UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

INTERNATIONAL CONSTRUCTION PRODUCTS LLC,

Plaintiff,

v. **Case No. 5:20cv226-TKW-MJF**

RING POWER CORPORATION, ZIEGLER, INC. and **THOMPSON TRACTOR COMPANY, INC.**,

Defendants.
_____/

ORDER GRANTING SUMMARY JUDGMENT

This case is before the Court based on Defendants' motions for summary judgment (Docs. 358, 359, 361). Plaintiff filed a combined response in opposition (Doc. 375) to which Defendants filed replies (Docs. 381, 382, 383). No hearing is necessary to rule on the motions, and for the reasons that follow, the Court finds that the motions are due to be granted.

Overview

This case is a spin-off from a still-pending suit filed by Plaintiff in federal court in Delaware nearly 7 years ago.[1] The case has a long and tortured procedural history, but it boils down to a fairly simple question: Did Defendants conspire to keep Plaintiff out of the heavy construction equipment sales market in North America by threatening to withhold their used equipment from the online auction site that Plaintiff had contracted with to sell its new equipment?

Defendants argue in their motions for summary judgment that the answer to this question is "no" because there is simply no record evidence from which a jury could find that they individually did what Plaintiff claims, much less that they

[1] *Int'l Constr. Prods., LLC v. Caterpillar, Inc., et al.*, D. De. Case No. 1:15cv108-RGA-SRF (filed Jan. 29, 2015).

conspired with each other (or anyone else) to do so. Having carefully reviewed the evidence and legal memoranda submitted by the parties,[2] the Court agrees.

Background

Plaintiff was a distributor of new Chinese-manufactured Lonking heavy construction equipment, and it was also "an authorized reseller" of other Chinese-manufactured heavy construction equipment. Plaintiff's business model was to sell the equipment directly to consumers over the Internet rather than through a dealer network, which was the typical business model in the North American heavy construction equipment market.

Defendants are independently owned and operated heavy construction equipment dealers who sell new and used equipment manufactured by Caterpillar, Inc. in exclusive regional territories around the United States. Defendants sometimes use online auction sites, such as IronPlanet, and auction companies, such as Cat Auction Services (CAS) and Ritchie Bros. Auctioneers, to sell their used equipment.

There was considerable interrelationship between the auction services and the heavy construction equipment manufacturers and dealers. For example, Defendant Ring Power Corporation was a minority shareholder of IronPlanet and Defendant Ziegler, Inc. was a shareholder of CAS. Additionally, Ziegler's president and CEO, Bill Hoeft, was a founding member of CAS and chairman of its board of directors.

In January 2014, after several months of informal discussions, IronPlanet and CAS began formal merger negotiations.[3] The merger was consummated the following year, and in 2016, the combined entity merged with Ritchie Bros.

In March 2014, while the merger discussions were ongoing between CAS and IronPlanet, Plaintiff entered into an agreement with IronPlanet to sell certain new

[2] Collectively, the parties filed nearly 200 exhibits containing over 3,700 pages (including dozens of condensed four-page-to-one-page deposition transcripts), *see* Attach. to Docs. 355, 356, 357, 376, and more than 200 pages of legal memoranda in support of and in opposition to the motions for summary judgment.

[3] Although Plaintiff devotes substantial discussion in its response to events related to the merger between CAS and IronPlanet to support its conspiracy claim, the Delaware court unequivocally ruled in October 2019 that "because … the merger agreement between IronPlanet and [CAS] did not restrain trade, [Plaintiff] cannot rely on the merger agreement to establish concerted action." Doc. 238, at 9.

Chinese-manufactured heavy construction equipment on IronPlanet's website.[4] The agreement was announced at a large industry trade show, and as Plaintiff hoped, the announcement generated significant press coverage and "ma[d]e a splash" in the industry.

IronPlanet terminated the agreement the following month, and Plaintiff subsequently went out of business. The circumstances giving rise to the termination of the agreement form the basis of Plaintiff's claims.

There is evidence that IronPlanet terminated the agreement because it did not want to continue devoting substantial resources to a venture that generated only one sale and it wanted to devote its resources to the potentially more lucrative CAS merger. However, there is also evidence that (in the light most favorable to Plaintiff) shows that IronPlanet's decision to terminate the agreement was based, at least in part, on "pressure" exerted on it by industry stakeholders that were not happy with its decision to sell new Chinese-manufactured heavy construction equipment on its website.

The dispositive issue in this case is whether the pressure was the result of concerted action involving Defendants. The facts and evidence pertinent to the resolution of this issue are interspersed in the analysis section below.

Procedural History

In January 2015, Plaintiff filed suit against Caterpillar, CAS, and several other heavy construction equipment manufacturers in federal court in Delaware, alleging antitrust violations and other claims. Over the course of that litigation, the claims against CAS and manufacturers other than Caterpillar and Komatsu America Corporation were dismissed.

In September 2018, Plaintiff was granted leave to file a second amended complaint to add three Caterpillar dealers (Ring Power, Ziegler, and Thompson Tractor Company, Inc.) as defendants. Nearly two year later, in August 2020, after initially dismissing the claims against these "dealer defendants" for lack of personal jurisdiction, the Delaware court reconsidered the dismissal and transferred the claims against the dealer defendants to this Court. *See* Docs. 294, 295. The Delaware court did not transfer the claims against Caterpillar and Komatsu, and those claims remain pending in the Delaware court.

Three months after the case was transferred to this Court, Plaintiff was granted leave to file an amended complaint that focused solely on the claims against the three

[4] The "representative brands" indentified in the agreement were Lonking, Shantui, Sunward, Zoomlion, XCMG, and Mahindra.

named dealer defendants. *See* Doc. 324 (denying Defendants' motion to dismiss and granting Plaintiff's motion to amend). The amended complaint (Doc. 322) asserts four counts against Defendants: two under Section 1 of the Sherman Act, 15 U.S.C. §1 (Counts 1 and 2) and two tortious interference claims under state law (Counts 3 and 4). Defendants answered the complaints, denying the claims asserted against them and asserting various affirmative defenses. *See* Docs. 325, 326, 327.

Two months later, in January 2021, a scheduling order was entered establishing a phased discovery schedule. *See* Doc. 338, at ¶4.a. Phase 1 was limited to "fact discovery on the issue of the existence of a conspiracy in relation to the alleged agreement to boycott IronPlanet," and Phase 2 was to focus on "expert discovery and the issues of market definition, antitrust injury, and damages." *Id.* Phase 2 was not to proceed until the Court resolved any summary judgment motions concerning the existence of the alleged conspiracy. *Id.* at ¶4.c.; *see also* Doc. 386 (denying Plaintiff's motion to defer consideration of the summary judgment motions to allow it to conduct certain expert discovery).

Phase 1 discovery was completed in July 2021, as scheduled. Defendants thereafter filed motions for summary judgment on all the claims asserted by Plaintiff in the amended complaint.

Briefing on the motions was completed in October 2021. Plaintiff requested oral argument on the motions, but the Court sees no need for it. Thus, the motions are ripe for rulings.

Analysis

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party, but "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The movant has the initial burden to demonstrate the absence of a genuine dispute as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This burden can be met by "either negating an essential element of the nonmoving party's case or showing that there is no evidence to prove a fact necessary to the nonmoving party's case." *McGee v. Sentinel Offender Servs., LLC*, 719 F.3d 1236, 1242 (11th Cir. 2013).

If the movant meets its burden, the nonmoving party must point to specific evidence showing a genuine issue for trial. *See Celotex*, 477 U.S. at 324. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "A mere scintilla of evidence in support of the nonmoving party will not suffice to overcome a motion for summary judgment, and unsupported speculation is not enough to create a genuine issue of material fact." *Franklin v. Tatum*, 627 F. App'x 761, 764 n.6 (11th Cir. 2015) (internal citations and quotations omitted); *see also Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005) ("[U]nsupported speculation ... does not meet a party's burden of producing some defense to a summary judgment motion. Speculation does not create a *genuine* issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment." (quoting *Hedberg v. Ind. Bell Tel. Co.,* 47 F.3d 928, 931-32 (7th Cir.1995)) (emphasis in original)); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir. 1987) ("[U]nsubstantiated assertions alone are not enough to withstand a motion for summary judgment.").

Sherman Act Claims (Counts 1 and 2)

Defendants argue that the summary judgment evidence fails to establish the existence of a conspiracy and, as a result, they are entitled to judgment as a matter of law on the antitrust claims asserted in the amended complaint. Plaintiff responds that the summary judgment evidence establishes (directly or circumstantially) the existence of a conspiracy between Defendants and others, or that it at least shows that there are genuine factual disputes on the issue. The Court agrees with Defendants, as explained below.

Section 1 of the Sherman Act makes illegal "[e]very contract, combination …, or conspiracy, in restraint of trade." 15 U.S.C. §1. This provision has been interpreted to prohibit only "unreasonable" restraints on trade, so the elements of a §1 claim are [1] a conspiracy, that [2] unreasonably [3] restrains trade. *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co.*, 917 F.3d 1249, 1260 (11th Cir. 2019). Here, only the first element is currently at issue.

An agreement to restrain trade is a "threshold requirement of every antitrust conspiracy claim." *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 569 (11th Cir. 1998). This is so because, "as a general matter, the Sherman Act 'does not restrict the long recognized right of [a private enterprise] freely to exercise [its] own independent discretion as to parties with whom [it] will deal." *Verizon Commc'ns. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

To prove the existence of an agreement to restrain trade, the plaintiff must establish "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Harcros*, 158 F.3d at 569 (quoting *Seagood Trading Corp. v. Jerrico, Inc.,* 924 F.2d 1555, 1573 (11th Cir. 1991)). The existence of an agreement can be proven by direct evidence of the agreement or inferred from circumstantial evidence tending to establish an agreement. *Id.*

"Direct evidence" is evidence that "is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." Black's Law Dictionary 699 (11th ed. 2019); *see also United Am. Corp. v. Bitmain, Inc.*, 530 F. Supp. 3d 1258 (S.D. Fla. 2021) ("Direct evidence is explicit and does not require courts to make inferences to find an agreement."). The evidence must show "an explicit understanding … to collude." *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 272 (5th Cir. 2008). Ambiguous statements are not direct evidence of collusion. *See Hyland v. HomeServices of Am., Inc.*, 771 F.3d 310, 318 (6th Cir. 2014); *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 149 (3d Cir. 2003).

Here, the summary judgment evidence does not contain any direct evidence of an explicit agreement between Defendants to pressure IronPlanet into terminating its relationship with Plaintiff. Defendants' employees and officials unequivocally denied the existence of such an agreement, and Plaintiff did not point to any direct evidence explicitly showing the existence of an agreement.[5] All of the purported direct evidence cited by Plaintiff in its response would require one or more inferences to find that the Defendants agreed to collude against Plaintiff.

For example, the telephone conversation in which IronPlanet's president, Jeff Jeter, allegedly told Plaintiff's chairman, Tim Frank, that "Cat[erpillar] and at least one other manufacturer" were "putting pressure" on IronPlanet to terminate its relationship with Plaintiff or "they" (understood by Mr. Frank to be the manufacturers and dealers) would no longer consign equipment to IronPlanet does not directly establish the existence of an agreement rather than parallel independent

[5] The Court did not overlook the Eleventh Circuit statement in *De-Long Equip. Co. v. Wash. Mills Abrasive Co.*, 887 F.2d 1499, 1515 (11th Cir. 1989), that the court "must look beyond the defendants' bald denial of concerted action and analyze the substance of [plaintiff's] evidence in order to determine if summary judgment was appropriate," but the Supreme Court has made clear that when faced with sworn testimony denying involvement in the alleged conspiracy, a plaintiff must come forward with something more than an assertion that the denials are not credible to withstand summary judgment, *see Anderson*, 477 U.S. at 256 (rejecting argument that a plaintiff can defeat a summary judgment motion "by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy").

action, nor does it unambiguously tie the dealer defendants in this case to the agreement.[6] The Court did not overlook Mr. Jeter's contemporaneous notes of this conversation, which stated that Mr. Frank "understands pressure and said he suspects it would be hard to brush off if they [the manufacturers and dealers] are serious." Although this is evidence from which a jury could find that IronPlanet received "pressure" to terminate its agreement with Plaintiff, it is not direct evidence of a conspiracy because the factfinder would be required to infer that the pressure was being exerted through a collective agreement rather than parallel independent action. Additionally, Mr. Jeter's notes and his deposition testimony about the notes do not tie any particular dealer (much less the defendants named in this case) to the pressure being asserted because, although Mr. Jeter confirmed in his deposition that "they" referred to manufacturers and dealers generally, he could not recall the "specificity and granularity" of which manufacturers or dealers were exerting pressure or what pressure they were asserting.

The fact that the summary judgment evidence does not contain direct evidence of a conspiracy is not dispositive (or surprising) because "it is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement." *Harcros,* 158 F.3d at 569 (quoting *Seagood Trading Corp.*, 924 F.2d at 1573). Indeed, "most conspiracies are inferred from the behavior of the alleged conspirators, and from other circumstantial evidence (economic and otherwise), such as barriers to entry and other market conditions." *Id.*

Although the existence of a conspiracy can be inferred from circumstantial evidence, "antitrust law limits the range of permissible inferences from ambiguous evidence in a §1 case." *Matsushita Elec.,* 475 U.S. at 588. "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* Thus, the plaintiff must present evidence that "tends to exclude the possibility that the alleged conspirators acted independently." *Id.* (internal quotation omitted); *see also Bell Atlantic Corp. v.*

[6] Additionally, the statements attributable to Mr. Jeter are hearsay insofar as they are being offered to prove the truth of the matter asserted—that IronPlanet terminated its agreement with Plaintiff due to "pressure" from Caterpillar and others. The statements are not excluded from the definition of hearsay under Fed. R. Evid. 801(d)(2)(E) because IronPlanet is not alleged to be a "coconspirator" with Defendants. The statements are not admissible under Fed. R. Evid. 804(b)(3)(A) because Mr. Jeter testified in his deposition that he did not recall the substance of his conversion with Mr. Frank, not that he did not recall having a conversation at all. *See Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1317 (11th Cir. 2013) ("Rule 804(a)(3) applies only if the declarant is unable to remember the 'subject matter,' i.e., if 'he has no memory of the events to which his hearsay statements relate.' The fact that the witness does not remember making the statements themselves is irrelevant." (quoting *N. Miss. Commc'ns v. Jones*, 792 F.2d 1330, 1336 (5th Cir. 1986))).

Twombly, 550 U.S. 544, 554 (2007) ("[P]roof of a §1 conspiracy must include evidence tending to exclude the possibility of independent action .... [C]onspiracy evidence must tend to rule out the possibility that the defendants were acting independently.").

Although the plaintiff's evidence "need not be such that *only* an inference of conspiracy may be derived from it," the evidence must at least "go beyond equivocal complaints and *tend* to exclude the inference of independent action." *Am. Contractors Supply, LLC v. HD Supply Constr. Supply, Ltd.*, 989 F.3d 1224, 1234 (11th Cir. 2021) (quoting *De-Long Equip*., 887 F.2d at 1509) (emphasis in original). The Court must consider the evidence as a whole, rather than compartmentalizing the separate factual components. *See Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

A showing of "parallel business behavior" can be circumstantial evidence of the existence of a conspiracy, but without more, "conscious parallelism"[7] is not enough to establish a conspiracy. *See Twombly*, 550 U.S. at 561 n.7. The plaintiff must also show that "each defendant engaging in the parallel action acted contrary to its economic self-interest, or [show] other 'plus factors' tending to establish that the defendants were ... in a collusive agreement to fix prices or otherwise restrain trade." *Harcros*, 158 F.3d at 570-71. The existence of the plus factors "remove[s] [a plaintiff's] evidence from the realm of equipoise and render[s] that evidence more probative of conspiracy than of conscious parallelism." *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003). There is no finite list of plus factors; any showing that "tends to exclude the possibility of independent action" may qualify. *Id.* at 1303.

Here, Plaintiff argues that a conspiracy can be inferred from the fact that each Defendant threatened not to use (i.e., boycott) IronPlanet to sell its used equipment if IronPlanet did not terminate its relationship with Plaintiff. Defendants respond that the summary judgment evidence does not show that they threatened to boycott IronPlanet and even if they had, the evidence fails to show any "plus factors" that would tend to rule out the possibility that they were acting independently. Each point—the existence (or not) of parallel conduct and the existence (or not) of any plus factors—will be discussed in turn.

To establish that the defendants engaged in "parallel conduct," the plaintiff must show that they took similar actions to achieve the same end. *See SD3, LLC v.*

[7] Conscious parallelism is "a common reaction of 'firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions.'" *Quality Auto*, 917 F.3d at 1261 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)).

Black & Decker (U.S.) Inc., 801 F.3d 412, 427 (4th Cir. 2015); *see also In re Musical Instruments & Equip. Antitrust Lit.*, 798 F.3d 1186, 1193 (9th Cir. 2015) (noting that an example of parallel conduct is when "competitors adopt[] similar policies around the same time in response to similar market conditions"). The defendants' actions need not be simultaneous or identical, but substantial variances in the actions may undercut the inference of a conspiracy. *See Anderson News, LLC v. Am. Media*, Inc., 899 F.3d 87, 105 (2d Cir. 2018).

Here, Plaintiff points to the following communications as evidence that Defendants engaged in parallel conduct by threatening to boycott IronPlanet if it did not terminate its relationship with Plaintiff:

- On March 18, 2014, Ziegler's president and CEO, Bill Hoeft, emailed IronPlanet's CEO, Greg Owens, confirming receipt of IronPlanet's latest merger proposal. The email also included a "side note," stating: "We[8] would like to better understand the relationship [between IronPlanet and Plaintiff], as we are concerned that Caterpillar and the CAT dealers would have significant concerns about any arrangement where IronPlanet is providing auction services for new equipment for a Caterpillar competitor." There is no evidence of any other communications between Mr. Hoeft (or anyone else at Ziegler) and anyone at IronPlanet relating to Plaintiff.

- On April 2 and 3, 2014, Ring Power employee Frank Fowler had several phone calls with Mr. Owens. Neither of them recalled the exact substance of the calls, but contemporaneous notes show that Mr. Fowler was calling Mr. Owens merely "to verify [the rumors] and find out what is going on" with IronPlanet and Plaintiff.

- On April 4, 2014, at the request of a supervisor, Thompson employee Richard Lindley asked IronPlanet employee Bob Winnette "[w]hat does this [the agreement between IronPlanet and Plaintiff] mean?" This communication occurred while Mr. Lindley was negotiating with Mr. Winnette over the consignment of six pieces of heavy equipment to IronPlanent. Mr. Winnette

[8] Plaintiff argues that "we" refers to Ziegler because the signature block on the email identified Mr. Hoeft as the president and CEO of Ziegler. However, even when viewed in the light most favorable to Plaintiff, the summary judgment evidence establishes that the "we" refers to CAS (not Ziegler) because the email was sent in the context of the ongoing merger negotiations between CAS and IronPlanet in which Mr. Hoeft was involved in his capacity as a member of CAS's board of director; the substance of the "side note" closely tracked language proposed by a consultant working for CAS on the merger; and Mr. Hoeft (and Ziegler) had no business relationship with IronPlanet other than Mr. Hoeft's involvement in the merger negotiations.

> responded by forwarding an email stating that IronPlanet's agreement with Plaintiff had been "suspended." Mr. Lindley requested a more formal statement on IronPlanet letterhead, which Mr. Winnette provided several days later in a letter stating that "IronPlanet has terminated its relationship with [Plaintiff]" and that Plaintiff's equipment had been removed from IronPlanet's website.

These communications do not contain any express or implied threats and, even in the light most favorable to Plaintiff, amount to nothing more than mere inquiries and expressions of concern about the impact of IronPlanet's deal with Plaintiff on the heavy construction equipment industry. This concern is not unreasonable or contrary to Defendants' economic interests considering that the sale of Plaintiff's new equipment on IronPlanet's website could have reduced the price for which Defendants could sell their used equipment on the website. Additionally, the communications were not unusual because Ring Power and Thompson had existing business relationships with IronPlanet and one of them (Ring Power) had an ownership interest in IronPlanet.

There is no evidence that the communications were perceived as boycott threats by Mr. Owens or any other IronPlanet employee. Indeed, IronPlanet's president, Mr. Jeter, unequivocally testified that he did not receive—and that he was unaware of—any threats from Defendants.

Plaintiff did not point to any conflicting evidence regarding the substance or nature of the communications between Defendants and IronPlanet. Plaintiff's speculation and unsupported claims of a group boycott are simply not enough to establish a genuine issue for trial on this record. *See Cordoba*, 419 F.3d at 1181 ("Speculation does not create a *genuine* issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment." (quoting *Hedberg v. Ind. Bell Tel. Co.*, 47 F.3d 928, 931-32 (7th Cir. 1995)) (emphasis in original)); *Kemp Pontiac-Cadillac, Inc. v. Hartford Auto Dealers' Ass'n, Inc.*, 380 F. Supp. 1382, 1389 (D. Conn. 1974) ("[G]lib and conclusory allegations … are insufficient to raise genuine issues for trial in the face of the specific denials in sworn depositions and affidavits by and in behalf of the several defendants that they never engaged in any such conduct.").

The Court did not overlook Plaintiff's argument that a jury could reasonably find that Thompson and Ziegler's communications to IronPlanet amount to veiled threats because they implicitly conditioned the outcome of ongoing negotiations on IronPlanet's termination of its relationship with Plaintiff. There are (at least) four problems with this argument.

First, with respect to Ziegler, the summary judgment evidence establishes that Mr. Hoeft's email was sent on behalf of CAS, not Ziegler. Thus, any alleged threat in that email cannot be attributable to Ziegler.

Second, no one at IronPlanet viewed these communications as threats (veiled or otherwise), and based on the substance and context of the communications, it would require a stacking of inferences and/or pure speculation to find them to be boycott threats.

Third, there is no evidence that there was an agreement between Thompson and Ziegler to threaten not to deal with IronPlanet, and it is well established that an independent decision not to do business with someone is not an antitrust violation.

Fourth, it is undisputed that before the events giving rise to this case, Ziegler did not consign equipment to IronPlanet, so a threat from Ziegler to withhold consignments in the future would not have changed the existing status quo or been a real threat.

In sum, on this record, no reasonable jury could find that Defendants individually threatened to boycott IronPlanet if it did not terminate its relationship with Plaintiff. Accordingly, there is no parallel conduct from which the jury could possibly infer the existence of a conspiracy.

Without parallel conduct, the Court need not consider whether the "plus factors" identified by Plaintiff tend to show that Defendants' conduct is more probative of a conspiracy than conscious parallelism. However, for sake of completeness, the Court will address the plus factors below.

Plaintiff identifies six "plus factors" to show that the boycott threats that Defendants allegedly made to IronPlanet are more indicative of a conspiracy than individual action or conscious parallelism: (1) context, (2) uniformity of conduct, (3) common motive to conspire, (4) actions against self-interest, (5) evidence implying a traditional conspiracy, and (6) compliance transparency. Each will be discussed in turn.

First, Plaintiff alleges that the context in which the communications were made is a plus factor. However, the considerations cited by Plaintiff in support of this contention are unconvincing.

The timing of the communications amongst Defendants after they became aware of the IronPlanet deal does not tend to show a conspiracy and exclude independent action because it would be natural for industry players who communicate regularly (both professionally and socially) to discuss new developments in the industry at the time those developments transpire. Moreover,

the fact that high-level executives were aware of and may have discussed IronPlanet is unsurprising (and not indicative of a conspiracy) because the relationship between IronPlanet and Plaintiff injected an entirely new business model into the industry.

Likewise, the speed at which IronPlanet switched from devoting resources to build up a website for Plaintiff's sales to taking the website down does not tend to show the existence of a conspiracy rather than independent parallel action. Those actions were taken by IronPlanet, not any of the alleged conspirators, and there is simply no evidence from which it could be inferred that the reason IronPlanet took these actions as quickly as it did is because of a conspiracy rather than independent parallel action. Additionally, it is noteworthy that IronPlanet's actions were not inconsistent with its post hoc explanation that (1) continued devotion of substantial time and resources to a website for Plaintiff was not a fruitful endeavor because the website only generated one sale in the month that it was operational; (2) IronPlanet wanted to expeditiously stop its inefficient use of limited resources and devote more time and money to other initiatives, such as the potentially more lucrative CAS merger; and (3) the juxtaposition of new and used equipment on its website was confusing buyers.

Finally, the threat posed by Plaintiff to the alleged conspirators is speculative at best, given the low volume of sales that actually resulted while the its partnership with IronPlanet was in existence and the novelty and lack of proven success of Plaintiff's proposed business model.

Thus, the context in which the communications and related actions occurred do not tend to make the alleged (but unproven) parallel action more likely to indicate conspiracy than lawful conscious parallelism.

Second, Plaintiff identifies "uniformity of conduct" as a plus factor. However, it seems that the similarity of Defendants' conduct is effectively subsumed within the parallel conduct element of the alleged antitrust violation, because the conduct would have to be sufficiently uniform to qualify as parallel. Although the record shows uniform conduct at a high level of generality, Defendants' conduct was not *so* similar as to portend collusion rather than independent action. For example, Ring Power's alleged boycott threat was not made in the context of ongoing negotiations, as was the case with the threats allegedly made by Thompson and Ziegler; and, Ziegler's alleged threat was in the context of negotiations on the CAS merger, not the sale of equipment as was the case with Thompson's alleged threat. Moreover, the fact that Defendants reacted similarly (by seeking additional information about an understandable concern created by a potential "sea change" in the industry) is at least equally consistent with parallel independent action as it is to the existence of a conspiracy. *See Quality Auto*, 917 F.3d at 1267 (uniformity of conduct suggestive

of agreement only if it "would not plausibly arise from 'independent responses to common stimuli'" (quoting *Twombly*, 550 U.S. at 556 n.4)).

Third, Plaintiff asserts that Defendants were motivated by a desire to eliminate a competitor to maintain their own profits. However, under the circumstances, the particular communications at issue are at least as indicative of a good business practice (curiosity and concern about changes in their industry) than of a group boycott conspiracy designed to eliminate a competitor. *See Anderson News*, 899 F.3d at 112. Moreover, because the motive behind most (if not all) anticompetitive agreements is ultimately to protect profits, labelling that common motive a "plus factor" is not particularly helpful to the analysis. *See Parker Auto Body Inc. v. State Farm Mut. Auto. Ins. Co.*, 171 F. Supp. 3d 1274, 1283 (M.D. Fla. 2016); *see also Quality Auto*, 917 F.3d at 1263 n.14 ("This plus factor is more properly invoked in contexts where the motive is unique and specific to the alleged conspirators.").

Fourth, Plaintiff identifies "actions against self-interest" as a plus factor, asserting that Defendants stood to lose money by withholding consignments from IronPlanet. Putting aside that this factor would not squarely apply to Ziegler because the summary judgment evidence shows that it had never listed equipment on IronPlanet prior to the events giving rise to this case, the evidence establishes that IronPlanet was not the only viable auction service that could be used to sell heavy construction equipment. Moreover, because common sense dictates that the price Defendants would have been able to get for their *used* equipment may have decreased if cheaper *new* equipment was being sold on the same website, it would not necessarily have been against their self-interest not to consign their used equipment to IronPlanet if it was also selling the new Chinese-manufactured equipment distributed by Plaintiff. Thus, even when viewing the evidence in the light most favorable to Plaintiff, any conclusion as to whether boycotting IronPlanet would have been against Defendants' individual economic interests would be purely speculative.

Fifth, Plaintiff points out the volume of frequent communications between Defendants and IronPlanet and argues that the timing and circumstances surrounding their communications is a plus factor because it is indicative of a traditional conspiracy. However, considering that the case appears to turn on only a mere handful of calls and emails over the course of several days, the volume and frequency of these communications seems unremarkable, particularly given that the parties communicated fairly regularly anyway. And regardless, this factor cannot overcome the lack of any evidence that those communications contained or constituted parallel threats. Stated another way, in the face of evidence indicating that the communications to IronPlanet were not threatening in nature, it would be

implausible and unreasonable to infer that the timing or frequency of the communications amongst Defendants somehow renders them unlawful.

The issue is not whether Defendants communicated with each other. Rather, the issue is whether any of the communications show that Defendants agreed to threaten IronPlanet with a boycott if it did not terminate its relationship with Plaintiff.

The summary judgment evidence establishes that at least Ring Power and Thompson had communications with each other during the pertinent timeframe of March and April 2014. However, the evidence also shows that it was not uncommon for Defendants to communicate with each other regarding the sale of used equipment or other legitimate business matters. Moreover, even if Plaintiff is correct that the communications were more frequent than normal during the pertinent timeframe, that would not be enough to show collusion without evidence of the substance of the communications. *See In re Fla. Cement & Concrete Antitrust Lit.*, 746 F. Supp. 2d 1291, 1316 (S.D. Fla. 2010) (close relationships and telephonic communications among defendants were merely an opportunity to conspire, and were not enough to show conspiracy); *Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp.*, 913 F. Supp 1088, 1117-18 (N.D. Ill. 1995) ("The telephone calls, although significant with respect to the time period in which they were made and the context in which they occurred, do not provide any evidence of a horizontal conspiracy because there is no testimony indicating who called whom or what was said during those conversations."); *see also Williamson Oil*, 346 F.3d at 1319 ("'[T]he mere opportunity to conspire among antitrust defendants does not, standing alone, permit the inference of conspiracy.' … [T]he opportunity to fix prices without any showing that [the defendants] actually conspired does not tend to exclude the possibility that they did not avail themselves of such opportunity …." (quoting *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 (11th Cir. 1991))).

Here, there is simply no evidence from which a reasonable jury could find that the substance of the communications amongst Defendants involved Plaintiff or an agreement to threaten IronPlanet with a boycott. Although those involved in the communications amongst Defendants did not recall the precise substance of most of the communications (other than that some of the communications between Ring Power and Thompson employees involved the potential sale of particular piece of equipment), they all consistently testified that the communications did not involve a plan to threaten IronPlanet with a boycott over its relationship with Plaintiff. The record contains no evidence to the contrary, and it is well established that a plaintiff cannot defeat a summary judgment motion "by merely asserting that the jury might,

and legally could, disbelieve the defendant's denial of a conspiracy." *See Anderson*, 477 U.S. at 256.

In sum, although evidence of the communications amongst Defendants (and the other alleged conspirators) shows that Defendants had opportunity to formulate an agreement to threaten IronPlanet with a boycott, it does not support an inference that they did so because the summary judgment evidence also shows that Defendants communicated regularly (and did so here) for legitimate purposes, such as negotiating deals for used equipment. *See Seagood Trading Corp.*, 924 F.2d at 1574 ("[W]hen the defendant puts forth a plausible, procompetitive explanation for his actions, [the Court] will not be quick to infer, from circumstantial evidence, that a violation of the antitrust laws has occurred.").

Sixth, Plaintiff lists "compliance transparency," or the ability to monitor or enforce a conspiracy, as a plus factor. *See In re Urethane Antitrust Lit.*, 768 F.3d 1245, 1265 (10th Cir. 2014) (finding evidence of collusion in the price-fixing context when "defendant companies monitored one another to prevent cheating and to discipline any supplier that was found cheating"). In support, Plaintiff points to evidence that Defendants and other alleged conspirators individually monitored the IronPlanet website, and particularly Plaintiff's section of the website. This is unremarkable, considering that at least Ring Power and Thompson listed their equipment on IronPlanet, and that they and the other alleged conspirators were also likely to keep track of available inventory in order to strategize internally and set their own prices. Moreover, the entire public had the ability to view the website during the pertinent time period, and the fact that Defendants may have done so as well does not show that they were monitoring each other in order to discipline any alleged conspirator who did not conform to the alleged boycott threat. Thus, the fact that Defendants each monitored IronPlanet's website regularly does not tend to show that they acted collusively rather than independently.

In sum, even if there was sufficient evidence of parallel conduct to require consideration of whether any there were any "plus factors" that would tend to show that the parallel conduct was the result of a conspiracy rather than independent action or conscious parallelism, Defendants would still be entitled to summary judgment based on the discussion above.[9] At the very least, based on the summary judgment

[9] Even if the Court considered Plaintiff's untimely and unauthorized expert declaration (Doc. 376-107), the outcome would be the same. The "plus factors" discussed in the declaration are (1) motive to conspire, (2) actions against independent self-interest, (3) evidence of a traditional conspiracy, and (4) compliance transparency. The discussion of the first factor is unhelpful because, like an opportunity to conspire, the fact that defendants have a motive to conspire does not tend to show that they did so. The discussion of the second factor is irrelevant because it

evidence, Plaintiff has not "remove[d] [its] evidence from the realm of equipoise" such that it is "more probative of conspiracy than of conscious parallelism." *Williamson Oil*, 346 F.3d at 1301. Stated another way, the summary judgment evidence does not tend to exclude the possibility that Defendants acted independently and is "as consistent with permissible competition as with illegal conspiracy." *Matsushita Elec.*, 475 U.S. at 588.

Accordingly, because there is no direct or circumstantial evidence that Defendants engaged in a conspiracy to exclude Plaintiff from the heavy construction equipment sales market by threatening to boycott IronPlanet if it did not terminate its relationship with Plaintiff, Defendants are entitled to judgment as a matter of law on the Sherman Act claims in Counts 1 and 2 of the amended complaint.

Tortious Interference (Counts 3 and 4)

The tortious interference claims are based on the same general premise as the antitrust claims—i.e., Defendants' threats to boycott IronPlanet if it continued its relationship with Plaintiff caused IronPlanet to terminate the relationship. The parties disagree as to what law governs these claims (North Carolina, Illinois, or Florida), but the Court need not resolve that dispute because the parties agree that there are no material differences in the applicable laws of those states. The Court will cite to Florida law because that is what it is more familiar with.

"Four elements are required to establish tortious interference with a contractual or business relationship: (1) the existence of a business relationship or contract; (2) knowledge of the business relationship or contract on the part of the defendant; (3) an intentional and unjustified interference with the business relationship or procurement of the contract's breach; and (4) damage to the plaintiff as a result of the interference." *Howard v. Murray*, 184 So. 3d 1155, 1166 (Fla. 1st DCA 2015) (citing *Tamiami Trail Tours, Inc. v. Cotton*, 463 So. 2d 1126, 1127 (Fla. 1985)). Defendants do not contest the first or fourth elements,[10] but they argue that there is no evidence from which a reasonable jury could find in Plaintiff's favor on the second or third elements. The Court agrees in part.

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focuses on actions by IronPlanet that were against its self-interest, not actions of the alleged conspirators (i.e., Defendants) that were against their self-interests. The discussion of the third and fourth factors is effectively legal argument masquerading as an expert opinion that was fully considered (and rejected) in the Court's consideration of the "plus factors" identified by Plaintiff in its response in opposition.

[10] It is undisputed that Plaintiff and IronPlanet had a business relationship (first element), and the issue of damages (fourth element) was deferred until Phase 2 of the case.

With respect to the second element, it is undisputed that Ring Power and Thompson had knowledge of the agreement between IronPlanet and Plaintiff because they specifically asked IronPlanet about it. However, Ziegler argues that the summary judgment evidence fails to establish that it was aware that Plaintiff had a contract with Plaintiff. This argument is unpersuasive because it is undisputed that Ziegler (through its president and CEO, Mr. Hoeft) at least knew that IronPlanet and Plaintiff had some sort of "business relationship," which is all that is necessary to prove the second element. *See Howard*, 184 So.3d at 1166; Restatement (Second) of Torts §766 cmt. i.

With respect to the third element, Defendants argue that there is no evidence from which a jury could find that they intentionally and unjustifiably interfered with the business relationship between IronPlanet and Plaintiff or induced IronPlanet to breach its agreement with Plaintiff. The Court agrees.

Specifically, as to Ring Power, there is no evidence from which a reasonable jury could find that it intentionally interfered with the agreement between IronPlanet and Plaintiff because, as discussed above in connection with the antitrust claims, the summary judgment evidence fails to show that Ring Power threatened to boycott IronPlanet as Plaintiff claims. Rather, all of the nonspeculative evidence of record shows that the communications Ring Power had with IronPlanet concerning Plaintiff were nothing more than inquires to "find out what is going on" that did not contain or imply (and were not received as) a boycott threat. Thus, Ring Power is entitled to summary judgment on the tortious interference claims against it.[11]

Likewise, as to Thompson, the summary judgment evidence fails to establish that it threatened to boycott IronPlanet if it did not terminate its agreement with Plaintiff. However, even if the communications between Messrs. Lindley and Winnette could be construed as a veiled threat that Thompson would not consign the equipment that was under negotiation to IronPlanet without confirmation from IronPlanet that its deal with Plaintiff had been "suspended," that threat would not be actionable because Thompson was justified in not dealing (or threatening not to deal) with IronPlanet under the circumstances. *See* Restatement (Second) Torts §766 cmt. *l* ("A's aversion to C is as legitimate a reason for his refusal to deal with B as his

[11] Based on this disposition, the Court need not consider Ring Power's alternative argument that any alleged interference would have been "privileged" because it was a minority owner of IronPlanet. *See Bridge Fin., Inc. v. J. Fischer & Assocs., Inc.*, 310 So. 3d 45, 50 (Fla. 4th DCA 2020) (holding that "because [the defendant] was a partial [5%] owner in [the plaintiff], he was not a stranger to a business relationship, and thus cannot be held liable for tortious interference"). Likewise, the Court need not consider Plaintiff's argument that Ring Power should not be allowed to assert this privilege defense now because it did not raise it in its answer.

aversion to B. If he is merely exercising that freedom, he is not liable to C for the harm caused by B's choice not to lose A's business for the sake of getting C's."); *see also Genet Co. v. Annheuser-Busch, Inc.*, 498 So.2d 683, 684 (Fla. 3d DCA 1986) ("[T]here can be no claim [for tortious interference] where the action complained of is undertaken to safeguard or promote one's financial or economic interest."). Furthermore, the undisputed evidence establishes that Thompson's concern about the status of the relationship between IronPlanet and Plaintiff was motivated by its legitimate business interests (a concern that its used equipment would sell for less if IronPlanet's website also listed Plaintiff's new equipment), rather than malice. *See Menendez v. Beech Acceptance Corp.*, 521 So.2d 178, 180 (Fla. 3d DCA 1988) ("[C]onduct engaged in [to protect a competing financial interest], even if tinged with animosity and malice, does not give rise to a cause of action for interference with a contractual relationship."); *McCurdy v. Collis*, 508 So.2d 380, 383 (Fla. 1st DCA 1987) (noting that the privilege to interfere is only negated "when malice is the sole basis for interference" (emphasis added)). Thus, Thompson is entitled to summary judgment on the tortious interference claims against it.

Finally, as to Ziegler, the summary judgment evidence establishes that Mr. Hoeft's email asking to "better understand th[e] relationship" between IronPlanet and Plaintiff was sent on behalf of CAS, not Ziegler. But, even if the email could be construed to have been sent on behalf of Ziegler, it did not contain or imply (and was not received as) a boycott threat. Additionally, even if that communication was somehow construed as a threat by Ziegler not to use IronPlanet to sell equipment in the future because of IronPlanet's dealings with Plaintiff, that would not be actionable because Ziegler, like Thompson, was free to independently decide who to deal with based on its own business interests. Thus, Ziegler is entitled to summary judgment on the tortious interference claims against it.

Accordingly, because the summary judgment evidence establishes that Defendants did not intentionally or unjustifiably interfere with Plaintiff's business relationship with IronPlanet, Defendants are entitled to judgment as a matter of law on the tortious interference claims in Counts 3 and 4 of the amended complaint.

Conclusion

In sum, although a reasonable jury could find that IronPlanet was "pressured" into terminating its relationship with Plaintiff, there is simply no evidence (direct or circumstantial) from which a jury could find that the dealer defendants named in this case were responsible for exerting that pressure, much less that they unlawfully entered into an agreement to do so. Accordingly, it is

ORDERED that Defendants' motions for summary judgment (Docs. 358, 359, 361) are **GRANTED**. The Clerk shall enter judgment in favor of Defendants and close the case file.

DONE and ORDERED this 23rd day of December, 2021.

T. Kent Wetherell, II

T. KENT WETHERELL, II
UNITED STATES DISTRICT JUDGE