UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CALDWELL WHOLESALE COMPANY, L.L.C., Plaintiff, v. R.J. REYNOLDS TOBACCO COMPANY, Defendant.	Case No. 5:17-CV-200-SMH-MLH Judge S. Maurice Hicks, Jr. Magistrate Judge Mark L. Hornsby

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

Dated: April 24, 2017

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PRELIMINARY STATEMENT

This case challenges the 2004 business decision by R.J. Reynolds Tobacco Company ("Reynolds" or "RJR") to end its direct-distributor relationship with plaintiff. Reynolds did not breach the parties' direct-distributor agreement, and there is no claim for breach of contract. Plaintiff instead pleads two very stale extra-contractual claims: one for violation of Louisiana's Unfair Trade Practices Act and one for tortious interference with business relations. Both fail for multiple reasons, and the Amended Complaint should be dismissed with prejudice.

The Unfair Trade Practices claim fails right out of the gate, because the applicable one-year peremptive period expired long ago. That one-year period began running in December 2004, so the claim has been time barred for over a decade. And even if that were not the case, plaintiff does not plead a factual basis for such a claim: Louisiana law gives Reynolds a unilateral and absolute right to refuse to deal with anyone in the commercial context. Lastly, as this Court held in *Baba Lodging, LLC v. Wyndham Worldwide Operations, Inc.*, No. 10-CV-1750, 2012 U.S. Dist. LEXIS 36891 (W. D. La. Mar. 19, 2012) (Hicks, J.), only a consumer or business competitor has standing to bring an Unfair Trade Practices claim. Case law and the allegations of the Amended Complaint make clear that plaintiff is neither.

The claim for tortious interference with business relations fares no better. It, too, is subject to a one-year limitations period that began running in December 2004 and similarly expired over a decade ago. And the interference claim, like the Unfair Trade Practices claim, rests on Reynolds' decision to end its contractual relationship with plaintiff—which is Reynolds' absolute right under Louisiana law. Further, a claim for intentional interference with business relations requires, unsurprisingly, plausible allegations that the defendant maliciously interfered with specific, identifiable customers of the plaintiff, resulting in loss of business to the plaintiff. But the Amended Complaint does not identify a single one of plaintiff's customers and, even if it

did, fails to allege any communications between Reynolds and any such customer, let alone communications that amounted to malicious interference.

For all of these reasons, explained in greater detail below, the Amended Complaint should be dismissed.

I. BACKGROUND

Reynolds conducts business primarily in the highly competitive cigarette market. Generally, Reynolds distributes its cigarettes and other tobacco products to retailers that purchase through a large network of wholesale distributors, some of which purchase Reynolds products directly from Reynolds and others of which purchase Reynolds products from other wholesalers. *E.g.*, ¶¶ 6, 8, 23.[1] Plaintiff Caldwell Wholesale Company, L.L.C. ("Caldwell") was a direct distributor of Reynolds products for a number of years. ¶ 6. In an exercise of its business prerogative to manage its distributor network, Reynolds decided to end its direct relationship with Caldwell and, as it was entitled to do, terminated its direct-distributor agreement with Caldwell in December 2004. ¶ 17. Caldwell, for its part, desired to continue distributing Reynolds products and, accordingly, began "purchas[ing] RJR products from an intermediary." ¶ 10.

But Caldwell was, and is, unhappy with Reynolds' decision—over twelve years ago now—to terminate the direct-distributor agreement. That is because retailers that obtain their supplies of Reynolds products from wholesalers that purchase directly from Reynolds are eligible to receive discounting, or "buydown," payments from Reynolds based on the quantity of Reynolds products purchased by the retailer. ¶ 15. Retailers then pass through those discounts

[1] All paragraph references are to the numbered paragraphs of the Amended Complaint, ECF No. 5.

to consumers in the form of lower prices. Retailers that purchase Reynolds' products from indirect wholesalers like Caldwell are not eligible for these payments, unless Reynolds and the indirect wholesaler, or "sub-jobber," have entered into a sub-jobber agreement. ¶ 18. Such an agreement requires, among other things, that the sub-jobber report all of its tobacco sales information to a third-party data management company, Management Science Associates, or MSA, which in turn reports the information to RJR. ¶¶ 14, 18, 26.[2] Reynolds has declined to enter into a sub-jobber agreement with Caldwell, having determined in its business judgment that "distribution of R.J. Reynolds tobacco products would not be improved by" entering into a sub-jobber agreement with Caldwell. ¶¶ 27, 31.

The upshot, then, is that ever since Reynolds' December 2004 decision to end its direct-purchase relationship with plaintiff, retailers that purchase Reynolds products through Caldwell are not eligible for buydown payments from Reynolds. ¶ 17. This means, unsurprisingly, that some retailers that previously purchased Reynolds products from Caldwell have opted to purchase them from other sources. ¶¶ 38-43.

Caldwell desires to regain the privilege it enjoyed—whereby retailers that purchase Reynolds products through Caldwell were eligible for buydown payments from Reynolds—prior to December 2004. *E.g.*, ¶ 28. Its Amended Complaint alleges that the December 2004 termination (and the resulting loss of buydown privileges) has caused "lost sales and business opportunities" for Caldwell that "have continued to occur . . . since" that date. ¶ 46. Caldwell, however, cannot plead a breach of contract claim because the contract itself allowed Reynolds to

[2] Reynolds requires such reporting so that it can track the distribution of its cigarette products in the marketplace and thus prevent retailers from engaging in fraud by, for example, seeking buydown monies and then reselling the cigarettes to another retailer that also seeks buydown monies on the same cigarettes.

terminate it. Caldwell instead tries to squeeze its 12-year-old (meritless) contract claim into a different mold (or, more precisely, into two different molds). Its Amended Complaint asserts that Reynolds' December 2004 decision amounted to an unfair trade practice under the governing Louisiana statute as well as tortious interference with business relations. But these ancient claims, too, are factually unsupported—and unsupportable—and, at any rate, are time-barred by more than a decade.

II. ARGUMENT

To survive a motion to dismiss, a complaint must allege facts that "raise a right to relief above the speculative level," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and show "more than a sheer possibility that a defendant has acted unlawfully," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Put another way, a complaint must provide enough factual "heft" to plausibly "sho[w] that [the plaintiff] is entitled to relief." *Twombly*, 550 U.S. at 557 (citation omitted); *Iqbal*, 556 U.S. at 678. A complaint should be dismissed when it "pleads facts that are merely consistent with a defendant's liability" but has not "nudged" the claim "across the line from conceivable to plausible." *Iqbal*, 556 U.S. at 678, 680 (citations omitted).

"A Rule 12(b)(6) motion to dismiss for failure to state a claim is an appropriate method for raising a statute of limitations defense." *Practical Healthcare Supply, Inc. v. AssuredPartners Gulf Coast Ins. Agency, LLC*, No. 15-CV-235, 2015 WL 9685561, at *3 (W.D. La. Nov. 19, 2015), *adopted*, No. 15-CV-235, 2016 WL 116496 (W.D. La. Jan. 8, 2016). A "motion to dismiss may be granted on the basis of prescription if the untimeliness appears from the face of the complaint." *Potier v. JBS Liberty Sec., Inc.*, No. 13-CV-789, 2014 WL 5449726, at *3 (W.D. La. Oct. 24, 2014). And where a "plaintiff['s] claims are prescribed on the face of

the petition, [the] plaintiff has the burden of proving the claims are not prescribed." *Sims v. Am. Ins. Co.*, 101 So. 3d 1, 4 (La. 2012).

A. Caldwell's Claim for Violation of the Louisiana Unfair Trade Practices and Consumer Protection Law Fails.

Caldwell's claim for violation of the Louisiana Unfair Trade Practices and Consumer Protection Law ("LUTPA") fails for multiple reasons, each of which is sufficient on its own to warrant dismissal. The claim, filed over eleven years late, is time-barred. And even if this were not the case, the conduct alleged does not constitute a violation of LUTPA. Lastly, Caldwell lacks standing to assert the claim, as it is neither Reynolds' competitor nor a consumer.

1. Caldwell's LUTPA Claim is Time-Barred.

A one-year limitations period applies to private actions brought under LUTPA. La. Stat. § 51:1409(E) (private action under LUTPA "shall be prescribed by one year running from the time of the . . . act which gave rise to th[e] right of action").[3] The "act" at issue here is Reynolds' alleged "terminat[ion of] Caldwell's status as a direct purchaser in December 2004." ¶ 10. As Caldwell did not file this action until January 2017, its claim is way too late and thus must be dismissed. The issue is straightforward.

[3] While "[t]he Louisiana Supreme Court has not ruled as to whether [La. Stat. § 51:1409(E)] implicates preemption or prescription," "most lower state courts . . . interpret § 51:1409(E) as a peremptory provision." *Max Access, Inc. v. Gee Cee Co. of LA, Inc.*, No. 15-CV-1728, 2016 WL 454389, at *5 (E.D. La. Feb. 5, 2016). Courts in this District have repeatedly reached the same conclusion. *See, e.g.*, *Jones v. Herlin*, No. 12-CV-1978, 2013 WL 5270547, at *9 (W.D. La. Sept. 17, 2013). Regardless, even if the period were prescriptive, the result would be unchanged here, as the Amended Complaint contains no allegations that the prescriptive period has been interrupted. *See, e.g.*, *Walker v. Jackson Par. Dist. Attorney's Office*, No. 12-CV-2978, 2015 WL 432894, at *3 (W.D. La. Feb. 2, 2015) (claims "clearly prescribed" where the "bare-bones allegations in the amended complaint" were insufficient to meet "plaintiff's burden of proving that prescription ha[d] been interrupted").

No doubt Caldwell is aware of this fatal flaw. Accordingly, certain allegations in the Amended Complaint evince a half-hearted attempt to plead around the cut-and-dry peremptive period. Caldwell first alleges that in 2011 and in 2014 it asked to enter into a sub-jobber agreement and that Reynolds declined to enter into such a contract. ¶¶ 22-27, 28-31. Caldwell also focuses on damages, alleging that its claimed "lost sales and business opportunities" stemming from the December 2004 contract termination "have continued to occur, on an ongoing basis." ¶ 46. And, Caldwell alleges, Reynolds' refusal to do business with Caldwell "has caused, and continues to cause, damage to Caldwell in the form of lost profits and sales, loss of customers, loss of customer goodwill and other injuries . . . ." ¶¶ 50, 53.

These allegations are undoubtedly made in hopes of invoking the continuing-violation doctrine to short-circuit the statutory bar on Caldwell's stale claim. But that doctrine applies only if the wrong itself that caused Caldwell's alleged injury is an ongoing, continuous one. *See Miller v. Conagra, Inc.*, 991 So.2d 445, 456 (La. 2008) (suggesting that a "continuing violation of LUTPA" *might* keep a peremptive period from commencing). But Caldwell's effort to invoke the doctrine here is futile. In *Miller v. ConAgra, Inc.*, 991 So.2d 445 (La. 2008), the Louisiana Supreme Court addressed, and rejected, an analogous attempt to skirt the peremptive period. The plaintiff in that case, Gary Miller, sued ConAgra for alleged violations of LUTPA stemming from the termination of the chicken production agreement between ConAgra and Miller. ConAgra had falsely accused Miller of stealing chicken feed, had coerced him into terminating the chicken production agreement by threatening prosecution for stealing the chicken feed, and had failed to terminate the agreement in writing as required. *Id.* at 456. As a result of the 1993 termination, Miller "was forced to declare bankruptcy in 1996." *Id.* at 448. He did not bring his LUTPA claim until 2000. *Id.* at 448.

Notwithstanding LUTPA's one-year peremptive period, the trial court and court of appeals ruled in plaintiff's favor, concluding that, even though nearly seven years had passed between the termination and the filing of the LUTPA claim, the limitations period had "not begun to run because ConAgra's unfair practices have persisted to this day." *Id.* at 456. ConAgra's "repeated accusations against Miller and perpetual threats to bring criminal proceedings against him," the court of appeals had found, meant that the company's violation of LUTPA was continuing and not confined to the 1993 termination. *Miller v. ConAgra, Inc.*, 970 So.2d 1268, 1273 (La. 3d Cir. 2007).

A unanimous Louisiana Supreme Court reversed. In doing so, it reiterated that a continuing wrong occurs only where, among other things, "the *operating cause of injury* is a continuous one . . . ." *Miller*, 991 So.2d at 456 (quotation omitted; emphasis added). "[A] continuing tort," the Supreme Court said, "is occasioned by unlawful acts, not the continuation of the ill effects of an original, wrongful act." *Id.* (quotation omitted). That the termination of the agreement eventually brought about plaintiff's bankruptcy and that ConAgra reiterated its accusations of theft and threats to pursue criminal charges against Miller did not change the bottom line: "All performances under the contract ceased on [December 21, 1993]. Because ConAgra's wrongful conduct triggering Miller's damages had occurred on December 21, 1993, the operating cause of injury was not continuous." *Id.* And the failure to put the termination in writing as required did not make a difference either: "This omission was not the 'operating cause' of Miller's injury, and it did not 'give rise to successive damages. . . . ConAgra's decision to not memorialize the termination appears to be ancillary to the truly injurious act." *Id.* (quotations omitted). ConAgra's alleged LUTPA violation was not continuous, and thus the LUTPA claim was untimely. *Id.*

The continuing-violation doctrine was also discussed in detail in *Crump v. Sabine River Authority*, 737 So.2d 720 (La. 1999). While not a LUTPA case, the Louisiana Supreme Court's decision there is nevertheless highly instructive. In *Crump*, the plaintiff leased property adjacent to her own. *Id.* at 723. The leased property provided access to a bayou, which in turn provided access to both a river and a reservoir. *Id.* Construction of a canal on the defendant's land caused the portion of the bayou adjoining the leased property to dry up, leaving plaintiff without access to the river and reservoir. *Id.* Over the course of twenty years, the plaintiff met with representatives of the defendant river authority in attempts to resolve the issue. *Id.* at 723-25. Those negotiations resulted in at least two attempts by the defendant to remedy the problem. *Id.* at 725. But those attempts ultimately failed, and the talks did not lead to restoration of the plaintiff's access to the waterways. *Id.* Though over 20 years had passed between the digging of the canal and the plaintiff's filing suit, the court of appeals concluded that the plaintiff's post-termination negotiations with the defendant, as well as the defendant's attempts to remedy the problem, satisfied the requirements of a continuing tort, and thus the one-year prescriptive period had not run. *Id.* at 723, 725.

Once again, the Louisiana Supreme Court reversed. It concluded that the operative cause of injury was the digging of the original canal that dried up the bayou. *Id.* at 727. "The continued presence of the canal and the consequent continuous diversion of water . . . are simply the continuing ill effects arising from a single tortious act." *Id.* at 727-28. Subsequent conduct, including the discussions between the parties about a possible remedy, did not change this analysis. "[T]he breach of the duty to right a wrong and make the plaintiff whole simply cannot be a continuing wrong which suspends the running of prescription, as that is the purpose of any lawsuit and the obligation of every tortfeasor." *Id.* at 729.

Miller and *Crump* make clear that the continuing-violation doctrine does not operate to delay the running of the peremptive period here. Just as in *Miller*, where the termination of the chicken production agreement was the act that gave rise to the plaintiff's alleged LUTPA damages and started the one-year limitations clock, so here, the act giving rise to the alleged LUTPA cause of action (such as it is[4]) was Reynolds' "terminat[ion of] Caldwell's status as a direct purchaser in December 2004." ¶ 10. And plaintiff's allegations that "lost sales and business opportunities have continued to occur," ¶ 46, and that the termination "caused, and continues to cause, damage to Caldwell," ¶¶ 50, 53, do nothing to change that fact. In *Miller*, the Court concluded that such post-termination damages were nothing more than the "continuation of the ill effects of an original . . . act," *Miller*, 991 So.2d at 456, that did not constitute a continuing tort. And the court reached the same conclusion in *Crump*, where it determined that the damages caused by the "continuous diversion of water" arose from a "single tortious act" at a specific point in time, and thus did not turn the tort into a continuing one. *Crump*, 737 So.2d at 728. In short, "the Louisiana Supreme Court [has] rejected the contention that a continuing breach of duty could consist of a defendant's failure to remedy the harm caused by the initial tortious conduct." *Terrebonne Parish Sch. Bd. v. Mobil Oil Corp.*, 310 F.3d 870, 885 (5th Cir. 2002).

Likewise, the Amended Complaint's assertion that "lost sales and business opportunities . . . have reached a point . . . that has caused Caldwell to conclude it cannot indefinitely sustain its business" is of no use to Caldwell either. ¶ 46. "When a defendant's damage-causing act is completed, the existence of continuing damages to a plaintiff, even progressively worsening

[4] As explained *infra* at 10-13, the Amended Complaint in fact falls woefully short of pleading a cognizable LUTPA claim.

damages, does not present successive causes of action accruing because of a continuing tort." *In re Med. Review Panel for Claim of Moses*, 788 So. 2d 1173, 1183 (La. 2001). There is no question that the limitations period has run, and the LUTPA cause of action has been perempted.

That Caldwell is alleged to have twice initiated unsuccessful post-termination discussions about the potential for a new contractual relationship, ¶¶ 22-27, 28-31, does not alter this analysis, as such discussions do not supply the missing evidence of a continuing tort. Like the defendant's continuing refusal in *Miller* to terminate the contract in writing as required, these subsequent discussions are "ancillary" to the event that caused the alleged injury: the decision to end the direct-distributor agreement in December 2004. *Miller*, 991 So.2d at 456. And as *Crump* made clear, subsequent discussions between parties in an attempt to work out their differences have no bearing on the running of the one-year limitations period and are not the original source of "injury." *See Crump*, 737 So.2d at 725, 727-28. Further, even if one were to conclude, contrary to settled law, that these discussions evidenced a continuing tort, the last discussions are alleged to have concluded in October 2014—more than two years before Caldwell filed this case. ¶ 31.

In short, the allegations of the Amended Complaint incontrovertibly show that the LUTPA claim is time barred.

2. Caldwell's Allegations Describe a Mere Contract Termination, Not a Violation of LUTPA.

Though the LUTPA claim can, and should, be dismissed because it is untimely, it is substantively deficient as well. Instead of alleging (as it must in order to survive a motion to dismiss) egregious acts giving rise to a LUTPA claim, the Amended Complaint relies on nothing more than the contractually permitted termination of a contract. This comes nowhere close to stating a claim under LUTPA.

"LUTPA, a penal act, calls for strict construction; it reaches only egregious actions involving elements of fraud, deception, or other unethical conduct." *Hyatt v. Rovig*, No. 13-CV-6328, 2014 WL 970152, at *9 (E.D. La. Mar. 12, 2014) (quotation omitted). "The range of prohibited practices under LUTPA is extremely narrow." *Jones Energy Co., LLC v. Chesapeake Louisiana, L.P.*, 873 F. Supp. 2d 779, 789 (W.D. La. 2012). The statute covers only unfair or deceptive trade practices that have been "declared unlawful." *FloQuip, Inc. v. Chem Rock Techs.*, No. 16-CV-35, 2016 WL 4574436, at *15 (W.D. La. June 20, 2016), *adopted*, No. 16-CV-35, 2016 WL 4581345 (W.D. La. Sept. 1, 2016). Further, "LUTPA does not prohibit sound business practices, the exercise of permissible business judgment, or appropriate free enterprise transactions." *Knatt v. Hosp. Serv. Dist. No. 1 of E. Baton Rouge Par.*, 289 F. App'x 22, 31 (5th Cir. 2008) (quotation omitted).

Here, Caldwell has failed to allege any "egregious action" that has been declared unlawful. *Hyatt*, 2014 WL 970152, at *9. Rather, all the Amended Complaint alleges is that Reynolds terminated Caldwell's status as a direct purchaser in December 2004. ¶ 10. But "LUTPA does not provide an alternate remedy for simple breaches of contract." *Innovative Sales LLC v. Northwood Mfg. Inc.*, No. 07-30598, 2008 WL 3244114, at *6 (5th Cir. Aug. 6, 2008) (quotation omitted). To the contrary, "[t]here is a great deal of daylight between a breach of contract claim and the egregious behavior [LUTPA] proscribes." *Id.* And the Amended Complaint does not even allege a breach of contract—*i.e.*, it does not even allege that the ending of Caldwell's direct purchaser status breached the terms of the agreement between Reynolds and Caldwell. If, as is the case, a *breach* of contract does not constitute a violation of LUTPA, *a fortiori*, the decision to end a contract in compliance with its terms is certainly no violation.

The Amended Complaint does allege that Reynolds ended the relationship in "retaliation" for Caldwell's involvement in the "Smith Litigation," ¶ 10, but this allegation is implausibly pled. *See Twombly*, 550 U.S. at 570. Caldwell admits that it became a plaintiff in the Smith Litigation at some point after other plaintiffs filed it—becoming one of twenty wholesalers in the suit. ¶¶ 7-8. Yet it offers no plausible explanation as to why it was singled out for alleged retaliatory treatment. The closest it comes is with the allegation that Ken Caldwell, while serving as president of the American Wholesale Marketers Association, had helped instigate—and encouraged other wholesalers to participate in—the Smith Litigation. ¶ 11. But, as Caldwell admits, Mr. Caldwell's term as president ended *before* the Smith Litigation even began, and well before Caldwell joined that litigation. ¶ 12.

In any event, even if one were to credit these implausible allegations for purposes of this motion to dismiss, Caldwell's retaliation theory would still fail as a matter of law. Louisiana law provides that Reynolds, "regardless of . . . motive, has an absolute right to refuse to deal with" plaintiff. *Int'l Bhd. of Elec. Workers Local 130 v. BE & K Gov't Grp., Inc.*, No. 05-CV-6629, 2007 WL 781354, at *7 (E.D. La. Mar. 12, 2007) (emphasis added); *Muslow v. A.G. Edwards & Sons, Inc.*, 509 So. 2d 1012, 1020 (La. 2d Cir. 1987) (same).[5] Thus, far from constituting, as required, an "unfair or deceptive . . . practice declared unlawful," *e.g.*, *FloQuip*, 2016 WL 4574436, at *15, and falling within the "extremely narrow" "range of prohibited practices under LUTPA," *Jones Energy*, 873 F. Supp. 2d at 789, Reynolds' decision to cease

[5] This well-established principle is typically stated in this formulation: "An individual, regardless of his motive, has an absolute right to refuse to deal with another." *E.g.*, *Int'l Bhd.*, 2007 WL 781354, at *7 (quotation omitted). But the principle applies not only to "individuals" in the sense of natural persons, but to business entities as well. Both cases cited above, for example, dealt with the right of business corporations to refuse to deal with others. *See id.*; *Muslow*, 509 So.2d at 1020.

dealing directly with Caldwell was "the exercise of permissible business judgment" that "LUTPA does not prohibit," *Knatt*, 289 F. App'x at 31.[6]

3. Caldwell Lacks Standing to Bring its LUTPA Claim.

Caldwell's LUTPA claim also fails because Caldwell lacks standing. "To have standing to bring a private action under LUTPA, the plaintiff must be a direct consumer or business competitor of the defendant." *Knatt v. Hosp. Serv. Dist. No. 1 of E. Baton Rouge Par.*, 327 F. App'x 472, 480 (5th Cir. 2009). Caldwell most certainly does not allege that it is a consumer. To the contrary, Caldwell is "a full-service wholesale distributor." ¶ 5. And neither is Caldwell a business competitor of Reynolds. Reynolds is a tobacco manufacturer. Caldwell is a wholesale distributor. As Caldwell alleges, for a period of 45 years, it *worked with RJR* to directly distribute RJR's products, purchasing tobacco products from Reynolds and reselling them to retailers. ¶ 6. *See, e.g.*, *Nat'l Gypsum Co. v. Ace Wholesale, Inc.*, 738 So.2d 128, 129 (La. 5th Cir. 1999) (affirming trial court ruling that former distributor was not a business competitor under LUTPA); *Dorsey v. N. Life Ins. Co.*, No. 04-CV-342, 2005 WL 2036738, at *12 (E.D. La. Aug. 15, 2005) (plaintiff insurance agents were not business competitors of defendant insurer, whose policies they sold). Indeed, Caldwell has not even *alleged* that it is Reynolds' business competitor.

Because it is not a consumer or Reynolds' business competitor, Caldwell lacks standing to bring this claim.[7]

[6] Likewise, Reynolds' decisions not to re-enter into a contractual relationship with Caldwell in 2011 and 2014, ¶¶ 22-27, 28-31, were not violations of LUPTA given Reynolds "absolute right to refuse to deal with" plaintiff. *Int'l Bhd. of Elec. Workers Local 130*, 2007 WL 781354, at *7.

B. Caldwell's Claim of Tortious Interference Fails As Well.

Like its LUTPA claim, Caldwell's claim for tortious interference with business relations fails on multiple grounds. The claim is both time-barred and substantively insufficient.

1. Caldwell's Tortious Interference Claim is Time-Barred.

A one-year prescription period applies to delictual actions, including claims for tortious interference. La. Civ. Code art. 3492; *K.P.'s Auto Sales Inc. v. Gen. Motors Corp.*, No. 07-30906, 2008 WL 4580087, at *3 (5th Cir. Oct. 15, 2008). "This prescription commences to run from the day injury or damage is sustained." La. Civ. Code art. 3492. But as discussed above, the Louisiana Supreme Court has made clear that "[w]hen a defendant's damage-causing act is completed, the existence of continuing damages to a plaintiff, even progressively worsening damages, does not present successive causes of action accruing because of a continuing tort." *In*

(continued…)

[7] In *Cheramie Services, Inc. v. Shell Deepwater Production, Inc.*, 35 So.3d 1053 (La. 2010), a plurality of the Louisiana Supreme Court stated—in dicta, *see id.* at 1065 (Guidry, J., concurring in result)—that the private right of action under LUTPA is not limited to consumers and business competitors. *Id.* at 1058. Some courts therefore have concluded that, post-*Cheramie*, the potential pool of LUTPA plaintiffs has expanded beyond consumers and business competitors. *See, e.g.*, *Nola Fine Art, Inc. v. Ducks Unlimited, Inc.*, 88 F. Supp. 3d 602, 612 (E.D. La. 2015). But as this Court has previously recognized, the plurality opinion in *Cheramie* is not binding on this Court or the Louisiana state courts. *Baba Lodging, LLC v. Wyndham Worldwide, Operations, Inc.*, No. 10-CV-1750, 2012 U.S. Dist. LEXIS 36891, at *10 (Mar. 19, 2012) (Hicks, J.). Further, the Fifth Circuit precedents limiting LUTPA actions to consumers and business competitors remain in place and are binding on this Court. And even under an *Erie*-based attempt to predict Louisiana law, the fact that the Louisiana Supreme Court could not muster a *majority* of votes to expand LUTPA beyond consumers and business competitors shows, if anything, that the law is likely to remain unchanged (*i.e.*, limited to consumers and business competitors). As it has in the past, this Court should reject any attempt to disregard Fifth Circuit precedent absent a clear change in the law endorsed by a majority of the Louisiana Supreme Court. *See Baba Lodging*, 2012 U.S. Dist. LEXIS 36891, at *11 (Hicks, J.) ("As non-binding precedent, . . . *Cheramie* does not change the state of the law concerning standing under the LUTPA. Moreover, in the absence of a majority opinion of the Louisiana Supreme Court definitively interpreting standing under LUTPA, the Court will follow the binding Fifth Circuit [precedent].").

re Med. Review Panel for Claim of Moses, 788 So. 2d at 1183. *See supra* at 7-10. As with the LUTPA claim, the alleged "damage-causing act" at issue here was Reynolds' "terminat[ion of] Caldwell's status as a direct purchaser in December 2004," ¶ 10—an act that was completed over 12 years before Caldwell brought this claim. "Because plaintiff['s] claims are prescribed on the face of the petition, plaintiff has the burden of proving the claims are not prescribed." *Sims v. Am. Ins. Co.*, 101 So. 3d 1, 4 (La. 2012). Caldwell cannot meet that burden here. The tortious interference claim is prescribed and must be dismissed.

2. Caldwell Has Failed to State a Tortious Interference Claim.

While, in Louisiana, "a cause of action exists for tortious interference with a business relationship, the courts do not look on this particular cause of action with favor." *St. Landry Homestead Fed. Sav. Bank v. Vidrine*, 118 So.3d 470, 490 (La. 3d Cir. 2013). *See, e.g.*, *Mountain States Pipe & Supply Co. v. City of New Roads*, No. 12-CV-2146, 2013 WL 3199724, at *3 (E.D. La. June 21, 2013) ("Louisiana jurisprudence . . . has viewed this cause of action with disfavor." (citations omitted)). The cause of action is "based on the principle that the right to influence *others* not to enter into business relationships . . . is not absolute." *Bogues v. Louisiana Energy Consultants, Inc.*, 71 So. 3d 1128, 1134-35 (La. 2d Cir. 2011) (emphasis added). Therefore, "a plaintiff bringing suit for tortious interference with business must show that the defendant improperly influenced others not to do business with the plaintiff." *Brand Coupon Network, LLC v. Catalina Mktg. Corp.*, No. 11-CV-556, 2014 WL 6674034, at *10 (M.D. La. Nov. 24, 2014) (citing *Junior Money Bags, Ltd. v. Segal*, 970 F.2d 1, 10 (5th Cir. 1992) (same)). "This burden is not satisfied by general allegations of a decrease in business. One party must show that the other actually prevented him from having dealings with an identifiable third party." *Id.* (citation omitted); *Bogues*, 71 So. 3d at 1135 ("it is not enough to allege that a

defendant's actions affected plaintiff's business interests; the plaintiff must allege that the defendant actually prevented the plaintiff from dealing with a third party"). Further, "[i]n order to sustain a claim for tortious interference with business relations, actual malice must be pleaded in the complaint." *Boudreaux v. OS Rest. Servs., L.L.C.*, No. 14-CV-1169, 2015 WL 349558, at *5 (E.D. La. Jan. 23, 2015).

The Amended Complaint comes nowhere close to meeting these rigorous requirements. It fails to identify even a single Caldwell customer. And it fails to plead malicious interference by Reynolds with any of Caldwell's customers. Indeed, far from pleading interference with those customers, the Amended Complaint does not allege any *communication* between Reynolds and any Caldwell customer. *See, e.g.*, *Dorsey v. N. Life Ins. Co.*, No. 04-CV-342, 2005 WL 2036738, at *16 (E.D. La. Aug. 15, 2005) (claim for tortious interference with business failed where there were "no allegations that any in-house agent [of defendant] actually contacted any of plaintiffs' clients"); *Junior Money Bags, Ltd. v. Segal*, 798 F. Supp. 375, 381 (E.D. La. 1990) (dismissing claim for tortious interference with business relations where claimant "failed to show that any communications by [counter-defendants] with third parties caused them not to deal with" claimant), *aff'd*, 970 F.2d 1 (5th Cir. 1992).

Rather than any direct interference with Caldwell's customers, the Amended Complaint's allegations of harm to Caldwell rest solely on Reynolds' decision to end its contractual relationship with Caldwell (which decision Reynolds decided not to alter when Caldwell sought sub-jobber status). But as discussed, *supra* at 12, Reynolds "regardless of . . . motive, has an absolute right to refuse to deal with" Caldwell. *E.g.*, *Int'l Bhd. of Elec. Workers Local 130*, 2007 WL 781354, at *7 (emphasis added); *Muslow*, 509 So. 2d at 1020 (same). When it comes to substance, then, Caldwell's tortious interference claim is doubly insufficient: It (1) fails to

allege communication, much less interference, with plaintff's customers by Reynolds, and (2) fails to grapple with the fact that the only "harmful" action that it alleges Reynolds took—terminating its direct relationship with Caldwell—is protected under Louisiana law. In short, the circumstances alleged in the Amended Complaint come nowhere close to showing the type of "malicious and wanton interference" required to state a claim with respect to "this very limited form of recovery," *Junior Moneybags, Ltd.*, 970 F.2d 1, 11 (5th Cir. 1992), and the tortious interference claim must be dismissed with prejudice.

III. CONCLUSION

For all of these reasons, the Amended Complaint should be dismissed with prejudice.[8]

[8] Dismissal of a complaint with prejudice is appropriate "if it is clear from the face of the complaint that the claims asserted are subject to an obvious meritorious defense, such as a peremptory time bar." *Mitchell v. U.S. Customs Serv.*, 24 F.3d 239 (5th Cir. 1994) (quotation omitted). *See also, e.g.*, *Smith v. T.D.C.J.*, 442 F. App'x 966, 967 (5th Cir. 2011) (affirming dismissal of complaint with prejudice where the action was time-barred).

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