

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

RETRACTABLE
TECHNOLOGIES, INC., et al.

v.

BECTON, DICKINSON AND CO.

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Case No. 2:08-CV-16-MHS-RSP

REPORT AND RECOMMENDATION

Before the Court is Becton, Dickinson and Company's Motion for Partial Summary Judgment on the Antitrust (Counts 1 and 2) and Unfair Competition (Count 6) Claims (Dkt. No. 173, filed January 11, 2012). Having considered the summary judgment evidence and the arguments, the Court **RECOMMENDS** that BD's Motion for Partial Summary Judgment be **DENIED**.

SUMMARY JUDGMENT STANDARD

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Any evidence must be viewed in the light most favorable to the nonmovant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). Summary judgment is proper when there is no genuine issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson*, 477 U.S. at 247-48. The substantive law identifies the material facts, and disputes over facts that are irrelevant or unnecessary will not defeat a motion for summary judgment. *Id.* at 248. A dispute about a

material fact is “genuine” when the evidence is “such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

The moving party must identify the basis for granting summary judgment and identify the evidence demonstrating the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the moving party does not have the ultimate burden of persuasion at trial, the party “must either produce evidence negating an essential element of the nonmoving party’s claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

DISCUSSION

BD moves for summary judgment on RTI’s claims under the Sherman Act §§ 1 and 2, Clayton Act § 3, the Texas Antitrust Act, and Texas common law unfair competition.

A. Sherman Act § 1 Claim

Section 1 of the Sherman Act declares that “[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, is hereby declared to be illegal.” 15 U.S.C. § 1. The elements of a claim under Section 1 of the Sherman Act are: “(1) the existence of a contract, combination or conspiracy; (2) an unreasonable restraint on trade; and (3) an effect on interstate commerce.” *Lone Star Milk Producers, Inc. v. Dairy Farmers of Am., Inc.*, 2001 WL 1701532, at *5 (E.D. Tex. Jan. 22, 2001); *see also Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 627 (5th Cir. 2002).

Because there is no allegation that any complained-of conduct is a violation *per se* of the Sherman Act, the rule of reason analysis applies. *Apani Southwest, Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 627 (5th Cir. 2002). Under the rule of reason, the plaintiff must demonstrate

conduct that unreasonably restrained trade. *Id.* “The court must then balance the ‘anticompetitive evils of a restrictive practice . . . against any procompetitive benefits or justifications within the confines of the relevant market. Proof that the defendant’s activities, on balance, adversely affected competition in the appropriate product and geographic markets is essential to recovery under the rule of reason.’” *Id.* (citations omitted).

BD moves for summary judgment on RTI’s claim under Section 1 of the Sherman Act on the grounds that RTI cannot establish that any of BD’s agreements unreasonably restrain trade. (Mot. at 15, Dkt. No. 173.) BD divides its agreements into two categories: (1) its contracts with group purchasing organizations (GPOs) (*id.* at 5-10); and (2) its incentive agreements with a limited number of hospitals (*id.* at 13).

Turning to the GPO contracts, BD argues that they are not exclusive dealing agreements because there are no contractual obligations preventing GPO members from buying competitive products, and competitors, such as RTI, are free to negotiate and obtain similar contracts with the GPOs. (Mot. at 16.) BD also argues that the volume discounts offered by the contracts do not make the agreements *de facto* exclusive dealing agreements. (*Id.* at 17.) According to BD, the volume discount aspects of the agreements do not unreasonably restrain trade because (1) there are no contractual obligations to buy from BD (*id.* at 21); (2) the only “theoretical” consequence for not buying enough BD product is that a customer may lose a negotiated discount (*id.*); (3) the contracts are multi-source agreements and not single-source agreements (*id.* at 22); and (4) there are no bundled discounts, commitment requirements or claw-back provisions (*id.* at 22).

With respect to the special incentive agreements, BD maintains that (1) the agreements are in place in too small of a segment to foreclose competition; (2) less than 5% of sales of safety

needles and syringes are made under the agreements; and (3) there is no evidence that RTI would have to price below its costs in order to compete. (Mot. at 23-24.)

In response, RTI argues that BD uses a variety of contracting practices to restrain competition in the marketplace, and that BD mischaracterizes its contracts by arguing that they are merely volume discount arrangements. (Resp. at 11-12, Dkt. No. 360.) With respect to the GPO contracts, RTI points to evidence that the agreements impose loyalty conditions separate from volume-based conditions, and to evidence that the loyalty conditions are used to punish buyers that are not compliant. (Resp. at 12-13.) RTI's evidence indicates that "from 2004 to 2010, BD's non-penalty prices remained stagnant, while its penalty prices significantly increased." (*Id.* at 13.) With respect to harm to competition, RTI points to evidence that BD was able to maintain higher pricing premiums, foreclose sales by RTI, and increase switching costs for consumers. (*Id.* at 14-20). RTI argues that there is no evidence that BD's agreements have any procompetitive benefits. (*Id.* at 14.)

The Court finds that genuine disputes of material fact currently prevent the Court from determining whether BD's agreements are unreasonable restraints of trade, which precludes granting summary judgment. BD focuses on the legal requirements of the contracts on the relevant economic activity. However, the Court must consider the practical effects of the contracts. RTI has produced sufficient evidence suggesting that BD's contracts have anticompetitive effects.

BD's motion makes much of the fact that BD's market share is dropping and that RTI's sales are increasing. However, this alone does not negate the possibility that BD's contracts unreasonably restrain trade. In other words, in a world free of the alleged anticompetitive effects

of BD's contracts, BD's market share could decline at a faster rate, and sales by RTI and other competitors could increase at a faster rate.

Having found that there are sufficient genuine disputes of material fact that preclude finding that BD's contracts are not unreasonable restraints on trade as a matter of law, summary judgment should be denied on the Sherman Act § 1 claim.

B. Sherman Act § 2 and Clayton Act § 3

BD argues that it is entitled to summary judgment on the Sherman Act § 2 claim because RTI's claim is based upon RTI's flawed Sherman Act § 1 and false advertising theories. (Mot. at 24.) In the same vein, BD argues that it is entitled to summary judgment on RTI's Clayton Act § 3 because it "fails as a matter of law for the same reasons" as the Sherman Act § 1 claim. (Mot. at 23 n.13.) As the Court has found that that the Sherman Act § 1 claim is viable, BD is not entitled to summary judgment on the Sherman Act § 2 and Clayton Act § 3 claims.

C. Texas Antitrust Act

BD argues that it is entitled to summary judgment on the Texas Antitrust Act claim "[b]ecause the Texas antitrust statute 'mandates that its provisions be interpreted in harmony with federal antitrust law'" (Mot. at 16 n.7 (quoting *Johnson v. Hospital Corp. of Am.*, 95 F.3d 383, 391 n.7 (5th Cir. 1996).) Because the Court has found that viable federal antitrust claims exist, summary judgment on the Texas Antitrust Act claim should be similarly denied.

D. Texas Common Law Unfair Competition

For RTI to recover under its Texas common law unfair competition claim, RTI must establish that BD is liable for an independent tort or illegal conduct. Because the antitrust claims can serve as the basis for a Texas common law unfair competition claim, summary judgment on this claim should be denied.

CONCLUSION

For the foregoing reasons, the Court **RECOMMENDS** that BD's Motion for Partial Summary Judgment on the Antitrust (Counts 1 and 2) and Unfair Competition (Count 6) Claims (Dkt. No. 173) be **DENIED**.

Any objections to this Report and Recommendation must be filed no later than March 25, 2013. A party's failure to file written objections to the findings, conclusions, and recommendations contained in this report shall bar that party from de novo review by the district judge of those findings, conclusions, and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings, and legal conclusions accepted and adopted by the district court. Fed. R. Civ. P. 72(b)(2); see *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc).

SIGNED this 14th day of March, 2013.


ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE