IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DIEBOLD INCORPORATED,	)	
	)	
Plaintiff,	)	C.A. No. 02-374 GMS
	)	
v.	)	
	)	
POSITRAN MANUFACTURING, INC., LARRY KEENEY, and JOSEPH UHL,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

The plaintiff, Diebold, Inc. ("Diebold"), filed the above-captioned action in the United States District Court for the Northern District of Ohio, alleging, *inter alia*, trademark infringement and trade secret misappropriation. In January 2002, the Ohio court transferred this action to the District of Delaware. Thereafter, Diebold amended its complaint to include a claim for patent infringement. Diebold also asserted that Larry Keeney ("Keeney") and Joseph Uhl ("Uhl"), as Positran's CEO, Treasurer and co-owners, were individually liable under each of the claims listed in its amended complaint.

Presently before the court is Positran Manufacturing, Inc.'s motion to dismiss Keeney and Uhl. For the reasons that follow, the court will deny this motion.[1]

[1]On September 26, 2002, the court ruled that Positran held a valid license to produce Mosler products ordered under an agreement between the parties. The court was unable to determine on a motion for summary judgment what the scope of that license was. Thus, the present memorandum and order is relevant only insofar as a jury finds that Positran exceeded the scope of its license.

II. STANDARD OF REVIEW

The purpose of a motion to dismiss is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case. *See Kost v. Kozakiewicz*, 1 F.3d 183 (3d Cir. 1993). Thus, in deciding a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them." *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir.1990). In particular, the court looks to "whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer." *Colburn v. Upper Darby Tp.*, 838 F.2d 663, 666 (3d Cir.1988). However, the court need not "credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3rd Cir.1997). The court will only dismiss a complaint if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). Thus, in order to prevail, a moving party must show "beyond doubt that the plaintiff can prove no set of facts in support of his claim [that] would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

III. DISCUSSION

Positran asks the court to dismiss the amended complaint against Keeney and Uhl because it maintains that conclusory allegations with respect to piercing the corporate veil are not sufficient to survive a motion to dismiss. Diebold responds that its third amended complaint pleads facts sufficient to pierce the corporate veil. Diebold alternatively argues that piercing the corporate veil is not necessary to find liability under any of its theories. At this early stage of the litigation,

however, it is unnecessary for the court to make a determination as to whether piercing the corporate veil is indeed a prerequisite. This is so because the court concludes that, even were such a piercing required, Diebold has alleged sufficient facts to withstand a motion to dismiss.

The United States Court of Appeals for the Third Circuit has set forth several factors for a court to consider in determining whether to pierce a corporate veil. *See United States v. Pisani*, 646 F.2d 83, 88 (3d Cir. 1981). These consideration are as follows: (1) undercapitalization; (2) failure to observe corporate formalities; (3) nonpayment of dividends; (4) the insolvency of the debtor corporation at the time; (5) siphoning of the corporation's funds by the dominant stockholder; (6) absence of corporate records; and (7) the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders. *See id*. Moreover, the situation must present an element of injustice or fundamental unfairness. *See id*. However, the *Pisani* list of factors is not conjunctive, nor is it an exclusive list. *See Galgay v. Gangloff*, 677 F. Supp. 295, 299-300 (M.D. Pa. 1987).

In the present case, Diebold has alleged that Positran is undercapitalized and that it is now near bankruptcy. To that end, Diebold alleges that Positran's now-defunct Manufacturing Agreements with Mosler accounted for roughly eighty percent of Positran's operating revenues. It further alleges that Keeney and Uhl were informed directly of their infringing activities. However, despite such information, they replied that they would "do what they had to do." Diebold further alleges that Keeney and Uhl directly and personally benefitted from decisions they made, as Positran's officers, to continue manufacturing and selling Mosler's patented products. According to Diebold, those decisions were to the detriment of Positran as a corporate entity, but solely in Keeney and Uhl's personal financial interests as the only stockholders.

The court concludes that these allegations suffice to withstand a motion to dismiss for failure to state a claim. In so holding, however, the court expresses no opinion as to the ultimate merits of Diebold's claims.

IV. CONCLUSION

Because Diebold has alleged sufficient facts to withstand a motion to dismiss, Positran's motion must be denied.

1. Positran's Renewed Motion to Dismiss (D.I. 27) is DENIED.

2. Positran's Motion to Dismiss (D.I. 9) is declared MOOT.

Dated: October 4, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE