UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

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MAR 29 2002
CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY ____ DEPUTY

United States of America,

Plaintiff,

vs.

LSL Biotechnologies, Inc., Seminis Vegetable Seeds, Inc., and LSL Plantscience LLC,

Defendants.

JUDGMENT IN A CIVIL CASE

Case No. CV-00-529-TUC-RCC

DECISION BY COURT. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants LSL Biotechnologies, Inc. and LSL Plantscience LLC's Motion to Dismiss [Docket #16] is GRANTED.

IT IS FURTHER ORDERED Defendant Seminis Vegetable Seeds, Inc.'s Motion to Dismiss [Docket #18] is GRANTED.

IT IS FURTHER ORDERED that this action is DISMISSED WITHOUT PREJUDICE.

March 29, 2002
Date

RICHARD H. WEARE
CLERK

Cathy Schwader
(By) Cathy Schwader, Deputy Clerk

(47)

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CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, v. LSL BIOTECHNOLOGIES, INC., SEMINIS VEGETABLE SEEDS INC., and LSL PLANTSCIENCE LLC, Defendants.	No. CV 00-529-TUC-RCC **ORDER**

Pending before the Court is Defendants' December 5, 2000 motion to dismiss the complaint.[1] On July 9, 2001, the parties appeared before the Court for oral argument. For the reasons set forth below, the Court will grant Defendants' motion to dismiss.

I. FACTUAL AND PROCEDURAL BACKGROUND

Beginning in 1983, defendant LSL Biotechnologies, Inc.[2], a Delaware corporation, entered into a series of agreements with Hazera Quality Seeds, Inc. ("Hazera"), an Israeli

[1] Defendants LSL Biotechnologies, Inc. and LSL Plantscience LLC filed the original motion to dismiss. On December 5, 2000, Defendant Seminis Vegetable Seeds, Inc. joined in the motion to dismiss. *See* U.S.D.C. docket # 16 and #18.

[2] The other two defendants, Seminis Vegetable Seeds, Inc. and LSL Plantscience LLC are currently either partners or partially owned subsidiaries of LSL Biotechnologies, Inc.

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company, "to develop tomatoes with a longer shelf life." One of Defendants' and Hazera's goals was to develop a seed that would allow farmers in Mexico to grow vine-ripened tomatoes during the winter which could be harvested in Mexico, shipped overland to the United States and eaten before spoiling. The collaboration between the companies and an Israeli university resulted in a successful tomato seed that included a "RIN [ripening inhibitor] gene." LSL Biotechnologies owns all the patent rights to the RIN gene technology.

Although Defendants and Hazera worked together for 12 years, from 1983 to 1995, their relationship resulted in numerous disputes, mostly litigated in Israel. In 1987, Hazera sued LSL Biotechnologies in Israel. Ultimately, the 1987 litigation led to a settlement agreement and contract modification. Part of the settlement was an addendum to the 1983 agreement between LSL Biotechnologies and Hazera. [hereinafter "non-compete agreement"] This non-compete agreement was later included as part of a 1996 Israeli District Court judgment. The addendum provides in part,

> Subsequent to the termination of the agreement hereunder, Hazera shall not engage, directly or indirectly, alone, with others and/or third parties, in the development, production, marketing or other activities involving tomatoes having any long-shelf-life qualities.

The non-compete agreement applies to a defined geographic area that includes North America.

On September 15, 2000, the Government filed a complaint with this Court claiming that the non-compete agreement violates Section 1 of the Sherman Act. The Government alleges that the non-compete agreement restricts Hazera from developing long-shelf-life

tomato seeds, not based on Defendants' proprietary technology, that could be grown "in North America during the winter months" and is, therefore, an unlawful restraint on competition. The relief requested for the alleged violation includes a permanent injunction preventing the enforcement of the non-compete agreement.

II. LEGAL STANDARD FOR MOTION TO DISMISS

a) Subject Matter Jurisdiction—Rule 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) provides that a party can file a motion to dismiss challenging a court's subject matter jurisdiction. Although the defendant is usually the moving party on a Rule 12(b)(1) motion, the plaintiff always bears the burden of establishing subject matter jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Stock West Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). Courts presume lack of subject matter jurisdiction until the Plaintiff proves otherwise. *Id.* Subject matter jurisdiction can be challenged in two ways: (1) a facial challenge or (2) a factual challenge. While a facial challenge only examines the allegations in the complaint, a factual challenge can encompass extrinsic evidence outside the pleadings. *See Adler v. Fed. Republic of Nigeria*, 107 F.3d 720, 728 (9th Cir. 1997). In reviewing a factual challenge, courts should not, in an attempt to determine whether subject matter jurisdiction exists, resolve genuinely disputed facts. *See Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

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b) Failure to State a Claim—Rule 12(b)(6)

A court may grant a motion to dismiss for failure to state a claim upon which relief can be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *See Western Reserve Oil & Gas Co. v. New,* 765 F.2d 1428, 1430 (9th Cir. 1985); *Conkey v. Reno*, 885 F.Supp. 1389, 1391 (D. Nev. 1995). A court may only look to the facts alleged in the complaint when deciding whether to grant a Fed. R. Civ. P. 12(b)(6) motion. *See Western Reserve Oil*, 765 F. 2d at 1430. A court must take all material facts alleged in the complaint as true and must construe them in the light most favorable to the nonmoving party. *See Amfac Mortgage Corp. v. Ariz. Mall of Tempe*, 583 F.2d 426, 430 (9th Cir. 1978). Ordinarily if the court grants a motion to dismiss, the non-moving party is given leave to amend the dismissed claim unless, no set of facts can be proved under an amendment which would constitute a valid claim. *See Saul v. United States,* 928 F.2d 829, 843 (9th Cir. 1991); *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

III. JURISDICTIONAL STANDARDS

In order to establish a claim under Section 1 of the Sherman Act, a plaintiff must show that the alleged restraint on trade was either per se illegal or that it illegally restrained trade under a rule of reason analysis. *See Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1318 (9th Cir. 1996). If the restraint is not alleged to be a per se violation, the plaintiff must establish the "relevant market" affected by the alleged restraint. *Id.* at 1319. The "relevant market"concept encompasses notions of geography and product use. *Id.* The geographic

component of a relevant market looks at the area of effective competition. *Oltz v. St. Peter's Cmty Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1988).

In its complaint, the Government states that the relevant market "consists of seeds designed to grow fresh-market tomatoes in North America during the winter months." (Compl. ¶33.) The jurisdictional requirements of the Sherman Act differ depending on whether the alleged unlawful conduct was foreign or domestic. Here, the Government alleges a relevant market encompassing a foreign country. Therefore, the complaint concerns both foreign and domestic conduct by Defendants. Due to the different jurisdictional requirements, the Court will consider the alleged foreign and domestic conduct separately.

IV. DOMESTIC CONDUCT- proper definition of the relevant market

In addition to demonstrating that there was a contract, combination or conspiracy and that the agreement affected interstate commerce, Section 1 of the Sherman Act requires plaintiffs to show that the agreement restrained trade under either a per se rule of illegality or a rule of reason analysis. *See Tanaka v. Univ. Of Calif.*, 252 F.3d 1059, 1062 (9th Cir. 2001). As previously discussed, under the rule of reason analysis plaintiffs "bear the initial burden of showing that the restraint produces 'significant anti-competitive effects' within a 'relevant market'." *Id.* at 1063 *quoting Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996.). "Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim." *Tanaka*, 252 F.3d at 1063 *citing Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1105 (9th Cir. 1999).

With regard to the effect of the non-compete agreement in the United States, the

Government fails to consistently identify the relevant market. At one point in its complaint, the Government states that the "relevant market consists of seeds designed to grow fresh-market tomatoes in North America during the winter months." (Compl. ¶33.) Furthermore, the complaint states that the "Restrictive Clause limits effective competition in innovation in the relevant market by excluding forever from the market one of the few companies likely to develop seeds for growing fresh-market tomatoes for United States consumers during the winter months." (Compl. ¶35.) Despite this characterization, the Government argues, in its opposition to the motion to dismiss, that "Hazera is one of a very small number of seed companies whose expertise and track record leave it poised to develop extended shelf life seeds for U.S. soil and climatic conditions." (Opp'n at 15-16.) It is unclear to this Court whether the relevant market at issue consists of all seeds designed to grow fresh-market tomatoes in the United States during the winter, just those winter fresh-market seeds that can grow in open fields resulting in long shelf life qualities or some other combination of attributes.

Last year, the Ninth Circuit dismissed a case alleging a violation of Section 1 of the Sherman Act due to an incorrect identification of the relevant market. *See Tanaka v. Univ. of Southern Calif.*, 252 F.3d 1059 (9th Cir. 2001.) In *Tanaka*, the plaintiff was a collegiate athlete challenging "an intercollegiate athletic association rule that discourages student-athletes from transferring to member institutions during the course of their collegiate athletic careers." *Tanaka*, 252 F.3d at 1060. According to the plaintiff, the relevant geographic market was Los Angeles and the relevant product market was the UCLA women's soccer

program. *See id.* at 1063. The court cited two flaws with the plaintiff's alleged market. First, the correct geographic market was national in scope because universities across the country competed to recruit the plaintiff for her athletic skills, not just schools in Los Angeles. *Id.* Second, the UCLA women's soccer program was not the appropriate product market because it was interchangeable with other Pac-10 and non-Pac 10 programs. *Id.* at 1063-64.

Although the scope of Hazera and Defendants' non-compete agreement encompasses all of North America, for purposes of the Sherman Act the relevant geographic area is considerably smaller. The geographic area of effective competition for the sale of winter growth tomato seeds cannot consist of all of North America because open field winter tomatoes can only potentially be grown in Mexico and some Southern U.S. states including Florida, California and Arizona. Therefore, Mexico, a few Southern U.S. states or even smaller areas potentially comprise the relevant geographic market.[3] However, the Government never explicitly defines the geographic component of its alleged relevant market in terms of where effective competition for the product occurs.

In the complaint, the relevant product market is defined as "seeds designed to grow fresh-market tomatoes in North America during the winter months." (Compl. ¶33.) "The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Oltz v. St. Peter's Cmty Hosp.*, 861

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[3] According to the parties, tomato seeds are developed to be successful in very specific growing regions. For example, the most successful seed used to grow tomatoes in Mexico may, if planted in California, lead to dismal results. Due to the fact that the seeds are designed for microclimates, there would only be competition between seeds designed for the same geographic area. It seems to the Court that separate relevant markets exist for each growing region that requires a distinct seed variety.

F.2d 1440,1446 (9th Cir. 1988). The Government's alleged market includes seeds without long-shelf-life qualities which Hazera can develop and sell under the non-compete agreement. Numerous types of seeds are covered by the currently alleged market including seeds designed to grow in greenhouses, cherry tomato seeds, open-field seeds and seeds with long-shelf-life qualities. Clearly, these different types of seeds are not interchangeable and their demand is therefore, not highly elastic. *See Olin Corp. v. F.T.C.*, 986 F.2d 1295, 1301 (9th Cir. 1993) (cross elasticity of demand indicates which products compose a relevant product market). Without clearly defined relevant geographic and product markets, it is impossible for this Court to grant any type of relief. Therefore, the Court will grant Defendants' motion to dismiss as to the domestic conduct for failure to state a claim upon which relief can be granted. It is not inconceivable that the Government could draft a complaint with properly alleged relevant markets. Therefore, the portion of the complaint addressing Defendants' domestic conduct will be dismissed without prejudice.

V. FOREIGN CONDUCT - seeds developed to be sold and grown in Mexico

Under the Foreign Trade Antitrust Improvements Act ("FTAIA"), plaintiffs must satisfy a higher standard than standard commerce clause jurisprudence would require, in order for federal courts to have subject matter jurisdiction over their claims. In purely domestic commerce cases, a plaintiff need only show that the alleged restraint involved transactions "in or affecting" interstate commerce. *See McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980). When foreign conduct is alleged, plaintiffs must show a "direct, substantial and reasonably foreseeable effect" on U.S. domestic commerce.

See 15 U.S.C. §6a(1)(A) (2002). In addition, plaintiffs must prove that the alleged effect gives rise to their purported injury. *See* 15 U.S.C. §6a(2) (2002); *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 427-28 (9th Cir. 2001).

In this case, Defendants argue that the Government's allegations do not meet the more stringent requirements of the FTAIA and therefore, this court lacks subject matter jurisdiction over the government's claim. The Government responds by citing the Supreme Court's decision in *Hartford Fire Insurance v. California*, 509 U.S. 764 (1993), which held that, "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Id.* at 796. The Court agrees with the Government that the *Hartford* decision is unclear whether the FTAIA's "direct, substantial, and reasonably foreseeable effects" standard or the more traditional "meant to and did produce some substantial effects" test applies to antitrust actions involving foreign conduct. (Feb. 2, 2001 Opp'n at 13.) According to the Government, its allegations against Defendants satisfy both subject matter jurisdiction standards. After reviewing both the FTAIA and the Supreme Court's opinion in *Hartford*, this Court finds that Congress specifically set forth the standard for subject matter jurisdiction governing alleged foreign antitrust conduct in the FTAIA. Therefore, examining whether the alleged foreign conduct had a "direct, substantial and reasonably foreseeable effect" on United States domestic commerce is the appropriate legal standard for determining this Court's jurisdiction.

The parties' briefs fail to clearly and consistently discuss the two most important factors in assessing this Court's jurisdiction over the alleged foreign conduct: the effect of

the non-compete agreement and the alleged injury. Regarding the development of seeds for the Mexican market, the effect of the non-compete agreement according to the complaint is twofold. First, the non-compete agreement delays or makes less likely innovations in the creation of tomato seeds designed to produce winter tomatoes in Mexico with long-shelf-life qualities. (Compl. ¶41.) The non-compete agreement's second effect is that it allows Defendants to "charge more for their seeds (or more for a license to use seeds with the RIN gene) than their otherwise could." *Id.* According to the Government, the limited competition in the Mexican tomato seed market injures American consumers by depriving them of higher quality, better tasting winter tomatoes. *Id.*

a) Whether the restrictive clause has a direct effect on U.S. domestic commerce

Defendants argue that the non-compete agreement does not have a direct effect on U.S. domestic commerce because the agreement between Hazera and Defendants involves the development of seeds, not tomatoes. (Dec. 5, 2000 Mem. in Supp. of Mot. to Dismiss at 10.) According to the Government, the Sherman Act's jurisdictional requirements are met when the intrastate restraints on one product affect the downstream interstate movement of related products. (Feb. 2, 2001 Opp'n at 11.) However, the authority cited by the Government for this proposition involves the Sherman Act's reach in domestic commerce cases. The Government's attempt to analogize this principle to foreign conduct fails because federal court jurisdiction differs depending on whether the alleged conduct is foreign or domestic. When the suspect conduct is purely domestic, courts look to the existence of interstate effects, not their magnitude. As long as the effects are not *de minimis*, the Sherman

Act applies to domestic conduct. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 485 (1940) ("the nature of the restraint and its effect on interstate commerce and not the amount of the commerce.").

The FTAIA provides that the Sherman Act applies only when foreign trade or commerce has a "direct, substantial, and reasonably foreseeable effect" on trade or commerce in the United States. *See* 15 U.S.C. §6a(1)(A) (2002). With regard to the regulation of foreign conduct, the type and scope of the effect on domestic commerce is crucial. In light of the different jurisdictional standards for domestic and foreign conduct, the Government's attempts to simply analogize case law involving the domestic downstream movement of related products is not persuasive. Therefore, the Court finds that the restriction on Hazera potentially limiting the development of seeds for Mexico cultivation does not have a direct effect on U.S. domestic commerce.

The second issue is whether any increased price for Mexican winter tomato seeds with long-shelf-life qualities resulting from the non-compete agreement has a direct effect on U.S. domestic commerce. According to Defendants, any seed price increase resulting from the non-compete agreement is not significant because the cost of a seed is a tiny fraction (less than 1%) of the ultimate price of the tomato. Neither party disputes the large volume of winter tomatoes imported into the United States from Mexico each year.[4] However, not all winter tomatoes grown in Mexico are exported to the United States. In addition, even if the Mexican growers and transporters pass along any increase in the price

[4] The Government cites reports that the annual value of imported winter tomatoes from Mexico is approximately $250 million.

of the seed, such a price increase does not constitute a direct, or even substantial, effect on U.S. domestic commerce. Defendants' involvement is limited to the development and sale of the plant seeds in Mexico. They have no impact on the decisions made regarding the downstream pricing of a related product. Therefore, any effect of the non-compete agreement on seed prices does not have a direct effect on the subsequent sale price of a tomato in the United States.

As discussed above, the non-compete agreement's effects on innovation and price in the Mexican market do not have a direct effect on U.S. domestic commerce. As a result, this Court does not have subject matter jurisdiction over the portion of the Government's allegations concerning the non-compete agreement's application in Mexico. Amendment of this portion of the complaint would be futile and will therefore, be dismissed without leave to amend.

CONCLUSION

The Government has failed to either state a claim upon which relief can be granted with regard to Defendants' domestic conduct or prove that this Court has subject matter jurisdiction over Defendants' foreign conduct. Therefore, this action will be dismissed without prejudice.

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IT IS HEREBY ORDERED that:

(1) Defendants LSL Biotechnologies, Inc. and LSL Plantscience LLC's December 5, 2000 motion to dismiss [docket #16.] is **GRANTED**;

(2) Defendant Seminis Vegetable Seeds, Inc.'s December 5, 2000 motion to dismiss [docket #18.] is **GRANTED**;

(3) this action is **DISMISSED WITHOUT PREJUDICE**; and

(3) the Clerk of the Court is directed to enter judgment and close the case.

Dated this 28th day of March, 2002.

RANER C. COLLINS
United States District Judge