PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Andrew N. Ferguson, Chairman**
Melissa Holyoak
Mark R. Meador

In the Matter of:

Caremark Rx, LLC;

Zinc Health Services LLC;

Express Scripts, Inc.;

Evernorth Health, Inc.;

Medco Health Services, Inc.;

Ascent Health Services LLC;

OptumRx, Inc.;

OptumRx Holdings LLC; and

Emisar Pharma Services LLC,

Respondents.

Docket No. 9437

RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO LIFT THE STAY

The Commission should deny Complaint Counsel's ("CC") Motion and exercise its discretion to keep the current stay in place. The Eighth Circuit is poised to consider in the next few months the constitutionality of adjudicating the Commission's claims in this Part 3 forum, and that court should have a chance to rule before the Commission resumes a proceeding that Respondents maintain is unconstitutional.[1] But in the event this proceeding does continue, the Commission should first evaluate Respondents' forthcoming Motion to Dismiss ("MTD") before requiring CC, Respondents, and numerous non-parties to waste significant time, money, and resources on potentially obsolete or misshapen discovery.

The risk of wasteful discovery is particularly acute here where the Commission has never brought—much less won—a similar case. The Complaint is rooted in the Biden-Harris FTC's misguided effort to expand Section 5 through its 2022 Policy Statement regarding the FTC's authority to prosecute unfair methods of competition ("UMC") ("2022 Policy Statement"). Chairman Ferguson has correctly criticized the 2022 Policy Statement as not coming "from the statute or from any case law." *See In re Grubhub, Inc.*, Statement of Commissioner Andrew N. Ferguson Concurring in Part and Dissenting in Part, at 3 (Dec. 17, 2024). The Complaint makes no allegation that Respondents have violated the Sherman or Clayton Acts, colluded with one another, have market power individually or collectively (the Complaint fails even to identify a relevant market), or have excluded or foreclosed rivals from competing. Compounding these fundamental problems, the Complaint seeks to prosecute multiple unrelated and non-conspiring Respondents in a single Part 3 action, disregarding basic misjoinder principles routinely applied by federal courts. This unprecedented administrative expansion—divorced from the statute and the case law—should not be allowed to proceed.

[1] *See Express Scripts, Inc. v. FTC*, No. 25-1383 (8th Cir. Mar. 3, 2025).

The risk of wasteful discovery is also high because the Commissioners now presiding over this case have not yet had any opportunity to consider the allegations authorized by the Biden-Harris FTC. The Trump-Vance FTC should give itself that opportunity before enormous discovery costs are imposed on the parties (including on the FTC). Respondents acknowledge that filing a MTD does not automatically stay discovery in a Part 3 proceeding. But, as explained more fully below, this is a unique case where a continuation of the stay of discovery is reasonable and justified.

CC claims in its motion that continuing a stay on discovery while the Commission considers Respondents' MTD would constitute an attempt by Respondents "to unnecessarily delay proceedings." Mot. at 5. However, it was CC—not Respondents—that sought a longer schedule prior to the stay.[2] Moreover, months ago CC rejected a process by which Respondents could have raised the Complaint's defects to the current Commission. In March 2025, shortly after President Trump fired the two Commissioners previously overseeing this matter, Respondents proposed to CC that the matter should be withdrawn from adjudication so the parties would be free to raise these fundamental issues directly with the Commission once even a single Commissioner could participate in the matter. CC rejected that proposal and insisted on a stay of the case instead. CC now seeks to prevent the Trump-Vance FTC from weighing in on whether it wishes to continue the prior Administration's effort to expand Section 5 before reopening costly discovery.

It is difficult to conceive of any concrete harm from maintaining a stay on discovery to conserve resources while the Commission addresses these fundamental issues that have never

[2] *See* Complaint Counsel's Motion for a Later Evidentiary Hearing Date (Feb. 25, 2025) (requesting that the evidentiary hearing date be delayed to January 2026).

been presented to any sitting Commissioner. Indeed, for each Respondent, the Complaint seeks relief that is effectively already in place: low-list price insulin products are already widely used on clients' formularies, and low-cost insulin is easily obtained by the public.[3] CC cannot credibly argue that any harm would accrue to American consumers while the Commission considers Respondents' MTD.

To decide this Motion, the Trump-Vance FTC need not decide whether this case is appropriate for adjudication in Part 3, whether it will support the Biden-Harris FTC's 2022 Policy Statement, or whether this litigation is in fact based on the prior Administration's policies. Instead, the only issue ripe to decide on this Motion is whether the Commission will make its own evaluation of the merits of continuing this litigation and the wisdom of spending scarce government resources on this enforcement proceeding.

I. If This Case Proceeds, The Commission Should Decide Respondents' Motion To Dismiss Before Parties And Non-Parties Waste Additional Resources On Discovery.

The Commission, Respondents, and non-parties have already spent tens of millions of dollars on discovery in this case and face the prospect of spending tens of millions of dollars more if the Commission grants CC's Motion. The Trump-Vance FTC should evaluate whether it wants to devote enormous taxpayer resources to a case that is seemingly based upon the 2022 Policy Statement that Chairman Ferguson has correctly criticized.

The Supreme Court has long recognized that discovery in an antitrust lawsuit is "a sprawling, costly, and hugely time-consuming undertaking." *Bell Atl. Corp. v. Twombly*, 550 U.S.

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[3] *See*, *e.g.*, EXPRESS SCRIPTS INC., 2025 EXPRESS SCRIPTS NATIONAL PREFERRED FORMULARY 1 (2025), https://www.express-scripts.com/art/open_enrollment/Preferred_Members_FormularyRxGuide.pdf; OPTUM RX, 2025 PREMIUM STANDARD FORMULARY 28-29 (2025), https://www.optum.com/content/dam/o4-dam/resources/pdfs/guides/premium-standard-booklet-jan-2025.pdf; CVS CAREMARK, PERFORMANCE DRUG LIST – STANDARD CONTROL 5 (2025), https://www.caremark.com/portal/asset/caremark_recaprxclaimsdruglist.pdf; *see also, e.g.*, "Lilly Insulin Value Program," https://insulinaffordability.lilly.com ("Through the Lilly Insulin Value Program, all Lilly insulins are available for $35 a month whether you have commercial insurance or no insurance.").

544, 560 & n.6 (2007) (admonishing courts not "to forget that proceeding to antitrust discovery can be expensive" in reversing Second Circuit for adopting too lenient an approach on a motion to dismiss). Federal courts therefore routinely consider the expense of potential discovery to determine whether discovery should proceed pending a MTD and numerous courts have stayed discovery in antitrust cases while a MTD is pending based on the reasoning in *Twombly*. *See e.g.*, *In re Broiler Chicken Grower Litig.*, 2017 WL 3841912 (E.D. Okla. Sept. 1, 2017); *Kelsey K. v. NFL Enter., LLC*, (N.D.Cal. May 25, 2017) *aff'd*, 757 Fed. Appx. 524 (9th Cir. 2018); *Dowdy & Dowdy Partnership v. Arbitron Inc.*, 2010 WL 3893915 (S.D. Miss. Sept. 30, 2010); *Nexstar Broad., Inc. v. Granite Broad. Corp.*, 2011 WL 4345432, at *4 (N.D. Ind. Sept. 15, 2011); *Océ North America, Inc. v. MCS Services, Inc.*, 2011 WL 13217390 (D. Md. Mar. 1, 2011); *In re Graphics Processing Units Antitrust Litig.*, 2007 WL 2127577, at *4 (N.D. Cal. Jul. 24, 2007); *In re Copper Tubing Litig.*, 2006 WL 8434911, at *4 (W.D. Tenn. Oct. 3, 2006).

Continuing the stay of discovery for the relatively short time the Commission needs to decide threshold issues in a MTD is also in the interest of judicial economy. *See Mitchell Int'l., Inc. v. HealthLift Pharmacy Servs., LLC*, No. 2:19-cv-000637, 2022 WL 111126, at *4 (D. Utah Jan 12, 2022); *In re Broiler Chicken Grower Litig.,* 2017 WL 3841912, at *5 (staying discovery "may conserve judicial resources by waiting until the court resolves threshold issues before becoming mired in possible discovery disputes"). The context here—where no member of the current Commission has participated in this matter in any capacity—also counsels in favor of discovery remaining stayed temporarily. In the usual Part 3 situation, the same Commissioners who voted to issue a complaint are called upon to decide a MTD. In that context, those Commissioners have already heard from the respondent and have assessed the plausibility of the allegations in the complaint by voting in favor of its issuance. Here, no current FTC

Commissioner has heard from the parties on this case, much less assessed the plausibility of the Complaint's claims.

II. Before Restarting Discovery, The Trump-Vance FTC Should Decide Whether It Intends To Follow The Biden-Harris FTC's Expansive View of Section 5 By Ruling On Respondents' Forthcoming Motion To Dismiss.

A goal of the Biden-Harris FTC was to dramatically expand the scope of the agency's authority under Section 5, particularly for UMC claims. The 2022 Policy Statement is untethered from statutory text or case law and instead represents a view of the law as the Biden-Harris FTC wished it could be. This Part 3 proceeding was a test case for the past Administration's policies. And it is a test case for the current FTC to determine whether that misguided 2022 Policy Statement will continue to hang over American businesses and tie up taxpayer resources.

Chairman Ferguson already criticized the 2022 UMC Policy statement's "incredible breadth." *In re Grubhub, Inc.*, Statement of Commissioner Andrew N. Ferguson Concurring in Part and Dissenting in Part, at 4 (Dec. 17, 2024). For example, Chairman Ferguson noted "to be unfair, a method of competition *must affect competition in the market where the method's devisor competes*." *Id*. (emphasis supplied) (internal citation omitted). Chairman Ferguson concluded that the complaint in *Grubhub* did not "allege any facts supporting a plausible inference that Grubhub's deception affected competitive conditions *in the alleged market for prepared meal delivery*." *Id.* (emphasis supplied). The same is true here. Indeed, the Complaint fails to allege any relevant market at all, let alone one in which Respondents compete and in which competitive conditions were affected.

Similarly, Commissioner Meador has said the "central question" in "distinguishing between competition on the merits and unfair methods of competition" is whether the conduct is "in the form of collusion or exclusion."[4] Neither is alleged in this case.

Without clarity from the Trump-Vance FTC on the issues to be raised in Respondents' MTD, Respondents and the Commission—as well as dozens of non-parties—face the prospect of spending thousands of hours and tens of millions of dollars on a case with obvious pleading deficiencies. If, for example, the Trump-Vance FTC follows an approach to interpreting Section 5 that Chairman Ferguson articulated in his separate statement in *GrubHub*, the Complaint here should be dismissed. Even if the Complaint were to survive, discovery and the parties' expert reports and trial presentations will be materially different if they are proceeding under the 2022 Policy Statement or the principles the Chairman articulated in *GrubHub*. The Trump-Vance FTC should want to avoid potentially wasting government resources in this way. *See Testimony of the Fed. Trade Comm'n Before the Subcomm. on Financial Services and Gen. Gov't of the H. Comm. on Appropriations,* 119th Cong. 1 (2025) (statement of Andrew Ferguson, Chairman, Fed. Trade Comm'n) (stating "our resources have been spread thin by the previous administration's mismanagement" and explaining "the measures we must take to address our resource constraints").[5]

Even apart from its misguided attempt to expand the Biden-Harris Commission's UMC authority, this case is an outlier. The Complaint in this case asserts no violation of the Sherman or Clayton Acts, and the Complaint as written could not state such a claim: there is no allegation of

[4] Statement of Commissioner Mark R. Meador, Antitrust Myth Busting, Remarks at the Second Annual Antitrust Conference at George Washington University, at 3 (May 5, 2025).

[5] *Cf.* Corrected Status Report and Motion to Hold Appeal in Abeyance for 60 Additional Days, FTC v. Ryan, No. 24-10951 (5th Cir. Jul. 10, 2025) (Explaining that the FTC needs "additional time . . . to determine whether the Commission should reconsider" its position because of "significant personnel changes," including Commissioner Meador's confirmation).

a conspiracy between the Respondent groups; no allegation that the Respondent groups have the market or monopoly power in a relevant market required by both statutes; and no allegation that Respondents have engaged in exclusionary conduct or otherwise reduced competition for PBM services in any way. Although then-Chair Khan made clear her intention to expand the scope of the Commission's UMC authority, this is the only contested case the Biden-Harris Administration brought where a UMC claim was not accompanied by an alleged violation of the Sherman and/or Clayton Acts. In *Amazon*, *USAP*, and *Deere*, the Biden-Harris FTC did not attempt to put forward a true "standalone" UMC claim.[6] This case stands alone with important policy implications.

Chairman Ferguson has stated that:

> When the Section 5 claim I'm presented with is either a Sherman or Clayton Act violation or very closely tied to the sort of conduct that the Sherman and Clayton Acts prohibit, I feel pretty confident about Section 5. When we get away from that, I'm going to look at it more askance, going to conduct a more searching inquiry, and I'm going to spend more time playing with the text of Section 5 to ensure that I feel comfortable.[7]

Given that no member of the Trump-Vance FTC participated in the decision to bring this case, pled this way, and in this venue, the Commission should take this opportunity now "to conduct a more searching inquiry" into whether the Complaint properly alleges a viable violation of the law. Respondents' forthcoming MTD provides the Commission with precisely the opportunity to, in Chairman Ferguson's words, "make sure that the FTC isn't just sort of gallivanting across the land searching for monsters to destroy without trying to tie that [] to the text."[8]

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[6] Complaint at ¶¶ 354, 379, 395, 402, FTC v. U.S. Anesthesia Partners, Inc., FTC File No. 2010031 (S.D. Tex. Sept. 21, 2023); Complaint at ¶¶ 455, 462, FTC v. Amazon, No. 2:23-cv-01495 (E.D. Wash. Sept. 26, 2023); Amended Complaint ¶ 130, FTC v. Deere & Co., No. 3:25-cv-50017 (N.D. Ill. Feb. 19, 2025).
[7] "A Conversation with FTC Commissioner Andrew Ferguson Hosted by Alden Abbott," *Mercatus Center at George Mason University*, June 13, 2024 [herein after "A Conversation with FTC Commissioner Andrew Ferguson"].
[8] *Id.*

Like the Complaint's UMC claim, its two UAP claims are also outliers among the Commission's prior UAP enforcement efforts. Unlike other cases, where the Commission has rooted claims of "unfairness" in a violation of some existing law or public policy, the Complaint here seeks to regulate an entire industry without alleging that any of Respondents' conduct violates any specific legal duty. The FTC is not a regulator and historically has not treated Section 5's prohibition of unfair acts as free license to make centralized economic policy.[9] The Complaint here abandons that traditional role. It seeks to create new legal obligations for PBMs out of whole cloth rather than to enforce rules enacted by Congress or established by the President,[10] and to interfere with tens of thousands of private commercial contracts and dictate health plan benefit design terms to tens of thousands of private employers.

Furthermore, the Biden-Harris FTC chose to break new ground in this case by challenging separate conduct undertaken at different times by multiple independent Respondent groups in a single proceeding. The Complaint does not allege that the Respondents have conspired, colluded, or coordinated (even tacitly), or that they are interdependent in any way. There is no precedent for the Commission engaging in group pleading in this way—in an administrative adjudication or otherwise.

Finally, the Commission should be particularly cautious about restarting discovery in this case because the Biden-Harris FTC improperly chose to bring this case as an administrative adjudication before the agency's in-house tribunal instead of before an independent Article III judge in federal court—a defect that the Eighth Circuit is poised to consider. An administrative

[9] *CNBC "Squawk Box" Interview with FTC Chairman Andrew Ferguson*, Mar. 13, 2025 ("I don't see it as the FTC's job to be a regulator. I'm a cop on the beat. I check our markets to make sure there's no fraud, there's no monopolization, there's no collusion. If there is, I act, and if there isn't, I stay out of the way.").
[10] A Conversation with FTC Commissioner Andrew Ferguson ("I see my job primarily as an interpreter of text and then an enforcer of the laws.").

adjudication is not the appropriate forum to test the Complaint's unprecedented legal theories, nor is it consistent with the Constitution's mandate that only Article III courts adjudicate private rights. *See Axon Enters. v. F.T.C.*, 598 U.S. 175, 203 (2023) (Thomas, J., concurring) ("If private rights are at stake, the Constitution likely requires plenary Article III adjudication.").[11] If the current Commission is committed to the prior administration's effort to expand Section 5, it should not do so using a constitutionally dubious in-house administrative adjudication.

III. Complaint Counsel Violated The Commission's Order To Engage In Good Faith Discussions With Respondents Over The Hearing Date.

If the Commission lifts the stay, it should first order CC to "engage in good faith discussions" with Respondents on "the ultimate hearing date" as required by the Commission's April 1 Order Staying Administrative Adjudication. Despite the April 1 Order, CC filed their motion to lift the stay and requested that the Commission set a hearing date without ever discussing the hearing date with Respondents. CC should be required to follow Commission orders, not be rewarded for violating them.

CONCLUSION

Respondents respectfully request that the Commission deny CC's Motion to Lift the Stay. If the Commission lifts the stay, however, it should do so only for the purpose of evaluating Respondents' forthcoming MTD.

[11] *See also A Conversation with FTC Commissioner Andrew Ferguson* ("I think Justice Thomas' concurrence on the lawfulness of agency adjudications involving private rights is pretty persuasive.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2025, I filed the foregoing document electronically using the FTC's E-Filing system, which will send notification of filing to:

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EXHIBIT A

2010 WL 3893915
Only the Westlaw citation is currently available.
United States District Court,
S.D. Mississippi,
Hattiesburg Division.

DOWDY & DOWDY PARTNERSHIP, d/b/a WZKX (FM) Radio Station, Plaintiff
v.
ARBITRON INC., Adela Ware Corporation; Clear Channel Communications, Inc., a foreign corporation; CC License, LLC, and Chase Radio Properties, Inc.; Aloha Station Trust, LLC, each a foreign limited liability company and Capstar Tx Limited Partnership, a foreign partnership, Defendants.

Civil Action No. 2:09cv253 KS–MTP.
|
Sept. 30, 2010.

Attorneys and Law Firms

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ORDER

KEITH STARRETT, District Judge.

***1** This matter is before the court on Motions to Stay **[# 35]** and **[# 37],** filed on behalf of the defendants Arbitron, Inc., Clear Channel Communications, Inc., Capstar TX Limited Partnership, LLC, and Aloha Station Trust, LLC. The court having reviewed the motions and being advised that no response has been filed and being otherwise fully advised in the premises finds that the motions are well taken and should be granted. The court specifically finds as follows:

Plaintiff Dowdy & Dowdy Partnership, d/b/a WZKX (FM) Radio Station ("Plaintiff'), filed this action in the Circuit Court of Jones County, Mississippi, Second Judicial District, on November 12, 2009, against Arbitron, Clear Channel Communications, Inc. ("Clear Channel") and four other defendants alleged to be wholly-owned subsidiaries of Clear Channel (together with Clear Channel, the "Clear Channel Defendants"). The Complaint alleges that the defendants have conspired with the intent to destroy competition in the radio broadcast industry: (1) by selling or offering Arbitron's services to the Clear Channel Defendants at a price lower than that charged to Plaintiff; (2) through Arbitron's enforcement of its license agreements against Plaintiff while waiving escalation clauses in the Clear Channel Defendants' contracts and performing "other acts" for the benefit of the Clear Channel Defendants; and (3) by otherwise conspiring for the purpose of injuring Plaintiffs business. Arbitron removed this action to this federal court and answered the Complaint on December 11, 2009.

On July 23, 2010, Arbitron filed a 12(c) Motion for Judgment on the Pleadings, asking this court to grant a judgment in Arbitron's favor alleging the plaintiff's Complaint does not allege any facts supporting its conclusory allegations that the defendants acted jointly and pursuant to an understanding, agreement or conspiracy to restrain trade, among other grounds. On September 10, 2010, defendants Clear Channel Communications, Inc., Capstar TX Limited Partnership, LLC, and Aloha Station Trust, LLC filed a Motion for Judgment on the Pleadings as well.

The United States Court of Appeals for the Fifth Circuit has recognized that a stay of discovery is appropriate where a preliminary motion asking for dismissal of the case is pending because: (1) such motions are decided based on the content of the complaint only, without regard to facts obtained during discovery; and (2) the motion, if granted, would dispose of the case, thus avoiding the effort and expense of discovery. *Landry v. Air Line Pilots Ass 'n Int'l AFL–CIO,* 901 F.2d 404, 435–36 (5th Cir.1990), *cert. denied,* 111 S.Ct. 244 (1990); *see also Nankivil v. Lockheed Martin Corp.,* 216 F. RD. 689 (M.D.Fla.2003), *aff'd,* 87 Fed. Appx. 713 (11th Cir.2003) (good cause to stay discovery exists where "resolution of preliminary motion may dispose of entire action.").

This court has discretion to grant this type of stay based on Federal Rule of Civil Procedure 26(c). Rule 26(c) provides that the court, "may, for good cause shown, issue an order to protect a party or person from ... undue burden or expense."

Fed. R Civ. P. 26(c). "Good cause may be shown where a party has filed a dispositive motion, the stay is for a short period of time, and the opposing party will not be prejudiced." *Spencer Trask Software and In'l Servs., LLC v. Rpost Int'l Lim.,* 206 F.RD. 367, 368 (S.D.N.Y.2002).

***2** The court finds that good cause to grant a stay of discovery exists here. The defendants have filed dispositive motions seeking the dismissal of the Complaint with prejudice for failure to satisfy the pleading requirements under *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 1965 (2007). The defendants assert that the plaintiff's sole antitrust claim does not meet *Twombly's* plausibility standard because it lacks basic factual support for its conclusory allegations of a conspiracy among Arbitron and the Clear Channel defendants to restrain trade or harm the plaintiff's business through discriminatory pricing. The plausibility standard is intended to avoid the expense of far-reaching discovery in cases where the complaint is insufficient to support "a reasonably founded hope that the discovery process will reveal relevant evidence." *Twombly,* 550 U.S. at 559, 127 S.Ct. at 1967 (citations omitted). Proving an antitrust conspiracy of unspecified timing and scope is precisely the type of "sprawling, costly, and hugely time consuming undertaking" that should not be commenced on the strength of a complaint consisting entirely of conclusory allegations and vague generalities. *See id* . at n. 6.

The equities and potential harm to the defendants also weigh heavily in favor of granting a stay of discovery. Regardless of the defendants' contention that the vacuity of the plaintiff's Complaint makes it difficult to discern the scope of relevant discovery in this matter, it is possible that the plaintiff's discovery requests would require the defendants to image, search, and collect large amounts of electronic and paper documents. In light of the requirements regarding discovery of electronically stored information and depending on the scope of discovery the plaintiff intends to serve, the defendants' search for and production of documents could potentially be very expensive.

In comparison, an entity such as the plaintiff which is far smaller will likely only incur a fraction of the defendants' discovery costs. Since *Twombly* contemplates that unnecessary discovery costs should be averted where a complaint is insufficient, discovery in this case should be stayed until the court determines whether the pleading standard under *Twombly* has been met. Moreover, the requested stay should be granted because it will be effective for only a short period of time, while the court considers the pending 12(c) Motions for Judgment on the Pleadings.

IT IS THEREFORE ORDERED AND ADJUDGED that the Motions to Stay **[# 35]** and **[# 37],** filed on behalf of the defendants Arbitron, Inc., Clear Channel Communications, Inc., Capstar TX Limited Partnership, LLC, and Aloha Station Trust, LLC are granted and all discovery in this matter is stayed pending disposition of the pending motions to dismiss.

SO ORDERED AND ADJUDGED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 3893915

End of Document

2017 WL 3841912
Only the Westlaw citation is currently available.
United States District Court, E.D. Oklahoma.

IN RE: BROILER CHICKEN GROWER LITIGATION

Case No. 6:17-CV-00033-RJS
|
Signed 09/01/2017

ORDER GRANTING DEFENDANTS' MOTION TO STAY DISCOVERY PENDING RESOLUTION OF MOTIONS TO DISMISS

ROBERT J. SHELBY, United States District Judge

***1** Before the court in this consolidated action[1] is Defendants' Motion to Stay Discovery Pending Resolution of their Motions to Dismiss.[2] Plaintiffs oppose the Motion.[3] For the reasons discussed below, the court GRANTS Defendants' Motion.[4]

Background

This is a putative class action centering on antitrust claims that broiler chicken growers assert against poultry production companies. The six named Plaintiff growers[5] allege that beginning nearly a decade ago—"at least 2008, and likely earlier"—the twelve Defendant poultry companies[6] engaged in illicit anticompetitive activity in concert with others to artificially suppress grower compensation.[7] The growers contend the poultry companies met this goal by, among other means: 1) sharing detailed compensation and business data through a statistical and research firm called AgriStats, 2) allowing access to each other's production facilities, 3) permitting high-level employees to move to jobs at each other's companies without contractual restrictions, and 4) complying with a "no-poach" agreement under which the poultry companies agreed not to recruit or hire growers from each other.[8]

Some growers initially filed suit in this District against the poultry companies in January 2017.[9] After other growers filed a second, substantially similar case in this District in March 2017,[10] the cases were consolidated.[11] Plaintiffs claim there are thousands of growers who may join them in this action.[12]

After a June 9, 2017 case management hearing, and pursuant a subsequent June 14 order,[13] the grower Plaintiffs jointly filed the now-governing Consolidated Amended Complaint on July 10, 2017.[14] They assert two causes of action: 1) Agreement in Restraint of Trade in Violation of Section I of the Sherman Antitrust Act, 15 U.S.C. § 1; and 2) Unfair Practices in Violation of Section 202 of the Packers and Stockyards Acts of 1921, 7 U.S.C. § 192.[15]

***2** Under the court's June 14 order, the Defendant poultry companies have until September 8, 2017, to file their Motions to Dismiss.[16] The Plaintiffs must file any oppositions by October 23, 2017, and Defendants have until November 22, 2017 to file any reply memoranda.[17] Thus, unless the parties seek and the court permits an extension, briefing on initial Motions to Dismiss will be complete in three months.

In its June 14 order, the court admonished the Defendants to, when possible in view of similar legal and factual positions, file joint submissions rather than individual motions.[18] The Defendants' Motion to Stay Discovery pending the court's determination of the anticipated Motion to Dismiss was filed jointly on July 24.

Since the Defendants filed their Motion to Stay Discovery, Plaintiffs have given notice of their intent to issue preservation subpoenas to twenty-four third party poultry production companies.[19] Each subpoena identically sets forth thirty-three separate categories of requested documents—and some categories have up to ten sub-parts.[20] The subpoenas seek from these third parties documents on a broad range of subjects, including the third parties' own internal management teams; corporate policies; practices with regard to poultry growers—including compensation, economic evaluations, and contracts; use of AgriStats; and personnel information —including entire personnel files for any employee who may have attended a meeting wherein a poultry company discussed a topic relating to growers.[21]

Analysis

Defendants seek a stay of discovery pending the resolution of their anticipated Motions to Dismiss. Their anticipated Motions will be grounded in multiple "threshold" issues upon which this complex antitrust case may be resolved for all or some of the dozen Defendants. Therefore, they argue the burden and expense that immediate discovery would inflict on the them, the court, and third parties far exceeds any prejudice the Plaintiffs may bear if required to wait until the Motions are resolved. Plaintiffs respond that the Defendants will not prevail on their Motions to Dismiss, and that delaying discovery will prejudice them but not the Defendants, the court, and third parties.

The Federal Rules of Civil Procedure are meant to "secure the just, speedy, and inexpensive determination of every action...."[22] The Rules do not provide for discovery stays like the one Defendants seek as a matter of course pending the resolution of dispositive motions.[23] But within this court's discretion to control discovery[24] and its own docket lies the ability to stay discovery.[25] Analogously, Rule 26(c) allows the court to issue an order protecting a party from discovery that will cause "annoyance, embarrassment, oppression, or undue burden or expense...."[26] "The 'good cause' standard of Rule 26(c) is highly flexible, having been designed to accommodate all relevant interests as they arise."[27] Thus, while blanket discovery stays pending resolution of dispositive motions are rarely appropriate,[28] and it is not this court's general practice to halt discovery simply because a motion has been filed, particular circumstances may warrant a discovery stay for a period time.

***3** The Tenth Circuit instructs that the determination of whether such circumstances warrant a discovery stay calls "for balancing the competing interests on both sides."[29] Defendants, as the parties seeking a stay, bear the burden to make out a "clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which [they] pray[ ] will work damage to someone else."[30] In balancing the parties' claimed hardships, some district courts in this circuit specifically evaluate the following factors: "(1) plaintiff's interests in proceeding expeditiously with the civil action and the potential prejudice to plaintiff of a delay; (2) the burden on the defendants; (3) the convenience to the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest."[31] Under these guiding principles, the court concludes that Defendants have established that a general discovery stay is warranted until the court has resolved the anticipated Motions to Dismiss.

1. The Defendants' Anticipated Motions to Dismiss

The court preliminarily reviews the nature of the anticipated Motions to Dismiss as Defendants have generally described in their briefing. This is relevant to the court's analysis because if they seek dismissal of all claims against all or some of the Defendants, then subjecting those Defendants to discovery they might otherwise wholly avoid seems less inviting. Though Defendants have yet to file their Motions, in their briefing they represent that they will move to dismiss the Consolidated Amended Complaint with prejudice on at least the following grounds:

1) All Defendants will argue the Consolidated Amended Complaint should be dismissed in its entirety because it fails plausibly to allege conspiracy allegations, and Plaintiffs are unlikely to be able to cure this deficiency;

2) Some Defendants will move to dismiss for lack of jurisdiction and/or improper venue;

3) Some Defendants will seek to compel arbitration based on clauses set forth in contracts with growers and to dismiss the claims against them in this action; and

4) One Defendant will seek to enjoin or dismiss litigation against it based on a confirmation order entered by the U.S. Bankruptcy Court for the Northern District of Texas.[32]

Accordingly, all Defendants will seek dismissal of this action in its entirety, and some Defendants will seek dismissal of all claims against them on the basis of "threshold" issues, including jurisdiction and venue.

The parties spend a good part of their briefing discussing the nature and merits of the Defendants' anticipated Motions to Dismiss. In evaluating whether to stay discovery pending resolution of a dispositive motion, courts often discuss the nature of the defenses asserted in the motion, as this court has done based on Defendants' representations in the briefing on this Motion.[33] Some courts also some delve into a motion's likelihood of success.[34] This court determines in the context of this case that it need not delay a decision on the discovery stay issue until it can evaluate in detail the actual Motions to Dismiss and engage in an in-depth legal analysis—akin almost to a preliminary or advisory ruling on the Motions. The court finds it sufficient that the parties appear to have a significant dispute on the defenses Defendants intend to assert. The court next turns its attention to the balancing of the competing interests.

2. Plaintiffs' Interests

***4** The court first evaluates Plaintiffs' interests in avoiding a stay, including whether a delay will prejudice or "work damage" to them. After careful review, it appears that any prejudice to Plaintiffs resulting from a relatively brief discovery stay will be minimal in the context of this case and does not weigh strongly against the imposition of a stay.

Like most litigants, Plaintiffs are eager to proceed with their case. Along these lines, they contend that Defendants' proposed discovery stay will harm them by prolonging the damage to their livelihoods occasioned by "Defendants' anticompetitive conduct" and "because prejudgment interest is rarely granted, [therefore] a stay offers Defendants an unearned windfall."[35] They also point out that a delay may cause unspecified evidence to disappear and unidentified witnesses to become unavailable or have memories fade.[36]

The court seeks to move this case to an efficient resolution. But it cannot conclude that these interests Plaintiffs identify will be significantly affected by a limited discovery delay measured in months while the court considers the anticipated Motion to Dismiss.

First, the court cannot conclude a short period of additional time will work significant additional harm to Plaintiffs, particularly in view of the lengthy time this case has been percolating and will take to litigate. The conduct at issue in the Consolidated Amended Complaint began nearly a decade ago. This litigation—a proposed antitrust class action with thousands of potential claimants against twelve large companies and potentially involving thousands of claimants—puts that decade of conduct at issue. There is little doubt these claims will take a substantial amount of time to litigate. In this context, a few months' delay to permit evaluation of initial Motions to Dismiss as this case begins will work only a comparatively small amount of harm to Plaintiffs.[37]

Second, the court finds that a limited discovery stay is unlikely to be the cause of lost evidence, missing witnesses, or significantly faded memories. Defendants are under an obligation to retain evidence; and they state in their briefing that they have preservation holds in place. Plaintiffs have prepared and are able to serve subpoenas to third parties to ensure that they too retain evidence pending the start of discovery. It is unclear to the court from the parties' briefing the witnesses who might become unavailable following a limited discovery stay. Where this is so, and given the complex nature of this proposed antitrust class action, the decade of conduct at issue, and the length of time it will likely take to resolve the action, the court cannot conclude that staying discovery for a short period will notably risk the loss of any witnesses or testimony.

3. Burden on the Defendants

***5** The court next evaluates the alleged burden on the Defendants. They contend that the complex antitrust subject matter of this case necessarily means that discovery will be extremely costly and burdensome to them, and that the wide-ranging allegations concerning a decade of conduct and directed against a dozen Defendants in the Consolidated Amended Complaint only exacerbate these costs and burdens because the breadth of discovery will be very broad. They argue these costs and burdens weigh in favor of a discovery stay to ensure Plaintiffs' pleaded claims are legally plausible and that only those among the dozen Defendants truly subject to suit in this venue are subjected to them. The court agrees that these considerations strongly favor a stay, particularly in light of the minimal prejudice Plaintiffs identify.

Still, Plaintiffs suggest that if the court finds Defendants' position persuasive on this issue, it might permit "preliminary" discovery to begin in steps—a Rule 16 conference, requests and objections, negotiation of a protective order for handling electronically stored information (ESI), and producing certain categories of data. But the court generally agrees with Defendants that the preliminary nature of these steps does little to lessen the discovery burden on the parties, particularly in the time the court will take to resolve the Motions to Dismiss. The steps will be undertaken with uncertainty as to whether all, some, or no Defendants and claims will remain in the case. And even those preliminary steps will require substantial time and money spent in negotiations, planning, document review, preparing and objecting to discovery requests, establishing protocols for ESI disclosures, and resolving possible disputes on these matters.

4. The Court's Convenience and the Public Interest

The court next discusses the "convenience to the court" and public interest factors. The court seeks in all cases to resolve cases both promptly and efficiently. In many, if not most cases, the court would be disinclined to stay discovery simply because a dispositive motion were forthcoming or pending. And the court's own convenience is not of primary concern in most instances.

But the careful use of judicial resources—an interest to both the court and the public—has been of significant concern since the inception of this complex antitrust putative class action, involving a decade's worth of allegations against a dozen companies in the poultry industry. To that end the court has, and will continue to work to find ways to make litigation of this case comport with common sense for the benefit of all. The court sua sponte consolidated the two underlying cases and, in its June 14 order, expressly encouraged the Defendant poultry companies to find common ground on legal and factual issues when possible in order to minimize the number filings to which Plaintiffs must separately respond. Defendants appear to have taken this guidance to heart.

Under the particular circumstances in this case, the court concludes that the public interest is furthered by first resolving the initial Motions to Dismiss and determining which claims and Defendants will remain in this case before discovery begins in earnest. This not only may conserve judicial resources by waiting until the court resolves threshold issues before becoming mired in possible discovery disputes; it is also consistent with the court's initial admonishment to Defendants to minimize disparate and costly filings and side-disputes by finding common factual and legal ground. When the court has given answers to the parties as to what claims and Defendants are properly before it, the Defendants will more ably comply with the court's admonishment.

5. The Interests of Non-Parties

The court briefly addresses the interests of non-parties. Though the parties do not squarely address this factor in their initial briefing, the Defendants recently supplied to the court notice of twenty-four subpoenas that Plaintiffs intend to serve on non-party poultry production companies. With thirty-three categories of requested documents, these subpoenas seek a wide range of documents from these companies on their management, finances, and personnel. The burden and expense on these third-party companies in responding to these subpoenas will be significant. The court finds this factor weighs in favor of a limited discovery stay pending the resolution of Defendants' initial Motions to Dismiss.

Conclusion

***6** Based on the foregoing, the court finds Defendants have met their burden to show clear hardship to themselves and third parties warranting a discovery stay in this action pending the resolution of their initial Motions to Dismiss. While Plaintiffs may suffer some delay in litigating their claims, and generally claim that this delay adds to their continuing financial harm—assuming for the moment they are entitled to recover from any Defendant—the court concludes that on balance, a stay should issue. In the context of this complex, putative class antitrust action with potentially thousands of claimants asserting claims of illicit conduct spanning a decade, a limited delay in discovery to resolve threshold issues raised at the outset of litigation will not only prevent potentially unnecessary expenses, it will also serve judicial economy. For these reasons, the court GRANTS Defendants' Motion to Stay Discovery[38] pending resolution of Motions to Dismiss filed on September 8, 2017.[39]

SO ORDERED this 1st day of September, 2017.

All Citations

Not Reported in Fed. Supp., 2017 WL 3841912

Footnotes

1 This case involves two cases that have been consolidated—this case and Case No. 6:17-cv-00112. The underlying complaints initially filed in these cases have been superseded by the filing of a Consolidated Amended Complaint (Dkt. 137).

2 Dkt. 144.

3 Dkt. 151.

4 Defendants requested oral argument on their Motion. Dkt. 144 at 1 and 21. Upon careful review of the parties' thorough briefing, the court has determined that a hearing on the Motion as Defendants request is unnecessary. *See* LCvR 78.1 ("hearings on motions ... will not be conducted unless ordered by the Court.").

5 The named Plaintiffs are Haff Poultry, Inc.; Nancy Butler; Johnny Upchurch; Jonathan Walters; Myles B. Weaver; and Melissa Weaver. Dkt. 137 (Consolidated Amended Complaint) at 1.

6 Defendants are Tyson Foods, Inc.; Tyson Chicken, Inc.; Tyson Breeders, Inc.; Tyson Poultry, Inc.; Pilgrim's Pride Corporation; Perdue Farms, Inc.; Koch Foods, Inc.; Koch Meat Co., Inc. dba Koch Poultry Co.; Sanderson Farms, Inc.; Sanderson Farms, Inc. (Food Division); and Sanderson Farms, Inc. (Processing Division). *Id.*

7 *Id.* at 17 ¶ 66.

8 *Id.* at 17-23.

9 Dkt. 2.

10 Case No. 6:17-cv-00112.

11 Dkt. 127, Joint Order Following Case Management Hearing.

12 Dkt. 137 at 37.

13 Dkt. 127.

14 Dkt. 137.

15 *Id.* at 38-40.

16 Dkt. 127 at 3.

17 *Id.*

18 *Id.* at 2.

19 Dkt. 187-1.

20 *See, e.g.*, Dkt. 187-1 at 25, Request No. 26.

21 Dkt. 187-1.

22 Fed. R. Civ. P. 1.

23 But, some statutes do provide for automatic stays upon the filing of a motion to dismiss. For example, cases covered by the Private Securities Litigation Reform Act are subject to such automatic stays.

24 Generally, "discovery rulings are within the broad discretion of the trial court." *Cole v. Ruidoso Mun. Schools*, 43 F.3d 1373, 1386 (10th 1994) (citations omitted).

25 *Clinton v. Jones*, 520 U.S. 681, 706-07 (noting district court's "broad discretion to stay proceedings as an incident to its power to control its own docket" might justify a stay of "trial or discovery" but finding lengthy and categorical trial stay trial until after President Clinton left office that took no account of the plaintiff's interest in getting to trial was an abuse of discretion) (citations omitted); *see also Landis v. North American Co.*, 299 U.S. 254-55 (1936) (noting "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment which must weigh competing interests and maintain an even balance.").

26 Fed. R. Civ. P. 26(c)

27 *Rohrbough v. Harris*, 549 F.3d 1313, 1321 (10th Cir. 2008).

28 *Commodity Futures Trading Com'n v. Chilcott Portfolio Management, Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983) (noting the "underlying principle ... that '[t]he right to proceed in court should not be denied except under the most extreme circumstances.' ") (quoting *Klein v. Adams & Peck*, 436 F.2d 337, 339 (2d Cir. 1971)).

29 *Chilcott Portfolio Management, Inc.*, 713 F.2d at 1484 (citations omitted).

30 *Id.* (quoting *Landis*, 299 U.S. at 255).

31 *String Cheese Incident, LLC v. Stylus Shows, Inc.*, 2006 WL 894955, *2 (D. Colo. Mar. 30, 2006) (citing *FDIC v. Renda*, 1987 WL 348635, *2 (D. Kan. Aug. 6, 1987)); *see also Hernandez v. Asset Acceptance, LLC*, 970 F.Supp.2d 1194 (D. Colo. 2013) (citing the *String Cheese* and *Renda* cases).

32 Defendants also contend in their opening brief that "even if the Complaint withstands dismissal motions, discovery would still be wasteful and unnecessary[ ]" because the Plaintiffs will be unable to succeed in getting their proposed class certified. Dkt. 144 at 9. This argument seems misplaced at this stage of the case, and is unpersuasive. As Plaintiffs note in response, the Defendants' Motion to Stay is premised on awaiting resolution of anticipated motions to dismiss, which will be decided long before the court determines whether to certify a class.

33 The court in *Ciempa v. Jones*, 2012 WL 1565284 (N.D. Okla. May 2, 2012), cited by the Defendants, noted that "[a] stay of discovery until after resolution of a pending dispositive motion is appropriate 'where the case is likely to be finally concluded as a result of the ruling thereon, where the facts sought through uncompleted discovery would not affect the resolution of the motion, or where discovery on all issues of the broad complaint would be wasteful and burdensome.' " The court then granted the defendants' motion to stay discovery pending resolution of their summary judgment motion based on the argument that plaintiff failed to exhaust required administrative remedies, where the discovery plaintiff sought was unrelated to the exhaustion issue and engaging in unrelated discovery would be "wasteful and burdensome." *Id.* at *3. The court did not evaluate the likelihood that the dispositive motion would succeed—but its subject matter was relevant to whether the plaintiff needed to conduct discovery pending the resolution of the motion.

34 For example, in *Hong Leong Finance Ltd. (Singapore) v. Pinnacle Performance Ltd.*, 297 F.R.D. 69 (S.D.N.Y. 2013), the court evaluated whether there was good cause to stay discovery pending resolution of the defendants' motion to dismiss the plaintiff's Lanham Act, fraud, and contract claims. The court noted that district courts in the Second Circuit considered in their analysis the "strength of the motion"—but that some courts interpreted that to mean the motion simply did "not appear to be without foundation in law," while other courts more stringently required a motion to have "substantial grounds." *Id.* at 72-73 (citations omitted). That court determined to apply the "substantial grounds" test.

35 Dkt. 151 at 11.

36 *Id.*

37 And, as Defendants note in their briefing, the harm Plaintiffs claim here—to their livelihoods from Defendants' alleged anticompetitive activity and a possible inability to recover interest that will unfairly remain in Defendants' pockets—all assumes that Plaintiffs will prevail on their claims. This is something that the court cannot clearly evaluate at this time. But if they prevail, they will be able to seek monetary recovery from Defendants their damages to their livelihood and may also seek interest.

38 Dkt. 144.

39 In granting Defendants' Motion, the court does not foreclose any party from requesting permission to conduct discovery that may be needed to respond to forthcoming Motions to Dismiss. Any party may, if necessary, seek leave from the court to conduct such discovery.

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2006 WL 8434911
Only the Westlaw citation is currently available.
United States District Court, W.D.
Tennessee, Western Division.

IN RE: COPPER TUBING LITIGATION
This document relates to: All Actions

No. 04-2771 DV
|
Signed 10/03/2006

ORDER GRANTING IN PART DEFENDANTS' MOTION TO STAY DISCOVERY UNTIL JURISDICTIONAL ISSUES ARE RESOLVED AND GRANTING DEFENDANTS' TO BIFURCATE CLASS ACTION DISCOVERY AND MERITS DISCOVERY AND ENTRY OF SCHEDULING ORDER

DIANE K. VESCOVO, UNITED STATES MAGISTRATE JUDGE

***1** Before the court is the motion of the defendants, Boliden AB ("Boliden"); Boliden Fabrication AB ("Boliden Fabrication"); Boliden Cuivre & Zinc S.A. ("Boliden Cuivre"); IMI plc ("IMI"); IMI Kynoch Ltd. ("IMI Kynoch"); Yorkshire Copper Tube Ltd. ("Yorkshire Copper Tube"); KME America Inc. ("KME America"); Tréfimétaux S.A. ("Tréfimétaux"); Europa Metalli S.P.A. ("Europa Metalli"); Halcor S.A. ("Halcor"); Mueller Industries, Inc. ("Mueller"); WTC Holding Co. ("WTC Holding"); DENO Holding Co. ("DENO Holding"); Outokumpu Oyj ("Outokumpu"); Outokumpu Copper Products Oy ("Outokumpu Copper"); Outokumpu Copper (U.S.A.), Inc. ("Outokumpu Copper U.S.A."); Wieland Metals, Inc. ("Wieland Metals"); Austria Buntmetall AG ("Austria Buntmetall"); and Buntmetall Amstetten GmbH ("Buntmetall Amstetten") (collectively "the moving defendants"), to stay all discovery until the resolution of pending jurisdictional issues and to defer all merits discovery until after the motion of the plaintiffs, American Copper & Brass, Inc. ("American Copper") and the Bankrupt Estate of Smith & Wofford Plumbing & Industrial Supply, Inc. ("Smith & Wofford"), (collectively "the plaintiffs") for class certification is decided by the court.[1] The plaintiffs filed a brief in opposition to the moving defendants' motions, and the moving defendants filed a reply brief in further support of their motions.

I. FACTUAL AND PROCEDURAL BACKGROUND

This is a class action antitrust suit against sellers of copper plumbing tubes[2] in the United States. The plaintiffs seek to represent a nationwide class of persons who purchased copper plumbing tubes in the United States directly from the named defendants for the time period of July 1, 1988 to March 31, 2001. (Consol. Am. Compl. ¶ 36.)

On September 24, 2004, American Copper filed an initial class action complaint on behalf of itself and others similarly situated against twenty-one defendants, most of whom were European companies. The complaint alleged that the defendants violated antitrust laws of the United States, specifically section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, by conspiring and agreeing on the price at which they would sell copper plumbing tubes in the United States. (Compl. ¶ 49.) American Copper filed an amended complaint on September 30, 2004, adding additional American subsidiaries as defendants. The amended complaint alleged that the defendants engaged in a conspiracy to raise, fix, or maintain the price of copper tubing in the United States from July 1, 1988 to March 31, 2001, the result of which was that American Copper and other putative class members paid more for copper plumbing tubes during the relevant period than they would have in a competitive market. (Am. Compl. ¶¶ 49-56.)

***2** On November 17, 2004, Smith & Wofford filed a similar class action complaint on behalf of itself and others similarly situated against many of the same defendants. (Compl. Bankrupt Estate of Smith & Wofford Plumbing & Indus. Supply, Inc. v. Boliden AB, Civil Case No. 04-2930DV (W.D. Tenn. Nov. 17, 2004.)) The two actions were consolidated on February 7, 2005, by order of the court.

Pursuant to the court's order, the plaintiffs, through court-appointed lead counsel, filed a consolidated amended class action complaint on March 9, 2005, against twenty-three defendants, seventeen of whom are European companies and six of whom are located in the United States. The consolidated amended complaint alleges, like the prior complaints, that the defendants engaged in a conspiracy to raise, fix, or maintain the price of copper tubing in the United States from July 1, 1988 to March 31, 2001, in violation of section 1 of the Sherman Antitrust Law, 15 U.S.C. § 1, the result of which was that American Copper and other putative class members paid more for copper plumbing tubes during the relevant period than they would have in a competitive market. (Consol. Am. Compl. ¶¶ 61-68.) The factual allegations in the consolidated amended complaint stem, for the most part, from and recite the language of a press release issued by the European Commission ("Commission") in September of 2004 announcing its decision to impose fines against some of the defendants for operating a cartel in the European Economic Area ("EEA") for copper water, heating, and gas tubing from June 1988 to March 2001 in violation of the European Community Treaty Article 81 and EEA Agreement Article 53. (Consol. Am. Compl. ¶¶ 53–59.) The plaintiffs further allege, in a deviation from the press release, that the copper tubing market is global in nature, that the defendants needed to collude in the United States in order to fix prices in Europe, and vice versa, and the conspiracy to fix prices of copper tubing is therefore international in nature. (*Id.* ¶ 60.) Mueller was the only American copper plumbing tube manufacturer with operations in Europe and was the only American manufacturer named in the Commission's decision. (Defs.' Report of Planning Meeting 5.)

One of the named defendants, HME Nederlan BV, has not yet been served. Two of the named defendants, KM Europa Metal AG and Wieland Werke AG, were served but have not yet answered or otherwise responded. (*See* Docket No. 119, listing defendants served and attaching returns of service.)

The other twenty defendants all filed motions to dismiss the consolidated amended complaint on various grounds. On May 6, 2005, six defendants—Mueller, WTC Holding, DENO Holding, KME America, Outokumpu Copper U.S.A., and Wieland Metals—moved to dismiss the consolidated amended complaint in its entirety for failure to state a claim and as barred by the statute of limitations. The court denied the motion to dismiss as to Mueller, KME America, Outokumpu Copper U.S.A., and Wieland Metals. The court granted the motion to dismiss as to WTC Holding and DENO Holding, but subsequently reversed its ruling. Tréfimétaux also moved to dismiss for failure to state a claim, but the court also denied its motion.

The other thirteen defendants sought dismissal on the basis of lack of personal jurisdiction, in addition to failure to state a claim and as barred by the statute of limitations. On September 13, 2006, the court granted the motion of Mueller Europe Ltd. to dismiss for lack of personal jurisdiction, but denied the other twelve of the thirteen defendants' motions. As to the three Boliden defendants—Boliden, Boliden Fabrication, and Boliden Cuivre—the court denied their personal jurisdiction motions with leave to renew their motions after a 90-day jurisdictional discovery period. The remaining nine defendants who sought dismissal for lack of *in personam* jurisdiction have filed motions, which are still pending, for reconsideration and/or certification of the *in personam* jurisdiction issues for appeal to the Sixth Circuit Court of Appeals: (1) Halcor (Docket No. 235); (2) Austria Buntmetall (Docket No. 242); (3) Buntmetall Amstetten (Docket No. 242); (4) Yorkshire Copper Tube (Docket No. 265); (5) Europa Metalli (Docket No. 265); (6) IMI (Docket No. 270); (7) IMI Kynoch (Docket No. 270); (8) Outokumpu (Docket No. 309); and (9) Outokumpu Copper (Docket No. 309). Thus, motions of a total of twelve defendants raising lack of personal jurisdiction are still unresolved.

***3** Mueller, KME America,[3] Outokumpu Copper U.S.A., and Wieland Metals filed answers to the consolidated amended complaint in August of 2005. WTC Holding, DENO Holding, Austria Buntmetall, Buntmetall Amstetten, IMI, and IMP Kynoch filed answers to the consolidated amended complaint in May of 2006. Outokumpu, Outokumpu Copper, Europa Metalli, Tréfimétaux, and Yorkshire Cooper Tube filed answers to the consolidated amended complaint in June of 2006.

The court scheduled a Rule 16(b) scheduling conference for July 27, 2006. In anticipation of the conference, the parties held a Rule 26(f) telephonic planning meeting but were unable to agree on a proposed discovery plan and a proposed joint report of the planning meeting. Consequently the plaintiffs and defendants submitted separate proposed scheduling orders and Rule 26(f) reports.

All the moving defendants propose that discovery, when it commences, should proceed in two stages: (1) class certification discovery and (2) merits discovery. In addition, all the moving defendants ask that all discovery be stayed until after the motions of the twelve foreign defendants who still have *in personam* jurisdictional issues pending are resolved. The plaintiffs oppose a stay of discovery and bifurcation of discovery on the grounds that class and merits issues are closely intertwined, bifurcation would result in unnecessary delay of the litigation, and bifurcation would waste the parties' and the court's resources.

II. ANALYSIS

A. Motion to Stay Discovery Until Jurisdictional Issues Are Resolved

Rule 26(c) of the Federal Rules of Civil Procedure provides in pertinent part that,

> [u]pon motion by a party or by the person from whom discovery is sought ... and for good cause shown, the court in which the action is pending ... may make any order which justice requires to protect a party or person from ... undue burden or expense, including ... that the ... discovery may be had only on specified terms and conditions, including a designation of the time or place.

Fed. R. Civ. P. 26(c). Although Rule 26 does not explicitly authorize the imposition of a stay of discovery, "[i]t is settled that entry of an order staying discovery pending determination of dispositive motions is an appropriate exercise of the court's discretion." *Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C. 2001) (staying discovery pending resolution of defendants' motion to dismiss and summary judgment); *see also Sprague v. Brook*, 149 F.R.D. 575, 578 (N.D. Ill. 1993) (staying discovery pending resolution of motion to dismiss and finding discovery requests irrelevant to pending dispositive motions). Furthermore, Rule 1 states that the Federal Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. "A stay of discovery pending the determination of a dispositive motion 'is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources.' " *Chavous*, 201 F.R.D. at 2 (citation omitted).

In determining whether to stay discovery, the court considers the following factors: the type of motion pending; the nature and complexity of the action; whether some or all the defendants join in the motion; the stage of litigation; the extent of the discovery and the complexity of the issues in the case; and other relevant circumstances. *Hachette Distrib., Inc. v. Hudson County News Co.*, 136 F.R.D. 356, 359 (E.D.N.Y. 1991) (denying stay of discovery in antitrust action pending motion to dismiss where some defendants had not made dispositive motions). A stay of discovery is not proper in every circumstance. For example, a stay of discovery "is rarely appropriate when the pending motion will not dispose of the entire case." *Chavous*, 201 F.R.D. at 3 (quoting *Keystone Coke Co. v. Pasquale*, No. Civ. A. 97-6074, 1999 WL 46622, at *1 (E.D. Pa. Jan. 7, 1999)). A trial court also "should not stay discovery which is necessary to gather facts in order to defend against [a] motion [to dismiss]." *Id.* (alteration in original)(quoting *Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D. Fla. 1997)). Furthermore, a trial court must consider whether the party seeking the discovery will be prejudiced by the delay. *See id.* at 3–4; *Johnson v. N.Y.U. Sch. of Educ.*, 205 F.R.D. 433, 434 (S.D.N.Y. 2002) (finding that a stay of discovery was proper where plaintiff failed to demonstrate prejudice by a stay).

***4** In this case, there are twelve unresolved motions related to *in personam* jurisdiction. "Challenges to the court's personal or subject-matter jurisdiction should take priority." Manual for Complex Litigation (Fourth) § 11.32 (2004). Several courts have recognized that discovery should be stayed where there is a challenge to the [c]ourt's jurisdiction. *Hachette*, 136 F.R.D. at 358 (recognizing that discovery should be stayed "where a challenge is directed to the court's jurisdiction"); *River Plate Corp. v. Forestal Land, Timber & Ry. Co.*, 185 F. Supp. 832, 835 (S.D.N.Y. 1960) (allowing jurisdictional discovery and staying merits discovery in antitrust action when motions to dismiss for lack of *in personam* jurisdiction were pending); *Bandag, Inc. v. Michelin Retread Techs., Inc.*, 202 F.R.D. 597, 597-98 (S.D. Iowa 2001) (limiting discovery to requisite minimal contacts while jurisdictional motions were pending); *Pyle v. Pyle*, 81 F. Supp. 207, 208 (W.D. La. 1948) (staying discovery until jurisdictional issues determined); *see also* 7 J. Palmer, Cyclopedia of Federal Procedure § 25.86a (3d ed. 1986) (requests for discovery "properly deferred" until determination of jurisdictional issue").

This is a complex antitrust action. Of the twenty-three defendants named in the consolidated amended complaint, seventeen are foreign companies and six are domestic companies. Discovery on the merits will be extensive. As the Ninth Circuit has recognized, a stay of discovery is particularly appropriate in complex antitrust cases when motions to dismiss are pending.

> The purpose of [Rule] 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery. In antitrust cases this procedure especially makes sense because the costs of discovery in such actions are prohibitive. As observed in *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F. 2d 549, 553 (7th Cir. 1980), "if the allegations of the complaint fail to establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility." It is sounder practice to

> determine whether there is any reasonable likelihood that plaintiffs can construct a claim before forcing the parties to undergo the expense of discovery.

Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987) (internal citations omitted). The same is equally true for Rule 12(b)(2) motions to dismiss for lack of personal jurisdiction. If the defendants who are challenging the court's jurisdiction prevail on their Rule 12(b)(2) motions, it would be unfair to put them in the position of disclosing records of their business practices and putting them to the burden and expense of engaging in costly merit discovery. It would be a better practice to dispose of the personal jurisdiction motions before putting the foreign defendants to the expense of discovery in this action.

If the Rule 12(b)(2) motions to dismiss for lack of personal jurisdiction are granted, it would dispose of the entire case to those defendants challenging personal jurisdiction. Not all the defendants have pending jurisdictional motions, however; only twelve of the defendants do. If some or even all of the defendants prevail, it would therefore not result in a termination of the entire lawsuit. Thus, whether or not the jurisdictional motions are granted, discovery will proceed in this case against Mueller, WTC Holding, DENO Holding, KME America, Outokumpu Copper U.S.A., Wieland Metals, and Tréfimétaux, because they do not have personal jurisdictional challenges pending.

None of the parties have demonstrated how they would be prejudiced by a stay of discovery. The plaintiffs have not indicated that additional jurisdictional discovery is needed except as to the three Boliden defendants. The defendants who have not challenged jurisdiction have not claimed they would be prejudiced by a stay of discovery. Indeed, those defendants have joined in the request for the stay of all discovery.

***5** Under the circumstances, the motion to stay discovery is granted as to Boliden, Boliden Fabrication, and Boliden Cuivre, Halcor, Austria Buntmetall, Buntmetall Amstetten, Yorkshire Copper Tube, Europa Metalli, IMI, IMI Kynoch, Outokumpu, and Outokumpu Copper until their jurisdictional issues are resolved or unless otherwise ordered by the court, whichever occurs first. The motion to stay is denied as to Mueller, WTC Holding, DENO Holding, KME America, Outokumpu Copper U.S.A., Wieland Metals, and Tréfimétaux. The plaintiffs may proceed with discovery as to these defendants, and these defendants may proceed with discovery as to the plaintiffs. The court acknowledges that granting the motion to stay as to some defendants and denying the motion to others may result in some duplication of depositions and document production, but believes that the duplication will be minimal. Those defendants challenging personal jurisdiction may be adequately represented in discovery by those who have not contested personal jurisdiction. In addition, counsel for those defendants contesting personal jurisdiction may appear at any depositions but will not be allowed to participate until the issues of personal jurisdiction as to their respective clients are resolved.

B. Motion to Bifurcate Discovery

Having determined that discovery may proceed with respect to some of the defendants, the next issue is the bifurcation of class certification discovery and merits discovery. Whether to bifurcate class certification and merits discovery is within the discretion of the court. *See, e.g.,* *Stewart v. Winter*, 669 F.2d 328, 331-32 (5th Cir. 1982)(finding the district court acted within its discretion in limiting discovery during the pre-certification phase). Rule 23 of the Federal Rules of Civil Procedure mandates that a class certification decision be made “at an early practicable time” after commencement of an action. Fed. R. Civ. P. 23(c)(1)(A). Numerous courts have recognized that allowing class-wide discovery on certification issues and postponing class-wide discovery on the merits is appropriate “to make early class determination practicable and to best serve the ends of fairness and efficiency.” *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1570–71 (11th Cir. 1992) (citing *Stewart*, 669 F.2d at 331); *see also* Manual for Complex Litigation, *supra*, § 11.213 (recognizing that courts “should ascertain what discovery on class questions is needed for a certification ruling and how to conduct it efficiently and economically”). Indeed, this court has granted bifurcation of discovery in other class actions. *See, e.g., Isabel v. Velsicol Chem. Co.*, No. 04-2297-DV (W.D. Tenn. June 7, 2004) (Vescovo, M.J.) (limiting first phase of discovery to class certification issues), *aff'd*, 2004 U.S. Dist. LEXIS 18057 (W.D. Tenn. Aug. 12, 2004) (Donald, J.) (denying plaintiff's appeal of order bifurcating discovery and finding “substantial authority allows for pre-class certification discovery”); *Bostick v. St. Jude Med., Inc.*, No. 03-2636-BV (W.D. Tenn. Nov. 14, 2003) (Vescovo, M.J.) (limiting initial discovery to issues relevant to class certification). The primary considerations to determine whether bifurcation of class certification discovery from discovery on the merits is fair and efficient are whether merits discovery is intermingled with class discovery and whether the litigation is likely to continue absent class certification. *In re Plastics Additive Antitrust Litig.*, 2004 WL 2743591, at *3

(E.D. Pa. Nov. 29, 2004). *See generally* Manual for Complex Litigation, *supra*, § 21.14.

In this case, class certification issues are distinct from merits discovery issues and can easily be segregated. The consolidated amended class action complaint alleges that all the "[d]efendants engaged in a global conspiracy to artificially inflate the price for copper plumbing tubes sold in the United States to Plaintiffs and the Class." (Pls.' Opp. to Defs.' Mot. for Bifurcation 1.) The moving defendants point out that "this case is highly unusual and perhaps unprecedented in that a large percentage of the product at issue is sold in the United States by companies that are not alleged to have participated in the conspiracy." (Defs.' Report of Planning Meeting 5.) In other words, the complaint alleges that Mueller, the only major U.S. supplier of copper plumbing tubes named as a defendant, conspired with European companies who sold none or small amounts of copper plumbing tubes in the United States, while the other major U.S. suppliers of copper plumbing tubes in the United States are not even named as defendants or alleged to have participated in a conspiracy to fix prices for copper plumbing tubes in the United States. (*Id.*) As a result, the moving defendants insist that the plaintiffs will be unable to demonstrate that common questions of law and fact predominate. (*Id.*)

***6** The moving defendants point out that class certification discovery will focus on competitive conditions in the United States for copper plumbing tubes, local market conditions in various geographic regions, and the number of competitors for the products, among other matters. (*Id.* 8-9.) The moving defendants have listed a number of issues unique to class certification discovery, some of which include:

1. The identity and characteristics of the copper plumbing tube products that are sold in the United States;

2. [T]he identity of the Defendants (if any) from which the named plaintiffs purchased copper plumbing tube[s];

3. [The e]ffect of sales by U.S. copper plumbing tubes suppliers that are not [named as defendants in this lawsuit];

4. Competitive conditions in different geographical regions; [and]

5. List prices, discounts, rebates, price concessions, price negotiations and other promotional techniques used by [sellers of copper plumbing tubes] in the United States.

(*Id.*) The plaintiffs have not identified any specific issues for which class certification discovery would be needed. Rather, the plaintiffs claim that the above class certification discovery issues identified by the moving defendants are actually relevant only to merits discovery. If plaintiffs are correct, then discovery would not be needed into these matters prior to a class certification decision, thus expediting a decision on class certification. At any rate, it appears to the court that the parties can identify what discovery is needed for class certification and that the defendants would not oppose class certification discovery on the issues set forth in their brief, even if those issues are related to merits discovery as the plaintiffs insist.

In contrast, merits discovery would focus on whether the defendants engaged in a conspiracy to fix prices in the United States. Merits discovery would include documents located in Europe and witnesses located abroad, who, for example, could testify to the existence or non-existence of improper agreements between the defendants affecting prices to be charged in the United States.

Bifurcation of class certification discovery and merits discovery will not significantly delay the litigation. Although the consolidated amended class action complaint was filed nearly eighteen months ago, much time and effort has been spent on resolving preliminary jurisdictional issues and dispositive motions. The plaintiffs have not opposed extensions of time to brief the issues and have themselves requested additional time on numerous occasions. Although the court does not necessarily agree, defendants' proposed schedule allows the plaintiffs four months to file their class certification motion and four months from that time for defendants to conduct any needed discovery and file their response. The plaintiffs can, of course, file their motion for class certification sooner.

Accordingly, the defendants' motion to bifurcate discovery is granted.

III. SCHEDULING ORDER

The following are established as final dates for:

1. JOINING PARTIES: Motions to join parties shall be filed on or before October 30, 2006.

2. AMENDING PLEADINGS: Consistent with Fed. R. Civ. P. 15, the parties must seek leave of the court before amending their pleadings.

***7** 3. CLASS CERTIFICATION DISCOVERY: The court finds that dividing discovery into two stages will allow discovery to proceed in an incremental, fair, and efficient manner. Therefore, the initial stage of discovery will be devoted to issues relating to class certification. Class certification discovery may commence October 16, 2006.

a. The issues on which discovery should focus at the class certification state include:

- The identity and characteristics of the copper plumbing tube product(s) that are sold in the United States and that the plaintiffs purport to include in the alleged conspiracy;
- Information regarding the named plaintiffs' purchases of copper plumbing tube, including particularly the identity of the defendants (if any) from which the named plaintiffs purchased copper plumbing tube;
- Price and non-price factors affecting the plaintiffs' copper plumbing tube purchasing decisions;
- Description and/or characteristics of the plaintiffs' business operations and use of the copper plumbing tube purchased from the defendants;
- Effect of sales by United States copper plumbing tube suppliers that are not alleged to be part of the conspiracy on competition for the sale of copper plumbing tube to purported class members;
- Competitive conditions in the sale of copper plumbing tube in different geographical regions of the United States;
- Definition of the relevant product and geographic markets for copper plumbing tube and competitive conditions within those markets (to permit an assessment of whether a uniform injury can be established across the purported class with common proof);
- Geographic location of purchase and geographic location of use of copper plumbing tube sold in the United States;
- Characteristics and dollar volume of copper plumbing tube sold by the defendants in the United States;
- List prices, discounts, rebates, price concessions, price negotiations, and other promotional techniques used by the defendants to sell copper plumbing tube in the United States; and
- Factors affecting the defendants' cost of producing, shipping, and selling copper plumbing tube, and their capacity to do the same, in the United States.

b. The defendants will not be required to produce information or materials concerning the European Commission's copper plumbing tube investigation or the merits of the plaintiffs' allegations of antitrust violations until the court has ruled upon the plaintiffs' class certification motion. If the court certifies a class, the parties will proceed to the second stage of discovery concerning the merits of the plaintiffs' claims.

4. CLASS CERTIFICATION MOTION: The court adopts the following schedule for the filing of the plaintiffs' class certification motion, development of an adequate evidentiary record on class certification, and briefing and disposition of the motion:

a. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION: December 15, 2006

b. PLAINTIFFS' DISCLOSURE OF RULE 26(A)(2) EXPERT WITNESS INFORMATION PERTAINING TO CLASS CERTIFICATION: December 15, 2006

c. DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION: February 16, 2007

d. DEFENDANTS' DISCLOSURE OF RULE 26(A)(2) EXPERT WITNESS INFORMATION PERTAINING TO CLASS CERTIFICATION: February 16, 2007

e. PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE: March 16, 2007

f. COMPLETION DEADLINE FOR CLASS CERTIFICATION DISCOVERY: March 16, 2007

5. MERITS DISCOVERY: Within fifteen (15) days after the court decides the plaintiffs' motion for class certification, the parties shall meet, confer, and submit to the court a proposed scheduling order for merits discovery and other deadlines, if necessary.

***8** 6. OTHER MATTERS:

a. The plaintiffs as a group may notice a maximum of ten (10) depositions, and the defendants as a group may notice a maximum of ten (10) depositions during the class certification phase of discovery. The plaintiffs as a group may notice a maximum of twenty (20) depositions, and the defendants as a group may notice a maximum of twenty (20) depositions during the merits phase of discovery. Otherwise, the Federal Rules of Civil Procedure shall govern limits on discovery.

b. No depositions may be scheduled to occur after the respective discovery cutoff dates. All motions, requests for admissions, or other filings that require a response must be filed sufficiently in advance of the respective discovery cutoff dates to enable opposing counsel to respond by the time permitted by the Rules prior to that date.

c. Motions to compel discovery are to be filed and served by the discovery deadline or within thirty (30) days of the default of the service of the response, answer, or objection, which is the subject of the motion, if the default occurs within thirty (30) days of the discovery deadline, unless the time for filing of such motion is extended for good cause shown, or the objection to the default, response, answer, or objection shall be waived.

d. The court will schedule a pretrial conference and set a trial date after ruling on the plaintiffs' class certification motion.

e. The parties are reminded that pursuant to Local Rule 11(a)(1)(A), all motions, except motions pursuant to Fed. R. Civ. P. 12, 56, 59, and 60, shall be accompanied by a proposed order.

f. The opposing party may file a response to any motion filed in this matter. Neither party may file an additional reply, however, without leave of the court. If a party believes that a reply is necessary, it shall file a motion for leave to file a reply accompanied by a memorandum setting forth the reasons for which a reply is required.

g. At this time, the parties have not agreed on whether trial may proceed before the magistrate judge.

Absent good cause shown, the scheduling dates set by this order shall not be modified or extended.

IT IS SO ORDERED this 3rd day of October, 2006.

All Citations

Not Reported in Fed. Supp., 2006 WL 8434911

Footnotes

1 At the Rule 16(b) Scheduling Conference on July 27, 2006, the court stated that it would treat the defendants' proposed scheduling order as a motion to stay and to bifurcate discovery.

2 “Copper plumbing tubes” is defined in the complaint as copper water, heating and gas tubes that go into residental and commercial buildings. The term includes both plain and copper plumbing tubes and plastic-coated copper plumbing tubes. (Am. Compl. ¶ 5.) “Copper Tubing” is defined in the consolidated amended complaint as including “plain copper plumbing tubes as well as pastice-coated tubes used for such things as the delivery of water, heating and gas in buildings.” (Consol. Am. Compl. ¶ 5.)

3 KME America amended its answer on July 13, 2006.

End of Document

2007 WL 2127577
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

In re GRAPHICS PROCESSING UNITS ANTITRUST LITIGATION.
This Order Relates To: All Actions.

No. C 06-07417 WHA.
|
MDL No. 1826.
|
July 24, 2007.

Attorneys and Law Firms

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PETRIAL ORDER No. 4

ORDER GRANTING DEFENDANTS' MOTION TO STAY DISCOVERY AND DISCLOSURES

WILLIAM ALSUP, United States District Judge.

INTRODUCTION

***1** In this antitrust multi-district litigation, defendants move to stay discovery and disclosures pending the resolution of their motions to dismiss. Plaintiffs have asked that defendants be required to turn over all documents already produced to the Antitrust Division of the Department of Justice pursuant to its pending and unindicted criminal investigation. Contrary to defendants, Federal Rule of Criminal Procedure 6(e) does not forbid the production of such documents. Also contrary to defendants, the recent *Twombly* decision does not compel a blanket stay of all discovery in antitrust cases pending resolution of motions to dismiss. Defendants have, however, shown that the facts surrounding this case warrant a temporary stay of discovery until the current round of motions to dismiss is resolved. Accordingly, a stay of all discovery and all disclosures is entered. This is without prejudice to revisiting the issue of focused, limited discovery in the event the motions to dismiss are granted.

STATEMENT

Defendants Nvidia Corporation and ATI Technologies, Inc., manufacture, market, sell, and distribute graphics processing units. ATI merged with defendant Advanced Micro Devices, Inc., in October 2006. GPUs are dedictated graphics rendering devices used for displaying computer graphics in computers, game consoles, and mobile devices. Allegedly, there are only two majors players in the GPU market-AMD and Nvidia.

On November 30, 2006, AMD and Nvidia separately announced that they had received subpoenas asking for documents regarding pricing and customer agreements from the Antitrust Division of the United States Department of Justice. AMD later confirmed in SEC filings that the investigation was criminal in nature. Thus far the investigation has not resulted in any indictments.

The first of these civil antitrust actions was filed on December 4, 2006. Many others quickly followed. A majority of the complaints were filed by indirect purchasers of GPUs; the remainder of them were filed by direct purchasers. By order of the Judicial Panel on Multidistrict Litigation, a number of these actions were consolidated for pretrial purposes on April 18, 2007, pursuant to 28 U.S.C. 1407. Other tag-along actions have been transferred and consolidated into this multi-district litigation proceeding.

An initial case management conference was held on May 24, 2007, in which parties first discussed the issue of discovery and its relationship to defendants' anticipated motions to dismiss. A briefing schedule for both the motion to stay and the motions to dismiss was set at the conference. After the conference, an order dated May 30, 2007, appointed interim class counsel for the indirect and direct purchaser plaintiffs.

The motion for a stay of discovery was filed on June 7, 2007, and complaints for both the direct and indirect purchasers were filed on June 14, 2007. The complaints allege that AMD and Nvidia entered into price-fixing agreements in violation of Section 1 of the Sherman Act and various other state-law claims. The motions to dismiss will be heard on September 20, 2007.

***2** A lengthy hearing on the motion to stay discovery was held on July 10, 2007. Attorney Alexandra Shepard appeared specially on behalf of the Antitrust Division of the Department of Justice. She addressed some of the Court's questions regarding the status of the government investigation and stated that the government neither favored nor opposed a stay. Also, parties were invited to submit supplemental briefing on the issue of prejudice to plaintiffs and the effect of the statute of limitations if a blanket stay of discovery were granted.

ANALYSIS

Under Rule 26(c), the Court may, on a showing of good cause, enter an order to stay discovery in order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." District courts have broad discretion to stay discovery pending the resolution of dispositive motions, including motions to dismiss under Rule 12(b)(6). *Jarvis v. Regan,* 833 F.2d 149, 155 (9th Cir.1987).

1. Federal Rule of Criminal Procedure 6(e).

Defendants contend that rules governing secrecy during a grand jury proceeding support a stay of all discovery. Grand jury secrecy is governed by Federal Rule of Criminal Procedure 6(e). Under Rule 6(e)(2)(A), "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B)." In turn, Rule 6(e)(2)(B) states that unless provided otherwise, grand jurors, interpreters, court reporters, operators of recording devices, persons transcribing recorded testimony, and attorneys for the government must not disclose matters occurring before the grand jury. Simply put, defendants are *not* in the Rule 6(e) list. They are free to reveal the subpoena itself as well as all documents produced in response to it. Indeed, a witness appearing before a grand jury is thereafter free to hold a press conference and reveal everything that was asked of him or her and what his or her answers were. The fact of any subpoena and its requests may likewise be published by the recipient. Since defendants are free to volunteer the information, a court may compel a disclosure. Nothing in Rule 6(e) is otherwise.

Defendants next argue that allowing discovery at this time could disrupt the Antitrust Division's ongoing investigation. As stated, however, Attorney Shepard appeared for the government at the hearing and voiced no such objection. She explained that a grand jury had been empaneled on this matter. She also stated that the Antitrust Division had not discussed the pending motion to stay with the parties. The government took no position on the pending motion and presently has no plans to intervene in this action. Since the Antitrust Division appears to believe discovery in this action can coexist with its grand jury investigation, defendants' argument that discovery here would somehow derail the Antitrust Division's efforts fails.

Defendants next argue that Rule 6(e), as interpreted in case law, supports a general policy of not requiring defendants to disclose documents produced in a grand jury investigation. Requiring disclosure, the argument goes, would open up defendants to scandal merely on account of a grand jury investigation that may go nowhere. This argument is overblown. The records will show only what the records will show. If they show antitrust scandal, then they would reveal nothing more than the facts.

***3** Rule 6(e) has not been interpreted as a complete bar on producing documents given to the grand jury. "[I]f a document is sought for its own sake rather than to learn what took place before the grand jury, and if its disclosure will not compromise the integrity of the grand jury process, Rule 6(e) does not prohibit its release." *United States v. Dynavac,* 6 F.3d 1407, 1411-12 (9th Cir.1993). The Ninth Circuit later explained that "the only exception to *Dynavac* is if the material reveals a secret aspect of the grand jury's workings." *Kersting v. United States,* 206 F.3d 817, 821 (9th Cir.2000). Defendants' policy argument fails because Ninth Circuit decisions reflect a concern in protecting the grand jury proceedings themselves, not the reputations of targets of investigations. Here, plaintiffs do not ask for documents related to any actual proceedings before a grand jury.

Defendants cite *In re Sealed Case,* 801 F.2d 1379, 1381-32 (D.C.Cir.1986), in support of their view. *First,* this decision is not binding here as it is out-of-circuit authority. *Second,* in that decision, the documents sought by the SEC were wide-ranging, and affidavits in connection with the requests failed to establish a need for any specific document. *Id.* at

1382. The D.C. Circuit held that such broad requests were inappropriate. Had the SEC shown particularized need for specific, identifiable documents, the SEC could have possibly received them.

Finally, defendants contend that the decision *In re Sulfuric Acid Antitrust Litigation,* 2004 WL 769376 (N.D.Ill.2004), forbids turning over the documents produced earlier to the Department of Justice. That decision acknowledged that Rule 6(e) does not explicitly allow defendants to resist document production in a civil case, recognizing that civil defendants are not named in the rule. There, a grand jury was in session concurrently with a parallel civil antitrust action. A motion to compel production of *any and all* documents produced to or received from *any* federal or state government entity was denied. *Id.* at *1. Perhaps this was a sound outcome but nothing in Rule 6(e) requires the result.

In short, contrary to defendants, Rule 6(e) simply does not authorize a blanket prohibition on civil production of documents already given to a grand jury. Nor does it bar compliance with a request to make a duplicate set of all documents given to a grand jury.

2. The *Twombly* Decision.

Defendants next argue that a recent Supreme Court decision, *Bell Atlantic Corp. v. Twombly,* --- U.S., ---- 127 S.Ct. 1955 (May 21, 2006), holds by implication that no discovery may proceed in an antitrust action before the complaint is held viable.

The Supreme Court's decision in *Twombly* addressed pleading standards for antitrust complaints alleging conspiracy under the Sherman Act. It noted that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." The decision criticized a common interpretation of the hoary "no set of facts" language from *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). *Twombly* noted that "[o]n such a focused and literal reading of *Conley'* s 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Id.* at 1968.

***4** Specific to antitrust actions, the Supreme Court held that merely pleading parallel conduct or interdependence of behavior, even when consistent with antitrust conspiracy, was not sufficient to state a claim for conspiracy. *Id.* at 1964. Stating a claim under Section 1 of the Sherman Act "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 1965. On the facts in *Twombly,* the defendant telecom companies' behavior could have been conceivably construed as consistent with illegal activity, however, their behavior also supported a conclusion that the telecom companies were merely acting rationally in accordance with past behavior. *Id.* at 1971-73. The plaintiffs had "not nudged their claims across the line from conceivable to plausible," so the complaint was dismissed. *Id.* at 1974.

Twombly also discussed discovery in antitrust actions. The decision noted that "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." *Id.* at 1967 (internal citations omitted). The action involved "a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years." *Ibid.* The Court concluded that "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence." *Id.* at 1967.

Defendants' statement that "*Twombly* stands for the proposition that antitrust plaintiffs cannot subject defendants to *any* discovery until the Court determines that the plaintiffs have articulated a 'plausible entitlement to relief' on the face of the complaint" is incorrect (Reply Br. at 2) (emphasis in original). This order does not read *Twombly* to erect an automatic, blanket prohibition on any and all discovery before an antitrust plaintiff's complaint survives a motion to dismiss. Defendants' argument upends the Supreme Court's holding; the decision used concerns about the breadth and expense of antitrust discovery to identify pleading standards for complaints, it did not use pleading standards to find a reason to foreclose all discovery.

To be sure, to allow antitrust discovery prior to sustaining a complaint would defeat one of the rationales of *Twombly,* at least when the discovery would be burdensome. When, however, the discovery would not be so burdensome, a closer question is presented, a question calling for the exercise of discretion and the balancing of competing factors.

3. Calibrating Discovery in Tandem with the Dismissal Motions.

***5** Having rejected the arguments for an automatic, blanket stay of all antitrust discovery pending identification of a viable claim, the issue remains whether discovery should, on the instant record, be postponed pending the resolution of the motions to dismiss. This order concludes that first resolving the motions to dismiss is the better course. After full ventilation of the viability *vel non* of the complaint, we will all be in a much better position to evaluate how much, if any, discovery to allow. If, among other possible outcomes, the complaint proves to be solid save for perhaps a single soft element for which evidence would normally be outside the reach of plaintiffs' counsel without discovery, then it may be that a narrowly-directed and less burdensome discovery plan should be allowed with leave to amend to follow. If, however, the complaint proves to be so weak that any discovery at all would be a mere fishing expedition, then discovery likely will be denied. Of course, if the complaint is sustained, then discovery will proceed apace. The immediate point is that adjudicating the motions to dismiss will shed light on the best course for discovery.

Our immediate circumstances omit any compelling need for prompt discovery, such as might be the case if provisional relief were being sought or if testimony needed to be preserved due to ill health of a witness. It is true that the Court has indicated that it will try to manage this case so that it will end at least by the end of 2008. The leisurely briefing schedule on the motions to dismiss was recommended by both sides-neither side should now try to capitalize on that schedule to advance or to delay discovery. In sum, we have no urgent need for immediate discovery. We have time enough to critique the complaint and to then consider the best course for discovery.

Nor is this a case where it is almost certain that the complaint is viable, such as is often true where guilty pleas have already been entered in a parallel criminal case. Of course, in such conditions, at least some discovery should ordinarily proceed despite any pending motion to dismiss (unless civil discovery would interfere with a criminal case). Here, there has been no indictment, much less any guilty plea by any defendant. This factor seems to distinguish the circumstances in the unreported decision of Judge Claudia Wilken in the SRAM case where she ordered the records given to the Antitrust Division to be produced to plaintiffs' counsel.

It is true that the discovery sought at this time is the same discovery already gathered, assembled, and produced to the government. Therefore, the incremental cost to produce a duplicate set to plaintiffs' counsel would be minor in the overall picture. Still, there would be the issue of various objections (based, for example, on employee privacy) that might be assertable against plaintiffs that were unasserted against the government. Defendants would be entitled to interpose possibly valid objections that would take time to evaluate. And, regardless of the foregoing, the compelled act of turning records over to the government pursuant to the subpoena does not mean that everyone else has an equal right to rummage through the same records. Defendants have a legitimate interest in maintaining the confidentiality of their records. Without question, this interest may eventually have to yield to civil discovery interests but, for the reason stated, whether and the extent to which this should occur will be best decided after ruling on the Rule 12 motions. All other considerations raised by the parties, including issues of prejudice and burden, may be re-asserted at that time, the foregoing being persuasive and dispositive at this juncture.

CONCLUSION

***6** For all of the above-stated reasons, defendants' motion to stay all discovery and disclosures pending the resolution of the motions to dismiss is **Granted** subject to a new evaluation after the motions to dismiss are decided.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2007 WL 2127577

End of Document

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KELSEY K., individually and on behalf of all others similarly situated,

Plaintiff,

v.

NFL ENTERPRISES, LLC, *et al.*,

Defendants.

_______________________________________/

No. C 17-00496 WHA

ORDER GRANTING MOTION TO DISMISS AND DENYING REQUEST FOR DISCOVERY

INTRODUCTION

In this putative class action for antitrust violations, defendants move to dismiss. The motion is **GRANTED**. Plaintiff's request for discovery at the pleading stage is **DENIED**.

STATEMENT

Plaintiff Kelsey K. asserts putative class claims for violations of the Sherman Act and the Cartwright Act against the National Football League and 27 of its member teams. The gravamen of the complaint is that defendants conspired "to fix and suppress the compensation of" and "to eliminate competition among them for" cheerleaders. The following facts are taken from the well-pled allegations of the complaint (Dkt. No. 1).

In recent decades, NFL revenue and profits have skyrocketed, and the salaries of male athletes have followed suit (*id.* ¶¶ 60–63). As of 2016, NFL players earned an average of approximately $1.3 million per athlete, practice squad players earned at least $117,300 per season, and mascots earned anywhere from $25,000 to $65,000 per year (plus benefits). In contrast, cheerleaders — who perform during televised games and participate in community outreach and photo shoots — still earn "well below market value" (*id.* ¶¶ 63, 68–71). During the relevant time period, no NFL team ever attempted to recruit a cheerleader from another team, even when located in the same geographic market (*id.* ¶ 77).

Senior executives in the NFL — including team owners, high-ranking management officials, and the heads of cheerleading teams — gather at "various meetings throughout the year." Such meetings include "annual NFL owner meetings, the NFL scouting combine, the NFL Draft, the Super Bowl, the Pro Bowl, trade shows, and even conference calls among senior executives" (*id.* ¶ 79). Additionally, the NFL constitution and bylaws require all teams to "file with the NFL all written employment contracts with all non-player employees" (*id.* ¶¶ 81, 83). This filing occurs each year as teams hire new waves of cheerleaders (*id.* ¶ 86).

The complaint asserts that, through the foregoing means, the NFL and its member teams conspired to suppress earnings for cheerleaders below fair market value by (1) paying them "a low, flat wage for each game" and not paying them for rehearsals or community outreach events; (2) refraining from poaching other teams' cheerleaders; and (3) prohibiting cheerleaders from seeking employment with other professional cheerleading teams and from discussing their earnings with each other (*e.g.*, *id.* ¶ 80).

The complaint also alleges that NFL teams conspired to "use fear and intimidation to induce compliance [with] and acceptance of suppressed earnings." For example, unspecified NFL teams and agents allegedly told unidentified cheerleaders "they were lucky to be chosen, should be grateful and could be quickly replaced if they failed to perform in any way" (*id.* ¶ 98). The suppression of earnings also had the effect of suppressing cheerleader mobility, since the costs of moving to or even auditioning for a different team in a different geographic region, relative to the expected profits from such a move, would be prohibitively high. The lack of mobility, in turn, "reinforced the suppression of earnings" for cheerleaders (*id.* ¶ 99).

The complaint alleges some effects said to flow from the purported conspiracy. At unspecified times in the past, the Raiders paid their cheerleaders a flat fee of $125 per game and did not pay them for rehearsals or "mandatory community events, along with other time that should have been compensated." The Buccaneers paid their cheerleaders a flat fee of $100 per game, did not pay them for rehearsals, and "rarely paid a low hourly wage for community events." The Bengals paid their cheerleaders a flat fee of $90 per game and did not pay them for rehearsals or community events. The Bills did not pay their cheerleaders at all for games or rehearsals "and rarely paid them for community events" (*id.* ¶ 87).

After "a rash of lawsuits filed over the last few years alleging that various NFL teams paid their [cheerleaders] below the legally-mandated minimum wage," however, NFL teams "generally raised their earnings for [cheerleaders] to minimum wage" (*id.* ¶¶ 75, 89). The complaint is silent on the current state of cheerleader compensation in the NFL but alleges, on "information and belief," that the true fair market value for cheerleaders "may have been and may continue to be" approximately $100,000 per cheerleader per year "based on consultations with industry experts" (*id.* ¶ 92).

Based on the foregoing allegations, plaintiff asserts claims for violations of the Sherman Act and the Cartwright Act. Defendants move to dismiss. This order follows full briefing and oral argument.

ANALYSIS

To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has facial plausibility when its factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss. *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001). For example, "formulaic recitation of the elements" of a claim are not entitled to the presumption of truth. *Iqbal*, 556 U.S. at 681. A plaintiff may, however, plead facts "alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible." *Soo Park v. Thompson*, 851 F.3d 910, 928–29 (9th Cir. 2017).

To be clear, the complaint here asserts *only* claims for violations of antitrust law. This is *not* a lawsuit for violation of wage-and-hour or labor laws (*see, e.g.*, Dkt. No. 1 ¶ 75). Nor is it a complaint for general maltreatment of cheerleaders. For present purposes, allegations that cheerleaders deserve to be paid more for their skills (*see, e.g.*, *id.* ¶ 67), or that defendants treated cheerleaders in "insulting" or "demeaning" ways (*see, e.g.*, *id.* ¶¶ 63, 66, 88), even if true, are inapposite. Plaintiff chose to assert *antitrust* claims, so she must plead factual allegations sufficient to show violations of *antitrust* law.

To state an antitrust claim here, plaintiff must plead not only "ultimate facts, such as conspiracy, and legal conclusions" — *e.g.*, that defendants agreed not to compete with each other or entered into an agreement to prevent competition — but also "the necessary evidentiary facts to support those conclusions." Put differently, the complaint must answer the basic questions of "who, did what, to whom (or with whom), where, and when?" *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047–48 (9th Cir. 2008). Plaintiff has not met these requirements.

1. SHERMAN ACT CLAIM.

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. 1. A Section 1 claim requires (1) a contract, combination, or conspiracy (2) intended to unreasonably restrain or harm trade (3) that actually injures competition and (4) harms the plaintiff via the anticompetitive conduct. *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1129 (9th Cir. 2015); *see also Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1178 (9th Cir. 2016) (citing *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 189–90 (2010)).

For a conspiracy of the scale alleged by this complaint, one would expect at least some evidentiary facts to have been located and pled. For example, a former NFL employee might have come forward to counsel, at least as a confidential witness, to provide the details of "who, did what, to whom (or with whom), where, and when" regarding some actual conspiratorial meeting, communication, or agreement. The complaint fails to allege anything of the sort and instead rests on assertions of parallel conduct anchored in rhetoric and conclusory statements.

A. No Allegations of Parallel Conduct with Plus Factors.

To state a claim under Section 1, the complaint must contain sufficient factual matter, taken as true, to suggest that an agreement was made. Mere allegations of parallel conduct that "could just as well be independent action" and bare assertions of conspiracy do not suffice. *Twombly*, 550 U.S. at 556–57. In our circuit, courts distinguish permissible parallel conduct from impermissible conspiracy by looking for "plus factors," *i.e.*, "economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action." *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1193–94 (9th Cir. 2015). Put differently, because plaintiff relies solely on circumstantial evidence of conspiracy, she must allege facts tending to exclude the possibility that defendants acted independently. *See In re Citric Acid Litig.*, 191 F.3d 1090, 1096 (9th Cir. 1999).

Applying the foregoing standards here, this order concludes that the complaint fails to state a plausible claim under Section 1 of the Sherman Act.

(1) Attendance at Annual Events.

The complaint alleges that senior executives in the NFL gathered at "various meetings" throughout the year, including "annual NFL owner meetings, the NFL scouting combine, the NFL Draft, the Super Bowl, the Pro Bowl, trade shows, and even conference calls" (Dkt. No. 1 ¶ 79). But this allegation, taken as true, supports no inference of nefarious purpose or unlawful conduct. Attendance at the aforementioned annual events would have been consistent with simply running the business of the NFL and its member teams, a perfectly legitimate endeavor.

In *Citric Acid*, our court of appeals refused to infer conspiracy from the mere fact that trade associations gathered information about pricing and competition because such activities constituted "standard fare" and served "legitimate functions" in the industry. 191 F.3d at 1098. Similarly, this order declines to infer conspiracy from the mere fact that defendants attended annual events that constitute standard fare and serve legitimate functions in the NFL. Plaintiff attempts to distinguish *Citric Acid* on the basis that it considered a motion for summary judgment rather than a motion to dismiss but fails to explain how this affects the relevant principle. The complaint's allegations here, taken as true, are analogous to the evidence in *Citric Acid*. Both fail to support any plausible inference of conspiracy.

Both sides cite two previous decisions by the undersigned judge to guide the analysis here. One dismissed an antitrust claim that pled "at most that defendants had the opportunity to [meet and agree to fix prices] because they attended many of the same meetings," and "then attempt[ed] to correlate the release of products with those meetings." *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007). The other declined to dismiss an antitrust complaint that alleged more than "mere participation in trade-organization meetings." *B & R Supermarket, Inc. v. Visa, Inc.*, No. C 16-01150 WHA, 2016 WL 5725010, at *8 (N.D. Cal. Sept. 30, 2016).

Significantly, in *B & R* the operative complaint alleged *direct* evidence of a conspiracy via certain admissions from the defendants. That operative complaint also alleged (1) that in implementing the alleged conspiracy, the defendants departed from their preexisting pattern of conduct; (2) a "clear common motive to conspire" between defendants; (3) that the defendants exhibited an "absence of competitive behavior" despite having specific incentive to compete; and (4) that specific employees of each defendant attended a conference featuring panels with descriptive titles that seemed consistent with the alleged conspiracy. These "plus factors," considered as a whole and together with direct evidence of conspiracy, sufficed to raise a plausible suggestion of collusion rather than mere parallel conduct. *Id.* at *6–9.

Plaintiff argues that *Graphics Processing Units* is distinguishable because the complaint here "is not pleading mere opportunity" to conspire and that, like the complaint in *B & R*, the complaint here pleads "*specific* meetings where *specific* (though unnamed) *persons* expressly agreed to engage in very specific activities in an effort to collectively suppress wages of a specific set of their respective employees" (Dkt. No. 21 at 12). This order disagrees.

Unlike the complaint in *B & R*, the complaint here shows no *direct* evidence of conspiracy, no departure from any preexisting pattern of conduct (nor could it, since plaintiff describes the conspiracy as a continuing phenomenon with no specific beginning (Dkt. No. 1 ¶ 86)), no "clear common motive to conspire" between defendants, and no unusual "absence of competitive behavior." The complaint alleges a broad range of routine annual events in the NFL but fails to allege that any *specific* meeting set the stage for conspiracy, much less factual details — like the conference panel titles in *B & R* — tending to support the inference of unlawful conduct therein. In short, the complaint here simply does not allege the type of direct and circumstantial evidence that, taken as a whole, sufficed to state a claim for relief in *B & R*.

Plaintiff contends the complaint "specifically alleges more than joint participation; it alleges Defendants entered into an express agreement or series of agreements to eliminate competition among them" (Dkt. No. 21 at 12). The three paragraphs of the complaint that plaintiff cites in support of the foregoing, however, contain only allegations of parallel conduct and conclusory allegations of conspiracy (*see* Dkt. No. 1 ¶¶ 1–2, 79). As explained, parallel conduct alone does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. *Graphics Processing Units*, 527 F. Supp. 2d at 1024 (quoting *Twombly*, 550 U.S. at 556–57).

Plaintiff also points out that the complaint alleges "the NFL exercises significant control over the individual teams" by requiring them to file cheerleader contracts with the NFL (Dkt. No. 21 at 13). But plaintiff does not suggest that either the NFL's control over its member teams or its contract-filing requirement strays from the NFL's legitimate operations. For all the complaint shows, the filing requirement might actually have been intended to protect employees. Plaintiff simply describes these operations as an "enforcement mechanism" for conspiracy — just as she describes legitimate NFL meetings and events as opportunities to conspire. Both descriptions are rhetorical spin that beg the most important question, namely, whether there was any conspiracy to begin with. On that key question, the complaint lacks the factual allegations demanded by *Twombly*.

(2) Payment of Low, Flat Wages.

The complaint alleges specific facts concerning cheerleader wages only as to the Raiders, Buccaneers, Bengals, and Bills (but not as to plaintiff's own former employer, the 49ers). Even among those four examples, however, the conduct alleged is hardly parallel. According to the complaint, the Raiders paid their cheerleaders a flat fee of $125 per game, the

Buccaneers paid their cheerleaders a flat fee of $100 per game, the Bengals paid their cheerleaders a flat fee of $90 per game, and the Bills did not pay their cheerleaders for games at all. And while the Raiders and the Bengals did not pay their cheerleaders for community events, the Buccaneers and the Bills sometimes did (Dkt. No. 1 ¶ 87). These admissions of non-parallel conduct undercut the very theory asserted by the complaint. Plaintiff's attempts to gloss over the differences in conduct between defendants are unavailing.

First, plaintiff claims "the difference in ranges of compensation is *de minimis*," and that the difference between the pay of a Raiders cheerleader and that of a Buccaneers cheerleader is "0.8 percent" (Dkt. No. 21 at 13). This turns out to be counterfeit logic. According to the complaint itself, the difference is between $125 per game and $100 per game — actually 20 or 25 percent. To take an even stronger example, according to the complaint, the Raiders paid their cheerleaders $125 per game while the Bills paid their cheerleaders *zero* dollars per game. These differences make plaintiff's theory implausible. *See Graphics Processing Units*, 527 F. Supp. 2d at 1022 (finding allegations of parallel conduct less convincing where defendants accused of price fixing released products with a difference in price of just twenty dollars).

Second, plaintiff argues that these differences are "inconsequential" when considered against what the complaint claims cheerleaders *should* have been paid, *i.e.*, $26,000 to $100,000 per year, because her theory is not that defendants "agreed to pay the same" but that they "agreed to pay illegally, and to keep wages down" (Dkt. No. 21 at 14). Even construing plaintiff's theory this way, however, fails to resolve all inconsistencies between the theory and the complaint's own allegations. For example, the complaint asserts that defendants conspired to pay cheerleaders a low, flat wage per game. This is inconsistent with its allegation that the Bills paid their cheerleaders *nothing* for games. The complaint also asserts that defendants conspired to not pay cheerleaders for community events. This is inconsistent with its allegation that the Buccaneers and the Bills sometimes paid their cheerleaders for such events.

The closest the complaint comes to showing parallel conduct is its general allegation that no NFL team pays cheerleaders for rehearsals (*id.* at 13). Plaintiff's broad theory of conspiracy, however, does not turn merely on rehearsals. Rather, it is that defendants agreed to

United States District Court
For the Northern District of California

a comprehensive scheme to suppress cheerleader wages on multiple fronts, including for NFL games, community events, and photo shoots. As to the majority of plaintiff's accusations under this supposed umbrella scheme, the complaint either lacks sufficient supporting factual allegations or alleges facts tending to weigh *against* a finding of conspiracy. In light of these shortcomings and inconsistencies, it will take more than a mere allegation that no team pays cheerleaders for rehearsals to nudge the overall conspiracy across the line from *conceivable* to *plausible*. *See Twombly*, 550 U.S. at 570; *see also In re Graphics*, 527 F. Supp. 2d at 1022.

In summary, the complaint's wage-related allegations barely show minimal parallel conduct and fail to show plus factors that would support an inference of conspiracy. As the undersigned judge has previously observed in another antitrust case, allegations of not-quite parallel conduct "could possibly be indicative of a conspiracy but fall short of unusual, lockstep pricing behavior . . . competitive market forces will tend to drive the prices of like goods to the same level, so like prices on like products are not, standing alone, sufficient to implicate price-fixing." *In re Graphics*, 527 F. Supp. 2d at 1022. So too here.

(3) Refraining from Poaching.

The complaint generally describes a non-poaching agreement between defendants as a key component of the alleged conspiracy to suppress cheerleader wages (*see* Dkt. No. 1 ¶ 2). This is again based only on assertions of parallel conduct, *i.e.*, that NFL teams have not attempted to poach cheerleaders from each other. Significantly, however, the complaint itself avoids alleging that poaching of NFL cheerleaders would have been the norm in a free market. In other words, for all the complaint shows, NFL teams might have had little or no desire or need to poach each other's cheerleaders anyway. The complaint does not allege, for example, that any NFL team has ever expressed interest in recruiting a competing team's cheerleader. Nor is there any allegation of a shortage of cheerleading services such that NFL teams would have needed to poach in order to field a cheerleading squad. On the contrary, the complaint actually alleges that cheerleaders "were told . . . they were lucky to be chosen, should be grateful and could be quickly replaced" (*id.* ¶ 98). There is no need to poach for positions where individuals can be "quickly replaced."

The opposition brief adds, "in a free market, competitive businesses compete with employees by trying to hire the highest performing employees from competitors." Thus, the opposition argues, a conspiracy is the only plausible explanation for the absence of cheerleader poaching within the NFL (*see* Dkt. No. 21 at 15–16). This argument provides the sole basis for plaintiff's assertion that the absence of poaching among defendants is a product of unlawful and anticompetitive behavior. Arguments in a brief, however, are not a substitute for well-pled factual allegations in the actual complaint.

(4) Prohibitions on Seeking Employment and Discussing Earnings.

The complaint contains several conclusory assertions that defendants agreed to prohibit cheerleaders from seeking employment with other professional cheerleading teams (Dkt. No. 1 ¶¶ 2, 78, 80) and from discussing their earnings with each other (*id.* ¶¶ 2, 80). But the complaint contains no factual allegations actually answering the basic questions of "who, did what, to whom (or with whom), where, and when" as to these prohibitions imposed on cheerleaders — even though cheerleaders like Kelsey K. should have first-hand knowledge of and be able to plead specific factual allegations about the prohibitions. *See Kendall*, 518 F.3d at 1047–48. Given the absence of such factual allegations, the complaint does not support a plausible inference that defendants are liable for any unlawful agreement to prohibit cheerleaders from seeking other employment and discussing their earnings.

B. No Allegations of Injury to Plaintiff.

Apart from failing to plead factual allegations of parallel conduct with plus factors sufficient to show conspiracy, the complaint also fails to plead the necessary element of injury to plaintiff Kelsey K. herself. Although plaintiff purports to represent a class, this is not yet a class action. At this stage, what matters is whether plaintiff — who worked as a cheerleader for the 49ers — can state a plausible claim for relief on her own behalf. Yet the complaint is silent on plaintiff's own experience as a cheerleader except to say (Dkt. No. 1 ¶ 7):

> 7. Plaintiff [is], and at all times mentioned herein was, a resident of Santa Clara County, State of California, and is over 18 years of age. [Plaintiff] is a former employee of Defendant 49ers. [Plaintiff] worked for the 49ers from approximately July 2013 until February 2014 as a female athlete, colloquially known as a "cheerleader", on the 49ers "Gold Rush Girls" dance team.

> [Plaintiff] is a trained well-rounded and multi-disciplinary dancer who spent nearly two decades training to be a ballet dancer before being employed as a female athlete with the 49ers. [Plaintiff] was injured in her business or property by reason of the violations alleged herein.

Only the last sentence of the foregoing paragraph even hints at plaintiff's individual claim for relief, and it is utterly conclusory. To survive dismissal, the complaint needs factual allegations that state a plausible claim for relief specifically as to plaintiff Kelsey K. Generalized accusations of wrongdoing against cheerleaders as a whole do not suffice. *See Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1200 (9th Cir. 2012) (to state a Section 1 claim, a plaintiff must allege *both* that the defendant's behavior is anticompetitive *and* that the plaintiff has been injured by the anticompetitive aspect of the practice under scrutiny).

In summary, the complaint fails to state a claim for relief under Section 1 of the Sherman Act because it does not allege facts supporting a plausible inference that defendants entered into any agreement or conspiracy to unlawfully restrain trade, or facts showing that plaintiff herself suffered any harm as a result of defendants' anticompetitive conduct.

2. CARTWRIGHT ACT CLAIM.

Both sides agree that plaintiff's federal and state law antitrust claims are predicated on the same allegations of conspiracy (*see* Dkt. Nos. 16 at 11; 21 at 17). The complaint therefore fails to plausibly allege conspiracy under the Cartwright Act for the same reasons that it fails to do so under the Sherman Act. *See Graphics Processing Units*, 527 F. Supp. 2d at 1025.

Separately, defendants argue that, as a matter of law, the Cartwright Act does not apply to the type of conduct alleged in the complaint. This order reaches the issue because it bears on the question of whether leave to amend would be futile.

In *Partee v. San Diego Chargers Football Co.*, the California Supreme Court reversed a trial court's finding that certain NFL "operating rules" violated the Cartwright Act, holding that "the Cartwright Act is not applicable to the interstate activities of professional football." 34 Cal.3d 378, 380 (1983). Plaintiff posits that *Partee* is "limited to NFL rules promoting on-field athletic competition" and thus does not apply to cheerleaders, who do not "compete" on the field. In support of her position, plaintiff misleadingly quotes *Partee* as granting an exemption to the Cartwright Act "to promote athletic competition by providing a means of keeping the teams on a par with each other and to foster the business success of the member teams" (Dkt. No. 21 at 17–18 (quotation omitted)).

Actually, the pertinent passage reads:

> To promote athletic competition by providing a means of keeping the teams on a par with each other and to foster the business success of the member teams, the NFL has certain operating rules, many of which are embodied in the NFL constitution and bylaws. Partee's antitrust action concerns five of these operating rules [found] to violate California antitrust laws.

Partee, 34 Cal.3d at 381. Contrary to plaintiff, *Partee* did not grant an exemption to the Cartwright Act solely for the purpose of promoting on-field competition in professional football. Rather, as the decision itself makes clear, the rationale behind the exemption is that the nationwide league structure of professional football requires nationally uniform regulation such that "the burden on interstate commerce outweighs the state interests in applying state antitrust laws" to that structure. *Id.* at 385.

In short, interstate commerce, not on-field competition, is the driving force behind *Partee*. And interstate commerce, unlike on-field competition, may encompass the NFL's employment of cheerleaders. Indeed, the complaint accuses the NFL of anticompetitive conduct based in part on a contract-filing requirement in its constitution and bylaws — precisely the kind of "operating rule" *Partee* sought to exempt. Possibly, *Partee* would compel rejection of plaintiff's Cartwright Act claim here.

That being said, *Partee* involved football players, not cheerleaders, and considered different factual allegations of anticompetitive conduct than those raised by plaintiff here. The question of whether, under these particular circumstances, the burden on interstate commerce would outweigh California's interests in applying the Cartwright Act to defendants' alleged conduct is therefore a fact-intensive inquiry not susceptible to adjudication based solely on plaintiff's complaint (which, as stated, provides sparse factual allegations). *See Dang v. San Francisco Forty Niners, Ltd.*, No. 5:12–CV–05481–EJD, 2014 WL 4275627, at *4–5 (N.D. Cal. Aug. 29, 2014) (Judge Edward Davila). Accordingly, this order concludes that leave to amend would not necessarily be futile on account of *Partee*. This is without prejudice to defendants reviving this issue at a later time with the benefit of adequate factual allegations or a factual record that would permit the full analysis required by *Partee*.

* * *

In the event that defendants' motion to dismiss is granted, plaintiff requests "at least 120 days to conduct discovery" before she amends her complaint (Dkt. No. 21 at 19). (No specific discovery is itemized in the request.) Defendants respond that discovery should be denied because the complaint is "so weak that any discovery at all would be a mere fishing expedition" (Dkt. No. 22 at 6). As *Twombly* cautioned, "proceeding to antitrust discovery can be expensive," and "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." 550 U.S. at 558–59 (citations omitted). To avoid the potentially monumental expenses of antitrust discovery here until a plausible claim for relief is pled, no discovery will be allowed for now.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is **GRANTED**. Plaintiff may move to file an amended complaint by **JUNE 15 AT NOON**. Any such motion should include as an exhibit a redlined version of the proposed amended complaint that clearly identifies all changes from the initial complaint. This order has illuminated certain items missing from the complaint. But it will not necessarily be enough to add a sentence parroting each missing item identified herein. Depending on context, more details may be necessary to show "who, did what, to whom (or with whom), where, and when," especially for facts that are within the personal knowledge of cheerleaders like plaintiff or facts that one would ordinarily expect to be uncovered by reasonable pre-filing investigation. In the proposed amended complaint, plaintiff should be sure to plead her best case.

IT IS SO ORDERED.

Dated: May 25, 2017.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

757 Fed.Appx. 524
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

KELSEY K., Individually and on Behalf of All Others Similarly Situated, Plaintiff-Appellant,
v.
NFL ENTERPRISES, LLC; et al., Defendants-Appellees.

No. 17-16508
|
Submitted December 19, 2018[*] San Francisco, California
|
FILED DECEMBER 21, 2018

Synopsis
Background: Professional football cheerleader brought putative class action against football teams for violations of Sherman Act and California's Cartwright Act based on alleged conspiracy to suppress cheerleader wages and prevent cheerleader recruitment. The United States District Court for the Northern District of California, William Alsup, J., dismissed action for failure to state claim and denied discovery, 254 F.Supp.3d 1140, and denied leave to amend as futile, 2017 WL 3115169. Cheerleader appealed.

Holdings: The Court of Appeals held that:

cheerleader failed to state Sherman Act claim;

cheerleader failed to state Cartwright Act claim, as requirements to plead such claim were patterned after Sherman Act; and

denial of discovery had been proper.

Affirmed.

Attorneys and Law Firms

***525** Drexel Andrew Bradshaw, Esquire, Bradshaw & Associates, P.C., San Francisco, CA, for Plaintiff-Appellant.

Derek Ludwin, Covington & Burling LLP, Washington, DC, Sonya D. Winner, Covington & Burling, LLP, San Francisco, CA, for Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California, William Alsup, District Judge, Presiding, D.C. No. 3:17-cv-00496-WHA

Before: CALLAHAN, N.R. SMITH, and MURGUIA, Circuit Judges.

MEMORANDUM[**]

Plaintiff-Appellant Kelsey K. was employed as a cheerleader for the San Francisco 49ers' cheerleading squad, the Gold Rush Girls, from May or July 2013 through February 2014.[1] Kelsey filed a complaint alleging violations of the Sherman Act, 15 U.S.C. § 1, and California's Cartwright Act, Cal. Bus. & Prof. Code § 16720, against twenty-seven of the National Football League teams (the "NFL Member Teams") who, during the proposed class period, employed cheerleaders, and seeking certification of a class of current and former NFL cheerleaders allegedly harmed by those violations. Kelsey alleges that the NFL Member Teams conspired to suppress cheerleaders' wages and to prevent cheerleader recruitment. Kelsey appeals the district court's: (1) dismissal of the complaint for failure to state a claim; (2) denial of leave to amend as futile; and (3) denial of discovery. We have ***526** jurisdiction under 28 U.S.C. § 1291, and we affirm the district court's rulings.[2]

A dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *AE ex rel. Hernandez v. Cty. of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012). Denial of leave to amend is improper unless, upon de novo review, it is clear that the complaint could not be saved by any amendment. *Id.* Discovery rulings are reviewed for abuse of discretion. *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000, 1009 (9th Cir. 2004).

Section 1 of the Sherman Act prohibits unreasonable restraints on trade. *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988). To prove *per se* illegality, a plaintiff must allege "evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce ... ; (3) which actually injures competition." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008) (citations omitted).

Kelsey's complaint alleges the existence of two agreements amongst the defendants that she argues are *per se* illegal, namely a no-poaching agreement and a wage fixing agreement. Kelsey fails to plausibly allege *per se* illegality of either agreement. Her assertions of direct evidence are deficient for two reasons.

First, Kelsey fails to plausibly allege the existence of an agreement or conspiracy to restrain trade. Her allegations largely center on an anti-tampering provision that has been in the NFL's constitution and bylaws for decades (which broadly prevents NFL teams from tampering with other teams' employees while they are under contract), and the fact that NFL executives and team owners re-ratified that provision annually. However, those allegations "just as easily suggest rational, legal business behavior," as they do the existence of an agreement among the defendants to restrain trade. *Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos.*, 795 F.3d 1124, 1130 (9th Cir. 2015) (citations omitted).

Second, Kelsey failed to allege any facts showing that the NFL Member Teams intended to harm or restrain trade. Kelsey asserts that NFL executives' meeting at annual events, including the Super Bowl, evince conspiratorial intent. However, the mere fact that these meetings occurred, at most, shows opportunity, not intent. These allegations, again, suggest rational, legal business behavior, not a violation of the antitrust laws. *Id.*

Similarly, Kelsey's assertions of circumstantial evidence are inadequate to sustain a claim for relief. To plead a conspiracy through circumstantial evidentiary facts, a plaintiff must allege both (i) actual parallel conduct and (ii) additional "plus factors" to "nudge[ ] the[ ] claims across the line from conceivable to plausible[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "[P]lus factors are economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action." ***527** *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1194 (9th Cir. 2015) (citation omitted).

Kelsey alleges that during her employment as a cheerleader for the 49ers, she was paid $125.00 per game, not paid for time spent rehearsing, and was paid for working at mandatory community outreach events only in limited circumstances. She alleges the "low, flat fee" was parallel to that paid by four other teams, and asserts several "plus factors." However, her alleged "plus factors" are largely consistent with unilateral conduct rather than explicitly coordinated action among the teams. Without something more plausibly asserting "a meeting of the minds," *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955, Kelsey has not alleged a conspiracy or agreement to restrain trade.

Kelsey's claim under California's Cartwright Act fails for the same reasons because the requirements to plead a claim under California's Cartwright Act are "patterned after section 1 of the Sherman Act." *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1476–77 (9th Cir. 1986) (citations omitted). Accordingly, we affirm the district court's ruling that the complaint fails to plausibly allege conspiracy under the Cartwright Act.

Furthermore, the amendments that Kelsey proposes would not cure these defects. *See Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 725–26 (9th Cir. 2000).[3] Accordingly, the district court did not abuse its discretion when it denied leave to amend.

Finally, the district court properly denied discovery. The Supreme Court in *Twombly* noted that "proceeding to antitrust discovery can be expensive" and prescribed that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." 550 U.S. at 558, 127 S.Ct. 1955 (citations omitted). Here, the district court's conclusion that no plausible claim for relief has been pled justifies the denial of discovery "to avoid the potentially enormous expense of [antitrust] discovery" cautioned against in *Twombly*. *Id.* at 559, 127 S.Ct. 1955. Thus, we affirm the district court's denial of discovery.

AFFIRMED.

All Citations

757 Fed.Appx. 524, 2019-1 Trade Cases P 80,632

Footnotes

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1 Kelsey's complaint alleges both date ranges.

2 The facts and procedural history are familiar to the parties and are restated here only as necessary to resolve the issues.

3 Kelsey also suggests that leave to amend should be granted to permit her an opportunity to include facts sufficient to allow her claims to be analyzed under the rule of reason. Kelsey concedes that her present complaint may not allege sufficient facts to establish liability under the rule of reason. As allegations relevant to a rule of reason analysis could have been pled but were not, and, as no explanation has been given for that omission, there is no merit in this suggestion.

2022 WL 111126
United States District Court, D. Utah, Central Division.

MITCHELL INTERNATIONAL, INC., Plaintiff and Counterclaim Defendant,
v.
HEALTHLIFT PHARMACY SERVICES, LLC; Brian Anderson; Natalie Neil; and Joseph Noll, Defendants and Counterclaim Plaintiffs.

Case No. 2:19-cv-000637
|
Signed 01/12/2022

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MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR LIMITED STAY OF DISCOVERY RE: ANTITRUST CLAIMS

Daphne A. Oberg, United States Magistrate Judge

***1** Before the court is Plaintiff Mitchell International, Inc.'s ("Mitchell") Motion for Limited Stay of Discovery Re: Antitrust Claims, ("Mot.," Doc. No. 246). Mitchell seeks to stay discovery on the counterclaims brought by Defendants HealthLift Pharmacy Services, LLC ("HealthLift"), Brian Anderson, Natalie Neil, and Joseph Noll (collectively, the "HealthLift Defendants") under the Sherman Act and Clayton Act (the "antitrust claims") until the court rules on Mitchell's pending motion to dismiss these claims, (Doc. No. 106). The HealthLift Defendants oppose a stay of antitrust discovery. (HealthLift Defendants' Response to Mitchell's Renewed Mot. to Stay Antitrust Disc. ("Opp'n"), Doc. No. 248.) For the reasons explained below, the court grants the motion and stays discovery on the antitrust claims.

BACKGROUND

Mitchell and HealthLift are competing companies which provide pharmacy benefit management and revenue cycle management services to insurance companies and pharmacies. (*See* Compl. ¶¶ 17–20, Doc. No. 2; Am. Countercl. ¶ 58, Doc. No. 99.) Mr. Anderson, Ms. Neil and Mr. Noll left their employment with Mitchell in 2017 and created HealthLift in 2018. (*See* Compl. ¶¶ 60, 75, 91, Doc. No. 2; Am. Countercl. ¶ 57, Doc. No. 99.) Mitchell then filed this action against the HealthLift Defendants on September 9, 2019, asserting claims including breach of contract, tortious interference with economic relations, misappropriation of trade secrets, and civil conspiracy. (Compl. ¶¶ 126–70, Doc. No. 2.) The parties served initial disclosures in November of 2019 and proceeded with discovery. (*See* Scheduling Order, Doc. No. 44.) The HealthLift Defendants brought counterclaims against Mitchell in May 2020 for breach of contract, defamation, conversion, injurious falsehood, interference with economic relations, unfair competition, and abuse of process. (*See* Defs.' Answer and Countercl., Doc. No. 73.) They amended their counterclaims to include the antitrust claims at issue on July 10, 2020. (*See* Defs.' Am. Countercl. ¶¶ 421–51, Doc. No. 99.)

On August 10, 2020, Mitchell moved to dismiss all the HealthLift Defendants' counterclaims. (Mot. to Dismiss Defs.' Am. Countercl., Doc. No. 106.) On March 23, 2021, the court held a hearing on the motion and took it under advisement. (*See* Minute Entry, Doc. No. 209.) Two weeks later, Mitchell filed its first motion to stay discovery on the antitrust claims. (Doc. No. 215.) On April 23, 2021, the court stayed the case at the parties' joint request to allow them to pursue settlement discussions. (Order Granting Stipulated Mot. for Temp. Stay of Litigation, Doc. No. 223.) The court terminated Mitchell's motion to stay antitrust discovery, with leave to refile it if the stay was lifted. (*Id.* at 1.) After several extensions, the stay expired on November 28, 2021, with the parties unable to reach a settlement. (*See* Docket Text Order (Dec. 1, 2021), Doc. No. 240; Post-Stay Status Report, Doc. No. 241.) On December 15, 2021, the parties submitted alternative proposals for an amended scheduling order, (Doc. Nos. 244 & 245), and Mitchell filed the renewed motion to stay antitrust discovery now before the court, (Doc. No. 246).

LEGAL STANDARD

***2** District courts have "broad discretion to stay discovery to protect the parties from undue burden and expense and to promote judicial economy." *Martin v. SGT Inc.*, No. 2:19-cv-00289, 2019 WL 12043488 at *1, 2019 U.S. Dist. LEXIS 237658 at *3 (D. Utah Aug. 21, 2019) (unpublished). But "[b]ecause 'the right to proceed in court should not be denied except under the most extreme circumstances,' the movant seeking a stay 'must make a strong showing of necessity[.]' " *Classic Aviation Holdings LLC v. Harrower*, No. 2:20-cv-00824, 2021 WL 633587 at *2, 2021 U.S. Dist. LEXIS 31365 at *3 (D. Utah. Feb. 8, 2021) (unpublished) (quoting *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983)). " '[I]f even a fair possibility exists that the stay would damage another party,' the movant 'must demonstrate a clear case of hardship or inequity.' " *Id.* (quoting *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 987 (10th Cir. 2000)). The party seeking a stay "generally faces a difficult burden." *Id.* (internal quotation marks omitted).

In deciding whether to grant a motion to stay pending resolution of a dispositive motion, courts consider factors such as:

> (1) plaintiff's interests in proceeding expeditiously with the civil action and the potential prejudice to plaintiff of a delay; (2) the burden on the defendants; (3) the convenience to the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest.

String Cheese Incident, LLC v. Stylus Shows, Inc., 2006 WL 1196956, at *——, 2006 U.S. Dist. LEXIS 97388, at *4–5 (D. Colo. Mar. 30, 2006) (unpublished); *see also Martin*, 2019 WL 12043488, at *1, 2019 U.S. Dist. LEXIS 237658, at *3 (applying these factors to a motion to stay discovery); *In re Broiler Chicken Grower Litig.*, No. 6:17-cv-00033, 2017 WL 3841912, 2017 U.S. Dist. LEXIS 142069 (E.D. Okla. Sept. 1, 2017) (unpublished) (same).

DISCUSSION

Mitchell argues antitrust cases are particularly suited for temporary stays pending dispositive motions, due to the costly and burdensome nature of discovery in such cases. (Mot. 2–5, Doc. No. 246.) Mitchell asserts the antitrust discovery sought by the HealthLift Defendants is "incredibly broad," including requests such as transaction-level data for every sale for the last eleven years and interrogatories seeking Mitchell's business strategies, projects, and plans for "essentially all of Mitchell's business operations since 2010." (*Id.* at 5–6.) Mitchell argues this discovery "is unduly burdensome and would impose a clear case of hardship on Mitchell," particularly where it could be rendered unnecessary by the ruling on motion to dismiss. (*Id.* at 6.) In support of these arguments, Mitchell attached the HealthLift Defendants' Second Set of Discovery Requests and Notice of 30(b)(6) Deposition. (*See* Exs. A & B to Mot., Doc. Nos. 246-1 & 246-2.)

In opposition, the HealthLift Defendants argue a "one-sided" stay of antitrust discovery would be inappropriate at this stage, where discovery has been active for more than a year and Mitchell would be permitted to proceed with its own discovery. (Opp'n, Doc. No. 248 at 7.) They contend delaying discovery on some claims but not others would cause prejudice by unnecessarily extending the discovery process and multiplying their costs. (*Id.* at 10.) The HealthLift Defendants also argue a stay would be impractical because their antitrust claims and non-antitrust claims are based on same underlying conduct, rendering discovery on these claims difficult to tease apart. (*Id.* at 8–9.) Finally, they argue Mitchell has not demonstrated hardship or inequity. (*Id.* at 10–11.)

As the Supreme Court has recognized, antitrust discovery is "a sprawling, costly, and hugely time-consuming undertaking." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560 n.6, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *see also id.* at 558, 127 S.Ct. 1955 ("[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." (citation omitted)). Because of this, numerous courts have concluded discovery should be stayed in antitrust cases while motions to dismiss are pending, at least where the party seeking a stay demonstrates the discovery would be burdensome. *See, e.g.*, *In re Broiler Chicken Grower Litig.*, 2017 WL 3841912, at *——, 2017 U.S. Dist. LEXIS 142069, at *19 (staying discovery in an antitrust case based on a pending motion to dismiss); *Top Rank, Inc. v. Haymon*, No. CV 15-4961, 2015 WL 9952887, at *2, 2015 U.S. Dist. LEXIS 164671, at *5 (C.D. Cal. Sept. 17, 2015) (unpublished) ("Staying discovery in antitrust cases pending the resolution of a motion to dismiss may be particularly appropriate."); *Nexstar Broad., Inc. v. Granite Broad. Corp.*, No. 1:11-cv-249, 2011 WL 4345432 at *3, 2011 U.S. Dist. LEXIS 105056 at *6 (N.D. Ind. Sept. 15, 2011) (unpublished) ("Since *Twombly*, Seventh Circuit courts have taken this concern seriously, staying discovery in antitrust litigation and other complex cases."); *In re Graphics Processing Units Antitrust Litig.*, No. C 06-07417, 2007 WL 2127577, at *4, 2007 U.S. Dist. LEXIS 57982, at *23 (N.D. Cal. July 24, 2007) (unpublished) ("[T]o allow antitrust discovery prior to sustaining a complaint would defeat one of the rationales of *Twombly*, at least when the discovery would be burdensome."); *In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308, 321 (N.D. Cal. 2007) ("[S]taying discovery may be particularly appropriate in antitrust cases, where discovery tends to be broad, time-consuming and expensive."); *In re Copper Tubing Litig.*, No. 04-2771, 2006 WL 8434911 at *4, 2006 U.S. Dist. LEXIS 102875 at *16 (W.D. Tenn. Oct. 3, 2006) (unpublished) ("[A] stay of discovery is particularly appropriate in complex antitrust cases when motions to dismiss are pending.").

***3** Considering these concerns and the relevant factors set forth above, Mitchell has met its burden in showing a stay of antitrust discovery is warranted here. Mitchell has demonstrated the antitrust discovery sought by the HealthLift Defendants would be highly burdensome. The HealthLift Defendants' discovery requests attached to Mitchell's motion include interrogatories and eighty-eight requests for production of documents ("RFPs").[1] On their face, the discovery requests are expansive, seeking:

- transaction-level data for every sale of Mitchell's "Relevant Product" from 2010 to the present (RFP 76);
- all documents related to Mitchell's acquisitions of and mergers with twelve other entities from 2012 to 2019 (RFPs 60–61, 63–72);
- all documents relating to the market for any "Relevant Product" (RFP 80);
- all "strategy plans or projects related to mergers and acquisitions as a competitive strategy" (Interrogatory 23); and
- all "strategy plans or projects related to the market for Provider-Facing Services, the market for Insurer-Facing Services, or the relationship between the two markets" (Interrogatory 24).

(Ex. A to Mot., Defs.' Second Set of Disc. Reqs. 9–16, Doc. No. 246-1.) According to Mitchell, these requests cover "essentially all of Mitchell's business operations since 2010," (Mot. 6, Doc. No. 246)— a characterization which the HealthLift Defendants do not contest in their opposition. The topics listed in the Rule 30(b)(6) notice are similarly expansive, covering "sales of the Relevant Products" without limitation, and all competitors in the markets for the "Relevant Products" in the United States. (Ex. B to Mot., Def. HealthLift Pharmacy Services, LLC's Notice of 30(b)(6) Dep. 5–6, Doc. No. 246-2.) Mitchell has adequately demonstrated the discovery sought is burdensome based on the broad scope of the requests.[2]

Further, this discovery may be rendered entirely unnecessary if the antitrust claims are dismissed. These requests reach far beyond the scope of discovery necessary for the parties' other claims—which focus on the contractual relationships and competitive activity between the parties themselves. Although the HealthLift Defendants argue it would be difficult to disentangle antitrust discovery from other discovery, they do not explain how the expansive requests described above would be relevant to their other claims and defenses.[3] Thus, permitting the HealthLift Defendants to proceed with antitrust discovery would greatly expand the scope of discovery in this case, even though the viability of the antitrust claims has not yet been determined. In these circumstances, the concerns set forth in *Twombly* militate against allowing burdensome antitrust discovery to proceed before a ruling on the motion to dismiss.

***4** The burden on Mitchell of proceeding with antitrust discovery outweighs the HealthLift Defendants' interest in proceeding expeditiously with such discovery and any potential prejudice to the HealthLift Defendants from a delay. Contrary to the HealthLift Defendants' argument, the stay is not one-sided. All parties (not only Mitchell) are free to proceed with discovery on their other claims and defenses. Further, the motion to dismiss is fully briefed and the court has already held a hearing on it, so any delay is unlikely to be substantial. Any risk of duplication of efforts or additional costs if antitrust discovery proceeds after other discovery is far outweighed by the burden of proceeding with such discovery before the antitrust claims are deemed viable.

As the HealthLift Defendants note, this case is unusual in that the stay is sought after discovery has already commenced rather than at the outset of the case. However, this is because the HealthLift Defendants did not add antitrust claims to their counterclaim until July 2020, after discovery had been underway for more than seven months. Mitchell promptly moved to dismiss the antitrust claims a month later. While

Mitchell did not move to stay discovery on the antitrust claims until April 9, 2021, there is no indication the HealthLift Defendants pursued discovery on these claims before until shortly before the April motion was filed. (*See* Ex. A to Mot., Defs.' Second Set of Disc. Reqs., Doc. No. 246-1 (certifying the requests were served on March 18, 2021); Ex. B to Mot., Defs.' Notices of 30(b)(6) Dep., Doc. No. 246-2 (certifying the notices were served on April 6, 2021).) From this record, it appears Mitchell sought a stay promptly—as soon as the HealthLift Defendants began pursuing antitrust discovery.[4] *Cf.* *Merrill v. Scottsdale Ins. Co.*, No. 2:20-cv-00064, 2021 WL 2947587 at *1, 2021 U.S. Dist. LEXIS 133346 at *2 (D. Utah Mar. 1, 2021) (unpublished) (denying a motion to stay all discovery for a dispositive motion, where the dispositive motion was filed months before and the parties had "actively engaged in discovery during the intervening time period"). Thus, the timing of the motion to stay is a result of when the HealthLift Defendants began pursuing antitrust discovery, and not any delay by Mitchell.

Turning to the remaining factors, a stay of antitrust discovery is also in the interest of judicial economy. This litigation has already involved a number of discovery disputes requiring court intervention. Based on this history and the scope of the antitrust discovery sought, such discovery will likely give rise to further disputes requiring judicial resources to resolve, which could be rendered unnecessary if the antitrust claims are dismissed. *See* *In re Broiler Chicken Grower Litig.*, 2017 WL 3841912, at *5, 2017 U.S. Dist. LEXIS 142069, at *18 (noting a stay on antitrust discovery "may conserve judicial resources by waiting until the court resolves threshold issues before becoming mired in possible discovery disputes"). Finally, a stay will have no substantial effect on the interests of nonparties or the public.

Considering all of these factors, Mitchell has demonstrated a stay of antitrust discovery is appropriate pending a ruling on the motion dismiss the HealthLift Defendants' antitrust claims.

CONCLUSION

Mitchell's motion to stay antitrust discovery is GRANTED. Any discovery which solely relates to the HealthLift Defendants' antitrust claims is STAYED pending a ruling on Mitchell's motion to dismiss these claims.

All Citations

Not Reported in Fed. Supp., 2022 WL 111126, 2022-1 Trade Cases P 81,942

Footnotes

1 As this is the HealthLift Defendants' second set of discovery requests, the interrogatories are numbered 19 through 24 and the RFPs are numbered 59 through 146. (Ex. A to Mot., Defs.' Second Set of Disc. Reqs., Doc. No. 246-1.)

2 The HealthLift Defendants contend a generalized argument that antitrust discovery is burdensome is insufficient to support a motion to stay, citing *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, No. 11-cv-01468, 2011 WL 4018207, 2011 U.S. Dist. LEXIS 101787 (D. Colo. Sept. 8, 2011) (unpublished), and *Christou v. Beatport, LLC*, No. 10-cv-02912, 2011 WL 650377, 2011 U.S. Dist. LEXIS 19055 (D. Colo. Feb. 10, 2011) (unpublished). (Opp'n 9 n.13, Doc. No. 248.) Here, Mitchell explains why the particular antitrust discovery the HealthLift Defendants seek in this case is burdensome rather than merely relying on generalized arguments. *Cf.* *SOLIDFX, LLC*, 2011 WL 4018207, at *3, 2011 U.S. Dist. LEXIS 101787, at *7 (noting the moving party "fails to point to any pending discovery and provide evidence as to the burden it imposes"); *Christou*, 2011 WL 650377, at *2, 2011 U.S. Dist. LEXIS 19055, at *6 (finding the moving party "did not provide any specific arguments regarding how or why discovery will be unusually expensive and protracted in this case").

3 The issue of whether any specific request is relevant to particular claims or defenses is not before the court on this motion.

4 As noted above, subsequent delays were the result of the parties' joint request to stay the case for settlement negotiations. (*See* Order Granting Stipulated Mot. for Temp. Stay of Litigation, Doc. No. 223.)

End of Document

2011 WL 4345432
Only the Westlaw citation is currently available.
United States District Court,
N.D. Indiana,
Fort Wayne Division.

NEXSTAR BROADCASTING, INC., Plaintiff,
v.
GRANITE BROADCASTING CORPORATION, Wise–TV License LLC, and Wise–TV, Inc., Defendants.

No. 1:11–CV–249.
|
Sept. 15, 2011.

Attorneys and Law Firms

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OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO STAY

ROGER B. COSBEY, United States Magistrate Judge.

I. INTRODUCTION

***1** This matter is before the Court on Defendants' Motion to Stay Discovery and supporting memorandum filed on September 12, 2011. (Docket # 34, 35.) Argument on the motion was heard and concluded at the scheduling conference on September 14, 2011. At the conference, the Court GRANTED Defendants' Motion to Stay for the reasons set forth in this opinion.

II. FACTUAL AND PROCEDURAL BACKGROUND

On July 25, 2011, Plaintiff Nexstar Broadcasting, Inc. ("Nexstar") sued Defendants Granite Broadcasting Corporation, Wise–TV License LLC, and Wise–TV, Inc. (collectively, "Granite") in this Court, alleging that Granite violated the Sherman Act, the Clayton Act, and the Indiana Antitrust Act.[1] (Compl. Counts I–V .) These allegations arise from an agreement between Granite and FOX Broadcasting Company making Granite the new exclusive network affiliate of FOX, effective August 1, 2011. (Compl.¶ 30.) Prior to this agreement, WFFT–TV, a Nexstar-owned station, was the FOX network affiliate in Fort Wayne. (Compl.¶ 16.) Nexstar alleges that as a result of Granite's relationship with Malara, another broadcast group, Granite controls sales and revenues for the NBC, ABC, CW, and MyNetworkTV affiliates in Fort Wayne (Compl.¶ 29) and, after August 1, 2011, for the FOX affiliate as well (Compl.¶ 31).

Nexstar further claims that immediately after the public announcement of the new FOX affiliation agreement, Granite attempted to hire away key Nexstar employees who possessed confidential and proprietary information about WFFT–TV. (Compl.¶¶ 32–33.) Furthermore, Nexstar alleges that even before its exclusive affiliation agreement with FOX became effective, Granite attempted to accelerate the movement of advertisers from Nexstar's WFFT–TV to the stations owned by Granite and Malara by denigrating WFFT–TV to advertisers and the public. (Compl.¶ 34.) As a result of Granite's actions, Nexstar asserts that it has incurred and will incur substantial harm, namely loss of substantial profits, increased costs of programming, and preclusion from accessing certain viewer constituents. (Compl.¶ 8.)

In lieu of responding to Nexstar's Complaint, Granite filed a Motion to Dismiss for Failure to State a Claim on September 12, 2011. (Docket # 32.) Specifically, Granite's Motion to Dismiss argues that Nexstar's complaint must be dismissed for failure to allege the requisite antitrust injury and causation elements, lack of antitrust standing, lack of a cognizable antitrust claim for its allegations of denigrating speech and predatory hiring, and for failing to allege a cognizable conspiracy necessary to support its concerted action claims. (Defs.' Mem. in Supp. of Mot. to Dismiss iii-iv.) Also on September 12th, Granite filed the present Motion to Stay Discovery. (Docket # 34.) Nexstar, however, argues that all it is really seeking from Granite is the information Granite gave to the Indiana Attorney General as well as initial disclosures under Federal Rule of Civil Procedure 26(a).

III. DISCUSSION

***2** Under Federal Rule of Civil Procedure 26(c) and (d), a court may limit the scope and sequence of discovery. *In re Sulfuric Acid Antitrust Litig.,* 231 F.R.D. 331, 336 (N.D.Ill.2005). District courts have extremely broad discretion in controlling discovery, *id.,* which includes managing the timing, extent, frequency, and manner of discovery, *Nixon v. Haag,* No. 1:08–cv00648–LJM–JMS, 2009 WL 2026343, at *2 (S.D.Ind. July 7, 2009). The Court must use its discretion to ensure that technically proper discovery does not impose oppression or undue burden or expense. *Id.*

While a party's filing of a motion to dismiss may be an appropriate circumstance in which to limit discovery, "[t]he filing of a motion to dismiss by itself does not mandate a stay of discovery pending resolution of that motion, nor does the right to discovery continue in light of a pending dispositive motion." *Duneland Dialysis LLC v. Anthem Ins. Co., Inc.,* No. 4:09–CV–36–RLM–PRC, 2010 WL 1418392, at *2 (N.D.Ind. Apr.6, 2010) (quoting *Simstad v. Scheub,* No. 2:07 CV 407, 2008 WL 1914268, at *1 (N.D.Ind. Apr.29, 2008)). Rather, whether a stay of discovery is warranted depends on the individual case. *Id.* A stay is appropriate where the motion to dismiss can resolve the case, where ongoing discovery is unlikely to produce facts necessary to defeat the motion, or where the motion raises a potentially dispositive threshold issue, such as a challenge to plaintiff's standing. *Id.* (citing *Simstad,* 2008 WL 1914268, at *1; *Bilal v. Wolf,* No. 06 C 6978, 2007 WL 1687253, at *1 (N.D.Ill. June 6, 2007); *Builder's Ass'n of Greater Chi. v. City of Chi.,* 170 F.R.D. 435, 437 (N.D.Ill.1996)). (internal quotation marks omitted).

Discovery concerns are particularly great in antitrust litigation, where discovery "can quickly become enormously expensive and burdensome to defendants." *DSM Desotech Inc. v. 3D Sys. Corp.,* No. 08 CV 1531, 2008 WL 4812440, at *2 (N.D.Ill. Oct.28, 2008); *see Asahi Glass Co. v. Pentech Pharm., Inc.,* 289 F.Supp.2d 986, 995 (N.D.Ill.2003) (Posner, J., sitting by designation) (requiring that "some threshold of plausibility ... be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase"). The Supreme Court recognized this concern in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 558, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), stating that "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." The *Twombly* Court was "concerned lest a defendant be forced to conduct expensive pretrial discovery in order to demonstrate the groundlessness of the plaintiff's claim." *Limestone Dev. Corp. v. Vill. of Lemont,* 520 F.3d 797, 803 (7th Cir.2008) (construing *Twombly,* 550 U.S. at 559). Furthermore, when multiple theories of antitrust liability are advanced, defendants face a potentially greater burden because the scope of discovery must be further expanded to encompass each type of alleged anticompetitive action. *DSM Desotech Inc.,* 2008 WL 4812440, at *2.

***3** Since *Twombly,* Seventh Circuit courts have taken this concern seriously, staying discovery in antitrust litigation and other complex cases. *Id.* at 3 (relying on *Twombly* in granting defendants' motion to stay discovery pending the outcome of their motion to dismiss in an antitrust litigation); *see Coss v. Playtex Prod., LLC,* No. 08 C 50222, 2009 WL 1455358, at *4–5 (N.D.Ill. May 21, 2009) (granting a general stay based on the rationale of *Twombly* but ordering very focused discovery that the defendant agreed would not be burdensome); *Bodnar v. John Hancock Funds, Inc .,* No. 2:06 cv 87, 2007 WL 1577914, at *3 (N.D.Ind. May 30, 2007) (granting motion to stay pending motion to dismiss in an ERISA case with numerous plaintiffs because discovery of facts was unnecessary in response to a motion to dismiss); *cf. Limestone Dev. Corp.,* 520 F.3d at 802–804 (finding that RICO cases, like antitrust cases, were "likely to be more than usually costly" and indicating that burdensome discovery in RICO cases during the pendency of a motion to dismiss is inappropriate). After *Twombly* and *Ashcroft v. Iqbal,* ––– U.S. ––––, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), which applied *Twombly* to all civil actions, "the policy against burdensome discovery in complex cases during the pendency of a motion to dismiss holds fast," requiring district courts to carefully consider the potential discovery needed in complex cases. *Coss,* 2009 WL 1455358, at *3. If the case is susceptible to burdensome and costly discovery, the district court should limit discovery once a motion to dismiss for failure to state a claim has been filed. *Id.*

In the instant case, Granite moved for a stay of discovery pending its motion to dismiss for failure to state a claim. While the mere filing of a motion to dismiss does not mandate a stay of discovery pending the outcome of this motion, *Duneland Dialysis LLC,* 2010 WL 1418392, at *2, in this case, granting the motion to stay is appropriate because of both the nature of the case as well as the arguments in Granite's Motion to Dismiss. Critically, this is an antitrust case, which directly invokes the Supreme Court's concerns in *Twombly* about burdensome and expensive discovery. Moreover, multiple theories of antitrust liability are advanced, from unreasonable restraint of trade to a conspiracy to monopolize to violations of the Clayton Act and Indiana Antitrust Act, placing an even greater potential discovery burden on Granite. *See DSM Desotech Inc.,* 2008 WL 4812440, at *2.

A stay is also appropriate because Granite's Motion to Dismiss may not only resolve the case, but it raises a potentially dispositive threshold issue, two of the circumstances in which a stay was deemed appropriate in *Duneland Dialysis LLC* and the cases cited therein. Granite argues that all of the claims in Nexstar's complaint must be dismissed on the basis of lack of standing, failure to pled the necessary elements of the antitrust and concerted action claims, and raising claims that are not cognizable. (Defs.' Mem. in Supp. of Mot. to Dismiss iii-iv.) If Granite's motion is granted, all of Nexstar's claims would be dismissed, and the case could be resolved completely. More importantly, Granite's motion challenges Nexstar's standing, which is a threshold issue that, if standing is not found, would end the case as well. Accordingly, the Court found that the Motion to Stay Discovery pending the outcome of Granite's Motion to Dismiss to be appropriate and granted this Motion to Stay at the scheduling conference.

***4** During the scheduling conference, Nexstar argued that since it was requesting only the information that Granite provided to the Indiana Attorney General and initial disclosures under Rule 26(a), this would not be burdensome as the information was already compiled and required only duplication. Granite objected to this proposition on the grounds that the information provided to the Attorney General was confidential and, if disclosed to Nexstar, could damage Granite's competitiveness. A California district court dealing with this same issue found that while "it is true that the discovery sought at this time is the same discovery already gathered, assembled, and produced to the government," making the costs of producing a duplicate set for the plaintiff minimal, "there would be the issue of various objections ... that might be assertable against plaintiffs that were unasserted against the government." *In re Graphics Processing Units Antitrust Litig.,* No. C 06–07417, 2007 WL 2127577, at *5 (N.D.Cal. July 24, 2007). Moreover, turning documents over to the government "does not mean that everyone else has an equal right to rummage through the same records." *Id.* Accordingly, the court found that the defendants had a legitimate interest in maintaining the confidentiality of these records and refused to permit discovery at that point in the litigation. *Id.; see also Rio Grande Royalty Co., Inc. v. Energy Transfer Partners, L.P.,* No. H–08–cv–0857, 2008 WL 8465061, at *1 (S.D.Tex. Aug.11, 2008) (finding that discovery request would place undue burden on defendants, even though documents had already been assembled and produced to government agencies, because of defendants' need to review a large volume of documents before producing them and the plaintiff's concession that it did not need the discovery to respond to the pending motion to dismiss); *cf. Sisk v. Guidant Corp.,* No. 1:05–cv–01658–SEB–WTL, 2007 WL 1035090, at *3–4 (S.D.Ind. Mar.30, 2007) (refusing to lift an automatic stay under the PSLRA pending a motion to dismiss for disclosure of documents already produced to governmental entities because the fact that defendants already produced the documents did not create undue prejudice for plaintiffs).[2]

In this case, the information that Granite was required to provide to the Attorney General, such as customer lists and their prices in the market, could give a competitive edge to Nexstar or hurt Granite's ability to compete if Nexstar were provided with it. Granite had objections to sharing such information with Nexstar that it did not have when sharing that information with the Attorney General. Therefore, Granite has "a legitimate interest in maintaining the confidentiality of [its] records." *In re Graphics Processing Units Antitrust Litig.,* 2007 WL 2127577, at *5. Furthermore, requiring Granite to review all of the information provided to the Attorney General to parse out the relevant and non-confidential information that could be given to Nexstar would be burdensome at this point in the litigation, especially considering that Nexstar did not argue that it needed such information to respond to Granite's Motion to Dismiss. *See Rio Grande Royalty Co. ., Inc.,* 2008 WL 8465061, at *1. Therefore, the Court denied Nexstar's requests for the information Granite provided to the Indiana Attorney General as well as initial disclosures under Rule 26(a).

IV. CONCLUSION

***5** Having heard arguments at the scheduling conference on September 14, 2011, the Court determined that Defendants' Motion to Stay (Docket # 34) should be GRANTED for the reasons set forth in this opinion.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 4345432, 2011-2 Trade Cases P 77,643

Footnotes

1 Accordingly, subject matter jurisdiction arises under 28 U.S.C. § 1331.

2 One recent Northern District of Illinois case, *Rawat v. Navistar Int'l Corp.,* No. 08 C 4305, 2011 WL 3876957, at *6–8 (N.D.Ill. Sept.1, 2011), granted the plaintiffs' motion to compel the defendant to produce documents that the defendant had already produced in an earlier case and an SEC investigation because the defendant did not show that producing these documents would be unduly burdensome. However, this case is easily distinguishable as there was no pending motion to dismiss and the parties had moved passed the pleading stage, which is not the case here.

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2011 WL 13217390
Only the Westlaw citation is currently available.
United States District Court, D. Maryland.

OCÉ NORTH AMERICA, INC.
v.
MCS SERVICES, INC. et al.

Civil Action WMN–10–984
|
Signed 03/01/2011

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MEMORANDUM AND ORDER

William M. Nickerson, Senior United States District Judge

***1** Pending before the Court is Plaintiff Océ North America, Inc.'s Motion to Stay Discovery Concerning Defendants' First Amended Counterclaims, ECF No. 108, in which Océ requests a suspension of counterclaim-related discovery until the Court rules upon Océ's motion to dismiss the counterclaims. Defendant MCS Services, Inc. opposes the instant motion and argues a stay would be both impracticable and prejudicial.

Océ's Second Amended Complaint alleges various copyright, trade secret and breach of contract claims against MCS and others. In contrast, MCS's counterclaims allege, inter alia, four antitrust violations under Section 2 of the Sherman Act. Océ timely filed a forty-one page motion to dismiss all of MCS's counterclaims on December 20, 2010, and a reply to MCS's opposition of that motion on February 2, 2011. Separately, the parties engaged in a settlement conference with Magistrate Judge Gesner on February 17, 2011, but they were unable to resolve their disputes. Océ's motion to dismiss the counterclaims is now ripe for review.

Pursuant to Federal Rule of Civil Procedure 26(c), the Court may issue a protective order specifying the terms of discovery to prevent the imposition of an undue burden or expense on a party. When considering a stay of discovery pending the outcome of a dispositive motion, courts may consider: the potential for the dispositive motion to terminate all claims in the case or all claims against a particular party; the merits of the dispositive motion; and the irrelevancy of the discovery to the dispositive motion. See Yongo v. Nationwide Affinity Ins. Co., Case No. 07–94–D, 2008 WL 516744 (E.D.N.C. Feb. 25, 2008) (citing Tilley v. United States, 270 F. Supp. 2d 731, 734 (M.D.N.C. 2003) (affirmed by the Fourth Circuit in an unpublished opinion)).

In this case, Océ argues it should not be required to proceed with the very substantial discovery obligations inherent in antitrust actions because such discovery would be needless and moot if the Court were to grant its motion to dismiss. As the Supreme Court has noted, discovery in antitrust lawsuits is indeed onerous and may impose "enormous cost." See Bell Atlantic v. Twombly, 550 U.S. 544, 546, 558 (2007). Here, Océ claims its discovery obligations may entail a review of "hundreds of thousands of emails from potentially hundreds of document custodians" and "thousands of customer files." Mot. Stay at 3, ECF No. 108–1. These documents would need to be collected, cataloged, reviewed for relevance and then reviewed for privilege, all at very substantial cost.

MCS, on the other hand, argues discovery regarding its affirmative defenses to Océ's allegations overlaps substantially with discovery regarding MCS's counterclaims. By staying the latter while proceeding with the former, MCS argues it would be forced to duplicate many of its efforts and depose key witnesses twice, once before the stay is lifted and again thereafter. In addition, MCS submits that Océ's motion to dismiss is likely to fail and that even if it is granted, the motion will not release any of the parties from the action. Last, MCS argues the stay would deprive it of information required for certain upcoming litigation events.

***2** If Océ's motion to dismiss succeeds in its entirety, it will indeed terminate all claims currently pending against Océ. In addition, the parties have fully briefed the motion to dismiss and the settlement conference has now concluded, so further discovery is irrelevant to Océ's potentially dispositive motion now pending. These factors all weigh in favor of granting a stay. More to the point, however, litigation of this dispute has grown increasingly intense. In addition to the instant motion to stay discovery and Océ's motion to dismiss the counterclaims, there are three other motions outstanding between this case and a related case before this Court, MCS v. Jones, Case No. WMN–10–1042. Two of those motions argue Océ should be held in contempt of court for violations of the parties' stipulated preliminary injunction, and a third involves yet another dispute regarding a production request. This is despite the Court's earlier involvement in a related discovery dispute and a failed settlement conference. Thus, by any measure, discovery is not proceeding smoothly.

At the same time, the parties' various motions ask the Court to sift through several complex questions—briefing on Océ's motion to dismiss alone approached one hundred pages excluding myriad exhibits—and while the Court will work through those motions with all deliberate speed, a brief but not insubstantial measure of time will pass before Océ's dispositive motion is decided. Unless the Court grants a momentary stay of antitrust-claim-related discovery, Océ would in the mean time be required to exert tremendous energy responding to MCS's production requests, and MCS would in turn expend a significant sum performing its own analysis of the production. The Court sees no benefit to either party under this arrangement when such efforts may end up unnecessary. Even if Océ's motion is only partially successful, the resulting decision may circumscribe discovery thereafter and save both parties significant time and money. Last, as the Court does not anticipate a lengthy pause, MCS will not be prejudiced by a short delay in discovery regarding its counterclaims. In consequence, the Court will grant Océ's motion.

Nonetheless, the Court is aware of the practical implications of the stay. To the extent ongoing discovery related to MCS's affirmative defenses overlaps with discovery related to MCS's counterclaims, the Court is confident the parties, acting in good faith as they are required to do, will be able to reach amicable and efficient compromise solutions. After all, a Court–ordered stay does not preclude counsel from agreeing to reasonable solutions to avoid inconvenient and expensive duplication of discovery. Of course, if the stay somehow delays discovery relating to MCS's affirmative defenses, the Court will accommodate a revised discovery deadline and scheduling order should the parties request one.

For the foregoing reasons, it is this 1st day of March, 2011, by the United States District Court for the District of Maryland, ORDERED:

1. That Plaintiff Océ North America, Inc.'s Motion to Stay Certain Discovery, ECF No. 108, is hereby GRANTED;

2. That discovery related to MCS's counterclaims is stayed until such time as this Court rules upon Océ's motion to dismiss MCS's counterclaims, unless the parties mutually agree to proceed on some limited portions of that discovery; and

3. That the Clerk of the Court shall transmit a copy of this Memorandum and Order to all counsel of record.

All Citations

Not Reported in Fed. Supp., 2011 WL 13217390

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Ryan, L.L.C.,
Plaintiff-Appellee,

Chamber of Commerce of the United States of America, *et al.*,
Intervenor-Plaintiffs-Appellees,

v.

Federal Trade Commission,
Defendant-Appellant.

No. 24-10951

CORRECTED STATUS REPORT AND MOTION TO HOLD APPEAL IN ABEYANCE FOR 60 ADDITIONAL DAYS

Pursuant to Federal Rule of Appellate Procedure 27 and this Court's order of March 12, 2025, the government respectfully submits this status report on ongoing agency proceedings and moves to hold this appeal in abeyance for 60 additional days. The government proposes to file a status report in 60 days, on September 8, 2025, regarding appropriate next steps in this appeal. Plaintiff does not oppose this motion, subject to the Commission's status report being due by September 8, and intervenor-plaintiffs do not oppose this motion.

1. In May 2024, the Federal Trade Commission issued a rule that defines most existing non-competes as unenforceable unfair methods of competition (subject to an exception for certain senior executives) and bans the future use of most non-

competes. Non-Compete Clause Rule, 89 Fed. Reg. 38,342 (May 7, 2024). Plaintiff and intervenor-plaintiffs challenged that rule, and the district court granted summary judgment in their favor and vacated the rule universally. *See* ROA.5637. This appeal followed.

In March 2025, the Commission moved to hold this appeal in abeyance for 120 days. As that motion explained, the newly appointed Chairman of the Commission had publicly stated that he believed the Commission should reconsider its defense of the rule challenged in this case. In light of that statement, the Commission believed that holding this appeal in abeyance would conserve party and judicial resources and promote the efficient and orderly disposition of this appeal. On March 12, 2025, this Court granted the Commission's motion and directed that, at the end of the 120-day abeyance period, the Commission file a status report.

2. Since this Court granted the Commission's abeyance motion, the Commission has undergone significant personnel changes, including the Senate confirmation and the swearing in of Commissioner Mark Meador. In light of these changes and the press of Commission business, some additional time is necessary to determine whether the Commission should reconsider its defense of the rule challenged in this case. Thus, the Commission respectfully requests that this Court extend the previously granted abeyance for an additional 60 days. The Commission would respectfully propose that it file another status report at the end of that 60-day

period regarding appropriate next steps in this appeal.

3. Plaintiff does not oppose this motion, subject to the Commission's status report being due by September 8, and intervenor-plaintiffs do not oppose this motion.

Respectfully submitted,

MICHAEL S. RAAB

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July 2025

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 389 words, according to the count of Microsoft Word.

/s/ Sean R. Janda
Sean R. Janda