FILED
2013 Nov-04 AM 09:40
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FAST AND EASY FOOD STORES, INC.,	)	
Plaintiff,	)	
v.	)	Case No. 7:11-cv-1929-MHH
GREENE BEVERAGE COMPANY, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This is an antitrust action. Plaintiff Fast and Easy Food Stores, Inc. ("F&E"), an Alabama corporation that operates convenience stores in Tuscaloosa County, Alabama, sued Greene Beverage Company, Inc. ("Greene"), an Alabama corporation that operates as a wholesale beer distributor. F&E seeks relief from alleged price discrimination with respect to beer sales. F&E contends that Greene "has charged [F&E] a significantly higher price for [beer] than what [Greene] has charged other similar businesses which are in proximity to and compete with [F&E] for the same retail customer." (Doc. 12, p. 4). Based on the conduct described in the amended complaint, F&E asserts a claim against Greene under section 2(a) of the Robinson-Patman Act ("RPA"), 15 U.S.C. § 13. (Doc. 12,

Count I). F&E demands compensatory and treble damages, attorney fees, costs, and any other relief to which it may be entitled. (Doc. 12, p. 5).

Pursuant to Rule 12(b)(6), Greene asks the Court to dismiss F&E's action. (Doc. 13). Greene contends that the Court should dismiss F&E's amended complaint because F&E has failed to allege that Greene acted in a discriminatory manner while engaging in interstate commerce as required by the RPA. (Doc. 13, p. 2.). F&E responds that the "flow of commerce" allegations in its amended complaint satisfy the RPA's interstate commerce requirement. (Doc. 15). For the reasons stated below, the Court denies Greene's motion to dismiss.

Applicable Legal Standard

The Federal Rules of Civil Procedure establish a straightforward standard for assessing the adequacy of a complaint. A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).[1] Interpreting Rule 8(a)(2), the United States Supreme Court has held that a "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Thus, the pleading standard set forth in Federal Rule of Civil Procedure 8 evaluates the plausibility of the facts alleged, and the notice stemming

[1] Plaintiffs must plead with particularity in cases in which they allege fraud or mistake. Fed. R. Civ. P. 9(b). This is not one of those cases. "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id.*

from a complaint's allegations." *Keene v. Prine*, 477 Fed. Appx. 575, 583 (11th Cir. 2012) (citing *Evans v. McClain of Ga., Inc.*, 131 F.3d 957, 964 n.2 (11th Cir. 1997) (per curiam), and *Hamilton v. Allen-Bradley Co.*, 244 F.3d 819, 823-24 (11th Cir. 2001)). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 663. When a complaint satisfies Rule 8's notice and plausibility requirements, "the form of the complaint is not significant if it alleges facts upon which relief can be granted, even if it fails to categorize correctly the legal theory giving rise to the claim." *Keene*, 477 Fed. Appx. At 583 (finding that plaintiff stated a claim because her complaint, though "not a model of clarity," should have put the defendant on notice of the claim leveled against it).

A Rule 12(b)(6) motion to dismiss tests the sufficiency of a complaint against the legal standard of Rule 8. When ruling on a Rule 12(b)(6) motion, the court must accept all well-pled facts as true. *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000). Ultimately, this inquiry is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 663-64.

F&E's Factual Allegations

According to the amended complaint, F&E operates convenience stores in the Tuscaloosa County, Alabama, area, and the convenience stores sell alcoholic

beverages. (Doc. 12). Greene is the sole wholesale distributor of Budweiser beer ("the Beer") in the Tuscaloosa County area. (*Id*.). Greene allegedly "purchases the Beer from out of state manufacturers, and then resells the Beer, without any transformation of the same, in a continuing flow of interstate commerce." (*Id*. at 2). F&E is a customer of Greene and purchases the Beer to sell in its stores. (Doc. 12, pp. 3-4).

F&E asserts that Greene discriminates among different retailers who purchase the Beer from Greene, stating that Greene charges F&E a higher price for the Beer than it does other customers. (*Id*. at 4). According to F&E, this activity has been ongoing since at least June 1, 2009. (*Id*.). Specifically, F&E asserts that Greene charges it "a significantly higher price for the Beer than what [Greene] has charged other similar businesses which are in proximity to and compete with [F&E] for the same retail customer. This is true despite the Beer being of identical grade and quality." (*Id*.). Because of such purported price discrimination, F&E claims that its ability to compete with the businesses receiving discounted Beer from Greene has been "substantially lessened and prevented" and that Greene's actions have proximately injured F&E. (Doc. 12, pp. 4-5).

F&E bases its flow of commerce theory on the following factual allegations: Greene serves specific customers whose demand for the Beer is "constant and predictable" (Doc. 12, p. 2). Greene and its customers have an understanding that

Greene will maintain an inventory of the Beer based on its customers' anticipated needs. (*Id*. at 3). To meet its customers' anticipated needs, a representative of Greene inspects the Beer stock at its customers' stores and submits an order for Beer to Greene. Greene then distributes the Beer "without transformation [] to its specific customers based on their anticipated needs." (Doc. 12, p. 3). F&E alleges, therefore, that because of Greene's understanding with certain customers, Greene can "accurately estimate the demands of its specific customers and purchase the beer" without relying on previous orders or contracts. (*Id*.). Furthermore, F&E contends that whether or not Greene intends to deliver the Beer to its customers immediately, Greene is able to order an accurate amount of the Beer from its own distributor because of Greene's knowledge of its customers' anticipated needs. (*Id*.).

Based on the above-stated factual allegations, F&E contends that "the Beer remains in the flow of interstate commerce so as to be considered 'in commerce' for purposes of the [RPA] because:" (1) Greene purchases the Beer when its customers place their orders and intends to deliver the Beer to the customer immediately; (2) Greene purchases the Beer from its supplier according to understandings with its customers in order to meet their needs, whether or not Greene intends to immediately deliver the Beer; and/or, (3) Greene purchases the Beer based on its specific customers' anticipated needs. (Doc. 12, p. 4).

F&E's Legal Theories

In Count I, F&E's sole claim in its amended complaint, F&E alleges that "[Greene] has violated 15 U.S.C. § 13 by discriminating in the prices it charges different purchasers for Beer of like grade and quality." (Doc. 12, p. 5). F&E contends that because of Greene's price discrimination against F&E, Greene "has substantially lessened [F&E]'s ability to compete with other like businesses" and, therefore, has injured F&E. (*Id.*). Greene asks the Court to dismiss F&E's amended complaint. (Doc. 13).

On this record, the Court considers Greene's Rule 12(b)(6) motion to dismiss.

Analysis:

F&E alleges in its amended complaint that Greene has violated the RPA by engaging in price discrimination. (Doc. 12). The RPA provides, in relevant part, that "it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce." 15 U.S.C. § 13(a). F&E contends that Greene sold and continues to sell the Beer to F&E's competitors at a substantially lower price than it sold and sells to F&E. (*Id.*). In addition, F&E claims that Greene's actions have prevented F&E from competing

with Greene's other customers and that, as a result, Greene has proximately injured F&E. (*Id*.). These allegations are sufficient to place Greene on notice of F&E's antitrust claim pursuant to the RPA. Moreover, F&E's factual allegations are plausible.

Greene argues that F&E's amended complaint contains a jurisdictional defect because the amended complaint does not establish that one or more purported discriminatory transactions crossed a state line. (Doc. 13, p. 2). The RPA applies "only where the allegedly discriminatory transactions took place in interstate commerce. That is, '…at least one of the two transactions which, when compared, generate a discrimination must cross a state line.'" *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 497 F.2d 4, 8-9 (5th Cir. 1969).[2] Thus, when framing an antitrust claim pursuant to the RPA, a plaintiff must plead and prove that the purported discriminatory transaction(s) that took place in interstate commerce.

Greene notes that F&E concedes in its amended complaint that Greene sells the Beer exclusively within the state of Alabama. Greene submits, therefore, that its purported discriminatory sales practices occur only intrastate so that F&E fails to state a claim for which relief can be granted pursuant to the jurisdictional requirements of the RPA. (Doc. 13.)

[2] Case law from the former Fifth Circuit that predates September 30, 1981, is binding in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*).

F&E argues that when "determining whether a product is 'in commerce' so as to establish jurisdiction under the RPA, the Supreme Court of the United States, the Eleventh Circuit and its predecessor have long applied the flow of commerce doctrine." (Doc. 15, p. 2). Quoting *Hampton v. Graff Vending Co.*, 516 F. 2d 100 (5th Cir. 1975), F&E contends that "[t]he flow of commerce doctrine provides that if goods shipped from outside the state are still within the 'practical, economic continuity of the interstate transaction at the time of the intrastate sale of goods, the latter sale will be considered 'in commerce' for the purposes of the Robinson-Patman Act.'" (*Id*.) (quoting *Hampton*, 516 F. 2d at 102). The *Hampton* court held that a plaintiff may establish that goods are within the flow of commerce so as to give rise to jurisdiction under the RPA by demonstrating any one of the following three circumstances:

> [W]here they are purchased by the wholesaler or retailer upon the order of the customer with the definite intention that the goods are to go at once to the customer; where the goods are purchased by the wholesaler or retailer from the supplier to meet the needs of specified customers pursuant to some understanding of the customer although not for immediate delivery; and where the goods are purchased by the wholesaler or retailer based on anticipated needs of customers, rather than upon prior orders or contracts.

Hampton, 516 F.2d at 102-03.

Attempting to avoid *Hampton*, Greene argues that, "[t]hough it discussed 'flow of commerce' after-the-fact, the *Hampton* Court actually applied the *Hiram Walker* rule and found that none of the subject sales of gum crossed a state line.

So in *Hampton*, the Court did not actually recognize a 'flow of commerce' exception to the *Hiram Walker* rule, but rather used the 'flow of commerce' discussion to demonstrate that interstate commerce could not be shown under even the most lax test." (Doc. 13, p. 11). This is an incomplete description of the *Hampton* decision.

The Fifth Circuit issued its opinion in *Hampton* shortly after the United States Supreme Court decided *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974). Although the plaintiff in *Hampton* initially proved facts that established under pre-*Gulf Oil* precedent that the sales practices at issue occurred in interstate commerce, the plaintiff's evidence did not satisfy the interstate commerce requirement in the wake of *Gulf Oil*. *Hampton*, 515 F.2d at 103. Consequently, after describing the flow of commerce test, the Fifth Circuit remanded the *Hampton* case to the district court to give the plaintiff the opportunity "to establish jurisdiction, if he can" by presenting "evidence of the circumstances governing the particular shipments" at issue. *Id.*

Tracking the flow of commerce language in *Hampton*, F&E alleges facts in its amended complaint from which the Court reasonably may infer that Greene's actions fall within at least one, if not all, of the flow of commerce scenarios described in *Hampton*. F&E contends that: (1) Greene purchases the Beer when its customers place their orders and intends to deliver the Beer to the customer

immediately; (2) Greene purchases the Beer from its supplier according to understandings with its customers in order to meet their needs, whether or not Greene intends to immediately deliver the Beer; and/or, (3) Greene purchases the Beer based on its specific customers' anticipated needs. (Doc. 12, p. 4). Therefore, F&E plausibly has pled that the Beer Greene sells to F&E and competing retailers remains within the flow of commerce for the purposes of the RPA. (Doc 12). As F&E argues, it is entitled to discovery "to further develop the facts bearing upon whether the transactions at hand are in interstate commerce." (Doc 15, p. 7); *Eaton v. Dorchester Development Inc.*, 692 F.2d 727, 731 (11th Cir. 1982) ("'the rules entitle a plaintiff to elicit material through discovery before a claim may be dismissed for lack of jurisdiction.'") (quoting *Blanco v. Carigulf Lines*, 632 F.2d 656, 658 (5th Cir. 1980)). If F&E is unable to develop evidence that supports its flow of commerce allegations, then Greene may renew its jurisdictional arguments in an appropriate motion.[3]

[3] Although interstate commerce is "a jurisdictional element" of a claim under the RPA, the Eleventh Circuit has held that a defendant should pursue a motion to dismiss for failure to adequately plead that alleged discrimination occurred in interstate commerce under Rule 12(b)(6) rather than Rule 12(b)(1), "unless the interstate commerce claim is patently frivolous." *McCallum v. City of Athens*, 976 F.2d 649, 650 n. 1 (11th Cir. 1992). Although the Court could consider evidence pertaining to jurisdiction with respect to a Rule 12(b)(1) motion, the Court is limited to the face of the complaint when evaluating a Rule 12(b)(6) motion. Fed. R. Civ. P. 12(b)(6). If an RPA claim survives a Rule 12(b)(6) motion, "after appropriate discovery," a defendant "may move for summary judgment under Rule 56." *McCallum*, 976 F.2d at 650 n. 1.

Conclusion

For the reasons stated herein, the Court DENIES Greene's motion to dismiss.

DONE and **ORDERED** this 4th day of November, 2013.

MADELINE HUGHES HAIKALA
UNITED STATES DISTRICT JUDGE