IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEIJER, INC., et al. On Behalf of Itself and Others Similarly Situated	:	CIVIL ACTION
v.	:	NO. 04-5871
3M (MINNESOTA MINING AND MANUFACTURING COMPANY)	:	

MEMORANDUM

Padova, J. **July 13, 2005**

Plaintiffs, Meijer, Inc. and Meijer Distribution, Inc. (collectively "Meijer"), have brought this antitrust action against Defendant 3M for damages arising out of 3M's anticompetitive conduct during the time period from October 2, 1998, through the present. Presently before the Court is 3M's Motion to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, this Motion is denied.

I. BACKGROUND

The conduct of 3M which forms the basis of this class action lawsuit was the subject of a prior lawsuit in this Court, LePage's, Inc. v. 3M, Civ. A. No. 97-3983 (E.D. Pa.). In that suit, LePage's, Inc., a competing supplier of transparent tape, sued 3M alleging, *inter alia*, unlawful maintenance of monopoly power in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. After a nine-week trial, the jury found in favor of LePage's on its unlawful maintenance of monopoly power claim. The jury awarded damages in the amount of $22,828,899.00, which were subsequently trebled to $68,486,697.00. See Le Page's, Inc. v. 3M, Civ. A. No.

97-3983, 2000 WL 280350 (E.D. Pa. Mar. 14, 2000). 3M filed a Motion for Judgment as a Matter of Law, which this Court denied on March 14, 2000. See id. 3M thereafter appealed this Court's denial of its Motion for Judgment as a Matter of Law to the United States Court of Appeals for the Third Circuit ("Third Circuit"). A Third Circuit panel initially reversed this Court's Order upholding the jury's verdict and directed the Court to enter judgment for 3M on LePage's' unlawful maintenance of monopoly power claim. LePage's, Inc. v. 3M, 277 F.3d 365 (3d Cir. 2002) ("LePage's I"). Upon rehearing *en banc*, the Third Circuit vacated the panel decision and reinstated the original jury verdict against 3M. LePage's, Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) ("LePage's II"), cert. denied 124 S. Ct. 2932 (2004).

Thereafter, Bradburn Parent/Teacher Store, Inc. brought a class action lawsuit against 3M on the basis of the conduct litigated in LePage's. Bradburn Parent/Teacher Store, Inc. v. 3M, Civ. A. No. 02-7676 (E.D. Pa.). Bradburn, who originally had sought to represent a class which included Meijer, was ultimately granted class certification on a modified class that excluded purchasers of private label tape, such as Meijer. Bradburn Parent/Teacher Store, Inc. v. 3M, Civ. A. No. 02-7676, 2004 WL 1842987 (E.D. Pa. Aug. 18, 2004). Having been excluded from the class in Bradburn, Meijer first attempted to intervene in that lawsuit as an additional class representative. In denying Meijer's motion to intervene, the Court noted that "there is nothing which would prevent Meijer from filing its own individual

or class action lawsuit against [3M] and presenting its claims in that forum." Bradburn Parent/Teacher Store, Inc. v. 3M, Civ. A. No. 02-7676, 2004 WL 2900810, at *6 (E.D. Pa. Dec. 10, 2004). On December 16, 2004, Meijer filed the instant Complaint.

Meijer brings this action on behalf of itself and other members of a proposed class, which includes "[a]ll persons and entities who purchased invisible or transparent tape directly from 3M . . . at any time during the period from October 2, 1998 to the present . . . ." (Compl. ¶ 18.) The Complaint sets forth one count of monopolization in violation of Section 2 of the Sherman Act. The Complaint alleges that 3M unlawfully maintained monopoly power in the transparent tape market through its bundled rebate programs[1] and through exclusive dealing arrangements with various retailers. (Id. ¶ 27.) The Complaint further alleges that "3M has used its unlawful monopoly power . . . to harm Plaintiffs and the other Class members in their business or property by increasing, maintaining, or stabilizing the prices they paid for invisible and transparent tape above competitive levels." (Id. ¶ 34.) The damages period in this case runs from October 2, 1998, to the present. (Id. ¶ 18.) In the instant Motion, 3M moves to dismiss the Complaint in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6).

[1] As described at length in the LePage's litigation, 3M's bundled rebate programs provided purchasers with significant discounts on 3M's products. However, the availability and size of the rebates were dependant upon purchasers buying products from 3M from multiple product lines. See LePage's II, 324 F.3d at 154-55.

II. LEGAL STANDARD

When determining a motion to dismiss pursuant to Rule 12(b)(6), the court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The court must accept as true all well pleaded allegations in the complaint and view them in the light most favorable to the Plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted when a Plaintiff cannot prove any set of facts, consistent with the complaint, which would entitle him or her to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). Documents "integral to or explicitly relied upon in the complaint" and related matters of public record may be considered on a motion to dismiss. In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997).

III. DISCUSSION

3M argues that the Complaint should be dismissed pursuant to Rule 12(b)(6) because (1) Meijer's claim is barred by the applicable statute of limitations; and (2) the Complaint fails to state a valid claim of antitrust injury.

A. Statute of Limitations

3M first argues that this case is time-barred under the applicable statute of limitations. The statute of limitations is an affirmative defense, and the burden of establishing its applicability to a particular claim rests with the defendant.

Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481, 487 (3d Cir. 1985). When considering a motion to dismiss pursuant to Rule 12(b)(6) on statute of limitations grounds, "'[courts] must determine whether the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations.'" Davis v. Grusemeyer, 996 F.2d 617, 623 (3d Cir. 1993) (quoting Cito v. Bridgewater Twp. Police Dept., 892 F.2d 23, 25 (3d Cir. 1989)). The defendant bears a heavy burden in seeking to establish that the challenged claims are barred as a matter of law. Davis, 996 F.2d at 623, n.10 (citing Buskirk, 760 F.2d at 498).

The Clayton Act, 15 U.S.C. § 15b, which governs private antitrust actions, provides that "[a]ny action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. "Generally, a cause of action accrues, and the statute begins to run, when a defendant commits an act that injures a plaintiff's business." Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338 (1971). Meijer, which seeks damages for the period from October 2, 1998 through the present based on conduct by 3M which began as early as 1993, does not dispute the applicability of the Clayton Act's four year statute of limitations. Meijer argues, however, that the instant action is timely under the continuing violation and speculative damages exceptions to the four-year accrual rule.

1. Continuing violation exception

Meijer argues that the instant action is timely because 3M's conduct constitutes a continuing violation of the Sherman Act. "The Supreme Court has considered and rejected the argument that, in the context of a defendant's continuing violation of the Sherman Act, the statute of limitations runs from the violation's earliest impact on a plaintiff." In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1171 (3d Cir. 1993). The four year statute of limitations does not bar recovery for later private antitrust actions if the defendant's conduct "constituted a continuing violation of the Sherman Act and . . . inflicted continuing and accumulating harm." Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 502, n.15 (1968). In such situations, even if the overt act which demonstrates the antitrust violation occurs outside the statute of limitations period, an injurious act within the limitations period may serve as the basis for a timely antitrust suit. Lower Lake Erie Iron Ore, 998 F.2d at 1172.

Here, Meijer argues that the continuous violation exception should be applied because the predatory and exclusionary practices 3M engaged in outside the limitations period have resulted in continuing and accumulating harm to Meijer within the limitations period by allowing 3M to continue to charge supracompetitive prices for its invisible and transparent tape. Generally, a subsequent act will only preserve an antitrust claim if that act is an "injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequence[] of some pre-limitations action." Al George, Inc. v. Envirotech Corp., 939

F.2d 1271, 1275 (5th Cir. 1991) (quoting Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 238 (9th Cir. 1987)) (emphasis deleted); see also Varner v. Peterson Farms, 371 F.3d 1011, 1019 (8th Cir. 2004); Grand Rapids Plastics, Inc. v. Lakian, 188 F.3d 401, 406 (6th Cir. 1999); see generally Phillip E. Areeda et al., Antitrust Law, ¶ 320 at 208-211 (2d ed. 2000). While a leading commentator has noted that "it should seem that high prices following . . . the creation of a monopoly are mere inertial consequences one naturally expects to flow from such acts," Areeda ¶ 320 at 210, it has long been held that "a purchaser suing a monopolist for overcharges paid within the previous four years may satisfy the conduct prerequisite to recovery by pointing to anticompetitive actions taken before the limitations period." Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 296 (2d Cir. 1979). This principle is based on the recognition that

> although the business of a monopolist may be injured at the time the anticompetitive conduct occurs, a purchaser, by contrast, is not harmed until the monopolist actually exercises its illicit power to extract an excessive price. The case of predatory pricing illustrates the point clearly. As soon as the dominant firm commences such a policy, other producers, who may be driven out of the market, are injured. But, clearly, purchasers are not, for they receive the temporary boon of artificially low prices. It is only when the monopolist, having devoured its smaller rivals, enjoys the spoils of its conquest by boosting its price to excessive levels that a purchaser feels the adverse impact of the violation. And if the monopolist never consummates its scheme by taking this final step, the purchaser has no cause of action.

Id. at 295 (quoting Zenith, 401 U.S. at 339).

The United States Court of Appeals for the Third Circuit ("Third Circuit") has similarly differentiated between "on the one hand, an 'overt act' necessary to show the existence of a [continuing violation], and, on the other hand, an injurious act causing damages within the limitations period." Lower Lake Erie Iron Ore, 998 F.2d at 1172. Accordingly, courts have held that, in purchaser antitrust actions, the requisite injurious act within the limitations period can include being overcharged as the result of an unlawful act which took place outside the limitations period but continues to allow the defendant to maintain market control. See In re K-Dur Antitrust Litig., 338 F. Supp. 2d 517, 551 (D.N.J. 2004) (purchasers' antitrust claims "are not barred by the statute of limitations to the extent that they bought and overpaid for [defendant's] products within the applicable time limitations"); see also In re Buspirone Patent Litig., 185 F. Supp. 2d 365, 378 (S.D.N.Y. 2002) ("[i]f a party commits an initial unlawful act that allows it to maintain market control and overcharge customers for a period longer than four years, purchasers maintain a right of action for any overcharges paid within the four years prior to their filings.").

Here, the Complaint alleges that "[a]s found in LePage's or otherwise, 3M's unlawful maintenance of its tape monopoly has suppressed competition and has maintained prices paid by direct purchasers to 3M above competitive levels, even after any 3M rebates attributable to tape purchases." (Compl. ¶ 32.) The

Complaint further alleges that "[t]he issues regarding 3M's violation of Section 2 of the Sherman Act in LePage's v. 3M are identical to those in the case at bar," (id. ¶ 37), and that "3M has used it unlawful monopoly power . . . to harm Plaintiffs and other Class members in their business or property by increasing maintaining, or stabilizing the prices they paid for invisible and transparent tape above competitive levels." (Id. ¶ 34.) The Complaint, therefore, alleges a cause of action on the basis of an initial overt act of unlawful maintenance of monopoly power that occurred more than four years ago, but which continues to allow 3M to commit the injurious act of overcharging Meijer and other purchasers. See Lower Lake Erie Iron Ore, 998 F.2d at 1172; see also In re K-Dur, 338 F. Supp. 2d at 551; In re Buspirone, 185 F. Supp. 2d at 378. Accordingly, the Court concludes that Meijer's claims are not barred by the statute of limitations to the extent that Meijer seeks to recover for any overcharges paid within the four years prior to the filing of the instant Complaint, plus any additional time period during which the statute of limitations may be tolled.[2]

[2] Although the parties have made some arguments with respect to the possible tolling of the statute of limitations in this case, which would extend the damages time period in this case. The Court notes, however, that it need not decide what the applicable period for the calculation of damages may ultimately be in ruling on the instant Motion. In re K-Dur, 338 F. Supp. 2d at 551. Moreover, Meijer has advised the Court that "there are additional arguments for further tolling," which it did not develop in the submission currently before the Court. (04/04/2005 Tr. at 40.) Accordingly, the Court will defer ruling on the propriety of tolling the statute of limitations at this time.

2. Speculative damages exception

Meijer also argues that the statute of limitations does not bar the instant action because Meijer's damages were speculative prior to the filing of the instant lawsuit. The general rule of accrual in antitrust actions provides that "if a plaintiff feels the adverse impact of an antitrust [violation] on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future." Zenith, 401 U.S. at 339. The mere fact that damages may continue to accrue "in the future, as opposed to at the time the acts are committed, does not prevent the cause of action from accruing." Astoria Entm't, Inc. v. Edwards, 159 F. Supp. 2d 303, 316 (E.D. La. 2001) (quoting 8 Julian O. van Kalinowski et al., Antitrust Laws and Trade Regulation § 162.02[1] at 162-5). However,

> it is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable.

Zenith, 401 U.S. at 339. In these instances, antitrust causes of action for future damages "will accrue only on the date [the damages] are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted." Id.

In purchaser antitrust actions, damages from future overcharges necessarily fall into the speculative damages exception

to the four year statute of limitations. See Berkey Photo, 603 F.2d at 195-96. The United States Court of Appeals for the Second Circuit has explained that

> [p]lainly, at the time a monopolist commits anticompetitive conduct it is entirely speculative how much damage that action will cause its purchasers in the future. Indeed, some of the buyers who will later feel the brunt of the violation may not even be in existence at the time. Not until the monopolist actually sets an inflated price and its customers determine the amount of their purchases can a reasonable estimate be made. The purchaser's cause of action, therefore, accrues only on the date damages are 'suffered.'

Berkey Photo, 603 F.2d at 295-96 (internal quotations omitted). To hold otherwise would require a purchaser to predict and prove, within four years of the time it was first injured by antitcompetitive conduct, the amount of future overcharges, the quantity of future product purchases, the level of future competition in the relevant market, and the availability of substitutes and new suppliers over time. Resolution of these issues depends on overall changes in consumer demand for tape, developments in the purchaser's overall business, variations in the cost of producing the product over time, and the future prices which the supplier ultimately decides to charge. These considerations are too speculative and remote to properly predict a purchaser's future damages. The Court, therefore, finds that Meijer's antitrust claim against 3M could not accrue until it actually payed the overcharge. See Berkey Photo, 603 F.2d at 295.

3M argues that the Court should nonetheless find that Meijer's

claims are barred by the statute of limitations, because

> [r]epose is especially valuable in antitrust, where tests of legality are often rather vague, where many business practices can be simultaneously efficient and beneficial to consumers but also challengeable as antitrust violations, where liability doctrines change and expand, where damages are punitively trebled, and where duplicate treble damages for the same offense may be threatened.

Areeda, ¶ 320a at 205. The Court notes, however, that "there can be no unfairness in preventing a monopolist that has established its dominant position by unlawful conduct from exercising that power in later years to extract an excessive price," because "[t]he taint of an impure origin does not dissipate after four years . . . ." Berkey Photo, 603 F.2d at 296. The Court, therefore, concludes that because Meijer's future damages were speculative in 1993, when Meijer was first injured, a new cause of action accrued to Meijer each time it payed an overcharge. See Berkey Photo, 603 F.2d at 295. Accordingly, this action is not barred by the statute of limitations to the extent that Meijer seeks to recover for overcharges during the four years prior to the filing of the instant Complaint, plus any additional time period during which the statute of limitations may be tolled.

B. Failure to State a Valid Claim of Antitrust Injury

3M also argues that the Complaint should be dismissed pursuant to Rule 12(b)(6) because it fails to state a valid claim of antitrust injury.

> To state a claim for monopolization [in violation of Section 2], a plaintiff must allege "(1) the possession of monopoly power

> in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident."

Schuylkill Energy Res., Inc. v. Pa. Power & Light Co., 113 F.3d 405, 412-13 (3d Cir. 1997) (quoting Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 197 (3d Cir. 1992)). The right to maintain a private cause of action for damages arising under Section 2 flows from Section 4 of the Clayton Act, 15 U.S.C. § 15(a), which provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may initiate litigation. 15 U.S.C. § 15(a). Accordingly, plaintiffs bringing a private cause of action under Section 2

> must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *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). The Court notes that "the existence of antitrust injury is not typically resolved through motions to dismiss." Schuykill Energy, 113 F.3d at 417 (citing Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 876 (3d Cir. 1995)). Moreover, "[t]here are no special pleading requirements for an antitrust claim. Rather, '[n]otice pleading is all that is required for a valid antitrust complaint."

Bradburn Parent/Teacher Store, Inc. v. 3M, Civ. A. No. 02-7676, 2000 WL 34003597, at *2 (E.D. Pa. July 25, 2003) (quoting Mun. Utils. Bd. of Albertville v. Ala. Power Co., 934 F.2d 1493, 1501 (11th Cir. 1991)). Courts, therefore, "must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn from them." Schuykill Energy, 113 F.3d at 417. Courts "are not, however, required to accept as true unsupported conclusions and unwarranted inferences." Id.

Here, 3M argues that the Complaint fails to state a valid claim for antitrust injury because, although the Complaint alleges that 3M unlawfully maintained monopoly power through its bundled rebate programs and exclusive dealing arrangements with retailers, "it does not necessarily follow . . . that Meijer or the class it seeks to represent suffered any injury at all because such retailers benefitted directly and significantly from those rebates." (Def. at 18.) The Complaint alleges as follows:

> As found in LePage's or otherwise, 3M's unlawful maintenance of its tape monopoly has suppressed competition and has maintained tape prices paid by direct purchasers to 3M above competitive levels, *even after any 3M rebates attributable to tape purchases*. . . . 3M has used its unlawful monopoly power described herein to harm [Meijer] and other Class members in their business or property by increasing, maintaining, or stabilizing the prices they paid for invisible and transparent tape above competitive levels.

(Compl. ¶¶ 32, 34.) (emphasis added). Moreover, the Complaint alleges that 3M "intended to use, did use, and continues to use" its "anitcompetitive and monopolistic practices in the conduct of

trade or commerce." (Compl. ¶ 1.) The Court has previously held that these allegations, "if proven, could establish that, were it not for [3M's] anti-competitive conduct, [Meijer] would have paid less for transparent tape than it actually paid during the damages period, even when any bundled rebates or other discounts are taken into account." Bradburn, 2000 WL 34003597, at *4. The Court, therefore, concludes that Meijer has properly alleged injury of the type the antitrust laws were designed to prevent.[3] Accordingly, 3M's Motion is denied in this respect.

[3] The Court notes that it is "not in a position to predict whether [Meijer] will ultimately be able to sustain [its] burden of proof on this issue since [Meijer] has not yet had an opportunity to obtain evidence." Brader, 64 F.3d at 876. Accordingly, the sufficiency of Meijer's contentions regarding the effect of 3M's conduct on prices will be resolved "after discovery, either on summary judgment or after trial." Id.

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O R D E R

AND NOW, this 13th day of July, 2005, upon consideration of Defendant 3M's Motion to Dismiss (Doc. No. 9), all documents submitted in response thereto, and the Argument held on April 25, 2005, **IT IS HEREBY ORDERED** that said Motion is **DENIED.**

BY THE COURT:

/s/ John R. Padova

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John R. Padova, J.