IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior District Judge Richard P. Matsch

Civil Action No. 14-cv-03133-RPM

FOREIGN TRADE CORPORATION,
a California corporation, d/b/a Technocel,

Plaintiff and Counter Defendant,
v.

OTTER PRODUCTS, LLC,
a Colorado limited liability company;
TESSCO TECHNOLOGIES, INC., a Delaware corporation;
NITE IZE, INC., a Colorado corporation;
BRIGHTSTAR CORPORATION, a Delaware corporation; and
INGRAM MICRO, INC., a Delaware corporation,

Defendants.

ORDER ON OTTER PRODUCTS, LLC'S MOTION TO DISMISS FOREIGN TRADE CORPORATION'S ANTITRUST CLAIM (DOC. 94)

This civil action began with a complaint filed by Foreign Trade Corporation (Technocel) on November 20, 2014, alleging that defendant Otter Products, LLC (OtterBox) breached a distributorship contract and related agreements and interfered with the plaintiff's relationships with its customers for OtterBox products. OtterBox counterclaimed to recover more than 3.5 million dollars for unpaid purchases and related claims. OtterBox alleges that it changed its distribution system by reducing the number of distributors from twelve to four, and that it terminated the agreement with Technocel in October, 2014, pursuant to a termination on 90-day notice clause in the

basic agreement.[1]

OtterBox sued other distributors for unpaid purchases in state court actions which the defendants removed based on diversity jurisdiction.[2] OtterBox sought to stay those new cases and proceed to trial on the Technocel case because of the extensive discovery that had taken place. At a hearing on January 29, 2016, the Court refused the stay and set the cases for a conference for coordinated discovery.

The scope of the litigation was drastically altered when Technocel filed an amended complaint on April 14, 2016. The First Amended Complaint added the four remaining distributors as defendants and pleaded a claim against them and OtterBox for violation of Sherman Act § 1 (First Claim), as well as claims for tortious interference with contract and prospective business relationships (Sixth and Seventh Claims) against the four distributors and related claims against Otterbox. OtterBox and the Distributor Defendants filed Rule 12(b)(6) motions to dismiss the antitrust claim. This ruling is limited to that First Claim for Relief against OtterBox.[3]

This case is in an unusual procedural posture. The amended complaint was filed

[1]OtterBox also alleges that it gave notice of immediate termination of Technocel's distributorship in November 2014 for failure of payment, which is disputed and the subject of a counterclaim.

[2]Those associated cases are *Otter Products, LLC v. Wireless Xcessories, et al.*, Civil Action. No. 15-cv-02575-RPM, and *Otter Products, LLC v. H.L. Dalis, et al.*, Civil Action No. 15-cv-02591-RPM.

[3] OtterBox filed a separate motion to dismiss Technocel's Fifth Claim for Relief [Doc. 95]. In addition, the Distributor Defendants, TESSCO Technologies, Inc. (TESSCO), Nite Ize, Inc. (Nite Ize), Brightstar Corporation (Brightstar), and Ingram Micro, Inc. (Ingram Micro) jointly filed a motion to dismiss all of Technocel's claims against them [Doc. 96]. Those motions are addressed in separate orders. Motions to dismiss filed by OtterBox and the Distributor Defendants in the associated cases are also addressed in separate orders.

after months of discovery on the issues framed in the original pleadings. The amended complaint therefore contains many more factual allegations to support the claims than would be expected if it had been filed as an initiating complaint. In some sense the motion to dismiss is a hybrid between Rule 56 and Rule 12(b)(6). Some material has been included in the briefing that may be relevant to the merits of the claim but the law requires that the factual allegations in the amended complaint be accepted as true and the plausibility standard be applied.

Technocel sells smartphone accessories, which include hardware and software used with a smartphone but not critical to the operation of the device. Its product assortment includes around 3,000 SKUs[4] including numerous smartphone cases. There are two types of cases. The mass market cases are driven by aesthetics and are much less expensive than protective cases engineered to protect the phone from rugged usages and conditions.

OtterBox manufactures cell phone cases of both types at a plant in Fort Collins, Colorado. It is a leader in protective cases, a position enhanced by its acquisition of a competitor, LifeProof, in 2013. Technocel had these cases in its product line since 2009. Initially it was required to buy from a sub-distributor. In 2013, by written agreements OtterBox authorized Technocel to buy directly as a master distributor selling through sub-distributors to resellers who sold to the public. It also sold to major accounts like T-Mobile and Verizon. Technocel was in competition with 11 other Master Distributors all of whom were free to sell throughout the United States at prices they set.

[4]A SKU is a stock keeping unit identifying a particular product.

This distribution system was a minor part of a complex system by which OtterBox products reached consumers.

In 2013, OtterBox sales went through five primary channels. It sold directly to (1) carriers, (2) retailers, (3) business to business (B2B), and (4) online. The fifth channel, called the U.S. Core Channel for all other sales in the United States, used a complex network of distributors and resellers. There were "master distributors" and "sub-distributors" providing product to "resellers" who sold to the public. Some distributors also sold to national accounts that included some of the carriers and retailers. Thus some entities bought OtterBox smartphone cases both directly from OtterBox and from distributors.

By 2013, OtterBox's master distributors were Wireless Xcessories Group, Inc. ("WireX"), H. L. Dalis, Inc. ("H. L. Dalis"), Technocel, Superior Communications, Inc., BrightStar, TESSCO, NuCourse Distribution, Inc., and Nite Ize. Ingram Micro was added. Technocel and the other master distributors owned the cases upon delivery by OtterBox and were free to sell them at their prices and on their terms downstream to sub-distributors and as many as 10,000 resellers across the U.S. who would then sell them to the public. The four Distributor Defendants sold roughly 50% of OtterBox's sales into the U.S. Core Channel. Technocel and the plaintiffs in the two associated cases (H. L. Dalis and WireX), accounted for approximately 25% of those sales. The Core Channel sales were about 28% of OtterBox's total sales.[5]

OtterBox's distribution agreements granted distributors the "non-exclusive right"

[5]Technocel has suggested this number may be 30% or more. Its First Amended Complaint alleges 28%.

to sell OtterBox cases throughout the United States. They competed for sales and the "vast majority" of resellers could shop for the best price and terms, buying from any distributor they chose. This price competition among distributors, known as "intra-channel business swapping," squeezed master distributor margins, cut OtterBox's profits, and hampered revenue growth for both.

OtterBox's master distributors also faced "cross channel" competition from cellular carriers and big box retailers who purchased directly from OtterBox and could resell into the Core channel as well as to the public. OtterBox margins on sales to distributors were higher than sales to carriers. Higher-margin sales were lost when resellers bought from carriers or big box retailers rather than from the distributors. Resellers had the benefit of selecting sources for OtterBox products on such terms as they might negotiate. OtterBox had difficulty reducing these less profitable sales because resellers were not required to buy from distributors, much less from any specific distributor.

The complexity of the historical distribution model made it difficult for OtterBox to solve the problem unilaterally. Reducing the number of distributors and changing to an exclusive distribution model required acceptance by the participating distributors. OtterBox would also need to transition thousands of resellers from terminated distributors and sub-distributors to the surviving master distributors, which also required cooperation.

In 2014, in the U.S. Core distribution channel only, OtterBox changed from the non-exclusive, wholesale distribution model to an exclusive distributor regime using only

the four Distributor Defendants as master distributors. Technocel alleges that because the problems created by the historical system could not be solved unilaterally, OtterBox and the Distributor Defendants had to conspire to shrink the number of distributors and assign exclusive territories to the Distributor Defendants. Technocel alleges that in order to ensure that both OtterBox and the Distributor Defendants would be satisfied with the new distribution model, OtterBox became the hub for structuring an agreement among the competing Distributor Defendants on the contours of the new, exclusive regime.

Technocel alleges that the new model was developed and agreed upon in a series of meetings and other communications among OtterBox and the Distributor Defendants occurring from January through October 2014, including discussions of which distributors would "make the cut," a timeline for implementation, cooperation by the Distributor Defendants, division of geographic territories, and allocation of customers. At the end of October 2014, OtterBox issued termination letters to Technocel and the master distributors other than the Distributor Defendants, and also terminated all sub-distributors.

In January 2015, OtterBox wrote to some 10,000 resellers about OtterBox's distributorship changes, telling each that only one distributor would be allowed to sell to them and identifying the distributor that would handle the reseller's account. OtterBox, with the Distributor Defendants' approval, also changed its Authorized Reseller Application to provide that resellers could not contact "any third party, for the purpose of manufacturing or obtaining any product similar to" OtterBox's smartphone case

products. Technocel alleges that this provision prevented resellers from purchasing product competitive to OtterBox's, thereby reducing inter-brand competition.[6]

Technocel recognizes that a vertical restraint by a manufacturer on sales to its distributors is not a violation of the Sherman Act. In this case it has pleaded adequate facts to show a hub and spoke conspiracy in which OtterBox as the hub required the Distributor Defendants to form a horizontal agreement to restrict sales in furtherance of a network that excludes other distributors, establishes exclusive territories, and limits sales to those who have agreements with OtterBox restricting their reselling freedom. The question is whether this system is anticompetitive within the prohibition of the Sherman Act.

What is the horizontal agreement among the four Distributor Defendants? They each agree that they will buy only OtterBox cases and sell them within a restricted territory only to resellers who, in turn, agree to buy and sell only OtterBox cases. Standing alone, that can be argued to be a per se restraint of trade in violation of the Sherman Act, based on a presumption that the agreement has such a pernicious effect on competition and the lack of any redeeming virtue that it is not necessary to show actual harm to competition and no business justification will be considered. The Supreme Court established the per se doctrine and has applied it in a variety of arrangements fixing prices or establishing exclusive territories.

Technocel urges *United States v. Topco Associates*, *Inc.*, 405 U.S. 596 (1972)

[6]This interpretation of the provision is disputed by OtterBox, but the Court accepts it for purposes of this motion to dismiss.

as a controlling precedent for its claim. The broad language of that case has superficial appeal. Following it here would ignore the many decisions of the Court during the intervening years leading some scholars and case law to suggest its continuing validity has become questionable.

In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 293-94 (l985), the Court cautioned that care must be used in application of the per se doctrine. In the opinion deciding *Bus. Elecs. Corp. v. Sharp Elecs. Corp.,* 485 U.S. 717, 726 (l988), the Court reiterated that there is a presumption in favor of the rule of reason standard in analyzing restraints alleged to be anti-competitive in violation of the Sherman Act, and that departures from that standard "must be justified by demonstrable economic effect … rather than formalistic distinctions…." The rule of reason is the default approach in the Tenth Circuit Court of Appeals. *Gregory v. Fort Bridger Rendezvous Ass'n,* 448 F.3d 1195, 1203 (2006).[7]

The Tenth Circuit has recognized that application of the per se rule is not appropriate where the restraint is ancillary to the objective of a joint venture. *See SCFC ILC, Inc., v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994) (observing that "virtually any collaborative activity among business firms may be called a joint venture"). Other cases have also recognized that a per se rule should not be applied without analysis where the agreement at issue, rather than being a "naked" restraint, is ancillary or

[7] This was recently reaffirmed in *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, ___ F.3d. ___, 2017 WL 460969 *5 (10th Cir. Feb. 3, 2017) ("Absent a showing that per se treatment is warranted, 'courts should apply a rule-of-reason analysis.'" (quoting *Nw. Wholesale*, 472 U.S. at 296-97)).

subordinate to a joint venture or other separate, legitimate transaction intended to enhance efficiency and economy of the participants. *See, e.g., Rothery Storage and Van Co. v. Atlas Van Lines, Inc.,* 792 F.2d 210, 224-29 (D.C. Cir. 1986); *Polk Bros., Inc. v. Forest City Ents., Inc.,* 776 F.2d 185, 188-89 (7th Cir. 1985). *See also Massachusetts Food Ass'n v. Massachusetts Alcoholic Beverages Control Comm'n,* 197 F.3d 560, 564 n.2 (1st Cir. 1999) ("Topco may no longer be good law for its broader proposition that such a restraint is condemned per se even where it is ancillary to a productive joint venture….").

While not all of the attributes of a formal joint venture are present here, OtterBox's system of distribution is a cooperative venture among OtterBox and its distributors and resellers. As Technocel alleges, OtterBox and its master distributors executed comprehensive written agreements that included provisions for confidentiality, warranty credit, stock rotation credits, and a minimum advertised price policy, the purpose of which was to support OtterBox's product by protecting the reputation of the OtterBox brand. Such provisions defined and regulated the relationships between and among participants in the distribution complex. Modifying the distribution system in the U.S. Core channel was admittedly intended to fix a poorly-functioning enterprise that was rife with problems that adversely affected OtterBox and its distributors, including intra-channel business swapping, cross-channel selling, and non-compliance with minimum-advertised-pricing policy. The new exclusive distribution system in the U.S. Core channel was thus "part of an integration of the economic activities of the parties," *Rothery*, 792 F.2d at 229, and was ancillary to the larger enterprise. As in *SCFC*,

"competitive incentives between independent firms are intentionally restrained and their functions and operations integrated to achieve efficiencies and increase output." *SCFC*, 36 F.3d at 963. This is not a per se case.

Technocel also attacks this distribution system using a rule of reason analysis of the facts pleaded in the First Amended Complaint. Under a rule of reason analysis, "the plaintiff bears the initial burden of showing that an agreement had a substantially adverse effect on competition." *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998). That must be viewed from the perspective of the consumer. *See Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986) ("[T]he purpose of the antitrust laws is the promotion of consumer welfare.").

Where can a consumer buy an OtterBox product now? The sources are not restricted to those outlets obtaining products from the restricted resellers who remain within the U.S. Core channel. They can also buy it along with a phone from a carrier, from a retailer who obtained it from OtterBox, from OtterBox directly, from other sellers online (*e.g.*, Amazon), and from other retailers who acquired product from these sources outside the Core Channel. Consumers retain the same array of sources to purchase OtterBox products.

The anti-competitive effects, if any, are on the 10,000 resellers who must sell only OtterBox cases and at prices set by their authorized distributors. The protection of their business is not within the purpose of the Sherman Act. *See SCFC,* 36 F.3d at 963 ("[A] practice ultimately judged anticompetitive is one which harms competition, not a particular competitor."). In addition, even if the Authorized Reseller Agreement prevents

resellers from purchasing competing products, Technocel does not allege to what extent the imposition of the new provision on resellers impacted the market as a whole. Particularly where the impact is only on the U.S. Core channel, and there is no alleged impact on sales in the other four channels, the allegation of a limitation on consumer choice for competing products is not plausible.

There is also no plausible allegation that the conspiracy was intended to or did increase the price of OtterBox products to consumers. There are pro-competitive aspects to this change in the distributorship system. It eliminates intra-brand price competition for the purpose of simplifying the Core Channel but price competition remains from the other channels. An efficient system of distribution may improve the ability of OtterBox to compete with other manufacturers. Technocel argues that OtterBox has an 80 to 85% share of the sub-market for protective cases as a conclusory allegation, but there is no support for an inference that this restraint on sales in the U.S. Core channel gives OtterBox the power to raise prices beyond a competitive level.

Technocel has failed to state claim for relief under Sherman Act § 1 on either a per se or rule of reason theory. Based on the foregoing it is ORDERED that OtterBox's motion to dismiss Technocel's First Claim for Relief is GRANTED.

DATED: February 15, 2017.

BY THE COURT:

s/Richard P. Matsch

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Richard P. Matsch, Senior District Judge