[* 1.]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

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STATE OF NEW YORK, by Eliot Spitzer,

Plaintiff,

- against -

DAICEL CHEMICAL INDUSTRIES, LTD., EASTMAN CHEMICAL COMPANY, HOECHSTAKTIENGESELLSCHAFT, NUTRINOVA NUTRITION SPECIALTIES & FOOD INGREDIENTS, GMBH, HOECHST CELANESE CORPORATION, a/k/a CNA HOLDINGS, INC., NUTRINOVA, INC., CELANESE AG, AVENTIS S.A., NIPPON GOHSEI, a/k/a NIPPON SYNTHETIC CHEMICAL INDUSTRY CO., LTD., and UENO FINE CHEMICALS INDUSTRY, LTD.,

Defendants.

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INDEX NO. 403878/2002

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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 the motion is decided in accordance with the accompanying Decision and Order.

Dated: September 24, 2004

KARLA MOSKOWITZ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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STATE OF NEW YORK, by Eliot Spitzer,

Plaintiff,

Index No. 403878/2002

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DAICEL CHEMICAL INDUSTRIES, LTD., EASTMAN CHEMICAL COMPANY, HOECHST AKTIENGESELLSCHAFT, NUTRINOVA NUTRITION SPECIALTIES & FOOD INGREDIENTS, GMBH, HOECHST CELANESE CORPORATION, a/k/a CNA HOLDINGS, INC., NUTRINOVA, INC., CELANESE AG, AVENTIS S.A., NIPPON GOHSEI, a/k/a NIPPON SYNTHETIC CHEMICAL INDUSTRY CO., LTD., and UENO FINE CHEMICALS INDUSTRY, LTD.,

DECISION & ORDER

Defendants.

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HON. KARLA MOSKOWITZ, J.S.C.:

The motions with sequence numbers 002, 003, 004, and 005 are consolidated for disposition. These motions are essentially identical applications from different groups of co-defendants to dismiss the complaint, both for lack of jurisdiction and pursuant to CPLR 3211. For the following reasons, the court grants three of these motions in part and denies them in part, and, on the consent of the parties, grants the fourth motion in its entirety.

BACKGROUND

The Defendants

The co-defendants are all large, international corporations that sell sorbates, the minuscule amounts of chemical additives that extend the shelf life of food and other consumer products. Co-defendant Daicel Chemical Industries, Ltd. (Daicel) is a Japanese sorbate manufacturer, headquartered in Tokyo, that markets sorbates in the United States through two

non-party subsidiary corporations, Daicel (U.S.A.), Inc. (Daicel USA) and Mitsui & Co. (U.S.A.), Inc. (Mitsui USA). (See Notice of Motion [motion sequence number 003], Exhibit B [complaint], ¶ 7). Co-defendant Eastman Chemical Company (Eastman), an American sorbate manufacturing and marketing corporation, is licensed in Delaware and has its principal place of business in Tennessee. (Id., ¶ 8). Co-defendant Hoechst Aktiengesellschaft (Hoechst AG), a now-defunct German corporation, has its headquarters in Frankfurt. (Id., ¶ 9). Co-defendants Nutrinova Nutrition Specialties & Food Ingredients, GmbH (Nutrinova), another German corporation with headquarters in Frankfurt, and Hoechst Celanese Corporation, a/k/a CNA Holdings, Inc. (CNA Holdings), and Nutrinova, Inc. (Nutrinova, Inc.), two Delaware corporations with headquarters in New Jersey, were all direct or indirect subsidiaries of Hoechst AG. (Id., ¶¶ 10-12). Hoechst AG and Nutrinova manufacture sorbates. CNA Holdings and Nutrinova, Inc. market sorbates in the United States. (Id., ¶ 14). In 1999, co-defendant Celanese AG (Celanese AG), a German corporation with headquarters in Kronberg im Taunus, acquired Nutrinova, CNA Holdings and Nutrinova, Inc. from Hoechst AG pursuant to a "Demerger Agreement" (the Demerger Agreement). (Id., ¶¶ 13, 15). Also, in 1999, co-defendant Aventis S.A. (Aventis), a French corporation with headquarters in Strasbourg, acquired nearly all of Hoechst AG's stock. (Id., ¶ 16). Co-defendant Nippon Gohsei, a/k/a Nippon Synthetic Chemical Industry Co., Ltd. (Nippon Gohsei) is a Japanese sorbate manufacturer, with headquarters in Osaka, that markets sorbates in the United States through non-party Mitsui USA. (Id.,¶ 17). Co-defendant Ueno Fine Chemicals Industry, Ltd. (Ueno) is also a Japanese sorbate manufacturer, with headquarters in Osaka, that markets sorbates in the United States through non-party Kanematsu U.S.A., Inc. (Kanematsu SA). (Id., ¶ 18).

The Underlying Antitrust Claims and the Tolling Agreement

In the complaint, the New York State Attorney General (State AG) states that, between January 1979 and June 1997, the co-defendants and others, engaged in a world-wide, illegal conspiracy to fix prices in the commercial sorbates industry and that this conspiracy had economic consequences in New York State. (Id., ¶¶ 2, 4, 35-37, 44-46). Between September 1998 and March 2001, Eastman, Hoechst AG, Nippon Gohsei, Daicel and Ueno each pled guilty and agreed to pay substantial fines to criminal antitrust charges, that the United States Department of Justice's Antitrust Division filed in the United States District Court for the Northern District of California. (Id., ¶¶ 38-42, Exhibits 7-11). The State AG notes that certain of the co-defendants also settled five private class action lawsuits in the states of California, Kansas, Tennessee and Wisconsin between 2000 and 2001 for similarly substantial sums. (Id., ¶ 3). The State AG commenced this action in October 2002 in the wake of those successful actions.

Prior to doing so, however, the State AG and 31 other states attorneys general had signed an agreement with certain of the co-defendants that tolled the statutes of limitations on "any claim relating to the Sorbate Activity arising under state ... antitrust or consumer protection law that the State Attorneys General may assert ... as of July 2, 2001 (the Tolling Agreement)." (See Notice of Motion [motion sequence number 003], Exhibit A). The Tolling Agreement contained a New York choice of law clause and also provided that it would expire, of its own terms, on July 2, 2003 unless all parties mutually agreed to extend it. (Id.) They evidently chose not to do so. Co-defendants Celanese AG, Aventis, and Ueno did not sign the Tolling Agreement. (Id.)

Prior Proceedings

As previously mentioned, the State AG commenced this action in October of 2002. The complaint sets forth causes of action for: 1) violation of General Business Law § 340 et seq ("the Donnelly Act"); 2) violation of Executive Law § 63 (12) ("fraudulent or illegal business transactions"); 3) violation of General Business Law § 349 ("unfair or deceptive trade practices"); and 4) unjust enrichment. (Id., ¶¶ 47-64). On April 10, 2003, the court granted Ueno's application to admit its counsel pro hac vice (motion sequence number 001). Now, instead of answering, Ueno (motion sequence number 002), Celanese AG (motion sequence number 003), Hoechst AG, Nutrinova, CNA Holdings, Nutrinova, Inc., Celanese AG, Daicel, Eastman, and Nippon Gohsei, collectively (motion sequence number 004, the joint motion), and Aventis (motion sequence number 005), move to dismiss the complaint, on both jurisdictional grounds and pursuant to portions of CPLR 3211.

DISCUSSION

Successor Liability

Aventis and Celanese AG both argue that there is no basis for imposing successor liability against them (motion sequence numbers 005 and 003, respectively). Aventis specifically argues that the complaint fails to allege why it should be liable for the actions of Hoechst AG, whose stock Aventis acquired in 1999. (See Memorandum of Law in Support of Motion [motion sequence number 005], at 4-7). The State AG states that he "does not oppose dismissal of the complaint as to Aventis, on the ground that there is no ground for imposing successor liability against Aventis." (See Weinstein Affidavit as to Aventis on Behalf of Plaintiff New York, ¶ 6). Aventis acquired the majority of Hoechst AG's stock after Hoechst AG had "spun off"

Nutrinova, CNA Holdings, and Nutrinova, Inc., to Celanese AG. (Id., ¶¶ 9-16). Dirk Oldenberg, Aventis's general counsel and a member of its board of managers, states that his company's 1999 transaction with Hoechst AG was not a merger, but a stock acquisition, and that Aventis has never been involved, either directly or indirectly, in the manufacture, marketing or sale of sorbates. (See Oldenberg Affidavit in Support of Motion [motion sequence number 005], ¶¶ 1-6). Oldenberg also states that Hoechst AG was not involved in the manufacture, marketing or sale of sorbates at the time that Aventis acquired its stock, and that Aventis did not agree to assume any of Hoechst AG's liabilities or obligations as part of that acquisition. (Id., ¶¶ 7-9). Accordingly, the court grants Aventis's motion (005) on consent without passing on any of Aventis's other arguments.

Celanese AG argues that the State AG has failed to allege a basis for imposing successor liability against it for the actions of Nutrinova, CNA Holdings, and Nutrinova, Inc. (See Memorandum of Law in Support of Motion [motion sequence number 003], at 2-3). The State AG replies that the terms of the Demerger Agreement clearly show otherwise. (See p. 2 supra.; Plaintiff New York's Main Memorandum of Law in Opposition to Defendant Celanese's Motion to Dismiss, at 5-6).

In New York, successor liability exists where: "(1) the acquiring corporation expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations". (See Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc., 275 AD2d 243, 247; citing Schumacher v Richards Shear Co., Inc., 59 NY2d 239). Here, Celanese AG disputes the

existence of conditions giving rise to successor liability. (See Memorandum of Law in Support of Motion [motion sequence number 003], at 2-3).

However, the State AG refers to the portions of the Demerger Agreement that provide that:

> **2. Demerger (Section 2)**
> Pursuant to the Demerger Agreement, Hoechst AG will transfer to Celanese AG the assets specifically described in the Demerger Agreement [i.e., Nutrinova, CNA Holdings and Nutrinova, Inc.], including any and all related rights and obligations. Such transfer will be made by way of partial universal succession. To this extent, Celanese AG will be the legal successor of Hoechst AG.
>
> * * *
>
> **4. Demerged Assets (Section 4)**
> ... The demerger will ... include - with certain exceptions - all rights, obligations, debts and liabilities that are connected with the demerged businesses as well as those still existing from earlier business activities. ...

(See Grimm Affidavit in Opposition to Defendants' Motions, Exhibit 1, A, at 78-79). The State AG also presents the affidavit of Werner Dupre, a member of Hoechst AG's board of managers, who states that former Hoechst AG subsidiaries Nutrinova, CNA Holdings and Nutrinova, Inc. all became subsidiaries of Celanese AG as part of the demerger, along with their respective "assets and liabilities." (Id., Exhibit 1, ¶¶ 3, 4, 9, 10). The court finds that at this juncture, this evidence sufficiently supports the State AG's allegation that Celanese AG expressly assumed legal responsibility for the actions of Nutrinova, CNA Holdings and Nutrinova, Inc. (See Notice of Motion [motion sequence number 003], Exhibit B (complaint), ¶ 15). Celanese AG's reply argument, that "plaintiff has come forward with no evidence whatsoever" in support of its

allegations, is belied by the foregoing documents. (See Defendant Celanese AG's Reply Memorandum of Law, at 2).

Celanese AG also raises the argument that the Demerger Agreement is actually a "cost sharing agreement" and not a "liability sharing arrangement," because it contains certain indemnification provisions. (Id., at 4). However, Appendix 3 to the Demerger Agreement plainly discloses that a separate 1999 indemnification agreement that Hoechst AG made with Nutrinova "in connection with the government investigation and litigation associated with the sorbates industry ... for price fixing," was among the liabilities that Hoechst demerged to Celanese AG. (See Grimm Affidavit in Opposition to Defendants' Motions, Exhibit 1, A, at 116-117). Accordingly, the court rejects Celanese AG's claim that plaintiff has failed to plead adequately successor liability and denies that portion of the motion seeking dismissal on that ground.

Personal Jurisdiction

The joint motion begins with the argument that no personal jurisdiction lies against Daicel, Hoechst AG or Nippon Gohsei, pursuant to either CPLR 302 (a) (1) or 302 (a) (3). (See Memorandum of Law in Support of Motion [motion sequence number 004], at 5-11). To determine whether a plaintiff may sue a non-domiciliary in New York, the court must decide whether the long-arm statute confers jurisdiction over the defendant and, if so, whether the exercise of jurisdiction comports with due process. (See, e.g., LaMarca v Pak-Mor Mfg. Co., 95 NY2d 210, 214). As the party asserting jurisdiction, plaintiff bears the burden of proof. (See, e.g., 72A Realty Associates v New York City Environmental Control Bd., 275 AD2d 284). However, in order to defeat the motion to dismiss, a plaintiff need only make a prima facie

showing that jurisdiction exists. (See, e.g., Sipa Press, Inc. v Star-Telegram Operating, Ltd., 181 Misc 2d 550, 554, citing Hoffritz for Cutlery, Inc. v Amajac, Ltd., 763 F2d 55, 57 (2nd Cir 1985). Here, the court finds that the State AG has met his burden of proving jurisdiction, pursuant to CPLR 302 (a) (1), over Daicel and Nippon Gohsei only and has met his burden of proving jurisdiction, pursuant to CPLR 302 (a) (3), over all three co-defendants.

I) CPLR 302 (a) (1)

CPLR 302 (a) (1) is "a 'single act statute.' Proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." (Kreutter v McFadden Oil Corp., 71 NY2d 460, 467). A plaintiff need not establish the existence of a formal agency relationship between a defendant and its alleged New York agent. Instead, the plaintiff need only demonstrate that the agent engaged in purposeful activities here relating to the subject transaction (for the benefit of, and with the knowledge and consent of, the defendant) and that the defendant has exercised some control over the agent in the matter. (Id. at 467. See also Corporate Campaign, Inc. v Local 7837, United Paperworkers Intl. Union, 265 AD2d 274).

Daicel and Nippon Gohsei argue that CPLR 302 (a) (1) does not apply because they are Japanese companies that neither transacted any business in New York nor contracted anywhere to provide goods and services in New York. (See Memorandum of Law in Support of Motion [motion sequence number 004], at 6-7). The State AG responds that Daicel and Nippon Gohsei transacted business in New York through their New York agent, Mitsui USA, that contracted to sell sorbates in New York. (See Notice of Motion [motion sequence number 003], Exhibit B

[complaint], ¶¶ 7, 17, 21; Plaintiff New York's Main Memorandum of Law in Opposition to Defendants' Motions, at 12). Daicel and Nippon Gohsei reply that they actually sold their sorbates in Japan to Mitsui & Co. Ltd., the Japanese parent company of Mitsui USA, and that it was Mitsui & Co. Ltd., and not themselves, that sold the sorbates to Mitsui USA in New York for resale. (See Defendants Reply Memorandum in Support, at 2-4, 6-7). However, the statement of Brendan Naulty, a former Director for Food Additives for Mitsui USA, contradicts this assertion:

> 3. Between at least March 1991 and December 1999 (the "Relevant Period"), [Mitsui USA] performed [] importation, marketing, sales and distribution functions for Daicel and Nippon Gohsei, acting as the primary U.S. sales agent for these manufacturers' sorbate products
>
> 4. During the Relevant Period, [Mitsui USA]'s functions for Daicel and Nippon Gohsei were conducted primarily at or from [Mitsui USA]'s New York, New York office
>
> 5. Jodawnco, [Mitsui USA]'s sub-agent, solicited sorbates orders from U.S. customers (both distributor-resellers and end-users) and forwarded them to [Mitsui USA]. If Daicel and Nippon Gohsei accepted an order, [Mitsui USA] arranged for the product to be delivered to the customer and billed the customer. [Mitsui USA] collected the sorbates customers' payments. [Emphasis added.]

(See Grimm Affidavit in Opposition to Defendants' Motions, Exhibit 4 [Naulty Affidavit], ¶¶ 3-5). It is clear that the above-mentioned "importation, marketing, sales and distribution functions," that Mitsui USA performed in New York, would constitute "purposeful activities" undertaken for the benefit of, and with the knowledge and consent of, Daicel and Nippon Gohsei, with respect to the sales of those two companies' sorbates in New York. (See Kreutter v McFadden Oil Corp., 71 NY2d at 467). It is also clear that Daicel and Nippon Gohsei exercised some control over Mitsui USA in this matter, because Mitsui USA was obligated to wait until

Daicel or Nippon Gohsei decided whether or not to accept a given order that Mitsui USA had solicited. (Id). Thus, the court finds that the State AG has made an adequate showing that Daicel and Nippon Gohsei acted "purposefully" in New York through their agent, Mitsui USA. The "substantial relationship" between the sorbates sales that Mitsui USA arranged and the price fixing claims is self-evident. Accordingly, the court finds that the State AG has sustained his burden of establishing that Daicel and Nippon Gohsei are subject to personal jurisdiction under CPLR 302 (a) (1).

The court cannot make the same finding with respect to Hoechst AG, however. That co-defendant argues that CPLR 302 (a) (1) does not apply because it is a German company that neither transacted any business in New York nor contracted anywhere to provide goods and services in New York. (See Memorandum of Law in Support of Motion to Dismiss [motion sequence number 004], at 6-7). The State AG responds that Hoechst AG both transacted business in New York through its New Jersey subsidiary, CNA Holdings (that contracted to provide sorbates here), and also directed CNA Holdings and Nutrinova to transact business in New York using Mitsui USA as their New York agent (that did the same). (See Notice of Motion [motion sequence number 003], Exhibit B [complaint], ¶¶ 14, 21; Plaintiff New York's Main Memorandum of Law in Opposition to Defendants' Motions to Dismiss, at 12). Hoechst AG replies that the State AG has not presented sufficient evidence that the subsidiary companies were either "agents" or "mere departments" of it, so as to justify the court's exercise of jurisdiction. (See Defendants' Reply Memorandum in Support, at 4-6). The court agrees. The evidence that the State AG has presented shows only that CNA Holdings imported sorbates from Hoechst AG in Germany and then contracted, on its own, with distributors to sell them in the

United States. (See Grimm Affidavit in Opposition to All Motions, Exhibits 19-31). To date, State AG has presented no evidence that Hoechst AG exercised corporate control over CNA Holdings or its other American subsidiaries. Nor does the State AG offer evidence that any of the distributors that CNA Holdings contracted with were acting directly as the agent for Hoechst AG (the German parent) instead of CNA Holdings and/or Nutrinova (the American subsidiaries). It is well established that the mere existence of a parent-subsidiary relationship, without more, does not evince a sufficient connection between the parent corporation and any New York activity of the subsidiary to warrant the assertion of personal jurisdiction over the parent. (See, e.g., Sone v Tsumura, 222 AD2d 231). At this juncture, there is no evidence of anything more. Accordingly, the court finds that the State AG has not sustained his burden of establishing that Hoechst AG is subject to personal jurisdiction, pursuant to CPLR 302 (a) (1).

II) CPLR 302 (a) (3)

However, the court finds that all three moving co-defendants are subject to the court's jurisdiction pursuant to CPLR 302 (a) (3). That statute applies to any non-domiciliary who:

> commits a tortious act without the state causing injury to person or property within the state ..., if he ... (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

CPLR 302 (a) (3) (ii). Here, each of the three moving co-defendants pled guilty to criminal antitrust violations the United States Department of Justice asserted. (See Grimm Affidavit in Opposition to All Motions, Exhibits 7, 8). In the relevant portions of their respective plea agreements, each of them admitted that:

> 4. (a) For the purposes of this Plea Agreement, the "relevant period" begins in or about January 1979 and continues until in or about March 1996. ... During the

> relevant period, [each co-defendant] was a producer of sorbates, ... , and was engaged in the sale of sorbates for resale in the United States and elsewhere. ...
>
> (b) During the relevant period, [each co-defendant], through several of its officers or employees, participated in a conspiracy among major sorbates producers, the primary terms of which were to fix the prices and allocate the market shares of sorbates to be sold in the United States and elsewhere. ...
>
> (c) During the relevant period, sorbates sold by one or more of the conspirator firms, and equipment and supplies necessary to the production and distribution of sorbates, as well as payments for sorbates, traveled in interstate and foreign commerce. The business activities of [each co-defendant] and its co-conspirators in connection with the production and sale of sorbates affected by this conspiracy were within the flow of, and substantially affected, interstate and foreign trade and commerce[.]

(Id). The terms of the foregoing agreements contain admissions that each of the moving co-defendants herein: 1) "committed a tortious act without the state (i.e. an antitrust conspiracy);" 2) "expected or should reasonably have expected that act to have consequences in the state;" and 3) "derived substantial revenue from interstate and/or international commerce." In this action, the moving co-defendants are estopped from denying the matters that they admitted in their respective plea bargains. (See, e.g., Gilberg v Barbieri, 53 NY2d 285; Grayes v DiStasio, 166 AD2d 261).

Nonetheless, the moving co-defendants seek to avoid the reach of CPLR 302 (a) (3) on the grounds that there was "no direct injury in New York." (See Memorandum of Law in Support of Motion to Dismiss [motion sequence number 004], at 8-9). The State AG responds that the evidence shows that, during the relevant time frame, there were substantial sales of the co-defendants' sorbates in New York at inflated prices. (See Plaintiff New York's Main Memorandum of Law in Opposition to Defendants' Motions to Dismiss, at 7-11, 13-14; Exhibits 2-4, 13, 15-18, 20-23, 25, 27-35). New York sorbates purchasers and consumers clearly suffered

these injuries "directly," within the meaning of the statute. (See, e.g., Weiss v Greenburg, Traurig, Askew, Hoffman, Lipoff, Quentel & Wolff, P.A., 85 AD2d 861, 862, quoting American Eutectic Welding Alloys Sales Co. v Dytron Alloys Corp., 439 F2d 428, 433 [2nd Cir 1971] [the situs of a nonphysical, commercial injury is where "the critical events associated with the dispute took place"; see also Fantis Foods, Inc. v Standard Importing Co., Inc., 49 NY2d 317). Accordingly, the court finds that the State AG has sustained his burden of establishing that all three moving co-defendants are subject to personal jurisdiction, pursuant to CPLR 302 (a) (3) (ii).

III) Due Process

Once the court determines that a provision of New York's long-arm statute applies, it must then decide whether the exercise of jurisdiction over a defendant comports with principles of due process. (See, e.g., LaMarca v Pak-Mor Mfg. Co., 95 NY2d 210). These principles require first, that a defendant have certain "minimum contacts" with the forum state; and second, that the court's exercise of jurisdiction over the defendant "would not offend traditional notions of fair play and substantial justice." (Id. at 216-219). Here, the court finds that both of these criteria have been met.

"Minimum contacts" exist where "a defendant's 'conduct and connection with the forum State' are such that it 'should reasonably anticipate being haled into court there.'" (Id. at 216, quoting World-Wide Volkswagen Corp. v Woodson, 444 US 286, 297). This depends upon whether the defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State." (Id). As the Court of Appeals has noted, the United States Supreme Court reasons that: "if the sale of a product of a manufacturer or distributor ... is not

simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States [emphasis in original]." (Id). Here, the movants urge that the State AG "has not offered any facts establishing that the jurisdiction defendants have purposefully availed themselves of the privilege of conducting business in this forum," and that "these defendants lack any such connection to New York." (See Memorandum of Law in Support of Motion to Dismiss [motion sequence number 004], at 11). Defendants are incorrect. The evidence clearly shows that, during the relevant time period, all three of the moving co-defendants made it part of their business plans to cause their subsidiaries or agents to target actively sorbates customers in the New York market. (See Grimm Affidavit in Opposition to All Motions, Exhibits 2, 3, 4, 21, 24, 25, 28, 30, 31). By doing so, they made a conscious effort to "indirectly serve" this state's sorbates market. (See LaMarca v Pak-Mor Mfg. Co., 95 NY2d at 216, quoting World-Wide Volkswagen Corp. v Woodson, 444 US at 297). Accordingly, the court finds that the State AG has presented sufficient evidence to meet the "minimum contacts" test.

In assessing whether "traditional notions of fair play and substantial justice" would be offended, the court must determine whether a defendant "who purposefully has directed [its] activities at forum residents ... [has presented] a compelling case that the presence of some other considerations would render jurisdiction unreasonable." (See LaMarca v Pak-Mor Mfg. Co., 95 NY2d at 217, quoting Burger King Corp. v Rudzewicz, 471 US 462, 477). The court has reviewed the moving co-defendants' memorandum, reply memorandum and sur-sur-reply memorandum. The court finds that they are devoid of any arguments addressed to this prong of

jurisdictional analysis. The court itself is unable to apprehend any "considerations" that would render its exercise of jurisdiction over the moving co-defendants "unreasonable." (Id). Thus, the court determines that the State AG has presented sufficient evidence to meet the second prong of the due process analysis test and also finds that jurisdiction is proper over the moving co-defendants, pursuant to CPLR 302 (a) (3) (ii). Accordingly, the court denies that portion of the joint motion that seeks dismissal for lack of personal jurisdiction over Daicel, Hoechst AG, and Nippon Gohsei.

Other Grounds for Dismissal

In the joint motion, co-defendants make several arguments pursuant to CPLR 3211 (a) (7). Accordingly, the court's task is to determine "not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." (See Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae, 243 AD2d 168, 176, quoting Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48). To this end, the court must accept all of the facts in the complaint as true and determine whether they fit within any "cognizable legal theory." (See, e.g., Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303). Here, the court finds that two of the State AG's causes of action are viable, while two are not.

I) The Donnelly Act Claim

The first cause of action specifically states that the State AG "brings this action ... on behalf of persons in New York (including governmental entities) who purchased in New York either sorbates or products containing sorbates ...". (See Notice of Motion [motion sequence

number 003], Exhibit B [complaint], ¶ 6). This language clearly refers to both direct and indirect purchasers of sorbates. The complaint further states that defendants committed their alleged Donnelly Act violations "[f]rom in or about January 1979 through in or about June 1997." (Id., ¶ 48). However, not until December 23, 1998 was the Donnelly Act amended to allow indirect purchasers to recover. (General Business Law § 340 [6]). The Donnelly Act's indirect purchaser provision provides only prospective, not retroactive, relief. (See Lennon v Philip Morris Companies, Inc., 189 Misc 2d 577). Accordingly, to the extent that the first cause of action raises claims on behalf of indirect purchasers, based on activities that concluded prior to the effective date of the statutory amendment giving indirect purchasers the right to recover, that cause of action is invalid. However, the Donnelly Act's indirect purchaser provision also states that "in any action in which claims are asserted against a defendant by both direct and indirect purchasers, the court shall take all steps necessary to avoid duplicate liability, including but not limited to the transfer and consolidation of all related actions." (General Business Law §340 (6) [emphasis added]). The cause of action does assert claims on behalf of both types of purchasers. There is no evidence that the State or any of the direct purchaser claimants have yet recovered damages from the defendants. Thus, it would be improper for the court to dismiss the State AG's claim in its entirety. Accordingly, the court grants these motions (motion sequence numbers 002, 003 and 004) solely to the extent of dismissing the State AG's first cause of action with leave to replead it within the parameters of statutory coverage (i.e., on behalf of any direct purchasers of defendants' sorbates, as well as "the state, [and] any political subdivision or public authority of the state.").

The remaining Donnelly Act arguments in support of the joint motion are all plainly

without merit. First, no language in General Business Law §§ 342 or 342-a limits the State AG's discretion to seek treble damages on behalf of the people of New York State when prosecuting a Donnelly Act claim. (See Memorandum of Law in Support of Motion to Dismiss [motion sequence number 004], at 14-16; see also General Business Law §§ 342, 342-a). Second, no language in General Business Law § 342-b requires the State AG to specify, in the pleadings, exactly on behalf of which "political subdivisions or public authorities of the state" he is asserting a Donnelly Act claim. (Id. at 16-17). (See also General Business Law § 342-b). The State AG is correct to state that "that is generally a matter for the discovery phase of the case." (See Plaintiff New York's Main Memorandum of Law in Opposition to Defendants' Motions to Dismiss, at 34-35).

Finally, co-defendants argument that the Donnelly Act applies only to intrastate, and not interstate, commerce (Memorandum of Law in Support of Motion to Dismiss [motion sequence number 004], at 17-18), misstates the law. (See, e.g., Two Queens, Inc. v Scoza, 296 AD2d 302 [where the conduct complained of principally affects interstate commerce, but is also alleged to have a significant intrastate or local anti competitive impact, Donnelly Act claims will survive]).

The State AG's two arguments in opposition are also mistaken. First, as previously discussed, the law is clear that the indirect purchaser provision of General Business Law § 340 (6) does not apply to pre-1986 conduct. (See Memorandum of Law in Support of Motion to Dismiss [motion sequence number 004], at 28-30; see also Lennon v Philip Morris Companies, Inc., 189 Misc 2d 577, supra). Second, courts have rejected the contention that, because that provision is remedial in nature, it may be given retroactive effect. (See Memorandum of Law in Support of Motion to Dismiss [motion sequence number 004], at 30-33; see also Cox v

Microsoft Corp., 290 AD2d 206 [treble damages remedy portion of Donnelly Act is punitive in nature, rather than remedial]). Accordingly, the court rejects all of these arguments.

In its sur-sur-reply brief, Ueno argues that the Donnelly Act claim should be dismissed against it, pursuant to CPLR 3211 (a) (5), because a four-year statute of limitations governs these claims and that period has expired. (See Defendant Ueno's Reply Brief to Sur-Reply [motion sequence number 002], at 2). Donnelly Act claims do have a four-year statute of limitations (General Business Law § 340 [5]), but "[w]hen there is an alleged continuing antitrust conspiracy, the statute of limitations 'has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of that act.'" (See Stolow v Greg Manning Auctions Inc., 258 F Supp 2d 236, 251 (SD NY) affd 2003 WL 22717684 [2nd Cir 2003], quoting Higgins v New York Stock Exch., Inc., 942 F2d 829, 832 [2nd Cir 1991]).

The complaint alleges that Ueno participated in a continuing antitrust conspiracy through June 1997. (See Notice of Motion [motion sequence number 003], Exhibit B [complaint], ¶ 2). Thus, the statute of limitations for a Donnelly Act claim would ordinarily have expired against Ueno in June 2001. However, "[t]he statute of limitations in a private antitrust suit is tolled '[w]henever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws.'" (See Stolow v Greg Manning Auctions Inc., 258 F Supp 2d at 251 supra, quoting 15 USC § 16 [I]). The complaint alleges that the United States Department of Justice's Antitrust Division commenced a criminal antitrust action against Ueno in the United States District Court for the Northern District of California in

January 2001, and the evidence shows that Ueno pled guilty to the charges in March 2001. (See Notice of Motion [motion sequence number 003], Exhibit B [complaint], ¶ 42; Grimm Affidavit in Opposition to All Motions, Exhibits 7-D, 8-D). By Ueno's reasoning, this would have added another three months to the limitations period that would have expired in September 2001. Ueno notes that it did not sign the Tolling Agreement. (See Defendant Ueno's Reply Brief to Sur-Reply [motion sequence number 002], at 2). Ueno argues that the Donnelly Act claim against it is, therefore, time-barred because the State AG did not commence this action until October of 2002.

Although he did not respond directly to Ueno's sur-reply argument, the State AG asserts elsewhere that the tolling provision set forth in General Business Law § 342-c dictates a different result. (See Plaintiff New York's Main Memorandum of Law in Opposition to Defendants' Motions, at 26-27). That statute provides:

> Whenever any civil or criminal proceeding is instituted by the federal government to prevent, restrain, or punish violations of the federal antitrust laws, the running of the period of limitations in respect of every right of action arising under section[] three hundred forty ... of this article, based in whole or in part on any matter complained of in the federal proceeding, shall be suspended during the pendency of said proceeding and for one year thereafter; provided, however, that whenever the running of the period of limitations in respect of a right of action arising under section[] three hundred forty ... of this article is suspended hereunder, any action to enforce such right of action shall be forever barred unless commenced either within the period of suspension or within the period of limitations otherwise prescribed in this article.

(See General Business Law § 342-c). The State AG takes the position that the statute of limitations should have been tolled for three and a half years: from September 1998, when the United States Department of Justice's Antitrust Division filed the first criminal antitrust

information against co-conspirator Eastman, through March 2002, one year after the date on which co-conspirator Ueno entered the final guilty plea in the federal antitrust prosecution. (See Plaintiff New York's Main Memorandum of Law in Opposition to Defendants' Motions, at 26, Exhibits 11A, 8D). By this reasoning, plaintiff commenced this action timely as against Ueno, because plaintiff served the complaint in October 2002 and the statute of limitations would not have expired until December 2004 - three and a half years after June 2001. The State AG notes that the United States Supreme Court has long held that the identical tolling provision in the Clayton Act extends through the litigation of claims against all of the members of an ongoing antitrust conspiracy, even when only some of the co-conspirators were defendants in the initial action and the others were not prosecuted until much later. (See, e.g., Zenith Radio Corp. v Hazeltine Research, Inc., 401 US 321).

Here, it appears that the federal authorities litigated the antitrust claims against Ueno and the other co-conspirator co-defendants during the three-and-a-half year time period that the State AG specified. Ueno presents no authority, and the court can discover none, to support the argument that the measure of the statute of limitations period for Donnelly Act claims against Ueno is independent from the period that applies to identical claims against co-conspirators. Accordingly, the court denies that portion of Ueno's motion that seeks to dismiss the State AG's Donnelly Act claim against it on statute of limitations grounds (motion sequence number 002). This denial also applies against Celanese AG, that raised the same arguments as Ueno in its own motion (motion sequence number 003). The State AG may serve an amended complaint on both of these co-defendants, as well as on all of the co-defendants who participated in the joint motion.

The court also notes in passing that the foregoing findings regarding the applicable statute of limitations cannot support the State AG's claims on behalf of indirect purchasers, because their right to recover did not exist until after the defendants' concluded the alleged conspiracy, whereas the direct purchasers' right and the state's right to recover were extant.

II) The Executive Law § 63 (12) Claim

The State AG's second cause of action alleges that co-defendants violated Executive Law § 63 (12), that prohibits "fraudulent or illegal business transactions." (See Notice of Motion [motion sequence number 003], Exhibit B [complaint], ¶¶ 53-56). In their joint motion, co-defendants argue both that this claim falls afoul of the specific pleading requirement of CPLR 3016 and that it is also time-barred. (See Memorandum of Law in Support of Motion [motion sequence number 004], at 24-25).

New York courts have broadly defined "fraudulent activity," within the meaning of Executive Law § 63 (12). (See, e.g., People v Concert Connection, Ltd., 211 AD2d 310; People by Abrams v 21st Century Leisure Spa Intl. Ltd., 153 Misc 2d 938). However, the court need not reach the issue of whether or not plaintiff has complied with CPLR 3016, because the violation of GBL § 349 can serve as a basis for the claim under Executive Law 63(12). (See People ex rel Vacco v. World Interactive Gaming Corp., 185 Misc. 2d 852). In addition, defendants' guilty pleas to violations of the Sherman Act may also provide a basis for an Executive Law 63(12) claim. (Cf. New York v. Feldman, 210 F.Supp2d 294, 300 [SDNY 2002]).

The court also finds that this claim is not time-barred. A six-year statute of limitations governs Executive Law § 63 (12). (See State of New York v Cortelle Corp., 38 NY2d 83). Because the complaint alleges that co-defendants participated in the predicate "illegal or

fraudulent activity" through June of 1997, the statute of limitations on the State AG's Executive Law § 63 (12) claim would, therefore, not have expired until June of 2003. Accordingly, because the State AG commenced this action in October of 2002, the Executive Law § 63 (12) claim is clearly timely as against those co-defendants who participated in the joint motion.

Celanese AG also argues that the State AG's Executive Law § 63 (12) claim against it is untimely, because it was asserted after a three-year limitations period had expired. (See Memorandum of Law in Support of Motion [motion sequence number 003], at 3-5). Celanese AG notes that it did not sign the Tolling Agreement. (Id). Ueno raises the same arguments in its sur-sur-reply brief. (See Defendant Ueno's Reply Brief to Sur-Reply [motion sequence number 002], at 2). However, as previously discussed, a six-year statute of limitations governs the claim that would not have expired until June of 2003. (See State of New York v Cortelle Corp., 38 NY2d 83, supra). It is, therefore, of no moment that neither Celanese AG nor Ueno signed the Tolling Agreement and the court finds that the State AG clearly timely commenced the Executive Law § 63 (12) claim against both of these co-defendants. Accordingly, the court denies those portions of the joint motion and of Celanese AG's and Ueno's individual motions seeking to dismiss the second cause of action.

III) The General Business Law § 349 Claim

The State AG's third cause of action alleges that co-defendants violated General Business Law § 349, that prohibits "unfair or deceptive trade practices." (See Notice of Motion [motion sequence number 003], Exhibit B [complaint], ¶¶ 57-60). In the joint motion, co-defendants argue that the court should dismiss this claim pursuant to CPLR 3211 (a) (7) and (a) (5). (See Memorandum of Law in Support of Motion to Dismiss [motion sequence number 004], at

18-24). Co-defendants first note that proponents of claims pursuant to General Business Law § 349 must demonstrate that the challenged act or practice was consumer-oriented, that it was misleading in a material way and that the plaintiff suffered injury as a result of the deceptive act. (Id. at 19, citing Stutman v Chemical Bank, 95 NY2d 24, 27). They then argue that the conduct charged in this action was not "consumer-oriented," within the meaning of the statute. (Id. at 19-21). However, a court will find conduct to be "consumer-oriented" if "the acts or practices have a broader impact on consumers at large." (See Cruz v NYNEX Information Resources, 263 AD2d 285 [citation omitted]). Here, the State AG argues that co-defendants' conduct indirectly affected New York State consumers at large, because those consumers "ultimately paid the inflated price" for products that contained co-defendants' sorbates. (See Plaintiff New York's Main Memorandum of Law in Opposition to Defendants' Motions, at 36). The court agrees. Co-defendants' reply argument, that individual consumers must either have been parties to, or directly targeted by, the sorbates sales contracts, is mistaken. (See, e.g., Cruz v NYNEX Information Resources, 263 AD2d at 290-291, ["the statute's consumer orientation does not preclude its application to disputes between businesses" provided that "the complained-of conduct might either directly or potentially affect consumers"]). Accordingly, the court rejects co-defendants' first argument.

Co-defendants also argue that the court should dismiss the General Business Law § 349 claim because the price-fixing allegations in the complaint are not "deceptive acts," within the coverage of the statute. (See Memorandum of Law in Support of Motion to Dismiss [motion sequence number 004], at 21-23). The co-defendants claim, instead, that their conduct is more like "unfair methods of competition," a matter beyond the statute's reach. (Id). The State AG

replies that "price-fixing antitrust violations, such as bid rigging" are clearly within the ambit of General Business Law § 349. (See Plaintiff New York's Main Memorandum of Law in Opposition to Defendants' Motions, at 37). Federal courts have certainly adopted the State AG's position. (See, e.g., New York v Feldman, 210 F Supp 2d 294, 301 [SD NY 2002] [a scheme to manipulate public stamp auctions was collusive activity falling within section 349's definition of "deceptive acts or practices"]). One Appellate Division Decision suggests that a complaint setting forth "allegations of fact from which it could be inferred that there was an agreement or understanding between co-defendants to cooperate in a fraudulent or deceptive scheme" would sufficiently state a claim, pursuant to General Business Law § 349. (See Soule v Norton, 299 AD2d 827, 829 [finding complaint insufficient]). This complaint clearly contains such allegations that co-defendants' guilty pleas in the federal antitrust prosecutions amply support. Moreover, co-defendants have cited no authority directly supporting their largely semantic argument. Accordingly, the court also rejects co-defendants' second argument.

Finally, co-defendants argue that the General Business Law § 349 claim is not timely. (See Memorandum of Law in Support of Motion to Dismiss [motion sequence number 004], at 23-24). They correctly point out that the statute of limitations for this claim is three years. (Id. at 23, citing Gaidon v Guardian Life Ins. Co. of America, 96 NY2d 201). The State AG replies that the statute did not begin to run from the last antitrust violation in June of 1997, however, but from September 1998, when the United States Department of Justice's filing of charges against co-defendant Eastman put him on notice. (See Plaintiff New York's Main Memorandum of Law in Opposition to Defendants' Motions, at 38). It is true that Gaidon v Guardian Life Ins. Co. of America does not support the State AG's position, because the Court of Appeals held that the

statute of limitations for a General Business Law § 349 claim begins to run on the date when the plaintiff suffers an injury as a result of an unfair or deceptive trade practice and not on the date when the plaintiff learns of the injury. However, that case does not harm plaintiff's position either. The tolling provision of General Business Law § 342-c, that applies to the "period of limitations in respect of every right of action arising under section[] three hundred forty ... of this article, based in whole or in part on any matter complained of in the federal [antitrust] action," governs claims pursuant to General Business Law § 349. The General Business Law § 349 claim obviously involves matters in the previous federal antitrust prosecutions. Thus, taking into account the normal three-year limitations period for General Business Law § 349 claims, the three and a half years when the federal antitrust prosecutions were pending and the additional year thereafter that General Business Law § 342-c affords, the court finds that, even if co-defendants correctly contended that the cause of action had accrued in June of 1997, the statute of limitations would not have expired until seven and a half years later, in December of 2004. Accordingly, the court denies those portions of the joint motion and Celanese AG's and Ueno's individual motions, seeking to dismiss the State AG's General Business Law § 349 claim.

IV) The Unjust Enrichment Claim

The State AG's final cause of action seeks restitution under the equitable theory of unjust enrichment. (See Notice of Motion [motion sequence number 003], Exhibit B [complaint], ¶¶ 61-64). Co-defendants argue that this claim is improper because the State AG has no authority to bring such a claim and because he has failed to plead requisite elements. (See Memorandum of Law in Support of Motion to Dismiss [motion sequence number 004], at 26-29).

"Unjust enrichment" is an equitable remedy. (See, e.g., Wiebusch v Hayes, 263 AD2d 389). The Attorney General here seeks injunctive relief including the possible disgorgement of monetary benefits that defendants may have wrongfully obtained. Defendants fail to cite a single case precluding the Attorney General from seeking disgorgement via an unjust enrichment claim under these circumstances. Defendants also fail to explain the myriad cases where the Attorney General has pled an unjust enrichment claim in combination with statutory claims. (See, e.g., Spitzer v. Lev, 2003 WL 2169444 (N.Y. Cty June 5, 2003); Vacco v. Diamandopoulos, 185 Misc.2d 724; see also Vacco v. World Interactive Gaming Corp., 185 Misc.2d 852, 856 [Attorney General sought restitution and damages to injured investors in case he commenced pursuant to Executive Law § 63(12) and GBL 23-A]).

Defendants also argue that the Attorney General's unjust enrichment claim, if he has authority to bring it, fails as a matter of law for a host of reasons, primarily because plaintiff has failed to plead "a direct benefit or enrichment as a direct result of plaintiff's conferring a benefit." (Defs. Reply Mem. At 30). However, "the reach of equity is not so short. It suffices that defendant received benefits to which it was not entitled that were effectively conferred by plaintiff. . . " (EBC I, Inc., v. Goldman Sachs & Co., 7 AD3d 418, 420 [unjust enrichment claim viable even though plaintiff did not pay the alleged kickbacks"]).

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of co-defendant Ueno Fine Chemicals Industry, Ltd. (motion sequence number 002) is granted with respect to the first cause of action only, and is, in all other respects, denied; and it is further

ORDERED that the motion, pursuant to CPLR 3211, of co-defendant Celanese AG

(motion sequence number 003) is granted with respect to the first cause of action only, and is, in all other respects, denied; and it is further

ORDERED that the joint motion, pursuant to CPLR 3211, of co-defendants Hoechst Aktiengesellschaft, Nutrinova Nutrition Specialties & Food Ingredients, GmbH, Hoechst Celanese Corporation, a/k/a CNA Holdings, Inc., Nutrinova, Inc., Celanese AG, Daicel Chemical Industries, Ltd., Eastman Chemical Company, and Nippon Gohsei, a/k/a Nippon Synthetic Chemical Industry Co., Ltd. (motion sequence number 004) is granted with respect to the first cause of action only, and is, in all other respects, denied; and it is further

ORDERED that the plaintiff State of New York, as represented by Attorney General Eliot Spitzer, is granted leave to serve an amended complaint so as to replead the first cause of action within 20 days after service on the Attorney General's office of a copy of this order with notice of entry. In the event that plaintiff fails to serve an amended complaint within that time, leave to replead shall be deemed denied, and that cause of action shall be deemed dismissed with prejudice; and it is further

ORDERED that the motion, pursuant to CPLR 3211, of co-defendant Aventis S.A. (motion sequence number 005) is granted on consent, without costs and disbursements to defendant; and it is further

ORDERED that the balance of this action is severed and shall continue.

The parties are directed to appear for a preliminary conference on Thursday, October 14, 2004, at 11:00 a.m. in courtroom 248 at 60 Centre Street, New York, NY, with Justice Moskowitz as her court attorney is precluded from working on this matter.

Dated: September 27, 2004

ENTER

J.S.C.