UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: DIGITAL MUSIC ANTITRUST LITIGATION	MDL Docket No. 1780 (LAP)
	ELECTRONICALLY FILED
	Assigned to: Judge Loretta A. Preska

BERTELSMANN, INC.'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Defendant Bertelsmann, Inc. submits this supplemental memorandum, focusing on issues specific to Bertelsmann, Inc., in further support of Defendants' Motion, pursuant to Rule 12(b)(6), to dismiss the Second Consolidated Amended Complaint ("SCAC") for failure to state a claim upon which relief can be granted.[1] In addition to its other failings, the SCAC does not allege, with any requisite specificity, anything wrongful done by Bertelsmann, Inc. In substance, it only alleges that Bertelsmann had an ownership interest in a joint venture with some, but not all, of the other major music labels. On this basis, Bertelsmann, Inc. ought not be subjected to the burdens and costs of the far-reaching discovery sought by a nationwide class in a hope that such discovery might uncover some basis for a plausible antitrust claim.

BACKGROUND

The SCAC alleges nothing about Bertelsmann, Inc.'s business – such as what it produces or sells and its competitive relationship to other of the defendants – much less what specific anti-competitive acts Bertelsmann, Inc. is alleged to have committed in this case. Of the SCAC's 146 paragraphs, the following are the only ones that mention the conduct of Bertelsmann entities:

- Paragraph 22 alleges that Bertelsmann, Inc. is a subsidiary of Bertelsmann AG. It also alleges that Bertelsmann AG has a number of media businesses in Europe and elsewhere. Paragraph 21 alleges that Bertelsmann AG entered into a joint venture with Sony to form SonyBMG. Paragraph 64 alleges that Bertelsmann AG sells CDs to consumers. Nothing in those paragraphs nor anything else in the SCAC even purports to allege that such conduct by Bertelsmann AG is wrongful or to allege a basis for holding Bertelsmann, Inc. liable for any conduct of Bertelsmann AG.

- Paragraphs 58, 67 and 72 allege that an unidentified "Bertelsmann" entity joined in the formation of the MusicNet joint venture. Those paragraphs are not consistent in alleging the other members of the joint venture. While all three paragraphs allege that EMI and WMG were part of the joint venture, paragraph 58 alleges that Sony was a member, paragraph 72 omits Sony altogether, and paragraph 67 alleges that SonyBMG is a member of that joint venture. In any event, joining in the formation of a joint venture hardly is sufficient to state an antitrust claim.

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[1] Bertelsmann, Inc. has joined the Motion to Dismiss filed by all defendants.

- Paragraph 62 alleges that "Defendant BMG sells and has sold CDs directly to consumers through its BMG Music Club Service." Paragraph 64 again refers to "defendant BMG." There is no such defendant in this case, nor is there any allegation that would make Bertelsmann, Inc. liable for any alleged conduct of a BMG entity.[2]

Plaintiffs allege that "[a]s a result of Defendants' conspiratorial and anticompetitive conduct, plaintiffs and members of the Classes have paid more for Internet Music and CDs than they would have in a Digital Music market free of Defendants' illegal restraints of trade." *SCAC* ¶ 3. Deficient as these allegations otherwise are, they say virtually nothing about the role of Bertelsmann, Inc. in any alleged conspiracy.

ARGUMENT

Plaintiffs' allegations are insufficient to state any claim against Bertelsmann, Inc. Plaintiffs must allege a cause of action against each named defendant. *See Heart Disease Research Found. v. Gen. Motors Corp.*, 463 F.2d 98, 101 (2d Cir. 1972) (conclusory allegations insufficient); *Chapman v. New York State Div. for Youth*, No. 1:04-CV-867, 2005 WL 2407548, at *5 (N.D.N.Y. Sept. 29, 2005) (must allege facts as to each defendant). Plaintiffs have not alleged facts showing any role in any anticompetitive activity by Bertelsmann, Inc. Without such allegations, plaintiffs fail to plead that Bertelsmann, Inc. injured plaintiffs in a manner remediable under the antitrust, consumer protection, and unjust enrichment laws. For this additional reason, plaintiffs' claims should be dismissed in their entirety as to Bertelsmann, Inc.

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[2] There are six instances in which plaintiffs make allegations regarding a specific Bertelsmann company, rather than use the vague term "Bertelsmann." Of those six, five clearly refer to either Bertelsmann AG or BMG, neither of which is a defendant in this case. The only instance in the entire complaint in which plaintiffs expressly refer to Bertelsmann, Inc. – the actual defendant – is paragraph 22. That paragraph simply alleges that Bertelsmann, Inc. is incorporated in Delaware and headquartered in New York, and is a subsidiary of Bertelsmann AG. That is the entirety of plaintiffs' allegations regarding Bertelsmann, Inc.

I. PLAINTIFFS FAIL TO ALLEGE FACTS SHOWING BERTELSMANN, INC.'S PARTICIPATION IN THE ALLEGED CONSPIRACY.

In pleading an antitrust conspiracy claim, plaintiffs cannot rely on wholly conclusory allegations that "defendants" committed certain acts. Rather, plaintiffs must allege facts that show each defendant's shared, conscious commitment to a common scheme to restrain trade. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). Plaintiffs cannot meet this requirement as is apparent from the absence of any factual allegations demonstrating a meeting of the minds between Bertelsmann, Inc. and the other defendants regarding a scheme to restrain trade in either the sale of Internet or CD music. This failure is fatal to plaintiffs' claims against Bertelsmann, Inc.

Courts have consistently held that an antitrust conspiracy claim that fails to allege specific facts demonstrating each defendant's conscious commitment to the unlawful scheme must be dismissed. *See Heart Disease*, 463 F.2d at 101 (affirming dismissal of antitrust conspiracy claims because complaint contained only "a bare bones statement of conspiracy [and] of injury under the antitrust laws without any supporting facts"); *see also DM Research, Inc. v. Coll. of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (affirming dismissal of antitrust conspiracy claim and stating "the price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome").[3] General allegations that "defendants" or "conspirators" participated in an

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[3] *See also TV Commc'ns Network, Inc. v. Turner Network Tel., Inc.*, 964 F.2d 1022, 1026 (10th Cir. 1992) (affirming dismissal of antitrust conspiracy claim because "[t]he use of antitrust 'buzz words' does not support the factual circumstances necessary to support [plaintiff's] conclusory allegations"); *Zimmerman v. Pepsico, Inc.*, 836 F.2d 173, 180 (3d Cir. 1988) (affirming grant of motion to dismiss because complaint contained only a "bare bones allegation of antitrust conspiracy"); *Ft. Wayne Telsat v. Entm't & Sports Programming Network,* 753 F. Supp. 109, 113 (S.D.N.Y. 1990) (dismissing antitrust conspiracy claim because plaintiff failed to plead any facts beyond "bare bones" allegations); *Petrochem Insulation, Inc. v. N. Cal. & N. Nev. Pipe Trades Council*, No. C-90-3628 EFL, 1992 U.S. Dist. LEXIS 4564, at *17 (N.D. Cal. March 24, 1992) (dismissing antitrust claim where plaintiff failed to identify for each combination and conspiracy "the parties to it by name," failed to describe the "common scheme," and failed to delineate "the acts each defendant performed or undertook in furtherance of each contract, combination or conspiracy").

antitrust conspiracy do not suffice. *E.g., Chapman*, 2005 WL 2407548, at *5 (dismissing antitrust claim against one defendant where complaint simply listed defendant as a "conspirator:" "[t]here are simply no allegations to support plaintiff's claims that [] defendants participated in monopolization or conspiracy to monopolize the relevant market"); *Invamed, Inc. v. Barr Labs., Inc.*, 22 F. Supp. 2d 210, 221 (S.D.N.Y. 1998) (dismissing antitrust claim against affiliate of defendant where the complaint failed to present facts that might establish participation by the affiliate in the alleged conspiracy "save including them within the term 'defendants'").

Plaintiffs can not cure the fundamental infirmity of the SCAC through frequent sweeping references to "defendants" with no distinction as to which defendants are accused of what specific activity or which entities within defendants' corporate families are alleged to be part of such activity. *See, e.g., SCAC* ¶ 66, 69, 76, 79, 81. Courts have not hesitated to dismiss antitrust conspiracy claims resting on conclusory or "bare bones" allegations. *See, e.g., Beyer Farms v. Elmhurst Diary, Inc.*, 142 F. Supp.2d 296, 301 (E.D.N.Y. 2001) ("The naked statement that the defendant 'conspired' with other entities is not sufficient without some factual allegation as to what constituted the conspiracy."); *Subsolutions, Inc. v. Doctor's Assocs., Inc.*, 62 F. Supp. 2d 616, 627 (D. Conn. 1999) ("a Section 1 conspiracy claim supported by vague and conclusory allegations of concerted activity cannot withstand a motion to dismiss"); *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 98-08272, 1999 WL 335139, at *6 (S.D.N.Y. May 26, 1999) ("this Complaint is no more than a 'bare bones statement of conspiracy' without any supporting facts") (citation omitted); *Northwest Title & Escrow Corp. v. Edina Realty, Inc.*, No. 3-93-436, 1993 WL 593995, at *2 (D. Minn. Dec. 11, 1993) ("This 'buzz word' tactic is exactly the approach [plaintiff] has used in this case, and it is a tactic that cannot succeed."); *Hawkins v. AT&T*, No. 90-0546, 1990 WL 174901, at *5 (D.D.C. Oct. 26, 1990) ("[a] naked allegation of antitrust conspiracy, unsupported by factual allegations, does not state a claim upon which relief can be granted") (citation omitted); *Sadler v. Rexair, Inc.*, 612 F. Supp. 491, 494 (D. Mont. 1985) ("A conclusory allegation of a conspiracy to restrain trade will not survive a motion to dismiss.") (citations omitted).

At core, plaintiffs' accusation against "Bertelsmann" is that it was a party to the formation of a joint venture called MusicNet. *SCAC* ¶ 67. Plaintiffs allege that the MusicNet and pressplay, a second joint venture, "were vehicles through which the Defendants effectively exchanged price information, policed their cartel and imposed restrictive licensing arrangements that retarded the growth of Internet Music." *Id.* ¶ 98. However, plaintiffs only refer to "Defendants" generically and fail to plead anything as to how Bertelsmann, Inc., which correctly is not alleged by plaintiffs to itself produce or sell music, utilized the MusicNet joint venture to monopolize any relevant market. As such, plaintiffs fail to allege Bertelsmann, Inc.'s conscious commitment to an illegal scheme by virtue of its participation in the MusicNet joint venture. It suffices to say, the pricing activities of a joint venture with regard to products within its scope are not presumed to be illegal. *See Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).

Moreover, the joint venture was separately incorporated and is therefore a separate legal entity. There is no allegation that would hold Bertelsmann, Inc. itself liable for the conduct of the joint venture. There are no piercing the corporate veil allegations. Since there is no allegation that renders Bertelsmann, Inc. liable for the joint venture's actions, Bertelsmann, Inc. could be liable only with allegations relating to actions of Bertelsmann, Inc. outside of the joint venture. There are no such allegations.

Allowing plaintiffs to plead an antitrust conspiracy based on a defendant's membership in a joint venture would transform all joint ventures into potential antitrust conspiracies simply because they create one of many opportunities for competitors predisposed to conspire to act on that predisposition. Indeed, "the mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred." *Capital Imaging Assocs., P.C., v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 545 (2d Cir. 1993). The allegation that the joint venture created an opportunity to conspire is nothing more than an allegation that some defendants formed a joint venture, which is entirely legal.

Plaintiffs' reliance on Bertelsmann, Inc.'s ownership in the MusicNet joint venture, moreover, does not comport with the legal recognition that the integration of resources in a joint

venture creates efficiencies that are valued under the antitrust laws including "risk-sharing, economies of scale, access to complementary resources and the elimination of duplication and waste." *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994). Plaintiffs' allegations show that defendants' formation of these joint ventures did bring a product to market – Internet Music – at a time when achieving a system of viable authorized downloading was in its infancy. These joint ventures, according to plaintiffs, enabled consumers to purchase music over the Internet. The antitrust laws do not penalize firms that, in effect, bring a new product to market or expand a market on the ground that the firms could have done so in a better manner, *see Carpet Steaming Tape Licensing Corp. v. Best Seam, Inc.*, 694 F.2d 570 (9th Cir. 1982), and they certainly do not provide treble damage class action plaintiffs a shortcut to pleading an antitrust price fixing claim.

Plaintiffs' sole allegation against Bertelsmann Inc. – that it had an ownership interest in the MusicNet joint venture – fails to allege facts showing Bertelsmann, Inc.'s participation in impermissible price-fixing. There is no allegation that Bertelsmann, Inc. itself did anything actionable. The complaint contains broad allegations of price-fixing, but there is no allegation that Bertelsmann, Inc. agreed to fix prices.[4] Moreover, that allegation is entirely conclusory – there is no mention of: (1) any specific person within Bertelsmann, Inc. involved in the conspiracy to fix prices, (2) any specific meetings attended by Bertelsmann, Inc., (3) any specific communications involving Bertelsmann, Inc., or (4) any specific songs or albums (and the price thereof) sold by Bertelsmann, Inc. Merely engaging in actions that parallel actions taken by others is unremarkable (indeed, it is commonplace in competitive markets) and does not support a claim that Bertelsmann, Inc. engaged in any such conspiracy. *Bell Atlantic Corp. v. Twombly*, 550 U.S. __, 127 S. Ct. 1955 (2007).

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[4] In every instance in which plaintiffs refer to a specific defendant's allegedly anti-competitive practices, it is a defendant other than Bertelsmann, Inc. *E.g., SCAC* ¶ 86 (UMG and role of pressplay); ¶ 94 (side letter involving EMI); ¶ 96 (UMG's use of MFN clauses).

The significance of plaintiffs' vague and general references to "defendants," rather than Bertelsmann, Inc. in particular, gains further importance from the fact that plaintiffs are unsure of which Bertelsmann entity they are suing. Not only do they twice refer incorrectly to a "defendant BMG," but of the six times that plaintiffs allege a specific Bertelsmann entity by name (rather just use the term "Bertelsmann" ambiguously), five of those expressly refer to entities other than Bertelsmann, Inc. A plaintiff that does not even know which Bertelsmann entity it is suing should not be heard to argue that its use of the term "defendants" was carefully intended to mean each and every one of the named defendant entities, including specifically Bertelsmann, Inc.

II. PLAINTIFFS' ALLEGATIONS REGARDING OTHER BERTELSMANN ENTITIES DO NOT STATE A CLAIM AGAINST BERTELSMANN, INC.

The named defendant, Bertelsmann, Inc., is mentioned only once in the complaint. *SCAC* ¶ 22. That allegation, regarding Bertelsmann, Inc.'s corporate status and location, is entirely innocuous. Other separate corporations within the broader Bertelsmann business are only mentioned in passing in the complaint. For example, BMG is only mentioned twice, and Bertelsmann AG is only mentioned three times.

The near complete lack of specific reference to Bertelsmann, Inc. is compounded by the fact that the complaint twice refers to "*defendant* BMG." *Id.* ¶¶ 62, 64 (emphasis added). Although an entity exists named Bertelsmann Music Group, which is sometimes referred to as "BMG," that entity is not a defendant in this case, and there is no allegation that its actions were directed or controlled by Bertelsmann, Inc. Accordingly, the SCAC's references to "BMG" and "Bertelsmann" are entirely ambiguous.[5]

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[5] For example, prior to consolidation, the complaint filed by the lead group of plaintiffs alleged that the Bertelsmann entity involved in the MusicNet joint venture (plaintiffs' primary basis for liability) was BMG. *See Bulcao Complt.* ¶ 38. Now, plaintiffs simply refer to the joint venture participant as "Bertelsmann." As that history shows, the use of short-hand or ambiguous terms is not an attempt at simplification, but, rather, is an effort to indiscriminately lump together allegations regarding different Bertelsmann entities.

Plaintiffs cannot save their insufficient allegations by claiming that corporate distinctions are irrelevant. Plaintiffs make the wholly conclusory allegation that "[d]efendants, directly or through a division, parent, subsidiary, co-conspirator or agent, have had actual knowledge of, and have knowingly participated in, the conspiracy . . . ." *SCAC* ¶ 31. A corporate separation, however, is presumed valid, and plaintiffs can only pierce the corporate veil with very specific factual allegations of how a defendant misused its corporate separateness. *Neilson v. Union Bank of Cal.*, 290 F. Supp. 2d 1101, 1116 (C.D. Cal. 2003) ("Conclusory allegations of 'alter ego' status are insufficient to state a claim. Rather, a plaintiff must allege specifically both of the elements of alter ego liability, as well as facts supporting each."). Here, plaintiffs' allegation is not only devoid of any facts but it also sweepingly refers to all defendants and their many intra-corporate relations. The allegation does not even mention Bertelsmann, Inc. and its relationship to either BMG or Bertelsmann AG.

Courts routinely dismiss such conclusory allegations. *See De Jesus v. Sears, Roebuck & Co., Inc.*, 87 F.3d 65, 70 (2d Cir. 1996) (dismissing claim because plaintiff failed to plead facts to overcome a "'presumption of separateness' afford to related corporations"); *In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 426 (S.D.N.Y. 2003) ("these purely conclusory allegations cannot suffice to state a claim based on veil-piercing or alter-ego liability, even under the most liberal notice pleading standard") (citation omitted); *Wady v. Provident Life & Accident Ins. Co. of Am.*, 216 F. Supp. 2d 1060, 1067 (C.D. Cal. 2002) (granting summary judgment where "none of the substantive allegations mentions [defendant]"); *Pizza Mgmt., Inc., v. Pizza Hut, Inc.*, 737 F. Supp. 1154, 1174 (D. Kan. 1990) (dismissing claim where "[p]laintiffs ha[d] not even asserted in their complaint any of the conclusory references or allegations associated with th[e] doctrine, such as 'alter ego,' 'mere instrumentality,' or 'piercing the corporate veil'"). Plaintiffs' conclusory allegations fall far short of overcoming the presumption of separateness of corporate entities.

In short, stripped of the irrelevant allegations about other Bertelsmann corporate entities, the only allegation specifically mentioning defendant Bertelsmann, Inc. is the allegation

regarding its incorporation and headquarters. That is wholly inadequate to sustain a claim against Bertelsmann, Inc.

CONCLUSION

For the foregoing reasons and those set forth in Defendants' Memorandum In Support of Motion to Dismiss, the Court should dismiss with prejudice the Second Consolidated Amended Complaint.

Dated: July 30, 2007

Respectfully submitted,

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Assigned to: Judge Loretta A. Preska

CERTIFICATE OF SERVICE

I, Ashley E. Bass, hereby declare, pursuant to 28 U.S.C. § 1746, I served Bertelsmann, Inc.'s Supplemental Memorandum in Support of Defendants' Motion to Dismiss and the Corporate Disclosure Statement of Bertelsmann, Inc. electronically upon all counsel of record in this action. I certify under penalty of perjury that the foregoing is true and correct. Executed on July 30, 2007.

Ashley Bass

Ashley E. Bass