IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROTOTHERM CORPORATION, Plaintiff, v. PENN LINEN & UNIFORM SERVICE, INC.; MAX H. STETTNER; ROGER F. COCIVERA; VIRGINIA LINEN SERVICE, INC.; DONALD L. STRUMINGER; MOHENIS SERVICES, INC.; DAVID H. BAILEY; HOSPITAL CENTRAL SERVICES COOPERATIVE, INC. and TIMOTHY R. CRIMMINS, SR., Defendants.	:	CIVIL ACTION NO. 96-6544

M E M O R A N D U M

BUCKWALTER, J. November 26, 1997

I. INTRODUCTION

Currently pending before the Court are Plaintiff's two -- or arguably four -- motions. The first seeks an extension of time to file a motion for reconsideration of the Court's July 3, 1997 Order dismissing the bulk of its complaint, and an extension of time to file a motion for leave to file an amended complaint. The second motion requests reconsideration of the July 3, 1997 Order and leave to amend. The Court will deny these motions for the reasons that follow.

II. BACKGROUND

The parties are well-acquainted with the background of this case, which is contained in the July 3, 1997

Memorandum. Plaintiff Rototherm Corporation ("Rototherm") brought a seven-count action sounding in breach of contract, tort, and antitrust. At issue are three sets of transactions that occurred between 1990 and 1996 among plaintiff and three groups of defendants:

(1) Hospital Central Services Cooperative, Inc. ("HCSC") and Timothy R. Crimmins, Sr. ("HCSC and Crimmins");

(2) the “Virginia Defendants”: Virginia Linen Service, Inc. ("Virginia Linen"), Mohenis Services, Inc. ("Mohenis"), Donald L. Struminger, and David H. Bailey; and

(3) the “Penn Linen Defendants”: Penn Linen & Uniform Service, Inc. ("Penn Linen"), Max H. Stettner, and Roger F. Cocivera.

Rototherm is a New Jersey corporation which manufactures "heat recovery units" for large commercial and industrial laundry dryers. The units are designed to reduce fuel usage and thus costs in the laundry industry. Since 1984, Rototherm has held a patent and an exclusive license to manufacture the units. It has also received a United States Department of Energy (“DOE”) grant to make them commercially available.

This action was based on Rototherm's attempts to have DOE-funded pilot units installed and tested in industrial laundry facilities. The first such attempt was with HCSC and Crimmins, the second with the Virginia defendants, and the third with the Penn Linen defendants.

In a July 3, 1997 Order, the Court dismissed Counts 2-7 of Plaintiff's complaint against all Defendants, and Count 1 against all individual defendants. What remains is Plaintiff's claim for breach of contract against HCSC, Virginia Linen, Mohenis and Penn Linen.

Plaintiff did not timely seek reconsideration of the July 3, 1997 Order, and the Defendants each answered the Complaint. Plaintiff's counsel withdrew, and its present counsel entered his appearance on September 9, 1997, and a scheduling order was issued on September 24, 1997. On October 17, 1997, Plaintiff filed the instant motions.

III. DISCUSSION

A. Motions for extension of time to file a motion for reconsideration and for reconsideration.

Fed. R. Civ. P. 59 (e) allowed Plaintiff ten days to move for reconsideration of the July 3, 1997 Order. Contrary to Plaintiff's selective reading of Fed. R. Civ. P. 6(b)(2), that Rule expressly precludes district courts from enlarging the time in which to file a Rule 59 (e) motion. Adams v. Trustees, N.J. Brewery Employees' Pension Trust Fund, 29 F.3d 863, 864 (3d Cir. 1994). The Court will deny the motion for an extension of time

to file a motion for reconsideration, and it will accordingly deny the motion for reconsideration as untimely.[1]

B. **Motion for extension of time to file a motion for leave to file an amended complaint.**

To the extent that Rototherm also seeks an extension of time to file a motion for leave to file an amended complaint pursuant to Fed. R. Civ. P. 15 (a), that motion is unnecessary, as neither that Rule nor the Local Rules contain an express time limit. What remains, then, is Plaintiff's Motion to Amend.

C. **Motion to amend.**

After a responsive pleading has been filed,[2] "a party may amend [its] pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15 (a). A district court nevertheless retains discretion to deny amendment. Foman v. Davis, 371 U.S. 178, 182 (1962). Prejudice to the nonmoving party has been characterized as the "touchstone" for denial of leave to amend, Lorenz v. CSX Corp., 1 F.3d 1406, 1414 (3d Cir. 1993), but, "[i]n the absence of substantial or undue prejudice, denial instead must be based on bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to

1. Although Plaintiff also refers to Fed. R. Civ. P. 60 (b), it expressly directs the Court to Rule 59 (e). Regardless, the Court would be unwilling to find "excusable neglect" justifying relief under Rule 60.

2. The Defendants filed Answers 6-16 weeks before Plaintiff's motion for leave to amend.

cure the deficiency by amendments previously allowed, or futility of amendment." Id.

Although the Court credits defendants' contention that they will be prejudiced by allowing amendment, it does not appear that such prejudice, standing alone, would be sufficiently undue or substantial to warrant denial of leave to amend. The Court will nonetheless deny leave to amend for the reasons that follow.

1. **Plaintiff's failure to timely move for reconsideration.**

Plaintiff now seeks to "re-state antitrust and tortious interference claims against HCSC, Penn Linen and Virginia Linen/Mohenis." This Court dismissed those claims with prejudice in its July 3, 1997 Order, and the proper vehicle to challenge that Order was a motion for reconsideration (or, of course, on appeal), which Plaintiff neglected to do in a timely manner. There is support for holding that an order dismissing a claim without leave to amend bars relitigation of that claim. See, e.g., Gasho v. United States, 39 F.3d 1420, 1438 n. 17 (9th Cir. 1994); Cannon v. Loyola University of Chicago, 784 F.2d 777, 780 (7th Cir. 1986). Without resting denial of the motion to amend solely on the preclusive effect, if any, of this earlier, unchallenged, Order, the Court believes it would work an unfairness to Defendants to allow Rototherm to achieve by a motion to amend what it clearly could not achieve, because of its lateness, through a motion for reconsideration.

2. **Delay**

Further, while Plaintiff's delay in seeking leave to amend may not appear objectively lengthy, the Court finds it to be unreasonable within the context of this case. Even if the Court were to ignore the period between July 3, 1997 and September 9, 1997, when Plaintiff's present counsel entered an appearance, Plaintiff nonetheless waited approximately six weeks after equipping itself with new counsel and over three weeks after issuance of the scheduling order to seek amendment. While Plaintiff contends that it would be unfair to tax the laxness, if any, of its prior counsel against it, the overriding fairness concern must be for the Defendants, who have reasonably relied upon the July 3, 1997 Order dismissing several of Plaintiff's claims. The Court agrees with Defendants' argument that granting Plaintiff leave to amend would require them to significantly alter the scope -- and ultimately prolong the length -- of their discovery. While disruption of the discovery schedule here may not be so severe as to warrant denial of the proposed amendments, it weighs heavily against Rototherm.

3. **Plaintiff's failure to submit a copy of the proposed amended complaint.**

Moreover, despite the amount of time since this Court's July 3, 1997 Order detailing the flaws in its Complaint, Plaintiff has not attached a copy of its proposed amended complaint to the motion to amend. See Averbach v. Rival Mfg. Co., 879 F.2d 1196, 1202-03 (3d Cir. 1989); Centifani v. Nix, 865

F.2d 1422, 1431 n. 10 (3d Cir. 1989). Plaintiff has instead broadly sketched out claims which, cannot be said to afford Defendants reasonable notice of their parameters, and which, as the Court will discuss, are so insufficient as to be futile.

4. **Futility**

Finally, the Court agrees with Defendants that the claims Plaintiff now outlines -- antitrust claims against the corporate defendants and tortious interference with contract claims against Stettner, Crimmins and Bailey -- would be futile for several reasons.

a. **Sherman Antitrust claims.**

The July 3, 1997 Order dismissed Plaintiff's antitrust claim against all defendants, because the Court found that Plaintiff's allegations demonstrated only that the Defendants were attempting to act cooperatively toward the goal of completing the pilot project and did not make out a conspiracy in restraint of trade. Whereas the Complaint lacked any allegations of conspiratorial conduct, Rototherm now asks us to infer such an agreement from the corporate Defendants' "consciously parallel" behavior, i.e., that each breached its agreement with Plaintiff. Alternatively, Plaintiff now tries to elide the conspiracy element by alleging a per se violation based upon a group boycott.[3]

3. The rule of reason is the general rule used to determine whether Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, has been violated. Under this rule, agreements are evaluated in the context of their effects upon competition within relevant geographic and product markets. Philadelphia Fast
(continued...)

A viable Section 1 claim must allege (1) an agreement among, or concerted action by, Defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the objects of the conduct pursuant to the concerted action were illegal, and (4) that Plaintiff was injured as a proximate result of the concerted action. Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1229 (3d Cir. 1993).

Section 1 only applies to contracts, combinations or conspiracies between separate entities, not to conduct that is "wholly unilateral." Copperweld Corp., 467 U.S. at 768 (quoting Albrecht v. Herald Co., 390 U.S. 145, 149 (1968)). Because Section 1 liability can only be based on concerted action, "[t]he very essence of a section 1 claim . . . is the existence of an agreement." Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 999 (3d Cir. 1994).

The July 3, 1997 Memorandum made clear the Court's wariness about dismissing Plaintiff's antitrust claim before the discovery period had commenced, since "the proof is largely in the hands of the alleged conspirators." Hosp. Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746 (1976) (quoting Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962)).

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3. (...continued)
Foods, Inc. v. Popeyes Famous Fried Chicken, Inc., 647 F. Supp. 216, 222 (E.D. Pa. 1986). Under the "per se rule," by contrast, certain agreements that are inherently anti-competitive are deemed illegal without regard to the harm caused by them. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984). A group boycott is a per se violation. Philadelphia Fast Foods, Inc., 647 F. Supp. at 222-23.

See also Commonwealth of Pennsylvania ex rel. Zimmerman v. Pepsico, Inc., 836 F.2d 173, 179 (3d Cir. 1988). The Court also stated, however, that it would not shrink from dismissing a vague or conclusory antitrust claim, as Section 1 conspiracy allegations must be pled with a degree of specificity.

> A general allegation of conspiracy without a statement of the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause of action. Although detail is unnecessary, the plaintiffs must plead the facts constituting the conspiracy, its object and accomplishment.

Pepsico, 836 F.2d at 182 (quoting Black & Yates v. Mahogany Ass'n, 129 F.2d 227, 231-32 (3d Cir. 1941)).

Plaintiff now argues that the existence of an agreement can be inferred from "proof of consciously parallel business behavior," because in addition to the circumstantial evidence -- each of the three sets of corporate defendants backed out of their agreements with Plaintiff -- Rototherm argues that in doing so they acted contrary to their own economic interests, and that they had a logical motive to enter an agreement in restraint of trade, i.e., to prevent their competitors from eventually benefitting from Rototherm's heat recovery unit.

Rototherm has basically moored a new theory to previously-pled facts. For example, it states that it would allege that Defendants entered into and breached contracts with Rototherm to evaluate the performance of the pilot unit; that they did this with the knowledge that Rototherm intended to use the expected successful tests of the unit to market it to the industrial laundry community; that Defendants were aware of

Rototherm's claims that the unit would result in significant savings in both energy consumption and drying time; that Defendants knew that at conclusion of testing period, Rototherm would be free to sell the unit to their competitors which would save their competitors money. While repetition of old averments may not warrant a finding of futility, standing alone, the Court finds that the allegations continue to be so vague as to warrant denying leave to amend, because they are insufficient to state a claim and thus to give Defendants notice of the actual shape of Rototherm's antitrust claims.

Moreover, Rototherm's allegations of injury to itself are necessarily speculative, as they are based upon hoped-for future earnings after potentially successful test runs of their product. The July 3, 1997 Memorandum noted the vagueness of Plaintiff's claim, including its failure to specify any potential customers or business it may have lost due to defendants' alleged actions. The Court noted that "such vague references to hoped-for contracts are not enough to withstand the defendants' motions to dismiss." See Advanced Power Sys. Inc. V. Hi-Tech Systems, Inc., 801 F. Supp. 1450, 1459 (E.D. Pa. 1992). As with Plaintiff's Original Complaint, the motion to amend is devoid of any allegations of prospective contracts plaintiff was prepared to enter into.

Even if Plaintiff's vague allegations of consciously parallel behavior were sufficient to demonstrate a conspiracy, Plaintiff does not allege that the Defendants'

exerted sufficient control over the market to actually restrain trade. Indeed, Rototherm has failed to even state what the relevant geographic market is, and it has failed to demonstrate any injury, beyond the speculative assertion that its pilot projects would have been successful.

The group boycott theory must also fail. As Defendants note, it would barely apply to a strongly-pled claim under these circumstances and here Rototherm has not demonstrated or even alleged that Defendants were in a position to actually keep Rototherm out of the market, however that market is defined.

The July 3, 1997 Memorandum gave Rototherm extensive notice of the Court's misgivings about its antitrust claims, and the Court will not, at this stage of litigation, require Defendants to guess at the scope and extent of Plaintiff's claims or injury. In short, the Court believes that Rototherm needed to return with a stronger claim than this to merit granting leave to amend.

b. **Tortious interference with contract.**

The July 3, 1997 Order dismissed Rototherm's claim that Defendants' actions constituted tortious interference with contract. Plaintiff now attempts to revive its claims that 1) Stettner, on behalf of Penn Linen, interfered with the Rototherm-TRSA[4] contract; 2) Crimmins interfered with the Rototherm-HCSC

4. According to the Complaint, TRSA, the Textile Rental Services Association of America, is the textile rental industry's primary trade association.

contract; and, 3) Bailey interfered with the Rototherm-Virginia Linen contract.

To plead a tortious interference claim, Rototherm would need to show 1) an actual contract between it and a party other than the Defendant; 2) that Defendant intended to harm Rototherm by interfering with its performance of the contract; 3) that Defendant had no privilege or justification for the interference; and, 4) damages. Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1388 (3d Cir. 1991); Killian v. McCulloch, 850 F. Supp. 1239, 1251 (E.D. Pa. 1994); Neish v. Beaver Newspapers, Inc., 581 A.2d 619, 625 (Pa. Super. 1990). The July 3, 1997 Memorandum and Order held that a corporation cannot tortiously interfere with a contract to which it is a party, see, e.g., Killian, 850 F. Supp. at 1251; Maier v. Maretti, 671 A.2d 701, 707 (Pa. Super. 1995), appeal denied, 694 A.2d 622 (Pa. 1997). Further, we noted that under Pennsylvania law, "a corporate officer . . . is not personally liable for inducing breach of contract unless the individual's sole motive in causing the corporation to breach a contract is actual malice directed toward the plaintiff, or the individual's conduct is against the interest of the corporation." Avins v. Moll, 610 F. Supp. 308, 318 (E.D. Pa. 1984)(emphasis in original). Unsurprisingly, Plaintiff now asserts that the individual defendants were motivated by "actual malice."

Initially, there are problems with these proposed claims general to each of the three individual defendants. None

is based on new information; each of the underlying averments was known to Plaintiff when it filed its Complaint and certainly during the period for timely filing a motion for reconsideration. See Lorenz, 1 F.3d at 1414 ("Most of the facts were available to plaintiff . . . before she filed her original complaint . . . ."). Further, while Rototherm uses the term "actual malice," with each of the three individual defendants, it provides little substance to demonstrate actual malice.

Additionally, the July 3, 1997 Memorandum and Order concluded that the Court lacked personal jurisdiction -- either general or specific -- over individual defendant Bailey, whose only contact with Pennsylvania was the Laurel Linen meeting, and the Court accordingly dismissed Plaintiff's claims against him with prejudice. As noted, Plaintiff did not timely challenge that determination. In its instant motion for leave to amend, however, Plaintiff asserts, in a footnote, that it "will allege facts sufficient to establish personal jurisdiction over Bailey based on the Court's exercise of specific jurisdiction." Plaintiff's failure to timely challenge the Court's earlier determination that it lacked personal jurisdiction over Bailey arguably waived any opportunity to state further claims against him now. Moreover, despite the Court's exploration of personal jurisdiction in its July 3, 1997 Memorandum, and its expressed concern that Plaintiff had but lamely attempted to demonstrate the basis for such jurisdiction, Plaintiff again fails to support

its assertion that such jurisdiction does in fact exist.[5] The Court finds that this failure, in addition to the vagueness of Plaintiff's substantive assertions against Bailey, weighs heavily against Rototherm's request for leave to amend.

The Court finds Rototherm's proposed claim against Stettner to be futile, because it fails to conform to the elements of a tortious interference claim, and because it is so vague as to compel the conclusion that are no facts which will support a claim that Stettner intended to harm Rototherm, much less that he was motivated by actual malice. A good portion of the allegations in Plaintiff's motion do not even directly involve Stettner, and those that do suggest at most poor management, which may or may not be relevant to Rototherm's breach of contract claim against Stettner's employer, Penn Linen.

Further, Rototherm makes vague allegations about Crimmins -- purportedly buttressed by reference to an exhibit not actually attached to the motion -- which suggest only that Crimmins may, at worst, have been somewhat unpleasant or

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5. When a defendant raises a defense of lack of personal jurisdiction, the plaintiff then bears the burden to come forward with sufficient facts to establish that jurisdiction is in fact proper. Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992). The plaintiff must produce "sworn affidavits or other competent evidence," since a Rule 12(b)(2) motion "requires resolution of factual issues outside the pleadings . . . ." Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 67 n.9 (3d Cir. 1984). With exceptions not here applicable, corporate agents are generally not subject to personal jurisdiction based solely on acts performed in the forum state in their corporate capacity. See, e.g., TJS Brokerage & Co. v. Mahoney, 940 F. Supp. 784, 789 (E.D. Pa. 1996); Bowers v. NETI Technologies, Inc., 690 F. Supp. 349, 357 (E.D. Pa. 1988); Bucks County Playhouse v. Bradshaw, 577 F. Supp. 1203, 1210 (E.D. Pa. 1983).

careless, but not that he was solely motivated by actual malice. For example, Rototherm refers to an unsworn statement by an HCSC employee who allegedly attended a meeting where "someone made reference to 'Rube Goldberg,' a derogatory reference to [Rototherm President] Herschel and the unit. [The employee] implied that Crimmins or [another person] made the statement." The vagueness of this averment is emblematic of Rototherm's entire motion to amend. "Actual malice" is not merely a talisman to fortify or legitimate vague allegations, and the Court believes, at this late date, that Rototherm had a duty to move beyond ambiguity and insinuation.[6] The Court accordingly finds Rototherm's proposed claim against Crimmins to be futile.[7]

IV. Conclusion

The Court will deny Rototherm's motion for an extension of time to file a motion for reconsideration, as it lacks the power to extend the deadline and would be disinclined to grant it even if it possessed the power. The Court will therefore deny the motion for reconsideration as untimely. The Court will deny the motion for an extension of time to file a motion for leave to amend as unnecessary. Finally, the Court will deny the motion for leave to amend the complaint for the following reasons:

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6. Rototherm also backs itself into a corner by implying that Crimmins lacked authority to contract for HCSC, as it is certainly not in Rototherm's interest to cast doubt on the very existence of a contractual relationship between it and HCSC.

7. The Court is also unimpressed by Rototherm's vague promise to demonstrate a basis for personal jurisdiction over Crimmins at some future point.

Plaintiff's delay in filing the motion was unreasonable and threatens some prejudice to Defendants; Plaintiff failed to timely seek a motion for reconsideration of the July 3, 1997 Order; Plaintiff failed to attach a copy of its proposed amended complaint to its motion; and, Plaintiff's proposed amended claims would be futile. An Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROTOTHERM CORPORATION, Plaintiff,	:	CIVIL ACTION
	:	NO. 96-6544
v.	:	
PENN LINEN & UNIFORM SERVICE, INC.; MAX H. STETTNER; ROGER F. COCIVERA; VIRGINIA LINEN SERVICE, INC.; DONALD L. STRUMINGER; MOHENIS SERVICES, INC.; DAVID H. BAILEY; HOSPITAL CENTRAL SERVICES COOPERATIVE, INC. and TIMOTHY R. CRIMMINS, SR., Defendants.	:	

O R D E R

AND NOW, this 26th day of November, 1997, upon consideration of (1)Plaintiff's Motion for an Enlargement of Time to File a Motion for Reconsideration of this Court's Order dated July 3, 1997 and for an Extension of Time to File a Motion for Leave to File an Amended Complaint (Dkt. # 32), and Defendants' Answer thereto; and (2) Plaintiff's Motion for Reconsideration of this Court's Order dated July 3, 1997 and for Leave to File an Amended Complaint (Dkt. # 32), and Defendants' Answer thereto, it is hereby ORDERED that:

(1) Plaintiff's Motion for an Enlargement of Time to File a Motion for Reconsideration of this Court's Order dated July 3, 1997 and for an Extension of Time to File a Motion for Leave to File an Amended Complaint is **DENIED**;

(2) Plaintiff's Motion for Reconsideration of this Court's Order dated July 3, 1997 and for Leave to File an Amended Complaint (Dkt. # 32) is **DENIED.**

BY THE COURT:

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RONALD L. BUCKWALTER, J.