

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

MEMORANDUM ORDER

Plaintiff has asserted various state law claims against defendant Biosynth AG including breach of contract, trade libel, fraud and intentional interference with prospective business relations. Presently before the court is plaintiff's motion for summary judgment on the breach of contract claim.

Plaintiff alleges that it entered into an exclusive dealing contract with Biosynth AG whereby plaintiff was to be Biosynth AG's exclusive distributor of melatonin to the U.S. "natural food" market. This exclusive distributor agreement allegedly derived from a series of written and oral communications and through the parties' conduct during 1993 and 1994. The essence of plaintiff's breach of contract claim is that Biosynth AG breached the agreement by selling to other entities in the U.S. market, by failing to use its best efforts to supply plaintiff and by terminating the agreement without reasonable notice.

Distributor agreements involving goods are governed by Article 2 of the Uniform Commercial Code, 13 Pa. C.S.A. § 2101 et seq. See Weilersbacher v. Pittsburgh Brewing Co., 218 A.2d 806, 808 (Pa. 1966) (applying U.C.C. to claim for breach of brewer's agreement to supply distributor); Eastern Dental Corp. v. Isaac Masel Co., 502 F. Supp. 1354, 1363 (E.D. Pa. 1980) (U.C.C. statute of frauds provision applied to distributor contract); Artman v. International Harvester Co., 355 F. Supp. 482, 486 (W.D. Pa. 1973) ("Pennsylvania courts have repeatedly held that dealership or distribution franchises fall within the sales section of the Uniform Commercial Code").<sup>1</sup> See also American Suzuki Motor Corp. v. Bill Kummer, Inc., 65 F.3d 1381, 1386 (7th Cir. 1995) ("virtually every" jurisdiction to address the issue has concluded that a dealership agreement is "predominantly for the sale of goods").

A contract may be formed "in any manner sufficient to show agreement including conduct by both parties which recognizes the existence of such a contract" and "even though the moment of its making is undetermined." See 13 Pa. C.S.A. §§ 2204(a)-2204(b). A contract for the sale of goods at a price exceeding \$500, however, requires a "writing sufficient to indicate that a contract for sale has been made between the parties and signed by

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1. Each party relies upon Pennsylvania law and U.C.C. principles.

the party against whom enforcement is sought." See 13 Pa. Stat. § 2201(a).

The principal evidence of record that Biosynth AG expressed an intent to make plaintiff its exclusive U.S. dealer are statements in its telefaxes of March 11, 1994, July 8, 1994 and December 19, 1994. None contains an explicit statement of intent to create an exclusive dealer relationship. On March 11, 1994, Biosynth AG stated that "we only want to supply through your company to the US-market." On July 8, 1994, it stated "we can assure you that you are the company we work [sic] together in the Nutritional US-market." On December 19, 1994, it suggested plaintiff tell an Israeli seller which acquired defendant's product from an Israeli trading company that "you sell exclusively our Ultra-Pure material in the U.S."<sup>2</sup> In an exchange of telefaxes the first week of November 1993, plaintiff had stated categorically "we are not asking for exclusivity" and defendant had advised "you will have competition." From the competent evidence of record construed most favorably to the non-movant, a reasonable juror could conclude that the parties never formed a binding exclusive dealing contract.

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2. The telefaxes suggest that there were related oral communications between the parties. The content and context of such communications, however, are not provided in any competent evidentiary form or otherwise.

Moreover, even assuming the existence of an exclusive dealing contract, plaintiff has not presented evidence from which a reasonable juror would be compelled to find that Biosynth AG breached such an agreement. Plaintiff presents no competent evidence that Biosynth AG at any pertinent time supplied melatonin to other distributors for the United States market, refused to fill orders placed by plaintiff or failed to use its best efforts to supply plaintiff.

Plaintiff submits a letter of September 4, 1995 from former employees of Biosynth AG stating that it was supplying directly to other companies in the United States. This letter, however, is hearsay and proof of the truth of the content of the statement has not been presented in competent form.<sup>3</sup>

Plaintiff also relies on a November 6, 1995 Chemical Marketing Reporter article in which an unidentified "spokeswoman" is quoted as stating that Biosynth AG had no exclusive dealing arrangement with plaintiff and does business with U.S. customers directly and through an American subsidiary. Plaintiff presents no affidavit from the reporter or other evidence to show the statement was actually made by someone with authority to bind the defendant under Fed. R. Evid. 801(d)(2). The article itself is hearsay and not competent to prove the statement was made as

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3. In response to Biosynth AG's motion to strike, plaintiff acknowledged that the letter was hearsay and inadmissible to show Biosynth AG in fact sold to other U.S. distributors.

quoted or was true. See In re Dual-Deck Video Cassette Recorder Antitrust Litigation, 1990 WL 126500, \*3 (D. Ariz. July 25, 1990) (newspaper articles are hearsay and inadmissible to prove truth of statements contained therein).

Plaintiff argues that the article falls into the hearsay exception for market reports and commercial publications under Fed. R. Evid. 803(17). Rule 803(17), however, is limited to a published tabulation, compilation or collection of objective factual data such as stock market closings, currency exchange rates, bank interest rates, weights and measurements or similar information. Id. at \*4 (rule contemplates compilation of objective facts); White Indus., Inc. v. Cessna Aircraft Co., 611 F. Supp. 1049, 1068 (W.D. Mo. 1985) (rule requires publication to be collection of factual data); M. Graham, *Federal Practice and Procedure: Evidence* § 6768 (1997).

Plaintiff also contends that the article itself is an admission by a party-opponent and thus not hearsay under Fed. R. Evid. 801(d)(2). Plaintiff's theory is that Biosynth AG chose the Chemical Marketing Reporter to act as its agent for the purpose of disseminating information about its marketing of melatonin. The problem with plaintiff's theory is that it assumes that which has to be proved. Carried to its logical extension, plaintiff's theory would render admissible for the truth of the matter asserted almost any statement published in a

magazine on a presumption that the purported declarant or reporter was authorized to speak for the party to whom the statements are attributed.

As to the allegation of termination without reasonable notice, plaintiff acknowledges that the alleged agreement does not specify any duration or method of termination. Under the U.C.C., a contract requiring ongoing or successive performance with an indefinite duration "is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party." See 13 Pa. C.S.A. § 2309(b). Termination, however, "requires reasonable notification." See 13 Pa. C.S.A. § 2309(c). "[A]pplication of principles of good faith and sound commercial practice normally call for such notification of the termination of a going contract relationship as will give the other party reasonable time to seek a substitute arrangement." See 13 Pa. C.S.A. § 2309 comment 8.

Plaintiff cites Jo-Ann, Inc. v. Alfin Fragrances, Inc., 731 F. Supp. 149 (D.N.J. 1989) (applying similar New Jersey U.C.C.) for the proposition that the termination of the agreement by Biosynth AG was per se unreasonable because it took effect immediately and provided no warning. See id. at 160 (notice was unreasonable where it occurred simultaneously with termination of exclusive distributorship agreement). The competent evidence of record, however, does not reasonably compel a finding that

Biosynth AG terminated any agreement without sufficient warning.

Plaintiff points to a letter of November 16, 1995 in which Biosynth AG denied that plaintiff was ever its exclusive U.S. agent. Biosynth AG points to a statement on May 10, 1995 by its president, Hans Spitz, that there was no exclusive distributorship contract. Plaintiff has not demonstrated that either statement necessarily would have provided insufficient notice because it has not shown when, if ever, any termination was effectuated. There is no competent evidence of record to show that Biosynth AG stopped supplying plaintiff or began selling to other U.S. customers.

Plaintiff's argument for summary judgment based upon an unjust enrichment theory is similarly unavailing. Pennsylvania permits a party to recover just compensation in circumstances in which it would be inequitable to retain such benefit without compensation. See Schneck v. K.E. David, Ltd., 666 A.2d 327, 328 (Pa. Super. 1995), alloc. denied, 676 A.2d 1200 (Pa. 1996); Styer v. Hugo, 619 A.2d 347, 350 (Pa. Super. 1993), aff'd, 637 A.2d 276 (Pa. 1994). This is sometimes characterized as a "contract implied in law."

Plaintiff has not pled an alternative claim for unjust enrichment. It is difficult to grant summary judgment on a claim which has not been pled. Moreover, a reasonable jury would not be compelled to find from the competent evidence of record viewed

most favorably to the non-movant that Biosynth AG sold melatonin directly to others in the U.S. market during the relevant period. Thus, plaintiff has not shown that Biosynth AG unfairly benefitted from any advertising or other marketing activity of plaintiff.

**ACCORDINGLY**, this                    day of May, 1999, upon consideration of plaintiff's Motion for Partial Summary Judgment (Doc. #72) and the response of defendant Biosynth AG, **IT IS HEREBY ORDERED** that said Motion is **DENIED**.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**