

1
2
3 UNITED STATES DISTRICT COURT
4 DISTRICT OF PUERTO RICO

5 RAMALLO BROS. PRINTING, INC.,

6 Plaintiff,

7 v.

8 EL DÍA, INC., EDITORIAL PRIMERA
9 HORA, INC. & ADVANCED GRAPHIC
10 PRINTING, INC.,

11 Defendants.

Civil No. 02-240

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U.S. DISTRICT COURT
SAN JUAN, P.R.

12 OPINION AND ORDER

13 Plaintiff, Ramallo Bros. Printing, Inc. ("Plaintiff") brings
14 this action against Defendants, El Día, Inc. ("Defendant El Día");
15 Editorial Primera Hora, Inc. ("Defendant Editorial Primera Hora"),
16 and Advanced Graphic Printing, Inc., ("Defendant AGP"); alleging
17 violations of Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15
18 and 26 (1997 & Supp. I 2003); Sections 1 and 2 of the Sherman Act, 15
19 U.S.C. §§ 1 and 2 (1997 & Supp. I 2003); and the antitrust laws of
20 the Commonwealth of Puerto Rico, 10 L.P.R.A. §§ 258, 260 and 268.
21 Docket Document Nos. 1, 13, 40.

22 Defendants move to dismiss all but one of Plaintiff's claims for
23 failure to state claims upon which relief can be granted. FED. R. CIV.
24 P. 12(b)(6). Docket Document Nos. 21, 25. Plaintiff opposes these
25 motions. Docket Document Nos. 37, 42.

I.

Factual and Procedural Analysis

We derive the following factual summary from Plaintiff's complaint and from the additional facts submitted in Plaintiff's Second Supplemental and Amending Complaint. Docket Document Nos. 1, 40. As we must, we "assume all plaintiffs' allegations are true and make all reasonable inferences in favor of the plaintiffs." Alternative Energy, Inc. v. St. Paul Fire and Marine Ins., Co., 267 F.3d 30, 36 (1st Cir. 2001).

Plaintiff Ramallo Bros. Printing, Inc. is a corporation organized and existing under the laws of Puerto Rico, with its principal place of business in Puerto Rico. It is a commercial printer whose business consists of, inter alia, the printing of inserts ("shoppers") advertising the sale of goods, which are distributed and inserted in newspapers of general circulation in Puerto Rico.

Defendant El Día is a corporation organized and existing under the laws of Puerto Rico with its principal place of business in Puerto Rico. It is currently owned by Ferré Investment Fund, Inc. ("FIF") (owner of approximately 90% of El Día's stock), the Luis A. Ferré Foundation (owner of approximately 5% of El Día's stock), and others (who own approximately 5% of El Día's stock). Defendant El Día is the owner and publisher of El Nuevo Día, the leading newspaper in Puerto Rico based on paid circulation and revenues. Its business

1 includes, inter alia, the distribution and delivery of shoppers
2 printed by Defendant El Día, Defendant AGP, and other commercial
3 printers, including Plaintiff Ramallo, that advertise the sale of
4 goods and are distributed and delivered together with and inserted in
5 El Nuevo Día.

6 Defendant Editorial Primera Hora is a corporation organized and
7 existing under the laws of Puerto Rico with its principal place of
8 business in Puerto Rico. Approximately 97.5% of Defendant Editorial
9 Primera Hora's stock is owned by Asset Growth Fund, Inc. ("AGF"), a
10 venture capital fund owned 100% by FIF. The balance of Defendant
11 Editorial Primera Hora's stock is owned by others. Defendant
12 Editorial Primera Hora owns and publishes Primera Hora, a daily
13 Puerto Rico newspaper. It is printed by Defendant El Día. Defendant
14 Editorial Primera Hora's business includes, inter alia, the
15 distribution and delivery of shoppers printed by Defendant El Día,
16 Defendant AGP, and other commercial printers, including Plaintiff
17 Ramallo, that advertise the sale of goods and are distributed and
18 delivered together with and inserted in Primera Hora.

19 Defendant AGP is a corporation organized and existing under the
20 laws of Puerto Rico with its principal place of business in Puerto
21 Rico. Defendant AGP is owned by FIF (owner of approximately 43% of
22 AGP's stock) and AGF (owner of approximately 57% of AGP's stock).
23 Defendant El Día has, or until recently had, an investment of
24 approximately \$11.2 million in preferred stock of Defendant AGP.

1 Defendant AGP is a commercial printing company that was formed by
2 Defendant El Día in 1997. It prints shoppers for some of Defendants
3 El Día and Editorial Primera Hora's customers. Defendant AGP is also
4 the exclusive printer of corporate supplements delivered as inserts
5 in El Nuevo Día and/or Primera Hora. Defendant AGP has obtained this
6 exclusive position because Defendants El Día and Editorial Primera
7 Hora require that all customers print with Defendant AGP all
8 corporate supplements to be delivered as inserts in El Nuevo Día and
9 Primera Hora. Defendant AGP also prints two magazines, Salud al Día
10 and De Moda, published by Defendant El Día, and which are also
11 distributed and delivered as inserts in El Nuevo Día.

12 For many years, El Nuevo Día has maintained a monopoly in the
13 newspaper delivery market, controlling approximately 73% of the
14 delivery market. In or about 1992, Defendant El Día attempted to
15 enter into the printing market by offering to purchase Art Printing,
16 a commercial printer and a leading competitor in the printing market.
17 Art Printing rejected the offer and in 1995, became affiliated with
18 Plaintiff Ramallo. In 1995, Defendant El Día began printing shoppers
19 using its newspaper presses. In late 1996, Defendant El Día began to
20 offer potential customers in the printing market discounted, often
21 below cost, printing and/or delivery of shoppers and/or commercial
22 supplements.

23 In 1997, Defendant El Día formed AGP. In March 1997, Defendant
24 AGP induced one of Plaintiff's key employees, the Vice President of

1 Manufacturing, to leave his employment and to work for Defendant AGP.
2 Defendant AGP induced at least twenty-three additional Ramallo
3 employees to leave their employment between April and October 1997.
4 Defendant AGP subsequently hired these employees who, Plaintiff
5 alleges, allowed Defendant AGP to gain access to Plaintiff's trade
6 secrets and other proprietary and confidential business information.

7 Defendant AGP then began to set the price for the printing of
8 shoppers at below-cost levels. Defendants El Día and Editorial
9 Primera Hora began requiring that all corporate supplements for
10 delivery by El Nuevo Día and Primera Hora be printed exclusively by
11 Defendant AGP. They also began, inter alia, discounting, at times to
12 below-cost levels, the delivery price of shoppers on the condition
13 that they be printed by Defendant AGP. Furthermore, El Día and
14 Editorial Primera Hora began giving free full pages of advertising,
15 shoppers, and commercial supplement inserts to customers who agree to
16 print their shoppers and/or commercial supplements with Defendant
17 AGP.

18 As a result of such practices, Plaintiff began losing a
19 considerable volume of business and suffered considerable lost
20 profits. Plaintiff was also forced to make substantial expenditures
21 for the training of employees hired to replace those induced to leave
22 by Defendants. Plaintiff claims actual damages in excess of \$37
23 million. Plaintiff requests, inter alia, treble damages, attorney's
24 fees, and costs.

1 Defendants move to dismiss Plaintiff's complaint, on the grounds
2 that Plaintiff has failed to state a claim upon which relief can be
3 granted, namely that (1) Plaintiff's trade secret and predatory hiring
4 claims are barred by the statute of limitations; (2) Plaintiff's
5 claim of conspiracy is legally impossible; (3) Plaintiff has failed
6 to allege the elements necessary for an attempted monopolization
7 claim of the printing market; (4) Plaintiff has improperly defined
8 the delivery market as to its monopolization claim; (5) the complaint
9 fails to state a claim of monopoly leveraging; (6) the complaint
10 fails to allege the elements of a per-se tying violation;
11 (7) Plaintiff may not bring a private cause of action under Section
12 259 of the Puerto Rico Civil Code; and (8) Plaintiff may not bring a
13 claim for interference with prospective economic advantage under
14 Article 1802 of the Puerto Rico Civil Code. Docket Document Nos. 21,
15 25. Plaintiff opposes both motions. Docket Document Nos. 37, 42.

16 II.

17 Legal Standard

18 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a
19 defendant may move to dismiss an action against him based solely on
20 the pleadings for the plaintiff's "failure to state a claim upon
21 which relief can be granted." FED. R. CIV. P. 12(b)(6). In assessing
22 a motion to dismiss, "[w]e begin by accepting all well-pleaded facts
23 as true, and we draw all reasonable inferences in favor of the
24 [nonmovant]." Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962,

1 971 (1st Cir. 1993); see also Coyne v. City of Somerville, 972 F.2d
2 440, 442-43 (1st Cir. 1992).

3 We note that a plaintiff must only satisfy the simple
4 requirements of Federal Rule of Civil Procedure 8(a) in order to
5 survive a motion to dismiss. Swierkiewicz v. Sorema N.A., 534 U.S.
6 506 (2002); Morales-Villalobos v. Garcia-Llorens, 316 F.3d 51, 52-53
7 (1st Cir. 2003); DM Research, Inc. v. College of Am. Pathologists,
8 170 F.3d 53, 55-56 (1st Cir. 1999). A plaintiff need only set forth
9 "a short and plain statement of the claim showing that the pleader is
10 entitled to relief," FED.R.CIV.P. 8(a)(2), and need only give the
11 respondent fair notice of the nature of the claim and petitioner's
12 basis for it. Swierkiewicz, 534 U.S. at 512-515. "Given the Federal
13 Rules' simplified standard for pleading, '[a] court may dismiss a
14 complaint only if it is clear that no relief could be granted under
15 any set of facts that could be proved consistent with the
16 allegations.'" Swierkiewicz, 534 U.S. at 514 (quoting Hishon v. King
17 & Spalding, 467 U.S. 69, 73 (1984)).

18 III.

19 Analysis

20 Defendants move to dismiss both Plaintiff's Complaint, Docket
21 Document No. 1, and Plaintiff's Supplemental and Amending Complaint,
22 Docket Document No. 13. Plaintiff's Supplemental and Amending
23 Complaint alters the original complaint only by amending two
24 additional counts for violations under Puerto Rico law. Defendants'

1 first motion to dismiss addresses the counts in Plaintiff's original
2 complaint. Docket Document No. 21. Defendants' second motion to
3 dismiss limits its scope to those claims advanced in Plaintiff's
4 amended complaint. Docket Document No. 25. We, therefore, discuss
5 Defendants' motions to dismiss and the arguments contained therein in
6 tandem.

7 **A. Statute of Limitations**

8 A private antitrust action such as this "shall be forever barred
9 unless commenced within four years after the cause of action
10 accrued." 15 U.S.C. § 15b. Defendants argue that Plaintiff's claims
11 alleging damages prior to September 16, 1998, four years before suit
12 was brought, namely Count VI, must, therefore, be dismissed. Docket
13 Document No. 21. Defendants cite to numerous factual allegations
14 submitted by Plaintiffs in their complaint regarding Defendants'
15 alleged illegal inducement of Plaintiff's employees which predate the
16 applicable four-year time period. Id.

17 The Supreme Court has outlined two distinct exceptions to the
18 four-year antitrust statute of limitations. See In re Relafen
19 Antitrust Litig., 286 F. Supp. 2d 56, 62 (D. Mass. 2003). First, a
20 plaintiff may recover for conduct outside the four-year time period
21 when it constitutes "a continuing violation of the Sherman Act and
22 [inflicts] continuing and accumulating harm." Hanover Shoe, Inc. v.
23 United Shoe Mach. Corp., 392 U.S. 481, 502 n.15 (1968). Second, when
24 damages resulting from the alleged illegal conduct are uncertain and

1 speculative at the time the defendant engages in such conduct, the
2 cause of action for future damages accrues "only on the date they are
3 suffered". Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S.
4 321, 339 (1971).

5 A continuing antitrust violation occurs when the plaintiff's
6 interests are repeatedly invaded. DXS, Inc. v. Siemens Med. Sys.,
7 Inc., 100 F.3d 462, 467 (6th Cir. 1996). In such situations, the
8 four-year statute of limitations is tolled each time the defendant
9 commits an overt act in furtherance of the antitrust conspiracy.
10 DXS, Inc., 100 F.3d at 467; Zenith Radio Corp., 401 U.S. at 338;
11 Morton's Mkt., Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823, 827-28
12 (11th Cir. 1999).

13 In its complaint, Plaintiff alleges that Defendants' conspiracy
14 and monopolistic practices "are ongoing and continue to the present
15 day, and they consist of new separate and overt acts that cause new
16 and additional damage." Docket Document No. 1. Plaintiff's
17 allegation seemingly pertains to its claims of Defendants' predatory
18 pricing, monopoly leveraging, and illegal tying arrangements.
19 However, Plaintiff's claim that Defendants illegally induced
20 Plaintiff's employees to leave their employment and, as such, gained
21 access to Plaintiff's trade secrets, rests on a set of specific,
22 isolated events dating to March 1997 and between April and October
23 1997. Id. Plaintiff does not allege that Defendants continually
24 attempted to induce Plaintiff's employees to depart from their work

1 with Plaintiff or that any continuing antitrust violation relating to
2 this illegal inducement occurred after October 1997.

3 Further, Plaintiff makes no claim that the damages relating to
4 the illegal inducement were uncertain or speculative at the time they
5 were suffered. Thus, we need not invoke the second exception to the
6 four-year statute of limitations in antitrust cases. We thereby
7 grant Defendants' motion to dismiss Count VI of Plaintiff's
8 complaint. Docket Document No. 21.

9 **B. Conspiracy Claims**

10 Defendants move to dismiss Plaintiff's conspiracy claims,
11 arguing that because Defendants are all substantially owned and/or
12 controlled by the Ferré Rangel family, they cannot be parties to a
13 conspiracy. Id.

14 In Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752
15 (1984), the Supreme Court dispensed with the "intra enterprise
16 conspiracy doctrine" and held that a corporation and its wholly-owned
17 subsidiary are not separate entities, and therefore cannot be parties
18 to a conspiracy. Id. at 770-71. The Court left unanswered the
19 question of whether a parent can conspire with an affiliated
20 corporation it does not completely own, and the First Circuit has not
21 addressed this issue. However, a number of lower courts have relied
22 on Copperweld's reasoning to reach an answer to this inquiry.

23 In Copperweld, the Supreme Court held that "[i]n any conspiracy,
24 two or more entities that previously pursued their own interests

1 separately are combining to act as one for their common benefit."
2 Id. at 769. However, in the case of a parent corporation and its
3 wholly-owned subsidiary, the two entities "share a common purpose
4 whether or not the parent keeps a tight rein over the subsidiary; the
5 parent may assert full control at any moment if the subsidiary fails
6 to act in the parent's best interest." Id. at 771-72. Thus, from
7 their inception, parents and their subsidiaries share a common
8 corporate consciousness and work to achieve a common economic
9 interests. "[A]greements among them do not suddenly bring together
10 economic power that was previously pursuing divergent goals," id. at
11 769, and therefore they cannot be said to conspire to thwart trade.

12 Similar reasoning can be applied to a parent corporation and a
13 less than wholly-owned subsidiary. See id. at 771-72 (recommending
14 that courts consider whether the affiliated corporate entities have
15 a complete unity of interest rather than focus strictly on corporate
16 form); Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp., 910
17 F.2d 139, 146 (4th Cir. 1990) (same). That is, "the entity with
18 legal control effectively dictates the policies and direction of its
19 subsidiary. . . . In this respect, the parent and subsidiary act with
20 a unity of interest." Bell Atl. Bus. Sys. Servs. v. Hitachi Data
21 Sys. Corp., 849 F. Supp. 702, 706 (N.D. Cal. 1994); see Leaco
22 Enters., Inc. v. Gen. Elec. Co., 737 F. Supp. 605, 609 (D. Or. 1990)
23 (finding a 91.9% ownership of a subsidiary to be a de minimis amount
24 less than complete ownership and thereby applying the Copperweld

1 rule); Novatel Communications, Inc. v. Cellular Tel. Supply, Inc.,
2 1986 WL 15507, at *6 (N.D. Ga. Dec. 23, 1986) (deeming 51% ownership
3 of subsidiary sufficient to create legal impossibility of
4 conspiracy).

5 Based on this reasoning, we are further led to conclude that
6 sister subsidiaries of the same parent are legally incapable of
7 conspiring with each other in violation of the Sherman Act. Because
8 these entities act pursuant to the same interests and goals, two or
9 more sister subsidiaries of the same parent over which the parent has
10 legal control, cannot be found capable of conspiring. Bell Atl. Bus.
11 Sys. Servs., 849 F. Supp. at 707; Total Ben. Servs., Inc. v. Group
12 Ins. Admin., Inc., 1993 WL 15671, at *2 (E.D. La. Jan. 7, 1993)
13 (finding that two sister companies, owned 100% and 85% respectively,
14 by the same parent were incapable, as a matter of law, of conspiring
15 with each other).

16 In the current case, Plaintiff alleges a conspiracy among
17 Defendants El Día, Editorial Primera Hora, and AGP. Docket Document
18 No. 1. As explained in Plaintiff's complaint, Defendant El Día is
19 owned 90% by FIF; Defendant Editorial Primera Hora is owned 97.5% by
20 AGF which is owned 100% by FIF; and Defendant AGP is owned 43% by FIF
21 and 57% by AGF. Id. That is, FIF maintains legal control and/or
22 actual control of all three Defendants. We, therefore, find that
23 Defendants are legally incapable of conspiring with each other in
24 violation of the Sherman Act and, therefore, grant Defendants' motion

1 to dismiss Plaintiff's claims implicating such a conspiracy. Docket
2 Document No. 21.

3 **C. Attempted Monopolization of the Printing Market**

4 Defendants next argue that Plaintiff's claim of attempted
5 monopolization of the printing market must be dismissed. Id. To
6 demonstrate attempted monopolization under Section 2 of the Sherman
7 Act¹, a plaintiff must generally show "(1) that the defendant has
8 engaged in predatory or anticompetitive conduct with (2) a specific
9 intent to monopolize and (3) a dangerous probability of achieving
10 monopoly power." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447,
11 456 (1993).

12 Defendants take issue with the third prong of this test,
13 claiming that Plaintiff has failed to allege any facts pertaining to
14 Defendant AGP's market share in the printing market, the means by
15 which monopoly power is usually established. Docket Document No. 21.
16 We disagree. The First Circuit has instructed that there is no
17 "inflexible requirement that pre-predation market share be
18 demonstrated." Springfield Terminal Ry. Co. v. Canadian Pac. Ltd.,
19 133 F.3d 103, 107-08 (1st Cir. 1997). Determining market power also
20 requires inquiry into the defendant's economic power in the relevant
21 market. Id. at 108.

¹Section 2 of the Sherman Act forbids any monopoly, or attempt to monopolize, or combination or conspiracy to monopolize. 15 U.S.C. § 2.

1 Furthermore, when considered in a light most favorable to
2 Plaintiff, Plaintiff's allegations could support a claim on which it
3 is entitled to relief. Docket Document No. 1; see Swierkiewicz, 534
4 U.S. at 514. Plaintiff alleges, inter alia, that Defendant AGP has
5 acquired a 35% market share within only five years. Docket Document
6 No. 40. Plaintiff alleges that Defendant AGP has acquired an
7 "exclusive position" as "the exclusive printer of corporate
8 supplements delivered as inserts in El Nuevo Día and Primera Hora,"
9 two of the leading newspapers in Puerto Rico. Docket Document No. 1.
10 Plaintiff contends that Defendants El Día and Editorial Primera Hora
11 require that Defendant AGP print any corporate supplements delivered
12 as inserts with El Nuevo Día and Primera Hora. Such allegations, if
13 true, suggest conduct which would be reasonably capable of creating
14 a monopoly in the defined market. In light of the liberal notice
15 pleading requirement established by the Federal Rules of Civil
16 Procedure, we find that Plaintiff's allegations regarding Defendants'
17 attempt to monopolize the printing market give Defendants fair notice
18 of the nature of the claim and Plaintiff's basis for it.
19 Swierkiewicz, 534 U.S. at 512-515. Accordingly, we decline to grant
20 Defendant's motion to dismiss said claim.

21 **D. Monopolization of the Delivery Market**

22 Defendants move to dismiss Plaintiff's claims of monopolization
23 of the delivery market, arguing that Plaintiff has improperly defined
24 the relevant market. Docket Document No. 21. To state a claim for

1 monopolization, plaintiffs must plead that defendants (1) have a
2 monopoly in the relevant market and (2) have willfully acquired or
3 maintained that monopoly power. Eastman Kodak Co. v. Image Technical
4 Servs., Inc., 504 U.S. 451, 481 (1992) (citing United States v.
5 Grinnell Corp., 384 U.S. 563, 570-71 (1966)). Defendants argue that
6 Plaintiff has defined the relevant market too narrowly and has failed
7 to consider alternate means, besides daily newspapers, for the
8 delivery of shoppers and commercial supplements. Docket Document
9 No. 21.

10 To plead a monopolization claim, a plaintiff must allege the
11 scope and boundaries of the relevant market which the defendant
12 allegedly sought to monopolize. Spectrum Sports, Inc., 506 U.S. at
13 455; Eastman Kodak Co., 504 U.S. at 481-82. The relevant market is
14 comprised of both the relevant geographic and product markets. See
15 Davric Me. Corp. v. Rancourt, 216 F.3d 143, 149-50 (1st Cir. 2000);
16 Moccio v. Cablevision Sys. Corp., 208 F. Supp. 2d 361, 377 (E.D.N.Y.
17 2002). The relevant product market consists of those products for
18 which there is a cross-elasticity of demand or which are generally
19 interchangeable. See Eastman Kodak Co., 504 U.S. at 481-82. The
20 relevant geographic market is that area where consumers may turn for
21 the goods in the relevant product market or that area where producers
22 of the product effectively compete. Tampa Elec. Co. v. Nashville
23 Coal Co., 365 U.S. 320, 327, 331-32 (1961).

1 Being that determining the relevant market is a highly fact
2 intensive, we do not here decide its scope. Coastal Fuels of P.R.,
3 Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 196 (1st Cir. 1996).
4 We do, however, find that in its complaint and amendments thereto,
5 Plaintiff alleges facts sufficient to describe a plausible relevant
6 delivery market subject to the purported monopolization, Docket
7 Document Nos. 1, 40, and we therefore decline to grant Defendants'
8 motion to dismiss Plaintiff's monopolization claim on this basis.

9 **E. Monopoly Leveraging**

10 Defendants argue that Plaintiff has failed to state a claim for
11 monopoly leveraging and must therefore be dismissed. Docket Document
12 No. 21. A monopoly leveraging claim involves a monopolist's use of
13 its monopoly power to "foreclose competition or gain a competitive
14 advantage, or to destroy a competitor." Otter Tail Power Co. v.
15 United States, 410 U.S. 366, 377 (1973); Eastman Kodak Co., 504 U.S.
16 at 483-84. Defendants argue that in order for Plaintiff to
17 successfully assert a monopoly leveraging claim, it must allege that
18 Defendants have used their monopoly power to "acquire or maintain
19 monopoly power in a second market, or attempt to do so in the second
20 market." Docket Document No. 21. It is not sufficient, Defendants
21 argue, to allege only that a monopolist has used power in one market
22 merely to gain a competitive advantage in the second. Id.

23 However, in its complaint Plaintiff references Defendants'
24 "attempt to monopolize and foreclose competition in the printing

1 market using [their] monopoly power." Docket Document No. 1. We
2 find such allegations, if true, would state a claim for monopoly
3 leveraging even under Defendants' interpretation of the applicable
4 law, and we therefore decline to grant Defendants' motion to dismiss
5 on these grounds. Docket Document No. 21.

6 **F. Tying Arrangement Claims**

7 Defendants further argue that Plaintiff fails to allege two of
8 the four elements necessary to establish a per se tying claim. Id.
9 The elements to a per se tying violation are: (1) the tying and tied
10 goods are two separate products; (2) the defendant affords consumers
11 no choice but to purchase the tied product from it; (3) the defendant
12 has sufficient market power in the tying product market to distort
13 consumers' choices with respect to the tied product; and (4) the
14 tying arrangement forecloses a substantial volume of commerce.
15 United States v. Microsoft Corp., 253 F.3d 34, 85 (D.C. Cir. 2001);
16 Borschow Hosp. and Med. Supplies, Inc. v. Cesar Castillo Inc., 96
17 F.3d 10, 17 (1st Cir. 1996) (quoting Data Gen. Corp. v. Grumman Sys.
18 Support Corp., 36 F.3d 1147, 1178 (1st Cir. 1994)). Defendants aver
19 that Plaintiff has failed to allege the second and third elements
20 necessary for such a claim and we therefore limit our discussion to
21 those two elements. Docket Document No. 21.

22 The second element requires some form of coercion, that is,
23 forcing the purchaser to take the tied product along with the tying
24 product. See Borschow Hosp. and Med. Supplies, Inc., 96 F.3d at 17-

1 18. A reading of recent First Circuit case law, as well as decisions
2 from this district, make clear that such coercion need not be
3 absolute; the defendant must "force the buyer into the purchase of
4 tied product that the buyer either did not want at all, or might have
5 preferred to purchase elsewhere on different terms." Wells Real
6 Estate, Inc. v. Greater Lowell Bd. of Realtors, 850 F.2d 803, 814
7 (1st Cir. 1988); Kell v. Am. Capital Strategies, Ltd., 278 F. Supp.
8 2d 156, 161 (D.P.R. 2003). The defendant must improperly impose
9 conditions that "'explicitly or *practically* require buyers to take
10 the second product if they want the first one.'" Borschow Hosp. and
11 Med. Supplies, Inc. v. Cesar Castillo Inc., 96 F.3d 10, 18 (1st Cir.
12 1996) (citation omitted) (emphasis added).

13 We find that Plaintiff has alleged facts which, although not
14 determinative, may indicate the requisite level of coercion necessary
15 to claim a per-se tying violation. Docket Document No. 1. In its
16 complaint, Plaintiff has alleged, inter alia, that Defendants El Día
17 and Editorial Primera Hora have entered into contracts and/or
18 agreements with its customers "requiring that all corporate
19 supplements for delivery by *El Nuevo Día* and *Primera Hora* be printed
20 *exclusively* by AGP" and that Defendants offer below-cost discounts on
21 "the delivery price of shoppers on condition that they be printed by
22 AGP." Id. Such allegations, if true, may leave consumers no other
23 economically viable option and thus, under the precedent within this
24 Circuit, may present sufficient evidence of coercion.

1 Defendants further argue that Plaintiff has failed to allege
2 economic power in the delivery market and request that we dismiss
3 Plaintiff's tying claim on this basis. Docket Document No. 21.
4 However, Plaintiff clearly alleges in its complaint that "*El Nuevo*
5 *Día* and *Primera Hora* control 75% of the delivery market." Docket
6 Document No. 1. Such a degree of control in the alleged tying market
7 (i.e. the delivery market) might be hearty enough to distort
8 consumers' choices with respect to the tied product (i.e. the
9 printer). We therefore refuse to dismiss Defendants' motion to
10 dismiss Plaintiff's tying arrangement claims.

11 **G. Unfair Trade Claims Under Puerto Rico Law**

12 Defendants move to dismiss Plaintiff's claim of unfair trade
13 practices under Puerto Rico law, claiming that claims brought under
14 10 P.R. LAWS ANN. § 259 (1997 & Supp. 2001) cannot be brought in a
15 private action and must therefore be dismissed. Docket Document
16 No. 25. Plaintiff does not dispute Defendants' argument and
17 voluntarily dismisses any claims that can be construed as asserting
18 claims for violation of Section 259. Docket Document No. 42. Rather,
19 Plaintiff simply indicates that any claims which may be brought under
20 Article 1802 of the Puerto Rico Civil Code, 31 P.R. LAWS ANN. § 5141
21 (1991 & Supp. 2001), for Defendants' alleged violations should be
22 maintained. Id. Because Defendants have not moved for dismissal of
23 such Article 1802 claims, we make no ruling on them at this time, and

1 allow only for the voluntary dismissal of claims brought under
2 Section 259.

3 H. Interference with Prospective Economic Advantage Claims Under
4 Puerto Rico Law

5 Finally, Defendants move to dismiss Plaintiff's claims for
6 prospective business relationships under Puerto Rico law, arguing
7 that such claims are not allowed under Article 1802 of the Puerto
8 Rico Civil Code. Docket Document No. 25. Again, Plaintiff does not
9 contest Defendants' argument and voluntarily dismisses any such
10 claims for prospective economic advantages. Docket Document No. 42.
11 However, Plaintiff clarifies that Article 1802 does allow for
12 tortious interference with business and contractual relationships, an
13 argument on which Defendants have not spoken. Docket Document
14 Nos. 25, 42. We, therefore, allow for the voluntary dismissal of
15 those claims alleging interference with prospective economic
16 relationships, but decline to dismiss any claim regarding tortious
17 interference with business and contractual relationships.

18 IV.

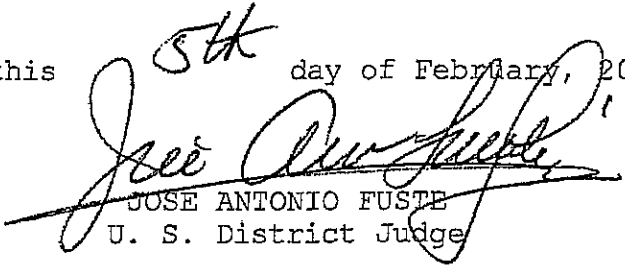
19 Conclusion

20 In accordance with the foregoing, we **GRANT** Defendants' motion to
21 dismiss Count VI of Plaintiff's complaint, as well as Plaintiff's
22 conspiracy claims. We further **GRANT** Defendants' motion to dismiss
23 Plaintiff's claims under Section 259 of Puerto Rico law and any
24 claims of interference with prospective economic relationships. We

1 DENY Defendants' motions to dismiss Plaintiff's claims regarding the
2 attempted monopolization of the printing market, monopolization of
3 the delivery market, monopoly leveraging, and claims of illegal tying
4 arrangements. Docket Document Nos. 21, 25.

5 IT IS SO ORDERED.

6 San Juan, Puerto Rico, this ^{5th} day of February, 2004.

7 
8 JOSE ANTONIO FUSTE
U. S. District Judge

2/6/04 mc

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