INDEX OF UNREPORTED CASES

14 of 103 DOCUMENTS

In the Matter of COLLEGE FOOTBALL ASSOCIATION, an unincorporated association, and CAPITAL CITIES/ABC, INC., a corporation

DOCKET NO. 9242

Federal Trade Commission

1990 FTC LEXIS 350

ORDER RE MORE DEFINITE STATEMENT

October 9, 1990

ALJ: [*1]

James P. Timony, Administrative Law Judge

Respondent Capital Cities/ABC, Inc. moves for more definite statement of the charges. Complaint counsel opposes, with some exegesis of the theory of the Complaint.

Additional information will undoubtedly be adduced under the rules, but there is enough for a responsive pleading.

The motion is denied.

11 of 103 DOCUMENTS

In the Matter of DIRAN M. SEROPIAN, M.D.

Docket No. D-9248

Federal Trade Commission

1991 FTC LEXIS 306

ORDER DENYING RESPONDENT'S MOTION FOR A MORE DEFINITE STATEMENT

July 3, 1991

ALJ: [*1]

Lewis F. Parker, Administrative Law Judge

The respondent, Dr. Diran M. Seropian, has filed a motion seeking a more definite statement of the charges against him, claiming that he cannot frame an appropriate response to the complaint since it does not:

1. Describe conduct with which he is charged in an individual capacity.

2. Name the others who were allegedly involved in the combination or conspiracy and does not disclose the acts and coercive means referred to in paragraphs seven and eight.

3. Reveal the basis for the claim that the alleged unlawful acts are continuing, and will continue or recur.

It is true that the complaint lacks the details which Dr. Seropian will need before he can mount a defense against its allegations, but such details need not be given in the complaint. The Rules of Practice, § 3.11(b)(2) require only that the complaint shall contain "a clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts . . . alleged to be in violation of the law."

The complaint meets this standard since it gives Dr. Seropian notice of the charges against him. L. G. Balfour v. FTC, 442 F.2d 1, 19 (7th Cir. 1971). [*2] The details of the Commission's case will be revealed to Dr. Seropian during the discovery phase of this proceeding, for complaint counsel will file a nonbinding statement and will be required at the appropriate time to turn over to him the names of potential witnesses and copies of documents which they intend to offer in evidence.

Since the complaint does not detail the charges against Dr. Seropian, his answer need not be any more informative. Therefore,

IT IS ORDERED that Dr. Seropian's motion for a more definite statement be, and it hereby is, denied.

In the Matter of THE ELECTRICAL BID REGISTRATION SERVICE OF MEMPHIS, INC., a corporation, and
C.H. DENNIS, JR., individually and as an officer and director of said corporation, and
JAMES L. OVERTON, WAYNE A. ALLEN, and JACK GROSS, individually and as directors of said corporation, and
THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, MEMPHIS CHAPTER, a corporation
Docket No. 9183
DATE: August 29, 1984

ORDER DENYING RESPONDENT'S MOTION FOR A MORE DEFINITE STATEMENT

Paragraph 11(b) of the Complaint alleges that the Memphis Chapter of the National Electrical Contractors Association (hereinafter "Memphis Chapter") "formed a new bid depository, the Registry," and Paragraph 11(c) of the Complaint alleges that the Memphis Chapter "supported and/or controlled the Registry." Respondent Memphis Chapter moves for a more definite statement on the grounds that the Complaint fails to state "in what manner the Memphis Chapter formed a new bid depository" and "in what manner the Memphis Chapter and its members supported and/or controlled the registry."

The motion is denied. Commission complaints, like those in federal court, are merely designed to give respondent notice of the charges against him. Conley v. Gibson, 355 U.S. 41, 47 (1957); L.G. Balfour v. F.T.C., 442 F.2d 1, 19 (7th Cir.1971). Paragraphs 11(b) and 11(c) meet this standard. Neither paragraph is ambiguous nor are they so vague that a responsive answer cannot be filed. The evidentiary detail and supporting evidence, which respondent's motion seeks, will be revealed later in various pre-trial procedures.

Morton Needelman

Administrative Law Judge

Dated: August 29, 1984
FTC

END OF DOCUMENT

5 of 103 DOCUMENTS

In the Matter of NEW BALANCE ATHLETIC SHOE, INC. a corporation

DOCKET NO. 9268

Federal Trade Commission

1994 FTC LEXIS 213

NO DATE IN ORIGINAL

October 20, 1994

ORDER:
[*1]

ORDER DENYING MOTION TO DISMISS OR FOR A MORE DEFINITE STATEMENT

Respondent moves to dismiss the Complaint (or in the alternative for a more definite statement) as deficient in clarity of facts and theory. At this stage of pleading the allegations appear succinct but informative. Discovery and argument will add detail.

The motion fails.

Dated: October 20, 1994

6 of 103 DOCUMENTS

In the Matter of RED APPLE COMPANIES, INC., et al.

DOCKET NO. 9266

Federal Trade Commission

1994 FTC LEXIS 90

June 21, 1994

ORDER:
[*1]

ORDER DENYING RESPONDENTS' MOTION FOR MORE DEFINITE STATEMENT AND DIRECTING RESPONDENTS TO FILE ANSWERS

Upon consideration of respondents' Motion For More Definite Statement, dated June 10, 1994, and complaint counsel's response opposing the motion, respondents' motion is hereby denied.

Under Section 3.11(b) of the Federal Trade Commission's Rules of Practice, a motion for a more definite statement is not granted unless the complaint is ambiguous or more information is necessary in order to enable the respondents to prepare a responsive answer to the complaint. See Fruehauf Trailer Co., 53 F.T.C. 1269, 1270 (1956); Kroger Co., Docket No. 9102, Order Denying Respondent's Motion For More Definite Statement (Aug. 12, 1977) (LEXIS, Trade library, FTC file).

It is well settled that the detailed facts underlying the charges in the complaint, including facts concerning relevant markets and entry, are discoverable in subsequent pretrial proceedings. See, e.g., Honickman, Docket No. 9233, Order Denying Motion For More Definite Statement, Nov. 27, 1989; Honickman, Docket No. 9233, Order Denying Motion For More Definite Statement, Nov. 30, 1989. It is also well settled [*2] that a motion for a more definite statement under the Commission's Rules of Practice is not to be used as a substitute for discovery. See Forte-Fairbairn, Inc., Docket No. 8453, Order Denying Motion For Bill Of Particulars, January 10, 1962, Trade Reg. Rep. P15,676; Juneau Square Corp. v. First Wisconsin National Bank, 60 F.R.D. 46, 48 (E.D. Wis. 1973); Kroger Co., Docket No. 9102, Order Denying Respondent's Motion For More Definite Statement (Aug. 12, 1977) (LEXIS, Trade Library, FTC file).

Since the complaint is not unintelligible, granting respondents' motion would defeat the concept of notice pleading under which a plaintiff need only plead a concise statement of his claim, not evidentiary facts. See Palm Springs Medical Clinic, Inc. v. Desert Hospital, 628 F. Supp. 454, 464-65 (C.D. Cal. 1986); Jenkins v. General Motors Corp., 354 F. Supp. 1040, 1048 (D. Del. 1973); General Motors Corp., Docket No. 9074, Order Denying Respondents' Motions For a More Definite Statement and Directing Them to File Answers (Mar. 29, 1976) (LEXIS, Trade library, FTC file); Ford Motor Co., Docket No. 9073, Order Denying Respondents' Motions For a More Definite Statement [*3] and Directing Them to File Answers (Mar. 29, 1976) (LEXIS, Trade library, FTC file); Chrysler Motors Corp., Docket No. 9072, Order Denying Respondents' Motions For a More Definite Statement and Directing Them to File Answers (Mar. 29, 1976) (LEXIS, Trade library, FTC file); Bankers Life and Casualty Corp., Docket No. 9075, Order Denying Respondents' Motions For a More Definite Statement and Directing Them to File Answers (May 4, 1976) (LEXIS, Trade library, FTC file). Here the complaint sufficiently informs respondents as to the nature of the statutory violations with which they are charged, with enough specificity to enable respondents to answer those charges. The respondents are directed to file their answers to the complaint within 10 days of service of this order upon them.

SO ORDERED.

June 21, 1994

LEXSEE 1992 U.S. DIST. LEXIS 9844

MARGARITA SANCHEZ, etc., Plaintiff, v. NEW YORK CITY et alia, Defendants.

CV-92-1467

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

1992 U.S. Dist. LEXIS 9844

June 29, 1992, Decided
June 30, 1992, Filed

LexisNexis(R) Headnotes

JUDGES: [*1] Sifton

OPINIONBY: CHARLES P. SIFTON

OPINION:

MEMORANDUM AND ORDER

SIFTON, District Judge.

This is a civil rights action brought by a woman seeking to regain custody of her child. The matter is currently before the Court on defendant Hector Goa's motion to compel plaintiff to produce a more definite statement. The motion is denied.

Plaintiff has sued various agencies and individuals associated with providing foster care. The lengthy complaint mentions the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, *42 U.S.C. § § 1981* and 1983, and pendent state law.

Defendant Hector Goa, a psychiatrist employed by the Puerto Rican Association for Community Affairs (PRACA), moves pursuant to *Rule 12(e) of the Federal Rules of Civil Procedure* for a more definite statement of the causes of action levelled against him. PRACA, under contract with the City, provides foster care for children. Both PRACA and the City are also defendants.

Defendants contend that the complaint is too vague and impermissibly intermingles several causes of action in each of its various counts. In response to this motion, plaintiff, without seeking leave of the Court and after one defendant has answered, [*2] has filed an amended complaint, apparently in hopes of satisfying the complaints made in this motion. n1 The amended complaint does not differ substantially from plaintiff's earlier effort. Goa has not withdrawn his motion. Plaintiff has not filed opposition papers.

n1 Rule 15(a) of the Federal Rules of Civil Procedure requires leave of the Court to amend a pleading once a responsive pleading has been served. Accordingly, the amended complaint is stricken without prejudice.

Rule 12(e) provides:

> If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired.

Motions under Rule 12(e) are "disfavored," largely because they often add little that discovery couldn't provide, while creating delay. *See Maltezos v. Marine Terrace Apartments, 1990* [*3] *WL 52112* (S.D.N.Y. Apr. 13, 1990); 5A Wright & Miller, Fed. Prac. & Proced. § 1377, at 600. "A motion pursuant to 12(e) should not be granted 'unless the complaint is so excessively vague and ambiguous as to be unintelligible

and as to prejudice the defendant seriously in attempting to answer it.'" *Bower v. Weisman, 639 F. Supp. 532, 538 (S.D.N.Y. 1986).*

Defendant's motion fails because it mistakes the role of the pleadings. The Federal Rules, trusting in the discovery process to provide much of the detail needed to sharpen issues, permits notice pleading. Defendant also complains that plaintiff folds several claims into single counts, making the complaint difficult to understand. However, under the rules "A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses." *Fed. R. Civ. P. 8(e)(2).*

Although defendant doesn't make the argument, I note that he might have sought recourse to the rule stating that "each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a [*4] separation facilitates the clear presentation of the matters set forth." *Fed. R. Civ. P. 10(b).* However, this requirement's focus on the "transaction or occurrence," not the claim asserted, underscores the Federal Rule's exaltation of substance over form. *See* 5 Wright & Miller, Fed. Prac. & Proced. § 1325, at 753-54 (1990). This is to be compared with the "outmoded common law practice of requiring separate counts for each identifiable claim." *Id.* at 753.

The complaint here is not vague or ambiguous. On the contrary, defendant appears to complain that it is so specific and detailed that it overwhelms him. While the complaint is no model of elegance, its length and complexity do not render it unintelligible. Rather, each count is made lengthy by plaintiff's attempt to plead many of the claims in the alternative and to specify how each defendant's conduct makes him or her culpable to each of the plaintiffs.

The complaint adequately places defendant Goa on notice of what plaintiff thinks Goa did wrong. "The essence of a complaint is to inform the defendant as to the general nature of the action and as to the incident out of which a cause of action arose. . . . [Plaintiff's] [*5] complaint satisfies this requirement as it clearly identifies the offending acts." *Bower, 639 F. Supp. at 538.* Here the facts section of the complaint explains that Goa counselled plaintiff and her daughter with the intention to drive the two farther apart and aid the foster family in its efforts to adopt the child. At the same time, the complaint alleges, Goa misrepresented his intention to plaintiff Margarita Sanchez. The pleading also accuses him of telling plaintiff to cease visiting her child on the pretense that it would speed the daughter's return to the plaintiff.

The structure of the complaint does not detract from these reasonably straightforward factual allegations. Count 1, by far the most involved of all the counts, may be understood as alleging several claims in the alternative all stemming from the same fact -- defendants' detention of plaintiff's child. n2 The count spells out in some detail how each defendant participated in this detention. Thus the directors of the foster care program are alleged to have maintained a policy or practice of detaining children based on unlawful criteria, and Goa (along with others) is accused of aiding the [*6] implementation of that policy. The nature of these allegations and the language used to describe them make clear that this count alleges violations of the federal Constitution and statutes that provide rights of action thereunder.

n2 References to a particular count are references to the original complaint.

The other counts present less difficulty. Count 2 does not mention Goa. Count 3, while somewhat repetitive of Count 1, alleges a civil rights conspiracy and the overt acts taken to achieve its objectives. Count 4 alleges a breach of a federal statutory duty to attempt to reunite families. Counts 5 and 6 allege violations of state law in depriving plaintiff of custody of her child. Count 7 appears to allege a malpractice claim against Goa for the way he conducted himself during the course of therapy. Count 8 does not mention Goa but alleges a constitutional violation stemming from the deprivation of visitation rights. Count 9 alleges fraudulent misrepresentations. Count 10 does not mention Goa but alleges [*7] that PRACA breached its contract with the City. Similarly, Count 11 does not refer to Goa, but it alleges that the foster parents breached a contract with PRACA.

For the foregoing reasons, defendant Goa's motion for a more definite statement is denied.

The Clerk is directed to mail a copy of the within to all parties.

SO ORDERED.

Dated: Brooklyn, New York, June 29, 1992

/s/ Charles P. Sifton

United States District Judge

26 of 51 DOCUMENTS

In the Matter of Schering-Plough Corporation, a corporation, Upsher-Smith Laboratories, a corporation, and American Home Products Corporation, a corporation

Docket No. 9297

Federal Trade Commission

2001 FTC LEXIS 198

ORDER DENYING MOTIONS OF RESPONDENTS SCHERING-PLOUGH AND UPSHER-SMITH TO DISMISS THE COMPLAINT

October 31, 2001

ALJ: [*1]

D. Michael Chappell, Administrative Law Judge

ORDER:

I. PROCEDURAL BACKGROUND

On June 7, 2001, Respondent Schering-Plough Corporation ("Schering") filed a motion for partial dismissal of the Complaint for failure to state a claim upon which relief could be granted. Complaint Counsel filed an opposition on June 25, 2001. Schering filed a reply in support of its motion on July 6, 2001. Oral arguments of counsel were heard on July 25, 2001.

On July 20, 2001, Respondent Upsher-Smith Laboratories, Inc. ("Upsher-Smith") filed a motion to dismiss the Complaint in its entirety as deficient as a matter of law. Complaint Counsel filed an opposition on August 8, 2001. Upsher-Smith filed a reply in support of its motion on August 15, 2001.

For the reasons set forth below, Schering's and Upsher-Smith's motions are DENIED.

II. STATUTORY AND REGULATORY FRAMEWORK STATED IN THE COMPLAINT

The Complaint contains the following allegations regarding federal regulation of prescription drugs:

. Under the Federal Food, Drug, and Cosmetic Act ("FFDCA"), 21 U.S.C. § 301 et seq., approval by the Food and Drug Administration ("FDA") is required before a company may market or sell a prescription drug [*2] in the United States. Complaint at P 9. Newly developed prescription drugs are often protected by patents and marketed under proprietary brand names and are commonly referred to as "brand name drugs" or "branded drugs." Id. at P 10. FDA approval for a branded drug is generally sought by filing a New Drug Application ("NDA") with the FDA. Id.

. In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act, known as the Hatch-Waxman Act, which simplified the procedure for obtaining approval of generic drugs. Id. at P 11. Under the Hatch-Waxman Act, manufacturers of generic drugs are required to submit an Abbreviated New Drug Application ("ANDA"). Id. at P 12. An ANDA applicant has to demonstrate that the generic drug is bioequivalent to the brand name drug that it references. Id.

. When a brand name drug is protected by one or more patents, an ANDA applicant that intends to market its generic product prior to expiration of any patent must certify that the patent on the brand name drug is invalid or will not be infringed by the manufacture, use, or sale of the drug for which the ANDA applicant seeks approval. Id. at P 13. This is called a "Paragraph IV Certification." [*3] Id.

. If the ANDA contains a Paragraph IV Certification, the ANDA applicant must provide notice to each owner of the patent that is the subject of the certification and to the holder of the approved NDA to which the ANDA refers. Id. at P 14. Upon receiving notice of a Paragraph IV Certification, the patent holder has 45 days in which to file a patent infringement suit against the generic manufacturer. Id. If a patent infringement suit is initiated against the ANDA applicant, the FDA must stay its final approval of the ANDA for the generic drug until the earliest of (1) the patent expiration, (2) a judicial determination of the patent litigation, or (3) the expiration of a 30-month waiting period. Id.

. The Hatch-Waxman Act provides that the first to file a Paragraph IV certified ANDA ("the first filer") is eligible for a 180-day period of exclusivity ("the 180-day exclusivity period"). Id. at P 15. That is, during those 180 days, the FDA will not approve any other ANDA for the same generic product until the earlier of the date on which (1) the first firm begins commercial marketing of its generic version of the drug, or (2) a court finds the patents claiming the brand name drug [*4] are invalid or not infringed. Id.

III. RELEVANT ALLEGATIONS OF THE COMPLAINT

The Complaint contains the following allegations:

. Respondents entered into unlawful horizontal agreements to delay entry of low-cost generic competition to Schering's prescription drug K-Dur 20. Complaint at P 1. These agreements have cost consumers in excess of $ 100 million. Id. at P 2.

. Schering has monopoly power in the market that includes K-Dur 20 and that entry of generic competition would significantly erode Schering's market share and profits. Id. at PP 17, 26-30, 37. To protect the profits of K-Dur 20 from the threat of generic competition, Schering conspired with two manufacturers of generic pharmaceuticals, Upsher-Smith and American Home Products Corporation ("AHP"), by paying each millions of dollars to delay their products' entry into the marketplace. Id. at PP 44-45, 55, 57, 63-64.

. Schering manufactures and markets two extended-release microencapsulated potassium chloride products: K-Dur 20 and K-Dur 10, both of which are marketed as brand name drugs. Id. at P 31. Schering's K-Dur 20 and K-Dur 10 are covered by a formulation patent owned by Schering, patent number 4,863,743 [*5] (the "'743 patent"), which expires on September 5, 2006. Id. at P 34.

. On August 6, 1995, Upsher-Smith filed an ANDA with the FDA to market Klor Con M20, a generic version of Schering's K-Dur 20. Id. at P 38. Upsher-Smith's ANDA was the first for a generic version of K-Dur 20. Id. Upsher-Smith submitted a Paragraph IV Certification with this ANDA and, on November 3, 1995, Upsher-Smith notified Schering of its Paragraph IV Certification and ANDA. Id.

. As the first ANDA filer with a Paragraph IV Certification for a generic version of Schering's K-Dur 20, Upsher-Smith is eligible for the 180-day exclusivity period. Id. at P 41. Because Upsher-Smith is eligible for the 180-day exclusivity period, no other generic manufacturer can obtain final FDA approval to market a generic version of K-Dur 20 until after the exclusivity period has expired. Id. at P 42.

. Schering sued Upsher-Smith for patent infringement in the United States District Court for the District of New Jersey on December 15, 1995, alleging that Upsher-Smith's Klor Con M20 infringed Schering's '743 patent. Id. at P 39. On June 17, 1997, Schering and Upsher-Smith agreed to settle their patent litigation. Id. at P 44. [*6] Under the settlement agreement, Schering agreed to make unconditional payments of $ 60 million to Upsher-Smith; Upsher-Smith agreed not to enter the market, either with the

allegedly infringing generic version of K-Dur 20 or with any other generic version of K-Dur 20, regardless of whether such product would infringe Schering's patents, until September 2001; both parties agreed to stipulate to the dismissal of the litigation without prejudice; and Schering received licenses to market five Upsher-Smith products. Id. at P 44.

. On December 29, 1995, ESI Lederle, Incorporated ("EST"), a division of AHP, submitted an ANDA to the FDA to market a generic version of Schering's K-Dur 20. Id. at P 51. ESI submitted a Paragraph IV Certification with this filing and notified Schering of its Paragraph IV Certification and ANDA. Id. Schering sued ESI for patent infringement in the United States District Court for the Eastern District of Pennsylvania on February 16, 1996, alleging that ESI's generic version of Schering's K-Dur 20 infringed Schering's '743 patent. Id. at P 53.

. On June 19, 1998, Schering and ESI executed a settlement agreement to their patent litigation whereby, inter alia, [*7] Schering agreed to pay ESI up to $ 30 million; AHP and ESI agreed to refrain from marketing the allegedly infringing generic version of K-Dur 20 or any other generic version of K-Dur 20, regardless of whether such product would infringe Schering's patents, until January 2004. Id. at P 54-55.

III. ARGUMENTS OF THE PARTIES

The Complaint alleges that Schering's settlement agreements with Upsher-Smith and with ESI violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 ("FTC Act") because they delayed the entry of Upsher-Smith's and ESI's generic versions of K-Dur 20. The Complaint also alleges that Schering's agreement with Upsher-Smith violates the FTC Act because it has the effect of keeping off the market other generic drugs manufactured by third parties.

Schering and Upsher-Smith urge dismissal or partial dismissal on the grounds that the Complaint fails to state a claim upon which relief could be granted. Schering asserts, first, that the Complaint's allegations that Schering's agreements with Upsher-Smith and ESI violate Section 5 of the FTC Act because they allegedly delayed entry of Upsher-Smith's and AHP's generics fail to state a claim because: (a) the [*8] Complaint fails to allege patent invalidity or non-infringement; and (b) the Complaint fails to allege that the patent suit was not bona fide or that the settlement was more anticompetitive than the probable outcome of the litigation. Schering asserts, second, that the Complaint's allegations that Schering's agreement with Upsher-Smith violates Section 5 of the FTC Act because it allegedly has the effect of blocking generics manufactured by third parties fails to state a claim because: (a) the Complaint misstates the FDA law; and (b) any effect the agreement had was by operation of federal law and thus immune from antitrust liability under the Noerr-Pennington doctrine.

Upsher-Smith asserts that the Complaint is deficient as a matter of law because it does not dispute that: (a) the patent suit was not bona fide; (b) the settlement resolved that dispute by compromise; or (c) the settlement was more anticompetitive than the probable outcome of the litigation.

Complaint Counsel responds to Schering's first argument and Upsher-Smith's argument by asserting that the allegations of the Complaint that Schering paid Upsher-Smith and AHP to delay their entry and withdraw their challenges to [*9] Schering's patent state an antitrust claim and provide a clear basis for that claim. Complaint Counsel asserts that, to state a claim, the Complaint need not contain allegations that Schering's patent is invalid or is not infringed. In Complaint Counsel's view, a patent settlement violates the antitrust laws, regardless of invalidity or infringement issues, when the patent-holder entices its competitors to delay entry or withdraw its challenges to the patent in exchange for a share of the monopoly profits. Complaint Counsel next asserts that proof of the parties' probabilities of winning the patent litigation is not necessary for proving an antitrust violation. Complaint Counsel asserts that all that is required - and is alleged - is that the settlements harmed competition.

Complaint Counsel responds to Schering's second argument by asserting that "the current state of the [FDA] law . . . in no way contradicts complaint allegations concerning the 180-day exclusivity period or the exclusionary effect of Schering's agreement with Upsher-Smith." Complaint Counsel's Response to Schering's Motion for Partial Dismissal of the Complaint at p. 24. Complaint Counsel next asserts that the Noerr-Pennington [*10] doctrine does not provide antitrust immunity where competitors enter into an agreement that manipulates the regulatory scheme and triggers the exclusionary effect identified in the Complaint.

IV. MOTION TO DISMISS STANDARD

Schering's and Upsher-Smith's motions are filed pursuant to Section 3.22(e) of the Commission's Rules of Practice which authorizes the filing of a motion to dismiss a complaint. 16 C.F.R. § 3.22(e). Although the Commission's Rules of Practice do not have a rule identical to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Commission has acknowledged a party's right to file, and the Administrative Law Judge's authority to rule on, a motion to dismiss for failure to state a claim upon which relief could be granted. E.g., Times Mirror Co., 92 F.T.C. 230 (July 25, 1978); Florida Citrus Mutual, 50 F.T.C. 959, 961 (May 10, 1954) (ALJ may "dismiss a complaint if in his opinion the facts alleged do not state a cause of action.").

Section 3.11(b)(2) of the Commission's Rules of Practice sets forth that the Commission's complaint shall contain a "clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the [*11] type of acts or practices alleged to be in violation of the law." 16 C.F.R. § 3.11(b)(2). This rule requires only that the complaint contain "a factual statement sufficiently clear and concise to inform respondent with reasonable definiteness of the types of acts or practices alleged to be in violation of law, and to enable respondent to frame a responsive answer." New England Motor Rate Bureau, Inc., 1986 FTC LEXIS 5, *114 (Dec. 12, 1986). "Commission complaints, like those in the federal courts, are designed only to give a respondent 'fair notice of what . . . the claim is and the grounds upon which it rests.'" Id. (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

A motion to dismiss for failure to state a claim upon which relief can be granted is judged by whether a review of the complaint allegations clearly shows that the allegations, if proven, are sufficient to make out a violation of Section 5. TK-7 Corp., 1989 FTC LEXIS 32, *3 (May 3, 1989). For purposes of a motion to dismiss, the factual allegations of the complaint are presumed to be true and all reasonable inferences are to be made in favor of complaint counsel. TK-7 Corp., 1989 FTC LEXIS 32, *3 (citing Miree [*12] v. DeKalb County, 433 U.S. 25, 27 n.2 (1977); Jenkins v. McKeitchen, 395 U.S. 411, 421-22 (1969)).

If the motion to dismiss raises issues of fact which are in dispute, dismissal is not appropriate. Herbert R. Gibson, 1976 FTC LEXIS 378, *1 (April 23, 1976); Jewell Companies, Inc. 81 F.T.C. 1034, 1972 FTC LEXIS 277, *4 (Nov. 10, 1972) (denying motion to dismiss where there was a substantial dispute on questions of fact). See also College Football Assoc., 1990 FTC LEXIS 485 (Dec. 27, 1990) (Where facts are needed to make determination on a "close question," the motion to dismiss will be denied.).

This standard used in Commission proceedings mirrors the standard used for evaluating motions to dismiss raised in federal courts under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Supreme Court has held that it "is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" McClain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 246 (1980) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Moreover, it is well established that, [*13] in ruling on a motion to dismiss, allegations in the complaint must be accepted as true and construed favorably to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "In antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746 (1976) (quoting Poller v. Columbia Broadcasting, 368 U.S. 464, 473 (1962)).

V. ANALYSIS

A. Allegations That Schering's Agreements with Upsher-Smith and with AHP Delayed the Entry of Upsher-Smith and AHP

The Complaint alleges that Schering entered into two separate agreements whereby Schering paid Upsher-Smith and ESI to delay the entry of Upsher-Smith's and ESI's generic versions of K-Dur 20. Complaint P P 44, 55. Complaint Counsel asserts that an evaluation of whether Schering's patent was valid or not infringed or of whether the settlement was more anticompetitive than the probable outcome of the patent litigation is not necessary for a determination of whether the agreements delayed entry.

The dispositive issue is whether, under [*14] any alleged factual scenario, the Complaint's allegations demonstrate a violation of Section 5 of the FTC Act. In any given case, there may be many different scenarios or facts, which are not alleged, that also support a violation of the law. Hypothetical fact patterns or scenarios which contradict facts alleged in the Complaint are not dispositive when considering a motion to dismiss.

Respondents, by arguing that the Complaint fails to allege patent invalidity or non-infringement and fails to allege the patent suit was not bona fide or that the settlements were more anticompetitive than the probable outcome of the patent litigation, urge the Court to accept a different set of facts than alleged in the Complaint. In essence, Respondents argue that if Schering's patent was valid and was infringed by Upsher-Smith's and AHP's products, then Schering has a legal right to exclude those proposed products from the market until September 2006. Memorandum in Support of Respondent Schering-Plough Corporation's Motion for Partial Dismissal of the Complaint at p. 7. Under this scenario, Respondents assert, the agreements which allow Upsher-Smith and AHP to bring their generics to market prior [*15] to September 2006 are legal and indeed are procompetitive because the agreements allow the generics to enter the market sooner than the products otherwise would have.

As Complaint Counsel has pled the facts, Schering combined with Upsher-Smith and with AHP to delay entry into the market. On a motion to dismiss, a court cannot consider facts that contradict those pled in the complaint and must accept the allegations pled in the complaint as true. See In re Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 653 (E.D. Mich. 2000) ("The mere fact that Defendant Andrx can come up with other plausible and legally permissible explanations as to why it prolonged its entry into the market is to no avail."); Biovail Corp. Int'l v. Hoechst Aktiengesellschaft, 49 F. Supp. 2d 750, 767-68 (D. N.J. 1999) (refusing to dismiss antitrust claims under Rule 12(b)(6) and reasoning "while it is possible that Andrx is not marketing its generic product because it does not want to risk potential patent infringement damages, it is also certainly possible that Andrx is not marketing its generic product -- and hence stalling the exclusivity period -- because defendants are paying it forty million dollars [*16] a year not to do so. This court simply cannot make this call on the pleadings.").

Agreements not to compete that unreasonably restrain trade have been found to violate the antitrust laws. National Collegiate Athletic Assoc. v. Board of Regents, 468 U.S. 85, 100 (1984); Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co., 472 U.S. 284, 289-90 (1985). "Antitrust law looks at entry into the market as one mechanism to limit and deter exploitation of market power by those who may temporarily possess it." Andrx Pharmaceuticals, Inc. v. Biovail Corp. Int'l, 256 F.3d 799, 814 (D.C. Cir. 2001).

At least one court has held that a party challenging an agreement similar to Schering's agreements with Upsher-Smith and AHP could state a claim for antitrust injury without first demonstrating that the brand name drug company's patent was invalid. In re Ciprofloxacin Hydrochloride Antitrust Litig., 2001 U.S. Dist. LEXIS 15386, *29 (E.D.N.Y. Oct. 1, 2001). If Complaint Counsel's allegations that the agreements delayed Upsher-Smith's and AHP's entry into the market and harmed consumers are taken as true, the Complaint need not allege that Schering's patent was invalid or not infringed [*17] and need not allege that the patent suits were not bona fide or that the settlements were more anticompetitive than the probable outcome of the litigation in order to state a cause of action under the motion to dismiss standard. Similarly, it is not necessary for the Complaint to dispute that the settlement of the patent litigation between Schering and Upsher-Smith resolved the patent dispute by compromise. Accordingly, the allegations of the Complaint will not be dismissed.

B. Allegations That Schering's Agreement with Upsher-Smith Delayed the Entry of Other Potential Generic Entrants

1. Upsher-Smith's 180 day exclusivity period

The Complaint alleges that, absent Schering's cash payments under its agreement with Upsher-Smith, Upsher-Smith would not have agreed to delay the launch of its generic product for as long as it did. Complaint P 64. The Complaint further alleges that the delay of the launch of Upsher-Smith's generic product had the effect of delaying other potential generic manufacturers from entering the market. Complaint P 47, 66.

The Complaint states that, as the first ANDA filer with a Paragraph IV Certification, Upsher-Smith is eligible for the 180-day exclusivity [*18] period. Complaint P 41. Although it is the Hatch-Waxman Act that makes Upsher-Smith eligible for the 180-day exclusivity period, the Complaint alleges that it is the agreement between Schering and Upsher-Smith that preserves the exclusivity period or delays the start of it. Complaint P 47, 66. But for the agreement, according to the Complaint, the 180-day exclusivity period would have been triggered earlier, either by Upsher-Smith prevailing in the patent litigation and entering the market earlier than September 2001, or by Schering prevailing in the patent litigation, resulting in the forfeiture of the 180-day exclusivity period. Id. This concerted action to preserve the exclusivity period is alleged to have delayed entry by other potential generic competitors. Id.

Schering asserts, first, that it is unclear whether the Hatch-Waxman Act grants the 180-day exclusivity period to a first filer who settles a patent suit. Schering asserts, second, that if the first filer is entitled to the 180-day exclusivity period, it is by operation of federal law with no resulting antitrust liability.

Although eligibility for the 180-day exclusivity period is by operation of federal law, the start [*19] date for triggering the exclusivity period is alleged to have been manipulated by the parties. It is the concerted action to manipulate the trigger date and preserve the exclusivity period that is alleged to violate the FTC Act. Actions taken to subvert a regulatory scheme for anticompetitive purposes are subject to the antitrust laws. Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1303 (5th Cir. 1972) (cited in Biovail Corp. Int'l v. Hoechst Aktiengesellschaft, 49 F. Supp. 2d at 768). Further, "a reasonable trier of fact could conclude that an agreement between two competitors to delay the applicability of an exclusivity period for the purpose of keeping another competitor out of the market is an unreasonable restraint of trade or a wilful attempt to maintain or obtain a monopoly." Biovail, 49 F. Supp. 2d at 767. See also Key Pharmaceuticals, Inc. v. ESI-Lederle, Inc., 1997 U.S. Dist. LEXIS 13328, *12 (E.D. Pa. 1997) (agreement to delay others' entry into market may be an illegal restraint on trade).

The Court of Appeals for the District of Columbia recently held that allegations that a settlement agreement to a patent dispute between a brand name [*20] drug manufacturer and a generic manufacturer to delay the start of the 180-day exclusivity period states a cause of action. Andrx Pharmaceuticals, Inc. v. Biovail Corp. Int'l, 256 F.3d at 809 ("Although it is true that the first to file an ANDA is permitted to delay marketing as long as it likes, the statutory scheme does not envision the first applicant's agreeing with the patent holder of the pioneer drug to delay the start of the 180-day exclusivity period.").

Respondents may well be able to show at trial that there was no concerted agreement to preserve the exclusivity period or manipulate the start date, that Upsher-Smith's eligibility for the 180-day exclusivity period was a consequence of Upsher-Smith's unilateral action in attaining first filer status, and that the exclusionary effect was by operation of federal law. Or, Complaint Counsel may be able to prove that, by purely private conduct and agreement, the parties intended to delay other generic manufacturers' entry into the market by delaying the start of the 180-day exclusivity period. Such acts would not be immune from antitrust liability under Noerr-Pennington. The facts alleged in the Complaint, if taken as true, and [*21] the reasonable inferences therefrom sufficiently allege concerted action which states a claim for which relief may be granted. Accordingly, these allegations will not be dismissed.

2. Status of law on the 180 day exclusivity period

Schering also argues that the Complaint misstates the governing FDA regulations as it alleges that "at all time relevant herein, FDA final approval of an ANDA for a generic version of K-Dur 20 for anyone other than Upsher-Smith was blocked." Schering argues that under the FDA regularions in effect at the time of the settlement, Upsher-Smith may have lost all exclusivity rights and all rights to block third party generics when it settled its case.

Complaint Counsel admits that "FDA's implementation of this exclusivity has varied over the course of time covered by the complaint." Complaint Counsel's Response to Schering's Motion for Partial Dismissal of the Complaint at p. 20. Complaint Counsel asserts: (1) at the time of Schering's agreement, there was uncertainty about whether Upsher-Smith would retain its right to 180 days of market exclusivity after the settlement; (2) this lack of certainty - and the possibility that Upsher-Smith might not be entitled [*22] to the exclusivity unless it successfully defended the patent suit - created an incentive for Schering to enter its January 1998 agreement with AHP; and (3) subsequent court decisions eliminated the uncertainty and confirmed Upsher-Smith's right to the 180-day exclusivity period.

Although it is apparent, based on the court decisions and FDA rulings referred to in the parties' pleadings, that the law on the 180 day exclusivity period has been in flux, whether or not FDA approval of an ANDA for a generic version of K-Dur 20 for anyone other than Upsher-Smith was blocked is a disputed factual question which will not be resolved through a motion to dismiss.

VI. CONCLUSION

For the above stated reasons, Schering's and Upsher-Smith's motions to dismiss the Complaint are DENIED.

ORDERED:

D. Michael Chappell

Administrative Law Judge

LEXSEE 1993 US DIST LEXIS 4663

TEXTIL RV LtdA, Plaintiff, v. ITALUOMO, INC., f/k/a STYLECRAFT CLOTHING LTD., INC., Defendant.

92 Civ. 526 (PKL)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1993 U.S. Dist. LEXIS 4663

April 13, 1993, Decided
April 13, 1993, Filed

LexisNexis(R) Headnotes

COUNSEL: [*1] KAZLOW & KAZLOW, 19 West 34th Street, New York, New York 10001, James M. Lemonedes, Esq., of counsel, ATTORNEYS FOR PLAINTIFF.

JOSEPH B. MILLER, P.C., 125-10 Queens Boulevard, Kew Gardens, New York 11415, Joseph B. Miller, Esq., of counsel, ATTORNEY FOR DEFENDANT.

JUDGES: Leisure

OPINIONBY: PETER K. LEISURE

OPINION:

OPINION AND ORDER

LEISURE, District Judge,

This action arises out of the business relationship between plaintiff Textil RV LtdA ("Textil") and defendant Italuomo, Inc. ("Italuomo," f/k/a "Stylecraft Clothing Ltd., Inc."). Textil initiated this action, seeking damages in the amount of $ 325,834.37 for goods sold and delivered. In response, Italuomo asserted seven counterclaims, seeking recovery on various claims concerning Italuomo's alleged breaches of contract and fraudulent misrepresentations Textil now moves for an Order dismissing six of the counterclaims for failure to plead fraud with the particularity required by *Rule 9(b) of the Federal Rules of Civil Procedure* and for failure to state a claim upon which relief may be granted, pursuant to Rule 12(b)(6). Plaintiff also moves for a more definite statement of the first and second counterclaims pursuant to Rule 12(e). For the following [*2] reasons, it hereby is ordered that: (1) Textil's motion to dismiss Italuomo's first and second counterclaims or for a more definite statement with respect to those counterclaims is denied; (2) Textil's motion to dismiss the third and fourth counterclaims for failure to plead fraud with particularity is granted; and (3) Italuomo's fifth and sixth counterclaims are dismissed for failure to state a claim upon which relief may be granted.

BACKGROUND

Textil, a foreign corporation with its principal place of business in Porto Alegre, Brazil, is engaged in the business of producing garments for wholesale clothing designers and manufacturers. Answer, P 19; Complaint, P 7. Italuomo is a wholesale clothing designer and distributor based in New York. Complaint, P 8. In or about July or August 1989, the parties entered into a written contract whereby Textil agreed to produce certain products for Italuomo. Answer, P 21. Textil alleges that between January 1991 and October 1991, Italuomo received and never rejected a number of shipments of goods. Complaint, P 11. The total amount due under various invoices was $ 352,253.34. Id. Italuomo made partial payment in the amount of $ 26,419.02, [*3] thereby reducing the total amount due to $ 325,834.32. Complaint, P 12. Italuomo has refused to make further payments or otherwise reduce the amount owed to Textil under the terms of the contract.

Italuomo alleges that Textils late delivery of merchandise and Textil's failure to deliver all the merchandise contracted for was a breach of the contract.

Answer, PP 28-29 (First Counterclaim). Italuomo also alleges that the late delivery of nonconforming goods violated implied warranties of merchantability and fitness for a particular purpose. Answer, PP 32-33 (Second Counterclaim). Italuomo argues that the shipments of goods that were actually received by Italuomo were received too late to be sold in the proper season and thus could be sold only at a substantial discount to Italuomo's regular prices.

In or about January 1990, Textil informed Italuomo that the contract was not in conformance with Brazilian export regulations. Answer, P 36 (Third Counterclaim). Italuomo claims that Textil's communication misled Italuomo, causing it damages. Answer, P 37. Further, Italuomo alleges that Textil materially misrepresented facts to Italuomo by promising that it could meet contractual obligations [*4] and specific deadlines. Answer, P 42 (Fourth Counterclaim). Thus, Italuomo claims that Textil is liable for fraud.

Italuomo next alleges that its relationship with Textil was one of trust and confidence. Complaint, P 46 (Fifth Counterclaim). Thus, Italuomo alleges that the relationship between the parties was fiduciary in nature and that Textil breached its fiduciary duties to Italuomo by breaching the contract and making fraudulent misrepresentations. Answer, P 50. Finally, Italuomo's sixth counterclaim is based on a theory of "economic coercion." Answer, PP 53-54. n1

> n1 Italuomo also alleges that Textil converted Italuomo's property to its own use. See Answer, P 57 (Seventh Counterclaim). Italuomo has not moved to dismiss this counterclaim.

DISCUSSION

I. The Contract Claims

Textil contends that the breach of contract and warranty claims in the first and second counterclaims are insufficiently pleaded such that it "cannot reasonably understand the nature of the breach alleged." See Memorandum [*5] of Law in Support of Textil RV LtdA's Motion to Dismiss the Counterclaims and for a More Definite Statement ("Defendant's Memo."), at 4. Thus, Textil seeks an Order pursuant to *Rule 12(e) of the Federal Rules of Civil Procedure* requiring Italuomo to file a more definite statement of the claims in the complaint. Additionally, Textil argues that the Italuomo's contract claims fail to state a cause of action upon which relief may be granted because Italuomo failed to plead that it rejected the goods in a timely fashion. Textil therefore seeks dismissal of the contract claims pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure.*

A. Rule 12(e) Motion for a More Definite Statement

Rule 12(e) provides for the filing of a more definite statement of a party's claims for relief:

> If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading.

Fed. R. Civ. P. 12(e). However, "Rule 12(e) is designed to remedy unintelligible pleadings, not merely to correct for lack of detail." *Kelly v. L.L. Cool J., 145 F.R.D. 32, 35 (S.D.N.Y. 1992)* [*6] (citing *FRA S.p.A. v. Surg-O-Flex of Am., Inc., 415 F. Supp. 421, 427 (S.D.N.Y. 1976)).* Thus, "[a] motion for a more definite statement should not be granted if the complaint complies with the requirements of Rule 8." *Kelly, 145 F.R.D. at 35;* accord *Bower v. Weisman, 639 F. Supp. 532, 538 (S.D.N.Y. 1986)* (Rule 12(e) motion "should not be granted 'unless the complaint is so excessively vague and ambiguous as to be unintelligible and as to prejudice the defendant seriously in attempting to answer it.'"). It has been noted, however, that "motions under Rule 12(e) are 'disfavored,' largely because they often add little that discovery couldn't provide, while creating delay." *Sanchez v. New York City, 1992 U.S. Dist. LEXIS 9844,* *2-3 (E.D.N.Y. June 29, 1992).

Rule 8(a) provides that a claim for relief should contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a).* Further, Rule 8(e) directs that "each averment of a pleading shall be simple, concise, and direct." *Fed. R. Civ. P. 8(e)(1).*

Italuomo's first [*7] counterclaim alleges that the parties entered into a contract for the production and delivery of goods and that Textil damaged Italuomo by breaching the contract. Answer, PP 21-31. Italuomo further alleges that Textil "failed to commence operation of the defendants [sic] product line in accordance with the aforesaid agreements" and that Textil "was responsible for the inexcusable delays in the shipment of the merchandise." Answer, P 28. Additionally, Italuomo alleges that Textil was responsible for the loss and shortage of merchandise. Answer, P 28. Finally, Italuomo alleges in its First Affirmative Defense, which is incorporated into the first counterclaim, that "some of the

goods were defective and non-conforming, mismatched and/or in incomplete lots." Answer, P 9. n2

> n2 A question as to the choice of law to be applied in this action remains unresolved. In a footnote in its moving memorandum of law, Textil states the bald conclusion that "under New York's Choice of Law Rules, it would appear that Brazilian law may need to be applied to the claims presented in this action." Defendant's Memo., at 2 n.2. However, Textil did not provide argument supporting its conclusion that Brazilian law "may need to be applied" to the instant claims. Rather, Textil addressed the viability of Italuomo's counterclaims under New York law, providing occasional footnotes to indicate where Brazilian law differed from New York law and requesting leave to brief issues of Brazilian law if the Court determined that Brazilian law governed the claims at issue in this action. Textil never provided any actual argument concerning the appropriate choice of law to be applied to the counterclaims. In responding to the motion, Italuomo failed to even acknowledge that there was a potential choice of law issue involved in this action.
>
> Under these circumstances, the Court declines to reach out to decide the choice of law issue at this time. Rather, given that the parties rely on New York law, the principle of implied consent to use a forum's substantive law permits the Court to assume that New York law applies to the claims in this action. See *Tehran-Berkeley Civil & Environmental Engineers v. Tippetts-Abbett-McCarthy-Stratton, 888 F.2d 239, 242 (2d Cir. 1989);* see also *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc., 933 F.2d 131, 137 (2d Cir. 1991).* Either party may, of course, argue that Brazilian law properly applies to this action, but the Court will not address this issue until it is directly raised in a party's papers. Accordingly, for the purposes of the instant motion to dismiss the counterclaims, the Court assumes that New York law applies to the claims presented in Italuomo's counterclaims.

[*8]

Clearly, this is not a case where the allegations are "so boldly conclusory that they fail to give notice of the basic events and circumstances of which [the pleader) complains." *Duncan v. AT&T Communications, 668 F. Supp. 232, 234 (S.D.N.Y. 1987).* Rather, the first counterclaim as pleaded is sufficient to alert Textil as to the general nature of Italuomo's breach of contract claim. Italuomo has met the burden imposed by Rule 8(a) and need not provide detailed evidence supporting its claims in its pleading. Textil is not entitled to a more specific pleading, but must use the discovery methods provided under the Federal Rules of Civil Procedure to ascertain the particular evidence Italuomo will adduce in support of its claim. Accordingly, Textil's motion for a more definite statement with respect to the first counterclaim is denied.

Italuomo's second counterclaim alleges that plaintiff's defective and incomplete deliveries of goods constituted breaches of the implied warranties of merchantability and fitness for a particular use. Answer, P 33. It is evident that this claim is pleaded in the alternative to the first counterclaim. The breach of warranty [*9] counterclaim, when considered as part of the entire pleading, satisfies the requirements of Rule 8(a). Accordingly, Textil's motion for a more definite statement with respect to this counterclaim also is denied.

B. Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted

Textil moves to dismiss the first and second counterclaims pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Textil claims that Italuomo failed to allege a timely rejection of the non-conforming goods, as required by *section 2-607(3)(a) of the Uniform Commercial Code*, as adopted by New York. See N.Y.U.C.C. § 2-607(3)(a). However, Italuomo's sixth affirmative defense, which is incorporated into the first and second counterclaims, states that:

> Defendant timely rejected the non conforming [sic] goods, incomplete lots, mismatched and damaged merchandise and the untimely delivered merchandise.

Answer, P 16. Thus, Textil's motion is wholly without merit and is denied.

II. Rule 9(b) Motion to Dismiss the Fraud Claims for Failure to Plead Fraud with Particularity

Italuomo argues that the fraud claims presented in [*10] the second and third counterclaims must be dismissed, pursuant to Rule 9(b), for failure to plead fraud with particularity. Rule 9(b) provides that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

Fed. R. Civ. P. 9(b). "The purpose of Rule 9(b) is threefold -- it is designed to provide a defendant with fair notice of a plaintiff's claim, to safeguard a defendant's reputation from improvident charges of wrongdoing, and to protect a defendant against the institution of a strike suit." *O'Brien v. Nat'l Property Analysts Partners, 936 F.2d 674, 676 (2d Cir. 1991); DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987)*. However, "on a [Rule 9(b)] motion to dismiss, a court must read the complaint generously, and draw all inferences in favor of the pleader." *Cosmas v. Hassett, 886 F.2d 8, 11 (2d Cir. 1989);* see also *O'Brien, 936 F.2d at 676-77* (on a Rule 9(b) motion to dismiss, [*11] the Court "assume[s] the truth of plaintiffs' allegations").

Pursuant to Rule 9(b), "the time, place, and nature of the misrepresentations must be set forth so that the defendant's intent to defraud, to employ any scheme or artifice to defraud, to make any untrue statement of a material fact, or to engage in any act or course of business that would operate as a fraud . . . is revealed." *Ross v. Bolton, 904 F.2d 819, 823 (2d Cir. 1990);* see also *Divittorio, 822 F.2d at 1247* ("fraud allegations ought to specify the time, place, speaker, and content of the alleged misrepresentations"). "Although scienter need not be alleged with great specificity, plaintiffs are still required to plead the factual basis which gives rise to a 'strong inference' of fraudulent intent." *Wexner v. First Manhattan Co., 902 F.2d 169, 172 (2d Cir. 1990)* (quoting *Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46, 50 (2d Cir. 1987),* cert. denied, *484 U.S. 1005 (1988))*. In addition,

> despite the generally rigid requirement that fraud be pleaded with particularity, [*12] allegations may be based on information and belief when facts are peculiarly within the opposing party's knowledge. This exception to the general rule must not be mistaken for license to base claims of fraud on speculation and conclusory allegations. Where pleading is permitted on information and belief, a complaint must adduce specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed pleading standard.

Id., 902 F.2d at 172 (citations omitted); see also *DiVittorio, 822 F.2d at 1247-48.*

As alleged in the third counterclaim, Textil informed Italuomo in or about January 1990 that the production plan and cost structure envisaged under the contract did not comport with Brazilian export regulations. Answer, P 36. Italuomo alleges further that

> Plaintiff communicated the same to the defendant and assured the defendant that in order to continue production and guarantee shipment, defendant would have to buy and then sell production of accessories and piece goods to the plaintiff at a discounted price.

Answer, P 37. Italuomo claims that it relied upon Textil's statements and thereby [*13] was misled. Answer, P 38.

Italuomo's third counterclaim is insufficiently pleaded under the requirements of Rule 9(b). Although the pleading alleges the general nature of the alleged fraud, Italuomo does not suggest how the January 1990 communication was fraudulent. Without greater specificity, Textil is placed in the difficult position of having to guess how Italuomo was misled and what Italuomo claims was fraudulent about Textil's representations concerning Brazil's export regulations. Further, Italuomo has failed to plead a factual basis giving rise to a "strong inference" of fraudulent intent, as required by *Wexner. 902 F.2d at 172.* Rule 9(b) requires that the pleader provide the party that must defend against a claim of fraud with more information concerning the alleged fraud than Italuomo provided in pleading the third counterclaim. Accordingly, Textil's motion to dismiss the third counterclaim pursuant to Rule 9(b) for failure to plead fraud with particularity hereby is granted.

Italuomo's fourth counterclaim alleges that Textil

> engaged in fraud against the defendant by directly making material representations to defendant with knowledge [*14] of their falsity and with the intent that the defendant rely thereon and be deceived.

Answer, P 41. The counterclaim also makes it clear that Italuomo's claim is based on "plaintiff's continuous representations, warranties, guarantees and promises that plaintiff could meet contractual obligations." Answer, P 42. However, Italuomo fails to identify any particular misrepresentations or state the time, place, or speaker of any fraudulent statements. Italuomo's pleading is wholly deficient and fails to meet the particularity requirements for fraud claims under Rule 9(b). Accordingly, Textil's motion to dismiss the fourth counterclaim pursuant to Rule 9(b) is granted.

Additionally, the Court notes that Italuomo has failed to plead a basis for its claim for punitive damages

in connection with the third and fourth counterclaims. Under New York law, a pleading adequately states a claim for punitive damages if the pleading recounts facts suggesting that "the misconduct was extraordinary and the wrongdoer exhibited a high degree of moral culpability or a total lack of loyalty and good faith." *Smith v. Lightning Bolt Prods., Inc., 861 F.2d 363, 372 (2d Cir. 1988).* [*15] Alternatively, "punitive damages are appropriate in cases involving 'gross, wanton, or willful fraud or other morally culpable conduct.'" *Action S.A. v. Marc Rich & Co., 951 F.2d 504, 509 (2d Cir. 1991)* (quoting *Borkowski v. Borkowski, 39 N.Y.2d 982, 387 N.Y.S.2d 233, 233, 355 N.E.2d 287 (1976)* (mem.)), cert. denied, *112 S. Ct. 1763, 118 L. Ed. 2d 425 (1992).* "A complaint that merely alleges fraud without alleging any other morally culpable or gross conduct will be dismissed." *International Television Prod., Ltd. v. Twentieth Century-Fox Television, 622 F. Supp. 1532, 1541 (S.D.N.Y. 1985).* The third and fourth counterclaims plead virtually no facts and are patently insufficient to state a claim for punitive damages. Accordingly, Italuomo's claim for punitive damages must be dismissed.

Italuomo is granted leave to file within thirty days an amended answer with counterclaims to replead the fraud allegations with the specificity required by Rule 9(b). Additionally, although the Court is doubtful that a claim for punitive damages could be pleaded sufficiently, considering the facts [*16] underlying this action, Italuomo is granted leave to replead its claims for punitive damages to provide a factual basis that demonstrates a prima facie claim for the award of punitive damages under New York law.

III. Rule 12(b)(6) Motion to Dismiss the Breach of Fiduciary Duty Counterclaim for Failure to State a Claim Upon Which Relief May Be Granted

Italuomo's fifth counterclaim alleges that Textil breached a fiduciary duty it owed to Italuomo. Italuomo contends that it "made clear to plaintiff the full extent of its dependence on and trust and confidence in plaintiff." Answer, P 46. Italuomo thus argues that there was a fiduciary relationship between the parties and that the breach of contract and fraud claims alleged in the first, second, third, and fourth counterclaims constituted breaches of Textil's fiduciary duty to Italuomo.

In reviewing the dismissal of a claim for breach of fiduciary duty, the Second Circuit recently discussed the scope of informal fiduciary relationships under New York law. See *Brass v. American Film Technologies, Inc., 1993 U.S. App. LEXIS 4258* (2d Cir. Mar. 8, 1993). The Court observed that under New York [*17] law

> a fiduciary relationship embraces not only those the law has long adopted -- such as trustee and beneficiary -- but also more informal relationships where it can be readily seen that one party reasonably trusted another. Examples of such informal fiduciary relationships found in the writings of scholarly commentators include priest and parishioner, bank and depositor, majority and minority shareholder, and close friends or family members.

1993 U.S. App. LEXIS 4258, at *25 (citing W. Prosser, Handbook of the Law of Torts § 106, at 697 (4th ed. 1971); *Restatement (Second) of Torts § 551* cmt f. (1977)).

The Second Circuit declined, however, to extend the scope of "informal" fiduciary relationships recognized under New York law to include parties participating in an arms-length transaction. *Brass, 1993 U.S. App. LEXIS 4258,* at *25-26; see also *Grumman Allied Indus., Inc. v. Rohr Indus., Inc., 748 F.2d 729, 739 (2d Cir. 1984); Feigen v. Advance Capital Management Corp., 150 A.D. 2d 281, 541 N.Y.S.2d 797, 799* (1st Dep't) ("a conventional [*18] business relationship does not create a fiduciary relationship in the absence of additional factors not here alleged"), appeal dismissed, *74 N.Y.2d 874, 547 N.Y.S.2d 840, 547 N.E.2d 95 (1989).* Thus, the Court affirmed the dismissal of a claim of breach of fiduciary duty brought by a prospective investor who attended a sales meeting with a previously unknown corporate officer. The clear import of the Brass decision is that parties participating in arms-length transactions do not incur fiduciary responsibilities except in unusual circumstances. Italuomo makes no allegations that support an exception to this general rule and a finding that Textil was in a fiduciary relationship with Italuomo. Accordingly, the fifth counterclaim fails to state a claim for breach of fiduciary duty and hereby is dismissed.

IV. Rule 12(b)(6) Motion to Dismiss the Claim for "Economic Coercion" for Failure to State a Claim Upon Which Relief May Be Granted

Italuomo's sixth counterclaim alleges that Textil's actions were done maliciously and wilfully and thus constituted the tort of economic coercion. Italuomo alleges that

> Plaintiff knowing that the defendant [*19] had entered into contracts for the sale and delivery of the merchandise that plaintiff was to manufacture, failed to honor said

> contracts and misrepresented material facts to the defendant thereby negligently and/or intentionally interfering with defendant's contractual obligations to customers and other third parties including but not limited to salesmen, entities, customers, suppliers and accounts and requiring the defendants to pay monies and incur expenses so that defendant could honor its commitments and contracts to its customers as defendant would have been and was in fact in jeopardy of losing its customers and accounts which were and are of great value to the defendant and did in fact lose customers and accounts. Defendant had to honor its contracts and commitments to its suppliers, salesmen, etc. to avoid losing credibility in the industry. The defendant had no alternative but to agree to the demands and representations of the plaintiffs.

Answer, P 53. This allegation to a large extent constitutes nothing more than a listing of the damages, speculative and otherwise, allegedly suffered by Italuomo because of the breach of contract and tortious activity by Textil, as [*20] alleged in the first, second, third, and fourth counterclaims. Only in the last sentence does Italuomo allude to any facts that could state a claim for economic coercion.

It is well-settled that

> individual allegations, although grammatically intact, may be so baldly conclusory that they fail to give notice of the basic events and circumstances of which the [pleader] complains. Such allegations are meaningless and, as a matter of law, insufficient to state a claim.

Duncan, 668 F. Supp. at 234 (citing *Barr v. Abrams, 810 F.2d 358, 363 (2d Cir. 1987)).* In this case, Italuomo's sixth counterclaim is so inadequately pleaded, conclusory, and unsupported by factual allegations that it fails to inform Textil of the general nature of its claim or make the requisite showing that Italuomo is entitled to relief, as required by Rule 8(a). Accordingly, the Court hereby grants Textil's motion to dismiss the sixth counterclaim pursuant to Rule 12(b)(6) of the Federal Rules of civil Procedure for failure to state a claim upon which relief may be granted.

CONCLUSION

For the foregoing reasons, the Court hereby (1) denies Textil [*21] RV LtdA's motion to dismiss Italuomo, Inc.'s first and second counterclaims or for a more definite statement with respect to those counterclaims pursuant to *Rule 12 of the Federal Rules of Civil Procedure*; (2) grants Textil's motion to dismiss the third and fourth counterclaims for failure to plead fraud with particularity in accordance with Rule 9(b); and (3) grants Textil's motion to dismiss Italuomo's fifth and sixth counterclaims for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6). Italuomo is granted to leave to replead within thirty days the allegations of the third, fourth, fifth, and sixth counterclaims, to the extent that it can allege a factual basis for each claim such that each counterclaim presents a claim upon which relief properly may be granted. The parties hereby are ordered to appear at a pre-trial conference on June 11, 1993, at 11:30 in the forenoon, in Courtroom 318, United States Courthouse, 40 Foley Square, New York, New York.

SO ORDERED

Dated: April 13, 1993
New York, New York

Peter K. Leisure

U.S.D.J.

8 of 103 DOCUMENTS

In the Matter of Weight Watchers International, Inc. a corporation

DOCKET NO. 9261

Federal Trade Commission

1993 FTC LEXIS 300

October 27, 1993

ORDER:
[*1]

ORDER DENYING WEIGHT WATCHERS' MOTION FOR A MORE DEFINITE STATEMENT

Weight Watchers International, Inc. ("Weight Watchers"), claiming that it cannot form a responsive answer, has asked me to direct complaint counsel to file a more definite statement of the allegations contained in the Commission's complaint.

The complaint satisfies the notice requirement of the Rules of Practice since it describes the "type of acts or practices alleged to be in violation of the law" § 3.11(b)(2). The details of complaint counsel's case, as well as of Weight Watchers' defense, will be disclosed as discovery progresses. Weight Watchers' request to file a reply to complaint counsel's answer is denied. Therefore,

IT IS ORDERED that Weight Watchers' motion for a more definite statement be, and it hereby is, denied.

IT IS FURTHER ORDERED that Weight Watchers shall file its answer to the complaint on or before November 5, 1993.

Dated: October 27, 1993