

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

In Re: Plastic Cutlery	:	CIVIL ACTION
Antitrust Litigation	:	MASTER FILE NO. 96-CV-728

MEMORANDUM OF DECISION

McGlynn, J.

June , 1998

Before the court is plaintiffs' motion to amend the caption of the complaint to change the name of defendant "Benchmark Holdings, Inc. t/a Winkler Products" to "Radnor Holdings, Inc." Radnor Holdings¹ opposes the motion. For the reasons which follow, plaintiffs' motion is denied without prejudice.

I. BACKGROUND

Plaintiffs² in this antitrust action allege defendants conspired to fix, raise, maintain and stabilize prices of medium weight polypropylene cutlery ("plastic cutlery") in violation of

¹ In their motion, plaintiffs erroneously identify Radnor Holdings Corp. as "Radnor Holdings, Inc." Although Radnor makes much of this error, the court will disregard plaintiffs' mistake and treat their motion as one seeking to substitute Radnor Holdings Corp. in place of Benchmark Holdings, Inc., t/a Winkler Products.

² Plaintiffs are: (1) Eisenberg Brothers, Inc.; (2) Servall Products, Inc.; (3) Clark Foodservices, Inc.; and (4) the St. Cloud Restaurant Supply Company. On March 20, 1998, the court granted plaintiffs' motion for class certification. See In re Plastic Cutlery Antitrust Litig., No. CIV. A. 96-CV-728, 1998 WL 135703 (E.D. Pa. March 20, 1998). The class consists of "all purchasers in the United States of plastic cutlery directly from defendants or their respective wholly-owned subsidiaries or affiliates, at any time from January 1, 1990 up to and including December 31, 1992 (excluded from the class are defendants, subsidiaries and affiliates of defendants, and co-conspirators of defendants)." Id. at *9.

the Sherman Act, 15 U.S.C. § 1. Defendants are several major producers of plastic cutlery in the United States. The current defendants are: (1) Amcel Corp.; (2) Dispoz-O Plastics Corp., and (3) Benchmark Holdings, Inc. ("Benchmark Holdings"). Although Amcel Corp. signed a settlement agreement with plaintiffs on February 18, 1998, Amcel remains a party to this action because the settlement has not been approved by the court as required under Federal Rule of Civil Procedure 23(e).

At the outset of this case in February, 1996, Benchmark Holdings was represented by the law firm Duane, Morris & Heckscher ("Duane, Morris"). Duane, Morris filed an answer and two amended answers on Benchmark Holdings' behalf in February and March of 1996, as well as a response to plaintiffs' motion for class certification in April of that year. However, the following October, Duane, Morris filed a motion to withdraw as counsel to Benchmark Holdings stating: (1) they had no authority to represent Benchmark Holdings, (2) were not being paid to do so, and (3) had attempted, in vain, to obtain instructions from Benchmark Holdings as to what lawyer should replace Duane, Morris in this action. See Duane, Morris Mot. to Withdraw of 10/18/96. On November 11, 1996 the court granted Duane, Morris' motion to withdraw.

By orders dated May 7 and June 4, 1996, the court stayed discovery in this matter pending the outcome of a parallel criminal antitrust action. The criminal trial in that case concluded on July 22, 1997, with a jury verdict of guilty against

defendants Amcel Corp. and Dispoz-O Plastics, Inc., and their respective presidents, Lloyd Gordon and Peter Iacovelli. The court reopened civil discovery in this case on September 26, 1997.

Now plaintiffs assert that "[s]ometime between February 1996 and December 1996, Benchmark Holdings, Inc. changed its name to Radnor Holdings, Inc." Pls. Br. at 4. They seek to amend the caption of the complaint to reflect that alleged name change. Radnor responds that plaintiffs have confused the real defendant here, Benchmark Holdings, with its former parent corporation, Benchmark Corp. of Delaware. They submit that: (1) in 1996, Radnor changed its name from Benchmark Corporation of Delaware to Radnor Holdings Corp., and is therefore a different corporate entity from Benchmark Holdings; (2) Benchmark Holdings is an existing corporation which has not changed its name and retains liability in this matter; and (3) Radnor no longer controls Benchmark Holdings.

II. LEGAL STANDARD

"[A] party may make a Rule 15(a) amendment to add, substitute, or drop parties to the action." 6 Charles A. Wright, Federal Procedure and Practice § 1474 (1990 ed.). After a responsive pleading has been filed, a party may amend its complaint "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The grant of leave to amend the pleadings under Rule 15(a) is within the discretion of the

trial court. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330 (1971).

"[P]rejudice to the non-moving party is the touchstone for denial of an amendment." Lorenz v. CSX Corp., 1 F.3d 1406, 1413 (3d Cir. 1993). To demonstrate prejudice, the non-movant must show that it is "unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely." Bechtel v. Robinson, 886 F.2d 644, 652 (3d Cir. 1989) (quoting Heyl v. Patterson Int'l, 663 F.2d 419, 426 (3d Cir. 1981)). Absent prejudice, "denial instead must be based on bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of the amendment." Lorenz, 1 F.3d at 1414.

III. DISCUSSION

Radnor's first two objections to plaintiffs' motion appear to be based on futility grounds, specifically: (1) the proper defendant, Benchmark Holdings, Inc., is already named in the complaint and the complaint fails to state a valid claim for piercing Radnor Holdings' corporate veil, and (2) the proposed amendment would be futile because Radnor no longer controls Benchmark Holdings. Radnor also contends the amendment would be prejudicial because Radnor was absent from the earlier stages of this litigation and could not take part in opposing plaintiffs' motion for class certification, or object to the settlement reached between plaintiffs and Amcel.

A. Futility

"'Futility' means that the complaint, as amended, would fail to state a claim upon which relief can be granted. In assessing 'futility,' the district court applies the same standard of legal sufficiency as applies under Rule 12(b)(6)."³ In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997).

1. Consideration of Radnor's Exhibits Under the Rule 12(b)(6) Standard

In support of its arguments, Radnor has submitted: (1) the Certificate of Incorporation of Benchmark Corporation of Delaware, filed with the Delaware Secretary of State on November 6, 1991, Radnor Br. Ex. A; (2) Benchmark Corporation of Delaware's Certificate of Amendment changing its name to Radnor Holdings Corporation, filed with the Delaware Secretary of State on October 29, 1996, Id. Ex. B; (3) the Certificate of Incorporation of Benchmark Holdings, Inc., filed with the Delaware Secretary of State on May 7, 1991, Id. Ex. C; (4) a Corporate Information printout from the Delaware Secretary of State confirming that "Benchmark Holdings, Inc." still exists as a Delaware corporation in good standing as of May 1, 1998; and (5) an SEC filing dated April 10, 1997 and entitled, "Amendment No. 4 to Form S-4 Registration Statement Under the Securities Act

³ That is, the court must accept as true the factual allegations in the amended complaint and all reasonable inferences that can be drawn from them, and refrain from granting a dismissal unless it is certain that no relief can be granted under any set of facts which could be proved. Fuentes v. South Hills Cardiology, 946 F.2d 196, 201 (3d Cir. 1991).

of 1933." Id. Ex. E.

In reviewing a 12(b)(6) motion, the court may consider the pleadings, matters of public record, orders, exhibits attached to the complaint and items appearing in record of case. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994). The submitted Certificates of Incorporation, Certificate of Amendment, and Corporate Information printout from the Delaware Secretary of State are all public records which may be considered in a 12(b)(6) analysis. See Redding v. Freeman Products, Inc., No. 94 C 398, 1995 WL 410922, at *2 (N.D. Ill. July 10, 1995) (Certificates of Good Standing issued by the Illinois Secretary of State were public records reviewable on motion to dismiss to show corporations were separate entities); see also Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1197 (3d Cir. 1993) (noting that public records to which the public has unqualified access have been reviewed on motion to dismiss), cert. denied, 510 U.S. 1042 (1994).

Radnor's SEC filing, "Amendment No. 4 to Form S-4 Registration Statement," is also within the scope of 12(b)(6) review. A district court may take judicial notice of public disclosure documents required by law to be filed, and actually filed, with the SEC as facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Kramer v. Time Warner Inc., 937 F.2d 767, 773 (2d Cir. 1991); Fed. R. Evid. 201(b)(2). In addition, "a court may consider an undisputedly authentic document that a

defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on that document." In re Donald Trump Secs. Litig., 7 F.3d 357, 368 n.9 (3d Cir. 1993), cert. denied, 510 U.S. 1178 (1994). Because plaintiffs base their arguments for amendment on the contents of two exhibits attached to their motion (Radnor's Amendment No. 1 and Amendment No. 4 to SEC Form S-4), the court may properly consider them under the 12(b)(6) standard. See Pls. Br. Exs. A & B.

2. Plaintiffs' Failure to State a Claim Against Radnor

The essential question here is whether the allegations of plaintiffs' amended complaint state a claim upon which relief can be granted against Radnor Holdings Corp.⁴

The documents from the Delaware Secretary of State show that Benchmark Holdings, Inc. ("Benchmark Holdings") was incorporated on May 7, 1991, and Benchmark Corporation of Delaware ("Benchmark Corp.") was incorporated on November 6, 1991. Radnor Br., Exs. A & C. At the time of its incorporation, Benchmark Corp.'s purpose was "to acquire the outstanding stock of Benchmark Holdings, Inc. and WinCup Holdings, Inc." Radnor Ex. E, Amendment No. 4 to SEC Form S-4, at F-7. Benchmark Corp.'s Certificate of Amendment

⁴ Plaintiffs have not submitted a proposed amended complaint with their motion to amend. However, the purpose of plaintiffs' motion is merely to amend the caption of the complaint to change the name of what they incorrectly believe to be the original defendant corporation. The court will therefore review the allegations of the original complaint as they would apply to Radnor Holdings Corp. if it were substituted as a defendant in this action.

indicates that its name was changed to Radnor Holdings Corporation on October 29, 1996. Radnor Ex. B. It is therefore clear that during the class period (January 1, 1990 through December 31, 1992) Radnor and Benchmark Holdings were separate corporations.

In November, 1995, Radnor sold its cutlery operations to James River Paper Company, Inc. Radnor Ex. E, Amendment No. 4 to SEC Form S-4, at 3. The sale to James River was an asset purchase, and James River did not assume Benchmark's liabilities except as provided in an October 31, 1995 Asset Purchase Agreement, which did not include assumption of antitrust liability.⁵ After the asset sale, Benchmark Holdings discontinued its cutlery operations. Id. at F-8.

According to Radnor's SEC filing, Benchmark Holdings and the Jackson National Life Insurance Co. ("Jackson") brought suit on November 25, 1996 against Radnor and its President, Michael T. Kennedy, over the November, 1995 sale of Benchmark Holdings' assets.⁶ Id. at 39. The suit alleges that certain terms of the nonvoting preferred stock held by Jackson were breached, that Mr.

⁵ "The only liabilities of Benchmark and WinCup assumed by James River were obligations arising after the closing under the assumed leased and assumed material contracts and vacation pay, holiday pay and sick pay earned or accrued during 1995." Radnor Ex. E, Amendment No. 4 to SEC Form S-4, at F-8.

⁶ The suit was filed in Cook County, Illinois Circuit Court. The other defendants include Wincup, the Joint Venture between Wincup and James River known as Wincup Holdings L.P., James River, and the James River Corporation of Virginia. Radnor Ex. E, Amendment No. 4 to SEC Form S-4, at 39.

Kennedy breached his fiduciary duties to Jackson and Benchmark Holdings, and that Radnor and certain defendants committed fraud that prevented Jackson from exercising its rights as a stockholder in time to prevent the sale. Id.

Lastly, the Corporation Information printout shows that Benchmark Holdings still exists as a Delaware corporation in good standing as of May 1, 1998, although it has not filed an annual report with the Delaware Secretary of State since 1996. Id. Ex. D.

These public records show that Radnor is not the same company as Benchmark Holdings, but is instead a separate corporate entity which holds or has held some portion of Benchmark Holdings' stock. In Pennsylvania, the general rule is that "the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception." Zubik v. Zubik, 384 F.2d 267, 273 (3d Cir. 1967). The court "may not disregard at will the formal differences between affiliated corporations." American Bell, Inc. v. Federation of Tel. Workers of Pa., 736 F.2d 879, 886 (3rd Cir. 1984).

In order to state a valid claim here, plaintiffs would have to make allegations which support piercing the corporate veil between Benchmark Holdings and Radnor. Piercing the corporate veil, however, is only appropriate "when the court must prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime." Zubik, 384 F.2d at 272. Other

factors to consider are: (1) failure to observe corporate formalities; (2) non-payment of dividends; (3) the insolvency of the debtor corporation at the time; (4) siphoning of funds of the corporation by the dominant stockholder; (5) non-functioning of other officers or directors; (6) absence of corporate records; (7) the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders; and (8) gross undercapitalization. American Bell, Inc. v. Federation of Tel. Workers of Pa., 736 F.2d 879, 886 (3rd Cir. 1984); United States v. Pisani, 646 F.2d 83, 88 (3rd Cir. 1981).

Plaintiffs' proposed amended complaint lacks any such allegations. As a consequence, plaintiffs have failed to state an actionable claim against Radnor Holdings Corp. and allowing their amendment would be futile. See Fort Washington Resources, Inc. v. Tannen, 153 F.R.D. 565, 567-69 (E.D. Pa. 1994) (denying motion to amend counterclaim for failure to state a claim for piercing corporate veil).

3. Control of Benchmark Holdings

Radnor secondly argues that permitting plaintiffs' amendment would be futile because Radnor no longer controls Benchmark Holdings. This issue, however, cannot be resolved on the record currently before the court. Drawing all reasonable inferences in favor of plaintiffs, it is unclear who controls Benchmark Holdings, Inc. Duane, Morris represented Benchmark Holdings from at least February 26, 1996, when it filed an answer on the company's behalf, until October 18, 1996, when it moved to

withdraw as Benchmark's counsel. Now Duane, Morris is counsel for Radnor Holdings Corp. The only direct indication that Benchmark Holdings, Inc. is no longer controlled by Radnor is the fact that Benchmark Holdings, along with Jackson National Life Insurance Co., brought suit against Radnor in 1996 in Illinois. See Radnor Ex. E, Amendment No. 4 to SEC Form S-4, at 39. Information regarding the lawsuit is contained Radnor's SEC filing entitled, "Amendment No. 4 to Form S-4." Id. But while the court may consider this public record under the 12(b)(6) standard, it does not conclusively establish Radnor's lack of control over Benchmark Holdings.

Moreover, the description of the Illinois lawsuit in the SEC filing does not preclude the possibility that Radnor still exerts control over Benchmark Holdings. The suit could be a derivative action, which by definition is asserted on the corporation's behalf by shareholders because of the corporation's failure, deliberate or otherwise, to act upon a primary right.⁷ Black's Law Dictionary 443-44 (6th ed. 1990). In any case, Radnor's current lack of control over Benchmark Holdings may be immaterial because the time period relevant to this action was more than five years ago, from January 1, 1990 through December 31, 1992.

B. Prejudice

Lastly, Radnor contends that plaintiffs' amendment would be

⁷ "In a shareholder's derivative suit, the shareholder sues on behalf of the corporation for harm done to it . . . [and] [r]ecovery . . . inures to the corporation" Spillyards v. Abboud, 662 N.E.2d 1358, 1363 (Ill. App. Ct. 1996).

prejudicial because Radnor was absent from the earlier stages of this litigation and could not take part in opposing plaintiffs' motion for class certification, or object to the settlement reached between plaintiffs and Amcel Corp.

To show prejudice, Radnor must demonstrate that its ability to present its case would be seriously impaired if plaintiffs' amendment were allowed. Dole v. Arco Chemical Co., 921 F.2d 484, 487 (3d Cir. 1991). Here, Radnor would not be prejudiced by the court's earlier certification of the class. "Under Rule 23(c)(1), the court retains the authority to re-define or decertify the class until the entry of final judgment on the merits. This capacity renders all certification orders conditional until the entry of judgment." In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 793 n.14 (3d Cir. 1995); Fed. R. Civ. P. 23(c)(1). Thus, if it were to become a defendant in this action, Radnor could move for class decertification on grounds that the class fails to meet the requirements of Rules 23(a) and 23(b)(3) at any time prior to final judgment.

Nor does plaintiffs' settlement agreement with Amcel Corp. prejudice Radnor. Under Fed. R. Civ. P. 23(e), the court must approve any settlement between the parties to a class action. In re Gen. Motors, 55 F.3d at 785; Fed. R. Civ. P. 23(e)⁸. The

⁸ Federal Rule of Civil Procedure 23(e) provides:

A class action shall not be dismissed or compromised without the approval of the

proponents of a settlement must make a preliminary showing to the court that the settlement is "fair, reasonable and adequate." Id.; see also Manual for Complex Litigation, § 30.41 (3d ed. 1997). The class must then be notified of the settlement terms and "given the opportunity to address the court as to the reasons the proposed settlement is unfair or inadequate." Grimes v. Vitalink Communications Corp., 17 F.3d 1553, 1558 (3d Cir. 1994); see also Manual for Complex Litigation, § 30.41 (3d ed. 1997). Plaintiffs and Amcel have not yet tendered their settlement agreement for the court's approval under Rule 23(e). Amcel is still a party to this litigation, and the court cannot see any prejudice to Radnor resulting from an unapproved settlement agreement between plaintiffs and Amcel.

In any case, Radnor might lack standing to object to the Amcel settlement. Non-settling defendants generally lack standing to object to a partial settlement because they are ordinarily not affected by such a settlement. Eichenholtz v. Brennan, 55 F.3d 478, 482 (3d Cir. 1995). An exception to that rule applies where the non-settling defendants "can demonstrate that they will suffer some formal legal prejudice as a result of the partial settlement." Id. If Radnor becomes a defendant, it can submit appropriate objections once the Amcel settlement has been submitted for the court's consideration. See, e.g., In re

court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Orthopedic Bone Screw Prod. Liab. Litig., MDL No. 1014, Civ. A. Nos. 962749, 97-381, 1997 WL 164237, at *4 (E.D. Pa. March 26, 1997) (sustaining non-settling defendants' objection to settlement where its contribution claims would be compromised). At this time, however, the unapproved settlement between plaintiffs and Amcel is not prejudicial to Radnor.

IV. CONCLUSION

For the foregoing reasons, plaintiffs' motion to amend the caption of the complaint is denied without prejudice.

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

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Antitrust Litigation	:	MASTER FILE NO. 96-CV-728
	:	

O R D E R

AND NOW, this day of June, 1998, after consideration of plaintiffs' motion to amend the caption of the complaint to change "Benchmark Holdings, Inc. t/a Winkler Products" to "Radnor Holdings, Inc.," and Radnor Holdings Corp.'s response thereto, it is hereby

ORDERED that plaintiffs' motion to amend is **DENIED** without prejudice.

BY THE COURT:

JOSEPH L. McGLYNN, JR., J.