IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

IN RE BROILER CHICKEN ANTITRUST LITIGATION	Case No. 1:16-cv-08637 Judge Thomas M. Durkin
THIS DOCUMENT RELATES TO ALL DIRECT ACTION PLAINTIFFS	**PUBLIC VERSION**

MEMORANDUM OF LAW IN SUPPORT OF
RABOBANK'S RULE 12(b)(6) MOTION TO DISMISS

Defendant Rabobank does not buy, sell, produce, or distribute chickens. It is a multinational bank that lends money to certain chicken producers (and many other clients). Yet, after more than four years of discovery, a small number of opt-out plaintiffs have added Rabobank to this litigation, alleging that Rabobank joined a wide-ranging, decade-long conspiracy to reduce the output of broiler chickens so that broiler prices would rise. Despite cherry picking the best "evidence" they could find from years of searching, plaintiffs' allegations do not even come close to stating a plausible Section 1 Sherman Act claim against Rabobank.

To state such claim, plaintiffs are required to allege that Rabobank had knowledge of the alleged conspiracy, was aware of its scope, agreed to play a defined role in it, and made good on that agreement by furthering the conspiracy in some meaningful way. Plaintiffs' allegations do not plausibly suggest *any* of these things. They do not suggest that Rabobank knew about an industry-wide conspiracy, had input into specific broiler reductions or pricing, controlled any of the chicken producers, benefitted when broiler prices rose or fell, or even was needed for the alleged conspiracy to function as desired by the companies that supposedly implemented it.

Instead, a fair reading of the allegations—when viewed in a light most favorable to plaintiffs—shows that Rabobank monitored activity in the chicken industry and periodically made the commonsense observation that the industry as a whole would benefit from reducing

supply. This type of encouragement is not actionable; it is Economics 101. As a senior judge in this District once observed: "[T]here is a trade-off between price and volume. If firms want to raise prices, they have to produce less, sell less, and thereby say 'no' to customers. It should not be a mark of conspiracy to say what is true, already known by the audience, and articulated by countless third-party analysts, academicians, and jurists alike." *Kleen Prods. LLC v. International Paper*, 276 F. Supp. 3d 811, 841 (N.D. Ill. 2017) (Leinenweber, J.).

These observations apply here. Rabobank's only alleged participation in the purported conspiracy was to make obvious statements derived from economic truths about the broiler chicken market. These statements did not enhance the conspirators' ability to enter into a scheme to reduce output, and they mirrored those of myriad other market observers and industry outsiders. Because plaintiffs have failed to plausibly allege that Rabobank knew about the alleged conspiracy, agreed to play a role in it, or participated in it in any way, this Court should dismiss plaintiffs' Section 1 Sherman Act and related state-law claims against Rabobank.

BACKGROUND

This antitrust suit has been pending since September 2016. The gravamen of the complaint is that "America's chicken producers reached illegal agreements" to restrain trade from at least 2008 through 2019. (ECF No. 4244 ¶ 1.) The producers allegedly did this in a number of ways, [redacted] (*Id.* ¶ 576.) Discovery has been ongoing for years, and the parties have exchanged almost 30 million documents and taken hundreds of depositions. Among those deposed were Adriaan Weststrate and Micki Donegan, the two Rabobank employees who were most heavily involved in the bank's relationship with poultry clients during the relevant time period.

On January 29, 2021, the direct action plaintiffs filed an Amended Consolidated Complaint in which less than 10% of them named as defendants four Rabobank entities. (*Id.* ¶ 240.)[1] Despite the massive amount of discovery plaintiffs have taken to date, their 425-page complaint only directs thirteen of its 1,514 paragraphs at Rabobank. (*Id.* ¶¶ 574-86.) In these thirteen paragraphs, [redacted]

Rabobank has attached to this memorandum all thirteen documents referenced in paragraphs 574-86 of the complaint, so the Court can review them free from plaintiffs' spin. (*See* Exs. 1-13.)[2] These documents, whether viewed individually or collectively, do not show that Rabobank had any knowledge of an alleged supply-reduction or price-fixing conspiracy by U.S. chicken producers, that Rabobank agreed to join such a conspiracy, or that Rabobank played a role in such a conspiracy. At best, the allegations show that, as a market analyst and

[1] These entities are: (1) Utrecht-America Holdings, Inc.; (2) Rabo AgriFinance LLC; (3) Rabobank USA Financial Corporation; and (4) Utrecht-America Finance Co. The complaint refers to these entities collectively as "Rabobank," and so, too, do the Rabobank defendants in this Memorandum. In reality, the Rabobank entity that has dealings with U.S. poultry companies and should have been named as a defendant in this action is Coöperatieve Rabobank, U.A., New York Branch.

[2] As this Court has held, in evaluating a motion to dismiss, "the Court considers both 'documents attached to the complaint' and 'documents that are critical to the complaint *and referred to in it*.'" *Belsky v. Field Imports, Inc.*, 2013 WL 5819232, at *1 (N.D. Ill. Oct. 29, 2013) (Durkin, J.) (emphasis added) (quoting *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012)).

observer, Rabobank believed U.S. chicken producers needed to decrease overall production to strengthen the financial viability of the industry. Thus, Rabobank expressed this view at industry events and in conversations with its poultry company clients.

This, of course, made perfect sense. According to plaintiffs, by 2008, "the oversupply and low prices of chickens put [chicken producers] in dire financial straits." (ECF No. 4244 ¶ 341.) As the "leading lender and financial institution serving the poultry industry," Rabobank did not want to see certain broiler producers who "turned to Rabobank for credit and/or transactional work" fail. (*Id.* ¶ 574.) But, as a bank, Rabobank had no ability to set the price of broiler chickens and did not benefit from any specific increase or decrease in price. Moreover, there would have been no reason for chicken producers to consult Rabobank about how to implement an industry-wide conspiracy to reduce output or fix prices. Plaintiffs do not allege otherwise.

Nor do plaintiffs allege that Rabobank facilitated the supposed conspiracy in the same manner as they allege the only other non-producer defendant in this case, Agri Stats, facilitated it. According to plaintiffs, Agri Stats gathered "specific, competitively-sensitive information" from chicken producers and disseminated this information in a "detailed, readily-decipherable form" that allowed the producers to see "financial, production, breeder flock size and age, capacity, cost, and numerous other categories of information by each chicken producer on a weekly and monthly basis." (*Id.* ¶¶ 938-39, 943-44.) Based on these allegations, this Court found that plaintiffs had identified Agri Stats as "a tool Defendants used to help implement their conspiracy." (ECF No. 541 at 44.)

No similar allegations have been made against Rabobank. Plaintiffs do not allege that Rabobank sent producers confidential information that was used to further the alleged

conspiracy. To the contrary, plaintiffs concede that "only Agri Stats" had that information. (ECF No. 4244 ¶ 937.) The supply and pricing information Rabobank possessed regarding the chicken industry came from the same public sources available to every other industry outsider. (*Id.* ("The USDA and various other entities publicly published aggregated weekly, monthly, and annual supply and pricing information concerning the U.S. chicken industry.").)

ARGUMENT

I. Legal Standard

There is no such thing as an unwitting conspirator. To state a claim under Section 1 of the Sherman Act, it is "essential to show that a particular defendant joined the conspiracy and knew of its scope." *Bank of Am., N.A. v. Knight*, 725 F.3d 815, 818 (7th Cir. 2013). Thus, for each defendant, a complaint must contain factual allegations that plausibly suggest the defendant "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Hackman v. Dickerson Realtors, Inc.*, 557 F. Supp. 2d 938, 946 (N.D. Ill. 2008) (citing *Monsanto v. Spray–Rite Service Corp.*, 465 U.S. 752, 764 (1984)).

Moreover, merely alleging that a defendant knew of an illegal agreement is not enough. A plaintiff also must plead facts showing that the defendant agreed to play a defined role in the conspiracy. In other words, for each defendant, a complaint must identify "what they agreed to do." *B & R Supermarkets, Inc. v. Visa, Inc.*, 2016 WL 5725010, at *10 (N.D. Cal. Sept. 30, 2016). In assessing whether a complaint plausibly alleges that the defendant participated in an antitrust conspiracy, a court should look beyond "labels and conclusions," which are insufficient to state a claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Finally, a Section 1 claim should be dismissed where a defendant's alleged involvement did not meaningfully further the conspiracy. Thus, for example, dismissal is proper where the

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