SPORTMART

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MEMORANDUM OPINION AND ORDER

Plaintiffs, Sportmart, Inc. and Olympic Distributors, Inc.,(hereinafter referred to as "Sportmart"), brought this privateantitrust action against defendants, Rossignol Ski Company,Inc. and Skis Rossignol, S.A. ("Rossignol defendants"),Nordica USA, Inc. ("Nordica-US") and Nordica di Franco eGiovanni Vaccari & C.S.A.S. ("Nordica-Italy"), RNC, Inc.("RNC"), a domestic distributor of Nordica and Rossignol skiproducts, and two employees of RNC, seeking declaratory,injunctive and monetary relief on the ground that defendantsallegedly conspired together in a concerted refusal to supplySportmart with certain Alpine skis and boots in violation ofsections 1 and 2 of the Sherman Act.[1] This matter ispresently before the Court on the Nordica defendants' motionto dismiss the complaint for lack of personal jurisdiction,improper venueand insufficient service of process[2] pursuant to Rule12(b)(2), (3), (4) and (5) of the Federal Rules of CivilProcedure. For the reasons set forth below, that motion willbe granted.

Although the parties submit that the in personam jurisdictionof this Court is governed by the law of Illinois, citingOhio-Sealy Mattress Manufacturing Co. v. Kaplan, 429 F. Supp. 139,140 (N.D.Ill. 1977), it is clear that federal due processprinciples govern the jurisdiction and venue questions in thisantitrust action.[3] Rule 4(e) of the Federal Rules of CivilProcedure provides that:

Whenever a statute of the United States or an order of court thereunder provides for service of a summons . . . upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule.

Thus, if a federal statute or rule provides for service ofprocess, service may be made in the manner prescribed by thestatute or rule. Only if there is no applicable federalstatute or rule, as in a case brought pursuant to federaldiversity jurisdiction, does Rule 4(e) refer to alternativemethods of service. In such circumstances, Rule 4(d)(7)immediately preceding Rule 4(e) refers a federal court to theapplicable state long-arm statute.[4]

The second clause of section 12 of the Clayton Act,15 U.S.C. § 22, provides for service of process upon a corporatedefendant in an antitrust case "in the district of which it isan inhabitant, or wherever it may be found." This worldwideservice of process provision prescribes the manner of servicein antitrust cases so that, pursuant to Rule 4(e), there is noneed to refer to the long-arm statute

of the state in which thefederal district court sits.[5] The only limitations onservice of process under section 12 of the Clayton Act arethose general due process principles articulated inInternational Shoe and subsequent cases dealing with theconstitutional limits on extra-territorial service of process.As the court saidin Black v. Acme Markets, Inc., 564 F.2d 681, 684 (5th Cir.1977), "[i]n such cases, the requirements of state long-armstatutes are simply irrelevant to the in personam jurisdictionof a federal court."[6] See also 14 Von Kalinowski, AntitrustLaws and Trade Regulation § 104.02[6] at 104-27.13. —104-27.15 (1981).

Venue, the other threshold inquiry with which we areconcerned at this early stage in these proceedings, may beestablished under the special venue provisions of the ClaytonAct, 15 U.S.C. § 15, 22, or under the general federal venueprovisions applicable to non-diversity cases, 28 U.S.C. § 1391(b),(c). It is clear that the venue provisions of theClayton Act are not to be applied exclusively in antitrustcases; they merely supplement the general rule. Ohio-SealyMattress Manufacturing Co. v. Kaplan, 429 F. Supp. 139, 140(N.D.Ill. 1977); C.C.P. Corporation v. Wynn Oil Company,354 F. Supp. 1275, 1279 (N.D.Ill. 1973); A.B.C. Great States, Inc.v. Globe Ticket, 310 F. Supp. 739 (N.D.Ill. 1970). In theinstant case, Sportmart contends that venue is properly laid inthis district because the Nordica defendants transact businesshere within the meaning of 15 U.S.C. § 22 and because the claimarose here within the meaning of 28 U.S.C. § 1391(b).

It is established that, as far as the Court's power over anon-resident corporate defendant in an antitrust action isconcerned, the jurisdiction and venue analyses are virtuallycongruent, since both are controlled by general due processprinciples. United States v. Scophony Corporation,333 U.S. 795, 68 S.Ct. 855, 866, 92 L.Ed. 1091 (1948); Eastman KodakCompany v. Southern Photo Materials Co., 273 U.S. 359, 370, 47S.Ct. 400, 402, 71 L.Ed. 684 (1927); Smokey's of Tulsa, Inc. v.American Honda Motor Co., 453 F. Supp. 1265, 1267 (E.D.Okla.1978); Zenith Radio Corp. v. Matsushita Electric IndustrialCo., Ltd., 402 F. Supp. 262, 317 (E.D.Pa. 1975); C.C.P.Corporation v. Wynn Oil Company, 354 F. Supp. 1275, 1278(N.D.Ill. 1973); Pacific Tobacco Corporation v. AmericanTobacco Co., 338 F. Supp. 842, 844 (D.Or. 1972). If venue isproper, then personal jurisdiction may be obtained over thedefendants by extra-territorial service of process. If venue isimproper, then the personal jurisdiction issue is moot sincethe court would not entertain the action in any event. Withthese principles in mind, we proceed to a discussion of themerits of the motion to dismiss in the case at bar.

In United States v. Scophony Corporation, 333 U.S. 795,807-08, 68 S.Ct. 855, 961-62, 92 L.Ed. 1091 (1948), the SupremeCourt stated that "[t]he practical, everyday business orcommercial concept of doing business or carrying on business`of any substantial character' [is] the test of venue" underthe "transacts business" language in section 12 of the ClaytonAct. Since Scophony, the lower federal courts have consistentlyapplied that practical test in determining whether venue isproper over a nonresident corporate defendant, domestic orforeign. See Caribe Trailer Systems, Inc. v. Puerto RicoMaritime, 475 F. Supp. 711, 716 (D.D.C. 1979); Smokey's ofTulsa, Inc. v. American Honda Motor Co., 453 F. Supp. 1265, 1268(E.D.Okla. 1978); Chromium Industries, Inc. v. Mirror Polishing& Plating Co., Inc., 448 F. Supp. 544, 550 (N.D.Ill. 1978);Zenith Radio Corporation v. Matsushita Electric

Industrial Co.,Ltd., 402 F. Supp. 262, 318-19 (E.D.Pa. 1975). Whether adefendant has transacted business within a particular districtsufficient to create venue is a factual question to bedetermined in each individual case. Id. Temporally, acorporation must have transacted business in the district atleast at the time the cause of action accrued, if not when thecomplaintwas filed. Lee v. Ply*Gem Industries, Inc., 593 F.2d 1266,1271-72 (D.C. Cir. 1979); Board of County Commissioners v.Wilshire Oil Company of Texas, 523 F.2d 125, 131-32 (10th Cir.1975); Eastland Construction Company v. Keasbey & Mattison Co.,358 F.2d 777, 780 (9th Cir. 1966); Sunbury Wire RopeManufacturing Co. v. United States Steel Corp., 230 F.2d 511,512 (3d Cir. 1956); Redmond v. Atlantic Coast Football League,359 F. Supp. 666 (N.D.Ill.), affirmed, 478 F.2d 1405 (7thCir. 1973).

In the case at bar, Sportmart contends that the Nordicadefendants transact business in this district because: (1)Nordica products are sold and advertised in Illinois; (2)Nordica-Italy purportedly controlled defendant RNC, a domesticdistributor of Nordica products which concededly transactedbusiness in this district, during the time period covered bythe complaint; (3) Nordica-US, a wholly-owned subsidiary ofNordica-Italy, has been the exclusive domestic distributor ofNordica products since early January, 1982, with substantialsales in this district; and (4) Nordica-US is merely acontinuation of the ongoing business of RNC with respect tothe distribution of Nordica products. Taken singly ortogether, however, these factors do not compel the conclusionthat either Nordica defendant is subject to personaljurisdiction in this district or that venue is properly laidhere.

Those courts that have considered the question in anantitrust context have tended to reject the notion that aforeign corporation transacts business in a district simplybecause its products are sold in the district in the absenceof other evidence that the sales are made by a companycontrolled by the foreign manufacturer. See, e.g., O.S.C.Corporation v. Toshiba America, Inc., 491 F.2d 1064, 1066 (9thCir. 1974); Smokey's of Tulsa, Inc. v. American Honda MotorCo., Inc., 453 F. Supp. 1265 (E.D.Okla. 1978). In order tosupport the exercise of jurisdiction and venue over the foreigncorporation, the relationship between the foreign and localcorporations must be such that one is merely the alter ego ofthe other. Wells Fargo & Company v. Wells Fargo ExpressCompany, 556 F.2d 406, 425 (9th Cir. 1977). That clearly wasnot the case as between RNC and Nordica-Italy at the time ofthe wrongs alleged in the complaint.

RNC is a Delaware corporation with headquarters inWilliston, Vermont. Nordica-Italy has a 34 percent minorityinterest in the company. Rossignol owns the remaining 66percent of RNC. Of the five members of the board of directorsof RNC, only two are also on the five member Nordica-Italyboard. Between 1976 and the time period covered in Sportmart'scomplaint filed in September, 1981, RNC was the exclusiveUnited States distributor for Nordica products. During thattime, sales between Nordica-Italy and RNC were negotiated onan arm's length basis. Title to the goods sold passed inItaly, and RNC bore responsibility for shipping the goods tothis country as well as the risk of loss. RNC was responsiblefor its own advertising, accounting, legal work, bookkeepingservices, and pension management.[7] The books and recordsof the two companies were always separately maintained. No RNCemployees left that company to work for Nordica-Italy

orvice-versa during the time preceding the filing of Sportmart'scomplaint. Under these facts,[8] it cannot besaid that RNC was the alter ego of Nordica-Italy so thatNordica-Italy would be subject to the jurisdiction of a courtwherever RNC did business or that venue as to the Italiancompany would be proper in those jurisdictions. Indeed, one ofthe reasons that Nordica-Italy established Nordica-US wasapparently so that it could exert more control over themarketing and distribution of its products in the UnitedStates, than it was able to exert over RNC during the previousfive years. See Vaccari Second Affidavit at ¶ 3.

The Court has searched in vain, however, for the legalsignificance in the argument that after the cause of actionalleged in Sportmart's complaint accrued and after thatcomplaint was filed, Nordica-US commenced operations andproceeded to transact business in this district, replacing RNCas the exclusive distributor of Nordica products. Whatever therelationship may be between Nordica-Italy and Nordica-US atthis juncture, a question we need not now decide, it is clearthat the relevant time period for jurisdiction and venuepurposes is the time that the cause of action accrued. See Leev. Ply*Gem Industries, Inc., supra; Board of CountyCommissioners v. Wilshire Oil Company of Texas, supra; EastlandConstruction Co. v. Keasbey & Mattison Co., supra; Sunbury WireRope Manufacturing Co. v. United States Steel Corp., supra;Redmond v. Atlantic Coast Football League, supra. The cause ofaction alleged in Sportmart's complaint arose in August, 1981,when the defendants allegedly conspired together and refused toaccept orders for Rossignol skis and Nordica boots for deliveryto Sportmart's Clark Street location. See Complaint at ¶ 17.Nordica-US did not commence operations until January 1, 1982,approximately five months later. The complaint thus fails toallege a sufficient jurisdictional nexus between the cause ofaction alleged and the transaction of business by Nordica-US atthe time the cause of action accrued. Although there areallegations in the papers filed in connection with the pendingmotion to the effect that, since the complaint was filed,Nordica-US has begun distributing Nordica products in thisdistrict and has refused to accept Sportmart's orders forNordica boots, those allegations go beyond the period involvedin the complaint presently on file and are thusjurisdictionally irrelevant.[9]

Sportmart's other arguments in support of personaljurisdiction and venue are also unavailing. The fact thatSportmart may have suffered injury here, without more, willnot support the exercise of personal jurisdiction or createvenue in an antitrust case such as the one at bar. As thecourt stated in Redmond v. Atlantic Coast Football League,359 F. Supp. 666, 669 (S.D.Ind.), affirmed, 478 F.2d 1405 (7th Cir.1973), "[w]hile it may be appropriate in tort cases to findthat the plaintiff's cause of action arose in the jurisdictionwhere the injury occurred, the current trend is to view this asa simplistic rationale to which antitrust actions are notsusceptible." The court went on to apply a `weight of thecontacts' approach to venue. Accord: Caribe Trailer Systems,Inc. v. Puerto Rico Maritime, 475 F. Supp. 711, 719 (D.D.C.1979); Philadelphia Housing Authority v. American Radiator &Standard Sanitary Corp., 291 F. Supp. 252, 260 (E.D.Pa. 1968).

Similarly, Sportmart's attempt to create jurisdiction orvenue over both Nordica defendants in this district on thebasis of the contacts of their alleged co-conspirators isunpersuasive. Most courts that

have considered the so-calledco-conspirator theory of venue after the Supreme Court'srejection of it in dictum in Bankers Life & Casualty Co. v.Holland, 346 U.S. 379, 74 S.Ct. 145,98 L.Ed. 106 (1953), have also declined to find venueappropriate over a non-resident corporate defendant solely onthe basis of the alleged conduct of its co-conspirators in theforum state. See Piedmont Label Company v. Sun Garden PackingCompany, 598 F.2d 491 (9th Cir. 1979); San Antonio TelephoneCo. v. American Telephone & Telegraph Co., 499 F.2d 349, 351 n.3 (5th Cir. 1974); H.L. Moore Drug Exchange, Inc. v. Smith,Kline & French Laboratories, 384 F.2d 97, 98 (2d Cir. 1967);Cascade Steel Rolling Mills, Inc. v. C. Itoh and Company,499 F. Supp. 829 (D.Or. 1980); Chromium Industries, Inc. v. MirrorPolishing & Plating Co., Inc., 448 F. Supp. 544 (N.D.Ill. 1978).This Court also declines to follow the co-conspirator theory ofvenue which, according to the court in Piedmont Label Co.,supra, "was given what has been called its `illegitimate birth'by a decision of [the Ninth Circuit] more than thirty years agoin Giusti v. Pyrotechnic Industries, [156 F.2d 351 (9th Cir.1946)]." Piedmont Label Co., supra, 598 F.2d at 493.[10]

Finally, this Court rejected the national contacts approachto personal jurisdiction, advanced herein by Sportmart withregard to Nordica-Italy, in Ingersoll Milling Machine Co. v. J.E. Bernard & Co., 508 F. Supp. 907, 910 n. 4 (N.D.Ill. 1981). Inthat opinion we noted that both the courts of appeals that haveconsidered the national contacts approach have rejected it aswell. See Wells Fargo & Company v. Wells Fargo Express Company,556 F.2d 406 (9th Cir. 1977); Honeywell, Inc. v. MeltzApparatewerke, 509 F.2d 1137 (7th Cir. 1975).

Accordingly, the Nordica defendants' motion to dismiss forlack of personal jurisdiction and improper venue is granted.It is so ordered.

1. Jurisdiction is asserted pursuant to 28 U.S.C. § 1331 and15 U.S.C. § 15.

2. Nordica-US was apparently served with process by theUnited States Marshal on October 2, 1981, after the motion todismiss was filed. Although it is unclear whetherNordica-Italy was ever served with a copy of the complaint,our disposition of the motion to dismiss on other groundsrenders unnecessary our consideration of the insufficientservice of process argument.

3. In the past, it was unnecessary to decide whether stateor federal law governed the personal jurisdiction inquiry ina federal antitrust case since Illinois courts had interpretedthat state's long-arm statute as being co-extensive with dueprocess principles. Braband v. Beech Aircraft Corp., 72 Ill.2d 548,557, 21 Ill.Dec. 888, 892, 382 N.E.2d 252, 256 (1978);Nelson v. Miller, 11 Ill.2d 378, 143 N.E.2d 673 (1957).Recently, however, the Illinois Supreme Court has indicated itsinclination to construe the Illinois Long-Arm Statute,Ill.Rev.Stat. ch. 110, § 17 (1979), more restrictively thanwould be required under traditional due process principlesenunciated in International Shoe Co. v. State of Washington,326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and itsprogeny, thereby developing a body of Illinois law on inpersonam jurisdiction that will be set back to an as yetundetermined extent from the broader parameters of the dueprocess clause. See Cook Associates, Inc. v. Lexington UnitedCorp., 87 Ill.2d 190, 57 Ill.Dec. 730, 429 N.E.2d 847 (1981);Green v. Advance Ross Electronics Corp., 86 Ill.2d 431, 56Ill.Dec. 657, 427 N.E.2d 1203 (1981).

4. Rule 4(d)(7) provides that service may be made upon anindividual or a corporation ". . . in the manner prescribed bythe law of the state in which the district court is held forthe service of summons or other like process upon anydefendant in an action brought in the courts of generaljurisdiction of that state."

5. It should be noted that section 12 only provides forservice of process on corporate defendants. Resort must stillbe had to state long-arm statutes to reach individual orpartnership defendants in an antitrust action. See, e.g.,United States Dental Institute v. American Association ofOrthodontists, 396 F. Supp. 565 (N.D.Ill. 1975); MetropolitanSanitary District of Greater Chicago v. General ElectricCompany, 35 F.R.D. 131 (N.D.Ill. 1964). State law also controlsthe determination of personal jurisdiction over a foreigncorporation with regard to any state law counts appended to afederal antitrust claim. See Call Carl, Inc. v. BP OilCorporation, 391 F. Supp. 367, 376-77 (D.Md. 1975).

6. In Black v. Acme Markets, Inc., supra, the court went onto decide the jurisdictional question under the Texas long-armstatute because the parties had argued the case in thatcontext. Unlike the case at bar, however, the Texas long-armwas apparently co-extensive with the due process clause so thatthe result in that case was identical to the result that wouldhave obtained under general due process principles. As thecourt noted, "[j]ust as there are many roads to Rome, there ismore than one avenue to personal jurisdiction in antitrustcases." 564 F.2d at 684. The court's statement is accurate,however, only so long as the state and federal tests forpersonal jurisdiction are the same in a particular case.

7. Although Nordica-Italy monitored RNC's financial recordsand performance activity, it did not participate in suchoperating decisions as reviewing sales policies and prices,warehousing, salaries and promotions, or collection ofaccounts receivable and inventory according to the secondaffidavit filed by Giovanni Vaccari, a director and officer ofthe Italian company. See Vaccari Second Affidavit ¶ 4. Even aparent corporation, let alone a minority shareholder, ispermitted to engage in "limited inter-organizational activitiessuch as record reporting or monitoring" without destroying itscorporate separateness for jurisdictional purposes. Tiger Trashv. Browning Ferris Industries, Inc., 560 F.2d 818, 823 (7thCir. 1977), cert. denied, 434 U.S. 1034, 98 S.Ct. 768, 54L.Ed.2d 782 (1978).

8. The facts stated herein were garnered from the twoaffidavits filed by Giovanni Vaccari of Nordica-Italy insupport of the motion to dismiss. Sportmart has not filed anyaffidavit to rebut the statements in the Vaccari affidavitswith respect to the relationship between Nordica-Italy andRNC.

9. Although it appears from the record before us at thistime that the newly-created Nordica-US is not merely acontinuation of RNC, but rather, is an independent company inits own right, though wholly-controlled ultimately byNordica-Italy, we need not decide that question at this time.As we stated earlier, conduct by Nordica-US after the accrualof Sportmart's cause of action is irrelevant to thejurisdictional inquiry under the complaint as it stands at thepresent time.

10. Sportmart's eleventh-hour attempt to base venue upon atelex purportedly sent to Nordica-Italy by RNC requestingNordica's assistance in cutting off the supply of Nordicaboots to unauthorized dealers in five cities, includingChicago, is misplaced. In a system based upon due processprinciples that look to whether a non-resident haspurposefully availed itself of the benefits of the forum, theunilateral act of an unrelated third party has nosignificance.