

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT V. MATTHEWS,	:
Plaintiff,	:
	:
-vs-	: Civ. No. 3:01cv2295 (PCD)
	:
PINNACLE FOODS, INC.,	:
Defendant.	:

RULING ON MOTION TO DISMISS

Defendant moves to dismiss Count Three of the complaint alleging a violation of the Connecticut Unfair Trade Practices Act (“CUTPA”), CONN. GEN. STAT. § 42- 110a *et seq.* For the reasons set forth herein, the motion is **granted**.

I. BACKGROUND

On June 29, 2000, plaintiff entered into a loan agreement with defendant, a company specializing in meat processing, by which plaintiff agreed to loan defendant \$300,000. Defendant executed a promissory note in conjunction with the loan agreement.

On November 22, 2000, plaintiff entered into a second agreement which modified the terms of the loan agreement. Under the second agreement, plaintiff became financial advisor to defendant and agreed to procure debt financing for defendant of \$9.5 million. Defendant agreed to deliver 1.1 million shares of defendant’s common stock to plaintiff not later than February 1, 2001. The agreement further provided that plaintiff would receive an additional 1.1 million shares of defendant’s common stock upon satisfactorily procuring the debt financing. All shares of common stock were protected by an anti-dilution provision. The second agreement further provided that either party could terminate the

agreement if debt financing were not procured by March 31, 2001.

Plaintiff was unable to perform under the agreement due to defendant's failure to cooperate with plaintiff, failure to provide timely and accurate information to plaintiff and failure to inform plaintiff of financial conditions which hindered plaintiff's efforts to obtain financing. As a consequence, plaintiff was unable to obtain debt financing by the deadline. On April 6, 2001, defendant terminated the agreement having delivered none of its shares of common stock to plaintiff.

On or about May 31, 2001, defendant entered into a stock purchase agreement with Smithfield Foods, Inc. ("Smithfield"), by which defendant agreed to sell approximately 13 million shares of its common stock. Defendant began negotiating the purchase agreement in February 2001. Defendant disclosed the purchase agreement in its proxy statement in addition to its dispute with plaintiff as to compliance with their agreements. The proxy statement further provided that Smithfield would be entitled to purchase a number of shares equal to the number purchased by plaintiff at \$0.01 per share rather than the normal \$0.45 per share. The statement did not indicate that, in accordance with the anti-dilution provision in the original loan agreement, plaintiff would be compensated for the share price disparity.

II. DISCUSSION

Defendant argues that plaintiff's CUTPA claim must be dismissed for failure to allege conduct that constitutes "trade or commerce" and for failure to allege more than breach of contract.

A motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) is properly granted when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 69 (2d Cir. 2001) (internal quotation marks omitted). A motion to dismiss must be decided on the facts as alleged in the complaint. *Merritt*

v. Shuttle, Inc., 245 F.3d 182, 186 (2d Cir. 2001). All allegations are assumed to be true and are considered in a light most favorable to the non-movant. *Manning v. Util. Mut. Ins. Co.*, 254 F.3d 387, 390 n.1 (2d Cir. 2001).

CONN. GEN. STAT. § 42- 110b(a) provides that “[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” “Trade” and “commerce” are defined as “the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state.” CONN. GEN. STAT. § 42- 110a(4). It has been consistently held that conduct merely incidental to one’s business does not satisfy the definition of “trade or commerce.” See *Cornerstone Realty, Inc. v. Dresser Rand Co.*, 993 F. Supp. 107, 113 (D. Conn. 1998); *Sealy Conn., Inc. v. Litton Indus.*, 989 F. Supp. 120, 127 (D. Conn. 1997); *Brandewiede v. Emery Worldwide*, 890 F. Supp. 79, 81 (1994); *Arawana Mills Co. v. United Techs. Corp.*, 795 F. Supp. 1238, 1253 (D. Conn. 1992). Defendant is alleged to be in the business of meat processing, not the business of debt financing. Plaintiff does not dispute the nature of defendant’s business, nor does he provide a persuasive reason for deviating from the holdings of other courts in this district on the precise issue here presented. As such, plaintiff’s claim does not implicate trade or commerce for purposes of CUTPA.

III. CONCLUSION

Defendant's motion to dismiss (Doc. No. 11) is **granted**. Count 3 is hereby dismissed.

SO ORDERED.

Dated at New Haven, Connecticut, October ____, 2002.

Peter C. Dorsey
United States District Judge