

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITY OF MOUNDRIDGE, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 04-940 (RWR)
)	
EXXON MOBIL CORP. <u>et al.</u> ,)	
)	
Defendants.)	

MEMORANDUM OPINION

Eighteen municipalities¹ sued Exxon Mobil Corporation, BP America, Inc., and ConocoPhillips Corporation for violating federal antitrust laws by agreeing to fix prices. The plaintiffs have moved for leave to amend the second supplemental complaint to add Shell Oil Company ("Shell") as a defendant, to add five municipalities as plaintiffs,² to clarify their allegation regarding the defendants' control of natural gas production, and to delete unnecessary allegations. In response, the defendants moved for reconsideration of the January 9, 2007 Order which denied their motion to dismiss the price fixing conspiracy claim

¹ The plaintiffs are the cities of Moundridge, Kansas; Winfield, Kansas; Coffeyville, Kansas; Denison, Kansas; Garnett, Kansas; Greensburg, Kansas; Halstead, Kansas; Humboldt, Kansas; Iola, Kansas; La Cygne, Kansas; Macon, Missouri; Minneapolis, Kansas; Osage City, Kansas; Rensselaer, Indiana; Sabinal, Texas; Shelbyville, Missouri; and Wellington, Kansas, and the Village of Stonington, Illinois.

² The additional plaintiffs would be the following five cities in Kansas: Chanute, Kechi, Larned, Lyons, and Spearville.

in Count One, and opposed the plaintiffs' motion arguing that the amendment is futile after Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007), and claiming undue prejudice and delay. Because the second supplemental complaint sufficiently pled a cause of action, the defendants' motion for reconsideration has been denied. Because filing an amended conspiracy complaint would not be futile, or cause undue prejudice or undue delay, but the proposed amended complaint realleges without authorization dismissed counts, the plaintiffs' motion for leave to amend has been denied without prejudice.

BACKGROUND

The background of this case is fully discussed in City of Moundridge v. Exxon Mobil Corp., 471 F. Supp. 2d 20, 27-29 (D.D.C. 2007). Briefly, the plaintiffs alleged that the defendants, producers of natural gas used in the United States, agreed to artificially raise natural gas prices and committed other antitrust violations. Id.; City of Moundridge v. Exxon Mobil Corp., 244 F.R.D. 10, 11 (D.D.C. 2007). Despite the defendants' claims of a dwindling natural gas supply, plaintiffs maintain that no natural gas shortage exists and that the defendants have reaped substantial profits due to their artificial price increases. City of Moundridge, 244 F.R.D. at 11. On January 9, 2007, Coral Energy Resources, L.P.'s ("Coral's") motion to dismiss was granted and all claims against

Exxon Mobil Corporation, BP America, Inc., and ConocoPhillips were dismissed except for the conspiracy claim in Count One. City of Moundridge, 471 F. Supp. 2d at 46.

Before the scheduling order's deadline of May 24, 2007, the plaintiffs moved for leave to amend the second supplemental complaint to add Shell as a defendant, to add five municipalities as plaintiffs, to clarify their allegation regarding the defendants' control of natural gas production, and to delete unnecessary allegations. (Pls.' Stmt. of P. & A. in Support of Mot. for Leave to Am. ("Pls.' Br.") at 1-2.) The plaintiffs moved to add Shell in response to Coral's dismissal, and asserted that the five new cities are similarly situated and raise common legal or factual questions. (Id. at 3.) The plaintiffs allege that like the other defendants, Shell both explores for and produces natural gas. (Pls.' Mot. for Leave to Am. Second Supplemental Compl. ("Pls.' Mot.") at 2.) At the time the plaintiffs moved to amend, fact discovery was in progress and did not close until December 14, 2007. Expert discovery had not started because the parties have been engaged in mediation which just concluded. The defendants moved for reconsideration of the January 9, 2007 order after Twombly was decided arguing that under Twombly, the complaint fails to sufficiently allege an agreement among the defendants. (Defs.' Mot. for Reconsideration & Opp'n to Pls.' Mot. for Leave to Amend ("Defs.' Opp'n") at 9.)

The defendants also oppose leave to amend because it would be futile and prejudicial, and would cause undue delay. (Id. at 10-12.)

DISCUSSION

I. RECONSIDERATION DUE TO TWOMBLY

Under Rule 54(b) of the Federal Rules of Civil Procedure, "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). Rule 54(b) permits reconsideration of an order that does not constitute a final judgment, or is interlocutory, "as justice requires." Cobell v. Norton, 224 F.R.D. 266, 272-73 (D.D.C. 2004) (stating that the court has broad discretion when considering a motion for reconsideration); Campbell v. U.S. Dep't of Justice, 231 F. Supp. 2d 1, 7 (D.D.C. 2002). The "as justice requires" standard requires "'determining, within the Court's discretion, whether reconsideration is necessary under the relevant circumstances.'" In Def. of Animals v. Nat'l Insts. of Health, 527 F. Supp. 2d 23, 28 (D.D.C. 2007) (quoting Cobell v. Norton, 355 F. Supp. 2d 531, 539 (D.D.C. 2005)). The discretion is "subject to the caveat that where litigants have once battled

for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." Singh v. George Washington Univ., 383 F. Supp. 2d 99, 101 (D.D.C. 2005) (internal quotation marks omitted) (quoting In re Ski Train Fire in Kaprun, Austria, on Nov. 11, 2004, 224 F.R.D. 543, 546 (S.D.N.Y. 2004)). Reconsideration may be warranted if there was a patent misunderstanding of parties, a decision made beyond the issues presented, a failure to consider controlling law, or a significant change in the law. Singh, 383 F. Supp. 2d at 101. The moving party has the burden of showing that some harm or injustice would result if reconsideration is denied. In Def. of Animals, 527 F. Supp. 2d at 29.

The defendants imply that Twombly changed the Rule 8 pleading standard for claims under § 1 of the Sherman Act, rendering plaintiffs' amended complaint insufficient. (Defs.' Opp'n at 7-8.) However, Twombly did not purport to require a "heightened fact pleading of specifics[.]" 127 S. Ct. at 1974. See also Hyland v. HomeServices of Am., Inc., No. 05-612, 2007 WL 2407233, at *3 (W.D. Ky. Aug. 17, 2007) (stating that Twombly's pleading standard looked to "what information has been provided by a plaintiff, not the amount"). What Twombly certainly did do is jettison the "no set of facts" formulation found in Conley v. Gibson, 355 U.S. 41, 45-46 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond

doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). Twombly requires "a complaint with enough factual matter (taken as true) to suggest that an agreement was made." 127 S. Ct. at 1965. The requirement of plausible grounds to "infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [an] illegal agreement." Id. A complaint is sufficient even if actual proof is "improbable" and "'recovery is very remote and unlikely.'" Id. Twombly stated that the allegations "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. at 1966. The Court found this standard to be consistent with Rule 8's threshold pleading requirements. The conduct alleged needs "some setting suggesting . . . agreement[,]" or otherwise put, some "further circumstance pointing toward a meeting of the minds" that "nudge[s] [the claim] across the line from conceivable to plausible[.]" Id. at 1966, 1974.

The defendants argue that the complaint does not provide factual allegations to suggest an actual agreement among the defendants. (Defs.' Opp'n at 9.) In Twombly, the plaintiffs attempted to show an agreement based on parallel conduct expressed by the absence of competition or resistance to enter

other territories, but did not show a basis for how or why the defendants may have conspired. Twombly, 127 S. Ct. at 1970-72. See also Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans, Inc., 511 F. Supp. 2d 1, 17 (D.D.C. 2007) (stating that the Twombly plaintiffs did not present any facts to "compel an inference as to the *motive* for [anticompetitive] conduct").

Unlike in Twombly, the plaintiffs here do not rely on only bare allegations of parallel behavior, or assume that there is a conspiracy because there is an "absence of any meaningful competition.'" See Twombly, 127 S. Ct. at 1970. The complaint alleges facts providing circumstantial evidence of a price fixing agreement. It alleges that the natural gas total resource base had not decreased, that the prices had risen and never fallen below an agreed-upon price, that the defendants had reported high profits, City of Moundridge, 471 F. Supp. 2d at 40-41, and that Hurricanes Katrina and Rita should not have affected the market as the defendants claimed and they were only a pretextual reason to justify withholding market supply to create an artificial shortage. (Second Supplemental Compl. ¶¶ 36, 37.) It also identifies the years and locations where the agreement was reached and the defendants who participated. (Second Supplemental Compl. ¶¶ 15, 17, 18.) These facts support an inference that the "defendants conspired to raise prices to reap the enormous benefits described by plaintiffs" and that the

"defendants falsified their statement about the shortage of natural gas to increase their profits." City of Moundridge, 471 F. Supp. 2d at 41.

The defendants also argue that "there are no facts alleged suggesting that higher natural gas prices were the result of an agreement amongst Defendants as opposed to each Defendant's independent business decision[,]" because "it is always in a company's independent self-interest . . . to increase its profits." (Defs.' Reply Br. in Support of Mot. for Reconsideration & Opp'n to Pls.' Mot. for Leave ("Defs.' Reply Br.") at 5, 7.) The Twombly district court examined whether the plaintiff had adequately pled the "plus factors," which involved economic interests and motives, believing that the plaintiffs must "allege additional facts that 'ten[d] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior.'" Twombly, 127 S. Ct. at 1963. The Supreme Court stated that the sufficiency of Twombly's complaint "turn[ed] on the suggestions raised by this [parallel] conduct when viewed in light of common economic experience[,]" id. at 1971, but did not explicitly require that plaintiffs prove the plus factors at the pleading stage. The Supreme Court stated that heightened pleading was not required, id. at 1973 n.14, and differentiated between the summary judgment and motion to dismiss standards, noting that "a § 1 plaintiff's offer of conspiracy

evidence must tend to rule out the possibility that the defendants were acting independently" at the summary judgment stage. Id. at 1964, 1973 n.14 (noting that at the pleading stage, the concern was not with the particularity of the factual allegations, but with whether the complaint "*in toto* . . . render[ed] plaintiffs' entitlement to relief plausible"). See also Iqbal v. Hasty, 490 F.3d 143, 155, 157-58 (2d Cir. 2007) (noting the confusion over Twombly's standard and concluding that Twombly does not require heightened pleading, but rather implemented a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*").

Economic interests and motivations can be relevant to evaluate plausibility, and price increases can be the result of an independent business decision. But, a complaint need not be dismissed where it does not "exclude the possibility of independent business action." (Defs.' Reply Br. at 7.) Such a requirement at this stage in the litigation would be counter to Rule 8's requirement of a short, plain statement with "enough heft to 'sho[w] that the pleader is entitled to relief.'" Twombly, 127 S. Ct. at 1966.³ To evaluate a complaint's

³ The Court positively cited its earlier decision in Swierkiewicz v. Sorema N. A., 534 U.S. 506 (2002), noting that a plaintiff does not have to allege "'specific facts' beyond those

sufficiency, Twombly requires allegations to 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."⁴ Id. The plaintiffs provided some circumstantial

necessary to state his claim and the grounds showing entitlement to relief." Twombly, 127 S. Ct. at 1973-74. Furthermore, while not in the antitrust context, the Court later cited Twombly in Erickson v. Pardus, 127 S. Ct. 2197 (2007), to emphasize the proper pleading standard. In Erickson, the Court stated that Rule 8 "requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Erickson, 127 S. Ct. at 2200 (concluding that allegations that prison officials stopped administering medication, which endangered the prisoner's life, and refused to continue treatment despite the need were not "too conclusory") (quoting Twombly, 127 S. Ct. at 1964) (internal citations omitted).

⁴ See In re OSB Antitrust Lit., No. 06-826, 2007 WL 2253419, at *5 (E.D. Pa. Aug. 3, 2007) (denying the motion to dismiss because the alleged parallel conduct "may or may not be Defendants' 'natural' reactions to the failing OSB market, but -- taken in combination with Plaintiffs' explicit allegations of Defendants' agreement to fix prices through [published price lists in an industry periodical], and their price-fixing discussions during industry events -- is certainly 'enough to raise a right to relief above the speculative level'"); Hyland, 2007 WL 2407233, at *3 (denying the motion to reconsider because the allegations of government enforcement actions, admissions of price fixing by brokers, exchange of price lists and catalogues, and price increases despite a decline in costs support an inference of an agreement to conspire). But see In re Elevator Antitrust Lit., 502 F.3d 47, 50-51 (2d Cir. 2007) (affirming the district court's dismissal by relying on the fact that the complaint contained "'basically every type of conspiratorial activity that one could imagine'" without specification and that similar contractual language, price, and equipment design were not "'plausible grounds to infer an agreement'" because the conduct could be consistent with conspiracy as well as with competitive business decisions); In re Late Fee & Over-Limit Fee Lit., No. 07-634, 2007 WL 4106353, at *7 (N.D. Cal. Nov. 16,

facts, including historical supply and consumption levels, market prices, profit levels, and the use the industry reports, to support an inference that the defendants engaged in not merely parallel conduct, but rather agreed to contribute false information regarding gas supply levels to industry reports, withhold supply, and engage in price-fixing.

All inferences are construed in favor of the plaintiffs and, while the claim may rest ultimately on a thin factual reed, the plaintiffs have alleged supporting circumstantial facts and placed their claims "in a context that raises a suggestion of a preceding agreement," "nudg[ing] their claims across the line from conceivable to plausible[.]" See Twombly, 127 S. Ct. at 1966, 1974. The defendants' motion to reconsider the denial of the motion to dismiss Count One thus has been denied.⁵

2007) (dismissing complaint that failed to provide details "as to when, where, or by whom [the] alleged agreement was reached" and that "itself provide[d] an alternative [business] explanation for the increases"); In re Graphics Processing Units Antitrust Lit., No. 06-07417, 2007 WL 2875686, at *9-11 (N.D. Cal. Sept. 27, 2007) (dismissing complaint because the allegations of historically unprecedented price increases and parallel conduct by the defendants was "consistent with conspiracy[,]" but . . . equally consistent with lawful conduct").

⁵ This result was by no means foreordained here. As the Second Circuit pointed out, Twombly's multiple "linguistic signals" have created "[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings[,]" Iqbal, 490 F.3d at 155-57, something the D.C. Circuit has not yet had occasion to address. Guidance from our court of appeals will ultimately settle the uncertainty for this circuit, particularly surrounding how to discern what crossing the line from conceivable to plausible is. The facts alleged here may be

II. AMENDED COMPLAINT

Under Rule 15(a), after a responsive pleading has been filed, a party can amend a complaint to add a new party only with leave of the court or with written consent by the adverse parties. I.A.M. Nat'l Pension Fund v. TMR Realty Co., Inc., Civil Action No. 04-594 (CKK), 2006 WL 544012, at *3 (D.D.C. Mar. 6, 2006). It is within a district court's discretion to decide whether to grant leave to amend. Harris v. Sec'y, U.S. Dep't of Veterans Affairs, 126 F.3d 339, 344 (D.C. Cir. 1997) (stating that determining the propriety of the amendment is done on a case by case basis). Leave should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). See also Atchinson v. Dist. of Columbia, 73 F.3d 418, 425 (D.C. Cir. 1996). Undue delay, undue prejudice to the defendant, or futility are factors that may warrant denying leave to amend.⁶ Id. The defendant has the burden of showing why leave should not be granted. LaPrade v. Abramson, Civil Action No. 97-10 (RWR), 2006 WL 3469532, at *3 (D.D.C. Nov. 29, 2006).

barely over that line, but they make it plausible that plaintiffs could, for example, uncover a witness with personal knowledge of discussions among defendants reflecting an agreement to fix prices. Preventing plaintiffs from trying to do so at this stage on these facts seems premature.

⁶ The defendants argue that amending the complaint would be futile because the amended complaint fails to meet the Twombly plausibility standard. As is discussed above, the pending claim is sufficiently pled, and nothing in the amended complaint dilutes its sufficiency.

To determine what is "undue delay," the parties' conduct in the litigation and the possibility of resulting prejudice should be considered. Atchinson, 73 F.3d at 426 (noting that additional discovery required due to an amendment of the complaint is a consideration); see also Dove v. Washington Metro. Area Transit Auth., 221 F.R.D. 246, 248 (D.D.C. 2004) (interpreting Atchinson to state that leave to amend a complaint should not be denied solely due to the time between the filing of the complaint and the request to amend). Leave may be denied if a plaintiff unduly delayed or had "sufficient opportunity to state a claim and has failed to do so." Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 810 F.2d 243, 247 (D.C. Cir. 1987) (finding that an attempt to raise a new issue years after filing the complaint, after discovery had been conducted, and after summary judgment has been granted against the plaintiff was untimely). Although undue delay is a basis for denying leave to amend, it has been done by this circuit only when the plaintiffs sought to add new factual allegations. Harrison v. Rubin, 174 F.3d 249, 253 (D.C. Cir. 1999) (stating that technical corrections and clarification of legal theories without a showing of prejudice are not sufficient grounds for denying a motion).

"Undue prejudice is not mere harm to the non-movant but a denial 'of the opportunity to present facts or evidence which [] would have [been] offered had the amendment[] been timely.'"

Dove, 221 F.R.D. at 248 (stating that examples of undue prejudice would be if the amendments altered the choice of counsel or the nature of the opposing party's strategy) (quoting Foremost-McKesson, Inc. v. Islamic Republic of Iran, Civil Action No. 82-220 (TAF), 1988 WL 122568, at *4 (D.D.C. Nov. 8, 1988) (noting that although an amendment will strengthen one party's case to the other side's detriment, it is not necessarily unduly prejudicial)). See also Atchinson, 73 F.3d at 427 (D.C. Cir. 1996) (finding that the district court did not abuse its discretion by denying the motion to amend when the choice of counsel and litigation strategy were affected). Inconvenience or additional cost to a defendant is not necessarily undue prejudice. See Hisler v. Gallaudet Univ., 206 F.R.D. 11, 14 (D.D.C. 2002) (stating that denying leave to amend because the amended complaint "may result in additional discovery or expense" would contradict the standard of granting leave freely when justice requires).

The defendants do not offer evidence that the amended complaint would unduly prejudice their legal strategy or their ability to present evidence. Rather, the defendants argue that the plaintiffs had sufficient opportunities to add new parties in their prior complaint revisions and that leave to amend would further delay and prejudice defendants by requiring more

discovery time and a change in the scheduling order.⁷ (Defs.' Opp'n at 11-12.) However, plaintiffs' motion was timely filed before the deadline to amend the complaint or join parties set in the scheduling order. In addition, adding Shell was a response to Coral being dismissed. The plaintiffs' original complaint included Royal Dutch Shell Group as a defendant. The plaintiffs were allegedly led to believe by Shell's counsel that Coral Energy was responsible for Shell's natural gas operations, and they substituted Coral for Shell in the first amended complaint. (Pls.' Mem. P. & A. in Opp'n to Defs.' Mot. for Reconsideration & Reply to Defs.' Opp'n to Pls.' Mot for Leave to Am. at 9.) Once Coral was dismissed, the plaintiffs decided to add Shell. Rule 15 allows amending a complaint to add a party. Liberty Mut. Ins. Co. v. Hurricane Logistics Co., 216 F.R.D. 14, 16 (D.D.C. 2003).

While plaintiffs have not explained their delay in adding new plaintiffs, their first amended complaint was filed with the defendants' consent to substitute Shell for Coral, and the

⁷ The defendants also assert that "[b]ecause Plaintiffs' attempted amendment is not based on newly discovered information or a recent event and is, instead, based on the same allegations contained in the original Complaint, Plaintiffs' motion for leave to amend should be denied." (Defs.' Opp'n at 11.) Failing to allege new facts or offering a duplicative amendment can be grounds for denying leave to amend. See Wiggins v. Dist. Cablevision, Inc., 853 F. Supp. 484, 499 (D.D.C. 1994). However, Rule 15 does not explicitly require that a plaintiff's amendment add newly discovered information or be based on recent events. See Fed. R. Civ. P. 15.

plaintiffs' supplements simply set forth "transaction[s], occurrence[s], or event[s] that happened after the date of the pleading to be supplemented." See Fed. R. Civ. P. 15(d). The scheduling order has now been modified in any event since the schedule had been suspended during the now-completed mediation. It has built in a modest additional discovery period that can accommodate new parties and several more depositions.

See Hisler, 206 F.R.D. at 14 (stating that even though discovery had closed, it could be reopened and an "'adverse party's burden of undertaking discovery, standing alone, does not suffice to warrant denial of a motion to amend a pleading'" (quoting United States v. Continental Ill. Nat'l Bank & Trust Co., 889 F.2d 1248, 1255 (2d Cir. 1989))). In light of Rule 15's preference to freely allow leave to amend and the plaintiffs' adherence to the scheduling order, the amendment would not unduly delay the proceedings or prejudice the defendants. However, since plaintiffs' proposed amended complaint includes, without authorization, claims that have already been dismissed, plaintiffs' motion to amend has been denied without prejudice to plaintiffs refiling the motion with a properly drafted amended complaint.

CONCLUSION

Because the complaint alleged some circumstantial facts that support an inference of an agreement, the plaintiffs' claim is

plausible and the defendants' motion [93] to reconsider the January 9, 2007 order has been denied. Because the defendants have not shown that the amendment to the complaint would be futile, or present undue prejudice or undue delay, but the proposed amended complaint improperly alleges counts that have already been dismissed, the plaintiffs' motion [85] for leave to amend the complaint has been denied without prejudice.

SIGNED this 16th day of April, 2008.

/s/
RICHARD W. ROBERTS
United States District Judge