

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KATHLEEN AND GORDON SCHAFER,

Plaintiffs

VERSUS

STATE FARM FIRE AND CASUALTY
COMPANY AND XACTWARE, INC.,

Defendants.

* CIVIL ACTION
*
* NO. 06-8262
*
* SECTION "K"(2)
*
* JUDGE DUVAL
*
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REPLY IN SUPPORT OF STATE FARM'S MOTION TO DISMISS

Defendant State Farm Fire and Casualty Company ("State Farm") respectfully submits this Reply in support of its motion to dismiss the Amended Complaint (the "Complaint"). By their Response,¹ Plaintiffs have attempted to supplement their inadequate allegations through briefing, but those embellishments cannot save their Complaint. State Farm's motion to dismiss should be granted.

ARGUMENT

I. Count I Must be Dismissed.

Most of Plaintiffs' Response attempts to salvage their antitrust claim under Section 122 of Louisiana's Trade and Commerce Code.² However, the United States Supreme

¹ For ease of reference, Plaintiffs' Consolidated Memorandum in Opposition to Defendants' Motions to Dismiss is referred to herein as "Plaintiffs' Response" or "Pl. Resp."

² See Pl. Resp. at 9-10. Plaintiffs do not dispute State Farm's prior showing that no claim could proceed under the federal Sherman Act or under the Louisiana Unfair Trade Practices Act.

Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 2007 WL 1461066 (May 21, 2007), attached as Exhibit A, makes clear that Plaintiffs' claim must be dismissed. In that case, the Court reiterated that an antitrust claim must pass two threshold requirements to survive a motion to dismiss. *Id.* at p. 11, n.5. First, the allegations must fall on the right side of the "line between the conclusory and the factual." *Id.* Second, the claim cannot be merely "factually neutral," but instead must state facts that actually tend to *exclude* the possibility that the defendant acted independently. *Id.* Plaintiffs' claim clearly fails both of these requirements.

A. Plaintiffs Have Not Adequately Alleged a Conspiracy.

1. Plaintiffs' Claim Lacks the Specificity Required Under *Bell Atlantic*.

In this case, Plaintiffs have conclusorily accused State Farm of engaging in a supposed horizontal conspiracy to "fix the prices utilized in calculating the amount(s) to be paid" to its homeowners insureds, allegedly by using "below market" price information supplied by defendant Xactware, Inc. to estimate the cost for necessary building repairs. *See* Complaint at ¶ 32. But Plaintiffs have not alleged any facts in support of that sweeping accusation. Plaintiffs do not state what damage occurred to their home, what State Farm estimated as the cost to repair that damage, whether Plaintiffs attempted to have the damage repaired, whether they were able to complete the repairs at the cost State Farm estimated, or whether they ever complained that State Farm's estimate was too low.³ Likewise, Plaintiffs' Complaint is absolutely devoid of factual allegations regarding State Farm's supposed conspiracy with other insurers. Indeed, Plaintiffs have not identified *a single specific insurer* that allegedly conspired with State Farm, a single communication by any State Farm employee with any other insurer, or a single supposed communication in which an agreement was formed, much less any terms of a supposed

³ Although the Response purports to describe how State Farm handles repair cost disputes (*see* Pl. Resp. at 5-6), the Complaint actually contains no supporting factual allegations.

agreement. Instead, Plaintiffs' allegations merely contend that State Farm engaged in "conscious parallelism" by copying other insurers' use of Xactware's data. That is precisely the sort of vague, amorphous, and speculative pleading that *Bell Atlantic* so clearly condemns.

In *Bell Atlantic*, the Court dismissed as legally deficient a complaint striking in its similarity to Plaintiffs' Complaint here, and in doing so, left no doubt that even where parallel, anti-competitive conduct among competitors is alleged, an antitrust conspiracy claim *cannot* proceed "absent some *factual context suggesting agreement, as distinct from identical, independent action.*" See Ex. A at 3 (emphasis supplied). The plaintiffs in *Bell Atlantic* were consumers who sued several telephone companies for an alleged seven-year conspiracy to refrain from competing in markets across the United States. See Ex. A at 3-4, 13 n.10. However, the only support for the plaintiffs' allegation of conspiracy was that the defendants had engaged in "conscious parallelism" – or knowingly copied one another – in refusing to attempt entry into allegedly lucrative new markets for their services. *Id.* at 9. Just like here, the *Bell Atlantic* pleadings "mentioned no specific time, place or person involved in the alleged conspiracies," and offered "no clue as to which of the [defendants] (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place." *Id.* at 13, n.10.

As the Supreme Court noted in *Bell Atlantic*, Rule 8 requires that even a simple negligence claim must allege facts identifying the defendant, the occurrence that caused the plaintiff's injury, and the date, time, and place of that occurrence. *Id.* The Court observed that a defendant responding to such a negligence claim would at least know what to answer, while in contrast, the *Bell Atlantic* defendants would have had "little idea where to begin" had they been required to respond to the plaintiffs' amorphous pleading. Such conclusory allegations, as the Court noted, simply cannot pass muster under Rule 8.

Plaintiffs argue that they need not identify State Farm’s alleged co-conspirators at the pleading stage (*see* Pl. Resp. at 14), and further cite to authority holding that a conspiracy may be formed through incremental actions by different alleged conspirators at different times (*see* Pl. Resp. at 10). Those authorities, however, are clearly distinguishable. Plaintiffs’ pleading gives no hint at all as to the identity of *any* alleged conspirator, and does not identify *any* contact between *any* employees of *any* competing carriers to show the existence of an agreement. None of Plaintiffs’ cited authority permitted such a vague and conclusory antitrust claim to survive dismissal.⁴ State Farm has shown that Plaintiffs’ allegations cannot support an antitrust claim (*see* S.F. Mem. at 6-11), and *Bell Atlantic* confirms that conclusion.

2. Plaintiffs Have Not Sufficiently Alleged “Plus Factors.”

Plaintiffs concede (as they must) that under *Bell Atlantic*, their antitrust claim cannot proceed based solely on allegations of conscious parallelism between State Farm and others – were the law otherwise, the courts would be inundated with antitrust suits against gas stations, car dealers, grocery stores, and the myriad other arms of commerce that reference publicly available market data in their business decisions. Plaintiffs feign to distinguish *Bell Atlantic* based on three purported “plus factors” (*see* Pl. Resp. at 11-12), but their supposed “plus factors” are not supported by any factual allegations tending to exclude the equally or *more*

⁴ *See Hewlett-Packard Co. v. Arch Assoc. Corp.*, 908 F. Supp. 265, 269 (E.D. Pa. 1995) (complaint adequately alleged conspiracy where alleged unnamed co-conspirators were a finite number of companies within the defendant’s own distribution network and had all entered into a particular type of contract with the defendant); *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 872 F. Supp. 52, 65-66 (S.D.N.Y. 1994) (where plaintiff plainly based conspiracy claim on defendant’s contracts with its own clients and travel agents, and defendant had exclusive knowledge of the identity of those individuals and entities, complaint would not be dismissed for failure to name the alleged co-conspirators); *Interstate Circuit, Inc. v. United States Paramount Pictures Distrib. Co.*, 306 U.S. 208, 226-27 (1939) (affirming judgment for plaintiffs based on evidence that defendants were invited to conspire, agreed to do so, and did conspire, though participants joined the conspiracy at different times).

plausible conclusion that State Farm's alleged conduct was independent. Plaintiffs' purported antitrust claim thus is not in any way "factually plausible," as *Bell Atlantic* requires.⁵

The first two "plus factors" Plaintiffs claim to have alleged are (i) that State Farm supposedly had a motive to conspire with other insurers to increase its profits by using Xactware's allegedly "below market" pricing data; and (ii) that State Farm could not have used Xactware's data independently to achieve that goal without harming its ability to compete. *See* Pl. Resp. at 12. These contentions defy Plaintiffs' own factual allegations *and* common sense.

To begin with, while Plaintiffs assert that Xactware's pricing data is uniformly "below market," that assertion contradicts their own simultaneous allegation that Xactware's pricing information is based on *actual* market data gleaned from such sources as surveys of area contractors and material costs from major area suppliers. *See* Complaint at ¶ 19. Further, as State Farm has shown, State Farm had strong reason *independently* to use Xactware data for post-Katrina homeowners insurance claims, given that the Louisiana Department of Insurance mandated that Xactware or comparable data be used as a starting point for resolving repair cost disputes under the State's alternative dispute resolution program. *See* S.F. Mem. at 10-11.

Citing to *In re Flat Glass Antitrust Litigation*, 385 F.3d 350 (3d Cir. 2004), Plaintiffs next posit that State Farm's use of Xactware data would have been contrary to its self-interest absent a conspiracy. *Flat Glass* presented a wholly different situation, however. In *Flat Glass*, the plaintiffs complained of a price fixing conspiracy in the sale of flat glass for new automobiles. *Id.* at 353-55. Overruling a summary judgment for the defendants, the *Flat Glass* court held that plaintiffs' claim could proceed based on evidence that (i) one defendant had

⁵ *See* Ex. A at 9 ("[R]esisting competition is . . . so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing.").

admitted to the Department of Justice that it had conspired with others; (ii) the relevant market was highly concentrated among just a handful of sellers; (iii) the defendants had engaged in parallel price increases; and (iv) some defendants knew of competitors' impending price increases before those increases were publicly announced. *Id.* at 361-67.⁶ *Flat Glass* is plainly distinguishable on its facts and provides no support for Plaintiffs' antitrust theory here. Plaintiffs have not alleged anything remotely approaching the evidence of conspiracy in *Flat Glass*, and that case involved an alleged conspiracy by sellers to fix the price of their goods, while here, State Farm is not alleged to have conspired to fix the price at which it sells its insurance policies. Rather, Plaintiffs' theory seems to be that simply by using a widely available and Insurance Department-approved repair cost estimating program, State Farm fixed its *estimates* for the cost to repair insureds' storm-damaged homes.

What *can* be taken from *Flat Glass*, however, is that the structure of the relevant market must make an antitrust claim plausible. Indeed, that is of particular concern here, given that homeowners insurers' conduct is highly regulated in Louisiana.⁷ But Plaintiffs have not alleged facts showing an oligopolistic market; specifically, that either the market for insurance or the market for home repair materials and labor in Louisiana are dominated by just a few sellers

⁶ The plaintiffs in *Flat Glass* also complained that the defendant sellers used an independent company's list of recommended prices to fix the price for replacement flat glass and stabilize the market. *Id.* at 369-70. The *Flat Glass* court affirmed summary judgment *against* the plaintiffs on that claim for insufficient evidence, despite a showing that the defendants had engaged in parallel price increases for their replacement glass products. *Id.* at 370.

⁷ See *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411-12 (2004) (where a regulatory structure exists, "the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny").

or buyers and thus conducive to “secret price fixing.”⁸ There are absolutely no factual allegations to suggest that State Farm’s unilateral, independent use of Xactware data would have harmed State Farm’s ability to compete in the future sale of homeowners policies. Moreover, Plaintiffs themselves have articulated an entirely sensible, pro-competitive reason why insurers might wish to use data from Xactware when handling claims:

[Insurers] allow their insureds to select a contractor who can perform the repairs, and agree to reimburse their insureds for the cost of such repairs.

The potential problems which may be created by this system of reimbursement are obvious. If an insured is guaranteed reimbursement up to any amount spent on repairs, there will be little incentive to shop around to secure an advantageous price for the repair work.

Pl. Resp. at 4. And, of course, such cost-cutting measures benefit the insured as well – the fewer dollars spent to perform repairs to one item of damage, the more dollars that remain available under available policy limits for further necessary repairs. In sum, there are numerous, entirely logical and benign explanations for State Farm’s alleged decision to use the market data supplied by Xactware when adjusting claims following Hurricane Katrina.⁹ Like the deficient complaint in *Bell Atlantic*, “nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy.” *See* Ex. A at 9.

The only remaining “plus factor” Plaintiffs point to in their Complaint is their allegation that “insurance companies have actively coordinated their actions through various organizations and associations.” *See* Pl. Resp. at p. 12 (quoting Complaint at ¶ 35). Plaintiffs

⁸ Plaintiffs’ citation to *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 222-23 (1948), is inapt for the same reason. That case also involved an oligopolistic market in which three buyers controlled the market for purchasing sugar beets and thus had the power and motive to conspire to suppress the price they would pay for that product. *Id.*

⁹ It is well-settled that insurers frequently use market data from outside sources for pro-competitive purposes. *See, e.g., Quality Auto Body, Inc. v. Allstate Ins. Co.*, 660 F.2d 1195, 1204 (7th Cir. 1981); *Zinser v. Rose*, 868 F.2d 938, 942 (7th Cir. 1989).

apparently recognize that this vague assertion falls well short under *Bell Atlantic*, however, and thus have offered to amend their Complaint to supplement it by listing “the myriad of property insurer associations and organization[s] which regularly hold meetings and conventions.” This Court should not be enticed by that offer, as Plaintiffs’ proposed supplementation plainly could not take Plaintiffs any closer to alleging a sufficient, plausible antitrust claim.¹⁰ Indeed, inasmuch as that is the best cure Plaintiffs can contemplate, their antitrust claim should be dismissed now with prejudice.

B. Plaintiffs Have Not Adequately Alleged an Unreasonable Restraint of Trade.

State Farm has shown that the supposed conduct Plaintiffs complain of in their antitrust claim simply is not “horizontal price fixing.” State Farm is not accused of conspiring with others to fix the price for the policies it sells, nor is it accused of having fixed the price of home repair materials or labor in Louisiana. *See* S.F. Mem. at 12-13. Thus, Plaintiffs’ inapt labeling of their claim as a “per se” illegal price fixing must be rejected. That then means that Plaintiffs’ claim cannot proceed absent allegations defining the market in which an allegedly anticompetitive effect occurred and identifying what unreasonable restraint of trade occurred. *Id.* It is undisputed that Plaintiffs’ Complaint is devoid of any such allegations, and their antitrust claim thus must be dismissed as a matter of law for this reason as well. *Id.*

C. Plaintiffs Are Not Entitled to Discovery to Supplement Their Pleading.

Plaintiffs cite two United States Supreme Court cases for the proposition that dismissal of an antitrust claim should be granted only “sparingly” if a plaintiff has not been given “ample opportunity” to conduct discovery. *See* Pl. Mem. at 8, quoting *Poller v. Columbia*

¹⁰ *See Bell Atlantic*, Ex. A at p. 14, n.12 (allegation that competitors participated in industry associations at a time when they charged the same price for their respective goods is not sufficient to suggest that price fixing occurred during those association meetings).

Broadcasting, 368 U.S. 464, 473 (1962); *Hospital Building Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1975). But it is just such discovery predicated on mere speculation and conclusory assertions that *Bell Atlantic* sought to stem. Any notion that aspiring antitrust plaintiffs are entitled to subject defendants to the enormously costly and time-consuming discovery that antitrust actions inevitably involve – *before* adequately alleging facts sufficient to support a claim – has been resoundingly rejected in *Bell Atlantic*.¹¹

II. Plaintiffs’ Remaining Claims Likewise Must be Dismissed as Inadequately Pleaded.

Plaintiffs’ failure to allege facts in their Complaint is fatal to their remaining claims as well. None can pass muster under Rule 8, much less the heightened requirements of Rule 9 applicable to Plaintiffs’ purported fraud claim. *See Bell Atlantic*, Ex. A at p. 11, n.3. (Rule 8(a)(2) still requires a “showing,” rather than a blanket assertion, of entitlement to relief).

Plaintiffs’ Response fails to address the necessary elements of their contract, negligence, and La. R.S. 22:658/1220 claims. Neither the Complaint nor the Response identify the items Plaintiffs believe State Farm underpaid or even the provision of the insurance policy that Plaintiffs contend that State Farm breached.¹² Plaintiffs’ Response merely cites to the conclusory allegations of paragraphs 40-43 of the Complaint, yet those allegations do little more

¹¹ As the Court has stated, “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases” before summary judgment or trial, and thus, 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.’” *See* Ex. A at p. 7 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975)).

¹² *See Arias-Benn v. State Farm Fire & Cas. Ins. Co.*, No. 05-6269, 2006 WL 1207951 (E.D.La. Apr. 26, 2006) (Berrigan, C.J.) (ordering plaintiffs to file a more detailed complaint to allege a specific provision of the insurance policy allegedly breached and to state with more particularity the acts allegedly constituting fraud and misrepresentation).

than restate the insurance statutes and offer none of the factual information required under Rule 8. *Bell Atlantic*, Ex. A at 6 (plaintiffs must provide more than mere "labels and conclusions").

Plaintiffs' fraud allegations fare even worse. As State Farm has shown, Rule 9 requires that the plaintiffs aver facts that establish the who, what, when, where and how of the alleged fraud. *See Shushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir. 1993). But Plaintiffs' Response concedes that they have named no individuals who allegedly committed fraud and they have not named any particular items for which plaintiffs were allegedly underpaid. Pl. Resp. at 22. The only reference to "when" and "where" of the alleged fraud are the allegations that it occurred "during the claims handling process and Hurricane's [sic] Katrina and Rita" and "in the state of Louisiana." These allegations do not state the particular time, place, and contents of the false representations, as required by Rule 9 and the Fifth Circuit. *See S.F. Mem.* at 13-17.

CONCLUSION

For all of the reasons set forth here and in State Farm's initial memorandum, State Farm respectfully requests that its motion to dismiss be granted in its entirety.

Respectfully submitted,

/s/ J. Dalton Courson

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CERTIFICATE

I hereby certify that a copy of the above and foregoing Reply Memorandum in Support of State Farm's Motion to Dismiss has been served upon all counsel of record by the CM/ECF electronic filing system, this 11th day of June, 2007.

/s/ J. Dalton Courson
