UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	Chapter 11
GRUPPO ANTICO, INC.,	)	Case No. 02-13283 (PJW)
f/k/a TREND HOLDINGS, INC., *et.al.*,	)	
	)	(Jointly Administered)
Debtors.	)	
	)	
	)	
ANTICO VACCA	)	
TECHNOLOGIES, INC.	)	Adversary Proceeding
f/k/a TREND TECHNOLOGIES, INC.,	)	No. 04-52619 (PBL)
	)	
Plaintiff,	)	
	)	
v.	)	Related Documents: 7, 12, 14, 15, 16
	)	
BAYER CORPORATION and BAYER	)	
DE MEXICO, S.A. de C.V.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION[1]

Before the Court is Bayer de Mexico, S.A. de C.V.'s Motion to Dismiss the above-captioned adversary proceeding as it relates to Bayer de Mexico, S.A. de C.V.,[2] pursuant to Federal Rule of Bankruptcy Procedure 7012 (b)(2) and (5). For the reasons that follow, Bayer de

[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

[2] Defendant Bayer Corporation took no part in Bayer de Mexico's Motion to Dismiss and therefore, it will not be affected by this Memorandum and Order.

Mexico, S.A. de C.V.'s Motion to Dismiss will be granted and the adversary proceeding against Bayer de Mexico, S.A. de C.V. will be dismissed.

STANDARD OF REVIEW

When considering a motion to dismiss based upon Federal Rule of Civil Procedure 12(b)(2), made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7012(b), it has been established that "[o]nce a jurisdictional defense has been raised, the plaintiff bears the burden of establishing with reasonable particularity sufficient contacts between the defendant and the forum state to support jurisdiction." *Provident Nat'l Bank v. California Federal Sav. & Loan Assoc.*, 819 F.2d 434, 437 (3d Cir., 1987). "To meet this burden, the plaintiff must establish either that the particular cause of action sued upon arose from the defendant's activities within the forum state ("specific jurisdiction") or that the defendant has "continuous and systematic" contacts with the forum state ("general jurisdiction")." *Id.*

BACKGROUND

On November 7, 2002, Gruppo Antico, Inc. ("Debtors"), Antico Vacca Technologies, Inc., ("Plaintiff"), and several other affiliated entities filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.[3] Those cases have been procedurally consolidated for administrative purposes and the Debtors continue to operate their business and manage their affairs as Debtors in Possession.

---

[3] 11 U.S.C. §§ 101 et seq. Hereafter, references to statutory provisions by section number only will be to provisions of the Bankruptcy Code, unless the context requires otherwise.

On February 18, 2004, Plaintiff filed its complaint seeking to avoid and recover certain allegedly preferential transfers pursuant to §§ 547 and 550. In its complaint, Plaintiff alleges that Defendant Bayer Corporation is a corporation formed under the laws of the State of Indiana and that Defendant Bayer de Mexico, S.A. de C.V. is a division of Bayer Corporation doing business in Mexico. Defendants are referred to in the complaint collectively as "Defendant."[4]

On April 16, 2004, Defendant filed its Motion to Dismiss pursuant to Rule 7012(b)(2) and (5), Fed. R. Bankr. P;[5] however, the Motion discusses only the sufficiency of service of process.

On June 16, 2004, Plaintiff filed its response to Defendant's Motion to Dismiss, wherein Plaintiff objects to dismissal, asserting that it was seeking to effectuate service of the summons and complaint under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Convention").[6]

Noting that no argument under Rule 7012(b)(2) was contained in the Motion to Dismiss, Plaintiff nevertheless addresses the issue in its opposition, and asserts that sufficient contacts exist to find personal jurisdiction over Defendant, citing authorities which will be discussed *infra*. In support of this contention, Plaintiff notes that Defendant shipped certain plastic goods to Plaintiff's predecessor, Trend Technologies, that Defendant sent invoices to Plaintiff in San

---

[4] Hereafter, the term "Defendant" will refer only to Defendant Bayer de Mexico, S.A. de C.V. Other entities, including Defendant Bayer Corporation, will be referred to by their full corporate name or title.

[5] Rule 7012(b) permits the assertion of certain defenses by motion, including: (2) lack of jurisdiction over the person, and (5) insufficiency of service of process.

[6] At a subsequent hearing before this Court, Counsel for Defendant conceded that if service was effectuated pursuant to the Hague Convention, its Rule 7012(b)(5) argument would be withdrawn, but that the Rule 7012(b)(2) issue would remain at issue.

Jose, California, and that it availed itself of payments from Plaintiff's American depository institution.

On July 7, 2004, Defendant filed its Reply Brief in Support of the Motion to Dismiss, wherein Defendant concedes that it manufactured and shipped certain plastic goods to Trend Technologies, but that such shipments were to Zapopan, Jalisco, Mexico, and that at no time were any products shipped to Trend Technologies, or to Plaintiff, in the United States. Furthermore, Defendant concedes that as a courtesy to Trend Technologies as its customer, it sent invoices to Trend Technologies at San Jose, California, and that it received payments drawn on Plaintiff's bank in the United States.

Plaintiff filed its Motion for Leave to File a Surreply, accompanied by its Surreply, to which Defendant objected and moved for leave to file its Answer to the Surreply, accompanied by its Answer. The Court has considered both the Surreply and the Answer thereto, and both will be treated as though their filing was authorized by the Court.

In the Surreply, Plaintiff urges that the "Bayer Group," of which Defendant was a part, operated as a unified company prior to 2003 and during the time of the transfers which are the subject of this action, and that Defendant and Bayer Corporation were alter egos of each other. Plaintiff, citing *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements, Ltd.*, 328 F. 3d 1122, 1134-1135 (9th Cir. 2003), contends that jurisdiction may be asserted over a subsidiary if its activities would have to be undertaken by the parent but for the existence of the subsidiary.

In its Answer to the Surreply, Defendant first notes that its parent, Bayer A.G., a German entity, is not a party to this action, and if Plaintiff seeks to have this Court "pierce the corporate veil," that is not possible in these circumstances. Next, Defendant provides the sworn statement

of its house counsel to the effect that Defendant is not the agent for Bayer Corporation, for the German parent entity, or for any entity in the "Bayer Group," for the manufacture or sale of polymers in the United States; that Bayer Corporation has its own polymers operation; that Defendant and Bayer Corporation are functionally and legally separate; and that the operations of Defendant are not controlled by the german parent or any entity in the "Bayer Group." Defendant cites *ESI, Inc. v. The Coastal Corporation, et al.,* 61 F.Supp. 2d 35, 50 (S.D.N.Y. 1999) for the proposition that "[j]urisdiction over the foreign subsidiary will be found only when the 'activities of the parent show a disregard for the separate corporate existence of the subsidiary.'"

DISCUSSION

The issue to be decided is whether this Court may render a binding *in personam* judgment against Defendant in this case, even where proper service of process is obtained pursuant to the Hague Convention. This Court has concluded that, in the circumstances here presented, it may not.

In *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L. Ed. 95 (1945), the Court stated that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe* at 316, 66 S.Ct. 154, 158, 90 L. Ed. 95, 102 (Quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L. Ed. 278 (1940)).

Plaintiff urges that the Supreme Court has held that even a single act may support jurisdiction if it creates a substantial connection with the forum. *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L. Ed. 2d 528 (1985). For that proposition, the *Burger King* Court cites *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L. Ed. 2d 223, 226 (1957). The *Burger King* Court continues, however, by stating that some single or occasional acts related to the forum may not be sufficient to establish jurisdiction if their nature and quality and the circumstances of their commission create only an attenuated affiliation with the forum, citing *International Shoe* and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). The Court then states that the distinction derives from the belief that with respect to this category of "isolated" acts, the reasonable foreseeability of litigation in the forum is substantially diminished. *Burger King*, 471 U.S. at 475, n.18.

Plaintiff also cites, and apparently relies upon *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 107 S.Ct. 1026, 94 L. Ed. 2d 92 (1987). In that case, the Japanese defendant sold a product to a Taiwanese manufacturer which incorporated the product into one of its own, some of which were imported into the United States. The primary litigation was settled, and the Japanese defendant remained only on the issue of its liability to the Taiwanese manufacturer. It was held that jurisdiction in the California courts in those circumstances would not comport with "fair play and substantial justice." The Court was divided, however, as to whether putting a product into the stream of commerce, even indirectly, constituted "purposefully" availing itself of the California market.

In the instant case, Plaintiff contends that Defendant's receipt of payment from Plaintiff's

United States bank is one of the "minimum contacts" with the United States that supports jurisdiction. Defendant cites *Western Textile, Inc. v. Transprint USA, Inc.* 1996 Westlaw 172195 (N.D.Ill. 1996), in which a similar contention is described as an "absurdity," since its acceptance would allow any plaintiff "to create personal jurisdiction over any prospective defendant by merely drafting a check and sending it to the prospective defendant." *Id.*, at n.1. Defendant also cites *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 104 S Ct. 1868, 80 L. Ed. 2d 404 (1984), in which the same point is made somewhat more gently: "Such unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Id.*, 466 U.S. at 417.

Defendant notes that in *Transprint,* the Court held with regard to assertions that the sending of invoices and written offers to contract, and the making of telephone calls to the forum State established the requisite "contacts," that "it is well established that telephone calls and written communication are alone not enough to establish personal jurisdiction over Transprint." *Transprint*, 1996 WL 172195, at 4.

Bayer Corporation and Defendant are the only defendants in this action. Bayer Corporation is not Defendant's parent, nor does Plaintiff allege sufficient facts to indicate that the two are *alter egos*. The submissions to the Court with the pleadings indicate the contrary to be the case.

Plaintiff has failed to establish *any* substantial contacts between Defendant and the United States. The mailing of invoices to a California address, at the request of its customer, is certainly not such a contact. Neither is the manufacture and delivery of products that were delivered to the

customer in Mexico. It has been seen that the receipt of payment from a United States bank is wholly insufficient to support jurisdiction. The affiliation of separate corporate entities, however close that affiliation may be, without more, does not warrant imposing jurisdiction upon a foreign corporation which has had no significant contact with the United States.

Plaintiff has not shown the requisite minimum contacts, purposeful availment, or substantial connections to the United States necessary to support *in personam* jurisdiction over Defendant. In short, Defendant has done nothing which would create the reasonable foreseeability of litigation, or which would cause Defendant to reasonably anticipate being haled into court in the United States.

CONCLUSION

Based upon the foregoing, Bayer de Mexico, S.A. de C.V.'s Motion to Dismiss the complaint for lack of personal jurisdiction over Defendant will be granted, and the complaint will be dismissed.

An appropriate order follows.

Dated: December 1, 2004

PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
GRUPPO ANTICO, INC.	)	Case No. 02-13283 (PJW)
f/k/a TREND HOLDINGS, INC., *et al.*,	)	
	)	Jointly Administered
Debtors.	)	
	)	
	)	
ANTICO VACCA TECHNOLOGIES,	)	
INC. f/k/a TREND TECHNOLOGIES, INC.,	)	
	)	Adv. No. 04-52619 (PBL)
Plaintiff,	)	
v.	)	
	)	Related Documents: 7, 12, 14, 15, 16
BAYER CORPORATION and BAYER	)	
DE MEXICO, S.A. de C.V.,	)	
	)	
Defendants.	)	

ORDER DISMISSING COMPLAINT AGAINST BAYER DE MEXICO, S.A. DE C.V. FOR LACK OF PERSONAL JURISDICTION

For the reasons set forth in the Court's Memorandum Opinion of this date,

IT IS HEREBY ORDERED that the Complaint filed by Antico Vacca Technologies, Inc. against Bayer de Mexico, S.A. de C.V. is dismissed for lack of personal jurisdiction.

Dated: December 1, 2004

PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE