IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

AMERICAN PROTEINS, INC. n/k/a CROSSROADS PROPERTIES A, INC., AMPRO PRODUCTS, INC. n/k/a CROSSROADS PROPERTIES B, INC., GEORGIA FEED PRODUCTS COMPANY, L.L.C. n/k/a CROSSROADS PROPERTIES C, LLC,	)	CIVIL ACTION FILE
Plaintiffs,	)	NO. 2:22-CV-091-RWS
v.	)	
RIVER VALLEY INGREDIENTS, LLC, TYSON POULTRY, INC., and TYSON FARMS, INC.,	)	
Defendants.	)	

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

PRELIMINARY STATEMENT

This case arises from a dispute regarding the purchase price that Defendant Tyson Poultry, Inc. ("Tyson Poultry") paid Plaintiffs American Proteins, Inc, AMPRO Products, Inc. and Georgia Feed Products Company, L.L.C. (collectively "API") for their poultry rendering operations and assets ("Assets"). In December 2019, Defendants Tyson Poultry, River Valley Ingredients, LLC, and Tyson

Farms, Inc. (collectively, "Tyson") filed a lawsuit in Delaware Superior Court against API alleging that API made fraudulent misrepresentations regarding its rendering operations that induced Tyson to overpay for API's Assets.

API responded to Tyson's lawsuit in Delaware by asserting counterclaims against Tyson alleging that Tyson forced API into selling its Assets at a depressed price based on alleged misrepresentations related to Tyson's exclusive ten-year supply agreements with API's largest supplier customers, Wayne Farms, LLC ("Wayne Farms") and Koch Foods, Inc. ("Koch"). API asserted various state and federal law claims against Tyson based on its allegations, including claims for fraudulent inducement, tortious interference, breach of contract and Federal and Georgia RICO violations.

Now, in an effort to escalate its ongoing dispute with Tyson regarding the purchase of API's Assets, API filed this action asserting federal antitrust claims under Sections 1 and 2 of the Sherman Act based on allegations substantially similar to those supporting API's counterclaims in Delaware. API's ill-advised attempt to assert antitrust claims based on the same alleged conduct that forms the basis for its pending claims in Delaware fails as a matter of law for several reasons.

First, API's allegations demonstrate that it does not have standing to pursue its antitrust claims. Numerous courts have consistently held that a plaintiff that

exits the market after the sale of its business does not suffer antitrust injury from wrongful conduct that forced the plaintiff to sell. And API does not have standing to pursue any alleged injuries suffered by third-parties which remained in the market after API's exit.

Here, the Complaint alleges that Tyson fraudulently misrepresented and omitted that Tyson had retained a contractual "out" in the contracts with Wayne Farms and Koch that allowed Tyson to back out if Tyson was unable to buy API's Assets. API claims that as a result of Tyson's actions, it was "forced" to sell its Assets to Tyson at a "depressed price below fair market value." Taking API's allegations as true, it is clear that any purported injury that API suffered flowed not from its elimination as a competitor, but rather from the alleged fraudulent conduct that induced API to sell its Assets. Accordingly, any injury caused by the acts of which API complains is not compensable under the antitrust laws, but instead must be redressed, if at all, under state law in the pending Delaware action.

Second, API's allegations do not state a plausible antitrust claim. API alleges that Tyson entered into exclusive supply contracts with Wayne Farms and Koch on better terms than API was offering, which is pro-competitive, not anticompetitive. API further alleges upon "information and belief" that after API's exit from the market, Tyson charged "higher prices" to poultry processors such as

Pilgrim's Pride Corporation and had access to confidential information about its customers' processing operations and the ability to collude with them. But API's speculative allegations concerning the opportunity to engage in anticompetitive conduct after Tyson acquired API's assets could not have impacted API and are insufficient to state viable antitrust claims.

Finally, API's antitrust claims are barred by the statute of limitations. The statute of limitations for an antitrust violation begins to run when the defendant commits an overt act that injures plaintiff's business. API alleges that Tyson entered into exclusive contracts with Wayne Farms and Koch that constituted a "refusal to deal" and "boycott" in the summer of 2017. Because API filed this lawsuit more than four years after it learned of the actions that API alleges constituted an illegal refusal to deal or boycott, API's claims are barred under the four-year statute of limitations that applies to antitrust claims.

The defects in API's Complaint are fatal and incurable. As a result, API's Complaint should be dismissed with prejudice.

FACTUAL BACKGROUND

The following statements are taken from the allegations in Plaintiffs' Complaint and from certain pleadings filed in *River Valley Ingredients, LLC, et al. v. American Proteins, Inc. n/k/a Crossroads Properties A, Inc., et al.*, Civil Action

Number N19C-12-160 MMJ CCLD (Del. Super. Ct.) (the "Delaware Litigation").[1] The Court in ruling on a motion to dismiss may take judicial notice of materials filed in other litigation, including the action between the parties pending in Delaware Superior Court. *U.S. ex rel. Osheroff v. Humana Inc.*, 776 F.3d 805, 812 n.4 (11th Cir. 2015); *see also Lozman v. City of Riviera Beach, Fla.*, 713 F.3d 1066, 1075 n.9 (11th Cir. 2013). Defendants request that the Court take judicial notice of the Plaintiffs' Complaint, the Amended Counterclaims of Defendants/Counterclaim Plaintiffs and the Counter-Defendants' Reply to Amended Counterclaims filed in the Delaware Litigation, which are attached as Exhibits A, B, and C, respectively, to the concurrently filed Declaration of Kasia Hebda.

I. The Parties.

Plaintiffs American Proteins, Inc. and its affiliates, AMPRO Products, Inc., and Georgia Feed Products Company, L.L.C. were in the poultry rendering business in the Southeast United States until August 20, 2018, when they sold their Assets to Tyson. (Dkt. 1 ¶¶ 12-14, 29, 94.)

[1] By describing Plaintiffs' allegations, Defendants do not admit the truth of those allegations.

Defendants Tyson Poultry, Tyson Farms, Inc., and River Valley Ingredients, LLC are wholly owned subsidiaries of Tyson Foods, Inc. (Dkt. 1 ¶¶ 15-17.) Before purchasing API's poultry rendering facilities, Tyson did not own or operate poultry rendering facilities in Georgia, Alabama, north Florida, and south Tennessee. (Dkt. 1 ¶¶ 34, 99.) Tyson is a poultry processor, and before August 20, 2018, was a supplier of raw materials to API. (Dkt. 1 ¶¶ 34, 97.)

II. The Southeast Poultry Rendering Market.

API alleges that the relevant market is the market for poultry rendering services to poultry processors located in Georgia, Alabama, north Florida and south Tennessee (the "Southeast Poultry Rendering Market" or the "Market"). (*See* Dkt. 1 ¶¶ 29-46.) Poultry processors slaughter poultry and process the meat for human consumption. (Dkt. 1 ¶ 41.) The alleged poultry rendering market consists of two separate but related components. (Dkt. 1 ¶ 40.) First, poultry renderers purchase leftover raw materials that are not typically sold for human consumption from poultry processors. (Dkt. 1 ¶ 41.) Second, poultry renderers process these raw materials into non-human consumable proteins for animal feed and other products and sell them back to poultry processors. (Dkt. 1 ¶ 42.) Without poultry rendering companies, poultry processors would be required to dispose of all of the raw materials not sold for human consumption, and disposal is

infeasible and cost prohibitive. (Dkt. 1 ¶¶ 43-44.) Consequently, 100% of the leftover raw materials from processors within the Market are sold to renderers. (Dkt. 1 ¶ 43.)

Because of the cost and potential for spoilage, poultry processors cannot transport their leftover raw materials supplied to poultry rendering facilities more than approximately 125 miles from their processing plants. (Dkt. 1 ¶ 35.) As a result, a poultry renderer must strategically locate its facility within 125 miles of poultry processing plants that supply it. (*Id.*) Before selling its assets, API operated poultry rendering facilities in Cumming, Georgia, Hanceville, Alabama, Alma, Georgia, and Cuthbert, Georgia. (Dkt. 1 ¶ 37.) According to API, the relevant geographic market is the area comprised of four concentric circles of radius 125 miles around each of the rendering facilities formerly owned by API. (Dkt. 1 ¶ 38; *id.* at Ex. A.)

The Southeast Poultry Rendering Market is highly concentrated. (Dkt. 1 ¶ 49.) Before selling its assets to Tyson, API controlled more than 90% of the Market. (Dkt. 1 ¶¶ 30-33.) Following the sale transaction, Tyson possesses over 90% of the market share for rendering in the Market. (Dkt. 1 ¶ 49.)

III. Tyson's Acquisition of API's Assets.

In the summer of 2017, Tyson approached API regarding Tyson's interest in acquiring API's Assets. (Dkt. 1 ¶ 72.) API alleges that Tyson executives falsely represented to API that Tyson had executed ten-year exclusive contracts to provide poultry rendering services to Wayne Farms and Koch, two of API's long-term customers. (Dkt. 1 ¶¶ 74-75.) API alleges on "information and belief" that Tyson offered Wayne Farms and Koch pricing for rendering services that was below Tyson's marginal costs of rendering. (Dkt. 1 ¶ 83.) Once it learned of these exclusive contracts, API immediately reached out to Wayne Farms and Koch to offer them attractive new rendering contracts. (Dkt. 1 ¶ 75.) These efforts were unsuccessful—Wayne Farms and Koch refused to even consider the proposals and advised API that the agreements with Tyson were done from the start. (*Id.*) API alleges that while Tyson had in fact reached agreements with Wayne Farms and Koch, Tyson misrepresented, omitted and concealed that the exclusive contracts included a contractual "out" that would allow Tyson to back out of the rendering contracts if Tyson was unable to induce API to sell its assets to Tyson. (Dkt. 1 ¶¶ 76-77.)

API alleges that Tyson's exclusive contracts with Wayne Farms and Koch would deprive API of its raw material supply and make it functionally unable to

continue operating because it would lack the ability to run its plants at the required minimum capacity. (Dkt. 1 ¶ 74.) As a result, API began negotiations with Tyson regarding a sale of its Assets. (*See* Dkt. 1 ¶ 78.)

Ultimately API and Tyson executed an Asset Purchase Agreement on May 14, 2018, pursuant to which API agreed to sell its Assets to Tyson for $825 million. (Dkt. 1 ¶ 93.) The transaction closed on August 20, 2018 (the "Sale Transaction"). (Dkt. 1 ¶ 94.)

IV. Alleged Harm to Competition and Consumers After the Sale Transaction.

Before purchasing API's Assets, Tyson did not have rendering capacity to serve itself and other poultry processors in the Southeast Poultry Rendering Market. (Dkt. 1 ¶ 99.) Through the purchase of API's Assets, API alleges that Tyson gained monopoly and monopsony power within the Market. (Dkt. 1 ¶ 100.) API alleges that this market power combined with high barriers to entry have provided Tyson the power to reward, punish, and to discriminate between and among customers, including Tyson's poultry processing competitors. (*Id.*)

API alleges on "***information and belief***" that Tyson has used its acquired market power to force Pilgrim's Pride Corporation ("Pilgrim's"), one of Tyson's poultry processing competitors, to pay above-market service fees for rendering raw materials. (Dkt. 1 ¶¶ 101-02, 107.) API alleges that Tyson's control over more

than 90% of the Market also provides Tyson with access to "highly confidential, commercially sensitive data" regarding industry supply levels that Tyson's competitors have no choice but to send to Tyson. (Dkt. 1 ¶¶ 111-112.) API speculates that access to this confidential, competitively sensitive information from its competitors allows Tyson not only to form new collusive agreements, but also to enforce, police and maintain existing collusive agreements with its competitors. (Dkt. 1 ¶¶ 112, 114.) The Complaint also contains conclusory allegations that Tyson can use its market power against existing players in the Market to demand higher prices at its other rendering facilities, by tying pricing in other markets to its provision of rendering services within the Southeast Poultry Rendering Market. (Dkt. 1 ¶ 116.)

V. The Delaware Litigation.

On December 20, 2019, Tyson filed a complaint in the Delaware Litigation, alleging that API had engaged in a "campaign of deception against Tyson aimed at inducing Tyson into paying [API] the vastly inflated sum of over $825 million for certain assets and operations, including the multiple poultry rendering facilities[.]" (Ex. A ¶ 1.) In particular, Tyson alleges that API concealed the existence of API's "(a) decades-long fraudulent rendering practices; (b) manipulated 2017 energy cost reconciliations with raw material suppliers; and (c) the deteriorating state of certain

API facilities." (*Id.*) Tyson has asserted claims for fraud in the inducement, civil conspiracy to commit fraud, unjust enrichment, and breach of contract against API related to the sale of API's assets and operations. (Ex. A ¶¶ 136-65.)

In response, API asserted counterclaims based on allegations of conduct that is substantially similar to that alleged in this action. (*See* Ex. B.) The Superior Court of Delaware dismissed API's claims for Federal Civil RICO, Georgia Civil Rico, and violations of the Packers & Stockyards Act, 7 U.S.C. §§ 181-229, but API's state law counterclaims for fraudulent inducement, rescission due to mistake, tortious interference with contractual and prospective business relations, unfair competition, civil conspiracy, and breach of contract remain pending. (*See* Ex. B ¶¶ 57-157; Ex. C ¶ 1.)

VI. The Georgia Litigation.

In its Complaint, API asserts three causes of action against Tyson. API alleges that Tyson violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by entering into agreements with its poultry processing competitors Wayne Farms, Koch, and others, "to boycott or refuse to deal with the API Entities." (Dkt. 1 ¶ 135.) API also alleges that by entering into long-term contracts with Wayne Farms and Koch, Tyson forced API to sell its Assets to Tyson and acquired the same monopoly power API held in the Market. (Dkt. 1 ¶¶ 142, 150.) API alleges that

these actions constituted monopolization and conspiracy to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. (Dkt. 1 ¶¶ 146, 149.)

At the heart of each of these claims is the same set of operative allegations that provide the basis for API's state law claims in Delaware. In particular, API alleges that it sold its Assets, at a depressed price below fair market value, after Tyson induced API to sell by entering into long-term exclusive supply contracts with Wayne Farms and Koch and misrepresenting and omitting that Tyson had retained a contractual "out" that allowed Tyson to back out if it was unsuccessful in inducing API to sell. (Dkt. 1 ¶ 139; *see also id.* ¶¶ 143, 151.)

ARGUMENT AND CITATION OF AUTHORITY

I. Legal Standard.

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual allegations "to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The well-pleaded factual allegations in the complaint, when taken as true, must "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251, 1255 (11th Cir. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In particular, "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive

issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). Importantly, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (citation omitted); *see also Jackson v. BellSouth Telecomm.*, 372 F.3d 1250, 1262 (11th Cir. 2004) ("[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." (citation omitted)).

II. API Lacks Standing to Pursue Antitrust Claims Against Tyson.

To pursue its antitrust claims, API must establish that it has standing. *Sunbeam Television Corp. v. Nielson Media Rsch, Inc.*, 711 F.3d 1264, 1270 (11th Cir. 2013). Antitrust standing requires more than simply satisfying the standing requirements under Article III of the Constitution. *Id.*; *Jes Props., Inc. v. USA Equestrian, Inc.*, 458 F.3d 1224, 1228 (11th Cir. 2006). An inquiry concerning antitrust standing "involves an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws." *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir. 1991).

Courts in this circuit apply a two-prong test to the allegations in the complaint to determine whether a plaintiff has antitrust standing. *Sunbeam Television Corp.*, 711 F.3d at 1271; *Todorov*, 921 F.2d at 1449. The plaintiff must establish (1) that it suffered antitrust injury, and (2) that it is "an 'efficient

enforcer' of the antitrust laws." *Sunbeam Television Corp.*, 711 F.3d at 1271 (citation omitted). A plaintiff that fails to satisfy either of these elements may not pursue antitrust claims. *See id.* at 1273-74. Standing is a question of law for the Court. *Todorov* 921 F.2d at 1448.

To demonstrate that it has suffered antitrust injury, a plaintiff must show not only "an injury to himself causally linked to illegal activities of the defendant[,]" but also that "the defendants' activities have the effect of stifling competition." *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 1982 WL 1952, at *8 (N.D. Ga. Dec. 30, 1982). "The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 343 (1990) (emphasis omitted). Here, the injury that API alleges it suffered did not flow from conduct that allegedly harmed competition. As a result, API cannot demonstrate that it suffered antitrust injury.

A. API Should Not be Allowed to Duplicate Its Delaware Claims in an Antitrust Action.

The crux of API's Complaint is that Tyson induced API to sell its Assets to Tyson by falsely representing that Tyson had irrevocably locked up two of API's suppliers, Wayne Farms and Koch, to exclusive, ten-year contracts. (Dkt. 1 ¶¶ 74-75.) API alleges that these representations were false because Tyson failed to

disclose to API that Tyson had negotiated a "contractual out" with Wayne Farms and Koch that allowed Tyson to back out of the agreements if Tyson was unable to buy API's assets. (Dkt. 1 ¶¶ 76-77.) Faced with the prospect of losing the raw materials necessary to operate its rendering assets, API alleges that it agreed to sell its Assets to Tyson at a "depressed price below fair market value." (Dkt. 1 ¶ 9; *see also id.* ¶¶ 92, 146, 154.) API claims that it suffered damages in the form of lost profits that it would have made had it decided not to sell and a depressed purchase price for its Assets that was below fair market value. (Dkt. 1 ¶¶ 139, 146, 154)

On June 23, 2021, API asserted counterclaims against Tyson based on substantially similar allegations in the Delaware Litigation. In particular, API alleges in its counterclaims that it was forced to sell is Assets to Tyson at a "depressed price below fair market value" after Tyson falsely represented to API "that [Tyson] had signed up Wayne Farms and Koch [] to ten-year exclusive contacts that would deprive [API] of an essential proportion of [its] raw material supply . . . ." (Ex. B ¶¶ 3, 29.) API further alleges that "while [Tyson] had in fact reached agreement with Wayne Farms and Koch [], [Tyson] misrepresented, omitted, and concealed that [Tyson] had retained a contractual 'out' that would permit [it] to back out of the Wayne Farms and Koch [] contracts if [it was] unable to induce [API] to sell [it] the Transferred Assets." (Ex. B ¶ 29.) API's claims for

fraudulent inducement, rescission due to mistake, tortious interference, unfair competition, and civil conspiracy that are based on these allegations remain pending. (*See* Ex. C ¶ 1.)

Now, API attempts to bootstrap these state law claims into an antitrust action in this Court. While API may be able to proceed to litigate the state law claims in Delaware, those same allegations demonstrate that it may not pursue its antitrust claims here.

B. API Cannot Recover Under the Antitrust Laws for Alleged Injury Suffered from the Sale of its Assets.

API's antitrust claims are based on damages API alleges it suffered from selling its Assets at a "depressed price below fair market value" to Tyson. API's sale of its Assets and API's resulting exit from the Market dictates a finding that API did not suffer antitrust injury.

Courts have repeatedly held that a plaintiff lacks standing to bring suit for antitrust violations when it voluntarily withdraws from the market. *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1373 (8th Cir. 1983); *Turner v. Johnson & Johnson*, 809 F.2d 90, 102 (1st Cir. 1986); *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir.1981); *A.D.M. Corp. v. Sigma Instruments, Inc.*, 628 F.2d 753, 754 (1st Cir.1980); *CSY Liquidating Corp. v. Harris Tr. & Sav. Bank*, 1998 WL 157065, at *15 (N.D. Ill. Mar. 31, 1998), aff'd, 162 F.3d 929 (7th Cir. 1998);

Snyco, Inc. v. Penn Cent. Corp., 551 F. Supp. 949, 952 (E.D. Pa. 1982); *Argus, Inc. v. Eastman Kodak Co.*, 612 F. Supp. 904, 914 (S.D.N.Y 1985), aff'd, 801 F.2d 38 (2d Cir. 1986). In these situations, where a plaintiff claims that it was wrongfully forced to sell its business, any loss arising from the sale did not arise from its elimination as a competitor. Rather, the loss resulted, if at all, from the fraudulent or otherwise wrongful conduct that forced it to sell its business. *Turner* v. *Johnson & Johnson*, 549 F. Supp. 807, 811 (D. Mass. 1982) ("It was not the fact of [plaintiff's] elimination as a competitor which caused its alleged injury, rather the injury resulted from the fraud and misrepresentation allegedly practiced by [defendant] during the negotiations and the acquisition."); *A.D.M. v. Signa Instruments, Inc.*, 481 F. Supp. 1297, 1299 (D. Mass 1980) ("But ADM's injury is not the 'ineluctable result' of its demise as a competitor. It is not the fact of ADM's elimination that led to its injury. Rather, the injury resulted from the alleged conflict of interest and duplicity that permeated the transaction."). As such, "injuries from such wrongful acts, if wrongful they were, are not compensable under the antitrust laws but, instead, are to be redressed (if they are, in fact, redressable), under tort law." *CSY Liquidating Corp.*, 1998 WL 157065, at *15.

Here, too, API did not suffer antitrust injury. If API suffered ***any loss at all*** from the sale of its Assets, that loss "springs not from the allegedly anticompetitive nature of the [Sale Transaction] as from the allegedly tortious or fraudulent aspects of that transaction." *Id.*; *see also Inform Inc. v. Google LLC*, 2021 WL 4295151, at *6 (N.D. Ga. Sept. 20, 2021) ("Plaintiff provides no factual support to show that Defendants weakened competition beyond Plaintiff's claim that Plaintiff was put out of business.").

The conceptual flaw of API's alleged antitrust theory is demonstrated by its own allegations. API alleges that prior to the Sale Transaction, Tyson was not a participant in the relevant antitrust market that it defines in the Complaint—the Southeast Poultry Rendering Market. (*See* Dkt. 1 ¶¶ 34, 38.) API alleges that Tyson wanted to acquire API's assets so that it could obtain API's monopoly power in the market and engage in anticompetitive activity. (Dkt. 1 ¶¶ 85, 95, 99.) And API alleges that Tyson accomplished this goal by entering into exclusive contracts with Wayne Farms and Koch, which induced API to sell to Tyson. (*See* Dkt. 1 ¶¶ 5, 74, 77-78, 99-100, 136, 143, 151.)

The antitrust laws are designed to address conduct that adversely affects competition in a relevant market. According to API's allegations, when API voluntarily sold its assets to Tyson, Tyson assumed API's monopoly position in the

market and began to perform under its contracts with Wayne Farms and Koch. As the Court held in *McDonald*, "[a]ny resultant effect on competition by reason of the [Sale Transaction] would have occurred whether or not [API was] harmed." 122 F.2d at 1376.

What API's allegations make clear is that by the time that there could have been any anticompetitive effects in the Market from Tyson's purchase of API's Assets and Tyson's alleged anticompetitive conduct, API was no longer a participant or competitor in the Market. API has never been a poultry processing company—the alleged targets of the anticompetitive behavior alleged in API's Complaint. And at the time it transferred its Assets to Tyson, API exited the Market entirely. (*See* Dkt. 1 ¶¶ 99-100.) Even if API's allegations of anticompetitive conduct could be based on more than "information and belief" or mere speculation, any alleged anticompetitive effects of Tyson's conduct would be felt by poultry processors in the Market, ***not by API***. (*See* Dkt. 1 ¶¶ 101-02, 107); *GAF Corp. v. Circle Floor Co.*, 463 F.2d 752, 759 (2d Cir. 1972).

Because API was no longer in the Market, API's alleged injury did not flow from any anticompetitive effects of Tyson's alleged conduct, a necessary predicate to antitrust standing. If there was any injury at all, that injury flowed from Tyson's alleged actions to induce API to sell its Assets when Tyson was not even a

participant in the Market. Because those allegations demonstrate that API does not have standing to pursue antitrust claims, API's claims must be dismissed with prejudice.

III. API's Allegations Fail to State a Plausible Claim.

In an apparent attempt to bolster its antitrust theory, API alleges on "information and belief" that Tyson offered Wayne Farms and Koch pricing for rendering services below Tyson's marginal costs and that Tyson planned to recoup these losses by charging other rendering customers, including Pilgrim's, higher prices if it was successful in acquiring API's Assets. (Dkt. 1 ¶¶ 83, 101-02, 107-08.) API admittedly has no direct knowledge of any alleged higher prices charged to Pilgrim's and API's Complaint does not identify the fees paid by Pilgrim's or quantify how much these fees allegedly exceed the market. (Dkt. 1 ¶¶ 101-02, 107.) API's inability to provide specific allegations is fatal to its claims. *See Inform Inc.*, 2021 WL 4295151, at *6 ("these 'naked assertions' . . . are insufficient to survive a motion to dismiss").

API also alleges that Tyson now has the ability to collude with other poultry processors by using confidential commercially sensitive information that Tyson receives from them because of its rendering operations in the Market and the ability to tie pricing in other markets to its provision of rendering services in the

Southeast Poultry Rendering Market. (Dkt. 1 ¶¶ 111-112, 116.) But API's conclusory allegations of Tyson's anticompetitive conduct merely state that Tyson's acquisition of API's assets provided the opportunity to engage in these actions, not that Tyson has done so. (*See, e.g.*, Dkt. 1 ¶¶ 100, 102, 108, 116.) These too provide no support for API's claims. *See, e.g.*, *CIBA Vision Corp. v. Spirito*, 2010 WL 553233, at *4 (N.D. Ga. Feb. 10, 2010) ("The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss.").

In any event, as discussed above, if Tyson were to conduct the activities that API alleges it has the opportunity to engage in, that is not a claim that API has standing to press. Any post-acquisition harm would not be suffered by API, but instead would be suffered by third parties which continue to operate in the Market. (See *supra*, at pp. 19-20.)

IV. API's Claims Are Time Barred.

API's antitrust claims are subject to a 4-year statute of limitations, 15 U.S.C. § 15b. Because API's claims arose in 2017, more than four years before it filed this action, API's claims are also barred by the statute of limitations.

A. API's Antitrust Claims Accrued More than Four Years Before it Filed this Action.

"A cause of action for an antitrust violation 'accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business.'" *Bray v.*

Bank of Am. Corp., 784 F. App'x 738, 740 (11th Cir. 2019) (quoting *Zenith Radio Corp. v. Hazeltine Rsch.*, 401 U.S. 321, 338 (1971)). "For statute of limitation purposes, . . . , the focus is on the timing of the causes of injury, i.e., the defendant's overt acts as opposed to the effects of the overt acts." *Peck v. Gen. Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990). In the context of a claim for a refusal to deal or boycott, the statute of limitations begins to run when the refusal to deal is made. *Se. Hose, Inc. v. Imperial-Eastman Corp.*, 1973 WL 802, at *3-4 (N.D. Ga. April 2, 1973).

Here, API's allegations make clear that API's claims accrued more than four years before it filed the Complaint. According to API's allegations, the overt act that forced API to sell its assets to Tyson at a below-market price was what API calls a "group boycott or horizontal refusal to deal" involving Tyson, Wayne Farms, and Koch. (Dkt. 1 ¶¶ 135-36, 143, 151.) API's Complaint, however, places this event in the summer of 2017, more than four years before May 11, 2022, the date API filed this lawsuit. (*See* Dkt. 1 ¶¶ 72, 74.) Specifically, API alleges that "in the summer of 2017, the Tyson Entities . . . , approached the API Entities, . . . , regarding the Tyson Entities' interest in acquiring the API Entities and/or the Transferred Assets" and that Tyson represented to API "that the Tyson Entities had signed up Wayne Farms and Koch Foods to ten-year exclusive

contracts[.]" (*Id.*) API further alleges that it "***immediately undertook efforts to retain their long-time customers***" by offering them new contracts, which Wayne Farms and Koch declined. (Dkt. 1 ¶ 75 (emphasis added).) Because API alleges that it learned of the alleged refusal to deal or boycott—and confirmed that it was final—during the summer of 2017, the statute of limitations began to run at that time. API did not file its Complaint until May 11, 2022, almost a year after the statute of limitations had run. As a result, API's claims are time barred.

The fact that API did not sell its assets to Tyson until August 20, 2018 does not save API's claims because "where a defendant commits an act injurious to plaintiff outside the limitations period, and damages continue to result from that act within the limitation period, no new cause of action accrues for the damages occurring within the limitations period because no act committed by the defendant within that period caused them." *Bray*, 784 F. App'x, at 741 (quoting *Imperial Point Colonnades Condo., Inc. v. Mangurian*, 549 F.2d 1029, 1035 (5th Cir. 1977) (emphasis omitted)); *see also Peck*, 894 F.2d at 849 ("[T]he timing of the defendants' overt acts, not the timing of the plaintiffs' injuries, controls the statute of limitations issue[.]") API cannot use allegations that it suffered harm within the limitations period "as a bootstrap to recover for injuries caused by other earlier [ ]

acts that took place outside the limitations period." *Premier Concrete LLC v. Argos N. Am. Corp.*, 2021 WL 1209354, at *6 (N.D. Ga. Mar. 31, 2021).

B. API's Allegations of Fraudulent Concealment Are Futile.

API's attempt to avoid the statute of limitations by asserting conclusory allegations that the statute of limitations was tolled due to fraudulent concealment is futile. (S*ee* Dkt. 1 ¶¶ 127-132.) API's allegations not only fail to show concealment, but they also confirm that API had actual knowledge in 2017 of the conduct that API alleges forced it to sell its assets.

As described above, Tyson Foods' senior executives represented to API in the summer of 2017 that Tyson had entered into 10-year exclusive contracts with Wayne Farms and Koch. (Dkt. 1 ¶¶ 72, 74.) API alleges that when it learned of the agreements, it "immediately" reached out to Wayne Farms and Koch, in an effort to retain its long-term customers, and made attractive new contract offers to Wayne Farms and Koch. (Dkt. 1 ¶ 75.) API alleges that its efforts were fruitless as Wayne Farms and Koch refused to consider the proposals and "advised [API] that the agreements with [Tyson] were done from the start." (*Id.*)

These allegations show that rather than concealing the existence of the exclusive contracts from API, Tyson, Wayne Farms, and Koch all openly revealed the existence of these contracts—and the alleged refusal to deal with API—in

2017. As a result, any claim by API that fraudulent concealment should toll the statute of limitations fails as a matter of law. *See Premier Concrete LLC*, 2021 WL 1209354, at *8.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiffs' Complaint with prejudice.

This 1st day of July, 2022.

Respectfully submitted,

TROUTMAN PEPPER HAMILTON SANDERS LLP

/s/ James A. Lamberth
JAMES A. LAMBERTH
james.lamberth@troutman.com
Georgia Bar No. 431851
CHARLES E. PEELER
charles.peeler@troutman.com
Georgia Bar No. 570399
KASIA HEBDA
kasia.hebda@troutman.com
Georgia Bar No. 637324

600 Peachtree Street, N.E.
Suite 3000, Bank of America Plaza
Atlanta, GA 30308-2216
Telephone: (404) 885-3000
Facsimile: (404) 962-6611

Attorneys for Defendants

LOCAL RULE 7.1D CERTIFICATION

By signature below, counsel certifies that the foregoing document was prepared in Times New Roman, 14-point font, in compliance with Local Rule 5.1C.

/s/ James A. Lamberth
JAMES A. LAMBERTH

CERTIFICATE OF SERVICE

I, James A. Lamberth, an attorney, hereby certify that on this 1st day of July, 2022, DEFENDANTS RIVER VALLEY INGREDIENTS, LLC, TYSON POULTRY, INC. AND TYSON FARMS, INC.'S BRIEF IN SUPPORT OF MOTION TO DISMISS was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send electronic notification and a service copy of this filing to all counsel of record who have appeared in this matter.

/s/ James A. Lamberth
JAMES A. LAMBERTH