UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NORTHSTAR ENERGY LLC, Plaintiff, -v- ENCANA CORPORATION, ENCANA OIL & GAS USA INC., CHESAPEAKE ENERGY CORPORATION, and O.I.L. NIAGARAN, LLC, Defendants.	)	No. 1:13-cv-200 HONORABLE PAUL L. MALONEY

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

This case is before the Court on each Defendant's motion to dismiss. (ECF Nos. 16, 18, and 20.) In this matter, Plaintiff NorthStar Energy LLC alleges that Defendants Encana Corp., Encana Oil & Gas USA, Inc. (collectively, "Encana"), Chesapeake Energy Corp. ("Chesapeake"), and O.I.L. Niagaran (OILN) formed an anti-competitive agreement and shared proprietary information in order to depress the prices of oil and gas leases in northern Michigan. As a result of the alleged collusion, Plaintiff claims it sold mineral and gas leases at a lower price and at less advantageous terms than it could have in a free, competitive market. Plaintiff's complaint alleges six counts, including violations of the Sherman Act and the Michigan Antitrust Reform Act for restraining trade and sharing competitive information, tortious interference with a business contract or expectancy, and civil conspiracy and concert of action. (ECF No. 1.)

Three motions to dismiss were filed by Defendants on April 30, 2013. (ECF Nos. 16, 18, and 20.) Plaintiff filed a response to each (ECF Nos. 26, 27, and 28) and Defendants filed replies to each (ECF Nos. 29, 30, 31). Having reviewed the briefing and relevant legal authority, the Court finds the matter can be resolved without oral argument. *See* W.D. Mich. L. R. Civ. P. 7.2(d). For the

following reasons, the Court will **GRANT IN PART AND DENY IN PART** the motions filed by Encana (ECF No. 16) and Chesapeake (ECF No. 18) and **DENY** OILN's motion (ECF No. 20).

I. BACKGROUND

For the purpose of this motion, the Court assumes as true the factual allegations made in the complaint. According to NorthStar's complaint, the facts are as follows. NorthStar was the owner of the oil and gas rights to thousands of acres of land in northern Michigan, including the rights to drill for oil and gas in the Utica/Collingwood shale formations. (ECF No. 1 at ¶¶ 22-23.) The oil and gas industry conducted testing and recognized that the Utica/Collingwood formations were commercially viable early in 2010. (*Id.* at ¶¶ 24-25.) However, harvesting the oil and gas in that area requires expensive and advanced drilling technologies and significant capital, making exploitation of the area only possible for large corporations. (*Id*. at ¶ 26.) Due to the newly recognized appeal of the oil and gas rights in the area, leases were sold for more than $3,000 an acre at the State of Michigan's May auction. (*Id*. at ¶¶ 27-29.) NorthStar decided to sell its leases for 9,838 acres in the area, and attracted interest from three bidders: Encana, Chesapeake (through its agent OILN), and Atlas Gas & Oil Company, LLC. (*Id.* at ¶¶ 30-31.)

NorthStar alleges that Encana and Chesapeake created an agreement to split up the counties in northern Michigan to avoid bidding on the same land rights and thereby driving the prices down due to lack of competition. (*Id.* at ¶¶ 34-40.) NorthStar recounts a number of suspect emails between the management at Encana and Chesapeake, as well as internal documents suggesting collusion between the two companies. (*Id.*) Only Chesapeake/OILN submitted a bid on NorthStar's leases. (*Id.* at ¶ 41.) The original agreement called for Chesapeake to buy 7,220 acres for $2,250 per acre by July 30, 2010, subject to a 10% well participation right for NorthStar and the parties reaching a satisfactory purchase and sale agreement (PSA). (*Id*. at ¶ 41.) NorthStar contends that this price was

well below market value. (*Id.* at ¶¶ 42-43.)

Next, NorthStar alleges that Encana told Chesapeake in July that Encana was not going to buy any more oil and gas rights until October or later. (*Id.* at ¶ 46.) Chesapeake used this knowledge to force NorthStar to agree to less favorable terms for the sale of its oil and gas leases, knowing that no competitor would make a better offer to NorthStar. (*Id.* at ¶¶ 46-49.) Accordingly, Chesapeake was able to force NorthStar to agree to a later closing date and a liquidated damages provision that essentially allowed Chesapeake to buy 750 acres of mineral rights for $1,000 an acre. (*Id.* at ¶¶ 50-57.) Chesapeake eventually invoked the liquidated damages provision. (*Id.* at ¶ 57.) NorthStar alleges that the collusion continued and resulted in extremely depressed prices at the October State of Michigan auction. NorthStar alleges that at the auction, Encana and Chesapeake did not buy any rights in the same counties and paid as low as $13 an acre for rights that sold for $3,000 an acre earlier in the year. (*Id.* at ¶¶58-61.)

On February 22, 2013, NorthStar filed this lawsuit. In the complaint, NorthStar alleges that: (1) all defendants violated the Sherman Act, 15 U.S.C. § 1, by agreeing and conspiring to restrain trade; (2) all defendants violated the Sherman Act by conspiring to exchange competitive information and restrain trade; (3) all defendants violated the Michigan Antitrust Reform Act, MCL 445.772, by agreeing and conspiring to restrain trade; (4) all defendants violated the Michigan Antitrust Reform Act by conspiring to exchange competitive information and restrain trade; (5) Encana and Chesapeake engaged in tortious interference with NorthStar's business contracts/expectancies; and (6) all defendants engaged in civil conspiracy and concert of action.

Encana's Motion to Dismiss (ECF No. 16) alleges that NorthStar lacks standing and was not harmed by any possible conspiracy because it retains almost all of its oil and gas lease interests, and that NorthStar has failed to plead factual material sufficient to create "a plausible suggestion of

conspiracy,"or the exchange of confidential or proprietary information.

Chesapeake's Motion to Dismiss (ECF No. 18) argues that the complaint does not allege facts establishing an anticompetitive agreement that impacted NorthStar, that the information exchanged could not support an antitrust claim, and that Chesapeake cannot be liable for tortious interference with a business relationship to which it was a party.

OILN's Motion to Dismiss (ECF No. 20) claims that it cannot be held liable because it had no knowledge of and did not participate in the alleged agreement between Chesapeake and Encana; it acted only as Chesapeake's agent, and the complaint does not allege that it participated in the conspiracy.

Each motion is discussed below.

II. LEGAL FRAMEWORK

Under the notice pleading requirements, a complaint must contain a short and plain statement of the claim showing how the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The complaint need not contain detailed factual allegations, but it must include more than labels, conclusions, and formulaic recitations of the elements of a cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A defendant bringing a motion to dismiss for failure to state a claim under Rule 12(b)(6) tests whether a cognizable claim has been pled in the complaint. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988). Although the court considers the well-pled factual allegations in the complaint, a motion to dismiss turns exclusively on questions of law. *See Thomas v. Arn*, 474 U.S. 140, 150 n.8 (1985); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 674-75 (2009) ("Evaluating the sufficiency of the complaint is not a 'fact-based' question of law, ...").

To survive a motion to dismiss under Rule 12(b)(6), the plaintiff must provide sufficient factual allegations that, if accepted as true, are sufficient to raise a right to relief above the

speculative level and the "claim to relief must be plausible on its face" *Twombly*, 550 U.S. at 555, 570. "A claim is plausible on its face if the 'plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (quoting *Twombly*, 550 U.S. at 556); *see Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 519 (6th Cir. 2008) ("Even under Rule 12(b)(6), a complaint containing a statement of facts that merely creates a *suspicion* of a legally cognizable right of action is insufficient.") "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citations omitted). When considering a motion to dismiss, a court must accept as true all factual allegations, but need not accept any legal conclusions. *Ctr. for Bio-Ethical Reform,*, 648 F.3d at 369. For motions to dismiss, the court considers only the pleadings, and ordinarily does not consider matters outside the pleadings. *Rondigo, LLC v. Twp. of Richmond*, 641 F.3d 673, 680 (6th Cir. 2011) (citation omitted). No heightened pleading requirements apply in antitrust cases. *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001).

III. ENCANA'S MOTION TO DISMISS

A. COUNTS I AND II: VIOLATIONS OF SECTION 1 OF THE SHERMAN ANTITRUST ACT

Under Section 1, the Sherman Antitrust Act prohibits "'[e]very contract, combination . . ., or conspiracy in restraint of trade or commerce.'" *Care Heating & Cooling, Inc. v. Am. Standard, Inc.*, 427 F.3d 1008, 1012 (6th Cir. 2005) (alterations in *Care Heating & Cooling*) (quoting 15 U.S.C. § 1). Because every contract ultimately restricts parties to some agreed upon choice or course of conduct, the Sherman Act has been interpreted to limit only "unreasonable restraint." *Id.* (citing *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003) ("*NHLPA*"). To establish a claim under § 1 of the Sherman Act, a claimant must demonstrate

(1) a contract, combination, or conspiracy, i.e, some agreement, and (2) that the agreement unreasonably restrains trade in the relevant market. *Realcomp II, Ltd. v. Fed. Trade Comm'n*, 635 F.3d 815, 824 (6th Cir. 2011) (quoting *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004)). For the first element, anticompetitive agreements generally fall into one of two categories: horizontal agreements, which restrain competitors at the same level of market structure, and vertical agreements, which restrain actors at different levels of market structure. *Care Heating & Cooling*, 427 F.3d at 1013. For the second element, the unreasonable restraint of trade, federal courts must distinguish between *per se* illegal conduct and conduct that must be evaluated under the "rule of reason." *Realcomp II*, 635 F.3d at 825; *Expert Masonry, Inc. v. Boone Cnty., Ky.*, 440 F.3d 336, 342 (6th Cir. 2006). Unless conduct falls within certain categories of offenses proscribed as *per se* anticompetitive, a presumption exists that the rule of reason standard will be used. *Expert Masonry*, 440 F.3d at 342 (quoting *Care Heating & Cooling*, 427 F.3d at 1012).

When employing the rule of reason, the factfinder "'weighs all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'" *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (citation omitted). Courts should consider specific information about the relevant business; the history, nature, and effect of the restraint; and whether the businesses involved have market power. *Id.* at 887 (citations omitted). The rule of reason involves a burden-shifting analysis similar to Title VII claims. *See Worldwide Basketball & Sport Tours*, 388 F.3d at 959. The claimant must first show that the agreement "produces significant anticompetitive effects within the relevant product and geographic markets." *Id.* (quoting *NHLPA*, 325 F.3d at 718). Once that burden is met, the respondent must produce evidence establishing that the restraint has "procompetitive effects sufficient to justify the injury resulting from the anticompetitive effects of the restraint." *Id.* Finally, the claimant must

prove that the legitimate procompetitive objectives can be achieved through substantially less restrictive means. *Id.*

Per se rules are used when the surrounding circumstances make the likelihood of anticompetitive conduct so great that further examination of the challenged conduct is not necessary. *Expert Masonry*, 440 F.3d at 342 (quoting *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 103-04 (1984) ("*NCAA*")); *see NHLPA*, 325 F.3d at 718 ("The *per se* rule identifies certain practices that 'are entirely void of redeeming competitive rationales.'") (citation omitted)). "[T]he *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." *Leegin*, 551 U.S. at 886 (internal citations omitted). Federal courts have found that horizontal agreements between competitors to divide or allocate geographic markets are subject to the *per se* rule. *Id.*; *Expert Masonry*, 440 F.3d at 344 (citing *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 277 (6th Cir. 1898)); *see Palmer v. BRG of Ga.*, 498 U.S. 46, 49-50 (1990) (per curiam) (involving bar review competitors agreeing not to compete by dividing the United States into two markets, Georgia and everything else); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) (involving a cooperative association whose members granted themselves licenses to sell branded products within an exclusive territory); *see also United States v. Brown*, 936 F.2d 1042, 1044-45 (9th Cir. 1991) (involving an agreement between billboard leasing companies not to bid against each other's former leaseholds for one year when the leasehold was abandoned or expired).

1. ANTICOMPETITIVE AGREEMENT

Encana first alleges that NorthStar has failed to plead facts demonstrating that Encana and Chesapeake reached an agreement in violation of the antitrust laws. Encana admits that negotiations

were occurring, but asserts that an agreement was never reached. Allegations of parallel conduct and bare assertions of a conspiracy do not provide sufficient factual details to state an antitrust claim. *Erie Cnty., Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 868 (6th Cir. 2012) (citation omitted). To survive a motion to dismiss, the pleadings must allege facts beyond parallel conduct, and must allege facts that make plausible the conclusion that the behavior was coordinated, and not the result of chance, coincidence, or a response to common stimuli. *Id.* "An agreement, either tacit or express, may ultimately be proven by either direct evidence of communications between the defendants or by circumstantial evidence of conduct that, in the context, negates the likelihood of independent action and raises an inference of coordination." *Id.* at 867-68.

The complaint here alleges sufficient facts to establish the plausibility of an unlawful agreement between Encana and Chesapeake. The Court must accept as true the following allegations in the complaint. In 2010, Encana and Chesapeake were in competition with each other to develop deep well oil and natural gas in Northern Michigan. (*Id.* ¶¶ 26-27.) They were also the only two companies actively acquiring interests in Northern Michigan in significant quantities. (*Id*.) As early as June 6, 2010, Encana and Chesapeake were exchanging emails about a plan to divide counties in Northern Michigan between the two companies. (*Id.* at ¶ 36; ECF No. 1-1 at pg. 31.) By June 15, the two companies were working to create a letter of intent in which they would agree "to a division of work for fee leasing in Michigan." (*Id*.) The detailed efforts by the two companies to reach an agreement are further outlined in paragraphs 36-40 of the complaint.

Emails between Encana and Chesapeake attached to the complaint reveal their discussions on how to avoid "bidding each other up" in many prospective lease deals and at a public land auction. Encana and Chesapeake discussed extensively how to divide up the counties containing the Utica/Collingwood formation. (ECF No. 1 at ¶ 36.) The emails also discuss keeping "acreage prices

from continuing to push up," "pushing from our end to save us both some money," "combining forces" to"prevent[] further inflation," and smoking "a peace pipe with eca on this one if we are bidding each other up." (*Id.* at ¶ 37.) One Chesapeake employee wrote, "the goal is to keep from running the prices up on each other." (*Id.* at ¶ 39.) Investigative journalists from Reuters reported that Chesapeake and Encana exchanged these emails discussing how to avoid competing for oil and gas rights in the area of the Utica/Collingwood formation. (ECF No. 1-2 at pg. 30-37.) NorthStar was the subject of multiple email exchanges between Encana and Chesapeake. When NorthStar sought bids from both companies, Chesapeake CEO Aubrey McClendon wrote: "[It] looks like NorthStar wants us to bid against each other next week, let's decide who should handle that one." (*Id.* at ¶ 36.)

The arrangement between Encana and Chesapeake resulted in lower lease prices for both private and public land rights. (*Id.* at ¶¶ 33-34.) In May 2010, the State of Michigan held a public auction for oil and gas rights to more than 118,000 acres. (ECF No. 1-2 at pg. 33.) The auction raised over $178 million. (*Id.*) Both Encana and Chesapeake participated in that auction. (*Id.*) By mid-July 2010, Encana and Chesapeake had cut the maximum amount per acre they were offering for Northern Michigan oil and gas rights by approximately fifty percent. (ECF No. 1 at ¶ 46.) When a second public auction was held in October 2010, the State of Michigan leased more than twice the acreage offered at the May auction, but raised almost $170 million less than it had in the first action. (*Id.* at 36.) The average price per acre in the May auction was over $1,400, while the average price per acre in the October auction was around $46. (*Id.*)

Taking these allegations as true, the actions go well beyond mere parallel conduct. Encana and Chesapeake colluded with each other to divide up the oil and gas lease market. Rather than bidding against each other, the two companies conspired or agreed to avoid bidding against each

other, thus keeping the price of the leases down. The complaint states that the two companies conspired not to compete against one another with the "primary purpose of depressing prices at which each could buy" oil and gas leases. (ECF No. 1 at ¶ 34.) In addition to rights for private land, like the NorthStar's, the complaint alleges Encana and Chesapeake also conspired to keep the price per acre low for public lands.

The complaint quite explicitly alleges sufficient facts which, if taken as true, plead the existence of an unlawful agreement between Encana and Chesapeake. Encana has not established the implausibility of an unlawful agreement. Encana points out that NorthStar's deal with Chesapeake fell through, and neither company ended up buying the majority of NorthStar's oil and gas leases. At best, the allegations to which Encana points call into question whether NorthStar suffered any injury from the anticompetitive behavior. Encana's argument ignores the portions of the complaint that allege the existence of the agreement, which was allegedly being negotiated while NorthStar was arranging a contract with Chesapeake. Because NorthStar has alleged a horizontal agreement between competitors to divide or allocate geographic markets, this claim is subject to the *per se* rule.

2. INFORMATION EXCHANGE

Next, Encana alleges that NorthStar cannot maintain its information exchange theory to impose liability under § 1 of the Sherman Act. The exchange of information can establish a violation of § 1 of the Sherman Act if it "produced adverse, anti-competitive effects within relevant product and geographic markets." *Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design*, 244 F.3d 521, 531 (6th Cir. 2001); *United States v. Container Corp. of Am.*, 393 U.S. 333, 334 (1969). Encana argues that no confidential information was exchanged and NorthStar has not alleged a relevant market, market power, or harm to competition.

Encana mistakenly argues that the only information alleged to have been exchanged was one email alerting Chesapeake that Encana was suspending its buying of oil leases until the following October. Encana claims that this email conveyed only information that was already publically-available. However, Plaintiff alleges that a plethora of information was exchanged between Encana and Chesapeake, including current leasing activities, short-term and long-term strategies, market impacts, and strategies for the state lease sale in October 2010. (ECF No. 1 at ¶¶ 36, 39, 46, 58.) Count II of the complaint alleges an ongoing information exchange over a period of months, not a single email. At this point in the litigation, Plaintiff's allegations must be taken as true and it only need allege a plausible exchange of confidential information. The complaint contains sufficient factual matter to support the allegation that confidential information was exchanged. This claim is analyzed under the "rule of reason" approach.

Next, Encana argues the complaint fails to plead a relevant market targeted by the allegedly unlawful agreement and market power. In the complaint, NorthStar submitted that the relevant geographic market is "the portion of northern Michigan, including Kalkaska, Emmet, Cheboygan, Charlevoix, Crawford, Roscommon, and Missaukee counties, that includes the Utica Collingwood shale formations," and the relevant market is "acreage from which the Utica/Collingwood shales may be explored and developed." (ECF No. 1 at ¶ 75.) "The basic rule in establishing the relevant geographic market is that the market selected must 'both correspond to the commercial realities of the industry and be economically significant.'" *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 734 F.2d 1157, 1167 (6th Cir. 1984) (internal quotation marks omitted) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962)). The determination of the relevant geographic market is a legal test applied to the factual circumstances of the case. *Worldwide Basketball & Sport Tours*, 388 F.3d at 659 (citation omitted). Ordinarily, the definition of the geographic market is a

"highly-fact based analysis that generally requires discovery," but a pleading may be dismissed when the geographic market is insufficiently pled or would be totally unsupportable. *Mich. Div.-Monument Builders of North America v. Mich. Cemetery Ass'n*, 524 F.3d 726, 733 (6th Cir. 2008). Land itself may serve as the geographic market upon a showing of a competitive advantage of the land's particular characteristics. *Id.* (citation omitted). The purpose of identifying the market definition and market power is to determine whether the alleged anticompetitive acts are likely to adversely affect competition. *F.T.C. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986).

NorthStar has sufficiently pled a relevant market: oil and gas rights for land in northern Michigan that is desirable because it allows access to the Utica/Collingwood shale formation. This is the land that Encana and Chesapeake "divvied up" according to the alleged agreement and thus it is the relevant area where prices for land rights would have been affected by the alleged anticompetitive behavior. However, an elaborate analysis of the market and market power is unnecessary when a Plaintiff alleges actual detrimental effects on competition. *Id.; Cason-Merenda v. Detroit Med. Cntr.*, 862 F. Supp. 2d 603, 647-48 (E.D. Mich. 2012). Here, private and government landowners sold land rights in that area for lower prices after the alleged agreement was in place than before it. NorthStar alleges that prices for land rights in the affected area dropped from an average of $1,413 an acre, with some parcels selling for more than $3,000, to an average of $46, with some selling as low as $13 an acre because Encana and Chesapeake refused to bid against each other. This allegation, if supported, establishes an actual detrimental effect on competition, which makes the analysis of the relevant market and market power unnecessary.

3. ANTITRUST INJURY

Finally, Encana alleges that NorthStar has failed to plead facts sufficient to demonstrate that it suffered any harm from the alleged agreement between Encana and Chesapeake. Specifically,

Encana claims that NorthStar does not have standing because it did not sell its leases at a lower price; rather, NorthStar remains in possession of its oil and gas rights because the deal fell through.

The Sherman Act allows individuals to recover treble damages. 15 U.S.C. § 15(a) (West 2013). The statute allows recovery by a person "who shall be injured in his business or property by reason of anything forbidden in the antitrust laws[.]" *Id.* The United States Supreme Court has interpreted the statute to require the claimant to:

> prove more than an injury casually linked to an illegal presence in the market. Plaintiffs must prove an antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); *see Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (holding that injury only casually related to an antitrust violation will not qualify as an antitrust injury unless the injury "is attributable to an anticompetitive aspect of the practice under scrutiny[.]") (quoting *Cargill, Inc. v. Montfort of Colo., Inc.*, 479 U.S. 104, 109-10 (1986)). "'The Sixth Circuit, it is fair to say, has been reasonably aggressive in using the antitrust injury doctrine to bar recovery where the asserted injury, although linked to an alleged violation of the antitrust laws, flows directly from conduct that is itself not an antitrust violation.'" *Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 920 (6th Cir. 2010) (quoting *Valley Prods., Inc. v. Landmark*, 128 F.3d 398, 403 (6th Cir. 1997)). In order to recover damages under the Sherman Act, the claimant must establish an antitrust injury such that (1) the alleged violation tends to reduce competition in some market and (2) the claimant's injury would result from a decrease in that competition, rather than from some other consequence of the defendant's actions. *Conwood Co., LP v. United States Tobacco Co.*, 290 F.3d 768, 788 (6th Cir. 2002).

Accepting NorthStar's allegations as true, it has pled antitrust standing and injury. NorthStar alleges that Chesapeake was the only company to bid on its leases because of the conspiracy between Encana and Chesapeake. Because no other competing bids were received, NorthStar determined it had to reach an agreement with Chesapeake or no other company would be interested in buying its leases. Thus, Chesapeake was given increased bargaining power to insert unfavorable terms into the agreement with NorthStar. The relevant unfavorable term allowed Chesapeake to walk away from its agreement to buy NorthStar's leases and receive 750 acres while only forfeiting $7,500. Under NorthStar's theory, if there was no collusion between Encana and Chesapeake, Chesapeake would not have been in a position to alter the terms of the contract because it would not have been so certain that another buyer would not have made NorthStar a better offer for its rights. Further, the alleged collusion between Encana and Chesapeake depressed the prices for oil and gas rights, thus impacting the liquidated damages price inserted into the contract. These claims are sufficient to create a viable claim of antitrust injury.

Accordingly, Encana's motion to dismiss Counts I and II of the complaint, alleging violations of § 1 of the Sherman Act, is **DENIED.**

B. STATE LAW CLAIMS

In addition to the Sherman Act claim, the complaint includes multiple state law claims: (1) an agreement and conspiracy to restrain trade in violation of the Michigan Antitrust Reform Act (MARA); (2) conspriacy to exchange competitive information and restrain trade in violation of MARA; (3) tortious interference with a business contract or expectancy; and (4) civil conspiracy and concert of action.

1. MICHIGAN ANTITRUST REFORM ACT

Michigan's antitrust act is patterned after the Sherman Antitrust Act, and federal court

interpretations of the Sherman Act are considered persuasive authority for the meaning and interpretation of the Michigan act. *Goldman v. Loubella Extendables*, 91 Mich. App. 212, 219, 283 N.W.2d 695 (1979); *see* Mich. Comp. Laws § 445.784(2) (West 2013) ("It is the intent of the legislature that in construing all sections of this act, the courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes, including, without limitation, the doctrine of per se violations and the rule of reason."). Because the complaint adequately pleads a violation of the Sherman Act, it also adequately pleads a violation of the Michigan Antitrust Reform Act.

2. TORTIOUS INTERFERENCE WITH BUSINESS CONTRACT OR EXPECTANCY

Encana argues the complaint fails to plead sufficient facts to establish a claim for tortious interference with a business expectancy. It alleges that NorthStar had no expectancy and did not claim an unlawful interference.

Under Michigan law, the elements of a claim for tortious interference with a business expectancy include (1) the existence of a valid business relationship or expectancy, (2) knowledge of the relationship or expectancy by the defendant, (3) intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the claimant. *Cedroni Assocs., Inc. v. Tomblinson, Harburn Assocs., Architects & Planners, Inc.*, 492 Mich. 40, 45, 821 N.W.2d 1 (2012); *BPS Clinical Labs. v. Blue Cross and Blue Shield of Mich.*, 217 Mich. App. 687, 698-99, 552 N.W.2d 919 (1996) (per curiam). For the third element, the claimant must allege that the defendant intentionally performed "a per se wrongful act or the performance of a lawful act with malice and unjustified in law" for the purpose of interfering with another's contract or business relationship. *Mich. Podiatric Med. Ass'n v. Nat'l Foot Care Program, Inc.*, 175 Mich. App. 723, 736, 438 N.W.2d 349 (1989) (citations omitted); *see Feldman*

v. Green, 138 Mich. App. 360, 378, 360 N.W.2d 881 (1985) (per curiam). When the defendant's actions were motivated by legitimate business reasons, the acts will not constitute an improper motive or an interference. *BPS Clinical*, 217 Mich. App. at 699 (quoting *Michigan Podiatric*, 175 Mich. App. at 736).

The complaint alleges sufficient facts that, if taken as true, establish the third element of this claim. For the reasons discussed above, the complaint pleads a *per se* unlawful act—a violation of the Sherman Antitrust Act. However, the complaint does not allege sufficient facts to demonstrate that Encana interfered with any contract or business expectancy to which NorthStar was a party. NorthStar alleges that the Encana-Chesapeake anticompetitive conspiracy (1) subverted NorthStar's advantageous leasehold position, thus depressing the price NorthStar could garner for its property, and (2) allowed Encana to interfere with the contract negotiations between Chesapeake and NorthStar, thus enabling Chesapeake to unfairly modify and ultimately abandon the sales agreement with NorthStar.

The first of NorthStar's allegations does not claim any business expectancy or contract. A business expectancy must be a" reasonable likelihood or probability, not mere wishful thinking." *Cedroni Ass'n, Inc.*, 492 Mich. at 45 (quoting *Trepel v. Pontiac Osteopathic Hosp.*, 135 Mich. App. 361, 277, 354 N.W.2d 341 (1984)). NorthStar's hopeful expectation that it could receive $3,000 or more an acre for its oil and gas rights was not a business expectancy; there was no reasonable likelihood or probability it would realize that price and no relationship with another party at that point.

In contrast, NorthStar's second allegation sufficiently alleges a business expectancy or contract with Chesapeake. However, the complaint does not allege facts that establish Encana's interference with the relationship between NorthStar and Chesapeake. To succeed on a tortious

interference claim, the plaintiff must plead, "with specificity, affirmative acts by the interferor." *Feldman*, 138 Mich. App. at 370. The Defendant's actions must be intentionally done with malice or in disregard of the law for the purpose of invading the plaintiff's business relationship. *Id.* at 369. Here, NorthStar does not allege that Encana was involved once NorthStar accepted Chesapeake's bid and began contract negotiations. The only action taken after the business relationship formed was Encana telling Chesapeake it no longer intended to buy property in the northern Michigan area until months later. Encana did not induce Chesapeake to add unfavorable terms into the contract or ultimately walk away from the sale and invoke the liquidated damages clause. There is no claim that Encana acted with malice or intended to destroy the contract between NorthStar and Chesapeake. In short, the complaint does not allege any affirmative acts by Encana that interfered with the NorthStar-Chesapeake contract negotiations. Accordingly, Encana's motion to dismiss Count V of the complaint is **GRANTED.**

3. CIVIL CONSPIRACY AND CONCERT OF ACTION

Finally, Encana argues the civil conspiracy claim should be dismissed because it cannot exist without some separate actionable tort.

"'A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means.'" *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n*, 257 Mich. App. 365, 384, 670 N.W.2d 569 (2003). A claim for a civil conspiracy cannot exist without some separate, actionable tort. *Id.* (quoting *Early Detection Ctr., PC v. N.Y. Life Ins. Co.*, 157 Mich. App. 618, 632, 403 N.W.2d 830 (1986)).

Because multiple tort claims survived the motion to dismiss, the civil conspiracy claim should not be dismissed. Encana's motion to dismiss on Count VI is **DENIED**.

IV. CHESAPEAKE'S MOTION TO DISMISS

A. COUNTS I AND II: VIOLATIONS OF § 1 OF THE SHERMAN ACT AND MARA

1. ANTICOMPETITIVE AGREEMENT

Chesapeake argues that NorthStar has not sufficiently alleged that it and Encana had an agreement to refrain from bidding against each other on *NorthStar's* oil and gas rights. It explains that negotiations were ongoing but not concluded when Chesapeake submitted its bid to NorthStar.

For the same reasons discussed above addressing Encana's motion to dismiss, NorthStar's complaint is sufficient to withstand a motion to dismiss on this point. There are enough factual allegations in the complaint to state a claim and raise a reasonable probability that discovery will reveal additional evidence of the agreement between Chesapeake and Encana. Significantly, Chesapeake CEO McClendon emailed Chesapeake and Encana executives and wrote: "[It] looks like NorthStar wants us to bid against each other next week, let's decide who should handle that one – thanks." This email, combined with the extensive negotiations on dividing up property reflected in other emails, make it plausible that the two companies reached an agreement in restraint of competition concerning the purchase of NorthStar's rights. This agreement need not be the formal letter of intent that was still circulating when Chesapeake began negotiations with NorthStar. Accordingly, NorthStar's complaint has met the *Twombly* and *Iqbal* standards and Chesapeake's motion to dismiss Counts I and III is **DENIED.**

2. INFORMATION SHARING

Next, Chesapeake argues that a conspiracy to exchange competitive information cannot constitute a violation of the Sherman Act independently, without evidence of an actual agreement to restrain competition. This argument fails, first because Plaintiff has alleged an agreement to restrain competition, and second because the exchange of information can be actionable under the

Sherman Act.

The exchange of information among competitors is not a *per se* violation of the Sherman Act, but it can be illegal if it has an anticompetitive purpose or effect under the "rule of reason" analysis. *Continental Cablevision of Ohio, Inc. v. Am. Elec. Power Co.*, 715 F.2d 1115, 1118-1119 (6th Cir. 1983). The Second Circuit has succinctly stated that this information exchange claim is a distinct claim. Distinguishing this claim from a price fixing claim, it noted:

> There is a closely related but analytically distinct type of claim, also based on § 1 of the Sherman Act, where the violation lies in the information exchange itself–as opposed to merely using the information exchange as evidence upon which to infer a price-fixing agreement. This exchange of information is not illegal *per se*, but can be found unlawful under a rule of reason analysis.

Todd, 275 F.3d at 198 (citing *Battipaglia v. N.Y. State Liquor Auth.*, 745 F.2d 166, 174-75 (2d Cir. 1984)). The cases cited by Chesapeake addressed information sharing that was not actionable under the facts of the case; none of those courts held that information sharing itself was not actionable.

NorthStar alleges that Encana and Chesapeake exchanged information about their current leasing activities, short-term and long-term strategies, market impacts, and strategies for the state lease sale in October 2010. (ECF No. 1 at ¶¶ 36, 39, 46, 58.) These allegations, if taken as true, would have an anticompetitive effect and thus could support a Sherman Act violation claim. This plausible claim may be established or disproved by discovery. Accordingly, Chesapeake's motion to dismiss Counts II and IV is **DENIED.**

B. STATE LAW CLAIMS

1. TORTIOUS INTERFERENCE

NorthStar claims tortious interference with its business expectancies and contracts under two theories: (1) the Encana-Chesapeake anticompetitive conspiracy subverted NorthStar's advantageous leasehold position, thus depressing the price NorthStar could garner for its property, and (2) the

conspiracy allowed Encana to interfere with the contract negotiations between Chesapeake and NorthStar, thus enabling Chesapeake to unfairly modify and ultimately abandon the sales agreement with NorthStar. Addressing the first claim, Chesapeake argues that NorthStar had no valid business expectancy that Encana would bid on its leases. Addressing the second claim, Chesapeake argues that it cannot be held liable for interfering with its own contract–only a third party can be liable. Chesapeake is correct on both points.

Again, NorthStar had no business expectancy that Encana would bid on its leases at a competitive price. A business expectancy must be a "reasonable likelihood or probability, not mere wishful thinking." *Cedroni Ass'n, Inc.,* 821 N.W.2d at 3 (quoting *Trepel,* 354 N.W.2d 341). An existing or prospective business relationship "must be of some substance and particularity," and must "provid[e] a specific and reasonable economic advantage." *Berlin v. Superintendent of Public Instruction*, 181 Mich. App. 154, 164, 448 N.W.2d 764 (1989). When a party solicits bids from others, the "competitive bid process does not rise to the requisite level of a business expectancy." *Midwest Auto Auction, Inc. v. McNeal*, No. 11-14562, 2012 WL 3478647 (E.D. Mich. Aug. 14, 2012). Even though Encana was one of the active buyers in the area and signed a confidentiality agreement with NorthStar to receive its prospective buyer packet, there was no reasonable expectation that Encana would bid on NorthStar's property. NorthStar's solicitation of bids does not rise to the requisite level of a business expectancy. NorthStar's first theory of tortious interference fails.

To establish tortious interference under Michigan law, "the plaintiffs must establish that the defendant was a 'third party' to the contract or business relationship. *Reed v. Mich. Metro Girl Scout Council*, 201 Mich. App. 10, 13, 506 N.W.2d 231 (1993) (citing *Dzierwa v. Mich. Oil Co.*, 152 Mich. App. 281, 287, 393 N.W.2d 610 (1986)). NorthStar negotiated with OILN, which was acting

as an agent for Chesapeake. When an agent enters into a contract on behalf of the principal, the principal becomes a party to that contract. *Versatile Helicopters, Inc. v. City of Columbus, Ohio*, Nos. 12-4239, 12-4475, 2013 WL 6246298 at *3 (6th Cir. Dec. 3, 2013); Restatement (Third) Agency § 6.01 (2006). Accordingly, Chesapeake was a party to its contract with NorthStar. NorthStar concedes that Chesapeake was not a third party to the agreement it made with OILN/Chesapeake on July 8, 2010. Thus, Chesapeake cannot be liable for tortiously interfering with its own contract, and NorthStar's second theory of tortious interference also fails. Chesapeake's motion to dismiss Count V is **GRANTED.**

2. CIVIL CONSPIRACY AND CONCERT OF ACTION

Finally, Chesapeake argues the civil conspiracy claim should be dismissed because NorthStar failed to allege underlying wrongful conduct.

"'A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means.'" *Advocacy Org.*, 257 Mich. App. at 384. A claim for a civil conspiracy cannot exist without some separate, actionable tort. *Id.* (quoting *Early Detection Ctr.*, 157 Mich. App. at 632..

Because multiple tort claims survived the motion to dismiss, the civil conspiracy claim should not be dismissed. Chesapeake's motion to dismiss on Count VI is **DENIED**.

V. OILN'S MOTION TO DISMISS

In its motion to dismiss, OILN argues that the complaint fails to state a claim against it because the facts alleged do not show that OILN knew of, participated in, or "consciously committed" to the Encana-Chesapeake conspiracy. OILN claims it acted only as an unknowing agent for Chesapeake and that it never knowingly joined or participated in the alleged conspiracy. Plaintiff

alleges that at the least, OILN knew of and acquiesced to the illegal scheme, and its allegations are enough to raise the claim that OILN was a direct participant in the conspiracy. Defendant OILN, in turn, disputes that mere acquiescence is a basis for liability and asserts that the emails recounted in Plaintiff's complaint do not establish OILN's knowledge of or participation in the alleged conspiracy.

To establish a Sherman Act claim, the Plaintiff must set forth sufficient facts to establish a plausible claim that the defendant "'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980); *Twombly*, 550 U.S. 544. Agents of a corporation can be held liable for violating antitrust laws if they are "actively and knowingly engaged in a scheme designed to achieve anticompetitive ends." *Brown v. Donco Enters., Inc.*, 783 F.2d 644, 646 (6th Cir. 1986). Thus, to survive a motion to dismiss, the Plaintiff must allege that each defendant "'participated in, authorized, directed, and/or knowingly approved or ratified' the illegal conduct." *In re Se. Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 949 (E.D. Tenn. 2008). A defendant's involvement in an antitrust conspiracy is not imposed on its agent absent the agent's own knowing involvement. *See Schmitt v. FMA Alliance*, 398 F.3d 995 (8th Cir. 2005) (holding that "while the knowledge of the agent is imputed to the principal, the converse is not true") (citation omitted). The complaint need not prove that OILN's participation in the alleged illegal scheme was probable or certain. However, it is insufficient to establish merely possible participation or plead conclusory allegations. *Iqbal*, 556 U.S. at 679. The probability pleading requirements require that the facts in the complaint raise a "reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly*, 550 U.S. at 556. In antitrust cases, the Supreme Court has directed that claims should rarely be dismissed for insufficiency because the proof of the

conspiracy is in the hands of the conspirators. *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976).

Plaintiff claims that OILN can be held liable because it knew about the conspiracy between Chesapeake and Encana and simply acquiesced in the scheme. In *United States v. Paramount Pictures, Inc.*, the Supreme Court held that "acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one." 334 U.S. 131, 161 (1948). However, courts have stressed that this acquiescence must be knowing involvement; the defendant must be conscious of the scheme of which it was a part and know that its actions will have anticompetitive effects. *United States v. United States Gypsum Co.*, 438 U.S. 422, 463 (1978); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.*, 156 F.3d 535, 541 (4th Cir. 1998). If a defendant furthers the object of a conspiracy without any knowledge of it, he is not liable as a participant. *United States v. Falcone*, 311 U.S. 205, 210 (1940). Knowledge of the conspiracy may be shown through direct or circumstantial evidence. *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 374-75 (9th Cir. 1957). An explicit agreement is not required–a tacit agreement demonstrated by the conduct of the parties can sufficiently show a conspiracy in violation of the Sherman Act. *Strobl v. N.Y. Mercantile Exch.*, 561 F. Supp. 379 (S.D. N.Y. 1983).

The complaint in this case alleges sufficient factual matter to support a plausible allegation that OILN knew about the alleged Chesapeake-Encana agreement and either acquiesced or participated in it. David McGuire of OILN was part of an email conversation that included Chesapeake's CEO telling Chesapeake's vice president it was time "to smoke a peace pipe with eca on this one if we are bidding each other up." (ECF No. 1-2 at pg. 27.) This raises the plausible inference that OILN knew about the agreement. OILN's participation in the actions that impacted NorthStar's sale of its oil and gas rights could support the finding of a tacit agreement or

acquiescence sufficient to support Sherman Act liability. Overall, the complaint raises the reasonable expectation that discovery could reveal that OILN participated in the alleged scheme. *See Twombly*, 550 U.S. at 556. Because any evidence of OILN's involvement is held by OILN, discovery is appropriate to determine the extent of OILN's knowledge and participation in the alleged scheme. *See Hosp. Bldg. Co.*, 425 U.S. at 746.

Accordingly, O.I.L. Niagaran's motion to dismiss (ECF No. 20) is **DENIED.**

VI. CONCLUSION

In the complaint, NorthStar sufficiently alleges plausible causes of action against Encana, Chesapeake, and OILN for violations of § 1 of the Sherman Act, Michigan's Antitrust Reform Act, and civil conspiracy/concert of action. However, NorthStar cannot maintain its tortious interference claim against Encana or Chesapeake.

ORDER

For the reasons discussed above, Encana Corp. and Encana Oil & Gas, USA's motion to dismiss (ECF No. 16) is **GRANTED IN PART AND DENIED IN PART.** Count V is **DISMISSED**. The motion to dismiss is **DENIED** on all other claims.

Chesapeake Energy Corporation's motion to dismiss (ECF No. 18) is **GRANTED IN PART AND DENIED IN PART.** Count V is **DISMISSED**. The motion to dismiss is **DENIED** on all other claims.

O.I.L. Niagaran, LLC's motion to dismiss (ECF No. 20) is **DENIED.**

IT IS SO ORDERED.

Date: March 10, 2014

/s/ Paul L. Maloney
Paul L. Maloney
Chief United States District Judge