

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:)
VITAMINS ANTITRUST LITIGATION)

) Misc. No. 99-0197 (TFH)

FILED

THIS DOCUMENT RELATES TO:)
ALL DIRECT ACTIONS,)

JAN 17 2002

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION Re: Certification of October 30, 2001 Order

Pending before the Court is a motion by Defendant UCB S.A. ("UCB") pursuant to 28 U.S.C. § 1292(b) to amend and certify for immediate interlocutory appeal this Court's October 30, 2001 Order, which granted in part and denied in part UCB's motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). Upon careful consideration of UCB's motion, the opposition and reply thereto, the Court's October 30, 2001 Order and accompanying Memorandum Opinion, and the entire record herein, the Court will deny UCB's request to amend and certify the Court's prior order for immediate appeal.

I. BACKGROUND

On October 30, 2001, the Court issued an Order and accompanying Memorandum Opinion in this case, granting in part and denying in part UCB's motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). In that decision, the Court examined both requirements of personal jurisdiction: statutory authorization and compliance with constitutional due process. Finding insufficient contacts in the District of Columbia to satisfy due process, the Court first held that jurisdiction could not be exercised over UCB in the District and granted the motion to dismiss accordingly. 10/30/01 Mem. Op. at 13-14.

21 83

However, the Court found statutory authorization and sufficient contacts to satisfy due process in the other jurisdictions at issue—Arkansas, California, Georgia, Illinois, Indiana, Kansas, Minnesota, Missouri, Texas, and Virginia—and denied the motion to dismiss concerning those jurisdictions. *Id.* at 3-36. In reaching this conclusion, the Court considered four theories of personal jurisdiction advanced by the plaintiffs. The Court first addressed section 12 of the Clayton Act, 15 U.S.C. § 22, which is "essentially a long-arm statute [that] permits service of process in a non-forum district, so long as the venue provision is met." Chrysler Corp. v. Gen. Motors Corp., 589 F. Supp. 1182, 1195 (D.D.C. 1984) (citing Frederick Cinema Corp. v. Interstate Theatres Corp., 413 F. Supp. 840, 841-42 n.1 (D.D.C. 1976)). As explained, the venue provision is met in pertinent part if the corporation "transacts business" in the forum. 15 U.S.C. § 22; 10/30/01 Mem. Op. at 4. The Court found that "UCB sufficiently controlled its U.S. subsidiaries to attribute the business activities of the subsidiaries to the parent company for purposes of establishing personal jurisdiction" in the ten jurisdictions, and it held that exercising jurisdiction comports with due process. *Id.* at 12-13. Second, the Court addressed the "conspiracy theory" of jurisdiction. It rejected UCB's argument that the theory is unconstitutional and found personal jurisdiction under it proper in Georgia, Illinois, Minnesota, Kansas, Arkansas, Indiana, Missouri, and Virginia. *Id.* at 14-23 & n.8. Third, the Court analyzed the "effects test" for personal jurisdiction. The Court held that jurisdiction could be exercised over the defendant in Illinois and California, "[g]iven the broad applications of the effects test in these two fora," and that doing so is consistent with due process. *Id.* at 25 & n.23. It could not find jurisdiction in the other fora, however, "based on actions aimed at the United States as a whole where the fora at issue require conduct 'expressly aimed' at those jurisdictions." *Id.* at 28. Finally, the

Court addressed the plaintiffs' claim that other provisions in the long-arm statutes at issue authorized jurisdiction. Predicated upon its earlier findings with respect to control, conspiracy, and effects, the Court held that jurisdiction was specifically authorized under subsections (2) and (3) of Georgia's long-arm statute, Ga. Code Ann. § 9-10-91, section 543.19 of Minnesota's long-arm statute, Minn. Stat. § 543.19, section 506.500 of Missouri's long-arm statute, Mo. Rev. Stat. § 506.500, and section 410.10 of California's long-arm statute, Ca. Civ. Pro. § 410.10 & Cmt., and that exercising jurisdiction under these provisions comports with due process. 10/30/01 Mem. Op. at 28-36.

Defendant UCB filed the instant motion to amend and certify the October 30, 2001 decision for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The defendant specifically seeks certification of three questions: (1) whether Delaware law governs the question of UCB's control over its U.S. subsidiaries for purposes of section 12 of the Clayton Act; (2) whether the "conspiracy theory" of personal jurisdiction is constitutional; and (3) whether the "effects test," as construed under California and Illinois law, is constitutional.

II. DISCUSSION

A. Legal Standard

Whether an immediate interlocutory appeal of a nonfinal order should be permitted is a discretionary decision for a district court under 28 U.S.C. § 1292(b). Swint v. Chambers County Comm'n, 514 U.S. 35, 46-47 (1995). Section 1292(b) provides in pertinent part:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b). In exercising its discretion, a district court thus considers three factors: (1) whether the order to be appealed involves a controlling question of law; (2) whether there is a substantial ground for difference of opinion on that question of law; and (3) whether an immediate appeal from the order may materially advance the ultimate termination of the litigation. Id.; see, e.g., First Am. Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1116 (D.D.C. 1996). Each of these elements must be met before certification may be granted. In re: Vitamins Antitrust Litig., No. 99-197, 2000 WL 673936, at *2 n.3 (D.D.C. Jan. 27, 2000) (citing Kirkland & Ellis v. CMI Corp., 1996 WL 674072, at *2 (N.D. Ill. Nov. 19, 1996), and Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb., Inc., 1989 WL 162315, at *5 (S.D.N.Y. Aug. 4, 1989)). Because section 1292(b) is meant for truly exceptional cases in that the provision " 'should not be read as a significant incursion on the traditional federal policy against piecemeal appeals,' " Tolson v. United States, 732 F.2d 998, 1002 (D.C. Cir. 1984) (quoting 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2658.2, at 80 (2d ed. 1983)), interlocutory appeals under it are "rarely allowed." First Am. Corp., 948 F. Supp. at 1116 (citing Tolson, 732 F.2d at 1002). The movants thus bear a " 'burden of showing that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.' " Id. (quoting Chalfin v. Beverly Enter., Inc., 745 F. Supp. 1117, 1122 (E.D. Pa. 1990)).

B. Analysis

As a preliminary matter, the plaintiffs request the Court to summarily deny UCB's motion because the "Court concluded that it had personal jurisdiction over UCB based on four separate legal theories," yet UCB "has challenged only three of those theories." Pls.' Opp'n at 1.

Regardless of how this Court rules on UCB's challenge to the first three bases, the plaintiffs thus conclude, UCB will not be not be dismissed from the case because the unchallenged fourth basis would provide an independent ground for maintaining jurisdiction over UCB. Interlocutory appeal, on this theory, therefore would not materially advance this litigation. UCB replies that the Court's fourth, long-arm basis for exercising jurisdiction "necessarily depend[s]" on the other three grounds "because jurisdiction under any long-arm statute must comport with the requirements of federal due process." Def.'s Reply at 1. In other words, because UCB challenges the constitutionality of each basis for jurisdiction found by the Court, a reversal of the Court's holding with respect to the long-arm provisions underlying the fourth basis is superfluous.

The Court will not deny the motion on this preliminary ground. In its decision, the Court did recognize that "*Plaintiffs* contend[ed] that, *in addition to* the Clayton Act, the conspiracy theory, and the effects test, several forum states have *other provisions* in their long-arm statutes which would subject UCB S.A. to jurisdiction." 10/30/01 Mem. Op. at 28 (emphasis added); see Pls.' 5/15/01 Opp'n at 47. Had the Court made findings that "other" provisions in the relevant long-arm statutes authorized personal jurisdiction and that the exercise of such other provisions would comport with due process, then there may have been a separate and independent fourth basis for personal jurisdiction, as contended by the plaintiffs. But it did not do so. Rather, the Court's holding that various sections of the jurisdiction's long-arm statutes authorized personal jurisdiction and that exercising jurisdiction comports with due process was predicated upon one or more of its earlier findings with respect to control, the conspiracy theory, and the effects test. E.g., 10/30/01 Mem. Op. at 30 & n.27 (Georgia); id. at 32 (Minnesota); id. at 33, 34 (Missouri); id. at 35 (California). Therefore, the fourth basis discussed by the Court is inextricably

intertwined with the other three. If UCB could prevail in its quest to reverse the Court's holding with respect to the other three theories, therefore, the fourth would be inadequate on its own for maintaining jurisdiction over UCB.

The Court therefore must consider the purported questions of controlling law advanced by UCB. For the purposes of section 1292(b), a controlling question of law is "one that would require reversal if decided incorrectly or that could materially affect the course of the litigation with resulting savings of the court's or the parties' resources." Kirkland & Ellis, 1996 WL 674072, at *3 (citing Aristotle v. Johnson, No. 88C7919, 1989 WL 121210 (N.D. Ill. Oct. 3, 1989)). "[T]he kind of question best adapted to discretionary interlocutory review is a narrow question of pure law whose resolution will be completely dispositive of the litigation, either as a legal or practical matter, whichever way it goes." KPMG Peat Marwick, L.L.P. v. Estate of Nelco, Ltd., 250 B.R. 74, 78 (E.D. Va. 2000) (quoting Fannin v. CSX Transp. Inc., 873 F.2d 1438, 1989 WL 42583, *5 (4th Cir. 1989) (unpublished)); see also, e.g., Muller v. Temura Shipping Co., 629 F. Supp. 1024, 1028 (E.D. Pa. 1986) (refusing to certify a "ruling on [a] personal jurisdiction issue [that] was based on a fact-specific inquiry"); Speizman Knitting Mach. Co. v. Terrot Strickmaschinen GmbH, 505 F. Supp. 200, 202 (W.D.N.C. 1981) ("A question which requires a factual as well as legal decision is not suitable for interlocutory review.") (citing Johnson v. Alldredge, 488 F.2d 820, 822 (3rd Cir. 1973)).

UCB first claims that in finding sufficient control by UCB over its U.S. subsidiaries to attribute the business activities of the subsidiaries to the parent company for the purposes of section 12 of the Clayton Act, "the Court declined to address a fundamental legal issue UCB S.A. raised in its arguments— which law governs the question of control." Def.'s Mot. at 2-3. UCB

believes that Delaware law—the law of incorporation for its subsidiaries—should govern the issue and that under Delaware law the plaintiffs must show "fraud or injustice in the establishment of the subsidiaries" in order to pierce the veil of its corporate structure. Id. The plaintiffs did not show, and the Court did not address, the existence of fraud or injustice in the establishment of UCB's subsidiaries. In its view, therefore, the Court should certify the controlling question of whether Delaware should be applied to determine the issue of control.

Even assuming *arguendo* that the question proposed by UCB is controlling,¹ the Court

¹ UCB relies almost entirely upon a 1989 federal district court in asserting that under Delaware law, the plaintiffs must show fraud or injustice in the establishment of its subsidiaries. Mobil Oil Corp. v. Linear Films, Inc., 718 F. Supp. 260 (D. Del. 1989). In Mobil Oil, the court stated that "fraud or something like it is required" to support an alter ego theory of liability. Id. at 268. It further opined that "[t]he underlying cause of action does not supply the necessary fraud or injustice. To hold otherwise would render the fraud or injustice element meaningless, and would sanction bootstrapping." Id. However, the same court later clarified that "'no single factor could justify a decision to disregard the corporate entity, but that some combination of them was required, and that an overall element of injustice or unfairness must always be present, as well.'" Harper v. Del. Valley Broadcasters, Inc., 743 F. Supp. 1076, 1085 (D. Del. 1990) (quoting Harco Nat'l Ins. Co. v. Green Farms, Inc., No. 1131, 1989 WL 110537 (Del. Ch. Sep. 19, 1989)). It restated the applicable standard as follows: "'whether [the two entities] operated as a single economic entity such that it would be inequitable for this Court to uphold a legal distinction between them.'" Id. (quoting Mabon, Nugent & Co. v. Tex. Am. Energy Corp., No. 8576, 1990 WL 44267 (Del. Ch. Apr. 12, 1990)). This led the Second Circuit Court of Appeals—in a case cited multiple times and relied upon by UCB—to state clearly that "under Delaware law, the alter ego theory of liability *does not require any showing of fraud.*" Fletcher v. Atex, Inc., 68 F.3d 1451, 1457 (2d Cir. 1995) (emphasis added). As clarified by that court:

Thus, under an alter ego theory, there is no requirement of a showing of fraud. . . . To prevail on an alter ego claim under Delaware law, a plaintiff must show (1) that the parent and the subsidiary "operated as a single economic entity" and (2) that an "overall element of injustice or unfairness . . . [is] present."

Id. (quoting Harper, 743 F. Supp. at 1085). Even if it applied the Delaware cases cited by UCB, therefore, the Court is not convinced by UCB's claim that the Court must specifically find "the existence of fraud or injustice in the establishment of the UCB S.A.'s indirect U.S. subsidiaries." Def.'s Mot. at 3.

cannot find a substantial ground for difference of opinion concerning it. As this Court has previously stated, section 12 of the Clayton Act is "essentially a long-arm statute [that] permits service of process in a non-forum district, so long as the venue provision is met." Chrysler Corp. v. Gen. Motors Corp., 589 F. Supp. 1182, 1195 (D.D.C. 1984) (citing Frederick Cinema Corp. v. Interstate Theatres Corp., 413 F. Supp. 840, 841-42 n.1 (D.D.C. 1976)).² Authorization under the statute is therefore a question of federal, not state, law. See, e.g., United States v. Scophony Corp., 333 U.S. 795, 807, 814-15 (1948) (articulating applicable standards for "transacts business" language under section 12 of the Clayton Act); Campos v. Ticketmaster Corp., 140 F.3d 1166, 1173 (8th Cir. 1998) (reviewing federal cases and standards for determining whether parent corporation, through control over its subsidiary, was engaged in "transacting business" for purposes of venue provision of section 12); Chrysler Corp., 589 F. Supp. at 1200 (same); Tiger Trash v. Browning-Ferris Indus., Inc., 560 F.2d 818, 823-24 (7th Cir. 1977) (same). UCB cites no case holding that a court must apply state law in deciding whether to pierce the corporate veil for the purpose of exercising personal jurisdiction under section 12 of the Clayton Act. Instead, UCB relies upon several cases that are clearly distinguishable in this respect. See, e.g., Fletcher v. Atex, Inc., 68 F.3d 1451, 1456 (2d Cir. 1995) (not addressing personal jurisdiction under

² In full measure, section 12 of the Clayton Act provides:

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22. The pertinent question in this case is whether UCB "transacts business" in the relevant fora to satisfy the venue provision and to thus authorize personal jurisdiction.

section 12 of the Clayton Act); Kalb, Voorhis & Co., v. Am. Fin. Corp., 8 F.3d 130, 132-33 (same); Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc., 519 F.2d 634, 637 (8th Cir. 1975) (same); Sunrise Toyota, Ltd. v. Toyota Motor Co., 55 F.R.D. 519, 523-24, 528-31 (S.D.N.Y. 1972) (applying New York law to diversity claims, while applying "several different statutes [such as 15 U.S.C. § 22] embodying different *federal* standards of corporate presence" for federal antitrust claims) (emphasis added). Having cited not one case holding that courts must apply state law to pierce the corporate veil for the specific purposes of section 12 of the Clayton Act, UCB has failed to make the requisite showing of a substantial ground for difference of opinion respecting the purported question of law it advances. Of course, "[m]ere disagreement, even if vehement, with a court's ruling on a motion to dismiss does not establish a 'substantial ground for difference of opinion' sufficient to satisfy the statutory requirements for an interlocutory appeal." First Am. Corp., 948 F. Supp. at 1116; see also Kirkland & Ellis, 1996 WL 674072, at *4 ("Interlocutory review should not be used merely to provide a review of difficult rulings in hard cases."). Thus, the Court will deny the motion with respect to this question.³

Having concluded that UCB has failed to demonstrate a substantial ground for difference of opinion respecting the law applicable for determining personal jurisdiction under section 12 of

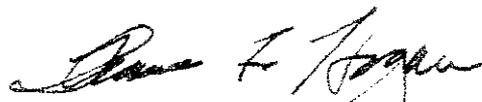
³ There is an additional problem, pertaining to materially advancing the ultimate termination of this litigation, with permitting interlocutory appeal of this question. Rather than a pure reversal resulting in the dismissal of UCB from this lawsuit, a favorable appeal by UCB would more likely result in a vacation and remand with instructions to make appropriate findings under Delaware law. Needless to say, such a decision would require reconsideration by this Court of the pertinent jurisdictional facts, and for the reasons noted above, see supra note 1, a conclusion in favor of UCB after such reconsideration is far from clear. Piecemeal appeal at this juncture would thus serve to further delay, rather than materially advance, the ultimate termination of this litigation.

the Clayton Act, the Court finds it unnecessary to address the other questions advanced by UCB. Because section 12 of the Clayton Act provides an independent basis for exercising personal jurisdiction in the relevant fora, and that issue will not be certified for appeal, the litigation in this case would proceed in substantially the same fashion regardless of a decision from the Court of Appeals concerning the conspiracy theory and effects test. Immediate interlocutory appeal of this Court's findings respecting the conspiracy theory and effects test therefore would not materially advance the ultimate termination of this litigation. The Court will thus deny UCB's motion as to these questions as well.

III. CONCLUSION

For the foregoing reasons, the Court does not find exceptional circumstances in this case sufficient to exempt it from the strong federal policy against piecemeal appeals and will accordingly deny the UCB's motion to amend and certify the order of October 30, 2001 for immediate appeal. An appropriate order will accompany this Memorandum Opinion.

January 16, 2002



Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:)
VITAMINS ANTITRUST LITIGATION)

) Misc. No. 99-0197 (TFH)

FILED

THIS DOCUMENT RELATES TO:)
ALL DIRECT ACTIONS,)

JAN 17 2002

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

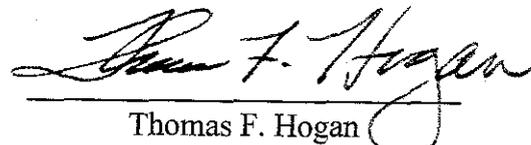
ORDER Re: Certification of October 30, 2001 Order

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that UCB's motion to amend and certify the order of October 30, 2001 for
immediate appeal is **DENIED**.

SO ORDERED.

January 16, 2002


Thomas F. Hogan
Chief Judge

21084