Tymar Distribution LLC Display Name: New England Express v. Mitchell Group USA, LLC

2021 | Cited 0 times | E.D. New York | April 15, 2021

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK ----------x TYMAR DISTRIBUTION LLC, DISPLAY NAME: NEW ENGLAND EXPRESS,

Plaintiff, - against - MITCHELL GROUP USA, LLC; RIVELLE PRODUCTS, INC.; and TIMOTHY MICHAEL FRAILLY,

Defendants. ----------x

MEMORANDUM & ORDER

20-CV-719 (PKC) (SJB)

PAMELA K. CHEN, United States District Judge:

Plaintiff Tymar Distribution LLC, Display Name: New England Express, brings this action against Defendants Mitchell Group USA LLC; Rivelle Products, Inc. d/b/a PricePRO; and Timothy Michael Frailly for violations of the Sherman Antitrust Act and tortious interference with existing and prospective economic relations in violation of New York state law. Defendants have moved to dismiss this action for lack of personal jurisdiction and venue, and failure to state a claim. granted, and this case is dismissed.

BACKGROUND I. Factual Background 1

A. The Parties Plaintiff is a Rhode Island domiciliary and limited liability company. (Second Amended , Dkt. 30, ¶ 25.) Plaintiff operated continuously as a third-party

1 For purposes of this motion, the Court accepts as true the following facts alleged in the Second Amended Complaint. See Forest Park Pictures v. Universal Television Network, Inc., 683 F.3d 424, 429 (2d Cir. 2012). seller on Amazon 2

from 2014 up to the time of the events at issue in this suit. (Id.) As a third- party seller, Plaintiff routinely listed approximately 300 brand names on Amazon and sold over 150,000 units of product. (Id. ¶ 50.) During its on made $425,498 in sales. (Id.) which are at issue in this suit was 22.1%. (Id.)

is a Delaware 3

limited liability company with its domicile and principal place of business in Miami, Florida. (Id. ¶ 28.) MGU is the -made personal products, products. (Id.) Defendant MGU also sells F&W products directly to customers through its own Amazon merchant store called . Id.)

Defendant Rivelle Products, Inc. is a duly formed corporation that is domiciled in California. (Id. ¶ 26.) Defendant Frailly is President of Rivelle. (Id. ¶ 13.) Since 2016, Rivelle, like Plaintiff, operated as a third-party seller of beauty products on Amazon, using the . 4

(Id. ¶¶ 26, 53.) Rivelle served as the exclusive distributor of some or all of MG W products listed on Amazon, and also

2 References to Amazon refer to both the company Amazon.com, Inc., as well as the retail website amazon.com.

3 Although the SAC states that MGU is a Florida limited liability company (SAC, Dkt. 30, ¶ 28), MGU is actually a Delaware limited liability company. (at 3 n.1.)

4 Alt Court will refer to this Defendant as 5

for MGU. (Id. ¶¶ 26 27.) Plaintiff alleges that, at all . (Id. ¶ 16.)

B. T for Third-Party Sellers on Amazon Amazon controls at least 47% of all e-commerce in the United States and, therefore, (Id. ¶¶ 38, 40.) As a third-

party seller on Amazon, Plaintiff operates in the so- re-selling products sourced at wholesale from manufacturers or authorized distributors outside online, but often at a cheaper price

than other sellers, See id. ¶¶ 4, 44 45.) A it is completely lawful for third-party sellers to purchase grey market goods and sell them on Amazon (Id. ¶ 46.) Moreover, Amazon permits multiple sellers to list their products for sale on the same product detail page, as long as the Id. ¶ 34.) In practice, this generates intense price competition that is highly beneficial to consumers (Id. ¶ 35.)

-party sellers from violating the intellectual property rights of others by, for example, listing counterfeit, expired, defective, or otherwise inferior product on an existing product detail page. 6

(Id. ¶ 36.) According to these policies, following a report of a violation and before it takes any action, Amazon must determine whether

5 reporting intellectual property infringement to Amazon, sometimes through brand protection

agencies or agents. (See SAC, Dkt. 30, ¶¶ 57, 57 n.19.)

6 Product detail pages are often created by a trademark holder, copyright holder, or affiliate SAC, Dkt. 30, ¶ 46.) Ama uct sellers to report violations if they believe that a product listed on a detail page is not an exact match, and therefore, improperly listed. (Id.; see also id. ¶ 34.) the reported item infringes 7

(Id.) If Amazon determines its policies have been violated - Id.) Before becoming a third-party seller on Amazon, Plaintiff executed a Business Solutions Agreement that would allow[] Amazon seller for any reason or for (Id. ¶ 49.) In general, Amazon restrict any seller from competing in the [Amazon] Marketplace and take such other unilateral

actions as A (Id. ¶ 43.)

C. Plaintiff is Eliminated as a Third-Party Seller of F&W Products In March 2018, Defendants Rivelle and MGU executed a two-year Agreement,

(Dkt. 67, at ECF 9

4 12.) Defendant Frailly signed the Distribution Agreement on behalf of Rivelle. (Id. at ECF 12.) Plaintiff alleges that Rivelle also , by lodging complaints - and

7 t requires evidence of infringement for each to challenging legal grey market practices. (SAC, Dkt. 30, ¶ 36.) Amazon is not a party to this system that Plaintiff views as turning a blind eye to and permitting anticompetitive behavior.

8 The Distribution Agreement produced during jurisdictional discovery is highly redacted, including redaction of the definition and description of which products are covered by the agreement. (Dkt. 67, at ECF 4 12.)

9 Citations to refer to the pagination generated by the Court docketing syste 10

(SAC, Dkt. 30, ¶¶ 56 58, 66.) According to Plaintiff, these services l[ie] (Id. ¶ 58.) MGU created and provided the email address

(h to Rivelle corresponding with e- (Dkt. 63-1, at

ECF 22 23.) Plaintiff alleges that Rivelle used this its unlawful purpose as a brand protector for MGU. (SAC, Dkt. 30, ¶ 57; see also id. ¶ 57 n.19.)

In May 2018, Plaintiff made the first of several purchases of F&W products from MGU. (Id. ¶ 61.) At

no time did MGU tell Plaintiff that it would be limited or prohibited from selling F&W products on Amazon. (Id. ¶ 60.) Between May 17 and October 18, 2018, Plaintiff sold approximately $28,350 worth of F&W products purchased from MGU. (Id. ¶ 51.) Plaintiff not repackage, modify, or otherwise change the product f id. ¶ 8); rather, it sold on Amazon (id. ¶ 51).

On or about June 22 or 23, 2018, MGU began making intellectual property complaints against Plaintiff to Amazon, alleging copyright and trademark infringement with

respect to F&W products. (Id. ¶ 64.) On June 24, 2018, Plaintiff sent a ecommerce email address demanding withdrawal of two allegedly false IP complaints. (Dkt.

67, at ECF 23 24.) The email, which was received by MGU employee Linda Patty, was forwarded to Defendant Frailly, who responded to Patty,

Id. at ECF 23.)

10 ¶ 59.) However, Plaintiff does not plead any facts in support of this allegation. Around this time, Plaintiff retained New York-based, F[a]m[u]laro 11

(SAC, Dkt. 30, ¶ 65; see also id. ¶ 15.) On June 27, 2018, R&F emailed a letter from attorney Anthony Famularo to ecommerce , disclaiming and demanding retraction of complaints against Plaintiff. (Dkt. 67, at ECF 18 21.) Godfrey Barboza of MGU forwarded this letter to Defendant Frailly, noting, Id. at

ECF 25.) Someone 12

responded to Famularo

(Id. at ECF 28.) Famularo replied that he would relay the proposal and requested clarification on the complaints, which was provided. (Id. at ECF 26 28.) When Famularo later followed up with MGU 13

regarding the complaints, Barboza forwarded the email to Frailly, who responded, Id. at ECF 26.)

Throughout July 2018, MGU filed more than a dozen IP complaints with Amazon accusing Plaintiff of counterfeiting. (See SAC, Dkt. 30, ¶¶ 68 72.) , the F&W listings , after Plaintiff produced invoices

11 The Court assumes that Plaintiff is referring to the law firm Rosenbaum, Famularo & Segall PC. See https://rosenbaumfamularo.com/about/ (last visited Mar. 23, 2021). The Court nonetheless will refer to the law firm

12 favorable to Plaintiff, the Court assumes that the response was sent by someone at Rivelle on

behalf of MGU. (See Dkt. 67, at ECF 25.)

13 The Court assumes that, as of the time of these emails in June 2018, Famularo believed he was corresponding directly with MGU vi ail address and was unaware that Rivelle was using that email address to communicate on behalf of MGU. verifying purchases directly from MGU, the listings were restored. (Id. ¶ 68.) On August 3, 2018, R&F sent a letter to Amazon criticizing the takedowns as premised complaints and explaining that Plaintiff sold products sourced directly from MGU. (Id. ¶ 73;

Dkt. 7-17, at ECF 1 3.) MGU continued to make false counterfeiting complaints against Plaintiff, including on August 10 and 18, September 27, and October 2, 2018. (SAC, Dkt. 30, ¶ 74.)

On August 23, 2018, Famularo sent a letter to ecommerce

(Dkt. 67, at ECF 32 33.) Specifically, Famularo solicited an

Id.) Famularo reiterated that the counterfeit complaints

against Plaintiff were baseless because Plaintiff had sourced its F&W products directly from MGU, and threatened that MGU could face civil or criminal penalties

Id.) On August 27, 2018, Frailly, writing from tim.frailly@rivellepro.com and copying the ecommerce emailed CJ Rosenbaum, another R&F attorney, and Famularo in response to August 23 solicitation letter, explaining

(Dkt. 67, at ECF 35; see also Dkt. 59.) The next day, Famularo responded Dkt. 67, at ECF 2.) Frailly and R&F exchanged a total of five emails. 14

(Dkt. 63-1, at ECF 32.) By October 2, 2018, MGU had initiated a total of 41 false IP complaints against Plaintiff. (SAC, Dkt. 30, ¶¶ 71, 74 75.) privileges based on five unresolved counterfeit complaints. (Id. ¶ 79; Dkt. 63-1, at ECF 20.)

Amazon explained that Plaintiff could its seller account inter alia, proof of authenticity for infringing listings (i.e., invoice or Order ID) or information about why the complaints are incorrect. (Dkt. 63-1, at ECF 20.) However, alternative, in mitigation of its damages, but to hire a consultant for $5,500 and thereafter agree to ce retraction of IP [c] SAC, Dkt. 30, ¶ 80.) On

October 22, 2018, the parties entered into such an agreement, which ability to sell F&W products on outlets other than Amazon. (Id. ¶ 81; Dkt. 7-16, at ECF 1 2.)

Plaintiff was reinstated as an Amazon seller on November 6, 2018. (SAC, Dkt. 30, ¶¶ 50, 112.)

* * * In sum, complaints against it were, purely and simply, a whether [or] counterfeit (which Amazon is quick to sanction) Id. ¶ 82.)

14 art of jurisdictional discovery; the remaining three emails were withheld by Defendant Rivelle as privileged attorney-client communication between Frailly and R&F. (See Dkt. 63-1, at ECF 31 32 (privilege log reflecting five emails).) The Court further notes that Plaintiff does not explain what happened after Frailly exchanged these emails with R&F, including, for example, whether Plaintiff terminated its attorney-client relationship with R&F or attempted to convey the solicitation to MGU on its own behalf. Plaintiff further alleges that consumers have been harmed by its exclusion as a third-party seller of F&W products on Amazon because, without competition from unauthorized sellers, the price of F&W products on Amazon has the availability of F&W products has been limited. (Id. ¶¶ 83, 84.) II. Procedural History

On February 10, 2020, Plaintiff commenced this action against Defendant MGU by filing a complaint, which was amended on February 19, 2020, to add Defendants Rivelle and Frailly. 15 (See Complaint, Dkt. 1; Amended Complaint, Dkt. 6.) The Amended Complaint alleges antitrust violations of the Sherman Act and violations of New York law for tortious interference with existing and prospective economic relations and for libel per se. (See generally Amended Complaint, Dkt. 6.) On May 4, 2020, Defendants Rivelle, Frailly, and MGU requested a conference in advance of filing motions to dismiss. (Dkts. 22, 23.) On May 6, 2020, Plaintiff responded and attached limited jurisdictional discovery requests aimed at Defendants MGU and Rivelle. (Dkts. 24, 24-1, 25, 25-1.) The Court scheduled a jurisdiction aspe

On June 4, 2020, the Court held a conference, during which it ordered Plaintiff to file a second amended complaint by June 18, 2020 that, inter alia, alleged more facts to establish jurisdiction. 16

(6/4/2020 Minute Entry; June 4, 2020 Conference Transcript , Dkt.

15 The Complaint and Amended Complaint also named Kameal and Vickram Narain as defendants. On February 20, 2020, after filing the amended complaint, Plaintiff voluntarily dismissed the Narains without prejudice (Notice of Voluntary Dismissal, Dkt. 8), and they were terminated as parties (2/20/2020 Docket Order).

16 ese events happened in New York, so I brought the case in New York rather than telling the client that 70, at 37:8 13.) During the conference, Plaintiff personal jurisdiction argument was the negotiations with R&F. (6/4/2020 Tr., Dkt. 70, at 9:12 11:8.) The Court determined that limited jurisdictional discovery was warranted and directed

Defendants to respond to discovery requests by June 19, 2020. (6/4/2020 Minute Entry.)

On June 17, 2020, Plaintiff filed the SAC with exhibits against Defendants MGU, Rivelle, and Frailly,

alleging violations of the Sherman Act and New York law for tortious interference with existing and prospective economic relations. 17

(See generally SAC, Dkt. 30.) Thereafter the parties engaged in extensive and repetitive motion practice regarding jurisdictional discovery (see Dkts. 31 45), for which they were admonished by the Honorable Sanket J. Bulsara, Magistrate Judge (see 7/10/2020 Docket Order). On July 21, 2020, the parties stipulated, inter alia, that Defendant Rivelle would but that Defendant Frailly retained all rights to contest personal jurisdiction over him. (Stipulation

, Dkt. 46.) On July 22 and 23, 2020, Plaintiff moved to compel Defendant and

13:10.) As the Court explains in this opinion, Plaintiff has failed to adequately allege that the events at issue in this case happened in New York or that they have a connection with New York sufficient 4, the Court is inclined to see his selection of venue more as a reflection of personal convenience

have been commenced in the Southern District of Florida, Central District of California, District of Delaware, or Western Wa -served to consider, in the first instance, whether any of those venues were more appropriate than the Eastern District of New York rather than inviting costly and time-consuming motion practice and discovery at the outset of the case.

17 . . . defamation under the common SAC, Dkt. 30, ¶ 11), the defamation claim on the record during the June 4, 2020 conference, after conceding that the claim was barred by the one-year statute of limitations (6/4/2020 Tr., Dkt. 70, at 36:19 37:5), and Plaintiff does not allege facts in support of such a claim in the SAC. See Dkts. 47, 49.) Judge Bulsara denied both motions to be onal jurisdiction over

MGU, Tymar Distrib. LLC v. Mitchell Grp. USA, LLC, No. 20-CV-719 (PKC) (SJB), 2020 WL 8408809, at *1 3 (E.D.N.Y. Sept. 8, 2020), and that Rivelle jurisdiction meant it was not required to provide jurisdictional discovery, see id. at *3.

On August 18, 2020, Defendant MGU moved to dismiss based on lack of personal jurisdiction, improper venue, and failure to state a claim, pursuant to Federal Rule of Civil Rule 12(b)(2), Rule 12(b)(3), and Rule 12(b)(6) respectively. (See generally Rivelle and Frailly jointly moved to dismiss on the same grounds as MGU, though Defendant Rivelle did not move to dismiss for lack of personal jurisdiction. (See generally Rivelle

dants filed reply briefs. (Reply Rivelle MGU of Law, Dkt. 69.) Thereafter, Plaintiff provided the Court with supplemental authority, to which

Defendants Rivelle and Frailly responded. (See Dkts. 71, 72, 73.)

LEGAL STANDARDS I. Rule 12(b)(2)

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Plaintiff bears the burden of demonstrating personal jurisdiction over a person or entity Troma Entm t, Inc. v. Centennial Pictures Inc., 729 F.3d 215, 217 (2d Cir. 2013) (citation omitted). The showing a plaintiff must make to defeat a motion to dismiss based on lack of on the procedural posture of the case. Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A., 722 F.3d 81, 84 (2d Cir. 2013) (per curiam). Prior to discovery, the plaintiffs prima facie showing may be established solely by allegations Id. at 85 (quoting Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir. 1990)). After discovery, ho the plaintiffs prima facie showing . . . must include an averment of facts that, if credited by the trier [of fact], would suffice to establish jurisdiction over the defendant. Id. (quoting Ball, 902 F.2d at 197). In other words, the prima facie showing must be factually supported. Id. (quoting Ball, 902 F.2d at 197); see Chloe v. Queen Bee of Beverly Hills, LLC, 616 F.3d 158, 163 (2d Cir. 2010).

In evaluating whether a prima facie showing of personal jurisdiction has been made, the court m construe the pleadings and affidavits in the light most favorable to plaintiffs, resolving Chloe, 616 F.3d at 163; accord Yih v. Taiwan Semiconductor Mfg. Co., 815 F. Appx 571, 572 73 (2d Cir. 2020) (summary order); Mednik v. Specialized Loan Servicing, LLC, No. 20-CV-427 (MKB), 2021 WL 707285, at *3 (E.D.N.Y. Feb. 23, 2021). However, courts resolve argumentative inferences in the plaintiffs favor or accept as true a legal conclusion couched as a factual allegation. Lifeguard Licensing Corp. v. Ann Arbor T-Shirt Co., LLC, No. 15-CV-8459 (LGS), 2016 WL 3748480, at *2 (S.D.N.Y. July 8, 2016) (quoting In re Terrorist Attacks on Sept. 11, 2001, 714 F.3d 659, 673 (2d Cir. 2013)). II. Rule 12(b)(3)

When faced with a Rule 12(b)(3) motion to dismiss for improper venue, a court applies the same standard it would to a motion to dismiss under Rule 12(b)(2). Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 355 (2d Cir. 2005). If the court chooses to rely on pleadings and affidavits, the plaintiff need only make a prima facie showing of [venue]. Id. at 355 (quoting CutCo Indus., Inc. v. Naughton, 806 F.2d 361, 364 (2d Cir. 1986)); see also Orly Indus., Inc. v. Rite Aid Hdqtrs. Corp., No. 12-CV-855 (SLT) (JMA), 2013 WL 4516101, at *3 (E.D.N.Y. Aug. 23, 2013) Rule 12(b)(3) allows a court considering a venue challenge to consider evidence outside the four corners of the complaint, including affidavits and other documentary evidence. omitted)). In analyzing whether the plaintiff has made the requisite prima facie showing that venue is proper, [courts] view all the facts in a light most favorable to plaintiff. Phillips v. Audio Active Ltd., 494 F.3d 378, 384 (2d Cir. 2007). III. Rule 12(b)(6)

To survive a motion to dismiss pursuant to Rule

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,

the court to draw the reasonable inference that the defendant is liable for the misconduct Id. (citing Twombly, 550 U.S. plausibility standard is not akin to a Id. (quoting Twombly, 550 U.S. at 556). Determining whether a complaint states a

plausible claim for r -specific task that requires the reviewing court to draw on its Id. n addressing the sufficiency of a complaint[,] [the Court] accept[s] as true all factual allegations and draw[s] from

them all reasonable inferences; but [the Court is] not required to credit conclusory allegations or legal conclusions couched as factual a Rothstein v. UBS AG, 708 F.3d 82, 94 (2d Cir. 2013).

DISCUSSION A Court facing a challenge to both its jurisdiction over a defendant and the sufficiency of any claim must first address the jurisdictional questions. [L]ogic compel[s] initial consideration of the issue of jurisdiction over the defendant a court without such jurisdiction lacks power to Arrowsmith v. United Press Int l, 320 F.2d 219, 221 (2d Cir. 1963); see also id. at 234 (vacating judgment dismissing the complaint for failure to state a claim and remanding for consideration of personal jurisdiction and venue before consideration of the merits); Lugones v. Pete & Gerry s Organic, LLC, 440 F. Supp. 3d 226, 234 (S.D.N.Y. 2020) (citing Arrowsmith and finding that it must first address the to dismiss for lack of personal jurisdiction before reaching the motion to dismiss for failure to state a claim). Therefore, the Court will first address whether Plaintiff has made a prima facie showing of personal jurisdiction over Defendants Frailly and MGU before moving to the sufficiency of federal antitrust and state-law claims. I. The Court Does Not Have Personal Jurisdiction Over Defendant Frailly

A. Section 12 of the Clayton Act To the extent Plaintiff claims that the Court has personal jurisdiction over Defendant Frailly under the Clayton Act, that argument fails. Section 12 of the Clayton Act states

[a]ny suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. 15 U.S.C. § 22 (emphasis added). This provision applies to corporations, and has been narrowly construed to Kingsepp v. Wesleyan Univ., 763 F. Supp. 22, 25 (S.D.N.Y. 1991) (quoting McManus v. Tato, 184 F. Supp. 958, 959 (S.D.N.Y. 1959)). Thus, even if the Clayton Act provided jurisdiction over the court must [still] look to the long-arm statute of the state where it sits in order to reach an individual defendant in an antitrust suit where he is transacting business. Daniel v. Am. Bd. of Emergency Med. (Daniel I), 802 F. Supp. 912, 919 (W.D.N.Y. 1992). The Court does not have jurisdiction over Defendant Frailly pursuant to the Clayton Act and therefore turns to - arm statute.

B. New York Civil Practice Law and Rules Section 302(a)(1) A district courts personal jurisdiction is determined by the law of the state in which the court is located. Licci ex rel. Licci v. Lebanese Canadian Bank, SAL (Licci I), 673 F.3d 50, 59 60 (2d Cir. 2012) (quoting Spiegel v. Schulmann, 604 F.3d 72, 76 (2d Cir. 2010)). There are two

types of personal jurisdiction (1) general jurisdiction, which may be asserted over a defendant when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State depends on an affiliatio[n] between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore

subject to the States regulation. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (citations omitted);

accord Waldman v. Palestine Liberation Org., 835 F.3d 317, 331 (2d Cir. 2016). In New York, provide the authority for the exercise of general and specific personal jurisdiction, respectively. See Licci I, 673 F.3d at 60 n.9; Mednik, 2021 WL 707285, at *3.

Plaintiff alleges that the Court has specific personal jurisdiction over Defendant Frailly 18 under CPLR § 302(a)(1) based with New York- based R&F. (SAC, Dkt. 30, ¶¶ 15, 20 21.) These communications amount to a total of five emails

18 Plaintiff does not assert general personal jurisdiction over Defendant Frailly, who is a resident and domiciliary of California; does not own property, maintain a bank account, file taxes, and has only traveled to New York twice in his life and only for brief leisure vacations. (See Declaration of exchanged between Frailly and R&F in which Frailly allegedly the alleged conspiracy

between Rivelle and MGU to eliminate competition and preserve supra-competitive pricing of F&W products on Amazon. 19

(Id. ¶ 21; see 35.) jurisdiction argument is complicated by the unique fact that R&F served as counsel to both Plaintiff

and Defendant Rivelle. In that sense, the at-issue communications at once constitute a response to a solicitation conveyed by -client communication addressing a potential conflict of interest from a client protecting its own business interest. The Court views these contacts through both lenses and concludes that it does not have personal jurisdiction over Defendant Frailly.

Section 302(a)(1) authorizes jurisdiction over defendants if: 1) the defendants transact business in New York; and 2) the cause of action arises from that transaction of business. Reich v. Lopez (Reich I), 858 F.3d 55, 63 (2d Cir. 2017). The defendant need not be physically present as long as he engages in [p]urposeful activities or volitional acts through which he avails [him]self of the privilege of conducting activities within the . . . State, thus invoking the benefits and protections of its laws Chloe, 616 F.3d at 169 (quoting Fischbarg v. Doucet, 880 N.E.2d 22, 26 (N.Y. 2007)). proof of one transaction in New York is sufficient to invoke jurisdiction, . . . so long as the defendants activities here were

19 30, ¶ 21), but alleges no specific facts to support the occurrence of such discussions. See Dorchester Fin. Sec., 722 F.3d at 85. Even assuming, arguendo, Plaintiff alleged facts regarding such phone discussions, it would not change conclusion that Fr jurisdiction over him in this matter. Id. (quoting Kreutter v. McFadden Oil Corp., 522 N.E.2d 40, 43 (N.Y. 1988)). Ultimately, the the quantity but the quality of the contacts Paterno v. Laser Spine Inst., 23 N.E.3d 988, 994 (N.Y. 2014); accord

Rosenblatt v. Coutts & Co. AG, 750 F. Appx 7, 10 (2d Cir. 2018) (summary order); Mason v. Antioch Univ., No. 15-CV-5841 (SJF) (GRB), 2016 WL 2636257, at *7 (E.D.N.Y. May 5, 2016) necessarily requires examination of the particular facts in each case Licci v. Lebanese Canadian Bank (Licci II), 984 N.E.2d 893, 899 (N.Y. 2012).

When viewing contacts with R&F as a response to a solicitation offer from , the Court is not convinced that Frailly has in New York within the meaning of Section 302(a)(1). Although New York courts have held that jurisdiction may extend to electronic and telephonic means to project themselves into New such jurisdiction extends when seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship Paterno, 23 N.E.3d at 993 (emphases added); see Fischbarg, 880 N.E.2d at 28 [J]urisdiction may [] be proper if the defendant on his or her own initiative projects himself or herself into this state to engage in a sustained and substantial transaction of business alterations, quotations, and citation omitted)). Here, Frailly email contacts with New York were responsive in nature, and not the type of interactions that demonstrate the purposeful availment necessary to confer personal jurisdiction over [an] out-of-state defendant[] See Paterno, 23 N.E.3d at 994 (holding that the Florida-based defendant whom the New York-based plaintiff was not subject to personal jurisdictio the and spoke with the plaintiffs New York-based doctor).

On August 23, 2018, New York-based R&F sent a letter to the ecommerce email address

(Dkt. 67, at ECF 32 33.) On August 27, 2018, Defendant Frailly

responded from his Rivelle email address

(Id. at ECF 35.) The next day, August 28, 2018, R&F replied that

Id. at ECF 2.) Jurisdictional discovery revealed that following August 27 more emails were exchanged regarding the same topic. 20

(Dkt. 63-1, at ECF 32.) Even construing these communications in a light most favorable to Plaintiff, it is clear that Frailly was neither seek[ing] out initiat[ing] contact with New York, Paterno, 23 N.E.3d at 993, but was responding to a communication that happened to originate in New York. Such responsive contacts do not, in themselves, constitute the transaction of business, and thus do not confer jurisdiction under Section 302(a)(1). See Gazzillo v. Ply Gem Indus., Inc., No. 17-CV-1077 (MAD) (CFH), 2018 WL 5253050, at *5 (N.D.N.Y. Oct. 22, 2018)

20 Although the three additional emails were not produced during jurisdictional discovery, the privilege log produced by Rivelle describes thos]ttorney- he purposes of preventing conflicts of interest that would damage the attorney-client relationship, and seeking advice re: services offered by the law firm. Dkt. 63-1, at ECF 32.) The Court assumes that the reference

(See Dkt. 59, at ECF 2.) The

67, at ECF 2.) The privilege log indicates that conversations between Frailly and R&F continued on that front. (See Dkt. 63-1, at ECF 32. explained herein, that they have a sufficient nexus to ims to confer jurisdiction over

Defendant Frailly. (See 29.) (finding that the defendants did not purposefully avail themselves of New York when they sent reply letters to [two] New York residents that merely [denied] warranty claims Mason, 2016 WL 2636257, at *8 (finding that the defendant was not subject to jurisdiction in New York based only on responses to inquiries from the New York-based plaintiffs). By responding to a solicitation that was sent from New York (but that could have been sent from was located), Frailly can hardly initiative. Cf. Fischbarg, 880 N.E.2d at 26 28 (finding that it was proper to exercise jurisdiction

over the defendant sought out plaintiff in New York and established an ongoing attorney-client relationship with inter alia jec ume faxes and e- . Even when construing the pleadings in

the light most favorable to Plaintiff, and viewing Frailly as inserting himself into, and thereby obstructing, , the Court still does not find that Frailly was , see Chloe, 616 F.3d at 169 (quoting Fischbarg, 880

N.E.2d at 26), simply by raising the conflict of int . Moreover, even if these communications satisfied the transacting-business prong of the analysis, they do not bear a sufficient nexus to claims to confer jurisdiction, in that the allegedly false IP complaints submitted by MGU to Amazon. 21

21 generally that self

into New York in connection with the IP complaints against Plaintiff. (See Dkt. 67, at ECF 2.)

Although Section 302(a)(1) does not require causation between the alleged unlawful conduct and the , the legal claims must not be from the in the state, such that the Licci II, 984 N.E.2d at 900 01. Generally, where claims have been dismissed on jurisdictional grounds for lack of a sufficient nexus . . . , the injuries sustained and the resulting disputes [will bear] such an attenuated connection to the New York activity upon which the plaintiffs attempt[] to premise jurisdiction that the disputes [cannot] be characterized as having arisen from the New York activity. Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC, 450 F.3d 100, 104 (2d Cir. 2006) (collecting cases); see, e.g., Johnson v. Ward, 829 N.E.2d 1201, 1203 (N.Y. 2005) Plaintiffs cause of action arose out of defendants allegedly negligent driving in New Jersey, not from the issuance of a New York drivers license or vehicle registration. Beacon Enters., Inc. v. Menzies, 715 F.2d 757, 765 (2d Cir. 1983) D shipments of goods into New York are irrelevant to [plaintiff]s declaratory judgment action[, which] would exist regardless of whether products were sent to New York. .

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If at least one element [of the claim] arises from the New York contacts, the relationship between the business transaction and the claim asserted supports specific jurisdiction. Licci II, 984 N.E.2d at 901; accord Licci ex rel. Licci v. Lebanese Canadian Bank, SAL (Licci III),

732 F.3d 161, 168 69 (2d Cir. 2013). Here, none of the claims arise from or are sufficiently related to email communications with R&F in response to a proposed joint venture. First, Plaintif claims alleging Sherman Act violations require proof that (1) the from an agreement, tacit or express common scheme . . . constituted an unreasonable restraint of trade United States v. Apple, Inc., 791 F.3d 290, 314 315, 320 21 (2d Cir. 2015). Plaintiff alleges that email

conspiracy to eliminate price competition (see SAC, Dkt. 30, ¶¶ 15, 20 21); however, it strains independent decision . Moreover,

these communications have nothing to do with whether the alleged restraint on trade, i.e., the elimination of price competition for F&W products, was, in fact, unreasonable. Second, claim alleging tortious interference requires proof (1) the plaintiff had business relations with

a third party; (2) the defendant interfered with those business relations; (3) the defendant acted for a wrongful purpose or used dishonest, unfair, or improper means; and (4) the defendants acts injured the relationship. Catskill Dev., L.L.C. v. Park Place Entm t Corp., 547 F.3d 115, 132 (2d Cir. 2008). limited communications with R&F about a proposed joint venture are unmoored from all elements of this claim, which alleged interference s relationship with Amazon through allegedly false IP complaints made to Amazon. In sum, the Court finds that Plaintiffs antitrust and tortious interference claims would exist regardless of whether Frailly communicated with New York-based R&F, see Beacon Enters., Inc., 715 F.2d at 765 Defendant Frailly based on these communications.

Even when viewing Defendant through the lens of an attorney-client relationship, and not simply as responsive to a solicitation by Plaintiff, the Court still cannot find that Section 302(a)(1) is satisfied, though for a different reason. retention of New York lawyers tasked with the advancement of [d]efendants interests qualifies as

Reich v. Lopez (Reich II), 38 F. Supp. 3d 436, 458 (S.D.N.Y. 2014) (citing PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1109 (2d Cir. 1997)), aff d, 858 F.3d 55 (2d Cir. 2017), jurisdiction does not lie where those lawyers did not participate in the see id. Two cases are instructive on this point. 22

In Reich II, the plaintiff alleged that the defendants transacted business in New York by [] and consulting with New York counsel on defamation lawsuits, to which the plaintiff was not a party, thereby involving New York counsel in their - to conceal an alleged illegal scheme. 38 F. Supp. 3d at 458. The court held that it did not have personal jurisdiction over defendants, noting the absence of any allegation that New York counsel participated in or provided advice regarding the two alleged phone calls giving rise to the current claims, and concluding th New York counsel was retained by

Defendants, who separately and independently caused harm to Plaintiffs. Id. (emphasis added). By contrast, in PDK Labs, Inc. v. Friedlander, the Second Circuit affirmed jurisdiction over a defendant who retained New York counsel that frequently contacted the plaintiff by phone and letter, threatened legal action, attempted settlement of alleged claims, and solicited the product. 103 F.3d at 1109. The C ersistent campaign by [the defendant]s

New York [attorney] agent . . . constitutes business transacted in New Yorkthe declaratory judgment action the strategy of intertwining legal threats with solicitation of investments in his product Id. at 1109 10.

22 Tilyou v. Carroll, 92-CV-750 (CPS), 1993 U.S. Dist. LEXIS 3217 (E.D.N.Y. Mar. 15, 1993) (see 3, at 25, 27 29) inapposite as the facts of that case are entirely distinguishable from the facts here. Tilyou involved a non- domiciliary attorney who solicited the New York-based plaintiff as a client, established an ongoing attorney-client relationship with the plaintiff, and then conducted activities in New York that gave Tilyou, 1993 U.S. Dist. LEXIS 3217, at *2 4, *17 18.

Here, the jurisdictional facts alleged by Plaintiff are far more analogous to those in Reich II than PDK Labs, Inc. Plaintiff that gave rise Sherman Act and state law claims. See PDK Labs, Inc., 103

F.3d at 1109. Plaintiff does not allege that R&F was involved in any negotiations between Rivelle and MGU to form the alleged anticompetitive conspiracy, or that R&F made IP complaints to Amazon on behalf of Defendants, or that Defendants directed R&F to contact or interact with Plaintiff. 23

In fact, Plaintiff retaining the firm as counsel. Any contention by Plaintiff that Frai ttorney-client coordination with R&F bears a sufficient nexus with claims is akin to the unsuccessful contention in Reich II that - to confer jurisdiction. See 38 F. Supp. 3d at 458. It does not. The pleadings, even when construed in a light most favorable to Plaintiff, plainly allege that Rivelle and MGU, separately and independently of R&F, harmed Plaintiff by allegedly conspiring to eliminate price competition. See id. In sum, Plaintiff has failed to make a prima facie showing of personal jurisdiction over Defendant Frailly under Section 302(a)(1).

* * *

23 Plaintiff argues in its opposition that it sought, unsuccessfully, to obtain discovery that would reveal hether R&F crea - to (Pl 26 27.) For the reasons started herein, the Court is skeptical that such

demonstrated involvement is tangential to Plaintif ction. In any event, the mere prospect that Plaintiff might uncover evidence to support its claims during discovery does not cure an otherwise inadequate pleading. See Iqbal, 556 U.S. at 678 . . . does not unlock the doors of discovery for a

uld be imputed to Defenda to personal jurisdiction. (See 31.) The stipulation expressly states that

Defendant Frailly retains jurisdiction over [him] ., Dkt. 46, ¶ 3), and Plaintiff has provided neither persuasive authority nor a compelling reason why this reservation of rights should not be honored. 24

that Defendant Frailly is subject to personal jurisdiction as a co-conspirator with Rivelle and MGU. (26, 36 37.) To allege a conspiracy theory of jurisdiction, Plaintiff must allege that fendant participated in the conspiracy; and (3) a co-conspirators overt acts in furtherance of the conspiracy had sufficient contacts with a state to subject that co- In re SSA Bonds Antitrust Litig., 420 F. Supp. 3d 219, 236 (S.D.N.Y. 2019) (quoting Charles Schwab Corp. v. Bank of Am. Corp., 883 F.3d 68, 87 (2d Cir. 2018)). Curiously, and circularly, the contacts Plaintiff relies upon to allege conspiracy jurisdiction vis-à-vis Frailly own contacts with New York. (36 37.) While this may amount to an argument for conspiracy jurisdiction

over alleged co-conspirators Rivelle and MGU, it does not constitute an argument for conspiracy jurisdiction over Defendant Frailly himself, and as already discus 24

[Rivelle] to concede personal jurisdiction of itself, shield relevant discovery as to Mr. Frailly (and MGU), t (31.) The so- from Rivelle, and that Judge Bulsara denied, included s sufficient to disclose any

standard verbiage used by defendant in reporting as counterfeit the listings or products listed by third party sellers on Amaz MGU. Tymar Distrib. LLC, 2020 WL 8408809, at *3. Plaintiff fails to explain how such discovery would strengthen its allegation that the Court has personal jurisdiction over Defendant Frailly, or how Plaintiff is unfairly prejudiced in meeting its burden regarding personal jurisdiction without such discovery. with New York are insufficient under New York law to confer personal jurisdiction over him in New York. 25

For all of these reasons, Defendant Frailly jurisdiction is granted, and he is dismissed from this case.

II. The Court Does Not Have Personal Jurisdiction Over Defendant MGU

A. Section 12 of the Clayton Act Plaintiff claims that the Court has personal jurisdiction over Defendant MGU under the Clayton Act because MGU conducted suit-related activities within this Distr ¶ 20.) Specifically, Plaintiff alleges that R&F provide other services

to MGU. (Id. ¶¶ 15, 20.) Section 12 properly confer[s] personal jurisdiction over a defendant only when the action is brought in the district where the defendant resides, is found, or transacts business, that is, the district where Section 12 venue lies. Daniel v. Am. Bd. of Emergency Med. (Daniel II), 428 F.3d 408, 427 (2d Cir. 2005) (quotation and citation omitted) s to commercial concept of doing business or carrying on business of any su 26

Id.

25 Because the Court concludes that Section 302(a)(1) does not confer jurisdiction over consider whether if such jurisdiction were conferred it would offend notions of due process. Mayes v. Leipziger, 674 F.2d 178, 185 n.5 (2d Cir. 1982).

26 venue under Section 12 of the stantial part of the events or omissions givi 32.) The § 1391(b)(2), not Section 12 of the Clayton Act. See Daniel II, 428 F.3d at 430 34. While the general venue statute remains available to plaintiffs, where 28 U.S.C. § 1391 is the basis for venue, then the must look to other service of process provisions, notably those specified in [Rule] 4 or incorporated therein from state law personal jurisdiction. Daniel II, 428 F.3d at 427. at 428 (quoting United States v. Scophony Corp. of Am., 333 U.S. 795, 807 (1948)). To transact continuity and certainly mo In re SSA Bonds Antitrust Litig., 420 F. Supp. 3d at 230 (citation omitted).

defendant manufacturer that promotes its goods in a judicial district through product demonstrations, that solicits orders through its salesmen in that district, and that ships its goods into that district clearly transacts business under Section 12. Daniel II, 428 F.3d at 429 (citing Eastman Kodak Co. of N.Y. v. S. Photo Materials Co., 273 U.S. 359, 374 77 (1927)). Compare Banana Distribs., Inc. v. United Fruit Co., 269 F.2d 790, 794 (2d Cir. 1959) (holding that the defendant that solicited orders, maintained offices, and provided customer assistance in the district transacted business there), with City of Long Beach v. Total Gas & Power N. Am., Inc., 465 F. Supp. 3d 416, 433 (S.D.N.Y. 2020) (finding that the defendant that made filings with the New York office of the SEC, paid a settlement through a New York bank account, and made a City did not transact business in the district). In assessing whether a defendant considered in light of the nature of [the Daniel II, 428 F.3d at 430.

Plaintiff has failed to make a prima facie showing that venue, and therefore personal jurisdiction under Section 12, is satisfied. Plaintiff alleges that MGU is a Florida limited liability company, 27

with its principal place of business in Miami, Florida. (SAC, Dkt. 30, ¶ 28.) Because offices, employees, or any significant presence or

27 As previously discussed, although the SAC alleges that MGU is a Florida limited liability company (SAC, Dkt. 30, ¶ 28), MGU states in its motion to dismiss that it is a Delaware limited liability company. (at 3 n.1.) In any event, MGU is not a New York limited liability company. operations this district re. See City of Long Beach, 465 F. Supp. 3d at 432. The primary contacts Plaintiff alleges MGU to have with New York arise out of with R&F, regarding Plaintiff itiative to be per products on Amazon and provide other services to MGU. (See SAC, Dkt. 30, ¶¶ 15, , at 31 33, 39.) However, these limited contacts, initiated by R&F, do not equate to MGU carrying on business of any substantial character district. See Daniel II, 428 F.3d at 428; see also In re SSA Bonds Antitrust Litig., 420 F. Supp. 3d at 230. This is particularly true when these contacts are Daniel II, 428 F.3d at 430, which is distributing and selling -made personal care products. (SAC, Dkt. 30, ¶ 28).

Plaintiff does not allege facts to show with R&F (or any other party in the district) contribute to or comprise a substantial portion of MGU distribution and sales business or revenue. See Daniel II, 428 F.3d at 430 (finding by mailing an application to plaintiff where the nature of business was certifying doctors in emergency medicine, and the revenue from application fees in the district was de minimis); see also Dennis v. JPMorgan Chase & Co., 343 F. Supp. 3d 122, 200 (S.D.N.Y. 2018) (finding that a district where the nature of business was banking and employee recruitment in the district did not comprise a substantial component of that business). 28

Further, to the extent Plaintiff alleges that

28 Although the SAC 30, ¶ 15), which is located in the Eastern District of s letterhead indicates that its office, at least as of the time of the relevant communications, was located at Madison Square Garden, 5 Penn Plaza, 23rd Fl., New York, NY 10001 (see Dkt. 67, at ECF 19; Dkt. 59, at ECF 4), which is in the Southern District contacts with R&F sufficiently demonstrated that MGU transacted business of a substantial character, that that business occurred in this district. MGU transacts business in the district based on its sale of F&W goods to (SAC, Dkt. 30, ¶ 23), such allegations are unavailing, as Plaintiff has not alleged nor pled facts demonstrating that these sales have any connection to this district. See City of Long Beach, 465 F. Supp. 3d at 433.

Thus, Plaintiff has failed to make a prima facie showing that Section 12 venue, and therefore personal jurisdiction, is satisfied with respect to Defendant MGU. See Daniel II, 428 F.3d at 427.

B. New York Civil Practice Law and Rules Section 302(a)(1) Plaintiff also alleges that Defendant MGU is subject to the personal jurisdiction of the Court under Section 302(a)(1) based on the following communications with New York-based R&F: (1) a June 27, 2018 letter on behalf of Plaintiff from R&F to MGU challenging and requesting withdrawal of three IP complaints against Plaintiff (Dkt. 7-8; Dkt. 67, at ECF 29); (2) a June 27 response from MGU 29

reiterating a previously conveyed compromise, i.e.,

(Dkt. 67, at ECF 28); (3) a June 27 reply from R&F

(id. at ECF 27 28); (4) a June 29 follow-up from R&F requesting additional information about the complaints against Plaintiff (id. at ECF 27); (5) a June 29 response from MGU explaining

id. at ECF 26 27); (6) a June 29 reply from R&F, requesting information about the basis

29 For purposes of this analysis, the Court assume ecommerce email address were made by or on behalf of MGU. (See Dkt. 67, at ECF 25.) for the trademark complaint (id. at ECF 26); and (7) a July 3 follow-up from R&F again requesting information about the basis for the trademark complaint (id.). (See SAC, Dkt. 30, ¶ 15.)

Tymar Distribution LLC Display Name: New England Express v. Mitchell Group USA, LLC

2021 | Cited 0 times | E.D. New York | April 15, 2021

In sum, over a span of six days were exclusively responsive and thus necessary to confer personal jurisdiction over [] out-of-state defendants See Paterno, 23 N.E.3d

at 994; cf. Fischbarg, 880 N.E.2d at 28. These communications do not reveal any attempt by MGU to seek[] out and initiate[] contact with New York, solicit[] business in New York, and establish[] a continuing relationship. Paterno, 23 N.E.3d at 993 (emphasis added). Quite the opposite. These communications reveal Plaintiff, through R&F, seeking out MGU and MGU providing limited responses to communications that happened to originate in New York. Such activity does not constitute transacting business in the state within the meaning of Section 302(a)(1).

Plaintiff also seems to allege that the Court has personal jurisdiction over MGU because nformation as to [F&W] products, and purchased such through (SAC, Dkt. 30, ¶ 23.)

When analyzing internet activity as the basis for jurisdiction under Section 302(a)(1), courts typically look at the nature and quality of commercial activity that an entity conducts over the Internet. Brady v. Anker Innovations Ltd., No. 18-CV-11396 (NSR), 2020 WL 158760, at *4 (S.D.N.Y. Jan. 13, 2020) (quoting Best Van Lines, Inc. v. Walker, 490 F.3d 239, 251 (2d Cir. 2007)). A website that offers products for sale to New York consumers may demonstrate purposeful availment of the benefits of transacting business in New York. See Chloe, 616 F.3d at 170; Lifeguard Licensing Corp., 2016 WL 3748480, at *3 A website that . . . allows customers to purchase goods online, is a highly interactive website, which may provide a basis for personal jurisdiction[.] Further, egularly offering and selling goods via an online marketplace such as Amazon.com can provide a basis for personal jurisdiction under CPLR § 302(a), even though [the defendants] do not control their Amazon.com storefront or its interactivity to the same extent that they control their own highly interactive website. Lifeguard Licensing Corp., 2016 WL 3748480, at *3 (citing EnviroCare Techs., LLC v. Simanovsky, No. 11-CV-3458 (JS) (ETB), 2012 WL 2001443, at *3 (E.D.N.Y. June 4, 2012)).

There is some uncertainty among courts in the Second Circuit as to whether a plaintiff must show that a defendant who operates an interactive website also made at least one sale to New York. Compare Spin Master Ltd. v. 158, No. 18-CV-1774 (LJL), 2020 WL 5350541, at *3 (S.D.N.Y. Sept. 4, 2020) (finding no personal jurisdiction where defendants offered products for sale to New York through a third-party online marketplace, but p fail[ed] to evidence a single act or transaction in New Yor with WowWee Grp. Ltd. v. Meirly, No. 18-CV-706 (AJN), 2019 WL 1375470, at *4 (S.D.N.Y. Mar. 27, 2019) (noting t the case law has stopped short of requiring additional conduct beyond maintaining an interactive website that offers products to consumers . However, it appears that the majority of cases to have analyzed Section 302(a)(1) jurisdiction over a defendant that used a highly interactive website to offer the sale of products to New York also involved evidence of actual sales to New York. See, e.g., Chloe, 616 F.3d at 170 ([Defendant] engaged in fifty-two other transactions where merchandise was shipped to New York. ; Hypnotic Hats, Ltd. v. Wintermantel Enters., LLC, No. 15-CV-6478 (ALC), 2016 WL 7451306, at *3 (S.D.N.Y. Dec. 27, 2016) Defendants have shipped numerous orders to consumers in New York.); Lifeguard Licensing Corp, 2016 WL 3748480, at *1

Defendants admit that the orders fulfilled by Amazon were directed to New York locations EnviroCare Techs., LLC, 2012 WL 2001443, at *4 item to Plaintiff in New York[.]

Here, Plaintiff alleges -interactive online presence through its residents purchased products. (SAC, Dkt. 30, ¶ 23.) Plaintiff does not allege facts regarding, nor provide proof of, any actual sales from the Beauty Dreams merchant store to consumers in New York. The Court agrees with the courts holding that where a plaintiff is alleging personal jurisdiction under Section 302(a)(1) based on defendant an interactive website and sale of goods into the state, the plaintiff must allege specific facts regarding, or [of,] a single act or transaction in New York. See Spin Master Ltd., 2020 WL 5350541, at *3; see also Chloe, 616 F.3d at 170 ourts have explained that section 302 is a single act statute and proof of one transaction in New York is sufficient to invoke jurisdiction[.] (internal quotation and citation omitted)). However, the Court need not resolve this issue because, even if Plaintiff had demonstrated that MGU sold goods to a consumer in New York, such contacts with the state do over Defendant MGU. None of the elements of claims which turn on an alleged conspiracy between MGU and Rivelle to eliminate price competition, an unreasonable restraint on trade, and (see discussion supra) arise out of, or are more than tangentially connected to, y- and sale of products to New York. See Licci II, 984 N.E.2d at 901. Any relationship between such contacts with New York and the causes of action is see id. at 900 01, and the Court finds that the causes of action would exist regardless of whether MGU sold products in New York, see Beacon Enters., Inc., 715 F.2d at 765.

Thus, Plaintiff has also failed to make a prima facie showing that Defendant MGU is subject to the Cour personal jurisdiction under Section 302(a)(1).

C. Conspiracy Jurisdiction Finally, t claim that personal jurisdiction is imputed to MGU under a theory of conspiracy jurisdiction based on Defendant alleged contacts with New York. (See SAC, Dkt. 30, ¶¶ 15, 20 21.) Even assuming that Plaintiff has adequately alleged the first two elements of conspiracy jurisdiction that a conspiracy existed and that MGU participated in that conspiracy with Rivelle and Defendant Frailly Plaintiff cannot satisfy the third element, requiring that a co-conspirators overt acts in furtherance of the conspiracy had sufficient contacts with a state to subject that co-conspirator to jurisdiction in that state Charles Schwab Corp., 883 F.3d at 87 (emphasis added); Rudersdal, EEOD v. Harris, No. 18-CV-11072 (GHW), 2020 WL 5836517, at *8 (S.D.N.Y. Sept. 30, 2020) (explaining that the third prong of the Schwab test requires both overt acts in furtherance of a conspiracy and that those acts subject the co- conspirator to jurisdiction in the forum . For the reasons explained above contacts with R&F are not sufficient to subject him the alleged co-conspirator to personal jurisdiction. Therefore, jurisdiction based on these contacts cannot be imputed to MGU.

For all of these reasons, Defendant MGU smiss based on lack of personal jurisdiction is granted, and MGU is dismissed from this case. III. Legal Sufficiency of the Allegations

The Court now addresses the legal against Defendant Rivelle, which is not contesting personal

jurisdiction. See Brown v. Lockheed Martin Corp., 814 F.3d 619, 625 (2d Cir. 2016) (Unlike subject matter jurisdic he requirement of personal jurisdiction represents first of all an individual right, [and therefore] it can, like other such rights, be waived. (alterations in original) (quoting Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982))); Actava TV, Inc. v. Joint Stock Co. Channel One Russia Worldwide , 412 F. Supp. 3d 338, 348 (S.D.N.Y. 2019) ([A]n entity may contract or stipulate with another to permit proceedings in a states courts, notwithstanding the remoteness from the state of its operations and organizat (quoting Brown, 814 F.3d at 625)). Although Rivelle is the sole remaining Defendant, alleged co- [and] a plaintiff can prove the existence of a conspiracy in a[] [Sherman Act] action against just one of the members of the conspiracy See Spinelli v. Nat l Football League, 96 F. Supp. 3d 81, 104 (S.D.N.Y. 2015) (quoting In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 284 (4th Cir. 2007)); see Georgia v. Pa. R.R. Co., 324 U.S. 439, 463 (1945) enjoin a[n antitrust] conspiracy not all the .

A. The Antitrust Claims Are Dismissed For Failure to State a Claim violations of Section 1 of the Sherman Act, which bans [e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. Mayor & City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 135 (2d Cir. 2013) (quoting 15 U.S.C. § 1). As previously stated, to succeed in a Section 1 case, from an agreement, tacit or express, and that common scheme . . . constituted an unreasonable restraint of trade under the per se rule or the rule of reason. Apple, Inc., 791 F.3d at 314 315, 320 21. Plaintiff advances claims under both rules. (See SAC, Dkt. 30, ¶¶ 86 104.)

1. The Per Se Rule Plaintiff alleges that the conduct of MGU and Rivelle namely, acting by rative Amazon marketplace constitutes a per se violation of Section 1. (SAC, Dkt. 30, ¶¶ 86 88.) Specifically, Plaintiff alleges that MGU and Rivelle acted in concert to out P (Id. ¶¶ 89 90.) As a result, Plaintiff lost profits due to its suspension from Amazon aease selling products. (Id. ¶¶ 92 93.)

he rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1 certain kinds of market restraints are deemed unlawful per se and do not require case-specific analysis because they always or almost always tend to restrict competition and decrease output . . . [and] have manifestly anticompetitive effects[.] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 86 (2007) (alterations, quotations, and citations omitted); see NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133 (1998) ertain kinds of agreements will so often prove so harmful to competition . . . that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances . Agreements within the scope of § 1 may be either horizontal, i.e., agreement[s] between competitors at the same level of the market structure, or vertical, i.e., combinations of persons at different levels of the market structure, e.g., manufacturers and distributors. Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 182 (2d Cir. 2012) (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972)). Horizontal price-fixing conspiracies traditionally have been, and remain, the archetypal example of a per se unlawful restraint on trade Apple, Inc., 791 F.3d at 321 (quoting Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980)),

while vertical restraints including those that restrict prices should generally be subject to the rule of reason id. (citing, inter alia, Leegin, 551 U.S. at 882).

Here, Plaintiff alleges a conspiracy between Defendants MGU and Rivelle based on the agreement they entered into, pursuant to which MGU, the exclusive United States distributor of F&W products, granted Rivelle, a third-party seller, the sole right to sell some of the products that MGU distributed in North America on Amazon. (See Dkt. 67, at ECF 4 12.) This agreement is vertical, in that Rivelle, a seller, sourced products from MGU, a distributor. See Anderson News, L.L.C., 680 F.3d at 182 involves combinations of persons at different levels of the market structure n omitted)). Plaintiff also alleges, however, that the Defendants had a horizontal relationship as competitors, competed with Rivelle for sales of F&W products. (SAC, Dkt. 30, ¶ 53.) Construing the pleadings in the light most favorable to Plaintiff, the Court accepts that Plaintiff has plausibly alleged some level of horizontal competition between MGU and Rivelle. See Anderson News, L.L.C., 680 F.3d at 182 (explaining agreement is between competitors at the same level of the market structure (citation omitted)). Thus, the Court concludes that the relationship between MGU and Rivelle is both vertical and horizontal.

Defendant Rivelle argues that the per se rule does not apply here because (1) the only restraint on trade is vertical (see Rivelle 9), and (2) the alleged economic interests i.e., the protec

not per se unlawful (Rivelle 68, at 2 5). Plaintiff responds that Rivelle both e it has nt with [the] vertical, dual distribution agreement[], eliminate competition, which should be subjected to the per se rule. (10 14.) The Court finds little support in law or in fact for Plaintiff that the per se rule applies in this circumstance. Plaintiff relies heavily United States v. Apple, Inc., which affirmed the application of the per se rule to a hub-and-spoke conspiracy to fix ebook prices. 30

See 791 F.3d at 321 22. There, the Circuit rejected, inter alia, engaged in vertical conduct per se when it entered multiple independent, vertical agreements h the six largest publishers of trade books. Id. at 298, 321 22. The Circuit explained the relevant agreement in restraint of trade in this case is the price-fixing conspiracy [organized by Apple], not Apples vertical contracts with the [book publisher defendants]. Id. at 325. Plaintiff also relies on Klor s, Inc. v. Broadway-Hale Stores, Inc., which held that group boycotts are illegal per se. 359 U.S. 207, 212 13 (1959). a wide combination consisting of manufacturers,

distributors and a retailer conspiring to its freedom to buy appliances in an open competitive market[,] and [to] drive[] it out of business as a dealer in the defendants products Id. at 213. Plaintiff, however, does not allege a hub-and- -fixing agreement 31

making these cases inapposite. Instead, Plaintiff alleges a conspiracy between two

30 -and- an entity at one level of the market structure, the hub, coordinates an agreement among competitors at a different level, the spokes. Apple, Inc., 791 F.3d at 314 These arrangements consist

of both vertical agreements between the hub and each spoke and a horizontal agreement among the spokes to adhere to the [hubs] terms, often because the spokes would not have gone along with [the vertical agreements] except on the understanding that the other [spokes] were agreeing to the same thing. Id. (citation omitted). In Apple, Inc., the Second Circuit noted that the hub-and-spoke metaphor is somewhat inaccurate [because] the plaintiff must also prove the existence of a rim to the wheel in the form of an agreement among the horizontal competitors. Id. at 314 n.15. As previously explained, MGU and Rivelle are two entities engaged in a relationship that is simultaneously vertical and horizontal, not a hub-and-spoke arrangement.

31 a formal [Minimum Advertised Price] policy to whic i.e., price fixing. (SAC, Dkt. 30, ¶ 6 n.4.) Rather, as Plaintiff explains in its opposition, conspiracy tal competitors, i.e. defendants, destroying competition at the horizontal level by blocking access to the Amazon platform and thereby limiting output and effecting supra-competitive price levels within the defendants that are, in own words, related both vertically and horizontally, and argues, citing no precedent, from per se (See 12; see also SAC, Dkt. 30, ¶¶ 53, 97.) The Court disagrees.

The Court is guided by a recent decision by the Honorable P. Kevin Castel in which he rejected the same argument Plaintiffs counsel attempts here, under comparable circumstances. 32 See 2238 Victory Corp. v. Fjallraven USA Retail, LLC., No. 19-CV-11733 (PKC), 2021 WL 76334, at *3 6 (S.D.N.Y. Jan. 8, 2021). In 2238 Victory Corp., a third-party seller on Amazon, like Plaintiff, sued a manufacturer and another third-party seller, like Rivelle, which had become the manufac thorized Amazon seller and also provided the manufacturer with See id. at *1 2. The complaint characterized the defendants in 2238 Victory Corp. as [] [having] a horizontal and vertical relationship, because while the manufacturer granted the third-party seller exclusive selling rights on Amazon, the manufacturer also competed for sales of its products through an online retail website. Id. at *4. The plaintiff alleged, as Plaintiff does here (almost verbatim), that the defendants had the [ing] counterfeiting complaints to Amazon resulting in [plain See 13 (emphasis added)). In short, this case is not

about price fixing.

32 that was also brought on behalf of a third-party Amazon seller plaintiff, and also alleged Sherman Act violations based on an alleged conspiracy between the defendants to make complaints to Amazon about the plaintiff and thereby eliminate discount price competition. Thimes Sols. Inc. v. TP Link USA Corp., No. 19-CV-10374 (PA) (EX), 2020 WL 4353681, at *8 (C.D. Cal. June 8, 2020). Although the facts in Thimes were somewhat different from the facts here, in that the defendants in that case did not have a vertical and horizontal relationship, the Court still feels compelled to and arguments that courts have repeatedly, and for good reason, rejected. temporary suspension from Amazon and permanent ban from selling [the man products, and increasing the Id. The

2238 Victory Corp. plaintiff further alleged, as Plaintiff also does here, that this coordination by the

defendants amounted to an agreement between horizontal competitors to eliminate competition, which is a per se violation of the Sherman Act. Id. However, Judge Castel found that because the complaint expressly alleged that the manufacturer directly sold its products to consumers, in addition to having a distributorship relationship with the third-party seller on Amazon, i.e., a simultaneous horizontal and vertical relationship, the defendants were engaged in had to be analyzed under the rule of reason and was not subject to the per se rule. Id. at *5 6. Thus, in 2238 Victory Corp., Judge Castel specifically found that a relationship virtually identical to the one between MGU and Rivelle constituted a dual distribution arrangement that could not be subject to scrutiny under the per se rule.

Although the facts in this case differ slightly from those in 2238 Victory Corp. in that MGU is the exclusive distributor, not the manufacturer, of the F&W products at issue and MGU competed with Rivelle for sales of F&W products on Amazon, not a separate retail website, these differences are immaterial. As previously explained, the alleged relationship between MGU and Rivelle, just as in 2238 Victory Corp., is both vertical and horizontal, and thus, as Judge Castel concluded in that case, is a that is properly analyzed under the rule of reason. See Elecs. Commc ns Corp. v. Toshiba Am. Consumer Prods., Inc., 129 F.3d 240, 243 (2d Cir. 1997) (hol lysis appli if the distributor and manufacturer also compete at the distribution level i.e., the manufacturer distributes its products through a distributor and independently (so-called dual distribution arrangements)); see also Beyer Farms, Inc. v. Elmhurst Dairy, Inc., 35 F. Appx 29, 29 (2d Cir. 2002) (summary order) alleged in its complaint that [defendants] were engaged in a dual-distributorship relationship, or both a vertical and horizontal relationship . . . [and thus] its complaint was subject to scrutiny under the rule of reason.); Gatt Commc ns, Inc. v. PMC Assocs., L.L.C., No. 10-CV- 8 (DAB), 2011 WL 1044898, at *2 (S.D.N.Y. Mar. 10, 2011) laims alleging a vertical relationship or mixed vertical and horizontal relationships must be evaluated under the rule of reason. aff d, 711 F.3d 68 (2d Cir. 2013). This conclusion finds further support in the Supreme Court caution that it is appropriate to adopt the per se rule only erable experience with the type of restraint restraint would almost always be invalidated as unreasonable. Leegin, 551 U.S. at 886 87 (citations omitted). Accordingly, in the context of business relationships where the economic the Supreme Court has been reluctant to adopt a per se rule. Id. at 887 (quoting State Oil Co. v. Khan, 522 U.S. 3, 10 (1997)).

At its core, this case is about an alleged restraint on intrabrand competition, i.e., competition for sales of F&W brand products, which, on the one hand, may have procompetitive effects, see Leegin, 551 U.S. 890 92; K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 127 28 (2d Cir. 1995) Restrictions on intrabrand competition can actually enhance market-wide competition by fostering vertical efficiency and maintaining the desired quality of a product. , and, on the other hand, may be unlawfully anticompetitive if it results in price-fixing or a seller cartel, Leegin, 551 U.S. at 892 94. Because the effects of an intrabrand restraint can vary significantly, these restraints are scrutinized under the rule of reason and not categorized as unlawful per se. 2238 Victory Corp., 2021 WL 76334, at *5 (collecting cases). This, in addition alleged by Plaintiff, militates in favor of a case-specific reasonableness analysis, rather than a categorical per se judgment.

Therefore, First Cause of Action, alleging a per se violation of the Sherman Act, is dismissed.

2. The Rule of Reason Second Cause of Action, which alleges a violation of the Sherman Act that is subject to the rule of reason.

The rule of reason is applied thro a three-step burden-shifting framework under which the behavior had an actual adverse effect on competition as a whole in the relevant market. 33

United States v. Am. Express Co., 838 F.3d 179, 194 (2d Cir. 2016) (internal quotation and citation omitted), , 138 S. Ct. 2274 (2018). At this first step, a must allege a plausible relevant market in which competition will be impaired. City of New York v. Grp. Health Inc., 649 F.3d 151, 155 (2d Cir. 2011). In defining the market, courts examine both the relevant product and the relevant geographic markets. N. Am. Soccer League, LLC v. U.S. Soccer Fed n, Inc., 296 F. Supp. 3d 442, 470 (E.D.N.Y. 2017) (citing PepsiCo, Inc. v. Coca Cola Co., 315 F.3d 101, 105 (2d Cir. 2002)), aff d, 883 F.3d 32 (2d Cir. 2018). The relevant [product] market is defined as all products reasonably interchangeable by consumers for the same purposes. Geneva Pharms. Tech. Corp. v. Barr Lab ys Inc., 386 F.3d 485, 496 (2d Cir. 2004) (quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956)). The relevant market is defined in this way because the ability of consumers to switch to a substitute restrains a firms ability to raise prices above the competitive level. Id. If the plaintiff fails to

33 After Plaintiff satisfies this initial the burden [then] shifts to the defendant to offer evidence of any procompetitive effects of the restraint at issue shifts back to the plaintiff to prove that any legitimate competitive benefits offered by defendant could have been achieved through less r Am. Express Co., 838 F.3d at 195 (internal quotations, alterations, and citations omitted). with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products . . . Grp. Health Inc., 649 F.3d at 155 56 (quoting Chapman v. N.Y. State Div. for Youth, 546 F.3d 230, 238 (2d Cir. 2008)). As best the Court can tell, Plaintiff alleges a relevant market defined as the market for F&W products on Amazon. 34

(See SAC, Dkt. 30, ¶¶ 94, 98; see also id. ¶¶ 58 59, 89; , Dkt. 63, at 15 (For purposes of [the rule of reason violation], Plaintiff has alleged a relevant product market for F&W products and a relevant national geographic market confined to the Plaintiff offers extensive allegations about the alleging that anti-competitive conduct in the Amazon Marketplace which allegedly controls at

least 47% of all e-commerce in the United States causes anti-competitive restraints in the nationwide e-commerce market. (See SAC, Dkt. 30, ¶¶ 38 43, 94 96.) However, Plaintiff wholly overlooks the requirement that it must allege a plausible product market that includes all products reasonably interchangeable by consumers for the same purposes. Geneva Pharms. Tech. Corp., 386 F.3d at 496 (quotation and citation omitted). The only products identified by Plaintiff as relevant here are F&W-branded products. (See In SAC ¶[]8 plaintiff alleges a certain line of F&W French-made

personal care products as the relevant

34 Plaintiff alternately identifies in the United well as re-mard-party ecommerce sales platforms in the of Fair & White products on amazon. azon F&W Products Mar ¶ 94). Despite the incoherence of these

myriad market definitions, it is clear to the Court that the scope of the product market alleged by Plaintiff is limited to one brand, F&W, without consideration of all interchangeable substitute products. See Grp. Health Inc., 649 F.3d at 155 56.

All facts plead by Plaintiff in support of its antitrust claims are limited to F&W products 35

Plaintiff identifies Defendants MGU and Rivelle as F&W products (emphasis added)), alleges that Plaintiff and other third-party sellers were sales of F&W products (id. ¶ 59 (emphasis added)), and alleges harm to consumers based on increasing prices and diminished stock for F&W products (id. ¶¶ 83 84, 104 (providing da abrand . Thus, even construing the pleadings in P it is evident that alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products. See Grp. Health Inc., 649 F.3d at 155. Here, the alleged relevant market starts and ends with F&W-branded products, which is legally insufficient. See id.; Chapman, 546 F.3d at 238 (affirming dismissal of antitrust claims where plaintiffs proposed relevant market does not encompass all interchangeable substitute products ; see also Mathias v. Daily News, L.P., 152 F. Supp. 2d 465, 482 (S.D.N.Y. 2001) Th[e] failure to reference the rule of interchangeability is alone grounds for dismissal. (citation omitted)).

Cases in which dismissal on the pleadings is appropriate frequently involve either (1) failed attempts to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes or (2) failure even to attempt a plausible explanation as to why a market should be limited in a particular way.

35 e by Defendants to eliminate competition at the retail sales level in the personal care products space ¶ 53.) Although this points to a lleged to support Plaintif ust claim relate solely to F&W products, as explained herein. Thus, Plaintiff does not allege a product market beyond a single brand. Todd v. Exxon Corp., 275 F.3d 191, 200 (2d Cir. 2001) (emphasis added) (collecting cases); see, e.g., Boneta v. Rolex Watch U.S.A. Inc., No. 16-CV-2369 (LGS), 2017 WL 2670752, at *4 (S.D.N.Y. June 21, 2017) (holding that an alleged product market for Rolex watches consisting of just Rolex watches was legally insufficient because one brand does not constitute a relevant product market when the brand competes with potential substitutes ; cf. U.S. Elecs., Inc. v. Directed Elecs., Inc., No. 06-CV-7899 (RMB), 2007 WL 9819273, at *5 6 (S.D.N.Y. Apr. 10, 2007) (finding that the overall Satellite Radio Products Market, rather than the Sirius Satellite Radio Product Market, was the relevant market . Here, Plaintiff limits the relevant market to a single brand and offers no explanation let alone a plausible explanation why the relevant market should not be defined to include all interchangeable

substitutes, such as, for example, other i.e., creams, soaps, and gel), of which F&W is just one of many brands. (See SAC,

Dkt. 30, ¶ 28.) Accordingly, for this reason alone, Plaintiffs rule of reason claim must be dismissed.

Although the relevant market alleged by Plaintiff is inadequate to support an analysis of any anticompetitive effect, see Laboratoires Majorelle SAS v. Apricus Biosciences, Inc., No. 17- CV-6625 (AT), 2018 WL 11222863, at *4 (S.D.N.Y. Sept. 21, 2018) (definition, it is impossible for a court to assess the anticompetitive effect of challenged (citation omitted)); N. Am. Soccer League, LLC, 296 F. Supp. 3d at 470 The determination of the relevant market is a necessary predicate to analyzing antitrust claims under the rule of reason. the Court nonetheless briefly addresses Plathat analysis. In its opposition, Plaintiff argues estion is whether the restraint to intrabrand competition plausibly harms consumers. (16.) This is incorrect. To prevail on a Section 1 Sherman Act claim, the Second Circuit has explained that plaintiff must more than just an adverse effect on competition among different sellers of the same product (intrabrand competition) is the relevant market as a whole which requires balancing restriction of intrabrand competition . . . against any increases in interbrand competition. K.M.B. Warehouse Distribus, Inc., 61 F.3d at 127 28 (emphasis added); see 2238 Victory Corp., 2021 WL 76334, at *5; Abbott Lab ys v. Adelphia Supply USA, No. 15-CV-5826 (CBA) (LB), 2017 WL 5992355, at *5 (E.D.N.Y. Aug. 10, 2017). A plaintiff may demonstrate an adverse effect on market-wide competition through direct evidence of increased prices and decreased quality atively, by demonstrating that the defendant Virgin Atl. Airways Ltd. v. Brit. Airways PLC,

257 F.3d 256, 264 65 (2d Cir. 2001) (citing Tops Mkts., Inc. v. Quality Mkts, Inc., 142 F.3d 90, 96 (2d Cir. 1998)); see Abbott Lab ys, 2017 WL 5992355, at *6 Market power is defined as the ability of a single seller to raise price[s] and restrict output. Virgin Atl. Airways Ltd., 257 F.3d at 265 (alteration in original) (citation omitted).

Here, Plaintiff alleges only increased prices and reduced outputs with respect to F&W products (see SAC, Dkt. 30, ¶¶ 83 84, 104), and does not allege any effects on price, quality, or outputs across brands in the personal care products market. To the extent the SAC can be read to include market power allegations, tho the Amazon Marketplace over the price of F&W products (see SAC, Dkt. 30, ¶¶ 21 23, 26 28,

53 56, 58), and, by extension, across e-commerce nationwide (see id. ¶¶ 83 84, 95 96). There the personal care products market as a whole. Accordingly, for this reason as well, Plaintiff fails to satisfy its initial burden under the rule of reason analysis and its Second Cause of Action must be dismissed. 36

See Am. Express Co., 838 F.3d at 194 95. B. The Tortious Interference Claim is Dismissed Having dismissed Defendants Frailly and MGU from this matter for lack of personal jurisdiction, and considers sole remaining cause of action for tortious interference with existing and prospective

economic relations in violation of New York law. Plaintiff alleges that the Court has supplemental jurisdiction, 28 U.S.C. § 1367, and diversity jurisdiction, 28 U.S.C. § 1332, over this remaining state law claim. (SAC, Dkt. 30, ¶ 14.)

To start, Plaintiff has not adequately alleged diversity jurisdiction in this case. For purposes of establishing diversity jurisdiction, the matter in controversy the sum or value of $75,000, exclusive of interest and costs and be between, inter alia citizens of different States 28 U.S.C. § 1332(a). Diversity jurisdiction i.e. all Finnegan v. Long Island Power Auth., 409 F. Supp. 3d 91, 95 (E.D.N.Y. 2019) (quoting Pa. t. Sys. v. Morgan Stanley & Co., 772 F.3d 111, 117 18 (2d Cir. 2014)). An determined by his domicile, which is fixed home and principal establishment, and to which, whenever he is absent, he has the intention of r

36 Because Plaintiff withdrew its rule of reason claim in 2238 Victory Corp., the court did not need to reach the issue of whether that claim was sufficiently alleged. 2021 WL 76334, at *5 uch a claim likely would have been dismissed inter alia, the complaint failed to coherently define a relevant product market, failed to describe any broader effect on the market in backpack sales (as opposed to sales of a particular backpack brand), and failed to identify any effect on interbrand competition. Id. For the reasons explained herein, Plaint suffers from virtually identical deficiencies, requiring dismissal of this claim. Palazzo ex rel. Delmage v. Corio, 232 F. 3d 38, 42 (2d Cir. 2000) (quoting Linardos v. Fortuna, [A] limited liability company is a citizen of each state in which its individual members are citizens. U.S. Liab. Ins. Co. v. M Remodeling Corp., 444 F. Supp. 3d 408, 409 (E.D.N.Y. 2020) (citing Castillo Grand, LLC v. Sheraton Operating Corp., 719 F.3d 120, 122 (2d Cir. 2013)). In pleading the citizenship of a limited liability company, the identity and citizenship of each member of the company must be specifically alleged. Id. at 410 (emphasis added). [A] corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business 28 U.S.C. § 1332(c)(1).

Plaintiff alleges that the standard for diversity jurisdiction is satisfied and defendant are residents of the same state and the amount in controversy in this matter exceeds

¶ 14), however, Plaintiff failed to plead facts to adequately demonstrate the citizenship of the parties. Plaintiff is alleged to be liabilit (id. ¶ 25), but Plaintiff fails to specifically allege the identity and citizenship of

each of its members. See U.S. Liab. Ins. Co., 444 F. Supp. 3d at 409 10. Likewise, Defendant its domicile and principal place of business 37

(SAC, Dkt. 30, ¶ 28), but again, Plaintiff fails to specifically allege the identity and citizenship of each of members. See U.S. Liab. Ins. Co., 444 F. Supp. 3d at 409 10. Defendant Rivelle is alleged to be ly formed corporation, domiciled in California (SAC, Dkt. 30, ¶ 26), but Plaintiff fails to allege the state(s) 37

at 3 n.1.) See 28 U.S.C. § 1332(c)(1). De citizenship is not even addressed in the SAC.

Although Defendant Rivelle does not appear to challenge diversity jurisdiction in this matter ([a] federal courts lack of subject matter jurisdiction is not waivable by the parties and must be addressed before reaching the merits. Adames v. Taju, 80 F. Supp. 3d 465, 467 (E.D.N.Y. 2015) (quoting Holt v. Town of Stonington, 765 F.3d 127, 130 (2d Cir. 2014)). f subject matter jurisdiction is lacking and no party has called the matter to the courts attention, the court has the duty to dismiss the action sua sponte. Durant, Nichols, Houston, Hodgson & Cortese-Costa P.C. v. Dupont, 565 F.3d 56, 62 63 (2d Cir. 2009) (citation omitted). Plaintiff has failed to adequately allege the citizenship of

each of the parties, and therefore has failed to adequately plead diversity jurisdiction. Accordingly, diversity jurisdiction does not provide a basis for the Court to consider remaining state law claim. 38

In addition, having the Court declines to exercise supplemental jurisdiction over remaining state law claim. Section 1367(c) provides that may decline to exercise supplemental jurisdiction over a claim under [Section inter alia 28 U.S.C. § 1367(c). In determining whether to exercise supplemental jurisdiction, a court should not decline jurisdiction unless it also determines that [exercising supplemental jurisdiction] would not promote the values . . . [of] economy, convenience, fairness, and comity. Oneida Indian

38 Though it need not reach the issue, the Court also concludes that even if, arguendo, Plaintiff had adequately pled diversity jurisdiction, venue would not be proper in this district under 28 U.S.C. § 1391 (b), (c) and (d), as alleged by Plaintiff. (SAC, Dkt. 30, ¶ 18.) No Defendant resides in New York State, much less the Eastern District of New York, and, as explained herein, Nation of N.Y. v. Madison County, 665 F.3d 408, 439 (2d Cir. 2011) (alterations in original) (quoting Jones v. Ford Motor Credit Co., 358 F.3d 205, 214 (2d Cir. 2004)). Here, the claims over which the Court had original jurisdiction, i.e., the federal antitrust claims, have been dismissed, and the only remaining claim arises under New York state law. This claim does not implicate any federal issues or doctrines and will require application of state law. Additionally, the lawsuit is still in the early stages; aside from limited discovery into jurisdictional issues, discovery has not begun in earnest. Thus, the Count concludes that neither economy, convenience, fairness, nor comity weigh in favor of exercising supplemental jurisdiction. See 2238 Victory Corp., 2021 WL 76334, at *6 (declining to exercise supplemental jurisdiction over tortious interference and libel claims under New York law after dismissing federal antitrust claim). claim for tortious interference with existing and prospective economic relations is therefore dismissed. IV. Pla -Transfer Request Is Denied Fi -ditch request for the Court to transfer venue to the Southern District of Florida rather than dismiss the case. Plaintiff argues suitable as an alternate foru MGU and its staff are located in SDFL, as are counsel for

both [P] (at 41 42.) Under 28 U.S.C. § 1404(a), or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented 28 U.S.C.

§ 1404 The decision to transfer an action lies within the sound discretion of the district court Tobey v. Nat l Action Fin. Servs., Inc., No. 09-CV-1917 (ARR) (JMA), 2009 WL 3734320, at *2 (E.D.N.Y. Nov. 4, 2009) (quoting Minnette v. Time Warner, 997 F.2d 1023, 1026 (2d Cir.1993)), upon consideration of several factors, including:

(1) the convenience of witnesses; (2) the availability of process to compel the attendance of unwilling witnesses; (3) the convenience of the parties; (4) the locus of operative facts; (5) the location of relevant documents and relative ease of access to sources of proof; (6) the relative means of the parties; (7) the forums familiarity with the governing law; (8) the weight accorded the plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of circumstances[,] Vida Longevity Fund, LP v. Lincoln Life & Annuity Co. of N.Y., No. 19-CV-6004 (ALC) (DF), 2020 WL 4194729, at *5 (S.D.N.Y. July 21, 2020) (citation omitted). Ultimately, the party moving of demonstrating the appropriateness of transfer by clear and convincing evidence. Tobey, 2009 WL 3734320, at *2. Plaintiff has plainly failed to meet this burden here, offering little to no evidence factors or convince the Court that transfer to the Southern Distr See 28 U.S.C. § 1404. Moreover, at this

point, for the reasons already stated, the Court is ithout subject-matter jurisdiction therefore is without power to effect the relief [Plaintiff] seek[s], i.e., transfer of venue. Yun Chi v. Parajon, No. 20-CV-9042 (PAE), 2020 WL 6700584, at *2 (S.D.N.Y. Nov. 13, 2020) (finding that because plaintiffs have failed to plead facts sufficient to establish that the Court has subject- matter jurisdiction over this action, the Court is con transfer ; see Findwhat.Com v. Overture Servs., Inc., No. 02-CV-447 (MBM), 2003 WL 402649, at *3 (S.D.N.Y. Feb. 21, 2003) Before a district court can consider a motion to transfer, it must determine whether it has subject-matter jurisdiction. . venue is denied.

CONCLUSION Defendant miss based on lack of personal jurisdiction is granted. motion to dismiss based on lack of personal jurisdiction is also granted. per se and rule of reason antitrust causes of action for failure to state a claim is granted. The Court also dismisses Plaintiff law claim for tortious interference with existing and prospective economic relations because Plaintiff fails to sufficiently allege diversity jurisdiction and because the Court declines to exercise supplemental jurisdiction over that claim. Finally, t The Clerk of Court is respectfully directed to enter judgment for Defendants and close the case.

SO ORDERED.

/s/ Pamela K. Chen Pamela K. Chen United States District Judge Dated: March 31, 2021 Brooklyn, New York