opposition, Ex. C. The affiant identifies SOS as "New Zealand King Salmon Company, which before June 1996 was known as Southern Ocean Seafood Company." Changes in the parties' names, which may affect proper captioning of the case, are not material to the joinder issues before the Court.

² The fact that SSB, before withdrawing its proposed stipulation, considered stipulating that the benefits of the agreement would "inure to" SSB does not undermine the effect of its admission on the record disavowing the claim.

³ Under Rule 19(b) a person is indispensable if it satisfies the requirements of Rule 19(a) and "in equity and good conscience" the action should not proceed in that party's absence.

plaintiff and its alternative motion to dismiss SOS's claim for failure to join an indispensable party.⁴

III. Subject Matter Jurisdiction Over TOWFC and Chatham

TOWFC and Chatham contend that they are immune from this Court's subject matter jurisdiction pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-05. The FSIA provides that a foreign state, which "includes ... an agency or instrumentality of a foreign state," is "immune from the jurisdiction" of United States courts. 28 U.S.C. §§ 1603(a), 1604.⁵

A. Agency or Instrumentality

An "agency or instrumentality of a foreign state" is defined as any entity which is: (1) a separate legal person; (2) an organ of, or majority-owned by, a foreign state or a political subdivision thereof; and (3) not a citizen of the United States or the creation of a third country. 28 U.S.C. § 1603(b).⁶ The parties dispute whether TOWFC and Chatham are organs of, or majority-owned by, New Zealand within the meaning of § 1603(b)(2).

In assessing whether an entity is an organ of a foreign state courts consider whether: (i) the foreign state created the entity for a national purpose; (ii) the foreign state actively supervises the entity; (iii) the foreign state hires public employees and compensates them; (iv) the entity holds exclusive rights to some right in the country; and (v) the entity is treated as a part of the

⁴ Because joinder is not warranted under Rule 19 I need not decide whether SSB would satisfy Rule 19(a)'s mandate that the person to be joined be "subject to service of process." SSB has not challenged the basis for personal jurisdiction.

⁵ Under § 1603(a) a "foreign state" also includes "a political subdivision of a foreign state." No political subdivision of New Zealand is involved in this case.

⁶ Under § 1603(b) "[a]n agency of instrumentality of a foreign state means any entity--
(1) which is a separate legal person, corporate or otherwise, and
(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose . . . ownership interest is owned by a foreign state or political subdivision thereof, and
(3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

government under the laws of the foreign state. Corporacion Mexicana de Servicios Maritimos, S.A. v. M/T Respect, 89 F.3d 650, 654-55 (9th Cir. 1996); Supra Medical Corp. v. McGonigle, 955 F. Supp. 374, 379 (E.D. Pa. 1997).

According to affidavits of TOWFC officials, the Treaty of Waitangi, entered into in 1840 between the Crown of New Zealand and the Maori, an indigenous people of New Zealand, guaranteed the Maori certain rights to native fisheries. In 1986, an Act of the New Zealand Parliament imposed a quota system creating private property rights to fish resources that can be transferred on the open market. Maori parties challenged the legislation as undermining their rights under the Treaty of Waitangi. After the Maori obtained interim relief precluding the Crown from bringing any further fish resources under the quota system, the New Zealand Parliament passed the Maori Fisheries Act of 1989 and the Treaty of Waitangi Fisheries Claims Settlement Act of 1992 which transferred 10% of the marketable fishing quota to the Maori Fisheries Commission, which later became the Treaty of Waitangi Fisheries Commission, to be administered on behalf of indigenous tribes in compliance with the treaties entered into by the Crown.

TOWFC's Commissioners are appointed by the Governor-General of New Zealand on the advice of the Minister of Maori affairs. Under the legislation creating TOWFC the Commission reports to the Minister regarding matters within its jurisdiction. The Commission, like other public entities, is subject to an annual Audit the results of which are reported to Parliament. TOWFC's salaries, fees, and expenses are subject to the approval of the Minister of Finance.

The record establishes that TOWFC was created by the New Zealand government for the national purpose of complying with treaty obligations between New Zealand and indigenous peoples. Its purpose and functions are defined by an Act of the New Zealand Parliament, its Commissioners are appointed by governmental officials, it holds exclusive control over a significant portion of national fishing resources, and New Zealand courts have declared that TOWFC acts "on behalf of the Crown" as well as the Maori people. TOWFC bears the indicia of

a governmental organ under the FSIA. See M/T Respect, 89 F.3d at 654-55; Supra Medical, 955 F. Supp. at 379.

Counterclaim plaintiffs contend that TOWFC is not an organ of New Zealand because its chief constituency is the Maori people. I disagree. TOWFC's role serves a clear "national purpose" of complying with New Zealand's treaty obligations to the Maori and administering fishing rights among peoples within New Zealand's borders. This public function is no less governmental because it involves the rights of indigenous populations.⁷ TOWFC is an organ of the New Zealand government and thus an agency or instrumentality of New Zealand under § 1603.

Chatham, however, has not made the requisite prima facie showing that it satisfies § 1603(b)(2). See Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270, 1285 n.13 (3d Cir. 1993); Supra Medical, 955 F. Supp. at 379. Chatham's only basis for invoking the FSIA is the fact that it "is a wholly owned subsidiary of Chatham Holdings Limited, which in turn is a wholly owned subsidiary of TOWFC." Under the plain language of § 1603(b)(2) an entity is not an agency or instrumentality of a foreign state unless it is either an organ of the state or is majority-owned by the state. § 1603(b)(2).⁸

Chatham bears none of the indicia of an "organ" of a foreign state, see M/T Respect, 89 F.3d at 654-55; Supra Medical, 955 F. Supp. at 379, and does not assert that it is majority-owned by New Zealand or a subdivision thereof; it asserts only that it is majority-owned by an agency or instrumentality of New Zealand, TOWFC. While the definition of an "agency of instrumentality" under § 1603(b)(2) explicitly includes entities that are either organs of or majority-owned by a foreign state or a subdivision thereof, it does not include entities that, like Chatham, are merely majority-owned by an agency or instrumentality thereof. An "entity wholly owned by an `agency

⁷ Pursuant to counterclaim plaintiffs' argument, the Department of the Interior's Bureau of Indian Affairs would not be an organ of the United States government because its role involves interests of Native Americans.

⁸ An entity can also satisfy § 1603(b)(2) if it is an organ of, or majority-owned by, a political subdivision of the state. This case does not involve any political subdivisions of New Zealand.

or instrumentality of a foreign state' is not owned by a 'foreign state or a political subdivision thereof' and therefore does not meet the definition of § 1603(b)(2)." M/T Respect, 89 F.3d at 655; accord Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270, 1285 n.12 (3d Cir. 1993) (noting, in dictum, that § 1603(b)(2)'s definition of "agency or instrumentality" explicitly includes entities that are organs of or majority-owned by either a foreign state or a political subdivision, and thus can be construed as implicitly excluding entities that are organs of or majority-owned by another agency or instrumentality); but see In re Air Crash Disaster Near Roselawn, Ind., 96 F.3d 932, 938-39 (7th Cir. 1996) (holding that ownership by agency or instrumentality is tantamount to ownership by the foreign state and satisfies § 1603(b)(2)).⁹ Chatham, unlike TOWFC, is not entitled to invoke the jurisdictional immunity conferred by the FSIA.

B. The FSIA's Commercial Exception

Counterclaim plaintiffs contend that their claims fall within the FSIA's commercial exception which permits certain suits against otherwise immune foreign sovereign entities. Under the commercial exception, foreign states are not immune from jurisdiction in actions

⁹ I find the dictum of the Third Circuit Court of Appeals persuasive although it is set forth as the view of only one Judge. Contrary cases reason that because, under § 1603(a), a "foreign state ... includes ... an agency or instrumentality of a foreign state," an agency or instrumentality can be equated with a "foreign state." By equating the agency or instrumentality with the foreign state, these cases conclude that an entity majority-owned by the agency or instrumentality is in effect majority-owned by the foreign state and thus also constitutes an agency or instrumentality under § 1603(a)(2). See In re Air Crash Disaster, 96 F.3d at 938-39. I find this view unpersuasive. An agency or instrumentality is "included" within the definition of a foreign state under § 1603(a); it is thus narrower than, and not equivalent to, the concept of a foreign state.

A construction that equates an agency or instrumentality with a foreign state for the purposes of § 1603(b)(2) ignores the fact that under § 1603(a) a "foreign state ... includes a political subdivision of a foreign state" as well as an agency or instrumentality, placing agencies and instrumentalities on equal footing with political subdivisions in terms of whether they may be equated with the foreign state. Yet § 1603(b)(2) explicitly includes entities majority-owned by political subdivisions but does not include those majority-owned by agencies and instrumentalities.

If the entities owned by agencies or instrumentalities were implicitly included simply because agencies or instrumentalities can be equated with foreign states, then entities majority-owned by political subdivisions would also be implicitly included by the same logic and the explicit references to entities owned by political subdivisions would be wholly superfluous. While § 1603(b)(2) does not distinguish between direct and indirect ownership, it does distinguish based on the type of state entity that holds the ownership interest, and extends the FSIA to entities owned, whether directly or indirectly, by states and their political subdivisions but not to those owned by agencies or instrumentalities of the state. I thus find M/T Respect and Federal Insurance persuasive and would not deem Chatham, which is owned by an agency or instrumentality, a foreign state under the FSIA.

based upon: (i) a commercial activity carried on in the United States by the foreign state; (ii) an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or (iii) an act outside the United States in connection with a commercial activity of the foreign state elsewhere that causes a direct effect in the United States. 28 U.S.C. § 1605(a)(2).

The counterclaims allege that TOWFC and Karamea wrongfully negotiated a transfer of fishing rights from SOS and SSB to Chatham, thus interfering with contractual relations related to the distributorship agreement. These transactions, which occurred exclusively among New Zealand entities in New Zealand, do not implicate the first and second prongs of § 1605(a)(2), which require acts in the United States. I must decide whether TOWFC's actions outside the United States caused a "direct effect" in the United States as required under the third prong of § 1605(a)(2).

Mere financial loss in the United States caused by commercial activity abroad does not constitute a "direct effect." United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n, 33 F.3d 1232, 1238-39 (10th Cir. 1994); Antares Aircraft v. Federal Republic of Nigeria, 999 F.2d 33, 35-37 (2d Cir. 1993); Gregorian v. Izvestia, 871 F.2d 1515, 1527 (9th Cir. 1989). To establish a "direct effect" in the United States the plaintiff must establish that "something legally significant actually happened in the U.S." Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1515 (D.C. Cir. 1988). A party's breach of duties or obligations that were to be performed in the United States can constitute the legally significant act in the United States causing the requisite direct effect. See, e.g., Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619-20 (1992) (holding that where parties designated New York as "the place of performance for [the] ultimate contractual obligations" breach of those obligations had a "direct effect" in the United States).

TOWFC had no duties or obligations to be performed in the U.S. The claims against it arise from transfers of fishing rights among New Zealand entities in New Zealand. This conduct directly affected only the New Zealand entities SOS and SSB. The fact that the effects of these

transactions on SOS and SSB in New Zealand in turn caused SOS to breach its obligations to Dockside establishes only an indirect effect in the United States that is too attenuated to satisfy § 1605(a)(2). Because the effect of TOWFC's conduct on other foreign entities fails to satisfy the "direct effect in the United States" requirement of § 1605(a)(2), the FSIA's commercial exception does not deprive TOWFC of the immunity granted in § 1604.

C. The FSIA's Tort Exception

Counterclaim plaintiffs also contend that their claims fall within the FSIA's tort exception. That exception, set forth in 28 U.S.C. § 1605(a)(5), applies to claims "not otherwise encompassed in paragraph (2) [the commercial exception] above."¹⁰ Under the tort exception the FSIA does not afford immunity for actions in which "money damages are sought against a foreign state for ... damages to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state" or any official thereof acting in an official capacity. § 1605(a)(5).

For paragraph (a)(5) to confer jurisdiction "both the tort and the injury must occur in the United States." Persinger v. Islamic Republic of Iran, 729 F.2d 835, 842 (D.C. Cir. 1984). The counterclaims do not allege tortious conduct in the United States and thus do not implicate paragraph (a)(5). Even where paragraph (5) would otherwise apply, a restriction set forth in subparagraph (a)(5)(B) provides that paragraph (5) "shall not apply to ... any claim arising out of misrepresentation, deceit, or interference with contract rights." § 1605(a)(5)(B). The counterclaims allege that TOWFC interfered with Dockside's contractual relations and thus fall squarely within subparagraph (a)(5)(B). Accordingly paragraph (a)(5)'s tort exception does not

¹⁰ The exceptions to immunity are set forth in paragraphs 1605(a)(1)-(6) and separated by the word "or." Only paragraph (a)(2)'s commercial exception and paragraph (a)(5)'s tort exception potentially apply to this case.

apply and does not deprive TOWFC of immunity.¹¹ TOWFC is an agency of the New Zealand government entitled to immunity under the FSIA, 28 U.S.C. §§ 1603-04, and is not deprived of that immunity by any of the exceptions set forth in § 1605(a). The claims against TOWFC must be dismissed for lack of subject matter jurisdiction.

IV. Personal Jurisdiction Over TOWFC, Chatham and Karamea

TOWFC, Chatham and Karamea contend that they are not subject to personal jurisdiction because they lack the requisite "minimum contacts" with Pennsylvania. International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945). These "contacts" must be such that the defendant "should reasonably anticipate being haled into court" in the forum state. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Where, as here, the defendant contests the basis for personal jurisdiction, "the plaintiff bears the burden of proving that the defendant's contacts with the forum are sufficient." Dutoit v. Strategic Minerals Corp., 735 F. Supp. 169, 170 (E.D. Pa. 1990).

Jurisdiction over a non-resident defendant may be either general or specific. General jurisdiction exists when the non-resident has "systematic and continuous" contacts with the forum state. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984). Such "systematic and continuous" contacts can arise from domiciling, maintaining offices, owning property, or conducting commercial activity within the forum state. See Arch v. American

¹¹ The parties cite cases analyzing the relationship between paragraphs (a)(2) and (a)(5). See Export Group v. Reef Indus., Inc., 54 F.3d 1466 (9th Cir. 1995); WMW Mach., Inc. v. Werkzeugmaschinenhandel GmbH IM Aufbau, 960 F. Supp. 734 (S.D.N.Y. 1997); Bryks v. Canadian Broadcasting Corp., 906 F. Supp. 204 (S.D.N.Y. 1995). Those cases analyzed whether subparagraph (a)(5)(B) could override (a)(2)'s exception to immunity. In this case where (a)(2) does not provide an exception to immunity because its "direct effects" requirement is not met, I need not decide whether (a)(5)(B) could override an exception to immunity under paragraph (a)(2). I note, however, that paragraph (a)(5) applies only to conduct "not otherwise encompassed in paragraph [(a)(2)]," and that subparagraph (a)(5)(B) is preceded by the clause "this paragraph shall not apply to--," which I construe as limiting the effect of (a)(5)(B) to denials of immunity under paragraph (a)(5). I would thus follow Export Group and WMW Machinery and not Bryks and would hold that subparagraph (a)(5)(B) does not restrict an exception to immunity under paragraph (a)(2).

Tobacco Co., Inc., 1997 WL 338597 at *2 (E. D. Pa. 1997); Boehringer, Inc. v. Murawski Corp., 699 F. Supp. 59, 61 (E.D. Pa. 1988).

Counterclaim plaintiffs do not allege any facts based on their knowledge, information or belief that would establish "systematic and continuous" contacts with Pennsylvania.

Counterclaim defendants TOWFC, Chatham and Karamea aver, through affidavits, that they neither have offices nor employ workers in Pennsylvania. TOWFC, through an authorized affidavit, contends that it has had no contacts with Pennsylvania apart from one visit by two representatives to meet with Dockside in 1995. Chatham, through the authorized affidavit of its general managers, attests that it has no contacts with Pennsylvania apart from twice shipping products through Philadelphia en route from New Zealand to New Hampshire. The record reveals no contacts between Karamea and Pennsylvania. The isolated contacts identified in the pleadings and the record do not support the exercise of general personal jurisdiction.

A non-resident defendant is subject to specific personal jurisdiction for claims arising from its forum-related contacts. See Vetrotex Certaineed Corp. v. Consolidated Fiber Glass Prods. Co., 75 F.3d 147, 151 (3d Cir. 1996); Arch, 1997 WL 338597 at *2. The counterclaims in this case arise from counterclaim defendants' alleged actions in New Zealand and do not involve any contacts with Pennsylvania. Neither the pleadings nor the record presents a basis for exercising specific personal jurisdiction over counterclaim defendants.

Dockside requests discovery as to counterclaim defendants' contacts with Pennsylvania. Parties are entitled to a "fair opportunity to engage in jurisdictional discovery" to obtain "facts necessary for thorough consideration of the [jurisdictional] issue." Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270, 1285 n.11 (3d Cir. 1993). However, jurisdictional discovery may, in the court's discretion, be denied where the party that bears the burden of establishing jurisdiction fails to establish a "threshold prima facie showing" of personal jurisdiction." Arch, 1997 WL 338597 at *11; Rose v. Granite City Police Dep't, 813 F. Supp. 319, 321 (E.D. Pa. 1993).

A prima facie case requires factual allegations that suggest "with reasonable particularity" the possible existence of the requisite "contacts between [the party] and the forum state." Mellon Bank PSFS v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992).¹² In this case where counterclaim defendants have submitted affidavits attesting to a lack of jurisdictional contacts and counterclaim plaintiffs, who have the burden of establishing jurisdictional facts, have countered the affidavits with "mere speculation, [their] request for an opportunity to conduct discovery on the matter must be denied." Poe v. Babcock Int'l, 662 F. Supp. 4, 7 (M.D. Pa. 1985).¹³

Counterclaim plaintiffs contend only that they are unable to allege jurisdictional facts because "they were not privy to the transactions in New Zealand that adversely affected [Dockside's] contract with SOS." This contention suggests only that other unknown events occurred in New Zealand; it does not suggest any information or belief that any defendant had contacts with Pennsylvania. Counterclaim plaintiffs have failed to make out a prima facie case of jurisdictional contacts and thus may not pursue discovery "in the hopes that it may uncover some evidence supporting jurisdiction." Arch, 1997 WL 338597 at *11.¹⁴ Because the record reveals no basis for exercising personal jurisdiction over TOWFC, Chatham or Karamea and does not establish a prima facie case warranting jurisdictional discovery as to these counterclaim

¹² See Raymark Indus., Inc. v. Baron, 1997 WL 359333 at *4 (E.D. Pa. 1997) (permitting discovery where party seeking discovery alleged specific acts in furtherance of conspiracy believed to have occurred in forum state); Manhattan Life Ins. Co. v. A.J. Stratton Syndicate, 731 F. Supp. 587, 593 (S.D.N.Y. 1990) (permitting jurisdictional discovery based on affidavits identifying specific business contacts with forum state).

¹³ See Massachusetts Sch. of Law v. American Bar Ass'n, 107 F.3d 1026, 1042 (3d Cir. 1997) (holding that conclusory allegation that defendant "transacts business" in an area is a "clearly frivolous" basis for jurisdictional discovery); Narco Avionics v. Sportsman's Market, Inc., 1992 WL 37106 (E.D. Pa. 1992) (holding that where the "assertion of personal jurisdiction is tenuous and based on mere allegations and speculation in the face of specific sworn denials by defendants ... discovery is not appropriate"); Ames v. Whitman's Chocolates, 1991 WL 281798 (E.D. Pa. 1991) (refusing to permit jurisdictional discovery where plaintiff failed to present affidavits or other evidence to refute affidavits denying jurisdictional contacts).

¹⁴ As the Arch court stated, with no pun intended as to the facts underlying this case, "discovery should not be used as a fishing expedition." Arch, 1997 WL 338597 at *11

defendants, I will dismiss the claims against them, which are alleged in Counts VI and VII of the counterclaim complaint, for lack of jurisdiction.¹⁵

V. Failure to State a Claim

A. Holt's Breach of Contract Claim Against SOS

In Count III counterclaim plaintiffs allege that Holt breached an agreement with SOS to arbitrate disputes. By Order dated January 15, 1997 this Court held that Holt and SOS did not enter an agreement to arbitrate disputes. Holt's appeal from that Order was dismissed by agreement of the parties by Order dated June 20, 1997. For reasons explained in the January 15, 1997 Order, SOS had no contractual duty to arbitrate disputes with Holt. Count III will be dismissed for failure to state a claim upon which relief can be granted.

B. Dockside's Breach of Contract and Interference With Contract Claims Against SOS and SSB

In Count I Dockside alleges that SOS breached the distributorship agreement between Dockside and SOS by requiring Dockside to maintain above-market prices, by failing to supply salmon,¹⁶ and by relinquishing its fishing rights to TOWFC, thus depriving itself of the means to fulfill its obligations under the agreement to supply seafood to Dockside. SOS seeks dismissal because the distributorship agreement may be terminated upon a "change in control" of SOS. ¶ 14(b)(ii). According to SOS, because its parent company SSB underwent a "change in control," SOS also underwent a change in control that terminated the contract.

¹⁵ If I had jurisdiction over Chatham I would be inclined to dismiss the claims against it on the pleadings, which allege that TOWFC and Karamea took the affirmative steps to acquire control of SSB/SOS and to negotiate the transfer of fishing rights. Chatham, which had not yet been created when these events occurred, merely received the rights once TOWFC and Karamea transferred them from SSB/SOS. Despite the conclusory assertion that these events constitute torts on the part of TOWFC, Karamea, "and/or Chatham," the factual allegations reveal no acts on the part of Chatham that give rise to a claim on which relief could be granted.

¹⁶ Salmon was identified in ¶ 1 of the agreement as a product within the exclusive distributorship.

The counterclaims, however, allege acts preceding the change in control that could, under certain sets of facts, constitute breaches of the agreement.¹⁷ Moreover, the agreement does not terminate automatically upon a change in control but rather provides that it "may be terminated by [SOS]" upon a change in control. ¶ 14(b)(ii). The counterclaims allege that SOS did not immediately terminate the agreement but rather assured Dockside that the arrangements under the agreement would continue despite the change in control. Thus a breach of contract could arise from conduct occurring after the change in control but before termination of the contract. Accepting the factual allegations as true and construing them favorably to counterclaim plaintiffs, I find that Count I states a claim for breach of the distributorship agreement. I will deny the motion to dismiss Count I.

In Count VII Dockside alleges that SOS and SSB, by requiring Dockside to maintain unrealistically high prices, failing to supply salmon, and transferring fishing rights so SOS could no longer fulfill obligations to supply seafood to Dockside, "intentionally, improperly and without justification" interfered with current and prospective contractual relations between Dockside and its customers.¹⁸ SOS and SSB contend that these allegations fail to state a claim for interference with contract because the contract between SOS and Dockside had terminated upon the "change in control" before the transfer of fishing rights. According to SOS and SSB, because there was no longer a contract obligating SOS to retain its fishing rights, the transfer of those fishing rights fails, as a matter of law, to establish the wrongful intent or impropriety required to state a tortious interference claim. See Shein v. Myers, 576 A.2d 985, 988 (Pa. Super. 1990) (holding that tortious interference claim requires intentional action that is improper and that results in interference of the performance of a contract with another).

¹⁷ I reserve judgment on the question whether a change in control of SSB constitutes a change in control of SOS within the meaning of ¶ 14(b)(ii) of the agreement.

¹⁸ Dockside named TOWFC, Chatham and Karamea as additional counterclaim defendants in Count VII. Because jurisdiction is lacking as to these parties I consider only whether Count VII states a claim against SOS and SSB.

However, as discussed in connection with Count I, the agreement did not automatically terminate upon a change in control and may have been in effect at the time the fishing rights were transferred. The allegations, when taken as true and construed favorably to counterclaim plaintiffs, assert that at the time SOS and SSB transferred all of SOS's fishing rights to third parties, SOS was under a contractual duty to Dockside to supply seafood, which it could not do if it relinquished those fishing rights. Thus the change in control provision does not defeat Dockside's tortious interference claim as a matter of law.

Count VII, however, differs from traditional tortious interference claims. The Pennsylvania Supreme Court, adopting § 766 of the Restatement (Second) of Torts, has recognized tortious interference claims against defendants who induce others to breach obligations owed to the plaintiff. See Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 393 A.2d 1175 (Pa. 1978).¹⁹ The Pennsylvania Supreme Court has not, however, addressed whether it would adopt § 766A of the Restatement, which recognizes tortious interference claims against defendants who prevent the plaintiff from performing its own obligations to others.²⁰ Section 766A is more applicable to Dockside's counterclaim, which does not allege that SOS and SSB induced a third party to breach a duty to Dockside but rather alleges that SOS and SSB prevented Dockside from performing its duties to others. The Court of Appeals noted in dictum that it is "far from clear" whether the Pennsylvania Supreme Court would recognize a cause of action under § 766A. Windsor Secs., Inc. v. Hartford Life Ins. Co., 986 F.2d 655, 663 (3d Cir. 1993).²¹

The parties have not addressed the application of § 766A to this case. Having raised the question sua sponte, I decline to predict the status of § 766A under Pennsylvania law without

¹⁹ Section 766 provides that one who "interferes with the performance of a contract ... between another and a third person by ... causing the third person not to perform the contract" is liable for the tort of interference.

²⁰ Section 766A provides that one who "interferes with the performance of a contract between another and a third person, by preventing the other from performing the contract" is liable for the tort of interference.

²¹ Windsor Securities noted divergences between Pennsylvania law and the Restatement regarding interference torts but, because defendant was entitled to summary judgment under the elements of § 766A, declined to predict whether Pennsylvania would adopt § 766A. 986 F.2d at 660-67.

affording the parties an opportunity to address the issue. I will reserve judgment to permit any party who wishes to be heard on the issue to file a brief addressing it. Because the present motions raise no grounds defeating Dockside's tortious interference with contract claim I will deny the motion to dismiss Count VII.

C. Holt's and Dockside's Breach of Duty of Good Faith and Fair Dealing Claims Against SOS

In Count II Dockside alleges that SOS breached a duty of good faith and fair dealing. Dockside contends that duties of good faith and fair dealing were implied in the exclusive distributorship agreement between the parties and that SOS acted in bad faith and dealt unfairly with Dockside by failing to supply salmon, by requiring Dockside to price products above market rates, and by failing to advise Dockside of changes in ownership of fishing rights the loss of which would "materially and adversely impact on SOS's ability to fulfill its contractual obligations to Dockside."

SOS, in support of its motion to dismiss, argues that Pennsylvania courts have recognized a duty of good faith and fair dealing only where a "special relationship" exists between the parties. Chrysler Credit Corp. v. B.J.M., Jr., Inc., 834 F. Supp. 813, 841 (E.D. Pa. 1993). A special relationship may arise when "one party surrenders substantial control over some portion of his affairs to the other." Id. at 842. The counterclaims allege that Dockside surrendered control to SOS in important matters related to pricing its products. The agreement established an exclusive distributorship arrangement between SOS and Dockside containing several covenants imposing duties to use "best efforts" to carry out aspects of the arrangement. See ¶¶ 12(b), 12(c). I find sufficient allegations of a special relationship to give rise to a duty of good faith and fair dealing.

SOS correctly emphasizes that the implied duty of good faith cannot defeat a party's express contractual rights by imposing obligations the party expressly contracted to avoid. See Creeger Brick & Bldg. Supply, Inc. v. Mid-State Bank & Trust Co., 560 A.2d 151, 153 (Pa.

Super. 1989). However, "in the absence of an express provision, the law will imply an agreement ... to do an perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract." Seal v. Riverside Fed. Sav. Bank, 825 F. Supp. 686, 699 (E.D. Pa. 1993) (quoting Somers v. Somers, 613 A.2d 1211, 1213 (1992)). In Seal this Court refused to dismiss a case where the defendants failed to disclose material facts that compromised their ability to perform their contractual obligations. The counterclaims similarly allege that SOS failed to disclose the transfer of fishing rights that compromised SOS's ability to perform its obligations under the distribution agreement and that SOS took other actions that impaired Dockside's right to receive the fruits of the agreement. I will deny the motion to dismiss Count II.²²

In Count IV Holt alleges that SOS breached a duty of good faith and fair dealing arising from the guarantee agreement between Holt and SOS. Holt alleges that it agreed to act as Dockside's guarantor only until Dockside attained a certain net worth, and that SOS, by failing to supply salmon, inflating prices, and diverting fishing rights essential to sustaining Dockside's distributorship, prevented Dockside from attaining that net worth. Construed favorably to Holt, the counterclaim alleges that the guarantee agreement provided Holt assurance that its obligations as Dockside's guarantor would end under specified circumstances and that SOS, acting in a manner contrary to "reason and justice," denied Holt the fruits of that contractual assurance by preventing those circumstances from occurring. These allegations state a claim for breach of the duty of good faith and fair dealing. I will deny the motion to dismiss Count IV.

D. Dockside's Fraud and Misrepresentation Claims Against SOS and SSB

²² A party is not entitled to maintain an implied duty of good faith claim where the allegations of bad faith are "identical to" a claim for "relief under an established cause of action." Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 701-02 (3d Cir. 1993). This principle does not warrant dismissal of Dockside's bad faith claim, which invokes duties reasonably implied from, but not expressly set forth in, the distributorship agreement. Dockside's claim is not identical to an otherwise established cause of action.

SOS and SSB move to dismiss Dockside's claims of fraud and negligent misrepresentation asserted in Counts VIII and IX on the grounds that the allegations lack the specificity and particularity required by Federal Rule of Civil Procedure Rule 9(b).²³

To satisfy Rule 9(b) a plaintiff must plead: (1) a specific false representation of material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity by the person to whom it was made; (4) intention that it should be acted upon; and (5) actions taken upon it to the plaintiff's detriment. Shapiro v. UJB Fin. Corp., 964 F.2d 272, 284 (3d Cir. 1992). These requirements must, however, be applied in light of the "general simplicity and flexibility" of the Federal Rules of Civil Procedure. Id. at 284-85. The pleadings, even when subject to the heightened specificity requirements of Rule 9, are governed by Rules 8(a)(2) and 8(e) which require a "short and plain" statement of the claim made through "simple, concise and direct" averments. In re Westinghouse Secs. Litigation, 90 F.3d 696, 702 (3d Cir. 1996). I assess the adequacy of counterclaim allegations in light of these competing requirements of particularity and simplicity.

Dockside alleges that "[i]n 1995" SOS and SSB "met or communicated with Dockside on several occasions about market price for lobster tail" and made representations about the pricing of lobster tail that SOS and SSB knew were false and knew Dockside, in its lesser experience, would rely on to its detriment. Dockside also alleges that SOS and SSB fraudulently concealed the impending transfer of fishing rights that would materially impair SOS's ability to fulfill its obligations under the distributorship agreement, causing Dockside to invest in developing the distributorship it did not know was in jeopardy.

While the counterclaims do not "describe the precise words used, each allegation of fraud adequately describes the nature and subject of the alleged misrepresentation." Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984). The allegations need

²³ While Rule 9(b) does not govern negligent misrepresentation claims, courts require a degree of specificity in allegations of negligent misrepresentation. See S. Kane & Son Profit Sharing Trust v. Marine Midland Bank, 1996 WL 325894 at *9 (E.D. Pa. 1996).

not specify the "date, place or time" of the fraudulent conduct as long as they use other means of "injecting precision and some measure of substantiation" into the allegations of fraud. Id. In this case the averments of fraud are confined to a finite number of communications between the parties during 1995 pertaining to specified subjects. The content of the allegedly fraudulent communications is identified with sufficient specificity to apprise counterclaim defendants of the "precise misconduct with which they are charged." General Ins. Co. of America v. Gross, 1997 WL 239800 (E.D. Pa. 1997); Kirschner v. Castello, 1992 WL 17212 (E.D. Pa. 1992); Pep Boys v. American Waste Oil Servs. Corp., 1997 WL 367048 (E.D. Pa. 1997). I find the allegations sufficient to satisfy Rule 9(b) and will deny the motion to dismiss Counts VIII and IX.

E. Punitive Damages

Punitive damages are not recoverable in either breach of contract claims or breach of duty of good faith claims, which are contractual in nature. Adjusters, Inc. v. Computer Sciences Corp., 818 F. Supp. 120, 122 (E.D. Pa. 1993); Lott Holding, Inc. v. Pennsylvania Manufacturers' Ass'n Life Ins. Co., 1989 WL 32751 (E.D. Pa. 1989); Mazzula v. Monarch Life Ins. Co., 487 F. Supp. 1299, 1300 (E.D. Pa. 1980); Iron Mountain Security Storage Corp. v. American Specialty Foods, Inc., 457 F. Supp. 1158, 1169 (E.D. Pa. 1978). I will therefore dismiss counterclaim plaintiffs' claims for punitive damages as to Counts I, II and IV. Counterclaim plaintiffs' allegations in connection with their tort claims, when taken as true and construed favorably to them, give rise to a potential claim of "malicious, wanton, willful or oppressive" conduct, precluding dismissal of the punitive damage claims as to the tort-based counterclaims. See Adjusters, Inc., 818 F. Supp. at 122.

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

SOUTHERN OCEAN SEAFOOD	:	
COMPANY	:	
	:	CIVIL ACTION

v.
HOLT CARGO SYSTEMS, INC.

:
:
:
:
ORDER

NO. 96-5217

AND NOW this day of August, 1997 upon consideration of defendant Holt's motion for joinder of Salmond Smith Biolab as an indispensable party or for dismissal of the complaint for failure to join an indispensable party, plaintiff's and counterclaim defendants' motions to dismiss or strike the counterclaims, and the parties' filings related thereto it is hereby ORDERED that:

(1) Defendant Holt's motion for joinder of Salmond Smith Biolab as an indispensable party or to dismiss the action for failure to join an indispensable party is DENIED;

(2) Dockside is hereby GRANTED leave to intervene pursuant to Federal Rule of Civil Procedure 24(b) as a counterclaim plaintiff;

(3) SSB, TOWFC, Chatham and Karamea are hereby JOINED as counterclaim defendants pursuant to Federal Rules of Civil Procedure 13(h) and 20(a);

(4) Plaintiff's and counterclaim defendants' motions to dismiss or strike the counterclaims are GRANTED IN PART AND DENIED IN PART AS FOLLOWS:

(a) The motion to dismiss or strike Count I is DENIED;

(b) The motion to dismiss or strike Count II is DENIED;

(c) The motion to dismiss or strike Count III GRANTED and Count III is DISMISSED for failure to state a claim upon which relief can be granted;

(d) The motion to dismiss or strike Count IV is DENIED;

(e) The motion to dismiss or strike Count V is GRANTED and Count V is DISMISSED as a counterclaim improperly brought solely against persons not originally parties to this action;

(f) The motion to dismiss or strike Count VI is GRANTED and Count VI is DISMISSED as to TOWFC for lack of subject matter jurisdiction and lack of personal jurisdiction; and is DISMISSED as to Chatham and Karamea for lack of personal jurisdiction; and is DISMISSED

as to all parties as a counterclaim improperly brought solely against persons not originally parties to this action;

(g) The motion to dismiss or strike Count VII is GRANTED as to TOWFC, Chatham and Karamea and Count VII is DISMISSED as to TOWFC for lack of subject matter jurisdiction and lack of personal jurisdiction; and is DISMISSED as to Chatham and Karamea for lack of personal jurisdiction. The motion to dismiss or strike Count VII is DENIED as to SOS and SSB.

(h) The motion to dismiss or strike Count VIII is DENIED;

(i) The motion to dismiss or strike Count IX is DENIED;

(j) The motion to dismiss or strike the punitive damages claims is GRANTED as to Counts I, II, III and IV and the punitive damages claims as to those Counts are DISMISSED. The motion to dismiss or strike the punitive damages claims is otherwise DENIED; and

(k) The requests for attorney's fees are DENIED.

J.

THOMAS N. O'NEILL, JR.,