

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.

April 29, 1998

Presently before the court is defendant Biosynth AG's motion for a protective order to quash plaintiff's notices of depositions. Plaintiff has filed a cross-motion to compel discovery from both defendants.

Plaintiff is a Pennsylvania corporation with its principal place of business in Perkasie, PA. It 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 Staad, Switzerland. It manufactures and exports pharmaceutical raw materials, 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.

The essence of plaintiff's claims is that Biosynth AG breached an exclusive distributorship agreement with plaintiff

for the sale of melatonin in the United States, fraudulently induced plaintiff to part with its customer list, misrepresented that plaintiff would receive the benefits of an exclusive agency, defamed plaintiff in a trade publication, and, in tandem with Biosynth International, diverted sales from plaintiff by soliciting plaintiff's customers and selling directly to others.¹

Plaintiff seeks to compel defendant Biosynth AG to respond to written interrogatories and document requests. Biosynth AG objected to such discovery as a "waste of the parties' resources" because of its motion to dismiss the claims against it on the ground of forum non conveniens. That motion has been denied and Biosynth AG will be ordered to respond to plaintiff's outstanding interrogatories and document requests.²

Plaintiff also seeks a court order compelling certain employees of defendants to appear for depositions in this

¹ Plaintiff's allegations and the factual background of this case are set forth at greater length in the court's Memorandum of September 17, 1997 in response to the motion of Biosynth International, Inc. to dismiss for improper venue and failure to state cognizable claims. See Triple Crown America, Inc. v. Biosynth AG, 1997 WL 611621 (E.D. Pa. Sept. 17, 1997).

² Defendant responded to the discovery requests with a blanket general objection but did not specify how any particular request was irrelevant or unreasonable and did not certify that it has undertaken a good faith effort to resolve any specific objection as required by L. R. Civ. P. 26.1(f). Moreover, defendant has not resisted providing discovery under the Federal Rules of Civil Procedure. To the contrary, it expressly represented that "Biosynth AG will respond as required by the Federal Rules of Civil Procedure." Defendant has stated its preference that plaintiff's representatives come to Switzerland to inspect and copy any of the requested documents. This approach, however, is consistent Fed. R. Civ. P. 34.

district. The parties disagree about which persons must appear for depositions upon notice and where any such depositions should take place.

"Only a party to litigation may be compelled to give testimony pursuant to a notice of deposition." United States v. Afram Lines (USA), Ltd., 159 F.R.D. 408, 413 (S.D.N.Y. 1994). If the party is a corporation, the federal rules provide two methods by which it may be deposed through its agents.

Under Fed. R. Civ. P. 30(b)(6), the party seeking to depose the corporation may notice a deposition with an explanation of the topic upon which information is sought. The corporation must then designate a deponent able to testify on behalf of the company regarding the pertinent subject matter. See Travelers Indem. Co. of Il. v. Hash Management, Inc., 173 F.R.D. 150, 155 (M.D.N.C. 1997); Afram Lines, 159 F.R.D. at 413. The party seeking discovery also may name a specific officer, director or managing agent to give deposition testimony on behalf of a party corporation pursuant to Fed. R. Civ. P. 30(b)(1). See Travelers Indem., 173 F.R.D. at 155; Stone v. Morton Int'l, Inc., 170 F.R.D. 498, 503-04 (D. Utah 1997); Afram Lines, 159 F.R.D. at 413. A person who is not an officer, director or managing agent, however, may only be compelled to testify pursuant to Fed. R. Civ. P. 45 or through the procedures of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters or

some other applicable treaty. See Afram Lines, 159 F.R.D. at 413.³

Plaintiff noticed the depositions of four employees of defendant Biosynth AG and five employees of Biosynth International, Inc. pursuant to Fed. R. Civ. P. 30(b)(1). It also noticed the deposition of both corporate defendants pursuant to Fed. R. Civ. P. 30(b)(6), seeking information regarding their production and sale of melatonin since 1990.

Both defendants contend that several individuals identified by plaintiff pursuant to Rule 30(b)(1) are not subject to deposition upon notice. Biosynth AG asserts that Dr. Uris Spitz, Mr. Martin Rissi and Dr. Annette Rahm are not officers, directors or managing agents of that corporation. Biosynth International, Inc. asserts that Mr. Bill Glaysher, Ms. Trish Jung, Ms. Jeslyn DeBaltz and Mr. Ron Jackson are not officers, directors or managing agents of that corporation.

The identification of corporate officers and directors is a simple fact question. The identification of a managing agent is a fact-sensitive question that depends on several factors. See Afram Lines, 159 F.R.D. at 413; Sugarhill Records

³ Resort to the procedures of the Hague convention is not required when discovery is sought from a party to an American lawsuit. Soci t  Nationale v. U.S. Dist. Ct., S.D. Iowa, 482 U.S. 522, 542 (1987). The Convention provides an optional alternative to the Federal Rules of Civil Procedure for obtaining evidence from foreign parties to American litigation in signatory countries. Id. at 538-40 & n.25.

Ltd. v. Motown Record Corp., 105 F.R.D. 166, 170 (S.D.N.Y. 1985). These essentially involve the extent of the individual's decisionmaking discretion and unsupervised authority, the degree to which his interests converge with those of the corporation and his general responsibilities, particularly with regard to the matters at issue in the litigation. See Founding Church of Scientology v. Webster, 802 F.2d 1448, 1453 (D.C. Cir. 1986), cert. denied, 484 U.S. 871 (1987); In re Honda American Motor Co., Inc. Dealership Relations Litigation, 168 F.R.D. 535, 540-41 (D. Md. 1996).

At the discovery stage, doubts about an individual's status as a "managing agent" are resolved in favor of the examining party. See Founding Church of Scientology, 802 F.2d at 1452 n.4; In re Honda, 168 F.R.D. at 540. The examining party, however, has the burden of providing enough evidence to show that it is at least a "close question" whether the proposed deponent is a "managing agent." Afram Lines, 159 F.R.D. at 413. The parties have failed to present competent evidence from which the court can discern whether the proposed deponents are officers or directors, let alone managing agents.

Defendants will be directed to provide plaintiff with lists of their corporate officers and directors and with information about the job title, description, responsibilities, discretionary authority and any ownership interest in the

corporation of each person to whose noticed deposition they have objected. Should the parties then still be unable to agree in good faith on the status of any individual, plaintiff may renew its motion to compel and, if the circumstances so warrant, seek appropriate sanctions.

The parties also disagree as to where the depositions noticed by plaintiff should take place. Depositions of a corporation through its agents generally should be taken at the corporation's principal place of business. See Thomas v. International Business Machines, 48 F.3d 478, 483 (10th Cir. 1995); Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979); Generale Bank Nederland N.V. v. First Sterling Bank, 1997 WL 778861, *2 (E.D. Pa. Dec. 18, 1997). See also, Work v. Bier, 107 F.R.D. 789, 792 n.4 (D.D.C. 1985) (plaintiffs cannot complain if discovery at distant locations is required). In circumstances where justice requires, however, the court may order that such depositions be taken at another location. See Socodis-Bocchi Trading, Inc. v. M/V Humbolt Rex., 1992 WL 142030, *3 (E.D. Pa. June 16, 1992); South Seas Catamaran, Inc. v. Motor Vessel Leeway, 120 F.R.D. 17, 21 n.5 (D.N.J. 1988), aff'd, 993 F.2d 878 (3d Cir. 1993); Charles A. Wright et al., Federal Practice and Procedure § 2112 (1994). See also, In re Standard Metals Corp., 817 F.2d 625, 628 (10th Cir. 1987) ("The court has substantial discretion to specify the time and place of any depositions");

Moretti v. Herman's Sporting Goods, Inc., 1988 WL 122299, *1
(E.D. Pa. Nov. 10, 1988).

Plaintiff has presented no persuasive reason to deviate from the general rule with respect to the depositions of defendant Biosynth International through its agents. Unless the parties agree on a mutually acceptable alternative arrangement, any noticed depositions of Biosynth International will take place at its headquarters in Illinois.

On the other hand, it appears that it would be difficult if not impossible for plaintiff to secure depositions of Biosynth AG in Switzerland in a manner as prompt, efficient and effective as that contemplated by the Federal Rules of Civil Procedure. The United States has an "overriding interest" in promoting the prompt and efficient resolution of litigation in its courts. Société Nationale, 482 U.S. at 543.

Plaintiff represents and defendant does not dispute that Swiss law places substantial restrictions on the conduct of discovery, including criminal sanctions against an attorney who attempts to take sworn discovery in that country for use in foreign litigation even from a consenting party. Defendant represents that Swiss authorities may grant permission for depositions in Switzerland for use in American lawsuits in accord with the Hague Convention. No information is provided, however, about how lengthy the time and cumbersome the process for

securing such permission may be or the manner in which those depositions may be conducted. The burden of demonstrating that use of the Convention procedures would provide effective discovery is on the proponent of using such procedures. Doster v. Schenk, 141 F.R.D. 50, 51 & n.3 (M.D.N.C. 1991); In re Benton Graphics v. Uddeholm Corp., 118 F.R.D. 386, 389 (D.N.J. 1987).

It appears that requiring plaintiff to seek to depose individual agents of Biosynth AG in Switzerland would entail substantial time, effort, expense and delay, and would not effectively facilitate the gathering of evidence in a manner contemplated by the Federal Rules. Defendant does not refute plaintiff's representations that any deposition in Switzerland in this case would be conducted in German by a judicial officer who would issue a report from handwritten notes, that the proceedings could not be transcribed by a party and that the ability of any Swiss attorney engaged by a party to pose questions to a deponent is not assured.⁴

The court will permit plaintiff to depose Biosynth AG'S agents in this district. See, e.g., In re Honda, 168 F.R.D. at

⁴ This appears to be consistent with the Convention which does not provide for the type of open, give and take oral depositions a party may obtain under the Federal Rules. See Hague Convention, Arts. 1-22, 23 U.S.T. 2555-68. See also Pain v. United Technologies Corp., 637 F.2d 775, 788-90 (D.C. Cir. 1980) (noting deficiencies in Hague Convention procedures when seeking to ensure availability of "American-style deposition"), cert. denied, 454 U.S. 1128 (1981).

541-42 (denying motion to quash deposition notices and requiring agents of Japanese corporate defendant to be deposed in Maryland); M&C Corporation v. Erwin Behr GMBH & Co., 165 F.R.D. 65, 68 (E.D. Mich. 1996) (denying protective order and requiring German corporate defendant's agents to appear for depositions in Detroit); R.F. Barron Corp. v. Nuclear Fields (Australia) Pty., Ltd., 1992 WL 212602, *2 (N.D. Ill. Aug. 28, 1992) (requiring depositions of Dutch and Australian defendants in Chicago); Roberts v. Heim, 130 F.R.D. 430, 439-40 (N.D. Cal. 1990) (compelling appearance of Swiss defendant for deposition in San Francisco); Work, 106 F.R.D. at 56 (requiring German corporate defendant and its agents to appear for depositions in Washington, D.C.).⁵

Plaintiff, however, will be required to reimburse defendant for reasonable costs associated with the travel and lodging of such witnesses and to schedule such depositions in a manner which minimizes the time commitment of each deponent and disruption to the operation of defendant's business.⁶ This will

⁵ Any non-party discovery from persons in Switzerland must, of course, proceed in a manner consistent with the Hague Convention.

⁶ The scheduling of five depositions at the same hour on the same day, as plaintiff initially did, is unreasonable and inconsistent with the court's admonition. See, e.g., Imperial Chemicals Industries, PLC v. Barr Laboratories, Inc., 126 F.R.D. 467, 471 (S.D.N.Y. 1989) (criticizing scheduling of six depositions for same date).

limit Biosynth AG's costs and deter plaintiff from unduly prolonging or taking unnecessary discovery. See Ward-THG, Inc. v. Swiss Reinsurance Co., 1997 WL 83294, *1 (S.D.N.Y. Feb. 27, 1997) (ordering deposition of Swiss nationals in the United States after plaintiff agreed to pay costs).

Because the amenability to a Rule 30(b)(1) deposition of three of the persons noticed by plaintiff is disputed by Biosynth AG and cannot be determined from the record presented, the notices directed at those persons will be quashed without prejudice to plaintiff to reissue such notices once it receives information about these individuals and, if necessary, to renew its motion to compel or to seek appropriate sanctions if defendant resists proper discovery. Defendant's motion to quash will otherwise be denied. Plaintiff's cross-motion to compel will be denied insofar as it pertains to persons whose managing agent status is disputed without prejudice to renew, if necessary, after receipt of information from defendants about these individuals, and will be denied insofar as plaintiff seeks to compel the depositions of defendant Biosynth International's agents other than at that defendant's headquarters or other place mutually agreed upon. The cross-motion to compel will otherwise be granted. An appropriate order will be entered.

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O R D E R

AND NOW, this day of April, 1996, upon consideration of the Motion of Defendant Biosynth AG for a Protective Order to Quash Deposition Notices (Doc. #31) and Plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in part in that the notices for deposition of Dr. Urs Spitz, Mr. Martin Rissi and Dr. Annette Rahm are quashed without prejudice to plaintiff to reissue such notices once it receives from defendant Biosynth AG a list of its officers and directors and information about the job title, description, responsibilities, discretionary authority and any ownership interest of these three individuals which shall be provided to plaintiff within fifteen (15) days and is otherwise **DENIED** upon condition that plaintiff reimburse defendant for the reasonable costs of travel and lodging of those witnesses deposed in this district; and, upon consideration of plaintiff's cross-Motion to Compel Depositions and Discovery Responses from defendants (docketed with no document number and listed on the computer print-out simply as

"Doc. #0") and defendants' response thereto, consistent with the accompanying memorandum, **IT IS FURTHER ORDERED** that said Motion is **GRANTED** in part in that defendant Biosynth AG shall respond to plaintiff's outstanding interrogatories and document requests within forty-five (45) days and shall promptly arrange for the deposition in this district of its designated corporate representative, Mr. Hans Spitz and others acknowledged to be corporate agents at mutually convenient times but in no event later than July 10, 1998 and is **DENIED** insofar as it seeks to compel the depositions of persons whose managing agent status is disputed without prejudice to renew, if necessary, after receipt from both defendants of a list of their officers and directors and information about the job title, description, responsibilities, discretionary authority and any ownership interest of those persons which shall be provided within fifteen (15) days and insofar as it seeks to compel the depositions of Biosynth International's agents other than at that defendant's headquarters or other location mutually agreed upon.

BY THE COURT:

JAY C. WALDMAN, J.