Gabriel & Assocs. v. Invisible Fence Co.

United States District Court for the District of Maryland

November 9, 1993, Decided ; November 9, 1993, Filed

CIVIL NO. H-93-1016

Reporter
1993 U.S. Dist. LEXIS 19907 *; 93-2 Trade Cas. (CCH) P70,440

GABRIEL & ASSOCIATES, INC. and LAUR & BEV CORPORATION, Plaintiffs v. INVISIBLE FENCE COMPANY, INC., et al., Defendants

Core Terms

distributors, pet, monopolization, electronic, personal jurisdiction, conspiracy, manufacturer, motion to dismiss, plaintiffs', defense motion, contracts, network, lack of personal jurisdiction, allegations, marketing, commerce, restraint of trade, fail to state, Robinson-Patman Act, Sherman Act, competitor, contacts, amended complaint, anti trust law, Clayton Act, defendants', antitrust violation, interstate commerce, relevant market, leave to amend

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

HN1[] **In Rem & Personal Jurisdiction, Constitutional Limits**

The limits of a federal district court's personal jurisdiction are coextensive with that of the state courts of the state in which the federal district court sits. Under *Fed. R. Civ. P. 4(e)* a court must apply a two step analysis in determining whether or not it may exercise personal jurisdiction over a particular defendant. First, the court must determine whether such personal jurisdiction is statutorily authorized. Second, the court must determine whether such personal jurisdiction is permissible under the *Due Process Clause of the Fourteenth Amendment*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Torts > Procedural Matters > Commencement & Prosecution > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN2 **Agriculture & Food, Distribution, Processing & Storage of Food & Agricultural Products**

Md. Cts. and Jud. Proc. Code Ann., § 6-103, states in relevant part: A court may exercise personal jurisdiction over a person who directly or by an agent: Transacts any business or performs any character of work or service in the state; Contracts to supply goods, food, services, or manufactured products in the state; Causes tortious injury in the state by an act or omission in the state; Causes tortious injury in the state or outside of the state by an act or omission outside the state if he regularly does or solicits business, engages in any other persistent course of conduct in the state or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the state. This statute has been interpreted by Maryland courts as extending personal jurisdiction to the limits permissible under the Due Process Clause.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN3 **In Personam Actions, Challenges**

In order for a court to assert personal jurisdiction over a defendant who is neither a domiciliary of Maryland nor served while present in Maryland, such defendant must have "minimum contacts" with Maryland such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. Generally, the defendant must have taken some action "purposefully directed" towards Maryland. If a court determines that a defendant has purposeful contacts with the forum state, it must then determine whether the assertion of personal jurisdiction would conform to fair play and substantial justice. Importantly, when a court's exercise of personal jurisdiction is challenged by a defendant, the burden of alleging and proving the factual basis for the court's exercise of such jurisdiction is upon the plaintiff.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN4 **In Rem & Personal Jurisdiction, In Personam Actions**

The burden is on the plaintiff to make out a prima facie case of personal jurisdiction over a defendant.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN5 **In Rem & Personal Jurisdiction, In Personam Actions**

It is well established that jurisdiction over a corporation does not constitute jurisdiction over corporate officers, directors or employees who are sued as individuals.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

HN6 **Defenses, Demurrers & Objections, Motions to Dismiss**

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) should be denied 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. In determining whether to dismiss a complaint, the court must view the well-pleaded material allegations in a light most favorable to the plaintiff, with the alleged facts accepted as true.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN7 **Complaints, Requirements for Complaint**

Fed. R. Civ. P. 8(a) calls for a short and plain statement of the claim showing that the pleader is entitled to relief, and Fed. R. Civ. P. 10(b) states, each claim founded on a separate transaction or occurrence shall be stated in a separate count whenever a separation facilitates the clear presentation of the matters set forth.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN8 **Antitrust & Trade Law, Sherman Act**

The Sherman Act, 15 U.S.C.S. § 1 provides, in part, every contract, combination or conspiracy in restraint of trade or commerce among the several states is declared to be illegal. Mere conclusory allegations do not satisfy the requirements for pleading a violation of the antitrust laws.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN9 **Pleadings, Rule Application & Interpretation**

The facts alleged must, if proved, show that the plaintiff is entitled to relief under the statutory provision in question.

Antitrust & Trade Law > Sherman Act > General Overview

HN10 **Antitrust & Trade Law, Sherman Act**

Mere meetings between a manufacturer and its distributors do not, without more, prove the existence of an unlawful vertical conspiracy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] Exclusive & Reciprocal Dealing, Exclusive Dealing

An arrangement does not violate the antitrust laws unless it creates an unreasonable restraint on interbrand competition.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN12[] Scope, Monopolization Offenses

The Sherman Act, *15 U.S.C.S. § 2* makes it unlawful to monopolize, attempt to monopolize, or combine or conspire to monopolize any part of the trade or commerce among the several states. The statute bars three types of conduct: monopolization, attempted monopolization, and a conspiracy to monopolize trade. To prove an antitrust violation of monopolization, a plaintiff must prove (1) the defendant's possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. To prove an antitrust violation of attempted monopolization, a plaintiff must show that the would-be monopolist had a dangerous probability of success.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN13 **Antitrust & Trade Law, Sherman Act**

To prove an antitrust violation of conspiracy to monopolize, a plaintiff must prove: (1) that a conspiracy to obtain (or maintain) a monopoly in the relevant market existed; (2) that this conspiracy to monopolize concerned goods in interstate commerce; (3) that the defendant entered into the conspiracy with the specific intention or purpose of monopolizing the relevant market; (4) that at least one of the conspirators committed an overt act to further the conspiracy; and (5) that the plaintiff was injured in its business or property as a result of the defendant's actions.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > Commerce Requirement

HN14 **Robinson-Patman Act, Claims**

The Robinson-Patman Act, *15 U.S.C.S. § 13(a)* provides: It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where the effect of such discrimination may be substantially to lessen competition.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Robinson-Patman Act

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN15 **Robinson-Patman Act, Claims**

To have standing the Robinson-Patman Act, *15 U.S.C.S. § 13*, a plaintiff must also prove that it was injured by the defendant's actions.

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

HN16 **Antitrust & Trade Law, Clayton Act**

The Clayton Act, *15 U.S.C.S. § 14* provides: It shall be unlawful for any person engaged in interstate commerce, in the course of such commerce, to make a sale or contract for sale of goods for use, consumption or resale within the United States on the condition, agreement, or understanding that the purchaser thereof shall not use or deal in the goods of a competitor or competitors of the seller, where the effect of such sale may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Antitrust & Trade Law > Clayton Act > General Overview

HN17[] **Antitrust & Trade Law, Clayton Act**

In order to plead a cause of action under section 3 of the Clayton Act, 15 U.S.C.S. § 14 plaintiff must allege that a contract for sale of goods between defendant and plaintiff, not defendant and others, was conditioned on a promise of not dealing in the goods of a competitor.

Civil Procedure > Attorneys > General Overview

Civil Procedure > Sanctions > General Overview

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN18[] **Civil Procedure, Attorneys**

Fed. R. Civ. P. 11 provides that if a particular claim is not well grounded in fact and warranted by existing law, sanctions should be imposed.

Judges: [*1] Harvey, II

Opinion by: ALEXANDER HARVEY, II

Opinion

MEMORANDUM AND ORDER

In this civil action, plaintiffs have charged numerous defendants with violations of federal ***antitrust law*** resulting from defendants' sale and distribution of the "Sta-Put System" brand of electronic pet restraints. [1] The two plaintiffs, Gabriel & Associates, Inc. and Laur & Bev Corporation, are distributors of electronic pet restraints. The complaint named 19 defendants, including 15 corporations and 4 individuals. By its Memorandum and Order of October 13, 1993, the complaint was dismissed without prejudice as to four of the corporate defendants. [2] The 11 remaining corporate defendants include one manufacturer of electronic pet restraints and 10 distributors of that product.

[*2] Pending before the Court are motions to dismiss filed on behalf of all of the remaining defendants. The following motions have been filed:

(1) Motion of defendant Invisible Fence Company, Inc. to dismiss the complaint for failure to state a claim on which relief may be granted;

(2) Motion of individual defendants Helen Weary, Thomas Weary, William Annesley and Jeffrey Hanhausen to dismiss the complaint for lack of personal jurisdiction;

(3) Motion of defendant Clark Enterprises, Inc. to dismiss the complaint for lack of personal jurisdiction;

(4) Motion of defendants Canine Containment Distributing Company; I.F.D., Inc.; Clark Distributors, Inc.; Invisible Fence Distributor of the Midwest; Invisible Fence of the Northland; Invisible Fence of the North Pacific; Invisible Fence South and J.G.B. Distributing, Inc. to dismiss the complaint for failure to state a claim on which relief may be granted;

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[1] Electronic pet restraints emit low frequency signals which are inaudible to the human ear and which harm a pet that strays from the area "fenced in" by these signals.

[2] Two defendants were dismissed pursuant to Rule 4(j), F.R.Civ.P., and two others were dismissed for lack of prosecution.

(5) Motion of defendants Invisible Fence of the North Pacific; Canine Containment Distributing Company; I.F.D., Inc.; Invisible Fence Distributor of the Midwest; Invisible Fence of the Northland; Invisible Fence South and J.T.B. Distributing Inc. to dismiss the complaint for lack **[*3]** of personal jurisdiction; and
(6) Motion of defendant Canine Fence Company, Inc. to dismiss the complaint for lack of personal jurisdiction.

Following its review of the complaint, defendants' motions and the extensive memoranda and exhibits filed in support of and in opposition to the pending motions, the Court has determined that no hearing is necessary. *See* Local Rule 105.6. For the reasons stated herein, the Court has concluded that all of the pending motions to dismiss of all defendants must be granted.

I

Background Facts

Reading the complaint in a light most favorable to the plaintiffs, the following are the pertinent facts. Invisible Fence Company ("IF"), is the manufacturer of the "Sta-Put" brand of electronic pet restraints. Plaintiffs have here sued four of IF's corporate officers individually, and numerous distributors of the product located in various parts of the United States.

Defendant IF is incorporated in Delaware and has its principal place of business in Pennsylvania. It currently markets its product through a network of independent, exclusive distributors. The distributors are guaranteed by IF to be the only "Sta-Put" distributor in their region. In **[*4]** return, each distributor agrees not to sell or market the brands made by other pet restraint manufacturers. [3] Vigorous competition exists in the field of electronic pet restraints.

Plaintiffs Gabriel & Associates, Inc. and Laur & Bev Corporation distribute pet restraints to retailers in two markets, namely in Maryland and North Carolina. Plaintiffs were once part of IF's distribution network and purchased their stocks of "Sta-Put" pet restraints directly from IF as the manufacturer. However, when IF reorganized its distribution network in 1991, plaintiffs were no longer permitted to be a part of IF's exclusive network. As a result, plaintiffs could no longer purchase products directly from IF as the manufacturer but instead had to purchase the "Sta-Put" product from distributors, which were one step further down the distribution chain.

Plaintiffs complain of their exclusion from IF's **[*5]** direct distribution network. They allege that IF has harmed their business by selling products directly to plaintiffs' customers on a consignment basis. According to plaintiffs, they cannot, because of these circumstances, profitably offer competitive prices to their customers. Plaintiffs further allege that IF and its distributors frequently failed to fill plaintiffs' orders of "Sta-Put" systems. Plaintiffs also assert that IF sought to harm their business by "junking" the plaintiffs' stock [4] and by interfering with plaintiffs' attempts to sell their business. Between 1989 and 1992, plaintiffs attempted to sell their North Carolina business, and, at least on one occasion, they had lined up a buyer. However, IF allegedly interfered with and scuttled that transaction by offering the potential buyer the exclusive territory formerly assigned to the plaintiffs.

Based on these allegations, plaintiffs contend that defendants have violated various provisions **[*6]** of federal ***antitrust law***, including provisions of the Sherman Act, of the Clayton Act, and of the Robinson-Patman Act. [5]

II

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[3] It appears that it was the violation by plaintiffs of this exclusivity agreement that led to their termination as an IF distributor.

[4] It is not clear from the complaint what is meant by "junking."

[5] The complaint also claims, in its introductory paragraph, violations by defendants of the "Fair Trade Law." However, the complaint does not address such a law beyond this initial mention of it, and the Court will not therefore consider that assertion.

Discussion

(a)

The Motions to Dismiss

For Lack of Personal Jurisdiction

HN1[↑] The limits of a federal district court's personal jurisdiction are coextensive with that of the state courts of the state in which the federal district court sits. *Rule 4(e), F.R.Civ.P.* A court must apply a two step analysis in determining whether or not it may exercise personal jurisdiction over a particular defendant. First, the court must determine whether such personal jurisdiction is statutorily authorized. Second, the court must determine whether such personal jurisdiction is permissible under the *Due Process Clause of the Fourteenth Amendment*. E.g., *Prince v. Illien Adoptions International, Ltd., 806 F. Supp. 1225, 1228 (D.Md. 1992)*. **[*7]**

Maryland's long-arm statute, ***HN2***[↑] *Md. Cts. & Jud. Proc. Code Ann. § 6-103*, states in relevant part:

> (b) In general -- A court may exercise personal jurisdiction over a person who directly or by an agent:
> (1) Transacts any business or performs any character of work or service in the State;
> (2) Contracts to supply goods, food, services, or manufactured products in the State;
> (3) Causes tortious injury in the State by an act or omission in the State;
> (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State.

This statute has been interpreted by Maryland courts as extending personal jurisdiction to the limits permissible under the Due Process Clause. E.g., *Geelhoed v. Jensen, 277 Md. 220, 224, 352 A.2d 818 (1976)*. ***HN3***[↑] In order for a court to assert personal jurisdiction over a defendant who is neither a domiciliary of Maryland nor served while present in Maryland, such defendant must **[*8]** have "minimum contacts" with Maryland such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington, 326 U.S. 310, 316, 319, 90 L. Ed. 95, 66 S. Ct. 154 (1945)*. Generally, the defendant must have taken some action "purposefully directed" towards Maryland. *Hanson v. Denckla, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958)*; *Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 109, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987)*. If a court determines that a defendant has purposeful contacts with the forum state, it must then determine whether the assertion of personal jurisdiction would conform to "fair play and substantial justice." *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)*, quoting *International Shoe Co., 326 U.S. at 320*. Importantly, **[*9]** when a court's exercise of personal jurisdiction is challenged by a defendant, the burden of alleging and proving the factual basis for the court's exercise of such jurisdiction is upon the plaintiff. *Mylan Laboratories, Inc. v. AKZO, N.V., 2 F.3d 56, 59-60 (4th Cir. 1993)*.

In this case, 13 of the 15 remaining defendants have challenged this Court's jurisdiction over them. When the principles of the decisions cited hereinabove are applied to the facts of this case, it is apparent that all of the pending motions to dismiss for lack of personal jurisdiction must be granted. Plaintiffs have failed to establish, either by the allegations of the complaint or in the oppositions which they have filed to defendants' motions to dismiss, that the 13 defendants in question have contacts with the State of Maryland which would permit this Court to exercise personal jurisdiction over them.

(i)

The Nine Remaining Distributors

The distributors of IF which have been sued here are located in various parts of the United States. Defendant IF operates its business mostly in Pennsylvania. The plaintiffs have not alleged any facts indicating that IF's distributors, other **[*10]** than Clark Distributors, Inc., (hereinafter "Clark Distributors"), have engaged in any kind of business activity in Maryland.

All the distributors (except for Clark Distributors, which operates in Maryland) have submitted affidavits establishing that they are incorporated outside Maryland, that they have their principal places of business outside Maryland, that they transact no business in Maryland, that they have not contracted to conduct any business in Maryland, and indeed that they have engaged in no activity at all in Maryland. [6] **[*11]** These affidavits place the burden on plaintiffs to come forward with contrary evidence. [7] No such evidence has been supplied by the plaintiffs. Indeed, in their complaint, plaintiffs have not even alleged facts which would indicate that these defendants had the necessary "minimum contacts" with Maryland. [8]

For these reasons, the motions of these **[*12]** nine defendants to dismiss for lack of personal jurisdiction will be granted.

(ii)

The Four Individual Defendants

Defendants Helen Weary, Thomas Weary, William Annesley, and Jeffrey Hanhausen, all of whom are officers or directors of defendant IF, have challenged this Court's jurisdiction on grounds that they, as individuals, have no contacts with Maryland.

Plaintiffs' complaint contains no allegations which would, if proved, establish that these individual defendants had any of the necessary "minimum contacts" with Maryland. Indeed, the facts alleged by plaintiffs concerning these defendants' activities, such as visiting plaintiffs' Maryland warehouse, making phone calls to Maryland discussing shipments, and the like, are clearly acts done in their position as corporate officers conducting the business of their employer.

HN5[↑] It is well established that jurisdiction over a corporation does not constitute jurisdiction over corporate officers, directors or employees who are sued as individuals. *Birrane v. Master Collectors, Inc., 738 F. Supp. 167, 168-70 (D.Md. 1990)*; *Umans v. PWP Services, Inc., 50 Md. App. 414, 420-21, 439 A.2d 21 (1982)*. **[*13]** Thus, the fact that personal jurisdiction exists in this case as to defendant IF does not give this court personal jurisdiction over these individual officers and directors.

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[6] Defendant Canine Fence, Inc., acknowledges in its motion to dismiss that it has twice sold goods to a Maryland resident. It sold replacement parts for a machine that it had sold in Connecticut, whose buyer later moved to Maryland. Two isolated sales to one customer in Maryland does not constitute the necessary minimum contacts under the *International Shoe* due process analysis. Moreover, plaintiffs did not even file an opposition to Canine Fence's motion to dismiss.

[7] In a case such as this one, ***HN4***[↑] the burden is on the plaintiff to make out a *prima facie* case of personal jurisdiction over a defendant. *Mylan Laboratories, Inc. v. AKZO, N.V., 2 F.3d 56, 60 (4th Cir. 1993)*.

[8] In their opposition to defendants' motions to dismiss for lack of personal jurisdiction, plaintiffs completely ignore the issue of personal jurisdiction. Instead, they argue that this Court has subject matter jurisdiction in antitrust cases and that venue was proper in this district. It is axiomatic, however, that "venue provisions come into play only after jurisdiction has been established." *Lindahl v. Office of Personnel Management, 470 U.S. 768, 793 n.30, 84 L. Ed. 2d 674, 105 S. Ct. 1620 (1985)*. *See also, Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167-68, 84 L. Ed. 167, 60 S. Ct. 153 (1939)*, 15 C. Wright & A. Miller, *Federal Practice and Procedure* § 3801, at 4-5 (1986).

Plaintiffs have therefore failed to satisfy their burden of alleging or producing facts establishing the necessary minimum contacts. Accordingly, the motions to dismiss for lack of personal jurisdiction of the four individual defendants will also be granted.

(b)

The Motions to Dismiss

For Failure to State a Claim

Only two defendants, IF, a manufacturer, and Clark Distributors, a distributor, have conceded that this Court has personal jurisdiction over them. These two defendants have, however, filed motions to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6), F.R.Civ.P. [9]

[*14] ***HN6***[⬆]

A motion to dismiss under Rule 12(b)(6), F.R.Civ.P., should be denied 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, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). In determining whether to dismiss a complaint, this Court must view the well-pleaded material allegations in a light most favorable to the plaintiff, with the alleged facts accepted as true. 2A *Moore's Federal Practice,* P 12.07 [2.-5] (2d ed. 1987); 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1357, at 304-21 (1990).

Defendants first contend that the complaint fails to meet the minimal pleading requirements of Rule 8 and Rule 10, F.R.Civ.P. ***HN7***[⬆] Rule 8(a) calls for "a short and plain statement of the claim showing that the pleader is entitled to relief," and Rule 10(b) states, "Each claim founded on a separate transaction or occurrence . . . shall be stated in a separate count . . . whenever a separation facilitates the clear presentation of the matters set forth."

The complaint filed in this case by plaintiffs is a veritable jumble **[*15]** of facts, conclusory statements of law, and antitrust jargon. It is disorganized and confusing. Nevertheless, the Court will not dismiss the complaint for failure of the plaintiffs to comply with Rules 8 and 10. A court should liberally construe an antitrust complaint. *Knuth v. Erie-Crawford Dairy Coop., 395 F.2d 420, 423 (3rd Cir. 1968), cert. denied, 410 U.S. 913, 35 L. Ed. 2d 278, 93 S. Ct. 966 (1973).* Even if the complaint is given a liberal reading, this Court nevertheless concludes that it fails to state claims against defendants IF and Clark Distributors upon which relief may be granted. The motions to dismiss of these two defendants will therefore be granted pursuant to Rule 12(b)(6), with leave to plaintiffs to file an amended complaint against defendants IF and Clark. [10]

The complaint contains **[*16]** two counts. Count I is entitled "Violation of Title 15 USC § 1 and § 2." In this Count, plaintiffs also allege a violation of the Robinson-Patman Act, 15 U.S.C. § 13. Count II is entitled "Conspiracy in Restraint of Trade (USC § 1 Monopoly of Trade) (15 U.S.C. § 14 Civil Damages, Sale, etc. On Agreement Not To Use Goods Of a Competitor)." Although it cannot be readily determined from a reading of the complaint, the Court will assume that plaintiffs are asserting claims under all of the antitrust statutes listed. The Court will therefore address herein §§ 1 and 2 of the Sherman Act, § 2 of the Robinson-Patman Act, and § 3 of the Clayton Act.

(i)

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[9] while this Court discusses herein only the motions to dismiss for failure to state a claim of these two defendants, its analysis would apply to the other defendants as well. Plaintiffs' failure to state a claim upon which relief may be granted thus represents an alternative ground for dismissal of the other thirteen defendants as well.

[10] If an amended complaint is filed, it should be drafted in strict compliance with Rule 8(a) and Rule 10(b), F.R.Civ.P.

15 U.S.C. § 1

Both counts of the complaint assert claims under HN8[↑] § 1 of the Sherman Act, which provides, in part, "Every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States . . . is declared to be illegal." Plaintiffs' complaint does not properly allege a conspiracy in restraint of trade.

Mere conclusory allegations do not satisfy the requirements for pleading **[*17]** a violation of the antitrust laws. As Judge Friendly wrote:

> A mere allegation that defendants violated the antitrust laws as to a particular plaintiff and commodity no more complies with Rule 8 than an allegation which says only that a defendant made an undescribed contract with the plaintiff and breached it, or that a defendant owns a car and injured plaintiff by driving it negligently.

Klebanow v. New York Produce Exchange, 344 F.2d 294, 299 (2d Cir. 1965). Moreover, HN9[↑] the facts alleged must, if proved, show that the plaintiff is entitled to relief under the statutory provision in question.

Applying these principles here, this Court concludes that plaintiffs have not alleged sufficient facts to avoid dismissal of the claims asserted by plaintiffs under § 1 of the Sherman Act. Paragraph 20 of the complaint alleges:

> That at various times between 1991 and 1993 your defendants met, conspired, entered into contracts, engaged in combination and conspiracy to restrain the trade and commerce of the electronic pet restraint business with the sole purpose of fixing or conspiring to fix the price, market share and availability of the electronic pet **[*18]** restraint commerce.

Plaintiffs here rely on the fact that the defendants "met" and "entered into contracts." [11] HN10[↑] Mere meetings between a manufacturer and its distributors do not, without more, prove the existence of an unlawful vertical conspiracy. As the Supreme Court said in Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763-764, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984), "In order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently."

[*19] Plaintiffs do not in the complaint explain how the contracts relied upon resulted in a restraint of trade. On the contrary, the "contracts" which the defendants allegedly entered into are not proof of antitrust violations. These contracts are described in Paragraphs 27-29 of the complaint, as follows:

> 27. That on or about April of 1991, the Defendants . . . attempted to set up and establish the national marketing scheme [sic] to conduct the business of distribution and marketing electronic pet restraints and conferred on the Defendants . . . as the exclusive agency for the marketing the same [sic] in the continental United States in which the Plaintiff and other dealers conduct the business of selling electronic pet restraints to wholesale and retail dealers for resale. That in order to participate in said marketing scheme, each of the above defendants agreed not to use or deal in merchandise, goods or wares of a competitor in violate [sic] of 15 USC § 14.
>
> 28. That on or about April 1, 1991 pursuant to an Agreement executed by each one of the Defendants [sic], the Defendants commenced thereinafter and still continue the marketing and distribution **[*20]** of "Sta-Put Systems" as the exclusive agent in the continental United States.

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[11] In addition, plaintiffs allege various types of unilateral conduct on the part of defendant IF, such as buying plaintiffs' stock and "junking" it, and placing some retailers on a "consignment basis." Complaint P 19. Unilateral conduct, however, does not violate § 1 of the Sherman Act, which bars a "conspiracy" in restraint of trade. More than one party is obviously required. Monsanto v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984).

> 29. The distributorship system of the Defendants as alleged in paragraph 3 above and the contract of the Defendants as alleged in paragraph 4 about [sic] [12] were undertaken by the Defendants as part of a conspiracy to fix, control, raise and stabilize arbitrarily, unlawfully, unreasonably and knowingly the price of electronic pet restraints in interstate commerce; to restrain trade in interstate commerce for electronic pet restraints and to preclude the Plaintiff and other dealers marketing and distributing electronic pet restraints from dealing in interstate commerce except on the terms controlled by the Defendants in violation of Title *15 USC § 1, et seq.*

The contracts alleged by plaintiffs as restraining trade in the sale of electronic pet restraints are those whereby defendant **[*21]** IF appointed a network of exclusive distributors for its product. However, the appointment by a manufacturer of a network of exclusive dealers results in a vertical relationship, which must be reviewed under the rule of reason. Such ***HN11***[↑] an arrangement does not violate the antitrust laws unless it creates an unreasonable restraint on interbrand competition. *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. Nowhere in the complaint is it alleged that the defendants' network had any impact on competition between brands of pet restraints. On the contrary, the complaint alleges that interbrand competition is vigorous. Paragraph 17 alleges:

> The business of the Plaintiffs is in the purchasing of electronic pet restraint systems *from various manufacturers* and reselling the same to various customers and purchasers for retail trade in the state of Maryland and North Carolina *constitutes a substantial competitive product to the [defendant Invisible Fence] "Sta-Put System*" and sold by the Defendant, Invisible Fence Company, Inc. in the same states. (emphasis added)

Under conditions **[*22]** like those alleged in the complaint, there is no violation of the antitrust laws. Furthermore, IF's unilateral exclusion of the plaintiffs from its network likewise does not violate *§ 1* of the Sherman Act. *Garment Dist., Inc. v. Belk Stores Services., Inc., 799 F.2d 905, 910 (4th Cir. 1986)*, *cert. denied, 486 U.S. 1005, 100 L. Ed. 2d 193, 108 S. Ct. 1728 (1988)*; *Purity Prods., Inc. v. Tropicana Prods., Inc. 702 F. Supp. 564, 570-74 (D.Md. 1988)*, *aff'd mem., 887 F.2d 1081 (4th Cir. 1989)*.

For these reasons, this Court concludes that the complaint fails to state a claim against defendants IF and Clark Distributors under *§ 1* of the Sherman Act.

(ii)

15 U.S.C. § 2

HN12[↑] *Section 2* of the Sherman Act makes it unlawful to "monopolize, attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several states . . . ." The statute bars three types of conduct: monopolization, attempted monopolization, and a conspiracy to monopolize trade.

To prove an antitrust **[*23]** violation of monopolization, a plaintiff must prove (1) the defendant's possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *Oksanen v. Page Memorial Hosp., 945 F.2d 696 (4th Cir. 1991)* (en banc), *cert. denied, U.S. , 112 S. Ct. 973 (1992)*, citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596 n.19, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*.

The complaint contains no allegations addressing the element of market power. [13] Not only is there no discussion of market shares or barriers to entry, but the complaint even describes a vigorously competitive market. Complaint P 17. The complaint thus fails to state a proper claim of monopolization.

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[12] Paragraphs 3 and 4 do not relate in any way to defendants' distributorship system or to contracts between them.

[13] Nor does the complaint address the second element. In this Circuit, a plaintiff must show, in order to satisfy this element, that there could be no valid business reason or concern for efficiency for the defendant's conduct. *Oksanen, 945 F.2d at 710*.

To prove an antitrust violation of attempted monopolization, a plaintiff must show that the would-be monopolist had a "dangerous probability of success." *United States v. Empire Gas, 537 F.2d 296 (8th Cir. 1976)*, **[*24]** *cert. denied, 429 U.S. 1122, 51 L. Ed. 2d 572, 97 S. Ct. 1158 (1977).* The complaint does not address this element in any way. Therefore, it fails to state a proper claim of attempted monopolization.

HN13[⬆]

To prove an antitrust violation of conspiracy to monopolize, a plaintiff must prove (1) that a conspiracy to obtain (or maintain) a monopoly in the relevant market existed, (2) that this conspiracy to monopolize concerned goods in interstate commerce, (3) that the defendant entered into the conspiracy with the specific intention or purpose of monopolizing the relevant market, (4) that at least one of the conspirators committed an overt act to further the conspiracy, and (5) that **[*25]** the plaintiff was injured in its business or property as a result of the defendant's actions. Leonard B. Sand et al., *Modern Federal Jury Instructions - Civil* P 80.03, p. 80-72 (1993). *See also, Cullum Electric & Mechanical, Inc. v. Mechanical Contractors Association of S.C., 436 F. Supp. 418, 425 (D.S.C. 1976), aff'd, 569 F.2d 821* (4th Cir.), *cert. denied, 439 U.S. 910, 58 L. Ed. 2d 255, 99 S. Ct. 277 (1978).*

These necessary elements have not been pled in the complaint. Although plaintiffs have alleged that a conspiracy existed, the complaint does not define the relevant market in any way, nor does it allege an overt act on the part of a conspirator which would tend to indicate furtherance of the conspiracy to monopolize. Therefore, the complaint fails to state a proper claim of attempted monopolization.

(iii)

15 U.S.C. § 13

While the complaint does not rely on this section of the Robinson-Patman Act in a separate count, plaintiffs have alleged a violation of *§ 13* in the concluding line of Paragraph 19. [14] ***HN14***[⬆] *Section 2(a)* **[*26]** of the Robinson-Patman Act, *15 U.S.C. § 13(a)*, provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where . . . the effect of such discrimination may be substantially to lessen competition . . . .

[*27] To prove a violation of this Section of the Robinson-Patman Act, a plaintiff must prove the following elements: (1) discrimination in price; (2) between different purchasers; (3) of commodities of like grade and quality; and (4) that the effects of such discrimination may substantially lessen or injure competition. *Universal Lite Distributors, Inc. v. Northwest Indus., Inc., 452 F. Supp. 1206, 1214 (D.Md. 1978)*, *aff'd, 602 F.2d 1173 (4th Cir. 1979)*. Obviously, ***HN15***[⬆] to have standing, a plaintiff must also prove that it was injured by the defendant's actions.

The plaintiffs have not pled any of the required elements. Remarkably, they have not even asserted that defendant IF sold its pet restraint systems at different prices to different customers. Such an allegation is the cornerstone of a claim asserted under *§ 13(a)*. Moreover, plaintiffs have failed to allege that IF's "indirect price discrimination" has had or would have any impact on competition. *FTC v. Sun Oil Co., 371 U.S. 505, 527, 9 L. Ed. 2d 466, 83 S. Ct. 358 (1963)*. Accordingly, the complaint fails to state **[*28]** a proper claim under the Robinson-Patman Act.

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[14] Paragraph 19, entitled "Violations of Title *15 USC § 1* and *§ 2*," states:

> 19. At various times between January 1992 and January 1993 Defendant, Invisible Fence Company, Inc. took over the stock of Gabriel and Associates, Inc. and the Laura [sic] and Bev Corporation sold by the Plaintiffs to retail sellers in the state of Maryland and the state of North Carolina and arranged to junk and destroy such stocks. At the same time Defendant, Invisible Fence Company, Inc. arranged to place such retail sellers who were the Plaintiff's customers under a consignment basis to induce them to transfer their business from the Plaintiffs to the Defendant, Invisible Fence Company, Inc., thereby committing indirect price discrimination in violation of Title *15 USC § 13*, Subsection (a).

(iv)

15 U.S.C. § 14

HN16[] Section 3 of the Clayton Act provides:

> It shall be unlawful for any person engaged in [interstate] commerce, in the course of such commerce, to . . . make a sale or contract for sale of goods . . . for use, consumption or resale within the United States . . . on the condition, agreement, or understanding that the . . . purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the seller, where the effect of such . . . sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

To prevail on a claim of a violation of this statute, a plaintiff must allege and prove (1) that the defendant made a sale on the condition that the buyer not deal in the goods of the sellers' competitors; (2) that the contract has the effect of substantially lessening competition in the relevant market; and (3) that the plaintiff was injured in its business or property as a result of the defendant's actions.

Plaintiffs' Clayton Act claims must fail for two reasons. First, plaintiffs have no standing to assert a Clayton **[*29]** Act claim. Indeed, a plaintiff will usually be injured only when the challenged contract prevents it from entering into other contracts which it would deem beneficial. As Judge Watkins of this Court said in *Central Chem. Corp. v. Agrico Chem. Co., 531 F. Supp. 533, 540 (D.Md. 1982)*, *aff'd,* 1985-2 CCH Trade Cases P 66, 753 (4th Cir. 1985), HN17[] "In order to plead a cause of action under § 3, plaintiff must allege that a contract for sale of goods between [defendant] and [plaintiff], not [defendant] and others, was conditioned on a promise of not dealing in the goods of a competitor . . . ."

In this case, the plaintiffs acknowledge in their complaint that they are able to and do purchase the products of IF's competitors. Complaint P 17. Such an admission is fatal to a Clayton § 3 claim. *David R. McGeorge Car Co., Inc. v. Leyland Motor Sales, Inc., 504 F.2d 52, 58 (4th Cir. 1974)*, *cert. denied, 420 U.S. 992, 43 L. Ed. 2d 674, 95 S. Ct. 1430 (1975)*; *McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332, 338 (4th Cir. 1959)*. **[*30]**

Second, plaintiffs have failed to allege any adverse impact of the challenged contracts on competition in the sale of electronic pet restraint systems. As discussed above, they actually do the opposite by alleging that substantial competition exists among various manufacturers of the product. Complaint P 17.

Thus, the complaint fails to state a proper claim under the Clayton Act.

IV

Leave to Amend

The motions to dismiss of thirteen defendants have been granted because this Court lacks personal jurisdiction over those defendants. These dismissals are without leave to amend.

The motions to dismiss of defendants IF and Clark Distributors have been granted because the complaint fails to state claims against those defendants which would entitle them to relief. If they choose to do so, plaintiffs may file an amended complaint against those two defendants. The dismissals as to defendants IF and Clark Distributors are therefore with leave to amend.

As the Court has pointed out herein, the facts alleged in the complaint do not come close to stating proper antitrust claims against defendants IF and Clark Distributors. Although the precise nature of plaintiffs' claims cannot be determined **[*31]** from a reading of the complaint, it appears here that the essential dispute between plaintiffs and defendant IF arises as a result of the latter's network of exclusive distributors from which plaintiffs have now been excluded. It appears that plaintiffs are now unable to purchase the "Sta-Put" system of pet restraints directly from defendant IF and that plaintiffs are therefore required to pay a mark-up imposed by IF's distributors. It is doubtful that these facts amount to antitrust violations under any theory which may be espoused. Nevertheless, the Court

will not at this stage of these proceedings foreclose plaintiffs from attempting to allege proper antitrust claims against defendants IF and Clark.

In this regard, the Court would remind counsel for plaintiffs to pay strict attention to counsel's obligations under ***HN18***[↑] *Rule 11, F.R.Civ.P.* *Rule 11* provides that if a particular claim is not well grounded in fact and warranted by existing law, sanctions should be imposed. Counsel should carefully consider the facts and should include in any amended complaint only those claims which are well grounded in fact and existing law. If the claims alleged in an amended complaint which is later **[*32]** filed are not well grounded in fact and existing law, defendants IF and Clark Distributors may move for sanctions under *Rule 11*.

Although there are many deficiencies in the existing complaint, the Court will not under all the circumstances here impose sanctions at this time on counsel for plaintiffs. *Rule 11* sanctions addressed to an original complaint are not ordinarily imposed until later in the proceedings. Now that plaintiffs' attorney has had the benefit of reviewing defendants' memoranda and the Court's rulings set forth in this Memorandum and Order, plaintiffs' attorney should have a much more comprehensive understanding of the applicable facts and existing law. Counsel for plaintiffs should understand that the Court will not hesitate to impose sanctions if *Rule 11* is later violated.

V

Conclusion

For the reasons stated, the motions to dismiss of thirteen of the remaining defendants will be granted without leave to amend. The motions to dismiss of defendants IF and Clark Distributors will be granted with leave to amend.

Accordingly, it is this 9th day of November, 1993 by the United States District Court for the District of Maryland,

ORDERED:

1. That the motion of defendant **[*33]** Invisible Fence Company, Inc. to dismiss the complaint be and the same is hereby granted, with leave to plaintiffs to file an amended complaint against said defendant within 20 days;
2. That the motion of defendants Helen Weary, Thomas Weary, William Annesley and Jeffrey Hanhausen to dismiss the complaint be and the same is hereby granted;
3. That the motion of defendant Clark Enterprises, Inc. to dismiss the complaint be and the same is hereby granted;
4. That the motion of defendant Clark Distributors, Inc. to dismiss the complaint be and the same is hereby granted, with leave to plaintiffs to file an amended complaint against said defendant within 20 days;
5. That the motion to dismiss the complaint of defendants Invisible Fence of the North Pacific; Canine Containment Distributing Company; I.F.D., Inc.; Invisible Fence Distributor of the Midwest; Invisible Fence of the Northland; Invisible Fence South and J.T.B. Distributing, Inc. be and the same is hereby granted; and
6. That the motion of defendant Canine Fence Company, Inc. to dismiss the complaint be and the same is hereby granted.

Alexander Harvey, II, Senior United States District Judge

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