IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

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GRAND STRAND AND WATER & SEWER AUTHORITY, on behalf of itself and all others similarly situated,

Plaintiff,

v.

OLTRIN SOLUTIONS, LLC; JCI JONES CHEMICALS, INC.; OLIN CORPORATION; and TRINITY MANUFACTURING, INC.,

Defendants.

No. 4:14-cv-2800-RMG

ORDER

Plaintiff filed this proposed class action alleging that defendants, two bulk bleach sellers and their parent companies, violated the Sherman Act by forming an unlawful agreement in restraint of trade, monopolizing, attempting to monopolize, and conspiring to monopolize the market for bulk bleach in North Carolina and South Carolina commencing in March 2010.

On September 12, 2014, the four defendants filed three Motions to Dismiss for Failure to State a Claim. Defendant JCI Jones Chemicals Inc. ("JCI") filed individually (Dkt. No. 50), as did Defendant Olin Corporation ("Olin") (Dkt. No. 54). Oltrin Solutions, LLC ("Oltrin") and Trinity Manufacturing Inc. ("Trinity") filed a joint motion (Dkt. No. 55). Plaintiff filed a consolidated Response on October 17, 2014 (Dkt. No. 62), which included a request for leave to amend the complaint if the Court were to find it deficient. (*Id.* at 39 n.31). Oltrin filed a Reply on October 31, 2014 (Dkt. No. 68) and Olin filed a Reply on the same date (Dkt. No. 69). For the reasons stated below, the Court GRANTS Defendant Olin's motion to dismiss the claims against it as pled, (Dkt. No. 54) and DISMISSES Plaintiff's claims against Olin without

prejudice and with leave to amend the complaint. The Court DENIES the remaining motions (Dkt. Nos. 50 and 55).

I. Background

On a Motion to Dismiss, the Court assumes the truth of all facts alleged in the complaint and the existence of any fact that can be proved consistent with the complaint's allegations. *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000).

Plaintiff Grand Strand Water & Sewer Authority ("Plaintiff") provides water and sewer services in the non-municipal area east of the Intercoastal Waterway in Horry County, parts of Georgetown County, and rural areas west of the Waccamaw River in South Carolina. Plaintiff alleges that it purchased bulk bleach directly from one or more of the defendants between March 2010 and the present (the "Class Period").

This case arises from an agreement among Defendants that Plaintiff alleges had the purpose and effect of allocating markets and territories and otherwise unlawfully limiting competition in North Carolina and South Carolina in the bulk bleach market. Bulk bleach refers to bleach (sodium hypochlorite), which is normally sold in bulk by the gallon or ton in concentrations of at least ten percent. (Dkt. No. 1 at ¶ 26). Typical concentrations for bulk bleach are 12.5% solution, used for water chlorination, and 15% solution, used for waste water treatment. Other industries that use bulk bleach include agriculture, chemical, food, glass, paper, pharmaceutical, synthetics, and textile. (*Id.* at ¶¶28-29). According to Plaintiff, storing and transporting bulk bleach is costly, dangerous, and difficult, since it is toxic and evaporates and degrades quickly. Therefore, geographic markets are limited by the distance that any shipment would have to travel from a manufacturer to a customer. (*Id.* at ¶¶ 30-31). Bulk bleach products

are interchangeable with one another; it is a commodity without distinction between one producer's goods and another producer's goods. (*Id.* at ¶ 36).

According to the Complaint, chlorine is also an inelastic product (one that is still in demand even if the price rises) because, among other reasons, it is necessary for so many industrial processes and potential substitutes are so dangerous and expensive to utilize as to be unsuitable. (*Id.* at ¶ 31). In North Carolina and South Carolina, sales of bulk bleach are, according to the Complaint, at least $30 million per year. Entry into the market of bulk bleach production is difficult because of the specific facilities needed and the strict safety regulations governing the industry. (*Id.* at ¶ 37).

Defendant JCI is a bleach producer that is headquartered in Sarasota, Florida. It manufactures and sells bleach from its plant in Charlotte, North Carolina. (*Id.* at ¶ 16). Defendant Olin is a corporation headquartered in Missouri. Defendant Trinity is a bleach manufacturer headquartered in Hamlet, North Carolina, where it produces and distributes bleach. Olin and Trinity formed a joint venture, Oltrin, which sells the bulk bleach produced by Trinity. (*Id.* at ¶ 17-19).

According to the Complaint, prior to March 2010, Oltrin and JCI were the largest players in the bulk bleach market in North Carolina and South Carolina.[1] On March 18, 2010, Oltrin and JCI entered into a series of four interrelated agreements, referred to by Plaintiff collectively as the "market allocation agreement," and referenced herein as the Agreement. The Agreement provided that JCI would provide Oltrin with a complete list of the bulk bleach customers it serviced with its Charlotte, North Carolina plant, and exit the North Carolina and South Carolina

[1] According to Plaintiff, the company Univar also manufactured bulk bleach at a plant in Suffolk, VA, before that plant was shut down shortly after the alleged conspiracy began, leaving Univar with a business model mainly comprised of distributing bulk bleach produced by Trinity or JCI. (Dkt. No. 1 at ¶¶ 46-47).

bulk bleach markets for a period of six years. In return, Oltrin agreed to pay JCI $5.5 million. (*Id.* at ¶¶ 40-41).

The Complaint further alleges that after the Agreement, Trinity, via Oltrin, became the predominant source of bleach in the Carolinas, that Oltrin increased the price of bulk bleach during the Class Period for its municipal and private customers, and that bids for municipalities purchasing bulk bleach increased 20-25% during the Class Period.

On or about March 31, 2010, Plaintiff received a letter from JCI stating that its Charlotte, NC facility would remain in operation but would no longer supply Plaintiff or any other customer requiring more than 2,000 gallons with bleach. JCI requested Plaintiff's consent to assign its existing bleach supply contract to Oltrin. (*Id.* at ¶ 57).

At some point between 2010 and 2013, the Federal Trade Commission ("FTC") commenced an investigation into possible anti-competitive behavior by Defendants in the bulk bleach market in the Carolinas. The FTC filed an administrative complaint on January 18, 2013 against Defendants alleging that the Agreement had anticompetitive effects. (*Id.* at ¶ 4-5). On March 7, 2013, the Defendants entered into a Consent Agreement that essentially reversed the Agreement they had made amongst themselves in 2010; the Consent Agreement required JCI to reenter the bulk bleach market in the Carolinas and required Oltrin to transfer certain bleach contracts back to JCI and share bid information with JCI for a period of time while JCI became reestablished in the market. (*See* Dkt. No. 50-3). The FTC stated that the purpose of the Consent Agreement was "to enable JCI to compete in the manufacture and sale of Bleach to commercial, industrial and governmental Customers in North Carolina and South Carolina" as well as "to remedy in a timely and sufficient manner the lessening of competition resulting from the Transaction as alleged in the Commission's Complaint." (*Id.* at ¶ 56).

Plaintiff states that the letter it received from JCI gave no indication that JCI had given its customer list to Oltrin and agreed not to re-enter the bulk bleach market in the Carolinas for a period of time in exchange for a $5.5 million payment. (*Id.* at ¶ 58). According to the Complaint, Plaintiff and members of the proposed Class did not discover, and could not have discovered through the exercise of reasonable diligence, the existence of the Agreement prior to the FTC's announcement and complaint revealing the Agreement along with a redacted version of its Decision and Order and other documents. (*Id.* at ¶¶ 59-61).

II. Discussion

A. Legal Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits the dismissal of an action if the complaint fails "to state a claim upon which relief can be granted." Such a motion tests the legal sufficiency of the complaint and "does not resolve contests surrounding the facts, the merits of the claim, or the applicability of defenses. . . . Our inquiry then is limited to whether the allegations constitute 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (quotation marks and citation omitted). In a Rule 12(b)(6) motion, the Court is obligated to "assume the truth of all facts alleged in the complaint and the existence of any fact that can be proved, consistent with the complaint's allegations." *E. Shore Mkts., Inc.* 213 F.3d at 180. However, while the Court must accept the facts in a light most favorable to the non-moving party, it "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Id.*

To survive a motion to dismiss, the complaint must state "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Although the requirement of plausibility does not impose a probability requirement at this stage, the complaint must show more than a "sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint has "facial plausibility" where the pleading "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Defendants have attached to their submissions to the Court documents relating to the FTC consent agreement, which Defendants submit to show the FTC's view of the legality of Defendants' behavior, as well as facts about the bulk bleach market, such as contracts and financial plans. Defendant JCI explains that in its view, these documents are "integral to the complaint and authentic" and are therefore appropriate for consideration without converting its motion to a Motion for Summary Judgment. (Dkt. No. 50 at 5 n.1). The Court disagrees and declines to consider these submissions. The Complaint's reference to the FTC investigation is relevant in explaining the chronology of the factual background in this case, but whatever facts were uncovered in that investigation are neither properly before this Court, nor are they integral or central to Plaintiff's Complaint, which alleges that Defendants' agreements and subsequent actions are themselves illegal. The terms of Defendants' settlement of similar allegations lodged by the FTC may be of some relevance to the case, but it is hardly central to the Complaint. As to the information submitted regarding bids, pricing, and Plaintiff's consideration of alternatives to bleach, (Dkt. Nos. 55-7, 55-8, 55-9, 55-10, and 55-11), these are all attached to dispute the facts as alleged by the Complaint, and are inappropriate for consideration on a motion to dismiss.

When a party is aware that material outside the pleadings is before the court, the party is on notice that a Rule 12(b)(6) motion may be treated as a motion for summary judgment. *See, e.g., Portland Retail Druggists Association v. Kaiser Foundation Health Plan,* 662 F.2d 641,

645-46 (9th Cir. 1981); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 392-93 (6th Cir. 1975). However, notification that a Rule 12(b)(6) motion may be converted is only one of the requirements of Rule 12. Once notified, a party must be afforded a "reasonable opportunity for discovery" before a Rule 12(b)(6) motion may be converted and summary judgment granted. *Gay v. Wall*, 761 F.2d 175, 177 (4th Cir. 1985). Such an opportunity has not yet been provided in the case at bar, and it would be premature to attempt to settle any dispute of fact at this stage in litigation.

B. Statute of Limitations

Olin's Motion argues that because Plaintiff became aware of "Oltrin's acquisition of JCI's Charlotte-based bulk bleach business" no later than March 2010, the four year statute of limitations ran in late March, 2014, four months before Plaintiff filed its Complaint. (Dkt. No. 54-1 at 8-14, citing 15 U.S.C. § 15b). Oltrin and Trinity incorporates the same argument into their Motion (Dkt. No. 55-1 at 15), and JCI makes similar arguments in support of its Motion (Dkt. No. 50 at 19-22). Plaintiff responds that, as it pled in its Complaint, Defendants' formation of the Agreement without any public knowledge of its terms, and their communication with Plaintiff via a letter that omitted the terms of the Agreement, constitute fraudulent misrepresentation sufficient to toll the statute of limitations. It also contends that the statute of limitations should be tolled because the conspiracy violation of the Sherman Act constituted a "continuing violation." (Dkt. No. 62 at 36-37).

1. Fraudulent Concealment

In a case of fraudulent misrepresentation, the limitations period does not begin to run until the plaintiff discovers the fraud. The Supreme Court has stated that the fraudulent concealment tolling doctrine is to be "read into every federal statute of limitation." *Holmberg v.*

Armbrecht, 327 U.S. 392, 397 (1946). To invoke the doctrine in this circuit, a plaintiff in an antitrust action must satisfy each element of a three part test: (1) the party pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff's claim, and (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence. *Weinberger v. Retail Credit Co.,* 498 F.2d 552, 555 (4th Cir. 1974); *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995).

As Defendants point out, Fed. R. Civ. P. 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Dismissal pursuant to the statute of limitations is only justified when the "complaint sets forth on its face the facts necessary to conclude that plaintiff's claims are barred by the statute of limitations." (Dkt. No. 54 at 8, citing *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007)).

The parties' dispute here centers on the first element of the test for fraudulent concealment. Plaintiff makes two arguments on this point: first, that the alleged conspiracy was "inherently self-concealing," and second, that Defendants took affirmative action to conceal their antitrust violations. Plaintiff's argument respecting whether Defendants' acts were of a "self-concealing" nature such that they tolled the statute of limitations is incomplete. The Fourth Circuit's decision in *Marlinton* considered a number of fraudulent concealment standards to apply in antitrust cases, and settled upon two standards, applicable to two different types of claims. According to that decision and those that followed (*e.g. Detrick v. Panalpina, Inc.*, 108 F.3d 529 (4th Cir. 1997)), a Plaintiff may rely on a Defendant's actions as "self-concealing" only where the *violation alleged* includes concealment as an element. Plaintiff's argument here that it

would be reasonable to assume bleach was a well-regulated market and Plaintiff had no reason to doubt its competitiveness may be logical. But because Plaintiff has not argued that one or more of its four claims (unlawful agreement violating Section 1 of the Sherman Act, monopolization violating Section 2 of the Sherman Act, attempt at monopolization violating Section 2 of the Sherman Act, and conspiracy to monopolize violating Section 2 of the Sherman Act) includes concealment as an element of the offense, the Court cannot apply the "self-concealment" test here. It therefore turns to the "affirmative actions" standard, articulated by the *Marlinton* decision and cited by both sides in this case.

The affirmative actions standard requires that a plaintiff allege that a defendant took affirmative steps to mislead; "silence is not enough" and neither is "failure to admit to wrongdoing." *Boland v. Consol. Multiple Listing Serv., Inc.*, 868 F. Supp. 2d 506, 518 (D.S.C. 2011*) aff'd and remanded sub nom. Robertson v. Sea Pines Real Estate Companies, Inc.*, 679 F.3d 278 (4th Cir. 2012). While Plaintiff must plead facts as to allegations of fraudulent behavior with particularity, information as to Defendants' intent is not subject to an elevated pleading standard, and may be alleged generally. Fed. R. Civ. P. 9(b); *Ashcroft v. Iqbal*, 556 U.S. 662, 665 (2009).

The Court finds that it would be premature at this point in the litigation to dismiss based on the statute of limitations. None of the parties have submitted a copy of the letter that allegedly put Plaintiff on notice that it should have inquired into the existence of or details of the Agreement, and the Court is therefore unable to review the document that both parties rely upon to show JCI's allegedly fraudulent or not fraudulent statements. No record has been developed as to communications between Plaintiff and Defendants, or whether Defendants were generally silent as to their relationships with one another or failed to volunteer information or engaged in a

"trick or contrivance" to evade suspicion. (Dkt. No. 54-1 at 10). Construing all facts in favor of the nonmoving party, JCI wrote a letter Plaintiff intended to reveal only enough information about its new relationship with Oltrin to achieve its financial ends of transferring its contract to Oltrin, which was calculated to conceal the fact that it had actually accepted a large payment of funds in exchange for the agreement not to compete with Oltrin for a period of time. In addition, the Complaint's characterization of the letter as assuring Plaintiff that JCI was "committed to ensuring there would be no disruption of service or supply" and that the "Charlotte JCI facility will most definitely remain in operation" constitutes a sufficient allegation of affirmative acts in furtherance of fraudulent concealment to overcome a motion to dismiss. (Dkt. No. 1 at ¶¶57-58).

2. Continuing Violations

Having found that Plaintiff has alleged sufficient facts to support a fraudulent concealment theory, it is unnecessary to rely on its allegations of continuing violations to deny the Motions to Dismiss. Furthermore, it appears from Plaintiff's Response that its position that Defendants' continued compliance with the alleged conspiracy to allocate markets and restrain trade constitutes "continuing acts" sufficient to toll the statute of limitations would only encompass one of its claims. (Dkt. No. 62 at 36). Defendants' position on this issue is also underdeveloped; Olin argues in its Reply that "effects" of a business acquisition and non-competition agreement do not restart the clock on the statute of limitations.[2] Whether a higher price for a product is simply the result of a past act by Defendants, or whether the sale itself constitutes a "continuing violation" of the Sherman Act is not a question that the Supreme Court or this circuit have solved with a simple formula. *See California v. American Stores Co.*, 495

[2] Only Defendant Olin submitted an argument on this point, in its Reply, citing *U.S. v. Kissel*, a 1910 case that provides little support for Defendants. 218 U.S. 601, 607 ("[W]hen the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one."

U.S. 271 (1990) (continuing ownership of stock unlawfully acquired was a continuing violation of the Clayton Act (citation omitted)); *U.S. v. A-A-A Elec. Co., Inc.* 788 F.2d 242, 246 n.4 (1986) (in dicta, continued receipt of payments was not a continuing violation of antitrust laws for civil purposes); *Lancianese v. Bank of Mount Hope*, 783 F.2d 467, 470 (4th Cir. 1986) (a continuing violation of antitrust laws must include an overt act in violation of the law committed within the limitations period); *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.,* 546 F.2d 570 (4th Cir. 1976) (same); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971) ("[I]f a plaintiff feels the adverse impact of an antitrust conspiracy 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 from the acts of the conspirators on that date. To recover those damages, he must sue within the requisite number of years from the accrual of the action."); *Klehr* v. *A.O. Smith Corp.,* 521 U.S. 179, 189-90 (1997) ("each sale to the plaintiff . . . starts the statutory period running again" (internal quotations and citation omitted)).

Plaintiff has sufficiently alleged a continuing conspiracy that caused Plaintiff injury until March 7, 2013 at the earliest, when the FTC Consent Agreement was reached, and is potentially ongoing until the anticompetitive effects of the 2010 Agreement are eliminated. Analyzing whether Defendants' behavior after the Agreement actually constituted a continuing conspiracy, or a violation of the law in other respects, is a task that may be revisited at the summary judgment stage or at trial.

C. FTC Filings

Reference to the FTC's investigation into the Agreement and its subsequent filings appears throughout the parties' filings. According to JCI, the FTC Complaint and Consent Agreement do not "provide[] any facts to support Plaintiff's Sherman Act claims against JCI . . .

Instead, the stated purpose and operational effect of the FTC filings was to incentivize JCI to re-enter the bulk bleach market and help it compete." (Dkt. No. 50 at 6). According to Oltrin and Trinity, "there are no allegations in the FTC Complaint suggesting a territorial market allocation between Oltrin and JCI." (Dkt. No. 55-1 at 6).[3]

As an initial matter, JCI's characterization of the FTC's actions with respect to unraveling its deal with Oltrin as a kind of benign, neutral intervention with the intention to only "assist – not punish – JCI" (Dkt. No. 50 at 8) is at a minimum subject to dispute. The consent agreement, which all of the Defendants in this litigation were party to, was arguably intended to remedy a perceived restraint of trade generated by the Agreement. However, this point is of no great weight, because the Consent Agreement, by its own terms, was drafted "for settlement purposes only." (Dkt. No. 50-3 at 2). In other words, Plaintiff may not rely upon it at trial as evidence of wrongdoing. *See Wendkos also v. ABC Consol. Corp.,* 379 F. Supp. 15, 21 (E.D. Pa. 1974) ("plaintiff . . . may not make use at trial of the FTC consent order which was entered against defendants"). No more convincing are Defendants' protests that if they did not admit guilt in their agreement with the agency, they cannot be guilty of the charges leveled in this suit. A settlement is crafted for the express purpose of avoiding the risk of a final finding of liability; it does nothing to prove innocence.

As Plaintiff here points out, there is some support for the proposition that the existence of a government investigation may bolster a district court's plausibility analysis of a claim at the motion to dismiss stage. (Dkt. No. 62 at 8, citing, *e.g. In re Packaged Ice Antitrust Litig.*, 723 F. Supp. 2d 987, 1009 (E.D. Mich. 2010)). *See also* Fed. R. Ev. 408; *Koch Indus., Inc. v. Aktiengesellschaft*, 727 F. Supp. 2d 199, 224 (S.D.N.Y. 2010) ("Rule 408 prohibits admission of

[3] Olin appears to agree with the Court that the FT's Consent Agreement is of little to no evidentiary value. (Dkt. No. 54-1 at 2 n.1).

a settlement when offered to prove a defendant's liability, but does not prohibit evidence of settlements offered for other purposes. . . . In the present case, plaintiffs' only burden is to show potential liability; they are not seeking to show that defendants were actually liable for the conduct alleged in the settled suits. It is unclear whether Rule 408 prohibits evidence of settlement under these circumstances. We do not resolve the issue here, since, even if defendants' settlement were inadmissible, plaintiffs have provided other evidence sufficient to establish potential liability.") (citing *Starter Corp. v. Converse, Inc.,* 170 F.3d 286, 293 (2d Cir. 1999) ("The trial judge has broad discretion as to whether to admit evidence of settlement . . . offered for another purpose.") (internal quotations omitted)). However, even setting aside any consideration of the FTC's activities, Plaintiff's allegations as to Defendants' Agreement to reduce competition in the bulk bleach market in the Carolinas would be sufficient to survive the motions to dismiss filed here.

D. Plaintiff's Injury

Defendants JCI, Oltrin, and Trinity argue that Plaintiff has not alleged injury sufficient to show standing (Dkt. No. 55-1 at 16-19; Dkt. No. 50 at 8-12). To establish standing, Plaintiff must allege it has suffered antitrust injury. *Novell, Inc v. Microsoft Corp.*, 505 F.3d 302, 310-12 (4th Cir. 2007). Antitrust injury requires an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Supermarket of Marlinton, Inc.* v. *Valley Rich Dairy*, 161 F.3d 3, 3 (4th Cir. 1998). "The antitrust injury requirement is sufficiently pled where plaintiff alleges" Defendants' conduct caused "a decrease in competition in that market." *E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc.* 688 F. Supp. 2d 443, 460 (E.D. Va. 2009). Beyond that, "an analysis of antitrust injury . . . [is] more

properly conducted after discovery." *Cont'l Airlines, Inc.v. United Air Lines, Inc.*, 120 F. Supp. 2d 556, 569 n.25 (E.D. Va. 2000) (citations omitted).

Defendants' arguments regarding standing rely on factual disputes that are inappropriate in the motion to dismiss stage. For example, JCI admits that Plaintiff has alleged that "prices for bulk bleach increased dramatically in 2010 and have remained at those supra-competitive levels" and that "Plaintiff and the other Class members have been injured because they have paid more for bulk bleach than they would have paid absent the Agreement." (Dkt. No. 50 at 9). JCI then proceeds to argue that Plaintiff's alleged facts regarding what prices were for bulk bleach before and throughout the Class Period are incorrect because the prices paid by Metropolitan Sewerage District of Buncombe County, North Carolina, is not representative of the market, the amount Plaintiff paid for bulk bleach immediately following the Agreement were not at supra-competitive levels, and another market player, Univar, was still operating in the market, contrary to Plaintiff's claims. (*Id.* at 9-10).

The Court declines to embark on the task of resolving whether the first contract between Oltrin and Plaintiff post-Agreement was or was not a product of pre-Agreement negotiations, and whether it is or is not demonstrative of the market as a whole, or Plaintiff's injuries or lack of injuries in the following years. It also declines to pursue any of the other factual questions raised by Defendants.[4] In a Rule 12(b)(6) motion, the Court is obligated to "assume the truth of all facts alleged in the complaint and the existence of any fact that can be proved, consistent with the complaint's allegations." *E. Shore Mkts., Inc.* 213 F.3d at 180. Defendants are of course free

[4] Furthermore, the fact that the documents referred to by Defendants are *publicly available* does not qualify them as "official public records" (Dkt. No. 50 at 11 n.3; Dkt. No. 55-1 at 8 n.9) and they are not properly subject to judicial notice. *See* Fed. R. Ev. 201.

to contest Plaintiff's version of the facts after the facts have been fairly investigated and assembled through discovery.

E. Product Market

Defendants also request a dismissal because Plaintiff's market definition, which refers to "sodium hypoclorite in a concentration of at least 10 percent" (Dkt. No. 1 at ¶ 24, cited in Dkt. No. 50 at 13, Dkt. No. 55-1 at 26) is overly inclusive and does not appropriately narrow the market to the one complained of, which is "bulk" bleach. However, as the Fourth Circuit explained in 2011, "dismissal of an antitrust claim for failure to adequately plead the relevant market can be problematic." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 443 (4th Cir. 2011) ("As then-Judge, now-Justice Sotomayor noted in *Todd [v. Exxon Corp.,* 275 F.3d 191 (2d Cir. 2001)], '[b]ecause market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market. *See Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design,* 244 F.3d 521, 531 (6th Cir. 2001) ("Market definition is a highly fact-based analysis that generally requires discovery.") (citing *Eastman Kodak Co. v. Image Technical Servs., Inc.,* 504 U.S. 451, 482 (1992)); *Double D Spotting Serv., Inc. v. Supervalu, Inc.,* 136 F.3d 554, 560 (8th Cir. 1998) (noting that "courts are hesitant to dismiss antitrust actions before the parties have had an opportunity for discovery"); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.,* 124 F.3d 430, 436 (3d Cir. 1997) (explaining that "in most cases, proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers") (citing *Eastman Kodak,* 504 U.S. at 482); *cf. Hayden Publ'g Co. v. Cox Broad. Corp.,* 730 F.2d 64, 70 n.8 (2d Cir. 1984) ("The conclusion that genuine issues of material fact preclude a finding as to [the] relevant market as a matter of law is

not unexpected. It frequently has been observed that 'a pronouncement as to market definition is not one of law, but of fact. . . .'")).

The Complaint is quite clear that the market under inquiry is that of bulk bleach, which is sufficient to state a claim. Defendants have pointed to no authority requiring that a plaintiff narrow its market analysis to a precise measurement at this stage in litigation.

F. Trinity and Olin

Defendants Olin and Trinity both contend that they should be dismissed from the case because their only involvement in the events in question relates to their ownership interest in Oltrin, which is not sufficient to implicate them in the Agreement. Plaintiff responds that because Olin and Trinity were both parties to the FTC Consent Agreement, that they are properly named defendants in this action. The Court reads the Complaint and Plaintiff's Response to the motions to allege responsibility by Olin and Trinity for Oltrin's actions because Oltrin is a creation of the two companies and acts as their agent, implicating them in any wrongdoing. Olin responds that "[t]here is not a single fact alleged about Olin during the statute of limitations period, beyond its former interest as an indirect investor in Oltrin." (Dkt. No. 54-1 at 7).

Agency must be shown by the party asserting it exists, in this case Plaintiff, and is generally determined "by evaluating the amount of control and supervision exercised by one entity over another." *Hammond v. Honda Motor Co., Ltd.*, 128 F.R.D. 638, 643 (D.S.C. 1989); *see also Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 61 (4th Cir. 1993) (agency test applied by Maryland courts "allows a court to attribute the actions of a subsidiary corporation to the foreign parent corporation only if the parent exerts considerable control over the activities of the subsidiary").

South Carolina courts have considered four factors in this control analysis: "(1) common ownership, (2) financial independence, (3) degree of selection of executive personnel and failure to observe corporate formalities, and (4) the degree of control over marketing and operational policies." *ScanSource, Inc. v. Mitel Networks Corp.*, 6:11-cv-382, 2011 WL 2550719 at * 6 (D.S.C. June 2011) (citing *Builder Mart of Am., Inc. v. First Union Corp.*, 563 S.E.2d 352, 358 (S.C. Ct. App.2002)). As the Supreme Court explained in a recent case, "Agencies . . . come in many sizes and shapes: 'One may be an agent for some business purposes and not others so that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose.'" *Daimler AG v. Bauman*, 134 S. Ct. 746, 759 (2014) (citation omitted).

Plaintiff's allegations regarding Trinity include the assertion that Oltrin essentially acts as Trinity's distributer, and that therefore Trinity itself achieved a monopoly in the Carolinas through the Agreement. (Dkt. No. 1 at ¶ 18). Olin's motion also states that "Trinity produces bleach among other chemicals. Oltrin serves as Trinity's marketing arm." (Dkt. No. 54-1 at 3 n.2). The Court therefore finds that Plaintiff has sufficiently alleged an agency relationship between Trinity and Oltrin for purposes of the motion to dismiss.

However, the Complaint includes no information specific to Olin's role in the alleged Sherman Act violations apart from its action forming Oltrin in 2007. Plaintiff has not alleged that Olin as an entity either controls Oltrin or benefits from the Agreement. Plaintiff's only arguments respecting Olin rely solely on the FTC Consent Agreement and fail to allege facts sufficient to state a plausible claim against Olin. The Court declines to come to a legal conclusion regarding Olin and Oltrin's relationship based on Olin's participation in the consent agreement for the reasons already discussed. Therefore, the Court grants Olin's motion to

dismiss the claims against it without prejudice and grants Plaintiff leave to amend the Complaint with information specific to Olin within fifteen days of this order.

G. JCI

JCI claims it sold its business to Oltrin and is therefore exempt from any antitrust liability, as a business owner cannot be constrained by law to continue operating when he or she has decided to close their business. (Dkt. No. 50 at 15). However, it is not clear to the Court at this time that JCI did, in fact, "sell its business" to Oltrin. No manufacturing facilities, employees, inventory, or equipment seem to have been transferred to Oltrin, and the two companies certainly did not merge. It does not appear, from the allegations before the Court, that the Agreement transferred anything from JCI to Oltrin other than a promise to exit a certain market for a certain period of time.[5] Whether this agreement constituted a "sale of goodwill" and whether such a sale of goodwill is exempt from Sherman Act liability is a mixed question of law and fact that has not been fully briefed before the Court, and is not ripe for resolution at this time. This question also raises the issue of the standard to be applied to the alleged restraint of trade. Even if Defendants are successful in showing that the noncompete agreement was ancillary to a valid sale, they may escape *per se* liability but still be subject to a rule of reason analysis as to whether the Agreement was a "legitimate transaction" and the noncompete provision was "necessary to make that transaction effective." *Nat'l Soc. of Prof'l Engineers v. United States,* 435 U.S. 679, 689 (1978) ("The Rule of Reason suggested by *Mitchel v. Reynolds* has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business. Judge (later Mr. Chief Justice) Taft so interpreted the Rule in his classic rejection

[5] The complaint does quote the letter from JCI mailed in March 2010 stating that it had agreed to "sell the assets of its bulk Sodium Hypochlorite business to Oltrin." No evidence is before the Court at this time as to what assets the letter referenced.

of the argument that competitors may lawfully agree to sell their goods at the same price as long as the agreed-upon price is reasonable."

III. Conclusion

For the reasons stated herein, the Court GRANTS Defendant Olin's motion to dismiss the claims against it as pled, (Dkt. No. 54) and DISMISSES Plaintiff's claims against Olin without prejudice and with leave to amend the complaint. The Court DENIES the remaining motions (Dkt. Nos. 50 and 55).

IT IS SO ORDERED.

Richard M. Gergel
United States District Judge

March 30, 2015
Charleston, South Carolina