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

U.S. HORTICULTURAL SUPPLY, INC.,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	
THE SCOTTS COMPANY, et al.	:	
Defendants	:	NO. 04-5182

MEMORANDUM AND ORDER

McLaughlin, J. June 1, 2006

The plaintiff has alleged that the Scotts Company ("Scotts") conspired with Griffin Greenhouse Supplies, Inc. ("Griffin") to restrain trade in the mid-Atlantic and/or New England market for horticultural products and Scotts brand horticultural products in violation of Section 1 of the Sherman Act. Scotts has moved to dismiss the plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. The Court will deny Scotts' motion.

I. Procedural History

The plaintiff originally sued Scotts on February 7, 2003 and brought an attempted monopolization claim against Scotts pursuant to Section 2 of the Sherman Act. The plaintiff also made allegations of promissory estoppel and breach of contract. Scotts moved to dismiss the Sherman Act claim and the promissory estoppel claims. The plaintiff then withdrew the promissory

estoppel claims and after some discovery, agreed to withdraw the Section 2 claim as well. On July 20, 2005, the Court granted Scotts' motion for summary judgment with respect to the breach of contract claim.

On September 29, 2004, while the plaintiff was still litigating the Section 2 claim, the Court denied the plaintiff's motion for leave to amend to add a claim under Section 1 of the Sherman Act. Following that decision, the plaintiff filed this complaint on November 5, 2004 against Scotts and Griffin. Scotts filed a motion to dismiss on December 2, 2004 and oral arguments were held on March 18, 2005. At the oral arguments, a representation was made that the plaintiff settled with Griffin, so only Scotts remains as a defendant.

II. Factual Background[1]

In support of its Section 1 claim, the plaintiff, a former distributor of horticultural products in the mid-Atlantic region, alleges that Scotts, a supplier of horticultural

[1] When considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court accepts all facts and allegations listed in the complaint as true and construes them in the light most favorable to the plaintiff. H.J., Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 249 (1989); Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

products, conspired with another one of its distributors, Griffin, to restrain trade in the mid-Atlantic and New England market for horticultural products and Scotts brand horticultural products. The plaintiff alleges that the objects of the conspiracy were: (i) to eliminate the plaintiff as a competitor to Griffin by preventing the plaintiff from entering the New England market and driving the plaintiff out of the mid-Atlantic market; (ii) to prevent the plaintiff from selling horticultural products from other manufacturers that competed with Scotts; (iii) to prevent the plaintiff from selling Scotts' products at lower prices than Scotts desired; and (iv) to raise the prices of Scotts branded products.

To accomplish the objects of the conspiracy, the plaintiff claims that Scotts and Griffin agreed that: (i) Scotts would assist Griffin in entering the mid-Atlantic market; (ii) Scotts would hinder the plaintiff from entering the New England market to compete with Griffin; (iii) Scotts would impose unreasonable credit terms and other costs on the plaintiff so that the plaintiff could not survive as a competitor to Griffin; and (iv) after the plaintiff had been eliminated as a competitor, Griffin would increase the prices it charged for Scotts branded products to supra-competitive levels.

The result of this alleged conspiracy was that the plaintiff did go out of business and Griffin was able to purchase

the plaintiff's assets at distressed levels. As a result of the plaintiff's demise, inter-brand competition with Scotts' products was reduced and Griffin raised the prices of Scotts brand products to supra-competitive levels.

III. Legal Analysis

Section 1 of the Sherman Act provides: "Every 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, is hereby declared to be illegal." 15 U.S.C. § 1. Courts have long recognized that Section 1 only prohibits unreasonable restraints of trade. Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988).

Generally, to establish a Section 1 violation, a plaintiff must prove: "(1) concerted activity 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); Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991). When a conspiracy to commit a per se violation of Section 1 is alleged though, a plaintiff need only prove a conspiracy existed that was the proximate cause of the plaintiff's injuries.

In re Flat Glass Antitrust Litig., 385 F.3d 350, 356 (3d Cir. 2004).

Scotts has argued that the complaint should be dismissed because it does not plead facts that are sufficiently specific to support a conspiracy and that the facts it does allege are consistent with unilateral action. Additionally, Scotts argues that even if the complaint properly alleges a conspiracy, it does not allege a per se violation and the plaintiff has not properly alleged an anti-competitive effect or a relevant product or geographic market. Although the Court has reservations about whether the plaintiff will be able to prove its claims, at this stage in the proceedings, the Court concludes that the plaintiff had pled facts which, if true, could establish a vertical agreement to fix prices that is illegal per se under Section 1.

A. Concerted Action

Generally, Section 1 claims are held to the pleading standard laid out in Federal Rule of Civil Procedure 8(a) which requires a short and plain statement of the claim. Lum v. Bank of Am., 361 F.3d 217, 228 (3d Cir. 2004). Courts "'should be extremely liberal in construing antitrust complaints.'" Id. (quoting Knuth v. Erie-Crawford Dairy Coop. Ass'n., 395 F.2d 420, 423 (3d Cir. 1968)). However, a general allegation of

conspiracy, without more is not sufficient. Although detail is not necessary, a plaintiff "must plead the facts constituting the conspiracy, its object and accomplishment." Black & Yates, Inc. v. Mahogany Ass'n, Inc., 129 F.2d 227, 231 (3d Cir. 1941).

Albeit in a slightly different context than this instant case, the United States Court of Appeals for the Third Circuit dealt with the question of whether allegations of concerted action in a Section 1 case were sufficient to survive a motion to dismiss in Fuentes v. South Hills Cardiology, 946 F.2d 196 (3d Cir. 1991). The plaintiff in Fuentes alleged that doctors, who were in competition with the plaintiff, conspired with a hospital to terminate the plaintiff's staff privileges. In sum, the relevant allegations in the complaint stated that: (i) competing doctors requested that the hospital deny the plaintiff staff privileges; (ii) in direct response to this request, the hospital did deny the plaintiff staff privileges; (iii) the denial of staff privileges would not have occurred but for the request by competing doctors; (iv) the defendants' conduct constituted an illegal group boycott under Section 1; and (v) the denial of staff privileges at the hospital deprived the plaintiff of the ability to provide health care services in competition with the defendants. Fuentes, 946 F.2d at 201.

After referencing the standard from Black & Yates, the Court of Appeals held that the plaintiff's "allegations

identifying the conspiracy's participants, purpose and motive are sufficient to survive a motion to dismiss." Id. at 202. This was so even though the plaintiff had not identified any meetings or phone calls at which the conspiracy was carried out. Id.

In this case, although the complaint lacks detail about how the alleged conspiracy was formed, it is sufficiently specific to survive a motion to dismiss.

First, the complaint identifies Scotts and Griffin as the participants in the conspiracy and alleges that its purpose was to drive the plaintiff out of the mid-Atlantic market, replace it with Griffin, raise the prices of Scotts branded products and reduce inter-brand competition with Scotts branded products. The ultimate motive of Scotts and Griffin is easily inferred as a desire to increase profits. (Compl. ¶¶ 1, 18).

Additionally, the complaint goes into some detail as to how Scotts and Griffin accomplished and carried out their agreement. The complaint alleges that the conspiracy was formed in about 1998. Initially, Griffin obtained Scotts' permission to distribute Scotts branded products in the mid-Atlantic market and in about 1998 Griffin entered that market. Scotts facilitated Griffin's entry by shipping products directly to certain high-volume, high-profit buyers thereby saving Griffin storage and distribution costs. At the same time that Scotts was assisting Griffin's entry into the mid-Atlantic market, it is alleged that

Scotts denied the plaintiff the ability to compete with Griffin in the New England market and imposed onerous credit restrictions on the plaintiff. In 2002, Scotts ceased doing business with the plaintiff, after repeated promises that the plaintiff's distribution agreement would be renewed and following discussions between the plaintiff and Scotts regarding the plaintiff's distribution of certain non-Scotts brand products. This left the plaintiff without adequate supply arrangements for horticultural products and drove the plaintiff out of business. Griffin was then able to purchase the plaintiff's assets at a low price. Following this, Griffin raised the prices it charged for Scotts brand products to supra-competitive levels. (Compl. ¶¶ 1-2, 17-42).

Scotts relies on Zimmerman v. PepsiCo., Inc., 836 F.2d 173 (3d Cir. 1988), a case decided prior to Fuentes, to support its argument that the plaintiff's allegations of a Section 1 conspiracy are not sufficiently particularized to withstand a motion to dismiss. At issue in PepsiCo was whether the plaintiff had alleged facts sufficient to support a claim that the defendants committed a per se Section 1 violation by forming a horizontal conspiracy. Although the Soft Drink Act governed the plaintiff's allegations, the United States Court of Appeals for the Third Circuit considered in detail the question of whether the plaintiff had pleaded a per se violation of the Sherman Act

based on a horizontal conspiracy that would exempt the case from the requirements of the Soft Drink Act. However, the Court of Appeals concluded that because of the Soft Drink Act, the plaintiff had a much higher pleading burden than that in a typical antitrust case. PepsiCo, 836 F.2d at 181.

The complaint alleged that PepsiCo, two licensed bottlers and other unnamed co-conspirators agreed to reduce competition between bottlers and resellers by prohibiting sales between resellers. Specifically, the complaint alleged that the defendants and their co-conspirators would refuse to sell to and would otherwise penalize resellers who bought PepsiCo products from or sold PepsiCo products to other resellers. The defendants and their co-conspirators would track such sales by a coding identification system. Id. at 180.

The Court of Appeals concluded that the complaint did not state a horizontal conspiracy claim which would exempt it from the Soft Drink Act. In reaching that conclusion, the Court of Appeals found that: (1) the complaint did not properly identify the co-conspirators and did not allege any agreement that was attributable solely to bottlers, without the involvement of PepsiCo; and (2) there were no allegations of any communications between the defendant bottlers or other means by which any alleged agreement came about. Id. at 181.

Even disregarding the fact that a higher pleading

burden was imposed on the plaintiff in PepsiCo as a result of the Soft Drink Act, the plaintiff's complaint in this case is distinguishable from the complaint in that case.

First, in this case, the plaintiff's complaint identifies the participants by name and makes an allegation of an agreement which, if true, would constitute the vertical agreement which forms the basis of the plaintiff's Section 1 claim. The complaint in PepsiCo, which alleged a horizontal agreement, failed to allege an agreement solely among competing bottlers.

Second, although the plaintiff's complaint makes only bare-bones allegations of specific communications between Scotts and Griffin,[2] the lack of such allegations alone does not require dismissal. See Fuentes, 946 F.2d at 202. Additionally, the plaintiff's complaint does go into detail about the means employed to carry out the alleged agreement. Thus, dismissal is not required under PepsiCo.

Lack of specificity aside, Scotts has also argued that the plaintiff's Section 1 claim must be dismissed because the complaint does not allege facts which are inconsistent with unilateral action. In Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), the Supreme Court held that in

[2] Besides the general allegation that Scotts and Griffin conspired, the only allegation of a specific communication between Scotts and Griffin is an allegation in paragraph 18 of the complaint which states that Griffin sought and obtained Scotts' permission to enter the mid-Atlantic market.

the context of a summary judgment motion, "a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." Matsushita, 475 U.S. at 588 (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984)). Although Matsushita did not deal with a motion to dismiss, its reasoning has been applied in this context. See Brunson Commc'ns Inc. v. Arbitron, Inc., 239 F. Supp. 2d 550, 563-564 n.5 (E.D. Pa. 2002) (citing cases). The Court of Appeals in PepsiCo also found Matsushita relevant in the context of a motion to dismiss, but did not directly apply its reasoning. PepsiCo, 836 F.2d at 181-82.

Cases that have applied Matsushita in the context of a motion to dismiss have not required a plaintiff to put forth evidence that tends to exclude the possibility that the defendants acted independently, but instead look to the facts alleged in the complaint to see if they support an inference of an agreement. For example, in Brunson, the district court applied Matsushita and dismissed the complaint because the allegations were "not sufficient to support an inference that defendants acted conspiratorially." Brunson, 239 F. Supp. 2d at 563-64. Similarly, the cases cited by Brunson to support the application of Matsushita found that dismissal was warranted when the alleged conspiracy was illogical, made no economic sense, or

when the facts, viewed in the light most favorable to the plaintiff, did not support an antitrust claim. See DM Research, Inc. v. College of Am. Pathologists, 2 F. Supp. 2d 226, 229-230 (D.R.I. 1998) (aff'd 170 F.3d 53); United Magazine Co. v. Murdoch Magazines Distrib. Inc., 146 F. Supp. 2d 385, 401-02 (S.D.N.Y. 2001); Cancall PCS, LLC v. Omnipoint Corp., No. 99-3395, 2000 U.S. Dist. LEXIS 2830 at *23 n.4 (S.D.N.Y Mar. 6, 2000). These decisions are consistent with Fuentes which held that a complaint should not be dismissed even though there was a competing inference of unilateral action. Fuentes, 946 F.2d at 202.

The Court does not have to decide whether Matsushita is applicable here, because even applying Matsushita to the plaintiff's complaint, the Court concludes that the complaint states a plausible claim for a conspiracy.

The parties do not dispute that Scotts would have been justified under the antitrust laws if Scotts had unilaterally decided to choose Griffin over the plaintiff as a distributor for its products in the mid-Atlantic region and the most likely inference to be drawn from the plaintiff's allegations is that Scotts did just that. Any subsequent price increase or refusal to sell competing products by Griffin is likely due to an independent decision by Griffin.

That said, the complaint alleges that all of the actions taken by Scotts were done to carry out a joint plan with

Griffin to drive the plaintiff out of the market, reduce competition with competing brands and raise prices. Although at some point the plaintiff will need to put forth evidence, beyond bare allegations, that tends to exclude unilateral conduct, at this stage, the Court cannot rule out the possibility that Scotts may not have decided to stop doing business with the plaintiff unilaterally unless it had some assurances that another distributor would be in a position to take over for the plaintiff, charge higher prices and reduce competition from other brands. Thus, dismissal is not appropriate at this stage even applying Matsushita. See Fuentes 946 F.2d at 202.

B. Per Se Violation

The next issue is whether the alleged conspiracy constitutes a per se violation of the Sherman Act. If the plaintiff has alleged a conspiracy to commit a per se violation of Section 1, the plaintiff only has to plead facts which, if true, could show that Scotts was the proximate cause of the plaintiff's injuries. In re Flat Glass Antitrust Litig., 385 F.3d 350, 356 (3d Cir. 2004). Otherwise the plaintiff must proceed under the rule of reason and also plead facts which, if true, could demonstrate an anti-competitive effect within the relevant product and geographical markets. See Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991).

In Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988), the Supreme Court addressed the question of when a vertical agreement results in a per se violation of Section 1. Business Electronics involved a situation where Sharp terminated one of its dealers, Business Electronics, because of price cutting and pursuant to an agreement with another dealer. Bus. Elecs., 485 U.S. at 722. The Supreme Court agreed with the United States Court of Appeals for the Fifth Circuit which held that for a vertical agreement between a manufacturer and a dealer to terminate a second dealer to be illegal per se, the non-terminated dealer must "expressly or impliedly agree to set its prices at some level, though not a specific one." Id. at 722, 726 (internal quotations omitted).

In this case, the plaintiff has alleged facts, which if proven, could establish a per se violation of the Sherman Act under Business Electronics. The complaint alleges that Scotts and a dealer, Griffin, conspired to eliminate another dealer, the plaintiff, because of the plaintiff's price cutting and sales of non-Scotts branded products. It is alleged that part of the conspiracy was an agreement between Scotts and Griffin that Griffin would raise prices to supra-competitive levels once the plaintiff had been eliminated. Once the plaintiff was no longer in business, it is alleged that Griffin did indeed raise prices for Scotts branded products and/or other horticultural products

to supra-competitive levels.[3] (Compl. ¶¶ 1-2, 18, 42).

Scotts has not argued that the plaintiff failed to plead facts which, if true, could demonstrate that the alleged conspiracy was the proximate cause of the plaintiff's injuries. Thus, the plaintiff has stated a claim under Section 1. See In re Flat Glass Antitrust Litigation, 385 F.3d 350, 356 (3d Cir. 2004). Because the plaintiff has pled a per se violation of the Sherman Act, at this stage, the Court need not consider Scotts' arguments that the plaintiff has not adequately pled an anti-competitive effect in a relevant product or geographical market.

IV. Conclusion

Since Scotts terminated its distribution agreement with the plaintiff in late 2002, there have been a number of lawsuits between the plaintiff and Scotts in both this Court and in other fora. Prior to this case, the plaintiff filed a Section 2 claim against Scotts that the plaintiff agreed to dismiss after insufficient evidence was found during discovery to support its allegations. However, despite the fact that there has been extensive litigation of related claims, this instant claim was filed as a new case and the defendants filed a motion to dismiss

[3] Scotts has argued that depositions in a related case undermine the plaintiff's allegation of price-fixing. At this stage though, the Court will not look beyond the complaint to discovery taken in a related case.

for failure to state a claim. Although the Court has some serious reservations as to the merits of the plaintiff's claims, at this point, the Court cannot conclude that it is beyond doubt that the plaintiff will be able to prove a violation of Section 1 and thus Scotts' motion to dismiss must be denied.

An appropriate Order follows.

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

U.S. HORTICULTURAL SUPPLY, INC.,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	
THE SCOTTS COMPANY, et al.	:	
Defendants	:	NO. 04-5182

ORDER

AND NOW, this 1st day of June, 2006, upon consideration of the motion to dismiss filed by the Scotts Company (Docket No. 5), the plaintiff's opposition and Scotts' reply, as well as arguments presented at a hearing held on March 18, 2005, IT IS HEREBY ORDERED that Scotts' motion to dismiss is DENIED for the reasons set forth in a memorandum of this date.

The Court will hold a telephone conference with counsel on Monday, June 26, 2006 at 11:00 a.m. to discuss the scheduling of this case. Counsel for the plaintiff shall initiate the call. Judge McLaughlin's chambers telephone number is 267-299-7600. Prior to the telephone conference the parties shall attempt to reach an agreement regarding a schedule for discovery and dispositive motions.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.