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: *Certain Direct Action Plaintiffs*	Magistrate Judge Jeffrey T. Gilbert

REPLY BRIEF IN SUPPORT OF
RABOBANK'S RULE 12(b)(6) MOTION TO DISMISS

INTRODUCTION

Plaintiffs do not contest a single proposition of law in Rabobank's opening memorandum. They concede, for example, that to survive dismissal, they must allege that Rabobank knew of the alleged output-reduction conspiracy, was aware of its scope, agreed to play a defined role in it, and furthered the conspiracy in a meaningful way. Yet, rather than explain how their allegations satisfy these requirements, plaintiffs attack straw men and rely on evidence outside their complaint to argue that they plausibly have alleged Rabobank joined a massive, nationwide, decade-long conspiracy to reduce output in a market in which Rabobank never participated with numerous parties with which Rabobank had no relationship.

Strong in tone, but light on the law, plaintiffs' response can be distilled to four arguments: (1) Rabobank erroneously suggests that only market participants can be liable for Section 1 conspiracies; (2) Rabobank had a motive to participate in the alleged conspiracy; (3) plaintiffs have sufficiently alleged that Rabobank facilitated the alleged conspiracy and did not provide "mere encouragement"; and (4) Rabobank's concern is overblown that allowing plaintiffs' allegations to survive dismissal will spur baseless antitrust claims against other similarly situated non-market participants. As explained below, plaintiffs are wrong on all four counts.

ARGUMENT

I. Plaintiffs Simply Ignore Many of Rabobank's Arguments and Legal Authority

The most telling aspect of plaintiffs' response is what it *doesn't* say. In many instances, plaintiffs completely fail to address significant arguments and case law cited in Rabobank's brief.

Rabobank's motion was built on the following legal propositions, each supported by case law. Plaintiffs not only failed to contest these propositions, but they also failed to cite, discuss, or distinguish Rabobank's cases:

- To allege a Section 1 conspiracy, a plaintiff must plead facts showing that the defendant agreed to play a defined role in the conspiracy—*i.e.*, "what they agreed to do." (Rabobank Mem. at 5.)

- Dismissal is proper where a defendant's alleged involvement did not meaningfully further the conspiracy, such as where the information it supposedly shared was not "necessary to a fix-suppression scheme." (*Id.* at 5-6.)

- Decisions by industry players to attend dinners and cocktail receptions and make observations at industry events do not suggest involvement in a conspiracy. (*Id.* at 9, 11.)

- Lumping all of the Rabobank defendants together and failing to attribute conduct to any one of them in particular is grounds for dismissal. (*Id.* at 12.)

- The antitrust laws do not concern themselves with encouragement, particularly by industry outsiders. (*Id.* at 12-13.)

- Participation in an antitrust conspiracy cannot be inferred from public statements about reducing supply that are "virtually indistinguishable from statements that would have been made without a conspiracy." (*Id.* at 13.)

- It is not a mark of a conspiracy to make obvious economic observations about "what is true, already known by the audience, and articulated by countless third-party analysts, academicians, and jurists alike." (*Id*. at 2.)

Plaintiffs' failure to challenge these points is particularly noteworthy because plaintiffs used just two-thirds of the pages this Court allows for response briefs. Only one conclusion can be reached from this failing: plaintiffs have nothing to say.

II. Rabobank's Motion is Not Based on the Faulty Premise that Non-Market Participants Cannot Be Liable under Section 1 of the Sherman Act

According to plaintiffs, "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 chicken.'" (Resp. at 2.) This is incorrect. Rabobank did not argue that plaintiffs' claims against

it should be dismissed simply because Rabobank is not a chicken producer. To the contrary, Rabobank acknowledged this Court's ruling with respect to Agri Stats and compared the allegations against Agri Stats to the allegations against Rabobank in explaining why the latter allegations fail to state a claim. (*See* Rabobank Mem. at 4-6.)

After setting up this straw man, plaintiffs attempt to knock it down by citing seven cases for the proposition that "a non-competitor can violate Section 1 of the Sherman Act." (Resp. at 2-3.) A review of these cases, however, confirms that plaintiffs' allegations against Rabobank cannot stand. Not one of them sought to hold a third party liable for providing financial services or analyst information to an alleged co-conspirator. One of the cases actually affirms the dismissal of antitrust claims, and makes the non-controversial observation that conspiracies need not be "limited solely to market participants" in the context of analyzing a conspiracy to monopolize under Section 2. *See Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1078 n.10 (11th Cir. 2004). No such claim is at issue here.

In plaintiffs' six other cases, the non-market participant was alleged to be a critical player in the conspiracy without which the conspiracy could not have occurred. Indeed, in several instances, the industry outsider was the mastermind behind the illegal arrangement. *See United States v. Apple*, 791 F.3d 290, 296-98 (2d Cir. 2015) (finding that Apple had devised scheme to wrest ebook sales away from Amazon by coaxing publishers to sign agreements that allowed them to raise prices if they acted in concert); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 337, 344 (3d Cir. 2010) (identifying insurance broker as the "mastermind" that "instigated, coordinated, and policed" the conspiracy); *United States v. MMR Corp. (LA)*, 907 F.2d 489, 496-98 (5th Cir. 1990) (affirming criminal conviction against supposed non-competitor that actively participated in bid-rigging scheme by agreeing not to bid on construction project in exchange for

multi-million-dollar subcontract); *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, 764 F. Supp. 2d 991, 1003 (N.D. Ill. 2011) (denying motion to dismiss where trade association allegedly facilitated supply-reduction conspiracy by falsely denying the existence of supply shortages and lying to a government agency); *TYR Sport Inc. v. Warnaco Swimwear Inc.*, 679 F. Supp. 2d 1120, 1134-36 (C.D. Cal. 2009) (denying motion to dismiss where non-market participant was one of two members in the alleged conspiracy and allegedly furthered it by lying to customers and altering images of sponsored athletes to remove competitors' logos); *Smithkline Beecham Corp. v. Eastern Applicators, Inc.*, 2002 WL 1197763, at *8 (E.D. Pa. May 24, 2002) (allowing bid-rigging claims to proceed against non-market participant that allegedly oversaw the construction project at issue and managed the rigged bidding process).

In each of these cases, the outsider's role was clear and essential to the operation of the conspiracy. Here, in contrast, none of plaintiffs' allegations show that Rabobank actually knew the details of any supposed output-reduction conspiracy or was needed to advance its aims. Plaintiffs do not allege that Rabobank devised the alleged conspiracy or profited from it like the defendants in *Apple* and *In re Insurance Brokerage*. Plaintiffs do not allege that Rabobank lied to anyone to facilitate the conspiracy like the defendants in *In re Plasma* and *Warnaco Swimwear*. Nor do plaintiffs allege that Rabobank participated in the decision-making process that led any broiler producer to cut supply, or that any producer did *anything* in response to comments from Rabobank that the chicken industry would benefit from reduced output.

Even today, as Rabobank submits this reply, it lacks critical information about its supposed involvement in the alleged conspiracy. The fact that Rabobank attended industry events and had conversations with its poultry clients is of no moment. Who at Rabobank agreed to join an alleged conspiracy and when? What role did they agree to play that was essential to

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