IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

A&B CAMPBELL FAMILY LLC, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 3:15-cv-00340-MEM
	)	
CHESAPEAKE ENERGY CORPORATION, *et al.*,	)	
	)	
	)	
Defendants.	)	

BRIEF IN SUPPORT OF MOTION TO DISMISS OF DEFENDANTS ACCESS MIDSTREAM PARTNERS, L.P., ACCESS MLP OPERATING, L.L.C., AND APPALACHIA MIDSTREAM SERVICES, L.L.C.

Michael J. Gibbens (*pro hac vice*)
Susan E. Huntsman (*pro hac vice*)
CROWE & DUNLEVY
A Professional Corporation
500 Kennedy Building
321 South Boston Avenue
Tulsa, Oklahoma 74103
(918) 592-9800
(918) 592-9801 (Facsimile)
michael.gibbens@crowedunlevy.com
susan.huntsman@crowedunlevy.com

John S. Summers
Alan C. Promer
Dylan J. Steinberg
HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 496-7062

Mack J. Morgan III (*pro hac vice*)
CROWE & DUNLEVY
A Professional Corporation
Braniff Building
324 N. Robinson Ave., Suite 100
Oklahoma City, Oklahoma 73102
(405) 235-7700
(405) 239-6651 (Facsimile)
mack.morgan@crowedunlevy.com

September 18, 2015

ATTORNEYS FOR DEFENDANTS ACCESS MIDSTREAM PARTNERS, L.P., ACCESS MLP OPERATING, L.L.C., AND APPALACHIA MIDSTREAM SERVICES, L.L.C.

Page(s)

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

PROCEDURAL HISTORY AND STATEMENT OF FACTUAL ALLEGATIONS 5

STATEMENT OF ISSUES 14

ARGUMENT AND AUTHORITIES 14

I. PLAINTIFFS MAY NOT PURSUE THEIR ANTITRUST CLAIMS BECAUSE THEY FAIL TO ALLEGE ANTITRUST INJURY 14

A. Plaintiffs allege no reduction in competition from the Marcellus Gathering Agreement 15

B. Plaintiffs' factual allegations do not support an inference that the "supra-competitive" gathering fees resulted from the exercise of market power by Access 16

II. PLAINTIFFS MAY NOT PURSUE THEIR ANTITRUST CLAIMS BECAUSE THEY FAIL TO PLEAD A LEGALLY SUFFICIENT RELEVANT MARKET 18

A. Plaintiffs fail to allege facts plausibly suggesting that Bradford County and adjoining portions of surrounding counties constitute a legally sufficient geographic market 19

B. The proposed geographic market consisting of the AMI is legally improper 21

C. The proposed geographic market consisting of acreage "dedicated" to Access by Chesapeake is also improper 23

III. PLAINTIFFS' FACTUAL ALLEGATIONS ARE INSUFFICIENT TO SUPPORT AN ANTICOMPETITIVE CONSPIRACY INVOLVING ACCESS, AMLP, OR APPALACHIA MIDSTREAM 25

Page(s)

IV. PLAINTIFFS FAIL TO STATE A RICO CLAIM UNDER 18 U.S.C. § 1962(c) AGAINST ACCESS, AMLP, OR APPALACHIA MIDSTREAM 30

A. Plaintiffs' factual allegations are insufficient to plead an association-in-fact enterprise including Access, AMLP, or Appalachia Midstream 31

B. Plaintiffs do not adequately allege that Access, AMLP, or Appalachia Midstream was conducting the affairs of the enterprise, as opposed to its own affairs 34

V. PLAINTIFFS FAIL TO STATE A RICO CONSPIRACY CLAIM UNDER 18 U.S.C. § 1962(d) AGAINST ACCESS, AMLP, OR APPALACHIA MIDSTREAM 35

VI. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST ACCESS, AMLP, OR APPALACHIA MIDSTREAM FOR CONVERSION 38

VII. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST ACCESS, AMLP, OR APPALACHIA MIDSTREAM FOR CONSPIRACY 40

CONCLUSION 41

CERTIFICATE OF SERVICE 43

Page(s)

TABLE OF AUTHORITIES

CASES

Acre v. Spindletop Oil & Gas Co.,
2009 WL 4016116 (E.D. Ark. Nov. 18, 2009).....20, 22

Ajir v. Exxon Corp.,
1995 WL 429234 (N.D. Cal. July 7, 1995), *aff'd*,
185 F.3d 865 (9th Cir. 1999).....24

Ashcroft v. Iqbal,
556 U.S. 662 (2009).....14, 33, 34

AT&T Co. v. IMR Capital Corp.,
888 F.Supp. 221 (D. Mass 1995).....16

Atlantic Richfield Co. v. USA Petroleum Co.,
495 U.S. 328 (1990).....15

Balaklaw v. Lovell,
14 F.3d 793 (2d Cir. 1994).....16

Barnsdall Oil Co. v. Willis,
152 F.2d 824 (5th Cir. 1946).....2

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007).....14, 26, 29, 33

Brown Shoe Co. v. United States,
370 U.S. 294 (1962).....14

City of Pittsburgh v. W. Penn Power Co.,
147 F.3d 256 (3d Cir. 1998).....18

Concord Assocs., L.P. v. Entm't Props. Trust,
2014 WL 1396524 (S.D.N.Y. Apr. 9, 2014).....22, 28, 36

Dicar, Inc. v. Stafford Corrugated Prods., Inc.,
2010 WL 988548 (D.N.J. Mar. 12, 2010).....20

Domico v. Kontas,
2013 WL 1248638 (M.D. Pa. Mar. 26, 2013).....35

Page(s)

Elsevier Inc. v. W.H.P.R., Inc.,
692 F.Supp.2d 297 (S.D.N.Y. 2010) 32

Festa v. Jordan,
803 F.Supp.2d 319 (M.D. Pa. 2011).....40

In re Digital Music Antitrust Litig.,
812 F.Supp.2d 390 (S.D.N.Y. 2011) 37

In re Elevator Antitrust Litig.,
502 F.3d 47 (2d Cir. 2007) 26

In re Ins. Brokerage Antitrust Litig.,
618 F.3d 300 (3d Cir. 2010) 30, 31, 32

In re Lewis,
478 B.R. 645 (Bankr. E.D. Pa. 2012) 39

In re LIBOR-Based Fin. Instruments Antitrust Litig.,
935 F.Supp.2d 666 (S.D.N.Y. 2013), *right to appeal order of dismissal recognized sub nom. Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897 (2015)..... 17-18

In re Mushroom Direct Purchaser Antitrust Litig.,
514 F.Supp.2d 683 (E.D. Pa. 2007)..... 14-15

In re Pressure Sensitive Labelstock, Antitrust Litig.,
566 F.Supp.2d 363 (M.D. Pa. 2008).....4, 26, 27, 28

In re Processed Egg Prods. Antitrust Litig.,
821 F.Supp.2d 709 (E.D. Pa. 2011).....26, 33

In re Wellbutrin SR/Zyban Antitrust Litig.,
281 F.Supp.2d 751 (E.D. Pa. 2003).....23

Irish v. Ferguson,
970 F.Supp.2d 317 (M.D. Pa. 2013).....15

John B. Parsons Home, LLC v. John B. Parsons Foundation,
90 A.3d 534 (Md. App. 2014) 39

Jung v. Ass'n of Amer. Medical Colleges,
300 F.Supp.2d 119 (D.D.C. 2004).....37

Page(s)

Kilmer v. Elexco Land Services, Inc.,
990 A.2d 1147 (Pa. 2010).....9, 10, 28, 36

Limestone Dev. Corp. v. Vill. of Lemont, Ill.,
520 F.3d 797 (7th Cir. 2008).....31

McGreevy v. Stroup,
413 F.3d 359 (3d Cir. 2005).....40

McKeeman v. Corestates Bank, N.A.,
751 A.2d 655 (Pa. Super. 2000).....40

Mid-Michigan Radiology Assoc., P.C. v. Cent. Michigan Cmty. Hosp.,
1995 WL 239360 (E.D. Mich. Feb. 14, 1995).....16

Morales Villalobos v. Garcia Llorens,
137 F.Supp.2d 44 (D.P.R. 2001).....20, 22

Navarra v. Marlborough Gallery, Inc.,
820 F.Supp.2d 477 (S.D.N.Y. 2011).....28, 36

Pension Benefit Guar. Corp. v. White Consol. Indus. Inc.,
998 F.2d 1192 (3d Cir. 1993).....23

Pioneer Commercial Funding Corp. v. Am. Fin. Mortgage Corp.,
855 A.2d 818 (Pa. 2004).....38

Pittsburgh Constr. Co. v. Griffith,
834 A.2d 572 (Pa. Super. 2003).....38

Queen City Pizza, Inc. v. Domino's Pizza, Inc.,
124 F.3d 430 (3d Cir. 1997).....18, 24

Race Tires Am., Inc. v. Hoosier Racing Tire Corp.,
614 F.3d 57 (3d Cir. 2010).....25

Rahemtulla v. Hassam,
539 F.Supp.2d 755 (M.D. Pa. 2008).....38

Reves v. Ernst & Young,
507 U.S. 170 (1993).....34

Page(s)

Schwartz v. Lawyers Title Ins. Co.,
970 F.Supp.2d 395 (E.D. Pa. 2013).....32

Synthes, Inc. v. Emerge Med., Inc.,
2012 WL 4473228 (E.D. Pa. Sept. 28, 2012).....20

Tunis Bros. Co., v. Ford Motor Co.,
952 F.2d 715 (3d Cir. 1991) 19, 20, 21

United Food & Commercial Workers Unions & Employers Midwest Health Benefits Fund v. Walgreen Co.,
719 F.3d 849 (7th Cir. 2013) 34

Universal Premium Acceptance Corp. v. York Bank & Trust Co.,
69 F.3d 695 (3d Cir. 1995) 38

Warfield Philadelphia, L.P. v. Nat'l Passenger R.R. Corp.,
2009 WL 4043112 (E.D. Pa. Nov. 20, 2009).....18

Westland Oil Dev. Corp. v. Gulf Oil Corp.,
637 S.W.2d 903 (Tex. 1982) 2

STATUES AND RULES

18 U.S.C. § 1962(c) 30

18 U.S.C. § 1962(d) 34

Fed. R. Civ. P. 12(b)(6).....14

OTHER AUTHORITIES

Areeda, Phillip E. & Hovankamp, Herbert, *Antitrust Law* (3d Ed. 2007), Vol. IIB at ¶ 519a, pp. 191-92 24

1 Callmann on Unfair Comp., Tr. & Mono. § 4:31 (4th Ed.).....18

Lansdown, Scott, *Golden v. SM Energy Company and the Question of Whether an Area of Mutual Interest Covering Oil and Gas Rights is Binding on Successors and Assigns*, 89 N.D. L. Rev. 267 (2013) 2

At its core, this case is a dispute about whether Chesapeake Energy Corporation ("Chesapeake") and the other companies holding working interests in Plaintiffs' oil and gas leases breached the terms of those leases by deducting a share of post-production costs from Plaintiffs' royalties. Plaintiffs transmogrify this simple claim into complex, far-reaching, and implausible antitrust, RICO, and tort claims, seeking to enhance their recovery through treble and punitive damages. The factual allegations of the Amended Complaint are insufficient, however, to plausibly establish basic and essential elements of their antitrust claims. Moreover, Plaintiffs' allegations fail to establish that Williams Partners, L.P., f/k/a Access Midstream Partners, L.P. ("Access"), or its affiliates, Access MLP Operating, L.L.C. n/k/a Williams MLP Operating, L.L.C. ("AMLP"), and Appalachia Midstream Services, L.L.C. ("Appalachia Midstream"), are proper parties to this litigation. Accordingly, the Court should dismiss all claims against these Defendants.[1]

INTRODUCTION

The Amended Complaint focuses on an agreement between Chesapeake, Anadarko E&P Onshore LLC ("Anadarko"), Statoil Onshore Properties, Inc. ("Statoil"), and Mitsui E&P USA LLC ("Mitsui") [collectively referred to as the

[1] Motions filed by the other Defendants establish that no valid tort, antitrust or RICO claims have been asserted against any of the Defendants, including Access and its affiliates

"Lessee Defendants"], to jointly develop natural gas wells and gathering systems within an "Area of Mutual Interest" in and around Bradford County, Pennsylvania ("the AMI Agreement").[2] Because the Lessee Defendants are horizontal competitors in oil and gas exploration, Plaintiffs contend that the AMI Agreement constitutes a *per se* unlawful antitrust conspiracy to eliminate competition for gas mineral rights, gas well operating rights, and gas gathering services. Plaintiffs further allege that, as the contractually-designated operator of the gas wells and gathering systems developed in the AMI, Chesapeake (either directly or through its affiliates) had monopoly power in each of those lines of commerce. Chesapeake's possession of monopoly power in the market for gas gathering services, allegedly allowed Chesapeake to charge "supra-competitive" fees for gathering services to wells within the AMI, including wells on property leased by Plaintiffs.

[2] "Clauses providing for an 'Area of Mutual Interest' ('AMI') are common features on agreements between oil and gas lessees, including joint operating agreements and various other agreements under which lessees agree to share in the exploration for, and production of, oil and gas." Scott Lansdown, *Golden v. SM Energy Company and the Question of Whether an Area of Mutual Interest Covering Oil and Gas Rights is Binding on Successors and Assigns*, 89 N.D. L. Rev. 267, 267 (2013). AMI agreements have been a part of oil and gas contracts for at least 75 years. *See, e.g.*, *Barnsdall Oil Co. v. Willis*, 152 F.2d 824, 828 (5th Cir. 1946) (first reported reference to an AMI in noting, in a dispute concerning a landman's commission for obtaining oil and gas leases in 1943, the landman's "familiarity with the area of mutual interest" in which he was obtaining leases); *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 905 (Tex. 1982) (determining the enforceability of an AMI clause found in a 1966 letter agreement).

In January 2012, relying on a recent opinion from the Pennsylvania Supreme Court, the Lessee Defendants began to deduct a proportionate share of the post-production costs incurred in bringing natural gas produced in the AMI to market. Gathering fees are one component of post-production costs. Plaintiffs allege that the Lessee Defendants' deduction of these amounts breached the terms of their leases. Plaintiffs further allege that the deductions were part of a RICO scheme, because the Lessee Defendants mailed Plaintiffs royalty statements intended to deceive them about the existence and magnitude of the deductions.

These allegations -- focusing on a purported horizontal conspiracy and allegedly deceptive royalty reporting practices -- do not involve Access and its affiliates, AMLP and Appalachia Midstream. Access and its affiliates are not parties to the AMI Agreement. They are not parties to Plaintiffs' leases, nor do they owe royalties, make deductions, or communicate with Plaintiffs in any manner concerning the leases or royalties. Access and its affiliates could not be part of a horizontal conspiracy because, as vendors of gathering services, they have a vertical relationship with the Lessee Defendants.

The sole links between Access and the purported horizontal conspiracy are two transactions in late 2011 and 2012, through which Plaintiffs allege that Access purchased gas gathering operations in parts of the Marcellus Shale region from Chesapeake. According to Plaintiffs, in exchange for Access agreeing to purchase

these assets, Chesapeake agreed to purchase from Access all of its gathering services within certain acreage (referred to as "dedicated" acreage), and to pay Access a "supra-competitive" rate for such services.

These facts do not support an inference that Access also agreed to join what Plaintiffs contend was a long-standing horizontal conspiracy among the Lessee Defendants. First, Plaintiffs' allegations imply nothing more than that, in purchasing the gathering assets, Access negotiated a good deal for itself, consistent with its own economic interests and perhaps taking advantage of Chesapeake's alleged financial difficulties. As a matter of law, this cannot support a conspiracy claim. *See In re Pressure Sensitive Labelstock Antitrust Litig*., 566 F.Supp.2d 363, 368 (M.D. Pa. 2008). Second, Plaintiffs do not allege that Access or its affiliates could require, or prevent, Chesapeake or any other Lessee Defendant from deducting a share of the gathering fees from Plaintiffs' royalties. Nor do Plaintiffs allege that Access benefitted in any way from such deductions; indeed, it is undisputed that Access's fees remain the same regardless of whether the Lessee Defendants deduct a portion of such fees from royalty payments.

Plaintiffs' antitrust claims should be dismissed.

As shown below, this Court should dismiss Plaintiffs' antitrust claims because Plaintiffs have failed to plead either antitrust injury or a legally sufficient relevant market. Plaintiffs also fail to plead any facts plausibly establishing that

Access or its affiliates were parties to an agreement with the Lessee Defendants to injure competition in, or monopolize, the market for gas gathering services.

Plaintiffs' other claims should similarly be dismissed.

RICO. Plaintiffs' RICO claims also fail as to Access and its affiliates because Plaintiffs have not pled facts that permit an inference that they agreed with the Lessee Defendants to participate in a scheme to defraud Plaintiffs, or that they directed the affairs of a RICO enterprise.

Conversion. Because it is never alleged that Access or its affiliates had control over the funds that were deducted from Plaintiffs' royalties, the Court should dismiss Plaintiffs' claims for conversion.

Civil Conspiracy. With no underlying conversion, Plaintiffs' civil conspiracy claim fails. Additionally, there are no factual allegations to support an inference of a conspiracy or agreement on the part of Access, AMLP, or Appalachia Midstream.

PROCEDURAL HISTORY AND STATEMENT OF FACTUAL ALLEGATIONS

This is Plaintiffs' second bite at the apple. In their original Complaint, Plaintiffs asserted contract claims against the Lessee Defendants, and antitrust and RICO claims against Chesapeake, Access, and certain of their affiliates. [Dkt. No. 1.] The Defendants moved the Court to dismiss these claims. [Dkt. Nos. 60-61, 65, 68-69, 71, 73-75, 77-78]. Rather than responding to these motions, Plaintiffs filed

an Amended Complaint substantially re-stating their claims against the Defendants. [Dkt. No. 94.][3] Plaintiffs still bring contract claims against the Lessee Defendants. But Plaintiffs now contend that all of the Defendants were parties to antitrust, RICO, and civil conspiracies, and that they converted Plaintiffs' funds to their own use.

To support their claims, Plaintiffs contend that the Defendants participated in "a series of separate but related unlawful schemes." Amended Complaint ("AC"), ¶6. The Access Defendants deny participation in any such "scheme." However, even if Plaintiffs' allegations are accepted as true for purposes of this motion, the claims still fail.

Scheme #1: "The anticompetitive scheme to allocate geographic markets for the acquisition of gas mineral rights." AC, p.8.

Plaintiffs own properties in Bradford, Sullivan, and Wyoming Counties, in northeast Pennsylvania. AC, ¶¶40-113. These counties are within a small portion of the Marcellus Shale region, which extends from West Virginia, through eastern Ohio and most of Pennsylvania, to southern New York. Due to the desirability of natural gas exploration in that region, "many oil and gas production companies . . . embarked on aggressive programs to acquire oil and gas leases to properties" there.

[3] Unless specifically described otherwise, factual statements in this brief are taken from Plaintiffs' Amended Complaint. While Access disputes many of these statements, they are assumed to be true for purposes of this motion.

AC, ¶130. Plaintiffs entered into leases with Anadarko, or its predecessor T.S. Calkins, between December 29, 2005, and August 14, 2006. *See* AC, ¶¶142-43.

On September 1, 2006, Anadarko entered into a Joint Exploration Agreement with Chesapeake or its affiliate Chesapeake Appalachia, L.L.C. ("CALLC"). AC, ¶136. As described by Plaintiffs, the Agreement created an AMI, which covered portions of Bradford, Sullivan, Susquehanna, and Wyoming Counties, also called "Area A." AC, ¶¶9, 136, 241. Plaintiffs allege that, through subsequent participation agreements, Statoil and Mitsui joined in and provided "critical financial support for the conspiracy" in exchange for working interests in the wells developed by the joint venture. AC, ¶¶140, 243.

Plaintiffs claim that the AMI Agreement constitutes a market allocation device intended by the Lessee Defendants to reduce or eliminate competition for gas mineral rights in the geographic area in and around Bradford County. AC, ¶¶240, 241. Plaintiffs do not allege that Access or its affiliates were parties to the AMI Agreement or participants in Scheme #1.

Scheme #2: "The anticompetitive scheme to allocate geographic markets for the acquisition of … operating working interests in oil and gas leases." AC, p.8.

Although Anadarko secured all of the leases at issue in this litigation, it did not operate the wells drilled or units established pursuant to those leases. AC, ¶13. Rather, Plaintiffs allege that, as part of the AMI Agreement, the Lessee Defendants

agreed that CALLC "would serve as the operator of the leases within the AMI." AC, ¶136. Plaintiffs allege that this "scheme" eliminated competition in, and permitted CALLC to control the market for, operating rights in the AMI. AC, ¶¶15, 240. Plaintiffs do not allege that Access or its affiliates were parties to the AMI Agreement or participants in Scheme #2.

Scheme #3: "The initial scheme to eliminate, reduce and restrain competition in the market for gas gathering services." AC, p.11.

Plaintiffs contend that, under the AMI Agreement, Chesapeake and Anadarko agreed that Chesapeake would construct and operate gas gathering systems to serve the wells to be operated by CALLC in Area A, and Anadarko would receive a proportionate interest in those systems. AC, ¶¶138, 170. Statoil and Mitsui subsequently bought ownership interests in the gathering systems. AC, ¶243. Plaintiffs do not allege that Access or its affiliates were parties to the AMI Agreement or participants in Scheme #3. AC, ¶16 (alleging that this scheme involved "the same defendants who schemed to allocate the geographic market for Gas Mineral Rights and operating working interests").

On February 29, 2008, Chesapeake formed Chesapeake Midstream Development, L.P. ("CMD"), to own, operate, and develop midstream assets. AC, ¶171. Through the end of 2011, Chesapeake provided gas gathering and related post-production services to the wells operated by CALLC through its own subsidiaries and affiliates, including CMD and CMD's then-subsidiary Appalachia

Midstream.[4] AC, ¶175. Plaintiffs allege that, through the AMI Agreement, Chesapeake thus acquired monopoly power over the sale of gathering services in the AMI. AC, ¶ 247. Plaintiffs claim that this monopoly power enabled Chesapeake, through its subsidiaries, to charge "supra-competitive" fees for gathering services. AC, ¶246, 247.

The Lessee Defendants did not initially deduct any post-production costs (including gathering fees) from the sale price of the natural gas in calculating and paying royalties to Plaintiffs. AC, ¶163. In January 2012, however, CALLC changed the manner in which it calculated and paid royalties, based upon the Pennsylvania Supreme Court's decision in *Kilmer v. Elexco Land Services, Inc.*, 990 A.2d 1147 (Pa. 2010). AC, ¶163. In *Kilmer*, the Court affirmed the right of a well operator to use the "net back" method of calculating the market value of gas at the wellhead. This method permits an operator to calculate royalties as a fraction (often one-eighth) of the sale price of the natural gas, minus one-eighth of the post-production costs incurred in bringing the natural gas to market. *Id.* at 1157-58.

Plaintiffs allege that each of the Lessee Defendants subsequently began to deduct post-production costs from Plaintiffs' royalty payments. AC, ¶¶24, 167.

[4] While Appalachia Midstream was the sole operator of these gas gathering systems, it owned only 47% of the assets. AC, ¶184. The remaining 53% was owned, directly or indirectly, by Statoil ASA, Anadarko Petroleum Corp., and Mitsui & Co., Ltd. *Id*. These companies are not parties to this litigation; instead, they are the corporate parents of Statoil, Anadarko, and Mitsui, respectively. *Id*.

Plaintiffs claim that paying higher gathering fees was beneficial to the Lessee Defendants because it had the effect of lowering their royalty payments to Plaintiffs. *Id*.[5] Plaintiffs do not allege that Access or its affiliates have any role in determining royalties, determining how to account for post-production costs in calculating royalties, or paying royalties. Plaintiffs further do not allege that Access or its affiliates owe any duties to Plaintiffs to pay for or account for royalties.

Scheme #4: "The subsequent scheme to transfer, bolster and extend the unlawfully acquired monopoly on gas gathering services." AC, p.12.

Scheme #4 is the only purported antitrust scheme alleged to involve Access or its affiliates. According to Plaintiffs, by the end of 2011, Chesapeake faced a "liquidity crisis," caused by a decline in the market price for natural gas. AC, ¶181. To address this alleged "liquidity crisis," Chesapeake decided to sell midstream assets, including its interest in certain gathering systems and pipeline operations in the Marcellus Shale region. AC, ¶182.

The Amended Complaint describes two assets sales from Chesapeake to Access: (1) the sale of Appalachia Midstream to Access on December 29, 2011, for

[5] The plaintiffs in *Kilmer* similarly argued that gas companies would inflate their post-production costs in order to drive down royalty payments. The Court rejected this argument: "[W]e find that claim unconvincing because gas companies have a strong incentive to keep their costs down, as they will be paying seven-eighths of the costs." *Id*. at 1158 (emphasis added).

$879.3 million;[6] and (2) the sale of Chesapeake Midstream Operating, L.L.C. ("CMO"), to Access on December 20, 2012, for $2.16 billion ("the CMO Acquisition"). AC, ¶¶183, 189. According to Plaintiffs, Chesapeake and Access negotiated a new gas gathering agreement relating to the Marcellus Shale region (the "Marcellus Gathering Agreement") as a part of the CMO Acquisition. AC, ¶204. Plaintiffs allege that the CMO Acquisition and Marcellus Gathering Agreement evidence a conspiracy to restrain trade in, or grant Access a monopoly in, the market for gas gathering services. AC, ¶¶247-249, 261.

In particular, Plaintiffs contend that the Marcellus Gathering Agreement granted Access monopoly power over gas gathering services because the Agreement called for Chesapeake to purchase all of its gathering services within certain acreage (referred to as "dedicated acreage") exclusively from Access. AC, ¶198. Plaintiffs thus assert that the Agreement grants Access 100% market share within the dedicated acreage. AC, ¶202.

Plaintiffs also contend, with no supporting factual allegations, that Chesapeake agreed to pay gathering fees to Access pursuant to the Marcellus Gathering Agreement that were in excess of the rates available in a competitive

[6] At that time, Access was known as Chesapeake Midstream Partners, L.P. *See* AC, ¶183. Chesapeake owned a partial interest in Access at the time Access purchased Appalachia Midstream. AC, ¶¶172-174. Chesapeake sold its partial interest in Access on June 15, 2012. *See* Access Form 8-K (6/20/2012) at § 5 (attached hereto as Exh. 1).

market. AC, ¶209. Plaintiffs allege that, while Access claims its rates were cost-of-service based, this claim was false, because the Marcellus Gathering Agreement guaranteed Access a specified rate of return on invested capital. AC, ¶207.

This contention is illusory. Fees that are based on the actual cost of invested capital are "cost-of-service based."[7] Therefore, the fact that the rates charged by Access provide for a return on its invested capital does not establish that the rates are deceptive or anticompetitive. Moreover, as Plaintiffs recognize, without the cost-of-service fees, Access would bear the risk from changes in the market price of natural gas, *see* AC, ¶187, and might have refused to purchase the gathering systems, or might have charged more for its gathering services to mitigate this risk. *See* AC, ¶206 (acknowledging that the guaranteed rate of return was "an incentive" for Access to purchase the assets).

Scheme #4, the purported conspiracy to eliminate competition and grant Access a monopoly in the market for gas gathering services, is based entirely on the CMO Acquisition and the Marcellus Gathering Agreement. AC, ¶¶247-249,

[7] By definition, cost-of-service based fees provide for a rate or return on invested capital. For example, in the context of interstate pipelines, the Federal Energy Regulatory Commission ("FERC") has defined "cost-of-service" as "the amount of revenue a regulated gas pipeline company must collect from rates charged consumers to recover the cost of doing business. These costs include operating and maintenance expenses, depreciation expenses, taxes and a reasonable return on the pipeline's investment." FERC, Cost-of-Service Rates Manual, at 6 (June 1999), https://www.ferc.gov/industries/gas/gen-info/cost-of-service-manual.doc (last visited 8/25/15) (emphasis added).

261. As alleged by Plaintiffs, Access and Chesapeake were the only parties to these agreements, AC, ¶¶189, 204, and they are thus the only potential conspirators. Plaintiffs do not allege that AMLP or Appalachia Midstream were parties to these agreements. Nor do Plaintiffs allege that Anadarko, Statoil, or Mitsui were parties to these agreements.

Scheme #5: "The scheme to defraud Plaintiffs of their royalties by the misrepresentation of unauthorized or artificially inflated deductions." AC, p.13.

Plaintiffs' final "scheme" is an alleged RICO scheme to defraud Plaintiffs of royalties through a pattern of mail fraud. Plaintiffs allege that all of the Defendants, together with their officers, directors, employees and agents, constitute an "association in fact" enterprise, whose common purpose is to defraud Plaintiffs through a scheme by which (1) Access "artificially inflated" the gathering fees it charged to CALLC, and (2) the Lessee Defendants improperly deducted a portion of such fees from Plaintiffs' royalties. AC, ¶¶270-272, 276. Plaintiffs also allege that the Defendants conspired to commit RICO violations. AC, ¶¶291-297.

Plaintiffs' State Law Claims

Plaintiffs bring contract-based claims against the Lessee Defendants, alone. Plaintiffs also bring claims against all Defendants for conversion, and for conspiracy to commit conversion, based upon the deduction of post-production costs. AC, ¶¶320, 328-332.

STATEMENT OF ISSUES

Pursuant to Fed. R. Civ. P. 12(b)(6), have Plaintiffs stated a claim for which relief can be granted against Access, AMLP, or Appalachia Midstream?

ARGUMENT AND AUTHORITIES

A complaint must be dismissed under Rule 12(b)(6) when it does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In all events, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. The court may not accept legal conclusions set forth as factual allegations. *Id*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," will not pass muster. *Iqbal*, 556 U.S. at 678.

I. PLAINTIFFS MAY NOT PURSUE THEIR ANTITRUST CLAIMS BECAUSE THEY FAIL TO ALLEGE ANTITRUST INJURY

The antitrust laws were enacted for "the protection of competition, not competitors." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). "Business practices -- however unseemly, hurtful, or even otherwise unlawful -- do not constitute antitrust violations unless they harm, or at least endanger, competition." *In re Mushroom Direct Purchaser Antitrust Litig*., 514 F.Supp.2d

683, 695-96 (E.D. Pa. 2007). To proceed with an antitrust claim under either Section 1 or Section 2 of the Sherman Act, a private plaintiff must therefore allege antitrust injury; that is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co*., 495 U.S. 328, 334 (1990); *Irish v. Ferguson*, 970 F.Supp.2d 317, 363 (M.D. Pa. 2013). A plaintiff may recover under the antitrust laws only if its loss stems from a reduction in competition caused by the defendant's behavior. *Atl. Richfield*, 495 U.S. at 344. Even a cursory review of Plaintiffs' Amended Complaint reveals the absence of factual allegations plausibly establishing an injury stemming from a reduction in competition in the market for gas gathering services.

A. Plaintiffs allege no reduction in competition from the Marcellus Gathering Agreement

Plaintiffs claim that the competitive harm resulting from the Marcellus Gathering Agreement is that consumers are forced to pay "supra-competitive" prices as a result of the elimination of competition for gathering services. AC, ¶ 253. From the consumers' point of view, however, nothing about the market has changed. Plaintiffs allege that, prior to the CMO Acquisition, Chesapeake had monopoly power in the provision of gathering services in the AMI. AC, ¶¶16-17, 175, 246-247. By entering into the CMO Acquisition and Marcellus Gathering Agreement, Plaintiffs allege that Chesapeake simply transferred its monopoly

power to Access. AC, ¶¶18, 199, 247. Therefore, from a competitive standpoint, as alleged by Plaintiffs, the market for gathering services was exactly the same before and after the CMO Acquisition: one provider with 100% market share. AC, ¶202.

Where there has been no reduction in competition, and one exclusive provider has merely been substituted for another, there is no antitrust injury. *Balaklaw v. Lovell*, 14 F.3d 793, 798-99 (2d Cir. 1994) (dismissing antitrust claim based upon hospital's change from one exclusive provider to another; "[f]rom the consumers' point of view, nothing about the market has changed"); *Mid-Michigan Radiology Assoc., P.C. v. Cent. Mich. Cmty. Hosp*., 1995 WL 239360, at *4 (E.D. Mich. Feb. 14, 1995) (dismissing antitrust claim where one exclusive provider was substituted for another; "[f]rom a market stand-point, no matter how narrowly or broadly defined, there has been no reduction" in competition).

B. Plaintiffs' factual allegations do not support an inference that the "supra-competitive" gathering fees resulted from the exercise of market power by Access

The allegations of the Amended Complaint also fail to link Plaintiffs' claimed injury to any alleged exercise of market power by Access. *AT&T Co. v. IMR Capital Corp*., 888 F.Supp. 221, 254 (D. Mass 1995) ("[plaintiff] alleges that it was harmed by [defendant's] actions, but does not explain how that damage arises out of [defendant's] exercise of market power").

Plaintiffs contend that the Marcellus Gathering Agreement (1) gave Access monopoly power in the market for sales of gathering services to Chesapeake leases, *see* AC, ¶202, and (2) set the gathering fees to be paid by Chesapeake at an above-market level, *see* AC, ¶¶204-206. Plaintiffs fail to allege, however, that there is a causal relationship between these two components of the Agreement. That is, Plaintiffs do not contend that Access forced Chesapeake to pay high prices because Access possessed monopoly power (which, indeed, it did not at the time the fees were being negotiated). Rather, Plaintiffs allege that Chesapeake offered to pay, and deliberately structured its agreements to pay, high gathering fees, to induce Access to purchase its gas gathering assets. AC, ¶206 (gathering fees were structured "as an incentive and as consideration for the payments [Access] made to Chesapeake").

Thus, according to Plaintiffs' allegations, it was Chesapeake's desire to induce Access to purchase its midstream assets, not Access' market power, that induced Chesapeake to pay the supposed above-market rates for gas gathering services. This is not an exercise of market power but, rather, is "consistent with normal commercial incentives facing [the] defendants." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F.Supp.2d 666, 690 (S.D.N.Y. 2013) (dismissing antitrust claims where plaintiffs' alleged harm "could have resulted from normal

competitive conduct"), *right to appeal order of dismissal recognized sub nom. Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897 (2015).

Plaintiffs have thus failed to allege sufficient facts to show antitrust injury, and their antitrust claims against Access, AMLP, and Appalachia Midstream -- claims based upon purported conspiracies to reduce or eliminate competition in the market for gas gathering services -- should be dismissed. *City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 265 (3d Cir. 1998) (dismissing antitrust claim for failure to allege antitrust injury); *Warfield Philadelphia, L.P. v. Nat'l Passenger R.R. Corp.*, 2009 WL 4043112, at *6 (E.D. Pa. Nov. 20, 2009) ("Because [plaintiff] has failed to allege facts to support a conclusion that there has been an antitrust injury or that defendants' actions caused such an injury, we will dismiss its claims under §§ 1 and 2 of the Sherman Act.").

II. PLAINTIFFS MAY NOT PURSUE THEIR ANTITRUST CLAIMS BECAUSE THEY FAIL TO PLEAD A LEGALLY SUFFICIENT RELEVANT MARKET

"The relevant market is the geographic and product/service area that is affected by the questioned activity or operation, and it is in that market where the effect upon competition must be assessed." 1 Callmann on Unfair Comp., Tr. & Mono. § 4:31 (4th Ed.). It is well settled that an antitrust plaintiff must plead a relevant market. *See Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436–37 (3d Cir. 1997).

The relevant market has two components, a product market and a geographic market. Plaintiffs allege that the relevant product market for purposes of the purported "scheme" involving Access and its affiliates is the market for the sale of gas gathering services. AC, ¶238. For purposes of this motion only, Access and its affiliates do not challenge this definition of the relevant product market; rather, they focus on the fatal flaws in Plaintiffs' proposed geographic market.

The Third Circuit defines the geographic market as "the area in which a potential buyer may rationally look for the goods or services he or she seeks." *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 726–27 (3d Cir. 1991) (internal quotation marks omitted). In this case, Plaintiffs propose three alternate geographic markets in connection with their Section 1 claim, AC, ¶237,[8] and propose that either the first or third of these geographic markets is relevant to their Section 2 claim. AC, ¶258. As shown below, none of the three geographic markets described by Plaintiffs is legally adequate.

A. Plaintiffs fail to allege facts plausibly suggesting that Bradford County and adjoining portions of surrounding counties constitute a legally sufficient geographic market

Plaintiffs' first proposed geographic market is Bradford County, Pennsylvania, and "adjoining portions" of Sullivan, Susquehanna and Wyoming Counties, Pennsylvania. AC, ¶237(a). Plaintiffs do not specify in the Amended

[8] Paragraph 237 of the Amended Complaint is attached hereto at Exh. 2.

Complaint what territory is included in the "adjoining portions," making the proposed market facially unsustainable. *See Acre v. Spindletop Oil & Gas Co.*, 2009 WL 4016116, at *7 (E.D. Ark. Nov. 18, 2009) (dismissing proposed geographic market of "Arkansas and other surrounding states" where complaint failed to specify in which states the defendant had monopoly power); *Morales Villalobos v. Garcia Llorens*, 137 F.Supp.2d 44, 47 (D.P.R. 2001) (dismissing antitrust claim where plaintiff's "vague reference to the 'Arecibo region,' without specifics, makes difficult any further analysis of her claim").

Moreover, "the geographic market is not comprised of the region in which the seller attempts to sell its product, but rather is comprised of the area where his customers would look to buy such a product." *Tunis Bros.*, 952 F.2d at 726 (citation omitted). A plaintiff must therefore focus on elasticity of demand, *i.e.* consumer behavior in response to potential price changes. *Synthes, Inc. v. Emerge Med., Inc.*, 2012 WL 4473228, at *6 (E.D. Pa. Sept. 28, 2012) (citing *Dicar, Inc. v. Stafford Corrugated Prods., Inc.*, 2010 WL 988548, at *11 (D.N.J. Mar. 12, 2010)). Where a plaintiff has not focused on consumer behavior, it has not "adequately plead a geographic market." *Id.*

Here, the Amended Complaint does not contain a single factual allegation regarding where a well operator in northeast Pennsylvania could or would look for gas gathering services. The Amended Complaint offers no justification for its focus

on Bradford County and surrounding areas of Sullivan, Susquehanna, and Wyoming Counties, other than that this is where Plaintiffs' leases are located. In the absence of allegations that a purchaser of gathering services would reasonably limit itself to this area, the Amended Complaint fails to plead a proper geographic market, and Plaintiffs' antitrust claims should be dismissed. *See Tunis Bros*., 952 F.2d at 727 ("[t]he mere delineation of a geographical area, without reference to a market as perceived by consumers and suppliers, fails to meet the legal standard necessary for the relevant geographic market.").

B. The proposed geographic market consisting of the AMI is legally improper

The second geographic market proposed by Plaintiffs is the AMI (known as "Area A") designated in the Joint Exploration Agreement. AC, ¶237(b). Although the Amended Complaint repeatedly refers to the AMI, Plaintiffs never actually define the boundaries of this geographic area. The most specific description of the AMI appears to be the following:

> On information and belief, Anadarko E&P entered into a 50/50 Joint Exploration Agreement dated September 1, 2006 with Chesapeake Energy and/or CALLC (and/or its affiliates) (the "Joint Exploration Agreement"), covering portions of Bradford, Sullivan, Susquehanna and Wyoming Counties within an area of mutual interest that the parties to the agreement [identified] as "Area A" (previously defined as the "AMI"), and agreed that CALLC would serve as the operator of the leases within the AMI.

AC, ¶136 (emphasis added). It would appear from this description that Plaintiffs propose -- on "information and belief" -- a geographic market consisting of gas wells operated by CALLC within "portions of Bradford, Sullivan, Susquehanna and Wyoming Counties." This proposed geographic market is insufficient for multiple reasons.

First, as previously discussed, a market consisting of unidentified "portions" of various counties is not sufficiently specific to constitute a valid market. *See Acre*, 2009 WL 4016116, at *7; *Morales Villalobos*, 137 F.Supp.2d at 47.

Second, to the extent that Plaintiffs attempt to limit the geographic market to CALLC-operated wells within Bradford, Sullivan, Susquehanna, or Wyoming Counties, this definition is plainly not permitted. As one court has observed, "[i]t is easy enough to identify a competitor as a 100% monopolist when one defines the relevant market . . . as the place where the competitor operates and nowhere else." *Concord Assocs., L.P. v. Entm't Props. Trust*, 2014 WL 1396524, at *20 (S.D.N.Y. Apr. 9, 2014). Therefore, a plaintiff must set forth a "plausible explanation" for defining the market so narrowly. *Id*.

Plaintiffs have not done so. The only factual allegation marginally supportive of this market definition is Plaintiffs' claim that "Chesapeake (directly or through its affiliate CALLC is the sole operator of wells in most of Bradford County, and in much of the surrounding portions of Sullivan, Susquehanna and

Wyoming Counties." AC, ¶14. This allegation is based entirely upon an un-dated map, with no source information reflected, and which appears to be a single page taken out of a presentation that is neither provided nor (apparently) publicly-available. This is an insufficient factual basis for Plaintiffs' proposed geographic market, particularly inasmuch as publicly-available data from the Pennsylvania Department of Environmental Protection ("DEP") -- the state agency charged with licensing and inspecting natural gas wells -- indicates that numerous companies other than Chesapeake operate natural gas wells in Bradford, Sullivan, Susquehanna, and Wyoming Counties. *See* Penn. DEP Well Inventory Report, http://www.depreportingservices.state.pa.us/ReportServer/Pages/ReportViewer.aspx?/Oil_Gas/OG_Well_Inventory (last visited 9/10/2015).[9]

C. The proposed geographic market consisting of acreage "dedicated" to Access by Chesapeake is also improper

The final geographic market proposed by Plaintiffs appears to be the "Dedicated Area," together with any other dedicated acreage defined in

[9] The DEP Well Inventory Reports indicate that Chesapeake operates approximately 37% of the current natural gas wells in the four-county area. This is a far cry from being the "sole operator" in these counties. This Court may take judicial notice of matters of public record without converting this motion to dismiss into a motion for summary judgment. *In re Wellbutrin SR/Zyban Antitrust Litig*., 281 F.Supp.2d 751, 754 n.2 (E.D. Pa. 2003) (citing *Pension Benefit Guar. Corp. v. White Consol. Indus. Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993)). "Public records" include the published reports of administrative bodies, such as the DEP. *Id*. The fact that an agency report is published on the internet does not affect the ability of a court to take judicial notice of it. *Id*.

Chesapeake's gathering agreements, so long as the agreements relate to property in Bradford, Sullivan, Susquehanna, or Wyoming Counties. AC, ¶237(c). The term "Dedicated Area" is not defined in the Amended Complaint. However, the Amended Complaint suggests that the term "Dedication Areas" means any area in which Chesapeake is contractually obligated to purchase gathering services from Access alone. AC, ¶198. Plaintiffs thus appear to allege that the relevant geographic market is the region in which gathering services are sold exclusively by Access and to Chesapeake within Bradford and surrounding counties.

Third Circuit law is clear, however, that antitrust plaintiffs may not define a relevant market based on the very contractual restrictions they seek to challenge. *Queen City Pizza, Inc. v. Domino's Pizza, Inc*., 124 F.3d 430 (3d Cir. 1997) (dismissing antitrust claim where plaintiff attempted to define the relevant market in terms of the contractual restraints on a single purchaser).[10] Accepting Plaintiffs' proposed market definition would amount to a determination that every exclusive contract violates the antitrust laws, a determination that the Third Circuit has

[10] *See also Ajir v. Exxon Corp*., 1995 WL 429234, *3 (N.D. Cal. July 7, 1995) (finding that, "[j]ust because Exxon's direct serve dealers may contractually purchase gasoline from only one source -- Exxon -- does not mean that the relevant market is Exxon gasoline," and holding that the correct relevant market is all gasoline), *aff'd*, 185 F.3d 865 (9th Cir. 1999); Phillip E. Areeda & Herbert Hovankamp, *Antitrust Law* (3d Ed. 2007), Vol. IIB at ¶ 519a, pp. 191-92 (cautioning that finding a "relevant market" on the basis of contractual lock-in "would turn antitrust into an engine for resolving contract disputes").

rejected. *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 76 (3d Cir. 2010) ("[I]t is widely recognized that in many circumstances [exclusive dealing arrangements] may be highly efficient—to assure supply, price stability, outlets, investment, best efforts or the like—and pose no competitive threat at all.") (internal citation omitted).

Publicly-available sources, of which this Court may take judicial notice, establish that there are numerous other buyers and sellers of gas gathering services in and around Bradford County.[11] Under such circumstances, Plaintiffs may not define the relevant market as sales of gathering services only by Access and only to Chesapeake. *Id*.

Plaintiffs have failed to plead a plausible geographic market. The Court should therefore dismiss their antitrust claims against Access, AMLP, and Appalachia Midstream.

III. PLAINTIFFS' FACTUAL ALLEGATIONS ARE INSUFFICIENT TO SUPPORT AN ANTICOMPETITIVE CONSPIRACY INVOLVING ACCESS, AMLP, OR APPALACHIA MIDSTREAM

To survive a motion to dismiss, a complaint asserting conspiracy claims under the Sherman Act "must contain enough factual matter (taken as true) to

[11] *See* Access 2013 Form 10-K (2/21/14) at 8 (attached hereto as Exh. 3) (stating that Access's competitors in the region include Penn Virginia Resource Partners, Mark West Energy Partners, and Talisman Energy); DEP Well Inventory Report, http://www.depreportingservices.state.pa.us/ReportServer/Pages/ReportViewer.aspx?/Oil_Gas/OG_Well_Inventory (last visited 9/10/2015).

suggest that an agreement was made." *In re Elevator Antitrust Litig*., 502 F.3d 47, 50 (2d Cir. 2007) (internal quotation marks omitted). This required factual content must be pleaded with respect to each defendant named in the complaint. *Id*. at 50-51; *In re Processed Egg Prods*. *Antitrust Litig.*, 821 F.Supp.2d 709, 719 (E.D. Pa. 2011). Conduct that is "entirely consistent" with the defendant pursuing its own economic interests does not support an inference of conspiracy. *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F.Supp.2d 363, 368 (M.D. Pa. 2008); *see also Twombly*, 550 U.S. at 567 (allegations of conspiracy are deficient if there are "obvious alternative explanation[s]" for the facts alleged).

In the initial Complaint, Plaintiffs alleged that Access, AMLP, and Appalachia Midstream conspired with Chesapeake to restrain trade in, or monopolize, the market for gas gathering services. In Amended Complaint, however, Plaintiffs allege that these entities conspired with all other Defendants to restrain trade or monopolize that market. AC, ¶248, 260.[12] Despite these substantially enlarged claims, Plaintiffs have added no additional factual allegations to the Amended Complaint which indicate that Access or its affiliates conspired with Anadarko, Statoil, or Mitsui. Indeed, Plaintiffs' claims of a post-2012 conspiracy to eliminate competition in the market for gas gathering services

[12] These conspiracies are described as "Scheme #4" by Plaintiffs. *See* AC, p.12. Plaintiffs do not allege that Access participated in the first three "schemes" described in the Amended Complaint.

are founded entirely on the CMO Acquisition, and the Marcellus Gathering Agreement. AC, ¶¶247-248. As described by Plaintiffs, however, these are agreements solely between Access and Chesapeake. AC, ¶¶189, 198, 204. Therefore, they cannot plausibly support a conspiracy involving non-parties to these agreements.

Indeed, the CMO Acquisition and Marcellus Gathering Agreement cannot plausibly support a conspiracy, even as to Chesapeake and Access alone. Plaintiffs' allegations of collusion are insufficient because Plaintiffs have pled nothing more than conduct by Access that is "entirely consistent" with Access pursuing its own economic interests. *In re Pressure Sensitive Labelstock*, 566 F.Supp.2d at 368. Plaintiffs allege that Chesapeake desperately needed to sell its gas gathering assets in the Marcellus Shale region to stave off a severe "liquidity crisis." AC, ¶¶181-182. Chesapeake allegedly induced Access to purchase these assets by promising Access the exclusive right to provide gas gathering services to Chesapeake in the Marcellus, at an above-market rate. *See*, *e.g.*, AC, ¶206. Plaintiffs allege that, due to Chesapeake's precarious financial situation, Access was able to strike a very good deal. AC, ¶30.

None of this is evidence of a supposed conspiracy. Plaintiffs allege that Access paid Chesapeake over $2 billion for assets with uncertain value, due to the declining market for natural gas. AC, ¶187 (recognizing that long-term gas

gathering agreements would limit financial risk in connection with purchase of gas gathering systems based on changes in market price of natural gas); *see also* AC, ¶181 (alleging that the declining price of gas is what drove Chesapeake to sell the gathering assets). For Access to desire a guarantee that its investment in these assets would not quickly decline in value is entirely consistent with Access pursuing its own economic interests. For Access to receive such assurance is entirely consistent with Chesapeake needing to sell the assets more than Access needed to purchase them, while still wanting to obtain fair value. Where Access was pursuing its own economic self-interest, there is no basis to infer conspiracy on the part of Access. *In re Pressure Sensitive Labelstock*, 566 F.Supp.2d at 368.

Plaintiffs' unsupported allegation that Access "must have known" that Chesapeake could not fulfill its financial guarantees to Access unless it treated the gas gathering payments to Access as deductible post-production costs, *see* AC, ¶209, is too speculative and conclusory to be the basis to establish Access's involvement in a conspiracy. *Navarra v. Marlborough Gallery, Inc.*, 820 F.Supp.2d 477, 487 (S.D.N.Y. 2011); *Concord Assocs.*, 2014 WL 1396524, at *24. The allegation that Access "must have known" that Chesapeake's ability to meet its commitments required deductions from lessors is all the more speculative because, at most, Chesapeake could only deduct one-eighth of the gathering fees that it paid. *Kilmer*, 990 A.2d at 1157-58.

Plaintiffs supply no factual allegations to support their claim that Access had any knowledge of how Chesapeake intended to fulfill its financial obligations under the Agreement. Plaintiffs do not allege that Access knew anything about Plaintiffs' leases, much less that they purportedly prohibit the otherwise-lawful deduction of post-production costs. Access cannot be linked to a purported conspiracy to intentionally harm competition on such conclusory and implausible allegations.

Plaintiffs are required by *Twombly* to allege facts plausibly suggesting that Access purposefully joined with the other Defendants in a conspiracy to restrain trade in the market for gas gathering services. They have not done so. As to AMLP and Appalachia Midstream, Plaintiffs have set forth no factual allegations whatsoever to suggest their participation in a conspiracy.[13] As to Access, the allegations of the Amended Complaint are entirely consistent with that company pursuing its own economic interests in obtaining the CMO assets at the best financial terms possible for itself, while Chesapeake did the same for its part.

[13] Plaintiffs rely heavily on generic references to "Defendants" in pleading their antitrust claims, even where the allegation could not possibly apply to Access, AMLP, or Appalachia Midstream. For example, Plaintiffs state: "Because the claim set forth in this cause of action is founded on agreements among horizontal competitors to divide and allocate markets . . . Plaintiffs' respectfully submit that Defendants' conduct described herein constitutes a per se violation of Section 1 of the Sherman Act . . . ." AC, ¶ 241. Access and its affiliates are not horizontal competitors of the Lessee Defendants.

Because Plaintiffs have not alleged facts plausibly suggesting that Access, AMLP, and Appalachia Midstream conspired with the remaining Defendants to eliminate competition in the market for gas gathering services, the Court should dismiss the antitrust claims against them.

IV. PLAINTIFFS FAIL TO STATE A RICO CLAIM UNDER 18 U.S.C. § 1962(c) AGAINST ACCESS, AMLP, OR APPALACHIA MIDSTREAM

To plead a RICO claim under § 1962(c), the plaintiff must allege that the defendant participated in the "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 364 (3d Cir. 2010) (citations omitted). Although Access and its affiliates do not believe that Plaintiffs have adequately pled (or will be able to prove) any of the elements set forth above, they recognize that this Court found allegations similar to those set forth in the Amended Complaint sufficient to allege a pattern of racketeering activity in *Suessenbach Family Ltd. P'ship v. Access Midstream*, Case No. 14-cv-2297. Access will not address the same arguments here. Nevertheless, the Court should dismiss Plaintiffs' RICO claim because Plaintiffs have not pled facts plausibly suggesting that Access participated in the conduct of the purported RICO enterprise described in the Amended Complaint.

A. Plaintiffs' factual allegations are insufficient to plead an association-in-fact enterprise including Access, AMLP, or Appalachia Midstream

The RICO statute describes two categories of associations that "come within the purview of the 'enterprise' definition." *Ins. Brokerage Antitrust Litig*., 618 F.3d at 364. The first is organizations such as corporations and partnerships, and other "legal entities." The second is "any union or group of individuals associated in fact although not a legal entity." *Id*. In this case, Plaintiffs allege that the RICO enterprise is an "association-in-fact enterprise" of "the Defendants." AC, ¶270.

Where the RICO enterprise is an association-in-fact, it is not enough simply to identify the alleged associate components. *Id*. at 369. "The enterprise element of RICO claims is a close analogue of [Sherman Act] § 1's agreement element." *Id.* at 370. Therefore,

> Unless a plaintiff is required at the pleading stage to suggest plausibly the existence of an enterprise structure . . . the RICO statute's allowance for association-in-fact enterprises becomes an open gateway to the imposition of potentially massive costs on numerous defendants, regardless of whether there is even a hint of the collaboration necessary to trigger liability.

Id. *See also Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 803 (7th Cir. 2008) (noting that concerns about subjecting antitrust defendants to massive litigation costs on the basis of threadbare pleadings are "as applicable to a RICO case, which resembles an antitrust case in point of complexity and the availability of punitive damages and of attorneys' fees to the successful plaintiff").

Recognizing these concerns, the Third Circuit found that "simply identifying the allegedly associated components does not serve to put defendants on notice of the RICO claim alleged against them." *Ins. Brokerage Antitrust Litig*., 618 F.3d at at 369. Rather, the Third Circuit held that:

> [A] RICO claim must plead facts plausibly implying the existence of an enterprise with the structural attributes identified in *Boyle* [*v. United States*, 556 U.S. 938 (2009)]: a shared "purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."

Id. at 369-70. *See also Elsevier Inc. v. W.H.P.R., Inc*., 692 F.Supp.2d 297, 307 (S.D.N.Y. 2010) (dismissing RICO claim where plaintiffs failed to allege how the members of the association-in-fact "came to an agreement to act together"). At a minimum, the plaintiff's factual allegations must show that each member of the enterprise "understood the essential nature of the plan and knowingly agreed to participate in the plan." *Schwartz v. Lawyers Title Ins. Co*., 970 F.Supp.2d 395, 405 (E.D. Pa. 2013).

As previously demonstrated in connection with the discussion of Plaintiffs' antitrust claims, *see supra* at pp. 26-29, Plaintiffs have failed to allege facts plausibly establishing that Access, AMLP, or Appalachia Midstream "knowingly agreed" to participate in a common plan with the other Defendants.

As to Access, Plaintiffs allege that Access simply purchased gathering assets from Chesapeake in exchange for acreage dedications with a cost-of-service based

fee. There is not a single factual allegation in the Amended Complaint suggesting that Access had any knowledge of, or interest in, how Chesapeake, Anadarko, Statoil, or Mitsui accounted to Plaintiffs for post-production costs. Moreover, for reasons discussed above, Plaintiffs' allegation that Access "must have known" that Chesapeake would pass a portion of these fees on to Plaintiffs is too speculative and conclusory to establish that Access knowingly agreed to participate with Chesapeake in a plan to defraud Plaintiffs.[14]

As to AMLP and Appalachia Midstream, the Amended Complaint contains no allegations whatsoever regarding their participation in the purported RICO enterprise. Plaintiffs may not simply rely on generic references to "Defendants" to satisfy their burden of pleading each Defendant's participation in the RICO enterprise. *In re Processed Egg Prods. Antitrust Litig*., 821 F.Supp.2d 709, 720 (E.D. Pa. 2011) ("Conclusory, collective language is too convenient, too undisciplined, and too unfocused in light of exposures to litigation expense and

[14] Plaintiffs' allegations regarding the nature of the association-in-fact enterprise consist entirely of boiler-plate statements, devoid of factual detail. For example, Plaintiffs allege that "[e]ach of the Defendants . . . agreed to, and did, participate in the conduct of the Enterprise and carried out its role using broad and independent discretion." AC, ¶271. Plaintiffs further assert that "[t]he Enterprise has operated since at least 2010, and its operation is ongoing," AC, ¶274, and "[t]he Enterprise has an ascertainable structure separate and apart from the pattern of racketeering activity in which Defendants engage." AC, ¶275. After *Twombly*, mere "labels and conclusions," or formulaic recitation of elements are insufficient. *Iqbal*, 129 S.Ct. at 1949.

disruption (even without ultimate liability) that are so great in antitrust (and other) cases.").

Because Plaintiffs have failed to allege facts showing how the members of the alleged association-in-fact enterprise came to an agreement to act together, the Court should dismiss Plaintiffs' RICO claim.

B. Plaintiffs do not adequately allege that Access, AMLP, or Appalachia Midstream was conducting the affairs of the enterprise, as opposed to its own affairs

RICO liability also requires a "showing that the defendants conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (emphasis in original). *See also United Food & Commercial Workers Unions & Employers Midwest Health Benefits Fund v. Walgreen Co.*, 719 F.3d 849, 854 (7th Cir. 2013) (affirming dismissal of RICO claim). Plaintiffs fail to allege any conduct by which AMLP or Appalachia Midstream participated in the affairs of the purported enterprise. Further, as previously shown, Access's conduct in negotiating the CMO Acquisition and the Marcellus Gathering Agreement is entirely consistent with Access conducting its own affairs, and not conducting those of the purported enterprise. *See supra* at pp. 27-28. Under such circumstances, Plaintiffs' RICO allegations do not cross the line between the theoretically possible and the plausible. *See Iqbal*, 556 U.S. at 678.

Accordingly, the Court should dismiss Plaintiffs' RICO claim as to Access, AMLP, and Appalachia Midstream.

V. PLAINTIFFS FAIL TO STATE A RICO CONSPIRACY CLAIM UNDER 18 U.S.C. § 1962(d) AGAINST ACCESS, AMLP, OR APPALACHIA MIDSTREAM

To state a RICO conspiracy claim, under 18 U.S.C. § 1962(d), plaintiff must allege (1) an agreement to commit the predicate act and (2) knowledge that those acts were part of a pattern of racketeering activity conducted in such a way as to violate one of the substantive provisions of the RICO statute. *Domico v. Kontas*, 2013 WL 1248638, at *9 (M.D. Pa. Mar. 26, 2013). The predicate acts of mail fraud identified by Plaintiffs consist of the Lessee Defendants' preparation and mailing of allegedly misleading royalty statements and payments to Plaintiffs. AC, ¶¶277-284.

Plaintiffs do not allege that Access, AMLP, or Appalachia Midstream had any role in this conduct.[15] Instead, Plaintiffs' allegations with regard to Access focus on the terms of the Marcellus Gathering Agreement, by which Chesapeake allegedly agreed to pay Access "supra-competitive" fees for its gathering services. These allegations are completely unrelated to any question of how Chesapeake or

[15] Plaintiffs allege that it was the Lessee Defendants, alone, who were "responsible for accounting for and distributing its share of the royalties due and owing to royalty interest owners, including Plaintiffs, in connection with the leases in which the respective Lessee defendants hold working interests." AC, ¶4.

the other Lessee Defendants would account for these costs in calculating royalty payments to Plaintiffs. Rather than allege Access' agreement to participate in the purported RICO conspiracy, Plaintiffs rely solely on speculative and conclusory allegations that Access "must have known" that Chesapeake could not afford to pay the agreed-upon gathering fees unless it passed a proportionate share of those gathering fees on to Plaintiffs through royalty deductions.

As with Plaintiffs' antitrust claims, these allegations are too speculative and conclusory to be the basis to establish Access's involvement in a RICO conspiracy. *Navarra v. Marlborough Gallery, Inc.*, 820 F.Supp.2d 477, 487 (S.D.N.Y. 2011); *Concord Assocs.*, 2014 WL 1396524, at *24. Plaintiffs supply no factual allegations to support their claim that Access had any knowledge of how Chesapeake intended to fulfill its financial obligations under the Agreement.[16] Further, this allegation, on its face, relates only to what Access might have known about Chesapeake's intentions. The purported RICO conspiracy includes Anadarko, Statoil, and Mitsui, and yet Plaintiffs include no allegations that Access

[16] In any event, the deduction of a proportionate share of post-production costs (including gathering fees) had been found to be lawful by the Pennsylvania Supreme Court. Any assumption by Access that Chesapeake would follow the decision in *Kilmer* could not support an inference that Access intended to defraud Plaintiffs, particularly given the absence of any allegation that Access knew that Plaintiffs' leases (purportedly) prohibit this practice.

"must have known" that those companies intended to deduct a proportionate share of post-production from Plaintiffs' royalties.

As to AMLP and Appalachia Midstream, the Amended Complaint contains no allegations whatsoever that they agreed to participate in a RICO conspiracy. Plaintiffs' repeated references to the actions of "Defendants" are insufficient to satisfy their pleading burden as to AMLP and Appalachia Midstream. *In re Digital Music Antitrust Litig.*, 812 F.Supp.2d 390, 417 (S.D.N.Y. 2011) (recognizing that generic references to "defendants" are insufficient in alleging direct involvement of individual defendants in the alleged conspiracy); *Jung v. Ass'n of Amer. Medical Colleges*, 300 F.Supp.2d 119, 163 (D.D.C. 2004) ("Plaintiffs cannot escape their burden of alleging that each defendant participated in or agreed to join the conspiracy by using the term 'defendants' to apply to numerous parties without any specific allegations as to [an individual defendant].").

Because Plaintiffs have failed to allege that Access, AMLP, or Appalachia Midstream was party to an agreement to commit mail fraud, and have also failed to allege that these entities had knowledge that the Lessee Defendants' actions were part of a pattern of racketeering, Plaintiffs have failed to state a RICO conspiracy claim against them.

VI. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST ACCESS, AMLP, OR APPALACHIA MIDSTREAM FOR CONVERSION

"Under Pennsylvania law, conversion is defined as 'the deprivation of another's right of property in, or use or possession of a chattel, or other interference therewith, without the owner's consent and without lawful justification.'" *Rahemtulla v. Hassam*, 539 F.Supp.2d 755, 776 (M.D. Pa. 2008) (quoting *Universal Premium Acceptance Corp. v. York Bank & Trust Co.*, 69 F.3d 695, 704 (3d Cir. 1995)). Money may be the subject of conversion, but only where those funds are specifically identifiable. *Pioneer Commercial Funding Corp. v. Am. Fin. Mortgage Corp.*, 855 A.2d 818, 827 n.21 (Pa. 2004) ("Identifiable funds are deemed a chattel for purposes of conversion."); *Pittsburgh Constr. Co. v. Griffith*, 834 A.2d 572 (Pa. Super. 2006) (holding that funds placed in escrow account by the defendant for the sole purpose of paying the plaintiff-builder pursuant to a set schedule were sufficiently identifiable to be the subject of conversion claim). Moreover, the right to the money must have originally belonged to the plaintiff. *Rahemtulla*, 539 F.Supp.2d at 704.

Plaintiffs fail to articulate any allegations plausibly suggesting a right to recover from Access, AMLP, or Appalachia Midstream on this claim. Plaintiffs allege only that the conversion occurred when the Defendants "wrongfully deducted" certain charges from Plaintiffs' royalties which properly belonged to Plaintiffs. Plaintiffs allege further that the amounts deducted by the Defendants are

"specific and readily identifiable pursuant to royalty statements largely in the control of the Lessee Defendants." AC, ¶¶317-322. Because Plaintiffs' conversion claim is based entirely on "wrongful deductions," and because only the Lessee Defendants were responsible for distributing royalties to Plaintiffs, *see* AC, ¶¶4, 304, Plaintiffs do not and could not allege that Access, AMLP, or Appalachia Midstream have or had possession of any funds belonging to Plaintiffs.

Neither could Plaintiffs contend that Access, AMLP, or Appalachia Midstream received their allegedly converted funds. Plaintiffs could not possibly allege that the specific funds allegedly withheld from their royalties for gathering – which were at most one-eighth of the gathering fees – were transferred to Access or one of its affiliates. *In re Lewis*, 478 B.R. 645, 668 (Bankr. E.D. Pa. 2012) (rejecting claim that, by accepting money from a company that allegedly defrauded the plaintiff, the defendant essentially converted plaintiff's funds, because plaintiff was not the only source of funding for company) (Pennsylvania law). *See also John B. Parsons Home, LLC v. John B. Parsons Found.*, 90 A.3d 534, 547 (Md. App. 2014) (affirming dismissal of conversion claim where allegedly converted funds were commingled with other assets of the defendant, and thus "los[t] their 'separateness'") (Maryland law).

In the absence of allegations that Access, AMLP, or Appalachia Midstream controlled specifically identifiable funds belonging to Plaintiffs, Plaintiffs cannot state a claim for conversion against them, and this Court should dismiss this claim.

VII. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST ACCESS, AMLP, OR APPALACHIA MIDSTREAM FOR CONSPIRACY

Plaintiffs' final claim against Access and its affiliates is for civil conspiracy. "A predicate to any civil conspiracy claim is the presence of an underlying tort." *Festa v. Jordan*, 803 F.Supp.2d 319, 326 (M.D. Pa. 2011) (citing *McGreevy v. Stroup*, 413 F.3d 359, 371 (3d Cir. 2005)). Plaintiffs allege that the underlying tort is conversion. AC, ¶329. Because, as shown above, Plaintiffs have failed to state a claim against Access and its affiliates for conversion, they cannot pursue a claim against them for conspiracy. *McKeeman v. Corestates Bank, N.A.*, 751 A.2d 655, 660 (Pa. Super. 2000) (holding that, "because we have concluded that [dismissal] was properly granted with regard to the conversion claim, there can be no cause of action for civil conspiracy here based on that claim").

Moreover, even if their conversion claim were not fatally flawed, Plaintiffs could not pursue a claim against Access, AMLP, or Appalachia Midstream for civil conspiracy. Under Pennsylvania common law, a civil conspiracy requires that two or more conspirators reached an agreement to commit an unlawful act or perform a lawful act by unlawful means. *Festa*, 803 F.Supp.2d at 327. In this case, Plaintiffs contend that there was a conspiracy among all of the Defendants. AC,

¶328. As previously shown, *supra* at pp. 26-29, Plaintiffs have failed to allege facts plausibly establishing that Access and its affiliates conspired with Chesapeake, Anadarko, Statoil, and Mitsui.

Accordingly, the Court should dismiss Plaintiffs' claim for civil conspiracy.

CONCLUSION

The Court should dismiss the antitrust claims brought against Access, AMLP, and Appalachia Midstream because the Amended Complaint (1) fails to allege antitrust injury, (2) fails to allege a legally sufficient relevant market, and (3) fails to allege that Access, AMLP, or Appalachia Midstream was a party to a conspiracy with the other Defendants to restrain or eliminate competition in the market for gas gathering services. The Court should dismiss each of Plaintiff's RICO claims against Access, AMLP, and Appalachia Midstream because the Amended Complaint fails to allege that these entities participated in the conduct of the affairs of the purported enterprise described in the Amended Complaint, or agreed to participate in a RICO conspiracy. The Court should dismiss the conversion claim against Access, AMLP, and Appalachia Midstream because the Amended Complaint contains no allegations indicating that they controlled or acquired the funds Plaintiffs claim were converted. Finally, the Court should dismiss the civil conspiracy claim against Access, AMLP, and Appalachia

Midstream for lack of an underlying tort and lack of plausible allegations of conspiracy.

Respectfully Submitted,

/s/ John S. Summers

John S. Summers
Alan C. Promer
Dylan J. Steinberg
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 496-7062

-AND-

Michael J. Gibbens (*pro hac vice*)
Susan E. Huntsman (*pro hac vice*)
CROWE & DUNLEVY
A Professional Corporation
500 Kennedy Building
321 South Boston Avenue
Tulsa, Oklahoma 74103
(918) 592-9800
(918) 592-9801 (Facsimile)
michael.gibbens@crowedunlevy.com
susan.huntsman@crowedunlevy.com

-AND-

Mack J. Morgan III (*pro hac vice*)
CROWE & DUNLEVY
A Professional Corporation
Braniff Building
324 N. Robinson Ave., Suite 100
Oklahoma City, Oklahoma 73102
(405) 235-7700
(405) 239-6651 (Facsimile)

mack.morgan@crowedunlevy.com

ATTORNEYS FOR ACCESS MIDSTREAM PARTNERS, L.P., ACCESS MLP OPERATING, L.L.C., AND APPALACHIA MIDSTREAM SERVICES, L.L.C.

CERTIFICATE OF WORD COUNT

I, John S. Summers, hereby certify that the text of the foregoing Brief in Support of Motion to Dismiss of Defendants Access Midstream Partners, L.P., Access MLP Operating, L.L.C., and Appalachia Midstream Services, L.L.C. pursuant to Federal Rule of Civil Procedure 12(b)(6) contains 9,638 words as calculated by the word-count function of Microsoft Word, which is within the limit of 10,000 words as requested in Defendants' September 15, 2015 Motion for Leave to Enlarge Length of Brief.

Dated: September 18, 2015

/s/ John S. Summers
John S. Summers

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2015, that I caused the foregoing Brief in Support of Motion to Dismiss of Defendants Access Midstream Partners, L.P., Access MLP Operating, L.L.C., and Appalachia Midstream Services, L.L.C. pursuant to Federal Rule of Civil Procedure 12(b)(6) to be filed electronically using the Court's electronic filing system, and that the filing is available to counsel for all parties for downloading and viewing from the electronic filing system.

/s/ John S. Summers
John S. Summers