SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CO Ramos PART 53

Index Number : 600831/2009
KATZ COMMUNICATIONS
vs
U.S. INTERNATIONAL MEDIA LLC
Sequence Number : 004
CONSOLIDATION/JOINT TRIAL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

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Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE ..... 004 in 600832/09

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/14/11

HON. CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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TELEREP, LLC, HARRINGTON, RIGHTER & PARSONS, LLC, and MMT SALES, LLC

Plaintiffs,

Index No. 600832/09

-against-

U.S. INTERNATIONAL MEDIA, LLC and MARTIN RETAIL GROUP, LLC,

Defendants.

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U.S. INTERNATIONAL MEDIA, LLC

Counter-claimant,

-against-

TELEREP, LLC, HARRINGTON, RIGHTER & PARSONS, LLC, and MMT SALES, LLC

Counter-defendants.

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Charles Edward Ramos, J.S.C.:

This decision consolidates four motions in three related actions currently before this Court for disposition.

In motion sequence 004 of this instant action (the "Telerep Action"), the plaintiffs Telerep, LLC, Harrington, Righter & Parsons, LLC, and MMT Sales, LLC (collectively, "Telerep") move to dismiss the defendant U.S. International Media, LLC's ("USIM") counterclaims pursuant to CPLR 3211(a)(7) and for a stay of discovery pursuant to CPLR 3124(b) and Rule 11(d) of the Commercial Division Rules of Practice ("Rule 11(d)").

In motion sequence 003 of the related action *Petry Television v. U.S. International Media*, Index #600881/09 (the "Petry Action"), the plaintiffs Petry Television Inc. and Blair Television Inc. (collectively, "Petry") move to dismiss the defendant USIM's counterclaims pursuant to CPLR 3211(a)(7) and for a stay of discovery pursuant to CPLR 3124(b) and Rule 11(d).

Similarly, in motion sequence 005 of the related action *Katz Communications v. U.S. International Media*, Index #600831/09 (the "Katz Action"), the plaintiffs Katz Communications, Inc. and Katz Millennium Sales and Marketing, Inc. (collectively, "Katz") move to dismiss the defendant USIM's counterclaims pursuant to CPLR 3211(a)(7) and for a stay of discovery pursuant to CPLR 3124(b) and Rule 11(d).

USIM has asserted identical counterclaims against Telerep, Petry, and Katz (collectively, the "National Reps"), alleging violations of General Business Law § 340(1) (the "Donnelly Act"), tortious interference, and abuse of process. The National Reps have submitted joint memoranda of law in opposition.

Finally, in motion sequence 004 of the Katz Action, USIM moves to consolidate the Telerep Action, the Petry Action, and the Katz Action (collectively, the "Related Actions") pursuant to CPLR 602(a).

Background

USIM's counterclaims allege that the National Reps have monopolized the national spot advertising market (the "National Market"), and are using their monopoly to restrain trade in the local spot advertising market (the "Local Market") and the spot placement services market (the "Placement Market")(Answer, ¶¶ 1,3).

USIM alleges that by the end of the 1990s, the National Reps were the only remaining major national representative firms in the television broadcast spot advertising industry and collectively controlled nearly 100% of the National Market (Answer, ¶ 47). As a result, the National Reps allegedly horizontally divided the National Market, which is sub-divided into 210 Designated Marketing Areas ("DMAs"), by collectively agreeing to add "exclusivity" provisions to every contract with each local television station client (the "Stations"), thereby ensuring that there would be no competition from the other National Reps for the duration of the contract, which was subject to renewal (Answer, ¶ 50-51).

In response to the refusal of certain Stations to be represented by the same National Rep as another Station in the same DMA, known as dual representation, the National Reps allegedly created subsidiaries and or divisions (e.g.,

counterclaim-defendants Harrington, Righter & Parsons, LLC, and MMT Sales, LLC) to avoid direct conflicts and the appearance of dual representation (Answer, ¶ 46).

Additionally, USIM alleges that around 2005, the Station Representatives Association (the "SRA"), a trade association whose membership consists solely of the National Reps, was reduced to a mere vehicle for the National Reps to coordinate and effect their anti-competitive scheme (Answer, ¶ 48). The SRA has no website and the address on its letterhead is identical to Katz's office in New York (Answer, ¶ 75).

Spot advertising may be sold by either the local television station or the local television station's national representative firm (e.g., Telerep, Katz, or Petry)(Answer, ¶ 29). Spot advertising is advertising sold by a local television station (e.g., ABC 7 in Buffalo, NY) for broadcast on that specific local television station, as opposed to network advertising that is sold by the network (e.g., ABC) for broadcast on all of that specific network's affiliates nationwide, which includes multiple local television stations (e.g., ABC 7 in Buffalo, NY). Spot advertising sold directly by the local television station in the Local Market is known as "local" spot advertising, which is usually purchased by advertisers looking to advertise in that local television station's specific DMA (Answer, ¶ 30). Spot

[* 6]

advertising sold through the local television station's national representative in the National Market is known as "national" spot advertising and is usually purchased by advertisers looking to advertise regionally or nationally, across a number of DMAs. (Answer, ¶ 31).

Generally, when an advertiser purchases advertising in the National Market, the National Rep for that Station receives a commission based on the sale (Answer, ¶ 54). Conversely, if the advertising is purchased directly from the Station in the Local Market, then the National Rep is not involved in the transaction and receives no commission (Answer, ¶¶ 55, 61).

USIM, as a media buying agency, represents advertisers in the purchasing of spot advertising in the Local Market and the National Market (Answer, ¶ 32). USIM is also a participant in the Placement Market, where USIM, similar media buying agencies, advertising agencies, and the National Reps compete to provide services that facilitate the purchase of spot advertising in the Local Market and the National Market (Answer, ¶ 33).

USIM alleges that it has invested in unique capabilities and resources tailored to represent purchasers of "local" spot advertising, such as 21 offices located across the United States, and staff members who have developed relationships with a Station's local sale manager that entitle them to greater

[* 7]

discounts, promotions, and bonus spot advertising (extra advertising time at no additional cost), none of which is offered by the National Reps (Answer, ¶ 43).

USIM alleges that as a result of an evolution in how advertisers approach spot advertising, advertisers have shifted from purchasing large amounts of advertising in the National Market to a more diffused approach, purchasing advertising in different DMAs across the United States (Answer, ¶¶ 56-58). It alleges that sales from the National Market previously accounted for 50% of a Station's revenue, but currently, sales from the National Market account for only 30% of a Station's revenue (Answer, ¶ 54).

In response to the shift from the National Market to the Local Market, the National Reps allegedly reinterpreted the contracts with the Stations to characterize certain "local" spot advertising as "national" spot advertising (Answer, ¶ 63).

USIM alleges that is has purchased "local" spot advertising directly from Stations for over 40 years under the traditional arrangement (e.g. advertising purchased directly from a Station for broadcast in that Station's specific DMA)(Answer, ¶ 63).

Under the new interpretation, a sale would be considered "national" spot advertising if the point of origin or the point of billing for a specific order was not within that Station's

specific DMA (*id.*). Thus, if a local advertiser purchased "local" spot advertising directly from a local television station within its DMA, it would be considered "local" spot advertising, but if that same advertiser contracted with USIM to make the purchase and if USIM does not have an office in that DMA, then it would be considered "national" spot advertising, and the National Reps would be entitled to receive commissions (*id.*). USIM also alleges that the National Reps constructed "exclusivity" provisions to block USIM from directly purchasing "local" spot advertising directly from the Stations in all DMAs (Answer, ¶ 64).

In late 2008, USIM was contracted by advertisers to purchase spot advertising in the Local Market.

On January 16, 2009, counsel for the SRA sent a letter to USIM informing it of the "exclusivity" provisions in the contracts between the National Reps and the Stations (Answer, ¶ 72). Furthermore, it stated that the National Reps were treating its purchases of advertising as "national" spot advertising and demanded that the purchased be made through the National Reps (Answer, ¶ 73).

On March 18, 2009, Telerep commenced this instant litigation. Additionally, Katz and Petry commenced lawsuits against USIM alleging similar facts and causes of action (Answer,

¶ 76).

On August 11, 2009, this Court dismissed the complaint in each of the Related Actions with leave to replead. Each of the National Reps appealed this Court's determination. On June 1, 2010 the Appellate Division reversed, finding that Telerep's contracts with the Stations were ambiguous and reinstated its complaint (*Telerep, LLC v U.S. Intl. Media, LLC*, 74 AD3d 401 [1st Dept 2010]). Thereafter, USIM stipulated to the reinstatement of the complaints in the Katz Action and the Petry Action and all remaining appeals were withdrawn.

USIM answered and asserted counterclaims alleging three violations of the Donnelly Act, tortious interference with actual and prospective contractual relations, and abuse of process.

Each of the National Reps moved to dismiss the counterclaims and for a stay of discovery in their respective litigation.

Discussion

The National Reps move to dismiss all of USIM's counterclaims and for a stay of discovery in this instant action.

"In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide [USIM] the benefit of every possible inference" (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). USIM's ability to ultimately

establish its allegations is not a consideration in determining a motion to dismiss (*id.*).

The Donnelly Act

The Donnelly Act declares illegal and void "[e]very contract agreement, arrangement or combination whereby...[c]ompetition or the free exercise of any activity in the conduct of any business trade or commerce or in the furnishing of any service in this state is or may be restrained" (Gen Bus § 340 [1]).

Modeled after the Federal Sherman Antitrust Act of 1890 (the "Sherman Act"), the Donnelly Act "should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in statutory language or the legislative history justify such a result" (*X.L.O. Concrete Corp. v Rivergate Corp.*, 83 NY2d 513, 518 [1994][internal quotations omitted]).

"To state a claim under the Donnelly Act, a party must: (1) identify the relevant product market, (2) describe the nature and effects of the purported conspiracy, (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question, and (4) show a conspiracy or reciprocal relationship between two or more entities" (*Benjamin of Forest Hills Realty, Inc. v Austin Sheppard Realty, Inc.*, 34 AD3d 91, 94 [2d Dept 2006]).

The National Reps argue that all three Donnelly Act counterclaims should be dismissed because USIM fails to adequately satisfy the requirements for pleading a counterclaim under the Donnelly Act.

USIM counters that its has properly alleged a counterclaim under the Donnelly Act, including the relevant product markets, direct and circumstantial evidence of the National Reps' conspiracy, the nature and effects of the conspiracy, and the resulting antitrust injury suffered by USIM.

USIM alleges in all three Donnelly Act causes of action that the National Reps' conspiracy involved agreeing to collectively reinterpret their contracts with the Stations to encompass additional sales of spot advertising, enforcing those provisions through the SRA, and commencing concerted frivolous litigation against USIM (Answer, ¶¶ 108, 114, 122). The National Reps' conduct has only anti-competitive effects in each of the relevant markets and restrains trade in violation of the Donnelly Act (Answer, ¶¶ 111, 118, 125).

USIM alleges in its first counterclaim for conspiracy to restrain trade in the Local Market that certain advertisers prefer to purchase spot advertising directly from the Stations because it provides the advertiser local advantages (e.g., greater discounts, promotions, and bonus spot advertising),

usually not available if purchasing through the National Reps (Answer, ¶ 90-92).

Generally, it is more expensive to purchase "local" spot advertising directly, but USIM has invested significant resources in building offices and cultivating relationships with a Station's local sales managers, enabling it to provide services that are less expensive and more efficient than the National Reps (Answer, ¶ 93-99).

As a consequence of having to purchase the spot advertising through the National Reps, the quality of spot advertising output is decreased for advertisers seeking to purchase directly from the Stations as opposed to the National Reps. Any advantages of purchasing directly from the Stations are lost if the purchase is made through the National Reps (Answer, ¶ 100, 110). In addition, the Stations do not have to compete vigorously on price under the reinterpretation, consequently, spot advertising is more expensive if purchased through the National Reps, entitling them to even greater commissions (Answer, ¶ 101).

USIM alleges in its second counterclaim for conspiracy to restrain in the Placement Market that the reinterpretation prevents USIM from providing the same level of inexpensive and inefficient service that its clients are accustomed to (Answer, ¶¶ 102-103).

As a result, there has been a decrease in the output and quality of the services provided in the Placement Market (Answer, ¶ 117) and USIM has lost and will continue to lose clients that insist on the advantages of purchasing directly from the Stations (Answer, ¶ 104).

USIM alleges in its third counterclaim that the National Reps conspired to maintain its monopoly of the National Market by horizontally dividing the National Market through their reciprocal agreement to not compete against each other (Answer, ¶ 122).

The objective of their monopoly is to maintain the National Reps collectively dominant market share and market power and restrain trade in the Local Market and the Placement Market (Answer, ¶ 123).

Relevant Market

"For antitrust purposes, a relevant market consists of both a product market-- those commodities or services that are reasonably interchangeable, and a geographic market-- the area in which such reasonable interchangeability occurs" (*Shepard Indus. v 135 E. 57th St., LLC*, 1999 WL 728641, *3, 1999 US Dist LEXIS 14431, *11 [SD NY 1999]).

In pleading its Donnelly Act counterclaims, USIM clearly alleges violations of the Donnelly Act occurring in three

different product markets: the Local Market, the National Market, and the Placement Market. The geographical market for each product market consists of the 210 DMAs across the United States and the 10 DMAs in New York State (Answer, ¶ 34).

USIM alleges that the Local Market and the National Market are distinct because the demand for local or national advertising is unique to each advertiser. Additionally, the Placement Market encompasses agents of advertisers or the Stations, that provide services related to the purchase and sale of spot advertising. (Answer, ¶¶ 32-33).

USIM alleges that each of the markets are unique and that there are no close substitutes. Furthermore it alleges that spot advertising is not reasonably interchangeable with other forms of media advertising. (Answer, ¶ 32).

Nature and Effects

USIM alleges that the nature and effects of the conspiracy are to prevent USIM and other similar media buying companies from purchasing local spot advertising directly from the Stations and to allow the National Reps to maintain their monopoly of the National Market, while restraining trade in the Local Market and the Placement Market.

Economic Impact to Restrain Trade

"Antitrust injury is injury of the type the antitrust laws

were intended to prevent and that flows from that which makes defendants' acts unlawful" (*Global Reins. Corp. - U.S. Branch v Equitas Ltd.*, 2011 NY Slip Op 264, 3-4 [1st Dept 2011]).

"[A]ntitrust laws are meant to protect competition and not competitors...To demonstrate harm to competition, a plaintiff must show that there has been an adverse effect on prices, output, or quality of goods in the relevant market as a result of the challenged actions (*Aventis Envtl. Sci. USA LP v Scotts Co.*, 383 F Supp 2d 488, 503 [SD NY 2005]). "The injury should reflect the anti[-]competitive effect either of the violation or of anti[-]competitive acts made possible by the violation" (*Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.*, 429 US 477, 489 [1977]).

Accordingly, USIM must allege harm to competition as a whole (*Global* at 4). "In determining whether [USIM] has suffered antitrust injury, the conduct causing the injury is assumed to be a violation of the antitrust laws" (*id.*).

USIM alleges the National Rep restraint of trade in the Local Market has resulted in a decrease in the output and quality of local spot advertising and artificially high prices and commissions for local spot advertising. As a result of the National Rep restraint of trade in the Placement Market, there is a decrease in the output and quality of spot placement services.

The National Reps are able to maintain their monopoly over the National Market by their agreement not to compete against one another. As a result of this agreement, the National Reps are able to dominate the National Market, divert the purchase of "local" spot advertising from the Stations to themselves, and seize commissions from the Stations to increase their own revenues.

USIM alleges that this conduct is not only harmful to itself, but to other similar media buying agencies and to competition as a whole.

Conspiracy

The National Reps argue that USIM's allegations of parallel conduct are insufficient to infer an agreement among the National Reps to restrain trade.

Based on the liberal pleading standard for a motion to dismiss pursuant to CPLR 3211, USIM only needs to allege enough facts to suggest there was an agreement among the National Reps to satisfy the Donnelly Act requirement of a conspiracy (*Starr v Sony BMG Music Entm't*, 592 F3d 314, 321 [2d Cir 2010]). While no probability requirement is imposed during the pleading stage, there must be enough facts "to raise a reasonable expectation that discovery will reveal evidence of illegal agreement" (*id.*).

"[A]n allegation of parallel conduct coupled with only a

bare assertion of conspiracy is insufficient to state a [counterclaim under the Donnelly Act]" (*id.*). "Instead allegations of parallel conduct must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action" (*id.* [internal quotations omitted]). Parallel conduct that satisfies the pleading requirements would "include parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties" (*id.*).

USIM alleges that the National Reps conspired to monopolize the National Market by horizontally dividing 210 DMAs in the National Market. This was effectuated by including exclusivity provisions in all of the National Reps' contracts with the Stations, thus each station could only be represented by one of the National Reps at any given time (Answer, ¶ 51). Consequently, each National Rep was able to conduct business without any concern that the other National Reps would compete for contracts with their Stations.

In addition, the National Reps allegedly conspired to prevent USIM and similar media buying companies from entering the Local Market (Answer, ¶ 53). The National Reps reinterpreted the "exclusivity" provisions of the contracts to include spot

advertising that has historically been considered "local" spot advertising.

USIM alleges that the Stations were pressured to participate in the scheme because the National Reps were still responsible for the spot advertising sales in the National Market. In addition, the National Reps assured the Stations that they would not have to compete against each other's prices for "local" spot advertising because USIM would be forced to purchase from the National Reps at a higher price (Answer, ¶ 66).

USIM alleges that this scheme would not be possible unless each of the National Reps agreed to participate. Otherwise, the National Reps that did not participate would have a competitive advantage over the National Reps that were advancing the scheme (Answer, ¶ 68).

USIM and its clients also received numerous letters from the Stations that reiterated the "exclusive" arrangement between the National Reps and the Stations and requested that the purchase of "national" spot advertising be conducted through the National Reps (Answer, Exhibits A-D). USIM alleges the letters were a result of a coordinated effort by the National Reps (Answer, ¶ 75).

Additionally, USIM highlights the large market share held by the National Reps as a factor that increases the plausibility of

the conspiracy.

This Court rejects the National Reps' contentions and finds that USIM has adequately pled its counterclaims for violations of the Donnelly Act. USIM clearly alleges a relevant market, the nature and effects, and the economic impact of the National Reps' conspiracy. Furthermore, USIM alleges a plausible conspiracy between the National Reps that is sufficient to defeat a motion to dismiss and warrants discovery.

While, USIM does not submit direct evidence of an agreement, its allegations of parallel conduct when analyzed together, place the parallel conduct in the context that raises a suggestion of a preceding agreement (*Starr* at 323).

First, USIM alleges the dominance of the National Reps in the relevant markets, which is confirmed by the SRA's letter stating that the National Reps "represent over 900 television stations including nearly every non-network owned station in the Top 100 markets and collectively we serve all television markets in the U.S." (Answer, Exhibit 3).

Second, the coordinated reinterpretation of the contracts with the Stations definitely raises the plausibility of a preceding agreement among the National Reps. Independent decision making seemingly dictates that if one National Rep unilaterally reinterpreted its contracts, the remaining two

National Reps would resist the reinterpretation and immediately become more attractive to the Stations by allowing the Stations to retain their revenue stream from the Local Market.

Thus, the Stations, arguably, would prefer to be represented by the National Rep that converted less of their sales of "local" spot advertising. It would be reasonable to expect a migration to the remaining National Reps that did not reinterpret their contracts upon the expiration of the current contracts with the Stations.

This Court cannot find and the National Reps have not provided, any rationale that demonstrates that the concerted reinterpretation was reached through independent decision making. Therefore, this Court finds the suggestion that the National Reps were acting according to a preceding agreement, within the context of a motion to dismiss, quite plausible.

Noerr-Pennington Doctrine

The National Reps argue that the Noerr-Pennington doctrine shields it from antitrust liability for threatening to commence and commencing this instant action. If the Noerr-Pennington doctrine was applied, then USIM would not be able to use the National Reps' concerted threats of litigation and concerted commencement of the Related Actions as a basis for its Donnelly Act causes of action.

USIM argues that the Noerr-Pennington doctrine has only been applied to the Sherman Act and is not applicable to the Donnelly Act. Furthermore, it argues that the Related Actions are sham litigations, which are not immunized by the Noerr-Pennington doctrine.

The National Reps concede that there has been no application of the Noerr-Pennington doctrine to any Donnelly Act cause of action by a state court (Telerep Memo., p. 11). Nevertheless, because the Donnelly Act is modeled after the Sherman Act, this Court will examine its application within the context of the Sherman Act (*X.L.O. Concrete Corp. at 518*).

Essentially, the Noerr-Pennington doctrine provides that "parties may not be subjected to liability for petitioning the government" (*I.G. Second Generation Partners, L.P. v Reade*, 17 AD3d 206, 208 [1st Dept 2005]). The Sherman Act does not prohibit coordinated efforts among competitors to enforce common legal rights (*Sharon Steel Corp. v Chase Manhattan Bank, N.A.*, 691 F2d 1039, 1052 [2d Cir 1982]["Joint activity by creditors facing a debtor is commonly in the interests of all parties...concerted activity by the creditors does not mean, however, that consumers are injured"]; *Primetime 24 Joint Venture v NBC*, 219 F3d 92, 99 [2d Cir 2000]["the Sherman Act has been read not to limit copyright owners from defending their

individual copyrights against common infringers through concerted litigation, even though the owners and infringers may all be competitors"]).

However, this Court finds that USIM sufficiently pleads a conspiracy among the National Reps based on their concerted reinterpretation of the contracts with the Stations, without considering the coordinated letters from the SRA or the commencement of the Related Actions, consequently, it is not necessary to answer the question of whether or not the Noerr-Pennington doctrine applies to the Donnelly Act causes of action.

Tortious Interference with Contract

USIM alleges that the National Reps were aware of USIM's valid contracts with advertisers to purchase "local" spot advertising. Furthermore, USIM alleges that the National Reps procured a breach of those contracts from advertisers by deceptively claiming that USIM cannot purchase "local" spot advertising directly from the Stations. The National Reps' actions allegedly prevented USIM from performing under its existing contracts and entering into new contracts with prospective advertisers (Complaint, ¶¶ 128-132).

The National Reps argue that USIM's fourth counterclaim for tortious interference with contract and prospective contractual relations and fifth counterclaim for abuse of process should be

dismissed because the allegations fail to state a cause of action. They contend that USIM's allegations are vague and lack specificity as to the contracts at issue, the breach of those contracts, and the National Reps' procurement of the breach.

Pleading a cause of action for tortious interference with contract requires that USIM alleges the existence of a valid contract with a third party, the National Reps' knowledge of that contract, the National Reps' intentional and improper procurement of a breach, and damages (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]).

To establish a cause of action for tortious interference with prospective contract requires that USIM demonstrate that the National Reps' interference with its prospective contractual relations was accomplished by "wrongful means" or that the National Reps acted for the sole purpose of harming the USIM (*Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299-300 [1st Dept 1999]).

USIM's allegations merely recite the elements of the causes of action in a conclusory manner, while failing to supply any detail with respect to the counterclaims for tortious interference.

USIM fails to articulate the breach that occurred between it and its advertisers that would give rise to a counterclaim for

tortious interference with actual contractual relations. Furthermore, USIM fails to specify what wrongful means were used by the National Reps in tortiously interfering with prospective contractual relations.

"Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations...are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]).

Consequently, the fourth counterclaim for tortious interference is dismissed with leave to replead.

The counterclaim for conspiracy to tortiously interfere with contract is dismissed as well because New York does not recognize conspiracy as an independent cause of action and it cannot be sustained if there is a dismissal of the underlying cause of action (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]).

Abuse of Process

USIM alleges that the Related Actions were "instituted for the purposes of restraining trade and causing economic harm to USIM" (USIM Opp., p. 24).

The National Reps counter that the counterclaim for abuse of process should be dismissed because USIM fails to allege that the summons and complaint was improperly used after it was issued.

"The gist of the action for abuse of process lies in the improper use of process after it is issued" (*Williams v Williams*, 23 NY2d 592, 596 [1969]). To sustain a cause of action for abuse of process under New York law, the process must unlawfully interfere with one's person or property (*id.*).

"Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]).

First, "the institution of a civil action by summons and complaint is not legally considered process capable of being abused" (*Casa de Meadows Inc. (Cayman Islands) v Zaman*, 76 AD3d 917, 921 [1st Dept 2010][internal quotations omitted]). Secondly, "a malicious motive alone...does not give rise to a cause action for abuse of process" (*Curiano* at 117).

While, USIM continually and consistently alleges that the Related Actions were commenced as a part of a anti-competitive scheme, those allegations are conclusory in nature. USIM fails to allege that the summons and complaint were improperly used and fails to offer any factual support for its allegations.

As previously stated, *supra*, conclusory allegations are insufficient to defeat a motion to dismiss. Therefore, the fifth

counterclaim for abuse of process and conspiracy to abuse process is dismissed as well.

Stay of Discovery

The National Reps' application for a stay of discovery is pending a determination on this instant motion is moot.

Motion to Consolidate

This Court previously determined that the Related Actions should be consolidated for discovery purposes only and any determinations regarding consolidation for trial shall be determined after discovery is complete (Transcript, November 4, 2010, 32:19-33:2).

The Related Actions

Due to the identical nature of both USIM's counterclaims and the National Reps' arguments in opposition to this instant motion, this Court's decision shall be applied identically to the Katz Action and Petry Action.

Accordingly, it is

ORDERED that the plaintiff Telerep's motion to dismiss (MS 004) is denied in part and granted to the extent that the fourth cause of action is dismissed with leave to replead and the fifth cause of action is dismissed, and it is further

ORDERED that the plaintiff Petry's motion to dismiss (MS 003) in *Petry Television v. U.S. International Media*, Index

#600881/09 is denied in part and granted to the extent that the fourth cause of action is dismissed with leave to replead and the fifth cause of action is dismissed, and it is further

ORDERED that the plaintiff Katz's motion to dismiss (MS 005) in *Katz Communications v. U.S. International Media*, Index #600831/09 is denied in part and granted to the extent that the fourth cause of action is dismissed with leave to replead and the fifth cause of action is dismissed, and it is further

ORDERED that the plaintiff Katz's motion to consolidate (MS 004) the Related Actions in *Katz Communications v. U.S. International Media*, Index #600831/09 is denied for the reasons set forth in the November 4, 2010 transcript, and it is further

ORDERED that the parties are directed to contact the Clerk of Part 53 to schedule a preliminary conference to be held no later than May 26, 2011.

This constitutes the decision and order of this court.

Dated: April 11, 2011

ENTER:

J.S.C.
HON. CHARLES E. RAMOS