

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-0416-WYD-KLM

BRANTA, LLC, a Delaware limited liability company;
BRANTA EXPLORATION & PRODUCTION COMPANY, LLC, a Delaware limited liability
Company;
HARVEST (US) HOLDINGS, INC., a Delaware corporation;
HARVEST NATURAL RESOURCES, INC., a Delaware corporation,

Plaintiffs,

v.

NEWFIELD PRODUCTION COMPANY, a Texas corporation,

Defendant.

ORDER ON MOTION TO DISMISS

I. INTRODUCTION & BACKGROUND

This matter is before the Court on Defendant's Motion to Dismiss Amended Complaint (ECF No. 44), filed on October 2, 2015. The Motion is fully briefed.

This case arises out of the sale of oil, gas, and mineral assets in the Uinta Basin of Utah. These assets were sold through auction by Plaintiffs Branta, LLC ("Branta") and Branta Exploration & Production Company ("Branta E&P") (collectively "Branta Plaintiffs"), and by Plaintiffs Harvest (US) Holdings, Inc. ("Harvest") and Harvest Natural Resources, Inc. ("HNR") (collectively "Harvest Plaintiffs") to the Defendant, Newfield Production Company ("Newfield") on March 21, 2011, for approximately \$310 million.¹ These transactions were defined in two separate Purchase and Sales Agreements ("PSA") – one between the Branta Plaintiffs and Newfield, and the other between the

¹ Branta is the parent company of Branta E&P. HNR is the parent company of Harvest.

Harvest Plaintiffs and Newfield. The Branta Plaintiffs allege that when Newfield expressed interest in buying the Branta Plaintiff's assets in February 2010, the two parties entered into a Confidentiality Agreement prior to the auction selling the oil and gas assets, which granted Newfield access to confidential and proprietary information about the assets. The Confidentiality Agreement prohibited Newfield from contacting other entities that may also have been interested in purchasing the Plaintiffs' assets. Plaintiffs state that the other viable entity that would have been interested in such a purchase was Ute Energy. The Confidentiality Agreement was modified in February of 2011, allowing Newfield to communicate with the Harvest Plaintiffs. Subsequently, Newfield executed a separate Confidentiality Agreement with the Harvest Plaintiffs.

Plaintiffs argue that prior to the auction and sale of assets to Newfield, Newfield breached the Confidentiality Agreements by contacting Ute Energy, and offering to compensate Ute Energy if Ute Energy agreed to not bid competitively in the auction. Plaintiffs argue that the offer to compensate Ute Energy by Newfield was not the extension of a prior arrangement between the two entities, "but rather an offer made for the sole purpose of discouraging Ute Energy's participation in the auction." First Amended Complaint ("FAC"), ¶ 32. Plaintiffs assert that they did not know of Newfield's communications with Ute Energy until September of 2013 (Branta Plaintiffs) or late 2014 (Harvest Plaintiffs) when they became aware of a letter, dated May of 2011, from Ute Energy to Newfield discussing the auction. Plaintiffs argue that Ute Energy would have submitted a highly competitive bid for the oil and gas assets, but instead chose not to

participate based on discussions with and promises made by Newfield. Plaintiffs argue that this “bid-rigging” was done in violation of the Confidentiality Agreements, and that Newfield conspired with Ute Energy to conceal their bid rigging activities from the Plaintiffs.

Plaintiffs assert seven claims for relief in their Amended Complaint (ECF No. 35): 1) breach of contract between the Branta Plaintiffs and Newfield; 2) breach of contract between the Harvest Plaintiffs and Newfield; 3) violation of the Colorado Antitrust Act of C.R.S. § 6-4-101 et seq.; 4) violation of the Sherman Antitrust Act of 15 U.S.C. § 1 et seq.; 5) tortious interference with prospective business advantage by the Branta Plaintiffs; 6) tortious interference with prospective business advantage by the Harvest Plaintiffs; and 7) civil conspiracy.² Plaintiffs seek compensatory, actual, and treble damages; pre- and post-judgment interest; and attorneys’ fees and costs.

Newfield argues that 1) Plaintiffs lack standing to bring any claims because they sold their claims in the respective PSAs; 2) the statute of limitations bars any recovery on Plaintiffs’ federal antitrust and breach of contract claims; 3) the tortious interference claims are not sufficiently pled to survive a motion to dismiss; and 4) the antitrust claims do not allege a *per se* violation, or survive analysis under the “rule of reason.”

II. STANDARD OF REVIEW

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to

² Plaintiffs’ breach of contract claims are governed by Texas law. Their tort claims are governed by Colorado law.

relief.” Although this pleading standard does not require detailed factual allegations, it does require “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 678 (2007). Further, “a pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do’ . . . [n]or does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555, 557). A motion to dismiss can be granted if a complaint fails to state a claim upon which relief can be granted under Fed. R. Civ. Pro. 12(b)(6). In order for a complaint to survive a motion to dismiss, it must contain “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.*, citing *Twombly*, 550 U.S. at 570. Facial plausibility is met when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*, citing *Twombly*, 550 U.S. at 556. When deciding a motion to dismiss under Rule 12(b)(6), a court must assume the truth of all well-pleaded facts in the complaint, and draw all reasonable inferences in a light most favorable to the plaintiff. See *Teigen v. Renfrow*, 511 F.3d 1072, 1078 (10th Cir. 2007).

III. ANALYSIS

Newfield offers four arguments in favor of dismissal: 1) Plaintiffs lack of standing; 2) a bar of claims due to the statute of limitations; 3) insufficient pleading of the tortious interference claims; and 4) insufficient pleading of the antitrust claims.

A. Plaintiffs' Standing

A party's standing to bring a claim in federal court is a threshold question. *City of Colo. Springs v. Climax Molybdenum Co.*, 587 F.3d 1071 (10th Cir. 2009). Newfield argues that Plaintiffs lack standing to bring any cause of action in this case because they allegedly sold their claims to Newfield in the Purchase and Sales Agreement. Newfield refers to §§ 2.1 and 2.2(k) in both of the PSAs, which state as follows:

§ 2.1: Purchase and Sale of Assets. At the Closing, Seller shall sell and convey to Purchaser, and Purchaser shall purchase and receive from Seller, all of Seller's right, title and interest in the Acquired Assets free and clear of all Liens other than Permitted Liens created by, through or under Seller or its Affiliates, but not otherwise, under the terms of, and subject to the conditions in, this Agreement.

§ 2.2 Acquired Assets. "Acquired Assets" means all of Seller's right, title, and interest in and to the following, but excluding the Excluded Assets . . .

(k) Except to the extent relating to the Excluded Assets, and except for Claims, payments, and proceeds under insurance policies (the proceeds of which are not transferred in connection with any Casualty Losses that are covered under Section 10.10), all accounts receivable or rights to payment arising out of or attributable to the Acquired Assets accruing or attributable to any period after the Effective Time, including the right to any payments with respect to any Royalties or net profits, and all rights, Claims, refunds, causes of action, or choses in action relating to the foregoing, except in each case with respect to Property and Production Taxes, which shall be governed by Section 15.1(c)

The "*Effective Time*" of the agreement is defined as March 1, 2011. See PSA, ECF No. 45, p. 71. The term "*Claims*" in the PSAs is defined as "any notice, claim, demand, allegation, cause of action, chose in action, or other

communication alleging or asserting Liability or seeking contribution, indemnification, cost recovery, or compensation for Losses or injunctive or other equitable relief.” *Id.* at 70. Newfield argues that since Plaintiffs’ claims seek additional payments for the Acquired Assets, they necessarily arise out of and are attributable to the Acquired Assets, and the language of the PSAs, according to Newfield precludes any such claim of action. Newfield purchased the Acquired Assets, and therefore, it argues, “Newfield, not Plaintiffs, owns the claims” in Plaintiffs’ FAC. Mot., p. 8.

The PSA provisions cited by Newfield state that Newfield purchased the “right, title and interest in the Acquired Assets.” PSA, § 2.1. Those enumerated assets, as listed in Section 2.2(k), include “all rights, Claims, refunds, causes of action, or choses in action *related to the foregoing*.” The key modifier here, *related to the foregoing*, can only be interpreted as relating to the asset as described immediately prior: “all accounts receivable or rights to payment arising out of or attributable to the Acquired Assets accruing or attributable to any period after the Effective Time, including the right to any payments with respect to any Royalties or net profits.” Section 2.2(k) follows other sections in the PSAs which describe the assets, including oil, gas, and mineral leases; pooling agreements; oil and gas wells; hydrocarbons; easements; owned and leased interests in equipment and operating inventory; permits; contracts; real estate; and technical data. See § 2.2 (a)–(j). Newfield’s expansive reading of the definition of a

“claim” to include any cause of action of any nature is inconsistent with the specific language of Section 2.2(k) of the PSAs. Additionally, the PSAs include a provision at Section 17.10 which defines the governing law of any claims and causes of action based on the agreement, including claims related to the “inducement to enter into” the agreement. This is precisely the kind of claim that Plaintiffs bring in the present action.

After a plain reading of the PSAs, it is clear that the conveyance of Plaintiffs’ claims was intended only to apply to the “foregoing” matters described in Section 2.2(k) - accounts receivable and payments for royalties or net profits related to the oil and gas leases that were the subject of the transaction. Since Plaintiffs’ claims are not for payments related to royalties or net profits, I find that Plaintiffs have standing to bring the current action against Newfield.

B. Statute of Limitations

Next, Newfield argues that Plaintiffs’ federal antitrust claims and breach of contract claims are barred by relevant statutes of limitation because those claims did not accrue until after Plaintiffs sold their claims to Newfield. Since I find that Plaintiffs conveyance of claims relates only to those matters as described in Section 2.2(k) of the PSAs, their antitrust and contract claims are not precluded here on the basis of Newfield’s ownership of them.

Under Texas law, the statute of limitations on a breach of contract claim is four years. See Tex. Civ. Prac. & Rem. Code § 16.051. It is well-settled that a

breach of contract claim accrues when the contract is breached. *Stine v. Stewart*, 80 S.W.3d 586, 592 (Tex. 2002); *Smith v. Fairbanks, Morse & Co.*, 102 S.W. 908, 909 (Tex. 1907).

Plaintiffs' breach of contract claims are based upon allegations that Newfield improperly communicated with Ute Energy, breaching the provisions of the Confidentiality Agreements. Specifically, Plaintiffs allege that Newfield's former head of the Rocky Mountain Business Unit, Daryll Howard, communicated with the former President and CEO of Ute Energy "in or around March of 2011." Am. Compl., ¶¶ 32, 33. Since the initial Complaint in this matter was filed on February 27, 2015, Plaintiffs' breach of contract claims are timely filed.

The statute of limitations on a Sherman Antitrust Act claim is also four years. See 15 U.S.C. § 15b. The limitations period begins to run when the cause of action accrues. Plaintiffs' antitrust allegations also stem from Newfield's alleged communications with Ute Energy, in violation of the Confidentiality Agreements, in March of 2011, less than four years before Plaintiffs filed their Complaint. Accordingly, Plaintiffs' federal antitrust claims are timely filed.

C. Sufficiency of Tortious Interference Claims

Newfield argues that Plaintiffs' claims of tortious interference with prospective business advantage (Claims V and VI) should be dismissed because they fail to plead with sufficiency the likelihood of a business relationship with Ute Energy. Newfield notes that Plaintiffs only allege a *prospective* relationship with

Ute Energy, and fail to specifically allege a reasonable *expectation* that Ute Energy would bid on the assets for sale at the auction. Mot. p. 11. To assert a claim for tortious interference with prospective business advantage, Plaintiffs must allege that 1) Newfield either induced a third person not to enter into or continue a contractual relationship with Plaintiffs, or prevented Plaintiffs from acquiring or continuing the prospective relation; 2) Newfield did so intentionally; and 3) Newfield used improper means to do so. See *L-3 Commc'ns Corp. v. Jaxon Eng'g & Maint., Inc.*, 863 F. Supp. 2d 1066, 1085-86 (D. Colo. 2012); *MDM Group Assocs., Inc. v. CX Reinsurance Co.*, 165 P.3d 882, 886 (Colo. App. 2007), citing *Restatement (Second) of Torts* § 766B (1979). “[E]xpectations of receiving future contracts are protected against tortious interference so long as ‘there is a reasonable likelihood or reasonable probability that a contract would have resulted’ absent the interference.” *L-3*, 863 F. Supp. 2d at 1086, citing *MDM Group*, 165 P.3d at 886.

Here, Plaintiffs have alleged that Newfield induced Ute Energy not to enter into a relationship with Plaintiffs, by urging Ute Energy not to bid at the auction. Newfield asserts that Plaintiffs only allege that “[b]y virtue of its existing operations in the Uinta Basin and expected participation in the auction . . . a prospective business or contractual relationship existed” between Plaintiffs and Ute Energy. See Am. Compl., ¶ 72. Newfield argues that this allegation is insufficient. However, Plaintiffs also allege, through reference to a letter from Ute Energy to

Newfield in May of 2011, that Ute Energy had communicated with Harvest regarding the auction, but did not participate based on communications with Newfield. See ECF No. 58-1. Newfield argues in its Reply that the letter should not be considered by the Court because it was “neither attached to nor referenced in the [First Amended Complaint].” Reply, ECF No. 75, p. 1.

Although Newfield does not specifically raise the argument of conversion, I note here that consideration of material extraneous to a complaint typically requires a court to convert a Rule 12(b)(6) motion into one for summary judgment. Fed.R.Civ.P. 12(d). If, however, a document is referenced in and central to a complaint, a court may consider it without converting the motion. *Leonhart v. ITT Sys. Corp.*, 2011 WL 5459455, at *2 (D. Colo. Nov. 10, 2011); *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997). Here, I will consider the Ute Energy letter to Newfield because Plaintiffs reference it in their Amended Complaint, and it is central to their claims. See Am. Compl., ¶¶ 33, 34, 38, 39.

The letter was written by Joe Jaggers of Ute Energy on May 20, 2011, and sent to Daryll Howard of Newfield. The letter references the “Harvest/Branta Acquisition” and discusses Ute Energy’s participation in the acquisition of the Harvest/Branta leases. See ECF No. 58-1. It indicates that “Ute Energy communicated to Newfield consistently and openly that it would not enter into the Harvest/Branta sales process on its own behalf because we believed that Newfield

would represent our interests and that we expected to be a part of the acquired leases and wells.” *Id.* A plain reading of the letter suggests that Ute Energy was interested in acquiring Plaintiffs’ assets, and would have bid on them at auction if not for communications and agreements made with Newfield. Plaintiffs allege with sufficiency that Newfield intentionally interfered with the bidding process for Plaintiffs’ assets, and may have used improper means to do so, either by breaching the Confidentiality Agreements that it had with the Plaintiffs, or by conspiring to conceal its agreement with Ute Energy from Plaintiffs. Drawing all reasonable inferences in a light most favorable to the Plaintiffs, I find their allegations of tortious interference sufficient to survive dismissal.

D. Sufficiency of Antitrust Claims

Newfield seeks dismissal of Plaintiffs’ claim under Section 1 of the Sherman Antitrust Act (Claim IV), and the analogous state claim pursuant to the Colorado Antitrust Act, C.R.S. § 6-4-101 et seq. (Claim III). The Sherman Act is a federal statute prohibiting monopolies and combinations in restraint of trade. The Colorado Antitrust Act is the state law equivalent to the Sherman Act. See Colo. Rev. Stat. § 6–4–119 (“the courts shall use as a guide interpretations given by the federal courts to comparable federal antitrust laws.”). Because federal antitrust law principles apply to both the federal and state antitrust claims, both claims may be analyzed together. See *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango*, 582 F.3d 1216, 1220, n.1 (10th Cir. 2009). Section 1 of the

Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” 15 U.S.C. § 1; see *also* Colo. Rev. Stat. § 6–4–104 (“Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce is illegal.”). Plaintiffs must demonstrate two elements for a Section 1 claim: 1) an agreement in the form of a contract, combination, or conspiracy; and 2) an unreasonable restraint of trade in a relevant market. *Systemcare, Inc. v. Wang Labs Corp.*, 117 F.3d 1137, 1139 (10th Cir. 1997).

1. Contract, Combination, or Conspiracy

At the pleading stage, a Section 1 claim “requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made . . . [and] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” *Twombly*, 550 U.S. at 556. Here, Plaintiffs allege that Newfield and Ute Energy “conspired to rig the auction bidding process and artificially deflate the value of the winning bid” for Plaintiffs’ assets. Am. Compl., ¶ 59. This bid-rigging, Plaintiffs allege, “interfered with the setting of price by the free market.” *Id.* at ¶ 60. Plaintiffs allege that Newfield engaged in unlawful communications with Ute Energy, and based on those communications, Ute Energy did not submit a competitive bid for Plaintiffs’ assets. Plaintiffs allege that the ultimate price paid by Newfield for the assets was depressed because Ute Energy did not also submit

a bid, and that Newfield concealed its breach of the Confidentiality Agreements in order to prevent Plaintiffs from discovering the conspiracy. *Id.* at ¶¶ 32-33, 35-36. Plaintiffs further allege that after Newfield purchased the assets at below market value, Ute Energy sold acreage in the Uinta Basin for approximately \$5,000 per acre, which was a 67% markup on the price Newfield paid at the auction, and that other sales in the same area may have been for approximately \$12,000 per acre. *Id.* at ¶ 41. I find that these allegations plead sufficient factual matter to suggest the existence of an agreement, and to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement.

2. *Restraint of Trade*

While Section 1 of the Sherman Act prohibits agreements in restraint of trade, it is not read so broadly as to render “every conceivable contract or combination which could be made concerning trade or commerce . . . anywhere in the whole field of human activity to be illegal.” *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60 (1911). Rather, Section 1 prohibits only those agreements that impose unreasonable restraints of trade, which is determined under one of two analyses: the *per se* illegality test, or the “rule of reason” test. See *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1016 (10th Cir. 1998); *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (noting that the Sherman Act prohibits only those restraints of trade that are unreasonable).

If “a practice is identified as illegal *per se*, a court need not examine the

practice's impact on the market or the procompetitive justifications for the practice before finding a violation of antitrust law.” *Id.* However, if the practice is not *per se* illegal, courts apply the “rule of reason” test, which involves a burden-shifting analysis to determine the extent to which the practice has unreasonably anticompetitive effects. *Id.* at 1017. Defendant’s Motion argues that the conduct alleged in Plaintiffs’ FAC does not constitute an unreasonable restraint of trade under either the *per se* test or the rule of reason test. Plaintiffs argue that the *per se* analysis applies because bid-rigging is a *per se* violation of the Sherman Act, and they have adequately alleged such activity in their FAC.

The Tenth Circuit has held that “[a]ny agreement between competitors pursuant to which contract offers are to be submitted [to] or withheld from a third party constitutes bid rigging *per se* violative of 15 U.S.C. Section 1.” *United States v. Mobile Materials, Inc.*, 881 F.2d 866, 869 (10th Cir. 1989); *see also United States v. Reicher*, 983 F.2d 168, 170 (10th Cir. 1992). Here, Newfield and Ute Energy were competitors. *See* Mot., p. 2. Plaintiffs have sufficiently alleged the existence of an agreement between those competitors regarding bids to be submitted to Plaintiffs, a third party, for Plaintiffs’ assets for sale at the auction. Therefore, Plaintiffs’ allegations are sufficient to meet the definition of a *per se* violation under Tenth Circuit law.

Newfield argues, citing case law from the Seventh Circuit, that bid rigging “is not a well-defined activity that compels the application of a *per se* rule.”

Mot., p. 13. However, it is well-defined under Tenth Circuit law, and the allegations as stated in the FAC meet that definition.

Newfield then relies on a Colorado Supreme Court case in support of its argument that its conduct did not constitute bid-rigging. In *Amos v. Aspen Alps 123, LLC*, 280 P.3d 1256 (Colo. 2012), the court found that bid-rigging had not occurred where three individual bidders had exercised their right to contract by pooling their resources to place bids on a property which they would otherwise be unable to afford. The court held that, based on the limited evidence at that stage of the litigation, there was no indication that the purpose of the individuals joining to purchase the property was to eliminate, reduce, or interfere with competition. That is not the case here. Plaintiffs have sufficiently alleged the existence of an agreement between competitors, affecting the competitive bids to be submitted to Plaintiff for their assets.

Finally, Newfield cites to a Tenth Circuit case for the proposition that there is a presumption in favor of the rule of reason standard over the *per se* rule standard. *Gregory v. Fort Bridger Rendezvous Ass'n*, 448 F.3d 1195, 1203 (10th Cir. 2006). However, the court in *Gregory* discussed the use of the rule of reason in the context of a group boycott allegation. The court noted that “some group boycotts have been deemed *per se* illegal” but that the approach was generally limited to cases where “firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor.” *Id.* at 1203-04. The

court cautioned that in the group boycott context, “*per se* treatment . . . should not be undertaken ‘indiscriminately.’” The present case does not involve a group boycott allegation, and the definition of bid-rigging is sufficiently met as alleged by Plaintiffs in their FAC. Newfield’s urging that the Court bypass the *per se* analysis and only consider Newfield’s conduct under the rule of reason is unpersuasive. The alleged conduct in Plaintiffs’ FAC meets the Tenth Circuit’s definition of bid-rigging, and therefore analysis beyond the *per se* rule is not required here. Accordingly, Plaintiffs’ antitrust claims cannot be dismissed at this stage of the litigation.

IV. CONCLUSION

Based on the foregoing, it is

ORDERED that Defendant’s Motion to Dismiss Amended Complaint (ECF No. 44) is **DENIED**.

Dated: August 12, 2016.

BY THE COURT:

s/ Wiley Y. Daniel
WILEY Y. DANIEL,
SENIOR UNITED STATES DISTRICT JUDGE