UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE: PACKAGED SEAFOOD PRODUCTS ANTITRUST LITIGATION

Case No.: 15-MD-2670 JLS (MDD)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

(ECF No. 1631)

Presently before the Court is Defendants Lion Capital LLP and Big Catch Cayman LP's (together, "Defendants") Omnibus Motion to Dismiss the Indirect Purchaser End Payer Plaintiffs' ("EPPs"), the Commercial Food Preparer Plaintiffs' ("CFPs"), the Direct Purchaser Class Plaintiffs' ("DPPs"), the Direct Action Plaintiffs' ("DAPs"), and The Cherokee Nation's[1] (collectively, "Plaintiffs") amended complaints[2] ("Mot.," ECF No. 1631). Plaintiffs jointly filed a Response in Opposition to ("Opp'n," ECF No. 1722) and

[1] The Cherokee Nation filed a Notice of Voluntary Dismissal on November 16, 2018. (ECF No. 1662) Consequently, the Court will not address the arguments made by Defendants in their Motion that relate specifically to The Cherokee Nation's Complaint since they are now moot.

[2] The Court has previously noted that "for the purposes of the Omnibus Motion [to Dismiss], the Fourth Amended Complaint filed on October 5, 2018 in The Kroger Co., et al. v. Bumble Bee Foods LLC, et al., Case No. 16-cv-00051 (the "Kroger Complaint," [ECF No. 1423]), is in all material respects representative of the operative DAP amended complaints." (ECF No. 1529 ¶ 4.) Plaintiffs also agree that the Kroger Complaint is "representative of all Plaintiffs' allegations against Lion." (Opp'n at 2 n.2.)

Defendants filed a Reply in Support of ("Reply," ECF No. 1760) the Omnibus Motion. Having considered the Parties' arguments, and the law, the Court rules as follows.

BACKGROUND

This case concerns an alleged conspiracy to fix the prices of packaged seafood products throughout the United States. The many civil actions relating to this conspiracy were consolidated in this multidistrict litigation and centralized pretrial proceedings began in this Court on December 9, 2015. (*See generally* Transfer Order, ECF No. 1.) Early in this multidistrict litigation, the Court divided Plaintiffs into four tracks: (1) the DAPs, who are direct purchasers proceeding against Defendants individually; (2) the DPPs, who are direct purchasers proceeding on behalf of a class; (3) the CFPs, who are indirect purchasers proceeding on behalf of a class; and (4) the EPPs, who are indirect purchasers proceeding on behalf of a class. (ECF No. 119 at 1–2.)

I. The Lion Defendants

The present Motion concerns three Defendants: Lion Capital LLP ("Lion Capital") and Big Catch Cayman LP ("Big Catch"), the moving Defendants who are both specially appearing, and Lion Capital (Americas), Inc. ("Lion Americas") (together, the "Lion Defendants"). Defendant Lion Capital is a British private equity firm organized under the laws of the United Kingdom. (Kroger Compl. ¶ 189.) Lion Capital purchased Defendant Bumble Bee Foods LLC ("Bumble Bee") in 2010. (*Id.*) Lion Capital maintained an office in Los Angeles, California, that oversaw the Bumble Bee investment. (*Id.*)

Defendant Lion Americas is a subsidiary of Lion Capital and a Delaware corporation with its principal place of business in Santa Monica, California. (*Id.* ¶ 190.) Lion Americas provides investment advice regarding investments in North America to Lion Capital, which Lion Capital considers on behalf of the investment funds that it manages. (*Id.*)

Defendant Big Catch Cayman LP ("Big Catch") is a holding company that wholly owns Bumble Bee, (*id.* ¶ 200), and is organized under the laws of the Cayman Islands. (Mot. at 16.) Big Catch conducts no day-to-day operations, has no board meetings, and has no officers or employees. (Kroger Compl. ¶ 201.)

Several employees of the Lion Defendants are central to Plaintiffs' arguments. Lyndon Lea was the co-founder of Lion Capital and its managing partner. (*Id.* ¶¶ 189, 192.) Mr. Lea assigned the principle responsibility for managing the investment in Bumble Bee to Lion Capital members Eric Lindberg, Jeff Chang, and Jacob Capps, all of whom worked in the Los Angeles office overseeing the Bumble Bee investment. (*Id.*) Mr. Lindberg and Mr. Capps held positions at both Lion Capital and Lion Americas. (*Id.* ¶ 190.) Mr. Lindberg was a director at Lion Americas and a member at Lion Capital, while Mr. Capps was both the President of Lion Americas and member at Lion Capital. (*Id.*)

II. Procedural History Regarding the Lion Defendants

The Lion Defendants were not originally named in the Plaintiffs' complaints. In late 2017 and early 2018, however, Plaintiffs filed four motions to amend the scheduling order to add the Lion Defendants, (ECF Nos. 530, 724, 769, 811), which the Court granted in relevant part, (ECF No. 884).

Shortly after Plaintiffs filed their amended complaints, the Lion Defendants filed three motions to dismiss against (1) The Cherokee Nation (ECF No. 997), (2) the Bashas Plaintiffs (ECF No. 999), and (3) the EPPs, CFPs, DPPs, and DAPs (ECF No. 1248). Following briefing and oral argument on all three motions, the Court granted in part and denied in part Defendants' motions. ("Order," ECF No. 1358). Relevant to the present Motion, the Court granted Defendants' previous motion with regard to Lion Capital and Big Catch under Federal Rule of Civil Procedure 12(b)(6), finding that Plaintiffs had failed to allege plausible claims against Lion Captial and Big Catch. (*Id.* at 79–87.) The Court did not, however, dismiss Plaintiffs' claims against Lion Americas, finding sufficient allegations to state plausible claims. (*Id.*) Plaintiffs subsequently filed amended complaints that sought to address the deficiencies addressed in the Court's September 5, 2018 Order. (*See* ECF Nos. 1423, 1427, 1432, 1433, 1437, 1444, 1445, 1446, 1447, 1448, 1449, 1454, 1455, 1460, 1461, 1466, 1467, 1470.) Defendants filed the present Motion to dismiss for failure to state a claim under Rule 12(b)(6).

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the defense that the complaint "fail[s] to state a claim upon which relief can be granted," generally referred to as a motion to dismiss. The Court evaluates whether a complaint states a cognizable legal theory and sufficient facts in light of Federal Rule of Civil Procedure 8(a), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Although Rule 8 "does not require 'detailed factual allegations,' . . . it [does] demand more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A complaint will not suffice "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at 557).

To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible when the facts pled "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at 556). That is not to say that the claim must be probable, but there must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* Facts "'merely consistent with' a defendant's liability" fall short of a plausible entitlement to relief. *Id.* (quoting *Twombly*, 550 U.S. at 557). This review requires context-specific analysis involving the Court's "judicial experience and common sense." *Id.* at 678 (citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.*

Where a complaint does not survive 12(b)(6) analysis, the Court will grant leave to amend unless it determines that no modified contention "consistent with the challenged pleading . . . [will] cure the deficiency." *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schriber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)).

ANALYSIS

I. Whether Plaintiffs State a Claim Against the Lion Defendants

Plaintiffs bring a cause of action under section one of the Sherman Act. (*See, e.g.*, Kroger Compl. ¶¶ 243–50.) Defendants raise three arguments for why Plaintiffs' complaints must be dismissed. First, Defendants contend that Plaintiffs fail to state a claim that Lion Capital is a direct participant in the alleged conspiracy. (Mot. at 19–26.) Second, Defendants argue that Plaintiffs fail to show that they are liable under Plaintiffs agency theory of liability. (*Id.* at 26–44.) Lastly, Defendants argue that Plaintiffs have failed to state any plausible allegations concerning Big Catch specifically. (*Id.* at 44.) The Court will address each argument in turn.

A. Defendants' Arguments

1. Direct Involvement by Lion Capital

Defendants contend that, despite extensive fact discovery, Plaintiffs have still failed plausibly to allege with any specificity how Lion Capital, through the actions of Mr. Lea, the managing partner of Lion Capital, participated in the alleged conspiracy. (*Id.* at 21.) Defendants examine four new purported factual enhancements described in the Amended Complaint and contend that that they are insufficient to establish that Lion Capital plausibly participated in the conspiracy. (*Id.*)

First, the Lion Defendants analyze a July 2012 email that features Mr. Lindberg, a director at Lion Americas and a member of Lion Capital, discussing with Mr. Lea the implication of a recent write down in the value of Lion's investment in Bumble Bee. (*Id.* at 22.) In that correspondence, Mr. Lindberg explains to Mr. Lea that he believed that Bumble Bee had missed its financial goals because of pricing issues "caused by Starkist's

dysfunctional management team that was fired by Dongwon" and that this issue was resolved because StarKist and Dongwon "are now in lockstep with us in setting pricing rationally." (Kroger Compl. ¶ 221.)

Plaintiffs include this correspondence in their Amended Complaint as proof that Mr. Lea, and therefore Lion Capital, was directly involved in the conspiracy. Defendants argue that this snippet is no different than an earlier email correspondence, from March 2012, included in the previous complaint that was considered and rejected by the Court as insufficient to state a claim against Lion Capital. (Mot. at 23.)

Second, Defendants describe a March 18, 2012 meeting brief sent by Mr. Lindberg to Mr. Lea and others memorializing a meeting he had with the Thai Union president, Mr. Chansiri, on March 13, 2012. Plaintiffs conclude that this correspondence showed that Mr. Lindberg "always briefed Lea and others at Lion Capital" following meetings that involved aspects of the price fixing conspiracy. (Kroger Compl. ¶ 232.) Defendants argue that this is *ipse dixit* logic and should be rejected as proof that Mr. Lea somehow was directly involved in any conspiracy, since the letter brief contains no plausible allegations that such conversations occurred. (Mot. at 24.)

Next, Defendants address the argument that, as a sophisticated investment entity, Lion Capital would have "connected the dots and determined that" the successful pricing actions from 2008 to 2010 were the result of collusion among the largest contenders in the canned tuna industry. (Kroger Compl. ¶ 208). Defendants urge the Court to adhere to its prior holdings that Plaintiffs must "allege facts such as a 'specific time, place, or person involved in the alleged conspiracy'" to state a claim and find that Plaintiffs have once again failed to do so. (Mot. at 24.)

Lastly, Defendants examine Plaintiffs' assertions regarding the promotional material included on their website. (*Id.* at 25.) Plaintiffs allege that Lion Capital advertises itself as a "private equity firm that closely manages the business affairs of the companies in which it invests" and, consequently, it would have known of the alleged conspiracy. (Kroger Compl. ¶ 216.) Defendants contend that the promotional material is mere puffery

and that the Court could not reasonably rely on it as evidence that Defendants were directly involved in the alleged conspiracy just because they claim to have an active hand in managing their portfolio companies. (Mot. at 25.)

2. Agency Liability Theory

Defendants next argue that Plaintiffs have not adequately pled facts that could establish an agency relationship between Lion Americas and Lion Capital. Defendants contend that Plaintiffs have failed to "carry their pleading burden on the three requisite elements of an agency claim," which are: "(1) manifestation by the principal that the agent shall act for him; (2) that the agent has accepted the undertaking; and (3) that there is an understanding between the parties that the principal is to be in control of the undertaking." (*Id.* at 30 (citing *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 622 F. Supp. 2d 890, 899 (N.D. Cal. 2009) (citing Restatement (Third) of Agency § 1.01)).)

Defendants argue that Plaintiffs' contention that Lion Americas exists only because of Lion Capital is not sufficient to plead a plausible agency relationship. (*Id.*) Defendants argue that the fact that Lion Americas has no independent income and exists solely to manage Lion Capital's investment vehicles is not surprising given its status as a wholly owned subsidiary of Lion Capital. (*Id.*) Similarly, Defendants maintain that the fact that Lion Americas paid salaries to certain employees who were also entitled to compensation from Lion Capital does not "reflect an agreement on Lion Americas's behalf to be completely controlled by Lion Capital." (*Id.* at 31.)

Next, Defendants contest that Plaintiffs have pled facts that would show that Lion Capital had day-to-day control over Lion Americas. Defendants, citing to the Supreme Court's decision in *United States v. Bestfoods*, 524 U.S. 51 (1998), contend that parent corporations are generally not liable for the actions of dual employees working nominally on behalf of a subsidiary. (*Id.* at 31.) They argue that a parent can only be held liable if it is shown that one entity had "day to day" or pervasive control over the other. (*Id.*)

Plaintiffs rely heavily on a Membership Agreement signed by certain employees of Lion Americas as proof that Lion Capital had pervasive control over Lion Americas.

(Kroger Compl. ¶ 192.) Plaintiffs contend that the Membership Agreement dictated that certain Lion Americas employees' entire focus "must be devoted to the day-to-day responsibilities assigned and directed by Lea." (*Id.*) This, Plaintiffs argue, is proof that Lion Capital directed on a granular level the actions of Lion Americas. (*Id.*) Defendants say this is a gross mischaracterization of the Membership Agreement, which provides that:

> Each Member shall, unless the Managing Partner otherwise agrees, devote the whole of his time and attention to the performance of his obligations on behalf of the LLP and its Associates, as required by the Managing Partner and shall not engage in other business activities without the consent of the Managing Partner.

(Declaration of Adam Paris ("Paris Decl.) Ex. A at 14.) "Associates" is defined broadly in the Membership Agreement to include "any corporation, body corporate or undertaking which in relation to the person concerned is a holding company or parent undertaking or a subsidiary." (*Id.* at 4.) Defendants argue that this definition makes it clear that Members were not directed to work solely in the interest of Lion Capital, but rather for the Lion Defendants more broadly. (Mot. at 32–33.)

Relatedly, Plaintiffs argue that Lion Capital is liable because certain employees of Lion Americas acted with the knowledge and at the direction of Mr. Lea. (Kroger Compl. ¶ 206.) Defendants argue that the threadbare allegations in the Amended Complaint are not enough to plead an agency relationship between those employees and Lion Capital. (Mot. at 33.) Furthermore, Defendants assert that the Membership Agreement establishes that Mr. Lea only maintained a "high level" of oversight over the employees in question and not the pervasive control over their day-to-day actions necessary to create an agency relationship. (*Id.*)

3. Vicarious Liability Theory

Next, Defendants address Plaintiffs' argument that Lion Capital is vicariously liable for the actions of Messrs. Lindberg, Chang, and Capps as a "matter of both U.S. and British

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Law." (*See* Kroger Compl. ¶ 206.) As a threshold matter, both parties agree that only U.S. law is pertinent here. (*See* Opp'n at 7; Reply at 3.)

Defendants argue that, under federal common law, *respondeat superior* liability is only appropriate when "(1) the conduct occurred substantially within the time and space limits authorized by the employment; (2) the employee was motivated, at least in part, by a purpose to serve the employer; and (3) the act was of a kind that the employee was hired to perform." (Mot. at 37.) Defendants argue that if *respondeat superior* liability applies at all, then it could only apply to the action undertaken by Messrs. Lindberg, Capps, and Chang as employees of Lion Americas, not Lion Capital. (*Id.* at 37–38.) Defendants argue that the Amended Complaints are devoid of allegations about how Messrs. Lindberg, Capps, and Chang acted within the scope of their Lion Capital employment in participating in the alleged conduct, since it would have been in their capacity as Lion Americas employees that they would have been involved in the price fixing conspiracy. (*Id.* at 38.)

4. Big Catch

Finally, Defendants urge the Court to abide by its prior holding and once again dismiss Big Catch because the "complaint contains no factual matter concerning Big Catch's participation in the conspiracy." (Mot. at 39 (citing Order at 87).) Defendants argue that the Amended Complaints contain no new facts or allegations that would compel a different result. (*Id.*)

B. Plaintiffs' Arguments

1. Direct Involvement by Lion Capital

Plaintiffs respond to Defendants' argument that they have not included plausible allegations of direct involvement by Lion Capital in two ways. First, Plaintiffs argue that their amended complaint successfully alleges conduct by Messrs. Lindberg, Capps, and Chang, as well as Lion Americas, such that Lion Capital is plausibly liable for their conduct (Opp'n at 6–18); second, they contend that they have pled specific incidents that tie Mr. Lea to the conspiracy. (*Id.* at 18–20.)

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As far as specific incidents are concerned, Plaintiffs allege that between 2010 and 2012, Mr. Lea was briefed on or directly involved in conversations about pricing among the big three packaged seafood competitors. (*Id.* at 19.) Plaintiffs contend that these conversations are sufficient to show that Mr. Lea, and therefore Lion Capital, was directly involved in the conspiracy. (*Id.* at 19–20.)

2. Agency Liability for Messrs. Lindberg, Capps, and Chang

Regarding Plaintiffs' agency liability claims, Plaintiffs first take issue with the test advanced by Defendants for determining agency liability in federal courts. Plaintiffs agree that federal common law controls with respect to federal claims under the Sherman Act, (Opp'n at 7 (citing Restatement (Third) of Agency § 1.01)), but argue that the agency test does not require them to prove that Lion Capital had day-to-day operational control over Messrs. Lindberg, Capps, and Chang. (Opp'n at 10.) Instead, Plaintiffs say that what matters "is not how much control a [principal] exercises, but how much control the [principal] retains the *right* to exercise." (*Id.* (quoting *Freeney v. Bank of Am. Corp.*, Case No. CV 15-02376 MMM (PJWx), 2015 WL 12535021, at *19 (C.D. Cal. Nov. 19, 2015)).

Plaintiffs argue that the Membership Agreement establishes that Lion Capital retained complete control over the activities of Messrs. Lindberg, Capps, and Chang. Plaintiffs point to specific language in the Agreement which states that signatories were required to act "on behalf of Lion Capital and its Associates." (*Id.* at 12.) Plaintiffs maintain that this conjunctive statement makes it clear that "Lion Capital retained exclusive control over the day-to-day business activities of all Members, including Lindberg, Capps, and Chang." (*Id.* at 12.)

3. Representative Services Doctrine

Next, Plaintiffs argue that even if the participation of Messrs. Lindberg, Capps, and Chang is not enough, Lion Capital is still liable for the actions of its subsidiary, Lion Americas, under the representative services doctrine. (*Id.* at 16.) Plaintiffs maintain that the representative services doctrine looks to see whether the subsidiary functions as the parent corporation's representative in performing services that are sufficiently important

that, if it did not have a representative to perform them, the parent would undertake to perform on its own. (*Id.* at 17.) If so, then liability for the parent based on the actions of the subsidiary is appropriate. (*Id.*)

Plaintiffs argue that they have alleged sufficient facts in the complaint to show that Lion Capital would necessarily have had to perform Lion Americas' functions if the latter did not exist. (*Id.*) This, Plaintiffs argue, is sufficient to make out a plausible claim for liability under the representative services doctrine. (*Id.*)

4. Big Catch

Finally, Plaintiffs argue that they have adequately alleged liability for Lion Capital and, since Big Catch is the alter ego of Lion Capital, have adequately pled liability for Big Catch as well. (*Id.* at 20–21.)

C. Defendant's Response

1. Agency Liability for Messrs. Lindberg, Capps, and Chang

Defendants accept that federal common law principles of agency liability apply but argue that Plaintiffs have not shown that Messrs. Lindberg, Capps, and Chang's behavior occurred within the scope of their agency relationship with Lion Capital. (Reply at 3.) Defendants argue that the fact that Messrs. Lindberg, Capps, and Chang worked for both Lion Capital and Lion Americas triggers the *Bestfoods* presumption that those who are "nominally acting for the subsidiary—as the Lion Americas Employees were here—were 'wearing their subsidiary hats' and not their 'parent hats.'" (*Id.* at 4.)

Defendants invoke the *Bestfoods* presumption to counter Plaintiffs' argument that the Membership Agreement establishes Lion Capital's control over Messrs. Lindberg, Capps, and Chang. Defendants also argue that, at most, the Membership Agreement established that Mr. Lea determined the "duties, role and obligations . . . from time to time" of Messrs. Lindberg, Capps, and Chang. (*Id.* at 6.) This, Defendants argue, is not sufficient to establish that Messrs. Lindberg, Capps, and Chang were acting as agents of Lion Capital when they were engaged in business on behalf of Lion America.

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2. Representative Services Doctrine

Defendants respond to Plaintiffs' novel theory of liability under the representative services doctrine by arguing that (1) the doctrine is actually about establishing personal jurisdiction over a party, not liability; and (2) the representative services doctrine is unconstitutional. (*Id.* at 7–11.)

Defendants argue that the representative services doctrine has not been adopted by the Ninth Circuit as a "basis for imposing substantive liability." (*Id.* at 8.) Defendants argue that the only context in which the Ninth Circuit has considered the doctrine is in the personal jurisdiction context and, even there, the court refused to adopt it. (*Id.*)

Perhaps more damaging to Plaintiffs' theory of liability is Defendants' argument that the representative services doctrine itself is unconstitutional. Defendants argue that the Supreme Court's holding in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), invalidated "the 'representative services doctrine' as a basis for establishing personal jurisdiction." (*Id.* at 10–11.)

II. Court's Analysis

Section One of the Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states." 15 U.S.C. § 1. "A defendant may be held 'liable under § 1 of the Sherman Act if that person . . . [acted] either with the knowledge that the . . . [action] would have unreasonable anticompetitive effects or with the purpose of producing those effects.'" *Arandell Corp. v. Centerpoint Energy Servs., Inc.*, 900 F.3d 623, 629 (9th Cir. 2018) (alterations in original) (quoting *United States v. Bailey*, 444 U.S. 394, 404–05 (1980)). "Because § 1 of the Sherman Act 'does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy,'" *Twombly*, 550 U.S. at 553 (alterations in original) (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984)), "'[t]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express.'" *Id.* (alterations in original) (quoting *Theatre Enters., Inc. v. Paramount Film*

Distrib. Corp., 346 U.S. 537, 540 (1954)). The essential elements of a Section One cause of action are: "(1) an agreement among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition." *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 844 (9th Cir. 1980).

In *Twombly*, the Supreme Court emphasized the pleading requirements under Section One of the Sherman Act:

> [A] plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level.
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> In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement . . . .[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice.

550 U.S. at 555 (second alteration in original) (citations and footnote omitted).

The *Twombly* court "also suggested that to allege an agreement between antitrust co-conspirators, the complaint must allege facts such as a 'specific time, place, or person involved in the alleged conspiracies' to give a defendant seeking to respond to allegations of a conspiracy an idea of where to begin." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 565 n.10). With this general framework in mind, the Court turns to the Parties' arguments.

A. Direct Involvement by Lion Capital

Antitrust complaints often do not include any direct and independent allegations of an agreement. *See Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*,

795 F.3d 1124, 1130 (9th Cir. 2015). "Because direct evidence of concerted action in violation of antitrust laws is so rare, the Supreme Court has traditionally granted fact finders some latitude to find collusion or conspiracy from parallel conduct and inferences drawn from the circumstances." *Oltz v. St. Peter's Cmty. Hosp*., 861 F.2d 1440, 1450–51 (9th Cir. 1988) (citing *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)). That latitude, however, has limits: the Court "cannot . . . infer an anticompetitive agreement when factual allegations 'just as easily suggest rational, legal business behavior.'" *Name.Space*, 795 F.3d at 1130 (quoting *Kendall*, 518 F.3d at 1049).

Here, there is no direct evidence of an agreement between Lion Capital and Big Catch's executives and other members of the alleged conspiracy. The Court therefore must examine the new, circumstantial evidence Plaintiffs have included in their Amended Complaints. Defendants argue that the new allegations of direct participation by Lion Capital do not significantly differ from those previously considered and rejected by this Court. The Court agrees.

First, the Court finds that the July 2012 email between Mr. Lindberg and Mr. Lea does not create a plausible inference that Mr. Lea was involved in any alleged price fixing conspiracy. While Mr. Lindberg did write to Mr. Lea that Starkist, a competitor, was now in "lockstep with us in setting pricing rationally," (Kroger Compl. ¶ 221), the Court previously concluded that references to pricing rationality, without more, do not "plausibly lead to an inference of conspiracy." (*See* Order at 80.) The Court sees no reason to deviate from its prior finding.

Plaintiffs, in a footnote in their Opposition, argue that "to the extent that two competitors met in person and discussed a commitment to rational pricing, that conduct gives rise to a plausible inference of conspiracy." (Opp'n at 19 n.8.) Plaintiffs support this proposition with citations to out-of-circuit cases, some from the early 2000s and, consequently, before the revision of the pleading standard in *Twombly*. (*See id.*) The cases cited by Plaintiffs broadly stand for the proposition that courts, in determining whether an anticompetitive agreement has been plausibly pled, take a wide-angle view in determining

the scope of that agreement based on circumstantial evidence. This does not refute the Court's prior holding that discussions of rational pricing, without more, does not plausibly lead to an inference of a conspiracy, nor does it stand for the proposition that any meeting among competitors to discuss pricing supports a plausible inference of conspiracy.

Next, the Court considers the March 18, 2018 briefing note from Mr. Lindberg to Mr. Lea. The Court notes that no party has provided the actual text of this briefing note; however, based on the description of the note in the Amended Complaint, the Court does not believe that it gives plausible rise to the inference of a conspiracy. The Court "cannot . . . infer an anticompetitive agreement when factual allegations 'just as easily suggest rational, legal business behavior.'" *Name.Space*, 795 F.3d at 1130 (quoting *Kendall*, 518 F.3d at 1049). The fact that Mr. Lindberg kept Mr. Lea, the managing partner of Lion Capital, appraised of the performance of an almost billion-dollar investment is just as consistent with rational, legal business behavior as with an anticompetitive agenda. The Court therefore declines to infer from this routine business practice any anticompetitive agreement or direct participation by Mr. Lea in any conspiracy.

Having determined that there are no new plausible allegations of direct participation by Lion Capital, the Court will now turn to Plaintiffs' agency theory of liability.

B. Agency Theory

Next, the Court considers whether Plaintiffs plausibly have pled that Lion Capital is liable (1) because of the actions of certain employees of Lion Americas, or (2) under the representative services doctrine.

1. Agency Test

Both parties agree that Federal common law principles of agency govern. Federal courts in similar situations look to the test set out in the Restatement of Agency. *See*, *e.g.*, *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 622 F. Supp. 2d 890, 899 (N.D. Cal. 2009). Turning, then, to the operative Restatement Third, it lays the foundation for a traditional agency test that requires a plaintiff must demonstrate: (1) a manifestation by the principal that the agent shall act for him; (2) that the agent has accepted the undertaking;

and (3) that there is an understanding between the parties that the principal is to be in control of the undertaking. *See* Restatement (Third) of Agency, § 1.01. Also relevant is the Supreme Court's holding in *Bestfoods*, which established that when alleging liability for a parent corporation based on the actions of an employee of both the subsidiary and the parent corporation, the party alleging liability must plead facts showing that the employee was acting within his or her capacity as an employee of the parent corporation and not the subsidiary. 524 U.S. at 69–70. Otherwise, courts "generally presume 'that the directors are wearing their 'subsidiary hats' and not their 'parent hats' when acting for the subsidiary." *Id.*

Applying the traditional agency test pursuant to the standards articulated above, and with the *Bestfoods* presumption in mind, the ultimate question on this Motion is whether Plaintiffs have alleged facts that plausibly suggest that Messrs. Lindberg, Chang, and Capps were acting in their capacity as employees of Lion Capital and not Lion Americas when engaging in the alleged conspiratorial conduct.

Ultimately, the Court finds that Plaintiffs have not pled facts that plausibly suggest agency liability for Lion Capital based on the actions of Messrs. Lindberg, Chang, and Capps. Plaintiffs rely heavily on the Lion Capital Membership Agreement, arguing that the Membership Agreement required its signatories to act in the interests of Lion Capital at all times. Plaintiffs argue that because Messrs. Lindberg, Chang, and Capps signed the Membership Agreement, the test laid out in the Restatement is satisfied. But that is not all that is required. Messrs. Lindberg's, Chang's, and Capps' status as dual agents of both Lion Capital and Lion Americas requires Plaintiffs to plead with specificity how Messrs. Lindberg's, Chang's, and Capps' actions were taken in the interests of Lion Capital and not Lion Americas. The *Bestfoods* presumption is a reflection of the "well established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership . . . ." 524 U.S. at 69 (quoting *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 779 (5th Cir. 1997)).

Messrs. Lindberg, Chang, and Capps were employees of Lion Americas. Lion Americas, as an independent fund advisor, was tasked with managing the oversight of Lion Capital's investment in Bumble Bee Foods LLC. Defendants contention that Messrs. Lindberg, Chang, and Capps acted in their capacity as employees of Lion Americas is afforded particular weight because it is consistent with the corporate function of Lion America as an independent investment advisor to Lion Capital. *See Id.* at 70 n.13 ("Here, it is prudent to say only that the presumption that an act is taken on behalf of the corporation for whom the officer claims to act is strongest when the act is perfectly consistent with the norms of corporate behavior, but wanes as the distance from those accepted norms approaches the point of action by a dual officer plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent."); *see also Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001) ("[T]he Supreme Court [in *Bestfoods*] articulated a generally applicable principle that a parent corporation may be directly involved in the activities of its subsidiaries without incurring liability so long as that involvement is 'consistent with the parent's investor status.'"). Plaintiffs have not alleged the facts necessary to overcome the *Bestfoods* presumption.

2. Representative Service Doctrine

The Court has been unable to find, and Plaintiffs have failed to provide, a single case in which any court has found liability for a parent corporation based on the representative services doctrine. This is probably because the representative services doctrine, when it has been applied, deals with establishing personal jurisdiction and not substantive liability. *See id.* at 928–31. Even if the Court were inclined to extend this test to the personal liability context, which it is not, the Supreme Court has held that the doctrine violates traditional notions of fair play and due process for reasons that are no less applicable here. *See Daimler*, 571 U.S. at 134. The Supreme Court found that the test's focus on whether the subsidiary performs "important" work such that the parent would do the function itself if the subsidiary did not exist "stacks the deck, for it will always yield a pro-jurisdiction answer." *Id.* at 136. Such concerns are equally valid in the substantive liability context:

the representative services test would almost always result in a pro-liability answer. Consequently, this Court declines to adopt Plaintiff's novel theory of liability under the representative service doctrine.

C. Big Catch

The Amended Complaint contains no new allegations concerning Big Catch's participation in the conspiracy. Since Plaintiffs have not alleged sufficient facts to state a claim against Lion Capital, it does not matter that the Court has previously found that Big Catch is the alter ego of Lion Capital for personal jurisdiction purposes. Accordingly, the Court finds that Plaintiffs fail to state a claim with regard to Big Catch.

D. Leave to Amend

After years of litigation and discovery, the Court cannot conceive of any additional facts not already alleged that would cure Plaintiffs' Amended Complaint. The Court therefore finds leave to amend would be futile and is not warranted. *See Hartmann v. CDCR*, 707 F.3d 1114, 1130 (9th Cir. 2013) ("A district court may deny leave to amend when amendment would be futile.").

CONCLUSION

For the reasons discussed above, the Court **GRANTS** Defendants' Motion (ECF No. 1631) and **DISMISSES WITH PREJUDICE** Plaintiffs' claims against Lion Capital LLC and Big Catch Cayman LP.

IT IS SO ORDERED.

Dated: January 28, 2020

Janis L. Sammartino
Hon. Janis L. Sammartino
United States District Judge