IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

PAYCARGO, LLC, Plaintiff, v. CARGOSPRINT, LLC; and JOSHUA WOLF, Defendants.	CIVIL ACTION FILE NO. 3:19-cv-85-TCB

O R D E R

This case comes before the Court on the motion [30] of Defendants CargoSprint, LLC and Joshua Wolf to dismiss the amended complaint.

I. Background

Accepting the well-pleaded facts in the complaint as true, Plaintiff PayCargo, LLC offers electronic payment management services to carriers and shippers in the freight and cargo shipping industry. PayCargo's electronic payment services facilitate online freight payments and collections, help to resolve disputes, and aid in establishing freight credit.

CargoSprint, which was founded by Wolf, also offers electronic payment services to the freight and cargo shipping industry through a platform known as SprintPay. In addition to SprintPay, CargoSprint operates SprintPass, an electronic information-sharing platform that helps coordinate the transfer of cargo during dock deliveries.

On July 19, 2019, PayCargo filed this suit, alleging that Defendants have violated 15 U.S.C. §§ 1 and 2, the Sherman Antitrust Act, by tying the use of SprintPass to SprintPay in a manner that unlawfully restrains trade and attempts to create a monopoly over web-based payments in the shipping and cargo industry.

On September 3, Defendants moved [11] to dismiss PayCargo's complaint, contending that it failed to allege sufficient facts to state a plausible claim for relief. The Court granted [25] the motion to dismiss, essentially finding that PayCargo had made only conclusory allegations regarding the tying arrangement. However, PayCargo was granted leave to file an amended complaint.

On December 9, PayCargo filed its first amended complaint. The complaint contains a single count alleging that Defendants violated § 1 of the Sherman Antitrust Act by tying a consumer's use of SprintPay in the cargo payment services market to its purchase of SprintPass in the dock delivery scheduling market in a manner that unlawfully restrains trade.

Now, Defendants have moved [30] to dismiss the amended complaint. They contend that it suffers from the same deficiencies as the original complaint and should be dismissed for failure to state a claim upon which relief can be granted.

II. Legal Standard

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Chandler v. Sec'y of Fla. Dep't of Transp.*, 695 F.3d 1194, 1199 (11th Cir. 2012). The Supreme Court has explained this standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable

> inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted); *see also* *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324–25 (11th Cir. 2012).

Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555–56 (citations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (citation omitted). Although all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011), the Court need not accept as true the plaintiff's legal conclusions, including those couched as factual allegations, *Iqbal*, 556 U.S. at 678.

III. Discussion

"A tying arrangement is 'an agreement by one party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase the product from any other supplier.'" *Eastman Kodak Co. v. Image*

Tech. Servs., Inc., 504 U.S 451, 451 (1992) (quoting *N. Pac. R.R. Co. v. United States*, 356 U.S. 1, 5–6 (1958)). Such an arrangement is an unlawful restraint on trade if a seller exploits its "monopolistic leverage" in one market to gain control over another market. *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 611 (1953).

To plausibly plead the existence of an unlawful tying arrangement, a plaintiff must show:

> (1) "a tying and a tied product"; (2) "evidence of actual coercion by the seller that in fact forced the buyer to [purchase] the tied product"; (3) that the seller have sufficient market power in the tying product market to force the buyer to accept the tied product; (4) "anticompetitive effects in the tied market"; and (5) "involvement of a 'not insubstantial' amount of interstate commerce in the tied product market."

Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502–03 (11th Cir. 1985) (quoting *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56–57 (2d Cir. 1980)).

"Rule 12(b)(6) dismissals are particularly disfavored in fact-intensive antitrust cases." *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Comm'ns, Inc.*, 376 F.3d 1065, 1070 (11th Cir. 2004) (citing *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp.*, *S.A.*, 711 F.2d 989, 994–95 (11th Cir. 1983)). However, plaintiffs "must present enough information in their complaint to plausibly suggest the contours of the relevant . . . market[]," *Jacobs v. Tempur-Pedic International, Inc.*, 626 F.3d 1327, 1336 (11th Cir. 2010), and the Court "must not . . . assume plaintiffs can prove facts not alleged or that defendants have violated the antitrust laws in ways not alleged." *Quality Foods*, 711 F.2d at 995.

As a result, "[c]ases in which dismissal on the pleadings is appropriate frequently involve either (1) failed attempts to limit a product market to a single brand, franchise, institution or comparable entity that competes with potential substitutes, or (2) failure even to attempt a plausible explanation as to why a market should be limited in a particular way." *Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177(NRB), 2011 WL 856266, at *5 (S.D.N.Y. Mar. 9, 2011) (quoting *Todd v. Exxon Corp.*, 275 F.3d 191, 200 (2d Cir. 2001)).

Defendants argue that PayCargo has failed to plead sufficient facts in support of its amended complaint because it does not plausibly allege (1) the contours of the tying product market; (2) market power in the tying product market; and (3) that a non-insubstantial amount of interstate commerce in the tied market is affected by the tie. The Court will consider each of these arguments in turn.

A. Contours of the Tying Product Market

"Defining the relevant product market involves identifying 'producers that provide customers of a defendant firm (or firms) with alternative sources for the defendant's product or services.'" *Jacobs*, 626 F.3d at 1337 (quoting *Levine v. Cent. Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1552 (11th Cir. 1996)). Alternative sources must be "reasonably interchangeable," *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956), but there is "no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities." *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966).

The operative question in determining whether different services can be combined in a single market is whether they are used by consumers in the same way. *See Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1221 (11th Cir. 2002) (quoting *Queen City Pizza,* *Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 438 (3d Cir. 1997)) (finding that when determining whether products are reasonably interchangeable, "[a] court making a relevant market determination looks . . . to the uses to which the product is put by consumers in general"); *see also Cobb Theatres III, LLC v. AMC Entm't Holdings, Inc.*, 101 F. Supp. 3d 1319, 1336 (N.D. Ga. 2015) ("The relevant product market . . . is 'determined by the availability of substitutes to which consumers can turn.'") (quoting *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 423 (11th Cir. 1984)).

In their motion to dismiss, Defendants contend that PayCargo has failed to meet its burden of showing that SprintPass constitutes its own product market for two reasons. First, they argue that PayCargo excludes potential or otherwise functional alternatives to SprintPass, such as ad-hoc or first-in, first-out systems of coordinating dock deliveries. Second, they contend that PayCargo has not alleged any facts showing that consumer behavior supports the complaint's narrower definition of the relevant product market.

In its amended complaint, PayCargo alleges that the product market for dock delivery services should be limited to a single product—SprintPass—because there are no reasonably interchangeable substitutes that offer the same functionality to consumers. It argues that although cargo handlers and freight forwarders may use unsophisticated systems such as first-in, first-out deliveries to schedule dock deliveries and pick-ups, such "self-help procedures" do not streamline dock delivery. [28] at ¶ 40. It avers that SprintPass is different in that it offers a comprehensive and efficient mechanism for solving the issues created by less sophisticated processes, namely long wait times and last-minute delays.

These allegations are sufficient to plausibly suggest the contours of a relevant product market. PayCargo has alleged facts that tend to show that a consumer would not consider relying on an internal self-help system for dock deliveries as a functional replacement for the coordinated scheduling system available through SprintPass. *See United States v Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 186 (D.D.C. 2001) (finding that to be a functional alternative, consumers must be able to "replace the services of an external product with an internally-created system").

Defendants also argue that PayCargo has failed to demonstrate why *potential* alternatives to SprintPass should not be included in the relevant market. They argue that PayCargo identifies in its amended complaint two potential alternatives that are reasonable substitutes: (1) sophisticated automated delivery processes in the European market, and (2) an automated scheduling system produced in the U.S. by a company called TurretLabs.

However, PayCargo plausibly alleges in its complaint why these alternatives should not be included in the relevant product market. The European services "ha[ve] not made any significant efforts to enter the U.S. market" and thus are not available to consumers in the U.S. And although the TurretLabs system is available in the U.S., "it has not yet made any sales." [28] at 16.[1] Salability is crucial to determining

[1] Not only has TurretLabs not made any sales, but PayCargo also alleges that it will not be able to do so in the future because CargoSprint copied its technology, rebranded it as SprintPass, and offered it for free, such that TurretLabs is priced out of the market. The veracity of these allegations is a fact-based inquiry that will

whether two products are part of the same product market. *See Int'l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242, 250 (1959) (finding that championship boxing contests were in a product market distinct from non-championship contests because championship events were significantly more salable). Because neither TurretLabs nor the European producers "have the ability—actual or potential—to take significant amounts of business away from [CargoSprint]," *Gulf States Reorganization Group, Inc. v. Nucor Corp.*, 721 F.3d 1281, 1286 (11th Cir. 2013), they were properly excluded from the relevant product market. Thus, PayCargo has sufficiently alleged that SprintPass constitutes a single-product market for the purpose of demonstrating that CargoSprint established an illegal tying arrangement.

As a final matter, even if coordinated dock delivery services did not plausibly constitute a separate product market, PayCargo has sufficiently pled the existence of a distinct subset of a larger product market. A product submarket is determined based on "practical indicia"

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require extensive discovery. At the motion-to-dismiss stage, however, PayCargo's allegations are taken as true.

such as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

While no one factor is dispositive, evidence of a separate submarket may exist where the emergence of a new technology "heralds the obsolescence of [a] conventional system, or even poses a substantial threat." *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 553 (1st Cir. 1974) (noting that "[n]o objective criterion tells us that Rolls Royce competes with Mercedes but not with Volkswagen," but concluding that cost savings, the elimination of extraneous equipment, and "greater design flexibility [that would] outlast conventional systems two to three times" may indicate the emergence of a product submarket).

Here, PayCargo argues that even if no separate product market exists, there is a distinct submarket for coordinated delivery services in high-volume locations because "long waiting times and congestion are a particular problem at large, high-volume airports." [31] at 11.

Defendants argue that this limitation is irrelevant because submarkets "must be based on a distinction in the *product* sold to those customers." *T. Harris Young & Assocs., Inc. v. Marquette Elecs., Inc.*, 931 F.2d 816, 824 (11th Cir. 1991). Thus, a submarket cannot be based on the preference of a certain customer, such as a particularly busy airport.

However, the amended complaint avers that the relevant submarket would consist entirely of *sophisticated delivery services*, whereas the larger product market would be comprised of *all methods* of scheduling deliveries. Contrary to Defendants' assertion, such a submarket would be distinguished based on the product, not the consumer, and may constitute the relevant product market. *See Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 980–81 (finding that a product designed for specific cars constituted a submarket). Accordingly, even if PayCargo had not sufficiently alleged a separate product market for SprintPass, it has plausibly alleged the existence of a submarket.

B. CargoSprint's Market Power

To state a plausible claim for relief, PayCargo must also "allege that the seller has sufficient power within th[e] market to be able to force buyers to purchase the tied product." *Gen. Cigar Holdings, Inc. v. Altadis, S.A.*, 205 F. Supp. 2d 1335, 1355 (S.D. Fla. 2002); *see also Tic-X-Press, Inc. v. Omni Promotions Co. of Ga.*, 815 F.2d 1407, 1420 (11th Cir. 1987) ("Sellers in an illegal tying arrangement must possess some special ability to force a purchaser to do something that he would not do in a competitive market, which is usually called 'market power.'") (quoting *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13–14 (1984)). Demonstrating market power requires the plaintiff to show that "would-be competitors in the tied market cannot themselves offer the tying product on competitive terms: that is, that the seller has some cost advantage over rivals in producing the tying product or that there are substantial entry barriers into the tying product market." *Tic-X-Press,* 815 F.2d at 1420 (11th Cir. 1987).

Defendants contend that PayCargo has not plausibly alleged either that there are barriers to entry in the tying product market or that CargoSprint has a cost advantage over rivals in offering SprintPass.

As a preliminary matter, PayCargo argues that regardless of whether there are any specific barriers to entry or cost advantages, there are significant indicia to demonstrate CargoSprint's market power. For instance, it notes CargoSprint's high market share as the sole producer of automated delivery services in the U.S. market, its ability to charge double the price for the tied product in the cargo payment services industry, and its ability to retain consumers despite their express distaste at having to use SprintPay. *See* [28] at 19 ("The fact that vendors would agree to exclusivity and hence decline to offer a product to their customers costing half as much is a testament to the market power that CargoSprint possesses."). Defendants do not respond to these assertions.

PayCargo also argues that it *did* plausibly allege that there are barriers to entry in the dock delivery services market by stressing the extensive time and expense required to develop a technology such as SprintPass. It notes that TurretLabs, the presumptive would-be competitor to CargoSprint except for its inability to compete in the market, required more than two years to develop its automated dock delivery service. It argues that extensive development time alone may establish a barrier to entry.

CargoSprint urges—and the Court has not found precedent to indicate otherwise—that in the Eleventh Circuit, development time alone does not constitute a barrier to entry. Instead, it is one of a series of factors relevant to determining whether a barrier to entry exists. *See Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1346 n.11 (5th Cir. 1980) (finding that a significant barrier to entry existed where (1) competitors would require more than two years to develop a similar service; (2) development costs could reach $3,000,000; (3) it would be difficult for a producer to change its method of production; and

(4) there was no evidence that a competitor had entered the market in eleven years).[2]

However, PayCargo offers additional facts similar to those considered by the Fifth Circuit as evidence of market power—namely, the cost of developing a competing product, TurretLab's difficulty in entering the market as a competitor, and the cost to consumers using SprintPass and SprintPay.[3] Accordingly, the amended complaint plausibly alleges the existence of barriers to entry.

Moreover, even if PayCargo had not shown the existence of barriers to entry, it plausibly alleges that CargoSprint has a cost advantage over potential rivals in the market. It avers that CargoSprint

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[2] The Eleventh Circuit has adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

[3] The cost of SprintPass alone may establish a barrier to entry, as it is well established that so-called predatory pricing can lead to monopolization if the defendant is pricing below cost because it anticipates that it will recoup these costs in the future by raising the price to a supra-competitive level. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 210 (1993). Relying on persuasive authority out of the Third Circuit, PayCargo argues that even if a defendant is not pricing the tying product below-cost, predatory pricing may establish a barrier to entry if the defendant will recoup its costs by charging a higher price for the tied product. *See ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 278–79 (3d Cir. 2012).

avoided high development costs by "unlawfully copying or reverse engineering" SprintPass from the TurretLabs system as it was being developed. [31] at 19. Taking this statement as true, it is thus plausible that Defendants have a cost advantage over rivals by circumventing initial research and development costs.

Accordingly, PayCargo has plausibly alleged the existence of both barriers to entry in the dock delivery scheduling market and CargoSprint's cost advantage over competition in the market. In conjunction with its allegations that CargoSprint has a high market share as the sole provider of automated dock delivery services in the U.S., as well as its ability to retain customers despite their desire for lower prices, PayCargo has presented sufficient facts to plausibly allege that CargoSprint has significant market power in the dock delivery scheduling services market. *See Tic-X-Press Inc.*, 815 F.2d at 1420 (finding that market power would be sufficiently alleged if a plaintiff showed that "competitors in the tied market cannot themselves offer the tying product on competitive terms"); *see also Spartan Grain & Mill Co. v. Ayers*, 735 F.2d 1284, 1288 (11th Cir. 1984) (defining "the inquiry into economic power in a tying case as 'whether the seller has some advantage not shared by his competitors in the market for the tying product'") (quoting *U.S. Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 621 (1977)).

C. Foreclosure of Interstate Commerce

As a final matter, Defendants argue that PayCargo's claim fails because it does not plausibly allege that a not insubstantial amount of interstate commerce in the tied product market is affected by the tie. *See Amey*, 758 F.2d at 1503 (quoting *Yentsch*, 630 F.2d at 56–57) (finding that an antitrust plaintiff claiming a violation of § 1 must allege that more than a *de minimus* amount of business is affected by the tie). They contend that PayCargo alleges only the total volume of sales in the market, not the monetary effect on competitors because of the tie.

However, PayCargo alleges in its amended complaint that CargoSprint impacted a significant amount of business by imposing its tying arrangement on five major airports in the United States. It estimates that in Los Angeles alone, CargoSprint is processing 50,000 transactions each month, at ten dollars per transaction.[4] In doing so, it is not merely referencing the total amount of business conducted. Instead, PayCargo alleges that *all* transactions entered into at these airports were consummated as a result of the tie. *See* [28] at 18 (emphasis added) ("SprintPass *(and hence exclusively SprintPay)* is now in use at major air freight terminals."). This is sufficient to plausibly allege the involvement of a not insubstantial amount of interstate commerce.

IV. Conclusion

Based on the foregoing, PayCargo has plausibly alleged (1) the contours of the tying product market, (2) CargoSprint's significant share of market power, and (3) the involvement of a not insubstantial amount of interstate commerce in the tied product market. The Court

[4] Defendants do not argue that this amount fails to satisfy the "not insubstantial" threshold. *See Fortner Enters., Inc. v. U.S. Steel*, 394 U.S. 495, 501 (1969) (finding that "the controlling consideration is simply whether a total amount of business . . . [is] not . . . merely de minimus"). Even if they had done so, PayCargo has clearly exceeded the requisite threshold. *See Tic-X-Press*, 815 F.2d at 1419 ($10,091.07 in sales as a result of an illegal tie meets the not insubstantial test).

having disposed of all arguments to the contrary, Defendants' motion [30] to dismiss PayCargo's amended complaint is denied.

IT IS SO ORDERED this 14th day of April, 2020.

Timothy C. Batten, Sr.
United States District Judge