EXHIBIT 13

Not Reported in F.Supp., 1996 WL 241607 (N.D.Cal.), 1997-2 Trade Cases P 72,024
(Cite as: 1996 WL 241607 (N.D.Cal.))

United States District Court, N.D. California.
JM COMPUTER SERVICES, INC., Plaintiff,
v.
SCHLUMBERGER TECHNOLOGIES, INC., Defendant.
No. C 95-20349 JW.

May 3, 1996.

John A. Herfort, Susan M. Pereles, Gibson, Dunn & Crutcher, New York City.

Joel S. Sanders, Mark C. Alexander, Gibson, Dunn & Crutcher, San Francisco, CA.

Steven M. Kramer, Steven M. Kramer & Associates, New York City.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

WARE, District Judge.

***1** The motion of Defendant Schlumberger Technologies, Inc., to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), was submitted to the Court without oral argument. The court has read the moving and responding papers. Based upon all pleadings filed to date, the Court GRANTS Defendant's motion with leave to amend.

INTRODUCTION

Plaintiff JM Computer Services, Incorporated ("Plaintiff") filed this action on May 11, 1995, alleging *inter alia*, monopolization and attempted monopolization by Defendant Schlumberger ("Defendant"). On July 31, 1995, this Court granted Defendant's motion to dismiss with leave to amend. Plaintiff has filed a First Amended Complaint ("FAC").

The FAC alleges six claims: (1) monopolization; (2) attempted monopolization; (3) tying; (4) exclusive dealing; (5) slander; and (6) interference with prospective economic advantage. Thus, Plaintiff claims violations of §§ 1 and 2 of the Sherman Act as well as state law claims. Defendant now moves to dismiss the FAC for failure to state a claim, and alternatively, on the ground that the FAC was not timely filed.[FN1]

BACKGROUND

Defendant Schlumberger manufactures automatic testing equipment for semiconductors and integrated circuits. Plaintiff alleges that this action concerns the repair parts and services markets for Defendant's equipment. Plaintiff claims Defendant is a monopolist in this market.

Principals of Plaintiff worked for Defendant, repairing and servicing Defendant's testers, until mid-1993. At that time, Defendant closed its operations in Marlton, New Jersey and these principals were laid off. They later joined Plaintiff's organization. Plaintiff alleges that the automatic testing equipment market contains substantial entry barriers as each piece of equipment is made up of a dozen or more different boards which is comprised of custom components available only from the manufacturer.

Plaintiff claims that when it sought to enter the relevant markets in mid-1993, Defendant's market share was almost one hundred percent. Plaintiff alleges that because it had low overhead, it could charge lower prices than Defendant was charging. Plaintiff contends that Defendant's reaction was to develop anticompetitive strategies, such as tying, exclusive dealing, predatory pricing, price discrimination and slander to eliminate independent dealers from the market. Plaintiff further alleges that Defendant used these strategies to eliminate one of the other competitors from the market and that Defend-

ant was able to keep a necessary supply of parts and services away from Plaintiff.

Plaintiff claims that it attempted to obtain the needed parts, as it could not compete without them; however, Defendant destroyed Plaintiff's ability to compete because Defendant is the only supplier of parts and services for the testers. Plaintiff alleges that Defendant makes some "trivial quantities" of parts available to independent competitors who occupy a miniscule share of the relevant product markets, however, the quantity is not sufficient to enable a competitor such as Plaintiff to compete with Defendant. Finally, Plaintiff contends that customers in the market have been injured, as they now have no freedom to choose suppliers of repair parts and services.

LEGAL STANDARDS

***2** A claim may be dismissed as a matter of law for one of two reasons: "(1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal theory." *Robertson v. Dean Witter Reynolds, Co.*, 749 F.2d 530, 534 (9th Cir. 1984). "A complaint cannot be dismissed for failure to state a claim 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 (1957); *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989).

"All material allegations in the complaint are to be taken as true and construed in the light most favorable to the non-moving party." *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986); *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). However, the Court will not accept wholly conclusory allegations. *In re VeriFone Securities Litig.*, 11 F.3d 865, 868 (9th Cir. 1993); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981), *cert. denied*, 454 U.S. 1031 (1981).

In the Ninth Circuit, "antitrust pleadings need not contain great factual specificity." *Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan*, 662 F.2d 641, 648 (9th Cir. 1981), *cert. denied*, 469 U.S. 1229 (1981). "There is no special rule requiring more factual specificity in antitrust pleadings." *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919 (9th Cir. 1980) (citing *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1982 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977)).

However, the Court need not accept legal conclusions asserted in the complaint even if pled as "facts." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988) (citing *McCarthy v. Mayo*, 827 F.2d 1310, 1317 (9th Cir. 1987)). *See also Leticia Corp. v. Sweetheart Cup Co.*, 790 F. Supp. 702, 704 E.D. Mich. 1992) ("[M]ere conclusory allegations couched in factual allegations are not sufficient to state a cause of action, particularly in complex litigation such as alleged violations of the Sherman Act."); *HRM, Inc. v. Tele-Communications, Inc.*, 653 F. Supp. 645, 647 (D. Colo. 1987) ("conclusory allegations which merely recite the litany of antitrust will not suffice.").

DISCUSSION

Defendant contends that Plaintiff's FAC fails to state a claim for many of the same reasons that it was dismissed by this Court in July 1995.[FN2] The Court agrees.[FN3] Defendant generally contends that the amended complaint (1) fails to state how the alleged 48 product markets were affected by the anticompetitive conduct; (2) fails to identify the "customers" and "OEMs" [[[original equipment manufacturers] that Plaintiff alleges are involved with Defendant in tying and exclusive dealing; (3) fails to allege an actual price or price increase as to any specific part or service; and (4) fails to state a claim as to the newly-added state law allegations.

A. Sherman Act § 1: Tying and Exclusive Dealing

***3** Plaintiff alleges tying and exclusive dealing in violation of Section 1 of the Sherman Act in Counts Three and Four of the FAC. Section 1 states in pertinent part: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal[.]" 15 U.S.C. § 1 (1973).

In order to state a claim for violation of § 1 of the Sherman Act, a plaintiff must establish three elements: "(1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged (i.e., 'antitrust injury')." *McGlinchy v. Shell Chem. Co.,* 845 F.2d 802, 811 (9th Cir. 1988); *Rutman Wine Co. v. E. & J. Gallo Winery,* 829 F.2d 729, 734 (9th Cir. 1987). Antitrust injury is "injury of the type the antitrust laws were intended to prevent .... The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 (1977).

As an initial matter, Plaintiff has failed to identify the other participant(s) in the agreement or conspiracy which Plaintiff claims violates § 1. This is a sufficient basis for dismissing Plaintiff's § 1 claims. *T.W. Elec. Serv. v. Pacific Elec. Contractors,* 809 F.2d 626, 633 (9th Cir. 1987); *see also Newport Components, Inc. v. NEC Home Elec., Inc.,* 671 F. Supp. 1525, 1546 (N.D. Cal. 1994).

1. Tying

Plaintiff alleges that Defendant has tied together the sale of its repair services and parts:

... Sale of parts is conditioned on purchase of the Defendant's services. The buyers are not free to take either product by itself.

Parts and services constitute two distinct products. These products possess no technological interrelationship, nor are they complementary products. There is no necessity that the products be sold together.

....

[Defendant] has sufficient power in the market for parts to force and coerce the use of services on customers because [Defendant] has agreements with the manufacturers of parts.

....

A substantial volume of commerce, including interstate commerce, is foreclosed by this tying agreement. [Plaintiff] and other market participants, including Hines & Associates, were foreclosed from the market of parts because of [Defendant's] tying activities.

FAC ¶¶ 62-67.

The Court agrees with Defendant that Plaintiff's allegations are conclusory. Plaintiff has not identified with any degree of specificity the tied-product "services" that the customers allegedly did not want to purchase and has not alleged facts which relate the tying to any of the alleged submarkets. Plaintiff's tying allegations are merely legal conclusions. As Plaintiff has not pled facts establishing the elements of a tying claim, Defendants' motion to dismiss this claim is hereby granted with leave to amend. *Papasan v. Allain,* 478 U.S. 265, 286 (1986); *McGlinchy v. Shell Chem. Co.,* 845 F.2d 802, 810 (9th Cir. 1988).

2. Exclusive Dealing

***4** Plaintiff alleges that:

[Defendant] entered into exclusive dealing agreements with the manufacturers of the parts (OEMs) in the relevant parts markets that Defendant itself

did not manufacture. The purpose of the exclusive agreements was to harm competition in general in the relevant markets. These agreements actually did harm competition in the relevant markets.

These exclusive dealing agreements unreasonably deprived [Plaintiff] of a needed source of supply and froze out of the market a significant fraction of the buyers and sellers.

FAC ¶¶ 49, 50.

Plaintiff has failed to plead an exclusive dealing claim as it has failed to identify an agreement with a specific person or entity and does not identify the parts, services, or contracts involved in the alleged exclusive dealing. Antitrust pleadings are not subject to more specificity than that required by Federal Rule of Civil Procedure 8, a short and plain statement of the claim. *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919 (9th Cir. 1980) (citations omitted). However, failure to allege facts essential to support the elements of the claim with a minimum level of detail warrants dismissal of the claim.

B. Sherman Act § 2 - Monopolization and Attempted Monopolization

Plaintiff alleges monopolization and attempted monopolization in violation of Section 2 of the Sherman Act in Counts One and Two of the FAC. Section 2 states 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, or with foreign nations, shall be deemed guilty of a felony[.]" 15 U.S.C. § 2 (1973).

In order to state a claim for monopolization under § 2 of the Sherman Act, the plaintiff must demonstrate two elements: "(1) the 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." *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585, 569 n.19 (1985); *see also United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

In order to state a claim for attempted monopolization, plaintiff must demonstrate four elements: "(1) specific intent to control prices or destroy competition with respect to a part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; (3) a dangerous probability of success; and (4) causal 'antitrust' injury." *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377, 1382 (9th Cir. 1983), *cert. denied*, 464 U.S. 955 (1983).

1. Relevant Market

In addition to the elements above, a plaintiff must plead a relevant market in order to state a claim under § 2 of the Sherman Act. The relevant market consists of (1) the product market and (2) the geographic market. *Los Angeles Memorial Coliseum Commission v. N.F.L.*, 726 F.2d 1381, 1392 (9th Cir. 1984); *cert. denied*, 469 U.S. 990 (1984). The product market consists of a set of goods and services that enjoy reasonable interchangeability of use and cross-elasticity of demand. *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 995 (9th Cir. 1986), *cert. denied*, 459 U.S. 1009 (1987).

***5** Defendant's contentions that Plaintiff alleges the relevant market in terms so vague that they are meaningless and inconsistently defines the market are well-taken. In addition, Plaintiff's market allegations are largely conclusory, parroting the legal rules in the area of antitrust law without setting forth any facts from Plaintiff's specific circumstances to support the market definition. Significantly, Plaintiff does not identify the specific products or services in product markets for which Plaintiff claims there is no price elasticity.

Plaintiff's geographic market is inconsistently defined. *See* Complaint ¶¶ 31, 70. Plaintiff must point to an identifiable market which it claims that Defendant monopolized or attempted to monopolize. Finally, Plaintiff may not define the geographic market in terms of where it can or chooses to compete. The relevant geographic market is the area of effective competition, which is defined in terms of where buyers can turn for alternative sources of supply. *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1218 (9th Cir. 1977) (citing *Otter Tail Power v. United States*, 410 U.S. 366, 369 n.1 (1973)); *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir. 1991). The Court dismisses Plaintiff's § 2 claims for failure to state a claim.

C. State Law Claims

The Court hereby dismisses Plaintiff's state law claims with leave to amend. Plaintiff must plead a jurisdictional basis for these claims and indicate which state law applies to these claims.

CONCLUSION

For the reasons set forth above, the Court hereby GRANTS Defendant's motion to dismiss with leave to amend. Plaintiff may have thirty days from the date of this Order within which to file a Second Amended Complaint.

IT IS FURTHER ORDERED THAT Plaintiff's allegations of conduct prior to its entry into the restrained market are hereby DISMISSED WITH PREJUDICE as Plaintiff lacks standing under Section 4 of the Clayton Act to bring suit for time periods in which he was not a consumer or a competitor.

IT IS SO ORDERED.

FN1. In the Court's July 31, 1995 Order, the Court granted Plaintiff thirty days within which to file an amended complaint. Plaintiff apparently served its complaint on August 31, 1995. However, the amended complaint bears a file stamp date of September 7, 1995, more than a week after Plaintiff was ordered to file its pleading. Although the Court will not dismiss the action on this basis, the Court cautions Plaintiff to abide by the Court's orders. Failure to do so in the future will result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

FN2. Section 4 of the Clayton Act authorizes suit by any person injured in his business or property. 15 U.S.C. § 15. Plaintiffs must demonstrate that they are "either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market." *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 540 (9th Cir. 1987). The Court agrees with Defendant's contention that Plaintiff does not have standing to assert claims based on activities prior to Plaintiff's entry as a competitor of Defendant in the restrained markets. The Court dismisses with prejudice Plaintiff's allegations to the extent that they precede Plaintiff's entry into the relevant market.

FN3. The Court notes that Plaintiff has had an opportunity to cure the pleading deficiencies identified in the Court's previous order and thus cautions Plaintiff that the failure to cure the pleading deficiencies with the Second Amended Complaint may result in the dismissal of this action with prejudice.

N.D.Cal.,1996.
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