

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRESH MADE, INC.,
Plaintiff

CIVIL ACTION

v.

LIFEWAY FOODS, INC., et al.,
Defendants

NO. 01-4254

MEMORANDUM AND ORDER

McLaughlin, J.

August 8, 2002

The present case arises out of a long-running business and legal dispute between two competing manufacturers of specialty dairy products such as kefir, a fermented yogurt-style drink. Plaintiff Fresh Made, Inc. alleges that the defendants have engaged in unfair competition and have violated federal antitrust laws, various state laws, and the Lanham Act. Defendants Lifeway Foods, Inc. and Michael Smolyansky have filed a Motion to Dismiss the Amended Complaint.

Because the Court concludes that the Amended Complaint does not sufficiently allege a relevant antitrust market, the federal antitrust claims will be dismissed. The Court also finds that the state law claims, which are largely predicated upon the conduct underlying the federal antitrust claims, are insufficiently pled and must also be dismissed. However, the Amended Complaint does state a valid claim under the Lanham Act,

and the motion to dismiss will be denied insofar as it seeks to dismiss that claim. The Court will grant Fresh Made leave to amend the complaint.

I. Background

Plaintiff Fresh Made, Inc. ("FreshMade") is a closely held Pennsylvania corporation which has, since 1982, been engaged in the business of manufacturing, distributing and selling certain specialty dairy products, such as kefir, a fermented yogurt-style drink. Fresh Made targets these products to immigrants from the former Soviet Union. Defendant Lifeway Foods, Inc. ("Lifeway") is a publicly traded Illinois corporation that is a principal competitor of Fresh Made. Defendant Michael Smolyansky is the President and CEO of Lifeway.

Fresh Made alleges that Lifeway has been engaged in an illegal campaign of unfair competition designed to suppress and stifle Fresh Made's attempt to compete with Lifeway in the sale of kefir and other specialty dairy products. As part of this campaign, Fresh Made alleges that Lifeway threatened to pull its business from distributors who also did business with Fresh Made, threatened legal proceedings against distributors who did business with Fresh Made, and threatened to "call in" lines of credit it had provided to certain specialty food markets if they

did not stop carrying Fresh Made products. Fresh Made further alleges that Lifeway conspired with manufacturers of kefir containers to restrict the sale of such containers to Fresh Made in an effort to restrict competition.

The Amended Complaint states that 20% of Lifeway's outstanding common stock is owned by Danone Foods, Inc. ("Danone"), which allegedly either controls or exercises significant influence over Lifeway's business activities. It also states that Danone and Lifeway entered into an agreement not to compete with each other. **This** agreement allegedly gave Lifeway direct entry into Danone's extensive distribution network.

In addition, Fresh Made alleges that Lifeway has filed a series of lawsuits against it, with the intent of driving Fresh Made out of business by forcing it to expend large amounts of money on legal fees. The first **of** these lawsuits, filed in the Northern District of Illinois, claimed that Fresh Made had copied Lifeway's use of milk-bottle shaped kefir containers. That suit was dismissed for want of personal jurisdiction in October of **1996**. Shortly thereafter, Lifeway filed a similar lawsuit against Fresh Made in the Eastern District of Pennsylvania. That suit was ultimately dismissed in June of **1997** because Lifeway failed to serve a timely complaint.

In March of **1998**, Lifeway once again filed suit over Fresh Made's use **of** milk-bottle shaped kefir containers, again in the Eastern District **of** Pennsylvania. The parties ultimately settled this lawsuit for a modest sum.

In August **of** 1999, Lifeway filed a fourth lawsuit against Fresh Made, this time in the Eastern District of New York. The suit alleged that Fresh Made was improperly marketing some of its dairy products under a Russian term that had been trademarked by Lifeway.' In that action, Fresh Made brought a counterclaim seeking to invalidate Lifeway's trademark. In April of 2000, the parties entered into a settlement agreement and mutual release. Pursuant to the terms of the release, the parties dismissed their claims against each other, and Lifeway agreed to purchase from Fresh Made all unused product labels for Fresh Made cheese products bearing the disputed Russian term. Fresh Made alleges that the **\$30,000** paid **by** Lifeway for these labels was really compensation for Fresh Made's agreement not to prosecute its trademark invalidation counterclaim.

Following the execution of the settlement agreement, Fresh Made alleges that Smolyansky threatened to make Fresh Made pay back the **\$30,000**. Smolyansky also allegedly said that in

¹ The Russian term is КРЕСТЬЯНСКИЙ. The English transliteration of this term is Krest'yanskiy.

America, it was the destiny of a big company to swallow up a little company like Fresh Made.

In May of 2001, Lifeway brought another lawsuit against Fresh Made, this time in Illinois state court. The suit alleges that Fresh Made has breached the terms of the settlement agreement by using labels on its butter products that are not in conformity with the terms of the agreement. This action is still pending in Illinois.

In the present action, Fresh Made alleges that Lifeway has violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2, by conspiring to restrict competition and attempting to obtain a monopoly in the market which includes kefir and other specialty dairy goods (Counts I and II). Fresh Made also brings state law claims for Restraint of Trade (Count III), Malicious Abuse of Process (Count IV), Interference with Existing and Prospective Business Relationships (Count V), Civil Conspiracy (Count VI), and Unfair Competition and Attempted Monopoly (Count VII). Finally, Fresh Made alleges that Lifeway has violated the Lanham Act, 15 U.S.C. § 1125(a), through the use of an advertisement for kefir that contains allegedly false representations (Count VIII).²

² The Amended Complaint also includes a claim for violation (continued..)

Presently before the Court is a Motion to Dismiss the Amended Complaint filed by defendants Lifeway and Smolyansky.³ They argue that this suit is barred by the terms of the settlement agreement and release signed by the parties in April of 2000. The defendants also argue that Counts I through VII should be dismissed for failure to state a claim. Finally, the defendants have moved for a more definitive statement on Count VIII, should the Court find that the Lanham Act claim is not barred by the settlement agreement and release.

11. Settlement Agreement and Release

The settlement agreement entered into by the parties in **April** of 2000 was intended not only as a settlement of the trademark suit that was then pending in the Eastern District of New York, but also as a global settlement of all differences between the parties. Am. Compl. ¶ 87. Indeed, the release language of the agreement is broad and global in scope. The

²(...continued)
of Pennsylvania's Unfair Trade Practices and Consumer Protection Law (Count X). Fresh Made, however, wishes to withdraw the claim, and it will be dismissed.

³ Lifeway and Smolyansky joined in the motion to dismiss, but the Court will refer throughout this memorandum to the parties collectively as "Lifeway." Danone was originally a defendant as well, but Fresh Made moved to dismiss Danone as a defendant, and by order of March 11, 2002, Danone was dismissed from the case. See Docket #25.

release provides that Lifeway and Freshmade release each other from "any and all actions, causes of actions, [and] suits . . . [which the parties] now know of or which should have been known for, upon, and by reason of any matter, cause or thing whatsoever, from the beginning of the world to the date of this Settlement Agreement and Mutual Release," Ex. A. to Def.'s Mot. to Dismiss ("Agreement"), ¶ 12.

Fresh Made makes several arguments about why the release should not bar its claims in the instant suit. First, Fresh Made argues that to read the release to bar its antitrust claims would be against public policy.⁴ The Third Circuit,

⁴ The settlement agreement has a choice of law clause which selects New York law to govern the terms of the agreement. See Agreement at ¶ 17. At oral argument, Fresh Made's counsel conceded that New York law governs the agreement. Tr. of March 8, 2002 Hr'g ("Tr."), 3. However, in supplemental briefing, Fresh Made argued that federal common law should govern the agreement insofar as it is applied to bar any antitrust claim. The Third Circuit has held that there is no federal policy which mandates a uniform national rule to govern the effect of a contractual release as applied to antitrust claims. Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 889 (3d Cir. 1975). Therefore, as long as state law "guards against the antitrust violator's use of deception to avoid the federally-created cause of action", state law is properly applied to interpret releases of antitrust claims. Id. at 892 (applying Pennsylvania law). Because contractual releases procured by fraud are not enforceable under New York law, the Court finds that New York law appropriately governs the interpretation of the release at issue. See Ladenburg Thalmann & Co. v. Imaging Diagnostic Sys., Inc., 176 F. Supp.2d 199, 204 (S.D.N.Y.2001); Steen v. Bump, 649 N.Y.S.2d 731, 732 (N.Y.App. Div. 1996). See also, VKK Corp. v. (continued...)

however, has held that "there is nothing in the public policy behind antitrust laws that prohibits general releases encompassing antitrust claims, provided that the release does not seek to waive damages from future violations of antitrust laws." Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 896 n.27 (3d Cir. 1975). See Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1310 (5th Cir. 1983) (recognizing that "a general release [is] sufficient to release antitrust claims"). Because the release language in question does not seek to immunize future antitrust violations, applying the release to Fresh Made's antitrust claims is not against public policy.⁵

The plaintiff also argues that the release is part and parcel of the larger pattern of antitrust activity, and as such the release is illegal and invalid. The part and parcel doctrine provides that a release is invalid if the release itself was "an integral part of a scheme to violate the antitrust laws." VKK Corp., 244 F.3d at 125 (citations omitted). To satisfy this

⁴(...continued)
Nat'l Football League, 244 F.3d 114, 121-22 (2d Cir. 2001)
(applying New York law to determine the validity of a release encompassing antitrust claims).

⁵ **By its** terms, the release does not bar any cause of action arising after the date of the release agreement. For that reason, to the extent that Fresh Made alleges claims that post-date the release, such claims survive Lifeway's motion to dismiss based on the release.

standard, the 'release must be an object of the combination or conspiracy or an integral part of the scheme in restraint of trade." Id. (citation and internal quotation marks omitted). If the release is "merely an outgrowth, rather than a cause of the violation, it is not part and parcel of the antitrust conspiracy." Id. (citation and internal quotation marks omitted). In addition, 'the part and parcel doctrine [cannot] be read so broadly as . . . to render void all releases relating to conspiracies alleged to continue post-release." Id. at 126.⁶

Fresh Made argues that its allegations "establish that Lifeway entered into the agreement solely because it sought to procure a release of Fresh Made's challenge to [Lifeway's] trademark and not because it intended to end all litigation and claims between the parties." Plf.'s Supp. Br. at 5. Even if true, this does not establish that the release itself was an integral part of the allegedly illegal antitrust activity. The plaintiff does not explain how the release was integral to the vexatious use of litigation or the attempts to prevent Fresh Made from competing with Lifeway, nor does the plaintiff argue that

⁶ As the Second Circuit recently noted, the "part and parcel" doctrine has been "[r]arely discussed and more rarely applied." VKK Corp., 244 F.3d at 125. In fact, the VKK Court observed that no court of appeals "has ever applied the part and parcel theory to invalidate a release." Id. at 126.

the alleged conspiracy could not have proceeded without the release. VKK Corp., 244 F.3d at 126. For that reason, the Court finds that Fresh Made cannot invoke the part and parcel doctrine to avoid the terms of the release.

Fresh Made also asserts that Lifeway's filing of the May 2001 suit in Illinois breached the terms of the settlement agreement, suspending Fresh Made's obligations under the release. Fresh Made alleges that although the Illinois lawsuit is styled as a breach of contract action, Lifeway is seeking to revisit the trademark infringement issues that were settled and released by the April 2000 agreement. However, as that action is currently pending in Illinois, it would be improper for this Court to look beyond the pleadings in an effort to examine the substance of that proceeding.

Similarly, Fresh Made asserts that by filing the May 2001 suit in Illinois, Lifeway violated the forum selection clause of the April 2000 agreement. However, the clause in question does not mandate New York as the exclusive forum for litigating issues pertaining to the agreement. The clause only provides that the parties "consent[] to the jurisdiction [of] the United States District Court of the Eastern District of New York" and "waive any rights to challenge [that] jurisdiction and venue". Agreement at ¶ 17. Therefore, Lifeway did not, simply

by filing in Illinois, plainly violate the terms of the settlement agreement.⁷

Finally, Fresh Made argues that the agreement is unenforceable because it was procured by fraud. Under New York law, "allegations of fraud in the inducement of a release warrant denial of a motion to dismiss that is grounded on a release." Ladenburg Thalmann & Co. v. Imaging Diagnostic Svs., Inc., 176 F. Supp.2d 199, 205 (S.D.N.Y. 2001). See Steen v. Bump, 649 N.Y.S.2d 731, 732 (N.Y. App. Div. 1996).

In the Amended Complaint, Fresh Made alleges that even when negotiating the April 2000 settlement agreement that was supposed to be a settlement of all differences between the

⁷ At oral argument, Fresh Made also argued that the release should not be applied at the motion to dismiss stage to bar its claims. Under New York law, Fresh Made argues, courts interpreting broad release language are required to go behind the language to determine what the intent of the parties to the agreement was. The caselaw relied on by Fresh Made, however, merely holds that when parties enter into a release "purporting to exempt a party from liability for injuries *which may occur in the future*", the release covers only those claims which were "within the contemplation of the parties at the time" of execution. Bradley Realty Cora. v. State of New York, 389 N.Y.S.2d 198, 199 (N.Y. App. Div. 1976) (emphasis added). See Beardslee v. Blomberg, 416 N.Y.S.2d 855, 856-57 (N.Y. App. Div. 1979). The release in this case does not seek to exempt either party from liability for future conduct, but releases only past claims. Therefore, because the release language is clear and unambiguous on its face, the Court need not look to extrinsic evidence to give meaning to its terms. See, e.g., Goldberg v. Mfr's Life Ins. Co., 672 N.Y.S.2d 39, 44 (N.Y. App. Div. 1998).

parties, Lifeway intended to bring further litigation against Fresh Made. Am. Compl. at ¶¶ 87, 92. This allegation of fraud is sufficient, at this point, to avoid Lifeway's motion to dismiss insofar as it is based on the settlement agreement and release.⁸

111. Sherman Act Section 1

Section 1 of the Sherman Act Provides: "Every contract,

⁸ Because a release procured by fraud in the inducement is voidable at the option of the defrauded party, that party can choose to affirm or disaffirm the contract. See Laudenberg, 176 F. Supp.2d at 204. In order to disaffirm the contract, the defrauded party must offer to return the consideration received. Id. Fresh Made asserts that it may maintain the current action without returning the \$30,000 it received under the agreement because it is entitled to affirm the contract and seek to recover damages in an amount equal to the difference between the actual value of the contract and the value as fraudulently represented by Lifeway. Fresh Made argues that there is a question of fact about whether or not the \$30,000 was given by Lifeway as consideration for the release or consideration for the purchase of labels. For that reason, Fresh Made believes that it is entitled to affirm the contract for the purchase of labels and to maintain its suit while avoiding the release. Under New York law, a party is entitled to affirm a contract and bring an action alleging fraud, while avoiding the defense of release. See Goldsmith v. Nat'l Container Corp., 287 N.Y. 438, 442-43 (N.Y. Ct. App. 1942) ("the releases given by the plaintiff, which the defendants' answer pleads as a defense, do not bar the present action at law whereby the plaintiff seeks damages due to alleged fraudulent misrepresentations and concealments which induced him to give such releases"). For that reason, Fresh Made need not, at this point, return the \$30,000 received under the April 2000 agreement in order to avoid the release through its allegations of fraud.

combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.'" 15 U.S.C. § 1.

Fresh Made alleges that Lifeway's agreements with manufacturers of kefir containers, distributors, and store owners to restrict Fresh Made's access to the market constitute a continuing conspiracy in restraint of trade that violates Section 1.

To establish a Section 1 violation, a plaintiff must prove (1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted action was illegal; and (4) that the plaintiff was injured as a proximate result of the concerted action. Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 442 (3d Cir. 1997). Lifeway argues that Fresh Made has failed to sufficiently allege a relevant antitrust market, antitrust injury, or concerted action.

To state a violation of Section 1, a plaintiff must allege that there has been an antitrust injury.' An antitrust

⁹ To recover damages, a private antitrust plaintiff must also allege that it has suffered an "injury in fact" that is attributable to something the antitrust laws were designed to prevent. See J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981). The Amended Complaint alleges that Fresh Made suffered economic losses such as 'lost income, revenues and profits',, that it has been deprived of the opportunity to expand, (continued..)

injury is the type of injury that the antitrust laws were enacted to prevent - an injury to competition rather than competitors. See Alberta Gas Chems. Ltd. v. E.I. Du Pont de Nemours and Co., 826 F.2d 1235, 1241 (3d Cir. 1987) ("antitrust law aims to protect competition, not competitors"). In order to allege an injury to competition, a plaintiff must allege an injury to competition in a particular relevant market. See Eichorn v. AT & T Corp., 248 F.3d 131, 147-48 (3d Cir. 2001). The plaintiff bears the burden of defining the relevant market. Queen City, 124 F.3d at 436. Failure to do so may result in the dismissal of an antitrust complaint.

A relevant market for antitrust purposes is comprised of a geographic and a product market. The relevant product market is defined as "those commodities reasonably interchangeable by consumers for the same purposes." Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1992). The

9(...continued)
grow or otherwise become more profitable, and that its participation in the market has been restricted or reduced. Am. Compl. at ¶¶ 100, 101, 105(b). These allegations sufficiently state that Fresh Made has suffered an injury in fact. See ABA Section of Antitrust Law, Antitrust Law Developments, 762 (4th ed. 1997). In addition, as a direct competitor of Lifeway, the injuries to Fresh Made's business and participation in the market fall into the category of injuries that **flow** from the conduct that the antitrust laws were intended to prevent. See Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 964 & n.14 (3d Cir. 1983).

relevant geographic market is defined as the "area in which a potential buyer may rationally look for the goods or services he or she seeks." Id. at 726. This geographic market must "conform to commercial reality." Eichorn, 248 F.3d at 147.

Lifeway argues that Fresh Made has failed to define a proper product or geographic market, and that the Section 1 claim must, therefore, be dismissed. Fresh Made counters that it has fairly alleged a relevant market. It asserts that the relevant geographic market is the United States, and the relevant product market is specialty Russian dairy foods, including kefir.¹⁰ See Am. Compl. ¶¶ 17, 19, 116.

The Third Circuit has instructed that although "in most cases, proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers", there is no "prohibition against dismissal of antitrust claims for failure to plead a relevant market". Queen City, 124 F.3d at 436. "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all

¹⁰ The United States can, in appropriate instances, be a relevant geographic market. See, e.g., United States v. Grinnel Corp., 384 U.S. 563, 575 (1966).

interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted." Id. Therefore, where a "complaint fails to allege facts regarding substitute products, to distinguish among apparently comparable products, or to allege other pertinent facts relating to cross-elasticity **of** demand" a motion to dismiss may be properly granted. Re-Alco Indus., Inc. v. Nat'l Ctr. for Health Educ., 812 F.Supp. 387, 391 (S.D.N.Y. 1993) (cited by Queen City, 124 F.3d at 437).

In the Amended Complaint, Fresh Made does not ground its allegations regarding product market with reference to the rule **of** reasonable interchangeability and cross-elasticity **of** demand.¹¹ Fresh Made does not allege facts establishing that the market for specialty Russian dairy products, such as kefir, is distinct from the market for yogurt, other drinkable yogurt

¹¹ Reasonable interchangeability of use implies that 'one product is roughly equivalent to another for the use to which it is put.'" Queen City, 124 F.3d at 437. Reasonable interchangeability can be indicated by cross-elasticity of demand between the product itself and substitutes for it. Id. Products in a relevant market are "characterized by a cross-elasticity of demand, in other words, the rise in the price **of** a good within a relevant product market would tend to create a greater demand for other like goods in that market." Id. (quoting Tunis Bros., 952 F.2d at 722).

products, or from other dairy products in general.¹² The amended complaint contains no allegations relating to the price of and/or the demand for kefir and other specialty Russian dairy products relative to products in the larger dairy market as a whole.

Fresh Made simply fails to allege whether there are reasonably interchangeable alternatives for its products. It is also unclear from the allegations what relationship kefir has to other specialty Russian dairy products or why they are appropriately in the same product market.

Without pleadings asserting otherwise, the Court cannot at this point conclude that the proposed market of kefir and

¹² Fresh Made does allege that its products serve the needs of the "Russian-speaking immigrant community that has taken residence in the United States." Am. Compl. ¶ 17. Fresh Made also alleges that it is these immigrants who represent the market for the "niche or specialty dairy products" that it produces. *Id.* at ¶ 19. These allegations suggest that Fresh Made may be able to plead a relevant sub-market within the overall dairy market. See Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) (holding that within a "broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes"). Factors indicating whether the finding of a sub-market is appropriate include "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.* See Tower Air, Inc. v. Federal Express Corp., 956 F. Supp. 270, 280 (E.D.N.Y.1996); Tasty Baking Co. v. Ralston Purina, Inc., 653 F. Supp. 1250, 1258 (E.D. Pa. 1987). However, a complaint alleging a submarket is not excused from grounding its allegations with facts regarding reasonable interchangeability and cross-elasticity of demand.

other specialty Russian dairy products is an appropriately separate and distinct market, and therefore a relevant market for antitrust purposes. See, e.g., Queen City, 124 F.3d at 436-37, citing, B.V. Optische Industrie De Oude Delft v. Hologic, Inc., 909 F. Supp. 162, 172 (S.D.N.Y. 1995) (dismissing antitrust claim because there were no pleadings that the "chest equalization radiography" market was independent from the "overall X-ray market"); E. & G. Gabriel v. Gabriel Bros., Inc. No. 93 Civ. 0894 (PKL), 1994 WL 369147, at **3-5 (S.D.N.Y. July 13, 1994) (dismissing antitrust claim because proposed market contained varied items with no cross-elasticity of demand); Re-Alco Indus., 812 F. Supp. at 392 (dismissing antitrust claim where the complaint failed to "discuss the existence or nonexistence" of alternate products "and any relevant differences in demand"). The Court concludes that the Amended Complaint fails to sufficiently define a relevant product market in support of the Section 1 claim.

Fresh Made argues that even if the Amended Complaint fails to adequately allege a relevant market, it has alleged activity that constitutes a *per se* antitrust violation, and as such, it need not plead or establish a relevant market. If a plaintiff can show a *per se* antitrust violation, market power in a relevant market need not be established. See Fed. Trade Comm'n

v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 431-35 (1990); Eichorn, 248 F.3d at 147 n.4; In re: Mercedes-Benz Anti-Trust Litig., 157 F. Supp.2d 355, 359 (D. N.J. 2001). Fresh Made argues that because the complaint alleges a concerted refusal to deal (a boycott), it has alleged a *per se* violation, and any failure to plead a relevant market is immaterial.

The Supreme Court has, however, held that "precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors." NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135 (1998). Therefore, "antitrust law does not permit the application of the *per se* rule in the boycott context in the absence of a horizontal agreement.,' Id. at 138. In addition, no vertical restraint can be "illegal *per se* unless it includes some agreement on price or price levels." Id. at 136 (citing Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 735-36 (1988)).

The Amended Complaint alleges only a vertical boycott between Lifeway, the kefir container manufacturers, distributors and store owners.¹³ See, e.g., TV Communications Newtork, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1027 (10th

¹³ There is no allegation that Danone is a competitor of Lifeway in the relevant market, so any argument that any alleged agreement between those two parties is sufficient to state a horizontal boycott would be unavailing.

Cir. 1992) (agreement between "entities at different market levels" is a vertical restraint, which is not illegal *per se* absent an agreement as to pricing levels). In addition, there is no allegation that this boycott was designed to affect the price of kefir or other specialty dairy goods. For these reasons, the Amended Complaint does not properly allege a *per se* antitrust violation. Therefore, the failure to sufficiently allege a relevant antitrust market is fatal to Fresh Made's claim under Section 1 of the Sherman Act.

Lifeway also argues that Fresh Made has failed to sufficiently allege an antitrust conspiracy or concert of action. To state a federal antitrust claim under Section 1, a plaintiff must allege a conspiracy or concerted activity **by** the defendant. See Queen City, 124 F.3d at 442. A "general allegation of conspiracy without a statement **of** the facts is an allegation of a legal conclusion and insufficient of itself to constitute a cause **of** action". Fuentes v. South Hills Cardiology, 946 F.2d 196, 201-202 (3d Cir. 1991) (citation omitted). Therefore, a plaintiff "must plead the facts constituting the conspiracy, its object and accomplishment." Id.

The Amended Complaint alleges that Lifeway conspired, with the "express or implicit consent" of Danone, with manufacturers of kefir containers, with distributors, and with

store owners, in violation of Section 1.

To the extent that a conspiracy is alleged to exist between Lifeway and Smolyansky, such allegation is insufficient. such an internal agreement "to implement a single firm's policies does not raise the antitrust dangers that [Section 1] was designed to police." Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1132 (3d Cir. 1995) (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984)). Although some courts have recognized that in cases where the agent is acting "for personal reasons", an "exception to the general rule that a corporation cannot conspire with its employees, officers or agents" may exist, any such exception is not applicable here. Id. at 1135. Because Fresh Made has not alleged that Smolyansky was acting to "further his own economic interest in a marketplace actor which benefits from the alleged restraint", the personal interest exception does not apply. Id. at 1136-37.

In addition, to the extent that Fresh Made alleges a Section 1 conspiracy between Lifeway and Danone, such allegations may be insufficient. Copperweld held that a corporation cannot conspire for antitrust purposes with a wholly-owned subsidiary. Copperweld, 467 U.S. at 771-72. The Amended Complaint states that Danone is the owner of 20% of Lifeway's outstanding common stock. Danone's alleged 20% interest in Lifeway does not appear

to be enough to invoke the Comerweld rule.¹⁴ However, the allegation that Danone controls or exercises significant and substantial influence over Lifeway arguably makes Danone and Lifeway a single entity with unity of interests, incapable of conspiring under Copperweld.¹⁵ See Eichorn, 248 F.3d at 138 (recognizing that a parent and its wholly owned subsidiary cannot conspire because they have "complete unity of interest" and one 'corporate consciousness').

In any event, Fresh Made also alleges that Lifeway has conspired with manufacturers of kefir containers, distributors, and store owners.¹⁶ Am. Compl. ¶¶ 97(a)-(d). No

¹⁴ Courts have, however, extended Copperweld to situations where the parent corporation owned all but a *de minimis* portion of the subsidiary. See Siegel Transfer, 54 F.3d at 1132-33 (applying Comerweld because 99.92% stock ownership was *de minimis* variation from 100% ownership); Julian O. von Kalinowski, et al., 1 Antitrust Laws and Trade Regulation, §11.02[2] [a][iii] at 11-16 through 11-17 (2d Ed. Matthew Bender, 2001) (citing cases).

¹⁵ Fresh Made also cites a pre-Copperweld case from the Northern District of California to support its argument that single firm behavior can be litigated under Section 1 under a 'thin conspiracy' theory. See Gen. Communications Eng'g, Inc. v. Motorola Communications and Elecs., Inc., 421 F. Supp. 274 (N.D. Cal. 1976). However, as it pre-dates Comerweld, it is of little value.

¹⁶ Lifeway argues that because these persons or entities are unnamed, the allegation is insufficient. At oral argument, Fresh Made stated that if granted leave to amend the complaint, it would name at least some of the manufacturers, distributors, and store owners involved in the conspiracy. Tr. at 52. Such an
(continued..)

Copperweld problem arises with regard to these entities.¹⁷

Fresh Made has requested leave to amend its complaint to the extent that it has failed to adequately allege a proper market in support of its antitrust allegations. Plf.'s Br. at 50. Although the Court recognizes that Fresh Made has already amended its complaint once as a matter **of right** and has yet to plead a valid antitrust claim, the Court will permit Fresh Made an opportunity to amend its complaint. If Fresh Made can, in good faith, plead a relevant antitrust market with appropriate well-founded allegations to support a Sherman Act claim, it may attempt to **do** so.

IV. Sherman Act Section 2

In order to prevail on an attempted monopolization"

¹⁶(...continued)
amendment should alleviate Lifeway's concern.

¹⁷ Lifeway also argues that Fresh Made's allegations of conspiracy between Lifeway and manufacturers, distributors, and store owners describe statements made exclusively by Lifeway, and action by the other entities only under duress. See Am. Compl. ¶¶ 36-40. However, "even if one is coerced by economic threats or pressure to participate in an illegal scheme, that does not make him any less a co-conspirator" for purposes of Section 1. E.g., Otto Milk Co. v. United Dairy Farmers Coop. Ass'n, 261 F. Supp. 381, 385 (E.D. Pa. 1966), aff'd 388 F.2d 789 (3d Cir. 1967).

¹⁸ Section 2 can support a claim for monopolization or attempted monopolization. The Amended Complaint states only a
(continued...)

claim under Section 2 of the Sherman Act, a plaintiff must prove that the defendant (1) engaged in predatory or anticompetitive conduct with (2) specific intent to monopolize, and with (3) a dangerous probability of achieving monopoly power. Queen City Pizza, 124 F.3d at 442; Barr Labs., Inc. v. Abbott Labs., 978 F.2d 98, 112 (3d Cir. 1992). "In order to determine whether there is a dangerous probability of monopolization, a court must inquire into the relevant product and geographic market and the defendant's economic power in that market." Queen City, 124 F.3d at 442 (citations and internal quotation marks omitted). Lifeway argues that the Section 2 claim must be dismissed because Fresh Made cannot establish a dangerous probability of achieving monopoly power without defining the relevant product and geographic markets. "

Under Section 2, as under Section 1, the relevant market is defined by reasonable interchangeability and cross-elasticities of demand, **&**, at 442 n. 18. Because the Court has found that Fresh Made has not alleged a sufficient market in

¹⁸(...continued)
claim for attempted monopolization. Am. Compl. ¶¶ 112-117.

¹⁹ Lifeway did not challenge the Amended Complaint's allegations of anti-competitive conduct. In addition, Fresh Made alleges that Lifeway had specific intent to achieve monopoly power, and the alleged statements of Smolyansky are a sufficient factual basis for this assertion. See Am. Compl. ¶¶ 74 & 112.

terms of reasonable interchangeability and cross-elasticity of demand, the Section 2 claim will also be dismissed. See id. at 442.

Even had Fresh Made sufficiently described a relevant antitrust market, the Amended Complaint has not sufficiently alleged that there is a dangerous probability that Lifeway would achieve monopoly power. Although the Amended Complaint states that there "exists a dangerous probability that Lifeway will succeed in achieving a monopoly over the Russian specialty dairy product market in the United States", such a conclusory allegation standing alone is insufficient to state a Section 2 attempted monopolization claim. See, e.g., E. & G. Gabriel, 1994 WL 369147 at *5 (allegation that defendant had "a dangerous probability of achieving monopoly power" insufficient where claim was otherwise deficient).

The Amended Complaint alleges that Lifeway's gross annual revenues are five times as large as Fresh Made's, that Lifeway has achieved access to Danone's large distribution network, and that Lifeway has used its influence to threaten distributors and food markets who did not agree to its demands. Am. Compl. at ¶¶ 6, 10, 113 & 117. Fresh Made does not, however, allege the overall size of the proposed market, identify Lifeway's percentage share of the proposed market, identify other

participants and competitors in the market, or allege what percentage of Lifeway's gross annual revenues are derived from the proposed market. Therefore, the allegations regarding the relative size of the parties do not sufficiently illustrate that Lifeway has a dangerous probability of achieving monopoly power in the relevant market.

V. Lanham Act

Count **VIII** of the Amended Complaint alleges that Lifeway has violated the Lanham Act by publishing certain advertisements for kefir that are false and misleading. The allegedly false advertisements state that Lifeway's kefir is "America's only real kefir." Am. Compl. ¶ 170 & Ex. C.

Lifeway does not argue that Fresh Made has failed to plead the requisite elements of a Lanham Act claim.²⁰ Rather, Lifeway argues that because the Amended Complaint does not allege

²⁰ To establish a Lanham Act violation, a plaintiff must prove that: (1) the defendant has made false or misleading statements as to his own product or another's; (2) that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience; (3) that the deception is material in that it is likely to influence purchasing decisions; (4) that the advertised goods traveled in interstate commerce; and (5) that there is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, or the like. U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 922-23 (3d Cir. 1990).

that the advertisements were published after the date of the April 2000 settlement agreement, the claim is barred by the release. The Amended Complaint does, however, allege that "Lifeway represents that it sells 'America's only real kefir.'" Am. Compl. at ¶ 170. Read in a light most favorable to the plaintiff, this allegation asserts on-going conduct. As such, it alleges that the advertisements post-date the release."

Lifeway also claims that because Count **VIII** incorporates **by** reference the previous allegations contained in the Amended Complaint, "it is impossible" for Lifeway to respond to the allegations as presently pled. Def.'s **Br.** at 23. Therefore, Lifeway argues that Fresh Made should be required to re-plead Count **VIII**. The Court disagrees. The allegations in Count **VIII**, standing alone, are sufficient to put Lifeway on notice as to the nature of Fresh Made's Lanham Act claim. Lifeway's request that Fresh Made be required **to** re-plead the claim will be denied.

VI. Unfair Competition and Restraint of Trade

Lifeway argues that because Fresh Made is unable to

²¹ Of course, because Fresh Made has alleged that the release was procured by fraud, the release cannot, at this stage, act to bar the Lanham **Act** claim.

state a valid federal antitrust claim, Counts III (Restraint of Trade) and VII (Unfair Competition) should also be dismissed. The Court agrees.

Fresh Made alleges that the actions underlying its Sherman Act claims also constitute an unreasonable restraint of trade under Pennsylvania law. Am. Compl. ¶ 125. Pennsylvania Courts have recognized that the Sherman Act is "merely the application of the common-law doctrine concerning the restraint of trade to the field of interstate commerce." Collins v. Main Line Bd. of Realtors, 304 A.2d 493, 496 (Pa. 1973). See Yeager's Fuel, Inc. v. Pa. Power & Light Co., 953 F. Supp. 617, 668 (E.D. Pa. 1997); Lakeview Ambulance & Med. Servs., Inc. v. Gold Cross Ambulance & Med. Serv., Inc., No. 1994-2166, 1995 WL 842000, *4 (Pa. Ct. Comm. Pleas, Oct. 18, 1995). Therefore, the restraint of trade claim will be dismissed for the reasons given in the Court's Sherman Act discussion.²² See Yeager's Fuel, 953 F.

²² The Court also recognizes that it is questionable whether a plaintiff can recover damages under a common law restraint of trade theory in Pennsylvania. Some courts have concluded that there is no private remedy for damages under a common law restraint of trade theory, while others have left the question open. See Collins, 304 A.2d at 498 (finding an agreement in restraint of trade to be invalid, but awarding only injunctive relief, holding that the record did "not provide any legal basis for an award of damages"); Lakeview Ambulance, 1995 WL842000 at *4 (recognizing that certain courts have recognized a common law anti-trust cause of action, "but only in the limited (continued..)

Supp. at 668 ("the Court's decision regarding Plaintiffs' common-law restraint of trade claim mirrors the conclusion reached in assessing Plaintiffs' claim under § 1 of the Sherman Act").

Pennsylvania has recognized a common-law claim of unfair competition under the Restatement (Third) of Unfair Competition. See Yeager's Fuel, 953 F. Supp. at 668; Lakeview Ambulance, 1995 WL 842000 at *2; Restatement (Third) Unfair Competition § 1(a) & Comment g. Fresh Made alleges that Lifeway's efforts to "restrict [FreshMade's] market share" and to "establish a monopoly over the specialized dairy products" market constitute acts of unfair competition. Am. Compl. ¶¶ 156 & 157. As these allegations essentially mirror Fresh Made's Sherman Act claims, they suffer from the same deficiencies in how Fresh Made has attempted to define market share and the relevant market. For that reason, the Unfair Competition claim will also be dismissed. Cf. Yeager's Fuel, 953 F. Supp. at 668 (allowing

22(...continued)
circumstances of trademarks, trade secrets, or restraint of trade pursuant to statute"); XF Enters. Inc. v. BASF Corp., No. 9906-1477, 2000 WL 33155746, *1 (Pa. Ct. Comm. Pleas July 13, 2000) ("No court to date has held that a private remedy **is** available for damages under Pennsylvania's common law on antitrust violations."). Even if a private plaintiff in Pennsylvania could recover under common law restraint of trade theory, the Amended Compliant has failed to state such a claim. Therefore, the Court need not, at this point, decide whether it would be possible for a plaintiff to recover under such a theory.

unfair competition claim to go forward because there were 'fact issues concerning whether [the defendant] violated the various federal antitrust statutes").

VII. Civil Conspiracy

Count VI of the Amended Complaint alleges that the "defendants have, among themselves, agreed to embark on a course of conduct with the specific intent of restraining Fresh Made's business." Am. Compl. ¶ 150. Lifeway argues that this claim should be dismissed because it is merely a restatement of Fresh Made's antitrust claims, because the defendants, having unity *of* interest, cannot conspire with one another, and because Fresh Made has failed to allege the requisite degree of malice.

"A civil conspiracy under Pennsylvania law requires that two or more persons combined or agreed with intent to **do** an unlawful act or to do an otherwise lawful act by unlawful means. Proof of malice, *i.e.*, an intent to injure is essential in proof of a conspiracy." Keating v. Bucks County Water & Sewer Auth., No. Civ. A. 99-1584, 2000 WL 1888770, *16 (E.D. Pa. Dec. 29, 2000) (citing Skipworth by Williams v. Lead Indus. Ass'n., Inc., 690 A.2d 169, 174 (Pa. 1997) and Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 472 (Pa. 1979)). In addition, under Pennsylvania law, as under federal antitrust law, a corporation

cannot conspire with itself, or with its officers or agents acting solely for the corporation. See, e.g., Keating, 2000 WL 1888770 at *16; Fox v. Keystone Turf Club, Inc., No. Civ. A. 97-1424, 1997 WL 793590, *2 (E.D. Pa. Dec. 4, 1997); Thompson Coal, 412 A.2d at 473.

Because there are no allegations that Smolyansky was acting outside of his role as a director of Lifeway, any alleged conspiracy between him and Lifeway fails as a matter **of** law. See, e.g., Fox, 1997 WL 793590 at *2. Similarly, because Fresh Made alleges that Danone controls and exercises significant influence over Lifeway, any allegation **of** conspiracy between Danone and Lifeway raises similar concerns.²³

In any event, under Pennsylvania law, a claim of civil conspiracy cannot be pled without also alleging an underlying actionable wrong. See Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 405 (3d Cir. 2000). When a court dismisses the causes of action which underlie a civil conspiracy claim, the

²³ To the extent that Fresh Made's conspiracy claim is based on a conspiracy between Fresh Made and the unnamed manufacturers, distributors and store owners, the claim is also on unsound footing. See, e.g., Fox, 1997 WL 793590 at *2 (dismissing civil conspiracy claim where the identity of the co-conspirators was "unclear at best"). **As** mentioned above, Fresh Made has indicated that it would name certain **of** the manufacturers, distributors and store owners if granted leave to amend. Tr. 52. This could cure any defect in the identification of any such conspirators.

civil conspiracy claim must also be dismissed. See, e.g., Samuel v. Clark, No. Civ. A. 95-6887, 1996 WL 448229, *4 (E.D. Pa. Aug. 7, 1996) (dismissing conspiracy claim where underlying claims for fraud and discrimination were dismissed); Rose v. Wissinger, 439 A.2d 1193, 1199 (Pa. Super. Ct. 1982) (dismissing conspiracy claim where defamation and outrageous conduct claims were dismissed); Raneri v. Depolo, 441 A.2d 1373, 1376 (Pa. Cmwlth. 1982) (dismissing conspiracy claim where underlying claim for defamation was dismissed); see generally Boyanowski, 215 F.3d at 405 (overturning civil conspiracy verdict where jury found no liability on underlying tortious interference claim); GMH Assocs., Inc. v. Prudential Realty Grp., 752 A.2d 889, 905 (Pa. Super. 2000) (setting aside civil conspiracy verdict where underlying fraud verdict was reversed on appeal).

Fresh Made's civil conspiracy claim is predicated upon the same conduct underlying the antitrust, unfair competition, and restraint of trade claims. Because the Court will dismiss those claims, the claim for civil conspiracy must also be dismissed. See, e.g., Samuel, 1996 WL 448229 at *4.

VIII. Malicious Abuse of Process

In Count IV **of** the Amended Complaint, Fresh Made alleges that the series of lawsuits filed against it by Lifeway

constitute the tort **of** malicious abuse of process. To establish a claim for malicious abuse **of** process under Pennsylvania law, it must be shown that "the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed, and (3) harm has been caused to the plaintiff." Hart v. O'Malley, 647 A.2d 542, 551 (Pa. Super. Ct. 1994) (citing Restatement (Second) Torts § 682). Although the word "process" as used in this tort "has been interpreted broadly [to] encompass the entire range of procedures incident to the litigation process", the restatement makes clear that the gravamen of this tort is not "the wrongful initiation" of proceedings. Restatement (Second) Torts § 682, Comment a.

Recognizing this fact, and the distinction between the tort of abuse of process and the tort of wrongful use of civil proceedings,²⁴ courts have held that a complaint alleging only

²⁴ The tort of wrongful use of civil proceedings makes a person liable for initiating or continuing a civil proceeding if he acts (1) in a grossly negligent manner or without probable cause and primarily for a purpose other than that **of** securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and (2) the proceedings have terminated in favor **of** the person against whom they are brought. See Rosen v. Am. Bank of Rolla, 627 A.2d 190, 191-92 (Pa. Super. Ct. 1993) (citing 42 Pa. Cons. Stat. Ann. § 8351). Here there are no allegations that **any** of the court proceedings initiated by Lifeway terminated in favor of Fresh Made (indeed, the parties settled two of the lawsuits and one is ongoing), and the tort of wrongful initiation of civil proceedings is not applicable.

that one party initiated suit against another for improper purposes is insufficient to state a claim for malicious abuse of process, See Todi v. Stursberg, No. Civ. A. 01-2539, 2001 WL 1557517, *2 (E.D. Pa. Dec. 4, 2001).

The Amended Complaint alleges only that the lawsuits at issue were "commenced" by Lifeway with an improper purpose. Am. Compl. ¶ 133. In the absence of allegations that process was abused after the suits were commenced, Fresh Made has not adequately stated a claim for malicious abuse of process. See id. at *2 ("Absent allegations that a party has abused the process *after* its issuance . . . an abuse of process claim cannot stand.") (citations and internal quotation marks omitted). Therefore, the Court will dismiss Count IV of the Amended Complaint.

IX. Interference with Business Relationships

In Count V, Fresh Made alleges that Lifeway "with purposeful intent to interfere with [Fresh Made's] business, induced merchants and distributors to cease doing business with [Fresh Made] under threat of economic sanctions," Am. Compl. ¶ 142. Fresh Made also alleges that Lifeway "interfered with Fresh Made's ability to develop future or prospective contractual business relationships with merchants and distributors. Id. at ¶

143. Lifeway argues that Count V must be dismissed because Fresh Made has not identified the specific existing and prospective business relationships which have been harmed by Lifeway's conduct.

To establish a claim for interference with contractual or prospective contractual relations under Pennsylvania law, a plaintiff must show: (1) the existence of a contractual or prospective contractual relationship between the plaintiff and a third party; (2) a purpose or intent to harm an existing relationship or to prevent a prospective relationship from accruing; (3) the absence of privilege or justification on part of the defendant; and (4) the occurrence of actual harm or damage to the plaintiff as a result of the defendant's conduct. See Pellegrino Food Prods. Co. v. City of Warren, 136 F. Supp.2d 391, 408 (W.D. Pa. 2000); Advanced Power Sys., Inc. v. Hi-Tech Sys., Inc., Civ. No. 90-7952, 1992 WL 97826, *10 (E.D. Pa. Apr. 30, 1992).

When alleging interference with existing contractual relations, a plaintiff should identify which existing contractual relationships were hindered. See Allstate Transp. Co. v. Southeastern Pa. Transp. Auth., No. 971482, 1997 WL 666178, **10-11 (E.D. Pa. Oct. 20, 1997). When alleging interference with prospective contractual relations, the allegations need not be as

precise. A plaintiff must not, however, "rest a claim for tortious interference with prospective contractual relations on a mere hope that additional contracts or customers would have been forthcoming but **for** defendant's interference." Advanced Power Sys, 1992 WL 97826 at *11. The complaint "must allege facts that, if true, would give rise to a reasonable probability that particular anticipated contracts would have been entered into." Id. Such a probability "may arise from an unenforceable express agreement **or** an offer", or where "there is a reasonable probability that a contract will arise from the parties' current dealings." Allstate Transp., 1997 WL 666178 at *11. However, "merely pointing to an existing business relationship or past dealings **does not** reach this level of probability." Id.

Fresh Made alleges that its existing contractual relationships with certain distributors and stores were interfered with by Lifeway. Fresh Made does not further identify any of the stores or distributors, or otherwise identify any contractual relationships that were interfered with. Although the federal rules require only a short and plain statement of the claim, that statement "must be sufficient to give the defendant[s] notice of the claim and the grounds upon which it is based." Id. Because **the** potential universe **of** identified

relationships is enormous,²⁵ the Court concludes that the Amended Complaint does not give sufficient notice of the existing business relationships at issue here.²⁶ ~~See, e.g.,~~ Id. (claim dismissed where claim identified relationships with "essential contractors" and "other ParaTransit business relationships"); Centennial Sch. Dist. v. Independence Blue Cross, 885 F. Supp. 683, 688 (E.D. Pa. 1994) (claim dismissed where complaint "fail[ed] to identify what contractual relationships were threatened"); see generally, Fluid Power, Inc. v. Vickers, Inc., Civ. A. No. 92-0302, 1993 WL 23854, *4 (E.D. Pa. Jan. 28, 1993) (claim sufficient where one contract was identified with particularity and where plaintiff provided customer lists with the names of plaintiff's other existing and prospective customers).

Fresh Made's allegations with regards to prospective business relationships are also insufficient. The Amended Complaint states only that Fresh Made "was developing future or prospective business relationships" with certain distributors and

²⁵ As an illustration, Lifeway distributes its products to some 15,000 stores nationwide. Tr. at 55. Because the proposed relevant market encompasses the entire country, each of these stores is potentially implicated by Fresh Made's allegations.

²⁶ Fresh Made's intention to name certain stores and distributors in any amended pleading could address this shortcoming.

merchants, and that Lifeway interfered with Fresh Made's "ability to develop" those contractual relationships. Am. Compl. ¶¶ 141 & 143. These allegations do not identify any particular potential relationships, nor do they provide any basis for concluding that there was "an objectively reasonable probability that [such relationships would] come into existence". Allstate Transp., 1997 WL 666178 at *11. For that reason, Fresh Made's claim for interference with potential business relationships will be dismissed. See, e.g., Jaramillo v. Experian Inf. Solutions, Inc., 155 F. Supp.2d 356, 365 (E.D. Pa. 2001) (claim dismissed where plaintiff failed to plead the "existence of any specific contract or prospective contract"); Advanced Power Sys., 1992 WL 97826 at *12 (claim dismissed where plaintiff "failed to either identify particular potential customers or to allege the existence of a mechanism that would routinely bring it new customers"); see generally, Joyce v. Alti Am., Inc., No. Civ. A. 00-5420, 2001 WL 1251489, *4 (E.D. Pa. 2001) (claim sufficient where plaintiff identified a "specific third party" with whom it had been attempting to enter a contract); Pellegrino, 136 F. Supp.2d at 408 (claim sufficient where plaintiff alleged that it received inquiries about potential contracts from certain entities).

X. Request for Leave to Amend

In its Brief in Opposition to the Motion to Dismiss, Fresh Made reports that it has discovered another potential Lanham Act violation allegedly committed by Lifeway. Fresh Made states that Lifeway has been using a limited trademark which does **not** apply to butter on its butter products. Fresh Made has requested leave to amend the complaint to include additional claims, under the Lanham Act and common law unfair competition, for this alleged conduct. Lifeway did not oppose this request in its reply brief. The Court will grant Fresh Made's request for leave **to** amend to add these claims. See Fed. R. Civ. P. 15(a) ("leave shall be freely given when justice so requires").

An appropriate Order follows.

IN **THE** UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT **OF** PENNSYLVANIA

FRESH MADE, INC.,
Plaintiff

CIVIL ACTION

v.

:
:

LIFEWAY FOODS, INC., et al.,
Defendants

NO. 01-4254

ORDER

AND NOW, this 8th day of August, 2002, upon consideration of the Motion of Defendants Lifeway Foods, Inc., and Michael Smolyansky to Dismiss the Amended Complaint in its Entirety, or in the Alternative for a More Definitive Statement as to Count VIII (Docket #15), the plaintiff's Memorandum of Law in Opposition thereto, various supplemental filings **by** the parties, and after oral argument, **IT IS HEREBY ORDERED** that said Motion is **GRANTED IN PART** and **DENIED IN PART**, as follows, in accordance with the Memorandum of today's date:

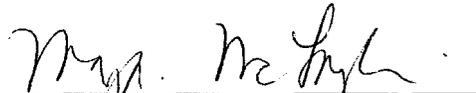
1. The Motion is **GRANTED** as to Counts **I** (Sherman Act Section 1), **II** (Sherman Act Section 2), **III** (Restraint of Trade), **IV** (Malicious Abuse of Process), **V** (Interference with Existing and Prospective Business Relationships), **VI** (Civil Conspiracy), **VII** (Unfair Competition), and **X** (Unfair Trade Practices Act). Those counts are **HEREBY DISMISSED**.

2. The Motion is DENIED insofar as it seeks to dismiss Count VIII (Lanham Act).

3. The Motion is DENIED insofar as it seeks a more definitive statement as to Count VIII (Lanham Act).

4. The plaintiff shall be permitted to file an amended complaint within **forty-five** (45) days.

BY THE COURT:


MARY A. McLAUGHLIN, J.

Unmailed 8/9/02:

R. Kessler, usg

faxed 8/9/02:

E. Golbin, usg

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