IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

HEMISPHERX BIOPHARMA, INC., Plaintiff	**:** JULY TERM, 2000
	: No. 3970
v.	**:**
MANUEL P. ASENSIO, ASENSIO & COMPANY, INC., and ASENSIO.COM, INC., Defendants	**:**
	: Control Nos. 091841 and 101612

O R D E R

AND NOW, this 14th day of February 2001, upon consideration of the Preliminary Objections of plaintiff, Hemispherx Biopharma, Inc. ("HBI"), to the Preliminary Objections of defendants, Manuel P. Asensio, Asensio & Company, Inc. and Asensio.com, Inc., to the Complaint, and those Preliminary Objections of the defendants, the parties respective memoranda, all other matters of record, and in accord with the Opinion being filed contemporaneously with this Order, it is **ORDERED** that:

1. plaintiff's Preliminary Objections as to the "untimeliness" of the defendants' Preliminary Objections are **Overruled;**

2. plaintiff's Preliminary Objections asserting that the defendants have waived and are estopped from raising objections to personal jurisdiction and venue are **Sustained**;

3. plaintiff's Preliminary Objections asserting that defendants waived their objections to the legal sufficiency of plaintiff's pleadings are **Overruled**;

4. defendants' Preliminary Objections regarding pendency of a prior action; failure to effectively transfer the matter from Federal Court pursuant to 42 Pa.C.S.A. §5103; failure to make service; the demurrer to Count IV (Civil Conspiracy) and objections as to insufficient specificity in the remaining Counts to the Complaint are **Overruled**; and

5. defendants shall file an Answer to the Complaint within twenty-three (23) days from the date of this Order.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

ALBERT W. SHEPPARD, JR., J. ..... February 14, 2001

Presently before this court are the Preliminary Objections of plaintiff, Hemispherx Biopharma, Inc. ("HBI") to the Preliminary Objections of defendants, Manuel P. Asensio, Asensio & Company, Inc., and Asensio.com, Inc. (collectively "Asensio defendants") to plaintiff's Complaint.[1] Also before the court are those Preliminary Objections of defendants.

For purposes of clarity and efficiency, this court will analyze plaintiff's objections in conjunction with defendants' objections.

For the reasons set forth, the plaintiff's objections to defendants' objections are overruled, in part, and sustained, in part. The defendants' remaining objections are overruled.

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[1]The Complaint presently before this court is the Second Amended and Supplemented Complaint which was originally filed in the District Court for the Eastern District of Pennsylvania. It supersedes all previously filed complaints and takes the place of the original pleading. See Vetenshtein v. City of Philadelphia, 755 A.2d 62, 67 (Pa.Commw.Ct. 2000)(an amended complaint virtually withdraws the original complaint and takes its place)(citations omitted). See also, Hemispherx Biopharma, Inc. v. Asensio, No.Civ.A. 98-2504, 2000 WL 807012, *3 (E.D.Pa. June 7, 2000)(Padova, J.)(quoting Wellness Community v. Wellness House, 70 F.2d 46, 50 (7th Cir. 1995).

Background

This matter originated in the Federal Court system over two years ago. It was transferred to this court, on July 31, 2000, pursuant to 42 Pa.C.S.A. § 5103, following the dismissal by the Federal Court for lack of subject matter jurisdiction on June 7, 2000.[2] See Defs. Preliminary Objections, Exhibit B. The general rule provides that a matter, which is transferred to the proper tribunal of this Commonwealth, "shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court or magisterial district of this Commonwealth." 42 Pa.C.S.A. § 5103(a). Therefore, resolution of the objections requires a brief recitation of the procedural and factual history of this case.

The gravamen of this action stems from the defendants' alleged scheme to illegally short-sell[3] and manipulate the price of HBI's common stock through defendants' publication of allegedly defamatory statements in a series of "research reports" and/or press releases about HBI and HBI's development of the anti-viral drug, Ampligen. See Second Am.Compl. at ¶¶ 10-20. Specifically, in September of 1998, defendants allegedly published statements, which appeared in Business Week and on the Internet site of Asensio.com, and included the following:

(a) Ampligen is "toxic,"
(b) Ampligen has "no medical or economic value,"
(c) Ampligen "is medically useless and an obsolete drug,"
(d) Ampligen is "off patent,"

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[2]Defendants dispute the efficacy of this transfer. This court will address their argument in the discussion below.

[3]"'Short-selling' takes place when a speculator sells stock he does not own, in anticipation of a fall in the price prior to his covering purchase of those shares." Hemispherx Biopharma, Inc. v. Asensio, No.Civ.A. 98-5204, 1999 WL 144109, at *1 n.1 (E.D.Pa. March 15, 1999).

(e) HBI has made "fraudulent misrepresentations about Ampligen's FDA filing status and CFS [4] earnings claims," . . .

(g) There is "no legitimate medical or business purpose for [HBI's] continuing attempts to test Ampligen for treatment of CFS and other diseases," . . .

(i) HBI has "purposefully cultivated" false claims regarding Ampligen "in order to defraud investors." . . . .

Id. at ¶ 15. Plaintiffs further allege that prior to the publication of some or all of the defamatory statements, defendants engaged in heavy short selling of HBI's common stock in order to realize a profit from the additional decrease in the price of the stock which would be caused by the publication of additional statements. Id. at ¶ 18. As a result of defendants' allegedly defamatory publications, the price of HBI's common stock declined by in excess of $ 300,000,000, on a fully diluted basis. Id. at ¶ 19.

On September 30, 1998, HBI filed its original complaint against Manuel P. Asensio ("Mr. Asensio"), Asensio & Company, Inc. ("ACI") and certain other defendants[5] in the United States District Court for the Eastern District of Pennsylvania. On October 22, 1998, prior to any party defendant filing a responsive pleading, HBI filed its First Amended Complaint, alleging both federal and state law claims.[6] In November of 1998, the Asensio defendants and other defendants filed three Motions to Dismiss the First

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[4]"CFS" refers to Chronic Fatigue Syndrome, a condition or illness that causes unexplained chronic fatigue. See Compl. Exhibit Research Report of Asensio & Company, Inc., at 6.

[5]The other originally named defendants were Fort Hill Partners, FSC Securities Corp., Mesirow Financial Services, Inc., Flagship Securities, Inc., Sharpe Capital, and "LXE."

[6]Specifically, the First Amended Complaint set forth claims for alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), pursuant to 18 U.S.C. §§ 1961(3) and 1962; alleged violations of § 10(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (a); common law fraud, intentional interference with existing and prospective business relations; defamation; disparagement and negligence. See Counts I-IX of the First Amended Complaint. This complaint also added CIBC Wood Gundy Securities, Inc. as a defendant.

Amended Complaint, pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim for relief.[7]

On March 15, 1999, the Honorable John R. Padova issued a Memorandum Opinion and Order, dismissing defendant Wood Gundy from the case, dismissing Counts I (RICO) and III (common law fraud) as against defendant Fort Hill and the Asensio defendants, and dismissing Count VIII (negligence) as against the Asensio defendants. Hemispherx Biopharma, Inc. v. Asensio, etal., No. Civ.A. 98-5204, 1999 WL 144109, at *14 (E.D.Pa. March 15, 1999). The Order of March 15, 1999 specifically left the following counts in the case: Counts II (section 10(a)), V (intentional interference with existing and prospective business relations), VI (defamation) and VII (disparagement). Id.

In April of 1999, the Asensio defendants filed an Answer and Counterclaim to the First Amended Complaint. In the interim, HBI's claim in Count II, premised on alleged violations of the Securities and Exchange Act of 1934 and the only federal claim left in the case, was dismissed from the case.[8] On September 10, 1999, HBI filed a Second Amended Complaint against the Asensio defendants,

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[7]Specifically, the Asensio defendants sought dismissal of Counts I (RICO), III (common law fraud) and VIII (negligence). Similarly, defendant Fort Hill sought dismissal of Counts I and III. In addition, defendant Wood Gundy sought dismissal of all counts against it, including Count II (section 10(a)), Count IV (common law fraud) and Count IX (negligence).

[8]The Asensio Defendants assert that HBI voluntarily withdrew Count II, thereby dispensing of all federal claims. Defs. Preliminary Objections, at ¶ 5. On the other hand, plaintiff maintains that the parties entered into a Joint Stipulation and Order, by which the parties agreed that the Court's Order dismissing certain counts of the Plaintiff's First Amended Complaint would apply to all of the defendants. Pl. Answer to Preliminary Objections, at ¶ 5. See Defs. Preliminary Objections, Exhibit C - Stipulation and Order, dated April 30, 1999, Docket Entry # 50; Hemispherx Biopharma, Inc. v. Asensio, No.Civ.A. 98-5204, 2000 WL 807012, at *2 n.1 (E.D.Pa. June 7, 2000). Though the record is not clear exactly when or how Count II was dismissed, it clearly was dismissed or withdrawn prior to the filing of the Second Amended Complaint.

including Asensio.com, Inc., LXE[9] and John Does 1-20. In this Complaint, HBI presents the same factual allegations but asserts only four counts against these defendants: (1) defamation; (2) disparagement; (3) intentional interference with existing and prospective business relations; and (4) civil conspiracy. Thereafter, the parties engaged in discovery and various pretrial activities for approximately six months. See Docket Entries ## 79-135.[10]

On March 31, 2000, the Asensio defendants moved to dismiss the Plaintiff's Second Amended Complaint for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1).[11] Plaintiff, in response, argued that the Federal Court had pendant jurisdiction over the action and relied on the relation of its claims to the federal claims asserted in the First Amended Complaint. Hemispherx Biopharma, Inc. v. Asensio, No.Civ.A. 98-2504, 2000 WL 807012, at **1-2 (E.D.Pa. June 7, 2000). See also Second Am.Compl. at ¶ 8. Subsequent to filing this Motion to Dismiss, the parties continued to engage in discovery from each other and non-party witnesses. See Docket Entries ## 137-179. For example, on May 8, 2000, the Asensio defendants filed a motion to compel discovery from plaintiff. Though the record does not reflect the precise purpose of this discovery, it seems clear that the parties

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[9]Defendant LXE is alleged to be a New York corporation and registered broker-dealer, correspondent firm or introducing firm, subject to the rules, regulations and standards of business conduct of the SEC and self-regulatory organizations. Second Am.Compl. at ¶ 6.

HBI entered a default against LXE in the Federal Court. For present purposes, the issues presented do not implicate LXE.

[10]All references in this Opinion to "Docket Entries" are to the District Court's docket, attached to defendants' Preliminary Objections, which details the history of this case in the Federal Court.

[11]The Asensio defendants assert that no answer or other motions were filed with respect to the Second Amended Complaint because of their recognition of the jurisdictional defect inherent in it. Defs. Mem. of Law in Support of Their Preliminary Objections ("Defs. Mem. of Law # 1"), at 3 n.1.

continued to prepare to litigate the matter.

Nonetheless, on June 7, 2000, by Memorandum Opinion and Order, the Honorable John R. Padova granted defendants' Motion to Dismiss for lack of subject matter jurisdiction and dismissed all pending motions. Asensio, 2000 WL 807012, at *3. In his Opinion, Judge Padova found that plaintiff's reliance on the First Amended Complaint is misplaced since "[a]n amended complaint supersedes an original complaint, and renders the original complaint 'of no legal effect'." Id. at *2 (citation omitted). The District Court, relying on Wellness Community v. Wellness House, 70 F.3d 46, 50 (7th Cir. 1995), held that the Second Amended Complaint, which superseded the original complaint, contained no federal claim to which its state claims could be supplemental. Id. at *3. Thereafter, plaintiff filed a Motion for Reconsideration, which Judge Padova denied on July 17, 2000. Hemispherx Biopharma v. Asensio, No.Civ.A. 98-5204, 2000 WL 10502045, at *1 (E.D.Pa. July 17, 2000).[12]

On July 31, 2000, plaintiff filed a praecipe to transfer the matter to this court, pursuant to 42 Pa.C.S.A. § 5103, along with a certified copy of the final judgment rendered by the District Court and a certified copy of the District Court's docket. See Defs. Preliminary Objections, Exhibit C. On August 14, 2000, plaintiff filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit seeking reversal of the District Court's Order(s) dismissing the action for lack of subject matter jurisdiction.

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[12]Prior to this final decision by the District Court, on June 26, 2000, the defendants purportedly filed a second action by Summons in the Supreme Court of New York against, *inter alia*, HBI, seeking a declaration that the statements which defendants made against HBI were not defamatory ("Declaratory Judgment Action"). See Defs. Mem. of Law # 1, at 5. On August 30, 2000, HBI filed a Demand for Complaint in the Declaratory Judgment Action and on September 25, 2000, a Complaint was filed. See Id.

See id., Exhibit D.[13]

On September 1, 2000, the Asensio defendants filed Preliminary Objections, asserting the following: (1) HBI's transfer was ineffective and untimely under 42 Pa.C.S.A. § 5103, (2) pendency of prior action, (3) failure to serve the Asensio defendants, (4) lack of personal jurisdiction, (5) improper venue, (6) failure to plead its claim for civil conspiracy with the requisite legal sufficiency, and (7) insufficient specificity as to HBI's remaining claims, in contravention of Pa.R.C.P. 1019. Defs. Preliminary Objections, at ¶¶ 16-68. In turn, on September 21, 2000, plaintiff filed both an Answer to these objections and their own set of Preliminary Objections, contending that defendants' objections were untimely and that defendants waived and are estopped from raising any objection to jurisdiction, venue or insufficient specificity in HBI's pleadings.

On October 11, 2000, plaintiff filed certified copies of the First Amended Complaint, the defendants' Answer and Counterclaim, and plaintiff's Second Amended and Supplemented Complaint. Thereafter, on November 20, 2000, this court granted the plaintiff's Motion *Nunc Pro Tunc* to direct the Prothonotary of the Court of Common Pleas, Philadelphia County, to have the docket reflect that these pleadings were filed as of July 31, 2000.[14]

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[13]Plaintiff's counsel represented that it would withdraw this appeal in the event that this court denies the defendants' preliminary objections. See Pl.'s Counsel's letter, dated January 5, 2001. Counsel also supplied documentation that the appeal in the Third Circuit is stayed, pending this court's resolution of the preliminary objections. Id. In addition, the parties stipulated that the plaintiff, here, would have thirty days after this court's ruling to respond to the complaint filed by the defendants in the related New York case, Asensio, et al. v. Hemispherx Biopharma, Inc. and William A. Carter, Index No. 114050/00. Id.

[14]In its Motion, plaintiff asserted that its counsel took great care in contacting and working with the courts to ensure that it would effectuate a proper transfer and file the correct pleadings. Motion *Nunc Pro Tunc*, at ¶¶ 9, 13-17. This court found their assertions to be persuasive.

In the context of this complicated procedural history, this court must now decide the merits of both the plaintiff's objections and the defendants' objections.

Discussion

A. Defendants' Objections Filed Thirty-One Days After The Purported Transfer From The District Court Were Not Untimely Under The Circumstances Of This Case And Plaintiff Did Not Sufficiently Demonstrate That It Was Prejudiced By Any Delay.

As a preliminary matter, plaintiff argues that defendants' objections were not filed within the twenty-day period required by law without any justification. And, they therefore must be stricken. Pl. Mem. of Law in Support of Its Preliminary Objections ("Pl. Mem. of Law # 2"), at 2-3. Plaintiff maintains that on July 31, 2000, as allowed under the Pennsylvania Rules of Civil Procedure, it served defendants' counsel of record, Thomas S. Biemer, Esq. with the transfer papers. Id. at 3-4. Over two weeks later, Mr. Biemer purportedly informed plaintiff's counsel that he was not authorized to accept service of these pleadings. Id. On August 22, 2000, plaintiff's counsel then personally served the defendants with copies of the transfer papers. See Pl. Mem. of Law # 2, Exhibit B.

In response, defendants contend that plaintiff filed no pleadings or documents containing a "notice to defend." Defs. Mem. of Law in Opposition to Pl. Preliminary Objections ("Defs. Mem. of Law # 2"), at 6. Defendants also assert that plaintiff did not comply with the requirements of 42 Pa.C.S.A. § 5103 by failing to file copies of the relevant pleadings from the District Court. Id. at 6-7. Further, defendants argue that plaintiff failed to properly serve the defendants with the transfer papers but rather "delivered" these papers to defendants' counsel without requesting that counsel accept these papers on the defendants' behalf. Id. at 7-8. The substance of defendants' arguments overlaps with their Preliminary Objections (which the court will address later), but their arguments do present an issue of the timing of the

filing of the Preliminary Objections.

Rule 1026(a) of the Pennsylvania Rules of Civil Procedure ["Pa.R.C.P."] requires that each pleading, subsequent to the complaint, shall be filed within twenty days after service of the preceding pleading. However, under Pa.R.C.P. 126, a court at every stage of a proceeding may disregard any error or defect of procedure which does not affect the substantive rights of the parties. Further, "absent a showing of prejudice, the failure to file a responsive pleading within twenty days, as required by Pa.R.C.P. 1026, does not require that the late pleading be stricken." Ambrose v. Cross Creek Condominiums, 412 Pa.Super. 1, 9, 602 A.2d 864, 868 (1992). See also, Ellenbogen v. PNC Bank, N.A.. 731 A.2d 175, 183 n.16 (Pa.Super.Ct. 1999)("[t]he court may ignore insubstantial noncompliance with procedural rules not resulting in prejudice, such as rules regarding deadlines"); Gale v. Mercy Catholic Med. Ctr. Eastwick , Inc., Fitzgerald Mercy Div., 698 A.2d 647, 649 (Pa.Super.Ct. 1997)("[i]t is left to the sound discretion of the trial court to permit a late filing of a pleading where the opposing party will not be prejudiced and justice so requires"); Weaver v. Martin, 440 Pa.Super. 185, 191, 655 A.2d 180, 183 (1995)(the twenty-day filing period "has been interpreted liberally and is permissive rather than mandatory"). Rather, the Pennsylvania Supreme Court has established that "[w]hen a party moves to strike a pleading, the party who files the untimely pleading must demonstrate just cause for the delay. It is only after a showing of just cause has been made that the moving party needs to demonstrate that it has been prejudiced by the late pleading." Peters Creek Sanitary Auth. v. Welch, 545 Pa. 309, 314-15, 681 A.2d 167, 170 (1996).

Here, the record reflects that the Second Amended Complaint and other pleadings were not actually filed until October 10, 2000, though plaintiff filed its praecipe to transfer the case along with certified copies of the final judgment and the District Court's docket on July 31, 2000. Defendants filed

their preliminary objections on September 1, 2000, approximately thirty-one days after plaintiff had purportedly perfected the transfer. On November 20, 2000, this court granted plaintiff's Motion *Nunc Pro Tunc* to have the Complaint and the other pleadings be deemed filed as of July 31, 2000. Under these circumstances, defendants could reasonably have determined that the twenty-day deadline had not been triggered as of July 31, 2000. Nonetheless, even if the deadline was triggered as of this date, defendants filed their preliminary objections only eleven days after this deadline, which is a *de minimis* delay at most. See Ambrose, 412 Pa.Super. at 9-10, 602 A.2d at 867-68 (holding that plaintiff suffered no prejudice where preliminary objections were filed approximately two weeks late). Moreover, plaintiff has not sufficiently demonstrated that it was prejudiced by this delay.

In sum then, the plaintiff's Preliminary Objections arguing the lateness of defendants' Objections are overruled.

B. Plaintiff's Transfer, Pursuant To 42 Pa.C.S.A. § 5103, Was Sufficiently Prompt And Effective Where The Transfer Papers Were Filed Less Than One Month After The Motion For Reconsideration Was Denied By The District Court And The Relevant Pleadings Were Actually Filed Less Than Three Months Thereafter.

Defendants contend that this action should be dismissed because plaintiff did not file a certified transcript of the pleadings, as required by 42 Pa.C.S.A. § 5103, when plaintiff attempted to transfer the case from the District Court, but plaintiff instead filed a certified copy of the docket which does not qualify as pleadings. Defs. Mem. of Law in Support of Their Preliminary Objections ("Defs. Mem. of Law #1"), at 8-11. Defendants rely primarily on the Pennsylvania Superior Court's language in Williams v. F.L. Smithe Machine Co., Inc., 395 Pa.Super. 511, 516-17, 577 A.2d 907, 910 (1990), which emphasized the need to promptly file both a certified transcript of the final judgment of the Federal Court

and a certified transcript of the pleadings from the federal action at the same time.

In turn, plaintiff asserts that it complied with the letter and the spirit of 42 Pa.C.S.A. § 5103, which contains permissive language for effectuating a transfer from Federal Court, and that defendants read Williams too narrowly. Pl. Mem. of Law in Opposition to Defs. Preliminary Objections ("Pl. Mem. of Law # 1"), at 10-12. Plaintiff further argues that it took great care in contacting and working with the appropriate courts in order to effectuate the transfer. Id. at 12-14. Plaintiff's counsel also represented that certain offices of the courts instructed that plaintiff need only file certified copies of the final judgment and of the docket and that the court would instruct counsel as to which pleadings it would require. Id. at 13.

Defendants' objections that the transfer was not prompt or effective has virtually been rendered moot by this court's Order, dated November 20, 2000, granting plaintiff's Motion *Nunc Pro Tunc* which allowed the Second Amended Complaint, the First Amended Complaint and defendants' Answer and Counterclaim to be deemed filed as of July 31, 2000. However, this court will address the parties' respective arguments in order to clarify this issue.

The statute governing the transfer of erroneously filed cases, 42 Pa.C.S.A. § 5103, provides the following in pertinent part:

> (a) General rule.--If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth which does not have jurisdiction of the appeal or other matter, the court or district justice shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court or magisterial district of this Commonwealth. . . .

> (b) Federal cases.--(1) Subsection (a) shall also apply to any matter transferred or remanded by any United States court for a district embracing any part of this Commonwealth . . . . Where a matter is filed in any United States court for a district embracing any part of this Commonwealth and the matter is dismissed by the United States court for lack of jurisdiction, any litigant in the matter **may** transfer the matter to a court or magisterial district of this Commonwealth by complying with the transfer provisions set forth in paragraph (2).
>
> (2) Except as otherwise prescribed by general rules, or by order of the United States court, such transfer **may be effected** by filing a certified transcript of the final judgment of the United States court and the related pleadings in a court or magisterial district of this Commonwealth. The pleadings shall have the same effect as under the practice in the United States court, but the transferee court or district justice may require that they be amended to conform to the practice in this Commonwealth. Section 5535(a)(2)(i)(relating to termination of prior matter) shall not be applicable to a matter transferred under this subsection.

42 Pa.C.S.A. § 5103(a) and (b) (emphasis added).

In Williams, which defendants correctly point out is factually similar to the present case, the Pennsylvania Superior court determined that the purpose of § 5103 was to provide protection from the bar of the statute of limitations. 395 Pa.Super. at 515, 577 A.2d at 909. In that case, plaintiffs filed a personal injury action in the Middle District of Pennsylvania which was dismissed for lack of subject matter jurisdiction six months after the action was commenced. Id. at 513, 577 A.2d at 908. Approximately two weeks thereafter, plaintiffs filed a new complaint in the state court, which was identical to the one filed in Federal Court, along with attached certified copies of the Federal Court docket and of the Federal Court's final judgment. Id. Approximately one month later, realizing it was unnecessary to file a new complaint, plaintiffs filed true and correct copies of the pleadings which had been filed in the Federal Court action. Six months later, realizing these copies were not certified copies, plaintiffs filed certified copies in the state court. Id.

The trial court determined that plaintiffs were required to institute a new action because the Federal Court had dismissed the action, rather than transferring it to the state court. Id. Since the statute of limitations had run, the trial court dismissed the action as time barred. Id. The Pennsylvania Superior court reversed and remanded the case, holding that the harsh result of dismissal of the case was not appropriate even though the plaintiffs failed to strictly comply with 42 Pa.C.S.A. § 5103 when they moved to transfer their case from Federal Court after it was dismissed for lack of subject matter jurisdiction. 395 Pa.Super. at 516, 577 A.2d at 910. In dicta, the court said:

> [h]owever, for benefit of both bench and bar, we now emphasize that in order to protect the timeliness of an action under 42 Pa.C.S.A. § 5103, a litigant, upon having his case dismissed in Federal Court for lack of jurisdiction, must promptly file a certified transcript of the final judgment of the Federal Court and, at the same time, a certified transcript of the pleadings from the federal action. The litigant shall not file new pleadings in state court.

Id. at 516-17, 577 A.2d at 910. The Williams court did not however clarify what would be considered prompt under § 5103, nor did it explicitly define "transcript of the pleadings".

Pennsylvania cases, following the Williams decision, continue to emphasize that § 5103 requires litigants to act promptly in effectuating a transfer of a federal case which has been dismissed for jurisdictional reasons. Constantino v. The University of Pittsburgh, 2001 WL 8568, at *3 (Pa.Super.Ct. Jan. 4, 2001); Ferrari v. Antonacci, 456 Pa.Super. 54, 58-59, 689 A.2d 320, 323 (1997), appeal denied, 548 Pa. 670, 698 A.2d 594 (1997); Collins v. Greene Cty. Memorial Hospital, 419 Pa.Super. 519, 524-25, 615 A.2d 760, 762-63 (1992), aff'd, 536 Pa. 670, 698 A.2d 594 (1994). Further, the Pennsylvania Superior court has twice called for the Legislature to include a specific time requirement in the provisions of § 5103, but the Legislature has not responded. Constantino, 2001 WL 8568, at *3 (citing Ferrari, 456 Pa.Super. at 59, 689 A.2d at 323; and Collins, 419 Pa.Super. at 525, 615 A.2d at 763). Nonetheless,

in Collins, the Pennsylvania Superior court held that a nearly seven-month delay between dismissal of the federal action and the plaintiff's praecipe to transfer the case to state court was untimely. 419 Pa.Super. at 524, 615 A.2d at 762. Likewise, in Ferrari, a delay of nearly one year between the Federal Court dismissal and the state court filing was also found to be untimely. 456 Pa.Super. at 59, 689 A.2d at 323.

However, the more instructive case is Constantino, where the federal case was still pending on appeal at the time of the transfer. 2001 WL 8568, at **1-2. In that case, the plaintiff had timely filed its appeal to the Court of Appeals of the Third Circuit, four days after the District Court had dismissed for lack of subject matter jurisdiction over the pendant state law claims. Id. at *1. While the appeal was pending, approximately 105 days after the District Court's dismissal, the plaintiff praeciped to transfer her case to the state court. Id. at *2 The defendants filed preliminary objections for failure to seek a transfer in a timely manner and for failure to state a claim upon which relief could be granted. Id. Defendants also requested a stay in the state court pending the disposition of the appeal in Federal Court, which the trial court granted. Id. After the United States Supreme Court denied certiorari, defendants moved to lift the stay and list their preliminary objections for argument in the state court. Id. The trial court sustained the objections and dismissed the complaint on the finding that plaintiff had untimely transferred the case to state court and had also failed to state a claim for defamation. Id. The appellate court disagreed with the trial court's determination that the transfer was untimely under § 5103. Id. at *4. It held that the uncertainty resulting from the pending appeal, as well as the lack of necessity for proceeding in state court in the event the court of appeals reversed the federal dismissal, provides an explanation for the delay. Id. The court also determined that the defendants could not claim prejudice since they had no reason to believe the case had terminated with the appeal pending. Id. However, the appellate court also upheld the trial court's

determination that plaintiffs had failed to state a claim for defamation. Id. at *5.

Here, contrary to defendants' assertions, this court finds that plaintiff's transfer of this action was both sufficiently prompt and effective under Section 5103. On July 31, 2000, plaintiff filed its praecipe, pursuant to 42 Pa.C.S.A. § 5103, to transfer the matter from the District Court, approximately two weeks after that court had denied the plaintiff's Motion for Reconsideration. Along with its praecipe, plaintiff filed certified copies of the final judgment from the District Court and a certified copy of the docket, but, unlike Williams, plaintiff did not file a new complaint. Defs. Preliminary Objections, Exhibit A. Admittedly, plaintiff did not file certified copies of its Second Amended Complaint or the other pleadings filed in the District Court, at the same time that it filed its other transfer papers. However, unlike Williams, Collins, Ferrari or even Constantino, on October 10, 2000, plaintiff actually filed its Second Amended Complaint less than three months after the federal dismissal. Moreover, this Complaint is deemed to have been filed on July 31, 2000 by virtue of this court's Order of November 20, 2000. In addition, on August 14, 2000, plaintiff filed a Notice of Appeal with the Court of Appeals for the Third Circuit, relating to the District Court's Orders dismissing the action for lack of subject matter jurisdiction. Id., Exhibit D. Thus, similarly to Constantino, this court finds that defendants cannot claim prejudice for delay in the filing of the pleadings since the federal appeal was still pending, leaving the finality of the Federal Court's judgment to be in a state of uncertainty.

Alternatively, defendants have requested that this court stay the matter during the pendency of the federal appeal. Defs. Preliminary Objections, at ¶ 68. This request is now moot in light of the fact that the Court of Appeals for the Third Circuit has stayed the appeal, pending this court's adjudication of

the Preliminary Objections. See Letter of Pl.'s Counsel, dated January 5, 2001, and attached documentation.

In light of these circumstances, this court finds that plaintiff's transfer pursuant to Section 5103 was sufficiently prompt and effective. The defendants' objections to the transfer are therefore overruled.

C. Defendants' Preliminary Objections Regarding Pendency Of Prior Action Are Moot Where These Actions Have Been Stayed, Pending This Court's Adjudication Of The Objections.

A party may raise preliminary objections based on the pendency of a prior action. Pa.R.C.P. 1028(a)(6). This protects "a defendant from harassment by having to defend several suits on the same cause of action at the same time." Penox Techs., Inc. v. Foster Med. Group, 376 Pa.Super. 450, 453, 546 A.2d 114, 115 (1988). Under Pennsylvania law, the question of a pending prior action "is purely a question of law determinable from an inspection of the pleadings." Davis Cookie Co. v. Wasley, 389 Pa.Super. 112, 121, 566 A.2d 870, 874 (1989)(quoting Hessenbruch v. Markle, 194 Pa. 581, 592, 45 A. 669, 671 (1900).

To sustain a preliminary objection based on pending prior action, "the objecting party must demonstrate to the court that in each case the parties are the same, and the rights asserted and the relief prayed for are the same." Virginia Mansions Condominium Ass'n. v. Lampl, 380 Pa.Super. 452, 456, 552 A.2d 275, 277 (1988). See also, Davis Cookie Co., 389 Pa.Super. at 120, 566 A.2d at 874 (requiring that the parties be "acting in the same legal capacity" in both actions). But see, Hessenbruch, 194 Pa. at 594, 45 A. at 671 (while a plaintiff in the first suit may be a defendant in second suit, the fact that the same persons are present in both suits allows a court "with perhaps some liberality of construction, [to] assume

that the parties are the same."). The test must be applied strictly. Norristown Auto. Co. v. Hand, 386 Pa.Super. 269, 274, 562 A.2d 902, 904 (1989). Moreover, an action advancing outside the Commonwealth is generally not considered a pending prior action unless the action pending in another state or other country reaches judgment. Singer v. Dong Sup Cha, 379 Pa.Super. 556, 560, 550 A.2d 791, 792-93 (1988)(citation omitted).

Here, defendants assert that the federal appeal and the suit filed in the Supreme Court of New York, by the defendants against the plaintiff, are prior pending actions, and that this court must dismiss the present action. Defs. Mem. of Law # 1, at 8. As noted, the federal appeal has been stayed pending this court's adjudication of the Preliminary Objections. Likewise, the parties have stipulated that HBI and William A. Carter, the defendants in the New York action, shall have up to thirty days after this court issues a ruling, in which to answer, move to dismiss or otherwise respond to the complaint in that action. See Letter of Pl.'s Counsel, dated January 5, 2001, and attached documentation. Consequently, the Asensio defendants' objections based on pendency of prior action are overruled as moot.

D. Service Of Transfer Papers On Defendants' Attorney Of Record Was Sufficient To Comply With The Pennsylvania Rules Of Civil Procedure As Original Service Was Not Required Since Defendants Had Sufficient Notice Of The Transfer Of The Action And Plaintiffs Also Attempted Service Of The Transfer Papers On The Defendants Themselves.

Defendants argue that they were not properly served with the transfer papers, relying on Pa.R.C.P. 1007 which governs the commencement of an action. Defs. Mem. of Law # 1, at 18-19. Plaintiff, in turn, contends that it served defendants' counsel of record, Thomas S. Biemer, Esq.,[15] with the

[15]Mr. Biemer of Dilworth Paxson, L.L.P. was the original counsel of record for the Asensio defendants when the action was first filed in Federal Court. See Docket, at 2. In November, 1999, the defendants had terminated present counsel's representation and Ira Silverstein, Esq. of Buchannan

transfer papers on July 31, 2000, as permitted by Pa.R.C.P. 440. Pl. Mem. of Law #2, at 3-4. Plaintiff further responds that upon notification two weeks later that Mr. Biemer was not authorized to accept service of these pleadings, plaintiff then directly served these papers on the defendants on August 22, 2000. Id. See also, Pl. Preliminary Objections, Exhibit B.

This court agrees with plaintiff's position and finds that defendants' objections regarding service are without merit.

It is true that Rule 1007 provides that an action may be commenced by filing a praecipe for a writ of summons or a complaint. Pa.R.C.P. 1007. This rule is not applicable to the instant case which was transferred to this court pursuant to 42 Pa.C.S.A. § 5103. See City of Philadelphia v. White, 727 A.2d 627, 630-31 (Pa.Commw.Ct. 1999)(discussing the rules allowing for service on attorney of record). Rather, Rule 440 governs service of legal papers other than original process and permits service to be made to the party's attorney of record. Pa.R.C.P. 440(a)(1)(i). Here, the defendants' attorney of record, at the time of the transfer, was Mr. Biemer. See note 14 *supra*. This court has also determined that the transfer was effective. This action thus shall be treated as if originally filed in this court. 42 Pa.C.S.A. § 5103(a). Moreover, defendants were personally served with the transfer papers on August 22, 2000. The circumstances demonstrate that plaintiff has made a good faith effort to effectively notify defendants of its

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Ingersoll entered his appearance for the Asensio defendants. See Docket # 102. In February, 2000, Mr. Silverstein withdrew as counsel for the Asensio defendants and Manuel P. Asensio sought to proceed *pro se*. Id. at ## 112, 118. The District Court did not allow Mr. Asensio to appear individually but ordered the Asensio defendants to obtain substitute counsel. Id. at # 122. Thereafter, in March, 2000, Dilworth Paxson reentered its appearance on behalf of the Asensio defendants. Id. at # 126. Specifically, Mr. Biemer again entered his appearance on March 20, 2000. Id. at # 129.

intent to transfer this action to this court. Defendants cannot reasonably argue that it had no notice of this transfer.

Under these circumstances, defendants' objections regarding service are overruled.

E. Defendants Waived Their Right To Object To Lack Of Personal Jurisdiction And Venue When They Failed To Raise These Issues After The Claim Based On The Securities And Exchange Act Of 1934 Was Withdrawn Or At Any Time During The Prosecution Of The Federal Case.

As a preliminary matter, plaintiff urges that defendants waived any objection to venue and jurisdiction by failing to raise this defense in Federal Court and by actively litigating this matter for almost two years. Pl. Mem. of Law # 2, 5-6. In response, defendants argue that they "never consented to the jurisdiction or venue of the State Court and their personal jurisdiction and venue objections in this case are valid." Defs. Mem. of Law # 2, at 12. As support, defendants contend that they were not able to object to personal jurisdiction or venue since plaintiff had originally asserted a claim based on alleged violations of the Securities and Exchange Act of 1934 which authorizes nationwide service of process. Id. at 12-13.

Contrary to defendants' position, this court finds that the defendants waived any objection to venue or jurisdiction by failing to raise these defenses in a timely fashion after the claim based on the Securities and Exchange Act of 1934 was dropped from the action.

In evaluating whether defendants waived their objections to personal jurisdiction and venue, certain principles must be noted. Preliminary objections which would result in dismissal of a complaint should be sustained only in cases that are clear and free from doubt. Butler v. Illes, 747 A.2d 943, 944 (Pa.Super.Ct. 2000)(citing Baker v. Brennan, 419 Pa. 222, 225, 213 A.2d 362, 364 (1965)). Further, in ruling on objections for lack of personal jurisdiction and/or improper venue, the court must consider the

evidence in the light most favorable to the nonmoving party. Eastern Continuous Forms, Inc. v. Island Business Forms, Inc., 355 Pa.Super. 352, 354, 513 A.2d 466, 467 (1986). Having raised objections to personal jurisdiction and venue, defendants initially bear the burden of proof. Barr v. Barr, 749 A.2d 992, 994 (Pa.Super.Ct. 2000); Grimes v. Wetzler, 749 A.2d 535, 538 (Pa.Super.Ct. 2000); King v. Detroit Tool Co., 452 Pa.Super. 334, 339, 682 A.2d 313, 315 (1996)(the objecting party must "meet its burden of showing jurisdictional infirmities that are 'clear and free from doubt'"). However, "[o]nce the moving party supports its objections to personal jurisdiction, the burden of proving personal jurisdiction is upon the party asserting it." Barr, 749 A.2d at 994. See also, Grimes, 749 A.2d at 538.

Nonetheless, Pennsylvania state courts have often stated that "[q]uestions of personal jurisdiction, venue and notice . . . must be raised at the first reasonable opportunity or they are waived." Kubik v. Route 252, Inc., 762 A.2d 1119, 1123 (Pa.Super.Ct. 2000)(citation omitted); Goodman v. Goodman, 383 Pa.Super. 374, 395, 556 A.2d 1379, 1390 (1989), appeal denied 523 Pa. 642, 565 A.2d 1167 (1989). Once a party takes some action, beyond merely entering a written appearance, which goes to the merits, he waives his right to object to defective service of process. Ball v. Barber, 423 Pa.Super. 358, 361, 621 A.2d 156, 158 (1993). See also, Radakovich v. Weisman, 241 Pa.Super. 35, 41, 359 A.2d 426, 429 (1976)(citations omitted)("[i]t is well-established that a party may waive his objections to personal jurisdiction by consenting to the court's authority: 'Jurisdiction of the person may only be obtained, however, through consent, waiver or proper service of process.'"); O'Barto v. Glossers Stores, Inc., 228 Pa.Super. 201, 205, 324 A.2d 474, 476 (1974). In addition, the right to object to venue is a mere personal privilege belonging to the defendant which may be waived by him. Misher v. Bo's Auto Parts, Inc., 383 Pa.Super. 592, 596, 557 A.2d 410, 412 (1989); McLain v. Arneytown Trucking Co., 370

Pa.Super. 520, 524, 536 A.2d 1388, 1389 (1988); Wolf v. Weymers, 285 Pa.Super. 361, 367, 427 A.2d 678, 680-681 (1981).

Similarly, Federal Courts hold that objections to personal jurisdiction and venue, as well as defective service, are waived if not asserted in a timely fashion by motion or in the answer. McCurdy v. American Bd. of Plastic Surgery, 157 F.3d 191, 194 (3d Cir. 1998); In re Grand Jury Proceedings, 654 F.2d 268, 271 (3d Cir. 1981)(citations omitted). Likewise, "a party is deemed to have consented to personal jurisdiction if the party actually litigates the underlying merits or demonstrates a willingness to engage in extensive litigation in the forum." In re Texas Eastern Transmission Corp. PCB Contamination Ins. Coverage Litig., 15 F.3d 1230, 1236 (3d Cir. 1994).

Moreover, Rule 12(h) of the Federal Rules of Civil Procedure ["Fed.R.Civ.P."] provides that:

> (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

Fed.R.Civ.P. 12(h)(1). Subdivision (g) of Rule 12 requires that a party consolidate every Rule 12 defense and objection he may have and that he can assert by motion. Fed.R.Civ.P. 12(g). Generally, only the defenses of failure to state a claim for relief, failure to join an indispensable party or lack of subject matter jurisdiction are not waived if not presented in the original Rule 12 motion. Fed.R.Civ.P. 12(h)(2) and (3). Therefore, in Federal Court, a defendant effectively waives its objections to personal jurisdiction, venue and service if it fails to raise these defenses in a Rule 12 motion to dismiss for lack of subject matter jurisdiction. See, e.g., McCurdy, 157 F.3d at 194-95 (defendant waived objection to untimely service by

failing to raise it in Rule 12 motion to dismiss for lack of personal jurisdiction); Triple Crown America, Inc. v. Biosynth AG and Biosynth International, Inc., 1997 WL 611621, at *7 (E.D.Pa. Sept. 17, 1997)(defendant waived objection to personal jurisdiction by failing to assert it in Rule 12 motion to dismiss for improper venue); Harris Bank Naperville v. Pachaly, 902 F.Supp. 156, 157-58 (N.D.Ill. 1995)(defendant could not assert lack of subject matter jurisdiction in second Rule 12 motion to dismiss where he failed to assert it in first motion to dismiss for lack of subject matter jurisdiction).

Admittedly, defendants readily filed their preliminary objections asserting lack of personal jurisdiction and improper venue soon after the transfer of the case was effectuated. However, this does not end the court's inquiry. Rather, the court must resolve whether defendants waived their objections to personal jurisdiction and venue prior to the transfer from Federal Court since this transferred case must be treated as if it was originally filed in this court. 42 Pa.C.S.A. § 5103 (a).

It is true that this case originally included a claim based on alleged violations of the Securities and Exchange Act of 1934. See First Am.Compl., Count II. As such, jurisdiction was originally based on 15 U.S.C. § 78aa and pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). Id. at ¶ 13. Plaintiff had also asserted that the District Court had supplemental jurisdiction over Counts III through IX of the Complaint pursuant to 28 U.S.C. § 1367(a). Id. Further, plaintiff had contended that venue was proper in the District Court pursuant, *inter alia*, to 15 U.S.C. § 78aa. Id. at ¶ 14. Defendants correctly point out that certain courts have held that the Securities and Exchange Act authorizes nationwide service of process and hold that the only contacts relevant to the due process analysis are those between the defendant and the United States. See, e.g., 15 U.S.C. § 78aa; Sovereign Bank v. Rochester Community Sav. Bank, 907 F.Supp. 123, 125 (E.D.Pa. 1995)(citations omitted).

Notwithstanding defendants' contentions, the claim based on the alleged violations of the Securities and Exchange Act of 1934 was dropped from the case sometime prior to the filing of the Second Amended Complaint on September 10, 1999. See note 7 *supra*. In this Complaint, which set forth only state law claims, plaintiff asserted that the District Court had supplemental jurisdiction pursuant to 28 U.S.C. § 1367 and that venue was proper pursuant to 28 U.S.C. § 1391. Id. at ¶¶ 8-9. In the interim, the parties continued to engage in discovery and pre-trial activities. See Docket Entries ## 79-135. Defendants, however, did not bring their Rule 12 motion to dismiss for lack of subject matter jurisdiction until March 31, 2000, approximately six months after the Second Amended Complaint was filed. However, defendants failed to raise lack of personal jurisdiction or improper venue in this same motion despite having the ability to do so. Though lack of subject matter jurisdiction is a non-waivable defense, defendants would thus be deemed to have waived these objections in Federal Court.[16] See Fed.R.Civ.P. 12(h)(1); McCurdy, 157 F.3d at 194-95; Triple Crown, 1997 WL 611621, at *7; Pachaly, 902 F.Supp. at 157-58. If defendants had wanted to preserve these defenses, they should have raised them at the very least in the same Rule 12 motion to dismiss. Still, the better and more timely practice would have been to raise these defenses as soon as the securities claim was withdrawn from the case instead of waiting over

[16]Incidentally, both state courts and Federal Courts treat the matter of subject matter jurisdiction as a non-waivable defense. See, e.g., Pa.R.C.P. 1032; LaChapelle v. Interocean Management Corp., 731 A.2d 163, 167 (1999); EF Operating Corp. v. American Buildings, 993 F.2d 1046, 1048 (3d Cir. 1993). The United States Supreme Court has also emphasized that unlike subject matter jurisdiction, which a court may raise *sua sponte*, a defense of personal jurisdiction may be intentionally waived or a defendant may be estopped from raising the issue where the actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not. Insurance Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694, 704-05 (1982).

six months. Thus, defendants are estopped from raising these issues now that this case has been transferred to this court.

Under these circumstances, this court concludes that defendants waived and are estopped from asserting objections to personal jurisdiction and venue. The plaintiff's objections to defendants' objections are sustained in this regard.[17]

F. The Second Amended Complaint Is Sufficiently Specific To Notify Defendants Of The Nature Of The Plaintiff's Claims And To Enable Defendants To Prepare Their Defense Especially Where This Case Originated Over Two Years Ago, The Parties Engaged In Discovery And Plaintiffs Identified The Third Party Co-Conspirators In A Letter To Defense Counsel.

In its objections, plaintiff argues that defendants waived their objections to the legal sufficiency of the pleadings in the Second Amended Complaint and that these pleadings are sufficiently specific to meet the fact pleading standards required by Pa.R.C.P. 1019. Pl. Mem. of Law # 2, at 29-30. Defendants, in turn, object that plaintiff's claims for defamation (Count I), disparagement (Count II), tortious interference with existing and prospective business relations (Count III) and civil conspiracy (Count IV) do not meet the specific fact pleading standards required by Pa.R.C.P. 1019. Defs. Mem. of Law # 2, 19-20. In particular, defendants assert that the claim for civil conspiracy (Count IV) is legally insufficient where plaintiffs allege "that the Asensio defendants conspired with other, unnamed third parties for the purpose of entering into an unlawful scheme to manipulate the price of HBI's common stock." Id. at 21.

[17]In light of this conclusion, this court need not address the merits of defendants' objections regarding personal jurisdiction and venue.

Under both the Pennsylvania Rules of Civil Procedure and the Federal Rules of Civil Procedure, a defense based on the legal insufficiency of a claim is never waived. See Pa.R.C.P. 1032(a); Fed.R.Civ.P. 12(h)(2). Further, this court, as the transferee court, is authorized to require that the pleadings be amended, if need be, to conform to the practice in this Commonwealth. 42 Pa.C.S.A. § 5103(b)(2). Unlike the federal "notice pleading" requirements, in "the Pennsylvania system of fact pleading, the pleader must define the issues; every act or performance essential to that end must be set forth in the complaint." Miketic v. Baron, 450 Pa.Super. 91, 104, 675 A.2d 324, 330 (1996)(citing Santiago v. Pennsylvania Nat. Mut. Cas. Ins. Co., 418 Pa.Super. 178, 183, 613 A.2d 1235, 1238 (1992)). Therefore, plaintiff's objections that defendants waived their ability to challenge the legal sufficiency of plaintiff's pleadings in its Complaint are overruled. In light of this ruling, this court must examine defendants' objections regarding the insufficient specificity in plaintiff's Complaint.

Pursuant to Pa.R.C.P. 1028(a)(3), defendants generally set forth objections that plaintiff's pleadings are insufficiently specific and fail to meet various requirements of Rule 1019 of the Pennsylvania Rules of Civil Procedure. Defs. Preliminary Objections, at ¶¶ 56-62. In summary, Rule 1019(a) requires the plaintiff to state "[t]he material facts on which a cause of action . . . is based . . . in a concise and summary form." Pa.R.C.P. 1019(a). "Averments of time, place and items of special damage shall be specifically stated." Pa.R.C.P. 1019(f). Further, a party must attach the writing upon which a claim or defense is based. Pa.R.C.P. 1019(h). To determine if a pleading meets Pennsylvania's specificity requirements, a court must ascertain whether the facts alleged are "sufficiently specific so as to enable [a] defendant to prepare [its] defense." Smith v. Wagner, 403 Pa.Super. 316, 319, 588 A.2d 1308, 1310 (1991)(citation omitted). See also, In re The Barnes Foundation, 443 Pa.Super. 369, 381, 661 A.2d 889,

895 (1995)("a pleading should formulate the issues by fully summarizing the material facts, and as a minimum, a pleader must set forth concisely the facts upon which [the] cause of action is based.").

Upon examination of the allegations in the Complaint, this court finds that defendants are able to understand the nature of the plaintiff's claims and can prepare their defense to these claims. Plaintiff specifically alleges the timing and substance of the defamatory or disparaging statement, published by defendants and pertaining to the plaintiff and its development of Ampligen. Second Am.Compl. at ¶¶ 15-17. Plaintiff also specifically avers the defendants' intent in making these statements and the specific resulting damage in the decline in the price of plaintiff's common stock. Id. at ¶¶ 16, 18, 19, 20, 24, 25, 28-31. Plaintiffs also specifically allege existing or prospective business relations with its investors, shareholders, business partners, financiers and patients, as well as defendants' conduct which is designed to harm the plaintiff by interfering with those relationships. Id. at ¶¶ 33-38. In addition, plaintiff has attached a copy of an article appearing in the Philadelphia Inquirer, which makes reference to the Business Week article upon which this action is based. Pl. Mem. of Law #1, Exhibit C. In summary, this court finds that plaintiff has sufficiently stated claims for defamation (Count I), disparagement (Count II) and tortious interference with existing or prospective business relations (Count III). See Levin v. Schiffman, July 2000, No. 4442, slip op. at 17-22 (Sheppard, J.)(C.P. Phila. February 1, 2001)(examining similar claims).

Defendants also sets forth a demurrer to Count IV (civil conspiracy), arguing that plaintiff's failure to identify or name the other third party co-conspirators makes its claim legally insufficient. Defs. Preliminary Objections, at ¶¶ 51-54. Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure allows for preliminary objections based on legal insufficiency of a pleading or a demurrer. When reviewing preliminary objections in the form of a demurrer, "all well-pleaded material, factual averments and all

inferences fairly deducible therefrom" are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa.Super.Ct. 2000). "In order to state a cause of action for civil conspiracy, a plaintiff must show 'that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means.' " Brinich v. Jencka, 757 A.2d 388, 403 (Pa.Super.Ct. 2000)(citations omitted). Moreover, "[a] single entity cannot conspire with itself and, similarly, agents of a single entity cannot conspire among themselves." Rutherfoord v. Presbyterian-University Hosp., 417 Pa.Super. 316, 333-34, 612 A.2d 500, 508 (1992).

In Count IV of the Complaint, plaintiff alleges, in pertinent part, that:

> 40. Upon information and belief, defendants Asensio, ACI and Asensio.com conspired with various other as yet unknown persons, identified herein as defendant John Does 1-20, in their campaign to depress the price of HBI's securities by means of the publication and widespread dissemination of defamatory and disparaging statements. Upon information and belief, defendant John Does 1-20 acted overtly in combination with defendants Asensio, ACI and Asensio.com for the common purpose of causing a decline in the price of HBI's securities.
>
> 41. Upon information and belief, certain of defendant John Does 1-20 acted in combination with defendants Asensio, ACI and Asensio.com by engaging in short-selling of HBI stock in accounts maintained for their benefit and/or in accounts managed and/or maintained by them for the benefit of various other persons. . . .
>
> 42. Upon information and belief, certain of defendant John Does 1-20 acted in combination with defendants Asensio, ACI and Asensio.com by assisting in the preparation of the "research report" and accompanying press release containing the Initial Statements and/or in the preparation of certain or all of the press releases containing the Additional Statements. . . .

Second Am.Compl. at ¶¶ 40-42. Accepting these allegations as true, as this court must for purposes of a demurrer, this court finds that plaintiff sufficiently alleged the existence of a conspiracy between the Asensio defendants and the unnamed defendant John Does 1-20 to engage in a common scheme to

depress the price of plaintiff's common stock. Moreover, plaintiff's counsel represents that it had proposed to supply defense counsel with the names of the John Doe co-conspirator defendants on May 8, 2000. Pl. Mem. of Law # 1, at 30. See also, Pl. Mem. of Law # 1, Exhibit D (letter of May 8, 2000 specifically naming certain John Doe defendants). Under these circumstances, this court finds that plaintiff sufficiently stated a cause of action for civil conspiracy.

In light of this analysis, this court overrules defendants' objections regarding the specificity of plaintiff's allegations and the legal sufficiency of the claim for civil conspiracy.

Conclusion

For the reasons set forth, plaintiff's objections as to the "untimeliness" of the defendants' objections and those regarding defendants' waiver of objecting to the legal sufficiency of plaintiff's pleading are overruled. However, plaintiff's objections asserting that the defendants have waived and are estopped from raising objections to personal jurisdiction and venue are sustained.

The remaining objections of defendants regarding pendency of a prior action; failure to effectively transfer the matter from Federal Court pursuant to 42 Pa.C.S.A. § 5103; failure to properly serve the defendants; legal insufficiency of Count IV (Civil Conspiracy) and insufficient specificity in the remaining Counts to the Complaint are also overruled.

A contemporaneous Order in accord with this Opinion shall be entered.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.