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

PENN-MONT BENEFIT SERVICES, INC.	**:**	
Plaintiff	**:**	**CIVIL ACTION**
	:	**NO. 02-1980**
v.	**:**	
	:	
THOMAS W. CROSSWHITE, ET AL.,	**:**	
Defendants	**:**	

MEMORANDUM

RUFE, J. **January 29, 2003**

This case is just one of numerous suits involving these parties and their disputes over a troubled business relationship. Before the Court is Defendants' Motion to Dismiss for Failure to State a Claim. For the reasons set forth below, Defendants' Motion is granted, and the Amended Complaint is dismissed.

I. BACKGROUND

As the Court noted in its December 18, 2002 Memorandum, which the Court incorporates herein, the tenor and strain of this case can only be understood by a full explication of the parties' litigious relationship. As it is related below, the factual background of the instant dispute is taken mostly from Plaintiff's Amended Complaint, as the Court on a motion to dismiss must accept as true the factual allegations therein.

When it was originally filed in April 2002, Defendants in this case included four Oregon corporations: The Corben Institute ("Corben"); Cascade Marketing Agency, Inc. ("Cascade"); MJT Marketing, Inc. ("MJT"); Jontiff, Inc. ("Jontiff"); and Welfare Benefit Services, LLC ("WBS"). The other three defendants were all individual citizens of Oregon: Thomas W. Crosswhite ("Crosswhite"); his wife, Barbara J. Crosswhite; and Arnie A. Rigoni ("Rigoni").

Crosswhite is the CEO of Corben, President of MJT, and principal of WBS.

In a December 18, 2002 Order, this Court dismissed defendants MJT, Jontiff, WBS, Barbara J. Crosswhite, and Rigoni for lack of personal jurisdiction, leaving three defendants in the case: Crosswhite, Corben, and Cascade. Plaintiff is Penn-Mont Benefit Services, Inc. ("Penn-Mont"), a Pennsylvania corporation. Jurisdiction in this case is premised on diversity of citizenship. See 28 U.S.C. § 1332.

Penn-Mont developed and is the plan administrator for a type of employee benefit program known as a Voluntary Employees' Beneficiary Association (a "VEBA"). In the minds of some, Penn-Mont's President, John J. Koresko, is considered among the nation's foremost authorities on VEBAs.[1]

In December 1998, Crosswhite and David Cole, then a corporate officer and equity partner for Corben, approached Penn-Mont and requested permission to market VEBA programs. Penn-Mont agreed, but claims that it conditioned such an arrangement on the execution of agreements designed to protect confidential information created by Penn-Mont. Although not at issue in this case, Penn-Mont allegedly granted to some of the Defendants a license to use certain materials for marketing VEBAs, and the parties allegedly entered into a written agreement to that effect (the "Licensing Agreement"). In addition, Penn-Mont alleges that David Cole, on behalf of Corben, executed a Confidentiality Agreement that identifies certain VEBA-related materials as proprietary, and requires that signatories and their affiliates keep such information

[1] Plaintiff's pleadings are replete with puffery regarding Mr. Koresko's expert abilities. This Court has no occasion to express any opinion as to Mr. Koresko's skill in the VEBA arena, and neither this nor any other opinion of this Court should be read as an endorsement or recognition of Mr. Koresko's alleged VEBA expertise.

confidential. See Confidentiality Agreement, attached to First Affidavit of David Cole, filed May 10, 2002, at Ex. A [doc. no. 5]. Penn-Mont has failed to produce a signed copy of the Confidentiality Agreement in this litigation, and so it rests on David Cole's sworn testimony that he personally signed the Agreement. See First Affidavit of David Cole ¶ 9; Amended Complaint ¶ 20.

Central to this case is the confession of judgment clause in the Confidentiality Agreement. In brief, this type of clause is a grant of authority by one contracting party to another, upon the occurrence of some triggering event, such as a breach of the terms of the contract, to enter a judgment against them. See 11 Standard Pennsylvania Practice 2d: Judgments By Confession § 67.10 (1996). The confession of judgment clause in this case states, in relevant part:

> THE UNDERSIGNED "RECEIVING PARTIES" HEREBY IRREVOCABLY AUTHORIZE AND EMPOWER THE PROTHONOTARY OR CLERK OR ANY ATTORNEY OF ANY COURT OF RECORD TO APPEAR FOR AND CONFESS JUDGMENT THEREIN AGAINST "RECEIVING PARTIES" FOR THE AMOUNT WHICH FROM THE FACE HEREOF MAY APPEAR TO BE DUE HEREON . . . . The parties consent to the exclusive venue and jurisdiction of the Court of Common Pleas of Montgomery County, Pennsylvania in all controversies related to the relationship between the parties and this Agreement.

Confidentiality Agreement ¶ 8 (capitalization in original).

The business relationship between Defendants and Penn-Mont terminated in approximately December 2000. Penn-Mont contends that the Defendants' prior and subsequent actions have violated the terms of the Licensing Agreement and the Confidentiality Agreement. As a consequence, the parties have pursued legal and equitable claims related to these agreements in at least five related lawsuits, three of which have appeared on this Court's docket.

In December 2001, Penn-Mont initiated suit against Great Southern Life Insurance Company ("GSL") in the Court of Common Pleas of Montgomery County, Pennsylvania, bringing claims arising at least partly out of the actions of Crosswhite, Corben, and Cascade when acting as agents of GSL (the "GSL Action"). As part of the discovery in this case, counsel for Penn-Mont sent a letter demanding rescission and return of a premium for a client solicited by Crosswhite.

This letter (and perhaps other aspects of this suit) led to the filing on March 26, 2002 of a second suit in Circuit Court for the State of Oregon for the County of Multonomah (the "Oregon Action"), where Crosswhite, Rigoni, Corben, and Cascade alleged slander, libel, tortious interference with existing business relationship, tortious interference with business relations, and unlawful trade practices against Koresko, the law firm representing Penn-Mont in the GSL Action, among others. The Oregon Action was removed to federal court in Oregon, transferred to this Court's docket, and voluntarily dismissed on September 30, 2002. See Crosswhite v. Koresko, No. 02-7592 (before Rufe, J.).

The third action, a confession of judgment, was filed in the United States District Court for the Eastern District of Pennsylvania on April 9, 2002, and randomly reassigned to this Court's docket on June 28, 2002 (the "Confession of Judgment Action"). See Penn-Mont Benefit Servs. v. Crosswhite, No. 02-1980. The Confession of Judgment Action arises out of alleged violations of the Confidentiality Agreement by Defendants, and is the matter presently before the Court.

Fourth, Penn-Mont initiated another action in the Court of Common Pleas of Montgomery County, Pennsylvania on September 5, 2002 (the "Preliminary Injunction Action")

against the same Defendants in the Confession of Judgment Action, seeking to enforce the same Confidentiality Agreement. In that case, Penn-Mont seeks, *inter alia*, a preliminary injunction requiring Defendants to cease and desist using Plaintiff's material protected by the Confidentiality Agreement. Defendants removed the Preliminary Injunction Action to this Court on September 16, 2002. See Penn-Mont Benefit Servs. v. Crosswhite, No. 02-7322 (before Rufe, J.). Penn-Mont then moved to remand to the Court of Common Pleas of Montgomery County, Pennsylvania based on the forum selection clause in the Confidentiality Agreement. The Court granted Penn-Mont's motion in a December 18, 2002 Order [doc. no. 8].

Finally, Penn-Mont initiated yet another action in the Court of Common Pleas of Montgomery County, Pennsylvania on December 24, 2002. That case names numerous defendants, including Corben, Cascade, Crosswhite, and GSL. See docket entry attached to Defendants' Supplemental Mem. at Ex. A [doc no. 37].

II. STANDARD OF REVIEW

A court should not dismiss a complaint under Rule 12(b)(6) for failure to state a claim for relief "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In evaluating whether dismissal is proper, a court must accept all the factual allegations of the complaint as true, and must draw all reasonable inferences to aid the pleader. See Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 559 (3d Cir. 2002).

III. DEFENDANTS' MOTION TO DISMISS

A. Introduction

Plaintiff's claim in this case rests largely on the confession of judgment clause in the

Confidentiality Agreement. Therefore, in conducting its initial review of Defendants' motion in this case, the Court began its analysis with an examination of the agreement at issue. The Court was immediately struck by the forum selection clause, which states that any disputes related to the relationship between the parties shall be subject to the exclusive venue and jurisdiction in the Court of Common Pleas of Montgomery County, Pennsylvania.

At the same time, the Court was cognizant of the related, pending litigation in Montgomery County, and of the potential for inefficient use of judicial resources, confusion among the parties and the court, and conflicting judgments that may arise from identical parties litigating identical issues in two different courts. Moreover, it appeared from the pleadings in the Preliminary Injunction Action that Plaintiff no longer wanted to litigate the enforcement of the Confidentiality Agreement in federal court. In arguing its motion seeking to remand the Preliminary Injunction Action from this Court back to the state court, Plaintiff stated that the Court of Common Pleas of Montgomery County "is the proper and appropriate forum for resolution of the active litigation." Plaintiff's Motion to Remand at 12 [doc. no. 5 in Penn-Mont Benefit Servs. v. Crosswhite, No. 02-7322].[2] Accordingly, the Court requested further briefing from the parties on whether the Court should dismiss this case based on the forum selection clause in order to permit the litigation to proceed in the parties' (apparently) chosen forum. See December 18, 2002 Court Order [doc. no. 33].

In response to the Court's request, both parties submitted supplemental memoranda.

[2] Seeking to buttress its argument in favor of a remand in the Preliminary Injunction Action, Plaintiff suggested that the Court could also remand the Confession of Judgment Action to state court. Although this was an inaccurate statement of law given that the Confession of Judgment Action was never filed in state court to begin with, the Court took note of Plaintiff's willingness to litigate the Confession of Judgment Action in state court.

Defendants explained in their memoranda that they initially abstained from asserting the forum selection clause because they "wished to afford no credence to the idea that they executed, or were bound by, the Confidentiality Agreement." In addition, given that a motion to transfer the Oregon Action to this Court was then pending (and ultimately granted), and they were not yet named as defendants in any Pennsylvania state court action, Defendants predicted that maintaining the case in this Court would reduce, rather than multiply, the number of fora entertaining litigation between the parties. Since that time, the litigation between these parties in state court has grown to two cases, (with a third case looming),[3] while litigation in this Court has dwindled to the single matter presently before the Court. As such, Defendants asked the Court to dismiss the Confession of Judgment Action based on the forum selection clause. See Mem. of Defendants [doc. no. 34].

Plaintiff, on the other hand, argued that the Court should not dismiss the case based on the forum selection clause, thus abandoning its previous view that this case belongs in state court. In a subsequent telephone conference with counsel for the parties, the Court requested another round of memoranda, this time directed at the question of whether Defendants waived their opportunity to raise the forum selection clause in the Confidentiality Agreement. The parties provided these memoranda on January 17, 2003, and the Court now turns to the issues at hand.

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[3] Defendants note that although they are not named in the GSL Action, Plaintiff initiated that action by a writ of summons and without filing a complaint. Accordingly, Plaintiff still may name Defendants in the GSL action as well, and Defendants contend that Plaintiff has stated its intention to do so on numerous occasions. If this comes to be, the number of cases pending between these parties in state court will grow to three.

B. Dismissal Based on the Forum Selection Clause

Although it is the minority view among federal courts,[4] a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is the appropriate mechanism for enforcing a forum selection clause in the Third Circuit. See Salovaara v. Jackson Nat'l Life Ins. Co., 246 F.3d 289, 298-300 (3d Cir. 2001) (noting that when confronted with a forum selection clause specifying a non-federal forum, "it seems the district court would have no choice but to dismiss the action so it can be filed in the appropriate forum so long as dismissal would be in the interests of justice."); 17 James. Wm. Moore et al., Moore's Federal Practice - Civil ¶ 111.04[3][b][ii] (Matthew Bender 2002) ("A minority of courts hold that a motion to dismiss for failure to state a claim under Rule 12(b)(6) is the appropriate vehicle when the clause makes a particular state court, or a foreign court, the exclusive forum."). As the Third Circuit has noted, "no one doubts the district court's power to dismiss pursuant to a properly construed forum selection clause. . . ." Foster v. Chesapeake Ins. Co., Ltd., 933 F.2d 1207, 1215 (3d Cir. 1991).

As noted above in Part I, the forum selection clause in the Confidentiality Agreement grants "exclusive venue and jurisdiction" to the Court of Common Pleas of Montgomery County, Pennsylvania.[5] In the Preliminary Injunction Action, this Court held that the Confidentiality

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[4] The majority of courts have held that when the plaintiff brings the action in a federal court contrary to a clause specifying a particular state court as the exclusive forum, a motion to dismiss for improper venue is the appropriate vehicle to enforce the clause. See generally 17 James. Wm. Moore et al., Moore's Federal Practice - Civil ¶ 111.04[3][b][i] (Matthew Bender 2002).

[5] As noted in the Court's December 18, 2002 Order, the forum selection clause at issue in this case contains exclusive, as opposed to permissive, language, restricting venue and jurisdiction to a single forum. See E'Cal Corp. v. Office Max, Inc., Civ.A.No. 01-3281, 2001 WL 1167534, at *2 (E.D. Pa. Sept. 7, 2001) (noting contrast between permissive clauses where parties "consent" to jurisdiction, versus exclusive clauses, where only one forum is permitted for

Agreement's forum selection clause is valid and enforceable. See Dec. 18, 2002 Order [doc. no. 8] in Penn-Mont Benefit Servs. v. Crosswhite, No. 02-7322. As a consequence, this Court may dismiss this action pursuant to Defendants' motion provided they have not waived the opportunity to do so.

Plaintiff contends that Defendants waived their opportunity to assert the forum selection clause because they did not pursue it as a basis for dismissal in their initial 12(b)(6) pleading. See doc. no. 7. In its supplemental brief submitted to the Court, Plaintiff characterizes Defendants' effort to seek dismissal based on the forum selection clause as an objection to venue. The Federal Rules, of course, provide that an objection to venue is waived if omitted initially from a party's Rule 12 motion. See Fed. R. Civ. P. 12(h)(1). If Defendants' objection were grounded on improper venue, their failure to include it in their motion to dismiss would certainly preclude this Court's consideration of the issue at this juncture.

In the Third Circuit, however, an objection based on a forum selection clause is properly viewed as a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), not as an objection to venue under Fed. R. Civ. P. 12(b)(3). See Salovaara, 246 F.3d at 298-300. Accordingly, the question before the Court is whether a party may waive the defense of failure to state a claim under Fed. R. Civ. P. 12(b)(6). An examination of the Federal Rules and relevant case law demonstrate that it cannot be waived.

Fed. R. Civ. P. 12(g) generally requires that all available defenses and objections be

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litigating disputes). The parties' agreement to litigate disputes related to the Confidentiality Agreement in the Court of Common Pleas of Montgomery County *alone* reinforces today's decision, and further underscores the manifest fact that it is the appropriate forum for resolution of this action.

consolidated into a single motion. Like so many other rules, however, it contains an exception:

> If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by the motion, the party shall not thereafter make a motion based on the defense or objection so omitted, *except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.*

Fed. R. Civ. P. 12(g) (emphasis added). Turning to subdivision (h)(2), it provides:

> A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

Fed. R. Civ. P. (12)(h)(2). Thus, the plain text of the Federal Rules demonstrate that the defense of failure to state a claim cannot be waived before the occurrence of a trial on the merits. The advisory committee notes confirm that the defense is preserved against waiver. See Fed. R. Civ. P. 12 advisory committee's note to 1966 amendment to subdivision (h) ("[T]he more substantial defense[] of failure to state a claim upon which relief can be granted . . . [is] expressly preserved against waiver by amended subdivision (h)(2) and (3).").

In addition to the text of Rule 12, precedent confirms that the defense cannot be waived in these circumstances. The First Circuit shares the Third Circuit's view that an objection based on a forum selection clause should be characterized as an allegation of failure to state a claim. See Silva v. Encyclopedia Britannica, Inc., 239 F.3d 385, 388 n.3 (1st Cir. 2001) ("The Third Circuit joins this Court in characterizing the motion as a Rule 12(b)(6) defense . . . while other circuits have considered such motions as based on Rule 12(b)(3) (improper venue). . . ."). Because the First Circuit utilizes the same approach as the Third, the Court looks to its precedent in analyzing the instant matter. Silva itself is particularly instructive here.

In Silva, the district court first entertained a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). The district court granted the motion as to some plaintiffs, and thereafter discovery proceeded in the case for over a year. See id. at 387. Subsequently, the defendant filed a motion to dismiss based on the forum selection clause, which the district court granted.

On appeal, the plaintiff argued that by failing to consolidate its defense premised on the forum selection clause with its initial 12(b) motion against the other plaintiffs, the defendant was barred from raising the issue later. The First Circuit rejected this argument, explaining:

> Appellant misconstrues the law of this Circuit, under which a motion to dismiss based upon a forum-selection clause is treated as one alleging the failure to state a claim for which relief can be granted . . . . Consequently, in this Circuit, a motion to dismiss by reason of a forum-selection clause is covered by Rule 12(h)(2), which states that "[a] defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." . . . This provision constitutes an exception to the consolidation requirement of Rule 12(g) and therefore a motion to dismiss on forum-selection grounds is not bound to the strict limitations of 12(h)(1).

Id. at 387-88 (citations omitted). The Silva court affirmed the dismissal, holding, "a motion to dismiss based on a forum-selection clause may be raised at any time in the proceedings before disposition on the merits," and that the defendant had met this requirement by filing its motion to dismiss before the completion of discovery. Id. at 388. The reasoning of the Silva court is highly persuasive in the instant matter. In light of the text of the Federal Rules, and in light of the precedent discussed above, the Court will grant Defendants' motion based on the forum selection clause.

Although Defendants are not presently pursuing their defense of failure to state claim

using one of the three enumerated mechanism described in Rule 12(h)(2), (*i.e.*, via a pleading under Rule 7(a), a motion for judgment on the pleadings, or at trial), the Court believes consideration of the issue presented by Defendants' motion is appropriate at this stage of the litigation. The Honorable D. Brooks Smith, before being elevated to the Third Circuit, addressed whether, in light of the text of Rule 12(h)(2), it is advisable for a court to permit a motion to dismiss for failure to state a claim even though the basis for the motion had not been asserted initially in the defendants' first motion to dismiss. In permitting the motion to proceed, Judge Smith noted, "[t]here is simply no reason to put the defendant to the time and expense of filing an answer, or both defendant and plaintiff to the time and expense of addressing an issue to be raised later in a motion for judgment on the pleadings, when that issue can easily be resolved now." In re Westinghouse Sec. Litig., No. Civ.A.91-354, 1998 WL 119554, at *6 (W.D. Pa. 1998) (noting that many courts permit the defense of failure to state a claim upon which relief can be granted to be asserted in a subsequent motion as a means of preventing unnecessary delay). See also Coleman v. Pension Ben. Guar. Corp., 196 F.R.D. 193, 196-97 (D.D.C. 2000) (permitting defendant to assert defense of failure to state a claim even after omitting it from its initial Rule 12 motion). As in Westinghouse, the issue presently before the Court is ripe for adjudication, and any further delay is unnecessary.

Today's decision is consistent with this Court's duty to construe and administer the Federal Rules so as to secure the "just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. As described *supra* at Part I, the legal and factual landscape of this case is already unraveling in numerous other lawsuits pending in the Court of Common Pleas for Montgomery County. Even independent of the sound legal basis for today's decision, it is the

Court's view that this litigation should proceed in the Court of Common Pleas for Montgomery County, where it may be efficiently managed as that able court sees fit.[6]

An appropriate Order follows.

[6] Plaintiff argues that this Court should deny Defendants' motion because it would deprive Plaintiff of its right to pursue the Confession of Judgment Action in this forum, and cites the basic rule that "the pendency of a state court proceeding is not a reason for a federal court to decline to exercise jurisdiction established by Congress." Harris v. Pernsley, 755 F.2d 338, 345 (3d Cir.) (citing McClellan v. Carland, 217 U.S. 268, 281-82 (1910)), cert. denied, 474 U.S. 965 (1985). Plaintiff's citation to this rule is inapposite, as it concerns the abstention doctrine. The Court has not declined to exercise jurisdiction under the abstention doctrine, and the Court is mindful that the mere presence of a forum selection clause does not divest the Court of *subject matter jurisdiction*. See Foster, 933 F.2d at 1212 n.7. Rather, the Court today applies the text of the Federal Rules and relevant legal principals to the Amended Complaint, and dismisses it for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6).

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

PENN-MONT BENEFIT SERVICES, INC.	:	
Plaintiff	:	**CIVIL ACTION**
	:	**NO. 02-1980**
v.	:	
	:	
THOMAS W. CROSSWHITE, ET AL.,	:	
Defendants	:	

ORDER

AND NOW, this 29th day of January, 2003, upon consideration of Defendants' Motion to Dismiss for Failure to State a Claim [doc. no. 7], Plaintiff's Response [doc. no. 8], Defendants' Reply [doc. no. 13], Plaintiff's Sur-Reply [doc. 24], Defendants' Memorandum Pursuant to the Court's December 18, 2002 Order [doc. no. 34], Plaintiff's Supplemental Memorandum [doc. no. 35], Defendants' Supplemental Memorandum Pursuant to Court's Request of January 13, 2003 [doc. no. 37], and Plaintiff's Supplemental Memorandum of Law Relating to Waiver of Objection to Venue, and for the reasons set forth in the attached Memorandum, it is hereby ORDERED that Defendants' Motion is GRANTED. It is further ORDERED:

1. The Clerk of the Court is hereby directed to enter onto the case docket Plaintiff's Supplemental Memorandum of Law Relating to Waiver of Objection to Venue;

2. The Amended Complaint [doc. no. 4] is hereby DISMISSED WITH PREJUDICE;

3. Defendants' Motion for a Transfer [doc. no. 6-2] is DENIED as MOOT;

4. The Court's December 18, 2002 Memorandum [doc. no. 33] is hereby AMENDED to correct a typographical error. The year "2001" in line 15 on page 3 of the Court's Memorandum is amended to read "2000."

5. The Clerk of the Court is hereby directed to mark this case closed for statistical purposes.

It is so ORDERED.

BY THE COURT:

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CYNTHIA M. RUFE, J.