STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

OPTIC PLUS ENTERPRISES, LIMITED,

Plaintiff, DECISION AND ORDER

v. Index #2005/06749

BAUSCH & LOMB INCORPORATED and
BAUSCH & LOMB B.V. NETHERLANDS,
Defendant.

Plaintiff's motion for summary judgment dismissing the Fourth Counter-claim is premised, in part, on its contention that Messrs. Alikhani and Fardanesh did not personally execute Exhibit E, the 1999 "Authorized Distributor Agreement" between B&L and Optic Plus, B&L's exclusive distributor in the Commonwealth of Independent States, comprising 12 of the 15 states of the former Soviet Union, and that therefore plaintiff could not be responsible for any violation of these two men of the non-compete clause (¶2.2). Plaintiff's position appears to be that a company's "principals" are not bound to the terms of the company's agreements when they do not individually sign them. Plaintiff further supports its motion by reference to B&L's attempt to buy Optic Plus weeks prior to execution of the 1999 distributor agreement with a proposed agreement which demanded that Messrs. Alikhani and Fardanesh sign employment agreements with B&L upon the proposed buyout. Plaintiff reasons: "Thus

defendants themselves have recognized and defined the distinction between Optic Plus and its principals." Plaintiff's Memorandum of Law (2-16-06), at p.6.

At the same time, however, plaintiff sought in its Memorandum to reserve the issue whether "Messrs. Alikhani and Fardnesh are appropriately characterized as its principals." Id. at 6 n.6 (emphasis supplied). At oral argument, plaintiff's counsel reiterated its reservation of rights, and further affirmatively represented and insisted that Messrs. Alikhani and Fardnesh were not principals of Optic Plus, and that there is no evidence in the record that they were "principals."

The observation of the court during oral argument, however, concerning whether Messrs. Alikhani and Fardanesh were in breach of their duties to plaintiff did not depend upon a formalistic characterization of Messrs. Alkhani and Fardanesh as Optic Plus's principals. B&L contends in this litigation that, through "a complicated web of companies, which may include entities known as Lorendana, Grand Vision, Prime Optic, and Optic Plus St. Petersburg," together with Optic Plus and Messrs. Alikhani and Fardanesh, may have established a competing business in the distribution territory in violation of the ¶2.2 of the distribution agreement. Plaintiff has, in response to defendant's second set of interrogatories, conceded that Mr. Alikhani "held the position of plaintiff's commercial manager for

the period 1995-2001," and was "responsibl[e]" for "the day-to-day operation of the business, including oversight of customers and employees." Furthermore, plaintiff admitted that "AA and BF are officers of Optic Plus." Plaintiff refused to answer whether the two men had a direct or indirect ownership interest in Optic Plus (#19), but admitted that they were directors of Lorendana.

Accordingly, plaintiff admits that Messrs. Alakhani and Fardanesh were officers and employees of plaintiff, responsible for day-to-day management and operation of various facets of Optic Plus' business. As such, plaintiff's contention that the Fourth Counterclaim should be dismissed because, assuming that the two men did compete with B&L, plaintiff cannot be held responsible for it is on this record a frivolous argument. The notion that a company's officers and employees may act in derogation of the company's contractual duties to third parties such as B&L, and that the company escapes liability for breach of contract merely because its officers and employees commit the breach is entirely foreign to our law.[1] It is not alleged that

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[1] For example, although the business judgment rule "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." Auerbach v Bennett, 47 N.Y.2d 619, 629 (1979), "it constitutes no grant of general or inherent power in the directors to enforce ... an edict of the directors beyond their authority to make." Fe Bland v Two Trees Management Co., 66 N.Y.2d 556, 565 (1985). Thus, the business judgment rule is not applicable to actions taken by a Board in excess of its contractual authority. Ludwig v 25 Plaza Tenants Corp., 184 A.D.2d 623, 624-625 (2d Dept. 1992). In other

these two men acted outside the scope of their employment during the relevant time period. But even if plaintiff had made such a claim, that would not shield plaintiff from defendant's discovery demands on the subject, nor would it alone warrant a determination that plaintiff is not, as a matter of law, liable for breach of contract at the hands of its officers and employees. Thus, plaintiff's characterization of the issue whether the two men were principals as "irrelevant" for purposes of this motion, id at 6 n.6, is technically correct but misleading, indeed too clever by half.

To the extent plaintiff's motion directed to the Fourth Counterclaim is based on the lack of evidence adduced by defendant that competition indeed occurred in violation of ¶2.2 of the distributor agreement, suffice to say that plaintiff has hardly sustained its initial burden to show that the so-called complicated web of companies, and Messrs. Alikhani and Faranesh, did not so compete as a matter of law, either by affidavits executed by the relevant Optic Plus actors, or otherwise.[2] A summary judgment motion must be denied irrespective of the non-

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words, "[b]reach of contract is not a choice within the Board's business judgment to make." Emily Towers Owners Corp. v Carleton Emily Towers, L.P., 170 Misc.2d 82, 84 (Civil Ct., City of N.Y. 1996).

[2] Ordinarily, a summary judgment motion may not be based on alleged deficiencies in an opponent's proof. Yousuf v. Nowak, 306 A.D.2d 894, 895 (4th Dept. 2003).

moving party's response to the motion when the moving party fails to meet its initial burden. See Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 853 (1985) ("Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.") In any event, given my examination of plaintiff's quite cagey responses to defendants' discovery demands to date, some of which are described above, and the granting of defendants' motion to compel, plaintiff's motion is certainly premature.

Defendants move to dismiss the Third and Fourth causes of action (denominated Count III and Count IV) on statute of limitation grounds. Count III sounds in fraud. Count IV is pled as a claim for misappropriation of trade secrets. If considered under the six year statute, plaintiff's claims accrued in July 1997, Kaufman v. Colon, 307 A.D.2d 113 (2d Dept. 2003), even if damages accrued later. Ely-Cruikshank Co. v. Bank of Montreal, 81 N.Y.2d 399; Forest Medical Prof. Cond. v. Tiburzi, ORT., 214 A.D.2d 962 (4th Dept. 1995). If considered under the two year from discovery rule, plaintiff's action accrued shortly after November 2000, by plaintiff's own account. Accordingly, the Third Cause of Action must be dismissed unless plaintiff establishes an issue of fact that the limitations period should be tolled. Because plaintiff does not allege misrepresentations designed to induce it to refrain from commencing the action

separate from the fraud which is a subject of the complaint, Medco Plumbing, Inc. v. Sparrow Constr. Corp., 22 A.D.3d 647 (2d Dept. 2005), or establish that the parties were in a fiduciary relation, Cabrini Med. Center v. Desina, 64 N.Y.2d 1059, 1062 (1985); Marino v. Buck, 231 A.D.2d 931 (4th Dept. 1996), Count III must be dismissed.

Because the misappropriation claim alleged in Count IV does not relate to trademark infringement or dilution, or a breach of fiduciary duty, the three year statute of CPLR 214(4) applies, and accrual occurs either when defendant acquired the trade secrets, which plaintiff concedes was in September 1997, or when defendant is alleged first to make use of the secrets, which by plaintiff's own account was in November 2000. Powers Mercantile Corp. v. Feinberg, 109 A.D.2d 117, 121 (1st Dept. 1985), aff'd on op. below, 67 N.Y.2d 981, 982 (1986); Petnel v. Am. Tel. & Tel. Co., 280 App. Div. 706, 709 (3d Dept. 1952). See Sporn v. MCA Records, Inc., 58 N.Y.2d 482, 488 (1983)(singular act of misappropriation). Cf., Greenlight Capital, Inc. v. Greenlight (Switzerland) S.A., unpublished 2005 WL 13682 (S.D.N.Y. Jan. 3, 2005). Plaintiff's theory of misappropriation is that it delivered the confidential or trade secret information to B & L in reliance upon the latter's fraudulent misrepresentation in 1997 that it wished to purchase Optic Plus. According to the complaint (¶ 39), plaintiff delivered the information to B & L in

September 1997, which consisted of plaintiff's customer list, transaction history with each, prices paid and other unspecified confidential information. Thereafter, according to the complaint, B & L wrongfully terminated its distributor agreement with plaintiff (in November 2000) and began to sell its product to plaintiff's customers directly, "[s]ince the end of 2000 through the current day," Complaint ¶58, presumably using the misappropriated data plaintiff delivered to it.

On these pleaded facts, plaintiff's interest in the trade secrets were, as to it, completely destroyed by disclosure to B & L coupled with B & L's open and notorious use of the information in the distribution territory upon termination of the distributor agreement in late 2000 as plaintiff alleges. Sachs v. Cluett Peabody & Co., 265 App. Div. 497, 501 (1st Dept. 1943), aff'd, 291 N.Y.772 (1944). There is no proper theory of a continuing misappropriation when plaintiff knows of defendant's possession of the trade secrets (by its voluntary, if fraudulently induced, delivery of them to defendant) and also knows of defendant's open and notorious use of them to plaintiff's manifest commercial disadvantage. Lemelson v. Carolina Enterprises, Inc., 541 F. Supp. 645, 660 (S.D.N.Y. 1982)("whether the defendant made use of the trade secret in such a manner that plaintiff's property interests were destroyed"); id. at 660 ("defendant has openly and continuously manufactured or marketed . . . [the product

employing plaintiff's trade secret] throughout the period since 1966"). Accord, Robert L. Haig (ed.), Commercial Litigation in the New York State Courts §81:25, at 41 (2d ed. 2005)("When the alleged secret is published or disclosed, the property rights in the information disappear and the limitations period begins to run.") Accordingly, this action is time barred under CPLR 214(4).

The documents submitted by plaintiff in its post-argument letter have been considered, and found not to warrant submitting these issues to a trier of fact. The pleadings suffice.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: March 13, 2006
Rochester, New York