UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re DIGITAL MUSIC ANTITRUST LITIGATION	:	MDL Docket No. 1780 (LAP)
	:	ECF Case
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DEFENDANT TIME WARNER'S SUPPLEMENTAL REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND CONSOLIDATED AMENDED COMPLAINT

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October 15, 2007

Defendant Time Warner Inc. ("Time Warner") respectfully submits this supplemental reply memorandum of law in further support of its July 30, 2007 Supplemental Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiffs' Second Consolidated Amended Complaint ("Opening Brief" or "Time Warner Br.") and Defendants' July 30, 2007 motion to dismiss plaintiffs' Second Consolidated Amended Complaint ("Complaint") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Time Warner also joins Defendants' October 15, 2007 Reply Memorandum of Law in Further Support of Motion to Dismiss and to Strike Portions of Plaintiffs' Second Consolidated Amended Complaint (the "Joint Reply Memorandum for Defendants"), which sets forth additional grounds on which plaintiffs' claims against all defendants should be dismissed.

ARGUMENT

I. PLAINTIFFS FAIL TO ALLEGE FACTS SUFFICIENT TO HOLD TIME WARNER LIABLE FOR THE ALLEGED ACTS OF ITS (FORMER) SUBSIDIARY WARNER MUSIC GROUP.

As set forth in Time Warner's Opening Brief, it is well-established that liability can never be predicated solely upon the fact of a parent corporation's ownership of a controlling interest in the shares of its subsidiary. (Time Warner Br. at 4-5.) Indeed, in their Supplemental Opposition Brief,[1] plaintiffs concede -- as they must -- that to state a claim against Time Warner based on the conduct of Warner Music Group ("WMG"),

[1] "Supplemental Opposition Brief" or "Pl. Supplemental Mem." will be used throughout this memorandum to refer to Plaintiffs' Consolidated Memorandum of Law in Opposition to Defendants Bertelsmann, Inc.'s, Sony Corporation of America's and Time Warner, Inc.'s Supplemental Memoranda of Law, filed September 13, 2007.

plaintiffs must allege that Time Warner "exercise[d] dominion and control" over WMG.[2] (Pl. Supplemental Mem. at 11 ("Courts in this District have held that a complaint contains sufficient facts to hold a parent corporation liable for the acts of its subsidiaries if it contains allegations concerning the parent corporation's exercise of dominion and control over the subsidiary.") (emphasis added).)

After making that concession, however, plaintiffs fail to point to a single statement in the Complaint that even arguably could be read to allege that Time Warner "dominated or controlled" WMG. (Pl. Supplemental Mem. at 12.) Instead, plaintiffs rely solely upon the conclusory allegation that "WMG was a wholly-owned subsidiary and an agent of Time Warner". (Id.) But, a parent corporation cannot be held liable for the acts of its subsidiary unless a plaintiff alleges that: (1) the parent company so dominated and controlled the day-to-day business activities of its subsidiary that the companies operated as a single economic entity, with the subsidiary having no will, mind or existence of its own; and (2) the domination and control of the subsidiary was used to perpetuate a fraud or similar injustice against the plaintiff. (Time Warner Br. at 4-5.) The allegations here do not come close to satisfying either prong of that standard -- and plaintiffs need to satisfy both. (Id.)

[2] Plaintiffs make clear that they allege antitrust liability against Time Warner based solely upon the conduct of Time Warner's former subsidiary, WMG, and not for any actions of its current subsidiary, America Online, Inc. ("AOL"). (See Pl. Supplemental Mem. at 5 n.6; see also Pl. Supplemental Mem. at 2-3 (alleging that Time Warner participated in MusicNet "via [its] former wholly owned subsidiary Warner Music Group" and explaining that "[i]t was through [MusicNet and Pressplay] that Bertelsmann, Sony and Time Warner . . . artificially inflated the prices of Digital Music . . . ."), 11-13 (arguing that Time Warner is "liable for the conduct of its wholly-owned subsidiary WMG").)

The only case plaintiffs cite in support of their argument that Time Warner should be held liable for the conduct of WMG, In re Alstom SA Securities Litigation, 454 F. Supp. 2d 187 (S.D.N.Y. 2006), is plainly distinguishable, and, indeed, illustrates why the allegations in the Complaint are not sufficient to state a claim against Time Warner. Unlike the plaintiffs here, the plaintiffs in Alstom pointed to the "disregard of corporate formalities by Alstom and ATI in suspending [a board member and executive of their subsidiary], Alstom USA's one hundred percent stock ownership of ATI and Alstom's one hundred percent stock ownership of Alstom USA, that ATI and Alstom USA shared officers, and that Alstom and Alstom USA used this control and dominance of ATI to carry out the ATI fraud". Id. at 216. Even then, the court in Alstom found that the motion to dismiss failed only "by a narrow margin". Id. Here, plaintiffs rely solely on the fact that Time Warner used to own WMG; that allegation cannot establish even the most basic requirements (domination and control) for piercing the corporate veil. (See Time Warner Br. at 4-6; see also Miller v. Citicorp, No. 95 Civ. 9728 (LAP), 1997 WL 96569, at *9 (S.D.N.Y. Mar. 4, 1997) (Preska, J.) (recognizing that "New York courts have displayed a considerable reluctance to pierce the corporate veil of the parent of a subsidiary" and dismissing complaint for failure to state a claim because "[e]ven a wholly-owned subsidiary with identical executive officers is not considered an agent for its parent corporation unless that subsidiary can be characterized as a 'mere dummy'").)[3]

[3] Plaintiffs' failure to allege how Time Warner purportedly used its ownership interest in WMG to commit a fraud or similar injustice against plaintiffs constitutes a separate and independent ground for dismissal. See Kaplan v. Aspen Knolls Corp., 290 F. Supp. 2d 335, 340 (E.D.N.Y. 2003); see also Mobil Oil Corp. v. Linear Films, Inc., 718 F. Supp. 260, 268 (D. Del. 1989) ("[t]he underlying cause of action [alleged in the complaint cannot] supply the necessary fraud or injustice").

Plaintiffs also suggest that issues related to parent/subsidiary liability can never be decided at the motion to dismiss stage. (Pl. Supplemental Mem. at 11-13.) That is plainly wrong. Courts in this district and elsewhere routinely grant motions to dismiss under Rule 12(b)(6) where, as here, the complaint fails to allege facts sufficient to pierce the corporate veil. See, e.g., De Jesus v. Sears, Roebuck & Co., Inc., 87 F.3d 65, 70 (2d Cir. 1996) (affirming dismissal of complaint for failure to pierce the corporate veil where plaintiff failed to point to any "specific facts" concerning domination and control); Rosenberg v. Home Box Office, Inc., No. 601924/05, Slip Op. at 21-22 (N.Y. Sup. Ct. Feb. 8, 2006) (attached to Time Warner's Opening Brief)[4]; Appalachian Enters. v. ePayment Solutions Ltd., No. 01 Civ. 11502, 2004 WL 2813121, at *8 (S.D.N.Y. Dec. 8, 2004) (dismissing complaint where plaintiff failed to proffer "any factual allegations to support its conclusory assertion that the individual defendants exercised complete domination and control over the . . . defendants in order to plead a viable claim for alter ego liability"); Binder v. Nat'l Life of Vt., No. 02 Civ. 6411, 2003 WL 21180417, at *3 (S.D.N.Y. May 20, 2003) (dismissing claim premised on alter ego theory where plaintiff had not properly alleged complete domination and merely made "conclusory" statement that one corporation was parent or controlling entity of other); Zinaman v. U.S.T.S. N.Y., Inc., 798 F. Supp. 128, 132 (S.D.N.Y. 1992) (dismissing claim against parent corporation where plaintiff made only "conclusory" allegation of ownership and control, and failed to

[4] Plaintiffs claim that Rosenberg is "easily distinguishable" because, unlike the plaintiffs in that case, "[p]laintiffs here have pled direct participation in, and conduct in furtherance of, the alleged conspiracy". (Pl. Supplemental Mem. at 12-13.) That is irrelevant to this motion. The sole basis for plaintiffs' allegation that Time Warner participated in and furthered the purported conspiracy is Time Warner's ownership of WMG. (Compl. ¶ 26.) Plaintiffs do not -- because they cannot -- allege that Time Warner itself directly participated in or furthered the alleged antitrust conspiracy.

make any "reference to the factors typically considered in applying the alter ego theory, such as the absence of formalities in corporate decision making, and inadequate capitalization"); Reynolds Metals Co. v. Columbia Gas Sys., Inc., 669 F. Supp. 744, 750 (E.D. Va. 1987) (dismissing complaint seeking to hold parent corporation liable for the anti-competitive activities of its subsidiaries).

The Reynolds case is squarely on point. In Reynolds, plaintiffs sought to hold liable one of the named defendants, System, because its subsidiaries (the other named defendants) were alleged to have engaged in an antitrust conspiracy. Reynolds, 669 F. Supp. at 746. The plaintiffs "attempt[ed] to include System within the scope of its antitrust claim by referring [in the complaint] to all defendants as 'Columbia Systems Companies'". Id. at 750. However, the broad allegations in the complaint actually referred to actions taken by System's subsidiaries, not System. Id. "The only allegation plaintiff [made] concerning System's relation to anti-competitive behavior [was] that System [was] the parent of the other defendants." Id. Because "ownership alone is insufficient to disregard the corporate entity" and because "plaintiff has made no allegation beyond ownership", the court concluded that "the actions of the subsidiaries will not be imputed to System". Id.

That is precisely the situation here. Plaintiffs seek to hold Time Warner liable for the allegedly anti-competitive behavior of its former subsidiary. As in Reynolds, however, because plaintiffs have "made no allegation beyond ownership" of WMG by Time Warner, the conduct of WMG should "not be imputed to [Time Warner] and dismissal is proper under Rule 12(b)(6)". Id.

II. PLAINTIFFS HAVE FAILED TO STATE AN UNDERLYING CLAIM AGAINST WMG.

For the reasons set forth in Defendants' July 30, 2007 Joint Memorandum of Law in Support of Motion to Dismiss and to Strike Portions of Plaintiffs' Second Consolidated Amended Complaint and in the Joint Reply Memorandum for Defendants, both of which are incorporated herein by reference, plaintiffs have failed to state a claim against WMG. Because plaintiffs' Complaint fails to state, and cannot state, a plausible antitrust conspiracy against WMG, there is no basis for such a claim against Time Warner -- even assuming Time Warner could be held liable for WMG's conduct, which it cannot.

CONCLUSION

For the foregoing reasons, the Court should dismiss with prejudice plaintiffs' claims against Time Warner for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6).

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Respectfully submitted,

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