IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MITCHELL HEALTH TECHNOLOGIES, INC.,
RUSS MITCHELL and JAMES HIGGINS,

Plaintiffs,

OPINION AND ORDER

02-C-0439-C

v.

NATUREWELL, INC., f/k/a
LA JOLLA DIAGNOSTICS, INC.,

Defendant.

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This is a civil action for monetary and declaratory relief in which plaintiffs allege that defendant Naturewell, Inc., f/k/a La Jolla Diagnostics, Inc., (1) breached its marketing agreement with plaintiff Mitchell Health Technologies, Inc. and (2) failed to issue plaintiffs Russ Mitchell and James Higgins stock certificates without a restrictive legend that prohibits them from trading the stock.

Presently before the court are defendant's (1) motion to dismiss for lack of subject matter jurisdiction on the basis of a forum selection clause; (2) motion to transfer pursuant to 28 U.S.C. § 1404(a); (3) motion to dismiss portions of plaintiffs' complaint under Fed. R. Civ. P. 12(b)(6); and (4) motion to strike portions of plaintiffs' brief in response and

portions of William Skolnick's affidavit.

Because (1) the alleged forum selection clause is permissive; (2) defendant has not met its burden of showing that the transferee court is clearly more convenient; and (3) the disputed portions of plaintiffs' complaint state a claim upon which relief can be granted, I will deny defendant's two motions to dismiss and its motion to transfer. Because plaintiffs disclosed testimony covered by a confidential arbitration agreement, I will grant defendant's motion to strike those portions of plaintiffs' brief in opposition and William Skolnick's affidavit that refer to either James Arabia's prior deposition testimony or the arbitration agreement itself.

Before discussing the pending motions, I will take the opportunity to advise counsel for both sides that their pejorative comments about their opponents do not make their arguments any more persuasive.

For the sole purpose of deciding defendant's Rule 12(b)(6) motion, I accept as true plaintiffs' allegations their complaint.

ALLEGATIONS OF FACT

Plaintiff Mitchell Health Technologies, Inc. is a Wisconsin corporation with its principal place of business in Schofield, Wisconsin. Plaintiff Mitchell Health brokers and distributes health care products to wholesalers and retailers on behalf of manufacturers.

Plaintiff Russ Mitchell is president of Mitchell Health and a resident of Marathon County, Wisconsin. Plaintiff James Higgins is executive vice president of Mitchell Health and a resident of Marathon County, Wisconsin. Defendant is a Delaware corporation with its principal place of business in La Jolla, California. Defendant develops, manufactures and sells health care products nationwide and does business in Wisconsin.

On November 3, 2000, plaintiff Mitchell Health and defendant entered into a marketing agreement in which Mitchell Health would be the exclusive broker and distributor of two of defendant's products, MigraSpray and AllerSpray. Under the terms of the agreement, defendant was required to (1) grant plaintiff Mitchell Health exclusive representation of MigraSpray and AllerSpray in certain markets; (2) pay plaintiff Mitchell Health a commission equal to 10% of the net revenue from the sales of these sprays in these markets; (3) issue 1.5 million shares of common stock to plaintiff Mitchell Health; and (4) route all communications through plaintiff Mitchell Health. (The November 3 agreement does not contain a forum selection clause, an arbitration clause or a choice-of-law provision.)

In a supplementary agreement, defendant agreed to support plaintiff Mitchell Health's distribution efforts with an advertising budget of at least $1 million. Subsequent to the November 3 agreement, these two parties modified their agreement orally to (1) include another product, MigraDaily; (2) increase the overall commission rate to 10.5%; and (3) issue an additional 1.5 million shares of defendant's common stock to plaintiff Mitchell

Health. Defendant failed to act in accordance with the parties' agreements by failing to advertise the products as agreed; directing plaintiff Mitchell Health to suspend the solicitation of new orders temporarily because defendant allegedly did not have sufficient funds to manufacture the products; failing to maintain an adequate supply of currently dated inventory; declining the opportunity to place its products in certain retail stores because defendant either did not want to or could not pay fees that were a pre-condition to such placement; dropping MigraSpray from its product line; communicating directly with brokers and retailers; and failing to honor plaintiff Mitchell Health's exclusive representation by bypassing it with certain mass merchandising efforts.

To fulfill its stock obligation under the November 3 agreement, defendant issued 300,000 shares of its stock to plaintiff Higgins and 1.2 million shares to plaintiff Mitchell on January 17, 2001. Each share bears a restrictive legend. Plaintiffs Higgins and Mitchell cannot trade these shares until the restrictive legend is removed.

OPINION

A. Forum Selection Clause

Defendant contends that this court lacks "subject matter jurisdiction" because the May 1, 2002 contract contains a forum selection clause requiring the parties to litigate disputes in California. As a procedural matter, in the Seventh Circuit a forum selection

clause raises questions of venue, not subject matter jurisdiction. See Freitsch v. Refco, Inc., 56 F.3d 825, 830 (7th Cir. 1995) (motion to dismiss on basis of forum selection clause should be deemed brought under Rule 12(b)(3) (improper venue)). This is also true in the Ninth Circuit, the jurisdiction in which defendant's counsel practices. See Richard's v. Lloyd's of London, 135 F.3d 1289, 1292 (9th Cir. 1998). In any event, plaintiffs point out defendant's labeling error and construe defendant's argument as an objection to venue on the basis of the forum selection clause. Plaintiffs contend that venue is proper because (1) plaintiff Mitchell Health never entered into the May 1 contract that contains the forum selection clause at issue; and (2) even if the May 1 agreement were the operative contract, the forum selection clause in question is permissive, not mandatory.

The forum selection clause provides that "[Plaintiff Mitchell Health] irrevocably consents and agrees that any proceedings arising under this agreement *may* be brought in any state or any United States federal court located in the county of San Diego, California." (Emphasis added.) When interpreting a forum selection clause, a court must give effect to the plain meaning of the language used in the clause. See Paper Express Limited v. Pfankuch Maschinen, 972 F.2d 753, 756 (7th Cir. 1992) ("all disputes" coupled with "shall be" manifests intent to make venue compulsory). In this case, the permissive word "may" means that the parties are permitted to commence a lawsuit in the county of San Diego, California, but courts in that county do not have exclusive jurisdiction. See AAR International, Inc. v.

Nimelias Enterprises S. A., 250 F.3d 510, 525 (7th Cir. 2000) ("forum selection clause in the Lease agreement is permissive, not mandatory . . . it provides that suit *may* be brought in Illinois as well as other jurisdictions, but does not mandate that suit be brought exclusively in Illinois").

Defendant argues unpersuasively in its reply brief that because the arbitration clause (also found only in the disputed May 1 agreement) uses mandatory language ("all disputes . . . will be resolved by arbitration in San Diego, California"), this language somehow "harmonizes" with the forum selection clause. The arbitration clause provides that:

> except for claims for payment for Products sold and delivered, all disputes arising out of or relating to the Agreement or the parties' relationship . . . will be resolved by arbitration in San Diego, California . . . arbitrators will be empowered to award actual money damages, but will not be empowered to award specific performance, injunctive relief or other equitable relief.

Therefore, defendant argues, the forum selection and arbitration clauses "are not inconsistent with one another because [they] allowed [defendant] to file an injunctive action in a court of law . . . but directed all other disputes, such as this one, to arbitration in San Diego" and that "[a]ccordingly, [plaintiffs'] contentions relating to the permissive selection clause and subject matter jurisdiction have no merit." Dft.'s Reply, dkt. #14, at 8-9. This argument seems to imply two contentions: (1) defendant seeks to dismiss this lawsuit on the basis of the arbitration clause; and (2) because the arbitration clause is mandatory, so is the forum selection clause. As is evident, defendant's position is anything but clear. In any

event, to the extent that defendant is arguing that the arbitration clause's mandatory language renders the permissive language in the forum selection clause mandatory, I am unpersuaded. Simply put, the mandatory nature of another provision in the contract does not determine the nature of the forum selection clause. See Paper Express, 972 F.2d at 756. Accordingly, I will deny defendant's motion to dismiss on the basis of the alleged forum selection clause.

To the extent that defendant is arguing that the court should dismiss this action because of the arbitration clause, there are several glaring problems with defendant's off-hand reference to arbitration. First and foremost, it is unclear whether defendant is actually attempting to invoke arbitration. Second, even if that is what defendant is trying to do, it did not raise the possibility until it filed its reply brief. See United States v. Turner, 203 F.3d 1010, 1019 (7th Cir. 2000) (arguments raised for first time in reply brief are waived); James v. Sheahan, 137 F.3d 1003, 1008 (7th Cir. 1998) (same). Third, the proper procedure to invoke arbitration is a motion to stay proceedings pursuant to 9 U.S.C. § 3. For these reasons, I will not treat defendant's ambiguous remarks as an attempt to invoke arbitration. Nevertheless, if defendant is planning on invoking arbitration, two further comments are in order. First, although defendant has waived its arbitration argument for purposes of this motion to dismiss, it is unclear whether it has waived its alleged right to arbitrate forever. See generally Cabinetree of Wis. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388

(7th Cir. 1995) (discussing when waiver of right to arbitrate occurs). Second, although the arbitration clause provides that the arbitrators can award only monetary damages, it is unclear whether the clause requires claims for equitable relief to be litigated because the clause also provides that "all disputes" except those pertaining to product payments will be resolved through arbitration.

B. Section 1404(a) Transfer

Defendant's motion to dismiss for "improper venue" is confusing because the caption of the motion is inconsistent with the substance of the argument. In the caption of its brief, defendant labels its motion as one to dismiss for improper venue. However, in the body of the brief, defendant argues exclusively for transfer to the Southern District of California pursuant to 28 U.S.C. § 1404(a). Defendant should be aware that courts give effect to the substance of a document, not its caption. See Gleash v. Yuswak, 308 F.3d 758, 761 (7th Cir. 2002); see also Smith v. Barry, 502 U.S. 244, (1992) (appellate brief may be treated as notice of appeal if it contains all matters essential to notice of appeal). Therefore, because defendant makes no arguments suggesting venue is improper, I will treat its motion as one to transfer pursuant to § 1404(a) and not as a motion to dismiss for improper venue.

Before a court weighs the appropriate factors to determine whether to transfer a case under § 1404(a), it must conclude that (1) venue is proper in the transferor district and (2)

the transferee district is one in which the action could have been brought. See Coffey, 796 F.2d at 219. Because defendant failed to raise venue or personal jurisdiction in its motion to dismiss, it has waived its right to challenge these aspects of jurisdiction. See Fed. R. Civ. P. 12(b) and 12(h)(1). Accordingly, jurisdiction is proper in this court. Venue also would have been proper in the Southern District of California because defendant's principal place of business is in La Jolla, California. See 28 U.S.C. § 1391(a). Therefore, the question is whether transfer of this case is warranted.

In a motion to transfer brought pursuant to 28 U.S.C. § 1404(a), the moving party bears the burden of establishing that the transferee forum is "clearly more convenient." Coffey, 796 F.2d at 219-20. In weighing the motion, a court must decide whether the transfer serves the convenience of the parties and witnesses and will promote the interest of justice. See 28 U.S.C. 1404(a); Coffey, 796 F.2d at 219-20; see also Roberts & Schaefer Co. v. Merit Contracting, Inc., 99 F.3d 248, 254 (7th Cir. 1996) (question is whether plaintiff's interest in choosing forum is outweighed by either convenience concerns of parties and witnesses or interest of justice). The court should view these factors as placeholders among a broader set of considerations and evaluate them in light of all the circumstances of the case. See Coffey, 796 F.2d at 219 n.3. Such broader considerations include the situs of material events, ease of access to sources of proof and plaintiff's choice of forum. See Harley-Davidson, Inc. v. Columbia Tristar Home Video, Inc., 851 F. Supp 1265, 1269 (E.D.

Wis. 1994); Kinney v. Anchorlock Corp., 736 F. Supp. 818, 829 (N.D. Ill.1990)

Defendant argues that the Southern District of California is more convenient because (1) it plans to sue plaintiff Mitchell for breach of fiduciary duty in California; (2) a judge located in California would be able to interpret California law more easily than a judge located in Wisconsin; (3) this case is about the "internal workings" of defendant, a California-based corporation; and (4) defendant's employees, executives and board of directors will be the primary witnesses in this case.

1. Plaintiffs' choice of forum

Plaintiffs' choice of forum is entitled to great deference and should not be set aside lightly. See Piper Aircraft v. Reyno, 454 U.S. 235, 255 (1981); see also Chicago, Rock Island & Pacific R.R. v. Igoe, 220 F.2d 299, 302 (7th Cir. 1955). Plaintiffs chose to bring this case in the district court for the Western District of Wisconsin and each plaintiff resides in Wisconsin. Therefore, this factor weighs heavily in favor of plaintiffs.

2. Convenience of parties

Defendant has not shown that it would be clearly more convenient for it to litigate this case in California. Instead, defendant asserts in a conclusory fashion that this case is about the "internal workings" of defendant and that "everything about this transaction was

California-based other than Russ Mitchell's physical location." I am unpersuaded by this argument. The record in this case indicates that the controversy revolves around which contract is the operative agreement embodying the parties' obligations. Moreover, plaintiffs have indicated that their witnesses would have to travel if trial were held in California. Shifting the inconvenience from one party to the other does not justify a transfer. See Heller Financial, Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1293 (7th Cir. 1989). Accordingly, this factor weighs in favor of plaintiffs.

3. Convenience of witnesses

Defendant asserts that it will call "Arabia, Connor, Belice, Brucker and other employees and other board members" as witnesses. Although defendant fails to tell the court where these individuals reside, it appears that they reside in California because they work for defendant. In any event, most of plaintiffs' prospective witnesses will have to travel whether this action is located in Wisconsin or California. Accordingly, this factor weighs slightly in favor of defendant.

4. Interest of justice

The final factor considered is whether the transfer will serve the interest of justice. The "interest of justice" includes such concerns as trying related litigation together, having

a judge who is familiar with the applicable law try the case and insuring speedy trials. See Coffey, 796 F. 2d at 221; see also Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 30 (1988) (interest of justice embraces public-interest factors of systemic integrity and fairness, rather than private interests of litigants and their witnesses).

a. Related litigation

Defendant argues that judicial economy requires this case to be transferred because it "plans" to file a lawsuit in the Southern District of California. Although this tidbit might be of some interest to someone, to this court defendant's intentions are nothing more than speculation. Even if defendant were to file a suit in California, it would post-date this cause of action and, thus, would not weigh in favor of transfer. See Federal Electric Products Co. v. Frank Adam Electric Co., 100 F. Supp. 8 (S.D.N.Y. 1951) (where plaintiff's action in original forum pre-dates defendant's action in transferee court, suits may be consolidated only if there are other grounds for transfer). Moreover, as plaintiffs point out, defendant is free to file a counterclaim in this action. Because there is no related litigation, this factor is irrelevant.

b. Speedy trial

Defendant has failed to suggest how the administration of justice would be improved

if this case were transferred to California. According to the latest Federal Court Management Statistics prepared by the Administrative Office of the U.S. Courts, the docket in the Western District of Wisconsin is far less congested than the docket in the Southern District of California. For the period ending September 30, 2001, civil litigants in the Western District of Wisconsin could expect to go to trial in 8 months, whereas in the Southern District of California, the median time from filing to trial was 24 months. This factor weighs in favor of plaintiffs.

c. Familiarity with applicable law

In a diversity action, it is advantageous to try a case with a federal judge who is familiar with the applicable state law. See Coffey, 796 F.2d at 221. Defendant argues that a federal court located in California is better equipped to decide California law. However, defendant simply assumes that California law will apply and fails to provide any choice-of-law analysis. Without a meaningful analysis of the choice-of-law issue, it is impossible to determine which state's law would apply. Nevertheless, I need not resolve this issue. Although it is highly likely that a federal court sitting in California is more familiar with California law and, in that same vein, a federal court sitting in Wisconsin is more familiar with Wisconsin law, federal courts are often called upon to decide substantive legal questions involving the laws of various states. See Brandon Apparel Group, Inc. v. Quitman

Manufacturing Co., 42 F. Supp. 2d 821, 835 (N.D. Ill. 1999). The issues in this case are not beyond the bounds of either court's ability. Accordingly, this factor is in equipoise.

In sum, defendant has not met its burden of establishing that the transferee forum is clearly more convenient. See Coffey, 796 F.2d at 219-20. Only the convenience of witnesses factor weighs in favor of defendant and it tilts only slightly in its favor. All other factors weigh in favor of plaintiffs, including plaintiffs' choice of forum, which is entitled to great deference. Accordingly, defendant's motion to transfer pursuant to 28 U.S.C. § 1404(a) will be denied.

C. Failure to State a Claim

A claim will not be dismissed under Fed. R. Civ. P. 12(b)(6) unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). The standard is based on the concept of notice pleading, which requires that every complaint contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Notice pleading does not require a plaintiff to plead facts supporting each element of a cause of action. See Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994) ("At this stage the plaintiff receives the benefit of

imagination, so long as the hypotheses are consistent with the complaint.").

Plaintiffs pleaded in their complaint that defendant breached the contract and supplementary oral agreements in a number of different ways, including by (1) failing to advertise the products as agreed; (2) directing plaintiff Mitchell Health to temporarily suspend the solicitation of new orders; (3) failing to maintain an adequate supply of currently dated inventory; (4) declining to place products in certain retail stores; and (5) dropping MigraSpray from its product line. See Plts.' Cpt., dkt. #2, at ¶¶ 14, 20.

Defendant argues first that claims (2) through (5) fail to state a claim upon which relief can be granted because according to plaintiffs' earlier allegations neither the November 3 contract nor the alleged oral supplemental agreement covered these issues. Although plaintiffs alleged early in their complaint that the parties agreed to certain things, these allegations do not limit plaintiff's later, additional allegations that the contract was breached in other ways as well. Moreover, each of these four claims states a claim upon which relief can be granted in and of itself. See Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998) (pleading "I was turned down for a job because of my race" is enough to state a claim for employment discrimination); see also McCormick v. City of Chicago, 230 F.3d 319, 326 (7th Cir. 2000). These allegations state a claim upon which relief can be granted and are not inconsistent with plaintiffs' earlier allegations.

As to claim (1), the alleged advertising agreement, plaintiffs pleaded in their

complaint that the parties supplemented the November 3 agreement orally when defendant agreed to support plaintiff Mitchell Health's efforts with an advertising budget of at least $1 million. Defendant argues that this claim should be dismissed because plaintiffs fails to allege when the oral agreement was made, provide any details as to who made the agreement or recount any events surrounding the agreement. Thus, defendant argues, it is "beyond comprehension for this court to believe that a promise to spend one million dollars in advertising would have been given to Mitchell but not memorialized in the contract of November 3, 2000." However, defendant misconstrues the nature of a Rule 12(b)(6) motion. At the motion to dismiss stage, it is inappropriate to weigh plaintiffs' credibility or their ability to prevail. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) ("issue is not whether plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims"). In fact, in determining whether to grant a motion to dismiss, the court is required to accept plaintiffs' factual allegations as true and draw all reasonable inferences in plaintiffs' favor. See Harrell v. Cook, 169 F.3d 428, 431 (7th Cir. 1999). A complaint does not fail to state a claim merely because it does not set forth a complete or convincing picture of the alleged wrongdoing. See Bennett, 153 F.3d at 518; McCormick, 230 F.3d at 325. Plaintiffs need not describe the details of the alleged oral agreement in their complaint. Instead, defendant can seek that information during discovery. Accordingly, defendant's motion to dismiss for failure to state a claim will be denied.

C. Motion to Strike

Defendant moves to strike under Rule 12(f) portions of plaintiffs' brief in opposition and portions of William Skolnick's affidavit because it cites confidential deposition testimony taken in another dispute that had been settled by arbitration. See Fed. R. Civ. P. 12(f) ("court may order stricken from any pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter"). Although defendant does not inform the court how this information is redundant, immaterial, impertinent or scandalous so as to fall within Rule 12(f), it nevertheless argues that divulging James Arabia's deposition testimony violates the terms of a confidential arbitration agreement it had with Dr. Stephen Roberts, an individual not a party to this litigation. The connection is that Roberts and plaintiffs share the same counsel, William Skolnick and Rolin Cargill. Defendant's arbitration agreement with Roberts provides that:

> The parties agree that they will keep all materials generated in the litigation and arbitration . . . in strict confidence and will refrain from providing such materials to any third party, except that each party may disclose such information to the extent compelled to do so by a lawful subpoena or court order. The parties agree that this provision shall apply to their respective lawyers, employees and agents. For purposes of this paragraph the term "materials" include, without limitation, deposition transcripts, correspondent between the Parties and/or their attorneys, documents produced in discovery and interrogatory responses.

Instead of moving for an order compelling the disclosure of Arabia's deposition testimony as the agreement explicitly provides, plaintiffs' counsel took it upon themselves

to disclose that testimony in plaintiffs' brief in opposition even though they were aware of the terms of the agreement. Proceeding in this manner does counsel no credit. Although plaintiffs' counsel state that they had a duty under the Standards of Professional Conduct for the Seventh Circuit to disclose Arabia's allegedly false testimony, they could have fulfilled their alleged duty by moving for an order to compel disclosure. Had they taken the higher ground, they would have stayed within the terms of the Roberts arbitration agreement and provided all parties the opportunity to present their version of events to this court. (Defendant asserts that Arabia's testimony is consistent because at the time of Arabia's earlier deposition, he was under the impression that even if a contract had been negotiated fully, it would be unenforceable unless it was signed. However, Arabia is now aware that an unsigned contract may be enforceable under the "agreement-implied-by-conduct" theory allegedly articulated by the Court of Appeals for the Seventh Circuit in Roberts & Schaeffer Co. v. Merit Contracting, Inc., 99 F.3d 248 (7th Cir. 1996).) In any event, I will grant defendant's motion to strike those portions of plaintiffs' brief in opposition and William Skolnick's affidavit that refer to either Arabia's prior deposition testimony or the arbitration agreement itself.

ORDER

IT IS ORDERED that

1. Defendant Naturewell, Inc., f/k/a La Jolla Diagnostics, Inc.'s motion to dismiss on the basis of a forum selection clause is DENIED;

2. Defendant's motion to transfer pursuant to 28 U.S.C. § 1404(a) is DENIED;

3. Defendant's motion to dismiss portions of plaintiffs' complaint under Fed. R. Civ. P. 12(b)(6) is DENIED; and

4. Defendant's motion to strike is GRANTED; those portions of plaintiffs' brief in opposition and William Skolnick's affidavit that refer to either James Arabia's prior deposition testimony or the arbitration agreement itself are STRICKEN;

Entered this 2nd day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge