UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: DIGITAL MUSIC ANTITRUST LITIGATION	)	MDL Docket No. 06MD1780 (LAP)

SONY CORPORATION OF AMERICA'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendant Sony Corporation of America ("SCA") submits this supplemental memorandum addressing SCA-specific issues in support of Defendants' July 30, 2007 Motion to Dismiss and Strike Portions of Plaintiffs' Second Consolidated Amended Complaint and the related Memorandum of Law (the "Joint Motion").[1]

I.
INTRODUCTION AND SUMMARY OF RELEVANT FACTS

As set forth in Defendants' Joint Motion, the Second Consolidated Amended Complaint (the "Complaint"), which attempts to allege an antitrust conspiracy among defendants with respect to Internet music and CDs (*see* Complaint at ¶ 3), should be dismissed in its entirety. Defendant SCA should be dismissed for all of the reasons set forth in the Joint Motion, as well as for the additional reason that the Complaint does not adequately allege any conduct at all by SCA, let alone any wrongful or anticompetitive conduct.

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[1] SCA is a signatory to the Joint Motion.

As explained below, plaintiffs' allegations do not come close to supporting antitrust conspiracy claims against SCA, and as such, even if plaintiffs' Complaint is not dismissed in its entirety by Defendants' Joint Motion, SCA should still be dismissed from this litigation.

II.
THE COMPLAINT FAILS TO STATE A CLAIM AGAINST SCA

Plaintiffs have attempted to state claims against SCA for violation of section one of the Sherman Act,[2] for violation of state antitrust and unfair and deceptive acts and practices statutes, and for unjust enrichment under state law. However, as discussed in detail in Part I of the Argument in Defendants' Joint Motion, plaintiffs' conclusory allegations do not satisfy the pleading requirements for antitrust suits. *See Bell Atlantic Corp. v. Twombly,* 550 U.S. --, 127 S.Ct. 1955 (2007). This is especially true with respect to SCA. *See Chapman v. New York State Div. for Youth*, 2005 WL 2407548, *5, n.5 (N.D.N.Y. Sept. 29, 2004) ("There are simply no allegations to support the plaintiff's claims that [certain] defendants participated in monopolization or conspiracy to monopolize the relevant market. Those claims are therefore subject to dismissal regardless of plaintiff's other pleading deficiencies.")

Plaintiffs have failed to allege any actionable conduct at all by SCA, and in particular have failed to allege specific facts regarding SCA's role in the purported conspiracies or specific anticompetitive acts by SCA. It is particularly telling that no SCA conduct is alleged given the length of the Complaint and number of plaintiff firms with a hand in drafting the Complaint. In

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[2] Count I for violation of section 1 of the Sherman Act does not specifically state which defendants it seeks to hold liable. It refers generally to "Defendants" throughout the count, but states specifically that "[t]he Digital Music market is dominated by four entities - Defendants EMI, Sony BMG, UMG and WMG – which collectively function as a highly concentrated, tightly knit oligopoly." Complaint at ¶ 124. Significantly, paragraph 124 does not make any mention of SCA.

the absence of such factual allegations, SCA must be dismissed. *See Heart Disease Research Found. v. Gen. Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972) (affirming dismissal of antitrust claim and stating that "a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal"); *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").

Conclusory allegations pertaining generally to all defendants cannot save plaintiffs' claims against SCA. This is because plaintiffs must allege facts showing each defendant's conscious commitment to a common scheme to restrain trade. *Invamed, Inc. v. Barr Labs., Inc.*, 22 F. Supp. 2d 210, 221 (S.D.N.Y. 1998) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). Here, plaintiffs have alleged virtually no facts at all about SCA, and have utterly failed to meet their burden of alleging facts that show SCA's conscious commitment to a common scheme to restrain trade.

Moreover, plaintiffs' allegations relating to SONY BMG, Sony Connect, Sony Music Entertainment Inc. [3] or any other entity related to SCA cannot and do not form the basis for a claim against SCA. *See DeJesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 69-70 (2d Cir. 1996)

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[3] SONY BMG, Sony Connect and Sony Music Entertainment Inc. are separate companies from SCA. Plaintiffs try to gloss over the fact that Sony Connect is a separate entity from SCA in alleging that SCA sold music through Sony Connect (Complaint at ¶ 60). Moreover, the Complaint contains no allegation that Sony Connect, a music *retailer*, participated in a conspiracy to set *wholesale* prices for recorded music. Indeed, the Complaint contains no allegation that Sony Connect did anything other than sell music. Additionally, plaintiffs' allegations that SCA launched and sold music through the pressplay joint venture (originally called "Duet") (Complaint at ¶¶ 59, 67, 72, 85) are incorrect. SCA's affiliate, Sony Music Entertainment Inc., launched and sold music through pressplay. But even accepting this

(dismissing parent company of the alleged RICO enterprise and explaining that "a corporate relationship alone is not sufficient to bind a parent corporation for the actions of its subsidiary").

Finally, Plaintiffs' allegations regarding SCA's participation in joint ventures with other defendants (which are factually inaccurate and internally inconsistent in any event[4]) are insufficient to state a claim against SCA. As set forth in more detail in Part 1.A of the Argument in Defendants' Joint Motion, the allegation that the joint ventures allegedly provided an opportunity to conspire is not sufficient to state a claim. This is particularly true where, as here, plaintiffs have not alleged any overt acts by SCA. In particular, the Complaint contains no specific allegations that SCA entered into a price-fixing agreement. It contains no allegations that any SCA representatives were involved in the purported price fixing and no allegations of meetings attended or communications made by SCA.

Given plaintiffs' complete failure to connect SCA with any alleged wrongful conduct, SCA must be dismissed. SCA should not be forced to incur the heavy burden and significant expense of being a party to this case based solely on plaintiffs' description (which is not even accurate) of SCA's relationship to other companies.

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allegation as true for purposes of this motion would not suffice to state a claim against SCA absent specific allegations regarding SCA's participation in the alleged conspiracy.

[4] Paragraph of 58 the Complaint incorrectly alleges that SCA sold music to consumers "through [its] MusicNet joint venture." However, paragraphs 67 and 72 contain allegations that correctly omit SCA from the list of companies identified as MusicNet's founders or owners.

III.
CONCLUSION

For all of the foregoing reasons, as well as those detailed in Defendants' Joint Motion to Dismiss and to Strike Portions of Plaintiffs' Complaint, SCA should be dismissed from this litigation.

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