

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re DIGITAL MUSIC ANTITRUST  
LITIGATION

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MDL Docket No. 1780 (LAP)

**BERTELSMANN, INC.'S SUPPLEMENTAL REPLY MEMORANDUM IN SUPPORT  
OF DEFENDANTS' MOTION TO DISMISS**

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Defendant Bertelsmann, Inc. submits this Supplemental Reply Memorandum, focusing on issues specific to Bertelsmann, Inc., in further support of Defendants' Motion to Dismiss. Plaintiffs do not allege any specific conduct or agreements involving Bertelsmann, Inc. References to other Bertelsmann entities, including numerous incoherent references to "defendant BMG" (there is no defendant with that name), and general references to "defendants" do not suffice to state a claim against Bertelsmann, Inc.

### ARGUMENT

It is well-established that plaintiffs must allege facts stating a claim against each defendant. *Heart Disease Res. Found. v. Gen. Motors Corp.*, 463 F.2d 98, 101 (2d Cir. 1972). Plaintiffs rely upon the irrelevant concept that not all defendants must commit an overt act in furtherance of the conspiracy. *See Pls. Consol. Mem.* at 7. Of course, if four people conspire to rob a bank, they are all liable even if only one of them actually robs the bank. But, there must be allegations tying all of them to the conspiracy in the first place. Here, plaintiffs allege nothing showing that Bertelsmann, Inc. joined any conspiracy.

As shown in Bertelsmann, Inc.'s *Supplemental Memorandum*, plaintiffs have essentially no allegations regarding anything agreed to or done by Bertelsmann, Inc. The only remotely pertinent allegation concerning Bertelsmann, Inc. itself is that Bertelsmann, Inc. formed the MusicNet joint venture, which, by itself, is entirely legal. Although seeking to hold Bertelsmann, Inc. liable for the conduct of MusicNet, a separate corporation, plaintiffs do not allege anything entitling them to pierce the corporate veil separating those two entities. Purely conclusory allegations with no specific allegation about Bertelsmann, Inc. do not "overcome the 'presumption of separateness' afforded to related corporations." *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir. 1996) (internal quotations omitted). Plaintiffs must allege "specific facts" that show "actual domination required to pierce the corporate veil." *Id.* (internal quotations omitted). Plaintiffs do not even claim to have made such allegations.

Apart from the allegation that Bertelsmann, Inc. helped form a joint venture, plaintiffs have no substantive allegation about Bertelsmann, Inc. Plaintiffs do not deny that their few allegations about other Bertelsmann entities, such as their allegations about Bertelsmann AG and the non-existent “defendant BMG,” have no relevance here. They have not alleged any facts or theory for holding Bertelsmann, Inc. liable for the conduct of other Bertelsmann entities.

Plaintiffs attempt to sidestep their irrelevant allegations regarding other Bertelsmann entities by saying that their complaint is “not based solely” on such allegations but also includes “allegations that specifically refer to Bertelsmann.” *Pls. Consol. Mem.* at 8 n.8. Plaintiffs fail to cite any such allegations. The only allegation specifically concerning Bertelsmann, Inc. is paragraph 22, which merely identifies where Bertelsmann, Inc. is headquartered and incorporated.

Plaintiffs misrepresent their own allegations by claiming that “[s]pecifically, the Complaint alleges Bertelsmann and Sony jointly own BMG Music Entertainment (‘Sony BMG’).” *Pls. Consol. Mem.* at 2. However, their complaint actually alleges that Sony BMG is partly owned by Bertelsmann AG, not defendant Bertelsmann, Inc. *Second Consol. Am. Compl.* ¶ 21.

Since they allege nothing substantive about defendant Bertelsmann, Inc., plaintiffs rely upon their allegations about “defendants.” As set forth in the opening and reply briefs filed by defendants jointly, such allegations do not state a claim against any defendant.

Those allegations are further defective with respect to defendant Bertelsmann, Inc. because plaintiffs are not entitled to the inference that Bertelsmann, Inc. did each of the things that “defendants” are alleged to have done. By contrast to its single innocuous allegation about Bertelsmann, Inc., the complaint twice refers to “defendant BMG.” And, even now, plaintiffs continue to insist that allegations concern Bertelsmann, Inc., when, in fact, they expressly refer to Bertelsmann AG. Five of their six allegations that mention a Bertelsmann entity actually concern non-defendants. Under these circumstances, plaintiffs should not be heard to insist that their wholly general allegations about “defendants” actually concern the relevant Bertelsmann entity.

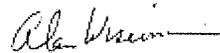
Such precision regarding the Bertelsmann entities is entirely absent from the complaint. None of the cases cited by plaintiffs for the purported proposition that they are entitled to some leniency regarding allegations about “defendants” deal with the situation present here, where plaintiffs’ other allegations show a persistent indifference to which Bertelsmann entity is actually a defendant.

### CONCLUSION

Defendant Bertelsmann, Inc. respectfully submits that the Court should dismiss the Second Consolidated Amended Complaint as to Bertelsmann, Inc.

Dated: October 15, 2007

Respectfully submitted,



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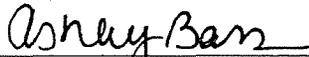
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**CERTIFICATE OF SERVICE**

I, Ashley E. Bass, hereby declare, pursuant to 28 U.S.C. § 1746, I served Bertelsmann, Inc.'s Supplemental Reply Memorandum in Support of Defendants' Motion to Dismiss electronically upon all counsel of record in this action. I certify under penalty of perjury that the foregoing is true and correct. Executed on October 15, 2007.

  
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Ashley E. Bass