IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

INTERNATIONAL CONSTRUCTION PRODUCTS LLC,	)	
Plaintiff,	)	
v.	)	
	)	**C.A. No. 1:15-cv-108-RGA**
CATERPILLAR INC., et al.,	)	
Defendants.	)	

REPLY BRIEF IN SUPPORT OF CATERPILLAR'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

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Dated: January 22, 2019

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ICP's strategy of referring to numerous alleged conspirators as a group cannot overcome the fact that ICP's allegations lack facts plausibly supporting its claims against Caterpillar.

I. THE SAC FAILS TO ALLEGE PLAUSIBLE ANTITRUST CLAIMS

In cases involving multiple defendants, the complaint must allege specific facts as to each defendant and may not simply lump all of them together or refer to them interchangeably. *See, e.g., SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 422-23 (4th Cir. 2015). The SAC fails to meet this basic pleading requirement as to Caterpillar for two reasons, the SAC does not allege: (1) a plausible agreement by Caterpillar and (2) an unreasonable restraint by Caterpillar.

A. ICP Does Not Plausibly Allege that Caterpillar Conspired Unlawfully

The "'crucial question'" for Sherman Act § 1 claims "is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement[.]'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (citation omitted).

1. There Is No Direct Evidence of Conspiracy by Caterpillar

None of purported "direct evidence" alleged by ICP (Resp. 8) constitutes direct evidence as to Caterpillar because none explicitly refer to Caterpillar agreeing to threaten or boycott IronPlanet. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 324 n.23 (3d Cir. 2010).

2. There Is No Circumstantial Evidence of Conspiracy by Caterpillar

ICP's new allegations cannot plausibly support an inference of conspiracy by Caterpillar because they demonstrate neither (1) parallel conduct by Caterpillar nor (2) satisfaction of plus factors by Caterpillar. *See id.* at 321-22 (reviewing plaintiff's pleading burden).

No Plausible Parallel Conduct. ICP concedes that no other *manufacturer* threatened IronPlanet on April 4, the day Caterpillar allegedly communicated a threat to IronPlanet. (Resp. 14.)[1] With no other plausibly alleged threat on April 4, there is no parallel conduct by Caterpillar.

[1] ICP speculates Ring Power might have communicated with IronPlanet on April 4. (Resp. 14.)

(D.I. 45 at 7-8 (explaining that alleged threats made days apart, without more, "does not suffice").)

ICP's attempt to conjure the appearance of parallel conduct should be rejected. ICP asserts that Ziegler acted with Caterpillar's "knowledge and consent" on March 18 and Caterpillar was "acting through" AAS on March 26. (Resp. 10, 12, 15; SAC ¶ 104.) Both assertions are legal conclusions that should not be accepted under *Twombly*. 550 U.S. at 555. ICP's cases do not support its assertions because, unlike this case, the parties admitted to acting collusively. *See Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 468-69 (3d Cir. 1998); *Champagne Metals v. Ken-Mac Metals, Inc.* 458 F.3d 1073, 1083-84 (10th Cir. 2006). Similarly, AAS's alleged communications are not imputed to Caterpillar simply because it was a board member and investor in AAS. *See Sky Angel U.S., LLC v. Nat'l. Cable Satellite Corp.*, 947 F. Supp. 2d 88, 101 (D.D.C. 2013).[2]

No Plausible Plus Factors. The SAC does not plausibly allege the three plus factors as to Caterpillar. *First*, ICP's assertion that Defendants' were "motivated by the desire to protect their own business interests by excluding ICP (Resp. 20-21) does not support an inference of a plausible conspiracy by Caterpillar. (Jt. Opening Br. at 18-19 (citing cases).) Indeed, *Twombly* explained that this particular motive is incapable of "raising a suggestion of a preceding agreement" because businesses always have this motive and would attempt to exclude competitors regardless of the existence of an agreement. *See* 550 U.S. at 566-67.

Second, ICP's allegation of "risked lost sales" cannot satisfy the act-against-interest factor.

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[2] ICP's reliance on *Am. Needle, Inc. v. NFL* is misplaced. There, the Court recognized the presumption that agreements within a single firm constitute independent action. 130 S. Ct. 2201, 2215 (2010). An exception may arise when the members of a firm make decisions "on interests separate from those of the firm itself." *Id.* The SAC merely parrots *Am. Needle's* language in a conclusory manner (*e.g.*, Resp. 9; SAC ¶ 47) and should not be considered. *See Twombly*, 550 U.S. at 555, 557 (disregarding "labels and conclusions"). The SAC alleges the decisions were made pursuant to AAS's own interests, thus making the *Am. Needle* exception not applicable. (*E.g.*, SAC ¶ 85 (AAS pursuing merger because "a merger...would enhance [AAS's] revenue and profits").)

(Resp. 18-19.) ICP concedes lost sales through IronPlanet would shift to AAS. But Caterpillar had ownership stakes in both entities; thus, no alleged risk. (SAC ¶¶ 10, 48, 60, 89.) This does not support the conclusion that Caterpillar faced risk from "threatening" IronPlanet as alleged. *See Ins. Brokerage*, 618 F.3d at 328 (assessing whether defendant is "better off" overall).

Third, ICP's reliance on "precise parallelism" – or "[i]dentical parallel conduct taken simultaneously by multiple competitors ...absent common stimuli" – fails to satisfy the traditional conspiracy factor. (Resp. 16-18.) Critically, the Response presented no evidence of an agreement between Caterpillar and Komatsu. Further, ICP's brief confirms that Caterpillar no longer allegedly acted in parallel with any other Defendant, as noted above. ICP's allegations also fail because the alleged conduct is explained by a common stimulus. *See Twombly*, 550 U.S. at 556, n.4. As the Court previously explained, ICP's announcement about IronPlanet changing its business to begin selling new construction equipment (SAC ¶¶ 74-78, 124) "threatened to change the entire industry dynamic," and one would expect Caterpillar and others to "make the same rational decision to the same stimulus: stop ICP's entry." (D.I. 45 at 10.)

With implausible plus factors, ICP relies on the Court's prior ruling allowing the FAC to survive (Resp. 17, 19-20), based on allegations that Caterpillar and another manufacturer allegedly made the same threat on the *same* day (D.I. 64 at 8-9). That assertion fails now that phone records show that Caterpillar and Komatsu did not make calls to Iron Planet on the same day. Moreover, ICP's allegations have changed from an alleged three-manufacturer conspiracy to a multi-level conspiracy involving a merger, manufacturers, dozens of dealers, and a used equipment auctioneer (*e.g.*, SAC ¶¶ 1, 4-5; Jt. Open. Br. 11-13, 20, Exs. 2-4). The plus factors should be assessed as alleged in the SAC, which fails to plausibly support the factors as to Caterpillar.

B. The SAC Fails to Plead an Unreasonable Restraint of Trade by Caterpillar

There is no merit to ICP's argument that the relevant market allegations dismissed by the

Court are plausible or that ICP's new, complicated conspiracy is *per se* unlawful.

1. The Relevant Market Allegations are Dismissed

The argument that the Court did not dismiss ICP's alleged national geographic market is not credible. (Resp. 30.) The Court twice rejected ICP's relevant market allegations as defective and dismissed the entirety of the claims dependent upon relevant markets. (D.I. 45 at 19-20, 27; D.I. 64 at 15-20.) ICP's allegations remain dismissed, ICP did not fix them in the SAC, and, consequently, ICP lacks the markets necessary to plead that the alleged agreement is unreasonable under the Rule of Reason. *See Ins. Brokerage*, 618 F.3d at 315; Mot. 25-26.

The argument that the Court did not dismiss ICP's relevant product market is not sound. (Resp. 30.) The Complaint alleged a "heavy construction equipment" market "and narrower relevant markets," consisting of assorted equipment types. (D.I. 1 at ¶ 33.) The Court previously explained that this product market is defective because ICP failed to support the alleged market with facts on reasonable interchangeability and cross elasticity of demand. (D.I. 64 at 15-20.) ICP's § 2 claims were dismissed in their entirety.

2. ICP's Alleged Conspiracy is not *Per Se* Unlawful

With dismissed relevant markets, ICP now claims they were not needed because its conspiracy claim qualifies for the narrow *per se* exception. ICP is mistaken. *First*, the Response failed to show that ICP's new conspiracy is primarily horizontal, a prerequisite for the *per se* exception in this Circuit. *See, e.g.*, *AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 531 (3d Cir. 2006). The SAC alleges a conspiracy encompassing at least 30 purported conspirators that operate in at least three levels of the distribution chain, and sales of at least two different products. (Jt. Open. Br. at 23.) This multi-product, multi-level conspiracy is not a horizontal fact pattern.

Second, the Response failed to establish that ICP's alleged boycott qualifies for the *per se* exception, which is reserved for specific practices that courts have found to be anticompetitive

based on experience with those specific practices. *See Ariz. v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 344, 349, n.19 (1982). Yet the Response provided no authority for the specific restraint alleged.[3] Nor could ICP provide such authority because, in this Circuit, group boycotts might qualify only when they are "classic" – meaning "attempts by competitors to exclude horizontal competitors." *Larry v. Muko, Inc.*, 670 F.2d 421, 430 (3d Cir. 1982). ICP's alleged boycott does not fit because Defendants do not compete horizontally with ICP. (SAC ¶ 2; Resp. 22.) *See, e.g., James Julian, Inc. v. Raytheon Co.*, 593 F. Supp. 915, 927 (D. Del. 1984); *IDT Corp. v. Bldg. Owners & Managers Ass'n Int'l*, 2005 WL 3447615, at *12 (D.N.J. Dec. 15, 2005) (ruling *per se* exception did not apply when boycott was not "by competitors against competitors"). In sum, the Court should not take the extraordinary step of decisively declaring that ICP's alleged complex and unsound conspiracy qualifies for the narrow *per se* exception, because there is no relevant precedent that would support such an approach.

II. ICP'S STATE LAW CLAIMS SHOULD BE DISMISSED WITH PREJUDICE

In addition to the reasons in the joint brief and reply brief, the state law claims against Caterpillar should be dismissed because ICP has not alleged any facts as to Caterpillar with the required specificity. *In re Processed Egg Prods. Antitrust Litig.*, 821 F. Supp. 2d 709, 720 (E.D. Pa. 2011) ("Simply using the global term 'defendants' to apply to numerous parties without any specific allegations that would tie each particular defendant to the conspiracy is not sufficient.")).

CONCLUSION

For the foregoing reasons, Caterpillar respectfully requests an Order dismissing the SAC's claims against Caterpillar in their entirety and with prejudice.

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[3] ICP did not cite a single case reflecting the complex form of conspiracy alleged here. *See U. S. v. Gen. Motors Corp.*, 384 U.S. 127 (1966) (horizontal dealers and one manufacturer); *MM Steel v. JSW Steel Inc.*, 806 F.3d 835 (5th Cir. 2015) (few horizontal dealers and two manufacturers).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David J. Baldwin, hereby certify that on January 22, 2019, the attached documents were electronically filed with the Clerk of the Court using CM/ECF which will send notification to the registered attorney(s) of record that the documents have been filed and are available for viewing and downloading:

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