UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

	ECM FILING
COALITION FOR A LEVEL PLAYING FIELD, L.L.C., et al.,	
Plaintiffs,	
	04 CV 08450 (RO)(GWG)
-against-	
AUTOZONE, INC., AUTOZONE FLORIDA, L.P., ADAP, INC., AUTOZONE STORES, INC., AUTOZONE.COM, INC., AUTOZONE TEXAS, L.P., CHIEF AUTO PARTS, INC., WAL-MART STORES, INC., SAM'S WEST, INC., ADVANCE STORES COMPANY, INC., DISCOUNT AUTO PARTS, INC., ACDELCO, INC., HONEYWELL INTERNATIONAL, INC., ARVIN INDUSTRIES, INC., ASHLAND, INC., BORGWARNER , INC., CARDONE INDUSTRIES USA, DANA CORPORATION, THE CYPRESS GROUP, MARK IV, FORD MOTOR COMPANY, PENNZOIL-QUAKER STATE COMPANY, STANDARD MOTOR PRODUCTS, INC., and TENNECO AUTOMOTIVE, INC.,	
Defendants.	

PART II OF DECLARATION OF CARL E. PERSON DATED APRIL 24, 2006
CONSISTING OF EXHIBITS B, C AND D

[Part I consists of a 2-page declaration and 44-page Exhibit A - proposed Appendix B-6]

New York, New York
April 24, 2006

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you don't have to incur a transportation cost.

Or where the retailer inventories and warehouses the product so the manufacturer doesn't have to shoulder that cost. The retailer does that and is compensated by what in economics we call a functional discount.

Another example would be where a retailer says to the manufacturer I'll promote your part. I'll market it. I'll merchandise it for you, and I'll incur costs in doing that and to be compensated for that, I will get what we call a functional discount to pay me for the services that I'm offering you, the manufacturer.

Q. What was the final or third question you looked at?

A. The third question I looked at was if AutoZone receives functional discounts, is there any way that they could be anti-competitive, and based on my research of the structure of this market, AutoZone's position as a buyer, the deconcentration of the market, the growth of the market, my conclusion was that even if AutoZone receives functional discounts, they could not be anti-competitive, just the opposite. They are pro-competitive.

They benefit consumers.

Q. Thank you, Professor.

MR. TAYLOR: I have no further questions on direct, your Honor.

CROSS-EXAMINATION

EXHIBIT B

functional discount, all of that gets bundled into the discount. That is, there's not necessarily some wooden and mechanical component where AutoZone says, okay. Putting it in the Charlottesville store on the end cap aisle is worth one penny and Fram says, okay. We agree that's worth one penny.

They look at this as a bundle. There's tough head-to-head negotiations that go on and out of that comes a functional discount, an allowance, a rebate, all of these terms that exist in the industry, I bundle it together as a functional discount.

So what happens is you have Honeywell selling a part to AutoZone, but what you also have happening is AutoZone going back this way and providing and selling services to Honeywell.

Q. And --

A. And that discount comes out of those negotiations.

The reason I don't think that negotiation can lead to a discount that AutoZone enjoys that would be anti-competitive is because AutoZone is just one of many retailers of automotive parts to which Fram can turn, about 12 percent of the market, just for the DIY market.

Q. You mentioned services, and one of these services is that the manufacturer doesn't have to establish for itself 4,000 stores.

AutoZone and says, well, what are the prospects for a company like AutoZone being able to deliver on this bundle of services.

And out of that comes a net effect in price, and in some cases I think you can tie that particular, say something like a co-op advertising allowance where you can tie that back to real ads and monitor it.

But in other cases, it's my judgment that there may be six or seven discrete discounts that cannot always be tied in some dollar for dollar, wooden and mechanical way to particular services. Now that's not surprising to me as an economist that a negotiation would go that way.

You know, people have limited time, and thousands and thousands and thousands of transactions are being made here. What did we here, six million people go through an AutoZone every week. So you don't want a company that is so laden with accounting expenses where you have 50,000 accountants trying to track every particular deal to a particular downstream marketing service.

But when you come to the bottom line, does AutoZone offer important downstream marketing services to manufacturers? On that there is no doubt in my mind.

And when you come to the bottom line, is AutoZone in a position to extract discounts beyond that

Not Reported in F.Supp.2d, 2001 WL 1763440 (E.D.N.Y.), 2001-2 Trade Cases P 73,517

(Cite as: 2001 WL 1763440 (E.D.N.Y.))

H

United States District Court, E.D. New York.
COALITION FOR A LEVEL PLAYING FIELD LLC, et al.
v.
AUTOZONE, INC., et al.
No. 00-CV-0953.

Oct. 18, 2001.

MEMORANDUM OF DECISION AND ORDER

MISHLER, D.J.

*1 This is an action to recover damages and for injunctive relief for violations of the Robinson-Patman Act, 15 U.S.C. §§ 13(f) and 13(c) . Presently before the Court is a motion by all of the defendants to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief may be granted. Also before the Court are motions by defendants O'Reilly Automotive, Inc. ("O'Reilly") and CSK Auto Inc. ("CSK") to dismiss the charges against them for lack of personal jurisdiction and venue, or alternatively to sever the claims against them and transfer these actions to another district. The plaintiffs cross-move to amend the Amended Complaint. For the following reasons, the motions by defendants O'Reilly and CSK are denied. The motion to dismiss for failure to state a claim is granted in part and denied in part. The plaintiffs' motion for leave to file an amended complaint is granted.

BACKGROUND

This is an action by 143 different plaintiffs (some if which are divided into multiple corporations) against eight defendants that allegedly benefitted from sales by 16 non-defendant suppliers of automotive products in violation of the Robinson-Patman Act. The lead plaintiff, Coalition for a Level Playing Field, LLC, is a New Hampshire corporation comprised of six trade associations for warehouse distributors and jobbers of automotive parts and accessories. The remaining plaintiffs are individual warehouse distributors and jobbers of automotive parts and accessories located in different states.

Plaintiffs allege that defendants' participation in prohibited conduct enables the defendants to buy goods from manufacturers at prices approximately forty percent lower than those paid by plaintiffs when purchasing the same goods from the same manufacturers. This alleged conduct includes, inducing and receiving volume discounts, slotting and other allowances, free inventory, sham advertising, promotion payments, sharing manufacturer's profits, and excessive payments for services purportedly performed for the manufacturers. Plaintiffs allege that as a result of this conduct, defendants are able to sell these goods at prices lower than plaintiffs are able to offer. Accordingly, plaintiffs assert, many of defendants' competitors have been forced out of business, and that the plaintiffs who still remain in business may be faced with business closure.

The Amended Complaint states two causes of action: (1) violation of section 2(f) of the Robinson-Patman Act by volume discounts, slotting fees, rebates, other fees and allowances, free merchandise and sham programs, and (2) violation of section 2(c) of the Robinson-Patman Act by compensation to defendants from manufacturers for services not performed or for excessive compensation for services.

DISCUSSION

12(b)(6) Motion

The defendants move to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). In support of this motion, defendants assert that the plaintiffs have engaged in

EXHIBIT C

impermissible group pleading, that the complaint fails to state a *prima facie* case for violation of either section 2(f) or section 2(c), and that the plaintiffs lack standing to bring this lawsuit. For the following reasons, this motion is granted insofar as it pertains to Count II of the Amended Complaint (section 2(c)), but denied insofar as it pertains to Count I of the Amended Complaint (section 2(f)).

*2 On a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must accept as true the allegations in the complaint and construe all reasonable inferences in favor of the plaintiff. *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir.1995). "The court's function on a Rule 12(b)(6) motion is not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." *Festa v. Local 3 Int'l Brh. of Elec. Workers*, 905 F.2d 35, 37 (2d Cir.1990). The court should dismiss the complaint only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993) (*quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

1. Impermissible Group Pleading

Defendants assert that this action should be dismissed because the plaintiffs have engaged in impermissible group pleading. We find, however, that the proposed amended complaint sets forth, with sufficient particularity, the claims of each individual plaintiff. Thus, there is no impermissible group pleading.

It is well established that there are no special pleading requirements for antitrust cases. *See Nagler v. Admiral Corp.*, 248 F.2d 319, 322 (2d Cir.1957) ("antitrust litigation may be of wide scope and without a central point of attack, so that defense must be diffuse prolonged, and costly ... it is quite clear that the federal rules contain no special exception for antitrust cases"); *National Assoc. of College Bookstores, Inc. v. Cambridge Univ. Press*, 990 F.Supp. 245, 252 (S.D.N.Y.1997) ("A Complaint is sufficient for the purposes of this rule if it gives the defendant 'fair notice of what the plaintiff's claim is and the grounds upon which it rests' " (citations omitted)). Accordingly, all that is required of an antitrust plaintiff is that the complaint provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a).

Courts have made clear, however, that although "notice pleading is acceptable in antitrust cases ... plaintiffs may not achieve through generalized pleadings the benefits of a class action when no class allegations are made or appropriate." *Chawla v. Shell Oil Co.*, 75 F.Supp.2d 626, 654 (S.D.Tex.1999). The *Chawla* court explained that, in order to meet the pleading requirements for a Robinson-Patman Act claim, each plaintiff "must allege facts pertaining to each of the elements of the claim." *Id.* at 654. The court then directed, that in order to meet this requirement, the plaintiffs should attach an appendix to the complaint which included the following information for each plaintiff:

> (i) the name and location of the source of the particular Plaintiff's [store/station], and if known, the name and location of the source of [merchandise] acquired by the [competitors].
>
> *3 (ii) the type of Robinson-Patman violation that is alleged ... and whether there is a contention that Defendants use a functional discount as a subterfuge vis a vis a particular Plaintiff.
>
> (iii) the identity and location of the particular [competitors] ... that receive an allegedly unlawful favorable price, the approximate price that [the competitor] received (if known), and the approximate time period of the allegedly unlawful favorable treatment.
>
> (iv) the geographic area in which the specific Plaintiff competes with each [competitor] in issue as to the Plaintiff, [and]
>
> (v) what or how the competition has or may have been injured as a result of price discrimination suffered by that Plaintiff.

Id. at 654.

In the instant case, the plaintiffs have offered an Amended Complaint, including an appendix, which provides a more succinct statement of the facts pertaining to each of the Robinson-Patman claims. Specifically, proposed Appendix E alleges the

approximate prices and dates of comparable sales between a specific manufacturer, plaintiff and competitor. [FN1] The allegations address: the name and location of the manufacturer from whom they received the automotive parts in question (as well as the address of the manufacturers headquarters), and if known, the name and location of the manufacturer from whom their competitors received similar automotive parts, whether the alleged violation was direct or indirect, the identity and location of the particular competitors receiving an allegedly unlawful favorable price, the approximate price that the product was sold for (when known), the approximate date of the unlawful favorable treatment and the specific geographic area in which the specific plaintiff competes with each competitor in issue as to that plaintiff. Plaintiffs also allege the other information required by the *Chawla* court, i.e., whether there is a contention that defendants used a functional discount as a subterfuge vis a vis the particular plaintiff and what or how competition may have been injured as a result of the price discrimination suffered by that plaintiff, as to each defendant in the Amended Complaint.

> FN1. Plaintiffs do not have extensive records of such transactions, however, "[a]n antitrust plaintiff need not alleged specific transactions in the complaint ..., a 'general description of the conduct and practices at issue' will suffice." *National Assoc. of College Bookstores, Inc. v. Cambridge Univ. Press,* 990 F.Supp. 245, 252 (S.D.N.Y.1997).

In addition, the allegations in the Amended Complaint estimate that defendants have been receiving items are a price of 40% lower than the same manufacturers were charging plaintiffs for the same items, and approximate the time period of the unlawful conduct as a whole.

All of these specific allegations in the proposed amended complaint and appendix clearly place the defendants on notice of the claims against them by each plaintiff. Accordingly, plaintiffs have not engaged in impermissible group pleading, and defendants motion to dismiss on this ground is denied.

2. Failure to State a Claim--Count I

Defendants additionally assert that the Amended Complaint should be dismissed because plaintiffs have failed to plead a *prima facie* claim for violation of the Robinson-Patman Act. We find that plaintiffs have adequately plead a violation of section 2(f) of the Act, and accordingly defendants' motion is denied as to Count I of the Amended Complaint.

*4 Section 2(f) of the Robinson-Patman Act makes it unlawful for purchasers, such as defendants, "knowingly to induce or receive a discrimination in price which is prohibited by this section." 15 U.S.C. § 13(f). "Liability under § 2(f) is derivative in nature--a buyer may be held liable under § 2(f) only if his seller could be held liable under § 2(a)." *Intimate Bookshop, Inc. v. Barnes & Noble, Inc.,* 88 F.Supp.2d 133, 137 (S.D.N.Y.2000) (citing *Great Atl. & Pac. Tea Co. v. Federal Trade Comm'n,* 440 U.S. 69, 77 (1979)). Therefore, in determining whether plaintiffs have sufficiently pled a § 2(f) violation against defendants, it is necessary to determine whether the facts they have put forth support § 2(a) claims against defendant sellers. *Id.* at 137.

Section 2(a) of the Robinson-Patman Act makes it unlawful for anyone engaged in commerce:

> [t]o discriminate in price between different purchasers of commodities of like grade and quality, where ... the effect of such discrimination may be to substantially lessen competition ... with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them.

15 U.S.C. § 13(a)(1997).

To state a claim for secondary-line price discrimination [FN2] under § 2(a), a plaintiff must show:

> FN2. "The theory of secondary-line Robinson-Patman injury is that the unlawful price discrimination injures

> disfavored purchasers in its ability to compete with the favored purchaser." XIV HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2333a (1999).

(i) the seller made sales in interstate commerce;
(ii) the seller discriminated in price between two buyers;
(iii) the product sold to both purchasers was the same grade and quality, and;
(iv) the price discrimination had an unlawful effect on competition.

George Haug Co. v. Roils Royce Motor Cars Inc., 148 F.3d 136, 141 (2d Cir.1998).

1. Sales in Interstate Commerce

The requirement that the seller have made sales in interstate commerce has been interpreted "to mean that § 2(a) applies only where 'at least one of the two transactions which, when compared, generate a discrimination ... [that crosses] a state line." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (citations omitted). Therefore, to state a claim under § 2(a), "it is necessary to allege ... that the transactions complained of are actually in interstate commerce." *Willard Dairy Corp. v. National Dairy Prods. Corp.*, 309 F.2d 943 (6th Cir.1962).

Plaintiffs allege that the discriminatory sales were made in interstate commerce. *See* Amended Complaint ¶ 67. Additionally, in Appendix E, where plaintiffs allege comparable sales between specific manufacturers, plaintiffs and competitor defendants, plaintiff lists the city and state of each manufacturer, plaintiff and defendant. The addresses of each plaintiff-seller and defendant-seller pairing demonstrates that the products allegedly sold at discriminatory prices crossed state lines, and thus were "actually in interstate commerce." Therefore, the Amended Complaint adequately pleads the "interstate commerce" jurisdictional prerequisite.

2. Discrimination in Price

*5 The second element of a § 2(a) claim, that the seller have discriminated in price between two buyers, does not require allegations of specific transactions, rather "a general description of the conduct and practices at issue will suffice." *National Assoc. of College Bookstores, Inc.*, 990 F.Supp. at 252. Here, the Amended Complaint is sufficiently descriptive to meet this burden. The Amended Complaint alleges various conduct which enabled the defendants to buy their goods from manufacturers at approximately 40% less than the price paid by plaintiffs. It also identifies the types of products which were generally the subject of discriminatory treatment. In addition to these general allegations, Appendix E provides descriptions and item numbers of specific products that were the subject of discriminatory sales, as well as the prices paid for the products by plaintiffs and defendants respectively. Plaintiffs also identify the specific plaintiff and defendant that was party to each transaction. Thus, the Amended Complaint, incorporating Appendix E, provides defendants with fair notice of the grounds upon which plaintiffs' discrimination claims rest. [FN3] *See National Assoc. of College Bookstores, Inc.*, 990 F.Supp. at 253.

> FN3. Defendants, relying on the case of *Mountain View Pharmacy v. Abbott Laboratories*, 630 F.2d 1383 (10th Cir.1980), argue that the Amended Complaint is inadequate because it does not demonstrate discriminatory sales by a mutual supplier to a plaintiff and defendant. Defendants reliance on *Mountain View*, however, is to no avail. There, the court held that "a complaint drafted only in terms of the statutory language in a case involving thirteen plaintiffs alleging Sherman Act and Robinson-Patman Act violations by twenty-eight defendants cannot satisfy Rule 8(a)(2). *Id.* at 1387. The *Mountain View* court found that the complaint "furnishe[d] not the slightest clue" as to the what conduct that plaintiff's claimed violated the antitrust laws in that "[i]t failed to specify any products that were the subject of the discriminatory treatment [or]

> identify the favored purchasers of a particular product. *Id.* at 1388. Here, as is outlined above, the proposed Amended Complaint is more than sufficient to place the defendants on notice of the nature of the claims against them.

3. Same Grade and Quality

The third element of a § 2(a) claim is that the products sold to both purchasers be of the same grade and quality. Here, as in *National Assoc. of College Bookstores, Inc.*, the plaintiffs have alleged that the discriminatory sales to defendants involve the *identical* products that plaintiffs have purchased from these manufactures. Notwithstanding the adequacy of these allegations, the proposed Amended Complaint surpasses the minimal pleading requirements, and, in Appendix E, details sales of specific items from manufacturers to the respective plaintiff and defendant pairings. Accordingly, plaintiffs have adequately pled the "same grade and quality" element.

4. Effect on Competition

The fourth element of a § 2(a) claim is that the price discrimination have had an unlawful effect on competition. "In secondary-line price discrimination cases, such as this action, competitive injury may be inferred from evidence demonstrating injury to an individual competitor." *Intimate Bookshop, Inc. v. Barnes & Noble, Inc.*, 88 F.Supp.2d 133, 139 (S.D.N.Y.2000) (citing *George Haug Co.*, 148 F.3d at 142). "The Supreme Court has held that an inference of injury to competition can be drawn from evidence that some purchasers were required to pay substantially more than their competitors for the same goods." *National Assoc. of College Bookstores, Inc.*, 990 F.Supp. at 252-53 (citing *FTC v. Morton Salt*, 334 U.S. 37, 46-47 (1948)). "Allegations of such a price differential and identification of the relevant competitors are therefore sufficient to notify the defendants of the facts on which plaintiffs intend to establish this inference." *Id.*

Here, the plaintiffs have alleged price differentials for the same product sold by the same manufacturer. Additionally, the Amended Complaint alleges that the plaintiffs were in actual competition with the defendants that they are suing. Plaintiffs further allege that the price discrimination has caused thousands of competitors to go out of business in the past five years, and is threatening business closure to the plaintiffs that remain in business. Therefore, plaintiff's have adequately plead that the alleged unlawful discrimination has an effect on competition.

5. Knowledge

***6** Although, as set forth above, plaintiffs have adequately pled a *prima facie* claim under § 2(a) of the Robinson-Patman Act, [FN4] to state a claim under § 2(f), plaintiffs must additionally demonstrate that defendants "knowingly [induced] or receive[d] a discrimination in price which is prohibited by this section." 15 U.S.C. § 13(f).

> FN4. Notwithstanding the thoroughness of the proposed Amended Complaint, we note that courts have held that "even a complaint that fails to allege an element of an antitrust claim may be adequate." *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R .D. 485, 487-88 (S.D.N.Y.1973) (Robinson-Patman Act claim not dismissed despite its failure to allege lessening of competition).

Defendants claim that plaintiffs have failed to allege facts sufficient to establish that they knowingly induced the price discrimination. "The knowledge requirement has been construed to mean that the buyer must have either actual knowledge, i.e., he or she must have known that the price in question was illegal, or constructive knowledge, i.e., he or she must have been reasonably cognizant of its illegality." *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 79- 80, 97 L.Ed. 1454, 73 S.Ct. 1017 (1953).

In the immediate case, plaintiffs have sufficiently pled that each of the defendants "knowingly induced or received" the allegedly discriminatory

discounts, fees, rebates, free inventory and other payments from the manufacturers. The Amended Complaint alleges, *inter alia* that, "[a]cquisitions of competing retail chains ... by some of the defendants ... have provided such defendants with precise data to show defendants that they have been receiving favorable discriminatory prices, whereas the companies being acquired were the disfavored purchasers." *See* Amended Complaint ¶ 77E. Furthermore, plaintiffs allege that defendants' knowledge of the discriminatory pricing was apparent from information and discussions that plaintiffs conducted with salespersons from the manufacturers. *Id.* at ¶ 77H. Thus, the Amended Complaint sufficiently pleads the knowledge element of plaintiffs' § 2(f) claim.

Accordingly, defendants' motion to dismiss Count I of the Amended Complaint is denied.

3. Failure to State A Claim--Count II

Defendants claim that Count II of the Amended Complaint, asserting violation of section 2(c) of the Robinson-Patman act should be dismissed because plaintiffs have not alleged either an unlawful brokerage agreement or commercial bribery. We agree, and accordingly, Count II of the Amended Complaint is dismissed.

Section 2(c) of the Robinson-Patman Act provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

15 U.S.C. § 13(c).

Plaintiffs assert a violation of this section based on "sham transactions, subterfuge payments and property transfers from the 16 manufacturers to defendants which are not attributable to specific auto-parts purchases." Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint at p. 32. Defendants assert, however, that section 2(c) applies only to illegal brokerage arrangements, discounts given in lieu of brokerage, and commercial bribery, and thus, plaintiffs allegations do not amount to a section 2(c) violation. Defendants' Opening Brief in Support of Their Motion to Dismiss the Amended Complaint p. 41.

*7 In addressing section 2(c), a leading authority on antitrust law has stated that "[a]lthough many things about this complex prohibition are unclear, one thing that is apparent is that it was intended to reach price discrimination disguised as the provision of or rebates for the 'dummy' use of brokers." XIV HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2362a (1999). More specifically,

> [t]he prolix and obscure statute is a model of bad drafting but seems to contemplate and condemn three specific types of practices:
> 1. The payment for brokerage services by one party (typically the seller) when the person performing those services is controlled by the other party (typically the buyer):
> 2. The payment of brokerage fees when no brokerage services are actually performed:
> 3. The offer of an allowance or discount "in lieu of" brokerage--that is, compensation given, typically to a large buyer, when brokerage services are not used.

Id. at ¶ 2362.

Thus, where, as here, there is no allegation that allegedly impermissible discounts were disguised as brokerage, or that discounts were provided in lieu of brokerage, there is no section 2(c) violation. *See Intimate Bookshop, Inc.,* 88 F.Supp. at 139-40 ("Section 2(c) was enacted to deal with abuses of the brokerage function .... the case law and legislative history of Section 2(c) make it clear that Section 2(c) was not intended to apply outside of the brokerage context ... Courts have routinely dismissed claims under Section 2(c) when the

plaintiff has not alleged that a discount or payment is in lieu of a brokerage or commission"). The Amended Complaint makes no allegations of a brokerage arrangement or commercial bribery at all. Therefore, the legality of the discounts that plaintiffs premise their section 2(c) claim on are more appropriately judged under plaintiffs' section 2(a) and 2(f) claim.

Accordingly, defendants motion to dismiss Count II of the Amended Complaint is granted.

4. *Standing*

Defendants additionally assert that the Amended Complaint should be dismissed because many of the plaintiffs lack standing to bring this action. Defendants make two standing claims: (1) that the "indirect purchaser" plaintiffs may not bring suit under the Robinson-Patman Act; and (2) that some of the plaintiffs do not "compete" with the defendants. We find that the plaintiffs have standing to bring this action, and thus deny defendants' motion to dismiss on these ground.

1. Indirect Purchasers

Defendants assert that the "indirect purchaser" plaintiffs, meaning those plaintiffs who did not buy parts directly (or through buying groups), have no standing to bring a Robinson-Patman Act claim. Defendants premise their assertion on the holding of the Supreme Court case of *Illinois Brick Co. v. Illinois* that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue for the amount it could show was absorbed by it." 431 U.S. 720, 735 (1977).

*8 Although defendants are correct that the *Illinois Brick* decision restricts an indirect purchaser's ability to recover damages for a Robinson-Patman violation, courts have interpreted *Illinois Brick* 's limitations as applying only to suits for monetary damages, not to suites for equitable relief. [FN5] *See Campos v. Ticketmaster,* 140 F.3d 1166, 1172 (8th Cir.1998), *cert denied,* 525 U.S. 1102, 119 S.Ct. 865, 142 L.Ed.2d 768 (1999); *Collins v. International Dairy Queen,* 59 F.Supp.2d 1305, 1311 (M.D.Ga.1999). Here, plaintiffs seek both monetary damages and an injunction. Therefore, although any "indirect purchaser" plaintiffs may be restricted in their ability to recover monetary damages, the claims should not be dismissed because the *Illinois Brick* doctrine does not preclude their claims for injunctive relief.

> FN5. The question of whether a plaintiff is an "indirect purchaser" is not always a simple one. Accordingly, we think that discovery will aid in identifying which, if any, of the plaintiffs qualify as "indirect purchasers" under *Illinois Brick. See In re Mercedes-Benz Antitrust Litigation,* 157 F.Supp.2d 355, 366 (D.N.J.2001).

2. Competition

Defendants additionally assert that there is a lack of standing because the "warehouse distributor" plaintiffs do not sell products to end users, and therefore are not in competition with the defendants. They claim that "each plaintiff must allege that it was in actual competition with at least one of the defendants", and thus that "to compete with the [warehouse distributors] in a three-step distribution, defendants must compete with plaintiffs in sales to jobbers." Defendants' Opening Brief in Support of Their Motion to Dismiss the Amended Complaint p. 32. We disagree, and accordingly, defendants motion to dismiss for lack of standing is denied.

The Second Circuit has stated that "even if we were to assume that the parties were not in actual competition in the relevant market, Section 2(a) does not categorically exempt price discrimination between parties competing at different functional levels." *George Haug Co., Inc. v. Rolls Royce Motor Cars Inc.,* 148 F.3d 136, 142 (2d Cir.1998). Additionally, plaintiffs allege that the competitive advantage that defendants gain through price discrimination enables them to take away business from the "warehouse distributor" plaintiffs. *See* Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint, p. 26

(the "WDs compete with the defendants in the purchasing of parts from the 16 manufacturers and compete through the WD's customers (with retail branches) in the sale of parts to retail customers (or with their own related corporation having retail branches). The sale of a part by a defendant is often the loss of a sale by the competing jobber, and the WD plaintiff from whom the jobber buys the parts").

Specifically, the Amended Complaint alleges:

> 57. Defendants buy their goods from the Manufacturers at substantially lower prices per unit than paid by the plaintiffs or their WD suppliers who buy the same type and quality of goods at the same time from the same Manufacturer, with the predictable result that the defendants offer and sell these goods at lower prices than the plaintiffs, and often at prices lower than the per unit price being paid by the plaintiffs or their suppliers for the same goods at the same time.
>
> *9 58. The result is that the defendants are able to and do take away business from the plaintiffs, by selling at the jobber level of distribution at a lower price than the plaintiffs are able to sell for at the same jobber level of distribution, and the defendants have the added advantage of a substantially higher profit margin with which to provide such things as better location, larger selection of goods more advertising and promotion, and free parking.

Amended Complaint ¶ ¶ 57-58.

Accordingly, the allegations in the Amended Complaint demonstrate that each of the plaintiffs has standing to participate in this action.

Personal Jurisdiction, Venue and Transfer

Defendants O'Reilly and CSK additionally move for dismissal of the claims against them on grounds of lack of personal jurisdiction and venue. Alternatively, these defendants request that the claims against them be severed and transferred. For the following reasons, these motions are denied.

1. Personal Jurisdiction

Defendants O'Reilly and CSK assert that plaintiffs have not alleged a sufficient factual predicate for this Court's assertion of personal jurisdiction over them. We conclude that the Amended Complaint makes a *prima facie* showing of jurisdiction, and thus, pre-discovery dismissal of the claims is inappropriate.

The procedure for ruling on a motion to dismiss for lack of personal jurisdiction has recently been set forth by a court in this district as follows:

> The Second Circuit has stated that "[i]n deciding a pretrial motion to dismiss for lack of personal jurisdiction, a district court has considerable procedural leeway." [The Court] may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion ....
>
> "If the court chooses not to conduct a full blown evidentiary hearing on the motion, the plaintiff need make only a *prima facie* showing of jurisdiction through its own affidavits and supporting materials."
>
> "Eventually, of course the plaintiff must establish jurisdiction by a preponderance of the evidence, either at a pretrial evidentiary hearing or at trial"...

Kowalski-Schmidt v. CLS Mortgage, Inc., 981 F.Supp. 105, 108 (E.D.N.Y.1997).

Like the *Kowalski-Schmidt* court, we elect not to hold an evidentiary hearing prior to ruling on defendants' motion to dismiss for lack of personal jurisdiction. Accordingly, "Plaintiffs need only make a "*prima facie* showing of jurisdiction through [their] own affidavits and supporting materials ..., notwithstanding any controverting presentation by ... [Defendants], to defeat the motion." *Id.*

Here, plaintiffs assert that jurisdiction over defendants O'Reilly and CSK is appropriate under New York Civil Practice Law and Rules sections 301, 302(a)(1) and 302(a)(2). These sections provide:

§ 301. Jurisdiction over persons, property or status

> *10 A court may exercise such jurisdiction over

persons, property or status as might have been exercised heretofore.

§ 302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state: or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act ...

N.Y. C.P.L.R. § § 301 & 302 (McKinney 1999).

It is well-settled that section 301 applies to a defendant who is "doing business" and therefore "present" in New York with respect to any cause of action, either related or not related, if the defendant does business in New York "not occasionally or casually, but with a fair measure of permanence and continuity." *Beacon Enter., Inc. v. Menzies*, 715 F.2d 757, 762 (2d Cir.1983) (quoting *Simonson v. Int'l Bank*, 14 N.Y.2d 281, 251 N.Y.S.2d 433, 436, 200 N.E.2d 427 (1964)). Section 302(a)(1) permits a court to exercise personal jurisdiction over a foreign defendant when two conditions are met: first, the foreign defendant must 'transact business' within New York; and second, the claim against the foreign defendant must arise out of the business transacted in the state. Although "the standard of 'transacting business' is considerably less than the requirements under the 'doing business' test ... unlike the 'doing business' basis, jurisdiction is conferred only to those acts arising out of the transaction." *Goldenberg v. Lee*, No. 97 CV 5297, 1999 WL 390611, *2 (S.D.N.Y. April 15, 1999).

Defendants O'Reilly and CSK assert that plaintiffs have not alleged sufficient and reliable facts from which the Court may conclude that they "transact business" or "do business" in New York, and thus have not demonstrated a valid statutory or constitutional basis for the assertion of jurisdiction over them. Plaintiffs allege, *inter alia*, that both O'Reilly and CSK purchased auto-parts from manufacturers in New York "at discriminatory prices and with Phantom Payments." Thus, a portion of the "business" which forms the basis of the charges in the complaint allegedly was conducted in New York. Additionally, plaintiffs assert that O'Reilly makes sales to customers in New York directly through its website. These allegations support this Court's exercise of jurisdiction over these defendants. Accordingly, although at some point the plaintiffs will be required to establish jurisdiction by a preponderance of the evidence, at this juncture, these allegations, which are supported by plaintiffs' memoranda and the declaration of Gil Harris [FN6], are sufficient to establish a *prima facie* case of personal jurisdiction.

FN6. Gil Harris is the Executive Vice President of plaintiff Coalition for a Level Playing Field, LLC.

2. Venue

*11 Defendants O'Reilly and CSK additionally challenge the propriety of venue in this Court. We find that venue is proper in this district both because the plaintiffs have alleged that defendants "transact business" in the Eastern District of New York and because, according to the allegations in the Amended Complaint, a substantial part of the events or omissions giving rise to the claims occurred in New York.

15 U.S.C. § 22 provides:

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein in may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

28 U.S.C. § 1391 provides, in relevant part

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all

> defendants reside, or in which the claim arose, except as otherwise provided by law.

As discussed above, with reference to the defendant's challenge of personal jurisdiction, the plaintiffs' allegations establish both that O'Reilly and CSK "transact business" in the Eastern District of New York, and that some of the allegedly discriminatory transactions out of which this action arose took place within the Eastern District of New York. Accordingly, plaintiffs have alleged facts supporting venue in the Eastern District of New York pursuant to both 15 U.S.C. § 22 and 28 U.S.C. § 1391.

3. Transfer

As an alternative to dismissal, defendants O'Reilly and CSK request that the claims against them be severed and transferred to a different forum. We find, however, that interests of convenience and judicial efficiency militate against severance of these claims

The standard to be applied on a motion to sever and transfer have recently been summarized as follows:

> Rule 21 of the Federal Rules of Civil Procedure authorizes the severance of any claim against a party in order that it be transferred pursuant to Section 1404(a) of the Judicial Code. Section 1404(a), in turn, permits the Court to transfer any civil action to any other district where it might have been brought "[f]or the convenience of parties and witnesses, in the interest of justice."
> Severance under Rule 21 generally is appropriate if venue is improper as to one or more defendant or a party has been joined improperly under Rule 20. However, in a multi-defendant case, the Court may sever and transfer a claim against one or more defendants where "the administration of justice would be materially advanced" thereby. This analysis requires the Court to consider:
> "(1) whether the issues sought to be tried separately are significantly different from one another, (2) whether the separable issues require the testimony of different witnesses and different documentary proof, (3) whether the party opposing the severance would be prejudiced if it is granted and (4) whether the party requesting the severance will be prejudiced if it is not granted."

*12 *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 104 F.Supp.2d 279, 287-88 (S.D.N.Y.2000).

We find that severance is inappropriate in this case. First, we note that the issues in the claims against O'Reilly and CSK are very close, if not identical, to the issues in the claims against the other defendants. These claims will likely require overlapping testimonial and documentary evidence. Additionally, in that this action alleges nationwide conduct, it is likely that no matter where these claims are heard, witnesses and documents will have to be brought in from out of state. These facts, taken together with the plaintiffs' interest in litigating their claims in one action, and the judicial efficiency that is attained by litigating the claims against O'Reilly and CSK together with the claims against the other defendants, tilt the balance against severance and transfer.

Accordingly, defendants O'Reilly and CSK's motions for severance and transfer are denied.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss the complaint for failure to state a claim is DENIED as to Count I, and GRANTED as to Count II of the Amended Complaint. Defendants O'Reilly and CSK's motions to dismiss for lack of personal jurisdiction and venue, or alternatively to sever and transfer the claims against them are DENIED. Plaintiffs' motion for leave to file an amended complaint is GRANTED.

Pursuant to Federal Rule of Civil Procedure 54(b), the Court finds that there is no just reason for delay, and the Clerk is directed to enter partial judgment in favor of defendants and against plaintiffs on Count II of the Amended Complaint.

SO ORDERED.

Not Reported in F.Supp.2d, 2001 WL 1763440

(E.D.N.Y.), 2001-2 Trade Cases P 73,517

END OF DOCUMENT

Not Reported in F.Supp.2d, 2005 WL 2548267 (E.D.N.Y.)

(Cite as: 2005 WL 2548267 (E.D.N.Y.))

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
E.D. New York.
Kap Jeung TANG, Plaintiff,
v.
JINRO AMERICA, INC., JS America, Inc. and Gun Chul Lee, Defendants.
No. CV-03-6477 (CPS).

Oct. 11, 2005.

Gary Ettelman, Ettelman & Hochheiser, P.C., Garden City, NY, for Plaintiff.

Lee Henig-Elona, Troutman, Sanders LLP, New York, NY, for Defendants.

MEMORANDUM OPINION AND ORDER

SIFTON, Senior J.

*1 Plaintiff, Kap Jeung Tang ("Tang") brings this action against defendants Jinro America, Inc. ("JAM"), JS America, Inc. ("JSA"), and Gun Chul Lee ("Lee") to recover damages arising from the alleged wrongful termination of Plaintiff's exclusive rights to distribute a premium brand of Korean liquor. Plaintiff alleges claims for: (1) breach of contract; (2) tortious interference with contract against defendants JSA and Lee; (3) tortious interference with prospective economic advantage; (4) unjust enrichment; (5) unfair competition; and (6) breach of covenant of good faith and fair dealing. Defendants assert counterclaims alleging (1) willful trademark infringement; (2) unfair competition; and (3) dilution of a famous mark.

Presently before the Court is Defendants' motion for summary judgment dismissing Plaintiff's claims pursuant to Federal Rule of Civil Procedure 56. For the reasons that follow, the motion is granted.

BACKGROUND

The following facts are drawn from the complaint, Local Rule 56.1 statements, affidavits, depositions, and exhibits submitted in connection with this motion. They are undisputed except where noted.

Plaintiff Kap Jeung Tang, a licensed wholesaler of alcoholic beverages, is a citizen of Pennsylvania. His company, Tang's Liquor Wholesale Co., has its principal place of business in Queens County, New York. Defendant Jinro America, Inc. ("JAM") is a corporation organized and existing under the laws of the State of Washington with its principal place of business in the State of California. Defendant JS America, Inc. ("JSA") is a New Jersey corporation with its principal place of business in the State of New Jersey. Defendant Gun Chul Lee, a citizen of New Jersey, is the President, Secretary, Treasurer, sole Director and sole stockholder of defendant JSA.

In 1992, Defendant JAM, by written agreement (the "1992 agreement"), granted Plaintiff Tang exclusive distribution rights in New York, New Jersey, Maryland, Virginia, and the District of Columbia (the "Territory") for the Jinro brand of Korean distilled spirits known as soju ("Jinro Soju"). [FN1] Those rights were to expire after five years. JAM was at that time the sole importer of Jinro Soju and wholly owned by Jinro Ltd., the Korean manufacturer of the product. Upon the expiration of the 1992 agreement, the parties entered into a new distributorship agreement on December 1, 1997 (the "1997 agreement") to expire November 30, 1999. Plaintiff alleges that, upon expiration of the 1997 agreement, it was his understanding that so long as he performed well, he would continue to be the exclusive distributor of Jinro Soju in the Territory. [FN2] Plaintiff continued to buy from JAM (and JAM continued to supply) the Jinro products and to distribute them within the Territory in absence of a

EXHIBIT D

written agreement. Plaintiff contends that due to his efforts, sales of Jinro Soju in Plaintiff's exclusive territory grew from none in 1986 to over $3.75 million worth in 2001.

> FN1. Plaintiff Tang contends that he began distributing Jinro Soju in 1986 "pursuant to an agreement that was either oral or, if written, has not been located." The time period between 1986 and 1992 is not at issue.
>
> FN2. To support this allegation, in his affidavit in opposition to Defendants' motion for summary judgment, plaintiff states only, "[t]hroughout this period. It was my understanding that I would remain the exclusive Jinro distributor in my territory, so long as I performed adequately. I never really paid much attention to the written agreements because there was a mutual understanding that I would remain the distributor. I understand that if my performance was inadequate, or if I took on a competing brand, or if I did not dedicate myself to the Jinro Products, I could be terminated." Testimony of Plaintiff to the operation of Defendant's mind would, of course, be inadmissible. Fed.R.Evid. 701 ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are ... rationally based on the perception of the witness"). No other evidence is offered to establish this "mutual understanding."

***2** Plaintiff asserts that sometime in late 1999, Defendant Lee replaced the prior president of JAM. On August 3, 2001, JAM sent a letter to Plaintiff noting that the 1997 agreement had expired. The letter further stated that pursuant to its management strategy, Jinro, Ltd. would be dividing its imports and sales between the Eastern and Western United States, with defendant JSA importing and selling the products to 26 states in the East (including Plaintiff's sales territory) and JAM continuing to import and sell the products on the West Coast. JSA, run by Defendant Lee, would become Plaintiff's importer, in place of JAM.

On November 15, 2001, Plaintiff was asked by JSA to enter into a distributorship agreement expiring on December 31, 2002 "valid and effective upon JSA obtaining the necessary permits and licenses from the applicable authorities to import and sell the Products hereunder." (the "2001 agreement"). Plaintiff contends that defendant Lee insisted that Plaintiff sign the agreement, threatening that if he did not, Plaintiff would no longer enjoy an exclusive distributorship in the Territory. The proposed new agreement included a higher price for the product for Plaintiff than for other United States distributors. Lee further refused to grant a long-term agreement as requested by Plaintiff. The parties dispute whether the 2001 agreement was ever signed. [FN3] Both parties agree, however, that they continued to negotiate the terms of a new agreement through June 2002 without success. [FN4]

> FN3. Plaintiff testified that he did sign the 2001 agreement (Tang Tr. at 17:17-18:4) and also that he did not sign the agreement (Tang Tr. at 23:22-24:3, 76:2-76:25). His affidavit in opposition to the motion for summary judgment only states that he felt pressured to sign the agreement, not that he signed it. Plaintiff has submitted only a copy of a translation of the agreement. The translation is not signed, nor does it contain a notation indicating that the original was signed. Plaintiff has not provided a copy of the original document. Defendants assert that the agreement was never executed.
>
> FN4. In Plaintiff's deposition testimony, he stated that the parties had never come to an agreement about the terms of the contract. When asked if Plaintiff and Defendant Lee ever came to an agreement about the price of the Jinro Soju, Plaintiff responded, "No. We didn't agree, but he raised the price and he continued to charge that price to me."

See Tang Dep. Tr. at 26:17-22.

On April 10, 2002, Plaintiff was contacted by a representative of the New Jersey Division of Alcoholic Beverage Control (the "ABC") regarding JSA's application for a distributorship license in the State of New Jersey (part of Plaintiff's territory). Plaintiff sent a letter to the ABC alleging discriminatory pricing on the part of Defendants and an attempt to usurp Plaintiff's exclusive distribution rights for themselves.

Following Plaintiff's submission of the letter to the ABC, JSA's attorneys sent Plaintiff a letter offering to allow Plaintiff to continue to distribute Jinro Soju conditioned only upon Plaintiff's withdrawal of his objection to JSA's license application by May 28, 2002. Plaintiff eventually withdrew his objection, however, not before May 28, 2002.

On June 3, 2002, Plaintiff received a letter from Defendants stating that the distributorship agreement was "terminated as of November 30, 1999 and our products shall be supplied to you until June 30, 2002. From the order for July of this year, we will not take your order any longer."

After his termination, Plaintiff Tang began distributing a competing soju liquor in place of Jinro Soju, but asserts that he has not approached the volume and profit levels he had reached with Jinro Soju.

Presently before the Court is Defendants' motion for summary judgment dismissing Plaintiff's claims pursuant to Federal Rule of Civil Procedure 56. For the reasons that follow, the motion is granted.

DISCUSSION

*3 This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(1). Plaintiff and Defendants are each citizens of different states, and the amount in controversy exceeds $75,000, exclusive of interest and costs.

Summary judgment is appropriate "[w]hen the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Rule 56 of the Federal Rules of Civil Procedure provides for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law." Fed. R. Civ. Pro. 56(c): *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Elec. Inspectors, Inc. v. Vill. of E. Hills*, 320 F.3d 110, 117 (2d Cir.2003). A fact is material when it "might affect the outcome of the suit under the governing law." *Id.*

The party seeking summary judgment has the burden of demonstrating that no genuine issue of material fact exists. *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 252 (2d Cir.1987). In order to defeat such a motion, the non-moving party must raise a genuine issue of material fact. Although all facts and inferences therefrom are to be construed in the light most favorable to the non-moving party, the non-moving party must raise more than a metaphysical doubt as to the material facts. *See Matsushita*, 475 U.S. at 586; *Harlen Assoc. v. Vill. of Mineola*, 273 F.3d 494, 498 (2d Cir.2001). The non-moving party may not rely on conclusory allegations or unsubstantiated speculation. *Twin Labs., Inc., v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir.1990). Rather, the non-moving party must produce more than a scintilla of admissible evidence that supports the pleadings. *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289-90, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); *Niagara Mohawk Power Corp. v. Jones Chem. Inc.*, 315 F.3d 171, 175 (2d Cir.2003).

The trial court's function in deciding such a motion is not to weigh the evidence or resolve issues of fact, but to decide instead whether, after resolving all ambiguities and drawing all inferences in favor of the non-moving party, there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Pinto v. Allstate Ins. Co.*, 221 F.3d 394, 398 (2d Cir.2000) .

Breach of Contract Claims

Under New York law [FN5] "an action for breach of contract requires proof of (1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages" resulting from the breach. *See First Investors Corp. v. Liberty Mut. Ins. Co.*, 152 F.3d 162, 168 (2d Cir.1998) (*quoting Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 525 (2d Cir.1994).) Plaintiff's claim fails with respect to the first element.

> FN5. The parties' briefs cite cases applying New York law, and "such 'implied consent ... is sufficient to establish choice of law." ' *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 61 (2d Cir.2004) (*quoting Krumme v. WestPoint Stevens, Inc.*, 238 F.3d 133, 138 (2d Cir.2000)). In any event, where, as here, the parties are silent about the choice of law question, the Court may apply the law of the forum. *See Michele Pommier Models v. Men Women N.Y. Model Mgmt.*, 14 F.Supp.2d 331, 336 (S.D.N.Y.1998) (*citing Keles v. Yale University*, 889 F.Supp. 729, 733 (S.D.N.Y.1995)).

*4 It is not disputed that Plaintiff's 1992 and 1997 written agreements with JAM expired in 1997 and 1999, respectively. If a valid *written* contract existed, therefore, at the time Defendants allegedly breached the contract in July 2002, it must have been the 2001 agreement with JSA.

Although Plaintiff has produced a translation of the 2001 agreement, neither party has produced the original contract in Korean. The translation is not signed, nor does it indicate that there were signatures on the original document. Defendants state that the 2001 agreement was never executed, and Plaintiff is inconsistent about whether or not he actually signed the agreement. In his deposition testimony, Plaintiff states both that he signed the agreement, and that he did not sign the agreement. Such inconsistency is not sufficient to create a "genuinely disputed" issue of fact if only because a statement against ones interest trumps one which is self-serving. In his affidavit in opposition to the motion for summary judgment, Plaintiff states that he "felt [he] had to sign the new agreement," and that "Lee insisted [he] sign," but he never alleges that he actually signed the agreement. Even if these statements are read to state that he did sign the agreement, it is well-settled that Plaintiff may not, in order to defeat a summary judgment motion, create a material issue of fact by submitting an affidavit disputing his own prior sworn testimony that he did not sign the agreement. *See, e.g., Mack v. United States*, 814 F.2d 120, 124 (2d Cir.1987); *Miller v. International Tel. & Tel. Corp.*, 755 F.2d 20, 24 (2d Cir.) (same), *cert. denied*, 474 U.S. 851, 106 S.Ct. 148, 88 L.Ed.2d 122 (1985); *McLaughlin v. Cohen*, 686 F.Supp. 454, 456 (S.D.N.Y.1988) (same); *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir.1969) (same); *Hayes v. New York City Department of Corrections*, 84 F.3d 614, 619 (2d Cir.1996) ("factual issues created solely by an affidavit crafted to oppose a summary judgment motion are not 'genuine' issues for trial" (*quoting Perma Research*, 410 F.2d at 578)). Accordingly, I conclude that plaintiff has not raised a genuinely disputed issue of fact as to whether a valid written contract existed when Plaintiff's distribution rights were terminated. [FN6]

> FN6. Defendants argue that even if the parties did sign the agreement, the agreement never went into effect because the condition precedent, "JSA obtaining the necessary permits and licenses from the applicable authorities to import and sell the Products hereunder," was never fulfilled. Plaintiff claims that he believes Defendants did obtain the necessary permits and licenses. Because I conclude that the contract was not executed, I do not address this issue.

Plaintiff claims that even if no written contract existed at the time Defendants terminated Plaintiff, Defendants were in breach of an implied agreement between Plaintiff and JAM.

Plaintiff Tang asserts that this Court should look to the parties' course of performance after the written agreement with JAM terminated to determine whether an implied contract existed between plaintiff and JAM after the 1997 agreement expired in 1999. Plaintiff relies on UCC 2-208(1), which states:

> Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

***5** This UCC provision, however, provides only that *terms* of the agreement should be interpreted according to the parties' course of performance; it does not provide that the parties' course of performance alone can establish that an implied contract exists after the expiration of the term of the written contract.

However, Courts can look to the course of parties' performance to determine whether parties have implicitly entered into a new agreement on the same terms after the expiration of a written contract. In *Martin v. Campanaro,* the Court of Appeals held that where an agreement expires by its terms, and the parties simply continue to perform on the same terms, "an implication arises that they have mutually assented to a new contract containing the same provisions as the old." *Martin v. Campanaro,* 156 F.2d 127, 129 (2d Cir.), *cert. denied,* 329 U.S. 759, 67 S.Ct. 112, 91 L.Ed. 654 (1946). Here, however, Plaintiff testified that it was not his understanding that the old agreement continued on the same terms. Instead, plaintiff testified that the parties entered into a new agreement that he would be defendants' distributor indefinitely unless he gave cause for his termination, a term not contained in the old agreement. Moreover, the *Martin* Court found that where, as here, the parties had engaged in "subsequent unsuccessful negotiations" to enter into a new contract, a reasonable person would not believe that the parties intended to form new contract extending the terms of the old. *See id.* at 129-30. Here, after defendant explicitly informed Plaintiff that it regarded the 1997 agreement as terminated, the parties engaged in unsuccessful negotiations to enter into a new contractual relationship. Accordingly, it cannot be said that Plaintiff has raised a genuinely disputed issue of fact as to whether an implied contract existed between Plaintiff and any of the defendants at the time Plaintiff was terminated.

Nor could an oral contract have existed between Plaintiff and JSA at the time Plaintiff was terminated because it is undisputed that the parties never reached an agreement as to the price Plaintiff would pay for Defendant's Jinro Soju. Plaintiff himself, in his deposition testimony, stated with respect to the negotiations between himself and Defendant JSA, "We just argued, that's it." [FN7] Because no written, implied, or oral contract existed at the time Plaintiff was terminated, Defendants did not breach any contractual obligation to Plaintiff. [FN8]

> FN7. Defendants argue that even assuming that an oral contract between Plaintiff and Defendant JSA existed, it is unenforceable under New York's Statute of Frauds, General Obligations Law § 5-701(a)(1), which requires a signed writing for proof of a contract which by its terms cannot be fully performed within a year. *See, e.g. D & N Boening, Inc., v. Kirsch Beverages, Inc. et al.* (1984) 63 N.Y.2d 449, 483 N.Y.S.2d 164, 472 N.E.2d 992,: *United Beer Distr. Co., Inc. v. Hiram Walker, Inc., et al.* (1st Dep't 1990) 163 A.D.2d 79, 557 N.Y.S.2d 336, 338. *See also Skop v. Benjamin Moore, Inc.* (2d Cir.1990) 909 F.2d 59, 60-61. Because no oral contract between Plaintiff and Defendants existed after the expiration of the 1997 agreement, I do not address this issue.
>
> FN8. Plaintiff Tang argues that JAM did not provide him with reasonable notice prior to terminating him, stating, "[i]f a contract is silent as to amount of notice or if an agreement is terminable at will, the law implies a reasonable notice

> requirement. According to Tang, such notice would require a minimum of 6 to 12 months to allow Tang to obtain and distribute a new product." Because, as discussed above, Defendants owed no contractual obligations to Plaintiff, I conclude that Defendants were under no notice requirement at the time they terminated Plaintiff.

Plaintiff next claims that Defendants should be equitably estopped from terminating their contractual relationships with Plaintiff. This argument also fails.

Under New York law, equitable estoppel requires proof of three elements: (1) conduct which amounts to a false representation of material facts; (2) an intent that such conduct will be acted upon by the other party; and (3) knowledge of the true facts. *See Int'l Minerals and Resources, S.A. v. Pappas,* 96 F.3d 586, 594 (2d Cir.1996); *Readco, Inc. v. Marine Midland Bank,* 81 F.3d 295, 301 (2d Cir.1996); *Benincasa v. Garrubbo,* 141 A.D.2d 636, 638, 529 N.Y.S.2d 797, 800 (2d Dep't 1988). "[T]he doctrine of equitable estoppel is to be invoked sparingly and only under exceptional circumstances." *Badgett v. N.Y.C. Health & Hosps. Corp.,* 227 A.D.2d 127, 128, 641 N.Y.S.2d 299, 300 (1st Dep't 1996).

*6 Plaintiff has not alleged or shown that Defendants made any misrepresentation of material fact, nor that defendants intended that such conduct be acted upon by the Plaintiff. At best, Plaintiff asserts only that "he understood, and JAM's conduct was consistent with the understanding, that he would remain the exclusive distributor in his territory so long as he adequately performed." A statement that Defendants' actions misled plaintiff into thinking he could remain an exclusive distributor indefinitely as long as he behaved is not the same as saying that Defendants' acted as they did with the intention of misleading Plaintiff to his detriment. As a result, I conclude that the requirements for applying the principles of equitable estoppel to this case are not satisfied.

For the reasons stated above, Defendants' motion for summary judgment dismissing Plaintiff's breach of contract claims is granted.

Tortious Interference with Contract Claim Against JSA and Lee

A claim for tortious interference with a contract can be sustained only where plaintiff has demonstrated (1) the existence of a valid contract between itself and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional procurement of a breach of that contract by the third party; and (4) damages. *See Nordic Bank PLC v. Trend Group, Ltd.* (S.D.N.Y.1985) 619 F.Supp. 542, 560-61.

Because, as discussed above, no contract existed between Plaintiff and JAM, Defendants JAS and Lee cannot be held responsible for interfering with a contractual relationship between Plaintiff and JAM. Accordingly, Defendants' motion for summary judgment dismissing Plaintiff's claim for tortious interference with contract against Defendants JSA and Lee must be granted.

Tortious Interference With Prospective Economic Advantage Claim

"In order to state a claim for tortious interference with prospective economic advantage, a plaintiff must show: (1) business relations with a third party; (2) defendants' interference with those business relations; (3) that defendants acted with the sole purpose of harming the plaintiff or used dishonest, unfair or improper means; and (4) injury to the relationship." *Purgess v. Sharrock,* 33 F.3d 134, 141 (2d Cir.1994). "[A] claim for interference with advantageous business relationships must specify some particular, existing business relationship through which plaintiff would have done business but for the allegedly tortious behavior." *Kramer v. Pollock-Krasner Found.,* 890 F.Supp. 250, 258 (S.D.N.Y.1995) (*citing PPX Enters., Inc. v. Audiofidelity Enters., Inc.,* 818 F.2d 266, 269 (2d Cir.1987)); *see also Envirosource, Inc. v. Horsehead Resource Dev. Co.,* No. 95 Civ. 5106, 1996 WL 363091, at *14 (S.D.N.Y. July 1, 1996) ("A 'general allegation of interference with customers without any sufficiently particular

allegation of interference with a specific contract or business relationship' will not withstand a motion to dismiss.") (*quoting McGill v. Parker,* 179 A.D.2d 98, 582 N.Y.S.2d 91, 95 (1st Dep't 1992)).

*7 Plaintiff has made no particular allegations of interference with specific contracts or business relationships. [FN9] In fact, when asked in an interrogatory to "[i]dentify and describe the valid contracts or prospective contracts Plaintiff had with numerous customers to purchase Jinro Soju, as alleged in ... the Complaint" Plaintiff responded only, that "[t]hese contracts refer to the numerous oral agreements and prospective oral agreements that Plaintiff had and would continue to have with its customers for the purchase and sale of Jinro products, including those customers with whom [Plaintiff] had developed long-term relationships." Nor has he been more particular or specific in responding to Defendants' motion for summary judgment. Accordingly, Defendants are entitled to summary judgment on Plaintiff's claim for tortious interference with prospective economic advantage.

> FN9. Plaintiff has submitted one affidavit from a customer, Hwa Jang, apparently for the purpose of demonstrating that Plaintiff Tang's name is synonymous with that of Jinro Soju. Plaintiff does not reference Jang in any of his arguments, and Jang's affidavit does not state that Jang would continue to purchase Jinro Soju from Tang but for Defendant's interference. Nor is any evidence produced that Defendants acted as they did for the purpose of harming Plaintiff or that they used dishonest or improper means.

Unjust Enrichment Claims

Plaintiff argues that as a result of his efforts, he developed substantial good-will for the Jinro brand name in the exclusive distribution territory. He argues that Defendants, in terminating Plaintiff's distribution rights, have acquired that good will for their own benefit and been unjustly enriched at Plaintiff's expense.

An unjust enrichment claim under New York law must contain the following elements: (1) the defendant was enriched; (2) enrichment was at the plaintiff's expense; and (3) the defendant's retention of the benefit would be unjust. *See Van Brunt v. Rauschenberg,* 799 F.Supp. 1467, 1472 (S.D.N.Y.1992). The third element is satisfied when the circumstances are such "that equity and good conscience require defendant to make restitution." *Violette v. Armonk Associates, L.P.,* 872 F.Supp. 1279, 1282 (S.D.N.Y.1995).

Any compensation sought by Plaintiff under a quasi-contractual remedy must be for services performed *after* the Agreement was terminated because such a remedy is available only in the absence of a contractual remedy. Corbin on Contracts, § 1.20; Clark-Fitzpatrick, 70 N.Y.2d at 389, 521 N.Y.S.2d 653, 516 N.E.2d 190. In *Gidatex, S.r.L. v. Campaniello Imports, Ltd.,* 49 F.Supp.2d 298, Campaniello served as the exclusive distributor of the Saporiti Italia brand of Italian furniture for Gidatex before Gidatex terminated the exclusive distributorship agreement and began locating new American distributorships in close proximity to Campaniello's showrooms. Campaniello brought a claim for unjust enrichment against Gidatex, arguing that as a result of Campaniello's efforts in protecting Gidatex's good-will, reputation, and market presence, Gidatex was being unjustly enriched at Campaniello's expense. *Id.* at 300- 301. The Court, in granting summary judgment against Campaniello, reasoned that, even assuming that Campaniello's claim met the first requirement for a claim of unjust enrichment under New York Law, "it has not offered any proof that Gidatex's enrichment was at Campaniello's expense." *Id.* at 301. Specifically, the Court reasoned that unjust enrichment is a quasi-contractual remedy, and as such, "[a]ny expenses incurred prior to the parties' termination of their contract should be covered by the terms of that Agreement" and "Campaniello has not offered any proof of expenditures in time or money for customer services, repair, or advertising after the termination of the Agreement." *Id.* at 304.

*8 Similarly, in this case, Plaintiff has not offered any proof of expenditures *after* the termination of

the agreement, [FN10] and the parties' 1997 written agreement stated, in relevant part:

> FN10. Although Plaintiff generally asserts that he made expenditures which resulted in an increase of sales of Jinro between 1986 and 2001, he makes no specific assertions of expenditures *after* his distribution rights were terminated.

> "JINRO shall not, by reason of the termination of expiration of this Agreement, be liable to DISTRIBUTOR (Tang) for compensation, reimbursement or damages either on account of present or prospective profits on sales or anticipated sales, or on account of expenditures, investments or commitments made in connection therewith or in connection with the establishment, development or maintenance of the business or goodwill of DISTRIBUTOR, or on account of any other cause or thing whatsoever....All expenditures, investments, and commitments that DISTRIBUTOR has made or may make in connection with this Agreement have been and will be made at DISTRIBUTOR's sole risk, and no such expenditures, investments, or commitments shall give rise to any right, interest, claim or cause of action."

Accordingly, I conclude that Plaintiff has failed to make out a claim for unjust enrichment. The *Gidatex* Court further reasoned,

> "good business sense would indicate that Campaniello continued to support the mark because it continued to sell the furniture and because it wished to ensure that its customers would continue to purchase furniture at its stores. Any benefit to Gidatex was a by-product. There is no rational economic motive to explain why Campaniello would have acted at its own expense to enrich Gidatex, a marketplace competitor and frequent legal adversary. Even drawing all inferences in favor of the non-movant, no rational trier of fact could find that Campaniello enriched Gidatex's goodwill in the Saporiti Italia mark at its own expense. *Id.* at 305 (emphasis added).

Similarly, in this case, Plaintiff Tang continued his distribution and marketing efforts after the expiration of the agreements for his own benefit, and no rational trier of fact could find that Tang enriched Defendants' goodwill in the Jinro Soju distribution market at his own expense.

Defendants motion for summary judgement against Plaintiff's unjust enrichment claim is therefore granted.

Unfair Competition Claim

Under New York law, in order for a claim for unfair competition to be sustained, the plaintiff must show that the defendant misappropriated the plaintiff's labors or expenditures and that the defendant displayed some element of bad faith in doing so. *Davis & Co. Auto Parts, Inc. v. Allied Corp.* (S.D.N.Y.1986) 651 F.Supp. 198, 203 (S.D.N.Y.1986) *citing Saratoga Vichy Spring Co. v. Lehman* (2d Cir.1980) 625 F.2d 1037, 1044. Such bad faith cannot be found where a defendant's alleged misconduct represents nothing more than its having exercised its legal rights. *See, e.g., Saratoga,* 625 F.2d at 1044 (no bad faith present in defendant's exploitation of a trademark which it was legally entitled to use); *Tri-Star Pictures, Inc. v. Leisure Time Productions, B.V.* 17 F.3d 38, 45 (2d Cir.), *cert. denied* (1994) 513 U.S. 987, 115 S.Ct. 484, 130 L.Ed.2d 396 (counterclaim alleging unfair competition was properly dismissed where there was no finding of contractual breach).

*9 Because I have previously concluded that no valid contract existed between Plaintiff and Defendants which granted plaintiff exclusive distribution rights, this claim must fail. Therefore, Defendant's motion for summary judgment dismissing Plaintiff's unfair competition claim is granted.

Breach of Covenant of Good Faith and Fair Dealing Claim

Plaintiff finally argues that Defendants, in terminating Plaintiff's exclusive distribution rights, have breached a covenant of good faith and fair dealing. However, a court cannot impose a covenant of good faith and fair dealing where it would be inconsistent with the terms of the parties' express written agreement.

In *Adiel v. Coca-Cola Bottling Company of New York, Inc.*, 1995 WL 542432 (S.D.N.Y.1995), the Court stated:

> "Plaintiffs have alleged that by terminating their distribution agreements, defendant breached an implied covenant of good faith and fair dealing. However, under New York law a party's reliance upon express contractual terms insulates it from such claims....[T]he implied covenant of good faith and fair dealing does not provide a court *carte blanche* to rewrite the parties' agreement. Thus, a court cannot imply a covenant inconsistent with terms expressly set forth in the contract. The agreements at issue here in no respect required defendant to renew after May 31, 1995. Accordingly, we dismiss plaintiffs' [claim]." *Id* (internal citations omitted).

In the present case, the agreements between Plaintiff and Defendants did not require defendant to renew the contracts after their expiration. Thus, Defendants could not have breached an implied covenant of good faith and fair dealing by terminating Plaintiff's distribution rights.

Accordingly, Defendants' motion for summary judgement against this claim is granted.

CONCLUSION

For the reasons set forth above, Defendants' motion for summary judgment is granted. The clerk is directed to enter judgment in favor of Defendants and furnish a copy of this opinion to all parties

SO ORDERED.

Not Reported in F.Supp.2d, 2005 WL 2548267 (E.D.N.Y.)

Motions, Pleadings and Filings (Back to top)

- 2005 WL 3146687 (Trial Motion, Memorandum and Affidavit) Plaintiff's Memorandum of Law in Support of Motion for Reconsideration (Oct. 31, 2005)

- 2005 WL 2149679 (Trial Motion, Memorandum and Affidavit) Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment (Jul. 27, 2005)

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