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

BERNARD J.M. GALL	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	
	:	NO. 04-CV-432
TOPCALL INTERNATIONAL, A.G. and FRANZ REUMANN	:	

SURRICK, J. **MARCH 21, 2005**

MEMORANDUM & ORDER

Presently before the Court is "Defendant Topcall International, A.G.'s Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6)" [sic] (Doc. No. 5).[1] For the following reasons, Defendant's Motion will be granted and Plaintiff's Complaint will be dismissed.

I. BACKGROUND

Plaintiff Bernard J.M. Gall is a citizen of the Netherlands who resides in Pennsylvania. (Compl. ¶ 1.) Defendant Topcall International, A.G. ("Topcall") is an Austrian company with a principal place of business in Austria. (*Id.* ¶ 2.) Defendant Franz Reumann is the chief executive officer of Topcall and a citizen of Austria. (*Id.* ¶ 3.)

Plaintiff and Defendant Topcall entered into an agreement in or about June, 1991, to create Topcall Corporation, a Pennsylvania corporation with a principal place of business in Pennsylvania. (*Id.* ¶ 7-8.) Under the terms of the agreement, Plaintiff was the president and sole

[1]Also pending is Plaintiff's Motion To Amend Complaint (Doc. No. 7). The Amended Complaint that is attached to that Motion is deemed to be filed for purposes of deciding Defendant's Motion To Dismiss.

director of the company. (*Id.* ¶ 7.) In February, 2000, Plaintiff agreed to resign as president and director of Topcall Corporation in exchange for a payment of $11,667, representing his gross salary for the month of January, 2000, plus a bonus calculated as "10% of the amount exceeding total revenues of TOPCALL Corporation of 5 (five) million USD for the fiscal year 2000 (January 1, 2000 to December 31, 2000)." (*Id.* ¶ 10, Ex. A.) It was expected that Plaintiff would receive $250,000 under the terms of this termination agreement. (*Id.* ¶ 14.)

After both parties entered into the termination agreement, Defendant Reumann proposed to amend it by eliminating Plaintiff's bonus based on corporate revenue and providing Plaintiff with 30,000 options to purchase Topcall shares. (*Id.* ¶ 12.) These options could be exercised on or before June 30, 2004. (*Id.*) Even though the short-term value of the stock options would be less than the remuneration provided for in the original termination agreement (*id.* ¶ 13), Reumann assured Plaintiff that the value of the stock options ultimately would be "at least as much as the ten percent (10%) of gross revenues above five million dollars ($5,000,000) provided for under the original agreement." (*Id.*) As a result of these assurances, Plaintiff avers that he was induced to believe that the value of his stock options as of June 30, 2004, would be worth at least $250,000. (*Id.* ¶ 14.)

Plaintiff accepted Defendant's proposed amendment of the termination agreement. (*Id.* ¶ 15, Ex. B.) After Gall received his Topcall options, the value of the stock significantly declined and the options "are now effectively worthless." (*Id.* ¶ 19.) Plaintiff claims that he would have received at least $100,000 under the original bonus provision of the termination agreement had

he not relied on Reumann's representations. (*Id.* ¶ 20.)[2]

Plaintiff asserts alienage jurisdiction to invoke this Court's ability to hear these claims. (*Id.* ¶ 5.) However, no United States citizen is a party in this litigation. In response to Defendant's Motion to Dismiss, Plaintiff concedes that this Court lacks jurisdiction over his claims based on the averments in his original Complaint. (Doc. No. 8 at unnumbered 1-2.) In an attempt to remedy this deficiency, Plaintiff seeks to file an Amended Complaint which states that Plaintiff "is an alien admitted to the United States for permanent residence" in Pennsylvania. (Doc. No. 7 Ex. A ¶ 1.) We directed counsel to submit supplemental briefs on the issue of jurisdiction and the matter is now ready for disposition.[3] (Doc. Nos. 9, 10.) For purposes of Defendants' Motion, we will assume that Plaintiff is a permanent resident alien domiciled in Pennsylvania as alleged in the Amended Complaint.

II. LEGAL STANDARD

Topcall asks this Court to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). (Doc. No. 5.) Under Rule 12(b)(1), a court must grant a motion to dismiss if it lacks subject matter jurisdiction over the

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[2]Plaintiff's Complaint asserts four state law counts: (1) negligent misrepresentation against Defendants Topcall International, A.G. ("Topcall") and Franz Reumann (Compl. ¶¶ 21-23); (2) innocent misrepresentation against Topcall (*id.* ¶¶ 24-27); (3) rescission (mutual mistake of fact) against both Defendants (*id.* ¶¶ 28-30); and (4) breach of fiduciary duty against both Defendants (*id.* ¶¶ 31-34).

[3]In Plaintiff's supplemental brief, he avers that he became a permanent resident alien in September, 1994. (Doc. No. 9 Gall Decl. ¶ 4.) However, the only documentation he submits to support this assertion is his completed Application to Replace Alien Registration Card, which was submitted to the United States Immigration and Naturalization Service on July 20, 2004. (*Id.* ¶ 5, Ex.) Plaintiff provides no official government documentation to support his averment that he is a permanent resident alien, or that he has held such status since 1994.

case. Fed. R. Civ. P. 12(b)(1). A plaintiff bears the burden of demonstrating jurisdiction by a preponderance of the evidence. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)*; Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1045 (3d Cir. 1993); *Graham v. United States*, Civ. A. No. 97-1590, 2002 U.S. Dist. LEXIS 1765, at *4 (E.D. Pa. Feb. 5, 2002). In reviewing the merits of a Rule 12(b)(1) motion, a district court may consider evidence that is outside the pleadings. *Graham*, 2002 U.S. Dist. LEXIS 1765, at *4.

III. LEGAL ANALYSIS

Federal courts are courts of limited, and not general, jurisdiction. "They possess only that power authorized by the Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen*, 511 U.S. at 377 (citations omitted); *see also Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). While Article III of the United States Constitution details the outer limits of the jurisdiction of federal courts, Congress may limit the ability of federal courts to exercise jurisdiction over certain cases. *See Serbin v. Ziebart Int'l Corp., Inc.*, 11 F.3d 1163, 1179-80 (3d Cir. 1993).

A. 28 U.S.C. § 1332(a)'s Deeming Provision

Under 28 U.S.C. § 1332(a), a district court:

> shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between - (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, . . . as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332(a) (2000). In 1988, Congress added the following language to § 1332(a): "[f]or the purposes of this Section, . . . an alien admitted to the United States for permanent

residence shall be deemed a citizen of the State in which such alien is domiciled." *Id.* Plaintiff relies on this language, also known as the deeming provision, to establish jurisdiction in this case. Defendant argues that the deeming provision does not apply here because no United States citizen is a party.

In interpreting a statute, "'our starting point must be the language employed by Congress.'" *Am. Tobacco v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)). In *Singh v. A.G. Daimler-Benz*, 9 F.3d 303 (3d Cir. 1993), the Third Circuit reviewed the new alienage language in § 1332(a) to determine how it affected the district court's jurisdiction over a case involving a permanent resident alien. The plaintiff in *Singh* was a permanent resident alien domiciled in Virginia who sued a German corporation, and a Delaware corporation that had its principal place of business in New Jersey. *Id.* at 304. In concluding that the district court had jurisdiction, the court determined that the alienage language was unambiguous and explained that "[t]he provision represents a straightforward congressional direction." *Id.* at 306.

Notwithstanding its conclusion that the statutory language was unambiguous, the court conducted a comprehensive review of the deeming provision's legislative history. After making this review, the court acknowledged that its discussion of the deeming provision was limited to suits involving a United States citizen as a defendant.[4] *Id.* at 312. In concluding that the

[4]Plaintiff relies on *Singh* to support his argument that we may invoke the permanent resident alien language of § 1332(a) to exert jurisdiction over this case. *Singh* is inapposite. The *Singh* court's statements regarding the clarity of the deeming provision have no application here because there is no United States citizen in this case. In *Singh*, one of the defendants was a United States citizen. In this case, Plaintiff, a permanent resident alien, is suing an Austrian company and an Austrian citizen. (Doc. No. 9 Gall Decl. ¶ 4; Compl. ¶¶ 2-3.) Plaintiff asserts that he should be considered a citizen of the state in which he resides for diversity purposes

deeming provision's legislative history supported its view that the district court had jurisdiction over the case, the court reasoned that the provision created a narrow category of cases which could proceed in federal court based on minimal diversity jurisdiction. *Id.* at 311 ("At a minimum, Congress's deeming provision falls within its power to invest the federal courts with jurisdiction when there is minimal diversity.").[5]

The Third Circuit chose not to address the application of the deeming provision to cases involving only aliens. However, it noted that while the statute "does not expressly provide that one alien may sue another in federal court," *id.* at 305, the plain text of the alienage amendment suggests that a permanent resident alien could establish jurisdiction over a nonresident alien even though neither is a citizen of the United States. *Id.* at 312. The court opined that, because there would not be minimal diversity in such cases, "the potential unconstitutional application of the deeming provision as to the citizenship of permanent residents is limited to situations in which a permanent resident alien sues as the sole defendant either a permanent resident alien domiciled in another state or a nonresident alien." *Id.* at 311. Because federal courts should not decide constitutional issues unless they are arguably presented, the *Singh* court decided to "leave this intriguing issue for another day . . . ." *Id.* at 312. Apparently, that day has arrived.

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because he is a permanent resident alien. (Doc. No. 9 at unnumbered 3-4.) However, he does not claim that either Defendant is a United States citizen. Interestingly, the *Singh* court made the following observation: "[i]n the situations encompassed by the new provision, Congress has abrogated, albeit without discussion, the Supreme Court's consistent interpretation of the diversity statute as requiring that a citizen of a state must also be a citizen of the United States." *Singh*, 9 F.3d at 311 n.4 (citing *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989); *Brown v. Keene*, 33 U.S. 112 (1834)).

[5]Generally, Congress requires complete diversity between parties to a suit, *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806), even though the Constitution only requires minimal diversity. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531-32 (1967).

B. Article III's Alienage Jurisdiction

The text of Congress's 1988 amendment regarding permanent resident aliens can be read to expand the jurisdiction of federal courts to include suits solely between aliens. *Id.* We must therefore determine whether Article III permits alienage jurisdiction over a suit solely between two foreign citizens.[6] Under Article III, district courts have subject matter jurisdiction over cases "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2. Alienage jurisdiction is an independent jurisdictional basis under Article III. Even though "[a]lienage jurisdiction traditionally has been lumped together with Article III's grant of diversity jurisdiction," they serve different purposes. Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 Yale J. Int'l L. 1, 3-4, 16 (1996).

Alienage jurisdiction was enshrined in the Constitution to prevent state courts from interfering with and disrupting international relations between the United States and foreign nations. *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 94 (2002); *see also Dresser Indus. v. Underwriters at Lloyd's of London*, 106 F.3d 494, 499 (3d Cir. 1997) ("Alienage jurisdiction . . . reflects a national concern over our relations with foreign governments and how they may be affected by the resolution of controversies involving their citizens."). Prior to the Constitutional Convention, state courts and legislatures sought to stymie the ability of British creditors to recover debts from American debtors. Johnson, 21 Yale J. Int'l

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[6]The Third Circuit suggested that Congress may rely on a provision of the Constitution other than Article III's alienage language to authorize federal jurisdiction over suits solely between aliens. *Singh*, 9 F.3d at 312. However, Plaintiff does not point to any source of constitutional law other than the alienage jurisdiction detailed in Article III that would allow this case to proceed.

L. at 6. Advocates of broad alienage jurisdiction argued that it would allow foreign citizens to pursue claims in federal court and avoid any anti-British bias that may exist within state courts.[7] *Id.* at 6-8. Various proponents of alienage jurisdiction, especially Federalists, also hoped that preventing state courts from hearing cases involving foreign citizens would make it easier to attract foreign capital. *Id.* at 6, 8.

A general consensus existed among participants at the Constitutional Convention and state ratification conventions that some form of alienage jurisdiction was appropriate. *Id.* at 10. Federalists and Anti-Federalists disagreed, however, regarding the scope of such jurisdiction. In advocating broad alienage jurisdiction, Alexander Hamilton and other Federalists emphasized that the treatment of foreign citizen litigants could affect the nation's foreign relations with other countries. *Id.* at 11-12. They argued that federal courts should hear all cases involving foreign citizens. *Id.* at 11-15; Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587, 623 (2002).[8] Anti-Federalists such as George Mason were less concerned about state court bias against noncitizens, and asserted that two United States citizens in one state should not have less access to federal courts than foreign citizens. Johnson, 21 Yale J. Int'l L. at 15; Bradley, 42 Va. J. Int'l L. at 623.

Even though there was no dispute about the importance of alienage jurisdiction, Professor

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[7]Anti-Federalists were concerned that alienage jurisdiction would allow British creditors to have an improper advantage over American debtors. Johnson, 21 Yale J. Int'l L. at 14. They argued that all creditors, including those who happened to be British, should be required to sue in state court. Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587, 623 (2002).

[8]In fact, the Federalists proposed draft constitutional language that would have allowed a federal court to exercise jurisdiction over any suit that involved a foreign citizen. Bradley, 42 Va. J. Int'l L. at 623.

Johnson notes that "one is left to wonder why the Constitution failed to provide for alienage jurisdiction in any case in which an alien was a party, as opposed to only to disputes between an alien and a citizen." Johnson, 21 Yale J. Int'l L. at 16. Despite the potential that a state court may favor one foreign citizen over another in a suit involving no United States citizen, the language of Article III is clear that federal courts may not exercise jurisdiction over a suit solely between two noncitizens. *Id.*; Bradley, 42 Va. J. Int'l L. at 627 ("[I]t is difficult to understand how either the Founders or the First Congress could have understood alienage jurisdiction as extending to suits between aliens, given the relatively clear language of Article III on this point."); *see also* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 474 (1989).

Indeed, since the early 1800s, the Supreme Court has consistently held that Article III does not create jurisdiction in cases solely between aliens. In *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809), the Court, in interpreting the diversity clause of Article III, held that this constitutional provision did not encompass such suits. *Id.* at 304;*see also Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 825 n.2 (1969) (stating that federal court may not exercise jurisdiction over case solely between two alien corporations); *Jackson v. Twentyman*, 27 U.S. (2 Pet.) 136, 136 (1829) (noting that, under the Constitution, "the judicial power was not extended to private suits, in which an alien is a party, unless a citizen be the adverse party"); *Montalet v. Murray*, 8 U.S. (4 Cranch) 46, 47 (1807) ("The Court was unanimously of opinion that the courts of the United States have no jurisdiction of cases between aliens."); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800) ("[T]he legislative power of conferring jurisdiction on the federal Courts is . . . confined to suits between citizens and foreigners . . . ."). For more than 200 years, the

Supreme Court has recognized that the text of Article III does not permit the exercise of federal jurisdiction over a suit that is only between aliens.

Because Article III and Supreme Court jurisprudence prohibit suits solely between aliens, we will not permit Plaintiff in this case to invoke this Court's jurisdiction under the deeming provision. While the plain language of the provision appears to confer jurisdiction on this Court, adopting such an interpretation of § 1332(a) would directly contravene the language of Article III.[9] In reaching this conclusion, we join various other district courts that have also held that the deeming provision cannot confer jurisdiction on federal courts over a suit solely involving aliens. *See Chavez-Organista v. Vanos*, 208 F. Supp. 2d 174, 177 (D.P.R. 2002) (dismissing suit solely between nonresident alien and permanent resident aliens); *Matsuda v. Wada*, 128 F. Supp. 2d 659, 667 (D. Haw. 2000) (no diversity jurisdiction over case involving Japanese citizen and Japanese citizen who is also a permanent resident alien); *Banci v. Wright*, 44 F. Supp. 2d 1272, 1276 (S.D. Fla. 1999) (dismissing suit solely between permanent resident alien and Ecuadorian citizen); *Ozawa v. Miyata*, No. 96 C 7500, 1997 WL 779047, at *3 (N.D. Ill. Dec. 15, 1997) (dismissing suit solely between Japanese nonresident aliens and permanent resident alien); *Helmut J. Unkel, Ltd. v. Tay*, No. C 94-20573 RMW (EAI), 1995 U.S. Dist. LEXIS 22196, at *4 (N.D. Cal. Feb. 28, 1995) (dismissing suit solely between Hong Kong corporation and Indonesian citizen, even if Indonesian citizen could be considered permanent resident alien).

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[9]There is general agreement among scholarly commentators "that any interpretation of the permanent resident alien amendment that would provide diversity jurisdiction for a case solely involving aliens would be unconstitutional." 15 James Wm. Moore et al., Moore's Federal Practice ¶ 102.78 (3d ed. 1999); *see also* Johnson, 21 Yale J. Int'l L. at 25-26; John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. Davis L. Rev. 735, 745 (1990-91).

To determine a plausible interpretation of the deeming provision that saves it from being rendered unconstitutional, we must review Congress's rationale for adopting it. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Federal courts should "not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Id.* When confronted "with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result," we must attempt to provide some alternative construction of the statutory language that avoids such a result. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1981) (Scalia, J. concurring); *see also Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989) ("Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention . . . .").

As mentioned above, in *Singh*, the Third Circuit did an extensive review of the 1988 amendments to 28 U.S.C. § 1332, including the new deeming provision. *Singh*, 9 F.3d at 306-10. The court concluded that the permanent resident alien provision was merely intended to be a noncontroversial judicial improvement.[10] *Id.* Prior to the enactment of the deeming provision, a permanent resident alien could rely on diversity jurisdiction to sue his neighbor in the same state, even though "a citizen living across the street" lacked the same privilege. *Id.* at 309. The court

[10]The *Singh* court declined to conclude that the provision was added by Congress in an attempt to reduce the federal judiciary's diversity caseload. *Singh*, 9 F.3d at 309.

concluded that Congress adopted this provision, in part, to prevent such a perverse result. *Id.*; *see also* 134 Cong. Rec. 31,055 (1988) (statement of Sen. Heflin) ("There is no apparent reason why actions between persons who are permanent residents of the same State should be heard by Federal courts merely because one of them remains a citizen or subject of a foreign state."); *Engstrom v. Hornseth*, 959 F. Supp. 545, 549 (D.P.R. 1997); *Arai v. Tachibana*, 778 F. Supp. 1535, 1540 (D. Haw. 1991).[11]

Given this background, it is plausible to interpret the deeming provision as merely preventing a permanent resident alien from suing a United States citizen who lives in the same state. *See, e.g., Saadeh v. Farouki*, 107 F.3d 52, 60 (D.C. Cir. 1997); *Matsuda*, 128 F. Supp. 2d at 667; *Engstrom*, 959 F. Supp. at 553; *Lloyds Bank PLC v. Norkin*, 817 F. Supp. 414, 419 (S.D.N.Y. 1993); *Arai*, 778 F. Supp. at 1542-43. Such an interpretation "is a reasonable and logically consistent reading of the text that does not entail any internal contradictions." *Engstrom*, 959 F. Supp. at 553. It is also consistent with the deeming provision's legislative history. As the District of Columbia Court of Appeals observed:

> It would be illogical to conclude that Congress intended to eliminate diversity jurisdiction in cases between a citizen and an alien permanently residing in the same state, but simultaneously intended to expand diversity jurisdiction in cases between an alien permanently residing in one state and an alien permanently residing in another state. Despite the plain language of § 1332(a), the alienage amendment clearly appears to have been intended only to eliminate subject matter jurisdiction of cases between a citizen and an alien living in the same state. There is no reason to conclude, however, that the amendment was intended to create diversity jurisdiction where it did not previously exist.

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[11]Interestingly, this rationale is similar to that offered by Anti-Federalists in arguing that alienage jurisdiction should not benefit foreign citizens over United States citizens. Johnson, 21 Yale J. Int'l L. at 15; Bradley, 42 Va. J. Int'l L. at 623.

Saadeh, 107 F.3d at 60.[12]

In addition, interpreting the deeming provision in a way that prevents the federal judiciary from exercising jurisdiction over a suit between two aliens faithfully adheres to the alienage text of Article III, as well as to Supreme Court cases interpreting that language. This interpretation recognizes that "Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491 (1983). By narrowly construing the deeming provision to prohibit suits between a permanent resident alien and a United States citizen residing in the same state, we uphold a proper exercise of congressional authority to circumscribe the kinds of cases that may be heard in federal court. Any alternative interpretation in this case would produce an unconstitutional result.

An appropriate Order follows.

[12]"There is no evidence that Congress . . . intended to allow a select group of aliens to sue other aliens in the federal courts" when it adopted the deeming provision. Johnson, 21 Yale J. Int'l L. at 26.

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	:	NO. 04-CV-432
TOPCALL INTERNATIONAL, A.G. and FRANZ REUMANN	:	
	:	

ORDER

AND NOW, this 21st day of March, 2005, upon consideration of "Defendant Topcall International, A.G.'s Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6)" [sic] (Doc. No. 5, No. 04-CV-432), and all papers filed in support thereof and in opposition thereto, it is ORDERED that Defendant's Motion to Dismiss is GRANTED and Plaintiff's Complaint is DISMISSED.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge