IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SAGE CHEMICAL, INC., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 22-1302-CJB
	)	
SUPERNUS PHARMACEUTICALS, INC., *et al.*,	)	**REDACTED VERSION**
	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

1. Presently pending before the Court is Plaintiffs Sage Chemical, Inc. ("Sage") and TruPharma, LLC's (collectively with Sage, "Plaintiffs") Motion for Leave to Amend Their First Amended Complaint ("FAC") (the "Motion"). (D.I. 406) Plaintiffs' proposed Second Amended Complaint ("SAC") reasserts Count I[1] against US WorldMeds Partners, LLC and USWM, LLC (the "Reorganized Entities")—two entities that were named in the FAC but were dismissed pursuant to the Court's June 4, 2024 Memorandum Opinion (the "June 4 MO"). (*See* D.I. 388; D.I. 389; D.I. 407 at 1; D.I. 451 at 1)[2] The Reorganized Entities oppose the Motion. For the reasons set forth below, the Motion is GRANTED.

2. The Court hereby incorporates by reference its discussion of the factual

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[1] Count I of the SAC asserts claims pursuant to alleged "[a]greements that [u]nreasonably [r]estrain [t]rade" in violation of Section 1 of the Sherman Act ("Section 1"), 15 U.S.C. § 1, Section 3 of the Clayton Act, 15 U.S.C. § 14, and the New Jersey Antitrust Act, N.J.S.A. 56:9-3. (D.I. 407, ex. 1 at ¶¶ 353-61) The parties' briefing focuses on Plaintiffs' claim under Section 1, and the Court will therefore do the same herein. (*See* D.I. 420 at 2 n.2; D.I. 451 at 8; D.I. 466 at 1)

[2] The SAC also includes additional allegations relating to Plaintiffs' Lanham Act claim and group boycott theory. (D.I. 407 at 2) These allegations are not challenged and thus are not at issue via the Motion.

background and legal analysis set out in the June 4 MO. The Court writes here for the parties, who are well familiar with the facts and desire prompt resolution of the Motion.

3. Federal Rule of Civil Procedure 15(a) declares that leave to amend shall be "freely" given "when justice so requires." Fed. R. Civ. P. 15(a)(2). The Supreme Court of the United States has explained that this mandate "is to be heeded" and that in the "absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962) (citation omitted).

4. In opposing the Motion, the Reorganized Entities assert that granting the Motion would be a futile act. (D.I. 414; D.I. 466)[3] In assessing futility with regard to a motion to amend, the Court "applies the same standard of legal sufficiency as applies under [Federal] Rule [of Civil Procedure] 12(b)(6)." *City of Cambridge Ret. Sys. v. Altisource Asset Mgmt. Corp.*, 908 F.3d 872, 878 (3d Cir. 2018) (internal quotation marks and citation omitted).

5. Section 1 of the Sherman Act prohibits agreements that unreasonably restrain trade. *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010); *see also, e.g.*, *Lifewatch Servs. Inc. v. Highmark Inc.*, 902 F.3d 323, 331 (3d Cir. 2018) ("To state a Section 1 claim, then, a plaintiff must allege (1) an agreement (2) to restrain trade unreasonably."). Unilateral activity by a defendant cannot give rise to a Section 1 violation, because a defendant "has the right to deal, or refuse to deal, with whomever it likes, as long as it

[3] Other Defendants had challenged the Motion on undue prejudice grounds, (D.I. 416), but the Court addressed that issue and denied that challenge during a prior videoconference, (D.I. 447).

does so independently." *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 465 (3d Cir. 1998) (internal quotation marks and citation omitted). Instead, "a plaintiff must plead some form of concerted action . . ., in other words, a unity of purpose or a common design and understanding or a meeting of the minds or a conscious commitment to a common scheme[.]" *Lifewatch Servs. Inc.*, 902 F.3d at 333 (internal quotation marks and citation omitted).

6. Much of the Reorganized Entities' briefing is devoted to asserting that the SAC fails to "adequately plead that an alleged agreement between [the Reorganized Entities and Defendants Supernus Pharmaceuticals, Inc. ('SPI'), MDD US Operations, LLC and MDD US Enterprises, LLC (collectively with SPI and MDD US Operations, LLC, 'Supernus')] constitutes concerted action under [Section] 1 of the Sherman Act[.]" (D.I. 466 at 1; *see also id.* at 1-10; D.I. 414 at 1-5) This is so, the Reorganized Entities argue, because a Section 1 violation is intended to address agreements between competitors or firms at different levels of the supply chain, but the allegations in the SAC demonstrate that the Reorganized Entities are being sued even though they were mere "service providers" or "consultants" to SPI. (D.I. 414 at 1; D.I. 466 at 1-7) The Reorganized Entities argue that claims like this one warrant "particularly high scrutiny" and that in order to assess the sufficiency of these allegations, the Court should apply a three-element test set out in an antitrust treatise: *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ("Areeda & Hovenkamp"). (D.I. 414 at 1; D.I. 466 at 4) In order for a service provider or consultant (i.e., a "pawn") to be held liable for a Section 1 claim, Section 1474a of the Areeda and Hovenkamp treatise ("Section 1474a") concludes that the pawn: (1) must have knowledge of the principal's objective to restrain trade; (2) must have a stake in the restraint; and (3) must "contribute materially" to the restraint. (D.I. 415, ex. A at 1 ("Section 1474a"); *see also* D.I. 451 at 2) And here, the Reorganized Entities are putting the

third prong of this three-part test at issue—i.e., they assert that the SAC fails to plausibly allege that they materially contributed to the alleged anticompetitive conduct. (D.I. 466 at 7-10)

7. The difficulty for the Court with the Reorganized Entities' argument is that the United States Court of Appeals for the Third Circuit has never held that the Areeda and Hovenkamp three-element test is the law in this Circuit. (*See* D.I. 451 at 2, 5-7 & n.4) Indeed, as far as the Court can tell, the Third Circuit has never cited to Section 1474 of Areeda and Hovenkamp, has never explicitly laid out the three-element test set out in Section 1474a, and has never stated that Section 1 allegations like the ones at issue here must be viewed with "particularly high scrutiny" in some way. As a result, the Court is not comfortable applying this three-element/"particularly high scrutiny" test in resolving the Motion. Or, put another way, the Court is simply not prepared to dismiss the claims against these two Defendants in this large antitrust matter by using a legal test that the governing Circuit Court has never mentioned and has never applied.[4]

8. That said, even if the Third Circuit had previously held that the Areeda and Hovenkamp three-element test should apply to certain Section 1-type allegations, the Court would not apply the test here for another reason. That is because Section 1474a explains that the test is only relevant when a complaint pleads a Section 1 claim as to an alleged co-conspirator that is said to be the type of "pawn" referenced above: i.e., an entity who simply has a

[4] Indeed, so far as the Court can tell, only a few courts *have* ever explicitly mentioned or applied the three-element test drawn from Section 1474a. *See, e.g.*, *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 497 (7th Cir. 2002); *In re Blue Cross Blue Shield Antitrust Litig. (MDL No. 2406)*, Master File No. 2:13-CV-20000-RDP, 2016 WL 6124143, at *10-11 (N.D. Ala. Oct. 20, 2016); *Gulf States Reorg. Grp., Inc. v. Nucor Corp.*, 822 F. Supp. 2d 1201, 1219-20 (N.D. Ala. 2011); *Southwire Co. v. J.P. Morgan Chase & Co.*, 528 F. Supp. 2d 908, 919-20 (W.D. Wis. 2007). And they seemingly almost always do so at the summary judgment stage, *see id.*, not the pleading stage (where we are here).

"subordinate role in performing a discrete, designated task at the direction of its principal." (Section 1474a at 1) But the SAC does not consistently describe the Reorganized Entities in this manner. The Reorganized Entities are not, for example, subsidiary corporations to one of the other Defendants, such as SPI; instead, they are independent corporate entities who employ their own workforce. (D.I. 407, ex. A at ¶¶ 44-45) Nor does the SAC assert that the Reorganized Entities acted as the agent of other Defendants, such as SPI. Now, to be sure, at times, the SAC describes the Reorganized Entities as having performed services for SPI following the sale of the Apokyn business—pursuant to the terms of the relevant Sale and Purchase Agreement ("SPA"). (*See, e.g., id*. at ¶¶ 40, 53) But the proposed pleading also describes the Reorganized Entities and Supernus as "competitors"—as evidenced by the fact that in the SPA, the Reorganized Entities [redacted] (*Id*. at ¶ 269) It is a little hard to see how a first entity could be the "pawn" of a second entity, if the first entity is an independent corporation that would otherwise be competing with the second entity in the normal course of events.

9. In any event, if the Court is not applying the Areeda and Hovenkamp three-element test here, then what is it supposed to do? In the Court's view, it should simply be asking whether the SAC sets out a *plausible* claim that the Reorganized Entities are independent actors who engaged in some form of concerted action with other Defendants to unreasonably restrain trade (that is, that they took such action having a unity of purpose, or a common design and understanding, or a meeting of the minds, or a conscious commitment to a common scheme, with at least one other Defendant in that regard). *See Lifewatch Servs. Inc.*, 902 F.3d at 333.

10. So are there plausible allegations that the Reorganized Entities are separate,

independent actors as compared to, for example, SPI? As noted above, there are. Again, the Reorganized Entities and SPI: (1) are alleged to enjoy separate corporate existences; (2) assertedly each pay and maintain their own employees; (3) are not alleged to be in a principal/agent relationship or a "one firm" relationship with each other (like an attorney/client relationship, or the relationship between a company and its in-house division, or something similar); and (4) are asserted to have been competitors prior to the beginning of their contractual relationship regarding Apokyn. *See supra* ¶ 8.[5] Now again, the Court acknowledges that the SAC does allege that the Reorganized Entities worked closely with SPI in the relevant time period, and that they were [redacted] (D.I. 407, ex. A at ¶¶ 247, 262) And the Reorganized Entities (on the one hand) and SPI (on the other) are alleged to have had a joint interest in the financial success of Apokyn (though the nature of the respective parties' financial interest appears to have differed). (*Id.* at ¶ 59) But we are at the *pleading* stage here. And the question before the Court is simply about whether it is *plausible* that these respective entities should be treated as something other than a single economic unit for Section 1 purposes. In the Court's view, it is. *See, e.g., In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig*., CIV. A. NO. 16-5073, 2017 WL 4910673, at *2, 7-8 (E.D. Pa. Oct. 30, 2017) (concluding that for purposes of a Section 1 claim, the operative complaint sufficiently pleaded that two pharmaceutical company entities were independent actors that could conspire with each other, even though the companies were engaged in a partnership to market the drug product in question, where there was not "complete unity of interest" between them since, *inter alia*, one

[5] Indeed, the Reorganized Entities emphasize in their briefing that they are not asserting that they amount to a "single firm" with SPI, in light of the SAC's allegations. (D.I. 466 at 4 n.3 (internal quotation marks and citation omitted))

entity ("MonoSol") was a separate corporation from the other ("Indivior"), neither corporation was responsible for the other's day-to-day operations, there was no indication that MonoSol's economic success was solely dependent on Indivior's economic success, the parties were acting for their own financial interests, and where the complaint allowed the "reasonable inference that MonoSol could have competed in the relevant market outside of its agreement with Indivior") (internal quotation marks and citations omitted); *see also 10x Genomics, Inc. v. Vizgen, Inc.*, 681 F. Supp. 3d 252, 266 (D. Del. 2023) (rejecting the defendant's argument that two entities (a patent holder and its exclusive licensee) should be treated as a single economic entity that cannot conspire with itself, where the complaint alleged that the entities were separate decisionmakers with different interests, which was sufficient to establish at the pleading stage that the entities "are independent decision[]makers that joined together"); *In re: EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, 336 F. Supp. 3d 1256, 1301-02 (D. Kan. 2018); (D.I. 451 at 6).[6]

11. Next, the Court asks: Are there plausible allegations that individuals associated with the Reorganized Entities took "concerted action" along with SPI and other Defendants to aid or advance the conspiracy? Admittedly, there are not many of these types of assertions in the SAC (especially for a case in which we are essentially through document discovery). (D.I. 466 at 9) But there are enough to sufficiently plead relevant concerted action on the part of the

[6] *Cf. Siegel Transfer, Inc. v. Carrier Exp., Inc.*, 54 F.3d 1125, 1135 (3d Cir. 1995) (concluding at the summary judgment stage that a defendant freight broker ("Carrier Express") could not have conspired with a third party management company ("Oak Management") for Section 1 purposes, where Carrier Express did not have employees of its own and used Oak Management to handle its day-to-day operations, where Oak Management was "in effect, an inseparable part of Carrier Express' structure" and its "well being was directly tied to Carrier Express' success[,]" where Oak Management "did not compete with Carrier Express" and where the two entities "constituted one economic unit").

Reorganized Entities. For example, the SAC alleges that on June 30, 2020, a few months after SPI and US WorldMeds Partners, LLC entered into the SPA, representatives from Supernus, the Reorganized Entities and Defendant Britannia Pharmaceuticals Limited discussed Sage and how they could block Sage's attempt to promote generic competition with Apokyn—including through the filing of a Citizen Petition with the United States Food and Drug Administration ("FDA") and by promoting the use of [redacted] (D.I. 407, ex. A at ¶ 245) The SAC also charges that an executive for the Reorganized Entities (Lee Warren) spoke with a third party about "obtaining additional exclusivity relating to the development [redacted] and then set up a call with Supernus to report back." (*Id*. at ¶ 250)[7] And it asserts that an employee of the Reorganized Entities, Taylor Beeler, raised Apokyn prices for all customers on behalf of Supernus, "thereby effectuating the object of the conspiracy to restrain generic competition in order to maintain, and even increase, prices." (*Id*. at ¶ 260) The Reorganized Entities are alleged to have taken these actions in conjunction with an effort undertaken by all Defendants known as "Project Lemonade," "which entailed a series of actions over many years with the specific intent to restrain generic competition." (*Id*. at ¶ 66; *see also id*. at ¶ 245) And they are alleged to have done so in order to benefit themselves financially, in light [redacted]

[7] The Reorganized Entities assert that there is not "anything plausibly anticompetitive about the efforts to develop [redacted] that has never been FDA approved, marketed or sold for use by patients with Parkinson's disease. (D.I. 466 at 9) However, the FAC alleges that efforts to pursue the development of [redacted] was "part of Project Lemonade to block generic competition[,]" (D.I. 407, ex. A at ¶ 245), and as Plaintiffs point out, "even a conspiracy as a whole need not be effective to be illegal[,]" (D.I. 451 at 11 n.9); *see also, e.g.*, *Cascades Comput. Innovation LLC v. RPX Corp.*, Case No.: 12–CV–1143 YGR, 2013 WL 6247594, at *12 (N.D. Cal. Dec. 3, 2013).

[redacted] (*Id.* at ¶ 261 (noting that it was a "'top priority'" to Reorganized Entities executives to [redacted]))[8]

12. Lastly, the Court considers: Do the allegations plausibly assert that the Reorganized Entities had a conscious commitment to a common scheme with at least one other Defendant to unlawfully restrain trade? The allegations in the paragraph above (including those asserting that the Reorganized Entities participated in meetings in which they discussed how to block Sage from entering the relevant market) do sufficiently assert that this is so. (D.I. 451 at 9); *cf. Rossi*, 156 F.3d at 468 (noting that evidence indicating that two alleged competitors "discussed and agreed to act jointly to prevent [the plaintiff] from competing with them in the [relevant industry]" was sufficient to demonstrate concerted action at the summary judgment stage); *In re Suboxone*, 2017 WL 4910673, at *10-11 (concluding that, "[r]eading the[] allegations collectively" and in the light most favorable to the plaintiffs, they permitted a plausible inference that MonoSol engaged in some concerted action with Indivior where it, *inter alia*, negotiated with Indivior to receive royalty payments for the product at issue, and "participated in meetings with Indivior about possible citizen petition possibilities to delay entry of generic tablets").

13. In the end, this theory of liability for the Reorganized Entities is one that Plaintiffs hardly mentioned in their prior operative complaint. (D.I. 388 at 9-10) And, as noted above, Plaintiffs' allegations about the specific acts of relevant conduct actually performed by Reorganized Entity employees could surely have been more robust. So the Court certainly

[8] Even assuming that the Reorganized Entities needed to commit acts that aided the conspiracy in a more-than-*de minimis* way, *see Harold Friedman, Inc. v. Kroger Co*., 581 F.2d 1068, 1075-76 (3d Cir. 1978); (D.I. 466 at 3), these allegations would plausibly suggest that they did so.

understands the reason for the Reorganized Entities' futility-related challenge here. Were this the summary judgment stage, the outcome might have been different. But at the *motion to dismiss* stage, with Plaintiffs getting the benefit of all reasonable inferences, dismissal does not seem like the right result. And so the Court must GRANT the Motion.

14. Because this Memorandum Order may contain confidential information, it has been released under seal, pending review by the parties to allow them to submit a single, jointly proposed, redacted version (if necessary) of the Memorandum Order. Any such redacted version shall be submitted no later than **December 10, 2024** for review by the Court. It should be accompanied by a motion for redaction that shows that the presumption of public access to judicial records has been rebutted with respect to the proposed redacted material, by including a factually-detailed explanation as to how that material is the "kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure." *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019) (internal quotation marks and citation omitted). The Court will subsequently issue a publicly-available version of its Memorandum Order.

Dated: December 5, 2024

Christopher J. Burke
Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE