UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: DIGITAL MUSIC ANTITRUST LITIGATION	)	MDL Docket No. 1780 (LAP)

SONY CORPORATION OF AMERICA'S SUPPLEMENTAL REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendant Sony Corporation of America ("SCA") hereby replies to Plaintiffs' Consolidated Memorandum of Law in Opposition to the Supplemental Memoranda of Law of Defendants Bertelsmann, Inc., Sony Corporation of America, and Time Warner, Inc.

INTRODUCTION

The entire Second Consolidated Amended Complaint (the "Complaint") should be dismissed for all of the reasons set forth in Defendants' Motion to Dismiss and Strike Portions of Plaintiffs' Second Amended Complaint and the related Memorandum of Law (the "Joint Motion") as well as defendants' October 15, 2007 joint reply memorandum of law in further support thereof. Furthermore, as set forth in SCA's Supplemental Memorandum in Support of Defendants' Motion to Dismiss, even if the Complaint is not dismissed in its entirety, it should be dismissed as to SCA. This is because, as plaintiffs' opposition memorandum only highlights, the Complaint does not allege facts concerning SCA sufficient to keep SCA in this case.

ARGUMENT

The Supreme Court recently clarified the pleading requirements in antitrust complaints and held that such complaints must contain "enough factual matter (taken as true) to suggest that

an agreement was made." *Bell Atlantic Corp. v. Twombly,* 550 U.S. --, 127 S. Ct.1955, 1965 (2007). In arguing that the Complaint is sufficiently detailed with respect to SCA, the only allegations to which plaintiffs can point are that (a) SCA is a corporate parent of SONY BMG Music Entertainment ("SONY BMG") (*see* Opp. at 2 and Complaint at ¶ 23); (b) SCA created the pressplay joint venture and at some point controlled and co-owned the MusicNet joint venture (*see* Opp. at 2-3 and Complaint at ¶¶ 58, 67); and (c) SCA sells online music through the online music store Sony Connect (which is a separate legal entity) (*see* Opp. at 4 and Complaint at 60). As noted in SCA's Supplemental Memorandum, plaintiffs' allegations are internally inconsistent and factually inaccurate. *See* SCA Supplemental Memorandum at n.3 and n.4. Nonetheless, even assuming plaintiffs' allegations to be true for the purposes of this motion, they do not come close to stating a claim because they do not plausibly suggest that SCA was part of any antitrust agreement or conspiracy, or engaged in any wrongful conduct at all.

Even if the Complaint had adequately alleged antitrust claims against SONY BMG, which it does not, SCA cannot be held liable for the acts of its subsidiaries or other related entities absent a showing that the corporate veil should be pierced. *See DeJesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 69-70 (2d Cir. 1996) ("a corporate relationship alone is not sufficient to bind a parent corporation for the actions of its subsidiary"); *Billy v. Consol. Mach. Tool Corp.*, 51 N.Y.2d 152, 163 (N.Y. 1980). Plaintiffs have not attempted to make any such showing here.

Moreover, SCA's (incorrectly) alleged involvement in the pressplay and MusicNet joint ventures is insufficient to serve as the basis for a claim that SCA agreed to be part of a conspiracy. *See, e.g., Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 23 (1979) (explaining that joint ventures and other cooperative arrangements are not usually unlawful). Similarly, SCA's alleged

sale of music over the internet through a service run by a separate company, Sony Connect, does not suggest any agreement by SCA to be part of a conspiracy.

If plaintiffs' allegations concerning SCA were enough, then a plaintiff could state an antitrust claim by alleging nothing more than mere participation in normally lawful activities, such as joint ventures or reselling. This clearly is insufficient to defeat *Twombly*'s stringent pleading requirements. To plead a case against SCA, plaintiffs were required to allege "allegations plausibly suggesting (not merely consistent with) agreement." 127 S. Ct. at 1963. But all that they could muster were allegations regarding ownership interests.

Plaintiffs' argument that they need not specify the individual acts of each member of an antitrust conspiracy (Opp. at 6-7) incorrectly assumes that each defendant was part of the alleged conspiracy in the first place. Here, plaintiffs have not alleged facts plausibly suggesting that SCA agreed to be part of any conspiracy or any other actionable conduct by SCA. *See Twombly*, 127 S. Ct. at n.10 (explaining that the complaint at issue furnished no clue as to who supposedly agreed, or when and where the illicit agreement took place, and that a defendant seeking to answer would have little idea where to begin); *Chapman v. New York State Div. for Youth*, 2005 WL 2407548, *5, n.5 (N.D.N.Y. Sept. 29, 2004) (dismissing claims against certain defendants who were listed as conspirators where "[t]here [were] simply no allegations to support the plaintiff's claims that [those] defendants participated in monopolization or conspiracy to monopolize the relevant market."). Without such allegations, SCA must be dismissed as a defendant in this case.

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CONCLUSION

SCA should not be dragged through costly and burdensome discovery in this case when plaintiffs have not alleged any facts suggesting that SCA engaged in any wrongful conduct. SCA respectfully requests that the claims against it be dismissed with prejudice.

Date: October 12, 2007

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