IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

CRAFTSMEN LIMOUSINE, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 98-3454-CV-S-RJC-ECF
	)	
FORD MOTOR COMPANY, et al.,	)	
	)	
Defendants.	)	

SUGGESTIONS IN SUPPORT OF
DEFENDANT GENERAL MOTORS CORPORATION'S
MOTION TO DISMISS

Introduction

Plaintiffs Craftsman Limousine, Inc., and JMRL Sales & Service, Inc., filed suit against General Motors Corporation ("GM") and other defendants alleging both federal and state antitrust claims and various state tort claims. For the reasons stated herein, this Court should dismiss plaintiffs' Complaint against GM.

I. Applicable standards for dismissal

Upon review of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must assume the facts alleged by a plaintiff are true. *See, e.g., Baxley-DeLamar Monuments v. American Cemetery Assoc.*, 843 F.2d 1154, 1156 (8th Cir. 1988). However, to survive a motion to dismiss, a plaintiff's complaint must allege all the necessary elements showing that he is entitled to relief. *See Penn v. Iowa State Bd. of Regents*, 999 F.2d 305, 307 (8th Cir. 1993). Thus, after a court reviews a complaint in the light most favorable to the plaintiff, dismissal is appropriate where "it is clear that no

relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Courts should be particularly scrutinizing at the pleading stage when claims of antitrust violations are asserted. As the Seventh Circuit has stated: "[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Car Carriers*, 745 F.2d at 1106.

II. Sherman Act § 1, Restraint of Trade Claim

Count I of plaintiffs' Complaint alleges that defendants conspired in an unreasonable restraint of trade that took the form of a group boycott:

> Said group boycott was instigated and conducted by Defendants Ford/Lincoln and General Motors/Cadillac who had and have market power, i.e., a controlling percentage of market share of, the manufacture of the passenger sedan automobiles which are the raw material of the limousine conversion industry; and by Defendants Limo and its members who had and have a market power over, i.e., a controlling percentage of market share of, the advertising and attendance necessary to support *Limousine & Chauffeur*, *Limousine Digest*, and their respective shows.

Plaintiffs' Complaint at ¶ 75.

When confronted with a motion to dismiss, courts must determine whether allegations covering all of the elements that comprise a § 1 claim have been stated. *See United States v. Employing Plasterers' Ass'n*, 347 U.S. 186, 189 (1954). Although modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant

antitrust language to state a claim for relief. *See TV Communications Network v. Turner Network Television*, 964 F.2d 1022, 1027 (10th Cir.), *cert. denied*, 506 U.S. 999 (1992).

The Sherman Act, 15 U.S.C. § 1, 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 declared to be illegal . . . ." Thus, regardless of the challenged activity, a plaintiff must establish three elements to prove a § 1 violation: (1) the existence of a conspiracy or concerted action among two or more separate entities; (2) an unreasonable restraint of trade, and (3) an effect upon interstate commerce. *See Consolidated Farmers Mut. Ins. Co. v. Anchor Savings Assoc.*, 480 F. Supp. 640, 648 (D. Kan. 1979). *See also Double D Spotting Serv. Inc. v. Supervalu, Inc.*, 136 F.3d 554, 558 (8th Cir. 1998). Plaintiffs have failed to adequately allege any of these elements.

A. Plaintiffs' Complaint fails to allege a conspiracy

Section 1 of the Sherman Act does not proscribe independent action by a single entity. *See United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Rather, § 1 reaches unreasonable restraints on trade effected by a contract, combination, or conspiracy. *See Copperweld Corp. v. Independence Tube Corp*, 467 U.S. 752, 768 (1984). A conspiracy is "a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). Such a conspiracy need not be in the form of an express agreement but may, in fact, be inferred from the behavior of the alleged conspirators. *See H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981).

A plaintiff must adequately allege this essential element of conspiracy to withstand a motion to dismiss. *See Smilecare Dental Group v. Delta Dental Plan*, 88 F.3d 780, 786 (9th Cir. 1996). A plaintiff must therefore make more than a "bare bones" allegation of conspiracy, *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994), and must plead factual allegations that would support such a claim, *see Dillard v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 961 F.2d 1148, 1159 (5th Cir. 1992). Simply alleging "conspiracy" or "agreement" is not enough. *See DM Research v. College of Am. Pathologists*, No. 98-1555, 1999 WL 104446, *4 (1st Cir. Mar. 4, 1999) ("[T]erms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation--for example, identifying a written agreement or even a basis for inferring a tacit agreement."); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) *cert. denied*, 470 U.S. 1054 (1985) ("the plaintiffs 'will get nowhere merely by dressing [the facts] up in the language of antitrust'"). While the plaintiff need not offer any reason for the alleged conspiracy, the lack of factual allegations supporting the claim is fatal. *See Broyles v. Wilson*, 812 F. Supp. 651, 655 (M.D. La. 1993).

Thus, where a complaint lacked any allegations of communications, meetings, or other means through which one might infer a conspiracy, and the complaint lacked details as to the time and place of the alleged conspiracy, the court upheld the dismissal of a § 1 claim. *See Estate Constr.*, 14 F.3d at 221. Similarly, where a complaint failed to allege a coherent theory of participation by the alleged conspirators, the court dismissed the claim. *See Kramer v. Pollock-Krasner Foundation*, 890 F. Supp. 250, 256 (S.D.N.Y. 1995).

The Complaint in this case is completely devoid of any factual allegations of a conspiracy. The Complaint merely asserts that "Defendants in concert and civil conspiracy one with another threatened to withdraw their advertisements," Complaint ¶ 49; that "Defendants (or some of them) in concert and civil conspiracy actually did withdraw their advertisement," Complaint ¶ 50; that "Defendants entered into a combination or conspiracy in unreasonable restraint of trade or commerce," Complaint ¶ 74; that "[t]his combination or conspiracy took the form of a group boycott," Complaint ¶ 75; and that "said group boycott was instigated and conducted by Defendants," Complaint ¶ 75.

Moreover, such a conspiracy is completely implausible and thus, absent some allegations to infer such a conspiracy, the claim must fail. *DM Research, Inc.*, 1999 WL 104446. In *DM Research, Inc.*, the plaintiff manufactured a form of bottled purified water, "reagent grade water," typically used in clinical laboratories. The National Committee for Clinical Laboratory Standards ("National") adopted a guideline requiring laboratories to use water produced by purification system on site rather than a bottled reagent water, and the College of American Pathologists ("the College") voluntarily adopted National's guideline. The First Circuit found that, in addition to the fact that the plaintiff offered "nothing more than unlikely speculations" of a conspiracy between National and the College, such a conspiracy was implausible:

> [N]o antitrust lawyer could help but ask almost immediately why National and the College would conspire. . . . [W]ithout more detail, it is highly implausible to suppose that the College or its members have any reason to "agree" with National to adopt a faulty standard whose main effect would be to raise costs for laboratories . . . .

Id. at *3. The court therefore dismissed the complaint.

The court's rationale in *DM Research* applies equally in this case. GM is in the business of selling automobiles--the more the better. It would be illogical and financially irrational for GM to enter into a conspiracy that would limit GM's ability to sell automobiles. Yet the conspiracy alleged by plaintiffs would do just that.

In sum, the plaintiffs have merely "dressed up" their claim with antitrust language, but have provided no factual contentions as to any details of the existence of a conspiracy. Although the Court must assume that plaintiffs can prove the facts alleged in their complaint, it is not proper to assume that plaintiffs can prove facts which they have not alleged. Indeed, such conclusory allegations are themselves a danger sign that plaintiffs are simply engaged in a fishing expedition. *See id.* The omission of any factual allegations, coupled with the fact that the alleged conspiracy is highly implausible, are fatal to plaintiffs' § 1 claim. The claim must be dismissed.

B. Plaintiffs fail to allege conduct that constitutes an unreasonable restraint of trade

In addition to the fact that the plaintiffs have failed to allege a conspiracy, the alleged conduct of the defendants does not as a matter of law constitute an unreasonable restraint of trade. In this case, the "rule of reason" analysis applies.

1. The defendants' conduct, as alleged, fails to constitute a group boycott

The plaintiffs in this case have alleged that defendants' conduct "took the form of" a group boycott of two trade publications, *Limousine & Chauffeur*, *Limousine Digest*, and their respective annual trade shows. A group boycott is a horizontal agreement among competitors not to deal with other competitors, customers or suppliers. Group boycotts

formerly were deemed per se illegal and thus violative of the Sherman Act. *See Mackey v. National Football League*, 543 F.2d 606, 618 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). More recently, however, courts have determined that not all group boycotts should be accorded per se treatment and that, instead, certain facts beyond the mere existence of such an agreement must be established before a group boycott is deemed illegal. *See Northwest Wholesale Station v. Pacific Station*, 472 U.S. 284, 297 (1985). A group boycott will be deemed per se illegal only if, for example, the purpose of the boycott was to disadvantage competitors or the boycotting firms possess market power. *Id.* at 294.

In this case, the Complaint is unclear as to who plaintiffs believe was allegedly conspiring with whom. *See* Complaint, ¶ 75. As best GM can discern, the plaintiffs are alleging a conspiracy between some manufacturers (referred to herein in this context as Ford/GM) and a trade association (Limo). Yet plaintiffs have made no allegations as to how GM is part of a conspiracy to restrain trade by depriving plaintiffs (potential purchasers of GM/Cadillac vehicles) of an opportunity to advertise or otherwise participate in trade shows.

Further, the per se rule of illegality applies only where conspirators compete at the same market level. In particular, the per se rule in the group boycott context is limited to horizontal agreements among direct competitors. *See Nynex Corp. v. Discon, Inc.* 119 S. Ct. 493 (1998) (holding that per se rule is inapplicable where case concerned a vertical agreement and a vertical restraint). *See also TV Communications Network*, 964 F.2d at 1027. Here, Ford/GM and Limo members compete at *different* market levels; Ford and

GM *manufacture* sedans (*see* Complaint, ¶ 29), while Limo is a trade association, and its members *convert* sedans into limousines (*see* Complaint, ¶¶ 6 & 28). The complaint contains no allegations that Ford and GM conspired, much less that the two conspired to set similar certification standards, that the standards are indeed similar, or that the intent or even the effect of the certification standards is anticompetitive. As a result, no cause of action for group boycott among Ford/GM and Limo, or Ford and GM, exists. The claim should be dismissed.

2. The defendants' conduct, as alleged, cannot violate § 1 under the rule of reason analysis

Under the rule of reason analysis, the plaintiff must allege and prove that a particular agreement is an unreasonable restraint of trade. *See, United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 374 n.5 (1967). To determine whether a given restraint is unreasonable, courts inquire whether the restraint "is one that promotes competition or one that suppresses competition." *See, e.g., National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 691 (1978). This inquiry is limited to assessing the "market impact" of the restraint, *id.* at 691 n.17, and requires that a plaintiff define the relevant market.

A relevant market is the "area of effective competition" within which the defendant operates. *See Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-328 (1961). Initially, a plaintiff must allege in the complaint a valid relevant market. Failure to do so is grounds for dismissal. *See Double D Spotting Serv., Inc.*, 136 F.3d at 560. The relevant market must be identified in terms of the product or services affected and the geographic

areas involved. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). *See also, Full Draw Productions v. Easton Sports, Inc.*, 992 F. Supp. 1231, 1234 (D. Colo. 1997) (organizer of bowhunting trade show brought suit against trade group and archery businesses alleging antitrust violations due to alleged group boycott; plaintiff's Sherman Act § 1 and § 2 claims dismissed due, in part, to plaintiff's failure "to make specific factual allegations defining the relevant product and geographic market, the number of market participants and their relevant shares, or defendants' market power . . . .").

As GM understands plaintiffs' Complaint, the market at issue in this case is "the market for passenger cars converted into limousines." Complaint ¶ 74. The Complaint therefore never defines the relevant product or geographical scope of the market, nor does the Complaint allege what commerce is being restrained or how said commerce is being restrained. Significantly, plaintiffs never even allege GM's market power in this market. The plaintiffs have failed to allege both a valid relevant market and GM's power in this market and, as such, the Complaint must be dismissed.

For these reasons, Count I of plaintiffs' Complaint should be dismissed. Correspondingly, Count II, which requests injunctive relief pursuant to 15 U.S.C. § 26, should also be dismissed.

III. Sherman Act § 2, Monopolization Claim

Count III of plaintiffs' Complaint alleges a violation under § 2 of the Sherman Act, which provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize

any part of the trade or commerce among the several States . . . shall be deemed guilty." 15 U.S.C. § 2.

Plaintiffs claim that the defendants have "maintained, attempted to achieve and maintain, or combined or conspired to achieve and maintain, a monopoly over the advertising and showing of limousines, and over the conversion of passenger sedan automobiles to limousines in the several States of the United States." Complaint ¶ 85. Plaintiffs further allege that the defendants have used their monopoly power "to affect competition in the conversion of passenger sedan automobiles to limousines and the advertising and sale of the same in the several States of the United States." *Id.* To survive this motion to dismiss, however, plaintiffs must plead facts sufficient to support the elements of a monopoly, an attempted monopoly, or a conspiracy to monopolize. Plaintiffs have failed to plead facts sufficient to support any of these claims.

The offense of monopoly under § 2 of the Sherman Act requires that two elements be proven: (a) the possession of monopoly power in the relevant market, and (b) the willful acquisition or maintenance of that power. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). To establish a claim of attempted monopolization under § 2, a plaintiff must establish that the defendant: (1) specifically intended to control prices or destroy competition in some part of commerce; (2) engaged in predatory or anti-competitive conduct; and (3) a dangerous probability of success. *See H.J., Inc. v. International Tel. & Tel. Corp.*, 867 F.2d 1531, 1540-41 (8th Cir. 1989). Conspiracy to monopolize requires proof of: (1) concerted action; (2) overt acts in

furtherance of the conspiracy; and (3) specific intent to monopolize. *See Volvo N. Amer. v. Men's Int'l Professional Tennis Council*, 857 F.2d 55, 74 (2d Cir. 1988).

The existence of market power is essential in a monopolization claim. *See Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 877 (3d Cir. 1995). Curiously, the plaintiffs have alleged a different market(s) under their § 2 claim than they alleged under their § 1 claim. *Compare* Complaint ¶ 74 ("the market for passenger cars converted into limousines") *with* Complaint ¶ 85 ("the advertising and showing of limousines, and . . . the conversion of passenger sedan automobiles to limousines").

In any event, plaintiffs' Complaint contains absolutely no allegation of GM's market power in these markets, nor does the Complaint define a valid relevant market. The alleged market power of a manufacturer of vehicles does not translate into market power over the advertising and conversion of those vehicles. There simply exists no basis to impute the alleged market power of GM in one market into other markets. Without such market power, plaintiffs have no basis to plead (and have not pled), for example, that the exclusion of plaintiffs from participating in trade shows is anticompetitive behavior. *See also National Assoc. of Sporting Goods Wholesalers, Inc. v. F.T.L. Marketing Corp.*, 779 F.2d 1281, 1285-86 (7th Cir. 1985) (where plaintiffs failed to establish that trade association enjoyed substantial market power in the industry trade association could exclude a member from participation in trade shows). The plaintiffs' monopolization claims must be dismissed.

For these reasons, Count III of plaintiffs' Complaint should be dismissed. Correspondingly, Count IV, which requests injunctive relief pursuant to 15 U.S.C. § 26, should also be dismissed.

IV. Missouri Statute § 416.031, Restraint of Trade and Monopolization Claims

Count V of plaintiffs' Complaint alleges a violation of Mo. Rev. Stat. § 416.031(1), which provides, "Every contract, combination or conspiracy in restraint of trade or commerce in this state in unlawful." Count VII alleges a violation of § 416.031(2), which provides, "It is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce in this state." To support these claims, plaintiffs make allegations identical to those set forth in their claims under the Sherman Act, except that plaintiffs replace "in the several States of the United States" with "in the State of Missouri." For those reasons that plaintiffs' federal antitrust claims fail, so to do plaintiffs' state antitrust claims.

The Missouri antitrust provisions closely parallel provisions of the Sherman Act. Indeed, Missouri law directs that its provisions "shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes," Mo. Rev. Stat. § 416.141, and was intended to provide a ready body of precedent and a single standard of business conduct. *See Fischer, Etc. v. Forrest T. Jones & Co.*, 586 S.W.2d 310, 313 (Mo. 1979) (en banc). Thus, courts dispose of claims under the Missouri antitrust statutes with the same rational with which claims under the Sherman Act are disposed. *See State of Missouri v. National Org. for Women*, 620 F.2d 1301, 1316 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980). If a claim fails under federal antitrust law, the claim

equally fails under Missouri antitrust law. *See Alpha Shoe Serv. v. Fleming Companies, Inc.*, 849 F.2d 352, 354 (8th Cir. 1988) (per curiam).

For those same reasons discussed *supra* Sections II and III of these suggestions, the plaintiffs fail to state a claim under the Missouri antitrust laws. As required under § 416.031(1), *see Metts v. Clark Oil & Refining Corp.*, 618 S.W.2d 698, 701-703 (Mo. Ct. App. 1981), plaintiffs fail to sufficiently allege a conspiracy and conduct that constitutes an unreasonable restraint of trade. Moreover, as required under § 416.031(2), *see id.* at 703-704, plaintiffs's fail to adequately plead their claims of monopolization, attempted monopolization, and conspiracy to monopolize.

Counts V and VII should be dismissed. Correspondingly, Counts VI and VIII, which request injunctive relief pursuant to Mo. Rev. Stat. § 416.071 and attorneys' fees pursuant to Mo. Rev. Stat. § 416.121, should also be dismissed.

V. There is No Federal Question in This Case and the Court Lacks Subject Matter Jurisdiction Over The Supplemental State Law Claims

In their Complaint, plaintiffs allege that the court has jurisdiction over the subject matter of this action based on 28 U.S.C. §1331. (Plaintiff's Complaint at ¶ 2). Section 1331 addresses federal question jurisdiction. The only claims that would give rise to federal question jurisdiction in plaintiffs' Complaint are Counts I-IV concerning federal antitrust violations. (Plaintiff's Compl. at ¶¶73-90).

Because there is no valid claim for relief under federal antitrust laws, plaintiffs have failed to establish a federal question. The Court, therefore, lacks original jurisdiction over a federal question and cannot assert supplemental jurisdiction over the

state law claims. *See* 28 U.S.C. §1367; *see also Hassett v. Lemay Bank and Trust Co.*, 851 F.2d 1127, 1130 (8th Cir.1988) (holding that the court properly refused to exercise jurisdiction over state law tort claims because the court dismissed the sole federal question claim) (citing *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) (holding that a court should dismiss pendent state law claims when the federal claims are dismissed before trial)).

Lacking federal question jurisdiction, the Court lacks supplemental jurisdiction over the state law claims in Counts IX, X and XI. Those claims should be dismissed.

Respectfully submitted,

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