UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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HAROLD CHARYCH and
MOUNTAIN PASS SYSTEMS, LLC,

Plaintiffs,

REPORT AND
RECOMMENDATION
CV 17-468 (JS) (GRB)

-against-

(1) SIRIUSWARE, INC.,
United States subsidiary of a United Kingdom entity;
(2) ACCESSO TECHNOLOGY GROUP, PLC,
United Kingdom parent entity of SIRIUSWARE, INC.;
(3) AXESS NORTH AMERICA, LLC
United States subsidiary of an Austrian entity
(4) AXESS, AG
Austrian parent entity of AXESS NORTH AMERICA, LLC
(5) ACTIVE NETWORK, LLC
Formerly Resort Technology Partners, LLC
(6) VISTA EQUITY PARTNERS, LLC
Parent company of Active Network, LLC
(7) SKIDATA, INC.
United States subsidiary of an Austrian entity
(8) SKIDATA, AG
Austrian parent entity of SKIDATA, INC.

Defendants.

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GARY R. BROWN, United States Magistrate Judge:

In this antitrust action, plaintiffs seek recovery based on allegations purporting to demonstrate that defendants acted unlawfully in connection with the distribution and marketing of automated ski resort validation systems. Defendants have moved to dismiss the fourth

amended complaint pursuant to Fed. R. Civ. P. 12(b)(2), (5) and (6) for lack of jurisdiction, failure of service and failure to state a claim, respectively, and said motions have been referred to the undersigned by the Honorable Joanna Seybert for Report and Recommendation. DE 80. For the reasons set forth herein, the undersigned respectfully recommends that defendants' motion be granted and the matter dismissed with prejudice.

ALLEGATIONS OF THE COMPLAINT

The fourth amended complaint ("Complaint") in this action, DE 67, alleges the following:

Many larger ski resorts utilize management software sold by Defendants Accesso Technology Group, PLC with its subsidiary Siriusware, Inc. (together "Accesso Technology") and defendant Active Network, LLC. ("Active Network"). Compl. ¶ 14. The solutions provided by these companies—which represent approximately 80% of the market—include production of ski lift tickets that include unique barcodes, which can be visually read by employees or scanned by mobile barcode readers. *Id.* Notwithstanding these safeguards, theft of services continues to present issues, including through improper lift ticket transfers among skiers. *Id.* ¶¶ 15-17.

To add additional security and greater efficiency, companies have developed automated ski lift access gates employing Radio Frequency Identification ("RFID") technology –essentially an EZ Pass for skiers. *Id.* ¶¶ 18-19. Active Network has partnered with the Skidata defendants to offer these products to its ski resort customers. *Id.* ¶¶ 22-24. Similarly, the Accesso Technology has made joint efforts with the Axess defendants to provide a unified RFID solution to their ski

resort customers. *Id.* ¶¶ 25-28. The Complaint alleges, in a most conclusory manner, that all defendants have "significant contacts" with the State of New York, through, among other things, efforts to purchase or sell products to or from businesses in New York and attending trade shows and conferences. *Id.* ¶ 12. With respect to the three non-US defendants—Axess AG, Vista and Skidata AG (together, the "foreign defendants")—plaintiffs fail to articulate any particularized allegations as to these entities, relying instead upon broad legal theories. *See, e.g.*, *id.* ¶¶ 284-87 (allegations against Axess AG suggesting that defendant "is *or may be liable* for the conduct of [Axess] under principles of *respondeat superior . . . and/or some other type of vicarious liability*") (emphasis added).

Plaintiffs developed, at a cost of $350,000, an RFID ski gate system that, they claim, offers superior features and a lower price point than the systems marketed by Axess and Skidata. *Id.* ¶¶ 31, 82. One technical difference of plaintiffs' system is the incorporation of ultra high frequency ("UHF") technology that purportedly offers a greater read range and more robust detection of RFID tickets. *Id.* ¶ 37. The complaint catalogs a series of features and advantages of plaintiffs' system that allegedly render it preferable to those produced by defendants. *Id.* ¶¶ 31-54. Following that description, plaintiffs describe testing their system at Loon Mountain in Lincoln, NH, Pico Mountain in Mendon, VT, and Sunday River in Newry, ME, and their unsuccessful efforts to market their system to Gore Mountain in North Creek, NY, Sunapee Mountain in Newbury, NH, and Wachusett Mountain Ski Area in Princeton, MA. *Id.* ¶¶ 56-79, 119-25. According to the allegations, the later, unsuccessful efforts to market their system turned on an unwillingness by Accesso Technology and Active Network to render their existing

systems compatible for integration of plaintiffs' products or to provide interface information to allow plaintiffs to effect such integration. *Id.*

The complaint describes additional efforts by plaintiffs to sell their system to other ski resorts, including Boyne Resorts and Powdr Resorts, entities which own groups of ski facilities. *Id.* ¶¶ 84-100. According to the complaint, all of these efforts were waylaid by defendants by the exercise of market power generally and, more specifically, failure to provide the interface for defendants' systems. *Id.* In one particular instance, Active Network indicated to Boyne Resorts that the cost of providing such an interface would run several hundred thousand dollars. *Id.* ¶ 100; *id.* Ex. S. Similarly, in connection with the Gore Mountain project, plaintiffs received information from the customer that providing an interface to the Accesso software "would not be cheap." *Id.* ¶ 115. In several other instances, plaintiffs cite, in support of their claims of restraint of trade, communications from potential customers asking questions about the nature of plaintiffs' relationship with Accesso Technology and Active Networks, as well as allegedly abrupt decision-making on the part of customers rejecting plaintiffs' products. *See generally id.*

Based on these allegations, the Complaint purports to set forth the following correspondingly numbered causes of action:

Count(s)	Defendants	Nature of Count
I, III,V, VII, IX, XI, XIII, XV	Siriusware, Accesso, Axess, Axess AG, Active, Vista, Skidata, Skidata AG	Restraint of Trade (Sherman Act, § 1)
II, IV, VI, VIII, XII, XIV, XVI	Siriusware, Accesso, Axess, Axess AG, Active, Skidata, Skidata AG	Agreement to Monopolize (Sherman Act, § 2)

In their *ad damnum* provision, plaintiffs seek actual damages exceeding $18 million (a figure drawn from income projections contained in plaintiffs' business plan), treble damages under the Sherman Act and other costs and fees. *Id.*

DISCUSSION

Lack of Personal Jurisdiction and Insufficient Service

As a threshold matter, the foreign defendants move to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2) and for insufficient service of process pursuant to Fed. R. Civ. P. 12(b)(5). With respect to personal jurisdiction, the Second Circuit has held that:

> A plaintiff bears the burden of demonstrating personal jurisdiction over a person or entity against whom it seeks to bring suit. *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 206 (2d Cir. 2003) (per curiam). "In order to survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a *prima facie* showing that jurisdiction exists." *Thomas v. Ashcroft*, 470 F.3d 491, 495 (2d Cir. 2006). Such a showing entails making "legally sufficient allegations of jurisdiction," including "an averment of facts that, if credited[,] would suffice to establish jurisdiction over the defendant." *In re Magnetic Audiotape*, 334 F.3d at 206 (internal quotation marks and ellipsis omitted).

Penguin Grp. (USA) Inc. v. Am. Buddha, 609 F.3d 30, 34–35 (2d Cir. 2010), *certified question accepted*, 933 N.E.2d 205 (N.Y. 2010*), & certified question answered*, 946 N.E.2d 159 (N.Y. 2011). As noted above, with respect to the foreign defendants, plaintiffs make only conclusory allegations of "minimum contacts." Compl. ¶ 12. Furthermore, one defendant submitted a declaration which calls into question such conclusory assertions. *See* DE 74-3, ¶¶ 4-11 (declaring that Axess AG is an Austrian entity that is not registered to do business and does not maintain addresses, offices, telephone number or agents for services of process anywhere in the

United States). In response, plaintiffs offer nothing but speculation on the question. DE 75 at 16 ("[T]here is bound to be a ski convention or conference in New York that the defendant attended . . . .").[1]

However, as to the foreign defendants, plaintiffs have run aground based upon the question of service. Plaintiffs have failed to provide any proof of service consistent with Rule 4(*l*)(1). While that failure alone could form the basis for the instant motion, *Reyes v. N. Shore-Long Island Jewish Health Sys.*, No. 00 CIV 8968 BSJ AJP, 2001 WL 395166, at *1 (S.D.N.Y. Apr. 16, 2001) (report and recommendation) (recommending the district court dismiss the action where "no affidavit of service on file with the Clerk's Office"), the undersigned will overlook this technical objection and examine the propriety of the underlying efforts to serve the foreign defendants. Because plaintiff failed to file affidavits of service, the only evidence of record describing the method used to provide notice to the foreign defendants is a declaration by Axess AG indicating that the complaint was sent to Austria "via a Federal Express mail delivery" and with no translations of the documents so delivered. DE 74-3, ¶ 12.

Service of process must comport both with the statute under which service is effectuated as well as due process requirements, and, of course, Fed. R. Civ. P. 12(b)(5) permits motions to dismiss for insufficient service. In this case, the statutory authority for service is the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or

[1] Plaintiffs have, however, for the first time on this motion, *see* DE 75 at 16-17, made a "request for further discovery on the question of personal jurisdiction." *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d at 206. Having done so, limited discovery on this issue would be permitted to proceed, provided plaintiffs' action should survive the balance of the motion. *Id.* As set forth below, it should not.

Commercial Matters ("Hague Convention"), as noted in Fed. R. Civ. P. 4(f)(1). *See Ackerman v. Levine*, 788 F.2d 830, 838 (2d Cir. 1986). "As a ratified treaty, the [Hague] Convention is of course 'the supreme law of the land.'" *Id.* (quoting U.S. Const. art. VI, cl. 2).

Article 10 of the Hague Convention states that "[p]rovided the State of destination does not object, the present Convention shall not interfere with the freedom to send judicial documents, by postal channels, directly to persons abroad." *Id.* at 839 (internal quotation marks omitted). The Second Circuit has long held the view that where a country "has made no objection to the use of 'postal channels' under Article 10(a), service of process by registered mail remains an appropriate method of service." *Id.* Recently, the Supreme Court reaffirmed this interpretation:

> Article 10(a) simply provides that, as long as the receiving state does not object, the Convention does not "interfere with ... the freedom" to serve documents through postal channels. In other words, in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law.

Water Splash, Inc. v. Menon, 137 S. Ct. 1504, 1513 (2017) (citing *Brockmeyer v. May*, 383 F.3d 798, 803-04 (9th Cir. 2004)).

So the relevant inquiry is whether Austrian law permits service of process by mail. The Eleventh Circuit has upheld a lower court determination that such "service . . . was prohibited by the law of Austria." *Prewitt Enters., Inc. v. Org. of Petroleum Exporting Countries*, 353 F.3d 916, 923 (11th Cir. 2003) (further holding that actual notice did not cure the deficient service). Another court held that "[i]n Austria, like many other European civil law countries, the direct service of foreign legal documents by foreign authorities or by private individuals without the

assistance or consent of Austrian authorities is regarded as an infringement of Austria's sovereignty." *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, No. 1428 (SAS), 01 CIV. 7342, 2003 WL 1807148, at *7 (S.D.N.Y. Apr. 4, 2003) (holding that the service of untranslated documents without consent is invalid under Austrian law). Additionally, on this motion, Axess AG presents a detailed, sworn declaration from an Austrian law professor which concludes as follows:

> Austrian law prohibits "direct" service of process via postal services, a private courier service or directly through the Plaintiff or Plaintiffs counsel. It demands that the foreign courts avail themselves of the legal assistance of Austrian authorities, *i.e.*, the Austrian Federal Ministry of Justice. On this basis, service of process will be performed by the competent Austrian courts and in accordance with the Austrian Federal Service Statutes.
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> From an Austrian law perspective, "direct" service of court documents without the involvement of the competent Austrian authorities is both contrary to Austrian due process principles and an infringement of Austrian territorial sovereignty. It is therefore prohibited and does not qualify as due service of process under Austrian law.

DE 74-2 at ¶¶ 15-16. In response to this detailed showing, plaintiffs offer neither evidence nor argument.

Accordingly, it is the recommendation of the undersigned that the action be dismissed without prejudice as against the foreign defendants for insufficient service of process pursuant to Fed. R. Civ. P. 12(b)(5).

Failure to State a Claim Under the Sherman Act

Standard of Review

Under Fed. R. Civ. P. 12(b)(6), a defendant may move to dismiss the complaint for "failure to state a claim upon which relief can be granted." "In considering a motion to dismiss

under Rule 12(b)(6), a court must accept as true all factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor." *Henry v. Nannys for Grannys Inc.*, 86 F. Supp. 3d 155, 157 (E.D.N.Y. 2015) (citing *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008)). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

To survive, a complaint must supply "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570); *see Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt., LLC*, 595 F.3d 86, 91 (2d Cir. 2010). A claim is plausible when the plaintiff sets forth "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 663.

In applying this standard in the context of an antitrust conspiracy action brought under § 1 and § 2 of the Sherman Act, the Second Circuit observed:

> We affirm the district court's dismissal of the conspiracy claims because plaintiffs are unable to allege facts that would provide "plausible grounds to infer an agreement," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007). "Considerable uncertainty" surrounds the breadth of the Supreme Court's recent decision in *Twombly*. *Iqbal v. Hasty*, 490 F.3d 143, 155 (2d Cir.2007). But we need not draw fine lines here; our precedents support application of *Twombly* to the conspiracy claims asserted under both Section 1 and Section 2. To survive a motion to dismiss under *Twombly*, it is not enough to make allegations of an antitrust conspiracy that are consistent with an unlawful agreement; to be viable, a complaint must contain "enough factual matter (taken as true) to suggest that an agreement [to engage in anticompetitive conduct] was made." *Twombly*, 127 S.Ct. at 1965 (citation and internal quotation marks omitted). While *Twombly*

> does not require heightened fact pleading of specifics, it does require enough facts to "nudge [plaintiffs'] claims across the line from conceivable to plausible." *Twombly*, 127 S.Ct. at 1974.

In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007) (footnotes omitted) (affirming district court's dismissal under Fed. R. Civ. P. 12(b)(6)). Importantly, in reaching its decision, the Court in *Elevator Antitrust Litigation* was swayed neither by "conclusory allegations of agreement," nor allegations of "parallel conduct," elements which represent cornerstones of plaintiffs' complaint here. *Id.*

Twombly, a Sherman Act decision, provides that a § 1 claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." 550 U.S. at 556. Notably, *Twombly* held that "[w]ithout more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id*. at 556-57. The parties agree that to state a claim under § 2, plaintiffs must allege "(1) concerted action, (2) overt acts in furtherance of the conspiracy, and (3) specific intent to monopolize." *Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prod., Inc.*, 129 F.3d 240, 246 (2d Cir. 1997) (internal quotation marks omitted) (quoting *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 74 (2d Cir. 1988)). Importantly, the Supreme Court cautioned that "[i]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . but quite another to forget that proceeding to antitrust discovery can be expensive." *Twombly*, 550 U.S. at 546 (internal

citation omitted).

Fed. R. Civ. P. 12(b)(6) Analysis of the Sherman Act Claims

While defendants raise a laundry list of potential deficits with respect to the restraint of trade and agreements to monopolize claims, one factual issue dominates the analysis: plaintiffs' claims turn on the alleged failure of Accesso Techonology and Active Network to create and provide a software interface that would permit plaintiffs' products to function in IT environments run by those defendants' management software systems. The problem for plaintiffs, however, is that according to the allegations of the complaint and the documents annexed thereto, the cost of providing such an interface for the Active Network system was estimated in the hundreds of thousands of dollars. Compl. ¶ 100; *id.* Ex. S. Plaintiffs conclusorily allege that such an estimate constituted an "outlandish amount for a very small effort." *Id.* ¶ 101. Yet, in an entirely separate allegation relating to Accesso's system, the complaint provides that creating an interface "would not be cheap." *Id.* ¶ 115. Plaintiffs offer no allegations or exhibits refuting this notion. Moreover, despite their efforts to minimize the effort involved, plaintiffs concede, in the allegations of the complaint, that creating such an interface would take "several weeks." *Id.* ¶ 71. Therefore, assuming the truth of the matters alleged, the creation of interfaces for these systems would be, by any measure, a costly endeavor.

The issue of a business's right to refuse to deal with a competitor has been comprehensively addressed by the Supreme Court:

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest

in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing-a role for which they are ill suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 63 L.Ed. 992 (1919).

However, "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2. We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm. The question before us today is whether the allegations of respondent's complaint fit within existing exceptions or provide a basis, under traditional antitrust principles, for recognizing a new one.

The leading case for § 2 liability based on refusal to cooperate with a rival, and the case upon which respondent understandably places greatest reliance, is *Aspen Skiing, supra.* The Aspen ski area consisted of four mountain areas. The defendant, who owned three of those areas, and the plaintiff, who owned the fourth, had cooperated for years in the issuance of a joint, multiple-day, all-area ski ticket. After repeatedly demanding an increased share of the proceeds, the defendant canceled the joint ticket. The plaintiff, concerned that skiers would bypass its mountain without some joint offering, tried a variety of increasingly desperate measures to re-create the joint ticket, even to the point of in effect offering to buy the defendant's tickets at retail price. *Id.* at 593-594, 105 S.Ct. 2847. The defendant refused even that. We upheld a jury verdict for the plaintiff, reasoning that "[t]he jury may well have concluded that [the defendant] elected to forgo these short-run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor." *Id.* at 608, 105 S.Ct. 2847.

Aspen Skiing is at or near the outer boundary of § 2 liability. The Court there found significance in the defendant's decision to cease participation in a cooperative venture. *See id.,* at 608, 610-611, 105 S.Ct. 2847. The unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. *Ibid.* Similarly, the defendant's unwillingness to renew the ticket even if compensated at

> retail price revealed a distinctly anticompetitive bent. [ ]
>
> The refusal to deal alleged in the present case does not fit within the limited exception recognized in *Aspen Skiing*. The complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion. Here, therefore, the defendant's prior conduct sheds no light upon the motivation of its refusal to deal-upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice. The contrast between the cases is heightened by the difference in pricing behavior. In *Aspen Skiing*, the defendant turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher. Verizon's reluctance to interconnect at the cost-based rate of compensation available under § 251(c)(3) tells us nothing about dreams of monopoly.
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> The specific nature of what the 1996 Act compels makes this case different from Aspen Skiing in a more fundamental way. In Aspen Skiing, what the defendant refused to provide to its competitor was a product that it already sold at retail-to oversimplify slightly, lift tickets representing a bundle of services to skiers. Similarly, in *Otter Tail Power Co. v. United States,* 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), another case relied upon by respondent, the defendant was already in the business of providing a service to certain customers (power transmission over its network), and refused to provide the same service to certain other customers. *Id.* at 370-371, 377-378, 93 S.Ct. 1022. In the present case, by contrast, the services allegedly withheld are not otherwise marketed or available to the public. The sharing obligation imposed by the 1996 Act created "something brand new"-"the wholesale market for leasing network elements." *Verizon Communications Inc. v. FCC,* 535 U.S., at 528, 122 S.Ct. 1646. The unbundled elements offered pursuant to § 251(c)(3) exist only deep within the bowels of Verizon; they are brought out on compulsion of the 1996 Act and offered not to consumers but to rivals, and at considerable expense and effort. New systems must be designed and implemented simply to make that access possible-indeed, it is the failure of one of those systems that prompted the present complaint.

Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407–10 (2004) (footnote omitted).

Here, the allegations do not even give rise to a conclusion that defendants refused to provide the sought after interface; rather, defendants were simply unwilling to bear the costs of developing an interface without reimbursement. Compl. ¶¶ 100-15. Even assuming, *arguendo*,

that the single conclusory allegation of an inflated estimate for developing an interface could be construed as a refusal to deal with plaintiffs, the conduct alleged cannot reasonably be construed as falling within the narrow exception to defendants' recognized right to such refusal. *See Int'l Bus. Machs. Corp. v. Platform Sols., Inc.*, 658 F. Supp. 2d 603, 613–14 (S.D.N.Y. 2009) (holding that allegations that IBM cease supporting and licensing a particular operating system could not give rise to a Sherman Act claim). "A refusal to deal is generally not unlawful unless it is done for the purpose of monopolization," the Second Circuit has observed. *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 124 (2d Cir. 2007) (citing *Colgate & Co.*, 250 U.S. at 307). "The absence of a legitimate business purpose for the defendant's refusal to deal has been seen as circumstantial evidence of improper intent." *Id.* (citing *Aspen Highlands Skiing Corp.*, 472 U.S. at 608). In this case, the legitimate business purposes of defendants' actions in seeking payment for the creation of a software interface, or even refusing to engage in such a significant undertaking, are self-evident from the allegations of the complaint. Thus, the complaint is facially deficient.

Equally important, the actions alleged do not exclude the possibility that the alleged actions by Accesso and Active represent independent (and, under the circumstances, seemingly reasonable) business actions rather than the demonstration of an anticompetitive agreement. *See, e.g.*, *Vedder Software Grp. Ltd. v. Ins. Servs. Office, Inc.*, 545 F. App'x 30, 33 (2d Cir. 2013) ("The insurers' alleged demand to require use of Xactimate fails to show an agreement because it does not 'tend[ ] to exclude the possibility of independent action.' *Twombly*, 550 U.S. at 555. Such a demand would assure an insurance company and its vendors utilize compatible

software to achieve consistency in estimates and ease in sharing data. Thus, the alleged demand could be expected of an insurer acting independently from its competitors.") This is particularly true where, as here, plaintiffs rely on a theory of parallel conduct by two groups of competitors. "[A]llegations of parallel conduct must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 32 (alterations omitted). In this case, as in *Twombly*, "the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the [defendants]." 550 U.S. at 564.

Defendants raise several additional meritorious arguments, including the following: First, as plaintiffs' allegations describe only injuries to their efforts to enter the market, the complaint fails to set forth a cognizable injury under the Sherman Act. *Wellnx Life Scis. Inc. v. Iovate Health Scis. Research Inc.*, 516 F. Supp. 2d 270, 289 (S.D.N.Y. 2007) (quoting *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 507 (2d Cir. 2004) ("'Because the antitrust laws protect competition as a whole, evidence that plaintiffs have been harmed as individual competitors will not suffice.'") Second, defendants correctly argue that the plaintiffs' claims are predicated upon a "shared monopoly" theory, which has been expressly rejected by the Second Circuit. *RxUSA Wholesale, Inc. v. Alcon Labs., Inc.*, 661 F. Supp. 2d 218, 235 (E.D.N.Y. 2009) (citing *H.L. Hayden Co. of N.Y., Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1018 (2d Cir.1989)) ("The Second Circuit has specifically rejected monopolization claims under Section 2 based on a shared monopoly theory of liability"), *aff'd sub nom., RxUSA Wholesale Inc. v. Alcon Labs.*, 391 F. App'x 59 (2d Cir. 2010); *see Siemens Med. Sys., Inc.*, 879 F.2d at 1018 (stating that

"the district court correctly concluded that the market shares of [defendants] could not be aggregated to establish an attempt to monopolize in violation of Sherman Act section 2, 15 U.S.C. § 2 (1982)"). Finally, defendants raise several other issues that would otherwise require further consideration, including the failure to allege actionable anticompetitive behavior, a properly defined product market or market power. However, because the fundamental factual premise here, to wit: that the software providers were somehow compelled to design a software interface for plaintiffs either without charge or at a better cost, is so flawed, these arguments need not be reached.

It is clear, based on the foregoing, that plaintiffs have failed to allege either a § 1 or § 2 claim under the Sherman Act. As such, the Complaint should be dismissed.

CONCLUSION

Based on the foregoing, it is respectfully recommended that defendants' motions be granted in all respects, and the case be dismissed with prejudice.

OBJECTIONS

A copy of this Report and Recommendation is being provided to the parties via ECF, and defendant should serve a copy upon plaintiff, and file an appropriate affidavit of service. Any written objections to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of service of this report. 28 U.S.C. § 636(b)(1) (2006 & Supp. V 2011); Fed. R. Civ. P. 6(a), 72(b). Any requests for an extension of time for filing objections must be directed to the district judge assigned to this action prior to the expiration of the fourteen (14) day period for filing objections. **Failure to file objections within fourteen (14)**

days will preclude further review of this report and recommendation either by the District Court or Court of Appeals. *Thomas v. Arn*, 474 U.S. 140, 145 (1985) ("[A] party shall file objections with the district court or else waive right to appeal."); *Caidor v. Onondaga County*, 517 F.3d 601, 604 (2d Cir. 2008) ("[F]ailure to object timely to a magistrate's report operates as a waiver of any further judicial review of the magistrate's decision.").

Dated: Central Islip, New York
July 30, 2018

/s/ Gary R. Brown
GARY R. BROWN
United States Magistrate Judge