UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE BROILER CHICKEN ANTITRUST LITIGATION	Civil Action No. 1:16-cv-08637
	Judge Thomas M. Durkin
THIS DOCUMENT RELATES TO:	Magistrate Judge Jeffrey T. Gilbert
Certain Direct Action Plaintiffs	**PUBLIC VERSION**

CERTAIN DIRECT ACTION PLAINTIFFS' OPPOSITION TO RABOBANK'S MOTION TO DISMISS

INTRODUCTION

Rabobank is—and has been for many years—the leading lender to the poultry industry in the United States, and globally.[1] This position puts Rabobank at significant financial risk whenever the industry faces downturns and poor performance due to oversupply.

Rabobank also offers merger and acquisition-related services, which it regularly pitches to its poultry producer clients and prospective clients. The more Rabobank helps producers make money, the more likely they will turn to Rabobank for these services.

Thus, Rabobank "consistently sought industrywide action to alter the output and pricing of broilers" in order "to advance its own interests and bottom line" (Compl. ¶ 576), making producer supply cuts *its own* goal.

Rabobank nevertheless seeks dismissal under Rule 12(b)(6), contending that: it lacks a motive to conspire because it is not a chicken producer; its encouragement of industry supply reductions is nothing more than "Economics 101"; and Plaintiffs' allegations about Rabobank's role in the alleged conspiracy are inadequate. Rabobank is wrong. The complaint alleges motive, and offers illustrations of how Rabobank facilitated and participated in the conspiracy among broiler producers. These allegations satisfy all applicable pleading requirements. Rabobank's motion should be denied.

[1] Deposition of Rabobank's Adriaan Weststrate ("Weststrate Dep.") 336:21-337:10.

ARGUMENT

I. Rabobank Inaccurately Suggests It Can Evade Section 1 Liability Because It Is Not a Broiler Producer

Rabobank's motion relies heavily on the notion that it cannot be liable for a Section 1 violation concerning broilers because it "does not buy, produce or distribute chickens." Memorandum of Law in Support of Rabobank's Rule 12(b)(6) Motion to Dismiss ("Rabo Mem.") at 1.[2] That is wrong. It is black letter antitrust law that a non-competitor can violate Section 1 of the Sherman Act. *See*, *e.g.*, *United States v. Apple*, 791 F.3d 290, 324-25 (2d Cir. 2015) (finding Apple could be liable for facilitating a horizontal agreement among defendant book publishers); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 337 (3d Cir. 2010) ("The fact that Marsh, an entity vertically oriented to the insurers, appears to be a *sine qua non* of the alleged horizontal agreement is not necessarily an obstacle to plaintiffs' claim."); *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1078 n.10 (11th Cir. 2004) ("Nothing in our case law suggests that a conspiracy must be limited solely to market participants so long as the conspiracy also involves a market participant and the non-participant has an incentive to join the conspiracy."); *United States v. MMR Corp. (LA)*, 907 F.2d 489, 498 (5th Cir. 1990) ("[A] noncompetitor can join a Sherman Act big-rigging conspiracy among competitors. If there is a horizontal agreement between A and B, there is no reason why others joining that conspiracy must be competitors."); *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, 764 F. Supp. 2d 991 (N.D. Ill. 2011) (denying motion to dismiss where Plaintiffs alleged "the two largest domestic producers of plasma-derivative therapies[] conspired . . . with . . . a trade association, to restrict supplies of the therapies, thus keeping prices high, in violation of the Sherman Act, 15

[2] *See also* Rabo Mem. at 4, 6, 12-14.

U.S.C. § 1."); *TYR Sport Inc. v. Warnaco Swimwear Inc.*, 679 F. Supp. 2d 1120, 1135-36 (C.D. Cal. 2009) (denying motion to dismiss because "the court finds no merit to USA Swimming's argument that a Section 1 conspiracy somehow requires all members to be 'market participants'"); *Smithkline Beecham Corp. v. E. Applicators, Inc.*, 2002 WL 1197763, at *8 (E.D. Pa. May 24, 2002) ("Plaintiff has alleged that defendants engaged in a horizontal agreement to force plaintiff to accept [another defendant's] uncompetitive bid, and that [non-competitor defendant] actively aided in this agreement. [Non-competitor defendant and its employee] may therefore be equally liable for a violation of the Sherman Act.").

One need look no further than this case to find a motion to dismiss order accepting that a non-competitor may engage in a Section 1 violation. *In re Broiler Chicken Antitrust Litig.*, No. 16 C 8637, 2019 WL 1003111, at *2 (N.D. Ill. Feb. 28, 2019) (rejecting Agri Stats's argument that an inference it joined the conspiracy "is not plausible because, unlike the other defendants, Agri Stats is not a Broiler producer, so it lacks a plausible motive to knowingly engage in a conspiracy to fix Broiler prices").

The fact that Rabobank is not a producer lends no support to its motion.[3]

II. Rabobank Had Motive to Participate in the Alleged Conspiracy

Rabobank also suggests the claims against it should be dismissed because it lacked a motive to conspire. For instance, it claims it "did not benefit from any specific increase or

[3] No doubt mindful of this Court's decision rejecting Agri Stats's motion to dismiss, Rabobank attempts to distinguish itself factually from Agri Stats. Rabo Mem. at 4-6. While these differences are legally irrelevant as a matter of antitrust jurisprudence, Rabobank ignores that the complaint alleges: "One facet of Rabobank's anticompetitive conduct involved coordination with defendant Agri Stats. In 2008, Rabobank retained as a consultant [redacted] Weststrate worked hand in hand with [redacted] for years—and with producers—to fix prices of broilers." Compl. ¶ 577; *see also id.* ¶¶ 587-80.

decrease in price" (Rabo Mem. at 4), or have "the requisite competitive interest and stake in the relevant market" (*id*. at 14). This argument too lacks merit.

As an initial matter, Rabobank ignores that the complaint expressly alleges Rabobank "consistently sought industrywide action to alter the output and pricing of broilers" in order "to advance *its own* interests and bottom line." Compl. ¶ 576 (emphasis added). Rabobank's alleged motive is clear.

Rabobank's motive is also borne out by the developing record evidence.

- Rabobank had significant exposure as a result of its lending to producers.
  - Rabobank's Weststrate testified that Rabobank [redacted] Weststrate Dep. 164:23-165:3.
  - As of May 2009, Rabobank had [redacted] Weststrate Dep. Ex. 2948; Rabo_0000064412-428 at 428; Weststrate Dep. 60:14-22.
  - Weststrate testified that in 2009 Rabobank [redacted] Weststrate Dep. 182:21-22; 350:24-351:2.
  - In an August 4, 2014 email to [redacted] Rabo_0000032730-31.
- Rabobank made achieving producer supply cuts *its own* goal.
  - In an internal email, Rabobank noted: [redacted] Rabo_0000097813.
  - In October 2011, the head of Rabobank's poultry business stated to others at Rabobank: [redacted] Compl. ¶ 576; Rabo_0000097339.
- Rabobank sought to influence producer pricing.
  - On September 15, 2011, Rabobank's Weststrate emailed [redacted] Rabo_0000096353.

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