

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

TRIPLE CROWN AMERICA, INC. : CIVIL ACTION  
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:   
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 to dismiss plaintiff's claims against it on ground of forum non conveniens.

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 Staad, Switzerland. Biosynth AG manufactures and exports specialty chemicals, pharmaceutical raw materials 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. Biosynth International, Inc. 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,<sup>1</sup> 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 journal and, in tandem with defendant Biosynth International, diverted melatonin sales from plaintiff by soliciting plaintiff's customers and selling directly to others.<sup>2</sup>

The court has reviewed the parties' submissions and weighed the pertinent private and public interest factors which appear to be applicable. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6 (1982); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947). As the movant, defendant Biosynth AG bears the burden of demonstrating the availability of an adequate alternate forum and justifying the propriety of dismissal. Id. There is a "presumption that plaintiff's choice [of forum] should govern." Lony v. E.I. DuPont de Nemours & Co., 935 F.2d 604, 609 (3d Cir. 1991). Where the movant seeks dismissal in favor of a foreign forum, the burden is particularly strong. Id. (citing 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3828, at 291-92 (1986)). Unless the balance of factors

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<sup>1</sup> Melatonin is a human hormone supplement believed by some to retard the aging process and to ameliorate sleeplessness.

<sup>2</sup> 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 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).

strongly favors dismissal, a plaintiff's choice of forum ordinarily should not be disturbed. Gulf Oil, 330 U.S. at 508.

Defendant suggests that this controversy should be resolved in the courts of Switzerland. There is no mention in defendant's expert's affidavit, however, of the availability of meaningful remedies for the alleged conduct complained of by plaintiff. See Mercier v. Sheraton International, Inc., 935 F.2d 419, 425-26 (1st cir. 1991) (defendant failed to demonstrate Turkey was adequate alternative forum for claims arising from alleged contract for operation of casino in Istanbul hotel where defendant's Turkish legal expert did not "state expressly" that asserted or analogous claims were cognizable under Turkish law and failed to address existence or applicability of statutes of limitations).<sup>3</sup>

Rather than discuss Swiss law, defendant cites three federal cases for the proposition that Switzerland is an adequate alternative forum. In affirming a finding that Switzerland was an adequate forum for the adjudication of the plaintiff's tort claims in the first cited case, the Court noted that defendant had presented the views of a Swiss legal expert on the subject

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<sup>3</sup> It is not essential that the proposed foreign forum provide an identical cause of action or the same relief. See Piper Aircraft, 454 U.S. at 247, 254-55. A movant bears the burden, however, of showing that fair treatment and meaningful relief are available in the foreign forum in the particular case presented. Mercier, 935 F.2d at 426-27.

and that legal proceedings were then actually pending in Geneva "involving the exact same factual matters." Schertenleib v. Traum, 589 F.2d 1156, 1160, 1165 (2d Cir. 1978). Neither of these things have occurred in the instant case. In the second cited case, the Court found persuasive evidence that the plaintiff had in fact been able to initiate in Switzerland a parallel legal claim for negligent damage to property. Dickson Marine, Inc. v. Air Sea Broker, Ltd., 969 F.2d 389, 392 (E.D. La. 1997). In the third cited case, there was then "presently pending an action in the courts of Geneva which encompasses the major claims that plaintiff asserts in this action." Fustok v. Banque Populaire Suisse, 546 F.2d 506, 509 (S.D.N.Y. 1982). Also, plaintiffs in Schertenleib and Fustok were non-U.S. citizens who resided in Europe.

Moreover, even assuming that Switzerland is an adequate alternative forum for the adjudication of the instant action, defendant has not justified the dismissal it requests.

Plaintiff is headquartered in Pennsylvania. Biosynth AG is located in Switzerland.

It appears that most of the likely witnesses in this commercial litigation are employees of the respective parties. Neither party has identified any essential witnesses who would be unwilling or unable to testify in either Philadelphia or Switzerland. It appears that at least some potential witnesses

would not be amenable to compulsory process in either jurisdiction.<sup>4</sup>

Plaintiff and Biosynth AG both conduct business internationally. Neither contends that it lacks the resources to litigate in either forum.

Not surprisingly, the records and physical evidence which each party deems relevant to the litigation of this action are located at their respective headquarters in Pennsylvania and Switzerland.

In support of its motion, Biosynth AG principally relies on an assertion that any judgment rendered against it in this case would be unenforceable in Switzerland. Biosynth AG presents the opinion of an expert supporting its position that a judgment rendered in this case would not be recognized under Swiss law. Defendant represents that it has no attachable assets in the United States and contends that litigation in this District would thus be a "futile exercise."<sup>5</sup>

Plaintiff submits a contrary expert opinion regarding

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<sup>4</sup> Presumably, plaintiff's witnesses would also include U.S. customers who were solicited by or purchased melatonin directly from one of the defendants and persons who were exposed to the allegedly defamatory statement about plaintiff.

<sup>5</sup> Defendant appears to overlook the possibility that it might prevail in this action which would then not have been futile as it would have provided protection to defendant against potential future claims in any jurisdiction which recognizes preclusion principles.

the potential for enforcement of a U.S. judgment by the Swiss courts in the circumstances presented in this case. Moreover, Biosynth AG does not aver that it has no potentially attachable assets in any third country which may recognize a U.S. judgment or that it does not contemplate generating future receivables from U.S. customers.

As evidenced by the discovery disputes that have arisen, plaintiff may encounter obstacles in any effort to gather evidence from non-party witnesses in Switzerland. There is no showing, however, that these obstacles would be obviated if plaintiff were forced to litigate this action in Switzerland. Indeed, these obstacles appear to be a product of Swiss law regarding the obtaining of evidence in Switzerland for use in any action.

If the court were to grant Biosynth AG's motion to dismiss, plaintiff would be forced to litigate intertwined claims against each defendant in separate actions in different countries. This clearly would result in more costly and less efficient litigation of plaintiff's claims.

Pennsylvania and Switzerland both have a relationship to this litigation and corresponding interests in the satisfactory adjudication of the controversies between the parties.

The parties disagree about whether Pennsylvania or

Swiss law governs the resolution of plaintiff's claims. They have not, however, meaningfully briefed the issue and the court cannot on the present record definitively conclude which law is applicable.<sup>6</sup> It does appear that a cogent argument can be made for the application of Pennsylvania law.

In resolving choice of law questions, a federal court applies the law of the state in which it is located. Shuder v. McDonald's Corp., 859 F.2d 266, 269 (3d Cir. 1988). In both contract and tort actions, Pennsylvania applies a flexible analysis that combines the significant relationship test of the Restatement (Second) of Conflicts of Law and the similar governmental interest test. Compagnie des Bauxites de Guinee v. Argonaut-Midwest Ins. Co., 880 F.2d 685, 688, 688 n.9 (3d Cir. 1989). See also Griffith v. United Airlines, Inc., 203 A.2d 796 (1964); Allstate Ins. Co. v. McFadden, 595 A.2d 1277, 1279 (Pa. Super. Ct. 1991).

According to plaintiff's allegations, the contract at issue resulted from communications in November 1993 between the parties at and from their respective places of business. The alleged contract provided that plaintiff would act as the

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<sup>6</sup> Defendant points to a choice of Swiss law provision in a Biosynth AG catalog which it states was "in the plaintiff's possession." There is no showing, however, that such a provision was part of the alleged distribution agreement or that the parties engaged in any transaction covered by this catalog which does not appear to encompass sales of melatonin or other products for human consumption. It appears from the portion submitted by defendant that the catalog described "toxic" chemical products "not for use in or on human subjects."

exclusive seller of defendant's melatonin in the United States and that the product would be shipped to plaintiff in Pennsylvania for resale in the United States. On these facts, performance of the contract would substantially occur in and from Pennsylvania. Biosynth AG's alleged misrepresentations to plaintiff were directed to it in Pennsylvania and intended to induce plaintiff to promote sales of defendant's product in the United States. Biosynth AG's alleged misappropriation of plaintiff's customer lists was for the purpose of diverting sales which would have been made by plaintiff from Pennsylvania to United States customers. Biosynth AG's allegedly libelous statement was made in an American journal and calculated to injure plaintiff in its business here.<sup>7</sup>

In any event, the court cannot conclude that Swiss law most likely governs the resolution of these claims for purposes of attaching any substantial weight to this factor.

Because plaintiff is a resident of this district and at least some of the events and omissions giving rise to its claims occurred here, plaintiff's choice of forum is entitled to "considerable deference." Lony, 935 F.2d at 609. See also Piper Aircraft, 454 U.S. at 255-56. The balance of other applicable

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<sup>7</sup> The allegedly libelous statement appeared in the Chemical Marketing Reporter, published by Schnell in New York and circulated, inter alia, in Pennsylvania.

factors does not outweigh plaintiff's choice of forum on the record presented.

Dismissing this case and forcing plaintiff to pursue its claims against Biosynth AG in Switzerland would largely result only in shifting some measure of inconvenience from this defendant to plaintiff.

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

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O R D E R

AND NOW, this                    day of April, 1998, upon  
consideration of defendant Biosynth AG's Motion to Dismiss (Doc.  
#32) and plaintiff's response thereto, consistent with the  
accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is  
**DENIED.**

BY THE COURT:

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JAY C. WALDMAN, J.