IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

GEORGE DEARLOVE, and ANNAREGINA ROBERTS	: NOVEMBER TERM, 2001
Plaintiffs,	: No. 1031
v.	: COMMERCE PROGRAM
GENZYME TRANSGENICS CORPORATION,	: CLASS ACTION
Defendant.	: Control No. 092104

O R D E R

AND NOW, this 31st day of December 2002, upon consideration of defendant, GTC Biotherapeutics, Inc. f/k/a Genzyme Transgenics Corporation's Motion for Reconsideration of Its Petition to Dismiss Pursuant to 42 Pa. Cons. Stat. Ann. §5322(e), the plaintiffs' response in opposition, the respective memoranda, all matters of record, and in accord with the contemporaneous Opinion filed of record, it is hereby **ORDERED** that the Motion is **Denied**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. ..... December 31, 2002

Defendant GTC Biotherapeutics, Inc. f/k/a Genzyme Transgenics Corporation ("GTC"), has filed a Motion for Reconsideration of Its Petition to Dismiss plaintiffs' class action Complaint pursuant to 42 Pa. C. S. § 5322(e). For the reasons set forth, the court is issuing a contemporaneous Order denying the Motion for Reconsideration.

FACTUAL ALLEGATIONS

The operative facts can be briefly summarized. Plaintiffs, George Dearlove and Annaregina Roberts, filed this class action alleging that GTC canceled the putative plaintiffs' stock options, originally granted to them pursuant to GTC's 1993 Equity Incentive Plan ("Plan"), in violation of the Plan. Compl., ¶¶ 29-31.

GTC is a biopharmaceuticals company with its headquarters and principal place of business at 175 Crossing Boulevard, Framingham, Massachusetts. Petition[1], ¶¶ 1-2. Framingham, Massachusetts is located approximately 290 miles from Philadelphia, Pennsylvania. Petition, ¶ 4; Answer[2], ¶ 4.

Previously, GTC owned a subsidiary called Primedica Corporation, also a biotechnology company with its headquarters and principal place of business in Worcester, Massachusetts. Petition, ¶ 28; Answer, ¶ 28. GTC also previously owned Primedica's five subsidiaries: Primedica Worcester, Inc. (principal place of business in Worcester, Massachusetts), Primedica Cambridge, Inc. (principal place of business in Cambridge, Massachusetts), Primedica Argus Research Laboratories, Inc. (principal place of business in Pennsylvania[3]), Primedica Redfield, Inc. (principal place of business in Redfield, Arkansas), and Primedica Rockville, Inc. (principal place of business in Rockville, Maryland). Petition, ¶¶ 29-34; Answer, ¶¶ 29-34. (Primedica Corporation and its five subsidiaries will be referred to in this Opinion, collectively, as "Primedica.")

The plaintiffs are employees of Primedica Argus Research Laboratories. Compl., ¶ 4. Plaintiff, George Dearlove, resides in Landenberg, Pennsylvania, and plaintiff, Annaregina Roberts, resides in Philadelphia, Pennsylvania. Compl., ¶¶ 1-2; Answer, ¶ 51.

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[1] "Petition" refers to defendant's Petition to Dismiss.

[2] "Answer" refers to plaintiff's Answer to the Petition to Dismiss.

[3] Plaintiffs allege that Primedica Argus Research Laboratories, Inc.'s principal place of business is in Horsham, Pennsylvania, whereas defendant alleges that it is in Argus, Pennsylvania. Petition, ¶ 32; Answer, ¶ 32. For present purposes this is not a disputed ***material*** fact. The parties agree that Primedica Argus Research Laboratories, Inc.'s principal place of business is in Pennsylvania, although not in Philadelphia County.

In 1993, GTC instituted a stock option plan entitled the 1993 Equity Incentive Plan ("Plan") to award GTC stock options to the employees of GTC and Primedica. Petition, ¶¶ 5-6. Beginning in 1993, GTC awarded stock options pursuant to the Plan to Primedica employees, including the plaintiffs. Petition, ¶¶ 42-43; Answer, ¶¶ 42-43; Compl., ¶¶ 6, 9. The Plan states that its provisions "shall be governed by and interpreted in accordance with the laws of the Commonwealth of Massachusetts." Petition, ¶ 9.

On February 26, 2001, GTC sold Primedica to Charles River Laboratories International, Inc. ("Charles River"), a biotechnology company with its headquarters and principal place of business in Wilmington, Massachusetts. Petition, ¶¶ 35-36. Defendant contends that upon the sale of Primedica, "the Plan required the exercise or cancellation of the vested shares held by those employees within ninety days of the closing of the sale." Petition, ¶ 45. According to GTC, on March 9, 2001, it notified Primedica employees who held stock options that they had until May 26, 2001 to exercise their vested options. Petition, ¶ 46; Answer, ¶¶ 46, 51. Plaintiffs dispute this, contending that no Pennsylvania employee was given notice. Those stock options held by Primedica employees which were not exercised by May 26, 2001, were canceled. Compl., ¶ 31.

Dearlove and Roberts bring the complaint on behalf of a putative class which includes "all employees of Primedica Corporation and it[s] subsidiaries who, as of February 7, 2001, had been awarded stock options and who had not yet exercised their options." Compl., ¶ 13. Plaintiffs allege that the putative class is composed of 641 former employees of Primedica. Answer, ¶¶ 42-43. Plaintiffs base this allegation on a document produced by defendant containing the last known addresses of all employees of Primedica who, as of February 7, 2001, had been awarded stock options and who had not yet exercised their options. Answer, Ex. 5, Defendant's Response to Plaintiffs' Request for Interrogatories No. 1.

Plaintiffs allege that of these 641 former Primedica employees, 299 (or 46.6%) have addresses in Massachusetts, 145 (or 22.6%) have addresses in Pennsylvania (17 of whom are in Philadelphia), 70 (or 10.9%) have addresses in Maryland, 68 (or 10.6%) have addresses in Arkansas, and 59 (or 9%) have addresses in eleven other states (including 19 in Connecticut, 8 in Rhode Island and 6 in New Hampshire). Answer, ¶ 42.

Defendant alleges that "[a]s of February 26, 2001, stock options issued pursuant to the Plan were held by 38 current and former employees of Primedica Corporation, 301 current and former employees of Primedica Worcester[, Inc.] and Primedica Cambridge[, Inc.], 78 current and former employees of Primedica Rockville[, Inc.], 153 current and former employees of Primedica Argus [Research Laboratories, Inc.], and 66 current and former employees of Primedica Redfield[, Inc.]." Petition, ¶ 42.

In their complaint, plaintiffs have alleged three counts against defendant GTC: breach of contract, breach of covenant of good faith and fair dealing, and unjust enrichment. Compl., ¶¶ 28-36; 37-42; 43-47.

In its petition, defendant seeks to dismiss the complaint based on *forum non conveniens* and contends that this case should be brought by plaintiffs in Worcester County, Massachusetts. On July 19, 2002, this court denied defendant's petition to dismiss, and on September 25, 2002, defendant filed this Motion for Reconsideration of that petition.[4]

[4] Meanwhile, on August 19, 2002, defendant filed a motion for summary judgment to which plaintiffs will be filing a response.

DISCUSSION

I. Standard of Proof to Dismiss Based on *Forum Non Conveniens*

Motions for reconsideration are "discouraged unless [ ] facts or law not previously brought to the attention of the court are raised." S.A. Arbittier, et al., Philadelphia Court of Common Pleas Civil Practice Manual, § 7-2.8 (10th ed. 2000). A trial court may consider motions for reconsideration because it has inherent power to reconsider its own rulings. Moore v. Moore, 535 Pa. 18, 25, 634 A.2d 163, 167 (1993); Key Automotive Equipment Specialists, Inc. v. Abernethy, 431 Pa. Super. 358, 362, 636 A.2d 1126, 1128 (1994) (citation omitted). In the instant motion for reconsideration, the defendant has raised a new case, Humes v. Eckerd Corporation, 807 A.2d 290 (Pa. Super. 2002), which our Superior Court issued very shortly after this court denied defendant's petition to dismiss. This court considers defendant's motion for reconsideration based on this new law.

In its petition to dismiss, the defendant relied on 42 Pa. C. S. § 5322(e) ("Section 5322(e)"), which permits a Pennsylvania court to dismiss a matter in whole or in part when the court finds that in the "interest of substantial justice," the matter should be heard in a forum outside Pennsylvania. To analyze defendant's petition to dismiss, this Court relied on the Superior Court's decision in Jones v. Borden, Inc., 455 Pa. Super. 110, 114, 687 A.2d 392, 394 (1996), which held that the analysis for petitions to transfer pursuant to Pa. R. Civ. P. 1006 applies to petitions to dismiss pursuant to Section 5322(e) because both types of petitions emanate from the common law doctrine of *forum non conveniens*.

The analysis enunciated in Jones, *infra*, focuses first on whether the case could be brought in an alternative forum, and once the viability of an alternative forum is confirmed, whether the defendant can show that the plaintiff's choice of forum is vexatious or oppressive. Jones, 455 Pa. Super. at 114, 687

A.2d at 394; See also Cheeseman v. Lethal Exterminator, Inc., 549 Pa. 200, 213, 701 A.2d 156, 162 (1997); Farley v. McDonnell Douglas Truck Services, Inc., 432 Pa. Super. 456, 462, 638 A.2d 1027, 1030 (1994). This analysis specifically rejects the consideration of any "private and public interest factors," such as the interest in not overburdening a particular court's docket and the interest in a court not having to apply another state's law. By an Opinion dated July 19, 2002, this court applied the analysis used in Jones, colloquially referred to in the caselaw as "the Cheeseman oppressive and vexatious test," and denied defendant's petition to dismiss.

Shortly thereafter, on September 5, 2002, our Superior Court issued its opinion in Humes v. Eckerd Corporation, *infra*, which specifically addresses this court's July 19, 2002 Opinion in this case and more generally discusses the proper analysis to be applied to petitions to dismiss based on Section 5322(e). The Court reviewed the existing caselaw and determined that "Aerospace, Jones, Shears and Alford would have us apply [the oppressive and vexatious test of] Cheeseman to Section 5322(e) petitions in the same manner we apply it to Rule 1006(d)(1) petitions." Humes, 807 A.2d at 293. Despite these cases, however, the Court found its decision in Poley v. Delmarva Power and Light Company, 779 A.2d 544 (Pa. Super. 2001), to be more persuasive. Humes, 807 A.2d at 295.

In Poley, *infra*, the Superior Court held that the proper analysis for a petition to dismiss based on Section 5322(e) is to permit a plaintiff's choice of forum to stand unless there are "weighty reasons" to dismiss the case. The Court stated that:

> [t]he two most important factors for the court to consider [in making the determination of whether to dismiss a suit on the basis of *forum non conveniens*] are (1) a plaintiff's choice of the place of suit will not be disturbed except for weighty reasons, and (2) no action will be dismissed unless an alternative forum is available to the plaintiff. Beatrice Foods Co. v. Proctor and Schwartz, 309 Pa. Super. 351, 359, 455 A.2d 646, 650 (1982).

> Furthermore, "a court will therefore not dismiss for *forum non conveniens* unless justice *strongly* militates in favor of relegating the plaintiff to another forum." Id., 309 Pa. Super. at 360, 455 A.2d at 650 (emphasis added). This is especially true when the plaintiff has chosen to litigate in his or her home forum. [citation omitted].

Poley, 779 A.2d at 546, citing Page v. Ekbladh, 404 Pa. Super. 368, 590 A.2d 1278, 1279-80 (1991), *app. denied*, 529 Pa. 651, 602 A.2d 861 (1992). The Humes Court stated its preference for this analysis by stating that "[i]n the absence of specific guidance from the Pennsylvania Supreme Court, and after consideration of the existing body of case law, we will follow Poley, [ ] and decline to find error in the lower court's refusal to apply Cheeseman to this Section 5322(e) petition." Humes, 807 A.2d at 295.[5]

Therefore, in considering the instant motion for reconsideration, this court will rely on the analysis as set forth in Humes and Poley, rather than the Cheeseman oppressive and vexatious test as set forth in Jones.

II. Availability of An Alternative Forum

The threshhold consideration is whether this case could be brought in an alternative forum. Poley, 779 A.2d at 546 (citation omitted); See also Farley, 432 Pa. Super. at 463, 638 A.2d at 1030.

For the reader's convenience, this court repeats the analysis from its July 19, 2002 Opinion here. Plaintiffs argue that this action could not be maintained as a nationwide class action in Massachusetts because that Commonwealth's class action rule, specifically Mass. R. Civ. P. 23(b) ("Rule 23(b)"), does

[5] Ultimately, the Superior Court in Humes did not reach an analysis of whether there were weighty reasons for the trial court to have dismissed the action. Instead, the Superior Court found that the trial court had abused its discretion in dismissing the action because it had improperly relied on a complaint filed in New Jersey and without reliance on that complaint, the record before the trial court was insufficient to support dismissal pursuant to Section 5322(e). Humes, 807 A.2d at 296-97. The Superior Court reversed the dismissal and remanded the case.

not permit a putative class member to opt out of a class action. Without an opt-out provision, plaintiffs argue that Massachusetts would not be able to comply with the United States Supreme Court's mandate of Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985), that a state must permit a potential plaintiff the opportunity to opt out of a class action. Pltfs' Memorandum of Law In Opposition to the Petition to Dismiss, p. 11. Plaintiffs further argue that notwithstanding the absence of an alternative forum for what they hope will be a nationwide class action, it would be inappropriate to find that the putative class members could bring individual actions in alternative fora because Pennsylvania favors class actions in circumstances where claims of many individuals can be resolved together. Id. at 13.

In response, GTC contends that, despite the absence of an opt-out provision, this potential nationwide class action could be maintained in Massachusetts in accordance with the United States Supreme Court's mandate because a Massachusetts court may assert personal jurisdiction over a non-Massachusetts resident where there exists "some minimum contact with the Commonwealth which resulted from an affirmative, intentional act of the [party]." Def's Memorandum of Law In Support of Its Petition to Dismiss, p. 3, quoting Nile v. Nile, 432 Mass. 390, 734 N.E.2d 1153, 1158 (2000); See Eldridge v. Provident Companies, Inc., No. 97-1099, 2000 WL 289640, *2-3 (Mass. Super. 2000) (In consideration of a motion for nationwide class certification, the court held that "the opportunity to opt out [of the class] may not be required in those instances where a state can establish personal jurisdiction over all plaintiffs or where the quest for equitable relief predominates over the pursuit of money damages."). GTC contends that a Massachusetts court could assert personal jurisdiction over Dearlove and Roberts, as well as each of the members of the putative class, because all of them have worked to generate profits for GTC, a Massachusetts company, and participated in GTC's stock option Plan which was administered in

Massachusetts. Def's Memorandum of Law In Support of Its Petition To Dismiss, pp. 3-4. Thus, GTC argues that a Massachusetts court could serve as an alternative forum for this action because it could satisfy due process concerns simply by providing notice and an opportunity for the putative class members to object. Furthermore, GTC urges that a finding that plaintiffs could bring individual actions in Massachusetts satisfies the requirement that an alternative forum be available for the plaintiffs to litigate their claims. Id.

This court is persuaded that a Massachusetts court could serve as an alternative forum for this action based on assertion of personal jurisdiction over the putative class members. However, the existence of the alternative forum is not dispositive.

III. Whether Weighty Reasons Exist to Disturb Plaintiff's Choice of Forum

The next consideration is whether there are weighty reasons to justify relegating the plaintiffs to another forum. In its Motion for Reconsideration, GTC contends that this court will be required to apply Massachusetts law to plaintiff's claims because the Plan provides that its provisions "shall be governed by and interpreted in accordance with the laws of the Commonwealth of Massachusetts" (Petition, ¶ 9), and that these claims present "novel questions of Massachusetts corporate and contract law" better analyzed by a Massachusetts court. Motion for Reconsideration, p. 5.

In Humes, our Superior Court specifically addressed the issue that GTC raises, i.e., that in analyzing a Section 5322(e) petition to dismiss, a court should consider what law will ultimately govern the merits of the plaintiffs' claims. The Humes Court stated:

> In the past, when applying the public and private factor analysis to Section 5322(e) petitions, this Court has found it necessary to take into account the issue of conflict of law. In Farley v. McDonnell Douglas, 432 Pa. Super. 456, 638 A.2d 1027 (1994), a panel of this Court noted that '[t]here is an appropriateness, too, in having the trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court in

> some other forum untangle problems in conflict of laws, and in law foreign to itself.' Farley, 638 A.2d at 1020 [citations omitted].

Therefore, based on this language in Humes, GTC argues that the application of another state's law to plaintiffs' claims qualifies as a weighty reason to disturb plaintiffs' choice of forum and to dismiss the action from this court.

Plaintiffs assert that assuming Massachusetts law applies, this factor does not warrant dismissal of this case from plaintiffs' home forum because this court is practiced in applying other states' laws. Pltfs' Memorandum of Law In Opposition to Motion for Reconsideration, pp. 5-6. Plaintiffs further assert that GTC fails to support its argument with any examples of courts that have granted a petition to dismiss based on the fact that another state's law would have to be applied, and that the examples that GTC does cite are inapposite. Plaintiffs contend that the case of Plum v. Tampax, Inc., 399 Pa. 553, 160 A.2d 549 (1960), is distinguishable because in that case, "there was no contact with Pennsylvania and the applicable law was Danish." Pltfs' Memorandum of Law In Opposition to the Motion for Reconsideration, p. 8. This court agrees with plaintiffs that applying another country's law is distinguishable from applying another state's law, and the former reason to dismiss does not exist here.

In addition, plaintiffs contend that Shears v. Rigley, 424 Pa. Super. 559, 623 A.2d 821 (1993), and Farley v. McDonnell Douglas Truck Services, 432 Pa. Super. 456, 638 A.2d 1027 (1994), are inapposite because the outcome of each case rejected dismissal. Pltfs' Memorandum of Law In Opposition to the Motion for Reconsideration, p. 8. In Shears, the Superior Court affirmed the denial of the petition to dismiss, and in Farley, the Superior Court reversed and remanded the case because it found that the trial court abused its discretion in granting the petition to dismiss.

Plaintiffs further assert that Cinousis v. Hechinger Dept. Store, 406 Pa. Super. 500, 594 A.2d 731 (1991), and Endre v. Trump Marina, 42 Pa. D.&C.4th 106 (Pa. Com. Pl., 1999), are inapposite because the critical factor for dismissing those cases was that there was a complete absence of any significant contacts with Pennsylvania.[6] Pltfs' Memorandum of Law In Opposition to the Motion for Reconsideration, p. 8. This court agrees with plaintiffs' analysis and distinguishes Cinousis and Endre from the instant case. Here, plaintiffs Dearlove and Roberts have alleged that they are residents of Pennsylvania, and that 22.6% of the putative class members reside in Pennsylvania (17 of whom reside in Philadelphia). Compl., ¶¶ 1-2; Answer, ¶¶ 42. Plaintiffs allege that they are employees of Primedica Argus Research Laboratories which is located in Pennsylvania and which GTC formerly owned as a subsidiary. Compl., ¶ 4; Petition, ¶¶ 28, 32; Answer, ¶¶ 28, 32. Plaintiffs further allege that GTC awarded the stock options at issue to plaintiffs in 1993 when they worked at Primedica Argus Research Laboratories in Pennsylvania. Compl., ¶¶ 6, 9; Petition, ¶¶ 5-6, 42-43; Answer, ¶¶ 42-43. Admittedly, these facts may not evidence an overabundance of significant contacts with Pennsylvania, but they do reveal some significant contacts and therefore, this court does not find Cinousis or Endre to be factually similar.

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[6] In Cinousis, the Superior Court reiterated the findings of the trial court, as follows: "The plaintiffs are not residents of Pennsylvania. The pertinent events giving rise to the cause of action occurred outside of Pennsylvania. The relevant medical records of plaintiff's physician . . . are located outside of Pennsylvania. The known witnesses reside outside of Pennsylvania and any additional witnesses will most likely reside outside of Pennsylvania. Finally, the plaintiffs have another more convenient forum available to them in New Jersey." Cinousis, 406 Pa. Super. at 504, 594 A.2d at 733. These findings point to an absence of contacts with Pennsylvania. Similarly, in Endre, the Superior Court stated that "both parties are from New Jersey, all of the witnesses work and/or live in New Jersey, and the accident in question occurred in the State of New Jersey" and that "the defendant has shown the action to be inconvenient not only for themselves [sic], but for the plaintiff as well." Endre, 42 Pa.D&C.4th at 109-110.

The Superior Court in Humes emphasized the following language in Poley: "A court will . . . not dismiss for *forum non conveniens* unless justice *strongly* militates in favor of relegating the plaintiff to another forum. [citation omitted]. This is especially true when the plaintiff has chosen to litigate in his or her home forum. [citation omitted]." Humes, 807 A.2d at 293-94, citing Poley, 779 A.2d at 546 (citing Page v. Ekbladh, 404 Pa. Super. 368, 590 A.2d 1278, 1279-80 (1991), *app. denied*, 529 Pa. 651, 602 A.2d 861 (1992)). Thus, while giving due consideration to the reasons to dismiss this action raised by defendant in its Petition to Dismiss and Motion for Reconsideration, based on our Superior Court's instruction to favor a plaintiff's choice of its home forum, and based on the facts which reveal significant contacts with Pennsylvania, this court does not find sufficiently weighty reasons to trump plaintiffs' choice of forum.

CONCLUSION

For the reasons discussed, defendant's Motion for Reconsideration of Its Petition to Dismiss pursuant to 42 Pa. C. S. § 5322(e) is denied. The court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.