

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MEDTRONIC AVE, INC.,)
)
Plaintiff,)
)
v.) Civil Action No. 98-478-SLR
)
BOSTON SCIENTIFIC CORPORATION;)
SCIMED LIFE SYSTEMS, INC.;)
BOSTON SCIENTIFIC SCIMED,)
INC.; and MEDINOL, LTD.,)
)
Defendants.)

MEMORANDUM ORDER

At Wilmington this 30th day of March, 2001, having reviewed plaintiff's motion to strike defendants' counterclaims and sixth and seventh affirmative defenses (D.I. 55) and to dismiss defendants' counterclaim and to strike defendants' seventh affirmative defense (D.I. 56);

IT IS ORDERED that:

1. Plaintiff's motion to strike (D.I. 55) is denied, as it is not supported by relevant case law.

2. Plaintiff's motion to dismiss (D.I. 56) likewise is denied, for the reasons that follow:

a. The Federal Rules of Civil Procedure permit a party to move for dismissal of a claim or counterclaim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To prevail on such a motion, however,

the movant must show beyond a doubt that the claimant cannot prove **any** set of facts in support of the claim that would entitle it to relief. Conley v. Gibson, 335 U.S. 41, 45-46 (1957). Moreover, all of the claimant's well-pled allegations must be taken as true, and all reasonable inferences from those allegations must be drawn in the claimant's favor. Jenkins v. McKeithen, 395 U.S. 411, 421-22 (1969); Advanced Cardiovascular Sys. v. Scimed Life Sys., 988 F.2d 1157, 1161 (Fed. Cir. 1993); Dow Chemical Co. v. Exxon Corp., 30 F. Supp.2d 673, 694 (D. Del. 1998).

b. Count II of defendants' counterclaims is an action for violation of Section 2 of the Sherman Act, codified at Title 15, Section 2 of the United States Code. (D.I. 50 at 8-10). In essence, defendants allege that AVE is attempting to monopolize the market for coronary stents in the United States by enforcing the patents-in-suit against defendants and others, with full knowledge that those patents were fraudulently procured. Two separate acts of fraud are alleged: (1) fraud on the Patent Office during prosecution of the patents by virtue of intentionally and fraudulently failing to identify one or more inventors of the subject matter claimed in the patents, and (2) fraud perpetrated on the prior owner of the claimed subject matter to induce a transfer of ownership.

c. Plaintiff argues for dismissal of the antitrust counterclaim on three grounds. First, plaintiff argues that the counterclaim fails as a matter of law because defendants have not alleged that plaintiff possesses a sufficiently high market share. Plaintiff is incorrect in its assertion that there is a minimum market share requirement for an attempted monopolization claim. The case law is clear that market share is just one factor a court considers in evaluating the existence of monopoly power. See Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 201 (3d Cir. 1992) ("As a matter of law, **absent other relevant factors**, a 55 percent market share will not prove the existence of monopoly power.") (emphasis added).

d. Second, plaintiff argues that the nature of the alleged fraud on the Patent Office is not sufficiently "material" to support an antitrust claim. Under Walker Process Equip., Inc. v. Food Machinery and Chemical Corp., 382 U.S. 172 (1965), a patentee who brings an infringement suit can be subject to antitrust liability if the asserted patent was obtained through intentional fraud on the Patent Office and the patent would not have issued but for that act or omission. See Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1071 (Fed. Cir. 1998). Defendants assert that, during the prosecution of the patents-in-suit, the applicant "intentionally and fraudulently fail[ed] to identify one or more joint inventors of

the subject matter claimed in the patents." (D.I. 50, ¶ 15) The factual basis for this allegation arises from two pending state court actions where the question of inventorship is at issue. The Federal Circuit has declared that, "[a]s a critical requirement for obtaining a patent, inventorship is material. . . . Examiners are required to reject applications under 35 U.S.C. § 102(f) on the basis of improper inventorship." Perspective Biosystems, Inc. v. Pharmacia Biotech, Inc., 225 F.3d 1315, 1321 (Fed. Cir. 2000). Under controlling Federal Circuit precedent, then, the alleged fraudulent conduct is sufficient to withstand plaintiff's motion to dismiss.

e. Plaintiff's final argument is that defendants have failed to provide plaintiff with adequate notice of the basis for the antitrust claim. In accordance with the "notice pleading" approach embodied in the Federal Rules of Civil Procedure, a claimant is required to provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Additionally, where a claim involves an averment of fraud, "the circumstances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b).

f. The requirement for particularity in pleading fraud does not demand an exhaustive cataloging of facts, but only specificity sufficient to provide assurance that plaintiff has investigated the alleged fraud and reasonably believes that a

wrong has occurred. Resource Ventures, Inc. v. Resources Management Int'l, Inc., 42 F. Supp.2d 423, 441 (D. Del 1999) (denying motion to dismiss where pleading described the act of fraud, but not specifics such as the date, place or time). Moreover, a claimant is free to use alternative means of injecting precision and some measure of substantiation into its allegations of fraud. The court finds that defendants' pleadings pass muster under Fed. R. Civ. P. 9(b).

United States District Judge