

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

JUDITH E. EINBINDER, et al. : CIVIL ACTION
: :
v. : NO. 97-5810
: :
ALLEGIANCE CORP., et al. : (MDL NO. 1148)

BARBARA ZUCKER-PINCHOFF, et al. : CIVIL ACTION
: :
v. : NO. 97-5935
: :
ALLEGIANCE CORP., et al. : (MDL NO. 1148)

MARSHA BOGGS, et al. : CIVIL ACTION
: :
v. : NO. 97-5936
: :
ALLEGIANCE CORP., et al. : (MDL NO. 1148)

MYRA A. RUDT-POHL, et al. : CIVIL ACTION
: :
v. : NO. 97-5937
: :
ALLEGIANCE CORP., et al. : (MDL NO. 1148)

LAURIE J. MCGOOKIN, et al. : CIVIL ACTION
: :
v. : NO. 97-5938
: :
ALLEGIANCE CORP., et al. : (MDL NO. 1148)

SUSAN PHILLIPS, et al. : CIVIL ACTION
: :
v. : NO. 97-5939
: :
ALLEGIANCE CORP., et al. : (MDL NO. 1148)

TONI ANN SAVA, et al. : CIVIL ACTION
: :
v. : NO. 97-5940
: :
ALLEGIANCE CORP., et al. : (MDL NO. 1148)

O R D E R — M E M O R A N D U M

AND NOW, this 28th day of April, 1998, upon oral argument, the following is ordered:

1. The motion of defendant Health Industry Manufacturers Association (HIMA) to be dismissed from the seven above-captioned actions is denied. Fed. R. Civ. P. 12(b)(6).¹ While the fraud allegations of the complaints, ¶ 38, are arguably insufficient under Fed. R. Civ. P. 9(b), see Shapiro v. UJB Financial Corp., 964 F.2d 272, 284 (3d Cir.) (Rule 9(b) requirements), cert. denied, 506 U.S. 934, 113 S. Ct. 365, 121 L. Ed.2d 278 (1992), HIMA has explicitly chosen not to ask for a more specific pleading. Tr. at 12, April 15, 1998. Albeit on a high level of abstraction, the complaints state causes of action for concerted action and civil conspiracy against the trade association under both New York and Pennsylvania law, with fraud as the operative tort. City of New York v. Lead Industries Association, Inc., 190 A.D.2d 173, 177-78, 597 N.Y.S.2d 698, 700 (App. Div. 1st Dept. 1993) (concert of action); Sado v. Ellis, 882 F. Supp. 1401, 1408 (S.D.N.Y. 1995) (civil conspiracy); Burnside v. Abbott Laboratories, 351 Pa. Super. 264, 277-78, 280-81, 505 A.2d

¹ Under Rule 12(b)(6), the allegations of the complaint are accepted as true, all reasonable inferences are drawn in the light most favorable to the plaintiff, and dismissal is appropriate only if it appears that plaintiff could prove no set of facts that would entitle him to relief. Weiner v. Quaker Oats Co., 129 F.3d 310, 315 (3d Cir. 1997).

973, 980-81, 982 (1985) (concert of action and civil conspiracy). It can not be said as a matter of law that dismissal should be granted.²

2. HIMA's motion for sanctions under Fed. R. Civ. P. 11 is denied, see supra ¶ 1.

Edmund V. Ludwig, J.

² The argument that a trade association can not be held liable on a strict liability theory must give way to that of potential co-conspirator or concerted action liability.