

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CORRECT CRAFT IP HOLDINGS, LLC,
a Florida limited liability company,

Plaintiff,

Case No. 6:09-cv-813-Orl-28KRS

vs.

JURY TRIAL REQUESTED

MALIBU BOATS, LLC, a Delaware
limited liability company; and DANMARK
INTERNATIONAL, INC., d/b/a
CENTRAL FLORIDA BOATING
CENTER, a Florida corporation,

Defendant.

_____ /

MALIBU BOATS, LLC, a Delaware
limited liability company; and DANMARK
INTERNATIONAL, INC., d/b/a
CENTRAL FLORIDA BOATING
CENTER, a Florida corporation,

Counterclaimants,

vs.

CORRECT CRAFT, INC., a Florida
corporation, and CORRECT CRAFT IP
HOLDINGS, LLC, a Florida limited
liability company,

Counterclaim Defendants.

_____ /

COUNTER CLAIM DEFENDANTS'
MOTION TO DISMISS SECOND COUNTERCLAIM (DOC. 53)

The Counterclaim Defendants hereby move the Court for the entry of an order dismissing Counts 15 and 16 of the Second Counterclaim filed by Malibu pursuant to

Rule 12(b)(6), Fed. R. Civ. P.

Introduction

In its new Counterclaim Malibu reasserts its *Walker Process* claims for attempted monopolization under the Sherman Act (Count 15) and the Florida Antitrust Act of 1980 (Count 16). Both claims are directed at the “Correct Craft Entities,” though Malibu concedes that Correct Craft Holdings, LLC is but a patent holding company and a subsidiary of Correct Craft, Inc. (Second Counterclaim ¶¶ 3-8). Malibu posits that Correct Craft, Inc., and its holding company have “misused the Patents-in-suit, which they know were procured through fraud, with the specific intent to obtain and maintain monopoly power in the relevant nationwide markets for towered power boats and towers for towing watersports performers (‘the Relevant Markets’).” (Second Counterclaim ¶ 250). The question raised by this motion is whether Malibu has identified by such conclusory allegations economically plausible markets that could be monopolized by these “Correct Craft Entities,” even if the patents had been “procured through fraud,” as claimed.¹

In *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007) the Supreme Court took note of the *ad terrorem* potential for antitrust claims in particular, observing:

. . . it is one thing to be cautious before dismissing an antitrust complaint

¹ This issue was also briefed in the Counterclaim Defendants’ initial dismissal motion. The Court granted that motion (Motion at Doc. 37, p. 16) without addressing the market definition issue. (Doc. 52, at 15).

in advance of discovery . . . but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago in *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519 (1983), “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed. . . Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with ‘no reasonably founded hope that the [discovery] process will reveal relevant evidence’ to support a § 1 claim.” *Id.*, at 550 U.S. 558-59 (internal citations omitted).

Though this case presents no conspiracy charge, as such, it implicates all of the concerns about waste, expense and implausible allegations that concerned the Court in *Twombly*. An antitrust counterclaim that does not bother to plead the existence of a plausible market that is in danger of monopoly at the hands of the patentee is one that is not plausible on its face and must therefore be dismissed. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009). Likewise, if such a counterclaim merely resorts to “labels and conclusions, and a formulaic recitation of the elements of a cause of action,” *Twombly*, at 550 U.S. 555, dismissal is equally warranted.

The Elements of Pleading a Viable Market

Fundamental to any *Walker Process* theory is a product and geographic market in which there has been a “cognizable anticompetitive effect.” *Spanish Broad. Sys. of Fla. v. Clear Channel Communs.*, 376 F.3d 1065, 1076 (11th Cir. 2004), quoting *Manufacturing Research Corp. v. Greenlee Tool Co.*, 693 F.2d 1037, 1043 (11th Cir. 1982). Unless there is such a viable market to monopolize, there is no *Walker Process* claim, even in the

presence of a patent procured by fraud. *See, e.g., Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 178 (1965). For without a “definition of that market there is no way to measure [the defendants’] ability to lessen or destroy competition.” *Id.*, at 177. *See also Dippin’ Dots, Inc. v. Mosey*, 476 F.3d 1337, 1348 (Fed. Cir. 2007) (noting that a relevant market, as defined in accordance with the law of the regional circuit, is essential to a *Walker Process* counterclaim.)

The pleading of a viable market was a subject that this very court considered in detail in the pre-*Twombly* case of *Lockheed Martin Corp. v. Boeing Co.*, 314 F. Supp. 2d 1198 (M.D. Fla. 2004), and its teachings are directly applicable to Malibu’s Second Counterclaim. There this Court noted that a claim of attempted monopolization requires both “an appropriate relevant market” and “allegations of a defendant’s *current market share*.” *Lockheed Martin*, at 314 F. Supp. 2d 1229. (Emphasis added). The Court noted that a “showing that a defendant has between sixty and sixty-five percent market share is sufficient to present the issue of market power to a jury” but that “[o]ther factors, including barriers to entering the relevant market, are thereafter ‘relevant’ to the question of market power.” *Id.* This analysis is fully consistent with Eleventh Circuit precedent, which requires not only that the antitrust claimant’s market be economically plausible, *U.S. Anchor Mfg., Inc. v. Rule Industries, Inc.*, 7 F.3d 986, 999-1000 (11th Cir. 1993), but also that the pleader set forth facts sufficient to show that the antitrust defendants possess the requisite dangerous probability of monopolizing that market. *Spanish Broad.*

Sys., at 376 F.3d 1065, 1074-1076; *Valet Apartment Servs. v. Atlanta Journal & Constitution*, 865 F. Supp. 828, 832 (N.D. Ga. 1994). Such a dangerous probability would require *at least* a 50 percent share of a properly defined market. *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1250 (11th Cir. 2002) (“A market share at or less than 50% is inadequate as a matter of law to constitute monopoly power.”)

Malibu’s Strange Pleading Of Two Product Markets

Malibu’s Second Counterclaim continues unabated to allege a strange two-market theory. It posits that there is not one but two product markets: one for “towered power boats” and another for “towers for watersports performers.” This definition, one might better say this label, is set forth without elaboration for the first time in paragraph 250 of the Second Counterclaim. No succeeding allegation bothers to elaborate on these two purported “markets”: there are no allegations of the market share of either “Correct Craft Entity;” there is no meaningful way to determine the boundaries of either of the two posited markets; there is no explanation as to why these markets are two rather than one; and there is no allegation about the existence or non-existence of barriers to entry or other market conditions that would confer upon the defendant entities the necessary “dangerous probability of achieving monopoly power.” *Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993). Indeed, it is unclear what kinds of “towers” Malibu even intends to include: Just wakeboard towers? Or also fishing towers? Or tuna towers? All are included in what Malibu contends is the prior art. Instead of providing such details,

as a pleader with a plausible theory would, Malibu simply asserts in form-book fashion that the “entities” (which one?) “have a dangerous probability of success in establishing market power in the Relevant Markets through these improper acts.” (Second Counterclaim, ¶250). This is precisely the resort to “labels and conclusions, and a formulaic recitation of the elements of a cause of action” deemed insufficient in *Twombly. Id.*, at 550 U.S.561-62.

Nothing in the following paragraphs of Malibu’s Second Counterclaim illuminates these conclusory allegations. Paragraph 251 says that the “attempt to obtain” market power has come through threats to enforce Correct Craft IP Holding’s patents – patents that are, and must be, presumed valid. 35 U.S.C. § 282. These “threats” have, Malibu asserts, resulted in “numerous other market participants” taking licenses under the patents-in-suit. (¶251). Malibu simply overlooks in this allegation why, if there is monopoly power in the posited markets, there are “numerous other market participants.” After all, if there are numerous other market participants in the market, *as defined* by Malibu, this would suggest that these “market participants,” though licensees, have the ability to “take significant amounts of business away from each other,” *U.S. Anchor Mfg.*, at 7 F.3d 995 – the very opposite of a market dominated by a near monopolist. What is more, it is now settled that a patent, by itself, does not confer upon its owner any particular market power in and of itself. *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

Paragraph 252 says that Correct Craft, Inc. “has filed at least seven lawsuits” against named market participants, several of which resulted in “consent judgments.” This assertion only underscores the notion that the Correct Craft patents are indeed entitled to some presumption of validity, and thus that the assertion of them in the posited markets could be entirely lawful. *See, e.g., Mendenhall v. Cedarapids*, 5 F. 3d 1557, 1569 (Fed. Cir. 1993) (prior decisions upholding the patent-in-suit serve at least to inform the district court that “caution must be taken in reaching a contrary legal conclusion.”)

Paragraph 253 says that the “present lawsuit is still another example of an enforcement action by the Correct Craft Entities,” a rather needless point. Paragraph 254 adds to these assertions that the accused entities “have also directed communications to other market participants,” as would be expected by any patent holder. And paragraph 255 says nothing more than that the accused entities have “induced” “major boating companies” to take licenses— another concession that the posited market is occupied by “major boating companies,” an interesting concession by one accusing another of possessing a dangerous probability of monopoly power. The next paragraphs are of similar ilk.

Finally in paragraph 258 Malibu returns to the nature of the posited market: it asserts that the patents “cover products in the Relevant Markets for which there are no reasonably interchangeable products.” Here we have at least a passing reference to a

necessary fact. But note that the “markets” said to exist are for “towered power boats” and “towers for towing watersports performers.” If there is any intended substance to these markets, they must consist of various forms of “towered power boats” and “towers” available for fitting on to a boat. Which ones? All of the patent-related allegations, incorporated by reference into the antitrust claims, posit the invalidity of the patents because of claimed prior art. (E.g., Second Counterclaim at ¶ 23, claiming a tuna tower said to have been used to tow a water performer). Take, for example, Malibu’s own patented prior art, cited in the Correct Craft patents as U.S. Patent 5,018,474, disclosing a ski pylon – a form of tower capable of pulling a water performer. Is this not a product that one could use as a substitute for Correct Craft’s inventions? It was certainly cited as prior art. Malibu certainly knows of its existence. So why is the pylon form of towing not also a competing alternative whose presence constrains the ability of the Correct Craft “entities” to set prices and reduce output? Malibu does not deign to say. Yet it is fundamental that the “outer boundaries” of a product’s market power are defined by the existence of just such products – products that offer “reasonable interchangeability of use” and thus supply “cross-elasticity of demand between the product itself and substitutes for it.” *Lockheed Martin*, at 314 F. Supp. 2d 1225, quoting from *U. S. Anchor*, at 7 F.3d 995. To ignore Malibu’s own patent under these circumstances is to suggest a market that does not conform to reality. Malibu simply asserts, rather than alleging meaningful facts, that the Correct Craft “entities” occupy a market that does not

encompass interchangeable substitute products. *See Sun Microsystems, Inc. v. Versata Enterprises, Inc.*, 630 F. Supp. 2d 395, 403 (D. Del. 2009) (dismissing *Walker Process* suit for failure of allegations concerning the existence of substitute products). This is insufficient.

Indeed, the only treatment of the critical matter of market substitutes in the entire Second Counterclaim can be found in Malibu's reference to the '823 patent, in which the patentee refers to prior art approaches that "have not satisfied performers, flex too much and lead to boat instability." (Second Counterclaim, ¶ 258). But this is a claim that the '823 patent is patentably distinct from and an improvement over the known art, not that there are no substitutes, and the difference between the two concepts is vast. The inventions claimed in the patents-in-suit do provide a patentable improvement to the prior art, but that does not take away from the fact that there *are* substitutes – products that are reasonably interchangeable with the patented products, even according to Malibu's theories of the prior art.

To define a real market, one that is economically plausible, Malibu must allege something about these substitutes other than that the Correct Craft patents represent an improvement over them. Volumes of antitrust cases suggest the forms such allegations might take, not least *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). But Malibu adds nothing to this accusation, as if it would prefer to avoid the little matter of economics.

Paragraph 258 adds to Malibu's other allegations only a litany of conclusions associated with the addition of patents "to a growing portfolio."

Malibu then launches into the substantive allegations under the Sherman Act in Count 15, in which it again resorts entirely to the form-book prose of a relevant market and damages. Count 16 merely repeats the allegations of the Sherman Act claim.

The Lack of Market Power Allegations is Fatal

And this is all that Malibu asserts as alleged fact for its antitrust claims. It *never* even bothers to say what the market power of either defendant is in either of the posited markets. Yet as this very Court has ruled, an antitrust pleader must allege *something* about the relative market share of the defendant sufficient to show that it does not indeed possess a sufficient share of a viable market to make it plausible to say that it possesses monopoly power. *Lockheed Martin*, at 314 F. Supp. 2d 1225. This is itself fatal to Malibu's allegations. The "entities" Malibu has sued must have the power to "raise price and restrict output," *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969), as the result of a "predominant share of the market." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 464 (1992). Malibu has made the tactical decision to avoid such an allegation – presumably because it cannot do so in good faith.

The Failure to Properly Plead Product and Geographic Markets is Also Fatal

But even more fundamentally, as this Court has also previously ruled, an antitrust pleader must allege a plausible product market. *Lockheed Martin*, at 314 F. Supp. 2d

1225. Malibu has not done this either. It has ignored the fact that there are other products for towing water performers, and it has failed to show why those products do not also occupy the posited markets. It has also failed to explain why there are two markets rather than one. Or why other products for “water performers” than those covered by the patents-in-suit are not reasonable substitutes in one or both of the claimed markets. As this Court has explained, a limitation of a product market to a narrow subset of products, or to a single product, “must be based on a distinction in the *product* sold,” one that is economically viable. *Lockheed Martin*, at 1225, quoting from *T. Harris Young & Associates, Inc. v. Marquette Electronics, Inc.*, 931 F.2d 816, 824-25 (11th Cir. 1991). Where is that economically viable explanation for the Correct Craft products? It does not exist in the Second Counterclaim. Yet in defining a market, even by a pleading, the economic reality of the posited market is critical. *See Eastman Kodak*, at 504 U.S. 482.

It is no answer to say that the relevant market here consists entirely of one product. For this claim would be contradicted by Malibu’s various assertions that there are other “market participants,” only some of whom are licensees of the patents-in-suit. To properly define a market as a one-product market, moreover, the pleader must say something about why there are no interchangeable products that are reasonable substitutes to those of Correct Craft, viewing the market in light of “commercial realities.” *Eastman Kodak*, at 504 U.S. 482. And it is a rare thing indeed for a viable market, even one covered by patents, to be an entirely one-product market. *See, e.g.*,

Harrison Aire, Inc. v Aerostar Int'l, 423 F.3d 374 (3rd Cir. 2005) (noting that the one-product market in *Eastman Kodak* was rare, and the function of locked-in customers, high switching costs, and other factors peculiar to that particular after-market); *Kaiser Foundation v. Abbott Labs*, 2009 U.S. Dist. LEXIS 1074512 at * 26 (C.D. Cal. Oct. 8, 2009) (granting summary judgment in a *Walker Process* suit because the patentee “is a market to itself and, thus, *ipso facto* a monopoly is unpersuasive.”)

Malibu’s choice to supply nothing but legal buzzwords about the particular markets it assumes to exist will not suffice to “nudge” its claims “across the line from conceivable to plausible.” *Twombly*, at 550 U.S. 570.

Finally, Malibu also eschews any mention of why the “markets” it posits are only national markets. Are there no Asian competitors for “towers” for “water performers,” as there are for most products? Malibu does not say. It simply asserts, as if by form book, that the markets are “relevant nationwide markets.” Why? A viable geographic market is defined by the area of effective competition: the geography within which the accused’s customers can practically turn to other sellers for supplies (including substitutes) if the accused raises prices or restricts output. *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 359 (1963) (The “area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.”). If one chooses, as Malibu does, to posit a market in “towers for towing watersports performers” separate and apart

from a market in “towered power boats,” then every retrofitter and supplier of retrofit parts for towing must be included. Why would one stop at the nation’s borders in counting? Surely there are cheap substitutes for retrofitting boats available overseas. Malibu cannot plead a plausible market without saying *something* that makes sense about this question. Yet it has said nothing.

Conclusion

What emerges from a study of the market definition allegations Malibu has chosen to supply, even in the face of a previous dismissal, is that it has no plausible factual basis for asserting an attempt to monopolize. If it had, it would not have repeated the same mistakes once again, electing to avoid any allegations that Correct Craft, or its patent holding company – even with allegedly invalid patents – have the ability to control price and reduce output, or are dangerously close to that power, in a real, economically viable product and geographic market – one in which available substitutes to the Correct Craft products do not exist. This Court should not overlook the Supreme Court’s admonitions in *Twombly*: if Malibu cannot plead, after a second try, a plausible factual basis for inferring monopoly power in the hands of the “Correct Craft Entities,” it would be wrong to expose these parties to the prodigious expense of an antitrust counterclaim that is doomed to failure. The Court should dismiss both antitrust counts with prejudice.

Respectfully submitted March 29, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2010, I electronically filed the foregoing document using the Case Management/Electronic Case Filing (“CM/ECF”) system which will send a Notice of Electronic Filing to the following CM/ECF participants:

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