IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FORCE PARTNERS, LLC, Plaintiff, v. KSA LIGHTING & CONTROLS, INC.; ACUITY BRANDS, INC.; JIM WILLIAMS; and ASHLEY WILLIAMS, Defendants.	Case No. 1:19-cv-07776 Hon. Mary M. Rowland

KSA DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

PRELIMINARY STATEMENT

Plaintiff Force Partners LLC's ("Plaintiff" or "Force Partners") First Amended Complaint ("FAC") suffers from the same defects that caused Plaintiff to abandon its original complaint. None of Plaintiff's new allegations state an antitrust claim, and like its original complaint, the FAC should be dismissed in its entirety, with prejudice.

Plaintiff brought this action against one of its direct competitors in the lighting industry—KSA Lighting & Controls, Inc. ("KSA"). Both Plaintiff and KSA are sales agents for commercial lighting companies and compete to sell to the same lighting distributors. Unhappy with its business prospects, Plaintiff brought this action to prevent KSA from offering a new incentive program to those distributors. Despite Plaintiff's groundless allegations, that program, designed to offer KSA's "best prices" and "services" to distributors, has yet to even be implemented. But rather than compete on price or service, Plaintiff—a self-described three-year old "new entrant" (*see* FAC ¶¶ 5, 53)—has preemptively condemned KSA's program as part of an alleged "multifaceted conspiracy" designed to "monopolize" the market. While these claims are baseless on their face, "the antitrust laws were passed for the protection of *competition*, not *competitors*" and here, Plaintiff's FAC fails to set forth the legal and factual predicates necessary to allege viable antitrust claims. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993).

Plaintiff complains of a so-called "conspiracy" to drive it out of the market, yet bases this theory on KSA's unilateral invitation to its distributors to enter into the new incentive program. But *invitations* to enter into an incentive program are not actionable as an "agreement" or "conspiracy"—an essential element of a Section 1 Sherman Act claim. *See, e.g.*, *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 393 (7th Cir. 1984) ("The mere announcement" of a dealer policy "would not establish an agreement" under Sherman Act.). And while Plaintiff alleges

in conclusory terms that KSA entered into "unwritten agreements" with certain of its customer-distributors, it offers no plausible allegations that any such agreements exist. Nor could it. Not only has KSA not implemented its proposed *optional* incentive program, but there are no allegations that identify even a single specific distributor that refused to deal with Force Partners because of a so-called "unwritten agreement" with KSA. Because there are none.

None of Plaintiff's allegations support its newfangled "unwritten agreement" theory. It now brazenly alleges that KSA coerced "agreements" from distributors by engaging in "abusive tactics." This rhetoric is baseless. The so-called "abusive" tactic was nothing more than a letter KSA wrote to a customer in *2011—eight years* before KSA even proposed the incentive program at issue and *six years* before Plaintiff even formed as a business.[1] (*See* FAC ¶¶ 60-64.) Even more galling is Plaintiff's other new allegation—that KSA allegedly engaged in "commercial bribery" simply because it is alleged to "extravagantly" wine and dine customers. (*See id.* ¶¶ 70-71.) This is nothing short of frivolous. While this mudslinging has no place in this case, it certainly does not constitute "abusive" conduct—much less an antitrust case that should proceed in this Court.

Plaintiff's Section 1 claim suffers from another fatal defect—it does not plausibly allege that the proposed incentive program forecloses competition in a relevant market. The FAC does not allege that *any* of KSA's competitors, including Plaintiff, have been excluded from the market due to the alleged conduct. "If there is no exclusion of a significant competitor," the supposed "unwritten" agreements "cannot possibly harm competition." *Roland Mach.*, 749 F.2d at 393.

[1] And despite Plaintiff's innuendo that the competitor "is no longer in business" because of KSA, (FAC ¶¶ 60-64), Lighting Solutions is still very much in business. *See* Ex. 1, *Corp. File Detail Report: Lighting Sols. of Illinois, Inc.*, OFF. OF THE ILL. SEC'Y OF STATE, *available at* https://www.ilsos.gov/corporatellc/CorporateLlcController (last visited June 9, 2020). The Court may take judicial notice of filings with the Illinois Secretary of State. *See Allen v. Chase Home Fin. LLC*, No. 10 C 8270, 2011 WL 3882814, at *4 (N.D. Ill. Sept. 2, 2011) (taking "judicial notice from P & B's filings with the Illinois Secretary of State that it is an Illinois corporation").

Indeed, no one is forced to enter into the program, and as conceded by Plaintiff, there is no requirement that any distributor stop doing business with Plaintiff. As such, all of Plaintiff's Section 1 claims should be dismissed.

Plaintiff's attempted monopolization and Clayton Act claims are equally flawed. They too are based on the theory that KSA's incentive program may create exclusive relationships with certain distributors, but ignore well-settled law that "vertical exclusive distributorships (like in this case) are presumptively legal." *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 736 (7th Cir. 2004); *see also Methodist Health Servs. Corp. v. OSF HealthCare Sys.*, 859 F.3d 408, 410 (7th Cir. 2017) ("[W]hat is more common than exclusive dealing?").

Plaintiff finally claims that KSA made disparaging statements about Plaintiff's methods of selling lighting in Chicagoland, but its theory is "outside the reach of the antitrust laws" as disparaging statements by a competitor represent competition—not "genuine anticompetitive effects." *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 851-52 (7th Cir. 2011). In short, none of Plaintiff's antitrust claims—including its similarly flawed state law claims—are actionable, and all of them should be dismissed.

Plaintiff is no doubt vexed by the prospect of losing business to KSA if, and when, the incentive program is implemented. But Plaintiff also has the option to compete and offer its own incentives, rather than have this Court micromanage the parties' sales strategies. Lower prices and better service do not violate the antitrust laws, and Plaintiff's hazy conspiracy and boycott allegations far from justify subjecting any of the Defendants to years of discovery. This Court should grant Defendants' motion and bring this litigation to a halt now.

FACTS AND ALLEGATIONS

Neither Plaintiff's gripes against its competitor nor any of its new allegations state a

plausible antitrust claim. Force Partners is a sales representative for, among others, a lighting and control products manufacturer, Eaton Lighting, also known as Cooper Lighting Solutions ("Eaton/Cooper"), in the Chicagoland area. (FAC ¶¶ 9, 31.) Plaintiff calls itself a "new entrant" to the market (*id.* ¶ 5), and was formed in 2017 after "Eaton/Cooper convinced the two principals of Force Partners to form" as their "exclusive representative in the Market." (*Id.* ¶ 53.)[2] Despite being a new entrant, Plaintiff alleges it is one of the "largest four sales representative suppliers of lighting and control products in the Market" and accounts for 23% "of specified and approved products of the top four firms in the project/specification market." (*Id.* ¶ 43.)

Plaintiff initiated this suit in November 2019 alleging that Defendants KSA, its officers Jim and Ashley Williams (together, the "Individual Defendants" and collectively with KSA, the "KSA Defendants"), and Acuity Brands, Inc. ("Acuity") engaged in a "conspiracy" to compete against Plaintiff. Like Plaintiff, KSA serves as a sales representative for approximately 150 lighting manufacturers, including Defendant Acuity. (*Id.* ¶ 32.)

Plaintiff competes with KSA for customers, often distributors. While the FAC claims there are "approximately 23 distributors who purchase lighting and control products both for commercial and industrial projects," (*id.* ¶ 2), in reality, there are dozens more. Nevertheless, the FAC alleges these 23 distributors "represent as much as 90% of Force Partners' sales," and that KSA was "attacking" Plaintiff by making sales presentations to these distributors. (*Id.* ¶ 5.)

Specifically, Plaintiff alleges that starting in August 2019, Defendants made a series of "secretive PowerPoint presentations" to certain Chicago lighting distributors that included an offer to participate in a new authorized distributor program. (*Id.* ¶¶ 5-9, 73-80.) According to the FAC, distributors that expressed interest in participating would be termed "Partners," and would receive

[2] Eaton/Cooper has not joined as a plaintiff in this suit.

the best prices and services on products KSA represents. (*Id.* ¶ 82.) Plaintiff alleges that such Partners would agree to work primarily with KSA, including, for example, providing KSA the opportunity to match prices offered by other sales representatives. (*Id.* ¶¶ 83-84.) Distributors that chose not to participate as "Partners," according to Plaintiff, would be "Associates." (*Id.* ¶ 90.) Such Associates would still have full access to the entire line of products KSA represents, but would not be eligible for preferred pricing or ancillary services available to Partners. (*Id.*)

The FAC is abundantly clear that there are no written agreements or contracts between Defendants and any distributor. (*Id.* ¶¶ 11, 95-96, 109.) Instead, Plaintiff baldly alleges that some unidentified "distributors in fact entered into unwritten agreements with KSA." (*Id.* ¶ 11.) Elsewhere, the FAC refers to ambiguous "oral agreements" that KSA could supposedly "enforce," (*id.* ¶ 109), but simultaneously recognizes that these supposed agreements are without any "contractual recourse," (*id.* ¶ 96). In other words, the FAC at most alleges that some distributors chose to participate in the authorized distributor program.

Based on KSA's meetings with these distributors, the so-called "secretive PowerPoint presentation," and the nebulous "agreements" with unnamed distributors, Plaintiff filed the instant FAC alleging a group boycott under Sherman Act, Section 1 (Count I), a horizontal conspiracy under Sherman Act, Section 1 (Count II), attempted monopolization under Sherman Act, Section 2 (Count III), exclusive dealing under Clayton Act, Section 3 (Count IV), corresponding violations of the Illinois Antitrust Act (Count V), violations of the Illinois Uniform Deceptive Trade Practices Act ("IUDTPA") (Count VI), and tortious interference with prospective business relations (Count VII).[3] For the reasons set forth below, all of Plaintiff's claims should be dismissed.

[3] The FAC identifies both the IUDTPA claim and the tortious interference claim as "Count VI." (*See* FAC ¶¶ 175-90.) Based on the ordering of the claims, this Memorandum refers to the IUDTPA claim as "Count VI" and the tortious interference claim as "Count VII."

LEGAL STANDARD

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court does not, however, have to accept "labels and conclusions" or "'naked assertion[s]' devoid of 'further factual enhancement'" as true. *Id.* (quoting *Twombly*, 550 U.S. at 555, 557). In antitrust conspiracies, this standard requires that Plaintiff plead "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556. The Seventh Circuit has further instructed that when evaluating complex claims, such the antitrust statutes, "a fuller set of factual allegations may be necessary to show that relief is plausible" under the prevailing pleading standards. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1083 (7th Cir. 2008). Strict adherence to such pleading standards is critical because "[w]hen a district court by misapplying the *Twombly* standard allows a complex case of extremely dubious merit to proceed, it bids fair to immerse the parties in the discovery swamp . . . and by doing so create[s] irrevocable as well as unjustifiable harm to the defendant [absent reversal on immediate appeal]." *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 625-26 (7th Cir. 2010).

ARGUMENT

I. Counts I and II Should Be Dismissed Because Plaintiff Cannot Plead Essential Elements of a Section 1 Sherman Act Claim

Plaintiff's assault on KSA's management and proposed authorized distributor program fails to state any actionable claim, much less one under Section 1 of the Sherman Act. To state a federal Section 1 conspiracy claim, a plaintiff must plead sufficient facts showing: "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in [a] relevant market; and (3) an accompanying injury." *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 335

(7th Cir. 2012). The FAC fails to allege any of these essential elements.

A. Plaintiff Has Not—and Cannot—Allege an Actionable Agreement Under Section 1 of the Sherman Act

1. Count I Should Be Dismissed Because Defendants Are Incapable of Conspiring Under *Copperweld* and its Progeny

At the outset, Count I should be dismissed because the so-called "co-conspirators"—KSA, its owners, and Acuity—are closely related individuals and entities that cannot legally conspire with each other. In the seminal case *Copperweld Corp. v. Independence Tube Corp.*, the Supreme Court explained that only "separate economic actors pursuing separate economic interests" can be deemed co-conspirators under Section 1, and held that related companies pursuing common goals must be viewed as a single enterprise incapable of conspiring with itself. 467 U.S. 752, 769 (1984).

Here, none of the Defendants can be pled as "co-conspirators" under Section 1. The Individual Defendants are officers and owners of KSA, and therefore, constitute a single enterprise under *Copperweld*. *Id.* ("The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals."); *BookXchange FL, LLC v. Book Runners, LLC*, No. 19 CV 506, 2019 WL 1863656, at *3 (N.D. Ill. Apr. 25, 2019) (dismissing Section 1 claim, company cannot conspire with co-founders and members); *Pudlo v. Adamski*, 789 F. Supp. 247, 251-52 (N.D. Ill. 1992), *aff'd*, 2 F.3d 1153 (7th Cir. 1993) (members of medical staff could not conspire with hospital, or each other). To that end, Jim and Ashley Williams—as officers of KSA—cannot legally conspire with KSA under the Sherman Act. *Copperweld*, 467 U.S. at 769.

Nor can any of the KSA Defendants conspire with Acuity because KSA is Acuity's closely related sales representative. Consistent with *Copperweld's* teachings, federal courts routinely hold that a principal and its sales representative are incapable of conspiring under the Sherman Act. *See, e.g.*, *F.B. Leopold Co. v. Roberts Filter Mfg. Co.*, 882 F. Supp. 433, 446-47 (W.D. Pa. 1995),

aff'd, 119 F.3d 15 (Fed. Cir. 1997) (corporation and independent sales representatives unable to conspire under Sherman Act); *Pink Supply Corp. v. Hiebert*, 788 F.2d 1313, 1316-17 (8th Cir. 1986) (manufacturer and sales representatives lacked conspiratorial capacity because "so closely intertwined in economic interest and purpose . . . as to amount to a unified economic consciousness incapable of conspiring with itself"); *Card v. Nat'l Life Ins. Co.*, 603 F.2d 828, 834 (10th Cir. 1979) (corporation and agents "could not be regarded as conspirators"). Contrary to Plaintiff's conclusory allegation, (*see* FAC ¶ 33), KSA and Acuity uniformly serve the same economic interest—selling as many of Acuity's products as possible—and could no more form a conspiracy than Plaintiff and its represented brand (Eaton/Cooper). *See Boyce v. Penn Fishing Tackle Mfg.*, Civ. No. 94-1496 (GEB), 1997 U.S. Dist. LEXIS 23293, at *14-15 (D.N.J. Sep. 8, 1997) ("since NS is merely a sales representative for Penn Fishing, any agreement between [them] cannot violate § 1"); *Sample, Inc. v. Pendleton Woolen Mills, Inc.*, 704 F. Supp. 498, 502 (S.D.N.Y. 1989) (Section 1 "claim must fail because the sales representatives act as agents for Pendleton, rather than as separate entities"). Thus, Plaintiff's attempt to concoct a "conspiracy" against KSA, its owners, and Acuity (the brand it represents) should be rejected, and Count I should be dismissed.

2. Count I Should Also Be Dismissed Because Plaintiff Does Not Allege an Anticompetitive Agreement

Even if Defendants were capable of conspiring with each other under the Sherman Act, Count I should still be dismissed because it fails to allege any actionable agreement. *Twombly*, 550 U.S. at 556-57, 570 ("conclusory" allegations of a conspiracy are insufficient to state a claim; plaintiff must state "enough facts to state a claim to relief that is plausible on its face"). Although less than clear, Count I does not allege a typical horizontal conspiracy between competitors. Instead, Count I is styled as a "Group Boycott" and alleges that "Defendants *agreed between themselves* to deny services" to "Market Distributors"—a term not defined in the FAC—if the

distributors did business with Force Partners. (FAC ¶ 119 (emphasis added).) But this allegation—based on the theory that Defendants boycotted the distributors themselves, not Plaintiff—collapses for three reasons.

First, Plaintiff pleads no facts plausibly suggesting that the KSA Defendants and Acuity entered into any agreement for an unlawful purpose.[4] *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) (conspiracy requires separate actors who "had a conscious commitment to a common scheme designed to achieve an unlawful objective").[5] Far from a "conscious commitment to a common scheme," KSA is accused of making presentations and offering distributors an opportunity to join an authorized distributor program—not an illegal, conspiracy involving Acuity (its representative brand). To be sure, Plaintiff alleges that KSA offered distributors the option to become "Partners" with KSA and that some unknown number of distributors chose to participate, meaning those distributors would receive KSA's best prices and services in exchange for allegedly curtailing their business with other sales representatives. (FAC ¶¶ 3, 9, 82.) But offering authorized distributor programs to customers is the very opposite of anticompetitive—it demonstrates competition by cutting prices. *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1061 (8th Cir. 2000) (rejecting exclusive dealing theory based on dealer discount programs, as "cutting prices in order to increase business often is the very essence of competition").[6] Plaintiff even concedes that "KSA's prices might go down" as a result of the

[4] Plaintiff does not—and cannot—allege a *per se* group boycott because those claims are limited to cases "involving horizontal agreements among direct competitors." *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998). Here, Defendants are not direct competitors.

[5] Plaintiff admits that Defendants did *not* deny distributors who chose not to participate in the authorized distributor program access to any brands represented by KSA, including Acuity. (*See* FAC ¶¶ 9, 90.)

[6] Notably absent from the FAC—and underscoring the manufactured nature of the unlawful "agreement" between Defendants—are any allegations of agreements between the KSA Defendants and the approximately 150 other manufacturers KSA represents, each of whom would benefit from the authorized distributor program in the exact same manner as Acuity. (*See* FAC ¶¶ 9, 32.)

authorized distributor program. (FAC ¶ 85.) None of Plaintiff's allegations plausibly suggest an unlawful agreement to boycott distributors, or any behavior outside the normal relationship of a manufacturer and sales representatives working together to increase sales with incentives.

Second, the allegation that KSA would "deny access" to its brands to distributors "unless those distributors terminated their relationship" with Plaintiff is completely false. (*See id.* ¶ 119.) As the FAC makes clear, KSA's authorized distributor program provides all distributors the option of being "Partners" or "Associates," giving distributors the choice of how much commitment they wish to make. (*Id.* ¶¶ 82, 90 (alleging "Associates" would simply "not be able to get KSA's brands' 'best prices' or attendant services").) But at no time did—nor is it alleged that—KSA ever refuse to deal with a distributor who wished to continue doing business with Plaintiff. Accordingly, Plaintiff's allegation in Paragraph 119 is factually inconsistent with its other allegations, and does not plausibly state a "group boycott" claim.

Finally, KSA has every right to unilaterally offer authorized distributor programs, just as it has every right to deal with only those distributors that follow its terms. KSA is perfectly within its rights to announce that it will stop dealing with any distributors that do not wish to be Partners in its program. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (Sherman Act "does not restrict the long recognized right of trader . . . to exercise his own independent discretion as to parties with whom he will deal"); *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000) ("Part of competing like everyone else is the ability to make decisions about with whom and on what terms one will deal."). In short, there are no allegations that the Defendants entered into an unlawful agreement to boycott distributors. Hence, Count I should be dismissed.

3. Count II Should Be Dismissed Because Plaintiff Does Not Allege Any Actionable Agreement Under the Sherman Act

Count II similarly fails to allege an actionable agreement. Plaintiff alleges that KSA's

authorized distributor program "effectively require[d] distributors of electrical lighting equipment to deal exclusively with Defendants" and "Defendants obtained agreements from the distributors." (FAC ¶¶ 128-29). Unlike Count I, Count II alleges an *actual* conspiracy with distributors to boycott Plaintiff. This Count fails both factually and legally.

Factually, Count II fails to state a claim because Plaintiff cannot allege that the incentive program has been implemented, and repeatedly alleges that no written contract has been offered to any distributor. (*Id.* ¶¶ 10-11, 95-96, 109). Instead, it premises Count II on alleged "unwritten" agreements. (*Id.* ¶¶ 3, 109). Other than conclusory allegations of their existence, (*see id.* ¶ 3, 11, 20, 117), the FAC offers no details. It does not identify the parties to the alleged agreements, when the parties entered the alleged agreements, and how—or if—the agreements could be enforced.[7] It is a basic tenet of antitrust law that "stating [a Section 1] claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556. Plaintiff's "bare assertion of conspiracy will not suffice . . . and [its] conclusory allegation[s] of agreement[s] at some unidentified point does not supply facts adequate to show illegality." *Id.* at 556-57. Count II should therefore be dismissed.

Count II is legally insufficient as well. The crux of that claim is that KSA offered distributors the option to become "Partners" with KSA, meaning those distributors would receive KSA's best prices and services in exchange for allegedly curtailing their business with other sales agents. (FAC ¶ 82.) Plaintiff calls this an "unwritten agreement." Wrong—a unilateral *invitation* to each distributor does not constitute any type of an *agreement*, much less an antitrust violation. The Seventh Circuit has explained that inducing dealers to follow a supplier's exclusive dealing policy or guideline—and even terminating business with non-compliant dealers—does not create

[7] The FAC implicitly acknowledges the illusory nature of these unwritten "agreements" by noting that the parties would "have no contractual recourse" in the event a party breaches the "agreement." (FAC ¶ 96.)

an actionable agreement under Section 1. *See Roland Mach.*, 749 F.2d at 393. In *Roland Machinery*, the Seventh Circuit found allegations even stronger than Plaintiff's were insufficient to warrant even a preliminary injunction:

> Assume that [defendant] made clear to [plaintiff] and its other dealers that it wanted only exclusive dealers and would exercise its contract right to terminate, immediately and without cause, any dealer who took on a competing line. The mere announcement of such a policy, and the carrying out of it by canceling [plaintiff] or any other noncomplying dealer, *would not establish an agreement*. It would be a classic example of the conduct permitted by *United States v. Colgate & Co.*, 250 U.S. 300, 305-06 (1919).

Id. (emphasis added); *see also id.* ("The fact that [the defendant] was hostile to dealers who would not live and die by its product . . . and . . . cancel[ed] a dealer who did the thing to which it was hostile, does not establish an agreement, but if anything the opposite: a failure to agree on a point critical to one of the parties."). Put simply, KSA can unilaterally impose any policy it wishes on its distributors—irrespective whether they constitute what Plaintiff terms as an "abusive" tactic. Regardless of the hyperbole Plaintiff uses, it cannot make the leap that KSA's *offer* to distributors to join its authorized distributor program constitutes an *agreement* with distributors to boycott.

To the contrary, providing incentives to distributors—including "best prices" and "services"—represents robust competition, not a conspiracy in violation of Section 1. *Concord Boat*, 207 F.3d at 1061 (rejecting exclusive dealing theory based on dealer discount programs, as "cutting prices in order to increase business often is the very essence of competition"); *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 266 (2d Cir. 2001) ("even with monopoly power, a business entity is not guilty of predatory conduct through excluding its competitors from the market"); *Broadcom Corp. v. Qualcomm Inc.*, No. 05 CV 3350, 2006 WL 2528545, at *16 (D.N.J. Aug. 31, 2006), *aff'd in part, rev'd in part and remanded*, 501 F.3d 297 (3d Cir. 2007) (dismissing exclusive dealing claim on dealer "discounts, economic incentives, and other

rewards").[8] Accordingly, Plaintiff comes nowhere close to alleging any actionable agreement under Section 1, and thus, Counts I and II should be dismissed.

B. Force Partners Failed to Plead That the Alleged Agreements Caused a Restraint of Trade Within Relevant Product and Geographic Markets

Both Counts I and II suffer from another pleading deficiency—Plaintiff has failed to allege that KSA's invitations to enter into an authorized distributor program and the supposedly resulting "oral agreements" *unreasonably* restrained trade in any market. This is necessary because, contrary to its allegation, this is not a "hub-and-spoke conspiracy," (*see* FAC ¶¶ 4, 117, 130), subject to the per se rule. *See Marion Healthcare, LLC v. Becton Dickinson & Co.*, 952 F.3d 832, 842 (7th Cir. 2020) (hub-and-spoke conspiracy insufficient where plaintiff failed to show distributors "coordinated not only with the manufacturer, but also with each other"). Instead, this element should be judged under the rule of reason because Plaintiff does not allege a horizontal agreement between competitors, but rather a vertical restraint between Acuity, KSA, KSA's owners, and unspecified individual distributors—*i.e.*, a restraint "between firms at different levels of distribution." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018); *see also Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advert. Ass'n, Inc.*, 672 F.2d 1280, 1284 (7th Cir. 1982) ("[T]he rule of reason is the standard traditionally applied to most anticompetitive practices challenged under [Section] 1 of the Sherman Act."). Under this standard, "the plaintiff carries the burden of showing that an agreement or contract has an anticompetitive effect on a given market within a given geographic area." *Agnew*, 683 F.3d at 335; *see also Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("[T]his Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact

[8] Broadcom did "not appeal the dismissal of its claims for tying and exclusive dealing." *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 306 (3d Cir. 2007).

unreasonable and anticompetitive before it will be found unlawful.").

Plaintiff alleges no "unreasonable restraint" under the rule of reason in either Counts I or II. As noted, there are no plausible allegations of any actionable "agreement" with Acuity or with any distributor.[9] With no "agreement," there can be no "restraint on trade" and thus, there is no actionable Section 1 claim.

Even if there is a properly pled agreement with distributors to enter into KSA's authorized distributor program (or as Plaintiff sees it, an "exclusive deal"), Plaintiff still has not pled that the program forecloses competition. *Broadcom*, 2006 WL 2528545, at *16 (arrangement to provide discounts or incentives for not using competitor's product not unlawful exclusive dealing because buyers not foreclosed from purchasing competitor's product). "[E]xclusive dealing arrangements violate antitrust laws only when they foreclose competition in a substantial share of the line of commerce at issue." *Republic Tobacco*, 381 F.3d at 737-38. This is a high bar. It requires Plaintiff to show "that [the arrangement] is likely to keep at least one significant competitor of the defendant from doing business in a relevant market," and that "the probable (not certain) effect of the exclusion will be to raise prices above (and therefore reduce output below) the competitive level." *Roland Mach.*, 749 F.2d at 394. But here, the challenged activity is an offer to join an authorized distributor program. It is completely voluntary. And irrespective of whether a distributor chooses to become a "Partner," the distributor would still have access to KSA's manufacturers' products and other competing lines. (FAC ¶ 90.) Therefore, it is not exclusionary. *See Chicago Studio Rental, Inc. v. Illinois Dep't of Commerce*, 940 F.3d 971, 979 (7th Cir. 2019) (dismissal of Section

[9] As discussed more fully in Section II.B, Plaintiff fails to allege a legally sufficient relevant antitrust market, which by definition, precludes Plaintiff from alleging a Section 1 rule of reason claim and warrants dismissal. *See Concord Assocs., L.P. v. Entm't Properties Tr.*, No. 12 CIV. 1667 ER, 2014 WL 1396524, at *10 (S.D.N.Y. Apr. 9, 2014), *aff'd*, 817 F.3d 46 (2d Cir. 2016) (dismissing Section 1 claim where plaintiff "failed to properly plead a relevant market").

1 and 2 claims where plaintiff "does not allege that it was entirely excluded from the market").

As *Broadcom* stated, even if a "deal" provides incentives to purchase one product over competitors, "it does not foreclose the purchase of another company's" product. *Broadcom*, 2006 WL 2528545, at *16. Thus, like any typical rewards or mileage program, Plaintiff cannot claim that KSA's program forecloses distributors from purchasing Plaintiff's products. *See Concord Boat*, 207 F.3d at 1059 (discount program not exclusive when it did not require a commitment for any specified time and free to walk away to competitors); *Stitt Spark Plug Co. v. Champion Spark Plug Co.*, 840 F.2d 1253, 1257-58 (5th Cir. 1988) (dealer incentives for dropping competing lines not exclusive dealing where no evidence the distributor could not still stock competitor products); *Beverage Mgmt., Inc. v. Coca-Cola Bottling Corp.*, 653 F. Supp. 1144, 1154 (S.D. Ohio 1986) (incentive program encouraging exclusivity in supplier's brand not unlawful because retailer free to sell competing brands). Hence, Plaintiff failed to allege anything to indicate that KSA's conduct actually impacted or "foreclose[d] competition in a substantial share" of any relevant market, and therefore, all claims that KSA invited exclusive agreements should be dismissed. *Republic Tobacco*, 381 F.3d at 738; *see also Methodist Health*, 859 F.3d at 410 ("no evidence that Saint Francis's exclusive contracts have a significant exclusionary effect"); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 209 (5th Cir. 2002) ("no basis in [plaintiff]'s complaint for concluding that either of the two licensing agreements . . . are likely to foreclose a significant share of the relevant software markets").[10] Both Counts I and II should be dismissed.

[10] While the challenged authorized distributor program clearly does not foreclose competition, Plaintiff is wrong in suggesting it "knows of no procompetitive effects" of Defendants' program. (FAC ¶ 114.) To the contrary, Plaintiff alleges that distributors participating in KSA's authorized distributor program would allow KSA to match Plaintiff's prices when quoting "multiple-name specification bids," (*id.* ¶ 84), the precise kind of competition that "[d]istributors prefer . . . because it provides . . . lower costs," (*id.* ¶ 102). More clearly, Plaintiff alleged that distributors would have to allow KSA to meet any lower prices offered by Plaintiff, meaning the end customer would *benefit* from Defendants' program because it could choose

II. Count III Should Be Dismissed Because Plaintiff Fails to Allege That Defendants Attempted to Monopolize Any Market

Count III for "attempted monopolization" fares no better than the prior two antitrust claims. To state an attempted monopolization claim, a plaintiff must adequately plead "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of obtaining monopoly power." *Hon Hai Precision Indus. Co. v. Molex, Inc.*, No. 08 C 5582, 2009 WL 310890, at *2 (N.D. Ill. Feb. 9, 2009) (citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993)).

Here, Plaintiff alleges that Defendants *attempted* to monopolize a market by (1) inviting distributors into its authorized distributor program, and (2) disseminating false information. Nowhere, however, does the FAC identify any exclusionary conduct, define a legally sufficient market, or properly allege a dangerous probability that Defendants will succeed in monopolizing any relevant market. Count III should be dismissed.

A. Plaintiff Fails to Allege Any Exclusionary or Anticompetitive Conduct Sufficient to State an Attempted Monopolization Claim

1. Plaintiff Fails to Plead That KSA's Invitation to Enter Into Alleged Exclusive Relationships is Exclusionary, and Therefore Fails to Allege the Requisite Anticompetitive Conduct Element

As stated above, KSA's invitations to distributors do not constitute exclusive agreements or "boycotts"—much less exclusionary conduct actionable under Section 2. But even so, "vertical exclusive distributorships (like here) are presumptively legal." *Republic Tobacco*, 381 F.3d at 736.

As with its Section 1 claims, Plaintiff makes no allegations that any invitations, or even

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from more products at lower prices. Plaintiff also concedes that the program may cause "KSA's prices [to] go down." (*Id.* ¶ 85.) This is the essence of competition, and underscores that Plaintiff's FAC is nothing more than the grumblings of a disgruntled competitor. *See Brillhart v. Mutual Medical Ins., Inc.*, 768 F.2d 196, 200-01 (7th Cir. 1985) (antitrust laws protect competition, not competitors, rejecting antitrust claims where "plaintiffs' real complaint . . . [is] their failure to make more money").

any agreements, related to Defendants' authorized distributor program would foreclose competition in any product market that Plaintiff alleges—an essential element of its Section 2 claims. *Id.* at 737-38 ("exclusive dealing arrangements violate antitrust laws only when they foreclose competition in a substantial share of the line of commerce at issue"). Nor could they, because as previously explained, there is nothing in the authorized distributor program that prevents distributors from purchasing products from other competitors. And while Plaintiff calls the program exclusionary, it makes no allegations about how many distributors actually participate in the relevant geographic market or how many of them are alleged to have exclusive agreements with KSA. (*See* FAC ¶ 37 ("In the relevant Market, over 75% of trade is handled by approximately 23 distributors, which in turn comprise approximately 90% of the customers for both KSA and Force Partners.").) The FAC is also silent as to how many distributors sell exclusively Acuity or KSA products versus products of other manufacturers, the percentage of the distributors in the market that are—or would be—allegedly foreclosed from selling Plaintiff's products, or the sizes or market shares of these distributors. (*See id.* ¶¶ 3, 11, 20, 117, 129 (baldly alleging unidentified distributors agreed to deal exclusively with KSA).)

Hence, Plaintiff fails to allege any facts indicating that Defendants' conduct impacted or "foreclose[d] competition in a substantial share" of the relevant market, and therefore, any monopolization claim based on Defendants' invitations to enter into its authorized distributor program or exclusive agreements with distributors should be dismissed. *Republic Tobacco*, 381 F.3d at 737-38; *see also Methodist Health*, 859 F.3d at 410-11; *Dickson*, 309 F.3d at 209.

2. Plaintiff's Allegations That KSA Made False or Disparaging Statements to Distributors Fail to Support its Monopolization Claim

Plaintiff's remaining monopolization allegation—that KSA made a false statement or disparaged Force Partners—is insufficient to state a claim as a matter of law. Plaintiff claims that

KSA told distributors that "Force Partners was bypassing distributors to make sales directly to end-users and contractors, thereby denying sales and profits to distributors." (FAC ¶ 77). But that statement, even if made and somehow viewed as "disparaging," is not actionable. Disparaging statements of a competitor fall "outside the reach of the antitrust laws, however critical they may be of a competitor's product or business model." *Mercatus Grp.*, 641 F.3d at 851.

The Seventh Circuit has explained that "claims based on one competitor's disparagement of another should presumptively be ignored" in evaluating antitrust claims. *Id.* at 851-52; *see also id.* ("[E]ven false statements about a competitor serve to set the stage for competition."). This is because "[f]alse statements about a rival's goods do not curtail output in either the short or the long run," *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 623 (7th Cir. 2005), and so they are irrelevant to the kind of anticompetitive conduct that the antitrust laws are intended to curb.

Here, even if made, KSA's alleged statement that Plaintiff "bypass[es] distributors" at times is not only benign, but comes nowhere close to alleging an attempted monopolization claim. KSA's alleged statement may reflect strong competition between Plaintiff and KSA, but such "[c]ommercial speech is not actionable under the antitrust laws." *Id.* at 624; *see also id.* at 623 ("Antitrust law condemns practices that drive up prices by curtailing output. False statements about a rival's goods do not curtail output in either the short or the long run. They just set the stage for competition in a different venue: the advertising market.").

Plaintiff's new allegations that KSA engaged in "abusive" tactics or "commercial bribery" fare no better. (FAC ¶¶ 59-72.) They should be ignored as immaterial and as an unfounded character assassination on KSA. Plaintiff can cite no law supporting the meritless notion that an invitation to exclusively do business with a distributor or that "wining and dining" customers constitutes "abuse" or exclusionary conduct actionable under the Sherman Act. (*Id.*) There is

none. As such, Plaintiff has offered no exclusionary or anticompetitive conduct sufficient to state a Section 2 monopolization claim, and therefore, Count III should be dismissed.

B. Plaintiff Does Not Allege the "Dangerous Probability of Success" Element

Plaintiff also fails to plausibly plead another crucial element of attempted monopolization—that KSA's invitations create a "dangerous probability of success" of achieving a monopoly in a given market. Pleading a "dangerous probability of establishing a monopoly in a particular market requires more than allegations of merely unfair or predatory conduct; instead, the antitrust plaintiff must also prove the defendant has market power in a relevant market and that the market power will tend to approach monopoly power if the alleged unlawful conduct remains unchecked." *Int'l Equip. Trading, Ltd. v. Illumina, Inc.*, 312 F. Supp. 3d 725, 731 (N.D. Ill. 2018). Plaintiff fails on multiple fronts.

First, Plaintiff defines the relevant product market as "lighting and controls for buildings and private roadways." (FAC ¶ 28.) This definition is fatally vague because it provides insufficient information about what products are actually included in the proposed market. *See Cupp v. Alberto-Culver USA, Inc.*, 310 F. Supp. 2d 963, 971 (W.D. Tenn. 2004) (dismissing antitrust claims where the product market of "'hair care products' is itself so vague that it leaves the Court at a loss as to what sorts of products to include"). Indeed, Plaintiff's product market apparently includes everything from a light bulb sold at a hardware store to an exit sign sold on the internet. (*See* FAC ¶ 28.) As Plaintiff did not "define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, . . . the relevant market is legally insufficient" and Count III should be dismissed. *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997); *Right Field Rooftops, LLC v. Chi. Baseball Holdings, LLC*, 87 F. Supp. 3d 874, 886 (N.D. Ill. 2015) ("failure to offer a plausible relevant market is a proper ground for dismissing an antitrust claim").

Missing too are plausible allegations of market power. In an attempt to attribute a high market share to KSA, Plaintiff alleges a spattering of market percentages, but none of them are tethered or even relate to Plaintiff's contrived product market:

- KSA represents between 40% and 70% *of some distributors' lighting and control business*. (FAC ¶¶ 10, 40, 98.)
- KSA accounts for 59.5% "of specified and approved products *of the top four firms in the project/specification market*."[11] (*Id.* ¶ 43 (emphasis added).)
- KSA accounts for 90% of the "sales" *in three of the nineteen counties at issue*. (*Id.* ¶ 55.)

As is obvious from these allegations, statistics relating to "some distributors" or the "top four firms" are meaningless in determining whether KSA has market power in the so-called market of all "lighting and controls for buildings and private roadways." Plaintiff cannot allege with a straight face that KSA—a sales agent—would have market power for all "lighting and controls for buildings and private roadways" when it does not even manufacture those products and there are dozens of companies that produce them.

Ignoring this point, Plaintiff still ambiguously alleges that "[t]he large market share represented by Defendants indicates a dangerous probability of success." (FAC ¶ 148). This conclusory allegation is not enough. *Hon Hai*, 2009 WL 310890, at *3 (Section 2 claim dismissed "because [plaintiff] did not allege a 'dangerous probability' that [defendant] may obtain monopoly power in the relevant market"). There are no plausible allegations of market power or the dangerous probability of success element, and therefore, Count III should be dismissed. *Endsley v. City of Chicago*, 230 F.3d 276, 282 (7th Cir. 2000) ("[W]here plaintiffs fail to identify any facts

[11] The FAC does not identify the combined share of these four firms in the project/specification market, nor does it allege the share of the total lighting market made up of project/specification sales or how either of those are related to access to distributors. (*See* FAC ¶ 35 (explaining that sales representatives sell to both "[s]tock and flow distributors" and "[p]roject/specification distributors").)

from which the court can infer that defendants had sufficient market power to have been able to create a monopoly, their § 2 claim may be properly dismissed.").

III. Count IV Should Be Dismissed Because Plaintiff Did Not Allege an Exclusive Agreement for Goods Resulting in Any Actual Exclusion From a Relevant Market

Plaintiff's Clayton Act Section 3 claim should be dismissed for the same reason its Section 1 claims fail—there is no allegation of a contract or agreement that violates the antitrust laws. Section 3 prohibits certain exclusive *contracts* for the sale of *goods*. 15 U.S.C. § 14; *see also Dos Santos v. Columbus-Cuneo-Cabrini Med. Ctr.*, 684 F.2d 1346, 1352 n.11 (7th Cir. 1982) ("Since section 3 relates only to exclusive dealing contracts for the sale of goods, plaintiffs seeking to challenge exclusive dealing arrangements for the provision of services must premise their claims on section 1 of the Sherman Act."). But as described above, there are no actual contracts—as Plaintiff repeatedly states—between Defendants and distributors, and so Plaintiff cannot state a claim under Section 3. (*See, e.g.*, FAC ¶¶ 95, 109; *id* ¶ 96 ("With no written promises" the parties "will have no contractual recourse.").) Additionally, Plaintiff's Clayton Act claim fails for the independent reason that it has not alleged an exclusive contract for *goods*. (*See, e.g.*, *id.* ¶ 119 ("Defendants agreed . . . to deny *services* . . . to Market Distributors" (emphasis added)).)

Moreover, Plaintiff's Section 3 claim is that "Defendants have conditioned purchase of their product at commercially reasonable prices on exclusive dealing." (FAC ¶ 161a.) But it is well established that "a mere refusal by a manufacturer to deal with a [distributor] who will not confine his dealings to the goods of the manufacturer does not run afoul of [Section 3]." *McElhenney Co. v. W. Auto Supply Co.*, 269 F.2d 332, 338 (4th Cir. 1959) (collecting "unanimous" cases). Instead, "[i]n order to prove a [Section] 3 claim, [a plaintiff] must show that the likely effect of [the defendant's] exclusivity agreements is to substantially decrease competition." *Republic Tobacco*, 254 F. Supp. 2d at 1004. Plaintiff made no such showing here. According to

the FAC, distributors that declined to participate in Defendants' authorized distributor program could still purchase products manufactured by KSA's contracted manufacturers, (FAC ¶ 90), those that did participate could still quote Force Partners' manufacturers' products, (*id.* ¶ 84), and at worst would have to allegedly "curtail"—not cease—business with Force Partners, (*id.* ¶ 9). Even Plaintiff's strongest allegations prove the point. They merely allege that non-participating distributors would supposedly "lose meaningful access"—not complete access—"to KSA-represented brands." (*Id.*) Without any actual exclusion, there can be no substantial lessening of competition. *Alarm Detection Sys. v. Orland Fire Prot. Dist.*, 129 F. Supp. 3d 614, 635 (N.D. Ill. 2015) (plaintiff not actually excluded from market could not state antitrust claims).

Even assuming there were contracts between Defendants and distributors that pertained to goods—which are not alleged—Plaintiff's Section 3 claim would still fail. "A determination of the relevant market is essential under § 3 of the Clayton Act, as it is under the Sherman Act." *Republic Tobacco, L.P. v. N. Atl. Trading Co.*, 254 F. Supp. 2d 985, 1004 (N.D. Ill. 2002) (citing *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 329 (1961)); *see also Dos Santos*, 684 F.2d at 1352 ("In the context of exclusive dealing arrangements, this means that the plaintiff can prevail only by showing that the agreement in question results in a substantial foreclosure of competition in an area of effective competition, that is, in a relevant market.").

As Plaintiff has not sufficiently alleged a relevant antitrust market (as set forth in Section II.B) nor any actual exclusion from that relevant antitrust market, its Clayton Act claim (Count IV) should be dismissed.

IV. Count V Should Be Dismissed Because Illinois Antitrust Act Claims Are Evaluated Under the Same Standards as Federal Antitrust Claims

Plaintiff's Illinois Antitrust Act claims (Count V) fail for the same reasons as the federal claims. The Illinois Antitrust Act expressly requires harmonization with the federal laws. 740

ILCS 10/11 ("When the wording of this Act is identical or similar to that of a federal antitrust law, the courts . . . shall use the construction of the federal law by the federal courts as a guide in construing this Act."). That is, courts look to the application of the federal counterpart to guide analysis of the state antitrust law claims. *State of Ill., ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1479-80 (7th Cir. 1991) (Illinois courts "use the construction of federal antitrust law by federal courts to guide their construction of ... state antitrust laws"). More simply, if the federal claims are dismissed, the equivalent state claims should be dismissed. *VBR Tours, LLC v. Nat'l R.R. Passenger Corp.*, No. 14-CV-00804, 2015 WL 5693735, at *16 (N.D. Ill. Sept. 28, 2015) ("Illinois Antitrust Act claims will stand or fall with federal ... claims based on the same underlying facts and legal theories.").

The same holds true here. Plaintiff asserts claims under 740 ILCS 10/3(2) and (3), (FAC ¶¶ 169, 171), which are substantially similar to, and construed in the same ways, as Sherman Act Sections 1 and 2, respectively. *Hannah's Boutique, Inc. v. Surdej*, 112 F. Supp. 3d 758, 765 n.7 (N.D. Ill. 2015). Plaintiff also asserts claims under 740 ILCS 10/3(4), (FAC ¶ 172), which is substantially similar to, and construed in the same ways as, Clayton Act Section 3. *Ray Dancer, Inc. v. DMC Corp.*, 594 N.E.2d 1344, 1350 (Ill. App. Ct. 1992). Accordingly, for the same reasons that Plaintiff's federal claims fail, these state law claims should likewise be dismissed.[12]

Finally, Plaintiff asserts claims under 740 ILCS 10/3(1), again claiming that *per se* analysis is warranted. (FAC ¶¶ 167-68.) But Plaintiff cannot state a cause of action under this provision, which "is *expressly limited* to agreements between two classes of persons: (a) those who are competitors and (b) those persons who, but for a prior agreement, would be competitors." 740 Ill. Comp. Stat. 10/3 Bar Committee Comments–1967 (emphasis added). "Section 3(1) does not reach

[12] While 740 ILCS 10/3(4) differs slightly from Clayton Act, Section 3 because it allows for claims based on a contract for services, this claim still fails for all of the independent reasons described in Section III.

vertical agreements." *Id.*; *see also Sportmart, Inc. v. No Fear, Inc.*, No. 94 C 4890, 1996 WL 296643, at *17 (N.D. Ill. June 3, 1996). As Defendants are not alleged to be, and never would be, competitors of one another, they cannot enter any agreement that would be subject to scrutiny under 740 ILCS 10/3(1). Plaintiff's 740 ILCS 10/3(1) claim should be dismissed.

V. Count VI Should Be Dismissed Because Defendants Did Not Disparage Plaintiff Within the Meaning of the IUDTPA

This Court should dismiss Plaintiff's baseless IUDTPA claim. Plaintiff claims that KSA "disparag[ed] the goods, services, or business of Force Partners," but fails to identify an actionable disparaging statement. (FAC ¶¶ 175-79.) Its entire claim is based on only two sentences:

> KSA claimed that Force Partners was bypassing distributors to make sales directly to end-users and contractors, thereby denying sales and profits to distributors. This claim was false, and KSA knew or should have known it was false.

(*Id.* ¶ 77.) Neither of these sentences are disparaging, and neither state a claim under the IUDTPA. That statute only prohibits a person engaged in his or her business from "disparag[ing] the goods, services, or business of another by false or misleading representation of fact." 815 ILCS 510/2(a)(8).[13] Despite the statutory language, Illinois courts have repeatedly held that "[b]ecause Section 2(8) codifies common law commercial disparagement, . . . claims require a plaintiff to allege that a defendant published untrue or misleading statements that disparaged the plaintiff's *goods or services*." *Evanger's Cat & Dog Food Co., Inc. v. Thixton*, 412 F. Supp. 3d 889, 903 (N.D. Ill. 2019) (emphasis added); *see also Organ Recovery Sys., Inc. v. Pres. Sols., Inc.*, No. 11 C 4041, 2012 WL 116041, at *6 (N.D. Ill. Jan. 16, 2012) ("The statements, however, must specifically disparage a product or service and not just attack the reputation of the business or the person selling it."). Here, there is no allegation that KSA disparaged Plaintiff's goods or services,

[13] The IUDTPA allows only for injunctive relief and "does not provide a cause of action for damages." *Greenberg v. United Airlines*, 563 N.E.2d 1031, 1036 (Ill. App. Ct. 1990).

and so Plaintiff's IUDTPA claim fails.

Moreover, a statement is "considered commercially disparaging" only if it "accuse[s] a businessman of outright dishonesty or reprehensible business methods in connection with his goods." *Unique Coupons, Inc. v. Northfield Corp.*, No. 99 C 7445, 2000 WL 631324, at *5 (N.D. Ill. May 16, 2000). At worst, KSA's alleged statement suggests that Plaintiff used an alternative sales channel. This in no way suggests "outright dishonesty or reprehensible business methods." *Unique Concepts, Inc. v. Manuel*, 669 F. Supp. 185, 190 (N.D. Ill. 1987) (commercial disparagement claim dismissed where statements could be reasonably construed to mean something other than a charge of reprehensible conduct). And according to the FAC, the statement is based on "an instance in which an end user asked to make a purchase directly from a Force Partner's brand" and that Force Partners "insisted" on compensation for the relevant distributor when it "became aware of this situation." (FAC ¶ 78.) In other words, the FAC suggests that the statement may well be true, and thus not actionable under the IUDTPA.

But even if KSA's statement was false and could be construed as disparaging, Plaintiff did not meet Rule 9(b)'s heightened pleading standard. "[T]rade disparagement claims under [Section 2(a)(8) of] the UDTPA" are subject to Rule 9(b) "because, as is true in the instant case, allegations of false or misleading statements tend to sound in fraud or mistake." *See Nakajima All Co., Ltd. v. SL Ventures Corp.*, No. 00 C 6594, 2001 WL 641415, at *6 (N.D. Ill. June 4, 2001). "Under Rule 9(b), . . . IUDTPA . . . []claims must allege 'the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated.'" *CardioNet, Inc. v. LifeWatch Corp.*, No. 07C 6625, 2008 WL 567031, at *3 (N.D. Ill. Feb. 27, 2008) (quoting *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 683 (7th Cir. 1992)). Here, even the most generous reading of Plaintiff's

IUDTPA allegations cannot impute a time, place, or method to the alleged misrepresentation, and so Plaintiff's claim fails as a matter of law. *See id.* (the "absence of essential details renders these [IUDPTA claims] deficient"). As such, Count VI should be dismissed.

VI. Count VII Should Be Dismissed Because Defendants' Authorized Distributor Program is Protected by the Privilege of Competition

Lastly, Plaintiff's claim for tortious interference fails as a matter of law. Plaintiff alleges that Defendants tried to persuade its customers to purchase lighting products through KSA instead of Plaintiff. But those communications reflect competition—not a tort. *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862, 865 (7th Cir. 1999) ("There is in general nothing wrong with one [competitor] trying to take a client from another . . . . That is the process known as competition . . . . Competition is not a tort . . . ."). "A plaintiff seeking to plead a cause of action for tortious interference with . . . prospective economic advantage must plead absence of privilege or sufficient facts to constitute actual malice." *Chicago Show Printing Co. v. Sherwood*, No. 92 C 309, 1992 WL 175577, at *2 (N.D. Ill. July 14, 1992). Here, Plaintiff has done neither.

Despite Plaintiff's conclusory and unsupported assertions, Defendants' alleged conduct is protected by the privilege of competition. (*See* FAC ¶ 189.) "Under Illinois law, commercial competitors are privileged to interfere with one another's prospective business relationships provided their intent is, at least in part, to further their businesses and is not *solely* motivated by spite or ill will." *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 882 N.E.2d 1011, 1019 (Ill. 2008) (emphasis added). The FAC is clear that Plaintiff and KSA are competitors, and that KSA proposed the authorized distributor program to promote the products it represents and increase sales—far from pure spite or ill will toward Plaintiff. (*See, e.g.*, FAC ¶¶ 26-32 ("Force Partners competes directly with KSA"); *id.* ¶¶ 9, 83-84 (Partners would allow KSA to match competitor prices on spec bids and would only sell KSA-represented products out of inventory);

id. ¶ 73 (KSA offering distributors "monetary inducements" to promote its manufacturers' products); *id.* ¶ 82 (the authorized distributor program would offer distributors Defendants' "'best prices' and services").) A bare and conclusory recitation that Defendants were supposedly solely motivated by spite and ill will cannot save Plaintiff's claim in the face of its detailed allegations proving otherwise. *Iqbal*, 556 U.S. at 678 (pleading "labels and conclusions" without "factual enhancement" insufficient to state a claim (citing *Twombly*, 550 U.S. at 555, 557)). Accordingly, all of Defendants' discussions surrounding the authorized distributor program are protected by the privilege of competition, and Count VII must be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's First Amended Complaint in its entirety and with prejudice pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: June 12, 2020

By: */s/ James F. Herbison*

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on June 12, 2020, the foregoing KSA DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT was filed electronically with the Clerk of Court using the CM/ECF system. Copies of the document will be served on all counsel of record automatically by operation of the Court's MC/ECF filing system.

Dated: June 12, 2020 By: */s/ James F. Herbison*