

Glenmark Pharms. S.A. v Nycomed U.S., Inc.
2010 NY Slip Op 31131(U)
April 23, 2010
Sup Ct, NY County
Docket Number: 603615/09
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. CAROL EDMEAD**

PART 35

Index Number : 603615/2009

GLENMARK PHARMACEUTICALS, S.A.

vs.

NYCOMED U.S., INC.

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. _____

MOTION DATE 3/8/10

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, It is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion by Nycomed U.S., Inc. and Nycomed International Management GmbH pursuant to 3211(a)(8) to dismiss the complaint as against Nycomed International Management GmbH for lack of personal jurisdiction, is denied; and it is further

ORDERED that the branch of the motion by Nycomed U.S., Inc. and Nycomed International Management GmbH pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action is granted, without prejudice for leave to amend the complaint to assert a claim for tortious interference with business relations claim; and it is further

ORDERED that Nycomed U.S., Inc. and Nycomed International Management GmbH serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 4/23/10

HON. CAROL EDMEAD

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
APR 29 2010
NEW YORK
COUNTY CLERK'S OFFICE
S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
GLENMARK PHARMACEUTICALS S.A.,

Index No.: 603615/09

Plaintiff,

-against-

NYCOMED U.S., INC. and NYCOMED
INTERNATIONAL MANAGEMENT GmbH,

Defendants.

-----X
HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

FILED

APR 29 2010

NEW YORK
COUNTY CLERK'S OFFICE

In this action for tortious interference with contract, defendants Nycomed U.S., Inc. ("Nycomed U.S.") and Nycomed International Management GmbH ("Nycomed International") (collectively "Nycomed") move pursuant to CPLR 3211(a)(7) and (8) to dismiss the complaint for failure to state a cause of action and for lack of personal jurisdiction.

Factual Background

This action concerns certain PDE4 inhibitor technology to treat chronic obstructive pulmonary disease ("COPD"), including emphysema and chronic bronchitis. PDE4 is an enzyme used to develop PDE4 inhibitors as anti-inflammatory treatments in airway diseases, including the treatment of COPD.

It is alleged that before September 2004, Glenmark developed a series of heterocyclic compounds, one of which is known commercially as Olgemilast. Plaintiff claims that Nycomed U.S. and Nycomed International are alter egos of one another, and own other PDE4 technology, including a compound known commercially as Daxas. Although neither Olgemilast nor Daxas currently is on the market, they are direct competitors, in that they both are PDE4 technologies intended to treat

COPD.

In September 2004, Glenmark entered into a License and Collaboration Agreement dated September 22, 2004 ("Collaboration Agreement") with Forest Laboratories Holdings Limited, an Ireland corporation. Forest Laboratories Holdings Limited is a wholly owned subsidiary of Forest Laboratories, Inc., a New York corporation. It is alleged that Forest Laboratories Holdings Limited and Forest Laboratories, Inc. (collectively "Forest") are alter egos of one another. Pursuant to the Collaboration Agreement, Glenmark licensed its PDE4 technology, including the compound used in Oglemilast to Forest for development and marketing in North America.

For the last five years, Forest has proceeded with the development of Oglemilast pursuant to the Collaboration Agreement, while Glenmark sought to develop other PDE4 technologies.

In October 2008, during the time that the Oglemilast Phase II trials were beginning, Nycomed sought to identify partners to commercialize Daxas. At some point in the first half of 2009, Forest decided to pursue Daxas as a contingency against the potential negative results of the Oglemilast Phase II COPD study and the possibility that Oglemilast would not deliver within Forest's desired time frame. A substantial part of the negotiations between Forest and Nycomed took place in New York. On August 10, 2009, Nycomed and Forest announced in a press release that "they have entered into an exclusive development, manufacturing and commercialisation agreement in the United States for Daxas" (the "Nycomed-Forest Agreement").

Glenmark alleges that Nycomed knew that Forest was developing Oglemilast and the status of the development of Oglemilast because the existence of the licensing deal between Forest and Glenmark for Glenmark's PDE4 technology was public information and because Forest and Glenmark had periodically issued public statements apprising the public of key steps taken during the

development of Oglemilast. Nycomed had an incentive to keep Glenmark's PDE4 technology off the market until after Nycomed introduced its "Daxas" into the market first. Plaintiff alleges that the Nycomed-Forest Agreement would prohibit Forest from further development of Glenmark's PDE4 technology, including Oglemilast and Glenmark's other PDE4 technology, pursuant to the Collaboration Agreement. By preventing Forest from developing Glenmark's PDE4 technology, Nycomed interfered with the Collaboration Agreement between Forest and Glenmark and induced Forest to breach the Collaboration Agreement, in violation of the standards of commercially acceptable conduct. As a result, Glenmark has lost milestone payments and royalties that would have been paid to Glenmark under the Collaboration Agreement if Forest were permitted to proceed with the development of the Glenmark PDE4 technology.

On November 19, 2009, Glenmark filed a Request for Arbitration with the International Court of Arbitration of the International Chamber of Commerce alleging, among other things, that Forest has materially breached its contract with Glenmark.¹ Thereafter, Glenmark commenced this action against Nycomed.

In support of dismissal, Nycomed argues that Glenmark's conclusory pleading entirely lacks the specificity required to maintain an interference claim.

Glenmark fails to plead an "actual" breach of a contract between that plaintiff and a third party, in that Glenmark fails to sufficiently allege a breach of the Glenmark-Forest Agreement. Although Glenmark alleges that Nycomed "induced Forest to breach the Collaboration Agreement" Glenmark omits any description of the contractual term or provision that Forest supposedly breached, or of the conduct that constituted an alleged contract breach by Forest.

¹ See paragraph 8 of the Affidavit of Glenmark's President, Glenn Saldanhau ("Saldanhau").

Additionally, Glenmark fails to show that Nycomed had actual knowledge of any allegedly material provision of any Glenmark-Forest Agreement. The complaint contains no factual allegation to support an inference that Nycomed knew of any material terms of the Glenmark-Forest Agreement. While Glenmark alleges that Nycomed "knew that Forest was developing Oglemilast" because "the existence of the licensing deal between Forest and Glenmark for Glenmark's PDE4 technology was public information," nowhere does Glenmark allege that Nycomed had actual knowledge of the specific contract between Glenmark and Forest or of the substantive terms of that contract. Glenmark has, at most, alleged Nycomed's constructive knowledge of a business relationship between Glenmark and Forest.

Glenmark also failed to plead facts showing that the Glenmark-Forest Agreement would not have been breached "but for" Nycomed's conduct. Glenmark's belief that it would be inconceivable for Nycomed not to have prevented Forest from developing Glenmark's Oglemilast, and assertion that "[b]y preventing Forest from developing Glenmark's PDE4 technology, Nycomed knowingly . . . interfered with the Collaboration Agreement . . . and induced Forest to breach the Collaboration Agreement," is insufficient. Also, Glenmark's allegation that Forest pursued a relationship with Nycomed as a contingency flatly contradicts any assertion that Nycomed was the "but for" cause of any assumed contract breach by Forest.

Additionally, Glenmark fails to even allege the existence of the kind contract that could support a claim for tortious interference. Since the complaint concerns a licensing agreement that leaves open the possibility that the contract was terminable at will, the allegations are deficient. Glenmark fails to allege that the Collaboration Agreement imposes any limitation upon termination or is of a fixed duration and must be considered to be terminable at will and incapable of supporting a

claim for tortious interference with contract.

Glenmark's failure to plead wrongful conduct warrants dismissal of the complaint. In the context of competitors, a competitor's ultimate liability will depend on a showing that the inducement exceeded a minimum level of ethical behavior in the marketplace. There are "more demanding requirements" for proving interference with prospective contractual relations and contracts that are terminable at will. The complaint demonstrates economic justification for Nycomed's open invitation to the marketplace for a business partner and its willingness to respond to Forest's pursuit of a Daxas licensing relationship. And, Glenmark failed to allege that Nycomed acted illegally or out of malice, let alone criminally or fraudulently, so as to support its claim. Nor does Glenmark allege any pattern of conduct directed at the public generally to support its demand for punitive damages.

Nycomed also argues that the complaint should be dismissed because Glenmark cannot establish a *prima facie* basis for jurisdiction over the Swiss Nycomed International. The allegation upon information and belief that Nycomed International and the New York-based Nycomed U.S. entity are "alter egos, agencies and instrumentalities" of each other, is entirely insufficient to meet Glenmark's jurisdictional burden. Having pleaded the separate corporate forms of these Nycomed entities, Glenmark cannot generically plead alter ego as the basis for jurisdiction over this foreign corporation.

In opposition, Glenmark argues that Glenmark clearly alleges (i) a breach of the Collaboration Agreement; (ii) Nycomed's actual knowledge of the Collaboration Agreement's material terms; and (iii) Nycomed's intentional interference with the Collaboration Agreement. Glenmark alleges that Forest materially breached the Collaboration Agreement because its conduct with Nycomed frustrated the entire purpose of the contract. Nycomed's suggestion that Glenmark was required to allege breach

of a specific section of the Forest contract is not the law. Even if such a requirement existed, Glenmark would have met such a requirement, because its Complaint can fairly be read to allege that Forest breached the provision of the Collaboration Agreement requiring Forest to use commercially reasonable efforts to develop and market Oglemilast. Glenmark alleges that it entered into the Collaboration Agreement with Forest to commercialize Glenmark's PDE4 drug, and that because Forest's 2009 contract with Nycomed prohibits it from commercializing any drug (including Oglemilast or any of Glenmark's Backup Compounds) that would compete with Nycomed's PDE4 drug, Daxas, Forest is in material breach of the Collaboration Agreement. Forest's license agreement with Nycomed includes language which confirms that in May 2009 (before Nycomed and Forest entered their license agreement), Nycomed and Forest discussed the Collaboration Agreement, and how they could best use to their mutual advantage the license to Oglemilast that Glenmark had granted to Forest. The language confirms that rather than just having Forest terminate the Collaboration Agreement (which would have resulted in the rights to Oglemilast being returned to Glenmark), Nycomed and Forest decided it would be "optimal for both companies for Forest to retain rights to Oglemilast."

Glenmark argues that the principle that "terminable at will" contracts are deemed prospective contractual relations and, as such, cannot support a claim for tortious interference with an existing contract is only relevant where a contract has actually been terminated, and here, Forest refuses to terminate the Collaboration Agreement. Further, Nycomed's "economic interests" theory is an affirmative defense, not grounds for dismissal, and is inapplicable in any event as this defense only applies where a third party actually terminated plaintiff's contract. And, Glenmark does not allege tortious interference with prospective contractual relations. Nor does Glenmark need to plead that the

interference was part of a practice directed at the public generally to support a punitive damage claim, a standard applicable to breach of contract claims. Instead, Glenmark needs to show that Nycomed acted with "actual malice," which is a question for the finder of fact.

Finally, Glenmark argues that jurisdiction is properly exercised over Nycomed International. Nycomed's own press release shows that, at least for purposes of the licensing agreement with Forest that is at the heart of this action, the company makes no distinction between "the Swiss Nycomed entity," International, and US, but simply refers to itself as "Nycomed." Likewise, the details of the press release clearly evidence a connection between "the Swiss Nycomed entity" and the Forest licensing agreement. The Court can properly exercise personal jurisdiction over "Nycomed" entities, *i.e.*, U.S. and International.

In reply, Nycomed adds that Glenmark cannot allege an induced breach of contract because Glenmark is complaining not about Forest's breach, but about Forest's refusal to terminate its Collaboration Agreement with Glenmark while concurrently contracting with Nycomed. The tort of interference expressly requires breach, not some "refus[al] to terminate" or some attestation about what other contracting parties "envision" for the future. "Frustration" of contract is not the equivalent of a breach. The case law is clear that agreements that are terminable at will are classified as only prospective contractual relations, and thus cannot support a claim for tortious interference with existing contracts. Where, as here, those contract rights can be terminated at the will of the allegedly breaching party, New York law evaluates the conduct of an allegedly interfering competitor under the more rigorous tort concerning prospective relations, requiring a pleading of fraudulent or criminal behavior by that party. There is no "termination prerequisite" to applying the legal principle that alleged interference with "at will" contracts requires pleading of more intentional and specific conduct

that is not intended to benefit the alleged interfering defendant. Glenmark knows that the actual tort it must assert here is tortious interference with prospective contractual relations, but it cannot admit that fact because it cannot meet the necessary elements of that claim, including pleading the requisite Nycomed state of mind..

Nycomed argues that Glenmark does not plead that Nycomed acted criminally or fraudulently and it cannot allege, that Nycomed's alleged interference was for no economic interest of Nycomed. A tortious interference "claim cannot be maintained on bare allegations that defendants acted without just cause, fraudulently, willfully and maliciously." There is no allegation that Nycomed criminally procured any alleged or imagined future breach. The Nycomed-Forest Agreement was not prohibited by the terms of the Collaboration Agreement, and does not prohibit Forest's continued performance under the Collaboration Agreement. But even if it were, Nycomed's status as a competitor of Glenmark insulates it from this claim of tortious interference with the at-will Collaboration Agreement.

As to punitive damages in a tortious interference case, such claim is insufficient since a punitive damages claim is not viable, where Glenmark failed to allege facts demonstrating that Nycomed's conduct was so outrageous as to evince a high degree of moral turpitude and showing such wanton dishonesty as to imply a criminal indifference to civil obligations.

Finally, argues Nycomed, there is no *prima facie* basis for jurisdiction over Nycomed International. The press release contains a brief description of Nycomed's global operations and notes its headquarters in Switzerland. The claim that the parent is the alter-ego of all of its subsidiaries is absurd.

Discussion

Personal Jurisdiction

To establish in personam jurisdiction over Nycomed International, Glenmark must show that Nycomed International functioned merely as the alter ego of Nycomed U.S., a New York based corporation. The corporate form will be pierced only if one corporation is so controlled by the other as to be a mere agent, department or alter ego of the other (*People ex rel. Vacco v World Interactive Gaming Corp.*, 185 Misc 2d 852, 714 NYS2d 844 [Sup Ct New York County 1999]). It is alleged that Nycomed U.S. and Nycomed International are alter egos of one another, and own other PDE4 technology, including a compound known commercially as Daxas. Plaintiff further alleges that a "substantial part of the negotiations between Forest and Nycomed took place in New York." Additionally, plaintiff relies on a press release, which states: "Nycomed and Forest Laboratories to collaborate on US commercialization of Daxas® in COPD." Although the address given for "Nycomed" is "Louischenbachstr. 95, 8050 Zurich, Switzerland," and Swiss telephone and fax numbers are listed, the press release quotes Hakan Bjorklund, "Chief Executive of Nycomed," as saying: "we believe Forest Laboratories is the best possible partner for Nycomed in the United States." The press release does not defeat the allegation that Nycomed U.S. and Nycomed International are alter egos of one another, and Nycomed's mere argument that the complaint is deficient to establish jurisdiction, in and of itself, is insufficient. Accepting the allegations in the complaint as true, and in light of the absence of any documentary evidence or affidavit from Nycomed International or Nycomed U.S. to the contrary, it cannot be said at this juncture that the court lacks personal jurisdiction over Nycomed International. Thus, dismissal of the action as against Nycomed International for lack of jurisdiction is denied.

Failure to State a Cause of Action

In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). While affidavits may be considered, if the motion is not converted to a 3212 motion for summary judgment, they are *generally* intended to remedy pleading defects and *not to offer evidentiary support for properly pleaded claims*" (*Nonnon v City of New York*, 9 NY3d 825 [2007] [emphasis added]).

At the outset, it is noted that Glenmark does not assert a claim for tortious interference with prospective contractual relations, but for tortious interference with contract. The widely accepted elements of a tortious interference with contract or business relations claim are: (1) the existence of a valid contract between plaintiffs and a third party, (2) defendants' knowledge of the contract, (3)

defendant's intentional procurement of a breach of the contract without justification, (4) actual breach of the contract, and (5) resulting damages (*Vigoda v DCA Productions Plus Inc.*, 293 AD2d 265, 741 NYS2d 20 [1st Dept 2002]; *Avant Graphics v United Reprographics*, 52 AD2d 462 [1st Dept 1998]; *Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 424, 646 NYS2d 76; *Global Reinsurance Corporation-U.S. Branch v Equitas Ltd.*, 20 Misc.3d 1115, 867 NYS2d 16 [Sup Ct New York County 2008] citing *Hoag v Chancellor, Inc.*, 246 AD2d 224, 228 [1st Dept 1998] (The elements of a tortious interference with contract claim are well established the existence of a valid contract, the tortfeasor's knowledge of the contract and intentional interference with it, the resulting breach and damages)). It has been held that an essential element of the claim is that the breach of contract would not have occurred but for the activities of the defendant (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 816 NYS2d 702 [Sup Ct New York County 2006] citing *Cantor Fitzgerald Assocs., L.P. v Tradition N. Am., Inc.*, 299 AD2d 204 [1st Dept 2002], lv denied 99 NY2d 508 [2003]).

Nycomed allegedly had knowledge of such Agreement, albeit through public announcements concerning the development of Olgemilast. Nycomed cites no authority for the proposition that such knowledge constitutes "constructive" knowledge, insufficient to sustain this tort. Moreover, Forest's "confirmatory offer" to Nycomed (*see infra* at p. 13), and the Nycomed-Forest Agreement granting Nycomed a limited right to demand that Forest terminate the "Olgemast" Agreement also supports plaintiff's claim that Nycomed had knowledge of the Collaboration Agreement.

As to defendant's intentional procurement of a breach of the contract without justification,²

² Where the cause of action is for interference with an existing contract, rather than a prospective economic relationship, the defense of economic justification (discussed *infra* at p. 17) is inapplicable (*Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd.*, 35 AD3d 317, 829 NYS2d 7 [1 Dept 2006]).

plaintiff alleges that Nycomed had an incentive to keep Glenmark's PDE4 technology off the market. As the "first in class" PDE4 technology for the treatment of COPD, Nycomed expected to achieve monopoly profits with Daxas. The commercialization of Glenmark's PDE4 technology, whether it be through Oglemilast or another drug incorporating the Glenmark PDE4 technology, would significantly deplete Nycomed's monopoly profits. Therefore, the allegations support a motive underlying Nycomed's alleged procurement of Forest's alleged breach of the Collaboration Agreement.

Further, plaintiff alleges that the Nycomed-Forest Agreement prohibits Forest from further development of Glenmark's PDE4 technology, including Oglemilast and Glenmark's other PDE4 technology. According to the affidavit of Glenmark's President, Saldanhau, under the Collaboration Agreement, Glenmark licensed its PDE4 technology to Forest and granted Forest the right to sell Oglemilast exclusively in the United States, Canada and Mexico. According to Saldanhau, he met with Howard Solomon ("Solomon"), the Chief Executive Officer of Forest, in New York to discuss the impact of Forest's deal with Nycomed regarding the development of another PDE4 inhibitor, Daxas, on Oglemilast. Solomon acknowledged that Forest's deal with Nycomed prohibited Forest from introducing a drug, such as Oglemilast or one of Glenmark's Backup Compounds, that would compete with Daxas.

Saldanhau further attests that in the Arbitration, Forest attached to its Answer a May 2009 "confirmatory offer" to Nycomed that sets forth and discusses some of the pertinent terms of the Nycomed-Forest Agreement. Forest acknowledged that pages 4 and 5 of the six-page "confirmatory offer" (*i.e.*, the portion dealing with Forest's proposal to Nycomed regarding Oglemilast) were included in the final version of the Nycomed-Forest Agreement, which was executed on August 7,

2009. Forest's "confirmatory offer" states:

We [Forest] understand that a concern for Nycomed in considering Forest as the licensee for [Daxas] is that Forest is currently developing another PPE4 inhibitor, oglemilast. This is certainly a reasonable and legitimate concern for Nycomed. However, we believe that *Forest's development of oglemilast in fact provides the opportunity for a unique and substantial upside to Nycomed.*

(Emphasis added).

It is claimed that because Forest has refused to terminate its Collaboration Agreement with Glenmark, Forest will be able to delay Oglemilast's NDA approval until Daxas's patent expires. Saldanhau's affidavit states that Forest allegedly told Nycomed:

We believe treating these two products as a franchise provides a greatly enhanced opportunity and value to Nycomed, by both expanding and extending Nycomed's financial interests. We hope you will agree that this proposal ensures that Forest will maximize the value of both the original product and the successor product and that Nycomed will be a beneficiary of that effort. [Although Forest has the right to terminate its license with Glenmark] *we firmly believe that it would be optimal for both companies for Forest to retain rights to oglemilast, because ... it could be a very exciting successor product that could substantially expand and extend the opportunity for both Forest and Nycomed.*

(Labeled as "page 5 of 6" . . .)

(Affidavit, ¶ 13)

Finally, according to Saldanhau, Forest's Answer in the Arbitration (page 28) allegedly contains an acknowledgment that the Nycomed-Forest Agreement gives "Nycomed ... a limited right to demand that Forest exercise its right to terminate the Oglemilast Agreement."

Such allegations support Glenmark's claim that by preventing Forest from developing Glenmark's PDE4 technology, Nycomed interfered with the Collaboration Agreement between Forest and Glenmark and induced Forest to breach the Collaboration Agreement.

Further, as to whether Glenmark alleged an "actual breach of the contract" by Forest, the above facts sufficiently support an inference that Forest breached its obligation to use all reasonable

efforts to develop Glenmark's product. That plaintiff alleges that Forest refuses to terminate its Collaboration Agreement with Glenmark does not contradict the claim that Forest breached the Collaboration Agreement. Forest had an obligation to Glenmark under the Collaboration Agreement to develop Glenmark's product, and that Nycomed's new agreement with Forest precludes Forest from developing competitive inhibitors, including Glenmark's product. Moreover, there is authority for the proposition that an "actual breach" need not be alleged where it is also alleged that the defendant's intentional inducement rendered performance by the third party impossible (*see Kronos Inc. v AVX Corp.*, 81 NY2d 90, 94, 595 NYS2d 931 [1993] (The tort of inducement of breach of contract, now more broadly known as interference with contractual relations, consists of four elements: (1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff); *Kyle v Helberger & Associates, P.C.*, 25 Misc 3d 1218, 2009 WL 3417851 [Sup Ct Bronx County 2009] citing *Israel v Wood Dolson Co.*, 1 NY2d 116, 120, 151 NYS2d 1 [1956]; *Butler v Delaware Otsego Corp.*, 218 AD2d 357, 638 NYS2d 805 [3d Dept 1996]; *Lazzarino v Warner Bros. Entertainment, Inc.*, 13 Misc 3d 1230, 831 NYS2d 354 [Sup Ct New York County, Fried, J. 2006]). Here, the Nycomed-Forest Agreement allegedly renders Forest's performance of the Collaboration Agreement impossible.

And, that the complaint alleges that Forest pursued Nycomed does not defeat the "but for" element plaintiff's tortious interference with contract claim. Nycomed allegedly induced Forest, which held an exclusive license from Glenmark, to enter to the Nycomed-Forest Agreement to preclude Forest from developing Glenmark's competing products.

Furthermore, resulting damages are alleged.

However, although Glenmark alleges the existence of a valid, enforceable contract between it and a third party, *i.e.*, the Collaboration Agreement between Glenmark and Forest, the allegations in the complaint, coupled with the affidavit of Glenmark's President, Saldanhau, indicate that the Collaboration Agreement is a contract terminable at will, and thus, incapable of supporting the complaint. Agreements that are terminable at will are classified as only prospective contractual relations and cannot support a claim for tortious interference with an existing contract (*Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 684 NYS2d 235 [1st Dept 1999] (where plaintiff resigned and alleged that defendants interfered with his "employee-at-will" agreement, his tortious interference with contract claim was defeated, as "[a]greements that are terminable at will are classified as only prospective contractual relations, and thus cannot support a claim for tortious interference with existing contracts]; *Auerbach v Klein*, 19 Misc 3d 1102, 859 NYS2d 901 [Sup Ct Suffolk County 2008] citing *Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191-192) (where a "standstill" agreement was terminable at will by either party upon written notice, improper interference with such a contract terminable at will is actionable under the theory of tortious interference with prospective business relations).

Orange County Choppers, Inc. v Olaes Enterprises, Inc. (497 F Supp 2d 541 [SDNY 2007]), is instructive. In *Orange County Choppers*, defendant Olaes Enterprises, Inc. d/b/a ODM ("ODM") alleged in its counterclaim that it entered into a licensing agreement with Discovery Channel granting it the right to manufacture, promote, advertise, sell and distribute merchandise with the brand name "American Choppers," the Discovery Channel television show featuring plaintiff Orange County Choppers, Inc ("OCC"). ODM claimed that OCC threatened to cease production of "American Choppers" if Discovery did not terminate its agreement with ODM, which caused Discovery to

revoke its agreement with ODM. It also alleges that, at a trade show in February 2006, Discovery's licensing representatives abruptly interrupted a meeting with ODM and insisted that Discovery representatives end the meeting with ODM. The Court stated that "Conspicuously missing, however, is whether Discovery actually breached the contract with ODM. ODM merely alleges that 'On information and belief, OCC's threats constituted willful interference with ODM's contract with Discovery, causing a loss of an existing relationship and prospective economic advantage.'" The Court held that ODM's allegations were deficient "because they leave open the possibility that Discovery lawfully terminated the contract or that the contract was terminable at will. . . ."

Here, plaintiff attests that Forest breached the Collaboration Agreement by virtue of entering into an agreement with Nycomed that precludes Forest's performance under the Collaboration Agreement. However, when describing the terms of the Collaboration Agreement, plaintiff attests:

The Collaboration Agreement requires Forest to use all commercially reasonable efforts to undertake a program of research and development to obtain an approved New Drug Application ("NDA") for marketing Oglemilast as a treatment for COPD and asthma. The Collaboration Agreement also requires Forest to make milestone payments to Glenmark upon completion of certain defined development steps and, upon commercial launch of Oglemilast, to pay Glenmark royalties on net sales according to an agreed-upon formula.

The Collaboration Agreement permits Forest to avoid making milestone payment(s) by providing notice of termination, in which case Forest will retain no license rights to any of Glenmark's PDE4 technology. . . .

(Affidavit ¶¶4-5).

According to the complaint:

Forest has proceeded with the development of Oglemilast pursuant to the Collaboration Agreement for the last five years. . . .

As of the late autumn of 2008, Forest was dosing patients for a Phase II study of Oglemilast for COPD, and Glenmark was planning its Phase II study of Oglemilast for asthma.

(¶¶ 12-13).

That Forest can simply terminate its license under the Collaboration Agreement by providing notice of termination indicates that such Agreement is terminable at will, and Glenmark has not asserted that the Collaboration Agreement has any period of duration (*see B. Lewis Productions, Inc. v. Maya Angelou, Hallmark Cards, B. Lewis Productions, Inc. v Maya Angelou, Hallmark Cards, Inc.*, 2005 WL 1138474 [SDNY 2005] (noting that a duration clause is not necessary in a contract for services. If such a contract makes no provision for duration, the contract is presumed to be terminable at will). Forest's ability to terminate the Collaboration Agreement is expressed in the "confirmatory offer" cited by Glenmark, wherein Forest acknowledges that "[it] has the right to terminate its license" with Glenmark. Thus, Nycomed's alleged interference with the Collaboration Agreement is actionable solely under the theory of tortious interference with prospective business relations, and the tortious interference with contract claim is dismissed.

The Court notes that in order to state an actionable claim for tortious interference with business relations, a plaintiff must allege: (1) the existence of a business relation with a third party; (2) that the defendant, having knowledge of such relationship, intentionally interfered with it; (3) *that the defendant either acted with the sole purpose of harming the plaintiff or by means that were dishonest, unfair, or improper*, and (4) a resulting injury to the plaintiff's business relationship (*Empire One Telecommunications, Inc. v Verizon New York, Inc.*, 26 Misc 3d 541, 558, 888 NYS2d 714 [Sup Ct 2009] (emphasis added). Specifically, "[w]hen, as here, the party claiming injury and the party charged with interference are business competitors and the interference is intended, at least in part, to advance the competing interest of the interferer, the plaintiff must demonstrate that the interferer used 'wrongful means.' 'Wrongful means' is defined as physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure. It does not include

persuasion alone, even if knowingly directed at interference with the contract (*Auerbach v Klein*, 19 Misc 3d 1102, citing *Guard-Life Corp. v Parker Hardware Mfg. Corp.*, *supra* at 190-191; *NRT Metals, Inc. v Larabee Wire, Inc.*, 102 AD2d 705, 476 NYS2d 335, 338 [1st Dept 1984] (To state a claim for tortious interference with an at-will business relationship, plaintiffs must claim malice or use of unlawful means by defendants); *Island Rehabilitative Services Corp.*, 19 Misc 3d 1108 ("Even when at issue is a contract terminable at will and therefore not deemed to be enforceable for a definite term, recovery may be had where the means of interference deliberately employed were wrongful, consisting of fraudulent representations. . .")). Moreover, the interferer's status as a competitor "may excuse him from the consequences of interference with prospective contractual relationships, where the interference is intended, at least in part, to advance the competing interest of the interferer...." (*Guard-Life Corp. v S. Parker Hardware Manufacturing Corp.*, 50 NY2d at 191).

The allegations in the complaint and in Saldanhau's affidavit, as they are currently drafted, fail to indicate that Nycomed 's interference with the Collaboration Agreement was malicious, unlawful, fraudulent, physically violent, or involved any civil suit or criminal prosecution., or was done with the sole purpose of harming Glenmark. Glenmark's allegations demonstrate that Nycomed simply announced its interest in securing a partnership to advance product, and, when Forest responded to Nycomed's public announcement, entered into an exclusive agreement with Forest for this purpose. Although Nycomed was allegedly aware of Forest's agreement with Glenmark, its entering into an exclusive contract with Forest, to the alleged detriment of Glenmark, was not an act solely aimed at harming Glenmark, or an act that can be deemed malicious, fraudulent, or otherwise unlawful, or violent.

Although it has been stated that economic justification is a defense to a tortious interference

with business relations claim (*see E.F. Hutton Intern. Associates Ltd. v Shearson Lehman E.F. Hutton Intern. Associates Ltd. v. Shearson Lehman Brothers Holdings, Inc.*, 281 AD2d 362, 723 NYS2d 161 [1st Dept 2001]) (To overcome the defense of economic justification . . . plaintiffs must establish "either malice on the one hand, or fraudulent or illegal means on the other"); *Kronish Lieb Weiner & Hellman LLP (supra)*, plaintiff's own complaint and affidavit, at this juncture, demonstrate that Nycomed was a competitor of Glenmark, whose interference was to advance Nycomed's economic interest in the marketplace.

Therefore, as plaintiff failed to state a claim for tortious interference with contract, dismissal of this claim is granted, without prejudice for leave to amend the complaint to assert a claim for tortious interference with business relations claim.

Punitive Damages

A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action (*Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603 [1994]). Not only does the complaint fail to allege sufficient facts indicating that Nycomed's interference with the Collaboration Agreement had the character of spite, malice or evil motive (*Wilson v City of New York*, 7 A.D.3d 266, 267, 775 NYS2d 527 [2004] (claims for punitive damages were not cognizable where there was no indication that the alleged misconduct had "the character of spite, malice or evil motive")), a claim for punitive damages cannot stand as an independent claim. Thus, in light of the dismissal of the sole tortious interference with contract claim, dismissal of Glenmark's punitive damage claim is granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by Nycomed U.S., Inc. and Nycomed International

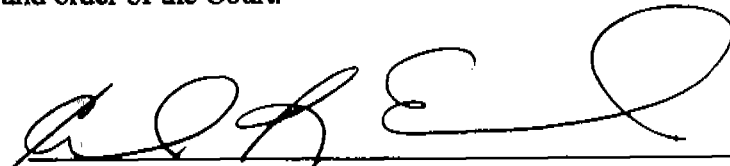
[* 21]
Management GmbH pursuant to 3211(a)(8) to dismiss the complaint as against Nycomed International Management GmbH for lack of personal jurisdiction, is denied; and it is further

ORDERED that the branch of the motion by Nycomed U.S., Inc. and Nycomed International Management GmbH pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action is granted, without prejudice for leave to amend the complaint to assert a claim for tortious interference with business relations claim; and it is further

ORDERED that Nycomed U.S., Inc. and Nycomed International Management GmbH serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 23, 2010


Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

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