IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

GREGG LAPOINTE, et al.,	*	
Plaintiffs,	*	
v.	*	Civil No. 363433
SIGMA TAU PHARMACEUTICALS, INC., et al.,	*	
	*	
Defendants.	*	

OPINION AND ORDER[1]

This matter comes before the Court on the Motion for Summary Judgment of the Defendant, Sigma-Tau Finanziaria, S.P.A. and Paolo Cavazza on the Plaintiff's claim for tortious interference under Count VIII of the Amended Complaint.

The Plaintiffs, all former employees of Sigma-Tau Pharmaceuticals, Inc. (STPI) allege that Sigma-Tau Finanziaria, S.P.A. ("STF") and Paolo Cavazza ("Cavazza") tortuously interfered with the long-term benefit plan that they had entered into with STPI. STPI is a wholly-owned subsidiary of STF. Cavazza is STF's largest shareholder and allegedly controls the company. As a result of STF's and Cavassa's (the Defendants') interference, STPI refused to pay benefits to which the plaintiffs were entitled.

STF argues that it is entitled to judgment because even assuming wrongful interference, no liability exists when a parent interferes in a contract between a solely

[1] The Court wishes to acknowledge the significant contribution of Aaron Moore, Esq., the Honorable Mary Beth McCormick's law clerk, in drafting this Opinion.

owned subsidiary and a third party. Because there is a "unity of interest," the parent and the subsidiary are treated as one and a party cannot be held liable for tortiously interfering with its own agreement. As the largest shareholder in STF, Cavazza also claims a benefit of this "identity of interest" doctrine. Although both Defendants deny that they engaged in wrongful conduct, they maintain that even if wrongful conduct were established, there would still be no liability because of the "unity of interest."

It is well settled in Maryland that "[a]s a matter of law, a party to a contract cannot 'interfere' with his or her own contract; the party can, at most, breach it." *Bagwell v. Peninsula Reg'l Med. Ctr.*, 106 Md. App. 470, 503 (1995) (internal citations omitted). This principle has been expanded to include persons other than the named parties to the contract. For example, agents and employees of a party to a contract usually cannot "interfere" with the contract. *Bleich v. Florence Crittenton Servs. of Balt., Inc.*, 98 Md. App. 123, 147 (1993).

Whether the unity of interest doctrine applies to tortious interference claims involving a parent corporation and its wholly owned subsidiary has been the subject of discussion by the Maryland Court of Appeals, but has not been formally adopted. [2] As discussed in *Alexander*, those states that have adopted the privilege in such cases have typically done so based upon the "unity of interest" analysis. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984), the Supreme Court held that a parent corporation could not be prosecuted for an antitrust violation involving its subsidiary because "a parent and its wholly owned subsidiary have a complete unity of interest. Their

[2] *Alexander & Alexander Inc. v. B. Dixon Evander & Assocs., Inc.*, 336 Md. 635, 658 (1994)

objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one." The courts that have considered the question of a parent corporation's liability for tortious interference with the contractual agreement of its subsidiaries have applied this same rationale to that situation.

Most courts that have adopted the privilege have done so with limitations. One of the most thorough discussions of the privilege and its limitations is found in the case of *Waste Conversion Sys., Inc. v. Greenstone Indus., Inc.*, 33 S.W.3d 779, 781 (Tenn. 2000). The issue came before the Supreme Court of Tennessee on certified questions from the United States District Court for the Eastern District of Tennessee. Among the certified were:

1. Can a parent corporation be held liable under Tennessee law for inducing a subsidiary to breach a contract with another party?
2. For a parent corporation to be held liable for inducing its subsidiary to breach a contract, must it employ wrongful means?

Id. at 781-83.

The facts presented to the Tennessee Supreme Court for consideration of the issues are almost directly on point with those now before the Court. The Plaintiff, Waste Conversion Systems, Inc. ("WCS") had entered into a long-term contract to sell waste paper to Greenstone Industries-Atlanta, Inc. ("GSI-A"). *Id*. at 780. GSI-A was a wholly owned subsidiary of Greenstone Industries, Inc. ("GSI"). *Id*. The contract required GSI-A to purchase minimum quantities of fiber per month from WCS at a fixed price. *Id*. Because the market price of fiber dropped after the contract was entered into, GSI directed GSI-A to

refuse to purchase any fiber from WCS in breach of the agreement and without any legal justification. *Id*. at 780-81.

This was an issue of first impression in Tennessee. Citing to courts from numerous other jurisdictions, as well as the Court of Appeals for the Second Circuit, the Supreme Court of Tennessee held that in such circumstance a privilege on behalf of the parent existed but that it was not an unlimited one. *Id*. at 781-82. In finding the privilege to exist they adopted the analysis of the United States Supreme Court in *Copperweld Corp. v. Independence Tube Corp. Id*. at 782.

The privilege recognized, the Court next considered under what circumstance the parent corporation could lose its immunity. Based upon a further review of cases from around the country, the Supreme Court of Tennessee held that there were two instances where the parent corporation could lose the privilege. First, "[a] parent corporation acting contrary to its wholly-owned subsidiary's economic interests can be considered a third party to its subsidiary's contractual relationship and can be held liable for tortiously interfering with that relationship." *Id*. at 783. Second, "if [the parent] employs 'wrongful means[,]' [t]he privilege can be lost even if the parent does not act contrary to the subsidiary's best interest." *Id.* The Supreme Court of Tennessee went on to adopt a broad definition of "wrongful means" to include misrepresentation of facts, fraud, threats, intimidation, as well as a number of other acts, including "any other wrongful act recognized by statute or common law." *Id*. at 784 (internal citations omitted).

Finally, the Tennessee court discussed the burden of proof on these issues. They found that the majority of those jurisdictions placed the burden of proving the parent

corporation was not entitled to immunity on the Plaintiff. *Id*. at 783. In other words, the Plaintiff must prove that the parent was acting contrary to the economic interests of its subsidiary or that the parent corporation had employed wrongful means.

The Court herein finds the opinion of the Supreme Court of Tennessee to be well reasoned and to comport with the dicta of the Court of Appeals in *Alexander & Alexander Inc. v. B. Dixon Evander & Assocs., Inc.*, 336 Md. 635 (1994). The issue of whether the "unity of interest" between a parent and subsidiary offered a complete defense to claims of tortious interference by the parent with contracts between a subsidiary and a third party was not directly before the Court in *Alexander*. The actual holding of *Alexander* was that the Plaintiff had "failed to establish that the defendants' interference with economic relations was wrongful or malicious, and thus failed to prove the existence of tortious conduct. Moreover, even if we were to assume arguendo the existence of tortious conduct, [the Plaintiff] failed to establish the requisite actual malice to support an award of punitive damages." *Alexander & Alexander Inc.*, 336 Md. at 662. Accordingly, the Court of Appeals reversed the judgment in favor of the Plaintiff for punitive damages in the total amount of $5 Million. *Id*. at 638, 662.

It was solely in the context of deciding whether the Plaintiff had proven actual malice to justify an award of punitive damages that the Court discussed the nature of the parent/subsidiary relationship. In *Alexander*, the Plaintiff ("Evander") was the founder and owner of an insurance brokerage corporation. *Id*. at 638. For many years, Evander had obtained malpractice liability insurance for the University of Maryland Hospital ("the hospital") from the St. Paul Fire & Marine Insurance Company ("St. Paul"). *Id*. Evander

negotiated these policies through St. Paul's agent, Shand, Morahan & Company, Inc. ("Shand"). *Id*. Shand was a wholly-owned subsidiary of a competing insurance brokerage firm, Alexander & Alexander ("Alexander"). *Id*. at 638-39.

After many years, apparently in an effort to reduce the brokerage fees they were paying, the hospital elected to terminate the relationship with Evander and instead retain Alexander as their insurance broker. *Id*. at 639-40. Following this change of brokers, the hospital decided to self-insure. *Id*. at 642. The decision was reached while the last policy of insurance placed by Evander was still in force and effect. *Id*.

The policy in place at the time was a claims made policy. *Id*. at 639. As such, a claim was covered only if the claim was made within the policy period. *Id*. However, the policy contained an option to extend the reporting period. *Id*. Within 30 days of terminating the existing policy, the policyholder could elect to extend the reporting period into the indefinite future in return for an additional premium. *Id*. The premium was approximately 155% of the premium for the policy's final year. *Id*.

Pursuant to their agreements with the hospital, Evander's termination date and Alexander's commencement date was July 1, 1985. *Id*. at 641. On May 6, Alexander notified Shand that the hospital would not be renewing its existing policy and intended to exercise their option to extend the claims period. *Id*. at 642. Shand notified Evander of the hopsitals decision. *Id*. On May 8, Evander sent a letter to the hospital explaining how that option had to be exercised. *Id*. Shand notified the hospital that the premium for the extended reporting policy was $3 Million and a commission on the premium of 8% or $265,907.28 was owed to Evander. *Id*.

This claim for commissions presented a problem for Alexander. Pursuant to Alexander's brokerage agreement with the hospital, in lieu of any commissions they received a flat fee of $250,000 on an annual basis. *Id*. at 641. The hospital and Alexander agreed that if for any reason a commission had to be paid on an insurance policy, the hospital would be entitled to a credit against Alexander's annual fee in the amount of the commission. *Id*. Accordingly, if Shand, acting as the hospital's agent, paid Evander the commission, it would wipe out Alexander's fee for the first year. *Id*. at 642. For this reason, Alexander asked Shand not to bill the hospital for the claimed commission. *Id*. Alexander's position was that the exercise of the option was a service provided by Alexander and therefore covered by their flat fee. *Id*.

Shand initially refused Alexander's request. Shand advised Alexander that based on standard practices in the industry, Evander was owed the commission. *Id*. Eventually, notwithstanding its belief, Shand complied with Alexander's request and deleted the commission from the bill to the hospital. *Id*. Thereafter, Shand refused Evander's request for his commission. *Id*. at 642-43.

In addition to a claim for breach of contract against Shand and St. Paul, Evander brought an action for tortious interference with contract against Alexander and one of its senior employees. *Id*. at 643. Evander was successful on both counts before a jury. *Id*. at 644. He recovered not only his commission on the breach of contract claim but was awarded $40 Million in punitive damages against Alexander, later reduced by the trial judge to $12.5 Million. *Id*. at 644-45. The decision was appealed. *Id*. at 645.

The Court of Special Appeals affirmed the award of compensatory damages on the breach of contract but reversed the award of punitive damages and remanded the matter for a new trial to determine whether the "conduct justifi[ed] an award of punitive damages." *Id*. at 646. Following a second trial, the Plaintiff was again awarded punitive damages against Alexander in the amount of $4 Million and one of its senior employees in the amount of $1 Million. *Id*. at 649. Both sides appealed. *Id*. On this second appeal, Alexander argued that there was no evidence a tort was committed, there was no evidence of actual malice and the punitive damages award was granted without any meaningful standard. *Id*.

On appeal, the Court of Appeals initially observed "[p]unitive damages may be awarded only . . . if there was tortious conduct accompanied by 'malice.'" *Id*. The only tort alleged by Evander on the retrial was wrongful interference with contractual or business relationships. *Id*. at 650. The Court noted such claims typically arise in a commercial context. In the marketplace, "competitors inevitably damage one another in the struggle for personal advantage." *Id*. at 653 (internal citations omitted). For that reason, the Court stated "we have made clear in our cases that acting to pursue one's own business interests at the expense of others is not, in itself, tortious." *Id*. at 654 (internal citations omitted). In order to be tortious, the interference must be wrongful or malicious. "'[A]ctual malice', in the sense of ill will, hatred or spite, may be sufficient to make an act of interference wrongful where the defendant's malice is the primary factor that motivates the interference." *Id*. at 657. The Court found this was the only theory Evander had relied upon for his claim of tortious interference and punitive damages. *Id*. at 657-58.

It was in this context the Court commented upon the nature of the relationship between Alexander and Shand, its wholly-owned subsidiary. On appeal, Evander had argued that "the relationship between Alexander and Shand [a wholly-owned subsidiary] made Alexander's exercise of influence over Shand **particularly objectionable**." *Id*. at 658 (emphasis added). The Court felt the opposite was true. The Court stated "that relationship gave Alexander further legitimate reasons for acting as it did. A parent corporation is generally justified in requiring its subsidiary to modify economic arrangements, contractual or otherwise, if those arrangements do not benefit the parent. Under these circumstances, interference by the parent is ordinarily not tortious." *Id*. (internal citations omitted).

In a footnote following that statement, the Court of Appeals noted "[i]t is not clear under Maryland law whether the interference tort lies where the Plaintiff's contract or economic relations are with a corporation, and the defendant in the interference action is a controlling officer or stockholder (including parent corporation) of the contracting corporation. Although some jurisdictions have found tortious conduct under these circumstances, they have generally limited tort liability to situations in which the controlling individual or entity acted in bad faith . . . . We do not reach this question in the present case." *Id*. at 659 n.21 (internal citations omitted).

With citation to a number of cases, including *Alexander*, the Defendants herein assert that "as a matter of law, the privilege always applies to corporate parents and their wholly-owned subsidiaries because such companies 'have a complete unity of interest and are essentially the same entity.'" Mot. for Summ. J. of Def. Sigma-Tau Finanziaria and Paolo Cavazza, 19 (internal citation omitted). The cases cited by the Defendants in support of that

proposition, however, do not lend support to such a broad proposition. One such case, *F.C. Cycles Int'l v. Fila Sport, S.P.A.*, involved a motion to compel discovery where the Defendants asserted attorney-client privilege. 184 F.R.D. 64, 66 (D. Md. 1998). In moving to compel documents and communications relating to those documents, the Plaintiff argued that to the extent any privilege once existed, it had been waived. *Id*. at 70. As an alternative, the Plaintiff argued that no privilege attached because the communications were made in furtherance of a tort, that is, tortious interference with a contract. *Id*.

Most of the Court's opinion is devoted to a discussion of the waiver issue. After concluding that the privilege had been waived, the Court found it was unnecessary to reach the alternative argument concerning whether communications were made in furtherance of a tort but stated it would "briefly do so." In applying the "unity of interest" test from *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), the Court found "[t]he Plaintiff does not contest that Fila Canada or Fila U.S.A. are anything other than wholly owned subsidiaries of Fila Sport or that there is a lack of unity of interest between them. Thus, the Plaintiff has failed to establish prima facie evidence that Fila Canada and Fila U.S.A. are third parties to the contract allegedly interfered with. As plead, this is not a sufficient showing." *F.C. Cycles Int'l, Inc.*, 184 F.R.D. at 81. However, significantly for this Court's purposes, the District Court also observed that the "unity of interest test is used to determine, **on a case-by-case basis**, whether closely related companies are capable of interfering with each other's contracts." *Id*. at 80 (emphasis added) (internal citations omitted).

Implicit in the District Court's holding is that where the Plaintiffs can establish that a "unity of interest" does not lie, notwithstanding the legal relationship of the entities, a parent is capable of interfering with its subsidiary's contracts. The analysis must be made on a "case-by-case" basis. Moreover, this Court finds that the case is entitled to little weight since the District Court devotes less than a page of its opinion to this issue that it found it was "unnecessary to decide." Nowhere in the opinion is there a discussion of whether privilege has limits, and if so, what those limitations are.

The Defendant also cites the Court to *Aerotek, Inc. v. Tyonek Native Corp.*, Civ. No. 05cv 1080-JCC-LO2007, 2007 U.S. Dist. LEXIS 24054, at *21 (E.D. Va. Apr. 2, 2007). In an unreported opinion, the Court therein states "[u]nder the parent-subsidiary rule, a parent and its subsidiary are the same party, and a party cannot tortiously interfere with a contract with itself." *Id*. at *21. However, the issue was decided under Florida law. *Id*. at *18. As authority for the foregoing proposition, the District Court cites *Bobson Bros. Co. v. Allison*, 337 So. 2d 848 (Fla. 1976). A reading of that case demonstrates that the District Court in *Aerotek* overstates the law of Florida on this issue. In *Bobson*, the Defendant corporation and another that entered into a contract with the Plaintiff were owned by common shareholders and had common officers and directors. *Bobson Bros. Co*., 337 So. 2d at 850. The Court found the Defendant could not interfere in a contract between the Plaintiff and another corporation "because it ha[d] a financial interest in the business" of the second corporation. *Id*. The Court based its decision upon the Restatement of the Law of Torts in Section 769 (Tentative Draft No. 14 approved by the Institute 5/21/69). *Id*. The privilege described therein is a limited one. The privilege exists where the Defendant "(a) does not

employ improper means, and (b) acts to protect [its] interest from being prejudiced by the contract or relation." *Id*.

Upon review of the relevant authorities, including those cited by the Defendant, the Court finds that while a privilege generally does exist when a parent corporation is alleged to have interfered in a contract or with economic relations between a wholly-owned subsidiary and the Plaintiff, the privilege is not absolute. The privilege does not lie if the parent acts contrary to the interest of the subsidiary or interferes with the contract or relationship by use of wrongful means. The burden of establishing the privilege does not lie, rests, with the Plaintiff. The Court further finds that this privilege would extend to a shareholder who has a controlling interest in the parent corporation. Because there is a material dispute of fact in this case regarding whether STF and/or Cavazza used wrongful means to interfere with the contract at issue between the Plaintiffs and STPI, the motion for summary judgment shall be denied.

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Date

MICHAEL D. MASON, JUDGE
Circuit Court for Montgomery County, MD.