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

TRIPLE CROWN AMERICA, INC.	:	**CIVIL ACTION**
v.	:	
BIOSYNTH AG and BIOSYNTH INTERNATIONAL, INC.	:	**NO. 96-7476**

M E M O R A N D U M

WALDMAN, J. **September 17, 1997**

Plaintiff is a Pennsylvania corporation with its principal place of business in Perkasie, PA. Plaintiff is a wholesale importer of raw materials for the pharmaceutical and natural foods industries. Defendant Biosynth AG is a foreign corporation with its principal place of business in Switzerland. Biosynth AG manufactures and exports pharmaceutical raw materials, fine and specialty chemicals and raw materials for the natural foods industry. Defendant Biosynth International, Inc. is an Illinois Corporation with its principal place of business in Skokie, IL. It is a subsidiary of Biosynth AG and a marketing and sales organization for the parent corporation's products.

Presently before the court is defendant Biosynth International's Motion to Dismiss for improper venue and a failure to state claims upon which relief may be granted, pursuant to Fed. R. Civ. P. 12(b)(3) and 12(b)(6).[1]

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1. The burden is on the movant to demonstrate that venue is improper. See Myers v. American Dental Ass'n., 695 F.2d 716, 724-25 (3d Cir. 1982), cert. denied, 462 U.S. 1106 (1983). Even assuming that the plaintiff bears the burden of demonstrating the (continued...)

The pertinent allegations in plaintiff's amended complaint are as follow.

Plaintiff has purchased various products from Biosynth AG since 1987. In September 1993, plaintiff made inquiries to Biosynth AG concerning the purchase of Melatonin. By letter of November 3, 1993 plaintiff informed Biosynth AG that it wanted to develop the Melatonin business and asked for assurances regarding supply and price protection. By letter of November 5, 1993 Biosynth AG informed plaintiff that it would be given a distributor discount and could sell Melatonin world-wide but it would be in competition with Biosynth International in the United States market.

Hokan Cederberg, plaintiff's CEO and Chairman, was then informed by Hans Spitz, Biosynth AG's founder and President, that Biosynth AG would refer all Melatonin business inquiries it received to plaintiff. This arrangement was confirmed by letter of November 19, 1993 from Mr. Cederberg to Chuck Feit of Biosynth International. Biosynth AG sent a letter dated March 11, 1994 to

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1. (...continued)
propriety of venue, particularly when it turns on the existence of personal jurisdiction, see id. at 731-32 (Garth, J. concurring and dissenting); Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3826 at 259 (1986); Emjayco v. Morgan, Stanley & co., Inc., 901 F. Supp. 1397, 1400 (C.D. Ill. 1995) Banque de la Mediterranee-France v. Thergen, Inc., 780 F. Supp. 92, 94 (D.R.I. 1992), the result in the instant case would be the same. Dismissal pursuant to Rule 12(b)(6) is inappropriate unless, taking plaintiff's allegations as true, it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989).

plaintiff stating: "we only want to supply through your company to the US-market."

By letter of March 14, 1994 plaintiff asked Biosynth AG about rumors that it was selling directly to purchasers in the United States and inquired about the sale of Melatonin in other markets by sister companies of plaintiff. Biosynth AG responded by letter of March 15, 1994 that an exclusive arrangement was not possible in Europe.

On March 29, 1994, Mr. Cederberg met with representatives of Biosynth AG in Switzerland and at their request presented them with a list of plaintiff's customers. Defendants later contacted and sold to those customers without informing plaintiff. Plaintiff asked Biosynth AG if it was quoting prices to plaintiff's customers. Biosynth AG responded by letter of July 8, 1994 that although it sometimes got inquiries from European companies, they carefully ask where the material will go and "we can assure you that you are the company we work together [sic] in the Nutritional US-market."

By letter of December 19, 1994 Biosynth AG authorized plaintiff to tell potential customers that it was the exclusive seller of Biosynth AG's "Ultra-Pure" Melatonin in the United States. On February 3, 1995, plaintiff provided a copy of a marketing letter to Biosynth AG in which plaintiff described itself as "exclusive agent" for Melatonin. Biosynth AG did not object to the letter.

On April 13, 1995, plaintiff again asked Biosynth AG if it had quoted a price to one of plaintiff's customers. Biosynth AG responded on April 18, 1995 that the quotation was made in error and it would not supply the customer.

In a meeting in Switzerland in May 1995 Biosynth AG expressed its satisfaction with plaintiff's performance as exclusive agent. In the summer of 1995 the Melatonin market "exploded" and plaintiff "began having problems getting Melatonin from Biosynth [AG]."

In a letter of September 4, 1995, former Biosynth AG employees informed plaintiff that Biosynth AG was supplying directly to other companies in the U.S. and that Mr. Spitz had "insisted" on selling Melatonin to other U.S. companies in 1994.

Mr. Cederberg sent Biosynth AG a letter dated September 8, 1995 describing plaintiff as Biosynth AG's "exclusive agent in the U.S." and stating that plaintiff wished to continue working together with Biosynth AG. Biosynth never refuted the statements in the letter.

In the November 6, 1995 edition of the Chemical Marketing Reporter, Biosynth AG declared that plaintiff was not its exclusive agent in the United States and that Biosynth International was its United States representative.

Mr. Cederberg expressed his concerns about plaintiff's arrangement with Biosynth AG in a letter dated November 7, 1995. Counsel for Biosynth AG responded by letter of November 16, 1997

that there was no contract between that parties and that plaintiff was never Biosynth AG's exclusive agent.

In Count I of its amended complaint, plaintiff asserts a breach of contract claim against Biosynth AG. In Count II, plaintiff asserts a trade libel claim against Biosynth AG for the statement that plaintiff was never an exclusive agent. In Count III, plaintiff asserts a fraud claim against Biosynth AG for intentionally misrepresenting to plaintiff that it would be defendant's exclusive agent for Melatonin in the United States. In Count IV, plaintiff asserts a fraud claim against Biosynth AG for its extraction and use of plaintiff's customer list. In Count V, plaintiff asserts a fraud claim against Biosynth AG for misrepresenting that it manufactured the Melatonin sold to plaintiff. In Count IX, plaintiff asserts a claim against Biosynth AG for intentional interference with plaintiff's prospective contractual relations by directly contacting firms on its client list.

In Count VI, plaintiff asserts a claim against Biosynth International for interference with plaintiff's exclusive dealings contract with Biosynth AG. In Count VII, plaintiff asserts a claim against both defendants for conspiracy to defraud. In Count VIII, plaintiff asserts a claim for "alter ego liability" against both defendants. Plaintiff alleges that Biosynth International was the "alter ego and/or agent" of Biosynth AG, that the latter "used, dominated and controlled" the

former and that the defendants operated "interchangeably" and in disregard of their "corporate separateness."[2]

Thus, the essence of plaintiff's claims is that Biosynth AG breached an exclusive agency contract with plaintiff, fraudulently induced plaintiff to part with its customer list, misrepresented that plaintiff would receive the benefits of an exclusive agency and, in tandem with Biosynth International, diverted sales from plaintiff by selling directly to others and soliciting plaintiff's customers.

Plaintiff has asserted that venue is proper in this district pursuant to 1391(a)(2). That statute provides that in an action wherein jurisdiction is based on diversity of citizenship, venue is proper in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated." A court must look at the nature of the dispute to determine whether an act or omission giving rise to the claim is substantial. Cottman Transmissions Systems, Inc. v. Martino, 36 F.3d 291, 295 (3d Cir. 1994); Cornell & Co., Inc. v. The Home Ins. Companies, 1995 WL 46618, *5 (E.D.Pa. Feb. 6, 1995).

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2. Plaintiff does not further elaborate on this theory of liability and it is not altogether clear. That a subsidiary corporation acted as an agent of its parent or that the parent corporation dominated, controlled and misused the subsidiary might render the parent liable for acts of the subsidiary but one does not readily discern how this would render the subsidiary liable for the unilateral acts of the parent.

Plaintiff presents evidence of telephone calls and mailings into this district with an affidavit of John V. Henderson, plaintiff's Sales Manager. Mr. Henderson avers that plaintiff had "numerous written and telephonic" contacts with Biosynth International regarding the arrangement with Biosynth AG and plaintiff's sale of Melatonin. Mr. Henderson avers that he had "approximately one dozen" telephone conversations regarding sales leads with Charles Feit, Director of Sales and Marketing at Biosynth International, that were "primarily initiated" by Mr. Feit. He also avers that at Mr. Feit's request, he sent various news and magazine articles regarding Melatonin to Biosynth International.

Attached to the affidavit as exhibits is correspondence between the parties. One exhibit is a letter from plaintiff to Biosynth International discussing plaintiff's exclusive arrangement with Biosynth AG and confirming that both defendants will refer all U.S. Melatonin business to plaintiff. Two exhibits are letters regarding attempts to patent Melatonin. One is a letter from Biosynth AG to plaintiff referencing the receipt from Biosynth International of a news article it received from plaintiff regarding Melatonin and seeking information about a potential Japanese competitor. Two letters are from Biosynth International providing sales leads to plaintiff. Another is a letter from Biosynth AG to plaintiff informing it that Biosynth International had identified a potential customer seeking price information and suggesting that plaintiff contact that customer.

The final exhibit is a letter from plaintiff to Biosynth AG thanking them for the sales leads given to plaintiff by both defendants.

These calls and letters are clearly not a substantial part of the events giving rise to a claim against Biosynth International for fraud or interference with a contractual relationship. Indeed, these exhibits show only that Biosynth International was encouraging and supporting sales of Melatonin by plaintiff. There is no allegation or showing that Biosynth International solicited any customers of plaintiff in this district or made sales of Melatonin to others here despite the exclusive agency agreement. Plaintiff asserts only that Biosynth International helped Biosynth AG to "sell directly to Triple Crown's customers in the United States."

Plaintiff contends that venue is proper here because it is located in this district, conducts business here and incurred lost revenue here. An act committed outside this district resulting in a loss of revenue to a party in the district is not itself an event in the district giving rise to a claim. See Cottman, 36 F.3d at 295 (averments that defendants' breach of contract and tortious conduct "caused plaintiff to suffer injury in this district" does not establish venue). To accept plaintiff's argument would be to rewrite §1391 to provide venue in any district in which a plaintiff who claims to have been injured happens to reside or conduct business.

While never asserted by plaintiff, there is another basis on which venue may be predicated. A defendant corporation is "deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced" or "within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State." 28 U.S.C. § 1391(c).[3] Thus, the test for proper venue in a case against a corporate defendant is effectively the same as that for personal jurisdiction. DiMark Mkt., Inc. v. Health Serv. & Indem. Co., 913 F. Supp. 402, 408 (E.D. Pa. 1996); Ontel Products, Inc. v. Project Strategies Corp., 899 F. Supp. 1144, 1149 (S.D.N.Y. 1995); Bicicletas Windsor, S.A., v. Bicycle Corp. of America, 783 F. Supp. 781, 786 (S.D.N.Y. 1992). It follows that venue would lie in this district if the minimum contacts test can be satisfied. See Mellon Bank (East) PSFS v. DiVeronica Bros., Inc., 983 F.2d 551, 554 (3d Cir. 1993) (personal jurisdiction can be based on minimum contacts arising from the specific act upon which the action rests or continuous and systematic contacts with the forum); Cornell & Co., Inc., 1995 WL 46618 at *9 (same).[4]

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3. A plaintiff's citation of unavailing venue provisions in his complaint does not preclude the court from determining whether venue is proper under any applicable provision. See Neufeld v. Neufeld, 910 F. Supp. 977, 986 & n.13 (S.D.N.Y. 1996).

4. There is no allegation, suggestion or showing that Biosynth International ever engaged in "continuous and systematic" business in this district or is otherwise subject to general personal jurisdiction here. See 42 Pa. Cons. Stat. Ann. §

(continued...)

That a forum defendant is injured as a result of acts outside the forum is not sufficient to sustain a claim of specific personal jurisdiction. See, e.g., Naegler v. Nissan Motor Co., Ltd., 835 F. Supp. 1152, 1155-56 (W.D. Mo. 1993). What is required is a showing that a defendant intentionally targeted some wrongful act at the plaintiff in the forum. See Narco Avionics, Inc. v. Sportsman's Market, Inc., 792 F. Supp 398, 408 (E.D. Pa. 1992). Plaintiff has made no such showing. There is an important distinction between acts which result in injury in the forum and acts targeted at the forum for the very purpose of having an effect there. Id.

Where personal jurisdiction depends on minimum contacts between a defendant and the forum, it must appear that plaintiff's claim arises from or is related to those contacts. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984); Gundle Lining Const. Co. v. Adams County Asphalt, 85 F.2d 201, 205 (5th Cir. 1996); Sawtelle v. Farrell, 70 F.3d 1381, 1388-89 (1st Cir. 1995); Dollar Sav. Bank v. First Sec. Bank, 746 F.2d 208, 211 (3d Cir. 1984). Even a single contact may be sufficient if it gives rise or relates to plaintiff's claim. See Glen Eagle Square Equity Associates, Inc. v. First Nat'l Bank of Pasco, 1993 WL 405387, *2 (E.D. Pa. Oct. 12, 1993) (venue proper where defendants targeted communication to

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4. (...continued)
5301(a)(2)(iii); Provident Nat'l Bank v. California Federal Savings and Loan Ass'n, 819 F.2d 434, 437 (3d Cir. 1987).

plaintiff in the forum and plaintiff's claims were premised on misrepresentations made in that communication). There is, however, a difference between correspondence or telephone calls incidental to a transaction that results in litigation and such contacts that give rise to plaintiff's claim or create a substantial connection between the defendant and the forum. Grand Entertainment Group v. Star Media Sales, 988 F.2d 476, 482-83 (3d Cir. 1993).

The forum contacts of an agent may be attributable to his principal. Id. at 483; Taylor v. Phelan, 912 F.2d 429, 433 (10th Cir. 1990). It does not logically follow, however, that the forum contacts of the principal may be imputed to his agent. The pertinent allegation in this case is only that Biosynth International acted as the agent of Biosynth AG.

That a court has personal jurisdiction over an alleged conspirator does not confer jurisdiction over an alleged co-conspirator which does not itself have sufficient minimum contacts with the forum. Hawkins v. Upjohn Co., 890 F. Supp. 601, 608-09 (E.D. Tex. 1994). See also Emjayco, 901 F. Supp. at 1401 (venue cannot be predicated on forum contacts of alleged co-conspirator).

The forum contacts of a corporate defendant may be attributed to a subsidiary or other related corporation when one is the alter ego of the other. Brooks v. Bacardi Rum Corp., 943 F. Supp. 559, 562 (E.D. Pa. 1996); Select Creations, Inc. v. Palafito America, Inc., 852 F. Supp. 740, 774 (E.D. Wis. 1994);

Hopper v. Ford Motor Co., Ltd., 837 F. Supp. 840, 844 (S.D. Tex. 1993) Nat. Precast Crypt v. Dy-Core of Pa., Inc., 785 F. Supp. 1186, 1194-95 (W.D. Pa. 1992); U.S. v. Arkwright, Inc., 690 F. Supp.1133, 1138-39 (D.N.H. 1933). That two corporate entities have a close relationship or coordinate and cooperate with each is not alone sufficient to show alter ego status. Katz v. Princess Hotels Intern., Inc., 839 F. Supp. 406, 410-11 (E.D. La. 1993); Hopper, 837 F. Supp. at 844. The disregard of corporate independence or the exercise by the parent of pervasive control over the subsidiary can be sufficient to show alter ego status for the purpose of imputing forum contacts. Brooks, 943 F. Supp. at 562-63.

Plaintiff has not presented information regarding the capitalization of defendants, their directors and officers, any commingling of funds or particular instances where corporate formalities were not observed. Plaintiff, however, does aver that the defendant corporations are operated interchangeably without regard for any corporate distinctiveness and that Biosynth AG so dominated and controlled Biosynth International that the latter was an alter ego of the former. Defendant has submitted nothing to refute these assertions but merely contends they are inadequate to make even a prima facie showing of alter ego status sufficient to withstand a motion to dismiss.

The court cannot discern whether orders of Melatonin would be delivered to plaintiff from Biosynth AG or through Biosynth International, but it does appear that the two acted in

tandem at least in developing and supplying the U.S. market for Melatonin. In the correspondence of September 5, 1994 from Biosynth AG to plaintiff regarding a potential Japanese competitor, the former refers to "our colleagues at Biosynth Intl." In the correspondence of September 7, 1994 to plaintiff from Biosynth AG regarding a potential customer, the Director of Sales and Marketing of Biosynth International is characterized as "our Mr. Feit." In any event, without imputing the forum contacts of Biosynth AG to Biosynth International, this is a district in which it is subject to personal jurisdiction.

While the question is a close one, this defendant at the time the action was commenced had sufficient minimum contacts with this district to sustain an exercise of personal jurisdiction. Whether by design or self-assertion, it appears that defendant was privy to and a component of the Biosynth AG-Triple Crown relationship which was predicated on mutual interests and efforts in promoting Melatonin sales pursuant to exclusive rights allegedly bestowed on plaintiff by the parent corporation. For its apparent benefit and on behalf of its parent, Biosynth International engaged in a series of communications with plaintiff in the forum to foster product sales from the forum. In so doing, it fairly appears that defendant undertook an affirmative act by which it purposefully availed itself of the privilege of engaging in business activity in the forum. See Hanson v. Denckla, 357 U.S. 235, 253 (1958). It appears that as part of a continuing business relationship,

the existence and nature of which underlie plaintiff's claims, defendant directed a number of communications to plaintiff in the forum which are related to those claims. See Grand Entertainment, 988 F. 2d at 482, 483; Mellon Bank (East) PSFS Nat. Ass'n. v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992).

Moreover, defendant has effectively conceded that it is subject to personal jurisdiction in this district by waiving any objection when filing the instant motion. See Fed. R. Civ. P. 12(h)(1); Pilgrim Badge & Label Corp. v. Barrios, 857 F.2d 1, 3 (1st Cir. 1988) (defendant waived objection to personal jurisdiction by failing to assert it in its Rule 12 motion to dismiss for improper venue); Myers, 695 F.2d at 720-21 (same).[5] See also Albany Ins. Co. v. Almacenadora Somex, S.A., 5 F.3d 907, 909 (5th Cir. 1993) (defendant waived specific objection to venue by failing to assert it in its motion to dismiss for improper venue on other grounds); Harris Bank Naperville v. Pachaly, 902 F. Supp. 156, 157 (N.D. Ill. 1995) (failure to assert lack of personal jurisdiction in Rule 12 motion to dismiss for lack of subject matter jurisdiction results in waiver).

Defendant contends with some force that plaintiff's claims or theories of liability are not altogether consistent. At this juncture, however, the court need not elaborate upon the intricacies of whether or when under Pennsylvania or Illinois law

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5. Concomitantly there has been no assertion and it does not appear from what has been presented that an exercise of jurisdiction over this defendant is fundamentally unfair or unjust. See Grand Entertainment, 988 F.2d at 483.

a totally controlled subsidiary can conspire with its parent or be liable for interference with a contract to which the parent is a party. Subject to the strictures of Rule 11, a plaintiff may plead multiple or alternative claims regardless of consistency in the statement of facts or legal theory asserted. See Fed. R. Civ. P. 8(e)(2); Henry v. Daytop Village, 42 F.3d 89, 95 (2d Cir. 194); Dugan v. Bell Telephone of Pennsylvania, 876 F. Supp. 713, 722 (W.D. Pa. 1994); Atlantic Paper Box Co. v. Whitman's Chocolates, 844 F. Supp. 1038, 1043 (E.D. Pa. 1994).

It does not appear beyond doubt from the face of the amended complaint that plaintiff will be unable to show that Biosynth International was a distinct entity which interfered with a contract between plaintiff and Biosynth AG and collaborated with the latter to perpetrate a fraud upon plaintiff, or alternatively that the two defendant corporations were so entwined that the wrongful acts of each are fairly attributable to the other.[6] Plaintiff has set forth claims against the moving defendant sufficient to withstand a motion to dismiss.

Accordingly, defendant's motion will be denied. An appropriate order will be entered.

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6. Plaintiff, of course, has a continuing obligation to withdraw any claim or correct any allegation which may later appear to be insupportable.

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O R D E R

AND NOW, this day of September, 1997, upon consideration of the Motion of defendant Biosynth International, Inc. to Dismiss for lack of venue and failure to state a cognizable claim pursuant to Fed. R. Civ. P. 12(b)(3) & (6) (Doc. #5), and plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **DENIED**; and, as defendant Biosynth International's Motion to Dismiss docketed as Doc. #6 is in fact an identical copy of the motion docketed as Doc. #5 which was merely refiled with a corrected supporting brief, to clear the docket and avoid the possibility of any confusion in the future, **IT IS FURTHER ORDERED** that this Motion (Doc. #6) is **DENIED** as well.

BY THE COURT:

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JAY C. WALDMAN, J.