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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – ESSEX COUNTY
DOCKET NUMBER ESX-L-1583-06

BIOVAIL CORPORATION and BIOVAIL PHARMACEUTICALS, LLC (formerly known as BIOVAIL PHARMACEUTICALS, INC.),	)	
	)	Civil Action
Plaintiffs,	)	
vs.	)	
	)	OPINION
S.A.C. CAPITAL MANAGEMENT, LLC, S.A.C. CAPITAL ADVISORS, LLC, S.A.C. CAPITAL ASSOCIATES, LLC, S.A.C. HEALTHCO FUNDS, LLC, SIGMACAPITAL MANAGEMENT, LLC, TIMOTHY MCCARTHY, GRADIENT ANALYTICS, INC. (formerly known as CAMELBACK RESEARCH ALLIANCE, INC.),	)	
Defendants.	)	

Decided: August 20, 2009

Nancy E. Delaney and T. Barry Kingham, for Plaintiffs Biovail Corporation and Biovail Pharmaceuticals, LLC (formerly known as Biovail Pharmaceuticals, Inc.) (Curtis, Mallet-Prevost, Colt & Mosle, Attorneys; Mr. Kingham, Ms. Delaney, Dora Straus and Timothy N. McCabe on the briefs).

Gregory B. Reilly, Martin Klotz, and Daniel J. Kramer for Defendants S.A.C. Capital Management, LLC, S.A.C. Capital Advisors, LLC, S.A.C. Capital Associates, LLC, S.A.C. Healthco Fund, LLC and Sigma Capital Management, LLC (McCarter & English, LLP, Lowenstein Sandler, PC, Willkie Farr & Gallagher LLP, Paul, Weiss, Rifkind, Wharton & Garrison LLP, attorneys; Mr. Reilly, Mr. Klotz, Mr. Kramer, Andrew T. Berry, and Joseph T. Boccassini on the briefs).

Michael O. Kassak for Defendants, Gradient Analytics, Inc. and Camelback Research Alliance, Inc. (White and Williams LLP, attorneys; Mr. Kassak, and Edward M. Koch on the briefs).

Theresa M. Trzaskoma for Defendant Timothy McCarthy (Drinker Biddle & Reath LLP and Brune & Richard LLP, attorneys; Ms. Trzaskoma, James M. Altieri, Matthew J. Fedor, Susan E. Brune, and Paul N. Lekas on the briefs).

GOLDMAN, J.S.C.

Overview

This case arises from allegations by the Biovail Corporation ("Biovail") and Biovail Pharmaceuticals, LLC ("BPLLC") that S.A.C. Capital Management, LLC ("Management"); S.A.C. Capital Advisors ("Advisors"); S.A.C. Capital Associates ("Associates"); S.A.C. Healthco Funds, LLC ("Healthco"); Sigma Capital Management ("Sigma") (collectively, "S.A.C. Defendants"); Timothy McCarthy (formerly a Healthco employee) ("McCarthy"); and Gradient Analytics, Inc. (formerly known as Camelback Research Alliance, Inc.) ("Gradient/Camelback") acted in concert to deliberately injure Biovail by committing trade libel, thus forcing a dramatic decrease in the price of Biovail shares. In short, Biovail alleges that the S.A.C. Defendants, in a conspiracy with Gradient/Camelback, engaged in a short-selling scheme involving Biovail shares. The allegation is that the S.A.C. Defendants led Gradient/Camelback to knowingly write false reports about Biovail, and that the S.A.C. Defendants subsequently manipulated the release date of these reports in order to affect the price of Biovail shares.

Biovail is Canada's largest publicly held pharmaceutical company. It specializes in the development, manufacture, and marketing of pharmaceutical products. Biovail operates facilities in Canada and the United States, with its corporate headquarters in Ontario, Canada. BPLLC, a wholly owned subsidiary and marketing arm of Biovail, is a Delaware limited liability company headquartered in New Jersey. Biovail stock is traded on the New York Stock Exchange ("NYSE") and the Toronto Stock Exchange ("TSX").

The S.A.C. Defendants, directly or indirectly, manage, advise or operate various hedge funds or are hedge funds themselves. Management is incorporated in Delaware, and has its principal places of business in New York, New York, and in Connecticut. Associates and

Healthco are incorporated in the British West Indies and have offices in New York. Advisors is incorporated in Delaware, with its principal place of business in Connecticut. McCarthy, a Healthco employee, lives and works in New York; he owns no property in New Jersey and has no other significant New Jersey contacts. Gradient/Camelback is an Arizona corporation with its principal place of business in Scottsdale, Arizona. Gradient/Camelback also employed two individuals with separate home offices in New Jersey in 2004.

Biovail alleges that, in Spring 2003, the S.A.C. Defendants conspired to drive down the price of Biovail stock. According to the proposed second amended complaint, the S.A.C. Defendants sold Biovail shares short. Short-selling is the selling of shares that have been borrowed from a third party at current market prices. The hope is that the price of the shares will decline so that the shares of stock can be repurchased for a much lower price and then returned to the lender. The short-seller hopes to profit from a decline in the price of the stock by paying less to repurchase the shares than it received on selling them. There is nothing illegal or wrong about short-selling, and it can actually make the market more efficient and liquid. By facilitating transactions of those who believe the shares will go down in price, the valuation of shares in the market can be more accurate. Further, the theory is that more stable or solvent companies will be less subjected to short-selling, as their shares would not be subject to the price fluctuations from which a short-seller derives profit; thus, short-selling, it has been argued, may serve to weed out inferior business structures.

That is what happened here as the short-sales were followed closely by a precipitous decline in the market value of Biovail shares. Once the Biovail shares were sufficiently devalued, the S.A.C. Defendants purchased the shares and returned them. Biovail alleges that the S.A.C. Defendants guaranteed profits by conspiring with Gradient/Camelback to issue false and misleading reports about Biovail, specifically with reference to Biovail's viability, accounting and business practices, and its research and development, to artificially depress the price of its stock, thus enabling the S.A.C. Defendants to repurchase the stocks sold at a significantly lower price.

To issue these reports, the S.A.C. Defendants engaged Gradient/Camelback, a third-party in the business of conducting supposedly independent equity research for investors. The S.A.C. Defendants then supplied false reports about Biovail to Gradient/Camelback. According to Biovail, the Gradient/Camelback reports were not the product of Gradient/Camelback's independent research. Instead, Biovail claims that Gradient/Camelback acted as a gun for hire, aggressively disseminating negative views of Biovail written by and at the behest of the S.A.C. Defendants. Gradient/Camelback's reports were allegedly "ghost-written" by McCarthy, and the timing of their release was dictated by the S.A.C. Defendants. These reports were provided to Biovail's largest shareholders as well as various financial media outlets and journalists.

When the reports were initially released in early June 2003, Biovail stock was enjoying a fifty-two week high, trading in excess of $50 per share, and some analysts projected a price of $60 per share for 2004. However, shortly following the release of the reports, Biovail stock dropped steadily, eventually reaching $18 per share. Biovail alleges that this drop in price was caused by Gradient/Camelback's false reports.

The S.A.C. Defendants, Gradient/Camelback and McCarthy contend that the collapse of Biovail's stock price was a direct result of Biovail's own improprieties, which Gradient/Camelback rightfully reported upon. As proof of Biovail's misconduct, defendants point to the settlement, earlier this year, in which Biovail agreed to pay $138 million to settle a civil case and consented to a $10 million penalty for "chronic fraudulent conduct" in which

"Biovail's executives repeatedly overstated earnings and hid losses in order to deceive investors." Biovail also pled guilty to criminal charges and was directed to pay a $24.6 million fine.

Procedural History

To better understand the procedural history of this case it is important to be aware of other related cases. Prior to, and during the course of, this litigation, Biovail has been engaged in a number of other legal matters concerning securities issues. In re Biovail Securities Litigation, docket no. 03-CV-8917, was a consolidated class action that sought damages from Biovail for its illegal practices in an action in the Southern District of New York and assigned to Judge Richard Owen. In re Biovail Securities Litigation eventually settled in 2009 with Biovail paying $138 million, after having been transferred to Judge Gerard Lynch.

Beginning in November 2003, thirteen (13) class action lawsuits, later consolidated, were brought by shareholders against Biovail for violating Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. The complaints alleged that the drop in Biovail's stock price between July 2003 and March 2004 was caused by Biovail's material misrepresentations or omissions in its financial statements, public statements, or S.E.C. filings. The complaints also alleged that insider trading in violation of securities law occurred.

Simultaneous to the inception of the class action suits, Biovail was also under investigation by the U.S. Department of Justice and the Security Exchange Commission ("SEC"), as well as other U.S. and Canadian regulatory authorities, for the possible use of illegal marketing practices and the inflation of Biovail's share price before the 2003 decline. As part of its defense to those charges, in 2005, Biovail subpoenaed records of Bank of America Securities subject to a protective confidentiality order entered by Judge Owen dated April 29, 2005.

On February 22, 2006, Biovail initiated the present action, raising claims under the New Jersey Racketeering Influenced and Corrupt Organizations Act, N.J.S.A. 2C:41-1 et seq. ("RICO"). The initial complaint in this action alleged that the S.A.C. Defendants falsely accused Biovail of inflating the company's earnings reports and misrepresenting the overall health of the enterprise to deceive shareholders. The case was removed to federal court immediately after filing in 2006, but was remanded back to state court by Judge Stanley R. Chesler in January 2007. Shortly after the filing of the present complaint, certain Biovail shareholders (under the guidance of Biovail counsel) also filed a complaint in the matter of Del Guidice v. S.A.C. Capital Management, LLC (hereafter "Del Guidice"). Del Guidice was brought in the District Court of New Jersey and assigned to Judge Chesler. The Del Guidice complaint was virtually identical to the original complaint in this case except that it added an additional count alleging violations of federal securities law. Almost immediately following remand, Judge Chesler, pursuant to the Securities Litigation Uniform Standards Act (SLUSA), stayed all discovery in state court until he could decide anticipated motions to dismiss the Del Guidice matter. This stay left this case in limbo for years.

As noted above, in 2005, in In re Biovail Securities Litigation, Biovail had subpoenaed certain records of Bank of America Securities and had obtained those records subject to a protective confidentiality order. What happened in this regard is taken from the opinion rendered by Judge Chesler on February 19, 2009. The documents obtained in accordance with that subpoena and subject to a protective confidentiality order were wrongfully used to draft the complaints in both this case and Del Guidice in direct violation of the protective confidentiality order.[1] As recited in Judge Chesler's opinion, the conduct of counsel for Biovail (not Biovail's present counsel) was quite improper in many respects. In fact, the conduct of counsel and the plaintiffs was so egregious that Judge Chesler, in a motion filed by the defendants under F.R.C.P. 11, took the extraordinary step of dismissing the Del Guidice complaint in its entirety. Judge Chesler also opined that Biovail's theory of wrongdoing was "incompatible with admission of guilt in a kickback scheme that the Del Guidice complaint accuses defendants of falsely reporting and with Biovail's admissions, in connection with the settlement of the SEC enforcement action, of making false statements that inflated its stock price." With the dismissal of the Del Guidice action, the SLUSA stay that Judge Chesler had imposed evaporated, having been based on the pendency of the Del Guidice action.

In April 2009, after the SLUSA stay was lifted, Biovail was faced with numerous motions that had been filed under R. 1:4-8 in 2007, claiming that the complaint alleging a New Jersey RICO conspiracy was frivolous. Biovail, represented by new counsel, agreed that it would withdraw those claims but substitute for them a cause of action using a new theory. In so doing, Biovail also agreed that it would drop a number of former defendants from any new claims. In order to expedite proceedings for this lawsuit which was now quite old (having first been removed to federal court and then after remand having been subjected to a SLUSA stay), I allowed Biovail to file a motion to amend its complaint to allege a new cause of action and, at the same time, allowed the defendants to file motions to dismiss this new cause of action for failure to state a cause of action under R. 4:6-2(e), as well as motions to dismiss on jurisdictional

[1] The amended complaint under review in this motion has been purged of references to any protected materials.

grounds. The understanding was that if I determined that the newly pled cause of action did not state a claim, the entire lawsuit would be dismissed with prejudice.

While the newly pled cause of action generally asserts the same facts as the original complaint, it now alleges that these facts give rise to a cause of action called "trade libel." In New Jersey this cause of action is also called "product disparagement" or "injurious falsehood." The amended complaint also alleges a conspiracy between Gradient/Camelback and the S.A.C. Defendants.

The pending motions before me are as follows:

1. Biovail's motion to amend the complaint. All defendants concede that the only basis for opposition to that motion is their motion to dismiss any such amended complaint under R. 4:6-2(e) for its failure to state a cause of action; and
2. Motions to dismiss on grounds of lack of personal jurisdiction by all defendants except for Sigma, which concedes personal jurisdiction.

Oral Argument and Post-Argument Briefing

Following the submission of extensive briefs, oral argument occurred on July 10, 2009. Based upon oral argument and the extensive briefing, some of the issues were refined and some new issues were raised. As will be discussed later, the defendants' primary argument on the claim of failure to state a claim was based on the theory that Biovail failed to properly plead special damages, a special pleading requirement for the tort of trade libel. The parties extensively briefed and argued the elements of this cause of action in New Jersey and argued the relevancy of cases from other jurisdictions. At oral argument, however, I, sua sponte, raised the issue of choice of law, that is which jurisdiction's law applied. I allowed new briefing on this issue and have since been the beneficiary of this new briefing. I also asked counsel to brief the issue of the history of and rationale for the special damage requirement.

In a complete turnabout, all parties now concede that, after having spent months briefing and arguing about the requirements in New Jersey for the tort of trade libel, New Jersey law does not apply at all. The parties now argue that either New York law or Ontario, Canada law applies. In the alternative, Biovail claims that if Ontario law does not apply, New Jersey law should apply because its subsidiary, BPLLC, currently has its principal place of business in New Jersey, having moved to New Jersey in November 2003, shortly after the commission of the alleged trade libel.

In addition, at oral argument, Biovail conceded that its sole claim for damages, including special damages was the drop in its share price as the alleged result of the S.A.C. Defendants short-selling scheme. Biovail admits that it has no evidence that this drop in share price caused it to be denied access to credit markets, that any specific proposed borrowing was refused or had its terms altered, or that any specific proposed stock offering or any other identifiable financial transaction was adversely affected by the drop in the price of its shares. It indicated that if offered the opportunity to further amend it pleadings to allege a more specific form of special damages, it could not and would not do so.

With respect to the issue of jurisdiction, while it is most common for jurisdiction in a tort action to be based on specific as opposed to general jurisdiction, Biovail conceded that its theory of jurisdiction was solely based on general jurisdiction and that there was no claim based on specific jurisdiction. Again, I raised the issue at oral argument, not briefed by the parties in their original submissions, as to the period of time properly examined for the purposes of determining general jurisdiction. Supplemental briefing has resulted in apparent agreement that general jurisdiction contacts should be considered "over a reasonable period of time" and "up to and including the date the suit was filed." This period of time is agreed to be from 2000 to 2006. With these preliminary matters explained, I will discuss the merits of the motion.

Biovail seeks to amend its complaint pursuant to R. 4:9-1. In the proposed complaint, Biovail raises two claims. First, Biovail asserts that Gradient/Camelback committed trade libel by knowingly publishing injurious and false reports about Biovail with the intention of causing Biovail's stock to fall in price. Biovail alleges that the publicized reports disparaged its business model and future viability, which discouraged investors from purchasing Biovail stock. Biovail stock drastically fell in price causing alleged damages in excess of $100 million.

Biovail's second claim is for civil conspiracy. On the civil conspiracy count, Biovail alleges that the S.A.C. Defendants conspired with Gradient/Camelback to commit trade libel and disparagement. According to Biovail, each defendant participated in the production of false and misleading reports about Biovail, with the shared goal of causing the price of Biovail stock to fall.

Defendant's Claim that Plaintiffs Fail to State a Claim, R. 4:6-2(e)

In their efforts to demonstrate that Biovail has failed to state a claim pursuant to R. 4:6-2(e), all defendants argue two primary grounds: 1) that Biovail has failed to plead a claim within the scope of trade libel, as trade libel concerns statements about a product or service, and not about a company's business model or health; and 2) that Biovail failed to adequately plead special damages, an essential element to the tort of trade libel. Concerning the scope of trade libel, defendants argue that the proposed amended complaint abandons the original factual assertion in the earlier complaint that defendants had disseminated "false information concerning new Biovail drugs and products" to allege instead that the reports contained injurious assertions such as "Biovail's increased dependence on lower quality sources of revenue, negative cash flows, [and] earnings overstated by nonrecurring gains." Because Biovail has abandoned any claim about actionable statements concerning Biovail's goods or services, defendants iterate that trade libel cannot be pled unless the alleged false statements were made about Biovail's products or services; thus, the comments about Biovail's business strategies fail to state a cause of action.

To support the contention that no special damages have been pled, the defendants also emphasize that there is no precedent for pleading a decrease in its share price as special damages. Rather, defendants contend that this injury was sustained, if at all, by Biovail's shareholders, and not by Biovail itself. In fact, the proposed complaint alleges no specific special injury: no lost contract, no lost sales, and no specific decline in volume of business. The injury sustained is phrased as a "curtailed . . . ability to raise and maintain capital," and Biovail's inability to "use its stock as currency for transactions requiring share transfer as consideration." Nevertheless, Biovail admits that it can point to no specific loan, stock offering, product sale, curtailment of its ability to raise capital or use its shares as consideration, transaction involving its shares, or any other similar specific transaction. In other words, Biovail alleges no injury except for the dramatic drop in the price of its stock and its general effect on Biovail.

In fact, at oral argument, I asked counsel for the S.A.C. Defendants:

> if the allegation were that the diminishment in price affected their ability to obtain financing, their ability to engage in business with third parties, their ability to obtain financing from banks, their ability to engage in business relationships with third parties

would that state a claim for special damages? Counsel admitted that it would. I also asked Biovail counsel if Biovail might further amend their complaint to allege specific instances in which Biovail was denied financing, was unable to raise capital, or was inhibited in its relationships with third parties, because, if so, there would be no issue as to special damages, and the motion would be denied. Notwithstanding this opportunity, Biovail counsel said that they could not do so.[2]

Moreover, defendants argue that Biovail's allegations fail to draw a direct causal link between defendants' conduct and these injuries, alleging instead that the injuries resulted from a collapse of Biovail share price in the second half of 2003 that is not solely attributable to defendants. This argument is largely based upon the same set of facts that led Judge Chesler to conclude that Biovail's theory of wrongdoing was "incompatible with admission of guilt in a kickback scheme that the Del Guidice complaint accuses defendants of falsely reporting and with Biovail's admissions, in connection with the settlement of the SEC enforcement action, of making false statements that inflated its stock price." In other words, the defendants say that Biovail cannot prove that the alleged short-selling scheme caused the stock to fall in price when Biovail's false statements prior to the decline had actually caused the stock price to be artificially inflated.[3]

Additionally, all defendants contend that since the civil conspiracy claim relies on the defective trade libel claim, it too fails. Biovail does not argue that the conspiracy can survive even if the trade libel claim fails. Its only opposition is that, "[b]ecause, as set forth above, plaintiffs adequately plead their claim for trade libel, plaintiffs' civil conspiracy claim stands as well." Thus, Biovail agrees that one is dependent on the other.

Choice of Law

As an initial matter, the parties' disagreement over the choice of substantive law must be addressed. As explained earlier, the parties' initial briefs and oral argument focused on New

[2] These are claims that would be within Biovail's current knowledge and not require any discovery.

[3] While this argument may be a powerful one at trial, because it brings in fact outside the four corners of the complaint, it cannot be considered in this R. 4:6-2(e) motion.

Jersey law. At oral argument, I asked counsel why New Jersey law should apply because much of the argument of counsel dealt with cases from many other jurisdictions and how their law compared to New Jersey law.

Now, based upon post-argument briefing, all defendants urge me to apply New York law, while Biovail now argues for the application of Canadian law on the basis of Biovail's residence in Ontario, Canada. Based on the facts of the case, New York, New Jersey, and Ontario are the potential sources of law to be applied. In determining the choice of law, the Court has recently abandoned the "governmental interest" test and adopted in its place the "substantial relationship" test as enunciated in the Restatement (Second) of Conflict of Laws. P.V. ex rel. T.V. v. Camp Jaycee, 197 N.J. 132, 136 (2008). The "substantial relationship" test presumes that in a tort action the law of the place of injury should govern, unless another state has a more significant relationship to the parties or issues. Id. at 143.

In cases of defamation and injurious falsehood, the Restatement (Second) of Conflict of Laws generally recommends the state where the injured corporation has its principal place of business, if the matter complained of has been published in that state. Restatement (Second) of Conflicts of Law §150. However, if the offending communications "are done in a state other than that of the plaintiff's [principal place of business] and when the matter complained of is published in the state of the plaintiff's [principal place of business] and in one or more other states to which the plaintiff has a substantial relationship," § 150 allows for the application of the law of another state, so long as it "is the state where the defamatory communication caused plaintiff the greatest injury to his reputation." Ibid.

The test begins by examining whether any conflict exists between the applicable laws of the interested states. Veazay v. Doremus, 103 N.J. 244, 248 (1986). As will be discussed in more detail later, the parties agree that New York maintains a much stricter requirement that special damages be pled than New Jersey. Where a conflict is found, the presumptive choice — locus of the injury — is tested against the contacts enumerated in Restatement (Second) of Conflicts of Law § 145. The contacts to be weighed in a tort case such as this are:

1. The place where the injury occurred,
2. The place where the conduct causing the injury occurred,
3. The domicile, residence, nationality, place of incorporation and place of business of the parties, and
4. The place where the relationship, if any, between the parties is centered.

Examining the facts of this case, it is apparent from the outset that the alleged injury primarily occurred in New York, as Biovail's shares were mostly traded on the NYSE. Although Biovail stock is traded on both the NYSE and TSX, the volume of NYSE trades is significantly greater (by a magnitude of 3.25 in 2003, the year of the injury) than the volume of trades on the TSX.[4] The only injury Biovail alleges is to the price of its stock. Biovail does not allege any specific harm in the nature of lost or more difficult financing or the like to its business activities in Canada or elsewhere. Further, Biovail claims that the alleged libelous publication was initially drafted by McCarthy, a New York resident. Conversely, no link to New Jersey has been demonstrated concerning either the place of injury or actions taken within New Jersey leading to such alleged injuries. As to the Restatement (Second) of Conflict of Laws factor of the residence of the "parties," only New York is relevant to all the parties. The S.A.C. Defendants largely

[4] Compare *Big Chart – Interactive Chart, Biovail Shares Traded on NYSE* http://bigcharts.marketwatch.com/interchart/interchart.asp?symb=BVF&time=&freq=13 (accessed August 12, 2009) to *Big Chart – Interactive Chart, Biovail Shares Traded on CA* http://bigcharts.marketwatch.com/interchart/interchart.asp?symb=CA%3ABVF&time=13 (accessed August 12, 2009).

conduct their business in New York, and, significantly, McCarthy, who is dubbed the "principal actor" in the scheme, worked in New York. With respect to the place of incorporation, multiple jurisdictions are implicated. Biovail claims to be located in Ontario, Canada and New Jersey, but its stock is listed primarily on the NYSE, in New York, and Biovail does not deny doing some business in New York. While defendants are scattered across a number of states including New York, Arizona, Connecticut and the Caribbean, all have some business dealings in New York. Moreover, as defendants point out, four of the named defendants – Management, Healthco, Sigma, and McCarthy – reside or have principal places of business in New York. As such, the record supports a finding that New York law should be applied and not New Jersey law.

Concerning the conflict between New York and Ontario law, Biovail, citing to § 150 of the Restatement (Second) of Conflict of Laws, claims that the "injury occurred in Ontario, its principal place of business, where its reputation was most affected." Id. at § 150. Section 150 instructs that the law of a corporation's principal place of business should be considered the venue of the injury in a defamation case "if the matter complained of was published there." Ibid. While only one of the two plaintiffs are situated in Canada (BPLLC being a Delaware corporation), four of the seven defendants are actually located in New York and all parties do some level of business in New York. Further, Biovail has alleged no loss of business opportunities, such as refused loan applications, failed financing opportunities, or failed stock issuances; rather, it claims damages only for the devaluation of Biovail stock.

Fighting against the potential applicability of New York law, Biovail argues that if Ontario law is not applicable, New Jersey law should apply choice because BPLLC, the "marketing arm" of Biovail, is located in Bridgewater, New Jersey. The gravamen of this argument is that the injury to Biovail's reputation curtailed BPLLC's ability to market the company's products within New Jersey (although BPLLC was designed to market Biovail's products all over the United States, including New York, and was not limited to marketing Biovail products in New Jersey). This argument is easily refuted by Biovail's own admission in its supplemental memorandum that "damages in this case are centered upon the decline in market value of the Biovail parent's stock, not the subsidiary." Moreover, as previously discussed, Biovail has refused to avail itself of every opportunity to identify a specific instance in which its financing ability, sales, or ability to raise capital was injured. Biovail has steadfastly chosen to have its case rise or fall on the viability of the drop in price of its stock on the NYSE and TSX as the sole element of special damages.

In sum, the effects of Biovail's only pled injury (the drop in price of Biovail stock) were much more pronounced in New York than in Ontario. Because of this, and because most of the defendants are situated in New York (making it also the most likely staging grounds for the alleged misconduct), I shall utilize New York law in this matter.

The Proposed Amendment

Having determined that New York law is the proper substantive law for this matter, I shall now proceed to determine the appropriateness of amendment.[5] R. 4:9-1 establishes when a party might amend its complaint:

> A party may amend any pleading as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is to be served, and the action has not been placed upon the trial calendar, at any time within 90 days after it is served. Thereafter a party may amend a pleading only by written consent of the adverse party or by leave of court which shall be freely given in the interest of justice.

[5] No party has disputed that New Jersey procedural law should apply.

Leave to amend is generally granted without consideration of the ultimate merits of the amendments. R. 4:9-1. The rules contemplate broad power of amendment at any stage of the proceedings. However, I have discretion to deny a motion to amend in the interest of justice. Hansen v. Hansen, 339 N.J. Super. 128 (App. Div. 2001); Zacharias v. Whatman PLC, 345 N.J. Super. 218 (App. Div. 2001), certif. denied, 171 N.J. (2002). A trial court may properly deny a leave to amend if it is satisfied that the new claim is not sustainable as a matter of law. Malone v. Aramark Servs., 334 N.J. Super. 669 (Law Div. 2000) (holding that former employee was not permitted to amend complaint to add claim when the proposed claim was not recognized by New Jersey law); Ctr. 48 L.P. v. May Dept. Stores Co., 355 N.J. Super. 390 (App. Div. 2002) (denying defendant's motion for leave to amend as issues raised in proposed amendment had already been considered and rejected on plaintiff's motion for summary judgment).

R. 4:6-2(e) permits the defendant to seek to dismiss a complaint for the failure to state a claim:

> Every defense, legal or equitable, in law or in fact, to a claim for relief in any complaint, counter-claim, cross-claim or third party complaint shall be asserted in the answer thereto, except that the following defenses may at the option of the pleader be made by motion, with briefs . . . (e) failure to state a claim upon which relief can be granted.

Printing Mart-Morristown v. Sharp Electronics, 116 N.J. 739 (1989), establishes the standard for a motion to dismiss for failure to state a claim: the complaint must be thoroughly examined with liberality to determine whether a cause of action can be reasonably discerned on the face of the pleadings. At this early stage of the litigation, I am not concerned with Biovail's ability to prove its allegations but rather the sufficiency of the alleged facts on the face of the complaint. Fazilat v. Feldstein, 180 N.J. 74, 78 (2004); Decker v. Bally's Grand Hotel Casino, 280 N.J. Super. 217

(App. Div.), certif. den. 136 N.J. 297 (1994) (finding that proper consideration is the facial sufficiency of the complaints alleged).

The motion to dismiss for failure to state a claim is granted in the "rarest of instances," and without prejudice, as every reasonable inference is accorded to the plaintiff, especially when discovery is pending. NCP Litig. Trust v. KPMG LLP, 187 N.J. 353, 365 (2006); Banco Popular N. Am. v. Gandi, 184 N.J. 161,165-66 (2005); Smith v. SBC Communs. Inc., 178 N.J. 265, 282 (2004).

The Trade Libel Cause of Action

The first cause of action in the proposed complaint is for trade libel. Trade libel, also known as product or commercial disparagement or injurious falsehood, is an action to recover for words or conduct tending to disparage or negatively reflect upon the condition, value or quality of a product or property. The elements of a common law trade libel or product disparagement claim are: (1) falsity of the statement, (2) publication to a third person, (3) malice (express or implied), and (4) proven special damages. Gucci Am., Inc. v. Duty Free Apparel, Ltd., 277 F. Supp. 2d 269, 276 (S.D.N.Y. 2003); Waste Distillation Tech., Inc., v. Blasland & Bouck Eng'rs, P.C., 523 N.Y.S.2d 875, 877 (N.Y. App. Div. 1988); Angio-Medical Corp. v. Eli Lilly & Co., 720 F. Supp. 269 (S.D.N.Y. 1989).[6]

"A party alleging trade libel must establish that the communication was a substantial factor in inducing others not to conduct business with it and, unlike libel per se, must adduce proof of special damages in the form of lost dealings." Sandler v. Simoes, 609 F. Supp. 2d 293, 303 (E.D.N.Y. 2009), (citing Waste Distillation Tech., Inc. v. Blasland & Bouck Eng'rs, P.C.,

[6] New Jersey law requires the same elements be pled. See Patel v. Soriano, 369 N.J. Super. 192 (App. Div.), certif. den. 182 N.J. 141 (2004); New Jersey Auto. Ins. Plan v. Sciarra, 103 F. Supp. 2d 388, 409 (D.N.J. 1998).

523 N.Y.S.2d 875, 877 (N.Y. App. Div.1988)). The communication must be made to third parties and play a material part in inducing others to not deal with plaintiff. Penn Warranty Corp. v. DiGiovanni, 810 N.Y.S.2d 807, 813 (N.Y. Sup. Ct. 2005); see also Enriquez v. West New Jersey Health Sys., 342 N.J. Super. 501, 524 (App. Div.), certif. den. 170 N.J. 211 (2001) (citing Prosser & Keeton on Torts §128 at 967). Like defamation, trade libel is defeated by a showing that the published statements are substantially true. Newport Serv. & Leasing v. Meadowbrook Distrib. Corp., 794 N.Y.S.2d 426 (N.Y. App. Div. 2005). Language which merely disparages a product is not actionable unless special damages are pled and it appears that such damages are a natural and immediate consequence of the disparaging statements. Angio-Medical Corp., supra, 720 F. Supp. at 274 (citing Drug Research Corp. v. Curtis Pub. Co., 166 N.E.2d 319 (N.Y. 1960)); see also Mayflower Transit, L.L.C. v. Prince, 314 F. Supp. 2d 362 (D.N.J. 2004).

Trade libel claims, variously referred to as "product defamation," "product disparagement," and "slander of goods," are often confused with personal defamation claims. See generally Prosser & Keeton of Torts § 128 (5th ed. 1984). Due to this confusion, a series of cases have addressed the distinctions between the elements of these causes of action under New York law.[7] See, e.g. El Meson Espanol v. NYM Corp., 521 F. 2d. 737, 739 (2d Cir. 1975); Harwood Pharmacal Co. v. National Broadcasting Co., 174 N.E.2d 602 (N.Y. 1961); Marlin Firearms Co. v. Shields, 64 N.E. 163 (N.Y. 1902). Ruder & Finn, Inc. v. Seaboard Sur. Co., 422 N.E.2d 518 (N.Y. 1981) summarized the aforementioned cases thus:

> Although defamation and disparagement in the commercial context are allied in that the gravamen of both are falsehoods published to third parties, there is a distinction. Where a statement impugns the basic integrity or credit-worthiness of a business, an action for

[7] Dairy Stores, Inc. v. Sentinel Pub. Co., 104 N.J. 125, 133 (1986) discusses the differences between the two under New Jersey law; the analysis is much the same.

> defamation lies and injury is conclusively presumed. Where, however, the statement is confined to denigrating the quality of the business' goods or services, it could support an action for disparagement, but will do so only if malice and special damages are proven.

[Id. at 522 (internal citations omitted).]

Trade libel "sometimes overlap[s]" with defamation; however, they "stem from different branches of tort law." Dairy Stores, Inc. v. Sentinel Pub. Co., 104 N.J. 125, 133 (1986). "While in most situations the two torts may overlap, they are not only conceptually distinct but, more importantly, provide relief for different kinds of injury." Fred T. Magaziner, Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation, 75 Colum. L. Rev. 963, 969 (1975).[8] While defamation affords a remedy for damage to one's reputation, trade libel "is an offshoot of the cause of action for interference with contractual relations, such as sales to a prospective buyer." Dairy Stores, supra, 104 N.J. at 133 (citing Restatement (Second) of Torts § 559, § 623 comment g (1965)). "The two causes may merge when a disparaging statement about a product reflects on the reputation of the business that made, distributed, or sold it." Ibid. However, "[i]n general, a defamatory statement about a corporation will primarily affect its ability to buy goods and services, while a disparaging statement about its products will affect its ability to sell goods and services." Magaziner, supra, 75 Colum. L. Rev. at 970 (emphasis in original). Stated otherwise, "[t]he tort of slander of title [defamation] is almost identical to the tort of product disparagement, the only difference being that the former tort involves aspersing the quality of one's title to property and the latter tort involves aspersing the quality of one's property." Wendy's of South Jersey, Inc. v. Blanchard

[8] This law review article was cited extensively in Dairy Stores, Inc. supra.

Management Corp., 170 N.J. Super. 491, 494 (Ch. Div. 1979) (citing System Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1140-41 (3d Cir. 1977)).

It is noteworthy that "[t]he use of brand names [and subsidiaries] insulates the corporation from its products and lessens the possible impact of a defamatory allegation." Magaziner, supra, 75 Colum. L. Rev. at 970. For example, where a defamatory statement is made about Altria, the brand name of Marlboro insulates the impact of that defamatory statement as there is a lessened likelihood that the public will boycott sales of such a company, or even be aware of a connection between the two. Conversely, "[b]rand names . . . provide no protection in cases of disparagement." Ibid. Thus, the line between defamation and trade libel becomes all the more defined: a claim for defamation directly injures a corporation's reputation, but a claim for trade libel may be directed at the product or service while leaving the corporation's reputation unharmed, as a brand name for the good or service may serve to insulate or distance the corporation's reputation from the good.

"In order to prove defamation, a plaintiff must establish, in addition to damages, that the defendant (1) made a defamatory statement of fact (2) concerning the plaintiff (3) which was false, and (4) which was communicated to a person or persons other than the plaintiff." Pisani v. Staten Island Univ. Hosp., 440 F. Supp. 2d 168, 171 (E.D.N.Y. 2006); Celle v. Filipino Reporter Enters., 209 F.3d 163 (2d Cir. 2000). Further, a plaintiff must show fault as either negligence or actual malice. Ibid.

> One who publishes defamatory matter concerning a corporation is subject to liability to it
>
> (a) if the corporation is one for profit, and the matter tends to prejudice it in the conduct of its business or to deter others from dealing with it, or

> (b) if, although not for profit, it depends upon financial support from the public, and the matter tends to interfere with its activities by prejudicing it in public estimation.

[Restatement (Second) of Torts § 561.]

Where a plaintiff has alleged a libelous statement, and damages claimed have amounted to a general diminution in stock prices, courts have previously found that this amounts to a claim of defamation, and not of trade libel. For instance, in Biospherics, Inc. v. Forbes, Inc., 989 F. Supp. 748 (D. Md. 1997), aff'd 151 F.3d 180 (4th Cir. 1998), the plaintiff corporation sued for a diminution in the value of its shares as a result of allegedly false statements. The depreciation in stock price due to false reports about the company was held to amount to defamation, as opposed to trade libel.

History of the Special Damages Requirement

Given the parties dispute over the meaning of special damages, I thought it made sense to try to know the history and purpose of the requirement because that might assist in understanding its meaning. At oral argument I asked the parties to submit supplemental briefing on that issue. Counsel have kindly provided me with thorough explanations of the history and purpose of this requirement.

The requirement for pecuniary or "special" damages in the defamation context can be traced back to the "ancient divisions between ecclesiastical [courts] and the King's courts. Ecclesiastical courts had jurisdiction over spiritual matters and the King's Court over temporal matters. Defamation without temporal losses was a sin to be punished in the church courts." Rocci v. Ecole Secondaire Macdonald-Cartier, 165 N.J. 149, 161 (2000) (O'Hern, dissenting). Beginning in the sixteenth century, in order to reduce a "flood" of such cases emerging in the secular courts, restrictions on claims for defamation were imposed. As Prosser explains:

> [A]ctions for defamation developed according to no particular aim or plan. Originally the common law courts took no jurisdiction, leaving defamatory utterances to be dealt with by the local seigniorial courts. When these began to fall into decay, the ecclesiastical courts stepped in, regarding defamation as a sin, and punishing it with penance. As these courts in turn lost their power, there was in the sixteenth century a slow infiltration of tort actions for slander into the common law courts. For a considerable length of time there were conflicts over jurisdiction between the two sets of tribunals, which led the common law courts to hold that unless "temporal" damage could be proved, defamation was a "spiritual" matter which should be left to the Church. When the common law jurisdiction was once established, an unexpected flood of actions was let loose upon the judges, who seem to have been annoyed and dismayed by it, and so proceeded to hedge the remedy about with rigid restrictions, some of which survive.
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> * * *
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> The reluctance with which the common law courts at first received the action of slander, and their fear of invading the province of ecclesiastical law, led them to hold that the action would not lie without proof of "temporal" damage. From this there developed the rule that slander, in general, is not actionable unless actual damage is proved. To this the courts very early established certain specific exceptions: the imputation of crime, of a loathsome disease, and those affecting the plaintiff in his business, trade, profession, office or calling-which required no proof of damage. The exact origin of these exceptions is in some doubt, but probably it was nothing more unusual than a recognition that by their nature such words were especially likely to cause pecuniary, or "temporal," rather than "spiritual" loss.

[Prosser and Keeton on Torts, § 112 at 772, 788 (5th ed.1984)]

Given the separation between secular and ecclesiastical courts, pleading special damages led to a jurisdictional difference. Plaintiffs could avoid ecclesiastical courts by pleading special damages so that they could obtain money damages. Soon, however, "[t]he doctrine of special damages, which originally served the function of establishing the jurisdiction of temporal courts, became a means of weeding out claims where no real damage had been done . . . ." J.M. Balkin, Too Good To Be True: The Positive Economic Theory of Law, 87 Colum. L. Rev. 1447, 1488 (1987).

Today, there is no need to allege special damages for the four categories of slander per se. These categories apply "when the false statements (1) charge commission of a crime, (2) impute certain loathsome diseases, (3) affect a person in his business, trade, profession or office, or (4) impute unchastity to a woman." Ward v. Zelikovsky, 263 N.J. Super. 497, 503 (App. Div. 1993), rev'd on other grounds, 136 N.J. 516 (1994). No proof of damage is required because "historically, some types of statements were held to 'clearly "sound to the disreputation" of the plaintiff,' making them 'defamatory on their face and actionable per se.'" Id. at 540 (internal citations omitted). Otherwise, a plaintiff is required to allege and prove special damages with respect to the defamatory statement, i.e. "harm of a material or pecuniary nature," or the "loss of something having economic or pecuniary value." Ward, supra, 136 N.J. at 540. Thus, the historical origin of the special damages requirement leads to the rule, still applicable today, that to succeed in an action for defamation other than slander per se, a plaintiff must demonstrate "actual harm to reputation through the production of concrete proof," i.e. special damages. Ward, supra, 136 N.J. at 540.

From this generally agreed upon historical perspective the parties take divergent paths. Biovail refers to Prosser who suggests that, as an historical matter, the damages claimed for trade libel consisted of loss of prospective contracts with the plaintiff's customers or loss of specific sales to identified customers. Prosser and Keeton On Torts § 128 at 972 (5th ed. 1984). Biovail also suggests that Prosser says that the "modern tendency" is away from such a rule, and that special damages need not be so narrowly or arbitrarily framed. Id. at 972-73. Biovail also cites Harper, James and Gray on Torts Vol. 2, § 6.1 at 318 n.25 (3d ed. 2006). Biovail argues that special damage requirement "is probably an echo from an earlier era when the merchant knew his customers personally." Ibid. "Such a rule appears ill suited to an age when business is often conducted on a national basis and mass media of communication make possible disparagement on a national scale." Ibid.

Defendants take another view. They explain that when law courts allowed jurisdiction, the volume of such cases proliferated. Acquittal of criminal charges allowed the defendant to sue the witnesses and the grand jury for defamation in ecclesiastical courts. Traditionally, only religious remedies were available and such suits were not frequent, but once money damages were available, the incentive for such suits increased.

Common law courts, therefore, adopted mechanisms to limit claims. The defendants explain that among those mechanisms was the requirement that plaintiffs were "required to allege and prove a precise connection between the defamatory words and the damages suffered." Colin Rhys Lovell, The "Reception" of Defamation by the Common Law, 15 Vand. L. Rev. 1051, 1066 (1962). Defendants, thus, argue that the purpose of the special damages requirement was to "stem the flow of slander cases into the royal courts, [or] to avoid providing relief for trivial, commonplace injuries" citing John Bruce Lewis and Gregory V. Mersol, Opinion and Rhetorical Hyperbole in Workplace Defamation Actions, 52 DePaul L. Rev. 19, 23 (2002).

Another factor to consider is that trade libel is a form of speech and thus First Amendment considerations apply. Of course, New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726; 11 L. Ed. 2d 686, 706 (1964), held that libel claims brought by public officials are only constitutional when the statements at issue are alleged to have been made with "actual malice." That same requirement of malice also applies to trade libel. Thus, trade libel claims must be evaluated under the First Amendment constitutional standards of New York Times Co. v. Sullivan and its progeny. See Compuware Corp. v. Moody's Investors Servs., 499 F.3d 520, 530 (6th Cir. 2007); Unelko Corp. v. Rooney, 912 F.2d 1049, 1058 (9th Cir. 1990), cert. denied, 499 U.S. 961, 111 S. Ct. 1586, 113 L. Ed. 2d 650 (1991); Hofmann Co. v. E. I. Du Pont de Nemours & Co., 248 Cal. Rptr. 384, 387 (Cal. Ct. of App. 1988). Malice may be hard to prove but it is easy to allege.[9] This requirement of malice makes trade libel a disfavored tort. 10 Wright & Miller, Federal Practice and Procedure § 2730, 590 (1973) explains: "[a]ctions that involve questions of malice often are disfavored torts; that is especially true of those that threaten the free exercise of important rights such as speech and press."

Analysis

The elements of a common law trade libel claim are: (1) falsity of the statement, (2) publication to a third person, (3) malice (express or implied), and (4) proven special damages. In the present action, there is no dispute that Biovail has alleged the second and third elements for a cause of action for trade libel or product disparagement. The second prong of a trade libel claim requires a showing that the defamatory statements were made to a third party. Penn Warranty Corp., supra, 810 N.Y.S.2d at 813. There is no dispute that the allegedly false reports were publicized and disseminated by Gradient/Camelback as Biovail has pled. Biovail must also plead "malice" in a trade libel case; this has been satisfied in the proposed complaint, as Biovail claims that Gradient/Camelback reproduced and disseminated the allegedly false reports maliciously and with reckless disregard for the truth. While all the defendants cite Judge Chesler's opinion to suggest that the alleged trade libel, in large part, turns out to be true, for the purpose of this opinion, I assume that these prongs have been satisfied.

[9] Requiring proof of malice does not thwart frivolous actions at the pleading stage. "The proof of 'actual malice' calls a defendant's state of mind into question, and does not readily lend itself to summary disposition. Hutchinson v. Proxmire, 443 U.S. 111, 120, 99 S. Ct. 2675, 2680; 61 L. Ed. 2d 411, 442 (1979).

Here, of course, Biovail has ample allegations of malice. That is what its allegations of the so-called short-selling scheme are all about.[10] In fact, Biovail claims in its supplemental brief that the special damage requirement should not apply here because "the disparagement was part of a sophisticated short-selling scheme designed to injure a corporation's reputation and cause its share price to drop, thereby allowing the defendants to reap financial gains." But the special damage requirement has nothing to do with malice.

While the second prong (publication) and the third prong (malice) have been pled sufficiently, the adequacy of the proof of the first and fourth prongs is hotly disputed. In a trade libel claim, a plaintiff needs to first demonstrate that defendant made statements "derogatory to the plaintiff's property or business, of a kind designed to prevent others from dealing with him or otherwise to interfere with plaintiff's relations with others." Gucci Am., Inc., supra, 277 F. Supp. 2d at 276; Waste Distillation, supra, 523 N.Y.S.2d at 877; see also Patel, supra, 369 N.J. Super. at 246-47 (citing Prosser & Keeton on Torts § 128 at 967 (5th ed.1984)); Henry V. Vaccaro Constr. Co. v. A.J. De Pace, Inc., 137 N.J. Super. 512, 514 (Law Div. 1975). Traditionally, trade libel has referred to the interference by a defendant with business relations or potential business relations between a plaintiff and a third party; the disparagement has traditionally focused on statements concerning items sold by a plaintiff. Magaziner, supra, 75 Colum. L. Rev. at 970. Previous courts in other jurisdictions have also found that statements concerning a corporation's viability or reputation are best considered defamation as opposed to trade libel. See, e.g., Biospherics, Inc., supra, 989 F. Supp. 748 (permitting a claim of defamation where the plaintiff

[10] The profits made by the S.A.C. Defendants on the short-selling scheme are not the claimed damages in this trade libel action. This is different than an action for alleged tortious interference with contract where the disgorgement of ill-gotten profits may be proper. Zippertubing Co. v. Teleflex, Inc., 757 F.2d 1401, 1411 (3d Cir. 1985).

alleged a diminution in the value of its stock prices resulting from allegedly defamatory statements of the defendant). In ¶ 47 of the proposed complaint, Biovail lists seventeen (17) points of error found within the six reports co-authored by the S.A.C. and Gradient/Camelback defendants. Such statements include, among others:

1. that Biovail's "strategy to transform the company into a fully-integrated pharmaceutical firm" might be "unraveling" and "running out of steam" because "revenue growth slowed dramatically in 2002 as a result of declining product sales";

2. that Biovail's newly launched Cardizem LA[11] would face "strong competition from other products in the Cardizem family (i.e. CD, SR and XL)";

3. that Biovail's research and development commitment and expenditure were severely declining, and that such expenditures lagged behind their peers;

4. that Biovail's product revenues were decreasing;

5. that Biovail had a history of "aggressive accounting" involving profit shifting between financial periods, and that Biovail had manipulated its earnings;

6. that Biovail was experiencing "severely negative free cash flow"; and

7. that there was a high likelihood of "product . . . write down[s]."

In examining the trade libel alleged against Biovail, it is apparent that the statements concern the business practices of Biovail and the viability of the company, as opposed to a specific product or service offered by Biovail. The statements are mainly comments doubting the future viability of the corporation, the adequacy of its capitalization, and its revenues; no statement refers to a specific product created, manufactured or sold by Biovail or to a service offered by Biovail to customers, other than to mention that Cardizem LA would face strong

[11] Biovail's long acting version of the generic drug diltiazem.

competition from other drugs. The Cardizem statement, however, makes no statement as to the quality of Cardizem LA, but only references that a competitive market exists. The alleged statements by the S.A.C. Defendants and Gradient/Camelback do not comport with the traditional form of trade libel. Rather, these statements reflect upon the reputation of Biovail — its viability, the competency of its directors and officers, its methods and practices — while avoiding statements reflecting upon goods or services supplied by Biovail.

While Patel indicates that trade libel is broad enough to include statements concerning the plaintiff's business, trade libel "[g]enerally . . . has been applied to statements that are injurious to plaintiff's business, but cast no reflection on either plaintiff's person or property." Patel, supra, 369 N.J. Super. at 246-47. However, trade libel only goes to comments regarding an actual product or service of a company, and statements that "attack the personal character of its owner as vendor" are in actuality defamation. Id. at 247 (quoting Restatement (Second) of Torts § 626 comment d (1977)). Gradient/Camelback's statements refer to Biovail's character, i.e. that it is undercapitalized and dubiously managed, and not to any product, such as one of the myriad of pharmaceuticals produced by Biovail. Examining the law above, the alleged statements are properly pled as an action in defamation, and not one for trade libel. The statements refer to the conducting or character of business, the integrity of the business, and its viability; there is not a single disparaging statement about a product sold or service offered by Biovail. As such, Biovail has failed to present a prima facie case for trade libel, but rather pled statements that would suffice for a cause of action couched in defamation.[12]

Biovail's proposed amended complaint suffers with regards to the pleading of special damages. All relevant courts — New York, New Jersey, and Canada — require plaintiffs to

[12] The statute of limitations has long run in every jurisdiction for a claim for defamation.

plead special damages in a claim for product disparagement. “Special damages go to the cause of action itself . . . . The necessary showing is specific: plaintiff must establish pecuniary loss that has been realized or liquidated.” Patel, supra, 369 N.J. Super. at 248; Waste Distillation, supra, 523 N.Y.S.2d at 877. A plaintiff’s inability to establish material or pecuniary injury resulting from defendant’s conduct has proven fatal to trade libel claims. Angio-Medical Corp., supra, 720 F. Supp. at 274 (holding that attorney’s fees and executive time standing alone do not comprise special damages); Arista Records, Inc. v. Flea World Inc., 356 F. Supp. 2d 411, 428 (D.N.J. 2005) (dismissing defendant’s trade libel counterclaim because claims that “[d]efendants were "damaged" and that the statements "curtail[ed] legitimate business" is simply not sufficient” as special damages); Lysko v. Braley, 79 O.R. (3d) 721, 762 (Ont. [Canada] Court of Appeal Rep. 2006) (“[w]hile the appellant claims special damages for injurious falsehood, he has not particularized the actual damages.”).

Even if Canadian Law were applicable, it would be unlikely to help Biovail. Biovail claims that its trade libel claim would fall under Ontario’s Libel and Slander Act, R.S.O. 1990, c. L. 12, § 17 which would excuse Biovail’s failure to plead special damages. But Biovail has not pled this statutory cause of action and has failed to satisfy the statute of limitations for a statutory trade libel action in Canada. Canada's Limitations Act of 2002, which became effective on January 1, 2004, subjects statutory claims to a two-year statute of limitations, unless otherwise specified. Because Biovail has waited three years to advance this statutory claim, it would likely be found time-barred. The “discovery rule” does not apply to a trade libel action, because, by its nature, it accrues when published and the damaging impact of trade libel is felt immediately. It certainly was here. Once a party knows that it has been injured, it can easily file a timely lawsuit and use fictitious names to identify culprits whose names are unknown. See generally, Francis

M. Dougherty, Annotation, Limitation of Actions: Time of Discovery of Defamation as Determining Accrual of Action, 35 A.L.R.4th 1002 (2009).

Biovail originally relied on New Jersey law which it claims permits an alternative to pleading special damages, permitting the pleading of a "general diminution in business" when a plaintiff is unable to meet the particularity standard of special damages.[13] While I have held New York law, which does not provide for this alternative, applies, for the purposes of a thorough decision, I will examine the issue of general diminution. In Mayflower Transit, L.L.C. v. Prince, supra, 314 F. Supp. 2d at 378, Judge Linares held that a plaintiff must "allege either the loss of particular customers by name, or a general diminution in its business . . . ." A properly pled trade libel claim predicated on a general diminution in business must show "an established business, the amount of sales preceding and subsequent to the publication at issue, facts connecting the amount of the business decline, and facts showing that the decline was a natural result of the defendant's wrongful conduct." Ibid. While the proposed complaint does allege that Biovail was "deprived of market capitalization, which in turn depressed its business opportunities and reputation," in lieu of itemizing particular sales lost, Biovail failed to pair the "general diminution" plea with the requisite facts concerning its inability to plead special damages. Biovail's pleadings fail to pass muster under New Jersey's more liberal standards and certainly fail under New York's more exacting standards. Mayflower Transit dismissed the plaintiff's trade libel claim because the complaint merely recited that the business was "inevitably damage[d]" by the derogatory publications about plaintiff posted on defendant's website. Mayflower Transit, supra, 314 F. Supp. 2d at 379. Similarly, the Second Circuit found the

[13] This "relaxed" requirement for special damages, which does not exist in New York, may be another reason why this claim was brought in a New Jersey court.

plaintiff's statement that the alleged defamatory statement "has greatly injured [the company] in its reputation and has lost many sales of said blades" to be legally "insufficient if the rule requiring proof of special damage to establish disparagement of title really means anything . . . ." Eversharp, Inc. v. Pal Blade Co., 182 F.2d 779, 782 (2d Cir. 1950). To the extent that Biovail may attempt to avail itself of the "general diminution" alternative pleading standard, the proposed complaint remains deficient as New York courts are not tolerant of conjectures even when general diminution is being pled.

New York courts have adhered strictly to the special damages requirement for pleading trade libel. Angio-Medical Corp., supra, 720 F. Supp. at 274 (finding that special damages requirement can be obviated only where plaintiff proves per se libel or defamation). "Special damages must be fully and accurately stated. If the special damage was a loss of customers the persons who ceased to be customers, or who refused to purchase, must be named. If they are not named, no cause of action is stated." Drug Research Corp., v. Curtis Publishing Co., supra, 199 N.Y.S.2d at 38 (citing Reporters' Ass'n. of America v. Sun Printing & Publishing Ass'n., 79 N.E. 710 (1906)); DiSanto v. Forsyth, 684 N.Y.S. 2d 628 (N.Y. App. Div. 1999) (holding that special damages are a critical element of the trade libel tort and must be pleaded with sufficient specificity); Freihofer v. Hearst Corp., 480 N.E. 2d 349 (N.Y. 1985) (dismissing plaintiff's cause of action in the absence of sufficient allegation of special damages); Nyack Hosp. v. Empire Blue Cross & Blue Shield, 677 N.Y.S. 2d 485 (N.Y. App. Div. 1998) (holding general allegations of damages do not satisfy the special damages requirement). Where a party has pled a loss of business, New York still requires a pleading of specific injury. See Eversharp, supra, 182 F.2d at 781 (holding that plaintiff "[must specify] what sales of blades were lost through the alleged defamatory words or why details concerning special damages could not be given").

Biovail cites Hermispherx Biopharma, Inc. v. Asensio, 1999 WL 144109, 1999 U.S. Dist. LEXIS 2849 (E.D. Pa March 15, 1999) (unpublished) as a factually analogous case where the plaintiff pled a dramatic drop in share price to satisfy the "general diminution in business" requirement. Hermispherx Biopharma claimed to be a victim of a short-selling conspiracy by third party analysts who falsely misrepresented the state of its business affairs causing the drop in the price of its stock. The complaint, much like the instant proposed complaint, asserted that Hermespherx's market capitalization declined by more than $300 million. The trial judge relied upon KBT Corp., Inc. v. Ceridian Corp., 966 F. Supp. 369, 375 (E.D. Pa. 1997), which had held that if a plaintiff could not identify a specific lost customer or sale it could allege lost sales generally, but that since the plaintiff did not even allege lost sales generally, it had not alleged sufficient special damages. The trial judge, without explanation or discussion, said that the plaintiff, by alleging a drop in the price of its stock, alleged more than the plaintiff had in KBT Corp. and refused to dismiss the complaint.

The problem the trial judge faced was that the product disparaged, Ampligen, was a drug still pending FDA approval. Normally, a trade libel claim requires showing an established business and the sales before and after the product disparagement. But for Ampligen, there were no sales possible because the drug had not yet been approved by the FDA. How does one prove damages from product disparagement of a product not yet approved for sale? Under those circumstances it may have been reasonable to allow a plaintiff to continue beyond the pleading phase by claiming that the only available measurement of the value of the still unapproved drug was by valuing the stock price.

Defendants urge another difference. They suggest that the difference between Hermispherx and the present case is that in Hermispherx, the plaintiff was a newly formed company; the court held that a developmental stage pharmaceutical company could not possibly compile lists of actual or prospective losses since it had no sales. Thus, the plaintiff could demonstrate the reasons why pleading special damages would be impossible. Biovail, Canada's largest publicly held pharmaceutical company, is not a young company with a dearth of sales records and a lack of financial transactions. Pleading traditional forms of special damages should be possible if such special damages exist.

Using either argument, Hermispherx can be distinguished, but even if it could not, it is merely an unpublished opinion[14] which does not explain the logic of allowing the use of a mere diminishment in stock price as a basis for asserting special damages in a trade libel case. Here, Biovail does not allege that sales of Cardizem LA were affected in any way by the alleged trade libel.

Defendants, on the other hand, submit that two other cases bear the closest factual semblance to this case. The first is Computerized Thermal Imaging, Inc. v. Bloomberg, L.P., 2001 U.S. Dist. LEXIS 24905 (D. Utah Mar. 26, 2001) (unpublished), aff'd 312 F.3d 1292 (10th Cir. 2002). It is important to note that while the trial court decision is unpublished, it was affirmed by the 10th Circuit in a published opinion. Although it is based on Utah law, there is no evidence that Utah law is more restrictive than New York law in requiring that special damages be properly pled. In Computerized Thermal Imaging, supra, the court dismissed the complaint because pleading a decline in company share price fell short of the special damages required in a

[14] R. 1:36-3 provides:

> No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court.

trade libel cause of action. The trial court characterized the damages pled as "conjecture [which] do not result in the realized and liquidated losses required by Utah law." In another reported decision in Computer Aid Inc. v. Hewlett-Packard Co., 56 F. Supp. 2d 526 (E.D. Pa. 1999), the court similarly granted a defense motion for summary judgment because the only alleged damage was depreciated stock price and expert testimony linking the decline to the defendant's conduct.[15] There is no case law directly on point in New York; however, it is notable that the courts that have addressed the issue in published opinions have found allegations of only a diminution in stock price unsatisfactory as special damages in a trade libel claim.

It is important to remember that Biovail's trade libel claim is not dependant upon proof of the short-selling conspiracy. Its claim would exist if the source of the allegedly false statements were a disgruntled employee, a dissatisfied customer, or a voracious competitor. If a disgruntled employee had tipped off Gradient/Camelback, truthfully or falsely, about Enron, General Motors, or Lehman Brothers, would those companies have a cause of action for trade libel merely because their stock fell on a report that Gradient/Camelback might issue? Even where the allegations are false, if the only harm caused is an alleged drop in the price of its stock, should a publicly listed company have an action against anyone who may criticize it? It can easily respond in the marketplace.[16] If the allegations are false, the stock price will undoubtedly rebound. A temporary drop in price is probably harmless to a public company in the long run and any specific harm from a temporary drop could be pled as special damages; a long-term drop in price would be more likely caused by factors other than a refutable falsehood.

[15] That Computer Aid involved a summary judgment motion is not a basis for distinguishing it as Biovail admits that it neither has nor will have any more evidence of damages that the plaintiff in Computer Aid had.

[16] The expenses involved in advertising or other public relations efforts to counteract the trade libel would likely constitute special damages but Biovail alleges no such damages.

In sum, trade libel is a disfavored cause of action that is potentially subject to widespread abuse. The history and purpose of the requirement of pleading special damages shows that it is an important mechanism to weed out claims with no real or demonstrable damages. The purpose of the special damages requirement supports the idea that merely alleging a drop in stock price would make the requirement to plead special damages meaningless. Case law in virtually every jurisdiction supports this view.

Biovail has thus failed to adequately state a cause of action in their proposed amended complaint. This is a claim for trade libel, which under New York, Canadian and New Jersey law, requires pleading of special damages. Biovail fails to elicit any specific special damages, and instead relies upon a general diminution theory. As this theory has not as of yet been recognized under New York law — and Biovail nonetheless fails to plead special damages with the requisite specificity required — Biovail's claims must be dismissed. Further, Biovail's complaint fails in that the statements alleged are not the type that are considered within the gamut of trade libel, but rather defamation, a claim for which the statute of limitations has long since run. As such, their motion to amend to include a claim for trade libel is denied, and defendants' motion to dismiss is granted.

Conspiracy

A claim for civil conspiracy is not an independent cause of action, but rather is a derivative claim of an underlying substantive tort. See, e.g., Innovative Networks v. Satellite Airlines Ticketing Ctrs., 871 F. Supp. 709, 730 (S.D.N.Y. 1995), aff'd without opinion, 152 F.3d 918 (2d Cir. 1998) (citing Danahy v. Meese, 446 N.Y.S.2d 611, 613 (App. Div. 1981)); see also Kurtz v. Oremland, 33 N.J. Super. 443, 456 (Ch. Div.), aff'd o.b. 16 N.J. 454 (1954). Such an action cannot be maintained in the absence of, first, the overt act of one or more of the conspirators in furtherance of the conspiracy, and second, the consequential damage to the rights of another, of which the overt act is the proximate cause. A conspiracy cannot be the subject of a civil action unless something is done which, without the conspiracy, would give a right of action. John's Insulation, Inc. v. Siska Constr. Co., 774 F. Supp. 156, 162 (S.D.N.Y. 1991) (citing Grove Press, Inc. v. Angleton, 649 F.2d 121, 123 (2d Cir. 1981).

The pertinent inquiry is whether the proposed complaint alleges performance of an overt act in furtherance of a conspiracy to commit trade libel, and whether that overt act injured the plaintiff. The proposed complaint alleges that the S.A.C. Defendants acted in concert with Gradient/Camelback to publish falsified reports concerning Biovail's financial viability and business practices in furtherance of an on-going short-selling scheme perpetrated against Biovail by defendants. Furthermore, it is alleged that these reports were strategically released by Gradient/Camelback at the command of the S.A.C. Defendants. Consequently, Biovail stock price declined drastically and Biovail suffered a "general diminution in business." Finally, Biovail alleges that defendants knowingly conspired to harm Biovail, each actively participating in achieving the conspiratorial goal.

While Biovail has pled the elements of a cause of action for conspiracy, they have failed to state a prima facie cause of action for a claim of trade libel. As conspiracy is a derivative claim, and Biovail has failed to properly plead the underlying claim, the claim for conspiracy must fail.

Jurisdiction

The S.A.C. Defendants, Gradient/Camelback, and McCarthy all challenge personal jurisdiction, pursuant to R. 4:6-2 (b). Jurisdiction is admitted only for Sigma. Biovail, on the other hand, contends that it has acquired personal jurisdiction over all defendants. As indicated earlier, however, its jurisdictional claims rest solely upon a theory of general - and not specific - jurisdiction.

New Jersey's “long-arm statute,” R. 4:4-4(b)(1), permits service of process on a non-resident defendant to the outermost limits of due process permitted by the United States Constitution. Avdel Corp. v. Mecure, 58 N.J. 264, 268 (1971). Due process requires “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 101 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 61 S. Ct. 339, 342, 85 L. Ed. 278, 283 (1940)). “Minimum contacts” requires that a defendant “purposefully avail itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.” Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239, 2 L. Ed. 2d 1283, 1297 (1958). The “minimum contacts” requirement protects defendants against litigating in inconvenient forums and ensures that states do not exceed their jurisdictional limits. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92, 100 S. Ct. 559, 564, 62 L. Ed. 2d 490, 498 (1980). This doctrine has been substantially relaxed over the years, as technological and economic developments increasingly encourage the conduct of business transactions across both state and national borders without any physical presence. Id. at 292-93.

The minimum-contacts analysis distinguishes between specific and general jurisdiction. Wilson v. Paradise Village Beach Resort & Spa, 395 N.J. Super. 520, 527 (App. Div. 2007). “Although the minimum-contacts test centers on the defendant's relationship with the forum state, the sufficiency of the contacts for jurisdictional purposes depends on ‘the relationship among the defendant, the forum, and the litigation . . . .’” Charles Gendler & Co., Inc. v.

Telecom Equipment Corp., 102 N.J. 460, 471 (1986), (quoting Shaffer v. Heitner, 433 U.S. 186, 204, 97 S. Ct. 2569, 2579, 53 L. Ed. 2d 683, 697 (1977)). When the cause of action arises directly out of a defendant's contact with the forum state, the court's jurisdiction is specific, and an isolated act by a defendant may be sufficient to support jurisdiction over that defendant. However, when the cause of action is unrelated to a defendant's contacts with the forum state, the court's jurisdiction is general, and those forum contacts must be continuous and substantial. Provident Nat'l Bank v. California Federal Sav. & Loan Asso., 819 F.2d 434, 436 (3d Cir. 1987); Decker v. Circus Circus Hotel, 49 F. Supp. 2d 743, 747 (D.N.J. 1999). The facts required to establish general jurisdiction must be "extensive and persuasive." Reliance Steel Products Co. v. Watson, Ess, Marshall & Enggas, 675 F. 2d 587, 589 (3d Cir. 1982). This higher burden is to "ensure . . . the fairness of treating a non-resident identically to a resident in terms of amenability to the suit in the jurisdiction." Charles Gendler & Co., supra, 102 N.J. at 470. Even if a defendant's forum contacts are sufficiently continuous and systematic to justify general jurisdiction, I must nonetheless determine if such exercise would comport with due process in a manner according with "fair play and substantial justice." International Shoe, supra, 326 U.S. at 310; Waste Management v. Admiral Ins. Co., 138 N.J. 106, 119-20 (1994), cert. den. sub nom. WMX Techs. v. Canadian Gen. Ins. Co., 513 U.S. 1183, 115 S. Ct. 1175, 130 L. Ed. 2d 1128 (1995); Lebel v. Everglades Marina, Inc., 115 N.J. 317, 322 (1989).

Once a defendant raises lack of personal jurisdiction as a defense, the plaintiff must demonstrate that the defendant has sufficient contacts with the forum to justify the exercise of jurisdiction. North Penn Gas Co. v. Corning Natural Gas Corp., 897 F. 2d 687, 689 (3d Cir.), cert. den. 498 U.S. 847, 111 S. Ct. 133, 112 L. Ed. 2d 101 (1990). A plaintiff need only make a prima facie demonstration of jurisdiction by showing with sufficient particularity the presence of contacts between the defendant and the forum. See, e.g., Mellon Bank PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992). A court, in examining whether the plaintiff has satisfied this prima facie burden, must resolve all disputes of material fact in favor of the plaintiff. See, e.g., Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 96 (3d Cir. 2004).

When determining whether minimum contacts exist, it is not only necessary to determine whether physical contacts exist, but also to determine whether there exist temporal contacts coinciding or relating to the injury or filing of the complaint. The relevant time to assess whether a defendant's contacts satisfy the "continuous and systematic" standard is over a period that the court deems reasonable under the circumstances, up to and including the date the suit was filed. Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 569-70 (2d Cir.), cert. den. 519 U.S. 1006, 117 S. Ct. 508, 136 L. Ed. 2d 398, (1996). The parties have agreed that the relevant time frame is from 2000 to 2006.

S.A.C. Defendants

As to the issue of “minimum contacts,” the S.A.C. Defendants (for purposes of considering personal jurisdiction, Sigma is excluded) contend that they: (a) do not reside or live in New Jersey; (b) are not registered to do business in New Jersey; (c) do not maintain an office, mailing address, phone number, or bank account in New Jersey; (d) do not own any real property in New Jersey; (e) do not employ any persons in the State of New Jersey; and (f) have not filed any income tax in New Jersey. Accordingly, the S.A.C. Defendants assert that Biovail has “not carried, and will not be able to carry,” the burden of establishing the S.A.C. Defendants’ continuous and systematic contacts with New Jersey.

In response to the S.A.C. Defendants, Biovail presents a variety of arguments. Initially, Biovail contends that jurisdiction is proper essentially based upon a theory that the S.A.C.

defendants have such substantial investments in various entities within New Jersey that general jurisdiction is proper. Biovail asserts that as of March, 2009, S.A.C. Defendants maintained such investments in New Jersey, totaling at least $280 million that general jurisdiction is appropriate; that as of December 31, 2008, Advisors' New Jersey investments totaled approximately 5.7% of Advisors' total investment portfolio; that until February, 2006, Advisors and Management held an interest of over 5% in New Jersey-based Majesco Holdings, Inc., and on January 25, 2007, held at least a 10% interest in Par Pharmaceutical Companies, Inc., another New Jersey company; and, finally, that four employees of an S.A.C. affiliate currently sit on the board of MedQuist, a corporation based in Mount Laurel, New Jersey.

Biovail urges a second ground for personal jurisdiction beyond investments in New Jersey, relying on the uncontested jurisdiction over Sigma. Sigma is an investment advisor that is owned wholly by Management, and provides its services to the S.A.C. hedge funds in this matter. Biovail contends that the concession of jurisdiction over Sigma imputes general jurisdiction to the others because of the high degree of identity between the various S.A.C. Defendants. Effectively, Biovail asserts that the corporate veil should be pierced as Sigma is a mere alter ego of Management, and, further, that Management, Advisors, Associates, and Healthco are all alter-egos of each other. Thus, Biovail contends that if there is general jurisdiction over one — Sigma — there is general jurisdiction over all of the S.A.C. Defendants. To this end, Biovail cites various points of overlap between Sigma and its co-defendants, including their direction by Steven Cohen and their common offices in New York and Connecticut. Biovail argues that this identity warrants an extension of jurisdictional discovery.

Where general jurisdiction exists regarding a subsidiary corporate defendant, its extension to a parent entity depends upon determinations of "whether the subsidiary was merely the alter ego or agent of the parent, and whether the independence of the separate corporate entities was disregarded." Koff v. Brighton Pharmeceutical Inc., 709 F. Supp. 520, 525 (D.N.J. 1988) (citation omitted). The alter ego theory of jurisdiction may be satisfied where a plaintiff demonstrates "the entities' common ownership plus one's financial dependency, the other's domination/control, or either's failure to observe corporate formalities." Star Video Entertainment, L.P. v. Video USA Assoc. 1 L.P., 253 N.J. Super. 216, 225 (App. Div. 1992) (citing Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp., 751 F.2d 117 (2d Cir. 1984)). In deciding whether to pierce the corporate veil on an alter ego theory, courts have considered certain factors, including: "(1) the level of capitalization of the subsidiary; (2) who the subsidiary does business with other than the parent; (3) the day-to-day involvement of the parent's directors, officers and personnel with the subsidiary; and (4) the payment of the subsidiary's salaries and expenses by the parent." Seltzer v. I.C. Optics, Ltd., 339 F. Supp. 2d 601, 610 (D.N.J. 2004). A similar formulation is found in Trs. of the Nat'l Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk, 332 F.3d 188, 194 (3d Cir. 2003), which set forth the following factors to consider:

> gross under capitalization, failure to observe corporate formalities, nonpayment of dividends, insolvency of debtor corporation, siphoning of funds from the debtor corporation by the dominant stockholder, nonfunctioning of officers and directors, absence of corporate records, and whether the corporation is merely a facade for the operations of the dominant stockholder.

Other cases have allowed jurisdiction only where the corporate form was "used fraudulently" or "disregarded by the related entities themselves." Ibid (quoting Gear, Inc. v. L.A. Gear California, Inc., 637 F. Supp. 1323, 1329 (S.D.N.Y. 1986)).

The higher threshold for general jurisdiction demands contacts with the forum that "approximate physical presence." Appaloosa Inv., L.P.I v. J.P. Morgan Securities, Inc., 398 N.J.

Super. 52, 58 (App. Div. 2008). To that end, where a plaintiff seeks to impute jurisdiction over a subsidiary corporation to its parent, New Jersey requires “something more than ownership.” Seltzer, supra, 339 F. Supp. 2d at 610. Indeed, a court will generally inquire whether the subsidiary was a mere alter ego or agent of the parent, and whether their corporate independence was disregarded. Ibid (citing State, Dep’t of Environmental Protection v. Ventron Corp., 94 N.J. 473 (1983)).

Biovail has offered nothing to suggest that the S.A.C. Defendants' ties with Sigma “approximate” their own physical presence in New Jersey. While the S.A.C. Defendants may indeed do business together, share offices, and share high-ranking officers, these do not justify a determination of general jurisdiction. And, although Biovail points to the S.A.C. Defendants' likely reliance upon broker-dealers and clearing firms, New Jersey courts generally agree that the use of such agents will not warrant an exercise of general jurisdiction. See, e.g., Appaloosa, supra, 398 N.J. Super. at 58 (holding that the use of agents required for maintenance of stock listings is insufficient contact for general jurisdiction). Further, the possibility of investments into New Jersey companies has no bearing on this analysis. Biovail has cited no authority for the proposition that the mere acceptance of investment capital from New Jersey residents could make a corporation subject to this state's jurisdiction, nor has Biovail provided any evidence to suggest that the S.A.C. Defendants actively solicited New Jersey investors or received any particular benefit from such investments.

Gradient/Camelback

Gradient/Camelback is an Arizona Corporation with its principal place of business in Scottsdale, Arizona. It functions as an independent researcher, preparing reports on various business organizations and their viability. It is not licensed to do business in New Jersey, has no subsidiaries located here, owns no real property in New Jersey, and maintains no office or bank account here. It does not advertise in the state. None of its employees are currently located in New Jersey, though it previously employed two salesmen, Mark Rosenblum ("Rosenblum") and Doug McNeil ("McNeil"), within this state.

Gradient/Camelback argues that general jurisdiction over it is improper in that it never had sufficient presence in New Jersey to support jurisdiction. Gradient/Camelback asserts that it is not presently registered or incorporated in New Jersey, nor has it ever been. Further, Gradient/Camelback asserts that its contacts with New Jersey — McNeil and Rosenblum, two employees who worked from home offices in 2004, after the alleged product disparagement, but prior to the filing of the complaint — are insufficient to support general jurisdiction. Gradient/Camelback notes that neither salesman met with success in their endeavors to expand Gradient/Camelback's business into New Jersey, having failed to make even a single sale during their tenure in New Jersey. According to Gradient/Camelback, Rosenblum's unsuccessful solicitation of potential customers in New Jersey, telecommunications from New Jersey, and efforts to attract the attention of New Jersey-based media outlets in the tri-state area with a national audience are patently insufficient. Further, Gradient/Camelback also contends that the mere establishment of a home office by one of its salesman is unable to provide sufficient contacts to create general jurisdiction over the entire company.

Biovail argues that they have established prima facie jurisdiction over Gradient/Camelback. It claims that Gradient/Camelback admits that two of its employees maintained offices in New Jersey. Rosenblum was an employee of Gradient/Camelback from July, 2003 through February, 2004, and used his home in Summit, New Jersey as his Gradient/Camelback office. Gradient/Camelback hired Rosenblum in July, 2003 with the express intention of fostering business relationships in the Connecticut, New York, and New Jersey tri-state area. At Gradient/Camelback's behest, Rosenblum pursued various business opportunities in New Jersey, including identifying potential clients and garnering publicity for Gradient/Camelback in New Jersey as well as similar activities in New York and Connecticut. Based on these proofs, Biovail contends that general jurisdiction over Gradient/Camelback is satisfied.

Biovail's argument for general jurisdiction over Gradient/Camelback rests primarily on Rosenblum's contacts with New Jersey as an employee of Gradient/Camelback from July 2003 through February 2004. According to Rosenblum, his chief responsibilities involved developing new business relationships in New Jersey, New York, and Connecticut, and securing the attention of national media outlets located in New Jersey. During that time, Rosenblum resided in New Jersey, working out of a home office equipped by Gradient/Camelback. Rosenblum's business card listed his home office and phone number as a "satellite office" of Gradient/Camelback's main office. In addition to Rosenblum, Gradient/Camelback employed McNeil, in New Jersey, who operated from a home office for a short period of time as well. Despite the presence of two representatives in New Jersey, neither Rosenblum nor McNeil ever successfully solicited a New Jersey client, and indeed the record only reflects one Gradient/Camelback client based in New Jersey.

Biovail has provided no information to suggest that Gradient/Camelback's physical presence in New Jersey extended beyond the seven (7) months of Rosenblum's employment or that their New Jersey residence was established at Gradient/Camelback's request. The facts here are more like Lucachick v. NDS Ams., Inc., 169 F. Supp. 2d 1103 (D. Minn. 2001), where plaintiff Lucachick was hired by a California company as a regional sales manager and worked out of his home in Minnesota. Like here, his territory encompassed more than one state and, like here, his employer did not dictate where he lived. In this case there is no evidence that Rosenblum was required to live in New Jersey and forbidden to live in New York or Connecticut, the other states in the tri-state region where he had sales duties. Lucachick held that where an employee chose the location of his housing, that location of the home office could not form the basis for jurisdiction over the employer. Rosenblum’s short tenure with Gradient/Camelback (even if considered with McNeil’s short tenure) fails to have any significance when considered in light of the agreed upon seven (7) year period under consideration, from 2000 to 2006. It was not until after June of 2003 when Gradient/Camelback released the allegedly libelous reports that Gradient/Camelback hired Rosenblum. For the next seven (7) months, Rosenblum solicited clients and sought media coverage, apparently without success. In February 2004, Gradient/Camelback terminated Rosenblum's employment; this marks the end of Gradient/Camelback's known efforts to establish itself in New Jersey, approximately two years before Biovail filed suit. Biovail has not alleged that McNeil’s employment would extend much beyond the minimal impact of Rosenblum’s employment.

In any event, once a party quits a forum, the forum’s courts may only exercise jurisdiction over that party as to causes of action arising from its previous activities in that forum. Keech v. Lapointe Machine Tool Co., 200 N.J. Super. 177, 182-83 (App. Div. 1985) (citing Restatement (Second) of Conflict of Laws 2d §48 at 177 (1971) (Once a corporation has left, the state's jurisdiction is limited to “causes of action arising from the business done by the corporation within its territory; its jurisdiction does not extend to causes of action unrelated to this business.”)). In other words, the courts of that forum are limited to the exercise of specific jurisdiction; the cause of action, then, must arise out of the defendant's prior forum contacts. Id.. at 183.

In Keech, the defendant had maintained a systematic and continuous business presence in New Jersey from 1957 until 1972, when it discontinued its activities in the state. In 1978, the plaintiff was injured by slipping on fluid leaking from a machine defendant had sold to an Oklahoma company in 1955, but which had subsequently been acquired by plaintiff's New Jersey employer. Citing to World-Wide Volkswagen Corp., supra, 444 U.S. at 297, the court concluded that the 1955 sale had no substantial connection to New Jersey despite the machine's later being re-sold for use in that state, and certainly nothing that would reasonably cause the defendant to anticipate being sued in New Jersey. Keech, supra, 200 N.J. Super. at 184.

In Keech, a forum presence lasting fifteen (15) years was insufficient to support retroactive general jurisdiction after the termination of that presence. Here, so far as the record indicates, Gradient/Camelback's presence lasted a mere seven (7) months, was insubstantial and unsuccessful, and came to a close two years before Biovail filed their first complaint. There is no evidence submitted to suggest that Gradient/Camelback received any benefit from having Rosenblum within New Jersey, as it is conceded that Rosenblum failed to make any sales while working for Gradient/Camelback. Accordingly, the complaint is dismissed as to Gradient/Camelback for lack of personal jurisdiction.

McCarthy

McCarthy disputes general jurisdiction over him, arguing that any alleged contacts he had with New Jersey were not so continuous and systematic as to establish general jurisdiction. There is no contention that McCarthy owns property in New Jersey, lives in New Jersey, or works from or is employed in New Jersey. Rather, Biovail contends that because of McCarthy’s responsibilities with Healthco, a hedge fund focused exclusively on the healthcare industry, an industry centered largely in New Jersey, general jurisdiction is appropriate over McCarthy. According to McCarthy, he neither had any meaningful ties to New Jersey, nor did he play a "major role" in Healthco's "corporate structure," and so cannot be subjected to New Jersey's general jurisdiction on the basis of his professional responsibilities.

Biovail has not stated a prima facie case for general jurisdiction over McCarthy. McCarthy resides and works in New York, and Biovail does not allege any significant connections with the state of New Jersey. Indeed, Biovail's argument in favor of general jurisdiction actually concludes with a request for jurisdictional discovery. Ultimately, while Biovail outlines their suspicions of McCarthy's New Jersey contacts, they fail to present evidence to support a finding of general jurisdiction. And even if their suspicions about McCarthy's New Jersey contacts were proven true, Biovail has failed to allege the systematic and continuous contacts required to support general jurisdiction. McCarthy's motion to dismiss is granted for lack of personal jurisdiction.

Biovail's Claim for the Need of Jurisdictional Discovery

Biovail claims that even if it has not alleged facts to justify personal jurisdiction, it should be granted jurisdictional discovery to allow it to discover more facts that might justify jurisdiction.

Jurisdictional discovery should be allowed unless "clearly frivolous." Nehemiah, supra, 765 F.2d at 48. In Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 456 (3d Cir. 2003), the Third Circuit held that a request for jurisdictional discovery should be granted if it is "specific, non-frivolous, and a logical follow-up based on the information known." Such discovery is particularly appropriate where the defendant is a corporation. Metcalfe v. Renaissance Marine, Inc., 566 F.3d 324 (3d Cir. 2009).

As to the S.A.C. Defendants, Biovail contends that further discovery might, for example, disclose that the hedge funds limited partners were New Jersey residents, that their investments might be in New Jersey based companies, or that employees of the investment advisor defendants may have traveled to New Jersey to investigate New Jersey companies or attend meetings or conferences in New Jersey.

Even if Biovail attained all jurisdictional discovery that it seeks, Biovail will nonetheless be unable to establish a basis for general jurisdiction over the S.A.C. Defendants; Biovail's request for jurisdictional discovery does not propose to find anything that would carry its jurisdictional burden. While the S.A.C. Defendants may indeed do business together, share offices, and share high-ranking officers, these facts would not justify a grant of jurisdiction. Biovail's hopes are especially unrealistic given the additional burden of showing cause to pierce the corporate veil. See Seltzer, supra, 339 F. Supp. 2d at 610. Under these facts, Biovail's proposed jurisdictional discovery, however successful, would not suffice to establish general jurisdiction over the S.A.C. Defendants. Accordingly, Biovail's request for jurisdictional discovery is denied and their complaint dismissed as to the S.A.C. Defendants for lack of personal jurisdiction.

As to Gradient/Camelback, Biovail contends that further discovery might uncover information regarding its New Jersey operations sufficient to warrant an exercise of general jurisdiction. Biovail considers it highly probable that Gradient/Camelback employees conducted regular meetings, attended conferences, and met with existing and potential clients in New Jersey. Perhaps they provided Rosenblum with a computer, printer, scanner and fax machine for his home office (although there is no suggestion that they would not have provided similar amenities if Rosenblum had chosen to have his home office in Manhattan, Westchester, Staten Island, or Connecticut). Even if such limited activities were conducted, when considered over the agreed upon seven (7) year period of consideration from 2000 to 2006, such activities cannot rise to the required level of systematic and continuous contacts to justify general jurisdiction.

Biovail's requests for jurisdictional discovery, then, are entirely unavailing; no matter what lengths Rosenblum went to in order to make a sale, his pursuit of six "potential clients" in New Jersey cannot justify an exercise of general jurisdiction. Because none of the information that Biovail seeks would suffice to uphold general jurisdiction over Gradient/Camelback, Biovail's request for jurisdictional discovery is denied. See Nehemiah, supra, 765 F.2d at 48 (finding that jurisdictional discovery may be denied if a request is "clearly frivolous").

As to McCarthy, Biovail has suggested that McCarthy would be subject to jurisdiction if he had a major role in the Healthco corporate structure, had "significant" contacts with New Jersey, and had extensively participated in the alleged tortious conduct. TJS Brokerage & Co. v. Mahoney, 940 F. Supp. 784, 788-89 (E.D. Pa. 1996). Biovail also believes that jurisdictional discovery will confirm that McCarthy regularly visited New Jersey as part of his work with Healthco. However, an employee's periodic visits to a state will not justify jurisdiction over its employer, given the heavy requirements of general jurisdiction. Even if McCarthy were a senior officer in Healthco and even if there were jurisdiction over Healthco, there is no basis for allowing jurisdiction of McCarthy. Officers, directors and employees are not personally subject to jurisdiction of a state's courts merely because their corporate employer may be.

As to McCarthy's participation in the alleged tortious conduct, such a claim is contrary to Biovail's admission that specific jurisdiction does not apply here. Thus, Biovail has offered nothing to suggest that McCarthy has "significant" contacts with New Jersey. TJS Brokerage does not excuse Biovail from the required showing of minimum contacts, and Biovail has not pleaded that McCarthy, who lives and works in New York, formed such systematic and continuous contacts with New Jersey as to be subject to its general jurisdiction, independent of his position with Healthco or otherwise. Because Biovail has failed to set forth a prima facie claim of general jurisdiction, they are not entitled to jurisdictional discovery, and McCarthy's motion to dismiss is granted for lack of personal jurisdiction. Sathianathan v. Pac Exch., Inc., 248 Fed. Appx. 345 (3d Cir. 2007).

Conclusion

Thus, in summary, Biovail's complaint is dismissed in its entirety for failure to state a cause of action. In addition, the complaint is dismissed as to all defendants, except Sigma, for lack of personal jurisdiction. I have not, for purposes of this motion, evaluated the merits of Biovail's claims. I have not, except to set them forth for their bearing on procedural history, relied upon the actions in federal court, Judge Chesler's opinion, nor the enforcement action against Biovail by the S.E.C. in reaching my conclusions here today.