United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
Clerk

No. 20-50179

ACADEMY OF ALLERGY & ASTHMA IN PRIMARY CARE; UNITED BIOLOGICS, L.L.C., DOING BUSINESS AS UNITED ALLERGY SERVICES,

Plaintiffs—Appellants,

versus

QUEST DIAGNOSTICS, INCORPORATED,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:17-CV-1295

Before STEWART, HIGGINSON, and WILSON, *Circuit Judges*.

CARL E. STEWART, *Circuit Judge*:

Plaintiffs-Appellants Academy of Allergy & Asthma in Primary Care ("AAAPC") and United Allergy Services ("UAS") sued Quest Diagnostics ("Quest") for conspiring to force them out of the market of providing allergy and asthma testing. The district court dismissed Plaintiffs' claims under Rule 12(b)(6). We AFFIRM in part and REVERSE and REMAND in part.

I. FACTUAL AND PROCEDURAL HISTORY

A. Factual Background

In 2009, UAS began providing allergy testing and treatment services in Texas. UAS's services allowed primary care physicians to treat allergies, disrupting the standard practice that required doctors to refer patients to allergists for treatment. Quest is one of the leading laboratories that receive patient referrals. Phadia is an allergy test producer and a defendant in Plaintiffs' 2014 suit.[1]

According to Plaintiffs' complaint, Quest and Phadia began discussing ways to curtail competition posed by UAS in 2011. The two businesses created a "talking points letter" to be distributed by their employees to discourage doctors from working with UAS. The letter fabricated warnings about patient safety, medical and legal liability, and the risks of fraudulent billing associated with UAS's testing products.

Unaware that Quest and Phadia were working to push UAS out of the market, UAS began negotiating with Quest to provide alternative methods of allergy testing. Phadia instructed Quest not to work with UAS, and Quest passed along confidential information about UAS to Phadia. Notably, Quest shared UAS's customer list with Phadia in 2012. Phadia then targeted those customers and tried to convince them to cease their relationships with UAS. Quest and Phadia also used a misleading opinion from the Office of the Inspector General of Health and Human Services ("OIG") that cautioned against businesses like UAS.[2] Through 2014, Quest and Phadia trained their

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[1] Plaintiffs' 2014 suit will be discussed *infra* Section B.1.

[2] James Wallen, an associate and alleged co-conspirator of Phadia and Quest, put together a company called Universal Allergy Labs, LLC, not to be confused with Plaintiffs' United Allergy Labs (the predecessor to UAS). The Office of the Inspector General Opinion referred to UAL and expressed serious concerns about businesses providing

employees to tell physicians and providers about the opinion and to spread misinformation about UAS.

From 2014 to 2016, Quest and Phadia continued to disparage UAS and to conspire to remove it from the market. In September 2014, Phadia and Quest used a Superior Health Plan policy change (that was announced in June 2014 and enacted in August 2014) to convince primary care physicians to stop working with UAS.

As a result of Quest and Phadia's actions, competition declined and the two entities now account for more than 70% of the local market share in allergy testing and immunotherapy.

B. Procedural History

1. The 2014 Lawsuit

In January 2014, UAS began tracking which customers were targeted with disinformation about its testing products. Unaware that Phadia or Quest were involved in spreading the disinformation, UAS filed both state and federal antitrust claims against several physicians. *Acad. of Allergy & Asthma in Primary Care v. Am. Acad. of Allergy*, No. SA–14–CV–35–OLG, 2014 WL 12497080, at *2 (W.D. Tex. Sep. 8, 2014). As the lawsuit progressed through discovery, Plaintiffs learned of Phadia's role and amended their complaint to add Phadia as a defendant in 2015.

Plaintiffs soon sought discovery from Phadia, and they began to suspect that Quest might have knowledge of Phadia's conduct. Plaintiffs subpoenaed Quest's corporate representative and requested document

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allergy tests being run by a single person with no healthcare experience. Plaintiffs argue that Wallen intentionally "sandbagged" the review process to get an unfavorable decision so that it could be used to falsely equate Wallen's company with Plaintiffs.

production in December 2015. Quest responded in January 2016 with several objections. Quest provided a representative in May 2016, and only then did Plaintiffs learn of Quest's involvement.

The physicians and Phadia settled Plaintiffs' 2014 suit. The remaining defendants (Allergy Asthma Network/Mothers of Asthmatics, Inc. ("AANMA") and Tonya Winders, Phadia's former market development leader and new CEO of AANMA) went to trial, and a jury found them not liable.

2. The Current Suit

The deadline for Plaintiffs to add Quest to their 2014 suit occurred before Quest responded to Plaintiffs' subpoenas. Once Plaintiffs learned of Quest's involvement, they filed this suit against Quest on December 28, 2017.

Quest moved to dismiss on March 9, 2018. The district court granted Quest's motion on February 22, 2019. The district court dismissed Plaintiffs' antitrust claims as time-barred, concluding that Plaintiffs had not alleged that Quest committed overt acts within the four-year statute of limitations. The court dismissed Plaintiffs' state law tortious interference and civil conspiracy claims as time-barred by Texas's two-year statute of limitations. The court also dismissed Plaintiffs' misappropriation of trade secrets claim as time-barred because it was not filed within three years of when Plaintiffs discovered or could have discovered the misappropriation through ordinary diligence.

Plaintiffs requested leave to amend, and the district court denied their request. Plaintiffs then submitted a Rule 59(e) motion, and the district court denied it because it failed to raise new arguments. This appeal followed.

II. STANDARD OF REVIEW

This court reviews de novo a district court's grant of a Rule 12(b)(6) motion to dismiss. *Gregson v. Zurich Am. Ins. Co.*, 322 F.3d 883, 885 (5th Cir. 2003). We construe all allegations in favor of the plaintiff. *Id.*

"[D]ismissal for failure to state a claim based on the statute of limitations defense should be granted only when the plaintiff's potential rejoinder to the affirmative defense was foreclosed by the allegations in the complaint." *Jaso v. The Coca Cola Co.*, 435 F. App'x 346, 352 (5th Cir. 2011) (internal quotation marks omitted).

III. DISCUSSION

Plaintiffs appeal the district court's dismissal of the following seven claims against Quest: (1) Sherman Act § 1, (2) Sherman Act § 2, (3) Texas antitrust, (4) Texas misappropriation of trade secrets, (5) Texas tortious interference with contracts, (6) Texas tortious interference with existing and prospective business, and (7) Texas civil conspiracy.

A. Dismissal of Plaintiffs' Federal and State Antitrust Claims

Plaintiffs alleged that Quest violated §§ 1 & 2 of the Sherman Act and Texas antitrust law. The district court dismissed these claims under Rule 12(b)(6), concluding that they were time-barred. We disagree.

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Texas law also prohibits restraints on trade. *See* TEX. BUS. & COM. CODE § 15.05(a) ("Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful."). Section 2 of the Sherman Act prohibits persons from "monopoliz[ing], attempt[ing] to monopolize, or combin[ing] or

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